CONSTITUTIONAL LAW OF SOUTH AFRICA 2nd Edition

Stu Woolman & Michael Bishop

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Editor's Note

> Intellectual activity is a little bit like seduction. If you go straight for your goal, you almost certainly won't succeed. If you want to be someone who contributes to world historical debates, you almost certainly won't succeed if you start off by contributing to world historical debates. The most important thing to do is to be talking about the things that have, as we might put it, world historical resonance but at the level at which you can be influential. If your contribution to the conversation then gets picked up and becomes part of a larger conversation or part of conversations happening elsewhere as well, then so be it and so much the better. So I don't think intellectuals do very well talking about the need for the world to be democratic, or the need for human rights to be better respected worldwide. It's not that the statement falls short of the desirable, but it contributes very little to either achieving its goal or adding to the rigor of the conversation. Whereas the same person, really showing exactly what's defective about democracy and democracies, sets a much better base for the argument that ours is a democracy that others should be encouraged to emulate… . If you look at the history of nations that maximized the virtues that we associate with democracy, you notice that what came first was constitutionality, rule of law, and the separation of powers. Democracy almost always came last. If by democracy we mean the right of all adults to take part in the choice of government that's going to rule over them, that came very late — in my lifetime in some countries that we now think of as great democracies, like Switzerland, and certainly in my father's lifetime for other European countries like France. So we should not tell ourselves that democracy is the starting point … . That's not an argument for going back to restricted suffrage or two classes of voters, or whatever it might be — you know, the informed or the uninformed. But it is an argument for understanding that democracy is not the solution to the problem of unfree societies.
>
> Tony Judt 'On Intellectuals and Democracy'

Dear Subscribers

Both of the authors whose work appears in this revision service understand Judt's point all too well. They do not bang their drums in the service of some timeless, universal ideal. They address a decidedly South African audience — primarily lawyers, judges and academics — who live here and now, and who must act, in the service of justice, here and now.

Vicky Bronstein's chapter on 'Conflicts' engages a moment in time contemplated by the decidedly practical, hard-nosed drafters of the 1996 Constitution, but not quite yet upon us. When our multi-party constitutional democracy finally catches up with its creators, Professor Bronstein's work will be waiting to mark the path. It's consistent thematic beat enables the reader to track carefully the avail-

able interpretations for each provision that addresses potential conflicts between national legislation and provincial legislation. Her notion of 'deliberate regulatory space' provides an incisive, preferred reading of these provisions, and raises her contribution far above more formal, quotidian assessments of the same subject matter found elsewhere.

PJ Schwikkard's chapter on 'Evidence' could, on the other hand, have been forced asunder by the sheer weight of extant case-law that notionally falls within its titular ambit. As the co-author of one of the leading treatises on evidence, Professor Schwikkard understood that the audience for her mini-monograph consists of lawyers and judges daily confronted with a more narrowly defined set of concerns regarding the legitimacy — as determined by a discernible core of rights found in the Constitution — of the evidence allowed into our courtrooms.

We also wish to thank Richard Stacey, Steve Allcock and Patty Searle for their editorial efforts. They understand that the path to creating and to maintaining a decent work on South African constitutional law is neither straight, nor easy, never ideal, and never, ever at an end.

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CONSTITUTIONAL LAW OF SOUTH AFRICA

Second Edition

Revision Service 5: January 2013

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Constitutional Law of South Africa

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> Do I contradict myself? Very well, then I contradict myself.
> I am large, I contain multitudes.
> Walt Whitman *Leaves of Grass*

> Constitutional choices must be made; to all of us belong the challenges of making them wisely. We make them at many levels in many ways. Judges must make them whenever choosing among alternative interpretations of the Constitution … Legislators must make such choices … in voting for or against measures challenged as constitutionally infirm … As lawyers and scholars, all of us must make constitutional choices in the cases or causes we argue, in the constitutional viewpoints and principles we espouse or reject. … *I write in part out of a conviction that constitutional choices, whatever else their character, must be made as fundamental choices of principle*, not as instrumental calculations of utility, or as pseudo-scientific calibrations of social cost against social benefit … in which the 'costs' … are supposedly 'balanced' against the 'benefits' … My reply to this grim metamorphosis of constitutional argument … is not to propose an alternative method… My reply is to question all formulas as concealing the constitutional choices that we must make — and that we cannot responsibly pretend to derive by any neutral technique.
> Laurence Tribe *Constitutional Choices*

1.1 INTRODUCTION

Writing an introduction to this four-volume, 76 chapter treatise — *Constitutional Law of South Africa* — is akin to writing a Baedeker for the city of Venice. Coherent as the four volumes may appear on a bookshelf, the contents of this work — like the many twisting streets, hidden canals, cul de sacs and charms of that isle — cannot be captured in the short space we have allotted ourselves. We have, therefore, set ourselves two limited tasks. The first is to explain the method behind this work and what it hopes to achieve. The second is to say something about how *Constitutional Law of South Africa* connects to the text of the Final Constitution, the jurisprudence of our courts, and the basic principles that animate our constitutional democracy.

1.2 ON THE METHODOLOGY OF *CONSTITUTIONAL LAW OF SOUTH AFRICA*

No single account of South African constitutional law could explain either the content of our Constitution, the legislation promulgated by Parliament or the jurisprudence of our courts. *Constitutional Law of South Africa* certainly never set itself such a Herculean task. But let's say it had. The rapid speed at which South African constitutional law has developed — from the coming into force of the Interim Constitution in 1994, the advent of the Final Constitution in 1997, and the subsequent jurisprudence that has flowed from both these documents — would have defied such an effort.

While this work follows — self-consciously — a maximalist approach to constitutional law, the fact that *Constitutional Law of South Africa* is a multi-authored work means that any attempt to fit all 76 chapters within a single analytic rubric

would likewise have proved impossible.[1] That said, the maximalism and the anti-reductive approach associated with Tribe's *American Constitutional Law* has determined what we — as the editors — have asked of all our authors.

The first thing that we ask of them is that they take the text of the Final Constitution, the reasoning of cases, the political institutions that govern us, the fellow academics who contribute to their understanding, and a whole range of other quotidian academic considerations — like logic and research —seriously.[2] Within these parameters, we have been able to give the best South African and international legal academics the freedom to write about the area (or areas) of constitutional law doctrine that most interests them. What we may have lost through this approach in overarching coherence, we hope to have made up in discrete, detailed, theoretically sophisticated chapters that provide some insight into the problems thrown up by South Africa's basic law.

A second goal that we set for all of our authors is that they write chapters that succeed in making greater sense of the system of constitutional law within which we operate. In the best of all possible worlds, the authors would — after engaging the text of the Final Constitution, the reasoning of cases, and the contributions of fellow academics in the field — produce a full blown 'theory' about the subject matter of their chapter. Again, such an expectation is subject to three strong limitations. The first limitation is that some subjects — for a variety of reasons — do not lend themselves to detailed accounts of the black letter law (for there may be none), good faith reconstructions of the black letter law (because such a good faith reconstruction is defeated by the black letter law) and preferred readings of the Final Constitution (because there are few, if any, grounds for dispute

[1] See William Brennan 'Reason, Passion and "The Progress of the Law"' (1988) 10 *Cardozo Law Review* 3. In speaking about 19th century treatises, Brennan wrote: 'The goal of the treatise — to classify reported cases into objective and determinative categories of legal principle — appealed to the positivist minds of the late-nineteenth century . . . Through classification of subjects, it sought to show that law proceeds not from will but from reason. Through its "black letter" presentation of supposed "general principles" of law it sought to suppress all controversy over policy which promoting the comforting ideal of a logical, symmetrical and, most importantly, inexorable system of law.' Conspicuously absent from the treatises was any narrative voice. The earliest treatises contain no commentary whatsoever, and even in later editions authors eschewed personal commentary on the cases and principles. The absence of commentary was consistent with, and no doubt helped to reinforce, the nineteenth-century conception of law as something that judges discovered but did not help define.' Ibid. It should be obvious that a treatise with over 50 authors defies the earlier efforts of treatises to systematize the law. Indeed, Brennan and the editors share, amongst other things, the belief that law's progress is contingent upon a happy marriage of reason, passion and multiple perspectives. See also Albie Sachs 'A Gentle Provocation: A Reply to Stu Woolman' in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 37, 39.

[2] We know, for example, that the correct reading of a founding provision may turn on the placement of a comma — and that a bad outcome may flow from an errant reading of a preposition. On the importance of a comma for understanding the meaning of 'democracy' in our Constitution, see Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10. On the importance of a misinterpretation of a proposition — 'of' in *Kaunda* — for the extraterritorial application of the Bill of Rights, see Stu Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31.

over the basic law's meaning).[1] The second limitation flows from the fact that many authors may not be inclined to offer a 'deep' account of their subject matter. The third limitation is that quite a number of chapters offer accounts of technical or procedural aspects of constitutional law that neither admit nor warrant a grand theory: a statement of the law as it stands is more than service enough to our readers.[2] As editors, we have imposed a baseline 'standard' for the chapters without dictating a template that all the chapters must follow.

That said, our push for maximalism — and our openness to giving each author a platform to say what she or he wishes — has led many of our authors to adopt the desired approach. As a result, over a third of the chapters are of monograph length and quality. Another third of the chapters offer rich accounts of their subject matter — detailed coverage of the black letter law and a good faith reconstruction of the law as it currently stands — while eschewing the academic predisposition to offer a 'grand' theory. The final third, we hope, say exactly what needs to be said, though they may appear 'thin' by comparison to the more ambitious chapters.

We would like to suggest that the richness of this book lies precisely in its democracy and pluralism — the multi-faceted picture of South African constitutional law that the work as a whole constructs. Step back, and much like one of Seurat's pointillist paintings, all of a sudden discrete dabs of paint begin to cohere and a fuller picture of South African constitutional law starts to emerge.

But perhaps the demand for even that level of coherence cannot be sustained by the many chapters in this work. Indeed, there are many instances where chapters overlap in subject matter and offer distinctly different pictures of their subjects. That sets up the strong democratic Whitmanian or cubist view of *Constitutional Law of South Africa*. We consider that a virtue of this work. For, by setting our authors free to write as they like over the past seven years, we have had no expectation that they would agree with us or other authors in the book. For example, 'The Rule of Law, Legality and the Supremacy of the Constitution' (Michelman) covers terrain explored in some detail in 'Jurisdiction' (Seedorf). Read both. The conclusions that they draw from the text, the case law and secondary sources are not entirely at odds. However, they do engage in deep, well-articulated, and respectful rational disagreement. Or take the more subject

[1] See, eg, Stu Woolman & Julie Soweto-Aullo 'The Commission for the Promotion and the Protection of the Rights of Cultural, Religious, and Linguistic Communities' (supra) at Chapter 24F (Authors opted for a sociological analysis of this Chapter Nine Institution because it had produced no decisions of note and because the fragility of the institution seemed to be its most compelling feature.)

[2] See, eg, Adrian Friedman 'Costs' (supra) at Chapter 6 (Advocate Friedman's chapter is the only one of its kind — as far as we know — and an invaluable guide to practitioners (and academics) who wish to understand how the awarding of costs works in constitutional matters.)

specific chapters on the 'President and the National Executive' (Murray & Stacey), the 'National Legislative Authority' (Budlender), 'Provincial Executive Authority' (Murray & Ampofo-Anti), 'Provincial Legislative Authority' (Madlingozi & Woolman), 'Local Government' (Steytler & De Visser), 'Legislative Competence' (Bronstein), 'Conflicts' (Bronstein), 'Co-operative Government' (Woolman, Roux & Bekink), 'Democracy' (Roux) and 'Public Finance' (Kriel & Monadjem). While there may be little disagreement on how the case law ought to be read, there are more than marginal differences between the authors about how the powers of our democratic institutions ought to be understood and whether various provisions regarding the allocation of political power in the Final Constitution require a progressive, liberal or conservative reading. Similar kinds of disagreements (between Albertyn, Bishop, Klaaren, Schutte, Soweto-Aullo, White and Woolman) take place in the chapters on the Chapter Nine Institutions

As one might expect, the chapters on the Bill of Rights create even more opportunity for 'dust-ups' — though they are never pitched in that manner. The chapters on Freedom of Association, Dignity, Education and Community Rights (Woolman), and their reliance upon a pretty thick understanding of involuntary associations and the need to protect sources of social capital stand in tension with the unremittingly egalitarian line taken in the chapter on 'Equality' (Albertyn & Goldblatt). The chapters on Socio-Economic Rights are penned by some of the best South African legal academics writing today. Here you'll find a commitment to a thick reasonableness test grounded in dignity (Liebenberg) set off against another chapter's strong philosophical arguments in favour of a minimum core (Bilchitz). Moreover, we benefit equally from the 'Food' chapter's discussion (Brand) on how the State's FC s 7(2) duty to protect, to promote and to fulfil fundamental rights influences our understanding of FC ss 26 and 27, and the 'Housing' chapter's account of the dynamic relationship between constitutional housing law and government housing policy during the past ten years (McLean).

Even the most 'mechanical' sections produce important disagreements. Monograph length chapters on 'Application' (Woolman) and 'Limitations' (Woolman & Botha) bracket an equally lengthy treatment of 'Interpretation' (Du Plessis). However, the normative (and structural) framework of shared constitutional interpretation and experimental constitutionalism that underlies both 'Application' and 'Limitations' sits somewhat uneasily with the predisposition towards subsidiarity in 'Interpretation'.

Who is right? As far as we are concerned, no one author in *Constitutional Law of South Africa* has written a single chapter that lies beyond the most basic strictures of coherence or plausibility. *Constitutional Law of South Africa* is large; it contains multitudes; and it may — on occasion — contradict itself. But like a cubist painting, the subject depicted will be all the more interesting for the alternative perspectives that different authors offer our readers.

1.3 On the Relationship Between *Constitutional Law of South Africa* and the Final Constitution

As we have already noted, many chapters in this work, and some of the best articles in South African constitutional law jurisprudence, aspire to be maximalist. What we mean by that term should not be misunderstood. The maximalist chapters are not designed to exhaust the entire interpretative space that a constitutional provision or norm creates. Rather our understanding of maximalism is that, where possible, and where the author is so inclined, the chapters ought to provide fairly full-blown accounts of the case law as it stands, a good faith reconstruction of the law, a critique where the good faith reconstruction itself lacks coherence and a preferred reading where the critique calls for one.[1]

The 'call' for maximalism — for substantive reasoning, but no specific form of substantive reasoning itself — is hardly new. Various authors have pressed for various forms of maximalism since the Interim Constitution came into being. Etienne Mureinik's 'A Bridge to Where' continues to remind us that the mere authoritative pronouncements of the courts, or Parliament or the President, are not good enough.[2] We are always entitled to good, compelling reasons for government action: and it is, in fact, a constitutional obligation of government to persuade us of the rectitude of its responses to various social needs and problems.[3] Indeed, the demand for reasons — good reasons — explains why we

[1] A good faith reconstruction can mean a number of things. First, it can be as simple as pulling together a diverse set of cases that fall within the scope of a particular constitutional provision and demonstrating how — in the absence of any express 'theory' provided by the courts — the author's reconstruction holds that body of law together. That is, in fact, a task undertaken by most academics and practitioners as a matter of course. (In a treatise, one might expect more explanation as to how a brace of cases are held together than one would find in heads of argument.) Second, it may mean something more: in the face of thinly reasoned judgments, academics may be required to 'fill in the gaps' in order to provide an account of what a particular constitutional provision is designed to do. This exercise, to be meaningful, must begin with the premise that the Court is (generally) right about its findings. It falls then, to the honest interpreter to 'struggle' with the texts in order to make them meaningful (in its truest sense) to ordinary readers. See Frank Michelman 'On the Uses of Interpretive Charity: Some Notes From Abroad on Application, Avoidance, Equality, and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa' (2008) 1 *Constitutional Court Review* 1 ('Charity'). Professor Michelman's influence on the writing of many chapters in this work can be traced to his instructions regarding what a good faith reconstruction is, and how the principle of interpretive charity forces a particular kind of discipline on the interpreter. Between the good faith reconstruction and a preferred reading, our authors hope to do more than provide aesthetically pleasing designs of how law ought to appear. These thought projects are intended to stand some test of time.

[2] Etienne Mureinik 'A Bridge to Where?' (1994) 10 *SAJHR* 31, 32 ('If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification — a culture in which every exercise of public power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defense of its decisions, not the fear inspired by the force at its command.')

[3] See FC s 7(2); Mureinik (supra) at 32. This vision has been endorsed by the Constitutional Court on a number of occasions. See *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 156; *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 25; *Pharmaceutical Manufacturers Association of SA & Another: in re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 85.

have a just administrative action clause — as well as the Promotion of Access to Justice Act (PAJA)[1] — and why we have justiciable socio-economic rights.[2]

Karl Klare's 'Legal Culture and Transformative Constitutionalism' picks up where Mureinik left off.[3] In particular, Klare focuses on alternative institutional arrangements that 'can be used to include the interests of people who find it difficult to make use of the participatory [or political] process'.[4] This new institutionalism lies at the heart of his post-liberal order. In a new South African social democratic state, Klare's judiciary would advance the 'progressive agenda' made manifest in our Final Constitution through greater transparency and thicker justifications for the reasoning that underlies the courts' decisions'.[5] However, it is one thing to 'call for substantive reasoning' in constitutional adjudication. It is

[1] Act 1 of 2000.

[2] See Etienne Mureinik 'Beyond a Charter of Luxuries: Socio-Economic Rights in the Constitution' (1992) 8 *SAJHR* 464. Between the Act and FC s 33, one exhausts many, if not quite all, of the public law disputes brought to court. See Jonathan Klaaren & Glenn Pennfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008); Cora Hoexter *Administrative Law in South Africa* (2007). However, Professor Mureinik's most significant contribution to the creation of a government of law, and not a government of men, was his staunch defence of the common-law principle of legality. See Etienne Mureinik 'Reconsidering Review: Participation and Accountability' in Hugh Corder (ed) *Administrative Law Reform* (1993) 35, 38-39. For Professor Mureinik, legality — and the kind of robust review he advocated — is desirable because it makes government more responsive to the people, and because it 'fosters the justification of decisions' which, in turn, 'can be used to include the interests of people who find it difficult to make use of the participatory process.' Ibid at 42. Legality or the rule of law doctrine is now one of the most important features of South African constitutional law. The best articulation of the legality principle or the rule of law doctrine occurs in *Pharmaceutical Manufacturers*: 'There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.' See *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC)('*Pharmaceutical Manufacturers*') at para 44. See also *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC)('*Fedsure*'); Frank Michelman 'The Rule of Law Doctrine, the Legality Principle and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11, 11-38. See also Frank Michelman 'Constitutional Supremacy and Appellate Jurisdiction in South Africa' in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 33; Justice Kate O'Regan 'On the Reach of the Constitution and the Nature of Constitutional Jurisdiction: A Reply to Frank Michelman' in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 51.

[3] (1998) 14 *SAJHR* 148.

[4] In reading some of the initial judgments of the Constitutional Court, Klare saw some reason for concern. As evidence for such concern, he begins with a quote from *S v Makwanyane:* 'Our function is to interpret the text of the Constitution as it stands. Accordingly, whatever our personal views on this fraught subject might be, our response must be a purely legal one.' 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 349.

[5] Ibid at 152. It is fair to say that the vast majority of South African constitutional scholars shared (and still share) this vision, and that quite a few had already put that conception into words. See, eg, Stu Woolman & Dennis Davis 'The Last Laugh: Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions' (1996) 12 *SAJHR* 361.

quite another to provide a 'theory' that would require our courts to offer substantive arguments grounded in first principles.[1] Klare offers no such theory.[2]

Alfred Cockrell's 'Rainbow Jurisprudence' captures the critical difference between 'a call' for transformative adjudication and the actual delivery of substantive reasons for decisions.[3] Unlike the anti-positivists or anti-formalists who preceded him,[4] Cockrell speaks the language of rules and does not for a moment deny their efficacy. What he wants, however, is greater space for the substantive reasoning that justifies the decision in a case and any rule that might be applied to (or arise from) the case. (And that, for starters, is what *Constitutional Law of South Africa* does — or attempts to do — when our courts do not.)

But what have these views to do with the decision-making process of the Constitutional Court? The commitment to rules had been thought to obscure from view the ugly, inhumane substantive reasons that served to uphold the racist apartheid regime. (That rather outré belief reflects a rather odd reification of law — in the South African legal academy — in light of the palpable facts on the ground during life under apartheid.) If one could get behind the rules, so the anti-formalists argued, then one might have a better chance at securing the kinds of substantive reasoning that would vouchsafe the humane treatment of the majority of South Africa's citizens in its courts.

Thus, when the Constitutional Court first alighted upon the plethora of 'values' to be found in the Bill of Rights and the Interim Constitution as a whole, it saw an opportunity to liberate itself from the formalism that marked apartheid and to

[1] See Theunis Roux 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?' Paper presented at *Conference on Transformative Constitutionalism after 10 Years* Stellenbosch University (8 August 2008).

[2] In fairness to Professor Klare, he had been asked by the *South African Journal on Human Rights* to author a tribute to the late Professor Mureinik. That tribute takes the form of a serious attempt to honour his friend and extend his work. Professor Klare can hardly be faulted for not offering a full blown theory: it was simply not his brief.

[3] Alfred Cockrell 'Rainbow Jurisprudence' (1996) 12 *SAJHR* 1. Cockrell's offering retains its freshness more than 13 years on, because Cockrell, with his usual perspicacity, saw in the 1995 term's jurisprudence troubling ways of approaching both the constitutional text, and the resolution of disputes before the Court, that remain quite evident in the Court's rulings today. Professor Cockrell begins his piece by traversing several themes: (1) the Court's aversion to rules; (2) The sub-optimality of rules; (3) the Court's preference to speak in values. Cockrell is not entirely averse to rule-making. He rues the formalists' beholdenness to rules, in the first instance, because rules will almost always be over-inclusive and under-inclusive. Ibid at 5-6 citing Frederick Schauer *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1991) 102. But he then notes that such is the purpose of rules. They convey (often desirable) substantive reasoning and preclude decision-makers from taking matters into their own hands. Or: they take certain considerations off the table because previous decision makers have decided that such considerations should not be the subject of debate or play a role in the outcome of disputes. He concurs, therefore, with Frederick Schauer that rules often preclude a decision-maker from getting to the substantive reasons behind the rules. By blocking the use of substantive-reasoning to arrive at better, more appropriate outcomes with respect to the dispute before a court, rules sometimes promote suboptimal outcomes. Cockrell (supra) at 6 citing PS Atiyah & Robert Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions* (1987) 21.

[4] See John Dugard 'The Judicial Process, Positivism and Civil Liberty (1971) 88 *SALJ* 181.

engage in the substantive reasoning that had long been blocked in our judiciary. Cockrell expected such a response. However, the results bore out only half his expectations. The Interim Constitution, and its interpretation by the Court, led to a 'paradigm shift with profound implications'. That is, the Court eschewed unjustified rule-making and the formalism associated with it. Still, the cup was but half-full. 'The most striking feature of the record of the first year of the Constitutional Court', writes Cockrell, '… has been the absence of a rigorous jurisprudence of substantive reasoning.'[1] What we were given instead, he continues, is a quasi-theory so lacking in substance that he proposed to call it 'rainbow jurisprudence':

> We have as much chance of finding genuine instruction about substantive reasoning in the wishy-washy pronouncements as we have in touching a rainbow. Second: it is a feature of these statements … that they seem intent on denying deep conflict in the realm of substantive reasons. My point is that substantive reasons are difficult reasons; they require hard choices to be made between moral or political values which are inherently contestable and over which rational people will disagree.[2]

Cockrell then goes on to note that it would be one thing if the language of rainbow jurisprudence were a 'decoy', 'a cover for some theory that is actually doing the work'.[3] That there is no deep theory, Cockrell contends, emerges from a statement of Sachs J where he acknowledged that 'we will frequently be unable to escape making difficult value judgments, where … logic and precedent are of limited assistance.'[4] Cockrell dissects this statement with characteristic aplomb: since logic and precedent are of limited assistance and rainbow jurisprudence is no decoy for some underlying deeper normative theory, what we are witnessing is a Court averse — in a sizeable number of cases — to the kind of substantive reasoning that would give the Constitution meaningful content.[5]

Twelve years down the road, Cockrell's words still resonate profoundly.[6] What is now clear from the Court's intervening jurisprudence is that it will employ a term of art designed to offer the illusion of substantive reasoning, but fail to make the necessary effort to give that term of art substantive content. We are talking here about the Court's regular invocation of the German Federal Constitutional Court's notion of an 'objective, normative value system'. Unlike the German Federal Constitutional Court, however, the Constitutional Court of South Africa has done little to delineate its extension.[7] Even prior to the use of the phrase in

[1] Cockrell (supra) at 10.
[2] Ibid at 11.
[3] Ibid at 12.
[4] *Coetzee v Government of the RSA* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC) at para 46.
[5] Cockrell acknowledges such exceptions. See, eg, *Ferreira v Levin NO* 1996 (1) SA 984 (CC), 1996 (4) SA 1 (CC).
[6] See Stu Woolman 'The Amazing, Vanishing Bill Rights' (2007) 124 *SALJ* 762.
[7] The Constitutional Court recognizes that there are any number of notionally different approaches one could take when constitutionally pruning the bramble bush that is the South African legal system. However, there is, the Court says, only one true way: '[I]t is within the matrix of … [the Final Constitution's] objective normative value system that the common law must be developed.' See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) at para 54. See also *S v Thebus* 2003 (6) SA 505 (CC), 2003 (2) SACR 318 (CC), 2003 (10) BCLR 1100 (CC) at para 27. See also

Carmichele v Minister of Safety and Security,[1] the Constitutional Court had demonstrated little interest in giving the kind of content to statements about 'values' that might help us better understand the Final Constitution.[2] In *Makwanyane*, for example, the Court appears to use the 'values' enshrined in the Interim Constitution to do away with capital punishment.[3] However, upon a closer reading of the 11 judgments in this case, one notes that no judgment really takes up the Constitution's invitation to engage in substantive moral, legal or political reasoning. Instead, as Roux notes:

> the common themes running through the eleven judgments are: (1) reference to foreign law as a substitute for the consideration of moral values; (2) rejection of the relevance of public

Phumelela Gaming and Leisure Ltd v Gründlingh & Others 2006 (8) BCLR 883 (CC) at paras 25-29. What this term of art means in South Africa remains unclear. For the clearest exposition of the phrase's meaning, and one entirely ignored by the courts and most academics, see Andre Van Der Walt 'Transformative Constitutionalism and the Development of South African Property Law: Parts 1 & 2' (2005) *TSAR* 655 and (2006) *TSAR* 1. But see *Geldenhuys v Minister of Safety and Security* 2002 (4) SA 719, 728 (C). Davis J's analysis suggests that the South African usage reflects a modernist response to post-modern anxiety about how memory and power turn law into hotly contested politics. The appeal to universally shared values ostensibly blunts the force of assertions that the Court actually plays politics or that its judgments reflect controversial ethical positions. That said, the phrase currently adds nothing to constitutional analysis. In *Transnet Ltd T/A Metrorail v Rail Commuters Action Group*, the High Court, the Supreme Court of Appeal, and the Constitutional Court all differed over the content of the civic morality — the objective normative value system — enshrined in the Final Constitution. In *Rail Commuter Action Group v Transnet Ltd T/A Metrorail*, the High Court had found that the Final Constitution imposed a legal duty on Transnet to ensure that all railway commuters — regardless of race or class — enjoyed a certain level of physical safety, 2003 (5) SA 518, 573 (C), 2003 (3) BCLR 288 (C).While recognizing the 'objective' moral content of our basic law, the Supreme Court of Appeal rejected the proposition that our constitutionally mandated morality demanded that a legal duty of care be imposed on Transnet in order to remedy the endemic violence visited upon commuters from historically disadvantaged communities, 2003 (6) SA 349 (SCA), 2003 (12) BCLR 1363 (SCA). When called upon to give the content to the 'objective, normative value system' that would dispose of this matter, the Constitutional Court reversed the Supreme Court of Appeal's decision. *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC). The three decisions offer three obviously different understandings of how the phrase 'objective, normative, value system' determines the meaning of 'freedom and security of the person' and the outcome of a case.

[1] *Carmichele* (supra) at para 54 citing 39 *BVerfGE* 1, 41.

[2] See Theunis Roux 'Morality, Law and Society: The Constitutional Value System and Social Values in South Africa' Paper presented at the 16th Annual Conference on 'The Individual vs the State' Panel on Constitutional Axiology, or is There Anything Behind/Above the Constitution? Central European University, Budapest, Hungary (June 7-8, 2008)('Values')(Manuscript on file with authors). However, as Roux notes, that does not mean that values have failed to feature, quite significantly, as background norms in a range of cases that have drawn upon various sections of FC s 1. He offers the following examples: the prisoners' right to vote, *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2005 (3) SA 280 (CC), 2004 (5) BCLR (CC) at para 21, the allocation of fishing rights, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 73, the state's duty to provide an effective system for the protection of property rights, *President of the Republic of South Africa & others v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) paras 48 and 51, and the requirements for registration in municipal elections, *African Christian Democratic Party v Electoral Commission & Others* 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC). See also Theunis Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* — (forthcoming).

[3] 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC).

> opinion to the case as a way of defining the Court's institutional function in the new constitutional order; and (3) the use of the indigenous value of *ubuntu* to forge a link between the constitutional value system and social values.[1]

The Constitutional Court's reticence regarding the meaning of 'an objective normative value system' — or its outright refusal to offer more than thin justifications in a significant number of its decisions — is particularly difficult to reconcile with recent extra-curial remarks of Chief Justice Pius Langa:

> This approach to adjudication requires an acceptance of the politics of law. There is no longer place for assertions that the law can be kept isolated from politics. While they are not the same, they are inherently and necessarily linked. At the same time, transformative adjudication requires judges to acknowledge the effect of what has been referred to elsewhere as the 'personal, intellectual, moral or intellectual preconceptions' on their decision-making. We all enter any decision with our own baggage, both on technical legal issues and on broader social issues. While the policy under apartheid legal culture was to deny these influences on decision-making, our constitutional legal culture requires that we expressly accept and embrace the role that our own beliefs, opinions and ideas play in our decisions. This is vital if respect for court decisions is to flow from the honesty and cogency of the reasons given for them rather than the authority with which they are given.[2]

It is hard to square the Chief Justice's acknowledgement of the politics of law, and the need to provide substantive reasons for a decision, with the Court's preference for couching outcomes in terms of vague reference to the values found in the Final Constitution or to the objective normative value system said to animate the basic law. And thus, 13 years of jurisprudence later, we return to the problem first identified by Cockrell.

What, then, should one make of the Court's lack of interest in making fine distinctions between the right and the good when it regularly relies upon a phrase that requires such distinctions? Perhaps what animates this rhetorical move is no more than a jurisdictional question: namely, how does a specialized constitutional court ensure that the basic law transforms the manner in which courts with plenary jurisdiction dispose of ordinary disputes?[3] Or perhaps this flight from substance 'is necessary to the Court's overall objective of winning public support for its role in the South African political system'.[4] Whatever the reason, a discernible gap clearly exists between what the Court understands its constitutional mandate to be — to model rational discourse and engage in substantive reasoning — and what it actually does.

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[1] Roux 'Values' (supra) at 23.

[2] (2006) 17 *Stellenbosch LR* 351.

[3] See *S v Thebus* 2003 (6) SA 505 (CC), 2003 (2) SACR 318 (CC), 2003 (10) BCLR 1100 (CC). An 'objective normative value system' grounded in the 'objectives' of FC s 39(2) has the potential to expand dramatically the jurisdiction of the Constitutional Court. Despite the *Thebus* Court's admission that FC s 39(2) '*does not specify what triggers the need to develop the common law* or in which circumstances the development of the common law is justified', the failure of any court to adhere to FC s 39(2)'s obligation to develop the common law in light of the 'notional' demands of the Final Constitution's 'objective normative value system' risks reversal by our highest constitutional tribunal. See Woolman 'Application' (supra) at Chapter 31, § 31.4*(e)*(ii)(b); Seedorf 'Jurisdiction' (supra) at Chapter 4, §§ 4.3*(d)* and 4.3*(b)*(i)(*aa*); Michelman 'Rule of Law' (supra) at Chapter 11, § 11.2.

[4] See Roux 'Values' (supra) at 1.

In our view, *Constitutional Law of South Africa* steps in and fills that gap. It answers Mureinik, Klare, Cockrell and Langa's call for substantive reasoning by, at least momentarily, filling in the 'aporia' in the basic law. Let us be clear: we do not mean to overstate the contribution of *Constitutional Law of South Africa*. Its 76 chapters and 4 800 or so pages remain a commentary about what the courts, the legislatures, the executive and other institutional actors have already said about our basic law. Our authors engage that work: They do not seek to supplant it. However, where substantive reasoning is missing from the case law, from legislation or executive rule-making, then it falls to the many authors of this work to provide good faith reconstructions — doctrines full of substantive reasons — that 'fill the gap'.

Again, there will be differences amongst the authors about how to fill the gap. The initial surface inclination of some would appear to be toward critique;[1] while others seem more inclined towards charity.[2] But those distinctions reflect no more than the play of surfaces. What does bind the authors of *Constitutional Law of South Africa* together is that we claim no 'neutral method' of constitutional interpretation that makes hard choices for us. The eschewal of neutral methods — or a single reductive theory of interpretation — further ensures that there is no 'flight from substance' in *Constitutional Law of South Africa*. As Frank Michelman suggests, the provision of greater heft to a body of case law that is sometimes thinly justified and often under-theorized lies at the heart of the legal theorist's calling. In reflecting upon Tribe's refusal to offer a single theory of interpretation or a neutral method of judicial review that ends all quests for the justification of a constitutional order, Michelman writes: 'When … Tribe speaks … of the futility of the search for … legitimacy, he cannot mean that the question is one we may ever permit ourselves to stop asking.'[3] Such a never-ending quest for the substantive reasons, the full-blown doctrines and 'the fundamental principles' that undergird our basic law is the leitmotif for *Constitutional Law of South Africa* and its orchestra of authors.[4]

[1] See Stu Woolman 'The Amazing, Vanishing Bill Rights' (2007) 124 *SALJ* 762.

[2] See Frank Michelman 'On the Uses of Interpretive Charity: Some Notes From Abroad on Application, Avoidance, Equality, and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa' (2008) 1 *Constitutional Court Review* 1.

[3] Frank Michelman 'The Not So Puzzling Persistence of the Futile Search: Tribe on Proceduralism in Constitutional Theory' (2008) 42 *Tulsa Law Review* 797. See also Wil Waluchow 'Constitutions as Living Trees: An Idiot Defends' (2005) 18 *Canadian Journal of Law and Jurisprudence* 204, 208 (Waluchow suggests that we view Constitutions, Bill of Rights, and Charters as 'representing a mixture of only very modest precommitment[s] combined with a considerable measure of humility. . . Far from being based on the (unwarranted) assumption that we have the right answers to the controversial issues of political morality arising . . .[as constitutional] challenges, the alternative conception stems from the exact opposite: from a recognition that we do *not* have all the answers, and that we are better off designing our political and legal institutions in ways which are sensitive to this feature of our predicament.')

[4] It is a never-ending quest at a very practical level. Having taken six years to write *Constitutional Law of South Africa 2nd Edition* (2002–2008), we have been forced to begin its revision immediately upon completion in order to keep pace with the changes in the law and our own points of view.

2 Constitutional History

Stu Woolman & Jonathan Swanepoel

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2.1 The Potemkim Constitution[1]

> There ought to be, behind the door of every happy contented man, some one standing with a hammer continually reminding him with a tap that there are unhappy people; that however happy he may be, life will show him her laws sooner or later — disease, poverty, losses, and no one will see or hear, just as how he neither hears, nor sees others.
>
> Anton Chekhov 'Gooseberries'

Everyone loves a winner. And who would have been churlish enough a year ago to contend that the first 13 years of South Africa's experiment in constitutional democracy was anything but an unadulterated success — especially when viewed against the conflagrations that consumed Bosnia, Rwanda, the Congo, Sudan and Somalia.

On the home front, power passed peacefully from Mandela to Mbeki. The economy grew at 5% a year and a black middle class equal in size and in power to the white middle class arose and suggested that the fundamentals of a bourgeois social democracy had been put in place.

Against this background, the AIDS denialism of the Mbeki regime — its Punch and Judy-like fights with the Treatment Action Campaign — left one shaking one's head. The disaster on the other side of the Limpopo could easily be blamed on an aging dictator with a bad moustache. The ANC's election as party leader of an alleged rapist, a politician charged with being 'on the take', and a public figure who begins populist rallies with intimations about how to take care of the moffies in KZN could be dismissed with deft analyses about how those groups sidelined by Mbeki formed a coalition of self-interest to secure Zuma's party presidency and how democratic politics can actually occur within one-party dominated states. The lights flickering on and off in 2008 could be seen as the price we paid for some very good years, the very bad management of Eskom and petrol rising to almost $150 per barrel (at the time of writing).

But what of the fires that rage, currently, in townships across South Africa. Pat answers about xenophobia do not explain the murderous intent of our fellow citizens. Instead, a scratching of the surface reveals a far more compelling explanation for our current internecine battles.

As recent historiographers of the early 20th century pograms in the Ukraine discovered, the mass murders of Jews were not, primarily, orchestrated by the Czar, the State, the police or the Cossacks, or motivated by such classic anti-semitic fictions as 'The Protocols of the Elders of Zion'.[2] For the most part these continuous outbursts of violence, after the death of the Czar, were the unfortunate responses of large groups of Russians and Ukrainians, who, having moved to the cities from rural environments, found themselves without work, adequate shelter or food. These internal immigrants discovered that outsiders — like the small number of Jews allowed to live in various cities — had access to the scarce resources they so

* We would like to thank Heinz Klug for permission to use material from his chapter on 'Historical Background' and for constructive suggestions regarding this chapters contents.

[1] See Stu Woolman 'The Potemkin Constitution' *Without Prejudice* (December 2008).

[2] See Paul Brass (ed) *Riots and Pogroms* (1996); Johan Klier & Shlomo Lambroza (eds) *Pogroms: Anti-Jewish Violence in Modern Russian History* (1992).

desired. The absence of a strong state, the presence of a political vacuum left by the death of the Czar and high levels of social anxiety created the conditions for the pograms that left some 30,000 dead. Sigmund Freud, reflecting upon these murders and other similar social conflagrations, attributed their occurrence to what he described as 'the narcissism of minor difference'.

Freud's theory of the 'narcissism of minor difference' holds that under conditions of instability, people project their anxiety onto others. These 'others' become the ostensible source of the uncertainty — despite the fact that these 'others' bear no responsibility for the current political or economic dynamics of a country, region or city. The us/them dynamic reinforces the identification of individuals with the group and turns the group into a safe harbour or a laager: and it allows these same individuals to turn their rage at their conditions outward toward 'others'. As Freud wrote in *Civilization and Its Discontents*:

> It is always possible to bind together a considerable number of people in love, so long as there are other people left over to receive the manifestations of their aggressiveness. I once discussed the phenomenon that it is precisely communities with adjoining territories, and related to each other as well, that are engaged in constant feuds and in ridiculing each other — like the Spaniards and the Portuguese, for instance, the North Germans and the South Germans, the English and the Scots and so on. I gave this phenomenon the name of the "narcissism of minor differences".[1]

Relatively recent events in Rwanda bear out the new historiography and the somewhat older Freudian insights. Rwanda's genocide does not reflect a well-conceived orchestration of state-sponsored violence: a political vacuum — created by assassinations and the inability of Hutus and Tutus to arrive at a long-term power sharing arrangement — fed the social anxiety created by too many people forced to make a subsistence living on too little land. The massacre of 800,000 Rwandans by young, male, often unemployed, machete-carrying fellow Rwandans offers a prototypical example of how a weak state incapable of delivering basic services to the majority of its citizens could allow a handful of antagonists to initiate a mass murder.

The ethnic cleansing and genocide in Bosnia and in Nazi Germany bear a strong family resemblance. Yuogoslavia, after Tito's death, had little to hold its loose federation of regions together. With the fall of communism in 1989 — and all the uncertainty that the fall brought to many parts of Eastern Europe — Franjo Tudjman in Croatia and Slobodan Milosevic in Serbia were able to exploit the political vacuum and the social anxiety left by Tito's departure and the absence of a workable democratic constitutional federalist state. The result — aside from the fragmentation of Yugoslavia into some seven autonomous states —

[1] Sigmund Freud *Civilization and Its Discontents* (1929) 117. See also Sigmund Freud *The Taboo of Virginity* (1918); Sigmund Freud *Group Psychology and the Analysis of Ego* (1921); AG Burstein 'Ethnic Violence and the Narcissism of Minor Differences' (1999) 3 (Manuscript on file with authors)(One might go so far as to claim that the 'in-group exists [solely] by virtue of a denied egoism and a deflected suspicion; the out-group by virtue of the innate suspicion displaced toward it and rationalized on the basis of difference, however minor.') Cf Pal Kostlo 'The "Narcissism of Minor Differences" Theory: Can It Explain Ethnic Conflict?' *Filozofijaidrustrutvo* (2007).

was a set of wars, marked by the genocide of Bosnian Serbs. When Michael Ignatieff asked several of the Croatian combatants what this Yugoslavian civil war was all about, he was told: 'They smoke different cigarettes than we do'.[1] Do the conditions out of which the Holocaust arose look so very different? Germany's Weimar Republic was weak. Unemployment rose from 25% before the depression to almost 50% after the depression. Hitler's ability to convince his fellow Germans that the cause of the Reich's rot lay with the assimilation of and miscegenation with non-Aryans — namely the Jews — was rather easy. He had an audience ripe for the taking. And he made it all the easier by using Keynesian economics to drastically reduce unemployment in the 1930s and further convince his fellow Germans that a new Judenfrei Reich would make *all* of their problems go away.

We are by no means suggesting that the new South Africa bears all — or even many — of the hallmarks of the Ukraine, Rwanda, Czarist Russia, Nazi Germany and the former Yugoslavia. And that is why we have begun our account of South Africa's history by describing our Final Constitution as a Potemkin Constitution. Potemkim, despite the unfortunate idiom attached to his name, did, in fact build a large number of very *real* villages and ports throughout the Crimea. He has, however, been remembered most for papering over the backwardness of various towns that the Czarina Catherine — and her entourage of foreign guests — would view during a visit through Russia.

We have a Potemkin Constitution because, as we shall see, many of our new institutions and new constitutional doctrines are very *real* and a marvel to behold. At the same time, the root causes of the riots of 2008 can be traced to a failure — over the past 14 years — to translate the promise of South Africa's liberation into a substantially better life for the majority of South Africans.[2]

We have managed in 14 years to produce a robust commitment to the rule of law within our court system.[3] Shaik, Zuma, Basson have all paid — in part at least — for their sins in courts of law. We have managed in 14 years to establish a commitment in our courts to the recognition of the dignity and the equality of all

[1] Michael Ignatieff *The Warrior's Honor* (1997)(Offers analysis of Bosnian and Rwandan genocides).

[2] Finance Minister Trevor Manuel recently conceded that xenophobic violence had exposed the government's failure to spread economic gains to the poor. See *Financial Times* (31 May 2008). In his interview, Manuel admitted that the government's inability to deliver basic services lay behind these deadly riots: 'If you have millions of young people who feel so excluded from all that is good in society, then sometimes this takes a form of actions against others.'

[3] See Frank Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 11; *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC)('*Pharmaceutical Manufacturers*'); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC)('*Fedsure*').

South Africans.[1] Same-sex life partners do not simply enjoy the ability to conduct their 'private affairs' as they wish.[2] They have now been granted the right to form civil unions that place them on an equal legal footing with opposite-sex life partners.[3] We have managed in 14 years to deepen and enrich our notion of democracy. Our democracy is no longer limited to the exercise of the franchise by all citizens every 5 years.[4] It now ensures that citizens are able to participate in various democratic processes that directly affect them.[5]

But this success in building some of the more formal structures of our constitutional order has not been mirrored by an equal degree of success in rectifying wrongs in other domains of our polity. Our HIV/AIDS morbidity and mortality rates for women and children have risen: the same rates have fallen in our poorer neighboring states.[6] Our housing policy — and its predilection for little stands with white picket fences — has not made a significant dent in the backlog that exists for affordable housing.[7] We have yet to see a comprehensive food policy programme that would prevent some 40% of our country from experiencing hunger every year.[8] We are on the verge of having a second lost generation of learners because schools have not been built and our teachers have not been adequately trained.[9]

And so we have, at this historical moment, a Potemkin Constitution.

[1] See Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36; Cathi Albertyn & Beth Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 35.

[2] See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC).

[3] See *Minister of Home Affairs v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).

[4] See *August & Another v Electoral Commission & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC); *New National Party of SA v Government of the RSA & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC); *Democratic Party v Government of the RSA & Others* 1999 (3) SA 254 (CC), 1999 (6) BCLR 607 (CC).

[5] See Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10; *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC); *Matatiele Municipality & Others v President of South Africa & Others* 2007 (6) SA 477 (CC), 2007 (1) BCLR 47 (CC).

[6] See *UNAIDS Epidemiological Fact Sheet on HIV/AIDS and STIs* (South Africa 2006), available at http://www.unaids.org; DT Jamison, RG Feachem, MW Makgoba, ER Bos, FK Baingana, KJ Hofman & KO Rogo (eds) *Disease and Mortality in Sub-Saharan Africa* (2nd Edition, 2006); Stu Woolman & Courtenay Sprague 'Aspen Pharmacare: Providing Affordable Generic Pharmaceuticals to Treat HIV/AIDS and Tuberculosis' in R Hamann, S Woolman & C Sprague (eds) *The Business of Sustainable Development in Africa: Human Rights, Public-Private Partnerships, and New Business Models* (2008) Case 13.

[7] See Kirsty McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 55. See also K Rust 'No Shortcuts: South Africa's Progress in Implementing its Housing Policy, 1994—2002' (Unpublished paper prepared for the Institute for Housing of South Africa, 2003, on file with the authors); National Department of Housing *Breaking New Ground: The Comprehensive Plan for the Creation of Sustainable Settlements* (2004) 4.

[8] See Danie Brand 'Food' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 56C.

[9] See Brahm Fleisch *Primary Education in Crisis* (2007).

That said, we do not have an apartheid Constitution. Our Final Constitution's entrenchment of the rule of law, the right to dignity and various forms of direct, participatory and representative democracy reflects the manner in which we have overcome (some of) the depredations of apartheid.

We shall spend the initial part of this chapter acknowledging that past and explaining, at least obliquely, how the depredations of apartheid — the absence of any semblance of the rule of law, the refusal to recognize the dignity of most of South Africa's denizens, and the wholesale denial of basic democratic rights to 87% of the population — are mirrored by the transformation brought about by the Interim Constitution and the Final Constitution. We shall then move from the period that has been identified as both 'Colonial Politics and Apartheid' and 'The Struggle for Liberation' into the period known rightly as 'The Road to Democracy'. In this penultimate section of the chapter, we shall traverse the constitutional negotiations that brought us both democratic constitutions, the certification judgments that officially stamped the Final Constitution as our basic law, the amendments that have shifted the content of our basic law, and an amendment bill that potentially threatens the independence of the institution — the judiciary — vouchsafed with protecting the basic law. In 'The Consolidation of Constitutional Democracy', we end with an acknowledgement of the basic constitutional doctrines that mark the break between the old order and the new, some ruminations as to whether that break is sufficiently radical for the centre to hold, and whether one can expect much more than a formal break from the basic text that animates this treatise.

2.2 Colonial Politics and Apartheid

(a) Sasikhona (We Were Always Here)[1]

South African political history did not begin, as many an outdated legal text might have us believe, in 1652. This portion of southern Africa had long been home to many autonomous communities. Many of these communities — though no longer fully autonomous — continue to form an important part of South Africa's political fabric.

Indeed, one might want to start this section again. There was, in truth, no 'South Africa' prior to the Union of South Africa in 1910. And so even the presence of Europeans, with their history of trading posts, incursions in-land, wars of conquest and a three-century long period of colonialism, often gets filtered by legal historians looking back in time through the distorted political lens of the rather recent construct known as the 'Republic of South Africa'.

[1] Of course, this proposition too is untrue — no matter what the language (Xhosa, rather San or English). All existing human populations are a function of treks back and forth across the globe over the last 200,000 years. What a significant cohort of physical anthropologists and geneticists currently seem to agree upon is that the same mitochondrial DNA — shared by all of humanity — can be traced back to approximately '2,000 to 10,000 Africans who lived around 190,000 years ago'. Stephen Oppenheimer *Out of Africa's Eden: The Peopling of the World* (2003) 46 citing Rebecca Cann et al 'Mitochondrial DNA and Human Evolution' (1987) 325 *Nature* 31; E Watson et al 'Mitochondrial Footprints for Human Expansions in Africa' (1997) 61 *American Journal of Human Genetics* 691; M Richards and V Macauley (2001) 68 *American Journal of Human Genetics* 1315.

What then can be said? Studies in anthropology clearly demonstrate that

> [t]he region was not demarcated ecologically or culturally. There were two main zones, an arid western one, occupied by Khoisan-speaking hunters and herders [the San were the hunters, the Khoi the herders], and an eastern one, occupied largely by Bantu-speaking agro-pastoralists, but there were further significant differences between the Nguni-speaking peoples of the eastern coastal region and the Sotho-Tswana of the Highveld.[1]

Still, as Adam Kuper notes, Bantu, Nguni and Sotho-Tswana communities possessed a strong linguistic family resemblance and shared a wide array of values, beliefs, rituals and institutions.[2] These values, beliefs, rituals and institutions continue to inform everyday South African life.

One of the primary concepts that continues to animate everyday South African life — at least at the level of rhetoric — is 'ubuntu'. 'Ubuntu', an express grundnorm of the Interim Constitution,[3] and an implicit commitment of the Final Constitution,[4] captures, according to Chief Justice Pius Langa:

> a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such a person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.[5]

However, as unique and widespread as the cultural artifact 'ubuntu' may be to southern Africa,[6] it does not radically distinguish the relationship between individuals and the communities in southern African thought from non-African cultural conceptions of the relationship between members of a given society. Hillel's tripartite injunction — 'If I am not for myself, then who will be for me? If I

[1] Adam Kuper 'Review: Carolyn Hamilton's *The Mfecane Aftermath: Reconstructive Debates in Southern African History'* (1997) 38 *Current Anthropology* (1997) 471.

[2] Ibid.

[3] The post-amble of the Interim Constitution Act 200 of 1993 ('IC') reads, in pertinent part, as follows: 'This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. . . . These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization.' (Emphasis added.)

[4] See *Hoffman v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para 38 (According to Justice Ngcobo: 'People living with HIV must be treated with compassion and understanding. We must show ubuntu towards them.')

[5] See *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC)('*Makwanyane*') at paras 224-225.

[6] Marius Pieterse notes that most of the pre-colonial African communities still resident in South Africa have a phrase that mirrors 'ubuntu': in Xhosa, the same general commitments are reflected in the maxim 'Umuntu ngumuntu ngabantu' or in the Sotho saying 'Motho ke motho ba batho ba bangwe'. M Pieterse '"Traditional" African Jurisprudence' in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438, 441.

am not for others who am I? If not now, when? — is grounded in a particularly strong sense of political solidarity (well over 2000 years old) in the Hebraic tradition. A person who answers to the demands of such a call is a 'mensch'. That *Yiddish* word 'mensch' maps pretty closely onto its linguistic *German* cousin 'Menschlichkeit'. Both terms represent, at bottom, the goal of every human being to rise above her passions and, in every moral transaction, to attempt to turn herself, as the *American* writer Henry James wrote, into a person 'upon whom nothing is lost'.[1]

Our point is not to displace 'ubuntu' as a core South African value. Instead we take our more nuanced lead from Marius Pieterse. Pieterse describes *The Gorillas in the Mist* view of 'ubuntu' and African jurisprudence as clouded by the wishful thinking that 'pre-colonial African society contain[ed] numerous well-hidden "truths" which, once prospected and polished, would enrich the dull worldview of the West with their unsophisticated [and truly authentic] wisdom.'[2] This notion, he continues, 'fails to overcome the ideological bias' — the kind of noble savage/fallenness cleavage associated with Rousseau[3] — and actually stands 'in the way of meaningful engagement with African society' and those long standing conceptions of morality and politics that 'still reverberate through contemporary African society'.[4]

The point of this initial digression is manifestly not to diminish the historical claims of various communities to the land that has come to be known as South Africa.[5] It is, in fact, designed to recognize those claims — but at the same time bracket them. For claims about 'who was already here', invariably begs the question of what one seeks to resolve with questions about time — 'already' (or 'first') — and space — 'here' — and blocks, as Pieterse notes, any genuinely charitable attempt to understand the moral universe occupied by others.[6]

[1] See Henry James *The Art of the Novel* (1907) 149.

[2] Pieterse (supra) at 339.

[3] Jean-Jacques Rousseau *The Social Contract* (1762) 1 ('Everything is good in leaving the hands of the Creator of Things; everything degenerates in the hands of man.')

[4] Pieterse (supra) at 339–440. See also Elsje Bonthuys 'Accommodating Gender, Race, Culture and Religion: Outside Legal Subjectivity' (2002) 18 *SAJHR* 41, 45 ('By their adherence to a somehow purer, authentic lifestyle, residents of the third world compensate sophisticated westerners for their loss of authenticity.')

[5] It is, ultimately, unimportant that the San were here first — several millennia before the Khoikhoi. See Martin Hall *The Changing Past: Farmers, Kings, and Traders in southern Africa 200–1860* (1987). What matters is that the Khoisan are treated with equal respect and equal concern within the political community within which we all must live: South Africa.

[6] As Donald Davidson writes: 'Charity is forced on us; whether we like it or not, if we want to understand others, we must count them right in most matters.' Donald Davidson *Inquiries into Truth and Interpretation* (1984) 197 as cited in Frank Michelman 'On The Uses of Interpretive "Charity": Some Notes From Abroad on Application, Avoidance, Equality, and Objective Unconstitutionality' (2008) 1 *Constitutional Court Review* 1. In addition, the pre-colonial/post-colonial split diminishes, argues Makau wa Mutua, the contribution of Africans (of all hues) to the project of human rights on the continent and to constitutional democracy in South Africa. Makua wa Matua 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1994) 35 *Virginia Journal of International Law* 339, 346–359. We make the same argument later on about the relationship between the Freedom Charter and the Final Constitution.

(b) (Im)Modest Beginnings of European Involvement in South Africa

South Africa's recorded history begins in 1652 — that is to say its European history. During that year the Dutch East India Company ('DEI'), with a party consisting of three ships, arrived at what is now Cape Town. The company's intention was not to establish a colony. They merely meant to create a way-station — a simple refreshment outpost for ships to resupply their basic stocks during their voyages from Europe to the Orient and back.[1]

Indeed, with its eye always on the bottom line, the DEI ordered Jan van Riebeeck, the station commander, to have limited engagement with the local inhabitants.[2] Van Riebeeck was permitted to grow fruit and vegetables and to barter with the Khoisan population of the Cape to purchase animals.[3] A hedge planted around the settlement marked the limits of intended European settlement in Africa.[4] The governance structures of the Cape were equally modest. Executive, legislative and judicial authority vested in a DEI Council of Policy.[5]

The Company's disengagement with the world beyond the hedges ensured that the first European settlers objectified the native populations of South Africa and reduced them to mere instruments in DEI's trade policies.[6] Thus began the next three and a half centuries of disenfranchisement of South Africa's denizens.[7]

Had the Dutch East India Company succeeded at limiting Cape Town to a fuel stop, history may well have taken a different tack. However, the DEI's concern for the bottom line required van Riebeeck to retrench a number of his employees. These employees moved beyond the hedges and remained in the Cape as farmers.

[1] See Frank Welsh *A History of South Africa* (1998) 25; Allister Sparks *The Mind of South Africa* (2003) 35.

[2] See Sparks (supra) at 35. The Dutch East India Company had had less than stellar success in the establishment of various colonies. It was, therefore, less inclined to duplicate those follies in the Cape. See Welsh (supra) at 25.

[3] See Sparks (supra) at 35.

[4] Sparks (supra) at xv. Rijkloof van Graan, a visiting commissioner of the Dutch East India Company, suggested the construction of a canal which would separate the settlement from the rest of the African continent. The Dutch East India Company rejected this suggestion.

[5] Welsh (supra) at 25.

[6] See Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005). Dignity requires the recognition of the individual as an end-in-herself, and does not tolerate the treatment of others as mere instruments for the realization of the objectives of others. And yet, from the earliest arrival of European settlers, South Africa's history has been marked by legal conventions designed to turn black South Africans into mere instruments for white colonial control. For example, the notorious restrictions of black land ownership occasioned by the Land Act 27 of 1913 were designed to redeploy black labor from farm to mines — without any regard for the needs of the workers, their families or their communities.

[7] As George Devenish writes, 'the arrival of the Dutch settlers [signalled] a brutal policy of hegemony and inequality between the whites and people of colour that was to endure for nearly 350 years.' George Devenish *Commentary on the South African Constitution* (1999) 551.

(c) The Expansion of European Involvement in South Africa

In fact, these employees, and the other Europeans that followed them, moved well beyond the hedges. Over the next 250 years, these employees, their descendants, migrants and the indigenous population of South Africa witnessed — and took part in — a series of convulsive events, each marking a distinctive period in the colonial era.

Even the first venture of 'free burghers' beyond the Dutch East Indies' hedge became a source of conflict. The Khoikhoi launched the 'first war of resistance'.[1] The Khoikhoi lost — but took their grievances and cattle elsewhere, namely to land settled by other indigenous communities. A domino effect followed. New wars were waged between communities vying for the same territory. As Allister Sparks notes, the Khoikhoi conflict established South Africa's overriding political principles for the next three centuries:

> Thus was established the right of conquest and a tradition that the land was the White South African's for the taking. It was the first act in a long process of land dispossession that combined with slavery and cheap labour to create the institutions and the habits of apartheid society.[2]

The 'Afrikaner' peace lasted about 150 years. In 1795, the British annexed the Cape Colony. The English — some two centuries ahead of the Afrikaners in politics, in industry and the making of war — initially crushed both Afrikaner and African communities. Moreover, their later discovery of gold and diamonds enabled them 'to launch the continent's only industrial revolution and build its most powerful economy.'[3]

The real result was perpetual war — not peace. The British invasion and the sealing off of the boarder of the Eastern Cape had a much larger domino effect than the Dutch East India Company-Khoikhoi conflict of a century past. Thirty years of war resulted in conflicts between virtually every population group in South Africa. When the dust had settled two important facts were indisputable: the Afrikaners had resettled some '1000 miles to the north and . . . black Africans had been dispossessed of 90% of their land.'[4] In sum, the British invasion led to the establishment of English colonies in the Cape and Natal; the peripatetic trek of the Afrikaners to the north culminated in the eventual creation of the two Boer republics in the Orange Free State and the South African Republic; and wars amongst indigenous population led to the consolidation of a Zulu nation of some 7 million people in Natal. So, by the mid-nineteenth century, we had two colonies, two republics, and a self-governing, not as yet defeated, African kingdom.

The situation remained much the same until the late 1880s.[5] The gold and diamonds of Johannesburg and Kimberly proved too great an attraction to the

[1] Sparks (supra) at 36.
[2] Ibid.
[3] Ibid at 43.
[4] Ibid at 48.
[5] Welsh (supra) at 274. Of course, in the interim, the British managed: to conduct a disastrous series of battles with the Zulus; to fail to prevent an equaling damaging war with the Xhosa; to receive the short end of a battle with the Transvaal; and to outrage the Orange Free State through their unilateral annexation of diamond mines. Ibid.

English — as did the seductive prospect of greater wealth in Rhodesia. Only the Orange Free State and the Transvaal stood in the way. The Anglo-Boer war, over diamonds and gold, began in earnest in 1899.

(d) The English Model and the Roman-Dutch Tradition

The introduction of Roman-Dutch law in South Africa followed hot on the heels of the arrival of the Dutch East India Company. Roman-Dutch law — rooted in Roman law, German custom and Dutch practice — was implemented by the company throughout the region.[1]

By 1806, the British had occupied and imposed their public law on the Cape. At the time, the notion that Parliament could 'do everything that is not naturally impossible' was the dominant political doctrine in English law. (English courts retained some sense of 'natural justice'. This sensibility, and a commitment to ensuring that Parliament played by the rules Parliament itself articulated, constituted the full extent of judicial review under English law.[2]) By the time some measure of self-government was granted to the Cape and Natal, parliamentary supremacy was the defining feature of British politics.[3]

The dominance of British legal institutions — parliamentary sovereignty and the common law — in the Cape and Natal did not displace the Roman-Dutch tradition. Indeed, the Roman-Dutch tradition remains an influential feature of South African law today. Of course, as Martin Chanock notes, both systems of law addressed challenges prevalent in Europe and were not 'developed in response to contemporary needs and conflicts' in southern Africa.[4]

After the Anglo-Boer War at the beginning of the 20th century, one of the two systems had to give. And the British had won the war. Great Britain's Westminster System remained the departure point for South African politics from the creation of the Union of South Africa in 1909 through the country's liberation in 1994.[5] As Gretchen Carpenter writes:

> Parliament was composed of members elected on the basis of territorial representation in single-member constituencies; the government was in the hands of a Cabinet of ministers, who were Members of Parliament, belonging to the majority party of Parliament and responsible to Parliament; the most important figure in the government was the Prime Minister, who was the leader of the majority party in Parliament; the State President was a figure-head cast in the mould of the British monarch; conventions played a major role in determining the relationships between the various organs of government; the party system operated in a manner similar to that encountered in Britain; the principles of parliamentary sovereignty and separation of powers were adhered to in the same measure as in Britain,

[1] See John Dugard *Human Rights and the South African Legal Order* (1978) 9; Adam Ashforth *The Politics of Official Discourse in Twentieth-Century South Africa* (1990) 34.

[2] See *Dr Bonham's Case* 8 Co Rep 113b, 77 ER 646 (CP 1610)(Sir Edward Coke); Roscoe Pound *The Development of Constitutional Guarantees of Liberty* (1957).

[3] See Dugard (supra) at 14-18.

[4] Martin Chanock *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2001) 155.

[5] See David Dyzenhaus *Hard Cases in Wicked Legal Systems* (1991) 35.

with some adaptations; evolutionary development was a feature of the system; and South Africa had a unitary and not a federal system of government.[1]

(e) The Early Failure of Judicial Review in South Africa

Despite the dominance of English constitutionalism in the Cape and Natal, the Boer Republics established in the mid-nineteenth century sought alternative sources of constitutionalism. Drafters of the Orange Free State Constitution of 1854 turned to the Constitution of the United States of America and adopted rigid rules of amendment and guaranteed rights of peaceful assembly, petition, property, and equality before the law.[2] Although the 1854 Constitution did not explicitly provide for judicial review or a Supreme Court, such a court was established by legislation in 1876 and its power of judicial review was 'accepted as an inherent feature of the Constitution'.[3]

The attempt by Chief Justice JG Kotze in the High Court of the South African Republic ('ZAR') to actually assert the power of judicial review did not meet with much success. In a judgment replete with references to US Chief Justice Marshall's reasoning in *Marbury v Madison,* Kotze CJ argued that as sovereignty vested in the people of the Republic and not the *Volksraad*, the court had a duty to strike down legislation incompatible with the *Grondwet*.[4]

Kotze's decision triggered a firestorm within the executive of the ZAR. ZAR President Paul Kruger's declared that the 'testing right' was an 'invention of the devil'.[5] After the *Volksraad* adopted legislation denying the court's power of judicial review, President Kruger dismissed the Chief Justice. While Kotze was supported by judges on the Orange Free State Bench, important members of the Cape Bench and the Johannesburg Bar, such as Sir Henry de Villiers and Jan Smuts, supported President Kruger's assertion of legislative supremacy.[6]

Despite the formal recognition of constitutional review in the Orange Free State and its assertion by the Chief Justice of the South African Republic, the court undertook judicial review of legislation in but one case. In *Cassim and Solomon v The State*, the High Court of the Orange Free State reviewed a law of 1890 that prohibited 'Asians' from settling in the state without the permission of the President. The legislation was challenged on the grounds that it violated the constitutional guarantee of equality before the law. The High Court upheld the

[1] Gretchen Carpenter *Introduction to South African Constitutional Law* (1987) 80. The 1983 Constitution, which attempted to co-opt Indian and Coloured voters, 'combined the state President and Prime Minister into one office, created a tri-cameral parliament, and mandated a multi-party governing cabinet rather than a winner-take-all system.' Ibid at 81. However, given that the 1983 Constitution left all the hallmarks of white minority executive rule in place, it is hard to characterize the 1983 Constitution, as Carpenter does, as a significant break from the Westminster System.

[2] See HR Hahlo & Ellison Kahn *South Africa: The Development of its Laws and Constitution* (1960) 72–83.

[3] *Marburg v Madison* 5 US 137 (1803)(Though not the first exercise of judicial review in the United States, *Marbury v Madison* is viewed as the ur-text for the assertion of such powers in other constitutional democracies.)

[4] *Brown v Leyds NO* (1897) 4 Off Rep 17.

[5] See Dugard (supra) at 22.

[6] Ibid at 23. See also Hahlo & Kahn (supra) at 107–110.

legislation on the grounds that the constitutional guarantee had to be 'read in accordance with the *mores* of the Voortrekkers'.[1] Thus even this early experiment with constitutionalism bore the taint of racism that would later be enshrined in South African constitutional law.[2]

(f) The Formation of the Union

After the fragile peace at the end of the Anglo-Boer War in 1902, negotiations began to unite the two former British colonies and the two former Boer Republics.[3] In 1908, the South African National Convention met to discuss this thorny issue and the even thornier 'Native Question'.[4]

The convention ended in 1909 with the creation of the Union of South Africa. The Union laid the foundations for the modern South African state: for the first time, a single territorial entity was called South Africa; and we, today, share those same borders.

The Union was a product of intense compromise. The parties to the 'National Convention' were in basic agreement on the need for white political unity in order to resolve economic tensions between the former colonies and the Boer Republics.[5] Further agreement was finally achieved on the equal official status of English and Dutch (later Afrikaans). Despite Judge Kotze's public plea before a meeting of the Convention for a rigid Constitution with a Bill of Rights, s 152 of the South Africa Act empowered Parliament to 'repeal or alter any of the provisions of this Act' by a simple majority in both Houses.[6] This provision was subject to a number of entrenchment procedures.

The thorniest of issues turned on race. At the time of the Union, the Cape had made provision for a qualified non-white franchise. Indeed, the franchise was open to all 'civilised' men.[7] The Republics were fundamentally opposed to allowing any non-white franchise and the Transvaal maintained a strict colour bar. The Cape's proposal was that the qualified franchise be extended throughout the Union. Not surprisingly, the Afrikaans states threatened to leave the convention. The two sides compromised: the Cape non-white franchise would be maintained

[1] Dugard (supra) at 19.

[2] See John Hund 'A Bill of Rights for South Africa' (1989) 34 *American Journal of Jurisprudence* 23 (Hund contends that the grounds for the rejection of the notion of a sovereign Bill of Rights — in the Boer Republics — lay in a Calvinist view of the proper place of an individual — namely a subordinate role — within an essentially authoritarian state.)

[3] DJ Brand 'Constitutional Reform — The South African Process' (2002-2003) 33 *Cumberland Law Review* 1, 3.

[4] Ibid.

[5] The argument for political unity as the most efficient means of realizing economic progress was initially formulated by members of Lord Milner's 'Kindergarten'. It was given the imprimatur of approval by the High Commissioner, Lord Selborne, in 1907 ('Selborne Memorandum'). See Lord Selbourne 'A Review of the Present Mutual Relations of the British South Africa Colonies' (1907) Cd 3564. See also Leonard Thompson 'The Compromise of Union' in M Wilson & L Thompson (eds) *The Oxford History of South Africa Vol II* (1975) 347.

[6] See Dugard (supra) at 26.

[7] Ibid at 20. Natal shared with the Cape the notion that voting should be extended to all civilised men. However, its property ownership qualification effectively ensured that the existing cohort of 'civilized' men contained virtually no non-white voters.

— but would not be extended beyond the Cape. The parties then subjected this arrangement to entrenched procedures that would not be easy to repeal.[1]

The concessions made by the British administration regarding the voting rights of non-white citizens represented a massive betrayal of the majority of South Africa's population. As George Devenish notes, during the nineteenth century, the Cape Constitution was the most liberal Constitution in the British Empire and, by percentage, more non-white voters enjoyed the franchise in the Cape than did working class voters in Britain.[2]

South Africa, however, was still a colony. Thus, South Africa's first constitution was in fact a product of the British Parliament:[3] The South Africa Act.[4] Until the passing of the Statute of Westminster in 1931, any product of the colony's legislature was subject to the Colonial Laws Validity Act. The Act provided for the invalidation of South African law by the British government.

At the heart of the creation of modern South Africa lay racial exclusion. The Convention was entirely white. This level of exclusivity did not however extend to the effects of the Convention. Black South Africa — although subject to the dictates of a legislature — had no voice, no representation in that legislature. As Iain Currie and Johan de Waal note, the Union, from its very inception violated one of Albert Dicey's essential preconditions for the rule of law.[5] South Africa's Parliament could not, in Diceyean terms, legislate validly for the majority of its citizens: the governed were not subject to the same rules as the governers.[6]

(g) Construction of a Bifurcated, Racist State

(i) *The South African Native Affairs Commission*

The immediate origins of bifurcation are to be found in the process of unification. The process gained momentum after the establishment of the South African

[1] Section 35 of the South Africa Act l909 (9 Edw 7, c 9). The first proposal would have required a two-thirds majority of each House of Parliament. The final compromise was weaker — a two-thirds vote of both Houses sitting together. See Hahlo & Kahn (supra) at 122.

[2] Devenish (supra) at 554.

[3] The Union adopted the Westminster model. Parliament was bicameral. A senate formed the upper house and held the lion's share of power

[4] See Brand (supra) at 3.

[5] Iain Currie & Johan de Waal (eds) *The Bill of Rights Handbook* (5th Edition, 2005) 3. Albert Dicey *Introduction to the Study of the Law of the Constitution* (10th Edition, 1959) 171.

[6] Black voters were removed from the common voters roll by the Representation of Natives Act 12 of 1936. The Act provided Africans with indirect representation in Parliament via a 'Natives Representative Council'. The Council, in turn, possessed only limited advisory abilities. Dyzenhaus *Hard Cases* (supra) at 38. The Act, which was passed in accordance with the entrenched procedures of section 35 of the South Africa Act, was seen by some of its opponents in Parliament as a departure from passing laws that at least can claim to be aimed at improving and 'uplifting' the African population. Ibid. In challenging the validity of the Act, the appellant in *Ndlwana v Hofmeyr NO* somewhat counter-intuitively argued that as a consequence of the passage of the Statute of Westminster in 1931, the Union Parliament was no longer bound by the entrenched clauses of the South Africa Act. 1937 AD 229 (The Statute of Westminster empowered the Union Parliament to pass laws in conflict with Imperial laws.) In rejecting this argument, the court, *per* Stratford ACJ, held that an Act of Parliament cannot be questioned as 'Parliament, composed of its three constituent elements, can adopt any procedure it thinks fit; the procedure expressed or implied in the South Africa Act, in so far as Courts of Law are concerned, [are] at the mercy of Parliament like everything else'. Ibid at 238. Indirect representation of Africans in Parliament was finally abolished on 30 June 1960 as a consequence of apartheid policy and the Promotion of Bantu Self-Government Act 46 of l959. See Hahlo & Kahn (supra) at 165.

Native Affairs Commission ('Lagden Commission') and a pan-South African Customs Union in 1903.[1] Although the recognition of African territories and land holdings came out of the interaction of independent African communities and expanding colonialism,[2] the Inter-Colonial Customs Conference of 1903 elevated this recognition into a principle of governance: 'the reservation by the state of land for the exclusive use and benefit of natives involves special obligations on their part to the state'.[3] Appointed 'with the object of arriving at a common understanding' in the formulation of native policy, the Lagden Commission's Report adopted the principle of 'special obligations' and developed a vision of a future South African federation based on the territorial segregation of black and white as a permanent mandatory feature of public life.[4]

While the Commission's endorsement of territorial separation merely coincided with the establishment of segregated 'locations' for urban Africans by the governments of all four colonies, it also gave approval to the established Shepstonian practice of creating 'native reserves'. The Lagden Commission found in this reservation of land, and the 'special obligations' arising out of it, a principled basis for political segregation. The Commission first identifies 'natives' as having 'distinct rights' to the reserved lands as the 'ancestral lands held by their forefathers'. These tenure rights are then characterized as amounting to a form of group ownership under which the 'Tribal Chief' administers the land in trust for the people.

Finally, the chiefs are said to have transferred their sovereign rights — including their powers of administration over communal lands — to the Crown through a process of 'peaceful annexation'. Having received all the rights and obligations previously possessed by the chief as sovereign, the Crown then had the duty to administer the affairs of 'natives' according to traditional forms of governance — 'tribalism'. The Commission described this 'tribal system' as follows: '[like] father exercises authority within his family … so the Chief rules the tribe and guides its Destinies'. This description left no doubt as to the degree of autocracy envisaged by the Commission. Instead of merely acknowledging a plurality of systems of governance, the Commission placed authority in the hands of the white administration which, according to the Commission, was obliged to govern the 'natives' 'as a nation in its nonage'.[5]

The creation of 'differential spheres of citizenship for "European" and "Native" populations within one territory' was reflected in s 147 of the South Africa Act of 1909.[6] While the bulk of the South Africa Act dealt with the powers of a government, to be essentially representative of white male adults, s 147 stated

[1] See Rodney Davenport *South Africa: A Modern History* (1977) 147–169.
[2] See Rodney Davenport & KS Hunt (eds) *The Right to Land* (1974) 1–30.
[3] South African Inter-Colonial Customs Conference 1903, Cd 1640, *Minutes* 'Native Question' at para 1.
[4] Davenport *South Africa* (supra) at 152.
[5] Adam Ashforth *The Politics of Official Discourse* (1990) 37.
[6] Ibid.

that '[t]he control and administration of native affairs … throughout the Union shall vest in the Governor-General in Council'.[1] The connection between the exercise of authority over 'natives' and the exercise of authority over land was made explicit in s 147. It stated that the executive (the Governor-General in Council)

> shall exercise all special powers in regard to native administration hitherto vested in the Governors of the Colonies or exercised by them as Supreme chiefs, and any lands vested in the Governor … for the purposes of reserves, for native locations shall vest in the Governor-General in Council, who shall exercise all special powers in relation to such reserves as may hitherto have been exercisable by any such Governor.

(ii) *The Racial Construction of Citizenship*

The history of the franchise and the fragmentation of voting rights provide the two most important keys to unlocking the construction of citizenship in South Africa. While immigration law encouraged the expansion of a 'European' community, it was the constant manipulation of voting rights that determined the character of South African citizenship and the constitutional order. In part, it was the cleavages between the two main segments of the white population, those of English decent and those of Dutch decent, which drove the racialization of political power and the marginalization of Africans. The English — in efforts to appease the defeated Afrikaners immediately after the war, to minimize discontent when the depression hit Afrikaaner semi-skilled workers particularly hard and to ensure that a significant portion of all white South Africans might be enriched by a South African economy built on cheap African labor — systematically stripped black South Africans of all meaningful political power.

(h) The Rise of Apartheid: *Harris I*, *Harris II* & *Collins*

South Africa, like Britain, emerged from the Second World War with its wartime leader facing re-election. Jan Smuts, like Winston Churchill, failed to be re-elected.

In the 1948 general election, South African politics lurched sharply to the right. The Nationalist Party obtained a mandate to govern based largely on a platform of radically institutionalised racial segregation.

The question of the limits of judicial review over Parliamentary action arose soon after the election of the Nationalist Party. In 1951, Parliament passed the Separate Representation of Voter's Act.[2] The Act purported to extinguish what

[1] See South Africa Act 1909 s 34(i)(The quota of representatives from each province is to be 'obtained by dividing the total number of European male adults in the Union … by the total number of members … .')

[2] Act 46 of 1951.

little remained of the non-white vote. The Act was challenged in *Harris v Minister of the Interior*.[1] The National Party's slender majority in Parliament was to prove to be the Act's undoing. The Act had been passed in both Houses, sitting separately, and by a mere simple majority. Because the Act had failed to secure the special majorities required by the South Africa Act, the Appellate Division upheld the challenge and declared the Act invalid.

The Appellate Division's decision in *Harris I* was not based on the substantive content of the law or its manifest unfairness. It did not invoke, as *Brown v Leyds* had done, reasoning such as that employed in *Marbury v Madison*. It struck down the Act on purely procedural grounds.[2]

In response, Parliament passed the High Court of Parliament Act.[3] The Act granted Parliament the power to sit as a court and to review any judgment made by any court which declared any piece of legislation to be invalid.[4] The High Court of Parliament Act met a fate identical to the Separate Representation of Voter's Act. In *Harris II*, the Appellate Division found that the legislation ran afoul of section 152 of the South Africa Act.[5]

Despite increased support for the National Party ('NP') in the 1956 general elections, the government still could not muster the votes needed to meet the demands of section 35 of the South Africa Act. The government finally arrived at a solution to its problem. It increased the size of the Senate, the upper House of Parliament.[6] Parliament then increased the quorum requirement in the Appellate Division.[7] Having packed the Senate with the numbers necessary to ensure the proper passage of the legislation, the government could rest assured that a similarly loyal bench would uphold the Act.

The South Africa Amendment Act[8] achieved two important objectives for the government. First, it reinstated the 1951 Separation of Voter's Roll Act. Second, it landed the *coup de grace* on the courts: it excluded the power of judicial review from the exercise of legislative power. The Act provided that '[n]o court of law shall be competent to enquire into or to pronounce upon the validity of any law passed by parliament'. The hegemony of Parliament was now well entrenched. Although a challenge was brought to the Act in *Collins v Minister of the Interior*, the Appellate division rubber stamped the legislation.[9]

[1] 1952 (2) SA 428 (A)('*Harris I*').
[2] See Erwin Griswold 'The Demise of the High Court of Parliament Act' (1953) *Harvard Law Review* 564.
[3] Act 35 of 1953.
[4] Act 35 of 1952.
[5] *Minister of the Interior v Harris* 1952 (4) SA 769 (A)('*Harris II*').
[6] The Senate Act 53 of 1955.
[7] The Appellate Division Quorum Act 27 of 1955.
[8] Act 1 of 1958.
[9] *Collins v Minister of the Interior* 1957 (1) SA 552 (A)('*Collins*').

(i) Apartheid and the Republic[1]

It is important to constantly recall, as we trawl through the law, David Dyzenhaus' words about the lived experience of apartheid:

> The ordinary day-to-day operation of the apartheid machine inflicted huge suffering on the majority of South Africa's population. In the cause of white supremacy, people were forceably removed from their homes, their land was taken away from them, family members were separated from one another, they were stripped of their citizenship and consigned to dustbowls ruled by dictorial puppets, and they were explicitly told that they should have just those rights and just that amount of education that would fit them into an economic system run for the exclusive benefit of the white majority. … Apartheid inflicted violence on all those who were its victims of its racist laws. That violence was 'ordinary' only in that it was part of the fabric of daily existence. There were also the 'extraordinary' violence of apartheid — the beatings, torture and murder (sometimes amounting to massacre) which the security forces dealt out to political opponents of the ordinary violence.[2]

(i) *Denationalization of black South Africans*

After all South Africans of colour were officially disenfranchised, three acts in the early 1950s put in place the remaining foundations of apartheid. The Population Registration Act required all South Africans to register — and be classified — as either 'white', 'coloured', 'Indian' or 'Bantu.'[3] The Abolition of Passes and Coordination of Documents Act required all black South African males to carry passes.[4] In 1956, the law was amended to embrace black South African women as well. Finally, the Natives Laws Amendment Act allowed Africans to live in white communities only if they were born there, they had lived there for fifteen years continuously, or they had been continuously employed by the same employer for at least ten years.[5]

[1] As the commitment to apartheid increased, the country's political isolation grew. South Africa was suspended from the Commonwealth. In response, white South African's held a referendum to gauge whether South Africa should end its relationship with Britain and become a Republic. On 31 May 1961, the Republic of South Africa came into being. The advent of the Republic did not bring any substantial constitutional or political change. The South African parliament adopted its own constitution. The Constitution of the Republic of South Africa Act 32 of 1961. The 1961 Constitution enshrined parliamentary sovereignty and limited powers of judicial review.

[2] David Dyzenhaus *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998) 6.

[3] Act 30 of 1950. Interestingly, the definition of European in colonial Natal was constructed primarily around the threefold distinction between indigenous Africans, indentured Indians, and other members of colonial society. For example, prison regulations classified prisoners into three groups, Africans, Indians and Europeans, but the definition of Europeans was unusual in that it included 'all persons of European descent, Eurasians … American Negroes, French Creoles and West Indians'. Albie Sachs *Justice in South Africa* (1973) 89.

[4] Act 67 of 1952.

[5] Act 54 of 1952.

Given these severe restrictions on black South African participation in South African political life, the government felt obliged to provide some distorted form of political rights to black South Africans. This recognition, combined with the process of decolonization which was sweeping through Africa in the late 1950s, led the apartheid government to produce a scheme which sought to extend franchise rights to the African majority — but only within geographically small, fragmented entities: Bantustans. The logic behind this scheme was the eventual denationalization of the majority of black South Africans and their reconstitution as foreign citizens exercising full political rights outside of the South African constitutional framework. Such Bantustans — the American equivalent of reservations for Native Americans — allowed the cheap African labour force to remain stable — and available — while moving excess workers and their families to fictional homelands 'run' by African leaders controlled by the apartheid state.

(ii) *Apartheid and the creation of Bantustans*

The Promotion of Bantu Self-Government Act established this scheme.[1] The Union Constitution described these fictional homelands as oases of 'tribal' governance in which Africans could exercise their own unique political aspirations. The apartheid regime referred to this racist, ghettoization of South Africa as the policy of 'separate development'.[2]

This Orwellian language was backed up by action: pass laws and forced removals led to the creation of four notionally 'independent' bantustans and the balkanization of the country.[3] The Transkei Constitution Act initiated the process contemplated by the Bantu Self-Government Act.[4] The Black States Constitution Act continued the process of ghettoization: in a Goebbals-like turn of phrase, the government compared this process 'in form and timing … to African decolonization'.[5] Rejected by the majority of South Africans and the international community as a violation of every black South African's right to self-determination, 'separate development' became a process of denationalization in which the citizenship of black South Africans was re-imagined as foreign citizenship regardless of an individual's place of birth or preference.[6] Ultimately, the

[1] See Heinz Klug 'Self-Determination and the Struggle Against Apartheid' (1990) 8 *Wisconsin International LJ* 251, 294–295.

[2] Act 46 of 1959.

[3] See, generally, HJ Richardson 'Self-Determination, International Law and the South African Bantustan Policy' (1978) 17 *Columbia Journal of Transnational Law* 185; DA Basson & HP Viljoen *South African Constitutional Law* (2nd Edition, 1991) 307–318.

[4] For an early critique of the policy of separate development and the idea of bantustan development, see Govan Mbeki *South Africa: The Peasants' Revolt* (2nd Edition, 1984) 73–94.

[5] Act 48 of 1963. See WJ Hosten, AB Edwards, C Nathan & F Bosman *Introduction to South African Law and Legal Theory* (1983) 665–678.

[6] See M Vorster, M Wiechers, D van Vuuren & G Barrie *The Constitutions of Transkei, Bophuthatswana, Vendav and Ciskei* (1985) 15 (Authors compare the process of 'separate development' under apartheid with the process of decolonization that the British implemented throughout Africa. They show how the South African government attempted to legitimize separate development by following the British decolonization model in form, if not in substance.)

lack of economic infrastructure in the homelands and the refusal of African leaders to participate in this denationalization scheme led to its demise.[1]

(iii) *Apartheid and the Silencing of Opposition*

From the 1920s onward, the South African government enacted repressive law after repressive law in a largely successful effort to stifle dissent.[2] The promulgation of anti-expression legislation accelerated dramatically after the National Party took power in 1948. The National Party launched its campaign to eviscerate the freedom to dissent — through expression, association and assembly — with the Suppression of Communism Act ('SCA').[3] SCA s 9 allowed the Minister of Justice to prohibit a gathering or an assembly whenever there was, in his opinion, reason to believe that the objects of communism would be furthered at such a gathering.[4] A few years later the government — in response to the ANC's 1952

[1] Dyzenhaus *Hard Cases* (supra) at 41.

[2] Gilbert Marcus and Derek Spitz lay out a selective, but nowhere near exhaustive, regime of statutory provisions that blocked freedom of expression under apartheid: the Public Safety Act 3 of 1953; the Riotous Assemblies Act 17 of 1956; the Defense Act 44 of 1957; the Police Act 7 of 1958; the Post Office Act 44 of 1958; the Trespass Act 6 of 1956; the Correctional Services Act 8 of 1959; the Trademarks Act 62 of 1963; the Armaments Development and Production Act 57 of 1968; the Petroleum Products Act 120 of 1977; the Copyright Act 98 of 1978; the National Key Points Act 102 of 1980; the Intimidation Act 72 of 1982; the Internal Security Act 74 of 1982; the Protection of Information Act 84 of 1982; the Nuclear Energy Act 92 of 1982; the Regulation of Gatherings Act 205 of 1993. See Gilbert Marcus & Derek Spitz 'Freedom of Expression' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS2, 1998) Chapter 20, 20-4. See also Anthony Mathews *Law, Order and Liberty in South Africa* (1971) 240–2, 249–50; John Dugard *Human Rights and the South African Legal Order* (1978) 186–91.

[3] Act 44 of 1950. The Act was later incorporated into the Internal Security Act 74 of 1982.

[4] The Minister could, in terms of SCA ss 9 and 5 (which applied to listed persons), give notice to a person prohibiting him from attending any gathering. The provisions gave rise to a number of court cases that turned on the definition of the word 'gathering'. See, eg, *S v Meer en 'n Ander* 1981 (4) SA 604, 606 (A)(Court accepts premise of the statute — namely that the threat of communism, breakdowns in the security of the State, and the maintenance of public order were real enough to justify radical restrictions on gatherings. Having accepted the premise, the court then articulates a taxonomy of gatherings in which prohibited 'social gatherings' does not 'include the family … activities of the restricted person.') See also C Forsyth *In Danger for Their Talents* (1985) 148–67; Dugard (supra) at 162–3. The bench's blinkered world-view and its efforts to compartmentalize law and politics meant apartheid era judges could, with a straight face, state that:

> [F]reedom of speech and freedom of assembly are part of the democratic right of every citizen of the Republic, and Parliament guards these rights jealously for they are part of the very foundation upon which Parliament rests. Free assembly is a most important right for it is generally only organized public opinion that carries weight and it is extremely difficult to organize it if there is no right of public assembly.

S v Turrel 1973 (1) SA 248, 256 (C)(Magistrate's prohibition of a meeting in terms of Riotous Assemblies Acts s 2(1) reversed on grounds that the order did not identify the meeting at issue with sufficient clarity.) See also *S v Budlender & Another* 1973 (1) SA 264 (C). For more on the repression of expression under apartheid, see Dario Milo, Glenn Penfold & Anthony Stein 'Freedom of Expression' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 42. See also S Woolman 'Freedom of Asembly' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 43.

defiance campaign — passed the Criminal Law Amendment Act ('CLAA').[1] The CLAA increased penalties for crimes committed in the context of political protest.[2]

More serious limitations upon political dissent followed the enactment of a new Riotous Assemblies Act in 1956.[3] Open opposition to the government met with further restrictions in the 1960s and 1970s.[4] By the late 1970s it became almost impossible to obtain permission to protest, to assemble, or to speak out against the tyranny of apartheid.[5] Attempts at reform in the early 1980s failed.[6] In the mid-1980s, as South Africa's political crisis deepened, and it appeared that the law on freedom of speech and conduct could get no worse, the government responded by issuing extremely restrictive 'emergency' regulations under the Public Safety Act.[7]

[1] Act 8 of 1953.

[2] The Internal Security Act was designed to achieve a similar result. Act 74 of 1982 ss 58 and 59. See Ackermann (supra) at 164–168. The judiciary, on occasion, saw a political motive as an aggravating factor in sentencing. See Edwin Cameron 'Civil Disobedience and Passive Resistance' in Hugh Corder (ed) *Essays on Law and Social Practice in South Africa* (1988) 219, 231.

[3] Act 17 of 1956. Initially, the Act allowed the Minister of Justice to prohibit any public gathering in order to maintain public peace or to prevent the engendering of racial hostility. However, the 1974 amendments to the Act extended the Minister's prohibitory powers to private gatherings. See Riotous Assemblies Amendment Act 30 of 1974 s 2(1). The Riotous Assemblies Act, s 17, states that a person commits the crime of incitement to public violence if the natural and probable consequences of his act, conduct, speech or publication would be the commission of public violence by others. At the time of writing, the Act was, at least partially, still in force.

[4] The General Law Further Amendment Act required that assemblies receive both the local authority's consent and the approval of a magistrate in the district in which the assembly was to take place. Act 92 of 1970 s 15. See Dugard (supra) at 187. Under the Internal Security Acts of 1976 and 1982, the Minister issued annually a notice that declared outdoor gatherings illegal — save for *bona fide* sporting and religious purposes — unless permission was, at least partially, obtained from a magistrate.

[5] See Hugh Corder & Dennis Davis 'A Long March — Administrative Law in the Appellate Division' (1988) 4 *SAJHR* 281, 289.

[6] Not only did the Rabie Commission fail to deliver the hoped for reform, it could be argued that it led to an even more repressive regime of laws. See, eg, Internal Security Act 74 of 1982, For a comprehensive analysis of such repressive statutes, see Mathews (supra) at 52–56, 139–147; Ackermann (supra) at 149–168.

[7] Act 3 of 1953. Regulation 7(1), Proclamation 109 of 1986 issued in terms of the Public Safety Act, held that '[t]he . . . Commissioner may for the purpose of the safety of the public . . . issue orders . . . (bA) whereby any particular gathering, or any gathering of a particular nature, class or kind, is prohibited at any place or in any area specified in the order.' A few challenges to the assembly regulations were successful. See, eg, *Natal Newspapers (Pty) Ltd v State President of the Republic of South Africa* 1986 (4) SA 1109 (N)(Court struck down Regulation 7(1)(d)). The majority were not. See, eg, *Van der Westhuizen NO v United Democratic Front* 1989 (2) SA 242 (A)(Court upheld regulation 7(1)(bA).) See Etienne Mureinik 'Pursuing Principle: The Appellate Division and Review under the State of Emergency' (1989) 5 *SAJHR* 60; Deon Basson 'Judicial Activism in a State of Emergency: An Examination of Recent Decisions of the South African Courts' (1987) 3 *SAJHR* 28; Michael Kidd 'Meetings and the Emergency Regulations' (1989) 5 *SAJHR* 471. See also John Dugard, Nicholas Haysom & Gilbert Marcus *The Last Years of Apartheid: Civil Liberties in South Africa* (1992).

(iv) *Sharpeville, 1960 and Soweto, 1976*[1]

Although official apartheid lasted almost 50 years, two events stand out in the battle against the NP's racist, minority regime: the Sharpeville massacre of 1960 and the Soweto uprising of 1976.

Early on in 1960, the ANC planned to launch a campaign of protests against pass laws. The PAC decided to pre-empt the ANC by launching its own campaign ten days earlier. On March 21, some 7,000 people marched to the police station in Sharpeville.[2] The plan — reminiscent of Ghandi's own campaign — was to make themselves subject to arrest for not carrying their pass books.

The police and the military first responded with fighter planes designed to intimidate the crowd into dispersing. When that tactic failed, the police set up a column of armored vehicles and began to fire upon the crowd.[3] The Truth and Reconciliation Commission noted the ruthless manner of this state-sponsored violence and found 'a degree of deliberation in the decision to open fire'.[4] It further found that the majority killed and wounded were shot in the back.[5] Sixty-nine were left dead.

The domestic response was immediate. Demonstrations, protest marches, strikes, and riots around the country led to the imposition of a state of emergency on 30 May 1960. The international response was almost as immediate — the United Nations and the British Commonwealth condemned the actions.[6] South Africa would not be viewed as the independent Republic it would soon become: the world came to view it as the racist, fascist, pariah state it had long been.

The Soweto Uprising took a somewhat different form. But its effects were equally devastating and substantially longer lasting.

Although the roots of the uprising can be traced back to the Eiselin Report of 1949 — which led to the elimination of mission schools and a radical diminution in state aid for black South African schools — the immediate cause of this massacre was the imposition of Afrikaans on black learners.[7] On June 16, 1976, thousands of black students walked from their schools to Orlando Stadium to protest against this new policy. Again, the organizers of the march had called for peaceful action. The police response — to the throwing of stones and other minimal provocations — was to open fire on the students.[8]

While the number of deaths ran to some 500, the real effect of the Soweto

[1] See, generally, Allister Sparks *The Mind of South Africa* (1990).

[2] Chris Nicholson 'Nothing Really Gets Better: Reflections on 25 years between Sharpeville and Uitenhage' (1986) 8 *Human Rights Quarterly* 511, 512.

[3] Ibid at 513.

[4] *Truth and Reconciliation Commission of South Africa Report, Volume 3, Chapter 6*, (1998) 531-537.

[5] Ibid.

[6] United Nations Security Council Resolution 134 (April 1960). See also Geoffrey Robertson *Crimes against Humanity* (2006) 46.

[7] John Venter *Youth Day: June 16* (2007) 8.

[8] Nicholson (supra) at 515.

Uprising was the radicalization of a new generation of South Africans.[1] The lesson many students drew was that violence could only be met with violence. Schools became no-go zones and Umkhonto we Sizwe — the ANC's armed wing — found itself the beneficiary of a new group of willing and able volunteers.[2]

(v) *States of Emergency*[3]

Under PW Botha's security state in the 1980s, and in the face of the United Democratic Front's efforts to make the country ungovernable, the last years of apartheid rule in South Africa took place in a relatively constant state of emergency.

The State of Emergency declared on 20 July 1985 gave the State President virtually unlimited powers to undermine the resistance to apartheid.[4] He could rule by fiat — the Constitution, for what it was worth, was largely a dead letter. So stringent, so abusive, so inhumane were the security state's efforts that thousands of people were jailed and hundreds 'disappeared'. (The fate of the many disappeared would only be revealed a decade later through the work of the Truth and Reconciliation Commission.) So paranoid and ruthless was PW Botha's regime that possessing documents deemed a 'threat' to state security, advising a person to 'stay away from work' or revealing the names of persons arrested under the State of Emergency became criminal offences.

In 1986, the State of Emergency — initially limited to areas of unrest — was extended to the entire country.[5] It had the reverse of its intended effect: it only further galvanized the opposition. By 1989, Botha had met Mandela and begun to sketch the lineaments of a peaceful transfer of power.[6] A year later, under a new State President, FW de Klerk, the state of emergency was lifted, Mandela was released from 27 years of incarceration, anti-apartheid groups were unbanned, the press was granted greater freedom and the death penalty was suspended.

(vi) *1983 Constitution and the Endgame of Apartheid*

The balkanisation of South Africa, under the Bantustan 'states', created additional, unanticipated problems. The white minority government had now created a distorted form of black suffrage in these 'homelands'. It had left unresolved the question as to why two other 'populations' lacked voting power.

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[1] Thomas Blair 'The Use & Effectiveness of Economic Sanctions against Nations that Violate Human Rights: Can the United States Force Reform on South Africa' (1986) 4 *New York Law School Human Rights Annual* 511, 512.

[2] George Devenish 'South Africa from Pre-colonial Times to Democracy' (2005) 3 *TSAR* 547, 565.

[3] See, generally, Stephen Ellmann *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992).

[4] Devenish (supra) at 565.

[5] See *Bloem v State President* 1986 (4) SA 1064 (O)(Upholding validity of state of emergency.) See also Edwin Cameron 'Judicial Enforcement of Apartheid Propaganda' (1987) 3 *SAJHR* 223.

[6] Peter Bouckaert 'The Negotiated Revolution: South Africa's Transition to Multiracial Demoracy' (1995) 33 *Stanford Journal of International Law* 375, 386. Botha had approached Mandela as early as 1985 — offering emancipatoin in return for a cessation of armed violence. Mandela famously replied: 'Only Free men, not prisoners, can negotiate.'

But the decision in the early 1980s to grant Indian and coloured voters a limited form of the franchise had nothing at all to do with efforts to make South Africa a formally more equal polity. It was, in short, merely an extension of the divide and conquer strategy that drove apartheid politics.[1]

Thus, in 1983, the South African Parliament passed the 1983 South African Constitution ('the Tricameral Constitution'). The 1983 Constitution created three houses of Parliament: the House of Delegates (for Indians), the House of Representatives (for Coloureds) and the House of Assembly (for Whites).[2] However, in no sense was this new institution meant to put these three 'population' groups on an equal footing. (A Department of Information publication released at the time to publicise the new constitution talks, again in 'big lie language', described the 1983 Constitution as a 'sustained effort by various governments to arrive at satisfactory constitutional solutions for South Africa'.[3]

On its face, each group was given the mandate of governing their own affairs. Matters of 'common concern' would be decided by all three houses.[4] However, to ensure that political power remained in white hands on matters of common concern, voting was weighted in terms of a 4:2:1 ratio. The Assembly's votes counted four times the Representatives' votes counted twice. The Delegates' votes counted once only. The ratio ensured that a unified House of Assembly could not be overruled by the other 2 Houses.[5]

At any rate, the political pressures of the anti-apartheid movement resulted in a significant departure from the Westminster system. The 1983 Constitution created a State President. The State President was a much needed product of the times. Under the new Constitution, he could expect Parliament and cabinet to rubber-stamp his decisions. He also enjoyed the power to declare states of emergency that would enable him to further consolidate power in the Executive and act to suppress all threats to the white, minority regime.[6]

2.3 The Liberation Movements: The Struggle for Freedom

It is difficult to say whether there is, as yet, a victor's account of South African history. Many would say we are still on that long walk to freedom.

However, a desiccated historical account of this country's law that failed to consider the role of the liberation movements in shaping the current constitutional landscape would have the perverse effect of emphasizing the actions of those persons in power for the better part of the last few centuries: South Africa's

[1] See Currie & De Waal (supra) at 4; Hugh Corder 'Towards a South African Constitution' (1994) 57 *Modern Law Review* 491, 495.

[2] For more on the Tricameral Parliament, see John Dugard 'Racism and Repression in South Africa: The Two Faces of Apartheid' (1989) 2 *Harvard Human Rights Law Journal* 97, 98.

[3] Department of Foreign Affairs and Information *Constitutional Guidelines: A New Dispensation for White, Coloureds and Indians* (1983)('*Constitutional Guidelines*') 1.

[4] Ibid at 5.

[5] John van der Vyver 'The 1983 Constitution: An Exercise in Consociationalism?' (1986) 2 *SAJHR* 341.

[6] See Dugard 'Two Faces' (supra) at 980.

white minority. This section recognizes that the law is more than that which appears in a government gazette. Law — good and bad, enforced and unenforceable — reflects the lived experience of a country's inhabitants.

(a) Ghandi, Pass Laws & Satayagraha[1]

In 1760, the Cape introduced pass laws to regulate the movement of slaves. Pass laws soon became a fashionable way of segregating South Africa — at work, at home and in public. Mahatma Ghandi, a lawyer of Indian extraction arrived, in 1893, to conduct business in Pretoria.[2] He did not find the pass laws attractive or amusing. Soon after purchasing a first class train ticket from Durban, he was forcibly ejected from a train carriage reserved for whites only.[3] Finding himself in jail, and the conditions of Indians in South Africa intolerable, Ghandhi led an Indian movement to have the pass laws withdrawn (for Indians).[4] When various forms of pressure failed, for example, pass burning, he created a new form of resistance: *Satayagraha*. This peaceful, non-violent form of firm, passive resistance forced the British — who were hell bent on maintaining control of the country through guns, not butter — to reveal the brutal nature of their power.[5]

Shortly after his release from that ignominious stay in jail, Gandhi founded the Natal Indian Congress. The primary purpose of his new endeavor was to teach Indians how to effectively use *Satayagraha*. And that they did.

In 1906, Gandhi announced that he would return to jail before he obeyed another Anti-Asian law. In addition to various peaceful protests, Gandhi led strikes in the mines and on the plantations — as well as a march from Natal to the Transvaal to protest the racist Anti-Asian measures put in place by the Immigration Act. He paid for his resistance and was jailed on numerous occasions.[6]

But he ultimately succeeded: at least by some lights. In 1914, the relatively new Union government conceded to a number of important demands: the recognition of Indian marriages and the abolition of the poll tax.

Ghandi remembers the course of his life in terms of that first fateful trip from Natal to the Traansvaal:

> I recall particularly one experience that changed the course of my life. Seven days after I had arrived in South Africa the client who had taken me there asked me to go to Pretoria from Durban. It was not an easy journey. On the train I had a first-class ticket, but not a bed ticket. At Maritzburg, when the beds were issued, the guard came and turned me out. The train steamed away leaving me shivering in cold. Now the creative experience comes there. I was afraid for my very life. I entered the dark waiting room. There was a white man in the

[1] See, generally, Mohandas Ghandi *Satayagraha in South Africa* (1928).
[2] John Leubsdorf 'Ghandi's Legal Ethics' 51 *Rutgers Law Review* (1998) 923, 924.
[3] See Charles DiSalvo 'Ghandi: The Spirituality and Politcs of Suffering' (1997) *Oklahoma City University Law Review* 51, 53.
[4] See Shuba Ghosh 'Ghandi and the Life of Law' (2003) 53 *Syracuse Law Review* 1273.
[5] See DiSalvo (supra) at 54.
[6] See Leubsdorf (supra) at 924.

> room. I was afraid of him. What was my duty; I asked my self. Should I go back to India, or should I go forward, with God as my helper and face whatever was in store for me? I decided to stay and suffer. My active non-violence began from that day.[1]

Others take a somewhat dimmer view of Ghandi's contributions. According to Les Switzer, Gandhi saw *Satayagraha* as little more than a means of protest — and securing reform — on behalf of the Indian in South Africa.[2] Indeed, his language regarding black South Africans was in keeping with the times. He called black South Africans lazy and indolent, and did not, it would appear, make similar efforts to win other South Africans of colour the limited emancipation he secured for Indian South Africans.[3] That said, he did secure such victories in South Africa and quite consciously employed them in India's successful fight for independence.[4]

(b) The African National Congress, the Pan Africanist Congress and Black Consciousness

The African National Congress ('ANC') was formed officially on 8 January 1912.[5] Tribal authorities, people's representatives, church organizations and other prominent individuals — such as John Dube, Pixley ka Isaka Seme and Sol Plaatjie — formed the ANC in order create an institution that defended the rights and freedoms of all black South Africans.[6]

The ANC has a long, complicated history of resistance to white political rule. No short precis of its activities can do it justice. We will therefore confine our account to some of the more important events it orchestrated.

It initiated, in June 1952, and with the assistance of other anti-aparthied movements, the Defiance Campaign. The campaign employed Ghandi's passive resistance techniques against the legal restrictions imposed upon all non-white South Africans. The campaign had limited success — and new laws restricting public protest made passive resistance a less effective means of combating apartheid.

The ANC then helped to engineer the Freedom Charter, again in conjunction with other opponents of apartheid. This document, as we note below, laid the foundation for many of the rights, the freedoms and the democratic institutions we find in the Final Constitution.

The ANC leadership underwent enormous sacrifice in the name of freedom. While many of its leading members were acquitted five years after the first Treason Trial began in 1956, the subsequent Rivonia Trial resulted in the conviction

[1] 'Gandhi in South Africa' available at http://www.encounter.co.za/article/112.html (accessed on 24 June 2008).

[2] Les Switzer *South Africa's Alternative Press: Voices of Protest and Resistance, 1880s-1960s* (1997).

[3] See David Machlowit 'Ghandi: Lawyer to Legend' (1983) 69 *American Bar Association Journal* 370.

[4] It would, likewise, be an act of conscious amnesia to forget that Martin Luther King successfully employed Satayagraha in the civil rights movement in the United States some 50 years later.

[5] Thomas Karis 'South African Liberation: The Communist Factor' (1987) 65 *Foreign Affairs* 267.

[6] Saki Mako Zamce 'The ANC and the Transformation of South Africa' (1995) 2 *Brown Journal of World Affairs* 241.

and life imprisonment of Nelson Mandela, Walter Sisulu and many of the other top leaders of the ANC.[1]

Perhaps the ANC's most important pre-liberation decision followed the Sharpeville massacre. The ANC concluded that Ghandhi's *Satayagraha* would never be an effective means of ending apartheid. The ANC's military wing, Umkhonto we Sizwe ('MK'), was charged with using various forms of violence to sabotage the apartheid state.[2]

In the 1970s and 1980s, the ANC leadership in exile upped the ante. It decided, under Oliver Tambo's leadership, to target for assassination members of the apartheid government and the secret police, and to destroy important assets in the military-industrial complex. The ANC's military attacks convinced many black South Africans that something could be done and the white minority government that they had meaningful opposition when it came to the use of force. The apartheid state's decision to further increase its repressive actions only reinforced the commitment of ANC MK cadres and their United Democratic Front brethren. And it was this commitment through the 1980s that led the apartheid state to concede that it had no option but to cede power to the majority of South Africa's citizens.

It seems ironic then, at this juncture of the narrative, to note that the reason the Pan Africanist Congress ('PAC') split from the ANC in 1959 was that the ANC was thought to be too accommodationist. The PAC, under the leadership of Robert Sobukwe, emphasized mass action and the view that African liberation in South Africa could not be secured with the assistance of Indian, coloured or white members. Although far less of a threat than the ANC — at the time of its formation — the aforementioned two strands of thought had two identifiable consequences. The first was the Sharpville massacre: a direct function of the PAC's desire to pip the ANC to the post in terms of confrontational mass action. The second was an unintended consequence: the ideology of Black Consciousness.

Although the founding of Black Consciousness ('BC') is generally credited to Steve Biko — its political pedigree cannot be denied.[3] Like the PAC, BC held that genuine liberation of black South Africans could not occur within multiracial institutions, parties or movements. Biko sets out the basis for this view in *I Write What I Like*:

> Black Consciousness is in essence the realization by the black man of the need to rally together with his brothers the cause of their operation — the blackness of their skin — and to operate as a group in order to rid themselves of the shackles that bind them to perpetual

[1] See George Bizos 'The Abrogation and Restoration of the Rule of Law and Judicial Independance in South Africa' (1998) 11 *Revue Quebecoise de Droit Internationale* 155, 157.

[2] See Bizos (supra) at 157. See also John Dugard 'Soldiers or Terrorists: The ANC & The SADF Compared' (1995) 45 *SAJHR* 221.

[3] For a discussion of the affect of Black Consciousness on South African Christian establishment, see Peter Walsh 'Church vs State in South Africa: the Christian Institute and the Resurgence of African Nationalism' (1977) *Journal of Church & State* 457.

> servitude. It seeks to demonstrate the lie that black is an aberration from the 'normal', which is white .... It seeks to infuse the black community with a new-found pride in themselves, their efforts, their value systems .... The interrelationship between the consciousness of the [black] self and [BC's] emancipatory programme is of paramount importance. Blacks no longer seek to reform the system because so doing implies acceptance of the major points around which the system revolves.... Blacks are out to completely transform the system and make of it what they wish. Such an undertaking can only be realized in an atmosphere where people are convinced of the truth inherent in their stand.... With this background in mind we are forced, therefore, to believe that it is a case of haves against have-nots, where whites have been deliberately made haves and blacks have-nots. There is ... no worker in the classic sense among whites in South Africa, for even the most down-trodden white worker still has a lot to lose if the system is changed. He is protected by several laws against the competition at work from the majority. He has a vote and he uses it to return the Nationalist Government to power because he sees them as the only people who, through job reservation laws, are bent on looking after his interests against competition with the 'Natives'. The overall analysis, based upon the Hegelian theory of dialectic materialism, is as follows. That since the thesis is a white racism there can only be one valid antithesis, ie, a solid black unity to counterbalance the scale. If South Africa is to be a land where black and white live together in harmony without fear of group exploitation, it is only when the two opposites have interplayed and produced a viable synthesis of ideas and a modus vivendi. We can never wage any struggle without offering a strong counterpoint to the white races that permeate out society so effectively.[1]

As we shall see below, the African National Congress offers in the Freedom Charter a compelling non-racial, but still radical, view of a post-apartheid South Africa. But as we suggest near the end of this chapter, that radical view can be revised — and reiterated — in terms of the standard bourgeois social democratic discourse of modern constitutional law. Biko's BC challenge offered no such accommodation. Whites would — in his view of a Hegelian/Marxist dialectic — be compelled to renounce their current ideology and privilege for some unknown set of institutions that recognized neither capital nor race as singularly important attributes.[2] It is little wonder that the apartheid state saw Steve Biko as a greater threat than everyone's 'hero' — the incarcerated Nelson Mandela. And it is little wonder that the apartheid state engineered his death, while in police custody, in September 1977.[3]

[1] Steve Biko *I Write What I Like* (1978) 53–55.

[2] Johan Froneman 'Democracy, Constitutional Interpretation and the African Renaissance' (2001) 12 *Stellenbosch Law Review* 10, 21.

[3] As Kevin Hopkins notes, the murder of Steve Biko was the tipping point for the international community. After his death, South Africa lost the support of France, Britain and the United States. See Kevin Hopkins 'Assessing the Worlds Response to Apartheid: A Historical Account of International Law and its part in the South African Transformation' (2002) 10 *Miami International and Comparitive Law Review* 241, 254. For an account of the medical attention received by Biko, see also Lawrence Baxter 'The Abdication of Responsibility: the Role of Doctors in the uitenhage Unrest' (1985) 1 *SAJHR* 151, 152.

(c) The Freedom Charter of 1955

Despite the hegemony of parliamentary sovereignty, the advocacy of human rights from within South Africa's anti-apartheid movement and from social movements outside South Africa kept the notion of inalienable rights alive. Two documents stand out from amongst the others. The ANC's *African Claims in South Africa* reformulated the Atlantic Charter's principles of freedom and democracy from the perspective of Africans in South Africa. Adopted by the ANC on 16 December 1945, this 'Bill of Rights … made the revolutionary claim of one man one vote, of equal justice in the courts, freedom of land ownership, of residence and of movement … claimed freedom of the press, and demanded equal opportunity in training and in work'.[1] The Freedom Charter, adopted at Kliptown on 26 June 1955 by the Congress of the People, is the second important expression of the aspiration of the majority of South Africans for a charter of rights.[2]

Much is made of the uniqueness and progressiveness of South Africa's Final Constitution. However, that Constitution has a history, and an important part of that history is the adoption of the Freedom Charter. Even the most cursory inspection of the Charter's language reveals the debt our Final Constitution owes to this founding document of the liberation movements in South Africa:

> **We, the People of South Africa, declare for all our country and the world to know:** that South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people; that our people have been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality; that our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities; that only a democratic state, based on the will of all the people, can secure to all their birthright without distinction of colour, race, sex or belief; And therefore, we, the people of South Africa, black and white together equals, countrymen and brothers adopt this Freedom Charter; And we pledge ourselves to strive together, sparing neither strength nor courage, until the democratic changes here set out have been won.
>
> **The People Shall Govern!** Every man and woman shall have the right to vote for and to stand as a candidate for all bodies which make laws; All people shall be entitled to take part in the administration of the country; The rights of the people shall be the same, regardless of race, colour or sex; All bodies of minority rule, advisory boards, councils and authorities shall be replaced by democratic organs of self-government.
>
> **All National Groups Shall have Equal Rights!** There shall be equal status in the bodies of state, in the courts and in the schools for all national groups and races; All people shall have equal right to use their own languages, and to develop their own folk culture and customs; All national groups shall be protected by law against insults to their race and national pride; The preaching and practice of national, race or colour discrimination and contempt shall be a punishable crime; All apartheid laws and practices shall be set aside.

[1] Michael Benson *The African Patriots: The Story of the African National Congress of South Africa* (1963) 117.

[2] See Raymond Suttner & Jeremy Cronin *30 Years of the Freedom Charter* (1986). The Congress of the People was launched by the Congress Alliance in 1954 not as a single event but as a series of discussions culminating in the adoption of the Freedom Charter. Professor ZK Mathews, who proposed the Congress of the People, called for 'a gathering to which ordinary people will come, sent there by the people. Their task will be to draw up a blueprint for the free South Africa of the future.' Raymond Suttner *The Freedom Charter: The People's Charter in the Nineteen-Eighties* (1984).

The People Shall Share in the Country's Wealth! The national wealth of our country, the heritage of South Africans, shall be restored to the people; The mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole; All other industry and trade shall be controlled to assist the wellbeing of the people; All people shall have equal rights to trade where they choose, to manufacture and to enter all trades, crafts and professions.

The Land Shall be Shared Among Those Who Work It! Restrictions of land ownership on a racial basis shall be ended, and all the land re-divided amongst those who work it to banish famine and land hunger; The state shall help the peasants with implements, seed, tractors and dams to save the soil and assist the tillers; Freedom of movement shall be guaranteed to all who work on the land; All shall have the right to occupy land wherever they choose; People shall not be robbed of their cattle, and forced labour and farm prisons shall be abolished.

All Shall be Equal Before the Law! No-one shall be imprisoned, deported or restricted without a fair trial; No-one shall be condemned by the order of any Government official; The courts shall be representative of all the people; Imprisonment shall be only for serious crimes against the people, and shall aim at re-education, not vengeance; The police force and army shall be open to all on an equal basis and shall be the helpers and protectors of the people; All laws which discriminate on grounds of race, colour or belief shall be repealed.

All Shall Enjoy Equal Human Rights! The law shall guarantee to all their right to speak, to organise, to meet together, to publish, to preach, to worship and to educate their children; The privacy of the house from police raids shall be protected by law; All shall be free to travel without restriction from countryside to town, from province to province, and from South Africa abroad; Pass Laws, permits and all other laws restricting these freedoms shall be abolished.

There Shall be Work and Security! All who work shall be free to form trade unions, to elect their officers and to make wage agreements with their employers; The state shall recognise the right and duty of all to work, and to draw full unemployment benefits; Men and women of all races shall receive equal pay for equal work; There shall be a forty-hour working week, a national minimum wage, paid annual leave, and sick leave for all workers, and maternity leave on full pay for all working mothers; Miners, domestic workers, farm workers and civil servants shall have the same rights as all others who work; Child labour, compound labour, the tot system and contract labour shall be abolished.

The Doors of Learning and Culture Shall be Opened! The government shall discover, develop and encourage national talent for the enhancement of our cultural life; All the cultural treasures of mankind shall be open to all, by free exchange of books, ideas and contact with other lands; The aim of education shall be to teach the youth to love their people and their culture, to honour human brotherhood, liberty and peace; Education shall be free, compulsory, universal and equal for all children; Higher education and technical training shall be opened to all by means of state allowances and scholarships awarded on the basis of merit; Adult illiteracy shall be ended by a mass state education plan; Teachers shall have all the rights of other citizens; The colour bar in cultural life, in sport and in education shall be abolished.

There Shall be Houses, Security and Comfort! All people shall have the right to live where they choose, be decently housed, and to bring up their families in comfort and security; Unused housing space to be made available to the people; Rent and prices shall be lowered, food plentiful and no-one shall go hungry; A preventive health scheme shall be run by the state; Free medical care and hospitalisation shall be provided for all, with special care for mothers and young children; Slums shall be demolished, and new suburbs built where all have transport, roads, lighting, playing fields, creches and social centres; The aged, the orphans, the disabled and the sick shall be cared for by the state; Rest, leisure and recreation shall be the right of all: Fenced locations and ghettoes shall be abolished, and laws which break up families shall be repealed.

There Shall be Peace and Friendship! South Africa shall be a fully independent state which respects the rights and sovereignty of all nations; South Africa shall strive to maintain world

> peace and the settlement of all international disputes by negotiation — not war; Peace and friendship amongst all our people shall be secured by upholding the equal rights, opportunities and status of all; The people of the protectorates Basutoland, Bechuanaland and Swaziland shall be free to decide for themselves their own future; The right of all peoples of Africa to independence and self-government shall be recognised, and shall be the basis of close co-operation. Let all people who love their people and their country now say, as we say here: **These freedoms we will fight for, side by side, throughout our lives, until we have won our liberty**

Aspirational as this document may have been, it resonates profoundly with the document that animates the rest of this four volume treatise. The Freedom Charter, like the Final Constitution, commits itself to a non-racial society (FC s 1), multiparty democracy (FC ss 1 and 19), equality before the law (FC s 9), the universal franchise (FC ss 1 and 20), a redistribution of basic goods and land (FC ss 25, 26 and 27), freedom of trade, occupation and profession (FC s 22), prohibitions on slavery, servitude and forced labour (FC s 13), equal access to education (FC s 29), freedom from public and private violence (FC s 12) and freedom of movement and residence (FC ss 20 and 21). The obvious connections between these two documents gives the lie to the claim that the Final Constitution represents an imposition of western thought on an African society.

(e) The Rivonia Trial

The Rivonia Trial took place during 1963 and 1964. Ten members of the African National Congress — including Nelson Mandela, Walter Sisulu, Govan Mbeki and Rusty Bernstein — were tried for 221 acts of sabotage. Eight of the accused were found guilty. Only Rusty Bernstein was acquitted.

The state first requested the imposition of the death penalty. However, world-wide protests and skilled legal maneuvers by the defence resulted in sentences of life imprisonment.[1] As the ANC archives note:

> There was no surprise in the fact that Mandela, Sisulu, Mbeki, Motsoaledi, Mlangeni, and Goldberg were found guilty on all four counts. The defense had hoped that Mhlaba, Kathrada, and Bernstein might escape conviction because of the skimpiness of evidence that they were parties to the conspiracy, although undoubtedly they could be prosecuted on other charges. But Mhlaba too was found guilty on all counts, and Kathrada, on one charge of conspiracy. Bernstein, however, was found not guilty. He was rearrested, released on bail, and placed under house arrest. Later he fled the country.[2]

Mandela's conviction took on greater and greater metaphoric dimensions as the years of his imprisonment ticked by. Year after year, 'Free Mandela' became an ever more popular slogan for the anti-apartheid movement. His 27 years of

[1] The defense was led by Bram Fischer, the distinguished Afrikaner lawyer. He was assisted by Harry Schwarz, Joel Joffe, Arthur Chaskalson, George Bizos and Harold Hanson. Arthur Chaskalson and George Bizos would play, as we note below, an especially significant role in the ongoing legal fight against apartheid. And, of course, Arthur Chaskalson would go on to become the first President of the Constitutional Court, and then still later, Chief Justice of South Africa. See Bizos (supra) at 158. See also Stephen Ellmann 'To Live Outside the Law, You Must be Honest': Brahm Fischer & the Meaning of Integrity' (2001) 17 *SAJHR* 451.

[2] *The Rivonia Trial* (2008), available at www.anc.org.za/show.php?=ancdocs/history/trials/toward_ robben_ island.html (accessed on 24 June 2008).

incarceration — and the martyrdom that inevitably followed such a lengthy imprisonment — can blur the meaning and the integrity and the motivations behind Mandela's actions and his willingness to give up his life for the cause of South Africa's freedom. Mandela's own words, at the Rivonia Trial, offer the best possible account of his politics, and the man behind the liberation of South Africa:

> The structure and organization of early African societies in this country . . . greatly influenced the evolution of my political outlook. The land, the main source of production, belonged to the whole tribe . . . . There were no classes, no rich or poor and no exploitation of man by man. . . . There was much in such a society that was . . . insecure . . . and it certainly would not live up to the demands of the present epoch. But in such a society lay the seeds of revolutionary democracy in which none shall be held in slavery or servitude, and in which poverty, want and insecurity shall be no more. This is the history which . . . inspires . . . our struggle. . . . I would say that the whole life of any thinking African in this country drives him continuously to conflict between his conscience on the one hand and the law on the other. Recently, in Britain, . . . Bertrand Russell, probably the most respected philosopher of the western world, was sentenced and convicted for precisely the type of activities for which I stand before you today — for following his conscience in defiance of the law, as a protest against the nuclear weapons being pursued by his own government. He could do no other than to oppose the law and suffer the consequences for it. Nor can I. Nor can many Africans in this country. The law as it is applied, the law as it is written and designed by the Nationalist government is a law which, in our view, is immoral, unjust and intolerable. . . . I was made, by the law, a criminal, not because of what I had done, but because of what I stood for, because of what I thought, because of my conscience. . . . [T]here comes a time, as it came in my life, when a man is denied the right to live a normal life, when he can only live the life of an outlaw because the government has so decreed to use the law to impose a state of outlawry upon him. I was driven to this situation, and I do not regret the decisions that I did take. Other people will be driven in the same way in this country . . . to follow my course, of that I am certain.[1]

(f) The United Democratic Front

Formed in 1983, the United Democratic Front ('UDF') was an incredibly broad non-racial coalition of about 700 civic, church, student and worker organisations.[2] At its height, the UDF could claim some 3 million members. They were not underground: they were a visible — and intentionally disturbing — part of South African life.

The UDF was initially inspired by the new 'insult' of the 1983 Constitution and its Tricameral Parliament.[3] But the UDF was not brought into being to 'protest' just another apartheid institution. The genius of the UDF's strategy lay in its plan to make South Africa ungovernable. The UDF's strikes, rent boycotts, school

[1] Nelson Mandela *Long Walk to Freedom* (1995) 329–332.

[2] See Karis (supra) at 269; Bernard Magubane 'The Current Situation in South Africa: A Sociological Perspective' (1987) 5 *Journal of Law & Religion* 473; Thomas Karis 'Revolution in the Making: Black Politics in South Africa' (1984) 62 *Foreign Affairs* 378.

[3] Implementation of the tricameral Parliament was met with 90 000 students and 90 000 miners going on strike. See Grayling Williams 'In Support of Azania: Divestiture of Public Pension Funds as One Answer to US Private Investment in South Africa' (1984) 9 *Black Law Journal* 167, 184.

protests and other forms of non-compliance — along with continued external and internal pressure by the liberation movements — were so successful that State President PW Botha felt it necessary to declare a state of emergency.[1] The state of emergency — as we have seen — failed because the UDF — and such leaders as Archbishop Tutu, Reverand Alan Boesak, Albertina Sisulu and Helen Joseph — maintained multiple forms of pressure on the state.[2] In the end, the UDF can be credited with pressing the government into negotiations and bringing down the apartheid state.

It is also worth noting that the UDF retains a role of prominence in current South African politics. The trade unions — such as the National Union of Mineworkers and the Congress of South African Trade Unions ('COSATU') — provided not only the muscle for the UDF movement, but also much of its brains. COSATU — part of the tripartite alliance that governs South Africa (with the ANC and the much smaller Communist Party) — has ensured that leftist politics have remained an important feature of South African discourse.

(g) Lawyers, Human Rights and the Rule of Law

As we have already seen, the National Party government was quite adept at manipulating the institutions of government in order to realize its grand plan of apartheid. And as *Harris I*, *Harris II* and *Collins* ultimately reflect, the judiciary was no match for the coordinate branches. Indeed, as Richard Abel notes, it became commonplace for the security police to brief magistrates and prosecutors on how they should impose both the law and its sanctions.[3]

But that does not mean lawyers — and some judges — had no role to play in the fight against apartheid. Lawyers such as Arthur Chaskalson, George Bizos, Sydney Kentridge, John Dugard, Geoffrey Budlender, Halton Cheadle, Nicholas Haysom and Gilbert Marcus found ways to exploit gaps in apartheid law in the service of justice and with the aim of destabilizing the apartheid legal system. Judges such as Ismail Mohamed, Laurie Ackermann, Richard Goldstone, John Didcott and Johan Kriegler used the judiciary's ostensible commitment to the rule of law to advance human rights under apartheid — if only at the margins.[4]

Lawyers had always been part of the struggle. Ghandhi had gone to the bar. Mandela and Sisulu were attorneys. Brahm Fischer was an advocate. But they were first and foremost members of the struggle: they were not laywers' lawyers.

After *Collins*, one might have thought the space for constitutional lawyers rather limited. With parliamentary sovereignty deeply entrenched and the judiciary

[1] See Magubane (supra) at 490.

[2] Cora Hoexter 'Emergency Law' (1990) *South African Human Rights Yearbook* 110; Jerome Barrett & Anne Motlins 'South Africa Trade Unions: A historical Account, 1970-1990' (1990) 131 *Monthly Labour Review 25*. See also *Van Der Westhuizen NO v United Democratic Front* 1989 (2) SA 242 (A).

[3] See Richard Abel *Politics by Other Means: Law in the Struggle Against Apartheid, 1980–1994* (1995) 17–18 (Abel recalls an instance in which the security police briefed Durban magistrates and prosecutors — at the behest of the Chief Magistrate.)

[4] See Richard Goldstone *Do Judges Speak Out?* (1993). See also Stephen Ellmann *In Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992).

packed with apartheid state apparatchiks, only persons with incredible imagination and intestinal fortitude could conceive and create the legal institutions required to challenge the State in the courtroom.

John Dugard, then dean of the the University of the Witwatersrand's School of Law, recognized the immediate need to create progressive and effective legal NGOs in the wake of Steve Biko's murder: 'At that time the reputation of the South African legal system sunk to its lowest level and there was a manifest need for the creation of institutions … to work for justice and equality through law.'[1] John Dugard and Felicia Kentridge — along with colleagues from US based foundations such as the Carnegie Corporation — contrived a scheme that brought about the realization of two of South Africa's most important — and still vibrant — public interest litigation units: the Centre for the Applied Legal Studies (CALS) and the Legal Resources Centre (LRC). Dugard did not promise, nor did his funders expect, the sky. Early on, he wrote to his funders a blunt assessment of what law could and could not do under the apartheid regime: 'If a Centre [CALS] and a [public interest law] firm [LRC] are established they will not bring about radical change of the kind prompted [in the United States] by *Brown v Board of Education*.'[2] Nonetheless, as Rosenfeld, Sprague and McKay note, Dugard 'stressed that the Centre would conduct research into socially relevant areas and reform of the law, and … knit together a group of lawyers who would use the law to contribute to a more just legal order', while the LRC would run cases that exploited 'the interstices of the apartheid legal structure'.[3]

CALS and the LRC — fully-funded and well-staffed by such luminaries as Sydney Kentridge, Arthur Chaskalson, Geoff Budlender, Edwin Cameron and Gilbert Marcus — litigated cases that ran the entire gamut of issues raised by apartheid's cruel injunctions: 'forced removals, censorship, homeland policies, detention without trial, unfair labor practices, housing, citizenship, and bus tariffs.'[4] Adapting some of the tactics successfully employed by the ACLU and the NAACP to a harsher South African reality, the LRC and CALS won such critical cases as *Wendy Orr v the State*,[5] *Komani v Bantu Affairs Administration Board, Peninsula Area 1980*[6] and *Rikhoto v East Rand Administration*

[1] Patricia Rosenfield, Courtenay Sprague & Heather McKay 'Ethical Dimensions of International Grantmaking: Drawing the Line in a Borderless World' (2004) 11 *The Journal of Leadership and Organizational Studies* 48, 58.

[2] Ibid.

[3] Ibid. See also Wilmot James 'Concluding Remarks' in WG James (ed) *The State of Apartheid* (1987) 197–198 as quoted in Patricia Rosenfield, Courtenay Sprague & Heather McKay 'Ethical Dimensions of International Grantmaking: Drawing the Line in a Borderless World' (2004) 11 *The Journal of Leadership and Organizational Studies* 48, 58 (James obsevered the need for the LRC and CALS in these terms: '[T]he army and police now have learned how to kill civilians regularly and get away with it. … This is the modern racial machine of apartheid, which derives its logic from the desire to oppress the majority of the populace.')

[4] Rosenfield, Sprague & McKay (supra) at 59.

[5] *Wendy Orr & Other v Minister of Law and Order & Others* Case No 2507/85 (South Eastern Cape, Local Division, 1985)(Court acknowledged both torture and abuse of political detainees.)

[6] *Komani v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (A)(Court granted requested improvements to system of 'influx control'.)

Board.[1] Both Abel and Sprague conclude that these 'cases contributed to the gradual dismantling of apartheid laws regulating movement and torture, and became part of the process of chipping away at the edifice of apartheid policies.'[2] More importantly, notes the LRC's former national director, Geoff Budlender: 'What can … be said without fear of successful contradiction is that the public interest law movement in South Africa made a significant contribution to the movement for democracy in South Africa.'[3]

2.3 The Road to Democracy: Private Meetings, Negotiations, Referenda and an Assassination

(a) Meetings in the 1980s, Here and Abroad[4]

Neither the regular states of emergency, nor the MK's armed resistance had brought South Africa any closer to a resolution of its simmering civil war. Behind the scenes, important changes were afoot.

In the Soviet Union, a bastion of ANC support, some officials suggested that the ANC might do well to concede 'collective rights and group guarantees in a post-apartheid constitution'.[5] While Soviet officials quickly backed away from such a position, the point was clear: the aim was no longer the over-throw of the white minority state, but a negotiated settlement that would bring about a black, democratically-elected government.

The ANC's private position had already changed several years earlier. In 1986, the ANC's President, Oliver Tambo set out the conditions under which the ANC — and other liberation movements — would be prepared to begin negotiations: (1) the release of 'Nelson Mandela and all other political prisoners'; (2) the unbanning of the ANC and other political organizations'; (3) the lifting of the 'state of emergency then in force' and (4) the scrapping of laws central to the maintenance of apartheid.[6] The armed struggle would continue, however, until such conditions had been met.

The NP likewise recognized that it could no longer rule through force on behalf of a white minority. President FW de Klerk secured substantial support, in a 1989 referendum, to begin negotiations. He released major ANC officials

[1] *Rikhoto v East Rand Administration Board* 1983 (4) SA 278 (W)(Court held regulations unlawfully restricted the freedom of movement of black South Africans.)

[2] See Abel (supra) at 23–65 (In his chapter, 'Carving Loopholes in the Pass Laws', Abel offers detailed accounts of the outcomes in *Komani, Rikhoto* and *Orr*); Courtenay Sprague 'The Carnegie Corporation, Public Interest Law, and Apartheid South Africa' Foundations of Globalization Conference, University of Manchester (6-7 November 2003)(Manuscript on file with authors.)

[3] Geoff Budlender 'The Development of the Public Interest Law Movement in South Africa' *Symposium on Public Interest Law in Eastern Europe and Russia* (June 29 to July 8, 1997) available at http://www.pili.org/en/dmdocuments/durbanb1.pdf (accessed on 24 June 2008) as cited in Rosenfield, Sprague & McKay (supra) at 60.

[4] See, generally, Geoffrey Heald 'Learning Amongst Enemies: A Phenomenological Study of the South African Negotiations from 1985 to 1988' (PhD, Witwatersrand, 2006).

[5] Allister Sparks *The Mind of South Africa* (2007) 369.

[6] Ibid at 372.

held prisoner since the Rivonia Trial and initiated quiet talks with Nelson Mandela regarding the future shape of South Africa and the logistics necessary for a peaceful transfer of political power.[1]

Of course, these changes occurred against a broader political backdrop. South Africa had long been viewed as a pariah state in the West — and the anti-apartheid movement had only increased pressure on the West to stop propping up this racist regime. And while Mikhail Gorbachev might not have known that perestroika would lead to the falling of the Berlin Wall and the end of communism in the Soviet Union, the ANC knew it could no longer count on unequivocal military or political support from governments on the left.[2] Thus, when on 2 February 1990, FW de Klerk announced that liberation organisations were to be unbanned and political prisoners were to be released — including Nelson Mandela, nine days later, on 11 February 1990 — the international community could hardly be said to be surprised.

(b) ANC Initiatives and Initiatives from Apartheid Institutions

In 1988, the ANC published the *Constitutional Guidelines for a Democratic South Africa*, the ANC's first public expression of its desire to work toward a negotiated settlement in South Africa.[3] In this declaration, the ANC committed itself to the adoption of a justiciable Bill of Rights and to constitutionalism generally. In August of 1989, the *Harare Declaration* was adopted by the Organization of African Unity. The *Harare Declaration* set forth several conditions that the apartheid government must fulfill before serious negotiations could begin: the lifting of restrictions on political activity, the legalization of all political organizations, and the release of all political prisoners. This declaration was later adopted by the Non-Aligned Movement and the United Nations' General Assembly.

The adoption of bills of rights in the Ciskei and Bophuthatswana bantustans in the 1980s provided South African courts with their first meaningful experiments with constitutional review. While the courts began to demonstrate a greater willingness to implement these documents after 1990, many of the early decisions provide an extremely incoherent account of the standards to be applied in constitutional interpretation.[4]

The South African government initiated its own halting steps in the direction of constitutionalism in April 1986.[5] The Minister of Justice announced that he had

[1] See Peter Bouckaert 'The Negotiated Revolution' (1997) 33 *Stanford Journal of International Law* 375, 385; Hugh Corder 'Towards a South African Constitution' (1994) 57 *Modern Law Review* 491, 494.

[2] See Corder (supra)at 494.

[3] See Adrienne van Blerk 'Critical Legal Studies in South Africa' (1996) 113 *SALJ* 86, 93 (ANC was adament that any Bill of Rights be rooted to the Freedom Charter.) See also Cyril Ramaphosa 'A Constitutional Framework for a New South Africa' (1992) 28 *Stanford Journal of International Law* 23.

[4] See John Hund 'A Bill of Rights for South Africa; 3 (1989) 34 *American Journal of Jurisprudence* 23.

[5] See Cyril Ramaphosa 'Negotiating a New Nation: Reflections on the Development of South Africa's Constitution' in P Andrews & S Ellmann (eds) *Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 71, 75.

requested the South African Law Commission 'to investigate and make recommendations regarding the definition and protection of group [rights] … and the possible extension of the existing rights protection of individual rights'.[1] The Law Commission subsequently issued a working paper in March 1989 and an Interim Report on Group and Human Rights in August 1991 that engaged even the most hostile elements of the extreme right wing in a debate on a bill of rights and constitutionalism.[2]

(c) CODESA and the Multi-Party Negotiating Forum

The immediate challenge — after the unbanning — was to bring together all parties interested in negotiating a road map to peace in South Africa. The Congress for a Democratic South Africa ('CODESA') commenced on 20 December 1991. However, it died soon after in 1992.[3] Despite CODESA's problems, the white electorate, in a referendum held on 17 March 1992, conclusively endorsed the efforts of the de Klerk government to continue with constitutional negotiations aimed at establishing a multi-party democracy based on a universal franchise.[4]

Before detailing the processes and the negotiations that led to the successful adoption of an Interim Constitution in 1993 and the holding of the first truly democratic elections on 27 April 1994, it is important to understand the general philosophical aims of the three major parties: the African National Congress, the National Party, and the Inkatha Freedom Party. It is likewise essential to understand the major compromises that allowed the second round of negotiations to succeed.

The ANC's primary goal was to have a constitution — written by a democratically elected assembly — that would create a government of majority rule with as few restraints as possible on its legislative power.[5] Although the ANC was generally successful in this aim, the NP's steadfast insistence on some form of interim government and an initial power-sharing scheme ultimately kept the desired goal of unfettered majority rule from being realized.

The NP, facing the political realities of universal suffrage, argued that the new constitutional order must devolve power to provinces and local governments and

[1] Leonard Thompson 'The Compromise of Union' in M Wilson & L Thompson (eds) *The Oxford History of South Africa* Vol II (1975) 252.

[2] Ibid.

[3] Ackerman (supra) at 635. The death of CODESA was brought about by a deadlock over the percentages necessary for ratification of the Final Constitution by the democratically elected Parliament. The ANC thought two-thirds of the Constitutional Assembly a sufficient amount to secure the Basic Law's legitimacy. The NP naturally wanted the requirement set somewhat higher: 75%. Currie and de Waal (supra) at 5.

[4] Brand (supra) at 7; Currie and de Waal (supra) at 5. The need for a referendum was necessitated by the loss of a by-election in which the NP lost support in favour of a more extreme right wing party. See Bouckaert (supra) at 391. 68.7% of the white electorate threw their weight behind a continued process of negotiation.

[5] See Heinz Klug *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2001). See also Heinz Klug 'Participating in the Design: Constitution-Making in South Africa' in Andrews & Ellmann (supra) at 136; Heinz Klug 'Constitutional Law: Towards a New Constitutional Order' 1993 *Annual Survey of South African Law* 19–28.

thereby place substantial restrictions on the power of the national government. It initially tried to block the idea of a Final Constitution written by a democratically elected assembly. It favoured an extended transitional government and a power-sharing mechanism that would allow the NP to gradually relinquish control and maximize its ability to influence and to restrain the new government.[1] During negotiations, the NP argued that all participating parties should have equal voice in the process. That would, of course, have given undue weight to minority interests. That argument it lost. However, as the negotiation process continued, the NP — with its authority and its resources as government — took the lead as the opposition party to the ANC. Its emphasis on 'collective political rights' — rejected outright by the ANC — shifted to the standard constitutional protections for individuals generally found in a justiciable Bill of Rights.[2]

The IFP, not surprisingly, argued strenuously for a form of federal government that afforded regional governments maximum autonomy. It proposed express limits on the central government's powers (powers it rightly assumed would be wielded by an ANC-led government). As for the eventual adoption of the Final Constitution, 'the IFP argued that since the purpose of a justiciable constitution and a bill of rights is to protect minorities from the tyranny of the majority, the minorities to be protected must give their assent to the particular framework.'[3] This logic would have effectively given minor parties — prior to any elections testing their popular strength — a veto over the text of the Final Constitution. The IFP decided that regular walkouts were an appropriate strategy for securing its ends. The incipient threat of civil war in Natal enabled the IFP to secure many of its aims for regional power without remaining present during constitutional talks.

The ANC and the NP were, despite the IFP's absence, able to arrive at a compromise that largely ended the impasse. The two parties agreed to a 5 year, democratically-elected interim government charged with writing the Final Constitution. Both sides lost things for which they had long pressed. The ANC accepted a limited power-sharing arrangement.[4] The NP gave up its demands for a mandatory coalition government and a rotating presidency.

[1] See Klug 'Participating in the Design' (supra) at 137-138.

[2] See Katherine Savage 'Negotiating South Africa's New Constitution: An Overview of the Key Players and the Negotiation Process' in Andrews & Ellmann (supra) at 164, 165.

[3] Heinz Klug 'Participating in the Design' (supra) at 139.

[4] The final agreement regarding power-sharing called for representation in Cabinet for parties gaining over 5% of the vote, a deputy-presidency for each party receiving more than 20% of the vote, and guaranteed consultation on policy matters. In an attempt to appease the NP, IFP, and Freedom Alliance, the ANC allowed for a more federalized system of government that granted increased powers to regional governments. While the NP was pleased with this compromise, the IFP and the Freedom Alliance continued their boycott of the negotiations. However, both parties decided, at the very last moment, to take part in the elections. To be precise, it was only after the Interim Constitution was amended a second time to entrench the constitutional status of the Zulu King in KwaZulu/Natal, that the IFP agreed — within days of the poll — to enter the electoral process. See Denise Atkinson 'Brokering a Miracle? The Multiparty Negotiating Forum' in S Friedman & D Atkinson (eds) *South African Review 7: The Small Miracle, South Africa's Negotiated Settlement* (1994) 13–43.

However, the most critical concession — by both sides — involved the creation of a set of Constitutional Principles that would be included as a schedule within the negotiated Interim Constitution. The purpose of these 34 principles was to place meaningful constraints on the ANC's ability to draft the Final Constitution. This concession provided both the NP (and the largely absent IFP) with some assurance that they would not be rendered entirely powerless — after universal franchise elections in 1994 — during the process of shaping the Final Constitution. The ANC was placated by three distinct processes. First, the Interim Constitution would go into effect after the first multi-racial elections and parties would be proportionally represented in Parliament. Second, the newly elected representatives in both Houses of Parliament would sit as a Constitutional Assembly and be required to produce the text of a Final Constitution within two years. Third, an independent Constitutional Court, staffed largely by the ANC's preferred appointees, would have the power to ensure that the Final Constitution — as drafted by the democratically elected Constitutional Assembly — satified the 34 Constitutional Principles.

Why did the Multi-Party Negotiating Forum ('MPNF') succeed where CODESA had failed? Social upheaval, mass action, and escalating violence had placed considerable pressure on the ANC and the NP to alight upon a viable solution.[1] But it would be a mistake to underestimate the importance of Nelson Mandela's impeccable sense of politics and timing.

On 10 April 1993, Chris Hani — the Secretary-General of the SACP and one of the leaders of ANC's armed resistance — was assassinated. His death could easily have precipitated uncontrollable violence. Instead, Mandela directed this moment of grief, anger, anxiety and uncertainty towards the completion of the Interim Constitution and the setting of a firm date for the first universal democratic elections. Within three months, the Interim Constitution was nailed down and elections were set for 27 April 1994.[2]

[1] The Negotiation Planning Conference, the committee which planned the MPNF, tried to construct a negotiation process more conducive to building consensus among the parties. Like CODESA, the ultimate decision-making authority of the MPNF was held in a plenary session in which delegates from each represented political party were present. While decision-making within the process remained tied to the 'sufficient consensus' formula of CODESA, the momentum of the negotiations, and the realization, even among those parties who had resisted participation in CODESA — the PAC and the CP — that there was no longer any alternative to a negotiated solution, kept the process on track. The new process provided for a Negotiating Council to ratify proposals from technical committees which were charged with the clarification of various constitutional issues. These technical committees, dominated by academics and lawyers steeped in the rhetoric of liberal democratic constitutional discourse, facilitated the emergence of clear alternatives for the two parties. These technical committee members did not, of course, set the boundaries for the Interim Constitution. What they succeeded in doing, however, was to harmonize subtle differences in position and to put the provisions of the Interim Constitution in language to which the two prime movers could agree. This new technical language was then submitted to all the political parties as a basis for multilateral negotiation and agreement. See Hassan Ebrahim The *Soul of a Nation* (1998) 98.

[2] The consequences of the exhaustive, technical and multi-lateral negotiation process are evident in text of the Interim Constitution (and in many respects, the Final Constitution). This process led to the inclusion of rights and provisions unique to the South African political transition: the right to economic

(d) The Elections of 27 April 1994

The first nation-wide, multiracial democratic elections were held from 26 to 29 April 1994. They took place in a surprisingly peaceful, if not ebullient, environment. Almost twenty million South Africans — an estimated 86% of the electorate — cast their ballots. The election results gave the ANC 252 seats, the NP 82 seats and the IFP 43 seats. No other party had more than 9 seats. In total, seven political parties were represented in Parliament (and thus the Constitutional Assembly.) (The IFP withdrew from the Constitutional Assembly in 1995.[1]) The ANC, with 63.7% of the Constitutional Assembly delegates, was but several votes short of the two-thirds majority needed to pass the Final Constitution.[2] That said, the ANC also understood that no constitution would possess the requisite political legitimacy needed for a basic law unless it was the product of a consensus between most of the parties in the Constitutional Assembly.

2.5 The Interim Constitution, The Constitutional Assembly, 34 Constitutional Principles and the Certification of the Final Constitution

(a) The Drafting of the Final Constitution

The Interim Constitution — Act 200 of 1993 — created the conditions necessary to hold democratic elections and to administer a newly-democratic South Africa.[3] As we noted above, once elected, the representative parliament was to wear a second hat — that of the Constitutional Assembly. The Constitutional Assembly was charged with drafting a Final Constitution that complied with the 34 principles set out in Schedule 4 of the Interim Constitution.[4] The newly formed Constitutional Court was given the unprecedented authority to determine whether the Constitutional Assembly had satisfied this task.[5]

Within the Constitutional Assembly, the drafting process was delegated to six theme committees.[6] The theme committees would identify a major issue, invite

activity (IC s 26); and the employer's right to lock out workers in the context of collective bargaining (IC s 27(5)); the explicit recognition of sexual orientation among the grounds upon which unfair discrimination is prohibited (IC s 8(2)); a specific provision guaranteeing and protecting programmes designed to enable full and equal enjoyment of rights by historically disadvantaged groups (IC s 8(3)*(a)*); and the right to restitution of dispossessed land rights (IC s 8(3)*(b)*). Another consequence of the protracted negotiations was the unavoidable tension between the guarantee of open and accountable government (IC ss 23 and 24) and the guarantee of existing civil service positions to bureaucrats whose training and professional culture had been opposed to openness, to transparency and to accountability (IC s 236(2)). See, generally, Lourens du Plessis & Hugh Corder *Understanding South Africa's Transitional Bill of Rights* (1995) 13.

[1] Savage (supra) at 164.

[2] Ebrahim (supra) at 189.

[3] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification Judgment*') at para 13.

[4] IC Schedule 4.

[5] IC s 68(1). The Constitutional Assembly had to produce a final constitution within two years of its first sitting. IC s 73(1).

[6] Christina Murray 'Negotiating Beyond Deadlock: From the Constitutional Assembly to the Court' in P Andrews and S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 103, 113.

the public to submit thoughts and proposals, and hold workshops with the various groups that would be affected by the issue.[1] The theme committees also consulted political experts — both from South Africa and from abroad — to better understand the complexities of the issue.[2]

This multi-committee structure soon proved overly-cumbersome. The Constitutional Assembly supplanted it with a group of about forty politicians. They combined the work of the six theme committees and wrote the initial text of the Final Constitution.[3]

This switch from the six committees to the one committee diminished, to a certain degree, the transparency of the process. Moreover, as the text took shape, the outstanding issues became more and more controversial. Private, bi-lateral negotiations between the ANC and the NP became increasingly commonplace as the deadline of 8 May 1996 drew near.[4] When the assembly was seemingly at an impasse, the chair — Cyril Ramaphosa — would often temporarily adjourn the meeting. He would then summon the chief negotiators for the ANC and the NP to work out a solution to the impasse. This tactic often proved successful.[5] As Savage notes: '[T]hese private … meetings … accounted for much of the progress made on the bulk of [the] chapters.'[6]

The certification requirement both shaped and drove the negotiations.[7] Many of the parties involved — including both the ANC and NP — allowed provisions into the draft text while they simultaneously planned to challenge them during certification. This process allowed disagreements over some issues, like labour relations, to be deferred.[8] The certification process also allowed groups outside the Constitutional Assembly to become more involved in the crafting of the Final Constitution by hiring counsel to draft written briefs and to present oral arguments in the Constitutional Court. Moreover, as power shifted to the new democratic institutions, and the constitution-drafting process took place in full view of the public, members of the Constitutional Assembly found themselves subject to greater pressures from their constituencies.[9]

[1] Ebrahim (supra) at 189
[2] See Savage (supra) at 166.
[3] Ibid.
[4] Ibid at 169.
[5] See Murray (supra) at 113.
[6] See Savage (supra) at 171.
[7] A set of intricate tie-breaking procedures — which would kick in if other processes failed — could have led to the dissolution of the Parliament, a new general election and, ultimately, a public referendum. Such conditions provided further inducement to compromise (especially on the part of the NP).
[8] See Murray (supra) at 119.
[9] The degree of public exposure to and participation in the constitution-drafting process is probably without historical precedent. Hundreds of public meetings were held to advertise the drafting of the Final Constitution and to invite public participation in the process. The Constitutional Assembly published its own monthly newsletter, *Constitutional Talk*, to publicize events related to the development of the Final Constitution. In addition to extensive television and radio coverage, the evolution of the Final Constitution from first draft to final product could be followed on a daily basis on the internet site of the Constitutional Assembly.

Collectively, these conditions produced several results that distinguished the drafting of the Final Constitution from the drafting of the Interim Constitution. Whereas the parties at CODESA and the MPNF had felt obliged to draw the Inkatha Freedom Party into the negotiated constitutional settlement, no such imperative existed in the Constitutional Assembly. When the IFP walked-out from the Constitutional Assembly, the remaining parties simply went about the task of drafting the constitution. Given the established parameters of the 34 principles and the ANC's clear electoral dominance, far fewer incentives existed for the ANC to accommodate IFP concerns.

In respect of almost all the controversial clauses, the consensus ultimately reached tended to favour the ANC. So while the property clause (FC s 25) might appear less expansive than IC s 28, its compromises are largely offset by a comprehensive package of land rights. With regard to labor rights, the ANC succeeded in making the right to economic activity even more attenuated than it had been in the Interim Constitution and having the right to lock out entirely removed. The unexpectedly contentious right to education in a mother tongue in public schools was worked out on the day before the draft of the Final Constitution draft was due. The ANC would simply not allow the state to be subject to an absolute obligation to fund culturally exclusive schools.[1]

The National Party briefly contemplated a confrontation with the ANC over three issues: property, lock-outs and cultural schools. However, the dynamics of the new constitution-drafting process left it no option but to back down. It faced the prospect of a referendum in the event of a failure by the Constitutional Assembly to pass a new constitutional text by a two-thirds majority.[2] On 8 May 1996, 87 per cent of the members of the Constitutional Assembly voted in favour of a new constitutional text. The missing 13 per cent represented the IFP members who had walked out, the Vryheidsfront members who had abstained (largely with respect to issues surrounding cultural schools), and the two African Christian Democratic Party members who voted against the text on religious doctrinal grounds.

Following its adoption by the Constitutional Assembly, the new constitutional text was submitted to the Constitutional Court. All political parties represented in the Constitutional Assembly — other than the ANC and the PAC — lodged objections with the Constitutional Court. In addition, 84 private parties objected. The political parties and 27 private parties were given the right to make oral submissions to the Court in a certification hearing which lasted nine days.[3]

[1] See Savage (supra) at 176. See also Brahm Fleish & Stu Woolman 'On the Constitutionality of Single Medium Public Schools' (2007) 23 *SAJHR* 34. The ANC's victory led to the FF's abstention from voting on the text of Final Constitution.

[2] IC s 73(6)

[3] *First Certification Judgment* (supra) at paras 24–25. A schedule of all of the objectors — and the clauses to which they objected — appears as Annexure 3 to the judgment.

On 6 September 1996, the Constitutional Court delivered its unanimous judgment. It refused to certify the initial text of the Final Constitution. And yet the response to this rebuke was mild to say the least. The Constitutional Assembly effected the necessary amendments to the draft — in answer to the Constitutional Court's findings — on 11 October 1996.[1] This revised text was, in turn, submitted to the Constitutional Court. On 4 December 1996, the amended text was certified.

(b) Law, Politics and the First Certification Judgment

The Constitutional Court's finding that the initial text of the Final Constitution was unacceptable, despite its adoption by eighty-six percent of the democratically-elected Constitutional Assembly, was an extraordinary assertion of the power of judicial review. Having a judicial body declare a constitution 'unconstitutional' was without precedent, and the uniqueness and potential perils of such a determination were not lost upon the Court. The Constitutional Court was careful to point out in its unanimous opinion, that 'in general and in respect of the overwhelming majority of its provisions', the Constitutional Assembly had met the predetermined requirements of the Constitutional Principles.[2]

(i) *Law and Politics*

The Interim Constitution offered little guidance to the Constitutional Court as to how it should determine whether the new text was in accord with the 34 Constitutional Principles.[3] The Constitutional Court therefore went to great lengths to explain its methodology. The Court claimed that its function was strictly legal, not political. In other words, it had a 'judicial not a political mandate',[4] that 'the wisdom or correctness' of the new text of the Final Constitution was left to the Constitutional Assembly,[5] and that it had 'no power, … and no right to express any view on the political choices made by the (Constitutional Assembly) in drafting the (New Text).'[6]

In strictly logical terms, an infinite number of texts could have satisfied the requirements of the 34 principles. The Court's role was not to select its preferred text from amongst the infinite number of potentially certifiable texts. Its role was limited to ensuring that the Constitutional Assembly had selected a compliant text.

In justifying this legal, as opposed to political, approach, the Court emphasized that the Interim Constitution created a 'solemn pact' between the negotiating parties to create a Final Constitution that adhered to the specified Constitutional Principles. To honour that pact, the Court stressed that despite the overwhelming support for the new text in the democratically elected assembly, it must send the

[1] Currie and De Waal (supra) at 6.
[2] *First Certification Judgment* (supra) at para 31.
[3] See Ziyad Motala and Cyril Ramaphosa, *Constitutional Law: Analysis and Cases* (1998) 11.
[4] *First Certification Judgment* (supra) at para 27.
[5] Ibid at para 39.
[6] Ibid at para 27.

constitutional text back for further revision. The Court's patient — 400 page — clause by clause expatiation of the new text reflected a nuanced and politically sensitive response: one largely devoid of 'technical rigidity'.[1] By focusing strictly on the text of the CPs and their relationship to the new text, the Court undertook every conceivable effort to demonstrate that its decisions were not an exercise of political judgment, but simply the application of careful analytic legal reasoning.

Once the Final Constitution was certified, the certification was final and non-reviewable. This aspect of the certification process made the interpretive techniques of the Constitutional Court all the more important. It was clear then, and remains clear now, that more than one reasonable interpretation of a constitutional provision could have been given. In such instances, the Court utilized an interpretive technique 'designed to facilitate certification' and 'to avoid interpretations which would prevent certification'.[2]

This methodology creates several interpretative difficulties. First, the commitment to *stare decisis* and precedent means that all future decisions by any court that interpreted a provision of the Final Constitution must interpret that provision in a manner consistent with interpretation offered by the Constitutional Court in *First Certification Judgment*. Second, as we discuss below, the Court did not always analyze the meaning of the new text as it was intended by the Constitutional Assembly: it actually placed its own gloss on several provisions of the new text that were susceptible to multiple interpretations. Thus, despite its initial claims that its judgment was purely legal and in no way political, the Court did adopt interpretations of the next text that clearly reflected a preferred political reading of the new text.

(ii) *The Grounds for Non-Certification: Institutional Concerns, the Rule of Law, Constitutionalism*

The Constitutional Court rejected the new text on nine discrete grounds.[3] An analysis of the *First Certification Judgment* reveals an interesting pattern. The local

[1] *First Certification Judgment* (supra) at para 36.

[2] Matthew Chaskalson & Dennis Davis '*Constitutionalism, the Rule of Law, and the First Certification Judgment*' (1997) 13 *SAJHR* 430, 433-434.

[3] The nine elements identified in the first certification judgment as failing to comply with certain constitutional principles were: (1) Section 23 of the new text conferred a right to engage in collective bargaining on employers' associations but not on individual employers. The court held that Principle XXVIII required that individual employers should have a constitutional right to engage in collective bargaining. *First Certification Judgment* (supra) at para 69. (2) Section 74 of the new text provided for the amendment of the Constitution by a two-thirds majority of the National Assembly. This, the court stated, failed to comply with Principle XV, which required special procedures as well as special majorities for the passing of amendments to the Constitution. Ibid at paras 152–6 It also failed to comply with Principle II because it did not entrench the Bill of Rights by giving its provisions greater protection from amendment than was given to the rest of the Constitution. Ibid at paras 157–9. (3) Section 194 of the new text provided for the removal of the Public Protector and the Auditor General on the grounds of misconduct, incapacity or incompetence, if a committee composed proportionally of all the members of the National Assembly made a finding to that effect which was confirmed by a formal resolution of the National Assembly. This was held to infringe Principle XXIX in that it failed adequately to safeguard the

government issues upon which certification was refused clearly failed to comply with the applicable constitutional principles. Excise taxes were simply not appropriate vehicles for local government financing. Furthermore, the scanty provisions of Chapter 7 of the new text could hardly be said to amount to a framework for the 'structures and powers of local government'. The collective bargaining provision in the new text also left little scope for certification.

However, in respect of all the other grounds for refusing certification, the Court could have rather easily gone the other way.[1] That it chose to reject the

independence of the Public Protector and Auditor General. Ibid at paras 163–5. (4) Section 196 of the new text provided for a Public Service Commission, but did not specify its functions and powers. This was held to be in contravention of Principle XXIX, a tacit requirement of which was the existence of an independent and impartial Public Service Commission. The court held that it could not certify the capacity of the Public Service Commission to exercise its powers independently unless those powers were entrenched in the Constitution itself. Ibid at para 176. It also held that an analysis of the powers of the Public Service Commission over provincial administrations was necessary for an evaluation of compliance with Principles XVIII.2 and XX, which concerned the powers and autonomy of the provinces. As s 196 of the new text neither provided for provincial service commissions nor placed any express limits on the powers of the Public Service Commission over provincial administrations, it was not possible to certify that Principles XVIII.2 and XX had been complied with. Ibid at para 177. (5) Section 229(1) of the new text gave local government a constitutionally entrenched power to raise excise taxes. It was held that this included the power to impose taxes which were inappropriate for municipalities. This contravened Principle XXV, which required the provision of 'appropriate fiscal powers and functions for different categories of local government'. Ibid at paras 303–5. (6) Section 241(1) of the text purported to place the Labour Relations Act (Act 66 of 1995) beyond constitutional scrutiny, but did not incorporate the provisions of the Act into the Constitution. This was held to be impermissible because Principle IV required the Constitution to be supreme and Principles II and VII required that the Bill of Rights be justiciable and enforceable. Ibid at para 149. (7) Clause 22(1)*(b)* of Schedule 6 of the new text similarly contravened Principle IV because it purported to place the Promotion of National Unity and Reconciliation Act 34 of 1995 beyond constitutional scrutiny. Ibid at para 150. (8) Chapter 7 of the new text dealt with local government. It infringed a number of principles. It created no 'framework for the structures' of local government. Ibid at paras 300–301. It did not differentiate between categories of local government. Ibid at paras 300–301. Finally, it failed to set out formal legislative procedures which had to be followed by local government. Ibid at para 301. (9) The Constitutional Court also held that Principle XVIII.2 was not satisfied by the new text because the powers and functions given to the provinces were substantially less than or inferior to those which the provinces enjoyed under the interim Constitution. Principle XVIII.2 is examined in paras 306–481. The Court summarizes its views on non-compliance with the principle at paras 471–481. The finding of the court with respect to Principle XVIII.2 was very narrowly stated. It identified a reduction of provincial powers in the areas of policing, education, local government, and traditional leadership, but stated that this alone would not contravene Principle XVIII.2. The Court wrote: 'Seen in the context of the totality of provincial power, the curtailment of these four aspects of the Interim Constitution schedule 6 powers would not in our view be sufficient in themselves to lead to the conclusion that the powers of the provinces taken as a whole are substantially less than or substantially inferior to the powers vested in them under the Interim Constitution.' Ibid at para 479. It was only when this reduction of power over specific matters was combined with the greater scope for national legislation to override conflicting provincial legislation that the court concluded that the overall reduction of provincial powers was substantial. In particular, the Court expressed concern at clause 146(4) of the new text, which would have created a presumption that national legislation passed by the National Council of Provinces prevailed over conflicting provincial legislation.

[1] See further Chaskalson & Davis (supra) at 430.

clauses in question is significant. All of them, to a greater or lesser extent, interfered or threatened to interfere with institutions and mechanisms designed to protect the rule of law and the project of constitutional democracy. The *First Certification Judgment* ensured that it would be more difficult to amend the Final Constitution, and the Bill of Rights in particular, that there would be greater independence for the Public Protector, Public Service Commission and Auditor General, and that no specific pieces of legislation could be placed beyond constitutional scrutiny. Even the question of reduced provincial powers, which was the most politically controversial topic canvassed at the certification hearings and which takes up almost half of the judgment, was ultimately cast as a question of judicial power and independence. The judgment was constructed in such a manner so as to make clear to the Constitutional Assembly that all it had to do to clear these various hurdles was to follow the dictates of the *First Certification Judgment*.

The *First Certification Judgment* reflects to a large degree how the Constitutional Court was able to assert its own views about the signal features of a constitutional democracy. That assertion demonstrates, in turn, the institutional confidence the Constitutional Court secured in its first eighteen months of operation and the degree to which constitutionalism and the rule of law had been accepted by most South African political actors by the end of 1996. The fact that none of the political parties questioned the legitimacy either of the certification process itself or of the particular decisions taken by the Constitutional Court during the certification process offers quite a positive, if implicit, commentary on the new democracy's commitment to its constitutional principles.

(c) The Amended Text and the Second Certification Judgment

As the Constitutional Court anticipated at the conclusion of its non-certification opinion, the rejected provisions of the new text of the Final Constitution did not cause any major complications in the negotiating process. After the Court's opinion was handed down, the Constitutional Assembly was quickly recalled in order to pass an amended text that satisfied the Constitutional Principles. Although, in theory, the entire constitution-making process could have been reopened,[1] the major parties confined themselves to amendments designed to overcome the concerns expressed by the Constitutional Court in the *First Certification Judgment*. On 4 December 1997 the amended text received the stamp of approval of the Constitutional Court in the *Second Certification Judgment*.[2] The amended text was promulgated by the President on 18 December 1996 and took effect as the Final Constitution on 4 February 1997.

[1] Once the court had refused to certify the original text as a whole the Constitutional Assembly was not bound to retain those elements of the text which had passed the scrutiny of the Constitutional Court.

[2] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC).

2.6 The Consolidation of Constitutional Democracy

(a) Constitutional Amendments

The Final Constitution has been amended thirteen times since its inception. Most of the amendments have been administrative in nature: changing the wording of the presidential oath;[1] setting forth more detailed procedures for financial legislation and administration;[2] changing municipal districts;[3] and extending the terms of Constitutional Court judges.[4] The exceptions — as discussed elsewhere in this treatise[5] — are amendments 8,[6] 9[7] and 10[8]. These amendments govern legislative floor-crossing at the municipal, the provincial, and the national level, respectively. However, even these amendments — which appeared to threaten the continued existence of minority parties — have proved relatively inconsequential.[9]

Taken together, the first thirteen amendments have not materially altered the Final Constitution. Thus, despite its considerable majorities in the national legislature, the ANC has not, as yet, used its legislative power to enact major changes to the negotiated peace settlement reflected in our Interim Constitution and our

[1] Constitution First Amendment Act of 1997 (previously referred to as Act 5 of 1997).

[2] Constitution First Amendment Act of 2001 (previously referred to as Act 34 of 2001).

[3] Constitution First Amendment Act of 1998 (previously referred to as Act 87 of 1998).

[4] Constitution First Amendment Act of 1999 (previously referred to as Act 3 of 1999).

[5] See Glenda Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 29.

[6] Constitution Eighth Amendment Act of 2002 (previously referred to as Act 18 of 2002)(Municipal floor-crossing).

[7] Constitution Ninth Amendment Act of 2002 (previously referred to as Act 21 of 2002)(NCOP floor-crossing).

[8] Constitution Tenth Amendment Act of 2003 (previously referred to as Act 2 of 2003)(National assembly and provincial legislature floor-crossing).

[9] The Final Constitution' provides for representative democracy primarily in terms of the proportional representation of persons who appear on party lists. FC s 46(1)(d). This principle was somewhat weakened by the eleventh and twelfth amendments. The amendments seek to add some flexibility to representation in Parliament and in provincial legislatures by allowing elected officials to 'cross the floor' to another party and still keep their seat. The system essentially works as follows. If a political party has ten seats in the National Assembly and one of its members wishes to join another political, then her seat is transferred from one political party to the other party (the 10% rule). One party therefore loses a seat in Parliament and the other party gains the seat. Formally, floor-crossing appears incompatible with the notion of proportional representation. Voters in a proportional representation system choose a party, not an individual. However, the Constitutional Court, when faced with a challenge to both the legislation and the amendments that underpin floor-crossing, demurred. On their rather thin conception of democracy — as enshrined in various provisions of the Final Constitution — the occasional window for floor-crossing did not undermine the basic commitment to multi-party democracy based upon proportional representation. See *United Democratic Movement v President of the Republic of South* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC). For a critique of this thin conception of representative democracy, and for a more robust account of what democracy means in our Final Constitution, see Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10.

Final Constitution. This state of affairs has enabled the political institutions established in 1994 — though still fragile — to consolidate the underlying commitment to the formal and the substantive transformation of South African society.

(b) The Proposed and Mothballed 14th Amendment Bill

Perhaps the only amendment bill that has generated genuine concern over the solidification of our constitutional democracy has been the Constitution of the Republic of South Africa Fourteenth Amendment Bill.[1] The Bill proposed: a division of 'judicial' and 'administrative' functions in the court system that would give the executive substantial control over the activities of the judiciary; the prohibition on adjudicating on laws before they commence; and the executive appointment of judges-president and of acting judicial leadership. Both the judiciary and the legal fraternity expressed their deep disapproval over what they considered to be a significant encroachment upon the judiciary's independence.[2] (The Bill also proposed the creation of a unitary court system in which the Constitutional Court would sit at the apex. This proposal did not elicit much criticism: indeed a Supreme Court of Appeal judge, Carole Lewis, expressly endorsed this move.[3])

Judicial independence is grounded FC s 165: 'Courts are independent and subject only to the Constitution and to law.' Since the Final Constitution came into effect, the Constitutional Court has sought, in any number of different ways, to insulate the judiciary from the hurly burly of democratic politics. In particular, it has attempted to create a judiciary that possesses nearly unfettered control over its budgeting and personnel decisions.[4]

The threat of the Bill flows from placing the administration of the courts under the Minister of Justice and Constitutional Development, removing the court's jurisdiction to decide matters regarding the suspension of an act of Parliament prior to its commencement (the so-called 'ouster clause') and diminishing the decision-making power of the Chief Justice and the Judicial Services Commission. As Cathi Albertyn notes:

[1] *Government Gazette* 28334 GN 2023 (14 December 2005).

[2] See Cathi Albertyn 'Judicial Independence and the Constitution Fourteenth Amendment Bill' (2006) 22 *SAJHR* 126. (Albertyn notes: 'At a Colloquium organized by the General Council of the Bar on 17 February 2006, the former Chief Justice, Arthur Chaskalson and the current Chief Justice, Pius Langa, both expressed their concerns with provisions that restricted the evolving model of judicial independence. On the same day, veteran human rights lawyer, George Bizos SC made a public speech condemning the Bills. 'Judiciary under threat, Bizos says' Business Day (20 February 2006).)

[3] See Carole Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' (2005) 21 *SAJHR* 509 (On the role of the Constitutional Court as the apex court and the rationalisation of the system of appeals.)

[4] See Albertyn (supra) at 131. See also *S v Van Rooyen* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 75 (Court describes the evolutionary steps taken over the previous decade to establish the independence of the judiciary.)

> The central problem is that the amendment does not take account of the fact that our evolving model of judicial independence, in line with the Constitution and international trends, is moving away from the system of close executive administration practiced under apartheid. This evolving model envisages at least partial judicial control, if not full autonomy, over finances and administration. In this context, a constitutional amendment that confers authority on the Minister alone for 'the administration and budget of all courts', without qualification, is a regressive move.[1]

The Amendment — Albertyn and others contend — would reverse the trend of the last decade toward an increasingly independent judiciary and bring about 'a pattern of creeping executive power at the expense of the judiciary.'[2] The ouster clause, while of limited practical effect, would represent a symbolic erosion of the Court's ability to provide a check on Parliament's power.[3] In the end, the executive backed down. And while it is too early to say that the battle is over,[4] the shelving of this Bill points to the further consolidation of our constitutional democracy.

(c) Dignity, Democracy, and Legality and the Potemkin Constitution

In this last section, we want to offer some final observations about our Potemkin Constitution. Fourteen years after political liberation, we have little doubt about the dramatic legal changes that have been brought about by the new constitutional order. Our commitment to dignity demands that we no longer treat individuals as mere means; democracy means that everyone can exercise the franchise; and legality principle means that the State must behave in a rational manner when it chooses to act or when it fails to react.[5] We have overcome the meanest, cruelest features of the apartheid state.

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[1] Albertyn (supra) at 136.

[2] Ibid at 132.

[3] Ibid at 137.

[4] See Theunis Roux 'A Thinkpiece on the 14 Amendment Bill' *Seminar on the Constitution Fourteenth Amendment Bill, 2005* (University of Cape Town, 2005)(Manuscript on file with authors)(Notes that executives in constitutional democracies always attempt to influence, if not control, the behaviour of the judiciary. Thus, while the Bill may not be sound, it does not constitute as radical a departure from international practice as some might suggest.)

[5] Albert Dicey identified three feature essential features of the rule of law or the doctrine of legality. Albert Dicey *Introduction to the Study of the Law of the Constitution* (1959, 10th Edition) 187. Dicey claimed that the rule of law was present where, firstly, absolute supremacy of law existed — and not the mere exercise of arbitrary power. Secondly, the courts must administer a system in which all ordinary laws treat all persons equally. Thirdly, Dicey believed that constitutional law necessarily required the protection of individual rights. We prefer John Finnis' account. As John Finnis somewhat cheekily puts it, 'the Rule of Law' is 'the name commonly given to the state of affairs in which a legal system is legally in good shape'. John Finnis *Natural Law and Natural Rights* (1980) 270. Here are some of the features of a legal system in good shape:

> (i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with; . . . (iii) its rules are promulgated, (iv) clear, and coherent one with another; . . . (v) its rules are sufficiently stable to allow people to be guided by their knowledge of the content of rules; . . . (vi) the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and . . . (vii) those people who have authority to make, administer and apply the rules in an official capacity (a) are acountable for their compliance with rules applicable to their performance and (b) do actually administer the law consistently and in accordance with its tenor.

Although the aforementioned commitments to dignity, democracy and legality can be given radical substantive content, it is, perhaps, in the nature of peaceful, negotiated constitutional transformations that these constitutional commitments have remained, for the moment, largely formal. Neither the African National Congress nor the majority of black South Africans have opted for the radical change proffered by Steve Biko. And, in the current climate of globalized, state-enforced capitalism — in which, ironically, notionally communist China may well be the best example — radical transformations of the kind envisaged by Biko may well be impossible. But that does not mean that the denial of the promise of liberation to a majority of South Africans may not have radical consequences. Recent riots over scarce resources augur ill. The failure of government to address the root causes of such discontent likewise causes one to wonder whether the centre will hold.

That said, this book is a book about the content of South African constitutional law. And in so far as the purposes — and the narrow vision — of this book are concerned, the centre has indeed held.[1]

Ibid at 270—271. For more on the 'rule of law', see Stu Woolman & Henk Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34. Finnis' description of the rule of law coheres with Woolman and Botha's account of the formal features of law of general application (for the purposes of limitations analysis.) It is worth stopping a moment to interrogate Finnis' first remark a little more closely. The rule of law, he says, describes a legal system 'legally' 'in good shape'. Finnis is being neither funny nor tautological. What he means is that in an age such as ours, where the ideals of

> legality and the Rule of Law . . . enjoy[s] an ideological popularity, . . . conspirators against the common good will regularly seek to gain and hold power through an adherence to constitutional and legal forms which is not the less 'scrupulous' for being tactically motivated, insincere and temporary. Thus, the Rule of Law does not guarantee every aspect of the common good and sometimes it does not even secure the substance of the common good.

Finnis (supra) at 274. In sum, a commitment to the rule of law is a necessary but insufficient condition for a just or a fair society. As Finnis observes, regimes that are exploitative or ideologically fanatical or some mixture of the two could submit themselves to the constraints imposed by the rule of law if it served the realization of their narrow conception of the good. Indeed, both Stephen Ellmann and David Dyzenhaus argue persuasively that South Africa under apartheid was an exploitative and ideologically fanatical regime committed to the rule of law. Stephen Ellmann *In a Time of Trouble: Law and Security in South Africa's State of Emergency* (1992); David Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law from the Perspective of Legal Philosophy* (1991). Why would a fanatic or an ideologue bother? Because by abiding by the rule of law, the ideologue can disguise his malignant intent. That said, while the rule of law did constrain the South African state — and even allowed for a cramped conception of human rights — few would allow that it was fair or just. What was missing was any real commitment to individual dignity and the sense that the purpose of the state was to enable all persons to 'constitute themselves in community'. Finnis (supra) at 274. It should come then as no surprise that the two most important — and somewhat novel — constitutional doctrines developed by the Constitutional Court in its first decade of operation turn on a robust and substantive conception of the rule of law and an account of dignity that makes it a grundnorm for the Final Constitution. See Frank Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, AStein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11; Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36. Quite unlike the regime of law authorized by apartheid, the new dispensation recognizes that its legitimacy is conditional upon the state's commitment to act for the 'general' welfare and to treat all individuals as worthy of equal concern and respect.

[6] See Stu Woolman 'The Potemkin Constitution' *Without Prejudice* (December 2008).

3 Constitutional Litigation

Matthew Chaskalson, Gilbert Marcus & Michael Bishop

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3.1 INTRODUCTION

While constitutional litigation has much in common with conventional litigation, it has a number of special rules that justify its treatment as a distinct discipline.[1] So although standard rules of court and principles of evidence, both common law and statutory, apply to constitutional litigation, they are themselves now subject to constitutional scrutiny.[2]

The special rules encompass specific additions to the Uniform Rules of Court relating to joinder[3] and submissions by an *amicus curiae*.[4] A separate set of rules regulate proceedings in the Constitutional Court.[5] A range of specific provisions of the Final Constitution deal with matters of jurisdiction,[6] standing,[7] and remedy[8] which have application only in constitutional matters. Apart form the Final Constitution itself, the Constitutional Court Complimentary Act regulates matters incidental to the establishment of the Constitutional Court.[9] These matters embrace the scope and the execution of process, the seat of the Court, contempt of the Constitutional Court and the subpoena of witnesses.[10] The Constitutional Court has also developed a number of principles which apply

[1] See HJ Erasmus *Superior Court Practice* (1994)(devotes an entire chapter to issues peculiar to constitutional litigation).

[2] The Constitutional Court has made it clear that all rules of court must comply with the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)('Final Constitution' or 'FC'). Where, for example, a particular rule limits the right of access to court or has that effect, the rule itself may be challenged. See, for example, *Giddey NO v JC Barnard and Partners* 2007 (2) BCLR 125 (CC) at para 16. In *Ferreira v Levin NO & Others,* Ackermann J observed that the coming in to operation of the Interim Constitution would require two areas of the law of evidence to be reconsidered in the light of the Bill of Rights: 'The one relates to the way in which evidence, particularly in criminal proceedings is obtained and the second to the question when and to what extent a trial judge has a discretion to exclude otherwise admissible evidence.' 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 146. The latter issue is now regulated by FC s 35(5): 'evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.' For more on FC s 35(5) and constitutionalization of the rules of evidence, see PJ Schwikkard 'Evidence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2007) Chapter 52.

[3] Rule 10A of the Uniform Rules of Court. For more on the rules governing constitutional matters, see K Hofmeyr 'Rules & Procedure in Constitutional Matters' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 5.

[4] Rule 16A of the Uniform Rules of Court. For more on the rules governing *amicus curiae* in constitutional matters, see G Budlender 'Amicus Curiae' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 8.

[5] The Constitutional Court Rules 2003, GN R1675, *Government Gazette* 25726 (31 October 2003)('CC Rules').

[6] See T Roux & S Seedorf 'Jurisdiction' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2008) Chapter 4.

[7] See C Loots 'Standing, Ripeness and Mootness' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 7.

[8] See M Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2008).

[9] Act 13 of 1995.

[10] Section 16 of the Constitutional Court Complimentary Act is the source of the Constitutional Court Rules.

specifically in constitutional litigation: the principle of legality and the principle of constitutional avoidance are, perhaps, the most important.[1]

3.2 WHAT IS A CONSTITUTIONAL ISSUE?

The Final Constitution draws a distinction between constitutional matters and non-constitutional matters. It does so in terms of the jurisdiction of the Constitutional Court to hear appeals. FC s 167(3)*(a)* provides that the Constitutional Court 'is the highest court in all constitutional matters'. FC s 167(3)*(b)* provides that the Constitutional Court 'may decide only constitutional matters and issues connected with decisions on constitutional matters'. Rule 19 of the Constitutional Court Rules, which regulates appeals to the Constitutional Court, requires that an application for leave to appeal must contain 'a statement setting out clearly and succinctly the constitutional matter raised in the decision, and any other issues including issues that are alleged to be connected with a decision on the constitutional matter.'[2] The purpose of these provisions is to delineate the jurisdiction of the Constitutional Court as the highest court in constitutional matters and to distinguish that Court's specialised jurisdiction from the general jurisdiction of other courts. The Supreme Court of Appeal, for example, possesses general jurisdiction. The dividing line, however, between constitutional and non-constitutional matters is far from clear. As Ngcobo J observed in *Van der Walt v Metcash Trading Limited*: '[W]hether one can speak of a non-constitutional issue in a constitutional democracy where the Constitution is the supreme law and all law and conduct has to conform to the Constitution is not free from doubt.'[3] However, he pointed out that it must be accepted that such a distinction exists and that the judges must 'try to make sense of that distinction'.[4] Justice Carol Lewis of the Supreme Court of Appeal has, nevertheless, argued that the distinction is illusory:

> The most notable defect in the present system arises from the distinction that was sought to be drawn between constitutional and other issues. In the context of a body of law that must necessarily be constitutionally coherent, that distinction is, and always was, an illusion. And because it is an illusory distinction it has not only sown uncertainty as to what is and what is not a 'constitutional issue', with practical consequences for the expeditious treatment of litigation, but it also threatens to impede the coherent development of the law.[5]

[1] For more on the principle of avoidance, see L du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2008) Chapter 32; I Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 138; C Sunstein *One Case at a Time* (1996). For a critique of the jurisprudence of avoidance, see S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *SALJ* 762; T Roux 'Principles & Pragmatism in the South African Constitutional Court' International Association of Constitutional Lawyers Conference (Athens, July 2007).

[2] CC Rule 19(3)*(b)*.

[3] 2002 (4) SA 317 (CC), 2002 (5) BCLR 454 (CC) at para 32.

[4] Ibid.

[5] C Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' (2005) 21 *SAJHR* 512 as cited in *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC)('*Dikoko*') at para 123.

Whatever difficulties there may be in seeking to draw a clear distinction between constitutional issues and non-constitutional issues — and there are many — it is an exercise central to constitutional litigation. The question as to whether the distinction is illusory is beyond the scope of a 'practical' chapter such as ours. An effort to get at the truth of the matter — through an extended engagement with the logic and the (in)coherence of the Court's jurisprudence — is carried out by both Frank Michelman in his chapter on 'The Rule of Law, Legality and the Supremacy of the Constitution'[1] and by Theunis Roux and Sebastian Seedorf in 'Jurisdiction'.[2] For present purposes, it suffices to say that constitutional matters clearly exist. Such matters embrace challenges to law or to conduct that is allegedly inconsistent with the Final Constitution, issues concerning the status, powers and functions of an organ of state,[3] the interpretation,[4] the application[5] and the upholding of the Final Constitution, the judicial review of administrative action,[6] and the question as to whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights.[7]

3.3 CONCEPTUALISING THE CASE

(a) Context in which a constitutional issue may arise

Constitutional matters can arise in a wide diversity of contexts: in both civil litigation and criminal litigation; they can adjudicated by both courts of law and statutory tribunals. A constitutional matter may arise, for example, as a defence to a criminal charge. In such a case, the accused might wish to challenge the constitutional validity of the law in terms of which she has been charged or she might

[1] F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11.

[2] T Roux & S Seedorf 'Jurisdiction' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2007) Chapter 4.

[3] See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) §31.4*(f)*.

[4] See L du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2008) Chapter 32

[5] See Woolman 'Application' (supra).

[6] *Pharmaceutical Manufacturers' Association of South Africa and Another: In re: Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 33. See J Klaaren & G Pennfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2002) Chapter 62; Michelman (supra).

[7] On the meaning and use of FC s 39(2), see Woolman 'Application' (supra). See also *Dikoko* (supra) at para 130.

lodge a constitutional challenge to some pre-trial procedure (ie, the circumstances under which a confession was made.) Similarly, a constitutional issue may arise in a civil context as a defence to a claim. If, for example, an issue arose concerning the validity of a contract which was required to conform to certain statutory formalities, a defendant may wish to challenge the constitutional validity of the statute in question. Because of FC s 8's endorsement of horizontal application, a rule of common law is also susceptible to direct constitutional challenge.[1] FC s 39(2), on the other hand, may be invoked by a party who wishes, through indirect application of the Bill of Rights, to resist the provisions of a contract, trust or will in the name of public policy (now informed by the provisions of the Final Constitution.[2]) Constitutional matters may be raised offensively or defensively. A litigant in civil or criminal proceedings may initiate the challenge to a particular statute or conduct. Or the constitutional matter may arise as a defence to a criminal charge or a civil claim.

The Final Constitution vests a specific power in members of the National Assembly to apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional.[3] Such an application must be supported by at least one third of the members of the National Assembly and must be made within thirty days of the date on which the President assented to and signed the Act.[4] A similar power vests in members of a Provincial Legislature to apply to the Constitutional Court for an order declaring that all or part of a provincial Act is unconstitutional.[5] Such an application must be supported by at least 20% of the members of the legislature and must be made within thirty days of the date on which the Premier assented to and signed the Act.[6]

Constitutional issues may also be raised in statutory tribunals other than courts of law. Although only a court of law has the power to declare legislation or conduct unconstitutional, statutory tribunals may draw down on the dictates of the Final Constitution. It has been held, for example, that the Competition Tribunal, established in terms of the Competition Act,[7] has the jurisdiction to consider whether or not a particular statutory provision is constitutionally compliant. Although it does not have the power to strike down a provision, if the

[1] See, for example, *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)(Common law rule of defamation, in terms of which a plaintiff does not have to allege and to prove the falsity of the defamatory imputations, was unsuccessfully challenged).

[2] See, for example, *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC)(Provisions of a prescriptive period in a contract of insurance unsuccessfully challenged.)

[3] See S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17.

[4] FC s 80.

[5] See T Madlingozi & S Woolman 'Provincial Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 19.

[6] FC s 122.

[7] Act 89 of 1998.

Tribunal were to conclude that the provision was inconsistent with the Final Constitution, it would have a duty not to enforce the provision.[1]

The context in which a constitutional issue is raised has procedural implications which must be considered by practitioners. For example, if a constitutional issue is raised by way of exception in a civil matter or objection to the charge in a criminal matter, an adverse decision against the objector may not be appealable to the Supreme Court of Appeal because it will not be a 'judgment or order' in terms of appealability case law under s 21 of the Supreme Court Act 59 of 1959.[2] In such cases, if the objector wants a final decision on her constitutional defence in advance of a full hearing of a trial, then she may be better served by bringing a free standing application for declaratory constitutional relief rather than by raising her constitutional defence in exception or objection proceedings.[3]

Similarly, if a constitutional issue is raised in proceedings before a court which has no jurisdiction to hear the constitutional issue,[4] and the litigant fails to institute parallel proceedings before a court with jurisdiction to determine the constitutional issue, then a litigant may find herself in the undesirable situation of either having to lead evidence relevant to the constitutional issue in the proceedings before a court which has no jurisdiction to determine the issue,[5] or having to introduce evidence relevant to the constitutional issue on appeal.

(b) Need for pleading

Irrespective of how and in which forum a constitutional matter arises, it has been frequently stressed that constitutional matters must be properly pleaded.[6] The general principles of civil procedure and the need to alert a party to litigation of the case must be met. Pleading is particularly important in cases where a party seeks to justify a limitation of fundamental rights. Justification cases frequently depend not on facts, but on the policies underlying laws intended to effect legitimate governmental objectives. However, even here, the party seeking to justify existing law must plead that the policy is being furthered by the challenged law, offer the reasons for that policy and demonstrate why it ought to be considered reasonable, in pursuit of that policy, to limit the fundamental right. In the absence

[1] See *Federal Mogul Aftermarket Southern Africa (Pty) Limited v Competition Commission &Another* 2005 (6) BCLR 613 (CAC).

[2] See, for example, *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A); *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA); *S v Western Areas Ltd & Others* 2005 (5) SA 214 (SCA), 2005 (1) SACR 441 (SCA)('*Western Areas*').

[3] See, for example, *Western Areas* (supra) at para 35.

[4] An example would be a plea that raised a constitutional challenge to a law in proceedings before the magistrates court. In terms of FC s 170, a magistrates' court 'may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.'

[5] This procedure is competent, if unsatisfactory. See *Walker v Stadsraad van Pretoria* 1997 (4) SA 189 (T).

[6] See *National Director of Public Prosecutions v Phillips & Others* 2002 (4) SA 60 (W) at para 37 (contains a useful collection of the authorities on the subject).

of pleaded particulars of this nature, the party mounting the constitutional challenge will not have a fair opportunity of rebutting the case for justification through countervailing evidence of a factual or expert nature.[1] Thus a bald allegation in pleadings that a limitation of fundamental rights is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom is excipiable as a vague and embarrassing plea.

Similar considerations would apply to remedial issues in cases where the constitutionality of any law or conduct is being challenged. Because of the Court's wide remedial powers under FC s 38 and FC s 172, it has been frequently stressed that a proper evidential foundation for the granting of ancillary orders of suspension of invalidity, retrospectively or prospectively, must be laid.[2] At the level of pleading, practitioners must ensure that they provide sufficient particulars of their client's remedial case under FC s 38 or FC s 172 to enable their opponents to adduce all relevant evidence necessary to rebut the challenge.

Although the general principle in constitutional litigation is the same as in conventional litigation — that a party raising a constitutional issue must raise the matter appropriately in the affidavits or the pleadings — the courts have also recognised that they may, of their own accord, raise a constitutional matter and give directions for the disposition of the case. In *De Beer v Raad Vir Gesondheidsberoepe van Suid-Afrika*, the court raised, mero motu, a constitutional issue and laid down particular procedures to be followed by the parties when addressing that constitutional issue.[3] Where courts raise constitutional issues on their own, the following steps should be followed:

1. The reservations or doubts as to the constitutionality of the specific provision or conduct should be described with precision.
2. The provisions of the Final Constitution that allegedly violated or engaged should be identified.
3. The parties should be afforded an unrestricted opportunity to comment on the court's *prima facie* view.
4. If the court remains of the view that the matter requires the clarification of a constitutional point, then the parties should be invited to assist the court in formulating the question to be resolved.
5. The parties should be afforded an opportunity to comment on whether there are other interested persons who should be invited to join.
6. The parties should be invited and afforded an opportunity to study the authorities on the question before the constitutional point is finally formulated.
7. The formulation adopted has to be acceptable to both parties and to the court.

[1] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) at para 36.

[2] *Chief Lesapo v North-West Agricultural Bank & Another* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC) at para 33.

[3] 2004 (3) BCLR 284 (T).

8. The court should then make appropriate orders in order for the requirements of Rule 16A of the Uniform Rules to be fulfilled.

(c) Bill of Rights litigation

The Bill of Rights contained in Chapter 2 of the Final Constitution has been the primary source of constitutional challenges. Bill of Rights challenges generally involve two independent steps.[1] The first step establishes whether or not the law or conduct entails a breach of the right in question. The party alleging such breach bears the burden of demonstrating that an infringement or limitation has occurred. Once a *prima facie* violation of a guaranteed right is established, the second stage of the enquiry requires an investigation as to whether or not the limitation of the right by law of general application is justifiable.[2] The burden of justification for proving that the limit on a fundamental right is permissible in terms of FC s 36 rests upon the party seeking to uphold the limitation.[3] The need for specificity in pleading assumes particular importance in relation to questions of justification.

In the assessment of the constitutional validity of a law, it is competent to enquire into both the purpose and the effect of the impugned provision. In this regard, and in the context of unfair discrimination analysis, the Constitutional Court has observed:

> The purpose and effect of a statute are relevant in determining its constitutionality. A statute can be held to be invalid either because its purpose or its effect is inconsistent with the Constitution. If a statute has a purpose that violates the Constitution, it must be held to be invalid regardless of its actual effects. The effect of legislation is relevant to show that although the statute is facially neutral, its effect is unconstitutional. This will be the case where, for example, the legislation has a discriminatory impact on a particular racial group.[4]

Several rights require the enactment of legislation to give effect to the right in question: the right to equality,[5] the right of access to information[6] and the right to just administrative action,[7] and the right to security of tenure.[8] With respect to

[1] For a detailed analysis of the two stages of Bill of Rights litigation, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[2] *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC)('*Zuma*') at para 21; *S v Wiliams & Others* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at para 54; *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC) at para 9. Only law, and not conduct may be justified in terms of FC s 36. See S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[3] *Zuma* (supra) at paras 35–38; *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 102.

[4] *Zondi v MEC for Traditional and Local Government Affairs & Others* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC)('*Zondi*') at para 90.

[5] FC 9(4) provides: 'national legislation must be enacted to prevent or prohibit unfair discrimination'.

[6] FC 32(2) requires national legislation to give effect to the rights embodied in FC s 32(1).

[7] FC s 33(3) requires national legislation to give effect to the rights embodied in FC s 33(1) and (2).

[8] FC s 25(9) requires national legislation to give effect to the right in FC s 25(6).

all four rights, the envisaged national legislation has been enacted.[1] Other rights envisage, but do not require, national legislation.[2] Where legislation gives effect to a constitutional right, it has been held that it is not permissible to invoke the right directly. Instead, recourse must be had, in the first instance, to the statute giving effect to the right. Thus, where reliance is placed upon the right to just administrative action, a party is obliged to bring the case under the Promotion of Administrative Justice Act. If the party contends that this Act does not go far enough to give effect to the fundamental right, only then may it invoke FC s 33 to challenge the constitutionality of the PAJA — as opposed to the conduct ultimately at issue.[3]

Other statutes have been enacted to give effect to constitutional rights even where the Final Constitution does not expressly require it. The Labour Relations Act was enacted to give effect to the labour rights embodied in the Interim Constitution.[4] Likewise, the National Environment Management Act was enacted to give effect to the environmental rights embodied in FC s 24.[5] Where such legislation has been enacted to give effect to a constitutional right, a litigant wishing to invoke the right to challenge the validity of conduct must first proceed under the statute in question rather than the fundamental right.[6] Direct recourse to the fundamental right in such cases is limited to challenges to the validity of the enabling legislation.[7]

Litigation concerning socio-economic rights presents different conceptual and

[1] The prohibition on unfair discrimination is given effect by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The right of access to information is given effect by the Promotion of Access to Information Act 2 of 2000. The right to administrative justice is given effect by the Promotion of Administrative Justice Act 3 of 2000. The right to security of tenure is given effect by a range of legislation including the Communal Land Rights Act 11 of 2004 and the Extension of Security of Tenure Act 62 of 1997.

[2] FC s 23.

[3] See *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at paras 22–6 (court held that an applicant for judicial review must invoke the statute rather than the constitutional right). See also *Zondi* (supra) at paras 99–103; *Minister of Health & Another v New Clicks South Africa (Pty) Limited & Others (Treatment Action Campaign & Another as* amici curiae) 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 (CC) at paras 92–97.

[4] Act 66 of 1995.

[5] Act 107 of 1998.

[6] *NEHAWU v University of Cape Town & Others* 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC)(Court held that with respect to the invocation of rights concerning labour relations in FC s 23, it is not permissible to invoke FC s 23 directly but, recourse should rather be had to the Labour Relations Act 66 of 1995.)

[7] See *Zondi* (supra) at para 99.

evidentiary issues.[1] These differences flow primarily from the nature of the state's duties in relation to such rights and particularly its obligation to ensure the 'progressive realisation' of the rights in question 'within its available resources'.[2] In *Government of the Republic of South Africa v Grootboom*[3] – in which the state's failure to provide access to adequate housing was challenged – the following principles were laid down:

1. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.[4]
2. The poor are particularly vulnerable and their needs require special attention.[5]
3. The state's obligations depend upon context and may vary.[6]
4. The state is required to 'devise a comprehensive and workable plan to meet its obligations'. That obligation is not unqualified and is defined by the state's obligation to take reasonable measures to achieve the progressive realisation of the right within available resources.[7]
5. A reasonable programme must 'clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available'.[8]
6. In the context of housing, 'a co-ordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other'. Each sphere of government 'must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state's … obligations'.[9]

[1] See S Liebenberg 'Interpretation of Socio-economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33; D Bilchitz 'Health' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 56A; K McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55; D Brand 'Food' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 56C; A Kok & M Langford 'Water' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 56B; M Swart 'Social Security' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 56D.

[2] This formula is used in FC s 26(2) and FC s 27(2). Slightly different formulations are used in FC s 24*(b)* and FC s 29(1)*(b)*.

[3] 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)('*Grootboom*').

[4] Ibid at para 24.

[5] Ibid at para 36.

[6] Ibid at para 37.

[7] Ibid at para 38.

[8] Ibid at para 39.

[9] Ibid at para 40.

7. The measures in question must establish a coherent programme directed towards the progressive realisation of the right: 'The programme must be capable of facilitating the realisation of the right. The precise contours and contents of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable.'[1]
8. The state is required to take reasonable legislative and other measures to meet its obligations. Mere legislation is not enough: 'These policies and programmes must be reasonable both in the conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented.'[2]

These principles must be addressed by the relevant State department once a breach of the right in question has been established.

(d) Non-chapter 2 litigation

The Final Constitution is the supreme law and any law or conduct inconsistent with it is invalid. It follows that law or conduct inconsistent with any provision of the Final Constitution may be challenged. Accordingly, provisions of the Final Constitution other than those found in the Bill of Rights may be invoked to challenge the validity of law or conduct.

FC s 1 articulates the founding values of the Constitution. One of those values, embodied in FC s 1*(c)*, is 'supremacy of the Constitution and the rule of law'. The Constitutional Court has relied on FC s 1*(c)* to develop the legality principle and the rule of law doctrine. According to the legality principle and the rule of law doctrine: all legislative and executive organs of state can exercise only those powers conferred lawfully on them;[3] executive action cannot be arbitrary;[4] all legislation must be rational;[5] the judiciary may not act arbitrarily and must be held accountable;[6] and rules of law must be stated in a clear and accessible manner.[7]

The Constitutional Court has also held that rationality is a minimum requirement of all law:

[1] *Grootboom* (supra) at para 41.
[2] Ibid at para 42.
[3] *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at paras 56-57; *President of the Republic of South Africa v South African Rugby Football Union* 1999 (2) SA 14 (CC), 1999 (2) BCLR 175 (CC) at para 42; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at para 148.
[4] *Pharmaceutical Manufacturers' Association of South Africa & Another: In re: Ex parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC)('*Pharmaceutical Manufaturers*') at paras 83–5.
[5] *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)('*New National Party*') at para 24.
[6] *Mphahlele v First National Bank of South Africa Limited* 1999 (2) SA 667 (CC), 1999 (3) BCLR 253 (CC) at para 12.
[7] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 47.

> The constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state.[1]

However, the Constitutional Court has only once struck down a statute as not being rationally connected to a legitimate governmental purpose.[2] In another matter, the Constitutional Court held that a decision by the President was irrational in circumstances where the President himself had conceded the irrationality of the decision under consideration.[3] While law or conduct may be challenged on grounds of irrationality, the Constitutional Court has emphasised the narrow scope of rationality review. It has stated that rationality review is: a deferential standard of review;[4] likely to be invoked only rarely;[5] not to be employed simply because a court disagrees with law or conduct;[6] not designed to enable courts to make policy choices which are the preserve of the legislature;[7] not a legitimate grounds for striking down legislation because the court believes that the legislature could have achieved its desired ends through better means or means that are less invasive of private rights.[8]

Constitutional challenges need not only be founded on the express provisions of the Final Constitution. Implied provisions carry the same force as express provisions. Thus, although the Final Constitution does not expressly create a justiciable doctrine of separation of powers, this doctrine is implicit in the basic

[1] *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC)('*Prinsloo*') at para 25; *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 53.

[2] *Van der Merwe v Road Accident Fund & Another (Women's Legal Centre Trust as* amicus curiae) 2006 (4) SA 230 (CC), 2006 (6) BCLR 682 (CC)(The Court concluded that s 18*(b)* of the Matrimonial Property Act 88 of 1984 was unconstitutional because it infringed FC s 9(1). Section 18*(b)* prohibited spouses married in community of property from claiming damages for patrimonial loss in respect of bodily injuries caused by the other spouse. The Court held that the section both differentiated between patrimonial and non-patrimonial damages and between marriages in community of property and those out of community of property. The latter distinction was held not to be useful and was no more than a 'relic of the common law of marriage'. The differentiation was arbitrary insofar as it gave one class of person 'greater protection from wilful domestic battery or accidental bodily injury' than another class. The Minister conceded that while the only purpose of the section was to avoid the futility of spousal claims, this objective was not a legitimate government purpose. A spousal claim in respect of patrimonial losses arising from bodily injuries caused by the other spouse would not be futile as the damages awarded in terms of such a claim would not accrue to the joint estate.)

[3] *Pharmaceutical Manufacturers* (supra).

[4] *New National Party* (supra) at para 122 (O'Regan J dissenting, but not on this point).

[5] *Pharmaceutical Manufacturers* (supra) at para 90.

[6] Ibid; *New National Party* (supra) at para 24.

[7] *Jooste v Score Supermarket Trading (Pty) Limited (Minister of Labour intervening)* 1999 (2) SA 1 (CC), 1999 (2) BCLR 139 (CC) at para 17; *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at paras 41–6.

[8] *Prinsloo* (supra) at para 36; *East Zulu Motors (Pty) Limited v Empangeni/Ngwelezane Transitional Local Council & Others* 1998 (2) SA 61 (CC), 1998 (1) BCLR 1 (CC) at paras 24 and 30.

law. A provision of a statute that violated the implied separation of powers was held to be inconsistent with the Final Constitution and therefore invalid.[1]

The Final Constitution prescribes the procedures to be adopted for passing a bill into law. Four different categories are identified and specific procedures are prescribed in each case.[2] The four categories are bills amending the Constitution,[3] ordinary bills not affecting provinces,[4] ordinary bills affecting provinces[5] and money bills.[6] Non-compliance with constitutional procedures will render invalid any law passed pursuant to an incorrect procedure. In *Executive Council, Western Cape Legislature & Others v President of the Republic of South Africa & Others*, the Court held that the 'manner and form' provisions of the Interim Constitution were not merely directory and can only be departed from when the Constitution permits this expressly or by necessary implication.[7] In *Executive Council, Western Cape*, the Court held that a provision of a statute which purported to vest a power in the President, acting alone, to amend an Act of Parliament was unconstitutional. The Final Constitution possesses similarly detailed provisions that must be followed for the passing of provincial legislation.[8] In principle, non-compliance with these provisions would likewise render a provincial statute invalid.

The Final Constitution has brought about a fundamental change in the structures of government. Provincial legislatures, for example, are vested with original legislative competence in respect of a wide range of matters and with exclusive legislative competence over matters described in Parts B of Schedules 4 and 5 of the Final Constitution. Legislation, whether national or provincial, may accordingly be challenged as falling beyond the legislative competence of a particular legislature.[9]

[1] *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC)(In this case, a provision of the Special Tribunals Act 74 of 1996 required that a judge or acting judge of the High Court be appointed to head a Special Investigating Unit for the purpose of investigating serious malpractices or maladministration in connection with the administration of state institutions. This provision was held to violate the separation of powers between the legislature, executive and judiciary.) See further T Roux & S Sibanda 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2008) Chapter 12.

[2] See S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17.

[3] FC s 74.

[4] FC s 75.

[5] FC s 76.

[6] FC s 77. Although money Bills constitute a special category, FC s 77 prescribes that they are to be dealt with in accordance with the procedure established by FC s 75.

[7] 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 62.

[8] See T Madlingozi & S Woolman 'Provincial Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 19.

[9] See, for example, *Ex parte President of the Republic of South Africa: In re: Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC). See also V Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15.

(d) Interpretive issues

The Final Constitution itself identifies rules of interpretation peculiar to constitutional litigation. FC s 39(2) provides: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

The leading decision on the use of FC s 39(2) to develop the common law is *Carmichele v Minister of Safety and Security & Another*.[1] The following principles emerge from that decision:

1. Where the common law deviates from the spirit, purport and objects of the Bill of Rights, the courts have an obligation to develop it.[2]
2. When courts exercise their powers to develop the common law, they should be 'mindful of the fact that the major engine for law reform should be the legislature and not the judiciary'.[3]
3. Where the cause of action arises before the coming into operation of the Final Constitution, but proceedings take place thereafter, the courts are 'obliged to have regard to the provisions of s 39(2) of the Constitution when developing the common law'.[4]
4. The obligation to develop the common law in the context of FC s 39(2) is not purely discretionary. Courts are under a 'general obligation' to develop the common law. This general obligation does not mean that 'a court must in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under s 39(2). At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties.'[5]
5. The development of the common law occurs in two stages which 'cannot be hermetically separated from one another'. The first stage 'is to consider whether the existing common law, having regard to the s 39(2) objectives, requires development in accordance with these objectives. This enquiry requires a reconsideration of the common law in the light of s 39(2). If this enquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the s 39(2) objectives'.[6]

[1] 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC)('*Carmichele*').
[2] Ibid at para 30.
[3] Ibid at para 36.
[4] Ibid at para 37.
[5] Ibid at para 39.
[6] Ibid at para 40.

6. The common law must be developed within the matrix of an 'objective normative system'. This requirement does not, however, entail 'overzealous judicial reform'.[1]

The obligation imposed by FC s 39(2) is not confined to the development of the common law. Its most frequent application arises in the context of the interpretation of statutes. The Constitutional Court has stressed that the obligation imposed by FC s 39(2) requires that 'all statutes must be interpreted through the prism of the Bill of Rights' and that 'the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights.'[2] The *Hyundai* Court went on to state that 'the purport and objects of the Constitution find expression in s 1 which lays out the fundamental values which the Constitution is designed to achieve'.[3] As such the Final Constitution 'requires that judicial officers read legislation, where possible, in ways that give effect to its fundamental values.'[4]

The obligation to interpret statutes in a manner that promotes the spirit, purport and objects of the Bill of Rights assumes particular importance when litigants first seek to characterise the precise nature of the constitutional attack. Prior to the launching of a constitutional challenge, litigants are under an obligation to attempt an interpretation of a law which preserves the statute's constitutionality rather than the adoption of an interpretation that would necessitate the invalidation of the statute. However, the duty to read down a statute to preserve its constitutionality has obvious limits. The language used by the legislature cannot be put under unreasonable strain merely to preserve the constitutionality of the law in question. Consequently, the process required by FC s 39(2) entails that only a reasonable interpretation should be adopted. There may be cases, however, in which the legislature has deliberately framed legislation in a way which consciously entails the violation of a protected right, but does so in a manner which the legislature contends would meet the test for justification under FC s 36. Thus, where the legislature intends legislation to limit rights, and where that legislation does so clearly but justifiably, that interpretation must be preferred. In such circumstances, however, the Court 'would have to be persuaded by careful and thorough argument that such an interpretation was indeed the proper interpretation and that any limitation caused was justifiable as contemplated by s 36 of the Constitution.'[5] Where the legislature actually intends to limit fundamental rights in a justifiable manner, this intention must be specifically pleaded. It

[1] *Carmichele* (supra) at para 55. For a discussion and a critique of the notion of an 'objective normative value system', see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31.

[2] *Investigating Directorate: Serious Economic Offenses & Others v Hyundai Motor Distributors (Pty) Limited & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 21.

[3] Ibid at para 22.

[4] Ibid.

[5] *NUMSA & Others v Bader Bop (Pty) Limited & Another* 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC) at para 37.

cannot be purely a matter of argument. The legislature will likely be required to provide evidence to justify the limitation in question.

While the Final Constitution vests original legislative competence in both the provinces and the national legislature, it also recognises that both legislative spheres have concurrent legislative competence over a range of areas.[1] Legislation on the same topic may be passed by both a provincial legislature and the national legislature. It is therefore necessary to have a mechanism for resolving conflicts between national and provincial legislation.[2] However, in cases of only apparent conflict between national and provincial legislation or between national legislation and a provincial constitution, 'every court must prefer any reasonable interpretation of the legislation or Constitution that avoids a conflict, over any alternative interpretation that results in a conflict.'[3]

The Final Constitution incorporates various forms of international law into domestic law.[4] With respect to the interpretation of domestic law, FC 233 provides that 'when interpreting any legislation, any court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.

3.4 Procedural and jurisdictional issues

(a) Mootness, ripeness and standing[5]

FC s 34 guarantees a right of access to court: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'[6] Like all other rights in the Bill of Rights, the right of access to court is capable of justifiable limitations. Indeed, over many years, courts have

[1] See V Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 16.

[2] See FC ss 146–50.

[3] FC s 150. A 'conflict' may arise in two different contexts. In the first instance, a conflict may arise where, for example, a provision in provincial legislation is simply beyond the legislative competence of the province. Secondly, a conflict may arise between two legislative provisions where 'they cannot stand at the same time, or cannot stand together, or cannot both be obeyed at the same time'. See *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re: Certification of the Constitution of the Province of KwaZulu-Natal,* 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC) at para 24. For more on the resolution of conflicts between a provincial constitution and national legislation or between a provincial constitution and the Final Constitution, see S Woolman 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 20.

[4] See FC ss 231–233.

[5] See C Loots 'Standing, Ripeness and Mootness' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 7.

[6] J Brickhill & A Friedman 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2007) Chapter 59.

fashioned rules which permit them to avoid deciding cases. In general, courts will only act 'if the right remedy is sought by the right person in the right proceedings and circumstances.'[1] In general, therefore, courts will only entertain matters initiated by persons with standing, which are not hypothetical or academic and which are brought at a time and in a manner which renders them appropriate for decision. Constitutional litigation is, in principle, no different.[2] However, the Constitutional Court has recognised that even in cases which are technically moot as between the parties, the interests of justice may tip the balance in favour of entertaining a particular dispute. Such an occasion might arise, for example, where the law on a particular topic is not settled and is of critical import to the operation of government.[3]

The Final Constitution has substantially relaxed the rules of standing in Bill of Rights litigation. In *Ferreira v Levin NO & Others,* Chaskalson P, while stressing that the Constitutional Court should not be required to deal with abstract issues, could nevertheless 'see no good reason for adopting a narrow approach to the issue of standing in constitutional cases'.[4] He continued:

> On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.[5]

Notwithstanding the broadened scope of standing under the Final Constitution, those seeking relief in terms of the Bill of Rights must still bring themselves within the ambit of FC s 38.[6]

(b) Joinder of necessary organs of state

In keeping with general principles of litigation, a party initiating a constitutional challenge must join all necessary parties to the dispute.[7] In relation to constitu-

[1] HWR Wade & C Forsyth *Administrative Law* (7th Edition, 1994) 342 cited in *Oudekraal Estates (Pty) Limited v City of Cape Town & Others* 2004 (6) SA 222 (SCA) at para 28.

[2] *JT Publishing (Pty) Limited & Another v Minister of Safety and Security & Others* 1997 (3) SA 514 (CC), 1996 (12) BCLR 1599 (CC) at para 15.

[3] *AAA Investments (Pty) Limited v Micro-Finance Regulatory Council & Another* 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC) at para 27.

[4] *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 165.

[5] Ibid (The Court was concerned with the standing provisions in the Interim Constitution which, for practical purposes, are the same as those contained in FC s 38.)

[6] See, generally, HJ Erasmus *Superior Court Practice* (1994) A2–3 to A2–4R.

[7] The common law position is well established. See, for example, *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A). The matter is also now specifically regulated by Rule 10 of the Uniform Rules of Court. See Erasmus (supra) at B1–93 to B1–98.

tional litigation, however, a special rule has been introduced. Rule 10A of the Uniform Rules provides:

> If in any proceedings before the Court, the constitutional validity of a law is challenged, the party challenging the validity of the law shall join the provincial or national executive authorities responsible for the administration of the law in the proceedings.

This rule is, in any event, a codification of principles established by the Constitutional Court in relation to joinder.[1]

Rule 5 of the Constitutional Court Rules goes further than its counterpart in the Uniform Rules. It provides:

> 5(1) In any matter, including any appeal, where there is a dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct, or in any enquiry into the constitutionality of any law, including any act of Parliament or that of a Provincial Legislature, and the authority responsible for the executive or administrative act or conduct or the threatening thereof or for the administration of any such law is not cited as a party to the case, the party challenging the constitutionality of such act or conduct or law shall, within five days of lodging with the Registrar a document in which such contention is raised for the first time in the proceedings before the Court, take steps to join the authority concerned as party to the proceedings.
>
> (2) No order declaring such act, conduct or law to be unconstitutional shall be made by the court in such matter unless the provisions of this rule have been complied with.

The Constitutional Court has stressed the importance of this rule: in a constitutional democracy, 'a court should not declare the acts of another arm of government to be inconsistent with the Constitution without ensuring that that arm of government is given a proper opportunity to consider the constitutional challenge and to make such representations to the court as it considers fit.'[2] The Court stated that there were two reasons for this requirement:

> First, the Minister responsible for administering the legislation may well be able to place pertinent facts and submissions before the Court necessary for the proper determination of the constitutional issue. Secondly, a constitutional democracy such as ours requires that the different arms of government respect and acknowledge their different constitutional functions.[3]

(c) Submissions by an *amicus curiae*[4]

Constitutional disputes, particularly those affecting the validity of a statute, have implications and effects beyond the immediate parties to the dispute. It is for that

[1] See, eg, *Parbhoo & Others v Getz NO & Another* 1997 (4) SA 1095 (CC), 1997 (10) BCLR 1337 (CC) at para 5.

[2] *Mabaso v Law Society of the Northern Province & Another* 2005 (2) SA 117 (CC), 2005 (2) BCLR 129 (CC) at para 13.

[3] Ibid.

[4] See, generally, G Budlender 'Amicus Curiae' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 8.

reason that interventions by interested parties are permitted in appropriate circumstances, now regulated by Rule 16A of the Uniform Rules of Court, Rule 16 of the Supreme Court of Appeal Rules and Rule 10 of the Constitutional Court Rules. The provisions of these rules are essentially the same. They all permit intervention by interested third parties on such terms and conditions as the relevant court may allow. Such intervention may have significant consequences. In appropriate circumstances, an *amicus* may be permitted to introduce new evidence.[1]

One aspect of Rule 16A of the Uniform Rules which is frequently overlooked is the obligation in Rule 16A(1) that requires any person raising a constitutional issue in an application or action to give notice thereof to the Registrar at the time of filing the relevant affidavit or pleading. The notice is required to contain 'a clear and succinct description of the constitutional issue concerned.' The notice must be placed upon a notice board designated for that purpose for a period of twenty days. The purpose of this notice is to inform the world at large that a constitutional issue has been raised and to permit the intervention of interested parties. The Constitutional Court has stressed the importance of this requirement. In *Shaik v Minister of Justice and Constitutional Development & Others*, the Court stated that the minds of litigants and, in particular, practitioners in the High Courts should be focused on the need for specificity.[2] The *Shaik* Court stated that 'the purpose of the rule is to bring to the attention of persons (who may be affected by or have a legitimate interest in the case) the particularity of the constitutional challenge, in order that they may take steps to protect their interests.'[3]

The twenty-day period (and other time periods stipulated by the rule) can be dispensed with by the court if it is in the interests of justice to do so.[4] Rule 16A is enacted in the public interest. The parties to litigation cannot, therefore, simply agree that the requirements of the rule may be ignored: 'The reason for the rule is that constitutional cases often have consequences which go far beyond the parties concerned.'[5] However, circumstances may exist that might justify a relaxation of the requirements of the rule. If the matter in issue has received wide notice in the public media, then the fundamental purpose of the rule would have been achieved. Urgency may also justify a relaxation of the time periods prescribed.[6]

(d) Form of proceedings

Although the vast majority of constitutional cases arise in motion proceedings, no reason exists why constitutional matters should not be dealt with by way of action. The choice of proceeding depends upon long established principles.

[1] See, eg, *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 61.
[2] 2004 (3) SA 599 (CC), 2004 (4) BCLR 333 (CC).
[3] Ibid at para 24.
[4] Rule 16A(9) of the Uniform Rules.
[5] *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C), 2004 (12) BCLR 1328 (C) at para 21.
[6] Ibid at para 22.

With regard to motion proceedings, however, the conventional practice established by the Rules of Court is not ideally suited for rights-based litigation. The general rule limiting the number of affidavits in motion proceedings was not formulated with constitutional litigation in mind.[1] Where an applicant alleges the violation of a fundamental right, the respondent bears the burden of justifying the limitation of the right in question. Accordingly, questions of justification will be raised for the first time in the answering affidavit. The proper disposition of rights-based litigation therefore warrants the filing of further affidavits. (Such a procedure was sanctioned in the pre-constitutional era in cases involving the deprivation of individual liberty.[2])

(e) Appropriate court

The Final Constitution expressly delineates the jurisdiction of the courts of law to hear constitutional matters. The precise rules of jurisdiction are dealt with elsewhere in this work.[3] For present purposes, it must be emphasised that appropriate relief must be sought in an appropriate court. Six matters fall within the exclusive jurisdiction of the Constitutional Court: disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state; the constitutionality of any parliamentary or provincial bill; matters referred to the Constitutional Court by members of the National Assembly or a Provincial Legislature; the constitutionality of any amendment to the Final Constitution; whether Parliament or the President has failed to fulfil a constitutional obligation; and the certification of a provincial constitution.[4]

Outside of these areas of exclusivity, the High Courts are vested with jurisdiction to decide any constitutional matter unless the matter in question has been assigned by an Act of Parliament to another court of a status similar to a High Court.[5] The Final Constitution further provides in FC s 172(2)*(a)* that the Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial act or the conduct of the President. However, an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

[1] Rule 6(5) of the Uniform Rules of Court envisages a founding affidavit, answering affidavit and replying affidavit in motion proceedings. Rule 6(5)*(e)* vests the court with a discretion to permit the filing of further affidavits.

[2] See *Minister Van Wet en Orde v Matshoba* 1990 (1) SA 280 (A)(Botha JA, on behalf of the majority, held that a detainee should be allowed to seek in motion proceedings an order for his release based on a founding affidavit in which he alleges that he is being held against his will notwithstanding the general requirement that an applicant must disclose his complete case in the founding affidavit. Moreover, the court held that the restriction on the number of sets of affidavits usually accepted in motion proceedings should be relaxed in accordance with Rule 6(5)*(e)* and that the filing of up to five sets of affidavits would be acceptable.)

[3] See T Roux & S Seedorf 'Jurisdiction' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2008) Chapter 4.

[4] FC s 167(4)

[5] FC s 169.

The Constitutional Court is vested with jurisdiction to hear matters as a court of first instance. FC s 167(6) provides that National Legislation or the Rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court, to bring a matter directly to the Constitutional Court. The matter is regulated by CC Rule 18.

Notwithstanding the jurisdiction to entertain matters by way of direct access, the Constitutional Court has repeatedly emphasised that it is undesirable for it to sit both as the court of first and final instance in a matter in which other courts have jurisdiction.[1] The expansive constitutional jurisdiction of the High Court means that most constitutional cases will not commence in the Constitutional Court itself but will reach it only on appeal.

(f) Reasons for a court to decline to exercise constitutional jurisdiction

A court may decline to hear a constitutional matter within its jurisdiction in certain defined circumstances. In disputes between spheres of government and organs of state, certain procedural requirements must be met before the dispute can be entertained by a court of law.[2] FC s 41(3) provides that an organ of state involved in an intergovernmental dispute 'must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.' FC s 41(4) provides that 'if a court is not satisfied that the requirements of sub-section (3) have been met, it may refer a dispute back to the organs of state involved.' The Constitutional Court has therefore held that a court 'will rarely decide intergovernmental dispute unless the organs of state involved in the dispute have made every reasonable effort to resolve it at a political level.'[3] In any case, the promulgation of the constitutionally mandated Intergovernmental Relations Framework Act 15 of 2005 has meant that courts will rarely, if ever, entertain such disputes.

Other important jurisdictional limitations exist. Rule 5 of the Constitutional Court Rules precludes the Constitutional Court from declaring an act, conduct or law to be unconstitutional until the joinder of necessary parties has been

[1] See *Transvaal Agricultural Union v Minister of Land Affairs & Another* 1997 (2) SA 621 (CC), 1996 (12) BCLR 1573 (CC) at para 18; *Bruce & Another v Fleecytex Johannesburg CC & Others* 1998 (2) SA 1143 (CC), 1998 (4) BCLR 415 (CC) at para 8; *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC), 1998 (12) BCLR 1449 (CC) at para 12; *Satchwell v President of the Republic of South Africa & Another* 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC) at para 6; *Zondi v MEC for Traditional and Local Government Affairs & Others* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC) at para 13.

[2] S Woolman & T Roux 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14.

[3] *Uthukela District Municipality & Others v President of the Republic of South Africa & Others* 2003 (1) SA 678 (CC), 2002 (11) BCLR 1220 (CC) at para 14.

effected. Similarly, non-compliance with the notice provisions in Rule 16A of the Uniform Rules of Court may result in a court declining to exercise jurisdiction.

(g) The principle of constitutional avoidance

At a very early stage of its constitutional jurisprudence, the Constitutional Court laid down a general principle 'that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed'.[1] The Court recognised, however, that the general principle is not inflexible. Thus, where a criminal trial was likely to last a long time, a challenge to the constitutional validity of the statute in terms of which the accused was charged would justify a departure from the general principle.[2] The principle of constitutional avoidance makes the most sense in the context of challenges to the validity of statutes. The striking down of a statute is considered to be a drastic remedy. It is understandable, therefore, that measures short of a striking down are to be preferred. However, the principle of constitutional avoidance cannot be treated a rule of constitutional law that disposes of matters. To elevate 'avoidance' to a constitutional rule would, at a minimum, undermine the obligation imposed by FC s 39(2) to interpret all statutes and to develop the common law in accordance with the spirit, purport and object of the Bill of Rights. It would, if treated as a rule, and not as a form of rhetoric, ultimately empty the specific substantive rights of Chapter 2 of their content.[3]

3.5 Appeals

(a) Appeals to the Constitutional Court

The rules relating to appeals to the Constitutional Court are addressed in detail elsewhere in this work.[4] However, the following principles may be of interest to practitioners:

1. Applications for leave to appeal to the Constitutional Court must be made directly to the Constitutional Court. Unlike applications for leave to appeal to the Supreme Court of Appeal, the High Court has no power to grant leave to appeal to the Constitutional Court.
2. The Constitutional Court will grant leave to appeal only when it finds that the interests of justice require the grant of leave: reasonable prospects of success are a necessary, but not sufficient requirement in any application for leave to appeal. In addition to demonstrating reasonable prospects of success, an applicant for leave to appeal will usually have to show that the constitutional issue is of sufficient importance to merit the attention of the Constitutional Court.

[1] *S v Mhlungu & Others* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 59.
[2] Ibid.
[3] See S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *SALJ* 762.
[4] See K Hofmeyr 'Rules and Procedure in Constitutional Matters' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 5.

3. Ordinarily, the Constitutional Court will not hear an appeal directly from the High Court. It will require appeals to proceed from the High Court to the Supreme Court of Appeal. This general rule is subject to three specific exception: appeals against orders of constitutional invalidity of Acts of Parliament; appeals against orders of invalidity of Acts of a provincial legislature; and appeals against orders invalidating the conduct of the President. In such cases, FC s 172(2)*(d)* vests the losing litigant with a right of direct appeal to the Constitutional Court.

(b) Appeals to the Supreme Court of Appeal

FC s 168(3) vests the Supreme Court of Appeal with jurisdiction over appeals 'in any matter'. The Supreme Court of Appeal has held that this provision invests it with appellate jurisdiction from specialist appellate courts like the Labour Appeal Court and the Competition Appeal Court. It has, however, made clear that it will exercise this appellate jurisdiction from specialist appellate courts sparingly. The test to be applied in such cases is the test for special leave to appeal. This test requires not only reasonable prospects of success, but also 'some additional factor' militating in favour of leave to appeal. That the applicants for leave to appeal from a specialist appellate court have already had the benefit of a full appeal before that court will ordinarily weigh heavily against the grant of leave to appeal by the Supreme Court of Appeal.[1]

The Supreme Court of Appeal has also recognised that FC s 168(3) changes the test for appeals of decisions of the High Court. A decision which does not amount to a 'judgment or order' in terms of the appealability case law[2] generated under s 21 of the Supreme Court Act 59 of 1959 may yet be appealable to the Supreme Court of Appeal if the applicant can show that it is in the interests of justice for her to be granted leave to appeal.[3] In order to satisfy the Supreme Court of Appeal that the interests of justice support the grant of leave to appeal, the applicant for leave to appeal must canvass all facts relevant to the interests of justice in the affidavits filed in support of her application for leave to appeal.[4]

3.6 Costs[5]

FC s 172 vests courts, when dealing with a constitutional matter, with the widest possible remedial jurisdiction. A court may make any order that is 'just and

[1] *American Natural Soda Ash Corp & Another v Competition Commission & Others* 2005 (6) SA 158 (SCA) at paras 21-22. See also *National Union of Metalworkers of South Africa v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA) at para 43.

[2] See, for example, *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A); *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA).

[3] *S v Western Areas Ltd & Others* 2005 (5) SA 214 (SCA), 2005 (1) SACR 441 (SCA) at para 28.

[4] Ibid at para 35.

[5] For more on costs in constitutional matters, see A Friedman 'Costs' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 6.

equitable'. Pursuant to this power, and its predecessor in the Interim Constitution, the Constitutional Court has deviated from the conventional principle that costs follow the result. The underlying rationale for this deviation has been articulated as follows:

> The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case.[1]

In cases which do not amount to some form of abuse of process, the Constitutional Court has frequently recognised that caution should be exercised 'in awarding costs against litigants who seek to enforce their constitutional right against the state, particularly where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or 'chilling effect' on other potential litigants in this category'.[2] In litigation between private parties, the Constitutional Court has, on occasion, followed the conventional rule that costs follow the result.[3] And when it comes to the Constitutional Court's review jurisdiction concerning the duties of a taxing master in relation to a bill of costs, it has held that no difference in principle exists between the role of the Constitutional Court and the role of the Supreme Court of Appeal.[4]

3.7 THE DUTIES OF THE STATE IN CONSTITUTIONAL LITIGATION

(a) The General Ethical Duty

The Final Constitution imposes a separate and distinct burden on the state in the conduct of constitutional litigation that is not placed on other constitutional litigants. That duty is best explained by Justice Sachs, writing separately in *Matatiele Municipality & Others v President of the Republic of South Africa & Others*:

[1] *Affordable Medicines Trust & Others v Minister of Health & Others* 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC).

[2] *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC), 1997 (6) BCLR 692 (CC) at para 30.

[3] See, eg, *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC) at para 103; *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at para 46.

[4] *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another* 2002 (2) SA 64 (CC), 2002 (1) BCLR 1 (CC) at paras 10–12.

> [T]he Constitution requires candour on the part of government. What is involved is not simply a matter of showing courtesy to the public and to the courts, desirable though that always is. It is a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open. Furthermore, it is consistent with ensuring that the courts can function effectively, as s 165(4) of the Constitution requires. . . . The notion that 'government knows best, end of enquiry', might have satisfied Justice Stratford CJ in the pre-democratic era. It is no longer compatible with democratic government based on the rule of law as envisaged by our Constitution. . . . [F]ar from the foundational values of the rule of law and of accountable government existing in discreet categories, they overlap and reinforce each other. Openness of government promotes both the rationality that the rule of law requires, and the accountability that multi-party democracy demands. In our constitutional order, the legitimacy of laws made by Parliament comes not from awe, but from openness. [1]

As Justice Sachs makes clear, the general 'ethical' duty on the state flows directly from a number of fundamental provisions in the Final Constitution. First, the rule of law requires that all laws and government action are rational.[2] To establish rationality, the government must provide courts with all available and germane information so that the courts deliver decisions based on a full and proper understanding of the facts. Second, FC s 165(4) requires '[o]rgans of state … to assist and protect the courts.'[3] This obligation must impose a duty on the state to act in such a manner when it is involved in litigation. Third, FC s 195(1) requires that all public administration be accountable[4] and transparent.[5] Finally, the general ethical duty gives effect to the transformative ideals of the Final Constitution — these ideals at a minimum, require a transition from a 'culture of authority' to a 'culture of justification'.[6]

[1] 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC)('*Matatiele I*') at paras 107, 109 and 110.

[2] FC s 1*(c)* entrenches 'the rule of law' as a founding value of the Final Constitution. For more on the rule of law, see F Michelman 'The Rule of Law, Legality and Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2003) Chapter 11. For more on the status and the content of the Final Constitution's founding values, see C Roederer 'Founding Values' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 13.

[3] FC s 165(4) reads in full: 'Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.'

[4] FC s 195(1)*(f)*.

[5] FC s 195(1)*(g)*. For more on FC s 195, see A Bodasing 'Public Administration' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 23A.

[6] This 'celebrated formulation' is drawn from Ettienne Mureinik's article 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31, 32. See also K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146; P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch LR* 351. The Constitutional Court has endorsed this principle in *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 156 (Ackermann J); *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 25; *Ferreira v Levin NO &Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 51 (Ackermann J); *Matatiele I* (supra) at para 100 (Sachs J).

The main duty on the State is to provide courts with all the information they need to make their decisions. This duty is not limited to the specific stages in constitutional litigation where the State often bears a specific evidentiary burden. It extends to all aspects of constitutional litigation.[1] The duty is not, nor can it be, limited only to the provision of information for the State to win its case. The duty covers all information that would assist a court in rendering its decision. The duty to adduce information arises from the time the litigation begins: it is not necessary for a court to request information from the State.[2]

Because the ethical duty on the State does not flow from its position as a litigant, but from obligations imposed by the Final Constitution, the Constitutional Court has emphasised that the State must provide relevant information even if the State does not oppose the specific challenge at issue. In *Khosa*, the Court wrote:

> Even in those cases where the view is taken that there is nothing to be said in support of challenged legislation, a court, in order to exercise the due care required of it when dealing with such matters, may well require the assistance of counsel. In this case it should have been apparent to the [government] respondents that the declaration of invalidity of the impugned legislation could have significant budgetary and administrative implications for the State. If the necessary evidence is not placed before the courts dealing with such matters their ability to perform their constitutional mandate will be hampered and the constitutional scheme itself put at risk. *It is government's duty to ensure that the relevant evidence is placed before the Court.*[3]

Apart from providing relevant material, the State's attorney is required to act professionally. Of course, all attorneys bear such a duty, but the duty on the State's attorney flows not only from her duty as a professional, but from the constitutional responsibilities she bears when she represents the State. As the

[1] It is arguable that the duty should extend also to non-constitutional matters. Indeed, considering the constitutional sources of the duty, it makes little sense to distinguish between matters concerning the Final Constitution and those that do not. However, that question goes beyond the boundaries of this chapter.

[2] *Khosa & Others v Minister of Social Development & Others; Mahlaule v Minister of Social Development & Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC)('*Khosa*') at para 18 ('The respondents had the opportunity to place evidence before the High Court and cannot be heard to say that it was the duty of the High Court to call for evidence before declaring the impugned legislation unconstitutional. It was the respondents who were to be blamed for the failure to place relevant information and argument before the High Court which explained the reasons for the disputed provisions and the purpose they were intended to serve.')

[3] Ibid at para 19. See also *Gory v Kolver NO & Others (Starke & Others Intervening)* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) at para 64 (The Minister had not opposed the constitutional challenge in the High Court, but had argued for a retrospective order. In the Constitutional Court the Minister did not oppose confirmation at all, despite the retrospective order being granted by the High Court. Van Heerden AJ commented in this regard as follows: 'To my mind, something more substantive is required when a state official is called upon to deal with the constitutionality of a statutory provision falling under his or her administration and with the formulation of an appropriate remedy in the event that such provision is held to be constitutionally invalid is under consideration by a court.')

Constitutional Court noted in *South African Liquor Traders*: 'Given the government's responsibility to assist the work of courts, a lapse … in the State Attorney's office gives cause for grave concern.'[1] In two recent hearings, several justices of the Constitutional Court have expressed particular displeasure and concern over the conduct of the State Attorney.[2]

A number of consequences can follow a failure by the State to fulfil its ethical duty. Firstly, it can be mulcted in costs, not only for wasted time, but also in the main application.[3] Secondly, it may justify a postponement of the application. While courts, especially the Constitutional Court, are reluctant to grant postponements,[4] the public importance of most constitutional cases is a powerful justification for postponing a case rather than deciding it without sufficient input from the State.[5] Finally, a failure to present enough evidence will 'tip the scales'

[1] See *South African Liquor Traders Association & Others v Chairperson, Gauteng Liquor Board & Others* 2006 (8) BCLR 901 (CC) at para 52 (The State Attorney had failed to inform the MEC of a constitutional challenge to provincial legislation and had failed to appear in court despite a request by the Registrar. O'Regan J expressed the court's displeasure in the following terms: 'The result is both unfortunate and serious. It is unfortunate because the effect in this case was to give the impression that the MEC, a senior member of the executive in provincial government, was not interested in assisting this court in resolving important constitutional litigation. That impression has now been rectified. It is serious because as a matter of common practice it is the State Attorney who is briefed by the government when it is involved in litigation. Given the government's responsibility to assist the work of courts, a lapse of this sort in the State Attorney's office gives cause for grave concern.')

[2] *Nyathi v MEC for Health: Gauteng & Others* CCT 19/07 (Heard on 30 August 2007, judgment reserved)(The State Attorney again failed to inform the MEC or the Minister of Justice of a constitutional challenge to the State Liability Act 20 of 1957. The court issued directions requiring the State Attorney to explain the failure. At the hearing several justices expressed dismay at the apparent lack of competence and capacity of the State Attorney. Some even suggested the possibility of a structural interdict so that the court could supervise the Office of the State Attorney and improve its performance.); *Shilubana v Nwamitwa* CCT 03/07 (Heard on 4 September 2007, judgment reserved)(The State Attorney failed to properly paginate the record or to respond to a request for power of attorney from the respondents. The court was openly hostile to the conduct of the State Attorney and only did not strike the matter from the roll because of its importance.)

[3] See, for example, *Liquor Traders* (supra) at para 54 (The court ordered costs *de bonis propriis* against the State Attorney for the negligent way it conducted the case). For more on costs in constitutional litigation, see A Friedman 'Costs' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 6.

[4] The general principles relating to postponements in constitutional matters have been set out by the Constitutional Court in a number of judgments. See *Shilubana v Nwamitwa* [2007] ZACC 14 (8 June 2007); *National Police Service Union & Others v Minister of Safety and Security & Others* 2000 (4) SA 1110 (CC), 2001 (1) BCLR 775 (CC); *Lekolwane & Another v Minister of Justice and Constitutional Development* 2007 (3) BCLR 280 (CC).

[5] *Khosa* (supra) at paras 24–5 ('This Court required further information to enable it to discharge its constitutional duty, and it was in the interests of justice that such information be placed before it. In the circumstances, the most appropriate way of dealing with the situation was to require the respondents to place the necessary information before this Court expeditiously. For these reasons, the matter was postponed'); *Liquor Traders* (supra) at para 20 (There was no appearance for the State at the hearing, despite numerous requests from the Court, because of a failure on the part of the State Attorney. The Court ordered a postponement, presumably because it did not want to hear the matter without input form the state, although the judgment does not specify the reason); *Shilubana v Nwamitwa* CCT 03/07 (Order of 4 September 2007)(Case was postponed because of a failure by the State to properly paginate the record or to respond to a request for a power of attorney.)

against the State.[1]

(b) Specific Evidentiary Burdens

(i) *Limitations*[2]

The burden of proof to justify an infringement of rights under FC s 36 will fall on the party relying on FC s 36.[3] The most obvious justification for placing this burden on the party relying upon the law in question, most often the State, is that the State will have unique access to the type of information that would be relevant to a justification analysis. That information will generally consist of statistical or other information that demonstrates: *(a)* the important purpose served by the law and the adverse consequences that may flow if the law is set aside;[4] or *(b)* the administrative or financial impact that a change in the law will have on the state.[5]

However, even if government fails to put up a case for justification, a court is still obliged to determine whether the impugned legislation can be justified.[6] However, as Somyalo AJ noted in *Moise*: 'The absence of evidence or argument in support of the limitation has a profound bearing on the weighing up exercise,

[1] See *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as* Amicus Curiae*)*('*Moise*') 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC) at para 19 ('If the government wishes to defend the particular enactment, it then has the opportunity — indeed an obligation — to do so. The obligation includes not only the submission of legal argument but the placing before Court of the requisite factual material and policy considerations. Therefore, although the burden of justification under s 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment.')

[2] See, generally, S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) §34.6 – from which this section is primarily drawn.

[3] See *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 102 ('It is for the legislature, or the party relying on the legislation, to establish this justification, and not for the party challenging it to show that it was not justified.')

[4] Ibid at paras 116 and 118 (The Attorney-General argued that the death penalty served as a deterrent and pointed to the increase in crime rates since a moratorium had been placed on implementing the death penalty); *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & Others* 2003 (12) BCLR 1333 (CC), 2004 (1) SA 406 (CC) at paras 64–5 (The State led evidence about the link between child pornography and child abuse and the serious effects of child abuse on children); *S v Jordan & Others* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) at para 86 (State argued that the criminalisation of prostitution was justified by leading evidence that prostitution was linked to human trafficking, drug abuse, violent crime, sexually transmitted diseases and child prostitution).

[5] See, eg, *Khosa* at paras 60-61 (State led evidence of the financial burden of providing social assistance to permanent residents as well as the administrative difficulties in identifying who would qualify for a grant); *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) at paras 133–4 (in finding that a prohibition on marijuana use by Rastafari was a justifiable limitation of the right to freedom of religion, the majority of the court relied on evidence presented by the state of the financial and administrative difficulties of establishing and policing an exemption in the form of a permit system).

[6] See *Du Toit & Another v Minister of Welfare and Population Development & Others* 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC) at para 31; *Phillips & Another v Director of Public Prosecutions (Witwatersrand Local Division) & Others* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC) at para 20; *J v Director-General, Department of Home Affairs & Others* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC) at para 15.

the more so as the parties who chose to remain silent have special knowledge of provincial and local government administration.'[1] Somyalo AJ then held that a 'failure by government to submit such data and argument may, in appropriate cases, tip the scales against it.'[2]

The State should also bear an evidentiary burden with respect to certain, if not all, internal limitations clauses.[3] Although the text offers no express guidance, and the courts have not yet provided an answer, Liebenberg, Woolman and Botha have all argued that there should be a burden shift in socio-economic rights cases. They contend that, if a litigant establishes a prima facie case of unreasonableness, the burden of justification should shift to the state to prove that it lacks available resources. 'It would be unreasonable,' as Liebenberg notes, 'to expect ordinary litigants to identify and to quantify the resources available to the State for the realisation of particular socio-economic rights.'[4]

(ii) *Remedies*[5]

Orders that declare legislation invalid ordinarily go into effect immediately and apply retrospectively to the date the Final Constitution came into force.[6] Such orders can, accordingly, seriously affect the operation of government and the conduct of private affairs. They can undo settled arrangements upon which many have reasonably relied. And they can leaving gaping lacuna in the law. The Final Constitution therefore makes specific provision for limiting the effect of declarations of invalidity by both suspending and limiting the retrospective effect of orders of invalidity.[7] However, the Constitutional Court has emphasised

[1] *Moise* (supra) at para 20. See also *Phillips* (supra) at para 20 (Yacoob J emphasised that the lack of evidence will 'tip the scales' only in 'appropriate cases'.)

[2] *Moise* (supra) at para 19.

[3] For more on internal modifiers and internal limitations, and why the State bears the burden of justification for internal limitations (but not internal modifiers), see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34

[4] S Liebenberg 'Interpretation of Socio-economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2003) at 33–53—33–54.

[5] For more on constitutional remedies in general, and the operation of orders of invalidity and the circumstances and manner in which they can be limited in particular, see M Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2008).

[6] See *Women's Legal Centre, Ex parte: In re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC), 2001 (8) BCLR 765 (CC) at paras 13-15.

[7] FC s 172(1)*(b)* reads:

> When deciding a constitutional matter within its power, a court —
>
> *(b)* may make any order that is just and equitable, including —
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

that it will only grant such an order if an evidentiary basis exists for doing so.[1] That evidence should reflect

> the effect of the order … on the successful litigant and on those prospective litigants in positions similar to that of the former, as well as the effect on the administration of justice or State machinery.[2]

The burden to supply that evidence will ordinarily rest on the State, both because it will be the only party in possession of the relevant information and because it will most often be the party seeking a limitation of the order.

The importance of presenting such evidence was demonstrated in *Chief Lesapo*. The Constitutional Court refused to grant a suspension order – despite the fact that the government had expressed grave concern about the effect of an immediate order – because the government had not presented any evidence to justify its fears.[3] However, specific evidence will not always be necessary. Other concerns may motivate granting such an order.[4] In addition, the detrimental effects might be clear to all concerned from the existing record or the nature of the provision in question.

The State bears an even stricter evidential burden when it seeks an extension of a suspension order. In such cases, the state must demonstrate that it is 'just and equitable' to extend the suspension. A court, when deciding to grant such an extension, will consider the following factors:

[1] *S v Mello* 1998 (3) SA 712) (CC), 1998 (7) BCLR 908 (CC) at para 11. See also *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC)('*Chief Lesapo*') at para 33; *S v Ntsele* 1997 (11) BCLR 1543 (CC), 1997 (2) SACR 740 (CC) at para 13; *S v Julies* 1996 (4) SA 313 (CC), 1996 (7) BCLR 899 (CC), 1996 (2) SACR 108 (CC) at para 4; *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC), 1996 (1) SACR 371 (CC) at para 30; *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC), 1995 (2) SACR 748 (CC) at para 30.

[2] *Chief Lesapo* (supra) at para 33. See also *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC) at para 27 (The *Ntuli* Court set aside provisions requiring a judge's certificate before an appeal from the magistrates' court, but suspended the order because of the impact it would have on the administration of justice.)

[3] *Chief Lesapo* (supra) at para 33.

[4] For example, suspension is often justified on the basis that the matter has many possible solutions and is best left to the legislature to decide. See, eg, *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC) at paras 50–51 (Court suspended an order invalidating a provision which did not require the consent of fathers of children born-out-of-wedlock for their adoption because of the many possible ways the legislature could address the problem); *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)(The unconstitutionality of limiting marriage to heterosexual couples was suspended to allow the legislature to deal with it, both because there were a number of possibilities and because any change was more likely to be accepted if it came from the legislature.) Courts often limit retrospectivity because of the obvious injustice that will flow from retrospective application, without the need for evidence of any specific injustices. See, eg, *Ex parte Minister of Safety and Security v Walters* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) at para 74 (The Court invalidated provisions permitting policemen to use lethal force in effecting an arrest, but limited the retrospective effect because it would criminalize acts performed in good faith); *S v Masiya* [2007] ZACC 9 (10 May 2007)(After extending the definition of rape to include anal penetration of a female, the court refused to apply the decision retrospectively because it would violate the principle of legality.)

> the sufficiency of the explanation for failure to comply with the original period of suspension; the potentiality of prejudice being sustained if the period of suspension were extended or not extended; the prospects of complying with the deadline; the need to bring litigation to finality; and the need to promote the constitutional project and prevent chaos.[1]

It is not possible to extend a suspension order if the original suspension period has already lapsed.[2]

(c) Constitutional duty of the state in the enforcement of court orders

Part of the general ethical duty imposed on the state flows from FC s 165(4):

> Organs of state, through legislative and other means, must assist and protect the courts to ensure independence, impartiality, dignity, accessibility and effectiveness of the courts.

This general obligation, together with the rule of law and the right of access to courts, implies a duty on the state, in certain circumstances, to take positive action to ensure compliance with court orders or the maintenance of the social fabric.

In *President of RSA & Another v Modderklip Boerdery (Pty) Ltd & Others*, the Constitutional Court was faced with a situation where tens of thousands of people had taken residence on a private party's land.[3] The scale of the problem prevented the enforcement of an ordinary eviction order. Langa ACJ (as he then was) found that FC s 34 imposed an obligation on the state to find a solution to the problem:

> The obligation on the State goes further than the mere provision of the mechanisms and institutions referred to above. It is also obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law. The precise nature of the State's obligation in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature of the right or interest that is at risk, as well as on the circumstances of each case.[4]

The obligation to take steps to ensure compliance with court orders does not, it seems, extend to a failure to comply with court orders against foreign states. The Supreme Court of Appeal in *Rootman v President of the Republic of South Africa* rejected an application to force the government to take steps to force the Democratic Republic of Congo to comply with an existing High Court order in the applicants favour.[5] Lewis JA relied on the principle established in *Kaunda v President of the Republic of South Africa* that the Final Constitution does not apply

[1] *Zondi v MEC for Traditional and Local Government Affairs & Others* 2006 (3) SA 1 (CC), 2006 (3) BCLR 423 (CC) at para 47.

[2] See *Ex Parte Minister of Social Development* 2006 (4) SA 309 (CC), 2006 (5) BCLR 604 (CC); *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC).

[3] 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC).

[4] Ibid at para 43.

[5] [2006] SCA 80 (RSA)('*Rootman*').

outside South Africa and therefore cannot require the DRC to comply with South African court orders.[1]

Finally, the State has a duty to comply with court orders against the State. The Transvaal High Court, in *Nyathi v Member of the Executive Council for Health, Gauteng & Another*, found that s 3(1) of the State Liability Act violated FC ss 34 and 165(5)[2] because it prohibited attachment 'or like processes' in enforcing a court order against the State.[3] This decision implies that the State has a constitutional duty to ensure that court orders can be effectively enforced.

[1] *Rootman* (supra) at para 12. For a compelling critique of *Kaunda,* and thus its application in *Rootman*, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2005) § 31.6. Even if the Final Constitution does not apply outside South Africa, Mr Rootman and the South African government are 'in' South Africa. It is therefore possible to require the State to take action to enforce the court order without invoking extra-territorial application of the Final Constitution (say, by freezing the assets of the foreign state located in South Africa.). Lewis JA accepted that the State could take certain diplomatic steps (eg writing a letter or making a telephone call). However, she concluded that these steps would likely be ineffective and therefore should not be granted. However, while the effect of diplomatic negotiations cannot be foreseen, the uncertainty of securing a positive response should hardly be grounds for releasing the government from taking any steps at all. For an alternative reading of *Kaunda*, see J Klaaren 'Citizenship' in S Woolman, J Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS December 2007) Chapter 60.

[2] FC s 165(5) reads: 'An order issued by a court binds all persons to whom and all organs of state to which it applies.'

[3] [2007] ZAGPHC 16 (30 March 2007). The matter was then heard as part of confirmation proceedings in the Constitutional Court. CCT 19/07 (30 August 2007). At the time of writing, judgment had not yet been delivered.

4 Jurisdiction

Sebastian Seedorf

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167 Constitutional Court

(1) The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges.

(2) A matter before the Constitutional Court must be heard by at least eight judges.

(3) The Constitutional Court —

(a) is the highest court in all constitutional matters;

(b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and

(c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

(4) Only the constitutional Court may —

(a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;

(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;

(c) decide applications envisaged in section 80 or 122;

(d) decide on the constitutionality of any amendment to the Constitution;

(e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or

(f) certify a provincial constitution in terms of section 144.

(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.

(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court —

(a) to bring a matter directly to the Constitutional Court; or

(b) to appeal directly to the Constitutional Court from any other court.

(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

172 Powers of courts in constitutional matters

(1) When deciding a constitutional matter within its power, a court —

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including —

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2)*(a)* The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

1 Introduction

The issue of jurisdiction is obviously of importance to the person initiating litigation: to which court should she address her claim? But jurisdiction is equally important for the court itself since it forms the basis for the court's power to grant or to refuse the relief sought. If a court declines jurisdiction, then the application will be dismissed without reaching the merits of the case — and without the court granting the relief sought, even if the applicant would otherwise have been entitled to it. To use what is still a relevant definition in South African law: jurisdiction means 'the power vested in a court by law to adjudicate upon, determine and dispose of a matter'.[1]

The framework for the jurisdiction of courts in South Africa is set out in Chapter 8 of the Final Constitution,[2] more specifically, in FC ss 167, 168, 169, 170 and 172. According to these provisions, jurisdiction in constitutional matters is shared between the Constitutional Court and other courts, such as the Supreme Court of Appeal and the High Courts. The crucial provision is FC s 167(3)*(b)*, which provides that the Constitutional Court 'may decide only constitutional matters, and issues connected with decisions on constitutional matters'. This provision links the Constitutional Court's jurisdiction to the term 'constitutional matter', which in turn clearly indicates that the Constitutional Court was conceived as a court of limited rather than plenary jurisdiction.

If the Constitutional Court's jurisdiction had covered every possible matter, then a chapter on the jurisdiction of the Court would not have had much relevance. The inclusion of the term 'constitutional matter', however, means that prospective applicants to the Constitutional Court need to determine whether their case falls within the Court's jurisdiction and accordingly whether the Court will hear the case at all. A proper appreciation for the Constitutional Court's jurisdiction is therefore the first criterion of success in any matter brought to the Court. Whether seeking leave to appeal or approaching the Court directly, parties are required, in addition to establishing the substantive merits of their case, to establish its constitutional dimension.[3] It is for this reason that this chapter is the first in a series of chapters in this work dealing with different aspects of constitutional litigation.

Once the Constitutional Court assumes jurisdiction, the applicant faces the possibility that the Constitutional Court may not hear the matter because it is not in the interests of justice for it to do so. Only if this question is answered in

* I would like to thank Theunis Roux and Michael Bishop for their insightful comments on and supportive criticisms of previous drafts of this chapter, and participants in a seminar at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), where an earlier draft of the chapter was presented, for their helpful suggestions.

[1] *Ewing McDonald & Co Ltd v M&M Products* 1991 (1) SA 252, 256G (A).

[2] Constitution of the Republic of South Africa, 1996 (hereafter 'the Final Constitution' or 'FC').

[3] See Carole Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' (2005) 21 *SAJHR* 509, 519.

the affirmative will the Court consider whether the other procedural preconditions for deciding the case have been met.[1] The Court may thereafter deal with questions of standing, ripeness and mootness,[2] and the possible participation of *amici curiae*.[3]

When the Constitutional Court was established by the Interim Constitution of 1993[4] the intention was not to replace the Appellate Division (as the Supreme Court of Appeal was then known), but to supplement it with a specialized new institution whose powers would be limited to adjudicating issues arising under the Final Constitution. The reason for this was political: it was felt that judges who had been appointed under apartheid should not be the custodians of the new democracy. The Appellate Division, and indeed the judiciary generally, were regarded as indelibly tainted by apartheid, and thus not well suited to hear cases brought under the new Constitution.[5] On the other hand, the Appellate Division and the Constitutional Court were placed on the same hierarchical level, and neither court could hear appeals from the other. The Final Constitution changed this arrangement, giving to the other courts, including the Supreme Court of Appeal, jurisdiction in constitutional matters, while leaving the final word to the Constitutional Court.

To clarify the different roles that the High Courts, the Supreme Court of Appeal and the Constitutional Court would play, the framers of both the Interim and the Final Constitutions decided not to make the jurisdiction of the Constitutional Court discretionary, but to limit it in a substantial way. In the Interim Constitution this was achieved through a provision that the Constitutional Court should have jurisdiction in the Republic as the court of final instance over all matters relating to the 'interpretation, protection and enforcement of the provisions of this Constitution' (IC s 98(2)). In the Final Constitution, this limitation is contained in FC s 167(3)*(b)*, which provides that the Constitutional Court may decide only 'constitutional matters'.

[1] See Kate Hofmeyer 'Rules and Procedure in Constitutional Matters' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 5.

[2] See Cheryl Loots 'Standing, Ripeness and Mootness' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 7.

[3] See Geoff Budlender 'Amicus Curiae' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 8.

[4] Constitution of the Republic of South Africa, 1993 (Interim Constitution).

[5] See Johann van der Westhuizen 'The Protection of Human Rights and a Constitutional Court for South Africa: Some Questions and Ideas, with Reference to the German Experience' (1991) 24 *De Jure* 1, 5-6; Patric Mzolisi Mtshaulana 'The History and Role of the Constitutional Court of South Africa' in Penelope Andrews & Stephen Ellmann (eds) *The Post-Apartheid Constitutions* (2001) 535; Lewis (supra) at 10; Arthur Chaskalson 'Constitutional Courts and Supreme Courts — A Comparative Analysis with Particular Reference to the South African Experience' in Ingolf Pernice, Juliane Kokott & Cheryl Saunders (eds) *The Future of the European Judicial System in a Comparative Perspective* (2006) 97, 100.

This jurisdictional limitation distinguishes the South African Constitutional Court from supreme courts in most other countries with a common-law tradition, where court proceedings typically progress to a single judicial body, irrespective of whether the country has a supreme-law Constitution with a fully fledged Bill of Rights (like the USA, Canada, India or Ireland), a supreme-law constitution with some (express or implied) constitutional rights (like Australia), or a Bill of Rights that gives the courts the power to declare legislation incompatible with a particular right or rights, but not the power to strike down legislation (like New Zealand or the UK). Instead, the prototype for a separate court with limited constitutional jurisdiction was the German Federal Constitutional Court,[1] whose influence on the South African model may be attributed to these two countries' shared history of totalitarianism, and the concomitant desire to make a clean break with the past.[2]

A decision to establish a specialist constitutional court is invariably contested. During the drafting of the 1949 German Constitution, the choice between a separate Constitutional Court and a single Supreme Court was very controversial.[3] Eventually, the proposal for a separate Constitutional Court carried the day, at least in part because it was felt that the quality of the ordinary courts' jurisprudence, based as it was on 'pure law' adjudication, would be compromised if they became involved in the more 'political' cases that a Constitutional Court would have to decide.[4] In South Africa, too, the Law Commission and the judiciary

[1] The idea of such a separate court is not a German invention, but was first used in Austria in 1920. Hans Kelsen, who later became internationally famous for his writings in international law and legal theory, was very influential in the establishment of the specialized Austrian Constitutional Court. For a historic overview and international comparison, see Georg Schmitz 'The Constitutional Court of the Republic of Austria 1918-1920' (2003) 16 *Ratio Juris* 240; Stanley L Paulson 'Constitutional Review in the United States and Austria: Notes on the Beginnings' (2003) 16 *Ratio Juris* 223. After the end of the Second World War, other European countries with a civil law tradition have also set up separate Constitutional Courts, notably Austria (in reviving the earlier tradition) and Italy. Others followed after breaking away from authoritarian rule (Spain, 1978 and Portugal, 1982). More Constitutional Courts in Europe have been set up after the end of the Cold War in middle and eastern European states, such as Poland and Hungary. The latter drew heavily on the German experience. See Wojciech Sadurski *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2005).

[2] On 'the Bundesverfassungsgerichtm' see Penuell Maduna 'Judicial Review and Protection of Human Rights Under a New Constitutional Order for South Africa' (1989) 21 *Columbia Human Rights Law Review* 73, 83; Marius Wiechers 'Regional Government in the New South Africa: The Role of Courts' (1991) 54 *THRHR* 618, 619-21; Johann van der Westhuizen 'The Protection of Human Rights and a Constitutional Court for South Africa: Some Questions and Ideas, with Reference to the German experience' (1991) 24 *De Jure* 1; Kader Asmal 'Constitutional Courts — a Comparative Survey' 1991 *CILSA* 315, 320; Johan Kruger 'A Constitutional Court for South Africa' (1993) 6(1) *Consultus* 13, 17-18.

[3] The first drafting conference, the 'Herrenchiemsee Convent' (August 1948), could not reach agreement on this matter and left the decision 'explicitly' open. Eventually, the drafting body of the Grundgesetz, the so-called 'Parliamentary Council' (*Parlamentarischer Rat*), agreed in December 1948 to create a separate Constitutional Court.

[4] For documentation on the drafting history of the Grundgesetz, see (1951) 1 *Jahrbuch des öffentlichen Rechts (Neue Folge)* 669-72; and for commentary on th drafting history, see Hans-Peter Schneider (ed) *Das Grundgesetz — Dokumentation seiner Entstehung* Vol 23/1 (1999). For an English account of the establishment of the German Federal Constitutional Court, see Martin Borowski 'The Beginnings of Germany's Federal Constitutional Court' (2003) 16 *Ratio Juris* 155.

expressed deep scepticism about the introduction of a separate Constitutional Court,[1] but the desire for a new institutional beginning proved to be too strong.

The decision to create a new Constitutional Court inevitably entails a decision about which matters the new court should be able to hear. The fundamental policy choice here is between enumerating a list of the disputes the Constitutional Court may decide and introducing an umbrella term to encompass all possible disputes. Obviously, South Africa (at least in the Final Constitution) opted for the latter choice: the Constitutional Court may decide only 'constitutional matters'.[2] As long as the Constitutional Court's jurisdiction is defined through that phrase, there is a need to distinguish between constitutional and non-constitutional matters. This chapter will therefore focus on the jurisdiction of the Constitutional Court in terms of that phrase and how it has sought to define its jurisdiction in relation to it.

2 The Conceptual Framework for Constitutional Jurisdiction in South Africa

Before analyzing the constitutional provisions on jurisdiction and how the Constitutional Court has applied and interpreted them, it is useful briefly to set out how the jurisdiction of the Constitutional Court relates to its overall functioning, and how it connects to related concepts such as the standard of review the Court applies, the merits of the case and any access enquiry.

(a) Jurisdiction and the institutional function of the Constitutional Court

The jurisdiction of the Constitutional Court reflects, as it should, the function that the Court performs under the Final Constitution.

The South African Constitutional Court is a court with all-encompassing, procedural and substantive review powers with regard to all law and conduct, including the conduct of all branches of government and (to a certain extent) of natural

[1] South African Law Commission *Project 58: Group and Human Rights — Working Paper 25* (1989) 445. Cf Michael McGregor Corbett, *Memorandum Submitted on Behalf of the Judiciary of South Africa on the Chapter on the Administration of Justice in the Draft Interim Constitution*, to the Technical Committee on Fundamental Rights of the Multi-Party Negotiation Process, 3rd September 1993. See also South African Law Commission, Project 77 — Report on Constitutional Models (1992) Vol III at paras 22.218–22.230 (A special 'constitutional chamber' of the Appellate Division could serve as the Constitutional Court.)

[2] The jurisdiction of most other Constitutional Courts seems to be defined by enumerating the types of disputes they are empowered to adjudicate. That is, for example, the situation in Spain (see art 161 of the Constitution of Spain (1978)), Poland (see art 188 of the Constitution of Poland (1997)) and Germany (see art 93 of the German Basic Law (1949)). In early drafts of the German Grundgesetz, it was suggested that the Federal Constitutional Court should have jurisdiction in 'constitutional disputes' between federal organs of state. This phrase was later abandoned, because it was seen to be too unspecified and, it was argued, would only require the Court to decide 'political questions'. This is why in the Grundgesetz today the disputes falling within the jurisdiction of the Federal Constitutional Court are each specified and not collated under a single heading. See Grundgesetz in 1 (1951) *Jahrbuch des öffentlichen Rechts (Neue Folge)* 669-72 (On the drafting history).

and juristic persons as well. This description is, in a nutshell, the essence of constitutional review: the judicial control and limitation of public and (certain forms of) private power by reference to the supreme law. The status of the Constitutional Court is thus similar to the Supreme Courts of the USA and Canada, to almost every court that calls itself a 'Constitutional Court' worldwide, and to international courts such as the European Court of Human Rights and the European Court of Justice. Its comprehensive review powers distinguish the Constitutional Court of South Africa from the House of Lords in the UK, where Parliament is supreme and statutes may not be struck down for inconsistency with the Human Rights Act, and the Conseil Constitutionnel in France, which may only review statutes *before* they enter into force.

The institutional function of the Constitutional Court is reflected in FC ss 172(5) and 167(5). These provisions deal with the validity of presidential conduct and Acts of Parliament. The status of the Constitutional Court as an institution on an equal footing with the other branches of government is reflected in the provisions on exclusive jurisdiction in FC s 167(4). And the Constitutional Court's superior role with regard to other courts is provided for in its competence to determine whether a matter is a constitutional matter (or whether an issue is connected with a decision on a constitutional matter) in FC s 167(3)*(c)*.

In addition to relying on these express provisions, the Constitutional Court has been careful to safeguard its review powers even where the constitutional text is silent. Thus, in *Pharmaceutical Manufacturers*, the Court made it clear that the Final Constitution sets the review standard for executive and administrative action,[1] and, in *Carmichele*, the Court showed that it would supervise other courts' interpretation and application of the ordinary law in terms of the Final Constitution.[2] These decisions, as argued below, have significant consequences for the Constitutional Court's jurisdiction.

The jurisdiction of the Constitutional Court is not determined only by the *scope* of its review powers, but also by the *standard* of review it applies. It is in this connection that the 'political question doctrine' becomes relevant, a term that in the United States has been used to describe a form of judicial restraint amounting to a refusal to assume jurisdiction in certain cases.[3]

[1] *Pharmaceutical Manufacturers Association of SA in re: the Ex Parte Application of the President of the RSA & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC).

[2] *Carmichele v Minister of Safety and Security & Another* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC).

[3] It is beyond the scope of this chapter to provide a comprehensive insight into the history and status of this doctrine. For leading contributions, see Louis Henkin 'Is There a 'Political Question' Doctrine?' (1976) 85 *Yale LJ* 597; Mark Tushnet 'Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine' (2002) 80 *N Car LR* 1203. See also Sanele Sibanda & Sebastian Seedorf 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12 at § 12.3*(d)*(ii)(aa).

The Constitutional Court is first and foremost a court of law. It is incorporated in the court structure (FC s 166*(a)*) as the first-mentioned court in the judicial branch of government, underling its superior role. Of the Constitutional Court judges, at least four must at all times be persons who were judges at the time they were appointed to the Constitutional Court (FC s 174(5)). By means of this rule, the Final Constitution intends to ensure that not only legal, but also distinctively judicial experience is reflected in the Court's jurisprudence. Equally, from the emphasis placed on the status of the Constitutional Court as a court, it follows that the Constitutional Court may decide only legal disputes. It is not expected or empowered to decide political or moral disputes.

These principles have been outlined by the Constitutional Court on several occasions. In the *First Certification Judgment*,[1] the Court clarified its function:

> First and foremost it must be emphasised that the Court has a judicial and not a political mandate. Its function is clearly spelt out in [IC s 71(2)]: to certify whether all the provisions of the [draft text of the Final Constitution] comply with the [constitutional principles]. That is a judicial function, a legal exercise. Admittedly a constitution, by its very nature, deals with the extent, limitations and exercise of political power as also with the relationship between political entities and with the relationship between the state and persons. But this Court has no power, no mandate and no right to express any view on the political choices made by the [Constitutional Assembly] in drafting the [Final Constitution], save to the extent that such choices may be relevant either to compliance or non-compliance with the [constitutional principles]. Subject to that qualification, the wisdom or otherwise of any provision of the [Final Constitution] is not this Court's business.[2]

This finding was later confirmed in another context:

> This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional.[3]

This dictum emphasizes the distinction between a political and a judicial role, not with regard to the subject matter of a dispute, but with regard to the review standard — the normative yardstick that is and needs to be applied. Political expediency is irrelevant in the judicial decision-making process. Instead, the Court, in applying the Constitution as the sole review standard, determines the constitutional framework for political decision-making.

A distinction between the subject matter of a case and the applicable review standard is essential because constitutional law is inevitably about the social and political order of a country and its society. To expect a constitutional order to be

[1] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC).

[2] *First Certification Judgment* (supra) at para 27.

[3] *United Democratic Movement v President of the Republic of South Africa & Others (2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR (CC) at para 11.

pure and separate from political developments is an illusion, and to hope that a Constitutional Court will 'stay out of politics' is futile. In Germany, the Bundesverfassungsgericht, in 1952 (the first year of operation of the Court), published a memorandum on its status, in which it proclaimed its institutional independence from the Department of Justice.[1] In this memorandum, the Court defined its distinctive role with reference to its institutional function in the political process: it had to deal with 'political legal disputes' and 'political law', meaning disputes in which political decisions are the subject of judicial assessment, measured against existing legal norms.[2] In this way, the Bundesverfassungsgericht adopted the view that one cannot separate legal from political questions by reference to subject matter since questions of constitutional law are inherently political.

A similar view has been adopted by the South African Constitutional Court. In holding in *Doctors for Life* that the decision whether Parliament has fulfilled its obligation to facilitate public involvement in the legislative process is 'pre-eminently a "crucial political" question', it did not draw the conclusion that it was prevented from reviewing that question. Instead, it held that it would have exclusive jurisdiction in the matter.[3] The fact that a decision has political implications does not prevent the Court from making a decision, but only requires the Court to apply a *legal* standard in making the decision.[4] In other words, the Constitutional Court is not asked to make political decisions, it is asked to ensure that political decisions comply with the (at times limited) standards the Final Constitution sets.

The same is true for the role of Constitutional Court judges. Their decisions will in many cases have political implications. They imply value and moral judgements. The judges are not asked to ignore the political and moral consequences of their decisions — quite the opposite. The judges are required to base their decisions on the Final Constitution and make pronouncements on the Final Constitution's values and moral choices — not on values they may hold themselves.

[1] *Die Stellung des Bundesverfassungsgerichts*, Denkschrift des Bundesverfassungsgerichts vom 27. Juni 1952, in: 6 (1957) *Jahrbuch des öffentlichen Rechts (Neue Folge)* 144-48.

[2] 'Die Verfassungsgerichtsbarkeit hat es mit einer besonderen Art von Rechtsstreitigkeiten zu tun, nämlich den 'politischen' Rechtsstreitigkeiten. Unter politischen Rechtsstreitigkeiten sind dabei solche Rechtsstreitigkeiten zu verstehen, bei denen über politisches Recht gestritten wird und das Politische selbst an Hand der bestehenden Normen zum Gegenstand der richterlichen Beurteilung gemacht wird.' Ibid at 144-45.

[3] *Doctors for Life International v The Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 21.

[4] From the Constitutional Court's decisions on socio-economic rights is it clear that the Court will not refrain from striking down government decisions just because they have a policy basis. Instead, the Court has made clear that it will test policy decisions of the executive against the Final Constitution. See *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC); *Grootboom v Government of the Republic of South Africa & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC); *Minister of Health & Others v Treatment Action Campaign & Others (2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1075 (CC).

The Constitutional Court is a court of law with a distinctive political function. That neither detracts from its status as a court, nor denies or downplays the political role it plays.

The Final Constitution stands as a symbol for the transformation of society from might to right. Against that background, the Constitutional Court has to place the 'right' — the constitutional imperatives and obligations — in the centre of its dispute-resolution processes. Might is a factor the Court has to take into account when it imposes different obligations on the parties: the state possesses its conceptually infinite resources and its monopoly on the legitimate use of force, while the individual litigant often has very limited resources and a much higher degree of vulnerability. The Court may also adopt different standards of review: these different standards allow parties greater latitude with regard to the constitutionality of their conduct. Such differences in the standard of review may, in effect, lead to greater 'might' in certain circumstances. But might as such is no basis for the Court's ruling; it can only be collateral to a holding based on a legal finding. A party (or even both parties to a dispute) may approach the Court to get an answer to the question of what it may do or may not do according to the law. And the Court is asked to give an answer only with regard to that legal yardstick. As long as the Court's answer is based on constitutional criteria, it fulfils its mandate as a court of law with special constitutional jurisdiction.

The second important institutional function of the Constitutional Court is to promote the transformative agenda of the Final Constitution. The Interim Constitution and the Final Constitution were adopted not as an embodiment of the social status quo, but with an almost revolutionary purpose: to provide a historic bridge between the past of a deeply divided society and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans.[1] This purpose distinguishes the South African Constitution from other constitutions:

> In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.[2]

[1] See the clause on National Unity and Reconciliation in the Interim Constitution.

[2] *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 262 (per Mahomed J).

This purpose of the Final Constitution has a direct impact on the functioning of the Constitutional Court:

> The Constitutional Court occupies a special place in this new constitutional order. It was established as part of that order as a new court with no links to the past, to be the highest court in respect of all constitutional matters, and as such, the guardian of our Constitution.[1]

Thus, it was not only that old-order judges could not be relied upon to give effect to the fundamental rights enshrined in the new Interim Constitution. The new Constitutional Court was also entrusted with an active role in shaping the entire legal system and bringing it into line with the new Constitutions.

The Constitutional Court's transformative function has a jurisdictional dimension as well. It is against this backdrop that the Constitutional Court has been eager to take on a supervisory role with regard to the rest of the judiciary. The Court most often relies FC s 39(2) in discharging this function. But if the main focus of the Constitutional Court is to ensure that the law in general develops and is practised in line with the Final Constitution, then it follows that the Court should not be burdened with cases in which no constitutional guidance needs to be given. To be the guardian of the Final Constitution is in itself a formidable task. There is no need to engage the Court in litigation where the Final Constitution is not implicated and where there is thus nothing to guard. As I argue below, this is an important consideration when deciding what constitutes a constitutional matter.

(b) The merits of a case and the dividing line between jurisdiction and access to the Constitutional Court

In several judgments, the Constitutional Court has clearly distinguished between the 'threshold enquiry'[2] into its jurisdiction and the question of whether it is in the interests of justice for it to hear the case.[3] In *Ingledew v The Financial Services Board*, the Constitutional Court articulated this distinction in a way that came close to a checklist:[4] 'Leave to appeal will be granted if, firstly, the application raises a constitutional matter and secondly, it is in the interests of justice to grant leave to appeal.'[5]

An even stricter distinction has to be made between issues of jurisdiction and the interests of justice, on the one hand, and the merits of the case, on the other. The enquiry into jurisdiction is exhausted once a court has established that it is the competent forum to deal with the matter — not when it decides that the

[1] *Pharmaceutical Manufacturers* (supra) at para 55.
[2] *Fraser v ABSA Bank Limited* 2007 (3) SA 484 (CC), 2007 (3) BCLR 219 (CC) at para 35.
[3] See *National Education Health & Allied Workers Union v University of Cape Town & Others* 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC) ('*NEHAWU*') at paras 13, 25.
[4] 2003 (4) SA 584 (CC), 2003 (8) BCLR 825 (CC).
[5] Ibid at para 13.

claim has merit. Earlier findings in this regard see a distinction between jurisdiction and the merits of the case as a matter of practicality: to avoid lengthy discussions of the legal arguments when the claim may in any case fail on jurisdictional grounds.[1] Later, the Court adopted a more categorical approach. In *Fredericks & Others v MEC for Education and Training, Eastern Cape & Others*, O'Regan J, writing for a unanimous court, simply stated: 'Whether the applicants' claim has merit or not can have no bearing on whether their claim raises a constitutional matter.'[2] In *Fraser v ABSA Bank Limited*, the Court confirmed that '[t]he acknowledgement by this Court that an issue is a constitutional matter . . . does not have to result in a finding on the merits of the matter in favour of the applicant who raised it.'[3] In another case, Langa CJ held that it was 'axiomatic' that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it.[4]

However, this 'axiomatic' distinction has not been followed in every case. In at least two judgments, the Court held that there were doubts whether the case raised a constitutional matter, but nevertheless approached the matter as if a constitutional issue were involved, showing that the Court will at times simply assume jurisdiction to allow it to deal with the merits: '[W]e prefer not to express an opinion on the question whether this case raises a constitutional matter but will assume, without deciding, that the matter does raise a constitutional issue.'[5]

The Court does not only on occasion skip the first leg of its enquiry so that it is not barred from dealing with the merits. Sometimes, the distinction between jurisdiction, the interests of justice and the merits of a claim is somewhat blurred. In two of the very few cases thus far in which the Constitutional Court has *explicitly* declined jurisdiction — *S v Boesak*[6] and *Phoebus Apollo Aviation v Minister of Safety and Security*[7] — the Court engaged fairly extensively with the merits of the case before eventually coming to the conclusion that no constitutional matter was

[1] See *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (2) SA 14 (CC), 1999 (2) BCLR 175 (CC) (*SARFU I*) at para 21 ('The record and judgment [of the High Court] in this matter run to some thousands of pages and it is important that the question of the proper forum should be determined before the record and detailed arguments on the merits are prepared'.)

[2] 2002 (2) SA 693 (CC), 2002 (2) BCLR 113 (CC) at para 11.

[3] 2007 (3) SA 484 (CC), 2007 (3) BCLR 219 (CC) at para 40; see also, *Fredericks & Others v MEC for Education and Training, Eastern Cape & Another* 2002 (2) SA 693 (CC), 2002 (2) BCLR 113 (CC) at para 11 ('whether the applicants' claim has merit or not can have no bearing on whether their claim raises a constitutional matter'); *Minister of Safety and Security v Luiters* 2007 (2) SA 106 (CC), 2007 (3) BCLR 287 (CC) at para 21 ('When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will ultimately be successful'.)

[4] Langa CJ in a separate concurring judgment in *Chirwa v Transnet Limited & Others* 2008 (4) SA 367 (CC), 2008 (3) BCLR 251 (CC) at para 155.

[5] *Van der Merwe & Another v Taylor NO & Others* 2008 (1) SA 1 (CC), 2007 (11) BCLR 1167 (CC) at para 106. Also see *Mphahlele v First National Bank of South Africa Ltd.* 1999 (2) SA 667 (CC), 1999 (3) BCLR 253 (CC) at para 7.

[6] 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC).

[7] 2003 (2) SA 34 (CC), 2003 (1) BCLR 14 (CC).

raised.[1] In *Boesak*, the Court held that the right to remain silent in terms of FC s 35(1)*(a)* is not impaired when a trial court draws negative inferences from the fact that the accused fails to challenge evidence that is brought against him.[2] In so doing, the Court stated quite explicitly that 'the evaluation of the evidence by the Supreme Court of Appeal did not breach the applicant's constitutional right to silence'.[3] The *Boesak* Court may have had good arguments for that conclusion, but it cannot be denied that the statement touches on the substantive merits of the claim.

The difference between a court's examination of its jurisdiction and the merits is that the former involves the definition of the subject matter of the case — a delineation of the questions the court is asked to decide (whether of fact or law) — while the merits comprise the answers the court gives to those questions. In *Boesak*, the Constitutional Court answered the question whether the claimant's right to silence had been breached. It did so in the negative, but nevertheless as a result of a substantive analysis, not merely as an exercise in deciding whether it was competent to conduct such an analysis. If the Constitutional Court had wanted to stay within the jurisdictional stage of the enquiry it should have said that the questions the claimant raised did not involve a constitutional matter, not that the answers did not.

The *Boesak* Court went on to state that the applicant could not successfully challenge his conviction for theft on the basis that this violated his right not to be deprived of freedom without just cause (FC s 12(1)*(a)*) because such a conviction constitutes just cause for depriving a person of personal freedom.[4] Here again, while the Court delivered a (convincing) interpretation of the Final Constitution, this gloss on the text did not resolve a jurisdictional question. It went to the very heart of the dispute. At some stage, the Court seems to have lost track of what it was doing: although the Court dismissed all the complaints raised by the applicant on the basis that they were 'without merit', the conclusion it drew was that the applicant did not raise 'a constitutional matter … over which this Court has jurisdiction'.[5]

In *Phoebus Apollo Aviation* the Court's engagement with the merits was not as explicit as in *Boesak*. Here, the applicant had tried to hold the Minister concerned vicariously liable for the theft of money by three dishonest policemen, acting

[1] See *Van Vuuren v S* 2005 (7) BCLR 639 (CC)(Court declined jurisdiction by simply applying its holding in *Boesak*.) In several other cases, the Constitutional Court found that one or some of the issues raised are outside its jurisdiction. See *Shabalala & Others v Attorney-General, Transvaal, & Others* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC) at para 8; *Occupiers of 51 Olivia Road, Berea Township & Others v City of Johannesburg & Others* 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC) at para 6 ('I would suggest that the standard for deciding whether or not to consider applications for leave to appeal should also apply when we are to decide whether to consider particular issues in an application for leave to appeal.')

[2] *Boesak* (supra) at paras 23-29.

[3] Ibid at para 29.

[4] Ibid at para 38.

[5] Ibid at paras 39-40.

under their assumed authority as police officers. The applicant asked the court to develop the common law in terms of FC s 39(2) and also invoked other sections of the Final Constitution in support of its case. The Court explicitly declined jurisdiction because the application of the common-law doctrine of vicarious liability had to be regarded as a merely factual matter, and because 'no convincing argument' had been advanced to establish why the common law should be developed so as to accommodate the claim.[1]

That may well have been so, but the Court's reasoning itself engages the merits of the case. The finding that the applicant's arguments were not convincing entails an assessment of these arguments in terms of the Constitution and therefore falls squarely within the Constitutional Court's constitutional mandate. The Court might — and indeed should — have assumed jurisdiction to decide the matter with reference to its responsibility to ensure that the development of the common law takes place in accordance with FC s 39(2), and thereafter found that both the doctrine and its application by the lower courts were in line with the Bill of Rights. For this reason I agree with Frank Michelman's comment elsewhere in this treatise that the Court's dismissal of the case for lack of jurisdiction was hardly an irresistible dictate of strict logic.[2]

It can be argued that the Constitutional Court decision to decline jurisdiction is equally confusing in a third case: *Van der Walt v Metcash Trading Limited*.[3] Here, the Court was faced with a litigant who lost his claim in the Supreme Court of Appeal even though, one day later, a different panel of the same court came to the opposite conclusion in a case identical to the first. Understandably, the losing litigant tried to rectify this seemingly unjust outcome by appealing to the Constitutional Court. The Court dismissed the application.

At no point in *Metcash* does the Court actually accept or refuse jurisdiction. Goldstone J, writing for the majority, holds that the question to be decided is whether the fact that the Supreme Court of Appeal came to different conclusions in two identical cases was 'unconstitutional'.[4] In answering this question, he interprets FC s 34 (access to courts) and FC s 9 (equality), and concludes that there is 'no merit in the reliance upon section 34 of the Constitution' and that 'section 9(1) of the Constitution has not been violated'.[5] This line of reasoning strongly suggests that the Court assumed jurisdiction and dismissed the case on its merits.

[1] *Phoebus Apollo Aviation* (supra) at para 6.

[2] Frank Michelman 'The Rule of Law, Legality and Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11 at § 11.2*(b)(i)*.

[3] 2002 (4) SA 317 (CC), 2002 (5) BCLR 454 (CC).

[4] Ibid at para 11.

[5] Ibid at paras 14, 25, respectively.

Halfway through the judgment, however, Goldstone J, almost by way of parenthesis, states that the difference in outcome between the two cases does not raise a 'constitutional question'.[1] At another point, he states that decisions of the Supreme Court of Appeal enjoy finality only in 'non-constitutional matters'.[2] But nowhere in the majority judgment does the Court explicitly reject jurisdiction because the application does not raise a constitutional matter in terms of FC s 167(3). Rather, it is in the minority judgements that it becomes clear that lack of jurisdiction was apparently the basis for the majority decision. Madala J thus dissents on the grounds that the majority judgment on the basis that '[t]he disparate orders of the SCA themselves raise the constitutional matter'.[3] He is also the only judge in the matter to sustain the conceptual distinction between jurisdiction and the merits of the case: 'It seems that this Court is duty-bound to enquire whether the disparate outcomes raise a constitutional matter. We must *then* decide whether this outcome is unconstitutional or not.'[4]

Madala J's careful observations about the need to distinguish between jurisdiction and constitutionality notwithstanding, the inevitable conclusion to be drawn from the decisions in *Metcash*, *Boesak* and *Phoebus Apollo* is that a case may sometimes simply be too weak on the merits to engage the Constitutional Court's jurisdiction. At this point we need to return to the distinction between jurisdiction and the Court's consideration of whether it is in the interests of justice to grant leave to appeal. The Court's occasional engagement with the merits of a case as a means to determine its jurisdiction is similar to the approach it has developed in this latter context.

It is settled law that a claim's prospects of success are an important factor in the Court's determination of whether it is in the interests of justice to grant leave to appeal.[5] The Court has used various criteria to assess this issue. It has said, for example, that an applicant would have to show that there are prospects that the Court would 'reverse or materially alter' the lower court's decision.[6] In criminal cases, the holding of the lower court must have been crucial for the conviction and not merely some point of law.[7] Assessing the prospects of success of a claim inevitably implies an assessment of whether the applicant potentially has a case. At the heart of the assessment, therefore, lies a more or less abstract engagement with the merits of the case.

[1] *Metcash* (supra) at para 14.
[2] Ibid at para 8.
[3] Ibid at para 63; also see Ngcobo J's statement at para 32 and Sachs J's reasoning at para 81.
[4] Ibid at para 72 (my emphasis).
[5] *Boesak* (supra) at para 12.
[6] *Pennington & Another v S* 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC) at para 52, cited with approval in *Boesak* at para 12. The phrase 'reverse or materially alter the judgment' of the court a quo was also used in Rule 18(6)*(a)*(iii) of the 1998 Constitutional Court Rules, but is not part of the 2003 rules.
[7] *S v Bierman* 2002 (5) SA 243 (CC), 2002 (10) BCLR 1078 (CC) at para 9.

In its early judgments, before the 1998 Constitutional Court Rules of Procedure came into force, the Court quite frankly admitted that the merits play a role in the assessment of a claim's prospects of success during the interests of justice enquiry. In *Pennington & Another v S*,[1] the Court (per Chaskalson CJ) held that '[the] procedure [of granting leave to appeal] requires a consideration of the merits of the appeal and is an exercise of the appellate jurisdiction vested in the Court'.[2] This consideration was justified, the Court stated, because:

> 'Leave to appeal' is . . . a requirement needed to 'protect' the process of this Court against abuse by appeals *which have no merit*, and it is in the 'interests of justice' that this requirement be imposed, for if appeals without merit were allowed against decisions of the Supreme Court of Appeal, justice would be delayed.[3]

Although the Court has said that it will not apply a full-blown test of constitutionality during the interests of justice stage of its enquiry (but rather inquire whether an appeal is 'viable'[4]), the reasonable prospects of success test is still applied. In *Pennington*, Chaskalson CJ not only laid out rules for the general procedure of appeals. He also dismissed the appeal 'in the light of the argument on the merits'.[5]

The Court has continued to use this approach in more recent judgements, albeit in a more subtle way. It still sometimes dismisses applications for leave to appeal because they 'have no prospects of success on the merits'[6] and continues to state that, in determining the interests of justice, 'each case is considered on its own merits'.[7] More often however, the Court proceeds directly to an in-depth examination of the applicable constitutional provision(s) and ordinary law, and only at the very end concludes that — because of its findings of substance — the application for leave to appeal should be granted or dismissed.[8]

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[1] 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC).

[2] Ibid at para 27.

[3] Ibid at para 26 (my emphasis). Against that background the court made the order that applications for leave to appeal will have to show prospects that the Constitutional Court 'will reverse or materially alter' the decision of the lower court.

[4] See *Beyers v Elf Regters van die Gondwetlike Hof* 2002 (6) SA 630 (CC), 2002 (10) BCLR 1001 (CC) at para 11 ('Die betrokke hof loop nie 'n beslissing aangaande die deugde van die voorgenome appèl vooruit nie, maar kyk slegs of die appèl *lewensvatbaar* is. As daar maar net 'n redelike vooruitsig op sukses is, word verlof tot appèl toegestaan.')

[5] *Pennington* (supra) at paras 28-44.

[6] See *Xinwa & Others v Volkswagen of South Africa (Pty) Ltd* 2003 (4) SA 390 (CC), 2003 (6) BCLR 575 (CC) at para 17. In a similarly clear manner, the Constitutional Court rejected an application for leave to appeal in *Concerned Land Claimants Organisation of PE v PE Land and Community Restoration Association & Others*. 2007 (2) SA 531 (CC), 2007 (2) BCLR 111 (CC).

[7] See *Union of Refugee Women & Others v Private Security Industry Regulatory Authority & Others* 2007 (4) SA 395 (CC), 2007 (4) BCLR 339 (CC) at para 21.

[8] See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC). Here Sachs J, writing for a unanimous Court, delivered a carefully balanced judgment on the constitutional relationship between FC s 25 (property rights) and FC s 26 (right to housing) and a City's duties towards informal settlers within the 'leave to appeal' enquiry. In *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd*, the Court likewise discussed the merits and only afterwards reached the conclusion that leave to appeal should be granted. 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC).

A perfect illustration of this structure of analysis appears in *Du Toit v Minister of Transport*. In *Du Toit*, the applicant challenged the amount of compensation awarded by the Supreme Court of Appeal for the expropriation of a quantity of gravel from his farm.[1] Mokgoro J, writing for the majority, treated the decision whether leave to appeal should be granted as a 'preliminary question' and decided it according to fairly abstract criteria, such as the importance of the subject matter of the dispute and the need to create certainty in the application of the Expropriation Act.[2] Mokgoro J thus dealt with the granting of leave to appeal *before* engaging with the merits — and eventually rejected the claim. Langa ACJ, in a dissenting judgment in which three judges concurred, dismissed the application for leave to appeal on the grounds that it bore no prospects of success.[3]

The majority and minority in *Du Toit* therefore reached the same conclusion, i e that the compensation paid for the expropriation of the gravel was just and equitable. But the way in which the minority judgment phrased this finding came close to a holding that the question whether a constitutional right had been violated was crucial to the interests of justice test and not only to the later enquiry into the merits:

> Given that it is our conclusion that the compensation awarded was not inconsistent with the Constitution, the applicant had no prospects of success. The applicant did not point to any other considerations relevant to the interests of justice which would suggest the application should have been granted. In my view, therefore, the application for leave to appeal should have been dismissed on this basis.[4]

In addition, the minority judgment seemed to suggest that the appeal should fail because no constitutional matter had been raised:

> If the compensation awarded by the Supreme Court of Appeal is just and equitable as contemplated by section 25(3) of the Constitution, then the applicant has no cause for constitutional complaint, no matter how the compensation was calculated in other courts. The applicant would accordingly have no prospects of obtaining relief in this Court.[5]

For reasons explained below, I am quite sympathetic to the minority view that the Constitutional Court should not hear a case when there is no contention that a constitutional standard (in this case that compensation should be just and equitable) has been 'notionally' violated. Typically, however, there *is* such a contention, and the Constitutional Court must therefore engage in a preliminary analysis of the merits. In many cases, the level of constitutional analysis used for this assessment (whether conducted at the jurisdiction or the interests of justice stage) amounts to no more than a qualified guess. It is also possible for the Constitutional Court to decide the prospects of success question without engaging

[1] 2006 (1) SA 297 (CC), 2005 (11) BCLR 1053 (CC).
[2] Act 63 of 1975 (ibid at para 25).
[3] Ibid at para 57.
[4] Ibid at para 88.
[5] Ibid at para 85.

the merits at all: such occasions arise where the lower courts have divided over the matter in question.[1] But in many cases, as we have seen, the Court has engaged in a full assessment of the merits before either declining jurisdiction or refusing leave to appeal, and there is no reason to suspect that it will not continue to do so again in the future.

What this means is that the dividing line between jurisdiction and access is not as clear as the Constitutional Court has sometimes proclaimed it to be. Both stages of the constitutional enquiry serve a similar purpose, i e ensuring that the Court hears and decides only those cases that it should hear based on the function it performs in the judicial system and the constitutional system more generally. In both the enquiry into jurisdiction and the granting of leave to appeal, the Court fulfils its constitutionally mandated role of ensuring (a) that other courts are given an opportunity to contribute to the development of constitutional law doctrine and (b) that judicial resources are not wasted.

This chapter formally deals with jurisdiction. Since the access enquiry is complementary to the jurisdiction enquiry, however, the relation between these two stages is also addressed.

3 JURISDICTION

(a) The threshold requirement of finding a 'constitutional matter'

The Constitutional Court is a specialized court since, according to s 167(3)*(b)*, it may decide only constitutional matters and issues connected with decisions on constitutional matters. This description of the Court's jurisdiction, which the Court itself has called a 'definition',[2] makes the question whether a constitutional matter is raised as a 'threshold enquiry'[3] in every case.

The question of what constitutes a 'constitutional matter' has preoccupied the Constitutional Court and other courts in a considerable number of judgments. It has also been discussed in the academic literature. In the case law the question at stake is usually very specific, the more general question is whether an overarching definition, or comprehensive theory, of the jurisdiction of the Constitutional Court can be derived from the Final Constitution and the Court's judgments. Additionally, the question has been asked as to whether, in a constitutional system in which the Final Constitution is supreme and its values permeate every aspect of the law, the distinction between constitutional and non-constitutional matters can be sustained.[4]

[1] *NEHAWU* (supra) at para 26.

[2] *Alexkor Limited v Richtersveld Community & Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) at para 21.

[3] See *Fraser* (supra) at para 35. In *Boesak*, it is called a 'threshold requirement' *Boesak* (supra) at para 11.

[4] See Carole Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex court in South Africa' (2005) 21 *SAJHR* 509. See also Frank Michelman 'The Rule of Law, Legality and Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11 at § 11.2.

(i) *Just labels: 'constitutional matter', 'constitutional issue', 'constitutional question'*

In the Constitutional Court's jurisprudence, the terms 'constitutional issue', 'constitutional question' and 'constitutional nature' are used synonymously with 'constitutional matter'.[1] Some judgments have also used the terms 'constitutional issue of substance'[2,] 'constitutional substratum',[3] and even 'jurisdictional matter'.[4]

To some extent, the proliferation of terms may be explained by the inexact wording of the Interim Constitution.[5] IC s 98(2) stated that the Constitutional Court should have jurisdiction over all '*matters* relating to the interpretation, protection and enforcement of the provisions of this Constitution' (my emphasis). However, in IC s 102(3) (dealing with referrals of cases from the Supreme Court to the Constitutional Court), the Interim Constitution used the phrase 'constitutional and other *issues*' (my emphasis), and went on to use 'constitutional issue' for the better part of that section.[6]

In the judgments of the Constitutional Court, all of the above terms are still common and no distinct meaning is attached to any of them. The Final Constitution itself avoids the linguistic confusion of its predecessor and sticks to the phrase 'constitutional matter', using 'issue' only in the term 'issues connected with decisions on constitutional matters' and in FC s 167(7), where a constitutional matter is said to include 'any issue involving the interpretation, protection or enforcement of the Constitution'. This suggests that the term 'issue' connotes something narrower than 'matter', but nothing appears to turn on this. In the course of this chapter, only the term 'constitutional matter' will accordingly be used.

(ii) *The Constitutional Court has not embraced any concept of 'constitutional matter'*

How has the Constitutional Court itself approached the apparent contradiction that it has, on the one hand, a far-reaching transformative task and, on the other, only a limited jurisdiction to decide constitutional matters? To start with, it has

[1] See, eg, *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC) at para 12; *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 59; *Lane & Fey NNO v Dabelstein & Others* 2001 (2) SA 1187 (CC), 2001 (4) BCLR 312 (CC) at para 5; *Van Der Walt v Metcash Trading Limited* 2002 (4) SA 317 (CC), 2002 (5) BCLR 454 (CC) at paras 14 , 81; *S v Thebus & Another* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC) at para 9; *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province & Others* 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC) at para 40; *Union of Refugee Women & Others v Private Security Industry Regulatory Authority & Others* 2007 (4) SA 395 (CC), 2007 (4) BCLR 339 (CC) at para 23.

[2] *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) at para 23.

[3] *Phoebus Apollo Aviation* (supra) at para 3.

[4] *Prophet v National Director of Public Prosecutions* 2007 (2) BCLR 140 (CC) at para 45.

[5] Act 200 of 1993.

[6] To complicate matters even further, IC s 102(12) introduced the notion of 'issues of constitutionality'.

identified the important connection that exists between any concept of its jurisdiction (following from its institutional imperatives) and the major criterion for triggering that jurisdiction, i e that the case should involve a 'constitutional matter'. The Constitutional Court has stated that it regards its jurisdiction as 'clearly … extensive'[1] and that it would be inappropriate to construe the term 'constitutional matter' narrowly. [2] The second statement follows logically from the first as it would be impossible for the Court to have jurisdiction in respect of a wide range of cases unless the term used to define its jurisdiction were interpreted in such a way as to cater to that wide range.

Apart from these statements, however, the Constitutional Court has thus far not provided an all-embracing definition or a principled understanding of the term 'constitutional matter'. Instead, the Court has decided on a largely *ad hoc* basis whether particular cases have involved constitutional matters or not. In *Boesak*, the Constitutional Court went so far to say that '[t]he Constitution offers no definition of a constitutional matter, or an issue connected with a decision on a constitutional matter. Section 167(3)*(c)* leaves that ultimately to the Constitutional Court to decide.'[3] This statement is true as a matter of the plain wording of the Constitution. There is indeed no section that offers a clear-cut definition in the style of 'a constitutional matter is a matter in which …' The only reference to the meaning of the phrase 'constitutional matter' is in FC s 167(7), and here the phrase is non-exhaustively explained as *including* 'any issue involving the interpretation, protection or enforcement of the Constitution'.[4]

Rather than providing a definition, the Constitutional Court's preferred approach has been to compile lists of case categories or standard issues that it regards as involving constitutional matters. The first such list was drawn up in *Boesak* by Langa DP (as he then was):

> If regard is had to the provisions of section 172(1)*(a)* and section 167(4)*(a)* of the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of state. Under section 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters. So too, under section 39(2), is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights.[5]

[1] *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC) at para 14

[2] *Fraser* (supra) at para 37

[3] *Boesak* (supra) at para 13 (footnote omitted).

[4] See *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa & Another* 2005 (4) SA 319, 2005 (3) BCLR 231 (CC) at para 19 (Court held that '[an] application [for leave to appeal] must raise a constitutional matter, *in other words* an issue which involves the interpretation, protection or enforcement of the Constitution' (my emphasis). This statement incorrectly elevates FC s 167(7) to the status of a definition.) Cf Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th ed, 2005) 103 (Treats FC s 167(7) as a definition).

[5] *Boesak* (supra) at para 14 (footnotes omitted).

In this passage, the Court identified four kinds of case that involve constitutional matters within the meaning of FC s 167(3). It did not, however, suggest that this list was comprehensive. Rather, the Court went on to say that it was neither necessary nor desirable to attempt to define the limits of its jurisdiction.[1] It is nevertheless noteworthy that the Court included only one area of exclusive jurisdiction (FC s 167(4)*(a)* — disputes between organs of state) of the six possible areas in FC s 167(4). The Court also significantly misquoted FC s 167(7) by substituting the terms *'application and upholding'* for *'protection or enforcement'*.

Six years after *Boesak*, in *Fraser v ABSA Bank Ltd*, the Court compiled a second list of cases that it said would necessarily involve a constitutional matter:

> This Court has held that a constitutional matter is presented where a claim involves: (a) the interpretation, application or upholding of the Constitution itself, including issues concerning the status, powers or functions of an organ of state and disputes between organs of state; (b) the development of (or the failure to develop) the common law in accordance with the spirit, purport and objects of the Bill of Rights; (c) a statute that conflicts with a requirement or restriction imposed by the Constitution; (d) the interpretation of a statute in accordance with the spirit, purport and objects of the Bill of Rights (or the failure to do so); (e) the erroneous interpretation or application of legislation that has been enacted to give effect to a constitutional right or in compliance with the legislature's constitutional responsibilities; or (f) executive or administrative action that conflicts with a requirement or restriction imposed by the Constitution.[2]

Though more comprehensive than the *Boesak* list, the *Fraser* list is not exhaustive either. Nor, like its predecessor, does it purport to offer anything more than a provisional list of the type of cases in which the Court has assumed jurisdiction.

The Constitutional Court's reluctance to define the term 'constitutional matter' does not mean that it is not possible or useful to specify or at least describe the term for purposes of FC s 167(3). A principled understanding of the extent and limits of the Constitutional Court's jurisdiction can only strengthen the working relationship between Bloemfontein and Constitution Hill. In addition, litigants are entitled to know in advance whether it is more or less likely that they will be able to approach the Constitutional Court.

The rest of this chapter tries to provide such a principled understanding by starting with the *Fraser* list. It then expands upon this list on the basis of a functionalist reading of the Constitutional Court's role in the judicial system.

(iii) *The* Fraser *list of case types in which the Constitutional Court has jurisdiction*

It is immediately apparent that the list of case types the Constitutional Court compiled in its judgment in *Fraser* is fragmentary at best. As seen in the passage quoted above, the Court introduces its list with the statement that it 'has held that

[1] *Boesak* (supra) at para 14.
[2] 2007 (3) SA 484 (CC), 2007 (3) BCLR 219 (CC) at para 38 (footnotes omitted).

a constitutional matter is presented' whenever a claim involves one of six categories. A cursory glance at its record, however, reveals that the Constitutional Court has decided cases that do not fall into any of these categories (for example, the provincial certification judgments,[1] which involved the Court's exclusive jurisdiction under FC s 167(4)*(f)*, and its various judgments on the constitutionality of constitutional amendments,[2] in which its jurisdiction was based on FC s 167(4)*(d)*).

The first category in the *Fraser* list (category (a): 'the interpretation, application or upholding of the Constitution itself, including issues concerning the status, powers or functions of an organ of state and disputes between organs of state') is a particularly odd example of legal systematization. Its origin is the predecessor list from the Court's judgment in *Boesak*. For no apparent reason, the *Fraser* Court collapses what were two categories in *Boesak* into one, making 'the interpretation, application or upholding of the Constitution itself' a general category into which 'issues concerning the status, powers or functions of an organ of state and disputes between organs of state' are made to fit. In restating the first part of this new, overarching category, the Court cites *Boesak's* reference to FC s 167(7), but repeats its earlier error in misquoting the constitutional provision (*'protection or enforcement'* being once again replaced with *'application and upholding'*). Or perhaps the Court is not misquoting FC s 167(7) — but deliberately reinterpreting it. If so, we are not provided with any reasons for its decision.

The next problem with category (a) is that it is not entirely clear why the second part of this category — disputes between organs of state — is made a subset of the first part. Perhaps the Court wanted to say that every dispute between organs of state necessarily involves an exercise of constitutional interpretation, application or upholding. This would turn FC s 167(7) into an overarching category that covers other categories of constitutional matter. As I argue below, there are, indeed, good reasons for such an understanding of FC s 167(7). If this is what the *Fraser* Court wanted to say, however, then it is not clear why disputes between

[1] *Speaker of the KwaZulu-Natal Provincial Legislature, Ex Parte: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996* 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC); *Speaker of the Western Cape Provincial Legislature, Ex Parte: In re Certification of the Constitution of the Western Cape, 1997* 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC) and *Speaker of the Western Cape Provincial Legislature, Ex Parte: In re Certification of the Amended Text of Constitution of the Western Cape, 1997* 1998 (1) SA 655 (CC), 1997 (12) BCLR 1653 (CC).

[2] See *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC) at para 34. *Matatiele* was decided just months before *Fraser*. See also *United Democratic Movement v President of the Republic of South Africa & Others (1)* 2003 (1) SA 488 (CC), 2002 (11) BCLR 1179 (CC) and *United Democratic Movement v President of the Republic of South Africa & Others (2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1213 (CC); *African National Congress & Others v United Democratic Movement & Others (Krog & Others Intervening)* 2003 (1) SA 533 (CC), 2003 (1) BCLR 1 (CC). See also *African National Congress & Others v United Democratic Movement & Others* (supra) at para 13. Admittedly, of these judgments, only the last one explicitly mentions the Constitutional Court's exclusive jurisdiction and does so without reference to FC s 167(4)*(d)*. Nevertheless, the Court in *Fraser* must have been well aware that its jurisdiction was not confined to FC s 167(4)*(a)*.

organs of state in terms of FC s 167(4)*(a)* involve the 'interpretation, application or upholding' of the Final Constitution, but other categories of exclusive jurisdiction in FC s 167(4) do not engage 'interpretation, application or upholding' of the Final Constitution. There is also some sloppy citation here, because neither *Boesak* nor *Fraser* refers to the only case the Constitutional Court has thus far decided under FC s 167(4)*(a)*: *Premier of the Western Cape v President of South Africa & Another*.[1]

Category (c) — cases involving 'a statute that conflicts with a requirement or restriction imposed by the Constitution' — is not supported by any case citations at all. We are therefore left wondering whether this category refers only to cases involving the confirmation of orders of invalidity, or whether it goes beyond FC s 167(5).

Even if the *Fraser* list and the Court's treatment of the jurisdictional issue in that case do not provide us with a comprehensive overview of cases in which the Constitutional Court has assumed jurisdiction, they do at least re-enforce the distinction between constitutional matters and non-constitutional matters. They also draw attention to the fact that we may be able to identify certain types of case in which the Constitutional Court will always have jurisdiction. However, the Court's case category approach is limited. Instead of compiling a list of cases over which the Court has assumed jurisdiction, it may be more instructive to start with the Constitution itself. Following this approach, three broad categories of constitutional matter suggest themselves:

- constitutional matters falling under the Court's exclusive jurisdiction;
- constitutional matters that are explicitly mentioned as falling under the Constitutional Court's concurrent jurisdiction; and
- other constitutional matters not explicitly mentioned in the Constitution.

(b) FC s 167(4): Constitutional matters falling under the Court's exclusive jurisdiction

FC s 167(4) lists six different types of dispute in which the Constitutional Court enjoys exclusive jurisdiction.[2] All of these types of dispute must by implication involve a constitutional matter since it is inconceivable that the Constitutional Court could assume jurisdiction on one of the grounds listed in subparas *(a)-(f)* and at the same time decline jurisdiction for want of a constitutional matter. FC s 167(4) in this way serves two functions: it defines a core set of cases that constitute constitutional matters, and denies other courts the jurisdiction to hear such cases.

The six categories of case falling under the Constitutional Court's exclusive jurisdiction correspond to the Court's primary function as guardian and final interpreter of the Constitution, as outlined in § 4.2*(a)* above. All of the categories

[1] 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC) at para 2.

[2] Admittedly, the Constitutional Court's responsibility to certify provincial constitutions as set out in FC s 167(4)*(f)* does not relate to typical dispute resolution.

in FC s 167(4) have to do with disputes in which the other spheres of government are directly involved. In this way, the Constitutional Court is tasked with ensuring that the structural principles of the South African political system as envisaged in the Constitution are upheld. When it adjudicates in such conflicts it not only acts as a neutral arbiter. It also exercises a decidedly political function:

> The Constitutional Court has been given the responsibility of being the ultimate guardian of the Constitution and its values. Section 167(4) thus confers exclusive jurisdiction to this Court in a number of crucial political areas which include the power to decide disputes between organs of state in the national and provincial sphere, to decide on the constitutionality of any parliamentary or provincial Bill, to decide on the constitutionality of any amendment to the Constitution and to decide whether Parliament or the President has failed to fulfil a constitutional obligation. . . . It follows that the drafters of the Constitution necessarily envisaged that this Court would be called upon to adjudicate finally in respect of issues which would inevitably have important political consequences.[1]

In adjudicating disputes within its exclusive jurisdiction the Constitutional Court fulfils its function as the political head of the judicial branch of government. In so doing, it assumes a status in the constitutional system equal to that of the other branches.

The exclusion of other courts from matters falling with this part of the Constitutional Court's jurisdiction is an exception to the general rule that the Constitution vests the judicial authority of South Africa in *all* courts (FC s 165(1)). It is also a deviation from the principle that a decision of a court of first instance should be subject to appeal. As the Constitutional Court has repeatedly pointed out, it is not generally desirable for a court to sit as a court of first and last instance,[2] and this should accordingly occur in exceptional circumstances only.[3] The notion that certain matters should fall within the exclusive jurisdiction of the Constitutional Court therefore has to be justified.

The first plausible justification for FC s 167(4) is that the provision for exclusive jurisdiction is a means to speed up the judicial process in certain cases. In the absence of hearings before other courts, the 'final word' on the meaning of the Final Constitution is inevitably delivered sooner. Since disputes between organs of state, branches of government and the executive and the legislature may interrupt the smooth functioning of the political system, it is appropriate that these disputes should be decided expeditiously in this way.

The second justification is based on less practical considerations: In its own way, the provision for exclusive jurisdiction serves the goal of separation of

[1] *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) ('*SARFU II*') at paras 72-73.

[2] See *Bruce & Another v Fleecytex Johannesburg CC & Others* 1998 (2) SA 1143 (CC), 1998 (4) BCLR 415 (CC) at paras 7-9.

[3] See *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC), 1998 (12) BCLR 1449 (CC) at para 4; *Dormehl v Minister of Justice* 2000 (2) SA 987 (CC), 2000 (5) BCLR 471 (CC) at para 5.

powers. In a constitutional state where judges can review everything the other branches of government do, the judiciary as an institution enjoys a high level of political influence. In the long term the other political actors have to accept this fact as a necessary part of a constitutional system that also serves their interests.[1] Although in a system of checks and balances all three branches of government in principle control each other, the practical reality is that the judiciary does most of the controlling. There are more cases to be decided by judges than judges to be elected, and more administrative action to be reviewed than court budgets to be negotiated. Against this background, even in a system of comprehensive judicial review (of both government action and legislation), the judiciary's control function has to be exercised with a certain amount of diplomacy.

The Final Constitution entrusts the Constitutional Court with sufficient institutional power to act on the same level as the political branches of government. This is of particular importance in disputes where the political branches are directly involved as parties. Here, their constitutionally enshrined status and their function in the political system make it appropriate that the dispute be decided by an institution of equal importance and political weight. The relevant point is not so much the intrusion into another branch's territory (the review of legislation that is already in force is after all a much stronger intrusion into the political branches' domain than the adjudication of a dispute between organs of state). It is rather that there is a legitimate expectation on the part of the legislature and the executive about which institution and therefore which individuals are appropriate to deal with their disputes. This expectation is based more on perception than judicial capability. Nevertheless, the status of the judges that perform a particular function is important for the acceptance of their decisions by the other branches of government. A certain amount of diplomacy and what may be called 'institutional respect' is thus inherent in the concept of exclusive jurisdiction.

It is this 'institutional respect' that links the idea of exclusive jurisdiction to the separation of powers doctrine: a connection frequently referred to in judgments by the Constitutional Court.[2] This correlation is particularly visible in the Court's three decisions in *President of the Republic of South Africa & Others v South African Rugby Football Union & Others*.[3] The case dealt with the decision of the President

[1] For an argument about the way the Constitutional Court has developed its jurisprudence to ensure that its decisions are indeed respected by the government and Parliament, and to a lesser extent by the public, see Theunis Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International J of Constitutional Law* (forthcoming).

[2] For an analysis of the Court's understanding of this issue, see Sanele Sibanda & Sebastian Seedorf 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12.

[3] See *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (2) SA 14 (CC), 1999 (2) BCLR 175 (CC); *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) and *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC).

to appoint a commission of enquiry into the affairs of organized rugby in South Africa. The High Court decided that some of the applicants' factual claims needed clarification and ordered the President to give oral evidence. On appeal, the Constitutional Court did not completely rule out the possibility that the President may be required by a court of law to give evidence in relation to the performance of his official duties. But it emphasized that such a decision would require special consideration:

> [T]here is the public interest in ensuring that the dignity and status of the President is preserved and protected, that the efficiency of the executive is not impeded and that a robust and open discussion take place unhindered at meetings of the Cabinet when sensitive and important matters of policy are discussed. Careful consideration must therefore be given to a decision compelling the President to give evidence and such an order should not be made unless the interests of justice clearly demand that this be done. The judiciary must exercise appropriate restraint in such cases, sensitive to the status of the head of state and the integrity of the executive arm of government.[1]

In another part of the decision, the Constitutional Court considered the purpose of its exclusive jurisdiction:

> The purpose of these provisions . . . is to preserve the comity between the judicial branch of government on the one hand and the legislative and executive branches of government on the other, by ensuring that only the highest court in constitutional matters intrudes into the domains of the principal legislative and executive organs of state.[2]

The Court later confirmed this reasoning in explaining why the Final Constitution granted it exclusive jurisdiction in all of the areas listed in FC s 167(4).[3]

The same considerations inform both the general notion of judicial restraint in terms of the separation of powers and the idea of exclusive jurisdiction: there is no substantial difference between a preservation of the 'dignity and status' of the President and the idea of 'comity' towards the legislative and executive branches of government. Through the doctrine of separation of powers, and in particular the Constitutional Court's invocation of it,[4] the courts show institutional respect for the other branches. In matters involving the Constitutional Court's exclusive jurisdiction, the Constitution ensures that the same institutional respect is maintained by preventing courts other than the Constitutional Court from hearing such cases.

[1] *SARFU III* (supra) at para 243.

[2] See *SARFU I* (supra) at para 29. On the meaning of FC s 172(2), but endorsed more broadly in relation to 'provisions of the Constitution which confer exclusive jurisdiction upon [the Constitutional Court] to decide certain constitutional matters', see *President of the Republic of South Africa & Others v United Democratic Movement & Others*. 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC) at para 20.

[3] *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 23.

[4] See Sanele Sibanda & Sebastian Seedorf 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12 at § 12.3*(d)*(ii)*(aa)*; Roux 'Principle and Pragmatism' (supra).

It is interesting to note that other constitutional democracies, too, subscribe to the idea that the highest court in the land should enjoy exclusive jurisdiction with regard to disputes in which other important political actors — such as the head of government, members of the national executive or the chairperson of the national parliament — are involved. The jurisdiction of the German Federal Constitutional Court, for example, is almost entirely exclusive. Article 93 of the German *Grundgesetz* enumerates seven types of dispute falling in its jurisdiction, six of which are exclusive, including 'disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law' (art 93(1) No 1).[1] Only the category of 'Constitutional Complaints' (*Verfassungsbeschwerde*) according to arts 93(1) No 4a and 94(2) has a quasi-appeal character, since a claimant may be required to exhaust all other legal remedies before filing a claim. In certain other proceedings, such as 'concrete norm control' (*konkrete Normenkontrolle*, art 100(1)), other courts must refer the matter to the Constitutional Court. Thus, another court is inserted between the plaintiff and the Constitutional Court, although only the Constitutional Court may decide on the constitutionality of acts of parliament.

The jurisdiction of the US Supreme Court is comprised of two types: original jurisdiction, in which the court acts as a court of first instance or as a trial court, and appellate jurisdiction. Article III Section 2 of the Constitution grants original jurisdiction to the US Supreme Court over cases affecting ambassadors, other public ministers and consuls, and those to which a state is party (in all other cases the US Supreme Court is granted appellate jurisdiction). While in most legal systems, original and exclusive jurisdiction for the highest court are the same thing, the US Supreme Court has held that Congress can give the lower federal courts concurrent jurisdiction even when the Constitution specifies that the Supreme Court should have original jurisdiction.[2] Effectively, the US Supreme Court only assumes exclusive jurisdiction in disputes between two or more states.[3]

[1] According to s 63 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*) only these institutions are 'highest organs of the state' and have standing in disputes with the exclusive jurisdiction of the Bundesverfassungsgericht in terms of art 93(1) No. 1 of the Basic Law: The President of the Federal Republic of Germany, the Bundestag (Parliament), the Bundesrat (Federal Council of Provinces), the Federal Government and those parts of these organs that have been vested with own rights either in the Grundgesetz or in the rules and orders of the Bundestag or the Bundesrat. However, this limited provision has been extended by the Bundesverfassungsgericht to the Chancellor and every Minister of the Federal Government individually (BVerfGE 67, 100 ('*Flick-Untersuchungsausschuss*' ['*Flick-Parliamentary Commissions of Enquiry*']), individual members, groups and caucuses of Parliament (BVerfGE 80, 188 ('*Wüppesahl*') and political parties (BVerfGE 1, 208, 223 ('*7,5%-Sperrklausel*' ['*7,5%-minimum threshold*'])).

[2] See *Ames v Kansas ex rel/ Johnson* 111 US 449, 464 (1884).

[3] The original jurisdiction of the Supreme Court is laid out by statute in 28 USC § 1251. The section provides that the Supreme Court shall have original *and* exclusive jurisdiction over all controversies between two or more States. In actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties, in all controversies between the United States and a State and in all actions or proceedings by a State against the citizens of another State or against aliens, the Supreme Court shall have only original *but not* exclusive jurisdiction. In these cases, the plaintiff has the option to initiate proceedings directly in the Supreme Court.

The Constitutional Court of South Africa has stated that the more important and complex the issues in a case, the more compelling the need for it to be assisted by the views of another court.[1] In matters involving its exclusive jurisdiction, however, the Court cannot enjoy the benefit and assistance of the views of other courts. In these cases, it is precisely the importance of the matters at stake for the overall constitutional structure that requires the Constitutional Court to be a court of first and last instance.

On several occasions, the South African Constitutional Court has been confronted with litigants who sought to bring their matter directly to it, bypassing the High Court and the Supreme Court of Appeal. The Constitutional Court has declined to hear most of these cases. Its grounds for rejecting these cases, however, have mostly been based on FC s 167(6)*(a)*, i e on whether it was in the interests of justice for the Court to hear the matter as a court of first instance, and not on considerations related to its jurisdiction.[2] The basis of the Court's approach in this regard is that only in exceptional circumstances should direct access be granted, because in such cases it does not enjoy the benefits and the assistance of the views of other courts on the matter before it.[3]

A similar approach should be followed in understanding the Constitutional Court's exclusive jurisdiction in terms of FC s 167(4): Because exclusive jurisdiction is an exception to the general rule that the judicial authority vests in all courts, this category of cases should be narrowly construed.

(i) *Disputes between organs of state, FC s 167(4)*(a)

Although 'organ of state' is a term defined in FC s 239, this category of exclusive jurisdiction is the one most open to interpretation. Even the Final Constitution's detailed definition still leaves ample room for differing views about what institutions qualify as organs of state.[4]

[1] See *Mkontwana v Nelson Mandela Metropolitan Municipality & Another; Bissett & Others v Buffalo City Municipality & Others; Transfer Rights Action Campaign & Others v MEC, Local Government and Housing, Gauteng & Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC) at para 11.

[2] See, eg, *Mkontwana* (supra) at para 11 (Contains additional references.)

[3] This approach has been criticized by Jackie Dugard. She argues that the Court's practice regarding direct access applications does not adequately facilitate the uptake of issues affecting the fundamental rights of poor people. In so doing, the Court has failed to live up to its transformative promise. Jackie Dugard 'Court of First Instance?: Towards a Pro-Poor Jurisdiction for the South African Constitutional Court' (2006) 22 *SAJHR* 261.

[4] See Stu Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.4*(f)*(On whether a department of state acts as an organ of state when entering into contracts or whether privatized formerly state-run entities qualify as organs of state.) One may also ask whether any functionary or institution exercising a public power or performing a public function in terms of the common law (as opposed to legislation) would qualify as an organ of state in terms of FC s 239.

One would expect that, since the definition in FC s 239 is rather broad, disputes between organs of state relying on the Court's exclusive jurisdiction under FC s 167(4)*(a)* would not be uncommon.[1] FC s 167(4)*(a)*, however, includes two qualifiers limiting the scope of the Court's jurisdiction in this respect. First, it refers only to organs of state in the national or provincial sphere, thereby excluding from its ambit disputes between organs of state in the local government sphere.[2] The second qualification is that the dispute between organs of state must concern their 'constitutional status, powers or functions'.

At first glance, the second qualification on the Court's jurisdiction under FC 167(4)*(a)* seems to be contradictory: Is the status of every organ of state not derived from the Constitution and do they not all exercise their powers and functions subject to the Final Constitution? In its leading judgment on this matter, *National Gambling Board v Premier of KwaZulu-Natal & Others*, [3] the Constitutional Court accepted this point, but held that, in the context of exclusive jurisdiction, it was necessary to go beyond the obvious. While the Court had no difficulty in asserting that the parties to the case[4] were indeed organs of state in terms of FC s 239, it was unsympathetic to the applicant's view that every power which is traceable to the Final Constitution is a 'constitutional power' within the meaning of FC 167(4)*(a)*, and likewise that every issue of constitutional status or function, is an issue capable of founding the Court's exclusive jurisdiction under this subparagraph.[5] Certainly, the Court held, in a constitutional state all public power is derived from the Final Constitution.[6] But if the word 'constitutional' in FC s 167(4)*(a)* is understood only to repeat this basic principle, it would follow that every dispute between organs of state concerning their status, powers or functions would be a matter exclusively within the Constitutional Court's jurisdiction. This result, the Court implied, was not desirable, and the word 'constitutional' in the phrase 'constitutional status, powers or functions' would serve no

[1] However, the Constitutional Court has thus far decided only one case explicitly on the basis of this section: *Premier of the Western Cape v President of South Africa & Another* 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC). This case is discussed below. See *Executive Council Province of the Western Cape v Minister for Provincial Affairs; Executive Council KwaZulu-Natal v President of the Republic of South Africa* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at para 10. (Court considered exclusive jurisdiction and held that it was unclear what it was characterized by: the identity of the parties to the dispute or the subject matter of the dispute. Eventually, these questions were left undecided because the right of the parties to come directly to the Constitutional Court was not put in issue and the Court was satisfied that the interests of justice required that leave to come directly to it be granted.)

[2] See *National Gambling Board v Premier of KwaZulu Natal & Others* 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 (CC) at para 20.

[3] 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 (CC).

[4] The National Gambling Board, the Minister of Trade and Industry, the Premier of KwaZulu-Natal and the KwaZulu-Natal Gambling Board.

[5] *National Gambling Board* (supra) at para 23.

[6] See *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC); *Pharmaceutical Manufacturers Association of SA in re: the Ex Parte Application of the President of the RSA & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC). For a discussion of these judgments, see § 4.3*(d)*(ii).

purpose.[1] Rather, the subparagraph had to be narrowly construed so as to balance the need for the Court to hear certain matters as a court of first and last instance against the countervailing principle that, in general, it was better for it to have the benefit of other courts' views.

What then is the meaning of 'constitutional status, powers or functions' in FC s 167(4)*(a)*? The Constitutional Court in *National Gambling Board* found assistance in the definition of 'organ of state' in FC s 239:

> In paragraph *(b)* of the definition of organ of state, a distinction is made between an institution or functionary 'exercising a power or performing a function in terms of the Constitution' and those doing so 'in terms of any legislation'. The word 'constitutional' in section 167(4)*(a)* encapsulates the same distinction: It refers to status, powers or functions explicitly or by implication provided for in terms of the Constitution as opposed to those provided for in terms of any legislation. Put differently, the term 'constitutional status, powers or functions' in section 167(4)*(a)* means status, powers or functions derived directly from the Constitution.[2]

The Court here used a criterion that is consistent with the general principle that the ambit of its exclusive jurisdiction should be narrowly construed. Additionally, one can read a principle of proximity into the Court's reasoning: the closer the rights, or 'status, powers or functions' in question are to a constitutional provision, the more likely it is that they will trigger the Constitutional Court's exclusive jurisdiction. This principle characterizes the Court's exclusive jurisdiction as something that lies at the core of constitutional adjudication, and which is directly connected to its primary function as the guardian and final interpreter of the Constitution. The more important part of the Constitutional Court's approach in *National Gambling Board*, in other words, is not the (formal) criterion of absence of legislation, but the substantive criterion that the status, powers or functions in dispute should be *explicitly or by implication* provided for in the Constitution. Take for example legislation that prescribes the privileges and immunities of the National Assembly, Cabinet members and members of the Assembly, as contemplated in FC s 58(2). Is any dispute concerning these privileges automatically outside the scope of FC s 167(4)*(a)* because the privileges are based on legislation and not derived directly from the Constitution? Surely not. While keeping the exceptional nature of exclusive jurisdiction in mind, the Constitutional Court should determine whether the rights in question are genuinely founded on legislation or whether they are in fact, or by implication, provided by the Constitution. Such a substantive understanding of this part of its exclusive jurisdiction would give the Court the necessary discretion to avoid any over-interpretation of its mandate while at the same time taking into account the institutional respect due to the parties involved and the purpose of FC s 167(4)*(a)*.

[1] *National Gambling Board* (supra) at para 23.
[2] Ibid at para 24.

In *National Gambling Board*, the Constitutional Court rejected the argument that the dispute involved these core constitutional issues, and held that it was a simple conflict between a national and a provincial Act that fell to be resolved in terms of FC ss 146, 148 and 150.[1] In its judgment, the Court emphasized that the dispute was about the effect of the legislation and not the power to make it.[2] This statement is quite revealing. It is clear that the Constitutional Court had in mind a standard situation with regard to the sort of dispute that would fall under FC s 167(4)*(a)*, i e disputes about the respective legislative competence of the National Assembly and the provinces in terms of FC ss 44 and 104, and Schedules 4 and 5 of the Constitution.

This understanding of the purpose of FC s 167(4)*(a)* has much to recommend it. If the National Assembly passes legislation with regard to a matter falling within a functional area listed in Schedule 5 (exclusive provincial legislative competence) it can only do so by way of 'intervention' in terms of FC s 44(2). Whether the preconditions of FC s 44(2) are met is a matter of constitutional interpretation and thus any dispute over the National Assembly's power to pass such legislation would be a dispute about a power derived directly from the Constitution. The same argument would apply if a province legislated with regard to a matter which that was allegedly outside one of the functional areas listed in Schedule 4 or 5. Here, the allegation would be that the province had intruded on the exclusive legislative domain of the National Assembly, which is a power derived directly from the Final Constitution. Such a dispute would accordingly fall into the Constitutional Court's exclusive jurisdiction.

On the other hand, if both Parliament and the provincial legislatures are entitled to legislate on a particular matter — as was the case in *National Gambling Board*, which concerned 'Casinos, racing, gambling and wagering, excluding lotteries and sports pools' as provided for in Schedule 4 Part A of the Final Constitution — the question of which legislation should prevail would not depend on the status, powers or functions of Parliament or the province concerned. To be sure, the case would involve the interpretation of the Constitution, i e whether the conditions of FC s 146(2) or 146(3) had been met. But this would not be enough to bring the case within the Constitutional Court's exclusive jurisdiction since the powers of both Parliament and the provincial legislature to legislate on the matter would by definition not be in dispute. This reading is supported by the text of FC s 146(4) and FC s 150. These sections respectively refer to 'a court' and 'every court' and imply that disputes over matters of concurrent legislative competence are not exclusively for the Constitutional Court to decide.

The Constitutional Court's understanding of the constitutional status, powers and functions of organs of state is well illustrated by *Premier of the Western Cape v President of South Africa & Another*[3] — the only case the Court has thus far decided

[1] *National Gambling Board* (supra) at paras 25-26.
[2] Ibid at para 26.
[3] 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC).

under FC s 167(4)*(a)*. At first glance, the Court's conceptual engagement with the issue of jurisdiction in this case is rather feeble: Chaskalson P, writing for a unanimous Court, simply asserts the exclusive jurisdiction of the Constitutional Court to hear the matter without providing any reasons.[1] But, on a closer reading, the Court's decision is squarely in line with its more elaborate reasoning in *National Gambling Board* two and a half years later.

The dispute in *Premier of the Western Cape* concerned an amendment to the Public Service Act with repercussions for the way in which provinces were administered. Properly understood, the conflict between the national and provincial sphere was not about their respective legislative competences but about whether the national legislation at issue infringed the executive authority of the Western Cape, as set out in FC s 125. The precise question was whether Parliament had the competence to prescribe to provinces how to structure their respective administrations.[2] In answering this question, the Court held that FC s 197, which provides for a public service in South Africa, directly confers on Parliament the necessary power to regulate the structure of the public service, both for the national and the provincial sphere, and that no implied provincial executive power was infringed by the contested legislation.[3] In the Court's words:

> [T]he competence concerning the structure and functioning of the public service is dealt with specifically in the Constitution, and was not left to be dealt with under the general legislative power conferred on parliament by section 44(1)(a).[4]

The second aspect of the Court's judgment in *Premier of the Western Cape* had to do with an alleged infringement of the principle of co-operative government in Chapter 3 of the Final Constitution. As it turned out, the Court largely rejected this contention, but for the purposes of this chapter the relevant question is whether any case between two organs of state (solely) based on an infringement of the principles of co-operative government in FC ss 40 and 41 will by definition concern the constitutional status, powers or functions of those organs of state in terms of FC s 167(4)*(a)*.

The correct position, it is submitted, is that the exclusive jurisdiction of the Constitutional Court cannot be triggered simply by asserting that the principle of co-operative government has been violated. I offer four reasons for this conclusion. First, most parts of FC ss 40 and 41 do not refer to the constitutional powers, status or functions of organs of state.[5] Secondly, those parts that do

[1] *Premier of the Western Cape v President of South Africa* (supra) at para 2.

[2] Ibid at para 7.

[3] Ibid at para 44 (Constitutional Court stated that FC s 197(1) does not draw a distinction between provincial and national competences, and that Chapter 10 applies to all aspects of public administration in every sphere of government.)

[4] Ibid at para 46.

[5] It is in fact debatable whether large parts of Chapter 3 provide for legally binding norms at all. But see S Woolman, T Roux & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 14 (Several provisions that might have been thought to be non-justiciable have been used to dispose of matters — and in quite a few early case, it disposed of disputes between the state and private parties.)

refer to constitutional powers, do not *create* national or provincial powers but *presuppose* them. FC s 41(1)*(g)*, for example, as the Court in *Premier of the Western Cape* remarked, is concerned with the way power is exercised, not with whether or not a power exists (which is determined by other provisions of the Final Constitution).[1] Thirdly, FC s 41(3) and (4) refer to 'a court' in relation to the resolution of intergovernmental disputes — not solely to the Constitutional Court. Not every dispute mentioned in FC s 41(3) and (4), therefore, is a dispute for purposes of FC s 167(4)*(a)*.[2] If the Constitutional Assembly had intended this to be the case, it would have mentioned the Constitutional Court by name.[3] Finally, the provisions of FC Chapter 3 are framed in such a broad way, and encompass so many wide (and difficult to define) concepts, that virtually any dispute between different spheres of government could be framed as a violation of the principle of co-operative government. If every dispute concerning FC Chapter 3 were understood to be a dispute concerning a constitutional power, status or function, however, then every such dispute involving the provincial and the national sphere would fall under the exclusive jurisdiction of the Constitutional Court. This consequence the Constitutional Court expressly rejected in *National Gambling Board*.

It follows that intergovernmental disputes in which the Constitutional Court exercises exclusive jurisdiction should be limited to cases involving FC s 41(1)*(e)*, *(f)* and *(g)*.[4] Additionally, the Constitutional Court should follow a case-by-case approach, taking into account factors such as whether other aspects of the case also fall under FC s 167(4)*(a)*, as was the case in *Premier of the Western Cape*. In that case, the Court emphasized that the functional and institutional integrity of the different spheres of government, as envisaged in FC s 41(1)*(g)*, must be determined with due regard to the respective place of the national, provincial and local spheres in the constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government.[5] The

[1] *Premier of the Western Cape v President of South Africa* (supra) at para 57. Admittedly, on a plain-language reading, one can argue that the Constitutional Court enjoys exclusive jurisdiction when the exercise of a constitutional power is at stake as well as in cases where the existence of that power is the relevant issue. FC s 167(4)*(a)* does not distinguish between these two classes of cases.

[2] That question was raised but left open in *Executive Council Province of the Western Cape v Minister for Provincial Affairs ; Executive Council KwaZulu-Natal v President of the Republic of South Africa*. 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at para 10.

[3] There is no provision in the South African Constitution similar to art 93 (1) No.3 of the German Grundgesetz. That provision of the Basic Law provides the Bundesverfassungsgericht with exclusive jurisdiction 'in the event of disagreements respecting the rights and duties of the Federation and the Länder [provinces]'.

[4] Of course, this limitation does not apply when the challenge to another subsection of FC s 41 is brought under one of the other headings in FC s 167(4). For example, in *Matatiele I*, the Court considered an (ill-conceived) challenge in terms of FC s 41 on the basis of its exclusive jurisdiction in terms of FC s 167(4)*(d)*, because the case involved a constitutional amendment. See *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC) at paras 54-57.

[5] *Premier of the Western Cape v President of South Africa* (supra) at para 58.

Court thereby understood the powers and functions referred to in FC Chapter 3 in the context of other powers or functions explicitly or by implication derived from the Final Constitution. A similar kind of connection between a FC Chapter 3 power or function and another constitutional power or function would have to be present in a co-operative government dispute before such a case could be decided by the Constitutional Court in terms of FC s 167(4)*(a)*.

(ii) *Constitutionality of Bills, FC s 167(4)*(b)

FC s 167(4)*(b)* confers on the Constitutional Court exclusive jurisdiction to decide the constitutionality of a bill, but only in 'the circumstances anticipated in section 79 or 121'. These circumstances ensure that judicial review of bills may only be initiated by a very limited group of persons for limited purposes.

(aa) Initiation of judicial review of a Bill

In a constitutional order that adheres to the separation of powers, the legislative process on the national and the provincial level is the domain of Parliament or the provincial legislatures, as the case may be. Any judicial challenge to a statute in bill form is thus an intrusion into the domain of the people's democratically elected representatives and should, in the words of the Constitutional Court, be treated with caution:

> The legislature has a very special role to play in such a democracy — it is the law-maker consisting of the duly elected representatives of all of the people. With due regard to that role and mandate, it is drastic and far-reaching for any court, directly or indirectly, to suspend the commencement or operation of an Act of Parliament and especially one amending the Constitution, which is the supreme law.[1]

The Final Constitution, therefore,

> contains clear and express provisions which preclude any court from considering the constitutionality of a bill save in the limited circumstances referred to in sections 79 and 121 of the Constitution, respectively.[2]

In its judgment in *Doctors for Life International v Speaker of the National Assembly & Others*,[3] the Constitutional Court repeated this point and emphasized the importance of an unobstructed legislative process:

[1] *President of the Republic of South Africa & Others v United Democratic Movement & Others* 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC) at para 25.
[2] Ibid at para 26.
[3] 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC).

> [Parliament] must be free to carry out its functions without interference. . . . The business of Parliament might well be stalled while the question of what relief should be granted is argued out in the courts. Indeed the parliamentary process would be paralysed if Parliament were to spend its time defending its legislative process in the courts. This would undermine one of the essential features of our democracy: the separation of powers.[1]

The separation of powers principle, the Constitutional Court continued, functions as a limitation on challenges to the parliamentary process and prevents the other branches of government[2] and everyone else from interfering with it — apart from certain constitutionally mandated exceptions. FC ss 79 and 121, as referred to in FC s 167(4)*(b)*, define these constitutionally mandated exceptions. They limit the persons who may challenge a parliamentary or provincial bill to the President and the Premier of a province.

FC s 79 regulates one of the final stages in the process of national legislation.[3] Because legislating is the domain of Parliament, the executive can have no veto on laws that have been passed. Consequently, the Final Constitution imposes an obligation on the President to assent to and sign a Bill into law. In so doing, he or she may raise neither political objections nor editorial concerns.[4] The only objection the President may raise, FC s 79 provides, is to the constitutionality of the Bill. In this case, the President must refer the Bill back to Parliament. If that process fails, and the Bill is again passed in a form that does not put an end to the dispute,[5] then — to avoid a stalemate — the President may refer the Bill to the Constitutional Court for a decision on its constitutionality (FC s 79(4)*(b)*).[6]

[1] *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 36.

[2] With regard to the judiciary, the Court on the one hand stressed that courts must be conscious of the vital limits on judicial authority while on the other hand made clear that Parliament is also bound by the Constitution and that it is up to the Constitutional Court to ensure that Parliament fulfils its constitutional obligations. *Doctors for Life* (supra) at paras 37, 38.

[3] This process is regulated by FC s 81: A Bill becomes an Act of Parliament the moment the President assents to and signs it. This Act of Parliament must then be published in the Government Gazette and enters into force when published or on a date determined in terms of the Act. See Steven Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17.

[4] This set of circumstances is not totally hypothetical. See *In re: the Constitutionality of the Mpumalanga Petitions Bill, 2000* 2002 (1) SA 447 (CC), 2001 (11) BCLR 1126 (CC) at para 2 (Premier of the Mpumalanga Province when referring the Bill for reconsideration to the provincial legislature, besides raising constitutional concerns, recommended that certain typographical and grammatical errors be corrected.)

[5] The Bill does not have to be passed again in the original draft version to engage this provision. The Bill may have been amended but the amendment may still not satisfy the constitutional concerns of the President. FC s 79(4) does not focus on the formal criterion of an unchanged passing, but on the substantive factor whether the President is of the opinion that his constitutional concerns have been addressed. See also *Ex parte the President of the Republic of South Africa In re: Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC) at para 14.

[6] The President is explicitly entitled to refer a Bill back to the National Assembly for reconsideration of the Bill's constitutionality and, eventually, to the Constitutional Court for a decision on the Bill's constitutionality. See FC ss 84(2)*(b)* and *(c)*.

FC s 121 provides for basically the same arrangement in the provincial sphere: a Premier of a province has to assent to and sign a Bill passed by the provincial legislature or, if the Premier has reservations about the constitutionality of the Bill, refer it back to the legislature for reconsideration. If, after reconsideration, the Premier is still not convinced that the Bill complies with the Final Constitution, he or she must refer it to the Constitutional Court for a decision on its constitutionality.

By cross-referring to these provisions, FC s 167(4)*(b)* serves two purposes. First, it anticipates a specific conflict, i e a dispute between the President and Parliament (or the equivalent institutions at the provincial level) on the constitutionality of a Bill and ensures that this dispute is resolved in a swift manner by the only body that is institutionally capable of acting as a referee between these two constitutional organs. If the Constitutional Court decides that the contested provision indeed would violate the Constitution, then the dispute ends there. The Bill may not be signed into law and does not create unconstitutional obligations.[1] If, however, the Constitutional Court decides that the Bill is constitutional, then the President must assent to and sign it (FC s 79(5)).[2]

The second purpose served by FC s 167(4)*(b)* is that it prevents any judicial review of Bills except at the instance of the President or a provincial Premier. The Constitutional Court has emphasized that referral by the President is the decisive factor triggering its exclusive jurisdiction with regard to Bills. All other constitutional organs, political parties, civil society groups or individuals have to wait until the Bill is in force before approaching a court to get a ruling on its constitutionality. Consequently, all other courts are prohibited from exercising the exceptional 'power of abstract judicial review'[3] envisaged in FC s 167(4)*(b)*.[4]

[1] See *Liquor Bill* (supra) at para 18.

[2] The premier of a province is similarly bound. FC s 121(3).

[3] See *President of the Republic of South Africa & Others v United Democratic Movement & Others* 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC) at para 26.

[4] See *Ex parte the President of the Republic of South Africa In re: Constitutionality of the Liquor Bill* (supra) at paras 7-9. Cameron AJ's judgment provides an overview of similar procedures of pre-enactment constitutional scrutiny. Apparently, in the United States, the United Kingdom, Australia, New Zealand and Germany no comparable procedure exists. Similar referrals are, however, part of the constitutional law of Ireland, France, Canada and India. In Germany, however, it is established constitutional practice that the Federal President is entitled to withhold signature of a parliamentary Bill when he has constitutional concerns regarding the legislative procedure and, to a lesser extent, also with regard to substantive constitutional provisions (Article 82(1) of the Grundgesetz). On eight occasions, different Federal Presidents have since 1949 refused to sign a Bill. As there is no referral procedure, the Bundestag (Parliament) would have to apply to the Constitutional Court for an order compelling the President to sign the Bill within the procedure of a dispute between organs of state. Such a request has never occurred. Instead, Parliament has either reconsidered the Bill or, on one occasion, the Grundgesetz has been amended to accommodate the concerns. On the other hand, German Presidents have signed several Bills with publicly expressed reservations, which effectively invited challenges to the Act almost immediately after it entered into force. See, for example BVerfGE 106, 310 ('*Zuwanderungsgesetz*'['*Migration Act*']) of 2002 and BVerfGE 115, 118 *('Luftsicherheitsgesetz'* ['*Aviation Security Act*']) of 2006.

In *Doctors for Life*, an advocacy group challenged the constitutionality of four health-related statutes on the grounds that during the legislative process leading to the enactment of these statutes, the National Council of Provinces and the provincial legislatures had failed to comply with their constitutional obligation to facilitate public involvement. When the application was launched, all but one of the statutes had already been enacted. The applicants, however, challenged all four statutes, including the one that was still in Bill form.

The Constitutional Court held that the applicants could not base their complaint against the statute that was still in Bill form on FC s 167(4)*(b)*:

> [W]hile [section 167(4)*(b)*] confers exclusive jurisdiction on this Court to consider the constitutional validity of a national or provincial bill, this power is expressly limited to a challenge brought by the President or a Premier and in circumstances contemplated in section 79 or 121 of the Constitution. The provisions of these sections are too clear to admit of any other construction.[1]

To surmount this hurdle, the applicant tried to approach the Constitutional Court using FC s 167(4)*(e)*, which grants the Constitutional Court exclusive jurisdiction to decide if the President or Parliament has failed to fulfil a constitutional obligation.[2] But the Court correctly rejected this argument, too. The only applicable provision with regard to Bills is FC s 167(4)*(b)*, as it is a more specific provision than FC s 167(4)*(e)*. All other access roads to any other court are, in effect, blocked for as long as the Bill is not signed. It is, as the Court pointed out, also not relevant whether the Bill is challenged for procedural or substantive reasons: even a complaint relating to a failure by Parliament to facilitate public involvement in its legislative processes (as was brought in *Doctors for Life*) will invariably require a court to consider the validity of the resulting bill. The purpose and the effect of litigation that is brought in relation to a Bill is therefore always to render the Bill passed by Parliament invalid — and it is exactly this kind of litigation that FC s 167(4)*(b)* seeks to preclude.[3]

The Constitutional Court's exclusive jurisdiction with regard to Bills and the entire referral procedure had a different focus under the Interim Constitution.[4] Under the Interim Constitution, concerns about the constitutionality of a Bill (or any of its provisions) were assumed to be part of a dispute between different political groups inside Parliament (or a provincial legislature). According to IC ss 98(2)*(d)* and 98(9), the Constitutional Court could decide a dispute over the

[1] *Doctors for Life* (supra) at para 43.
[2] This subsection is dealt with in more detail below.
[3] *Doctors for Life* (supra) at paras 44-56.
[4] Cf *Speaker of the KwaZulu-Natal Provincial Legislature, Ex Parte: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Speaker of the KwaZulu-Natal Provincial Legislature, Ex Parte: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995* 1996 (4) SA 653 (CC), 1996 (7) BCLR 903 (CC); *Speaker of the National Assembly, Ex Parte: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC); *Gauteng Provincial Legislature, Ex Parte: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC).

constitutionality of any Bill only at the request of the Speaker of the National Assembly, the President of the Senate or the Speaker of a provincial legislature, and then only upon receipt by these persons of a petition by at least one third of all the members of the National Assembly, the Senate or the affected provincial legislature requiring them to do so. Thus, the rationale behind the Constitutional Court's exclusive jurisdiction was not the resolution of a dispute between two or more organs of state, but the protection of minority parties in the parliamentary process. Given the circumstances leading up to the enactment of the Interim Constitution, it may be assumed that the intention of the drafters, in addition to confining the various legislatures to the imperatives of the new constitutional order, was to give the political opposition in Parliament, the Senate (as it then was) and any provincial legislature an effective tool to stop the ruling party from enacting constitutionally problematic legislation. The protection of parliamentary minority parties is no longer part of the rationale behind the Constitutional Court's exclusive jurisdiction under FC s 167(4)*(b)*. Under the Final Constitution, parliamentary minority groups may still approach the Constitutional Court and access its exclusive jurisdiction, but only after the Bill has been signed into law and have become an Act of Parliament. This procedure is set out in FC s 167(4)*(c)* read with FC s 80. I discuss its primary features below.

(bb) Scope of judicial review of a Bill

Once a referral is made in accordance with either FC s 79 or FC 121, the Constitutional Court not only has exclusive jurisdiction to hear the case, but also has to decide the matter. A formally correct referral by the President or the Premier of a province, in other words, imposes an obligation on the Constitutional Court to decide on the constitutionality of the Bill to resolve the dispute. But the scope of the Court's review power is limited. In *Liquor Bill*, the Constitutional Court emphasized that it was not obliged to scrutinize the whole of a Bill in order to determine its constitutionality for purposes of FC s 79.[1] Rather, FC s 79(5) must be read as empowering the Court to make a decision regarding the Bill's constitutionality only in relation to the points raised in the President's reservations.[2] These reservations, however, and thus the focus of the Court's attention, may relate both to specific provisions and to the Bill as a whole.[3]

The scope of the Court's review powers in respect of Bills was further refined in *In re: The Constitutionality of the Mpumalanga Petitions Bill, 2000*.[4] Here, the Premier of the Mpumalanga Province's reservations included a concern not previously

[1] *Liquor Bill* (supra) at para 13. The Court goes on to say that FC s 79 does not entail a 'mini-certification' process (at para 16).
[2] Ibid at para 14.
[3] Ibid at paras 17-18.
[4] 2002 (1) SA 447 (CC), 2001 (11) BCLR 1126 (CC).

referred to the legislature, but which had been raised for the first time only in papers before the Court. The Court eventually declined jurisdiction in terms of FC s 167(4)*(b)*, holding that such a referral by the Premier (or the President) is defective for non-compliance with the constitutional requirement that it should first be referred to the legislature for (re-)consideration of the Bill. The principle of respect for the democratically elected legislature and the value of an unobstructed legislative process, which underlie the rules about who may initiate the review of a Bill, are also decisive here:

> The Court's function to adjudicate upon the Bill commences only after this political process [contemplated by FC s 121] has been exhausted and it is limited to a consideration of the Premier's reservations together with the responses of the parties represented in the legislature. The role of the legislature would be undermined if the Premier's reservations could be entertained by this Court without having been referred to the legislature for its consideration.[1]

In *Liquor Bill*, the Court had explicitly left open whether it may ever be appropriate for it, upon a presidential referral, to consider other provisions of the Bill which appear to be manifestly unconstitutional, but which were not included in the President's reservations.[2] In *Mpumalanga Petitions Bill*, the Court settled this question: In referral proceedings under FC ss 79 and 121, the Court held, no room exists for the Court to consider issues that have not been properly raised by the President or the Premier,[3] either — one may add — because the issue has not been raised earlier at all, or because it has not previously been referred to the legislature. This interpretation of the Court's function in terms of FC s 167(4)*(b)* appears correct. Nevertheless, it is doubtful whether the Court really would refrain from considering a provision in a Bill that was manifestly unconstitutional. One could imagine at the very least the Court's bringing a patent constitutional defect in a Bill to the attention of the parties, even where that defect was not properly before it.

In *Gauteng School Education Bill*, the Court assumed jurisdiction and found the Bill to be in line with the Interim Constitution even though the Bill, after referral to the Court, had been passed and duly enacted (as the Gauteng School Education Act of 1995).[4] Although the disputed sections had not been put into operation at the time of the Court's decision, the Bill technically no longer existed, and the Constitutional Court could have decided that the case had become moot.[5] It

[1] *Mpumalanga Petitions Bill* (supra) at para 9. FC s 79(2) provides similarly with regard to the President and a Parliamentary Bill.

[2] *Liquor Bill* (supra) at para 15.

[3] *Mpumalanga Petitions Bill* (supra) at para 13. Consequently, the Court requires that the document in terms of which the President or Premier conveys his or her reservations to Parliament or the provincial legislature ought to form part of the referral to the Constitutional Court under the provisions of FC ss 79 or 121.

[4] *Gauteng Provincial Legislature, Ex Parte: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC).

[5] Of course, the constitutionality of the provisions in dispute could have been challenged in another way and eventually the Constitutional Court would have had to decide the matter, anyway — but not in terms of its exclusive jurisdiction.

did not do so, with Mahomed DP stressing that none of the parties had contended that the Court's exclusive jurisdiction was 'in any way ousted' because the Bill had since been enacted.[1] In *Doctors for Life*, the Constitutional Court confirmed this approach on more principled grounds. In this case, the Court held that it would follow the general rule in South African law that the crucial time for determining whether a court has jurisdiction is the time when the proceedings commenced.[2] Once a referral has been made or an application lodged, the Court will objectively assess whether the conditions for its jurisdiction have been fulfilled. The subjective intention of the parties cannot influence the Court's decision at this stage.[3]

It is in any case very likely that the President, having referred a case to the Constitutional Court in terms of FC s 79, would wait for the Court's decision before signing the Bill into law. But what if he does not? In *Doctors for Life*, the Court held that a lack of jurisdiction to entertain a challenge to a Bill could not be compensated for by the fact that the Court would later have jurisdiction to pronounce on the constitutional validity of the resultant Act.[4] This line of reasoning would probably not operate the other way, however. If the President, after the referral, signs the Bill, the Court no longer has to resolve a live dispute between the President and Parliament and, consequently, it should decline to hear the case as moot.[5] The exception to this rule, as *Gauteng School Education Bill* suggests, is that the Court might still be prepared to entertain the case if the contested provisions have not yet been put into operation.

Finally in this regard, a decision by the Constitutional Court under FC s 167(4)*(b)* that a Bill is constitutional does not in any way prevent further constitutional challenges to the statute after its enactment. Of course, *stare decisis* prevents re-litigation of issues that the Court has already determined in its analysis of the Bill.[6]

[1] *Gauteng School Education Bill* (supra) at para 2.

[2] *Doctors for Life* (supra) at para 57 referring to *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295, 310D-E (A) and *MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA) at para 7.

[3] *Doctors for Life* (supra) at para 9 (Constitutional Court states: 'the question whether this Court has exclusive jurisdiction in this matter is too important to be resolved by concession.' On a very narrow reading, the Court here only ruled on 'this matter'. But the principle of exclusive jurisdiction cannot generally depend on consent only. First, this would contradict the exceptional nature of the jurisdiction compared to the normal case of concurrent jurisdiction. Secondly, the Constitutional Court can always grant direct access in terms FC s 167(6)*(a)*, and there is therefore no need for a wide conception of its exclusive jurisdiction.)

[4] *Doctors for Life* (supra) at para 57.

[5] This reasoning applies, of course, *mutatis mutandis* to the provincial sphere in terms of FC s 121.

[6] See *Liquor Bill* (supra) at para 20.

(iii) *Abstract review of Acts of Parliament and provincial Acts, FC s 167(4)(c)*

FC s 167(4)*(c)* grants the Constitutional Court exclusive jurisdiction in applications envisaged in FC ss 80 and 122. These are applications brought by members of the National Assembly or members of provincial legislatures for an order declaring that all or part of an Act of Parliament (or provincial Act, as the case may be) is unconstitutional. The Constitutional Court's jurisdiction in such applications starts where its jurisdiction in terms of FC s 167(4)*(b)* ends, ie, at the moment the President signs the Bill into law. As with FC s 167(4)*(b)*, the Court's powers under FC s 167(4)*(c)* are powers of abstract review in relation to a particular kind of dispute. The procedure that triggers the Court's jurisdiction is not part of FC s 167(4)*(c)* itself, but is regulated by the Constitution's provisions on the national and provincial legislative process.

FC s 80 provides that, within 30 days of its signing into law, one third or more of the members of the National Assembly may apply to the Constitutional Court for an order declaring 'all or part of an Act of Parliament … unconstitutional'.[1] This provision balances the parliamentary majority's interest in legislating according to its political convictions against the parliamentary minority's interest in having any constitutional concerns with regard to a statute resolved in a timely manner. Members of the National Assembly may not stop a Bill from becoming an Act since this would contradict the basic principle of majority rule. On the other hand, they are given the right to initiate a process of abstract review to test the constitutionality of a provision or entire statute. This right may be regarded as an adjunct of the general principle, articulated in FC s 57(2)*(b)*, that the rules and orders of the National Assembly must provide for participation by minority parties.

The primary function of Parliament as the democratically elected lawmaker does not only protect it from undue *outside* interference, as mentioned above.[2] Ngcobo J's remarks in *Doctors for Life* that the business of Parliament might be paralysed if Parliament were to spend its time defending its legislative process in the courts are also relevant here, where the threat of undue influence comes from the inside.[3] This explains the relatively high proportion of members that is required for an application under FC s 80[4] and the strict 30-day time limit within which the application must be brought.[5] Parliament is required to take

[1] The following comments apply, unless otherwise indicated, *mutatis mutandis* to the equivalent procedure with regard to a provincial legislature in terms of FC s 122.

[2] See FC s 167(4)*(b)* above.

[3] Cf *Doctors for Life* (supra) at para 36.

[4] In the provincial sphere, the one-third requirement for the National Assembly is reduced to 20 per cent of the members of the provincial legislature (FC s 122).

[5] The National Assembly currently consists of 400 members, of which 297 are members of the ruling party, the African National Congress (74.25 %). See Electoral Institute of Southern Africa 'South Africa: National Assembly floor-crossing outcome 2007' available at (www.eisa.org.za). Thus, not even all members of the National Assembly from other parties together reach the quorum of FC s 167(4)*(c)*. This fact explains why so far there has been not a single application to the Constitutional Court in terms of this subsection.

constitutional constraints into account when drafting Bills. Had FC s 80 allowed a small number of minority members of Parliament to challenge the constitutionality of an Act at any time after its signing into law, the application process would have been turned into a political device for the parliamentary minority to continue a fight over a statute that had been lost in the ordinary legislative process.

Interestingly, FC s 80 does not specify that only those who voted against the Bill in Parliament may apply for its consideration by the Constitutional Court under FC s 80, or only those who raised constitutional concerns about the Bill in plenary session or in committee. Neither do the applicants have to belong to a single parliamentary caucus. In contrast to the situation where the President acts under FC s 79, members of Parliament acting under FC s 80 do not interfere from outside with the legislative process. They are part of it. This explains why the President's right of referral in FC s 167(4)(b) is a matter of last resort after the failure of a fairly elaborate internal dispute resolution process, whereas members of Parliament may apply to the Constitutional Court under FC s 167(4)(c) immediately after the Bill has been signed into law, without further consideration of the matter by Parliament.

The crucial date for the start of the 30-day time limit is the date on which the President signs the Act into law, not the date on which it takes effect, which may be some time later. The fact that the Act may not be in force at the time of the application does not affect the Constitutional Court's jurisdiction to hear the matter, as held in a different context in *Khosa*.[1] The holding in that case was based on FC s 172(2)*(a)*, which does not distinguish between the courts' powers to invalidate statutory provisions that have been brought into force and those which have not.[2] In *Doctors for Life*, the Constitutional Court confirmed this holding in respect of entire statutes, on the grounds that FC s 80 and FC s 122 did not exhaust the circumstances in which Acts of Parliament that had not yet been brought into force could be challenged.[3] Indeed, there is nothing to prevent a member of the public from challenging a provision of an Act of Parliament during the 30-day window-period contemplated in FC s 80.[4]

FC s 80(3) provides for a special form of preliminary ruling in terms of which the Constitutional Court, while it is contemplating the constitutionality of an Act of Parliament under FC s 80, may order that all or part of the Act has no force. The Court may only make such an order if the interests of justice require it and the main application under FC s 80(1) has a reasonable prospect of success. Both these criteria are based on well-established principles that form part of the criteria for the granting of direct access under FC s 167(6). FC s 80(3) is nevertheless

[1] *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) at para 90.
[2] *Khosa* (supra) at para 91.
[3] *Doctors for Life* (supra) at paras 63-64.
[4] Ibid at 63-64.

distinctive in treating the applicant's prospects of success and the interests of justice as separate criteria. Under FC s 167(6) the applicant's prospects of success form part of the interests-of-justice enquiry. This difference may be attributed to the fact that the 'prospects of success' criterion serves a special purpose under FC s 80(4) (as I discuss below). In respect of the enquiry whether an order of suspension in terms of FC s 80(3) should be granted, it has to be taken into account that Parliament has passed the Act in question and that the President has assented to it. In sum, the two organs of state responsible for legislation have already come to the conclusion that the statute is constitutionally sound. The test for purposes of FC s 80(3) should therefore be similar to that for the granting of an urgent application: namely, whether the applicant will suffer irreparable harm if the challenged provision remains in force and his or her challenge ultimately proves to be successful. The same test should apply in respect of challenges to provincial acts under FC s 122(3).

The final part of FC s 80(4) entitles the Court to order the applicant members of Parliament to pay the costs of the application in the event that it is unsuccessful and did not have a reasonable prospect of success. This subsection clearly has a punitive character. As mentioned above, even though members of Parliament are permitted to apply to the Constitutional Court for the abstract review of the constitutionality of an Act of Parliament, they may not do so simply to carry on a political dispute lost in the legislature. They may only do so in order to raise a genuine constitutional challenge to the Act. The threat of an adverse costs order is specifically mentioned so as to deter members of Parliament from making frivolous applications. The Rules of the Constitutional Court reinforce this provision by requiring applicants to support their application by providing an affidavit setting out the contentions on which they rely, including the statutory provision or provisions being challenged, the relevant provision or provisions of the Final Constitution relied upon, and the grounds upon which the respective provisions are deemed to be in conflict.[1]

On the other hand, it is in the interests of Parliament as a whole that its laws should be constitutional. If a sufficient proportion of members of the National Assembly are legitimately concerned about the constitutionality of a provision, they should not be penalized simply because the Constitutional Court ultimately upholds the provision. It is accordingly submitted that the second condition for the granting of a costs order — that the applicant should have no reasonable prospect of success — should be generously interpreted. This approach was followed in a slightly different setting by the Supreme Court of Appeal in *Gauteng Provincial Legislature v Kilian & Others*.[2]

Kilian was decided under the Interim Constitution, which allowed members of Parliament to challenge the constitutionality of statutes when still in Bill form,

[1] Constitutional Court Rules 15(1) and 15(4) of 2003.
[2] 2001 (2) SA 68 (SCA), 2001 (3) BCLR 253 (SCA).

with the application reaching the Constitutional Court by way of request by the Speaker of the National Assembly.[1] In such circumstances, the Supreme Court of Appeal held, applications by minority party members for the review of a statute were in the interests of the provincial legislature and its effective and efficient functioning. Indeed, such applications could be seen to be 'part and parcel of the legislative process'.[2] On the facts, the applicants had not acted in their personal capacity, and their action was not frivolous, vexatious or due to improper motives.[3] The Supreme Court of Appeal accordingly found that they should not be held liable for costs.

Under the Final Constitution this precise line of reasoning no longer applies. By the time of a challenge under FC s 80 or FC s 122, the Bill has been signed into law and the legislative process is conclusively over. Nevertheless, the basic principle that applicants who raise important issues of constitutional principle should not be penalized is still relevant. As held by Mahomed DP in *Gauteng School Education Bill*:

> A litigant seeking to test the constitutionality of a statute usually seeks to ventilate an important issue of constitutional principle. Such persons should not be discouraged from doing so by the risk of having to pay the costs of their adversaries, if the Court takes a view which is different from the view taken by the petitioner. This, of course, does not mean that such litigants can be completely protected from that risk. The Court, in its discretion, might direct that they pay the costs of their adversaries if, for example, the grounds of attack on the impugned statute are frivolous or vexatious or they have acted from improper motives or there are other circumstances which make it in the interest of justice to direct that such costs should be paid by the losing party.[4]

This holding should be applied *mutatis mutandis* to costs orders in respect of applications under FC s 80. Save for frivolous, vexatious or improperly motivated applications, applicants must generally be understood to be acting as members of the National Assembly in the interests of ensuring that the statute in question complies with the Constitution.[5] Other factors the Court may legitimately

[1] According to IC ss 98(2)*(d)* and 98(9), the Constitutional Court would have to decide a dispute over the constitutionality of any Bill only at the request of the Speaker of the National Assembly, the President of the Senate or the Speaker of a provincial legislature, who should make such a request to the Court upon receipt of a petition by at least one-third of all the members of the National Assembly, the Senate or the affected provincial legislature requiring him or her to do so.

[2] *Kilian* (supra) at para 29.

[3] Ibid at para 24.

[4] *Gauteng Provincial Legislature, Ex Parte: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* (supra) at para 36.

[5] In coming to this conclusion, I respectfully disagree with Steven Budlender. Budlender is of the opinion that applications in terms of FC s 80 should not occur at the expense of the legislature. See Steven Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17 at § 17.5*(b)*. See also Adrian Friedman 'Costs' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 6, § 6.2*(g)*(Friedman also advocates a more flexible approach than Steven Budlender.)

consider are whether the constitutional concerns raised were discussed in Parliament and whether they were supported during public hearings.[1]

(iv) *Amendments to the Constitution, FC s 167(4)*(d)

In terms of FC s 167(4)*(d)*, only the Constitutional Court may review the constitutionality of an amendment to the Final Constitution.[2] Because other courts are prevented from declaring constitutional amendments invalid (neither FC s 172 nor the confirmation procedure of FC s 167(5) apply) litigants can approach the Constitutional Court directly. However, although the effect is the same, applications for access to the Court under FC s 167(4)*(d)* have a different basis to applications for direct access under FC s 167(6)*(a)*. Direct access is typically granted only in exceptional circumstances because it requires the Constitutional Court to sit as a court of first and last instance in circumstances where other courts are capable of hearing the application. In applications based on FC s 167(4)*(d)*, on the other hand, only the Constitutional Court is competent to hear the matter. Whether the Constitutional Court should be approached directly is therefore a function of the nature of the case, and in particular of whether the case consists of a linked challenge to ordinary legislation and to a constitutional amendment, or simply of a challenge to a constitutional amendment. In the former instance, it may be necessary first to approach the High Court in respect of the challenge to ordinary legislation, and then to proceed to the Constitutional Court (a) for an order confirming the High Court's order of invalidity (or appealing its failure to grant such an order) and (b) for an order of constitutional invalidity in respect of the constitutional amendment. This procedure was followed in *United Democratic Movement v President of the Republic of South Africa & Others (1)*,[3] where the applicants first initiated urgent proceedings in the High Court for review of the two pieces of ordinary legislation challenged, and then approached the Constitutional Court in respect of the legislative package (including constitutional amendments) lifting the ban on floor-crossing as a whole.

In *Matatiele Municipality & Others v President of the Republic of South Africa & Others*,[4] the applicants approached the Constitutional Court under FC s 167(4)*(d)* with regard to their challenge to the Constitution Twelfth Amendment Act and under FC s 167(6)*(a)* with regard to their challenge to the Cross-Boundary Municipalities Laws and Related Matters Act ('the Repeal Act').[5] In its two judgments in this case, the Constitutional Court drew a clear distinction between

[1] The Constitutional Court's ordinary test for prospects of success takes into account whether earlier court decisions were divided over the constitutional matter. This part of the test is obviously not possible here, as the Constitutional Court has exclusive jurisdiction, but it shows that the existence of differing viewpoints on a matter may give rise to an impression of reasonable prospects of success.

[2] The scope of challenges to constitutional amendments is limited. See Budlender (supra) at § 17.2*(a)* and § 17.3*(g)*.

[3] 2003 (1) SA 488 (CC), 2002 (11) BCLR 1179 (CC).

[4] 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC) (*Matatiele I*); 2007 (1) BCLR 47 (CC)(*Matatiele II*).

[5] Act 23 of 2005. See *Matatiele I* (supra) at para 33.

'normal' access applications and those where litigants approach the Court on the basis of its exclusive jurisdiction. Its first judgment briefly confirmed its exclusive jurisdiction in respect of the challenge to the constitutional amendment. It did not considering issues relevant to applications for direct access, such as the interests of justice.[1] In its second judgment, the question as to whether the applicants were entitled to approach the Court directly on the issue of the validity of the Repeal Act was considered only *after* it had dealt with the constitutionality of the Constitution Twelfth Amendment Act.[2] The Court granted direct access because of the interrelationship between the two Acts: it would have been unreasonable for the litigants to challenge one of the legislative components of a comprehensive package in a different forum.[3] The exclusive jurisdiction of the Constitutional Court in assessing a constitutional amendment therefore influences (if not determines) whether it is in the interests of justice in terms of FC s 167(6)*(a)* to grant access to the Court directly with a simultaneous challenge to another act of Parliament when both regulate the same subject matter.[4]

(v) *Constitutional obligations of Parliament or the President, FC s 167(4)*(e)

FC s 167(4)*(e)* is the clearest example of an area of exclusive jurisdiction based on the principle of institutional respect.[5] Given the inevitably controversial nature of such disputes, it makes sense that only the highest Court in constitutional matters should be able to decide whether 'Parliament or the President has failed to fulfil a constitutional obligation'. But what does the term 'constitutional obligation' mean in this context? It surely cannot refer to these institutions' general duty to act in conformity with the Constitution, since such an interpretation would contradict FC s 172(2)*(a)*, which empowers the High Court and the Supreme Court of Appeal to make orders concerning the constitutional validity of an Act of Parliament and any conduct of the President.[6]

[1] *Matatiele I* (supra) at para 34.

[2] Ibid at para 14 ('Ordinarily, the issue of direct access would be considered first, before considering the merits of the constitutional challenge. However, this issue relates to the Repeal Act only and does not affect the Twelfth Amendment. It will therefore be convenient to address the constitutional validity of the Twelfth Amendment first, followed by the question whether the applicants were entitled to approach this Court directly on the issue of the validity of the Repeal Act, and if so, whether the Repeal Act is constitutionally valid.')

[3] See *Matatiele II* (supra) at para 105 ('Otherwise, the applicants would have been required to lodge a constitutional challenge relating to the Twelfth Amendment in this Court, which is the only court having jurisdiction in relation to the Twelfth Amendment, and lodge a separate challenge to the Repeal Act in the High Court. The result would be two applications in two different courts raising substantially the same issue.')

[4] This approach is similar to the tack taken by the Court with regard to 'issues connected with decisions on constitutional matters'. See § 4.3*(e)* infra.

[5] See § 4.3*(b)* supra.

[6] *Doctors for Life* (supra) at paras 16-17.

In the first *SARFU* judgment, the Constitutional Court, referring to the need to reconcile FC s 167(4)*(e)* with FC s 172(2)*(a)*, held that not all conduct of the President amounts to a constitutional obligation for purposes of FC s 167(4)*(e)*, and that this provision should accordingly be given a narrow meaning.[1] The Court, however, declined to define the term 'fulfil a constitutional obligation', holding that its meaning would depend on 'the facts and the precise nature of the challenges to the conduct of the President'.[2] In *Doctors for Life*, the Court extended this holding to the alleged failure by Parliament to fulfil a constitutional obligation.[3]

In the absence of an overarching definition, the ambit of FC s 167(4)*(e)* must be discerned from the cases in which this provision has been considered. The first such case after *SARFU I* was the Supreme Court of Appeal's decision in *King & Others v Attorneys Fidelity Fund Board of Control & Another*.[4] In this case, the applicants challenged the validity of a statute on the grounds that Parliament had failed to fulfil its obligation in terms of FC s 59(1) to facilitate public involvement in its processes. The High Court had dismissed the claim on the grounds that there had been due compliance with this requirement. The Supreme Court of Appeal approached the matter on a different basis. Since the applicants had argued that a constitutional obligation had been breached, the Supreme Court of Appeal held, the crucial question was whether it had jurisdiction to grant an order of statutory invalidity in terms of FC s 172(2)*(a)*, or whether the case fell to be decided exclusively by the Constitutional Court under FC s 167(4)*(e)*.[5]

In answering this question, the Supreme Court of Appeal, like the Constitutional Court in *SARFU I*, did not offer a definition of 'constitutional obligation' for purposes of FC s 167(4)*(e)*. Instead, it pointed out which constitutional provisions would *not* give rise to such an obligation, but nevertheless could justify the invalidation of a statute under FC 172(2)*(a)*, if not adhered to. First, the Supreme Court of Appeal held, there are parts of the Constitution, like the Bill of Rights, which define 'the scope of Parliament's legislative authority'. Statutes that infringe these parts of the Constitution may be invalidated by the High Courts and the Supreme Court of Appeal under FC s 172(2)*(a)*, subject to confirmation by the Constitutional Court.[6]

Secondly, the Supreme Court of Appeal held, the Constitution imposes certain procedural or 'manner and form' requirements that must be complied with for a statute to be valid.[7] Failure to comply with these procedural requirements would also not found the Constitutional Court's exclusive jurisdiction under FC s 167(4)*(e)*:

[1] *SARFU I* (supra) at para 25.
[2] Ibid at para 25.
[3] *Doctors for Life* (supra) at para 20.
[4] 2006 (1) SA 474 (SCA), 2006 (4) BCLR 462 (SCA).
[5] *King* (supra) at para 15.
[6] Ibid at para 16.
[7] Ibid at para 17.

> Procedural requirements that are prerequisites to validity do not impose obligations. This is because constitutional limitations on legislative authority generally — albeit not invariably — derive from disabilities contained in rules that qualify the way in which the Legislature may act: and it is a mistake to confuse legal limitations that arise from procedural prerequisites and from other limitations of legislative power with those that derive from the imposition of duties. . .[1]

This left, the Supreme Court of Appeal held, situations where 'Parliament so completely fails to fulfil the positive obligations the Constitution imposes on it that its purported legislative acts are invalid'.[2] Unlike a failure to comply with a manner and form provision, which was a purely 'formal question', an allegation that Parliament had failed to fulfil a positive obligation imposed on it by the Final Constitution was 'a crucial political question' of the sort that the Constitutional Court was uniquely qualified to decide.[3] As an example of this sort of obligation the Supreme Court of Appeal cited the constitutional obligation that 'Parliament function in accordance with the principles of accountability, responsiveness and openness' in FC s 1*(d)*.[4] The National Assembly's duty under FC s 59(1) to 'facilitate public involvement' in its processes was part of a series of provisions giving effect to FC s 1*(d)*, and an allegation that Parliament had failed to comply with this duty was accordingly the kind of 'extreme' case that the Final Constitution reserved for the Constitutional Court to decide.[5]

In its decision in *Doctors for Life*, the Constitutional Court endorsed the Supreme Court of Appeal's holding in *King* that disputes concerning the substantive or formal constitutional validity of a statute or conduct on the part of the President are not to be equated with disputes concerning a failure to fulfil a constitutional obligation.[6] The Constitutional Court was also generally supportive of the Supreme Court of Appeal's conclusion that the question whether Parliament has fulfilled its obligation to facilitate public involvement is a 'crucial political question' of the kind that the Constitutional Court was uniquely qualified to decide.[7] The Constitutional Court's justification for this conclusion, however, is somewhat different. The relevant distinction, Ngcobo J held, was between 'constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes' and 'those provisions which impose the primary obligation on Parliament to determine what is required of it'.[8] Decisions in

[1] *King* (supra) at para 17. The Supreme Court of Appeal then quotes with approval HLA Hart's distinction between 'legal duties' on the one hand and 'legal disabilities' and 'legal limits' on the other. The latter implies, not the presence of a duty, but the absence of legal power.

[2] Ibid at para 19.

[3] Ibid at paras 18 and 23.

[4] Ibid at para 19.

[5] Ibid at para 23.

[6] *Doctors for Life* (supra) at paras 16-17. The judgment cites the duties in FC s 7(2) as an example of a (substantive) provision to which the state has to adhere, but which does not amount to a constitutional obligation in the sense of FC s 167(4)*(e)*.

[7] Ibid at para 21.

[8] Ibid at para 25.

respect of the former type of case involve purely formal criteria, whereas a decision in respect of the second type of case 'trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers'.[1] A dispute over an alleged failure on the part of Parliament to facilitate public involvement in its affairs was a case of the second type because the relevant sections of the Constitution (FC s 59(1 and s 72(1)) do not set a readily ascertainable standard, but leave it to Parliament to determine how best to facilitate public involvement in its affairs. The most important issue for the Constitutional Court in assuming exclusive jurisdiction in *Doctors for Life*, in other words, was not the degree to which Parliament had failed to fulfil its positive obligations,[2] but the fact that the case required the Court to substitute its view of how Parliament should regulate its processes for that of Parliament.

The ratio of the Constitutional Court's decision in *Doctors for Life* is accordingly that the Constitutional Court will have exclusive jurisdiction under FC s 167(4)*(e)* whenever the case involves a dispute over the content of the obligation imposed on Parliament or the President, in a situation where the Constitution can be understood as imposing the primary duty for developing the content of the obligation on Parliament or the President, as the case may be. This principle is obviously a fairly abstract one, and the dividing line between purely formal requirements and content-dependent requirements will need to be refined in future cases. As a general rule, however, the less specific the provisions in the Constitution are on what Parliament or the President must do, the more likely it is that the Court will assume exclusive jurisdiction under FC s 167(4)*(e)*. Such an approach is also in line with the more general idea of shared responsibilities between the Constitutional Court and the other courts (with the Supreme Court of Appeal at their helm), i e, that the Constitutional Court's function is to set abstract standards and not primarily to decide whether they have been applied.

(vi) *Certification of a provincial Constitution, FC s 167(4)*(f)

According to FC s 144, a provincial Constitution or an amendment to it does not become law until the Constitutional Court has certified that the provincial Constitution or amendment complies with the national Constitution.[3] Since FC s 167(4)*(f)* provides that only the Constitutional Court may exercise this certification function, it thus confers exclusive jurisdiction on the Court.

[1] *Doctors for Life* (supra) at para 26.

[2] The Constitutional Court expressly rejects this part of the Supreme Court of Appeal's reasoning in *King*. See *Doctors for Life* (supra) at para 21, fn 16.

[3] For a more in-depth analysis, see Stu Woolman 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 21.

The certification of a provincial Constitution is a slightly odd facet of the Constitutional Court's jurisdiction. It requires the Court to perform an abstract review in the absence of a dispute. Admittedly, abstract review is also the subject matter of FC ss 167(4)*(b)* and *(c)*. Under FC ss 167(4)*(b)* and *(c)*, however, the abstract review arises out of a conflict either between the President/Premier and Parliament/provincial legislature (FC s 167(4)*(b)* read together with FC ss 79 and 121) or between a majority and minority of parliamentarians in the national or provincial sphere (FC s 167(4)*(c)* read together with FC ss 80 and 122). In assessing the constitutionality of a Bill or an Act of Parliament in these circumstances, the Constitutional Court simultaneously resolves the dispute that gave rise to the case. The certification process for a provincial Constitution does not depend on the existence of a dispute. A provincial Constitution may be hotly contested within a province, but that is not relevant to the constitutional enquiry: even if a draft Constitution enjoys unanimous support in the province, the Constitutional Court still has to certify it in order for it to become law.[1] Consequently, the purpose of this certification exercise is not dispute resolution, but simply achieving certainty in the law, i e, ensuring that a provincial Constitution complies with the national Constitution and thereby putting its constitutionality beyond doubt.[2]

The Constitutional Court must certify or decline to certify the text of a provincial Constitution in its entirety.[3] It can neither limit its 'certificate' to parts of the proposed Constitution, nor can it declare parts that are inconsistent with the national Constitution invalid. The Court may only point out where there are problems with a provision and, consequently, why it will not certify the text.

(vii) *Interim relief in matters of exclusive jurisdiction*

Under the Interim Constitution, any High Court (then a division of the Supreme Court) had jurisdiction to grant an interim interdict in relation to matters exclusively within the jurisdiction of the Constitutional Court, even where such interdict or relief might have the effect of suspending (or otherwise interfering with) the application of an Act of Parliament (IC s 101(7)). The Final Constitution does not contain such a provision.

[1] This set of circumstances was reflected in the proposed Constitution of KwaZulu-Natal: while the ANC and the national government of the day objected to the draft Constitution at the Constitutional Court, the draft was passed unanimously by the KwaZulu-Natal legislature. Nevertheless, the Constitutional Court correctly pointed out that this 'fact' could not in any way influence the performance of its certification function. *Speaker of the KwaZulu-Natal Provincial Legislature, Ex Parte: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996* 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC) at para 12. The amended draft of the Constitution of the Western Cape was also submitted without objection. See *Speaker of the Western Cape Provincial Legislature, Ex Parte: In re Certification of the Amended Text of Constitution of the Western Cape, 1997* 1998 (1) SA 655 (CC), 1997 (12) BCLR 1653 (CC) at para 2. Similarly, the Final Constitution was supported by 87% of the Constitutional Assembly — and yet met with objections during the certification process by some of the very parties that had voted for it.

[2] *Certification of the Constitution of KwaZulu-Natal* (supra) at para 11.

[3] Ibid at para 10.

At common law, a court's jurisdiction to entertain an application for interim relief depends upon whether it has jurisdiction to preserve or restore the status quo, as this is the purpose of preliminary legal protection. It does not depend on whether a court has jurisdiction to decide the main dispute.[1]

On this basis, the Constitutional Court in *National Gambling Board* determined that a High Court will have jurisdiction to grant interim relief in matters of exclusive jurisdiction as long as the preliminary ruling does not involve a final determination of the rights of the parties and does not affect the final determination.[2] Additionally, an applicant for such relief must rely on manifest prejudice or prejudice that is established on the facts placed before the court.[3] The jurisdiction of the High Court is independent from the form or effect of the interim interdict applied for. On the other hand, the High Court must not engage in an in-depth analysis of the contested constitutional right, but instead determine only whether the applicant has a *prima facie* right to the relief which is sought in the Constitutional Court.[4]

In addition to this systemic consideration, functional considerations also point towards granting jurisdiction to High Courts in matters of urgency:

> The Constitutional Court is not designed to act in matters of extreme urgency. It consists of eleven members and a quorum of the Court is eight of them. This Court is in recess for some months of each year and during those times its members disperse to their homes which, in some cases, are a considerable distance from the seat of the Court in Johannesburg … [and] it is not always possible to convene a quorum of the Court at very short notice during a recess.[5]

If it was only up to the Constitutional Court to grant interim relief in constitutional matters, even in matters of exclusive jurisdiction, there would be a great risk that a person might be left without the protection of the law.

Every category of exclusive jurisdiction has to be treated and interpreted separately to decide whether a High Court has the power to grant or refuse interim relief pending the decision of a matter exclusively within the Constitutional Court's jurisdiction.[6] FC s 167(4)*(a)* grants exclusive jurisdiction to the Constitutional Court to *decide* disputes between organs of state. Provided that it does not decide the dispute, a High Court has jurisdiction to grant interim relief pending the final determination of such a dispute.[7] In contrast, FC s 167(4)*(b)* leaves no room for interim relief with regard to Bills. As no court may, save as provided in FC ss 79 and 121, consider the constitutionality of a bill, no court may grant interim relief either. There would in any case be no proceedings in respect of

[1] *Airoadexpress v LRTB, Durban* 1986 (2) SA 663 (A).
[2] *National Gambling Board* (supra) at para 50.
[3] *President of the Republic of South Africa & Others v United Democratic Movement & Others* 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC) at para 33.
[4] *National Gambling Board* (supra) at para 52.
[5] *President of the RSA v United Democratic Movement* (supra) at para 30.
[6] *National Gambling Board* (supra) at para 51.
[7] Ibid at para 53.

which such relief would be relevant.[1] In the nature of things, a Bill referred to the Constitutional Court for a decision on its constitutionality would not have been signed into law and would have no legal force. It follows that interim relief would not be necessary because no one would be left without protection of the law, as might be the case with an Act of Parliament.

The special application procedures of FC s 80 (national sphere) and FC s 122 (provincial sphere) that are referred to in FC s 167(4)*(c)* provide for a specific mechanism in matters of urgency (FC ss 80(3) and 122(3), respectively) that only the Constitutional Court may entertain.[2] Here, High Courts are prevented from granting interim relief.[3] In *President of the RSA v United Democratic Movement*, the Constitutional Court nevertheless left open the question whether a High Court could have jurisdiction to suspend an Act of Parliament — before or after publication — outside the special application procedure of FC s 80 (or FC s 122). It is conceivable that a High Court might grant such an order in exceptional cases.[4]

With regard to constitutional amendments and exclusive jurisdiction under FC s 167(4)*(d)*, the Constitutional Court has held that, although a constitutional amendment does not usually have an immediate effect on persons or their rights, in exceptional cases interim relief may be granted by a High Court to prevent serious and irreparable prejudice, provided that in doing so the court *a quo* does not decide on the amendment's constitutionality. However, courts should take notice where a constitutional amendment has achieved the special support required by FC s 74, and should be careful not to thwart the will of the legislature, save in extreme cases.[5]

Should ordinary legislation fall within the High Court's jurisdiction in terms of FC s 172(2), the High Court may also grant an interim order pending its own decision, or, if the legislation is found unconstitutional, pending an application for confirmation by the Constitutional Court.[6] In *National Gambling Board*, the Constitutional Court explicitly left undecided whether a High Court would have jurisdiction to grant interim relief in circumstances where Parliament or the President had failed to fulfil a constitutional obligation (FC s 167(4)*(e)*). However, there is no reason why the general rule — avoidance of a decision and preservation of the status quo — should not apply here.

In any case, interim relief should only be granted where it is strictly necessary in the interests of justice. The Constitutional Court has held that the constitutional standard of FC s 80(3) should apply in other cases — at the very least in cases of exclusive jurisdiction. In determining 'the interests of justice', the High Court has to balance the interests of the person seeking interim relief against the interests of

[1] *President of the RSA v United Democratic Movement* (supra) at para 26.
[2] See above at § 4.3*(b)*(iii).
[3] *National Gambling Board* (supra) at para 51.
[4] *President of the RSA v United Democratic Movement* (supra) at para 27.
[5] Ibid at paras 28-30.
[6] Ibid.

others who might be affected by the grant of such relief. Where the case involves the enactment of legislation, any interim relief should be strictly tailored so as not to interfere with the operation of that legislation. This proviso is germane to instances in which the legislation relates to a constitutional amendment.[1]

(c) Constitutional matters of concurrent jurisdiction explicitly mentioned in the Constitution

In all constitutional matters not falling within the Constitutional Court's exclusive jurisdiction, the Court shares concurrent jurisdiction with other courts. However, the jurisdiction of the Constitutional Court is not completely congruent with that of other courts. It remains a specialized court. As outlined above, the Constitutional Court is a court of limited, rather than plenary jurisdiction, as embodied in the text of FC s 167(3)*(b)*. Therefore, the Constitutional Court may decide only constitutional matters, and issues connected with decisions on constitutional matters.

The threshold question of what constitutes a 'constitutional matter' is not in play for matters of exclusive jurisdiction. The Court cannot decline jurisdiction by arguing that the matter is not 'constitutional' within the meaning of FC s 167(3). There is another subset of cases where the 'constitutional matter' enquiry is only nominally engaged. These are cases where the Final Constitution, although not granting the Constitutional Court exclusive jurisdiction, nevertheless assigns a special task to the Court. The Court can fulfil these tasks without much consideration of the constitutional nature of the case. The first class of cases under this subset are those cases in which the Constitutional Court has to confirm an order of invalidity of an Act of Parliament made by a lower court according to FC s 167(5). In this subsection, the Constitution says in plain language that 'the Constitutional Court … *must* confirm any order of invalidity' (emphasis added). The Court cannot decline jurisdiction here.[2] The second class of cases are those that involve 'the interpretation, protection or enforcement of the Constitution'. Such cases are constitutional matters by reason of FC s 167(7). A term like 'interpretation' is not self-explanatory, of course. Nevertheless, to find that a matter requires the interpretation of the Final Constitution and then to draw the conclusion that it involves a constitutional matter is an exercise different from an independent finding that a case involves a constitutional matter. The former enquiry is guided by the text of FC s 167(7), while the latter is a more open-ended exercise of finding a basis for the Constitutional Court's jurisdiction.

[1] *President of the RSA v United Democratic Movement* (supra) at para 32.

[2] Cf *Masiya v Director of Public Prosecutions, Pretoria & Another (Centre for Applied Legal Studies & Another, Amici Curiae)* 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 at para 16 ('A declaration of constitutional invalidity raises a constitutional matter which in the ordinary course must be considered by this Court'.)

(i) *Confirmation of orders of statutory invalidity, FC s 167(5)*

FC s 167(5) must be read in conjunction with FC s 172(2)*(a)*. Together, the two provisions set the scene for the judicial review of national and provincial statutes and conduct of the President. This defining feature of a constitutional state — that all three branches of government must adhere to the Constitution (and face invalidation of their acts if they do not) — was uncontroversial throughout the negotiation of both the Interim and the Final Constitutions.[1] It is today unequivocally enshrined in the supremacy clause (FC s 2) and, specifically with regard to the Bill of Rights, in the application clause (FC s 8(1)). It has also been confirmed by the courts.[2] As an almost inevitable consequence of this principle, the Final Constitution confers on the judiciary the power to review Acts of Parliament. According to FC s 172(1)*(a)*, '[w]hen deciding a constitutional matter within its power a court — (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.'

This clause covers all statutory provisions enacted by Parliament. It does not extend to subordinate legislation (e g regulations and by-laws),[3] to conduct other than conduct of the President,[4] or to the common law.[5] In regard to these other forms of law and conduct, confirmation of a declaration of invalidity is not required and the High Court's finding is final — provided the parties do not appeal the case to the Constitutional Court. From the perspective of this chapter, the crucial question is which court has the power to make a (final) finding on the constitutionality of legislation.

Two features of South Africa's hybrid system determine the answer to this question: first, the fact that the task of declaring legislation invalid is not solely assigned to one court (as in the US or Germany); and, secondly, the fact that not all courts are equally competent to make a final decision, again provided that the decision is not appealed to a higher court (as in Japan).

As to the first point: not every court is competent to make orders concerning the constitutional validity of an Act of Parliament or a provincial Act. The courts that are competent to make such orders are the 'Supreme Court of Appeal, a

[1] The idea of a breaking away from the Westminster tradition of parliamentary sovereignty was a position shared or at least publicly advocated across the political spectrum in the early 1990s. See Albie Sachs *Protecting Human Rights in a New South Africa* (1990) 34-36; South African Law Commission *Project 58: Group and Human Rights — Interim Report* (1991) at para 1.31. For an even earlier view on this matter, see Marinus Wiechers 'The Fundamental Laws behind Our Constitution' in Ellison Kahn (ed) *Fiat Iustitita: Essays in Honour of Oliver Deneys Schreiner* (1983) 383 at 385.

[2] *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C) at para 25.

[3] See *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 11; *Booysen & Others v Minister of Home Affairs & Another* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC) at para 1; *Minister of Home Affairs v Liebenberg* 2002 (1) SA 33; 2001 (11) BCLR 1168 (CC) at para 9.

[4] See *Van Rooyen & Others v State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 8.

[5] See *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 2.

High Court or a court of similar status' (FC s 172(2)*(a)*).[1] The Magistrates' Courts are explicitly excluded from any decision on the constitutional validity of these types of statutes (FC s 170). Courts 'of similar status' either to the Supreme Court of Appeal or to a High Court are the Labour Court (s 151(2) of the Labour Relations Act 66 of 1995), the Labour Appeal Court (s 167(3) of the Labour Relations Act 66 of 1995),[2] and the Land Claims Court (s 22(2)(a) of the Restitution of Land Rights Act 22 of 1994).[3]

As to the second point: FC s 172(2)*(a)* makes it clear that an order of constitutional invalidity has no force until it is confirmed by the Constitutional Court. Thus, a decision by a High Court or the Supreme Court of Appeal declaring an Act of Parliament or a provincial Act invalid has no force until the Constitutional Court has confirmed such an order.[4] Here, the Constitutional Court's power of

[1] This enumeration is congruent with the powers of these courts in constitutional matters in general. See FC s 168(3) for the Supreme Court of Appeal and FC s 169*(a)* for the High Courts. Even if the Supreme Court of Appeal is not the highest court in constitutional matters it may nevertheless decide them.

[2] There is an ongoing dispute between the High Courts and the Labour Court with regard to their respective jurisdictions. They are especially at odds in cases where the state is the employer. See John Grogan *Workplace Law* (9th ed. 2007) 449-451, 455-458. This turf battle has no consequences for the powers of these courts in constitutional matters. A similar dispute on who had the final word in labour law matters between the Supreme Court of Appeal and the Labour Appeals Court was resolved in favour of the Supreme Court of Appeal in *NUMSA & Others v Fry's Metal (Pty) Ltd* (2005) 26 *ILJ* 689 (SCA). In constitutional matters, appeals from the Labour Appeals Court must generally first go to the Supreme Court of Appeal. See *NEHAWU* (supra) at paras 20-22.

[3] Thus far, no order of constitutional invalidity has been made by any court other than a High Court or the Supreme Court of Appeal.

[4] Under the Interim Constitution, only the Constitutional Court had jurisdiction over 'any enquiry into the constitutionality of any law, including an Act of Parliament' and no other court could make orders of statutory invalidity (IC ss 98(2)*(c)* and 98(3)). Under the Interim Constitution, the Constitutional Court was placed on the same hierarchical level as the Appellate Division of the Supreme Court and neither court could hear appeals from the other. When a local or provincial division of the Supreme Court held that a finding on the constitutionality of an Act of Parliament may be decisive for the case, it had to refer the matter in a complicated way to the Constitutional Court (IC s 102(1). A similar procedure had to be followed by Magistrates' Courts (IC ss 103(3) and 103(4)). In essence, the procedures prescribed in the Interim Constitution contemplated that enquiries into the validity of Acts of Parliament should be raised formally in proceedings before the Supreme Court of Appeal or other courts. They were only to be referred to the Constitutional Court for its decision in circumstances where it would be appropriate to do so according to a decision by the Supreme Court. The Supreme Court, thus, could not make any decision with regard to Acts of Parliament, but acted as a gatekeeper to the Constitutional Court. It had to ensure that the hearing of cases was not disrupted by unnecessary applications to refer issues to the Constitutional Court. Cases were only referred after all the evidence necessary for such a decision had been placed on record so that the determination of a constitutional issue could be deemed decisive. After the amendment of the Interim Constitution in 1995 (IC s 101(7) added by s 3 of Act 44 of 1995), interim relief could be granted by the Supreme Court. Because of the complicated referral procedure, the Constitutional Court explained the correct approach in a number of cases: *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC); *Luitingh v Minister of Defence* 1996 (2) SA 909 (CC), 1996 (4) BCLR 581 (CC); *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC). It is most likely that the intricate referral procedure under the Interim Constitution was one of the reasons for changing the system in the Final Constitution to the current scheme where only an affirmative decision by a High Court that a statute is invalid has to be referred to the Constitutional Court. Other advantages of this procedure are that the High Courts may feel a greater responsibility for declarations of invalidity and that the Constitutional Court has the advantage of another court's view on the matter.

review is nearly exclusive, i e, it has the final word in any decision on statutory invalidity. This superior role follows from the purpose of FC s 172(2)*(a)*, and, by extension, FC s 167(5):

> [The Constitutional Court] has exclusive jurisdiction in respect of certain constitutional matters, and makes the final decision on those constitutional matters that are also within the jurisdiction of other courts. This is the context within which section 172(2)*(a)* . . . is concerned with the law making acts of the legislatures at the two highest levels [national and provincial], and the conduct of the President, who as head of state and head of the executive is the highest functionary within the state. . . . The apparent purpose of the section is to ensure that this Court, as the highest court in constitutional matters, should control declarations of constitutional invalidity made against the highest organs of state.[1]

This statement's emphasis on separation of powers is consistent with the Constitutional Court's understanding of FC s 167(4). Additionally, the Court's position that its superior role is constitutionally warranted by 'comity' towards the other branches of government has been emphasized, first with regard to FC s 172(2), and later with regard to exclusive jurisdiction in the strict sense.[2]

Rule 16 of the Constitutional Court Rules sets out the procedural requirements for a referral to confirm an order of constitutional invalidity of a statute.[3] Although the Constitutional Court's jurisdiction is triggered by an order of constitutional invalidity, in many cases parties themselves have applied to the Constitutional Court for a confirmation order.[4] As Kate Hofmeyer points out, an application is not necessary as the Constitutional Court receives the case 'automatically' (and will confirm or decline to confirm in due course). However, such a redundant procedure is permitted by FC s 172(2)*(d)* and can be strategically employed by parties to avoid a delay in the final decision caused, for example, by the other party's appealing to the Supreme Court of Appeal.[5]

(ii) *Interpretation, protection or enforcement of the Constitution, FC s 167(7)*

FC s 167(7) offers a hint of what the Constitutional Assembly might have intended when it decided that the Constitutional Court should be a court with

[1] *Pharmaceutical Manufacturers Association of SA in re: the Ex Parte Application of the President of the RSA & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 55-56.

[2] See § 4.2*(c)* supra.

[3] See, further, Kate Hofmeyer 'Rules and Procedure in Constitutional Matters' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 5, § 5.2*(c)*.

[4] See *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC) at para 14 (Constitutional Court pointed out that in these circumstances an application to the Constitutional Court does not require leave of the court making the declaration or the Constitutional Court itself.) But see *President Ordinary Court Martial & Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC), 1999 (11) BCLR 1219 (CC) at para 16 (Where a provision declared invalid by a High Court has subsequently been repealed by an Act of Parliament, the Constitutional Court has a discretion to decide whether or not it should deal with the matter.)

[5] Hofmeyer (supra) at § 5.2*(c)*.

jurisdiction limited to 'constitutional matters'. FC s 167(7) is the only subsection that offers something like an explanation of what makes up 'constitutional matters' and gives both the Constitutional Court and the legal community at large some indication of how to distinguish constitutional from non-constitutional matters.[1] One has to keep in mind that under the Interim Constitution the entire jurisdiction of the Constitutional Court was defined through this legal triad (of interpretation, protection and enforcement).[2] Under that Constitution, the Constitutional Court's jurisdiction was triggered by 'matter[s] relating to the interpretation, protection and enforcement of the provisions of [the Interim] Constitution', which encompassed all sorts of disputes and enquiries (some of them within the Court's exclusive jurisdiction), rather than the presence of a 'constitutional matter.'

It seems that the Constitutional Assembly believed that the phrase 'interpretation, protection and enforcement' might be too narrow and thus replaced it with 'constitutional matter'. At the same time, however, the Constitutional Assembly apparently did not want to drop this phrase altogether. Instead, it altered it from a term that comprehensively defined the Constitutional Court's jurisdiction to one that defined a group of related cases falling under the overall jurisdiction of the Court. The consequence of this revision is that, today, both the courts and legal scholars focus entirely on whether a case presents a 'constitutional matter', while FC s 167(7) enjoys no prominence (even to the extent of being misquoted by the Constitutional Court).[3]

Its origins notwithstanding, FC s 167(7) on its own has an indeterminate scope. It states that 'a constitutional matter *includes* any issue involving the interpretation, protection or enforcement of the Constitution' (emphasis added). This phraseology implies that, at least conceptually, there may be a constitutional

[1] It has also been argued that FC s 167(7) serves to emphasize the supremacy of the Final Constitution by pronouncements of the Constitutional Court in the interpretation, protection and enforcement of the Final Constitution, in particular with regard to the Bill of Rights. See *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C) at para 34.

[2] IC s 98(2) of the Interim Constitution provided:

The Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution, including —

(a) any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3;
(b) any dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state;
(c) any enquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution;
(d) any dispute over the constitutionality of any Bill before Parliament or a provincial legislature, subject to subsection (9);
(e) any dispute of a constitutional nature between organs of state at any level of government;
(f) the determination of questions whether any matter falls within its jurisdiction; and
(g) the determination of any other matters as may be entrusted to it by this Constitution or any other law.

[3] The Constitutional Court has misquoted FC s 167(7) in two cases. See *Boesak* (supra) at para 14; *Fraser* (supra) at para 38. See § 4.3*(a)*(ii) and (iii) supra.

matter that does *not* involve the interpretation, protection or enforcement of the Final Constitution. Still, FC s 167(7) serves the very important purpose of guaranteeing at least a minimum standard for identifying cases that the Constitutional Court must deal with. Any enquiry by the Constitutional Court into whether it should assume or decline jurisdiction should therefore start with an enquiry into whether there is an issue in the case that involves the interpretation, protection or enforcement of the Constitution. If this question is answered in the affirmative, it is strictly speaking unnecessary to embark on a free-floating consideration of the constitutional nature of the case.

As we have seen, FC s 167(7) stipulates that constitutional matters include any 'issue' involving the interpretation, protection or enforcement of the Final Constitution. It is unlikely, however, that the distinction between 'matter' and 'issue' will prove significant: a constitutional 'matter' can be understood as the entire case, while an 'issue' is limited to one aspect of the case. This is simply an acknowledgment that legal disputes usually contain a bundle of different questions, factual and legal, all of them 'issues' for decision by a competent court. Against this background, FC s 167(7) provides that only one aspect of a case need involve the interpretation, protection or enforcement of the Constitution to trigger the jurisdiction of the Constitutional Court. Such a reading is consistent with the distinction between constitutional matters and 'issues connected with decisions on constitutional matters' in FC s 167(3)*(b)*. The Constitutional Court may also decide other issues, which do not involve the interpretation, protection or enforcement of the Constitution and are — at least *prima facie* — not constitutional matters, if they are sufficiently connected with a decision on a constitutional matter.[1]

Splitting up FC 167(2) into its constituent parts, a constitutional matter is present, first, whenever there is an issue that involves the 'interpretation' of the Final Constitution. Much has been written on the interpretation of the Final Constitution in general and on the Bill of Rights in particular.[2] However, the purpose of this literature is predominantly to show how the Final Constitution should be interpreted. The Constitutional Court has on numerous occasions, beginning with its first decision, elaborated how it approaches the interpretation of the Final Constitution and what it takes into account when doing so.[3] All very

[1] See § 4.3*(e)* infra.

[2] See Lourens du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32.

[3] See, eg, *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 17 (On purposive interpretation and its limits); *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at paras 59-64 (Reading down of statutes); *Coetzee v Government of the Republic of South Africa & Others; Matiso v The Commanding Officer, Port Elizabeth Prison & Others* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC) at para 11 (Interpretation to promote values of the Bill of Rights applies to both the fundamental right and the evaluation of any limitation according to the criteria of the limitation clause).

important considerations — no doubt — but for the Constitutional Court to assume jurisdiction in terms of FC s 167(7), it is necessary to determine *when* it is interpreting the Final Constitution, not *how* it interprets it. One has to go a step back, so to speak.

A court interprets the Final Constitution when it gives meaning to one or more of its provisions. Interpretation involves the understanding, exposition, and application of a text in order to ascertain and give effect to the intention of its author.[1] While this is true across disciplines, in the legal field interpretation has a more specific purpose: to determine whether a specific situation falls within the scope of a provision, and whether a case is covered by a particular legal norm. The interpretation of a statute requires a norm to be transposed into a concrete situation.[2] Ultimately, courts are asked to interpret a legal provision, such as a clause in the Final Constitution, in order to establish whether law or conduct is inconsistent with that provision.[3] A matter, therefore, involves the 'interpretation' of the Final Constitution under FC s 167(7) when meaning must be given to one or more provisions of the Final Constitution (or to the Final Constitution as a whole) in order to determine the constitutionality of law or conduct.

Next, it is necessary to ask when a court 'protects' the Final Constitution and thus entertains a 'constitutional matter' in the second sense mentioned in FC s 167(7). One possible understanding of the term 'protection' may be found in FC s 7(2), the opening section of the Bill of Rights, which stipulates that the state must 'respect, *protect*, promote and fulfil the rights in the Bill of Rights'. However, the meaning of the different obligations FC s 7(2) imposes on the state is all but clear. The Constitutional Court usually does not distinguish between them, but rather uses them conjunctively to define the state's obligations in terms of the Bill of Rights.[4] In academic writing, it has been suggested that the phrase 'protect' in FC s 7(2) refers to the state's positive duty to give effect to the Bill of Rights.[5] If such a positive duty can be established, any nonfeasance has the same legal quality as the abuse of state power: both would be infringements of the Final Constitution.[6]

The problem with such an approach to FC s 167(7) is that it is difficult to imagine why the Constitutional Court should only have jurisdiction when the state has failed to perform a particular positive obligation in the Bill of Rights. Why

[1] Lourens du Plessis & Hugh Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 61.

[2] Lourens du Plessis & Hugh Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 89; IG Rautenbach *General Provisions of the South African Bill of Rights* (1995) 17-18.

[3] Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 145.

[4] See, eg, *Carmichele v Minister of Safety and Security & Another* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) at para 57.

[5] See Lourens du Plessis 'The Bill of Rights in the Working Draft of the New Constitution — An Evaluation of Aspects of a Constitutional Text Sui Generis' (1996) 7 *Stell LR* 3. 8.

[6] Such a case could involve socio-economic rights where the state has to take (reasonable) positive measures to achieve their progressive realization. See *Grootboom v Government of the Republic of South Africa & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 38; *Minister of Health & Others v Treatment Action Campaign & Others (2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1075 (CC) at para 39.

would the Final Constitution exclude the jurisdiction of the Constitutional Court when a right needs to be, say, respected or fulfilled? Additionally, 'protection' may very well include the obligation not to infringe the Final Constitution in a negative way. It is much more likely that the word 'protection' in FC s 167(7) was carried over from the Interim Constitution without the intention of confining it to the same meaning as 'protect' in FC s 7(2). It is submitted, therefore, that 'protection' in FC s 167(7) refers to cases where the safeguarding of the Final Constitution is at stake, regardless of whether negative or positive duties are implicated.

Finally, the 'enforcement' of the Final Constitution is an issue that is in some way incidental to its interpretation and protection. Enforcement overlaps partly with protection, as effective protection demands the enforcement of a legal provision. However, both interpretation and protection require a court to pronounce on what the Final Constitution says with regard to a specific situation. They involve inquiries into the meaning of the Final Constitution. 'Enforcement', on the other hand, is less concerned with the meaning of the constitutional text and more concerned with its practical implementation in the form of remedies. To fall within the meaning of 'enforcement', one would have to establish, first, that the Final Constitution demands certain (positive or negative) conduct from the state or an individual. Second, one would need to establish guidelines for effective compliance. Thus, a case would involve a constitutional matter according to FC s 167(7) if it involves an order that gives effect to the Final Constitution.

Of course, these definitions of 'interpretation', 'protection' and 'enforcement' are not meant to create discrete categories. One may argue that every process of 'interpreting' the Final Constitution also requires its 'protection', and vice versa. The point is not that these categories are mutually exclusive; the differences between them are merely matters of emphasis. The categories of FC s 167(7) may overlap, but they were all included in this subsection to emphasize the different ways by which the Final Constitution may be implicated.

Having said that, it is difficult to avoid the conclusion that every single one of the over 300 cases the Constitutional Court has thus far decided could be classified as involving either the 'interpretation', the 'protection' or the 'enforcement' of the Final Constitution. From this perspective, it is not obvious that there *really* is any room for constitutional matters outside of FC s 167(7). How, for example, could a court make a finding on the constitutionality of a Bill, an Act of Parliament, or even an amendment to the Final Constitution without interpreting the Final Constitution? Likewise, disputes between organs of state concerning their *constitutional* status, powers or functions will always demand some interpretation of the Final Constitution. Is a decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional at all possible without at least an implicit evaluation of what the constitutional text demands in the situation? The term 'constitutional matter' does not seem to include more than what is already

envisaged in FC s 167(7). To this extent, the framers of the Interim Constitution appear to have been quite forward-looking in their approach to the Constitutional Court's jurisdiction.

This being so, the next question is whether FC s 167(7) provides only retrospective justification for the assumption of jurisdiction in cases the Constitutional Court has already decided, or whether it can also help us to understand how the Court should decided future cases. Is it possible to use FC s 167(7) to decide that a case does *not* involve the interpretation, protection or enforcement of the Final Constitution, and therefore that the Court should not assume jurisdiction? Not in such a simple way. As argued below, the subsection is indeed capable of limiting the jurisdiction of the Constitutional Court, but this requires a specific functionalist understanding of the Court's jurisdiction and a specific definitional approach to FC s 167(7).[1] Before elaborating on this point, it is necessary to review the cases in which the Constitutional Court has assumed jurisdiction without express reliance on FC ss 167(4), 167(5) or 167(7), and also those cases where it has held that no constitutional matter is present.

(d) Other constitutional matters of concurrent jurisdiction

Thus far, the constitutional matters discussed have all been linked to FC ss 167(4), 167(5) or 167(7). In addition to cases in which its jurisdiction has been founded on these provisions, the Constitutional Court has held that it has jurisdiction in a number of other cases, all of which involve 'constitutional matters' in terms of FC s 167(3)*(b)*. These cases can be grouped into several broad categories, all of which help to understand the Court's approach to its jurisdiction.

(i) *Interpretation of legislation and development of the common law or customary law in accordance with the spirit, purport and objects of the Bill of Rights, FC s 39(2)*

FC s 39(2) imposes duties on the judiciary in the normal process of adjudication. In a nutshell, courts have to take the Bill of Rights into account whatever they do.[2] This section requires the courts to live up to a constitutional standard when they interpret statutory provisions or develop the common law or customary law. The context in which FC s 39(2) applies is not the interpretation or application of the Final Constitution itself, but solely the application, interpretation and development of the *ordinary law*. The Final Constitution is not relevant in these cases because it is invoked directly. In fact, neither of the parties may have relied on the Final Constitution for their claim. Rather, the Final Constitution is relevant because it influences the ordinary law.

[1] See § 4.3*(b)*(ii) infra.

[2] For a detailed analysis of what FC s 39(2) requires the courts to do, see Stu Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.4*(e)*.

FC s 39(2) is not merely a directive for courts to develop the common law and interpret legislation. Courts do this in any event. Instead, this section sets the standard according to which the common law needs to be developed and legislation interpreted. In short, FC s 39(2) imposes an obligation on every court, tribunal or forum to ensure that the ordinary law evolves in a specific direction, ie, in accordance with the Final Constitution. In *Carmichele*, the Constitutional Court stated:

> [I]t is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it *appropriately*.[1]

FC s 39(2) sets the same standard for the interpretation of legislation. Consequently, the Constitutional Court has followed a similar approach to statutory interpretation as it has to the development of the common law. Just as every court must apply the common law within the framework of the Final Constitution, every court has a duty to interpret statutes through 'the prism of the Bill of Rights'.[2] The obligations are the same:

> [The Constitutional Court has held] that the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary but that the courts are under a general obligation to develop the common law appropriately where it is deficient, as it stands, in promoting the section 39(2) objectives. There is a like obligation on the courts, when interpreting any legislation … to promote those objectives.[3]

A constitutional matter arises where a court, tribunal or forum fails to interpret legislation or fails to develop the common law consistent with this constitutional standard. The obligation is both process- and outcome-based. As Frank Michelman rightly points out, the Constitutional Court's jurisdiction here derives from its oversight function in steering the course of the common law (and statutory law) in the direction mandated by the Final Constitution.[4] In this regard, it is not only FC s 39(2), but also provisions such as FC ss 8(3) and 173 (which guarantee the inherent power of, among others, the Constitutional Court to develop the common law) that take this steering function into account.

In pursuit of its oversight function, the Constitutional Court has allowed a significant number of cases to trigger its jurisdiction based on FC s 39(2). Although the Court has held that the obligations of FC s 39(2) are the same for both common and statutory law, it has nevertheless approached cases involving the common law differently from those involving only legislation.

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[1] *Carmichele* (supra) at para 39 (emphasis added).

[2] *The Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others; In re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 21.

[3] *First National Bank (FNB) of SA t/a Wesbank v Commissioner for the South African Revenue Services & Another; First National Bank of SA t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 31 and quoted with approval in *Fraser* (supra) at para 43.

[4] Michelman (supra) at § 11.2*(a)*.

(aa) Cases involving the common law

Not every case that involves the common law is automatically deemed to be a constitutional matter. Generally speaking, the Constitutional Court distinguishes between different challenges to the common law. Only some give rise to a constitutional matter.

First, similar to a challenge to statutory provisions, an applicant may challenge the constitutionality of a particular common-law rule. The Constitutional Court has held that the question of whether a distinct common-law rule is in conflict with the Final Constitution is indeed a constitutional matter which should properly be determined by the Court and that it, therefore, 'is entitled to decide' such a question.[1]

Secondly, in *S v Boesak*, the Constitutional Court made clear that a court's failure to develop a common-law rule consistent with its obligation under FC s 39(2), or with some other right or principle of the Final Constitution, may give rise to a constitutional matter.[2] The Constitutional Court, however, has been careful to distinguish between the development of a common-law rule and its mere application in cases where there is no advancement of that rule. In one of its earlier cases, the Court clearly stated that the application of an ordinary common-law principle would generally *not* raise a constitutional matter:

> What the correct application of the [common law principle of *stare decisis*] should have been in the proceedings … is, however, not a 'constitutional issue' which falls within the jurisdiction of this Court, in terms of the Constitution. The Supreme Court had jurisdiction to determine that question. It is simply the proper interpretation of a common law principle. It is not an issue which can properly be referred to this Court.[3]

In this passage, the Court draws a distinction between the review of a common-law rule, the application or interpretation of that rule, and the question of whether the rule needs to be developed. This distinction is also apparent in *Phoebus Apollo Aviation*:

> It is not suggested that in determining the question of vicarious liability the Supreme Court of Appeal applied any principle which is inconsistent with the Constitution. Nor is there any suggestion that any such principle needs to be adapted or evolved to bring it into harmony with the spirit, purport or objects of the Bill of Rights. On the contrary, counsel for the appellant expressly conceded that the common law test for vicarious liability, as it stands, is consistent with the Constitution. … The thrust of the argument presented on behalf of the appellant was essentially that though the Supreme Court of Appeal has set the correct test, it had applied that test incorrectly — which is of course not ordinarily a constitutional issue. … It is not for [the Constitutional Court] to agree or disagree with the manner in which the SCA applied a constitutionally acceptable common law test to the facts of the present case.[4]

[1] *Shabalala & Others v Attorney-General, Transvaal, & Another* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC) at para 9.
[2] *Boesak* (supra) at para 15*(b)*.
[3] *Shabalala* (supra) at para 8.
[4] *Phoebus Apollo Aviation* (supra) at para 9.

Thus, FC s 39(2) may be invoked either when a common-law rule as it stands is inconsistent with the Bill of Rights *or* when it needs to be adapted or evolved to conform with the Final Constitution. It is important to note, however, that the jurisdiction of the Constitutional Court is triggered because the common law purportedly needs to be developed — not because this is in fact demanded by the Final Constitution, as this is a question going to the merits of the case. On this basis, the Court has assumed jurisdiction even when it later decided that the Final Constitution did not require development of the common-law rule at issue.[1]

In other cases, however, this neat distinction between the development and application of the common law has not been followed by the Constitutional Court. In some instances, even the application of a legal rule may constitute a constitutional matter. In *Boesak*, the Court recognized the possibility, without citing an example, that the application of a rule could be inconsistent with some right or principle in the Final Constitution.[2] Not every application of a common-law rule raises a constitutional matter, but cases may exist in which even the simple application of a common-law rule (that is itself consistent with the Final Constitution) triggers constitutional jurisdiction. The case that best illustrates such a possibility is *K v Minister of Safety and Security*.[3] In *K*, the Constitutional Court found that a common-law rule may have a 'policy-laden character' and that it may be 'imbued with social policy and normative content'.[4] Therefore, the Court concluded, both the rule *and its application* need to be developed to accord more fully with the spirit, purport and objects of the Final Constitution.[5]

In the abstract, it is sound to hold that the application of policy-laden common-law rules has a constitutional dimension and is therefore subject to constitutional scrutiny. South African courts have long held that common-law rules include concepts that are open to policy considerations — such as 'public policy', 'boni mores' or 'reasonableness' — and courts have used these notions of fairness and justice to influence the formal structure of the law.[6] Courts could, in shaping the legal order, account for changing social attitudes without changing the structure of the existing common law by invoking such principles as '*contemporary* boni mores and the general sense of justice of the community'.[7] With the enactment of the Interim Constitution, the new Bill of Rights became the predominant

[1] *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC).
[2] *Boesak* (supra) at para 15.
[3] 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC).
[4] *K* (supra) at para 22.
[5] Ibid at para 23 (emphasis added).
[6] See *Eastwood v Shepstone* 1902 TS 294; *Jajbhay v Cassim* 1939 AD 537; *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *Sasfin (Pty) Ltd. v Beukes* 1989 (1) SA 1 (A); *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) 1204; *Amod v Multilateral Motor Vehicle Accident Fund* 1999 (4) SA 1319 (SCA) at para 21.
[7] *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) at 462G (my emphasis).

guiding force for these open concepts.[1] Ackermann J's judgment in *Du Plessis v De Klerk*[2] emphasized this function of the Bill of Rights:

> [T]he law can deal effectively with these challenges [of private discrimination] through the very process envisaged by section 35(3) [of the Interim Constitution], namely, the indirect radiating effect of the Chapter 3 rights on the post constitutional development in the common law and statute law of concepts such as public policy, the boni mores, unlawfulness, reasonableness, fairness and the like. . .. The common law of this country has, in the past, proved to be flexible and adaptable, and I am confident that it can also meet this new constitutional mandate.[3]

The correlation between the Final Constitution and the common law (with its inherent notions of policy and open clauses) has become an accepted feature of South African Law.[4] As Davis J puts it:

> Like the concept of boni mores in our law of delict, the concept of good faith is shaped by the legal convictions of the community. While Roman-Dutch law may well supply the conceptual apparatus for our law, the content with which concepts are filled depends on an examination of the legal conviction of the community . . . In short, the constitutional State which was introduced in 1994 mandates that all law should be congruent with the fundamental values of the Constitution. . . . In accordance with its constitutional mandate the courts of our constitutional community can employ the concept of *boni mores* to infuse our law of contract with this concept of *bona fides*.[5]

The problem with the Constitutional Court's decision in *K* is not the rationale of the finding but the inconsistency with which it treats the common-law rule at issue. The Court held that the rule (or rather set of rules in this case) on vicarious liability was so imbued with social policy that even its application raised a constitutional matter. Yet, in *Phoebus Apollo Aviation*, which involved the very same set of common-law rules, the Court declined jurisdiction. In *K,* the question as to whether an employer should be held vicariously liable for unlawful acts by its employees is treated as a policy issue that necessarily has a constitutional dimension whereas in *Phoebus Apollo* this question is treated as a mere application of an acceptable common-law test in which no constitutional issue is raised. No wonder the notion that there is any legally-relevant distinction between these two cases has been described as tenuous at best.[6]

[1] Cf JA Ferreira & GM Robinson 'Reflections on the Boni Mores in the Light of Chapter Three of the 1993 Constitution' (1997) 60 *THRHR* 303, 307.

[2] 1996 (3) SA 850, 1996 (5) BCLR 658 (CC).

[3] *Du Plessis v De Klerk* (supra) at para 110.

[4] See, eg, *Carmichele* (supra) at paras 54-56; *Steenkamp v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC) at para 41; *Phumelela Gaming and Leisure Ltd v Gründlingh & Others* 2007 (6) SA 350 (CC), 2006 (8) BCLR 883 (CC) at para 31; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para 17.

[5] *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464, 474J and 475F and cited with approval by the Supreme Court of Appeal in *Brisley v Drotsky* 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 at para 69 and by the Constitutional Court in *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) at para 140 (per Sachs J).

[6] See Carole Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' (2005) 21 *SAJHR* 509, 518.

In *K*, the Constitutional Court tried to justify its decision by referring to the fact that in *Phoebus Apollo Aviation* the applicant had not argued that the common-law rule of vicarious liability needed reconsideration. In *K*, by contrast, the applicant had claimed that the common law should be developed so as to vindicate its constitutional rights.[1] In *K*, therefore, the 'sharp issue of the constitutionality of the common-law rule' was in issue.[2] This distinction, however, is not convincing: if 'courts are under a general obligation to develop the common law appropriately where it is deficient, as it stands, in promoting the section 39(2) objectives'[3] why should it be an applicant's responsibility to draw the court's attention to the possibility of a deficiency and the need for development? Instead, every court, tribunal or forum has to assess on its own whether a common-law rule that is put in issue and that does not support the claim (or the defence) needs to be developed according to the spirit, purport and objects of the Bill of Rights.[4] Indeed, the Constitutional Court has held that all courts operate under such an obligation.

Assuming the Constitutional Court decides to stick to its current approach, advocates who wish the Constitutional Court to hear their client's case would be well advised to argue that the application of the common-law rule in question involves a policy question informed by the values of the Final Constitution and that, in any case, the common law is never just applied but always developed.[5]

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[1] *K* (supra) at para 14.

[2] Ibid at para 20. However, the *constitutionality* of the common law rule was *not* at issue. At no time does the Court genuinely test the common-law principle of vicarious liability against the Final Constitution, neither does it contemplate declaring it unconstitutional. Instead, the judgment is at pains to show that the common-law principle can perfectly accommodate the demands of the Bill of Rights. See *K* (supra) at para 44:

> The objective element of the test [of vicarious liability in case of an intentional wrongful act of an employee] which relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objects of the Constitution in mind, is sufficiently flexible to incorporate not only constitutional norms, but other norms as well. It requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not. Thus developed, by the explicit recognition of the normative content of the objective stage of the test, its application should not offend the Bill of Rights or be at odds with our constitutional order.

This quote shows that the Court does not test the constitutionality of the principle. What it does, in fact, is indirect application of the Constittion through the interpretation of an open-ended phrase ('sufficient connection'), similar to the interpretation of phrases like '*boni mores*' or 'wrongfulness'. In the words of the Constitutional Court, one has to look 'at the principle of vicarious liability through the prism of section 39(2) of the Constitution'. Ibid at para 22.

[3] *First National Bank (FNB) of SA t/a Wesbank v Commissioner for the South African Revenue Services & Another; First National Bank of SA t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 31. See *Carmichele* (supra) at para 39.

[4] Cf *Phumelela* (supra) at para 27 ('A court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law. In this *no court* has a discretion' (my emphasis).)

[5] A beautiful example is *Phumelela*. In the High Court and the Supreme Court of Appeal the applicant relied entirely on the law of delict, viz the delict of unlawful competition. When it appealed to the Constitutional Court it realized that it had to bring in the Final Constitution to make the case a constitutional matter. It thus started to argue that the Supreme Court of Appeal had failed to determine the wrongfulness of the conduct of the defendants by reference to FC s 39(2). It was submitted that, had the Supreme Court of Appeal developed the common law as it ought to have, it would have recognized the applicant's claim as a constitutionally protected interest (in this case in terms of the property clause).

This approach was followed in the third case that came before the Constitutional Court involving the common-law rules relating to vicarious liability: *Minister of Safety and Security v Luiters*.[1] In this case, an off-duty policeman had shot and wounded several people he suspected of robbing his house. The Minister, faced with a claim for civil liability, asked for a variation of the test formulated in *K* to exclude police officers who were not on duty when they committed an offence. The Court rejected this submission and confirmed its holding in *K*. In so doing, it had little difficulty in assuming jurisdiction on the basis that the Minister had sought the development of the common law of vicarious liability under FC s 39(2) and thereby 'forced the Court to consider constitutional rights or values'.[2]

In other cases, the Constitutional Court has stated that it will leave the primary task of common-law development to the Supreme Court of Appeal.[3] Even when an applicant asserts that the common-law rule in question requires reconsideration in the light of the Final Constitution, such arguments must first be placed before the Supreme Court of Appeal before being raised in the Constitutional Court.[4] On the other hand, the Court has stated that, because all courts are under a duty to consider the Bill of Rights, even where the parties have not referred to it, a party's failure to raise a FC s 39(2) argument in the High Court or the Supreme Court of Appeal does not necessarily bar that party from accessing the Constitutional Court.[5] The Constitutional Court's statements about common-law development being the primary task of the Supreme Court of Appeal must therefore be treated with caution: the mere attribution of primary responsibility to the Supreme Court of Appeal does not alter the scope of the jurisdiction that the Constitutional Court reserves for itself. The net has been cast wide, and the only possible conclusion is that every application of the common law is potentially subject to appeal to the Constitutional Court.[6]

(bb) Cases involving legislation

Where legislation is directly challenged as being in violation of the Final Constitution, the Constitutional Court's jurisdiction is founded on FC ss 167(5) and

[1] 2007 (2) SA 106 (CC), 2007 (3) BCLR 287 (CC).

[2] *Luiters* (supra) at para 23. The Court did, however, reject jurisdiction on the first element of the *K* test — whether the policeman intended to act in the course and scope of employment — because this was a purely factual matter. Ibid at paras 14 and 28.

[3] *Amod v Multilateral Motor Vehicle Accident Fund* 1998 (4) SA 753 (CC), 1998 (10) BCLR 1207 (CC) at para 33 ('The Supreme Court of Appeal has jurisdiction to develop the common law in all matters including constitutional matters. Because of the breadth of its jurisdiction and its expertise in the common law, its views as to whether the common law should or should not be developed in a 'constitutional matter' are of particular importance.')

[4] *S v Bierman* 2002 (5) SA 243 (CC), 2002 (10) BCLR 1078 (CC) at para 7.

[5] *Phumelela* (supra) at para 26.

[6] Here I agree with Stu Woolman's conclusion that a sword of Damocles has been placed over High Courts and the SCA. Stu Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.4*(e)*(ii)(bb).

172(2)*(a)*.[1] Where no direct challenge is made, the Court's jurisdiction may be founded on FC s 39(2). As the Constitutional Court put it in *NEHAWU*:

> In relation to a statute a constitutional matter may arise either because the constitutionality of its interpretation or its application is in issue or because the constitutionality of the statute itself is in issue. A challenge to the manner in which the statute has been interpreted or applied does not require the litigant to challenge the constitutionality of the provision the construction of which is in issue.[2]

The Court's jurisdiction, in other words, is not limited to explicit challenges. If the issues in an application concern the interpretation of legislation in conformity with the Final Constitution, the case will involve a constitutional matter.[3] Because the interpretation of legislation in accordance with the Final Constitution is an obligation of every court, tribunal or forum, the Constitutional Court may found its jurisdiction on points of statutory interpretation raised by the courts *mero motu*. However, in most cases, the applicant will explicitly ask the Constitutional Court to review the interpretation of the statutory provision that was adopted by the lower court.

The interpretation of legislation in conformity with the Final Constitution lay at the heart of the *Fraser*. In *Fraser*, the applicant challenged a Supreme Court of Appeal ruling preventing him from accessing certain frozen assets in terms of s 26 of the Prevention of Organized Crime Act 121 of 1998 ('the POCA'). The *Fraser* Court held:

> The question raised by this application is whether the Supreme Court of Appeal's interpretation of section 26 [of the POCA] has failed to promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) [of the Constitution]. This differs from an attack on an allegedly wrong factual finding or incorrect interpretation or application of the law, as in the cases referred to earlier. . . . A constitutional matter has thus been raised, and this Court accordingly has jurisdiction to hear the matter.[4]

The *Fraser* Court then went on to state some additional reasons in support of its competence to provide guidance on the interpretation of the POCA — not just the section relevant to the case but the whole statute. Though the POCA serves a legitimate purpose, the Court held, it could have potentially far-reaching and abusive effects, if not interpreted and applied in accordance with the rights and

[1] There have been 'borderline cases' where a statutory provision has been challenged on the ground that it was, on a proper interpretation, in violation of the Final Constitution (jurisdiction of the Constitutional Court in terms of FC s 172(2)). However, the Constitutional Court (by a majority) held that the statute was not invalid as it was indeed open to an interpretation that brought the challenged wording in line with the Final Constitution (jurisdiction in terms of FC s 39(2)). See, eg, *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC).

[2] *NEHAWU* (supra) at para 15.

[3] *S v Shaik & Others* 2008 (2) SA 208 (CC), 2007 (12) BCLR 1360 (CC) at para 83.

[4] *Fraser* (supra) at para 47.

values protected in the Constitution. Moreover, it was (then) relatively new on the statute book, and thus there was not an abundance of jurisprudence to enlighten and guide its interpretation and application.[1]

The Constitutional Court's understanding of FC s 39(2) as a yardstick for constitutionally appropriate statutory interpretation or application, and common-law interpretation, application or development, has made such exercises constitutional matters in terms of FC s 167(3)*(b)* and has considerably expanded its jurisdiction. In addition to these cases, the Constitutional Court's jurisdiction in respect of the interpretation of legislation is also triggered when a court, in interpreting legislation, fails to have due regard to the demands of international law in terms of FC s 233.[2]

(ii) *Exercise of public power and administrative action*

An important function of every Final Constitution is the restraint of executive and administrative power. Not only law, but also conduct may be challenged under the Final Constitution. In contrast to the legislature, the executive organs of state are not bound only by the Final Constitution. They are also bound by the ordinary law of the land, either in its statutory or in its common-law form. This is a central aspect of the doctrine of legality, which in itself is part of the rule of law.[3]

For purposes of this chapter, it is necessary to ask whether there is a difference between constraints on executive and administrative action by way of common law or statutory law, and constraints imposed directly by the Final Constitution. Is a constitutional matter raised only when there is a specific constitutional constraint on executive or administrative action or also where the constraint is based on the common law or a statute? The Constitutional Court has given a clear answer to this question. According to it, there are not two yardsticks for measuring the conduct of the executive and the administration, but only one — the Final Constitution. Consequently, it is the task of the judiciary to establish that all executive and administrative action complies both with the ordinary law and the Final Constitution. And it is the function of the Constitutional Court to

[1] *Fraser* (supra) at para 46.

[2] *S v Basson* 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC) at para 100.

[3] The principle of legal supremacy has been recognized in English law since medieval times. See William Searle Holdsworth *A History of English Law* vol 10 (1936) 647. Dicey emphasized this central aspect of the rule of law: '[The rule of law] means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government.' AV Dicey *Introduction to the Study of the Law of the Constitution* (9th Edition, 1939) Part II Ch. IV. See also Michelman (supra) at § 11.1*(a)*. This aspect of the rule of law has always been part of South African law. See Ben Beinart 'The Rule of Law' 1962 *Acta Juridica* 99, 102. This feature of the rule of law also has a long tradition in continental Europe: it is embodied in the 'principe de legalité' as being part of the 'Etat légal' or 'Etat de droit' in the French tradition and the 'Legalitätsprinzip' as being part of the 'Rechtsstaat' in the German tradition. See Sabine Michalowski & Lorna Woods *German Constitutional Law — the Protection of Civil Liberties* (1999) Part 1, Section 2.2.3; David P Currie *The Constitution of the Federal Republic of Germany* (1994) 18-20.

ensure that the constitutional requirements in this regard have been duly observed, which, in turn, makes the review of any exercise of public power a constitutional matter in terms of FC s 167(3)*(b)*.

The first case in which the Constitutional Court was asked to determine the scope of its jurisdiction to review executive action was *President of the Republic of South Africa & Another v Hugo*.[1] The case concerned a presidential decision to pardon certain categories of prisoners. It did not involve the testing of that decision against the common law, but only against the Constitution itself. The Court, however, wrote that the supremacy clause subjects all presidential action to the Constitution, that there is no room for prerogative powers outside the scope of judicial review, and that the exercise by the President of his powers is subject to review by courts of appropriate jurisdiction.[2] In *Hugo* there could be no doubt that the Constitutional Court itself was the 'court of appropriate jurisdiction' because the Final Constitution authorised the presidential power in question (viz the power to pardon or reprieve offenders in terms of IC s 82(1)*(k)*). But the idea that the Final Constitution also incorporates traditional rule of law concepts is first made visible in the separate judgment of Mokgoro J. Mokgoro J applies the doctrines of accessibility, precision and general applicability to enquire whether the challenged presidential decision could be justified under the limitations clause.[3]

The relationship between the Inrerim Constitution and common law and statutory limits was further set out in *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others*.[4] This case involved a challenge to a rate increase imposed by a local government structure on property owners. The applicants had challenged the rate increase on the grounds that it was ultra vires the powers conferred on local government by the applicable proclamation and ultra vires the sections of the Interim Constitution empowering local governments to levy rates, levies, fees, taxes and tariffs. When the case, which had started in the Johannesburg High Court, went on appeal, the Supreme Court of Appeal considered whether it had 'some kind of parallel jurisdiction with the Constitutional Court where the relevant attack is founded on common-law grounds',[5] but ultimately referred this question to the Constitutional Court in the following form:

[1] 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC).
[2] See Hugo (*supra*) at paras 8, 12, 13, 28. See also *SARFU III* (supra) at para 148.
[3] Hugo (*supra*) at para 102 (per Mokgoro J).
[4] 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC).
[5] *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1998 (2) SA 1115 (SCA) at 1124B, 1998 (6) BCLR 671, 678 (SCA). This assertion was made despite the fact that under the general scheme of the Interim Constitution the respective jurisdictions of the Constitutional Court and the Appellate Division of the Supreme Court mutually excluded each other: The Constitutional Court had jurisdiction only in constitutional issues while the Appellate Division had jurisdiction only in non-constitutional issues. IC s 101(5).

> [W]hether or not the interim Constitution preserved for the predecessor of the Supreme Court of Appeal any residual or concurrent jurisdiction to adjudicate upon any attack made by the appellants on … administrative actions … on the grounds that such administrative actions fell to be set aside, reviewed or corrected at common law.[1]

The Constitutional Court, in its answer to this question, began by setting out the general relationship between constitutional and common law (with regard to the powers of local government):

> [T]he powers, functions and structures of local government provided for in the Constitution will be supplemented by powers, functions and structures provided for in other laws made by a competent authority. There is no provision in the interim Constitution which expressly states that where a local government acts ultra vires its empowering statutes it acts unconstitutionally, but it seems that the proposition must be correct [because several provisions of the Constitution require a local government to act consistently with both the Constitution and an Act of Parliament or an applicable provincial law]. … These provisions imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition — it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law — to the extent at least that it expresses this principle of legality — is generally understood to be a fundamental principle of constitutional law.[2]

Because unlawful acts are in breach of the principle of legality, which is part of the rule of law, which, in turn, is part of constitutional law, the Court in effect held, every unlawful act by a local government body is in itself a breach of the Interim Constitution.[3] This holding had an immediate jurisdictional consequence:

> There is of course no doubt that the common law principles of ultra vires remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to 'administrative action' the principle of legality is enshrined in section 24(a) [of the interim Constitution]. In relation to legislation and to executive acts that do not constitute 'administrative action', the principle of legality is necessarily implicit in the Constitution. *Therefore, the question whether the various local governments acted intra vires in this case remains a constitutional question.*[4]

The consequence of this holding was that the Constitutional Court reserved jurisdiction in these matters for itself.[5] Under the Interim Constitution, with its provision for two separate jurisdictional spheres headed by the Constitutional Court and the Appellate Division of the Supreme Court (as the Supreme Court of Appeal was then known), this conclusion deprived the Appellate Division of

[1] Order No 1*(b)* of the Supreme Court of Appeal judgment. *Fedsure* (supra) at para 20.

[2] *Fedsure* (supra) at paras 54-56 (footnotes omitted). At another point in the judgment, the Court emphasizes that the principle of legality is at least fundamental to the Interim Constitution, while leaving the question open whether any constitutional dimension of the rule of law has greater content than the principle of legality (at para 58).

[3] *SARFU III* confirmed this holding with regard to acts by the President. *SARFU III* (supra) at para 148.

[4] *Fedsure* (supra) at para 59 (my emphasis).

[5] Ibid at para 105.

jurisdiction to review executive conduct and administrative action. Even the Constitutional Court regarded this outcome as 'unsatisfactory', as courts would be denied the benefit of the experience and expertise of the Appellate Division in administrative-law matters.[1] However, *Fedsure* was decided in October 1998, almost two years after the coming into force of the Final Constitution. The practical effect of *Fedsure* was therefore temporary only.[2] Under the Final Constitution, the *Fedsure* holding does not deprive the Supreme Court of Appeal of jurisdiction to review executive conduct and administrative action, but simply asserts the Constitutional Court's power to have the final word on these matters.

The Constitutional Court's approach to the judicial review of administrative action and executive conduct in *Hugo* and *Fedsure* was confirmed in *Pharmaceutical Manufacturers Association of SA in re: the Ex Parte Application of the President of the RSA & Others*.[3] This decision has featured prominently in academic writing on the Constitutional Court's jurisdiction.[4] *Pharmaceutical Manufacturer* involved a presidential decision to bring an Act of Parliament into force that was found to be ultra vires the provisions of the Act in question by a full bench of the High Court.[5] The Constitutional Court began its judgment by clarifying that, although *Fedsure* was decided under the Interim Constitution, it was applicable to the exercise of public power under the Final Constitution.[6] In fact, the proposition that the principle of legality was foundational to the Final Constitution had become even easier to assert: the rule of law and the principle of constitutional supremacy are expressly listed as founding values in FC s 1*(c)*. On this basis, the Constitutional Court confirmed the key holding of *Fedsure* in the following terms:

> The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law. The question whether the President acted intra vires or ultra vires in bringing the Act into force when he did, is accordingly a constitutional matter. The finding that he acted ultra vires is a finding that he acted in a manner that was inconsistent with the Constitution.[7]

[1] *Fedsure* (supra) at para 106.

[2] To rectify its own finding, the Constitutional Court eventually held that it would be in the interests of justice that, in respect of constitutional issues under the Interim Constitution that may come before the Supreme Court of Appeal, it should exercise the jurisdiction conferred upon it over constitutional matters in terms of the Final Constitution. See *Fedsure* (supra) at para 113.

[3] 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC).

[4] See Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 103-104; Michelman (supra) at §§ 11.1*(b)* and 11.3*(b)*.

[5] See *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa & Others* 1999 (4) SA 788 (T). The case reached the Constitutional Court in a rather odd way. The finding of the High Court that the President had acted *ultra vires* in bringing the Act into force did not rely on the Final Constitution. In fact, the High Court explicitly stated that '[n]one of those powers which are conferred upon the President by the Constitution are in issue in the present case'. Ibid at 796F. Nevertheless, the Constitutional Court was asked to confirm that order as one of 'constitutional invalidity' with regard to conduct of the President in terms of FC s 172(2)*(a)*. The Court was thus asked to give its opinion on an order that was not made.

[6] *Pharmaceutical Manufacturers* (supra) at para 17.

[7] Ibid at para 20.

On a narrow reading, one could argue that this statement is confined to presidential acts, as was the case in *Hugo*. The President's powers are after all defined by the Final Constitution, and therefore the exercise of these powers is subject to review for constitutionality on this basis. This narrow construction was the view taken by the Supreme Court of Appeal in *Container Logistics* — a judgment handed down after the Constitutional Court's decision in *Fedsure*.[1] In *Container Logistics*, the Supreme Court of Appeal tried to distinguish between judicial review under the Final Constitution and judicial review under the common law. It held that 'constitutional review' would be concerned only with the *constitutional* legality of executive or administrative action, the question in each case being whether the action was or was not consistent with the Constitution.[2] Common-law review, on the other hand, would assess whether executive or administrative action was in accordance with the empowering statute and the requirements of natural justice.[3] Whenever the Final Constitution does not explicitly set the standard for executive or administrative action, the Supreme Court of Appeal seems to contend that the matter is purely one of common law and, consequently, not a constitutional matter. In *Fraser*, the Constitutional Court seemed to support such a distinction when it held — with explicit reference to *Hugo* and *Pharmaceutical Manufacturers* — that a claim has to involve executive or administrative action that conflicts with a requirement or restriction *imposed by the Final Constitution*.[4]

But such a narrow understanding of constitutional imperatives in relation to executive and administrative action is neither supported by the Court's decision in *Pharmaceutical Manufacturers*, nor by other judgments on this topic. On the one hand, *Fedsure* was not about presidential conduct, but about a composite local government decision that required review both of legislative action and of administrative action.[5] On the other hand, the importance of the Constitutional Court's decision in *Pharmaceutical Manufacturers* is that it applies to any exercise of public power, without exception, and therefore goes beyond the review of presidential acts. The Final Constitution does *not* impose a specific category of review, limited to certain decision makers in the executive sphere or to a confined sphere of 'constitutional legality'. As the Constitutional Court emphasized in that case, there is only one standard of review:

> The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common

[1] *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 (3) SA 771 (SCA), 1999 (8) BCLR 833 (SCA). For a more in-depth analysis of the case, see Michelman (supra) at § 11.3*(b)*.

[2] *Container Logistics* (supra) at para 20.

[3] Ibid.

[4] *Fraser* (supra) at para 38 (my emphasis).

[5] *Pharmaceutical Manufacturers* (supra) at para 27.

> law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.[1]

After holding that the entire common law is subject to the Constitution, the Court concludes:

> What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. . . . What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. . . . One of [the Constitutional Court's] duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction.[2]

In consequence, every case involving the lawfulness of administrative or executive action, from the President to other organs of state, to authorities in the national or provincial sphere, to any regional or local administrative structure, automatically involves a constitutional matter in terms of FC s 167*(3)(b)*.[3] Administrative or executive action in this sense includes law-making, such as regulations, by-laws and other forms of delegated legislation.[4]

The Constitutional Court's decision in *Pharmaceutical Manufacturers* has received a great deal of academic attention. Frank Michelman, in his chapter on the rule of law in this work, focuses on the consequences of the holding that the principle of

[1] *Pharmaceutical Manufacturers* (supra) at para 33.

[2] Ibid at paras 50 and 51.

[3] In later cases the Constitutional Court has confirmed that several different authorities have to adhere to the principle of legality: The President (*SARFU III* (supra) at para 148; *Masetlha v President of the Republic of South Africa & Another* 2008 (1) SA 566 (CC), 2008 (1) BCLR 1 (CC) at para 78); ministers and other functionaries in national departments (*Affordable Medicines Trust & Others v Minister of Health of the Republic of South Africa & Another* 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC) at para 50; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 22); the national government (*Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) at para 34); provincial departments (*Bel Porto School Governing Body & Others v Premier of the Western Cape Province & Another* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) per Mokgoro and Sachs JJ at para 40); the CCMA (*Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2008 (2) SA 24 (CC), 2008 (2) BCLR 158 (CC) at para 41, but see the dissenting judgement of Ngcobo J at para 163); municipalities (*City of Cape Town and the Minister of Provincial and Local Government v Robertson & Another* 2005 (2) SA 323 (CC), 2005 (3) BCLR 199 (CC) at para 61).

[4] See *Affordable Medicines Trust* (supra) at para 108. For a detailed analysis of what constitutes administrative action (in particular with regard to FC s 33 and the Promotion of Administrative Justice Act 3 of 2000 (PAJA)) see Jonathan Klaaren & Glenn Penfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) Chapter 63.

legality as part of the rule of law is enshrined in the constitutional supremacy clause in FC s 2. He raises a number of relevant questions with regard to the Constitutional Court's jurisdiction in 'constitutional matters'. As I understand him, he asks whether, in a system of constitutional supremacy, a distinction between constitutional and non-constitutional matters is at all possible. This chapter will try to provide an answer to that question once all the different aspects of the Constitutional Court's approach to the term 'constitutional matters' have been outlined.

In relation to the Constitutional Court's understanding of violations of the principle of legality as constitutional matters, Michelman argues that the Court's decision to found the principle of legality on the Final Constitution itself makes the concept of constitutional matter meaningless.[1] According to Michelman, the principle of legality does not only require the executive and the legislative branches to act in accordance with the law, but also so requires of the judiciary. This result, in turn, makes every appeal from a lower-court decision a constitutional matter, since an appeal necessarily involves a complaint that a judicial body made a legally wrong decision.

In my opinion, Michelman raises a valid point. However, his argument rests on an assumption which, although reasonable in the abstract, has no authority in South African law, ie that judges' decisions are subject to the principle of legality in the same way as administrative, executive and legislative conduct.[2] Neither in the (traditional) academic understanding of the principle of legality nor in the jurisprudence of the courts is there any indication that a mistaken legal finding by a court, either on the facts or the law, in itself constitutes an infringement of the principle of legality.

During the Apartheid era, the content of the rule of law was a highly contested issue. Some authors tried to argue that this concept included substantive guarantees, such as civil rights.[3] Others emphasized that the rule of law determined mainly the formal legal framework according to which justice was administered.[4] Despite these differences, there seems to have been agreement on the point that the rule of law included the proposition that a judge had to observe the law.[5] The emphasis in this regard, however, fell on the principle that the judiciary was independent and organized according to professional standards.[6] Nowhere was explicit reference made to the view that an erroneous decision in itself constituted a violation of the rule of law. Rather, the availability of an appeal structure to

[1] Michelman (supra) at § 11.2*(b)*(ii).

[2] Of course, Frank Michelman is very much aware of the assumption on which this statement depends and admits that his view may not be the position of the Constitutional Court. See Michelman (supra) at § 11.2*(b)*(iii)).

[3] See Andrew Mathews 'The Rule of Law — A Reassessment' in *Ellison Kahn* (ed) *Fiat Iustitita: Essays in Honour of Oliver Deneys Schreiner* (1983) 294, 307.

[4] See Ben Beinart 'The Rule of Law' 1962 *Acta Juridica* 99.

[5] Beinart (supra) at 111; Andrew Mathews *State, Security and the Rule of Law* (1988) 27-30.

[6] Beinart (supra) at 112-114.

rectify such erroneous decisions was seen as essential to the rule of law. In contemporary academic writing, too, the rule of law is always exclusively discussed in relation to actions by organs of state, administrative officials and the various legislatures.[1]

In the jurisprudence of the Constitutional Court, the abstract question of whether the principle of legality applies to the judiciary has not been specifically addressed. Thus far, the Court has only applied the principle of legality to the executive branch of government (including the administration), Parliament and the provincial legislatures.[2] The rule of law has on occasion also been invoked to guarantee fair procedures in courts. In this limited sense, the Constitutional Court has held that the judiciary is subject to the rule of law:

> [I]n terms of section 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the judiciary is bound by it. The rule of law undoubtedly requires judges not to act arbitrarily and to be accountable.[3]

However, not every *procedural* shortcoming is remedied by reference to the rule of law and it certainly provides no remedy for substantive errors of law.[4] Material findings of lower courts that have been reversed by the Constitutional Court have not been reversed on the basis that they constituted an infringement of the principle of legality. They have instead been overturned on the basis that the court a quo misinterpreted some or other aspect of the Final Constitution.

The assumption that every 'unlawful' court decision should be treated like an unlawful official act is also hard to reconcile with the Constitutional Court's decisions in *Metcash* and *Boesak*. *Metcash*, it will be recalled, involved two contradictory Supreme Court of Appeal decisions on the same set of facts and law. As long as one assumes that there is only one legally correct answer to the same legal question, one of the Supreme Court of Appeal decisions must have been wrong, and thus 'unlawful'. The Constitutional Court, however, declined jurisdiction, holding that, 'even if the decision in the applicant's matter was wrong, and the contrary decision was correct, that would not provide a basis for the relief claimed by the applicant'.[5] In *Boesak*, the Constitutional Court was faced with an argument

[1] See Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 10-13; George Devenish 'Constitutional Law' *The Law of South Africa* (2nd Edition, 2004) Volume 5, § 4.

[2] With regard to Parliament, see *New National Party of South Africa v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 24 (Arbitrary legislation is inconsistent with the rule of law).

[3] *Mphahlele v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC), 1999 (3) BCLR 253 (CC) at para 12.

[4] But see *Pharmaceutical Society of South Africa v Tshabalala-Msimang & Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health & Another* 2005 (3) SA 238 (SCA); 2005 (6) BCLR 576 (SCA) at paras 38-39 (Supreme Court of Appeal found a delay on the part of a High Court in deciding an application for leave to appeal to be 'unreasonable' and quoted with approval an English judgment that found such a delay 'ultimately subversive of the rule of law'.)

[5] *Metcash* (supra) at para 14.

that the Supreme Court of Appeal had convicted the appellant on insufficient evidence. In its judgment, the Court did not say that the evidence was sufficient to establish guilt beyond reasonable doubt. It held that a mere allegation that an error of this kind had been made did not raise a constitutional matter.[1] To support its holding, the Court posited a counterfactual, arguing that, if it were to have jurisdiction in such cases, all criminal cases would be constitutional matters, and the distinction drawn in the Final Constitution between the jurisdiction of the Constitutional Court and that of the Supreme Court of Appeal would collapse.[2] It is clear from this judgment that the Constitutional Court wanted to preserve — at least in theory — a space for the Supreme Court of Appeal to have the final word in some cases.

This argument should not be understood as denying that the judiciary is bound by the rule of law to the extent that judges should follow the law and apply it correctly. This proposition follows clearly from FC s 8(1), which provides that the judiciary is bound by the Bill of Rights. The rule of law does not mean the rule of judges: every judicial officer must swear or solemnly affirm that he or she will administer justice 'in accordance with the Final Constitution *and the law*'.[3] It is not possible to infer from this, however, that erroneous decisions *per se* violate the principle of legality.

There is, finally, a procedural argument for treating court decisions and those by other branches of government differently. FC s 167(6)*(a)* provides that a person, 'when it is in the interests of justice and with leave of the Constitutional Court', may 'bring a matter directly to the Constitutional Court'. The word 'directly' here means that no other court need be involved in the matter. If a case that did *not* involve a constitutional matter were brought to the Constitutional Court in terms of this provision, the Court would not have jurisdiction to decide it. On Michelman's view, however, the same case would have to be treated differently if it were not brought to the Constitutional Court by way of direct access, but by way of appeal. Even if the case dealt purely with factual issues or the most standard, non-policy-imbued common-law principle, it would be turned into a constitutional matter the moment the lower court ruled on it. In order to found the Constitutional Court's jurisdiction on appeal, the losing party would simply need to contend that the case had been wrongly decided, and therefore that the principle of legality had been breached. Such an understanding of the Constitutional Court's jurisdiction is unpalatable for two reasons. First, either a case raises a constitutional matter at the outset or it does not. It cannot subsequently turn into a case that raises a constitutional matter, except, perhaps, where a constitutionally relevant procedural error in the lower courts occurs.[4] Secondly,

[1] See § 4.2*(e)(i)* infra.
[2] *Boesak* (supra) at para 15.
[3] Item 6 of Schedule 2 of the Final Constitution (my emphasis). This argument was also used by Ngcobo J in a dissenting judgment in *Metcash*. *Metcash* (supra) at para 33.
[4] See § 4.3*(d)*(iv) infra.

on Michelman's approach, the parties have the power to determine whether a case involves a constitutional matter by their choice of procedure. If applicants apply for direct access in terms of FC s 167(6)*(a)*, they run the risk that the Constitutional Court may reject their application for lack of jurisdiction. If, on the other hand, they approach the High Court first, they will either win their case or be entitled to appeal it to the Constitutional Court. The principle of legality would in this way have different implications depending on the procedure adopted. Such a possibility is not envisaged by the Final Constitution.[1]

(iii) *Interpretation and application of legislation giving effect to the Final Constitution*

The Constitutional Court might not have accepted the general proposition that it has the power to review every decision by a lower court simply on the basis that the decision might be wrong and therefore in violation of the rule of law. It has, however, adopted what amounts to this approach in a vast number of subject-specific areas, including labour law, administrative law, land rights, environmental law and broadcasting law. What all these areas have in common, as we shall see, is that every legal dispute falling in one of these areas will automatically involve a constitutional matter. It is hard not to see a flat contradiction between the Court's approach in this sub-set of cases and its floodgates-driven holding in *Boesak* that a finding of guilt in a criminal case does not per se give rise to a constitutional matter.[2] Why should the Constitutional Court be reluctant to review all criminal law cases but eager to review all labour law cases? Surely a sentence of imprisonment is about the strongest state interference with constitutional rights imaginable?[3] The answer, according to the Court, is that the areas of law in which it will automatically grant jurisdiction are all governed by statutes which were enacted to give content or effect to a constitutional right, or otherwise to meet the legislature's constitutional obligations.[4]

[1] One comparison comes to mind, viz the approach the US Supreme Court took with regard to state action in *Shelley v Kramer* 334 US 1 (1948) that every court decision in itself constitutes state action sufficient to subject the challenged private action to constitutional scrutiny. This decision — which has apparently not been followed by the Supreme Court in later cases — effectively made state action a formal criterion and would have rendered the distinction between private and state action meaningless.

[2] *Boesak* (supra) at para 15.

[3] The Court acknowledged this argument in *S v Shaik*. It stated that a sentence involving imprisonment is a potentially drastic infringement of the right to freedom in FC s 12(1) and that a trial must be fair in terms of FC s 35(3). However, it would not hear appeals against sentences based on a trial court's alleged incorrect evaluation of facts. See *S v Shaik & Others* 2008 (2) SA 208 (CC), 2007 (12) BCLR 1360 (CC) at para 71. This holding is somewhat ambiguous: is the right to personal freedom in the context of sentencing only implicated when the trial was not fair? Could a wrong evaluation of facts possibly amount to an unfair trial and then raise a constitutional matter?

[4] In criminal law matters, such a distinction seems to be largely arbitrary. The Criminal Procedure Act is, in a sense, constitutionally required. It would be impossible to arrest, try and imprison anyone *constitutionally* without an authorizing law.

The first case in which the Constitutional Court adopted this approach was *NEHAWU v University of Cape Town*. In *NEHAWU*, the Court was faced with an appeal against a judgment of the Labour Appeal Court ('LAC'). The LAC had (by majority decision) rejected a claim by the appellant (a union) that the outsourcing of certain services by the respondent (a university) constituted the transfer of a 'going concern' in terms of s 197 of the Labour Relations Act 66 of 1995 ('the LRA'). The union did not challenge the constitutionality of this provision as such, but contended that the interpretation of the provision by the LAC was inconsistent with the rights of employees to fair labour practices in terms of FC s 23(1), and that the LAC had therefore failed to promote the spirit, purport and objects of the Bill of Rights in terms of FC s 39(2).[1]

On the case as presented, the Court could have easily assumed jurisdiction on the basis of its supervisory powers under FC s 39(2).[2] But, instead, it took a different approach. Writing that it was not necessary to deal with FC s 39(2), the Court held:

> The LRA was enacted 'to give effect to and regulate the fundamental rights conferred by section [23] of the Constitution.' In doing so the LRA gives content to section 23 of the Constitution and must therefore be construed and applied consistently with that purpose. Section 3*(b)* of the LRA underscores this by requiring that the provisions of the LRA must be interpreted 'in compliance with the Constitution'. Therefore the proper interpretation and application of the LRA will raise a constitutional issue.[3]

On the face of it, there seems to be no difference between this approach and the Court's approach to statutory interpretation in terms of FC s 39(2): in both cases the Court ensures that legislation is interpreted in accordance with the Bill of Rights. But FC s 39(2) takes as its starting point the individual case, and the specific interpretation given to the legislation by the lower court. In such cases, the Court has held that the mere application of the statute does not on its own raise a constitutional matter. Before assuming jurisdiction, the Court must consider whether the specific legal finding at issue transgressed the limits set by the Final Constitution. The *NEHAWU* Court, by contrast, took a shortcut. The starting point was not the interpretation exercise, but the legal norm. In emphasizing the constitutional foundation of the LRA, the Court effectively argued that the entire Act had a 'policy-laden character' and was 'imbued with social policy and normative content' — to use the terminology devised in relation to the development of the common law under FC s 39(2). On this approach, not only interpretations of the LRA that require consideration of the spirit, purport and object of the Bill of Rights are open to Constitutional Court review, but every case involving the interpretation of this statute.

[1] *NEHAWU* (supra) at para 13.
[2] See § 4.3*(d)(i)* supra.
[3] *NEHAWU* (supra) at para 14.

The respondent in *NEHAWU* pointed out that such an approach would mean that the Constitutional Court would have jurisdiction in all labour matters. The Court replied as follows:

> If the effect of this requirement is that this Court will have jurisdiction in all labour matters that is a consequence of our constitutional democracy. The Constitution '. . . is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.' Our constitutional democracy envisages the development of a coherent system of law that is shaped by the Constitution.[1]

This statement is hard to reconcile with the idea of the Constitutional Court as a court of special and limited jurisdiction. The quote within the quote comes from paragraph 44 of *Pharmaceutical Manufacturers* and illuminates the point at issue in that case. By contrast, the issue in *NEHAWU* was not the constitutional control of 'the law', but the application of the law by the labour courts. In *Pharmaceutical Manufacturers*, the Court did not equate the constitutional control of the law with its application — it was the fact that the addressees of the law (administrative officials) were bound by both the (common) law and the Final Constitution that triggered constitutional review. The Court in *Pharmaceutical Manufacturers* was concerned to ensure that no administrative action should escape judicial review:

> Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised.[2]

This rationale is not applicable in labour law cases. Three different bodies (the Commission for Conciliation, Mediation and Arbitration, the Labour Court and the LAC) already exist to review employers' actions under the LRA. Nevertheless, the argument used in *Pharmaceutical Manufacturers* is turned in *NEHAWU* from an argument about the need for every exercise of public power to be subject to judicial review to something approximating the need for the Constitutional Court to have general jurisdiction. In so doing, the *NEHAWU* Court comes very close to Frank Michelman's understanding of the principle of legality: every (wrong) application of the ordinary (labour) law is a constitutional matter, because the yardstick for what is right and wrong in labour law is at base a constitutional one.

In *NEHAWU*, the Constitutional Court held that the case did not require it 'to go beyond the regulatory framework established by the LRA'.[3] If the case really fell entirely within the framework of the LRA, however, why did it raise a constitutional matter? According to the Court, the labour law question presented to it — the precise nature of a transfer of employment — had to be interpreted in

[1] Ibid at para 16.
[2] *Pharmaceutical Manufacturers* (supra) at para 45.
[3] *NEHAWU* (supra) at para 17.

accordance with the constitutional right to fair labour practices, which seeks to ensure the continuation of the relationship between the employer and the employee on terms that are fair to both.[1] There can be no quibble with this. But the Court should have made this point the trigger for its jurisdiction in this particular case. Such an approach would have been in line with its holding in *Boesak* that not every criminal case involves a constitutional matter, even though, of course, some interpretations of criminal law provisions have a constitutional dimension. The Constitutional Court's role when assuming jurisdiction in labour law matters should be to go beyond the LRA to see what the Final Constitution demands in the circumstances of the particular case.

Interestingly, one week after deciding *NEHAWU*, the Court delivered its decision in *National Union of Metalworkers of South Africa v Bader Bop Ltd.*[2] In *Bader Bop,* the Court adopted a more case-based approach to its jurisdiction in labour law matters. Here, the Court held that it was presented with a constitutional matter, not because the matter was a labour law matter, but because the applicants had argued that the interpretation of the LRA adopted by the majority of the LAC constituted an infringement of their constitutional right to strike, alternatively that the provisions concerned were unconstitutional.[3] The idea that the Court might have jurisdiction just because the case involved the LRA played no role. Only Ngcobo J, in a separate concurring judgment, repeated the holding from *NEHAWU*.[4]

In *NEHAWU*, then, the Constitutional Court essentially declared itself to be the 'Labour Appeal Appeal Court'. The only constraint in this respect is that it must be in the interests of justice for it to hear appeals from the LAC. Because the main responsibility for overseeing the ongoing interpretation and application of the LRA lies with the Labour Court and the LAC, the Constitutional Court will be reluctant to hear appeals from the LAC unless they raise important issues of principle.[5] This is very similar to the Court's approach to the Supreme Court of Appeal's primary responsibility for development of the common law in *Bierman*.[6] In both instances, what prevents the Constitutional Court from taking every conceivable case is not its limited jurisdiction, but the interests of justice criterion.

Following the reasoning in *NEHAWU*, the Court has held that the interpretation and application of the following statutes give rise to a constitutional matter:

[1] *NEHAWU* (supra) at paras 42-43.
[2] 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC).
[3] *Bader Bop* (supra) at para 15.
[4] Ibid at para 51. Ngcobo J had, in fact, written the (unanimous) judgment in *NEHAWU*.
[5] *NEHAWU* (supra) at paras 30-31.
[6] *S v Bierman* 2002 (5) SA 243 (CC), 2002 (10) BCLR 1078 (CC).

- the Restitution of Land Rights Act 22 of 1994, which gives content to FC s 25(7);[1]
- the Promotion of Administrative Justice Act 3 of 2000, which gives effect to FC s 33;[2]
- the Broadcasting Act 4 of 1999 and the Independent Communications Authority of South Africa Act 13 of 2000, which give effect to FC s 192 (independent authority to regulate broadcasting in the public interest) and protect the fundamental right to freedom of expression;[3] and
- the Environment Conservation Act 73 of 1989 and the National Environmental Management Act 107 of 1998, which give effect to FC s 24.[4]

Litigation under any of these statutes will involve a constitutional matter because they were all enacted to give content to a constitutional right or otherwise to meet the legislature's constitutional obligations. On the same grounds, the Court will likely also assume jurisdiction in cases that involve the Water Services Act 108 of 1997 and the Mineral and Petroleum Resources Development Act 28 of 2002,[5] the Promotion of Access to Information Act 2 of 2000,[6] the Promotion of

[1] See *Alexkor Limited v Richtersveld Community & Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) at para 23; *Department of Land Affairs & Others v Goedgelegen Tropical Fruit (Pty) Ltd* 2007 (6) SA 199 (CC), 2007 (10) BCLR 1027 at paras 30-31. These Constitutional Court judgments, on a narrow reading, limit that jurisdictional finding to s 2(1) of the Restitution of Land Rights Act: this subsection was 'enacted to give content to the section 25(7) constitutional right and to fulfil Parliament's obligations'. However, the preamble to the Restitution of Land Rights Act expressly states that the entire Act was enacted in respect of the constitutional provision for the restitution of a right in land to a person or community dispossessed under or for the purpose of furthering the objects of any racially based discriminatory law. Consequently, in *Mphela & Others v Haakdoornbult Boerdery CC & Others,* the Constitutional Court held that its jurisdiction also includes the application and interpretation of other sections of the Restitution of Land Rights Act. 2008 (4) SA 488 (CC), 2008 (7) BCLR 675 (CC) at para 24.

[2] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 25. With *Bato Star*, administrative law has been entirely 'constitutionalized': the Constitutional Court has jurisdiction either because the PAJA has been applied or because the ruling in *Pharmaceutical Manufacturers* regarding administrative officials is applicable.

[3] See *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa & Another* 2005 (4) SA 319, 2005 (3) BCLR 231 (CC) at para 20.

[4] See *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province & Others* 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC) at para 40; see also *MEC Department of Agriculture Conservation and Environment & Another v HTF Developers (Pty) Ltd.* 2008 (2) SA 319 (CC), 2008 (4) BCLR 417 (CC) at para 24. However, in *HTF Developers*, the Constitutional Court assumed jurisdiction on the basis of FC s 39(2) *and* because the ECA requires an interpretation that gives effect to the environmental right contained in the Final Constitution. Ibid at para 19.

[5] They seem to have also been enacted to give effect to FC s 24*(b)*(iii).

[6] That issue was partly considered in *Ingledew v Financial Services Board: In Re Financial Services Board v van der Merwe & Another*. 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC). It was not decided as PAIA had not yet entered into force. But see *S v Basson* 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC) at para 90.

Equality and Prevention of Unfair Discrimination Act 4 of 2000[1] and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.[2]

(iv) *Fair procedure in the judicial system*

In certain cases the Constitutional Court has held that it is not the subject matter, but rather an aspect of the lower court's handling of the case that gives it jurisdiction to review it.

Such an approach is perhaps best visible in *Mphahlele v FNB*. In this case, the Court found that courts are under a constitutional duty to give reasons for their decisions. Goldstone J (writing for a unanimous Court) held that the case raised a question of procedure. Whether that question in turn gave rise to a constitutional matter was open to doubt, but the Court was prepared to assume for purposes of its decision that it did.[3] This may not be a very principled approach, but the case nevertheless shows that it is not only the subject matter of the case that can trigger constitutional review. Moreover, the Court explicitly denied that the original case in the High Court had raised a constitutional matter.[4] Hence, even if Goldstone J was not entirely convinced, the aspect of the case that made him treat it as a constitutional matter was solely the procedural question.

A number of other cases have centred on the recusal of decision-makers, both in court cases and also in quasi-judicial and administrative proceedings, due to alleged bias. The Court held that all of these cases involved constitutional matters.[5] The basis for the assumption of jurisdiction in these cases, however, has varied from case to case. In the *SARFU II*, the Constitutional Court held that a court that allowed a judge to hear a case despite a reasonable apprehension of bias would infringe FC s 34.[6] The Court also held that the impartial adjudication of

[1] The first Constitutional Court case involving the Equality Act (sometimes referred to by its rather inelegant acronym 'PEPUDA') was decided in 2007. *MEC for Education: KwaZulu-Natal & Others v Pillay* 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC). Although the Constitutional Court asserted that the case raised a 'constitutional issue' and held that the Equality Act is 'clearly the legislation contemplated in section 9(4) and gives further content to the prohibition on unfair discrimination', the Court did not draw the conclusion that the former followed from the latter, as it did in *NEHAWU*. Ibid at paras 30 and 39.

[2] According to the Constitutional Court, the Act provides 'legislative texture to guide the courts in determining the approach to eviction now required by section 26 (3) of the Constitution'. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) at para 24. See also *Occupiers of 51 Olivia Road, Berea Township & Others v City of Johannesburg & Others* 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC) at para 38, (Court saw no need to decide the question whether the Prevention of Illegal Eviction Act applied, or to expand on the relationship between FC s 26 and the Act).

[3] *Mphahlele* (supra) at para 7.

[4] Ibid at paras 7, 18-19.

[5] *SARFU II* (supra); *South African Commercial Catering and Allied Workers Union & Another v Irvin & Johnson Ltd Seafood's Processing Division* 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 (CC); *S v Basson* 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC).

[6] See *SARFU II* (supra) at para 30. Additionally, the judge would act in breach of the requirements of FC s 165(2) and the prescribed oath of office.

disputes is 'a cornerstone of any fair and just legal system'.[1] This finding was later cited as a rationale for holding that judicial recusal is a constitutional matter.[2] Such an understanding indicates that, on occasion, the Constitutional Court sees the need for a more general power of intervention to guarantee the right to a fair procedure, based on a broad understanding of the spirit, purport and objects of the Bill of Rights.

In most cases involving procedural questions, however, constitutional jurisdiction flows from the fact that the court a quo failed to take account of a litigant's right of access to court in terms of FC s 34. In *New Clicks*, the High Court's failure to decide an application for leave to appeal in a timely manner was criticized on this basis.[3] In *Giddey*, the Court held that a lower court's order requiring a company in liquidation to furnish security for costs affected the company's right of access to court in terms of FC s 34.[4]

A broad range of procedural decisions fall into the Constitutional Court's jurisdiction because they relate to a fair criminal trial in terms of FC s 35(3). The Court has used that criterion of 'fairness' to review procedural decisions by trial courts in relation, for example, to the admission of evidence. The Court has emphasized that such decisions involve the exercise of discretion by the trial court based on all the circumstances of the particular case.[5] On appeal, the scope of review is limited:

> The ordinary approach on appeal to the exercise of a discretion … is that the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law.[6]

In the exercise of such discretion, the trial court must have regard to what is fair in the circumstances, and this makes a challenge to its decision a constitutional matter in terms of FC s 167(3).[7]

Other cases suggest, however, that respect for the discretionary powers of trial courts will not be a barrier to review if the Constitutional Court really wants to hear the case. This point is well illustrated by *Dikoko v Mokhatla*.[8] The case concerned the defamation of one municipal official by another, and centred on

[1] *SARFU II* (supra) at para 35.
[2] See *Basson* (supra) at para 21.
[3] *Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign and Another as Amicus Curiae)* 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 (CC) at para 68.
[4] *Giddey NO v Barnard* 2007 (5) SA 525 (CC), 2007 (2) BCLR 125 (CC) at para 4.
[5] See *S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at paras 97-98.
[6] *Giddey* (supra) at para 19.
[7] *Basson* (supra) at para 26.
[8] 2006 (6) SA 235 (CC), 2007 (1) BCLR (CC).

the question of whether municipal councillors should enjoy some form of parliamentary immunity. The High Court had rejected such a notion and had awarded damages to the defamed official in the amount of R110 000. On appeal, the Constitutional Court rejected the applicant's arguments and confirmed the holding of the High Court denying him privilege. The matter did not end there, however, because in the course of the hearing the issue had been raised whether the amount of damages awarded was appropriate. On this point the Court was divided. Three judges found the amount too high and wanted to reduce it to R50 000. Seven judges found the amount to be reasonable, and one judge held that the question did not raise a constitutional matter and therefore declined to comment on the amount. In all three judgments the question whether the assessment of defamation damages is a constitutional matter in terms of FC s 167(3)*(b)* featured prominently.

Both the majority and the minority took the view that the extent of damages for defamation has implications for the balance between the right to dignity and free expression because overly excessive amounts of damages will deter free speech.[1] The majority, additionally, held that such an assessment would perhaps give rise to a constitutional matter because the remedy of sentimental damages (although located within the common law) would constitute 'appropriate relief' within the meaning of FC s 38.[2] While Mokgoro J, writing for the minority, concluded that the Court was 'clearly seized' with a constitutional matter, the majority (per Moseneke DCJ) decided to leave this question open (although it saw 'a very strong argument to be made' for it), and simply assumed in favour of the applicant that a constitutional matter had indeed been raised.

The reasoning in both the majority and the minority judgments appears to be outcome-driven rather than principled. Just as the decision in *NEHAWU* means that every labour law matter falls within the jurisdiction of the Constitutional Court, *Dikoko* effectively subjects the entire law of defamation — now premised on the appropriate balance between the right to dignity and freedom of expression — to constitutional review. Such an approach is virtually bottomless. Almost every legal rule can be construed to strike a balance between two or more competing rights.[3] It is one thing, however, to say that courts must have regard to constitutional rights when applying the common law, another to say that the application of a common-law rule that is premised on the balance to be struck between two or more constitutional rights necessarily raises a constitutional matter. This makes nonsense of the attempt in FC s 39(2) to limit the application of the Constitution to instances of common-law development.

[1] *Dikoko* (supra) at para 92 (majority judgment). Ibid at paras 53-54 (minority judgment).

[2] Ibid at para 90.

[3] Cf Stu Woolman 'Application' (supra) at Chapter 31, Appendix (Contends that not every legal dispute engages a constitutional right, and, it follows that not every legal dispute can be recast as a case concerning conflicting constitutional rights.)

The *Dikoko* Court's treatment of FC s 38 is more defensible. But if the Court really wanted to respect trial courts' discretionary powers, it should not have said that the assessment of defamation damages necessarily gives rise to a constitutional matter. Rather, it should have pointed out the circumstances in which such an assessment *may give rise* to one. As long as the Court simply substitutes its own view of the appropriate quantum of damages for that of the trial court, there is no difference between constitutional and non-constitutional matters. Any relief granted by a court must be 'appropriate'. A meaningful distinction is only drawn when the Court provides general criteria, which a lower court can apply.

This more principled approach was taken by the lone dissenter, Skweyiya J:

> A judge calculating damages in a case where defamation has been proved is given a set of guidelines which he must work with in settling on the amount of damages. These guidelines take the form of a number of factors which may be considered when arriving at the appropriate quantum. There is no rigid test in that none of the factors are mandatory. The manner in which a judge chooses to apply the factors, the factors which he chooses to give weight to and other similar matters are matters left to his discretion.[1]

This is not to say that the Constitutional Court can never interfere with a lower court's assessment of the quantum of damages. It must do so, however, when it sees a shortcoming in the procedure followed, not in the outcome:

> It is possible that in a future case an applicant will be able to show that as a result of the way in which the lower court judge evaluated the factors a constitutional right is violated; or that the judge failed to infuse the values of the Constitution into the process whereby he settled on an amount of damages to be awarded.[2]

The general implications of this approach for the Constitutional Court's jurisdiction are explored below.[3]

(e) Issues connected with decisions on constitutional matters

FC s 167(3)*(b)* does not only refer to constitutional matters but also to 'issues connected with decisions on constitutional matters'. As stated above, while a constitutional matter can be understood as comprising the entire case, an issue is just one aspect of the case.[4] Legal disputes usually contain a bundle of different factual and legal questions — all of them 'issues' for a competent court to decide — and at least one of these issues must implicate the Final Constitution for the case to raise a constitutional matter. Once jurisdiction is assumed on this basis, FC s 167(3)*(b)* grants the Court jurisdiction to decide every other issue, even if these other issues are not constitutional matters themselves — when considered

[1] *Dikoko* (supra) at para 133.
[2] Ibid at para 135.
[3] See § 4.3*(b)*(ii) infra.
[4] See § 4.3*(c)*(ii) supra.

in the abstract. The reasons for this rule are largely practical. As the Court has held: 'Were it to be otherwise, this Court's ability to fulfil its constitutional task of determining constitutional matters would be frustrated.'[1]

The Constitutional Court commented extensively on the scope and meaning of this part of its jurisdiction in *Richtersveld*. The *Richtersveld* Court was faced with several 'issues bearing on or related to establishing the existence of' the constitutional claims made by the applicants.[2] As these issues were preconditions for consideration of the constitutional matter, the Court examined the nature of the connection required between these issues and the constitutional matter for the issues to fall under its jurisdiction. The judgment starts with a literalist approach:

> 'Connected', defined variously by the Oxford English Dictionary as 'linked together' or 'joined together in order or sequence (as words or ideas)' or 'related, associated (in nature or idea)', is clearly a word of wide import, connoting a relationship between, amongst other things, ideas or concepts. It is not limited by any sense of immediacy or close relationship.[3]

The obvious but nevertheless important consequence of this holding is that issues connected with decisions on constitutional matters can only enlarge the jurisdiction of the Constitutional Court, but never establish it on their own. Any 'connection' requires (at least) two things between which the connection is made — and one of these needs to be a valid and independent constitutional matter. In other words, a case always has to raise at last one proper constitutional matter before the Court may consider whether the case may also involve issues connected with decisions on that constitutional matter. There can be no jurisdiction in a case that has only issues connected with decisions on constitutional matters but no constitutional matter itself. The purpose of including issues connected with decisions on constitutional matters in FC s 167(3)*(b)* was to give the Court the power to decide (legal and factual) issues *within a case* in which it already has jurisdiction. The purpose of the provision was not to grant the Constitutional Court jurisdiction *in more cases*.

After establishing the wide scope of the word 'connected', the *Richtersveld* Court went on to scrutinize this reading in light of the purpose of FC s 167(3)*(b)*:

> This wide construction is consistent with the purpose of the provision. It is intended to extend the jurisdiction of this Court to matters that stand in a logical relationship to those matters that are primarily, or in the first instance, subject to the Court's jurisdiction. The underlying purpose is to avoid fettering, arbitrarily and artificially, the exercise of this Court's functioning when obliged to determine a constitutional matter. If any anterior matter, logically or otherwise, is capable of throwing light on or affecting the decision by this Court on the primary constitutional matter, then it would be artificial and arbitrary to

[1] *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at para 52.
[2] *Richtersveld* (supra) at para 24.
[3] Ibid at para 29.

> exclude such consideration from the Court's evaluation of the primary constitutional matter. To state it more formally, when any *factum probandum* of a disputed issue is a constitutional matter, then any *factum probans*, bearing logically on the existence or otherwise of such *factum probandum*, is itself an issue 'connected with [a] decision[] on [a] constitutional matter[]'.[1]

The Court then confirmed this holding not only with regard to the purpose of the provision, but also with regard to broader policy considerations:

> Whatever the precise meaning of the word 'connected' in the phrase 'issues connected with decisions on constitutional matters', it must include a relationship of dependence between a primary order on a constitutional matter and an ancillary order. What constitutes 'dependence' must be understood in a broad sense. There are important policy reasons for such an approach: if a party may not approach this Court for leave to appeal on these ancillary matters, this would give rise to a bifurcated appeal and confirmation procedure in which the appeal on the ancillary matters could not be resolved before this Court together with the confirmation application, but would have to be heard and resolved in separate proceedings before another court. This would obviously be a most undesirable state of affairs, undermining the achievement of finality for the parties and resulting in an unnecessary waste of judicial resources.[2]

On that basis the Court concluded: '[Issues connected with decisions on constitutional matters] are all legal and factual issues that need to be decided in order to determine [a constitutional matter].'[3] Thus, the decisive factor is that a decision on the 'issues' is crucial to any meaningful decision on the constitutional matter itself, i e it must be a legal question that needs to be considered in order to reach a decision on the constitutional matter.[4]

The Constitutional Court has the final word not only with regard to constitutional matters, but also with regard to issues connected with decisions on constitutional matters. This contention appears to be self-evident. FC s 167(3)*(a)*, however, states that the Constitutional Court 'is the highest court in all constitutional matters' and does not mention issues connected with decisions on constitutional matters. Moreover, FC s 168(3) declares that the Supreme Court of Appeal 'is the highest court of appeal except in constitutional matters'. On the basis of these provisions, the Final Constitution could be interpreted to mean that the Constitutional Court may indeed decide issues connected with decisions on constitutional matters, but that it is the Supreme Court of Appeal that has the final word on these issues. Such an interpretation, however, would obviously lead to the time-consuming, costly and disruptive passing of cases back and forth between the two courts. The Constitutional Court has therefore made it clear that this interpretation is not supported by a proper understanding of its jurisdiction:

[1] *Richtersveld* (supra) at para 30.
[2] *Gory v Kolver NO & Others* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) at para 47.
[3] *Basson* (supra) at para 22.
[4] See Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 107.

> [W]hen one adopts a purposive approach to the harmonising of section 167(3) and (7) and section 168(3) … it is evident that this Court is the highest court in respect of issues connected with decisions on constitutional matters. The contrary conclusion would be anomalous and contrary to the Constitution's structure of jurisdiction and its division between this Court and the SCA. It would mean that, although this Court is granted jurisdiction in respect of 'issues connected with decisions on constitutional matters,' those would be the only matters under its jurisdiction in respect whereof its judgment would not be final. This would moreover give rise to a serious hiatus in the Constitution, since there is no appeal from this Court. The conclusion that this Court is the highest court also in relation to 'issues connected with decisions on constitutional matters' is in our view placed beyond doubt by the fact that section 167(3)*(c)* provides that this Court also makes the final decision on 'whether an issue is connected with a decision on a constitutional matter.[1]

In sum, the Constitutional Court has the final word on everything that falls under its jurisdiction.

(f) The Constitutional Court's power to make the final decision whether a matter is a constitutional matter, FC s 167(3)*(c)*

FC s 167(3)*(c)* provides that the Constitutional Court 'makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter'. This provision is the other side of the coin of the Constitutional Court's jurisdiction. The limited jurisdiction the Court enjoys must always be understood against the background of its institutional purpose and function, i e to ensure that all law and conduct is in line with the Final Constitution. All the Court's reasoning about there being only one legal standard for executive and administrative action, and its holdings about how the Final Constitution permeates the entire body of South African law, would be of little effect if it did not have the power finally to determine whether a matter is a constitutional matter.

On the other hand, it is not as though the entire constitutional structure would fall apart without FC s 167(3)*(c)*. Even in the absence of this provision, the Constitutional Court would have been able to come to the conclusion that its role as final interpreter of the Final Constitution necessarily implied the power to decide whether a particular matter was a constitutional matter. As noted above, the Constitutional Court had little difficulty in finding that its final decision-making powers related to both 'constitutional matters' and 'issues connected with decisions on constitutional matters'. It simply held that 'the contrary conclusion would be anomalous and contrary to the Final Constitution's structure of jurisdiction and its division between this Court and the SCA.' The Court would no doubt have used a similar argument to ensure that its jurisdiction included the power finally to decide whether a particular matter was a constitutional matter or

[1] *Richtersveld* (supra) at paras 27-28.

not. Given this, it seems that FC s 167(3)*(c)* was included simply to head off a potential source of conflict between the Constitutional Court and other courts over whether a lower court could prevent a case from going to the Constitutional Court by declaring that it did not involve a constitutional matter. In light of FC s 167(3)*(c)*, lower courts clearly do not have the power to do this.

Nobody has questioned the Constitutional Court's power finally to determine the scope of its jurisdiction. One could, however, argue that such a power renders obsolete any attempt to define the term 'constitutional matter' in an abstract and principled way. If the Court has the power finally to determine the meaning of this term, why should we bother to define it? Two reasons come to mind. First, it is certainly not the purpose of FC s 167(3)*(c)* to rule out the possibility that there might be a general principle underlying the Constitutional Court's jurisdiction. Had that been the case, the term 'constitutional matter' would not have featured so prominently as an ostensible limitation on the Court's jurisdiction. Put differently, if the Constitutional Assembly had not wanted this term to function in this way, it would have granted the Constitutional Court jurisdiction in every matter in which it decided to grant access.[1] Secondly, the interpretation of any phrase or term in the Final Constitution is ultimately for the Constitutional Court to decide, even if this is not explicitly stated in the Final Constitution. Nothing precludes the Court from developing a principled understanding of these other phrases and terms, and the same should thus be true of the phrase 'constitutional matter'.

(g) The Constitutional Court's findings on what is not a 'constitutional matter'

(i) *Factual findings by lower courts*

The leading case in which the Constitutional Court declined jurisdiction for want of a constitutional matter is *Boesak*. In this case, as we have seen, the Court held that a challenge to a decision of the Supreme Court of Appeal on the sole basis that it was wrong on the facts is not a constitutional matter.[2] The Court held:

> In the context of section 167(3) of the Constitution the question whether evidence is sufficient to justify a finding of guilt beyond reasonable doubt cannot in itself be a constitutional matter. Otherwise, all criminal cases would be constitutional matters, and the distinction drawn in the Constitution between the jurisdiction of this Court and that of the SCA would be illusory. There is a need for finality in criminal matters. … Disagreement with the SCA's assessment of the facts is not sufficient to constitute a breach of the right to a fair trial. … Unless there is some separate constitutional issue raised therefore, no constitutional right is engaged when an appellant merely disputes the findings of fact made by the SCA.[3]

[1] Frank Michelman argues that a principled approach to constitutional matters is supported by such a provision because it pins final responsibility on the Constitutional Court for the prudent implementation of such a principle. Michelman (supra) at § 11.2*(a)*.

[2] *Boesak* (supra) at para 15.

[3] Ibid.

Langa DP's argument in this passage is essentially pragmatic: all criminal cases require the court to decide whether the accused really committed the crime. If that process raised a constitutional matter, then the Constitutional Court would have jurisdiction to review all criminal matters. In addition to this, pragmatic considerations determine that criminal cases should be brought to finality as soon as possible.

The problem with this 'everything becomes a constitutional matter' argument is that it has not always been consistently invoked by the Constitutional Court. As noted above, the Court has had no problem in assuming jurisdiction to review every labour law case, every land restitution case, every broadcasting case and every administrative law case. It has also had no problem in reviewing all defamation cases on the basis that defamation law in general strikes a constitutional balance between freedom of expression and dignity. One might argue that when a matter deals with a statute, which has been enacted to give content or effect to a constitutional right, the Court is not confronted with questions of fact, as it was in *Boesak*, but of law. This is true, but the argument in *Boesak* was not that the Constitutional Court did not want to deal with evidentiary matters, but that the term 'constitutional matter' should not be defined in a way that would bring an entire body of law under the jurisdiction of the Constitutional Court. What the Court said in *Boesak*, in essence, was that the standard question faced by courts in a particular area of law cannot in itself be a constitutional matter. The standard question that a court in criminal cases is asked to decide is whether there is sufficient evidence to make a finding of guilt. In other areas of law, the standard question is different. In labour law, for example, the Labour Court has to decide whether a dismissal was fair. The difference between these two standard cases is not so big as to justify the Court's holding that the first type of case never gives rise to a constitutional matter whereas the other always does. What would happen, one is tempted to think, if Parliament enacted a new Criminal Procedure Act with the express aim of giving effect to FC s 35? The logic of *NEHAWU* and the other decisions mentioned earlier would suggest that, in that event, all criminal cases would indeed give rise to constitutional matters.

Perhaps one should understand the *Boesak* judgment as standing for the principle that the Constitutional Court will not assume jurisdiction if all it is being asked to do is to reverse a factual finding made by a lower court. In a more recent judgment, the Constitutional Court has indeed stated its reluctance to reconsider factual findings already established in the course of adjudication: 'This Court, as any court of appeal, would be slow to interfere with findings of fact by a trial court based on a careful assessment of the credibility of witnesses and the probabilities of their respective versions.'[1] If this is so, however, this principle should apply to labour law and any other area of law as well. In addition, the basis for this principle would need to change from a pragmatic concern for limiting the

[1] *Minister of Safety and Security v Van Niekerk* 2007 (10) BCLR 1102 (CC) at para 10.

flow of cases to the Court to an institutional and functional concern for the appropriate supervisory role of the Constitutional Court in relation to findings of fact (note the reference to 'any court of appeal' in the quote immediately above).

Even this narrow version of the *Boesak* principle has not been consistently applied by the Constitutional Court. While the *Luiters* Court held that the question of whether a person acted with intention is a purely factual question beyond the scope of its jurisdiction,[1] this very question was the basis on which the Court assumed jurisdiction in *NM*.[2] In another case, *Rail Commuters Action Group*, the Court emphasized that the *Boesak* judgment should not be read to mean that factual questions may never be resolved by the Court:

> This reasoning [in *Boesak*] does not imply that disputes of fact may not be resolved by this Court. It states merely that where the only issue in a criminal appeal is dissatisfaction with the factual findings made by the SCA, and no other constitutional issue is raised, no constitutional right is engaged by such a challenge. Where, however, a separate constitutional issue is raised in respect of which there are disputes of fact, those disputes of fact will constitute 'issues connected with decisions on constitutional matters' as contemplated by section 167(3)*(b)* of the Constitution.[3]

The rationale behind this holding, apparently, is that, in the eyes of the Constitutional Court, too many cases turn on the application of open-textured laws to facts in ways that render a distinction between fact and law uncertain. This conclusion means, in turn, that the distinction between fact and law does not provide a principled basis for determining the Court's jurisdiction.[4] This point obviously raises the question as to whether the Constitutional Court is in a position to establish facts itself. In most cases, it will rely on the facts as they have been established in the High Court and the Supreme Court of Appeal. But there will be exceptions to this rule:

> Where an applicant seeks constitutional relief, and there is a dispute of fact on the papers before the Court, the identification of the facts upon which the constitutional matter should be adjudicated constitutes an issue connected with a decision on a constitutional matter which falls within this Court's jurisdiction. In such circumstances, this Court is not bound by the facts as determined by the SCA . . .[5]

In other words, the Constitutional Court will not decide a case that *only* raises factual questions. Factual questions are not constitutional matters in themselves. Nevertheless, the Court may decide them in exceptional circumstances where a

[1] See *Minister of Safety and Security v Luiters* 2007 (2) SA 106 (CC), 2007 (3) BCLR 287 (CC) at para 28.
[2] See *NM & Others v Smith & Others (Freedom of Expression Institute Intervening)* 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC).
[3] *Rail Commuters Action Group* (supra) at para 52.
[4] Kate O'Regan 'On the Reach of the Constitution and the Nature of Constitutional Jurisdiction: A Response to Frank Michelman' in Stu Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 51.
[5] *Rail Commuters Action Group* (supra) at para 53.

clear mistake made by a trial court can possibly justify the re-examination of a factual finding[1] or when doing so is necessary to decide another constitutional matter raised by the case, since factual questions would then be issues connected with a decision on a constitutional matter.

(ii) *Incorrect application of the law*

In *Phoebus Apollo Aviation* and, arguably, *Metcash*, the Constitutional Court declined jurisdiction on the basis that it has no power to overturn lower court judgments where the ordinary law is simply incorrectly applied. The starting point for this holding was the short decision of *Lane & Fey NNO v Dabelstein & Others*.[2] As in *Boesak*, the applicants in this case had argued that the Supreme Court of Appeal had failed to consider certain evidence and made a wrong factual finding, which infringed their right to a fair trial. The Constitutional Court rejected this argument:

> Even if the SCA had erred in its assessment of the facts that would not constitute the denial of the constitutional right contended for. The Constitution does not and could hardly ensure that litigants are protected against wrong decisions. On the assumption that section 34 of the Constitution does indeed embrace that right [to a fair trial], it would be the fairness and not the correctness of the court proceedings to which litigants would be entitled.[3]

The second and the third sentence in the above quote extend the Court's holding beyond the purely factual realm. In these sentences, the Court implies that it will not assume jurisdiction to overturn legally wrong decisions by lower courts if no additional constitutional complaint is involved. This rule formed the basis for the Court's later holding in *Metcash* that, as a general rule, litigants who dispute the correctness of an order made by the High Court — on the law or on the facts — are confined to an appeal to the Supreme Court of Appeal, with the Supreme Court of Appeal's decision being final.[4] As noted earlier, these statements show that the Constitutional Court does not accept the argument that a wrong legal finding constitutes unlawful action by a court, and that such a finding in itself violates the principle of legality, thereby raising a constitutional matter.[5]

The problem with the principle that the application of the ordinary law is not a matter for the Constitutional Court is that is has been so eroded by the Court that today it is very difficult to predict whether the Court would accept such an argument (typically raised in opposition to an application for leave to appeal). One simply needs to recall the cases discussed above in which the Court has

[1] *Minister of Safety and Security v Van Niekerk* (supra) at para 10 with explicit reference to *Rail Commuters Action Group*.
[2] 2001 (2) SA 1187 (CC), 2001 (4) BCLR 312 (CC).
[3] *Dabelstein* (supra) at para 4.
[4] *Metcash* (supra) at para 14.
[5] See § 4.3*(d)*(ii) supra.

included whole areas of law under its jurisdiction on the basis that the controlling statute was enacted to give effect to the Final Constitution.[1] All of these cases involve the application of the ordinary law, and yet any such case will automatically raise a constitutional matter.

Even beyond these areas of law, the mere application of a legal rule in itself is sometimes regarded as being inconsistent with some constitutional right or principle. In *Phoebus Apollo Aviation*, the Constitutional Court declined jurisdiction on the basis that the application of a common-law principle was a matter solely for the High Courts and, eventually, for the Supreme Court of Appeal to determine. In *K*, the Constitutional Court held the very same common-law principle to be so imbued with policy and normative content that every application of it raised a constitutional matter.[2] In consequence, only applications of the ordinary law that do not involve policy choices can be said not to raise a constitutional matter.

Finally, there is a thin line between application and interpretation of legislation and application and development of the common law, the second of each of these pairs being subject to constitutional jurisdiction under FC s 39(2). There is also a lot of merit in the argument that application and interpretation are in fact one and the same thing.[3] In *Fraser*, the Court defined its role as being that of a benign interpreter of a statute that was relatively new on the statute book, the interpretation *and application* of which the Court therefore had to guide.[4] Could this mean that only the application of old statutes or longstanding common-law principles might *not* give raise to a constitutional matter? Probably not. Instead, what is crucial for the Constitutional Court is whether the lower court's decision is in line with the Final Constitution: 'Where an individual's rights have been infringed because a legal norm has been applied to a set of facts in a manner oblivious or careless of constitutional rights, a constitutional issue is raised.'[5]

In more practical terms, cases at the level of the Supreme Court of Appeal or the LAC usually involve questions about the interpretation of law *and* the development of the common law. It seems inevitable that any legal finding made by these courts could be attacked on the basis that it did not take the Final Constitution properly into account.

How far the Constitutional Court is prepared to go in assuming jurisdiction to review a case that really just deals with the application of non-constitutional law is also visible in *Basson*. One of the challenges in this case involved the trial judge's

[1] See § 4.3*(d)*(iii) supra.
[2] See § 4.3*(d)(i)* supra.
[3] See Lourens du Plessis 'Re-reading Enacted Law-texts. The Epoch of Constitutionalism and the Agenda for Statutory and Constitutional Interpretation in South Africa' (2000) 15 *SAPR/PL* 257, 295—99; Lourens du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32, § 32.3*(d)* and § 32.5*(c)(ii)*.
[4] *Fraser* (supra) at para 46 (my emphasis).
[5] Kate O'Regan 'On the Reach of the Constitution and the Nature of Constitutional Jurisdiction: A Response to Frank Michelman' in Stu Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 51.

decision to quash certain charges because they did not disclose an offence. The Supreme Court of Appeal had declined to reverse this finding because South African criminal law does not permit the prosecution to reserve a question of law for decision by the Supreme Court of Appeal in circumstances where an objection to a charge is upheld by a trial court. On appeal by the state, the Constitutional Court eventually held that this question raised a constitutional matter. But it was divided on how to justify this conclusion.

A majority of the Court took a route that rode roughshod over established precedents on constitutional jurisdiction. After a rather emotional beginning on how the criminal law plays an important role in protecting constitutional rights and values, and on the importance of the state's prosecutorial capacities, the majority held:

> Where a court quashes charges on the ground that they do not disclose an offence with the result that the state cannot prosecute that accused for that offence, the constitutional obligation of the prosecuting authority and the state, in turn, is obstructed. The constitutional import of such a consequence is particularly severe where the state is in effect prevented from prosecuting an offence aimed at protecting the right to life and security of the person. In these circumstances the quashing of a charge in an indictment will raise a constitutional matter.[1]

This passage is hard to reconcile with the Court's decision in *Boesak*, in which it held that the conviction of an accused is not in itself a constitutional matter. It would appear to follow from that decision that the acquittal of an accused should not in itself constitute a constitutional matter either. While *Boesak* could perhaps be distinguished on the grounds that it dealt with factual findings, cases like *Dabelstein* and *Metcash* clearly hold that legally wrong decisions do not per se raise constitutional matters. The majority in *Basson* is not, of course, wrong to say that the effective prosecution of crime is impeded if an accused is erroneously acquitted. But the error in such cases is part of the ordinary law and is exactly the sort of error that the High Courts and the Supreme Court of Appeal are in the best position to rectify. This, at any rate, was the view taken by the minority in *Basson*. For these judges, there was no difference between a wrong decision that leads to the failure of a prosecution and a wrong decision that leads to the conviction and imprisonment of an accused person.

The *Basson* minority found a more sophisticated way to assume jurisdiction. First, the minority considered whether the trial court, in interpreting the applicable law, failed to take international law properly into account. This question is in line with the question the Constitutional Court asks in assuming jurisdiction under FC s 39, only in this case FC s 233 is the operative section. Having raised this question, however, the minority ultimately left it open in favour of assuming jurisdiction on another ground. This second ground was based, not on the decision by the trial court, but on the decision by the Supreme Court of Appeal.

[1] *Basson* (supra) at para 33.

According to the minority, FC s 168(3), which regulates the jurisdiction of the Supreme Court of Appeal, was 'relevant to the proper construction' of the section of the Criminal Procedure Act on which the Supreme Court of Appeal had relied in deciding not to review the trial court's decision to quash the charges. It was this point that put the case within the Constitutional Court's jurisdiction. An interpretation of the Criminal Procedure Act that precludes an appeal to the Supreme Court of Appeal, the minority held, 'has a material bearing' on 'the nature and ambit' of the powers of the Supreme Court of Appeal, and therefore raises a constitutional matter.[1]

This line of argument appears flawed: an interpretation of the Criminal Procedure Act in a single case has nothing to do with the general appellate jurisdiction of the Supreme Court of Appeal, and certainly does not limit 'the powers' of the Supreme Court of Appeal in terms of Chapter 8 of the Final Constitution. The only ground, therefore, that could convincingly have been used to bring the *Basson* matter under the jurisdiction of the Constitutional Court would have been the proper consideration of international law by the trial court, but the minority found this question to be too difficult to decide.

A similarly faulty line of reasoning was applied in *Phillips & Others v National Director of Public Prosecutions*.[2] This matter concerned a High Court decision rescinding an earlier restraint order against certain assets of the applicants on the basis of a provision of the Prevention of Organised Crime Act 121 of 1998 ('the POCA'). The Supreme Court of Appeal reversed the High Court's decision, holding that a restraint order may not be varied or rescinded except in the narrow circumstances provided for in a statute or on the basis of a recognized common-law ground, which must have existed when the restraint order was granted. A High Court that grants a restraint order, in other words, has no inherent jurisdiction to rescind that order, because the POCA has limited that possibility. On appeal, the Constitutional Court rejected the respondent's claim that no constitutional matter was present as being 'clearly incorrect'.[3] According to the Court, the applicants' contention once again related to the 'nature and ambit of the powers of superior courts, in particular the scope of their inherent power'.[4]

In both *Basson* and *Phillips*, the Constitutional Court relied on its earlier decision in *Bannatyne v Bannatyne*.[5] *Bannatyne* concerned the power of a High Court to commit someone to prison for contempt of a maintenance order by a magistrate's court by way of so-called process-in-aid.[6] The respondent had contended that the

[1] *Basson* (supra) at paras 109-111.
[2] 2006 (1) SA 505 (CC), 2006 (2) BCLR 274 (CC).
[3] *Phillips* (supra) at para 31.
[4] Ibid.
[5] 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC).
[6] Although money judgments cannot ordinarily be enforced by contempt proceedings, maintenance orders are in a special category in which such relief is competent. However, while a High Court has the power to entertain civil proceedings for committal for contempt to ensure that its own orders are obeyed, a maintenance court (which has the status of a magistrate's court) does not have these inherent powers, as there are only statutory remedies for the enforcement of its orders. Its orders may be enforced by execution upon the property of the person against whom the order has been made, or by the attachment of emoluments or debts due to him. The failure to comply with such an order might also constitute a criminal offence.

High Court had no jurisdiction to commit him for contempt by reason of his failure to comply with an order of the maintenance court, and that the applicant instead had to rely on the limited powers granted to the maintenance court. The Constitutional Court had assumed jurisdiction because it regarded this question as one concerning 'the nature and ambit' of the High Court's powers, thus implicating FC s 169.[1]

This finding appears justified. However, it perhaps stretches (a bit) the implications of FC Chapter 8 High Court powers. In *Bannatyne*, the Constitutional Court indeed had to rule on the exercise by the High Court of a general power, ie the power to convict a person for contempt when the original order was issued by another court. In *Basson*, by contrast, the Supreme Court of Appeal's general competence to hear appeals was not in question, but merely whether the state was entitled to a particular remedy in the circumstances. In *Phillips*, too, the Supreme Court of Appeal had not questioned the general power of the High Court to rescind its own orders. The Supreme Court of Appeal judgment in *Phillips*, in fact, was a decision on the merits: the applicants did not seek to have the restraint order rescinded on one of the grounds provided for in the Act — presumably because none of them would have been met. The same applied to the so-called common-law grounds under which a court may always set aside its own decisions,[2] as those conditions were not met either. Instead, Mr Phillips and the other applicants had asked the High Court to rescind the order in the circumstances which prevailed in that particular case. Against this background, the Supreme Court of Appeal held that the statute prescribed conclusively the circumstances in which a High Court may vary or rescind a restraint order.[3] Thus, the *Phillips* case did not concern the inherent jurisdiction of the High Court, but whether in the specific circumstances of that case there was a legal basis for the applicants' rescission claim.

In the end, therefore, the Constitutional Court's reasoning in both *Phillips* and *Basson* that these cases touched on the nature and ambit of the judiciary's powers as contemplated in FC Chapter 8 is not persuasive. Instead, both cases simply involved questions of statutory interpretation (of the Criminal Procedure Act in *Basson*, and of the POCA in *Phillips*). As such, they illustrate the Constitutional Court's general willingness to reconsider the interpretation of the ordinary law by a lower court.

The Constitutional Court's decisions in other cases involving the POCA confirm this trend. The Act provides that property derived from crime ('proceeds') or used in the commission of crime ('instrumentalities') may be forfeited to the

[1] *Bannatyne* (supra) at para 17.

[2] Such judgments would encompass decisions founded upon fraud, common mistake and the doctrine of *instrumentum noviter repertum* (the coming to light of as yet unknown documents). See the SCA judgment in *National Director of Public Prosecutions v Phillips & Others* 2005 (5) SA 265 (SCA) at para 21.

[3] *Phillips SCA* (supra) at para 19. See also *Phillips CC* (supra) at para 36 ('[T]he grounds for rescission provided by the Act constitute a closed list'.)

state.[1] The first set of cases concerned challenges to the procedure followed under the Act. All of these challenges were unsuccessful.[2] In 2006, however, an applicant challenged the forfeiture as such and thereby the application of the POCA.[3] The applicant, Mr Prophet, contended that there had to be proportionality between the offence committed and the property forfeited and that this had been not the case in the forfeiture in question (a house which he had allegedly used for manufacturing drugs). The Supreme Court of Appeal agreed with the applicant that the POCA required some form of proportionality between the crime committed and the property to be forfeited. The majority of the Supreme Court of Appeal, however, set a standard of 'significant disproportionality' to render a deprivation of property arbitrary and thus unconstitutional, and found that no disproportionality justifying the refusal of a forfeiture order had been shown to exist in Mr Prophet's case.[4]

The Constitutional Court assumed jurisdiction on the basis of FC s 39(2), holding that the relevant sections of the POCA needed to be interpreted in light of the Final Constitution, particularly the property clause in FC s 25.[5] The Court first considered whether the property at issue had been 'an instrumentality of an offence'. This pure question of law had been answered by the Supreme Court of Appeal. Instead of providing guidelines on how this term should be interpreted, however, the Constitutional Court merely repeated the Supreme Court of Appeal's finding. In so doing, the Constitutional Court did not refer to the Final Constitution at all, but simply re-evaluated the evidence.[6] The only thing the Court was asked to do was to confirm the constitutionality of the evidentiary standard applied by the SCA (proof on a balance of probabilities). It did so in a single sentence, almost by way of parenthesis.

With regard to the proportionality enquiry, the Constitutional Court did provide guidelines, holding that the proportionality of a forfeiture order depended on a number of different factors, including whether the property was integral to the commission of the crime; whether the forfeiture would prevent the further commission of the offence and its social consequences; whether the 'innocent owner'

[1] Both 'instrumentalities forfeiture' and 'proceeds forfeiture' are possible when the owner is not convicted of an offence but where it is established, on a balance of probabilities, that the particular property has been used to commit an offence, or constitutes the proceeds of unlawful activities, even where no criminal proceedings in respect of the relevant crimes have been instituted.

[2] See *National Director of Public Prosecutions & Another v Mohamed NO & Others* 2002 (4) SA 843 (CC), 2002 (9) BCLR 970 (CC); *National Director of Public Prosecutions & Another v Mohamed NO & Others* 2003 (4) SA 1 (CC), 2003 (5) BCLR 476 (CC).

[3] *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC), 2007 (2) BCLR 140 (CC). The applicant had also challenged the provisions of the POCA. The Constitutional Court did not allow the challenge because the applicant raised the issue for the first time in the Constitutional Court and had not sought a declaration of constitutional invalidity in the High Court or in the Supreme Court of Appeal.

[4] See *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 (SCA) at paras 37 and 41.

[5] *Prophet* (supra) at para 46.

[6] Ibid at paras 55-57.

defence would be available to the applicant; the nature and use of the property; and the effect on the applicant of the forfeiture of the property.[1] Since the Supreme Court of Appeal had essentially applied this test, the appeal was dismissed.

In *Prophet*, therefore, the Constitutional Court fulfilled its constitutional mandate by giving guidance to other courts on how to interpret and apply the POCA in line with the Constitution. In *Mohunram*, however, the Court assumed jurisdiction without adding to *Prophet* in any significant way.[2] The facts of *Mohunram* were almost identical to those in *Prophet*, the difference being that the offence of which Mr Mohunram had been accused was illegal gambling rather than the production of drugs. In addition, the property to be forfeited — the premises on which Mr Mohunram operated gaming machines — was registered in the name of a company in which he held a 100 percent member's interest. The High Court had dismissed the state's application for a forfeiture order, concluding that the property had not been shown to be an instrumentality of an offence. The state appealed to the Supreme Court of Appeal, which upheld the appeal and granted the forfeiture order.

Mr Mohunram appealed to the Constitutional Court. The Court assumed jurisdiction on the basis of its holding in *Prophet*.[3] It later did the same in *Fraser*.[4] These cases therefore indicate that the Court seems to have taken the view that *every* application of the POCA raises a constitutional matter. This conclusion either means that the Court has included the POCA in its list of statutes, the mere application of which is always subject to constitutional review, or that civil forfeiture is an area of law so imbued with policy considerations that every application of the POCA raises a constitutional matter.[5] Either way, these cases further erode the general principle that the ordinary application of the law is not subject to constitutional review.

In its decision on the merits in *Mohunram*, the majority of the Constitutional Court (in two separate judgments) found the forfeiture to be disproportional. (A minority found it to be proportional.) Before considering this issue, the Court reviewed all of the applicant's contentions in the same way that the Supreme Court of Appeal had done, with all the judges agreeing that an illegal casino

[1] The quantity of the prohibited substance found on the premises was not a decisive factor in determining proportionality. *Prophet* (supra) at paras 63, 65.

[2] *Mohunram & Another v National Director of Public Prosecutions & Another (Law Review Project As Amicus Curiae)* 2007 (4) SA 222 (CC), 2007 (6) BCLR 575 (CC).

[3] Ibid at para 9.

[4] *Fraser v ABSA Bank Limited* 2007 (3) SA 484 (CC), 2007 (3) BCLR 219 (CC).

[5] A similar argument was used in *Van der Merwe & Another v Taylor NO & Others* 2008 (1) SA 1 (CC), 2007 (11) BCLR 1167 (CC)(With regard to seizure in terms of the Criminal Procedure Act.) In a minority judgment, Mokgoro J wrote: 'Once the State seizes private property . . . and the legal basis for the seizure and holding is in dispute, the question of arbitrary deprivation of property under section 25(1) of the Constitution is clearly implicated, making the matter intrinsically a constitutional one.' Ibid at para 20. The majority of the Court avoids that conclusion (because it may have 'serious implications') and merely assumes, without deciding, that the case raises a constitutional matter. Ibid at para 106.

had been operated on the premises in question[1] and that the property was instrumental in this illegal gambling activity.[2] In addition to these questions, the Constitutional Court considered two aspects of the case that had not been considered earlier, viz, whether illegal gambling was a sufficiently serious offence for an order of civil forfeiture in terms of the POCA (the minority of the Court held that it was while the majority left this question open),[3] and whether the forfeiture provisions in the applicable provincial gambling act should preclude the application of the POCA (the minority and the majority disagreed on this question).[4] These two questions on their own could be said to have raised constitutional matters since they required the Court to define the overall scope of the POCA in light of the Bill of Rights and to determine whether a provincial or a national act should apply. Even if the Constitutional Court was legitimately entitled to answer these questions, however, it was not strictly speaking necessary for it to reconsider the Supreme Court of Appeal's factual findings, or its application of the proportionality test. While these issues could be seen to be issues connected to the Court's decision on the two genuinely constitutional matters, a more restrained Court might have assumed jurisdiction to decide the two novel points, and left the Supreme Court of Appeal's findings on the facts, and its application of the proportionality test, undisturbed.

Mohunram is not the only case in which the Constitutional Court has essentially second-guessed the Supreme Court of Appeal's application of a legal test without adding to our constitutional understanding of it. A common thread running through these judgments is that they almost all involve some sort of proportionality or balancing enquiry mandated by the ordinary law. *Dikoko*, for example, concerned the assessment of damages for defamation,[5] while *Du Toit v Minister of Transport* engaged the calculation of compensation for expropriation.[6] In some of these cases the Constitutional Court agreed with the Supreme Court of Appeal, while in others it substituted its view for that of the other court. In theory, when the Constitutional Court upholds an appeal against the Supreme Court of Appeal, it must do so on the basis that the Supreme Court of Appeal failed to take constitutional considerations into account, or that it misunderstood the true import of the Final Constitution for the case. All that the Constitutional Court really does in these cases, however, is to repeat the enquiry that the Supreme Court of Appeal has already conducted. Whether it ultimately upholds or dismisses the appeal, the ordinary law is not *constitutionally* developed.

[1] *Van der Merwe & Another v Taylor NO & Others* (supra) at paras 35-37.
[2] Ibid at paras 43-55.
[3] Ibid at paras 15-34 (minority) and 111-117 (majority).
[4] Ibid at paras 38-42 (minority) and 127-128 (majority).
[5] *Dikoko v Mokhatla* 2006 (6) SA 236 (CC), 2007 (1) BCLR 1 (CC).
[6] 2006 (1) SA 297 (CC), 2005 (11) BCLR 1053 (CC).

A particularly unfortunate example of this trend is *NM & Others v Smith & Others (Freedom of Expression Institute Intervening)*.[1] The applicants in *NM* claimed damages against the defendants for publishing their names and HIV status in a book without their prior consent. The High Court had dismissed the claim on the basis that the defendants had not acted wrongfully and had had no intention of harming the applicants. The Constitutional Court, by majority judgment, awarded damages. The jurisdictional part of the judgment is nothing short of a conceptual disaster:

> The dispute before us is clearly worthy of constitutional adjudication and it is in the interests of justice that the matter be heard by this Court since it involves a nuanced and sensitive approach to balancing the interests of the media, in advocating freedom of expression, privacy and dignity of the applicants irrespective of whether it is based on the constitutional law or the common law. This Court is in any event mandated to develop and interpret the common law if necessary.[2]

As mentioned above in relation to *Dikoko*, the problem with assuming jurisdiction to review rules that are related to constitutional rights is that almost every legal rule is so related. For the Court to base its jurisdiction on this factor — not to mention on an empty slogan like 'worth[iness]' — is to ignore even the lowest threshold the Final Constitution offers for limiting it jurisdiction. The holding in *NM* not only distorts any such idea. It also seems to imply that the idea of limited jurisdiction is nothing but a minor inconvenience that can be ignored or overcome with ease. FC s 167 does not, however, grant jurisdiction to the Constitutional Court when a dispute is 'worthy', but only when it involves a constitutional matter. What has happened in *NM*, one might ask, to the notion of the need for a bona fide constitutional matter emphasized in *Fraser*? The reference to the development of the common law only adds insult to injury. The High Courts and the Supreme Court of Appeal are primarily responsible for developing and interpreting the common law. The Constitutional Court is only mandated to oversee their decisions when there is some indication that these courts have developed the law in a way not countenanced by the Final Constitution. Instead, FC s 39(2) is introduced in *NM* almost light-heartedly as a kind of fall-back position. It is exactly this understanding of the Constitutional Court's jurisdiction that has made more or less every application of the common or statutory law a constitutional matter.

The *NM* Court might be forgiven had it been necessary to develop the common law in order to vindicate the applicant's claim. But the majority expressly held that the common law as it stood was in line with the Final Constitution.[3] The sole basis for its decision was that the defendants, contrary to what the lower courts had found, had acted intentionally. The assumption of jurisdiction in such

[1] 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC).
[2] *NM* (supra) at para 31.
[3] *NM* (supra) at para 57.

circumstances directly contradicts *Luiters*, in which the Court held that the question of whether someone acts with intention is a factual question and does not therefore raise a constitutional matter.[1] In ignoring this precedent, the majority in *NM* assumed the role of an ordinary appeal court, second-guessing the lower courts' application of the ordinary law and their interpretation of the facts. Although the Constitutional Court may, after this decision, still pay lip service to the doctrine that cases involving the application of the ordinary law, whether common or statutory, do not raise constitutional matters, its own jurisprudence points in the other direction.

(h) An alternative conception of the Constitutional Court's jurisdiction

This chapter has thus far been concerned with an overview of the Constitutional Court's case law on its jurisdiction under FC s 167. The different categories of constitutional matters that the Constitutional Court has embraced have been examined, together with the situations in which the Court has declined jurisdiction. The critique thus far has been limited to the question of coherence, i e to the question whether the Court has established clear rules determining its jurisdiction and whether these rules have been consistently applied. The aim of this exercise has been to provide litigants with assistance on how to assess their case with regard to the Constitutional Court's jurisdiction — the first hurdle in bringing a successful constitutional claim.

This section tries to address the broader consequences of the Constitutional Court's understanding of its jurisdiction and asks a number of conceptual questions. Has the Court delivered on its mandate as a court of limited jurisdiction and as an institution with a transformative function? Does the framework for the division of responsibilities between the Constitutional Court and the Supreme Court of Appeal devised by the Constitutional Assembly in the mid-1990s still make sense? Is it possible to draw a theoretically sound distinction between constitutional and non-constitutional matters in a system of constitutional supremacy? Is it possible to draw a meaningful distinction between matters that are decided by the Constitutional Court and those that are not?

(i) *Consequences of the Constitutional Court's approach to its jurisdiction*

The Constitutional Court's approach to understanding the term 'constitutional matter' as the entry point to its jurisdiction has had a number of unfortunate consequences.

[1] See *Luiters* (supra) at para 28.

(aa) It has become impossible to determine when the Constitutional Court will decline jurisdiction

If the cases discussed above indicate anything at all, it is that the Constitutional Court has adopted an understanding of the all-pervasiveness of the Final Constitution in the legal system that effectively renders the distinction between constitutional and non-constitutional matters illusory. This is not to say that the Constitutional Court will never decline jurisdiction. It is just that it has become impossible to predict with any certainty in which cases it will do so. This is not merely a problem for parties seeking to access the Court. It also casts doubt on the foundational notion of the Constitutional Court as a court of special, limited jurisdiction.

Save for the exceptional situation where no issue other than a purely factual question is present when the case reaches the Constitutional Court,[1] every case that involves the interpretation and application of either statutory or common law may potentially raise a constitutional matter. With regard to statutes that have been enacted after 1994, one can never be entirely sure whether the Constitutional Court will include them in its list of legislation enacted to give effect or content to a provision of the Bill of Rights, or otherwise to provide the framework for some constitutional principle. Depending on this classification, the Constitutional Court may or may not assume jurisdiction over any interpretation or application of the legislation concerned, leading in the first instance to total control of the subject matter of the case.

With regard to the common law, the distinction between development of the law (which is subject to constitutional scrutiny) and mere application (which is supposedly not) has collapsed in cases where the common-law principle is open to 'policy choices' or where the case 'implicates' one or more rights in the Bill of Rights. And yet what lawyer would confidently advise a client that the common-law principle central to his or her matter was not an expression of some or other social policy or a balance struck between competing constitutional rights?

How did this happen? The most likely explanation is that the Constitutional Court's almost de facto plenary jurisdiction is a consequence of the supervisory role it has undertaken to ensure that lower courts interpret, develop, construe or apply the law through the prism of the Final Constitution. The original basis for this notion was the Court's understanding of the all-pervasiveness of the Final Constitution in relation to the rest of the legal system. The Court early on recognized that the ordinary law is not separate from the Final Constitution, but 'intertwined'[2] with it, and that the Final Constitution and the ordinary law form

[1] This qualifier is important to show that the case may well have included many constitutional matters when it started in the High Court. However, on its way up the court hierarchy all of them had been decided and the parties did not pursue any of them further. The open questions that were still decisive for the case had been reduced. What the Constitutional Court is really saying, therefore, is that it does not want to deal with cases where the only matter left for it to decide is one of fact.

[2] *Pharmaceutical Manufacturers* (supra) at para 33.

just one standard against which the conduct of those bound by the Final Constitution is to be measured. Frank Michelman has pointed out that the Constitutional Court in this respect follows an ideal of the unity of the legal system.[1] In my view, Michelman not only correctly describes the ideals followed by the Constitutional Court, his description also embraces the ideals espoused by the Final Constitution itself. This ideal is to be found not only in the supremacy clause (FC s 2) but also in FC s 8(1) — FC s 8(1) proclaims that the Bill of Rights applies to all law.

None of the above is problematic. The problem only arises because of the further step that the Constitutional Court has taken: according to its jurisprudence, not only is all law subject to the Final Constitution, but so too is every legal finding. In the eyes of the Court, every alleged shortcoming in a judgment renders the case in principle appealable. Here, I respectfully differ with Michelman: the structural basis for this understanding is not the principle of legality, ie the fact that the lower court (allegedly) made a wrong finding of law. Instead, the Constitutional Court assumes jurisdiction because it regards it as its duty to ensure that lower courts fulfil their constitutional obligation to interpret and apply the ordinary law in line with the Final Constitution. The constitutional basis, therefore, is not the principle of legality, but FC s 39(2). The Constitutional Court has developed its understanding of its mandate on the back of this provision, but reads the provision in a very wide sense, in a way that arguably goes beyond the provision's intended scope. Today, the Constitutional Court's understanding of FC s 39(2) requires 'every court, tribunal or forum [to] promote the spirit, purport and objects of the Bill of Rights' not only when interpreting any legislation and when developing the common law (or customary law), but in everything they do, including every settlement of a dispute and every process of adjudication. From this conception of the constitutional character of other courts' ordinary functions, the Constitutional Court has developed its conception of itself as being constitutionally mandated and empowered to supervise the work of the lower courts. This does not mean, of course, that every assumption of jurisdiction by the Constitutional Court can be retraced to FC s 39(2). What it means is that the Court has adopted a reading of FC s 39(2) that renders the distinction between constitutional and non-constitutional matters practically meaningless.

The enlargement of the scope of FC s 39(2) so as to support the Constitutional Court's supervisory role is paradoxically visible in the *Boesak* case, one of the few cases in which the Court eventually declined jurisdiction. In *Boesak*, the Court held that a constitutional matter would arise if the Supreme Court of Appeal (or any other court) 'developed, or failed to develop, the rule under circumstances inconsistent with its obligation under section 39(2) of the Constitution *or with some other right or principle of the Constitution*.'[2] In this passage the wide reading of FC s 39(2) is

[1] Michelman (supra) at § 11.4*(b)*.
[2] *Boesak* (supra) at para 15*(b)*, my emphasis, footnote omitted.

clearly present: the Court's jurisdiction to oversee the development of the law arises not just where FC s 39(2) is directly engaged and not only when the Bill of Rights is in issue, but also where the lower court develops or fails to develop the law in line with 'some other [constitutional] right or principle'.[1]

Other cases point in the same direction, in particular those in which the Constitutional Court assumed jurisdiction on questionable grounds — most obviously, *Dikoko*, *Basson, NM* and *K*, but also *NEHAWU*. In all these cases the Court assumed jurisdiction on the basis that the lower court was bound to take the Final Constitution into account: either in the exercise of its discretion in relation to a procedural or substantive matter, or in the application of a statute. It is this understanding that makes the Court's conception of what constitutes a 'constitutional matter' virtually limitless. Put slightly differently, the Final Constitutional Court has adopted an understanding of the influence of the Final Constitution in the application of the ordinary law that is based on an extremely wide interpretation of FC s 39(2).

Michelman argues that the principle of legality, properly understood, collapses the distinction between unlawful and unconstitutional decisions of lower courts. His point is that the yardstick for every court, ie the lawfulness of its decision, has been constitutionalized. But the distinction between unlawful and unconstitutional decisions is at least theoretically still upheld in South African law (with the exception of cases involving the review of administrative and executive action). The Constitutional Court has adopted its own yardstick for reviewing lower court decisions that encompasses everything they do in a way that makes it irrelevant whether the lower court's decision was lawful or not. To put it differently: when the emphasis is placed on the principle of legality, every *wrong* decision is open to review by the Constitutional Court. This means that an applicant to the Constitutional Court would have to argue that the lower court made a wrong decision in the same way s/he would argue an appeal from a High Court to the Supreme Court of Appeal. When the emphasis is placed on the Constitutional Court's power to control the interpretation and application of the law, every decision is open to review by the Court, even lawful ones.

Is such a wide understanding of the Constitutional Court's jurisdiction the consequence of the underlying principle embodied by FC s 39(2) or just of an aberrational reading of that provision? One approach might be to argue that every application of legislation necessarily involves its interpretation, but that there must be a difference between the development and the mere application of the common law. FC s 39(2) only mentions the former and thus the Constitutional Court

[1] See Lourens du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32 at § 32.1*(c)*: although there are difference between provisions of the Bill of Rights and other provisions in the Constitution these should not be overemphasized as both can mutually reinforce the values of the Constitution, in particular with regard to rights: fundamental rights can be protected — or conditions conducive to their protection can be created and enhanced — by giving effect to constitutional norms that do not form part of the Bill of Rights.

was right to emphasize the distinction between application and development in cases like *Shabalala* and *Carmichele*. But is it really possible hermetically to seal off the courts' function in applying the law from their duty to develop or interpret it?

Both legal scholars and practitioners have strongly and convincingly advocated that it is not.[1] In her extra-curial writings, Constitutional Court judge Kate O'Regan has pointed out that the Constitution envisages a unified legal system within an overall objective, normative framework provided by the text of the Final Constitution. This unified system encompasses statute law, common law and customary law, and subjects all of them to the discipline of constitutional norms and values. FC s 39(2) is a textual indicator that all courts are enjoined to work within this unified system to promote the Final Constitution's vision for a just society.[2] Against that backdrop, there can be no distinction between interpretation, application and development of non-constitutional law.

Furthermore, experience in Germany suggests that once constitutional influence on the interpretation, application and formation of non-constitutional law is accepted and subject to review by the Constitutional Court (by the method of indirect application of the Final Constitution under an objective, normative framework), the jurisdiction of the Constitutional Court is potentially limitless.[3] When a Constitution is both supreme and all-pervasive, and when this all-pervasiveness is at least partly executed by way of the interpretation and application of the ordinary law, a clear-cut distinction between constitutional and ordinary (read: non-constitutional) law, and between a Constitutional Court and every other court, is impossible to draw.[4] Importantly, any resultant blurring of the distinction between constitutional and non-constitutional jurisdiction should not be seen as part of some or other strategy on the part of the Constitutional Court to expand its domain at the expense of other judicial and political actors. Rather, any shift in

[1] See Lourens du Plessis 'Re-reading Enacted Law-texts. The Epoch of Constitutionalism and the Agenda for Statutory and Constitutional Interpretation in South Africa' (2000) 15 *SAPR/PL* 257, 295–299; Lourens du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32, § 32.3*(d)* and § 32.5*(c)*(ii).

[2] Kate O'Regan 'On the Reach of the Constitution and the Nature of Constitutional Jurisdiction: A Response to Frank Michelman' in Stu Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 51.

[3] The Bundesverfassungsgericht's jurisprudence on indirect horizontal application and the establishment of an objective order of values has been criticized on the basis that, although these doctrines have opened the legal system to fundamental rights, they have at the same time eliminated any distinction between constitutional and non-constitutional law. See Ernst-Wolfgang Böckenförde *Zur Lage der Grundrechtsdogmatik nach 40 Jahren Grundgesetz* (1990) 32; Christian Starck 'Verfassungsgerichtsbarkeit und Fachgerichte' (1996) 51 *Juristenzeitung* 1033, 1035. It has even been suggested that the doctrine of a clear-cut distinction between constitutional and non-constitutional law in the German context is nothing but a 'Lebenslüge' (a lifelong illusion). See Philip Kunig 'Verfassungsrecht und einfaches Recht — Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit' (2002) 61 *VVDStRL* 34, 40.

[4] See Georg Hermes 'Verfassungsrecht und einfaches Recht — Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit' (2002) 61 *VVDStRL* 119, 124-126; and the comment by Dieter Grimm (ibid) at 180-82.

the balance of power between the various branches of government and within the judicial branch must be seen as an almost inevitable consequence of the Constitutional Court's attempt to give full recognition to the Final Constitution.[1]

(bb) Every case notionally raises a constitutional matter

The other side of the coin of the Constitutional Court's move to control lower courts' interpretation and application of the law is that every case can be *treated* as raising a constitutional matter. The Constitutional Court has been very clear that a constitutional matter raised must be genuine:

> [T]his Court will not assume jurisdiction over a non-constitutional matter only because an application for leave to appeal is couched in constitutional terms. It is incumbent upon an applicant to demonstrate the existence of a bona fide constitutional question. An issue does not become a constitutional matter merely because an applicant calls it one.[2]

The Court itself, however, is to blame for the fact it has become all too easy to do just that. By ruling that it has jurisdiction whenever a litigant contends that a lower court has failed to develop the common law or to interpret legislation in accordance with the Final Constitution, the Court has set the jurisdictional threshold very low: such allegations, at any rate, are seemingly sufficient to raise a *bona fide* constitutional matter.

The crucial point is not that a litigant will sometimes try to postpone a final ruling by applying to the Constitutional Court and desperately 'couch[ing]' its application 'in constitutional terms'. Rather, the point is that the Court's conception of the term 'constitutional matter' does not stop it from assuming jurisdiction if it wants to in these cases. It is always possible to claim that the ordinary law either itself infringes the Final Constitution or that the lower court did or did not interpret/develop the ordinary law consistently with the Final Constitution.

(cc) The transformative function of the Constitutional Court is impaired

A third consequence of the approach adopted by the Constitutional Court to its jurisdiction is that the Court has blurred the line between itself, on the one hand, and the Supreme Court of Appeal and the High Courts, on the other, in a way that has damaged its transformation agenda. As we have seen, the Constitutional Court has asserted its jurisdiction in a way that goes beyond even the few conceptual limits it has imposed on the exercise of its powers. It has decided not only cases, or issues within cases, that engaged the Final Constitution, but on several occasions has assumed jurisdiction when merely the application of statutory or common law was at stake. To this extent, I agree with Stu Woolman that part of the problem lies in the fact that the mere assertion by a litigant of a need to

[1] Dieter Grimm 'Constitutional Issues in Substantive Law — Limits of Constitutional Jurisdiction' in Ingolf Pernice, Juliane Kokott & Cheryl Saunders (eds) *The Future of the European Judicial System in a Comparative Perspective* (2006) 277, 279.

[2] *Fraser* (supra) at para 40 (footnote omitted).

develop the common law often persuades the Court to assume jurisdiction, even though the judges later find that the common law need not be developed.[1] But the deeper problem is that the Court does not take its own institutional function seriously.

As I pointed out at the beginning of this chapter, the Constitutional Court was established to institutionalize the break from the colonial and apartheid legal order to a new legal order in which constitutional parameters would inform the limits and the content of the law, both with regard to rules and their application in day-to-day life. The purpose of the Constitutional Court's jurisdiction is, consequently, to ensure that this transformation takes place. The role of the Constitutional Court is, as far as the common law and statutory law are concerned, to ensure legal unity from the perspective of the Final Constitution.[2] This transformative function is secured by the possibility of appeal to the Constitutional Court against any lower court's decision, and by the Constitutional Court's mandate to ensure that other courts have as much regard to the Final Constitution as it does itself. The Court's jurisdiction 'includes' (or is equivalent to, as noted earlier) 'the interpretation, protection or enforcement of the Constitution' (FC s 167(7)), because the exercise of these powers by the Court ensures that the legal order is brought into line with constitutional imperatives. The Court needed to say in *Pharmaceutical Manufacturers* that there is only one system of law in South Africa because its comprehensive review powers, and thus its transformative function, would otherwise have been threatened. This is also why the Court in *Du Plessis v De Klerk* and later in *Carmichele* mentioned the 'evolving fabric of our society',[3] to which the judiciary has to have regard in bringing the common law into harmony with the Final Constitution. By interpreting, protecting and enforcing the Final Constitution, the Constitutional Court guides the development of the legal order, and ensures that constitutional standards that have already been established are adhered to.

The flipside of these observations, however, is that the Constitutional Court should *not* have jurisdiction when the constitutional project is not advanced. When there is neither a need to bring the law into line with the Final Constitution nor to ensure that a lower court adheres to an established constitutional standard, there is also no need for the Constitutional Court to become involved in the matter. What is required in these cases is the simple ascertainment of facts or the mere application of constitutionally compliant law. This principle does not only apply to entire judgments, but is also valid with regard to different aspects of a judgment. As most cases involve several legal issues, the Constitutional Court

[1] See Stu Woolman 'The Amazing, Vanishing Bill of Rights' (2007)124 *SALJ* 762, 782 n40 (With particular reference to *NM*).

[2] The value of legal unity as a constitutional value has been convincingly portrayed by Michelman. See Michelman (supra) at § 11.4*(b)*.

[3] *Du Plessis v De Klerk* (supra) at para 61; *Carmichele* (supra) at para 36.

should distinguish between those aspects of a case that raise a constitutional matter and those that do not. As we have seen, however, the Constitutional Court, while upholding the credo that purely factual questions are none of its business, has effectively given up (or at least has substantially cut back) on its limited jurisdiction in cases where constitutionally compliant law is applied. In so doing it has turned itself into an 'Über-Appeal Court'.

The Court's failure to distinguish between matters in which it provides a constitutional guideline and those where it assumes the role of a High Court and second-guesses the facts of the case weakens the influence of the Constitution in the overall legal framework of South Africa. This is so for two reasons. First, since the Court has to justify its findings with regard to the Final Constitution, deciding cases that it does not have to creates the impression that everything may be deduced from the Final Constitution. The Final Constitution is, in other words, presented as the answer to all legal questions. This stance undermines the value of the Final Constitution as a foundation — but not a substitute — for the legal and social order in South Africa.

Secondly, the Constitutional Court, even with all the supervisory powers it has assumed, will not be able to transform the entire legal system on its own. As a practical matter, the Court will never be able to hear all the cases that have constitutional implications. What is needed to ensure the transformation of the South African legal order is for every other court to feel not only bound, but also encouraged to 'promote the spirit, purport and objects of the Bill of Rights' (FC s 39(2)). To achieve transformation of the kind envisaged by the Final Constitution, the Constitutional Court needs the support of the lower courts, in particular the Supreme Court of Appeal. It is in this regard that the 'über-appeal-court approach' taken by the Constitutional Court has been particularly unhelpful.

The same criticism could be levelled against the Constitutional Court's seeming determination to decide every factual question in the process of adjudicating a constitutional matter, even where this means overturning factual findings made by the Supreme Court of Appeal.[1] The Constitutional Court's assumption of a general supervisory role can be justified. The principle underlying FC s 39(2), after all, inevitably leads to this sort of role. But the Court's supervisory role should be performed with care and respect for the Supreme Court of Appeal — not only because of the Supreme Court of Appeal's greater experience in dealing with the common law, but also because of the need to trust the Supreme Court of Appeal's general willingness and capacity to take account of the Final Constitution in its decisions. The need for such institutional respect has been acknowledged by the Constitutional Court on several occasions. But it needs to be observed, too. What this means is that, when the Constitutional Court is asked to review a decision of the High Court or the Supreme Court of Appeal involving the balancing of rights or the application of a proportionality test, the Constitutional Court

[1] See *Rail Commuters Action Group* (supra) at para 53; but compare *Minister of Safety and Security v Van Niekerk* (supra) at para 10.

should refrain from interfering with the decision unless it can be shown to have been based on a misunderstanding of the applicable constitutional standard or a misapplication of the applicable constitutional criteria. The mere fact that the Constitutional Court would have decided the case differently is not enough.

To sum up: the Constitutional Court has established an understanding of the term 'constitutional matter' that makes it impossible to predict whether it will assume jurisdiction in any given case, and which encourages parties to pretend that their case raises a constitutional matter. The Court has also asserted its jurisdiction in a way that often second-guesses the Supreme Court of Appeal's legal findings, even where the Final Constitution is not applied. This approach has led to a situation in which the Court has declared large areas of law to be automatically subject to its jurisdiction, including labour law, administrative law, broadcasting law and the law of defamation. In these matters, the Court does not distinguish between cases and aspects of cases that engage the Final Constitution, but applies and interprets the common law and statute law like any other court. This approach is not what was envisaged by the Constitutional Assembly. It is also conceptually and analytically weak, and bad for the Court's own transformation agenda.

(ii) *A functional approach to jurisdiction*

In order to remedy these shortcomings, the Constitutional Court needs to do three things. First, it should in conception and in practice adopt an approach to its jurisdiction that recognizes the limited powers it is supposed to exercise according to FC s 167(3)*(b)*. Secondly, the Court's approach to its jurisdiction should at least to some extent distinguish between cases it is likely to hear and those it will leave to the Supreme Court of Appeal to decide. Finally, the Court should take account of its transformative function, which is to say, it should distinguish between cases it needs to decide to ensure that the ordinary law is in line with the Final Constitution, both in form and in application, and those that it does not need to decide for this reason.

(aa) Limits of a substantive, and benefits of a functional, understanding of 'constitutional matter'

The Court's current, substantive approach to the definition of 'constitutional matter' is inherently inadequate. An all-encompassing, all-pervasive Constitution and a Constitutional Court that has a mandate to ensure the unity of the legal system — as Frank Michelman has convincingly shown — is irreconcilable with any distinction between areas of substantive law that fall inside, and areas that fall outside, the scope of the Court's jurisdiction. Any definition of the term 'constitutional matter' that tries to limit the type of matters that the Court may conceivably hear by asking what the case is about is futile and bound to fail. As long

as a dispute is legal, and as long as there is any statutory, customary or common-law principle guiding the dispute, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights, i e must decide the case from a constitutional vantage point. And as long as the Court adopts its supervisory role with regard to other courts' obligations under FC s 39(2), there is no case which is beyond its jurisdiction.

In *Dikoko*, Skweyiya J, in dissent, made a remark that pointed to the dilemma that a solely substantive understanding of the Court's jurisdiction poses: '[W]hile it is accepted that all matters have constitutional implications, in order to recognise and preserve this Court's jurisdictional distinction a line must be drawn.'[1] When all matters have 'constitutional implications', substantive considerations cannot be used to distinguish between constitutional and non-constitutional matters: something cannot be part of itself. It is necessary therefore to ignore substantive considerations — at least to a certain extent. For the Constitutional Court to make sense of its limited jurisdiction and to develop an understanding of its position in the court structure, the Court will have to move beyond the notion that in some areas of law legislation has been enacted to give effect to a fundamental right. It will also have to move beyond the notion that a dispute raises a constitutional matter because it has implications for the balance struck between rights enshrined in the Final Constitution. These propositions are not false, but they are meaningless as devices to determine the Court's jurisdiction. In some very limited cases, the substantive approach may suffice — for example, to decline jurisdiction when only factual questions are left for decision by the Constitutional Court. But in the majority of cases factual questions play only a secondary role. And, in any case, the Constitutional Court's approach to its jurisdiction cannot be restricted to sorting out purely factual disputes. Legal questions can be non-constitutional matters, too.

It remains a dilemma that with an all-pervasive Constitution every legal rule has some or other constitutional dimension. This conclusion seems to be at odds with the idea of a Constitutional Court separate from other courts, not only as an institution, but also in jurisdictional terms. Other constitutional courts, however, have also struggled with this situation, and there is much to be learned from their experience. In Germany, the Federal Constitutional Court has over time developed an approach that tries to reconcile its limited jurisdiction with the all-pervasiveness of the German Constitution.[2] The conceptual breakthrough in this process came when the Court realized that a distinction between constitutional

[1] *Dikoko* (supra) at para 123.

[2] In Germany, the pervasiveness of the Basic Law is amplified by the fact that the Grundgesetz states explicitly what Frank Michelman assumes to be the case for South Africa's Final Constitution. According to art 20(3) of the Grundgesetz, both the executive *and* the judiciary are bound by law and justice. Thus, in the constitutional order of the Grundgesetz, every wrong legal finding can indeed be seen as an infringement of the principle of legality and thus the Constitution.

and non-constitutional matters (or between constitutional and non-constitutional law) based on purely substantive criteria was not viable — but that functional criteria might work.

From early on the Bundesverfassungsgericht made it clear that it would ensure that all courts in their respective jurisdictions took the Constitution into account and did not adjudicate contrary to it. The approach adopted by the Bundesverfassungsgericht has widened the scope of its review powers to include, effectively, all judgments of all other courts.[1] Of course, such an extensive and all-encompassing supervisory function, which the Court has opened up through its judgments, has raised questions about its status as a court of limited jurisdiction, and also about the practicality of broadening its jurisdiction in this way. The Bundesverfassungsgericht has therefore moved to temper its broad review powers by reducing the intensity of its control function, especially with regard to constitutional complaints concerning judicial decisions (roughly the equivalent of appeals to the South African Constitutional Court). In particular, the Bundesverfassungsgericht has developed the principle that it will — notwithstanding the doctrine of legality — not review every (alleged) breach of the ordinary law, but only whether the court a quo's interpretation and application of the law has disregarded constitutional obligations:

> The Bundesverfassungsgericht has to check whether the ordinary court has rightly assessed the scope and the effect of the fundamental rights in the sphere of civil law. There follows from this at the same time the limit to this review: it is not for the Constitutional Court to check judgments of the civil courts completely for errors in law; the Constitutional Court has merely to assess the 'permeating effect' [also translated as the 'radiating effect'] of the fundamental rights on the civil law mentioned, and bring the value content of the constitutional principle to bear here too. It is the object of the institution of the constitutional complaint to make all acts of the legislative, executive and judicial power subject to review for 'constitutionality' (s 90 of the Federal Constitutional Court Act). Just as the Federal Constitutional Court is not called upon to act as a body for appeal or indeed 'super appeal'

[1] Milestones in the Bundesverfassungsgericht's jurisprudence in this regard are: BVerfGE 6, 32 ('*Elfes*')(1957)('The constitutional right to personal freedom protects every aspect of human behaviour and not just those specified and enumerated by other, more specific constitutional rights or by legislation. An infringement of a constitutional right can only be justified when the infringing act is both procedurally and substantively in line with the Constitution. Anybody can challenge any burdensome law as an infringement of basic rights through the procedure of constitutional complaint. The Constitutional Court will have jurisdiction in these cases and will assess both whether the challenged norm violates the fundamental rights as such and whether the norm was enacted according to the formally correct procedure); BVerfGE 7, 198 ('*Lüth*')(1958) (Ordinary courts can infringe fundamental rights when they fail to recognize the impact the Constitution has on private law. Here the Court used the 'objective value order' argument that later featured prominently in the South African Constitutional Court's decision in *Carmichele*. The Constitutional Court will review judgments with regard to such failures); BVerfGE 39, 1 ('*Schwangerschaftsabbruch (1)*' ['*First Abortion Decision*'])(1975)(The state has a duty to protect the fundamental rights of the Grundgesetz against private infringement. If non-action leaves citizens' fundamental rights unprotected, the legislature is constitutionally obliged to act. The Constitutional Court has jurisdiction to decide whether the state has fulfilled these positive obligations.)

> over the civil courts, so it should not universally refrain from reviewing such judgments and ignoring a misapprehension of norms and standards of fundamental rights that may occur in them.[1]

In this passage, the Bundesverfassungsgericht made it clear that its function is not to ensure that other courts' judgments are 'correct' — this is the task of the appeal courts — and that it will not overturn judgments simply because they are wrong in law. Like the efforts by the South African Constitutional Court to get to grips with the term 'constitutional matter', however, the Bundesverfassungsgericht initially struggled to determine when the judgment of an ordinary court should be construed as violating the Constitution. In 1964 it invented a test, which it has retained and developed since then:

> The . . . specific function of the Bundesverfassungsgericht would not be achieved if it were to review court decisions on questions of law in an unrestricted way like an appellate court, just because an incorrect decision could possibly affect the constitutional rights of the parties concerned. . . . Only when a court decision violates *specific constitutional law*, may the Bundesverfassungsgericht interfere on the basis of a constitutional complaint. Specific constitutional law has not been violated merely when a judgment has been incorrectly decided in terms of the ordinary law; instead the mistake of the lower court must lie in its disregard for constitutional rights.[2]

The now famous 'Heck formula' of 'specific constitutional law' (named after its inventor, Judge Karl Heck) of course begs the question of what is 'specific' about constitutional law. The Bundesverfassungsgericht admitted that even this formula would not always be able to delineate the limits of the court's review powers. However, it claimed, nevertheless, that limitation was a blessing in disguise: a certain degree of flexibility in the scope of its review powers was necessary to

[1] BVerfGE 7, 198, 207 ('*Lüth*'): 'Das Verfassungsgericht hat zu prüfen, ob das ordentliche Gericht die Reichweite und Wirkkraft der Grundrechte im Gebiet des bürgerlichen Rechts zutreffend beurteilt hat. Daraus ergibt sich aber zugleich die Begrenzung der Nachprüfung: es ist nicht Sache des Verfassungsgerichts, Urteile des Zivilrichters in vollem Umfange auf Rechtsfehler zu prüfen; das Verfassungsgericht hat lediglich die bezeichnete 'Ausstrahlungswirkung' der Grundrechte auf das bürgerliche Recht zu beurteilen und den Wertgehalt des Verfassungsrechtssatzes auch hier zur Geltung zu bringen. Sinn des Instituts der Verfassungsbeschwerde ist es, daß alle Akte der gesetzgebenden, vollziehenden und richterlichen Gewalt auf ihre 'Grundrechtmäßigkeit' nachprüfbar sein sollen (§ 90 BVerfGG). Sowenig das Bundesverfassungsgericht berufen ist, als Revisions- oder gar 'Superrevisions'-Instanz gegenüber den Zivilgerichten tätig zu werden, sowenig darf es von der Nachprüfung solcher Urteile allgemein absehen und an einer in ihnen etwa zutage tretenden Verkennung grundrechtlicher Normen und Maßstäbe vorübergehen.' This judgment was published in English in Bundesverfassungsgericht (ed) *Decisions of the Bundesverfassungsgericht 1958-1995*, Volume 2/I (1998) 1.

[2] BVerfGE 18, 85, 92–93 ('*Patentbeschluss*' ['*Patent Decision*']): '[Es würde] . . . der besonderen Aufgabe des Bundesverfassungsgerichts nicht gerecht werden, wollte dieses ähnlich wie eine Revisionsinstanz die unbeschränkte rechtliche Nachprüfung von gerichtlichen Entscheidungen um deswillen in Anspruch nehmen, weil eine unrichtige Entscheidung möglicherweise Grundrechte des unterlegenen Teils berührt. . . . [N]ur bei einer Verletzung von spezifischem Verfassungsrecht durch die Gerichte kann das Bundesverfassungsgericht auf Verfassungsbeschwerde hin eingreifen. Spezifisches Verfassungsrecht ist aber nicht schon dann verletzt, wenn eine Entscheidung, am einfachen Recht gemessen, objektiv fehlerhaft ist; der Fehler muß gerade in der Nichtbeachtung von Grundrechten liegen.' (References omitted)

ensure the performance of its supervisory function. In later judgments, the Bundesverfassungsgericht has refined its definition of 'specific constitutional law'.[1] As the law now stands, a judgment of a lower court violates constitutional law:

1. when the court a quo relies on a statute that in itself is unconstitutional;
2. when the court a quo infringes a procedural constitutional right of the applicant;
3. when the interpretation and application of the law by the court a quo violates constitutional law; and
4. when the decision of the court a quo is arbitrary.

The last criterion is obviously a very flexible one that effectively allows the Court to overturn judgments when it does not like the outcome — even if the judgment was based entirely on non-constitutional law. But while this category can be seen as an emergency escape hatch in cases where the need for equity outweighs the value of legality, the more important category is the third one, which mirrors the cases the South African Constitutional Court decides on the basis of FC s 39(2). As to the question when the interpretation and application of the law by the court a quo violates constitutional law, the Bundesverfassungsgericht has offered the following guideline:

> The ordinary application of the ordinary law to the case is beyond the review powers of the Constitutional Court unless the lower court's errors in interpreting the law were based on a fundamental misconception of the importance of the fundamental right, in particular its scope, and had some significance for the specific case.[2]

In addition to such 'fundamental misconceptions', a lower court commits a constitutional error in the interpretation and application of the law when it fails to realize that the Constitution impacts on the interpretation of the ordinary law or that conflicting fundamental rights need to be balanced against each other. Furthermore, the Bundesverfassungsgericht has held that the intensity of its powers of review depends on the intensity of the asserted impairment to a constitutional right.[3] Generally, the Constitutional Court will refrain from reviewing the interpretation and application of the ordinary law and from substituting its

[1] For a summary of the Bundesverfassungsgericht's jurisprudence, see Werner Heun 'Access to the German Federal Constitutional Court' in Ralf Rogowski & Thomas Gawron (eds) *Constitutional Courts in Comparison — The U.S. Supreme Court and the German Federal Constitutional Court* (2002) 143–145.

[2] BVerfGE 18, 85, 93: 'Freilich sind die Grenzen der Eingriffsmöglichkeiten des Bundesverfassungsgerichts nicht immer allgemein klar abzustecken; dem richterlichen Ermessen muß ein gewisser Spielraum bleiben, der die Berücksichtigung der besonderen Lage des Einzelfalls ermöglicht. Allgemein wird sich sagen lassen, daß die normalen Subsumtionsvorgänge innerhalb des einfachen Rechts so lange der Nachprüfung des Bundesverfassungsgerichts entzogen sind, als nicht Auslegungsfehler sichtbar werden, die auf einer grundsätzlich unrichtigen Anschauung von der Bedeutung eines Grundrechts, insbesondere vom Umfang seines Schutzbereichs beruhen und auch in ihrer materiellen Bedeutung für den konkreten Rechtsfall von einigem Gewicht sind.' (References omitted)

[3] BVerfGE 35, 202 (*'Lebach'*).

view for the assessment and evaluation of the particular circumstances of the case by the trial court. So, for example, in a defamation case, the Constitutional Court will not second-guess the trial court's findings about what was said and done and whether it was defamatory or not.[1] In cases of a high 'infringement intensity', however, constitutional review extends into the details of the application and interpretation of the law, both by the administration and the judiciary.[2] In some cases, the Constitutional Court may even substitute its view of the appropriate balance to be struck for that of the lower court.[3]

As Werner Heun has correctly pointed out, all these allocation criteria, and the differentiation between 'specific constitutional law' and limited review by the Bundesverfassungsgericht, are incomprehensible if they are only seen as an exercise in the interpretation of the constitutional text.[4] Instead, one needs to see them as an attempt to distribute tasks *functionally* between the Bundesverfassungsgericht and the other courts. The latter have comprehensive jurisdiction in the interpretation and application of all (usually statutory) law. The Constitutional Court controls whether the Constitution has been properly taken into account, without, however, hesitating to overrule a particularly grave miscarriage of justice.

Strictly speaking, by the time all these deliberations on the scope and intensity of review occur, the Bundesverfassungsgericht has already assumed jurisdiction and is dealing with the merits of the case. However, reduced review is, in effect, a jurisdictional criterion as it is used to distinguish between those aspects of the case in which the decision of the lower court is final and those in which the Constitutional Court can and does exercise its review powers. The distinction is a device to respect the expertise of the ordinary courts in their field and to limit the caseload of the Federal Constitutional Court. It achieves this in two ways: first, it allows the Court to decline to decide a case when the crucial matters are the interpretation and application of the law. Secondly, within a case, it allows the Constitutional Court to distinguish those aspects that have no constitutional implications from those that do. This is more than the decision, or rather non-decision, of 'issues connected with decisions on constitutional matters' found in FC s 167(3)*(b)*. It is an exercise that leaves legal questions as they were decided by the lower courts and concentrates on those that demand a decision by the Constitutional Court. Lower courts enjoy discretion in their interpretation, application and development of the law unless it is the specific interpretation, application and development of statutory or common law adopted by the lower court that is prohibited by the Constitution or — the other way around — unless there is a

[1] BVerfGE 30, 173, 197 ('*Mephisto*'). This judgment was published in English in Bundesverfassungsgericht (ed) *Decisions of the Bundesverfassungsgericht 1958-1995*, Volume 2/I (1998) 147.

[2] BVerfGE 83, 130 ('*Josephine Mutzenbacher*') at 145. This judgment was published in English in Bundesverfassungsgericht (ed) *Decisions of the Bundesverfassungsgericht 1958-1995*, Volume 2/II (1998) 474, 485-86.

[3] BVerfGE 42, 143, 148 ('*Deutschland Magazine*').

[4] Heun (supra) at 145.

specific interpretation, application and development of statutory or common law demanded by the Constitution which the lower court failed to adopt.

As the South African Constitutional Court faces the very same challenge of ensuring that the legal order complies with the all-encompassing Constitution (and transforms in this direction), while exercising limited jurisdiction in constitutional matters, the Court might profitably draw on the German experience. In particular, the Constitutional Court could adopt an approach to its jurisdiction where it is not primarily the subject matter of a case, but its function with regard to other courts, and its overall transformative role in the South African court structure, that determines whether it decides to review a case or not.

The functional approach is partly based on the specific setting and composition of the court concerned and its relative advantages and disadvantages. Such factors have already been recognized by the Constitutional Court, for example, with regard to evidentiary matters. The Court has declined to decide purely factual issues, at least in part because it is ill equipped to do so. Besides the fact that some of the judges of the Constitutional Court have no experience as trial judges, the fact that the Court is composed of eleven judges is not ideal for cross-examining witnesses.

Then there is the fact that the Court is often in recess and not ready to sit:

> The Constitutional Court is not designed to act in matters of extreme urgency. It consists of eleven members and a quorum of the Court is eight of them. This Court is in recess for some months of each year and during those times its members disperse to their homes which, in some cases, are a considerable distance from the seat of the Court in Johannesburg … [and] it is not always possible to convene a quorum of the Court at very short notice during a recess.[1]

This dictum in one of the *UDM* decisions was used in the context of exclusive jurisdiction. But it points to a functional understanding of the Constitutional Court as a court that deals with abstract legal questions that has wider implications for its jurisdiction in general.

The Court should also adopt a functional approach to its jurisdiction in cases where these practical aspects are not decisive. Even when, for example, the balancing of rights in a defamation case could be justifiably argued to raise a constitutional matter, the Constitutional Court should refrain from doing so and respect the lower court's discretionary judgment. To make sense of its limited jurisdiction and to ensure that the Final Constitution's transformation agenda is advanced, the Constitutional Court needs to focus on questions of constitutional principle, not on the application of the law. It should see its function as being to define the constitutional standards for the interpretation of a statute, the application and development of a common-law rule or the balancing of competing

[1] *President of the Republic of South Africa & Others v United Democratic Movement & Others* 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC) at para 30, cited with approval in *Ex parte: Minister of Social Development & Others* 2006 (4) SA 309 (CC), 2006 (5) BCLR 604 (CC) at para 51.

interests in the ordinary law. The Court should ask itself whether a case requires it to set or elaborate these standards. It also needs to ask itself what can be achieved by deciding a certain case: is it just adjudicating a dispute between two parties or deciding what the common law is in relation to a specific set of circumstances, or is it shaping the constitutional order in the broadest sense? By focusing on principles, the Constitutional Court would ensure that the law transforms according to the Final Constitution.

The purpose of such an approach is not to limit the relevance of the Final Constitution and its influence in court proceedings — every court, tribunal or forum must still promote the spirit, purport and objects of the Bill of Rights. Rather, since this obligation creates a common and mutual task for every court, the aim is to distribute the burden of this task between the courts, and to ensure that the Constitutional Court is able to fulfil its mandate.

Although the Constitutional Court's main task is to set guidelines for other courts, this does not mean that, once this task is done, the Court may not intervene when questions concerning the application of the guidelines arise. Guidelines set in earlier cases may need further clarification from time to time, or another criterion may need to be added. In this regard, the distinction between the Court's focus on issues of principle and the adoption of a supervisory role is really one of emphasis. By focusing on issues of principle the Constitutional Court would be able to demonstrate, not only that other courts have a duty to promote the Final Constitution, but that they are trusted agents of the constitutional project. The more credibility the Constitutional Court enjoys among the High Courts and the Supreme Court of Appeal, and the more room it leaves them for manoeuvre in the development of the common law and the interpretation of statutes, the more the judges of these other courts will take account of constitutional values in the adjudicative process. In addition, the more the Constitutional Court leaves the application of the constitutional guidelines it sets to the lower courts, the more these courts will accept that the Court may on occasion have to exercise its supervisory function under FC s 39(2) to review an erroneous application of these guidelines.

A functionalist (and consequently more limited) understanding of the Constitutional Court's jurisdiction, therefore, not only makes sense of the principle of limited jurisdiction as set out in the Final Constitution. It also promotes the constitutional transformation of the legal order by passing more responsibility for the transformation of the ordinary law to the other courts. Of course, this argument may be contested. One could argue that the Constitutional Court needs to assert the utmost possible control of the other courts in order to ensure transformation. From this perspective, a limited jurisdiction is indeed an obstacle, and the Constitutional Court should endeavour to expand its jurisdiction as much

as possible. The Court, on this approach, should decide as many cases as possible in order to build a strong body of constitutional law and ensure that the other courts toe the line.

This view is voiced by Moseneke J in *Daniels v Campbell NO*:[1]

> The problem of readily importing interpretations piecemeal into legislation is the precedent it sets. Courts below will follow the lead and readily interpret rather than declare invalid statutes inconsistent with the Constitution. However, constitutional re-interpretation does not come to this Court for confirmation. The result may be that high courts develop interpretations at varying paces and inconsistently. This makes for an even more fragmented jurisprudence and would have deleterious effects on how people regulate their affairs. It is highly undesirable to have an institution as important as marriage recognised for some people in some provinces and not in others. The rule of law requires legal certainty.[2]

Moseneke J's concern in this passage is directed against the threat of a fragmented legal system and a concomitant loss of control by the Constitutional Court. He raises this concern in relation to the difference between declarations of invalidity, which have to be confirmed by the Court, and lower court decisions on how statutes should be interpreted, which do not. But the same unease may be raised in relation to jurisdiction: is there not a danger, if the Constitutional Court relinquishes the wide jurisdiction it currently enjoys, that constitutional transformation will develop in different ways and at different speeds in the lower courts?

This concern is valid. But it can also be exaggerated. In every legal system, different courts may interpret or apply legal rules in different ways. That is why there are appeal courts, whose task it is to settle these differences. The occurrence and eventual settling of conflicting interpretations is part and parcel of the legal process, as much as it may cause dissatisfaction in a particular case. Like other legal systems, the South African legal system makes provision for this scenario: conflicting High Court interpretations of the common law or of particular statutes eventually reach the Supreme Court of Appeal, whose decision, absent a constitutional matter, should be final.

The same process should apply to constitutional matters: conflicting constitutional interpretations by different courts should be reviewed by the Constitutional Court in terms of FC s 39(2). Any such conflicts would be temporary only, pending the Constitutional Court's decision. Admittedly, such conflicts would not automatically reach the Constitutional Court, since they would be dependent on the aggrieved litigant's capacity to prosecute an appeal. There is no greater risk, however, that such conflicts would endure in the legal system than there is with regard to conflicting common-law interpretations. The main concern is that the Final Constitution should be mirrored in the legal system, and that its values should inform statutory interpretation and the development of the common law. From this perspective, the best system is one that encourages lower courts

[1] 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC).
[2] *Daniels v Campbell NO* (supra) at para 104.

to take the Final Constitution into account. In some cases, parties may not have the financial means or the emotional stamina to appeal a particular disputed interpretation all the way to the Constitutional Court. But in other cases litigants may benefit from a High Court that is not afraid to shape the law in terms of the Final Constitution by its own lights. The point is not that the Constitutional Court should necessarily decide fewer cases. It is that the Court should be more aware of the competence of lower courts to take the Final Constitution into account, both so that it can concentrate on those cases (or those aspects of cases) that really require its attention, and so as to encourage lower courts to apply the Final Constitution in their daily work.

(bb) Constitutional leeways as limits to constitutional jurisdiction

The functionalist approach to the definition of 'constitutional matter' suggested above is well-suited to reconciling the principle of an all-pervasive Constitution with the idea of the Constitutional Court's limited jurisdiction. The virtue of the functionalist approach is apparent when the jurisdiction of the Constitutional Court is linked to the way in which the Final Constitution itself 'applies to all law'. Although the Final Constitution is supreme and all-pervasive, its function is nevertheless limited to that of a framework and a foundation for the legal order. This conclusion means that the Final Constitution, on the one hand, sets the outer limits for every possible legal rule, but, on the other hand, does not contain all possible legal rules. Instead it contains 'leeways' — such leeways allow conflicting legal rules to be constitutional.

A constitutional leeway exists when the Final Constitution neither prohibits nor demands a certain decision. The Final Constitution, of course, prohibits decisions that are inconsistent with a constitutional right (not necessarily, but most often, a right in the Bill of Rights). The jurisprudence of the Constitutional Court is full of cases in which the Court has held that a particular legal rule infringes the Final Constitution and cannot be justified. Cases in which the Final Constitution demands a certain decision are less common. Here, the Final Constitution may set a minimum standard that can rise until there is only one decision possible. The Court has also sometimes ordered the legislature to cure a constitutional defect in a specific way.[1] More often, minimum standards may be satisfied by more than one decision, and the courts, the legislature or the executive may exercise their discretion about how to do this.[2] Where the Final Constitution neither prohibits

[1] See *Minister of Health & Others v Treatment Action Campaign & Others (2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1075 (CC); *Minister of Home Affairs and Another v Fourie & Another (Doctors for Life International & Others as Amici Curiae); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).

[2] See, eg, *Grootboom v Government of the Republic of South Africa & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC); *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC).

nor demands a particular decision, it creates a leeway.[1] Leeways start, in other words, where the definitive normative control of the Final Constitution ends.

The South African Constitution leaves ample leeway in this sense for the ordinary law to exist and evolve.[2] Such evolution takes place in the courts through the interpretation and application of legislation and the common law. It is also done through traditional dispute-resolution mechanisms in the case of customary law. When there is no conflict between the rule or its application and the Final Constitution, then the rule still derives its force from the Final Constitution and is subject to its supremacy.[3]

Since the Final Constitution is the Constitutional Court's only yardstick and its sole basis for review, the jurisdiction of the Court should end where constitutional leeway begins. The Constitutional Court should recognize the existence of leeways and respect the Supreme Court of Appeals's final decision-making powers in relation to matters falling within a leeway. It may, of course, review whether the lower courts have remained within the boundaries of a leeway left open by the Final Constitution. But the Constitutional Court should not substitute its view for that of a lower court where this set of circumstances does not obtain. In the context of constitutional interpretation, Lourens du Plessis has rightly pointed out that the Final Constitution is indisputably the supreme law of the Republic of South Africa, but that at the same time it is not the 'overarching, all-encompassing, omni-regulative, super law'.[4] The Final Constitution does not take the place of any other legal rule or, in other words, it does not have readymade answers to all legal problems.[5] This does not mean that the Final Constitution is not all-pervasive, however. What it means is that the Final Constitution leaves many legal questions for decision according to the ordinary law, provided such decisions remain within the parameters set by the Final Constitution.

In *Mhlungu*, Kentridge AJ remarked: 'I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a

[1] Robert Alexy 'Verfassungsrecht und Einfaches Recht — Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit' (2002) 61 *VVDStRL* 7, 22. See also Robert Alexy *A Theory of Constitutional Rights* (2002) 394. Instead of leeway, Alexy's translator uses the phrase '(structural) discretion'.

[2] The High Courts and the Supreme Court of Appeal have adopted an approach to the development of the common law that takes note of this leeway. See Stu Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.4*(e)*(iv).

[3] Here I agree with Kate O'Regan, who emphasizes that an issue may be regulated in several different ways, but still be part of one legal system whose precise content is not entirely or perhaps even substantially determined by the Constitution, because it operates within an overall normative constitutional framework. See Kate O'Regan 'On the Reach of the Constitution and the Nature of Constitutional Jurisdiction: A Response to Frank Michelman' in Stu Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 51.

[4] Lourens du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32 at § 32.3*(e)*(ii) and § 32.5*(b)*(iii)(bb).

[5] Du Plessis (supra) at § 32.5*(b)*(iii)(bb).

constitutional issue, that is the course which should be followed.'[1] This remark, which is usually regarded as the origin of the 'principle of avoidance',[2] was made in a jurisdictional context, ie in the context of deciding when a case should be referred to the Constitutional Court rather than being decided by the High Court. In my view, the 'possibility' of deciding a case without reaching a constitutional issue has both a material and a functional side to it. The principle of avoidance is the other side of the coin of the Constitutional Court's limited jurisdiction. It is a manifestation of 'jurisdictional subsidiarity', a term coined by Lourens du Plessis with which I fully agree, requiring a (lower) court to take a decision in the realm of its own jurisdiction if it is possible to do so and refrain from referring it to the Constitutional Court merely because the matter could be construed as raising a constitutional matter.[3] That does not mean that lower courts should avoid the Final Constitution, but rather that they should endeavour to bring the ordinary law in line with the imperatives of an all-pervasive Constitution. The Constitutional Court would then only exercise jurisdiction where, in terms of FC s 39(2), this standard has not been met. High Courts should be aware of their obligation to take the Final Constitution into account when applying the ordinary law, but a case does not need to be reviewed by the Constitutional Court when the Final Constitution is not engaged by it.

The problem, of course, is how to determine whether the Final Constitution is engaged. When is it necessary for the Court to decide a legal question in accordance with the Final Constitution and when should it leave legal questions to the Supreme Court of Appeal to decide? The German experience shows that the determination of a constitutional leeway will always be difficult, and will not be entirely free of contradictions. Nevertheless, in order to establish whether there is a constitutional leeway, the Bundesverfassungsgericht has adopted (but not always applied) a test that may be helpful in the South African context. According to this test, the interpretation or application of the law by the court a quo needs to be tested against the Constitution in the same way that a statutory provision is tested against the Constitution in the process of abstract review. The logic underlying this test is that a court should not be able to apply or interpret the law in a way that would be unconstitutional if the legislature were to enact such application or interpretation as a general legal rule. The first step in the performance of this test, therefore, is for the Constitutional Court (hypothetically) to reframe the court a quo's interpretation or application of the law as a general rule. The second step is for the Court to test the reframed rule against the Final Constitution. If the legal rule, reframed as an abstract norm, is not inconsistent with the Final Constitution, then the court a quo must be found to have adopted an interpretation that falls

[1] *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 59.

[2] See Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 24-25; Stu Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *SALJ* 762, 784; *Transnet Ltd & Others v Chirwa* 2007 (2) SA 198 (SCA) at para 42.

[3] Du Plessis (supra) at § 32.5*(b)*(iii)(aa).

into the leeway allowed by the Final Constitution. In other words, the interpretation or application of the statute or the common law in itself needs to be constitutional — nothing more, nothing less.[1]

The application of this test can be illustrated by using the contract law question Michelman employs in his 'rule of law' chapter: is it a constitutional matter whether acceptance of a written contractual offer occurs as soon as a letter of acceptance is posted or only later when it is received?[2] Although it is settled South African law that, according to the 'expedition theory', an offer made in writing becomes a contract on the posting of the letter of acceptance,[3] an aggrieved party might some day challenge this theory and appeal to the Constitutional Court to reverse a judgment of the Supreme Court of Appeal. On a purely substantive understanding of its jurisdiction, the Constitutional Court could legitimately decide this case on the basis that the answer requires it to interpret the Final Constitution. According to the functionalist approach, however, it should decline jurisdiction. The rule that the Supreme Court of Appeal would have applied in this case — 'an offer made in writing becomes a contract on the posting of the letter of acceptance' — does not violate any constitutional provision. Parliament could enact such a rule as a statutory provision. Therefore, even if the judges of the Constitutional Court were of the opinion that it would be better on policy grounds that a contract should become valid once the acceptance letter has been received by the offeror, it should decline to decide the case.

The crucial point about a constitutional leeway is that, even if South African law had adopted the other rule (that an offer made in writing becomes a contract when the letter of acceptance is received), this rule, too, would have been within the boundaries of the Final Constitution, and therefore beyond the jurisdiction of the Constitutional Court. It is the institutional function of the Supreme Court of Appeal to determine the common law. This construction of the Final Constitution means that the Supreme Court of Appeal should have the final say on the common law as long as its holdings are in line with the Final Constitution. The Constitutional Court may be asked to perform its function in ensuring that every legal rule is constitutional, even if the 'rule' is the consequence of an interpretation of the law. But this is a different question from the one the Supreme Court of

[1] In German constitutional law this test is known as the 'Schumann formula' because it was first proposed in Ekkehard Schumann *Verfassungs- und Menschenrechtsbeschwerden gegen richterliche Entscheidungen* (1963). It was, for example, applied in BVerfGE 89, 28 ('*Richterliche Selbstablehnung*' ['*Judicial Recusal*']) at 36: 'Nicht jeder Verfahrensfehler ist zugleich auch als Verletzung von Art. 103 Abs. 1 GG zu werten. Es gibt jedoch ein Mindestmaß an Verfahrensbeteiligung, das keinesfalls verkürzt werden darf. Ein Verfassungsverstoß liegt zumindest dann vor, wenn die Auslegung durch die Gerichte zu einem Ergebnis führt, das nicht einmal der Gesetzgeber anordnen könnte.'

[2] Michelman (supra) at § 11.4*(c)*.

[3] See *Cape Explosive Works Ltd v South African Oil and Fat Industries Ltd* 1921 CPD 244; *Kerguelen Sealing and Whaling Co Ltd v Commissioner for Inland Revenue* 1939 AD 487. For a discussion of the theory, see Schalk van der Merwe et al *Contract — General Principles* (3rd Edition, 2007) 68-72.

Appeal is asked to decide. Any pronouncement by the Constitutional Court on the narrow contract law question itself would not advance the constitutional project.

Such an approach would in no way limit the Constitutional Court's supervisory function under FC s 39(2). The Court would still protect the Final Constitution and ensure that the High Courts and the Supreme Court of Appeal observed the limits of the Final Constitution in the application and interpretation of statutes and the common law. The difference between the two approaches is that the functionalist approach is case-based, not area-of-law-based. On the functionalist approach, a case does not raise a constitutional matter because it involves the Labour Relations Act or because it deals with administrative action. It raises a constitutional matter because it engages the Final Constitution. The Constitutional Court would still be able to hold that, in any given case, the Supreme Court of Appeal or a High Court failed to promote the spirit, purport and objects of the Bill of Rights. It could do so in cases where administrative action is present, in labour law disputes and in defamation cases. But it would be necessary to define more precisely what constitutional obligation the court a quo misconstrued or misapplied. Such an approach would not only provide greater clarity about what the rights in the Final Constitution really mean and what content they have. It would also clarify what sort of disputes should be decided finally by the Supreme Court of Appeal as opposed to the Constitutional Court.

(cc) FC 167(7) as a basis for the Constitutional Court's jurisdiction

FC s 167(7) can be read as laying the basis for this functionalist understanding of the Constitutional Court's jurisdiction. As pointed out above, this subsection was the source of the Constitutional Court's jurisdiction under the Interim Constitution. Although, in the Final Constitution, the subsection is phrased in a way that suggests that there must be more to a constitutional matter than the interpretation, protection or enforcement of the Final Constitution, it is reasonable at least to begin with these terms. What they have in common is that they emphasize that the Final Constitution is the starting point in determining the Constitutional Court's jurisdiction.

To be sure, the Constitutional Court would have to interpret FC s 167(7) in a particular way. It would have to say that the word 'involving' in FC s 167(7) should be read as implying that there must be a reasonably close connection between the legal question and the constitutional provision to be interpreted, protected or enforced. Such an interpretation of FC s 167(7) would be the opposite of the interpretation offered in *Dikoko*, i.e. that the legal question must have 'implications' for a right in the Bill of Rights.[1] The *Dikoko* reading is certainly

[1] *Dikoko* (supra) at para 92 (majority judgment) and *Dikoko* (supra) at paras 53-54 (minority judgment).

plausible, but is no more plausible than one that attributes to FC s 167(7) a jurisdiction-limiting function, in line with the rest of FC s 167.

If FC s 167(7) is read in this way, the 'involvement' of the Final Constitution would be the threshold test for the limited jurisdiction of the Court. The Constitutional Court would need to ask in every application for leave to appeal or direct access whether the Final Constitution needs to be interpreted, protected or enforced. Effectively, this means that the Court should ask itself if the Final Constitution has anything to say on the question that the parties bring to it and which (in most cases) a lower court has already decided. By adopting such an approach the Court would give greater content and meaning to the Final Constitution because it would start its enquiry by asking which constitutional provision needs to be interpreted.[1] The Court would at an early stage of the investigation be able to look a little deeper into the contestation by a party that a lower court failed to interpret legislation or develop the common law in accordance with the Final Constitution. It could ask if there really is anything the Final Constitution can add to the interpretation or application of the common or statutory law. It could, at least, assess whether these concerns were already addressed in earlier judgments. It could, in short, use its role as an interpreter, protector and enforcer of the Final Constitution to be more of a guide for the other courts than just a supervisor.

An understanding of FC s 167(7) as the basis of the Constitutional Court's jurisdiction not only explains the Court's assumption of jurisdiction in almost every case it has thus far decided, it also explains the cases in which jurisdiction was declined. In *Boesak*, at least when the matter reached the Constitutional Court, the Constitution provided no answer to the only question still open, as it was purely factual. *Phoebus Apollo*, seen against the background of the later decision in *K*, is still hard to grasp. But one could read it as saying that both applications of the common law contended for were in line with the Final Constitution and thus the Constitutional Court had nothing to add to the finding of the Supreme Court of Appeal.

Even in cases involving the development of the common law, a closer connection to the Final Constitution could be required. Indeed, it seems that the Court has occasionally realized that it has opened the door too wide for applicants to argue constitutional matters. In *Luiters*, for example, the Court held: 'In the case of the development of the common law under section 39(2) of the Constitution, the [jurisdictional] question is whether the argument *forces* us to consider constitutional rights or values.'[2] Here, at least, the use of the word 'force' suggests

[1] Such an approach would accommodate the argument so forcefully made by Stu Woolman that the Constitutional Court has become more and more reluctant to give content to constitutional provisions, in particular with regard to the Bill of Rights. See Stu Woolman 'The Amazing, Vanishing Bill of Rights' 124 (2007) *SALJ* 762.

[2] *Luiters* (supra) at para 21, my emphasis.

that the argument for the application of the Final Constitution needs to be compelling, and a mere allegation that the development of the common law somehow has constitutional implications might not suffice.

(dd) Consequences of the functionalist approach for some Constitutional Court judgments

To be sure, FC s 167(7) is not the answer to all problems. In many cases, the Court would have to decide if the Final Constitution needs to be interpreted, protected or enforced to decide the matter. There will always be a grey area of unpredictability. But an understanding that a constitutional matter should involve the interpretation of the constitutional text, the protection of its principles or the enforcement of its obligations could at least provide some guidance that goes beyond the fragmented understanding the Court has adopted thus far. Again, absolute certainty in advance is not possible. The question of what a constitutional matter is must be answered at a level of abstraction that defies absolute certainty.

More important than absolute predictability is that the Court should assume jurisdiction on the basis of the specific case and its constitutional relevance, not on the basis that certain parts of the law always trigger constitutional scrutiny. On the functionalist approach, the Constitutional Court should have declined jurisdiction or assumed jurisdiction on a different basis in a number of cases:

NEHAWU: The Constitutional Court should not have based its jurisdiction on the fact that the Labour Relations Act gives effect to the right to fair labour practices. Rather, the Court should have assumed jurisdiction because in the case presented to it an interpretation of a constitutional provision was at stake. It had jurisdiction because it was asked to ensure that the specific interpretation of s 197 of the LRA passed constitutional scrutiny. Other labour law matters in future may or may not raise constitutional matters in this way.

Dikoko: The Constitutional Court should have declined jurisdiction on the basis of the dissenting judgment by Skweyiya J. It may be a constitutional matter whether a judge calculating damages in a defamation case has applied the constitutionally required guidelines. But the manner in which a judge chooses to apply the guidelines, the factors to which he chooses to give weight and other similar matters are matters left to his discretion.

Mohunram: Here, it is important to differentiate. A proper understanding of jurisdiction that advances the transformation agenda of the Constitutional Court and respects the domain of the Supreme Court of Appeal should not only work as a switch to the overall competence of the Constitutional Court to deal with a case. It should work as a gauge for the identification of those parts of a legal dispute where constitutional guidance is really required. Hence, the Constitutional Court did legitimately decide the few legal questions in which constitutional guidelines were necessary (on the scope of the POCA). But it should not

have engaged in assessing the proportionality of the forfeiture, as it had already given guidelines on this issue in the earlier case of *Prophet* and there was no indication that this test had not been applied by the Supreme Court of Appeal.

To some extent, the Constitutional Court has already adopted the functionalist approach. It has, however, not done so through its approach to jurisdiction, but through its jurisprudence on whether it is in the interests of justice to hear an appeal or grant direct access. In the beginning of this chapter we saw that in several cases the distinction between jurisdiction and access, and even between the merits of the case and these two earlier stages of the constitutional enquiry, has been blurred. The conclusion seems inevitable that one needs to consider at least briefly the merits of a case to decide whether the Constitutional Court should decide a matter.

4 Access to the Constitutional Court

As we have seen, the Constitutional Court's jurisdiction has developed in a way that renders the distinction between constitutional and non-constitutional matters illusory.[1] In consequence, the jurisdictional door to the Constitutional Court has been left so wide open that the Court has had to develop another way of limiting its case load. The method the Court has devised for this purpose is to test whether it is in the interests of justice for it to grant leave to appeal.

The constitutional basis for this test is FC s 167(6), which states that '[n]ational legislation or the rules of the Constitutional Court must allow a person, *when it is in the interests of justice* and with leave of the Constitutional Court to— (a) bring a matter directly to the Constitutional Court; or (b) to appeal directly to the Constitutional Court from any other court'. The Court has held that the term 'any other court' in this provision excludes the Supreme Court of Appeal, because the subsection does not concern itself with appeals to the Constitutional Court in the ordinary course and in the context of the hierarchy of courts, but only with 'direct appeals', which is a situation in which the Supreme Court of Appeal (and perhaps other courts) is bypassed.[2] Although the rules of the Constitutional Court do not distinguish between 'normal appeals' from the Supreme Court of Appeal and 'direct appeals' from other courts, the Court has established slightly different criteria for these two forms of appeal. The details on appeals and other ways of accessing the Constitutional Court are set out elsewhere in this work.[3] For purposes of this chapter, it is sufficient to show how the enquiry into the interests of justice relates to the question of jurisdiction.

[1] See § 4.3*(h)* supra.

[2] *Director of Public Prosecutions, Cape of Good Hope v Robinson* 2005 (4) SA 1 (CC), 2005 (2) BCLR 103 (CC) at para 22.

[3] See Kate Hofmeyer 'Rules and Procedure in Constitutional Matters' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 5.

The decision to grant leave to appeal is a matter entirely within the discretion of the Constitutional Court.[1] A standard practice has, however, emerged to guide the exercise of this discretion. While FC s 167(6) could be read in such a way that jurisdiction, the interests of justice and leave to appeal are treated as three different criteria that all need to be fulfilled, the Constitutional Court has held that jurisdiction and the interests of justice are the two decisive criteria in deciding whether leave to appeal will be granted.[2] Once jurisdiction has been established, everything depends on the interests of justice. If interests of justice are established, then the application for leave to appeal will be granted.

Whether it is in the interests of justice for an application for leave to appeal to be granted depends on a careful and balanced weighing-up of all relevant factors,[3] in which each case has to be considered in the light of its own facts and all the relevant circumstances.[4] Some of these factors include broad principles of public policy, such as the importance of the constitutional matter raised or the public interest in a determination of the constitutional issue.[5] On this basis, the Constitutional Court has affirmed that it is in the interests of justice for it to consider a case even where the prospects of success are not self-evident.[6] In other cases, the Court has stated that it may decide a constitutional matter for the benefit of the broader public or to achieve legal certainty, even though such a decision would go beyond the immediate needs of the parties,[7] or would have no practical value to the litigants themselves.[8] The purpose of broadening the interests of justice test in these cases is to go beyond the limited criterion of prospects of success and to give the Court an opportunity to decide a matter it might otherwise have been forced to decline. Against this background, it would require a bold move for the Court explicitly to accommodate functional considerations, as outlined above,[9] as part of the interests of justice enquiry and to state, for example, that the broader public would benefit were it *not* to decide the case, but rather leave the High Court or the Supreme Court of Appeal to have the final word on the matter.

[1] This position has been confirmed by the Court on several occasions. See, eg, *Armbruster & Another v Minister of Finance & Others* 2007 (6) SA 550 (CC), 2007 (12) BCLR 1283 (CC) at para 24; *Phillips* (supra) at para 31; *NEHAWU* (supra) at para 25; *Ingledew* (supra) at para 13.

[2] See *Ingledew* (supra) at para 13.

[3] *S v Shaik & Others* 2008 (2) SA 208 (CC), 2007 (12) BCLR 1360 (CC) at para 15 (For further references.)

[4] *S v Basson* (supra) at para 39 (For further references.)

[5] See Hofmeyer (supra) § 5.

[6] *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & Others* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) at para 3.

[7] *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) at para 18.

[8] *Radio Pretoria* (supra) at para 22.

[9] See § 4.3*(b)*(ii) supra.

The Court could, however, use the prospects of success enquiry, which is an important factor in determining the interests of justice,[1] as a means to limit the cases it decides from a functional point of view. At the beginning of this chapter, it was argued that both in the Constitutional Court's enquiry into its jurisdiction, and in its enquiry whether it is in the interests of justice to decide a case, the merits of the applicant's claim play an important role.[2] Here the substantive assessment whether a case involves the interpretation, protection or enforcement of the Final Constitution becomes instrumental again.

As argued above, the Constitutional Court should not substitute the outcome of a balancing enquiry or an interpretation of the ordinary law by a High Court or the Supreme Court of Appeal with its own view, simply because FC s 167(3)*(c)* gives it the power to so. This would just undermine the transformative potential of the Final Constitution. It was also argued that the Court could apply a more rigid approach to its jurisdiction by way of a stricter approach to FC s 167(7), i e by asking whether a case really requires the interpretation, protection or enforcement of the Final Constitution. If the Court, however, wants to keep the jurisdictional door wide open and still apply functional criteria, it would have to adopt an approach to the prospects of success criterion that takes the discretion of the High Court and the Supreme Court of Appeal in the interpretation of statutes and the common law seriously, even if the legal issue for decision involves policy considerations. It would then have to say that the Final Constitution sets the limits for such interpretations, but leaves margins in which the lower courts may exercise their jurisdiction, such that every outcome that stays within these limits is constitutional. Cases assessed as staying within constitutional limits in this way would have no prospects of success.

Such an approach was followed in the dissenting judgment of Langa ACJ in *Du Toit v Minister of Transport*.[3] As explained above,[4] the minority judgment emphasized that an application will have no prospects of success if it is simply aimed at overturning the lower court's interpretation of the ordinary law without stating a constitutional ground for this:

> If the compensation awarded by the Supreme Court of Appeal is just and equitable as contemplated by section 25(3) of the Constitution, then the applicant has no cause for constitutional complaint, no matter how the compensation was calculated in other courts. The applicant would accordingly have no prospects of obtaining relief in this Court.[5]

This is an approach that could reconcile the idea that the Constitutional Court is a court of limited jurisdiction with that of its supervisory role. At the same time, it

[1] See Hofmeyer (supra) at § 5.3*(e)(i)*(bb).
[2] See § 4.2*(b)* supra.
[3] *Du Toit* (supra) at paras 57-90.
[4] See § 4.2*(b)* supra.
[5] *Du Toit* (supra) at para 85.

does not require the Court to change (not to mention overrule) its existing jurisprudence. The problem with this solution, of course, is that the Constitutional Court would still not operate as a court of limited jurisdiction in the technical sense, because it would first assume jurisdiction and then decline to hear the matter because the applicant has no cause for constitutional complaint. It would be a little contradictory, to say the least, for the Court to hold that cases where no constitutional complaint has been established were nonetheless constitutional matters. But perhaps conceptual clarity in this instance has to give way to the need for a good working relationship between the Constitutional Court and the Supreme Court of Appeal and the promotion of the constitutional project.

5 The Constitutional Court as a Single Apex Court

In December 2005, the Department of Justice and Constitutional Development published the Constitution Fourteenth Amendment Bill for comment.[1] The aim of the Bill was, among other things, to transform the Constitutional Court into the highest court *in all matters* and to further regulate the jurisdiction of the Constitutional Court and the Supreme Court of Appeal. Several lawyers and concerned interest groups commented on the Bill and made submissions to the Portfolio Committee on Justice and Constitutional Development.[2] Most of these submissions were highly critical of the Bill for undermining the independence of the judiciary, a topic that is beyond the scope of this chapter. The submission to Parliament on behalf of the general Council of the Bar of South Africa, though generally critical of these aspects of the Bill, nevertheless welcomed the proposed creation of a single apex court, as did Carole Lewis in her 2005 Oliver Schreiner Memorial Lecture.[3] Following the largely negative response, the Bill was withdrawn from the formal parliamentary process. Its eventual re-introduction, however, seems certain after a decision taken at the ANC's Polokwane conference in December 2007 that the Constitutional Court should become the single apex court in South Africa. It is therefore worth examining these particular provisions

[1] GN 2023 in *GG* 28334 of 2005. The Constitution Fourteenth Amendment Bill was introduced as part of a package of Bills, including the Superior Courts Bill (B52-2003); the Judicial Service Commission Amendment Bill; the South African National Justice Training College Draft Bill and the Judicial Conduct Tribunal Bill. Only the first two Bills were introduced to Parliament at that stage, while the other three Bills were still the subject of discussion between the Department and the Judiciary. The Judicial Service Commission Amendment Bill was eventually introduced in November 2007 (B50 — 2007), and a reworked South African Judicial Education Institute Bill in February 2007 (B4 — 2007). Neither of these bills has yet been passed.

[2] Submissions were made by, inter alia, the General Council of the Bar of South Africa, the International Bar Association, the Legal Resources Centre and IDASA.

[3] Submission by the General Council of the Bar of South Africa to the Portfolio Committee on Justice and Constitutional Development in re Constitution Fourteenth Amendment Bill (2005) and Superior Courts Bill (2003) at 27; Carole Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' (2005) 21 *SAJHR* 509, 510.

of the Bill to see what difference they would make to the current arrangements.[1]

Clause 3 of the Bill substitutes FC s 167(3) as follows (words in square brackets indicate deletions from the current text, words underlined indicate additions):

'(3) The Constitutional Court–
(a) is the highest court **[in all constitutional matters]** of the Republic; and
(b) may decide **[only]**–
(i) constitutional matters–**[, and issues connected with decisions on constitutional matters;]**
(aa) on appeal;
(bb) directly, in accordance with subsection (6); or
(cc) referred to it as contemplated in section 172(2)(c) or in terms of an Act of Parliament; and
(ii) any other matter, if the Constitutional Court grants leave to appeal that matter on the grounds that the interests of justice require that the matter be decided by the Constitutional Court.
(c) **[makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.]**';

In addition, FC s 167(6)(a) would be amended to allow a person to bring a constitutional matter (but not other kinds of matter) *directly* to the Constitutional Court and by the addition of a new section 167(8) confirming the Constitutional Court's power to make the final decision whether a matter is a constitutional matter (i e the current FC 167(3)(c), which would be deleted by clause 3).

The consequence of these amendments to FC s 167 would be that the term 'constitutional matter' would still be mentioned in the constitutional text, but would no longer delimit the ambit of the Constitutional Court's jurisdiction. Instead, the Court would have jurisdiction both in constitutional matters and in other matters. Effectively, therefore, the amendment would collapse the current two-stage enquiry into jurisdiction and access into a single enquiry, with the emphasis on whether granting leave to appeal would be in the interests of justice. With regard to constitutional matters, the Court would continue to grant leave to appeal on this basis in terms of FC s 167(6)*(b)*, which remains unchanged. In non-constitutional matters, the new FC s 167(3)*(b)*(ii) dictates that the same criterion would apply.[2]

[1] In May 2008, the Department of Justice and Constitutional Development published a new Constitution Fourteenth Amendment Bill for comment. This Bill, however, concerned only the so-called 'floor-crossing' of members of the National Assembly and the National Council of Provinces. This Bill did not affect the structure of the judiciary at all and has nothing to do with the Bill published in 2005.

[2] The submission by the General Council of the Bar that constitutional matters will have a privileged status because they will have a greater prospect of being heard by the Court than a non-constitutional matter is therefore not supported by the text of the Bill. See Submission by the General Council of the Bar of South Africa to the Portfolio Committee on Justice and Constitutional Development in re Constitution Fourteenth Amendment Bill (2005) and Superior Courts Bill (2003) at 30.

It is doubtful whether the proposed amendment would substantially change the Constitutional Court's current jurisdictional practice. As indicated in this chapter, the Constitutional Court has watered down the criterion of constitutional matter to such an extent that it is already the apex court in every possible case. Effectively, the Constitutional Court already has the final word in the interpretation of statutes and the development of the common law. The proposed constitutional amendment would merely confirm this situation.[1] An earlier, 2001 amendment to the Final Constitution that changed the title of the President of the Constitutional Court to 'Chief Justice' in any case confirmed the Constitutional Court's status as the de facto apex court.

Given the Constitutional Court's generous interpretation of the term 'constitutional matter', the number of cases decided by the Court should not increase significantly as a consequence of this amendment. As we have seen, the Court rarely declines jurisdiction, and controls the size of its docket through its access jurisprudence. The constitutional amendment would not change this: the new FC s 167(3)*(b)*(ii) and FC s 167(6) would still require that a case should be heard only where it is in the interests of justice to do so.

The main change introduced by the amendment is that it would allow the Constitutional Court to decide non-constitutional matters as long as it was in the interests of justice to do so. When would this condition be satisfied? First, since the amendment removes the Court's power to decide 'issues connected with decisions on constitutional matters', the Court could simply hold that it was in the interests of justice to decide non-constitutional matters connected with decisions on constitutional matters. Secondly, the amendment enlarges the Constitutional Court's jurisdiction, but does not abolish the Supreme Court of Appeal. Thus, most non-constitutional matters reaching the Constitutional Court would already have been decided by the Supreme Court of Appeal. It may be assumed that the Constitutional Court would not want to make the SCA completely redundant, and thus that it would decide non-constitutional matters only where the Final Constitution demanded a particular decision. The remaining aspects of the interests of justice enquiry as currently applied would remain unchanged.

This raises a more general question: what should the relationship between the Constitutional Court, on the one hand, and the Supreme Court of Appeal and the High Courts, on the other hand, be, once the Constitutional Court's notionally limited jurisdiction has fallen away? The argument throughout this chapter has been that the Constitutional Court misses an opportunity to promote the Final Constitution's transformative agenda whenever it fails to encourage the Supreme Court of Appeal and the High Courts to apply the Final Constitution in everyday adjudication. The chapter has also argued that the Constitutional Court's

[1] The Department's Memorandum on the Objects of the Bill describes the purposes of the amendment to FC s 167 as being 'to *confirm* the status of the Constitutional Court as the apex court' (my emphasis).

occasional second-guessing of Supreme Court of Appeal decisions does not help in this regard (apart from being irreconcilable with the notion of separate constitutional matters).

As long as the Supreme Court of Appeal exists, even if it is effectively downgraded to an in-between appellate court,[1] the Constitutional Court would have to explain its choice to hear some appeals from the Supreme Court of Appeal but not others. Here, functional considerations might again be decisive. Although the proposed constitutional amendment would change the jurisdiction of the Constitutional Court, it would not change its function: it would still be the guardian of the Final Constitution and oversee the transformation of the South African legal order. Therefore, any future interests of justice test would have to include consideration of the transformative effect of the judgment and whether the Final Constitution needed to be engaged in the particular case.

Carole Lewis has argued that if the Constitutional Court is given the power to hear an appeal on any matter of general public importance, then the Court should be composed largely of judges appointed on the basis of wider skills and experience than is presently the case with the Constitutional Court.[2] This conclusion is not obviously necessary. As things stand, FC s 174(5) ensures that at least four of the Constitutional Court judges must at all times be persons who were judges at the time of their appointment to the Constitutional Court. Thus, a distinctive judicial qualification beyond constitutional law in the formal sense is already ensured in the composition of the court. Secondly, most constitutional cases concern the normative interaction between the common law, statutory law and the Final Constitution, rather than the philosophical elaboration of abstract values. In order to deliver competent judgments, the judges of the Constitutional Court need to engage with and fully grasp the common-law rules or statutory provisions that the case implicates. The record of the Constitutional Court to date shows that its members possess such a capacity. There is no reason to anticipate, therefore, that giving the Court the additional power to decide non-constitutional matters would render it less technically competent to decide cases than it currently is. In recent years, a number of judges from other courts have served on the Constitutional Court as acting judges. The skills and experiences of these acting judges have certainly enhanced the capacity of the Constitutional Court. At the same time, however, one hopes that these judges have returned to their courts with a better understanding of the Constitutional Court and its role in the judicial system.

At the end of the day, the Constitutional Court will have to define where it sees itself in the South African legal order. In my view, the Court has rightly adopted an understanding of its function that links it strongly to the Final Constitution's

[1] It would operate like a US Court of Appeals ('Circuit Court') or an Oberlandesgericht in Germany: the important difference is that the Supreme Court of Appeal's territorial jurisdiction would cover the whole of South Africa.

[2] Lewis (supra) at 522.

transformative project and its underlying value system. To fulfil this function, the Constitutional Court needs to establish a relationship with other courts that best serves these interests. It needs to do so as a court of limited, specialized jurisdiction. However, it would face the same task should it one day become the single apex court of South Africa. Under either arrangement, it is impossible for one court singlehandedly to drive constitutional transformation. On the other hand, the central and unique character of the Final Constitution in the legal system justifies a specialized court whose task it is to ensure that the transformative potential of the Final Constitution is fulfilled and its values embraced by other courts.

5 Rules and Procedure in Constitutional Matters

Kate Hofmeyr

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5.1 Introduction

This chapter begins with a general overview of the 2003 Rules[1] and then proceeds to discuss certain of the Rules in greater detail: Rules 8 & 10: intervenors and *amici curiae*;[2] Rules 14 & 15: referral of Bills and Acts; Rule 16: confirmation proceedings; Rule 18: direct access; and Rules 19 & 20: appeals. For ease of reference, the Rules are reproduced in full in an appendix to this chapter.

5.2 General Overview of the Rules

The 2003 Rules commence with a definitions' section and certain general provisions.[3] Of particular significance for practitioners is the inclusion, among the general provisions, of matters which were previously covered by Practice Direction 2.[4]

Rule 1(3) now stipulates that any references to 'lodging documents with the Registrar'[5] in the Rules shall be construed as including prior service of such documents on other parties and the lodging of 25 copies of all relevant documents and an electronic version thereof that is compatible with the software used by the Court.[6] This marks a change from the position under Practice Direction 2, where the lodging of an electronic copy was not compulsory.[7] By contrast, Rule 1(3) is couched in mandatory terms. Rule 1(3)'s requirement that 25 copies of all relevant documents be lodged with the Registrar must be read subject to the proviso in Rule 20(2)*(i)*. Rule 20(2)*(i)* provides that where a disk or electronic version of a document other than a record is provided in an appeal, the party need lodge only 13 copies of the document concerned with the Registrar.

Rule 1(4) now covers the requirement — previously found in Practice Direction 2[8] — that where notices or other communications are made by electronic copy, the party giving such notice or communication must lodge with the Registrar a hard copy of the notice or communication with a certificate signed by such party verifying the date of such communication or notice.

* I would like to thank Matthew Chaskalson for his helpful comments on previous drafts of this chapter and Adrian Friedman for all the insights our discussions on various aspects of this chapter produced.

[1] The Constitutional Court Rules, 2003 ('2003 Rules') were promulgated under Government Notice R1675 in Government Gazette 25726 of 31 October 2003 and came into effect on 1 December 2003. These rules replaced the Constitutional Court Rules, 1998 ('1998 Rules') which were promulgated on 29 May 1998 — GN R757 *Reg Gaz* 6199. In a number of respects, the 2003 Rules have simplified the procedures that existed under the 1998 Rules, particularly in relation to appeals to the Constitutional Court.

[2] For an extended discussion of the rules and practice of amici curiae, see G Budlender 'Amicus' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 8.

[3] Rule 1(2)–1(8).

[4] 1999 (2) SA 666 (CC), 1999 (3) BCLR 260 (CC), 1999 (1) SACR 370 (CC).

[5] In the remainder of the chapter, references to 'Registrar' will denote the Registrar of the Constitutional Court and references to 'Court' will denote the Constitutional Court.

[6] Although Practice Direction 2 (para 2) indicated that electronic copies of documents lodged with the Registrar should be in Word Perfect (5, 6, or 7) format, the Registrar, at the time of writing, has indicated a preference for documents to be formatted in MS Word.

[7] 1999 (2) SA 666 (CC), 1999 (3) BCLR 260 (CC), 1999 (1) SACR 370 (CC) at para 2.

[8] Ibid at para 4.

Rule 1(8) stipulates that, subject to Rule 5, the provisions of rule 4 of the Uniform Rules of Court shall apply, with the necessary modifications, to the service of any process of the Court.

Following the definitions' section, the Rules are divided into ten parts. Part 1 of the rules details the Court terms.[1] Part 2 includes provisions relating to the Registrar's office hours[2] and general duties.[3] Whenever the Court makes an order declaring or confirming any law to be inconsistent with the FC 172, the Registrar is required, no later than 15 days after such order has been made, to publish such order in the Government Gazette or the Provincial Gazette if the order relates to provincial legislation. The Registrar also has certain duties in relation to unrepresented parties who apply to the Court. Those obligations have, in fact, been slightly amended in the 2003 Rules from the position under the 1998 Rules. Under the 1998 Rules, the Registrar was obliged to refer that party to the nearest office of the South African Human Rights Commission, the Legal Aid Board, or any law clinic which may be willing to assist the party. The Registrar was similarly obliged to render assistance in preparing the papers required by the rules if the unrepresented party was unable to obtain assistance or, if so directed by the President of the Court, to request an advocate or attorney to assist the party. These latter two requirements have been altered under the 2003 Rules. In terms of Rule 4(11), the Registrar is now only required to refer an unrepresented party to the nearest office or officer of the Human Rights Commission, the Legal Aid board, a law clinic or such other appropriate body or institution that may be willing and in a position to assist such party.[4]

In two recent decisions, *De Kock v Minister of Water Affairs and Forestry* and *Mnguni v Minister of Correctional Services* the Constitutional Court, despite refusing to grant direct access to the unrepresented applicants in both cases, directed the Registrar to bring the judgments to the attention of the Law Society of the Northern Provinces. The Registrar was obliged to ask the Law Society of the Northern Provinces whether one of its members might provide assistance to the unrepresented applicants. In neither of these cases were the obligations of the Registrar in terms of Rule 4(11) discussed. It therefore remains unclear whether such a referral occurred. However, it must be safe to assume that, if it did take place, the applicants were unsuccessful in obtaining legal assistance. It will be interesting to see the extent to which the Court makes use of such a procedure where unrepresented applicants seek direct access to the Court in cases that raise 'important yet difficult issues which may well require adjudication'.[5]

[1] Rule 2.

[2] Rule 3. The office of the Registrar is open from 08h30 to 13h00 and from 14h00 to 15h30 on Court days.

[3] Rule 4.

[4] See *De Kock v Minister of Water Affairs and Forestry* 2005 (12) BCLR 1183 (CC)('*De Kock*'); *Mnguni v Minister of Correctional Services* 2005 (12) BCLR 1187 (CC)('*Mnguni*').

[5] *De Kock* (supra) at para 5; *Mnguni* (supra) at para 7.

Part 3 deals with the joinder of organs of state.[1] Rule 5(2) makes it clear that no order declaring an executive or administrative act or conduct, or threatened executive or administrative act or conduct, or any law to be unconstitutional may be made by the Court unless the party challenging the constitutionality of such act, conduct or law has, within five days of lodging with the Registrar a document in which such contention is raised for the first time in the proceedings before the Court, taken steps to join the authority concerned as a party to the proceedings.[2] In *Mabaso v Law Society, Northern Provinces, and Another*, O'Regan J, writing for the Court, spoke to the importance of this rule.[3] She highlighted the fact that, in a constitutional democracy, a court should not declare the acts of another arm of government to be inconsistent with the Final Constitution without ensuring that that arm of government is given a proper opportunity to consider the constitutional challenge and to make such representations to the court as it considers fit.[4] O'Regan J identified two underlying rationales for this approach. First, the Minister responsible for administering the legislation may well be able to place before the court pertinent facts and submissions necessary for the proper determination of the constitutional issue.[5] Second, Rule 5 shows respect for the other arms of government and their different constitutional functions.[6]

Part 4 covers matters relating to the representation of parties;[7] a change of parties owing to the fact that a party dies or becomes incompetent to continue any proceedings;[8] intervention by a party to the proceedings;[9] and requirements relating to powers of attorney.[10] Unless otherwise directed by the Chief Justice,

[1] Rule 5.

[2] The Court indicated, with respect to the 1998 Rules, that although the Rules apply only to proceedings in the Constitutional Court, in cases concerning the constitutional validity of law or an executive act, the relevant executive authority should be given the opportunity to be joined in the proceedings at the earliest possible stage. See *Pharboo and Others v Getz NO &Another* 1997 (4) SA 1095 (CC), 1997 (10) BCLR 1337 (CC)('*Pharbo*') at para 5; *Beinash v Ernst & Young* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC) at paras 27-8. See, further, *Jooste v Score Supermarket Trading* 1999 (2) SA 1 (CC), 1999 (2) BCLR 139 (CC)('*Jooste*') at paras 7-9.

[3] 2005 (2) SA 117 (CC), 2005 (2) BCLR 129 (CC)('*Mabaso*').

[4] *Mabaso* (supra) at para 13. In *Mabaso*, the applicant had failed to join the Minister for Justice and Constitutional Development, who was responsible for administering the Act, which he challenged in his application for leave to appeal to the Constitutional Court. In the special circumstances of the case, however, the Registrar had provided the Minister for Justice and Constitutional Development with a copy of the full record in the case, as well as the written submissions lodged by the parties and given her an opportunity to indicate whether she wished to intervene as a party. In a written notice to the Court, the Minister consented to being joined as a party in the proceedings, and indicated that she would abide by any judgment given by the Court. Thus, the Court had, on its own motion, cured the applicant's failure to take steps to join the Minister. The Court was, however, quick to emphasise that it would not ordinarily take steps to remedy the failure by an applicant to comply with Rule 5. It stressed that it had done so only because the Rule had recently been introduced and the applicant had taken steps to comply with the former Rule. Ibid at para 14.

[5] Ibid at para 13.

[6] Ibid.

[7] Rule 6.

[8] Rule 7.

[9] Rule 8.

[10] Rule 9.

only persons who are entitled to appear in the High Courts may appear on behalf of any party to proceedings of the Court.[1] Legal representatives are not required to file a power of attorney, but one can be demanded by a party who disputes the authority of a practitioner to act on behalf of another party.[2] Any person entitled to join as a party or liable to be joined as a party in the proceedings may, on notice to all parties, at any stage of the proceedings, apply for leave to intervene as a party.[3]

Part 5 deals with *amici curiae* submissions.[4] It provides for any person interested in any matter before the Court to appear as an amicus curiae either in terms of the written consent of all the parties in the matter, or, if such written consent has not been secured, on application to the Chief Justice to be admitted as an amicus curiae.

Part 6 covers Rules 11 to 13 which deal with application procedure,[5] urgent applications[6] and argument.[7] In any matter in which an application is necessary, including the obtaining of directions from the Court, the procedure to be used is notice of motion supported by affidavit.[8] The procedure prescribed is similar to the High Court application procedure. Once all affidavits have been filed, the application will be placed before the Chief Justice and he or she will then issue directions as to how the application will be dealt with and, in particular, whether it shall be set down for hearing.[9] Rule 13(2) makes it clear that oral argument will be allowed in the matter only if directions to that effect are given by the Chief Justice.[10] The Chief Justice may, when giving directions, permit the lodging of further affidavits.[11] Where an application is urgent, the Chief Justice may, at the request of the applicant, dispense with the forms and the service provided for in the Rules.[12]

Part 7 of the Rules covers those matters within the exclusive jurisdiction of the Court, including, referrals of Bills in terms of FC s 79(4)*(b)* or FC s 121(2)*(b)*;[13] applications in terms of FC s 80(1) and FC s 122(1);[14] confirmations of orders of constitutional invalidity;[15] and certifications of provincial constitutions.[16] Not all

[1] Rule 6.
[2] Rule 9(1).
[3] Rule 8(1).
[4] Rule 10. See, further, G Budlender 'Amicus' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 8.
[5] Rule 11.
[6] Rule 12.
[7] Rule 13.
[8] Rule 11(1).
[9] Rule 11(4).
[10] Rule 13(2).
[11] Rule 11(3)*(d)*.
[12] Rule 12(1).
[13] Rule 14.
[14] Rule 15.
[15] Rule 16. See M Bishop, S Budlender, M Chaskalson & J Klaaren 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 9.
[16] Rule 17. See S Woolman 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 20.

matters which fall within the exclusive jurisdiction of the Constitutional Court are specifically dealt with in the Rules, however. Those matters excluded are twofold: the constitutionality of amendments to the Final Constitution and matters relating to the failure of the President or Parliament to perform a constitutional obligation.[1] *Matatiele Municipality and Others v The President of the Republic of South Africa* deals with the first form of exclusion.[2] In *Matatiele*, the applicants challenged the constitutional validity of the Constitution Twelfth Amendment Act ('Twelfth Amendment') and the Cross-Boundary Municipalities Laws Repeal and Related Matters Act[3] ('Repeal Act'). Although the Court had exclusive jurisdiction to resolve the issue in relation to the Twelfth Amendment under FC s 167(4)*(d)*, the applicants' challenge to the Repeal Act did not fall within the Court's exclusive jurisdiction and thus an application was made for direct access to the Court to challenge the constitutionality of the Repeal Act in the same proceedings. On the question as to whether to grant the application for direct access, the Court held that the close interrelationship between the two Acts was sufficient to warrant granting the application for direct access. As the discussion of direct access later in this chapter makes plain, the Constitutional Court has been inclined to grant direct access in situations where a matter, to which the substance of the direct access application is closely related, is already before the Court.

Part 8 of the Rules deals with matters which fall within the concurrent jurisdiction of the Constitutional Court, the High Courts, the Supreme Court of Appeal and other courts of similar status. Rule 18 deals with direct access to the Constitutional Court. In appropriate cases, direct access will be granted, with leave of the Court, when it is in the interests of justice to do so. Rule 19 deals with appeals to the Constitutional Court and vastly simplifies the bifurcated approach to appeals that had been adopted under the 1998 Rules. Rule 20 details the procedures to be adopted on appeal. Rule 21 covers matters previously dealt with in Practice Direction 2.[4]

[1] Such matters will, in all likelihood, have to be brought using the application procedure provided for in Rule 11 which applies to 'any matter in which an application is necessary for any purpose' except those matters for which Rules have been specifically provided. It should be noted that Rule 11(1)*(a)* itself refers to matters contemplated in FC s 167(4)*(a)*: that is, disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state.

[2] *Matatiele Municipality and Others v The President of the Republic of South Africa and Others (No 2)* CCT 73/05 (Decided on 18 August 2006, as yet unreported.)

[3] Act 23 of 2005.

[4] 1999 (2) SA 666 (CC), 1999 (3) BCLR 260 (CC), 1999 (1) SACR 370 (CC). This direction dealt with the practice notes which were required to be filed together with any application for confirmation of an order of constitutional invalidity or appeal against such an order, as well as any application for leave to appeal. The notes were required to set out the length of the record or, if the record had not yet been transcribed, an estimate of its length and the time required for transcription. In addition, the practice note was required to set out any special circumstances which might justify a hearing of more than one day, or which might otherwise be relevant to the directions to be given by the President of the Court. The new Rule 21 replicates these requirements subject to the necessary amendment to replace references to the 'President of the Court' with references to the 'Chief Justice'.

Part 9 of the Rules deals with fees and costs.[1] The last section of the Rules — Part 10 — covers remaining miscellaneous provisions, including, matters relating to the library;[2] translations of records or other documents lodged with the Registrar;[3] models diagrams and exhibits;[4] the withdrawal of cases;[5] the formatting of documents;[6] the application of certain rules of the Uniform Rules of Court[7] and sections of the Supreme Court Act 59 of 1959;[8] non-compliance with the rules;[9] execution;[10] transitional provisions;[11] repeal of the previous rules;[12] and the short title.[13] In addition to these twelve items, Part 10 also includes a rule, which is dealt with in detail in the chapter in this treatise entitled 'Constitutional Litigation', that relates to the lodging of documents that canvass factual material which is relevant to the determination of the issues before the Court and which does not specifically appear on the record.[14]

[1] Rules 22 & 23. See A Friedman 'Costs' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 6.

[2] Rule 24.

[3] Rule 25.

[4] Rule 26.

[5] Rule 27.

[6] Rule 28.

[7] Rule 29. The Uniform Rules incorporated the following: joinder of parties on application and other matters relating to application procedure; amendments to pleadings and documents; discovery, inspection and production of documents; procuring evidence for trial by way of a hearing before a commission; variation and rescission of orders; sworn translators; interpretation of evidence; filing, preparing and inspection of documents; authentication of documents executed outside the Republic for use within the Republic; destruction of documents; and enrolment of commissioners of the Court.

[8] Rule 30. The sections of the Supreme Court Act that apply concern the reference of matters for investigation by a referee; the powers of court on the hearing of appeals; examinations by interrogatories of persons whose evidence is required in civil cases; and the manner of dealing with commissions *rogatorie*, letter of request and documents for service originating from foreign countries. It should be noted that the last-mentioned provision is to apply subject to the replacement of 'English and Afrikaans' with the phrase 'any official language'.

[9] Rule 32.

[10] Rule 33 stipulates that costs orders of the Constitutional Court are to be executed in the magistrates' courts. Where a costs order has not been complied with, the party in whose favour the order was made is to file with the Registrar an affidavit setting out the details of the costs order and stating that the order has not been complied with or has not been complied with in full, as well as the outstanding amount, and requesting that the Registrar furnish him or her with a certified copy of such costs order. Rule 33(2). The party in whose favour the costs order was made must then file the certified copy of the order with the clerk of the civil court of the district in which he or she resides, carries on business or is employed. Rule 33(4). The order shall be executed in accordance with the provisions of the Magistrates' Courts Act 32 of 1944 and the Magistrates' Courts Rules published under GN R1108 of 21 June 1968, as amended, regarding warrants of execution against moveable and immoveable property and the issuing of emolument attachment orders and garnishee orders only. Rule 33(5).

[11] Rule 34.

[12] Rule 35.

[13] Rule 36.

[14] Rule 31. See M Chaskalson & G Marcus 'Constitutional Litigation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition) OS, July 2007) Chapter 3.

5.3 Analysis of Particular Rules

(a) Rules 8 & 10: intervenors and *amici curiae*

Although Geoff Budlender engages the role of an amicus curiae at length elsewhere in this work, it is worth spending a moment here to consider the manner in which the 2003 Rules distinguishes the roles of *amici* and intervenors.[1] In *Hoffman v South African Airways*,[2] the Constitutional Court places the following gloss on this distinction:

> An amicus curiae assists the Court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the Court's decision may affect its interest. The amicus differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An amicus joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position.[3]

(i) *Rule 8: Intervention of parties in proceedings*

The 2003 Rules' inclusion of a specific provision relating to the procedure to be adopted by parties seeking leave to intervene in proceedings before the Court marks a change from the position under the 1998 Rules. The 1998 Rules embraced many of the Uniform Rules of Court. However, Rule 12 — which details the procedure for the intervention of parties — was excluded.[4] Rule 12 of the Uniform Rules of Court was also excluded from incorporation in the 2003 Rules. However, an entirely new Rule 8 — which substantially mimics Rule 12 of the Uniform Rules of Court — has been added in the 2003 Rules.[5]

Although the Court has yet to interpret Rule 8 itself, the Court's previous case law on intervention, as well as the case law surrounding Rule 12 of the Uniform Rules of Court, may provide some indication of what to expect from the Court

[1] See G Budlender 'Amicus' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 8.

[2] 2001 (1) SA 1 (CC), 2002 (11) BCLR 1211 (CC)('*Hoffman*').

[3] Ibid at para 63.

[4] Rule 12 (which is to be read with Rule 10) reads as follows:

Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet.

[5] Rule 8 reads as follows:

1. Any person entitled to join as a party or liable to be joined as a party in the proceedings may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a party.
2. The Court or the Chief Justice may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the proceedings as may be necessary.

under Rule 8. In *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)*, an application was made by one of the Alexandra flood victims — who was offered temporary accommodation at Leeuwkop — for leave to intervene as a party.[1] Chaskalson P noted the applicant's 'direct and substantial interest in the proceedings' — the test articulated in the case law surrounding Rule 12 of the Uniform Rules of Court — and determined that it entitled him to be joined in his own right to the proceedings.[2]

In *United Watch and Diamond Company (Pty) Ltd v Disa Hotels Ltd*,[3] Corbett J highlighted the fact that the test of a direct and substantial interest in the subject-matter of the action had been regarded as the decisive criterion in applications for intervention.[4] He also drew two important distinctions which relate to the power of a court in intervention applications. The first distinction is that between applications for intervention and cases where the non-joinder of a necessary party is raised by a defendant or by the court *mero motu*. The second distinction is that between applications for intervention and those cases where joinder of another is demanded as of right. In the case of the former distinction, Corbett J held that the court has a discretion in relation to the intervenor application which does not exist where the non-joinder issue is raised by a defendant or the court *mero motu*. In relation to the second distinction, Corbett J held that the power of a court to grant leave to intervene is wider than where joinder of another is demanded as of right.[5]

The conclusions reached by the courts in *Kyalami* and *United Watch and Diamond Company* raise several interesting questions in relation to Rule 8. On its face, it is clear that the Rule envisages leave being sought from the Court by a party wishing to intervene in proceedings before it. By adding the requirement that leave be sought, the Rule seems to envisage that while an applicant's entitlement to join as a party or liability to be joined as a party in the proceedings is a necessary requirement for intervention, it is not sufficient. The Court would appear to retain a discretion where a party seeks to intervene in proceedings. If this is, indeed, the correct construction of Rule 8, the success of applications under the Rule will depend on the factors identified by the Court as guiding the exercise of this discretion.

Although the Court's judgment in *Kyalami* regarded the existence of a 'direct and substantial interest' as the definitive criterion for the success of the applicant's leave to intervene application, it will be interesting to see whether the Court continues to adopt this approach to Rule 8 applications under the 2003 Rules. It should be noted, however, that if this 'interest' remains the sole criterion, the discretionary space which appears to be provided by Rule 8 will have been almost

[1] 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC)('*Kyalami*').
[2] Ibid at para 30.
[3] 1972 (4) SA 409 (C)('*United Watch and Diamond Company*').
[4] *United Watch and Company* (supra) at 416.
[5] Ibid.

entirely eliminated.[1] By contrast, if the Court were to add a proviso regarding the 'interests of justice' then its discretionary scope would be increased.

The Court may well wish to retain this discretionary space, particularly in relation to applications under Rule 8 in confirmation proceedings.[2] As Ackermann J emphasised in *National Director of Public Prosecutions v Mohamed NO*,[3] the Constitution demands that the courts adopt an objective approach to questions of constitutional validity.[4] The Court had previously made clear in *Ferreira v Levin NO and Others*[5] that such an approach entails that:

> a statute is either valid or 'of no force and effect to the extent of its inconsistency'. The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach.[6]

The class of applicants with a direct and substantial interest in a declaration of invalidity that reaches the Constitutional Court for confirmation is potentially vast. In principle, any person affected by the impugned provision or conduct may satisfy the requirements for joinder and would therefore be entitled, should the test be limited to the showing of a direct and substantial interest, to intervene in the proceedings. However, against the backdrop of an objective approach to constitutional validity, the specific circumstances of those applicants, although they may shed further light on some of the implications of the impugned law or conduct, ought to be immaterial to the determination of the Court.[7] When the demands of an objective approach to constitutionality is considered alongside the potentially extensive class of persons with a direct and substantial interest in confirmation proceedings, the Court may be tempted to increase the requirements

[1] See *Nelson Mandela Metropolitan Municipality & Others v Greyvenouw CC & Others* 2004 (2) SA 81 (SE), at para 9 (Plasket J offers a construction of Uniform Rule 12 which excludes any discretion on the part of the court when a direct and substantial interest has been established.)

[2] I am grateful to Matthew Chaskalson for pointing me to the application of Rule 8 to confirmation proceedings.

[3] 2003 (4) SA 1 (CC), 2003 (5) BCLR 476 (CC).

[4] Ibid at para 58.

[5] 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)('*Ferreira*').

[6] *Ferreira* (supra) at para 26. For more on the doctrine of objective unconstitutionality, see C Loots 'Standing, Ripeness & Mootness' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2nd Edition, OS, March 2005) Chapter 7; S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2nd Edition, OS, March 2005) Chapter 31.

[7] For more on the relationship between the doctrine of objective unconstitutionality and the interpretation of constitutional rights, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2nd Edition, OS, July 2006) Chapter 34; S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2nd Edition, OS, March 2005) Chapter 31.

for admission as an intervenor under Rule 8. Were the Court to do so, though, it would need to ensure that the applicant's right under FC s 34 was not unjustifiably limited by such an approach.[1] Thus, where a person is entitled to join as a party in terms of the direct and substantial interest test, the Court would be obliged to show that the interests of justice outweigh those interests and justify the denial of the application. Where an application is made to be admitted as an amicus curiae, the situation is different. The applicant is not a party to the proceedings and hence cannot claim a direct interest in the outcome of the litigation. Instead, it appears with the consent of the parties or by direction of the Chief Justice in order to assist the Court because of its expertise on or interest in the matter before the Court. The procedure governing *amici curiae* submissions is dealt with in Rule 10.

(ii) *Rule 10: Amici curiae submissions*

In *In Re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others*,[2] the Constitutional Court discussed the particular duty which an *amicus curiae* owes to the Court:

> In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the Court.[3]

Despite this warning, the Constitutional Court regularly notes the valuable role that *amici curiae* have played in shaping the Court's thinking about the matter before it.[4] In terms of Rule 10, an *amicus* may be admitted in only one of two scenarios: first, where it has obtained written consent of all the parties in the matter.[5] Where this consent has been obtained, the *amicus* will be admitted upon such terms and conditions, and with such rights and privileges as are agreed upon in writing with all the parties before the Court or as is directed by the Chief Justice.[6] Furthermore, the Chief Justice may amend any terms, conditions, rights and privileges which are agreed upon with all the parties.[7] The second scenario in

[1] For more on FC s 34, see J Brickhill & A Friedman 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 60.

[2] 2002 (5) SA 713 (CC), 2002 (10) BCLR 1028 (CC)('*TAC*').

[3] Ibid at para 5.

[4] See, eg, *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC)('*Bannatyne*') at para 3; *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC) ('*Moise*') at para 4; *Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others* 2002 (1) SA 1 (CC), 2002 (11) BCLR 1137 (CC) at para 9.

[5] Rule 10(1).

[6] Rule 10(1).

[7] Rule 10(3). In relation to its predecessor in the 1995 Rules, the Court in *Fose v Minister of Safety and Security* stressed that although a person or body has obtained the written consent of all parties, the Court's control over the participation of the amicus in the proceedings is not diminished because, in terms of subrule (3), 'the terms, conditions, rights and privileges agreed upon between the parties and the person seeking amicus status are subject to amendment by the [Chief Justice]'. 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at para 9.

which an *amicus* may be admitted is on application to the Chief Justice.[1] Such an application must be made within the time limits prescribed by any direction given in the matter, or in the absence of such directions, not later than five days after the lodging of the respondent's written submissions or after the time for lodging such submissions has expired.[2]

An application to be admitted as an *amicus curiae* must engage three issues. First, it must briefly describe the interest of the *amicus* in the proceedings. Secondly, it must briefly identify the position to be adopted by the *amicus* in the proceedings. Thirdly, it must set out the submissions to be advanced by the *amicus*, their relevance to the proceedings and the *amicus's* reasons for believing that the submissions will be useful to the Court and different from the submissions of the other parties.[3]

An *amicus* has the right to lodge written argument, provided that argument does not repeat any matter set forth in the argument of the other parties and raises new contentions which may be useful to the Court.[4] Rule 10(8) makes it clear that the amicus will be limited (subject to the provisions of Rule 31) to the record on appeal or referral and the facts found proved in other proceedings. Furthermore, the default position in relation to oral argument by an amicus is that oral argument will not be presented.[5] In practice, however, *amici curiae* are often invited by the Chief Justice, pursuant to the power under Rule 10(1) and (3), to present oral argument.[6]

An *amicus* is subject to the same requirements as the parties to the proceedings in so far as Rule 1(3) is concerned. An *amicus* will be required to serve any documents lodged with the Registrar on the parties to the proceedings and to lodge 25 copies, as well as an electronic version, of such documents with the Registrar.

Finally, *amici curiae* should be aware that pursuant to Rule 10(10), a costs order may make provision for the payment of costs incurred by or as a result of the intervention of an *amicus*. This Rule raises two possibilities: either an amicus curiae may be ordered to pay a portion of the costs, or costs may be awarded in its

[1] Rule 10(4).

[2] Rule 10(5). It should be noted that this changes the situation somewhat from that which existed under the 1998 Rules. Under the 1998 Rules, the application had to be made, in the case of an application for leave to appeal to the Court and in any case where the right of direct access had been invoked, within ten days after such application had been lodged with the Registrar. In any other matter, the application had to be made not later than ten days after the lodging of the respondent's written submissions or after the time for lodging such submissions had expired.

[3] Rule 10(6)*(a)-(c)*.

[4] Rule 10(7).

[5] Rule 10(8).

[6] See, eg, *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae) Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 (1) SA 524 (CC) 2006 (3) BCLR 355 (CC)('*Fourie*') at paras 37-8; *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of The Republic of South Africa and Another* 2005 (1) SA 580 (CC), 2005(1) BCLR 1 (CC)('*Bhe*') at para 11; *Kaunda and Others v President of The Republic of South Africa and Others* 2005 (4) SA 235 (CC), 2005 (10) BCLR 1009 (CC)('*Kaunda*') at para 6; *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC)('*Janse van Rensburg*') at para 6.

favour. In *President of The Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri Sa And Others, Amici Curiae)*, the Pretoria High Court had awarded costs in favour of the applicant, Modderklip Boerdery Pty Ltd, and the *amicus curiae* Agri SA.[1] On appeal, the Supreme Court of Appeal declined to interfere with the costs order made by the High Court. Langa ACJ, writing for the Constitutional Court, noted that although it is unusual, and will rarely be appropriate for costs to be awarded in favour of an *amicus curiae*, the State had expressly indicated in the Constitutional Court that it was not seeking to overturn the order of the High Court awarding those costs to Agri SA. Given that there was, accordingly, no basis upon which to interfere with the costs orders, the Constitutional Court did not disturb the costs order in favour of Agri SA.[2]

(b) Rules 14 & 15: Referral of Bills and Acts

(i) *Referral of Bills*

The referral of a Bill in terms of FC s 79(4)*(b)* or FC s 121(2)*(b)* by the President of the Republic or by the Premier of a province must be in writing and addressed to the Registrar and to the Speaker of the National Assembly and the National Council of Provinces (in respect of a national Bill) or to the Speaker of the provincial legislature in question (in respect of a provincial Bill).[3] The referral must cover the following three issues. First, it must identify the provision*(s)* of the Bill in respect of which the President or Premier has reservations.[4] Second, it must specify the constitutional provision*(s)* which the President or Premier believes render the Bill constitutionally infirm. Third, it must set out the grounds or reasons for such reservations.[5] Rule 14 makes further provision for political parties represented in the national Parliament or the provincial legislature concerned, to be entitled, as of right, to make written submissions relevant to the

[1] 2005 (5) SA 3 (CC), (2005) (8) BCLR 786 (CC)('*Modderklip Boerdery*').

[2] Ibid at para 67.

[3] Rule 14(1).

[4] In *In Re Constitutionality of The Mpumalanga Petitions Bill, 2000,* the Court held that it did not have jurisdiction to decide upon an objection which a Premier had not referred to the relevant legislature, but had raised for the first time before the Court. 2002 (1) SA 447 (CC), 2001 (11) BCLR 1126 (CC)('*Mpumalanga Petitions Bill*'). In *Mpumalanga Petitions Bill*, the Mpumalanga Petitions Bill, 2000, was submitted to the Premier for his assent and signature in terms of FC s 121. The Premier had reservations concerning the constitutionality of the powers conferred on the Speaker by clauses 18 and 19 of the Bill. Acting in terms of FC s 121(1), the Premier then referred the Bill back to the legislature for reconsideration, specifying his reservations in respect of these two clauses only. Although the legislature made certain amendments to the Bill on the basis of other typographical and grammatical changes suggested by the Premier, it failed to address the Premier's reservations concerning the functions and powers given to the Speaker under clauses 18 and 19. The Premier then referred the Bill to the Constitutional Court, in terms of FC s 121(2)*(b)*, but in addition to requesting that the Court determine the constitutionality of clauses 18 and 19 of the Bill, he requested that the Court determine whether the Mpumalanga legislature had the competence to pass the Petitions Bill. It was this latter question which the Court held that it did not have jurisdiction to entertain, given that it had not been referred to the legislature for consideration. Ibid at para 11.

[5] Rule 14(2)*(a)-(c)*.

determination of the issue.[1] Directions, issued by the Chief Justice, will indicate the time frames for receipt of such submissions[2] and may include a request to the relevant Speaker or Chairperson of the National Council of Provinces for additional information considered necessary or expedient to deal with in the matter.[3]

(ii) *Referral of Acts*

The procedure in relation to applications in terms of FC s 80(1) and FC s 122(1) substantially mimics the procedure for Bills discussed above. However, a few differences warrant comment. In the case of the referral of a Bill by the President or Premier, the referral is made in writing and is addressed to the Registrar of the Court, as well as the Speaker of the National Assembly and the National Council of Provinces (in respect of a national Bill) or to the Speaker of the provincial legislature in question (in respect of a provincial Bill). In the case of an application in terms of FC s 80(1) and FC s 122(1), the application is to be brought on notice of motion supported by an affidavit which is lodged with the Registrar and served on the Speaker of the National Assembly and, where applicable, the Chairperson of the National Council of Provinces, or on the Speaker of the provincial legislature concerned.[4] The application must be accompanied by a certificate from the Speaker of the legislature concerned indicating that the members of the legislature have complied with the requirements of FC s 80(2)*(a)* or FC s 122(2)*(a)*.[5] The notice of motion must also request the Speaker and, if relevant, the Chairperson of the National Council of Provinces, to bring the application to the attention of all political parties represented in the relevant house or legislature.[6] The application should cover all those matters required in terms of any referral under Rule 14, and, in addition, must specify the relief, including interim relief, sought.[7]

Rule 15(5) requires any political party in the legislature concerned, or any government that wishes to oppose the granting of the order sought in such application, to give notice of its intention to oppose to the Registrar, in writing, within fifteen days of service of such application.[8] Where such notice is given, the application is to be disposed of in accordance with the application procedures set out in Rule 11.[9] Where no notice of opposition is lodged, the matter is to be disposed of in accordance with directions issued by the Chief Justice.[10]

[1] Rule 14(3).
[2] Rule 14(4)*(b)*
[3] Rule 14(4)*(a)*.
[4] Rule 15(1).
[5] Rule 15(3).
[6] Rule 15(2).
[7] Rule 15(4).
[8] Rule 15(5)*(a)*.
[9] Rule 15(5)*(b)*.
[10] Rule 15(6).

(c) Rule 16: Confirmation proceedings

FC s 172(2)*(a)* makes it clear that although the Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, an order of constitutional invalidity issued by such a court has no force unless it is confirmed by the Constitutional Court.[1]

FC s 172(2)*(c)* further stipulates that national legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court. The Constitutional Court Complementary Act[2] was amended in 1997 in order to make provision for such referrals.

Section 8(1)*(a)* of the Constitutional Court Complementary Act provides:

> Wherever the Supreme Court of Appeal, a High Court or a court of similar status declares an Act of Parliament, a provincial Act or conduct of the President invalid as contemplated in section 172(2)*(a)* of the Constitution that court shall, in accordance with the rules, refer the order of constitutional invalidity to the [Constitutional] Court for confirmation.

In *Pharmaceutical Manufacturers Association of SA & Another: In Re Ex Parte President of The Republic of South Africa and Others*, the Court placed the following gloss on FC s 172(2):

> [The Constitutional Court] has exclusive jurisdiction in respect of certain constitutional matters and makes the final decision on those constitutional matters that are also within the jurisdiction of other courts. This is the context within which s 172(2)*(a)* provides that an order made by the SCA, a High Court or a Court of similar status 'concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President' has no force unless confirmed by the Constitutional Court. The section is concerned with the law-making acts of the legislatures at the two highest levels, and the conduct of the President who, as head of State and head of the Executive, is the highest functionary within the State. The apparent purpose of the section is to ensure that this Court, as the highest Court in constitutional matters, should control declarations of constitutional invalidity made against the highest organs of State.[3]

In *SARFU*, the Court emphasised that the aim of the section was to 'preserve the comity between the judicial branch of government, on the one hand, and the legislative and executive branches of government, on the other.'[4]

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[1] The Constitutional Court has, on a number of occasions, made it clear that declarations of invalidity made in respect of regulations are not subject to confirmation under FC s 172(2). See *Satchwell v President of The Republic of South Africa & Another* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC)('*Satchwell*') at para 2; *Van Rooyen and Others v The State & Others (General Council of The Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC)('*Van Rooyen*'), 2002 (2) 222 SACR (CC) at para 11; *Minister of Home Affairs v Liebenberg* 2002 (1) SA 33 (CC), 2001 (11) BCLR 1168 (CC)('*Liebenberg*')at para 13; *Booysen & Others v Minister of Home Affairs & Another* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC)('*Booysen*') at para 1. But see *Moseneke & Others v The Master & Another* 2001 (2) SA 18 (CC), 2001 (2) BCLR103 (CC)('*Moseneke*') at para 13 (Court left open the question of whether FC s 172(2)*(a)* applies to regulations made by State Presidents prior to the coming into force of the Interim Constitution.)

[2] Act 13 of 1995.

[3] 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at paras 55-56.

[4] *President of The Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (2) SA 14 (CC)('*SARFU*') at para 29.

In accordance with section 8(1)*(a)* of the Constitutional Court Complementary Act, Rule 16(1) requires the registrar of a court that has made an order of constitutional invalidity, as contemplated in FC s 172, to lodge a copy of such order with the Registrar of the Constitutional Court. Such an order must be lodged within fifteen days of such order having been made. Thus, the Constitutional Court receives notification of orders of invalidity automatically on the lodging of such orders by the registrars of the other courts.[1] It is not, therefore, necessary for the parties concerned to apply for confirmation of such orders.[2] However, the trend has been for parties to make such applications. The motive for many such applications is to pre-empt an appeal to the Supreme Court of Appeal by a respondent who does not wish the case to go directly to the Constitutional Court.

In a number of judgments, the Constitutional Court has highlighted the pursuit of legal certainty as an important aim of the confirmation process. Given the need to achieve legal certainty, the fact that a settlement may have been reached between the litigants in a case does not dispose of the need for confirmation proceedings.[3]

[1] See *Janse van Rensburg NO & Another v Minister of Trade and Industry & Another NNO* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC)('*Janse van Rensburg*'). In *Janse van Rensburg*, the Constitutional Court held that the approach of the registrar of the Transvaal High Court to delay referring the order of constitutional invalidity made by the Transvaal High Court to the Constitutional Court on the basis that he was aware that there was an appeal to the Supreme Court of Appeal and was thus under the impression that the registrar of the Supreme Court of Appeal would have the duty of lodging any order of constitutional invalidity made by the Supreme Court of Appeal with the Constitutional Court was incorrect. Pursuant to the then existing Rule 15, the registrar of the Transvaal High Court ought to have referred the declaration of invalidity to the Constitutional Court within fifteen days of its having been made, irrespective of the fact that there was an appeal to the Supreme Court of Appeal in the matter. Ibid at para 4.

[2] See *Sibiya & Others v Director of Public Prosecutions, Johannesburg &Others* 2005 (5) SA 315 (CC), 2005 (8) BCLR 812 (CC)('*Sibiya*'). The applicants had applied for confirmation of the orders of constitutional invalidity of certain provisions of the Criminal Law Amendment Act 105 of 1997. Although the High Court order also declared certain conduct of the President to be invalid, the applicants had not applied for confirmation of that aspect of the High Court's order. According to the Constitutional Court, the absence of any application for confirmation and any appeal against the order declaring the conduct of the President to be invalid raised the question whether the Court should enquire into the correctness of that aspect of the High Court order. In answering this question in the affirmative, the Court reasoned that it would not be appropriate to leave such a declaration of invalidity 'in limbo', with the attendant uncertainty that such a situation would create. Accordingly, the Court held that it must consider the issue. Ibid at para 44. It seems that this reasoning (and, indeed, the raising of the question) was superfluous. Section 8(1)*(a)* of the Constitutional Court Complementary Act specifically obliges the courts concerned to refer any orders of constitutional invalidity made by them in relation to an Act of Parliament, a provincial Act or conduct of the President to the Constitutional Court for confirmation. Thus the fact that the applicants did not apply for confirmation of that provision of the order relating to the conduct of the President cannot be relevant to the question whether the Constitutional Court must consider that aspect of the order. Such an application is not required in order to place the matter before the Constitutional Court; it is by virtue of its referral to the Constitutional Court by the court *a quo* that the matter is placed before the Constitutional Court and hence deserves its attention.

[3] See *Moise* (supra) at para 4; *Khosa & Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Devlopment and Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC)('*Khosa*') at para 35.

This certainty rationale has further implications in relation to challenges to an applicant's standing in confirmation proceedings. The question whether an applicant's standing to bring an application for confirmation of a declaration of constitutional invalidity can be challenged was raised in *Lawyers for Human Rights & Another v Minister of Home Affairs & Another*.[1] In the High Court proceedings, the government had disputed the standing of the applicants and had argued in favour of the validity of the impugned sections of the Immigration Act.[2] The High Court held that the applicants did have the requisite standing and further held that two of the impugned provisions were constitutionally invalid. In dealing with the challenge to the applicants' standing, Yacoob J remarked *obiter* that

> [I]t may in any event be incumbent on [the Constitutional] Court to deal with the substance of a dispute concerning the constitutionality of legislation that reaches [it] pursuant to s 172(2) of the Constitution. This is because a High Court has already declared a particular provision to be inconsistent with the Constitution. There are good public policy reasons to suggest that the uncertainty in relation to constitutional consistency ought not to be allowed to prevail. There is therefore a strong argument that the purpose of s 172(2) of the Constitution is to ensure that the uncertainty generated by the High Court decision of unconstitutionality is eliminated and that the substance of the debate raised by the declaration is finally determined.[3]

This reasoning seems to support the view that even where the court *a quo* has made an error in relation to the standing of an applicant before it, the fact of its order of constitutional invalidity and the uncertainty that such an order creates prior to confirmation by the Constitutional Court may require that such an error be overlooked.

In cases where the provision declared invalid by the court *a quo* has subsequently been repealed, the Constitutional Court has held that it possesses the discretion to decide whether or not to deal with the matter.[4] In deciding how to exercise its discretion, the Court will consider whether any order it may make will have a practical effect on the parties or on others. In at least two such confirmation cases, the Court has declined to exercise its discretion.[5]

FC s 172*(2)(d)* declares that any person or organ of state with a sufficient interest may appeal, or apply directly, to the Constitutional Court to confirm or to

[1] 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC)('*Lawyers for Human Rights*').

[2] Act 13 of 2002.

[3] Ibid at para 24.

[4] *President, Ordinary Court Martial & Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC), 1999 (11) BCLR 1219 (CC)('*President, Ordinary Court Martial*') at para 16.

[5] *President, Ordinary Court Martial & Others v Freedom of Expression Institute & Others* 1999 (4) SA 682 (CC), 1999 (11) BCLR 1219 (CC); *Uthukela District Municipality & Others v President of The Republic of South Africa & Others* 2003 (1) SA 678 (CC), 2002 (11) BCLR 1220 (CC). In *Janse van Rensberg*, the Court held that given that one of the provisions, in respect of which a declaration of invalidity had been made by the High Court, had subsequently been amended by legislation which removed the inconsistency, the matter had become moot. It accordingly held that no order would be made in respect of the confirmation proceedings relating to that particular provision of the impugned legislation. *Janse van Rensberg* (supra) at paras 9-10.

vary an order of constitutional invalidity granted by a court.[1] Rules 16(2) and (4) set out the requirements for the lodging of an appeal against an order of invalidity and for confirming such an order. Once a notice of appeal or an application for confirmation is lodged, the matter is to be disposed of in accordance with directions issued by the Chief Justice. Where no notice or application is lodged, the matter is to be disposed of in accordance with directions issued by the Chief Justice to that effect.[2]

In *City of Cape Town & Another v Robertson & Another*, the Cape High Court had, pursuant to FC s 172(2)*(a)*, referred its order of invalidity to the Constitutional Court for confirmation.[3] The City of Cape Town and the Minister of Provincial and Local Government had opposed the confirmation and appealed directly to the Court in terms of FC s 172(2)*(d)*. In addition, however, they had also appealed against other orders of the High Court which were not subject to confirmation. There was no objection to this procedure, and while the Court did not finally answer the question whether the appeal against the other orders lies as of right in terms of FC s 172(2)*(d)*, the Court did hold that even if the appeal was regarded as an application for leave to appeal against those other aspects of the order, leave would have been granted in the interests of justice.[4] It is difficult to conceive of a case where it would not be in the interests of justice to grant the application for leave to appeal against the other aspects of the court *a quo*'s order and thus it is likely that the Constitutional Court will hear such matters as part of the confirmation proceedings.

(d) Rule 18: Direct access

Although the Constitutional Court ordinarily functions as an appellate court in constitutional matters, provision is made for the Court to act as a court of first instance where it is in the interests of justice to do so.[5] To facilitate such applications, Rule 18 provides for direct access to the Court.

Rule 18 replicates the requirements of its predecessor in the 1998 Rules.[6] An application for direct access is to be brought on notice of motion, supported by

[1] See *President of The Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (2) SA 14 (CC)(Court highlighted the fact that the reference to 'sufficient interest' in subsection *(d)* qualifies the persons entitled to appeal or apply for confirmation and not the subject-matter of the appeal or application.)

[2] Rule 16(5).

[3] 2005 (2) SA 323 (CC), 2005 (3) BCLR 199 (CC)('*City of Cape Town*').

[4] Ibid at para 2. It should be noted that *Van Rooyen* left open the same question. See Van *Rooyen* (supra) at para 11.

[5] FC s 167(6) provides: National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court — *(a)* to bring a matter directly to the Constitutional Court.

[6] The rules are identical save for the necessary substitution of references to 'the Chief Justice' for 'the President of the Court'.

affidavit.[1] The application must be lodged with the Registrar and hence the provisions of Rule 1(3) apply to the form and number of copies required and the service of the application[2] on 'all parties with a direct or substantial interest in the relief claimed'.[3]

The application must set out the following: *(a)* the grounds on which it is contended that it is in the interests of justice for an order for direct access be granted; *(b)* the nature of the relief sought and the grounds upon which such relief is based; *(c)* whether the matter can be dealt with by the Court without the hearing of oral evidence and, if it cannot, *(d)* how such evidence should be adduced and the conflicts of fact resolved.[4] Rule 18(3) makes provision for any person or party wishing to oppose the application for direct access to notify the applicant and the Registrar in writing of his or her intention to oppose within ten days from the lodging of the application for direct access. After such notice is received, or where the period during which it may be lodged has expired, the matter will be disposed of in accordance with directions issued by the Chief Justice. Those directions may either call upon the respondents to make written submissions to the Court as to whether or not direct access should be granted or indicate that no written submissions or affidavits need to be filed.[5] Provision is made for such applications to be dealt with summarily, provided that where the respondent has indicated an intention to oppose, an application for direct access shall be granted only after the respondents have made written submissions to the Court, within the time period specified in directions, as to whether or not direct access should be granted.[6]

The Court has repeatedly emphasised that direct access is an exceptional procedure[7] and that it is not ordinarily in the interests of justice for the Court to sit as

[1] Rule 18(1).

[2] See *Ex Parte Omar* 2006 (2) SA 284 (CC), 2003 (10) BCLR 1087 (CC)('*Ex Parte Omar*') at para 7 (Court confirmed that it is necessary for applicants to comply with the provisions of Rule 1(3) when making an application for direct access.)

[3] Rule 18(2).

[4] Rule 18(2)*(a)-(d)*.

[5] Rule 18(4)*(a)-(b)*.

[6] Rule 18(5).

[7] *S v Zuma and Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC) at para 11; *S v Mhatha; S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC), 1996 (1) SACR 371 (CC) at para 29; *Luitingh v Minister of Defence* 1996 (2) SA 909 (CC), 1996 (4) BCLR 581 (CC) at para 15; *Besserglik v Minister of Trade, Industry and Tourism & Others (Minister of Justice Intervening)* 1996 (4) SA 331 (CC), 1996 (6) BCLR 745 (CC)('*Beseerglik*') at para 6; *Tsotetsi v Mutual & Federal Insurance Co Ltd* 1997 (1) SA 585 (CC), 1996 (11) BCLR 1439 (CC) at para 12; *Transvaal Agricultural Union v Minister of Land Affairs & Another* 1997 (2) SA 621 (CC), 1996 (12) BCLR 1573 (CC)('*Transvaal Agricultural Union*') at para 16; *Hekpoort Environmental Preservation Society and Another v Minister of Land Affairs and Others* 1998 (1) SA 349 (CC), 1997 (11) BCLR 1537 (CC) at para 6; *Van Der Spuy v General Council of The Bar of South Africa (Minister of Justice and Constitutional Development, Advocates for Transformation and Law Society of South Africa Intervening)* 2002 (5) SA 392 (CC), 2002 (10) BCLR 1092 (CC) ('*Van Der Spuy*') at para 7; *Mkontwana v Nelson Mandela Metropolitan Municipality & Another; Bissett and Others v Buffalo City Municipality & Others; Transfer Rights Action Campaign and Others v MEC, Local Government And Housing, Gauteng & Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC)('*Mkontwana*') at para 11; *Ex Parte Omar* (supra) at para 4.

a court of first and last instance.[1] According to the Court, 'experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised'.[2] Thus 'compelling reasons'[3] are required to persuade the Court that it should exercise its discretion to grant direct access.[4]

Three factors count against the granting of direct access:[5] first, where direct access is granted the Court may be called on to deal with disputed facts on which the leading of evidence might be necessary;[6] secondly, the Court may be required to decide constitutional issues which are not decisive of the litigation and which might prove to be purely academic; and thirdly, where litigants approach the Court directly, the Court is required to adjudicate the matter without the benefit of the views of other Courts having constitutional jurisdiction. Furthermore, where the applicant is an organ of state, direct access will rarely be granted where those organs have not fulfilled their obligations of cooperative government as detailed in FC ss 40 and 41.[7] In addition, the Court has made it clear that it 'will not grant an application for direct access to consider a challenge to the constitutionality of legislation where the Minister responsible for the legislation is not cited in the application.'[8]

In setting out the grounds upon which it is contended that it is in 'the interests of justice' for an order of direct access to be granted, an applicant should cover the following three matters. First, the applicant's request must engage the

[1] *Transvaal Agricultural Union* (supra) at para 18; *Bruce & Another v Fleecytex Johannesburg CC & Others* 1998 (2) SA 1143 (CC), 1998 (4) BCLR 415 (CC)('*Fleecytex*') at para 8; *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC), 1998 (12) BCLR 1449 (CC)('*Christian Education South Africa*') at para 12; *Van der Spuy* (supra) at para 19; *Satchwell* (supra) at para 6; *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC)('*Zondi*') at para 13; *Mkontwana* (supra) at para 11.

[2] *Fleecytex* (supra) at para 8. See also *Fourie* (supra) at para 39.

[3] See *Fleecytex* (supra) at para 9; *Dormehl v Minister of Justice and Others* 2000 (2) SA 987 (CC), 2000 (5) BCLR 471 (CC)('*Dormehl*') at para 5.

[4] See J Dugard 'Court of First Instance? Towards a Pro-Poor Jurisdiction for the South African Constitutional Court' 22 *SAJHR* (2006) 261, 275, 277 (Dugard is critical of the extent to which the combination of the absence of 'a de facto right to legal representation at state expense' and the Court's restrictive approach to direct access increases the risk of the Court becoming an elite institution. In response, Dugard proposes a pro-poor revamping of the requirements for direct access that would seek to lower the hurdle to access.) See also S Woolman & D Brand 'Is There a Constitution in This Classroom? Constitutional Jurisdiction after Walters and Afrox' (2003) 18 *SA Public Law* 38 (Sets out the doctrine of *stare decisis* for all courts with constitutional jurisdiction, and the severe constraints that the current doctrine, as explicated in *Walters* and *Afrox*, imposes on the development of constitutional doctrine, common-law rules and statutory interpretation in the High Courts.)

[5] *Fleecytex* (supra) at para 7.

[6] For a decision to deny an application for direct access in terms of this factor, see *Van Der Spuy* (supra) at paras 16-17, 19.

[7] See *National Gambling Board v Premier, Kwazulu-Natal, & Others* 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 (CC) at paras 29-31, 37 (Parties' failure to comply with their FC Chapter 3 obligations was deemed to be a sufficient ground for refusing direct access.) See, generally, S Woolman, T Roux & B Bekink 'Cooperative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2nd Edition, OS, December 2004) Chapter 14.

[8] *Ex parte Omar* (supra) at para 4.

question whether the applicant has exhausted all other remedies or procedures that may have been available.[1] Secondly, the applicant's request must demonstrate that the matter raised in the application is of sufficient urgency or public importance to warrant direct access.[2] To this end, proof of prejudice to the public interest or the ends of justice and good government will be relevant considerations.[3] Thirdly, the applicant's request must address the prospects of success.[4]

On a number of occasions, the Constitutional Court has emphasised that direct access should not be used where another procedure is appropriate, nor should it be used to cure a defect in an application. In *S v Shongwe*, the Court held that the applicant's application for direct access was in essence an application for leave to appeal against his conviction by the High Court.[5] The Court held that the rule governing direct access was not applicable to appeal procedures and could not be used for disguised appeals.[6] Furthermore, where an applicant attempted to use the direct access provision of the rules to have a judgment of the High Court declared 'unconstitutional and invalid', the Court stressed that when the correctness of a judgment is in question, the appropriate procedure is not to seek direct access to have the judgment declared a nullity. It is, rather, to seek leave to appeal against the judgment.[7] Thus the general approach of the Court is to insist that direct access is an exceptional procedure that may not be used to avoid the consequences of a failure properly to formulate a constitutional challenge.[8]

Direct access applications are increasingly being used by parties where the relief they seek is substantially similar to, or has a direct impact on, the relief sought by other parties in a matter already before the Constitutional Court.[9] The

[1] *Besserglik* (supra) at para 6.

[2] *Transvaal Agricultural Union* (supra) at para 19 (An applicant who contends that such urgency exists assumes an obligation of establishing such averment to the satisfaction of the Court.)

[3] *Fleecytex* (supra) at para 19.

[4] Ibid at para 7. See *Christian Education South Africa* (supra) at para 6; *Dormehl* (supra) at para 5.

[5] 2003 (5) SA 276 (CC), 2003 (8) BCLR 858 (CC), 2003 (2) SACR 103 (CC)('*Shongwe*').

[6] Ibid at para 4.

[7] *Wallach v High Court of South Africa, Witwatersrand Local Division, and Others* 2003 (5) SA 273 (CC), 2003 (12) BCLR 1333 (CC) at para 5.

[8] See *Zondi* (supra) at para 19. *Zondi* raised a number of interesting procedural issues. The applicant challenged the constitutional validity of a number of the provisions of the Pound Ordinance (KwaZulu-Natal), 1947 ('the Ordinance') in the Pietermaritzburg High Court. The High Court held the impugned provisions of the Ordinance constitutionally invalid and referred its order of invalidity to the Constitutional Court for confirmation in terms of FC s 172(2)*(a)*. The respondent also noted an appeal against the High Court decision. On the eve of the hearing of the matter, the applicant additionally brought an application for direct access to the Court to challenge the validity of the entire Ordinance. In rejecting the application for direct access the Court held that direct access applications should not be used to cure failures to formulate properly constitutional challenges from the outset of litigation. Ibid at para 19. It went on to consider the question whether a declaration of invalidity given in respect of the provisions of an ordinance required confirmation under FC s 172(2)*(a)*. However, because of the existence of the respondent's appeal in the case, and the Court's resolve to treat the notice of appeal as an application for leave to appeal (which it summarily granted), the Court declined to answer this interesting question. Ibid at para 30.

[9] See *Bhe & Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole & Others; South African Human Rights Commission and Another v President of The Republic of South Africa and Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('*Bhe*'); *Mkontwana* (supra); *Fourie* (supra).

Constitutional Court has tended to grant these applications where, and to the extent that, the submissions sought to be made by the applicants relate to substantive issues that are already before the Court and where the insights offered by the applicants may help to resolve difficult issues before the Court. Such issues often encompass questions of the appropriate remedy[1] or enable the Court to fill in doctrinal 'gaps' in the matter already before the Court. However, where the issues raised in the application for direct access are complex, the Court will tend to privilege the value of another court's views on the topic over the interests of the applicant in securing direct access. In *Mkontwana*, the Court granted the WLD applicants[2] direct access in relation to the constitutionality of section 118(1) of the Local Government: Municipal Systems Act 32 of 2000. That issue was already before the Court in a confirmation proceeding.[3] However, it declined to grant the applicants direct access in relation to other aspects of their challenge. With respect to the applicant's challenge to section 118(3) of the Local Government: Municipal Systems Act 32 of 2000, the Court found that the 'reasoned judgment of another court on how the section is to be interpreted is likely to be helpful'.[4]

(e) Rules 19 & 20: Appeals to the Constitutional Court

The most substantial change from the 1998 Rules to the 2003 Rules relates to appeals procedure. Whereas the 1998 Rules drew a distinction between appeals directly from the High Courts or other superior courts (such as the Labour Courts or Land Claims Court) to the Constitutional Court, on the one hand (Rule 18), and appeals from the Supreme Court of Appeal to the Constitutional Court, on the other (Rule 20), the 2003 Rules deal with all appeals in terms of one category — Rule 19.

Under the 1998 Rules, a litigant wishing to appeal directly to the Constitutional Court in terms of Rule 18 had, first, to obtain a certificate on the prospects of success and the desirability of a direct appeal from the court which gave the decision which formed the subject of the appeal, and had, secondly, to make an application for leave to appeal to the Constitutional Court. In relation to appeals from the Supreme Court of Appeal, under the 1998 Rules, a litigant did not have

[1] See *Bhe* (supra) at para 33.

[2] In December 2002, an application was launched in the Witwatersrand Local Division of the High Court. That application required a consideration of the meaning and constitutionality of national, provincial and local government legislation including s 118(1) of the Local Government: Municipal Systems Act 32 of 2000. Certain consequential relief was also sought in the application. The applicants included an association of persons and were jointly referred to as 'the WLD applicants'.

[3] The *Mkontwana* Court also granted direct access in relation to section 50(1)*(a)* of a Gauteng Local Government Ordinance 17 of 1939. The arguments advanced by the parties regarding the interpretation and the constitutionality of section 50(1)*(a)* were virtually the same as those directed at section 118(1). See *Mkontwana* (supra) at para 15.

[4] Ibid at para 13. The Court also declined to grant direct access in relation to the WLD applicants' challenge to section 49 of Gauteng Local Government Ordinance 17 of 1939 and certain by-laws of the City of Johannesburg. Ibid at para 14.

to obtain leave to appeal from the Supreme Court of Appeal prior to applying for leave to appeal to the Constitutional Court.[1]

Under the 2003 Rules, a single, vastly simplified procedure has been adopted for all appeals. That said, differences of substance, as opposed to form, remain. For example, the Constitutional Court takes a number of distinct, and additional, factors into the 'interests of justice' evaluation when an application for leave to appeal concerns a matter which has been dealt with only by a High Court (or court of similar status) as opposed to an application for leave to appeal from the Supreme Court of Appeal. Moreover, the Constitutional Court has stressed that applicants not conflate the considerations which influence decisions regarding direct access with the considerations which influence leave to appeal applications.[2] The difference in the respective considerations turns primarily on the fact that in direct access cases the Court sits as a court of first instance, whereas in the latter set of cases it sits as a court of appeal.

The procedure set out in Rule 19 requires the lodging of an application for leave to appeal, after notice has been given to the other party or parties involved, within fifteen days of the order[3] against which the appeal is sought.[4] The application for leave to appeal must be signed by the applicant or his or her legal representative and must contain the following: *(a)* the decision against which the appeal is sought and the grounds upon which such decision is disputed; *(b)* a statement setting out clearly and succinctly the constitutional matter raised in the decision; and any other issues allegedly connected with a decision on a constitutional matter; *(c)* such supplementary information or argument as the applicant considers necessary to bring to the attention of the Court; and *(d)* a statement indicating whether the applicant has applied or intends applying for leave or special leave to appeal to any other court and, if so, (i) which court, (ii) whether such application is conditional upon the application to the Constitutional Court

[1] In addition, the certificate procedure which used to form part of the direct appeals procedure has not been carried over to the 2003 Rules.

[2] See *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party & Others* 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC)('*Members of the Executive Council*') at paras 26-27.

[3] Rule 19 refers, as did its predecessor under the 1998 Rules, to applications for leave to appeal to the Constitutional Court where a *decision* on a constitutional matter has been given by any court. The reference to 'decision' was interpreted, in relation to its predecessor — Rule 18 — under the 1998 Rules, in *Khumalo v Holomisa*. 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)('*Khumalo*'). The *Khumalo* Court had to determine whether the dismissal of an exception was appealable to the Constitutional Court where such a dismissal was not appealable to the SCA. The *Khumalo* Court held that the term 'decision', in Rule 18, should not be given the same meaning as the words 'judgment or order' in section 20(1) of the Supreme Court Act. According to the *Khumalo* Court, were it to adopt a restrictive meaning of 'decision' in the light of a range of policy considerations relevant to determining when a matter should be the subject of an appeal, it would be adopting a test different to that proclaimed by the Final Constitution, namely, that the interests of justice be the determinative criterion for deciding when appeals should be entertained by the Court. Furthermore, the Court opined that all the considerations that had led the SCA to adopt a limited interpretation of 'judgment or order' could be accommodated by the 'interests of justice' criterion. Ibid at para 8.

[4] Rule 19(2). It should be noted that where the Chief Justice has refused leave to appeal, the fifteen day period will run from the date of the order refusing leave.

being refused, and (iii) the outcome of such application if known at the time that the application to the Constitutional Court is made.[1]

The respondent is given ten days from the date upon which the application is lodged with the Registrar to respond in writing thereto,[2] indicating whether or not the application for leave to appeal is being opposed and, if so, on what grounds.[3] Furthermore, where a respondent wishes to lodge a cross-appeal, an application for leave to cross-appeal must be lodged with the Registrar within the same ten day period following the lodging of the application for leave to appeal.[4]

Applications for leave to appeal may be dealt with summarily.[5] The Court may order that the application be set down for argument and direct that the written argument of the parties deal not only with the question as to whether leave to appeal should be granted, but also with the merits of the dispute.[6] Rule 20 then sets out the procedure to be followed when leave to appeal is granted.[7]

Whether to grant leave is a matter within the discretion of the Court.[8] Leave to appeal to the Court will be granted where the application raises a constitutional matter and it is in the interests of justice to grant the application. In *Director of Public Prosecutions, Cape of Good Hope v Robinson*, the Court held that Rule 19 must be interpreted in the context of FC s 167(3) and FC s 167(6)*(b)*.[9] The former section — read with FC s 167(7) — makes the Constitutional Court the highest court in all constitutional matters, including any issue concerning the interpretation, protection and enforcement of the Final Constitution.[10] The latter section stipulates that national legislation or the Rules of the Constitutional Court must allow a person to appeal directly to the Constitutional Court from any other court, with leave of the Constitutional Court, whenever it is in the interests of justice.[11]

[1] Rule 19(3). This provision makes it clear that it is permissible to apply for leave to appeal to the Constitutional Court while at the same time applying for leave to appeal to another appellate court.

[2] The response must be signed by the respondent or his or her legal representative. Rule 19(4)*(b)*.

[3] Rule 19(4)*(a)*.

[4] Rule 19(5)*(a)*.

[5] Rule 19(6)*(b)*.

[6] Rule 19(6)*(c)*.

[7] The requirements of the Constitutional Court in respect of the formatting of documents for an appeal record are less stringent than those of the corresponding Supreme Court of Appeal rule. See, in this regard, Rule 20(2) of the 2003 Rules as compared with rule 8 of the Rules of the Supreme Court of Appeal promulgated under GN R1523 in *Government Gazette* 19507 of 27 November 1998.

[8] *Phillips & Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC), 2006 (2) BCLR 274 (CC)('*Philips*') at para 30; *National Education Health & Allied Workers Union v University of Cape Town & Others* 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC), 2003 (24) ILJ 95 ('*NEHAWU*') at para 25; *Ingledew v Financial Services Board: In Re Financial Services Board v Van Der Merwe & Another* 2003 (4) SA 584 (CC), 2003 (8) BCLR 825 (CC) at para 13; *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC), 2001 (1) SACR 1 (CC)('*Boesak*'), at para 12.

[9] ***2005 (4) SA 1 (CC)*** ('*Director of Public Prosecutions, Cape of Good Hope*').

[10] On what constitutes a 'constitutional matter', see F Michelman 'The Rule of Law, Legality, and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2nd Edition, OS, March 2005) Chapter 11; T Roux & M Sikhekhane 'The Jurisdiction of the Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2nd Edition, OS, July 2007) Chapter 4.

[11] *Director of Public Prosecutions, Cape of Good Hope* (supra) at para 21.

The Court's assessment of the interest of justice 'involves a careful and balanced weighing-up of all relevant factors'[1] and a case-specific approach which allows for each application to be considered in the light of its own facts.[2] The following section outlines the factors relevant to the Court's evaluation of the interests of justice.

(i) *Factors relevant to all applications for leave to appeal*

(aa) Importance of the issue raised[3]

In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division & Others*, the Court held that the relevant question is whether the grounds of appeal raise a constitutional issue of importance on which a decision by the Court is desirable.[4]

(bb) Prospects of success

Although the prospects of success is an important factor in the determination of the interests of justice, the Court has repeatedly emphasised that it is not, generally, outcome determinative.[5] Indeed, the Court has stressed that the prospects of success is rather accommodating: 'the Court does not anticipate a decision as to the success of the intended appeal, but considers only the viability of the appeal'.[6] In *S v Boesak*, the Court held that an applicant who seeks leave to appeal must ordinarily show that there are reasonable prospects that the Court will reverse or materially alter the decision against which leave is sought.[7]

(cc) Public interest in a determination of the constitutional issues raised[8]

The Court has held that it may, in certain circumstances, be in the interests of justice for it to decide a constitutional matter for the benefit of the broader public or to achieve legal certainty or some other public purpose, even if the decision is of no practical value to the litigants themselves.[9]

[1] *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another* 2005 (4) SA 319 (CC), 2005 (3) BCLR 321 (CC)('*Radio Pretoria*') at para 19.

[2] *S v Basson* 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC), 2004 (1) SACR 285 (CC) at para 39.

[3] *Khumalo* (supra) at para 14; *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2005 (5) BCLR 433 (CC)('*Islamic Unity Convention*') at para 15; *Member of the Executive Council* (supra) at para 32.

[4] *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division & Others* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC), 2003 (2) SACR 445 (CC)('*De Reuck*') at para 3.

[5] *De Reuck* (supra) at para 3; *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 (CC), 2003 (2) BCLR 182(CC)('*NUMSA*') at para 17; *NEHAWU* (supra) at para 25; *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* 2002 (5) SA 703 (CC)('*TAC I*') at paras 9-10; *Brummer v Gorfil Brothers Investments (Pty) Ltd & Others* 2000 (2) SA 837 (CC), 2000 (5) BCLR 465 (CC)('*Brummer*') at para 3; *Fraser v Naude & Others* 1999 (1) SA 1 (CC), 1998 (11) BCLR 1357 (CC)('*Fraser*') at para 7.

[6] *Beyers v Elf Regters van die Grondwetlike Hof* 2002 (6) SA 630 (CC)('*Beyers*') at para 11.

[7] *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC), 2001 (1) SACR 1 (CC)('*Boesak*') at para 12.

[8] *Islamic Unity Convention* (supra) at para 18; *Khumalo* (supra) at para 14.

[9] *Radio Pretoria* (supra) at para 22.

(dd) Accuracy of pleadings

In *Shaik v Minister of Justice and Constitutional Development & Others*,[1] the Court emphasised that 'it constitutes sound discipline in constitutional litigation to require accuracy in the identification of statutory provisions that are attacked on the ground of their constitutional invalidity'[2] and that such accuracy will be relevant to an interests of justice determination.[3]

(ii) *Factors relevant to applications for leave to appeal directly to the Constitutional Court*

(aa) Saving in time and costs

In *Dudley v City of Cape Town & Another*, the Court noted that it would consider whether savings in time and costs would result from a direct appeal.[4]

(bb) Urgency of having a final determination of the matters in issue[5]

In *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Another (Mukhwevho Intervening)*,[6] the Court held that although there were a number of issues with which the High Court did not deal and which it would be forced to adjudicate if it were to grant leave to appeal, the interests of justice demanded that the dispute as to the legality of the transit camp that the government had established for flood victims at Leeuwkop be resolved as expeditiously as possible.[7]

(cc) Value of the views of the Supreme Court of Appeal

In *Amod v Multilateral Motor Vehicle Accidents Fund*,[8] the Court noted that

> when a constitutional matter is one which turns on the direct application of the Constitution and which does not involve the development of the common law, considerations of costs and time may make it desirable that the appeal be brought directly to [the Constitutional] Court. But when the constitutional matter involves the development of the common law, the position is different. The Supreme Court of Appeal has jurisdiction to develop the common law in all matters including constitutional matters. Because of the breadth of its jurisdiction and its expertise in the common law, its views as to whether the common law should or should not be developed in a 'constitutional matter' are of particular importance.[9]

[1] 2004 (3) SA 599 (CC), 2004 (4) BCLR 333 (CC)('*Shaik*').
[2] Ibid at para 25.
[3] See, further, *Phillips* (supra) at para 40.
[4] *Dudley v City of Cape Town & Another* 2005 (5) SA 429 (CC), 2004 (8) BCLR 805 (CC), 2004 (95) ILJ 991 (CC)('*Dudley*') at para 7; *Member of Executive Council* (supra) at para 32; *Islamic Unity Convention* (supra) at para 19.
[5] *Dudley* (supra) at para 7; *Member of Executive Council* (supra) at para 32.
[6] 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC).
[7] Ibid at para 28.
[8] 1998 (4) SA 753 (CC), 1998 (10) BCLR 1207 (CC)('*Amod*').
[9] Ibid at para 33. See also *Khumalo* (supra) at para 10; *S v Bierman* 2002 (5) SA 243 (CC), 2005 (10) BCLR 1078 (CC)('*Bierman*') at para 7.

Employing the same logic, the Court has also held that where both constitutional and other issues have been raised on appeal, it will seldom be in the interests of justice for the appeal to be brought directly to the Constitutional Court.[1] However, in *Mkangeli and Others v Joubert and Others*, the Constitutional Court noted that where the Court refuses leave to appeal because the matter properly belongs before the Supreme Court of Appeal, this decision does not preclude a litigant from approaching the Constitutional Court again for leave to appeal after the Supreme Court of Appeal has disposed of the matter.[2] Whether the Supreme Court of Appeal has disposed of the matter by way of a judgment or by refusing the petition for leave to appeal, the Constitutional Court will consider the application on its merits.[3]

(dd) Value of the views of the Labour Appeal Court

In *Dudley v City of Cape Town and Another*, the Court held that direct appeals from the labour courts deny it the advantage of having before it the judgments of the Labour Appeal Court on the matters in issue.[4] Any saving of time and costs and avoidance of delay must, according to the Court, be weighed against the need to ensure that the Labour Appeal Court, as the appellate court in labour matters, has had the opportunity to express its views on important labour matters.[5]

(ee) Compliance with obligations of cooperative government

The Court has held that where organs of State have not discharged their duties of co-operative government, such failure may militate against granting an organ of State leave to appeal directly to the Constitutional Court.[6]

(iii) *Factors relevant to applications for leave to appeal in custody cases:* Best interests of the child

In *Fraser v Naude and Others*, the Court held that where a matter involves a child, the interests of that child are paramount in assessing whether to grant leave to appeal.[7] The *Fraser* Court opined that even if leave to appeal were to be granted, and the applicant were to succeed in his application to have the adoption order set aside, that would not be the end of the matter. The adoption proceedings would then have to be reopened and the dispute would again have to wind its way through the courts.[8] Thus, according to the *Fraser* Court, even where it could be

[1] *Member of Executive Council* (supra) at para 32.
[2] 2001 (2) SA 1191 (CC), 2005 (4) BCLR 316 (CC)('*Mkangeli*').
[3] Ibid at para 7.
[4] 2005 (5) SA 429 (CC), 2004 (8) BCLR 805 (CC)('*Dudley*').
[5] Ibid at para 8.
[6] *MEC for Health, Kwazulu-Natal v Premier, Kwazulu-Natal: In Re Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 717 (CC), 2005 (10) BCLR 1028 (CC)('*TAC II*') at para 9.
[7] 1999 (1) SA 1 (CC), 1998 (11) BCLR 1357(CC)('*Fraser*') at para 9.
[8] Ibid.

shown that there were reasonable prospects of success, it would not generally be in the interests of justice for a further appeal to be heard because the continued uncertainty as to the status and the placing of the child could not be in the child's best interests.[1]

(iv) *Factors relevant to applications for leave to appeal in criminal cases*

The decision to grant leave to appeal in criminal cases tends to turn on three primary considerations: (1) the nature of the crimes concerned; (2) the FC s 35 rights of accused persons; and (3) the interests of the victims of the crimes.[2] In *S v Bierman*, the Court also indicated that it would not be in the interests of justice to grant leave to appeal against a criminal conviction on a point of law where a favourable decision would not result in the conviction being set aside.[3]

(aa) Simultaneous appeals

In *S v Basson*,[4] the Court made it clear that it would not sanction simultaneous appeals which, in effect, gave the litigant 'two bites at the appeal process'.[5] Thus litigants will not be permitted to apply for leave to appeal directly to the Constitutional Court from a High Court judgment where the issue in dispute has already been dealt with by the Supreme Court of Appeal and special leave to appeal has also been sought against that judgment of the Supreme Court of Appeal.[6]

This principle received further attention in *Mabaso v Law Society, Northern Provinces, and Another*.[7] In *Mabaso,* the applicant had sought leave to appeal against a judgment of the Supreme Court of Appeal. The Supreme Court of Appeal had refused condonation for a failure to comply with its rules and had not dealt with the constitutional issue raised by the applicant in the High Court judgment. The Constitutional Court held that, in such circumstances, the applicant should seek leave to appeal against the judgment of the High Court in which the constitutional matter was considered.[8] For although the Supreme Court of Appeal's decision whether to condone a failure to comply with its Rules is a matter of discretion, the Court held that such discretionary decisions by the Supreme Court of Appeal could not be allowed to frustrate the Constitutional Court in the performance of its constitutional duty to ensure that constitutional matters are engaged appropriately.[9]

[1] *Fraser* (supra) at paras 9-10.
[2] *S v Basson* 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC), 2004 (1) SACR 285 (CC)('*Basson*') at para 39.
[3] 2002 (5) SA 243 (CC), 2005 (10) BCLR 1078 (CC)('*Bierman*') at para 9.
[4] 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC), 2004 (1) SACR 285 (CC)('*Basson*').
[5] Ibid at para 77.
[6] Ibid at para 78.
[7] 2005 (2) SA 117 (CC), 2005 (2) BCLR 129 (CC)('*Mabaso*').
[8] Ibid at para 23.
[9] Ibid at para 24.

On their face, these two judgments may appear contradictory. However, they do, in fact, cohere. What *Basson* prohibits is simultaneous appeals in which the appeal from the High Court judgment is used, in effect, to cure shortcomings in the appeal to the Supreme Court of Appeal.[1] By contrast, what *Mabaso* recommends is that in a case where a constitutional matter is raised in the High Court's decision but, owing to the Supreme Court of Appeal's refusal to condone non-compliance with its rules, the Supreme Court of Appeal decision on the matter fails to deal with that constitutional matter, a litigant should apply to the Constitutional Court for leave to appeal against the judgment of the High Court. No problem of simultaneous appeals arises in the latter set of cases because the correct procedure to follow is to seek leave to appeal against the High Court decision alone.

That said, in *Mabaso*-like cases, reference will need to be made to the Supreme Court of Appeal decision, and, where available, the judgment of the Supreme Court of Appeal will presumably need to be lodged with the Constitutional Court: the Court has stressed that in assessing whether to grant such an application for leave to appeal, it will consider the circumstances in which the Supreme Court of Appeal has refused the application for condonation.[2] Furthermore, where there has been a flagrant and gross breach of the rules of the Supreme Court of Appeal by the litigant, that will, according to the Court, militate against the grant of leave. It will only be in the interests of justice for leave to be granted in such cases where it is clear that the constitutional issue is of some importance and that there are reasonable prospects of success in relation to the appeal on the constitutional issue.[3]

(bb) Litigants aggrieved by a decision

In *Director of Public Prosecutions, Cape of Good Hope v Robinson*,[4] the respondent contended that, in terms of Rule 19(2), the Director of Public Prosecutions ('DPP') was neither 'aggrieved by the decision of the High Court' nor a 'litigant' within the meaning of the Rule and hence the application for leave to appeal was not competent.[5] The High Court decision, against which leave to appeal was sought by the DPP, held that the magistrate concerned ought not to have declared that the respondent was liable to surrender within the meaning of section 10(1) of the Extradition Act.[6] On the magistrate's reading of the apposite section, the respondent would, contrary to the provisions of the Final Constitution, be forced, upon extradition, to serve a sentence of imprisonment imposed in his absence. In answering the respondent's contention, the Court held that the reference to 'person' in FC s 167(6) should be broadly construed.[7] On the basis of this

[1] *Basson* (supra) at para 78.
[2] *Mabaso* (supra) at para 27.
[3] Ibid.
[4] 2005 (4) SA 1 (CC)('*Director of Public Prosecutions, Cape of Good Hope*').
[5] Ibid at para 15.
[6] Act 67 of 1962.
[7] *Director of Public Prosecutions, Cape of Good Hope* (supra) at para 31.

reading of FC s 167(6), the Court held that the DPP qualified as a 'litigant' for the purposes of Rule 19.[1] Moreover, the Court held that the DPP was more than merely 'disappointed by the High Court decision'.[2] The office was, according to the Court, 'aggrieved' by the decision of the High Court because it had a direct and substantial interest in the adjudication of the issue: the DPP wished to have the respondent extradited and had been barred from extraditing him as a result of the High Court judgment.[3]

(v) *Factors to be considered with respect to appeals against interim orders of execution*

In so far as appeals against interim orders of execution are concerned, the Court has held that it will generally not be in the interests of justice for a litigant to be granted leave to appeal against such orders.[4] Ordinarily, for an applicant to succeed in such an application, the applicant would have to show that irreparable harm would result if the interim appeal were not to be granted — a matter which would, by definition, have been considered by the court below in deciding whether or not to grant the execution order. If irreparable harm cannot be shown, an application for leave to appeal will generally fail. If the applicant can show irreparable harm, that irreparable harm would have to be weighed against any irreparable harm that the respondent (in the application for leave to appeal) may suffer were the interim execution order to be overturned.[5]

(vi) *Factors to be considered with respect to appeals from the Labour Appeal Court*

In so far as appeals from the Labour Appeal Court are concerned, the Constitutional Court has held that it will be slow to hear appeals from the Labour Appeal Court because, by their very nature, labour disputes ought to be resolved expeditiously and be brought to finality so that the parties can organise their affairs accordingly.[6] It is in the public interest that labour disputes be resolved speedily and by experts appointed for that purpose. Nevertheless, where the case raises important matters of constitutional principle, as it did in *National Education Health and Allied Workers Union v University of Cape Town and Others*, the Constitutional Court may grant leave to appeal.[7]

[1] *Director of Public Prosecutions, Cape of Good Hope* (supra) at para 39.
[2] Ibid at para 40.
[3] Ibid.
[4] *TAC I* (supra) at para 12.
[5] Ibid.
[6] *National Education Health and Allied Workers Union v University of Cape Town & Others* 2003 (3) SA 1 (CC), 2004 (3) BCLR 237 (CC) at para 31.
[7] Ibid at para 32.

APPENDIX: CONSTITUTIONAL COURT RULES

1 Definitions

1. In these Rules any word or expression to which a meaning has been assigned in the Constitution shall bear that meaning and, unless the context otherwise indicates:

'affidavit' includes an affirmation or a declaration contemplated in section 7 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act 16 of 1963);

'apply' means apply on notice of motion, and 'application' has a corresponding meaning;

'Chief Justice' means the Chief Justice of South Africa appointed in terms of section 174 (3) of the Constitution;

'Constitution' means the Constitution of the Republic of South Africa, 1996;

'Court' means the Constitutional Court established by section 166 *(a)* of the Constitution, read with item 16 (2) *(a)* of Schedule 6 to the Constitution;

'Court day' means any day other than a Saturday, Sunday or public holiday, and only Court days shall be included in the computation of any time expressed in days prescribed by these rules or fixed by any order of the Court;

'Deputy Chief Justice' means the Deputy Chief Justice appointed in terms of section 174 (3) of the Constitution;

'directions' means directions given by the Chief Justice with regard to the procedures to be followed in the conduct and disposition of cases;

'judge' means a judge or acting judge of the Court appointed under section 174 or 175 of the Constitution, sitting otherwise than in open court;

'law clinic' means a centre for the practical legal education of students in the faculty of law at a university in the Republic, and includes a law centre controlled by a non-profit organisation which provides the public with legal services free of charge and is certified as contemplated in section 3(1)*(f)* of the Attorneys Act, 1979 (Act 53 of 1979);

'legal representative' means an advocate admitted in terms of section 3 of the Admission of Advocates Act, 1964 (Act 74 of 1964), or an attorney admitted in terms of section 15 of the Attorneys Act, 1979 (Act 53 of 1979);

'party' or any other reference to a litigant includes a legal representative appearing on behalf of a party, as the context may require;

'President' means the President of the Supreme Court of Appeal;

'Registrar' means the Registrar of the Court, and includes any acting or assistant Registrar of the Court, or in their absence any person designated by the Director of the Court;

'sheriff' means a person appointed in terms of section 2 of the Sheriffs Act, 1986 (Act 90 of 1986), and includes a person appointed in terms of section 5 or section 6 of that Act as an acting or a deputy sheriff, respectively, and a sheriff, an acting or a deputy sheriff appointed in terms of any law not yet repealed by a competent authority and in force immediately before the commencement of the Constitution, in any area which forms part of the national territory;

'Supreme Court of Appeal Rules' means the rules regulating the conduct of the proceedings of the Supreme Court of Appeal published under Government Notice R1523 of 27 November 1998; and

'Uniform Rules' means the rules regulating the conduct of the proceedings of the several provincial and local divisions of the high courts published under Government Notice R48 of 12 January 1965, as amended.

2. Any powers or authority vesting in the Chief Justice in terms of these rules may be exercised by a judge or judges designated by the Chief Justice for that purpose.
3. Any reference in these rules to a party having to sign documents shall be construed as including a reference to a legal representative representing such party, and a reference to lodging documents with the Registrar as including prior service of such documents on other parties and the lodging of 25 copies of all relevant documents and an electronic version thereof that is compatible with the software used by the Court, with the Registrar.
4. Notices, directions or other communications in terms of these rules may be given or made by registered post or by facsimile or other electronic copy: Provided that, if a notice or other communication is given by electronic copy, the party giving such notice or communication shall forthwith lodge with the Registrar a hard copy of the notice or communication, with a certificate signed by such a party verifying the date of such communication or notice.
5. The Chief Justice may extend any time limit prescribed in these rules.
6. Written arguments, responses and any other representations to the Court shall be clear and succinct.
7. Applications shall be legible and in double-spaced, typewritten format on A4-size paper.
8. Subject to rule 5, the provisions of rule 4 of the Uniform Rules shall apply, with such modifications as may be necessary, to the service of any process of the Court.

PART I (RULE 2)

2 COURT

1. There shall be four terms in each year as follows:
   - 15 February to 31 March, inclusive;
   - 1 May to 31 May, inclusive;
   - 15 August to 30 September, inclusive;

- 1 November to 30 November, inclusive.

2. A case may be heard out of term if the Chief Justice so directs.
3. If the day fixed for the commencement of a term is not a Court day, the term shall commence on the next succeeding Court day and, if the day fixed for the end of a term is not a Court day, the term shall end on the Court day preceding.

PART II REGISTRAR (RULES 3-4)

3 REGISTRAR'S OFFICE HOURS

1. The office of the Registrar shall be open from 08:30 to 13:00 and from 14:00 to 15:30 on Court days.
2. The Registrar may in exceptional circumstances accept documents at a time outside office hours, and shall do so when directed by a judge.

4 GENERAL DUTIES OF THE REGISTRAR

1. A notice of appeal, an order of court referring any matter to the Court by another court, or another document by which proceedings are initiated in the Court in terms of these rules shall be numbered by the Registrar with a consecutive number for the year during which it is filed.
2. Every document afterwards lodged in such a case or in any subsequent case in continuation thereof shall be marked with that number by the party lodging it and shall not be received by the Registrar until so marked.
3. All documents delivered to the Registrar to be filed in a case shall be filed by the Registrar in a case file under the number of such case.
4. All documents referred to in subrule (1) shall be subject to the payment of R75, 00 court fees in the form of a revenue stamp: Provided that if a party satisfies the Registrar in terms of subrule (5) that he or she is indigent, the payment of court fees shall be waived by the Registrar who shall make a note to that effect on the first page of the document in question.
5. A party who desires to initiate or oppose proceedings in the Court and who is of the opinion that he or she is indigent, or anybody on behalf of such party, shall satisfy the Registrar that, except for household goods, wearing apparel and tools of trade, such party is not possessed of property to the amount of R20 000 and will not be able within a reasonable time to provide such sum from his or her earnings.
6. Where photocopies are made, the fee prescribed in subrule (6) *(a)* shall be payable. Copies of a record may be made by any person in the presence of the Registrar.
   a. The Registrar shall at the request of a party make a copy of any court document on payment of court fees with revenue stamps of R0, 50 for every photocopy of an A4-size page or part thereof and shall against payment of a fee of R1, 00 certify that photocopy to be a true copy of the original.

b. The payment of court fees may be waived by the Registrar in the case of an indigent person referred to in subrules (4) and (5).

7. Whenever the Court makes an order declaring or confirming any law or provision thereof to be inconsistent with the Constitution under section 172 of the Constitution, the Registrar shall, not later than 15 days after such order has been made, cause such order to be published in the Gazette and in the relevant Provincial Gazette if the order relates to provincial legislation.
8. The Registrar shall publish a hearing list, which shall be affixed to the notice board at the Court building not less than 15 days before each term for the convenience of the legal representatives and the information of the public.
9. Directions with regard to any proceedings shall be furnished by the Registrar to the parties concerned within five days of such directions having been given.
10. a. The Registrar shall maintain the Court's records and shall not permit any of them to be removed from the court building.
    b. Any document lodged with the Registrar and made part of the Court's records shall not thereafter be withdrawn permanently from the official court files.
    c. After the conclusion of the proceedings in the Court, any original records and papers transmitted to the Court by any other court shall be returned to the court from which they were received.
11. a. If it appears to the Registrar that a party is unrepresented, he or she shall refer such party to the nearest office or officer of the Human Rights Commission, the Legal Aid Board, a law clinic or such other appropriate body or institution that may be willing and in a position to assist such party.
    b. The State or the Registrar shall not be liable for any damage or loss resulting from assistance given in good faith by that Registrar to such party in proceedings before the Court or in the enforcement of an order in terms of these rules in the form of legal advice or in the compilation or preparation of any process or document.

PART III JOINDER OF ORGANS OF STATE (RULE 5)

5 JOINDER OF ORGANS OF STATE

1. In any matter, including any appeal, where there is a dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct, or in any inquiry into the constitutionality of any law, including any Act of Parliament or that of a provincial legislature, and the authority responsible for the executive or administrative act or conduct or the threatening thereof or for the administration of any such law is not cited as a party to the case, the party challenging the constitutionality of such act or conduct or law shall, within five days of lodging with

the Registrar a document in which such contention is raised for the first time in the proceedings before the Court, take steps to join the authority concerned as a party to the proceedings.

2. No order declaring such act, conduct or law to be unconstitutional shall be made by the Court in such matter unless the provisions of this rule have been complied with.

PART IV PARTIES (RULES 6-9)

6 REPRESENTATION OF PARTIES

Except where the Court or the Chief Justice directs otherwise, no person shall be entitled to appear on behalf of any party at any proceedings of the Court unless he or she is entitled to appear in the high courts.

7 CHANGE OF PARTIES

1. If a party dies or becomes incompetent to continue any proceedings, the proceedings shall thereby be stayed until such time as an authorised representative or other competent person has been appointed in the place of such party, or until such incompetence ceases to exist.
2. Where an authorised or other competent person has been so appointed, the Court may, on application, order that such authorised or competent person be substituted for the party who has so died or become incompetent.

8 INTERVENTION OF PARTIES IN THE PROCEEDINGS

1. Any person entitled to join as a party or liable to be joined as a party in the proceedings may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a party.
2. The Court or the Chief Justice may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the proceedings as may be necessary.

9 POWER OF ATTORNEY OR AUTHORISATION TO ACT

1. A power of attorney need not be filed, but the authority of a legal practitioner to act on behalf of any party may, within 21 days after it has come to the notice of any party that the legal practitioner is so acting, or with the leave of the Court on good cause shown at any time before judgment, be disputed by notice, whereafter the legal practitioner may no longer so act, unless a power of attorney is lodged with the Registrar within 21 days of such notice.
2. Every power of attorney or authorisation to act lodged shall be signed by or on behalf of the party giving it, and shall otherwise be duly executed according to law.
3. No power of attorney or authorisation to act shall be required to be lodged by anyone acting on behalf of the State.

PART V (RULE 10)

10 AMICI CURIAE

1. Subject to these rules, any person interested in any matter before the Court may, with the written consent of all the parties in the matter before the Court, given not later than the time specified in subrule (5), be admitted therein as an amicus curiae upon such terms and conditions and with such rights and privileges as may be agreed upon in writing with all the parties before the Court or as may be directed by the Chief Justice in terms of subrule (3).
2. The written consent referred to in subrule (1) shall, within five days of it having been obtained, be lodged with the Registrar and the amicus curiae shall, in addition to any other provision, comply with the times agreed upon for the lodging of written argument.
3. The Chief Justice may amend the terms, conditions, rights and privileges agreed upon as referred to in subrule (1).
4. If the written consent referred to in subrule (1) has not been secured, any person who has an interest in any matter before the Court may apply to the Chief Justice to be admitted therein as an amicus curiae, and the Chief Justice may grant such application upon such terms and conditions and with such rights and privileges as he or she may determine.
5. If time limits are not otherwise prescribed in the directions given in that matter an application pursuant to the provisions of subrule (4) shall be made not later than five days after the lodging of the respondent's written submissions or after the time for lodging such submissions has expired.
6. An application to be admitted as an amicus curiae shall-
   a. briefly describe the interest of the amicus curiae in the proceedings;
   b. briefly identify the position to be adopted by the amicus curiae in the proceedings; and
   c. set out the submissions to be advanced by the amicus curiae, their relevance to the proceedings and his or her reasons for believing that the submissions will be useful to the Court and different from those of the other parties.
7. An amicus curiae shall have the right to lodge written argument, provided that such written argument does not repeat any matter set forth in the argument of the other parties and raises new contentions which may be useful to the Court.
8. Subject to the provisions of rule 31, an amicus curiae shall be limited to the record on appeal or referral and the facts found proved in other proceedings and shall not add thereto and shall not present oral argument.
9. An order granting leave to be admitted as an amicus curiae shall specify the date of lodging the written argument of the amicus curiae or any other relevant matter.
10. An order of Court dealing with costs may make provision for the payment of costs incurred by or as a result of the intervention of an amicus curiae.

11. The provisions of rule 1 (3) shall be applicable, with such modifications as may be necessary, to an amicus curiae.

PART VI APPLICATIONS (RULES 11-13)

11 APPLICATION PROCEDURE

1. Save where otherwise provided, in any matter in which an application is necessary for any purpose, including-
   a. in respect of a matter contemplated in section 167 (4) *(a)* of the Constitution; and
   b. the obtaining of directions from the Court,

   such application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief and shall set out an address within 25 kilometres from the office of the Registrar stating the physical and postal address with facsimile, telephone numbers and an e-mail address, where available, at which he or she will accept notice and service of all documents in the proceedings and shall set forth a day, not less than five days after service thereof on the respondent, on or before which such respondent is required to notify the applicant in writing whether he or she intends to oppose such application and shall further state that if no such notification is given, the Registrar will be requested to place the matter before the Chief Justice to be dealt with in terms of subrule (4).
2. When relief is claimed against any person, authority, government, organ of state or body, or where it is necessary or proper to give any of the aforementioned notice of an application referred to in subrule (1), the notice of motion shall be addressed to both the Registrar and the aforementioned, and shall set out such particulars, including physical address, facsimile, telephone numbers and an e-mail address, where available, of the party against whom the relief is sought, as will enable the Registrar to communicate with such party, otherwise it shall be addressed to the Registrar and shall be as near as may be in accordance with Form 1 or 2, as the case may be.
3. a. Any person opposing the granting of an order sought in the notice of motion shall—
      i. within the time stated in the said notice, notify the applicant and the Registrar in writing of his or her intention to oppose the application and shall in such notice appoint an address within 25 kilometres of the office of the Registrar at which he or she will accept notice and service of all documents in the proceedings;
      ii. within 15 days of notifying the applicant of his or her intention to oppose the application lodge his or her answering affidavit, if any, together with any relevant documents, which may include supporting affidavits.
   b. The applicant may lodge a replying affidavit within 10 days of the service upon him or her of the affidavit and documents referred to in paragraph *(a)* (ii).

c. i. Where no notice of opposition is given or where no answering affidavit in terms of paragraph *(a)* (ii) is lodged within the time referred to in paragraph *(a)* (ii), the Registrar shall within five days of the expiry thereof place the application before the Chief Justice.
ii. Where an answering affidavit is lodged, the Registrar shall place the application before the Chief Justice within five days of the lodging of the replying affidavit.

d. The Chief Justice may, when giving directions under subrule (4), permit the lodging of further affidavits.

4. When an application is placed before the Chief Justice in terms of subrule (3) *(c)*, he or she shall give directions as to how the application shall be dealt with and, in particular, as to whether it shall be set down for hearing or whether it shall be dealt with on the basis of written argument or summarily on the basis of the information contained in the affidavits.

12 Urgent Applications

1. In urgent applications, the Chief Justice may dispense with the forms and service provided for in these rules and may give directions for the matter to be dealt with at such time and in such manner and in accordance with such procedure, which shall as far as is practicable be in accordance with these rules, as may be appropriate.
2. An application in terms of subrule (1) shall on notice of motion be accompanied by an affidavit setting forth explicitly the circumstances that justify a departure from the ordinary procedures.

13 Argument

1. Written argument shall be filed timeously and shall contain a table of contents, and a table of authorities with references to the pages in the document on which they are cited.
2. Oral argument shall not be allowed if directions to that effect are given by the Chief Justice.
3. a. Oral argument shall be relevant to the issues before the Court and its duration shall be subject to such time limits as the Chief Justice may impose.
b. The parties shall assume that all the judges have read the written arguments and that there is no need to repeat what is set out therein.
4. a. Argument may be addressed to the Court in any official language and the party concerned shall not be responsible for the provision of an interpreter.
b. Should a person wish to address the Court in an official language other than the language in which such person's written argument is couched, such person shall, at least seven days prior to the hearing of the matter in question, give written notice to the Registrar of his or her intention to use another official language and shall indicate what that language is.

5. On the Court's own motion, or on the application of one or more parties, the Court may order that two or more cases, involving what appear to be the same or related questions, be argued together as one case or on such other terms as may be prescribed.

PART VII MATTERS WITHIN THE EXCLUSIVE JURISDICTION OF THE COURT (RULES 14-17)

14 REFERRAL OF A BILL

1. The referral of a Bill in terms of section 79 (4) *(b)* or 121 (2) *(b)* of the Constitution by the President of the Republic of South Africa or by the Premier of a province, as the case may be, shall be in writing and shall be addressed to the Registrar and to the Speaker of the National Assembly and the Chairperson of the National Council of Provinces, or to the Speaker of the provincial legislature in question, as the case may be.
2. Such referral shall specify-
   a. the provision or provisions of the Bill in respect of which the President of the Republic of South Africa or the Premier of a province has reservations;
   b. the constitutional provision or provisions relating to such reservations; and
   c. the grounds or reasons for such reservations.
3. Political parties represented in the national Parliament or the provincial legislature concerned, as the case may be, shall be entitled as of right to make written submissions relevant to the determination of the issue within the time specified in directions given under subrule (4).
4. Upon receipt of the referral, the matter shall be dealt with in accordance with directions given by the Chief Justice, which may include a direction-
   a. requesting the relevant Speaker or the Chairperson of the National Council of Provinces, as the case may be, for such additional information as the Chief Justice may consider to be necessary or expedient to deal with the matter; and
   b. calling upon all interested political parties in the national Parliament or the provincial legislature concerned, as the case may be, who may wish to do so to make such written submissions as are relevant to the determination of the issue within a period to be specified in such direction.

15 CONSTITUTIONALITY OF AN ACT

1. An application in terms of sections 80 (1) and 122 (1) of the Constitution by members of the National Assembly or a provincial legislature shall be brought on notice of motion supported by an affidavit as to the contentions upon which the applicants rely for relief and shall be lodged with the Registrar and

served on the Speaker of the National Assembly and, where applicable, the Chairperson of the National Council of Provinces, or on the Speaker of the provincial legislature concerned, as the case may be.

2. The notice shall request the Speaker and, if relevant, the Chairperson of the National Council of Provinces, to bring the application to the attention of all political parties represented in the relevant house or legislature in writing within five days of the service upon him or her of such application.
3. The application referred to in subrule (1) shall be accompanied by a certificate by the Speaker of the legislature concerned that the requirements of section 80 (2) *(a)* or section 122 (2) *(a)* of the Constitution, as the case may be, have been complied with.
4. The application referred to in subrule (1) shall also specify—
   a. the provision or provisions of the Act being challenged;
   b. the relevant provision or provisions of the Constitution relied upon for such challenge;
   c. the grounds upon which the respective provisions are deemed to be in conflict; and
   d. the relief, including any interim relief, sought.
5. a. Any political party in the legislature concerned or any government that wishes to oppose the granting of an order sought in such an application shall notify the Registrar in writing within 15 days of service of such application of such intention to oppose and shall, in such notification, appoint an address at which such party or government will accept notice and service of all documents in the proceedings.
   b. If such a notice is given, the application shall be disposed of in accordance with the provisions of rule 11.
6. If a notice to oppose is not lodged in terms of subrule (5), the matter shall be disposed of in accordance with directions given by the Chief Justice, which may include a direction—
   a. calling for such additional information as the Chief Justice may consider necessary or expedient to deal with the matter; and
   b. that all interested political parties in the national Parliament or the provincial legislature concerned, as the case may be, who wish to do so make such written submissions as are relevant to the determination of the issue within a period specified in such direction.

16 Confirmation of an Order of Constitutional Invalidity

1. The Registrar of a court which has made an order of constitutional invalidity as contemplated in section 172 of the Constitution shall, within 15 days of such order, lodge with the Registrar of the Court a copy of such order.
2. A person or organ of state entitled to do so and desirous of appealing against such an order in terms of section 172 (2) *(d)* of the Constitution shall, within 15 days of the making of such order, lodge a notice of appeal with the

Registrar and a copy thereof with the Registrar of the Court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice.

3. The appellant shall in such notice of appeal set forth clearly the grounds on which the appeal is brought, indicating which findings of fact and/or law are appealed against and the order it is contended ought to have been made.
4. A person or organ of state entitled to do so and desirous of applying for the confirmation of an order in terms of section 172 (2) *(d)* of the Constitution shall, within 15 days of the making of such order, lodge an application for such confirmation with the Registrar and a copy thereof with the Registrar of the Court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice.
5. If no notice or application as contemplated in subrules (2) and (4), respectively, has been lodged within the time prescribed, the matter of the confirmation of the order of invalidity shall be disposed of in accordance with directions given by the Chief Justice.

17 Certification of a Provincial Constitution

1. The Speaker of a provisional legislature which has passed or amended a constitution in terms of sections 142 and 144 (2) of the Constitution and which wishes such constitution or constitutional amendment to be certified by the Court shall certify in writing the content of the constitution or amendment passed by the provincial legislature and submit such constitution or constitutional amendment to the Registrar with a formal request to the Court to perform its functions in terms of section 144 of the Constitution.
2. The certificate contemplated in subrule (1) shall include a statement specifying that the constitution or the constitutional amendment was passed by the requisite majority.
3. Any political party represented in the provincial legislature shall be entitled as of right to present oral argument to the Court, provided that such political party may be required to submit a written submission to the Court in advance of the oral argument.
4. Upon the receipt of the request referred to in subrule (1), the matter shall be disposed of in accordance with directions given by the Chief Justice, which may include—
    a. referral to the Speaker for such additional information as is considered by the Chief Justice to be necessary or expedient to deal with the matter;
    b. a direction, specifying the time within which written submissions from interested political parties shall be made;
    c. a direction that any written submissions made in terms paragraph *(b)* should be brought to the attention of other political parties in the provincial legislature by such means as the Chief Justice considers suitable.

5. An order of the Court pursuant to section 144 of the Constitution may specify the provisions of the provincial constitution or of the constitutional amendment, if any, which comply and which do not comply with the Constitution.

PART VIII DIRECT ACCESS AND APPEALS (RULES 18-21)

18 DIRECT ACCESS

1. An application for direct access as contemplated in section 167 (6) *(a)* of the Constitution shall be brought on notice of motion, which shall be supported by an affidavit, which shall set forth the facts upon which the applicant relies for relief.
2. An application in terms of subrule (1) shall be lodged with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out—
   a. the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted;
   b. the nature of the relief sought and the grounds upon which such relief is based;
   c. whether the matter can be dealt with by the Court without the hearing of oral evidence and, if it cannot;
   d. how such evidence should be adduced and conflicts of fact resolved.
3. Any person or party wishing to oppose the application shall, within 10 days after the lodging of such application, notify the applicant and the Registrar in writing of his or her intention to oppose.
4. After such notice of intention to oppose has been received by the Registrar or where the time for the lodging of such notice has expired, the matter shall be disposed of in accordance with directions given by the Chief Justice, which may include—
   a. a direction calling upon the respondents to make written submissions to the Court within a specified time as to whether or not direct access should be granted; or
   b. a direction indicating that no written submissions or affidavits need be filed.
5. Applications for direct access may be dealt with summarily, without hearing oral or written argument other than that contained in the application itself: Provided that where the respondent has indicated his or her intention to oppose in terms of subrule (3), an application for direct access shall be granted only after the provisions of subrule (4) *(a)* have been complied with.

19 APPEALS

1. The procedure set out in this rule shall be followed in an application for leave to appeal to the Court where a decision on a constitutional matter, other than

an order of constitutional invalidity under section 172 (2) *(a)* of the Constitution, has been given by any court including the Supreme Court of Appeal, and irrespective of whether the President has refused leave or special leave to appeal.

2. A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave.
3. An application referred to in subrule (2) shall be signed by the applicant or his or her legal representative and shall contain—
   a. the decision against which the appeal is brought and the grounds upon which such decision is disputed;
   b. a statement setting out clearly and succinctly the constitutional matter raised in the decision; and any other issues including issues that are alleged to be connected with a decision on the constitutional matter;
   c. such supplementary information or argument as the applicant considers necessary to bring to the attention of the Court; and
   d. a statement indicating whether the applicant has applied or intends to apply for leave or special leave to appeal to any other court, and if so—
      i. which court;
      ii. whether such application is conditional upon the application to the Court being refused; and
      iii. the outcome of such application, if known at the time of the application to the Court.
4. a. Within 10 days from the date upon which an application referred to in subrule (2) is lodged, the respondent or respondents may respond thereto in writing, indicating whether or not the application for leave to appeal is being opposed, and if so the grounds for such opposition.
   b. The response shall be signed by the respondent or respondents or his or her or their legal representative.
5. a. A respondent or respondents wishing to lodge a cross-appeal to the Court on a constitutional matter shall, within 10 days from the date upon which an application in subrule (2) is lodged, lodge with the Registrar an application for leave to cross-appeal.
   b. The provisions of these rules with regard to appeals shall apply, with necessary modifications, to cross-appeals.
6. a. The Court shall decide whether or not to grant the appellant leave to appeal.
   b. Applications for leave to appeal may be dealt with summarily, without receiving oral or written argument other than that contained in the application itself.

c. The Court may order that the application for leave to appeal be set down for argument and direct that the written argument of the parties deal not only with the question whether the application for leave to appeal should be granted, but also with the merits of the dispute. The provisions of rule 20 shall, with necessary modifications, apply to the procedure to be followed in such procedures.

20 Procedure on Appeal

1. If leave to appeal is given in terms of rule 19, the appellant shall note and prosecute the appeal as follows:
   a. The appellant shall prepare and lodge the appeal record with the Registrar within such time as may be fixed by the Chief Justice in directions.
   b. Subject to the provisions of subrule (1) *(c)* below, the appeal record shall consist of the judgment of the court from which the appeal is noted, together with all the documentation lodged by the parties in that court and all the evidence which may have been led in the proceedings and which may be relevant to the issues that are to be determined.
   c. i. The parties shall endeavour to reach agreement on what should be included in the record and, in the absence of such agreement, the appellant shall apply to the Chief Justice for directions to be given in regard to the compilation of the record.
      ii. Such application shall be made in writing and shall set out the nature of the dispute between the parties in regard to the compilation of the record and the reasons for the appellant's contentions.
      iii. The respondent may respond to the application within 10 days of being served with the application and shall set out the reasons for the respondent's contentions.
      iv. The Chief Justice may assign the application to one or more judges, who may deal with the matter on the papers or require the parties to appear before him or her or them on a specified day and at a specified time to debate the compilation of the record.
      v. The judge or judges concerned shall give directions in regard to the compilation of the record, the time within which the record is to be lodged with the Registrar and any other matters which may be deemed by him or her or them to be necessary for the purpose of enabling the Court to deal with the appeal, which directions may include that the matter be referred back to the court a quo for the hearing of additional evidence specified in the directions, or that additional evidence be put before the Court by way of affidavit or otherwise for the purpose of the appeal.
2. a. One of the copies of the record lodged with the Registrar shall be certified as correct by the Registrar of the court appealed from.

b. Copies of the record shall be clearly typed on stout A4-size paper, double-spaced in black record ink, on one side of the paper only.
c. Legible documents that were typed or printed in their original form such as cheques and the like shall not be retyped and clear photocopies on A4-size paper shall be provided instead.
d. The pages shall be numbered clearly and consecutively and every tenth line on each page shall be numbered and the pagination used in the court a quo shall be retained where possible.
e. Bulky records shall be divided into separate conveniently-sized volumes of approximately 100 pages each. The record shall be securely bound in book format to withstand constant use and shall be so bound that upon being used will lie open without manual or other restraint.
f. All records shall be securely bound in suitable covers disclosing the case number, names of the parties, the volume number and the numbers of the pages contained in that volume, the total number of volumes, the court a quo and the names of the attorneys of the parties.
g. The binding required by this rule shall be sufficiently secure to ensure the stability of the papers contained within the volume; and where the record consists of more than one volume, the number of each volume and the number of the pages contained in a volume shall appear on the upper third of the spine of the volume.
h. Where documents are lodged with the Registrar, and such documents are recorded on a computer disk, the party lodging the document shall where possible also make available to the Registrar a disk containing the file in which the document is contained, or transmit an electronic copy of the document concerned by e-mail in a format determined by the Registrar which is compatible with software that is used by the Court at the time of lodgement, to the Registrar at: registrar@concourt.org.za: Provided that the transmission of such copy shall not relieve the party concerned from the obligation under rule 1 (3) to lodge the prescribed number of hard copies of the documents so lodged.
i. If a disk is made available to the Registrar the file will be copied and the disk will be returned to the party concerned. Where a disk or an electronic copy of a document other than a record is provided, the party need lodge only 13 copies of the document concerned with the Registrar.

3. If a record has been lodged in accordance with the provisions of paragraphs *(b)* and *(c)* of subrule (1), the Registrar shall cause a notice to be given to the parties to the appeal requiring—
   a. the appellant to lodge with the Registrar written argument in support of the appeal within a period determined by the Chief Justice and specified in such notice; and

b. the respondent to lodge with the Registrar written argument in reply to the appellant's argument by a specified date determined by the Chief Justice, which shall be subsequent to the date on which the appellant's argument was served on the respondent.

4. The appellant may lodge with the Registrar written argument in answer to the respondent's argument within 10 days from the date on which the respondent's argument was served on the appellant.
5. The Chief Justice may decide whether the appeal shall be dealt with on the basis of written arguments only.
6. Subject to the provisions of subrule (5), the Chief Justice shall determine the date on which oral argument will be heard, and the Registrar shall within five days of such determination notify all parties to the appeal of the date of the hearing by registered post or facsimile.

21 Additional Information to be Furnished to the Registrar

When an application for confirmation of an order of constitutional invalidity or a notice of appeal against such order is lodged with the Registrar in terms of rule 16, or an application for leave to appeal is lodged in terms of rule 19, the applicant or appellant shall at the same time provide the Registrar with a note—

a. setting out the length of the record, or if the record consists of evidence that has not been transcribed, an estimate of the length of the record and the time required for transcription;
b. whether there are any special circumstances that may require a hearing of more than one day or which might otherwise be relevant to the directions to be given by the Chief Justice.

Part ix Fees and Costs (Rules 22-23)

22 Taxation of Costs and Attorneys' Fees

1. Rules 17 and 18 of the Supreme Court of Appeal Rules regarding taxation and attorneys' fees shall apply, with such modifications as may be necessary.
2. In the event of oral and written argument, a fee for written argument may in appropriate circumstances be allowed as a separate item.

23 Fees of the Court

1. In addition to the Court fees already prescribed in these rules the fees in Schedule 2 shall be the fees of the court payable with revenue stamps.
2. The proviso to rule 4 (4) and the provisions of rule 4 (5) shall apply, with such modifications as may be necessary.

PART X MISCELLANEOUS PROVISIONS (RULES 24-36)

24 LIBRARY

1. The Court's library shall be available for use by the judges, the staff of the Court and other persons who have permission from the librarian for the purposes of constitutional research.
2. The library shall be open during such times as the reasonable needs of the Court may require and its operation shall be governed by the rules made by the Court's Library Committee in consultation with the Chief Justice.

25 TRANSLATIONS

Where any record or other document lodged with the Registrar contains material written in an official language that is not understood by all the judges, the Registrar shall have the portions of such record or document concerned translated by a sworn translator of the High Court into a language or languages that will be understood by such judges, and shall supply the parties with a copy of such translations.

26 MODELS, DIAGRAMS AND EXHIBITS

1. Models, diagrams and exhibits of material forming part of the evidence taken in a case and brought to the Court for its inspection shall be placed in the custody of the Registrar at least 10 days before the case is to be heard or submitted.
2. All models, diagrams and exhibits of material placed in the custody of the Registrar shall be removed by the parties within 40 days after the case is decided.
3. When this is not done, the Registrar shall notify the party concerned to remove the articles forthwith and if they are not removed within six months thereafter, the Registrar shall destroy them or otherwise appropriately dispose of them.

27 WITHDRAWAL OF CASES

Whenever all parties, at any stage of the proceedings, lodge with the Registrar an agreement in writing that a case be withdrawn, specifying the terms relating to the payment of costs and payment to the Registrar of any fees that may be due, the Registrar shall, if the Chief Justice so directs, enter such withdrawal, whereupon the Court shall no longer be seized of the matter.

28 FORMAT OF DOCUMENTS

1. Every document that exceeds 15 pages shall, regardless of the method of duplication, contain a table of contents with correct references.
2. Every document at its close shall bear the name of the party or his or her attorney, the postal and physical address, facsimile, telephone number and an e-mail address, where available, and the original document shall be signed by the party or his or her attorney.

3. a. The Registrar shall not accept for lodging any document presented in a form not in compliance with these rules, but shall return it to the defaulting party indicating respects in which there has been a failure to comply: Provided that if new and proper copies of any such document are resubmitted within five days of receiving written notification, such lodging shall not be deemed late.

   b. If the Court finds that the provisions of these rules have not been complied with, it may impose, in its discretion, appropriate sanctions.

29 Application of Certain Rules of the Uniform Rules

The following rules of the Uniform Rules shall, with such modifications as may be necessary, apply to the proceedings in the Court:

6 (7) to 6 (15)	Joinder of parties on application and related matters
28	Amendments to pleadings and documents
35 (13)	Discovery, inspection and production of documents
38 (3) to 38 (8)	Procuring evidence for trial
42	Variation and rescission of orders
59	Sworn translators
61	Interpretation of evidence
62	Filing, preparation and inspection of documents
63	Authentication of documents executed outside the Republic for use within the Republic
64	Destruction of documents
65	Commissioners of the Court

30 Application of Certain Sections of the Supreme Court Act, 1959 (Act 59 of 1959)

The following sections of the Supreme Court Act, 1959 (Act 59 of 1959), shall apply, with such modifications as may be necessary, to proceedings of and before the Court as if they were rules of their court.

19bis	Reference of particular matters for investigation by referee
22	Powers of court on hearing of appeals
32	Examinations by interrogatories of persons whose evidence is required in civil cases
33	Manner of dealing with commissions rogatoire, letters of request and documents for service originating from foreign countries: Provided that this provision shall apply subject to the replacement of English or Afrikaans with the phrase 'any official language'.

31 Documents Lodged to Canvass Factual Material

1. Any party to any proceedings before the Court and an amicus curiae properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts—
   a. are common cause or otherwise incontrovertible; or
   b. are of an official, scientific, technical or statistical nature capable of easy verification.
2. All other parties shall be entitled, within the time allowed by these rules for responding to such document, to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Court.

32 Non-compliance with the Rules

The Court or the Chief Justice may—
1. of their own accord or on application and on sufficient cause shown, extend or reduce any time period prescribed in these rules and may condone non-compliance with these rules; and
2. give such directions in matters of practice, procedure and the disposal of any appeal, application or other matter as the Court or Chief Justice may consider just and expedient.

33 Execution: Section 3 of the Constitutional Court Complementary Act, 1995 (Act 13 of 1995)

Costs orders of the Court shall be executed in the magistrate's court as follows:
1. The costs order shall have the effect of a civil judgment of the magistrate's court and the party in whose favour a costs order was made shall be deemed the judgment creditor and the party against whom such order was made shall be deemed the judgment debtor.
2. The party in whose favour a costs order was made shall, where a costs order has not been complied with, fiile with the Registrar an affidavit setting out the details of the costs order and stating that the costs order has not been complied with or has not been complied with in full, as the case may be, and the amount outstanding, and shall request the Registrar to furnish him or her with a certified copy of such costs order.
3. The Registrar shall, after having inspected the court file concerned to verify the contents of the affidavit, furnish the party referred to in subrule (2) with a certified copy of the costs order concerned and shall record such furnishing on the Court file.
4. The party referred to in subrule (2) shall file the said copy with the clerk of the civil court of the district in which he or she resides, carries on business or is employed.

5. Such order shall be executed in accordance with the provisions of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and the Magistrates' Courts Rules published under Government Notice R1108 of 21 June 1968, as amended, regarding warrants of execution against movable and immovable property and the issuing of emolument attachment orders and garnishee orders only.

34 Transitional Provisions

When a time is prescribed for any purpose in terms of these rules, and such time would otherwise have commenced to run prior to the commencement of these rules, such time shall begin to run only on the date on which these rules come into operation.

35 Repeal of Rules

The Rules of the Constitutional Court previously published shall be repealed on the date on which these rules come into operation: Provided that any directions in writing pertaining to the procedures to be followed in the determination of a dispute or an issue in cases already instituted shall remain in force, unless repealed in writing by the Chief Justice.

36 Short Title

These rules shall be called the Constitutional Court Rules, 2003.

Schedule 1 — Forms

Form 1: notice of motion to registrar
Form 2: notice of motion to registrar and respondent

Schedule 2 — Fees

	R
Lodging of any application (other than the first document)	10,00
Lodging of an answering affidavit (each)	10,00
Lodging of a notice of appeal or cross-appeal	15,00
Order of the court granting leave to appeal	15,00
For the Registrar's certificate on certified copies of documents (each)	1,00
Taxing fee in any matter	25,00

6 Costs*

Michael Bishop

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* The original version of this chapter was authored by Adrian Friedman. I am grateful that he has allowed me to draw liberally from his work in preparing this updated version. However, the views expressed in this chapter reflect my opinion alone.

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6.1 Introduction

Costs orders do not, generally, excite the passions of constitutional academics — although they most certainly interest litigants and litigators! As the Constitutional Court has noted, costs awards 'come at the tail-end of judgments as appendages to decisions on the merits.'[1] However, as the same Court has been at pains to explain, the way in which courts distribute the burden of costs in constitutional litigation is vital to the health of a constitutional democracy. If potential litigants are deterred from bringing cases by the cost of litigation, then constitutional violations will go unremedied and fewer constitutional disputes will be settled by the courts. An errant approach to costs in constitutional matters could leave important questions about the content of our basic law undecided. That is a real problem: In a constitution expressly committed to the rule of law, the absence of clearly articulated constitutional norms could put the rule of law itself in jeopardy. A constitutional democracy such as that contemplated by our Constitution only works when all actors know, in advance, what the law expects of them.

This chapter focuses primarily, though not exclusively, on the costs jurisprudence of the Constitutional Court in constitutional matters. It begins by laying out the basic principles that guide courts in awarding costs in constitutional cases. The next section considers the factors that might persuade a court to depart from the default rules. Thereafter, the third section considers a number of specific situations that might warrant a somewhat different approach to costs. Section Four considers two situations where costs can legitimately be used to limit access to courts. The fifth section looks at the relationship between higher and lower courts on the issue of costs: when can an appeal court interfere with a lower court's award? When can a litigant appeal solely on the issue of costs? The penultimate section considers the nitty-gritty of taxing costs, while the final section discussess the clarification of costs orders.

6.2 Basic principles

(a) Traditional approach

South African courts have historically treated costs as a matter of largely unfettered discretion.[2] Notwithstanding this 'free hand', a coherent set of principles on cost orders has emerged from the case law.

In civil litigation, the ordinary approach is that costs orders should indemnify a party against expenses that were incurred as a result of litigation that she should not have been required to initiate or to defend.[3] The rationale behind the rule in civil litigation is that if a private person is brought to court to defend a claim with insufficient merit, then it could hardly be fair to expect her to pay legal costs to defend an action that, objectively, ought not to have been brought in the first place.

[1] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC), 2009 (10) BCLR 1014 (CC), [2009] ZACC 14 ('*Biowatch*') at para 1.

[2] See A Cilliers *The Law of Costs* (2006) at § 14.04, citing *Neugebauer & Co Ltd v Hermann* 1923 AD 564, 575; *Penny v Walker* 1936 AD 241, 260; *Protea Assurance Co Ltd v Matinise* 1978 (1) SA 963, 976 (A); *Kilian v Geregsbode, Uitenhage* 1980 (1) SA 808, 815-816 (A).

[3] See *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another* 2002 (2) SA 64 (CC), 2002 (1) BCLR 1 (CC), [2001] ZACC 5 at para 15.

Although the Constitutional Court has departed significantly from this principle, it still remains the foundation of all costs awards. The different rules for costs in constitutional cases do not exist because the 'loser pays' principle doesn't apply. The Constitutional Court has departed from this basic principle in constitutional matters because the 'loser pays' principle is often outweighed by other, competing rationales.

The existence of competing rationales for departure from the civil law norm was recognised early on in the Constitutional Court's existence. Ackermann J, in *Ferreira v Levin NO (2)*, highlighted the two principles established by the superior courts to deal with costs orders.[1] First, the award of costs is, unless otherwise enacted, within the discretion of the judicial officer. Second, a successful litigant should ordinarily receive his costs.[2] Ackermann J was of the view that these principles were sufficiently flexible to apply to constitutional litigation and, to the extent required, adaptation could occur on a case-by-case basis.[3] Ackermann J then pointed out that (a) the second principle yields to the first principle and (b) this lexical ordering will be subject to various exceptions.[4] While not wishing to provide a comprehensive list of the exceptions that might apply, Ackermann J identified the following factors that would have a bearing on whether a successful litigant would be entitled to costs in constitutional matters: *(a)* the conduct of the parties; *(b)* the conduct of the legal representatives; *(c)* whether a party has had only a technical success; *(d)* the nature of the litigants; and *(e)* the nature of the proceedings.[5]

These principles, Justice Ackermann held,

> are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a useful point of departure. [However] if the need arises the rules may have to be substantially adapted… . . [T]his should however be done on a case by case basis. It is unnecessary, if not impossible, at this stage to attempt to formulate comprehensive rules regarding costs in constitutional litigation.[6]

For 12 years, that is how matters proceeded: the Constitutional Court applied the above-mentioned factors to various situations as they arose. Eventually, the case-by-case application crystallised into a relatively clear, if not comprehensive, set of principles for different types of cases. Those principles were finally expressly set out in a fairly full and comprehensive manner by the Court in *Biowatch Trust v Registrar Genetic Resources & Others*.[7]

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[1] 1996 (2) SA 621 (CC), 1996 (4) BCLR 441 (CC), [1996] ZACC 27 ('*Ferreira (2)*') at para 3.

[2] Ibid at para 3.

[3] Ibid. See also *Rudolph & Another v Commissioner for Inland Revenue & Others* 1996 (4) SA 552 (CC), 1996 (7) BCLR 889 (CC) at para 21.

[4] *Ferreira (2)* (supra) at para 3.

[5] Ibid.

[6] Ibid.

[7] 2009 (6) SA 232 (CC), 2009 (10) BCLR 1014 (CC), [2009] ZACC 14 ('*Biowatch*'). For commentary on *Biowatch*, see T Humber 'The *Biowatch* Case: Major Advance in South African Law of Costs and Access to Environmental Justice' (2010) 22 *Journal of Environmental Law* 125, 132 ('In the *Biowatch* decision, the Constitutional Court has made a remarkable effort to establish clarity on the question of costs in constitutional litigation.')

(b) General Approach: The *Biowatch* Framework

Biowatch not only provides the clearest and most recent statement on costs in constitutional matters, it also provides the appropriate framework through which to analyse the rest of the Court's jurisprudence on costs. *Biowatch* concerned an access to information dispute between an environmental NGO — Biowatch — and the Registrar for Genetic Resources. Biowatch had requested a range of information relating to Genetically Modified Organisms ('GMO'). The Registrar refused to provide the information, forcing Biowatch to sue. Monsanto (Pty) Ltd — a company involved in GMO production — intervened in the litigation in an attempt to prevent the disclosure of confidential information held by the Registrar. Biowatch was largely successful in its information request. It won access to eight of eleven categories of information that it had sought.[1] However, the High Court held that Biowatch's request had been framed vaguely and ineptly and therefore refused to grant a costs order against the Registrar. Instead it required each party to pay its own costs. Moreover, it ordered Biowatch to pay Monsanto's costs because the ostensibly poor quality of Biowatch's request had forced Monsanto to intervene to protect its interests. The decision on costs was confirmed by a unanimous full bench of the High Court.[2] Biowatch appealed to the Constitutional Court.

The High Court's decision sent a 'shockwave' that 'swept through the public interest law community'.[3] NGOs conducting public interest litigation — many of which relied entirely on donor funding — worried that adverse costs orders would render them unable to bring future constitutional challenges. Lawyers for Human Rights, the Centre for Child Law and the Centre for Applied Legal Studies all joined the matter as *amici curiae* in the Constitutional Court to seek a reversal of the High Court's decision.

In a unanimous judgment penned by Justice Sachs, the Court clearly set out its approach to costs in all constitutional matters. These principles convinced the Court to reverse the High Court's costs orders. It ordered the Registrar to pay Biowatch's costs and Monsanto to bear its own costs. These principles were, generally, not new; they had been developed and applied in countless cases over the previous 12 years. The value of *Biowatch* is that it brought the principles that had been developed — and the rationales supporting those principles — in the Court's existing jurisprudence together into a (largely) coherent statement on the law of costs in constitutional cases. The Court divided constitutional cases into three categories, with different rules for costs in each case. As we shall see, there are two further categories that the *Biowatch* Court did not explicitly address, but that fit neatly into the principles that the *Biowatch* Court adopted.

[1] *Trustees for the timebeing of the Biowatch Trust v Registrar Genetic Resources & Others* [2005] ZAGPHC 135.

[2] *Trustees for the time being of The Biowatch Trust v Registrar Genetic Resources & Others* [2007] ZAGPHC 270

[3] *Biowatch* (supra) at para 5.

(i) *Disputes between a private party and the state*

The first category is direct litigation between the state and private parties. Summarising its earlier jurisprudence, the *Biowatch* Court stated the principle in these cases as follows: 'ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs.'[1] Sachs J set out three reasons for this departure from the traditional principle:

> In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door.[2]

Although *Biowatch* mentions these rationales primarily in relation to the first category, they appear throughout its jurisprudence on costs and undergird the Court's approach to most classes of cases. The primary reason for almost all the deviations from the traditional 'loser pays' rule — whether the litigation directly involves the state or not — is the desire not to discourage litigants from raising legitimate constitutional claims.

[1] *Biowatch* (supra) at para 22. The Court quoted the following cases in support: *Affordable Medicines Trust & Others v Minister of Health & Another* 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC), [2005] ZACC 3 ('The award of costs is a matter which is within the discretion of the court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the court which may influence the court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case'); *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC), 2005 (11) BCLR 1053 (CC), [2005] ZACC 9 at para 55 ('Although the respondent had asked for a costs order, the applicant has brought an important issue to this Court regarding the application and interpretation of the relevant provisions of the Act. I therefore make no order as to costs'); *Volks NO v Robinson & Others* 2004 (6) SA 288 (CC), 2005 (5) BCLR 446 (CC), [2005] ZACC 2; *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC), 1999 (2) BCLR 139 (CC), [1998] ZACC 18; and *Steenkamp NO v The Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC), [2006] ZACC 16.

[2] 2009 (6) SA 232 (CC), 2009 (10) BCLR 1014 (CC), [2009] ZACC 14 at para 23.

The application of the principle is not unqualified. An application that is 'frivolous or vexatious, or in any other way manifestly inappropriate' will be treated as an ordinary civil case.[1] Moreover, '[m]erely labeling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to invoke' the special costs rule.[2] I discuss these factors in more detail below.[3]

(ii) *Disputes where the state plays a regulatory role*

The Court defined the second category of cases as 'constitutional litigation where the state is sued for a failure to fulfil its responsibilities for regulating competing claims between private parties'.[4] As Sachs J explained:

> Usually, there will be statutes or regulations which delineate the manner in which the governmental agencies involved must fulfil their responsibilities. In matters such as these a number of private parties might have opposite interests in the outcome of a dispute where a private party challenges the constitutionality of government action. The fact that more than one private party is involved in the proceedings does not mean, however, that the litigation should be characterised as being between the private parties. In essence the dispute turns on whether the governmental agencies have failed adequately to fulfil their constitutional and statutory responsibilities. Essentially, therefore, these matters involve litigation between a private party and the state, with radiating impact on other private parties.[5]

The dispute between Monsanto and Biowatch fits this description. Monsanto had been pulled into the litigation because of the Registrar's failure to fulfil its constitutional and statutory duty to provide the information to Biowatch. As the Court put it:

> [T]his case did not truly involve litigation between private parties. It was litigation in which private parties with competing interests were involved, not to settle a legal dispute between themselves, but in relation to determining whether the state had appropriately shouldered its constitutional and statutory responsibilities.[6]

Other examples that come readily to mind are applications for licenses and tenders.[7]

The rule in this category of cases is: 'the state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders

[1] *Biowatch* (supra) at para 24.
[2] Ibid at para 25.
[3] See § 6.3 below.
[4] *Biowatch* (supra) at para 26.
[5] Ibid at para 28.
[6] Ibid at para 54.
[7] The Court used two earlier cases as examples: *Fuel Retailers Association of South Africa (Pty) Ltd v Director General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & Others* 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC), [2007] ZACC 13 at para 107 (A dispute about whether environmental approval to permit a fuel station had been properly granted. The proprietors of the station argued that it had, an association of fuel retailers contended that it had not.); *Walele v City of Cape Town & Others* 2008 (6) SA 129 (CC), 2008 (11) BCLR 1067 (CC), [2008] ZACC 11 (Dispute between private parties over a municipality's decision to grant approval for building.) See also, for example, *Department of Land Affairs & Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC), 2007 (10) BCLR 1027 (CC), [2007] ZACC 12 at para 89 (In a land

against any private litigants who have become involved.'[1] In *Biowatch*, the rule resulted in a finding that while the state must pay Biowatch's costs, Monsanto must bear its own costs.[2]

Biowatch does not tell us what the appropriate principle is when the challenge is unsuccessful. In *Omar v Government, RSA & Others*, the Constitutional Court found that although the applicant's challenge to the Domestic Violence Act[3] was 'to a considerable extent ill-conceived', no costs order should be made in favour of the governmental entities defending the Act.[4] At the same time, however, the Court ordered the applicant to pay the costs of the third respondent.[5] The third respondent, the applicant's ex-wife under Islamic law, had been obliged to acquire various protection orders against the applicant in terms of the Domestic Violence Act. The *Omar* Court viewed that matter as one in which the state regulated a private dispute between husband and wife. Stated as a general principle: unsuccessful private parties will not pay the costs of the state, but will pay the costs of other private parties. Fair enough. Moreover, it squares with the rationales articulated in *Biowatch*. As a matter of practice, however, the actual outcome is likely to depend on the nature of the issue, the parties involved and how compelling a constitutional point was raised.

(iii) *True private disputes*

The third class of cases is true private disputes. Contractual disputes, arguments over intellectual property, private delictual disputes and defamation claims readily fall into this category. Here, the *Biowatch* Court failed to provide clear guidance. It began by endorsing the earlier decision in *Barkhuizen v Napier*,[6] a case in which the applicant had unsuccessfully raised a constitutional challenge to a contractual provision. The *Barkhuizen* Court had made no order as to costs on the grounds that the determination of these contractual 'issues is beneficial not only to the parties in this case but to all those who are involved in contractual relationships.'[7] The general principle in *Barkhuizen* — that Sachs J in *Biowatch* appeared to ten-

restitution dispute, the Court held that the dispute was really between the claimants and the state and that, although the current landowner had resisted the claim, it should only pay its own costs); *MEC for Education: Kwazulu-Natal & Others v Pillay* 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC), [2007] ZACC 21 at para 118 (Court upheld a challenge by a pupil to a decision of her school not to permit her to wear a nose stud. In dealing with costs, Langa CJ, held that the pupil should receive her costs and that the School should not have to pay costs as it had found itself 'at the centre of a difficult constitutional issue' and had 'played an important role in ventilating' that dispute. The provincial Department of Education therefore paid all the pupil's costs.)

[1] *Biowatch* (supra) at para 56.

[2] Ibid at paras 58-59.

[3] Act 116 of 1998.

[4] 2006 (2) SA 289 (CC), 2006 (2) BCLR 253 (CC), [2005] ZACC 17 ('*Omar*').

[5] Ibid at para 64.

[6] *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC), [2007] ZACC 5.

[7] Ibid at para 90 quoted in *Biowatch* (supra) at para 26. The Court followed a similar approach in *Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd & Another* 2006 (6) SA 103 (CC), 2006 (6) BCLR 669 (CC), [2006] ZACC 5 at para 28 (although dismissing leave to appeal, the Court held that the applicant had 'sought to raise important constitutional issues in this Court' and therefore made no order as to costs.)

tatively endorse — seems to be that private parties engaged in a *bona fide* private constitutional dispute should bear their own costs.

However, the *Biowatch* Court noted (in a footnote) that there were several similar cases where the Court *had* ordered costs against the unsuccessful private party. In *Laugh it Off,*[1] *Khumalo*[2] and *NM*[3] — all cases involving clashes between freedom of expression and other constitutional rights — the Court ordered costs to follow the result. Thus, the *Biowatch* Court was confronted with two lines of cases and two different principles: one line of cases awarded costs to successful private litigants; the other line of cases required each party to bear its own costs.

The Court avoided dealing with this inconsistency. It wrote: 'The present matter does not ... require us to consider whether the award of costs in those matters is consistent with the decision in *Barkhuizen* or with the general principles outlined in this judgment.'[4] The *Biowatch* Court declined to decide whether different rules obtain for different private disputes or different kinds of claims, or if its earlier decisions were wrong.

Fortunately, the Court provided some clarity — at the expense of backtracking on the principles announced in *Biowatch* — in *Bothma v Els*.[5] The *Bothma* Court concluded: 'The general principle as far as private litigation is concerned is that costs will ordinarily follow the result' however, there would be 'exceptional cases' which would justify a departure from this rule.[6] The primary factor 'justifying this departure from the general rule has been the extent to which the pursuit of public interest litigation could be unduly chilled by an adverse costs order.'[7]

Bothma provides a clear statement of principle and (more-or-less) reconciles the two lines of cases. Private litigants that raise constitutional claims solely to achieve commercial or private ends should be treated like litigants in ordinary, non-constitutional disputes.[8] However, private litigants that raise constitutional claims for non-commercial reasons — those who litigate in the 'public interest',

[1] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC), [2005] ZACC 7.

[2] *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC), [2002] ZACC 12.

[3] *NM & Others v Smith & Others* 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC), [2007] ZACC 6.

[4] *Biowatch* (supra) at fn 31.

[5] *Bothma v Els & Others* 2010 (2) SA 622 (CC), 2010 (1) SACR 184 (CC), 2010 (1) BCLR 1 (CC), [2009] ZACC 27 ('*Bothma*').

[6] Ibid at paras 91-93.

[7] Ibid at para 93.

[8] See, for example, *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC), [1998] ZACC 17 ('*Fedsure*') at para 116 (Although the Court did not, in *Fedsure*, explain the basis for awarding costs against the appellants, it has subsequently explained that an unsuccessful applicant will be required to pay costs when pursuing a private commercial interest); *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited Seafoods Division Fish Processing* 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 (CC), [2000] ZACC 10 at para 52 ('In this Court, the general principle has been established that parties should not be discouraged from asserting and vindicating their fundamental constitutional rights and freedoms as against the state. This principle does not apply to all private litigants unsuccessfully asserting constitutional claims against the state. This Court has for instance ordered such litigants to pay costs in the absence of good faith, or where the litigant mulcted in costs was apparently pursuing private commercial interests.' (footnotes omitted)).

as the *Bothma* Court puts it — should not be mulcted in costs for raising constitutional claims.

I discuss the reliance on a litigant's motive — which I believe is mistaken — in more detail below.[1] Suffice it to say that I believe the basic *Bothma* position to be undesirable (even as it tidies up the obvious incongruity in the law.) The Court had it right in *Barkhuizen* and *Biowatch*. As *Bothma* itself notes,[2] two of the three *Biowatch* rationales that justify a departure from the traditional approach to costs in litigation between citizens and the state apply to constitutional litigation between private parties: (a) the high costs of constitutional litigation will deter private parties from raising constitutional claims; and (b) constitutional decisions — even in private litigation — redound to the benefit of other members of the commonweal. In my view, the third *Biowatch* rationale — that it is the state that is ultimately responsible for unconstitutional laws — will usually apply to litigation between private parties. Most private constitutional litigation involves a claim that the existing law should be developed (in the case of the common law), or interpreted (in the case of legislation) to bring it in line with the Constitution. It is ultimately the state that is responsible for allowing those unconstitutional laws to remain in effect.[3] If all three rationales apply equally, then it makes little sense to apply a different default rule. It may be that departures from the rule will more often be justified in pure private disputes. But that fact is not reason enough to change the default position.

Applying the *Bothma* rule will not only contradict the *Biowatch* rationales, it will also, in some cases, be unfair on a more basic level. *Bothma* seems to assume that parties rely on the Constitution in private disputes either for narrow, selfish personal gain, or in the public interest. That is false. Litigants can also rely on constitutional rights simply because they want their rights protected. They can do this without expecting any additional, commercial gain and without consciously doing so in the public interest. They should not be penalised for doing so.

Bothma is a perfect example of this type of motivation and of the unfairness of the rule. Bothma, who alleged that Els had repeatedly raped her thirty-nine years earlier, instituted a private prosecution against him. Els went to the High Court to seek a permanent stay of that prosecution. He argued that his right to a fair trial would be impaired by a trial so long after the alleged crime. The High Court granted the stay. The Constitutional Court reversed and allowed the private prosecution to proceed. However, it acknowledged that Els's reliance on the right to a fair trial was genuine, not frivolous. However, in deciding to order Els to pay Bothma's costs, Sachs J wrote: 'The proceedings in effect sought to deny Mrs Bothma the opportunity to establish at the trial a factual explanation for her long delay in laying a complaint.'[4] The Court characterized Els' opposition as mere obstructionism. But Els' concerns about the fairness of his trial raised legitimate constitutional issues: if

[1] See § 6.3*(a)* below.

[2] *Bothma* (supra) at para 95.

[3] On this view, the line between the second and third category largely evaporates. The difference is not in the nature of the state's involvement, but the more practical difference that the state is not a party to the case. If the state were a party in *Laugh it Off*, *Khumalo*, *NM* or *Bothma*, then I have little doubt the Court would have found a way to make them bear a large portion of the costs.

[4] *Bothma* (supra) at para 98.

having a trial after such a long delay would render the trial unfair, then a permanent stay of prosecution might be warranted. It seems harsh in the extreme to require Els to pay Bothma's costs for trying to enforce his right to a fair trial without knowing (which the Court did not) whether Bothma's allegations are true or not.[1]

(iv) *Inter-governmental disputes*

Biowatch only addresses the three aforementioned categories. A fourth category of cases exists: inter-governmental disputes. Although the Constitution — and the Inter-governmental Relations Framework Act[2] — asks that government entities exhaust all possible avenues of non-judicial dispute resolution,[3] inter-governmental litigation does occur. The Court has not been explicit on this issue, but it seems that the general principle is that each government entity should bear its own costs. In *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & Others* — a dispute between local and provincial governments — Jafta J wrote of the question of costs:

> Wisely so, none of the parties have asked for costs. Excluding the *amici curiae*, all parties that took part in the hearing of this matter are organs of state. In addition the matter raises constitutional issues of some considerable importance. Therefore, there should be no order as to costs.[4]

While Jafta J articulates the preferred approach, it should not — as is the case with all costs orders — be a hard and fast rule. The conduct of the parties, or the nature of the issue involved, may require a different result. The role of the parties in failing to find a non-judicial solution to the dispute will, quite likely, be particularly relevant. For example, should costs be equally born when one party attempted to find a non-litigious solution, while the other ignored all efforts to arrive at a mutually agreeable outcome? (Of course, one must ask 'who pays' — inevitably, the taxpayer — and how uncooperative state parties can be made held to account for their lack of institutional comity. The latter question is not easily answered.)

(v) *Criminal litigation*

Criminal cases constitute the fifth and final category. At common law, costs orders are generally not made in criminal cases. As the Court held in *Sanderson*, in 'criminal

[1] The Court was perhaps influenced by the unusual character of the dispute — an application to prevent a private prosecution. The award of costs in private prosecutions is specifically addressed by the Criminal Procedure Act 51 of 1977 ss 14–17. But the Court does not refer to these sections and explicitly treats the case as a pure private dispute — despite the inevitable impact of the state's decision not to prosecute. Despite its mixed character, *Bothma* can properly be treated as reflecting the Court's attitude to costs in private disputes.

[2] Act 13 of 2005.

[3] See, generally, S Woolman & T Roux 'Co-operative Government & Intergovernmental Relations' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS1, July 2009) Chapter 14.

[4] [2010] ZACC 11 at para 94.

proceedings, which are instituted by the state … costs orders are not competent'.[1] This conclusion rather easily aligns with the general principle when the applicant is unsuccessful. Criminal accused should be entitled to raise all constitutional claims without fear of an adverse costs order. Of course, this rule, like all costs rules, is not inflexible. In *Thint Holdings (Southern Africa) (Pty) Ltd & Another v National Director of Public Prosecutions,* the Court required the unsuccessful applicants to pay the state's costs.[2] The applicants had persisted in challenging the validity of a letter to Mauritian officials requesting evidence, despite the fact that it became increasingly clear during the litigation that they would be able to challenge the admissibility of the evidence at the trial.[3]

However, the rule — that there should be no costs orders in criminal cases — also seems to apply when the applicant is *successful*. A litigant who successfully argues that a statute that led (or may lead) to his conviction is unconstitutional, or that his trial was unfairly conducted, is not entitled to his costs, but a litigant who successfully argues that he has a right to make funny t-shirts is.[4] This principle is so deeply embedded that the Court often does not even mention the question of costs when the criminal litigant has been successful. Moreover, while it has been crystal clear about what the rule is, it has never provided a rationale for the rule.

At first, this rule may appear strange. Why should a criminal accused who successfully argues that his constitutional right to a fair trial (or some other right) was violated by the state be treated differently from a civil litigant? The facts of *Weare* indicate the degree of absurdity at work.[5] Weare pre-emptively challenged the constitutionality of a provincial law that prevented juristic persons from holding a bookmaker's license. He lost, but the Court did not award costs against him — despite his commercial motivation — because

> the litigation is a challenge to a law which it is alleged the applicants have contravened. Any person contravening the Ordinance is guilty of an offence and subject to a fine of up to R5000 or two years' imprisonment or both. In my view, this Court should be careful not to dissuade litigants from challenging the constitutionality of laws of the state under which they face statutory penalties.[6]

That conclusion dovetails with the Court's general approach to costs. Yet, if Mr Weare had waited until he was actually accused before challenging the legislation,

[1] *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC), [1997] ZACC 18 at para 44. See also *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re: Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC), [2000] ZACC 12 ('*Hyundai*') at para 59; *Harksen v President of the Republic of South Africa & Others* 2000 (2) SA 825 (CC), 2000 (5) BCLR 478 (CC), [2000] ZACC 29 at para 30; *S & Others v Van Rooyen & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC), [2002] ZACC 8 at para 270; *S v Basson* 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC), [2004] ZACC 13 at para 78.

[2] 2009 (1) SA 141 (CC), 2008 (2) SACR 557 (CC), 2009 (3) BCLR 309 (CC), [2008] ZACC 14.

[3] Ibid at para 68.

[4] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International & Another* 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC), [2005] ZACC 7.

[5] *Weare & Another v Ndebele NO & Others* 2009 (1) SA 600 (CC), 2009 (4) BCLR 370 (CC), [2008] ZACC 20.

[6] Ibid at para 79.

he would not have been entitled to his costs because it would be a criminal case. Can this distinction be justified?

On reflection, there are three plausible (but ultimately unconvincing) reasons for this approach. First, we would not want to discourage the state from bringing *bona fide* prosecutions because of the fear of costs. There is always some unpredictability in prosecuting a case: a prosecutor never knows how witnesses will perform on the stand, what evidence the judge will admit and so forth. If the state risked an adverse costs order every time it lost, then it might be inclined to prosecute fewer cases. This rationale is also supported by various sections of the Criminal Procedure Act[1] that temper the general rule by permitting courts to make awards of costs where, for example, the state unsuccessfully appeals against a High Court order.[2] In addition, accused who believe their prosecution was *mala fide* can sue for malicious prosecution. These provisions indicate that, as long as the state acts in good faith, it should not pay defendants' costs.

While a powerful rationale in ordinary criminal cases, I am not convinced that it ought to apply to allegations of rights violations. In such cases the state has manifestly not acted properly because it has either given the specific accused an unfair trial, or has allowed a law that violates the accused person's rights to remain on the books. The state can legitimately be mulcted in costs because it has failed to fulfil its constitutional duty to provide fair trials, and not violate other rights. The Court has not hesitated to apply different rules to constitutional civil matters than are applied in ordinary civil matters. No compelling reason exists to fail to make such a distinction in criminal cases.

The second rationale is that the vast majority of criminal defendants do not in fact pay for their defence team. They are either represented by the Legal Aid Board or some other form of pro bono representation. In those cases it makes no sense to shift funds between the NPA and the Legal Aid Board. Although that may be a powerful rationale in the majority of cases, it does not provide a sufficient explanation in cases where the accused does indeed pay for her own defence.

Third, it could be argued that the primary rationale for a different attitude to costs in constitutional cases — that costs would chill constitutional litigation — does not apply to criminal cases. Those persons charged with crimes are likely to raise whatever issues they can to avoid conviction — including constitutional claims. The threat of punishment renders the issue of costs a less important factor because issues of cost are unlikely to deter the accused from raising constitutional issues that may lead to their acquittal. However, the rule does not fit with the other

[1] Act 51 of 1977 ('CPA').

[2] See CPA s 65A(2)*(c)*(If the state unsuccessfully appeals against the granting of bail, then the court may order the state to pay the accused's costs); CPA s 306(3)(If the accused takes a Magistrates' Court decision on review, then the state cannot be ordered to pay costs, whatever the outcome); CPA s 310A(6)(If the state appeals against the sentence of lower court, the appeal court may order the state to pay the accused's costs); CPA s 311(2)(If the state appeals against a High Court conviction to the Supreme Court of Appeal and the appeal is dismissed, then the appeal court may order costs against the state); CPA s 316B(3)(If the state appeals to the Supreme Court of Appeal against the sentence of a High Court, then the appeal court may order the state to pay the accused's costs); CPA s 342A(3)*(e)*(If proceedings are being delayed unreasonably, then each party must pay the cost it caused).

two *Biowatch* rationales. Constitutional claims in criminal cases redound to the benefit of the greater society just as much as civil constitutional complaints. They ensure that 'everyone' receives fair trials and, in some cases, that the state strikes unconstitutional laws from the books. In addition, the state, in criminal matters, will always be responsible either for the unconstitutional law on the books, or the unconstitutional conduct.

I can discern no compelling rationale for the unique treatment of costs in constitutional criminal cases. The Court has squarely confronted the issue of costs in civil cases. It should apply its mind with equal force to the underlying principles of costs in criminal cases.

It is possible that a more basic, unmentionable explanation exists: Criminals — and even innocent persons charged with a crime — are viewed as dangers to the realm and treated as outcasts. So while fellow citizens pressing constitutional civil claims enjoy our sympathy to some degree, alleged criminals do not. 'They' are the problem. 'They' are what ills the land. Surely these lepers amongst us ought not to enjoy the benefits of cost orders even when they ensure that the law on the books is 'fair' and 'just' for anyone charged in a criminal matter. The Constitutional Court has never endorsed this reasoning, and it does not square with its jurisprudence on the rights of criminals. Nonetheless, until the Court explains its position, there will be a suspicion that this rather natural bias tacitly informs their decisions.

(vi) *Conclusion*

To recap, the following general principles apply in the five categories:

(a) Litigation between private party and the state — if private party wins, then the state pays costs; if the state wins, then each party pays their own costs;
(b) Litigation between private parties as a result of state failure — state should pay the successful party's costs; no costs against any additional private parties involved in litigation; unsuccessful private party pays other private parties' costs;
(c) Litigation between private parties — the successful party gets its costs, unless there are exceptional circumstances, which most often concern whether the litigation is in the public interest;
(d) Inter-governmental litigation — each party bears its own costs;
(e) Criminal proceedings — no costs order.

While these principles provide clear starting points for each class of cases, reasons will often exist to deviate from them. In the next section I discuss those reasons that might justify departing from the default position.

6.3 Factors Justifying a Departure from the Default Approach

Various factors, particularly the conduct of litigants, are likely to have a bearing on the award of costs. However there is no closed list; a court will consider virtually any feature of a case that may be germane to a cost order. That said, the most commonly considered factors are: (a) the motivation for the litigation; (b) the conduct of the parties; and (c) whether the parties achieved full or partial success.

(a) The reason for litigation

The reason a party chooses to litigate is, on the Court's current approach, a relevant factor in deciding on a costs award. However, this rationale requires more reflection than might be commonly expected. For while the *Biowatch* Court unambiguously held that motivation was not relevant to a costs order, only four months later the *Bothma* Court later re-entrenched the relevance of purpose. How should one treat this disjunction? I break the discussion down into three parts. First, I consider, again, the tension between *Biowatch* and *Bothma*. Second, I attempt to reconcile these two apparently opposing positions. Third, I contend that motivation should not be relevant to determining costs.

Before going further, I should note that purpose is primarily relevant in true private disputes. It is unlikely that the purpose of litigation alone will be sufficient to convince a court to depart from the default position in other disputes.

(i) *Bothma v Biowatch*

The reason for the litigation is, on the authority of *Bothma v Els*, a relevant consideration. Those who litigate for commercial gain are more likely to pay the other side's costs if they are unsuccessful and less likely to receive their costs if they are successful, than litigants who go to court for the public good. As the *Bothma* Court puts it, '[a] factor that has loomed large in justifying this departure from the general rule [that the successful party should receive its costs] has been the extent to which the pursuit of *public interest litigation* could be unduly chilled by an adverse costs order.'[1] Although the *Bothma* Court does not define 'public interest litigation', it clearly does not embrace litigation motivated by pure economic interest. This principle has guided the Court in earlier cases as well. The Court has even held that 'when the litigation is pursued for private commercial gain' an unsuccessful litigant should pay the costs of the other party — even when the other party is the state.[2]

At first glance, this conclusion seems quite reasonable. Unfortunately, it runs counter to a powerful argument made by the same court in *Biowatch*.[3] One of the

[1] *Bothma v Els & Others* 2010 (2) SA 622 (CC), 2010 (1) SACR 184 (CC), 2010 (1) BCLR 1 (CC), [2009] ZACC 27 ('*Bothma*') at para 93 (my emphasis).

[2] *Weare & Another v Ndebele NO & Others* 2009 (1) SA 600 (CC), 2009 (4) BCLR 370 (CC), [2008] ZACC 20 at para 78 citing *South African Commercial Catering and Allied Workers Union (SACCAWU) & Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 (CC), [2000] ZACC 10 at para 51, with reference to *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC), [1998] ZACC 17 at para 116.

[3] See T Humber 'The *Biowatch* Case: Major Advance in South African Law of Costs and Access to Environmental Justice' (2010) 22 *Journal of Environmental Law* 125, 133 ('At first blush, the Court's rejection of an approach that would take the nature of the parties or the causes they advance into account is a point of criticism: By failing to acknowledge that parties do not come to court with an equality of arms — especially in the environmental sphere — the Court in fact perpetuates the systemic unfairness that bedevils access to justice in South Africa. But this avoidance is in fact a carefully considered and brilliant move because it effectively circumvents difficult questions as to which parties are acting 'in the public interest' and which are not, or what the threshold might be if the capacity of the 'war chest' with which litigants come to court should be taken into account. Unlike the test formulated with regard to protective costs orders in the UK, or attempts to formulate a special approach to costs in public interest litigation in other jurisdictions,

arguments advanced by the NGO *amici* was that courts should promote public-interest litigation by being slow to make costs orders against entities litigating in the public interest. The Constitutional Court strongly rejected this argument. While Sachs J acknowledged the important role that public interest litigators play in maintaining the vitality of a constitutional democracy, he held that the focus when determining an appropriate costs order should not be on the characterisation of the parties, but on the issues. It should not matter whether the litigant in respect of whom a costs order may be made is acting in its own name or in the public interest, is possessed of funds, is indigent or is reliant on external funding. 'The primary consideration in constitutional litigation', the *Biowatch* Court found, 'must be the way in which a costs order would hinder or promote the advancement of constitutional justice.'[1] The Court held, further, that the principle of equal protection before the law envisaged in s 9(1) of the Constitution required courts to focus on whether litigants sought to assert rights protected by the Constitution and not on whether a litigant was rich and litigating for commercial gain or was externally funded and acting in the public interest:

> Courts are obligated to be impartial with regard to litigants who appear before them. Thus, *litigants should not be treated disadvantageously in making costs and related awards simply because they are pursuing commercial interests and have deep pockets. Nor should they be looked upon with favour because they are fighting for the poor and lack funds themselves.* What matters is whether rich or poor, advantaged or disadvantaged, they are asserting rights protected by the Constitution.[2]

It is difficult to square the statements in *Biowatch* with *Bothma*. If litigants should not 'be looked upon with favour because they are fighting for the poor', why should we consider whether they are litigating in the public interest rather than for commercial gain?

It is possible to read the cases together if we construe the finding in *Biowatch* very narrowly. The argument rejected in *Biowatch* was that the *status* of the litigant should be relevant — that merely because they were an NGO, they should not be mulcted in costs. That is different from the *reason* a litigant raises a constitutional claim. An NGO can, conceivably, litigate for its own commercial advantage, just as a large corporation could litigate for non-commercial reasons. Although some of the language in *Biowatch* slips between status and reason, the core of the argument is that the nature of the institution is irrelevant. The central point in *Bothma* turns on the motivation for litigation, not the nature of the party. This distinction does not perfectly align all of the costs orders in existing case law. Instances certainly exist in which the Court has explicitly deemed a commercial motivation relevant. But it seems the best way to uphold the forceful point made in *Biowatch* with the decision in *Bothma* and the Court's longstanding and ongoing practice of relying on motivation.

However, the Court is still wrong to consider motivation. The Constitution does not exist only to protect the poor and the vulnerable, it exists to protect all

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the Constitutional Court's approach in the *Biowatch* matter leaves very little room for a subsequent restrictive interpretation of the principles it lays forth. All that matters is whether the litigation has been undertaken to assert constitutional rights and whether there has been any impropriety in the manner in which it has been conducted.')(Footnotes omitted)

[1] *Biowatch* (supra) at para 16.

[2] Ibid at para 17 (my emphasis).

members of society, including the rich and powerful. As Justice Sachs wrote in *Biowatch*:

> It is true that our Constitution is a transformative one based on the understanding that there is a great deal of systemic unfairness in our society. This could be an important, even decisive factor to be taken into account in determining the actual substantive merits of the litigation. It has no bearing, however, on the entitlement of all litigants to be accorded equal status when asserting their rights in a court of law.[1]

Some constitutional rights — the right to property, freedom of trade — are *intended* to protect commercial interests. Other rights — expression,[2] dignity[3] and equality[4] — can also be raised for commercial reasons. Assuming a constitutional point was legitimately raised, to scrutinise the motive for relying on a right creates a hierarchy of rights: those that protect the poor and vulnerable are more important than those that protect the rich and powerful. The Court has, correctly, explicitly rejected the notion of a hierarchy of rights. It should not allow that notion to creep into its jurisprudence through the backdoor of costs.

Perhaps the biggest danger is the uncertainty that still reigns in this area. While the status/motivation distinction makes sense of the Court's jurisprudence, the Court has not clearly endorsed it. The result is that private parties thinking about raising constitutional claims will be uncertain about how costs will be determined in their case. That uncertainty *will chill constitutional litigation* as parties are less likely to take the risk of litigating without certainty about how costs are likely to be distributed. The Court would do well to take the next opportunity to provide a clear answer to this question.

(ii) *Motivation in practice*

Despite the contested terrain discussed above, in numerous instances the Court has considered the commercial motivations of parties in making a costs award. Here are but a few examples.

In *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* the applicants had challenged the anti-dumping recommendation of the International Trade Administration Commission as it related to its trade in steel wire.[5] Their application failed, and the Court found no reason why — in what was essentially a commercial matter that raised some constitutional questions — costs should not follow the result.[6]

The Court in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & Another* also relied on the applicant's commercial motivation.[7] The applicant argued that an arbitration it had been involved in had not been fairly conducted and had, as a

[1] *Biowatch* (supra) at para 17.

[2] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International & Another* 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC), [2005] ZACC 7.

[3] *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC), [2007] ZACC 5.

[4] *Weare & Another v Ndebele NO & Others* 2009 (1) SA 600 (CC), 2009 (4) BCLR 370 (CC), [2008] ZACC 20 ('*Weave*').

[5] 2010 (5) BCLR 457 (CC), [2010] ZACC 6.

[6] Ibid at para 113.

[7] 2009 (4) SA 529 (CC), 2009 (6) BCLR 527 (CC), [2009] ZACC 6 ('*Mphaphuli*').

result, violated its FC s 34 right of access to court. A slim majority of the Court found that FC s 34 does not apply directly to private arbitrations.[1] On the issue of costs, O'Regan ADCJ concluded:

> Mphaphuli has raised a constitutional issue in this Court. The respondents were brought to this Court to answer that argument. They did not rely on any constitutional right of their own but disputed the constitutional argument made by the applicant. Properly construed, therefore, this is private litigation relating to a commercial matter and the applicant has lost. In my view, it should pay the costs, including those consequent upon the employment of two counsel.[2]

However, in *Weare* the Court overlooked the applicant's commercial motivation because 'this Court should be careful not to dissuade litigants from challenging the constitutionality of laws of the state under which they face statutory penalties.'[3] And in *Giddey*, despite holding that, in commercial matters, to force a litigant to provide security for costs did not violate the right of access to courts, O'Regan J made no costs order because 'the applicant has raised a constitutional issue of some importance'.[4]

The Court does not seem to adopt a principled position here. In some cases a commercial motivation is relevant, while in others it is trumped by the importance of the constitutional issue, or the Court's analysis of the fairness of the issue. Successful litigants will always be able to raise the commercial motivations of their opponents, but there is no guarantee that they will receive their costs.

(b) Partial success

When a litigant is only partial successful — or only successful on a technical, rather than a substantive point — this outcome may affect the court's determination of costs. The Court's first substantive decision on costs — *Ferreira v Levin NO (2)* — recognized this tenet. In *Ferreira v Levin NO (1)*,[5] the applicants had challenged the constitutionality of section 417 of the Companies Act.[6] Section 417 provided for enquiries to be held in respect of companies being wound up for failure to pay their debts. The gist of the applicants' complaint was that they were required, in terms of the provision, to give evidence in such an enquiry and evidence they gave could later be used against them in a criminal trial. The Court declared the section unconstitutional to the extent that the evidence could be used in a subsequent criminal trial. In *Ferreira v Levin NO (2)*, the Court dealt with the question of costs. The applicants had been only partially successful. The order of the Constitutional Court in *Ferreira (1)* still permitted the enquiry to take place and only barred the use of evidence in a subsequent criminal trial. In *Ferreira (2)*,

[1] For a discussion on the right of access to courts, although not of *Mphaphuli*, see J Brickhill & A Friedman 'Access to Courts' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 59.

[2] *Mphaphuli* (supra) at para 279.

[3] *Weare* (supra) at para 79.

[4] *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC), 2007 (2) BCLR 125 (CC), [2006] ZACC 13 at para 35.

[5] *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC), [1995] ZACC 13 ('*Ferreira (1)*').

[6] Act 61 of 1973.

therefore, the Court held that the applicants had not been successful as against the respondents. The respondents wanted evidence from the applicants and, notwithstanding the order in *Ferreira (1)*, were still able to secure it.[1] The applicants were, therefore, not entitled to their costs.[2] The Court has adopted a similar approach where a litigant claiming the return of foreign currency was successful with regard to some, but not all of the money,[3] in a dispute over a third party's rights to frozen assets,[4] and in a disagreement between provincial and national governments over local government legislation.[5]

The rule — or rather standard — is by no means firm. There are instances where an applicant does not achieve full success, but still receives its costs. If the claim — or the defence — is substantially (but not completely) successful, then the costs award will probably not be affected. *Biowatch* is perhaps the best example. Biowatch was only partially successful in the sense that it obtained only eight out of the eleven categories of information it had sought. Yet it still received its costs.[6] Similarly, in *Dawood*, the applicants succeeded in the substance of their appeal, but lost in their appeal against the suspension of the order of invalidity that had been granted by the High Court.[7] They still received their costs.

(c) Conduct of the litigation

One of the primary factors that will always affect a court's award of costs is the way that the litigants have conducted the litigation. If they have litigated vexatiously (including if the constitutional issue they raise has no firm basis in the Constitution) or abused the Court's process, the Court is likely to punish them by denying them costs to which they would otherwise be entitled or to order costs

[1] See *Ferreira v Levin NO & Others; Vryenhoek and Others v Powell NO & Others* 1996 (2) SA 621 (CC), 1996 (4) BCLR 441 (CC), [1996] ZACC 27 ('*Ferreira (2)*') at para 5.

[2] *Ferreira (2)* (supra) at para 7. See also *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC), 2008 (8) BCLR 771 (CC), [2008] ZACC 6 at para 76 (Partially successful applicants bear their own costs.)

[3] *Van Der Merwe & Another v Taylor NO & Others* [2007] ZACC 16, 2007 (11) BCLR 1167 (CC), 2008 (1) SA 1 (CC).

[4] *Fraser v ABSA Bank Limited* 2007 (3) SA 484 (CC), 2007 (3) BCLR 219 (CC), [2006] ZACC 24 (The applicant's assets had been frozen, except for what he needed for legal fees. ABSA, who had obtained default judgment against the applicant, applied to prevent the applicant from spending his unfrozen assets on legal fees as that would deplete the money available to satisfy its debt. The applicant succeeded in preventing the money that would be used for his legal fees from being frozen. But ABSA succeeded in being permitted to intervene in proceedings that would determine the extent of the assets the applicant would be able to use. The Court accordingly made no costs order.)

[5] *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development*; *Executive Council, KwaZulu-Natal v President of the Republic of South Africa & Others* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC), [1999] ZACC 13 at para 138 (The Western Cape and KwaZulu-Natal challenged the constitutionality of the whole Local Government: Municipal Structures Act. They succeeded only with regard to some sections. One of the reasons Ngcobo J supplied for making no costs award was that the applicants had only been partially successful.)

[6] *Biowatch* (supra).

[7] *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC), [2000] ZACC 8.

against them when they would otherwise have escaped without paying costs. In particularly severe cases, the court can make a punitive costs award.[1]

In this section I discuss the general issue of conduct under three subheadings. One, raising frivolous constitutional claims. Two, vexatious litigation. Three, other inappropriate conduct.

(i) *Frivolous Constitutional Claims*

In *Biowatch*, the Court held that a person raising a constitutional matter vexatiously would not be entitled to his costs. Sachs J wrote:

> Merely labeling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to invoke the general rule …. The issues must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication.[2]

It is difficult to find examples of such cases. The Constitutional Court will ordinarily dismiss frivolous constitutional claims without a judgment. If it hears the case, then there will almost always be a plausible constitutional claim. However, in the High Court, litigants should not expect that throwing in random references to the Constitution will protect them from costs orders.

(ii) *Vexatious Litigation*

Occasionally an unsuccessful applicant raises an important constitutional matter, but does so in the context of vexatious and unmeritorious litigation. The Constitutional Court has held that it would be unfair to expect the respondents in such matters to bear their own costs and has awarded costs to them. The classic example must be *Beinash & Another v Ernst & Young & Others*.[3] The respondents obtained an order against the applicants — who had instituted 45 different claims against the respondents — in terms of the Vexatious Proceedings Act.[4] They thereby prevented the applicants from instituting any litigation without the permission of the High Court. The applicants appealed to the Constitutional Court, arguing that the Act violated their right of access to court. Mokgoro J disagreed and held that 'by litigating as persistently and vexatiously as they did, the applicants placed respondents in the untenable position where they had to respond to such unmeritorious litigation, resulting in unnecessary costs. … In the circumstances, costs should follow the result.'[5]

(iii) *General inappropriate conduct*

There is no closed list of the type of conduct that might affect a court's decision on costs. What follows are merely some examples from the Constitutional Court's

[1] See §6.5 below.

[2] *Biowatch* (supra) at para 25.

[3] *Beinash & Another v Ernst & Young & Others* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC), [1998] ZACC 13 ('*Beinash*').

[4] Act 3 of 1956.

[5] *Beinash* (supra) at para 30.

history of conduct that influenced the Court's decision on costs — but was not so objectionable as to justify a punitive order.

In *Motsepe v Commissioner for Inland Revenue*,[1] the applicant sought and was granted an order referring to the Constitutional Court questions regarding the constitutionality of certain provisions of the Income Tax Act.[2] The Constitutional Court held that the referral was not competent because not only was the constitutionality of the Act not germane with respect to the matter before the Supreme Court, but the applicant had failed to pursue potential non-constitutional remedies.[3] The Constitutional Court held that, although its general approach was not to award costs against unsuccessful applicants, this approach would not be followed to the extent that litigants would be 'induced into believing that they are free to challenge the constitutionality of statutory provisions … no matter how spurious the grounds for doing so may be or how remote the possibility that [the Constitutional Court] will grant them access.'[4] Such a state of affairs would undermine the administration of justice and be unfair to those opposing this kind of application.[5] Given that the applicant had not explained her failure to use the non-constitutional remedies available in the Act and had revealed a general lack of candour in her papers before the Constitutional Court, the Court in *Motsepe* concluded that her application constituted a delaying tactic that justified an award of costs against her.[6]

In *Minister of Health & Another v New Clicks & Others*, the Constitutional Court was contronted with a government respondent that, in the Supreme Court of Appeal, had refused to address the merits of the case.[7] The circumstances that led to this decision were as follows: Various pharmacies challenged medicine pricing regulations. They were unsuccessful in the High Court, and sought an appeal to the Supreme Court of Appeal. Despite the urgency of the matter, the High Court delayed for several months in handing down its judgment on leave to appeal. The pharmacies approached the Supreme Court of Appeal for leave to appeal before the High Court's judgment was handed down and the matter was set down in the Supreme Court of Appeal with the application for leave to appeal to be argued together with the merits (which would be determined should leave be granted). The Minister's counsel refused to address the Supreme Court of Appeal on the merits, arguing that the Supreme Court of Appeal had no jurisdiction to hear argument on the merits until the question of leave to appeal was determined by the High Court.

[1] *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC), 1997 (6) BCLR 692 (CC), [1997] ZACC 3 ('*Motsepe*').

[2] Act 58 of 1962.

[3] *Motsepe* (supra) at paras 20, 22-23.

[4] Ibid at para 30.

[5] Ibid.

[6] Ibid at para 31.

[7] *Minister of Health & Another v New Clicks SA (Pty) Ltd & Others (Treatment Action Campaign and Innovative Medicines SA as Amici Curiae)* 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 (CC), [2005] ZACC 14 ('*New Clicks*').

The Constitutional Court condemned the Minister's refusal to address the merits.[1] To underscore its disapproval, the Court in *New Clicks* ordered the Minister to pay half of the pharmacies' costs in the Constitutional Court and the High Court and full costs in the Supreme Court of Appeal.[2]

A far worse example of abusing court process occurred in *President of the Republic of South Africa & Others v Quagliani*.[3] In an earlier decision, the Court had decided complex issues relating to the validity of South Africa's extradition agreements with various other countries.[4] On the morning that judgment was to be handed down, the applicants brought an application to postpone judgment and join the Speaker of the National Assembly and the Chairperson of the National Council of Provinces. The Court postponed judgment in order to allow the parties to address the issue. When it delivered the judgment approximately a month later, it observed: 'To say that the application for postponement of delivery of this judgment is remarkable would be a gross understatement.'[5] It severely criticised the applicants for bringing the application so late and required the parties to make submissions on who should bear the costs of the abortive application, including whether a punitive order should be made.

In *Quagliani II*, the Court granted costs against the applicant despite the applicant's attorneys contention that they were merely trying to act in the best interests of their client. Justice Sachs explained the *Quagliani II* Court's rejection of the applicant's argument as follows:

> [T]he only explanation for the extraordinary lateness of the application boiled down to a fear by the legal representatives that they might have paid insufficient attention during the four years of the litigation to the need to comply with certain procedural requirements. If the advantages of hindsight were allowed to prevail, litigants anticipating defeat would have second, third, and even fourth or fifth bites of the cherry. The litigation would be endless, court planning would be impossible and legal representatives would be rewarded for inadequate preparation.[6]

Although a lawyer should do all in her power for her client, 'it is quite unacceptable for a legal representative to clutch at each and every straw, giving false hope to a client, even if the motive is to do one's best on behalf of the client.'[7] However, the Court did not find the attorneys' conduct so unacceptable as to warrant a punitive order against them. Instead, it held that the applicant himself should bear the risk of instructing his attorneys to lodge the application and ordered costs to be imposed on an attorney and client scale.[8]

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[1] *New Clicks* (supra) at para 82. Although this discussion forms part of the judgment of Chaskalson CJ, which did not represent the majority on all issues, a majority of the Court concurred in this part of Chaskalson CJ's judgment. In addition, there is nothing to suggest that the dissenting members of the Court disagreed with this aspect of Chaskalson CJ's judgment.

[2] Ibid at para 21.

[3] 2009 (8) BCLR 785 (CC), [2009] ZACC 9 ('*Quagliani II*').

[4] *President of the Republic of South Africa & Others v Quagliani* 2009 (4) BCLR 345 (CC), [2009] ZACC 1 ('*Quagliani I*').

[5] *Quagliani I* (supra) at para 70.

[6] *Quagliani II* (supra) at para 7.

[7] Ibid at para 9.

[8] Ibid at para 10.

While in *Quagliani* the litigant was penalised for acting too late, in *Chonco II*, the Court ordered costs against the applicants for acting too hastily.[1] In *Chonco I*,[2] the Court held that the applicants — who sought to have their applications for political pardons decided — had incorrectly sued the Minister for Justice and Constitutional Development, when they should have sued the President. The applicants took the Court's advice and sued the President nine days later. Too quick, the Court held. As it turned out, on the day of the hearing the President largely conceded to all of the applicants' demands and indicated that he had considered most of the 384 applications. The applicants — despite the long history of presidential disinterest in the matter — should, the Court held, have first given the President an opportunity to respond to *Chonco I* before litigating anew. Khampepe J wrote as follows:

> I am mindful that the applicants, in the context of this case, would wish to vindicate their rights with greater urgency and use these proceedings as a 'bargaining chip'. This Court would not wish to deprive the litigants of a necessary weapon to use in order to vindicate their rights. But in the circumstances it is difficult not to conclude that the institution of these proceedings was hasty. At the very least, it behoved the applicants to put the Presidency on terms before resorting to litigation. A simple letter to the President putting him on terms or making inquiries in regard to the processing of their applications for pardon, given the decision in *Chonco 1*, would have sufficed.[3]

Similarly, in *Koyabe*, the Court criticised the applicants for failing to exhaust available internal remedies, before resorting to litigation.[4] Had the state not also acted inappropriately, they might have been forced to pay the state's costs.[5]

The Court has, finally, departed from the default positions when litigants failed (a) to initiate urgent challenges at the appropriate time;[6] (b) to properly identify the issues;[7] and (c) to use the proper procedure when raising an important constitutional matter.[8]

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[1] *Chonco & Others v President of the Republic of South Africa* 2010 (6) BCLR 511 (CC), [2010] ZACC 7 ('*Chonco II*').

[2] *Minister for Justice and Constitutional Development v Chonco & Others* [2009] 2010 (4) SA 82 (CC), 2010 (1) SACR 325 (CC), 2010 (2) BCLR 140 (CC), ZACC 25 ('*Chonco I*').

[3] *Chonco II* (supra) at para 13.

[4] *Koyabe & Others v Minister for Home Affairs & Others* [2009] 2010 (4) SA 327 (CC), 2009 (12) BCLR 1192 (CC), ZACC 23 ('*Koyabe*') at para 86.

[5] Ibid at para 87.

[6] *A Party & Another v The Minister for Home Affairs & Others, Moloko & Others v The Minister for Home Affairs & Another* [2009] 2009 (3) SA 649 (CC), 2009 (6) BCLR 611 (CC), ZACC 4 at para 82 (The applicant successfully challenged legislation prohibiting citizens from voting overseas. The challenge had been brought only months before the 2009 national election. This would have influenced the Court to deny the applicant its costs, had the government not also acted inappropriately.)

[7] *Chagi & Others v Special Investigating Unit* 2009 (2) SA 1 (CC), 2009 (3) BCLR 227 (CC), 2009 (1) SACR 339 (CC), [2008] ZACC 22 at para 49 (Court made no order on costs as both parties had been responsible for confusing the issue in the SCA.)

[8] *Transvaal Agricultural Union v Minister of Land Affairs & Another* 1997 (2) SA 621 (CC), 1996 (12) BCLR 1573 (CC), [1996] ZACC 22 at para 47.

(iv) *State's duty to the Court*

In addition to the ordinary rules that govern all litigants' conduct, constitutional litigation imposes special duties upon the state.[1] The state's ability to discharge those duties will affect the nature of any cost order that might be levied against them.

Gory v Kolver NO & Others[2] concerned a challenge to s 1(1) of the Intestate Succession Act.[3] This section of the Act conferred rights of intestate succession on heterosexual spouses but not on homosexual life partners. The applicant for confirmation had successfully challenged the constitutionality of s 1(1) in the High Court. In the High Court, the Minister of Justice and Constitutional Development did not formally oppose the application and filed an answering affidavit only on the issue of the potential retrospectivity of the declaration of invalidity.[4] The High Court did not limit the retrospectivity of its order in the manner suggested by the Minister. When the applicant applied for confirmation to the Constitutional Court, he sought a costs order against the Minister. The Minister opposed confirmation, not on the basis of the failure of the High Court to limit the retrospectivity of its order, but simply because the applicant sought a costs order against her.[5]

The Court ordered that the Minister bear the applicant's costs, not only in the Constitutional Court, but in the High Court as well. In oral argument, counsel for the Minister explained that she did not abandon her concerns about retrospectivity and opposed confirmation of that part of the order of the High Court dealing with retrospectivity despite the fact that she had not, in her papers before the Constitutional Court, done so formally. This argument was, in the *Gory* Court's view, inadequate. The Court held that something more substantive is required from a state official responsible for the administration of a statute declared unconstitutional when the question of appropriate remedy comes before the Court.[6] The Minister ought to have formally opposed confirmation in the Constitutional Court on the question of remedy and filed heads of argument dealing with the matter. Moreover, Van Heerden AJ pointed out that the state is under a constitutional duty to respect and promote the rights in the Bill of Rights — that duty encompasses the creation of an appropriate remedy for unconstitutional provisions in statutes. Despite this duty, no comprehensive legislation on same-sex partnerships had been enacted and same-sex couples had repeatedly been obliged to approach the courts for piece-meal relief. On the Court's view, since the State had created the circumstances that led to the constitutional challenge, justice required that the state bear the ill resourced applicant's

[1] See M Chaskalson, G Marcus & M Bishop 'Constitutional Litigation' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) § 3.7.

[2] *Gory v Kolver NO & Others (Starke & Others intervening)* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC), [2006] ZACC 20 ('*Gory*').

[3] Act 81 of 1987.

[4] *Gory* (supra) at para 62.

[5] Ibid at para 64.

[6] Ibid.

costs in what it deemed to be an important constitutional challenge.[1] This line of argument is largely a variation on the reasoning that justifies the default position in cases where the state plays a regulatory role. However, the *Gory* court, in addition also relies on the specific litigation choices of the Minister.

In a somewhat more extraordinary state of affairs, the Court has relied on this line of reasoning in ordering the state to pay costs even though the state was ultimately successful. In *Minister for Justice and Constitutional Development v Chonco & Others,* the respondents challenged the failure of the Minister to decide on their applications for pardons.[2] The High Court found in their favour. However, the Constitutional Court overturned the High Court's decision. It held that the respondents should have sued the President, not the Minister. Despite the respondent's procedural error, the Court found that the Minister's failure to discharge her responsibilities justified awarding costs against the state. Government intransigence with respect to such a significant issue, in the Court's view, far outweighed any mistake the respondent's counsel might have made. Langa CJ wrote:

> Six years have passed since Mr Chonco posted his application for pardon to the Minister. Yet, despite public undertakings made by the President and the Minister to expedite a response to the applications, the respondents have waited in vain. This is unacceptable. The Constitution requires that all constitutional obligations, wherever they lie, 'must be performed diligently and without delay.'[3]

(d) Miscellaneous

In addition to the major factors discussed above — motivation, the extent of success, conduct and the state's special duties — an endless variety of other factors could be deemed relevant to the determination of a costs order. A few, discussed below, give one a taste of the diverse range of concerns that can influence such determinations.

(i) *Role of Attorney*

Where an attorney initiates an action in his own name, on behalf of others, and in order to secure an order that does not affect him personally, courts must carefully scrutinize the litigation for abuse.[4] Even so, the Constitutional Court has applied

[1] *Gory* (supra) at para 65. This finding does not suggest that the relevant Minister will always be obliged to oppose confirmation when a High Court has declared legislation unconstitutional. Rather, where the relevant Minister can render substantive assistance to the Court in crafting the appropriate remedy — which will almost always be the case when a statute under her administration is declared unconstitutional — she should do so.

[2] 2010 (4) SA 82 (CC), 2010 (2) BCLR 140 (CC), 2010 (1) SACR 325 (CC), [2009] ZACC 25 ('*Chonco I*').

[3] Ibid at para 47.

[4] *Minister of Home Affairs v Eisenberg & Others* 2003 (5) SA 281 (CC), 2003 (8) BCLR 838 (CC), [2003] ZACC 10 ('*Eisenberg*') at para 72.

its pro-applicant costs order principles in relation to unsuccessful litigation initiated by an attorney seeking to challenge regulations affecting his clients.[1]

(ii) *Who funds the litigation*

The funder of the litigation may be relevant to a costs order. In *Mohamed & Another v President of the RSA & Others,* the applicant was handed over to the United States authorities, on their request, to stand trial in the US for his alleged part in the 1998 bombings of US embassies in Kenya and Tanzania.[2] Mohamed succeeded in his challenge to the lawfulness of this exchange because the South African authorities had failed to secure an assurance from US authorities that the applicant would not face the death penalty if convicted.[3] However, the Court declined to make a costs order in favour of the applicant. Although the applicant had successfully prosecuted an important constitutional claim, the United States government had paid his legal fees.[4] Making a costs order in his favour would 'effectively oblige the South African government to reimburse the United States government, for whose benefit and at whose instance' the applicant had been deported.[5] Unlike costs orders that turn on the status of the parties themselves, the costs order in *Mohamed* reflect the intervention of a non-party, 'external' funder of the litigation.

6.3 Specific Cases

The preceding sections have laid out the general rules for costs and the factors that might motivate a court to depart from those rules. This section considers a few specific situations that, although they may still fit the general pattern, warrant separate consideration.

(a) Interlocutory applications

In *SARFU III*,[6] the Constitutional Court endorsed the following dictum from *Fripp v Gibbon and Co* in respect of interlocutory orders:

> I agree that as a rule it is fair and just that the costs should follow the event, whether of claim or counterclaim. But I cannot agree with the view that the unsuccessful party should bear the burden of all the costs simply on the ground that in the final result he is the unsuccessful party. To me it seems more in accordance with the principles of equity and justice that costs incurred in the course of litigation which judged by the event or events, prove

[1] *Eisenberg* (supra). See also, *Kruger v President of the Republic of South Africa & Others* 2009 (1) SA 417 (CC), 2009 (3) BCLR 268 (CC), [2008] ZACC 17 (Attorney challenged an unintentional error of the President to bring amendments to the Road Accident Fund Act into effect on the wrong dates. He acted both in his own interest and that of his clients. The fact that it was an attorney acting did not affect the award of costs.)

[2] 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC), [2001] ZACC 18 at para 7.

[3] Ibid at para 73.

[4] Ibid at para 72.

[5] Ibid.

[6] *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC), [1999] ZACC 11 ('*SARFU III*').

> to have been unnecessarily or ineffectively incurred should, as a rule, be borne by the party responsible for such costs.[1]

So, in cases in which it is appropriate for the respondent to bear the costs and in which there have been interlocutory orders made by the Court, the Court will not simply award all costs to the applicant. When it comes to costs orders for the interlocutory applications, it will assess each individually.[2] The party who succeeds with an interlocutory order will receive its costs.[3] Again, the Court has emphasized the discretionary nature of such costs orders and the reluctance of appellate courts to interfere with existing costs orders by the High Courts. However, the Court's ruling in *SARFU III* suggests that the Court will overturn costs orders of the High Court with respect to successful interlocutory applications where appropriate.[4]

Despite endorsing the separation of interlocutory claims, the Court does not always follow its own advice. In *Independent Newspapers*, the Court considered a newspaper group's claim to open to the public, sealed portions of the Court's record in a case involving the dismissal of the head of the National Intelligence Agency.[5] In an interlocutory application, the newspaper group argued that its directors and lawyers should have access to the sealed part of the record in order to prepare argument on whether they should ultimately be made public. The Court found against Independent Newspapers in the interlocutory application, but they were partially successful in having some of the sealed parts of the record released. Moseneke DCJ made no costs order in the main application and then held:

> The [interlocutory] application was merely interim and must be disposed of as part of the main application. Another relevant consideration is that the arguments which were advanced in relation to the interlocutory application were in great part repeated in relation to the main application. I would follow the course I have taken in relation to the main application and that is to make no order as to costs in the interlocutory application as well.[6]

Perhaps *Independent Newspapers* is a special case as the substantive issues in the main and interlocutory applications were largely the same. But the case does indicate that costs in interim applications can not be completely divorced from the outcome and conduct of the main case.

(b) Matters Disposed of on the Papers

The Constitutional Court has held that it will not ordinarily make a costs order when an application is dealt with summarily — and thus without written or oral argument — on the basis of information contained in the affidavits.[7] Although

[1] 1913 AD 354, 361 cited in *SARFU III* (supra) at para 247.
[2] *SARFU III* (supra) at para 247.
[3] Ibid at paras 248-249.
[4] Ibid at paras 246-250.
[5] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC), 2008 (8) BCLR 771 (CC), [2008] ZACC 6 ('*Independent Newspapers*').
[6] Ibid at para 78.
[7] See, for example, *Brummer v Gorfil Brothers Investments (Pty) Ltd & Others* 2000 (2) SA 837 (CC), 2000 (5) BCLR 465 (CC) at para 7.

the Court has not announced it, the same rule seems to apply in cases that are dismissed without any judgment.

(c) Hague Convention on Civil Aspects of International Child Abduction (1980)

The Hague Convention on Civil Aspects of International Child Abduction protects children from the harmful effects of their wrongful removal or retention from the state of their habitual residence.[1] The Convention also provides for their prompt return to the place of origin. It has been incorporated into South African law by the Civil Aspects of International Child Abduction Act.[2]

States parties are obliged to designate a 'Central Authority' to discharge the duties that the Convention imposes.[3] In South Africa, the Family Advocate is designated as the Central Authority.[4] Since the Family Advocate must ensure the return of children wrongfully removed from their state of habitual residence, the Family Advocate must sometimes adopt an adversarial role with respect to a parent who resists the return of the child.[5]

In *LS v AT,* the parents of a young girl were divorced in Canada. A court order allowed the mother to leave Canada for one month with the girl on the condition that she return with the child. When the mother did not return and the father instituted proceedings for the return of the girl, the Family Advocate intervened to ensure that the girl was indeed returned. Despite ordering that the mother return the child to Canada, the Constitutional Court overturned the order of the High Court that the mother was to pay the costs of the Family Advocate. The Convention provides that the Central Authorities of states parties must bear their own costs and it was not appropriate, therefore, for the mother to bear the Family Advocate's costs.[6]

(d) Costs in Applications in Terms of FC s 80

In terms of the Interim Constitution,[7] the Constitutional Court had exclusive jurisdiction in cases involving 'any dispute over the constitutionality of any Bill before Parliament or a provincial legislature'.[8] This jurisdiction would only be exercised 'at the request of the Speaker of the National Assembly, the President of the Senate or the Speaker of a provincial legislature, who [was required to] make such a request to the Court upon receipt of a petition by at least one-third of all the members of the National Assembly, the Senate or such provincial legislature, as the case may be, requiring him or her to do so.'[9] The Constitutional Court re-inforced the principle, in light of the content of IC s 98, that an unsuccessful

[1] See *LS v AT & Another* 2001 (2) BCLR 152 (CC)('*LS*') at para 10.
[2] Act 72 of 1996.
[3] *LS* (supra) at para 13.
[4] Ibid.
[5] Ibid at para 14.
[6] Ibid at para 55.
[7] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').
[8] IC s 98(2)*(d)*.
[9] IC s 98(9).

applicant who raises an important constitutional issue should not be penalized with a costs order.[1]

FC s 80 contains similar, if somewhat more detailed, language regarding costs orders:

> (1) Members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional.
> (2) An application:
> *(a)* must be supported by at least one third of the members of the National Assembly; and
> *(b)* must be made within 30 days of the date on which the President assented to and signed the Act.
> (3) The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application if:
> *(a)* the interests of justice require this; and
> *(b)* the application has a reasonable prospect of success.
> (4) If an application is unsuccessful, and did not have a reasonable prospect of success, the Constitutional Court may order the applicants to pay costs.

FC s 80 sketches out the contours of a test to determine the question of costs in such matters: if an application does not have a reasonable prospect of success, the court may make a costs order against the applicants. However, since the provision leaves the matter in the discretion of the Court, the Constitutional Court need not depart from its general approach to costs: if the applicant raises an important constitutional issue, then it will ordinarily not be penalized in costs if it loses.

In the context of the equivalent provision in the Interim Constitution, the Court pointed out the kinds of exceptions that might exist to this principle:

> This [principle that losing applicants are not mulcted in costs], of course, does not mean that such litigants can be completely protected from that risk. The Court, in its discretion, might direct that they pay the costs of their adversaries if, for example, the grounds of attack on the impugned statute are frivolous or vexatious or they have acted from improper motives or there are other circumstances which make it in the interest of justice to direct that such costs should be paid by the losing party.[2]

Again: the text of FC s 80 accommodates the existing approach of the Constitutional Court. A bona fide applicant will not be forced to pay costs. However, where an application has been launched in terms of FC s 80 and there are no reasonable prospects of success, this abuse of process will often, but not always, amount to conduct justifying a costs order against the applicants.

[1] See *In re: National Education Policy Bill No 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC), [1996] ZACC 3 at para 36; *In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995*; *In re Payment of Salaries, Allowances and other Privileges to the Ingonyama Bill of 1995* 1996 (4) SA 653 (CC), 1996 (7) BCLR 903 (CC), [1996] ZACC 15 at para 49.

[2] *In re: The School Education Bill of 1995* (supra) at para 36.

(e) Counsel appearing at the request of the Court and *Amicus Curiae*

Where counsel appears at the request of the Constitutional Court, it is not customary for the court to make a costs order against the losing party[1] or in favour of a partially successful applicant.[2] In the case of a successful applicant, no costs are awarded because the applicant has incurred no costs.[3] The same rule applies to *amicus curiae*. The Court has held that, whatever the outcome, an *amicus* 'is neither a loser nor a winner and is generally not entitled to be awarded costs.'[4] The issue is discussed in detail in Geoff Budlender's chapter on *amicus curiae*.[5]

6.4 Using Costs to Prevent Litigation: Settlement and Security

This section addresses two seemingly disparate issues: (a) the effect of a rejected settlement offer on costs; and (b) the ability of a court to demand that an applicant provide security for the other party's costs before initiating litigation. What these subjects have in common is that they are both legitimate ways to use the threat of costs to keep potential litigants out of court. Both tactics have been, weakly, endorsed by the Constitutional Court.

(a) Settlement Offers

Rule 34 of the Uniform Rules of Court regulates offers of settlement. Rule 34(11) states: 'The fact that an offer or tender referred to in this rule has been made may be brought to the notice of the court after judgment has been given as being relevant to the question of costs.' The role of rule 34(11) was considered by the Constitutional Court in *NM v Smith*.[6] The plaintiffs had sued the defendants — the author, publisher and subject of an authorised biography of the politician Patricia De Lille — for revealing their HIV status without their consent. The plaintiffs had participated in a controversial HIV study conducted by the University of Pretoria. De Lille was involved in subsequent investigations of the study, an episode which was related in her biography. On the morning of the trial, the defendants offered the plaintiffs R35 000 each and a private apology as a settlement. The offer did not include an admission of liability. The plaintiffs refused the offer. The plaintiffs were only partially successful in the High Court and received R15 000 in damages. After the trial, the rejected settlement offer was revealed to the judge. Subsequent to the revelation, the judge ordered the plaintiffs to pay the defendants' costs from three days after the offer was made until judgment was handed down.

[1] See *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC), [1997] ZACC 7 at para 43.

[2] See *Sibiya & Others v Director of Public Prosecutions: Johannesburg High Court & Others* 2005 (5) SA 315 (CC), 2005 (8) BCLR 812 (CC), [2005] ZACC 6 ('*Sibiya*') at para 63.

[3] Ibid.

[4] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1235 (CC), [2000] ZA 17 at para 63.

[5] Geoff Budlender 'Amicus Curiae' in Stu Woolman, Theunis Roux & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 8.5.

[6] *NM & Others v Smith & Others* 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC), [2007] ZACC 6 ('*NM*').

The majority of the Constitutional Court overruled the High Court. The *NM* Court held the defendants liable for *iniuria*. It also awarded the respondents R35 000 in damages. The Court then overturned the High Court's award of costs and required each party to bear its own costs in both the High Court and the Constitutional Court. Although both parties specifically addressed the role of Rule 34 in the constitutional scheme the Court had created for considering costs, the majority avoided any engagement with the legitimacy or the effects of the rule. Instead, the *NM* Court focused on the timing and nature of the settlement offer. In the *NM* Court's view it had been made too hastily, without any attempt at negotiation.

The truly interesting statements on Rule 34 come from the partially dissenting judgment of Chief Justice Langa. The Chief Justice tackled the rule head-on. He held that the discretion to award costs in light of a settlement offer had to be exercised differently when the case concerned constitutional rights. He offered two reasons for this conclusion. First, money alone is not (always) enough to vindicate constitutional rights.[1] Second, Langa CJ noted that constitutional litigation — even between private parties — often demands a systemic and wide-reaching change in the existing law. The threat of an adverse costs order for failing to take a settlement offer could permit rich, powerful litigants to prevent changes to the law by making generous offers to keep the issue from being decided by a court. (Indeed, insurance companies are notorious for using settlement offers to avoid litigation that might establish an adverse precedent.) In the Chief Justice's words:

> There is a danger that the risk of adverse costs orders, despite ultimate success, might permit rich and powerful defendants to prevent the law from adapting to meet constitutional imperatives by throwing money at plaintiffs who cannot afford to take that chance. It already takes immense courage for ordinary people to take large powerful defendants to court and the additional peril of an adverse costs order will mean even fewer plaintiffs get their day in court. That could easily have happened in this case and the liability of media defendants for disclosing private medical facts would have remained unquestioned. The achievement of our constitutional vision should not be obstructed by the vested interests of those who have the money to protect them.[2]

The Chief Justice does not mean that costs can never be granted against plaintiffs who refuse settlement offers in constitutional cases. Rather, as this entire chapter has made patently clear, the litigation of constitutional rights dramatically 'alters the framework within which [a court's] discretion [with respect to costs] must be exercised'.[3] Langa CJ would have ordered the respondents to pay all of the applicants costs in both courts. While the Chief Justice's views on Rule 34 are beyond reproach, they attracted neither the attention nor the support of the majority. Post-*NM*, Rule 34 should be applied identically in constitutional and non-constitutional matters.

[1] *NM* (supra) at para 119 ('No matter the value of the offer, it does not give the acknowledgement of wrong-doing that is often far more valuable than any money could be.')

[2] Ibid at para 120.

[3] Ibid at para 121.

(b) Security for Costs

Section 13 of the Companies Act[1] permits a court to order a plaintiff company to provide security for the defendant's costs if there is reason to believe that it will not be able to afford an adverse costs order. If the company cannot provide security, then it will be prevented from litigating. The application of this provision was fully canvassed by the Constitutional Court in *Giddey NO v JC Barnard and Partners*.[2] The liquidator of a company had sued its previous accountants for failing to hold R100 million in trust. The accountants then made a s 13 application for costs to avoid defending the issue. The High Court granted the order and the applicant appealed to the Constitutional Court. Importantly, the applicant did not challenge the constitutionality of s 13; he merely argued that it should be applied in light of the right of access to court.[3]

O'Regan J lucidly explained the purpose of s 13:

> A salutary effect of the ordinary rule of costs — that unsuccessful litigants must pay the costs of their opponents — is to deter would-be plaintiffs from instituting proceedings vexatiously or in circumstances where their prospects of success are poor. Where a limited liability company will be unable to pay its debts, that salutary effect may well be attenuated. Thus the main purpose of section 13 is to ensure that companies, who are unlikely to be able to pay costs and therefore not effectively at risk of an adverse costs order if unsuccessful, do not institute litigation vexatiously or in circumstances where they have no prospects of success thus causing their opponents unnecessary and irrecoverable legal expense.[4]

A court has a discretion whether to grant the application for security. In exercising its discretion, a court should 'balance the potential injustice to a plaintiff if it is prevented from pursuing a legitimate claim as a result of an order requiring it to pay security for costs, on the one hand, against the potential injustice to a defendant who successfully defends the claim, and yet may well have to pay all its own costs in the litigation.'[5] In performing this balancing act, a court should also consider: 'the likelihood that the effect of an order to furnish security will be to terminate the plaintiff's action; the attempts the plaintiff has made to find financial assistance from its shareholders or creditors; … whether it is the conduct of the defendant that has caused the financial difficulties of the plaintiff; as well as the nature of the plaintiff's action.'[6] Section 13 was not capable, Justice O'Regan held, of being read to prohibit an award for security for costs where the award would prevent the plaintiff company from bringing the litigation. Absent a future constitutional challenge, bankrupt companies can be prevented from initiating litigation through s 13.

6.5 Costs Orders of Lower Courts

This section considers, first, when an appellate court can alter lower court's costs

[1] Act 61 of 1973.
[2] 2007 (5) SA 525 (CC), 2007 (2) BCLR 125 (CC), [2006] ZACC 13 ('*Giddey*').
[3] Ibid at para 18.
[4] Ibid at para 7.
[5] Ibid at para 8.
[6] Ibid at para 30.

award (when it reaches the same outcome on the merits) and, second, when it is permissible to appeal only the question of costs.

(a) Cost Orders of Lower Courts[1]

The award of costs is a discretionary matter and an appellate court will be slow to interfere with a costs order made by a lower court. The Constitutional Court, adopting the approach of Corbett JA in *Attorney-General, Eastern Cape v Blom & Others*,[2] has held that the circumstances in which such interference will be justified are limited 'to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question.'[3]

However, in *Sanderson v Attorney-General, Eastern Cape*,[4] the Constitutional Court set aside what appears, on its face, to be a perfectly reasonable costs order by the High Court. The appellant (applicant in the High Court) had unsuccessfully sought various relief based on his right to a fair trial. The High Court had applied the ordinary approach to costs and awarded the costs to the respondents. Although the appellant was unsuccessful in the Constitutional Court, the court set aside the costs order of the High Court on the basis that the principle that an unsuccessful litigant who raises a substantial constitutional issue should not be mulcted in costs applies equally to the other courts.[5] The fact that the constitutional issues were raised during the course of a criminal trial, in which costs orders are generally not competent, shaped the Court's decision in *Sanderson*.[6] The Court has followed the same approach in at least one non-criminal matter. In *ANC v Minister of Local Government and Housing, KwaZulu-Natal*,[7] the Court overturned the costs order of the court a quo against unsuccessful appellants who had raised an important constitutional issue.[8]

In *Bel Porto School Governing Body & Others v Premier of the Province, Western Cape & Another*, the appellants had initially applied to the High Court for an order compelling the respondents to provide information.[9] The appellants received the information just prior to the hearing. They then sought to amend their prayers, in light of this information, and mounted a substantive challenge to various aspects of the province's education policy. The High Court issued a costs order against the appel-

[1] The term 'lower court' is often used to refer to the 'inferior courts' such as the magistrates' courts. I use the term here to refer to all courts beneath the Constitutional Court.

[2] 1988 (4) SA 645, 670D–F (A).

[3] *Premier, Province of Mpumalanga & Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC), [1998] ZACC 20 at para 53. See also *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC), [2004] ZACC 20 at para 110 (Court refused to find that the High Court had exercised its discretion improperly.) See *Biowatch Trust v Registrar Genetic Resources & Others* 2009 (6) SA 232 (CC), 2009 (10) BCLR 1014 (CC), [2009] ZACC 14 at paras 29-31.

[4] 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC), [1997] ZACC 18 ('*Sanderson*').

[5] Ibid at para 44. See also *Mohamed & Another v President of the RSA & Others* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC), [2001] ZACC 18 at para 72 (The same approach was followed.)

[6] *Sanderson* (supra) at para 44.

[7] 1998 (3) SA 1 (CC), 1998 (4) BCLR 399 (CC), [1998] ZACC 2.

[8] Ibid at para 34.

[9] *Bel Porto School Governing Body & Others v Premier of the Western Cape Province & Another* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC), [2002] ZACC 2 ('*Bel Porto*').

lants with respect to the application for information. In the Constitutional Court, the appellants sought an order overturning this costs order.[1] Chaskalson CJ refused to interfere with the costs order of the High Court on the grounds that the Constitutional Court 'should not be required to determine questions of law that have no relevance other than the responsibility for costs of aborted litigation, particularly where those costs are but a small fraction of the costs that have been incurred.'[2]

In *Van der Merwe v Road Accident Fund & Another*,[3] the applicant for confirmation successfully challenged certain provisions of the Matrimonial Property Act that prevented her from claiming damages for her husband's intentional assault with a motor vehicle.[4] The court a quo made no order as to costs.[5] In weighing up the position of the parties as part of its determination of costs, the Constitutional Court pointed out that the applicant 'is an immediate beneficiary of the outcome of the case; but it is also true that there are similarly situated people who are not before us. The outcome of this litigation has a wide reach and is clearly in the public interest.'[6] On the other hand, the respondent was a juristic person created and funded by the State. Furthermore, it had persisted in defending the challenged law despite the view of another Minister that the law was unconstitutional.[7] In those circumstances, the Court in *Van der Merwe* could see no reason why 'a private citizen in the position of [the applicant] should forfeit the opportunity to recover onerous costs [incurred] in two courts' from an organ of state that sought to uphold a facially unconstitutional law.[8]

This approach introduces novel considerations into the question of whether a successful applicant should receive her costs. It does not, however, constitute a radical departure to the approach on costs orders of lower courts. The court a quo in *Van der Merwe* does not seem to have applied its mind to the question of costs. Thus, technically, the Constitutional Court's award does not constitute an example of interference with a lower court's discretion.

However, *Swartbooi & Others v Brink & Another (2)* offers a window on to another kind of case in which the Constitutional Court may set aside a decision of a lower court on costs.[9] The appellants were members of a municipal council. They had taken certain decisions, as members of the municipal council, adverse to the first and second respondents, also members of the municipal council. The first and second respondents had these decisions reversed by the High Court. The High Court ordered costs *de bonis propriis* against the appellants in their personal capacity.

In making its costs order, the High Court failed to take account of legislation providing immunity to councillors from civil proceedings in certain circumstances

[1] *Bel Porto Governing Body* (supra) at para 130.
[2] Ibid at para 131.
[3] 2006 (4) SA 230 (CC), 2006 (6) BCLR 682 (CC), [2006] ZACC 4 ('*Van der Merwe*').
[4] Act 88 of 1984.
[5] *Van der Merwe* (supra) at para 78.
[6] Ibid.
[7] Ibid.
[8] Ibid.
[9] 2006 (1) SA 203 (CC), 2003 (5) BCLR 502 (CC), [2003] ZACC 25 ('*Swartbooi*').

and, as a result, had materially misdirected itself. It was open to the Constitutional Court, therefore, to consider afresh the High Court's costs order.[1]

In rejecting the approach of the High Court to costs, the Court pointed out that the High Court appeared to be motivated, at least in part, by a desire to teach the councillors a lesson and to discourage them from making a similar decision in the future. The Constitutional Court held that

> [t]his is an improper approach and reflects an improper purpose. It trenches upon the separation of powers because it is judicial conduct aimed at influencing the conduct of the Legislative and Executive branches of Government. Courts have the power to set aside executive and legislative decisions that are inconsistent with the Constitution. They cannot attempt, by their orders, to punish municipal councillors and, in so doing, influence what members of these bodies might or might not do. This motive of the High Court constitutes a dangerous intrusion into the legislative and executive domain.[2]

If taken as a broad statement rather than a reaction to the specific facts of the case, this statement in *Swartbooi* is probably overbroad. Courts can and should use the threat of adverse and punitive costs awards to influence government conduct. The Court has specifically endorsed the use of costs to, for example, encourage the state to properly defend legislation it believes is constitutional,[3] prompt government to remove unconstitutional laws from the books before they are litigated,[4] and dissuade the state from raising cynical defences to avoid their constitutional responsibilities.[5] *Swartbooi* should, therefore, be read narrowly to discourage costs orders that attempt to influence government actors in the exercise of their political discretion in a way not required by the Constitution or some other law. Costs are a legitimate and effective mechanism to encourage government actors to comply with their legal obligations.

(b) Appeals against Costs Orders

A topic closely related to the question of when it will be appropriate to interfere with decisions of lower courts on the question of costs is the question: When it will be appropriate for appellate courts, and in particular the Constitutional Court, to permit a party to appeal solely against a costs order? Section 21A of the Supreme Court Act[6] states, in a somewhat convoluted fashion, that courts of appeal should permit an appeal on the issue of costs only in exceptional circumstances. Although that section does not bind (and does not refer to) the Constitutional Court, the Court in *Biowatch* held that principle underlying the section is 'manifestly meritorious'.[7] The Court held that although the standard applicable to the question as to whether leave to appeal to the Constitutional Court on the question of costs alone

[1] *Swartbooi* (supra) at para 23.
[2] Ibid at para 25.
[3] *Gory v Kolver NO & others (Starke & Others intervening)* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC), [2006] ZACC 20.
[4] Ibid.
[5] *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 (6) BCLR 571 (CC), 2008 (4) SA 237 (CC), [2008] ZACC 4.
[6] Act 59 of 1959.
[7] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC), 2009 (10) BCLR 1014 (CC), [2009] ZACC 14 ('*Biowatch*') at para 11.

is not, as in the case of other appellate courts, whether 'exceptional circumstances' exist, it will rarely be 'in the interests of justice' for leave to appeal to be granted solely on the question of costs.[1]

In *Biowatch*, leave to appeal on the question of costs alone was granted on the basis that the case raised the question as to whether the general principles established by courts in relation to costs orders require modification to meet the needs of constitutional litigation.[2] The case therefore sends the message that, in the ordinary course, leave to appeal to the Constitutional Court will not be granted on the issue of costs alone, unless there is some important issue of principle, transcending the parties to the matter, which requires resolution in the interests of justice.

Although *Biowatch* provides the most comprehensive treatment of the principles applicable to costs orders in constitutional litigation (in all courts) to date, it cannot be read as having covered the field on all issues of principle. There may, therefore, be scope in the future for leave to appeal to be sought from the Constitutional Court on an issue (or issues) relating only to a costs order made by a lower court. However, given the range of issues that *Biowatch* addressed, it will be rare for a case to arrive in which it would be in the interests of justice for leave to appeal to the Constitutional Court on the issue of costs alone.

In so far as other courts are concerned, section 21A continues to apply. However, it would not require too much imagination to interpret the phrase 'exceptional circumstances' as embracing the types of cases which the Constitution Court in *Biowatch* held would appropriately ground an application for leave to appeal to that court. This is especially so, given the now-trite principle that all legislation must be read in the light of the Bill of Rights. So, the reference in section 21A of the Supreme Court Act to 'exceptional circumstances', read in the light of the Bill of Rights, must mean that where a question of principle relating to costs in constitutional litigation arises in a case in the High Court it may constitute 'exceptional circumstances' justifying the granting of leave to appeal to the Supreme Court of Appeal on the issue.[3]

6.5 Punitive Costs Awards

Ordinary costs awards are, well, ordinary cost awards. However, there are situations — where the conduct of the litigants has been particularly deplorable — that justify a punitive costs award. I discuss: (a) costs on an attorney and client scale; and (b) costs *de bonis propriis*.

[1] *Biowatch* (supra) at para 11. The rationale of the Constitutional Court's finding in this regard is that appeals on costs orders alone have the effect of piling costs upon costs, favouring litigants with deep pockets and resulting in the unnecessary ventilation of side issues.

[2] *Biowatch* (supra) at para 12.

[3] Section 21A of the Supreme Court Act deals with appeals either to the Supreme Court of Appeal or to full benches of the High Court. Since, however, it is already well-accepted that appeals on issues of general application and wide-reaching principles should be heard by the Supreme Court of Appeal and not a full-bench of the appropriate High Court, it will be very rare indeed when it will be appropriate for leave to appeal to a full bench of the High Court to be granted on an issue relating to costs in constitutional litigation.

(a) Costs on an attorney and client scale

The Constitutional Court has adopted the approach of the Supreme Court of Appeal to the question of costs on an attorney and client scale: Because the Court does not wish to inhibit the right of appeal,[1] it will rarely award punitive costs.[2] The Court has also endorsed the traditional rationale for attorney and client costs:

> The true explanation of awards of attorney and client costs … seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.[3]

Swartbooi neatly demonstrates the Court's attitude toward punitive costs.[4] Two members of a local council went to the High Court to have decisions of the Council negatively affecting their rights set aside. They succeeded and the High Court granted costs on an attorney and client scale. The respondents appealed to the Constitutional Court. Yacoob J agreed that the Council's decisions were so obviously invalid that the members should not have had to go to court to have them declared so.[5] It was therefore an appropriate case to award attorney and client costs in the High Court. But the Court did not agree with the High Court that those costs should be paid *de bonis propriis* by the parties themselves. Puzzlingly, without explanation, it gave an ordinary costs award in the appeal. Despite the outcome in *Swartbooi*, the Court is generally willing to uphold punitive awards made in the lower courts.[6]

However, the Court has been reluctant to award costs on an attorney and client scale against parties appearing before it. In *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others*, the applicants had challenged the constitutionality of immigration legislation limiting the ability of foreigners to join their South African same-sex partners.[7] The respondents had filed no answering affidavit in the High Court during the seven months after the application had been launched. They then decided, 24 hours before the hearing in the High Court, to seek a postponement in order to file an answer.[8] The High Court refused the application. In the Constitutional Court, the respondents filed two applications. They sought an

[1] *Premier, Province of Mpumalanga & Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC), [1998] ZACC 20 at para 55.

[2] *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC), [1999] ZACC 17 ('*NCGLE*') at para 93.

[3] *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597, 607 quoted in *Swartbooi & Others v Brink & Another (2)* 2006 (1) SA 203 (CC), 2003 (5) BCLR 502 (CC), [2003] ZACC 25 at para 27 and *South African Liquor Traders Association & Others v Chairperson Gauteng Liquor Board and Others* 2009 (1) SA 565 (CC), 2006 (8) BCLR 901 (CC), [2006] ZACC 7 at para 48.

[4] *Swartbooi & Others v Brink & Another* 2006 (1) SA 203 (CC), 2003 (3) BCLR 502 (CC), [2003] ZACC 25,.

[5] Ibid at para 27.

[6] See, for example, *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC), [2004] ZACC 20 at para 110.

[7] 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC), [1999] ZACC 17 ('*NCGLE*').

[8] Ibid at para 5.

order condoning their failure to file an answering affidavit in the High Court and allowing them to file one. In the alternative, they sought to amend their notice of appeal to include a new basis for appeal: namely, that the High Court, in exercising its discretion, erred in refusing the postponement.[1] The Constitutional Court held that the first application was wholly misconceived: 'Short of setting aside on appeal an order made by another court and substituting a different order, [the Constitutional Court] has no jurisdiction to make an order on behalf of another court properly seized of a matter or to condone, on behalf of such court, non-compliance with the rules of procedure to which such court is subject.'[2] The second application was dismissed on the basis that, given the exercise of discretion by courts a quo, the High Court could not be said to have misdirected itself.[3]

The applicants argued that the costs in respect to the respondent's applications should be awarded on an attorney and client scale because they constituted an abuse of process and were manifestly without merit.[4] The Court acknowledged the application's lack of substance. 'If the argument … concerning the merits of the appeal had revealed the same lack of substance and apparent disregard for the rights of the applicants', Ackermann J hypothesized, 'I would have had no hesitation in ordering them to pay costs as between attorney and client'.[5] But the costs occasioned by the two applications were slight and the respondents had raised issues of substance in the main application. So, although the respondents' conduct in bringing the applications was ill-conceived, it was not 'such a serious abuse of the process of the Court' as to warrant the imposition of costs on an attorney and client scale.[6]

If the Court was ever going to award costs on an attorney and client scale, one would have expected them to do so in *President of the RSA & Others v SARFU &* Others.[7] The case concerned a challenge by the former head of South African rugby, Louis Luyt, to the appointment of a commission of enquiry into the administration of rugby. The matter was, to put it mildly, acrimonious. The most contentious element was a recusal application that alleged that a majority of the members of the Constitutional Court had close links to the ANC government and could not be trusted to render an impartial judgment. The recusal request failed. Three grounds were then raised in favour of a costs order on an attorney and client scale against the unsuccessful Dr Luyt. First, the recusal challenge had impugned the integrity of the Court in circumstances that could be described as 'extraordinary and contemptuous'.[8] Second, during the course of the proceedings, the respondent had essentially accused the President of South Africa of deliberately misleading the Court.[9] Third, during oral argument in the Constitutional

[1] *NCGLE* (supra) at paras 8-9.
[2] Ibid at para 10.
[3] Ibid at paras 10-11.
[4] Ibid at para 90.
[5] Ibid at para 93.
[6] Ibid at paras 93-96.
[7] 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC), [1999] ZACC 11 ('*SARFU III*').
[8] Ibid at para 251.
[9] Ibid at para 252.

Court, the mandate of the respondent's advocates was summarily withdrawn without explanation.[1]

Despite these factors, the Constitutional Court declined to order costs on an attorney and client scale. The Court in *SARFU III* noted that the respondent's tactics bore

> the hallmark of spin-doctoring by a respondent who, knowing that the appeal might succeed, lays the ground to discredit the court with the object of undermining a decision which might go against him. The appellants might succeed, but it would be a pyrrhic victory, secured by a dishonest President from a compliant Court.[2]

However, the Court held that the harm done by the recusal application was to the Court and not to the appellants.[3] Furthermore, the respondent was attempting to confirm the judgment of the court a quo. So although that judgment turned out to be wrong, the respondent was entitled to defend it.[4] The Court observed:

> If we were satisfied that there was indeed a calculated policy to prosecute the appeal in a manner designed to discredit the judgment of this Court and to undermine a decision it might give in favour of the appellants, we would have ordered costs to be paid on the attorney and client scale. We have concluded, however, though not without some hesitation, that there is insufficient evidence to permit us to draw such an inference with the certainty required for the making of such an order.[5]

SARFU indicates both that the conduct will have to be particularly egregious and that compelling evidence must indicate the nefarious motives of the transgressor.

The Constitutional Court's general reluctance to award costs on an attorney and client scale is further reflected in *New Clicks*.[6] In *New Clicks*, counsel for the Minister refused to address the Supreme Court of Appeal on the merits of the appeal, even though the Supreme Court of Appeal had specifically directed them to do so. The Constitutional Court awarded the pharmacies their full costs in the Supreme Court of Appeal. However, the Court in *New Clicks* Court did not award costs on an attorney and client scale. That fact is, perhaps, surprising given that the Court described the Minister's conduct as 'deplorable'.

However, occasions exist in which the court has found costs on the attorney and client scale appropriate. In *Quagliani II,*[7] which is discussed in full above,[8] the applicants brought an application for postponement and joinder on the morning the judgment was delivered. The Court was particularly critical of the attorneys' conduct and justifiably decided that the applicant himself should bear the risk of his agents' actions.

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[1] *SARFU III* (supra) at para 253.
[2] Ibid at para 255.
[3] Ibid at para 155.
[4] Ibid.
[5] Ibid at para 256.
[6] See *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others* 2006 (2) SA 311 (CC), 2006 (8) BCLR 872 (CC), [2005] ZACC 14 ('*New Clicks*') at para 82.
[7] *President of the Republic of South Africa and Others v Quagliani* 2009 (8) BCLR 785 (CC), [2009] ZACC 9 ('*Quagliani II*').
[8] § 6.3*(c)* above.

The Court awarded costs on an attorney and client scale in *Alexkor*,[1] for a late decision by the government to appeal, and, government's dilatory conduct in *Njongi*.[2] The *Alexkor* Court was motivated by the inconvenience the late application had caused for the other litigants and the Court. The cost order in *Njongi* was motivated by the Court's moral outrage that the government chose to raise a defence of prescription to avoid the obligation to provide a social grant to a disabled woman.

(b) Costs *de bonis propriis*

Costs *de bonis propriis* — literally, 'of his own goods' — are orders that require either the members/representative of an institutional defendant, or an attorney to personally pay the costs of an application, normally on a punitive scale. They are employed to express the court's displeasure at the conduct of the litigation. The standard for both attorneys and representatives is similar. The Constitutional Court held that an attorney will be required to pay costs *de bonis propriis* 'where a court is satisfied that there has been negligence in a serious degree.'[3] The traditional test, for litigants, as stated by Innes CJ, is: 'his conduct in connection with the litigation in question must have been *mala fide*, negligent or unreasonable'.[4] In fleshing out the meaning of costs *de bonis propriis,* we look at (a) the conduct of attorneys; and (b) the actions of government officials.

South African Liquor Traders Association & Others v Chairperson, Gauteng Liquor Board & Others[5] concerned the constitutionality of the definition of the word 'shebeen' in the Gauteng Liquor Act.[6] The applicants challenged the definition in the High Court and no answering affidavits were filed on behalf of the respondents.[7] On the day of the hearing, the State Attorney, on behalf of the respondents, indicated that the respondents did not oppose the application and consented to the relief sought. As a consequence, the High Court entered an order by consent declaring the definition unconstitutional.[8]

Once the application for confirmation was lodged in the Constitutional Court, the Chief Justice issued directions enrolling the matter for hearing and calling for written submissions. The applicants duly lodged their submissions but the respondents did not.[9] The Chief Justice issued further directions requesting the third respondent, the MEC, Finance and Economic Affairs, Gauteng, to file an affidavit speaking to the constitutionality of the challenged definition and to file written submissions by a particular date. A week before the written submissions were due, the State Attorney wrote a letter to the Constitutional Court saying

[1] *Alexkor Ltd & Another v Richtersveld Community & Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC), [2003] ZACC 18 at para 17.

[2] *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 (6) BCLR 571 (CC), 2008 (4) SA 237 (CC), [2008] ZACC 4 ('*Njongi*').

[3] *South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board & Others* 2009 (1) SA 565 (CC), 2006 (8) BCLR 901 (CC), [2006] ZACC 7 ('*SALTA*') at para 54.

[4] *Vermaak's Executor v Vermaak's Heirs* 1909 TS 679, 691 quoted with approval in *Visser v Cryopreservation Technologies* CC 2003 (6) SA 607 (T) at para 6.

[5] *SALTA* (supra).

[6] Act 2 of 2003.

[7] *SALTA* (supra) at para 13.

[8] Ibid at paras 13-14.

[9] Ibid at paras 15-16.

that the respondents continued not to oppose the relief sought and did not feel it necessary to file the affidavit or written submissions requested by the Chief Justice.[1] The Chief Justice then issued additional directions calling on the parties to address argument on the question as to whether the Chief Justice should issue directions compelling the third respondent to file the requested affidavit and written submissions. Once again, there was no response from the respondents.[2]

The day before the hearing, the registrar's office of the Constitutional Court contacted the attorney of record at the State Attorney's office and requested that she be present in court for the hearing. There was, however, no appearance at all for the respondents at the hearing.[3] After submissions were made by the applicants' counsel at the hearing, the matter was postponed to a later date and the Court made an order directing the third respondent to file an affidavit addressing, amongst other things, the constitutionality of the section. Shortly after the order was made, the State Attorney withdrew as attorney of record for the third respondent, and the affidavit and written submissions were, finally, submitted.[4]

In dealing with the costs order in this matter, O'Regan J pointed out that the attorney in the office of the State Attorney had not read the request for the affidavit and the submissions issued by the Chief Justice and had simply placed the order of the Chief Justice in the case file.[5] It was clear that the attorney in question was recently qualified and inexperienced in constitutional litigation. However, there was no indication that she had sought the assistance of her supervisors and there was no evidence from her supervisors of any system to supervise junior attorneys in important matters:[6]

> The result is both unfortunate and serious. It is unfortunate because the effect in this case was to give the impression that the MEC, a senior member of the executive in provincial government, was not interested in assisting this Court in resolving important constitutional litigation. … It is serious because as a matter of common practice it is the State Attorney who is briefed by the government when it is involved in litigation. Given the government's responsibility to assist the work of courts, a lapse of this sort in the State Attorney's office gives cause for grave concern.[7]

In *SALTA*, the state attorney ought to have placed the matter in the hands of a senior member of the office.[8] The failure of the state attorney to provide sufficient guidance to a younger member of staff justified the award of costs *de bonis propriis* against the state attorney.[9]

[1] *SALTA* (supra) at para 18.
[2] Ibid at para 19.
[3] Ibid at paras 19-20.
[4] Ibid at paras 20-21.
[5] Ibid at para 50.
[6] Ibid at para 51.
[7] Ibid at para 52.
[8] Ibid at para 53.
[9] Ibid at para 54.

If the misconduct in *SALTA* was related to professional judgment and issues of legal administration, in *Njongi*,[1] the potential for an award *de bonis propriis* arose from the moral or political decisions of the state and its attorneys. Mrs Njongi had been receiving a disability grant from the Eastern Cape Provincial Government. Her grant — along with tens of thousands of other — was inexplicably cancelled in 1997. She re-applied, and received her grant again in 2000, together with R1 100 in back pay. Believing she was owed significantly more in back pay — and receiving no joy from her requests to the Provincial Government — Mrs Njongi went, in 2004, to the High Court to overturn the administrative act that had cancelled her disability grant. In the High Court, the Provincial Government argued that her claim had prescribed because more than three years had elapsed since her grant was cancelled. Ms Njongi won in the High Court, lost before a Full Bench, was denied a hearing by the Supreme Court of Appeal and eventually made it to the Constitutional Court.

At the hearing, the Court raised the question whether the respondent (the MEC for Welfare) should be ordered to pay costs *de bonis propriis* for even raising the issue of prescription. The next day the Court issued directions requiring the MEC to 'show cause by affidavit why, irrespective of the outcome of the application, he should not be ordered to pay the Applicant's costs in the application on the scale as between Attorney and Client *de bonis propriis*.'[2] Moreover, if the MEC indicated that other people were responsible for the decision, 'each person identified in the [MEC]'s affidavit must also show cause by affidavit why, irrespective of the outcome of the application, they should not be ordered to pay the Applicant's costs on the scale as between Attorney and Client *de bonis propriis*.'[3]

The Court, in a unanimous judgment of Yacoob J, ultimately rejected the MEC's prescription claim. It then considered the question of costs. Yacoob J stressed that the government had a decision whether to raise prescription or not that had to be properly exercised in light of constitutional values, particularly the right to social security:

> There is an inevitable and, in my view, moral choice to be made in relation to whether a debtor should plead prescription particularly when the debt is due and owing. The Legislature has wisely left that choice to the debtor. For it is the debtor who would face the commercial, community and other consequences of that choice.
>
> A decision by the State whether or not to invoke prescription in a particular case must be informed by the values of our Constitution. It follows that the Provincial Government too, must take a decision whether to plead prescription to defeat a claim for arrear disability grant payments. This is not a decision for the State Attorney to make. It is an important decision and must not be made lightly. It must be made after appropriate processes have been followed and by a sufficiently responsible person in the Provincial Government who must take into account all the relevant circumstances. It is the duty of the State to facilitate

[1] *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 (6) BCLR 571 (CC), 2008 (4) SA 237 (CC), [2008] ZACC 4 ('*Njongi*').

[2] Ibid at para 61.

[3] Ibid.

rather than obstruct access to social security. This will be a fundamental consideration in making the assessment.[1]

Yacoob J described the provincial government's decision to raise prescription to avoid paying Mrs Njongi the grants she was owed as a 'cynical position devoid of all humanity'.[2] For reasons he does not explain,[3] however, he concluded that there was not sufficient evidence to justify an award *de bonis propriis*. All was not lost. The state's heartless attitude toward Mrs Njongi prompted Yacoob J to order the state to pay Mrs Njongi's costs in all courts on an attorney and client scale. Although the Court does not say so, it seems likely that the reason they could not make a *de bonis propriis* order was because the lines of authority were so muddied that no individual or group of individuals could be identified as responsible for this particularly egregious behaviour. The state officials did an excellent job of obscuring the facts of the matter — thereby masking their own culpability and that of other parties to the malfeasance.

6.6 Taxation of Costs

Up to now, this chapter has outlined the principles that govern what costs order a court should make. In this penultimate section, I look at the more technical part of costs orders: how they will be taxed. 'Taxing' is the process parties engage in to determine the precise amount that is owing based on the Court's costs decision.

Rule 22 of the Constitutional Court Rules, 2003 provides that:

(1) Rules 17 and 18 of the Supreme Court of Appeal Rules regarding taxation and attorneys' fees shall apply, with such modifications as may be necessary.
(2) In the event of oral and written argument, a fee for written argument may in appropriate circumstances be allowed as a separate item.

Rule 22 is functionally equivalent to Rule 21 in the 1998 Rules.

The power of the Constitutional Court in a review proceeding of the taxing master's exercise of her powers is identical to the power of the Supreme Court of Appeal acting under its Rule 17.[4] Although the Constitutional Court's approach to the award of costs might differ to the approach of other courts, the Court — in *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another* — pointed out that 'there is nothing inherent in the distinction between the respective areas of competence of the two courts to indicate that there should be any difference between their respective powers and duties to control their functionaries in the performance of their official duties.'[5] The Court further concluded that no reason exists to depart from the approach of the Supreme Court of Appeal 'on the actual details of costs or their taxation' and, in particular, 'with regard to the taxation of bills of costs by its taxing master.'[6]

[1] *Njongi* (supra) at paras 78-79.
[2] Ibid at para 90.
[3] Ibid at para 63.
[4] *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union* 2002 (2) SA 64 (CC), 2002 (1) BCLR 1 (CC), [2001] ZACC 5 ('*Gauteng Lions*') at para 10.
[5] Ibid.
[6] Ibid at para 11.

The primary questions for a court facing a challenge to the taxing master's award are: (a) what principles should the taxing master follow? and (b) under what circumstances is the court entitled to interfere? The *Gauteng Lions* Court, drawing from the experience of the Supreme Court of Appeal (and the approach of its taxing master),[1] set out the principles it would follow. These principles were succinctly summarised in *Hennie De Beer Game Lodge CC v Waterbok Bosveld Plaas CC & Another*:

> (a) Costs are awarded to a successful party to indemnify it for the expense to which it has been put through having been unjustly compelled either to initiate or defend litigation.
> (b) A moderating balance must be struck which affords the innocent party adequate indemnification, but within reasonable bounds.
> (c) The Taxing Master must strike this equitable balance correctly in the light of all the circumstances of the case.
> (d) An overall balance between the interests of the parties should be maintained.
> (e) The Taxing Master should be guided by the general precept that the fees allowed constitute reasonable remuneration for necessary work properly done.
> (f) And the Court will not interfere with a ruling made by the Taxing Master merely because its view differs from his or hers, but only when it is satisfied that the Taxing Master's view differs so materially from its own that it should be held to vitiate the ruling.[2]

This summary provides a clear explication of the Court's approach to costs orders involving the taxing master. However, some of these points require amplification.

First, where members of the Court are better equipped to deal with matters having a bearing on costs, they are more likely to review the decision of the taxing master. For example, whereas determinations as to the quantum of fees fall within the area of expertise of the taxing master, other areas, such as 'where a point as to admissibility of a segment of evidence is determined by the court and subsequently bears materially on costs items in dispute', may best be determined by the Court.[3]

Second, the practice of advocates to 'book the time actually spent in the preparation of a case and charge an hourly or daily rate for such time' is only one consideration in the overall assessment of reasonable costs. Indeed, the practice of billing on a 'rate-per-time' basis may encourage slow and inefficient work and

[1] *Gauteng Lions* (supra) at para 12.

[2] [2010] ZACC 1 ('*Hennie De Beer*') at para 8, summarising *Gauteng Lions* (supra) at paras 15-16 and 45. This approach to review was established, albeit in a different context, by Innes CJ in *Johannesburg Consolidated Investment Co. v Johannesburg Town Council* 1903 TS 111. It was first applied to review of decisions of the taxing master in *Ocean Commodities Inc & Others v Standard Bank of SA Ltd & Others* 1984 (3) SA 15 (A) 18. See also *JD van Niekerk en Genote Ing v Administrateur, Transvaal* 1994 (1) SA 595 (A).

[3] *Gauteng Lions* (supra) at para 14. See also *Hennie De Beer* (supra) at para 10 ('The Supreme Court of Appeal has taken note of "the almost invariable practice throughout the country nowadays for legal practitioners to make their charges time-related". The principle flowing from this is that time charged is not decisive. An objective assessment of the features of the case is primary, and time actually spent in preparing an appeal cannot be decisive in determining the reasonableness, between party and party, of a fee for that work. The reason is that time alone would put a premium on slow and inefficient work and would conduce to the charging of fees wholly out of proportion to the value of services rendered.')

conduce to 'the charging of fees that are wholly out of proportion to the value of the services rendered'.[1] Moreover, allowing counsel to charge on a rate-per-time basis also encourages over-lengthy written submissions. The Court in *Gauteng Lions* wrote that a rate-per-time basis is not only unfair to the litigants saddled with the costs, but 'places an additional burden on all who have to study the resultant verbosity'.[2] In *Hennie De Beer*, for example, respondent's counsel had charged 61 hours for preparing an affidavit opposing leave to appeal from the Supreme Court of Appeal. The taxing master approved the request. The applicant objected that, considering the same counsel had been involved in the High Court and the Supreme Court of Appeal, 61 hours was excessive. The Constitutional Court agreed. 'It is difficult to conceive', the Court wrote, 'how a competent professional acquainted with the issues, as counsel would have been in this case, could require more [than 20 hours] for this task.'[3]

Third, on a related note, although the details of the determination of costs is left to the taxing master, the one role the court generally plays is determining how many counsel were appropriate. Constitutional Court matters are generally complex and will ordinarily require the services of two counsel. However, there is a limit to the number of counsel a litigant may engage. In *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others,* the applicants engaged six counsel.[4] Considering the complexity of the issues, the Court awarded them the costs of three counsel. However, the Court interfered with the High Court's decision to award them the costs of five counsel. '[I]t is hard to conceive', Ngcobo CJ held 'of any basis on which a more generous award could have been justified in the High Court. It seems to me that awarding the costs of five counsel was excessive and unjustified.'[5] Although acknowledging the discretion that should be afforded to trial judges to craft appropriate costs orders, the Chief Justice felt that, in this matter, 'the High Court gave markedly over-generous weight to the complexity of the issues in the case, and to the research the case required. The award therefore failed to reflect fairly the position as between the parties, and consequently imposed an undue burden on the respondents.'[6]

Fourth, the primary consideration is not the hours spent, but always whether the fees charged are 'reasonable'. More generally, the *Gauteng Lions* Court stated that when it comes to party and party costs

> [o]ne is not primarily determining what are proper fees for counsel to charge their client for the work they did. That is mainly an attorney and client issue and when dealing with a party and party situation it is only the first step. When taxing a party and party bill of costs the object of the exercise is to ascertain how much the other side should contribute to the reasonable fees the winning party has paid or has to pay on her or his own side. Or, to put

[1] *Gauteng Lions* (supra) at paras 27-28 and 46.
[2] Ibid at para 46.
[3] *Hennie De Beer* (supra) at para 14.
[4] [2010] ZACC 10 ('*Tongoane*').
[5] Ibid at para 130.
[6] Ibid at para 131.

it differently, how much of the client's disbursement in respect of her or his own counsel's fees would it be fair to make recoverable from the other side?[1]

Lastly, the one material difference between the calculation process in the Supreme Court of Appeal and the Constitutional Court relates to the preparation of heads of argument. The Supreme Court of Appeal emphasizes the presentation of oral argument. Indeed, the rules of the Supreme Court of Appeal specifically provide that heads of argument are meant only to constitute succinct outlines of the arguments to be advanced at the hearing. The Constitutional Court, however, places far greater emphasis on written submissions. Rule 22(2) of the Constitutional Court Rules specifically provides that a fee for written argument may be allowed as a separate item. In the Supreme Court of Appeal, the practice is to award counsel a significant first-day fee. That fee encompasses remuneration for work done in preparation for the hearing. While it is appropriate for the taxing master to allow separate remuneration for the preparation of written submissions in the Constitutional Court, taxing masters in the Constitutional Court do not award a 'heavy first-day fee'.[2] As the Constitutional Court has observed: 'That would condone cumulative debiting and result in excessive fees being allowed.'[3]

6.7 Clarifying the Meaning of Costs Awards

Although costs awards are generally simple, it is possible — as the decision in *Chonco III* illustrates — from them to create confusion.[4] *Chonco III* concerned a dispute about whether the Constitutional Court's costs award required the government to pay the costs in the High Court and the Supreme Court of Appeal. Although the order explicitly indicated that the government should pay the costs in the Supreme Court of Appeal, it did not mention the High Court. However, the text of the judgment made it clear that the government should pay costs in the High Court as well. Khampepe J relied on the Court's powers under Rule 29 of its rules — which incorporates Rule 42 of the High Court rules[5] — to alter the order to properly reflect the intention in the judgment.

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[1] *Gauteng Lions* (supra) at para 47. See also *Hennie De Beer* (supra) at para 15.

[2] *Gauteng Lions* (supra) at paras 44-45.

[3] Ibid at para 45.

[4] *Minister for Justice and Constitutional Development v Chonco & Others* 2010 (7) BCLR 629 (CC), [2010] ZACC 9 ('*Chonco III*').

[5] Rule 42 reads:

(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
   (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
   (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
   (c) an order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.

7 Standing, Ripeness and Mootness

Cheryl Loots

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7.1 INTRODUCTION

This chapter deals with three issues that may present a barrier to adjudication of the merits of a dispute: standing, mootness and ripeness. These issues, which all concern the procedural justiciability of a claim, need to be distinguished from various other issues that go to substantive justiciability.

Whereas procedural justiciability concerns the identity of the person bringing the claim and the timing of the claim, substantive justiciability concerns the subject matter of the claim, and whether it is competent for the courts to decide claims of that sort. There are some issues that are not appropriately decided by the courts at all: For example, whether a foreign state should be recognized or not. Such decisions are clearly the prerogative of the executive, and their justiciability is typically dealt with in terms of a political question doctrine, or some other doctrine falling under the more general doctrine of separation of powers.[1]

In the case of procedural justiciability, by contrast, the merits of the dispute are appropriate for resolution by the court, but there is an alleged procedural barrier to those merits being heard. Such procedural barriers include: whether the plaintiff has standing to claim the relief; whether the dispute is ripe for resolution; and whether the dispute has been resolved and the issue is therefore moot.

In general, the requirement of procedural justiciability is based upon the principle that it is not the function of the courts to determine academic or hypothetical issues. This is a principle to which our courts still adhere.[2] However, where it is in the public interest that an issue be decided, there is an increasing trend towards regarding such issues as non-academic and, accordingly, justiciable.[3]

7.2 STANDING

(a) The concept of standing

The concept of standing is concerned with whether a person who approaches the court is a proper party to present the matter in issue to the court for adjudication.[4] The word 'standing' has been referred to as 'a metaphor used to designate a

[1] See *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government* 2001 (2) SA 609, 626G–H (E), 2000 (12) BCLR 1322 (E). Froneman J wrote: 'The nature and extent of a Court's assessment of the justiciability of a constitutional issue is, I think, intimately related to the extent to which it judges that those issues can adequately and better be dealt with by other democratic means.' Froneman J expressed the opinion that the position in South Africa is very different from the position in the United States of America because our Bill of Rights specifically recognizes socio-economic rights. Ibid at 625I–626B.

[2] See *Zantsi v Council of State, Ciskei & Others* 1995 (4) SA 615 (CC), 1995 (10) BCLR 1424 (CC) at para 7; *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)('*Ferreira*') at paras 164–165.

[3] *Port Elizabeth Municipality v Prut NO & Another* 1996 (4) SA 318, 325E–F (E), 1996 (9) BCLR 1240 (E); *Ferreira* (supra) at para 164; *Van Rooyen & Others v The State & Others* 2001 (4) SA 396, 422C–424I (T), 2001 (9) BCLR 915 (T).

[4] Adolf Homburger 'Private Suits in the Public Interest in the United States of America' (1974) 23 *Buffalo LR* 343, 388.

proper party to a court action.'[1] An inquiry into standing should thus focus on the party who brings the matter before the court, not on the issues to be adjudicated.[2] Doctrines of standing have assumed increasing importance in public law because often the party who brings a public-law issue before the court does so, not for personal gain, but out of a sense of conviction that public authorities — or some other non-state actor — should not be allowed to act unlawfully. Such 'ideological plaintiffs' or 'non-Hohfeldian plaintiffs' claim relief in the public interest or in the interest of a section of the public whose rights have, allegedly, been adversely affected by the wrong complained of.[3]

(b) Standing in South African law before 1994

Before the introduction of the Interim Constitution in 1994 South African courts adopted a restrictive attitude towards the issue of standing. They required a person who approached the court for relief both to have a personal interest in the matter and to have been adversely affected by the wrong alleged.[4] A plaintiff or applicant could not approach a court on the basis that the defendant or respondent was doing something contrary to the law and that the public interest demanded that the court grant appropriate relief.[5] A plaintiff or applicant who lacked a personal interest would have no '*locus standi*', or 'standing', to be before the court.

Wood & Others v Ondangwa Tribal Authority & Another constitutes a notable exception to this general rule.[6] In *Wood*, the Appellate Division allowed church leaders to seek an interdict in the interest of a large, vaguely defined group of persons who feared that they would be illegally arrested, tried and subjected to summary punishment on account of their political affiliations. The court took into account that it would be impractical to expect the people under threat, many of

[1] Marla E Mansfield 'Standing and Ripeness Revisited: The Supreme Court's Hypothetical Barriers' (1992) 68 *North Dakota LR* 1, 6, citing Steven L Winter 'The Metaphor of Standing and the Problem of Self-Governance' (1988) 40 *Stanford LR* 1371.

[2] Gene R Nichol Jr 'Rethinking Standing' (1984) 72 *California LR* 68, 85.

[3] Louis L Jaffe 'The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff' (1968) 116 *University of Pensylvania LR* 1033. Hohfeld postulated a plaintiff who would be seeking a determination that he had a right, a privilege, an immunity or a power. See Wesley N Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale LJ* 16.

[4] *Bagnall v The Colonial Government* (1907) 24 SC 470 ('*Bagnall*'); *Patz v Greene & Co* 1907 TS 427, 433–435 ('*Patz*'); *Director of Education v McCagie & Others* 1918 AD 616, 621–2, 631 ('*McCagie*'); *Cabinet for the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369, 389I (A)('*Cabinet for the Transitional Government*'); *Shifidi v Administrator-General for South West Africa & Others* 1989 (4) SA 631, 637 D-F (SWA)('*Shifidi*'); *Milani & another v South African Medical and Dental Council & another* 1990 (1) SA 899, 902D–903G (T); *Waks en Andere v Jacobs en 'n Ander* 1990 (1) SA 913, 917B–919C (T); *Natal Fresh Produce Growers' Association & Others v Agroserve (Pty) Ltd & Others* 1990 (4) SA 749, 758G–759D (N). As to what constitutes sufficient interest, see *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A); *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1998 (2) SA 1115 (SCA), 1998 (6) BCLR 671 (SCA).

[5] *Bagnall* (supra) at 470; *Patz* (supra) at 433; *Dalrymple & others v Colonial Treasurer* 1910 TS 372, 386; *McCagie* (supra) at 621, 627; *Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd* 1933 AD 87, 101; *Von Molkte v Costa Areosa (Pty) Ltd* 1975 (1) SA 255, 259A–C (C); *Wood & Others v Ondangwa Tribal Authority & another* 1975 (2) SA 294, 310F (A); *Cabinet for the Transitional Government* (supra) at 387I–389A.

[6] 1975 (2) SA 294 (A)('*Wood*').

whom were tribesmen living far from the seat of the court, to approach the court themselves. This decision could have been used by the courts as precedent to justify the relaxation of the traditional rule against representative standing. Instead, the Appellate Division limited its application to matters involving violations of life, liberty or physical integrity.[1]

(c) Standing under the Final Constitution

FC s 38 provides:

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief,[2] including a declaration of rights. The persons who may approach a court are —
> *(a)* anyone acting in their own interest;
> *(b)* anyone acting on behalf of another person who cannot act in their own name;
> *(c)* anyone acting as a member of, or in the interest of, a group or class of persons;
> *(d)* anyone acting in the public interest; and
> *(e)* an association acting in the interest of its members.[3]

These provisions alter radically the common-law rules of standing and the courts have accepted that such a generous approach to standing is appropriate

[1] *Christian League of Southern Africa v Rall* 1981 (2) SA 821, 826–7 (O); *Ahmadiyya Anjuman Ihaati-Islam Lahore (South Africa) & Another v Muslim Judicial Council (Cape) & Others* 1983 (4) SA 855, 864E–F (C); *National Education Crisis Committee v State President of the Republic of South Africa* Case No 16736/86 (Unreported, 9 September 1986, Witwatersrand Local Division) as discussed in Cheryl Loots 'Keeping *Locus Standi* in Chains' (1987) 3 *SAJHR* 66, 69; *National Union of Mineworkers v Free State Consolidated Gold Mines (Operations) Ltd* 1989 (1) SA 409, 413–4 (O)(Misrepresents *Wood* as relaxing standing only for the purpose of the *actio de libero homine exhibendo*.) See also *Marievale Consolidated Mines Ltd v President of the Industrial Court & Others* 1986 (2) SA 485, 492A (T)(Counsel requested the court to apply the *Wood* doctrine, but the court found it unnecessary to do so as it held that the applicant had standing on other grounds.)

[2] As to what constitutes appropriate relief, see Jonathan Klaaren, Matthew Chaskalson & Steven Budlender 'Judicial Remedies' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, August 2005) Chapter 9. See also *Gerber v Voorsitter: Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening* 1998 (2) SA 599 (T) (Court held that, in applying FC s 38, the nature of the remedy is not important.)

[3] IC s 7(4) contained similar provisions and read as follows:

(a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph *(b)* shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.

(b) The relief referred to in paragraph *(a)* may be sought by —
  (i) a person acting in his or her own interest;
  (ii) an association acting in the interest of its members;
  (iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
  (iv) a person acting as a member of or in the interest of a group or class of persons; or
  (v) a person acting in the public interest.'

for the purpose of the enforcement of the fundamental rights found in Chapter 2.[1] The Constitutional Court issued an early directive to this effect in *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others.*[2] In *Van Rooyen & Others v The State & Others*, Southwood J extended the reasoning in *Ferreira* to support of the proposition that FC s 38 confers practically unlimited *locus standi* in *judicio* and that no limit is placed on the manner in which persons may approach the court.[3] The Constitutional Court has not yet endorsed Southwood J's conclusions. In *Independent Electoral Commission v Langeberg Municipality*, the Constitutional Court stated that there is, presently, no clarity as to the outer reaches of FC ss 38*(a)–(e)*.[4]

(i) *Anyone acting in their own interest*

This provision appears to reflect the common-law rule that relief may be claimed by a person acting in his or her own interest. However, in *Van Huyssteen v Minister of Environmental Affairs and Tourism* Farlam J held that the term 'interest' was 'wide enough' to include the interest of a trustee in maintaining the value of a property. The court seemed to assume that the interest referred to in FC s 38*(a)* could be broader than that interest referred to at common law.[5]

In *Ferreira v Levin NO & Others* Ackermann J took the view that the interest referred to in the corresponding provision of the Interim Constitution — IC s 7(4) — must relate to the vindication of a constitutional right of the applicant and not of some other person.[6] A majority of the court disagreed. Chaskalson P found that although the person must act in his or her own interest, that person did not need to be the person whose constitutional right had been infringed.[7] While it remained for the Constitutional Court to decide what constituted a 'sufficient interest', Chalkalson P wrote that the Court would would adopt a broad approach to the question of standing: 'This would be consistent with the mandate given to [the] Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.'[8]

[1] *Beukes v Krugersdorp Transitional Local Council & Another* 1996 (3) SA 467, 474B–J (W); *McCarthy & Others v Constantia Property Owners' Association & Others* 1999 (4) SA 847, 855B–F (C); *Dawood and Another v Minister of Home Affairs & Others* 2000 (1) SA 997, 1028J–1030B (C); *Coetzee v Comitis & Others* 2001 (1) SA 1254 (C), 2001 (4) BCLR 323 (C) at paras 17.1–18.4.

[2] 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)('*Ferreira*') at para 165.

[3] 2001 (4) SA 396, 232G–I (T), 2001 (9) BCLR 995 (T)('*Van Rooyen*').

[4] 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) at para 15.

[5] 1996 (1) SA 283, 301G–H (C), 1995 (9) BCLR 1191 (C). See also *Ferreira* (supra) at para 165 (Chaskalson P); *Bafokeng Tribe v Impala Platinum Ltd & Others* 1999 (3) SA 517, 549E–551A (B), 1998 (11) BCLR 1373 (B); and *National and Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government & Another* 1999 (1) SA 701, 704A–E (O).

[6] *Ferreira* (supra) at para 38. Ibid at para 226 (O'Regan J, dissenting, rejects Ackermann J's narrow construction.)

[7] Ibid at paras 163–8.

[8] Ibid at para 165. See also *Van Rooyen* (supra) at 422D–424I.

Port Elizabeth Municipality v Prut NO & Another illustrates the proposition that the interest referred to need not relate to a constitutional right of the applicant, but may relate to a constitutional right of some other person.[1] The applicant municipality sought an order declaring that its differential treatment of white ratepayers black ratepayers in terms of the Black Local Authorities Act did not constitute unfair discrimination. The court held that the municipality had an interest in obtaining a declaratory order as to whether its conduct infringed the rights of the ratepayers.[2]

These dicta make it clear that a party can litigate in his, her or its own interest even where it is not that party's constitutional right that has been infringed. This principle was relied upon by the court in a matter in which the foreign homosexual partners of South African citizens challenged a statute that infringed the constitutional rights of their South African partners.[3] Relying on the objective theory of unconstitutionality, the court held that 'a litigant who has standing may properly rely on the objective unconstitutionality of a statute for the relief sought, even though the right unconstitutionally infringed is not that of the litigant in question but of some other person.'[4]

Several recent cases evince this relationship between a broad approach to standing and the objective theory of unconstitutionality. In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & Others* the court held that an applicant who had been charged, and might be convicted, in terms of a statutory provision had a direct interest in challenging the validity of that provision.[5] In *National and Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government, & Another,* an unsuccessful tenderer established that it had had a sufficient interest to apply for the review of the decision awarding the tender in terms of the constitutional right to just administrative action.[6] In *Eisenberg & Associates v Minister of Home Affairs* a firm of attorneys which practised exclusively in the field of immigration law was deemed to possess *locus standi* to apply for a declaration of invalidity in respect of Regulations that allegedly did not comply with the notice and comment provisions of s 7 of the Immigration Act.[7]

[1] 1996 (4) SA 318 (E), 1996 (9) BCLR 1240 (E).

[2] Ibid at 324H–325J.

[3] *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC).

[4] Ibid at para 29.

[5] 2002 (6) SA 370 (W).

[6] 1999 (1) SA 701 (O). Cf *Vulindlela Furniture Manufacturers (Pty) Ltd v MEC, Department of Education and Culture, Eastern Cape, & Others* 1998 (4) SA 908 (TK)(Held that the applicant did not have *locus standi* to compel the provincial government to insist on fulfilment of the terms and conditions of a contract by fellow successful tenderers.)

[7] 2003 (5) SA 281 (CC), 2003 (8) BCLR 838 (CC) at para 28.

(ii) *Anyone acting on behalf of another person who cannot act in their own name.*

This provision makes the decision in *Wood v Ondangwa Tribal Authority* applicable to the enforcement of all the rights guaranteed in Chapter 2. The *Wood* doctrine is no longer limited to situations in which life and liberty are endangered. The applicant is, however, still obliged to spell out why the person whose rights are affected is not able to approach the court personally and must allege that the person would have done so had he or she been in a position to do so.[1]

In *Wood*, the court determined that it would be impractical for all the people who feared that their rights would be infringed to approach the court themselves, particularly when they were resident about 800 kilometres from the seat of the court and lived in an environment in which legal assistance was not easily procured.[2] The facts of *Wood* support the conclusion that standing should be allowed under FC s 38*(b)* where the party affected fears that she may be victimized by launching an action in her own name.[3]

Some courts tend to confuse the provisions of FC s 38*(b)* and FC s 38*(c)*. In a number of cases in which the applicant clearly acted in the interest of a group or class of persons, the courts nevertheless considered whether the individual members of that group or class of persons were unable to act in their own names. In *Maluleke v MEC, Health and Welfare, Northern Province* Southwood J, referring to FC s 38*(b)*, concluded that the applicant did not have *locus standi* because there was no evidence that the persons on behalf of whom the applicant claimed the relief could not act in their own names.[4] With respect, the Judge erred. In view of the fact that the applicant was acting in the interests of 'some 92 000 beneficiaries', the applicable section was FC s 38*(c)*. FC s 38*(c)* is not constrained by a requirement that the members of the group or class not be able to act in their own names.

That the domain of cases covered by FC s 38*(b)* overlaps with the domain of cases covered by FC s 38*(c)* is born out by *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council & Others.*[5] In *Highveldridge Residents,* the applicant association instituted proceedings on behalf of the residents of a township, in the public interest and in the interest of its members. The *Highveldridge Residents* court held that the association had also established *locus standi* in terms of FC s 38*(b)*, since it was evident that the people affected by the alleged unlawful action were indigent and therefore unable individually to pursue their claims.[6]

[1] See *Wood* (supra) at 311G.
[2] Ibid at 313C–D.
[3] Jacques R De Ville *Judicial Review of Administrative Action in South Africa* (2003) 424; Geoff Budlender 'The Accessibility of Administrative Justice' in T W Bennet & Hugh Corder *Administrative Law Reform* (1993) 128, 131.
[4] 1999 (4) SA 367, 374A–C (T)('*Maluleke*').
[5] 2002 (6) SA 66 (T), 2003 (1) BCLR 72 (T)('*Highveldridge Residents*').
[6] Ibid at para 27.

(iii) *Anyone acting as a member of, or in the interest of, a group or class of persons*

This subsection introduces the class action into South African law. The essence of a class action, or representative action as it is known in many countries, is that one person may bring an action in the interest of a class of persons all having the same cause of action.[1] In other jurisdictions the representative plaintiff must be a member of the class. She must share the same cause of action and she must have the same interest as the other members of the class.[2] The use of the words 'acting as a member of or in the interest of' in FC s 38*(c)*, however, makes it clear that the representative plaintiff may be an ideological plaintiff and is not required to be pursuing an 'own interest'. Indeed, the courts have gone so far as to hold that a government authority may claim relief in the interest of members of the public whose rights are being infringed. In *Minister of Health and Welfare v Woodcarb (Pty) Ltd & Another,* the court held that the Minister of Health and Welfare could seek an interdict to prevent continued pollution of the atmosphere on the grounds that the pollution impaired the right of members of the public under IC s 29 to 'an environment not detrimental to health or well-being.'[3]

In other jurisdictions, a judgment in a class action is generally binding on the members of the class.[4] A public interest action, which seeks to benefit the group in whose interest it is brought, is not binding on the members of the class.[5] The concept of an action being binding upon persons not party to the action, in the sense that it will be *res judicata* against them, is foreign to South African lawyers.[6] It is important to realize that where such a class action fails on the merits, members of the class will be prevented from taking the same issue to court themselves. For this reason due process requires that class members be given notice of the action and have the opportunity to exclude themselves from the

[1] Representative actions have their origin in the seventeenth-century English Courts of Chancery. The Courts of Chancery developed a representative action to allow a single person to bring or to defend an action on behalf of all persons with a common interest. See Adolf Homburger 'State Class Actions and the Federal Rules' (1971) 71 *Columbia LR* 609–11; Stephen C Yeazell *From Medieval Group Litigation to the Modern Class Action* (1987) 132.

[2] In the United States, Rule 23*(a)* of the Federal Rules of Civil Procedure provides that '[o]ne or more members of a class may sue or be sued as representative parties on behalf of all.' The Ontario Class Proceedings Act provides in s 2(1) that '[o]ne or more members of a class of persons may commence a proceeding in court on behalf of the members of the class.' The Quebec Civil Code also refers to a member instituting a class action in article 1002.

[3] 1996 (3) SA 155 (N). See also *Bafokeng Tribe v Impala Platinum Ltd & Others* 1999 (3) SA 517 (B), 1998 (11) BCLR 1373 (B)(Friedman J held that a tribe could rely on FC s 38*(c)* to sue in the interest of its members.)

[4] The application of the *res judicata* principle to class actions was examined in detail by the Ontario Law Reform Commission in its *Report on Class Actions* (1982)('*Ontario LRC Report on Class Actions*') 753–70.

[5] See Adolf Homberger 'Private Suits in the Public Interest in the United States of America' (1974) 23 *Buffalo LR* 243, 288.

[6] The representative action of English law, which was the predecessor of the modern class action, was received into other Anglo-American legal systems, but not into South African law. The reason is that it was a procedure of courts of equity and the law of equity never became part of South African law.

class if they could be prejudiced by a decision given in the matter.[1] If a judgment is to have a binding effect on the members of the class, the court should consider whether notice to the class members is necessary and what type of notice is appropriate. Notice requirements will, some day, be regulated by legislation.[2] In many instances, say where there is a successful outcome in a challenge to legislation, notice is not particularly critical: the protection of rights will be achieved by a public interest action and the benefits automatically accrue to the group or class of persons in whose interest the action is brought. Where the action is of this nature, notice need not be given to the members of the group or class since an adverse judgment on the merits will not bar them from approaching the court on the same issue.[3]

Some early attempts to utilize the class action provision of the Interim Constitution failed.[4] It was, however, successfully invoked in *Beukes v Krugersdorp Transitional Local Council & Another*. In *Beukes* a white ratepayer raised a constitutional challenge to the levying by local authorities of 'flat rate' charges in black townships in contrast with higher 'user-based' charges levied in formerly white areas.[5] The applicant brought the application in his own interest and as a member of or in the interest of a group or class of persons — 'literally thousands' of other ratepayers within the jurisdiction of the Transitional Local Council. The names, addresses, telephone numbers and signatures of 120 of the persons on whose behalf the applicant purported to act were listed on a form appended to the application and contained the authorization of the signatories for the applicant to act on their behalf. The respondent objected to the procedure adopted on the grounds, *inter alia*, that none of the persons listed had deposed to an application in support of the application and that the group had not been accurately defined. In an enlightened judgment, Cameron J, adopting the broad approach to standing advocated by Chaskalson P in *Ferreira v Levin & Others,*[6] held that it would run counter to the spirit and purport of the Interim Constitution to require that persons, who identify themselves as members of a group or class as a member of whom and in whose interest a litigant acts, should be obliged to reiterate with formalistic precision the complaint with which they associate themselves, or to require that they attest to their status or that they put in affidavits joining in the litigation.[7]

[1] See *Ontario LRC Report on Class Actions* (supra) at 467–518 (Comprehensive analysis of notice requirements.)

[2] See South African Law Reform Commission *Report on the Recognition of Class Actions and Public Interest Actions in South African Law* (1998) Project 88 ('*SALC Report on Class Actions*').

[3] The operation of *stare decisis* will, however, deter repeated attempts to litigate the same issues.

[4] See *Matiso v Commanding Officer, Port Elizabeth Prison, & Another* 1994 (3) SA 899 (E), 1994 (3) BCLR 80 (E); *Lifestyle Amusement Centre (Pty) Ltd & Others v The Minister of Justice & Others* 1995 (1) BCLR 104 (C).

[5] 1996 (3) SA 467 (W)('*Beukes*').

[6] 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 165.

[7] *Beukes* (supra) at 474G–I. See also *City of Cape Town v Unlawful Occupiers, Erf 1800, Capricorn (Vrygrond Development) & Others* 2003 (6) SA 140, 149H–J (C), 2003 (8) BCLR 878 (C).

Not all judgments demonstrate such discernment. In *Maluleke v MEC, Health and Welfare, Northern Province,* Southwood J held that an applicant seeking an order setting aside the decision of a welfare authority suspending payment of her own pension — and payment of the pensions of some 92 000 other beneficiaries — could succeed only with regard to her own pension. He reasoned that, under FC s 38*(c)*, the applicant must allege that a right in the Bill of Rights has been infringed or threatened and that it was difficult to imagine how the suspension of payment of pensions could be an infringement of a right in the Bill of Rights. This decision was severely criticized[1] and subsequently overruled by the Supreme Court of Appeal.[2]

In a similar matter, *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government,* it was held that the applicants did have standing to bring an application of behalf of a large number of persons whose social welfare grants had been cancelled by welfare authorities without compliance with the requirements of procedural fairness.[3] Froneman J had no doubt that the suspension of the payment of social benefits without affording the beneficiaries a hearing was an infringement of the constitutional right to just administrative action and that a class action was therefore competent in terms of FC s 38*(c)*.[4] The learned judge explained the importance of social context in this type of matter and offered a number of solutions to some of the procedural problems presented by class action litigation in the absence of a well-developed set of court rules. He suggested that leave must be sought from the court to proceed on a representative basis before actually embarking on that road.[5] The *Ngxuza I* court made an order granting the applicants leave to pursue a class action and ordered the respondent to provide information concerning the members of the class to the applicant. This order provides a useful departure point for those initiating class actions.[6]

The respondent in *Ngxuza I* took the decision to grant the applicants leave to institute a class action on appeal to the Supreme Court of Appeal. Cameron JA, writing for the appeal court, delivered a scathing attack on the strategies employed by the welfare authority to try to avoid being held accountable for its unlawful action. *Ngxuza II* held that the circumstances of the case — 'unlawful conduct by a party against a disparate body of claimants lacking access to individualised legal services, with small claims unsuitable for, if not impractical of, enforcement in isolation — should have led to the conclusion, in short order, that the applicants' assertion of authority to institute class action proceedings was unassailable.'[7] The

[1] Clive Plasket 'Standing Welfare Rights and Administrative Justice: *Maluleke v MEC Health and Welfare Northern Province*' (2000) 117 *SALJ* 652.

[2] *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039 (SCA)('*Ngxuza II*') at para 19.

[3] 2001 (2) SA 609 (E), 2000 (12) BCLR 1322 (E)('*Ngxusa I*').

[4] Ibid at 622F–J.

[5] Ibid at 624D–J.

[6] Ibid at 629I–631D.

[7] *Ngxusa II* (supra) at paras 14–15.

Court held that the quintessential requirements for a class action were satisfied in that the class was so numerous that joinder of all its members was impracticable and that there were questions of law and fact common to the class. It also found that the applicants, through their legal representatives, the Legal Resources Centre, would fairly and adequately protect the interests of the class.[1] On the issue of territorial jurisdiction, the Supreme Court of Appeal held that the Final Constitution requires adjustment of rules relating to the jurisdiction of courts along sensible and practical lines to ensure the efficacy of the class action mechanism.[2]

The decisions in *Ngxuza I* and *II* go a long way towards providing guidelines on the circumstances in which a class action is appropriate and the procedures which should be followed. Class action rules would further facilitate this kind of litigation. In August 1998 the South African Law Commission published a report on its research into class actions and public interest actions and recommended the enactment of both enabling legislation and court rules.[3] Unfortunately, neither an act nor court rules has been forthcoming. An act would extend the power of the courts to hear class actions beyond claims for enforcement of constitutional rights. While no act is necessary for the enforcement of constitutional rights, because FC s 38 provides the courts with clear authority to entertain class actions, court rules would provide procedural guidelines both for litigants and the courts. Such rules are particularly necessary because while Magistrates' Courts are given jurisdiction to hear class actions in terms of the Promotion of Access to Information Act[4] ('PAIA'), the Promotion of Administrative Justice Act[5] ('PAJA'), and the Promotion of Equality and Prevention of Unfair Discrimination Act[6] ('PEPUDA'), they do not have the inherent jurisdiction to develop rules of procedure. South Africa's neighbour Zimbabwe has enacted such class action legislation.[7]

In developing class actions, South African courts have drawn on the practice and the experience of this type of litigation in other countries.[8] The complexities of class actions are explored in the Working Paper that preceded the Law Commission's Report.[9] An excellent comparative overview of class actions is to be found in the Ontario Law Reform Commission's *Report on Class Actions.*

[1] *Ngxusa II* (supra) at para 16.
[2] Ibid at paras 20–7.
[3] *SALC Report on Class Actions* (supra) at 1.
[4] Act 2 of 2000.
[5] Act 3 of 2000
[6] Act 4 of 2000.
[7] See *Petho v Minister of Home Affairs, Zimbabwe, & Another* 2003 (3) SA 131 (ZS).
[8] See *Ngxuza II* (supra) at fn 5.
[9] South African Law Commission *The Recognition of a Class Action in South African Law* Working Paper 57 (1995).

(iv) *Anyone acting in the public interest*

The provision in FC s 38*(d)* that 'anyone acting in the public interest' may approach a competent court for relief is, potentially, the most far-reaching of the five grounds on which standing may be granted to persons seeking to enforce the rights guaranteed in Chapter 2. On its face, this provision appears to introduce an unrestricted public interest action. The actual extent to which standing is unrestricted in terms of this clause, of course, will depend upon the way in which the courts interpret the words 'in the public interest'. Our courts would do well to follow the generous approach adopted by the Supreme Court of India. It regards any constitutional challenge to legislation or governmental action to be in the public interest, and on this basis allows any citizen to bring such a matter before the court.[1] A similarly liberal rule of standing in constitutional matters has been developed by the Canadian Supreme Court. It has held that a person who is not directly affected by legislation may challenge it, provided that there is a serious issue to be tried in which that person has a genuine interest as a citizen, and there is no other reasonable and effective manner in which the issue may be brought before the court.[2] Given that both of these liberal rules of standing have been developed in the absence of a provision equivalent to FC s 38*(d)*, it would be anomalous were South African courts to adopt a more restrictive interpretation.

In *Ferreira v Levin NO & Others,* O'Regan J was the only justice to reach the issue of *locus standi* to claim relief in the public interest. She identified IC s 7(4)*(v)* (which is virtually identical to FC s 38*(d)*) as 'the provision in which the expansion of the ordinary rules of standing is most obvious',[3] and said that the Court should require an applicant 'to show that he or she is genuinely acting in the public interest'. She elaborated on this requirement as follows:

> Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court.[4]

In *Port Elizabeth Municipality v Prut NO & Another*, the Eastern Cape High Court held that a municipality was acting in the public interest, as well as in its own interest, by requesting an order declaring that its differential treatment of ratepayers did not constitute unfair discrimination within the meaning of IC s 8(2). Referring to the broad approach to standing adopted by Chaskalson P in *Ferreira v Levin*,[5] Melunsky J held that a court should be slow to refuse to exercise

[1] See Cheryl Loots 'Standing to Enforce Fundamental Rights' (1994) 10 *SAJHR* 49, 50 ('Standing').
[2] *Minister of Justice of Canada v Borowski* 130 DLR (3d) 588, [1981] 2 SCR 575. See Loots 'Standing' (supra) at 55 (Discussion of this and other Canadian cases on standing.)
[3] *Ferreira* (supra) at para 233.
[4] Ibid at para 234.
[5] Ibid at paras 164–165.

its jurisdiction in terms of IC s 7(4) where a decision would be in the public interest and where it may put an end to similar disputes.[1]

In *Van Rooyen & Others v The State & Others*, a magistrate and the Association of Regional Magistrates of South Africa were held by the High Court to have *locus standi* in terms of FC s 38*(d)* to attack the validity of legislation which they contended undermined the independence of the magistrates' courts guaranteed by the Final Constitution.[2] Southwood J held that it was clearly in the public interest that the issue of the independence of the courts should be addressed and resolved.[3]

(v) *An association acting in the interest of its members*

The provision in FC s 38*(e)* that an association acting in the interest of its members may seek relief is important because, before 1994, there were a number of cases in which the courts had not allowed associations to claim such relief.[4] In *South African Association of Personal Injury Lawyers v Heath & Others*, FC s 38*(e)* was applied in granting the applicant association *locus standi* to challenge the constitutionality of search and seizure provisions that threatened to infringe the constitutional rights of its members.[5]

While FC s 38*(e)* clearly enables an association to act as a representative of its members, in two cases it has been relied upon by courts to deal with a challenge to the capacity of an unincorporated association to litigate in its own name. In *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council & Others* — in which the applicant association sought relief in the interests of the residents of a township — the association's *locus standi* was challenged on the basis that, as an unincorporated association which did not have the attributes of a *universitas*, it did not have the capacity to sue.[6] The court held that the Final Constitution's expanded standing provisions indicated that the common-law restrictions on the standing of voluntary associations could not apply without qualification to associations seeking redress for alleged infringements of fundamental rights. This decision gives effect to the directive in FC s 39(2) that, in

[1] *Port Elizabeth* (supra) at 325E–F.

[2] 2001 (4) SA 396, 424H (T), 2001 (9) BCLR 995 (T).

[3] This matter went on to the Constitutional Court for confirmation of the declaration of invalidity and on appeal, but *locus standi* was not in issue before the Constitutional Court. See *Van Rooyen & Others v The State & Others (General Council of the Bar Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC).

[4] *Ahmadiyya Anjuman Ihaati-Islam Lahore (South Africa) & Another v Muslim Judicial Council (Cape) & Others* 1983 (4) SA 855, 864E–F (C); *South African Optometric Association v Frames Distributors (Pty) Ltd* 1985 (3) SA 100, 103F–105C (O); *Natal Fresh Produce Growers' Association & Others v Agroserve (Pty) Ltd & Others* 1990 (4) SA 749, 758G–759D (N).

[5] 2000 (10) BCLR 1131 (T). *Locus standi* was not in issue when this matter subsequently came before the Constitutional Court. See *South African Asssociation of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC).

[6] 2002 (6) SA 66 (T), 2003 (1) BCLR 72 (T)('*Highveldridge*').

developing the common law, courts must promote the spirit, purport and objectives of the Bill of Rights.[1] A similar approach to the capacity of a voluntary association to claim relief in the interests of a vulnerable constituency was adopted in *Rail Commuter Action Group & Others v Transnet Ltd t/a Metrorail & Others (No 1)*. The *Rail Commuter* Court held that 'to restrict voluntary associations in the way that they are restricted by common-law requirements would be contrary to the ideal of a vibrant and thriving civil society which actively participates in the evolvement and development of a rights culture pursuant to the rights enshrined in the Bill of Rights.'[2] While this liberal attitude is a welcome indication of the commitment of the courts to the promotion of access to justice and the development of the common law, these findings were not strictly speaking necessary since Uniform Rule 14 permits such an association the procedural convenience of litigating in its own name.

(d) The wider effect of FC s 38

It is important to note that the extended standing provisions of FC s 38 apply only with regard to actions claiming relief in respect of the infringement of a right entrenched in Chapter 2. In all other matters the common-law rules of standing continue to apply. Over time, the common-law rules should be liberalized in view of the FC s 39(2) requirement that courts should have due regard to the spirit, purport and objects of the Bill of Rights in the interpretation of any legislation and the development of the common law or customary law. This has already begun to happen. In *Wildlife Society of Southern African & Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa & Others*, Pickering J adopted an extremely expansive approach to standing, expressing the opinion that, even at common law, an environmental conservation association should have *locus standi* to apply for an order compelling the state to enforce a conservation statute.[3]

In contrast to the decision in *Wildlife Society*, an extremely restrictive approach to the right of an association to represent the interests of its members was adopted by Pickering J in *Congress of Traditional Leaders of South Africa v Minister for Local Government, Eastern Cape, & Others*.[4] The applicant association applied for

[1] The argument considered by the court in paragraph 26 of the judgment is, with respect, without any merit and exhibits a great deal of conceptual confusion. Counsel submitted that if the court found that the association had no capacity to sue, then its members would still constitute a 'group of people' who would have standing in terms of FC s 38*(c)*. FC s 38*(c)* does not give standing to a group of people – it gives standing to an applicant who represents the interests of a group of people.

[2] 2003 (5) SA 518, 556 (C), 2003 (3) BCLR 288, 318–9 (C)('*Rail Commuter*') quoting *Highveldridge* (supra) at para 24.

[3] 1996 (3) SA 1095 (Tk) 1996 (9) BCLR 1221 (Tk)('*Wildlife Society*').

[4] 1996 (2) SA 898 (Tk)('*Congress of Traditional Leaders*'). It is interesting to compare the restrictive approach to *locus standi* in this matter with the expansive approach to *locus standi* adopted by the same judge in *Wildlife Society of Southern*. See § 7.2*(c)*(iii) infra.

an order declaring certain legislation relating to local government unconstitutional and therefore invalid. The court held that the applicant's essential complaint was that the legislation deprived traditional leaders of powers, derived from earlier legislation, that were, in some sense, entrenched in substantive provisions of the Interim Constitution.[1] Despite the fact that the application involved a constitutional issue, the court held that the association did not have *locus standi* to represent the interests of the traditional leaders because there was no claim based upon an alleged infringement of the Bill of Rights, and the Bill's standing provisions therefore did not apply. While it is correct that the constitutional standing provisions apply only in respect of infringements of the Bill of Rights, it is submitted that the court should have followed the line of cases in which courts have allowed associations to represent their members.[2]

The development of the common law in the direction of a more liberalized notion of standing is apparent from the decisions in *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council & Others* and *Rail Commuter Action Group & Others v Transnet Ltd t/a Metrorail & Others (No 1)*. In these cases it was held that the restrictive common-law attitude to the capacity of unincorporated voluntary associations to sue was not appropriate when such associations sought to enforce the specific provisions of and general values manifest in the Bill of Rights.[3] In both cases the courts referred to FC s 38 in support of the decision to liberalize the common-law rules.

7.3 RIPENESS

(a) The concept of ripeness

The doctrine of ripeness prevents a party from approaching a court before that party has been subject to prejudice, or the real threat of prejudice, as a result of the legislation or conduct challenged.

This doctrine is well developed in American law.[4] The United States Supreme

[1] *Congress of Traditional Leaders* (supra) at 902A–C.
[2] See § 7.2*(c)(v)* supra.
[3] See § 7.2*(c)(v)* supra.
[4] See Lawrence H Tribe *American Constitutional Law* (2nd Edition, 1988) 77–82; *United Public Workers v Mitchell* (1947) 330 US 75 (an example of the application of the doctrine of ripeness in a matter in which federal employees challenging a statute which banned them from being involved in political activities were denied relief because they had not yet violated the statute). See also *Laird v Tatum* (1972) 408 US 1. (The same principle applies where an administrative practice, programme or policy is challenged as being unconstitutional. Anti-war activists who challenged a programme of surveillance of civilians by the United States Army were refused declaratory and injunctive relief because they had not yet suffered any injury in consequence of the surveillance and could assert no more than a fear that the army might someday misuse the information gathered to their detriment. In a dissenting judgment, Justice Douglas said that a person in the position of the applicants (respondents in the appeal) should not have to wait until he loses his job or until his reputation is defamed before he is entitled to sue because that would in effect immunize from judicial scrutiny the alleged unconstitutional conduct.)

Court has held that the rationale behind the ripeness requirement is to enable courts to avoid becoming entangled in abstract disagreements with other branches of government.[1] It has also described the ripeness inquiry as a 'threshold' determination designed to measure whether the 'actual controversy' requirement of Article III of the US Constitution has been met.[2] In deciding whether to apply the doctrine as a bar to consideration of the merits of a case the courts have taken into account 'the hardship to the parties of withholding court consideration.'[3]

(b) Ripeness in South African law before 1994

The doctrine of ripeness was employed by South African courts as long ago as 1906 in *African Political Organization and the British Indian Association v Johannesburg Municipality*.[4] The plaintiffs sought an order declaring *ultra vires* a regulation in terms of which persons of colour were prohibited from traveling on the municipal tramway service. The court dismissed the application on the grounds that there was no allegation that any of the persons represented by the plaintiff associations had been refused access to the tramcars operated by the respondent. The inequity which results from the application of the doctrine in circumstances such as this is that people aggrieved by the legislation are required first to break the law or subject themselves to the indignity of being refused access to the facility concerned before the court will allow them to challenge the validity of the legislation.

Not all South African courts adopted this attitude. In *Transvaal Coal Owners Association v Board of Control* Gregorowski J reasoned as follows:

> It is perfectly true that usually the court does not solve hypothetical problems and abstract questions and declaratory actions cannot be brought unless the rights in question in such action have actually been infringed. But this is quite a different matter. Here the applicants are condemned to do certain things or to abstain from doing certain things which otherwise they are at perfect liberty to do or to abstain from doing. If they contravene the order they are liable to fine and imprisonment. If the order is invalid their right and freedom of action are infringed, and it is not at all convincing to say you must first contravene the order and render yourself liable to fine and imprisonment, and then only can you test the validity of the order, and have it decided whether you are liable to the penalty or not.[5]

The courts in *Gool v Minister of Justice*[6] and *Afdelingsraad van Swartland v Administrateur, Kaap* reached similar conclusions.[7] Baxter suggests that the criterion by which ripeness is to be measured is whether prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not.[8]

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[1] *Abbott Laboratories v Gardner* 387 US 136, 148 (1967)('*Abbot Laboratories*').
[2] See Gene R Nichol Jr 'Ripeness and the Constitution' (1987) 54 *University of Chicago LR* 153, 163.
[3] *Pacific Gas & Electric Co v State Energy Resources Conservation and Development Commission* 461 US 190, 201 (1983), quoting *Abbott Laboratories* (supra) at 149.
[4] 1906 TS 962. See also *Rossouw v Minister of Mines and Minister of Justice* 1928 TPD 741, 747.
[5] 1921 TPD 447, 452.
[6] 1955 (2) SA 682 (C).
[7] 1983 (3) SA 469 (C).
[8] Lawrence Baxter *Administrative Law* (1984) 720.

In *Cabinet of the Transitional Government for the Territory of South West Africa v Eins*, the Appellate Division ostensibly refused consideration on the merits because the applicant lacked *locus standi*. In fact it applied the doctrine of ripeness.[1] Eins applied for an order declaring legislation invalid in terms of the South West Africa Constitution Act 39 of 1968. The legislation at issue was an Act passed by the Legislative Assembly, which authorized the Transitional Cabinet to prohibit certain persons from being within the territory or order them to be removed from the territory if it had reason to believe that such persons endangered, or were likely to endanger, the security of the territory or its inhabitants or the maintenance of public order, or that such persons engendered, or were likely to engender, a feeling of hostility between members of the different population groups of the territory.[2] The persons who could be prohibited or removed in terms of this legislation were persons who were not born in the territory and were not rendering service in the defence force or employed by the government.[3] Eins alleged that he was one of thousands of people who were permanent residents of South West Africa, but who were not born in the territory and could, therefore, be prohibited from being in the territory or be removed from the territory in terms of the Act. It was submitted that the Act deprived Eins, and obviously others in his position, of the fundamental right to reside in South West Africa — which was guaranteed by the Constitution — and supplanted such right with a licence revocable at the discretion of the Cabinet of the Transitional Government of South West Africa.[4] The court of first instance declared the Act to be unconstitutional, invalid and unenforceable for want of compliance with the Bill of Fundamental Rights incorporated in the South West Africa Legislative and Executive Authority Establishment Proclamation[5] and enacted in terms of s 38 of the South West Africa Constitution Act.[6] On appeal, the Appellate Division refused to consider the merits of the application. It held that Eins had no *locus standi* to claim the relief because there was no evidence that any action had been taken against him, or that the Cabinet intended to take any action against him in terms of the Act. *Cabinet of the Transitional Government* offers a classic example of the blurring of the doctrines of standing and ripeness.[7]

(c) Ripeness under the Final Constitution

Ripeness is usually said to be at issue when the person bringing the action has not yet been affected by the unlawfulness of which he complains. The term may also, however, be used where alternative remedies have not been exhausted, or an issue can be resolved without recourse to the Final Constitution.

[1] 1988 (3) SA 369 (A)('*Cabinet of the Transitional Government*').
[2] Residence of Certain Persons in South West Africa Regulation Act 33 of 1985, s 9 ('Residence Act').
[3] Residence Act, s 9(1)*(a)*.
[4] *Cabinet of the Transitional Government* (supra) at 386G–I.
[5] R101 of 1985.
[6] Act 39 of 1968.
[7] See Cheryl Loots 'Standing to Enforce Fundamental Rights' (1994) 10 *SAJHR* 49.

(i) *Ripeness qua premature action*

Ripeness *qua* premature action was first dealt with by the Constitutional Court in *Ferreira v Levin NO & Others*. The applicants challenged the examination process in s 417(2)*(b)* of the Companies Act as an infringement of their fair trial rights. The section obliged them to give potentially incriminating answers that could be used in a future criminal proceeding. A minority of the *Ferreira* Court was of the view that the challenge was too hypothetical to be heard under IC s 7(4)*(b)*(i) because there was no evidence that the applicants were likely to face criminal charges.[1] However, for the majority of the *Ferreira* Court, ripeness was not an issue because the applicants were faced with an immediate demand to give potentially incriminating answers to the examiner's questions, and they faced imprisonment if they refused to provide these answers. The applicants could not, in those circumstances, be expected to expose themselves to prosecution under the statute before they were afforded an opportunity to challenge its constitutionality.[2]

Ripeness could have been raised in *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others*. The applicants, who sought to have an immigration law declared invalid, had never applied for an immigration permit under the impugned provision and had therefore not had action taken against them.[3] The state's argument on ripeness was, however, put in the form of an allegation that if the applicants had made the application, they may have been granted the permit, and this would have resolved the matter without resort to a constitutional challenge.[4]

The wording of both FC s 38 and IC s 7(4) indicate that the drafters intended that procedural barriers should not stand in the way of courts deciding constitutional issues. Where there is a real threat of a constitutional irregularity, a court should be prepared to hear the matter at the instance of any plaintiff who brings the issue before it. In *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza*, Cameron JA expressed disapproval of the conduct of the respondent, who had raised 'every stratagem and device and obstruction, every legal argument and non-argument that it thought lay to hand' including contradictory arguments as to ripeness and mootness.[5]

(ii) *Failure to exhaust other remedies*

Many constitutional claims involve judicial review of administrative action. The common-law principle that before claiming judicial review a party should first

[1] *Ferreira* (supra) at para 41 (Ackermann J), at paras 199 and 205 (Kriegler J), and at paras 231–232 (O'Regan J). O'Regan J nevertheless found that the public interest in determining the constitutionality of the section rendered the issue ripe for hearing and afforded the applicants standing under IC s 7(4)*(b)(v)*. Ibid at paras 233–237.

[2] Ibid at paras 162–164.

[3] 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC)('*NCGLE II*') at paras 21–26.

[4] See § 7.3*(c)*(iii) infra.

[5] 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039 (SCA) at para 14.

exhaust internal remedies[1] is now been embodied in s 7(2)*(a)* of the Promotion of Administrative Justice Act ('PAJA').[2] Where a party who claims judicial review of an administrative action has failed to exhaust internal remedies, the point may be taken that the matter is not ripe for hearing. At common law, a court had the discretion as to whether to uphold such an argument.[3] Section 7(2)*(c)* of PAJA now provides that a court or tribunal may 'in exceptional circumstances' exempt a person from the obligation to exhaust internal remedies if this is deemed to be 'in the interests of justice'.[4]

(iii) *Matters that can be resolved without reaching the constitutional issues*

In *NCGLE II*, the Constitutional Court held that '[t]he concept of ripeness also embraces the general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.'[5] This principle was first enunciated by Kentridge AJ in *S v Mhlungu & Others*.[6] In *Zantsi v Council of State, Ciskei*, the Court added the corollary that only where a compelling reason to do so exists should a court deviate from this principle.[7] If a putative constitutional issue is deemed not to be ripe, then the lack of ripeness applies only to the constitutional issue, not to the case as a whole.

7.4 Mootness

(a) The concept of mootness

While the 'ripeness' doctrine is concerned with cases that are brought too early, the 'mootness' doctrine is relevant to cases that are brought or heard too late because the issues underlying the dispute have, in some way, been resolved. A case is moot and therefore not justiciable if it no longer presents an existing or live controversy or the prejudice, or threat of prejudice, to the plaintiff no longer exists. Part of what underlies this doctrine is the notion that the courts should

[1] See Baxter (supra) at 720; Yvonne Burns *Administrative Law under the 1996 Constitution* (2nd Edition, 2003) 290; Jacques De Ville *Judicial Review of Administrative Action in South Africa* (2003) 464; Cora Hoexter *The New Constitutional and Administrative Law* (2002) 303; Marius Wiechers *Administrative Law* (translated by Gretchen Carpenter)(1985) 270.

[2] Act 3 of 2000.

[3] See Baxter (supra) at 720; Burns (supra) at 290; De Ville (supra) at 464; Hoexter (supra) at 303; Wiechers (supra) at 270.

[4] See Hoexter (supra) at 304–305; Iain Currie & Jonathan Klaaren *The Promotion of Administrative Justice Act Benchbook* (2002) 182–183.

[5] *NCGLE II* (supra) at para 21. See Johan de Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* (4th Edition, 2001) 66–70.

[6] 1995 (3) SA 867, 895E (CC), 1995 (7) BCLR 793 (CC) at para 59.

[7] 1995 (4) SA 615 (CC), 1995 (10) BCLR 1424 (CC) at para 4. See also *S v Bequinot* 1997 (2) SA 887 (CC), 1996 (12) BCLR 1588 (CC) at paras 12–3; and *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC)(*'Dlamini'*) at para 27.

avoid giving advisory opinions on abstract propositions of law.[1]

A classic example of mootness in American jurisprudence is *DeFunis v Odegaard*.[2] DeFunis was denied admission as a first-year law student at the University of Washington Law School. He challenged this decision, contending that the procedures and criteria employed by the Law School Admission Committee discriminated against him on account of his race in violation of the equal protection clause of the Fourteenth Amendment. The trial court granted a mandatory injunction commanding the law school to admit him. It did. On appeal this judgment was reversed by the Washington Supreme Court. DeFunis then petitioned the United States Supreme Court for a writ of *certiorari*. The writ resulted in a stay of the judgment of the Washington Supreme Court pending the final disposition of the case. By the time the matter came before the United States Supreme Court, DeFunis had registered for his final quarter in law school. The Supreme Court held that it could not, consistent with the case and controversy requirement of Article III, consider the substantive constitutional issues raised by the parties because DeFunis would complete his law school studies regardless of the decision of the court. Justice Brennan, in dissent, highlighted the unfortunate effect of a finding of mootness on a matter that engages issues of public interest:

> The constitutional issues which are avoided today concern vast numbers of people, organizations, and colleges and universities, as evidenced by the filing of twenty-six *amicus curiae* briefs. Few constitutional questions in recent history have stirred as much debate, and they will not disappear. They must inevitably return to the federal courts and ultimately again to this court.

In certain circumstances, American courts have exercised their discretion to decide a case seemingly moot where the result of refusing to decide the issues would create a situation 'capable of repetition, yet evading review'.[3] In *Roe v Wade*, a pregnant woman's class action challenging the constitutionality of state anti-abortion statutes reached the Supreme Court only *post partum*.[4] The *Roe* Court observed that '[p]regnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us.'[5] The *Roe* Court also took into account that the term of pregnancy is shorter than the period of gestation required for a matter to work its way up to the United States Supreme Court; review would never be possible if the court were to insist upon the plaintiff still being pregnant.

In *Minister of Justice of Canada v Borowski*, a challenge to anti-abortion legislation was disposed of on the basis that it had become moot.[6] The plaintiff's standing

[1] *NCGLE II* (supra) at para 21 fn 18.
[2] (1974) 416 US 312.
[3] See Tribe *American Constitutional Law* (supra) at 84.
[4] 410 US 113 (1973).
[5] Ibid at 125.
[6] (1981) 130 DLR (3rd) 588, [1981] 2 SCR 575('*Borowski*').

to bring suit had initially been recognized by the Supreme Court of Canada and the case had proceeded to its merits. But, after the case had been decided by the Saskatchewan Court of Appeal, and leave had been granted to appeal to the Supreme Court of Canada, all of the abortion provisions of the relevant Criminal Code were struck down in another matter.[1] Nevertheless, the claimant, Mr Borowski, wanted to continue his proceedings on the basis that non-therapeutic abortions as well as therapeutic abortions were now permitted. The Supreme Court of Canada refused to hear the matter. It held that there was no longer a live controversy to resolve because the conditions that gave rise to Mr Borowski's appeal had disappeared.

In the very same year, the Canadian Supreme Court exercised its discretion to decide another abortion case despite the fact that it had become moot. In *Tremblay v Daigle,* the plaintiff relied on the constitutional right to life of a foetus to claim an injunction against his girlfriend to restrain her from having an abortion.[2] By the time the case was argued, the defendant had had the abortion. The *Tremblay* Court denied the request for an injunction. It exercised its discretion to decide the case because it believed that it was important to remove the threat of such injunctive proceedings in the interest of other pregnant women. Hogg indicates that the Canadian Supreme Court has more often than not exercised its discretion to decide issues that have become moot where it is persuaded that there is a serious legal question to be decided and that the question, despite its mootness, would be properly argued on both sides.[3]

(b) Mootness in South African law before 1994

The doctrine of mootness does not appear to have been applied in South African law prior to the advent of the Interim Constitution.[4] One explanation for this may be that even where an issue had become moot, the court usually decided the merits for the purpose of determining which party was to pay the costs.

(c) Mootness under the Final Constitution

The Constitutional Court has held that mootness will be a possible bar to relief 'in the absence of any remaining triable issue.'[5] Mootness is particularly likely to be a bar to relief where the constitutional issue is not merely moot as between the parties but is also moot relative to society at large, and no considerations of compelling public interest require the court to reach a decision.[6] Where it

[1] *R v Morgentaler (No 2)* (1988) 44 DLR (4th) 385, [1988] 1 SCR 30.
[2] (1989) 62 DLR (4th) 634, [1989] 2 SCR 530.
[3] Peter W Hogg *Constitutional Law of Canada* (3rd Edition, 1992) § 56.3*(c)*.
[4] The principle that the court will not decide academic issues which will not have binding effect on the parties is, however, well established in South African law. See *Masuku & Another v State President & Others* 1994 (4) SA 374, 380I (T) applying *Ex parte Nell* 1963 (1) SA 754, 760B–C (A).
[5] *Dlamini* (supra) at paras 27 and 32.
[6] See *President of the Ordinary Court Martial NO v Freedom of Expression Institute* 1999 (4) SA 682 (CC), 1999 (11) BCLR 1219 (CC)('*FXI*').

is in the public interest that the constitutionality of legislation should be determined, an argument that the matter is moot is less likely to succeed.[1] Where there are conflicting High Court decisions, the need to resolve the conflict may persuade the Supreme Court of Appeal or Constitutional Court to hear the matter.[2]

In 1997, s 21A was introduced into the Supreme Court Act to give the Supreme Court of Appeal or any High Court sitting as a court of appeal the discretion to dismiss an appeal if the circumstances are such that the order it might give will have no practical effect or results.[3] In *Premier, Provinsie Mmpumulanga en 'n Ander v Groblerdalse Stadsraad* Olivier JA held that the effect of this section was to eliminate the use of such vague concepts of 'abstract', 'academic' or 'hypothetical' as criteria for the exercise of the power of a court of appeal not to hear an appeal.[4] Instead, the court held, s 21A imposes a positive test: Will the judgment or order have a practical effect or result? In *Western Cape Education Department & Another v George*, Howie JA assumed, without deciding, that the practical effect or result referred to in s 21A is not restricted to the position *inter partes*, but that it was wide enough to include a practical effect or result in some other respect, such as a matter of wide public interest or urgency, or to resolve conflicting High Court decisions.[5]

There is no provision similar to s 21A of the Supreme Court Act applicable to the Constitutional Court. However, in *President of the Ordinary Court Martial NO v Freedom of Expression Institute*, the Constitutional Court held that it had the discretion to exercise its power in terms of FC s 172(2) to confirm an order of another court declaring legislation to be invalid when the matter in issue had become moot. In exercising its discretion, the *FXI* Court stated that it would consider whether any order it may make would have any practical effect, either on the parties or on others.[6] This rule has been held to be equally applicable to appeals to the Constitutional Court.[7]

In *Independent Electoral Commission v Langeberg Municipality*, the Court held that its discretion must be exercised according to the interests of justice and that relevant factors may include the practical effect that any possible order may have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced.[8] The *Langeberg* Court made it clear, however, that the fact that it had exercised its discretion in favour of hearing one moot argument did not mean that it would be obliged to reach a finding with respect to other moot issues.[9]

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[1] See *S v Manamela* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC).

[2] See *Western Cape Education Department & Another v George* 1998 (3) SA 77, 84D–E (SCA)('*George*').

[3] Act 59 of 1959. The amendment was enacted in 1993, but came into operation only on 14 February 1997.

[4] 1998 (2) SA 1136, 114D–F (SCA).

[5] *George* (supra) at 83E–F and 84D–E.

[6] *FXI* (supra) at para 16. In *FXI* and in *Janse van Rensburg NO & Another v Minister of Trade and Industry NNO & Another*, the Constitutional Court declined to confirm the order of invalidity of a statutory provision on the ground that the issue had become moot. 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC).

[7] *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC)('*Langeberg*') at para 9.

[8] Ibid at para 11.

[9] Ibid.

The first case in which the Constitutional Court refused to hear a matter on the ground that the issue had become moot was *J T Publishing (Pty) Ltd & Another v Minister of Safety and Security & Others.*[1] In *J T Publishing,* the Court declined on appeal to make an order declaring the Publications Act[2] and the Indecent or Obscene Photographic Matter Act[3] unconstitutional because, after the application had been dismissed in the Supreme Court (now the High Court), legislation was tabled to repeal the two impugned laws. By the time the Constitutional Court gave its judgment on appeal this legislation had been passed by Parliament as the Films and Publications Act[4] — although it had not yet been brought into effect by the President. The Constitutional Court refused to grant the order sought by the applicant, because, as Didcott J wrote:

> [T]here can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted have now become. The repeal of the Publications Act has disposed altogether of the question pertaining to that. And any aspect of the one about the Indecent or Obscene Photographic Matter Act which our previous decision on it did not answer finally has been foreclosed by its repeal in turn. I therefore conclude that we should decline at this stage to grant a declaratory order on either topic.[5]

It is interesting to note that IC s 102(8) specifically provided that if any division of the Supreme Court disposed of a matter in which a constitutional issue had been raised and such court was of the opinion that the constitutional issue was of such public importance that a ruling should be given thereon, it could, notwithstanding the fact that the matter had been disposed of,[6] refer such issue to the Constitutional Court for decision. This provision highlighted the distinction between mootness as to parties and mootness relative to society at large. Where a decision on an issue had implications for the public or members thereof, the Constitutional Court could decide the issue despite the fact that it was moot with regard to the parties. There is no similar provision in the Final Constitution.

[1] 1997 (3) SA 514 (CC), 1996 (12) BCLR 1599 (CC)('*JT Publishing*').
[2] Act 42 of 1974.
[3] Act 37 of 1967.
[4] Act 65 of 1996.
[5] *J T Publishing* (supra) at para 17. The case illustrates the dangers of concluding prematurely that a matter has become moot. The decision of the Constitutional Court was handed down on 21 November 1996. In January 1998, the Films and Publications Act had still not been brought into operation. Thus the 'moribund and futureless provisions' which the Constitutional Court chose not to declare invalid continued to authorize unconstitutional censorship for more than a year after the Court had decided that their validity was a moot issue.
[6] As to the meaning of the expression 'disposes of a matter', see *Du Plessis & Others v De Klerk & Another.* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) at paras 26–28.

7.5 Delineating the Doctrines of Standing, Ripeness and Mootness

It seems clear that the standing doctrine should be concerned with *which person* may raise a particular issue, whereas the ripeness and mootness doctrines are concerned with *when* issues may be raised. However, the dividing lines between the doctrines are often fuzzy. In a decision that turns on ripeness or mootness, the court will often hold that the plaintiff has no standing.[1] In *City of Los Angeles v Lyons*, a plaintiff who had been choked to unconsciousness by an officer of the Los Angeles Police Department sought an injunction against the police department's alleged practice of applying unnecessary and life-threatening chokeholds.[2] The *Lyons* Court held that the plaintiff lacked the standing to request such relief. It has been suggested that the effect of this decision is that the standing doctrine has displaced the more flexible doctrine of mootness as the preferred hurdle in litigation predicated on past injuries.[3] The doctrine of mootness is more flexible because a court retains the discretion to hear a case which is moot, a finding that the plaintiff does not have standing will be an absolute bar to the matter being heard.

The fact that FC s 38 virtually precludes any opportunity for a court to refuse to hear a matter on the grounds that the plaintiff does not have standing may be advanced as a reason for retaining the doctrines of ripeness and mootness. However, while there is undoubtedly great advantage to be had in the retention of all three doctrines in their most flexible form, the courts should never exercise their discretion against hearing a matter if there is any public benefit to be derived from a decision being made.

[1] *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) (Discussed at § 7.2*(a)* supra).

[2] 461 US 95 (1983).

[3] Richard H Fallon Jr 'Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons' (1984) 59 *New York University LR* 1, 6. See also Gene R Nichol 'Ripeness and the Constitution' (1987) 54 *University of Chicago LR* 153, 172.

8 Amicus Curiae

Geoff Budlender

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8.1 INTRODUCTION

(a) Traditional conceptions of the amicus curiae

The term amicus curiae can have a wide variety of meanings.[1] Traditionally, the most common form of amicus curiae is a person who appears at the request of the court to represent an unrepresented party or interest.[2] The task of such an amicus is to present the best possible case for the unrepresented party or interest. In such cases, the role of the amicus does not differ in principle from that of the paid legal representative of a party. A second form of amicus responds to a request by a court for counsel to appear before it to provide assistance in developing answers to novel questions of law which arise in a matter, or (less commonly) where a person asks leave to intervene for this purpose. In such cases, the amicus curiae does not, ostensibly, represent a particular interest or point of view. A third common type of amicus curiae takes the form of the Law Society or Bar Council's intervention in an application for the admission of a legal practitioner. The professional body makes submissions to the court not to represent the interests of the professional body's members, but to assist and to advise the court in promoting the interests of the administration of justice.

(b) Amicus curiae in the new constitutional order

The new constitutional order introduced a fourth form of amicus curiae: a non-party requests the right to intervene so that it might advance a particular legal position which it has itself chosen.[3] This form of amicus was not permitted under the common law.[4] This new form of amicus curiae reflects two important changes brought about by our new constitutional democratic order. First, it reflects the underlying theme of participatory democracy in the Final Constitution. In matters of broad public interest, such as the interpretation of the Final Constitution, courts are more disposed towards listening to the voices of persons other than the parties to a particular dispute. Secondly, it reflects the fact that constitutional litigation often affects a range of people and interests that go well beyond those of the parties already before the court.

Courts in many jurisdictions have adopted special procedures for the intervention of non-parties (sometimes referred to as third-party interventions) in litigation of this kind.[5] The comments of Lieven and Kilroy with regard to the Human

[1] For a discussion of different types of amicus curiae, see HG Erasmus *Superior Court Practice* (1994) C4-19–C4-20; Christina Murray 'Litigating in the Public Interest: Intervention and the Amicus Curiae' (1994) 10 *SAJHR* 240, 241–43.

[2] See, eg, *The Merak S: Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 (SCA).

[3] Unlike the first two traditional forms of amicus curiae, the amicus is the intervening non-party, not the legal practitioner who appears before the court on its behalf.

[4] *Connock's (SA) Motor Co Ltd v Pretorius* 1939 TPD 355, 356-57.

[5] For an overview of the position in various countries, see Nathalie Lieven & Charlotte Kilroy 'Access to the Court under the Human Rights Act: Standing, Third Party Intervenors and Legal Assistance' in Jeffrey Jowell & Jonathan Cooper (eds) *Delivering Human Rights: How the Human Rights Act is Working* (2003) 115.

Rights Act in the United Kingdom apply with equal force to constitutional litigation in South Africa:

> The Public Law Project in their report on third party interventions point out that judicial review cases increasingly raise fundamental social, moral and economic issues and require competing rights and interests to be finely balanced or difficult policy questions to be addressed. Often such cases raise issues of more general significance beyond the interests of parties to the litigation. PLP observe that the advent of the HRA [Human Rights Act] only strengthens the need for specialist information. Not only are previously untested issues of fundamental and competing rights now coming before the courts which must be decided within complex social context, but in addition the courts are now required to apply the doctrine of proportionality when determining whether any interference with qualified rights is justified, and in doing so may need to weigh the impact upon other groups who are not represented by the litigants. The notion that the issues are merely between the parties will often not be correct.[1]

The response of the Constitutional Court in *Ferreira v Levin* reflects Lieven and Kilroy's' contention that courts must be aware of the impact of constitutional litigation on parties not already before the court.[2] In *Ferreira* – a matter that addressed various constitutional questions arising from the provisions of the Companies Act[3] which deal with examinations conducted during the winding up of a company – the Court invited and accepted written memoranda from the Association of Law Societies, the Public Accountants' and Auditors' Board, the South African Institute of Chartered Accountants and the Association of Insolvency Practitioners of South Africa.[4] The Court's rationale for these invitations was that the outcome of the case potentially affected very many non-parties.

This chapter is almost exclusively concerned with this new or fourth form of amicus curiae. Constitutional Court rule 10 describes this form of amicus as a person that is 'interested in any matter before the Court' and which chooses at its own initiative to seek to intervene in the proceedings. This form of amicus is also contemplated in the rules of other courts.[5]

Rule 10(6) makes it clear that to qualify as an amicus, the person must be 'interested' in the proceedings. That interest must be described in the application for admission. The rule also requires that the would-be amicus identify the 'position' which it will adopt in the proceedings. The amicus curiae is, therefore, by definition not a disinterested party. The amicus curiae in constitutional litigation under Constitutional Court rule 10 — or equivalent rules in other courts — is similar to an amicus curiae in the Supreme Court of the United States. In the US Supreme Court, an 'amicus brief' is 'filed by someone not a party to the case but

[1] Lieven & Kilroy (supra) at 129.

[2] *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (4) BCLR 441 (CC)('*Ferreira*') at para 4. See also Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 15-16.

[3] Act 61 of 1973.

[4] *Ferreira* (supra) at para 4.

[5] See § 8.4 infra.

interested in the legal doctrine to be developed there because of the relevance of that doctrine for their own preferred policy or later litigation'.[1]

Despite this express recognition of the amicus as an interested party, traditional conceptions of the amicus curiae as a friend of the court, whose primary task is to assist the court rather than to put forward a particular point of view, persist in the jurisprudence.[2] In *Hoffmann v South African Airways* the Constitutional Court offered the following account of the role of the amicus curiae:

> An amicus curiae assists the Court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the Court's decision may affect its interest. The amicus differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An amicus joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position.[3]

This description, with all due respect, rather confuses matters. To assert that an amicus joins proceedings 'as a friend of the Court … to assist the Court' is to perpetuate a fiction which is derived from the more traditional forms of amicus, and of course from the term amicus curiae itself. In truth, an amicus under rule 10 intervenes in the proceedings because it has an interest of its own which it wishes to promote. Under rule 10, it not only chooses its own position but is, in fact, required by rule 10(6) to identify that position in its application for admission.

A party or a person requested by the Court to argue a particular position, to represent an unrepresented party or interest, or to advise the court is not an amicus curiae in terms of rule 10. Such a person is not required to follow the rule 10 procedures, such as requesting the parties to consent to its participation as an amicus curiae, and making application to the Court in that regard.[4] The request comes from the Court, and the person concerned is an amicus in the traditional sense. The terms of participation are determined by the invitation or request made by the Court.

A clear example of this distinction emerged in the very first case argued in the Constitutional Court, *S v Makwanyane*.[5] In *Makwanyane*, the Court requested that the Johannesburg Bar Council appoint counsel to represent the unrepresented

[1] Kermit L Hall (ed) 'Amicus Brief' *The Oxford Companion to the Supreme Court of the United States* (1992) as quoted by Murray (supra) at 244.

[2] See *In Re Northern Ireland Human Rights Commission* [2002] UKHL 25 at para 24 (Lord Slynn emphasized the distinction between a conventional amicus curiae, who takes a non-partisan approach to the case, and a third party intervenor who advocates a particular position.) See also Sarah Hannett 'Third Party Intervention: In the Public Interest?' [2003] *Public Law* 128.

[3] 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC)('*Hoffmann*') at para 63.

[4] Erasmus (supra) at C4-20.

[5] 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) ('*Makwanyane*').

accused. In his judgment, Chaskalson P referred to counsel who performed this role as acting pro amico.[1] He did not describe them as amici curiae. By contrast, a number of 'rule 10-type'[2] amici curiae made written submissions. Several of these amici sought and received permission to submit oral argument. They were the Black Advocates Forum, Lawyers for Human Rights, the Society for the Abolition of the Death Penalty in South Africa, and a private individual who was a campaigner for the retention of the death penalty. The South African Police Service submitted an 'amicus brief', but did not make oral submissions.

(c) Amicus curiae contrasted with an intervening party

The passage from *Hoffmann* quoted above draws attention to the important distinction between an amicus curiae, which is 'interested' in the proceedings but has no right to participate in them, and an intervening party, which has a 'direct interest' and may intervene as a matter of right in the ordinary manner. Every party which has a 'direct interest' in the proceedings will be 'interested' in the proceedings; but it does not follow that every party which is 'interested' has a 'direct interest'. In logical terms, those who have a direct interest are a subset of those who are interested.

It is, therefore, possible for a person to seek to intervene on two alternative bases: that it has a direct interest and should therefore be admitted as of right; or that it is 'interested' and should be admitted as an amicus curiae. In *Kyalami Ridge* — a matter that engaged the legality of steps taken by the government to provide emergency housing for flood victims on government-owned land — an association representing private land-owners in the vicinity of the proposed emergency camp applied for an interdict to stop the settlement of the flood victims on the government-owned land. [3] The applicant did not join the flood victims as parties to the litigation. When the matter reached the Constitutional Court, one of the flood victims applied for leave to intervene in the application as a party and, alternatively, as an amicus curiae. He was admitted as a party, on the basis that he had 'a direct and substantial interest in the proceedings', and was therefore 'entitled to be joined as a party in his own right'.[4]

This distinction between an intervener and an amicus has considerable significance for three reasons. First, a person with a 'direct and substantial interest' has a right to intervene in the proceedings, and does not ask for any special dispensation. An amicus needs permission to intervene. Secondly, a person who intervenes as a party has procedural rights, such as the right to adduce evidence and to present oral argument to the Court. An amicus curiae has no such rights unless

[1] *Makwanyane* (supra) at para 50.

[2] Rule 9 was the rule governing amici then in force. See Rules of the Constitutional Court, Government Gazette 16204, Regulation Gazette 5450 (6 January 1995).

[3] *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC)('*Kyalami Ridge*').

[4] Ibid at para 30.

they are specifically granted by the Court. Thirdly, an intervening party is subject to the usual rules as to its ability to recover costs, and its liability for costs of opposing parties. In the ordinary course, an amicus curiae is neither awarded costs nor ordered to pay the costs of opposing parties.

These differences have the result that a would-be participant who (like Mr Mukhwevho in *Kyalami Ridge*) is a person with a direct and substantial interest may need to make a strategic decision as to whether to seek to intervene as a party or as an amicus curiae. This choice carries advantages and disadvantages that will vary with the particular circumstances of the case.

8.2 Parameters of the Role of the Amicus

An amicus curiae does not have the right to raise a new cause of action. If the amicus wishes to do so, that should be referred to in its application for admission, and permission to do so must be sought. The Chief Justice will then decide whether it would be appropriate to permit such an issue to be raised in the appeal.

Such permission is unlikely to be given if it would involve the joining of additional parties to the litigation, or if there is a likelihood that one or more of the parties would be prejudiced.[1] For example, in *VRM v Health Professions Council of South Africa & Others*, application was made for admission as an amicus curiae in an appeal which was pending before a full bench of the Transvaal Provincial Division.[2] The applicant had not raised a constitutional issue in the main case, but the amicus curiae wished to do so in the appeal. The court held that it was not in the interests of justice to seek determination of important constitutional issues raised by the would-be amicus curiae when such issues had not been properly raised, canvassed and debated in the court a quo. The court accordingly refused the application for admission as an amicus curiae.[3]

It does not follow from the finding in *VRM* that the amicus is always limited to the issues raised by the parties. If a matter has been raised and dealt with on the papers, the amicus may address it. In *Grootboom*, the applicants had asserted a right under FC s 26 (the right to housing) and FC s 28(1)*(c)* (the child's right to shelter).[4] The High Court decided the FC s 26 argument against the applicants, and the FC s 28(1)*(c)* argument in favour of the applicants. On appeal, the written argument submitted by the parties concentrated on the meaning and import of FC s 28(1)*(c)*. The amici curiae sought to broaden the arguments engaged by the Constitutional Court by contending that all of the applicants (including those who were adults) were entitled to shelter by reason of minimum core obligations

[1] *De Beer NO v North Central Local Council and South Central Local Council & Others (Umhlatuzana Civic Association Intervening)* 2001 (2) SA 429 (CC), 2001 (11) BCLR 1109 (CC) at para 31.

[2] 2004 (3) BCLR 311 (T).

[3] Ibid at 316.

[4] *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) ('*Grootboom*').

incurred by the State in terms of FC s 26. The Constitutional Court articulated no objection to the content of the amici's intervention and, ultimately, grounded its findings in terms of its view of the State's obligations under FC s 26.[1]

The statement by the Constitutional Court in *Hoffmann* that an amicus 'is neither a loser nor a winner'[2] might lead one to conclude that an amicus may never ask for relief. This is not so. In *Moise*, the Constitutional Court had declared certain provisions of a statute invalid.[3] Thereafter, the amicus curiae in the original proceedings applied to the Court for a variation of the order of invalidity. It asked that the order be made retrospective so as to apply to all extant actions that had not already been time-barred when the Interim Constitution came into effect.[4] The amicus curiae contended that the failure to address the retrospective effect of the invalidity constituted an error in the judgment of the Court which fell to be corrected. The Court held that the order was, in any event, retrospective as a matter of law, and the application was dismissed. The *Moise* Court did not, however, question the right of the amicus curiae to bring the application. On the contrary, the Court stated that the amicus 'is to be commended for conscientiously raising in the public interest a perceived error in need of correction'.[5]

8.3 Amicus Curiae in the Constitutional Court

The Constitutional Court was the first to introduce a rule which made provision for the intervention of an amicus curiae and which regulated that intervention. The rules of other courts are based broadly on that model and use similar concepts. I shall therefore deal first, in some detail, with the amicus curiae in the Constitutional Court. As we shall see in the section that follows, much of this analysis and commentary applies to the amicus in other courts.

It should be noted at the outset that that an amicus curiae does not appear to be a 'party' in terms of the rules.[6] It follows that those rules which refer to a party and its rights do not refer to an amicus curiae.

(a) Constitutional Court rule 10

Constitutional Court rule 10 provides as follows:

> (1) Subject to these rules, any person interested in any matter before the Court may, with the written consent of all the parties in the matter before the Court, given not later than the time specified in subrule (5), be admitted therein as an amicus curiae upon such terms and conditions and with such rights and privileges as may be agreed upon in

[1] *Grootboom* (supra) at para 18.
[2] *Hoffmann* (supra) at para 63.
[3] *Moise v Greater Germiston Transitional Local Council: Minister of Justice & Constitutional Development Intervening (Women's Legal Centre as amicus curiae)* 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC).
[4] *Ex Parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC).
[5] Ibid at para 3.
[6] See, in this regard, rule 31 which distinguishes between a 'party' to any proceedings before the Court, and an amicus curiae. This approach is also reflected in the judgment in *Hoffmann*, which similarly distinguishes between an amicus and a party.

writing with all the parties before the Court or as may be directed by the Chief Justice in terms of subrule (3).

(2) The written consent referred to in subrule (1) shall, within five days of it having been obtained, be lodged with the Registrar and the amicus curiae shall, in addition to any other provision, comply with the times agreed upon for the lodging of written argument.

(3) The Chief Justice may amend the terms, conditions, rights and privileges agreed upon as referred to in subrule (1).

(4) If the written consent referred to in subrule (1) has not been secured, any person who has an interest in any matter before the Court may apply to the Chief Justice to be admitted therein as an amicus curiae, and the Chief Justice may grant such application upon such terms and conditions and with such rights and privileges as he or she may determine.

(5) If time limits are not otherwise prescribed in the directions given in that matter an application pursuant to the provisions of subrule (4) shall be made not later than five days after the lodging of the respondent's written submissions or after the time for lodging such submissions has expired.

(6) An application to be admitted as an amicus curiae shall —

(a) briefly describe the interest of the amicus curiae in the proceedings;

(b) briefly identify the position to be adopted by the amicus curiae in the proceedings; and

(c) set out the submissions to be advanced by the amicus curiae, their relevance to the proceedings and his or her reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

(7) An amicus curiae shall have the right to lodge written argument, provided that such written argument does not repeat any matter set forth in the argument of the other parties and raises new contentions which may be useful to the Court.

(8) Subject to the provisions of rule 31, an amicus curiae shall be limited to the record on appeal or referral and the facts found proved in other proceedings and shall not add thereto and shall not present oral argument.

(9) An order granting leave to be admitted as an amicus curiae shall specify the date of lodging the written argument of the amicus curiae or any other relevant matter.

(10) An order of Court dealing with costs may make provision for the payment of costs incurred by or as a result of the intervention of an amicus curiae.

(11) The provisions of rule 1(3) shall be applicable, with such modifications as may be necessary, to an amicus curiae.

(b) The mechanism for admission

At first glance, rule 10 appears to contemplate two mechanisms for admission as an amicus curiae: (1) through rule 10(1), which requires the consent of the parties (on the basis that under rule 10(3) the Chief Justice may amend the terms, conditions, rights and privileges which have been agreed upon with the parties); or (2) alternatively through rule 10(4), by the permission of the Chief Justice, with the Chief Justice granting the application on such terms and conditions and with such rights and privileges as he or she may determine. One might be forgiven for

taking this approach, not only because of the apparent meaning of the words, but because the Constitutional Court has itself on occasion read the rule in that manner.[1]

However, the Constitutional Court has now made it clear that there are not two discrete means of securing admission as an amicus curiae:

> An amicus is a friend of the Court and no person may be admitted as an amicus without the consent contemplated in subrule 10(4) … it is implicit, if not explicit, from subrule 10(1) that after obtaining the necessary consent [of the parties] an applicant for admission as an amicus must still make an application to the Chief Justice for admission as an amicus.[2]

That statement in *Institute for Security Studies* is now the unequivocal position of the Constitutional Court. Not only does it post-date previous statements on the subject, but the Court has also stated that its holding in *Institute for Security Studies* 'must be regarded as a general instruction on how to prepare an application for admission as an amicus.'[3]

(c) Procedure for applying for admission as an amicus curiae

Institute for Security Studies sets out the steps which an applicant should take in order to obtain admission as amicus curiae.

The first step is to apply to the other parties for their consent under rule 10(1). This request must place the parties in a position where they can assess properly whether the request complies with the underlying principles governing applications for admission as amicus curiae.[4] Those principles are whether the submissions sought to be advanced are relevant to the issues before the court, will be useful to the court and are different from those of the other parties.[5] These matters are to be readily ascertainable from the application.

The next step is to seek the consent of the Court. If the written consent of the parties has been obtained, it does not follow automatically that the Court is bound to admit the applicant. The Court may refuse to admit the applicant where the principles referred to have not been satisfied.[6] The fact that the applicant has obtained the written consent of the parties contemplated in subrule 10(1) is simply a factor to be taken into consideration in the exercise of the Court's discretion whether or not to admit a person as an amicus.[7]

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[1] *In re Certain Amicus Curiae Applications: Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 713 (CC), 2002 (10) BCLR 1023 (CC)('*Certain Amicus Curiae Applications*') at para 3 ('A person may be admitted as an amicus either on the basis of the written consent of all the parties in the proceedings or on the basis of an application addressed to the Chief Justice.')

[2] *Institute for Security Studies: In re S v Basson* CCT 30/03 (Unreported decision of 9 September 2005)('*Institute for Security Studies*') at paras 6 and 9.

[3] Ibid at para 11.

[4] Ibid at para 10.

[5] Ibid at para 7.

[6] Ibid at para 7.

[7] Ibid at para 9.

If time limits have not been otherwise prescribed in the directions given in a matter, then in those cases where the written consent of the parties has not been secured, application for admission should be made to the Chief Justice not later than five days after the lodging of the respondent's written submissions, or after the time for lodging such submissions has expired.[1] The rules are silent as to the time within which the application is to be made to the Chief Justice if the written consent of the parties has been secured. Having regard to the interpretation which the Constitutional Court has now given to the rule, the five-day period may well also apply where the written consent of the parties has been obtained in terms of rule 10(1).

(d) Content of the application for admission

Institute for Security Studies also sets out what is to be contained in the application to the Chief Justice:

> Subrule 10(6)*(c)* requires an application for admission as an amicus curiae to set out the submissions to be advanced, their relevance to the proceedings, the reasons for believing that the submissions would be useful to the Court and different from those of the other parties to the proceedings. It is not always easy to assess these matters from mere allegations in the affidavit in support of an application for admission as amicus. Nor is it possible to assess them from a letter requesting consent to be admitted as amicus curiae. For a proper assessment of these matters to be made, the application for admission as an amicus must ordinarily be accompanied by a summary of the written submissions sought to be advanced. This will enable the Court to assess the application properly and evaluate the submissions sought to be advanced in the light of the principles governing the admission of an amicus. An applicant who fails to comply with this requirement runs the risk of the application being refused if the matters required by rule 10(6)*(c)* are not readily ascertainable from the application.[2]

Where the Chief Justice admits the applicant as an amicus curiae, the notice of admission invariably sets out the terms and the conditions of such admission, and the rights and the privileges which the amicus curiae is to have.

(e) Court's discretion as to whether to admit an amicus curiae

In *Institute of Security Studies*, the Court described the 'underlying principles' governing applications for admission as an amicus curiae as follows: *(a)* whether the submissions sought to be advanced are relevant to the issues before the Court, *(b)* whether the submissions will be useful to the Court and *(c)* whether the submissions are different from those of the other parties. It is striking that the judgment does not refer to an assessment of the 'interest' of the applicant in the proceedings as one of the underlying principles. Rule 10(1) states that only a person 'interested' in a matter before the Court may apply for admission as an amicus. In all likelihood, the reason for the Court's silence on this matter is that, in practice, this threshold test is fairly easily satisfied.

[1] Rule 10(5).
[2] *Institute for Security Studies* (supra) at para 10.

Erasmus suggests that the sort of 'interest' contemplated in the rule is 'an interest in the issues of law and policy involved in the matter by way of (for example) a standing commitment to the advancement of a particular point of view in relation to those issues, or a specialised knowledge of the matters in issue.'[1] This approach is consistent with the practice of the Constitutional Court. The threshold requirement of an 'interest' has never been a stumbling-block to admission as an amicus. If the applicant proposes to make submissions which are indeed relevant to the issues before the Court, which will be useful to the court, and which are different from those of the other parties, the Court will not refuse the application on the basis that the applicant is not sufficiently 'interested' in the matter before the Court.

However, when considering whether the applicant for admission as an amicus curiae has satisfied the principles underlying the rule, the fact that the person was admitted as an amicus curiae in the court below does not in itself give such a person the right to be admitted as an amicus in the Constitutional Court.[2] In criminal cases, an additional factor is relevant to the exercise of rule 10 discretion by the Court:

> As a general matter, in criminal matters a court should be astute not to allow the submissions of an amicus to stack the odds against an accused person. Ordinarily, an accused in criminal matters is entitled to a well-defined case emanating from the state. If the submissions of an amicus tend to strengthen the case against the accused, this is cause for caution. This, however, is not an inflexible rule. But it is a consideration based on fairness, equality of arms, and more importantly, what is in the interests of justice.'[3]

(f) Submission of argument by an amicus curiae

Admission as an amicus curiae carries with it the right to lodge written argument, provided that the written argument does not repeat matters set forth in the argument of other parties and raises new contentions which may be useful to the Court.[4] The directions given by the Chief Justice invariably set out the time limits for the lodging of written argument.

Rule 10(8) states flatly that an amicus curiae 'shall not present oral argument'. While that is the default position provided by the rules, it is not the invariable position or even the usual practice. In practice, a person admitted as an amicus is usually permitted, on application, to present oral argument. While rule 10 does not provide for this exercise of discretion, the power to permit the amicus to offer oral argument would appear to be derived from rule 32(2). Rule 32(2) states that the Court or the Chief Justice may give such directions in matters of practice, procedure and the disposal of any appeal, application or other matter as the Court

[1] HG Erasmus *Superior Court Practice* (1994) C4-23.
[2] *Institute for Security Studies* (supra) at para 11.
[3] Ibid at para 15.
[4] Rule 10(7).

or Chief Justice may consider just and expedient. The test is therefore whether it is 'just and expedient' to permit the amicus curiae to present oral argument. Given the Court's reliance on oral argument as an opportunity for members of the Court to debate issues raised in heads of argument, it is easy to understand why the Court will ordinarily allow a person who has been admitted as an amicus — and whose submissions by definition are different from those of the parties and may be useful to the court — to submit oral argument. Time limits are usually laid down to ensure that the hearing of the matter is not unnecessarily prolonged.

(g) New factual material and evidence

An amicus curiae is, like the parties, permitted by rule 31 to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record, provided that such facts *(a)* are common cause or otherwise incontrovertible; or *(b)* are of an official, scientific, technical or statistical nature capable of easy verification.

The scope of rule 31 is dealt with elsewhere in this volume.[1] The rule's essence is that the material must be of such a nature that it does not lead to any genuine and serious dispute of fact. Typically, the material submitted under this rule consists of statistical information from sources which are generally accepted as reliable,[2] articles from learned journals, government reports, reports of official bodies, and empirical data relevant to the matters at issue.[3] Where an amicus seeks to introduce evidence in terms of rule 31, a dispute as to the facts 'if genuine, usually will demonstrate that they are not "incontrovertible" or "capable of easy verification". Where this is so, the material will be inadmissible.'[4]

A question which has not yet been answered by the Constitutional Court is under what circumstances will an amicus curiae be permitted to introduce evidence which does not fall within the rubric of rule 31. Rule 10(8) states that, subject to the provisions of rule 31, an amicus curiae shall be limited to the record on appeal or referral and the facts found proved in other proceedings and shall not add thereto. That injunction can, however, not be invariable. It is followed

[1] See Kate Hofmeyr 'Rules and Procedure in Constitutional Matters' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 5.

[2] *August & Another v Electoral Commission & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 12.

[3] *Bannatyne v Bannatyne (Commission for Gender Equality, as amicus curiae)* 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC) at paras 3 and 26. The material admitted by the Court in this matter is described at footnotes 35, 36 and 37 of the judgment and gives a good indication of the range of material deemed admissible.

[4] *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at paras 22–25; *Prince v President, Cape Law Society & Others* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) at paras 10, 11 and 98; *Certain Amicus Curiae Applications* (supra) at para 8.

immediately by the injunction that the amicus curiae shall not present oral argument, and as we have seen, the Court has the power to permit oral argument. The Court must therefore also have the power to permit an amicus curiae to adduce additional evidence outside rule 31.

The general principle is that ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence. Similarly, evidence which is untested, and will lead to submissions which open an entirely new issue on appeal, will generally not be permitted. A further factor will be whether the new evidence will necessitate the postponement — and thus the resolution — of an otherwise urgent matter.[1] It is clear, however, that the role of an amicus is not limited to questions of law: the amicus also turns the Court's attention to relevant matters of fact.[2]

Whether the submission of new evidence will be permitted in any given case will depend on what is 'just and expedient' (the governing principle of rule 32(2)). Factors relevant to this assessment include: *(a)* the delay caused by giving the other parties an opportunity to respond to the new evidence; *(b)* the Constitutional Court's reluctance to deal with evidential material without having the benefit of the views of another court;[3] *(c)* the cogency of the evidence; and *(d)* the importance of the evidence to the matters which the Court has to decide. Where a party has, in its evidence, referred to the views or conduct of another person, which is not a party, but which is in fact interested in the proceedings and is subsequently admitted as an amicus curiae, that ought to strengthen the claim of the amicus to put its position on the record for the benefit of the Court.[4]

8.4 Amicus Curiae in Other Courts

(a) Supreme Court of Appeal

In the Supreme Court of Appeal, the admission of an amicus curiae is dealt with in rule 16. That rule is for practical purposes identical to Constitutional Court rule 10. There are, however, two exceptions.

First, rule 16(5) provides that an application for admission as an amicus curiae shall be made within one month after the record has been lodged with the Registrar. This proviso therefore requires lodging of the application by the amicus at an earlier stage than is the case in the Constitutional Court.

[1] *Certain Amicus Curiae Applications* (supra) at paras 6 and 7.

[2] Ibid at para 5.

[3] In this regard, the jurisprudence dealing with direct access to the Constitutional Court is relevant.

[4] See, eg, *Magidimisi NO v Premier of the Eastern Cape* (High Court, Bisho, Case No 2180/2004). In *Magidimisi,* the respondents made general statements about the conduct of the administration of the system of social grants, and contrasted their relationship with the applicants' attorney with their relationship with the Black Sash, a non-governmental organisation. The Black Sash was admitted as an amicus curiae, and was permitted to place before the court evidence as to its relationship with the respondents, and their administration of the social grant system.

Secondly, the rules of the Supreme Court of Appeal do not have a provision equivalent to Constitutional Court rule 31 that might accommodate documents lodged to support non-disputed factual claims. The amicus curiae in the SCA is therefore limited on appeal to the record. That said, Rule 11(1)*(b)* authorizes the President of the Court or the Court to give directions in matters of practice, procedure and the disposal of any appeal in such manner as the President or the Court may consider just and expedient. This rule would appear to give the President and the Court the power to permit an amicus curiae to adduce additional evidence, just as they have the power to authorize an amicus curiae to present oral argument notwithstanding the statement in rule 16(8) that an amicus shall not present any oral argument.

(b) Labour Appeal Court

In the Labour Appeal Court, the admission of an amicus curiae is dealt with in rule 7. The criteria for admission as an amicus curiae are, for all practical purposes, identical to those in the Constitutional Court. The person concerned must be 'interested' in the proceedings before the Court.[1] The application for admission must describe the interest of the amicus, identify the position to be adopted by the amicus, set out the submissions to be advanced by the amicus, demonstrate the relevance of the submissions to the proceedings, and reflect that person's reasons for believing that the submissions will be helpful to the Court and different from those of the other parties.[2]

Rule 7 makes no provision for a request to the other parties to consent to the admission of the would-be amicus curiae. The application is made directly to the Judge President or a Judge authorized by the Judge President. The application must be made not later than fifteen days before the date of hearing.[3]

The amicus curiae has the right to deliver written argument.[4] No reference is made in the rules to the submission of oral argument. But as *Woolworths* indicates, oral argument is permitted on occasion.[5] If new matters or arguments are raised by the amicus curiae, any other party has the right to file written argument within five days from the date on which the argument of the amicus curiae was served on those parties.[6]

An order of court dealing with costs 'may make provision for the payment of the intervention of the amicus curiae'.[7] This rule could be narrowly construed to mean that an order may be made for the payment of the costs incurred by the

[1] Rule 7(1).
[2] Rule 7(4).
[3] Rule 7(3).
[4] Rule 7(5).
[5] *Woolworths (Pty) Ltd v Whitehead (Women's Legal Centre Trust Intervening)* 2000 (3) SA 529 (LAC).
[6] Rule 7(6).
[7] Rule 7(7).

amicus, but not an order for costs against the amicus curiae. However, in *Woolworths*, the court implicitly accepted the proposition that it possessed the power to make an order for costs against an amicus curiae.

(c) High Court

In the High Court, the making of submissions by amici curiae is linked to rule 16A. Rule 16A requires a person raising a constitutional issue in an application or action to give notice thereof to the registrar at the time of filing the relevant affidavit or pleading. The registrar is required to place that notice forthwith on a notice board which has been designated for that purpose. The purpose of the rule is to bring the constitutional challenge to the attention of persons who may be affected by, or who may have a legitimate interest in, the case. This rule enables such persons to seek to intervene either as a party, or as an amicus curiae.[1]

The intervention process created by rule 16A is generally similar to that created by rule 10 in the Constitutional Court. There are, however, some significant differences.

The time limit for making application to the High Court for admission as an amicus curiae is not later than 20 days after the filing of the affidavit or pleading in which the constitutional issue was raised. This time period is much shorter than that of either the Constitutional Court or the Supreme Court of Appeal.

Unlike the rules of the Constitutional Court and Supreme Court of Appeal, High Court rule 16A makes provision for a party to oppose an application for admission as an amicus curiae. A party wishing to oppose is required to file an answering affidavit within five days of service of the application upon that party. The answering affidavit must clearly and succinctly set out the grounds of opposition. The court hearing the application for admission may refuse it or grant it upon such terms and conditions as it may determine.[2]

The rule is silent both on the question of the admission of evidence, and on the presentation of oral argument. It is, therefore, clear that a High Court has the discretion to permit both. It is rather easy to understand why this is so, particularly in relation to the question of evidence. The Constitutional Court and the Supreme Court of Appeal are (subject to very limited exceptions in the case of the Constitutional Court) courts of appeal. They do not hear matters at first instance. Appeals are, as a result, generally limited to the record of the court a quo. Where, however, the matter is heard at first instance by the High Court, it will be easier for an amicus curiae to persuade the court that it should be permitted to adduce evidence.

[1] *Fourie & Another v Minister of Home Affairs & Others* 2005 (3) SA 429 (SCA), 2005 (3) 241 (SCA)('*Fourie*') at para 55; *Shaik v Minister of Justice and Constitutional Development & Others* 2004 (3) SA 599 (CC), 2004 (4) BCLR 333 (CC) at para 24; *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C), 2004 (12) 1328 (C) at para 21.

[2] Rule 16A(8).

In *Modderklip*, the applicant — who had already obtained an eviction order from the High Court — sought an order that the governmental respondents were to take immediate steps to evict unlawful occupiers from land owned by the applicant.[1] AgriSA, a voluntary association representing commercial farmers, sought leave to intervene as an amicus curiae. The High Court not only permitted this intervention, but also permitted the amicus curiae to file affidavits providing a factual foundation for the submissions which it wished to make.[2]

(d) Land Claims Court

In the Land Claims Court the admission of an amicus curiae is dealt with in rule 14. Rule 14 is quite detailed and differs in some material respects from the framework created by Constitutional Court rule 10.

The most material difference is that rule 14(1) makes it clear that there are two alternative routes for admission as an amicus curiae: *(a)* through written agreement between the would-be amicus and all participating parties;[3] or *(b)* by order of the presiding judge or the court.[4] It seems clear that once the consent of all participating parties has been obtained, there is no requirement of permission of the presiding judge or the court. The agreement must be delivered or the application for admission must be made within 10 days after the filing of the last affidavit or pleading referred to in the rules, or after the time for filing such document has expired.[5]

Where application is made for an order admitting an amicus curiae, a party may oppose by filing an answering affidavit. The applicant may then file a replying affidavit.[6] The matter is dealt with in chambers by the presiding judge without any person being present. The judge may make an order on the application or refer it to the court for argument and decision.[7]

The question of evidence is dealt with explicitly. An application to the court for an order admitting a person or organisation as an amicus curiae must contain a summary of the evidence (if any) to be presented by the amicus.[8] The agreement with the participating parties, or the order of court admitting the amicus, must set forth the right (if any) which the amicus curiae has to produce evidence to the court, to cross-examine witnesses, to make written submissions, and to present oral argument to the court.[9] The possibility of the active participation of the

[1] *Modderklip Boerdery (Edms) Bpk v President van die RSA & Andere* 2003 (6) BCLR 638 (T)('*Modderklip*').
[2] Ibid at para 23. For more on the nature of the evidence, see *Modderklip* (supra) at para 30. The governmental respondents objected to this evidence, but the objection was rejected, partly on the grounds that the respondents had had the opportunity to answer it. Ibid at para 30.
[3] Rule 14(1)*(a)*.
[4] Rule 14(1)*(b)*.
[5] Rule 14 (1A).
[6] Rule 14(3) and (4).
[7] Rule 14(5).
[8] Rule 14(2)*(b)*(iii).
[9] Rule 14(6).

amicus through the presentation of evidence and cross-examination of witnesses is thus explicitly contemplated. The court may, at any time, vary the rights of the amicus set out in an agreement with the participating parties or in a prior order of the court.[1]

Unless the court orders otherwise, an amicus curiae is not entitled to any order for costs against any party. It may, in addition, not be subject to any order for costs in favour of any party.[2]

(e) Labour Court

In the Labour Court, the admission of an amicus curiae is dealt with in rule 19. This rule is identical to rule 7 of the Labour Appeal Court, except that the time for the filing of written argument in response to new matters or arguments raised by the amicus curiae is seven days from the date on which the argument of the amicus curiae was served on the parties.[3]

8.5 Costs

Constitutional Court rule 10(1) provides that an order of court dealing with costs may make provision for the payment of costs incurred by or as a result of the intervention of an amicus curiae. From this it appears that an order for costs may be made both in favour of and against an amicus curiae. However, that is seldom if ever done. There has not yet been any case in which the Constitutional Court has made such an order.

In *Hoffmann*, the amicus curiae asked for an order that the unsuccessful respondent pay its costs. Ngcobo J for the Court stated the general principle as follows:

> An amicus, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs. Whether there may be circumstances calling for departure from this rule is not necessary to decide in this case. Suffice it to say that in the present case no such departure is warranted.[4]

As pointed out above, rule 10(1) does in fact provide that an order of court dealing with costs may make provision for the payment of costs incurred by or as a result of the intervention of an amicus curiae. There must therefore be circumstances in which such an order may be made. The implication of the judgment of Ngcobo J is that exceptional circumstances are required before such an order will be made.

In *Woolworths (Pty) Ltd v Whitehead (Women's Legal Centre Trust Intervening)*, the appellant succeeded in its appeal to the Labour Appeal Court.[5] It contended that

[1] Proviso to Rule 14(6).
[2] Rule 14(7).
[3] Rule 19(6).
[4] *Hoffmann* (supra) at para 63.
[5] 2000 (3) SA 529 (LAC)('*Woolworths*').

the amicus, which had supported the position of the unsuccessful respondent, should be ordered to pay the costs occasioned by its intervention. The applicant contended that the amicus had raised issues collateral to those defined by the pleadings and the parameters of the lis between the parties, and that this intervention went beyond the proper functions of an amicus. Conradie JA did not agree:

> The amicus has contributed valuable submissions on the appropriateness of the test for determining unfairness and has assisted the Court on the question of onus. In my view the amicus does not deserve to be mulcted in costs.[1]

Zondo AJP agreed with Conradie JA that the amicus curiae should have been admitted:

> Even though the basis on which I have decided the matter did not require much of the arguments presented by the amicus, I am unable to say that the amicus was unnecessary or that he addressed collateral issues. I think he was sufficiently helpful to the Court.[2]

No order for costs was made either in favour of or against the amicus.[3]

The law reports identify only one case in which an amicus curiae has either been awarded its costs, or ordered to pay costs. In *Modderklip Boerdery*, the High Court ordered the respondents to pay the costs of the amicus curiae with regard to an unsuccessful application by the respondents for the striking out of certain evidence. That order for costs was not affected by the judgment of the Supreme Court of Appeal.[4] When the matter came before the Constitutional Court, Langa ACJ noted that 'it is unusual and indeed it will rarely be appropriate for costs to be awarded in favour of an amicus curiae'. However, the state had expressly stated that it was not seeking to overturn the order of the High Court awarding those costs to the amicus curiae. There was, accordingly, no basis for the Constitutional Court to interfere with the costs order.[5]

A court has made a costs order against an amicus curiae in one unreported case. In *Fourie & Another v Minister of Home Affairs & Others*, Roux J, in the Transvaal Provincial Division of the High Court, was of the opinion that the conduct of the amicus curiae went well beyond what had been regarded as proper by the Constitutional Court in *Treatment Action Campaign*. He ordered the amicus to pay the respondents' costs jointly and severally with the appellants. However, the respondents (wisely) abandoned that part of the order of the court.[6] The Supreme Court of Appeal did not make any order in respect of the costs of the amicus curiae, or the costs incurred as a result of the intervention of the amicus curiae.

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[1] *Woolworths* (supra) at para 52.
[2] Ibid at para 28.
[3] Ibid at para 151.
[4] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (AgriSA and Legal Resources Centre, amici curiae); President of the Republic of South Africa & Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* 2004 (6) SA 40 (SCA), 2004 (8) BCLR 821 (SCA) at para 50.
[5] *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (AgriSA & Others, amici curiae)* 2005 (5) SA 3 (CC), 2005 (9) BCLR 786 (CC) at para 67.
[6] *Fourie* (supra) at para 55.

9 Remedies

Michael Bishop

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38. Enforcement of Rights
Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

172. Powers of courts in constitutional matters
1. When deciding a constitutional matter within its power, a court—
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including—
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

9.1 INTRODUCTION

(a) Pointless. . .

To paraphrase Edmund Blackadder: Law without remedies is like a broken pencil. Pointless.[1] Indeed, for Justice Oliver Wendell Holmes and his realist progeny, the law is nothing but remedies: 'The prophecies of what the courts will *do* in fact, and nothing more pretentious, are what I mean by the law.'[2] Holmes' theory is based on the intuition pump of the hypothetical 'bad man' who is interested only in what the costs and benefits of obeying or disobeying the law are. But it is not, as Holmes makes clear, only the 'bad man' who cares more about what the court does than what it says. The ultimate concern of virtually all litigants is what the court orders, not why it orders it. When a father comes to court to prevent the adoption of his child, he does not care what test the judges adopt or what factors they consider. He cares only whether he will see his child again. When people approach a court because they have nowhere to live and their constitution tells them they have a right to a house, they are not concerned about whether the court adopts a reasonableness test or a minimum-core approach to socio-economic rights. They want only to know where they will sleep tomorrow. When two men facing state-sanctioned execution in the United States appeal to a court in a faraway land because that country's government illegally handed them over to the people who might now kill them, the reasons for the court's decision are irrelevant. They are interested only in whether the court can keep them alive.

* A chapter as long as this does not happen without the aid of many people who must be thanked. Firstly, Stu Woolman for making me part of *CLOSA* and for his continuous and unflinching support and encouragement (despite me missing endless deadlines), his constant advice and his fantastic and generous edit under immense pressure. Without him I would never have started, let alone finished, this chapter. Secondly, Theunis Roux for giving me the space to work on this project at SAIFAC. Thirdly, Jonathan Klaaren, Steven Budlender and Matthew Chaskalson for allowing me to use their draft material and Kate Hofmeyr for giving me access to her fantastic Thesis. Fourthly, Irene de Vos, Okyerebea Ampofo-Anti, Lisa Chamberlain and Lauren Kelso for last-minute editorial support. Fifthly, Ute Kuhlmann and her team at Juta for being so accommodating and allowing me to push the deadline to literally the last second. Last but not least, Clare Ballard for being a constant inspiration, even in her absence.

[1] 'Chains' (1986) Episode 6 *Blackadder II* ('Queeny: And me, did you miss me Edmund? Blackadder: Madame, life without you is like a broken pencil. Queeny: Explain. Blackadder: Pointless.')

[2] 'The Path of the Law' in *Collected Papers* (1920) 173 (my emphasis).

I am not saying that substantive legal reasoning is not important. It is, obviously, fundamental to any system committed to the rule of law. And I do not agree with Holmes that law is nothing but prophecy. But I am saying, and I do believe, that if courts did nothing but reason, if they only spoke about what *should* happen, but had no power to *make* it happen, they might still be interesting and influential social actors, but they would not be courts.[3] In the words of Paul Gerwitz:

> To be of the law, as opposed to philosophy and economic theory . . . one must take reality as the primary realm of activity. Law moves beyond articulation to implementation, and legal scholarship therefore must address the complexities of acting within an imperfect, resisting, often vulgar real world. In law, reality is not a footnote to theory or an appendix to the ideal. The claims of reality are a central intellectual imperative as much as a practical one.[4]

In 'Nomos and Narrative', Robert Cover imagines law as a normative universe, a 'nomos', that is constituted and can only be understood through narrative, through stories.[5] These stories are about what happens in the real world — what people have done and made and felt and lost. The normative universe of law is a function of the gap between the real world of these stories and the ideal world of our hopes and dreams:

> Law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative — that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative. . . . But the concept of a *nomos* is not exhausted by its 'alternity'; it is neither utopia nor pure vision. A *nomos*, as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures. A *nomos* is a present world constituted by a system of tension between reality and vision.[6]

This tension between the ideal and the real is the primary domain of legal remedies and, thus, of this chapter. But remedies do more than negotiate the difficult terrain that lies between the 'is' and the 'ought': 'To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the "is" and the "ought," but the "is," the "ought," and the "*what might be.*"'[7] This chapter tries

[1] See D Levinson 'Rights Essentialism and Remedial Equilibration' (1999) 99 *Columbia LR* 857, 939 ('Perhaps the institution of judicial review could even be changed to facilitate nonfunctional constitutional interpretation, for example by establishing a separate constitutional court and making constitutional adjudication purely declaratory or advisory. This would ensure that judges were not peeking at consequences, because there would be none, and it would insulate abstract constitutional judgments from social contexts where they would be too costly to implement or threaten serious harm. Constitutional judges, given the leisure to "follow the ways of the scholar" full-time, might then more closely approach Dworkin's Herculean ideal, bringing coherence and integrity to a closed philosophical system of abstract legal principles. Obviously, however, this utopian or dystopian model of constitutional law would bear little resemblance to the current practice of constitutional adjudication.')

[2] P Gerwitz 'Remedies and Resistance' (1983) 92 *Yale LJ* 585, 680.

[3] (1983) 97 *Harvard LR* 4.2

[4] Ibid at 9.

[5] Ibid at 10 (my emphasis).

not only to examine what courts have done to make the black letter doctrine of courts real. It endeavours to conceive of remedies as a way for imagining new ways of seeing the Final Constitution and thereby re-imagining what our founding document *means*; not in the doctrinal sense (that occupies much of the remaining 5000 pages of this treatise), but in the fullest (social, political, philosophical, economic) sense of 'meaning'. It aims, though not explicitly, to save remedies from its often parasitic relationship to rights and place them at the centre of our understanding of South African constitutional law. It hopes to paint remedies not as a limitation on what can be, but as an opportunity to imagine 'what might be'.

(b) A Roadmap

This ambitious goal is tackled in two separate halves. The first half — § 9.2 — asks some of the basic questions that are relevant to all remedies and is more theoretical in nature. The second half — § 9.3–9.6 — considers specific remedies and is more practical in nature. The latter portion also tries to separate the explication of the law from criticism. I hope that this separation of issues will make the chapter more useful for both practitioners and academics. Those who are interested only in the principles for the application of a specific remedy can skip straight to that discussion. Readers who want a more in-depth discussion of what remedies are, how they work and what principles should generally guide courts in their choice of remedies will be best served by the first half. This bifurcation does mean that there is a fair amount of repetition between the two sections that those brave readers who attack the chapter from beginning to end may notice. To them I apologise, but I hope the repetition serves my remaining readers well.

The chapter begins (§ 9.2*(a)*) by examining the various meanings of 'remedy' that are used in law and providing a fairly stable definition for the rest of the discussion. Next (§ 9.2*(b)*), I examine the contours of the central principle: *ubi jus ibi remedium* (where there's a right, there's a remedy). § 9.2*(c)* examines the relationship between rights and remedies. In short, I argue that the traditional separation of rights and remedies is descriptively inaccurate; rights and remedies influence each other in a number of ways. However, maintaining the separation between the two is, at the same time, beneficial because it makes it easier for courts to combat existing injustices. The following section (§ 9.2*(d)*) considers the extent of discretion that courts have in choosing remedies and the implications that may have for legitimacy. The way is then clear to consider the principles that should guide the courts' choices between different remedies. That is the task I set myself in § 9.2*(e)*. I suggest a structure for considering remedies that tries to make sense of the Constitutional Court's often ambiguous jurisprudence. The final question considered in the first half of the chapter is the relationship between private remedies and constitutional remedies (§ 9.2*(f)*).

§ 9.3 sets up the remainder of the discussion. It explains why the specific remedies are divided into remedies following a finding of invalidity, individual remedies and systemic remedies and the limitations of that division. I then consider each of these categories in turn. The first — discussed in § 9.4 — concerns the action that a court takes after it declares a law invalid. Courts can employ a number of mechanisms to limit the often drastic impact of declaring a law invalid. Courts can: add or remove specific words to invalidate only the specific portion of the law invalid; suspend the order of invalidity to allow new measures to be put in place; and regulate the effect of the declaration on past actions. Individual remedies — cases where there is a single victim of a right — are broken down into damages, declarations and interdicts. Each remedy is discussed in § 9.5. The last important part of the chapter — § 9.6 — considers an emerging and extremely important area of constitutional remedies: remedies for systemic violations. This section considers some of the same orders — declarations and interdicts — as the previous section. However, it does so in the context of systemic, rather than individual violations of rights. Finally, I briefly consider constitutional remedies flowing from statutes enacted to give effect to constitutional rights (§ 9.7) and offer a few remarks about remedies in criminal cases (§ 9.8).

9.2 THEORY

(a) What is a 'remedy'?

The word remedy has many different meanings in legal scholarship and practice. Peter Birks has identified at least five different denotations in English law: They range from 'a cause of action', to 'a right born of a wrong', to 'a right born from a court order'.[1] Such varied uses of the term 'remedy' likewise abound in South African case law. The courts have referred to the following as a 'remedy': a statutory right;[2] a common-law right;[3] an order of summary judgment;[4] a right of appeal;[5] and the court's order.[6]

[1] P Birks 'Rights, Wrongs and Remedies' (2000) 20 *Oxford Journal of Legal Studies* 1, 9–17 (The two meanings not mentioned in the text are a right born of an injustice or grievance, and right born of a court's order issued on a discretionary basis.) See also R Zakraewski *Remedies Reclassified* (2005)(Offers a fascinating discussion of how to understand remedies and their relationship to substantive rights in the context of English law.)

[2] See, for example, *Fedsure Life Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) at para 2 ('The 1956 Act . . . created a statutory remedy for the commission of what was referred to as an "unfair labour practice" which was soon interpreted by the Courts to C include the unfair dismissal of an employee'.)

[3] See, for example, *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811, 821A (A)('Its remedy, if any, was to sue Oneanate by way of a *condictio*.')

[4] See, for example, *First National Bank of SA Ltd v Myburgh* 2002 (4) SA 176 (C) at para 8 ('Summary judgment is designed to give plaintiff a speedy and cost-effective remedy in the case where the defendant does not disclose a valid and bona fide defence. It is an extraordinary and stringent remedy.')

[5] See, for example, *S v Dzukuda & Others; S v Tshilo* 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC) at para 48 ('If the provisions are misapplied the accused has an appeal remedy or may use the special entry mechanism of the CPA in case of irregularity.')

[6] See, for example, *Gory v Kolver NO & Others* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) at para 21 ('The Starke sisters argue that reading words into section 1(1) as ordered by the High Court is not the appropriate remedy in this case.')

Why such variation? 'Remedy' has a very different meaning when used by a court involved with a common-law action where the only possible order it can grant is one of damages than it does when a court considers a constitutional case where it has virtually unlimited discretion to grant whatever order it deems fit. And both systems encourage different uses of 'remedy' when a lawyer provides advise to her client ('Your best remedy here is defamation.') What all these uses of the word 'remedy' have in common is, as Birk writes

> that that which is referred to as a remedy is represented as a cure for something nasty. To remedy is to cure or make better. The only precondition to the use of the word is a state of affairs which needs making better.[1]

For the purposes of clarity, I will adopt a definition of 'remedy' suggested by Kate Hofmeyr: 'that which is provided by [a] court in response to the claimant's success in showing that his or her right has been violated [or threatened].'[2]

A few points about this definition. It does not refer only to orders. Although most remedies are found in a court's order, sometimes there are elements of a judgment not included in the order that nonetheless have direct practical effect. For example, when a court decides that legislation should be interpreted in a particular way, it ordinarily does not include that in its order. If the interpretation is the response to a showing that a right has been violated, then it qualifies as a remedy. A *right* must have been violated or threatened. I am, by and large, not concerned with decisions that do not involve the finding of a violation of a right or some other constitutional provision. Developments of the common law based on FC s 39(2) dismissals of leave to appeal, interim orders of condonation, postponement and so forth do not follow from the violation of a right and are not considered here. I also do not address costs. Those issues are all ably dealt with elsewhere in this treatise.[3] That said, the right need not always be constitutional in nature. In some places, I refer to cures outside the Final Constitution as 'remedies'. However, I am primarily concerned only with constitutional remedies. And so, unless the context indicates otherwise, the reader can assume that when I use the word 'remedy', I am referring to a cure for the violation of a *constitutional* right.

[1] Birks (supra) at 9.

[2] K Hofmeyr 'Understanding Constitutional Remedial Power' unpublished Mphil Thesis (Oxford University, 2006, on file with the author) 11.

[3] See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31; K Hofmeyr 'Rules and Procedures' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 5; A Friedman 'Costs' in S Woolman, T Roux, J Klaaren, A Steyn, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 6.

(b) Ubi jus ibi remedium

> There can to my mind be no doubt that the authors of the Constitution intended that those rights (that is, the rights entrenched in the Constitution) should be enforced by the Courts of law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. *Ubi jus, ibi remedium.*[1]
>
> — Centlivres CJ

(i) *General Principle*

This dictum — and the ancient principle that 'where there is a right, there is a remedy' — was adopted by the Constitutional Court in *August & Another v Electoral Commission & Others.*[2] The applicants in *August* were prisoners who wished to exercise the franchise. Ostensibly, no law prevented them from doing so and they were told that their right to vote remained as real as that possessed by any other citizen. All that prevented them from exercising their right were the prison walls between them and the polling stations. Sachs J employed the *ubi jus, ibi remedium* principle to justify an order requiring the government to take steps to make it *practically* possible for prisoners to vote. *August* clearly established the principle as part of our law and our courts have consistently re-affirmed that commitment.[3]

The idea that a right must be accompanied by a remedy has achieved near universal assent in legal systems across the world[4] and does not seem to require much by way of normative justification. As one writer on the topic has noted: 'The principle is so obviously correct that assent to it is instinctive.'[5] The best

[1] *Minister of the Interior v Harris & Others* 1952 (4) SA 769, 780 (A)('*Harris*').

[2] 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 34.

[3] See *Kaunda & Others v Presdient of the Republic of South Africa* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at para 181 (In a claim for diplomatic protection to ensure that the human rights of South African citizens being held in Zimbabwe were respected, Ngcobo J held: 'Unless the South African government grants South African nationals abroad diplomatic protection, they are likely to remain without a remedy for violations of their internationally recognised human rights. And if the government cannot protect South African nationals abroad against violations or threatened violations of their international human rights, it may well be asked, what then are the benefits of being a South African citizen?'); *Engelbrecht v Road Accident Fund* 2007 (5) BCLR 457 (CC), 2007 (6) SA 96 (CC) at para 21 (In the context of common-law remedies, the Court held: 'The remedy is part and parcel of a right (*ubi ius ibi remedium*)').

[4] For the position in Canada, see *Nelles v Ontario* [1989] 2 SCR 170, 196 quoted with approval in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at para 69 n 187 ('To create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur.')

[5] D Zeigler 'Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts' (1987) 38 *Hastings LJ* 665, 665 ('The principle that legal rights must have remedies is fundamental to democratic government. In a democracy, legal rights define social relations and promote human well-being in the broadest sense. Justice requires their enforcement'). See also T Thomas '*Ubi Jus, Ibi* Remedium: The Fundamental Right to a Remedy Under Due Process' (2004) 41 *San Diego L*R 1633; J Jeffries 'The Right-Remedy Gap in Constitutional Law' (1999) *Yale Law Journal* 87, 87 ('Ever since John Marshall insisted that for every violation of a right, there must be a remedy, [*Marbury v Madison* 5 US 137, 163] American constitutionalists have decried the right-remedy gap in constitutional law. Everyone

justification is to simply state the consequence of rejecting the principle:

> The greatest absurdity imaginable in law is: 'that a man hath a right to a thing for which the law gives him no remedy; which is in truth as great an absurdity, as to say, the having of right, in law, and having no right, are in effect the same.'[1]

There would be no point in possessing a right, in terms of law, that offered no relief to the person who sought its enforcement. On its face, South African law clearly requires that the violation of every right is accompanied by some sort of remedy.[2] However, the case law of the Constitutional Court suggests that the application of this general principle is not a simple matter. As it turns out, our law throws up instances in which this foundational commitment principle cannot be honoured. By considering some of these exceptions to the rule, we can get a better understanding of what *ubi jus ibi remedium* really means in South African law.

(ii) *Deviations*

The Court seems to have departed from the principle in two classes of cases. One, cases where the principle may appear to be ignored, but is in fact respected. Two, cases where the principle is not, in fact, respected.

(aa) Imaginary Deviations

First, does a declaratory order count as a remedy? If all a court does is state what the right means or that a right has been violated, is there really a remedy? For example, in *Rail Commuters Action Group & Others v Transnet t/a Metrorail & Others,* the applicants argued that various government entities (the respondents) had a responsibility to ensure their safety on public trains and that those entities had failed to meet that obligation.[3] The Court agreed both that the respondents had an obligation and that they had failed to fulfil it. However, the only relief they granted the applicants was to declare the existence of the obligation.

As I argue in more detail later,[4] declaratory relief can indeed be a remedy if it cures, or attempts to cure, the alleged ill. It will be a highly effective remedy in

agrees that victims of constitutional violations should have effective redress. So when Akhil Amar declares that governments acting unconstitutionally "must in some way undo the violation by ensuring that victims are made whole," [A Amar 'Of Sovereignty and Federalism' (1987) *Yale LJ* 1425, 1427] he voices a proposition commanding nearly universal assent.')

[1] *Harris* (supra) at 78C quoting *Dixon v Harrison* 124 All ER 958, 964, quoted with approval in *Administrator, Transvaal v Brydon* 1993 (3) SA 1, 13–14 (A).

[2] However, as I note below, the relationship between rights and remedies is not that simple. Remedies are not merely the handmaidens of rights; in many ways they substantively affect the content and value of rights. See § 9.2*(c)* infra.

[3] 2003 (3) BCLR 288 (C).

[4] See §§ 5*(b)* and 6*(a)* infra.

situations where all the parties seek is the clarification of the legal position[1] or where the underlying dispute has already become moot.[2] The difficulty is not whether a declaration is a remedy — it is and therefore upholds the *ubi jus* principle — but whether it is an effective remedy. In *Rail Commuters,* the declaration might not be as effective as another remedy might be. But it does achieve the partial remedial goal of regulating the future relationship between the parties and should make it easier for the applicants to assert a claim for 'better' relief (such as damages or an interdict) if the respondents fail to adhere to the declaration of rights.

Secondly, in some cases, it will seem impossible for a court to provide any relief — say, because the party or the parties are no longer in their jurisdiction.[3] In *Mohamed & Another v President of the Republic of South Africa & Others*, the applicants had been deported to the US (from South Africa) to be tried for the bombing and the destruction of the US embassies in Nairobi and Dar es Salaam.[4] In the United States, a conviction in federal district court could result in the imposition of a death sentence. The Constitutional Court held that the deportation was illegal. Given the unconstitutionality of the death sentence under the Final Constitution, the South African government ought not to have allowed them to be secreted out of the country by US officials (working in collusion with South African officials) without first obtaining an assurance that they would not receive the death penalty. By the time the decision was handed down the applicants were in New York — outside the Court's jurisdiction. Is it possible for the Court to provide a remedy in such a case?

The answer, again, must be yes. The *Mohamed* Court considered carefully what remedy would be appropriate and decided to give a declaratory order specifying how the government had breached the law and ordered that the judgment be sent to the federal district court in New York.[5] The Court also held that it possessed the authority to order the South African Government to intervene on the applicants' behalf with the US government but, considering the advanced stage of the criminal trial, declined to do so.[6] Still, the Court's order and its transmission to the district court might well have influenced the district court's decision not to impose the death penalty. Although the remedy was by necessity weak, it represented an attempt to cure the wrong that had been done to the applicants. It therefore demonstrates the Court's respect for the *ubi jus* principle.

[1] See, for example, *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC), [2007] 5 BLLR 383 (CC)(Both parties only sought clarification of the legal power of the National Commissioner of Police to upgrade or downgrade officers.)

[2] See, for example, *KwaZulu-Natal MEC of Education & Others v Pillay* 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC)(The respondent convinced the Court that her daughter had a right to wear a nose-stud to school, but by the time the case was decided, she had already left the school.)

[3] Under common law, the inability to enforce its judgment because the parties are not in its jurisdiction is a reason for a court to refuse to exercise jurisdiction at all. See, for example, *Tsung & Another v Industrial Development Corporation of South Africa Limited & Another* 2006 (4) SA 177 (SCA) at para 3.

[4] 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC).

[5] Ibid at paras 70–72.

[6] Ibid at para 72.

Thirdly, FC s 35(5) would appear to endorse violations of rights that then go unremedied. It permits the admission of evidence obtained in violation of rights in the Bill of Rights if it will not render the trial unfair. FC s 35(5) recently caused something of a dust-up between the Supreme Court of Appeal and the Constitutional Court. A majority of the Supreme Court of Appeal had held that if a court found that evidence had been obtained in terms of an invalid search warrant, the documents had to be returned to the person from whom they were seized.[1] Nugent JA rejected the view that the power to fashion a 'just and equitable' remedy in terms of FC s 38 could justify a 'preservation order' that would allow the state to keep the material until the trial court decided whether it was admissible or not: 'It seems to me that the power to fashion remedies for constitutional infringements is given to courts to enable them to vindicate rights rather than to deny them.'[2] Because a preservation order would, on his view, permit a continuing violation of the right to privacy, he regarded it as an impermissible remedy.

When the matter came to the Constitutional Court, Langa CJ came to the opposite conclusion.[3] He held that preservation orders were not only permissible, but should be the default remedy where a warrant was declared invalid.[4] In the Chief Justice's view, it should be up to the trial court — not the court hearing the application to invalidate the warrant — to decide in terms of FC s 35(5) whether

[1] *National Director for Public Prosecutions v Mohamed* [2007] ZASCA 135; [2007] SCA 135 (RSA)(Nugent JA (Mlambo J concurring) and Ponnan JA made up the majority on this issue. Farlam JA (Cloete JA concurring) would have granted the preservation order. On the ultimate outcome, however, Ponnan JA was in the minority. He was unwilling to grant any preservation order. Farlam and Cloete JJA were, for the sake of deciding the case, willing to sign onto the limited preservation order accepted by Nugent JA that allowed a copy of the documents to be kept in case a future dispute about their identity arose.)

[2] Ibid at para 21 (Ponnan JA was even more forceful in his rejection of preservation orders: 'If the courts were to simply escape their responsibility for redressing constitutional violations, people will be secure only in the discretion of the police and the protections of the right would evaporate. After all, the entire point of the police conduct in this case that violated constitutional guarantees was to obtain evidence for use at a possible subsequent criminal trial. The Bill of Rights must not be reduced to a code that the State may abide in its discretion. The Constitution requires more; it demands a remedy for a violation. That remedy, one would have thought, is well-settled. But, says the State in this case, there now exists a constitutional injunction to reconsider existing remedies and to re-fashion them in accordance with the spirit of our new constitutional order. To my mind, there is a fallacy in that approach. It is this: Out of a remedy available to someone wronged by a rights violation, the wrongdoer seeks to fashion for itself a right that it otherwise would not have had. That can hardly be authorised by our Constitution. Moreover, the preservation order is being sought in this case in anticipation of possible criminal proceedings, not against the respondent, but against her erstwhile client, Mr Zuma. How, it must be asked, can the State resist a claim for restoration where the items were illegally seized and where, even at the date of the hearing of this appeal, there has been no firm commitment by it that fresh charges will as a fact be preferred against Mr Zuma in regard to which the seized items might be used by it as evidence?' Ibid at para 39.)

[3] *Thint (Pty) Ltd v National Director of Public Prosecutions & Others; Zuma and Another v National Director of Public Prosecutions & Others* [2008] ZACC 13 ('*Thint*').

[4] Ibid at para 222.

the evidence should be admitted at trial or not.[1] The trial court would be unable to exercise that discretion if the evidence was returned to the applicant. More importantly, he did not think there was anything unusual with his decision:

> Although the point of departure is that a victim of a constitutional violation is entitled to effective relief, a court must also take into account other relevant circumstances, including the interests of others and the public interest, which in turn includes the public interest in the prosecution of serious crime.[2]

I agree with the Chief Justice's conclusion, but not all his reasoning. Within the structure of the Bill of Rights, it is difficult to avoid the conclusion that the admissibility of evidence must be left to the trial court. To put it differently, even if you regard a preservation order as an ongong violation of the right to privacy, it is endorsed by FC s 35(5). It is also legitimate to argue that there could still be a remedy: a declaration that the warrant violated the applicant's right to privacy. Such a declaration would enable an accused to clear the first hurdle in FC s 35(5): the demonstration of a violation of the right to privacy. However, to the extent that Langa CJ suggests that in contexts outside of FC s 35(5) matters, considerations outside the need to vindicate the right can justify granting no remedy at all — which, unfortunately, seems the most natural reading of the decision —he ignores the *ubi jus* principle. Moreover, given that the Court has strongly endorsed the *ubi jus* at principle, it is disingenuous to argue that the decision is unambiguously supported by previous precedent.

The final case of imaginary deviations is *Fose v Minister of Safety and Security*.[3] Mr Fose sued the Minister for pain that he had suffered as a result of abuse while in police custody. He relied directly on his constitutional rights rather than on a delictual action. The Court held that it was impermissible for him to have done so as a delictual action would have provided an adequate remedy for the violation of his rights.[4] There is no violation of the *ubi jus* principle in this case. The principle does not entitle a litigant to any specific type of relief or even to 'direct' relief. Kriegler J makes this clear in his concurring judgment: 'while applicants are entitled to relief if their fundamental rights have been violated, they have no right to a particular remedy.'[5] As long as the law somehow provides redress for the wrong suffered, it cannot matter whether the legal basis for that relief is delictual or constitutional.[6]

[1] *Thint* (supra) at para 221.
[2] Ibid at para 223.
[3] 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC)('*Fose*').
[4] The interaction between public and private remedies is discussed in more detail in § 9.2*(f)* infra. Damages are discussed in § 9.5*(a)* infra.
[5] *Fose* (supra) at n 215.
[6] See also *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at paras 96–97 (The Court upheld the applicant's complaint that the selective enforcement of the obligation to pay electricity rates in different areas of Pretoria unfairly discriminated against him on the basis of race. However, it decided that this was not a defence to the Council's action against him. The right entitled him to other forms of relief such as a declaration of rights or a mandamus to force the Council to cease its discriminatory practices. This decision does not deny the right, it just says that the applicant is not entitled to the remedy he sought — immunity from a claim for electricity rates due. He was entitled to other relief, but he had not sought it.)

(bb) Real Deviations

The following cases reflect instances where, despite a finding that a right had been violated, a court does not afford the actual litigant any remedy. A litigant might prove that a constitutional violation has occurred and then find that the requested relief is ultimately offered to others, but not to him. In *Fraser v Children's Court, Pretoria North & Others* the applicant successfully challenged a law that permitted a child to be adopted without the natural father's consent.[1] However, because of the many different ways in which the matter could be regulated, the Court decided to suspend the order for two years to allow the legislature to draft new legislation.[2] The effect was that Mr Fraser's child could be, and was, adopted without his consent. Mr Fraser found himself in precisely the same position he would have been in if the Court had concluded that he had no right at all.[3] Apart from cursorily noting that '[t]he applicant is not the only person affected by the impugned provision',[4] the Court does not even acknowledge, let alone justify, this breach of the *ubi jus* principle or the injustice that follows from failing to come to the aid of a litigant who has gone to enormous expense to have a statute declared unconstitutional. The Court's reasoning for ordering a suspension is compelling. However, it does not explain why they could not have created an interim remedy that would have come to the aid of the applicant and others in the same position.[5]

In other cases, a remedy is granted to some bearers of the right, but not to others. The Court's decision to limit the retrospective effect of its orders invariably has this consequence. For example, in *Ex Parte Minister of Safety and Security & Others: In re S v Walters & Another,* the Court invalidated a provision that permitted police to use lethal force in affecting arrests in unconstitutionally wide circumstances.[6] However, the invalidity would only apply from the date of the judgment. So although the constitutional right had been in effect from 1994, people who lost breadwinners where the police had used unconstitutional force after 1994, but prior to *Walters,* would have no civil claim. Those persons who suffered a similar loss after the decision would have a civil claim. As the right existed both before and after the decision, a remedy was granted to some bearers of a right and not to others.

Here, the departure from the general principle seems eminently justifiable. Retrospective application would criminalise conduct that was not criminal at the

[1] 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC)('*Fraser*').

[2] Ibid at paras 45–51.

[3] This case should be distinguished from other cases where suspension does not deny a remedy, but merely delays it. See, for example, *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International and Others* as Amici Curiae*); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)(A majority of the Court suspended an order that would legalize homosexual marriages. The right was only delayed because homosexual couples would be able to marry as soon as the period of suspension ended.)

[4] *Fraser* (supra) at para 50.

[5] For more on interim remedies, see § 9.4*(e)*(i)*(cc)* infra.

[6] 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC)('*Walters*').

time it was committed. Such an outcome would not only be unfair, but would potentially infringe FC s 35(3)*(l)*.[1] Providing a remedy for one right — the FC s 12(2) right to bodily integrity — would unjustifiably limit another. In such situations, a court can justifiably depart from the principle that a remedy always requires a right.[2]

However, even here it is necessary to proceed with care. There may well have been alternative remedies that would have avoided a violation of FC s 35(3)*(l)* but still vindicated FC s 12(2). The Court might have ordered the State to establish a fund to compensate victims of unconstitutional shootings, or have created a precedent or a mechanism whereby survivors or the families of deceased victims could have attained the symbolic recognition that their right to freedom and security had been violated. While situations may arise where a conflict between rights makes it genuinely impossible to provide a remedy, in almost all cases some form of 'imperfect' or 'second-best' relief will be available.

Most of the other cases where the Court has limited the effect of its retrospectivity so as to deny some people a remedy have not justified the denial based upon an unjustifiable limitation of another right. In most instances, the Court's decision turns on the potentially deleterious social consequences of a fully retrospective order. In cases dealing with succession, they have limited their orders to cases where the estate has not yet been wound up.[3] In cases involving statutory time-bars[4] and reverse onus provisions[5] the orders have only applied to cases that have not yet been decided on appeal. For reasons I explain in more detail in the section dealing with retrospectivity, I believe that these departures from the *ubi jus* principle, while not entirely without foundation, are certainly constitutionally suspect and in many instances constitutionally infirm.[6] To put it briefly, the practical costs have to be extremely high to justify a departure from a principle that is as important to our constitutional system as the bond between rights and remedies.

[1] *Walters* (supra) at para 74. FC s 35(3)*(l)* reads: 'Every accused person has the right to a fair trial, which includes the right — not to be convicted for an act or omission that was not an offence under wither national or international law at the time it was committed or omitted'. See also *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies & Another, Amici Curiae)* 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC)(The Court declared the common-law definition of rape unconstitutional because it applied only to female vaginal rape, not female anal rape. The decision only had prospective effect in order not to criminalize past conduct.) For more on FC s 35(3)*(l)*, see F Snyckers & J le Roux 'Rights of Arrested, Detained and Accused Persons' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 51.5*(m)*.

[2] See D Zeigler 'Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts' (1987) 38 *Hastings LJ* 665, 680.

[3] *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; SA Human Rights Commission & Another v President of the RSA & Another* 2005 (1) SA 563 (CC), 2005 (1) BCLR 1 (CC) at paras 126–129; *Gory v Kolver NO & Others* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) at paras 32–43.

[4] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC) at para 25; *Engelbrecht v Road Accident Fund* 2007 (5) BCLR 457 (CC), 2007 (6) SA 96 (CC)2 at para 45.

[5] See, for example, *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC), 1995 (2) SACR 748 (CC) at paras 32–34; *S v Ntsele* 1997 (11) BCLR 1543 (CC), 1997 (2) SACR 740 (CC) at paras 13–14.

[6] § 9.4*(e)*(ii) infra.

The final, and most disturbing, case in which the Court has not respected the general rule is *Steenkamp NO v Provincial Tender Board of the Eastern Cape*.[1] The applicant was a liquidator of a company (Balraz) that had been awarded a tender to provide an automatic cash payment service for welfare grants in the Eastern Cape. Soon after they were awarded the tender they began preparing to discharge their contractual responsibilities, incurring significant expenses in the process. However, a year later the tender was set aside by the High Court because of negligence by the Tender Board and was re-awarded to a different company. Balraz went insolvent as a result. The applicant complained that the Board was liable for the out-of-pocket expenses the company had incurred in preparing to perform the tender and sued the Board in delict.[2] The applicant took this course because the ordinary administrative remedies — having the award set aside or interdicting the Board to comply with some requirement — were not available in his situation. The sole issue for determination was whether the Board's conduct was wrongful, or to put it differently, whether the applicant was, in principle, entitled to claim damages.

A majority of the Constitutional Court held that even accepting that the Board had acted negligently — and therefore that Balraz's FC s 33 right to reasonable administrative action had been violated — the applicant was not entitled to a claim for damages. Moseneke DCJ went so far as to hold that 'even if there may not be a public law remedy such as an interdict, review or appeal this is no reason for resorting to damages as a remedy for out-of-pocket loss.'[3] He offers a number of reasons for this conclusion: namely: (a) it would result in different treatment for successful and unsuccessful tenderers;[4] (b) public considerations which require tender board adjudicators to be immune from damages claims in respect of their negligent but honest decisions;[5] (c) the legislation was designed to ensure

[1] 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC)('*Steenkamp*').

[2] As a result, the determination of whether the applicant was entitled to reclaim the lost expenses took place in the legal framework of a debate about the delictual wrongfulness of the Board's actions. This undoubtedly coloured the Court's approach to the question of whether a remedy was available or not. This intersection between public and private remedies is discussed in more detail in § 9.2*(f)* infra. However, from a constitutional point of view, it should not make a difference that the claim was brought in this manner as the right at stake remains a constitutional one. Indeed, after *Fose* (supra) the applicant was obliged to rely first on a delictual claim.

[3] *Steenkamp* (supra) at para 54. He reached this conclusion because, in his view, Balraz was not without a remedy: it could have *(a)* re-applied for the tender; or *(b)* ensured contractual protection for the possibility of out-of-pocket expenses. Ibid at paras 49–52. However, as Langa CJ and O'Regan J point out in their dissent, neither of these are effective remedies for the violation of the right to administrative justice. Ibid at paras 88–89. Indeed, they are not even remedies; they are steps that Balraz might have taken to mitigate its loss, not remedies that could be enforced by a court for the violation of Balraz's rights. To equate these options with judicial remedies is a mistake as they would have these options even without a right to administrative justice. This discussion proceeds on the basis that there were no alternative remedies.

[4] Ibid at para 54

[5] Ibid at para 55*(a)*.

a tender process in the public interest, not to protect tenderers;[1] and *(d)* permitting damages claims would create 'a spiral of litigation [that] is likely to delay, if not to weaken the effectiveness of or grind to a stop the tender process.'[2] As the dissent of Langa CJ and O'Regan J notes, these reasons do not hold up to scrutiny.[3]

But even if they did, even if they were excellent reasons, they do not change the principle which underlies the Court's decision: it is entitled to deny a specific applicant the only possible remedy for the violation of a constitutional right if it believes that it is in the public interest. This arrogation of power — that may well constitute a form of judicial overreach (re-writing, not interpreting, the basic law itself) — in effect denies the applicant the right: 'Where a man has but one remedy to come at his right, if he loses that he loses his right.'[4] *Steenkamp*, it seems to me, is a far more disturbing precedent than *Walters* or *Fraser*. Those cases all concerned the validity of legislation and the practical difficulty of giving relief to specific classes of rights-bearers because of the nature of the legislation and the manner in which the case was brought. The deprivation is a temporary one that only affects the right for a limited period of time, either in the past (retrospectivity) or in the future (suspension). Although one can criticise the conclusions that the Court reached in particular cases, these exceptions to the general principle seems to be an unfortunate necessity of operating within a constitutional democracy.

Steenkamp, on the other hand, stands for the proposition that a court can *permanently* deny a remedy to bearers of a right. No initially successful tenderer will *ever* be able to claim delictual damages because of the loss they suffered as a result of the negligence of a tender board.[5] That makes the right to administrative justice worthless. Again: the Court has effectively decided to rewrite the Final Constitution in a manner that allows it not only to decide when a constitutional right should be upheld, but whether a constitutional right actually exists.[6] That is a

[1] *Steenkamp* (supra) at para 55*(b)*

[2] Ibid at para 55*(c)*.

[3] Ibid at paras 87–93.

[4] *Ashby v White* (1703) 92 Eng Rep 126 (KB).

[5] Fortunately, the impact on the law is likely to be very limited as applicants in the position of Balraz might well have a claim under the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). PAJA s 8(1)*(c)*(ii)*(bb)* permits the payment of compensation in exceptional circumstances. The absence of any other vindication would surely qualify as 'exceptional circumstances'. See *Steenkamp* (supra) at paras 99–101 (Sachs J). This however does not alter the effect of the remedial principle adopted in *Steenkamp* which may affect the future development of the common law.

[6] I am not advocating that rights cannot be limited — FC s 36 clearly permits them to be — but they can only be limited by laws of general application that are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. If legislation or the common law outlawed damages claims in circumstances such as those that Balraz found itself in, government could attempt to justify that limitation of FC s 33 before a Court. There would not be a problem of a right without a remedy, as the right itself would be properly limited. The problem with *Steenkamp* is that there is no attempt to limit the right to administrative justice; the right, theoretically, remains unlimited but it is de-valued by denying a remedy for its violation. For more on FC s 36, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

very dangerous precedent indeed.[1] However broad the Court's power under the Final Constitution may be, it does not possess the power to amend the Final Constituion.[2] That power lies with Parliament alone.

(iii) *The Legal Position*

What then is the legal status of the *ubi jus, ibi remedium* principle in South African constitutional law? After *Fraser*, *Walters* and *Steenkamp,* it is clearly not an absolute rule. Those cases make it clear that a right can exist without a remedy. One danger is that the Court appears to treat the principle[3] as if it were merely part of a remedial balancing exercise — an orientation that absolves the Court of the need to provide a more compelling justification for these aberrant conclusions. Were the Court to reflect upon the collective effect of these deviant judgments, I do not think it would endorse as many exceptions to the rule. Its general rhetoric in favour of granting effective remedies in every case is far too strong.[4] Even in *Steenkamp*, Moseneke DCJ wrote:

> It goes without saying that *every* improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy *must* be fair to those affected by it and yet *vindicate effectively* the right violated.[5]

Therefore, I think it is best to view *Steenkamp* as mistakes. The correct position

[1] The reason for the decision in *Steenkamp* seems to be confusion between the law of delict and constitutional law. Under delict a person only has a claim to damages if an act is 'wrongful'. In effect, wrongfulness determines the existence of a right — there is no right for compensation caused by non-wrongful conduct. Under constitutional law, the entitlement to a remedy is not based on 'wrongfulness' but on whether a specific right has been violated. The flaw in the majority's reasoning is to assume that even though a constitutional right has been violated, there may not be a remedy if the violation is not wrongful. This subverts the relationship between the law of delict and constitutional law by placing delictual principles of wrongfulness above constitutional rights. This fails to respect the decree in FC s 2 that '[t]he *Constitution* is the supreme law of the Republic' (my emphasis). The correct position is that if conduct violates a right in the Bill of Rights (or indeed, any other chapter of the Constitution) it is delictually wrongful. For more on the relationship between private remedies and public remedies, see § 9.2*(f)* infra.

[2] There is a more generous interpretation of *Steenkamp*: All the Court said was that the applicant was not entitled to *delictual* damages, but he might have been entitled to constitutional damages. This interpretation seems to conform with Moseneke DCJ's focus on the delictual wrongfulness of the act and it is conceivable that the Court would have come to a different conclusion if the case had been brought as a direct reliance on the FC s 33. But I find it very difficult to believe that the Court would not have considered the same factors when determining if an award of damages was 'just and equitable' under FC s 38 as it did in determining whether the conduct was delictually wrongful. If the Court would have reached a different decision under FC s 33 then it just shows that the decision not to award delictual damages was wrong. It makes no sense to afford constitutional damages but not delictual damages when the law of delict can reasonably be interpreted to permit the claim.

[3] See, for example, *Thint* and *Steenkamp*.

[4] That rhetoric is discussed in more detail at § 9.2*(e)* infra.

[5] *Steenkamp* (supra) at para 29 (my emphasis).

must be that the principle is not absolute, but that any deviation must be grounded in extremely weighty and compelling considerations. Every remedial avenue should be explored and 'new tools forged'[1] before a court concedes that it really is impossible to afford any relief at all.

(iv) *Remedies without Rights?*

A final interesting question is whether a court can provide a remedy without finding that a right has been violated. The jurisprudence of the Constitutional Court, perhaps surprisingly, suggests that it can. In *Sibiya & Others v Director of Public Prosecutions: Johannesburg High Court & Others,* the Court concluded that legislation detailing how the sentences of people on death-row should be replaced did not violate any constitutional rights.[2] However, the *Sibiya* Court held that the government had taken far too long to complete the process of substituting sentences. It ordered a supervisory interdict to monitor the completion of the process. In doing so, it did not suggest that government's slow progress violated any rights. Yacoob J simply reasoned: 'This Court has the jurisdiction to issue a mandamus in appropriate circumstances and to exercise supervisory jurisdiction over the process of the execution of its order [in *S v Makwanyane & Another*][3]. It is appropriate in this case for this to be done.'[4] However the Court was not just enforcing *Makwanyane*. The order in *Makwanyane* required that all persons on death row 'will remain in custody under the sentences imposed on them, until such sentences have been set aside in accordance with law and substituted by lawful punishments.'[5] It did not set any time limit, nor suggest that a delay would violate a right. The order in *Sibiya* does not simply enforce the order in *Makwanyane*: it goes further by requiring that the sentences be converted within a specified timeframe. And it does so without first finding a violation of any right.[6]

Consider also *Mnguni v Minister of Correctional Services & Others*[7] and *De Kock v Minister of Water Affairs and Forestry & Others*.[8] In both these cases — involving claims for medical parole and for prevention of pollution respectively — the

[1] *Fose* (supra) at para 69 ('Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.')

[2] 2005 (5) SA 315 (CC), 2005 (8) BCLR 812 (CC)('*Sibiya*').

[3] 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC)('*Makwanyane*').

[4] *Sibiya* (supra) at para 61.

[5] *Makwanyane* (supra) at para 151.

[6] See also *Nyathi v MEC for Health, Gauteng & Others* [2008] ZACC 8 at para 152 (Justice Nkabinde adopted a similar stance in her dissent. Despite finding that the legislation at issue — which prevented the attachment of state assets for the satisfaction of a judgment debt — did not violate any rights, she still concurred in the majority's grant of a supervisory interdict to regulate the payment of government debts.)

[7] 2005 (12) BCLR 1187 (CC)('*Mnguni*').

[8] 2005 (12) BCLR 1183 (CC)('*De Kock*').

Court, in very brief judgments, refused the applications for direct access. However, because it saw some potential merit in the cases, it referred them to the Law Society with a request that the Society consider whether one of its members could represent the applicants.[1] Thus, the applicants received a remedy (of sorts) without establishing that the Court had jurisdiction or that a right had been violated.

While granting a remedy where no right has been violated may seem anomalous, there is clear support for this practice in the constitutional text. FC s 172(1)*(b)* empowers any court 'when deciding a constitutional matter' to 'make any order that is just and equitable'. The power to make the order is not dependent on a finding that a right has been violated, but simply that the matter is a constitutional one. Similarly, FC s 38 requires only an allegation that a right has been infringed *or threatened* to trigger a court's power to 'grant appropriate relief'. There will be cases where a sense of justice manifestly requires a remedy, even where no right has been violated. Courts engage in such behaviour when they grant interim remedies; no right has yet been violated, but the real possibility that a right might be violated justifies an order to prevent that violation.[2] The wide wording of FC ss 38 and 172(1)*(b)* suggests that constitutional drafters seemed to have envisioned that such cases would arise and that respect for the Final Constitution would require judicial intervention. One might also contend that open ended provisions such as FC s 39(2) invite the Court to pursue justifiable remedies without any meaningful alteration of the law (and thus any finding of a constitutional violation.)

However, despite the textual space for granting remedies where no rights have been violated, there are serious problems with exercising this power. Firstly, it is generally inappropriate to impose a remedial burden on a party, even the government, when they have not failed to discharge a legal duty or are not guilty of some constitutional infraction. It is not only unfair to the party, it undermines legal certainty as government does not know how it should act in order to avoid sanction. Secondly, it threatens the courts' legitimacy. As I explain more fully below,[3] unfettered remedial discretion poses potential problems for courts whose legitimacy depends, at least in part, on the constraints of legal materials. Courts that view themselves as unconstrained by legal texts and well-established principles are, indeed, usurping the roles of the legislature and executive. The idea that courts can only exercise their remedial powers following a legal finding that a right has been violated is an essential constraint on judicial power and lies at the heart of a new legal order that has self-consciously turned the rule of law doctrine and the principle of legality into first principles of our constitutional democracy.

I would therefore suggest that the power should only be exercised in limited circumstances. I can think of four such circumstances — although they by no

[1] *Mnguni* (supra) at para 7 and *De Kock* (supra) at paras 5–6.
[2] See § 9.5*(c)*(ii) infra.
[3] See § 9.2*(d)*(ii) infra.

means constitute a closed list. Firstly, FC s 38 contemplates situations in which a remedy may be provided where a right has not yet been violated — the right may merely be threatened. This pre-emptive remedy is an extension of the general *ubi jus* principle: it is necessary to protect the right.[1] Second, the protection of a constitutional principle — as opposed to a right — may require a remedy. This rationale underlies the majority's order in *Nyathi v MEC for Health, Gauteng & Others*.[2] In justifying the imposition of a structural interdict to regulate the payment of outstanding court orders against the state, Madala J argues that:

> Certain values in the Constitution have been designated as foundational to our democracy. . . . If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a state predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy. That, in my view, means at the very least that there should be strict compliance with court orders.[3]

These foundational values, rather than the enforcement of any rights, justified the structural remedy.

Thirdly, a remedy may be required that goes beyond the apparent parameters of the right in order to ensure that the right is actually respected. The Court in *Sibiya* seems to regard the interdict it grants as necessary to give full effect to the right not to be subjected to capital punishment.

Fourthly, a remedy may be necessary to ensure both the proper administration of our courts and effective use of our legal system by those most in need of the protection it ostensibly affords. Such reasons appear to animate the decisions in *Mnguni* and *De Kock*. The applicants were clearly without legal assistance and would, because of the way courts generally function, be unable to pursue possibly legitimate claims without legal assistance.

Whenever a court issues a remedy in the last three circumstances mentioned above, or in any other circumstance where a right has not been violated, it should consider very carefully the impact its decision will have on legal certainty and judicial legitimacy. Neither good should be lightly sacrificed.

(c) Rights and Remedies

This section considers the relationship between rights and remedies. The traditional wisdom is that 'rights and remedies are made of different stuff'.[4] Rights are

[1] See, for example, *Jamiat-Ul-Ulama of Transvaal v Johncom Media Investment Ltd & Others* [2006] ZAGPHC 12 (The High Court granted an interdict preventing the Sunday Times from publishing cartoons depicting the Muslim prophet Mohammed because it would violate the dignity of Muslims. If one accepts that finding, then granting the remedy makes sense.) For criticism of this decision, see D Milo, G Penfold & A Stein 'Freedom of Expression' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) § 42.9*(h)*.

[2] *Nyathi v MEC for Health, Gauteng & Others* [2008] ZACC 8.

[3] Ibid at para 80.

[4] D Levinson 'Rights Essentialism and Remedial Equilibration' (1999) 99 *Columbia Law Review* 857,2 858.

philosophical constructs that describe our ideal society. Remedies reflect the practical wisdom — the actual means — required to make those aspirations a reality. However, I will argue that the traditional wisdom is descriptively inaccurate. Remedies are not simply tools to be used to realise rights. In a variety of ways, remedies determine both the value and the content of rights.

(i) *Ways of understanding the rights-remedies relationship*

There are three ways in which to understand the relationship between rights and remedies.[1] First, 'automatic remedialism'.[2] Under this approach a specific remedy flows automatically from the assertion of the right. Secondly, rights and remedies can be seen as separate. Judges have a discretion to choose a remedy that gives effect to the right. One might call this description: 'rights essentialism'. Thirdly, rights and remedies can be viewed as inter-related. The rights a constitution recognizes obviously affect the remedies that are available; but remedies also affect the value and the content of rights. I will call this 'remedial equilibration'.[3] The three approaches differ on two issues: the extent to which remedies affect rights and the discretion courts have in crafting remedies.

(aa) Automatic remedialism

This approach to remedies holds that when a litigant proves that a delictual right has been violated, the remedy — normally an award of damages — flows automatically. In the United States, Abram Chayes has characterised this 'traditional' model of civil adjudication in the following terms:

> The scope of the relief is derived, more or less logically from the substantive violation under the general theory that the plaintiff will get compensation measured by the harm caused by the defendant's breach of duty.[4]

This is, generally,[5] the position for common-law actions. Courts do not have discretion to choose a remedy; the right a litigant relies on generally determines the remedy. A delictual claim equals damages while the *rei vindicatio* demands the

[1] See K Cooper-Stephenson 'Principle and Pragmatism in the Law of Remedies' in J Bennyman (ed) *Remedies: Issues and Perspectives* (1991) 1, 5–6.

[2] Cooper-Stephenson calls this approach 'rights maximising' — a phrase he borrows from Paul Gerwitz. Ibid at 5 citing P Gerwitz 'Remedies and Resistance' (1983) 92 *Yale LJ* 585. I do not believe Cooper-Stephenson's use of the term in this context accurately describes the manner in which Gerwitz employs it. Gerwitz does not imply that rights-maximising judges do not have a discretion in choosing a remedy. He simply argues that such a judge must exercise the discretion in a manner that will best give effect to the right. For more on 'rights-maximising', see § 9.2*(e)*(ii) infra.

[3] Both 'rights essentialism' and 'remedial equilibration' are terms borrowed from Daryl Levinson.

[4] A Chayes 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harvard LR* 1281, 1282.

[5] There are, however, cases where courts have some discretion. For example, in certain contractual claims courts can choose whether to order damages or specific performance. In defamation claims, courts can order an apology or retraction in addition to damages.

return of property. Similarly, in constitutional law a finding that law or conduct is unconstitutional results automatically in a declaration of invalidity.[1] The right and the remedy are seen as a single package — right = remedy. Courts have no discretion in picking a remedy and remedial options do not affect the content of rights. But apart from this important exception, the idea of automatic remedialism does not generally hold sway. The Constitutional Court has regularly asserted that courts have a discretion in fashioning remedies. Although it has established a number of rules and principles that confine the extent of that discretion, it has certainly not adopted any rules that automatically require a particular remedy for the violation of a particular right.[2]

(bb) Rights Essentialism

Lawrence Sager describes 'in a nutshell'[3] what rights essentialists believes:

> It is part of the intellectual fabric of constitutional law and its jurisprudence that there is an important distinction between a statement which describes an ideal which is embodied in the Constitution and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues.[4]

Rights essentialists treat rights as 'ideals, ultimate value judgments that are derived from some privileged source of legitimacy' while remedies 'exist not in the realm of the ideal but in the realm of the concrete, not in the domain of constitutionally privileged values but in the domain of contingent facts.'[5] Rights represent the ideal society; remedies are the means through which that society is brought into being. Rights essentialism holds that courts have a discretion in fashioning remedies and that the causal relationship only flows from rights to remedies, not vice versa.

This is the pre-eminent view in South African constitutional law. It is most obvious in the structure of analysis in the vast majority of Constitutional Court cases. The cases distinguish rights (and limitations) analysis from remedies analysis: only after a finding of an unjustifiably limitation of a right can does one consider the appropriate response to the violation. Moreover, in *Fose* Kriegler J echoed the description of rights essentialism I gave earlier when he wrote: 'When courts give relief, they attempt to synchronise the real world with the ideal construct of a constitutional world'.[6] Stressing the one-way relationship between

[1] FC s 172(1)*(a)*. For more on declarations of invalidity, see § 9.4*(c)* infra.

[2] For more detail on the extent of courts' remedial discretion, see § 9.2*(d)(i)* infra.

[3] Levinson (supra) at 861.

[4] L Sager 'Fair Measure: The Legal Status of Underenforced Constitutional Norms' (1978) 91 *Harvard LR* 1212, 1213.

[5] Levinson (supra) at 861. See also Cooper-Stephenson (supra) at 6 ('In sum, a court does very distinct things when it adjudicates a right and fashions a remedy. It reasons at different levels of abstraction, appeals to different kinds of justifications, employs different conceptual and linguistic strategies, and invokes different criteria of choice.')

[6] 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC)('*Fose*') at para 94.

rights and remedies, Sachs and Mokgoro JJ in *Bel Porto School Governing Body & Others v Premier, Western Cape & Another* held: 'It is the remedy that must adapt itself to the right, not the right to the remedy.'[1] These statements clearly indicate the court's preference for rights essentialism. Rights essentialism also seems to be the creed of South African scholars. In their excellent chapter on remedies, Iain Currie and Johan De Waal write that the object of constitutional remedies 'is to make the real world more consistent with the Bill of Rights.'[2]

(cc) Remedial Equilibration

Although the 'theory' has existed for some time,[3] remedial equilibration owes both its name and its full explication to Daryl Levinson. On this account, rights essentialism is an illusion that bears no relation to reality:

> In the actual practice of constitutional adjudication … the qualitative distinction between rights and remedies blurs, or even dissolves … rights and remedies in constitutional law are interdependent and inextricably intertwined.[4]

While the rights essentialists argue that causation only runs from rights to remedies — rights affect remedies, but remedies don't affect rights — Levinson's theory of remedial equilibration shows how causation also runs the other way — from remedies to rights.[5] It is this 'reciprocity of right-remedy causation' that Levinson identifies as the 'central feature of the remedial equilibration model'.[6] Perhaps the position is best explained by Paul Gerwitz:

> All dimensions of the law are affected by the world of the practical, the real, the subjective, the political — in short, 'the world' as we know it. The duality of the ideal and the real exists, but it pervades the judicial function. The two-sidedness is not conveniently deposited in the separate categories of right and remedy. The practicalities cannot be cordoned off into a separate domain to keep rights-declaring purely 'ideal.' There is a permeable wall between rights and remedies: The prospect of actualizing rights through a remedy — the recognition that rights are for actual people in an actual world — makes it inevitable that thoughts of remedy will affect thoughts of right, that judges' minds will shuttle back and forth between right and remedy.[7]

[1] 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC)('*Bel Porto*') at para 186.
[2] *The Bill of Rights Handbook* (5th Edition, 2005) 196.
[3] See Gerwitz (supra) and Cooper-Stephenson (supra).
[4] Levinson (supra) at 857. See also S Sturm 'Equality and the Forms of Justice' (2003) 58 *Univ of Miami LR* 51, 51 ('law operates in the world of the practical, tethered to the realities of dispute processing and implementation. The work of many great legal scholars and activists occupies this unstable space between principle and practice.')
[5] Levinson (supra) at 884.
[6] Ibid.
[7] Gerwitz (supra) at 678–679 (footnotes omitted).

This theory of 'the tail wagging the dog'[1] has received significant support among American academics.[2]

Although the Constitutional Court has primarily adopted a rights essentialist position, it has, in at least one case, acknowledged the impact that rights have on remedies. In *Sanderson v Attorney-General, Eastern Cape* the Court was concerned with the FC s 35(3)*(d)* right to a trial within a reasonable time.[3] Before considering American and Canadian case law on the topic, Kriegler J cautioned that the precedents were of limited value because the only possible remedy in those jurisdictions was a stay of prosecution and that this remedy had determined (and thereby constrained) the proper interpretation of the right.[4] He then held that: 'Our flexibility in providing remedies may affect our understanding of the right.'[5] And indeed it did.[6] He interpreted the right to entitle applicants to different forms of relief depending on the nature of prejudice they had suffered.[7] (By contrast, US and Canadian courts can do no more than consider whether the right is violated and a permanent stay is justified.)

Part of the doctrine of remedial equilibration is that courts often mix remedies and rights unconsciously or without acknowledging that remedial concerns are affecting their construction of the right. *Sanderson* is therefore very unusual: both because it does not conform with the Court's general adherence to rights essentialism and because the Court explicitly admits that available remedies are a factor in interpreting the content of a right. *Sanderson* is not, however, the only case in

[1] Cooper-Stehphenson (supra) at 10 ('A so-called right to contractual performance, to a fair hearing or even to equality is similarly dependant on the issuance of a specific remedy — not only in its substantive form but in the 'completeness' of is legal protection, since a substitutional remedy such as damages may fall short in so many ways. The remedial tail will frequently wag the substantive dog and thereby redefine the dog's substantive character. What may happen is that the apparent 'rule' of substantive entitlement is waived aside by a contradictory 'standard' of the law of remedies.')

[2] Apart from Gerwitz and Levinson, the theory is endorsed, in some form, in, for example, J Jeffries 'The Right-Remedy Gap in Constitutional Law' (1990) 109 *Yale LJ* 87; B Friedman 'When Rights Encounter Reality: Enforcing Federal Remedies' (1992) 65 *Southern California LR* 735; C Sabel & W Simon 'Destablization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard LR* 1015.

[3] 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC)('*Sanderson*').

[4] Ibid at para 27 and n 23.

[5] Ibid at para 27 quoted with approval in *Bel Porto* (supra) at para 180 (Sachs and Mokgoro JJ).

[6] See F Snyckers & J Le Roux 'Criminal Procedure: Rights of Arrested, Accused and Detained Persons' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) 51–131 (The authors argue that Kriegler J's statement 'should not be understood to conflate the right with the remedy, or as allowing a finding of violation to depend on the appropriateness of the remedy sought. On the contrary, it is to be taken as a cue to separate the question of violation from that of the remedy sought. For while the broad array of remedies available under the Final Constitution does make it easier for a court to find a violation of a fundamental right, one must keep in mind that the finding of a violation need not entail the very drastic remedy of what amounts to unconditional discharge.' The authors are correct that the statement does not 'conflate the right with the remedy'; that is, it does not endorse a form of automatic remedialism. However, the assertion that it 'separates' right and remedy does not mean it supports rights essentialism. As they acknowledge, the statement clearly conceives of the possibility of remedial options impacting on the content of the right. That is remedial equilibration.)

[7] *Sanderson* (supra) at para 41.

which the Court has engaged in remedial equilibration. The following section argues that, despite its assertions to the contrary, remedial equilibration is in many ways a more accurate description of the Court's remedial jurisprudence than rights essentialism.

(ii) *Methodological Concerns*

Before I explore each of the ways in which remedies affect rights, I must note the limits of this exercise. In almost all these cases, the judges do not acknowledge that remedies influence their construction of the right. Attributing the result to remedial concerns is therefore speculative. Levinson acknowledges this limitation with reference to remedial deterrence, although both the caution and the explanation seem to me equally applicable to other forms of remedial equilibration:

> Individual examples of remedial deterrence are difficult to document with great confidence because claiming that a right would be different if a different remedy followed entails a counterfactual claim that is ordinarily highly speculative: that the right would have been A rather than B if the remedy had been X rather than Y. If we knew what the 'real' shape or extension of the right looked like, then we could decide whether the observed shape was 'distorted,' and if so, whether remedial deterrence was a causal factor. Lacking direct epistemic access to the 'real' right (even assuming the ontology of such an entity), the best we can do is observe the changes in judicial decisionmaking over time and test likely causes. As a result, any individual example of remedial deterrence will inevitably be contestable. This is especially true of the examples that follow, which are presented without any serious attempt to rule out alternative explanations. Nevertheless, generating a series of plausible cases will hopefully suffice to illustrate the general point that remedial consequences exert an important influence over the shape and existence of constitutional rights.[1]

My own examples are even more deficient than Levinson's as they are, generally, not based on patterns of court behaviour over time but on a court's action in a single case. Nevertheless, like Levinson, I believe that remedial equilibration is generally the best explanation for the Constitutional Court's action and that the accumulation of cases strongly suggests the validity of the equilibration thesis.

Two major differences in the legal framework in South Africa and in the US require us to slightly alter the way we understand Levinson's contribution. Firstly, unlike the US Constitution, the Final Constitution includes a limitations clause — FC s 36(1) — that is meant to permit limitations of rights if doing so is 'reasonable and justifiable in an open and democratic society based on freedom, dignity and equality'. The limitations analysis will almost always include the evaluation of the practical — read 'remedial' — consequences of upholding or abolishing the limitation.[2] Showing the influence of possible remedies on the interpretation or

[1] Levinson (supra) at 890.

[2] For more on FC s 36(1), see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 31.

application of FC s 36(1) would be redundant. This section therefore only considers cases where remedial concerns influence *rights* rather than the limitation of rights. Secondly, Levinson notes that

> [a]ll judicially interpreted constitutional rights are over- and under-enforced in the sense that they might well be different in some abstract, theoretical realm (*or a purely declaratory system of constitutional adjudication*) where they would never have to be enforced.[1]

Although South Africa is certainly not a 'purely declaratory system', it does demand declaration in some cases[2] and the Constitutional Court has shown a discernable partiality to declaration as an appropriate remedy.[3] The availability of a declaration of invalidity as a remedy does perhaps mean that courts are substantially freer to define rights in the abstract than they might be in the US. However, I do not think this 'freedom' undermines the validity of the thesis as a whole.

(iii) *An Equilibrating Court*

Rights affect remedies in six ways. Firstly, as the Court did in *Sanderson,* the availability of remedies can expand the content of rights. I will call this remedial flexibility. Two: remedial deterrence is in some sense the opposite of remedial flexibility — the negative practical consequences of giving a right a wide meaning may force a court to give it a narrower interpretation. Thirdly, remedial incorporation occurs where a prophylactic rule is incorporated into a right because of the remedial difficulties of precise enforcement. Remedial substantiation, four, is different from the previously mentioned methods: it does not alter the content of the right. Instead, it asserts that the *value* of a right is dependant on the remedies that are available for its vindication. Fifthly, the availability of remedies affects the cases that litigants are willing to bring to court and, as a result, the rights that receive the most development. Finally, the remedy requested may determine whether a litigant even gets his foot in the courtroom door.

(aa) Remedial flexibility

This practice is precisely what occurred in *Sanderson*. As Kriegler J says, it is the 'flexibility in providing remedies' that impacts on the 'understanding of the right'.[4] Levinson seems to regard this practice as part of remedial deterrence.[5] He argues that the Supreme Court could never have created the *Miranda*[6] rules if it had not been able to limit the retroactive impact because 'if the warning requirement had

[1] Levinson (supra) at 925–926 (my emphasis).
[2] FC s 172(1)*(b)*. See § 9.4*(a)* infra.
[3] See § 9.5*(b)* and § 9.6*(a)* infra.
[4] *Sanderson* (supra) at para 27.
[5] Levinson (supra) at 889–890.
[6] *Miranda v Arizona* 384 US 436 (1966).

applied retroactively … every prisoner [would have been] released from custody on postconviction review.'[1] It was only '[b]y making *Miranda* mostly nonretroactive, [that] the Court eliminated the remedial deterrent threat of emptying the prisons and enabled the *Miranda* right to exist.'[2]

To my mind, this practice is different from remedial deterrence. Remedial deterrence involves a court interpreting a right in a certain way to avoid an undesirable remedial consequence. Remedial flexibility occurs when a court feels free to interpret the right as it deems fit because of the range of remedial options available to it. That freedom is a hallmark of remedial equilibration — and not rights essentialism — because a rights essentialist would interpret the right in the same way no matter what remedies were available. A court relying on its remedial flexibility considers the remedial consequences in fashioning the content of the right as it would reach a different decision if it did not have such a range of remedial options.

Remedial flexibility is, ironically, both the most prevalent and the most difficult to prove form of remedial equilibration in South African case law. Because of the immense remedial flexibility our courts have,[3] it could be argued that any decision where they rely on that flexibility might have turned out differently if they did not have that flexibility. Apart from *Sanderson*, the Court[4] does not admit that its conclusions might have been different if it had fewer remedial options. However, the consequences of a more confined remedial discretion in two classes of cases illustrates the likelihood that the Court's remedial flexibility affects its construction of rights.

Firstly, consider cases where, as in *Miranda*, the Court limits the retrospective effect of its orders. It is difficult to believe that the Court would have found violations in certain cases if this remedial option was not open to it. Take, for example, *S v Manamela & Another (Director-General of Justice Intervening)* — the Court invalidated the rule casting a reverse onus on people in possession of stolen goods to prove they had reasonable cause to believe the goods were not stolen.[5] The Court limited the retrospective effect so that it only applied to cases that had not been finalised. Considering the compelling reasons in the dissent of O'Regan J and Cameron AJ, would the majority have reached the same conclusion if they could not limit the retrospective impact and, as a result, all prisoners convicted under the section since 1994 would have to be released? Or how about *Masiya*[6] and *Walters*.[7] In both cases the Court limited the retrospective impact so as not

[1] Levinson (supra) at 890.
[2] Ibid.
[3] See § 9.2*(d)*(i) infra.
[4] The minority of Mokgoro and Sachs JJ endorse the statement in *Bel Porto* (supra) at para 181.
[5] 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC).
[6] 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC)('*Masiya*'). *Masiya* is also one of the few cases where the Court explicitly explains how its remedial concerns influenced on its construction of the right.
[7] 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC).

to criminalize past conduct.[1] Would they have reached the same conclusion if the necessary result was to violate the FC s 35(3)*(l)* right not to be convicted of an act that was not a crime at the time it was committed?

The second class of cases are a function of the Court's suspension of an order of invalidity. In *S v Ntuli*[2] and *S v Steyn,*[3] the failure to suspend the order of invalidity would have resulted in a massive increase in the number of criminal appeals from the Magistrates' Court and potentially would have swamped the High Courts. The failure to suspend the order of invalidity in *Mashavha v President of the Republic of South Africa & Others*[4] would potentially have meant that there was no legal authority for government to make social assistance payments,[5] while in *Matatiele Municipality & Others v President of the Republic of South Africa & Others*[6] it would have necessitated the invalidation of a five-month-old election. Would the court have constructed the right in the same way if it knew that these drastic consequences would inevitably follow?

In all these cases, although we cannot know for sure, it seems very likely that the Court would have reached a different conclusion at the rights stage if the option of limiting retrospectivity or suspending the order had not been available.

(bb) Remedial Deterrence

Remedial deterrence is the most worrying form of remedial equilibration. It is the flip-side of remedial flexibility. While in remedial flexibility rights can develop freely because remedial options are available to limit their impact, remedial deterrence shows us how constraints in the provision of remedies or concerns about the consequence of remedies directly alter the content of rights. This normally acts to constrain or lessen the content of rights as a 'threat of undesirable remedial consequences motivate[s] courts to construct the right in such a way as to avoid those consequences'.[7]

The history of school desegregation in the US provides a good model of this phenomenon. It was unclear for a long time whether the finding in *Brown v Board of Education*[8] — where the Supreme Court banned racial segregation in schools and, in *Brown II*,[9] required that existing segregation be remedied 'with all

[1] In *Masiya*, the conduct (anal rape of a female) was a crime, but would be re-classified as rape rather than indecent assault.

[2] 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC).

[3] 2001 (1) SA 1146 (CC), 2001 (1) BCLR 52 (CC).

[4] 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC) at para 69 (The Court held that the government had improperly assigned the payment of social grants to the provinces.)

[5] See *Ex parte Minister of Social Development & Others* 2006 (4) SA 309 (CC), 2006 (5) BCLR 604 (CC) at paras 18–20 (The Court was considering an application to extend the suspension granted in *Mashavha*. Although it did not decide the issue, it accepted that the possibility of the suspension expiring without new legislation being enacted would be to remove the authority for officials to pay social grants.)

[6] 2007 (6) SA 477 (CC), 2007 (1) BCLR 47 (CC).

[7] Levinson (supra) at 885.

[8] 347 US 483 (1954)('*Brown*').

[9] *Brown v Board of Education* 349 US 294 (1955).

deliberate speed' — was a prohibition only of *de jure* segregation or of *de facto* segregation.[1] As Levinson argues, the *Brown* and *Brown II* courts left that question open as they were dealing only with *de jure* segregation and obstructive officials. The real meaning of what the equal protection clause required 'only later came into focus, gradually and retrospectively, through the lens of remedy.'[2] Immediately after *Brown* the Supreme Court held that although *de facto* segregation was not in itself unconstitutional, but if the school district had engaged in earlier *de jure* segregation, it attracted a strong presumption of unconstitutionality.[3] The consequence of this approach was that a large number of school districts came under the control of the federal judiciary. The judiciary then devised a range of remedies — with the bussing of children and the rearrangement of school districts being the most prominent — to achieve *de facto* integration. This interventionism led, in turn, to growing political opposition and judicial unease about the extent to which the courts were micro-managing school affairs and local government. The Supreme Court then made a series of decisions limiting the use of bussing.[4] As Levinson notes:

> Nominally, these are all changes that rein in remedies while leaving the *Brown* right untouched; functionally, however, these decisions have redefined the right. Just as allowing expansive remedies had pushed *Brown* toward a *de facto* right in many school districts, constricting remedies is now pulling *Brown* toward a *de jure* right.[5]

This line of cases culminates in the recent case of *Parents Involved in Community Schools v Seattle School District No. 1*. A plurality of the Supreme Court rejected two school districts' integration plans and fell one vote short[6] of redefining *Brown* as endorsing a colour-blind constitution — and therefore prohibiting only *de jure* segregation.[7] The case was not brought as a challenge to the underlying principle of *Brown*, and the Court did not rule out all attempts at integration. But the impact of the extremely small range of remedies that the Court deemed permissible — (bussing was not one) — had the effect of altering the content of the right.

Remedial deterrence is most obviously prevalent in the Constitutional Court's socio-economic rights jurisprudence. In its first brush with socio-economic rights,

[1] That is, did *Brown* prohibit only laws preventing integrated schools, or did it require that schools in fact be integrated?

[2] Levinson (supra) at 875.

[3] *Swann v Charlotte-Mecklenburg Board of Education* 402 US 1, 26 (1971).

[4] Levinson (supra) at 877. Levinson cites *Milliken v Bradley* 418 US 717 (1974)(Students in areas that had not engaged in *de jure* segregation could not be part of bussing plans); *Missouri v Jenkins* 515 US 70 (1995)(remedies must be narrowly tailored to remedying previous segregation); *Freeman v Pitts* 503 US 467 (1992), *Board of Education v Dowell* 498 (US) 237 (1991) and *Pasadena City Board of Education v Spangler* 427 US 424 (1976). All three cases envision that integration plans will come to an end.

[5] Levinson (supra) at 877.

[6] Justice Kennedy's concurrence does not fully endorse a colour-blind constitution, although the space he leaves for continued action to force integration is very limited.

[7] 551 US _ (2007).

Soobramoney v Minster of Health (KwaZulu-Natal), the Court was confronted with a man suffering from chronic renal failure who argued that his FC s 27 right of access to healthcare entitled him to be placed on a dialysis machine at state expense.[1] The Court rejected the claim. It argued that the practical consequences of granting Mr Soobramoney's claim would be to decrease the money available for other health needs, and ultimately for other legitimate state goals.[2] In determining the content of the right, the Court does not conduct a purely philosophical inquiry. It looks at the practical (read remedial) consequences of its acts. The conclusion must be that rights (or at least socio-economic rights) are made in part of the same 'stuff' as remedies.

Similarly, in *Government of the Republic of South Africa v Grootboom*[3] and *Minister of Health & Others v Treatment Action Campaign*[4] the Court (largely)[5] rejected a 'minimum core' approach to FC ss 26 and 27. Two related reasons offered by the Court are, arguably, remedial. Firstly, in *Grootboom* the Court argues that the minimum core may be different for people in different circumstances and that it does not have information to determine what is required.[6] Underlying this concern is the spectre of the judiciary becoming involved in the details of managing each municipal housing scheme in order to determine what the 'minimum core' for that section of the population is. That is an undesirable *remedial* consequence. Second, in *TAC,* the unanimous Court held that '[c]ourts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic *consequences* for the community.'[7] Note that this mere assertion is not a philosophical argument as to how one should determine the content of the right. It is a bald statement of concern about the impact that any remedy granted by the Court might have on social affairs that lie beyond its immediate control. And it is these remedial concerns, amongst others, that lead the Court to reject the call for a minimum core approach.

The recent decisions of the Supreme Court of Appeal in *Zuma v National Director of Public Prosecutions*[8] and *National Director of Public Prosecutions & Another v Mahomed*[9] also offer a powerful indication of how remedies impact on rights. Both cases concerned the validity of search warrants. In *NDPP v Mahomed* it was accepted that the right to privacy had been violated. Nugent and Mlambo JJA would only grant very limited preservation orders (which would permit copies of the seized documents to be kept in case of future disputes) because they feared that anything more would make the right to privacy — which the State admitted had been infringed — meaningless. Farlam and Cloete JJA on the other hand

[1] 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC).
[2] Ibid at paras 27–28.
[3] 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)('Grootboom').
[4] 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC)('*TAC*').
[5] The Court may have left some space in the 'reasonableness' test for minimum core obligations to play a role. See D Bilchitz *The Justification and Enforcement of Socio-economic Rights* (2007).
[6] *Grootboom* (supra) at paras 32–33.
[7] *TAC* (supra) at para 38 (my emphasis).
[8] [2007] ZASCA 139.
[9] 2008 (1) SACR 309 (SCA), [2008] 1 All SA 181 (SCA)('*NDPP v Mahomed*').

were willing to grant a preservation order that would allow the NPA to later gain access to the documents and to potentially use them at trial. Ponnan JA was unwilling to grant any preservation order at all. These findings become even more interesting when one examines the same judges' findings in the *Zuma* matter. In *Zuma*, the applicant argued that the warrants issued to search his premises were overbroad, primarily because the definition of the crime was not specific enough, and therefore violated his right to privacy. Farlam and Cloete JJA agreed and would have set aside the warrants, but granted a preservation order on the same terms as the one they were willing to grant in *Mahomed*. Nugent, Mlambo and Ponnan JJA disagreed, holding that the warrants did not infringe the right to privacy.

The direct correlation between the voting blocs in the two cases, all but demands the conclusion that all the judges' decisions in *Zuma* were influenced by their convictions about the possible remedy in *Mahomed*. It was easier for Farlam and Cloete JJA to hold that Zuma's privacy had been infringed because they knew it was unlikely to influence his future prosecution: the documents would be preserved and easily admissible at trial. Similarly, Nugent, Mlambo and Ponnan JJA would have been extremely hesitant to find a violation of privacy because the only remedy that they deemed acceptable would have almost certainly ensured that the documents would never have been introduced in the trial. Both sets of judges, it seems, allow their idea of the appropriate remedy to influence their construction of the right to privacy.

Let me offer one final example of the way in which remedies have impacted on the content of not only of rights, but also on the doctrine of application of rights:[1] *Masiya v Director of Public Prosecutions, Pretoria & Another (Centre for Applied Legal Studies & Another,* Amici Curiae*)*.[2] The case concerned the trial of a man who had anally raped a young girl. The issue before the Court was whether the common-law definition of rape, which only criminalized the non-consensual penetration of a vagina by a penis, was unconstitutional for not including anal penetration. A majority of the Court[3] concluded that the common-law definition did not directly violate any of the rights relied on — equality, dignity, freedom and security of the person and privacy — but that it should be developed in terms of FC s 39(2) in light of the spirit, purport and objects of the Bill of Rights to include anal penetration of females, but not males. This remarkable conclusion is based on a fundamental misunderstanding of the remedies available to the Court following a finding of direct invalidity. The Court's reasoning is summarized in this passage:

[1] For more on application doctrine, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31. For arguments relating to application and rights interpretation in *Masiya*, see S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *SALJ* 762 ('Amazing'); F Michelman 'On the Uses of Interpretive 'Charity': Some Notes From Abroad on Application, Avoidance, Equality, and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa' (2008) 1 *Constitutional Court Review* 1.

[2] 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC)('*Masiya*').

[3] Langa CJ (Sachs J concurring) left this issue open. Ibid at para 76.

> The definition of rape is not unconstitutional in so far as it criminalises conduct that is clearly morally and socially unacceptable. In this regard it is different from the common law crime of sodomy which was declared unconstitutional by this Court[1] because it subjected people to criminal penalties for conduct which could not constitute a crime in our constitutional order. There is nothing in the current definition of rape to suggest that it is fatally flawed in a similar manner. The current definition of rape criminalises unacceptable social conduct that is in violation of constitutional rights. It ensures that the constitutional right to be free from all forms of violence, whether public or private, as well as the right to dignity and equality are protected. *Invalidating the definition because it is under-inclusive is to throw the baby out with the bath water. What is required then is for the definition to be extended instead of being eliminated so as to promote the spirit, purport and objects of the Bill of Rights.*[2]

The Court was operating under the mistaken assumption[3] that a finding of direct invalidity can only result in declaring the common-law definition unlawful. Because it believed its remedial options were limited, the Court changed the content of the right to avoid that undesirable remedial consequence — total invalidity of the definition. The majority asserts that FC s 9 — insofar as it applies to crime-creating laws — requires only that laws do not criminalize conduct that 'could not constitute a crime in our constitutional order.' It does not require rational reasons for the differentiation or that any differentiation does not amount to unfair discrimination. On this reasoning, crimes that only prohibited acts by white people or Jews would not violate the right to equality because their only flaw would be 'under-inclusiveness'. That is a serious — and unwelcome — change in the content of the right.[4]

In addition, the majority's assumption that only indirect application can permit the alteration of a common-law rule explains their distaste for the direct application of rights to the common law. If it were indeed true that direct application only permitted a common-law rule to be accepted or rejected, the Court's preference for indirect application would make sense. Because this hypothesis is blatantly false this choice has, rightly in my view, been the subject of serious

[1] *National Coalition for Gay and Lesbian Equality v The Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC).

[2] *Masiya* (supra) at para 27 (my emphasis).

[3] This assumption is clearly incorrect. See *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others as* Amici Curiae*); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)(In *Fourie*, the Court relied on the direct application of the right to equality to extend the common-law definition of marriage to include homosexual couples. Clearly the Court could also have used direct application to extend the definition in *Masiya*.)

[4] For the content of the right prior to *Masiya*, see, for example, *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 53 (Sets out the test for the violation of the right to equality.) See also C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 35. Hopefully, the Court will treat *Masiya* as an aberration and will not follow this precedent in future cases.

criticism.[1] However, the wisdom of the decision is not the point here. The point is that remedial concerns — the remedies that the Court believes are at its disposal or the remedies that it would prefer to use — alter the content both of rights and application doctrine.

There are many other cases in which one could argue that the Court has, consciously or unconsciously, engaged in remedial deterrence.[2] But I trust that these examples suffice to prove that remedial deterrence is a part of the fabric of our constitutional law.

(cc) Remedial Incorporation

The third way in which remedies impact on rights is remedial incorporation.[3]

[1] Woolman 'Amazing' (supra)(Woolman argues that the Courts decisions in *Masiya*, *NM & Others v Smith & Others (Freedom of Expression Institute as* Amicus Curiae*)* 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC) and *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) indicate a disturbing predilection for relying on FC s 39(2) and therefore an ongoing failure to give content to the rights in the Bill of Rights.)

[2] See I Currie & J De Waal *The Bill of Rights Handbook* (5th Edition, 2005) 192 n 7 (The authors argue that '[c]ourts are likely to be more hesitant to find a violation of a right in situations where there is no appropriate remedy for the violation.' They mention *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)('*Hugo*') and *New National Party of South Africa v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)('*New National Party*') as examples. In *Hugo* the Court was faced with an equality challenge to a decision by the President to remission of sentences to all mothers of children under 12. The President's act was challenged, predictably, by a father of a child under 12. A majority of the Court held that although there was discrimination, it was fair. Currie and De Waal suggest that part of the reason for this conclusion was that any remedy would either release a large number of male prisoners or re-incarcerate the mothers who had already been released. The *New National Party* Court concluded, very shortly before the 1999 elections, that a law requiring voters to have a bar-coded Identity Document was valid. Currie and De Waal argue that the Court was 'hesitant to find a violation because any relief that it granted would have placed the 1999 elections in jeopardy'.) See also *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC)(The applicants argued that the President had an obligation to intervene diplomatically on their behalf to ensure that their human rights were not violated while they were in Zimbabwe. A majority of the Court concluded that citizens only have a right to request diplomatic protection and to have that decision properly considered by government. Part of its reasoning was that courts are institutionally ill-suited to control diplomatic negotiations: 'The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill equipped to deal. The best way to secure relief for the national in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than judges, and which could be harmed by court proceedings and the attendant publicity.' Ibid at para 77. Because it saw the only available remedy — ordering government to make diplomatic representations — as potentially more harmful to the applicants' interests than granting no remedy at all, it limited the right to require intervention only when government had incorrectly exercised its discretion.)

[3] See, generally, Levinson (supra) at 899–904. See also O Fiss 'Foreword: The Forms of Justice' (1979) 93 *Harvard LR* 1, 49–50 (Fiss argues that specific elements of structural orders (such as requiring showers) are not directly required by the right, but are instrumental means to enforce the right either by preventing evasion, or simply to let officials know what is expected of them. However, unlike Levinson, he argues that these considerations do not become part of the right itself but are 'instrumental or remedial rights rather than constitutional rights proper'. The strength of the remedial equilibration model is that it illustrates that there is no difference between 'remedial rights' and constitutional rights. All rights are affected by remedial concerns and are no less valid or real for being motivated by instrumentality instead of principle.)

Remedial incorporation occurs when a court defines a right to include a prophylactic remedy that is not itself part of the right, but is necessary to ensure that the 'core' of the right is not violated. In *Hutto v Finney,* the Supreme Court held that keeping a prisoner in isolation for longer than 30 days was not itself a violation of the prohibition on cruel and unusual punishment.[1] However, it upheld a District Court order limiting stays in isolation cells to 30 days. There were two reasons for this apparently contradictory stance. Firstly, the other conditions in the prison — including overcrowding and malnutrition — when combined with long periods of solitary confinement did constitute cruel and unusual punishment and it was pointless to determine which specific combination of conditions was a violation and which was not. Secondly, the long history of unwillingness on the part of the state to remedy prison conditions necessitated 'specific, and easily verifiable remedial orders that aimed for a level of prison quality well above the constitutional standard.'[2]

The remedial influence on rights here is perhaps more subtle than remedial deterrence. Because the standard of 'cruel and unusual punishment' is inherently subjective and incapable of specific articulation, '[r]emedies are used by courts to define a constitutional standard that would otherwise be impossible to articulate, and those remedies become the normative criteria by which constitutional violations are judged.'[3] The real impact is not seen in *Hutto* itself, but in subsequent cases where litigants — and courts — rely on the remedial measures taken to establish constitutional violations.[4]

There are not as many South African examples of this practice. However, *Dawood & Another; Shalabi & Another; Thomas & Another v Minister of Home Affairs & Others* does fit the profile.[5] In *Dawood,* the Court struck down a provision

[1] 437 US 678 (1978).

[2] Levinson (supra) at 879. See also J Jeffries 'The Right-Remedy Gap in Constitutional Law' (1990) 109 *Yale LJ* 87, 111–112 (Discussion of impact of remedies on rights in prison reform litigation. Referring to Levinson, he argues: 'Whether this phenomenon is described as remedy exceeding right or as remedy implicitly redefining right or as remedy merely becoming a "criter[ion] by which . . . lawfulness is judged" is for present purposes immaterial. The important point is that in structural reform litigation, courts prospectively and selectively impose requirements that in other remedial contexts would not be constitutionally compelled.')

[3] Levinson (supra) at 879.

[4] Ironically, the consequence of this phenomenon was for district courts to get involved in the minutiae of prison management which in turn led to concerns of the legitimacy of judicial management and the Supreme Court eventually cutting down the content of the right to limit such interference to cases of 'deliberate indifference' by prison officials. This is another example of remedial deterrence — fears that the nature of remedies will lead to cutting down the content of rights. Levinson (supra) at 881–882.

[5] 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC)('*Dawood*'). My use of *Dawood* is inspired by D Strauss 'The Ubiquity of Prophylactic Rules' (1988) 55 *University of Chicago LR* 190, referred to and discussed in Levinson (supra) at 900–904. Strauss's goal is to establish the legitimacy of prophylactic rules — rules which are not themselves required by the Constitution, but are practically necessary to ensure a right is protected — such as the *Miranda* warnings. He does this by showing that prophylactic rules are the norm, not the exception. He relies, for example, on *Lovell v Griffin* (303 US 444 (1938), where the Supreme Court struck down a statute prohibiting people from distributing literature without the permission of the City Manager. The rationale for this holding was not that the material Lovell wanted to distribute was protected by the First Amendment or that the City Manager had improperly denied Lovell permission.

which required foreign spouses of South African citizens to be outside South Africa when they applied for a permanent residence permit. An exception was made that allowed spouses to stay in South Africa on a temporary permit, but the granting of the temporary permit was subject to the unguided discretion of an administrative official. O'Regan J held that, even though it was possible that the power would be properly exercised, the existence of the power was itself a limitation of the right to dignity.[1] Having found that the limitation was unjustifiable, the Court suspended the order of invalidity but created interim guidelines on how the administrative officials should exercise their discretion in the meantime. This remedy can be nothing other than a prophylactic rule. O'Regan J's contention that the state's power itself violates dignity is unconvincing – as it implies that a spouse's dignity is impaired even if she is in fact granted the permit. In fact, what the *Dawood* Court does is to expand the right to dignity to include a right for administrative officials to act according to proper guidelines because of the possibility of officials making the wrong decision and the *remedial* difficulty/impossibility of a court re-assessing each application.

The Union of Refugee Women & Others v The Director: Private Security Industry Regulatory Authority & Others fits the same mould.[2] The applicants unsuccessfully challenged a law that prevented refugees from registering as security guards. However, they also brought a challenge to the way that the regulator dealt with their applications for exemption from that law. A majority of the Constitutional Court held that the failure of the Authority to provide information to applicants on how to apply for exemption *might* violate their FC s 33 right to administrative action.[3] It therefore ordered the Authority to ensure that all potential applicants had the necessary information. The Court must be right that the failure by the Authority to provide information cannot in itself be an infringement of the right to administrative action. There may be individual applicants who are assisted by the Authority or who are aware of what information to supply without the Authority's assistance, or who supply the correct information simply by careful

Rather, as Strauss notes, the Court's reasoning was that 'if there are no standards to guide an official's discretion, the official is too likely to deny a permit for an impermissible reason. Relatively clear standards do not eliminate the danger that an official will deny permission for an improper reason, but at least they reduce that danger.' Strauss (supra) at 196. The comparison with this case and *Dawood* should be immediately apparent. For more on prophylactic remedies, see T Thomas 'The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief' (2004) 52 *Buffalo LR* 301.

[1] *Dawood* (supra) at para 39 ('The right to dignity of spouses is limited by the statutory provisions that empower immigration officers and the DG to refuse to grant or extend a temporary permit.')

[2] 2007 (4) BCLR 339 (CC)('*Union of Refugee Women*').

[3] Ibid at para 79 (Kondile AJ poses the following question: 'Is the provision of this information not an element of procedurally fair administrative action envisaged in section 3 of [the Promotion of Administrative Justice Act 3 of 2000]?' However, it leaves the question unanswered. The clearest indication that Kondile AJ had no intention of answering the question is that, despite his insistence that all administrative action claims must first be considered in terms of PAJA, he does not engage PAJA at all.)

thought, or by chance. In all these situations, the applicants will receive a fair hearing and the decisions that follow will be lawful, reasonable and procedurally fair. It is the *probability* that many applicants will not know what information to supply or how to apply that requires a prophylactic rule to prevent the potential of a limitation of FC s 33 because it is impractical for each applicant to separately request information when they do not have it. In the process, the Court builds into FC s 33 a right to information where the failure to provide it is likely to make it impossible to apply. The difficulty in fashioning perfect remedies for each violation necessitates a different interpretation of the right.

One more example: *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others.*[1] The two applicants had their houses sold in execution to repay meagre Magistrate Court judgment debts. They challenged the provision which permitted their immoveable property to be sold without the intervention of a court. The Constitutional Court held that the removal of somebody's existing access to housing violated FC s 26(1) which guarantees that '[e]veryone has the right to have access to adequate housing.' They remedied the violation by reading words into the statute that required a magistrate, after considering all relevant circumstances, to approve the execution of any immoveable property.[2] This seems like an entirely appropriate remedy. However, like *Dawood* and *Union of Refugee Women, Jaftha* effectively turns the FC s 26(1) right to adequate housing into a right not to have *any* immoveable property sold without intervention of a court. The remedy — and therefore the right — applies equally to the execution of business premises or a holiday home as it does to a person's only potential shelter). The necessary prophylactic rule expands the content of the right because it was too difficult (or even impossible) to draft a remedy that would only apply to those persons whose access to basic housing was really at stake. Although the owner of business premises or a holiday home will not be able to avoid execution, after *Jaftha,* FC s 26(1) prevents his property from being sold unless a court has considered the case.

(dd) Remedial Substantiation

While the first three forms of remedial equilibration all affect the content of the right, the fourth — remedial substantiation — exposes how remedies determine a right's *value* : 'the cash value of the right is … nothing more than what the courts … will do if the right is violated'[3] or, to put it differently, it is not only the case that 'a right without a remedy is worthless, but also that a right with less remedy is worth less and a right with more remedy is worth more.'[4] Unlike remedial

[1] 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC)('*Jaftha*').
[2] Ibid at paras 64 and 67.
[3] Levinson (supra) at 887.
[4] Ibid at 904. This extension of the normative basis for the *ubi jus ibi remedium* principle is discussed earlier at § 9.2*(b)* supra.

deterrence and remedial incorporation, remedial substantiation is always present — the value of *every* right is determined by the possible (or probable) remedies that accompany its violation. A right that can only be accompanied by a declaratory order is generally less valuable than a right that can be remedied by an interdict or an award of damages.[1] Remedial substantiation does not rely on a single conception of value. As long as the metric employed takes some account of how a right brings about real-world change, the value of the right is affected by the remedy it can provide.

This idea of remedial substantiation is, in many ways, the heart of the assertion that rights and remedies are not separate. The ultimate test of the value of a right, on this account, is the practical change that it can achieve. As Thomas correctly argues:

> Rights standing alone are simply expressions of social values. It is the remedy that defines the right by making the value real and tangible by providing specificity and concreteness to otherwise abstract guarantees.[2]

Levinson offers the fate of criminal procedure rights in the post-Warren Court era as an example of remedial substantiation.[3] The Warren Court had established very powerful doctrines protecting accused persons: perhaps none so powerful as the *Miranda* rights to be informed of the right to silence and the right to legal counsel.[4] Under the more conservative Burger and Rehnquist courts, these rights remained untouched and were even rhetorically strengthened. However, the remedies available to enforce these rights were dramatically reduced. Originally, the admission of any evidence obtained without *Miranda* warnings was automatically excluded. However, the Court later defined the warnings as a sub-constitutional prophylactic rule that could be deviated from in certain circumstances.[5] This move then permitted the Court to permit the admission of evidence indirectly derived from a *Miranda* violation[6] and to hold that evidence obtained

[1] Of course the standard to determine whether a remedy is 'better' or 'worse' — and therefore whether a right is more or less valuable — is far from uncontroversial. Although I think that other considerations can legitimately be taken into account in choosing a remedy (see § 9.2*(d)* infra), for present purposes, when I say that a remedy is less valuable, I mean that it provides less relief to the victim. However, even employing that relatively clear standard, what remedy best vindicates a right and therefore makes the right more 'valuable' will, in many cases, be open for debate. The best I can do is to acknowledge that limitation.

[2] T Thomas '*Ubi Jus, Ibi Remedium*: The Fundamental Right to a Remedy Under Due Process' (2004) 41 *San Diego LR* 1633, 1638.

[3] Levinson (supra) at 908–911. See also C Steiker 'Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers' (1996) 94 *Michigan LR* 2466.

[4] 384 US 436 (1966).

[5] See, for example, *Michigan v Tucker* 417 US 433, 439 (1974).

[6] *Oregon v Elstad* 470 US 298, 306–09 (1985).

without a *Miranda* warning is admissible to impeach the accused's testimony.[1] Levinson's point is that a right requiring automatic exclusion is very different from a right that permits evidence to be admitted in certain circumstances.

It is not strictly necessary to provide examples of remedial substantiation. Once the basic principle — that rights are only worth as much as their remedies — is accepted, every decision where a remedy is provided provides a measure of the value of the right. However, for the sake of illustration, I will provide a few examples of rights that are worth less (or more) because of the remedies that they can provide.[2] The big difference between these examples and the fate of the *Miranda* remedies outlined above is that these do not describe a change in the value of rights over time, but show how the choice of remedy in specific instances affects the worth of the right.

Sanderson v Attorney-General, Eastern Cape is an excellent example of remedial substantiation.[3] To recap: *Sanderson* concerns the FC s 35(3)*(d)* right to be tried without unreasonable delay. Kriegler J held that the remedy granted for a violation of the right depended on the nature of the prejudice caused by the delay:

> appropriate relief for an awaiting-trial prisoner who has been held too long; a refusal of a postponement is appropriate relief for a person who wishes to bring matters to a head to avoid remaining under a cloud; a stay of prosecution is appropriate relief where there is trial prejudice.[4]

In contrast, in both the US and Canada the only remedy available is a permanent stay, no matter what the nature of the prejudice.[5] The difference in possible remedies means that the value of the South African right is very different from American or Canadian right. One permits an accused to go free without ever facing a trial; the other will ordinarily only allow the accused to speed up the trial or to be compensated for a delay.

Other easy examples are *Fose v Minister of Safety and Security* and *Thint (Pty) Ltd v National Director of Public Prosecutions & Others; Zuma & Another v National Director of Public Prosecutions & Others*.[6] In *Fose,* the Court held that punitive damages are not appropriate for isolated cases of police abuse.[7] The case is easy because the 'cash value' of the right can be measured in monetary terms. If the Court had

[1] *Oregon v Hass* 420 US 714, 722–24 (1975); *Harris v New York* 401 US 222, 225–26 (1971).
[2] See also the cases discussed in § 9.2*(b)* supra.
[3] 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC).
[4] Ibid at para 41.
[5] Although, as I noted above (§ 9.2*(c)(i)*(cc) supra) the difference in remedy also allowed the Court to adopt a much more lenient approach to determining whether a delay was unreasonable than that adopted in the US and Canada. In some ways, the combination of making it easier to prove a violation but offering lesser remedies once that is done places the South African right on more or less the same level as the US or Canadian alternative.
[6] [2008] ZACC 13.
[7] 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC).

permitted punitive damages, Mr Fose would have received far more compensation and the right would have had impact on the systemic problem of police brutality. In *Thint* the Constitutional Court overturned an SCA decision[1] that had held when a warrant was declared invalid for violating the right to privacy, the items seized under the warrant had to be returned to the accused. The Constitutional Court held that the evidence could be preserved so that the trial court could decide whether to admit or not. The value of the right to privacy varies drastically across the two decisions.

The next two examples are instances where the Constitutional Court suspends orders of invalidity. One. When the Constitutional Court invalidated the laws prohibiting homosexual marriage, it suspended — over the dissenting voice of O'Regan J — the order for one year to allow the legislature to create an appropriate legislative framework.[2] The effect was that the applicants, and all other homosexual couples, would have to wait one year to marry. The majority and O'Regan J envisage not only different remedies, but different rights: the majority protects a right to marry in the future; O'Regan J protects a right to marry now. Two: *Matatiele Municipality & Others v President of the Republic of South Africa & Others*.[3] The applicants successfully challenged a constitutional amendment that had moved them from KwaZulu-Natal to the Eastern Cape just before the 2006 municipal elections. The Court ruled that the KwaZulu-Natal legislature had not adequately facilitated public involvement when it considered the legislation. The Court, however, decided not to invalidate the elections and granted Parliament 18 months to remedy the defect.[4] The right of the people of Matatiele to participate in the law-making process permitted only a future opportunity to convince the legislature not to move them to the Eastern Cape. It did not — and was therefore worth less than a right which did — automatically entitle them to elections held in accordance with lawfully drawn provincial boundaries.

(ee) Litigation Impact

Remedies can determine the content of rights by influencing what rights get litigated and how they get litigated.[5] A right with a powerful remedy is more likely to encourage potential beneficiaries of the right to seek a judicial solution, while beneficiaries of a right with a very weak remedy might be more inclined to seek alternative redress. For example, the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* found that it had the power to

[1] *National Director of Public Prosecutions & Another v Mahomed* [2008] 1 All SA 181 (SCA).

[2] *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others as* Amici Curiae*); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)('*Fourie*').

[3] 2007 (6) SA 477 (CC), 2007 (1) BCLR 47 (CC)('*Matatiele II*').

[4] Ibid at paras 92–99.

[5] Levinson (supra) at 912–913 (Levinson does not fully develop this aspect, but suggests it as an additional possibility.)

read words into a statute and therefore to extend benefits offered to heterosexual couples to same-sex couples.[1] This sparked a long string of cases successfully challenging similar laws. And in most cases, the Court articulated virtually identical remedies.[2] It is conceivable that the Court could have decided that it did not have the power to read words into a statute, or that the appropriate remedy was to declare the provision invalid, leaving both heterosexual and homosexual couples without legal recognition. If it had chosen either course, it is highly unlikely that the other cases would have been brought. Same-sex couples would know that they would have very little to gain even if they succeeded on the merits.

Socio-economic rights offer a powerful counter-example. Despite the unique inclusion of directly enforceable socio-economic rights in the Final Constitution and widespread lack of access to adequate food, water, healthcare, housing and education, relatively few socio-economic rights cases have been litigated. Thus far the Constitutional Court has considered only five cases that rely directly on socio-economic rights.[3] There has been no direct challenge in any court on the rights to education or food. While there are a number of possible reasons for this paucity of challenges,[4] at least one plausible cause is the ineffectiveness of the orders that the Constitutional Court has granted in the cases that it has decided. Despite the applicant's 'success' in *Grootboom* and *TAC,* serious structural and political problems undermine the implementation of the respective orders. Potential litigants may feel that it is not worth their time to litigate socio-economic rights if the remedy they are likely to receive will do little to directly alter their circumstances — even if it does have some influence on government policy.

(ff) Remedies and Jurisdiction

Finally, the remedy an applicant claims may determine whether the Court hears the case at all.[5] The paradigmatic case is *East Zulu Motors (Proprietary) Limited v*

[1] 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC).

[2] See, for example, *Satchwell v President of the Republic of South Africa & Another* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC)(Extending benefits for judges partners); *Du Toit & Another v Minister of Welfare and Population Development & Others (Lesbian and Gay Equality Project as* Amicus Curiae) 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC)(Extending adoption rights); *Gory v Kolver NO & Others* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC)(Permitting same-sex partners to inherit intestate).

[3] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC); *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC); *Minister of Health and others v Treatment Action Campaign and Others (2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC); *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minster of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC)(Extending social security benefits to permanent residents); and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others*) 2008 (3) SA 208 (CC)(Addressing the housing rights of residents in dilapidated buildings in the inner city of Johannesburg.)

[4] The most obvious reasons are lack of resources to litigate and the difficulty of proving a violation under the reasonableness standard adopted by the Court.

[5] See generally, R Fallon 'The Linkage Between Justiciability and Remedies — And Their Connections to Substantive Rights' (2006) 92 *Virgina LR* 633 (Argues that remedies affect whether litigants have standing to litigate rights. Because of our extremely wide standing rules, this exact link is not present (or at least, not visible) in South Africa. However, the issue under discussion here — the link between jurisdiction and remedies — is closely related.)

Empangeni/Ngwelezane Transitional Local Council & Others.[1] The Court held that because there were no 'reasonable prospects that this Court would make an order on appeal which would be of any benefit to the applicant', it refused leave to appeal.[2] Similarly, in *Hlophe v Constitutional Court of South Africa & Others,* the minority judges refused to consider Judge President Hlophe's allegations that the Constitutional Court had infringed its constitutional rights because no matter what they found on the substantive question, they would not have granted the remedy he sought — a declaration of rights.[3]

Although the content of the right is not directly affected by the remedy, the remedy determines whether the content of the right is examined at all. It acts in a similar way to the phenomenon discussed above — the remedy may influence a court to consider some rights in detail and ignore others completely.

This approach also echoes elements of remedial substantiation. A right that cannot be meaningfully litigated to achieve certain ends is worth less than a right that can be so used. That is not to say that there are not good reasons to limit jurisdiction to avoid hearing cases where the remedy sought is clearly inappropriate, but it does mean that there is a connection between right and remedy.

(gg) Conclusion

I hope I have shown that, as a descriptive matter, the theory of remedial equilibration (and not rights essentialism) is the most accurate account of the manner in which the Constitutional Court operates. The Court does not think about rights in a void that is uninfluenced by the practicalities of the real world. It interprets rights with a constant eye on the remedy that it could provide. These observations are not, generally, meant as a criticism of the Court, but as a description of how it reasons. In the next section I consider whether remedial equilibration, as well as being descriptively accurate, recommends itself on normative grounds.

(iv) *Equilibration and Transformation*

The fact that courts do allow remedial considerations to colour their interpretation of rights does not automatically mean that we should support that practice. Despite the difficulties inherent in separating remedies from rights in the judicial mind, it is not impossible to imagine a judicial system that does just that:

> the institution of judicial review could . . . be changed to facilitate nonfunctional constitutional interpretation, for example by establishing a separate constitutional court and making constitutional adjudication purely declaratory or advisory. This would ensure that judges were not peeking at consequences, because there would be none, and it would insulate abstract constitutional judgments from social contexts where they would be too costly to implement or threaten serious harm.[4]

[1] 1998 (2) SA 61 (CC), 1998 (1) BCLR 1 (CC).
[2] Ibid at para 13.
[3] [2008] ZAGPHC 289 (Gildenhuys J and Marais J wrote dissenting judgments.)
[4] Levinson (supra) at 939.

Levinson himself seems to advocate against this approach. In his view, full adoption of remedial equilibration is preferable and would be very different from the 'dystopia' described above:

> In a constitutional culture that had thoroughly repudiated rights essentialism, courts would be liberated to take as full account of empirical knowledge in the process of interpreting the Constitution as they sometimes do in developing elaborate institutional reform remedies. There would be no reason, for example, why the types of fact-finding procedures used by legislatures and administrative agencies — and for that matter by courts in the remedial phase of structural reform litigation — should not also be available to courts deciding the shape of constitutional rights.[1]

In order to understand the debate between these two visions properly, it is useful to sketch the outlines of a deeper jurisprudential debate between Ronald Dworkin and his adherents on the one hand, and the Chicago School of Richard Posner and Cass Sunstein on the other. Dworkin endorses a rights essentialist philosophy where judges seek legal principles and then apply them to concrete cases.[2] Posner and Sunstein prefer a theory more compatible with remedial equilibration — their theory takes account from the start of social realities and devises constitutional rights in order to best solve practical problems.[3] The difference is exemplified by Levinson's discussion of the two school's different approaches to the question of assisted suicide which came before the United States Supreme Court in *Washington v Glucksberg*.[4] Dworkin contributed to an amicus brief — which became known as the 'Philosophers' Brief' — that argued that the moral and constitutional principles demanded the recognition of a right 'to live and die in the light of [one's] own religious and ethical beliefs'.[5] The implementation of that right was only relevant once the principle had been adopted. Sunstein and Posner rejected Dworkin's 'top down' approach and agreed with the Court that the existence of a right to assisted suicide should depend on the practicalities of implementing it: If the risks of abuse by doctors or others are too great, then there ought not to be any cognizable right.[6]

[1] Levison (supra) at 939.

[2] Ibid at 927 citing R Dworkin 'In Praise of Theory' (1997) 29 *Arizona State LJ* 353. See also, generally, R Dworkin *Law's Empire* (1986).

[3] Levinson (supra) at 927–928 citing R Posner *Overcoming Law* (1995) 171–97; R Posner 'Conceptions of Legal "Theory": A Response to Ronald Dworkin' (1997) 29 *Arizona State LJ* 377; R Posner 'The Problematics of Moral and Legal Theory' (1998) 111 *Harvard LR* 1637; C Sunstein 'From Theory to Practice' (1997) 29 *Arizona State LJ* 389.

[4] 521 US 702 (1997).

[5] Levinson (supra) at 928–929.

[6] Ibid at 929–930. Another issue that arises in the choice between rights essentialism and remedial equilibration is the question of legitimacy. One defence of rights-essentialism is that it is the foundation for the legitimacy of judicial review. While judicial remedies inevitably bear a great resemblance to legislative or executive action, constitutional rights have some higher authority by virtue of the manner of the adoption or the truth of the principles they embody that separates them from the ordinary political concerns of the other branches of government. Traditional justifications for constitutionalism rest on the special status of constitutional rights. Remedies are merely the 'practical handmaidens' necessary to realise these rights. A theory that disrupts the separation between rights and remedies also threatens

Both positions seem to have benefits and drawbacks. Remedial equilibration makes it easier to take account of detailed facts. The problem is that by making that inquiry part of the definition of the right, it seems more likely to protect the status quo. If a court defines a right according to the existing position, it will be far more difficult to explain why the right requires that position to change. On the other hand, while it avoids the danger of stasis, the rights essentialist position risks irrelevance by creating rights that can never be realized.[1] It seems obvious to me that either extreme position is undesirable. But what balance should South African courts strike?[2]

To begin, we must remember that the Final Constitution is not an ordinary document; it is a powerfully *transformative* document.[3] It is not meant to maintain

the legitimacy of judicial review. As Levinson notes, the fact that legitimacy depends on rights rather than remedies can be used cynically by courts to keep rights officially untouched but gut their meaning by altering the remedies they can provide: 'Evisceration of constitutional protections is often accomplished by severing remedies while preserving the veneer of rights. . . . Eliminating remedies, on the other hand, does not create the same kind of legitimacy problems, not just because remedies are much less visible to the public, but, more importantly, because constitutional theory takes for granted that remedies are expected to change along with political and policy preferences.' Levinson (supra) at 934–935. On the other hand, 'whenever the Court revokes a controversial constitutional right, it announces that constitutional rights are the contingent product of political forces and social needs rather than abstract, timeless moral principles, and consequently threatens its own legitimacy as the privileged expositor of constitutional values, ibid at 936–937. Levinson argues against this conclusion which is, in his view, based on a narrow view of democracy and therefore of what is necessary to legitimate judicial review. But while he suggests possible ways for political theory to develop to legitimate a more remedial-equilibration-type view of judicial practice: One, 'jettison the simplistic equation of democracy and majoritarianism and develop a richer conception of democracy more inclusive of minority viewpoints than simple majoritarianism.' Two, 'give up trying to reconcile judicial review and democracy and instead to show how judicial review serves values that are supplementary to, and perhaps (in limited areas) more important than, democracy.' Ibid at 937. His main argument is that 'the legitimacy of judicial review, as a sociological matter, depends far more on its practical consequences than on any political theory developed to defend it. . . . A persuasive theoretical defense of the legitimacy of judicial review,' he continues, 'therefore, may be a cog that plays no part in any consequential mechanism. Perhaps forgetting about legitimacy and concentrating on results would lead not only to better results but also, ironically, to enhanced legitimacy.' Ibid.

[1] See *Bel Porto School Governing Body & Others v Premier, Western Cape & Another* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) at para 186 (Mokgoro and Sachs JJ)('It would indeed be most unsatisfactory and have negative consequences for constitutionality to fail to provide a remedy where there has been an infringement of a constitutional right. While courts should exhibit significant deference towards the administration and recognise the practical difficulties which the administration faces, it could create a misleading impression that in instances where there is an infringement of a constitutional right, and there are significant practical difficulties in remedying the injustice caused, a decision-maker will not be held to account. It is the remedy that must adapt itself to the right, not the right to the remedy.')

[2] I am concerned here only with South African courts and not with creating a theory for all jurisdictions primarily because I do not think the same approach would necessarily be appropriate in all jurisdictions.

[3] See, for example, P Langa 'Transformative Constitutionalism' (2007) 17 *Stellenbosch* 351; K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146; E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31; D Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 *SAJHR* 309; C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248.

the status quo, but to change it. Its goals map most closely onto those of the rights essentialist. In the words of Justice Kriegler:

> When Courts give relief, they attempt to synchronise the real world with the ideal construct of a constitutional world created in the image of s 4(1). There is nothing surprising or unusual about this notion. It merely restates the familiar principle that rights and remedies are complementary. The relationship holds true and is uncontroversial at common law. The Constitution is also a body of legal rules and we should expect to find in it the same pairing of rights and remedies. Indeed, *how much more so* in the case of an instrument that seeks to 'to create a new order' and provide a bridge
>
> > 'between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'.[1]

The nature of our founding document favours a rights essentialist position that is more likely to transform current understandings of how society is structured.

That said, judges will inevitably consider remedial consequences in their determination of rights. Even in the pure declaratory system Levinson hypothesises,

[1] *Fose* (supra) at para 94 (my emphasis) quoting the FC's preamble. See also *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 262 (Mahomed J)('All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. The past institutionalised and legitimised racism. The Constitution expresses in its preamble the need for a "new order . . . in which there is equality between . . . people of all races". . . . The past was redolent with statutes which assaulted the human dignity of persons on the grounds of race and colour alone; s 10 constitutionally protects that dignity. The past accepted, permitted, perpetuated and institutionalised pervasive and manifestly unfair discrimination against women and persons of colour; the preamble, s 8 and the post-amble seek to articulate an ethos which not only rejects its rationale but unmistakenly recognises the clear justification for the reversal of the accumulated legacy of such discrimination. The past permitted detention without trial; s 11(1) prohibits it. The past permitted degrading treatment of persons; s 11(2) renders it unconstitutional. The past arbitrarily repressed the freedoms of expression, assembly, association and movement; ss 15, 16, 17 and 18 accord to these freedoms the status of "fundamental rights". The past limited the right to vote to a minority; s 21 extends it to every citizen. The past arbitrarily denied to citizens, on the grounds of race and colour, the right to hold and acquire property; s 26 expressly secures it. Such a jurisprudential past created what the post-amble to the Constitution recognises as a society 'characterised by strife, conflict, untold suffering and injustice'. What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting "future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".')

judges would be influenced by the actions that might flow from the implementation of their declarations. It is useless to deny or suppress the judicial instinct to coordinate rights and remedies that permits judges to occupy simultaneously the world of the ideal and the world of the real. This recognition seems to support a moderate rights essentialist position. First, the awareness of remedial consequences that Levinson celebrates as the major benefit of a remedial equilibrationist position can occur equally well within the bifurcated structure of rights essentialism by relegating the serious fact-finding procedures to the remedial stage. Courts can there take cognisance of factual reality without distorting the aspirational and transformative nature of the Final Constitution.

Secondly, the major benefit of Levinson's thesis is making us all — and especially judges — aware of how rights and remedies are connected. While that awareness can be used to embrace those connections, it can also be used to try and avoid them. If a judge is aware of the potential dangers of remedial equilibration, she will be more likely to keep rights and remedies separated in her mind and her judgments. It is necessary here to distinguish between the various forms of remedial equilibration: for not all forms of remedial equilibration preclude judges from making the constitutional dream real. Remedial flexibility and remedial incorporation aid in the realisation of the constitutional ideal by making it possible for rights to be defined as broadly as possible and by including practical guarantees that do not undermine the content of the right itself. Remedial substantiation is neutral in this regard — it is simply a way of evaluating the worth of rights. Looking through that frame can inspire more or less change. The relationships between remedies and litigation strategies can similarly act either way depending on the remedy. It can promote or prevent litigation to enforce rights. The only truly dangerous relationship is remedial deterrence. The urge for judges to define rights restrictively because they believe their remedial options are limited undercuts the transformative potential of the Final Constitution.

In my view, awareness of remedial deterrence, combined with a commitment to making constitutional rights real and a remedial regime that gives courts virtually unlimited powers to construct any remedy they need to realise the right, justifies rejecting the adoption of remedial equilibration as the normative basis for remedial action. While there will always be instances where judges instinctively limit the content of a right in order to avoid the creation of paper tigers, we ought to encourage judges to be adventurous in fashioning remedies to give effect to rights which may, on first blush, seem unenforceable. Paul Gerwitz has, in a slightly different context,[1] endorsed a similar approach:

> While the existence of certain remedial costs may justify their consideration at the remedy stage *if* they are not part of the definition of the right, it does not explain or justify why these costs are not included as part of the right itself, why the right-remedy gap should not be

[1] Gerwitz is concerned with different ways of choosing remedies — rights maximizing or interest balancing — which are discussed in detail below. § 9.2*(e)*(ii) infra.

> closed by redefining the right to take such costs into account. … The … answer is that where [the] consideration of remedial costs leads to a failure to provide a fully effective injunction, it does not necessarily foreclose other remedies. Even if an injunctive remedy is too costly, other judicial remedies such as damages may be available to eliminate some effects of the violation, or other branches of government may try to vindicate the right in ways that a court believes it should not. Thus, *it is meaningful not to redefine the right but to preserve it as an aspiration that may be vindicated in other ways or places.*[1]

An important element that Gerwitz identifies is that courts are not the be all and end all of enforcing rights. Other branches of government, and even civil society and individual citizens, have the power and in some cases, the responsibility to realise the constitutional dream. But if courts define rights restrictively then the other branches are likely to view the restrictive interpretation as the limit of their obligations.[2]

To sum up, my answer to the relationship between rights and remedies is: (a) acknowledge the interaction between the two; (b) use this awareness to avoid those instances where remedies act to narrow rights; (c) use creative remedies to realise rights — it is better that we start by imagining that things 'could be different, could be better.'[3] Of course my answer requires a remedial regime which gives courts the necessary discretion. That regime is the subject of the next section.

(c) Discretion

This section considers two issues: (a) the extent of remedial discretion enjoyed by South Africa's courts; and, briefly, (b) the relevance of discretion for the legitimacy of judicial review.

[1] P Gerwitz 'Remedies and Resistance' (1983) 92 *Yale LJ* 585, 606.

[2] That is not to suggest that courts should only declare rights, but that their declarations of rights impact not only what courts do in individual cases, but how all other social actors perceive the meaning of the Final Constitution. Susan Sturm has correctly argued against privileging the rule elaboration role of courts because courts are much more than rule-announcers. S Sturm 'Equality and the Forms of Justice' (2003) 58 *Univ of Miami LR* 51, 63 ('Treating rule elaboration and enforcement as the only legitimate mode of judicial interaction discounts much of courts' actual practice. It also discourages the development of theories and criteria to guide judicial intervention aimed at responding to complex conditions that threaten publicly articulated values.') But that does not mean that rule-announcing is not part of the courts' role.

[3] Langa (supra) at 360 ('For as long as [challenges to the constitutional goal] exist there will be a drive to overcome them, there will be a tension that keeps alive the idea that things can be different. When all the challenges are gone, that is when the real danger arises. That is when we slip into a useless self-congratulatory complacency, a misplaced euphoria that where we are now is the only place to be. That is when we stop dreaming, imagining and planning that things could be different, could be better. That, for me, is the true challenge of transformation.')

(i) *The Extent of Discretion*

> It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.[1]

These words of McIntyre J were written about s 24(1) of the Canadian Charter of Rights. Section 24(1) permits courts the power to grant a remedy that is 'appropriate and just in the circumstances'. The words of our own Constitution in FC s 38 — 'appropriate relief' — and FC s 172(1)*(b)* — 'any order that is just and equitable' — are equally broad. Have South African courts followed Justice McIntyre's advice about not interfering with this free discretion? Yes and no. The courts have paid considerable judicial lip service to the broad discretion afforded by FC ss 38 and 172(1)*(b)*. But they have limited remedial discretion by creating standards and principles to guide the exercise of that discretion and have limited the discretion that trial courts have by interfering regularly on appeal (at least in some classes of cases).[2]

Kate Hofmeyr argues that we should analyse the extent of remedial discretion courts can exercise using a 'central case' model.[3] This model works by determining what the conditions would be for the freest exercise of discretion — the central case — and then analysing how far from that central case any particular system falls. She analyses this on two axes: standards and review. The standards axis measures 'the range of choices open to the decision-maker' while the review axis evaluates 'the extent to which the decision is reviewable and the grounds upon which it is reviewed'.[4] The central case of discretion exists where a body has

[1] *R v Mills* [1986] 1 SCR 863, 965

[2] 'Understanding Constitutional Remedial Power'(Unpublished Mphil Thesis Oxford University, 2006, on file with the author)('Remedial Power').

[3] Ibid at 42 relying on D Galligan *Discretionary Powers* (1986). She rejects Roach's three-legged approach which distinguishes, in a Dworkinian fashion, between three types of discretion. K Roach 'Principled Remedial Discretion' (2004) 25 *Supreme Court Law Review* (2d) 101. The first type of discretion, 'strong discretion', is entirely unbound by rules or principles. 'Rules-based discretion' is, as the name suggests, limited by rules. The form Roach favours is 'principled discretion' is 'not under-governed by law in the way of the first, strong sense of discretion, nor is it over-governed by self-executing categories and rules'. Hofmeyr 'Remedial Power' (supra) at 44. Hofmeyr's primary reason for rejecting this matrix is that it simplifies the many varied ways in which remedial discretion can be structured: 'discretion is a matter of degree and thus there are no bright lines distinguishing rule-based, from principled, from unfettered, discretion. Instead, each exercise of constitutional remedial power differs from the central case of discretion in varying degrees.' Ibid at 46. I agree.

[4] Hofmeyr credits her use of these two axes to Galligan (supra) and M Rosenberg 'Judicial Discretion of the Trial Court, Viewed from Above' (1971) 22 *Syracuse LR* 635. Hofmeyr 'Remedial Power' (supra) at n 100. Her taxonomy is also comparable — although it employs different nomenclature — to that suggested by William Fletcher. 'The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy' (1982) 91 *Yale LJ* 635, 642–645. Fletcher describes the forms of control over discretion as 'internal' and 'external'. Internal controls correspond to Hofmeyr's 'standards' axis and determine the impact of legal norms on the original decision. External controls are those controls which operate after the decision has been made, usually by appellate courts.

a complete range of choices available with no rules or standards governing its choice and it also has the first and final say on the decision. Clearly the remedial discretion of South African courts does not fit that description. But just how far is our situation from that of the central case? This question is best answered by separately analysing the two axes.

(aa) Standards Axis

The standards axis can be further broken down to measure both procedural and substantive standards. Hofmeyr identifies three procedural limits on judicial remedial discretion: (a) courts must reach a decision; they cannot — generally — decide not to decide;[1] (b) courts are constrained by form — they must provide a reasoned judgment;[2] (c) courts are reactive — they have to wait for cases to come to them.[3] A fourth procedural constraint relates to the adversarial nature of the South African legal system. The court will, ordinarily, not consider a remedy that has not been debated by the parties because it is unfair to make an order without giving both sides an opportunity to comment on it. The remedy need not be raised by the parties themselves — the Court could raise the possibility in oral argument — but the parties must somehow be able to argue for or against it.[4] This was explicitly recognised by the Supreme Court of Appeal[5] — and endorsed by the Constitutional Court[6] — in *Modderklip*. Harms JA held as follows:

> If a constitutional breach is established, [courts are] mandated to grant appropriate relief. A claimant in such circumstances should not necessarily be bound to the formulation of the relief originally sought or the manner in which it was presented or argued.[7]

However, this does not detract from the duty to raise, as the SCA did in *Modderklip*, alternative relief with the parties either in oral argument or through directions. This procedural rule does therefore still somewhat limit the options that a court may choose from.

The impact of substantive standards depends not only on the quantity of standards, but also their 'quality'; or, to put it differently, how many options the standard leaves for the decision maker. Generally, a standard can be either 'broad' or 'narrow'. A broad standard constrains discretion but still leaves a

[1] Hofmeyr 'Remedial Power' (supra) at 53.
[2] Ibid at 54.
[3] Ibid at 54–55.
[4] See, for example, *Nyathi v Member of the Executive Council for the Department of Health Gauteng & Another* [2008] ZACC 8 (Court ordered raised the possibility of a structural interdict with the parties in oral argument. It eventually made the order, despite no party originally requesting it.)
[5] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA), 2004 (8) BCLR 821 (SCA)('*Modderklip SCA*').
[6] *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others,* Amici Curiae*)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC)2 at para 52.
[7] *Modderklip SCA* (supra) at para 18.

number of options open. On the other hand, a narrow standard allows very few possible outcomes.[1] In terms of this framework, to what extent are South African courts bound by substantive standards? There are two answers to this question: what the Constitutional Court says, and what it does. These are not in direct conflict, but they are in tension.

At the level of rhetoric, the Court has constantly maintained that courts must possess a broad discretion in crafting remedies.[2] The Final Constitution gives the courts the power to grant 'appropriate relief' for any infringement or threat of infringement to a right in the Bill of Rights[3] and the power to 'make any order that is just and equitable' when deciding any constitutional matter.[4] The best rhetorical statement of the Court's position appears, somewhat ironically, in *Fose*: The only requirement of the interim Constitution is that the relief given by a competent court in any particular case should be "appropriate relief". *It is left to the courts to decide what would be appropriate relief in any particular case.*'[5]

The Court has only accepted two unalterable limitations on remedial discretion. First, the Court has acknowledged that the command in FC s 172(1)*(a)* that a court '*must* declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency' prevents it from granting an order that avoids invalidity. Second, as discussed in detail later, the Court has read the Final Constitution to require that every remedy must be 'effective'.[6]

But despite the Constitutional Court's expression of relatively unfettered choice of remedy, it has, over time, established a wide range of specific presumptions and principles that seriously constrain the decisions of both itself and lower courts. As Hofmeyr puts it:

> The Constitutional Court's remedial approach has mimicked the development of equitable discretion in English law in so far as it has set out guidelines for the exercise of remedial power in order to constrain its exercise. With the accretion of cases, this approach has drawn the constitutional remedial power towards the periphery of the concept of discretion.[7]

[1] Hofmeyr 'Remedial Power' (supra) at 55–57.

[2] See, for example, *Janse van Rensburg NO & Another v The Minister of Trade and Industry NO & Another* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC) at para 28 ('This Court has *broad remedial discretion* to make a just and equitable order' (my emphasis)); *Minister of Health & Others v Treatment Action Campaign & Others (2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) at para 101 ('[FC s 38] contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant "appropriate relief". It has *wide powers* to do so'. (my emphasis)); *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) at paras 27 and 38 ('Our *flexibility in providing remedies* may affect our understanding of the right' and '[the court has] adopted a *flexible approach* that is certainly inconsistent with the availability of a single remedy in North American jurisdictions' (my emphasis)).

[3] FC s 38.

[4] FC s 172(1)*(b)*. As noted above this power embraces the ability to grant a remedy even where there has been no violation of a right. See § 9.2*(b)*(iv) supra.

[5] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at para 18 (The court does earlier recognize the limitation imposed by the obligation to declare unconstitutional law and conduct invalid.)

[6] See § 9.2*(e)* infra. This 'limitation' is not, however, universally respected.

[7] Hofmeyr 'Remedial Power' (supra) at para 63.

For example, there are presumptions in favour of retrospectivity[1] and against suspension,[2] supervisory interdicts,[3] punitive damages[4] and interim interdicts.[5] The Court has also created a real hierarchy of remedial choice when dealing with the substantive effect of declarations of invalidity.[6] A court must first determine whether the provision is capable of a constitutional interpretation. If not, it should, if possible, read-in or sever to cure a constitutional infirmity rather than declare the whole section invalid. The Court has created relatively complex rubrics to determine whether reading-in[7] or severance is appropriate.[8] Only if reading-in or severance are not possible should it declare the whole section invalid. The Court has also established at least two absolute rules: Notional severance can never be used to cure an omission[9] and a suspension can never be extended after the period of suspension has expired.[10]

But it is not only the presumptions, principles and rules that the Court has laid down that constrain remedial discretion. The general principle that like cases should be treated alike means that decisions in similar previous cases will have a strong gravitational pull on future judgments.[11] For example, in *Engelbrecht v Road Accident Fund* the Court had to decide whether to limit the retrospective effect of an order that a prescription clause was unconstitutional.[12] It conducted no analysis of the effect of retrospectivity in the specific case. Instead, it simply cited a general principle that 'an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity'[13] and then noted that the 'principle was apparently applied in *Mohlomi*'[14] [another case dealing with prescription] and there is no reason not to apply it in this matter.'[15] For the Court, a principle combined with its application in a similar case provided an

[1] See § 9.4*(d)*(ii) infra.
[2] See § 9.4*(e)(i)* infra.
[3] See § 9.6*(e)* infra.
[4] See § 9.5*(a)*(ii)(bb) infra.
[5] See § 9.5*(c)*(ii) infra.
[6] See § 9.4*(a)* infra.
[7] See § 9.4*(d)*(iii) infra.
[8] See § 9.4*(d)(i)* infra.
[9] See § 9.4*(d)*(ii) infra.
[10] See § 9.4*(e)(i)*(ee) infra.
[11] For example, a string of cases concerning the retrospective application of changes affecting succession took virtually identical tacks. See *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC); *Bhe & Others v Magistrate, Khayelitsha and Others; Shibi v Sithole & Others; SA Human Rights Commission & Another v President of the RSA & Another* 2005 (1) SA 563 (CC), 2005 (1) BCLR 1 (CC); *Gory v Kolver NO & Others* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) discussed in § 9.4*(e)*(ii) infra.
[12] 2007 (6) SA 96 (CC), 2007 (5) BCLR 457 (CC)('*Engelbrecht*').
[13] Ibid at para 45 quoting *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC).
[14] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC)
[15] *Engelbrecht* (supra) at para 45.

absolute answer to the question of remedy. As the Court decides more and more cases, courts' remedial discretion will move further and further along the standards axis and away from the central case of discretion.

This narrowing of discretion was inevitable. The Court was confronted with a blank canvas and had to create some sort of guidelines to ensure certainty and relative uniformity in the future. If the Court had not set down guidelines for when reading-in was appropriate, High Courts would not have known what to look for and might have taken disparate approaches. The disparity between these approaches would eventually have to be solved by the Constitutional Court on appeal. If it did so without laying down principles, the problem would have been perpetuated. However, it is important that the guidelines and standards remain just that. FC ss 38 and 172(1)*(b)* do afford broad discretion: such discretion ought not to be undermined by judicial fiat. And there is nothing in the case law to suggest that the Constitutional Court would want to do so. The danger comes when the Court relies too easily on past precedent and fails to consider the virtue and vices of various remedies afresh in each case that comes before it.[1] Similar cases may require similar results. However, an exercise of remedial discretion in one case should only provide guidance on how it should be exercised in a future case, not binding precedent.

(bb) The Review Axis

The review axis measures the extent to which lower court decisions are subject to alteration by higher tribunals. The central case would be where there is no review of a decision. In constitutional matters, the Constitutional Court occupies this position. But what is the position of the lower courts? A standard of review will fall closer to the central case if a higher court is only entitled to intervene in tightly circumscribed instances such as abuse of power or irrationality. The furthest one can go from the central case is *de novo* review.

The approach of the Constitutional Court turns on the nature of the remedy requested. These fall into two classes. If it is confronted with a 'constitutional remedy' such as a reading-in or suspension, then it applies a very high standard of review — and usually considers the remedy afresh. The Court has adopted the same approach to interdicts. On the other hand, where a more traditional remedy such as damages or a sentence of imprisonment is at issue, the Court has, generally, given lower courts much more leeway.

As Hofmeyr argues, the Court's approach to the first class of remedies — which I will, for lack of a better term, call 'constitutional remedies' — must be understood in light of the fact that the Court is obliged to confirm any order declaring an Act of Parliament or conduct of the President unconstitutional before the order has any force.[2] As a result, the Court is obliged to determine

[1] See my criticism of the Court's retrospectivity jurisprudence in § 9.4*(e)*(ii)(cc) infra.
[2] FC 167(5).

the extent of the violation and therefore to interfere with the lower court's decision relating to the substantive extent of the invalidity and therefore will often have a direct impact on the possibility of reading-in and severance. In *S v Shinga,* the Court confirmed the High Court's declaration of invalidity of s 309B and 309C of the Criminal Procedure Act regulating appeals from the Magistrates' Court.[1] But whereas the High Court found the procedure invalid *in toto*, the Constitutional Court found it invalid only to the extent that it permitted a record not to be sent in some cases and for appeals to be considered by only one judge. Accordingly, Yacoob J simply read the necessary words in to cure those narrow constitutional inconsistencies.[2]

Although the Final Constitution does not require the Constitutional Court to review the lower court's ancillary remedial orders — such as suspension, limiting retrospectivity and so on — the Court has assumed that it has the power to do so virtually *de novo*. This attitude of the Constitutional Court is expressed by O'Regan J in *Dawood v Minister of Home Affairs*:

> Although this matter is before this Court for the confirmation of an order of invalidity, there is nothing in section 172 that suggests that the Court's power to make appropriate orders is limited in such matters. It seems clear from the language of section 172(1), in particular, that as long as a court is deciding a constitutional matter "within its power", it has the remedial powers conferred by that section, as broad as they may be. In the circumstances, therefore, the Court is not empowered merely to confirm or refuse to confirm the order that is before it. The Court, as section 172(1) requires, must, if it concludes that the provision is inconsistent with the Constitution, declare the provision invalid and then the Court may make any further order that is just and equitable.[3]

The Court has interpreted its power under FC s 167(5) to include a power to alter the remedy as it deems fit. This power is not an obvious consequence of the wording of either ss 167(5) or 172(2)*(a)*.

This interpretation might also explain the Court's willingness to interfere with the granting of supervisory orders. In both *Grootboom*[4] and *TAC*[5] the Court, although largely confirming the High Courts' substantive findings, replaced the structural interdicts both High Courts had granted with declaratory orders. In neither case did the Court even consider the possibility of deference to the High Court's determination. This attitude is not limited to the Constitutional Court. The Supreme Court of Appeal expressed a similar willingness to interfere with orders requiring supervision in *President of the Republic of South Africa v Modderklip Boerdery*.[6]

However, when it comes to the second class of cases — traditional remedies

[1] 2007 (5) BCLR 474 (CC), 2007 (2) SACR 28 (CC).
[2] Ibid at paras 55–56.
[3] 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 60.
[4] *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).
[5] *Minister of Health & Others v Treatment Action Campaign & Others (2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC)('*TAC*').
[6] *President of the RSA & Others v Modderklip Boerdery (Pty) Ltd* 2004 (8) BCLR 821 (SCA).

— the Court has been reluctant to meddle with high court orders. In *Dikoko v Mokhatla* a majority of the Constitutional Court held that even if the amount of damages in a defamation suit was a constitutional issue (and it suggested strongly that it was) appellate courts should be very hesitant to interfere with the determination of the trial court.[1] Moseneke DCJ held that in determining damages the 'trial court is entrusted with a wide discretion'[2] that should only be interfered with if it was 'based on wrong principle' or was 'glaring disproportiona[te]'.[3] Similarly, when dealing with criminal sentences, the Court has stated that the discretion of the trial court must be respected. In *S v Shaik*, a unanimous Court held:

> It has been stated repeatedly by courts that an appeal court would not easily interfere with a sentence imposed by a trial court exercising its discretion. The question is not which sentence the appeal court would have imposed, but rather whether the sentence is shockingly inappropriate, or whether an irregularity or misdirection occurred.[4]

The same approach has been taken with regard to the exclusion of evidence in criminal trials.[5] The approach in all these circumstances applies a much lighter form of review and therefore places the remedial discretion of lower courts much closer to the central case for traditional remedies.

What is the reason for this seemingly schizophrenic approach: zero discretion in some cases, massive deference in others, and virtually nothing in between? The Court has never explained its approach and so what follows is largely speculative. Based on the Court's judgments, the first answer that comes to mind is that the 'traditional remedies' are more intimately tied up with the facts of a specific case. A trial court would be better suited to determine the 'fact'. 'Constitutional remedies' are largely contingent upon issues of constitutional principle. An appellate court is equally well placed to determine such matters — indeed an 11 person bench may be better equipped to engage issues of principle.

However, on its own, the 'fact-principle' distinction is insufficient. Many remedial decisions in the class of constitutional remedies depend on the facts. When deciding to read-in, sever, suspend the order of invalidity or limit its retrospectivity, some of the most important factors are the impact that it will have on government administration, the budget or any other number of factual concerns. The same goes for supervisory orders: whether it is necessary to monitor the state's progress and what the precise terms of the order should be depend, as

[1] 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC).
[2] Ibid at para 94.
[3] Ibid at para 95.
[4] 2008 (2) SA 208 (CC), 2007 (12) BCLR 1360 (CC) at para 72.
[5] See, for example, *Thint (Pty) Ltd v National Director of Public Prosecutions & Others; Zuma & Another v National Director of Public Prosecutions & Others* [2008] ZACC 13 at para 61 ('The trial court, rather than preliminary courts, is best placed to balance the varying public and private interests at stake, namely, the public and private interests in the emergence of truth, the applicants' interests in their privacy and property, and the accused persons' fair trial rights.')

the Court itself has admitted,[1] largely on the factual situation, not on constitutional principle.

The additional difference between the two classes is that the 'constitutional remedies' deal with relief that will often have an impact on large classes of persons other than the litigants. Traditional remedies normally affect only the parties before the court. It is not so much that one determination is factual and the other is not. Rather, it is the nature of the facts. The relevant facts for 'traditional remedies' relate to the actions of individuals and the impact it will have in a very specific setting. On the other hand, 'constitutional remedies' rely on facts affecting the broad functioning of the mechanisms of government and a wider domain of social life. These facts are more connected to how our ideal society ought to be constructed (and how government ought to go about constructing it) than are facts about the appropriate sentence for a particular criminal.

A final possible explanation is precedent. When the Interim Constitution came into force there was no existing precedent specifying when constitutional remedies should be granted. That precedent had to be created. If the Constitutional Court had adopted an extremely deferential approach, the development of principles to guide remedial discretion would have been severely delayed and would have been created largely by the High Courts. The contrary is true when we consider the individual remedies: there was a huge amount of precedent relating to sentencing, damages and the exclusion of evidence. Not only was it not necessary for the Court to develop new precedent, but the existing precedent told it to avoid interfering in the decisions of trial courts.

Going forward, the Court would be well advised to increase the scope given to trial courts to fashion remedies, particularly supervisory orders. The main reason is that trial courts are better positioned to gather and analyse evidence than appellate courts. The Court has recognised this greater access to the pertinent facts. In *S v Ntsele* Kriegler J had the following to say:

> [Q]uestions of retrospectivity, prospectivity and the conditional suspension of orders of invalidity often present difficult choices, as is borne out by several judgments of this Court. Those choices often depend upon factors in respect of which evidence is necessary, for example, regarding the likely impact on the administration of justice if a provision were to be struck down with immediate effect, or the financial consequences for third parties of a retrospective order. Where that is so, all the relevant evidence should be received and evaluated by the court of first instance.[2]

[1] *TAC* (supra) at para 129 (The Court refused to order a structural interdict. It noted: 'In appropriate cases [courts] should exercise such a power if it is necessary to secure compliance with a court order. That may be because of a failure to heed declaratory orders or other relief granted by a court in a particular case. We do not consider, however, that orders should be made in those terms unless this is necessary. The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case.') See also *Nyathi v Member of the Executive Council for the Department of Health Gauteng & Another* [2008] ZACC 8 at para 84 (In this case the Court did grant a structural interdict because: 'It is apparent from the facts and history of this case that the legislature and the executive have not taken measures, legislative or otherwise, to ensure that the orders of a court are obeyed.')

[2] 1997 (11) BCLR 1543 (CC) at para 13.

(ii) *Discretion and Legitimacy*

The problem judicial remedial discretion poses for the legitimacy of judicial review is best expressed by Owen Fiss:

> The rightful place of courts in our political system turns on the existence of public values and on the promise of those institutions - because they are independent and because they must engage in a special dialogue - to articulate and elaborate the true meaning of those values. The task of discovering the meaning of constitutional values such as equality, liberty, due process, or property is, however, quite different from choosing or fashioning the most effective strategy for actualizing those values, for eliminating the threat posed to those values by a state bureaucracy.[1]

In essence, Fiss' argument is that courts derive their legitimacy from their unique — because they are independent and have to engage in reasoned dialogue with anybody who brings a case to court — ability to give *content* to public values. But they are not unique in their ability to give *effect* to those values. While courts can claim legitimacy in determining rights, they cannot claim the same legitimacy in crafting remedies. If they are given a free reign in crafting remedies — particularly constitutional remedies that have influence far outside the confines of the parties to a particular case — they will be performing tasks that could be equally well performed by the legislature or the executive.[2]

There are a number of solutions to this problem of legitimacy. Fiss' solution is that we cannot afford to allow judges only to declare rights and other branches of government to enforce them because 'a delegation of the task of actualization to another agency … necessarily creates the risk that the remedy might distort the right, and leave us with something less than the true meaning of the constitutional value.'[3] In order to ensure the protection of rights, it is necessary that remedies are devised by the same body that defines the rights.

Paul Gerwitz finds Fiss' solution uncompelling. He supports the remedial equilibration thesis,[4] namely that 'it [is] inevitable that thoughts of remedy will

[1] O Fiss 'Foreword: The Forms of Justice' (1979) 93 *Harvard LR* 1 ('Forms of Justice') 51.

[2] Ibid at 51–52. See also William Fletcher 'The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy' (1982) 91 *Yale LJ* 635, 694 (Fletcher argues that structural reform by federal courts must always be presumptively illegitimate. 'When a court resolves a non-legal polycentric problem ordinarily resolved by a political body, it mimics the manner of decisionmaking of the political body. But even if the mimicking is skillfully done, a critical element is, and always must be, missing. As an unavoidable structural matter, a federal judge is not controlled by the elements of the problem that he resolves. This control by the problem's constituent parts is what legitimates the exercise of discretion by a political body. Since this political control cannot exist over a federal judge, his or her discretionary resolution of the same problem simply cannot be legitimated on the same basis. And since the problem is non-legal in nature, the conventional means of control within the judiciary — legal rule and principle applied through the traditions of judicial reasoning and craft — are also unavailable as bases upon which to legitimate this exercise of power. Finally, since the problem is non-legal in nature, the district judge lacks even the internal control that would permit him or her to distinguish as a legal matter between appropriate and inappropriate remedial solutions.')

[3] Fiss 'Forms of Justice' (supra) at 53.

[4] See § 9.2*(c)*(i)*(cc)* supra.

affect thoughts of right, that judges' minds will shuttle back and forth between right and remedy.'[1] The rights declaring function is already a function that mixes with those traditionally assigned to the other branches of government. However, even if it were possible to separate rights and remedies, Gerwitz does not believe that Fiss' reasoning solves the problem of legitimacy. It simply shifts judges' illegitimate engagement with the real world to a different box. 'If legitimacy is undercut when judges behave adaptively and compromise with realities', Gerwitz argues, 'then this behaviour undercuts legitimacy at whatever "stage" it occurs.'[2] In Gerwitz's view, the legitimacy problem is insoluble on Fiss' terms. Fiss sets a standard for legitimacy that can only be met by a court that does not engage with the real world at all.

> If constitutional adjudication as we know it is to be deemed legitimate, the conditions of legitimacy must accommodate both the idealizing and adaptive nature of the enterprise and the pervasive nature of the enterprise and the pervasiveness of the duality.[3]

While Gerwitz is probably right that Fiss' definition of legitimacy puts him in a Chinese finger-trap from which he can't escape, Gerwitz' solution is equally unsatisfying. He seems to say: 'We must find a definition of legitimacy that legitimizes what we currently have.' That seems to get things backwards. It is current practice that must meet a definition of legitimacy, not the other way round.

William Fletcher offers an alternative.[4] He argues that since 'remedial discretion in institutional suits[5] is inevitably political in nature, it must be regarded as presumptively illegitimate.'[6] That presumption can only be 'overcome when the political bodies that should ordinarily exercise such discretion are seriously and chronically in default.'[7] A 'credible threat' of judicial intervention will encourage government to solve the problem: 'the greatest benefit of legitimating judicial remedial power may not be that it permits the court to act, but rather that it may force the political bodies to perform their functions.'[8]

Theunis Roux's recent work suggests a final possible approach to legitimacy.[9] Roux is not concerned with providing a theory of legitimacy. His project is instead to provide a description of the Constitutional Court's actions in a number

[1] P Gerwitz 'Remedies and Resistance' (1983) 92 *Yale LJ* 585, 679.
[2] Ibid.
[3] Ibid at 680.
[4] 'The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy' (1982) 91 *Yale LJ* 635.
[5] Although Fletcher is concerned with institutional suits, there is no reason why his reasoning would not apply to other remedies such as reading-in, severance, suspension and limiting retrospectivity that also tend to push into the territory of the other branches.
[6] Fletcher (supra) at 637.
[7] Ibid.
[8] Ibid at 696.
[9] 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* (forthcoming).

of difficult cases. He argues that these cases are best understood in terms of the Court trying to maintain a balance between three different forms of legitimacy: legal legitimacy, public support and institutional security. The first measures whether a decision is convincing within the legal community, the second whether it enjoys public support, and the third, 'the court's capacity to resist real or threatened attacks on its independence'.[1] He argues that the Constitutional Court acts out of mixed motives of principle and pragmatism in order to secure its institutional security without sacrificing its legal or public legitimacy. For example, Roux argues that the two decisions in *Fourie*[2] are best understood through this lens. There was no clear legal answer to the difficult question of whether the Court should suspend its order permitting same-sex couples to get married. In deciding in favour of suspension, Sachs J can be understood to have wanted to 'enlist the legislature's co-operation in the enforcement of a legal change that was likely to be highly divisive, and ran the risk of … weakening public support for the Court.'[3] O'Regan J, who would have made the order immediate, felt that suspension would undermine the Court's legal legitimacy which 'was ultimately a more important factor in securing public support for the Court.'[4]

My own view is that the question of legitimacy is not as difficult in South Africa as it may be in the United States. As noted earlier, the Final Constitution explicitly gives the courts very wide remedial powers. They can make any 'appropriate' order and any order that is 'just and equitable'. It would be odd indeed to argue that the existence of those powers is illegitimate.

However, that does not satisfactorily answer the deeper normative question. While the existence of discretion is secure, there is still an argument that it may be exercised in a way that undermines legitimacy. There is no doubt that courts have the power to take over the management of government institutions or even whole departments, but if they did so in situations that did not warrant that incursion, it would be perceived (rightly) as illegitimate. Let me put the point differently, the question for legitimacy in South Africa is whether the exercise of judicial discretion is indeed 'appropriate' or 'just and equitable'. It would not, absent special circumstances, be just and equitable for a court to take over the running of government or to re-write legislation from scratch. That leads into the next discussion: how courts choose remedies in specific cases.

(e) Choice of Remedy

This section constitutes the core of the chapter. It examines what factors are relevant to a court's choice of remedy generally and attempts to construct a framework for the determination of an appropriate remedy.

[1] Roux 'Principles and Pragmatism' (supra).
[2] 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).
[3] Ibid.
[4] Ibid.

(i) *Textual Considerations*

The Final Constitution gives very little guidance on what concerns should guide a court's choice of remedy. It says only that any relief granted for the infringement or threat of infringement for a violation of a right in the Bill of Rights must be 'appropriate' and that when dealing with any constitutional matter, a court may make 'any order that is just and equitable.' But what do these fairly vague terms mean and is there a difference between 'appropriate relief' in terms of FC s 38 and a 'just and equitable' order in terms of FC s 172(1)*(b)*?

The Court has given us some guidance on what 'appropriate relief' in terms of FC s 38 means. It has held that '[a]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution'[1] and that appropriateness,

> require[s] "suitability" which is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in chapter 3.'[2]

More recently, the Court has held that 'appropriate relief must necessarily be effective.'[3] These dicta — which as we shall see are not the Court's last word on the topic — suggest that 'appropriate relief' demands a victim-centred approach to remedies.

Does 'just and equitable' in FC s 172(1)*(b)* bear a different meaning? Some of the cases suggest that it does. The Constitutional Court has in a number of contexts held that what is 'just and equitable' requires a balance between the interests of all parties involved.[4] It has re-iterated that interpretation with regard

[1] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC)('*Fose*') at para 19.

[2] *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) at para 38. Although Kriegler J purports to be relying on the majority judgment in *Fose*, his construction more closely resembles the interpretation of 'appropriate relief' suggested in his concurring judgment. See *Fose* (supra) at para 97 ('When something is appropriate it is "specially fitted or suitable". Suitability, in this context, is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in chapter three.')

[3] *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others,* Amici Curiae*)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) at para 57.

[4] See *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC), 2005 (11) BCLR 1053 (CC) at para 33 (Interpreted 'just and equitable' in FC s 25(3) — which concerns compensation for expropriated property — to mean that compensation 'must reflect an equitable balance between the interests of the public and of those affected by the expropriation'); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) at paras 33–38 (Determined 'just and equitable' in the context of evictions in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 to require a consideration of all factors and approved of the High Court's approach that viewed 'just and equitable' as referring 'not only to the persons who occupied the land illegally but to the landowner as well.')

to the use of the phrase in FC s 172(1)*(b)*.[1] So while FC s 38 requires a victim-oriented approach, FC s 172(1)*(b)* can be read to require an all-embracing, all things considered exercise of discretion.

The conflict between the two remedial forms is plainly presented in the following passage from Bayda CJS's opinion in *Saskatchewan Human Rights Commission v Kodellas*:[2]

> Appropriateness connotes efficaciousness and suitability from the standpoint of the violation itself — a remedy 'to fit the offence' as it were. It suggests a remedy that, from the perspective of the person whose right was violated, will effectively redress the grievance brought about by the violation. The quality of justness, on the other hand, has a broader scope of operation. It must fill a more extensive set of criteria than the quality of appropriateness. To be just a remedy must be fair to all who are affected by it. That group may well include persons other than the person whose right was violated.[3]

The Constitutional Court was required to engage just such a conflict in *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others*.[4] In considering whether it was possible for a court to grant a

[1] See, for example, *Zondi v MEC for Traditional and Local Government Affairs & Others* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC) at para 130 (In a case concerning cattle that trespassed on neighbours' land, the Court held that 'just and equitable' relief 'should protect both the rights of stockowners and landowners.'); *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 94 (The Court was considering when an order limiting retrospectivity would be just and equitable and specifically whether there was a difference between s 98(6) of the Interim Constitution, which mentioned 'the interests of good government' and the Final Constitution. Ackermann J held that 'the test under the [Final] Constitution is a broader and more flexible one, where the concept of the interests of good government is but one of many possible factors to consider.'); *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others* as Amici Curiae*); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at para 132 (Court held that the test for whether a suspension should be granted is 'what is just and equitable, taking account of all the circumstances' (my emphasis).)

[2] (1989) 60 DLR (4th) 143; [1989] 5 WWR 1 (Sask CA)(The Court was required to consider the meaning of s 24(1) of the Canadian Charter of Rights and Freedoms which permits those whose Charter rights are infringed to 'obtain such remedy as the court considers appropriate and just in the circumstances.' The facts concerned an applicant whose complaint of sexual harassment had not been decided by the Human Rights Commission for over four years. All the judges agreed that the delay violated Kodellas' Charter rights, but disagreed on the remedy. Bayda CJS held that a stay was inappropriate because it would impact negatively on the original complainants' rights to have their sexual harassment complaint dealt with. He was however in the minority. Vancise and Wakeling JA held that only a permanent stay of the proceedings could cure the infringement of the applicant's rights. Interestingly, although they reached a different result, the majority's conception of the meaning of 'appropriate and just' was virtually indistinguishable from Bayda CJS's interperetation.)

[3] Ibid at para 34. The Constitutional Court has rejected this dictum. *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC)('*Hoffmann*') at n 36 ('This statement must be understood in the context of section 24(1) of the Canadian Charter, which provides that anyone whose rights, guaranteed in the Charter, have been infringed may apply to court "to obtain such remedy as the court considers appropriate and just in the circumstances." The Canadian Constitution, therefore, makes a distinction between "appropriateness" and "justness". Our Constitution does not. As we shall see, this assertion is not entirely true.')

[4] 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)('*Nicro*').

temporary exemption from a statutory provision in order to allow prisoners to vote, it held:

> This must of course be done within the overriding considerations of justice and equity. These considerations must be understood in the light of the constitutional imperative of providing appropriate relief to successful litigants.[1]

This reasoning is contradictory. The word 'overriding' suggests that justice and equity are the primary considerations. However, the use of 'imperative' implies that the relief must be appropriate at all costs. The dictum does not tell us what to do when justice and equity pull in one direction and appropriateness in another.

As Ackermann J argues in *Fose*, in many cases a remedy can be just, equitable and appropriate:

> Construed purposively … I see no material difference between the two concepts. It can hardly be argued, in my view, that relief which was unjust to others could, where other available relief meeting the complainant's needs did not suffer from this defect, be classified as appropriate. In [determining what is 'appropriate'] the interests of both the complainant and society as a whole ought, as far as possible, to be served.[2]

Of course, a court should choose a remedy that is both appropriate and just — that fulfils the interests of the right-bearer and society. But Ackermann J too does not tell us what should be done in those cases, however few they may be,[3] where it is not possible to find a remedy that is both 'just' *and* 'appropriate'. Is appropriateness ultimately subordinated to justness or do the interests of the right-bearer trump those of society?

The Court tried to finesse — or deny, if one wishes to be less charitable — this conflict in *Hoffmann v South African Airways* by importing the element of 'fairness':

> Section 38 of the Constitution provides that where a right contained in the Bill of Rights has been infringed, 'the Court may grant appropriate relief'. In the context of our Constitution 'appropriate relief' must be construed purposively, and in the light of s 172(1)*(b)*, which empowers the Court, in constitutional matters, to make 'any order that is just and equitable'. Thus construed, appropriate relief must be fair and just in the circumstances of the particular case. Indeed, it can hardly be said that relief that is unfair or unjust is appropriate. As Ackermann J remarked in the context of a comparable provision in the interim Constitution, '[i]t can hardly be argued, in my view, that relief which was unjust to others could, where other available relief meeting the complainant's needs did not suffer from this defect, be classified as appropriate'. Appropriateness, therefore, in the context of our Constitution, imports the elements of justice and fairness.
>
> Fairness requires a consideration of the interests of all those who might be affected by the order. In the context of employment, this will require a consideration not only of the interests of the prospective employee but also the interests of the employer. In other cases, the interests of the community may have to be taken into consideration.[4]

[1] *Nicro* (supra) at para 77.
[2] *Fose* (supra) at para 38.
[3] His qualification 'as far as possible' implies that he realised such cases would arise.
[4] *Hoffmann* (supra) at paras 42–43.

Again, Ngcobo J, by relying on Justice Ackermann's reasoning in *Fose*, only answers the easy question: what to do when 'other available relief meeting the complainant's needs' is not unjust to others. He does not tell us what to do when the only relief 'meeting the complainant's needs' is unjust to others. That is the *hard* question. Resort to the word 'fairness' does not answer it — it simply slaps a label on the problem.[1]

(ii) *Rights-maximising and Interest Balancing*

As should be clear by now, this textual debate about the difference between 'appropriate' and 'just' reflects a deeper conflict about the purpose of constitutional remedies. A classification of the possible approaches to this problem should help to clarify the issue. Paul Gerwitz identifies two basic approaches to the choice of remedy: 'rights maximising' and 'interest balancing'.[2] Any approach to remedies will fall somewhere between these two poles. The 'rights maximising' approach is entirely victim-focused; the sole aim is to vindicate the right in the most effective way possible. Other considerations — such as the separation of powers or budgetary concerns — will only be relevant if they have a bearing on the effectiveness of the right or if two remedies give effect to the right equally well and a court needs to choose between them.[3] A less than perfect remedy is only acceptable if it is unavoidable. This corresponds to some of the interpretations of 'appropriate' adopted by the Constitutional Court.

On the other hand, 'interest balancing' would appear to reflect the Court's understanding of the FC s 172(1)*(b)* phrase 'just and equitable'. It treats the vindication of a right as one of many factors to be considered in fashioning a remedy: 'In evaluating a remedy, courts in some sense "balance" its net remedial benefits to victims against the net costs it imposes on a broader range of social interests.'[4] Unlike a 'rights maximising' judge, a judge adopting an 'interest balancing' philosophy could choose a remedy that gives less than optimal effect to the right. She choose this less effective remedy because sufficiently weighty concerns justify doing so.[5]

A pure rights-maximising position — however intuitively attractive it may be for people like me who find the practical difficulties in implementing rights a permanent frustration — is untenable. In Gerwitz's words:

[1] On the use of words like 'fairness' to plaster over difficult legal cracks, see J Frank *Law and the Modern Mind* (1985)('Lawyers use what the layman describes as "weasel words", so-called "safety-valve concepts," such as "prudent", "negligence", "freedom of contract", "good faith," "ought to know," "due care," "due process," — terms with the vaguest meaning — as if these vague words had a precise and clear definition; they thereby create an appearance of continuity, uniformity and definiteness which does not in fact exist.')

[2] P Gerwitz 'Remedies and Resistance' (1983) 92 *Yale LJ* 585, 591.

[3] Ibid.

[4] Ibid.

[5] Ibid.

> However strong remedial effectiveness is as a value, it is not society's only value. Where effective remedies conflict with interests that were not considered at the rights stage — interests that are not relevant to the question of whether a right has been violated — those interests press to be considered at the remedy stage and, on occasion, to override the value of remedying violations of the right.[1]

However, as the quote implies, it does not follow that interest balancing ought to be the default position. Effective relief must be a priority if the Final Constitution is to have any meaning. And it should only be overridden 'on occasion'. But between these two contrasting extremes there are an infinite number of interim positions. The spectrum starts with the (hypothetical) judge who would accept that no limits are unavoidable — the right must always be fully vindicated. It then proceeds to judges who accept that some gap between right and remedy is unavoidable. The greater the acceptable gap, and the more often they will permit a gap to exist, the further they depart from the absolutist rights maximiser. Eventually, there will be a judge who accepts that an imperfect remedy is avoidable but other considerations are so strong that they justify granting it. We are now in the domain of 'interest balancing'. From there, the weaker the interests that are needed to outweigh the need to vindicate the right, the more the judge tends towards the interest balancing end of the spectrum. The final position is occupied by a judge for whom the need to vindicate the right is but one of many factors that must be weighed with all the others in choosing an appropriate remedy.

Where does the Constitutional Court's approach fall on the spectrum between rights maximiser and interest balancer? The case law throws up no easy answer. The passages from *NICRO*, *Fose* and *Hoffmann* quoted earlier show how ambivalent the Court has been on this score. The two primary impediments for slotting the Court into an identifiable position along the spectrum between rights maximizer and interest balancer are: (1) what the Court has said, and what it has done are not always the same; (2) it has adopted different approaches in different cases. In some remedial contexts, like damages, it has emphasized the need to maximize the right. In others, say, where reading-in is the remedy, it has stressed the importance of other factors. Even when concerned with the same remedy, the Court has sometimes adopted seemingly incompatible positions.[2]

However, despite this ambiguity, two things are clear. First, the Court is not a pure rights-maximiser. It has constantly accepted the proposition that avoidable concerns can limit rights. Second, neither is it a hard-core interest-balancer. It consistently emphasizes the need to provide effective relief as not merely one of many factors, but as an 'imperative'. Read as a whole, the Court's jurisprudence suggests that its preferences lie somewhere in the middle. The Court sees the need for effective relief as the primary goal of a remedy. Yet it accepts that in certain

[1] Gerwitz (supra) at 604.
[2] On retrospectivity, see § 9.4*(e)*(ii) infra.

circumstances other considerations will justify affording relief that is less than perfect, (or will justify affording no relief at all[1]), even if perfect or more effective relief is available.

The position is most clearly exhibited in the Court's consideration of a remedy in *Gory v Kolver NO & Others*.[2] The Court, concerned with whether the Intestate Succession Act[3] should be extended to same-sex life-partners, held that 'where a litigant does establish that an infringement of an entrenched right has occurred, he or she should *as far as possible* be given effective relief so that the right in question is properly vindicated.'[4] This rights-maximising position accepts only unavoidable limits with regard to the vindication of the right. However, two paragraphs later, the Court describes a different, interest-balancing, approach:

> It is necessary to *balance* the potentially disruptive effects of an order of retrospective invalidity … and the effect of such an order on the vested rights of third parties, on the one hand, with the need to give effective relief to Mr Gory and similarly situated persons, on the other.[5]

To properly understand the tension — if not the contradictions — in the Court's approach, these two statements need to be read together: The Court will try as hard as possible to vindicate the right, but will allow avoidable limits in compelling circumstances. Within that broad framework, there still remain a number of different ways to thinking about remedial choice.

(iii) *Ways of conceiving choice*

In this section I proffer five ways of thinking about how courts choose remedies. Each brings something new to the table. My own Frankenstein-like approach draws down on the insights from all these approaches.

(a) Bollyky's Formula

Thus far, the most serious attempt to construct a 'theory' for choice of remedies in South Africa has been provided by Thomas Bollyky.[6] Although his primary targets are remedies in socio-economic rights cases, his theory draws from, and is meant to apply to, all constitutional cases. Bollyky expresses his theory in the form of the following algorithm: R if C > P + B. I will let him explain what this formula means:

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[1] See § 9.2*(b)* supra.
[2] 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC)('*Gory*').
[3] Act 81 of 1987.
[4] *Gory* (supra) at para 40 (my emphasis).
[5] Ibid at para 42.
[6] 'R if C > P + B: A Paradigm for Judicial Remedies of Socio-economic Rights Violations' (2002) 18 *SAJHR* 161.

> When remedying a violation of the Bill of Rights, courts intuitively weigh the degree to which they must make choices regarding policies and budgets against the extent of the constitutional violation. If a remedy entails extensive — quantitatively and qualitatively — policy and budgetary considerations, the court will not make them for a constitutional violation which is not proportionately — quantitatively or qualitatively — extensive. The reverse is also true.
>
> This insight may be expressed algebraically as: R if C > P + B, where R is the desired remedy, C equals the extent of the constitutional violation (expressed as a product of its quantitative and qualitative elements), P is the level of policy interference required by the remedy sought, and B equals the level of budgetary interference required by that remedy.[1]

Bollyky emphasises that the formula does not propose a 'cost benefit analysis'. 'The common unit for the variables is not', he insists, 'economic.'[2]

> Instead, it describes the intuitive calculation judges use to arrive at an assessment of the legitimacy of ordering a particular remedy in a constitutional democracy with separation of powers. . . . The common unit, or the basis of comparison, for the variables in this paradigm is whether they add, or detract, from the legitimacy of granting the form of relief. Judges intuitively weigh these competing normative values and ultimately make an assessment of remedies based on their proportionality.[3]

Bollyky's theory has its virtues and vices — as well as its inconsistencies and inaccuracies. His characterisation of the choice of remedies as an intuitive weighing of competing normative values is extremely helpful. The choice of remedies will almost always involve competing values and interests that cannot, ultimately, be weighed on any other metric other than the judge's own sense of legitimacy.[4] However, this insight seems to undermine the core of Bollyky's project: to reduce this intuitive process to a simple formula. A process this complex will necessarily resist analysis based on any three (intuitive) variables. Here is a short list of factors that the Bollyky equation ignores: unfairness to third parties; conduct of the victim or the violator; impact on existing practice; the courts' own practical limitations; and whether the problem is isolated or systemic. These factors are not easily captured under either 'the extent of the violation', 'policy interference' or 'budgetary interference'.

(b) The purposive approach

Kent Roach explains that, at least until recently, the Canadian Supreme Court adopted a 'purposive approach' to remedies which sought 'to integrate Charter remedies with purposes of the particular Charter right being remedied, the general

[1] Bollyky (supra).
[2] Ibid at 175.
[3] Ibid.
[4] For critiques of the metaphor of balancing generally, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, July 2006) § 34.8*(d)*; S Woolman & H Botha 'Limitations: Shared Constitutional Interpretation, An Appropriate Normative Framework and Hard Choices' in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 149.

purposes and values of the Charter and the methodology that is applied to the interpretation of all Charter remedies.'[1] To put it plainly, the remedy must be fashioned to give effect to the purpose of the right, interpreted in light of the whole Bill of Rights. So, in *Osborne v Canada (Treasury Board)* Sopinka J wrote:

> In selecting an appropriate remedy under the Charter, the primary concern of the court must be to apply the measures that will best vindicate the values expressed in the Charter and to provide the form of remedy to those whose rights have been violated that best achieves that objective.[2]

The Constitutional Court, famous for its purposive approach to interpretation,[3] has flirted with purposivism as a remedial theory. In *Fourie,* Justice Sachs held that it was important: 'to look at the precise circumstances of each case with a view to determining how best the values of the Constitution can be promoted by an order that is just and equitable.'[4]

This purposive approach avoids 'restrictive and technical approaches' to remedies — such as Bollyky's — and encourages courts to 'be explicit about what they are trying to accomplish' with a particular remedy.[5] However, it is also incomplete. Rights serve many different goals. A purposive approach still requires a court to 'select among different purposes and constraints and apply them in particular contexts.'[6] The purpose of the Final Constitution as a whole, or of a specific right, even if it could be divined, would only ever be part of the inquiry. It also is incompatible with an interest-balancing approach —partially endorsed by the Court — that recognizes that other factors other than fulfilling the purpose of a right are relevant to crafting a remedy.

[1] K Roach *Constitutional Remedies* (1994)('*Remedies*') § 3.310.

[2] [1991] 2 SCR 170, 346 as quoted in Roach Remedies (supra) at § 3.380.

[3] See L Du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, June 2008) Chapter 32.

[4] *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others* as Amici Curiae*); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at para 135. See also *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC)('*Fose*') at para 96 (Kriegler J)('Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to deter its further infringement. Deterrence speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to "defend against encroachment or interference". It suggests that certain harms, if not addressed, diminish our faith in the Constitution. It recognises that a Constitution has as little or as much weight as the prevailing political culture affords it. The defence of the Constitution — its vindication — is a burden imposed not exclusively, but primarily, on the judiciary. In exercising our discretion to choose between appropriate forms of relief, we must carefully analyse the nature of a constitutional infringement, and strike effectively at its source.')

[5] Roach *Remedies* (supra) at § 3.400

[6] Ibid.

(c) The principled approach

In *Hoffmann* the Constitutional Court set out an approach to remedies that, although not denying the importance of the purpose, sets out more specific principles to be considered:

> The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, "we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source."[1]

Similar approaches have been adopted by the Canadian Supreme Court[2] and South African writers.[3] These approaches do not leave the determination to the vague idea of the purpose of a right — let alone the Bill of Rights as a whole. Nor do they try to construct a strict formula which automatically spits out remedies. They provide more general guidance than Bollyky and more specific and universal direction than the purposive approach.

What they lack though is a clear system for their application. They do not order the principles nor do they suggest how a conflict between principles is to be resolved. While no perfect lexical ordering of principles is possible, one can, I think, offer greater specificity about what factors to consider when crafting a remedy.

[1] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para 45 quoting *Fose* (supra) at para 96 (Kriegler J).

[2] *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 SCR 3 (The Court provided a list of five-principles which should be used to determine the remedy: *(a)* The remedy must 'meaningfully vindicate[ ] the rights and freedoms of the claimants'. Ibid at para 55. *(b)* The remedy 'must employ means that are legitimate within the framework of our constitutional democracy' and should not 'depart unduly or unnecessarily from [the courts'] role of adjudicating disputes and granting remedies that address the matter of those disputes.' Ibid at para 56. *(c)* The court must understand its functional limitations and should not grant remedies 'for which its design and expertise are manifestly unsuited'. Ibid at para 57. *(d)* The relief must also be 'fair to the party against whom the order is made.' Ibid at para 58. *(e)* '[T]he judicial approach to remedies must remain flexible and responsive to the needs of a given case.' Ibid at para 59.)

[3] I Currie & J De Waal *The Bill of Rights Handbook* (5th Edition, 2005) 196–198 (The authors identify eight factors that are relevant in choosing a remedy: *(a)* providing an effective remedy; *(b)* coming to the aid of similarly situated people; *(c)* the separation of powers; *(d)* the identity of the violator; *(e)* the nature of the violation; *(f)* the impact on the victim; *(g)* victim responsibility; and *(h)* the possibility of successful execution. I include all of these in my structure (and owe much of my thinking to Currie and de Waal's discussion of them) but instead of treating them as free-floating factors, I place them in a structure which I think gives effective relief its proper weight.)

(d) Taxonomies and constraints

Ken Cooper-Stephenson has suggested a detailed structure. He calls his rubric a 'remedial taxonomy' — to evaluate remedies.[1] The purpose of the taxonomy is not to provide a 'rigid sequence' or formula to determine remedies, but a 'framework for organizing analytic constructs'. The main headings of his taxonomy are: *(a)* the target of the remedy; *(b)* the purpose of the remedy; *(c)* applicable legal principles; *(d)* procedural issues; and *(e)* implementation.[2] Each of these headings then has a large number of subheadings. These concepts are 'heavily integrated and will function in an interactive way.'[3] In addition to these factors, Cooper-Stephenson also identified a number of underlying themes that are relevant to most or all of the taxonomic factors.[4]

The approach Roach adopts is to identify both the purposes remedies serve and the constraints that limit the achievement of those purposes. He conducts his discussion under four headings: *(a)* correction of the violation;[5] *(b)* regulating government behaviour;[6] *(c)* balancing interests;[7] and *(c)* institutional roles.[8] The first two are aimed at the vindication of the right[9] and the last two at what may justify departing from full vindication. Finally, as explained earlier, Paul Gerwitz distinguishes between avoidable and unavoidable limits on the full realisation of a right.[10] I think this is a useful distinction because it helps us to identify when a court is engaged in weighing interests, and when it is simply recognizing unfortunate but inevitable limits on its powers.

(iv) *Structuring Remedies*

Roach, Gerwitz and Cooper-Stephenson all articulate 'theories' that identify both the purposes remedies serve and the constraints that limit the achievement of those purposes. My somewhat eclectic approach borrows the best from each.

In my view, a court should start by determining what the most effective possible relief would be without regard for any potential problems with actually providing that relief. In doing so, it must consider the purpose of the right

[1] K Cooper-Stephenson 'Principle and Pragmatism in the Law of Remedies' in J Bennyman (ed) *Remedies: Issues and Perspectives* (1991).
[2] Ibid at 11.
[3] Ibid.
[4] These themes are: *(a)* indeterminacy; *(b)* time; *(c)* neutrality; *(d)* cohesion; and *(e)* efficiency.
[5] Roach *Remedies* (supra) at 223.410–3.550.
[6] Ibid at § 3.560–3.670.
[7] Ibid at § 3.680–3.780.
[8] Ibid at § 3.790–3.870.
[9] They seem to conform to Justice Kriegler's call for vindication and deterrence as the aim of remedies. *Fose* (supra) at para 97 ('Suitability, in this context, is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in chap 3.')
[10] Gerwitz (supra) at 591–608.

which, it must be remembered, will often go beyond the interests of the specific litigant before the court. From there, a court should consider the unavoidable limitations and pare down the remedy accordingly. Finally, the court should consider if any of the avoidable limitations justify a further limitation of the remedy. At all times, the goal should be to make the relief as effective as possible. I think this structure reflects the courts' emphasis on effective relief while still acknowledging the role that other factors play. In my view, it does this better than simply including effective relief as one of many factors to be considered.

However, this structured approach also has limitations. Firstly, although I think following this three-step structure is a useful way to balance competing interests, courts need not — and probably will not — go through each and every potential limitation in every case. The relevant limitations will often be clear — largely because of the experience manifest in existing precedent. But in cases where courts are uncertain as to what the appropriate remedy should be, thinking of it in these terms should be helpful. Secondly, there may well be considerations that are not listed here that may also be relevant to choice of remedy. What is most important about this structure, to my mind, is not so much the specific factors that it includes, but the structure that forces courts to first determine the most effective remedy and then justify every departure from that ideal. Finally, by far the biggest limitation is that it does not tell courts when an avoidable limitation justifies a limitation of a right. There is no absolute answer to that question. I hope that the second half of this chapter – which examines in depth each type of remedy – provides some more guidance about what sort of limitations on effective relief are justifiable and why. But at this very abstract level, it is impossible to provide more direction. In Justice Kriegler's words: 'One cannot be more specific. The facts surrounding a violation of rights will determine what form of relief is appropriate.'[1]

(aa) Effective Relief

(1) General principle

The Court has regularly stressed the need for effective relief. In *Fose v Minister of Safety and Security*, decided under the Interim Constitution, Ackermann J held:

> Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context *an appropriate remedy must mean an effective* remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced.[2]

[1] *Fose* (supra) at para 97.
[2] Ibid at para 69 (my emphasis).

The Court has since made it clear that this holding applies equally to FC s 38.[1]

In *Modderklip* the Court identified a 'constitutional right[ ] to an effective remedy as required by the rule of law and entrenched in section 34 of the Constitution.'[2] However, considering the factual matrix of the case,[3] it appears that this remedy does not issue from FC s 38. Instead, it is a right to have remedies properly enforced by the state.[4] Even if this more limited interpretation is correct, *Modderklip* still adds to the right to effective remedies because it ensures that a remedy, once granted, will become a reality.

Having established the importance that the Court places on providing effective relief, it is necessary to consider what the phrase actually means. 'Effective relief' is relief that leaves no gap between right and remedy: it makes the constitutional ideal a reality. The purpose of the right and of the constitutional scheme as a whole will be central in this determination. However, there are a number of more specific issues that can be identified.

(2) Corrective or distributive

The first question is whether the relief requires the rectification of past injustices or the prevention of present and future injustices. Some cases will only require rectification. In *NM & Others v Smith,* the applicants' privacy and dignity interests had been violated by the negligent publication of their HIV status.[5] There was no

[1] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000(1) BCLR 39 (CC)('*NCGLE v Minister of Home Affairs*') at para 65; *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others* Amici Curiae*)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC)('*Modderklip*') at para 57. As Hofmeyr notes, the courts interpretation of FC s 38 is strange because its predecessor (IC s 7(4)*(a)*) was couched in mandatory terms while FC s 38 is in permissive terms. K Hofmeyr 'Understanding Constitutional Remedial Power' (Unpublished Mphil Thesis, Oxford University, 2006, on file with the author)('Remedial Power') 64–65. IC s 7(4)*(a)* read: 'When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph *(b) shall* be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.' Although s 7(4)*(a)* is ambiguous as to whether the 'shall' entitles a person only to approach a court or also to appropriate relief, one would have thought that any ambiguity would have been removed by the use of the word 'may' in FC s 38. The Court, however, seems to have ignored this change.

[2] *Modderklip* (supra) at para 50. It is, admittedly, unclear whether this is a reference to a remedy for the violation of constitutional rights or simply a statement that litigants are entitled to have court orders enforced.

[3] *Modderklip* involved the invasion of a farm by people searching for housing. The state was unable or unwilling to enforce the eviction order secured by the owner of the farm. It was this failure that lead to a finding that right to access to courts had been violated.

[4] See A Friedman & J Brickhill 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) § 59.4*(b)*; Hofmeyr 'Remedial Power' (supra) at 67–68. Although this result seems like the best interpretation, it is strange that the Court did not rely on this finding in *Nyathi v MEC for Health, Gauteng & Others* [2008] ZACC 8 (The Court struck down a provision which prevented judgment creditors from attaching state assets to satisfy a court order.)

[5] 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC).

systemic wrong that required improvement.[1] The problem was an isolated incident of journalistic recklessness and all that was required was for the applicants to be compensated for their suffering. Other cases will be almost entirely forward looking. When *Lawyers for Human Rights* challenged the new Immigration Act, they did not allege or cite any wrongs that had been committed.[2] They challenged the Act in order to prevent constitutional rights being violated in the future. A mere declaration of invalidity sufficed and no damages or release orders were necessary.

Thus, Kriegler J may have overstated the case when he said that all remedies must both vindicate the right and deter future violations.[3] However, he was undoubtedly correct that most cases will require a court to look both backwards and forwards — even cases that seem to involve only an individual claim. In *Hoffmann v South African Airways*, for example, the applicant had been refused a post as an air host because he was HIV positive.[4] Ngcobo J found this action unconstitutional and decided that instatement was the appropriate remedy:

> Where a person has been wrongfully denied employment, the fullest redress obtainable is instatement. Instatement serves an important constitutional objective. It redresses the wrong suffered, and thus eliminates the effect of the unfair discrimination. It sends a message that under our Constitution discrimination will not be tolerated and thus ensures future compliance. In the end, it vindicates the Constitution and enhances our faith in it. It restores the human dignity of the person who has been discriminated against, achieves equality of employment opportunities and removes the barriers that have operated in the past in favour of certain groups, and in the process advances human rights and freedoms for all.[5]

If Justice Ngcobo had chosen to simply award Mr Hoffmann damages, then companies in the future might have decided that it was worth refusing to employ HIV positive people and to compensate them with damages. By insisting on employment as the appropriate remedy, Ngcobo J removed that possibility and made future violations less likely.

It will not always be possible to both rectify past injustice and prevent future injustice. Such a choice between past and future faced the Court in *Fraser*.[6] If it

[1] This is true of the majority opinion which found that the journalists had acted with intention. The minority opinions of Langa CJ and O'Regan J recognized that the common law should be developed to punish negligent wrongdoing by journalists. This was a systemic change that also recognized the need to protect people in the applicants' position in the future.

[2] *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC).

[3] *Fose* (supra) at para 97.

[4] 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC).

[5] Ibid at para 52. See also *NCGLE v Minister of Home Affairs* (supra) at para 82 ('But it must vindicate at more than an abstract level. It must operate to eradicate these stereotypes. Our constitutional commitment to non-discrimination and equal protection demands this. There is a wider public dimension. The bell tolls for everyone, because "[t]he social cost of discrimination is insupportably high and these insidious practices are damaging not only to the individuals who suffer the discrimination, but also to the very fabric of our society."')

[6] *Fraser v Children's Court, Pretoria North & Others* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC).

did not suspend the order, then Mr Fraser would be able to prevent the adoption of his child. However, other children might not be adopted in the future because fathers less worthy than Mr Fraser could prevent the adoption from taking place. The Court felt that permitting the injustice to Mr Fraser was warranted in order to safeguard the interests of children in the future. However, as I argue when considering orders of suspension,[1] difficulties such as those confronting the *Fraser* Court are not insurmountable. At the initial stage of imagining the most effective possible relief, courts should avoid 'lesser evil' outcomes: They should conjure up solely those remedies that would both vindicate and deter.

(3) Nature of the violation

The nature of the violation can be broken down in several ways: isolated or systemic; complete or ongoing; serious or trivial; individual or widespread. For a remedy to be effective it must consider these differences. *Rail Commuters* — which concerned violent attacks on trains — explains the impact of a number of these distinctions.[2] If the case had simply concerned a single, complete attack, then damages would probably have been the most effective remedy. However, the violation was not isolated but, ongoing and widespread — a result of systemic deficiencies in the security apparatus on all trains. Damages, even for all the people who had been victims, would not have been an effective solution. As a result, the High Court granted a structural interdict to ensure that security on the train improved.[3]

(4) Similarly situated

The Constitutional Court has made it clear on several occasions that '[e]ffective relief requires that relief be afforded not only to the specific litigant, but to all people who are similarly situated.'[4] A remedy that only aids a single litigant is not 'effective relief'. In many cases, this result will be easy and obvious. In *Fourie*, the right of same-sex couples to marry was extended to all same-sex couples, not just the particular couple that litigated the case. In *Bhulwana* the invalidation of a

[1] See § 9.4*(e)*(i)*(cc)* infra.

[2] *Rail Commuter Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2003 (3) BCLR 288 (C).

[3] But see, *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC)(On appeal the Constitutional Court overturned this order and granted a simple declaration setting out the state's obligations. However, the Court does not seem to have regarded this as the most effective relief, but that the most effective relief — a structural interdict — was not appropriate because of separation of powers concerns.)

[4] *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 32. See also *Gory v Kolver NO & Others* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) at para 42; *Van der Merwe v Road Accident Fund & Another (The Women's Legal Centre Trust as* amicus curiae*)* 2006 (4) SA 230 (CC), 2006 (6) BCLR 682 (CC) at para 71; *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) at para 74.

reverse onus provision had to apply not only to the litigant who had challenged it, but to all other people who had been convicted or were being convicted under the law.[1] But determining who is similarly situated is not always easy. In *S v Masiya*, the Court had to consider whether the definition of rape should be extended to include anal penetration.[2] The particular case before the Court concerned a young girl who had been raped. The majority of the Court decided that it should limit itself to the facts of the case before it and extended the definition of rape solely to the anal penetration of females.[3] Chief Justice Langa (with the support of Justice Sachs) dissented. He found that boys who were anally raped were 'similarly situated' and were therefore entitled to the same relief.[4] In *Satchwell* the Court refused to 'lump together' unmarried homosexual partners — to whom it extended the benefits of the law in question — with unmarried heterosexual partners — to whom it did not extend those benefits.[5] In the Court's view, the two groups raised 'quite different legal and factual issues'.[6]

At the stage of determining what qualifies as effective relief, 'similarly situated people' should be defined as widely as possible. Only if a genuinely meaningful difference exists between the two groups should effective relief be limited at this stage. I therefore agree with Chief Justice Langa that such a difference was not present in *Masiya*. The very reasons the majority relied upon — that rape is about power, not sex and that rape infringes the victim's dignity and bodily autonomy[7] —to extend the common law to cover anal rape of females applies equally to males.[8] However, the distinction in *Satchwell* fits with the reasoning because homosexual couples were unable to get married at the time — and therefore automatically qualify for the benefits at issue — while heterosexual people had that opportunity. Whether this distinction would ultimately justify refusing benefits to unmarried heterosexual couples is unclear, but it does clearly raise different substantive questions.

[1] But see § 9.4 *(e)*(ii)*(cc)* infra. I criticise the Court's approach to retrospectivity in this and other cases. Although I do not frame the criticism as one of not giving relief to 'similarly situated' people, it can be seen in that way. By only applying the declaration of invalidity to people whose cases have not yet been finalised, the Court could be said to presume there is a meaningful distinction (on a par with the distinction between men and women in *Masiya* or heterosexual and homosexual in *Satchwell*) between the two classes. It seems obvious to me that there is not. However, although the judgments are unclear on this point, I do not think that is how the Court conceived of the problem. Rather, I think they would acknowledge that finalised and unfinalised cases are similar, but that other reasons (concerns about the administration of justice) justify treating them differently.

[2] 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC)('*Masiya*').

[3] Ibid at para 29.

[4] Ibid at para 92.

[5] *Satchwell v President of the Republic of South Africa & Another* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC) at para 16.

[6] Ibid.

[7] Masiya (supra) at paras 78–79.

[8] Ibid at para 80. For criticism of the decision along these lines, see K Phelps & S Kazee 'The Constitutional Court Gets Anal About Rape-Gender Neutrality and the Principle of Legality in *Masiya v DPP*' (2007) 20 *South African Journal of Criminal Justice* 341.

(5) Reason for violation

This issue is considered in more detail in the context of systemic relief.[1] Suffice to say that different forms of relief may be more or less effective depending on whether the reason for the infringement of the right is inattentiveness, incompetence or intransigence. In the first instance, a mere declaration pointing out the problem may be sufficient. In the other cases, interdicts or structural remedies may be necessary to ensure that the appropriate steps are taken.

(bb) Unavoidable limits

Once one has determined what a fully effective remedy would be, there may be certain unavoidable limits on achieving it.

(1) Multiple goals

Where a remedy aims to achieve multiple goals, one may have to be sacrificed for another. Gerwitz offers the example of school desegregation.[2] Desegregation might have the dual goal of creating integrated schools and improving education in black schools. The best remedy for the first goal might be bussing, while the best remedy for the second goal might be to improve education in one-race schools.[3] It might be necessary to trade the one goal off against the other. A similar conflict confronted the Court in *Fourie*.[4] Effective relief clearly demanded that same-sex couples be permitted to marry immediately, but the Court was aware that it was necessary to attain social recognition and stability for those unions. Such legitimacy, the majority concluded, would best be achieved if the change came from Parliament.

(2) Conflicting rights

A different form of the multiple goals problem is the problem of conflicting rights. Different parties may have different legitimate interests that cannot all be satisfied. In *Mandel & Another v Johncom Media Limited; Johncom Media Limited v Mandel & Others,* the applicants challenged the constitutionality of s 12 of the

[1] See § 9.6*(c)*(v) infra. See also K Roach & G Budlender 'Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?' (2005) 122 *SALJ* 325; K Cooper-Stephenson 'Principle and Pragmatism in the Law of Remedies' in J Bennyman (ed) *Remedies: Issues and Perspectives* (1991) 15–17 (Cooper-Stephenson draws even finer distinctions than I, following Roach and Budlender. He distinguishes between *(a)* failure of comprehension; *(b)* failure of capacity; *(c)* failure of motivation; *(d)* failure by negligence; and *(e)* systemic failure.)

[2] P Gerwitz 'Remedies and Resistance' (1983) 92 *Yale LJ* 585, 594.

[3] Ibid.

[4] *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others* as Amici Curiae*); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)('*Fourie*').

Divorce Act.[1] The section prohibited the reporting of divorce proceedings.[2] Although the ban clearly violated the right to freedom of expression, lifting the ban completely — which would have been the most effective relief as far as the right to freedom of expression was concerned — might have undermined FC s 28(2)'s protection of the best interests of the child.[3]

The problem also arises when the retrospective application of a crime is in question. In *Walters*, the Court declared invalid a provision of a statute that permitted the use of deadly force to arrest criminals because it violated the rights to life, freedom and security and dignity of victims.[4] However, to give it full retrospective application would turn legal acts (at the time they were committed) into criminal acts and thereby violate FC s 35(3)*(l)*.

(3) Implementation

A final unavoidable limitation is implementation. It may be physically impossible for a fully effective remedy to be implemented. In *Mohamed,* the applicants had been illegally deported to the US to face trial where they might be sentenced to death.[5] Fully effective relief would have required that the applicants be returned to South Africa and extradited to the US only following a proper procedure and on assurance that he would not receive the death penalty. And that was not about to happen.

Problems of implementation will not always be that extreme. More often, they will only nibble at the edges of effective relief and not prevent it completely. In *Modderklip,* the applicant's farm had been invaded by people seeking land and the police were unable or unwilling to evict them. Part of the reason the Supreme Court of Appeal[6] and the Constitutional Court[7] opted for damages as an appropriate remedy stemmed from the practical difficulty of enforcing an order of eviction.[8]

[1] Act 70 of 1979.

[2] [2008] ZAGPHC 36.

[3] Ibid at paras 10–12 (The Court ultimately rejected this contention because it held that the discretion retained by the High Court as the upper guardian of all minors afforded sufficient protection. At the time of writing, judgment was reserved in the Constitutional Court where the *amicus curiae* argued strongly in favour of a limited order. *Johncom Media Investments Limited v Mandel & Others* CCT08/08 (Heard on 8 May 2008).)

[4] *Ex parte Minister of Safety and Security & Others: In re S v Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC).

[5] *Mohamed & Another v President of the Republic of South Africa & Others* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC).

[6] *President of the Republic of South Africa & Others v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA), 2004 (8) BCLR 821 (SCA).

[7] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others, Amici Curiae)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC)('*Modderklip*').

[8] This case also involved a conflict of rights as the invaders' right to housing would be infringed by forcing them off the land to vindicate the applicant's right to property (SCA) or access to court (Constitutional Court).

(cc) Avoidable limits

This section addresses limits that are avoidable. Such limits constrain a court's ability to provide an effective remedy only as a matter of good judgment, not of necessity.

(1) Separation of powers

The separation of powers, in its most basic form, is the idea that that the three branches of government have separate roles to play and that the other branches should not interfere in those roles. However, as Seedorf and Sibanda argue, this 'pure' or 'negative' form of separation of powers does not tell the whole story.[1] In order to be effective, separation of powers requires not only the independence of the three branches, but also their interdependence. The power of the legislature to dismiss the President or judges, of the Executive to appoint judges and of the Judiciary to strike down illegal laws or executive conduct all form part of the separation of powers.

However, when separation of powers is invoked in the remedial context, it is normally meant in its 'pure' form and is used as a reason for a court to refrain from providing fully effective relief. To do so would allegedly intrude too far into the prerogatives of the other branches. The Court has admitted that this doctrinal injunction remains rather vague:

> [A court must keep the principle of separation of powers in mind] and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature.[2]

Not only is it vague, but at least one Constitutional Court Justice has questioned its relevance at the remedial stage. In *Fourie*, Justice O'Regan held:

> The doctrine of the separation of powers is an important one in our Constitution but I cannot see that it can be used to avoid the obligation of a court to provide appropriate relief that is just and equitable to litigants who successfully raise a constitutional complaint.[3]

I agree with this statement insofar as separation of powers can never be a reason to avoid providing any relief at all. However, I think, and the Court's jurisprudence clearly accepts, that it can be used to make relief less than perfect. Justice O'Regan herself relied on the separation of powers in *Dawood* to suspend an

[1] S Seedorf & S Sibanda 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) § 12.2*(b)*.

[2] *NCGLE v Minister of Home Affairs* (supra) at para 66 as quoted in Sibanda & Seedorf (supra) at § 12.3*(d)*(ii)(cc).

[3] *Fourie* (supra) at para 170.

order of invalidity — where immediate invalidity would have been the ultimate effective relief.[1] Her statement in *Fourie* should be understood in this light.

Separation of powers concerns arise in the courts' relationship with both the legislature and the executive. I consider each in turn.

(x) Legislature

Deference to the legislature is of greatest concern where the most effective remedy would require reading-in words to legislation.[2] If there are a number of possible ways to cure the invalidity, then the judiciary might stand accused of usurping the role of the legislature if the court decided which of those possibilities to adopt. *Dawood* best expresses this concern:

> Where, as in the present case, a range of possibilities exists . . . it will ordinarily be appropriate to leave the legislature to determine in the first instance how the unconstitutionality should be cured. This Court should be slow to make those choices which are primarily choices suitable for the legislature.[3]

(y) Executive

Deference to the executive is most relevant when a court is considering detailed interdicts or supervisory orders.[4] The Court has recognised that the separation of powers doctrine does not prevent the issuing of these orders against the state:

> Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.[5]

However, in the same case, the Court held that the power to supervise the state's compliance with an order should only be exercised when the government has given the Court reason to believe that it will not obey the order.[6] This proviso

[1] *Dawood & Another; Shalabi & Another; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at paras 62–63 ('It would be inappropriate for this Court to seek to remedy the inconsistency in the legislation under review. The task of determining what guidance should be given to the decision-makers, and in particular, the circumstances in which a permit may justifiably be refused, is primarily a task for the legislature and should be undertaken by it. There are a range of possibilities that the legislature may adopt to cure the unconstitutionality.') O'Regan J did however grant interim relief in *Dawood* and, as I argue below, seemed to make interim relief mandatory in cases where suspension would fail to effectively vindicate rights. See § 9.4*(e)*(i)*(bb)* infra. For this reason, I think this reading of her statement in *Fourie* is probably the best interpretation.

[2] For a full discussion, see § 9.4*(c)*(iii) Infra.

[3] *Dawood* (supra) at para 64. See also *NCGLE v Minister of Home Affairs* (supra) at paras 65–66.

[4] For more, see § 9.6 infra.

[5] *Minister of Health & Others v Treatment Action Campaign & Others (2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) at para 99.

[6] Ibid at para 129. See also *President of the RSA & Others v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA), 2004 (8) BCLR 821 (SCA) at para 39 ('Structural interdicts . . . have a tendency to blur the distinction between the executive and the judiciary and impact on the separation of powers. They tend to deal with policy matters and not with the enforcement of particular rights.')

implies that the courts should expect the other branches to be competent and willing to do whatever the Final Constitution demands. Unlike the more structural elements of the separation of powers, this respect can be lost and earned. If the executive continuously fails to comply with court orders, the Court will feel more comfortable issuing detailed interdicts or supervisory orders.[1]

(2) Courts' limitations

In addition to the need to respect the position of the legislature and the executive, the nature of the Court as an institution may make it unsuitable or unable to carry out certain tasks. When the Court had to order the Electoral Commission to make arrangements to permit prisoners to vote, it acknowledged that it did 'not have the information or expertise to enable it to decide what those arrangements should be or how they should be effected.'[2] It therefore had to rely on the Commission to determine the steps that had to be taken.[3] Courts are generally ill-suited to taking over the detailed management of institutions and are therefore often hesitant to grant structural interdicts that will place them in a role that they have neither the expertise nor the resources to fulfil.

(3) Administration of justice

One of the most common limitations on full effective relief is the impact that an immediate change in the law will have on the past and the future. As explained in detail later,[4] orders of invalidity apply retrospectively to the date the Final Constitution came into force unless the Court orders otherwise. Effective relief would ordinarily require this retrospective application to ensure that all people who were affected by this unconstitutional law will be afforded redress. However, in some cases this will result in many decided cases being overturned. In the context of the criminal law, the Constitutional Court has adopted the reasoning of Justice Harlan of the United States Supreme Court:

[1] See *Nyathi v Member of the Executive Council for the Department of Health Gauteng & Another* [2008] ZACC 8 (Court, on its own initiative, grants a structural interdict to monitor the payment of the State's outstanding judgment debts); *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA)(Court orders damages, rather than a mere declaration, because the state continuously failed to comply with court orders.)

[2] *August & Another v The Independent Electoral Commission (IEC) & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 39.

[3] See also *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 32 (Although it relates more to the content of the right, the Constitutional Court's rejection of a minimum core because of the informational deficit inherent in its institutional position also demonstrates this problem.). *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at para 77 (court unsuited to diplomatic negotiations).

[4] See § 9.4*(e)*(ii) infra.

> No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.[1]

Administration of justice can also be affected by giving a decision immediate prospective effect. In *S v Ntuli*, the Court struck down the overly restrictive system for appeals from the Magistrates' Court to the High Court.[2] If the decision had had immediate effect, then the High Courts would have been swamped by all the appeals.[3] It was necessary to suspend the declaration of invalidity to allow some other filter mechanism to be implemented.

(4) Financial costs

Courts might also be deterred from providing a remedy if it would involve massive financial cost. Courts are hesitant, though not unwilling, to interfere with budgetary concerns. However, the refusal to interfere need not be motivated by separation of powers issues. A court may, on its own accord, come to the conclusion that the cost is too high. That was the case in *Fose*.[4] The applicant claimed punitive damages for the abuse he suffered in police custody because he believed that such damages would help prevent similar attacks in the future. Ackermann J held that even if punitive damages would have such a deterrent effect, they would be inappropriate:

> In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are 'multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform', it seems to me to be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already fully compensated for the injuries done to them, with no real assurance that such payment will have any deterrent or preventative effect.[5]

(5) Impact on third parties

A remedy may have negative consequences for people who aren't party to the litigation. A court may feel that it is unfair to require others to suffer so that the litigants can receive effective relief. The Court has relied on just this sense of injustice to justify limiting the retrospective effect of its orders. For example, in *Gory v Kolver NO* — one of a number of important challenges to succession laws

[1] *Mackey v US* 401 US 667, 691 (1971) quoted in *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 32.
[2] 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC).
[3] Ibid at para 27.
[4] 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC)('*Fose*').
[5] Ibid at para 72.

— the Court extended the Intestate Succession Act[1] to apply to same-sex couples but did not apply that decision to estates that had already been wound up or to payments that had been received in good faith because it would be unfair to take benefits away from people who had already received them.[2] This remedy may be rather easily distinguished from the unavoidable harm of conflicting rights. The interests at stake here are mere private or financial interests. The most obvious example is the difference between criminal and civil liability in *Walters*.[3] Criminal liability invokes another constitutional right (FC s 35(3)*(l)*). Civil liability invokes only a financial interest.

(6) Fault

A court may decide that although effective relief is possible, the litigant is not entitled to it because of the way he has conducted the litigation. Thus, in *Pretoria City Council v Walker* the Court refused to grant a remedy to a litigant who proved that the City's rate-collection policy was unfairly discriminatory because he had simply stopped paying his arrears rather than pursuing 'more practical remedies which would have been effective in getting the council to cease its objectionable conduct, thus eradicating the reason for the complaint.'[4] A similar attitude seems to have motivated the Court in *Steenkamp* when it refused a remedy because the applicant should have re-applied for the tender or secured better contractual protection when it was awarded the tender.[5]

(dd) Conclusion

Courts should only detract from the fully effective relief to the minimum degree necessary to accommodate the countervailing principle. If the problem is the financial cost, that is not a reason to provide no remedy at all, but to provide a remedy that incurs the maximum accessible economic burden. Where the limitation is based on the inadequacy of the Court as an institution, the answer is not for the Court to throw up its hands and do nothing, but to do the most it can within its limitations or to find another body that has the capacity to do what it cannot. This leads to the final point, that I have made before, and I want to make again. Courts must not feel constrained by the traditional forms of remedies. Anything is possible. Courts must think outside the box. They must 'forge new tools' and 'shape innovative remedies' to ensure that, within the inevitable limitations they provide the most effective relief available.[6] No, not 'available'. The most effective relief *imaginable*.

[1] Act 81 of 1987.
[2] 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC).
[3] *Ex parte Minister of Safety and Security & Others: in Re S v Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC)
[4] 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 96.
[5] 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC) at paras 49–50.
[6] *Fose* (supra) at para 69.

(f) Constitutional Remedies and Private Remedies

This section attempts to answer two questions and make one suggestion about the relationship between constitutional remedies and private remedies.[1] First, what characteristics do the two types of remedies share, and what sets them apart? Second, when should a litigant rely on a constitutional remedy and when on a private remedy? Third, I suggest that where the Constitutional Court has spurned direct reliance on the Bill of Rights for common-law cases in favour of indirect application in terms of FC s 39(2), direct application may still have a role to play when a new remedy is needed.

(i) *Characteristics*

Traditionally, a fairly strict distinction is drawn between private remedies and constitutional remedies based on the purpose that they serve. This distinction is accurately summarised by Currie and de Waal: 'Constitutional remedies are forward-looking, community-oriented and structural [while private remedies are] backward-looking, individualistic and retributive.'[2] The Constitutional Court, speaking in the context of the law of delict, has described the difference in more detail:

> The objectives of the law of delict differ fundamentally from those of constitutional law. The primary purpose of the former is to regulate relationships between private parties whereas the latter, to a large extent, aims at protecting the Chapter 3 rights of individuals from state intrusion. Similarly the purpose of a delictual remedy differs fundamentally from that of a constitutional remedy. The former seeks to provide compensation for harm caused to one private party by the wrongful action of another private party whereas the latter has as its objective *(a)* the vindication of the fundamental right itself so as to promote the values of an open and democratic society based on freedom and equality and respect for human rights; *(b)* the deterrence and prevention of future infringements of fundamental rights by the legislative and executive organs of state at all levels of government; *(c)* the punishment of those organs of state whose officials have infringed fundamental rights in a particularly egregious fashion; and *(d)* compensation for harm caused to the plaintiff in consequence of the infringement of one or more of the plaintiff's rights entrenched in Chapter 3.[3]

[1] The term 'public remedies' is often employed instead of 'constitutional remedies'. In my view, as well as that of Justice Ackermann, the former term is misleading. For Ackermann J, the problem is that using the term 'public' pulls one into the debate about the distinction between the 'public' and the 'private'. That debate is unhelpful when one attempts to understand the distinction between private remedies and constitutional remedies. I do not think that the difficulty can be avoided by changing the words we use. But I have my own reason for preferring the 'constitutional' prefix: Using 'public remedies' implies that there are public remedies outside of the Final Constitution that share features with the subset of constitutional remedies. I know of no remedies that fall into that category and therefore prefer to stick to the term: 'constitutional remedies'.

[2] I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 196. See also *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at para 80.

[3] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at para 17. See also *Steenkamp v Provincial Tender Board of the Eastern Cape* 2007 (3) BCLR 280 (CC) at para 29 (In an administrative law context, Moseneke DCJ said: 'Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.')

This distinction is generally accurate. It is especially true when we are talking about remedies flowing from a finding that a law is invalid or when the constitutional remedy is aimed at a systemic violation. But the distinction should not be pressed in too categorical a fashion. Constitutional remedies are concerned with the future, but they must *also* be concerned with the past. They must provide relief to the individual before them which will often be retrospective in nature. At the same time, when crafting private law remedies courts are often concerned with the future impact of their decisions. When a court decides whether to impose *delictual* liability in the face of a new set of facts, it considers not only the backward-looking justice of doing so, but also the forward-looking question of how imposing liability in all similar future cases will affect society. The Supreme Court of Appeal in *Steenkamp* refused to impose delictual liability for out-of-pocket expenses suffered by an successful tenderer because:

> [t]he chilling effect of the imposition of delictual liability on tender boards in a young democracy with limited resources, human and financial, on balance, is real because if liability were to be imposed, the potentiality of a claim by every successful tenderer would cast a shadow over the deliberations of a tender board on each tender and that may slow the process down or even grind it to a virtual halt.[1]

In addition, interim and final interdicts — which are designed not to compensate for loss, but prevent it — are available under common law and are forward rather than backward looking. So while it may be necessary to distinguish between retributive private remedies and distributive public remedies, the distinction has limited utility in understanding the details of either category of remedies.

(ii) *When should litigants rely on private remedies?*

The general rule for when a litigant should rely on a constitutional remedy and when a private remedy, can best be described in terms of the notion of subsidiarity. Kentridge AJ explains the principle of subsidiarity as follows: 'I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.'[2] This principle was applied to remedies in *Fose v Minister of Safety and*

[1] 2006 (3) SA 151 (SCA) at para 40. See also *National Media Ltd v Bogoshi* 1998 (4) SA 1196, 1210 (SCA), [1998] 4 All SA 347 (SCA)(the court changed the law of defamation for media defendants from strict liability to reasonableness in part because: 'If we recognise, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended . . . . Much has been written about the "chilling" effect of defamation actions but nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error.')

[2] *S v Mhlungu & Others* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 59. This principle has been adopted by the full Court in a number of cases. See, eg, *Ex parte Minister of Safety and Security & Others: in Re S v Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) at para 64. For more on subsidiarity, see L du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32; AJ van der Walt 'Transformative Constitutionalism and the Development of South African Property Law (Part 1)' (2005) *TSAR* 655 and AJ van der Walt 'Transformative Constitutionalism and the Development of South African Property Law (Part 2)' (2006) *TSAR* 1.

Security where the Constitutional Court rejected a claim for constitutional damages because the damages the plaintiff could claim under the existing law of delict would adequately vindicate the right. The implication of the judgment is that where there is an adequate private law remedy — whether in common law or statute — that vindicates the right, it should be used. Only if the remedy supplied by the existing law is insufficient to fully vindicate the right, should resort be made to direct reliance on constitutional remedies.[1]

Subsidiarity in constitutional remedies works fine in theory. It should not prevent any constitutional right from being vindicated. If common-law remedies are not adequate, then litigants are always entitled to bring a pure constitutional claim. Indeed, it has the apparent additional benefit of preventing the development of two different streams of jurisprudence for compensatory damages: a common-law stream and a constitutional stream. However, the doctrine has two practical drawbacks. The first relates to the way it encourages litigants to act. Although *Fose* does not prevent litigants from bringing private claims and constitutional claims together when the relief they seek goes beyond what private law can provide, in the majority of cases an individual litigant seeking compensation will have no motivation to go beyond the ordinary confines of the private law. The individual litigant is interested primarily in securing individual compensation — and far less concerned about preventing future violation. Broader problems with state actions or private conduct may go unnoticed and unaddressed. For example, in *Carmichele*,[2] *K*,[3] and *Zealand*[4] the litigants brought pure delictual claims for individual damages even though their individual loss may well have been related to broader structural problems with the police and correctional services. Constitutional remedies by necessity address themselves to systemic problems and hold out the promise that future violations of the Final Constitution will be curtailed.

Steenkamp v Provincial, Tender Board, Eastern Cape demonstrates the second potential pitfall of the *Fose* approach — namely, a business as usual orientation towards remedies.[5] The applicant, presumably motivated by the Court's decision in *Fose*, relied on the law of delict to enforce his constitutional right to just

[1] See J Klaaren 'Judicial Remedies' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) 9–9; H Varney 'Forging New Tools: A Note on *Fose v Minsiter of Safety and Security* CCT 14/96' (1998) 14 *SAJHR* 336, 343.

[2] *Carmichele v Minister of Safety and Security & Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC)(The applicant was attacked because of a failure by the police and the prosecutor to oppose bail.)

[3] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC)(Applicant was attacked and raped by off-duty policemen.)

[4] *Zealand v Minister for Justice and Constitutional Development and Another* 2008 (4) SA 458 (CC), 2008 (6) BCLR 601 (CC), 2008 (2) SACR 1 (CC)(The applicant was kept in gaol for five years longer than his criminal sentence because of administrative failures.)

[5] 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC). For more on *Steenkamp*, including the facts and a criticism of the Court's failure to provide a remedy, see § 9.2*(b)*(ii)(bb) supra.

administrative action.[1] The majority of the Court, although recognising that 'every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief' considered the case within the traditional delictual framework and found that the act was not 'wrongful' in a textbook delictual sense. Now, it is difficult to know what the Court would have done if Mr Steenkamp had not relied on the law of delict, but directly on the Final Constitution to found his claim. The Court may well have reached the same conclusion. But it seems to me that it would have been much more difficult for the Court to say: 'Your right to administrative justice has been infringed, but we will give you no remedy'. The business as usual approach allowed the Court to say: 'Your constitutional right has been infringed, but unfortunately that does not entitle you to *delictual* damages.' The *Fose* principle, at least in cases like *Steenkamp*, requires a litigant to frame his constitutional claim in delictual terms, but then allows the law of delict to prevent the vindication of the constitutional right.[2]

Based on these two practical difficulties, I think a slight modification of the *Fose* principal is warranted. The way it is ordinarily interpreted,[3] *Fose* stands for the following proposition:

> If a private remedy partially vindicates the constitutional right, then a litigant must rely on the private law for that part of the relief and may also rely on constitutional law for the relief necessary to vindicate the rest of the right.

My modification of the *Fose* principle would be:

> If a private remedy fully vindicates a constitutional right, the litigant must rely on the private remedy. If the private remedy only partially vindicates the right, a litigant is entitled, but not obliged, to rely solely on constitutional law for all aspects of her relief. If she does so, the existence of a remedy under private law should not be a bar for granting the same relief under constitutional law.

This modest modification reflects the position taken by the Supreme Court of Appeal in *Kate*.[4] In considering whether direct constitutional damages could be awarded to compensate to the plaintiff for the state's inexplicable delay in deciding whether to grant a social security grant, Nugent JA held:

[1] Without explaining the facts in any detail, the ordinary administrative law remedy — setting aside the decision — would not have aided the applicant. The only remedy he regarded as effective was an award of damages — hence the reliance on the law of delict.

[2] I should make it clear that this does not mean that whenever a constitutional right founds a delictual claim, the applicant is automatically entitled to damages. Where there is an alternative effective remedy, it will not be necessary for the vindication of the constitutional right to grant delictual damages. This was the case in, for example, *Olitzki* where an ordinary review of the administrative action would have adequately vindicated the right. *Olitzki Property Holdings v State Tender Board & Another* 2001(3) SA 1247 (SCA). That was not the case in *Steenkamp*.

[3] This interpretation seems like the correct interpretation to me because Ackermann J refuses to grant compensatory constitutional damages before he has decided whether to grant punitive constitutional damages. Therefore, even if he had decided that punitive damages were warranted, Mr Fose would still have had to rely on the law of delict, not his constitutional right, for compensation.

[4] *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA)('*Kate*').

> No doubt the infusion of constitutional normative values into delictual principles itself plays a role in protecting constitutional rights, albeit indirectly. And no doubt delictual principles are capable of being extended to encompass state liability for the breach of constitutional obligations. But the relief that is permitted by s 38 of the Constitution is not a remedy of last resort, to be looked to only when there is no alternative — and indirect — means of asserting and vindicating constitutional rights. While that possibility is a consideration to be borne in mind in determining whether to grant or to withhold a direct s 38 remedy it is by no means decisive, for there will be cases in which the direct assertion and vindication of constitutional rights is required. Where that is so the further question is what form of remedy would be appropriate to remedy the breach.[1]

Although not a closed list, the Supreme Court of Appeal listed two factors that prompted it to grant direct constitutional damages. First, the constitutional infirmity was a direct breach of a specific normative right, not 'merely a deviation from a constitutionally normative standard'.[2] Second, the breach of the right was endemic and required a clear assertion of the importance of the constitutional — as opposed to only the private — right.[3] The first justification goes further than my revision suggests because it would permit a constitutional remedy where the reliance is on a specific right, even if the private law completely vindicates the right. I am not sure if Nugent JA intended for the first justification alone to be a sufficient condition. One good reason to reject that proposition is that it could lead to the development of parallel systems of law.[4] For example, there could be one set of rules for victims of police brutality who relied on the law of delict and another for those who based their claim on a direct violation of FC s 12. That is undesirable. In my view, the first reason — a direct violation — is a necessary but insufficient justification for a constitutional remedy. It will need to be supplemented by other factors, such as the systemic breach at issue in *Kate*.

(iii) *Indirect application and remedies*

In addition to its preference for private remedies rather than constitutional remedies, the Constitutional Court has also expressed a clear preference for indirect application rather than direct application of the Bill of Rights to the common law. Because the Court is generally able to achieve all its preferred goals equally well through indirect application as it would through direct application, there is a danger that direct horizontal application — despite its explicit inclusion in the Final Constitution — may become extinct. Leaving aside criticisms of this move[5]

[1] *Kate* (supra) at para 27.
[2] Ibid.
[3] Ibid.
[4] Some commentators have suggested that two parallel systems — with twin peaks so to speak — might not be such a bad idea. See, for example, F Michelman 'Constitutional Supremacy and Appellate Jurisdiction in South Africa' in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 33.
[5] See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31; S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *SALJ* 762.

— with which I agree — the question for supporters of direct application is what role, if any, it might still play in private disputes.

I think a small space for direct application exists when the remedy sought falls outside the range of the private action or goes against the general purpose of the law. For example, the ordinary private law remedy for defamation is compensation because the purpose of the remedy is to right the wrong done to the person defamed. Other possible common-law remedies include an apology and retraction and an interdict to prevent publication.[1] Those remedies would ordinarily seem more than sufficient. But imagine that a newspaper regularly defamed people and that the problem seemed to be inadequate fact-checking structures or a 'we do whatever we please' culture which the institution was unwilling to fix. A well-known figure who was defamed by this newspaper might want not only compensatory damages, but also a supervisory interdict to ensure that the structural deficiencies were rectified. A court would not be able to grant such an order under existing common law, but it might be willing to do so based on a direct reliance on the right to dignity.[2]

While examples of such situations may be limited,[3] I think that we, in fact, anticipate such challenges. Viewing FC s 8 as a means of providing remedies in private disputes that would not be available through indirect application may guarantee a meaningful, ongoing role for direct application of the Bill of Rights and therefore avoid the untoward end that the Court's expansive use of FC s 39(2) currently promises.[4]

[1] See D Milo, G Penfold & A Stein 'Freedom of Expression' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) § 42.7*(c)*(vi).

[2] Although it would seem questionable whether the constitutional right to dignity should really protect reputation, the Constitutional Court has unambiguously held that it does. See *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC). Of course, the court could also develop the common law to permit the remedy as part of the common law. However, there are good reasons they might prefer not to. Firstly, it would be a very substantial change to the common law and the courts generally prefer incremental developments. Secondly, it would break down the traditional — although as we saw not exclusive — retributive, individualistic, backward-looking focus of private law. Thirdly, the need for a remedy of this nature would presumably only exist where a constitutional right had in fact been violated. To build in the direct violation of a right as an element of a common-law test seems inelegant, repetitive and unnecessary.

[3] Perhaps more realistic scenarios than the defamation example are companies that are polluting the environment because of structural problems, employers or private schools that have a culture of discrimination or intolerance that cannot be solved by a simple indirect application. This last situation is specifically envisaged by s 21(2) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, but in the Act's absence there is little doubt that it could only be achieved through a direct application of FC s 9.

[4] I must stress that I do not view this as an optimal solution. I agree with Woolman that litigants should be free to rely on either the direct application or indirect application of the Final Constitution and that the Court's reluctance to permit this choice is inconsistent with the text of the Final Constitution. My suggestion here is a good faith reconstruction to try and find a space for direct horizontal application within the Court's existing doctrinal framework.

9.3 Categorising Remedies[1]

There are many ways to break down a discussion of remedies. We could separate them into positive remedies (that tell people to do something) and negative remedies (that tell people not to do something). The line could be drawn between remedies that change law and those that do not. The relevant distinction could rest on the degree of discretion that courts have: confined remedies and unconfined remedies. Remedies that are based on a direct reliance on the Final Constitution could be separated from those that rest on an indirect reliance. All of these are valid, but limited, ways of thinking about remedies.

I separate remedies into three categories: *(a)* remedies following the invalidation of a law; *(b)* remedies for isolated/individual violations of rights; and *(c)* remedies for systemic violations. The first type is easy to define: They are whatever order a court makes following a finding in terms of FC s 172(1)*(b)* that law is unconstitutional. FC s 172(1)*(b)* necessitates that this include a declaration of invalidity, but it can also include supplementary orders regulating when the declaration begins to have effect and to isolate the specific parts of the law that are invalid from those that are not. These remedies are easy to differentiate from the other two types of remedies which do not involve the invalidation of law or conduct. The first of these two, individual remedies, concerns isolated or individual violations of rights. Individual is perhaps not the best label as I include under this heading violations of the rights of a group where that violation is a once-off or completed occurrence. By contrast, systemic remedies concern ongoing violations of many people's rights. The cause of the violation is often the result of existing policies, practices or institutional structures that actively or tacitly encourage rights violations. These situations more often, though not always, require remedies that try not only to compensate for past losses but to prevent or deter future violations.

However, while I separate these three categories for ease of analysis, it is important to stress the large degree of overlap between them.[2] In fact, it is perhaps best not to see them as separate categories but as points on a spectrum. On the one extreme are the most general remedies, those involving invalidity. These remedies are the most general because they affect the whole country. At the other extreme are individual remedies which concern the compensation of only a single individual. Systemic remedies fall in the middle as they require both individual redress and forward-looking transformation. Few cases will fall exactly in any category. They will have elements of each type and will rest somewhere on the spectrum between the various categories.

[1] This categorisation is motivated entirely by suggestions of Jonathan Klaaren, Matthew Chaskalson and Steven Budlender.

[2] See generally S Sturm & H Gadlin 'Conflict Resolution and Systemic Change' (2007) *Journal of Dispute Resolution* (Argue, in the context of conflict resolution in the National Institute of Health that individual problems can require systemic interventions and systemic problems may only permit individual interventions.)

Thus, an invalidity remedy will almost always arise out of an actual individual or systemic violation and there will be real litigants who will often want relief that goes beyond merely declaring the law invalid. In *Nyathi v Member of the Executive Council for the Department of Health Gauteng & Another* the applicant, who had been seriously injured by negligence in a state hospital, went to court because he wanted an interim payment from the state.[1] It was only when the state failed to pay that Mr Nyathi challenged the constitutionality of s 3 of the State Liability Act which exempted the State from attachment procedures.[2] By the time the case arrived at the Constitutional Court, it was clear that Mr Nyathi's experience was far from an isolated incident. There was a systemic problem with the state's payment of judgment debts. One can only understand *Nyathi* properly and provide an adequate remedy if one sees the intersections between the three categories of remedies. The Constitutional Court did just that. At the first hearing — which was set down as an urgent matter — the Court demanded that the state immediately pay Mr Nyathi the money he was owed. Once that urgent issue was addressed the Court postponed the case to consider the challenge to the legislation and the systemic problem in more detail. In addition to declaring s 3 invalid, the Court, on its own initiative, raised the question of a supervisory interdict to monitor the state's payment of all outstanding judgment debts — an order it eventually granted.

Sometimes the links are less obvious. In *KwaZulu-Natal MEC for Education & Others v Pillay* the litigation was a result of a school's refusal to allow a specific learner (Sunali) to wear a nose-stud to school.[3] However, the Constitutional Court recognized that the case was about more than Sunali's nose; it was about the way that the school — and many other schools — evaluated claims for exemptions from their code of conduct. If the remedy had applied only to Sunali, it would not necessarily have aided learners who found themselves in a similar position in the future. The Court therefore ordered the School to change its code of conduct to create a better process and substantive standard for granting religious and cultural exemptions.

There might also be cases where a systemic violation only permits an individual remedy. *Fose* is perhaps such a case.[4] The applicant was severely assaulted and tortured while in police custody. However, the evidence showed that the problem, especially at the police station where the assault took place, was widespread and endemic. The applicant claimed delictual damages, but in addition claimed constitutional punitive damages in part to deter future violations. Kriegler J noted that 'where there are systematic, pervasive and enduring infringements of constitutional rights, delictual relief compensating a particular plaintiff does not seem adequate as a means of vindicating the Constitution and deterring further violations of it.'[5] However, the alternative — punitive damages — was not an

[1] [2008] ZACC 8.
[2] Act 20 of 1957.
[3] 2008 (2) BCLR 99 (CC).
[4] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC).
[5] Ibid at para 102.

appropriate remedy because it unduly enriched a single plaintiff without any clear impact on the underlying problem. The possibility of a supervisory order to improve the situation was not raised and the court could not consider it. Despite the systemic nature of the problem, only an individual remedy could be afforded.

The inter-connectedness of these three types of remedies is vital in order to make constitutional rights real. Courts must always be aware of the potential systemic problems that may underlie an application to declare a law invalid or for individual damages. They should not be afraid to raise these issues *mero motu* and have the parties address potential remedies that may go beyond the narrow interests of the parties to the case.

9.4 REMEDIES FOLLOWING A FINDING OF INCONSISTENCY

(a) Hierarchy

A finding that a law — whether statutory, common or customary[1] — is inconsistent with the Final Constitution requires a particular set of remedies to cure the defect. There are two basic options: either interpret the law so that it is conforms to the dictates of the Final Constitution to avoid the violation or invalidate the law. If a court chooses the second option, they can limit their declaration of invalidity by cutting out only the offending words or adding new words or making the application of the law subject to a condition. Courts are also specifically empowered by FC s 172(1)*(b)* to suspend an order of invalidity to allow the legislature to put a new law in place and to limit the impact that the declaration of invalidity will have on the past.

The Constitutional Court has set out the following basic hierarchy for choosing these remedies:

(a) If possible, the law must be interpreted — '*read down*' — to avoid the inconsistency;
(b) If that is not possible, the law must be declared *invalid*;
(c) Rather than declaring the law completely invalid, the *substantive impact* of the declaration should, if possible, be limited by altering the law through severance, reading-in or notional severance to cure the constitutional defect;[2]

[1] Although the vast majority of cases concern legislation, and most of the Constitutional Court's statements only mention legislation, there is no reason in theory why the same principles should not apply to rules of common law and customary law that are found to directly violate (rather than to be in need of development in terms of FC s 39(2)) the Final Constitution. See, for example, *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)(Invalidated the common-law criminalization of sodomy); *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole and Others; SA Human Rights Commission & Another v President of the RSA & Another* 2005 (1) SA 563 (CC), 2005 (1) BCLR 1 (CC)(Invalidated customary-law rule of primogeniture).

[2] See *Van Rooyen v The State* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 88 ('[L]egislation must be construed consistently with the Constitution and thus, where possible, interpreted so as to exclude a construction that would be inconsistent with [the Constitution]. If held to be unconstitutional, the appropriate remedy ought, if possible, to be in the form of a notional or actual severance, or reading-in, so as to bring the law within acceptable constitutional standards. Only if this is not possible, must a declaration of complete invalidity of the section or subsection be made.')

(d) It might also be necessary to limit the *temporal impact* of the order by:
   a. If it is not possible to make an order in terms of *(c)*, *suspending* the order of invalidity.[1]
   b. Even if an order in terms of *(c)* is competent, limiting the *retrospective* effect of the order.

The discussion that follows will adhere, roughly, to this structure. However, this remedial hierarchy is not set in stone. Quite often, one step will affect the determination under another step. For example, whether a court is willing to read words in to a law may depend on the possibility of suspending the order and a court's willingness to read-down may be affected by the retrospective implications of that decision. The Constitutional Court has also combined temporary reading-in orders with suspension orders — that combination does not fit neatly into this structure.[2] But the hierarchy still provides a useful starting point for how the Court thinks about how to remedy constitutionally infirm laws.

(b) Reading Down

(i) *The nature of reading down: interpretation or remedy?*

It is necessary at the outset to explain precisely what reading-down means, and perhaps more importantly, what it does not mean. Reading down occurs when a statute[3] possesses two (or more) possible interpretations: one construction is constitutional while the other directly violates a constitutional provision.[4] A court faced with this situation must choose the constitutional interpretation over the unconstitutional interpretation. The classic statement[5] of this principle appears in *Hyundai Motor Distributors*: 'judicial officers must prefer interpretations

[1] *J & Another v Director General, Department of Home Affairs & Others* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC) at para 22 ('Where the appropriate remedy is reading-in words in order to cure the constitutional invalidity of a statutory provision, it is difficult to think of an occasion when it would be appropriate to suspend such an order.' This statement is discussed in more detail at § 9.4*(d)*(iii) infra.)

[2] See § 9.4*(e)*(i)*(cc)* infra.

[3] Technically, this mode of interpretation can also apply to rules of common law and customary law. However, those forms of law are generally less clear than statutes and are also open to 'development' under FC s 39(2). Reading down of common law or customary law is therefore theoretically possible, but practically irrelevant.

[4] Although ordinarily applied to the Bill of Rights, reading down applies to all other sections of the Final Constitution as well. See *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & Another* 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC) at para 72 (Langa CJ, dissenting, held: 'This principle is not limited to consistency with the spirit, purport and objects of the Bill of Rights as required by section 39(2), it is an implied principle of the Constitution as a whole that a constitutional interpretation should always be preferred to a non-constitutional interpretation.')

[5] Although this case provides the clearest account of what reading down entails, it was not the first time the method was considered as an option. See *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 28; *Mistry v Interim Medical and Dental Council of South Africa & Others* 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC) at para 32; and *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC)('*NCGLE v Minister of Home Affairs*') at paras 23–24.

of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.'[1] Described in this sense, reading down does not appear as a remedy but as a mandatory rule of interpretation. Unlike 'true' remedies, reading down does not follow a finding of invalidity, but avoids such a finding by choosing an interpretation that does not violate the Final Constitution.[2] Is it still accurate to talk about reading down as a 'remedy'?

The position is further complicated by the existence of a process very similar to reading-down: indirect application. In order to understand the difference between reading down and indirect application, it is necessary to look briefly at the Interim Constitution. That document created two separate rules of interpretation. The first demanded that if the prima facie reading of a law limited a right in the Bill of Rights, but the law was capable of another construction that did not limit the right, the law should be given the second interpretation.[3] The second rule required courts to interpret all law with 'due regard to the spirit, purport and objects' of the Bill of Rights.[4] The phrase 'reading down' referred exclusively to the first process. The second process was called 'indirect application'. Under the Final Constitution indirect application is entrenched in similar terms in FC s 39(2).[5] However, no equivalent provision exists for 'reading down'. Reading

[1] *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC)('*Hyundai Motor Distributors*') at para 23 (The case concerned s 29(5) of the National Prosecuting Authority Act 32 of 1998 which allowed for search and seizure warrants for preparatory investigations to be issued without a reasonable suspicion of wrongdoing. The section was challenged as a violation of the right to privacy. The Court held that, constitutionally interpreted, the section did require a reasonable suspicion that an offence had been committed.) See also *National Director of Public Prosecutions & Another v Mohamed NO & Others* 2003 (4) SA 1 (CC), 2003 (5) BCLR 476 (CC) at para 35 ('If the one construction leads to constitutional invalidity but the other not, the latter construction, being in conformity with the Constitution must be preferred to the former, provided always that such construction is reasonable and not strained.')

[2] See *NCGLE v Minister of Home Affairs* (supra) at para 24 ('There is a clear distinction between interpreting legislation in a way which "promote*(s)* the spirit, purport and objects of the Bill of Rights" as required by s 39(2) of the Constitution and the process of reading words into or severing them from a statutory provision which is a remedial measure under s 172(1)*(b)*, following upon a declaration of constitutional invalidity under s 172(1)*(a)*. . . . The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid.' While this statement is correct as far as it goes, it fails to draw a distinction between reading down and interpretation in terms of s 39(2). As I argue below, there is a difference between the two.)

[3] IC s 35(2).

[4] IC s 35(3).

[5] The major difference between IC s 35(3) and FC s 39(2) is that s 39(2) also permits 'development' of common law and customary law. While the exact scope of the development power is unclear, it certainly is broader than mere interpretation as it permits courts to change the wording of common law tests. See, for example, *Masiya v Director of Public Prosecutions, Pretoria & Another (Centre for Applied Legal Studies & Another, Amici Curiae)* 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC)(Court altered the common-law definition of rape). This important distinction allows courts dealing with the common law or customary law to largely dispense with direct application and the specific remedies that

down survives only as an implicit provision of the Final Constitution.[1] (Indeed, the absence of an equivalent provision to IC s 35(2) in the Final Constitution has led courts and academics to conflate the two processes.)

Does it make any sense to distinguish between reading down and indirect application? In the realm of substantive constitutional analysis, the two processes are clearly distinct. Reading down first requires the application and the interpretation of a specific substantive right to the law under scrutiny. Indirect application amounts to little more than an 'all-things-considered' type of test: namely does the rule of law comport with some vague notion of the spirit, purport, and object. But does that difference translate to a difference from a remedial perspective? Yes, because indirect application does not have a remedial phase. Determining whether interpretations conform to the spirit, purport and objects of the Bill of Rights — and whether they do not — and then choosing the best interpretation or alteration of that rule of law is undertaken simultaneously. The substantive and remedial phases are collapsed into a single inquiry. In terms of direct application of a specific substantive provision of the Bill of Rights, the substantive and remedial phases can be logically separated.[2] At the first phase the court deter-

follow as any changes they wish to make to the law can be achieved through indirect application. That option is not available when dealing with legislation that can only be interpreted. In drawing the distinction between 'reading-down' and indirect application, I am referring only to that part of indirect application that applies to the interpretation of statutes. For more on the development and reading down in terms of FC s 39(2), see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

[1] That reading down remains part of the Final Constitution is clear from, amongst other cases, *Hyundai Motor Distributors* (supra) which performed reading down under the Final Constitution.

[2] Although this answer provides a conclusive theoretical reason for treating the two processes separately, it still seems somewhat practically unsatisfying. A litigant could not care less whether a court engages in 'reading down' or indirect application; what she cares about is the end result. For the litigant an interpretation flowing from an indirect interpretation is as much a 'remedy' as one that results from reading down. This takes us back to the different uses of the word 'remedy'. The litigant uses the word in its broad sense to connote any action that cures a wrong. I use it in its narrow sense to connote a discretionary decision taken by a court following some finding of constitutional inconsistency. That is again a theoretical rather than a practical answer. However, there is also an important practical consequence to the choice of direct or indirect application. If a litigant only brings an indirect challenge and the words of the statute are incapable of bearing a meaning that is compatible with 'the spirit, purports and objects of the Bill of Rights' a court is obliged to apply that statute anyway and the litigant will receive no remedy. See, for example, *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC), 2007 (2) BCLR 125 (CC) at para 29 (O'Regan J held that s 13 of the Companies Act was incapable of being read so as to prohibit requiring security for costs if doing so would prevent the litigation. Because '[t]he applicant did not challenge the constitutionality of the section' he failed.) On the other hand, if the litigant relies on the direct application of the Bill of Rights and the statute cannot be interpreted to avoid a finding of inconsistency, the statute will still be declared invalid and the litigant will, probably, find some other form of relief. From this perspective, direct application would seem like the preferable option. However, the position is further complicated by the Constitutional Court's preference for indirect application. The Constitutional Court prefers, if it can, to engage in indirect application, rather than direct application, a fact which reinforces the reliance by litigants on indirect application. From a strategic point of view, if there is any doubt that the words to be interpreted can bear the meaning contended for, it is best to bring both a direct and an indirect challenge.

mines whether a right has been violated. At the second phase it decides how to cure that violation. I am, therefore, not concerned here with interpretations and alterations of the law that flow from an indirect application of the Bill of Rights. That topic is dealt with at length elsewhere in this treatise.[1]

However, two further issues regarding the relationship between reading down and indirect application bear mention. One, the test for how far the words of a statute can be stretched to bear a constitutional meaning is similar under both processes and it is therefore not inappropriate to draw some guidance from FC s 39(2) cases when a court first attempts to read down a statute.[2] Two, the Constitutional Court's preference for indirect application rather than direct application[3] may well make reading down, in the formal sense described here, largely redundant. Courts will always be able to reach the same result through reliance on the general test in FC s 39(2) rather than the specific rights analysis required by direct application and reading down. They are likely to follow the Constitutional Court's lead and employ FC s 39(2) wherever possible.

(ii) *When is reading down appropriate?*

Reading down comes into the picture when some form of limitation of a constitutional provision is alleged. An interesting question is whether, when the provision in question is a right in the Bill of Rights, the interpretation must also be unjustifiable under FC s 36(1) before reading down, or whether reading down can be used as a means not to prevent a limitation, but to allow it to be justified under s 36(1), or, finally, whether reading down occurs to prevent any limitation of the right at all. It seems that reading down can be used in all three ways. The first form of analysis was at play in *Lawyers for Human Rights & Another v Minister of Home Affairs & Another*.[4] The High Court had interpreted s 34(8) of the new Immigration Act to permit the mere say-so of an immigration officer to cause the indefinite detention of an immigrant. Yacoob J held that such an interpretation 'would be arbitrary and the subsection would be unconstitutional'.[5] He therefore adopted an interpretation of the subsection to avoid that consequence. Langa DP employed reading down in its second guise in *Hyundai Motor Distributors*. He was obliged to interpret a provision that permitted investigators to obtain a search warrant if there was a 'suspicion' that an offence had been committed to mean

[1] See L Du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32; Woolman 'Application' (supra) at Chapter 31.

[2] The test, explained in more detail below, is whether the words are 'reasonably capable' of bearing the assigned meaning. See § 9.4*(a)*(ii). For the most recent endorsements of this principle, see *MEC Department of Agriculture Conservation and Environment & Another v HTF Developers (Pty) Ltd* [2007] ZACC 25 at para 75; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another* [2008] ZACC 12 at para 105 (Yacoob J dissenting).

[3] See S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 114 *SALJ* 762.

[4] 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC).

[5] Ibid at para 29.

'reasonable suspicion'. That interpretation still limited the right to privacy.[1] However, because the limitation was very 'narrow', it was deemed justifiable under FC s 36(1). Reading down takes its third form in *Daniels v Campbell*. A majority of the Court re-interpreted the word 'spouse' so as to avoid any limitation of the right to equality.[2]

Reading-down cannot occur if there is no (notional) invalidity with respect to any of these three interpretive processes. That is, it is not possible to read down a statute that does not violate or limit a section of the Final Constitution. That rule would seem self-evident. However, it was ignored by Nicholson J in his recent decision in *Zuma v National Director of Public Prosecutions*.[3] He concluded that s 179 of the National Prosecuting Authority Act should have required the National Director of Public Prosecutions to consult the accused when reconsidering a decision to prosecute made not only by the Directors of Public Prosecutions — which the section mentioned — but also the Deputy National Director of Public Prosecutions (DNDPP) — which the section did not mention.[4] He reached this conclusion without finding — or even suggesting — that s 179 limited any provision of the Final Constitution. His only reason for adopting his line of argument was that when the statute was enacted, prosecutions did not begin with the DNDPP. Today they do. It therefore makes no sense to exclude the DNDPP.[5] That may be a good argument to interpret the statute in a particular way. However, it does not require, or even permit, a constitutional remedy, either in the form of reading down or reading-in.

This *Zuma* judgment also highlights the distinction between reading-in and reading down. Nicholson J called his actions: 'the process of interpretation known as reading-in'. This statement of the law is an error. Reading-in is not a process of 'interpretation' but of adding words to a statute. If he really meant to interpret s 179 then he was engaged in reading *down* not reading-in. If he thought he was engaged in reading-in, then he failed to do so. His order contains no mention of changing the words in the section.[6]

[1] *Hyundai Motor Distributors* (supra) at para 52.

[2] *Daniels v Campbell & Others* 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC)('*Daniels*')(The Court interpreted 'spouse' to include parties to a Muslim marriage and thereby avoided any limitation of the right to equality.) See also *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC), 2007 (5) BCLR 457 (CC) at paras 33–38 (Although the Court rejected the interpretation urged on it, if it had accepted it, it would have operated at the third level.)

[3] [2008] ZAKZHC 71.

[4] Ibid at para 125.

[5] Ibid.

[6] See *Daniels* (supra) at para 85 (In dissent, Moseneke J criticised the majority of the Court for interpreting the word 'spouse' to include parties to a Muslim marriage rather than declaring the provision invalid and reading-in words to include Muslim marraiges: 'The meaning of "spouse" preferred in the main judgment is said to be compelled by the need to redress "past discriminatory interpretations". The main judgment explains that "the potential under-inclusiveness and consequent discriminatory impact is avoided simply by correcting the interpretation." *In this way, the main judgment conflates the meaning that the Acts can reasonably bear with the constitutional remedy the applicant and others similarly situated may be entitled to. These processes ought to be two separate enquiries; the first goes to interpretation, and the second to remedy. Otherwise the meaning of the text becomes subservient to a preferred outcome or relief.*' (my emphasis)).

After a court has found some form of constitutional violation, the next question is how far a court will go in stretching the words of a statute to afford it a meaning that conforms with the Final Constitution. The *Hyundai Motor Distributors* Court clearly identified the framework within which reading down should operate:

> On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained.[1]

As is clear from this description, reading down is not always possible: the provision must be 'reasonably capable' of the constitutional interpretation.[2] If it is not reasonably capable of that meaning, then words must be severed or read-in to the statute.[3] To give an indication of how far the Court will go in interpreting statutes so that they remain constitutionally valid,[4] the Court has interpreted the word 'direction' in one section to mean something different from 'direction' in the next section,[5] and that a statute that required submission to a 'local representative' could be satisfied by submission to a central collecting point.[6]

[1] *Hyundai Motor Distributors* (supra) at para 24 (footnotes omitted). See also *Daniels* (supra) at para 46 (Ngcobo J).

[2] See, for example, *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 29 (Holding that a reverse-onus provision cannot be read down to impose an evidentiary burden); *NCGLE v Minister of Home Affairs* (supra) at paras 25–26 (The court found that the word 'spouse' could not be read to include same-sex couples and thus cure a constitutional defect.)

[3] See *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others as Amici Curiae); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)('*Fourie*') at para 33 ('In my view where the Legislature prescribes a formula of this kind its words can not be substituted by "updating" interpretation. If the court, and not the Legislature, is to make a constitutionally necessary change to such a formula, that must be done not by interpretation but by the constitutional remedy of "reading-in". That remedy is appropriate because it changes in a permissible manner the nature of the action the statute requires, without purporting merely to interpret its words.')

[4] Both these cases rely on FC s 39(2). However, as I noted earlier, the 'reasonably capable' test is used both for reading down and indirect application to statutes, so they do provide useful guidance on how far a court will stray from the natural meaning of a statute.

[5] *MEC Department of Agriculture Conservation and Environment & Another v HTF Developers (Pty) Ltd* [2007] ZACC 25 (The applicant successfully argued that 'direction' in s 31A of the Environmental Conservation Act 73 of 1989 — which permitted local government to direct that a person stop harming the environment — was not the same as the reference to 'direction' in s 32 — which required that directions be published 30 days before taking effect for public comment. The Court relied on the FC s 24 right to a healthy environment and the FC s 33 right to just administrative action.)

[6] *African Christian Democratic Party v The Electoral Commission & Others* 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC)(The legislation required a deposit to be submitted in order to contest a local election. The ACDP had, by the cut off date, had not submitted its deposit to the Cape Town office, but had submitted enough money to cover their participation in the Cape Town election to the central office of the Independent Electoral Commission. O'Regan J (Skweyiya J dissenting) held that, interpreted in light of the right to vote, this constituted sufficient compliance with the statute.)

However, on other occasions the desired 'constitutional interpretation' would stretch the extension of the words beyond all recognition.[1] As Justice Yacoob has recently warned, it is very dangerous for courts to begin assigning meanings to statutes that the words are incapable of bearing:

> This Court has no mandate, constitutional or otherwise, to afford to any law a meaning that it cannot reasonably bear. Courts ought never to go down that road, even to fulfil the laudable aim of achieving greater harmony between fundamental rights conferred by the Constitution and the law in question.[2]

In *Mistry v Interim Medical and Dental Council of South Africa,* the Court was confronted with a section that gave medical inspectors overly broad powers to search any home containing medicine.[3] Sachs J found that it was impossible to read the legislation down as it would do 'violence to the explicit language' of the legislation and alter drastically the powers of the inspectors.[4] One might contend, following Sachs J, that Nicholson J exceeded the bounds the words were reasonably capable of bearing in *Zuma*. The phrase 'Director of Public Prosecutions' does not seem to be obviously capable of meaning 'Director of Public Prosecutions and Deputy National Director of Public Prosecutions'.

Whether an interpretation is 'reasonable' is not always obvious. It has twice been the subject of disagreement on the Constitutional Court.[5] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another*[6] required the Constitutional Court to consider whether a piece of land qualified as 'agricultural land' in terms of s 1 of the Agricultural Land Act.[7] The details of the argument are somewhat technical. The interesting point is that a majority of seven judges held that the land was agricultural land while the remaining three judges not only disagreed with the finding, but disagreed so strongly that they would have dismissed leave to appeal because the majority's construction was not reasonable. Both sets of judges relied on a contextual method of interpretation. And yet they reached radically different conclusions. (It might seem, therefore, that context isn't everything.)

The reasonableness of an interpretation is debatable not only because of disagreement about the technical meaning of a word, but because it is a value-laden exercise. Two decisions regarding the meaning of 'spouse' illuminate this point. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the Court was faced with legislation that facilitated the immigration of 'spouses', but not same-sex life partners. The question was whether the word 'spouse' could be read

[1] The most obvious instances are the various cases concerning the word 'spouse'. Those cases are dealt with in more detail later in this section.
[2] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12 at para 105.
[3] 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC).
[4] Ibid at para 32.
[5] *Daniels* is discussed in greater detail below.
[6] [2008] ZACC 12.
[7] Act 70 of 1970.

to include same-sex life partners. The Court held that 'spouse' as it was used generally and in the context of the legislation applied only to married couples.[1] As same-sex marriage was, at that time, not possible, 'spouse' could not apply to same-sex couples. The Court was forced to make a finding of invalidity and to read words in to the statute to cure the discrimination.[2] This restrictive reading of the word 'spouse' was confirmed in a case involving payments to partners of homosexual judges,[3] and the maintenance of partners of life-long co-habitants.[4]

By contrast, in *Daniels v Campbell*, the Court adopted a much broader understanding of the word 'spouse'.[5] In *Daniels,* the question was whether parties to a Muslim marriage — that was not recognised by law — could be identified as 'spouses' for purposes of intestate succession. The High Court purported to follow *NCGLE v Minister of Home Affairs* and found that 'spouse' applied only to legally recognised marriages and therefore did not cover Muslim unions.[6] The majority of the Constitutional Court reversed that decision. Sachs J found that any ordinary understanding of 'spouse' would embrace the parties to a Muslim marriage and that the extension of the word 'spouse' would have to be drastically curtailed in order to exclude them.[7] *Daniels* held that any interpretation of the word 'spouse' had to be conducted with reference to the social context and the purpose of the particular statute. In *Daniels*, the purpose was, largely, to give protection to widows. The question, according to Sachs J, was therefore, 'not whether it had been open to the applicant to solemnise her marriage under the Marriage Act, but whether, in terms of "common sense and justice" and the values of our Constitution, the objectives of the Acts would best be furthered by including or excluding her from the protection provided.'[8] Ngcobo J (also writing for the majority) distinguished *Daniels* from *NCGLE v Minister of Home Affairs* by arguing that the same-sex couples accepted that their partnership was not protected by any law, while the Muslim applicants based their claim on the recognition Islamic law afforded their union.[9]

As Moseneke J notes in his dissent,[10] there is much to quarrel with in the

[1] *NCGLE v Minister of Home Affairs* (supra) at paras 25–26.
[2] For more on reading-in, see § 9.4 *(c)* (iii) infra.
[3] *Satchwell v President of the Republic of South Africa & Another* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC) at para 9.
[4] *Volks v Robinson NO* 2005 (5) BCLR 446 (CC) at paras 40–45.
[5] 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC)('*Daniels*').
[6] *Daniels v Campbell NO & Others* 2003 (9) BCLR 969 (C) .
[7] *Daniels* (supra) at para 19.
[8] Ibid at para 25.
[9] Ibid at paras 60–61.
[10] Moseneke J accused the Court of engaging in reading-in instead of reading down. Ibid at para 86. He also held that the word 'spouse' was incapable of bearing the meaning the majority assigned it. Ibid at paras 88–89.

Court's attempt to distinguish the two cases.[1] But for now, the most important point to make is that the distinction rests on implicit normative assumptions about what types of relationships the word 'spouse' encompasses. This exercise is a far cry from looking up 'spouse' in a dictionary.[2]

A final, obvious, point to make is that the reading down must solve the constitutional violation (at whatever level that is pitched). The interpretation adopted must in fact cure the constitutional violation asserted; it must be 'effective relief'. If it only provides a partial solution, then the court may have to order additional relief in addition to the new gloss on the statute. In *Engelbrecht v Road Accident Fund*, the Court was concerned with an access to court challenge to a regulation that gave people only 14 days to submit a claim to the RAF.[3] However, the regulation also included the qualifications 'if in a position to do so' and 'if reasonably possible'. The Court gave these phrases a relatively wide construction that would require that the claimant was 'mentally and physically able to do so and, in addition, [had] knowledge of the identity of the debtor and of the facts from which the claim arises and which the affidavit has to contain'[4] and was not prevented from submitting the affidavit by some outside force.[5] Kondile AJ held that, even with this relatively expansive interpretation, the regulation still violated the right at issue.[6] Reading down was not a solution because it did not cure the violation.

(c) Bald Declarations of Invalidity

As Currie and de Waal note, while the Court has held that the enactment of the

[1] The problem with this reasoning is that it simply does not explain the outcome in *NCGLE v Minister of Home Affairs*. At the time there was no law that granted recognition to same-sex couples. It was therefore not a choice on the part of the *NCGLE* applicants not to get married; it was impossible for them to do so. To confine the protection afforded by the word 'spouse' to couples who had gained enough social recognition to have a form of law that recognised their relationship, fails to protect the most marginalised in society: those whom no law recognises. It also has the absurd consequence that if the *NCGLE* applicants belonged to some form of religion that did recognise their relationship, they would, on *Daniel's* logic, qualify as spouses. That seems discriminatory on the basis of religion. Many people may think it is a distinction without a difference whether a group of people is aided by including them in the word 'spouse' or reading-in a phrase to legislation that excludes them. But there are two important bonuses of the former: *(a)* the symbolic impact of being recognised as being the same as everybody else; and *(b)* once the word 'spouse' is found to include a particular group in one piece of legislation it is very likely — though not certain — that other pieces of legislation will be interpreted in the same way without the need for further litigation. Further litigation would be necessary for the read-in option.

[2] It is more than a little ironic that when the Court eventually extended marriage to same-sex life partners, it did so by reading-in the word 'spouse' to the Marriage Act. See *Fourie* (supra).

[3] 2007 (6) SA 96 (CC), 2007 (5) BCLR 457 (CC)('*Engelbrecht*'). For more on the FC s 34 right of access to court, see J Brickhill & A Friedman 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 59.

[4] *Engelbrecht* (supra) at para 36.

[5] Ibid at para 37.

[6] Ibid at para 38.

Final Constitution automatically invalidated all unconstitutional laws[1] (and continues to do so whenever a new unconstitutional law is enacted), 'as a practical matter, inconsistency, invalidity and remedies cannot be separated from one another. … Invalidity … follows from inconsistency with the constitution but, by *declaring* the law or conduct to be invalid, a court grants a remedy.'[2] FC s 172(1)*(a)* recognises this inextricable link by requiring that a court '*must* declare that any law or conduct that is inconsistent with the Constitution is invalid'. The word 'must' means that, unlike most remedies, declarations of invalidity are not subject to judicial discretion: a declaration of invalidity is a mandatory result of a finding of constitutional inconsistency and flows automatically from that finding. This mandatory rule is sourced in the principle of the supremacy of the Final Constitution. While any court may declare a statue invalid, declarations of invalidity of national or provincial legislation or conduct of the President have no force unless they are confirmed by the Constitutional Court.[3]

These orders are the default remedy following a finding of invalidity and will only be departed from when a more limited order will provide a better outcome.[4] This 'better remedy' outcome is, as often as not, the rule. In most cases, the problem with a statute will be the exclusion (or inclusion) of a particular group, the attachment of a particularly onerous condition or process or some other form of overbreadth. Or, the invalid law may serve an important purpose that would make invalidation an inappropriate response. To give two of the simplest examples, if a law is invalid for permitting heterosexual couples to marry, but not same-sex couples, no sensible person would suggest that the appropriate remedy is to destroy — through a declaration of invalidity — the legal framework for marriage for everyone.[5] Or, where full invalidity would remove the legal authority for the government to pay social grants, it would make no sense to give the declaration immediate force.[6]

However, although surprisingly uncommon, cases exist in which complete, immediate and fully retrospective[7] invalidity is the only sensible remedy.[8] In

[1] *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at paras 26 and 158; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at para 94 (Kriegler J).

[2] I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 193.

[3] FC s 172(2)*(a)*.

[4] See Currie & de Waal (supra) at 199 (The authors contend that a limited remedy is justified 'where the resulting situation would be more unconstitutional than the existing one.' For the reasons described in detail earlier in this chapter, I do not think that comparative constitutionality is the only — or even the most — relevant concern. See § 9.2*(e)* supra.)

[5] See *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International and Others* as Amici Curiae*); Lesbian and Gay Equality Project and Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).

[6] See *Mashavha v The President of the Republic of South Africa & Others* 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC).

[7] Under the IC the default position was not full retrospectivity. See § 9.4*(e)*(ii)(aa) infra. I include cases here where the Court adopted the default position under the Interim Constitution.

[8] See, for example, *Magajane v Chairperson: North West Gambling Board* 2006 (5) SA 250 (CC), 2006 (10) BCLR 1133 (CC) at paras 97–99 (Court declared a whole section permitting unconstitutional search and seizures invalid immediately and in toto); *Case & Another v Minister of Safety and Security and Others; Curtis v*

S v Makwanyane, the Constitutional Court declared all provisions permitting the death penalty immediately invalid and banned any executions based on convictions already delivered.[1] Although the Court has expressed a clear preference for limited rather than full declarations of invalidity, in some cases, full declarations of invalidity respect the separation of powers more than limited orders, such as severance or reading-in. With unlimited orders, the Court does not appear to be making law. Instead, it puts the ball back in the legislature's court. Mokgoro J adopted this reasoning in *Larbi-Odam & Others v Member of the Executive Council for Education (North-West Province) & Another* to declare unconstitutional a regulation which prevented permanent residents from being employed as teachers in a permanent capacity.[2] Invalidating the legislation in part might have operated unfairly with regard to temporary residents. The Justice was certain that the legislature would not want such a result.[3] By issuing a simple order of invalidity, she left it up to the legislature to decide the best course to follow.

(d) Limiting Substantive Impact

Limiting substantive impact — invalidating only part of the legal effect of a law — can take three different forms: severance, notional severance, and reading-in. Severance requires the excision of certain words from a statute. When a court leaves the words of a statute unaltered, but submits its application to a condition, it engages in notional severance. Finally, when a court adds words to a statute, we call it 'reading-in'. These practices are not mutually exclusive. A court can simultaneously sever words and read-in words. Here, I treat them separately. For although the tests for each remedy may be similar, certain features are unique to each one.

Generally, a court should use one of these devices rather than a bald declaration of invalidity because it is 'less intrusive of the legislative function' to invalidate only that portion of the legislation that violates the Constitution, rather than the whole.[4] These devices permit the law to continue in operation rather than

Minister of Safety and Security & Others 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC)(Obscenity law); *Coetzee v Government of the Republic of South Africa; Matiso & Others v Commanding Officer, Port Elizabeth Prison, & Others* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC)(Civil imprisonment); *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as* Amicus Curiae) 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC)(Time limitation clause).

[1] *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC) at para 151

[2] 1998 (1) SA 745 (CC), 1997 (12) BCLR 1655 (CC).

[3] Ibid at paras 45–46.

[4] *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & Others* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) at para 87. See also *National Director of Public Prosecutions & Another v Mohamed NO & Others* 2002 (4) SA 843 (CC), 2002 (9) BCLR 970 (CC) at para 29; *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (1) BCLR 39 (CC), 2000 (2) SA 1 (CC)('*NCGLE v Minister of Home Affairs*') at paras 73–76.

creating a lacuna in the law that may disrupt social relations and require immediate action by the legislature.[1]

A special relationship exists between limiting substantive impact, and suspension. Both suspension and the three devices for limiting substantive impact aim to cure a defect in the law in the least intrusive manner. Suspension accomplishes this end by allowing the legislature an opportunity to fix the problem, while the other three remedies propose a solution that the legislature remains free to amend. Which remedy is to be preferred? In *J v Director General, Department of Home Affairs* Goldstone J seemed to express a preference for limiting substantive impact rather than suspending an order:

> Where the appropriate remedy is reading-in words in order to cure the constitutional invalidity of a statutory provision, it is difficult to think of an occasion when it would be appropriate to suspend such an order. This is so because the effect of reading-in is to cure a constitutional deficiency in the impugned legislation. If reading-in words does not cure the unconstitutionality, it will ordinarily not be an appropriate remedy. Where the unconstitutionality is cured, there would usually be no reason to deprive the applicants or any other persons of the benefit of such an order by suspending it. Moreover the legislature need not be given an opportunity to remedy the defect, which has by definition been cured.[2]

The same reasoning would apply equally if the appropriate remedy was severance or notional severance. We can agree that there is no point in delaying a remedy when an adequate cure can be instantly provided. However, Goldstone J moves too quickly. He ignores the possibility of combined orders. As I discuss in more detail when I address suspension,[3] it is possible to limit the substantive impact of the section as a temporary measure while the suspension lasts or to suspend an order, but craft a limited order that takes effect if the legislature fails to remedy the defect in time.

(i) *Severance*

Severance involves precisely what it describes: an invalid section of a statute is 'severed' or 'cut off' from the rest of the statute. Severance is appropriate when only part of a piece of legislation is constitutionally infirm. It gives effect to the injunction in FC s 172(1)*(a)* that law that is inconsistent with the Final Constitution must be declared invalid 'to the extent of its inconsistency'. Unlike reading-in, severance has never been viewed as controversial; it does not seem to infringe the separation of powers to invalidate less, rather than more of a statute.

[1] Not all bald declarations of invalidity create problematic gaps. When the Constitutional Court struck down corporal punishment in *S v Williams* there was no gap as other sentences could be employed in its place. 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC).

[2] 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC).

[3] See § 9.4*(e)(i)* infra.

However, severance is not always appropriate. Sometimes the law may be structured in such a way that it is impossible or unwise to sever only the unconstitutional parts without affecting the rest of the legislation. Accordingly, in *Coetzee v Government of the Republic of South Africa,* the Constitutional Court laid down the following two-part test for severance:

> [I]f the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?[1]

The first requirement has been rephrased as the need to 'ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values'.[2] Whether this objective can be realised will depend on the wording of the particular section as well as its place in the broader statutory scheme. The Court has also held that since 'the statute books still contain many provisions enacted by a Parliament not concerned with the protection of human rights, the first consideration will in those cases often weigh more heavily than the second'.[3]

A good example of where it was easy to separate the good from the bad is *South African National Defence Union v Minister of Defence & Another*.[4] O'Regan J found that a regulation was valid to the extent that it prohibited strike action by members of the Defence Force, but invalid in so far as it banned public protest. To remedy the defect, the Court simply severed the words 'or perform any act of public protest' and related phrases and left the proscription of strike action intact.[5]

On the other hand, such textual surgery was impossible in *Magajane v Chairperson, North West Gambling Board*.[6] Van der Westhuizen J held that a provision permitting warrantless search and seizures of unlicensed gambling premises was overbroad and therefore unconstitutional. However, the provisions permitting the searches applied to both licensed and unlicensed premises. Justice van der Westhuizen concluded that the 'intertwining of licensed and unlicensed premises … make[s] severance difficult and undesirable.[7] To put it in Kriegler J's words, it was not possible to separate the good (licensed premises) from the bad (unlicensed premises).

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[1] *Coetzee v Government of the Republic of South Africa; Matiso & Others v Commanding Officer, Port Elizabeth Prison, & Others* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC)(footnote omitted).

[2] *NCGLE v Minister of Home Affairs* (supra) at para 74.

[3] Ibid.

[4] 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC)('*SANDU I*'). See also *S v Lawrence; S v Negal: S v Solberg* 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at para 133 (O'Regan J dissenting would have cured the infringement of separation between church and state in a law banning the selling of alcohol on Sundays, Christmas Day and Good Friday — referred to in the legislation as 'closed days' — by simply excising 'closed days' from the prohibition.)

[5] *SANDU I* (supra) at paras 15 and 45.

[6] 2006 (5) SA 250 (CC), 2006 (10) BCLR 1133 (CC), 2006 (2) SACR 447 (CC).

[7] Ibid at para 98.

Other cases resist textual surgery.[1] Most of these cases fail the severance test at the second leg. However, before I address those cases, let me give one example where the severed legislation would still give effect to the purpose of the legislation — ie that would pass the second leg.[2] In *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others*[3] Chaskalson CJ severed a portion of the Electoral Act[4] that prevented prisoners from voting. The Court did not even discuss whether the severance still gave effect to the purpose of the law. The purpose of the legislation — regulating elections and thereby promoting the right to vote — could obviously only be enhanced by expanding the pool of voters.

Fraser v Children's Court Pretoria North & Others illustrates the contrary position — where severance would not give effect to the intent of the legislation. Mahomed DP refused to sever a portion of the unconstitutional legislation that permitted a child born out of wedlock to be adopted without the father's consent.[5] The effect of the severance would be that the father's consent would *always* be required: thus the fathers of children born from rape, incest or 'a very casual encounter on a single occasion' would retain the right to consent — or to withhold such consent.[6] The Court was not satisfied that position 'would adequately reflect what Parliament would wish to retain if it became alive to the fact that the section was vulnerable' for the reasons described in the judgment.[7] Severance was therefore inappropriate.

The same problem arose in *South African Liquor Traders Association & Others v Chairperson Gauteng Liquor Board & Others*.[8] The Constitutional Court held a provision that defined a shebeen as an unlicensed outfit selling less than 10 cases of beer, without specifying the time within which the 10 cases had to be sold, to be unconstitutionally vague. The High Court had simply severed the words 'and is selling less than ten (10) cases'.[9] The effect of that order was that 'any business

[1] See, for example, *Chief Lesapo v North West Agricultural Bank & Another* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC) at paras 30–32 (The Court found it was impossible to sever the offending provisions which allowed the Bank to bypass courts as it would require an amendment to other sections. In addition, severance would not give effect to the statutory scheme or to the legislative purpose to provide the Bank with a quick and effective remedy. Severance failed at both legs of the test); *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa & Others; Sheard v Land and Agricultural Bank of South Africa & Another* 2000 (3) SA 626 (CC), 2000 (8) BCLR 876 (CC)('*Sheard*') at paras 14–15 (The case concerned similar legislation to *Chief Lesapo* and was inappropriate for the same reasons. The Court also held: 'Severing the proposed part would alter the system of debt recovery set forth by the Legislature and would amount to legislating, a function reserved for Parliament'.)

[2] See also *Shinga v S (Society of Advocates, Pietermaritzburg Bar as Amicus Curiae); O'Connell & Others v S* 2007 (5) BCLR 474 (CC), 2007 (2) SACR 28 (CC)(Court severs exceptions from the general rule that the record should be applied to the High Court in criminal appeals from the Magistrates' Courts.)

[3] 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC).

[4] Act 73 of 1998.

[5] 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC) at paras 47–49.

[6] Ibid at para 49.

[7] Ibid at para 48.

[8] 2006 (8) BCLR 901 (CC)('*South African Liquor Traders*').

[9] Ibid at para 30.

primarily concerned with the sale of liquor and unlicensed, [would] fall within the terms of the definition and would in terms of the regulation be entitled to operate unlicensed.[1] O'Regan J concluded that severance would not be the correct remedy because the 'potential harm to the wider community of such a broad definition is clear and directly in conflict with the stated purposes of the Act': namely to regulate the sale of liquor.[2]

Although the Court has presented the severance test as requiring two separate inquiries, in many cases the two steps are collapsed into a single inquiry. *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* provides an excellent example of the linguistic difficulty associated with separation of powers questions.[3] The Court was concerned with a censorship provision that was manifestly overbroad. Mokgoro J held, applying the first part of the *Coetzee* test, that severance was not a 'viable option' because the 'overbreadth cannot be laid at the door of any one word, or group of words, but rather permeates the entire text.'[4] She then went on to hold that even if it were possible to 'apply a blue pencil to each and every [word] that presents overbreadth problems, we would effectively write a new provision that bears only accidental resemblance to that enacted by Parliament.'[5] The Court would violate the second leg of the test by 'paring down' the provision 'to prohibit only that discrete set of sexually-oriented expressions that this Court believes may constitutionally be restricted' and thus 'depart[ ] fundamentally from its assigned role under our Constitution'.[6] What is interesting about *Case & Curtis* is that whether the Court believes severance is textually plausible depends, at least in part, on the degree to which severance would usurp the legislature's role. The two elements of the test should be seen as related, not isolated, and should be considered simultneously, not sequentially.

[1] *South African Liquor Traders* (supra) at para 32.
[2] Ibid at para 34.
[3] 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC), 1996 (1) SACR 587 (CC)('*Case & Curtis*') at paras 70–75. See also *Chief Lesapo v North West Agricultural Bank & Another* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC) at paras 30–32 (The Court found it was impossible to sever the offending provisions which allowed the Bank to bypass courts as it would require an amendment to other sections. In addition, severance would not give effect to the statutory scheme or to the legislative purpose to provide the Bank with a quick and effective remedy. Severance failed at both legs of the test.); *Sheard* (supra) at paras 14–15 (The case concerned similar legislation to *Chief Lesapo* and was inappropriate for the same reasons. The Court also held: 'Severing the proposed part would alter the system of debt recovery set forth by the Legislature and would amount to legislating, a function reserved for Parliament.'); *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at paras 47–48 (The Court held that the investigative (constitutional) and litigation (unconstitutional) functions of a judge appointed to head a commission of inquiry were inextricably linked. It was impossible to separate the good from the bad.)
[4] *Case & Curtis* (supra) at para 71.
[5] Ibid at para 72.
[6] Ibid at paras 72 and 73.

(ii) *Notional Severance*

Notional severance is one of the more difficult remedies to understand. Like severance, it involves removing parts of the offending provision while leaving other words and provisions intact. However, as the adjective 'notional' suggests, no words are actually excised from the law. Instead the unconstitutional reach of the provision is identified by limiting the cases to which the law can apply or by making its valid operation subject to a condition. Notional severance also bears a passing similarity to reading down: both remedies leave the words of the statute unaltered, but affect its meaning or application. The difference between the two remedies is that notional severance does not claim that the words can actually bear the meaning that the court ascribes to them. In fact, they clearly cannot. Were it otherwise, the Court would have been obliged to read down the section, rather than notionally sever its parts. Notional severance provides instructions for the application of the rule, rather than specifying the correct interpretation.

These fine distinctions can be difficult to grasp. Perhaps the best way to explain notional severance is by example. In *Islamic Unity Convention*, the Court found that a clause prohibiting broadcast of any material that was 'likely to prejudice relations between sections of the population' was over-broad and infringed the right to freedom of expression.[1] Langa DCJ found that invalidating the provision completely would leave an impermissible gap in the law. Severance or reading-in, on the other hand, would trench too deeply into the legislative domain.[2] He therefore opted for an order of notional severance which declared the clause invalid except to the extent that it prohibited what was already impermissible in terms of FC s 16(2): '*(i)* propaganda for war; (ii) incitement of imminent violence; or (iii) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'[3] The effect of the order was that a prohibition on certain broadcasts remained in place, but that prohibition would henceforth only apply to the much more limited category of broadcasts that conflicted with the dictates of FC s 16(2).

While *Islamic Unity* is perhaps the clearest illustration of notional severance, it is by no means the only one.[4] Notional Severance was first employed in *Ferreira v Levin No & Others; Vryenhoek & Others v Powell NO & Others*. The *Ferreira* Court

[1] 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) at paras 21–51.

[2] Ibid at para 56.

[3] Ibid at paras 57 and 60.

[4] See, for example, *First National Bank (FNB) of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 114 (The Court declared invalid a provision permitting property to be sold to cover a customs debt, even if the owner of the property is not the custom debtor. The constitutional flaw was limited to the selling of property belonging to a third party. It accordingly ordered a notional severance limiting the invalidity to these situations); *Prince v President, Cape Law Society & Others* 2002 (2) SA 794 (CC) at para 85 (Ngcobo J dissenting)(Ngcobo J held that legislation prohibiting the possession of dagga violated the rights of Rastafarians. He declared it invalid to the extent that it prohibited 'the use or possession of cannabis by Rastafari adherents for bona fide religious purposes'.)

invalidated legislation[1] permitting a recalcitrant witness in a company's winding up process to be imprisoned.[2] However, the only defect the *Ferreira* Court found in the law was that the answers given by the witness could be used against the witness in subsequent criminal proceedings. It therefore limited the order of invalidity by a notional severance: it prohibited the answers given in the winding up proceedings from being used in non-perjury related criminal proceedings.[3] Notional severance has also been successfully combined with a suspension order so that the condition comes into effect if the legislature fails to fix the problem by the time the suspension period ends.[4] The benefit of this combination — if done properly[5] — is that it gives clear guidance to the legislature regarding the nature of the constitutional defect, and provides a 'constitutional fix' should the legislature fail to intervene before the suspension period expires.

While notional severance is an attractive remedy for courts faced with teasing out the good from the bad in intricately worded statutes, it has its limits. These limits were explained by Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*:

> The device of notional severance can effectively be used to render inoperative portions of a statutory provision, where it is the presence of particular provisions which is constitutionally offensive and where the scope of the provision is too extensive and hence constitutionally offensive, but the unconstitutionality cannot be cured by the severance of actual words from the provision. . . . Where, however, the invalidity of a statutory provision results from an omission, it is not possible, in my view, to achieve notional severance by using words such as 'invalid to the extent that' or other expressions indicating notional severance. An omission cannot, notionally, be cured by severance.[6]

[1] Companies Act 61 of 1973 s 417(2)*(b)*.

[2] 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC).

[3] Ibid at paras 156–157. See also *De Lange v Smuts NO* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 103 (The Court invalidated a law that permitted imprisonment of recalcitrant witnesses in insolvency proceedings only to the extent that the imprisonment could be ordered by non-judicial officers.)

[4] See *Nyathi v MEC of the Department of Health & Another* [2008] ZACC 8 (Madala J, for the majority, declared that s 3 of the State Liability Act was invalid 'to the extent that it does not allow for execution or attachment against the state and that it does not provide for an express procedure for the satisfaction of judgment debts.' He suspended that order for 12 months. This order gives Parliament a clear indication of what they need to alter to ensure that the new system is constitutional. The first part of the notional severance also makes it clear that if Parliament does not act, judgment creditors will be able to execute against state assets. The second part clearly might also justify the courts themselves to develop a process for attaching state assets if the legislature failed to do so.)

[5] An example of a failure to do this intelligently is *Fraser v Children's Court, Pretoria North & Others* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC) at paras 45–52 (The Court invalidated s 18(4)*(d)* of the Child Care Act 74 of 1983 which permitted a child to be adopted without an unmarried father's consent. It suspended the order to allow the legislature to regulate the area. However, although it noted that it was indeed proper to dispense with the father's consent in certain cases — such as rape — its order would have required the father's consent even in the case of rape. The Court would have done better to construct a more limited order.)

[6] *NCGLE v Minister of Home Affairs* (supra) at paras 63 and 64. See also *S v Niemand* 2002 (1) SA 21 (CC), 2001 (11) BCLR 1181 (CC) at para 31; *National Director of Public Prosecutions & Another v Mohamed NO & Others* 2002 (4) SA 843 (CC), 2002 (9) BCLR 970 (CC) at paras 26–27 (The High Court attempted to cure a defect in the Prevention of Organised Crime Act by declaring the provision invalid that it did

Notional severance can cure presence, not absence. The High Court's judgment in *National Director of Public Prosecutions & Another v Mohamed NO & Others* provides a fine example of such misapplication.[1] The constitutional flaw at issue flowed from the fact that s 38 of the Prevention of Organised Crime Act[2] always required an application for preservation of property to be brought *ex parte* and did not permit a court to issue a rule nisi for interested parties to make submissions. Cloete J attempted to remedy this defect by an order for notional severance that would allow courts to make a rule nisi order. On appeal, Ackermann J held that the remedy was not competent. The High Court had attempted to cure what was in fact 'an omission from the section, namely the failure to provide for the above procedure and remedy.'[3] That could not be done by notionl severance.

In addition, because of the greater certainty provided by actual severance, an order of actual severance should be preferred to an order of notional severance if it is 'linguistically competent'.[4] This advice was not followed in *Fraser v Children's Court, Pretoria North & Others*.[5] The Court invalidated s 18(4)*(d)* of the Child Care Act.[6] The infirm provision had permitted a child to be adopted without an unmarried father's consent. The Court suspended the order to allow the legislature to regulate the area. However, it also fashioned its order — which would come into effect at the end of the suspension period if the legislature did not cure the defect — as notional severance of s 18(4)*(d)* 'to the extent that it dispenses with the father's consent for the adoption of an "illegitimate" child in all circumstances.'[7] Precisely the same result could have been better achieved by simply deleting the proviso to s 18(4)*(d)*.

One final point. Like actual severance, notional severance will only be appropriate where it is possible to quarantine the unconstitutional parts of the legislation and where what is left will still give effect to the purpose of the legislation.

(iii) *Reading-in*

Reading-in is the opposite of severance. Instead of removing words from legislation, when a court reads-in it *adds* words to the statute to cure the constitutional

not allow an application to be brought in a different form); *Dawood & Another; Shalabi & Another; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 61; *Janse van Rensburg v Minister of Trade and Industry* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC) at para 28.

[1] Unreported Witwatersrand Local Division Case No. 2000/21921.

[2] Act 121 of 1998.

[3] *National Director of Public Prosecutions & Another v Mohamed NO & Others* 2002 (4) SA 843 (CC), 2002 (9) BCLR 970 (CC) at para 26.

[4] *SANDU I* (supra) at para 16.

[5] 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC)('*Fraser*').

[6] Act 74 of 1983. Section 18(4)*(d)* read: 'A children's court to which application for an order of adoption is made . . . shall not grant the application unless it is satisfied - *(d)* that consent to the adoption has been given by both parents of the child, or, if the child is illegitimate, by the mother of the child, whether or not such mother is a minor or married woman and whether or not she is assisted by her parent, guardian or husband, as the case may be'.

[7] *Fraser* (supra) at para 52.

defect. It is also important to distinguish reading-in from reading down and notional severance. With both reading down and notional severance, the text of the legislation remains untouched; it is simply given a meaning that conforms to the Final Constitution. When reading-in, courts change the text.

Reading-in has been the object of some suspicion. The actual act of 'writing' and 'editing' legislation, some charge, constitutes a judicial usurpation of legislative prerogatives and, therefore, a violation of the separation of powers.[1] The Constitutional Court thus went to some length to justify the use of reading-in in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*.[2] Although it acknowledged that reading-in invariably posed this apparent problem, it rejected the idea that reading-in should be treated any differently from severance:

> there is in principle no difference between a court rendering a statutory provision constitutional by removing the offending part by actual or notional severance, or by reading words into a statutory provision. In both cases the parliamentary enactment, as expressed in a statutory provision, is being altered by the order of a court. In the one case by excision and in the other by addition. This chance difference cannot by itself establish a difference in principle. The only relevant enquiry is what the consequences of such an order are and whether they constitute an unconstitutional intrusion into the domain of the legislature.[3]

The same considerations that apply to severance, therefore, also apply to reading-in: the reading-in must remedy the defect, interfere as little as possible with the legislation and still give effect to the purpose of the legislation.[4] However, because reading-in is more often employed to extend the reach of a law, courts are, despite the assertions in *NCGLE v Minister of Home Affairs*, more wary of reading-in.

There are two other important threads to be drawn from *NCGLE v Minister of Home Affairs*. The first is what has been called 'the equality of the vineyard or the graveyard':[5] When a statute is unfairly discriminatory because it provides a benefit

[1] For more on the separation of powers, see § 9.2*(e)*(iv)(cc)(1) supra. See also S Seedorf & S Sibanda 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12.

[2] 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC)('*NCGLE v Minister of Home Affairs*').

[3] Ibid at paras 67–68.

[4] *NCGLE v Minister of Home Affairs* (supra) at para 75 ('In deciding to read words into a statute, a Court should also bear in mind that it will not be appropriate to read words in, unless in so doing a Court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading-in (as when severing) a Court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution.')

[5] See *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others as Amici Curiae); Lesbian & Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at para 149 ('[T]he achievement of equality would not be accomplished by ensuring that if same-sex couples cannot enjoy the status and entitlements coupled with the responsibilities of marriage, the same should apply to heterosexual couples. Levelling down so as to deny access to civil marriage to all would not promote the achievement of the enjoyment of equality. Such parity of exclusion rather than of inclusion would distribute resentment evenly, instead of dissipating it equally for all. The law concerned with family formation and marriage requires equal celebration, not equal marginalisation; it calls for equality of the vineyard and not equality of the graveyard.')

to some groups and not others, is the correct remedy to provide the benefit to everybody, or to nobody?[1] There is no single answer. The remedy will, as always, depend on the facts of the case. However, possible budgetary implications that reading-in would have should not automatically deter a court from expanding protection.[2] The court should instead consider the extent of the budgetary intrusion and weigh the intrusion against the injustice of 'levelling down' — a Vonnegutian consequence in which everyone is made equal by ensuring that all are similarly disabled. In doing so, the guiding principle should not be the purpose of the legislation, but the constitutional norms underlying the finding of inequality.[3] Budgetary implications, did not, for example, deter the *Khosa* Court from expanding social security benefits to protect permanent residents as well as citizens.[4] However, an 'unsupportable budgetary intrusion' would bar a reading-in that would otherwise be valid.[5]

The second thread to be drawn from *NCGLE v Minister of Home Affairs* is that reading-in does not give the judiciary the final word on what the law is. It merely starts a conversation between the legislature and the courts.[6] In the Court's words: 'Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, "fine-tuning" them or abolishing them. Thus they can exercise final control over the nature and extent of the benefits.'[7] It matters not whether the remedy is pure invalidity, severance, notional severance or reading-in. However, because reading-in generally provides the Court with more options than the other remedies, courts should be especially cautious in this domain and are best

[1] See E Caminker 'A Norm-based Remedial Model for Underinclusive Statutes' (1986) 95 *Yale LJ* 1185.

[2] *NCGLE v Minister of Home Affairs* (supra) at para 75 ('Even where the remedy of reading-in is otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion. In determining the scope of the budgetary intrusion, it will be necessary to consider the relative size of the group which the reading-in would add to the group already enjoying the benefits.')

[3] Caminker (supra) quoted with approval in *NCGLE v Minister of Home Affairs* (supra) at para 72.

[4] *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minster of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC)('*Khosa*')(The budgetary considerations in *Khosa* were considered as part of the limitations analysis rather than the remedy analysis. This is, perhaps, a mistake as the budgetary impact depends on the remedy that the Court chooses to grant which should not be determined at the limitations stage. The Court could conceivably have devised a remedy that slightly decreased the social grants across the board in order to accommodate the permanent residents. If the budgetary increase is considered before a remedy is devised, the remedial possibility of avoiding — or at least minimizing — the increase in spending is lost.)

[5] *NCGLE v Minister of Home Affairs* (supra) at para 75.

[6] For more on constitutional dialogue, see K Roach 'Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience' (2005) 40 *Texas Journal of International Law* 537. On shared constitutional interpretation, see generally S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[7] *NCGLE v Minister of Home Affairs* (supra) at para 76.

advised to leave the choice to the legislature.[1] Such caution is most commonly signalled by suspending the order of invalidity. In *Dawood v Minister of Home Affairs,* the Court suspended an order relating to residence permanents for South Africans' spouses because there were so many ways the legislature could cure the defect.

The most obvious use for reading-in is to increase the reach of a provision to include a class of people currently excluded by the law. That was how the remedy was first employed in *NCGLE v Minister of Home Affairs*. The Constitutional Court read in the words 'or partner, in a permanent same-sex life partnership' after the word 'spouse' so as to extend the benefit of immigration laws to same-sex couples. It has employed the same strategy in a long string of subsequent cases to bring homosexual couples within the reach of various laws.[2] The Court has also used reading-in to extend social security to permanent residents,[3] to allow attorneys from the former homelands to be admitted in South Africa[4] and to allow multiple spouses and children to benefit from intestate succession.[5] The last case, *Bhe*, is particularly interesting because of the extreme detail of the Court's order. The Court invalidated the customary-law rule of primogeniture which limited inheritance to the eldest son. However, the Court could not simply apply the provisions of the Intestate Succession Act[6] because the Act did not cater for polygamous unions. It therefore fashioned what is, in effect, an entirely new set of laws to regulate these families which largely adhered to the same basic principles that regulated monogamous unions. But grafting such principles on to

[1] *Dawood & Another; Shalabi & Another; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC)('*Dawood*') at para 64 ('Where, as in the present case, a range of possibilities exists and the Court is able to afford appropriate interim relief to affected persons, it will ordinarily be appropriate to leave the Legislature to determine in the first instance how the unconstitutionality should be cured. This Court should be slow to make those choices which are primarily choices suitable for the Legislature.')

[2] See *Satchwell v President of the Republic of South Africa & Another* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC) and *Satchwell v President of South Africa & Another* 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC)(Legislation limited benefits for judges' spouses to heterosexual couples); *J & Another v Director General, Department of Home Affairs & Others* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC)(Law prohibited same-sex partners from becoming the parents of a child born by artificial insemination); *Du Toit & Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as* Amici Curiae *)* 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC)(Provision at issue prevented same-sex couples from adopting); *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others* as Amici Curiae*); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)(Altered the common law and the Marriage Act to permit homosexuals to marry); *Gory v Kolver NO & Others* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC)(Expanded the Intestate Succession Act to apply to homosexual couples).

[3] *Khosa* (supra).

[4] *Mabaso v Law Society, Northern Provinces* 2005 (2) SA 117 (CC), 2005 (2) BCLR 129 (CC).

[5] *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; SA Human Rights Commission & Another v President of the RSA &Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('*Bhe*').

[6] Act 81 of 1987.

polygamous unions is hardly uncontroversial.[1] The Court justified this extensive incursion into the legislative terrain by stressing the vulnerability of those persons who would be affected by a delay and by stating that its order 'should be regarded by the legislature as an interim measure.'[2] Ngcobo J dissented. In his view, regulating the problem involved policy choices that were best left to the legislature.[3] While there is something to be said for Ngcobo J's rejection of the Court's reading-in — its boldest use of the remedy thus far — the result remains the best solution to a difficult, if not intractable, problem.[4]

Reading-in can also be used to add a proviso to a section.[5] This use of reading-in bears many similarities to forms of notional severance except that reading-in actually adds the words. It does not simply prevent an unconstitutional

[1] The *Bhe* Court never uses the word 'reading-in' to describe its order, nor is the order itself fashioned in the normal manner for reading-in orders which read: 'The omission of "X" from the provision is unconstitutional.' Further, the order is phrased more like an order for notional severance that is aimed at the 'application' of the Intestate Succession Act rather than its wording. This judicial sleight of hand is interesting because it indicates that the Court realised how much further its order went than traditional reading-in orders that are limited to a few words or a phrase. However, it is clear that the order can be nothing but an order for reading-in. It cannot be notional severance because it cures an omission. See § 9.4*(d)*(ii) supra. It cannot be an instruction on how to interpret the Act because the words of the Act clearly cannot bear that meaning. The only way the Court could achieve its desired outcome is by altering the law; ie, reading-in.

[2] *Bhe* (supra) at paras 115–116.

[3] Ibid at paras 224–226 ('The determination of the choice of law rule which regulates the circumstances in which indigenous law is applicable involves policy decisions. In particular, it involves a decision on the criteria for determining when indigenous law is applicable. There is a range of options in this regard. The choice of law may be based on, among other things, agreement, the lifestyle of individuals, the type of marriage, the nature of the property such as family land, justice and equity, or a combination of all these factors. The Legislature is better equipped to make these policy choices.')

[4] Ngcobo J's solution was for customary to continue to apply without the absolute rule of primogeniture. The parties would try to reach agreement and if they failed, a Magistrate would have to come up with a solution that was 'fair, just and equitable in the circumstances of the case.' Ibid at para 239. There is good reason to be sceptical of this proposal. Not only does it not provide any solace to vulnerable women, but it fails to take seriously the systems of power that operate in many communities that would continue to prevent women from inheriting. The only other alternative — suspension — was rightly rejected by Langa DCJ for failing to provide relief to extremely vulnerable people whose most basic rights to equality were being violated.

[5] See, for example, *S v Manamela & Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC)('*Manamela*') at paras 55–59 (The law at issue created a presumption that a person in possession of stolen property was guilty of an offence unless they could prove they had a 'reasonable cause' to posses it. A majority of the Court found that construction overly invasive of the right to be presumed innocent but because of the prevalence of 'fencing' they did not want to strike down the whole provision. Instead, they removed the offending phrase and replaced it with the following slightly narrower construction: 'In the absence of evidence to the contrary which raises a reasonable doubt, proof of such possession shall be sufficient evidence of the absence of reasonable cause.'); *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC) at para 47 (The Immigration Act 13 of 2002 permitted people to be detained indefinitely without a trial. The Court found that position unconstitutional and read-in words to require that if the person were detained for 30 days, their continued detention had to be confirmed by a court for a maximum period of 90 days.); *S v Niemand* 2002 (1) SA 21 (CC), 2002 (3) BCLR 219 (CC) at paras 33–34 (The Court read in the words 'Provided that no such prisoner shall be detained for a period exceeding 15 years' to prevent indefinite detention of habitual criminals.)

application. For example, in *Jaftha v Minister of Justice* the Court altered s 66(1)*(a)* of the Magistrates Court Act to prevent attachment of immoveable property without court intervention.[1] It read-in the words 'a court, after consideration of all relevant circumstances, may order execution' to ensure that people were not deprived of their right to housing.[2]

There are, however, many other possible uses for reading-in. As the Court has noted, reading-in need not be 'confined to cases in which it is necessary to remedy a provision that is under-inclusive. There is no reason in principle why it should not also be used as part of the process of narrowing the reach of a provision that is unduly invasive of a protected right.'[3]

Reading-in cannot, however, be used as a 'back door' to address issues that were not properly raised in argument about the content of the right. In *Satchwell v President of the Republic of South Africa & Another,* the Court expanded a statute regulating benefits for judges' spouses to include same-sex life partners.[4] The Court was not, however, willing to extend it to heterosexual life partners. As Madala J put it:

> This Court is not at large to grant any relief under its power to grant "appropriate relief" — it cannot import matters that are remote to the case in question — otherwise it will be intruding too far into the legislative sphere. The intended accommodation of heterosexuals cannot be introduced via the backdoor into this case. It was not properly before us, nor did we hear argument on the complexities involved.[5]

The appropriateness of reading-in will always turn on the reason for invalidity and the structure of the particular section. Two possible scenarios warrant mention. In *South African Liquor Traders*, the Constitutional Court was faced with provincial legislation that intended to bring shebeens into the legislative framework.[6] The legislation defined shebeens as commercial operations that sold only 10 cases of quarts, but failed to specify the period in which they should be sold. The Court

[1] 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC).

[2] Ibid at para 67.

[3] *Manamela* (supra) at para 57. The cases described as to adding 'conditions' could also be described as narrowing the scope of the law. It is because they all narrow the scope in a particular way that I have chosen to place them under the rubric of 'conditions'.

[4] 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC).

[5] Ibid at para 40. See also *Masiya v Director of Public Prosecutions, Pretoria & Another (Centre for Applied Legal Studies & Another, Amici Curiae)* 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC)(The Court expanded, through FC s 39(2), the common-law definition of rape to include anal penetration of women, but refused to include men because the litigant in the case was female. If this alteration of the law had presented itself as a question of reading-in — if the Court had found a direct violation of the Final Constitution — reading-in might not have been justified for the same reason. However, *Masiya* differs from *Satchwell* because the issue of male anal rape was in fact raised in argument. But once the Court made its substantive decision on a basis that excluded men, it would have been improper to bring them back into the fold through the remedy.)

[6] *South African Liquor Traders Association & Others v Chairperson, Gauteng Liquor Board & Others* 2006 (8) BCLR 901 (CC)('*South African Liquor Traders*').

invalidated the provision on the basis of vagueness. Given the proffered evidence, the Court decided that shebeens could sell 60 cases within a week.[1] As an interim measure, and in order to avoid leaving the situation unregulated, it read words into the legislation to that effect.[2] The Court was not, however, prepared to permanently read words into the statute.[3]

If expanding protection and creating additional conditions are the primary uses for reading-in, the most common argument against it is the range of choices available to the legislature. Again, the concern raised here engages separation of powers doctrine: the 'Court should be slow to make … choices which are primarily choices suitable for the legislature.'[4] Such care was, at least on its face, part of the motivation for the majority's decision in *Fourie* to suspend the declaration of invalidity.[5] Sachs J believed that there were different ways that the state could solve the problem of same-sex marriage. The state could simply include same-sex couples under the existing legislation or it could create some variation on existing templates for traditional marriages and normal marriages.[6] O'Regan J rightly pointed out how limited these options — especially when combined with the Court's guidelines — were.[7] Even with such limited options, eight judges felt that 'the legislature [should] be given an opportunity to map out what it considers to be the best way forward.'[8] One senses here a genuine separation of powers concern: if legislatures possess greater political legitimacy by virtue of their election and ongoing accountability, then the legislature, and not an ostensibly unaccountable judiciary, should take responsibility for crafting a remedy that better fits the 'mores' and the inclinations of the electorate.

(iv) *Shinga*

I conclude this discussion of limiting the substantive impact of decisions with a case where a number of remedial options were in play: *Shinga v S (Society of Advocates, Pietermaritzburg Bar as Amicus Curiae); O'Connell & Others v S*.[9] The Court found constitutional defects in three sections of the Criminal Procedure Act[10] dealing with appeal procedures from the Magistrates' Court to the High Court and used three different remedial strategies. The first defect related to a

[1] *South African Liquor Traders* (supra) at paras 41–45.
[2] Ibid at para 55.
[3] Ibid at para 40.
[4] *Dawood* (supra) at para 64. Se also *South African Liquor Traders* (supra) at para 44.
[5] *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others* as Amici Curiae *); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).
[6] Ibid at paras 139–147.
[7] Ibid at para 168.
[8] Ibid at para 147.
[9] 2007 (5) BCLR 474 (CC), 2007 (2) SACR 28 (CC)('*Shinga*').
[10] Act 51 of 1977.

procedure which permitted petitions for appeal to be considered in chambers instead of in open court. The Court found the entire process unconstitutional and invalidated the whole section.[1] The second defect related to s 309C(4)*(c)*. This section required the record of the case to be sent to the High Court except in four instances: all four instances included appeals related only to sentence or to condonation. The Constitutional Court held that the record should be sent in every case and, therefore, that all the exceptions were unconstitutional. Declaring the whole section invalid would mean the record would never have to be sent. The Court therefore severed the exceptions and left intact the general rule that the record should be sent.[2] The final defect concerned a section which required that appeals only had to be considered by one judge, save in exceptional circumstances where the appeal would be considered by two judges. The Court held that the right to an appeal required that appeals always be considered by at least two judges. *Shinga* combined severance and reading-in by removing the reference to one judge and the proviso for exceptional circumstances, and by reading-in a requirement that appeals be considered by two judges.[3]

(e) Limiting Temporal Impact

The previous section considered ways in which courts can 'work' declarations of invalidity in a manner that limits their impact to only those substantive issues that have a genuine affect on our constitutional rights. This section addresses how a court can regulate the effect of their orders of invalidity on the future and the past. Suspension orders allow a court to prevent an order of invalidity from having effect until a future date. Retrospectivity orders determine an order's impact on the past. Although declarations of invalidity normally operate retrospectively to the date of the law's enactment or the enactment of the Final Constitution, courts are able to limit the potentially disruptive impact of such orders in many different ways.

(i) *Suspension*

(aa) How does suspension operate?

(x) Suspension as a resolutive condition

Ordinarily orders apply from the date upon which they are made. However, FC s 172(1)*(b)*(ii) specifically gives courts the power to suspend the coming into effect of an order of invalidity. It is important to understand exactly how these orders work. A court will declare a provision invalid, but state that the invalidity

[1] *Shinga* (supra) at para 54.
[2] Ibid at para 55.
[3] Ibid at para 56.

will only come into effect on a future date. The primary reason for suspension is to give the body responsible for the unconstitutional provision — normally the Legislature — an opportunity to rectify the defect. For that reason the suspension acts as a resolutive condition:

> If the matter is rectified, the declaration falls away and what was done in terms of the law is given validity. If not, the declaration of invalidity takes place at the expiry of the prescribed period and the normal consequences attaching to such a declaration ensue.[1]

While this approach is eminently sensible, it could lead to confusion down the line. It leaves uncertain whether the measures adopted by the legislature have in fact 'rectified' the matter. Such a matter has not yet come before the courts. However, a party with an interest in the outcome could apply to the Constitutional Court to determine whether the defect has been correctly remedied and whether the suspended order of invalidity should come into effect. It might be argued, for example, that the separate regime created by the new Civil Union Act[2] did not really 'rectify' the unconstitutional failure to permit same-sex couples to marry identified by the Court in *Fourie*. If it did not, then the suspended consequences specified in the *Fourie* order[3] (altering the common law and reading-in 'or spouse' to the Marriage Act[4]) should, in theory, have come into effect on the expiry of the suspension period.

(y) Do suspended orders that come into effect have retrospective force?

The next interesting question is whether — when the legislature fails to cure the defect and the suspended order comes into effect — the declaration operates retrospectively. As I explain below, unless the Court explicitly limits the retrospective effect, any declaration of invalidity operates back to 4 February 1997.[5] In theory then, if a declaration comes into force on a suspended date and the Court has not said anything about retrospectivity, the order should operate back to when the Final Constitution came into force, or at least to the date the order was made. The Court in *Executive Council of the Western Cape* held that if the constitutional infirmity was not rectified 'the normal consequences attaching to such a declaration ensue. In the present case that would mean that [the relevant law] and everything done under it would be invalidated.'[6] In short, the order will operate retrospectively. General retrospective effect for a suspended order is not,

[1] *Executive Council, Western Cape Legislature & Others v President, Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC)('*Executive Council, Western Cape 1995*') at para 106.

[2] Act 17 of 2006.

[3] *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others as Amici Curiae); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at para 162.

[4] Act 25 of 1961.

[5] See § 9.4*(e)*(ii)(aa) infra.

[6] *Executive Council, Western Cape 1995* (supra) at para 106.

however, how the Court has understood suspension orders since *Executive Council of the Western Cape*. Although it has not explicitly dealt with the issue, the correct position seems to be that suspended orders will not operate retrospectively unless the court has expressly stated otherwise.

In an ordinary case, when a suspension order is based on the need to retain the legal position in place in order to avoid disruption of a legal system, the order will not operate retrospectively. It would make no sense to have a suspension order act retrospectively when it would cause the precise ill that the court intended to avoid. The Constitutional Court implicitly confirmed this principle in *Mashavha v President of the Republic of South Africa & Others*.[1] The *Mashavha* Court declared various provisions of a presidential proclamation[2] — assigning the administration of social grants to the provinces — invalid and suspended that invalidity for 18 months without any mention, in the judgment or the order, of the retrospective effect. Eighteen months later, the minister responsible for social grants applied to the Court to extend the suspension period.[3] In refusing to extend the period, , the Court noted that the invalidity would operate only from the date the suspension period expired. It is, therefore, open to a court to specifically regulate the timing, and the retrospectivity, of the order of suspension. In *Executive Council of the Western Cape 1999*, for example, the Court's order made it clear that if the defect was not remedied, the order would not have retrospective effect.[4]

However, in at least one case, the ratio and the holding of the Court's judgment required retrospective application. In *Matatiele Municipality & Others v President of the Republic of South Africa & Others*, the Court invalidated part of a constitutional amendment that had changed the provincial boundary between KwaZulu-Natal and the Eastern Cape because the KwaZulu-Natal legislature had failed to facilitate public involvement.[5] The amendment was made only a few months before the 2006 municipal elections and the decision given a few months after the election. The Court decided to suspend the declaration for 18 months. The declaration posed the possibility of a massive disruption in service delivery. Moreover, Parliament could pass another amendment — this time following the correct procedure — in the same terms as the invalidated amendment. However, the Court recognised that '[i]f Parliament decides not to proceed with the amendment, or does not enact it within the period of suspension, or if the KwaZulu-Natal provincial legislature decides to veto an amendment that alters its

[1] 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC).
[2] Proclamation R7 of 1996.
[3] 2006 (4) SA 309 (CC), 2006 (5) BCLR 604 (CC).
[4] *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa & Others* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at para 139 ('In the event of the period of one year . . . expiring before the defect in question is corrected, the declaration of invalidity in paragraph 4.1 above will only take effect as from the date of such expiry.')
[5] 2007 (1) BCLR 47 (CC)('*Matatiele II*').

boundary, *the order of invalidity will take effect and the elections of 1 March 2006 will be rendered invalid.*'[1] It therefore contemplated the retrospective effect of the suspended order. If the order did not have retrospective effect, the past election could not be rendered invalid. (That said, the change in municipal boundaries would have necessitated a new election).

Matatiele II is an easy case because it explicitly states that the order could have retrospective effect. The difficult cases occur when the rationale for the Court's order is not based on a need to avoid disruption and the Court remains silent on retrospectivity. In *Volks NO v Robinson*,[2] a minority of the Court would have read-in words to extend the Maintenance of Surviving Spouses Act[3] to apply to permanent heterosexual life-partners. It would have suspended the order because it recognised that there were a number of ways the legislature could solve the problem. However, if the legislature had failed to attend to the matter, then one would expect that the order would have had the same limited retrospective effect that the Court has employed for other succession cases. The invalidity would apply to all estates that have not yet been finalised. In situations such as *Volks*, there is enough uncertainty to necessitate an application to the Court to clarify the position, but there is no principle that prevents suspended orders from acting retrospectively.[4]

(z) Calculating time periods

Considering the difficulty in getting periods of suspension extended,[5] it is necessary to know exactly how time periods are calculated. In *Ex Parte Minister of Social Development,* the Constitutional Court had to consider how time periods in suspension orders should be computed.[6] The relevant order of invalidity had been delivered on 6 September 2004 and suspended its effect for 18 months.[7] On 6 March 2006, the Minister applied for an order extending the period of suspension. The Court rejected the Minister's contention that a special form of computation of time should apply to suspensions of invalidity.[8] It held that ordinary

[1] *Matatatiele II* (supra) at para 96.
[2] 2005 (5) BCLR 446 (CC).
[3] Act 27 of 1990.
[4] Indeed, a principled approach would place the onus on the person disclaiming retrospectivity as orders are always retrospective unless specified otherwise. However, a practical approach seems more appropriate — at least until the Court provides greater clarity — and the person seeking retrospective application of a suspended order should apply to the Court to make it clear whether the order operates retrospectively or not.
[5] See § 9.4 *(e) (i)*(ee) infra.
[6] 2006 (4) SA 309 (CC), 2006 (5) BCLR 604 (CC).
[7] The declaration of invalidity emanated from the decision in *Mashavha v President of the RSA.* 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC).
[8] 2006 (4) SA 309 (CC), 2006 (5) BCLR 604 (CC) at paras 25–26.

common-law rules of computation of time should apply: the period would expire at the end of the day of the previous calendar day of the relevant month. In this case, the period would expire at midnight on 5 March 2006.[1]

(bb) When is suspension appropriate?

In *Coetzee v Government of the Republic of South Africa & Others* — the first case in which the Constitutional Court considered (and rejected) the option of suspension — Sachs J foretold the Court's approach for the next 13 years:

> The words 'in the interests of justice and good government'[2] are widely phrased and, in my view, it would not be appropriate, particularly at this early stage, to attempt a precise definition of their ambit. They clearly indicate the existence of something substantially more than the mere inconvenience which will almost invariably accompany any declaration of invalidity, but do not go so far as to require the threat of total breakdown of government. Within these wide parameters, the Court will have to make an assessment on a case-by-case basis as to whether more injustice would flow from the legal vacuum created by rendering the statute invalid with immediate effect, than would be the case if the measure were kept functional pending rectification. No hard and fast rules can be applied.[3]

Although the Court operates on a case-by-case analysis, one can divine some common features in its suspension jurisprudence. In short, some factors support suspension and some factors do not.[4] In *J & Another v Director General, Department of Home Affairs & Others,* Goldstone articulated the primary components of the Court's inquiry:

> the Court must consider, on the one hand, the interests of the successful litigant in obtaining immediate constitutional relief and, on the other, the potential disruption of the administration of justice that would be caused by the lacuna.[5]

[1] *Ex Parte Minister of Social Development* (supra) at paras 23–24.

[2] Referring to IC s 98(5). The equivalent in the Final Constitution is s 172(2) which permits an order of suspension if it is 'just and equitable'.

[3] 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC) at para 76 (footnote added). See also *First National Bank v Land and Agricultural Bank* 2000 (3) SA 626 (CC), 2000 (8) BCLR 876 (CC) at para 13 ('To suspend an order in terms of s 172(1)*(b)*(ii) it is required that the purpose served by the challenged statute outweighs the constitutional violation effected under its provisions'); I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 212 ('The possible detrimental effects of immediate invalidation must be compared against the detrimental effects of continued operation of the unconstitutional law or conduct. This involves a prediction. The court must determine whether a declaration of invalidity with immediate effect will result in a situation that is more inconsistent with the Constitution than the existing situation.' (Footnotes omitted.))

[4] In *Mistry*, 1the Court proposed the following list of factors: 'what the negative consequences for justice and good government of an immediately operational declaration of invalidity would be; why other existing measures would not be an adequate alternative stop-gap; what legislation on the subject, if any, is in the pipeline; and how much time would reasonably be required to adopt corrective legislation.' *Mistry v Interim Medical and Dental Council of South Africa & Others* 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC) at para 30. I have identified a few more factors and prefer to deal with the last two listed here as issues concerning the length of suspension, as that seems to be where they have their primary impact.

[5] 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC) at para 21.

This statement properly sets out the main elements of the test. There are, however, other factors that are also relevant.

(x) Factors in support of suspension

One: The most common and obvious use for a suspension order is when an immediate order of invalidity will create a lacuna in the law that would create uncertainty, administrative confusion or potential hardship.[1] For example, in *S v Ntuli* the Constitutional Court set aside legislation requiring that people appealing from the Magistrates' Court obtain a judge's certificate.[2] Because of the massive number of appeals that would ensue and the need to create structures to deal with those appeals, the Court suspended the order to allow for those structures to be created.[3] The Court in *South African National Defence Union v Minister of Justice* suspended a declaration lifting a ban on trade unions in the military to allow the Defence Force to create regulations.[4] It reasoned that immediate invalidity would be 'potentially harmful' and that regulations 'should assist in avoiding the disruption to discipline feared by the respondents and to ensure that labour relations develop in an orderly and constructive manner.'[5] In *South African Association of Personal Injury Lawyers v Heath & Others*, Chaskalson P held that the Special Investigating Unit that had been set up to investigate government corruption could not be headed by a judge.[6] He suspended the order so as not to disrupt the 'important work' being done by the Unit.[7]

[1] See *Prince v President, Cape Law Society & Others* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) at para 86 (The minority — Ngcobo, Mokgoro and Sachs JJ and Madlanga AJ — would have required an exemption to legislation criminalizing cannabis for Rastafarians. They would have suspended the declaration because immediate invalidity 'would result in an uncontrolled use of cannabis and this will undermine the admittedly legitimate governmental goal of preventing the harmful effects of dependence-producing drugs and trafficking in those drugs'); *Van Rooyen & Others v the State & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 272 (Suspended invalidity of provision permitting *ad hoc* appointment of acting magistrates 'to permit temporary magistrates to be appointed when that is necessary pending an appropriate amendment to the section.' The concern apparently being that not permitting any magistrates to be appointed would be detrimental to the functioning of the Magistrates' Courts); *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa & Others* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at para 135 (Court concluded that Parliament did not have the power to amend municipal powers as it had usurped the powers of the Municipal Demarcation Board. It suspended the order because failing to do so would result in there being 'no mechanism for declaring district management areas.').

[2] 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC).

[3] Ibid at paras 27–28. See also *S v Steyn* 2001 (1) SA 1146 (CC), 2001 (1) BCLR 52 (CC) at paras 45–46 (The Court invalidated the legislative response to *Ntuli* and again suspended the period to allow a new system to be implemented. The Court however granted a much shorter suspension period and coupled it with an interim order to regulate the situation in the meantime. Ibid at para 47.)

[4] 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC).

[5] Ibid at para 42.

[6] 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC)('*Heath*').

[7] Ibid at paras 49–50.

A variation of this motivation — not to disrupt important work or services — has been relied on to protect the holding of future elections and the validity of past elections. The Court in *Executive Council of the Western Cape* suspended an order to ensure that the first local government elections went ahead. It reasoned that even the possibility that the elections would be disrupted 'could lead to increased tension in areas where the inhabitants are anxious to democratise their local structures and to considerable waste of expenditure bearing in mind the preparations that are already under way and the steps that have been taken to lay the groundwork for such elections.'[1] In *Matatiele II* the Court also refused to invalidate elections. Had they done so there would have been 'no municipalities in the affected areas'. The absence of these municipalities would 'have serious implications for the provision of services in the affected areas.'[2]

An undesirable lacuna in the law does not necessarily exist merely because a power or requirement is removed: the remaining powers may well continue to give adequate effect to the purpose of the legislation.[3] Indeed, in the majority of the cases in which the issue has been considered, the Court has rejected claims that immediate invalidity will create a lacuna. In *Coetzee v Government of the Republic of South Africa*, the Court held that the invalidation of imprisonment as an option to enforce civil debt collection could take immediate effect because the system of enforcing debts was not 'dependent upon the imprisonment sanction for its

[1] *Heath* (supra) at para 110 (Chaskalson P) and paras 158–159 (Ackermann & O'Regan JJ).

[2] *Matatiele II* (supra) at para 92.

[3] See *Magajane v The Chairperson, Northwest Gambling* Board 2006 (5) SA 250 (CC), 2006 (10) BCLR 1133 (CC) at para 99 (The Court invalidated provisions permitting searches without warrant of unlicensed casinos. It held that the remaining search and inspection options were more than sufficient to fulfil the purpose of the Act); *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC), 2007 (5) BCLR 457 (CC) at para 44 (The Court invalidated a regulation requiring certain claimants from the Road Accident Fund to file an affidavit with the police within 14 days. It did not suspend the declaration as the purposes of the Act could be achieved without that requirement); *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at para 38 (Invalidity of legislation banning public protest by soldiers not suspended because other regulations preventing acts causing 'actual or potential prejudice to good order and military discipline' catered for any gap); *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 106 (Declared legislation permitting non-judicial officers to imprison people who failed to answer questions at an insolvency inquiry unconstitutional because only judicial officers should have that power. Refused to suspend the order because the function could validly be performed by magistrates); *Minister of Welfare and Population Development v Fitzpatrick & Others* 2000 (3) SA 422 (CC), 2000 (7) BCLR 713 (CC) at paras 35–36 (Order permitting foreign couples to adopt South African children not suspended because existing legislation and international law provided adequate safeguards to children); *First National Bank (FNB) of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 123 (Invalidated legislation permitting the forfeiture to pay customs debts of property owned by people not responsible for the debt because those 'goods represent no more than a minute proportion of goods annually attached and its effect on the fiscus is negligible'); *Du Toit & Another v Minister of Welfare and Population Development & Others (Lesbian and Gay Equality Project as* Amicus Curiae) 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC) at para 41 (Court permitted homosexual and unmarried couples to adopt children because the upper guardianship of the High Court provided sufficient safeguards.)

viability' and there were 'a number of other aids to judgment debt collection in the system.'[1] That was also the reasoning in *Case v Minister of Safety and Security*.[2] The Court struck down laws prohibiting the possession of obscene material for being overbroad. It refused to suspend the order because there was sufficient other legislation prohibiting the dealing in various forms of obscene and indecent material.[3] A final example is *Ex parte Minister of Safety and Security and Others: in Re S v Walters and Another*.[4] The *Walters* Court invalidated s 49(2) of the Criminal Procedure Act[5] which permitted the use of lethal force to effect an arrest or prevent a suspect from fleeing. The Court found it unnecessary to suspend the order because the surviving s 49(1) provided the police with sufficient powers to effect arrests.[6] All these cases indicate that the Court will scrutinize very closely any allegation that invalidity will create a gap in the law.

Two: Suspension may also be appropriate where multiple legislative cures to the constitutional defect exist.[7] This rationale is based on the separation of powers doctrine. It is for the legislature, not the judiciary, to make policy decisions where the Final Constitution does not require a particular outcome.[8] In *Fraser v Children's Court, Pretoria North*, the Court had invalidated a provision that did not require the consent of fathers of children born-out-of-wedlock for their adoption.[9] When determining the remedy, Mahomed DP found that there were 'multifarious and nuanced legislative responses which might be available to the legislature in meeting these issues' and that it was therefore 'in the interests of justice and good government that there should be proper legislation to regulate' the situation.[10] The Court suspended the order for two years notwithstanding the

[1] 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC)('*Coetzee*') at para 18.
[2] 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC).
[3] Ibid at paras 84–86 (Mokgoro J, concurred in this part by the majority).
[4] 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC)('*Walters*').
[5] Act 51 of 1977.
[6] *Walters* (supra) at para 76.
[7] See *Mashavha v The President of the Republic of South Africa & Others* 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC) at para 69 (Van der Westhuizen J suspended an order invalidating the assignment of the payment of social grants to the provinces because the whole social payment grant needed to be 'unified' which was a 'Herculean task' requiring legislative action); *South African Defence Union v Minister of Defence & Others* 2007 (5) SA 400 (CC), 2007 (8) BCLR 863 (CC) at para 103 (Order invalidating legislation regulating membership of Military Arbitration Boards who determine union disputes suspended because there were so many ways that the legislation could be constitutionally constituted); *S v Jordan & Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) at paras 125–126 (O'Regan and Sachs JJ, in dissent, would have found that a law criminalizing only the prostitute and not her client was unfairly discriminatory. Because the constitutional defect was not based on the right to privacy, decriminalization was not the only option available to the legislature. It could also choose to criminalize prostitution without discriminating. They therefore would have suspended the invalidity.)
[8] See generally S Seedorf & S Sibanda 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12.
[9] 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC)('*Fraser*').
[10] Ibid at para 50.

fact that this suspension would deny the applicant the relief he sought.[1] Similar concerns motivated the Court to suspend the order in *Dawood*.[2] The *Dawood* Court had invalidated, as a violation of the right to dignity, a provision which limited the right of foreign spouses of South African citizens to reside in South Africa while seeking permanent residence status. O'Regan J reasoned:

> There are a range of possibilities that the legislature may adopt to cure the unconstitutionality. For example, the legislature may decide that it is not necessary for foreign spouses of persons permanently and lawfully resident in South Africa to possess valid temporary residence permits while their applications for immigration permits are being processed. Another alternative would be for the legislature to provide an exhaustive list of circumstances that it considers would permit an official justifiably to refuse to grant a temporary permit. There are almost certainly other alternatives as well. Where, as in the present case, a range of possibilities exists, *and the Court is able to afford appropriate interim relief to affected persons*, it will ordinarily be appropriate to leave the legislature to determine in the first instance how the unconstitutionality should be cured. This Court should be slow to make those choices which are primarily choices suitable for the legislature.[3]

The italicised portion of the above quote indicates a slight departure from the approach under *Fraser*. The existence of legislative choice on its own should not, it would seem, justify suspension where continued validity would have an ongoing deleterious effect on the applicant's constitutional rights. In such circumstances, other concerns must justify a suspension — such as the possibility of service disruption or the need to protect the threatened rights.[4]

The difference in approach appears to be the basis for the disagreement within the Court regarding the appropriate order in *Minister of Home Affairs & Another v Fourie*.[5] In *Fourie*, the Court held that the common law and legislation preventing same-sex couples from marrying was unconstitutional and read-in words to cure the defect. However, the majority of the Court decided to suspend the invalidity for one year. It did so not because immediate invalidity would create a gap in the law, but because there was a limited range of choices as to exactly how same-sex couples could be accommodated.[6] But if we take *Dawood* seriously, the presence of an array of legislative choices should not, on its own, justify a suspension without interim relief. This recognition might have prompted Sachs J to put forward two additional justifications: *(a)* legislation would ostensibly provide a more solid foundation for the change in the law and would lessen the likelihood

[1] *Fraser* (supra) at para 51.
[2] *Dawood & Another v Minister of Home Affairs & Others ; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC).
[3] Ibid at paras 64–65.
[4] For more on interim orders, see § 9.4*(e)(i)*(cc) infra.
[5] 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)('*Fourie*').
[6] Ibid at para 139.

of an alteration of the law in the future;[1] and *(b)* on such a contentious social issue, a change in the law would be viewed as more legitimate if it was initiated by the legislature rather than the courts:

> The right to celebrate their union accordingly signifies far more than a right to enter into a legal arrangement with many attendant and significant consequences, important though they may be. It represents a major symbolical milestone in their long walk to equality and dignity. The greater and more secure the institutional imprimatur for their union, the more solidly will it and other such unions be rescued from legal oblivion, and the more tranquil and enduring will such unions ultimately turn out to be.[2]

These justifications have not been used before or since *Fourie* to justify suspension. The justifications appear to turn on the Court's awareness that same-sex marriage was extremely unpopular in South Africa. It is difficult to imagine that the Court would have felt it necessary to suspend the order if the majority of citizens were overwhelmingly in favour of permitting same-sex couples to marry.

O'Regan J dissented on the issue of suspension. She reasoned as follows. Given that the definition of marriage was found in the common law and that the common law remains within the accepted purview of the courts,[3] that the choices available to Parliament were very limited,[4] that it was important to provide individual relief,[5] and that Parliament always retained the power to amend the position later,[6] the order should have had immediate effect.[7] O'Regan J was correct not to take the majority's reliance on legislative choice seriously. The 'guidelines' the majority provided offered Parliament little space for choice. Justice Sachs wrote that the new law must not 'create equal disadvantage for all'[8] and must also be 'as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved.'[9] It is difficult to think of any remedy other than granting homosexuals all the benefits of marriage and calling the new institution of homosexual union 'marriage' that would satisfy these criteria. The justification for the remedy in *Fourie* relies entirely on an alleged need for stability and greater public acceptance. Ordinarily, such ground would not justify a suspension of invalidity. However, because the effect of suspension in *Fourie* was only to delay, not permanently deny, the applicants' rights, these weak justifications may be defensible, if not terribly convincing.

[1] *Fourie* (supra) at paras 136–137.
[2] Ibid at para 137. See also ibid at para 138.
[3] Ibid at para 167.
[4] Ibid at para 168.
[5] Ibid at para 170.
[6] Ibid at para 168.
[7] Ibid at para 173.
[8] Ibid at para 149.
[9] Ibid at para 153.

Three: If the deficiency found in the law is purely procedural, the Court may suspend the order to give the legislature a chance to pass new legislation according to the proper procedures and to avoid a gap in the legal system. In *Doctors for Life International v Speaker of the National Assembly & Others,*[1] the Court invalidated two entire pieces of legislation — the Traditional Health Practitioners Act[2] and the Choice on Termination of Pregnancy Amendment Act[3] — because of a failure by the National Council of Provinces to facilitate public involvement. It suspended the order of invalidity for the following reasons: 'Members of the public may have already taken steps to regulate their conduct in accordance with these statutes. An order of invalidity that takes immediate effect will be disruptive'.[4] It would be particularly disruptive to remove the existing legal framework only to have that framework return when Parliament passed the legislation again with the correct procedure.

(y) Factors against suspension

There is always a presumption against suspension. In the absence of any of the factors discussed above, suspension will not be granted. The two factors mentioned here will only become relevant if some of the factors favouring suspension are also present.

Perhaps the primary factor which weighs against granting a suspension is the importance of the right at issue to the constitutional scheme, or the extent of the violation of the right.[5] Kriegler J in *Coetzee v Government of the Republic of South Africa* held that even if immediate invalidity of the system of imprisonment for civil debt would 'lead to a break down of the whole debt collection procedure' the order could not be suspended because civil imprisonment 'is so clearly inconsistent with the right to freedom protected by [IC] section 11(1) and so manifestly indefensible under section 33(1) of the [Interim] Constitution that there is no warrant for its retention, even temporarily.'[6] In *Bhe & Others v Magistrate, Khayelitsha & Others,* the Court likewise rejected the option of suspending an order

[1] 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC)('*Doctors for Life*').
[2] Act 35 of 2004.
[3] Act 38 of 2004.
[4] *Doctors for Life* (supra) at para 214.
[5] See, for example, *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 30 (Suspension of reverse onus provision for cannabis possession would result in possibly innocent people being convicted); *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC) at para 30 (Suspension inappropriate because the provision — which created a reverse onus for arms possession — was 'not only manifestly unconstitutional, but [would] also result[ ] in grave consequences for potentially innocent persons in view of the serious penalties prescribed') *De Lange v Smuts NO* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 106 ('It would . . . be unconscionable to continue to allow persons to be committed to prison unconstitutionally in the future.')
[6] *Coetzee* (supra) at para 18.

invalidating the customary-law rule of primogeniture.[1] Langa DCJ's sole justification was that '[t]he rights implicated are [so] important … [that] those subject to the impugned provisions should not be made to wait much longer to be relieved of the burden of inequality and unfair discrimination'.[2] Of course, if the suspension will not result in further violations of the rights in question, then the severity of the past violation loses its relevance.[3]

However, the value of the right at issue is not always decisive. In *Moseneke & Others v The Master of the High Court & Another,* the Court was confronted with perhaps the most flagrant violation of the Final Constitution: a statue that created different procedures for the administration of the estates of Black people.[4] The Court acknowledged that the law was 'manifestly racist', made 'invidious and wounding distinctions on grounds of race'[5] and was part of 'a law which was a pillar of "the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice"'.[6] Despite the odious aspects of the law, it suspended the order of invalidity because the law had become 'encrusted with processes of great practical, day-to-day importance to a large number of people' and immediate invalidity would cause 'undue dislocation and hardship'.[7] It was necessary for the legislature to create a new system. However, in line with the reasoning in *Dawood,* the Court did draft an interim order to protect individuals against the 'continuing indignity of racist treatment'.[8]

Two: The Court will be very reluctant to grant suspension if it has previously granted a suspension on the same or similar issue. In *S v Steyn*[9] the Court had to consider the legislature's attempt to remedy the provisions declared unconstitutional several years earlier in *S v Ntuli.*[10] The state had failed to make use of the suspension granted in *Ntuli* and had enacted new provisions after that period expired[11] which failed to take account of the Court's judgments and again limited accused persons' right to appeal. Somyalo AJ expressed the Court's extreme displeasure at the state's conduct and made it clear that their continued failure to mend the situation weighed against granting another suspension:

[1] 2005 (1) SA 563 (CC), 2005 (1) BCLR 1 (CC).

[2] Ibid at para 108.

[3] See *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 50 (Noting that the damage to the independence of the judiciary had already been caused and would not be substantially worsened by a suspension of invalidity.)

[4] 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC).

[5] Ibid at para 25.

[6] Ibid at para 26 quoting the epilogue to the Interim Constitution.

[7] Ibid at para 26.

[8] Ibid at para 27.

[9] 2001 (1) SA 1146 (CC), 2001 (1) BCLR 52 (CC)('*Steyn*').

[10] 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC).

[11] See *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC)(The state applied for an extension of the suspension period in *Ntuli* which the Court refused. For more detail, see § 9.4*(e)(i)*(ee) infra.)

> [Suspension] by no means sanctions tolerance for that which has already been adjudged inconsistent with the Constitution. Even in the face of this Court's suspension of an order of invalidity, it is imperative that obligations imposed by the Constitution remain. Any unconstitutionality must be cured "diligently and without delay".[1]

In such circumstances the Court will not necessarily refuse to order suspension altogether, it is more likely, as the Court concluded in *Steyn*, to affect the length of the suspension.[2] In *S v Shinga* — the most recent (and hopefully final) case in the saga of Magistrate's Court appeals — Yacoob J did not even mention the possibility of suspension.[3] This silence might be a direct result of the states continuous failure to make good on previous suspensions.[4] Related issues, such as whether new legislation is in the pipeline, might also affect the court's determination. However, even pipeline legislation is only likely to affect the length of the period of suspension.[5]

(cc) Interim orders

I have, in the preceding discussion, referred to the possibility of granting an interim remedy during the period of suspension to diminish the continued violation of rights. It is a power that the Court has exercised fairly regularly and a practice that, in my view, should be expanded even further. These interim orders fall into two broad categories: those orders that establish guidelines for the exercise of a power and those orders that read-in words to the statute.

The Court first granted an interim order in *Dawood & Another v Minister of Home Affairs*.[6] The *Dawood* Court held that s 25(9) of the Aliens Control Act[7] violated the right to dignity because it gave officials the discretion to refuse to grant a temporary residence permit to the spouse of a South African Citizen without giving any guidance as to how that discretion should be exercised. The Court held that a suspension was necessary because there were a number of options open to the legislature on how to regulate the issue in the future. However, O'Regan J then noted that the Court should also 'ensure that appropriate relief is provided to the successful litigants in this case, and to those who are situated similarly to those litigants in the meantime.'[8] She therefore included a mandamus

[1] *Steyn* (supra) at para 45. See also *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at paras 40–42 (Noted that the Defence Force's tardiness in remedying the constitutional defect weighed against suspension, but still granted a very short 3-month suspension.)

[2] For more, see § 9.4*(e)(i)*(dd) infra.

[3] 2007 (5) BCLR 474 (CC), 2007 (2) SACR 28 (CC).

[4] The Court did however suspend the order for two weeks under the misleading heading of 'retrospectivity'.

[5] See *Walters* (supra) at para 76 (Refuses suspension in part because there was legislation 'in the wings' that could be put into effect in a matter of days.)

[6] 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC)('*Dawood*').

[7] Act 96 of 1991.

[8] *Dawood* (supra) at para 66 (footnote omitted).

in the order that required the relevant officials, when exercising their discretion, to consider the constitutional rights of the applicants and only to refuse the permit if 'good cause' was shown.[1] Justice O'Regan maintained that this order constituted a limited interference with the legislative power to provide guidance to decision-makers, and, therefore, that it was 'the best way in which to avoid usurping the function of the legislature on the one hand without shirking our constitutional responsibility to protect constitutional rights on the other.'[2]

The reasoning and approach in *Dawood* was followed soon after in, amongst other cases,[3] *Janse van Rensburg v Minister of Trade and Industry*.[4] The challenged provision permitted the Minister to issue orders to stay or prevent unfair business practices. The Court concluded that it was unconstitutional because it did not provide the Minister with any guidance on how to exercise her powers. The Court suspended the order of invalidity. At the same time, it provided detailed guidelines on how the Minister should exercise her discretion until new legislation was enacted.[5] It stressed that the guidelines were not meant to inform any future legislative enactments. The order merely regulated the exercise of executive discretion in the intervening period.[6] The Court also used an interim remedy in *S v Steyn*.[7] The decision had a long history as the Court had previously declared similar provisions regulating appeals from the Magistrates' Court unconstitutional. Although Madlanga AJ agreed to give the legislature one last chance to remedy the defect, he held that it was 'necessary to ameliorate the adverse effects of the leave to appeal and petition procedure' in the interim.[8] These procedures required the clerk of the Magistrates Court to provide the High Court with the record of the case in certain circumstances. The final order reads more like a piece of legislation in the way it identifies when a record is required and went far further than the Court would have gone if they had altered the law through a permanent reading-in.[9]

[1] *Dawood* (supra) at para 67.

[2] Ibid at para 68.

[3] See also *Booysen & Others v Minister of Home Affairs & Another* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC)(In a very similar case to *Dawood* — this time involving work permits — the Court gave an order in terms comparable to that in *Dawood*.); *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at paras 136 and 216–218 (Mokgoro and O'Regan JJ as well as Sachs J, in dissent, would have suspended an order invalidating the restriction of maintenance to surviving spouses only to married couples because 'the discrimination we have found may be cured by the Legislature in a variety of ways and that those ways need not be identical to the manner in which marriages are currently regulated.' The minority would, like the *Dawood* Court, have provided an interim solution.)

[4] 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC).

[5] Ibid at paras 29–36.

[6] Ibid at para 30.

[7] 2001 (1) SA 1146 (CC), 2001 (1) BCLR 52 (CC).

[8] Ibid at para 47.

[9] See also *Zondi v MEC for Traditional and Local Government Affairs & Others* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC)(The Court struck down laws permitting farmers to sell livestock that wandered onto their property. Ngcobo J crafted detailed interim procedures that would protect stockowners from having their livestock sold without their knowledge. Like *Steyn*, the procedures read more like legislation than a court order)

The second class of cases — where the Court alters the wording of the legislation — needs to be properly understood. As I noted earlier,[1] the Court has expressed the opinion that reading-in (or severance or notional severance) and suspension should be mutually exclusive.[2] This statement is not compatible with the Court's interim remedies jurisprudence. Why the discrepancy? When a court reads in as an interim measure, it has already found that reading-in as a permanent solution is inappropriate and suspension is necessary (normally because of the range of possible solutions). Nonetheless, it concludes that until the legislature gets around to deciding which of the many options it prefers, a stop-gap measure is required. The temporary reading-in is not an ultimate cure for the constitutional defect. Conceived as such, temporary reading-in does not violate the principle requiring reading-in rather than suspension.

The two examples of this practice are *Moseneke v The Master of the High Court*[3] and *South African Liquor Traders Association & Others v Chairperson, Gauteng Liquor Board & Others*.[4] In *Moseneke* the Court invalidated the sections of the Black Administration Act that provided for the estates of Black people to be administered by Magistrates, while white estates were dealt with by the Master of the High Court. As explained earlier, the Court suspended the order because of the practical value of the procedure. In the interim, it ordered that black people should be able to choose whether their estates would be governed by the Magistrates or the High Court. To accomplish this end, it ordered that the word 'shall' in the relevant section should be read as 'may' for the duration of the suspension.[5]

South African Liquor Traders offers an even more extreme example of the extent of the Court's interim remedial powers. The Court struck down as vague and irrational provincial legislation which limited the amount of beer that shebeens could sell to '10 cases' without specifying the period within which those cases must be sold. The Court deemed it necessary to suspend the order to allow the Gauteng Legislature to attend to the problem, but also concluded it necessary to provide some interim regulation because it would be inconsistent with the rule of law to leave in force a provision that was meaningless.[6] Based on the evidence before it, it concluded that most shebeens sold approximately 60 cases of beer per week and ordered that during the suspension period, the legislation and all licenses issued under it, should be read accordingly.[7]

[1] See § 9.4*(d)*(iii) supra.

[2] *J & Another v Director General, Department of Home Affairs & Others* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC) at para 21.

[3] 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC)('*Moseneke*').

[4] 2006 (8) BCLR 901 (CC)('*South African Liquor Traders*').

[5] *Moseneke* (supra) at para 27. In some sense this is more of a reading down than a reading-in because the word is not replaced, but 'read as'. However, it would not make sense for it to be a reading down because then there would be no reason for it not to be permanent. However it is classified, the order remains a good example of the possibilities of interim relief.

[6] *South African Liquor Traders* (supra) at para 41.

[7] Ibid at paras 43–45.

The usefulness of both categories of interim remedies is obvious. It permits the Court to have the best of both worlds — deferring ultimately to the legislature, but providing interim relief to the litigants and other similarly situated persons. Because they are only stop-gap measures that do not permanently interfere with the law, the Court feels free to go further than it might were the judgment to require permanent reading-in of potentially contentious wording or the fashioning of quite detailed procedures to guide the executive. Such flexible 'new tools' can be used to vindicate rights without interfering with other remedial goals. An interim remedy could, for example, have been productively employed in *Fraser* to prevent the applicant's child from being adopted without his consent.[1]

Of course, interim remedies will not always be helpful. I tend to agree with Justice Sachs that an interim remedy would not have served any purpose in *Fourie*. The very reason to suspend the invalidity was to find a permanent solution to the problem.[2] It would also not have helped in cases like *Matatiele*[3] or *Doctors for Life*[4] where the purpose of the suspension was to allow the legislature to craft a remedy for a procedural defect.

(dd) The Period of Suspension

The period for which the Constitutional Court suspends a declaration of invalidity varies widely from two weeks[5] to 18 months.[6] The majority of suspensions range from 12 to 18 months. The Court has not constructed any rules in this regard, nor would it have been wise for it do so. Each case should be judged on its merits. Generally, the relevant factors for determining the period of suspension are: the government's previous conduct;[7] whether there is any legislation in the pipeline or how long it will take to draft new legislation if there is not;[8] and the nature and severity of the continuing infringement. The onus is on the government to provide the court with the information necessary for it to make a reasoned decision. In addition, courts should remember that suspension is always a departure from the standard position that remedies for violations of constitutional rights should be immediate. Courts should always, therefore, adopt the shortest feasible time period for suspension.[9]

[1] For example, the Court could have read-in words permitting the Children's Court to depart from the general rule that paternal consent was unnecessary on application by the father.

[2] *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others as Amici Curiae); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at paras 154–155.

[3] *Matatiele Municipality & Others v President of the RSA & Others* 2007 (1) BCLR 47 (CC)('*Matatiele II*').

[4] *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC)('*Doctors for Life*').

[5] *S v Shinga* 2007 (5) BCLR 474 (CC), 2007 (2) SACR 28 (CC).

[6] See, for example, *Doctors for Life* (supra); *Matatiele II* (supra).

[7] *Steyn* (supra) at para 46.

[8] *Mistry v Interim Medical and Dental Council of South Africa & Others* 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC) at para 30.

[9] See K Roach & G Budlender 'Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?' (2005) 122 *SALJ* 325, 340–341.

(ee) Can suspension be extended?

On three occasions the State has applied to the Constitutional Court for an extension of the period of suspension in order to enact the provisions that would remedy a constitutional flaw. These three cases paint a fairly clear picture of when an extension will be granted, and when it will not.

In *Minister of Justice v Ntuli* the Minister applied for an 'extension' of the period after the original period had expired.[1] The Court pointed out that as the period had already expired, the Minister was in reality asking for a revival of the suspension. The Court expressed severe doubts as to whether such a revival was possible.[2] However, while the *Ntuli* Court assumed that there might be exceptional cases where such an order was possible, given the lassitude of the Minister and the minimal effect of the order of invalidity, the Court decided that the instant matter was not an appropriate case for such an order.[3]

In *Zondi v MEC for Traditional and Local Government Affairs & Others,* the Minster asked for an extension of suspension before the expiry of the original period.[4] The Constitutional Court held that it had not only the power, but an obligation under FC s 172(1) to extend the period, if it would be just and equitable on the facts of the case.[5] Ngcobo J emphasised, however, that the power only existed for as long as the original suspension period lasted.[6] While noting that in the interests of finality extending a period of suspension was a power that should be 'very sparingly exercised', it was ultimately a question of what relief was just and equitable.[7] Factors relevant to that decision included

> the sufficiency of the explanation for failure to comply with the original period of suspension; the potentiality of prejudice being sustained if the period of suspension were extended or not extended; the prospects of complying with the deadline; the need to bring litigation to finality; and the need to promote the constitutional project and prevent chaos.[8]

The *Zondi* Court found that the case satisfied these criteria and that it was therefore appropriate to extend the suspension period.

Ex Parte Minister of Social Development is the final case in the trilogy.[9] In *Mashava v President of the Republic of South Africa & Others*, the Court had set aside a

[1] 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC)('*Ntuli*').

[2] Ibid at para 26 ('The construction suggested by counsel for the Minister would enable a Court to revive a statute which it had previously declared to be invalid. If such an unusual power had been intended, I would have thought that it would be expressed in language much clearer than that which has been used, and that there would at least be some indication of the circumstances which would have to exist to justify the exercise of the power.')

[3] Ibid at paras 35–39.

[4] 2006 (3) SA 1 (CC), 2006 (3) BCLR 423 (CC).

[5] Ibid at para 39. The Court considered that it might also have the power under FC s 173 which gives the Court the power to regulate its own process. However, it found it unnecessary to decide the question.

[6] Ibid at paras 40 and 43.

[7] Ibid at paras 46–47.

[8] Ibid at para 47.

[9] 2006 (4) SA 309 (CC), 2006 (5) BCLR 604 (CC)('*Ex Parte Minister of Social Development*').

presidential proclamation that provided for the payment of social grants and suspended the order for 18 months. The Minister lodged an application the day before the period expired and the case was heard on the day the order expired. The effect of the *Mashava* order coming into force would be the absence of legal authority for the state to pay social grants.[1] The Court, though not unmindful of the hardship this lacuna in the law might cause, correctly confirmed what had been implicit in *Ntuli* and *Zondi* : a court has no power to revive an invalid law.[2] According to van der Westhuizen J

> There are important reasons of constitutional principle underlying the conclusion that a court is not empowered to resuscitate legislation that has been declared invalid. To do so, a court would in effect legislate. Such an exercise would offend both the separation of powers principle in terms of which law-making powers are reserved for the legislature, and the principle of constitutional supremacy which renders law that is inconsistent with the Constitution invalid.[3]

While clearly not wanting to encourage that the grants be paid without legal authority, the Court suggested that there might be other means to ensure that people received their grants.[4]

(ii) *Retrospectivity*

While the power to suspend an order of invalidity allows courts to determine the impact of the order on the future, the power to limit the retrospective effect permits regulation of the order's consequences for the past. Of course, the regulation of the past is only interesting because it affects the present. The retrospective effect of an order of invalidity can determine whether people remain in jail, receive inheritances, or are able to bring claims for damages. It may also determine whether subordinate legislation or executive action taken under an invalid law shares its fate.

In this section I describe, first, the default position for the retrospective application of laws and the variety of mechanisms a court can employ to regulate the retrospective effect of an order. Second, I discuss the reasons that may motivate a court to depart from that default position. Thirdly, and finally, I criticise the Court's approach to retrospectivity as overly cautious.

(aa) Mechanics of Retrospectivity

This section first explains how retrospectivity operates in the absence of any order by a court. It then briefly considers the various ways in which a court can limit retrospectivity.

[1] *Ex Parte Minister of Social Development* (supra) at paras 18–19.
[2] Ibid at para 38.
[3] Ibid at para 39.
[4] Ibid at paras 45–46.

(x) The Default Position

The retrospectivity provisions of the Final Constitution differ markedly from those in the Interim Constitution. Under s 98(6) of the Interim Constitution,[1] a distinction was drawn between pre- and post-constitutional law. A declaration of constitutional invalidity of a law existing when the Interim Constitution was adopted (pre-constitutional law) would not operate retrospectively and therefore would not invalidate acts performed under the invalid law, unless the Constitutional Court ordered otherwise.[2] However, an order invalidating post-constitutional law would ordinarily — again, unless the Constitutional Court ordered otherwise — operate retrospectively and thus invalidate all acts performed in terms of that law. The reason for this distinction was explained in *Executive Council, Western Cape* as follows: 'The former are an inheritance from the past. The latter are the actions of a Legislature in a constitutional State and special circumstances must exist to justify a decision by the Court to give validity to such legislation.'[3]

The Final Constitution differs from the Interim Constitution in three important ways. Ackermann J identified these differences in *National Coalition for Gay and Lesbian Equality v Minister of Justice*.[4] First, the Final Constitution draws no distinction between pre- and post-constitutional laws. This understanding follows from viewing the Interim Constitution as responsible for governance during a specific transition period which followed directly after apartheid. After the three-year

[1] IC s 98(6) read:
Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it orders, the declaration of invalidity of a law or a provision thereof-
(a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or
(b) passed after such commencement, shall invalidate everything done or permitted in terms thereof.

[2] IC s 98(6)*(a)*.

[3] *Executive Council, Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 108. See also *Women's Legal Centre, Ex p: In re Moise v Greater Germiston TLC* 2001 (4) SA 1288 (CC), 2001 (8) BCLR 765 (CC) at para 13. This fails to fully explain the distinction. There is no reason why an 'inheritance from the past' — and a racist and totalitarian past at that — should have ensured validity for even one day after the enactment of the Interim Constitution. The missing piece of the puzzle from the Court's explanation would seem to be that retrospective application to pre-constitutional laws would cause greater disruption to 'the interests of justice and good government'. But that too seems to be wrong; the impact of retrospective application depends primarily on the nature of the law in question, not on when it was enacted. However, one could reasonably have drafted the Interim Constitution in the opposite way so that pre-constitutional law was presumed to be retrospectively invalid and post-constitutional law was not. It could be argued that the Interim Constitution was meant to be a break from the past from the moment of its enactment and that it should therefore immediately invalidate all the existing (pre-constitutional) laws that violated its terms. Post-constitutional laws, on the other hand, are the work of a democratically elected legislature and should be afforded more deference by limiting the retrospective impact of orders invalidating them.

[4] 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)('*NCGLE v Minister of Justice*') at para 84.

buffer the Interim Constitution provided, the majority of unconstitutional apartheid-era laws should have been removed and the continued existence of any such laws could be made the responsibility of the new legislature that has failed to repeal them.

Second, and most importantly, if no ancillary order is made, an order of invalidity under the Final Constitution is automatically retrospective to either: *(a)* 4 February 1997 — the day the Final Constitution came into effect — if the law existed on that date; or *(b)* the date the law came into force if it was enacted after the Final Constitution. This position is based both on the wording of FC s 172(1)*(b)(i)* and the doctrine of objective unconstitutionality.[1] FC s 172(1)*(b)(i)* grants courts the power to 'limit the retrospective effect of [a] declaration of invalidity'. The implication must be that if they do not exercise that power, the declaration has full retrospective effect. The doctrine of objective unconstitutionality was first enunciated in *Ferreira v Levin NO*[2] and states — in part — that all pre-existing unconstitutional laws were automatically invalidated the moment the Final Constitution came into effect and all post-Constitutional laws that violate the Constitution were automatically invalid from the moment they are enacted. 'The Court's order' the *Ferreira* Court tells us, 'does not invalidate the law; it merely declares it to be invalid.'[3]

The automatic retrospectivity of orders was at issue in *Ex Parte Women's Legal Centre: In re Moise v Greater Germiston TLC*.[4] In an earlier case[5] the Court had issued a declaration of invalidity without saying anything about the retrospective effect of its order. The amicus in the original case brought an application for the Court to clarify the retrospective effect of its order. Kriegler J, for the Court, held that there was no need for clarification: 'Because the order … [was] silent on the question of limiting the retrospective effect of the declaration, the declaration was retrospective to the moment the Constitution came into effect. That is when the inconsistency arose. As a matter of law the provision has been a nullity since that date.'[6] This holding is important. The Court often does not mention

[1] For more on the theory of objective unconstitutionality, see S Woolman 'Application' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31.

[2] 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC). Although *Ferreira* was decided under the Interim Constitution, the Court has held that the doctrine is equally applicable under the Final Constitution. See *Ex Parte Women's Legal Centre: In re Moise v Greater Germiston TLC* 2001 (4) SA 1288 (CC), 2001 (8) BCLR 765 (CC) at para 12; *Gory v Kolver NO & Others* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) at para 39.

[3] *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 27.

[4] 2001 (4) SA 1288 (CC), 2001 (8) BCLR 765 (CC)('*Women's Legal Centre*').

[5] *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae*) 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC)(The case held that a 1970 statute that required a plaintiff suing a local government to issue notice of her intention to sue within 90 days of the debt becoming due violated the FC s 34 right of access to court.) For more on FC s 34, see J Brickhill & A Friedman 'Access to Courts' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 59.

[6] *Women's Legal Centre* (supra) at para 13.

retrospectivity in cases where it may seem that the retrospective effect of an order would be undesirable. *Women's Legal Centre* makes it plain that there is no need for doubt in these cases: the orders are fully retrospective.

A question that is not answered by the constitutional text is the retrospective effect of orders that develop the common law in terms of FC s 39(2) rather than declare it invalid in terms of FC s 172. It seems that, under the Interim Constitution, and for current developments that do not rely on the Final Constitution, the common law is presumed to be developed retrospectively. In the words of Kentridge AJ in *Du Plessis v De Klerk* :

> In our Courts a judgment which brings about a radical alteration in the common law as previously understood proceeds upon the legal fiction that the new rule has not been made by the Court but merely 'found', as if it had always been inherent in the law. Nor do our Courts distinguish between cases which have arisen before, and those which arise after, the new rule has been announced. For this reason it is sometimes said that 'Judge-made law' is retrospective in its operation.[1]

Of course, as Kentridge AJ went on to note,[2] and as the Court later held in *Masiya*,[3] courts are entitled to depart from this starting point. The standard — discussed in the next paragraph — for limiting retrospectivity should not be any different under FC s 39(2) than under FC s 172: the order should be 'just and equitable'. However, in *Masiya*, Nkabinde J states that prospective development will only be appropriate in 'rare cases'.[4] To the extent that Nkanbinde's statement suggests a higher bar for prospective development as opposed to retrospective application in FC s 39(2) cases, it should be ignored. There is, in this context, no meaningful distinction between development and invalidity.

A similar question is the retrospective effect of 'reading down' a provision. The Court explicitly left the question open in *Daniels v Campbell NO*.[5] It has not yet answered it. Despite the Court's reluctance to address the issue, it seems that the normal rule should apply: the interpretation is presumptively fully retrospective, but it can be limited. There is no reason why a court should have the power to limit the retrospective effect of an order of invalidity, but not have the same power when adopting a new interpretation. Indeed, courts would be well advised

[1] 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC)('*Du Plessis*') at para 65 quoted with approval (and therefore still law under the Final Constitution) in *Masiya v Director of Public Prosecutions, Pretoria & Another (Centre for Applied Legal Studies & Another, Amici Curiae)* 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC)('*Masiya*') at para 48.

[2] *Du Plessis* (supra) at para 65.

[3] *Masiya* (supra) at para 48.

[4] Ibid at para 51.

[5] *Daniels v Campbell & Others* 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC) at para 38 ('It is not necessary for the purposes of this case to deal with the possible retrospective effect of upholding the appeal. No pronouncement is made on whether in the absence of a declaration of invalidity, this Court is empowered to limit the retrospective effect of the declaration. Should problems concerning retrospectivity arise, they stand to be dealt with on a case by case basis.')

to address the issue as soon as they adopt a new interpretation — and force the parties, particularly the government — to supply them with the necessary information to do so — rather than waiting for problems to arise and forcing the courts and other parties to undertake further costly and time-consuming litigation to solve them.

The third difference under the Final Constitution from the position under the Interim Constitution is noted in *NCGLE v Minister of Justice*.[1] Under IC s 98(6), retrospective effect could be altered if it was 'in the interests of justice and good government'. The same power under the Final Constitution is part of the court's general 'just and equitable' remedial discretion. Because the Interim Constitution's formulation requires that the order be in the interests of justice *and* of 'good government' it is much narrower than the broad discretion afforded to courts by the phrase 'just and equitable'.[2] Although in many cases what is 'just and equitable' will also be what is 'in the interests of justice and good government', there will be other cases where it is not. The change in wording seems to imply that there may be cases where retrospectivity need not be limited, even if it is in the interests of good government. Why? Again, the litigation may raise other concerns — such as the rights of individuals — that are more important. I argue below that the Court has failed to account of this important alteration.

A final difference between the Interim Constitution and the Final Constitution — noted by the Court in *S v Ntsele*[3] — is that all courts are empowered to make orders affecting retrospectivity under the Final Constitution. Under the Interim Constitution, only the Constitutional Court exercised such powers. In *Ntsele,* Kriegler J stressed the importance of lower courts considering the issue of retrospectivity because *(a)* their reasoning would aid the Constitutional Court when deciding whether to confirm the order; and *(b)* the order would often depend on the evidence led and the trial court is generally in the best position to evaluate the evidence and to request more evidence if necessary.[4]

(y) Ways to limit the default position

An order limiting retrospectivity can take two main forms. It can limit the date from which it operates, or it can limit the type of people or cases to which the order applies. Thus far, the Court, when limiting retrospectivity based on a date, has made its orders applicable from the date of judgment and therefore effectively given the order no retrospective effect. However, there is no reason why the Court could not choose a date in the past and thus make the order applicable to a relatively short period before the judgment. It is, however, an unusual case in which that kind of remedy would be prefferable to an order that is limited to certain classes of cases or people.

[1] See *NCGLE v Minister of Justice* (supra) at paras 84 and 92–94.
[2] For more on the meaning of 'just and equitable', see § 9.2*(e)(i)* supra.
[3] 1997 (11) BCLR 1543 (CC) at para 12.
[4] Ibid at para 13.

Masiya is a good example of an order with prospective effect only. The Court developed the common-law definition of rape to include non-consensual anal penetration of women and, in order not to retrospectively create a crime, ordered that the development would only apply prospectively from the date of the order.[1] People who anally penetrated a woman before the date *Masiya* was handed down would be guilty of indecent assault. Those persons who committed the same act after the judgment would be guilty of rape.

In some situations, an order based solely on a date will not cover all those cases that the court wishes the order to cover and exclude all those cases that the court does not want the order to affect. In such circumstance, the court will specify the types of cases or people to which the order applies. For example, in *S v Bhulwana* O'Regan J held that her order invalidating a reverse onus provision would only apply to cases that had not yet been finally decided on appeal, or where an appeal could still be noted.[2] This common construction has been adopted by the Court in other cases concerning reverse-onus provisions,[3] statutory time bars[4] and crime-creating provisions.[5] I will call this type of order: 'the finalised cases order'.

The Court had to create an even more detailed remedy to address the difficulties posed by invalidating provisions dealing with succession. The first attempt came in *Brink v Kitshoff NO*. In *Brink*, the Court applied its order invalidating gender discriminatoy provisions retrospectively to all estates, but exempted payments that had been made in terms of the invalidated provisions.[6] In *Bhe* Langa DCJ constructed an even more narrowly tailored solution.[7] The Court had invalidated the customary law rule, and accompanying legislation, that provided for male primogeniture. But it did not want to invalidate transfers that had already been made, provided they were made in good faith — ie, that they were not made while the beneficiary was aware of the court challenge to the rules of primogeniture. Accordingly, the order did not apply to estates that had already been wound up, unless the beneficiary had been aware of the pending decision in *Bhe*.[8] The Court adopted the same construction when it expanded the Intestate Succession Act to apply to homosexual partners.[9]

[1] *Masiya* (supra) at paras 47–57. See also *Ex parte Minister of Safety and Security & Others: In Re S v Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC).

[2] 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC).at paras 33–34.

[3] See, for example, *S v Coetzee* 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC) at para 52.

[4] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC) at para 26; *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering Gauteng & Andere* 2001 (11) BCLR 1175 (CC) at para 11; *Engelbrecht v Road Accident Fund & Another* 2007 (6) SA 96 (CC), 2007 (5) BCLR 457 (CC) at paras 45 and 47.

[5] *NCGLE v Minister of Justice* (supra).

[6] 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC).

[7] *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; SA Human Rights Commission & Another v President of the RSA & Another* 2005 (1) SA 563 (CC), 2005 (1) BCLR 1 (CC)(*'Bhe'*).

[8] Ibid at paras 126–127 and 136.

[9] *Gory v Kolver NO & Others* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC)(*'Gory'*) at paras 32–42 (Applying the same remedy to an invalidation of provisions of the Intestate Succession Act which prevented same-sex life partners from inheriting from each other.)

As *Bhe* suggests, there is virtually no limit to the manner in which a court may phrase an order limiting retrospective effect. Courts should not be afraid to craft innovative and detailed retrospective orders that catch all the people — and only those people — to whom it would be just and equitable to apply the order. However, although courts have a wide discretion, the Constitutional Court has explicitly rejected the possibility of reaching back into the past to aid a single litigant and deny the same benefits to others who are similarly situated. In *Mistry v Interim Medical and Dental Council*, the Court struck down a law that permitted searches of medical professionals' homes and offices in unconstitutionally broad terms.[1] Sachs J gave the order only prospective effect. Indeed, the Court refused to come to the aid even of the applicant in the case who had gone 'to the trouble and expense of launching constitutional litigation' because making 'an order reaching selectively back into the past simply to come to the aid of one successful litigant without affording such relief to "all people who are in the same situation as the [litigant]" would "result in a denial of equal protection of the law [and would] raise considerations of legal certainty".'[2] However, it is not clear that *Mistry* imposes an absolute prohibition on retrospectivity to aid a single litigant. In the subsequent paragraphs, Justice Sachs points out that the impact of the prospective order on Mr Mistry was in fact minimal.[3] It may be that in a case where non-retrospectivity will have disastrous consequences for the named litigant — or even for a small group that can only be captured by naming them individually — the Court may be willing to reach back in time to come to her aid alone.

(bb) Reasons for limiting retrospectivity

Two rough categories exist for limiting retrospectivity. First, unlimited retrospectivity may cause some form of injustice to the litigants before the court or other similarly placed people. Second, retrospectivity may impair the administration of justice by invalidating acts already performed. All cases where the Constitutional Court has limited retrospectivity fall, fairly neatly, into one of these two categories. However, limiting retrospectivity is not a one-way street: the protection of individual rights almost always conflicts in some way with the good of the commonweal. What is interesting about retrospectivity is that individual good sometimes calls for limited and sometimes for unlimited retrospectivity. The same is true of the common good.[4]

[1] 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC)('*Mistry*').

[2] Ibid at para 42 (footnotes omitted).

[3] Ibid at paras 42–43.

[4] For example, in *Walters* — where the Court found that the law permitting the use of force in effecting an arrest was too broad — retrospective effect would have acted unfairly against the individual litigants who had acted according to the law by criminalizing (and rendering civilly actionable) their ostensibly lawful acts. *Ex parte Minister of Safety and Security v Walters* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC). Non-retrospectivity, on the other hand, would operate unfairly on those who lost breadwinners as a result of reliance on the provision as they would have no civil claim for their loss, despite the

Before I consider these cases in more detail, I should mention that retrospectivity is, usually,[1] also limited when an order of invalidity is suspended. Many of the concerns that motivate a court to suspend an order may also have motivated it to limit retrospectivity. However, in this section I consider only cases where there was no suspension, but retrospectivity alone was circumscribed. In *S v Shinga* the Court, under the heading of 'Retrospectivity' held that it would not be just and equitable for the order — invalidating large portions of the system for criminal appeals from the Magistrates' Court — to apply retrospectively but that the order should only apply from 14 days after the order.[2] This order is not, strictly speaking, an order limiting retrospectivity, but an order suspending the declaration of invalidity that makes express that the suspended order, when it comes into force, will not operate retrospectively.[3]

(x) Injustice to individuals

There are a number of ways in which retrospectivity can cause harm to individuals: from criminalising previously legal conduct to imposing formerly non-existent financial obligations. The first case — criminalising past conduct — is, perhaps, the consequence most at odds with a system committed to legality and the rule of law. In *Ex parte Minister of Safety and Security v Walters*, the Constitutional Court held that s 49(2) of the Criminal Procedure Act,[4] which permitted police officers to use lethal force when affecting arrest, violated the rights to life and freedom and security of the person.[5] The Court decided that it had to limit the retrospective effect to avoid injustice:

> [I]t would clearly be neither just, nor equitable to allow unqualified retrospectivity of invalidation. This the instant case demonstrates. When the two accused shot the fleeing burglar, they were ostensibly entitled to invoke the indemnity afforded them by section 49(2). The effect of the unqualified striking down of the section by the trial court might in their case in effect retrospectively criminalise conduct that was not punishable at the time it

authorizing statute being unconstitutional. In cases, such as *Bhulwana*, involving the invalidation of criminal laws, non-retrospectivity operates unfairly to individuals because they remain in jail. And in the succession cases, non-retrospectivity would have been unfair to some individuals — because they would not benefit from the change in the law — and beneficial to others — because their concluded transactions would be unaffected.

[1] See § 9.4*(e)(i)*(aa)(y) supra.

[2] 2007 (5) BCLR 474 (CC), 2007 (2) SACR 28 (CC).

[3] For a more detailed discussion of when suspension orders operate retrospectively and when they don't, see § 9.4*(e)(i)*(aa)(y) supra.

[4] Act 51 of 1977.

[5] 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC)('*Walters*')(The underlying facts were that a father and son who owned a bakery shot and killed a fleeing burglar. They relied on s 49(2) to justify their actions.)

> was committed. Whipping away the protective statutory shield against criminal prosecution with the wisdom of constitutional hindsight would not only be unfair but would arguably offend the right protected by section 35(3)*(l)* of the Constitution "not to be convicted for an act … that was not an offence … at the time it was committed".[1]

Although the *Walters* Court in this passage relies on FC s 35(3)*(l)*, such reliance was clearly not necessary for its decision: The Court also refused to permit any retrospective application that might lead to civil liability. The Court wrote that it would 'to some extent still be unfair to create even civil liability only after the event', even though, creating civil liability would not have been prohibited by s 35(3)*(l)*.[2] Retrospectivity can, therefore, be limited even where s 35(3)*(l)* is not violated.[3]

A more difficult set of facts — in which the High Court and the Constitutional Court disagreed — arose in *Masiya v Director of Public Prosecutions (Pretoria)*.[4] The accused had been charged with rape for anally penetrating a young girl. The problem was that, at the time the crime was committed, the definition of rape only covered vaginal penetration. The High Court found the common-law definition to directly violate the right to equality and altered it to include anal rape.[5] According to Ranchod AJ, retrospective application was not a problem and did not violate FC s 35(3)*(l)* because the order would not criminalise non-criminal activity — anal penetration already constituted the crime of indecent assault:

> The unlawful deed the accused committed is simply given another name, such name constituting a more serious form of indecent assault. The accused knew very well that he was acting unlawfully. It has never been a requirement that an accused should know, at the time of the commission of an unlawful deed, whether it is a common law or statutory offence, or what the legal/official terminology is in naming it.[6]

The Constitutional Court approached the matter differently. Firstly, it relied on indirect application of the Bill of Rights in terms of FC s 39(2) — instead of direct application under FC s 8 — to develop the common law definition[7] and,

[1] Ibid at para 74. See also *Masiya* (supra) at para 6 of the order (The Court extended the definition of rape to include anal penetration, but to avoid retroactively creating crimes, made the decision prospective only. This decision meant that the applicant before them could only be convicted of indecent assault, not rape.)

[2] *Walters* (supra) at para 75. The Court did however acknowledge that the development of the law carried out by the SCA in *Govender* would apply to all unfinished cases. *Govender v Minster of Safety and Security* 2001 (4) SA 273 (SCA).

[3] For more on FC s 35(3)*(l)*, see F Snyckers & J le Roux 'Criminal Procedure: The Rights of Arrested, Accused and Detained Persons' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 51.

[4] For a discussion of *Masiya* see C Snyman 'Extending the Scope of Rape - A Dangerous Precedent' (2007) 124 *SALJ* 677 (Argues against any extension of crimes by courts).

[5] *S v Masiya* 2006 (11) BCLR 1377 (T), 2006 (2) SACR 357 (T).

[6] Ibid at para 73.

[7] For a (justified) criticism of this approach, see S Woolman 'The Amazing Vanishing Bill of Rights' (2007) 124 *SALJ* 762. For an attempt to defend the Court's approach, see F Michelman 'On the Uses of Interpretive 'Charity': Some Notes From Abroad on Application, Avoidance, Equality, and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa' (2008) 1 *Constitutional Court Review* (forthcoming).

secondly, the new definition embraced only anal rape of females.[1] More importantly for present purposes, it refused to apply the development retrospectively. Nkabinde J held that s 35(3)*(l)* — as interpreted in *Veldman v Director of Public Prosecutions (Witwatersrand Local Division)*[2] — prohibited a court from giving a person a greater sentence than what had been proscribed at the time of the offence. Since rape carried a heavier sentence than indecent assault, FC s 35(3)*(l)* proscribed retrospective application.[3] In addition, Mr Masiya could not have been expected to foresee that his conduct would constitute rape, rather than indecent assault and it would therefore be unfair to convict him of the former offence.[4] The Court therefore endorsed a very strict approach to retrospectivity when altering criminal offences or sentences. Indeed, under the *Masiya* approach, it is difficult to think of any case where it would be permissible to apply such an order retrospectively.

The Constitutional Court has also limited retrospectivity to avoid financial hardship to individuals. This approach to retrospectivity has occurred, primarily,[5] in two contexts: succession and delictual liability. In the succession cases — *Brink*, *Bhe* and *Gory* — individual hardship flows from both full retrospectivity and non-retrospectivity. In *Brink v Kitshoff NO*[6] the Court invalidated legislation[7] that limited the benefits that a wife could gain from her husband's life insurance policy if it was ceded to her and the husband's estate was insolvent. It permitted the policy's benefits to flow to the estate's creditors. O'Regan J held that, on the one

[1] Langa CJ (Sachs J concurring) dissented on this point. For criticism of this aspect of the majority decision, see K Phelps & S Kazee 'The Constitutional Court Gets Anal about Rape — Gender Neutrality and the Principle of Legality in *Masiya v DPP*' (2007) 20(3) *SACJC* 341.

[2] 2007 (3) SA 210 (CC), 2007 (8) BCLR 827 (CC).

[3] *Masiya* (supra) at paras 55–56.

[4] Ibid at para 56. The reasoning in *Masiya* is questionable. On the first point, it would have been possible to convict Masiya of rape, but still sentence him as if his crime were indecent assault. The only additional punishment he would incur would be the additional stigma that might attach to the label 'rapist'. This additional punishment is however not mentioned in the judgment. The second argument supposes that in order to convict a person, that person must know not only that his act is criminal, but what crime it constitutes. That cannot be correct. The High Courts and the Supreme Court of Appeal regularly re-align the border between, for example, murder and culpable homicide or theft and fraud. The result of the *Masiya* approach is that whenever they do so, they must convict the person before them on law that they perceive to be wrong. It is in any event difficult to accept that Mr Masiya, or indeed any other right minded person, would not have described his anal penetration of a nine-year-old girl as anything other than 'rape'.

[5] See *First National Bank (FNB) of SALtd t/a Wesbank v Commissioner, South African Revenue Service and Another; First Nationa Bank of SALtd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 122 (The Court struck down a section that permitted property to be sold to settle a customs debt, even if the owner of the property was not the customs-debtor. However, it prevented the decision from applying to goods that had already been sold in good faith or cases that had been finalised by the courts. The Court mixed both injustice and administration reasons as it would prejudice indivduals and also be 'disruptive, burdensome and difficult to reverse the consequences of such sales if they were to be invalidated.')

[6] 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC)(*'Brink'*).

[7] Insurance Act 27 of 1943 s 44.

hand, unlimited retrospectivity would operate unfairly to creditors of estates that had already been wound up and who had, in good faith, benefited from the provision.[1] On the other hand, purely prospective application 'would deny some married women the protection of the Constitution' as their husbands' estates would still be subject to the discriminatory law.[2] To avoid (as far as possible) both injustices, O'Regan J limited the order of invalidity to apply only where payments had already been made in reliance on the now invalid provision.[3]

De Lange v Smuts NO indicates the clear distaste on the part of the Court for creating delictual liability for people, even official bodies, who relied on unconstitutional laws.[4] The provision in question permitted officials, including non-judicial officers, to imprison a person who refused to answer questions at an insolvency inquiry. The majority of the Court found the provision invalid only to the extent that the power was extended to non-judicial officers. They also held that the decision should only apply from the date of the decision:

> Persons who have, since the coming into operation of the Constitution, been unconstitutionally committed to prison, can unfortunately not be afforded effective relief in the sense of undoing any detention they might have suffered prior to the making of this order. Moreover, if the order is granted any retrospective effect it could raise uncertainties as to whether a person unconstitutionally committed to prison in the past had a claim for damages in respect of a committal which was unassailable at common law at the time and ordered in good constitutional faith. If it were to transpire that the retrospective operation of the order does not provide a cause of action for damages, then persons unconstitutionally detained in the past suffer no prejudice in relation to damages. If it has the effect of giving rise to such a claim, then it seems to be a most undesirable consequence, having regard to the fact that the committal took place in good faith. Retrospectivity can in any event not assist the applicant, inasmuch as his committal was ordered by a magistrate and was therefore constitutional.[5]

[1] *Brink* (supra) at para 56.

[2] Ibid at para 57.

[3] Ibid at paras 58 and 60. The same analysis — and a similar solution — was adopted in both *Bhe* (supra) (invalidated customary-law rule of primogeniture) and *Gory* (supra)(expanded the Intestate Succession Act to same-sex life partners). In *Bhe* a retrospective order would invalidate the transfer of money or goods which had already occurred in good faith. A prospective order would preserve a blatantly unconstitutional law and would prevent re-opening transactions even when the person who benefited knew that the rule of primogeniture was under court challenge. The Court therefore applied the order only to payments made in good faith.) In *Gory*, the law in issue was s 1(1) of the Intestate Succession Act 81 of 1987 which prevented homosexual life-partners from inheriting from their partners' intestate estates. A group of three sisters intervened in the case because if it was successful they would not benefit from the estate of their (homosexual) brother. Van Heerden AJ, for a unanimous Court, held that it would not be 'just and equitable' to deny Mr Gory relief, at least partly because he was part of a group that had been the victim of continued stigmatization and marginalization. Ibid at para 40. Van Heerden AJ therefore adopted the form of the order in *Bhe* with the additional proviso that if a party could show serious administrative or financial hardship, they could approach the Court for a variation of the order. Ibid at paras 41–42.

[4] 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC).

[5] Ibid at paras 104–105.

The *Walters*[1] and *Mistry*[2] Courts express a similar sentiment: namely that it is a lesser evil for a constitutional violation to go without compensation than to impose monetary liability on a person who, knowingly or not, relied on what she thought to be a valid law.

Of course, where that reliance was indeed in good faith and where the person on whom liability might be imposed is a private person, that assessment seems correct. However, where the body that would bear liability is an organ of state — and therefore responsible for respecting, protecting, promoting and fulfilling the rights in the Bill of Rights[3] — or where the person knew the law was subject to a constitutional challenge, there would seem to be very good reasons in favour of imposing liability. There might well be good reasons that justify limiting retrospectivity even in these circumstances — but they would have to be clearly established by the state.[4] If they were not established, a court could easily make an order that — along the lines of those granted in *Bhe* and *Gory* — strikes a fair balance between the various interests at stake by making retrospective application dependant on whether the person or organ of state acted in good faith or bad faith. The simple prospective orders in *De Lange* and *Walters* fail to take account of these nuanced possibilities.

(y) Administration of Justice

The primary reason for limiting retrospectivity is that it can threaten the administration of justice and legal certainty by invalidating acts (or laws) that have been taken (or made) under the invalidated provision. The Court has regularly relied on the need to preserve the sanctity of legal order to limit retrospectivity where it would undo court decisions or executive or legislative action.

This trend began in the Court's very first decision: *S v Zuma & Others*.[5] The Court struck down a law that placed the onus on the accused to prove that a confession was not made freely and voluntarily. Although the Court recognised that limiting retrospectivity 'may well … cause[ ] injustice to accused persons', it concluded that it 'cannot repair all past injustice by a simple stroke of the pen.'[6] It

[1] *Walters* (supra) at para 75 ('Allowing the order to operate retrospectively in respect of civil liability only would not involve section 35(3)*(l)* of the Constitution and would not be as manifestly inequitable as retrospectively taking away a defence to a criminal charge. Nevertheless it would be anomalous to have such a distinction between civil and criminal liability and it would to some extent still be unfair to create even civil liability only after the event.')

[2] *Mistry* (supra) at para 41 ('[Retrospectivity] could also give rise to delictual claims by persons subjected to searches and seizures after that date, and add further burdens to a health budget already under considerable strain.')

[3] FC s 7(2).

[4] Of course, even when dealing with a state acting in bad faith, the quantity of compensation might be so immense that it would jeopardise the functioning of the state.

[5] 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC)('*Zuma*').

[6] Ibid at para 44.

therefore limited[1] the retrospective effect of the order to cases that *(a)* started after 27 April 1994 (the day the Interim Constitution came into force); and *(b)* were not completed at the date of the judgment.[2] However, the *Zuma* position would turn out to be only a temporary solution. Both elements of this order on retrospectivity would be altered by the Court two months later in *S v Mhlungu & Others*.[3]

The reason for the change was a serious disagreement within the Court on how to interpret IC s 241(8). IC s 241(8) dealt with the application of the Interim Constitution to cases pending when the Interim Constitution was enacted.[4] One camp of judges (led by Kentridge AJ) proposed a literal reading of the provision that would preclude the application of the Interim Constitution to any cases pending on 27 April 1994. However, the majority of judges (represented by Mahomed J) preferred a more liberal reading that permitted application of the Interim Constitution to pending cases. Although Mahomed J proffered a number of reasons for his reading of the section, the first justification was the 'very unjust, perhaps even absurd, consequences' that would result from Kentridge AJ's reading. One of those consequences was:

> [M]erely because an accused person was served with an indictment before 27 April 1994, (and even if no evidence whatever was lead before that date) he could not contend that the [reverse onus for confessions was] unconstitutional. In the result, the Court could be compelled to convict him (and in consequence thereof even to imprison him for a substantial period) in circumstances where it has a reasonable doubt whether his confession was freely and voluntarily made and therefore even if the Court has a reasonable doubt about his guilt. Another accused charged as his co-conspirator could be acquitted simply because the indictment was served on him on 28 April 1994 in respect of an offence arising from exactly the same incident and the same evidence.[5]

[1] Strictly speaking, the Court did not limit the retrospectivity as, under the Interim Constitution, non-retrospectivity was the default position for pre-constitutional legislation. However, because the Court has not altered its practice under the Final Constituiton — a point I criticise later (see § 9.4*(e)*(ii)(cc) infra) — and in order to integrate the discussion of Interim Constitution and Final Constitution cases, I use the phraseology of 'limiting retrospectivity' under both the Interim Constitution and the Final Constitution.

[2] Ibid at para 44.

[3] 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC)('*Mhlungu*'). In this chapter I consider only the relevance of *Mhlungu* for retrospectivity. For more on the different interpretative strategies adopted by the judges, see L Du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32.

[4] IC s 241(8) read: 'All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed: Provided that if an appeal in such proceedings is noted or review proceedings with regard thereto are instituted after such commencement such proceedings shall be brought before the court having jurisdiction under this Constitution.'

[5] *Mhlungu* (supra) at para 4. Ibid at paras 5–6 (Details further 'absurd' consequences that would follow from the minority's interpretation.)

Mahomed J felt that it was 'arbitrary and irrational' that accused persons whose cases had been finalised before the date of the order in *Mhlungu* should not qualify for protection while otherwise identically placed accused whose trials were not yet finalised would be protected.[1] He therefore changed the order in *Zuma* to apply to all cases pending on 27 April 1994, *whether they had been finalised or not.*

Mhlungu stands for a very powerful principle in favour of retrospective application when non-retrospectivity will arbitrarily deny people their constitutional rights. The strength of the Court's commitment to this principle is evident both in the lengths they went to finesse the wording of IC s 241(8) and the fact that they were willing to effectively overrule their own order that was but two-months-old. One of the most interesting aspects of *Mhlungu* is that, unlike *Zuma* and the cases that would come later, there is very little attention paid to the potential impact of re-opening already finalised court decisions. The majority's focus is solely on the rights of the accused. It is therefore extremely surprising that, less than six months later, the Court would retreat from its position in *Mhlungu* and revert, largely, to the reasoning and outcome it adopted in *Zuma.*

S v Bhulwana; S v Gwadiso[2] turned on a very similar issue to *Zuma* and *Mhlungu* : a reverse onus provision. The law at issue in *Bhulwana* placed an onus on people found in possession of a certain amount of marijuana to prove that they were not guilty of distribution (as well as simple possession). The Court easily found the provision unconstitutional and then, in what has since become the standard precedent for retrospectivity cases, held that the order should only apply to cases that had not yet been finalised, or that could still be appealed[3] — what I earlier labelled the 'the finalised cases construction'.[4] Because of the influence *Bhulwana* has had on similar matters over the past 13 years, it is worth quoting O'Regan J's reasoning at some length:

> Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. It is only when the interests of good government outweigh the interests of the individual litigants that the court will not grant relief to successful litigants. In principle too, the litigants before the court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants. On the other hand, as we stated in *S v Zuma*, we should be circumspect in exercising our powers under [IC] s 98(6)*(a)* so as to avoid unnecessary dislocation and uncertainty in the criminal justice process. As Harlan J stated in *Mackey v US* 401 US 667 (1971) at 691:
>
> > "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."

[1] *Mhlungo* (supra) at para 48.
[2] 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC)('*Bhulwana*').
[3] Ibid at para 33.
[4] § 9.2*(e)*(ii)(aa)(y) supra.

As a general principle, therefore, an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity.[1]

This final principle has been accepted as the definitive statement of law on retrospectivity where the problem is that decided cases will be overturned.[2]

It should be helpful to list some of the situations in which the principle has been applied. It has been applied in a series of case which, like *Bhulwana*, concerned reverse onus provisions.[3] Most of these cases are very short. They simply repeat the holdings in previous decisions and then applying the remedy developed in *Bhulwana*. The template has also been used in time-limitation clause cases. In *Mohlomi v Minister of Defence*,[4] s 113(1) of the Defence Act[5] required people suing the Defence Force to do so within six months of the claim arising and to give notice within one month. Didcott J concluded that the provision unjustifiably limited the applicant's right of access to court.[6] Without much explanation, he adopted a slight variation of the finalised cases construction. His remedy limited the retrospective effect to cases that were not already barred by s 113 and that had been either decided on first instance on appeal or settled. Similar orders were made in *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering*[7] and *Engelbrecht v Road Accident Fund*.[8] Interestingly, in *Moise*, which concerned a very similar provision, the order was permitted to operate with full retrospectivity.[9]

[1] *Bhulwana* (supra) at para 32 (references omitted, emphasis added).

[2] This passage — or parts of it — has been quoted with approval on numerous occassions. See *S v Ntsele* 1997 (11) BCLR 1543 (CC)('*Ntsele*') at para 14; *S v Mello* 1998 (3) SA 712 (CC), 1998 (7) BCLR 908 (CC)('*Mello*') at para 13; *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 94; *Engelbrecht v Road Accident Fund & Another* 2007 (6) SA 96 (CC), 2007 (5) BCLR 457 (CC) at para 45. The reasoning has been followed in *S v Mbatha* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC)('*Mbatha*') at para 31; *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 54; *S v Julies* 1996 (4) SA 313 (CC), 1996 (7) BCLR 899 (CC)('*Julies*') at para 4; *Scagell & Others v Attorney-General, Western Cape & Others* 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC) at paras 35–36.

[3] See *Julies* (supra)(Presumption that possessor of drugs was also a dealer); *Scagell* (supra)(various reverse-onus provisions concerning gambling); *Ntsele* (supra)(Person in charge of land where marijuana plants found, presumed to be dealing in marijuana); *Mello* (supra)(Person in 'immediate vicinity' of drugs, presumed to be in possession thereof); *Mbatha* (supra)(law presumed that a person on a property where illegal arms were found was in possession of those arms.)

[4] 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC).

[5] Act 44 of 1957.

[6] For more on the right of access to court, see J Brickhill & A Friedman 'Access to Court' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 59.

[7] 2001 (11) BCLR 1175 (CC).

[8] *Engelbrecht v Road Accident Fund & Another* 2007 (6) SA 96 (CC), 2007 (5) BCLR 457 (CC)('*Engelbrecht*').

[9] *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as* Amicus Curiae *)* 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC).

The Court provided no explanation for why *Moise* was treated differently. None is apparent upon close analysis after the fact.[1]

Mistry v Interim Medical and Dental Council of South Africa is another excellent example of the chaos that can be caused by retrospectivity.[2] The Court struck down an overbroad search and seizure provision with prospective effect only because:

> Any general declaration of invalidity with retrospective effect would impact negatively on good government by rendering unlawful all such searches conducted after the retrospective date specified. This could create considerable uncertainty with regard to the validity of proceedings which were conducted on the basis of evidence obtained as a result of such searches.[3]

Other contexts in which retrospectivity has been limited to avoid disruption are the process for appointing magistrates,[4] indefinite detention,[5] adoption,[6]

[1] The best explanation seems to be that the Court simply forgot to deal with retrospectivity in the original judgment and when they were caught out in the subsequent case of *Ex Parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council*, did not want to admit their error. 2001 (4) SA 1288 (CC), 2001 (8) BCLR 765 (CC).

[2] 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC).

[3] Ibid at para 41. Compare this response to *Magajane v The Chairperson, Northwest Gambling Board*, where the Court also struck down search and seizure provisions but did not limit retrospectivity. 2006 (5) SA 250 (CC), 2006 (10) BCLR 1133 (CC). Unfortunately the *Magajane* Court did not explain its decision, so it is difficult to know if there is any meaningful difference between the two cases.

[4] *Van Rooyen & Others v The State & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 272 (The Court invalidated a variety of provisions detailing how Magistrates are appointed. Without much ado, Chaskalson CJ held that it was 'All that is necessary is to make the orders prospective so that completed matters are not affected.' The order clearly makes sense as retrospectivity would have invalidated all the cases decided by a magistrate appointed in terms of the defunct provisions and the constitutional flaw was in any event fairly minor.)

[5] *S v Niemand* 2002 (1) SA 21 (CC), 2002 (3) BCLR 219 (CC) at para 33 (A provision permitting indefinite detention of habitual criminals was held to constitute 'cruel, inhuman and degrading punishment' contrary to FC s 12(1)*(e)*. The order set the maximum detention period at 15 years and was prospective only. What is interesting about *Niemand* is that the Court specifically recognized that the prospective order would still aid currently imprisoned criminals because '[i]mprisonment is an ongoing process, and the terms of the order will apply to all such persons, despite the fact that they were declared to be habitual criminals before the coming into effect of the order.')

[6] *Fraser v Children's Court, Pretoria North* 1997 (2) SA 2 *(z)* 61 (CC), 1997 (2) BCLR 153 (CC) at para 51 (A law permitting adoption without the consent of the father was held to be unfairly discriminatory. Mahomed DP limited the retrospective impact of the order because 'it would be quite chaotic and clearly prejudicial to the interests of justice and good government if we made any order in terms of section 98(6) of the Constitution which might have the effect of invalidating any adoption order previously made'.)

immigration,[1] decriminalizing an act,[2] and permitting inter-spouse civil claims.[3]

(z) Validating invalidating legislation

Generally, a court will not limit retrospectivity in the absence of any of the factors discussed above. Indeed, the Court has produced a large number of orders in which it provides no reasons for its decision not to limit the order's retrospective effect.[4] In addition to the general presumption in favour of retrospectivity, there

[1] *National Coalition for Gay and Lesbian Equality & Another v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at para 89 (The Court invalidated a law that facilitated immigration of heterosexual spouses without affording the same benefit to homosexuals, and read-in words to cure the defect. Retrospectivity, the Court held, would 'cause uncertainty concerning the validity of decisions taken and acts performed in the past' and since limiting retrospectivity would cause no prejudice to homosexual couples as they could 'seek afresh, or persist with seeking' under the altered version of the legislation.)

[2] See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)('*NCGLE v Minister of Justice*')(The Court invalidated the common-law (and the derivative statutory) criminalisation of consensual sodomy and limited retrospectivity with a slight varioation of the 'unfinalised cases' construction. Ackermann J argued that *Bhulwana*, where the flaw was in the trial procedure, was not entirely applicable in this context because in *Bhulwana* 'unqualified retrospective operation . . . could cause severe dislocation to the administration of justice and also be unfair to the prosecution who had relied in good faith on such evidentiary provisions.' Ibid at para 95. The unconstitutionality of criminalising consensual sodomy was different because it was 'manifestly and grossly unjust and inequitable that such convictions should not be capable of being set aside' where the crime had in fact ceased to exist in 1994 and where it was just a 'chance fact' that a challenge to the act had not been brought earlier. Ibid at para 96. Accordingly, Ackermann J ordered that although the order should not apply directly to finalized cases, where the time for lodging an appeal had lapsed, people in jail should have an opportunity to apply for condonation for late filing of their appeal. Although there is technically nothing to stop people from doing this on the ordinary 'finalised cases' construction, it has not been specifically included in the order in other cases); *Phillips & Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC) at para 31 (The Court, over the dissent of Madala J, found unconstitutional a provision which criminalised, amongst other acts, stripping on premises that sold liquor. Without much explanation, Yacoob J found that it was 'just and equitable' to apply the standard 'finalised cases' construction); *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at para 39 (Invalidated the criminal prohibition on members of the Defence Force engaging in acts of public protest. 'Given the scope of the prohibition and the absence of proof of any unconstitutional reliance on the provisions, it is not appropriate in the circumstances of this case to make an order with retrospective effect.')

[3] *Van der Merwe v Road Accident Fund & Another (The Women's Legal Centre Trust as* amicus curiae *)* 2006 (4) SA 230 (CC), 2006 (6) BCLR 682 (CC) at para 77 (Moseneke DCJ invalidated legislation that prohibited spouses married in community of property from claiming patrimonial damages from each other. In a very confusing piece of retrospectivity analysis, he held: 'I think that the interest of justice requires that Mrs Van der Merwe and people similarly situated should get effective relief immediately from this order. I have not been referred to any major administrative dislocation or other consideration that militates against making the order retrospective. I have not been pointed to any prejudice; nor can I find any. I plan to limit the operation of the order to claims in which a final court order has not been made.' It is unclear what he meant by 'prejudice' or how the conclusion follows from the premises.

[4] There are several cases where the Court did not limit retrospectivity and did not provide reasons for not doing so where it might seem that reasons were warranted. See, for example, *Du Toit & Another v Minister of Welfare and Population Development & Others (Lesbian and Gay Equality Project as* Amicus Curiae*)* 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC)(Permitting same-sex couples to adopt); *Satchwell v President of the Republic of South Africa & Another* 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC)(Expanding judicial benefits to same-sex life partners); *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC)(Invalidating restrictive broadcast regulations); *J v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC)(Permitting same sex couples to engage in artificial insemination.)

is a specific situation in which the court has held retrospectivity is inappropriate for separate reasons. In *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others,* the Court overturned legislation under which various proclamations amended the initial legislation.[1] The proclamations — though made in error — had been intended to create the structure for the first local government elections in 1994. The Court eventually suspended the order to ensure that the elections could take place. It then considered the possibility of limiting retrospectivity in order to save the proclamations (despite invalidation of the empowering legislation.) It rejected this option. Although the Court accepted that its remedial powers are broad enough to do so, it concluded that

> it will seldom, if ever, be appropriate to use this power to validate amendments made to Acts of Parliament. It is logically inconsistent to strike down the empowering legislation, and at the same time, to validate Proclamations made under it, which will have the result that the things validated — laws which should be made only by Parliament — will apply not only to the past, but to the future as well. This is a task for Parliament and not for the Court.[2]

(cc) Criticism

The power to limit the retrospective impact of decisions is not uncontroversial. Under the leadership of Chief Justice Warren, the US Supreme Court, in a series of landmark criminal procedure cases,[3] was roundly criticised for using its remedial powers to 'mak[e] the law' and violating the separation of powers by permitting judges to legislate by creating new law.[4] Other critics complained that retrospectivity made it too easy for the Court to change settled constitutional doctrine.[5] As these criticisms indicate, limiting retrospectivity was originally associated with a liberal or 'activist' court. Fallon and Meltzer show how this perspective changed under the more conservative Burger and Rehnquist Courts. The power to limit retrospective effect which had been a tool to expand constitutional rights, became a means to deny people rights by prohibiting them from relying on 'new law'.[6] Victims of rights vilations were not permitted to rely on doctrines

[1] 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC).

[2] Ibid at para 105.

[3] See, for example, *Mapp v Ohio* 367 US 643 (1961)('*Mapp*')(Court requires states to exclude evidence obtained in violation of the Fourth Amendment); *Linkletter v. Walker* 381 U.S. 618 (1965)(Held that Court had the power to limit the retrospective impact of *Mapp*); *Miranda v Arizona* 384 US 436 (1966)('*Miranda*')(Court requires warnings to be read to people who are arrested).

[4] R *Fallon & D Meltzer 'New Law, Non-Retroactivity and Constitutional Remedies' (1991) 104 Harvard LR* 1731, 1734.

[5] Ibid.

[6] Ibid at 1734–1735. Indeed even during the Warren era there was a tension between the judges. Although almost all the judges supported limiting retrospectivity, some did so because it permitted them to more easily expand existing doctrine, while others did it to limit the impact of a doctrine they disagreed with. Ibid at 1739–1740.

developed after their rights had been infringed. The American experience leaves us with two important lessons. One, the power to limit retrospectivity is one of the most powerful tools the Court has in its possession. Indeed, some suggest that this power is almost as important as judicial review itself. Courts should always keep that in mind. Two, the power can be used both to promote change and to deny rights.

Flowing from this brief introduction, I have four inter-related criticisms of the Court's approach to retrospectivity. These criticisms focus mainly on the reverse-onus and time-limitation lines of cases because they are the most egregious, though not the only, examples of the flaws I see in the current retrospectivity doctrine.

Firstly, by continuing to apply the *Bhulwana* test — 'as a general principle … an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity'[1] — the Court has failed to appreciate two vital differences between the Interim Constitution and the Final Constitution.[2] First, under the Interim Constitution invalidation of pre-constitutional legislation — such as that at issue in *Bhulwana* — was presumed not to operate retrospectively. The presumption under the Final Constitution is reversed — all declarations are presumed to operate retrospectively. Second, the substance of the test is not based on 'the interests of justice and good government', but what is 'just and equitable'. These standards differ: 'the test under the [Final] Constitution is a broader and more flexible one, where the concept of the interests of good government is but one of many possible factors to consider.'[3] Indeed, the Constitutional Court itself has acknowledged that *Bhulwana* can no longer provide the authoritative test.[4] Yet, more than eight years later, the Court still relies on *Bhulwana* as if it were binding precedent.[5] But considering these two changes, *Bhulwana* cannot be the controlling test. It creates a presumption that runs counter to the more basic presumption in favour of retrospectivity and it privileges non-interference in legal decisions above other concerns that go to justice and equity. While both may have been justified under the Interim Constitution, they cannot be justified under the Final Constitution.

Secondly, and most importantly, the standard is inherently unjust, even under the Interim Constitution. The result in *Bhulwana* is that a person who may well have been innocent of the crime of distribution remains in prison because of a law that violated one of his most basic rights: the right to be presumed innocent. To argue that the general need for finality in legal decisions is more important than the constitutional demand that innocent people should not be imprisoned seems outrageously indefensible. Take the facts in *Engelbrecht*. Kondile AJ held,

[1] *Bhulwana* (supra) at para 32.
[2] See § 9.2*(e)*(ii)(aa)(x) supra.
[3] *NCGLE v Minister of Justice* (supra) at para 94.
[4] Ibid at paras 93–94.
[5] See *Engelbrecht* (supra) at para 45 ('[The] *Bhulwana* principle was apparently applied in *Mohlomi* and there is no reason not to apply it in this matter.')

correctly, that a regulation which required certain motor vehicle accident victims to submit an affidavit to the Road Accident Fund[1] within two weeks of their accident, failing which they would have no claim, violated their right of access to court because it gave them an unreasonably short period to act. The Court, without any explanation other than a bald referral to *Bhulwana* limited the retrospective effect to unfinalised cases.[2] The principle the Court created was that it is more important not to disturb decided cases than to provide relief to innocent victims of road accidents. As a result, a person who had been paralysed by a hit-and-run accident, had submitted their affidavit one day late and whose final appeal was turned down the day before *Engelbrecht* was decided would be entitled to absolutely *nothing*. In the words of Mahomed J, such an outcome is 'very unjust, perhaps even absurd'.[3] The Court seems stuck in a traditional common-law mindset that values legal certainty and stability — especially the sanctity of court decisions — above all else, even the rights conferred by a Final Constitution whose manifest aim is transformation.[4] From the perspective of a transformative constitution, disruption is the norm, not the exception. A society founded on a transformative constitution is a society in which, as Chief Justice Langa has put it, 'new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant.'[5] The Court's approach to retrospectivity is incommensurable with that vision.

Thirdly. I do not wish to argue that retrospectivity should never be limited. The cost — monetary or otherwise — to the country may well matter. My problem with the case law is that, as a general rule, it does not examine the evidence to determine what the actual cost of retrospectivity will be. There is no reference to statistics that indicate how many prisoners will be released or how many claims will have to be paid out. The judges do not question whether the state institutions have the capacity or the funds to deal with the impact of retrospectivity. Instead they seem to act on the assumption that in any case where a single prisoner might be released or a single penny spent, the cost will be too great. That approach gets the onus in retrospectivity cases back-to-front. If the starting point is full retrospectivity, then the state must bear the onus of providing evidence that would move a court to depart from that norm. Where the state fails to present evidence, it must face the consequences, namely, full retrospectivity. Of course, there may

[1] The Road Accident Fund Act 56 of 1996 makes the Road Accident Fund the only body against which delictual claims arising from motor vehicle accidents can be instituted. Victims are not entitled to institute claims against the actual wrongdoer. RAF Act s 17 read with s 21.

[2] *Engelbrecht* (supra) at para 45.

[3] *Mhlungu* (supra) at para 4. The gap that is sometimes left for people who would otherwise be denied relief to approach a court is insufficient as it requires resources and knowledge that are far beyond the means of ordinary people.

[4] See E Mureinik 'A Bridge to Where?' (1994) 10 *SAJHR* 31; K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146; P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch LR* 351.

[5] Langa 'Transformative Constitutionalism' (supra) at 356.

be cases where the social chaos created by retrospectivity will be so great and so obvious that the court may only take judicial notice of the likely consequences and not require the state to lead evidence.[1] But that could not possibly be the case in *Bhulwana* or *Engelbrecht* or any of the other reverse-onus or time-limitation clause cases where the Court could not possibly have had any idea how many innocent people were in gaol, or how many people who had filed their claims late still had legitimate claims, without the state supplying such evidence. If the Court had that evidence, then they certainly did not mention it in their judgments. That possibility would imply that they did not think the evidence was necessary to decide the case: but that too would be perverse. It would mean the rule was applied irrespective of the facts.

Fourthly, the Court has been inconsistent in its application of the principles it has laid down and has often failed to justify its decisions. Let's take the time-limitation cases. In *Mohlomi*, *Potgieter* and *Engelbrecht* the Court applies the unfinalised cases construction. In *Moise* it orders full retrospectivity. No attempt was made to distinguish *Moise* from the other cases — not even when an amicus questioned the retrospective effect of the order.[2] Earlier I tried to expound in the best possible light the Court's movement from *Zuma* through *Mhlungu* to *Bhulwana*. But the truth is that the *Zuma* and *Bhulwana* cannot be reconciled with *Mhlungu*. In *Mhlungu* Mahomed J held that '[i]t would … be arbitrary and irrational to deny to an accused person the right to rely on such invalidity merely because the declaration of invalidity by the Court took place on a date subsequent to the date when his pending trial was fortuitously completed.'[3] Yet that is precisely what the Court in *Bhulwana* does. It denies relief to people whose cases had been '[un]fortuitously completed' before the order was made. O'Regan J does not deny the consequences of these remarks in *Mhlungu*. She simply ignores them.[4] We are left to speculate as to why the Court backtracked in *Bhulwana* rather than sticking with the clearly superior principle it adopted in *Mhlungu*.[5]

[1] I think that *Mapp* (supra) and *Miranda* (supra) are good examples of this. Unlimited retrospectivity in these cases would have resulted in a large portion (perhaps even the majority in the case of *Miranda*) of convicted prisoners being released. That would clearly be unacceptable.

[2] *Women's Legal Centre* (supra).

[3] *Mhlungu* (supra) at para 45.

[4] *Bhulwana* (supra) at para 31.

[5] The only difference is that *Mhlungu* applies to all cases where there is a confession, while the other applies only to cases involving a certain amount of marijuana possession. This difference gives rise to two possible — but ultimately unsuccessful — justifications. First, the Court might have been motivated by the greater number of cases that would be affected by one order rather than the other. However, there were no facts before the Court on this question and it would seem that more cases would be affected by the provision in *Mhlungu* than that in *Bhulwana*. Second, there may have been a greater sympathy on the part of the Justices for people whose confessions were coerced than for those who carried too much marijuana on them. However there is nothing in the Constitution that seems to require a greater protection for the one class than the other. Both are victims of the same constitutional defect — a violation of their right to be presumed innocent — and should be afforded the same relief. Perhaps the best explanation is that Mahomed J — the author of *Mhlungu* — did not sit in *Bhulwana*. . .

I also find the Court's attempt to distinguish *Bhulwana* in *NCGLE v Minister of Justice* highly unsatisfactory. In *NCGLE v Minister of Justice*, the court invalidated the common law crime of sodomy. It held that it would be 'manifestly and grossly unjust and inequitable' to allow convictions for consensual sodomy to stand.[1] However, the Court felt that the overturning of those convictions should still occur through the machinery of the courts. It therefore made specific provision in the order for those persons to apply to a court for the late filing of a notice to appeal so that they could have their convictions set aside.[2] The *NCGLE v Minister of Justice* Court tries to draw a distinction between the two cases by arguing that it was concerned with the validity of a criminal provision, not a rule of evidence.[3] The latter would involve much greater disruption to the criminal justice system. Each case would have to be considered anew to determine whether the person would still have been convicted without the excluded evidence, and would be unfair to the prosecution who had relied on the evidence in good faith.[4]

Leaving aside the ridiculous reference to unfairness to the prosecutor,[5] and the absolute lack of evidence in any of the reverse-onus cases to show that the state could not easily cope with the number of prisoners who might be affected by the decision, the distinction might still have a gut-reaction appeal. However, consider this comparison: X is convicted of being in possession of arms and ammunition solely because he happened to be innocently present in a building where, without his knowledge, a large arms cache was stored. He is arrested and at trial is unable to satisfactorily explain his presence and is sentenced to 15 years imprisonment.[6] Y, who knows that sodomy is a crime, continues to have sex with his boyfriend and is convicted of sodomy and sentenced to 5 years imprisonment. Is it more unjust for Y to remain in gaol after the law under which he was convicted is

[1] *NCGLE v Minister of Justice* (supra) at para 96.

[2] Ibid at para 97. The relevant section of the order read: 'In terms of s 172(1)*(b)* of the 1996 Constitution, it is ordered that the order in para 1.1 shall not invalidate any conviction for the offence of sodomy unless that conviction relates to conduct constituting consensual sexual conduct between adult males in private committed after 27 April 1994 and either an appeal from, or a review of, the relevant judgment is pending, or the time for noting of an appeal from that judgment has not yet expired, or condonation for the late noting of an appeal or late filing of an application for leave to appeal is granted by a Court of competent jurisdiction.' While there was technically nothing stopping those convicted under the *Bhulwana* law from applying for the same condonation, the *Bhulwana* Court clearly did not envisage that it would be 'just and equitable' to include it in the order. The result is that any prisoner who did apply for condonation would be far less likely to receive it because the implication of the Court's judgment seems to be that he deserves to remain incarcerated.

[3] *NCGLE v Minister of Justice* (supra) at para 95.

[4] Ibid.

[5] It is ridiculous because the prosecutor suffers no prejudice if his good faith decision is later set aside because of a change in the law. The accused continues to sit in gaol.

[6] This was the effect of the statue invalidated in *S v Mbatha, S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC)('*Mbatha*'). The Court which relied directly on, and imposed the same order as the Court had in *Bhulwana*. The minimum sentence was 5 years and the maximum 25 years. *Mbatha* (supra) at para 20.

invalidated? That, in sum, is the reasoning in *NCGLE v Minister of Justice*. Such reasoning cannot be countenanced. The continued imprisonment of X and Y are, in my eyes, equally unjust.

These four criticisms demonstrate, I hope, that the Court needs to rethink its attitude to retrospectivity. I do not think it needs to look far. All the tools are already in its jurisprudence. The first flaw can be cured simply by picking up on the difference, which it has already explained, between the Interim Constitution and the Final Constitution. The reasoning I rely on to make the second criticism is nothing more than what Mahomed J had to say in *Mhlungu*. The Court already demands — in rhetoric but not practice — that litigants, especially the state, provide evidence of the practical impact of retrospectivity.[1] The inconsistency in the Court's judgments will probably be cured by taking the first three criticisms to heart and thinking a little more carefully about retrospectivity.

The Court also has the remedial tools to deal with the types of problems that arise in cases like *Bhulwana* and *Engelbrecht*. Simple retrospectivity would not be enough as there is no way to know whether all the people whom the declaration would affect would hear of the decision, whether they would be able to access a lawyer to take advantage of it and whether the state would aid or inhibit the realisation of the order. The best way to solve these problems is to make the type of supervisory order that the Court made in *Sibiya*.[2] The *Sibiya* order regulated the commuting of the death sentences of people still on death row when the death penalty was abolished. The government was required to provide a list of all the people who were still under sentence of death and then report on a regular basis on what progress was being made to change their sentences. In a case like *Bhulwana* — or even *NCGLE v Minister of Justice* — the government could be ordered to provide a list of all the people convicted in terms of the relevant statute and examine their cases to determine whether they might fall under the Court's order. Some mechanism could then be devised to deal with the cases.[3] Although this scheme would impose a small administrative burden on the Court, the gain we secure in the protection of individual rights make such a scheme an obvious improvement on the current default position on retrospectivity.

9.5 Individual remedies

This section considers remedies available for an isolated violation of an individual's rights (or the violation of the rights of a small identifiable group of individuals). I should stress again that individual remedies are not strictly separable

[1] See M Chaskalson, G Marcus & M Bishop 'Constitutional Litigation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) § 3.7.

[2] *Sibiya & Others v The Director of Public Prosecutions, Johannesburg, & Others* 2005 (5) SA 315 (CC), 2005 (8) BCLR 812 (CC).

[3] For example, they could be classified into cases where the person should clearly be released and cases where release was uncertain. The first class could be immediately released. The second class could be referred to the High Court to reconsider.

from systemic remedies or remedies following findings of invalidity. All three types of remedies are rooted in similar textual sources, offer analogous forms of relief and often reinforce one another. In sum, all three remedies are interrelated and must be as part of the same basket of remedies available to a court.

The three main remedies assayed under this heading — damages, declarations of rights and interdicts — are all available in most cases and the primary role of a court is to choose between them. No formula or algorthim exists for courts charged with determining which remedy is appropriate. Indeed, the chosen remedy most often turns on the facts and the relief pursued by the person asserting a constitutional claim. That said, the process of determining individual remedies is not as casuistic as it might appear. Upon closer inspection, the cases reveal some principles and suggest the process by which courts determine the appropriate remedy in cases where an individual's rights have been violated.

(a) Damages[1]

There are two categories of damages in constitutional matters. The first category consists of damages awarded in terms of the common law or a statute that gives effect to a constitutional right. I call these 'indirect constitutional damages' because they do not flow directly from the Final Constitution. The second category — 'direct constitutional damages' — flow from the Final Constitution alone. As I explain in more detail below, courts will, where possible, award indirect, rather than direct damages. Indeed, the courts will do so even if the award of indirect damages necessitates a development or re-interpretation of the law at issue.

(i) *Indirect constitutional damages*

In some sense, every award of delictual damages where the right asserted is also a constitutional right — such as dignity, bodily integrity, privacy or freedom of expression — is a constitutional remedy. Why? Because the indirect constitutional remedy serves to cure the violation of a constitutional right. The Court first ennunciated this proposition in *Fose v Minister of Safety and Security*.[2] Mr Fose had sued in delict for abuse suffered at the hands of the police but had, in addition to the normal delictual damages, asked for further constitutional damages to vindicate the violation of his constitutional rights. The Minister excepted to the second part of the claim. Ackermann J dismissed Mr Fose's argument in the following terms:

[1] For an excellent discussion of constitutional damages from a comparative perspective — US, New Zealand and India — see L Tortell *Monetary Remedies for Breach of Human Rights: A Comparative Perspective* (2006).

[2] 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC)('*Fose*').

> [T]here can, in my view, be no place for further constitutional damages in order to vindicate the rights in question. Should the plaintiff succeed in proving the allegations pleaded he will no doubt, in addition to a judgment finding that he was indeed assaulted by members of the police force in the manner alleged, be awarded substantial damages. This, in itself, will be a powerful vindication of the constitutional rights in question requiring no further vindication by way of an additional award of constitutional damages.[1]

The remedial principle established in *Fose* is that where a remedy under existing law adequately vindicates the constitutional right, there is no need to rely on the Constitution to create a new, self-standing, remedy.[2] Litigants who wish to vindicate a constitutional right through an award of damages should first determine whether they have a common-law (or statutory) claim. Claims that implicate constitutional rights of, for example, dignity[3] and privacy[4] have been successfully litigated in the Constitutional Court in the form of delictual actions and requests, where necessary for the development of delictual actions in order to secure the desired relief.

As I have just noted, the Final Constitution is not just the source of direct constitutional remedies. It also underwrites the creation and the award of indirect constitutional damages. Indirect constitution damages sourced in the Constitution generally occur where the Final Constitution is used to develop the common law (or interpret a statute) to provide a damages claim where no such claim was previously available.[5] The case that set the precedent for this kind of development was *Carmichele v Minister of Safety and Security*.[6]

Ms Carmichele had been assaulted by a known offender who had recently been arrested and then released on bail. Carmichele argued that the investigators and prosecutors were at fault for not having informed the presiding magistrate of the offender's state of mind and previous convictions. The High Court and the Supreme Court of Appeal rejected the claim on the basis that the state officials did not owe any legal duty to Carmichele in the circumstances. The Constitutional Court reversed the Supreme Court of Appeal. It held that the Final Constitution placed a cognizable duty on the state to protect people, particularly women, from violent crime. It sent the case back to the High Court[7] to reconsider the matter and to appropriately develop the common-law of delict in light of its findings. After further litigation in both the High Court and the Supreme Court of Appeal,[8]

[1] *Fose* (supra) at para 67.

[2] See § 9.2*(f)*(ii) supra.

[3] *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)(Defamation).

[4] *NM & Others v Smith and Others (Freedom of Expression Institute as* Amicus Curiae *)* 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC)(Disclosure of private medical facts).

[5] The line between these two classes of cases is by no means clear. I accept that some of the cases I identify as 'developments' merely relied on existing precedent. But nothing turns, from a remedial perspective, on whether a case is a development or not; the same principles of when damages are available apply.

[6] 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC).

[7] See *Carmichele v Minister of Safety and Security & Another* 2003 (2) SA 656 (C), 2002 (10) BCLR 1100 (C).

[8] *Minister of Safety and Security & Another v Carmichele* 2004 (3) SA 305 (SCA).

Ms Carmichele succeeded in her claim for (indirect constitutional) damages. *Carmichele* led to the litigation of a significant number of other cases that turned on alleged negligence or abuse by state officials. In these matter, the Final Constitution was employed to extend common-law liability beyond its traditional boundaries to hold the state liable for permitting prisoners to escape,[1] issuing licenses to an unstable person[2] and failing to remove a gun from a man they knew to be dangerous.[3] In another line of cases, the courts have use the Final Constitution in order to stretch the bounds of vicarious liability to ensure that those who are injured by delinquent policemen are able to claim from the state.[4]

These cases have relied heavily on the norm of accountability — one of the founding values of the Final Constitution mentioned in FC s 1[5] — to establish the award of (indirect constitutional) damages. This sentiment, and its limitations, is best expressed by Nugent JA:

> Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights, in my view, the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case. The norm of accountability, however, need not always translate constitutional duties into private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the State to account. Where the conduct in issue relates to questions of State policy, or where it affects a broad and indeterminate segment of society,

[1] *Van Eeden v Minister of Safety and Security (Women's Legal Centre as Amicus Curiae)* 2003 (1) SA 389 (SCA), 2002 (4) All SA 346.

[2] *Minister of Safety and Security & Another v Hamilton* 2004 (2) SA 416 (SCA).

[3] *Minister of Safety and Security v Van Duivenboden* 2003 (1) SA 389 (SCA)('*Van Duivenboden*')(The failure of the police failed to remove a gun from a man they knew to be dangerous led, almost ineluctably, to the shooting deaths of the man's wife and daughter.) But see *Minister of Safety and Security & Another v Rudman & Another* 2005 (2) SA 16 (SCA)(No legal duty on policeman without necessary training to perform CPR on drowning baby). For a discussion of these cases, see M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 40.5 *(b)*.

[4] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC)(Court held the Minister vicariously liable for the rape of a woman by on-duty policemen); *Minister of Safety and Security v Luiters* 1006 (4) SA 160 (SCA)(Minister vicariously liable for shooting spree of off-duty policeman); *Minister of Safety and Security v Luiters* 2007 (3) BCLR 287 (CC)(Confirmed SCA decision.)

[5] FC s 1*(d)* reads: 'The Republic of South Africa is one, sovereign, democratic state founded on the following values: . . . *(d)* Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.' For more on the role of founding values, see *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) at para 21 ('The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves.') See also C Roederer 'Founding Values' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 13. For more on the correct reading of FC s 1*(d)*, see T Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10.

> constitutional accountability might at times be appropriately secured through the political process or through one of the variety of other remedies that the courts are capable of granting. . . . There are also cases in which non-judicial remedies, or remedies by way of review and *mandamus* or interdict, allow for accountability in an appropriate form and that might also provide proper grounds upon which to deny an action for damages. However, where the State's failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm.[1]

Nugent JA also suggests that 'in some cases the need for effective government, or some other constitutional norm or consideration of public policy, will outweigh accountability in the process of balancing the various interests that are to be taken into account in determining whether an action should be allowed.'[2] To the extent that this suggestion applies to cases where no remedy other than damages is appropriate, it must be regarded with care. As I have argued above, there may be cases where compelling concerns justify the granting of no remedy at all.[3] However, in order to live up to the Final Constitution's promise of effective redress, such cases ought to remain the rare exception. This principle — itself extracted from the cases law — should be understood as a safety valve. It is not to be read as an endorsement for judicial abdication in cases where constitutional rights are deemed to conflict with one another.[4]

While the courts have been very eager to develop the common law to provide remedies for those who have suffered physical injury as a result of state negligence or abuse, they have proved far less sympathetic to those persons who have incurred only financial loss as a result of the state's negligence. In a string of cases related to negligent administrative action, the courts have refused to develop common-law administrative principles[5] to provide for compensation where the

[1] *Van Duivenboden* (supra) at para 21, quoted with approval in, for example, *Premier of The Province of the Western Cape v Fair Cape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA)('*Fair Cape*') at para 40; *Steenkamp v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC) at para 86 (Langa CJ and O'Regan J dissenting); *Minister of Safety and Security & Another v Carmichele* 2004 (3) SA 305 (SCA) at para 37 .

[2] *Van Duivenboden* (supra) at para 22. But see *Fair Cape* (supra) at para 40 (Lewis JA implies that Nugent JA held that there would *definitely* be cases where accountability would be outweighed by other factors. In my view, Nugent JA's use of the phrase 'there *might* be cases' and his deliberate avoidance of the issue point to a far more tentative suggestion.)

[3] See § 9.2*(b)*(iii) supra.

[4] For a critique of balancing generally, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 34.8*(d)*.

[5] These cases were decided before the advent of the Promotion of Administrative Justice Act 3 of 2000 which now governs administrative law. PAJA specifically permits compensation in extraordinary circumstances. PAJA s 8 (1)*(c)*(ii)(bb). It is therefore highly unlikely that there will be any further cases in this field. However, the tender cases provide a useful model for how courts might address similar questions that are not specifically regulated by statute.

constitutional right to administrative justice has been infringed.[1] The holding in *Olitzki Properties* offers two main reasons for this distinction.

The applicant ('Olitzki') applied unsuccessfully for a government tender to provide office space. Disappointed, Olitzki argued that the tender board had been improperly influenced by the provincial government and that they should have won the tender. It argued that the board had breached its responsibilities under the procurement provision of the Interim Constitution and therefore was liable in delict for the loss of profit Olitzki had suffered as a result of not receiving the tender. Cameron JA rejected the claim. Firstly, he held that Olitzki had alternative remedies. It could have had the decision set aside and re-applied, or — because it was aware of the government's influence before the decision was taken — it could have sought an interdict preventing the award of the tender.[2] Secondly, Olitzki was claiming the profit it lost as a result of not receiving the tender (some R10 million). Such an award would, the court found, place an undue burden on the 'public purse'. The award would amount to 'a double imposition on the State, which would have to pay the successful tenderer the tender amount in contract while paying the same sum in delict to the aggrieved plaintiff.'[3]

On the facts of *Olitzki Properties*, these reasons are compelling. However, they are far less compelling on the facts of *Steenkamp*. The case is discussed in detail earlier in this chapter and I will not rehearse the facts or my criticism here.[4] In short, the principles articulated in *Olitzki* ought not to have been applied in *Steenkamp* because there were no meaningful alternative remedies available and the applicant was only claiming the money it had spent in preparing to perform the tender. The Supreme Court of Appeal and the majority of the Constitutional Court were therefore wrong to deny the claim for damages.

The only context in which the courts have been willing to grant compensation for loss suffered from unjust administrative action is where there is proof of fraud on the part of the state.[5] In *Minister of Finance & Others v Gore NO,* Cameron JA distinguished *Olitzki* and *Steenkamp* in the following terms:

[1] See, for example, *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA)('*Olitzki*')(An unsuccessful tenderer may not claim the lost profits it would have received had it been awarded the tender); *Faircape* (supra)(No damages for loss suffered from negligent processing of application for removal of restrictions on property. *Fair Cape*, though an important decision, does not add much to our understanding of when damages can be awarded for negligent); *Dispersion Technology (SA) (Pty) Ltd t/a Pelo Healthcare v State Tender Board & Another* [2007] ZAGPHC 175 (Claim for damages flowing from a decision not to award a tender at all refused); *Steenkamp v Provincial Tender Board of the Eastern Cape* 2006 (3) SA 151 (SCA); *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) BCLR 280 (CC).

[2] *Olitzki* (supra) at paras 36–38.

[3] Ibid at para 30.

[4] See § 9.2*(b)*(ii)(bb) supra.

[5] *Minister of Finance & Others v Gore NO* 2007 (1) SA 111 (SCA).

> In *Olitzki* and *Steenkamp*, the cost to the public purse of imposing liability for lost profit and for out of pocket expenses when officials innocently bungled the process was among the considerations that limited liability. We think the opposite applies where deliberately dishonest conduct is at issue: the cost to the public of exempting a fraudulent perpetrator from liability for fraud would be too high.[1]

(ii) *Direct Constitutional Damages*

Direct constitutional damages are damages that arise from a provision or a principle in the Final Constitution rather than from the common law or a statute which protects — purposefully or incidentally — a constitutional right. While it has been rightfully chary with regard to the award of such damages, the Constitutional Court has made it clear that constitutional damages are appropriate in our constitutional regime:

> [T]here is no reason in principle why 'appropriate relief' should not include an award of damages, where such an award is necessary to protect and enforce [IC] chap 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the Legislature's intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law. When it would be appropriate to do so, and what the measure of damages should be will depend on the circumstances of each case and the particular right which has been infringed.[2]

The rest of the judgment in *Fose* made quite clear that, generally,[3] constitutional damages will be inappropriate where the existing law — as developed and interpreted in light of the Constitution — provides a remedy that fully vindicates the right.[4] The Supreme Court of Appeal has — in *MEC for the Department of Welfare v Kate* — taken a view that permits direct damages in a somewhat wider set of circumstances:

[1] *Gore* (supra) at para 88. While the decision in *Gore* is clearly correct — the law cannot immunise dishonest government action from liability — it also highlights what is wrong with *Steenkamp*. Surely the Constitution requires the government to be not only honest, but also competent. See FC s 195(1). Where other remedies are unavailable and the strain on the public purse is minimal, the same reasons that motivate granting damages in *Gore* should have led to the opposite outcome in *Steenkamp*.

[2] *Fose* (supra) at para 60.

[3] Ackermann J does not set the principle as an absolute rule, but it is difficult to think of a situation where another form of relief (whether damages or otherwise) is available through common law or statute and direct constitutional damages would still be justified. Perhaps, where a statute only permits a partial remediation (by limiting the damages to special damages for example) and it cannot be interpreted or developed to provide full remediation, direct constitutional damages should be employed to make up the shortfall.

[4] *Fose* (supra) at para 67.

> No doubt the infusion of constitutional normative values into delictual principles itself plays a role in protecting constitutional rights, albeit indirectly. And no doubt delictual principles are capable of being extended to encompass state liability for the breach of constitutional obligations. But the relief that is permitted by s 38 of the Constitution is not a remedy of last resort, to be looked to only when there is no alternative — and indirect — means of asserting and vindicating constitutional rights. While that possibility is a consideration to be borne in mind in determining whether to grant or to withhold a direct s 38 remedy it is by no means decisive, for there will be cases in which the direct assertion and vindication of constitutional rights is required.[1]

The *Kate* Court did not provide any detail on what those cases might be. But it did draw a distinction between a breach of a 'constitutionally normative standard' where indirect damages would be appropriate and the 'direct breach of a substantive constitutional right' where direct damages are fitting.[2] Also, if the breach of rights was widespread and continuous — as they were in *Kate* — then the situation would 'call out … for the clear assertion of [the right's] independent existence' through direct damages.[3]

The reasoning in *Kate* is far superior to that proffered in *Fose*. The vast majority of cases can be adequately addressed through indirect damages. However, a litigant should not have to fail at claiming indirect damages or prove that they will be ineffective to qualify for direct relief. Whether a court should award direct or indirect damages should depend on all the facts of the matter. The fact that a person framed a claim in terms of direct relief rather than indirect relief should not be used to deny them any relief at all. For what is ultimately at stake is the vindication of a constitutional right.[4]

That being said, three types of direct damages have been at least notional recognized. They are: damages to compensate for loss; punitive damages in addition to damages already claimed; and nominal or symbolic damages.

(aa) Damages to compensate for loss

To date, the Constitutional Court has only awarded direct constitutional damages in one, very unusual, case: *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd*.[5] A large number of people had illegally occupied a portion of Modderklip's farm. Modderklip eventually obtained an eviction order. However, by that time, some 40 000 illegal occupants lived on the farm. The sheriff required a deposit of R 1.8 million to enlist the help of a private contractor to evict the unlawful occupiers. That amount was far more than the value of the

[1] 2006 (4) SA 478 (SCA) at para 27.
[2] Ibid.
[3] Ibid.
[4] This was not the case. In *Fose*, the claim was for free-standing constitutional damages was made in addition to what he could claim through ordinary reliance on the law of delict.
[5] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC)('*Modderklip*').

occupied portion of the farm, so Modderklip sought alternative relief. It instituted action against the President and the Ministers of Safety and Security, Housing and Agriculture and Land Affairs. The Pretoria High Court ordered the various organs of state to ensure compliance with the eviction order and devised a supervisory interdict[1] to ensure compliance.[2]

On appeal, the Supreme Court of Appeal confirmed the findings that the state had failed to fulfill its obligations under FC ss 25 and 26. However, it altered the High Court's remedy.[3] The Supreme Court of Appeal took into consideration the fact that if the occupiers were evicted, they would have nowhere to go. Removing them from the land in the absence of alternative land was therefore not a viable option. It held:

> The only appropriate relief that, in the particular circumstances of the case, would appear to be justified is that of 'constitutional' damages, ie damages due to the breach of a constitutionally entrenched right. No other remedy is apparent. Return of the land is not feasible. There is in any event no indication that the land, which was being used for cultivating hay, was otherwise occupied by the lessees or inhabited by anyone else. Ordering the State to pay damages to Modderklip has the advantage that the Gabon occupiers can remain where they are while Modderklip will be recompensed for that which it has lost and the State has gained by not having to provide alternative land.[4]

The matter then came before the Constitutional Court. While the Court altered the basis of the relief,[5] it essentially confirmed the Supreme Court of Appeal's award of damages. Langa ACJ specifically referred to the findings in *Fose* that sometimes constitutional damages would be the only appropriate relief[6] and that the need for an effective remedy supported an award of constitutional damages.[7] An order of compensation also fit with the spirit and purpose of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.[8] Finally, the Court identified the following factors as favouring an award of constitutional damages:

> It compensates Modderklip for the unlawful occupation of its property in violation of its rights; it ensures the unlawful occupiers will continue to have accommodation until suitable alternatives are found and it relieves the state of the urgent task of having to find such alternatives.[9]

[1] For more on structural interdicts, see § 9.5*(c)*(iv) infra.

[2] *Modderklip Boerdery (Edms) Bpk v President van die RSA & Andere* 2003 (6) BCLR 616 (T) at paras 51–52.

[3] *President of the Republic of South Africa & Others v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA), 2004 (8) BCLR 821 (SCA).

[4] Ibid at para 43.

[5] *Modderklip* (supra) at paras 39–51 (Instead of relying on violations of the rights to property and housing, it based the decision on contempt for the rule of law and the right of access to courts (FC s 34).)

[6] *Fose* (supra) at para 60.

[7] Ibid at para 69.

[8] *Modderklip* (supra) at para 55.

[9] Ibid at para 59. The Court also avoided the difficulty of determining the amount of damages by holding that it should be determined in terms of the Expropriation Act 63 of 1975. Ibid.

The Court rejected the possibilities of declaratory relief[1] and an order for the state to expropriate the property.[2] It eventually settled on an award of damages. The appropriate lesson to draw from *Modderklip* is precisely what was suggested in *Fose*. There will be situations that require constitutional damages. They will, however, be exceptional cases where no other remedy is appropriate.

Somewhat more encouragingly, direct constitutional damages were also awarded by the Supreme Court of Appeal in the, now infamous, context of the continued failure of the Eastern Cape provincial government to pay social grants to people who were clearly entitled to them.[3] The case, *MEC for the Department of Welfare v Kate*, concerned an unexplained 40 month delay to decide whether to award Kate a disability grant.[4] Nugent JA held that the delay infringed Kate's FC s 27(1)*(c)* right to social security and that damages were the appropriate remedy.[5] Whether damages are appropriate must, he held, 'necessarily be determined casuistically with due regard to, amongst other things, the nature and relative importance of the rights that are in issue, the alternative remedies that might be available to assert and vindicate them, and the consequences of the breach for the claimant concerned.'[6] Like Langa DCJ in *Modderklip*, Nugent JA

[1] *Modderklip* (supra) at para 60 (The Court held that a declaratory order would not fully satisfy the right. Importantly, it held that this was the case even though Modderklip would still be able to bring a subsequent delictual action.)

[2] Ibid at paras 62–64 (The Court expressed concern that such an order would violate the separation of powers, but eventually rejected it because it did not know if the state had alternative land available to relocate the illegal occupiers. An order to expropriate would be unjust if such land was available.)

[3] For a summary of the situation and the accompanying litigation, see *Njongi v Member of the Executive Council, Department of Welfare, Eastern* 2008 (6) BCLR 571 (CC) at paras 8–26. See also *Ngxuza & Others v Permanent Secretary, Department of Welfare, Eastern Cape, & Another* 2001 (2) SA 609, 615F-618D (E); *Permanent Secretary, Department of Welfare, Eastern Cape, & Another v Ngxuza & Others* 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039 (SCA).

[4] 2006 (4) SA 478 (SCA)('*Kate*'). See also *Kate v MEC*, *Dept of Welfare*, Eastern Cape [2005] 1 All SA 745 (SE)(Froneman J too awarded constitutional damages, but for the violation of the right to administrative action.)

[5] *Kate* (supra) at para 22 (It is significant that the SCA found a violation of the right to social security rather than the right to administrative action. Nugent JA held: 'The realisation of substantive rights is usually dependant upon an administrative process. Rights that protect that process, like those that are embodied in s 33(1) and s 237 of the Constitution and in PAJA, are essentially ancillary to the realisation of those substantive rights. For without protection being given to the process the substantive rights are capable of being denied. Where, as in this case, the realisation of the substantive right to social assistance is dependant upon lawful and procedurally fair administrative action, and the diligent and prompt performance by the state of its constitutional obligations, the failure to meet those process obligations denies to the beneficiary his or her substantive right to social assistance. What has been denied to Kate is not merely the enjoyment of a process in the abstract, but through denial of that process she has been denied her right to social assistance, which is dependant for its realisation upon an effective process. It is the denial of that substantive right that lies at the centre of her claim.' (footnote omitted).) For more on FC s 27(1)*(c)*, see M Swart 'Social Security' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 56D. For more on FC s 33, see G Penfold & J Klaaren 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 63.

[6] *Kate* (supra) at para 25.

also considered and rejected the possibility of a declaration and a mandamus. A declaration was inappropriate because the long history of litigation made it clear that merely pointing out the illegality would have no impact on government.[1] The Supreme Court of Appeal seriously considered the possibility that Kate could have, within the 40 months she waited, obtained an interdict forcing the government to decide her application. Ultimately, this option was rejected for two reasons. First, persons who relied on social grants were amongst the poorest in society and they 'can be expected to have little or no knowledge of where their rights lie nor the resources readily to secure them'.[2] Second, given the existence of numerous other cases like *Kate*, a requirement that interdicts be sought in all of them would simply render impotent an already dysfunctional process.[3] Significantly, Nugent JA rejected an argument that damages would place an undue drain on the public purse in the following strident terms: 'the cause for that is the unlawful conduct of the provincial administration and it does not justify withholding a remedy.'[4] A final, vital element of *Kate* is that the damages did not cover financial loss. 'To be held in poverty is a cursed condition,' wrote Nugent JA. Kate was therefore entitled to compensation for both the physical discomfort and the reduction in her human dignity that her continued endurance of that condition caused.[5]

(bb) Punitive damages

The question of punitive damages was thoroughly considered by the Constitutional Court in *Fose v Minister of Safety and Security*. The applicant had been severely assaulted and tortured while in police custody. He also alleged that police torture and abuse were widespread at that police station. He asked the Court not only for delictual damages for his physical and emotional suffering, but for constitutional damages which, in addition to vindicating the right and compensating the applicant for loss suffered, would aim *(a)* to deter and to prevent future infringements of fundamental rights by the legislative and executive organs of State at all levels of government; and *(b)* to punish those organs of State whose officials had infringed fundamental rights in a particularly egregious fashion.[6]

The *Fose* Court refused to award any constitutional damages: of greatest import, perhaps, was its rejection of punitive damages. The majority adumbrated

[1] *Kate* (supra) at paras 28–29.
[2] Ibid at para 31.
[3] Ibid.
[4] Ibid at para 32.
[5] Ibid at para 33.
[6] *Fose* (supra) at para 17.

twelve criticisms of punitive constitutional damages.[1] However, it appears that the two most telling concerns were the unfairness and ineffectiveness of punitive damages. Ackermann J held that punitive damages in civil cases were generally inappropriate as it would give an aggrieved party the 'option to inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law'.[2] He also questioned whether an award of damages would really serve to decrease instances of police abuse in the current South African context:

> For awards to have any conceivable deterrent effect against the government they will have to be very substantial and, the more substantial they are, the greater the anomaly that a single plaintiff receives a windfall of such magnitude. . . . In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are 'multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform', it seems to me to be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already fully compensated for the injuries done to them, with no real assurance that such payment will have any deterrent or preventative effect. It would seem that funds of this nature could be better employed in structural and systemic ways to eliminate or substantially reduce the causes of infringement.[3]

However, despite these strong misgivings about punitive damages, the majority made it clear that its decision was limited to the facts of the specific case and left open the door for the possibility of punitive awards in future matters.[4] It would, however, be accurate to describe *Fose* as creating a presumption against punitive damages.[5]

[1] *Fose* (supra) at para 65 read with para 71 (*(a)* Punitive damages run counter to the tradition of 'carefully calculated compensatory damages'; *(b)* an expanded notion of the type of damages available for individual damages can achieve the same goal without shifting the focus from the individual; *(c)* there is no empirical evidence that punitive damages have any deterrent effect; *(d)* even if punitive damages can lead to systemic change, other relief can achieve the same goal faster; *(e)* punitive damages are too forward looking, detracting from the wrong actually suffered by the claimant; *(f)* 'it provides an unjustifiable windfall'; *(g)* funds can be better spent on directly improving the problems; *(h)* there is no warrant for punitive damages where the problem cannot be solved by deterrence; *(i)* the symbolic importance of rights can be demonstrated as well by non-pecuniary relief; *(j)* punitive damages are inappropriate in class actions; *(k)* they exact punishment without the safeguards of the criminal process; and *(l)* such awards against the government will ultimately be borne by the taxpayers.)

[2] Ibid at para 70 quoting Lord Devlin in *Rookes v Barnard* [1964] AC 1129, 1230 (HL).

[3] *Fose* (supra) at paras 71–72 (footnote omitted).

[4] Ibid at paras 20–21 and 74. Two judges took slightly different views on the correct approach to punitive damages. Didcott J felt the logic of Ackermann J's judgment served to completely rule out the possibility of punitive damages in any case. Ibid at para 86. Kriegler J preferred to limit his finding even more closely to the facts of the case where a punitive order was unlikely to solve the systemic problems described by the applicant. He left completely unanswered the possibility of punitive damages in other cases. Ibid at para 103.

[5] See J Klaaren 'Judicial Remedies' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) 9–11.

(cc) Nominal damages

Finally, damages could be awarded merely as a symbolic means to vindicate a plaintiff's right. This award would occur where the plaintiff had not suffered any actual damages and no punitive damages were required. Although not deciding the issue, the *Fose* Court had considerable doubts whether, even in the case of the infringement of a right which does not cause damage to the plaintiff, an award of constitutional damages in order to vindicate the right would be appropriate for purposes of [IC] s 7(4). The subsection provides that a declaration of rights is included in the concept of appropriate relief and the Court may well conclude that a declaratory order combined with a suitable order as to costs would be a sufficiently appropriate remedy to vindicate a plaintiff's right even in the absence of an award of damages.[1]

It is difficult to argue that, as far as symbolic value goes, damages will have any more force than a finding of invalidity or a declaration of rights.

(iii) *Is the quantum of damages a constitutional matter?*

The Constitutional Court's jurisdiction is limited by FC 167(3) to 'constitutional matters' and 'issues connected with decisions on constitutional matters'.[2] In order for the Court to reconsider a quantum of a damages award handed down by a High Court or the Supreme Court of Appeal, a litigant must convince the Court that it falls into one of those two categories. Given the Court's liberal approach to its jurisdiction — which has allowed the Court to recognise and to reinterpret traditional common-law issues, such as defamation or bodily injury claims as constitutional challenges — it is somewhat surprising that the Court has resisted a similar reconceptualization of damages.

However, it has not entirely shied away from using our basic law to rethink time-honoured approaches to damages. The Court recently engaged in a rather interesting — albeit unresolved — debate on damages in *Dikoko v Mokhatla*.[3]. *Dikoko* concerned defamation in the environment of a municipal council. The main application related to whether the statement was protected by the councillor's legislative privilege. The Court found that it was not. It then considered whether Dikoko's claim that the High Court's award of damages was too high raised a constitutional issue. Moseneke DCJ, for the majority, argued that defamation affects the right of freedom of speech and dignity and therefore concerns constitutional rights.[4] He reasoned that '[t]here appears to be no sound reason why common law remedies, which vindicate constitutionally entrenched rights,

[1] *Fose* (supra) at para 68.

[2] For more on the jurisdiction of the Court, see S Seedorf 'Jurisidction' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June) Chapter 4.

[3] 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC)('*Dikoko*').

[4] Ibid at para 90.

should not pass for appropriate relief within the reach of section 38', thus rendering the quantum a constitutional issue.[1] He noticed that especially high awards in defamation cases would have a 'chilling effect' on freedom of speech which is the 'lifeblood of an open and democratic society'.[2] However, despite holding that 'there is a very strong argument to be made that the assessment of damages in a defamation suit is a constitutional matter,' the majority avoided deciding the issue. Instead, it found that interference with the High Court's award was not justified.[3] Mokgoro J, with whom Nkabinde J concurred, were inclined to decrease the quantum and were forced to conclude, for the reasons given by Moseneke DCJ, that the question of quantum raised a constitutional issue.[4] Sachs J agreed with Mokgoro J, but wrote separately to emphasise the need for a more restorative approach to damages claims.

By contrast, Skweyiya J held that the quantum of damages generally does not raise a constitutional matter or issues connected with constitutional matters. He emphasised that despite the wide impact of the Final Constitution, a line had to be drawn somewhere between constitutional and non-constitutional issues.[5] He argued, with reference to earlier decisions,[6] that a mere disagreement with the High Court on its finding of quantum on the facts of the case, without some general challenge to the rule on which it relied, could not raise a constitutional issue. However, Skweyiya J conceded that '[i]t is possible that in a future case an applicant will be able to show that as a result of the way in which the lower court judge evaluated the factors a constitutional right is violated; or that the judge failed to infuse the values of the Constitution into the process whereby he settled on an amount of damages to be awarded.'[7] Such a case might raise a constitutional issue, he argued, but *Dikoko* was not such a case.

The possibilities envisaged by Skweyiya J arose in *NM & Others v Smith & Others*.[8] *NM* concerned the non-consensual disclosure of the HIV status of three

[1] *Dikoko* (supra) at para 91.
[2] Ibid at para 92.
[3] Ibid.
[4] Ibid at paras 53–54.
[5] For more on what constitutes a constitutional issue, see F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11; Seedorf 'Juridiction' (supra) at Chapter 4.
[6] *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC)(appeal against factual findings of a criminal court not a constitutional matter) and *Phoebus Apollo Aviation CC v Minister of Safety & Security* 2003 (2) SA 34 (CC), 2003 (1) BCLR 14 (CC)(whether employer liable for employee's actions on a particular set of fact not a constitutional matter.) The holding in *Boesak* and especially *Phoebus Apollo* have been somewhat undermined by the decision in *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC)(accepted that vicarious liability almost always raises constitutional issues). See further, Seedorf 'Jurisdiction' (supra) at Chapter 4; C Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa" (2005) 21 *SAJHR* 512.
[7] *Dikoko* (supra) at para 135.
[8] 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC)('*NM*').

women in the biography of a prominent politician. The High Court partly upheld their claim but in determining damages took into account the fact that the women were poor and illiterate and that it was unlikely that other people in their community would read the book.[1] The majority of the Constitutional Court, including Skweyiya J, agreed that consideration of these factors was inappropriate and that the High Court had failed to give sufficient weight to the claimants' rights to dignity and privacy.[2] It accordingly increased the damages from R15 000 to R35 000. Although it never specifically declared the issue a constitutional matter or explained why thought it was, it is clear that they considered it such.

Ultimately, it seems that the conclusion that the amount damages in a constitutional matter is also a constitutional matter will most likely prevail. It has the tentative support of seven judges. Another three were willing to eschew their caution and hold that it is. However, there is much to be said for Skweyiya J's objection. One must wonder whether the Court would find it had jurisdiction where an applicant in, say, a medical negligence case, did not question the merits of the High Court's decision but only the quantum of damages awarded. A medical negligence claim, like a defamation claim, requires a court to consider important constitutional rights: the right to bodily integrity. A particularly high award could discourage any innovation by doctors, while a low award would seem to tolerate negligence. A similar analysis could be constructed for most non-commercial common-law damages claims. Do they all fall within the jurisdiction of the Constitutional Court? The reasoning in *Dikoko* would suggest that they do. It was, perhaps, this rather drastic consequence that motivated the majority of judges to prefer not to finally decide the issue.

Until the Court is confronted with a case where damages are the only issue, they are likely to leave this new and potential radical 'doctrine' undecided. Until then, an easier path, both for litigants and the Court will be to argue that where the gravamen of the complaint constitutes a constitutional challenge, as in *Dikoko*, the issue of quantum is an 'issue connected to a decision on a constitutional matter'. This reasoning may limit the number of cases that fall within the Court's jurisdiction, but still enable it to intervene in most cases where it finds the award of damages to be inappropriate.

(b) Individual Declaratory Relief

(i) *The nature of the power*

FC s 38 makes specific provision for a court to grant a 'declaration of rights'. A declaration of rights does not invalidate any laws or actions. It simply declares that certain conduct fails to meet constitutional standards or specifies what conduct would meet those standards. Jonathan Klaaren describes a declaration of rights in the following terms:

[1] *NM* (supra) at para 75.
[2] Ibid at paras 74–75 and 81.

> By declaring the shape and content of the fundamental rights at issue — although not enforcing them directly in terms of any order — a court may employ a remedy that in a sense goes beyond the usual defensive remedy of refusing to apply an unconstitutional law. A declaration of rights purports merely to clarify but not to alter an unconstitutional law.[1]

The importance of the distinction between clarity and invalidity arose clearly in *Hlophe v The Constitutional Court of South Africa & Others*.[2] The facts are notorious. The Constitutional Court issued a public statement that it had lodged a complaint with the Judicial Services Commission ('JSC') against Judge President John Hlophe for attempting to influence their decision on the validity of search warrants executed against ANC President Jacob Zuma.[3] Hlophe JP took exception to the complaint being made public and, in addition to lodging a counter-complaint with the JSC, applied to the Johannesburg High Court for a declaration that the Constitutional Court had violated a range of his constitutional rights, particularly his rights to be heard, to dignity and to equality. Because of the unusual circumstances of the case, it was heard by a bench of five judges that produced three judgments. Hlophe argued that if the High Court found that his rights were violated, they were *obliged* under FC s 172(1)*(a)* to declare them as such. All three judgments rejected this proposition because what was sought was not invalidity, but a declaration of rights.[4] The distinction is made clear by considering, as Marais J did, the absurd consequences of a declaration of invalidity:

> we would … have to make an order 'that the publication of a media statement by the Constitutional Court judges was invalid'. What exactly would this mean? The act complained of was done; it cannot be undone. In what sense was it 'invalid'? Are we declaring it to have no force and effect? The applicant's very complaint is that it has a most detrimental force and effect and invades his rights. That cannot be undone by a declaration of invalidity.[5]

A declaration of rights would not suffer from this same absurdity because it would not claim to undo anything but merely state that rights had been violated.

The general approach taken in *Hlophe* is certainly correct: a declaration of invalidity can only apply to conduct that has legal effect. It is senseless to talk about invalidating something that was never 'valid'. In these cases, courts clearly do have a discretion to grant or to refuse to issue a declaration of rights.

However, while the *Hlophe* court was entitled not to issue an order of invalidity, Kriegler J in *Hugo v President of the Republic of South Africa* had no such luxury.[6] The

[1] Klaaren 'Judicial Remedies' (supra) at 9–8A.

[2] [2008] ZAGPHC 289 ('*Hlophe*'). To avoid confusion, please note that the paragraph numbers of the unreported version of the judgment restart at the beginning of each of the two dissenting opinions.

[3] That decision was handed down several weeks later. *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma & Another v National Director of Public Prosecutions and Others* [2008] ZACC 13.

[4] *Hlophe* (supra) at para 108 (Mojapelo DJP), para 26 (Gildenhuys J)('The publication of the media statement has happened. A declaration of invalidity cannot change that.') and paras 3–9 (Marais J).

[5] Ibid at para 9.

[6] 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)('*Hugo*').

Court was required to determine whether a Presidential order freeing female prisoners if they had children under the age of 12, but not their male counterparts was discriminatory on the basis of sex or gender. Kriegler J found, in dissent, that the Presidential order constituted unfair discrimination and was then faced with the difficult issue of what order to make. An order of invalidity would mean that the mothers who had already been released would — absent a further Presidential order — have to be re-incarcerated. An order extending the reach of the President's order would release a large portion of the criminal population. To avoid these unwanted consequences, Kriegler J did not declare the order invalid but issued a declaration that the Presidential order violated the right to equality.[1] While one sympathises with the difficult position that Kriegler J was in, the Presidential order, unlike the publication at issue in *Hlophe*, had legal effect and the Court was therefore obliged, under FC s 172(1)*(a)* to declare it invalid. The same result could have been achieved by limiting the retrospective effect of the order of invalidity so that the mothers who had been released would not have to be incarcerated and no male prisoners would be released.

Before we get to the more interesting discussion of when declarations can actually be granted, it is necessary to consider the source of the power to make a declaration of rights. *Hlophe* provides a useful lens through which to analyse this problem. Mojapelo DJP held that the power rested in s 19(1)*(a)*(ii) of the Supreme Court Act[2] read with FC s 38.[3] Gildenhuys J held that the power came from FC s 38, but then applied it with heavy reliance on s 19(1)*(a)*(ii).[4] Marais J agreed that FC s 38 was the fountainhead of the power but did not refer to the statutory discretion in his discussion of how it should be exercised. All three approaches have some merit, but none are entirely correct.

Firstly, FC s 38 applies only to violations of the Bill of Rights, not to other provisions of the Final Constitution. It is therefore only the remedial source in fundamental rights challenges. When other constitutional provisions are at stake, litigants can rely on the 'just and equitable' jurisdiction in FC s 172(1)*(b)*.[5] Secondly, s 19(1)*(a)*(ii) cannot be the source of the power where constitutional rights are concerned. The power flows solely from FC ss 38 and 172(1)*(b)*. Thirdly, the case law that has developed to interpret s 19(1)*(a)*(ii) has no precedential value in so far as the exercise the constitutional discretion is concerned. The considerations relied on by courts interpreting that statutory provision may, however, be persuasive if they provide sound normative guidance.

[1] *Hugo* (supra) at paras 87–88.
[2] Act 59 of 1959.
[3] *Hlophe* (supra) at para 108.
[4] Ibid at para 26.
[5] See *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC)('*Rail Commuters*') at para 106.

(ii) *When should declarations be ordered?*

Before I begin, I must repeat that I am not here concerned with declarations for remedying systemic problems.[1] We are still occupied by individual rights violations.

There are not, as yet, any clear constitutional principles for when declaratory relief should be granted. It is useful to briefly look at the principles for relief under s 19(1)*(a)*(ii). There are two requirements for a declaration under this section: 'First the Court must be satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation", and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.'[2] The first leg will obviously be satisfied if a constitutional right is at issue. The meaning of the second leg was given the following gloss in *Adbro investment Co Ltd v Minister of Interior & Others* :

> For a case to be a proper case, in my view, generally speaking it would require to be shown that despite the fact that no consequential relief is being claimed or perhaps could be claimed in the proceedings, yet nevertheless justice or convenience demands that a declaration be made, for instance as to the existence of or as to the nature of a legal right claimed by the applicant or of a legal obligation said to be due by a respondent. I think that a proper case for a purely declaratory order is not made out if the result is merely a decision on a matter which is really of mere academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the applicant's position with reference to an existing future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought.[3]

The idea of 'tangible' advantage is misleading. At common law, declarations would be avoided because of the courts' general aversion to deciding hypothetical cases. The Final Constitution has, however, vastly increased standing rules and is aimed at regulating society and future conduct, not only resolving past disputes between individuals.[4] The question is not therefore whether declaratory relief has a 'tangible' impact, but whether it is the most appropriate relief available. If damages or interdicts are unavailable, declaratory relief will often be an appropriate fall-back in constitutional litigation.

For example, declaratory relief has been used in cases that are already moot because the order retains symbolic value. In *Pillay*, a high school student successfully challenged her school's decision to prevent her from wearing a nose stud to school as part of her Hindu Tamil religion and culture. However, by the time final appeal was decided in the Constitutional Court, she had already left school.

[1] See § 9.6*(a)* infra.

[2] *Durban City Council v Association of Building Societies* 1942 AD 27, 32 quoted with approval in *Hlophe* (supra) at para 28 (Gildenhuys J).

[3] 1961 (3) SA 283, 285B-D (T) quoted with approval in *Hlophe* (supra) at para 31 (Gildenhuys J).

[4] See generally on standing, C Loots 'Standing, Ripeness and Mootness' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 7.

O'Regan J, in dissent, held that as the matter was moot, a declarator was not just and equitable.[1] Chief Justice Langa, writing for the majority, rejected this proposition. He held: 'The declarator is simply a reflection of this Court's findings. A failure to grant a declarator would, to my mind, fail to vindicate [the student]'s right and would therefore not qualify as effective relief.'[2] Langa CJ is clearly correct. Although the declaration would neither elucidate the legal positions of the parties nor regulate their future conduct, a declaration of rights has the psychological and the symbolic effect that a mere finding in a judgment does not.[3] In short, it provides an important reminder of the potential consequences of any similar future violation.

The symbolic value of a declaration was also part of the motivation behind the order in *Mohamed*.[4] The applicants had been illegally removed from South Africa to face trial in the USA. No more powerful relief could be granted because the applicants were already in US custody. In rebuffing assertions by the government that no appropriate relief was available, the Court stressed that 'quite apart from the particular interest of the applicants in this case, there are important issues of legality and policy involved and it is necessary that we say plainly what our conclusions as to those issues are.'[5] A declaration was therefore necessary.[6]

Perhaps the best instance for declaratory relief occurs where there is uncertainty as to the respective obligations of the parties and they have come to court solely to seek clarity on the legal position.[7] For example, in *South African Police Service v Public Service Association,* a dispute arose as to whether the National Commissioner had a discretion to continue to employ a person when their post was upgraded or if the person had to automatically be employed in the upgraded post.[8] The lack of clarity caused significant disruption: many disgruntled employees had taken their cases to arbitration.[9] The case was brought in order to obtain

[1] *KwaZulu-Natal MEC for Education v Pillay* 2008 (2) BCLR 99 (CC) at para 183.

[2] Ibid at para 115.

[3] This effect is perhaps also what motivated Kriegler J in *Hugo.*

[4] *Mohamed & Another v President of the Republic of South Africa & Others* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC).

[5] Ibid at para 71.

[6] The Court also noted that the declaration might have some real practical effect if it was sent to the US court where the applicants were being tried. Ibid.

[7] See *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC)('*Rail Commuters*') at paras 106–109. See also *Alexkor v The Richtersveld Community* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC)(The only issue before the Court was whether the community in question was entitled to the return of their land in terms of the Restitution of Land Act. The *Richtersveld* Court simply declared that they were without determining how that return would be facilitated); *Shilubana & Others v Nwamitwa* [2008] ZACC 9; *Shilubana & Others v Nwamitwa (Commission for Gender Equality as Amicus Curiae)* 2007 (2) SA 432 (SCA); *Nwamitwa v Philla & Others* 2005 (3) SA 536 (T)(The applicant in this case sought a declarator that he was the rightful hosi (chief) of the Valoyi community. The order was granted by the High Court and the SCA and refused by the Constitutional Court. Because the parties sought only a clarification of their legal rights, a declarator was the only remedy on the table.)

[8] 2007 (3) SA 521 (CC), [2007] 5 BLLR 383 (CC)('*SAPS*').

[9] Ibid at para 4.

clarity on the extent of Commissioner's powers.[1] The Court's eventual order was a simple declarator giving the Commissioner a limited discretion that gave the parties guidance for the future.[2] *South African Police Service*, like many cases of this nature, is interesting because a remedy is granted where no right has been violated. This phenomenon is discussed in more detail above.[3]

Similarly, declarators are also appropriate where the law has changed because of the influence of the Final Constitution and it would be unfair to immediately impose liability on a party who relied upon the legal position under the Interim Constitution or the pre-constitutional democratic era. Under such circumstance, it may be more appropriate to simply declare the new position under the Final Constitution and give the party an opportunity to comply. Thus, when the High Court developed the common law to impose a duty on paternal grandparents to support their extra-marital grandchildren, it did not order the grandparents at issue to pay any money. It simply declared that they now had a legal duty to do so.[4]

A number of other important principles emerge from the dissenting judgments in *Hlophe*.[5] Both Gildenhys J and Marais J found that a decalaration of rights was inappropriate for several reasons. Firstly, if the declaration bound the JSC, it might well usurp its constitutionally assigned jurisdiction, which Hlophe had accepted by lodging a complaint with that body, to decide the complaint.[6] Secondly, and alternatively, if the court's decision could not bind the JSC, it would make no sense to have the issue adjudicated twice.[7] Marais J articulated the objections against having two tribunals decide the same issue as follows:

> It is inherently undesirable that two tribunals inquire into the same conduct, this being a waste of time, money and expertise. But more than that the two tribunals particularly where there are different methods of arriving at a decision might come to different conclusions. This in itself is undesirable but even more undesirable is that this is a high profile matter and the public perception has to be taken into account. The judiciary would inevitably be subject to a loss of confidence in the public eye should there be such different results, as the public will be unable to understand the effect of different methods of deciding the same dispute. The public would simply say that judges cannot agree on what occurred and that will leave them in the dark in a matter of this public moment and exposure. This is highly undesirable.[8]

[1] *SAPS* (supra) at para 5.
[2] Ibid at para 37.
[3] See § 9.2*(b)*(iv) supra.
[4] *Petersen v Maintenance Officer & Others* 2004 (2) BCLR 205 (C).
[5] The majority judgment of Mojapelo DJP simply asserted, without discussion, that delaratory relief was appropriate. *Hlophe* (supra) at para 108.
[6] Ibid at paras 37–41 and 45–46 (Gildenhuys J) and para 35 (Marais J).
[7] Ibid at paras 42–44 (Gildenhuys J).
[8] Ibid at para 34.

Similarly, and thirdly, if the purpose of the claim was to pave the way for a future damages claim, then it would result in a twofold process which was itself enough reason not to grant the order.[1] Finally, Gildenhuys J stressed that declaratory relief was not appropriate for mere unfair treatment. The treatment also had to violate a statutory or constitutional right.[2]

A Court will also be disinclined to settle for a declaration where it has reason to believe that the government will not comply with the order. Thus, in *MEC for the Department of Welfare v Kate,* the Supreme Court of Appeal found that the Eastern Cape provincial government's continued failure to comply with court orders compelling them to provide social welfare was sufficient reason to reject the possibility of declaratory relief.[3]

(c) Interdictory Relief

(i) *Interdicts versus declarations*

Unlike declarations of rights, interdicts not only declare what the legal position is, they order a party to perform, or not to perform, a specific act. They are therefore far more powerful remedies. A party that fails to comply with an interdict risks being held in contempt of court. Despite, or perhaps because of, the additional power of an interdict, the Constitutional Court has expressed some hesitation in employing it in place of simple declaratory relief. The reason for this approach seems to be based upon respect for the other arms of government: absent indications to the contrary, it is necessary for the courts to presume that the other branches of government will comply with its declarations without the threat of an interdict requiring them to do so.[4] That expectation of good faith is particularly apt when a court considers a supervisory interdict.[5] In sum, courts should be hesitant to employ an interdict if the same result can be obtained through declaratory relief.

(ii) *Interim interdicts*

Interim interdicts can be given prior to the final determination of a matter to ensure that no irreparable harm is suffered before the matter is finally determined. The requirements for an interim interdict at common law are four-fold:

[1] *Hlophe* (supra) at paras 48–49 (Gildenhuys J).

[2] Ibid at paras 57–58. Neither Gildenhuys J nor Marais J made a finding whether Hlophe's rights had been violated because they determined first that the remedy sought was inappropriate.

[3] *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA) at paras 28–29.

[4] *Rail Commuters* (supra) at para 109.

[5] *Minister of Health & Others v Treatment Action Campaign & Others (2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) at para 129.

(a) a *prima facie* right;
(b) a well-grounded apprehension of irreparable harm if the relief is not granted;
(c) that the balance of convenience favours the granting of an interim interdict; and
(d) that the applicant has no other satisfactory remedy.[1]

The Constitutional Court seems to have adopted these principles for interim interdicts flowing from violations of constitutional rights as well.[2] Generally, these principles are appropriate. Because interim interdicts by definition arise when it is impossible to finally decide the issue, an interim interdict should only be granted when absolutely necessary. However, the common law test is not binding on courts exercising their powers under FC ss 38 or 172. If a court feels that it is necessary to grant an interim interdict where one of the four requirements are not met, it is free to do so.

While current rules for interim interdicts remain quite general, we can expect new, more nuanced, rules to develop over time in response to the exigencies of novel constitutional claims. For example, the Supreme Court of Appeal has suggested that prior restraints on publication of, for example, defamatory material will seldom be justified.[3] (Thus a new rule for interim interdicts flows from our commitment to freedom of expression.)

A similar special role for interim interdicts in constitutional law may arise when a party requests the suspension of the enactment of legislation pending a determination of the constitutionality of that legislation. Such a problem arose in *United Democratic Movement v President of the Republic of South Africa*.[4] Parliament had passed legislation, including a constitutional amendment, that allowed legislators to change political parties. Various parties urgently challenged the constitutionality of the legislation. The High Court suspended the operation of the laws pending an application to the Constitutional Court. The Constitutional Court did not suspend the operation of the acts. (However its order did preserve the status quo.) The Court explained that the peculiar circumstances of the case and the immense political uncertainty[5] created by the High Court order and the pending

[1] *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391, 398I-399A (A) quoted with approval in *Janse van Rensburg NO & Another v Minister of Trade and Industry & Another NNO* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC)('*Janse van Rensburg*') at para 32.

[2] *Janse van Rensurg* (supra) at para 32.

[3] 2007 (5) SA 540 (SCA) at para 20 ('Where it is alleged, for example, that a publication is defamatory, but it has yet to be established that the defamation is unlawful, an award of damages is usually capable of vindicating the right to reputation if it is later found to have been infringed, and an anticipatory ban on publication will seldom be necessary for that purpose.') For more on prior restraints, see D Milo, G Penfold & A Stein 'Freedom of Expression' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) § 42.9*(h)*.

[4] *President of the Republic of South Africa & Others v United Democratic Movement (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae)* 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC)('*UDM*').

[5] It appeared that many politicians had already attempted to change political parties and that this could potentially cause municipal and provincial power to shift from one party to another. Ibid at para 10–11.

constitutional challenge warranted an interim order.[1] The Court made it clear that granting an interim interdict, or what it called a status-quo order, would turn on the particular facts of the case. A litigant would have to prove that 'there is a need to prevent what might otherwise be substantial prejudice.'[2]

While it is clear that status-quo orders turn on the facts of the case, it seems that the following three factors are the most relevant for their issuance:

(a) are there reasonable prospects that the statute will be found unconstitutional?
(b) is there a real prospect of irreparable harm to the applicants or others?
(c) taking into account the public interest, where does the balance of convenience lie?[3]

Interim interdicts have also been regularly employed by the Constitutional Court to regulate the period until a suspension order takes effect. These cases involving interim interdicts and suspension orders are discussed in depth elsewhere in this chapter.[4]

Interim interdicts may also be of service where a High Court or the Supreme Court of Appeal wishes to regulate a situation pending the confirmation of an order of invalidity by the Constitutional Court. For example, the High Court prohibited an inquiry in terms of s 415 of the Companies Act from asking questions of a director that might incriminate him in a criminal offence while the Constitutional Court itself was considering the constitutionality of s 415.[5]

(iii) *Final interdicts*

Final interdictory relief can take the form of either mandatory relief or prohibitory relief. Mandatory relief — normally called a mandamus — obliges a party to act. A prohibitory interdict — often referred to simply as an interdict — compels a party *not* to act. There is no way to identify the manifold situations in which an interdict will be appropriate other than to (somewhat rather facilely) state that they will be appropriate where the plaintiff wants another person to do or refrain from doing something.

At common law, the requirements for a final interdict are slightly different from those for an interim interdict. These requirements make it both easier and harder to obtain final relief. Easier: there is no need to show that the balance of convenience favours granting an interdict.[6] Harder: instead of a mere *prima facie* right, an applicant for a final interdict must show a clear right.[7] The requirements

[1] *UDM* (supra) at paras 9–11.
[2] Ibid at para 12.
[3] J Klaaren 'Judicial Remedies' (supra) at 9–14.
[4] For more on these orders, see § 9.4*(e)*(i)(cc) supra.
[5] *Wehmeyer v Lane NO* 1994 (2) BCLR 14 (C).
[6] *Uthukela District Municipality & Others v President of the Republic of South Africa & Others* 2002 (5) BCLR 479 (N).
[7] Ibid.

of irreparable harm and the absence of an alternative remedy apply equally to final interdicts. Again, these common-law rules should be seen as guidelines, not rules when constitutional rights are at stake. Specifically, the court should not feel bound by the 'no alternative remedy' requirement. In fact it would make little sense for them to feel so bound. In many cases where final interdicts might be appropriate, an alternative remedy will be an award for direct constitutional damages. But the Constitutional Court has also held that direct damages are a remedy of last resort. What does a court do when confronted with a choice between two remedies, both of which can only be employed if the other is unavailable? Interdicts should be granted when appropriate, even if other remedies are technically available.

Probably the most common use for an interdict in the constitutional context is to force an official to perform a constitutional duty. Interdicts are used to: force the police to investigate crimes;[1] enforce environmental regulations;[2] force an administrative body to make a decision about registration;[3] require the Legal Aid Board to provide legal aid;[4] force the government to intervene with foreign states for the benefit of a citizen;[5] and make the Minister of Defence negotiate with unions.[6] In these cases interdicts were the only way to fully vindicate the right. The right to a healthy environment at stake in *Wildlife Society of Southern Africa* could not have been protected by a damages award after the environment

[1] *Fullimput 221 CC t/a Hawk Molaba Luxury Tours v Sono & Another; In Combination with Fullimput 221 CC t/a Hawk Molaba Luxury Tours v Minister of Safety and Security & Others* 2006 (10) BCLR 1202 (T)(The applicant had obtained an interim order to prevent members of the taxi industry from intimidating or assaulting his employees. When the attacks continued, he requested the police to investigate which the refused to do. Relying on the Police Service's constitutional duty to prevent people from harm, the Court granted an interdict compelling the police to investigate the incidents.)

[2] *Wildlife Society of Southern Africa & Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa & Others* 1996 (9) BCLR 1221 (Tk)(The government had failed to enforce a decree making part of the Transkei coast an ecologically protected area. Various people had been violating the decree with impunity. Relying in part on the constitutional right to a healthy environment, the applicants obtained an interdict forcing the government to enforce the decree.)

[3] *Noupoort Christian Care Centre v Minister of National Department of Social Development & Another* 2005 (10) BCLR 1034 (T)(The applicant ran a centre for drug addicts. The Minister had granted temporary registration pending compliance with a number of requirements which the applicant said it had fulfilled. The Minister refused to apply his mind to the question of final registration. The court ordered the Minister to take a decision within 1 month.)

[4] *Klink v Government of the Republic of South Africa & Others* 1997 (10) BCLR 1453 (E)(The applicant believed he was entitled to legal aid for a criminal appeal. The application was dismissed on the grounds that a final decision not to grant legal aid had not yet been taken.)

[5] See *Kaunda & Others v The President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC)(The applicants wanted the government to ensure they were properly treated while in custody in Zimbabwe); *Van Zyl & Others v Government of RSA and Others* 2005 (11) BCLR 1106 (T)(Application for diplomatic protection to enforce mining rights in Lesotho refused).

[6] 2004 (4) SA 10 (T), 2003 (9) BCLR 1055 (T)(Smit J found that FC s 23(5) imposed a duty on the Minister to negotiate with unions, and therefore ordered him to do so.)

had been destroyed. Where an interdict would prevent a crime from taking place, one cannot, in good faith, argue that an award of damages after a person has been the victim of a crime will constitute a full a vindication of the right.

A particularly interesting form of interdict was at play in *Hoffmann v South African Airways*.[1] Mr Hoffmann was refused employment by SAA on the grounds that he was HIV positive. The Court held that SAA's conduct constituted unfair discrimination. In light of the clear factual finding that, but for his HIV status, Hoffmann would have been employed, the appropriate remedy was instatement. The Court ordered the SAA to employ Hoffmann. Describing the order as the 'fullest possible redress', Ngcobo J expressed the benefits of instatement in these terms:

> Instatement serves an important constitutional objective. It redresses the wrong suffered, and thus eliminates the effect of the unfair discrimination. It sends a message that under our Constitution discrimination will not be tolerated and thus ensures future compliance. In the end, it vindicates the Constitution and enhances our faith in it. It restores the human dignity of the person who has been discriminated against, achieves equality of employment opportunities and removes the barriers that have operated in the past in favour of certain groups, and in the process advances human rights and freedoms for all. All these are founding values in our Constitution.[2]

Instatement should only be denied if there were other considerations rendering it unfair or impractical.[3] No such considerations obtained in this case. Mr Hoffmann was perfectly capable of performing the job. The Court also made the important point that '[w]hat constitutes appropriate relief depends on the facts of each case' and the possibility that granting relief in one case would open a floodgate of other cases should be ignored.[4] While the Court has not applied this reasoning in other remedial contexts, particularly damages,[5] it is certainly a prudent principle to guide the award of final interdicts.

Prohibitory interdicts have been less common. There have simply been fewer instances in which threatened or ongoing violations of constitutional rights have come before the courts. The Constitutional Court did, however, grant a prohibitory interdict in the very first case it heard: *S v Makwanyane*.[6] The Court declared

[1] 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC)('*Hoffmann*'). See also, for example, *Police and Prisons Civil Rights Union & Others v Minister of Correctional Services & Others* 2006 (8) BCLR 971 (E)(Reinstatement was ordered after setting aside as unlawful administrative action the dismissal of a large group of employees.)

[2] *Hoffmann* (supra) at para 52.

[3] Ibid at para 53.

[4] Ibid at para 55.

[5] See, for example, *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC), *Steenkamp v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC).

[6] *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC).

the legislation providing for the death penalty invalid and, in addition, ordered that 'the State is and all its organs are forbidden to execute any person already sentenced to death'.[1]

Although the following comments do not fall not strictly within the scope of this chapter, I think it important to the manner in which interdicts may function as limits on constitutional rights. For example, in *Acting Superintendent-General of Education of Kwazulu-Natal v Ngubo & Others,* the respondents were the leaders of a group that had been protesting at the Natal College of Education in favour of more teachers in black high schools.[2] The protest turned belligerent and property was damaged. A temporary order banned further protests. Hurt J was asked to make that order final. The judge acknowledged the importance of the rights to freedom of assembly and to freedom of expression relied upon by the respondents. He found, however, that the rights were not absolute and could be limited by an interdict. In this case, the limitation might be said to have engaged the penumbra of the two rights: the respondents could still get their message across equally, if not more effectively, by other means. He found instead that the more pressing right at stake favoured the applicants: namely the right to be protected from trespass, vandalism and intimidation. The mere fact that the leaders admitted that they were unaware of the unlawful activities of the original protesters constituted sufficient reason to believe that they could not, in good faith, provide an assurance that similar, harmful activities would not occur again.

(d) Contractual relief

The relief granted in terms of contracts can also be affected by — and used to vindicate — constitutional rights. In *Mpange & Others v Sithole,* the High Court made innovative use of the Final Constitution to justify an order of specific performance.[3] The applicants were lessees of a 'slum'. The abysmal living conditions under which they were forced to live encompassed shelters without partitions between rooms, unhygienic sanitation facilities and general decay.[4] They took their landlord to court in order to force him to improve the conditions as required by the rental contract. Satchwell J noted that specific performance was not traditionally awarded in these cases. Lessees are expected to effect repairs themselves and then claim damages from the lessor. However, in this case, the constitutional rights to housing, dignity and privacy compelled the court to

[1] *Makwanyane* (supra) at para 151. Strictly speaking, the interdict was unnecessary as execution had been made illegal. The Court does not explain why it felt it necessary to include the interdict. Perhaps it wished to make clear that the order applied even to people who had been convicted and sentenced before the Interim Constitution came into force without engaging with the difficulties of retrospective application of the order of invalidity. For more on retrospectivity, see § 9.4*(e)*(ii) supra.

[2] 1996 (3) BCLR 369 (N).

[3] [2007] ZAGPHC 202 ('*Mpange*').

[4] Ibid at para 7.

develop the common law to permit specific performance to be granted in situations where the lessees could not afford to put up the funds to repair the dwelling themselves.[1] However, the Court eventually decided against an order for specific performance. It noted two significant impediments. First, the owner of the property — to which substantial alterations would have to be made — was not joined. Second, the order would have to be quite specific. The Court found that it lacked sufficient information to make a meaningful order.[2] Instead, the Court ordered a reduction of rent. While not as dramatic as specific performance, this remedy constituted a significant departure from the ordinary common-law position.[3] *Mpange* deserves special attention from judges, lawyers and academics alike. It demonstrates how all traditional remedies can be radically reconstructed or reconceived when viewed through a constitutional lens.

9.6 Systemic remedies

In this section I discuss three possible remedies for systemic violations: declarations, interdicts and supervisory orders. Supervisory orders are declarations or interdicts over which the court maintains continuing jurisdiction.

(a) Declarations

While it is often perceived as a weak remedy because it creates no direct legal consequences, declaratory relief is often very useful in allowing a court to maintain its own institutional role and to reinforce the duties and the obligations of other branches of government. It is particularly useful when confronting systemic violations of constitutional rights because the steps that need to be taken to address the violations may be detailed and complex, and therefore avoid precise formulation in a court order. The Canadian Supreme Court has put it this way: '[a] declaration as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished.'[4]

This advice was followed by the Constitutional Court in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*.[5] The applicant was a group representing rail commuters in the Western Cape who were unhappy with the high levels of violence on trains in the area. They argued that the organs of state responsible for the railway had a constitutional duty to ensure commuters' safety which they

[1] *Mpange* (supra) at paras 48–58.
[2] Ibid at paras 75–82.
[3] Ibid at paras 64–70.
[4] *Eldridge v British Columbia* (1997) 151 DLR (4th) 577 (SCC) at para 96 quoted in K Roach & G Budlender 'Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?' (2005) 122 *SALJ* 325, 338.
[5] 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC)('*Rail Commuters*').

had failed to fulfil. The Constitutional Court agreed. As a remedy, the applicant sought a supervisory order that would have made sure the state took steps to improve safety on trains.[1] The Court, however, preferred a simple declaration of the state's obligations:

> A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. . . . It should also be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the executive and the legislature, the decision as to how best the law, once stated, should be observed.[2]

The Constitutional Court has also employed declaratory relief in socio-economic rights cases: the orders in both *Grootboom*[3] and *TAC*[4] (in part) defined the scope of the government obligations — under the rights to housing and the right to healthcare respectively. The decisions largely left the creation of 'coordinated and comprehensive programmes' required to fulfill constitutional desiderata to the government.

The benefits of declaratory relief for the separation of powers are twofold. Firstly, it gives the government another chance to eliminate the constitutional infirmity and allows the court to avoid the dangers associated with threats of contempt of court. Secondly, it permits the court to avoid getting too involved in the detail of state administration and limits the court's role to placing an appropriate gloss on the constitutional norm without telling the state how to meet its requirements.

However, declaratory relief for systemic violations can be too weak a remedy. Iacobucci J of the Canadian Supreme Court has identified the following deficiencies: 'declarations can suffer from vagueness, insufficient remedial specificity, an

[1] This remedy was granted by the High Court.

[2] *Rail Commuters* (supra) at para 108.

[3] *Government of the Republic of South Africa v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)('*Grootboom*') at paras 96 and 99. (The case concerned a group of people who were in a crisis situation and had no access to housing. The Court granted the following delarator:

(a) Section 26(2) of the [Final] Constitution requires the State to devise and implement within its available resources a comprehensive and co-ordinated program progressively to realise the right of access to adequate housing.

(b) The program must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Program, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

(c) As at the date of the launch of this application, the State housing program in the area of the Cape Metropolitan Council fell short of compliance with the requirements in para *(b)*, in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.)

[4] *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC)('*TAC*') at para 235 (The Court coupled the declaratory relief with an interdict.)

inability to monitor compliance, and an ensuing need for subsequent litigation to ensure compliance'.[1] In his view, declarations were only appropriate in cases where compliance with the Charter of Rights was optional or where an interdict would make the claimants worse off.[2]

In the South African context, these deficiencies are perhaps even more serious than they are in Canada. Government is generally less efficient and less likely to be able to comply with broad declarations and litigants are not as well-resourced and will find it more difficult to bring subsequent litigation. The post-litigation history of *TAC* testifies to the inadequacy of simple declaratory orders.[3] While there may still be cases in which they can be productively employed, the general fondness for declarations rather than interdicts expressed in *Rail Commuters* should be reconsidered. This is especially true considering that there are a number of other remedial devices that bring about the benefits of declaratory orders, without the negative effects. As discussed later, the Court's more recent jurisprudence suggests that they may be more inclined to supervision rather than declaration in the future.[4]

(b) Interdicts

Non-supervisory interdicts have been productively employed to solve systemic problems. For example, in *Union of Refugee Women & Others v The Director: The Private Security Industry Regulatory Authority* the applicants were refugees who wanted to become security guards.[5] The relevant legislation, which the majority of the Court upheld, generally prohibited refugees from becoming security guards, but made provision for them to be granted an exemption. However, the majority of refugee applicants were unaware of how to apply for this exemption or what information was required because the regulatory authority took no steps to inform them. The Court found this behaviour unacceptable:

> The least that can be done by the Authority is to furnish the refugee applicants with information regarding the existence of various categories of security activities and information regarding the possibility of exemptions and the procedure for applying for them.[6]

[1] *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* [2000] 2 SCR 1120 ('*Little Sisters*') at para 258 quoted in Roach & Budlender (supra) at 339. See also D Bilchitz 'Giving Socio-economic Rights Teeth: The Minimum Core and its Importance' (2002) 119 *SALJ* 484, 500–501 (Argues that the Court's declaratory order in *Grootboom* was inadequate because it was too vague, failed to set deadlines and would be difficult to enforce.)

[2] *Little Sisters* (supra) at paras 259–260.

[3] See Roach and Budlender (supra) at 334 (Noting that, at least in Mpumalanga 'there was only token compliance.' Only after another application threatening to hold the relevant MEC in contempt did the province comply. 'It is not' according to Roach and Budlender 'over-dramatic to suggest that as a result of the failure by the province to comply effectively with the order of the Constitutional Court a significant number of babies may have been infected with HIV where this was avoidable, with probably fatal consequences.')

[4] See § 9.6*(c)*(iv) infra.

[5] 2007 (4) BCLR 339 (CC)('*Union of Refugee Women*').

[6] Ibid at para 83.

The Court accordingly ordered the regulatory authority to make all potential applicants 'aware of the nature of the information that must be furnished in their applications for exemption'.[1] An interdict was also employed in, *KwaZulu Natal MEC for Health v Pillay*.[2] The Court held that Durban Girls High School had violated a learner's right to equality by not allowing her to wear a nose-stud in school. (The nose-stud was deemed to be an important part of her Hindu religious and cultural identity and practice.) In addition to declaring her right to wear a nose-stud to school, the Court also ordered the school to change its rules so that it would accommodate other learners in a similar position in the future.[3]

Once-off interdicts occupy a halfway station between declarations and supervisory interdicts. Unlike declarations, they are enforceable by an order of contempt. Like declarations, the Court does not retain jurisdiction or supervision over the process, so it is still up to litigants to go to court to enforce the order. If they are unable to do so, then there is no way to force the government to comply with the order.

(c) Supervisory orders

(i) *Models for supervision*

Supervisory orders[4] come in a variety of forms but share the common characteristic that the performance of the remedy is kept under the supervision of the court. Supervisory orders have two primary purposes: *(a)* to determine the terms of a more detailed future order; and *(b)* to ensure that the state[5] complies with an order. A supervisory order can bear one or both of these purposes. The form of the order will generally depend on what the purpose of the order is.

The most common form of the order is an interdict coupled with a requirement that the government submit regular reports on its compliance with this order. These reports are ordinarily submitted to the courts and the other original parties, but can also be ordered to be submitted to other parties who were not involved in the initial litigation.[6] The other parties are given an opportunity to

[1] *Union of Refugee Women* (supra) at para 90.
[2] 2008 (2) BCLR 99 (CC)('*Pillay*').
[3] Ibid at para 117.
[4] There are two points to make, one terminological and one structural. One: Supervisory orders are often also referred to as 'structural interdicts'. This is a less accurate term as not all supervisory orders are structural, while all structural orders require supervision. A supervisory order simply entails that the court retains jurisdiction or oversight over the implementation of its order. The term 'structural' implies either that the problem to be solved is with the structure of an institution or is in some sense caused by the structure of power. That need not be the case. Two: The supervisory order can rest either on a declaration or an interdict. The term 'interdict' or 'injunction' is therefore misleading.
[5] There is no reason in South Africa why supervisory orders cannot be used to cure constitutional violations by private parties, particularly corporations. See § 9.2*(f)* supra. However, the primary target will invariably be the state.
[6] *S v Z and 23 Similar Cases* 2004 (4) BCLR 410 (E).

comment on the reports and the Court will then make another order. The order can also include a specific re-hearing date when the reports will be discussed, or the option of re-hearing can be left open and the Court will only hold a future hearing if the reports seem to make it necessary. This basic form can be used to achieve both the compliance and the determinative purpose. It is also possible that the Court could delegate the monitoring of the case to another body.[1]

When the purpose is primarily to determine what the appropriate relief should be, Sturm has identified five basic models employed in US courts.[2] The first — the traditional adjudicatory model — does not deviate from a courts' ordinary practice in crafting a remedy and is only supervisory if the court maintains jurisdiction over its implementation. The traditional court either makes a decision based on the evidence before it, or leaves it to the defendant to determine what should be done. This has with only a few exceptions been the approach adopted by South African courts.

The second model is 'bargaining' where the parties are encouraged to agree to a remedy. This can be done by forcing negotiation between the parties or appointing a third party to oversee the negotiations or simply requiring the parties to submit proposals and penalising one or both if they fail to reach agreement. A variant of this was used by the Constitutional Court in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* to encourage agreement between the parties.[3] At the hearing the Court issued an order compelling the parties to negotiate to attempt to reach an agreement. They did, and that agreement was made part of the Court's order.

Third, the legislative hearing model.[4] The court conducts a hearing in which all interested parties are invited to participate, often with relaxed rules of evidence. The judge uses the information gathered from the hearings to fashion the remedy. Fourth, the remedy can also be referred to an expert to develop and propose a remedy.[5] The expert should try to mobilize support among parties for his proposal, but should also bring his own expertise to the matter. The approach of the High Court in *Centre for Child Law v MEC for Education* partially fits this profile.[6] The Court ordered a school of industry that was failing to protect children's rights to undergo and implement a developmental quality assurance process.

Fifth, the court and the parties can develop 'structures that involve the interested actors in a process of developing a consensual remedy through joint fact-finding and collaborative decisionmaking assisted by a third party.'[7] In one case

[1] See *Grootboom* (supra) at para 97 (The Court held that the Human Rights Commission, who was a party to the case would monitor the State's progress and report on the progress if necessary.)

[2] S Sturm 'A Normative Theory of Public Law Remedies' (1991) 79 *Georgetown LJ* 1355 ('Normative Theory').

[3] 2008 (3) SA 208 (CC).

[4] Sturm 'Normative Theory' (supra) at 1370–1371.

[5] Ibid at 1371–1373.

[6] Unreported, Transvaal Provincial Division, Case No 19559/06 (30 June 2006).

[7] Sturm 'Normative Theory' (supra) at 1373–1374.

this involved, as a starting point, creating a computer program that mimicked the variables that applied to a dispute over fishing rights and then determined what possible solutions would meet all the parties' minimum requirements.[1] This 'consensual remedial formulation model' is an amalgam of the bargaining model and the expert model as the expert works with the parties to come to a solution.

Sturm finds inadequacies in all these models[2] and suggests a slight variation on the fifth option — which she calls the 'deliberative model' — as the most appropriate approach. Like the consensual model, a third party is appointed to engage with the stakeholders to reach a conclusion. The primary difference is that in the deliberative model the court is centrally involved at all stages of the process to ensure that fair procedures are followed. The court also ensures that the solution meets the original normative goals of the remedy and makes a decision if agreement cannot be reached.

In Canada, the question of structural interdicts is largely governed by the Supreme Court decision in *Doucet-Boudreau*.[3] The Court agreed that the government had not taken account of their obligation to provide all children with an education in either English or French when deciding where to build new schools. The High Court[4] had granted a structural interdict to solve the problem and the Supreme Court split 5–4 over whether that remedy was appropriate. The majority upheld the structural interdict, stressing the need to provide effective remedies and downplayed the danger of institutional interference.[5] Echoing the US Supreme Court, the majority also noted the need for appellate courts to defer to trial courts' determination of the appropriate remedy.[6] In the minority's view, the remedy required the trial court to take on an administrative or a political role, both of which were inappropriate for a court.[7] They believed that ordinary contempt of court procedures were sufficient to ensure compliance.[8]

(ii) *The Case Law on Structural Interdicts*

The first hint from the courts that supervisory orders were a possibility came in *Pretoria City Council v Walker*.[9] The case concerned discrimination arising from the

[1] *United States v Michigan* File No M26–73CA (WD Mich, 7 May 1985) discussed in Sturm 'Normative Theory' (supra) at 1734. See also Brazil 'Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?' (1986) 53 *University of Chicago LR* 394, 410.

[2] Sturm 'Normative Theory' (supra) at 1411–1427.

[3] *Doucet-Boudreau v Nova Scotia (Department of Education)* [2003] 3 SCR 3 ('*Doucet-Boudreau*'). For a full discussion of the case, see Roach & Budlender (supra) at 341–345.

[4] *Doucet-Boudreau v Nova Scotia (Department of Education)* 2000 CarswellNS 220.

[5] *Doucet-Boudreau* (supra) at paras 25 and 36 ('Deference ends . . . where the constitutional rights that the courts are charged with protecting begin.')

[6] Ibid at para 87.

[7] Ibid at paras 118–129.

[8] Ibid at para 136.

[9] 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)('*Walker*').

use of different charging and collection policies for electricity rates in different areas of Pretoria. The Court found that the collection policies were unfairly discriminatory, but held that Mr Walker was not thereby entitled to — as he had — refuse to pay for his electricity as other remedies were available to him:

> Instead of withholding amounts lawfully owing by him to the council, [Mr Walker] could, for instance, have applied to an appropriate court for a declaration of rights or a mandamus in order to vindicate the breach of his [right to equality]. By means of such an order the council could have been compelled to take appropriate steps as soon as possible to eliminate the unfair differentiation and to report back to the court in question. *The court would then have been in a position to give such further ancillary orders or directions as might have been necessary to ensure the proper execution of its order.*[1]

In *Minister of Health v Treatment Action Campaign* the government argued that a court that found a violation of socio-economic rights could only make a declaratory order and leave it to the state to determine how to comply with that order.[2] An order that actually told government what to do would, the government submitted, violate the separation of powers by intruding into issues of policy, the realm of the legislature and executive. The Court strongly rejected this claim. While it acknowledged that courts should always pay 'due regard … to the roles of the Legislature and the Executive in a democracy', courts are also 'under a duty to ensure that effective relief is granted' and therefore must have the power 'to make orders that affect policy as well as legislation' including mandatory and supervisory orders.[3]

It is clear then, that courts have the power to make supervisory orders, but what have they done with it? The results have been mixed. The Constitutional Court has set a fairly high bar for the use of structural interdicts and it and the SCA have overturned some such orders made by the High Court, particularly in socio-economic rights cases. On the other hand, the Constitutional Court, the SCA and the High Courts have all indicated their willingness to supervise government's compliance in certain circumstances. The most recent instance also strongly suggests that such supervision will become more common in the future.

(aa) Cases where supervisory interdicts have been refused

The most important case on supervisory orders is *Minister of Health v Treatment Action Campaign*. The Constitutional Court held that the government's refusal to distribute the drug Nevirapine to prevent mother-to-child transmission of HIV/AIDS fell short of their obligations under the FC s 26(1)*(a)* to take reasonable measures to make healthcare progressively accessible.[4] The High Court had

[1] *Walker* (supra) at para 96 (my emphasis).

[2] 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC)('*TAC*') at paras 96–97.

[3] Ibid at paras 106 and 113. (The Court notes the support for this position in foreign jurisdictions (paras 107–111) and its own precedents supporting the need for effective relief and the power to grant mandatory orders where necessary. Ibid at paras 100–106.)

[4] For more on the right to health, see D Bilchitz 'Health' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 56A.

devised a supervisory interdict which ordered the government to develop a plan on how Nevirapine would be made available and to submit that plan to the Court for approval.[1] As noted earlier, the Constitutional Court confirmed the High Court's power to make such an order, however it determined that it was not appropriate in this case. The Court first established a strict test for when supervisory orders would be appropriate: '[Courts] should exercise such a power if it is *necessary* to secure compliance with a court order. That may be because of a failure to heed declaratory orders or other relief granted by a Court in a particular case.'[2] It then noted that government had 'always respected and executed orders of this Court' and that there was therefore 'no reason to believe that it will not do so in the present case.'[3] The Court made an order that both declared government's obligations and ordered them to take certain specific steps, while allowing government to deviate from the second part of the order if they found a better way to meet their obligations.[4]

The two important lessons to take from *Treatment Action Campaign* are: One, courts can grant supervisory orders even when they have policy implications, but, two, only where it is *necessary* to ensure compliance. The second lesson may seem to undermine the first as it will be very difficult to prove that supervision is necessary to ensure compliance unless a litigant can show that government is incompetent or in bad faith.

This view was given some credence in *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others.*[5] The supervisory orders granted by the High Court was substituted on appeal. *Rail Commuters* concerned the duty of government to protect people using trains in the Western Cape from violence. The High Court had ordered the relevant organs of state to 'take all such steps … as are reasonably necessary to put in place proper and adequate safety and security services … in order to protect [the constitutional] rights of rail commuters'[6] and required them to submit reports to allow the court to evaluate their progress.[7] The Constitutional Court preferred to grant a simple declaratory order specifying the state's obligations and leaving it to the state to determine how to meet those benchmarks. Part of the reason given by O'Regan J was the flexibility afforded by declaratory orders,[8] but she also noted that '[t]here is nothing to suggest on the papers that [the state] will not take steps to comply with the terms of the order.'[9]

[1] 2002 (4) BCLR 356 (T).
[2] *TAC* (supra) at para 129 (my emphasis).
[3] Ibid.
[4] Ibid at para 135.
[5] 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC).
[6] 2003 (3) BCLR 288 (C) at order para 3.1.
[7] Ibid at order para 3.2.
[8] *Rail Commuters* (supra) at para 108. For more on declaratory orders, see § 9.6*(a)* supra.
[9] *Rail Commuters* (supra) at para 109.

The Supreme Court of Appeal has expressed a different set of reservations about supervisory orders. The facts of *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*[1] are described in detail above,[2] but, in brief, people had invaded Modderklip's land and the state had been unable or unwilling to evict them. The High Court set out Modderklip's rights and required the government to submit a detailed plan of how it would remove the invaders from Modderklip's land and provide them with alternative housing.[3] On appeal, Harms JA advocated against supervisory orders

> Structural interdicts … have a tendency to blur the distinction between the executive and the judiciary and impact on the separation of powers. They tend to deal with policy matters and not with the enforcement of particular rights. Another aspect to take into account is the comity between the different arms of the state. Then there is the problem of sensible enforcement: the state must be able to comply with the order within the limits of its capabilities, financial or otherwise. Policies also change, as do requirements, and all this impacts on enforcement.[4]

Instead, he ordered the state to pay constitutional damages to Modderklip to compensate for his loss.[5] The Constitutional Court confirmed the SCA's order, but did not directly consider the High Court's supervisory order.[6]

(bb) Cases where supervisory interdicts have been granted

In *August & Another v Electoral Commission* the Court found that prisoners had been unconstitutionally deprived of their right to vote by the Electoral Commission's policy and ordered the Commission to make the necessary arrangements to permit prisoners to vote in the 1999 national elections.[7] Sachs J acknowledged that what those arrangements should be was 'a matter pre-eminently for the Commission' and that the Court did 'not have the information or expertise to enable it to decide what those arrangements should be or how they should be effected'.[8] It therefore ordered the Commission to draft an affidavit detailing what arrangements it would make and that that affidavit should be available for public inspection.[9] Although the Court did not specifically state this, it seems implicit that any of the parties or other interested persons who were unsatisfied with the Commission's plan could apply to the Court to rule on whether they

[1] 2004 (6) SA 40 (SCA), 2004 (8) BCLR 821 (SCA)('*Modderklip SCA*').
[2] See § 9.5*(a)*(ii)(aa) supra.
[3] 2003 (6) BCLR 616 (T) at para 52.
[4] *Modderklip SCA* (supra) at para 39.
[5] For more on constitutional damages, see § 9.5*(a)* supra.
[6] *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others, Amici Curiae)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC).
[7] 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC)('*August*').
[8] Ibid at para 39.
[9] Ibid.

were adequate. Five years later, the same issue arose in the 2004 elections.[1] Again the Court upheld prisoners' right to vote and again it ordered the Commission to lodge an affidavit explaining how the process would be managed.[2]

The Court's willingness to adopt supervisory orders in these cases probably rested on two factors. First, it would not be a long drawn out process of supervision of an institution, but a temporary supervision for a defined time. Second, and perhaps more importantly the task at hand — making it possible for prisoners to vote — was well defined and relatively simple, compared to, for example, the provisioning of housing for all people in the Johannesburg inner city. The Court probably felt that any disagreement on the plan adopted by the Commission was likely to be minor and could be easily resolved. The same would not be true when dealing with more complicated or institutional problems.

The Court engaged in a much more detailed supervisory process in *Sibiya v The Director of Public Prosecutions, Johannesburg* to regulate the conversion of sentences of people still sitting on death row after the death penalty was abolished.[3] The Government was required to submit information on all the prisoners still on death row and explain why their sentences had not yet been changed and what would be done to ensure that they were. The Court did not justify its supervision of the process in its original judgment, but later explained that it was based on 'the delay that had occurred since [the death penalty was declared unconstitutional] coupled with the pressing need for the sentences to be replaced'.[4] The Court eventually considered five reports by the government until the process was finalized. The first report set out the number of sentences that still needed to be converted while each subsequent report indicated what steps had been taken and what still remained to be done. The entire Court considered in detail each report and identified what problems remained and ordered a further report to be made. At the completion of the process, the Court issued a judgment reflecting on the supervisory process in generally positive terms:

> This judgment on the supervisory process in relation to the substitution of the death sentence shows the following:
> *(a)* Successful supervision requires that detailed information be placed at the disposal of a court.
> *(b)* Supervision entails a careful analysis and evaluation of the details provided.
> *(c)* Supervision cannot succeed without the full co-operation of others in the process.
> *(d)* Courts should exercise flexibility in the supervisory process.[5]

[1] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)('*NICRO*').

[2] Ibid at para 80 (This part of the order is not discussed in the body of the judgment. Presumably the same reasoning applied as in *August*.)

[3] 2005 (5) SA 315 (CC), 2005 (8) BCLR 812 (CC)('*Sibiya I*'). The death penalty was abolished in *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC).

[4] *Sibiya & Others v DPP, Johannesburg High Court & Others* 2006 (2) BCLR 293 (CC)('*Sibiya III*') at para 6.

[5] Ibid at para 22.

Sibiya reflects a growing comfort in the Court with supervision and satisfaction with their first serious foray into that area. Their emphasis on detail is particularly interesting. Yacoob J wrote that '[t]he detail was … essential so that this Court would not have to rely completely on the say-so of some other person that a particular stage in the process had been reached; there had to be sufficient information for the Court itself to be satisfied that a particular stage had been reached.'[1] This indicates that the Court is willing to engage in detailed analysis of government's plans and to identify the problems in them. Perhaps another explanation for the original order and the Court's satisfaction with the process is that *Sibiya* did not require the Court to substitute its own opinion for that of the government, but merely to ensure that the government completed a process to which it had already committed itself.

Although the SCA's dislike for supervisory orders was made clear in *Modderklip*, it has recently granted a supervisory order in a socio-economic case: *City of Johannesburg v Rand Properties (Pty) Ltd & Others*.[2] The court held that, although the City was entitled to evict people from buildings in the inner city, it had to provide them with alternative housing. It ordered the City to file an affidavit showing that it had done so. On appeal to the Constitutional Court, the Court, in the course of oral argument, ordered the parties to negotiate and attempt to reach a settlement.[3] The parties did so and the Court was thus spared deciding any further the question of remedy. Of course, the order to negotiate is itself a form of supervisory interdict as the parties were required to report back to the Court on their progress and the Court still had a discretion whether to make the agreement an order of court.

The High Court has been more willing to craft supervisory interdicts. What is particularly interesting is that many of the cases in which it has done so involve children.[4] In *S v Z and 23 Similar Cases* the Eastern Cape High Court was confronted with the problem that juvenile offenders were being sentenced to attend reform schools, yet there was no reform school in the Eastern Cape.[5] The result was that many juveniles were being held for long periods of time in places of safety, prison and police cells. Plaskett J found this situation unacceptable and, after hinting at the utility of a supervisory order, postponed the matter for further consideration. When it was considered again, Plaskett J ordered the state to report

[1] *Sibiya III* (supra) at para 7.
[2] 2007 (6) BCLR 643 (SCA).
[3] [2008] ZACC 1.
[4] See, eg *Grootboom & Others v Oostenberg Municipality & Others* 2000 (3) BCLR 277 (C). Davis J held that the state's failure to provide temporary shelter for families desperately in need violated the FC s 28(1)*(c)* right of children to 'basic shelter'. However, Davis J did not want to be 'prescriptive' about how the state should fulfill its obligations and therefore did not grant an interdict. Instead, he made a declaration of rights and retained supervisory jurisdiction by ordering the government to submit a plan that would then be responded to by the other parties and would ultimately be considered by the Court.
[5] 2004 (4) BCLR 410 (E)('*Z and 23*') discussed in Roach & Budlender (supra) at 331.

every four months to the Judge President of the Court, the Inspecting Judge of Prisons and two interested NGO's on the progress made in converting the facility where children were currently held and on building a reform school until the Judge President released them from the obligation.[1] This is a fascinating case because the Court is willing to undertake, in partnership with other interested bodies, the supervision of the sizable project of building a new school for an indefinite time.

More recently the Centre for Child Law approached the Pretoria High Court to force the provincial government to improve conditions for children staying at a so-called 'school of industry'.[2] Murphy J granted a wide-ranging order that required the state to immediately provide sleeping bags to the children, devise plans to control access to the school, subject the school to a developmental quality assurance process and commit to implement the plans arising from that process. The High Court retained supervisory jurisdiction over the implementation of this order. A supervisory order was also held to be necessary in *S v Mokoena; S v Phaswane* where the Court ordered radical revisions to the law regulating how children testify in criminal proceedings including requirements that any trial involving children be expedited and that children were entitled to testify through an intermediary.[3] The responsible government agencies were ordered to report back to the Court on the progress that had been made in implementing the order a year later.[4]

Why have the High Courts been so willing to intervene in cases involving children? Firstly, the High Court is, even under common law, the upper guardian of all children.[5] It therefore feels an innate responsibility to ensure their well-being which it may not feel for adults. Secondly, children's rights are all — unlike socio-economic rights — couched in absolute terms. Judges feel more comfortable intervening in government where there is a clear interest to protect rather than where the right is limited to the construction of a reasonable plan where policy is likely to play a much greater role.

There have, however, been several cases not involving children. As I noted earlier, the High Court's supervisory orders in *TAC* and *Modderklip in other areas were overruled on appeal. That was not the case in City of Cape Town v Rudolph.*[6] The City had attempted to evict a group of people from vacant public land. The occupiers replied with a counterclaim alleging that the City had failed to fulfill their obligations to provide them with housing. Selikowitz J agreed with the occupiers on

[1] *S v Zuba* [2004] ZAECHC 3.
[2] Unreported, Transvaal Provincial Division, Case No 19559/06 (30 June 2006)('*Centre for Child Law*').
[3] [2008] ZAGPHC 148.
[4] At the time of writing, the case was before the Constitutional Court for confirmation.
[5] See *Z and 23* (supra) at para 39.
[6] 2004 (5) SA 39 (C)('*Rudolph*').

both counts and made a supervisory order to ensure the City fulfilled its obligations. He distinguished the case from *TAC* by pointing out that a mere declaration had already been made — by the Constitutional Court in *Grootboom*.[1] The failure of the City to comply with that order justified the Court taking over supervision of the City's provision of housing.

The High Court has also supervised the provision of antiretrovirals to HIV positive prisoners in KwaZulu-Natal,[2] the provision of electricity to prisoners in Pretoria[3] and the creation of an administrative regime to process asylum-seekers in Cape Town.[4] This final case warrants further consideration. The refugee centres in Cape Town were seriously overwhelmed and many asylum-seekers were unable to get access to them in order to seek refugee status despite sleeping outside the centres because only a limited number of people were admitted each day.[5] The applicants argued, and the Court held, that this failure violated both South Africa's international law obligations and the constitutional rights to life and freedom and security of the person.[6] Van Reenen J emphasised that 'as far as the upholding of the fundamental rights and other imperatives of the Constitution are concerned, all those involved in the public administration, must, despite a lack of adequate resources, purposefully take all reasonable steps to ensure maximum compliance with constitutional obligations even under difficult circumstances'.[7] In order to ensure that refugees would be able to access the centres, he granted a wide-ranging supervisory order that compelled the government to produce a report detailing: the number of officials assigned to each centre; which days of the week such tasks are performed; whether provision has been made for overtime; the number of applicants at each centre; the extent of the backlog of applications; the progress that has been made with each application; whether any remedial steps have resulted in improvements; and what other plans had been made for improvement.[8] The court and the other parties would then be able to comment on the report and monitor the state's progress in improving the situation.

(iii) *Factors to draw from the case law*

Kent Roach and Geoff Budlender identify three types of cases where supervisory intervention is appropriate.[9] Although the authors frame these as separate

[1] *Rudolph* (supra) at 88.
[2] *EN & Others v Government of RSA & Others* 2007 (1) BCLR 84 (D)('*EN*').
[3] *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W)(The Court found that certain prisoners had a right to electrical plug points in their cells and ordered the Minister to make them available. Schwartzman J required the Minister to submit a report indicating the timeline for completion of the project.)
[4] *Kiliko & Others v Minister of Home Affairs & Others* 2007 (4) BCLR 416 (C)('*Kiliko*').
[5] Ibid at para 10.
[6] Ibid at para 31.
[7] Ibid at para 29 citing *Jaipal v S* 2005 (4) SA 581 (CC), 2005 (5) BCLR 423 (CC) at para 56.
[8] *Kiliko* (supra) at para 32.
[9] 'Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?' (2005) 122 *SALJ* 325.

cases, they could of course overlap so that it is perhaps better to think of them as factors, rather than categories. In some cases one factor will favour supervision, while another will act against it.[1]

The first factor is whether there is any reason to believe that the government will not comply completely with the order.[2] If government has previously failed to comply with an order, or has been slow in doing so, or if there is any other reason to believe they may not comply with this order, supervision may be warranted. Both *Sibiya* (where the government had failed to implement the decision in *Makwanyane*) and *Rudolph* (where the government had failed to implement *Grootboom*) indicate the effect of this thinking.[3] This also seems to have been the primary barrier to the Constitutional Court granting supervisory orders in *TAC* and *Rail Commuters*; there was no reason to believe the government would not comply with a declaration.

Second, the consequences of non-compliance with the order: the more severe the consequences, the more likely a court will be to supervise to ensure that it is complied with.[4] This could include concerns about the importance of the right at issue as well as practical concerns such as how many people will be affected by the order and whether the result of delay will be discomfort or death or something in between. The children's rights cases discussed above reflect this rationale as the best interests of the child are treated by the Final Constitution as 'paramount' and therefore it is easier to justify intrusions on the separations of powers to protect them than it is for other rights. It might also relate to the need for deadlines. If the harm will be increased by delay, there would be a stronger case for supervision.[5] In *EN* if the applicants did not receive antiretrovirals they could die within a couple of weeks. The High Court therefore ordered antiretrovirals to be supplied immediately and gave government only two weeks to come up with further plans.[6]

The last factor identified by Roach and Budlender is how clear it is what steps should be taken to fix the problem.[7] If it is clear, then a simple mandamus may be sufficient. If it is unclear, then supervision may be necessary to determine in consultation with all stakeholders what the appropriate relief is. This was the primary motivator of the supervision ordered by the High Court in *Grootboom* and was probably also part of the reasoning in *Kiliko*. As I argued earlier, this is a distinct purpose for supervisory orders; the other purpose is ensuring compliance. There may be cases where an order that is perfectly clear would still need to be monitored to ensure compliance.

[1] For example, in *NICRO* and *August* the relief was clear and there was no reason to suspect
[2] Roach & Budlender (supra) at 333.
[3] Ibid.
[4] Ibid.
[5] That would have been the case in, for example, *Sibiya III*, *NICRO* and *August* (supra).
[6] *EN* (supra) at para 33.
[7] Roach & Budlender (supra) at 334.

(iv) *Nyathi*

Mr Nyathi was injured as a result of negligence in a government hospital. He sued the government and they conceded liability but disputed the amount of compensation they owed him. Pending the hearing on quantum, Mr Nyathi wrote a letter requesting interim relief, both for medical expenses and for money to permit him to pay his legal expenses for the quantum trial. The state again refused, so Mr Nyathi brought an application to compel the state to make an interim payment. The state ignored the application and it was granted. The state ignored it. Fast running out of options, Mr Nyathi argued that s 3 of the State Liability Act[1] which prohibited the execution and attachment of state property violated his rights to equality and access to court. He succeeded in the High Court[2] and the matter was sent to the Constitutional Court for confirmation. On the day of the hearing in the Constitutional Court and under immense pressure from the Justices, the state finally paid Mr Nyathi. The determination of the constitutional challenge was postponed. Before it could be decided, Mr Nyathi died.[3]

This is the background — which I think is vital to understand the Court's reaction — to the decision in *Nyathi v MEC for Health, Gauteng*.[4] The Constitutional Court confirmed the High Court's finding that s 3 was unconstitutional; but what is interesting for our purposes, is that it also crafted an order whereby the Court would supervise the payment of all the government's outstanding judgment debts. Astonishingly, considering the Court's earlier distaste for supervisory orders, the Court granted this order on its own initiative.

The reasoning behind the order is murky, to say the least. The Court does not clearly explain why a supervisory order is necessary — as was required by *TAC* — to ensure compliance. The heart of the reasoning seems to come when Madala J states that

> we need legislative measures that will provide an effective way in which judgment orders may be satisfied, and mechanisms that will inform the litigants in detail on the procedures that they will need to follow regarding payment of court orders against the state. It has become necessary for this Court to oversee the process of compliance with court orders and to ensure ultimately that compliance is both lasting and effective.[5]

This excerpt is difficult to understand and does not support the order made. The first sentence calls for legislative measures to regulate the payment of judgment debts, which does not imply the need for court supervision, but for intervention by the legislature.

[1] Act 20 of 1957.

[2] *Nyathi v MEC for the Department of Health, Gauteng & Another*, 26014/2005 TPD, 30 March 2007, unreported.

[3] Cases like *Nyathi* cannot but remind us that, in Robert Cover's famous assertion: 'Legal interpretation takes place in a field of pain and death'. 'Violence and the Word' (1986) 95 *Yale LJ* 1601, 1601.

[4] [2008] ZACC 8 ('*Nyathi*').

[5] Ibid at para 83.

Later, Madala J argues that 'oversight is essential in the circumstances … [because] there can be no other effective manner to ensure that the state complies with the order'[1] and that '[i]n a state that has pledged itself to redeem the dignity of its citizens, it should not be the state itself that tramples on the rights of its citizens. On the contrary, everyone should be working tirelessly to protect and promote that dignity'.[2] These passages provide a clearer indication of the Court's reasoning. Although there was no indication that the government would not comply with an order by the Constitutional Court in the particular case, the government had clearly shown its disregard for court orders and for the dignity of its citizens generally by its continued failure to pay their judgment debts. The *TAC* assumption that Government would comply with any order the court made in *Nyathi* therefore no longer applied and supervision was necessary.

It is this reasoning that suggests that *Nyathi* may have far-reaching implications. If the impression that government was unwilling to comply with court orders is a general impression that applies to all instances when government is before the courts, then it must also apply in future cases. That is, the disdain for the courts proved in *Nyathi* was so serious that the courts will be unlikely in the future to ever take government assurances of compliance seriously. That may seem like an exaggeration. But consider the alternative position. It would make no sense to argue that the record of non-compliance in *Nyathi* only indicated that government would continue not to comply in another single case. Why would that general attitude change after one case? It is for that reason that I think the Court will be much more willing to grant supervisory orders in the future and that government will have to build up a record of compliance to re-establish the *TAC* assumption of compliance.

(v) *A Theory for Systemic Remedies*

Roach and Budlender have suggested a more general structure for considering remedies to systemic violations of rights. Drawing from the work of other scholars,[3] they argue that there are generally three levels of supervision that ought to be based on the attitude of government that is causing the problem: inattentiveness, incompetence and intransigence. I present their suggestions together with my own embellishments.

At the first level, the problem is mere inattentiveness on government's part. Once government's attention is drawn to the problem they are able and willing to fix it. At this stage, the appropriate order is, on Roach and Budlender's account, a

[1] *Nyatahi* (supra) at para 85.
[2] Ibid at para 89.
[3] See C Hansen 'Inattentive, Intransigent and Incompetent' in SR Humm (ed) *Child, Parent and State* (1994) and J Braithwaite *Restorative Justice and Responsive Regulation* (2002). See also K Cooper-Stephenson 'Principle and Pragmatism in the Law of Remedies' in J Bennyman (ed) *Remedies: Issues and Perspectives* (1991) 1; K Roach *Constitutional Remedies* (1994).

declaration of rights accompanied by a requirement that government report to the public on its progress. There are two reasons for the reporting requirement. Firstly, it is difficult to be sure whether the reason for the violation of rights is truly inattentiveness and not unwillingness or inability. Reporting serves as a backstop that puts continued pressure on government to comply with the order. The history of compliance with the *Grootboom* and *TAC* orders show how useful a reporting requirement might have been. Secondly, it is a means to keep the public informed of the progress that is being made, both to allow them to prepare and to influence the process. *August* is the best example of this.[1] There was no question about the Electoral Commission's willingness to comply with the order, but supervision was ordered because it was necessary to have certainty on the steps that would be taken to allow prisoners to vote.[2]

It seems to me that there is an additional reason for supervision: determining the terms of the remedy. Even a government that is merely inattentive may not be clear of what should be done to solve the problem once their attention is drawn to it. Supervision may be necessary to help the government devise a plan, especially if the constitutional rights at issue require relatively quick action.

The supervision at this level is both distant and light. It is distant because the Court will generally not scrutinize the government's plans in detail and will allow them space to determine how to meet their obligations. It is light because it gives the government 'two more chances'.[3] Because it is based on a declaration, it cannot found an order of contempt of court; a further order turning the declaration into an interdict and non-compliance with the interdict will be necessary before any contempt proceedings could be brought.

The next level addresses government incompetence.[4] As Roach and Budlender argue, incompetence is probably the most common reason for non-fulfillment of rights and non-compliance with orders. Supervision is justified because without it government, even with the best of intentions, may not be able to meet its commitments. It should not be seen as punishment, but as a means to help government to comply with its constitutional obligations.[5] As a result, it may often require much closer or more detailed supervision by the court than is the case at the first level. Supervision may also include the use of outside experts to determine what the appropriate remedy should be.[6] The use of a developmental quality assurance process in *Centre for Child Law* is a good example of that sort of process.[7] The remedy at this level will normally be based on an interdict rather than a declaration. However, Roach and Budlender argue that the interdict

[1] Roach & Budlender (supra) at 348.
[2] *August* (supra) at para 39.
[3] Roach & Budlender (supra) at 348 citing O Fiss 'Dombroski' (1977) *Yale LJ* 1103, 1122–1124.
[4] Roach & Budlender (supra) at 349–350.
[5] Ibid at 350.
[6] Ibid at 349–350.
[7] *Centre for Child Law* (supra).

might not be in specific enough terms so that it can result immediately in a finding of contempt. This is the kind of order the Court devised in *TAC* (without, of course, any supervision). The government was ordered to take various steps to provide Nevirapine, but was allowed to deviate from the Court's order if they thought there was a better way to achieve the goal. That type of interdict can hardly found a finding of contempt. Depending on the facts, a supervisory interdict may also be necessary. *Kiliko* is an excellent example of this. There was no bad will on government's part, merely an inability to comply due to a lack of resources. Once the Court decided that the provision of services to refugees was sufficiently important, they could ensure that resources were channeled in that direction and were most effectively used to aid refugees.

Government intransigence, or purposeful non-compliance, is the target of the third level.[1] Supervision will be necessary even for the simplest goals in order to ensure, through the threat of contempt, that government does in fact do what it is meant to do. Supervision will generally be extremely close to ensure that government does not try through subterfuge to avoid or undermine compliance with the order. It will also be heavy as it will be accompanied by the immediate threat of contempt in the case of non-compliance. The need to give government space to determine how best to achieve a goal will give way here to the necessity of ensuring government does something. The order will be based on a detailed interdict to ensure that contempt is an immediate threat.

EN fits into this category. Pillay J admitted that he was initially skeptical of a supervisory order because the government 'had shown some sense of commitment, however inadequate and irrational, to redress [the applicants'] plight.'[2] However, after considering the evidence he found that government had not provided any 'rational or workable' solutions and those steps that had been taken had been 'characterised by delays, obstacles and restrictions which seriously compromise the [applicants'] health'.[3] The order compelled the government not only to submit a plan but to immediately provide anti-retrovirals. This was enforceable by a contempt order. Indeed, this is what happened when the compliance with the order was considered.[4] Nicholson J found that the government had failed to comply with Pillay J's order and were therefore in contempt.[5] However, because s 3 of the State Liability Act prevented him from taking any steps to enforce an order of contempt and because the government had made some progress in complying with the order, he granted an extension rather than an order of contempt.[6] The Judge however summed up the serious problems faced when government refuses to comply with Court orders:

[1] Roach & Budlender (supra) at 350–351.
[2] *EN* (supra) at para 32.
[3] Ibid.
[4] *Treatment Action Campaign & Others v Government of the Republic of South Africa & Others* [2006] ZAKZHC 9('*TAC 2006*').
[5] Ibid at para 29.
[6] Ibid at paras 29–34.

> If the refusal to comply does not result from instructions from the first respondent, the Government of the Republic of South Africa, then the remaining respondents must be disciplined, either administratively or in an employment context, for their delinquency. If the Government of the Republic of South Africa has given such an instruction then we face a grave constitutional crisis involving a serious threat to the doctrine of the separation of powers. Should that continue the members of the judiciary will have to consider whether their oath of office requires them to continue on the bench.[1]

(vi) *Beyond Supervision*

Although supervision is a progressive and extremely effective remedy, there are other possibilities that go beyond supervision. One of these possibilities is the 'experimentalist approach'.[2] Unlike traditional supervisory orders where government bodies are required to comply with specific rules, the experimentalist approach 'combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability'.[3] There is no one set of orders that compromises the experimentalist approach. Basically it involves helping institutions to improve themselves by seeing what works and what doesn't under the guidance of the court. Courts are, as Sabel and Simon note, both more and less involved in experimental remedies than they are in ordinary supervisory orders:

> They are more involved because experimentalist remedies contemplate a permanent process of ramifying, participatory self-revision rather than a one-time readjustment to fixed criteria. But the courts are less involved because the norms that define compliance at any one moment are the work not of the judiciary, but of the actors who live by them. At least in prospect, the demands on the managerial capacities of the court, and the risk to its political legitimacy, are smaller in this continuous collaborative process than in top-down reform under court direction.[4]

The very idea with the experimentalist approach is to open up spaces for innovation. In Roberto Unger's phrase experimentalist remedies are 'destabilization

[1] *TAC 2006* (supra) at para 33.

[2] See generally, C Sabel & W Simon 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard LR* 1015; M Dorf & C Sabel 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia LR* 267; M Dorf & B Friedman 'Shared Constitutional Interpretation' (2000) *Supreme Court Review* 61; M Dorf '1997 Supreme Court Term Foreword: The Limits of Socratic Deliberation' (1998) 112 *Harvard LR* 4 (1998); S Sturm 'Second Generation Employment Discrimination: A Structural Approach' (2001) 101 *Columbia LR* 452. S Sturm 'The Promise of Participation' (1993) 78 *Iowa LR* 981, 987–991, 1002–1010; S Sturm 'A Normative Theory of Public Law Remedies' (1991) 79 *Georgetown LJ* 1357; A Fung & EO Wright 'Deepening Democracy: Innovations in Empowered Participatory Governance' (1998) 29(1) *Science & Society* 5; Woolman 'Application' (supra) at Chapter 31; Woolman and Botha 'Limitations' (supra) at Chapter 34; S Woolman *The Selfless Constitution: Experimentation & Flourishing as the Foundation of South Africa's Basic Law* (forthcoming 2009).

[3] Sabel and Simon (supra) at 1019.

[4] Ibid at 1020.

rights'[1] that aim to induce uncertainty.[2] The use of the phrase 'right' also indicates how experimentalism breaks down the barriers traditionally established between rights and remedies.[3] Experimentalist remedies also try to get as many stakeholders as possible involved in the determination of an appropriate solution.

Another possibility is to force the parties to negotiate to a settlement.[4] The Constitutional Court did this in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others*.[5] The applicants were living in terrible conditions in rundown buildings in the Johannesburg city centre. The City wanted to evict them, allegedly, because the buildings were a health risk.[6] The applicants did not want to leave because there was no other accommodation available near the downtown area where they needed to live to get work. During oral argument, the Court decided to order the parties to try to reach a settlement. The parties were able to negotiate successfully and agreed that government would make improvements to the buildings to remove the health risk as an interim remedy while a more permanent solution was sought for all people living in the inner city. The Court endorsed the agreement, but made it clear that endorsement was not automatic; an agreement would only be endorsed if it was a reasonable response to the problem.[7] In light of this renewed attitude of engagement, the Court declined to rule on the City's long term obligations:

> The City has agreed that these solutions will be developed in consultation with them. The complaint by the occupiers that negotiations have been marred by unclear and inconcrete housing plans is not in my view a sufficient reason for this Court to consider this question at this stage. There is every reason to believe that negotiations will continue in good faith. The situation now is very different from that which confronted the occupiers in the High Court. The City has shown a willingness to engage. As a result, the desperate situation of the occupiers has been alleviated by the reasonable response of the City to the engagement process. There is no reason to think that future engagement will not be meaningful and will not lead to a reasonable result. In any event this Court should not be the court of first and

[1] *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (1987) 530.

[2] See Sabel & Simon (supra) at 1055 ('The message that the new public law sends to prospective defendants is not that they will suffer any specific set of consequences in the event of default, but that they will suffer loss of independence and increased uncertainty. Uncertainty does not represent a failure of articulation but the deliberate crux of the message.')

[3] See § 9.2*(c)* supra.

[4] See *Lingwood & Another v The unlawful occupiers of R/E of Erf 9 Highlands* 2008 (3) BCLR 325 (W)(Court ordered the parties and the City of Johannesburg to engage in mediation to find a suitable solution. In my considered view, the justice and equity of the matter dictates that the parties . . . engage in mediation in an endeavour to achieve mutually acceptable solutions, and in achieving the underlying philosophy of [the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998], "to promote the constitutional vision of a caring society based on good neighbourliness and shared concern" and in line with the spirit of ubuntu which "suffuse the whole constitutional order"'.)

[5] 2008 (3) SA 208 (CC)('*Occupiers of 51 Olivia Road*').

[6] The real reason behind the evictions was a plan to gentrify the inner city.

[7] *Occupiers of 51 Olivia Road* (supra) at para 30. Yacoob J also noted that ideally these negotiations should occur prior to litigation. Ibid.

> last instance on whether the City has acted reasonably in the process. Nor should it be the only determinant of whether the plan is reasonable in the sense of being sufficiently concrete and clear. It is the duty of both parties to continue with the process of negotiation and for the occupiers or the City to approach the High Court if this course becomes necessary.[1]

As David Bilchitz notes, there are real benefits to this approach.[2] It forced the government to encompass opinions of those affected by the decisions and provided a solution that both sides could agree to. But there are also shortcomings. The Court's related decision to avoid deciding the constitutional duty of the City meant that, should the engagement fail, the applicants will have to go back to the High Court and fund and endure another round of litigation. If the parties had not reached agreement, the Court might have been compelled to decide the issue and thus potentially avoid future disagreement and suffering. There is also a possibility that negotiation will not be meaningful because of unequal power relations between the parties. If the applicants had not been represented by extremely competent lawyers, it is possible that the City could have negotiated an agreement that was not in the applicants' interests. Courts should be aware of this danger both when ordering negotiation and when monitoring the results of that engagement.

9.7 LEGISLATIVE REMEDIES

Many constitutional rights are regulated by specific pieces of legislation including:

- The Labour Relations Act (FC s 23)[3]
- The National Environmental Management Act (FC s 24)[4]
- The Promotion of Administrative Justice Act (FC s 33)[5]
- The Promotion of Equality and Prevention of Unfair Discrimination Act (FC s 9)[6]

[1] *Occupiers of 151 Olivia Road* (supra) at para 34.

[2] 'Taking Socio-economic Rights Seriously: The Substantive and Procedural Implications' in Geraldine van Bueren (ed) *Freedom from Poverty* (2008 forthcoming).

[3] Act 66 of 1995 (LRA). For more on the LRA and its relation to FC s 23, see C Cooper 'Labour Relations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 53.

[4] Act 107 of 1998 (NEMA). For more on NEMA and s 24, see M van der Linde & E Basson 'Environment' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS1, Forthcoming 2009) Chapter 50.

[5] Act 3 of 2000 (PAJA). For more on PAJA, see G Penfold & J Klaaren 'Just Administrative Action' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 63; C Hoexter *Administrative Law in South Africa* (2007).

[6] Act 4 of 2000 (PEPUDA). For more on PEPUDA and the right to equality, see C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 35.

- The Promotion of Access to Information Act (FC s 32)[1]
- The Restitution of Land Rights Act (FC s 25(7))[2]
- The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (FC s 25(6))[3]

When parties rely on these rights, they must first bring their case under the legislation that gives effect to these rights. In the words of the Constitutional Court:

> [A] litigant who seeks to assert [a constitutional right] should in the first place base his or her case on any legislation enacted to regulate the right, not on [the section of the Final Constitution]. If the legislation is wanting in its protection of the … right in the litigant's view, then that legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.[4]

The legislation cannot be used to challenge other pieces of legislation — in those cases the constitutional right is still the only option. But in all other cases, if the dispute in question is captured by the statute, a litigant must bring his case 'within the four corners of [the relevant] Act.'[5]

The majority of these pieces of legislation not only provide the normative framework to determine whether a right has been violated, they also determine what remedies are available if the statute has been violated. Litigants must therefore frame not only their substantive claim, but also their remedial claim under the statute. However, most of the statutes do not strictly limit the relief a court can grant; they grant a general power to afford 'appropriate' or 'just and equitable' relief and then provide a non-exclusive list of remedies that are included in that power.[6] For example, s 21(2) of PEPUDA empowers the court to 'make an appropriate order in the circumstances' and then lists 16 possible forms of relief. When phrased in this way, the legislation is suggestive rather than prescriptive. However, it may still limit a court's discretion by setting a higher bar for certain

[1] Act 2 of 2000 (PAIA). For more on PAIA and the right of access to information, see J Klaaren & G Penfold 'Access to Information' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS1, 2009) Chapter 62. See also I Currie & J Klaaren *The Promotion of Access to Information Act Commentary* (2002).

[2] Act 22 of 1994. For more on the Act and FC s 25(7), see J Pienaar & J Brickhill 'Land' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 48.

[3] Act 19 of 1998 (PIE). For more on PIE and FC s 25(6), see Pienaar & Brickhill (supra) at Chapter 48.

[4] *South African Defence Union v Minister of Defence & Others* 2007 (5) SA 400 (CC), 2007 (8) BCLR 863 (CC) at para 52. See also *KwaZulu-Natal MEC for Education & Others v Pillay* 2008 (2) BCLR 99 (CC)('*Pillay*') at para 40.

[5] *Pillay* (supra) at para 40.

[6] PEPUDA s 21(1), PAJA s 8(1) and PAIA s 82.

remedies. Section 8 of PAJA, for example, only permits a court to replace an invalid decision with its own decision or to award compensation in 'exceptional circumstances'.[1]

Some legislation, such as the LRA, is more prescriptive. In the case of ordinary[2] unfair dismissals, for example, the LRA does not provide the Labour Court with a general remedial power, but limits the power to re-instatement, re-employment or compensation[3] and strictly limits the conditions for the re-instatement, re-employment[4] and the amount of compensation.[5] It is, in part, because of these remedial limits that litigants have tried to avoid the jurisdiction of the Labour Court by framing their labour disputes either directly under FC s 23 or as contractual[6] or administrative claims.[7] However, the Constitutional Court has recently expressed disapproval of this practice and has stressed that labour law issues should be dealt within the framework of labour law[8] so it is unclear whether litigants will still be able to seek remedies outside those provided for in the LRA.

9.8 Criminal remedies

The availability of remedies in the context of a criminal trial is dealt with in detail elsewhere in this work.[9] However, for the sake of completeness, I address the topic very briefly here. Before I mention some of the available remedies, I must note that the same basic principles of remedies discussed in the first half of the chapter apply to remedies in criminal trials. Indeed, I have used some criminal cases in explicating those principles.

One of the most common uses of the Final Constitution in criminal trials is to exclude unconstitutionally obtained evidence. This issue is directly addressed by FC s 35(5) which reads:

> Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.[10]

[1] PAJA s 8(1)*(c)*(ii).

[2] If the dismissal is automatically unfair or based on operational requirements, the Labour Court does have a general remedial discretion. LRA s 193(3).

[3] LRA s 193(1).

[4] LRA s 193(2).

[5] LRA 194.

[6] See, for example, *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA).

[7] See, for example, *Mgijima v Eastern Cape Appropriate Technology Unit and Another* 2000 (2) SA 291 (Tk); *Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Other Workers and Others* 1998 (1) SA 685 (C).

[8] See *Chirwa v Transnet Ltd & Others* 2008 (3) BCLR 251 (CC) particularly the judgment of Ngcobo J. For justified criticism of this element (and others) of *Chirwa* see C Hoexter. Clearing the Intersection? Administrative Law and Labour Law in the Constitutional Court' (2008) 1 *Constitutional Court Review* (forthcoming).

[9] See F Snyckers & J le Roux 'Criminal Procedure: The Rights of Arrested, Accused and Detained Persons' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 51; P Schwikkard 'Evidence' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 52.

[10] FC s 35(5) is discussed at length in Schwikkard 'Evidence' (supra) at Chapter 52.

What is interesting about this remedy is that the terms for its use are specifically set in the text of the Constitution: (a) the evidence was gathered in a way that violates a constitutional right; (b) including the evidence would either (i) render the trial unfair; or (ii) be detrimental to the administration of justice. The Constitutional Court has emphasised that this is a decision that should principally be made by the trial court; evidence should not be excluded in pre-trial proceedings by other courts.[1]

Another possible remedy is a permanent stay of prosecution which prevents the accused from ever being tried on the same charges again.[2] This remedy is very rare in South Africa and will only be granted where the accused can show that it is impossible for him to receive a fair trial. For irregularities at trial, the obvious remedies are an acquittal or invalidating the trial. The Constitutional Court has adopted the pre-constitutional standard to determine the appropriate remedy. If the irregularity is not too serious, the court on appeal can reconsider the facts, excluding any evidence tainted by the irregularity, and convict or acquit the accused. Only when the irregularity is so severe that it cannot be said that a trial actually took place will a court set aside the trial.[3] When it sets aside a trial, unlike when it orders a permanent stay of prosecution, there is nothing to prevent the charges from being brought again. An arrested or detained person may also approach a court for an interdict to ensure that his rights are respected.[4]

[1] *Thint (Pty) Ltd v National Director of Public Prosecutions & Others; Zuma & Another v National Director of Public Prosecutions & Others* [2008] ZACC 13 at paras 215–223.

[2] See generally, *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC).

[3] See generally, *S v Shaik & Others* 2008 (2) SA 208 (CC), 2007 (12) BCLR 1360 (CC); *Veldman v Director of Public Prosecutions (Witwatersrand Local Division)* 2007 (3) SA 210 (CC), 2007 (8) BCLR 827 (CC).

[4] See, for example, *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W).

10 Democracy

Theunis Roux

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10.1 INTRODUCTION

Democracy is a noun permanently in search of a qualifying adjective. The core idea — that decisions affecting the members of a political community should be taken by the members themselves, or at least by elected representatives whose power to make those decisions ultimately derives from the members — is more or less settled. Even this relatively simple statement, however, does not fit many political systems that are widely regarded as democratic. Constitutional democracies by definition immunize certain decisions from popular control, but are not undemocratic for that reason alone.[1] And liberal democracies, by restricting the legitimate scope of collective decision-making, define the boundary between public and private power in a way that, for social democrats, seems to ignore the impact of certain types of private decision on the wider political community. But in this case, too, few would deny that liberal democracies are nevertheless democratic.[2]

Adding to the complexity is political theory's propensity, every five years or so, to add a new qualifying adjective to the mix in an attempt either to describe existing democratic systems more accurately or to set out an ideal form of democracy to which existing systems should aspire. In this way, the traditional lexicon of liberal v social and direct v representative democracy has been expanded by such terms as 'pluralist',[3] participatory,[4] 'deliberative',[5] 'associative',[6] 'consociational',[7] 'reflective'[8] and, inevitably, 'radical'[9] democracy.

When the preamble to the Final Constitution declares as one of its objectives the establishment of 'a society based on democratic values', one may therefore be

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[1] For the democratic objection to judicial review, see § 10.2*(d)* infra.

[2] There is, of course, plenty of room for debate about whether such systems could be made more democratic when measured against an idealized conception of democracy. See § 10.2*(c)* infra.

[3] See RA Dahl *Dilemmas of Pluralist Democracy* (1982) 1 (Arguing that 'the fundamental problem of pluralist democracy' is that 'autonomous organizations' are necessary to the democratic process, but may also work against the public good and 'weaken or destroy democracy'.)

[4] See C Pateman *Participation and Democratic Theory* (1970); CB Macpherson *The Life and Times of Liberal Democracy* (1977) 93-115.

[5] See J Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* trans W Rehg (1996); A Gutmann & D Thompson *Democracy and Disagreement* (1996); J Elster (ed) *Deliberative Democracy* (1998); S Macedo (ed) *Deliberative Politics: Essays on Democracy and Disagreement* (1999).

[6] See P Hirst *Associative Democracy: New Forms of Economic and Social Governance* (1994)(Arguing that late-twentieth-century representative democracy needs to be supplemented by self-governing voluntary associations.)

[7] See A Lijphart *Democracy in Plural Societies: A Comparative Exploration* (1982)(Examining a form of democracy in which elites in a pluralist society co-operate in the interests of stable democratic government.)

[8] See R Goodin *Reflective Democracy* (2003).

[9] See D Trend *Radical Democracy: Identity, Citizenship, and the State* (1996); C Mouffe 'Radical Democracy: Modern or Post-modern?' in A Ross (ed) *Universal Abandon? The Politics of Postmodernism* (1988) 41-44 (Describing the project of radical democracy as being an attempt to 'expand [democracy's] sphere of applicability to new social relations'.)

forgiven for mouthing a respectful 'yes, but'. Like meat and poison, democracy has a way of meaning different things to different people.[1] At a purely textual level, the word democracy, when used in the Final Constitution, is qualified by four adjectives: 'representative',[2] 'participatory',[3] 'constitutional',[4] and 'multi-party'.[5] And democracy itself is variously used to mean a system of government,[6] a form of society,[7] a principle,[8] and a set of values.[9] Democracy is, at one point, also referred to as a 'culture' that can be 'deepen[ed]' by the adoption of 'Charters of Rights'[10] — the very antithesis of democracy if the core idea is left unqualified.

Given that the various forms of democracy in political theory are either ideal types or deliberately partial accounts of what this term means, it is not surprising that the Final Constitution should have hedged its bets in this way — to have chosen as its blueprint just one of the existing 'models'[11] of democracy would have been artificial and unnecessary. Instead, what the Constitutional Assembly did was to sketch the contours of a peculiarly South African form of democracy, leaving it to the legislature and the judiciary to fill in the details. The task that this chapter sets itself is to describe those contours and, where possible, to identify sharp edges and hard boundaries that may be said to constitute South African democracy's justiciable core.

The chapter begins by distinguishing the most important forms of democracy in political theory — direct and representative democracy — and then discusses some of the main contemporary accounts of representative democracy, modern democracy's pre-eminent form. The central tension running through contemporary democratic theory, it is argued, is the tension between theories that purport to offer strictly descriptive accounts of actually existing democracy, and normative accounts that seek to extend our understanding of the ideal form of democracy in the modern nation-state. This theoretical distinction tracks a distinction between a shallow and a deep conception of democracy that is also present in South African constitutional law.

§ 10.3 analyses the express references to democracy in the Final Constitution and the case law interpreting these provisions. Although the express references do not tell us all that there is to know about the Final Constitution's conception of

[1] Cf Plato *The Republic* (2nd Edition, trans D Lee 1974) Book VIII.557d (Democracy is 'just the place to go constitution-hunting'.)
[2] FC ss 57(1)*(b)*, 70(1)*(b)*, 116(1)*(b)*.
[3] FC ss 57(1)*(b)*, 70(1)*(b)* , 116(1)*(b)*.
[4] FC s 181(1).
[5] FC s 236.
[6] FC ss 1*(d)*, 152(1)*(a)*.
[7] FC preamble and ss 36(1), 39(1) *(a)* , 59(2), 72(2), 118(2).
[8] FC s 195(1).
[9] FC preamble and ss 7(1), 195(1).
[10] FC s 234.
[11] On use of 'models' in this context, see D Held *Models of Democracy* (2nd Edition, 1996) and Macpherson (supra) at 3 (Defining the term 'model' when used in this context as 'a theoretical construction intended to exhibit and explain the real relations, underlying the appearances, between or within the phenomena under study'.)

democracy, they nevertheless provide a useful starting point. Cases turning on these references have required the courts to define the term 'democracy' in different contexts, and in this way a considerable body of black letter law has begun to develop.

§ 10.4 builds on this analysis by examining the case law in relation to a group of fundamental rights that both democratic theory and the courts suggest is integral to the Final Constitution's conception of democracy. The particular rights examined are the right to freedom of expression, political rights, and socio-economic rights. Cases decided under these rights frequently comment on the place of the right in the Final Constitution's overarching scheme for South African democracy, and therefore tell us more about what that scheme entails.

In conclusion, § 10.5 converts the assessment of the Final Constitution's conception of democracy in § 10.3 and § 10.4 into a statement of the principle of democracy in South African constitutional law. Despite the contested nature of democracy in political theory, it is possible to state this principle in a fairly precise way. The main argument in § 10.5 is that, while the principle of democracy discernible in the constitutional text is unquestionably a deep one, the courts have not always given effect to this principle, often preferring a shallower interpretation in politically sensitive cases. This does not yet mean that the principle of democracy discernible in the constitutional text needs to be restated, but it does call for a re-examination of the importance of this principle in cases in which the political stakes are high.

10.2 Democracy in Political Theory

The overview of democracy given in this section is necessarily truncated, and does not pretend to offer any original insights into the theoretical tradition here described.[1] Rather, the aim of this section is to give some indication of the ideas that lie behind the main forms of democracy in political theory, focusing on those forms to which express or implied reference is made in the Final Constitution. In the absence of any detailed judicial treatment of this issue, it is necessary to attempt at least a thumbnail sketch of the terrain, and to refer the reader to the literature for further study.

The secondary aim of this section is to create a normative framework from which to assess the South African courts' treatment of democracy in the cases discussed in § 10.3 and § 10.4. The Final Constitution's vision for South African democracy is both an amalgam and a particularization to South African conditions of the various forms of democracy in political theory. Without knowing what those forms are, it is impossible to understand the theoretical approaches on which the Final Constitution draws or the contribution it makes to our understanding of how the democratic ideal may be realized in practice.

The section starts by setting out the two most basic forms of democracy identified in political theory — direct and representative democracy. These two

[1] For one of the most comprehensive accounts, see D Held *Models of Democracy* (2nd Edition, 1996).

forms are based on a simple empirical distinction between political systems in which the people rule themselves and systems in which the expression of the people's will is mediated by their elected representatives. As an actually existing political system, direct democracy is very rare. Indeed, this form of democracy is said to have existed as a fully functioning system only in the fifth-century BC, in the city-state of Athens, and in certain other isolated and relatively short-lived polities.[1] Direct democracy nevertheless remains an important form of democracy in political theory, as a normative ideal, and also because aspects of this form of democracy can be seen in the provision made in modern democratic constitutions for referenda, the right to freedom of assembly and greater citizen participation in local government.

With these exceptions, all modern democracies are essentially representative in form, meaning that their commitment to the democratic ideal consists in the arrangements they make for elected representatives to take collective decisions on citizens' behalf, and the institutions through which citizens exert control over their elected representatives. When contemporary democratic theorists present alternative models of democracy, therefore, they generally do not mean to contest the place of representative democracy as the pre-eminent modern form of democracy, but rather to stress different aspects of democracy, either as a normative correction on the representative model, or as an attempt more accurately to describe its actual mode of operation. As indicated in § 10.1, the list of these contemporary accounts is long and ever growing. From among this list, however, three forms have emerged as the most important: pluralist, participatory and deliberative democracy. In addition to these three, constitutional democracy has, in the last thirty years or so, begun to receive increasing attention as a distinct form of democracy in its own right, one that may contain some or all of the elements of the other forms, but which nevertheless has unique features that are worthy of separate categorization.

(a) Direct democracy

Direct democracy may be defined as a system of government in which major decisions are taken by the members of the political community themselves, without mediation by elected representatives. As noted above, such a system has only ever existed in its pure form in the ancient city-state of Athens and certain other isolated and relatively short-lived polities. As a normative ideal, however, direct democracy figures in the influential contributions to democratic theory made by Jean-Jacques Rousseau, Karl Marx and Friedrich Engels.[2] It is also possible for direct democracy to be implemented in subsidiary institutions within an overarching system of representative democracy.

[1] The other examples of actually existing direct democracy typically given in the literature are the medieval Italian city-states, the Paris Commune of 1871, and contemporary New England town meetings (particularly in Vermont). See Dahl *On Democracy* (supra) at 110-112.

[2] See D Held *Models of Democracy* (2nd Edition, 1996).

The received account of Athenian direct democracy, though in certain respects 'conjectural',[1] is that, in the fifth century BC, this form of democracy was practised in a city-state comprised of about 30 000–45 000 citizens.[2] Since neither slaves nor women were counted as citizens, the Athenian system was not democratic in the modern sense. Nevertheless, it is held up as a unique historical example of a system in which fundamental political decisions were taken directly by the citizen body, or Assembly. The Assembly met about 40 times a year with quorum of 6 000.[3] Routine business, including the setting of the agenda for Assembly meetings, was undertaken by a Council of Five Hundred, split into ten Committees of 50. The Committees were not representative bodies as such since election to them was by lot, restricted to one year at a time, and to two years per citizen in total.[4] Athenian democracy also had no bureaucracy in the modern sense of a permanent class of people responsible for implementing (and thereby capable of influencing) policy. Rather, all decisions were taken by the Assembly after deliberation in plenary session.

The Athenian model of democracy was famously attacked by Plato in *The Republic*.[5] After identifying democracy as one of four 'imperfect' forms of society, Plato dialogically describes how democracies emerge from the collapse of oligarchies, 'when the poor win, kill or exile their opponents, and give the rest equal civil rights and opportunities of office'.[6] These, by modern standards, fairly welcome events are sarcastically dismissed by Plato as the harbingers of a political system in which everyone is free to do what they like, and in which leaders respond to the whims of the people at the expense of the public interest. 'Democracy,' Plato writes, 'doesn't mind what the habits and backgrounds of its politicians are; provided they profess themselves the people's friends, they are duly honoured . . . It's an agreeable anarchic form of society, with plenty of variety, which treats all men as equal, whether they are equal or not.'[7]

Elements of the direct democratic model were revived in the Italian city-republics of the sixteenth century,[8] but the sheer size and complexity of the modern nation-state has militated against the survival of this model as an actually existing political system. Nevertheless, direct democracy remains an important theoretical construct, most notably in the work of Rousseau, Marx and Engels.[9] Rousseau's *Social Contract*, first published in 1762,[10] attempted to revive the ideal of direct

[1] See D Lee 'Translator's Introduction' in Plato (supra) at 9, 26.
[2] Ibid; Held (supra) at 15.
[3] Held (supra) at 21. Lee writes that the Assembly met 'in theory . . . ten times a year; in practice a good deal more often, though probably never more than once a week'. Lee (supra) at 26.
[4] Lee (supra) at 27.
[5] See Held (supra) at 29.
[6] Plato (supra) at Book VIII.557a.
[7] Ibid at Book VIII.558c.
[8] Held (supra) at 40-43.
[9] Ibid at 33-34.
[10] This chapter refers to the 1968 Penguin edition.

democracy even as the conditions for its practical realization were fast disappearing. Under the influence of his experience of Geneva, a 'city-state of peasant proprietors',[1] Rousseau argued that, since the central value of democracy was the educative process undergone by citizens in the course of participating in collective decision-making, any system that did not give citizens a direct role in such decision-making was not truly democratic. Although his argument has been misunderstood as requiring the totalitarian submission of the individual interest to the 'general will',[2] revisionist accounts of Rousseau's work have re-emphasized the liberal leanings of his core idea, namely, that direct participation in collective decision-making allows individuals to see the way in which their sectarian interests are ultimately best served by the pursuit of the public interest.[3] In Rousseau's famous and controversial phrase, citizens can in this way be 'forced to be free'.[4]

This view of the central value of citizen participation necessarily drew Rousseau into a rejection of representative democracy. In his words:

> Sovereignty cannot be represented, for the same reason that it cannot be alienated; its essence is the general will, and will cannot be represented — either it is the general will or it is something else; there is no intermediate possibility. Thus the people's deputies are not, and could not be, its representatives; they are merely its agents; and they cannot decide anything finally. Any law which the people has not ratified in person is void; it is not law at all. The English people believes itself to be free; it is gravely mistaken; it is free only during the election of Members of Parliament; as soon as the Members are elected, the people is enslaved; it is nothing. In the brief moments of its freedom, the English people makes such a use of that freedom that it deserves to lose it.[5]

In this characteristically uncompromising passage, Rousseau's devotion to the ideal of citizen participation leads him to dismiss representative democracy as a sham, a mere illusion, in which citizens pretend to themselves that they exercise control over their elected representatives, but in which, in reality, they hand over control of collective decision-making to people who do not necessarily have the public interest at heart.

Like Rousseau's city-state of Geneva, Marx and Engels used an actually existing, albeit short-lived, example of direct democracy — the Paris Commune of 1871 — to inform their theoretical understanding of what an ideal form of democracy might look like.[6] In *The Civil War in France*, Marx eulogized the

[1] Pateman (supra) at 27.

[2] The most famous example of this is Isaiah Berlin's charge that Rousseau's model has 'tyrannical implications'. See Held (supra) at 61 referring to I Berlin *Four Essays on Liberty* (1969) 162-64.

[3] See, especially, C Pateman *Participation and Democratic Theory* (1970).

[4] Rousseau (supra) at 64.

[5] Ibid at 141 (partly quoted in Held (supra) at 58).

[6] In his Introduction to Marx's *The Civil War in France* (1891)(reprinted in the Lawrence and Wishart edition of *Karl Marx and Friedrich Engels: Selected Works* (1968) 237), Engels referred to the Paris Commune as a practical example of what the desired 'dictatorship of the proletariat' might look like. Ibid at 247. According to Engels, the Commune's most significant decisions, during its short period in power from 28 March to 28 May 1871, were that it 'filled all posts — administrative, judicial and educational — by election on the basis of universal suffrage of all concerned, subject to the right of recall at any time by the same electors', and that it restricted the wages of administrative officials to the same level as the wages received by 'other workers'. Ibid at 246.

organizational structure of the Paris Commune as follows:

> The Commune was formed of the municipal councillors, chosen by universal suffrage in the various wards of the town, responsible and revocable at short terms. The majority of its members were naturally working men, or acknowledged by representatives of the working class. The Commune was to be a working, not a parliamentary, body, executive and legislative at the same time.[1]

Marx's rejection of the liberal doctrine of separation of powers, which is implicit in this passage, is elsewhere made explicit. In reflecting on the Paris Commune's unfulfilled plans for expansion of the model on a national scale, for example, Marx wrote:

> The judicial functionaries were to be divested of that sham independence which had but served to mask their abject subserviency to all succeeding governments to which, in turn, they had taken, and broken, the oaths of allegiance. Like the rest of public servants, magistrates and judges were to be elective, responsible, and revocable.[2]

Although the Paris Commune lasted for only two months, and never attained the status of national government, Marx speculated that the model could have been extrapolated on a national scale in France by the formation of similar communes in all the major urban and rural centres, unified under a 'Communal constitution'.[3] Dispensing with representative government,[4] the proposed system would have operated by direct election to local communes, with the communes in turn electing representatives to central political organs.[5]

Though not unworkable as a form of party-political organization,[6] the model of the Paris Commune, when translated into a system of government, is incompatible with representative democracy and the liberal doctrine of separation of powers. By stipulating that all state institutions should be directly accountable to the electorate,[7] Marx and Engels excluded the possibility of horizontal checks and balances between state institutions. They also placed tremendous faith in the capacity of human beings to pursue long-term political projects over time.

The fundamental difficulty faced by all theories of direct democracy is the sheer complexity of collective decision-making in the modern nation-state. As noted above, Rousseau's model was constructed in deliberate denial of the changing social and economic circumstances of eighteenth-century Europe. From the perspective of the twenty-first century, his rejection of the legitimacy of representative decision-making seems quaint and other-worldly. In the same way, the

[1] Marx *The Civil War in France* (supra) at 274.
[2] Ibid at 275.
[3] Ibid.
[4] Marx's rejection of representative government is very reminiscent of Rousseau: 'Instead of deciding once in three or six years which member of the ruling class was to misrepresent the people in Parliament, universal suffrage was to serve the people, constituted in Communes . . .'. Marx (supra) at 275.
[5] See Held (supra) at 145 (Describing this system of government as one in which the people rule through a '"pyramid" structure of direct (or delegative) democracy'.)
[6] See Macpherson (supra) at 112-14.
[7] Held (supra) at 146.

failure of the communist states in Eastern Europe, which were at least in theory an attempt to implement the Marxist-Leninist model of direct democracy, has been attributed in part to the inability of these states in the end to compete with the post-industrial, technologically advanced states of Western Europe and North America.

The ideal of direct democracy, of course, survives in a subsidiary form in many modern constitutions, most notably in the right to freedom of assembly, and the provision made for the holding of referenda and a greater degree of citizen participation in local government. In the United States, for example, institutional provision is made for three kinds of direct democracy: the initiative (in terms of which a prescribed minimum number of voters may file a petition proposing legislation or a constitutional amendment); the referendum (in terms of which state legislatures may put a legislative proposal to voters for their approval); and the recall (in which a prescribed minimum number of voters may file a petition demanding that the continued tenure in office of an elected public official be put to the vote).[1] Other modern constitutions contain similar arrangements.[2] The role and influence of all these institutions, however, is carefully circumscribed, and their presence generally does not detract from the representative thrust of the main institutional arrangements.

(b) Representative democracy

Representative democracy is typically justified as a concession to the impossibility of achieving direct democracy in the modern nation-state.[3] This justification masks two curiosities about representative democracy that are worth noting: *(a)* the emergence of this form of democracy as an actually existing system of government is a surprisingly recent phenomenon, dating back to the emergence of liberal democracy in the late eighteenth century, and reaching its current form only in the first quarter of the twentieth century; and *(b)* many of the theoretical accounts of representative democracy, though beginning with the traditional, pragmatic justification, ultimately defend a conception of democracy in which the modern nation-state is a necessary condition for, rather than a practical constraint on, the achievement of 'true' or 'genuine' democracy.

As to the first point, most accounts place the rise of liberal democracy (and representative democracy as its practical embodiment) at the end of the eighteenth century.[4] Between this time and the direct democracy practised in the city-state of Athens there was a long period during which democracy all but

[1] See TE Cronin *Direct Democracy: The Politics of Initiative, Referendum and Recall* (1999) 2.
[2] See, for example, FC ss 84(2)*(g)* and 127.
[3] See, for example, JS Mill 'Considerations on Representative Government' in JS Mill *On Liberty and Other Essays* J Gray (ed) (1991) (Mill 'Considerations') 203, 248.
[4] See Macpherson (supra) at 20; J Dunn *Western Political Theory in the Face of the Future* (Revised Edition, 1993) 6.

disappeared as an actually existing political system.[1] Not only that, but democracy was for much of this period a pejorative term used to describe allegedly disordered societies in which no better form of government could be found than mob rule.[2]

The social, political and economic changes that made possible the re-emergence of democracy in the late eighteenth century are too complex to describe here, but essentially have to do with the emergence of an independent class of property owners capable of demanding and winning political freedom from royal authority, and the simultaneous unification in Western Europe of previously fragmented principalities into linguistically and culturally homogeneous nation-states.[3] Just as direct democracy is identified with the city-state governments of ancient Greece, so, too, representative democracy is inextricably tied to the emergence of this new form of polity. The connection between representative democracy and the modern nation-state explains, in turn, why one of the central cleavages running through democratic theory is that between theorists who appear to lament the passing of the city-state, and those who view the modern nation-state as a form of political organization that provides new opportunities for democracy, and hence new possibilities for the development of human freedom.

Even after the emergence of the nation-state in the late eighteenth century, the full maturation of representative democracy took another hundred years, with the vote being extended to all adult men in Western Europe and North America in the late nineteenth century, and to women only at the beginning of the twentieth century.[4] During this time, institutions that had developed at the end of monarchical rule as a means of giving the propertied classes a greater say in government, were gradually extended to the entire population according to the principle of political equality.[5]

Although it had important precursors in the work of Locke,[6] Montesquieu,[7] Madison,[8] and the utilitarian theory of James Mill and Jeremy Bentham, the classic liberal statement of the nature and benefits of representative democracy is John Stuart Mill's *Considerations on Representative Government.*[9] This work,

[1] The only exception being the medieval Italian city-states, which disappeared during the Renaissance. Dahl *Democracy and its Critics* (supra) at 213.

[2] See Dunn (supra) at 1-28.

[3] See Dahl *Democracy and its Critics* (supra) at 213. Dahl also discusses, in the same work, the conditions favourable to the emergence of polyarchy, which he argues is a precondition for democracy in the modern nation-state. Ibid at 221-22, 244-64.

[4] Ibid at 234-39.

[5] Ibid at 216.

[6] *Two Treatises of Government* (1689).

[7] *De l'Esprit des Lois* (1748).

[8] See Held (supra) at 91-92 (On Madison's importance as translator of Locke and Montesquieu); Dahl *Democracy and its Critics* (supra) at 218 (Madison's importance to democratic theory is his argument that increasing the size of a state good for democracy).

[9] JS Mill *Considerations on Representative Government* (1861).

appearing as it did in the second half of the nineteenth century, was intended both as an argument in support of the extension of the franchise then underway in Great Britain, and also as a statement about the possibility of democracy in the modern nation-state. Representative government, in Mill's cautious definition, is a system in which 'the whole people, or *some numerous portion of them*, exercise through deputies periodically elected by themselves, the ultimate controlling power, which, in every constitution, must reside somewhere' (emphasis added).[1] Mill's qualification of what is today understood as a necessary precondition for democracy — universal adult suffrage — is indicative of the age in which he was writing. At the time of the publication of the *Considerations* in 1861, voting rights in Great Britain were still restricted to the propertied class, and absolutely denied to women.[2] Nevertheless, the kernel of the modern idea of representative democracy is contained in Mill's definition, namely, the notion of democracy as a political system in which the people voluntarily exchange their power to govern themselves for the power to control those whom they elect to govern them.

The impetus behind Mill's theory is most easily understood in contradistinction to that of Rousseau. Although he shared Rousseau's concern for, and indeed insistence upon, the educative effects of citizen participation in politics,[3] Mill was more sanguine than Rousseau about the possibilities of indirect citizen participation. Rejecting the notion that the giving up of control leads necessarily to enslavement, Mill argued that representative democracy was preferable to all other forms of government. Whilst authoritarian societies might be able to outperform representative democracies over the short term, their inability to produce public-spirited citizens made them less attractive over the long term.[4] As for Rousseau's objection that voting in a representative system was an illusion that masked the reality of elite domination, Mill argued that it was possible for democracy to be 'learned' at the local level,[5] and for this learning to be translated onto the national stage.[6] In addition, there was a range of institutions available to

[1] Mill 'Considerations' (supra) at 269.

[2] For Mill's attitude on the representation of women, see 'The Subjection of Women' in Mill (supra) at 471.

[3] See Mill 'Considerations' (supra) at 210 (Arguing that representative government is 'of little value, and may be a mere instrument of tyranny or intrigue, when the generality of electors are not sufficiently interested in their own government to give their vote, or, if they vote at all, do not bestow their suffrages on public grounds. . .'.) On the similarities between Rousseau and Mill, see Pateman (supra) at 29-30.

[4] Mill 'Considerations' (supra) at 238-256.

[5] Pateman (supra) at 31 quoting JS Mill *Essays on Politics and Culture* (G Himmelfarb (ed)) (1963) 186.

[6] Mill's theory is marred by his ambivalence on the property-based franchise. Interestingly, much of this ambivalence has to do with Mill's doubts about whether the propertyless were truly capable of benefiting by the educative power of the vote, a view which, if propounded today, would be deeply offensive. See, for example, Mill's distinctly elitist argument that '[a] representative constitution is a means of bringing the general standard of intelligence and honesty existing in the community, and the individual intellect and virtue of its wisest members, more directly to bear upon the government, and investing them with greater influence in it, than they would in general have under any other mode of organization'. Mill 'Considerations' (supra) at 228-29. Elsewhere, however, Mill argues forcefully in favour of the impossibility of cross-class representation, ie the notion that it is possible for an elected representative from the propertied class fairly to represent the views and interests of workers. Ibid at 246.

representative government by means of which the people could retain control of their elected representatives: competition between political parties, the separation of powers and, most important of all, freedom of the press.[1]

The distinctly modern turn in Mill's argument was therefore to transform the (somewhat weak) justification of representative democracy as a pragmatic concession to the impossibility of direct democracy into a claim that representative democracy might actually improve on all other known forms of government. As David Held puts it: 'The conclusion Mill draws is that a representative government, the scope and power of which is tightly restricted by the principle of liberty, and *laissez-faire*, the principle of which should govern economic relations in general, are the essential conditions of "free communities" and "brilliant prosperity".'[2]

Representative democracy is today the basic form of democracy in every country considered to be democratic. The so-called 'third wave' of democracy, in which this form of government has spread out from its origins in Western Europe and North America to the rest of the world, has thus seen the proliferation of a common set of political institutions, including universal adult suffrage, regular elections, the right to free political participation and freedom of the press. The link between the globalization of democracy and the spread of formal political equality secured by individual rights is explored in § 10.2*(d)*.

(c) Contemporary accounts of democracy

Given the pre-eminence of representative democracy as modern democracy's practical form, the overriding concern of democratic theory today is to describe the operation of actually existing democratic systems and, in so doing, to identify weaknesses and deviations from the democratic ideal. Although the lexicon is vast, two main schools of thought may be identified: participatory democracy, which is associated with the work of Carole Pateman, and deliberative democracy, the main theorists of which are Jürgen Habermas and, in the English-speaking world, Amy Gutmann and Dennis Thompson. Neither of these schools is intended as a direct challenge to representative democracy. Nevertheless, both stress certain deficiencies in the representative model than can be traced back to the ideal of direct democracy.

Before summarizing the ideas underpinning these two schools, it is necessary first to say something about the two most influential attempts to describe and (in part) defend actually existing representative democracy: Joseph Schumpeter's competitive elitist model, and Robert A Dahl's conception of democracy as 'polyarchy'.

[1] Mill 'Considerations' (supra) at 210.
[2] Held (supra) at 104.

(i) *Pluralist democracy*

Although he did not himself use the term, Schumpeter is credited with the theoretical move that led to the still-dominant conception of democracy as 'pluralism', that is, the notion that, far from being the expression of the 'general will', voting in a democracy is essentially about the aggregation of diverse interests under the banner of political parties. The conceptual shift that made this view of democracy possible was, in Schumpeter's words, to 'reverse the roles' played in democratic theory by 'the selection of the representatives' and the 'deciding of issues by the electorate'.[1] According to Schumpeter, the problem with 'the classical doctrine of democracy' was that it assumed that the people were more active and engaged in politics than they actually were, and that voting was a method through which parliamentarians could be mandated to represent the people's opinions on specific issues.[2] If, on the contrary, one assumed that democracy was a value-neutral *method* for producing stable government,[3] then the primary role of the people could be seen to be the selection of representatives. On this approach, democracy was simply 'that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote'.[4] And democracy's claim to our allegiance, in turn, was not that it was ideally preferable to any other political system, but that historically it had proven to be more successful in producing stable governments than any other system.[5]

In explaining his theory, Schumpeter analogized the role of political parties to that of firms in the marketplace. Just as 'department store[s]' compete for custom by offering different brands of goods for sale, Schumpeter argued, so do political parties compete for office by gathering together 'a stock of principles or planks' that they deem likely to attract a majority of votes.[6] It was principally this idea that the main theorist of pluralism, Robert A Dahl, extrapolated in his notion of democracy as 'polyarchy', or 'rule by the many'.[7] For Dahl, like Schumpeter,

[1] JA Schumpeter *Capitalism, Socialism and Democracy* (1943) 269.

[2] Ibid.

[3] Cf Macpherson (supra) at 86 (Macpherson characterizes the central justificatory claim of the pluralist model as being the bringing about of 'an optimum of equilibrium of the supply and demand for political goods'.)

[4] Schumpeter (supra) at 269. Not surprisingly, this definition leads Schumpeter to dismiss proportional representation as practically 'unworkable'. Ibid at 272-73.

[5] Note how this definition provides a cynical answer to Plato's cynicism about democracy in *The Republic*. Just as Plato dismissed democracy for failing to produce efficient government, so Schumpeter endorses it, not for its inherent qualities, but for its relative effectiveness under modern conditions.

[6] See Schumpeter (supra) at 283. See also Pateman (supra) at 4.

[7] RA Dahl *On Democracy* (1998) 90. See also RA Dahl *A Preface to Democratic Theory* (1956) 133 (Arguing that democracy may be distinguished from dictatorship by the 'number, size, and diversity of the minorities whose preferences will influence the outcome of governmental decisions'); RA Dahl *Democracy and its Critics* (1989) 220 (Defining polyarchy as a 'political order' in which '[c]itizenship is extended to a relatively high proportion of adults, and the rights of citizenship include the opportunity to oppose and vote out the highest officials in government'.) For a discussion of Dahl's contribution to political theory, see Held (supra) at 206-208. For other major works in the pluralist canon, see SM Lipset *Political Man* (1960); DB Truman *The Governmental Process* (1951).

the task of political theory was to describe and explain actually existing democratic systems, rather than philosophize about democracy's ideal form.[1] But Dahl was more optimistic than Schumpeter about the prospects for direct citizen participation in politics, mainly because his empirical research revealed the existence of intermediate sites of power, between the governors and the governed, where competing interests could be asserted and mediated.[2] Stressing the importance to democracy of a shared 'political culture',[3] Dahl argued that the mid-twentieth-century welfare states of North America and Western Europe were best described as political systems in which a diverse range of minority interests competed for power. Unlike Schumpeter, therefore, Dahl's conception of democracy is not an elitist one in which a largely passive citizenry chooses between members of a self-appointed political class. Rather, democracy is secured by the dispersion of interests in advanced capitalist societies, and underpinned by societal consensus regarding the range of permissible government action.

There is some dispute in the literature as to whether Schumpeter and Dahl made normative claims for their theories in the sense that they contended not only that they provided the best descriptive account of contemporary democracies, but also that the democratic systems they were describing were better than any others.[4] Certainly, both Schumpeter and Dahl seem to make the pragmatic claim that the 'competitive elitist' or 'pluralist' form of democracy is the only *workable* form of democracy in advanced capitalist societies. In addition, critics of Schumpeter in particular have pointed to passages in which descriptive claims appear to shade into normative claims about the value of passive citizenship or, conversely, the dangers of active citizen participation in politics.[5]

Despite these criticisms, neither of the two critical schools that have come to challenge pluralism in recent years has been able to improve on the descriptive power of pluralism as applied to actually existing democratic systems. On the contrary, the theorists of both participatory and deliberative democracy have in their turn been criticized for their overly optimistic assumptions about the capacity of individuals in advanced capitalist societies to overcome their selfish, welfare-maximizing desires. As CB Macpherson has argued, the central challenge facing those critical of status-quo representative democracy is to overcome an

[1] Dahl did, however, begin to do this in his later work, such as *On Democracy* (supra).

[2] See, especially, RA Dahl *Who Governs? Democracy and Power in an American City* (1961)(Examining operation of democratic politics in situation of social and economic inequality in New Haven, Connecticut, and finding that power was dispersed between different sites.)

[3] See Held (supra) at 207.

[4] See Macpherson (supra) at 82-86; Pateman (supra) at 8-10; Dunn (supra) at 26-27; Held (supra) at 178.

[5] Held (supra) at 209 (Citing G Duncan & S Lukes 'The New Democracy' in S Lukes (ed) *Essays in Social Theory* (1963) 40-47.) See, eg, Schumpeter's discussion of Napoleon's 'master strokes' in solving various problems relating to religious freedom in post-revolutionary France. Schumpeter (supra) at 255-56. This discussion, part of his critique of the 'classical doctrine of democracy', ends with a more general conclusion that 'government for the people' (ie by a benevolent military dictator) might sometimes produce better outcomes than 'government by the people'. Ibid at 256.

apparent 'vicious circle'. On the one hand, in order to improve the quality of democracy, citizens need to develop a sense of themselves as something more than passive consumers of political goods. On the other hand, in order to change this perception, advanced capitalist societies first need to change in ways that encourage greater citizen participation in politics.[1] This paradox leaves theorists of participatory and deliberative democracy occasionally looking like utopian dreamers, however much more palatable their models may be to the democratic purist.[2]

(ii) *Participatory democracy*

The leading contemporary democratic theorist, David Held, classifies participatory democracy along with direct democracy as part of the same model.[3] And, indeed, there is an obvious relationship between these two forms of democracy, with both stressing the value of citizen participation in the making of collective decisions. What, then, is the difference? By most accounts, participatory democracy in its contemporary guise is as an attempt to re-inject elements of direct democracy into modern systems of representative democracy. In this sense, participatory democracy is essentially about the question whether, and if so, how, citizens should be given the right to participate in the making of decisions that affect them, notwithstanding the fact that the basic form of political organization in the modern nation-state is, and is likely to remain, representative democracy.[4] By contrast, direct democracy stands apart from representative democracy as a pre-modern form of democracy that is unlikely to be re-instantiated as the basic form of government in any polity that we know of, notwithstanding the residual role played by such institutions as the referendum and the right to freedom of assembly.

According to its chief theoretical exponent, Carole Pateman, participatory democracy returned to prominence in the 1960s in the context of New Left student politics in Europe and North America.[5] Before this time, this model had been suppressed by the belief that modern bureaucratic states were incompatible with mass participation and the related view that, where it had occurred, mass participation in politics had tended towards totalitarianism rather than democracy.[6] In particular, Schumpeter's attack on the 'classical' doctrine of democracy had successfully demonized participatory theory as resting on unrealistic assumptions about the actual extent of citizen participation in politics.[7]

[1] Macpherson (supra) at 100.

[2] Cf Dunn (supra) at 27 (Dunn concludes his assessment of participatory democracy and pluralism by saying that they represent the two less than satisfactory alternative forms of democracy existing today, 'one dismally ideological [pluralism] and the other fairly blatantly Utopian [participatory democracy]'.)

[3] Held (supra) at 6.

[4] As we have seen, in Schumpeter's account, representative democracy in its pure form restricts participation in politics to voting. Cf Pateman (supra) at 5.

[5] Ibid at 1. See also CB McPherson *The Life and Times of Liberal Democracy* (1977) 93.

[6] Pateman (supra) at 2-3.

[7] Ibid at 4.

Against this background, Pateman's work was devoted to demonstrating that Schumpeter had misrepresented the importance accorded to participation in the 'classical tradition', and to rehabilitating the theoretical importance of, among others, Rousseau and Mill. For Pateman, '[u]ntil the theory of participatory democracy has been examined in detail and the possibilities for its empirical realisation assessed, we do not know how much "unfinished business", or of what sort, remains for democratic theory.'[1]

Unfortunately for Pateman, the main empirical evidence she enlists in support of this argument, an upbeat study of 'workers' self-management in [1960s] Yugolsavia',[2] now looks a little dated. John Dunn, for one, dismisses her work with a quintessentially English putdown, suggesting in a footnote that we should consult Pateman's book '[f]or a clear, if somewhat innocent, exposition of the merits of participatory democracy'.[3] According to a more sympathetic critic, CB Macpherson, the central problem with this approach is that the two virtues of participation — promoting a more active citizenry and reducing social and economic inequality — are also its prerequisites.[4] This leads to the 'vicious circle' described earlier in which the realization of participatory democracy is hindered by the difficulty of creating conditions conducive to citizen support for the idea. Macpherson is not completely pessimistic, however, and finds some solace in the thought that the main threats to the stability of the liberal-democratic status quo might provide 'loopholes' in the circle capable of prompting a change for the better.[5] The best route to a more participatory form of democracy, he concludes, is to retain the present representative system, and to rely on political parties to encourage citizen participation in their internal structures.[6]

(iii) *Deliberative democracy*

Deliberative and participatory democracy are superficially similar since both can be seen as a reaction against the tendency of modern representative democracies to produce passive citizens, whose power to control their elected representatives is reduced to their right to participate in periodic elections. The distinction between these two forms of democracy, however, is the view propounded by theorists of deliberative democracy that a particular form of participation — deliberation — may legitimate collective decisions even in the presence of fundamental moral disagreement. Participatory democracy, by contrast, often appears

[1] Pateman (supra) at 21.
[2] Ibid at 85-102.
[3] Dunn (supra) at 28 n68.
[4] Macpherson (supra) at 99-100.
[5] Ibid at 101. The three main threats that Macpherson refers to are: the unsustainability, for environmental reasons, of current levels of economic growth; a growth in 'neighbourhood and community movements and associations' and 'movements for democratic participation in decision-making at the workplace'; and the logical need for capitalism to spread access to consumer goods to a greater proportion of the world's population. Ibid at 102-108.
[6] Ibid at 112-14.

naively to assume, as in Rousseau's work, that sufficient, or the right kind of, participation, will eventually produce agreement between citizens on a single right decision most conformable with the public interest.

The seminal thinker in the field of deliberative democracy is the German social theorist, Jürgen Habermas.[1] In the last twenty years all of Habermas's major works have been translated into English, and his ideas have in this way become part of the Anglo-American tradition of thinking about democracy. Even (or perhaps especially) in translation, however, Habermas's work remains impenetrable to the casual reader. According to Jon Elster, the main idea for which Habermas's version of deliberative democracy stands is that 'democracy revolves around the transformation rather than simply the aggregation of preferences'.[2] As Elster notes, this idea is not entirely new, since it was present in early accounts of Athenian democracy,[3] and also, as we have seen, in Rousseau and Mill's notion of the educative value of citizen participation in politics.[4] What distinguishes Habermas's account of democracy from these other accounts is the emphasis it places on the *legitimating* function of deliberation. This point can be seen most clearly, Elster argues, in contradistinction to the Marxist model of delegative democracy, which assumes that the citizen's mandate, once given at the local level, can be transmitted unchanged to the national level, with national delegates voting purely according to the mandate they receive from below. For Habermas, the problem with this model is that it denies both the possibility and the legitimacy of preference transformation through discussion.[5] In order to be legitimate, Habermas argues, 'political choice must be the outcome of *deliberation about ends among free, equal and rational agents*.'[6]

The most influential attempt in English thus far to set out the case for deliberative democracy is Amy Gutmann and Dennis Thompson's *Democracy and Disagreement*.[7] According to these authors, the main contemporary challenge to democracy in the United States is 'the problem of moral disagreement', by which they mean 'conflicts about fundamental values'.[8] Citing the controversy over abortion, Gutmann and Thompson question the extent to which the reference of this issue to the courts, and the United States Supreme Court in particular, has promoted the ideal of democracy. The liberal constitutionalist approach

[1] See J Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans W Rehg, 1996).
[2] J Elster (ed) *Deliberative Democracy* (1998) 1.
[3] Ibid at 1.
[4] Ibid at 3-4.
[5] Elster (supra) at 3.
[6] Ibid at 5.
[7] A Gutmann & D Thompson *Democracy and Disagreement* (1996). See also A Gutmann & D Thompson 'Democratic Disagreement' in S Macedo (ed) *Deliberative Politics: Essays on* Democracy and Disagreement (1999) 243-49 (Reply to their critics). For another Anglo-American take on deliberative democracy, see J Cohen 'Deliberation and Democratic Legitimacy' in D Estlund (ed) *Democracy* (2002) 87 (previously published in A Hamlin & P Pettit (eds) *The Good Polity* (1989)).
[8] Gutmann & Thompson *Democracy and Disagreement* (supra) at 1.

to the resolution of fundamental moral disagreements, they argue, tends to de-emphasize and therefore de-capacitate the role of citizen participation in politics. The proper response to this challenge is to seek ways in which the idea and practice of 'moral discussion in public life' can be re-introduced.[1]

In Gutmann and Thompson's account, the core idea of deliberative democracy is that, 'when citizens or their representatives disagree morally, they should continue to reason together to reach mutually acceptable decisions'.[2] For this reason, deliberative democracy is best seen as a proceduralist model of democracy, ie, a model of democracy that is concerned with how political decisions are taken rather than the substantive moral values that democracy should serve, or the ends it should seek to achieve. This approach requires citizens and their representatives to deliberate in a way that is somewhere in between 'impartiality' and 'prudence'.[3]

The three principles of deliberative democracy, according to Gutmann and Thompson, are reciprocity (the duty to deliberate in the manner just described), publicity (the need for reasons to be made public) and accountability (the duty of reason-givers to account to the immediate electorate and their moral constituency, including 'citizens of other countries and members of future generations').[4] The first principle requires citizens to deliberate in such a way that they can offer justifications to people who reasonably disagree with them. 'Citizens who reason reciprocally can recognize that a position is worthy of moral respect even where they think it is morally wrong.'[5] This principle also means that citizens should 'try to accommodate the moral convictions of their opponents to the greatest extent possible, without compromising their own moral convictions'.[6] Gutmann and Thompson qualify this position by arguing that the duty to deliberate in this way does not apply to all disagreements, but only to deliberative disagreements, by which they mean disagreements between two views, each of which is worthy of moral respect (such as the contending views on abortion). Other disagreements, they argue, may be 'non-deliberative', such as the disagreement between people who think that racial discrimination is justified and people who think that it is not. Where one of the contending views is not worthy of moral respect, Gutmann and Thompson argue, no duty to deliberate in the required manner arises.[7]

In anticipation of the discussion of constitutional democracy in § 10.2*(d)*, it is worth emphasizing that Gutmann and Thompson's conception of deliberative democracy leads them to reject the exclusive role of courts in deciding certain policy questions, such as those pertaining to what they call the 'middle democratic' issues of health policy, affirmative action and euthanasia.[8] The problem

[1] Gutmann & Thompson *Democracy and Disagreement* (supra).
[2] Ibid.
[3] Ibid at 2.
[4] Ibid at 8.
[5] Ibid at 2-3.
[6] Ibid at 3.
[7] Ibid.
[8] See Gutmann & Thompson 'Democratic Disagreement' (supra) at 4-5.

with the exclusive settlement of these questions by the courts is not just that this is potentially undemocratic, but that it deprives citizens of the opportunity to debate these questions, and therefore of the opportunity to develop as citizens.

The longstanding criticism of deliberative democracy is that a commitment to submit political decisions to public discussion can allow for the influence of rhetoric and demagogy, and that such discussion, at best, neither improves nor detracts from the quality of collective decision-making.[1] The theory also appears to depend for its practical realization on a pre-existing equality of deliberative power, meaning some measure of educational and social and economic equality between deliberators. Without this, even consensual outcomes might be distorted by the greater capacity of certain deliberators to articulate their interests in terms acceptable to the rules of deliberative democratic engagement. Like the challenge posed to participatory democracy at the end of the last subsection, therefore, there appears to be a circularity problem with deliberative democracy, in as much as the conditions for the realization of this ideal appear to depend on changes to the status quo that the commitment to deliberative democracy itself will not be able to bring about.[2]

(d) Constitutional democracy

Unlike the other terms considered thus far, 'constitutional democracy' is a purely descriptive term, not associated with any particular theorist, but used to connote a political system in which the people's power to make collective decisions is constrained by a written constitution, or at least a received set of institutional practices that is regarded as being incapable of ordinary amendment. Usually, but not necessarily, the power to decide whether the people, acting through the political branches, have deviated from the terms of the constitution is vested in the judiciary, and usually but not necessarily, the judiciary exercises this power on the authority of a supreme-law bill of rights. Understood in this way, 'constitutional democracy' is the binary opposite of the term 'parliamentary sovereignty', which connotes a political system in which the legislature has the final word in the event of inter-branch conflict over the constitutionality of a collective decision.

[1] Elster (supra) at 1-2.

[2] Various other criticisms of Gutmann and Thompson's work in particular can be found in Macedo (supra). Frederick Schauer, for example, argues that: '[t]he central anomaly in [Gutmann and Thompson's] argument . . . is the tension between, on the one hand, the nonideal world that they rightly claim gives rise to the problems they address and, on the other, the idealized dimension of the solution they propose for resolving or at least managing those problems.' F Schauer 'Talking as a Decision Procedure' in Macedo (supra) at 17, 22. Michael Walzer, in turn, lists a number of examples of *legitimate*, *non*-deliberative practices in democratic politics, including political education, mass organization and demonstration, the issuing of statements, bargaining, voting, and debate without any attempt to reach agreement. M Walzer 'Deliberation, and What Else?' in Macdeo (supra) at 58. In the end, most of the criticisms of deliberative democracy come down to the practical impossibility of introducing this form of decision-making in modern democratic politics, which appears rather to be dominated by the pursuit of sectarian interests and political power. I Shapiro 'Enough of Deliberation: Politics is about Interests and Power' in Macdeo (supra) at 28.

An apparent paradox surrounding the 'third wave' of democracy that has swept through the world in the last thirty years is that the newly democratic states have mostly rejected parliamentary sovereignty in favour of constitutional democracy. On the majoritarian conception of democracy, this does not make sense. When a political community moves from a long period of totalitarianism to democracy it is to be expected that the people should initially be jealous of their newfound power to make collective decisions. Instead, the third wave of democracy is associated with a simultaneous 'global expansion of judicial power'.[1]

One possible explanation is that the curtailment of democracy, if that is indeed what judicial review amounts to, is a necessary condition for the spread of at least some kind of democracy. Something like this explanation is given by Tom Ginsburg in his study of the emerging role of constitutional courts in Asia. According to Ginsburg, the institution of judicial review, by providing 'insurance' to prospective electoral losers, can persuade warring factions to commit to the democratic process.[2]

A second possible explanation is contained in Dahl's work on polyarchy, to which reference has already been made.[3] Polyarchy, in Dahl's usage, is not equivalent to democracy, but rather a set of institutions necessary to the emergence and maintenance of modern democratic systems.[4] '[O]ne of the most striking differences between polyarchy and all earlier democratic and republican systems,' Dahl writes, 'is the astounding expansion of individual rights that has occurred in countries with polyarchal government'.[5] Dahl would thus agree with Ginsburg that the enforcement of individual rights is naturally associated with the spread of democracy.[6] What Dahl adds is the idea that rights are not just a form of insurance, but also an ongoing means of dealing with the complexity of decision-making in the modern nation-state.[7] Recall that the rise of representative democracy is closely associated with the emergence of this form of polity, and that one of the central questions of contemporary democratic theory concerns how representative democracy is to retain its legitimacy when citizen participation in politics is effectively reduced to the right to participate in periodic elections. One possible answer to this question, Dahl argues, is that judicially enforced rights make up for what is lost. In place of direct participation in collective decision-making, citizens today participate in the political process as rights-bearers.[8] Rights both secure their membership of the political community and carve out 'a sphere of personal freedom that participation in collective decisions cannot'.[9] In this sense, the judicial enforcement of individual rights is a

[1] See C N Tate & T Vallinder (eds) *The Global Expansion of Judicial Power* (1995).
[2] T Ginsburg *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003).
[3] See § 10.2*(c)*(i) supra.
[4] Dahl *Democracy and Its Critics* (supra) at 221-22.
[5] Ibid at 219.
[6] See also Dahl *On Democracy* (supra) at 48-50.
[7] Dahl *Democracy and its Critics* (supra) at 220.
[8] Ibid.
[9] Ibid.

precondition for democracy, and there is thus no contradiction between the twin processes of democratization and the 'global expansion of judicial power'.

Whereas Ginsburg's view is explicitly premised on the assumption that rights detract from democracy, Dahl's argument sidesteps this question somewhat by arguing that the institutions of polyarchy that depend on judicial review, such as freedom of expression and the right to free and fair elections, 'are necessary to the *highest feasible attainment of the democratic process* in the [modern nation-state]' (emphasis added).[1] This approach is sufficient for Dahl's purposes, since his main aim is to defend status-quo political systems in North America and Western Europe against the charge that they have departed too far from the democratic ideal. For purposes of this chapter, however, this question cannot be avoided. The Final Constitution establishes a constitutional democracy with a justiciable Bill of Rights and an independent judiciary. It is therefore necessary to ask: Do rights detract from democracy? And, if so, are constitutional democracies really democratic?

The extensive literature on this topic, under the rubric of the 'counter-majoritarian dilemma', is canvassed elsewhere in this work.[2] The concern of this chapter is with a sub-component of this question, namely whether, as a matter of classification, the institution of judicial review can be said to render a political system undemocratic. This question was the subject of a well-known exchange between Ronald Dworkin and Jeremy Waldron. In the opening chapter of *Freedom's Law*,[3] Dworkin argues that, far from detracting from democracy, judicial review under a supreme-law Bill of Rights may in fact enhance it. For Dworkin, there is no such thing as the counter-majoritarian dilemma, and law professors who devote their scholarly lives to finding an 'interpretive strategy' between originalism and 'the moral reading' of the constitution are wasting their time.[4] Building on John Hart Ely's work,[5] Dworkin asserts that not just political rights, but also other rights which ensure that individuals are treated with 'equal concern and respect' are essential to the legitimacy of majority decision-making. When a majority infringes these rights, whether intentionally or inadvertently, the exercise of majoritarian power is illegitimate.[6] The 'constitutional conception of democracy', in other words, 'presupposes democratic conditions', or what Dworkin calls 'the conditions of moral membership in a political community'.[7] If these conditions are *not* met, 'no democracy exists'.[8]

[1] Dahl *Democracy and its Critics* (supra) at 220.
[2] See S Sibanda & A Stein 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, September 2006) Chapter 12. See also S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34
[3] R Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (1996)('*Freedom's Law*').
[4] Ibid at 14.
[5] JH Ely *Democracy and Distrust: A Theory of Judicial Review* (1980).
[6] Dworkin *Freedom's Law* (supra) at 1-37.
[7] Ibid at 23-24.
[8] Ibid at 24.

In responding to this argument, Waldron's starting point is to concede that '[t]he idea of democracy is not incompatible with the idea of individual rights' and that 'there cannot be a democracy unless individuals possess and regularly exercise … the right to participate in the making of the laws'.[1] But, Waldron says, Dworkin is wrong to argue that there is no 'loss to democracy' when an unelected body, such as a court, imposes its view of what the conditions of democracy are.[2] On the contrary, there is always a trade-off between rights and democracy, even where a court, in striking down legislation on the grounds that it undermines democracy, makes the right decision. This is because any such decision, if taken by a non-democratic body, entails 'a loss in self-government'.[3] Although the fact that a court makes the right decision may mitigate this loss, it does not mean that there is no loss.[4] Conversely, where such a decision is taken by a democratic body, and a mistake is made, 'it is not silly for citizens to comfort themselves with the thought that at least they made their *own* mistake about democracy rather than having someone else's mistake foisted upon them'.[5]

Even Waldron, however, the most strident recent defender of the 'dignity of legislation',[6] does not go so far as to argue that judicial review under a supreme-law Bill of Rights renders a political system undemocratic. At most, he argues that the presence of this institution renders a system less democratic. Nor does Waldron argue that political systems in which judicial review plays a role are more or less *just* than systems in which this is not the case. This question, Waldron argues, when asked in relation to any actually existing political system, involves a counterfactual, and hence is incapable of meaningful proof either way.[7]

We are left, therefore, with two main conclusions: *(a)* judicial review under a supreme-law bill of rights forms an integral part of many political systems that are widely regarded as democratic, and, indeed, the popularity of judicial review as a device to control state power may be said to have contributed to the 'third wave' of democracy experienced during the latter part of the last century; *(b)* even if judicial review detracts from democracy, as it certainly does from the simple majoritarian conception of democracy, this does not mean that political systems in which this institution plays a prominent role are not democratic.

As a rider to these two conclusions, we might add that, if the question is framed in the way Dahl frames it, as being whether judicial review is a necessary condition for the emergence and maintenance of some kind of democracy, albeit a less than perfect kind, then the answer is certainly 'yes'. The contribution to

[1] J Waldron *Law and Disagreement* (1999) 282.
[2] Ibid at 285-87, 302.
[3] Ibid at 293.
[4] Ibid.
[5] Ibid at 293-94.
[6] J Waldron *The Dignity of Legislation* (1999).
[7] Waldron *Law and Disagreement* (supra) at 287-89.

democratic theory made by judicial review on the American model is precisely this — that for democracy to endure, it must be saved from its excesses.[1]

10.3 Constitutional Provisions Referring to Democracy

This section considers the text of, and judicial commentary on, the various provisions in the Final Constitution in which direct reference is made to democracy. Although the Final Constitution's vision for South African democracy is obviously more complex than this, and is in the end conveyed through the entire constitutional text, consideration of the direct references to democracy provides a useful starting point.

(a) The preamble

The preamble to the Final Constitution, in setting out the purposes for which it was adopted, makes three direct references to democracy, each of which is tied to a different purpose. First, the preamble provides that one of the aims underlying the Final Constitution is to 'establish a society based on democratic values, social justice and fundamental human rights'. Secondly, the preamble commits the Final Constitution to 'lay[ing] the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law'. Thirdly, the preamble connects the adoption of the Final Constitution to the goal of 'build[ing] a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'.

The precise normative weight to be given to these provisions has not been considered, but is apparent from case law under the Interim Constitution.[2] In essence, the preamble, though not part of the operative provisions, may be taken into account in interpreting the rest of the Constitution. In *Soobramoney v Minister of Health, KwaZulu-Natal*, for example, the Court quoted the first part of the preamble in the course of explaining the role of socio-economic rights in combating poverty and inequality. This reference appears to have been intended to bolster the argument that there is no necessary conflict between the Final Constitution's commitment to democracy and the judicial enforcement of socio-economic

[1] Cf Aristotle *The Politics* (Revised Edition trans TA Sinclair 1981) Book VI.v. Aristotle argues that the best way of preserving any form of government is to make it less extreme: 'We shall know not to regard as a democratic (or oligarchic) measure any measure which will make the whole as democratic (or oligarchic) as it is possible to be, but only that measure which will make it *last* as a democracy (or oligarchy) for as long as possible.'

[2] See LM du Plessis *Re-interpretation of Statutes* (2003) 240-41 (Du Plessis observes that '[t]he Constitutional Court and, to a lesser extent high courts, have shown a readiness to rely on constitutional preambles for interpretive purposes without imposing the qualification that such reliance is warranted only where constitutional language lacks clarity and unambiguity'. Under the Interim Constitution, Du Plessis notes that the Court in *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 112 held that: 'The preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the rest that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purpose.')

rights.[1] Likewise, in *First National Bank*, the Court quoted the reference to 'democratic values' in the preamble when explaining the 'proportionate balance' that needs to be struck between 'protecting existing property rights' and 'serving the public interest'.[2]

Other references to the preamble have been less determinate,[3] and no judgment to date has attempted anything like a comprehensive analysis of this part of the Final Constitution. In the absence of relevant case law, the preamble should be taken at face value, and its three direct references to democracy should be understood to mean that democracy is expected to fulfil at least three different functions.

First, in providing that one of the purposes underlying the Final Constitution is 'to establish a society based on democratic values', the preamble suggests that democracy is something more than a system of government — a value-neutral set of procedures for achieving other valued ends. Democracy itself, the preamble implies, is a value system that demands our allegiance. Nor is this value-system limited in its application to the structure of state institutions and the way government conducts itself. Rather, the purpose behind the adoption of the Final Constitution is 'to establish a *society* based on democratic values' (emphasis added). The expectation, in other words, is that the Final Constitution's commitment to democracy will permeate all social relations, and inform all South Africans' dealings with each other,[4] whether as private citizens inter se or as civil servants appointed to serve the public interest.[5] It is significant, too, that the reference to democracy in this part of the preamble is tied to 'social justice and fundamental rights', suggesting that these three concepts are to be the fundamental building blocks of South African society, and implying that there is no necessary contradiction between them.

Secondly, the preamble provides that, in the 'open and democratic society' which the Final Constitution is expected to establish, 'government is [to be] based on the will of the people and every citizen is [to be] equally protected by law'. This statement reiterates the core democratic idea with which this chapter

[1] 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) at para 9.

[2] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 50.

[3] See, eg, *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C), 2000 (2) BCLR 151 (C) at para 58 (Preamble to the Final Constitution cited without comment.); *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para 43 (Quoting the preamble in holding that '[f]airness requires a consideration of the interests of all of those who might be affected by the [court's] order'.); *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 1 (Referring to the preamble as recording South Africa's commitment to 'the attainment of social justice and the improvement of the quality of life of everyone'.); *Islamic Unity Convention Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) at para 45 (Citing preamble in considering the fourth respondent's submission that the right to freedom of expression may be limited in the interests of 'building a united society'.)

[4] Cf I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 14 n60.

[5] FC s 195(1) provides that: 'Public administration must be governed by the democratic values and principles enshrined in the Constitution.' For discussion of FC s 195(1), see § 10.3 infra.

began — with two modifications. In introducing at this early stage the concept of openness, and in juxtaposing the democratic principle alongside the principle of formal equality, this part of the preamble aligns the Final Constitution with the liberal tradition of thinking about democracy discussed in § 10.2. This does not mean that the Final Constitution's vision for democracy is limited to the liberal tradition,[1] or that the Final Constitution does not seek to add to that tradition in any way. But it does mean that the conception of democracy in the Final Constitution, and the normative standard it seeks to impose, must develop out of the liberal tradition, rather than deviate from it.

Thirdly, in providing that the adoption of the Final Constitution is intended to serve the purpose of 'build[ing] a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations', the preamble acknowledges that, in the modern era, the fate of each democratic nation-state is tied to the rest. Apartheid stifled the democratic aspirations of the South African people. But it also hindered the spread of democracy in Africa. One of the secondary purposes of getting its own democratic house in order, this part of the preamble suggests, is to enable South Africa to make a contribution to the global struggle for democracy, social justice and the advancement of human rights.[2]

In addition to these three direct references to democracy, the preamble stresses that the Final Constitution is itself a democratic document, made by 'the people of South Africa through [their] freely elected representatives'. Like the similar provision in the US Constitution, this formulation imports into South African constitutional law the justification of constitutionalism as a democratic 'precommitment' to the rules according to which democracy is to operate.[3] The Final Constitution's overarching approach to the tension between rights and democracy is discussed in § 10.3*(c)*. For the moment, it is enough to note that the preamble openly embraces this tension in emphasizing the democratic pedigree of the document through which democratic politics are to be regulated.

(b) Founding provisions

FC s 1 provides that: 'The Republic of South Africa is one, sovereign, democratic state founded on the following values: *(a)* . . . *(d)* Universal adult suffrage, a national common voters role, regular elections and a multi-party system of democratic

[1] See *Democratic Alliance & Another v Masondo NO & Another* 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC)(Sachs J concurring). Sachs J contends that there are important parallels between the liberal tradition and the 'indigenous African tradition' of democracy, both of which stress the importance of participation and deliberation. Ibid at para 42. This decision, and Sachs J's judgment, are discussed in § 10.3*(d)* infra. See also *S v Mamabolo (E TV & Others Intervening)* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), as discussed in § 10.4*(a)* infra.

[2] See *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at para 222 (O'Regan J dissenting).

[3] See S Holmes 'Precommitment and the Paradox of Democracy' in J Elster & R Slagstad (eds) *Constitutionalism and Democracy* (1988) 195.

government, to ensure accountability, responsiveness and openness.' This provision lays the foundation for a system of representative government on the liberal model. Universal adult suffrage, regular elections and the expression of preferences through the medium of political parties are all institutions that have evolved in particular historical settings within the tradition of thinking about democracy described in § 10.2. However, in providing that the purpose underlying these institutions is 'to ensure accountability, responsiveness and openness',[1] FC s 1*(d)* gives the idea of representative democracy an inflection that is incompatible with some interpretations of the liberal tradition. The insistence on 'responsiveness', for example, is irreconcilable with Schumpeter's competitive elitist model in which, as we have seen, citizens are depicted as passive consumers of political goods. On the contrary, what FC s 1*(d)* envisages is a system in which the institutions of representative democracy operate to ensure that the people's elected representatives are genuinely answerable to an active, informed and engaged citizenry.

In practice, of course, this conception of democracy may be hopelessly idealistic, and Schumpeter's model, for all we know, may be a more accurate description of actually existing democratic politics in South Africa. But this is not the point. As a matter of constitutional law, FC s 1*(d)* attributes a broader instrumental purpose to the familiar institutions of liberal democracy, and in so doing imposes a normative standard that would not be satisfied by the mere holding of elections and the operation of an essentially elitist multi-party political system.

But how, exactly, is this normative standard to be enforced? In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) & Others*, the respondents argued that FC s 1*(d)* was not only directly justiciable, but that it posited an absolute right which was incapable of limitation under FC s 36.[2] The respondents, all of whom were prisoners, had been excluded by an amendment to the Electoral Act from participating in the 2004 general elections.[3] Although the respondents' case was in the main based on the contention that the amended provisions of the Act violated their voting rights in FC s 19(3)*(a)*, they argued, in the alternative, that the amendments violated FC s 1*(d)*, and that, since this provision gave rise to absolute rights, such violation could not be saved under FC s 36. The Constitutional Court rightly dismissed this argument:: 'The values enunciated in section 1 of the Constitution', the Court held, 'are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves.'[4] The founding values, in other words, must be

[1] FC s 1*(d)* is slightly ambiguous as to whether the phrase 'to ensure accountability, responsiveness and openness' qualifies the immediately preceding phrase — 'a multi-party system of democratic government' — or the entire provision. The presence of a comma after 'government' suggests the latter reading, which is the one preferred here. See § 10.5*(a)* infra.

[2] 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)('*NICRO*').

[3] 73 of 1998

[4] Ibid at para 21.

seen as interpretative guidelines, presumptions almost, which favour a certain way of understanding the South African constitutional project and, in the case of FC s 1*(d)*, the nature of the democracy which that project seeks to promote.[1]

There are two exceptions to this rule. First, in the event of an amendment to the Final Constitution, FC s 1*(d)* may be directly justiciable in so far as it may be used to determine the substantive category to which the amendment belongs. So much is clear from the *UDM*, in which the Court entertained an (ultimately unsuccessful) argument that, because it undermined South Africa's multi-party system of democratic government, the constitutional amendment at issue ought to have been passed according to the procedure laid down in FC s 74(1).[2] Secondly, FC s 1*(d)* may be directly relevant to the assessment of the constitutionality of a provincial constitution. In *Ex parte Speaker of the Western Cape Provincial Legislature: In re Certification of the Constitution of the Western Cape, 1997*,[3] the Constitutional Court was asked to strike down parts of the draft Western Cape Constitution on the basis of FC s 1*(d)*.[4] The substance of the challenge was that, in providing that two of the 14 members of the provincial cabinet need not be members of the provincial parliament, ss 42 and 83 of the Western Cape Constitution, read with clause 1 of Annexure A to Schedule 3, contradicted 'the principles of democratic government entrenched in [FC] s 1*(d)*'.[5] Citing the *First Certification Judgment*, the Constitutional Court held that democratic systems based on the principle of separation of powers do not require that every member of the executive be an elected member of the legislature.[6] The foundational commitment to 'regular elections and a multi-party system of democratic government' in FC s 1*(d)*, in other words, does not require either strict independence or interdependence between the legislature and the executive.[7]

Given the limited frequency of provincial constitution-making, it can be expected that the content of FC s 1*(d)* will mainly be elaborated in judgments considering challenges to constitutional amendments, and then only in the event that there is some strategic purpose to be served in classifying the amendment as one that affects the founding values. Thus, in *UDM*, because the procedure for ordinary constitutional amendments had been followed, and because the African National Congress could not, at that stage, be assured of obtaining the requisite majorities prescribed in FC s 74(1) for constitutional amendments affecting the

[1] C Roederer 'Founding Provisions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 13.

[2] *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as* Amici Curiae*) (No 2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1213 (CC)('*UDM*').

[3] 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC)('*Ex parte Speaker of the Western Cape Legislature*').

[4] The direct challenge to a provincial constitution in this way is made possible by FC s 143(2)*(a)*, which provides that a provincial constitution 'must comply with the values in section 1 and with Chapter 3'.

[5] *Ex parte Speaker of the Western Cape Legislature* (supra) at para 62.

[6] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 108.

[7] *Ex parte Speaker of the Western Cape Legislature* (supra) at para 63.

founding values, there was a strategic purpose in attempting to persuade the Court that the founding values were implicated, and, in particular, the foundational commitment to multi-party democracy. This argument, although in the end unsuccessful, at least required the *UDM* Court to comment on the constitutional conception of multi-party democracy in a way that adds to our understanding of this institution. Multi-party democracy, the *UDM* Court held, 'clearly excludes a one-party state, or a system of government in which a limited number of parties are entitled to compete for office'.[1] Rather, 'multi-party democracy contemplates a political order in which it is permissible for different political groups to organize, promote their views through public debate and participate in free and fair elections.'[2]

In *UDM*, the Court was required to apply this definition to an assessment of the constitutionality of a constitutional amendment and related electoral reform legislation that purported to amend the then applicable proportional representation system. The package of legislation, which is discussed in detail elsewhere in this work,[3] sought to make it possible for members of Parliament, the provincial legislatures and municipal councils to cross the floor without losing their seats. The crisp question before the Court was whether the foundational commitment to multi-party democracy precluded the creation of an electoral system in which the outcome of an election could be altered by post-election floor-crossing. The applicants' argument was not that the existing proportional representation system was constitutionally entrenched, but that, where an electoral system is based on proportional representation, a provision prohibiting parliamentarians from defecting to other parties between elections is essential to multi-party democracy.[4] The Court's somewhat long and convoluted answer to this question came down to the assertion that floor-crossing in a proportional representation system, though it may frustrate the will of the electorate, does not undermine multi-party democracy.[5] The frustration of the will of the electorate, for its part, does not infringe FC s 19 (political rights), because all the rights in this section 'are directed to elections, to voting and to participation in political activities. Between elections, however, voters have no control over the conduct of their representatives.'[6] And multi-party democracy is not undermined because FC s 1*(d)* does not prescribe a particular kind of electoral system.[7]

[1] *UDM* (supra) at para 24.
[2] Ibid at para 26
[3] See G Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 29; C Roederer 'Founding Provisions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 13; S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 17.
[4] *UDM* (supra) at para 30.
[5] Ibid at para 53.
[6] Ibid at para 49.
[7] Ibid at para 35.

UDM is disappointing, not because the outcome was necessarily wrong, but because the Court repeatedly fails to engage with the values underlying democracy in South Africa, and because the decision, uncharacteristically for the Court, too frequently relies on assertion rather than reasoned argument. For example, the statement that, '[b]etween elections voters have no control over the conduct of their representatives', simply asserts a shallow, pluralist conception of democracy that is out of kilter with some of the Court's other decisions in this area and with the Final Constitution's vision for South African democracy. It *is* the case that the main form of control that voters have over their representatives under the Final Constitution is the right of recall. However, FC s 1*(d)*, as noted above, prescribes a deeper conception of democracy, one that accords to the institutions of representative democracy the instrumental purpose of ensuring 'accountability, responsiveness and openness'. It is difficult to see how these values are served by a proportional representation system that allows people who were elected to represent a particular political party, and therefore a particular set of interests, to change parties between elections without any recourse to the electorate.

The *UDM* Court's reliance on the absence of any decision in foreign case law to the effect that proportional representation necessarily implies that members of a legislature are not permitted to defect equally fails to engage with the substantive values underlying democracy in South Africa.[1] The Final Constitution's vision for democracy is primarily a function of the constitutional text. The absence of foreign case law in which the lack of an anti-defection provision in a proportional representation system was found to be unconstitutional can only provide indirect evidence of what the commitment to multi-party democracy in South Africa entails. Such evidence is no substitute for a value-laden inquiry into the importance of multi-party democracy in South Africa. And yet such an inquiry is conspicuously absent from the Court's decision in *UDM*, notwithstanding an entire section ostensibly devoted to '[t]he anti-defection provision in the context of conditions in South Africa'.[2]

We are left in the end with the sense that the Court's refusal in *UDM* to elaborate a sufficiently deep, substantive conception of democracy was attributable to the deference it perceived itself to owe to the legislature in cases of this nature. At the outset of the judgment the Court signals this basic approach by declaring:

> This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional. It ought not to have been necessary to say this for that is true of all cases that come before this Court. We do so only because of some of the submissions made to us in argument, and the tenor of the public debate concerning the case which has taken place both before and since the hearing of the matter.[3]

[1] *UDM* (supra) at para 35.
[2] Ibid at paras 36-54.
[3] Ibid at para 11.

The Court's reliance in this passage on a rigid distinction between law and politics is really just a signal of the level of deference it felt to be appropriate to the case. Law and politics are inevitably intertwined, and constitutional courts are seen in political theory, at least, as pre-eminently political institutions.[1] In rhetorically denying this, the Court in *UDM* was merely setting the standard of review that it intended to apply in the case. In finding that foreign case law did not support the striking down of the provisions, for example, the Court held: 'Where the law prohibits defection, that is a lawful prohibition, which must be enforced by the courts. But where it does not do so, courts cannot prohibit such conduct where the Legislature has chosen not to do so.'[2] All that this holding really means is that the detailed design of South Africa's electoral system is a political question that is reserved for the legislature to make. And the two-parted ratio that we should take away from *UDM*, in turn, is that: *(a)* the commitment to multi-party democracy in FC s 1*(d)* does not guarantee a particular form of electoral system;[3] and *(b)* the commitment to multi-party democracy is not incompatible with a system of proportional representation in which members of the legislature are permitted to cross the floor between elections.

In addition to decisions on amendments to the Final Constitution, the extension of FC s 1*(d)* as an interpretative guide to the meaning of the rights enshrined in Chapter 2, and political rights in particular, has been determined in a number of voting rights cases. In *NICRO*, where this interpretative role was most clearly set out, FC s 1*(d)* did not go on to play a significant role in the interpretation of FC s 19(3)*(a)*, mainly because the right to vote had plainly been violated. This, in turn, meant that the focus of the *NICRO* Court's attention fell on the limitations stage of the inquiry, and in particular on the question whether limiting the right of certain categories of prisoner to vote was reasonable and justifiable in an open and democratic society. In two other cases involving the right to vote, however, FC s 1*(d)* has been deployed as an interpretative guide in the manner suggested in *NICRO*. In *August v Electoral Commission*, which also involved prisoners, and which preceded and in many ways paved the way for the challenge in *NICRO*, the Court was asked to consider whether the Electoral Commission's failure to take positive steps to enable prisoners to vote in the 1999 general elections violated FC s 19(3)*(a)*. The complication in *August* was that the Electoral Act at that time did not expressly disqualify prisoners from voting. The focus of the *August* Court's assessment thus fell on the first stage of the constitutional inquiry, since it was clear that, in the absence of a law of general application, the violation of the applicants' right to vote, once established, could not be justified. In this

[1] See, for example, L Epstein, O Shvetsova & J Knight 'The Role of Constitutional Courts in the Establishment of Democratic Systems of Government' (2001) 35 *Law & Society Review* 117-63 (Attempting to model the strategic calculations made by the Russian Constitutional Court in relation to politically controversial decisions.)

[2] *UDM* (supra) at para 35.

[3] Ibid at para 29 (Holding that the omission from FC s 1*(d)* of any express reference to proportional representation, in contrast to Constitutional Principle VIII, means that this electoral system does not form part of the founding values.)

context, the Court devoted an entire paragraph to the importance and meaning of FC s 1*(d)*, which is worth quoting in full:

> Universal adult suffrage on a common voters' roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.[1]

There are two main arguments running through this passage. First, the passage emphasizes that the Final Constitution's commitment to 'universal adult suffrage on a common voters roll' is no mere incantation of a foreign legal nostrum. Rather, it is a profound expression of South Africans' desire never to repeat the apartheid fallacy that a minority of citizens should be entitled to dominate the majority by dividing the electorate into separate polities, each with its own voters' roll and distinct national identity. Secondly, the passage connects the right to vote to the development of human personality in ways that are very reminiscent of Mill's emphasis on the educative effects of citizen participation in politics. At the same time, however, the passage strips Mill's argument of its elitist contention that, though all should be entitled to vote, the vote of some (the better educated, the wealthy) should be more important than the vote of others (the uneducated, the poor). South African democracy, this passage makes clear, is one in which the principle of political equality is taken to its logical conclusion.

This part of *August* is quoted in full in *African Christian Democratic Party v Electoral Commission & Others*.[2] In *African Christian Democratic Party*, the applicant, a political party, had been excluded from participating in the 2006 municipal elections for the City of Cape Town on the grounds that it had failed to pay the deposit prescribed by ss 14 and 17 of the Local Government: Municipal Electoral Act.[3] By agreement with the Electoral Commission, the applicant had made a central payment of a sum of money sufficient to cover the deposit required in respect of all the municipalities it sought to contest, but had not mentioned Cape Town in the list of municipalities that accompanied this payment. The question before the Court was whether the term 'deposit' in ss 14 and 17 necessarily meant an earmarked deposit in the sense that, when made, it

[1] 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 17.
[2] 2006 (5) BCLR 579 (CC)('*African Christian Democratic Party*') at para 22.
[3] Act 27 of 2000.

should be specific to a named municipality. This question, the *African Christian Democratic Party* Court held, was essentially one of statutory interpretation. However, the passage in *August* was relevant to the extent that it suggested that a court, 'when interpreting provisions in electoral statutes', is required 'to seek to promote enfranchisement rather than disenfranchisement and participation rather than exclusion'.[1] *African Christian Democratic Party* therefore confirms the holding in *NICRO* that, apart from the two exceptions discussed above, the role of the founding values is to act as a guide to the interpretation of legislation. In particular, where legislation seeks to regulate the right to vote, the role of FC s 1*(d)* is to act as a higher-norm presumption against an intention on the part of the legislature to exclude certain categories of people from voting.

In addition to the right to vote, FC s 1*(d)* has also featured as an interpretive guide in cases involving the right to freedom of expression,[2] the right to participate in the proceedings of municipal councils,[3] and the extra-territorial application of the Bill of Rights.[4] In *Khumalo & Others v Holomisa*, for example, FC s 1*(d)* was referred to in connection with the importance of the role of the media 'in ensuring that government is open, responsive and accountable to the people'.[5] And in *Democratic Alliance v ANC & Others*, following the Constitutional Court's decision in *UDM*, the Cape High Court held that FC s 1*(d)* does not prescribe proportional representation as the only 'fair' representative system compatible with multi-party democracy.[6]

In the most recent decision to engage FC s 1*(d)*'s relationship to multi-party democracy, *Matatiele Municipality & Others v President of the Republic of South African & Others*,[7] the Constitutional Court considered FC s 1*(d)* in the course of interpreting FC s 155(3)*(b)*. FC s 155(3)*(b)* provides that national legislation must 'establish criteria and procedures for the determination of municipal boundaries by an independent authority'. The Court re-iterated the view it had expressed in *Executive Council, Western Cape Legislature* that the purpose of establishing an independent authority to determine municipal boundaries was to 'guard against political interference'.[8] This, in turn, was necessary to protect 'our multi-party system of democratic government'.[9] The foundational commitment to multi-party

[1] *African Christian Democratic Party* (supra) at para 23.

[2] See, eg, *S v Mamabolo (E TV & Others Intervening)* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC) at para 45.

[3] *Democratic Alliance v ANC & Others* 2003 (1) BCLR 25 (C)('*Democratic Alliance v ANC*').

[4] See *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC)('*Kaunda*') (O'Regan J dissenting) at para 218.

[5] 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at para 23. For a discussion of this case, see § 10.4*(a)* infra.

[6] *Democratic Alliance v ANC* (supra) at 38D-F, citing *UDM* (supra). For a discussion of this case in relation to FC s 160(8), see § 10.3*(d)*(ii) infra.

[7] 2006 (5) BCLR 622 (CC)('*Matatiele*').

[8] Ibid at para 41 quoting *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa & Others* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at para 50.

[9] Ibid.

democracy here supports a reading of FC s 155(3)*(b)* that would prevent the manipulation of municipal boundaries by a dominant political party to safeguard its position against later shifts in the balance of political power.

Sachs J's concurring judgment in *Matatiele* stressed a different aspect of FC s 1(*d*), namely the foundational commitment to 'accountability, responsiveness and openness'. The pursuit of these goals, Sachs J held, requires government to be candid when asked to explain the purpose behind a legislative proposal:[1]

> [F]ar from the foundational values of the rule of law and of accountable government existing in discreet [sic] categories, they overlap and reinforce each other. Openness of government promotes both the rationality that the rule of law requires, and the accountability that multi-party democracy demands. In our constitutional order, the legitimacy of laws made by Parliament comes not from awe, but from openness.[2]

This passage, like Sachs J's remarks in *August*, helpfully deepens our understanding of the Final Constitution's conception of democracy. In particular, it suggests that the exercise by Parliament of its democratic law-making power is only legitimate to the extent that the purposes it seeks to achieve are properly explained. Legislation, like all assertions of public power, must also of course be rational. But, Sachs J concludes, the requirement of transparency in law-making is likely to promote rationality as a matter of course.[3]

(c) Democracy in the Bill of Rights: FC ss 7(1), 36(1) and 39(1)

There are three direct references to democracy in the Bill of Rights: FC 7(1) (the basic rights clause), FC s 36(1) (the general limitations clause) and FC s 39(1) (the interpretation clause). Together, these three provisions structure the way in which the tension between rights and democracy is to be managed in South African constitutional law.

FC s 7(1) provides that: 'The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'[4] Although the

[1] *Matatiele* (supra) at para 99.

[2] Ibid at para 110.

[3] Although he does not say so, Sachs J's understanding of the authority of legislation comes close to Habermas's notion of communicative power, that is, the notion that the only legitimate form of political power in the modern nation-state is the power that is exercised consequent on rational deliberation in the public sphere. See J Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Trans W Rehg, 1996) 170 and W Outhwaite *Habermas: A Critical Introduction* (1994) 142.

[4] In *Kaunda*, the Court held that FC s 7(1) means that the Bill of Rights enshrines the rights of South Africa's people only when they are literally *in* South Africa, and accordingly that the Bill of Rights has no extra-territorial application. *Kaunda* (supra) at para 37. The interesting aspect of *Kaunda* from the perspective of this chapter is that it placed the Court in the seemingly contradictory position of having to enforce constitutional rights in defence of persons charged with plotting the overthrow of the head of another sovereign state. The 69 applicants in *Kaunda* had been arrested in Zimbabwe on charges of participating in an attempted coup against the President of Equatorial Guinea. Amidst allegations of poor treatment and threatened extradition to Equatorial Guinea, where it was said they would face the death penalty, the applicants launched an urgent application in the Pretoria High Court demanding that the South African government seek their release and/or extradition to South Africa. The Constitutional Court's appeal ruling — that the Bill of Rights had no application to the case and that the Court should

academic debate over the question whether judicial review under a supreme-law Bill of Rights necessarily detracts from democracy will no doubt continue, in relation to cases heard under the Final Constitution at least, FC s 7(1) comes down decisively in favour of the view that it does not. Far from detracting from democracy, FC s 7(1) asks us to accept, the rights in the Bill of Rights lie at the very heart of the Final Constitution's vision for South African democracy. Or, to put the point the other way round, no South African political system claiming to be democratic would be worthy of that name unless it respected the democratic values which the Bill of Rights affirms.[1]

This approach to the rights-democracy tension resembles Dworkin's argument in *Freedom's Law*.[2] As we saw in § 10.2*(d)*, for Dworkin, there is nothing at all undemocratic about a court being asked to enforce, against the will of the majority, rights that are constitutive of democracy. Provided the court reaches the right answer, this practice can only enhance democracy. In endorsing this view, FC s 7(1) distinguishes South African democracy from the account of that system given by Schumpeter, and, to a lesser extent, Dahl. The purpose underlying the commitment to democracy in the Final Constitution, FC s 7(1) implies, is not the maintenance of political stability, or some kind of best-that-we-can-do-under-the-circumstances democracy, but the promotion of a value-laden system of government based on human dignity, equality and freedom.[3]

Of course, resolving the rights-democracy tension is not really this simple. Rights *are* in tension with democracy, and it will not always be readily apparent when a decision to vindicate a right against the will of the majority will serve the

accordingly defer to the executive's judgment of how best to protect its citizens — seems to run counter to the preamble's concern with the way in which the quality of South African democracy impacts on the struggle for democracy in other countries, especially on the African continent. For this reason, O'Regan's J's dissenting judgment is to be preferred. In contrast to the majority, O'Regan J did not read FC s 7(1) as necessarily implying that the Bill of Rights has no extraterritorial effect. In any event, she reasoned, the case did not concern the extraterritorial application of the Bill of Rights, but rather whether the applicants' *constitutional* rights as citizens of South Africa entitled them to protection in the circumstances of the case. Ibid at para 230. This approach appears to be more in keeping with the preamble's commitment to 'build[ing] a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'. As noted in § 10.3*(a)*, this commitment implies that there is a connection between the promotion of constitutional democracy in South Africa and the way South Africa relates to other sovereign states. This commitment cannot be fulfilled if the executive is not in principle bound by the Bill of Rights in the conduct of South Africa's international relations. For an extended discussion of the extraterritorial application of the Bill of Rights that largely accords with this view, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31. Other cases in which FC s 7(1) has been referred to include *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC) at para 32; *Carmichele v Minister of Safety and Security & Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) at para 33; and *Van Dyk v National Commissioner, South African Police Service & Another* 2004 (4) SA 587, 589I (T).

[1] *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC).

[2] R Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (1996).

[3] R Dworkin *Law's Empire* (1986).

democratic values listed in FC s 7(1), and when it will not. But what FC s 7(1) decisively does do is to put beyond question the idea that there will be at least some occasions when the vindication of a right at the expense of majoritarian wishes will not be undemocratic. In practice, the way this system works is through the two-stage approach to judicial review.[1] Like the 1982 Canadian Charter of Rights and Freedoms, the Final Constitution envisages an adjudicatory model in which courts resolve the rights-democracy tension in concrete cases by deciding first whether the impugned law or conduct infringes a right in the Bill of Rights, and thereafter whether such infringement can be saved under the general limitations clause. In this way, FC s 36(1) functions as a kind of democratic 'claw-back', allowing apparently rights-infringing law to be justified by reference to the very same values that FC s 7(1) says the Bill of Rights was adopted to affirm.

In order fully to appreciate this point, it is necessary to set out the first part of FC s 36(1) in full: 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom ' The repetition of the democratic values listed in FC s 7(1), to which reference is also made in FC s 1*(a)*, is deliberate. The only basis on which law that infringes a right in the Bill of Rights may be justified, FC s 36(1) tells us, is if that limitation can be said to be reasonable and justifiable in the sort of society that the Bill of Rights is committed to promoting. And what sort of society is that? Well, an 'open and democratic' society in which, whether it comes down in favour of the people's will or the right allegedly infringed, the resolution found for the rights-democracy tension must in the end promote the democratic values of 'human dignity, equality and freedom'.

It follows from this analysis that the case law applying FC s 36(1) is likely to tell us quite a bit about the Final Constitution's conception of democracy, or at least the Final Constitution's idea of what it means to live in an 'open and democratic society'.[2] And, indeed, a cursory examination of the law reports reveals this to be the case. In decision after decision in which the second stage of the constitutional inquiry has been reached, the courts have pronounced on this issue. In some cases, the courts' view is implicit in the holding of the case, in the form of a

[1] For a discussion of two-stage review, and the relationship between fundamental rights analysis and limitations analysis, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34. See, eg, *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 21; *S v Makwanyane & Another* 1995 (3) SA 391 (CC)('*Makwanyane*') at paras 100-102; *S v Williams & Others* 1995 (3) SA 632 (CC), 1995 (6) BCLR 665 (CC) at para 54; *Coetzee v Government of the Republic of South Africa; Matiso & Others v Commanding Officer, Port Elizabeth Prison, & Others* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC)('*Coetzee*') at para 9; *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 44; *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC) at para 9.

[2] See D Meyerson *Rights Limited: Freedom of Expression, Religion and the South African Constitution* (1997) 3 (Arguing that the reference to 'an open and democratic society' in FC s 39(1) suggests that the drafters of the Final Constitution had in mind for South Africa something like Cass Sunstein's 'republic of reasons', or deliberative democracy, citing CR Sunstein *The Partial Constitution* (1993).)

statement along the following lines: *In an open and democratic society based on human dignity, equality and freedom, it is (not) reasonable and justifiable to limit right X in the following circumstance*. In other cases, or in addition to holdings of this kind, the courts have expressly articulated what they think the Final Constitution's vision for an open and democratic society is. In, *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others*, for example, the Court remarked that '[t]he hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner'.[1]

In this way, the courts' interpretation of the Final Constitution's vision of what it means to live in an open and democratic society is a function of everything they have said in all the cases in which the second stage of the constitutional inquiry has been reached. It would serve no useful purpose to summarize all of this jurisprudence here.[2] Some of the more important decisions may, however, be briefly mentioned. We know, for example, that the Final Constitution's vision for what it means to live in an open and democratic society does not encompass certain types of reverse onus provision.[3] Nor is there space in that vision for the criminalization of sodomy between consenting adult males;[4] the disenfranchisement of prisoners serving sentences without the option of a fine;[5] the statutory restriction of the common-law prescription period for delictual claims against the state;[6] the detention and sale in execution of goods belonging to a third party to defray a customs debt;[7] the overbroad statutory authorization of lethal force in effecting an arrest;[8] the blanket criminal prohibition of nude performances on premises where liquor is sold;[9] and the sale of immovable property in execution of a judgment debt without judicial supervision.[10]

[1] 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at para 95. In the preceding paragraph of the judgment the Court remarked: 'In an open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred.' See also *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as* Amicus Curiae*)* 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC)('*Moise*') at para 23 ('Untrammelled access to the courts is a fundamental right of every individual in an open and democratic society'.)

[2] For such a summary, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[3] *S v Manamela & Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC).

[4] *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC).

[5] 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)('*NICRO*').

[6] *Moise* (supra).

[7] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC).

[8] *Ex parte Minister of Safety and Security & Others: In re S v Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC)('*S v Walters*').

[9] *Phillips & Another v Director of Public Prosecutions (Witwatersrand) & Others* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC).

[10] *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC).

What the limitations analysis in all of these cases reveals is that the resolution of the rights-democracy tension in concrete cases can only be achieved by means of a value-laden inquiry. As Sachs J noted in *Coetzee v Government of the Republic of South Africa*, a case decided under the Interim Constitution:

> [F]aithfulness to the Constitution is best achieved by locating the two-stage balancing process within a holistic, value-based and case-oriented framework. The values that must suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct.[1]

It is easy to dismiss this passage as being somewhat idealistic. In fact, it goes to the heart of the constitutional project. What is often forgotten when thinking about the two-stage approach to constitutional adjudication is that both stages of the inquiry are driven by considerations of rights *and* democracy: the first stage because it involves an assessment of whether the *right* in question has been infringed, in a context in which FC s 7(1) provides that the 'Bill of Rights is a cornerstone of *democracy*' and 'affirms the *democratic* values of human dignity, equality and freedom'; and the second stage because it involves the assessment of whether the *right* has been reasonably and justifiably limited, measured against the standards of 'an open and *democratic* society based on human dignity, equality and freedom'.

In South African constitutional law, therefore, it is not conceptually possible for a right in the Bill of Rights to *conflict* with 'the democratic values of human dignity, equality and freedom'. Such conflict is conceptually impossible because all of the rights in the Bill of Rights are only enforceable to the extent that they affirm these values. If a court *were* to find a conflict between a particular right and these values it would by definition have made a mistake. We would be entitled to say: That cannot be what the right means because FC s 7(1) provides that all the rights in the Bill of Rights affirm the values that you say are in conflict with this right.

In summary: the paradigmatic case in which law or conduct is impugned under the Bill of Rights does not require the court to resolve a *conflict* between the right on which reliance is placed and democratic values. Rather, such a case requires the court to resolve the inevitable *tension* between rights and democracy in a way that best advances the constitutional project. That project must be understood as the gradual working out, on a case-by-case basis, of the optimal balance to be struck between the need to respect democracy, in the sense of the people's right to govern, and the need to 'respect, protect, promote and fulfil the rights in the Bill of Rights',[2] without which there would be no meaningful democracy. On this understanding of the constitutional project, the will of the majority on its own will

[1] *Coetzee* (supra) at para 46.
[2] FC s 7(2).

never be a good enough reason to justify the limitation of a right. This is self-evidently the case where the will of the majority is deduced from public opinion polls.[1] But it is also the case where the will of the majority is expressed through duly enacted laws of general application. Unless those laws are found to be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom', the fact that they violate a right in the Bill of Rights will be fatal to their constitutionality.

FC s 39(1) fits into this scheme by providing that, '[w]hen interpreting the Bill of Rights, a court, tribunal or forum–*(a)* must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. On the reading of the Final Constitution just advanced this provision is strictly speaking redundant since FC s 7(1) already tells us that the rights in the Bill of Rights are intended to affirm these values.[2] A court doing justice to FC s 7(1) would therefore in any case be obliged to interpret the Bill of Rights in the manner suggested by FC s 39(1).[3] But constitution-makers are allowed some repetition for effect, and, if nothing else, what FC s 7(1) does is to say that, even where the general limitations clause is not (yet) implicated, at the first stage of the constitutional inquiry, the same values that infuse the second stage of the inquiry must be referred to in deciding whether that stage should be reached.

(d) The powers and functions of Parliament, provincial legislatures and municipal councils

The centerpiece of the Final Constitution's commitment to democracy is to be found in the provisions dealing with the powers and functions of Parliament, the provincial legislatures and the municipal councils. As Sachs J remarked in *Matatiele*, '[d]emocratically elected by the nation, Parliament is the engine-house of our democracy.'[4]

That the basic form of South African democracy is representative government is confirmed by FC s 42(3), which provides:

> The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.[5]

[1] Cf *Makwanyane* (supra) at para 88.

[2] But see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34 (Arguing that, because FC s 39 and FC s 36 invoke the same set of values, courts are obliged to acknowledge this 'unity of values' when engaged in both fundamental rights analysis and limitations analysis. They contend that arguments made here, in this chapter vis-à-vis FC s 7(1), re-inforce a value-based approach to both stages of analysis.)

[3] See *Walters* (supra) at para 26.

[4] *Matatiele* (supra) at para 109.

[5] See *King & Others v Attorneys Fidelity Fund Board of Control & Another* 2006 (1) SA 474 (SCA), 2006 (4) BCLR 442 (SCA) at para 20 (Summarizing various provisions relating to the National Assembly and concluding: '[t]hose are all facets of a National Assembly that belongs to the people, although its formal business is conducted through their representatives, and it is to an Assembly functioning in this way that the Constitution entrusts the power to legislate'.)

The main function of the National Council of Provinces, in turn, is to represent provincial interests.[1]

The Final Constitution's provisions on national, provincial and local government legislative authority are discussed in detail elsewhere in this work.[2] What this section does, instead, is to focus on three generic provisions that expressly refer to democracy and which are repeated in the various sections setting out the powers and functions of Parliament, provincial legislatures and municipal councils. The three generic provisions deal with legislative bodies' power to make rules and orders concerning their business, participation by minority parties in legislative proceedings, and public access to legislative bodies.

(i) *Rules and orders concerning legislative business must take account of representative and participatory democracy*

FC s 57(1)*(b)* provides that the National Assembly may 'make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement'. This formulation is repeated in respect of the National Council of Provinces[3] and provincial legislatures.[4] In *De Lille & Another v Speaker of the National Assembly*, the Cape High Court held that the 'suspension of a Member of the Assembly from Parliament for contempt is not consistent with the requirements of representative democracy [in FC s 57(1)*(b)*, read with FC s 57(1)*(a)* and FC s 57(2)*(b)*]'.[5] The main reason advanced in support of this holding was that such a punishment would not only 'penalise' the Member of Parliament in question, 'but also his or her party and those of the electorate who voted for that party who are entitled to be represented in the Assembly by their proportionate number of representatives'.[6] The limitation in FC s 57(1)*(b)* on the National Assembly's power to regulate the way it conducts its business, in other words, means that the rules and orders regulating its business cannot be so drafted as to frustrate the principle of democracy. This is a classic instance of what John Hart Ely has called the 'democracy-reinforcing' function of judicial review.[7] Although the *De Lille* case was eventually decided by

[1] FC s 42(4).

[2] See S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17; T Madlingozi & S Woolman 'Provincial Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 19.

[3] FC s 70(1)*(b)*.

[4] FC s 116(1)*(b)*. This provision was cited but not judicially considered in *In re: Constitutionality of the Mpumalanga Petitions Bill, 2000*. 2002 (1) SA 447 (CC), 2001 (11) BCLR 1126 (CC) at para 17. The equivalent provision in respect of municipal councils, FC s 160(6) makes no reference to democracy. FC s 160(6) was considered in *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa & Others*. 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at paras 96-112.

[5] 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C) at para 27.

[6] Ibid.

[7] JH Ely *Democracy and Distrust: A Theory of Judicial Review* (1980).

the Supreme Court of Appeal on a different basis,[1] the High Court's interpretation of FC s 57(1)*(b)* was not contradicted.

(ii) *Participation by minority parties in proceedings of Parliament, provincial legislatures and municipal councils*

FC s 57(2)*(b)* provides that the National Assembly's rules and orders must allow for 'participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy'. This formulation is repeated in respect of the National Council of Provinces,[2] provincial legislatures,[3] and municipal councils.[4] There have been two important decisions to date on the version of this provision that applies to minority party participation in the proceedings of a municipal council and its committees — FC s 160(8). In *Democratic Alliance v ANC & Others*,[5] which was handed down after the floor-crossing legislation at issue in *UDM*[6] had taken effect, the reconstitution of three committees of the City of Cape Town was challenged under FC s 160(8). The applicant, a minority political party, alleged that its representation on the City's reconstituted executive committee and two other committees was adversely disproportional to the number of seats it held in the municipal council. In argument, counsel conceded that the requirement in FC 160(8)*(b)* that the rights of members of a municipal council to participate in proceedings of the Council and those of its committees be 'consistent with democracy' would be satisfied by a first-past-the-post system in which the majority party took all the seats on the executive committee.[7] The decision accordingly turned on the interpretation of FC s 160(8)*(a)*, which provides that parties must be 'fairly represented' on committees of the Municipal Council.[8] On this issue the Cape High Court held that FC s 160(8)*(a)* confers a right to participate in such committees, rather than a right to demand that the composition of each committee be proportional to the parties' representation in the municipal council.[9]

[1] See *Speaker of the National Assembly v De Lille & Another* 1999 (4) SA 863 (SCA), 1999 (11) BCLR 1339 (SCA)(Holding that the respondent's conduct was protected by parliamentary privilege — FC s 58(1).) The SCA's judgment in *De Lille* is discussed in Budlender (supra) at 17-39 — 17-40.

[2] FC s 70(2)*(c)*. See also FC s 61(3)(Providing that national legislation determining how provincial legislatures' delegates to the National Council of Provinces are to be selected must ensure minority party participation); FC s 70(2)*(b)* (Rules and orders governing participation of provinces in proceedings of National Council of Provinces must be 'consistent with democracy').

[3] FC s 116(2)*(b)*.

[4] FC s 160(8).

[5] 2003 (1) BCLR 25 (C).

[6] *United Democratic Movement & Others v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as* Amici Curiae*) (No 2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC)('UDM').

[7] *Democratic Alliance v ANC & Others* 2003 (1) BCLR 25, 31D-F (C)('*Democratic Alliance v ANC*'). This aspect of the decision is criticized in § 10.5*(c)* infra.

[8] *Democratic Alliance v ANC* (supra) at 31D-G.

[9] Ibid at 37F.

Distinguishing *Democratic Party & Others v Brakpan Transitional Local Council & Others*,[1] and citing *UDM*, the Court in *Democratic Alliance v ANC* held that 'the requirement of "fair representation" set by FC s 160(8)*(a)* can be met by a system of representation other than proportional representation or a system approximating one of proportional representation.'[2] Later on in the judgment, the Court made it clear that its decision was strongly influenced by what it perceived to be the proper role of courts in 'political' cases. In cases of this nature, the Court held, a greater degree of judicial deference is in order.[3]

Two provisional conclusions may be drawn from the Cape High Court's decision in *Democratic Alliance v ANC*. First, it is clear that, where the Final Constitution refers to democracy *tout court*, rather than any particular form of democracy, there is a danger that the term 'democracy' will be understood as a reference to the majority-rule principle, rather than the deeper principle of democracy that appears to underlie the constitutional text as a whole. Secondly, the Court's reluctance to super-impose its own conception of democracy on FC s 160(8) illustrates the inherent difficulty in all cases where the principle of democracy is implicated. As the Court notes, cases of this type are by definition 'political', and therefore subject, if not to a formal political question doctrine, at least to more than the ordinary degree of deference. When this deferential approach is coupled with the contested nature of democracy itself, it may be expected that non-specific or unqualified references to democracy in the Final Constitution will rarely give rise to determinate rules, other than the requirement that the dispute should be resolved according to the wishes of the majority. On the other hand, where references to democracy *are* qualified, there may be a basis for more robust judicial intervention.

The Constitutional Court had an opportunity to consider FC s 160(8) in *Democratic Alliance & Another v Masondo NO & Another*.[4] In *Masondo*, the issue was whether a mayoral committee established under s 60 of the Local Government: Municipal Structures Act 117 of 1998 was a committee as contemplated in FC s 160(8).[5] Langa DCJ, writing for the majority, held that it was not, on two grounds: first, on the basis of a finding that the functions of mayoral committees

[1] 1999 (4) SA 339 (W), 1999 (6) BCLR 657 (W).
[2] *Democratic Alliance v ANC* (supra) at 38E.
[3] Ibid at 41B-F.
[4] 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC)('*Masondo*').
[5] Section 60 of the Structures Act provides that, where a municipal council has more than nine members, the executive mayor 'must appoint a mayoral committee from among the councillors to assist the executive mayor'. Section 60 is silent as to whether the committee must include councillors from minority parties. Note that the question posed in the second *Democratic Alliance* case is different from the one posed in the Cape High Court case. In the Cape High Court case the question was whether the composition of the executive committee of a municipal council must be proportional to the representation of parties in the council. In the second *Democratic Alliance* case the question was whether a mayoral committee, under an executive mayor system (which is different from the executive committee system) was a committee of the council at all, and therefore subject to FC s 160(8). The two decisions are accordingly distinguishable, and the Constitutional Court's decision in the second *Democratic Alliance* case must not be read as having overridden the Cape High Court's decision.

under the Structures Act were 'executive' not 'deliberative',[1] and, secondly, by reason of the fact that a mayoral committee was not elected by the municipal council, but appointed by the executive mayor.[2] In relation to the first point, the majority held that the Final Constitution was consistent in not requiring minority party representation on executive bodies, since the 'primary purpose' of such bodies was 'to ensure effective and efficient government and service delivery'.[3] In relation to the second point, the majority held that there was a contextual basis for finding that the word 'committees' in FC 160(8) meant committees elected by the municipal council.[4] A mayoral committee was therefore 'simply not the type of committee contemplated by s 160(8)'.[5]

O'Regan J, whilst agreeing that FC s 160(8)*(b)* connotes simple majority rule, dissented on the basis that FC s 160(8)*(a)* requires a prior procedure in which the views of minority parties should at least be taken into account. In O'Regan J's view, 'the obligation of fair representation means that those decisions [ie majority decisions under FC s 160(8)*(b)*] are made only once the interests of non-majority parties have been aired'.[6] Nor could the application of FC s 160(8) be said to depend on whether the mayoral committee was appointed by the municipal council or an executive mayor, as this would allow the subsection to be circumvented by the device of having all committees appointed in the latter way.[7] Rather, since the purpose underlying FC s 160(8)*(a)* was to ensure that decisions of the council and its committees are preceded by 'deliberation', the real question was whether mayoral committees are 'involved in deliberative decision-making'.[8] The fact that, in the case of local government, legislative and executive authority is vested in 'the same institution' (the municipal council) provided a strong indication that this was indeed the case.[9] Summarizing her position, O'Regan J concluded:

> [S]ection 160(8)*(b)* is clear that the principle of fair representation is always subject to democracy and the will of the majority. Members of the mayoral committee must therefore submit to that principle, as must all councillors. The principle established by section 16(8) is a principle which requires inclusive deliberation prior to decision-making to enrich the quality of our democracy. It does not subvert the principle of democracy itself.[10]

The third judgment delivered in *Masondo*, by Sachs J, neatly split the difference between the majority and the minority position. Whilst agreeing with O'Regan J's conception of democracy as requiring more than mere lip-service to be paid to

[1] *Masondo* (supra) at para 19.
[2] Ibid at para 20.
[3] Ibid at para 18, referring to FC ss 91 and 132.
[4] Ibid at para 20, referring to FC ss 160(1)*(c)*, 160(5)*(b)* and 160(6)*(c)*.
[5] Ibid at para 23.
[6] Ibid at para 63.
[7] Ibid at para 70.
[8] Ibid at para 72.
[9] Ibid at para 75.
[10] Ibid at para 78.

the notion of minority party participation and the value of deliberation,[1] Sachs J nevertheless concurred in the majority judgment. For Sachs J, the key point was that the Final Constitution 'is silent on the question of the kind of executive leadership that councils may have'.[2] The constitutional provisions on local government, Sachs J noted, lack the detail of — and the distinctions drawn in — the constitutional provisions on national and provincial legislative and executive authority.[3] Whereas O'Regan J drew from this silence the inference that the legislative and executive functions of a municipal council are effectively fused, for Sachs J the absence of detailed constitutional rules meant that the legislature had a significant margin of appreciation in designing the system of local government. Unless it could be shown that the Structures Act, in providing for the executive mayor system, necessarily undermined the deeper conception of democracy that he shared with O'Regan J, there was no basis for striking down any of its provisions.[4] Rather, the question of whether the mayoral committee system in practice undermined democracy had to be approached on a case-by-case basis.[5]

O'Regan J and Sachs JJ's judgments in *Masondo* provide compelling examples of courts' capacity to give meaningful effect to the principle of democracy where the text of the Final Constitution prompts them to do so. The difference between the majority and the minority decision in this case lies in O'Regan J's preparedness to exploit the distinction in FC s 160(8) between the manner of participation in municipal council committees and the basis on which decisions are ultimately taken. As we have seen, the emphasis placed in the theoretical literature on the value of participation in political decision-making and the associated value of deliberation is never made to the exclusion of the majority-rule principle.[6] None of the democratic theorists discussed in the previous section would thus argue that a modern democracy should be beholden to the impossible ideal of decision-making by consensus, or to exhaustive processes of participation that ultimately run counter to governmental efficiency. Rather, deliberation and participation in decision-making are stressed for the contribution these processes can make to better informed and more legitimate decisions. But there is always a tipping point at which participation and deliberation cease to be useful, and instead become counterproductive. O'Regan and Sachs JJ's judgments attempt to maintain this balance by reading FC s 160(8) in such a way as to ensure that, after adequate deliberation, the majority view must prevail. Had it carried the day, O'Regan J's judgment would arguably have contributed to the deepening of democracy in South Africa, since it would have helped to secure the conditions for multi-party participation in the entire local government system, rather than

[1] *Masondo* (supra) at paras 38 and 42 (Sachs J)
[2] Ibid at para 48.
[3] Ibid at para 47.
[4] Ibid at para 49.
[5] Ibid at para 50.
[6] Ibid at para 38 (Sachs J).

exempting an important part of that system — the functioning of mayoral committees where the executive mayor system applies — from the requirements of participatory and deliberative democracy.

(iii) *Public access to and involvement in Parliament and the provincial legislatures*

FC s 59(2) provides that the National Assembly 'may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society'. Once again this provision is replicated with respect to the National Council of Provinces in FC s 72(2) and provincial legislatures in FC s 118(2). None of these provisions has as yet been judicially considered. On their face, they acknowledge the value not so much of public participation in legislative decision-making as access to information about the inner workings of the democratic process. This value is promoted by conferring on the public a right to attend legislative committee hearings subject to a similar form of limitations analysis as that required FC s 36.

FC s 59(2) and its NCOP and provincial equivalents are complemented by FC ss 59(1), 72(1) and 118(1), all of which impose on the legislature concerned a positive duty: *(a)* 'to facilitate public involvement in the legislative and other processes of the legislature and its committees' and *(b)* to 'conduct its business in an open manner, and hold its sittings, and those of its committees, in public' subject to reasonable limitations. In *Matatiele Municipality & Others v President of the Republic of South African & Others*, the Constitutional Court remarked obiter that FC s 118(1)*(a)* may impose a duty on provincial legislatures, when considering a constitutional amendment under FC s 74(8), to entertain oral or written representations.[1] Because this issue was not properly argued, however, the Court declined to decide it, ordering instead that it be canvassed at a subsequent hearing.[2] For the same reason, the Court declined to comment on the correctness of the view expressed in *King & Others v Attorneys' Fidelity Fund Board of Control & Another* that '[t]he public may become "involved" in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes'.[3]

The question the Supreme Court of Appeal had to decide in *King* was whether an alleged violation by the National Assembly of its FC s 59(1)*(a)* obligation to 'facilitate public involvement' in its 'processes' fell to be determined exclusively by the Constitutional Court by reason of FC s 167(4). This subsection provides that '[o]nly the Constitutional Court may– *(a)* … *(e)* 'decide that Parliament or the President has failed to fulfil a constitutional obligation'. The Supreme Court of Appeal answered this question in the affirmative, holding that the National Assembly's obligation under FC s 59(1)*(a)* was 'pre-eminently a "crucial political"

[1] *Matatiele* (supra) at para 65.
[2] Ibid at para 86.
[3] 2006 (1) SA 474 (SCA), 2006 (4) BCLR 462 (SCA)('*King*') at para 22 (quoted and discussed in *Matatiele* (supra) at paras 64-65).

question' that the Final Constitution reserved for the Constitutional Court.[1] The views expressed in *King* about the obligation imposed by FC s 59(1)*(a)* were, therefore, not intended as a comprehensive analysis of that provision, but rather as a statement of the *sort* of obligation that FC s 59(1)*(a)* imposed, for the limited purposes of deciding the jurisdictional question. Had the Supreme Court of Appeal been properly seized with the case, its interpretation of FC s 59(1)*(a)* might have been more robust, particularly when read alongside FC s 59(1)*(b)* and (2).[2] These two provisions, after all, already secure the public's right not to be excluded from sittings of the National Assembly and its committees. FC s 59(1)*(a)* must therefore impose on the National Assembly a duty to do something more than this. Although the Supreme Court of Appeal was in principle correct to say that 'public involvement' is 'necessarily an inexact concept' and that the duty to facilitate it may be fulfilled in many ways, the juxtaposition of FC s 59(1)*(a)* alongside provisions that already secure the public's right of access to the National Assembly restricts the range of possible meanings that can be attributed to the phrase 'public involvement'. The only example the Supreme Court of Appeal gives of public involvement other than the right to make submissions is the suggestion that members of the public may have a right to be 'informed' of what the National Assembly is 'doing'.[3] This is not a plausible reading of FC s 59(1)*(a)* if it is taken to mean that the National Assembly's obligations under this paragraph may be fulfilled by alerting the public to upcoming legislative proposals. The word 'involvement' connotes far more than the passive right to receive information. Rather, the plain meaning of 'involvement' is active participation in the affairs of the legislative body concerned, not necessarily accompanied by the right to influence the outcome of a particular process, but, at the very least, embracing the right to be heard.[4] To argue, as the Supreme Court of Appeal did in *King*, that the fact that FC s 59(1)*(a)* gives rise to several possible obligations, and that the breach of just one of these obligations is therefore not conclusive, begs the question. The real question is whether FC s 59(1)*(a)* gives rise to a *core* obligation on the part of the National Assembly to entertain written or oral submissions from members of the public in respect of every legislative proposal that comes before it. On the facts in *King*, the public *had* been given this opportunity, although the appellants had not been directly consulted, and had not responded to any of the public calls for submissions. Had the Supreme Court of Appeal been properly seized with the case, that factual finding would have been an adequate basis for dismissing the appellants' argument.

[1] See *King* (supra) at para 23.

[2] These two provisions are cited in *King* but are not considered. See *King* (supra) at para 19

[3] See *King* (supra) at para 22.

[4] The *South African Concise Oxford Dictionary* defines the verb 'involve' as meaning: '(of a situation or event) include as a necessary part or result; cause to experience or participate in an activity or situation'. For related considerations on rights of participation, see S Woolman 'Freedom of Assembly' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 43.

A more detailed understanding of FC s 59(1)*(a)* and its cognates will emerge once the Constitutional Court gives judgment on the meaning of FC s 118(1)*(a)* in response to the further hearing in *Matatiele*.[1] Even in this case, however, the answer is likely to be partial, as the Constitutional Court's decision will be restricted to the obligation on a provincial legislature to facilitate public involvement in its processes when approving a constitutional amendment bill, as required by FC s 74(3)*(b)* read with FC s 74(8). It is apparent from the Constitutional Court's comments on *King* that the crucial question will be whether FC s 118(1)*(a)* imposes a duty to entertain written or oral submissions. If that question is decided in the affirmative, the next question will be whether the duty to entertain submissions always means oral submissions or sometimes just written submissions. The answer to this question, at least, is clear. Given the wide range of matters that come before the National Assembly, the NCOP and the provincial legislatures for consideration, FC s 59(1)*(a)* and its cognates cannot be read to imply a duty to entertain oral submissions in every case. No reasonable conception of democracy would require this. Rather, if it is found that FC s 59(1)*(a)* imposes a duty to entertain written or oral submissions, the choice between these two forms of public involvement should be left to the legislature, depending on the nature of the issue being discussed, the level of technical information required, the public importance of the issue, and the urgency of the need to decide it.

(e) Miscellaneous provisions

FC Chapter 9 is entitled 'State Institutions Supporting Constitutional Democracy'. FC s 181(1) goes on to provide a list of 'state institutions [that] strengthen constitutional democracy'.[2] This is the only provision in the Final Constitution in which the word 'democracy' is qualified by the adjective 'constitutional'. Although there can be little doubt that the system that the Final Constitution puts in place is

[1] The NCOP's obligation under FC s 72(1)*(a)* is also due to be considered in the Court's judgment in *Doctors for Life International v Speaker of the National Assembly & Others*. CCT Case 12/05 (Heard on 21 February 2006).

[2] Just how the state institutions supporting constitutional democracy are expected to perform their tasks is the subject of other chapters in this work. See M Bishop & S Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 24A; S Woolman & Y Schutte 'Auditor General' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 24B; J Klaaren 'South African Human Rights Commission' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 24C; C Albertyn 'Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D; J White 'Independent Communications Authority of South Africa (ICASA)' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24E; S Woolman & J S Aullo 'Commission for the Protection of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24F;

a constitutional democracy, the term 'democracy' when used in the Final Constitution is either left unqualified or qualified by terms such as 'participatory' or 'representative'. It would be wrong to read too much into this. The lack of any other references to 'constitutional democracy' simply confirms the fact that constitutional democracies, as indicated in § 10.2*(d)*, are compatible with a number of different forms of democracy. The presence of a supreme-law bill of rights in a constitution does not mean that the political system concerned ceases to be a representative democracy, or that elements of participatory or deliberative democracy cannot be grafted onto the constitution. As we have seen, both Sachs and O'Regan JJ have been at pains to articulate a deep, in the sense of being participation and deliberation-rich, *constitutional* conception of democracy. It is this deep conception that the Chapter 9 institutions ought to be strengthening. If it were not, there would have been no reason to establish them.

Other provisions that refer directly to democracy include: FC s 152(1),[1] FC s 195(1),[2] FC s 234,[3] and FC s 236.[4]

10.4 Constitutional Rights Shaping South African Democracy

As we have seen, FC s 7(1) provides that the Bill of Rights 'affirms the democratic values of human dignity, equality and freedom'. In theory, therefore, every right in the Bill of Rights is integral to understanding the Final Constitution's vision for South African democracy, and a comprehensive treatment of this issue would need to look at the contribution made by each right in the Bill of Rights to the articulation of this vision.[5] Such an undertaking is not possible

[1] FC s 152(1) provides that one of objects of local government is to 'provide democratic and accountable government for local communities'. This provision was considered in *Masondo*. The *Masondo* Court held that FC s 152 sets two main objects for local government: 'the development and promotion of democracy', which 'involves ensuring that the will of the majority prevails and also that the views of the minority are considered'; and the object 'to ensure that government is efficient and effective in the rendering of services and the promotion of social and economic development'. *Masondo*. (supra) at para 17. The *Masondo* Court continued: 'The two purposes are mutually reinforcing — they give meaning to each other. They are both indispensable to the enormous task of reconstructing society in the functional areas of local government.' Ibid.

[2] FC s 195(1) provides: 'Public administration must be governed by the democratic values and principles enshrined in the Constitution . . .' See *Rail Commuters Action Group & Others v Transnet t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at para 74 (Court held that the principle of accountability in the Final Constitution was an important consideration when deciding questions relating to the state's liability in delict.)

[3] FC s 234 provides: 'In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.'

[4] FC s 236 provides: 'To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis.' See *UDM* (supra) at para 52 (Court referred to this provision and held that it was possible to devise an equitable political party funding system even where floor-crossing was allowed. It offered Germany as an example.)

[5] On the interaction between the right to dignity and democracy, see S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) 36-13. On the relationship between the right to property and democracy, see *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 45.

within the confines of this chapter. To keep the discussion within reasonable bounds, this section concentrates on a small sample of rights that have come to be seen by democratic theory, and by the courts in South Africa, as being integral to the operation of a democratic system of government. For the most part, these rights are clustered together in one part of the Bill of Rights, FC ss 16-19, which covers respectively the right to freedom of expression; the right to freedom of assembly, demonstration, picket and petition; the right to freedom of association; and political rights. The clustering together of these rights is not co-incidental. As the Constitutional Court has observed, FC ss 16-19 are grouped together precisely because they share a common connection to the establishment and maintenance of the conditions necessary for democracy.[1] Whilst all of these rights are equally important, this chapter engages only with the right to freedom of expression and political rights.

The other group of rights that is integral to democracy is the group of socio-economic rights in FC ss 25-29. The link between these rights and the maintenance of the conditions necessary for democracy is self-evident, but nonetheless not as well established in liberal constitutional theory as might be expected. Indeed, the inclusion of socio-economic rights as fully justiciable rights in the Final Constitution is part of the reason why that document is regarded as being an extension of the liberal constitutionalist project, rather than a mere restatement of it.[2] By considering the place of socio-economic rights in the South African democratic system the discussion in § 10.4*(c)* below attempts to do justice to this broader vision.

[1] See *Case & Another v Minister of Safety and Security & Others; Curtis v Minister of Safety and Security & Others* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC)('*Case*') at para 27 (Referring to the right to freedom of expression in IC s 15 'as part of a web of mutually supporting rights . . . [which] together may be conceived as underpinning an entitlement to participate in an ongoing process of communicative interaction that is of both instrumental and intrinsic value'.) This dictum, though occurring in the minority judgment of Mokgoro J, was applied by a near-unanimous court to the right to freedom of expression in the Final Constitution. See *S v Mamabolo (E TV & Others Intervening)* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC) at para 28 (Referring to FC ss 15-19 as a group of rights together promoting 'the freedom to speak one's mind', which freedom 'is now an inherent quality of the type of society contemplated by the Constitution as a whole'); *South African National Defence Force Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC)('*SANDFU*') at para 8 (Citing the passage from *Case* with approval and remarking that the rights in FC ss 10 and ss 16-19 'taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions'). On the relationship between freedom of expression and democracy, see D Milo & A Stein 'Freedom of Expression' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 42. On the relationship between freedom of assembly and democracy, see S Woolman 'Freedom of Assembly' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 43. On the relationship between freedom of association and democracy, see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

[2] See KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146, 153 (Arguing that the Final Constitution views the realization of social rights as being necessary to the exercise of 'democratic political rights'.)

(a) Freedom of expression

In liberal constitutional theory, Ronald Dworkin has argued, the right to freedom of expression has both an 'instrumental' and a 'constitutive' dimension.[1] In its instrumental dimension, the right protects expression because of the consequences for society that are thought to follow from protecting certain forms of expression (such as political speech).[2] In its constitutive dimension, the right protects expression because allowing people the freedom to express themselves without government restraint is thought to be necessary to the development of human personality. Although it is easy to see the first dimension of the right as being necessary to democracy, the second dimension is equally relevant. As Dworkin has argued, recognition of the second dimension requires government to treat its citizens as 'responsible moral agents'.[3] The protection of non-political speech, in other words, promotes a culture in which citizens are regarded as being capable of forming their own opinions, and in which their right to make political choices and engage in public debate is thereby indirectly respected.

In addition to endorsing this approach,[4] the Constitutional Court's jurisprudence on the right to freedom of expression in FC s 16 shares with the liberal tradition the notion that it is sometimes justifiable to limit this right in order to protect democracy.[5] In *Islamic Unity Convention v Independent Broadcasting Authority & Others*, for example, the Court held:

[1] R Dworkin *Freedom's Law* (1996) 200 as quoted in I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 360.

[2] In his commentary on Canadian constitutional law, Peter Hogg writes: 'Perhaps the most powerful rationale for the constitutional protection of freedom of expression is its role as an instrument of democratic government'. PW Hogg *Constitutional Law of Canada* (Loose-leaf Edition, 2001 — Rel. 1) 40-7 citing *Switzman v Elbling* [1957] SCR 285, 358, 369.

[3] Dworkin *Freedom's Law* (supra) at 200.

[4] See *SANDFU* (supra) at para 59 (The right to freedom of expression 'lies at the heart of a democracy' and is valuable for three reasons: 'its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally'), quoted in *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC)('*Islamic Unity*') at para 26. See also *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at para 21 ('Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled'); *Phillips v Director of Public Prosecutions (Witwatersrand Local Division)* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC) at para 23 ('The right to freedom of expression is integral to democracy, to human development and to human life itself'); *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC)('*De Reuck*') at paras 59-60.

[5] FC s 16 provides: '(1) Everyone has the right to freedom of expression, which includes–*(a)* freedom of the press and other media; *(b)* freedom to receive or impart information or ideas; *(c)* freedom of artistic creativity; and *(d)* academic freedom and freedom of scientific research. (2) The right in ss (1) does not extend to–*(a)* propaganda for war; *(b)* incitement of imminent violence; *(c)* Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'

> The pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself. Thus open and democratic societies permit reasonable proscription of activity and expression that pose a real and substantial threat to such values as the constitutional order itself.[1]

The notion that certain forms of speech may in fact undermine democracy is captured in FC s 16(2), which excludes three types of expression from the protection afforded by FC s 16(1).[2] The Constitutional Court has made it clear that, where expressive conduct falls outside these three exclusions, any regulation of the right to freedom of expression will be found to limit the right, and the focus of the Court's attention will accordingly fall on the limitations stage of the inquiry.[3]

So much is uncontroversial. Besides affirming the liberal approach to the right to freedom of expression, however, the case law under FC s 16 also contains several arguments about the link between freedom of expression and democracy that are specific to South Africa. These arguments are worth examining for what they reveal about the peculiar features of the Final Constitution's vision for South African democracy.

In *S v Mamabolo (E TV & Others Intervening)*, a government official had been convicted by a High Court judge of the common-law crime of scandalizing the court. On appeal, the Constitutional Court was required to consider whether the continued existence of this crime in South African law was consistent with FC s 16(1). The interesting aspect of *Mamabolo* from the perspective of this chapter is that it concerned the role of freedom of expression in ensuring the accountability of judges to the people in a constitutional democracy.[4] In assessing this question, the Court weighed, on the one hand, the need for 'vocal public scrutiny'[5] of the judiciary, and, on the other, the need to preserve the 'moral authority'[6] of the judiciary, especially in a young democracy where the judiciary's role in the maintenance of democracy is still being established. Public scrutiny of the judiciary, the Court noted, 'constitutes a democratic check' and must be allowed because it is difficult for the political branches, except in extreme cases of judicial misconduct, to check the judiciary without being seen to threaten judicial independence.[7] The countervailing consideration, however, was the need to build public confidence in the judiciary, particularly given the 'erosion' of that confidence under apartheid.[8]

[1] 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) at paras 28-29 citing *Handyside v The United Kingdom* (1976) 1 EHRR 737, 754.

[2] The unprotected forms of expression listed in FC s 16(2) are: *(a)* 'propaganda for war'; *(b)* 'incitement of imminent violence'; and *(c)* 'advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm'.

[3] See *Islamic Unity* (supra) at paras 31-33; *De Reuck* (supra) at para 48; *Laugh it Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as* Amicus Curiae*)* 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC) at para 47.

[4] *Mamabolo* (supra) at para 15.

[5] Ibid at para 30.

[6] Ibid at para 16.

[7] Ibid at para 30.

[8] Ibid at para 17.

Against this background, the Final Constitution's vision for the right to freedom of expression was to seek a more nuanced approach to the right, in particular by balancing the right to freedom of expression against the right to human dignity in FC s 10.[1]

The *Mamabolo* Court contrasted its approach to that of the United States Supreme Court, whose jurisprudence it was asked to follow. In the United States, freedom of speech is given heightened protection in the form of the 'clear and present danger' test, which permits limitation of the First Amendment only in the most pressing circumstances. The Court was asked to follow this approach on the authority of a decision of the Ontario Court of Appeal which had sought to adapt it to Canadian law.[2] The *Mamabolo* Court's response to this argument is instructive about its view of the special features of the Final Constitution's vision for South African democracy. Stressing that South Africa was a young democracy emerging from a totalitarian past, the Court acknowledged that this might be taken as a reason for according the right to freedom of expression heightened protection on the American model:

> Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of express — the free and open exchange of ideas — is no less important that it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.[3]

Nevertheless, the Court reasoned, South Africa's status as a new democracy also provided an argument in favour of reducing the protection afforded to freedom of speech, especially in relation to criticism of the judiciary. It is precisely because the judiciary is more powerful in a new constitutional democracy that its integrity needs to be protected.[4] The Court also took cognizance of crucial differences between the drafting histories of the United States and South African Constitutions which suggested that a different approach to the right to freedom of expression in South Africa was in order. Whereas the American Constitution was 'a monument to the libertarian aspirations of the Founding Fathers', the Final Constitution 'is a wholly different kind of instrument infinitely more explicit, more detailed, more balanced, more carefully phrased and counterpoised'.[5]

It would be convenient to think of *Mamabolo* as situating South African democracy somewhere in the middle of the political spectrum between libertarianism and socialism, but of course this simple two-dimensional approach is misleading. Conceptions of democracy do not vacillate over time and from country to country in a fixed plane between these two extremes. Rather, the Western (and

[1] *Mamabolo* (supra) at para 41.
[2] See *R v Kopyto* (1987) 47 DLR (4th) 213 (Ont CA) as cited in *Mamabolo* (supra) at para 35.
[3] *Mamabolo* (supra) at para 37.
[4] Ibid at para 38.
[5] Ibid at para 40.

increasingly international) understanding of democracy, as the discussion in § 10.2 makes clear, is continually evolving, stretching out in a second dimension that the traditional left-right axis is incapable of capturing.[1] In addition, as *Mamabolo* indicates, the Final Constitution's vision for South African democracy is a product not only of the liberal tradition but also of the lived experience of the struggle for democracy in South Africa. Whether it is in the end correct to describe that vision as remaining within the liberal tradition does not really matter. The point is rather that the Final Constitution's vision for South African democracy is unique, and must in the end be deduced from a careful reading of the constitutional text, the history of its enactment, and the extrapolation of the constitutional drafters' basic premises to the changing circumstances of South African society.

The second case that illuminates the role of the right to freedom of expression in the Final Constitution's vision for South African democracy is *Islamic Unity Convention v Independent Broadcasting Authority & Others*.[2] *Islamic Unity Convention* involved a challenge under FC s 16 to clause 2*(a)* of the Code of Conduct for Broadcasting Services, which prohibits broadcasting of 'any material which is likely to prejudice the safety of the State or the public order or relations between sections of the population'.[3] The Court was accordingly required to focus on the exclusion from protection under FC s 16(2)*(c)* of expression that amounts to 'advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm'. 'There is no doubt', the Court held, 'that the State has a particular interest in regulating this type of expression because of the harm it may pose to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and the achievement of equality'.[4] Nevertheless, the regulation in clause 2*(a)* went beyond the confines of FC s 16(2) by prohibiting categories of speech other than those specifically excluded by this subsection.[5] Nor could the clause be saved by FC s 36. To be sure, FC s 36 authorized limitations of the right to freedom of expression in service of the democratic values of 'human dignity, equality and freedom'. It was also true that the 'achievement of these values' gave the state a special interest in regulating '[e]xpression that advocates hatred and stereotyping of people on the basis of immutable characteristics'.[6] But it had not been shown that this interest 'could not be served adequately by the enactment of a provision which is appropriately tailored and more narrowly focused'.[7]

[1] Karl Klare expresses something like this idea in attributing to the Final Constitution the label 'post-liberal'. See Klare (supra) at 151.

[2] 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC)('*Islamic Unity Convention*').

[3] Ibid at para 22.

[4] Ibid at para 33. Earlier on in the judgment, the *Islamic Unity Convention* Court remarked that '[t[he restrictions that were placed on expression [under apartheid] were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa.' Ibid at para 27.

[5] Ibid at para 35.

[6] Ibid at para 45.

[7] Ibid at para 51.

Islamic Unity Convention reminds us that the commitment in *Mamabolo* to a more balanced view of the role of freedom of expression in South African democracy does not exempt the state from the need to pay careful attention to the way that this balance is struck in practice. The holding in *Mamabolo* that the right to freedom of expression is not paramount in the Final Constitution's hierarchy of rights does not mean that the right is not important. Even in the most politically sensitive of areas — expression touching on questions of 'race, ethnicity, gender or religion' — the state still bears the onus, when straying outside the confines of FC s 16(2), of justifying any limitation of this right.

The third case worth mentioning is *Khumalo & Others v Holomisa*.[1] *Khumalo* concerned the question whether the common-law rules of defamation should be altered by the direct application of FC s 16. What is specific to South Africa about the right to freedom of expression, O'Regan J noted, is that this right is included in a Constitution committed to ensuring 'accountability, responsiveness and openness'.[2] This observation suggests that the mass media has a heightened role to play:

> The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperiled.'[3]

The striking thing about this passage is that it transforms the media's right to freedom of expression into a constitutional obligation to disseminate information and 'provide citizens with a platform for the exchange of ideas'.[4] Although prompted by a decision of the High Court of Australia,[5] O'Regan J, by referring to FC s 1*(d)*, amplifies the stress in that decision on media freedom to justify a much stronger conception of the role of the media in South Africa. The fact that the Final Constitution accords an instrumental purpose to the institutions of representative democracy, she reasons, means that the media is doubly important. Not only must it play a role in the exchange of information and ideas. It must also play a special role in holding government to account, and in ensuring that it is responsive to the needs of the electorate. Here, then, we have a much deeper conception of democracy than the one set out by the unanimous Court in *UDM*.[6] Democracy, according to O'Regan J in *Khumalo*, cannot depend for its protection

[1] 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)('*Khumalo*').

[2] FC s 1 *(d)* quoted in *Khumalo* (supra) at para 23 n27.

[3] Ibid at para 24.

[4] Ibid. See also ibid at para 33 ('The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression.')

[5] See *Theophanous v Herlad & Weekly Times Ltd & Another* (1994) 124 ALR 1, 61 quoted in *Khumalo* (supra) at para 22.

[6] See *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as* Amici Curiae*) (No 2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1213 (CC)('*UDM*').

on the restraining influence of regular elections alone. Rather it is a 'culture'[1] that needs to be nurtured between elections if it is to survive for any length of time.

The role of the right to freedom of expression in the consolidation of democracy has also been expressed in two decisions that otherwise might have been handed down in any one of the more established liberal democracies, *Phillips v Director of Public Prosecutions (Witwatersrand Local Division)*[2] and *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)*.[3] In both these cases, whilst stressing the traditional function of the right to freedom of expression, the Court suggested that forms of expression that could not be associated, even indirectly, with 'the growth of democracy' would enjoy concomitantly less protection.[4]

In summary, the four special features of the Final Constitution's conception of the link between freedom of expression and democracy are: (1) the right to freedom of expression is of central, but not paramount, importance to democracy, and must be balanced against the right to human dignity in FC s 10; (2) the right to freedom of expression has a particular role to play in a new democracy such as South Africa, where it is crucial to democratic consolidation; (3) expression based on the immutable characteristics of a person or group is potentially destructive of democracy, especially in a country such as South Africa, but must nevertheless be regulated with care so as to remain within the boundaries set by FC s 16(2); and (4) the role of the right to freedom of expression in holding the political branches to account means that the media has a special constitutional obligation in South Africa to create the conditions necessary for the development of a democratic culture.[5]

(b) Political rights

The 'right to participate in the making of laws' has been called 'the right of rights'[6] and, indeed, there is broad agreement in democratic theory that, if any right is integral to democracy, then it is the right to participate in the democratic process.[7] The special relationship between political rights and democracy is sometimes recognized in the text of a constitution,[8] and state action impinging on such rights

[1] Ibid at para 24.

[2] 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC)(*'Phillips'*)(Section 160 *(d)* of Liquor Act 27 of 1989, which makes it an offence for the holder of an 'on-consumption liquor licence to allow 'any person to perform an offensive, indecent or obscene act' out to perform in public without being properly clothed, found to be overbroad and unconstitutional against FC s 16.)

[3] 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC)(*'De Reuck'*)(Unsuccessful challenge to s 27(1), read with the definition of child pornography in s 1, of the Film and Publications Act 65 of 1996.)

[4] *Phillips* (supra) at para 23.

[5] See also *Speaker of the National Assembly v De Lille* 1999 (4) SA 863 (SCA) at para 29 ('The right of free speech in the [National] Assembly protected by s 58(1) is a fundamental right crucial to representative government in a democratic society').

[6] J Waldron *Law and Disagreement* (1999) 282.

[7] For a discussion of the right to participate, see § 10.3*(c)* supra.

[8] The 1982 Canadian Charter of Rights and Freedoms, for example, excludes the right to vote in s 3 from the parliamentary override provision in s 33. See J de Waal 'Political Rights' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS 5, 1999) 23-3; PW Hogg *Constitutional Law of Canada* (Loose-leaf Edition, 2003 — Rel. 1) 42-2.

may be subject to a heightened level of review.[1]

In South Africa, FC s 19, which provides for a range of political rights, is not singled out as being more important than other rights in the Bill of Rights. The core democratic institutions that FC s 19 supports are, however, enumerated in FC s 1*(d)*, which declares 'universal adult suffrage, a national common voters roll, regular elections, and a multi-party system of democratic government' to be among the values on which the South African state is founded.[2] This means that constitutional amendments affecting political rights may need to satisfy the procedural requirements, not just of amendments impinging on the Bill of Rights, but also of amendments to the founding values in FC s 1.[3]

FC s 19 identifies three main categories of political rights: 'the right to make political choices' (FC s 19(1)); 'the right to free, fair and regular elections' (FC s 19(2)); and the right to vote and stand for public office (FC s 19(3)). In two of the five political rights cases decided by the Constitutional Court to date, *August* and *NICRO*, the violation of FC s 19 was not seriously in dispute.[4] In a third case, *African Christian Democratic Party*, the constitutional claimant did not rely directly on political rights, but appealed instead to FC s 19, read with FC s 1*(d)*, as a guide to the interpretation of the electoral provisions at issue.[5] In the two remaining cases, however, *UDM* and *New National Party*, the question whether FC s 19 had been violated was central to the Court's decision.[6]

In *UDM*, as we have seen, it was alleged that FC s 19 had been infringed by the mid-term amendment of South Africa's proportional representation system so as to allow floor-crossing, and that the special procedures provided for constitutional amendments impinging on the Bill of Rights should therefore have been

[1] In the United States, the right to vote is generally protected through the equal protection clause of the Fourteenth Amendment. In such cases, the US Supreme Court has typically held that the standard of review to be applied is strict scrutiny. See, eg, *Dunn v Blumstein* (1972) 405 US 330 (State law conditioning right to vote on minimum residence requirement stuck down as being overbroad.) In Canada, by contrast, a deferential standard of review is applied to legislative determinations of electoral boundaries. See *Re Provincial Electoral Boundaries (Saskatchewan)* [1991] 2 SCR 158. Australia has, at best, an implied constitutional right to vote, and the jurisprudence of the Australian High Court is accordingly not particularly relevant. See T Blackshield & G Williams *Australian Constitutional Law and Theory: Commentary and Materials* (3rd Edition, 2002) 1101-05.

[2] See C Roederer 'Founding Provisions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 13.

[3] See FC s 74(1) and (2), as applied in *UDM*. As Steven Budlender points out in his chapter in this volume, a literal reading of FC s 74(1) and (2) suggests that, for these provisions to apply, the constitutional amendment must actually take the form of an amendment to FC s 1 or a right in the Bill of Rights. The Court in *UDM*, without saying so expressly, read FC s 74(1) and (2) more generously to apply to any constitutional amendment impinging on FC s 1 or the Bill of Rights. See S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) 17-30.

[4] See *August v Electoral Commission* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC)('*August*'); *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)('*NICRO*').

[5] *African Christian Democratic Party v The Electoral Commission & Others* 2006 (5) BCLR 579 (CC)('*African Christian Democratic Party*')at paras 21-23.

[6] *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)('*New National Party*').

followed.[1] The Constitutional Court dismissed this argument in three paragraphs.[2] The key argument in the Court's reasoning is the holding that:

> The rights entrenched under section 19 are directed to elections, to voting and to participation in political activities. Between elections, however, voters have no control over the conduct of their representatives.[3]

Whilst probably justified in relation to FC s 19(2) and (3), this argument seems misplaced in relation to FC s 19(1), which provides for the freedom 'to make political choices', including the right 'to form a political party', 'participate in the activities of a political party', and 'campaign for a political party or cause'. None of these rights may be meaningfully exercised only at election time, and all are patently capable of violation in between elections.

The deferential approach of the Court in *UDM* to state action impinging on political rights had earlier been signalled in *New National Party*, where an eight-to-one majority had dismissed a challenge by a minority political party to certain sections of the Electoral Act.[4] The impugned sections together provided that, in order to register and vote in a general election, citizens had to be in possession of a particular kind of identity document or temporary identity certificate. It was common cause that these provisions prevented certain South African citizens above the statutory age from voting. The question the *New National Party* Court had to decide was whether the impugned provisions violated the right to vote in FC s 19(3) and, if so, whether such violation was reasonable and justifiable according to the standard imposed by FC s 36.

The difference between the majority judgment of Yacoob J and the minority judgment of O'Regan J goes to the heart of the Final Constitution's conception of democracy. For the majority, although the 'importance of the right to vote is self-evident and can never be overstated', there was

> no point in belabouring its importance and it is sufficient to say that the right is fundamental to a democracy, for without it there can be no democracy. But the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless.[5]

There is some ambivalence in this passage about the importance of the right to vote that provides an early indication of the approach the majority ultimately takes. Whilst affirming the centrality of the right to vote in maintaining the conditions necessary for democracy, the majority downplays the importance of the right in the ambiguous last sentence of the quoted passage. The fact that the right to vote is 'empty and useless' without procedural arrangements for its exercise, of course, cuts two ways. Either it means, as the majority later presses us to accept, that the legislature should be given a relatively free hand to decide what those

[1] See § 10.3*(b)* supra.
[2] See *UDM* (supra) at paras 49-51.
[3] Ibid at para 49.
[4] Act 73 of 1998.
[5] *New National Party* (supra) at para 11.

arrangements should be,[1] or it means that the right is so important that a heightened level of review should be applied to the scrutiny of the arrangements — the approach taken by O'Regan J in her minority judgment.[2]

Two subsidiary considerations bolster the majority's approach in *New National Party*: a concern for the institutional legitimacy of the Court in reviewing procedural arrangements made for the exercise of the right to vote;[3] and the purely technical argument that the two-stage system of review requires the reasonableness of state action to be considered only at the second, limitations stage.[4] Both of these subsidiary arguments are flawed: the first because it ignores the importance of the right to vote in lending legitimacy to the system in terms of which laws regulating the right to vote are made, and the second because it is contradicted by decisions handed down both before and after *New National Party*.[5]

In avoiding these two errors, O'Regan J's minority judgment is more in keeping with the approach to political rights in democratic theory. As we have seen, democratic theory accords to political rights a special status as democracy-enhancing rights. Even Waldron, the most ardent critic of Dworkin's view that the set

[1] *New National Party* (supra) at para 14 ('The details of the system are left to Parliament.')

[2] Ibid at para 122.

[3] Ibid at para 19 ('It is to be emphasised that it is for Parliament to determine the means by which voters must identify themselves. This is not the function of a Court.')

[4] See *New National Party* (supra) at para 24.

[5] In a series of decisions across different areas of law the Constitutional Court has shown itself to be prepared to engage in reasonableness review at the first stage of the inquiry. The most familiar of these areas is socio-economic rights, where the inquiry into the violation of the right has, since the decision in *Government of the RSA & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), depended on the Court's assessment of the reasonableness of the legislative and other measures taken to realize the right. See further S Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33. In relation to property rights, too, the Court has laid down a test that sees it employing a flexible review standard at the initial stage, the outer end of which conforms to something approximating reasonableness review. See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 65, discussed in T Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46. In FC s 16 cases, as we have seen, the rationality of a law restricting freedom of expression generally does not provide a defence at the first stage of the inquiry unless the law regulates forms of expression specifically excluded by FC s 16(2). Although harder to compare, the Court's review standard under FC s 9(3), the unfair discrimination part of the equality clause, is also arguably higher than that deployed in *New National Party* in relation to political rights. See, eg, *Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1537 (CC) at para 52, discussed in B Goldblatt & C Albertyn 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 35. To be fair to the majority in *New National Party*, most of these decisions were handed down after the decision in that case. The basic structure of the Final Constitution in this regard was, however, clear, as pointed out in O'Regan J's minority judgment at para 123. For a slightly different view, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34 (The authors contend that, save for rights provisions containing internal limitations clauses, no good reason exists for reasonableness tests to form a part of fundamental rights analysis.)

of democracy-enhancing rights should be expanded to include all rights that ensure that citizens are treated with equal concern and respect, concedes that Dworkin's argument is unassailable in relation to the right to participate in the democratic process.[1] John Hart Ely's defence of political rights as 'democracy-reinforcing' rights is equally well known.[2] Against this background, the majority's reticence in *New National Party* to subject the right to vote in FC s 19(3) to reasonableness review is hard to fathom. Far from requiring special deference, the democratic objection to judicial review is weakest in relation to political rights.

Although in outcome they may appear to have vindicated the special place of political rights in the Final Constitution's vision for South African democracy, neither *August* nor *NICRO* nor *African Christian Democratic Party* contradicts the deferential standard of review adopted in *New National Party*. In *August*, a decision handed down just before *New National Party*, the Court held, in the absence of an express legislative prohibition, that the state was required to show that it had taken reasonable steps to enable prisoners to vote.[3] This was effectively the same standard of review as the one later applied in *New National Party*.[4] In *NICRO*, which was decided after the national Electoral Act had been amended to deny certain categories of prisoner the right to vote, the state conceded that such legislative prohibition necessarily limited the right in FC s 19(3).[5] The standard of review to be applied in the case accordingly did not arise. And in *African Christian Democratic Party*, as we have seen, FC s 19 was relied on only indirectly, with greater normative weight being given to FC s 1*(d)*.

Despite the relative degree of success enjoyed by constitutional claimants under FC s 19, therefore, the Court's jurisprudence in relation to political rights is out of kilter with its approach to FC s 16. As noted in § 10.4*(a)*, state action impinging on freedom of expression that is not excluded from the ambit of the right by FC s 16(2) is generally taken to infringe FC s 16(1), with most of the interpretative work being done at the limitations stage. Under FC s 19, on the other hand, the constitutional claimant must discharge a fairly difficult legal burden before the limitations stage can be reached. The explanation for this discrepancy seems to be that, in FC s 19 cases, at least where the political stakes are high, the Court — driven by pragmatic rather than principled considerations — has opted for a deferential review standard. The fact that this approach is diametrically opposed to the one suggested by democratic theory is a salutary reminder that the theory and practice of adjudication do not always converge.

(c) Socio-economic rights

Socio-economic rights interact with democracy in two main ways: first, as rights to the minimum standard of welfare required for meaningful participation in the

[1] See Waldron *Law and Disagreement* (supra) at 282.
[2] See JH Ely *Democracy and Distrust: A Theory of Judicial Review* (1980).
[3] See *August* (supra) at para 22.
[4] See *New National Party* (supra) at para 23.
[5] See *NICRO* (supra) at para 32.

democratic process,[1] and, secondly, as rights the adjudication of which involves the judiciary in the allocation of public resources, a function traditionally reserved for the legislative and executive branches of government. The first form of interaction is positive in the sense that the vindication of the right is, in theory at least, aimed at securing the conditions necessary for democracy to function. The second form of interaction, on the other hand, is potentially negative. For many, the judicial enforcement of socio-economic rights detracts from democracy, not just in the way Waldron argues that all rights detract from democracy,[2] but in a particularly severe way associated with the role judges are expected to perform when enforcing socio-economic rights. More so than in respect of other rights, the enforcement of socio-economic rights requires judges to review complex policy choices regarding the allocation of public resources. Quite apart from the fact that judges are not institutionally equipped to undertake this task, such policy choices are more legitimately made, many democratic theorists think,[3] by the people's elected representatives, or at least by those immediately answerable to them.

Of the two main forms of interaction between socio-economic rights and democracy, the second has dominated the Constitutional Court's jurisprudence to date.[4] None of the cases decided thus far has drawn an express link between socio-economic rights and the minimum standard of welfare required for meaningful participation in the democratic process.[5] Instead, the Court's attention has been devoted to rebutting the contention that the second form of interaction between socio-economic rights and democracy is necessarily a negative one. In

[1] See N Haysom 'Constitutionalism, Majoritarian Democracy and Socio-economic Rights' (1992) 8 *SAJHR* 451, 461 (Arguing that, '[b]y constitutionalising selected socio-economic rights, society is elevating certain rights to a necessary condition for the existence of a *minimum* civil equality'.); S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1, 2 (Arguing that the deprivation of 'basic subsistence needs . . . impedes the development of a whole range of human capabilities, including the ability to fulfil life plans and participate effectively in political, economic and social life'.); S Liebenberg 'Needs, Rights and Transformation: Adjudicating Social Rights' (Unpublished inaugural lecture, University of Stellenbosch, 4 October 2005, manuscript on file with author) 21-22 (Exploring the role of social rights in 'enhancing participatory parity'.)

[2] See § 10.2*(d)* supra.

[3] For a review of the literature, see R Gargarella 'Theories of Democracy, the Judiciary and Social Rights' in R Gargarella, P Domingo & T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (forthcoming, 2006).

[4] See L Williams 'Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South African Analysis' (2005) 21 *SAJHR* 436, 438 (Arguing that 'the fear that democracy might be undermined by judicial fiat has formed the backdrop against which the Constitutional Court has begun to fashion its role in giving content to socio-economic rights'.) The most important socio-economic rights cases decided to date are: *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC); *Grootboom* (supra); *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC)('*Treatment Action Campaign*'); *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC).

[5] The closest the Court has come to this interpretation is the statement in *Grootboom* (supra) at para 23 that '[a]ffording socio-economic rights to all people . . . enables them to enjoy the other rights enshrined in chap 2 [of the Final Constitution]'.

both *Grootboom* and *Treatment Action Campaign*, the Court emphasized that the adjudication of socio-economic rights was a role given to it by the Final Constitution, and therefore one to which no democratic objection could be raised, provided that the boundaries set by the Constitution were respected.[1]

Whilst this defence of the Court's role in relation to socio-economic rights is understandable in light of the separation of powers concerns that were raised in *Grootboom* and especially *Treatment Action Campaign*, when examined against the text of the Final Constitution it seems a little grudging. As noted in § 10.3*(c)*, FC s 7(1) enjoins the courts to interpret all the rights in the Bill of Rights as affirming the 'democratic values of human dignity, equality and freedom'. If this injunction is taken at face value, the judicial enforcement of socio-economic rights need not be anti-democratic. On the contrary, the Final Constitution requires the courts to interpret socio-economic rights as democracy-enhancing rights in the same manner as the right to vote, the right to freedom of expression, or indeed any of the rights in the Bill of Rights. The democratic defence of justiciable socio-economic rights, in other words, is not simply that the Constitutional Assembly, a democratic body, decided that the power of future majorities should be restrained in this way. It is that the Constitutional Assembly — on the plain meaning of FC s 7(1) — evidently thought that the judicial enforcement of socio-economic rights would enhance the quality of democracy in South Africa. That view may, of course, have been mistaken, but until the mistake is clearly established, and the Final Constitution amended, the courts' fidelity to the constitutional text requires them to give socio-economic rights the benefit of the doubt. Giving socio-economic rights the benefit of the doubt requires the courts not just passively to accept that such rights are capable of enhancing democracy, but actively to interpret socio-economic rights so as to serve this end.

The democracy-enhancing role of socio-economic rights is most obviously apparent in the first form of interaction described above. The very essence of this form of interaction, after all, is the claim that socio-economic rights enhance democracy by ensuring that everyone has the minimum standard of welfare required meaningfully to participate in politics. Of course, it may be that the judicial enforcement of socio-economic rights will in fact have the opposite effect, and that the involvement of courts in the allocation of public resources will either disrupt state welfare provision or impede economic growth.[2] But these speculative arguments must be disregarded for interpretive purposes. The Final Constitution clearly gives courts a role in enforcing socio-economic rights, and it is not for the courts to question the economic wisdom of that decision. Rather, what the

[1] See, eg, *Grootboom* (supra) at para 20; *Treatment Action Campaign* (supra) at para 99. On the precommitment defence to the democratic objection to constitutional review generally, see S Holmes 'Precommitment and the Paradox of Democracy' in J Elster & R Slagstad (eds) *Constitutionalism and Democracy* (1988) 195.

[2] See, eg, S Archer 'Human Rights and Economic Resources in South Africa after Political Change' Centre for Applied Legal Studies *Law & Transformation Conference* (Unpublished paper, August 2000, manuscript on file with author).

Final Constitution requires them to do is to interpret socio-economic rights in such a way as to ensure that no one is excluded from the democratic process for lack of resources.[1]

The second form of interaction between socio-economic rights and democracy was, at the time of the adoption of the Final Constitution, thought by almost everyone to be an unavoidably negative one. It was simply inconceivable that courts could enforce socio-economic rights without detracting from democracy. For some, this was reason enough to exclude socio-economic rights from the Bill of Rights altogether.[2] For others, the fact that justiciable socio-economic rights would inevitably detract from democracy was a convenient counterweight to the politically driven decision to include property rights. Since judges would be given *this* anti-democratic power, why not at least temper it with the power to vindicate socio-economic rights when the occasion demanded?

As it turned out, the Final Constitution's vision for the relationship between socio-economic rights and democracy was more profound than anyone imagined. Although the Constitutional Court's need to build its legitimacy has prevented it from exploiting all the interpretative possibilities in the constitutional text, its cautious case-by-case approach has shown that socio-economic rights and democracy are not necessarily in conflict.[3] In particular, the Court's record demonstrates that, by respecting the limits of its institutional role, a court may counter the democratic objection to justiciable socio-economic rights, whilst at the same time contributing to the deepening of democracy. This point may be illustrated by reference to policy developments after the decisions in *Grootboom* and *Treatment Action Campaign*.

In *Grootboom*, for technical reasons associated with the way the case was run, the order handed down was purely declaratory. This gave rise to a range of criticisms about the seriousness of the Court's commitment to enforcing the right to have access to adequate housing.[4] If the poor were unable to influence the democratic process in their favour, surely the Court had to act more forcefully to protect the Final Constitution's vision? The passage of time has shown that these criticisms were not justified. In the five years since *Grootboom* was handed

[1] But see *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC). Stu Woolman contends that the *Khosa* court's rationale for extending FC s 27's right of access to social security to permanent residents — that 'wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole' — 'emphasizes an increase in the objective sense of well-being that flows from the enhancement of the *agency* of each individual member of our society' and that such agency must, per force, embrace rights of self-governance, and therefore, rights of political participation. See S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) 36–15 citing *Khosa* (supra) at para 74.

[2] See, eg, D Davis 'The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 *SAJHR* 475.

[3] The case-by-case approach was enunciated in *Grootboom.* (supra) at para 20.

[4] For my own misguided criticisms, see T Roux 'Understanding *Grootboom* — A Response to Cass R Sunstein' (2002) 12 *Constitutional Forum* 41, 51.

down, there has been a slow but inexorable shift in national housing policy towards the position preferred by the Court.[1] Beginning with the adoption of the Emergency Housing Programme,[2] and more recently with the wholesale re-orientation of housing policy to cater to the needs of informal settlers,[3] the state's approach to housing today is closer to the kind of policy that the Court in *Grootboom* said was constitutionally required. That result could, of course, be entirely coincidental: it may be that South Africa's housing policy would have changed in this way without the intervention of the Court. But there are several reasons to think that *Grootboom* did make a difference. For one, *Grootboom* is cited in some of the major policy documents that have signalled this shift.[4] For another, some of the policy choices underlying the new programme are too close to those recommended in *Grootboom* as to be entirely unrelated to it. Even if those choices cannot be directly attributed to the judgment, *Grootboom* at the very least created an environment in which such choices could be openly debated.

In the health sector, the re-orientation of the state's anti-retroviral programme in the direction mandated by the Court in *Treatment Action Campaign* has been much more controversial, with the successful litigant having to institute contempt proceedings in order to ensure implementation of the Court's decision.[5] Nevertheless, public policy on the prevention and treatment of HIV/AIDS *has* since shifted in the direction preferred by the Court. More importantly, it is clear that the policy now more closely reflects the preferences of the majority of South Africans, and that this change occurred because *Treatment Action Campaign* created the space for broader public participation in the debate about the adequacy of government's response to the HIV/AIDS epidemic.

Grootboom and *Treatment Action Campaign* accordingly illustrate that, given the requisite amount of judicial restraint, and favourable political conditions, justiciable socio-economic rights may deepen democracy by enhancing public participation in the making of decisions about the allocation of public resources. Both

[1] The remainder of this paragraph and the one following it draw on arguments made elsewhere. See T Roux 'The Constitutional Framework and the Deepening of Democracy in South Africa' paper prepared for the Open Society Institute *Africa Governance Monitoring and Advocacy Project* (June 2005, manuscript on file with author).

[2] National Department of Housing (2003).

[3] The Informal Settlement Support Programme adopted by the national Department of Housing in 2004. The Emergency Housing Programme and the Informal Settlement Support Programme are discussed in detail elsewhere in this work. See K McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55.

[4] The discussion paper accompanying the Emergency Housing Programme referred expressly to the decision in *Grootboom*, along with the then recent experience of severe flooding in the north of the country, as the reason behind the new strategy. See National Department of Housing (2003). Although not that prominent in the policy documents underpinning the Informal Settlement Support Programme, the spectre of *Grootboom* loomed large in internal departmental discussions about how to deal with mass urbanisation. Arguably, *Grootboom* helped to tip the balance in these discussions in favour of a policy more accommodating of informal settlers.

[5] See M Heywood 'Contempt or Compliance? The *TAC Case* after the Constitutional Court Judgment' (2003) 4(1) *ESR Review* 7, 10.

cases therefore suggest that Gutmann and Thompson's scepticism about the impact of judicial review on democratic debate is misplaced.[1] Far from removing issues from public discussion, limited and sensitive involvement by the courts in important democratic decisions may actually enable an otherwise passive citizenry to become more involved in politics. In so far as the Final Constitution seems to mandate a more direct role for the courts than this, one which sees the courts directly enforcing rights to the minimum standard of welfare required for meaningful participation in the democratic process, the legitimacy that the Constitutional Court has built for itself over the first ten years of its existence may now enable it to interpret the Final Constitution more expansively in this way.

10.5 The Principle of Democracy in South African Constitutional Law

(a) Introduction

The constitutional provisions and cases discussed in the previous two sections together inform our understanding of the principle of democracy in South African constitutional law.[2] Some of the cases attempt expressly to articulate this principle in justifying the rules they lay down. Most of the cases, however, do not.[3] The correct statement of the principle is in any event not dependent on any particular case. Rather, it is a function of the best reading of the constitutional text

[1] See § 10.2*(c)*(iii) supra.

[2] The term 'principle' is used here in its Dworkinian sense of a legal standard that best fits and therefore best justifies the legal materials. See R Dworkin *Taking Rights Seriously* (1978), 22-31, 71-80; R Dworkin *Law's Empire* (1986) 225-58. In addition, though no court has confirmed this in so many words, the principle of democracy is also a justiciable principle of South African constitutional law akin to the principle of legality, or the rule of law doctrine, and the doctrine of separation of powers. On the principle of legality, or the rule of law doctrine, see *Fedsure Life Assurance & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at paras 56-59; *Pharmaceutical Manufacturers Association of SA & Another: In Re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 17 (Recognizing the principle of legality as a self-standing principle of South African constitutional law.) See also F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 11. On the separation of powers, see *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at paras 19-21 (Recognizing the separation of powers as an 'implied' provision of the Final Constitution.) In so far as its justiciability is concerned, the principle of democracy is more akin to the doctrine of separation of powers than it is to the principle of legality. This is because the principle of democracy, like the separation of powers doctrine, is given expression in the 'structure and provisions' of the Final Constitution as a whole. Cf *Heath* (supra) at para 21. It does not necessarily follow from this that, when invoking the principle of democracy, litigants should be able to point to the particular provision of the Final Constitution that they allege has been violated. As was the case in *Heath* in relation to the separation of powers, it should in theory be possible to invoke the principle of democracy by referring to its embodiment in the text of the Final Constitution as a whole. To date, however, all the cases in which express reference has been made to the principle of democracy have tied the application of that principle to a particular provision, meaning that the principle of democracy has not yet been recognized as a self-standing principle of South African constitutional law. See further the cases discussed in § 10.5*(c)* infra.

[3] See § 10.5*(c)* infra.

and the accompanying case law, and is subject to revision by future cases in light of the legal rules there developed.

Because of the interpretive function assigned to it by the Constitutional Court in *NICRO*,[1] the logical place to start in trying to articulate the principle of democracy is FC s 1*(d)*. As we have seen, the founding values function something like principles in the way they inform the interpretation of other provisions. FC s 1*(d)* is not itself, however, coterminous with the principle of democracy, both because it is stated in the form of a founding value, and because the principle of democracy is something larger and more mutable than FC s 1*(d)*.[2]

It is worth quoting FC s 1*(d)* in full again: 'The Republic of South Africa is one, sovereign democratic state founded on the following values: *(a)* … *(d)* Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.' On its face, the principle of democracy that this provision supports is one that attributes to the institutions of representative government a particular purpose, namely, 'to ensure accountability, responsiveness and openness'. For this reading, though not for the argument of this section as a whole, the placement of the comma after 'government' in FC s 1*(d)* is crucial. Without the comma, the words 'to ensure accountability, responsiveness and openness' would have qualified the phrase 'multi-party system of government' alone, and FC s 1*(d)* would for the most part have consisted of a list of institutions the purpose of which was left unstated. But this is not the provision that the Constitutional Assembly adopted. Nor is it a provision that would have made very much sense. Listing a range of institutions without any apparent purpose, except in the case of the last one, would have been an odd way for the Constitutional Assembly to have gone about articulating a founding value. Values, after all, provide standards against which conduct may be measured, whereas institutions are only valuable to the extent that they serve a valued purpose. The grammatically correct reading is therefore also the reading that makes best sense of the intention behind FC s 1*(d)*. What the placement of the comma after 'government' does is to make it clear that the Final Constitution's commitment to the institutions of representative government is not a commitment to the value of these institutions in and of themselves, but a commitment to a particular kind of relationship between government and the governed, one in which the people's representatives are controlled by and responsible to the people, and in which the reasons behind the exercise of governmental power are publicly explained.

Put in this way, it is immediately apparent that FC s 1*(d)*'s conception of democracy, and the deep principle of democracy it supports, would be incompatible with a model of democracy in which political parties vied for the people's

[1] See *NICRO* (supra) at para 21.

[2] I say 'larger' because the principle of democracy must attempt to reconcile all the cases, even those that appear to have been wrongly decided, and 'more mutable' because it is subject to change in future cases.

votes, only to ignore the people once elected. In adopting FC s 1*(d)*, the Constitutional Assembly also conclusively rejected Rousseau's scepticism about the quality of democracy in a representative system of government. On the contrary, there is something of J S Mill's optimism about FC s 1*(d)* in the way it confidently draws a causal link between the adoption of the institutions of representative government and the consequences it assumes will surely follow. To judge by FC s 1*(d)* alone, the principle of democracy in South African constitutional law is something like this: *Government in South Africa must be so arranged that the people, through the medium of political parties and regular elections, in which all adult citizens are allowed to participate, exert sufficient control over their elected representatives to ensure that: (a)* representatives are held to account for their actions; *(b)* government responds to the needs of the people; and *(c)* the reasons for all collective decisions are publicly explained.

Unfortunately, not all the cases read FC s 1*(d)* in this way. And there's the rub, for the principle of democracy must endeavour to reconcile the best interpretation of the constitutional text with the way the courts have in fact interpreted those same provisions. The major stumbling block in the way of the interpretation of FC s 1*(d)* just offered is, of course, the decision of the unanimous Constitutional Court in *UDM*.[1] In that case, the Court was asked to place a value-laden construction on the commitment to multi-party democracy in FC s 1*(d)* that would have prevented Parliament from changing the then applicable electoral system so as to allow floor-crossing. The possible reasons behind the Court's refusal to give such a value-laden reading have already been discussed.[2] They are relevant here only to the extent that it is necessary to discern whether the Court in *UDM*, in declining to interpret FC s 1*(d)* in the value-laden way it was asked to do, at the same time attributed to FC s 1*(d)* a different set of values that have changed the way in which the principle of democracy in South African constitutional law must be stated. Here, at least, advocates of the value-laden reading may be thankful for a bit of luck, for the Court in *UDM* did not base its refusal to apply that reading on the primacy of a countervailing set of values located in FC s 1*(d)*, but on a countervailing *principle*, extrinsic to FC s 1*(d)*, namely, the principle that, where the Final Constitution does not clearly prescribe a particular model, the judiciary should defer to the legislature in politically sensitive cases concerning the design of the electoral system. Since that countervailing principle is not a principle located in FC s 1*(d)* itself, it is not part of the normative universe that needs to be taken into account when stating the principle of democracy derivable from FC s 1*(d)*. Rather, the principle that the court should defer to the legislature in such cases is a self-standing principle, one that was accorded greater weight on the facts of the *UDM* case, but one that will not be relevant to all cases in which the principle of democracy is implicated.

[1] *United Democratic Movement & Others v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae) (No 2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC).

[2] See § 10.3*(b)* supra.

The principle of democracy derived from the plain meaning of FC s 1*(d)* accordingly survives *UDM*. Will it also remain unchanged as the best-fit reading of the legal materials when called upon to explain the other provisions in the Final Constitution on democracy and the cases decided under them? This is a complicated question and it will be easier to answer it in two stages. First, it will be necessary to consider whether the reading of FC s 1*(d)* offered at the beginning of this section fits with the other express references to democracy in the Final Constitution and the rights in the Bill of Rights that are integral to democracy. Once this task is complete, it will be possible to decide whether the case law necessitates an amendment to the principle of democracy discernible in the constitutional text.

(b) The principle of democracy in the constitutional text

The principle of democracy derived from FC s 1*(d)* is supported by the preamble. As noted in § 10.3*(a)*, the first part of the preamble characterizes democracy not as a value-neutral set of procedures for achieving other valued ends, but as a value system in itself. This is in keeping with FC s 1*(d)*'s commitment to the institutions of representative government as a means to ensure a particular kind of relationship between government and the governed. The second part of the preamble also affirms the core idea that democracy is a system of government 'based on the will of the people' in which 'every citizen is equally protected by law'. The principle of political equality to which this part of the preamble refers is reflected in FC s 1*(d)*'s commitment to universal adult suffrage on a national common voters' roll. The two statements of that principle are not incompatible with each other, and together can be incorporated into the democratic principle's understanding of political equality as a necessary condition for the sort of relationship between government and the governed that it seeks to establish. Finally, the preamble's concern with the connection between the consolidation of democracy in South Africa and South Africa's relationship to other sovereign states is not part of the democratic principle itself, but rather a statement about the consequences that are expected to follow from the observance of that principle. It is therefore not necessary to try to incorporate the third part of the preamble into our understanding of the principle of democracy in South African constitutional law.

The main feature of the reading of the relationship between rights and democracy in § 10.3*(c)* was that these two concepts should not be seen to be in conflict with each other, but rather as being in constructive tension, the resolution of which should take place on a case-by-case basis in accordance with the democratic values of 'human dignity, equality and freedom'. These values are repeated in FC ss 7(1), 36(1) and 39(1). They also appear in a slightly extended form in FC s 1*(a)*. The repetition of the same set of values in these provisions, it was argued, is deliberate, the intention being to make it clear that the rights in the Bill of Rights do not detract from democracy, but are rather constitutive of it. This Dworkinian approach to the relationship between rights and democracy is plainly incompatible with any attempt to equate the principle of democracy in South African constitutional law with

the majority-rule principle.[1] This is just not what the Final Constitution says, anywhere. Even if there were isolated references to democracy in the Final Constitution that could be read in this way,[2] the overwhelming weight of the express and implied references to democracy in the Constitution comes down in favour of a different view. The principle of democracy in South African constitutional law is not that collective decisions shall be taken by majority vote, but something far deeper than this, including, at the very least, the notion that the people's will may be trumped by individual rights where this serves the democratic values of 'human dignity, equality and freedom'.

All the rights in the Bill of Rights contribute in one way or another to this deep principle. In most cases, the contribution is indirect. In some cases, however, such as those discussed in § 10.4, the contribution is direct. Thus, when FC s 16(1) provides that '[e]veryone has the right to freedom of expression', or when FC s 19(3)*(a)* provides that '[e]very adult citizen has the right to vote', the clear intention is to secure these rights against majority override, not for anti-democratic reasons, but so as to safeguard the conditions necessary for democracy. To be sure, these rights may be limited by law of general application. But such limitation, according to FC s 36(1), will be in keeping with the principle of democracy only if the law in question itself serves the democratic values of 'human dignity, equality and freedom'.

At this point the Final Constitution needs to be read very carefully.[3] FC ss 7(1), 36(1) and 39(1) consistently tell us that the democratic values that the

[1] Note that the argument is not that the majority-rule principle is not a principle of South African constitutional law. Rather, the argument is that the principle of democracy can neither be equated with nor exhausted by the majority-rule principle.

[2] The reference to democracy in FC s 160(8)*(b)* has been read by several courts, including the Constitutional Court, to refer to majority rule. See § 10.5*(c)* infra.

[3] It might be useful at this point to contrast the reading of the principle of democracy offered here with the one proposed by Iain Currie and Johan De Waal. See I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 13-18. Currie and De Waal begin their treatment of 'democracy and accountability' by asserting that, in addition to the rule of law, 'the Constitution also requires the government to respect the principle of democracy'. Ibid at 13. The principle in general, they remark, means that 'government can only be legitimate in so far as it rests on the consent of the governed'. Ibid. They then list all the provisions in which direct reference is made to democracy, and quote FC s 1*(d)* in full. Ibid at 14. One can quibble that, apart from FC s 1*(d)*, most of the provisions they cite are not references to 'the principle of democracy' but to the word 'democracy', but this is not that important. Currie and De Waal's reference to FC s 1*(d)* as central to the principle of democracy is certainly correct. They then go on to make two mistakes, however, first, in asserting that there is 'no definition of democracy in the Constitution nor an exhaustive list of the requirements that the principle imposes', and, secondly, in distinguishing from the principle of democracy, whose existence they affirm, a separate, connected but normatively distinct 'principle of accountability'. Ibid at 17. The first statement is mistaken because it is not in the nature of a legal principle to list exhaustively all the requirements it imposes. Rather, as noted above, the principle of democracy is a function of the constitutional text, the cases decided to date and the cases yet to be decided. The list of requirements imposed by such a principle is in theory infinite. Currie and De Waal's second mistake is more serious. In arguing that there are, in fact, two self-standing principles, one of democracy and one of accountability, they divest the principle of democracy of its true content, and set up the possibility of a conflict between these two principles in which a more shallow principle of democracy may win out. If FC s 1*(d)* is taken to be the closest thing to

rights in the Bill of Rights are intended to serve are 'human dignity, equality and freedom'. On the other hand FC s 1*(d)* provides that the institutions of representative government are intended to ensure 'accountability, responsiveness and openness'.[1] Is there a contradiction here? No, because FC s 1*(d)* is only one of four values on which the democratic South African state is founded, the others being '[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms' (FC s 1*(a)*), '[n]on-racialism and non-sexism' (FC s 1*(b)*) and '[s]upremacy of the constitution and the rule of law' (FC s 1*(c)*). It follows that FC s 1*(d)* does not purport to be an exhaustive list of the values that the commitment to democracy in South Africa is intended to serve. Rather, it is a more limited list of the values that the institutions of *representative government* are thought to be capable of ensuring. The remaining values in FC s 1 can and must be integrated into our understanding of the principle of democracy in South African constitutional law. Any such principle, after all, though it need not articulate them expressly, must be consistent with the founding values in FC s 1. This can be done, it is suggested, by rephrasing the principle of democracy derived from FC s 1*(d)* in the form of two linked propositions — the proposition already given about the way in which government ought to be arranged, and then a complementary proposition, as follows: *The rights necessary to maintain such a form of government must be enshrined in a supreme-law Bill of Rights, enforced by an independent judiciary, whose task it shall be to ensure that, whenever the will of the majority, expressed in the form of law of general application, runs counter to a right in the Bill of Rights, the resolution of that tension promotes the values of human dignity, equality and freedom.*

The next part of the Final Constitution that we need to take into account is those provisions considered in § 10.3*(d)*, that is, express references to democracy in provisions setting out the powers and functions of the various legislative bodies. These provisions, as we have seen, may be divided into three basic types: provisions requiring legislative bodies to take account of representative and participatory democracy in the way they design their rules and orders; provisions requiring legislative bodies to allow minority party participation in their proceedings; and provisions requiring legislative bodies to facilitate public access to and involvement in their proceedings. All these provisions qualify the majority-rule principle underlying the provisions on national, provincial and local government legislative authority as a whole, that is, the principle that whichever party

a statement of the principle of democracy in the Final Constitution, then it is clear that the principle of democracy connotes a unified conception of democracy and accountability in which the institutions of representative government are not divorced from the purpose for which they are established. To extract the principle of accountability from FC s 1*(d)* in this way deprives the institutions of representative government of their instrumental purpose, and the principle of democracy of its deeper meaning.

[1] It is also possible to argue that 'accountability, responsiveness and openness' are really goals not values, and in this way to resolve the apparent contradiction between FC s 1*(d)* and FC ss 7(1), 36(1) and 39(1). See Dworkin's distinction between goals and values in *Taking Rights Seriously* (supra) at 22. However, we are expressly told in the beginning of FC s 1 that the items to follow are founding values — not goals. In any case, it is possible to reconcile them in another way, as the rest of this section makes clear.

wins the most votes in an election is entitled to form the government. The qualification that the three sets of provisions discussed in § 10.3*(d)* place on the majority-rule principle is that the commitment to multi-party democracy in FC s 1*(d)* is not one that may be fulfilled at election-time alone, but one that must be carried through to the day-to-day operation of the various legislatures, such that the views of citizens who voted for minority parties are fairly reflected in any discussions that take place. In addition, the third generic provision requires that the legislatures should make provision for citizens on occasion to bypass their elected representatives in order to participate directly in the proceedings of the legislature. This qualification may be expressed by restating the first element of the democratic principle in the following way: G*overnment in South Africa must be so arranged that the people, through the medium of political parties and regular elections, in which all adult citizens are entitled to participate, exert sufficient control over their elected representatives to ensure that (a) representatives are held to account for their actions, (b) government listens and responds to the needs of the people, in appropriate cases directly, [and] (c) collective decisions are taken by majority vote after due consideration of the views of minority parties, and (d) the reasons for all collective decisions are publicly explained.* (Words added are underlined; words deleted appear in square brackets.)

Is it also necessary to amend the statement of the democratic principle in light of the rights integral to democracy considered in § 10.4? To a large extent, these rights have already been taken into account in the statement of the second element of the democratic principle. At the risk of privileging certain rights over others and making the statement of the second element long and unwieldy, one might amend it thus: *The rights necessary to maintain such a form of government, including the right to freedom of expression, the right to form political parties, the right to vote, and the right to the minimum standard of welfare necessary to participate in the democratic process, must be enshrined in a supreme-law Bill of Rights, enforced by an independent judiciary, whose task it shall be to ensure that, whenever the will of the majority, expressed in the form of law of general application, runs counter to a right in the Bill of Rights, the resolution of that tension promotes the values of human dignity, equality and freedom.* This way of stating the second element of the principle, though accurate, is somewhat inelegant. On balance, therefore, it is probably better to leave the second element as it stood after consideration of FC ss 7(1), 36(1) and 39(1). This means that the principle of democracy derivable from the constitutional text, before consideration of the case law, is something like this: *(1)* G*overnment in South Africa must be so arranged that the people, through the medium of political parties and regular elections, in which all adult citizens are entitled to participate, exert sufficient control over their elected representatives to ensure that: (a) representatives are held to account for their actions, (b) government listens and responds to the needs of the people, in appropriate cases directly, (c) collective decisions are taken by majority vote after due consideration of the views of minority parties, and (d) the reasons for all collective decisions are publicly explained. (2) The rights necessary to maintain such a form of government must be enshrined in a supreme-law Bill of Rights, enforced by an independent judiciary, whose task it shall be to ensure that, whenever the will of the majority, expressed in the form of law of general application, runs counter to a right in the Bill of Rights, the resolution of that tension promotes the values of human dignity, equality and freedom.*

(c) The principle of democracy in the case law

The introduction to this section considered the extent to which the Constitutional Court's decision in *UDM* may be said to have altered the principle of democracy supported by FC s 1*(d)*. For the same reason that *UDM* cannot be said to have altered that principle, it cannot be said to have altered the more extended principle discernible in the entire constitutional text. By declining to engage with the substantive values underpinning multi-party democracy, *UDM* does not stand for a countervailing interpretation of the democratic principle, but for an independent principle of judicial deference in politically sensitive cases, such as those involving the design of the electoral system. Whatever one thinks of the correctness of *UDM*, therefore, it cannot be said to impact on the principle of democracy. Rather, *UDM* stands for the meta-principle that where the principle of democracy and the principle of judicial deference in politically sensitive cases conflict, the latter principle must prevail. As it so happens, that part of the *UDM* decision strikes one as intuitively wrong, but it is not necessary to make a case for that intuition here. It is sufficient to conclude that the statement of the principle of democracy discernible in the constitutional text need not be altered in order to accommodate *UDM*.

UDM was, of course, not the first case to rely on the principle of judicial deference in politically sensitive cases concerning the design of the electoral system. In *New National Party*,[1] Yacoob J held, in a decision from which only O'Regan J dissented, that the standard of review in challenges to electoral statutes based on the right to vote was bare rationality.[2] In her powerful dissent, O'Regan J stressed the centrality of the right to vote in the consolidation of South African democracy, remarking that: 'The right to vote is foundational to a democratic system. Without it, there can be no democracy at all.'[3] In according special importance to the right to vote in this way, O'Regan J aligned herself with the consensus view in the literature that, if any right needs to be safeguarded against majority override, it is the right to vote. For this reason, O'Regan J's judgment also supports the second element of the principle of democracy just outlined. As argued in § 10.5*(b)*, it is integral to the Final Constitution's conception of democracy that rights be capable of trumping the will of the majority where such a result better serves 'the democratic values of human dignity, equality and freedom'. Excluding the right to vote from the operation of this principle by subjecting the state's regulation of it to a standard of mere rationality alone is clearly wrong.

Although the decisions in *August*[4] and *NICRO*,[5] by vindicating prisoners' right

[1] *New National Party v Government of the Republic of South Africa*1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)('*NNP*').
[2] Ibid at paras 19-24.
[3] Ibid at para 122.
[4] *August v Electoral Commission* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC)('*August*').
[5] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)('*NICRO*').

to vote in the face of executive neglect and legislative override, counterbalance the decision in *NNP* somewhat, they do so without calling into question the standard of review laid down in that case.[1] *August* and *NICRO,* despite endorsing the centrality of the right to vote to South African democracy, neither support nor detract from the principle of democracy in § 10.5*(b)*. At best, they are agnostic on the question whether that principle can be enforced in cases where the state does not act irrationally.[2]

Another case in which the principle of democracy appears at first blush to have given way to the principle of judicial deference in politically sensitive cases is *Democratic Alliance v ANC & Others*.[3] In that case, it will be recalled, the Cape High Court was asked to decide whether FC s 160(8) meant that the party-political composition of a municipal council's committees, including the executive committee, had to be proportional to the parties' support in the council. The High Court decided that it did not, holding that FC s 160(8) primarily conferred on minority parties a right to participate in the proceedings of a municipal council and its committees, and that the composition of the committees need not exactly reflect the composition of the municipal council itself. This decision appears to have been strongly influenced by the decision in *UDM*, which had been handed down shortly before, and which gave rise to the dispute in *Democratic Alliance v ANC*. The *Democratic Alliance v ANC* Court thus held that, due to the political sensitivity of the case, a high degree of judicial deference was in order.[4] To this extent, the approach in *Democratic Alliance v ANC* may be distinguished on the same basis as *UDM*. However, before this stage of the decision had been reached, the Court made a finding that is potentially more damaging to the deep principle of democracy. As noted in § 10.3*(d)*(ii), the High Court accepted without question a concession by counsel that, read on its own, the requirement imposed by FC s 160(8)*(b)* would be satisfied by a first-past-the-post system in which all the members of a municipal council's executive and other committees came from the majority party. FC s 160(8)*(b)*, it will be recalled, provides that the manner in which members of a municipal council are entitled to participate in the proceedings of the municipal council and its committees must be 'consistent with democracy'. The construction placed by the Court in *Democratic Alliance v ANC* on this provision evinces a very shallow conception of democracy indeed. Read on its own, the Court held, the requirement that municipal councillors' participatory rights be consistent with democracy imposes an imprecise standard that would be satisfied by any number of arrangements, including a winner-takes-all system. The principle of democracy in FC s 160(8)*(b)*, the Court thereby implied, though

[1] *August* was decided twelve days before *NNP*. *NICRO* was decided some five years later.

[2] It should not be necessary to add that South African constitutional law does not need a deep principle of democracy to guard against irrational state action. The principle of the rule of law, including the doctrine of legality, would do this job just as well. See F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11.

[3] 2003 (1) BCLR 25 (C)('*Democratic Alliance v ANC*').

[4] Ibid at 41B-F.

not equivalent to the principle of majority rule, is insufficiently determinate as to be clearly incompatible with it.[1]

Here, then, we have a statement of the principle of democracy that appears to be diametrically opposed to the one contained in the constitutional text. What are we to make of it? The first thing to say is that the Cape High Court, in accepting the concession made by the applicant's counsel in relation to FC s 160(8)*(b)*, made a mistake. What the applicant's counsel and the Court seem to have missed is that the requirement of democracy in FC s 160(8)*(b)* applies both to municipal councillors' entitlement to participate in the proceedings of committees of the municipal council *and* to their entitlement to participate in the proceedings of the municipal council itself. FC s 160(8)*(b)* cannot therefore establish as weak a standard as the Court says it does, since a first-past-the-post system in which the majority party participated in the proceedings of the municipal council to the exclusion of minority parties would plainly be unconstitutional. In fact, a careful reading of FC s 160(8)*(b)* reveals that it has nothing at all to do with party-political participation in the municipal council or its committees. That issue is dealt with in FC s 160(8)*(a)*, which provides that municipal councillors are entitled to participate in the proceedings of the council and its committees in a manner that allows 'parties and interests reflected within the Council to be fairly represented'. As the Court in *Democratic Alliance v ANC* itself decides, this provision is directly relevant to disputes about the *extent* of party-political participation in the proceedings of the municipal council and its committees. FC s 160(8)*(b)* has to do with something else, namely the *manner* of members' participation in such proceedings, which must be 'consistent with democracy'. To discern what this requirement means would have required the Court to undertake a detailed analysis of that phrase. Given counsel's concession in relation to FC s 160 (8)*(b)*, it is easy to understand why the Court did not do this: the task of deciding what the phrase 'consistent with democracy' means is nothing short of the task undertaken in this chapter. Offered a convenient way out, the High Court took it, and we are accordingly left no wiser about what the principle of democracy really means. By the same token, however, *Democratic Alliance v ANC* cannot be read as detracting from the principle of democracy discernible in the constitutional text as a whole. Since it makes no attempt to interpret the text beyond FC s 160(8), it cannot be taken as a serious attempt to articulate that principle, and its holding in this respect may therefore be disregarded.

[1] See *MEC for Development Planning and Local Government in the Provincial Government of Gauteng v Democratic Party* 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC). This case concerned a challenge to s 16(5) of the Local Government Transition Act 209 of 1993 ('LGTA') in terms of FC s 160(3)*(b)* read with FC s 160(2)*(b)*. The constitutional provisions require that the budget of a municipal council be approved by a majority of members, whereas the LGTA provided for approval by two-thirds majority, with a deadlock-breaking mechanism allowing the MEC to approve the budget. One of the questions raised in this case was whether the LGTA framework offended a range of principles, including the principle of democratic government. The Court held that, even if there was such a principle, 'a deadlock-breaking mechanism to avoid impasse [in approving a municipal budget] would not be in breach of [it]'. Ibid at para 56.

The Constitutional Court's interpretation of FC s 160(8) is contained in *Democratic Alliance & Another v Masondo NO & Another*.[1] This case is a particularly rich one from the perspective of this chapter, and was accordingly discussed in some detail in § 10.3*(d)*(ii). Two of the three opinions, Sachs J's concurring and O'Regan J's dissenting opinion, come quite close to the reading of the constitutional text offered here. These opinions will be discussed in moment. First, however, it is necessary to ask whether the majority opinion in *Masondo* detracts from the principle of democracy set out in § 10.5*(b)*. As was the case with *UDM* and *Democratic Alliance v ANC*, the answer must be 'no'. This time, fortunately, the reason for this conclusion is quite simple. As we saw in § 10.3*(d)*(ii), the difference between the three opinions handed down in *Masondo* had to do with the question whether the principle of democracy was implicated in that case at all, rather than with differing views about the content of the principle. Had the majority been asked whether they agreed with Sachs and O'Regan JJ's vision for South African democracy they would probably have said, 'Yes, of course.' But that was not the point of their disagreement. The point of their disagreement was whether mayoral committees in an executive mayoral system are best understood as executive bodies or as bodies in which the functions of the legislature and the executive are combined. The majority took the former approach, and in effect held that the principle of democracy in FC s 160(8) did not apply to the case.[2] Sachs and O'Regan JJ, on the other hand, held that mayoral committees were mixed executive-legislative bodies because, in the nature of things, much of the deliberation over collective decisions in an executive mayoral system will occur in the mayoral committee. Both Sachs and O'Regan JJ therefore felt that the principle of democracy was indeed implicated. The difference between their two opinions can be attributed to O'Regan J's view that the absence of minority-party participation in the mayoral committee *per se* contradicted the 'fair representation' part of that principle, and Sachs J's view that it all depended on the way that the system was implemented.

It is impossible to summarize Sachs J's remarks in *Masondo* on the principle of democracy in South African constitutional law without depriving them of their special flavour:

> The requirement of fair representation [in FC s 160(8)*(a)*] emphasizes that the Constitution does not envisage a mathematical form of democracy, where the winner takes all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered. The dialogic nature of deliberative democracy has its roots both in international democratic practice and indigenous African tradition. It was through dialogue and sensible accommodation on an inclusive and principled basis that the Constitution itself emerged. It would accordingly be perverse to construe its terms in a way that belied or minimized the importance of the very inclusive process that led to its adoption, and sustains its legitimacy.

[1] 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC)('*Masondo*').

[2] *Masondo* (supra) at para 22 (Court holds that the governing principle was the need for effective and efficient service delivery, which is the more appropriate principle when it comes to the assessment of the conduct of the executive.)

> The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making. It should be underlined that the responsibility for serious and meaningful deliberation and decision-making rests not only on the majority, but on minority groups as well. In the end, the endeavours of both majority and minority parties should be directed not towards exercising (or blocking the exercise) of power for its own sake, but at achieving a just society where, in the words of the Preamble, 'South Africa belongs to all who live in it'. At the same time, the Constitution does not envisage endless debate with a view to satisfying the needs and interests of all. Majority rule, within the framework of fundamental rights, presupposes that after proper deliberative procedures have been followed, decisions are taken and become binding. Accordingly, an appropriate balance has to be established between deliberation and decision.[1]

These two paragraphs, though somewhat eclectic in their blending of different theories, powerfully articulate many of the elements of the principle of democracy that § 10.5*(b)* argued was discernible in the constitutional text. The key aspects of the principle in Sachs J's formulation are: *(a)* the rejection of the winner-takes-all conception of democracy, except in so far as majority rule remains the basic way of taking decisions once the values of participation and deliberation have been adequately served; and *(b)* the notion that democracy is not an event that takes place only at election time, but rather a 'continuous' process in which every reasonable attempt is made to accommodate, or at least listen to, divergent views. If there is one theoretical influence in the mix that dominates the rest, it is the theory of deliberative democracy, and in particular Habermas's notion that communicative power is the only legitimate form of power in the modern nation-state.[2] The principle of majority rule, in Sachs J's formulation, is legitimate only to the extent that it is subordinated to a deeper principle of democracy that stresses the value of participation and deliberation before decisions are taken.

O'Regan J's statement of the principle in FC s 160(8)*(a)* is very similar, but does contain one difference that may be crucial for the way the principle of democracy is conceived in other cases Although Sachs J, like the Cape High Court in *Democratic Alliance v ANC*, interprets the phrase 'consistent with democracy' in FC s 160(8)*(b)* as meaning consistent with the principle of majority rule,[3] it is clear from the remarks just quoted that he thinks that the Final Constitution's overarching vision for South African democracy is much deeper than this, and that the operation of the majority-rule principle, not just in FC s 160(8), but generally, is constrained by the need to engage in meaningful

[1] *Masondo* (supra) at paras 42-43.

[2] Cf *Matatiele Municipality & Others v President of the Republic of South African & Others* 2006 (5) BCLR 622 (CC)('*Matatiele*') at para 110 (Sachs J remarked: 'In our constitutional order, the legitimacy of laws made by Parliament comes not from awe, but from openness.') See § 10.3*(b)* supra.

[3] See *Masondo* (supra) at para 38.

deliberation beforehand. For Sachs J, therefore, the principle of democracy in South African constitutional law is a deep one, roughly corresponding to the statement of that principle in § 10.5*(b)*. O'Regan J, on the other hand, says in so many words that the principle of democracy, at least in FC s 160(8)*(b)* is coterminous with the principle of majority rule. In the passage already quoted in § 10.3*(d)*(ii) she says that:

> [FC] s 160(8)*(b)* is clear that the principle of fair representation is always subject to democracy and the will of the majority. The principle established by s 160(8) is a principle which requires inclusive deliberation prior to decision-making to enrich the quality of our democracy. *It does not subvert the principle of democracy itself*.'[1]

It is clear from this passage that, when O'Regan J uses the phrase, 'the principle of democracy', she means the principle of majority rule. Her reading of FC s 160(8), in other words, is that it contains two principles — a principle of fair representation and a principle of democracy — and that these two principles may be reconciled with each other by reading the former to apply to the manner in which minority parties should be allowed to participate in the proceedings of a municipal council and its committees, and the latter to the way in which decisions are taken. It has already been noted in the discussion of *Democratic Alliance v ANC* that this reading of FC s 160(8) is questionable. Textually, there is nothing in FC s 160(8)*(b)* that says that this provision applies to decision-making, and certainly not to the exclusion of other issues. The operation of the majority-rule principle with regard to decision-making in a municipal council is set out in FC s 160(3), which provides that certain decisions of a municipal council must be taken 'with a supporting vote of a majority of its members' and others 'by a majority of the votes cast'. Given this comprehensive regulation of the issue, it unclear why FC s 160(8)*(b)* should be read as restating the majority-rule principle in relation to participation in the proceedings of the municipal council and its committees.[2] The most obvious construction to be placed on FC s 160(8)*(b)*, when read with the comprehensive regulation of decision-making in FC s 160(3), is that it applies to the *manner* of participation in a municipal council and its committees, and not to the way decisions are taken. What FC s 160(8)*(b)* says is that, in addition to being fairly represented, minority parties are entitled to participate in the meetings of a municipal council and its committees in a manner 'consistent with democracy'. The principle of democracy to which FC s 160(8)*(b)* here refers must mean, not the majority-rule principle, which has already been stated in FC s 160(3), but the deeper principle of democracy discernible in the constitutional text as a whole.

It would thus seem that O'Regan J's equation of the FC s 160(8)*(b)* requirement with the principle of majority-rule in decision-making is open to question.

[1] *Masondo* (supra) at para 78.

[2] It is possible that the intention of FC s 160(8)*(b)* was to extend the majority-rule principle in FC s 160(3) to proceedings of the committees of a municipal council. However, as noted earlier, this reading is strained since FC s 160(8) expressly applies both to proceedings of the committees of a municipal council and to proceedings of the municipal council itself, that is, in plenary session.

Nevertheless, that is conclusively what she says, and we are therefore left with a dissenting opinion that fails to attribute to the principle of democracy the full meaning argued for in § 10.5*(b)*. Even Sachs J's concurring opinion, though it appears to support that reading of the principle more fully, might in the end be said to depend on the textual peg of the phrase 'fair representation'. Without that phrase, it is not self-evident that either O'Regan J or Sachs J would have read FC s 160(8) in the manner that they did. *Masondo* therefore leaves us with less than fulsome support for the reading of the principle of democracy outlined above.

Two more recent decisions, however, come much closer to that reading, and moreover were delivered by a near unanimous Court. In *African Christian Democratic Party*, the first occasion on which O'Regan J has written for the majority in a case concerning political rights, the Court held that provisions in electoral statutes should be interpreted in favour of 'enfranchisement rather than disenfranchisement and participation rather than exclusion'.[1] This holding was expressly tied to FC s 1*(d)*, which is quoted in full in the preceding paragraphs, along with Sachs J's commentary on FC s 1*(d)* in *August*.[2] O'Regan J's judgment was concurred in by all the members of the Court with the exception of Skweyiya J. Here, then, we have conclusive support for the deep principle of democracy operating as a guide to the interpretation of statutes affecting political rights.[3]

In a decision handed down three days later, *Matatiele Municipality & Others v President of the Republic of South African & Others*, we find even more conclusive evidence that a majority of the Constitutional Court may yet endorse the deep principle of democracy set out in § 10.5*(b)*. In this case, it will be recalled, an amendment to the Final Constitution altering a provincial boundary was challenged under FC s 155(3)*(b)* for unconstitutionally limiting the authority of the Municipal Demarcation Board. Although the Court ultimately decided against the applicants on this point, it affirmed the importance of the Demarcation Board 'to our constitutional democracy' and the role of FC s 153(3)*(b)* read with FC s 1*(d)* in guarding against political manipulation of the demarcation process. This dictum, though not crucial to the outcome of the case and therefore not part of the ratio, suggests a slightly less deferential approach to the legislative regulation of the voting system than was evident in *UDM*. Of course, the political stakes were not quite as high in *Matatiele*, and therefore it is easy to downplay the importance of this dictum. Nevertheless, it does suggest that the meta-principle in *UDM* — that the principle of democracy must give way to the principle of deference to legislative determinations of the design of the electoral system — is not sacrosanct.

The second aspect of the *Matatiele* decision provides even greater support for the principle that § 10.5*(b)* argued is evident in the constitutional text as a whole. Faced with a concession by applicants' counsel that the procedures for the

[1] *African Christian Democratic Party* (supra) at para 23.

[2] *August* (supra) at para 17, quoted in *African Christian Democratic Party* (supra) at para 22.

[3] *African Christian Democratic Party* does not, however, overturn the standard of review applied in *NNP*. FC s 19 was used in *African Christian Democratic Party* as the basis for an enfranchisement-friendly reading of the statute in question, rather than as part of a direct challenge to the statute.

amendment of the Final Constitution had been duly followed, a majority of the Court refused to accept it. There was enough on the papers, the Court held, to suggest that the people of Matatiele had not been properly consulted about the decision to transfer the area in which they lived to a different province.[1] Although a court should, as a rule, be cautious about deciding issues that were not raised by the parties in their pleadings, this rule had to 'yield to the interests of justice'.[2] FC s 118(1)*(a)* was open to the interpretation that the people directly affected by a decision to alter a provincial boundary should be consulted by the provincial legislature concerned, either through public hearings or by giving them an opportunity to make written submissions. These issues, the Court held, 'lie at the very heartland of our participatory democracy'.[3]

The order in Ngcobo J's majority judgment in *Matatiele* was supported by all but two of the judges. Three other judges supported the order but not all of the reasoning in the majority judgment. The joint dissenting judgment of Skweyiya and Yacoob JJ takes issue, not with the Court's remarks on the possible interpretation of FC s 118(1)*(a)*, but with the majority's decision to refer the case to further hearing. It therefore leaves the majority's provisional reading of this provision untouched. Sachs J, in concurring in both the order and the reasoning in the majority judgment, restates his conception of democracy in *Masondo* in even more explicitly Habermasian terms, holding that 'the legitimacy of laws made by Parliament comes not from awe, but from openness'.[4] For Sachs J, at least, the principle of democracy derived from FC s 1*(d)* is a deep one that is capable of invalidating virtually any law or conduct, provided that there is a textual peg on which to hang it. O'Regan J, in supporting the majority's order but not all their reasoning, is a little more cautious. For her, the central question in the case was whether the people of Matatiele had a legitimate grievance and, if so, the consequences for government's relationship with that community if that grievance were left unaddressed. In her words: 'Were we to leave undetermined the legal issues raised by Ngcobo J it would create uncertainty and doubt which might continue to be a source of disquiet and anger for decades to come.'[5] The fact that the case involved a constitutional amendment, in other words, only heightened the need to ensure that government was responsive to the concerns of the Matatiele community. In this indirect way, O'Regan J's judgment, too, though it does not mention it expressly, provides support for the deep principle of democracy outlined in § 10.5*(b)*.

What then, in conclusion, are we to make of the principle of democracy at this stage of our jurisprudence? The constitutional text clearly supports a deep reading of that principle which conforms to accounts in contemporary political theory which insist that, for democracy to be meaningful, government must facilitate real

[1] *Matatiele* (supra) at para 69.
[2] Ibid at para 66.
[3] Ibid at para 72.
[4] Ibid at para 110.
[5] Ibid at para 90.

public participation in decision-making and genuine deliberation. That this is indeed the principle of democracy in South African law has not yet been confirmed by a majority of the Constitutional Court. Of the current judges, Sachs J has come closest to endorsing this reading, and O'Regan J certainly appears very sympathetic to it. The other judges, however, have remained largely agnostic, with two exceptions — *NNP* and *UDM*. *UDM* remains the greatest obstacle in the way of the recognition of the deep principle of democracy in South African constitutional law, all the more so because it was joined by Sachs and O'Regan JJ. But it is possible to distinguish *UDM* on the basis that, rather than standing for a different principle of democracy, it stands for a meta-principle, namely, that the deep principle of democracy must yield to a principle of judicial deference in politically sensitive cases, such as those involving legislative determinations of the electoral system. To the extent that this meta-principle still stands in the way of the deep principle of democracy, there are indications in *African Christian Democratic Party* and *Matatiele* that the meta-principle is weakening, and that we will shortly have a decision in which the majority of the Court endorses the deep principle in a case in which it really matters.

11 The Rule of Law, Legality and the Supremacy of the Constitution

Frank I. Michelman

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11.1 INTRODUCTION

(a) The common law doctrine of legality

If a country has working legal and political orders, then somewhere within its *corpus juris* will be found its constitutional law, the law that structures and arranges political and legal institutions, their workings, and their interactions.[1] To that generalization, South Africa during the years preceding the recent constitutional transition was never thought to pose an exception.

As was typical for systems in the Westminster or Diceyan tradition, South Africa's pre-transition constitutional law was understood to be a part of its common law.[2] The twin pillars of that constitutional common law were the principles of legality and of parliamentary supremacy. According to the former doctrine: *(a)* government and its officials were deemed powerless to act upon the interests and concerns of persons without an authorization or chain of authorizations traceable to an act of Parliament or to the common law;[3] *(b)* actions by officials falling foul of any restrictions or requirements contained either in the common law or in any law laid down by Parliament or by duly authorized subordinate lawmakers were deemed to that extent unlawful and judicially remediable;[4] and *(c)* official actions that were judicially found to be arbitrary, according to certain inflections of that term — some of which had substantive overtones — were considered unlawful and judicially remediable, in the absence of clear and specific authorization from Parliament. Such, at least, was the formal state of doctrinal affairs.[5] Has the onset of the Final Constitution altered that state of affairs? If so, in what ways?

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* I am indebted to Dennis Davis, Andre Van der Walt, Stuart Woolman, and participants in a workshop at the University of Toronto for perceptive comments on drafts of this Chapter.

[1] See § 11.4 infra.

[2] See *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* (2000) (2) SA 674 (CC), 2000 (3) BCLR 241 (CC)('*Pharmaceutical Manufacturers*') at para 33 ('The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the Interim Constitution this control was exercised by the courts through the application of common law constitutional principles.')

[3] This branch of the legality principle apparently encompasses a restriction on the permissible 'vagueness' of statutory authorizations for official action. See *Affordbale Medicines Trust & Others v Minister of Health & Another* 2005 (6) BCLR 529 (CC)('*Affordable Medicines*') at paras 24, 108. The branch also ramifies directly to a norm for the interpretation of a certain class of statutes, those that base the liability of a subject to perform or forbear from an act on the existence some prior official action. An example would be a statute that attaches a penalty to the act of smoking in a posted area. See *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA) at paras 32–7 (When construed against the background of the principle of legality, such a statute normally will be taken to mean that the penalty does not ensue if the triggering official action (the posting, in our example) is shown by a person charged with violation not to have been accomplished according to law.)

[4] In case of any discrepancy between common-law and statutory requirements, the latter would prevail *per* parliamentary supremacy.

[5] Not within memory has the legality principle's formal status as a component of South African common constitutional law been doubted. Content is another matter, of course, as is the strength of judicial will to interpose the legality principle against questionable governmental conduct. It is notorious both that the meaning of 'arbitrary' underwent contraction and that the stringency of the demand for clear parliamentary authorization underwent dilution under the stress of apartheid-era realpolitik. For accounts of these matters, see D Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991); J Dugard *Human Rights and the South African Legal Order* (1978).

(b) Legality as a norm of enacted constitutional law

Today, the judicially enforceable claim to legality inhabits South African law not as a part of the common law carried over from pre-Constitutional days but as a norm sourced directly in the Final Constitution. The claim to legality has gained recognition as a guarantee within that body of enacted, supreme law — the Final Constitution — for the implementation of which the Constitutional Court ('CC') bears special and final judicial responsibility. The decisions proclaiming this development — their circumstances, motivations, and implications — provide the first main topic of this chapter. The second main topic is the related notion of constitutional supremacy or hegemony developed by the CC. The central and decisive judgment is that in *Pharmaceutical Manufacturers*. However, *President of the Republic of South African & Another v Hugo*[1] and *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*[2] are important way-stations, and there are several post-*Pharmaceutical* reaffirmations of the doctrine.[3]

(c) A product of judicial interpretation

Among the founding values of the Republic — alongside democracy, human dignity, and the achievement of equality, non-racialism and non-sexism — the Final Constitution lists 'supremacy of the constitution and the rule of law'.[4] As might have been foreseen from this text, the rule of law, like dignity,[5] is today invoked in South African constitutional jurisprudence as a pervasive value that 'informs the interpretation of many, possibly all, other rights.'[6] But also like dignity, the rule of law (or at least its included principle of legality[7]) has achieved

[1] 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)('*Hugo*').

[2] 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC)('*Fedsure*'). See §11.3*(b)* infra for a comprehensive account of *Fedsure* and *Pharmaceutical Manufacturers*.

[3] See *Affordabale Medicines* (supra) at paras 49, 108; *City of Cape Town and Another v Robertson & Another* 2005 (2) SA 323 (CC)('*Robertson*'); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Another* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC)('*Bato Star*'); *Bel Porto School Governing Body & Others v Premier of the Province, Western Cape & Another* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC)('*Bel Porto*').

[4] Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC') s 1*(c)*.

[5] See D Cornell 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 36.

[6] *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) ('*Dawood*') at para 35 (On dignity). Consider, for example, the appeal to rule-of-law values in construing the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC') s 8(1) and FC s 9(1). See *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 25 ('[T]he constitutional state . . . should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law . . . The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner.'); *Bel Porto* (supra) at para 120 (identifying a claim that certain governmental action was 'irrational and thus unlawful' as 'the same argument as that raised in relation to the claim based on s 9(1).') For a crisp summary of the influence of sundry dimensions of the rule-of-law ideal in recent South African constitutional adjudication, some of them tied to specific clauses in the Bill of Rights and some not, see H Botha 'The Legitimacy of Legal Orders (3): Rethinking the Rule of Law' (2001) 64 *THRHR* 523, 534–6.

[7] See *Fedsure* (supra) at para 57 ('Whether the [constitutionalised] principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here.') For a succinct review of the rule-of-law 'philosophy' in a somewhat fuller sense, see Y Burns 'A Right-based Philosophy of Administrative Law and a Culture of Justification' (2002) 17 *SAPL* 279, 284–5.

a dual status in South African constitutional law, serving not just as a pervasive value informing the interpretation of various constitutional clauses but also as a self-standing 'justiciable and enforceable' claim.[1]

Such a conclusion was strictly inescapable with regard to dignity, for the constitutional text, in addition to declaring dignity to be a founding value of the republic, expressly proclaims it a justiciable constitutional right.[2] Establishing the *constitutional* (as opposed to common-law) status of a general, justiciable claim to legality required something more in the way of interpretive exertion. This is true in three respects. First, at the moment when the CC first proclaimed the constitutional moorings of the claim to legality, it was dealing with the Interim Constitution, an instrument void of any text naming the rule of law as a constitutional 'value,' much less declaring it a guaranteed, justiciable right. By the Court's own testimony, the legality principle's niche in South Africa's tablets of judicially enforceable constitutional guarantees is one that it found to be 'implied' — meaning not expressly stated — within the terms of the Interim Constitution.[3] It is, then, a niche that the CC at one time felt impelled to carve out in the absence of any plain-on-its-face constitutional directive to do so.

Second, while the Final Constitution's designation of the rule of law as a 'founding value' of the Republic might now seem to offer a plain textual platform for the CC's doctrine that the Final Constitution confers a general, justiciable, subjective right to legality, no such simple explanation for that doctrine can be squared with the Court's declaration in *NICRO* that the founding values listed in FC s 1 do not in themselves 'give rise' to 'discrete and enforceable rights.'[4] Rather, as the CC went on to say in *NICRO*, the FC s 1*(c)* values 'inform and give substance' to the rights-granting sections of the Bill of Rights.[5] When we scan the Bill of Rights, we find no mention of a general, self-standing, justiciable claim to legality. What may be more to the point, the CC has never identified any section of the Bill of Rights as a direct textual source for such a general, justiciable claim. One is left to infer that the implication of which the CC spoke in *Fedsure* and *Pharmaceutical Manufacturers* is an implication from the Final Constituton in its entirety.

Third, as we shall see later, the CC's doctrine regarding a general claim to legality does not rest with giving such a claim a place within constitutional law.[6] The doctrine also essentially includes a *denial* that such a claim continues to

[1] *Dawood* (supra) at para 35.

[2] See IC s 10 and FC s 10 (Both explicitly confer a right to have one's dignity respected and protected.)

[3] *Fedsure* (supra) at para 58.

[4] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 at paras 21, 23.

[5] On the uses of 'the rule of law' as a value, see *Bel Porto* (supra) at para 120; *Dawood* (supra) at para 35; *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 25. See also *President of the Republic & Others v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (CC) at paras 34, 48, 51 ('*Modderklip*')(Constitutional Court relies on FC s1*(c)* to support its conclusion that the state had limited Modderklip's right of access to court, as guaranteed by FC s 34, by failing to provide an alternative housing location for illegal occupiers against whom Modderklip had obtained an eviction order that could not be enforced in the absence of such an alternative location.)

[6] See § 11.3*(c)* infra.

subsist *beyond* the Final Constitution, as a part of South African common law that arguably would fall outside the CC's special powers of control over adjudication respecting 'constitutional matters.'

What we have here, therefore, is no tame or paltry act of judicial lawfinding but rather an event of conscious, active constitutional interpretation by the CC, and one fraught with far-reaching consequences for the administration of law in South Africa. Among these consequences, moreover, as we are about to see, is one that appears to run directly counter to an express design of the Final Constitution: that of assigning to the CC a less-than-plenary subject-matter competence and thus of dividing final appellate authority between the CC and the Supreme Court of Appeal. We shall want, therefore, to consider the possible causes and justifications for this bold stroke by the CC.[1]

11.2 The Principle of Legality & the Jurisdiction of the Constitutional Court

(a) The scope of 'constitutional matters': The Constitutional Court not envisioned as a court of general jurisdiction

A court set up to have the last word on constitutional matters, as the CC indubitably is,[2] may or not also be a court set up to exercise a plenary jurisdiction over all legally cognizable matters that may arise. Whether a 'constitutional' court is also to serve as a court of plenary jurisdiction would seem to be a choice for constitutional drafters to make, both by their explicit delineations of the court's jurisdiction and by the prescriptive norms they write into their constitutional instrument. Taking the Final Constitution at its word, we would have to say the CC of South Africa decidedly is *not* set up to be a court of plenary jurisdiction. FC 167(3)*(a)* confines the CC's writ to 'constitutional matters' and 'issues connected with decisions on constitutional matters.'[3] By contrast, FC s 168(3) endows the Supreme Court of Appeal ('SCA') with authority to decide appeals in 'any matter,' subject to possible review by the CC in 'constitutional matters.' The conclusion seems inescapable: 'constitutional matters' compose a proper subset of all litigable matters, and the Final Constitution, by express design and presumably for reasons consciously held, has applied to the CC not only a special principle of concentration on constitutional matters but a concomitant rule of jurisdictional *confinement* to such matters.

The CC relied squarely on this view in *S v Boesak*.[4] The case raised the question of whether another court's judgment of the sufficiency of evidence in a criminal case to support a finding of guilt beyond a reasonable doubt is a constitutional matter falling within the CC's powers of review. The applicant maintained that

[1] See § 11.3 infra.

[2] See *S v Pennington* 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC) at para 10.

[3] Constitutional matters include issues involving 'the interpretation, protection or enforcement of the Constitution.' FC s 167(7). The Interim Constitution similarly made the Constitutional Court the final judicial arbiter of 'all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution.' IC s 98(2).

[4] 2001 (1) BCLR 36 (CC), 2001 (1) SA 912 (CC)('*Boesak*').

conviction on the basis of insufficient evidence — evidence that 'ought to' have left the tribunal in doubt about his guilt — infringed his right to be presumed innocent, expressly guaranteed by FC s 35(3)*(h)*,[1] and also (because imprisonment impended) his right not to be deprived of freedom without just cause, expressly guaranteed by FC s 12 (1)*(a)*.[2] On their face, these contentions seem easily to meet the requirement that 'the Constitution must be implicated in some way before a finding can be said to raise a constitutional issue within the jurisdiction' of the CC.[3] The CC nevertheless concluded that questions of the sufficiency of evidence to support a conviction of crime could not be classed as constitutional matters because, if they were, then 'all criminal cases would be constitutional matters, and the distinction drawn in the Constitution between the jurisdiction of this Court and that of the SCA would be illusory.'[4] However less than airtight such reasoning may be,[5] it plainly implies as a premise that the CC may not, consistently with Final Constitution, regard its subject-matter competence as plenary.

From a legal-realist standpoint, of course, one always can doubt that it is possible to seal off 'non-constitutional' issues in a system where 'the Constitution is the supreme law and all law has to conform to the Constitution.'[6] After all, the CC not only is granted the authority to decide 'issues connected with decisions on constitutional matters,' it is further expressly empowered to decide, with finality, 'whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter;'[7] and those grants may seem potentially plastic enough, in the hands of a sufficiently determined and confident court, to cover that court's seizure of control over just about any legal issue of clear public importance once brought to litigation by a party with arguable standing to raise it.[8]

It does not follow, however, that these textual concessions of power to the CC — to decide 'connected' issues, and to decide which issues are constitutional or connected — detract from the clarity of the Constitution's plan to confine the CC's competence to a proper subset of the set of all legal issues. These texts endorse the CC's exercise of ancillary powers that no set of words could have denied to it in practice. Making explicit what must have been true in any event, these constitutional clauses cannot be said to gainsay the Final Constitution's apparent commitment to a *principle* of limited subject-matter competence for the CC. Rather to the contrary: By expressly pinning final responsibility for

[1] *Boesak* (supra) at para 16.
[2] Ibid at para 36.
[3] Ibid at para 23.
[4] Ibid at paras 15 and 35.
[5] It seems the distinction would not be illusory as long as some non-criminal cases might be found that raise no constitutional matters.
[6] *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC), 2002 (5) BCLR 454 (CC)('*Metcash*') at para 32. Ngcobo J obviously wrote with the Final Constitution's supremacy clause in mind. See FC s 2 ("This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.')
[7] FC s 167(3)*(c)*.
[8] See C Loots 'Standing, Ripeness and Mootness' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 8.

prudent implementation of the principle on the CC — where, inevitably, such responsibility would rest in practice anyway — the Final Constitution confirms its commitment to the principle.

Neither is the Final Constitution's apparent commitment to a contained jurisdiction for the CC belied by FC s 173, granting to the CC an 'inherent power' to 'develop the common law, taking into account the interests of justice.' Other clauses of the Final Constitution unquestionably obligate courts at all levels to develop the common law when and as required in order to 'give effect to' or appropriately 'limit' a right in the Bill of Rights (FC s 8(3)), and furthermore to develop the common law as may be required to keep the latter duly attuned to the 'spirit, purport and objects of the Bill of Rights' (FC s 39(2)).[1] There thus must arise cases in which constitutional matters are at stake in deciding or steering the course of common-law development, and proper oversight by the CC in such cases obviously may be aided by allowing the CC a competence to participate along with other courts in developing the common law. FC 173 thus figures as an implementation of the principle of the CC's special competence in constitutional matters, and the CC would be expected to tailor accordingly its use of its common-law development power.[2]

We may conclude, therefore, that the Final Constitution's express delineations of the subject-matter competence of the CC disclose an intention or design to restrict that competence to a proper subset of all legal issues.

(b) A problem: The rule of law as a constitutional matter

Questions obviously remain about whether a limiting formula so open to interpretation as 'constitutional matters' realistically can rein in the CC in practice. Questions also remain — and we shall discuss them — about whether anything like a watertight containment really was intended, or is desirable, or is consonant

[1] It makes no difference here — although it may elsewhere, see below — that the distribution of these duties between the Supreme Court of Appeal and the High Courts is a contentious issue. See *Nontembiso Norah Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape* Case No 1907/03 (SEC) (Froneman J)('In matters where there may be doubt or ambiguity in higher court or authority, and where that doubt or ambiguity may have serious consequences for upholding the fundamental constitutional values of the supremacy of the Constitution and the rule of law, I would respectfully suggest that High Court judges of first instance are obliged to follow the interpretation of authority that in their serious and considered opinion would serve the Constitution and the rule of law best.'); *Ex Parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC)('*Walters*'); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA)('*Afrox*'); S Woolman & D Brand 'Is There a Constitution in this Courtroom? Constitutional Jurisdiction after *Afrox* and *Walters*' (2003) 18 *South African Public Law* 38; S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 31.4*(b)*(x)(On *stare decisis* development of common law, and high Court Jurisdiction).

[2] The CC has done just that. See Woolman 'Application' (supra) at § 31.4*(e)*(i)–(iv)(Describes CC's practice of deferring or standing aside while the Supreme Court of Appeal and High Courts take the labouring oar in common-law development.) See also *Gardener v Whitaker* 1996 (4) SA 337, 1996 (6) BCLR 775 (CC); *De Freitas v Society of Advocates of Natal* 2001 (6) BCLR 531 (SCA), *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC)('*Carmichele*'); *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (5) BCLR 771 (CC)('*Khumalo*'); *Boesak* (supra) at para 15 ('The development of, or the failure to develop, a common-law rule by the SCA may constitute a constitutional matter.')

with the Final Constitution's larger purposes.[1] Of course, none of these questions is independent of how the Final Constitution is construed *substantively*. Certain kinds of norms for the conduct of officials or the exercise of official powers, if found in the Final Constitution, might render the notion of a less-than-plenary jurisdiction for the CC illusory or inconceivable even in theory. Now that, indeed, is the result to which we are brought — for so we are about to see — by embrace of the CC's understanding of the place and function of the rule-of-law notion in the scheme and project of the Final Constitution. If, as the CC held in *Fedsure* and *Pharmaceutical Manufacturers*, the doctrine of legality is a 'rule' of supreme constitutional law giving rise to justiciable, subjective claims, it becomes impossible *in concept* (leave alone realist doubts about what will happen in practice) to see how any case coming to court in South Africa possibly can fall short of being a constitutional case. We develop this point over the next two subsections.

(i) *An optimistic view of the limited-in-principle scope of 'constitutional matters'*

To get started, we may ask how close to all-inclusive is the coverage of case-types in which the CC's subject-matter competence in constitutional matters is virtually uncontested and incontestable given the text of the Constitution. In *S v Boesak*, the CC summarised the textual position on 'constitutional matters' as follows:

> If regard is had to the provisions of s 172(1)*(a)* and s 167(4)*(a)* of the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of state. Under s 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters. So too, under s 39(2), is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights.[2]

Thus, cases of the following types all raise constitutional matters:

(a) Claims that a specific executive or administrative action falls foul of a requirement or restriction imposed by the Final Constitution.[3]

(b) Claims that a statute correctly construed falls foul of a requirement or restriction imposed by the Final Constitution.[4]

[1] See § 11.3*(c)* infra.

[2] *Boesak* (supra) at para 14 (citations omitted).

[3] See *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1, 1997 (6) BCLR 705 (CC)('*Hugo*')(Claim of violation of IC s 8(2) by the President's proclamation considered and upheld.) See J Kentridge 'Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 35.

[4] See *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at para 23 (Claim of violation of FC s 9(3) by s 25(5) of the Aliens Control Act 96 of 1991, considered and upheld. Court found that the word 'spouse' in the challenged statutory section could not permissibly be read to encompass a same-sex life partner.) See also F*irst National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at paras 40, 109, 113 and 114 (Claim of violation of FC s 25(1) by s 114 of the Customs and Excise Act 91 of 1964 was considered and upheld. Court concluded that the statute's deprivative application could not be limited by judicial construction to the class of 'credit grantors' of customs debtors.)

(c) Claims that a statute open to alternative plausible interpretations is rightly to be construed in the claimant's favor because the alternative construction causes the statute to fall foul of the Final Constitution.[1]

(d) Claims that a lower court has failed in the obligation imposed by FC s 39(2) to construe a statute so as to promote the spirit, purport and objects of the Bill of Rights.[2]

(e) Claims that a lower court has erroneously construed and applied a statute, when the statute was enacted for the purpose of giving content to a constitutional right.[3]

(f) Claims that a lower court has failed in the obligation imposed by FC ss 8(2) and 8(3) to develop the common law as required to give effect a right in the Bill of Rights, or in the obligation imposed by FC s 39(2) to develop the common law so as to promote the spirit, purport and objects of the Bill of Rights.[4]

Again, one realistically may doubt whether a sufficiently determined and confident court would have much trouble bringing any publicly salient legal issue under one or another of these six, more or less uncontested classes of constitutional matters. This is certainly so given the apparent sweeping and tentacular reach of the sundry guarantees in the Bill of Rights[5] — including guarantees

[1] See *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC)('*Daniels*') at para 16 (Claim directed by appellant against strict interpretation, in *Daniels v Campbell NO & Others* 2003 (9) BCLR 969 (C), of the term 'spouse' as used in the Intestate Succession Act and the Maintenance of Surviving Spouses Act.) See also *NEHAWU v University of Cape Town & Others* 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC) ('*NEHAWU*') at para 15 (CC declared that '[i]n relation to a statute a constitutional matter may arise either because the constitutionality of its interpretation or its application is in issue or because the constitutionality of the statute itself is in issue.') In speaking of cases in which the constitutionality of a statute's interpretation or its application is in issue, the CC undoubtedly had in mind cases that are in all practical respects equivalent to cases either of type C or of type D in the enumeration, above.

[2] See L Du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2005) Chapter 3. Such claims need not be strictly equivalent to claims of the preceding type C. Conceivably, a type D claim could succeed where a type C claim would fail. See, eg, *Daniels* (supra) at para 25 (Whereas the judgment explains at length why the more generous construction of 'spouse' both 'aligns itself with the spirit of the Constitution and furthers the objectives of the Acts,' at no point does it expressly embrace the applicant's claim that a narrower construction would render the Acts unconstitutional.) See also D Davis 'Elegy to Transformative Constitutionalism' in H Botha, A Van der Walt & J Van der Walt (eds) *Rights And Democracy* (2003) 57, 65.

[3] Although this class of cases might be thought covered by case-type D in our enumeration, the CC has distinguished this class as a discrete category of 'constitutional matters'. See *NEHAWU* (supra) at para 15. See also *Radio Pretoria v Chairperson of the Independent Communications Authority of South Africa & Another* 2003 (5) SA 451 (T), 2003 (4) BCLR 421 (T) at para 20 (Appeal raises constitutional issues because case involves application of a 'legislative framework' devised by Parliament to give effect to the requirement laid down by FC s 192 to establish an independent authority to regulate broadcasting in the public interest.)

[4] *Carmichele* and *Khumalo* fall within this class. See Woolman 'Application' (supra) at § 31.4*(e)*(ii)–(iv).

[5] See *Baloro & Others v University of Bophuthatswana & Others* 1995 (4) SA 197 (B), 1995 (8) BCLR 1018, 1054 (B)(IC s 35(3) gives judges 'an almost plenipotentiary judicial authority to decide according to a sense of natural justice, 'equity', '*ius naturale*', '*aequitas*' all being enshrined in the Constitution.')

respecting equality before the law,[1] freedom from arbitrary treatment,[2] and access to court for the fair resolution of disputes.[3] Given such a potentially wide-reaching set of constitutional norms, there is no chance that the CC's competence in constitutional matters can, in practice, be 'seal[ed] hermetically' from the general jurisdiction of the SCA,[4] and there is every chance that 'all' cases within certain broad classes — for example, labour disputes — will engage the CC's competence.[5]

Nevertheless, our enumeration of six classes of constitutional matters is finite in form, and it thus may leave open the possibility that there can arise legal issues falling outside all of the six classes — just as the Final Constitution's jurisdictional clauses evidently expect. We provide below a possible example of such a case.[6] Our point for now is that we might expect the CC to have an eye out for such cases and indeed to find sometimes that a case raises no issue within its competence to decide — thus affirming its own commitment to the apparent constitutional principle of a contained jurisdiction for the CC.

Two cases provide graphic examples of the CC apparently straining to demonstrate exactly such a commitment. In *Van der Walt v Metcash Trading Ltd*, 'on successive days in August 2001 [separate two-judge panels of the SCA] made contrary orders in two [civil] cases which were materially identical.'[7] A disadvantageously affected party sought review by the CC, asserting several constitutional grounds for complaint, all of which turned on the proposition that the resulting differential treatment by the judiciary of two identical and virtually simultaneous cases was unconstitutionally irrational and arbitrary. After noting the absence of any claim that either of the SCA panels had acted incompetently or in bad faith, the CC concluded that there was nothing it could do to correct what it called a

[1] FC s 9(1).

[2] Claims to freedom from arbitrary treatment stem from multiple constitutional roots, including the guarantee of fair administrative action in FC s 33(1) and the guarantee of equal protection of the law in FC s 9(1). See *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC)(Court prohibits irrational legislative 'differentiations' or classifications.) For cases involving neither administrative action nor legislative classifications, the Court employs the 'principle of legality'. See *Fedsure* (supra) at para 58; *Pharmaceutical Manufacturers* (supra) at para 17; J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) Chapter 62.

[3] FC s 34. See *Boesak* (supra) at para 14 ('If regard is had to . . . the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.')

[4] *Fedsure* (supra) at para 111.

[5] *NEHAWU* (supra) at para 16 (Such an effect, the Court explained, is 'a consequence of our constitutional democracy.' It is, in other words, a consequence of the constitutionalisation of South African democracy combined with the fact that the makers of the Final Constitution saw fit to bring labour matters under pervasive constitutional norms.)

[6] See § 11.2*(b)*(ii), (iii) infra (Discussion of *Phoebus Apollo Aviation CC v Minister of Public Security* 2003 (2) SA 34 (CC), 2003 (1) BCLR 14 (CC).)

[7] *Metcash* (supra) at para 1 (The orders were made in response to petitions for leave to appeal against orders of the High Court in summary judgment applications.)

misfortune,[1] and dismissed the appeal.[2] 'The Constitution,' the *Metcash* Court remarked, 'does not and could hardly ensure that litigants are protected against wrong decisions.'[3] The Court did not further explain — perhaps no further explanation was possible — why the appellant's claim of unconstitutionally arbitrary differentiation lacked sufficient merit, in these rare circumstances, to engage the Court's competence.

In *Phoebus Apollo Aviation CC v Minister of Public Security*, the appellants sought to hold the Minister vicariously liable for the larcenous acts of a few wayward policemen.[4] The sole question framed in the appeal to the CC was whether the SCA had correctly applied to the facts of the case before it the established common-law test for *respondeat superior* liability. The appellant offered no contention either that the SCA's doctrinal formulation of the test was at direct odds with the Final Constitution, or that it required modification in order to bring it into full harmony with the spirit, purport and objects of the Bill of Rights.[5] The CC dismissed the appeal expressly on the ground of want of jurisdiction,[6] remarking that the application of this uncontested legal standard to a particular set of facts would typically be classed as raising a question of fact, not of law — a sort of garden-variety judicial task that 'is of course not ordinarily a constitutional issue.'[7]

As in *Metcash Trading*, such a disposition — dismissal of the appeal — seems in line with a constitutional principle of confinement of the CC to a proper subset of all possible appeals. And yet the dismissal was hardly an irresistible dictate of strict logic. Despite the appellant's failure to frame its pleadings and its appeal so as formally to raise before the CC the issue of the constitutional adequacy of the SCA's formulation of the common-law *respondeat superior* doctrine, the CC easily could have raised that question on its own had it seen fit to do so. Having that fact in mind, what the CC is really telling us in *Phoebus Apollo Aviation* is that it sometimes will decline to hear argument on a claim of unconstitutionality because of the extreme *prima facie* implausibility of the claim,[8] as the CC surely has the power to do under FC 167(6) and its own Rule 20(1).[9]

But that is not how the CC chose to frame its dismissal of the appeal in *Phoebus Apollo Aviation*. By the *Phoebus* Court's own account, that dismissal was not a discretionary withdrawal of the leave to appeal it had previously given.[10] It rather

[1] *Metcash* (supra) at para 11.
[2] Ibid at para 28.
[3] Ibid at para 14 quoting *Lane NO v Dabelstein & Others* 2001 (2) SA 1187 (CC), 2001 (4) BCLR 312 (CC) at para 4.
[4] 2003 (2) SA 34 (CC), 2003 (1) BCLR 14 (CC)('*Phoebus Apollo Aviation*').
[5] Ibid at para 9.
[6] Ibid at paras 10–1.
[7] Ibid.
[8] Ibid at para 6.
[9] FC s 167(6) mandates provision for appeals to the CC from other courts, where constitutional matters are involved, 'when it is in the interest of justice and with leave of the Constitutional Court.' Rule 20(1) of the Rules of the CC provides that an appeal to the CC against a judgment of the SCA respecting a constitutional matter 'shall be granted only with the special leave of the Court on application made to it.'
[10] Compare *Boesak* (supra) at para 12 ('The decision to grant or refuse leave [to appeal, in terms of FC s 167(6) and Rule 201(1) of the Rules of the CC] is a matter for the discretion of the Court.')

was forced on the *Phoebus* Court by discovery that the case raised no issue within the CC's constitutionally bounded subject-matter competence. That form of self-explanation may be an apt gesture of recognition by the CC of the Final Constitution's plan to make its jurisdiction less than plenary. For that or other reasons, the choice to dismiss one or another case on jurisdictional grounds may represent wise judicial administration and it may fall amply within the CC's proper range of self-regulation. If so, then a cost of the constitutionalisation of the legality principle in *Fedsure* and *Pharamaceutical Manufacturers* is to make it highly implausible, if not downright impossible, for the CC ever again to dismiss an appeal, or to refuse leave to appeal, on the ground of want of jurisdiction.

(ii) *The destabilizing effect of introducing the principle of legality as a constitutional matter*

Speaking rigorously and strictly, a jurisdiction that extends to all 'constitutional matters' *must* be plenary, unless the body of judicially cognizable norms of the Final Constitution is itself subject to containment, in the sense that some cases conceivably can be brought to court to which none of these norms can plausibly be claimed to extend and apply. Owing to the presence of the constitutionalised doctrine of legality, that condition does not now hold in South Africa

As expounded by the CC in *Fedsure* and *Pharmaceutical Manufacturers*, the constitutionalised doctrine of legality encompasses a demand that any exercise of official power to the detriment of any person must comply with whatever terms and conditions may be set by any applicable law as may happen to exist. Nor does the principle stop there. It contains an *ultra vires* component, demanding that any exercise of official power to the detriment of any person — and this includes exercises of legislative power[1] — be affirmatively authorized by positive law.[2] The CC has made clear its view that a properly presented claim of default on either of those demands raises a constitutional matter within its jurisdiction.[3] From such a premise, it apparently must follow that every possible appeal in a case at law presents a constitutional question.[4]

In any possible appeal in a case at law, at least one party must be contending that at least one state body has acted in a way that either is contrary to law or is unauthorized by law. The body accused may be an executive body, charged with

[1] See *Fedsure* (supra) at paras 58–9 ('It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.') See also J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) Chapter 62.

[2] See *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) at para 35.

[3] See § 11.3*(b)* infra.

[4] See F Snyckers 'Civil and Constitutional Procedure' (2000) *Annual Survey of South African Law* 595–6 (Asserting that the CC's conclusion, in *Fedsure*, that claims of deviation from legality raise a constitutional question, 'could, if taken to its logical conclusion, wreak havoc with the distinction between constitutional and non-constitutional matters for purposes of jurisdiction. . . . One need only postulate Kelsenian notions that all legal questions are to be answered in terms of their ultimate sanction to find that every legal question has now become "constitutional".')

acting in contravention of statute, of the Final Constitution, or of the common law, or of acting without due authorization from any of those sources. It may be a subordinate legislative body charged with acting in violation of superior legislation, of the Final Constitution, or of the common law, or of acting without due authorization from any of those sources. It may be a provincial legislature or the national parliament, charged with acting in contravention of, or without authorization from, the Final Constitution.

Or — and here comes the rub — the body complained of might be a lower court charged with having made a legally erroneous or legally unauthorized decision to the complainant's detriment. After all, even a good faith misapplication to the facts of a concededly correct legal rule or standard, as claimed in *Phoebus Apollo Aviation*, seemingly must count as a legally non-authorized exercise of power by the judge who perpetrates it, to the detriment of a presumably innocent victim — as clear a case as one might hope to see of a direct insult to the principle of legality if allowed to stand uncorrected by a superior court that knows better.[1]

A charge of one or another of these kinds of legal misprision, against one or another of these kinds of bodies, is a necessary component of any appeal in a case at law. But every one of these kinds of charges also amounts to a charge of deviation from the principle of legality, which the CC holds to be a judicially cognizable mandate of the Final Constitution. Thus they all raise constitutional matters. The scope of 'constitutional matters' turns out coextensive with the scope of all claims that might appear in any viable appeal. The CC's finding that the principle of legality stands among the judicially cognizable and enforceable norms laid down by the Final Constitution is apparently at war with the principle of a less-than-plenary subject-matter competence for the CC, which the Court also repeatedly has endorsed.

(iii) *The Constitutional Court has never directly addressed this difficulty*

The CC has recognized expressly the expansive result for its subject-matter competence flowing from the constitutionalised legality doctrine: 'In *Pharmaceutical Manufacturers* . . . [a] unanimous Court held that under our new constitutional order the control of public power is always a constitutional matter.'[2] Of course, that declaration stops short of admitting that the Court's jurisdiction now is *plenary* for all intents and purposes (for not every case need be deemed to involve the control of public power), so it is worth asking whether any sort of reasoning remains by which so awkward-seeming a conclusion might be forestalled or denied.

Consider, again, a case like *Phoebus Apollo Aviation*. The plaintiff's claim *(i)* is

[1] The CC has made clear that the unquestioned good faith an official actor does not absolve the actor's legal errors from judicial remediation as breaches of the constitutionalised principle of legality. See *Pharmaceutical Manufacturers* (supra) at para 89 ('The fact that the President mistakenly believed that it was appropriate to bring the Act into force, and acted in good faith in doing so, does not put the matter beyond the reach of the Court's powers of review. What the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objectively rational manner.')

[2] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Another* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC)('*Bato*') at para 22; *Affordable Medicines* (supra) at paras 48–9.

based on common law, hence it implicates no particular exercise of legislative power. The plaintiff concedes, or the CC finds, that *(ii)* the legally cognizable wrong or harm pleaded by the plaintiff was perpetrated without any use of executive powers, by persons acting without the support or connivance of any holder of executive powers.[1] Insofar as the wrong or harm is, in substance, one of a sort that arguably is covered by some provision of the Bill of Rights, the CC concludes that *(iii)* taking into account the nature of the right in question and the nature of any duty imposed by the right, it is not one of those rights that by force of FC s 8(2) would bind a natural or juristic person; hence, there is no occasion in terms of FC s 8(3) to develop the common law.[2] The CC further concludes that *(iv)* the common law doctrine applied below stands in no need of development in order that it duly promote the spirit, purport and objects of the Bill of Rights.[3] Accordingly, the CC finds itself lacking power to look any further into the ordinary, residual common law merits of the case.

The CC has not doubted that often there will be such merits for *some* court — other than itself — to look into. The apparent premise is that there are sundry occasions for common-law doctrinal choice where either of two or more competing resolutions will correspond adequately to the Final Constitution's spirit, purport and objects and yet only one of these will be correct or best in the eyes of a responsible common-law judge.[4] In *Phoebus Apollo Aviation*, the CC acted on the basis that *this* decision is none of its proper business. The *Phoebus* Court purported to have acted thus not as a matter of discretion but in recognition of a legal curb on its powers. Having made the findings and conclusions we labelled (i), (ii), (iii), and (iv), the CC held itself barred by the Final Constitution's jurisdictional mandates from proceeding further.

Absent the constitutionlised doctrine of legality, such reasoning may strike us as supportable.[5] In the presence of that doctrine, the reasoning falters badly. A lower court judge who enters a legally erroneous judgment acts in contravention of or beyond her legally authorised powers, in apparent breach of the doctrine of legality. If legality is a requirement rooted in the Final Constitution, then a party who claims that the judge has broken it asserts a constitutional claim and raises a constitutional matter. No possible appeal escapes that logic.

[1] See *Phoebus Apollo Aviation* (supra) at paras 6, 8.

[2] Ibid at para 4 (Holding that the protections of FC s 25(1) 'are aimed at protecting private property rights against governmental action and are quite irrelevant' where the parties charged with robbery and theft have acted independently of the government.) See also S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 31. But see *Modderklip* (supra) at para 26 (Constitutional Court wrote as if the question of horizontal application of FC s 25(1) is still an open one, making no mention of its judgment in *Phoebus Apollo*.) Cf T Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46.

[3] See FC s 39(2); *Phoebus Apollo Aviation* (supra) at paras 9–10.

[4] See *Carmichele* (supra) at paras 55–6 ('Not only must the common law be developed in a way that meets the FC s 39(2) objectives, but it must be done in a way most appropriate for the development of the common law within its own paradigm. There are notionally different ways to develop the common law [relevant to this case] under s 39(2) of the Constitution, all of which might be consistent with its provisions. Not all would necessarily be equally beneficial for the common law.')

[5] But see § 11.4*(c)* infra.

True, but the logic depends on a premise that some might think debatable. The logic takes for granted that legality is defeated by good faith mistakes of legal judgment *by judges* in the same way as it unquestionably is defeated by judicially uncorrected good faith mistakes of legal judgment by executive officials, and by legislatures with regard to constitutional limitations and requirements.[1] Are there reasons to doubt this premise?

From *Fedsure* and *Pharmaceutical Manufacturers*, we understand that the constitutionalised principle of legality is meant to be made effective, as other legal norms are made effective, by judges enforcing the principle in litigated cases. Now, for a judge to apply the principle of legality to a case in litigation is nothing other than for that judge to decide whether certain questioned actions of *other* persons or bodies have or have not been conducted according to law. But the judge doing that is simply doing, on that particular occasion, what every judge is expected to do in every single case that ever may come before her: do the best she can to discern the relevant law correctly, and apply that law correctly, to the acts of the parties and others connected to the case.

Suppose we feel sure that the High Court judges in a particular case have decided the case in good faith and well within the bounds of legal competence. But suppose we also — being competent lawyers ourselves — disagree strongly with their rulings of law or with their applications of the law to the facts. Would it occur to us to think or to say that the judges had broken some principle of legality or the rule of law, just because we, with conviction, would have decided the matter differently? Surely not. What the rule of law requires of judges is legal competence and good faith, and mere error of legal judgment is a sign of a lack of neither. Of course, it is always open to an appellate court to find that any given lower court judgment has been rendered in bad faith or with gross incompetence. Such a finding, however, is tantamount to a finding of corrupt, malicious, or manifestly negligent conduct by the judge below, and so would require nullification of the tainted judicial handiwork quite aside from any highfalutin 'principle of legality.' Therefore (it might be said), it can make no sense — it would be purely redundant — to apply the legality principle to the acts of judges deciding cases. Perhaps judges engaged in the normal judicial business of deciding cases according to law should not, in that specific sense, be regarded as public officials wielding official powers.

We need not here resolve the merits of such a view. What we can say is that the CC's jurisdictionally framed dismissals of the appeals in *Metcash* and *Phoebus Apollo Aviation* suggest that possibly the CC has adopted it. In *Metcash*, the CC offered the observation that 'the judicial system in any democracy has to rely on decisions taken in good faith by judges' as a reason why the bare fact of an erroneous judicial decision cannot give rise to a constitutional complaint.[2] Both cases show

[1] See *Pharmaceutical Manufacturers* (supra) at para 89 ('The fact that the President mistakenly believed that it was appropriate to bring the Act into force, and acted in good faith in doing so, does not put the matter beyond the reach of the Court's powers of review. What the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objectively rational manner.')

[2] *Metcash* (supra) at para 19.

how, accepting this view, the CC can contrive to give effect to a real and substantial restriction imposed on its subject-matter competence by FC s 167(3), even with the principle of legality constantly looming as a part of constitutional law capable of giving rise to a 'constitutional matter'.[1]

11.3 The Causes of the Constitutionalisation of the Legality Principle

(a) Introduction

The plain fact remains that the CC's folding of the legality principle into the justiciable positive law laid down by the Final Constitution sits uneasily alongside the CC's own recognition that its charter is limited by FC s 167(3) to 'constitutional matters,' presumably meaning some proper subset of all the litigable matters there are. The CC is explicit that, with the legality principle in tow, its jurisdiction extends to every single case in which 'the control of public power' is at issue,[2] not excluding cases in which the only laws of which infractions are claimed are pieces of ordinary statute law or of common law,[3] and also not excluding cases in which the only claim against the exercise of power is that no law can be found to authorize it.[4]

At least to that extent, acceptance of the legality principle as a *constitutionally enacted* restraint on power — as distinct from a doctrine having common-law status only — exerts expansive pressure on the CC's jurisdiction, relative to the scope of jurisdiction that one might naively expect would accrue to a supposedly specialized 'constitutional' court; and, in fact — as we soon shall see — the CC's recognition of the legality principle as a piece of enacted constitutional law undoubtedly was meant to have exactly such an effect. It is in order, therefore, to ask what circumstances might have impelled, and what considerations might justify, this turn in constitutional-legal doctrine, which has the effect of very nearly transforming the CC into a court of general jurisdiction (insofar as it might see fit to act in such a capacity), contrary to the design that is apparent on the face of the Final Constitution.

[1] We are concerned in this chapter with the legality principle's implications for the outer bounds of the CC's authority in terms of 'constitutional matters,' should the Court choose to take cognizance of a case. This question is to be distinguished from other, important questions concerning the CC's management of its authority — concerning, for example, when appeals will be steered to the Supreme Court of Appeal as a matter of Court rule, policy, and practice, and when High Court decisions will be left standing without substantive review. See Snyckers (supra) at 595–596. These management questions, important as they are, are beyond the scope of our treatment here.

[2] *Bato* (supra) at para 22 ('In *Pharmaceutical Manufacturers* (supra) [a] unanimous Court held that under our new constitutional order the control of public power is always a constitutional matter.') See S Woolman & D Brand 'Is There a Constitution in this Courtroom? Constitutional Jurisdiction after *Afrox* and *Walters*' (2003) 18 *SAPL* 38 (Authors concur that the CC's reasoning in *Pharmaceutical Manufacturers* entails, in effect, that 'all manifestations of public power engage[s] the rule of law, and thus the Final Constitution.')

[3] *Bato* (supra) at para 22.

[4] *Pharmaceutical Manufacturers* stands for this proposition.

To ask about the origins or causes of the constitutionalisation of the legality principle is to ask not one question but two. From the internal standpoint of the CC or anyone seeking sympathetically to account for its actions, the question is one of justification: How might it be thought that the CC does best by the Final Constitution's drafters, or by its constituency more broadly conceived, to conclude that the Final Constitution has enacted the legality principle as a component of judicially cognizable constitutional law, despite the trouble that makes for the jurisdictional plan that is plain on the face of the instrument? From the external standpoint of a historian, the question would be different: What factors caused or led to that action by the CC? What factors actually prompted the CC to draw the conclusion that the Final Constitution has enacted the legality principle as a component of judicially cognizable constitutional law?

(b) The straight historical account

There is, of course, a good chance that answers to the two questions will overlap. Usually, if we try to list the main, proximate causes for some legal-interpretative choice made by a court, we'll want to include in our list certain facts regarding the judges' beliefs about which choice would be the right one, legally speaking. The judges, we think, will have acted as they did because, as matter of fact, they held certain beliefs about how they, as judges of the law, ought to act in the circumstances. Having identified these beliefs as best we can, we may or may not find them consonant with what we ourselves would approve as the best legal judgment. Insofar as we do so approve them, that part of our causal explanation for the judicial act ('they did it because they thought it was normatively justified for such-and-such reasons') will, for us, subsume a justification for that act.

But the normative convictions of the judges, however well warranted we may find them to be, need not ever stand in our eyes as the *sole* cause for a court's interpretative act, nor would historians be likely to find such convictions the sole cause of the specific judicial act that concerns us here. From the standpoint of narrative history, one plain proximate cause of the CC's pronouncements in *Fedsure* and *Pharmaceutical Manufacturers* nailing down the constitutional-legal status of the principle of legality was a simmering turf war between it and the SCA.[1]

This was not exactly an openly declared struggle, and indeed it is sometimes hard to tell whether a given adjudicatory episode is turf-war related or not. Take

[1] See S Woolman & D Brand 'Is There a Constitution in this Courtroom? Constitutional Jurisdiction after *Afrox* and *Walters*' (2003) 18 *SAPL* 38. On the 'widespread perception of a rivalry' between the two courts, the factual bases for it, and some reasons for deploring it, see J van der Walt 'Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-operative Relation between Common-law and Constitutional Jurisprudence' (2001) 17 *SAJHR* 342, 358 (J van der Walt 'Towards a Co-operative Relation'). Tussles between a dedicated CC and an 'ordinary' judiciary have occurred in other legal systems. See AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 141–5 (Describing a running disagreement in Germany between the Federal Constitutional Court and the civil courts over the availability of monetary compensation as a remedy for constitutionally improper regulation of property).

for example the SCA's decision in *Amod v Multilateral Motor Vehicle Accidents Fund*.[1] Decisions from pre-transition days had taken the view that 'potentially polygamous' (even if de facto monogamous) marriages according to Muslim rites, being *contra bonos mores*, give rise to no obligations enforceable in South African civil courts.[2] In *Amod*, Mahomed CJ found, to the contrary, that South African *boni mores* could no longer be found scandalised by de facto monogamous Muslim rite marriages.

Three years previously, in *Ryland v Edros*, Farlam J had ruled to similar effect in the High Court.[3] Both Farlam J and Mahomed CJ relied on the Constitution to help overcome what otherwise apparently would have been a serious doubt about whether any intervening factual shift in the social ethos had occurred, sufficient to support a departure from the established doctrine that Muslim-rite marriages are *contra bonos mores*.[4] They did so, however, in different ways. Farlam J explained that he was acting in compliance with the Interim Constitution's command to the judiciary to develop the common law with due regard to the spirit, purport and objects of the Bill of Rights.[5] Mahomed CJ, by contrast, denied that his judgment was in any way dictated by the Interim Constitution or was, in fact, anything other than a normal, common-law adjustment of the content of *boni mores* to keep pace with objective social conditions, including facts about the prevailing social ethos.[6] To Mahomed CJ, adoption of the Constitution was significant in the *Amod* case not by reason of any legal command the Interim Constitution might have directed to the judiciary to revise the *boni mores* doctrine as previously applied to Muslim rite marriages, but just as a historical fact evincing a relevant, factual change in the prevailing social ethos.

What might account for the differing approaches of Mahomed CJ in *Amod* and Farlam J in *Ryland*? Perhaps an answer lies in part in their different locations in the judicial hierarchy. Farlam J might have entertained some doubt regarding a High Court's authority — constitutional mandates aside — to revise clear Appellate Division precedent regarding the bearing of *boni mores* on Muslim-rite marriage cases.[7] Mahomed CJ could not have doubted the authority of the SCA to do

[1] 1999 (4) SA 1319 (SCA)(*'Amod'*).

[2] See *Ismail v Ismail* 1983 (1) SA 1006 (A)(*'Ismail'*).

[3] 1997 (2) SA 690 (C), [1996] 413 All SA 557 (C), 1997 (1) BCLR 77 (C)(*'Ryland'*)

[4] Ibid at 704 (As Farlam J put the matter, 'In the present case it would be difficult to find that there has been such a change in the general sense of justice of the community as to justify a refusal to follow the *Ismail* decision if it were not for the new Constitution. In the circumstances I prefer to base my decision on the fundamental alteration in regard to the basic values on which our civil policy is based which has been brought about by the enactment and coming into operation of the new Constitution.')

[5] IC s 35(3). See *Ryland* (supra) at 705 ('In my view it is clear that if the spirit, purport and objects of chap 3 of the [Interim] Constitution and the basic values underlying it are in conflict with the view as to public policy expressed and applied in the *Ismail* case then the values underlying chap 3 . . . must prevail.')

[6] See *Amod* (supra) at para 29 ('I have reached [my] conclusion without any reliance on either s 35(3) of the Interim Constitution or s 39(2) of the 1996 Constitution. It is therefore unnecessary for me to consider the submission of Counsel for the appellant based on these constitutional provisions.')

[7] In fact, Farlam J's apparent assumption that IC s 35(3) was the key to unlock High Courts from bondage to Appellate Division (later Supreme Court of Appeal) precedent later was rejected by the Supreme Court of Appeal in *Afrox*. That rejection has a bearing on the division of authority between the CC and the Supreme Court of Appeal. If High Courts are barred from taking the initiative to develop the

so. The fact remains that Mahomed CJ had the choice to follow the path marked out by Farlam J — indeed, a prior CC decision in the case had clearly anticipated that the SCA would do just that[1] — and for some reason chose not to take that course. What might have been that reason?

In the view of many, a major share of instances of common-law reconstruction impelled by FC s 39(2), at least in the near term, are likely to be cases involving applications of *boni mores* and other general common law standards such as good faith and unconscionability.[2] Mahomed CJ's judgment in *Amod* provides a model for High Court and SCA judges who might wish to package any given (or every) judgment of this kind so as ostensibly to keep it out of the class of constitutional matters, with a view to reserving for the SCA final control over this important stream of impending future cases.[3]

Was that any part of Mahomed CJ's purpose or intention in packaging his *Amod* judgment as he did? It would be rash to say so, because there is a clear and adequate alternative explanation for his choice. By placing his judgment in *Amod* squarely on non-constitutional grounds, Mahomed CJ — as he explained — avoided what could have been thorny questions about application of IC s 35(3) or FC s 39(2) to a case in which the cause of action arose prior to commencement of the Interim Constitution.[4]

Regardless of intention, however, the SCA's *Amod* judgment suggests a device of potentially broad applicability by which the SCA, if ever minded to do so, might seek to insulate its judgments in constitutionally sensitive territory from review by the CC. In that way, *Amod* prefigures the possible outbreak of open contestation between the SCA and the CC over final authority in important branches of South African jurisprudence. Such contestation did break out soon thereafter, and the bone of contention was the SCA's attempted use — this time unquestionably with jurisdiction-expanding intentions — of a device very similar to that suggested by its *Amod* judgment.

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council was decided under the Interim Constitution. The case involved an attack on the lawfulness of property rate levies by certain local government authorities on the ground (among others) that the levies in question were *ultra vires*,

common law in the face of entrenched AD precedent, then a High Court-to-Constitutional Court channel (High Court revises common law, CC affirms on direct appeal) cannot be set up to circumvent the Supreme Court of Appeal. See Woolman & Brand (supra) at 38–83 (On how the CC's and SCA's views on both constitutional jurisdiction and *stare decisis* conspire to block the development of the common law.) The CC still could revise the common law on its own hook, so to speak, on direct appeals from High Court decisions failing to do so, but the CC has made clear its very substantial reluctance to act in that manner.

[1] See *Amod v Multilateral Motor Accidents Fund* 1998 (4) SA 753 (CC), 1998 (10) BCLR 1207 (CC) at paras 33–4.

[2] See, eg, J van der Walt 'Towards a Co-operative Relation' (supra) at 351–2; A J van der Walt 'Transformative Constitutionalism and the Development of South African Property Law' 2005 *TSAR* ('Transformative Constitutionalism').

[3] FC s 168(3) makes the Supreme Court of Appeal 'the highest court of appeal except in constitutional matters.'

[4] See *Amod* (supra) at para 29.

unauthorized by the terms of any applicable law.[1] The High Court had rejected this claim, and the SCA had referred to the CC the question of whether an appeal from the High Court's ruling would more properly be directed to the CC or the SCA. The doubt arose because the Interim Constitution not only limited the CC's subject-matter jurisdiction to constitutional matters,[2] it also — unlike the Final Constitution — excluded the Appellate Division (predecessor of the SCA) from deciding any constitutional matter[3] (aside from developing the common law under the aegis of IC s 35(3).[4]) If, but only if, *ultra vires* was considered to be a subsisting doctrine of the common law, *as separate and distinct from law laid down by the Interim Constitution*, the correctness of the High Court's rejection of the *ultra vires* claim apparently would fall to be decided exclusively and finally by the SCA.

The CC held, to the contrary, that the *ultra vires* claim raised a constitutional matter, so that review in this case fell properly to it and not the SCA. At no point does the Interim Constitution state in so many words that a local government may act only within the powers lawfully conferred upon it. The *Fedsure* Court nevertheless reasoned that it is 'a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful,' and 'this principle of legality' is 'generally understood to be a fundamental principle of constitutional law.'[5] The *Fedsure* Court explained further:

> It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the Interim Constitution. . . . We . . . hold that fundamental to the Interim Constitution is a principle of legality.[6]

The CC recognized, of course, that a principle opposed to *ultra vires* government action was a part of the pre-Constitutional common law, and one that 'remain[s] under the new constitutional order.'[7] But the old doctrine now enjoys a new sort of support in the legal firmament. It is now 'underpinned (and supplemented where necessary)' by a principle of legality that is 'implicit in the Constitution.'[8] (With an apparent eye to the future, the *Fedsure* Court took note

[1] A second ground of attack was that the procedures by which the rate-levy resolutions were adopted failed to satisfy the requirements of IC s 24, which applied to 'administrative action.' The CC concluded that the local government actions in this case were 'legislative,' not 'administrative,' so IC s 24 fell away from the case. See *Fedsure* (supra) at paras 41–2.

[2] IC s 98(2).

[3] See FC s 101(5) ('The Appellate Division shall have no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court'.)

[4] See *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC)('*Du Plessis*'). See also Woolman & Brand (supra) at 42 (Authors note that most jurists and commentators did not, in fact, believe the AD possessed even this limited power of constitutional review until the CC enunciated that position in *Du Plessis v De Klerk*.)

[5] *Fedsure* (supra) at para 56.

[6] Ibid at para 58.

[7] Ibid at para 59.

[8] Ibid.

that the FC s 1*(c)*, declares 'supremacy of the Constitution and the rule of law' to be a founding value of the Republic.[1])

It would follow that the CC possessed jurisdiction in *Fedsure* and other cases like it. But would it necessarily follow that the SCA *lacked* jurisdiction in the case, by force of the Interim Constitution's exclusion of the Appellate Division from adjudicating 'any matter within the jurisdiction of the CC?' Conceivably not, if *ultra vires* survives as a common-law doctrine with a footing outside as well as inside the Interim Constitution.

Today, of course, the question must take a somewhat different form. It is no longer a question of who can exercise jurisdiction but of whose decision will be final. Today, the SCA is competent in constitutional as well as non-constitutional matters. However, by force of FC s 168(3)[2] and by clear implication of FC s 167(3), the SCA's decisions in constitutional matters are reviewable by the CC, whereas its decisions in non-constitutional matters are not. Thus, if *ultra vires* and other dimensions of the common-law doctrine of legality still retain a separate life outside the Final Constitution — a kind of Captain's Paradise of legal doctrine — that might arguably leave the SCA room to render its judgments on 'legality' claims in a form resistant to possible reversal by the CC.[3] In the *Fedsure* litigation, the SCA raised a possibility of this kind in a tentative way[4] and the CC clearly gestured toward a rejection of it,[5] but there was no occasion to resolve the question definitively.

The posture of the SCA turned more aggressive in *Container Logistics*.[6] The applicants contended that the responsible official had acted arbitrarily — had failed properly to 'apply his mind' — in holding them liable for certain import duties. They couched this contention both as a common law and as a constitutional claim. Agreeing with the contention on the merits, and concluding that 'at common law such a finding provides sufficient reason to set the decision aside,' the SCA declined to decide whether the questioned administrative action also, for the same reason, fell foul of IC s 24.[7] There can be little doubt that the SCA, by disposing of the case in this manner, expected or hoped to make its decision

[1] *Fedsure* (supra) at para 59.

[2] FC s 168(3) declares the Supreme Court of Appeal to be 'the highest court of appeal except in constitutional matters.'

[3] Compare the discussion of *Amod* (supra).

[4] See *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1998 (2) SA 1115, 1124 (SCA), 1998 (6) BCLR 671, 678 (SCA) ('It could conceivably be argued that the Interim Constitution did not exclude the jurisdiction of the Appellate Division to adjudicate on the cogency of any attack on administrative actions where such attacks are based on common-law grounds, and that the Appellate Division continues to enjoy some kind of parallel jurisdiction with the Constitutional Court where the relevant attack is founded on common-law grounds. I have some doubt as to whether this would be a sound argument.')

[5] See *Fedsure* (supra) at para 103.

[6] *Commissioner for Customs and Excise v Container Logistics (Pty) Ltd; Commissioner for Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 (3) SA 771 (SCA), 1999 (8) BCLR 833 (SCA)('*Container Logistics*').

[7] Ibid at para 21.

proof against further examination by the CC. As the SCA explained its stand in *Container Logistics*:

> Judicial review under the Constitution and under the common law are different concepts. . . . Constitutional review is concerned with the constitutional legality of administrative action, the question in each case being whether it is or is not consistent with the Constitution, and the only criterion being the Constitution itself. Judicial review under the common law is essentially also concerned with the legality of administrative action but the question in each case is whether the action under consideration is in accordance with the behests of the empowering statute and the requirements of natural justice. The enquiry in this regard is not governed by a single criterion. The grounds for review which the courts have developed over the years can never be regarded as a numerus clausus for the simple reason that administrative law is not static. As new notions develop and take root, so must new measures be devised to control the exercise of [official] functions. . . .[1]

The SCA conceded freely that 'it is difficult to conceive of a case where the question of legality cannot ultimately be reduced to a question of constitutionality.'[2] It nevertheless insisted that the common-law grounds for review had not 'ceased to exist.' The SCA could detect in the Interim Constitution no indication of an intention 'to bring about a situation in which, once a court finds that administrative action was not in accordance with the empowering legislation or the requirements of natural justice, interference is only permissible on constitutional grounds.'[3] (This, of course, meant 'only on grounds regarding which the CC has final powers of review.')

The stage thus was set for the CC's final riposte in *Pharmaceutical Manufacturers*. Acting on mistaken and disastrous bureaucratic advice, the President, as authorized by a certain Act of Parliament, issued a proclamation bringing the Act into force. Discovering the error, the President applied to the courts for an order annulling the proclamation and its effect. The High Court granted the requested order on the ground that the issuance of the proclamation was, in the circumstances, an *ultra vires* action by the President. The CC had to decide whether it had jurisdiction to review the High Court's ruling or whether, to the contrary, such jurisdiction would fall exclusively to the SCA to decide as court of last resort.

The CC answered by upholding its own jurisdiction. The High Court's finding of *ultra vires* action by the President, the CC concluded, was ineluctably 'a finding on a constitutional matter.'[4] In the course of explaining this conclusion, the CC conveyed its flat and final rejection of the SCA's sally in *Container Logistics* regarding the survival of the common law doctrine of legality as an extra-constitutional ground for judicial decision.

In a sense, the CC began, 'the control of public power by the courts through judicial review is and always has been a constitutional matter,' but now:

[1] *Container Logistics* (supra) at para 20.
[2] Ibid.
[3] Ibid.
[4] *Pharmaceutical Manufacturers* (supra) at para 20.

> [t]he common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.[1]

The CC found unacceptable any suggestion that the common law subsists as a body of norms 'separate and distinct from the Constitution':

> There are not two systems of law, ... each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control ... Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution, (and that need not be decided in this case) the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control.[2]

No text in the Final Constitution intimates otherwise. Indeed, the CC continued, IC ss 33(3)[3] and 35(3) and FC s 39(3)[4] and (2) imply the contrary proposition:[5]

> The reference in s 33(3) of the Interim Constitution and s 39(3) of the 1996 Constitution is to 'other rights', and not to rights enshrined in the respective Constitutions themselves. That there are rights beyond those expressly mentioned in the Constitution does not mean that there are two systems of law. Nor would this follow from the reference in s 35(3) of the Interim Constitution and s 39(2) of the 1996 Constitution to the development of the common law. The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims — thus, the command that law be developed and interpreted by the courts to promote the 'spirit, purport and objects of the Bill of Rights.' ... There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply.

The CC thus established, once and for all, that the SCA cannot insulate a decision on legality from CC review by dressing it as a merely common law (and hence *not* a constitutional) decision. But the CC's declarations in *Pharmaceutical Manufacturers* did

[1] *Pharmaceutical Manufacturers* (supra) at para 33.

[2] Ibid at paras 44–45 (footnote omitted).

[3] IC s 33(3) read: 'The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognized or conferred by common law, customary law, or legislation to the extent that they are not inconsistent with this Chapter.'

[4] FC s 39(3) reads: 'The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

[5] The CC at this point was responding to remarks of the Supreme Court of Appeal made in *Container Logistics*. See *Container Logistics* (supra) at para 20.

more. They pronounced emphatically a doctrine of the unity of all South African law under the aegis and control of the Final Constitution, which has important further implications, to be explored below.

(c) The justificatory account

In *Fedsure* and *Pharmaceutical Manufacturers*, the CC conferred upon the legality principle the status of a constitutional matter falling within the purview of the CC's special powers and responsibilities in the new constitutional order. The *Pharmaceutical Manufacturers* Court took this course despite the fact that doing so goes far to undercut the principle of a contained subject-matter competence for the CC, to which the Court also professes loyalty. It did so, moreover, at least initially as a matter of 'implication' in the absence of any plain-to-the-naked-eye textual compulsion.[1]

Of course there may be good grounds for such an implication. We next consider what such grounds might be.

The most promising line of justification for the implication appears to lie in the following four claims:

1. An interpretation of the Final Constitution is justified if *(a)* it is conducive to the Final Constitution's scheme of ends and means whereas rejection of that interpretation possibly would pose a hindrance to that scheme and *(b)* the interpretation is one that otherwise is open to a court under general, non-literalist principles of legal interpretation.
2. Among the Final Constitution's chief ends is the pursuit of social transformation in South Africa through the medium of law. Among its chosen means to that end is the establishment of a new and distinct branch of the South African judiciary — the CC — to serve as special judicial guardian of the Final Constitution's transformative function.
3. Survival of the legality principle in post-Constitutional South African law is required by general considerations of legal policy and by the Final Constitution's most central aims.
4. Survival of the legality principle as a doctrine of the common law independent of the Final Constitution would carry risks of endangerment of the CC's special guardianship role.

Claim 1 asserts, in effect, a purposive or teleological approach to constitutional interpretation. Claim 2 asserts a brace of leading and pervasive constitutional purposes by which interpretation accordingly should be guided, related to each other as a means (protection of the special guardianship role of the CC) to an end (the Final Constitution's socially transformative aim). Claims 3 and 4 combine to assert that this brace of purposes is assisted by acceptance of the doctrine of the constitutional-legal status of the legality principle and might stand to be endangered by rejection of that doctrine.

[1] See § 11.1 supra.

The CC has adhered consistently, from the outset of its work, to the sort of teleological approach to constitutional interpretation affirmed by claim 1.[1] In this respect, the CC's decisions and opinions in *Fedsure* and *Pharmaceutical Manufacturers* call for no special justification. Those opinions, moreover, show convincingly that the inference of a constitution-based, justiciable principle of legality is one that is neither precluded by the Final Constitution's text nor apparently out of kilter with main themes of that text. The merit of the inference, as a matter of purposive interpretation, thus will rise and fall with the cogency and strength of claims 2, 3, and 4.

To those claims we now turn. The brace of constitutional purposes affirmed by Claim 2 are discussed below in subsection (i). Claim 3 is the subject of subsection (ii), and Claim 4 of subsection (iii).

(i) The 'transformative' character of the Final Constitution and the special role of the Constitutional Court

Some constitutions may be called primarily *preservative*, in the sense that their aim is to consolidate and memorialise in the law, in a relatively enduring form, 'a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past.'[2] Other constitutions are primarily transformative, aimed at bringing to pass a societal future that will differ 'starkly' and 'dramatically' from a decisively rejected past.[3] The CC has declared time and again its view that the Final Constitution it sits to construe and apply is of the transformative kind,[4] a view with which there has been and seemingly could be little or no serious disagreement. The Court also has repeatedly conveyed — perhaps most dramatically in *President of the Republic & Others v South African Rugby Football Union & Others* — its understanding that it was brought into being for the particular purpose of ensuring that judicial applications of the new Constitution would not falter from the transformative commitment.[5] No doubt other branches of the judiciary

[1] See L du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 3.

[2] *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 262 ('*Makwanyane*')(Mahomed J). Compare *Michael H v Gerald D* 491 US 110, 141 (1989)(Scalia J, in effect, classified the US Constitution as preservative — its purpose being not to 'enable this Court to insert new [values],' but rather, to the contrary, to 'prevent future generations from lightly casting aside traditional values.') See also C R Sunstein *Designing Democracy: What Constitutions Do* (2001) 67–8; L Lessig *Code and Other Laws of Cyberspace* (1999).

[3] *Makwanyane* (supra) at 262. A transformative constitutional vision does not ignore the values of continuity. It retains from the past whatever is 'defensible' in the envisioned future. See K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146; D Moseneke, 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 *SAJHR* 309; A J van der Walt 'Transformative Constitutionalism (supra).

[4] See *Mkontwana v Nelson Mandela Metropolitan Municipality & Another* 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC) at para 81 ('*Mkontwana*')(O'Regan J)('As this Court has emphasised on many occasions, our Constitution is a document committed to social transformation.')

[5] 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) at paras 73–6.

are expected to work toward the same end,[1] but a special responsibility to secure it has devolved upon the CC.

Both reason and history support that understanding. Let us, however, be clear that they do so only in a historically contingent way. One cannot simply say that the sentiment for transformation, dominant as it was at the moment of constitution-making, compelled or determined South Africa's choice in favour of a justiciable constitution under which judges would act as powerful agents of change. Whether, in given historical conditions, judicial constitutional review is an aid or a barrier to social transformation can be, for obvious reasons, a hotly disputed and reasonably disputable question.[2] Judicial review patently can be a device for impeding or 'slowing down' majority rule, and slowing down post-transition majority rule in South Africa was not beyond all possibility of argument the most expeditious route to transformative results.[3] Yet substantial reasons can be summoned to support such a choice[4] and — this really is the only point that matters just now for our discussion — the choice for justiciability is the choice that South Africans indubitably have made. The Final Constitution says so, redundantly, in words too plain to brook any question.[5] (On some views, the mere inclusion of 'the rule of law' among the Final Constitution's founding values would have sufficed to establish the Final Constitution's justiciability.[6])

Once the die is cast for a justiciable constitution, the question necessarily follows of how to organize the country's judiciary for optimal performance in

[1] See *Nontembiso Norah Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape* Case No 1907/03 (SEC)('*Nontembiso*') at para 16. Froneman J wrote:

> All courts, including the High Court, are enjoined by the Constitution to uphold the rights of all, to ensure compliance with constitutional values, and to do so by granting 'appropriate relief', 'just and equitable orders', and by developing the common law 'taking into account the interests of justice'. In a new constitutional democracy such as ours that means that courts have to devise means of protecting and enforcing fundamental rights that were not recognized under the common law. . . . [Neither difficulties of practical implementation nor regard for the separation of powers] may . . . serve as an excuse for failing to fashion and enforce new remedies simply because they did not exist under the common law. In these situations the judge who fails to examine the existing law with a view to ensuring the effective realisation of constitutional rights and values that were not recognised before is not, as is often presumed by proponents of this course, merely neutrally and objectively applying the law. That will only ever be true if the existing common law proceeds from a fair and equal baseline, an assumption that will not often be open to the present judiciary in South Africa in cases such as the present, given our unequal past.

[2] See H Klug *Constituting Democracy* (2000) 181; P Lenta 'Democracy, Rights Disagreements and Judicial Review' (2004) 20 *SAJHR* 1.

[3] Cf R M Unger *What Should Legal Analysis Become?* (1996) 164–5 (Speaking of 'constitutional arrangements that slow down transformative politics.')

[4] See Lenta (supra) at 30.

[5] See FC, Preamble ('We . . . adopt this Constitution as the supreme law of the Republic . . .'); FC s 1*(c)* (Including 'supremacy of the constitution and the rule of law' among the Republic's founding values); FC s 2 ('This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'); FC ss 167(3)*(b)*, 168(3), 168*(a)*(Respectively empowering the CC, the Supreme Court of Appeal, and the High Courts to 'decide' constitutional matters.)

[6] See H Botha (supra) at 524–5.

light of the Final Constitution's aims and purposes. In South Africa, any answer to that question inevitably must reflect the primarily transformative role envisioned for the Final Constitution. Insofar as the judiciary has a share in the work of effectuating the Final Constitution's purposes, a leadership role within the judiciary respecting that work necessarily will carry over from the old regime if it is not explicitly assigned by the new Constitution. Those in whose eyes the new Constitution was meant to play a primarily transformative, not preservative, role in their country's legal and other affairs would have been leery of leaving judicial leadership in constitutional matters in the hands of judges and tribunals carried over from the old, repudiated regime and possibly imbued with its thoughtways and habits.[1] We should not be surprised, then, to find them choosing to turn over final judicial authority in constitutionally sensitive matters to a new tribunal, staffed with members freshly chosen for the purpose and conscious of having been thus chosen.[2] Historical accounts confirm that it was for precisely such a reason that introduction of the CC into the South African judicial constellation became a key component in the hard-bargained constitutional settlement of 1993.[3]

(ii) The impulse and need for retention of a general principle of legality after the onset of the Bill of Rights

Even under the most muscular judicial deployments of the doctrine of legality that Westminster legal history has known, the co-doctrine of parliamentary supremacy meant that plainly worded law having a parliamentary provenance prevailed over constitutional common law in case of any apparent inconsistency regarding authorization or restriction of official action. It meant, in other words, that Parliament was free to set the terms for lawful official action however it might choose, assuming it spoke with sufficient clarity, up to and including empowerment of officials to act arbitrarily under any or all possible common-law senses of that term.

Parliamentary supremacy, needless to say, was ousted from South Africa by the

[1] See Van der Walt 'Transformative Constitutionalism' (supra).

[2] See *Pharmaceutical Manufacturers* (supra) at para 54 (The CC . . . . 'occupies a special place in [the] new constitutional order. It was established as part of that order as a new court with no links to the past, to be the highest court in respect of all constitutional matters, and as such, the guardian of our Constitution. . . . The Constitution contains special provisions dealing with the manner in which the judges of this Court are to be appointed and their tenure which are different to the provisions dealing with other judicial officers. It has exclusive jurisdiction in respect of certain constitutional matters, and makes the final decision on those constitutional matters that are also within the jurisdiction of other courts.')

[3] See R Spitz & M Chaskalson *The Politics of Transition* (2000) 191–209; Klug (supra) at 140–2; H Klug 'Historical Background' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 2.

constitutional upheaval of 1993-94.[1] Subjecting Parliament itself to a principle of legality is, after all, everywhere understood to be the first and foremost point of replacing a Westminster-style regime with 'constitutionalism' in the form of a supreme-law type of justiciable, written constitution. Constitutionalism in that form, we may say, is the idea of legality writ large.[2] And so coiled within the very certainty that the onset of constitutionalism destroys parliamentary supremacy lies the certainty that its implication for a legal system's prior existing principle of legality must be exactly the opposite.

Enactment of a constitutionalist constitution, cannot — it simply cannot — be read to have the effect of leaving the country's *corpus juris* bereft of a legality principle it formerly possessed.[3] If, as was true in South Africa, the principle had fallen into a state of disrepair during the times preceding the constitutional transition, then the new Constitution's aim must be to salvage and restore the principle, not to erase it.[4] So if the new, written Constitution's roster of textually enumerated legal guarantees leaves some significant extension of legality uncovered, the impulse will be strong to be read that principle fully into the instrument by implication or by exegesis, or else — at the very least — to confirm legality's survival as a robust common law doctrine. No other choice is plausibly available. That a new constitutionalist Constitution would crowd out legality as an operative legal norm is unthinkable.

The case of South Africa turns out to be one in which the roster of constitutionally enumerated guarantees does, in fact, leave some extensions of legality uncovered. The property clause — FC s 25(1) — inveighs against state acts lacking authorization by non-arbitrary laws, but it applies only to deprivations of

[1] One important consequence of the replacement of parliamentary by constitutional supremacy is that the *ultra vires* branch of the legality principle no longer (as formerly) requires that governmental officials and bodies be able to justify their actions by chains of authorizations traceable to Acts of Parliament. Such powers now may be conferred directly by the Final Constitution. See, eg, *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC)(Discussed at § 11.3*(c)* infra); *City of Cape Town & Another v Robertson & Another* 2004 (5) SA 412 (C), 2004 (9) BCLR 950 (C)('*Robertson*') at paras 55–60 ('Now the conduct of a municipality is not always invalid only for the reason that no legislation authorises it. Its power my derive from the Constitution or from the legislation of a competent authority or from its own laws.')

[2] See *Fedsure* (supra) at para 58 (It is 'central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law.')

[3] See *Hugo* (supra) at para 28 ('It would be contrary to [the] promise [of a constitutional state contained in the Interim Constitution's Preamble] if the exercise of the presidential power [to issue pardons] is above the Interim Constitution and is not subject to the discipline of the Bill of Rights.')

[4] See H Botha 'The Legitimacy of Legal Orders (3): Rethinking the Rule of Law' (2001) 64 *THRHR* 523, 539 ('[T]he rule of law is not an a historical construct which stands in the way of democracy and the need to redress past injustices, but is rooted in the historical struggle of black South Africans for democracy and equal rights. . . . [T]he rule of law is vital in ensuring democratic accountability and in fighting social injustice.')

property.[1] The equality clauses — IC s 8(1) and FC s 9(1) — are construed to prohibit arbitrary legislative differentiations or classifications[2] but they have nothing to say about other possible cases of legislative, executive, or administrative lawlessness. The administrative justice clauses — IC s 24 and FC s 33 — may be read to cover any or every dimension of legality where administrative action is involved; but 'administrative action' designates a delimited category of official actions; and while the limits may be uncertain and contested, there is no doubt that a non-negligible residue of official actions lies outside them. These clauses have nothing to say, for example, about lawless legislative action;[3] nor do they speak to whatever cases of executive action may be deemed to fall outside the 'administrative' category.[4]

In addition to picking up residual categories of official action that might not otherwise be covered, a generalised constitutional principle of legality probably carries some further, important implications pertaining to the judicial system, ones that might not be found contained in the more specific rights-granting clauses in the Bill of Rights. Such a principle has been found, for example, to imply the powers of courts to devise non-traditional remedies in response to failures by state officials to carry out judicial orders.[5] In sum, all relevant factors considered, it is entirely understandable that the CC should have concluded that a *general* or sweeping principle of legality must have survived the most recent constitutional upheaval in South African jurisprudence.

[1] For the CC's gloss on 'arbitrary', see *First National Bank* (supra) at paras 62–71, 97–100; *Mkontwana* (supra) at paras 44–64.

[2] *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at paras 25–6, 35–6, *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 53. See *New National Party of South Africa v Government of the Republic of South Africa & Others* 1997 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)('*New National Party*') at paras 19, 24 (In a case questioning a statutory classification, the *New National Party* Court conveyed its view that FC s 9(1) was not the only possible basis for a challenge on the ground of lack of rational connection to a valid governmental purpose. An additional basis for such a challenge, the Court said, is supplied by 'the rule of law which is a core value of the Constitution.' The *New National Party* Court cited *Fedsure* (supra) at paras 56–7 for this proposition.)

[3] See *Fedsure* (supra) at paras 41–2.

[4] A clear example is the President's exercise of powers to appoint officers and create commissions of inquiry, which the CC has held to be constitutionally reviewable under the implied principle of legality, although such exercises are not administrative action covered by FC s 33. See *President of the Republic v South African Rugby Football Union* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at paras 146–7 ('*SARFU*'). One might also consider the President's exercise of his pardon power in *Hugo* and his statutorily granted power to proclaim a law into force in *Pharmaceutical Manufacturers*.

[5] See *Nontembiso* (supra) at paras 21, 25 ([T]he State and its organs have no powers outside that granted to it by the Constitution or by legislation complying with the Constitution. . . . So on what possible legal basis may any state organ refuse to implement a court order and expect the courts to recognize its legal right to do so? . . . It is one thing to realise the possibility *as a matter of fact* that the government might refuse to comply with court orders. It is something completely different to hold *as a matter of law* that courts are powerless to devise ways to ensure compliance with court orders in a constitutional state such as ours. . . . For the courts to do the latter would be to aid and abet unconstitutional government, the very antithesis of the courts 'duty in terms of the Constitution.')

(iii) The risks of locating the legality principle 'outside' the Final Constitution

The legality principle undoubtedly is a part of South African common law, and the Final Constitution takes pains to make clear that it does not displace or destroy pre-existing common law doctrines consistent with its spirit.[1] Accordingly, one might ask: For purposes of preserving in South African jurisprudence a sweeping principle of legality (were that the only end to be considered), might not a restoration of the common law principle to full vigour have sufficed, obviating any need to 'read up' the Bill of Rights by implying the legality principle into it as one of the Bill's protective clauses?[2]

The answer plainly would be 'no' insofar as one might perceive any substantial likelihood that some future Parliament, in a throwback to the old days, might see fit to legislate against a justiciable principle of legality. If or insofar as demands for adherence to legality are not protected by constitutional supreme law, parliamentary supremacy still holds with respect to such claims, just as with respect to any other legislative choices still left open by the constraints imposed by the Bill of Rights.

Be that as it may, the history we have reviewed suggests strongly that it is not any concern about possible parliamentary throwback that leads the CC to conclude that the legality principle now is irretrievably and inextricably a 'constitutional matter' in South Africa. For the CC, it is not enough to affirm that legality now is a justiciable guarantee of a supreme Constitution. No less urgent, in the CC's view, is the *negative* proposition that legality has *not* survived as a principle of the common law drawing breath, so to speak, on its own, outside the tent of the Final Constitution. What the CC has found itself driven to reject is the survival of legality in a legal form or medium that would leave the SCA in a position, sometimes, to pronounce with finality that an infringement of legality has occurred. The CC's apparent driving concern thus has not so much been a possible future *deficit* of legality as it has been a possible future *surfeit* of this presumptively good thing.

[1] See FC s 39(3): 'The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

[2] See *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC)(Suggests this model). In *Zuma*, the CC dealt with a claim under IC s 25(3)*(c)*'s guarantee of an accused person's right to be presumed innocent and remain silent, and held unconstitutional a statutory provision placing the onus on an accused, in certain circumstances, to prove that a confession was *not* given voluntarily. The *Zuma* Court relied heavily on its view that South African common law *as it existed prior to certain apartheid-era developments* would have left the onus on the State regarding the voluntariness of any questioned confession. 'The concepts embodied in [s 25] are by no means an entirely new departure in South African criminal procedure,' wrote the Court. It continued: 'The presumption of innocence, the right of silence and the proscription of compelled confessions have for 150 years or more been recognised as basic principles of our law.' Granting that those common-law principles had 'to a greater or lesser degree been eroded by statute and in some cases by judicial decision.' The *Zuma* Court saw fit to appeal to them in their pre-eroded state as 'part of the background to IC s 25.' Ibid at para 12. It surely was with the pre-erosion principles in mind that the *Zuma* Court felt moved to declare that post-transition jurisprudence would not cast out or ignore 'all the principles of law which have hitherto governed our courts.' Those principles, the *Zuma* Court declared, 'obviously contain much of lasting value.' Ibid at para 17.

Our justificatory question, then, comes down to this: How might either the transformative commitment of the Final Constitution or the CC's role as special judicial guardian of that commitment be compromised by admitting the SCA to an autonomous, equal-footing partnership with the CC in policing compliance with legality by sundry governmental agencies and officials in South Africa?

It would not, mainly, be by way of some feared likelihood that the SCA would lean toward being too *lenient*, too ready to find compliance. That is not a significant worry, because the bar and the High Courts easily could be taught the lesson that, if you don't wish to risk the SCA unappealably rejecting your breach-of-legality claims or decisions, you have only to plead your claim, or base your decision, on constitutional and not merely common-law grounds and then the CC can have the last word whenever it sees fit. No, the main, driving concern would have to be that the SCA might sometimes *uphold* breach-of-legality claims on — and only on — common-law grounds, when those claims — in the eyes of the CC — are both debatable and possibly fraught with counter-transformative baggage.

To say that the Final Constitution was born with transformative ends in view is by no means to say that every legally defensible application of its requirements — much less of the requirements of a common-law corpus that the Final Constitution and its appointed judicial guardians do not control — is guaranteed to advance transformative ends as those most typically are envisioned. That is not how law works or possibly can work. It is not, to take the most obvious case in point, the way we expect a typical constitutional property clause to work,[1] much less the common law of property.[2] No more can one assume that every time a court in a debatable case finds in favour of a breach-of-legality claim the cause of transformation, as typically envisioned, will have been advanced rather than hindered.

A number of examples come to mind. Take *City Council of Pretoria v Walker*.[3] In that case, the CC, conscious of the need to construe the Interim Constitution consistently with its transformative purpose,[4] rejected a claim that the Council's temporary use of a different system for utility rate charges in 'Old Pretoria' than in two amalgamated former townships was an instance of unfair discrimination (against whites) on a racial ground, prohibited by IC s 8(2). But suppose the plaintiffs had thought to plead, as a common-law claim only, that the Council had acted in breach of legality or natural justice in regard to the differentiated-

[1] See A J Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999).
[2] See A J Van der Walt 'Transformative Constitutionalism' (supra).
[3] 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)('*Walker*').
[4] Ibid at paras 46, 53.

rates policy[1] and the SCA had agreed (just as the CC itself came close to doing in regard to another branch of the case).[2]

Bel Porto presents a comparable scenario.[3] The case involved a claim that administrative officials had acted arbitrarily, in contravention of the principle of legality,[4] in a highly transformation-charged context in which the parties complaining were historically privileged, historically all-white schools. Would it have been a true reading of the Final Constitution to conclude that the SCA might have reserved to itself the final word on the case by upholding the claim on, and only on, a common-law ground?

The question here, it must be emphasised, is about constitutionally contemplated *process* — or, more precisely, institutional arrangement. The question is not about which substantive ruling in a case like *Bel Porto* — for or against the claim of a breach of legality — would have comported better on the whole with constitutional values and directives. As to that substantive issue, opinions may differ; and anyway, for aught we know, the SCA, given the opportunity, would have decided it just as the CC did. The question we face here is different. It is about whether the Final Constitution, on the better reading, assigns to the Supreme Court of Appeal or to the CC the ultimate power of decision over debatable claims of breaches of legality.

For further illustration, we may consider *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*.[5] Neighbouring landowners challenged the legality of the government's plan to establish, on land owned by the state, temporary shelters for persons left homeless by floods. The applicants contended that the planned actions would be *ultra vires* and hence unlawful, there being no legislation authorizing the government to act thus in the circumstances. The CC, of course, accepted the applicants' premise that 'the principle of legality is implied within the terms of the Interim Constitution,' but it ruled nevertheless in the government's favour.[6]

In order to do so, the CC had to *deny* the applicability of certain existing statutes to the case at hand, because those statutes included certain conditions

[1] *Walker* (supra) at para 56 (The CC found it necessary to deflect a claim of that very sort: 'The failure to deal openly with residents in old Pretoria is not in keeping with the new values of public accountability, openness and democracy. It is conduct that deserves censure; it is however not the central issue in the dispute.')

[2] See *Walker* (supra) at para 76 ('[W]here a policy is deemed by s 8(4) to constitute unfair discrimination on a ground specified under s 8(2), the fact that the policy is contrary to a fair and rational council resolution and is implemented in secrecy and in contradiction of public statements issued by the council officials, makes the burden of proving the policy not to be unfair more difficult to discharge than it might otherwise have been.' *Walker* held unconstitutional the council's policy of dealing more harshly with rate-arrearages in Old Pretoria than in the ex-township areas.)

[3] *Bel Porto School Governing Body & Others v Premier of the Province, Western Cape & Another* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC)('*Bel Porto*').

[4] Ibid at paras 120–1.

[5] 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC)('*Kyalami*').

[6] Ibid at para 35.

and requirements that the government plainly had not met.[1] But if, then, there was no applicable statutory framework, where was the 'law' to authorize the government's action with its alleged adverse impacts on the applicants? The *Kyalami* Court's answer found the authorizing law in the Final Constitution itself, taken together with the general common law of property ownership. By force of FC s 26 as construed in *Government of the Republic and Others v Grootboom and Others*,[2] the government is under legal obligation to take reasonable measures to come to the aid of persons in conditions of housing crisis. FC ss 85(2)*(b)* and *(e)* provide that the President's executive authority is exercised by 'implementing national … policy' and by 'performing any … executive function provided for in the Constitution.'[3] The CC confirmed the 'government's common law power to make its land available to flood victims pursuant to its constitutional duty to provide them with access to housing,'[4] and concluded that 'if regard is had to its constitutional obligations, to its rights as owner of the land, and to its executive power to implement policy decisions, [the government's] decision to establish a temporary transit camp for the victims of the flooding was lawful.'[5]

This reasoning lies well within the bounds of legal plausibility. Few, however, would regard it as legally inescapable. How absolutely certain can one be that another court would have come to a like conclusion had it been the court of last resort in this case? How worrisome should that question be to South African constitutionalists who respect the apparent plan of the Final Constitution to entrust judicial leadership in constitutionally sensitive affairs to the CC?[6] It is questions of that sort that the CC — or so we are suggesting — found itself confronting in *Fedsure* and *Pharmaceutical Manufacturers*, when presented with the thought that the principle of legality might currently have a home outside the Final Constitution but still within South African law.

Significantly, it is not only the members of the CC and the SCA to whom such questions will occur but also the litigating public, and this fact gives cause for concern. Consider the controversy that erupted in 2004 between certain private parties (pharmaceutical manufacturers and retailers) and the Minister of Health

[1] *Kyalami* (supra) at paras 44, 49 (The Court found that none of those statutes was designed 'to regulate the temporary settlement of people rendered homeless by natural disaster.' Hence, they did not qualify or limit the government's exercise of any powers it might otherwise hold to provide shelter for flood victims and the government did not, by ignoring those statutes and their requirements, make itself chargeable with avoiding an applicable legislative framework and in that way 'acting arbitrarily or otherwise contrary to the rule of law.')

[2] 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)('*Grootboom*').

[3] *Kyalami* (supra) at para 40.

[4] Ibid at para 49.

[5] Ibid at para 52.

[6] Other recent cases illustrate the importance of the question. See *Robertson* (supra) at paras 66–71 (The CC reversed a finding by the High Court that applicable legislation had withheld from municipalities the power to levy property rates on the basis of a provisional valuation roll, in circumstances where the CC had found the dispute to be fraught with transformative consequence.) See also *Affordable Medicines* (supra) at paras 41–55 (The CC condered and rejected a claim that the Minister of Health exceeded the powers granted her by statute when she issued regulations linking licenses to dispense medicienes to particular locations whence the medicines are dispensed.)

over regulations issued by the Minister that would have imposed controls on prices, mark-ups, and dispensing fees for medicines. The private parties claimed that the regulations were, in various respects, unauthorized by the applicable legislation. When the High Court rejected these challenges, appeals obviously impended.[1] From the ensuing stances and skirmishings of the parties, it is evident that the two sides had strongly differing preferences respecting the venue of the first appeal — the Government preferring to have the CC review the merits directly and the private parties evidently believing that their prospects would be brightened — or at least any losses delayed — by securing first a judgment from the SCA.[2]

Because there could have been no possible question about the involvement in the case of constitutional matters — the case turned on questions of statutory interpretation that surely drew FC s 39(2) into play along with the guarantee of access to health care services in FC s 27 — it seemed bound to reach the CC sooner or later. For that reason, the parties' differences over whether it should or should not be routed first through the SCA probably were less acutely felt than they might have been if a judgment from the SCA would have been final. Now, final is just what an SCA judgment in this case could well have been, if the norm of legality had survived as the basis of an extra-constitutional objection to the regulation. We can see, then, that one benign consequence of the *Fedsure/Pharmaceutical* doctrine is to diminish the stakes in forum-shopping struggles. More fundamentally, one might hope that the establishment of secure roles for both the SCA and the CC in all contexts of legal disputes having even arguable constitutional sensitivity would tend over time to instill expectations of 'shared constitutional interpretation' in place of what have up to now been perceptions of a rivalrous relation between the two tribunals. Indefinite persistence into the future of the perception of rivalry cannot be a healthy thing for the rule of law in South Africa.[3]

[1] *New Clicks South Africa (Pty) Ltd v Msimang NO & Another; Pharmaceutical Society of South Africa & Others v Minister of Health & Another* Case No 4128/2004 (C)('*New Clicks HC*'); and *Pharmaceutical Society of South Africa & Others v Minister of Health & Another; New Clicks South Africa (Pty) Ltd v Msimang NO & Another* Case Nos 542/04 and 543/04 (SCA).

[2] See *New Clicks HC* (supra) at paras 3–14 (The stances and manoeuvres are described in detail in the Supreme Court of Appeal's opinion.)

[3] See J van der Walt 'Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-operative Relation between Common-law and Constitutional Jurisprudence' (2001) 17 *SAJHR* 342, 362–3 ('A widespread perception of a rivalry between the two top courts in a legal system obviously casts doubt on the quality of the administration of justice in the country concerned.') On the virtues and benefits of shared interpretation, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) § 31.4*(e)*(vii); M Dorf & B Friedman 'Shared Constitutional Interpretation' (2000) 2000 *Sup Ct R* 61. Woolman, Dorf, and Friedman have conceived of shared interpretation as sharing responsibility for constitutional meaning-making between the judicial and legislative branches of government. We here extend their thought to such sharing between branches of the judiciary. (Here is where welcoming rules of engagement for the High Courts could make an important difference. See Woolman & Brand (supra) at 38–83.) We also skate near the edge of debate over the possibility of merging the CC and the SCA, upon which we shall not enter beyond cautioning that our remarks here do not come close to establishing that merger is a good idea. See L Berat 'The Constitutional Court of South Africa and Jurisdictional Questions: In the Interest of Justice?' (2005) 3 *Int'l J of Constitutional Law* 39, 72–76.

11.4 Supremacy of the Constitution

In order to grasp fully what the CC is driving at in its *Fedsure and Pharmaceutical Manufacturers* decisions, we have to take our analysis one step further. Observing that FC s 1's list of the South African republic's founding values speaks not of 'the rule of law' in splendid isolation but rather of that value in a coupling with the 'supremacy of the constitution,' it is time to ask: In what way does the latter phrase signify *a value*? And how, if at all, is the value it signifies related to the value of legality with which it is textually coupled?

Three propositions, affirmed by the CC, fix the legality principle's central place in South Africa's legal order. Exercises of state power — seemingly without exception[1] — are subject to a constraint of legality. This constraint is justiciable, so that anyone suffering disadvantage from an exercise of state power may demand from some court a ruling on the lawfulness of that exercise of power, and furthermore a remedy in case the exercise is found unlawful. Every such demand for a ruling gives rise to a constitutional matter falling within the appellate purview of the CC.

As we have seen, the CC initially found these propositions to be implicit in the entirety of a constitutional instrument — the Interim Constitution — that lacks any particular text pointing explicitly at them.[2] Even today the CC would be prevented from basing them simply on Final Constitution s 1*(c)*'s proclamation of the 'rule of law' as a founding value of the Republic, by its own insistence that the FC s 1 values do not 'in themselves' give rise to 'discrete and enforceable rights.[3] To be sure FC s 1*(c)* is not beside the point, either, because the FC s 1 values do 'inform and give substance to' everything that is in the Final Constitution.[4] But then what, if anything, has the coupled reference to the supremacy of the Final Constitution got to do with what we have been talking about?

(a) Constitutional supremacy as a value (not just a rule)

It goes almost without saying that the Final Constitution is supreme law in South Africa, in the plain and simple sense — let us call it the 'trumping' sense — of that term. Whenever and insofar as a legal norm or rule of decision laid down by the Final Constitution (as construed) comes into practical collision with a legal

[1] See *Hugo* (supra) at paras 28–9 (Affirming that it would be contrary to the promise of a constitutional state to treat any exercise of presidential power as entirely above the law, regardless of whether that exercise would have fallen within the royal prerogative as a matter of traditional Westminster constitutional law); *SARFU* (supra) at para 38 (Affirming judicial reviewability, under traditional 'legality' standards — such as whether the President had properly 'applied his mind' to the question — of presidential exercises of power to appoint commissions of inquiry); *Kaunda & Others v President of the Republic* 2004 (10) BCLR 1009 (CC) at paras 78–9 (Affirming that a presidential refusal of a request by a South African citizen for diplomatic protection abroad is judicially reviewable for irrationality or arbitrariness, citing *Hugo* and *SARFU*.)

[2] See § 11.1*(c)* supra.

[3] See *NICRO* (supra) at para 21.

[4] Ibid. The CC rested its conclusion that the FC s 1 values do not in themselves give rise to enforceable rights not only on the language of FC s 1 but also on an observation of redundancy, or, as the *NICRO* Court put it, 'the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights'.

norm or rule of decision laid down by any sort of non-constitutional law (as construed) — be it parliamentary legislation, subordinate legislation, common law, or customary law — the Final Constitution's norm is to be given precedence by anyone whose project is to carry out the law of South Africa. To that extent, the Final Constitution's norm or rule of decision is *the* rule of decision for a South African court.

Can supremacy in the trumping sense be the total sum and substance of what FC s 1*(c)* means to convey when it names 'supremacy of the Constitution' as a *founding value* of the South African Republic? There are compelling reasons to resist such a tame and facile reading. The most glaring of these is redundancy. Other clauses of the Final Constitution beat out to a fare-thee-well the message that norms of the Final Constitution prevail over other, arguably conflicting norms in the legal system. FC s 2 declares that the Final Constitution 'is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.' If that were not sufficient to get the point across, FC s 173(1) obliges any court finding itself faced with such a question, at the very least and regardless of what further remedy the court may find to be just and equitable, to 'declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.'[1]

FC s 1, captioned 'Republic of South Africa,' presents the Republic in terms of values on which it is founded. The mention of supremacy of the Final Constitution as one of these values is followed almost instantaneously by the Final Constitution's official supremacy clause, FC s 2, which actually is captioned 'Supremacy of the Constitution.' Why the duplication? Because — one is virtually compelled to think — there really is no duplication; the two clauses are addressed to different matters, and indeed they say so on their faces. FC s 1*(c)* posits supremacy of the Final Constitution as a *value*. FC s 2 lays down constitutional supremacy as a rule for the construction of a determinate, hierarchical relation among legal norms emanating from various, recognized sources of law in and for South Africa. Trumping-sense constitutional supremacy — the payload of FC s 2 — is, in short, a practical rule, not a 'value.' We do not normally speak of 'values' when rules of practice are what we have in mind. Values, rather, serve as *reasons for* rules; conversely, rules (if they are any good) serve to implement values.

When we look at FC s 1 as a whole, with its references to 'human dignity,'

[1] See also FC s 8(1)('The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'); FC s 83*(b)*(declaring that the President 'must uphold, defend and respect the Constitution as the supreme law of the Republic'); FC s 211*(c)*('The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'); FC s 232 ('Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.') FC s 231(4) provides that 'any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Final Constitution or an Act of Parliament.' Does this clause arguably imply that acts of Parliament enacting non-self-executing treaty obligations into law prevail *regardless of* inconsistency with other norms of the Final Constitution? See K Hopkins & H Strydom 'International Law' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 30. Even if it does, constitutional supremacy in the trumping sense is not impaired. FC s 231(4) itself is a norm of the Final Constitution.

'achievement of equality and the advancement of human rights and freedoms,' 'non-racialism and non-sexism,' the section appears to use 'values' to mean states of social affairs to which South Africa as a political community now is committed; states of affairs, then, to be promoted and sustained by governmental and other social means that themselves are consonant with the Final Constitution. Values, thus understood, serve as reasons for rules. That means they also are available (insofar as we can ascertain their content) to serve as guides to the interpretation and application of rules, when guidance is needed because the proper extension of the rule is not facially self-evident.

What do we find, then, if we try to put together FC ss 1*(c)* and 2? First, a value: a desired condition of South African society to which FC s 1*(c)* gives the name 'supremacy of the Constitution and the rule of law.' Second, a rule (likewise labelled 'Supremacy of the Constitution' by FC s 2) that presumably is meant to promote the achievement of the specified societal condition. Thus, achievement of the condition is an end to which the rule is related as a means. We know the content of the rule (the means): Norms of the Final Constitution trump any other, arguably conflicting norms that may be found floating around in South Africa's legal system. But then what is the content of the desired societal condition ('supremacy of the Constitution') to which that rules stands as a means? That condition cannot consist simply of the state of affairs in which the trumping rule is faithfully followed, else the two supremacy clauses, those of FC ss 1*(c)* and (2), would be purely redundant.

The challenge thus posed to bench and bar by the 'supremacy' clause in FC s 1*(c)* is clear and somewhat daunting. It is to comprehend the sense in which 'supremacy of the Constitution' now is established as a polestar for the general guidance of South African government, society, and jurisprudence, *beyond* the point of establishing the trumping rule that the Final Constitution's norms prevail, in cases of conflict, over other norms claiming recognition in the legal system.

On the face of it, this is a puzzling question. FC s 1 expressly names some of the Constitution's motivating and guiding values. The remainder of the Final Constitution sets forth an array of prescriptive norms that presumably are meant to subserve these values directly or indirectly, no doubt along with other values that remain implicit. An obvious further step towards advancement of these same values is to lay down a rule that the Final Constitution's prescriptive norms must take precedence over arguably conflicting norms emanating from recognized legal sources apart from the Final Constitution. That is what FC s 2 expressly does. In that instrumental way, FC s 2's rule of trumping-sense supremacy has value (given that the items named in FC s 1 and presumably subserved by the Final Constitution's array of prescriptive norms are true values). But how are we to understand 'supremacy of the Constitution' as *being itself a value* capable of giving guidance to the interpretation of other norms of the Final Constitution (which is what it ought to be if it belongs in FC s 1)?

(b) The unity of the legal system and the pursuit of justice

Our question is: in what way does the *value* of constitutional supremacy declared by FC s 1*(c)* transcend the *rule* of trumping-sense supremacy laid down by s 2.

Puzzling as the question may be, the extant jurisprudence of South Africa demands that it be faced, for we have the CC's word for it that indeed there is some way in which the supremacy value does and is meant to transcend the supremacy rule.

That word is given by the CC in its *Pharmaceutical Manufacturer*s decision, in the well-known peroration:

> There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.[1]

In those two sentences, the CC claims for the Final Constitution not just one special virtue as compared with the rest of South Africa's laws but three of them, two of which go well beyond the claim (which also is there) for the Constitution's supremacy in the unadorned, norm-trumping sense declared by FC s 2. The first of these additional claims is for the *pervasiveness* of the Final Constitution's norms — 'all law . . . is subject to constitutional control.' The second is the claim for the Final Constitution's status as the *basic law* of South Africa — 'all law . . . derives its force from the Constitution.'[2] Certainly there is no *other* law in South Africa of which it may be said either that all (other) law is subject to its control or that the force of all (other) law flows or stems from it.

Now, a law to which these unique virtues are ascribed, along with trumping-sense supremacy, would be about as superlatively — or 'radically'[3] — supreme as a law can get. Suppose, then, that the CC's attribution to the Final Constitution of the three special virtues combined could be seen to posit or reflect a *value* to which South Africa's embrace of the Final Constitution could defensibly be said to have committed the country; a value, that is, that stands distinct from and additive to the other human and societal goods posited as founding values by FC s 1. If we could see the threefold attribution in such a light, then we might understand 'supremacy of the Constitution' as it occurs in FC s 1's list of founding values to be the textual pointer toward the CC's claims in *Pharmaceutical Manufacturers* for the pervasiveness and the basic-law status, as well as the normative-trumping force, of the Final Constitution.

What, then, might be the value that correlates to the aggregation within a single law — the Final Constitution — of the three virtues of trumping power, pervasive application or relevance, and basic-law status? Once we have the question shaped up in that form, the answer stares us in the face: 'Supremacy of the Constitution' names the value of legal-systemic harmony in the service of the vision of the good society staked out by the entire list of founding values set forth in FC s 1 and instinct in the rest of the Final Constitution. We deal here

[1] *Pharmaceutical Manufacturers* (supra) at para 44.

[2] Both the idea of the pervasiveness of constitutional norms and that of the Final Constitution's basic-law status require further development, which we supply in §§ 11.4.c and 11.4.d infra.

[3] See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) § 31.4*(e)*(iv) ('[T]he Constitutional Court has assured the Supreme Court of Appeal and the High Courts that this radical doctrine of constitutional supremacy does not mean that every judicial decision is meat for constitutional review or that the Constitutional Court will supplant the Supreme Court of Appeal as the guardian of the common law.')

with the value of the unity of the legal system — meaning the system's normative unity or, as one might say more poetically, its visionary unity.[1] The value in question is the value of having all the institutional sites in which the legal order resides — and especially all of its courts of law — pulling in the same and not contrary directions, working in ultimate harmony (which is not to say without difference and debate) toward the vision (the elements of which must always be open to interpretation) of a well-ordered South African society depicted in very broad-brush fashion by the other founding values listed in FC s 1: human dignity, equality, human rights and freedoms, non-racialism, non-sexism, and the basic accoutrements of an open, accountable, representative-democratic system of government. Such an understanding of the value named 'the supremacy of the Constitution' in FC s 1*(c)* accords well with that item's coupling there with 'the rule of law,' for the traditional rule-of-law ideal — we need hardly point out — already strongly intimates the integrity and consistency of the compilation of norms and proto-norms composing a *corpus juris*.[2]

What is more, we can now see how FC s 1*(c)*'s linkage of 'the rule of law' to 'supremacy of the Constitution' insinuates significant glosses on both the partners to the coupling. The linkage suggests that, in the Final Constitution's sight, legal-systemic unity — every site of law pulling in the same direction — is a relative or contingent value, not an absolute one. What that value is contingent on is the direction of the pull. It is when the sites pull together toward the vindication of human dignity, human rights, non-racialism, non-sexism, and the rest that the unity of the country's law in their service figures as a true value. Accordingly, the Final Constitution means by the rule of law something richer than that formula's most traditional, formal, Diceyan signification. If we read FC s 1 holistically — so that the coupling of the rule of law to constitutional supremacy signifies the value of legal-systemic unity in the service of human dignity, non-racialism, and the rest — then 'the rule of law' signifies not just the rule of rules but the rule of justice, as the Final Constitution envisions justice. 'Supremacy of the Constitution and the rule of law' signifies the unity of the legal system in the service of transformation by, under, and according to law.

That, in a nutshell, is what the CC's work described in this chapter has been driving at; or so we would contend. But there are wrinkles still to iron out, and to them we now turn.

(c) An all-pervasive Constitution?

At any time, a case might come along that prompts the judiciary to re-examine some parcel of common law doctrine. To be provocative, let us take as our example the doctrine that decides whether acceptance by mail of a contractual offer — and therefore formation of a contract — occurs as soon as the letter of acceptance is posted or only later when it is received. The law has got to decide

[1] See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 35 ('Rather than envisage the foundational values of the rule of law and the achievement of equality as being distinct from and in tension with each other, PIE treats these values as interactive, complementary, and mutually reinforcing.').

[2] See, eg, LL Fuller *The Morality of Law* (1969) 38–9.

this question, one way or the other, by a general rule. Has the Final Constitution anything at all to do with such a matter? Are there not, after all, some questions of law that lie beneath the Final Constitution's notice, or beyond its gaze? If there are some, the choice between 'effective-on-dispatch' and 'effective-on-receipt' in the law of contract doubtless is one of them. (Notice, though, that if there are any such questions at all, then there probably are quite a few of them.)

When the CC declares, as it did in *Pharmaceutical Manufacturers*, that 'all law' is 'subject to constitutional control,' is the CC giving us its answer to the question we have just posed? Is the CC saying 'no, no legal question at all is beneath the Constitution's notice'? Just staring at those words in isolation, one might well doubt it. The words (in isolation) can easily be construed — are perhaps most naturally construed — to say simply that the Final Constitution's norms prevail wherever they extend, without implying anything about how pervasively those norms extend across the length and breadth society's affairs.

Suppose we had a constitutional instrument that addressed itself solely to the design of state institutions, and not at all to substantive limits and constraints on the acts of those institutions. Regarding such an instrument, one might perfectly aptly say that all law is subject to its control; it is just that this truism would make little difference to the substantive content of the law and of legal decrees, because all duly enacted laws and decrees, regardless of content, would satisfy the demands of the narrow-bodied constitution whose control they were under. In such a case, 'all law is subject to constitutional control' would simply repeat the doctrine of the constitution's trumping-sense supremacy. The remark would bear no implication regarding what we have termed the 'pervasiveness' of constitutional norms.

When, however, we place the CC's remark — 'all law is subject to constitutional control' — in context, we may feel strongly drawn to read it differently. The context very saliently includes the CC's repeated stresses on the unity of the legal system ('there is only one system of law'). More telling is the CC's expressed view of the Final Constitution's role in conferring that unity ('shaped by the Constitution'). The context further includes the actual stakes in the *Pharmaceutical Manufacturers* case — to wit, the sharply contested issue of whether legal cases can arise in South Africa over which the CC (restricted to deciding constitutional matters and matters ancillary to constitutional matters) is precluded from having the last word. With these contextual factors in the picture, 'all law is subject to constitutional control' almost irresistibly conveys a claim for the pervasiveness of the Final Constitution's norms. Such, after all, is the conclusion to which all the preceding discussion in this chapter has been tending. Call it the thesis of the all-pervasive Constitution.

How problematic a conclusion is it? The all-pervasive-Constitution thesis certainly contradicts the ostensible design of the Final Constitution to divide last-resort appellate jurisdiction between the CC and the SCA.[1] However, as the logicians like to tell us, you can prove anything with a contradiction. Merely

[1] See § 11.2 supra.

noticing a contradiction tells us nothing about how to proceed in the face of it. Merely noticing this one tells us nothing, yet, about which of the two contending ideas — the ostensible jurisdictional division or the all-pervasive Constitution — is the one that had better give way if we want to keep faith with the Final Constitution as best we can. Might our discussion in § 11.4.b, above, possibly have some light to shed on this question?

Recall our conclusion there: 'Supremacy of the Constitution' names the value of legal-systemic harmony in the service of the vision of the good society staked out by the entire list of founding values set forth in FC s 1 and instinct in the rest of the Constitution. The premise, unstated, is that such a vision — a comprehensive (if doubtless somewhat inchoate) vision of the good society — indeed resides in the Final Constitution. Significantly, that is a premise to which the CC has subscribed:

> Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court:
>
> > The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary.
>
> The same is true of our Constitution. . . . It is within the matrix of this objective normative value system that the common law must be developed.[1]

If common law, then how not all law?[2] An objective normative value system is not a Swiss cheese. Something going under that name ought to have a bearing on every legal choice, even if it does not fully decide them all. There would be no way to exclude a priori the choice between 'dispatch' and 'receipt' in the law of contract. Granting that the relevant message from the objective normative value system inhabiting South Africa's Constitution may not occur to you just now, that may be because you have not thought hard enough about it. More likely it is because the system's implications remain far less than fully developed and resolved at this point in South Africa's history of collective self-definition through political and juridical exchange and contestation. One may hope and expect that such a condition of openness to refreshed understanding will persist forever. Still the point would remain: some judge, some day, may grasp the Final Constitution's message for the 'dispatch'/'acceptance' choice and therefore every judge, every day, is expected to confront that choice and others like it in a state of conscious reflection on what the Final Constitution is up to. Such would appear

[1] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) at para 54 (citation omitted); *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) at para 94. See also Woolman 'Application' (supra) at § 31.4*(e)*(vii) (On the meaning of 'objective normative value system'.)

[2] Compare FC s 2; FC s 8(1)('The Bill of Rights applies to all law.') See Woolman 'Application' (supra) at § 31.4*(b)*(i)–(ii). (On the meaning of 'all law').

to be the import of FC s 1*(c)*, 'the supremacy of the Constitution and the rule of law,' at least in the current view of the CC.

But if that is so, then how explain the CC's performances in cases like *Metcash Trading* and *Phoebus Apollo Aviation*?[1] In *Phoebus Apollo Aviation*, the CC peels the onion, exposing layer by layer the absence from the case of any question of law save the acceptability of the SCA's formulation of the general test for *respondeat superior* in ordinary delict cases. 'None of our business, then,' says the CC. 'True today if you say so,' we respond, 'but who can say about tomorrow, when you or your successors may see further or deeper into that objective normative value system of which you speak?' When the CC dismisses an appeal such as that in *Phoebus Apollo Aviation*, pleading want of jurisdiction, it seems we must understand the Court as confessing to a temporary shortfall in its comprehension of that objective normative value system whose inhabitation of the Final Constitution it posits. ('We don't know yet.') Otherwise, why is the CC not affirming the decision below? (Granted, 'temporary' here may refer to a condition that is not short-term.)

(d) Constitutional supremacy as basic-law status

Let us turn now to the third of the three special legal virtues claimed for the Final Constitution by the CC in *Pharmaceutical Manufacturers*: 'All law, including the common law, derives its force from the Constitution.' It is hard to know what to make of this remark. On its face, as we explain just below, it registers as a proposition in the field of jurisprudence or the philosophy of law. The trouble is that the remark thus read draws the CC into a debate in legal theory that the CC surely has neither any intention of entering nor any slightest reason to enter — the theorists' debate being entirely lacking in consequence for the CC's work.

To state the matter as briefly and simply as possible: Truckloads of legal theorists would pronounce 'All law derives its force from the Constitution' an obvious mistake and moreover an impossibility. All law in South Africa, they would say, including the Final Constitution (as well as all statute law, common law, and customary law), necessarily derives its force from something called South Africa's 'ultimate rule of recognition,' which is not and cannot be identical with South Africa's enacted Final Constitution. Very roughly, South Africa's ultimate rule of recognition consists of a set of understandings, presumably widely shared across South African society, by which South Africans are able to converge on acceptance of the Final Constitution as the highest-ranking law in South Africa. Such a convergence of pre-legal understandings must necessarily exist as a matter of 'social fact' — so the argument quite persuasively runs — in order for the practice of legal ordering to exist in this or any society.[2] Without it, the Final

[1] See § 11.2*(b)* supra.

[2] A modern *locus classicus* is HLA Hart *The Concept of Law* (1961). See also F Schauer 'Amending the Presuppositions of a Constitution' in S Levinson *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (1995) 147.

Constitution could not function as law. Moreover — the argument continues — once the necessary existence of this widely shared set of pre-legal understandings is acknowledged, then *it* — and not the Final Constitution — will be seen to serve as the source providing the force of law not just to the Final Constitution but also to statutes enacted in accordance with the Final Constitution's rules, and to common-law and customary-law doctrines that emanate from sources authorized by the Final Constitution to pronounce and develop common law and customary law.

For our purposes, it does not matter whether the view just described is correct or not. More to the point is the likelihood that most if not all of the justices of the CC would happily sign on to that view if asked for their opinion regarding it. At any rate, they would have no reason not to. The CC is plainly and strongly committed to claims that the Final Constitution's norms are all-pervasive and the they have trumping-sense supremacy over all other South African law. Those claims, however, stand, quite independent of any claim that the Final Constitution — as opposed to an ultimate rule of recognition distinct from the Final Constitution — supplies the force of law to statutes and the common law. Rather, implicit in the CC's stance is a claim about *the content of* South Africa's ultimate rule of recognition, the social source from which all South African law derives its force. The CC is claiming, in effect, that South Africa's ultimate rule of recognition contemplates both the all-pervasive relevance of the Final Constitution's norms and their trumping-sense supremacy within South Africa's legal system.

If so, however, what are we to make of 'all law derives its force from the Constitution'? What is the Court trying to say by that remark, that makes any practical sense or any practical difference?

(e) Constitutional supremacy and discursive style

All else failing, let us try to find an answer by changing the subject.

When we place the Final Constitution side-by-side with the pre-constitutional South African *corpus juris* and ask 'what is new?', our first answers likely will speak in terms of the substantive content of the law and the values animating it. Democracy, human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism[1] have gained a new ascendancy, and acquired new meanings, in the orderings of values that, in one way or another, enter into legal decision-making. In a word, what is new is every dimension of the social valuation of legal choices conveyed by the word 'transformation.' In *Pharmaceutical Manufacturers*, the CC plainly affirmed the point that no pocket of South African law is exempt from reconsideration in the light of the Final Constitution's scheme of values.

But 'transformation' signifies to many a shift in the style as well as in the substance of the law — a shift in the law's discursive modalities as well as in its guiding vision of human and social flourishing. Exactly what sort of stylistic or

[1] See FC s 1.

discursive shift is indicated is a matter under discussion, of course. For some observers, the relevant contrast is that between 'doctrinal' argument (old style) and 'political' argument (new style).[1] For others, it is the contrast between Roman-Dutch formalism and a legal pragmatism that opens decision-making wide to the particulars of 'the social, political and historical context of the case.'[2] For still others, the contrast is best rendered in terms of choices of dominant metaphors: say, 'rights as boundaries' versus 'rights as relationships.'[3] And for yet others (the list is not exhaustive), the crucial contrast is the contrast between a 'matrix mindset' that thinks inside legal boxes containing 'comparatively unreflective' sets of settled rules and structures and a 'post-matrix mindset' that is constantly subjecting received rules and practices to the test of consistency with a guiding, global set of values.[4] Or the contrast may similarly be defined as being that between modes of judicial analysis that allow or invite law outside the Final Constitution — above all, the common law — to 'drive the enquiry into constitutional values,' and modes that put the Final Constitution in the driver's seat by forcing courts to explicate constitutional values separately *before* asking about the adequacy of the fit between — for example — this or that antecedent common-law doctrine and the Final Constitution.[5]

Tracing the commonalities and differences among these assorted views of what may be at stake discursively in the Final Constitution's entry onto the South African legal scene is beyond the scope of this chapter. What is very much to its point is this: Among those who perceive that 'constitutional' denotes a transformed style of legal (no doubt some would say *faux*-legal) argumentation, there is disagreement over whether *that* transformation ought to reach into every last redoubt of juridical activity. Some maintain that the country is best served by leaving the old style (however that may be conceived) some space in which to operate alongside the new.[6] Others disagree.[7]

[1] The former is said to employ a distinctively legal grammar that injects into the facts and events that compose a legal case their distinctly legal significance, thus shielding legal decision off from raw, consequentialist calculation. Doctrinal argument is a method, then, by which trained, specialist practitioners work out the *legally* best or aptest shadings and orderings of shared, permanent principles or values in changing contexts, where 'legally' connotes a time-tested, evolving, civilizational wisdom that no sheerly instrumentalist or 'balancing' calculus ever could capture. See D van der Merwe 'Constitutional Colonisation of the Common Law: A Problem of Institutional Integrity' (2000) 1 *TSAR* 15, 22–5. By contrast, political, including constitutional argument involves the parties in an open, unmediated contest of clashing interests and rights-claims that only a trade-off could resolve. Ibid at 24.

[2] See AJ van der Walt 'Dancing with Codes — Protecting, Developing, Limiting and Deconstructing Property Rights in the Constitutional State' (2001) 118 *SALJ* 258.

[3] H Botha 'Metaphoric Reasoning and Transformative Constitutionalism (Part 2)' (2003) (1) *TSAR* 20, 34.

[4] C Roederer 'Post-Matrix Legal Reasoning: Horizontality and the Rules of Values in South African Law' (2003) 19 *SAJHR* 57, 62.

[5] See D Davis 'Elegy to Transformative Constitutionalism' in H Botha, A Van der Walt & J Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 57, 65.

[6] See, eg, Van der Merwe (supra) at 15.

[7] See, eg, Roederer (supra) at 57.

We cannot here go into detail. We merely suggest that when the CC spoke in *Pharmaceutical Manufacturers* of all law deriving its force from the Final Constitution, it may have been giving expression to that side of its mind that decidedly favours having constitutional values (post-matrix) drive the enquiry into the adequacy of all other law, rather than the reverse. This may have been the CC's way of conveying that there remains in South Africa no trace of law that does not act discursively like the law of the Final Constitution; no law that does not, in that sense, bear the Final Constitution's genes. To put the point another way: No legal argument, contention, or proposal is rejectable today simply because it does not 'sound' right or 'feel' right to a well-brought-up South African jurist of the current generation. To say *that* is to say something significantly more than that all law has to harmonize with the spirit, purport, and objects of the Final Constitution.

12 Separation of Powers

Sebastian Seedorf & Sanele Sibanda

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12.1 INTRODUCTION

The adoption of the Interim[1] and subsequently the Final Constitution[2] is often lauded as the major milestone in the attainment of freedom in South Africa. As important a milestone as the adoption of these two Constitutions was, however, it is arguably the governmental structures that these Constitutions established that have been most vital in ensuring that South Africa continues to develop as a constitutional state, i e a state in which political power is restricted in various ways and in which the Constitution serves as the standard for the legitimate exercise of public power.

Constitutional restrictions on public power may be both procedural and substantive. The focus of substantive restrictions is an entrenched and justiciable bill of rights and a commitment to certain foundational values, such as the rule of law. The separation of powers falls on the procedural side, although its purpose is related to substantive interests: it is a means to ensure the protection of individual rights by way of the distribution of political power between different institutional actors, and includes mechanisms to ensure that such power is not unduly exercised. The idea behind separation of powers is that a concentration of power will most likely lead to self-interested action and abuse of power for personal gain. Historical experience suggests that benign dictators, who rule wisely, judge fairly and generally advance everyone's welfare, are very hard to find — if such people ever existed. The underlying idea beneath any separation of powers doctrine is thus the sceptical assessment that good governance is more likely when political power is distributed between different institutions and persons.

Separation of powers is the basis for an institutional, procedural and structural division of public power to create conditions that place human rights at the centre of society. Both from an institutional and structural point of view, such a constitutional principle is an essential aspect of promoting and securing the entrenchment of South Africa's nascent constitutional democracy. Separation of powers — as well as democracy and the rule of law — are therefore linked to the constitutional project of creating a society founded on the recognition of human rights, peaceful co-existence and development opportunities for all South Africans. The objective of separation of powers is to curtail the exercise of political power to prevent its abuse — meaning the violation of human rights. This instrumental function of separation of powers as an institutional mechanism to protect human rights is the reason why the combination of these two ideas (separation of powers and human rights) has been called the 'core of constitutionalism'.[3] And it is these features that have ensured that there really has been a decisive break from the past constitutional system in South Africa.

[1] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').
[2] Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC').
[3] Jan-Erik Lane *Constitutions and Political Theory* (1996) 25. See also Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 8.

Separation of powers means that specific functions, duties and responsibilities are allocated to distinctive institutions with defined areas of competence and jurisdiction. Separation of public powers is, in short, separation of public institutions (legislature, executive and judiciary) and of public functions, i e the making of law, law application and execution, and dispute resolution. Functional distribution leads to specialization and this, in turn, enhances state efficiency — the second rationale for separation of powers. In US constitutional law, the argument that a proper division of public functions and their attribution to particular institutions helps government to perform better was employed to justify a strong executive with a powerful President at its helm.[1] More generally, the underlying idea is that particular institutions are particularly well equipped to perform a particular function. In complex modern societies with numerous stakeholders and multifaceted decision-making processes, this argument takes account of the level of specialization and expertise required for the delivery of 'good governance'. When only people who know what they are talking about are involved in the decision-making process it is more likely that the outcome will be just and equitable and serve the public good. This argument thus relates to the first rationale of separation of powers, i e prevention of the abuse of power. On the other hand, the efficiency rationale has lost some of its force due to the fact that pure efficiency has to be limited to some degree to ensure that all relevant considerations in the decision-making process are taken into account. Unhindered technocratic rule by experts (not questioning their knowledge of the subject at all) may lead to institutional deafness and ignorance of the plight of others and, in the worst case, to exactly the kind of human rights violations and abuses of power the Constitution aims to prevent. The prevailing purpose of checks and balances as part of the separation of powers doctrine is therefore to ensure that institutions do not become too self-centred in their conduct, even if they are thus impeded in efficiently fulfilling their functions to a certain extent.

This chapter engages in a detailed analysis of the import and impact of the doctrine of separation of powers in the development of South Africa's constitutional law. Before moving to consider exactly how the doctrine has manifested itself in the South African context, the first part of the chapter will briefly consider the doctrine's origins and its profound influence on the development of the modern democratic state premised on the idea of limited government. This analysis will seek to show that the doctrine's success as a means of establishing a fairly predictable set of structured constitutional arrangements has resulted in a growing tendency to emphasize the doctrine's form over its substance.

In the second part of the chapter the focus will turn to a consideration of how the doctrine has been incorporated in the text of the Final Constitution, in spite of the fact that the constitutional text makes no reference — direct or indirect — to separation of powers. In this section it will be shown that, rather than slavishly

[4] Geoffrey Stone, Louis Seidman, Cass Sunstein, Mark Tushnet & Pamela Karlan *Constitutional Law* (5th Edition, 2005) 363.

following other states' interpretation of the doctrine, the drafters of the Final Constitution incorporated the idea of separation of powers in a manner that was 'distinctively' conceived to meet South Africa's peculiar needs and context. Further, this section will commence with the consideration of the Constitutional Court's jurisprudence on separation of powers. This analysis will be prefaced by a consideration of the Court's own role with respect to the development of the separation of powers as a justiciable doctrine, particularly in light of its own far-reaching powers of judicial review.

The final part of the chapter will engage in an analysis of the Constitutional Court's separation of powers jurisprudence and in so doing identify some important emerging features and principles. Although the development of this jurisprudence has necessarily been conducted on a case-by-case basis, a cumulative reading of the Constitutional Court's judgments illustrates that the doctrines and principles identified in this chapter have heavily influenced the Court's goal of distilling a 'distinctively South African model of separation of powers'. This section further seeks to demonstrate that, although the judgments discussed go a long way towards illuminating the separation of powers doctrine in South Africa, the Constitutional Court's conceptualization of this doctrine is, much like South Africa's overall constitutional project, an ongoing enterprise to which there are no full and final answers.

12.2 Origins and conceptual framework of the separation of powers doctrine

(a) 'Power arrests power': the historical development of the idea of separated powers

The articulation of an explicit doctrine of separation of powers as a distinct explicatory theory of governance is generally thought to have its origin in the political philosophy of the age of Enlightenment in seventeenth-century Europe, when political thinkers started to challenge the unlimited might and arbitrariness of an absolute monarch. However, its basic aim is much older, i e to find a structure of government that prevents the accumulation of too much power in one institution. Mitigating power by way of diffusion has been a feature common to many societies for ages, even when they have followed a strictly hierarchical system of government.

For example, in pre-colonial southern African societies, no separation of powers technically existed, because traditional leaders performed all functions of government, including dispute resolution.[1] However, traditional leaders were always expected to consult with an advisory body (usually consisting of senior

[1] See Tom Bennett & Christina Murray 'Traditional Leaders' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) § 26.6*(c)*.

members of the society) or seek the approval of a popular assembly. As Tom Bennett and Christina Murray point out, even without formal constraints, no important decision could be taken without discussion in the council, giving the members of the group (or their representatives) opportunities to check self-interested action and effectively limit the power of the ruler.[1]

The idea that the accumulation of power can be (best) prevented by the introduction of distinctive institutions with defined functions, areas of competence and jurisdiction, which exercise public power in mutual co-operation, was foundational to the Roman republic of the sixth century BC. While the senate, a body of up to 600 men from (mostly) Roman nobility, engaged in general policy debates, made important decisions (such as decisions about entering into war and suing for peace) and controlled the treasury, administrative and judicial functions were transferred to annually elected officials (collectively called magistrates) with titles like consul or praetor depending on their rank and responsibilities. These were elected by assemblies (the comitias) representing the Roman people.

Much of the theoretical groundwork for such an arrangement was laid by the Greek philosopher Aristotle, who formulated the idea of a threefold division of public power as one of the requirements of a good constitution. Aristotle saw three elements in every constitution: the deliberative element (responsible for law-making and other important decisions), the element of the magistracies (everything concerning the day-to-day 'running' of the state) and the judicial element.[2] In his view, when the drafters of a Constitution had reached the best arrangement for each of the three elements, and they were all acting in the right 'proportion', the Constitution as a whole would work well. This background in Aristotelian theory and Roman practice was not lost and influenced the scholarly debate on how societies ought to be structured for centuries — although, in practical terms in medieval Europe, state power became increasingly concentrated in single rulers.[3]

The emergence of all-powerful, absolute rulers whose authority was not restrained, balanced and countered by other institutions led to the revitalization of separation of powers ideas in the seventeenth century. At that time, these ideas were influenced by the developing liberal notions of personal freedom and civil liberties. Aristotle had focused on the well-being of the community as a whole, the *polis*, and only indirectly on the individual. During the period of the Reformation and the Renaissance, however, a growing emphasis was placed on the fact that public power should be exercised in the interests of the governed. Absolute monarchs could not be trusted in this regard, as 'there is the danger that they will think themselves to have a distinct interest from the rest of the Community.'[4]

[1] Bennett & Murray (supra) at §§ 26.2, 26.6*(c)*(iii).

[2] Aristotle *Politics* Book IV, Chapter 14. In modern terms, Aristotle's drew a distinction between state organs and state functions.

[3] MJC Vile *Constitutionalism and the Separation of Powers* (1967) 40; Lane (supra) at 22–25.

[4] John Locke *Two Treatises of Government II* (1688) Chapter XI para 138.

Thus, the idea that public power must be distributed and controlled was developed with a view to the accountability of government to the will of the people. The basis for today's notion of separation of powers was laid with the functional understanding that democracy and the rule of law require both the division of powers and mutual checks and balances. The main proponents of this idea were John Locke (1632–1704), Charles Baron de Montesquieu (1689–1755) and James Madison (1751–1836).

Locke's work was based on his experiences with the Civil War in England around 1650 and the Revolution of 1688, when King James II of England was overthrown by a union of parliamentarians, which effectively ended absolute monarchy in Britain by circumscribing the monarch's powers. Although supportive of this development, Locke's concern was that absolute monarchical power should not just be replaced by absolute parliamentary power. In his view, the concentration of influence in any one institution entailed an inherent danger:

> [I]it may be too great a temptation to humane frailty apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage.[1]

Locke was influenced by natural law assumptions such as that all men are by nature free and equal and that legitimate governments are those which have the consent of the people. For this reason, there was a need 'to think of methods of restraining any exorbitances of those to whom [the people] had given the authority over them, and of balancing the power of government, by placing several parts of it in different hands'.[2] This was Locke's essential thought: separation of powers as a means to counter the power-accumulating tendencies of human nature. To prevent arbitrariness, his prescription for the executive power (in his view, the King) was that it should not be concerned with law-making, while the legislature, on the other hand, should only be concerned with the passing of general rules and, equally important, should be dissolved on a regular basis so that it would consist of different people from time to time.[3]

Although quite revolutionary for his time, Locke's understanding of separation of powers differed in important ways from later conceptions of this doctrine. First, Locke still saw the judicial function as part of the executive, as it was for him part of the implementation of abstract legal rules.[4] Secondly, advocating the

[1] Locke (supra) at Chapter XII, para 143.
[2] Locke (supra) at Chapter VIII, para 107.
[3] See FA Hayek *The Constitution of Liberty* (1960) 170.
[4] Locke divided state functions mainly between law making (legislative power) and law implementation, including adjudication (executive power). He nevertheless advocated three distinctive governmental powers because he distinguished between internal 'executive power' (where the executive was subject to the control of the legislature) and external 'federative power', i e foreign affairs, which cannot be conducted subject to predetermined abstract legal rules and in which the executive is not subject to the control of the legislator. See Vile (supra) at 66–67.

then emerging English model of parliamentary supremacy, he did not think of an effective *institutional* counterbalance to the legislature, but only of procedural restraints.[1]

The division of state power between three distinctive institutions was introduced by Montesquieu, who is generally credited with devising the modern conception of separation of powers. Montesquieu's singular contribution was to conceive the judicial power as an independent state function, thereby treating it as a form of power equivalent to legislative and executive power, and laying the theoretical basis for the independence of the judiciary.[2] Montesquieu conceived his theory as an empirical study in which he examined all kinds of regimes present and past. In this endeavour, he started from a rather gloomy view of human nature, similar to that of Locke: human beings in power have the tendency to abuse it.[3] But Montesquieu thought that such tendencies need not prevail because the structure of government, as embodied in the constitution of a nation, could make a difference.

For Montesquieu, the separation of powers doctrine was foundational to any constitution that sought to prevent the abuse of power and advance personal freedom:

> [There is no] liberty if the power of judging is not separate from legislative power and from executive powers. . . . All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.[4]

Jan-Erik Lane has noted that Locke's constitutionalism is focused on the concept of limited government, of restrained and restricted political power to ensure the liberty of the individual, while Montesquieu focused on the fact that such liberty is most likely to survive in a state where executive, legislative and judicial power are not in the same hands.[5] What they had in common was that they regarded separation of powers as a means directly to prevent the accumulation of power and, even more importantly, indirectly to ensure that every member of society enjoyed individual rights and freedoms.[6]

[1] See Vile (supra) at 68–70.

[2] Although Montesquieu did not accord the judicial branch an exactly equal status with the legislative and executive branches of government, he clearly intended the judiciary to be independent of the other two. See Vile (supra) at 96.

[3] Montesquieu *The Spirit of the Laws* (1748, translated and edited by Anne M Cohler, Basia Carolyn Miller & Harold Samuel Stone, 1989) Book XI Chapter 4 155 ('. . . it has eternally been observed that any man who has power is led to abuse it; he continues until he finds limits.')

[4] Montesquieu (supra) at Book XI Chapter 6 157.

[5] See Lane (supra) at 39.

[6] It was exactly this focus on individual liberty that persuaded writers advancing communism or socialism to reject the idea of separation of powers. A government of the working class demanded absolute accountability of every state function to the 'masses'. Mutual checks and balances are unnecessary where 'revolutionary forces' exercise all power and control all state functions. For an appraisal of the apparent mixing of state functions during the short-lived Paris Commune of 1871 by Karl Marx, see Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, A Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 10.2*(a)*.

Montesquieu's point was that separation of powers was crucial for good government. He believed that only the separation of powers would create a situation in which the common good would be advanced. Some 50 years before the Jacobins in the aftermath of the French revolution would disguise their reign of terror as a reign of virtue, Montesquieu strongly emphasized that even a government with the best intentions needed to be limited: 'Is it not strange, though true, to say that virtue itself has need of limits?'[1]

Additionally, Montesquieu realized that limitations imposed by procedural or even substantive laws would not suffice to prevent the abuse of power. Instead, such legal limitations had to be supported by alternative sources of political power, which also meant bringing social forces into consideration.[2] To make separation of powers work, a Constitution would have to distribute power between the different branches of government: 'To prevent this abuse, it is necessary from the very nature of things that power arrests power.'[3]

James Madison later picked up on this insight (though without explicitly referring to Montesquieu) when he outlined the structure of the US Constitution:

> But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.[4]

[1] Montesquieu (supra) at Book XI Chapter 4 155 ('Qui le dirait! La virtue même a besoin de limites.' Some English editions have used a different translation more congruent with the French original: 'Who would think it! Even virtue has need of limits.')

[2] Montesquieu placed great emphasis on the accommodation of the different strata of society, in particular the nobility, of which he himself was part. To separate powers not only according to their function, but also along social lines was of great importance to him: 'Here, therefore, is the fundamental constitution of the government of which we are speaking. As its legislative body is composed of two parts, the one will be chained by the other by their reciprocal faculty of vetoing. The two will be bound by the executive power, which will itself be bound by the legislative power. The form of these *three* powers should be rest or inaction.' Montesquieu (supra) at Book XI Chapter 6 164 (my emphasis). Although Montesquieu does not mention the judiciary in this context, he nevertheless speaks of *three* powers. Instead of state powers here he has social powers in mind, referring to the monarch as the head of the executive, the nobility (comprising the upper house of Parliament) and the bourgeoisie, represented in the second chamber or lower house of Parliament. This class emphasis is also visible from his argument that members of the aristocracy should not be judged in the ordinary courts of law, but in courts made up of their peers, because 'important men are always exposed to envy; and if they were judged by the people, they could be endangered . . .' Montesquieu (supra) at 163.

[3] Ibid at Book XI Chapter 4, 155 ('Pour qu'on ne puisse abuser du pouvoir, il faut que, par la disposition des choses, le pouvoir arrête le pouvoir.') Depending on the translation, the last part of this sentence may read 'power must be a check on power'.

[4] Alexander Hamilton, James Madison & John Jay *The Federalist Papers No 51* (1788, JM Dent Edition, 1992) 266 ('*The Federalist*').

Hannah Arendt has called Montesquieu's insight the 'forgotten principle underlying the whole structure of separated powers', because it realizes that power must be limited and kept intact at the same time. Separation of powers must not have a disabling, but an enabling function:

> Power can be stopped *and* still be kept intact only by power, so that the principle of the separation of powers not only provides a guarantee against the monopolization of power by one part of the government, but actually provides a kind of mechanism, built into the very heart of government, through which new power is constantly generated, without, however, being able to overgrow and expand to the detriment of other centres or sources of power.[1]

As much as Montesquieu made one of the most enduring conceptual contributions to today's understanding of the separation of powers doctrine, he did not outline institutional mechanisms to serve his ideal. The task of putting Montesquieu's ideas into practice was left to James Madison and his fellow 'founding fathers'. Drawing on their experience with the far-reaching powers of colonial governors, the framers of the early American constitutions ensured that the principle of separation of powers played a central role in the structures of government for the first time.[2] They started from the same assumption as Montesquieu, i e that the division of power is essential to prevent its abuse:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny.[3]

One important aspect in the American implementation of the doctrine was the distinction between a Constitution and ordinary legislation. For the majority of Americans at the time, the distinctive source of political power was the people. It was the people who constituted the state and expressed their will in the form of a written Constitution.[4] Against this, the legislature had only a delegated power, which needed to have limits, too. However, early experiences with some State Constitutions and their systems of separated powers had shown that a simple

[1] Hannah Arendt *On Revolution* (1963) 151–152 (emphasis in the original).

[2] See, for example, the Constitution of Virginia of June 29, 1776 (Not to be confused with the Virginia Bill of Rights of June 12, 1776): 'The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time; except that the justices of the county courts shall be eligible to either House of Assembly.'

[3] Hamilton, Madison & Jay *The Federalist No 47* (supra) at 247 (Madison placed great emphasis on the fact that a majority could abuse its power, too, and act contrary to the interests of a just society. 'It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger. . .' *The Federalist No 51* at 267–268.)

[4] See Vile (supra) at 158–159.

division of functions had neither sufficiently acknowledged the idea of popular sovereignty, nor restricted the legislatures to the passing of general rules. Instead, the State legislatures had slowly absorbed more and more powers.[1]

The problem of how to place limits on the legislature was thus the background against which the drafters of the US Constitution, based on their reading of Montesquieu, concluded that a strict separation of powers would not prevent the accumulation of power.[2] To put the principle that 'power arrests power' into practice, it would instead be necessary to draft a Constitution 'in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.'[3]

The idea of 'checks and balances' as a complement to the mere separation of powers was the decisive innovation. Although in a sense a breach of the doctrine, the Americans realized that checks and balances were nevertheless necessary to the successful application of the separation of powers. In the Constitutional Convention of 1787, Madison argued that the introduction of a balance of powers and interests would add a defensive power to each department to maintain the theory of separation of powers in practice.[4] As checks and balances concerned institutions, which had to be linked in order to exercise control over each other, Madison pointed out that the emphasis in separation of powers should lie in the persons, rather then in their functions. In this way, different institutions might well have a share in the same state function (e g the passing of legislation by the legislature and its signing into law by the head of the executive), but the personnel of government were to be kept strictly separate.

With the ratification of the US Constitution, the modern understanding of separation of powers, including the elements of division *and* interdependence between different branches of government, was established:

> The constitutional convention of 1787 is supposed to have created a government of 'separated powers'. It did nothing of the sort. Rather, it created a government of separated institutions sharing powers.[5]

With this development also came a giant conceptual leap for modern constitutionalism in general — the idea that, to keep not only the government but also the legislature in check, something higher than law is needed, something that

[1] See Hamilton, Madison & Jay *The Federalist No 48* (supra) at 254 ('The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.')

[2] Hamilton, Madison & Jay (supra) at 257 ('[A] mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.' In his writings, Madison pointed out several times that it was fully in line with Montequieu's theory to allow for some mutual interference between the different branches of government.)

[3] Thomas Jefferson *Notes on the State of Virginia* (1781) Query 13, 4.

[4] James Madison 'Records of the Debates in the Federal Convention of 1787' Notes of July 21, 1787.

[5] Richard E Neustadt *Presidential Power: The Politics of Leadership* (1966) Chapter 3: 'The Power to Persuade' 33.

determines the legitimacy of all public power. This was the idea of a Constitution as a fundamental law of special rank and status superior to the ordinary law. As stated in Article 16 of the Declaration of the Rights of Man and of the Citizen of 26 August 1789: 'A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.'

In the final stage of this process, the connection between the idea of constitutional supremacy and the doctrine of separation of powers led to the development of judicial review of Acts of Parliament in the US, according to the argument that the distinction between a Constitution and a law enacted by the delegated power of the legislature demanded that the judiciary should act as the final arbiter of whether the constitutional limits on the legislature had been observed.[1] Although judicial review was not originally set out in the US Constitution of 1787, and only later developed by the US Supreme Court, it is today part of the fabric of many constitutional states, such as the US, Germany, and South Africa.

(b) Constitutionalism, 'checks and balances' and the 'pure form' of separation of powers

The modern notion of separation of powers as a foundational concept in constitutional law is often said to be premised in organizational theory and therefore primarily concerned with the design of ideal structural and institutional arrangements. Fuelled, further, by the adoption of formal written constitutions encapsulating constitutional rules and arrangements as a modus vivendi, separation of powers is often depicted as a depoliticized, and purely formal, justificatory or descriptive theory of governance.[2]

It is in line with such formalist notions that a 'pure form' of separation of powers has evolved. The doctrine in its 'pure form' has been described as requiring the strictest adherence to the following three principles:

- the division of governmental power into the three branches: legislative, executive and judicial, with no control or interference by one on the other;
- the separation of functions; and
- the separation of personnel.[3]

[1] See Hamilton, Madison & Jay *The Federalist No 78* (supra) at 400 ('It is not . . . to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.')

[2] See Martin Loughlin 'Constitutional Law: The Third Order of the Political' in Nicholas Bamford & Peter Leyland (eds) *Public Law in a Multi-layered Constitution* (2003) 27–51, 46–49.

[3] See Vile (supra) at 14 ('A pure doctrine of separation of powers might be formulated in the following way. It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive and judicial. Each branch of government must be confined to its own function and not allowed to encroach upon the functions of other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch.') See also Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 19 (On an 'absolute' separation of powers.)

This pure form of separation of powers emphasizes *negative* limits on the powers of political actors in a society. The existence of several autonomous decision-making bodies with distinctive functions is considered a sufficient safeguard against the concentration and abuse of power. Simply by allocating different functions to different people, each of the branches will be a check on the others and no single group of people will be able to control the machinery of the state.[1] The 'pure form' of separation of powers could thus be said to represent a theoretical highpoint at which the doctrinal prescripts are achieved and governmental power is truly separated.

The problem with this negative or pure understanding of separation of powers, however, is that it does not provide for the situation when one of the branches of government (or the people who control it) nevertheless attempts to enlarge their power by encroaching upon the functions of another branch. How are they to be stopped? This inadequacy has led to the modification of the separation of powers doctrine in line with the idea of checks and balances, as described above. The introduction of checks and balances brought *positive* elements to the doctrine of separation of powers, such as the right of the executive to veto legislation, the power of the legislature to impeach the (head of the) executive, or the power of the judiciary to declare both acts of the legislature and the executive to be unconstitutional and void. As MJC Vile has put it, each branch was given the power to exercise a degree of direct control over the others by authorizing it to play a part, although only a limited one, in the exercise of the others' functions.[2]

At the same time, a system of totally separated powers may lead to a diffused and uncoordinated exercise of power. The doctrine needs 'to avoid diffusing power so completely that the government is unable to take timely measures in the public interest'.[3] Thus, a doctrine of separation of powers needs not only to cater for the case where one of the branches exercises its power improperly. It also has to take account of the fact that, in modern societies, government may need to be organized in a co-ordinated manner to provide for solutions to complex problems.

The aim of checks and balances, therefore, was and still is to create links between the different branches of government to make government in general and the doctrine of separation of powers in particular more efficient. It is important that this deviation from the pure form should be limited: the basic idea of a division of functions remains and is only modified by the fact that each of the branches may assert some specifically defined authority in the field of the others. For example, the executive may have a share in the legislative process through its

[1] See Vile (supra) at 14, 19.

[2] Ibid at 20.

[3] *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 60. For further endorsement of this proposition, see *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 24; *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC) at para 15.

right to veto legislation, but may not legislate itself.[1] Thus, while the introduction of mutual checks and balances inevitably brings with it some deviation from a complete *separation* of powers, it is in the overall interests of an effective balance between different centres of power. Separation of powers requires independence as much as it requires interdependence. To quote MJC Vile again:

> Without a high degree of independent power in the hands of each branch, they cannot be said to be interdependent, for this requires that neither shall be subordinate to the other. At the same time a degree of interdependence does not destroy the essential independence of the branches.[2]

For these reasons, it is generally well accepted that in practice there is no constitutional system that either aspires or claims to implement the 'pure form' of the separation of powers.[3] Instead, the importance of the 'pure form' of separation of powers can be said to be its utility as an analytical tool, in that by comparing constitutional arrangements as manifested in a particular constitution to the abstract principles embodied in the 'pure form', the existence of different models of separation of powers, ranging from the weak to the strong, becomes more evident.[4] Informed by an individual state's particular history and values, the division of power, functions and personnel, and provision for checks and balances, may differ significantly, despite the fact that the different states may all claim to have incorporated the same doctrine.[5]

Therefore, as MJC Vile has quite incisively noted, the incorporation of separation of powers in a particular constitutional system should not be seen as an end in itself.[6] Instead, the extent of the actual incorporation of the doctrine within a nation's constitutional system should rather be viewed as being reflective of that

[1] Note that in South Africa this right is limited by FC s 79 to questions of constitutionality.

[2] Vile (supra) at 104.

[3] See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 108 ('There is, however, no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government over another, there is no separation that is absolute.') See also EFJ Malherbe & IM Rautenbach *Constitutional Law* (4th Edition, 2004) 78–79; Marius Pieterse 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 *SAJHR* 386.

[4] See Ziyad Motala 'Towards an Appropriate Understanding of the Separation of Powers, and Accountability of the Executive and Public Service under the New South African Order' (1995) 112 *SALJ* 506–07. Motala notes that there are variations in constitutional models incorporating separation of powers with the US adhering to a model that requires a strict separation of personnel, whilst the model under the South African Interim Constitution (and Final Constitution) was a weaker version premised on a parliamentary system of government that does not envisage a strict separation of personnel, except where the judiciary is concerned.

[5] The prevalence of governmental power being divided up between the three primary branches of the government in national constitutions is that even countries that do not claim to subscribe to the doctrine of separation of powers divide their power up in the same way. See for example, Hogg *Canadian Constitutional Law* (3rd Edition, 1992) 184 (Points out that 'there is no general' separation of powers. The Act does not separate the legislative, executive and judicial functions and insist that each branch of government exercise only 'its own' function.) See also ibid at 243 -44.

[6] See Vile (supra) at 9–11.

nation's political choices and aspirations, whilst the 'pure form' of the doctrine merely serves as a useful analytical reference point informing the choice of appropriate constitutional principles, rules, processes and institutions.

(c) The different forms of separation of powers

The emphasis in the doctrine of separation of powers, both in its classical meaning and also in contemporary constitutional discourse, falls on the division of state functions between different institutions in one sphere of government. This distinction between 'branches' of government is based on Montesquieu's division of powers: that of making the laws, that of administrating and executing these laws, and that of judging crimes or disputes between individuals. But besides this 'horizontal' separation of powers between different actors in the same sphere of influence, contemporary political and constitutional theory involves several other restrictions on political power by way of separating and dividing different spheres of influence.

An obvious division in this regard is the 'vertical' separation of powers in a state between the local, provincial and national levels of government (or 'spheres of government' as it is put in FC s 40(1)).[1] The entire notion of a federal system of government is based on the separation of powers: the political power of the central government in its different branches is restricted in some areas, which are the domain of smaller territorial entities (the provinces or states).[2] In South Africa, these matters are defined as functional areas of exclusive provincial legislative competence, as set out in Schedule 5 of the Final Constitution.[3]

This division of power between different levels of government as a means to restrict the power of the centre was already present in the feudal societies of medieval Europe and in this way provided the 'bedrock' for constitutionalist ideas about how to limit royal power and the later separation of powers doctrine.[4] The idea that smaller territorial entities could form their own government and exercise their own powers independent of, and autonomous from, a national, central or federal government was also a prominent consideration in the constitutional development of the US.

[1] It has been pointed out that the Constitutional Assembly deliberately used the word 'sphere' instead of 'level' to emphasize co-ordination and different responsibilities, rather than competition and hierarchy. Stu Woolman, Theunis Roux & Barry Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) § 14.1.

[2] This is particularly true for the South African context as the creation of provinces was part of the historic power-sharing compromise between the old regime and the liberation movement. See Bertus de Villiers *The Future of Provinces in South Africa — The Debate Continues* Konrad-Adenauer Foundation Policy Paper No 2 (October 2007) Chapter 2.

[3] For more details, see Steven Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) § 17.3*(a)*.

[4] See Jan-Erik Lane *Constitutions and Political Theory* (1996) 21.

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments [ie state and federal], and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[1]

Again, the separation of powers by way of federalism is not an end in itself, but a way to protect 'justice and the general good'. The delegation of political influence to smaller entities also helps to keep decision-making in line with local and regional demands, to ensure spending of public funds in a particular region (and not only in some far away capital city), or to provide generally for some degree of self-determination for one (ethnic or cultural) group on their 'home turf'. At the same time, federalism does not only divide powers between local, provincial and central political actors, but also between the different provinces. In that way, federalism provides for a territorial separation of powers: institutions of one province cannot exercise power on another province's territory.

Of course, as checks and balances accompany the traditional horizontal notion of separation of powers between different branches of government and thus ensure that no branch trespasses onto the other's competence, and that government is not diffused completely, similar interdependencies are part and parcel of the vertical separation of powers between the national and the provincial sphere, too. First, the institutional system of provincial government mirrors that in the national sphere, since in the provinces, too, the legislature and the executive are separated and control each other.[2] In South Africa, this replication does not apply to the judiciary, as this country does not distinguish between provincial and national courts, and has no courts administered by the provinces. Secondly, the provinces participate in the national legislative process through their representation in the National Council of Provinces.[3]

Additionally, the constitutional institution of regular elections can be understood as a means to separate power on a time-line basis. Elections serve the goal of allocating power temporarily to a particular group of representatives. The time factor is crucial, because it guarantees the intended accountability of the elected representatives. As long ago as John Locke it was pointed out that a democratically elected Parliament may be as bad as an unelected monarch, if the legislature is 'in one lasting assembly always in being',[4] because such representatives will lose touch with the electorate over time and pursue only their own interests. Particularly since, between elections, voters have no control over the conduct of their

[1] Hamilton, Madison & Jay *The Federalist No 51* (supra) at 267.

[2] For more details, see Tshepo Madlingozi & Stu Woolman 'Provincial Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constituional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 19; and Christina Murray & Okeyrebea Ampofo-Anti 'Provincial Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constituional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 20.

[3] See Budlender (supra) at § 17.1*(b)*; Madlingozi & Woolman (supra) at § 19.8.

[4] John Locke *Two Treatises of Government* 2nd Treatise (1688), Chapter XI para 138.

representatives, the prospect that office-holders may not be re-elected and that they govern on borrowed time ensures that power is not misused.[1] Given this background, the Final Constitution is based on the founding value of regular elections (among other features of democracy) for the explicit purpose of ensuring 'accountability, responsiveness and openness' (FC s 1*(d)*). Regular elections from this vantage point prevent the accumulation of political power and a lack of responsiveness between the elected and the electorate, as envisaged by Locke.

The same argument, of course, is true for time limits in relation to the terms of office of political office-bearers, in particular, the executive. The fact that in South Africa no person may hold office as President for more than two terms (FC s 88(2)) is based on the idea that power accumulation through unlimited rule has to be avoided, not least because historical experience world-wide has shown that rulers who do not fear the possibility of electoral defeat tend to abuse their power.

More recent conceptions of separation of powers have emphasized that the formal notion that a completely independent legislature controls an equally independent executive is to a large extent illusory, and does not mirror real avenues of political influence.[2] In modern democracies, it is political parties which form governments on the basis of their majority in Parliament. The executive not only regularly comprises members of the legislature (e g FC s 91(3) explicitly requires the President to select the majority of Ministers from among the members of the National Assembly). Both the government and the underlying political party (or parties) have — at least in theory — the same political agenda. The political dividing line in a parliamentary system of government does not run primarily between government and Parliament, but rather between the government and the governing party in Parliament, on the one hand, and the opposition parties, on the other. Besides the constitutional separation of power between Parliament and the executive, there is a political separation of power between the governing party and the opposition. Although there are certainly members of the governing party in Parliament who take their oversight function seriously, controlling the political power of government is generally the task of the opposition party. Opposition parties may control the majority by way of public criticism and the constant promise they hold out, however hypothetical, of being voted into power.

Furthermore, because in modern democracies real political influence has shifted from the individual members of Parliament to their parties and, in fact,

[1] See *United Democratic Movement v President of the Republic of South Africa & Others (2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR (CC) at para 49.

[2] See Eberhard Schuett-Wetschky 'Gewaltenteilung zwischen Bundestag und Bundesregierung? Nach dem Scheitern des Gewaltenteilungskonzeptes des Parlamentarischen Rates: Gemeinwohl durch Parteien statt durch Staatsorgane?' in Klaus Dicke (ed) *Der Demokratische Verfassungsstaat in Deutschland* (2001) 67–117.

from constitutional organs to party committees, transparency in the decision-making processes of government has declined. This lack of transparency is partly remedied by the independent media, which ideally provides information for the general public so that officials can be held accountable and self-interested actions can be exposed. This check on government by way of exposure to public criticism, and the important political and social consequences associated with press coverage and the possibility of adverse public opinion, has led to the media being referred to as the 'fourth estate'.[1]

The purpose of pointing out the separation of powers dimension of these different institutions is to show that features and institutions based on the idea of separation of powers are found throughout the Final Constitution — although the phrase itself is not mentioned in the Constitution. In this fashion, other ways of dividing power may be added.[2] While not all of these ways are necessarily derived from the doctrine of separation of powers in the strict sense, they perform the common service of preventing the accumulation of too much power in one institution.

12.3 Separation of powers under the South African Constitution

Before 1994, South African constitutionalism was based on the Westminster system that centralized political power in an elected Parliament.[3] Parliament controlled the executive, but its decisions were not in turn subject to control by any other institution — hence, Parliament was sovereign and superior to the other branches of government.[4] Some aspects of the separation of powers principle were part of the South African legal tradition at this time and, as such, still influence contemporary understandings of this doctrine.[5] For example, members

[1] The term 'estate' here is derived from the French 'état', referring to a particular social class, such as the clergy, nobility and commons (basically ordinary citizens). The term 'fourth estate' for the press as a powerful social force is usually attributed to the eighteenth-century English theorist Edmund Burke. See Julianne Schutz *Reviving the Fourth Estate — Democracy, Accountability and the Media* (1998) 47–48.

[2] For example, the German political scientist Winfried Steffani has identified a 'constitutional level' of separation of powers, which requires that some decisions need a qualified higher majority in Parliament, a 'decisionmaking level' that takes the different stakeholders of civil society in the formulation of policy decisions into account, and a social separation of powers that recognizes unequal distribution of influence between different classes or strata in society. See Winfried Steffani *Gewaltenteilung und Parteien im Wandel* (1997).

[3] See Stu Woolman & Jonathan Swanepoel 'Constitutional History' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 2 (The chapter discusses in great detail the constitutional system of government premised on the doctrine of parliamentary supremacy that had its roots in the Westminster system of government which was the bedrock of South Africa's pre-1994 Constitutions. In terms of this system, Parliament could make whatever laws it wanted, whilst the courts' role was limited solely to interpreting the law (that is establishing the will of Parliament). Parliamentary supremacy, as a model of constitutionalism, provided a permissive environment that allowed for the establishment of the apartheid legal framework, and placed governmental laws and policies beyond the review jurisdiction of the courts.)

[4] For a historic account, see Hermann Robert Hahlo & Ellison Kahn *The Union of South Africa* (1960) 146–163 (Covering the period of the Union of South Africa); Marius Wiechers *Staatsreg* (2nd Edition, 1967) 249.

[5] See Gretchen Carpenter *Introduction to South African Constitutional Law* (1987) 158–59.

of the executive were also members of the legislature and thus responsible to it; and the judiciary was, in theory at least, guaranteed independence from both legislative and executive interference. Nevertheless, the distinction between the three branches of government was only formal, and never amounted to a real system of mutual checks and balances. It has therefore been said that the pre-1994 South African constitutional system was not, in fact, founded on the separation of powers.[1]

Furthermore, both in terms of formal constitutional law and in practice, legislative powers were increasingly transferred to the executive, mainly from 1976 onwards. The 1983 'tricameral' Constitution vested supreme power in the executive, with an exceptionally potent State President at the top, and did not contain any substantive power constraints.[2] By then, the traditional concept of parliamentary supremacy had been surpassed by the power of the executive to manipulate legislation.[3] For example, the President could categorize a matter as an 'own affair' of a particular population group and in so doing select the legislative mechanism to be applied in the enactment of statutory provisions dealing with this matter. Additionally, when the three houses of Parliament failed to reach consensus in respect of so-called 'general affairs', the President could activate a 'President's Council' as a substitute legislature.[4] Finally, all these institutions were reserved and limited to a tiny minority of the population and could thus never claim real democratic legitimacy.

In the *First Certification Judgment,* the Constitutional Court concluded:

> At the same time the Montesquieuan principle of a threefold separation of state power — often but an aspirational ideal — did not flourish in a South Africa which, under the banner of adherence to the Westminster system of government, actively promoted parliamentary supremacy and domination by the executive. Multi-party democracy had always been the preserve of the white minority but even there it had languished since 1948. The rallying call of apartheid proved irresistible for a white electorate embattled by the spectre of decolonisation in Africa to the north.[5]

(a) Separation of powers in the Interim Constitution and the Constitutional Principles

The end of Westminster-style constitutionalism and the subsequent transformation of South Africa from a racially divided society into a democratic, racially inclusive society brought with it a decisive break with the past and the arrival of a 'new order' based on the ideals of constitutional supremacy. The drafters of

[1] See Johan van der Vyver 'The Separation of Powers' (1993) 8 *SAPR/PL* 177, 185.
[2] Ibid (supra) at 188.
[3] Ibid (supra) at 189.
[4] See Carpenter (supra) at 363–71.
[5] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 6.

the Interim Constitution were faced with many challenges, of which one of the major ones was how power relations in the new South Africa would be mapped out and political power distributed.

There seems to have been consensus among the main players in the negotiations process that the new constitutional order should be based on the separation of powers doctrine.[1] For the pre-1994 South African government (and the National Party behind it), the insistence on separation of powers may have been one aspect of ensuring that the newly elected government established by the formerly disenfranchised did not use its new-found power to engage in regressive and retributive measures.[2]

Nevertheless, the text of the Interim Constitution does not mention the term 'separation of powers'. In the absence of clear textual support, it is the structure of the Constitution itself, and the interplay of the different organs of state, which aim to ensure that political power is not accumulated in one centre, but mitigated and checked by other institutions. The principle of separation of powers was, however, constitutionally entrenched in the Constitutional Principles, which served as a yardstick for the Constitutional Assembly in its drafting of the Final Constitution. Constitutional Principle VI provided as follows:

> There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

As was the case in the historical development of the doctrine, the drafters of the first democratic South African Constitution regarded the separation of powers not as a goal in itself, but as a means to democracy and good governance. To prevent a government pre-occupied with its own self-interest, detached from the people and inclined to non-transparent backroom politics, the Constitution would have to distribute political power between the different branches of government. Notably, Constitutional Principle VI was silent as to the model of separation of powers to be established by the Constitutional Assembly. The structural and institutional choices made by the drafters of the Final Constitution, pursuant to this principle, were subject only to the proviso that the scheme crafted had generally to ensure the promotion and attainment of democratic principles, namely accountability, responsiveness and openness.

The moment of truth came in the *First Certification Judgment*, in which the Constitutional Court assessed whether the drafters of the Final Constitution had complied with the Constitutional Principles.[3] In this decision, the Constitutional

[1] See, for example, Albie Sachs *Protecting Human Rights in a New South Africa* (1990) 191. Sachs was, at that time, a member of the ANC's NEC as well as its Constitutional Committee.

[2] According to Allistair Sparks one of the major challenges faced during the negotiations related to allaying fears harboured by many in the white section of the population that the democratic principle of majority rule would not result in black reprisals. *Tomorrow is a Another Country* (1994) 94. Therefore, according to Sparks: '[M]uch of the new (interim) constitution was devoted to reassuring the white minority that the tables would not be turned on them in a regime of vengeance'.

[3] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('*First Certification Judgment*').

Court made it clear that the silence of Constitutional Principle VI with regard to the specific model of separation of powers to be established by the Constitutional Assembly was not a problem, but allowed for a tailor-made solution:

> Within the broad requirement of separation of powers and appropriate checks and balances, the Constitutional Assembly was afforded a large degree of latitude in shaping the independence and interdependence of government branches. The model adopted reflects the historical circumstances of our constitutional development.[1]

The Court emphasized that there is no universal model of separation of powers and that in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government on another, there is no separation that is absolute.[2] It is notable that the text of the 1996 Constitution makes no express mention of separation of powers. In the *First Certification Judgment*, the Court did not appear to be in any way constrained by this apparent omission. Instead of looking for the phrase 'separation of powers', it considered whether both the basic structure of the (draft) Final Constitution and its detailed textual provisions were in accordance with the Constitutional Principles.

With regard to the overall thrust of the Constitution, the Constitutional Court remarked rather dryly that an examination of the draft text established that it satisfied the basic structure and premises of the new constitutional order as contemplated in the applicable Constitutional Principles.[3] It held that the principle of separation of powers was complied with through the constitutional provisions in Chapters 4 (Parliament), 5 (the President and National Executive) and 8 (Courts and Administration of Justice) and clauses 47, 89, 92, 165 and 177 of the draft Final Constitution.[4]

Relying on CP VI as its review standard, the Court went on to test the provisions of the draft Final Constitution. While separation of powers concerns were raised with regard to several provisions that regulate the distribution and interplay of governmental powers and functions, as well as the designation of functionaries, the Constitutional Court engaged most thoroughly with the principle in relation to the constitutional provisions which provide for members of the executive also to be members of the legislature in all three spheres of government.[5]

[1] *First Certification Judgment* (supra) at para 112.
[2] Ibid at para 108.
[3] Ibid at para 46.
[4] Ibid at para 46 note 44.
[5] Ibid at paras 106–113. See also the paragraphs in the *First Certification Judgment* where the Court dealt with challenges raised on the basis that CP VI had not been complied with. Ibid at para 54 (Dealing with the contention that the horizontal application of the Bill of Rights violates the separation of powers in that it allows the courts to alter legislation and thereby to encroach upon the proper terrain of the legislature); para 77 (Using the same argument against the introduction of socio-economic rights); paras 123–32 (Where it was alleged that the participation of the executive in the appointment of judges and acting judges was a breach of separation of powers); paras 185–86 (wherein it was alleged that the constitutional anti-defection clause breached separation of powers.)

In the end, the Constitutional Court declared that such a deviation from the principle that the persons who compose the three branches of government must be kept separate and distinct and that no individual should be allowed to be at the same time a member of more than one branch (as it is the case in the US) was in line with the separation of powers doctrine as envisaged in CP VI. The Court even found a connection between the dual membership provisions and the constitutional rationale of separation of powers: 'The overlap provides a singularly important check and balance on the exercise of executive power. It makes the executive more directly answerable to the elected legislature.'[1]

The Court held that the language of CP VI is sufficiently wide to cover the particular kind of separation that the Final Constitution provided for. In this regard, the Constitutional Court emphasized the purposive understanding of separation of powers, which had already been present during the drafting of the Constitutional Principles, i e to ensure accountability, responsiveness and openness: 'We find in the [draft final Constitution] checks and balances that evidence a concern for both the over-concentration of power and the requirement of an energetic and effective, yet answerable, executive.'[2]

This purpose has survived the period of the Interim Constitution and these principles are now enshrined in FC s 1*(d)*. Therefore, although the Constitutional Principles have lost their main function as a yardstick for the Final Constitution in light of the certification of the new constitutional text of 1996, these provisions still inform any analysis of the South African model of separation of powers.

(b) Separation of powers in the Final Constitution

As already indicated, the Final Constitution does not mention the principle of 'separation of powers' anywhere in the text. Hence, in the *First Certification Judgment*, the Constitutional Court pointed out that there is no fixed or rigid constitutional doctrine of separation of powers. Rather, the doctrine is to be found in the provisions outlining the functions and structure of various organs of state and their respective independence and interdependence.[3]

Because the doctrine of separation of powers has developed over several centuries and because it has been given expression in many different forms and made subject to checks and balances of many kinds, it is important to understand the appropriate relation between constitutional provisions and any theoretical conception of separation of powers. As indicated with regard to the 'pure form' of the doctrine above, the relation between different branches of government should not be tested against some abstract idea of separation of powers. Instead, any conception of separation of powers has to come from the constitutional text itself and be properly aligned with the particular constitutional system one is looking at.

[1] *First Certification Judgment* (supra) at para 111.
[2] Ibid at para 112.
[3] Ibid at paras 110–11.

Against that background, the Constitutional Court cited with approval the following remark by constitutional scholar Laurence Tribe in respect of the US Constitution:

> We must therefore seek an understanding of the Constitution's separation of powers not primarily in what the Framers thought, nor in what Enlightenment political philosophers wrote, but in what the Constitution itself says and does. What counts is not any abstract theory of separation of powers, but the actual separation of powers '*operationally defined* by the Constitution.' Therefore, where constitutional text is informative with respect to a separation of powers issue, it is important not to leap over that text in favour of abstract principles that one might wish to see embodied in our regime of separated powers, but that might not in fact have found their way into our Constitution's structure.[1]

Although the importance of starting in the text as highlighted above is self-evident, it is also important to note that this textual approach has inherent limitations in that it can never tell the entire story with regard to the operational distribution of power and functions; this story only becomes evident through the application and interpretation of the Constitution. And it is here that different conceptions of the doctrine have their significance, provided they are based on the text in the first place:

> At times, text will be sufficient, without necessarily developing an overarching vision of the structure, to decide major cases. . . . Sometimes, however, it will be necessary to extrapolate what amounts to a blueprint of organizational relationships from the fundamental structural postulates one sees as informing the Constitution as a whole.[2]

The exposition of the separation of powers doctrine in South Africa that follows therefore commences by briefly considering the text of the Final Constitution and how it conceptualizes the respective independence and interdependence of the different branches of government. In order to evaluate the extent to which the text accords with or deviates from the 'pure form' of the doctrine it is helpful to recall that the doctrine requires the separation of functions between the three branches of government, the separation of personnel (a person should not be part of more than one of the three branches of government), and generally that one branch of government should not control or interfere with the work of another.

(i) *The legislature and the executive*

In the co-operative government system applicable in South Africa, the Final Constitution divides legislative authority between the national, provincial and

[1] Laurence Tribe *American Constitutional Law* Vol 1 (3rd Edition, 2000) 127. This paragraph was cited with approval in *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC) at para 17 and *Van Rooyen & Others v State & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 34.

[2] Tribe (supra) at 130 (Cited with approval by the South African Constitutional Court in *S v Dodo* (supra) at para 17.)

local spheres of government. In the following exposition, however, the focus falls solely on the national legislative authority vested in Parliament.[1] The Final Constitution does not provide a description or definition of what legislative authority is, but from FC s 44(1) it can be gleaned that the exercise of legislative authority entails the power to make laws, to amend the Constitution, and to assign or delegate legislative powers to other legislative bodies in another sphere of government. Plenary legislative competence is conferred by the Final Constitution on Parliament, although there is an important substantive constraint on the exercise of legislative authority, in that Parliament must act in accordance with, and within the limits of the Final Constitution (FC s 44(4)) — marking a clear departure from the pre-1994 Westminster system of government. To be more precise, the function of legislating is exercised primarily by Parliament, which is comprised of members of the National Assembly[2] and delegates of the National Council of Provinces.[3] That the legislature is envisaged as an autonomous, deliberative and representative body with its own constitutional power base is evident in the fact that there are constitutional provisions that empower both legislative houses to regulate their own sitting periods[4] and processes,[5] and which confer parliamentary privilege on all members and delegates for all speeches made before the house or its committees.[6]

Executive authority, on the other hand, is vested by the Final Constitution in the President (FC s 85(1)), and is exercised by the President together with the other members of Cabinet (FC s 85(2)). According to the Final Constitution, the executive function is a broad one that entails responsibility for the development, preparation and implementation of national policy and legislation, and the co-ordination of the functions of state departments and the public administration (FC s 85(2)*(a)-(e)*). In recognition of the immense powers enjoyed by the executive relative to the other branches, the Final Constitution enjoins the President — and by necessary extension the entire Cabinet — to uphold, respect and defend the Constitution as the supreme law (FC s 83*(b)*).

[1] See FC s 43*(a)*. See also Victoria Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (eds) (2nd Edition, OS, March 2005) Chapter 15; Steven Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17.

[2] See FC ss 46, 47 for provisions relating to the composition, election and membership of the National Assembly.

[3] See FC ss 60, 61 for provisions relating to the composition and allocation of delegates to the National Council of Provinces.

[4] See FC s 51.

[5] See FC s 57 in respect of National Assembly and FC s 70 in respect of the National Council of Provinces.

[6] See FC s 58 in respect of the National Assembly and FC s 71 in respect of the National Council of Provinces. See also *Speaker of the National Assembly v De Lille* 1999 (4) SA 863 (SCA), 1999 (11) BCLR 1339 (SCA) at paras 28–30 (Held that FC s 58(1) protects the right to free speech in the Assembly, as it is a fundamental right crucial to representative government in a democratic society.)

Notwithstanding the institutional separation of Parliament and the national executive, the Final Constitution makes provision for the involvement of the executive in the legislative function by allowing members of Cabinet to initiate and introduce legislation in Parliament.[1] In addition to this, the President enjoys the power to summon Parliament to an extraordinary sitting to discuss special business.[2] Furthermore, the legislative process is incomplete without the assent of the President, who has to sign duly passed Bills into law, provided that he or she has no constitutional reservations (FC s 79(1)).

As far as the mixing of personnel is concerned, the majority of the national executive (including the President and the Deputy President) must at the same time be members of the National Assembly. The President, as head of the national executive, is elected from the National Assembly, but ceases to be a member of it from the date of his or her election (FC ss 86(1) and 87). The President enjoys the power to appoint and dismiss Cabinet; however, the President is constrained by the Final Constitution to selecting the Deputy President and all but two members of the Cabinet from the National Assembly (FC s 91(3)). In consequence of this arrangement, the majority of members of Cabinet are simultaneously members of Parliament in similar fashion to parliamentary systems of government. As we have seen, this feature was challenged during the certification process of the Final Constitution, but was justified as a means to ensure accountability of the executive to the legislature.[3] In this respect, therefore, the Final Constitution has adopted a hybrid system of government that combines the features of an executive presidential system (with the Cabinet chosen by the head of the executive and with its members accountable only to him or her) with a parliamentary-style Cabinet mostly drawn from the legislature.[4]

To what extent can Parliament control or interfere with the functions of the executive and vice versa? The Final Constitution clearly places the executive under the scrutiny of the legislature. It is the constitutional duty of the legislature, especially the National Assembly, to oversee the exercise of executive authority in the implementation of legislation and more generally to hold the executive accountable to it, as envisaged in FC s 55(2). Correspondingly, the Final Constitution provides that members of Cabinet are accountable individually and collectively to Parliament (FC s 92(2)), and must provide full and regular reports concerning matters under their control (FC s 92(2)*(b)*). On the other hand, the President and any member of the Cabinet or any Deputy Minister who is not a

[1] See FC ss 73(2), 85(2)*(d)*.

[2] FC s 42(5). See also FC ss 51(2) and 63(2) for similar provisions in respect of the National Assembly and the National Council of Provinces respectively.

[3] *First Certification Judgment* (supra) at paras 106–13. See also § 12.3*(a)* supra.

[4] See *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Other*s 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 55; EFJ Malherbe & IM Rautenbach *Constitutional Law* (4th Edition, 2004) 181; Jonathan Klaaren 'Structures of Government in the 1996 South African Constitution: Putting Democracy Back into Human Rights' (1997) 13 *SAJHR* 3, 9.

member of the National Assembly may, subject to the rules and orders of the Assembly, attend and speak in the Assembly, but may not vote (FC s 54). The Final Constitution seems to assume that the national executive's duty to explain and justify its conduct to Parliament will ensure that the executive will perform its functions both in accordance with the Constitution and the law and in line with the political convictions of the majority of the National Assembly. As some form of ultima ratio, the National Assembly may force the President and the other members of the Cabinet and any Deputy Ministers, or just the Cabinet, to resign by a vote of no confidence supported by a majority of its members (FC s 102). Finally, according to FC s 89, the National Assembly is empowered to institute proceedings to remove the President when he or she is found to have violated the Constitution or the law, or when the President is found to have engaged in serious misconduct, or when the President is found no longer to be able to perform the functions of his or her office.

This constitutional feature of legislative control of the executive does not mean that government does not enjoy influence over Parliament. In the complex regulatory environment that is modern government the scope of the functions and powers exercised by the executive are necessarily extensive, particularly if one considers the centrality of the executive in the formulation and execution of policy and legislation. Besides the fact that the Final Constitution allows members of Cabinet to initiate and introduce legislation in Parliament, the influence that the executive has in determining the content of legislation cannot be underestimated. The executive's apparent ascendancy in its relations with the legislature may be attributed to the specialized or technical nature of modern governance that requires ever-increasing regulation. The executive's access to specialized skills by virtue of its control of the bureaucracy has positioned it as the primary initiator, drafter and implementer of both policy and legislation.[1]

Of some concern is the relationship between the impeachment provisions of FC s 89 and FC s 47, which prescribe the conditions of membership of the National Assembly. It is clear from FC s 47(1)*(e)* that anyone who has been finally (i e without a further avenue of appeal) convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine cannot become a member of the National Assembly. The same applies to parliamentarians: once an MP has been convicted in this way, he or she ceases to be eligible and, therefore, automatically loses his or her membership of the National Assembly (FC s 47(3)*(a)*). Since the President has to be elected from among the members of the National Assembly, someone who intends to become President has to be a member of the National Assembly first — and thus must not have a criminal record of the kind contemplated.

[1] See Marius Pieterse 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 *SAJHR* 386, 387–89 for a well-articulated and critical account of the 'stranglehold' that the executive has assumed over the legislature.

This constitutional feature of legislative control of the executive does not mean that government does not enjoy influence over Parliament. In the complex regulatory environment that is modern government the scope of the functions and thus the standards for continuation in the formulation and execution of no confidence and the removal procedure are the only instruments that the Final Constitution provides to force an elected President out of office.

The Final Constitution is silent on whether court proceedings may be instituted or, once instituted, proceed against a person who has been elected President. In our view, such proceedings may be pursued, because the fact that someone does not automatically cease to be President once he or she has been finally convicted and sentenced to more than 12 months' imprisonment only affects the consequences of such a conviction. There is nothing in the Final Constitution that suggests that such a conviction cannot be handed down, or that all legal proceedings have to come to a standstill once a person has been elected President. Certainly, a pending trial requiring personal attendance may be an impediment to the performance of the President's official duties. However, although the judiciary must be sensitive to the status of the head of state,[1] the involvement of an accused in court proceedings is clearly in the interests of justice, and the practical obstacles that come with such involvement do not outweigh the requirement that the President appear in Parliament. Finally, according to FC s 89, the President may only be removed from office on the grounds of serious misconduct or a serious violation of the Constitution or the law (in addition to his or her inability to perform the functions of office). It is, however, the function of the courts to establish whether a serious violation of the Constitution or the law has been committed. Therefore, if the courts were not allowed to pass judgment in a case involving an incumbent President, MPs would be left to speculate whether the law or the Constitution had been violated, and the impeachment procedure would be without foundation in the rule of law.

On the other hand, a sentence of imprisonment could hardly be executed while the President remained in office. In the light of the wide array of presidential duties and functions outlined in FC s 84, any actual confinement would prevent a President from performing his or her duties and would therefore for all practical purposes remove him or her from office. Such a de facto removal from office might be construed as a violation of FC s 89, which requires a resolution adopted with a supporting vote of at least two thirds of the members of the National Assembly for a removal to take effect.

(ii) *The judiciary*

FC s 165 vests judicial authority in the courts, which are independent and 'subject only to the Constitution and the law'. This section also stipulates that the courts

[1] See *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC)('*SARFU III*') at para 243.

are enjoined to apply the Constitution and the law 'impartially and without fear, favour or prejudice'.[1] The importance of the functional and institutional independence of the courts finds expression in FC s 165(4), which provides that the other organs of state must take measures to 'assist and protect' the courts to ensure their 'independence, impartiality, dignity, accessibility and effectiveness'.

The Final Constitution establishes a hierarchy of courts.[2] Within this hierarchy the Constitutional Court is designated as the apex court in all constitutional matters, whilst the Supreme Court of Appeal is the apex court for all non-constitutional matters.[3] The supremacy of the courts in matters of constitutional interpretation makes the judiciary an immensely powerful branch. The judiciary's constitutionally ordained role as an independent and impartial arbiter with the power to review the constitutionality of all law and conduct makes it an important check on, and counterweight to, the other two branches.[4]

With regard to the executive, which is bound by the Constitution and the ordinary law (either in its statutory or common-law form), judicial review is a central aspect of the doctrine of legality, which in itself is part of the rule of law and a long established principle of South African law.[5] Today, the supremacy clause in FC s 2 binds the executive to the Constitution, subjects all Presidential action to the Constitution and leaves no room for prerogative powers outside the scope of judicial review.[6]

With regard to Acts of Parliament, judicial review is part of the change in South Africa from the pre-1994 Westminster system of parliamentary supremacy to a system of constitutional supremacy. Thus, FC s 172 provides for competent courts to declare that any law inconsistent with the Constitution is invalid to the extent of its inconsistency, with the Constitutional Court making the final

[1] See also the prescribed text of the oath or solemn affirmation of Judicial Officers in Schedule 2 of the Final Constitution.

[2] FC s 166*(a)-(e)* sets out the hierarchy of courts as follows: the Constitutional Court; the Supreme Court of Appeal; the High Courts; the magistrates' courts and any other courts established or recognized by an Act of Parliament. Subsequent sections of the Final Constitution set out the jurisdictional limits of the various courts.

[3] FC ss 167(3) and 168(3) respectively. For more details, see Sebastian Seedorf 'Jurisdiction' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 4.

[4] But note that FC s 170 precludes the magistrates' courts and other courts of a status lower than the High Court from reviewing the constitutionality of legislation or conduct of the President.

[5] See Ben Beinart *The Rule of Law* (1962) 99 and 102.

[6] See *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at paras 8, 12, 13 and 28. See also *Pharmaceutical Manufacturers Association of SA in re: the Ex Parte Application of the President of the RSA & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at paras 20, 33, 50 and *SARFU III* (supra) at para 148.

decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional (FC s 167(5)).[1]

The power conferred upon the courts in this regard is irrefutably substantial, but should nevertheless not be overstated as it is in the main limited to single determinations of the constitutionality of laws made by the legislature that the executive is require to enforce. Although the courts therefore have the power to interfere with the political process, they lack the capacity to act on their own initiative. A court's power as a political actor outside of an actual dispute is rather limited compared to the other two branches. Nevertheless, the potential for dysfunctional institutional relations, or for the sort of constitutional crisis that may result from too expansive a judicial role, has often been highlighted.[2]

In its relations with the other two branches of government, the judiciary enjoys independence (FC s 165(2) and (3)). Both institutional and operational independence are necessary incidents of the constitutional injunction that the courts must apply the law impartially. The Final Constitution makes provision for such independence by guaranteeing judges' security of tenure and by providing that salaries, allowances and benefits of judges may not be reduced (FC s 176).[3]

Furthermore, both for the appointment of judges and their removal from office, the independent Judicial Services Commission (JSC) is inserted between the executive and the judiciary, with the process for the removal of a judge from office being rather onerous.[4] Although the most potent check available to members of the legislature or the executive against the judiciary lies in their power to

[1] The immense powers enjoyed by judges in a constitutional system like South Africa's that establishes a system of constitutional review will always raise issues of counter-majoritarianism. The fact that a group of unelected judges has the power to thwart the democratic will of the majority has been the source of a great deal of controversy and will no doubt be an issue that will inform the perceived and actual role of the courts in the development of South Africa's constitutional jurisprudence. On counter-majoritarianism, see Alexander Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962); Dennis Davis, Matthew Chaskalson & Johan de Waal 'Democracy and Constitutionalism: The Role of Constitutional Interpretation' in Dawid van Wyk, John Dugard, Bertus De Villiers & Dennis Davis (eds) *Rights and Constitutionalism* (1994) 6–11; Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 9–10; and George Devenish *The South African Constitution* (2005) 18–20.

[2] See Iain Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 158 (Currie makes the point that, although the power to have the last word on the meaning of the Constitution is an 'awesome' one, it is one which must be construed in light of the fact that the courts are not the only interpreters of the Constitution, and that the legislature is equally entitled and empowered to interpret the Constitution. In interpreting the Constitution, the court should exercise its powers in accordance with the 'salutary rule' followed in the US that requires that a court 'should never anticipate a question of constitutional law in advance of the necessity to decide it'.) See also Patrick Lenta 'Judicial Restraint and Overreach' (2004) 20 *SAJHR* 544 (Lenta argues that the judiciary and the legislature can rightly be perceived as being in competition as far as the exercise of their 'discretionary' interpretive powers is concerned.)

[3] These guarantees are essential for the independence of any judicial officer and crucial for maintain the separation of powers. See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('*First Certification Judgment*') at para 128.

[4] See FC s 174 for the procedure for appointments of judicial officers and FC s 177 for the procedure in respect of the removal of judges.

initiate proceedings for the removal of judges via the Judicial Services Commission (JSC), this is only possible on the very limited grounds of incapacity, gross incompetence or gross misconduct. Where the JSC makes such a finding, the removal proceedings will come under consideration by the National Assembly, which may resolve by a two thirds vote of all its members to order that a judge be removed. Where such resolution is passed, the President must effect the removal of that judge. Therefore, the ability of the legislative and executive branches directly to influence the operation or composition of the courts is constitutionally limited, which is important if the overt politicization of the courts is to be avoided.

The Constitutional Court has placed the independence and impartiality of the judiciary at the centre of the South African constitutional system and linked it to the separation of powers principle.

> An essential part of the separation of powers is that there be an independent judiciary. . . . What is crucial to the separation of powers and the independence of the judiciary is that the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive.[1]

And on another occasion:

> The separation of the judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution, and is essential to the role of the courts under the Constitution. Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws thus made, but have no law-making power other than that vested in them by the legislatures. . . . Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent.[2]

Judicial independence manifests itself in the absence of external interference in the assessment of the facts of a case and the application of the law.[3] But institutional and functional independence (referred to in FC s 166(3) and in the *First Certification Judgment*) are equally important. These aspects of independence require judicial control over administrative decisions that bear directly and immediately

[1] *First Certification Judgment* (supra) at para 123.

[2] *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 25.

[3] See *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 70 (Constitutional Court quoted with approval the Canadian Supreme Court on judicial independence: '[T]he generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider — be it government, pressure group, individual or even another judge — should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. . . . The ability of individual judges to make decisions on concrete cases free from external interference or influence continues . . . to be an important and necessary component of the principle.' *Canada v Beauregard* (1986) 30 DLR (4th) 481, 491.)

on the exercise of the judicial function, i e the budget of the institution, the human resources available to the court, and the way it conducts its business.[1] This institutional independence of the judiciary was the concern of many observers, both from inside and outside the judiciary, when, in December 2005, the Department of Justice and Constitutional Development published the Constitution Fourteenth Amendment Bill for comment.[2] The Bill, among other things, proposed placing the administration of the courts in the hands of the executive and was perceived by many as an attack on the independence of the judiciary.[3] It was suggested by these commentators that the proposed changes, in terms of which the government would have exercised greater control over the functioning of the judiciary, were harmful, and would reverse the evolving process of judicial independence — a view to which we fully subscribe. As at the time of writing, however, the Bill had not been tabled in Parliament, and whether the government still intends to do so, and, if so, in what form, remains to be seen.

Judicial independence is measured by an objective standard based on whether a well-informed, thoughtful and reasonable person would perceive a court to be independent.[4] This perception has to be based on a balanced view of all the material information, with the objective observer being sensitive to South Africa's complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Final Constitution, its values and the distinction it makes between different levels of courts.[5]

[1] See *Valente v The Queen* (1985) 24 DLR (4th) 161, 171 ('It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government . . . The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.' This passage was quoted with approval in *De Lange v Smuts* (supra) at para 159.)

[2] GN 2023 in *GG* 28334 of 14 December 2005. The Constitution Fourteenth Amendment Bill was introduced in conjunction with a package of Bills, comprising the Superior Courts Bill (B52–2003), the Judicial Service Commission Amendment Bill, the South African National Justice Training College Draft Bill, and the Judicial Conduct Tribunal Bill.

[3] See Cathi Albertyn 'Current Developments — Judicial Independence and the Constitution Fourteenth Amendment Bill' (2006) 22 *SAJHR* 126 (Contains additional references). Cf Proceedings of the General Council of the Bar Human Rights Committee Conference on the Justice Bills, Judicial Independence and the Restructuring of the Courts, Johannesburg (17 February 2006).

[4] The test was originally developed with regard to judicial bias. See *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) (*SARFU II*) at para 48. It was later endorsed for independence. See *Van Rooyen & Others v the State & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC)('*Van Rooyen*') at paras 33–34.

[5] *Van Rooyen* (supra) at paras 33–34.

The fact that courts operate at different levels has a direct impact on judicial independence, because the Final Constitution allows the complexity of the court system to be taken into account:

> Judicial independence can be achieved in a variety of ways; the most rigorous and elaborate conditions of judicial independence need not be applied to all courts, and it is permissible for the essential conditions for independence to bear some relationship to the variety of courts that exist within the judicial system.[1]

The main point is that institutional independence is a constitutional principle and therefore that the constitutional protection of the core value of judicial independence is not subject to any limitations.[2] The specific ways in which judicial independence has manifested itself are discussed later in this chapter.

(iii) *Independent constitutional institutions*

A specific feature of the Final Constitution is the establishment of constitutional bodies, which enjoy independence from all the other branches of government. This first and foremost refers to the state institutions supporting constitutional democracy provided for in Chapter 9.[3] These institutions are protected against all the other branches of government in that no person or organ of state may interfere with their functioning (FC s 181(4)).

Other constitutional bodies outside Chapter 9 are also expressly independent:

- the Municipal Demarcation Board, established as an independent authority in terms of FC s 155(3)*(b)*;[4]

[1] *Van Rooyen* (supra) at paras 27–28.

[2] Ibid at paras 22, 35.

[3] These institutions are extensively covered elsewhere in this work: See Michael Bishop & Stu Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24A; Stu Woolman & Yolandi Schutte 'Auditor General' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chaper 24B; Jonathan Klaaren 'South African Human Rights Commission' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 24C; Catherine Albertyn 'Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 24D; Justine White 'Independent Communications Authority of South Africa' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24E; Stu Woolman & Julie Soweto Aullo 'Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24F; and Glenda Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2005) Chapter 29.

[4] The Constitutional Court has held that the independence of the Board is crucial to South African constitutional democracy and that it should be able to perform its functions without being constrained in any way by the national or provincial governments. See *Executive Council Province of the Western Cape v Minister for Provincial Affairs; Executive Council KwaZulu-Natal v President of the Republic of South Africa* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at para 55; *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC)('*Matatiele I*') at para 41.

- the Public Service Commission, the independence of which is provided for in FC s 196(2);
- the Independent Complaints Directorate of the South African Police Service, established in terms of FC s 206(6);
- the Financial and Fiscal Commission, the independence of which is provided for in FC s 220(2); and
- the Central Bank (South African Reserve Bank), which must perform its functions independently according to FC s 224(2).

Additionally, the Final Constitution provides for institutions that have to exercise their mandate with a degree of impartiality, although the word 'independence' is not expressly used: the Judicial Service Commission (FC s 178),[1] and the National Prosecuting Authority (FC s 179).[2]

These institutions enjoy a somewhat hybrid status. All of them are asked to perform their duties with a degree of independence, which places them outside the usual administrative structures of government. They also all have important supervisory and watchdog functions. In performing these functions, they sometimes assist the executive in its decision-making (e g the Financial and Fiscal Commission), complement and support Parliament in its oversight function (eg the Human Rights Commission), or enhance the judiciary by ensuring professional and ethical standards in the appointment and promotion of judges (the Judicial Service Commission). The Final Constitution or the relevant legislation guarantees the key personnel in these institutions some sort of tenure security and limits the grounds for their removal. Of course, the degree of independence or impartiality of these institutions varies, but the common thread running through their governing provisions is that government may not interfere with their decisions and affairs.

The Final Constitution guarantees the independence and impartiality of the Independent Electoral Commission (IEC), the Public Protector, the Auditor-General and possibly also the Human Rights Commission to such a high degree that it mirrors the independence of the judiciary. In our view, therefore, it makes sense to regard these institutions as falling outside the traditional *trias politica*, the three-fold division of power in the classical understanding of separation of powers. Their specific constitutional status puts them beyond the legislature, executive and judiciary and creates a further dimension to the separation of powers in South Africa. This point has been most clearly emphasized with regard to the IEC:

[1] But the Constitutional Court has held that the JSC is 'an independent body'. *First Certification Judgment* (supra) at para 128.

[2] See *First Certification Judgment* (supra) at para 146 ('Section 179(4) provides that the national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. There is accordingly a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts.')

> Our Constitution has created institutions like the Commission that perform their functions in terms of national legislation but are not subject to national executive control. The very reason the Constitution created the Commission — and the other chapter 9 bodies — was so that they should be and manifestly be seen to be outside government.[1]

As regards the Public Protector and the Auditor-General, the Constitutional Court remarked that these institutions perform sensitive functions that require their independence and impartiality to be beyond question, and are protected by stringent provisions in the Final Constitution.[2] In reference to the Judicial Service Commission, the Constitutional Court used the language of separation of powers and held that the Commission provides 'a check and balance to the power of the executive' to make judicial appointments.[3] Of course, the IEC and the other institutions perform a public function that may even be described as governmental. But, according to the Constitutional Court, there is a distinction between the state and government, and the independence of the Chapter 9 institutions is intended to refer to independence from the government.[4] In short, they are part of governance, but not part of government.[5]

Not all of the constitutional bodies and institutions mentioned above can be considered to be part of a 'fourth branch of government'. In fact, the majority of them were established to assist the executive in the application and execution of the law. For example, the National Prosecuting Authority has the power to institute criminal proceedings on behalf of the state and is more associated with the executive branch than the judicial branch of government, with the Minister of Justice and Constitutional Development exercising final responsibility over it in terms of FC s 179(6).[6] In addition, the Constitutional Court has held that the functions of the Public Service Commission are materially different to those of the Public Protector and the Auditor-General.[7] The separation of powers principle, however, does not necessarily require independent bodies to form an additional branch of government (although with regard to the IEC we do think that such a classification is warranted). Rather, the separation of powers principle in South Africa guarantees their independence, requiring all other branches of government, in particular the executive, to respect these institutions' domain of influence and not to interfere with their decisions. Both institutional and functional independence are crucial for these institutions to perform their constitutional mandate appropriately and to perform their role in good governance.

[1] *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC)('*IEC v Langeberg Municipality*') at para 31.

[2] *Ex Parte Chairperson of the National Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at para 142 ('*Second Certification Judgment*').

[3] *First Certification Judgment* (supra) at para 124.

[4] See *IEC v Langeberg Municipality* (supra) at para 27.

[5] Parliament of the Republic of South Africa *Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions. A Report to the National Assembly of the Parliament of South Africa* (2007) 10.

[6] See *First Certification Judgment* (supra) at para 141.

[7] *Second Certification Judgment* (supra) at para 142.

Against this background, the Constitutional Court has held that the IEC must enjoy financial independence, administrative independence (especially relating to the institution's control over administrative decisions that bear directly and immediately on the exercise of its constitutional mandate) and independence with regard to appointments procedures and the security of tenure of appointed office-bearers.[1] Even the National Prosecuting Authority enjoys independence from the government in so far as the prosecution of individual cases is concerned.[2]

Of course, none of the institutions mentioned above exists in a constitutional vacuum. Their powers are checked and balanced against those of the other three branches: the heads of these institutions are usually elected by the National Assembly; in some cases members of the commissions are also appointed by the executive. Chapter 9 institutions are also accountable to the legislature. Finally, their conduct can be challenged in the courts. But their constitutional mandate must not be impaired by any other branch. This is not only true for the executive, but also for the legislature. This was the essence of a Constitutional Court decision in which it held that Parliament could not make a law allowing the executive the discretion to reject a municipal boundary determined by the Municipal Demarcation Board.[3] In another case, *Matatiele I*, the Court was asked whether Parliament could 'usurp' the Board by passing a constitutional amendment, effectively overriding the Board's decision. The Court did not answer this question in general terms (in theory, any of these institutions could be abolished by constitutional amendment), but held that, if Parliament could base its conduct on another constitutional power (in *Matatiele I*, its power to redefine *provincial* boundaries), such exercise of power could legitimately curtail the powers of independent bodies in so far as this was reasonably necessary.[4]

[1] See *New National Party v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at paras 98–99.

[2] It is necessary to draw a distinction between the setting of prosecutorial policy and exercise of prosecutorial discretion in individual cases. According to FC s 179(5)*(a)* and s 21 National Prosecuting Authority Act 32 of 1998, the National Director of Public Prosecutions must formulate prosecutorial policy with the concurrence of the Minister of Justice. In the in setting of such policy the approval of the Minister of Justice is needed and the National Director does not enjoy independence. The same applies to various duties on the National Director to provide information and submit reports to the Minister. On the other hand, although the National Director of Public Prosecutions must observe prosecutorial policy during the prosecution process and exercise his powers and perform his functions in respect of this policy, this does not affect the exercise of prosecutorial discretion. Neither the Constitution nor the Act grants any power to the Minister regarding the exercise of prosecutorial discretion in individual cases. As such, individual decisions regarding whether or not to prosecute in a particular case are not within the purview of the Minister's 'final responsibility', but rest in the exclusive independent discretion of the prosecuting authority, and ultimately the National Director. See Hannah Woolaver & Michael Bishop 'Submission to the Enquiry into the National Director of Public Prosecutions by the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC)' (2008) 21:2 *Advocate* 30.

[3] See *Executive Council Province of the Western Cape v Minister for Provincial Affairs; Executive Council KwaZulu-Natal v President of the Republic of South Africa* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at para 68.

[4] *Matatiele I* (supra) at paras 48–51.

(c) Beyond the text: separation of powers as a living doctrine

The text of the Final Constitution, as shown above, provides for the establishment of three co-equal branches of government with differing but complementary roles in the South African constitutional system. It is apparent from the text that all three branches are competent interpreters of the Constitution,[1] albeit each within its constitutionally prescribed domain.[2] Unlike the case in other jurisdictions, the inclusion of a justiciable bill of rights and express powers of judicial review has made it unnecessary to consider which branch has the power finally to decide the meaning of the Constitution.[3] The Constitutional Court is quite clearly the final and authoritative interpreter of the Constitution, enjoying the last word on all constitutional matters.[4]

This institutional function of the Constitutional Court covers every aspect of the Final Constitution, including the constitutional powers of the three branches of government and their relationship inter se. This creates a paradox in that the Constitutional Court is authorized to regulate itself. In particular, in the field of separation of powers, the Court can and does determine its own constitutional mandate.

The Constitutional Court has addressed this paradox in two ways. On the one hand, it has employed a flexible approach to separation of powers issues on the understanding that the Final Constitution provides for a unique and distinctive model of separation of powers. On the other hand, it has ensured its exceptional position in the constitutional structure by asserting that separation of powers issues (involving the judiciary or not) are not any less subject to constitutional scrutiny than any other provision of the Constitution.

[1] See Lourens du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) § 32.2 (Supremacy clause demands that all those who are obligated by and somehow benefit from the Final Constitution — and not only (or even primarily) courts of law (with the Constitutional Court at the helm) — are authorized readers and therefore interpreters of the Final Constitution.)

[2] Although employing a different phraseology with respect to the three branches of government, it is quite evident that the Constitution requires all three branches to exercise their powers and fulfil their duties in a constitutional manner. See, for example, FC s 44(4) with respect to Parliament, FC s 83*(b)* with respect to the President (and by necessary extension Cabinet as a whole), and FC s 165(2) with respect to the judiciary. This requirement may be understood to mean that in fulfilling their functions each branch must have regard to what the Constitution permits and demands even though the interpretation of the details may vary. See also FC s 41(1)*(d)*, which provides that '[a]ll spheres of government and all organs of state within each sphere must be loyal to the Constitution, the Republic and its people.'

[3] For example, in the US Constitution, there is no provision that explicitly provides for judicial review. It was only as a result of the seminal decision of Chief Justice Marshall in *Marbury v Madison* 5 US (Cranch) 137 (1803) that the federal courts assumed the power to engage in judicial review for constitutionality of legislation. See generally Heinz Klug 'Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review' (1997) 13 *SAJHR* 185.

[4] FC s 167(3)*(a)* states that the Constitutional Court is the highest court in all constitutional matters, while FC s 167(3)*(c)* confers upon the Constitutional Court the final say in determining whether a matter is a constitutional matter or not. See Sebastian Seedorf 'Jurisdiction' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) § 4.3.*(f)*.

(i) *A distinctively South African model of separation of powers*

When the membership of Parliament by Cabinet Ministers was challenged during the certification of the Final Constitution, the objectors based their criticism on the fact that such dual membership was in violation of the separation of powers principle as practised in other countries around the world. As indicated above, the Constitutional Court found the possibility that members of the executive could at the same time be members of Parliament constitutionally justified.[1] In so doing, the Constitutional Court rejected the objectors' argument that the manner in which the separation of powers principle is instantiated in other parts of the world is decisive for the understanding of this principle in South Africa. Instead, the Court coined the idea of a specifically South African model of separation of powers:

> Within the broad requirement of separation of powers and appropriate checks and balances, the [Constitutional Assembly] was afforded a large degree of latitude in shaping the independence and interdependence of government branches. The model adopted reflects the historical circumstances of our constitutional development. We find in the [Constitution] checks and balances that evidence a concern for both the over-concentration of power and the requirement of an energetic and effective, yet answerable, executive. A strict separation of powers has not always been maintained; but there is nothing to suggest that the [Constitutional Principles] imposed upon the [Constitutional Assembly] an obligation to adopt a particular form of strict separation, such as that found in the United States of America, France or the Netherlands.[2]

The Court emphasized that there is no universal model of separation of powers and that the relationship between the different branches of government, and the power or influence that one branch of government has over the other, differ from one country to another.[3] In fact, the Court found that 'separation of powers' is an umbrella concept, open to all sorts of content:

> [T]he separation of powers doctrine is not a fixed or rigid constitutional doctrine, it is given expression in many different forms and made subject to checks and balances of many kinds.[4]

In its 1998 decision in *De Lange v Smuts NO & Others*, the Court referred to its earlier holding in the *First Certification Judgment* and further developed the framework for interpreting separation of powers under the Final Constitution:

> [O]ver time our Courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating

[1] See § 12.3.*(b)(i)* supra.
[2] *First Certification Judgment* (supra) at para 112.
[3] Ibid at para 108.
[4] Ibid at para 111.

> powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest. . . . This is a complex matter which will be developed more fully as cases involving separation of powers issues are decided.[1]

The notion of a 'distinctively South African model of separation of powers' introduced by Ackermann J in this passage has had an enduring influence on the way the separation of powers doctrine is understood.[2] Save for highlighting the point that the model must be grounded in South Africa's particular circumstances and needs, the notion of a 'distinctively South African model of separation of powers' is conceptually empty. Its importance, however, lies in its recognition of the fact that where separation of powers is concerned there are no immutable principles, predetermined answers or international precedents that *must* be followed by South African courts. Instead, the model is one that must develop over time based on interpretations of the Final Constitution as it operates in the South African politico-legal context.

This patriotic approach notwithstanding, the Constitutional Court has, in several judgments, made reference to aspects of the separation of powers doctrine in other constitutions. Any emphasis on the particular South African model of separation of powers, therefore, does not mean that the Court disregards foreign models. Rather, the Court uses the distinctiveness of the South African model to deviate from a review standard applicable in other countries where necessary. As foreign concepts are not to be slavishly followed, the Constitutional Court can deploy them according to its own institutional needs. This 'pick-and-choose' approach is particularly useful in separation of powers matters, because such matters often touch on the delicate balance between the different branches of government and thus on issues of extreme political sensitivity.

(ii) *Justiciability of the separation of powers principle*

There is no express reference to 'separation of powers' in the Final Constitution. Nevertheless, in a large number of cases litigants have relied upon this principle, either expressly or implicitly, to formulate their complaints. This has raised the question of what the exact basis for invoking the separation of powers doctrine as a justiciable principle is. In the *First Certification Judgment*, it was enough for the Constitutional Court to point out that the principle was implicit in the text since no one had suggested that there had not been an adequate separation of the judicial power from the legislative and executive power, or that there had not been an adequate separation of the respective functions of the legislature, the executive and the judiciary.[3]

[1] *De Lange v Smuts* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at paras 60–61.

[2] See *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 24; *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC) at para 15.

[3] See *First Certification Judgment* (supra) at paras 107 and 113.

In *Heath*,[1] however, the question arose whether a principle not expressly mentioned in the Final Constitution could be relied upon in constitutional proceedings. The High Court had answered this question in the negative, holding that a legislative provision cannot be set aside on grounds that it is inconsistent with what, at best, is no more than a 'tacit' principle of the Constitution.[2] The Constitutional Court rejected this restrictive approach, first by recognizing separation of powers as an *implicit* or *implied* provision of the Final Constitution,[3] as it had done before with other principles not expressly mentioned,[4] and then by stating that such implicit provisions are no less justiciable than express provisions:

> I cannot accept that an implicit provision of the Constitution has any less force than an express provision. . . . The Constitutions of the United States and Australia, like ours, make provision for the separation of powers by vesting the legislative authority in the Legislature, the executive authority in the Executive, and the judicial authority in the Courts. The doctrine of separation of powers as applied in the United States is based on inferences drawn from the structure and provisions of the Constitution, rather than on an express entrenchment of the principle. In this respect, our Constitution is no different. . . . There can be no doubt that our Constitution provides for such a separation and that laws inconsistent with what the Constitution requires in that regard are invalid.[5]

The effect of this dictum seems clear: separation of powers may be relied upon directly by litigants in proceedings before the courts. Like any express right or principle in the Final Constitution, the principle of separation of powers is justiciable.

Besides this unequivocal proposition, however, there is a second, more subtle, consequence that follows from the Court's holding. It is that, as in other jurisdictions, separation of powers is apparent from the detailed provisions of the Final Constitution setting out the respective powers of the legislature, the executive and

[1] *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC)('*Heath*').

[2] *South African Association of Personal Injury Lawyers v Heath & Others* 2000 (10) BCLR 1131, 1160A (T)(Coetzee AJ).

[3] *Heath* (supra) at para 19 (The Court preferred to use the words 'implicit' or 'implied' to refer to unexpressed constitutional terms rather than 'tacit' because the law of contract draws a distinction between tacit and implied terms and the making of such a distinction in the context of the Constitution may be understood as an endorsement of the doctrine of original intent, which the Court wanted to avoid.)

[4] For the principle of legality, see *Fedsure Life Assurance & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 58.

[5] *Heath* (supra) at paras 20–22 (footnotes omitted). The Court referred to several other decisions in which it had invoked the separation of powers principle. See, eg, *First Certification Judgment* (supra); *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Other*s 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC); *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC); *Pharmaceutical Manufacturers Association of SA & Another: In re Ex parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC); and *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC).

the judiciary (as well as, one might add, the powers of local government, the provinces and other institutions under the Final Constitution, like the institutions supporting constitutional democracy). These provisions, when read and interpreted cumulatively, constitute the distinctively South African model of separation of powers:

> The constitutional principle of separation of powers . . . is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers.[1]

Since the Final Constitution is supreme law and any law or conduct inconsistent with it is unconstitutional, any of the specific provisions may obviously be relied upon in a constitutional challenge. For example, a litigant may rely on the provisions pertaining to the independence of the judiciary, such as FC s 165. Or a litigant may bring a challenge based on the alleged violation of the exclusive power vested in provincial legislatures under FC s 104 read with Schedule 5 of the Final Constitution. These are all separation of powers challenges, although their true nature lies in the underlying provisions of the Final Constitution on which they are based. These underlying provisions are express provisions. To refer to separation of powers as an 'implicit provision', therefore, is slightly misleading, since it tends to ignore the fact that separation of powers challenges may in many cases be based on express provisions.

On the other hand, the notion of a self-standing separation of powers principle derived from these provisions allows the Constitutional Court (and of course litigants) to develop constitutional standards and rules that may not be traced back to any particular provision, but rather follow from the interplay between the different branches of government, and their respective powers and functions. The principle of separation of powers is not only a technical term for the sum of all the express provisions dealing with the powers and functions of the different branches of government. It is also the source of abstract rules and principles which re-shape these powers and functions and the way in which they may be used as checks and balances. Thus, the whole principle of separation of powers is more than the sum of its parts, i e the express provisions. In recognizing separation of powers as a justiciable principle, it is not necessary for the Court to determine a specific basis for a rule derived from this principle beyond what is expressed in the language of the Constitution. This is the core feature of the relationship between textual provisions and overarching principles, as formulated by Laurence Tribe and endorsed by the Constitutional Court:

> At times, text will be sufficient, without necessarily developing an overarching vision of the structure, to decide major cases. . . . Sometimes, however, it will be necessary to extrapolate what amounts to a blueprint of organizational relationships from the fundamental structural postulates one sees as informing the Constitution as a whole.[2]

[1] *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 37.

[2] Laurence Tribe *American Constitutional Law* Vol 1 (3rd Edition, 2000) 130.

The remainder of this chapter sets out the general principles and doctrines applicable to these organizational relationships, as derived from the principle of separation of powers, which, in turn, is derived from the text of the Final Constitution as a whole.

(d) Emerging general principles and doctrines of separation of powers

(i) *Legislature, executive and judiciary between pre-eminent domains and checks and balances*

As indicated in our explanation of how the Final Constitution conceptualizes the separation of powers, both in its express provisions and in the overarching structure of inter-branch relations, there is no 'absolute separation of powers'. The Constitutional Court, too, has rejected any attempt to read the Final Constitution as embodying the 'pure form' of separation of powers. Instead, the powers, functions and institutions of the legislature, executive and judiciary are interrelated. This principle notwithstanding, the way separation of powers issues have been addressed by the Constitutional Court shows that, in South African constitutional law, understanding the nature of each branch's separate (or pre-eminent) domain is as important for the theoretical and practical elaboration of the separation of powers principle as the acknowledgement of mutual checks and balances.

In fact, the Constitutional Court has recognized that the separation of powers principle guarantees the unobstructed exercise of powers and functions and the integrity of each particular branch of government in a way similar to the way in which individuals enjoy rights in the Bill of Rights. In this sense, the principle of pre-eminent domain protects the core functions and powers of each branch of government against intrusions from outside, while other intrusions are treated as checks and balances. Where a particular arrangement between the legislature, executive or judiciary is challenged on the basis of an alleged breach of separation of powers, the inquiry is therefore two-fold: first, the court must establish whether the power at issue falls into the core area of the branch's pre-eminent domain and, secondly, if not, whether the power may be subject to limitations aimed at tempering its exercise and constraining its abuse.

(aa) A pre-eminent domain for each branch of government

The rejection of a strict separation between the three branches of government has, however, not prevented the Constitutional Court from acknowledging that within the separation of powers each branch has a specific mandate. The principle of pre-eminent domain signifies that there are certain functions and powers that fall squarely within the domain of one or the other branch of government. Within this domain, interference or involvement by another branch cannot be justified as 'checks and balances', but must instead be treated as unconstitutional intrusions.

The principle of pre-eminent domain, in other words, emphasizes the separation of functions and limits the attribution of certain powers to the 'wrong' institution. In *Minister of Health & Others v Treatment Action Campaign & Others (2)*, the Court clearly made this point when it stated:

> [A]lthough there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation.[1]

Apparently, although several powers and functions may fall into the grey area between the different branches, and are at times hard to discern ('no bright lines'), there are others which are clearly attributable to one particular branch, so that no ambiguity arises. This leads to the obvious question of what these matters that can be so unequivocally attributed to one particular branch of government are. In *Ferreira v Levin NO*, one of its earliest judgments, the Constitutional Court indicated how it perceived the general distribution of responsibilities between the three branches:

> Whether or not there should be regulation and redistribution is essentially a political question which falls within the domain of the legislature and not the court. It is not for the courts to approve or disapprove of such policies. What the courts must ensure is that the implementation of any political decision to undertake such policies conforms with the Constitution. . . . The protection of fundamental freedoms is pre-eminently a function of the court.[2]

Although the Constitutional Court has never defined the boundaries of these domains in abstract terms, this statement shows that a 'pre-eminent domain' is a core area of exclusive competence defined from a functional point of view. When dealing with the 'domain', 'heartland', 'exclusive competence' or 'central mission' of the executive, legislature or judiciary, the Court looks at the distinctive function of that particular branch of government in its relation to the other branches.

These core areas of each branch of government are well established in other jurisdictions — and they are usually invoked as a limitation on any intrusion by another branch, in effect a limitation on checks and balances. In Germany, for example, the Bundesverfassungsgericht has held that the separation of powers principle demands that the executive has room for manoeuvre and that there be a separate domain for each branch of government:

[1] 2002 (5) SA 721 (CC), 2002 (10) BCLR 1075 (CC) at para 98 (emphasis added). See also *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 199 and fn 41 (For cases cited in support of proposition.)

[2] *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at paras 180, 183.

> The Basic Law does not require separation of powers in a pure form, but mutual checks, balances and moderation between the different branches of government. Nevertheless, the distribution of power and influence between the three branches as it is set up in the Constitution must be respected. No branch may develop a predominance over another branch that is not warranted by the Constitution. No branch may be deprived of the competences it needs to fulfil its constitutional tasks and mandate. The core-area of each of the three branches is invariable.[1]

This idea of a core area has been used by the German Federal Constitutional Court to counter demands by Parliament with regard to the publication of certain government files in a parliamentary commission of inquiry,[2] or to make certain politically contested decisions itself, in particular with respect to foreign policy,[3] but with the notable exception of military operations in foreign countries.[4]

The South African Constitutional Court has picked up on this understanding of pre-eminent domains defined by function. A case that illustrates the point is *Doctors for Life*, where the Court made the almost trite finding that the parliamentary process falls within the exclusive domain of Parliament, and emphasized the importance of its protection:

> Parliament has a very special role to play in our constitutional democracy — it is the principal legislative organ of the State. With due regard to that role, it must be free to carry out its functions without interference. To this extent, it has the power to 'determine and control its internal arrangements, proceedings and procedures'. The business of Parliament might well be stalled while the question of what relief should be granted is argued out in the courts. Indeed the parliamentary process would be paralysed if Parliament were to spend its time defending its legislative process in the courts. This would undermine one of the essential features of our democracy: the separation of powers. The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings.[5]

At first glance, the fact that the determination of parliamentary procedure is the prerogative of Parliament seems to be so self-evident that it needs no further explanation. The underlying purpose of this passage, however, is to point out that

[1] *BVerfGE* 95, 1 (*'Südumfahrung Stendal'* ['*Stendal Southern Beltway*']) 15 ('Das Grundgesetz fordert nicht eine absolute Trennung, sondern die gegenseitige Kontrolle, Hemmung und Mäßigung der Gewalten. Allerdings muß die in der Verfassung vorgenommene Verteilung der Gewichte zwischen den drei Gewalten gewahrt bleiben. Keine Gewalt darf ein von der Verfassung nicht vorgesehenes Übergewicht über eine andere Gewalt erhalten. Keine Gewalt darf der für die Erfüllung ihrer verfassungsmäßigen Aufgaben erforderlichen Zuständigkeiten beraubt werden. Der Kernbereich der verschiedenen Gewalten ist unveränderbar.' (references ommitted).)

[2] See *BVerfGE* 67, 100 ('*Flick-Untersuchungsausschuss*' ['*Flick-Parliamentary Commission of Inquiry*']).

[3] See *BVerfGE* 68, 1 ('*NATO-Doppelbeschluss/Atomwaffenstationierung*' ['*NATO-Double Track Decision / Deployment of Nuclear Arms*']).

[4] See *BVerfGE* 90, 286 ('*Auslandseinsätze der Bundeswehr*' ['*Military Out of Area Operations*']).

[5] *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC)('*Doctors for Life*') at paras 36, 37.

Parliament's control over its own procedure must be protected to enable Parliament to fulfil its major function: to make policy decisions and enact general rules.[1]

This idea is further illustrated in *De Lange v Smuts NO & Others*.[2] This case concerned the constitutional validity of a provision in the Insolvency Act, which authorized a person presiding over a creditors' meeting to imprison a recalcitrant witness. After holding that coercive imprisonment as such may be constitutionally justified, the majority of the Constitutional Court found that the separation of powers demanded that an order for such imprisonment should only be imposed by a judicial officer. Because the power to commit an uncooperative witness to prison lies 'within the very heartland of the judicial power', it cannot be exercised by non-judicial officers.[3] After some reference to foreign jurisdictions, Ackermann J laid out the rationale behind this pre-eminently judicial function:

> Judicial officers enjoy complete independence from the prosecutorial arm of the state, and are therefore well-placed to curb possible abuse of prosecutorial power. However, were executive branch officials to be invested with the power to compel, upon pain of imprisonment, cooperation with their investigative demands, this necessary check on the prosecutorial power would vanish, because it would allow the executive to pass judgment on the lawfulness of its own prosecutorial decisions.[4]

This statement shows that the ambit of pre-eminent domain is defined by the function of the branch of government concerned. The power to commit someone to prison is such a threat to personal liberty that it needs to be exercised by someone institutionally and personally independent from government influence. This power forms part of the pre-eminent domain of the judiciary because the protection of fundamental freedoms is one of the core functions of the judiciary.

The companion case to *De Lange v Smuts* is *Heath*, which involved the question of judicial independence from the executive.[5] In *Heath*, the Constitutional Court had to consider the validity of certain statutory provisions (and presidential proclamations issued in terms of these provisions) providing for the appointment of a High Court judge as the head of an extraordinary police organization (the so-called 'Special Investigating Unit' (SIU)) tasked with investigating serious malpractices or maladministration in, or in connection with, the public service. In particular, the question was raised whether the numerous functions the head of the

[1] Obviously, the ironic twist in the *Doctors for Life* decision is that after all this strong language the Constitutional Court in the end did interfere with that seemingly sacred domain, holding that Parliament had failed to comply with the constitutionally mandated law-making process and declaring the Acts adopted in violation of that procedural requirements invalid (although the declaration of invalidity was suspended).

[2] *De Lange v Smuts* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC)('*De Lange*').

[3] Ibid at para 61.

[4] Ibid at para 63.

[5] *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC).

organization was required to fulfil were consistent with his or her position as a judge or would undermine the independence of the judiciary and the separation of powers.

Chaskalson P, writing for a unanimous Court, characterized this particular issue as one 'not concerned with the intrusion of the executive into the judicial domain, but with the assignment to a member of the judiciary by the executive, with the concurrence of the legislature, of functions close to the "heartland" of executive power'.[1] The performance of functions in the heartland of the executive is incompatible with the core competence of the judiciary, i e the impartial assessment of executive power against the laws made by the legislature.[2] This core competence, the Court went on, determines and shapes the skills and qualities required for the performance of judicial functions — skills and qualities such as independence, the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the basis of a consideration of relevant information.[3] In contrast, the head of the SIU, the Court held, was required to perform functions incongruent with these characteristics:

> [The functions that the head of the SIU has to perform] include not only the undertaking of intrusive investigations, but litigating on behalf of the state to recover losses that it has suffered as a result of corrupt or other unlawful practices. . . . By their very nature, such functions are partisan. The judge cannot distance himself or herself from the actions of the SIU's investigators.[4]

This is the heartland of the executive: to act in a partisan, interest-driven way, not to be independent but to follow the political views of the democratically elected government and to act accordingly — of course within the limits set by the Constitution.

The main reason for keeping a judge outside the executive is not that the legitimate partisan interests of the government would be threatened by an independently minded judge. The reason for the Constitutional Court to reject such appointments is their potential effect on the judiciary itself. It is the negative perception of the judiciary that could follow if judges were to act sometimes in an interest-driven way. The *Heath* Court makes it very clear that for this reason the constitutional review standard is objective, and demands that it go beyond the identity of the particular judge and his or her appointment to the SIU:

[1] *Heath* (supra) at para 24.
[2] Ibid at para 29 (The Court cites with approval *Mistretta v United States* 488 US 361, 388 (1989)('Congress may delegate to the Judicial Branch non-adjudicatory functions that do not trench upon the prerogative of another Branch and that are appropriate to the central mission of the Judiciary' (Blackmun J).)
[3] *Heath* (supra) at para 34.
[4] Ibid at paras 39–40.

> Under our Constitution, the judiciary has a sensitive and crucial role to play in controlling the exercise of power and upholding the bill of rights. It is important that the judiciary be independent and that it be perceived to be independent. If it were to be held that this intrusion of a judge into the executive domain is permissible, the way would be open for judges to be appointed for indefinite terms to other executive posts, or to perform other executive functions, which are not appropriate to the 'central mission of the judiciary.' Were this to happen the public may well come to see the judiciary as being functionally associated with the executive and consequently unable to control the executive's power with the detachment and independence required by the Constitution. This, in turn, would undermine the separation of powers and the independence of the judiciary, crucial for the proper discharge of functions assigned to the judiciary by our Constitution. The decision, therefore, has implications beyond the facts of the present case, and states a principle that is of fundamental importance to our constitutional order.[1]

On the other hand, once a non-judicial function has been assigned to a judicial officer in a way consistent with the Constitution, he or she is accountable to the executive, and may not enjoy the same degree of independence in the exercise of this function as when performing a judicial function. Against this background, the Constitutional Court distinguished the function of a magistrate's court in extradition proceedings from its core judicial functions in *Geuking*.[2] When a foreign state requests the extradition of one of its nationals from South Africa, the process of extradition is initiated by the issue of a warrant of arrest by a magistrate. In this procedure, according to s 10(2) of the Extradition Act,[3] a certificate from the appropriate authorities in the foreign state must be accepted as conclusive proof that such authority has sufficient evidence to warrant the prosecution of the person concerned. It was contended that this conclusive presumption had the effect of obliging the magistrate to commit the person concerned without any individual assessment of the alleged criminal conduct. The Court rejected the argument that such 'blindfolding' interferes with the functioning of the judiciary, because there is a difference between 'ordinary domestic proceedings' (read: court proceedings) and extradition proceedings. The inquiry by a magistrate during extradition proceedings does not constitute a trial in which guilt or innocence has to be determined. Instead, it is conducted in the context of a quasi-administrative procedure aimed at determining whether or not there is reason to remove a person to a foreign country to be put on trial there.[4] Consequently, the independence of the judiciary is not affected and the separation of powers not violated.

[1] *Heath* (supra) at paras 46.
[2] *Geuking v President of the Republic of South Africa & Others* 2003 (3) SA 34 (CC), 2004 (9) BCLR 895 (CC)('*Geuking*').
[3] Act 67 of 1962.
[4] *Geuking* (supra) at paras 49–50.

Because, within these pre-eminent domains, separation of powers is absolute and no checks and balances apply, such domains are defined narrowly and the courts are very specific in their delimitation. For example, in *Doctors for Life*, the Constitutional Court had no problem in reviewing the parliamentary process ex post, i e once the bills at issue had been enacted. In *De Lange*, the Court limited the judiciary's pre-eminent domain to committing people to prison, while not preventing the executive from, among other things, pardoning offenders, limiting the discretion of the courts through minimum and maximum sentencing legislation, or running prisons. The same analysis works for *Heath*: judges regularly chair commissions of inquiry, head the Legal Aid Board, the Rule Board and the Inspectorate of Prisons. These are all functions that are, at least slightly, legislative or executive in nature, but they may be less partisan, do not deviate from the heartland of the judicial function, and are therefore acceptable.

Finally, in some exceptional circumstances, the principle of pre-eminent domain may not apply. Again, in *Doctors for Life*, the Constitutional Court kept the door open to intervene during the parliamentary process in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have violated the constitutional rights of that person beyond repair.[1] The exception, in fact, makes it debatable whether the Constitutional Court would accept the pre-eminent domain of another branch of government where this would prevent it from exercising necessary judicial review powers. In these limited circumstances, one may see a pre-eminent domain not as an absolute barrier to judicial intervention, but rather as a subject matter requiring a particularly high level of justification for judicial intervention. There may also be extreme situations — war or national emergency — where the Constitution may permit the executive to perform functions reserved for Parliament or the judiciary, at least on a temporary basis.[2]

To sum up, the principle of pre-eminent domain is designed to ensure the functional separation of powers between the executive, the legislature and the judiciary. It is used when the Constitutional Court regards a contested power as being so closely related with the primary function of that particular branch of government that (almost) no interference by other branches of government may be justified.

(bb) The availability of checks and balances

In a constitutional system that does *not* follow a strict separation between the legislature, the executive and the judiciary, the principle of pre-eminent domain is necessarily limited to core areas. Beyond these heartlands, there is room for procedures that limit the unobstructed exercise of powers by each of these branches and embody the countervailing principle of checks and balances.

[1] See *Doctors for Life* (supra) at para 69.

[2] See Nicole Fritz 'States of Emergency' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 61.

In its engagement with checks and balances, the Constitutional Court has repeatedly disavowed an approach to separation of powers questions that focuses on the form of the institutional arrangements alone, preferring to examine in detail the substantive effect of these arrangements. The point about checks and balances is precisely that they do provide for interference between the branches of government. The courts are asked carefully to examine if such interference is an unwarranted intrusion into the domain and independent functioning of one branch of government or another constitutional body, or if such interference constitutes an institutional safeguard designed to prevent the abuse of power.

This issue has been discussed at some length by the Constitutional Court with regard to the appointment procedures for judicial officers, which involve the participation of the other branches of government.

> An essential part of the separation of powers is that there be an independent judiciary. The mere fact, however, that the executive makes or participates in the appointment of judges is not inconsistent with the doctrine of separation of powers or with the judicial independence . . . In many countries in which there is an independent judiciary and a separation of powers, judicial appointments are made either by the executive or by Parliament or by both. What is crucial to the separation of powers and the independence of the judiciary is that the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive.[1]

This argument was later picked up in *Van Rooyen.*[2] In *Van Rooyen,* it was contended that magistrates' courts lacked the institutional independence required by the Final Constitution.[3] The question was raised whether magistrates could be independent as long as they were appointed by a commission largely dominated by the executive. The Constitutional Court, after affirming that magistrates indeed enjoy judicial independence, even if not in the same form as higher courts,[4] rejected this view, and held that the fact that the executive, under the relevant legislation, might have a direct or indirect influence on these matters did not *in itself* entail a breach of judicial independence. According to the Court, a strong influence on the appointment of the members of the Magistrates Commission by the executive does not mean that the magistrates' courts themselves lack institutional independence. Nor does it follow from this that the Commission 'is unlikely to take any decisions, express any views or make any recommendations which do not find favour with the Minister', as the High Court had presumed.[5] Instead, the Court emphasized the fact that the appointment process for magistrates is designed with a view to the functions of magistrates:

[1] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 123.

[2] *Van Rooyen & Others v S & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC)('*Van Rooyen*').

[3] The High Court had declared several provisions of the Magistrates Act 90 of 1993 and the Magistrates' Courts Act 32 of 1944 unconstitutional and referred the matter to the Constitutional Court for confirmation in terms of FC s 172(2).

[4] *Van Rooyen* (supra) at paras 27–28.

[5] Ibid at para 71.

> There is . . . a difference between being nominated by the executive to perform a duty which calls for an independent decision and being chosen by the executive to perform that duty in accordance with its wishes.[1]

The thread that runs through the Court's reasoning throughout the *Van Rooyen* judgment is the inquiry whether the influence (or power) of the executive over the judiciary can be abused. Checks and balances allow for interdependencies, but these must be safeguarded against abuse of the power concerned. Because judicial officers are required to act independently and impartially in dealing with cases that come before them, the Constitution at an institutional level requires structures to protect courts and judicial officers against external interference.

What eventually saved the institutions and procedures relating to magistrates and their judicial function from the separation of powers attack in *Van Rooyen* was that there were at least one or two institutional constraints on the actual encroachment on the independence of the judiciary. The powers concerned were: *(a)* subject to judicial control by a higher court in the form of review; and *(b)* subject, in certain instances, to control by the Magistrates Commission itself.[2] Finally, Parliament could also counter potentially undue influence on magistrates by the executive.[3] For example, the Court regarded the fact that magistrates are required to perform administrative duties unrelated to their functions as judicial officers to be not 'ideal', because it may make them answerable to the executive, and if that happens, the separation of powers that should exist between the executive and judiciary would eventually be blurred. However, the Constitutional Court seemed to accept such non-judicial assignments as long as none of these administrative duties specifically affects the judicial independence of magistrates. This is because, on the one hand, the assignment of any duty, either by law or by executive regulation, is itself subject to constitutional control, and because such assignments may serve the legitimate goal of using administrative resources prudently, and are thus not per se unconstitutional.[4]

Adopting this approach, the *Van Rooyen* Court focused on specific instances of violation rather than general allegations. It found repeatedly that there was no violation of separation of powers under the particular institutional arrangements established under the respective acts. The High Court had erred in focusing on

[1] *Van Rooyen* (supra) at para 93

[2] Ibid at paras 69, 73, 87, 100, 128, 133, 148, 213, 238 and 263–265.

[3] Ibid at para 133.

[4] Ibid at paras 228–234. Technically, the question whether administrative duties unrelated to a magistrate's judicial functions can properly be assigned to magistrates was not the basis on which the constitutionality of the statutory provisions was challenged. The Chief Justice therefore refrained from dealing with that more general question in a decisive way. But he nevertheless held that '[t]here may be reasons why existing legislation that makes provision for administrative functions and duties to be performed by magistrates is necessary, and is not at present inconsistent with the evolving process of securing institutional independence at all levels of the court system.' Ibid at para 233.

the provisions at a level of generality that neglected the internal safeguards. It had preferred form over substance. By analyzing the specific provisions it was revealed that there were sufficient checks and balances to ensure that there was no infringement of separation of powers.

This approach is also visible in *S v Dodo*,[1] a case in which the Constitutional Court had to decide on mandatory sentences to imprisonment for life.[2] The High Court had reasoned that the imposition of the most severe punishment falls within the 'exclusive prerogative and discretion' of the courts, was inconsistent with separation of powers as required by the Constitution, and had accordingly declared the statutory provisions to be invalid.[3] The Constitutional Court refused to follow this reasoning. Ackermann J (in a unanimous decision) firstly rejected the argument that sentencing was the pre-eminent domain of the judiciary.[4] Nevertheless, because the imposition of mandatory sentences was some kind of limitation on a trial court's sentencing discretion, a separation of powers concern was indeed raised. This limitation, however, could be justified because, although the separation of powers under the Final Constitution was intended as a means of controlling government by separating or diffusing power, it was never intended to be strict. Instead, according to the Constitutional Court, the South African constitutional model of separation of powers is one that

> embodies a system of checks and balances to prevent an over-concentration of power in any one arm of government; it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another; this engenders interaction, but does so in way which avoids diffusing power so completely that government is unable to take timely measures in the public interest.[5]

The Court explicitly accepted the legislature and executive's role and interest in respect of punishments imposed by the courts. It would only be contrary to the rule of law and constitutionalism if the legislature were to oblige the judiciary to impose punishments without any regard to the circumstances of each individual case, for then the judiciary would merely 'rubber stamp' a general legislative decision or impose a sentence that was not proportional to the crime.[6] Therefore, despite the obvious legislative encroachment into the judicial domain, the Court

[1] 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC).

[2] Criminal Law Amendment Act 105 of 1997 s 51(1) made it obligatory for a High Court to sentence an accused, convicted of offences specified in the Act, to imprisonment for life unless, under s 51(3)*(a)*, the court was satisfied that 'substantial and compelling circumstances' exist which justify the imposition of a lesser sentence. The SCA had elaborated on how this exception clause should be applied in *S v Malgas*. 2001 (2) SA 1222 (SCA), 2001 (1) SACR 469 (SCA).

[3] *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC)('*Dodo*') at para 8. The decision of the High Court is reported as *S v Dodo* 2001 (3) BCLR 279 (E), 2001 (1) SACR 301 (E).

[4] *Dodo* (supra) at para 13.

[5] Ibid at para 16. Ackermann J later writes: 'There is under our Constitution no absolute separation of powers between the judicial function, on the one hand, and the legislative and executive on the other'. Ibid at para 22.

[6] Ibid at para 26.

rightly recognized that mandatory sentencing legislation does not have the effect of excluding the exercise of judicial discretion in the ultimate decision as to what sentence is appropriate in the particular case. The statutory imposition of mandatory sentences was regarded as a constitutionally justified check or balance on judicial power. In the view of the Court, it was justified because it is 'pre-eminently the function of the legislature' to determine what conduct should be criminalized and punished, and because the legislature had pursued a legitimate objective, i e ensuring that sufficiently severe penalties are imposed on dangerous criminals in order to protect society and trying to facilitate greater consistency in sentencing.[1]

The relationship between the inviolable domain of each branch and justified checks and balances, as well as the problem of where the one starts and the other ends, surfaces again in a summary halfway into Ackermann J's judgment:

> On this part of the case I accordingly conclude as follows:
> 33.1 While our Constitution recognises a separation of powers between the different branches of the state and a system of appropriate checks and balances on the exercise of the respective functions and powers of these branches, such separation does not confer on the courts the sole authority to determine the nature and severity of sentences to be imposed on convicted persons.
> 33.2 Both the legislature and the executive have a legitimate interest, role and duty, in regard to the imposition and subsequent administration of penal sentences.
> 33.3 The concomitant authority of the other branches in the field of sentencing must not, however, infringe the authority of the courts in this regard.
> 33.4 It is neither possible nor, in any event, desirable to attempt a comprehensive delineation of the legitimate authority of the courts in this regard.
> 33.5 For purposes of this case it is sufficient to hold that the legislature is not empowered to compel any court to pass a sentence which is inconsistent with the Constitution.[2]

Thus, a limitation on a function of one branch of government may be justified under the separation of powers doctrine if that limitation does not affect the core area of that other branch, if the limitation is itself the exercise of a core function or originates in the pre-eminent domain of the 'intruding' branch, and if the limitation serves a legitimate objective.

(ii) *Judicial review and the separation of powers*

Most of the decisions discussed above involve the judiciary and its independence from outside interference by the other branches. There are considerably fewer Constitutional Court decisions dealing with the separation of, and interrelationship between, the legislature and the executive.[3] Besides decisions in which the

[1] *Dodo* (supra) at paras 23 and 25.
[2] Ibid at para 33. Apparently, 'authority' here refers to those powers that form the pre-eminent domain of the judiciary and may not be infringed.
[3] On the problem of delegated legislation, see § 12.3*(d)*(iii) infra.

institutional and functional independence of the judiciary has been at stake, the principle of separation of powers has also played a prominent role in decisions in which intra-governmental relations were *not* the subject matter of the dispute. In several decisions concerning individual rights and freedoms, the Constitutional Court has used separation of powers criteria to determine the scope of its own review powers, the level of scrutiny and the remedies available.

In these cases, separation of powers concerns, informed by the Court's understanding of its institutional function in the South African constitutional system, were decisive for the assessment of the rights violations at issue and the substantive claims pursued. Considerations crucial to the practical operation of the separation of powers doctrine in South Africa, in other words, have not only been developed in the face of executive or legislative intrusions into the judicial domain, but also with regard to perceived or real intrusions into the other branches' domains by the judiciary. In this context, separation of powers is connected to the general notion of the benefits and problems of judicial review.

(aa) Judicial review in the context of the supremacy of the Constitution, the political question doctrine and intergovernmental respect and courtesy

In terms of the supremacy clause in FC s 2 and its jurisdiction as set out in FC ss 167 and 172, the Constitutional Court has the power to review legislation and executive action for consistency with the Constitution, in some instances as the final arbiter, and in others as the exclusive arbiter. This in itself is one of the most radical changes to the pre-1994 system introduced by the Final Constitution:

> Prior to the enactment of the interim Constitution, courts adopted a more deferential attitude to laws made by elected legislatures than they did to laws made by administrative functionaries. Judicial review was developed and applied by South African courts against the background of a legal order which recognised the supremacy of parliament. Legislation duly passed by parliament in accordance with the then existing constitution was not subject to judicial review, and the power of the courts was confined to interpreting such laws and applying them to the facts of the particular case. … The introduction of the interim Constitution has radically changed the setting within which administrative law operates in South Africa. Parliament is no longer supreme. Its legislation, and the legislation of all organs of state, is now subject to constitutional control.[1]

The Constitutional Court has again and again emphasized that it understands its mandate and its own 'pre-eminent domain'[2] to be the enforcement and protection of the Constitution, to ensure that the limits on the exercise of public power are not transgressed, to control the exercise of power and to uphold the Bill of Rights:

[1] *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at paras 28 and 32.

[2] See § 12.3*(d)(i)*(aa) supra.

> Where we used to have a supreme Parliament, we now have a supreme Constitution. The Constitutional Court has been given the responsibility of being the ultimate guardian of the Constitution and its values.[1]

The very reason for the judiciary to be independent from the legislature and the executive is so that it can fulfil this guardianship role:

> In our constitutional order the Judiciary is an independent pillar of State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of State; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the Judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of State and, ultimately, as the watchdog over the Constitution and its Bill of Rights — even against the State.[2]

Whenever, in the years since its establishment, the question has arisen whether the Constitutional Court has the power to review a particular legal rule or conduct, the Court has affirmed its comprehensive review powers. Some of these affirmations were inevitable given the clear language of the supremacy clause, such as the Court's holding in *Pharmaceutical Manufacturers*[3] that the Final Constitution alone sets the review standard for executive and administrative action.[4] Others were, perhaps, based on a particular understanding by the Constitutional Court of its own institutional function and mandate. In *Carmichele*,[5] the Court held that it would supervise other courts' interpretation and application of the ordinary law in terms of the Final Constitution.[6] Together, these decisions have led the Court to establish that there is no executive, administrative, parliamentary or

[1] *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) ('*SARFU II*') at paras 72–73.

[2] *S v Mamabolo (E TV & Others Intervening)* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC) at para 16.

[3] *Pharmaceutical Manufacturers Association of SA in re: the Ex Parte Application of the President of the RSA & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC).

[4] For further insight into this judgment, see Frank Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) § 11.3*(b)*; Sebastian Seedorf 'Jurisdiction' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) § 4.3*(d)*(ii).

[5] *Carmichele v Minister of Safety and Security & Minister of Justice and Constitutional Development* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC).

[6] The Constitutional Court has assumed a supervisory function with regard to the constitutionality of the application, interpretation and development of statutory and common law by other courts. See Stu Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) § 31.4*(e)*; Seedorf 'Jurisdiction' (supra) at §4.3*(d)(i)* and §4.3*(h)(i)*(aa).

judicial conduct, and no law whatsoever (including amendments to the Final Constitution, which are (at least) subject to procedural review[1]), that escape constitutional scrutiny.

The Constitutional Court's strong conception of judicial review and of its constitutional mandate is the reason why the Court has declined to adopt anything like a political question doctrine. In other jurisdictions, this doctrine has developed as a key determinant of whether a court will consider an issue or not. The approach of the US Supreme Court was authoritatively declared in the oft-cited case of *Baker v Carr*.[2] Justice Brennan, whilst characterizing the various formulations of the political question doctrine as 'essentially a function of separation of powers', described the doctrine as follows:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for discovering it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for the unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[3]

The doctrine as articulated in this passage has the effect of ousting the court's jurisdiction with respect to the consideration of issues characterized as political questions, as these issues are deemed for the reasons set out in the passage as being non-amenable to judicial settlement. One of the more interesting aspects of the doctrine, particularly with regard to its general ousting effect, is that the limitation on the court's jurisdiction is in essence a self-imposed one. According to Laurence Tribe, at the heart of the political question doctrine are issues of justiciability and the courts' perception of their competence and limitations.[4]

The South African Constitutional Court has followed the US model to a certain extent, but on the other hand has taken a more flexible approach to political questions. At first glance, the Court has confirmed that there are questions which it cannot decide, such as political or moral questions.[5] In this way, the exclusion of certain matters from the realm of the judiciary reflects the Court's notion of pre-eminent domains:

[1] See *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2007 (1) BCLR 47 (CC)('*Matatiele II*').

[2] 369 US 186 (1962).

[3] *Baker v Carr* (supra) at 217.

[4] Laurence Tribe *American Constitutional Law* Vol 1 (3rd Edition, 2000) 368, 385. See also Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 46.

[5] Other matters outside the scope of judicial review are, for example, religious questions: 'Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies. . . . Whether or not the Biblical texts support [an applicant's argument] would certainly not be a question which this Court could entertain.' *Minister of Home Affairs & Another v Fourie & Others; Lesbian & Gay Equality Project v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at paras 92–93.

> Whether or not there should be regulation and redistribution is essentially a political question which falls within the domain of the legislature and not the court. It is not for the courts to approve or disapprove of such policies. What the courts must ensure is that the implementation of any political decision to undertake such policies conforms with the Constitution.[1]

The crucial distinction drawn in this and other passages is between the political function of the legislature and the executive and the politicality (or controversy) of a particular question that may be presented for decision. Thus far, the Constitutional Court has followed the US model only insofar as it has accepted that its power to decide a case may be limited by a 'lack of judicially discoverable and manageable standards'. This principle has been articulated on several occasions. In the *First Certification Judgment*, for example, the Court held:

> First and foremost it must be emphasised that the Court has a judicial and not a political mandate. . . . Admittedly a constitution, by its very nature, deals with the extent, limitations and exercise of political power as also with the relationship between political entities and with the relationship between the state and persons. But this Court has no power, no mandate and no right to express any view on the political choices made by the [Constitutional Assembly] in drafting the [Final Constitution], save to the extent that such choices may be relevant either to compliance or non-compliance with the [constitutional principles]. Subject to that qualification, the wisdom or otherwise of any provision of the [Final Constitution] is not this Court's business.[2]

It has been recognized in academic writing that constitutional questions are inevitably political questions, and as such the mere classification of an issue as being 'political' is not determinative of whether or not a court should adjudicate it.[3] This view has also been articulated by some members of the Constitutional Court in their extra-curial writings.[4] Furthermore, the Court has held that because the Final Constitution 'by its very nature deals with the extent, limitations and exercise of political power' the fact that a particular case has political implications may be precisely what brings it into the ambit of constitutional review.

> Section 167(4) . . . confers exclusive jurisdiction to this Court in a number of crucial political areas which include the power to decide disputes between organs of State in the national and provincial sphere, to decide on the constitutionality of any parliamentary or provincial Bill, to decide on the constitutionality of any amendment to the Constitution and to decide

[1] *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 180.

[2] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 27.

[3] On the false dichotomy between politics and (constitutional) law, see Martin Loughlin 'Constitutional Law: The Third Order of the Political' in Nicholas Bamford & Peter Leyland (eds) *Public Law in a Multi-layered Constitution* (2003) 27–51; Bruce Ackerman 'Constitutional Politics/ Constitutional Law' (1989) 17 *Yale LJ* 453.

[4] Pius Langa 'Transformative Constitutionalism' (2006) 17 *Stell LR* 351, 353.

whether Parliament or the President has failed to fulfil a constitutional obligation. … It follows that the drafters of the Constitution necessarily envisaged that this Court would be called upon to adjudicate finally in respect of issues which would inevitably have important political consequences.[1]

In other cases, the fact that a matter 'pre-eminently involves a "crucial political" question', far from precluding the power of judicial review, has been the basis on which the Court has assumed exclusive jurisdiction to hear the matter.[2]

The nature of political questions that fall outside the scope of judicial review becomes clearer if one does not look at the subject matter but rather at what the Court may be asked to do. As the Court put it in *UDM*:

> This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional.[3]

This dictum emphasizes the distinction between political and legal questions *not* with regard to the subject matter of the dispute but with regard to the judiciary's function to adjudicate disputes that can be resolved through the application of law. The key to judicial review — and therefore the function of the courts in contrast to other branches of government — is not what the dispute is about, but the review standard or the yardstick that is applied. Any criterion of political expediency is irrelevant in the judicial decision-making process. Instead, the Court, in applying the Final Constitution as the sole review standard, determines the constitutional framework for political decision-making. In this respect, the distinction between political and legal questions is related to the Constitution's threshold criterion for access to courts, i e that the dispute can be resolved by the application of law.[4] There is a similarity between the possibility that a dispute may be resolved by a legal standard and the idea that political questions fall outside the ambit of the Constitutional Court's review powers.[5] In both cases, a legal norm (the review standard) must be able to provide a solution or answer to the question raised.[6]

[1] *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC)(*SARFU II*) at paras 72–73.

[2] *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 21. See Seedorf 'Jurisdiction' (supra) at § 4.3.*(b)*.

[3] *United Democratic Movement v President of the Republic of South Africa & Others (2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR (CC) at para 11.

[4] See Jason Brickhill & Adrian Friedman 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) § 59.3*(a)(v)*.

[5] Currie & de Waal (supra) at 707.

[6] Chuks Okpaluba writes: '[F]or a matter raising a purely political question to emerge, it must be clear that judicial intervention … lacks constitutional foundation…. It is that question that defies all constitutional and legal solutions since its resolution could not be traced to any … legal source. For want of a better phraseology, that is the political question over which the court cannot assume jurisdiction, entertain its cause of complaint or grant any relief in any exercise of judicial authority. 'Justiciability, Constitutional Adjudication and the Political Question in a Nascent Democracy' (2003) 18 *SAPR/PL* 331.

It is therefore never the particular subject matter of a case that renders it 'political' and thus outside the review powers of the judiciary in general or the Constitutional Court in particular. Political questions in South Africa are not political matters or political cases. The determining factor is rather the methodology a court can apply in giving an answer to the question. There are questions for which the Final Constitution does not provide a review standard, such as whether there should be a particular law or not or whether one regulatory scheme is better than the other. The Final Constitution does not provide a review standard for criteria like what is 'better', and accordingly the judiciary cannot be asked to decide such questions.

The Constitutional Court's approach in this regard is in keeping with its constitutionally ordained role of being the 'guardian of the Constitution'. However, in spite of the clarity of the Court's position with respect to its power to decide political matters, but not policy choices, the question still remains as to how to determine where the latter category starts, i e at what moment the Constitution fails to provide a workable review standard.

As will become clearer in the discussion of remedies below, the Constitutional Court will usually refer a question back to the other branches of government if choices are available for which the Constitution does not provide a single answer, but rather a leeway — a set of options all within the framework of the Constitution.[1] Once the political choice has been made, however, the Court's mandate is to see that this choice complies with the Constitution. Every final policy choice is open and subject to judicial review.

In other words, the Final Constitution makes the courts the final arbiters of the nature and extent of the powers of the other branches and institutions of state. Through the power of review, they are possessed of the power not only to set aside the unlawful exercise of power by the executive, but to strike down legislation that is inconsistent with the Constitution. The courts themselves are the final arbiters of constitutional consistency. This power is to some extent checked by the powers of Parliament to amend the Constitution and the powers of other institutions of state to ensure that the courts are staffed with qualified and responsible officers. However, these instruments of control are either indirect or cumbersome.

In such a constitutional system it is necessary that the courts themselves formulate, articulate and apply principles for guiding the limits of their *own powers* and preventing their abuse. The formulation and application of these principles is important for the actual self-constraint which the courts exhibit. However, the articulation of these principles is equally important. Since the ultimate constraint on the abuse of power by the courts is political, articulation publicizes the standards by which the exercise of the courts' powers will be measured by society and

[1] See § 12.3*(d)*(ii)*(cc)* infra.

its elected representatives. The courts' powers, if improperly and irresponsibly exercised, may undermine the courts' institutional legitimacy and lead to a situation where other branches of government no longer respect the authority of the courts.

This is particularly important for the Constitutional Court. For one, the Constitutional Court as the highest court on constitutional matters can and does constrain the exercise of power by all other courts, through the established institutions of appeal and review. Secondly, sensitivity to the requirement of self-restraint is most acute in respect of the exercise of the Constitutional Court's powers. Although there is a danger that the legitimacy of the courts as a whole may be undermined by cumulative or systematic abuse of judicial power, the wide jurisdiction and the symbolic position that the Constitutional Court enjoys require the Court to exercise its powers with particular care. The separation of powers principle is tested most in those difficult cases, where the Court is called upon to determine the authority of the other branches, and by corollary, where the Court's own authority is determined. In such cases, the Constitutional Court has made it clear that it will respect the powers of the other branches of government, such as its statement in *Ferreira* that the decision whether or not there should be regulation and redistribution falls into the domain of the legislature and not the courts.[1] It has over time developed its jurisprudence in a strategic way to ensure that its decisions are indeed respected by the government and Parliament and, to a lesser extent, by the public.[2]

Like courts in other jurisdictions, the Constitutional Court of South Africa has on frequent occasions employed the idea of judicial restraint, a conscious decision based on separation of powers concerns not to interfere with decisions by the other branches of government, provided that they are in line with the Constitution. The last part of this sentence points to the dilemma that the Constitutional Court faces: the separation of powers principle demands that the Court should respect the domains and powers of the other branches of government, while at the same time ensuring that these branches act in accordance with the Constitution.

The judges of the Constitutional Court, of course, are aware of this challenge:

> [T]his Court may frequently find itself faced with complex problems as to what properly belongs to the discretionary sphere which the Constitution allocates to the legislature and the executive, and what falls squarely to be determined by the judiciary. . . . The search for an appropriate accommodation in this frontier legal territory accordingly imposes a particularly heavy responsibility on the courts to be sensitive to considerations of institutional competence and the separation of powers. Undue judicial adventurism can be as damaging as excessive judicial timidity. . . . Both extremes need to be avoided.[3]

[1] See *Ferreira v Levin NO* (supra) at para 180. See also § 12.3*(d)(i)*(aa) supra.

[2] This thesis is convincingly argued by Theunis Roux. 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International J of Constitutional Law* (forthcoming). See also Patrick Lenta 'Judicial Restraint and Overreach' (2004) 20 *SAJHR* 544, 554–56.

[3] *Prince v President, Cape Law Society & Others* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) at paras 155–56 (Sachs J).

While it is generally advisable to avoid extremes, the supremacy of the Constitution must be the starting point for any such inquiry. In *Doctors for Life*, Ngcobo J emphasized that the judiciary's terrain has been mapped out quite clearly by the constitutional supremacy clause (FC s 2):

> Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution. . . . But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. . . . Courts are required by the Constitution to ensure that all branches of government act within the law and fulfill their constitutional obligations.[1]

The performance by the Court of its mandate to ensure allegiance to the Constitution necessarily manifests itself as an intrusion into the domain of the other branches. Constitutional scrutiny, however, shows no disrespect for the separation of powers, but is the very embodiment of the system of checks and balances required by the Final Constitution. This point was made by the Constitutional Court in *Treatment Action Campaign (2)*:

> The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the state to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.[2]

In *Doctors for Life*, too, the Constitutional Court held that it would take the most unambiguous of ouster clauses to deprive it of its power to enforce the Constitution.[3] Later in this judgment, Ngcobo J pointed out that the separation of powers principle could not serve as such an ouster:

> [W]hile the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty.[4]

[1] *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC)('*Doctors for Life*') at paras 37–38.
[2] *Minister of Health & Others v Treatment Action Campaign & Others (2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1075 (CC) at para 99.
[3] *Doctors for Life* (supra) at para 38.
[4] Ibid at para 200.

This is the correct approach. The separation of powers doctrine is a justiciable, though not express, constitutional principle reflected in the very structure of government.[1] Intergovernmental relations can be reviewed against this principle. It provides, both in its express provisions and in the overarching concept to which it gives rise, the yardstick against which alleged encroachments by the different branches of government can be scrutinized and assessed. But the principle of separation of powers cannot serve as a justification for the violation of other constitutional provisions or principles, especially those in the Bill of Rights. Where there is a rights violation, the Court must ensure that the violation stops and that the victim is given a remedy.

The Constitutional Court is aware that its own powers of review necessarily require it to intrude into the domains of the other branches of government. As much as it has said that such intrusions are mandated by the Constitution, it has at the same time pointed out that its powers must, nevertheless, be exercised with respect for the legislature and the executive. In *Van Rooyen*, the Court was thus critical not only of some of the conclusions reached by the High Court, but also rebuked the High Court for the manner in which its conclusions had been reached and the ease with which the High Court was prepared to infer improper motives on the part of other organs of state:

> In a constitutional democracy such as ours, in which the Constitution is the supreme law of the Republic, a substantial power has been given to the judiciary to uphold the Constitution. In exercising such powers, obedience to the doctrine of separation of powers requires that the judiciary, in its comments about the other arms of State, show respect and courtesy, in the same way that these other arms are obliged to show respect for and courtesy to the judiciary and one another. They should avoid gratuitous reflections on the integrity of one another.[2]

Here, respect and courtesy are applied as standards to guide the manner in which the Court relates to the other branches — not as standards influencing how the judiciary exercises its review powers in the first place. The basis for and limitations of judicial review in the constitutional context are to be determined by the separation of powers principle itself:

> The use of the word 'deference' may give rise to misunderstanding as to the true function of a review Court. This can be avoided if it is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.[3]

[1] *Doctors for Life* (supra) at para 37.

[2] *Van Rooyen & Others v S & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 48.

[3] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 46.

Respect and courtesy are necessary corollaries of the review powers of the judiciary, and in particular to the Constitutional Court's review powers, because of its exclusive jurisdiction in certain matters.[1] Where there is no constitutionally mandated need for review and the administration of justice is not impeded, courts should preserve the comity that exists between the judicial branch of government, on the one hand, and the legislative and executive branches of government, on the other.[2]

However, as argued below, the Constitutional Court has not always followed its own principle that the separation of powers doctrine should not be used to avoid the courts' obligation to prevent violations of the Constitution. In certain cases, it has used the separation of powers principle in the process of constitutional interpretation to reduce the level of review, and thus to find that there was no violation. It has also in some cases relied on the separation of powers principle in its determination of the appropriate remedy, after a finding that the Constitution had been infringed.

(bb) Separation of powers and the applicable standard of review

The Constitutional Court has used separation of powers considerations to justify reduced levels of scrutiny in Bill of Rights cases. Such reduced levels of scrutiny, or review standards, have meant that law and conduct that otherwise might have been found to be unconstitutional has passed constitutional muster. This has occurred not only at the second stage of the two-stage process for the analysis of rights infringements,[3] but also at the first stage, where such considerations are arguably irrelevant.

The question of different levels of scrutiny or different review standards preoccupied the Constitutional Court from the very beginning of its work. The limitations clause in the Interim Constitution stipulated that all limitations of a right in the Bill of Rights needed to be reasonable and justifiable, and that limitations of certain rights had in addition to be necessary.[4] In *Makwanyane*, the Constitutional Court accepted that, under the Interim Constitution, there could be at

[1] See Sebastian Seedorf 'Jurisdiction' (supra) at § 4.3*(b)*.

[2] See *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (2) SA 14 (CC), 1999 (2) BCLR 175 (CC) at para 29.

[3] See *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 21 ('[The limitation clause in the Bill of Rights] calls for a 'two-stage' approach. First, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?') For further details, see Stu Woolman & Henk Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 34.3.

[4] IC s 33(1)*(b)*.

least these two levels of scrutiny depending on the right.[1] Half a year later, in *Ferreira v Levin NO*, the Court rejected the possibility of further flexibility in the application of its review standards:

> In terms of our Constitution we are enjoined to protect the [right to freedom and security of the person] against all governmental action that cannot be justified as being necessary. . . . We cannot regulate this power by mechanisms of different levels of scrutiny as the courts of the United States do, nor can we control it through the application of the principle that freedom is subject to laws that are consistent with the principles of 'fundamental justice', as the Canadian courts do.[2]

In practice, however, the Constitutional Court has not abandoned the idea of different review standards for different rights. In *Hugo*, which dealt with the granting of a presidential pardon to imprisoned mothers (but not fathers), the Court relied on the fact that mothers had been the victims of past discrimination to develop a special review standard under the equality clause in the Interim Constitution.[3] Kriegler J's dissenting judgment was even more explicit:

> Although the Constitution does not establish levels of scrutiny in the manner of the American Constitution, it is nevertheless worth noting that race and sex/gender are given special mention in the Preamble and head the list of [the specifically prohibited bases for discrimination] categories. The drafters of the Constitution could hardly have established a presumption of unfairness [in the equality clause] only to have the burden of rebuttal under the section discharged with relative ease.[4]

The limitation clause in the Final Constitution dropped the notion of dual levels of scrutiny. Why? It may be because the drafters intended that the courts should be able to tighten or loosen the clause's justificatory requirements according to the nature and importance of the right at issue.[5] Whether this proposition is true or not, the crucial question is what considerations may legitimately inform the level of review applied by the courts at both the first and the second stage of the constitutional inquiry. The full answer to this question is beyond the scope of this chapter. For purposes of this chapter, the question is whether the courts may legitimately use separation of powers considerations to adjust the review standard applicable to a case, either at the first stage, or at the second.

[1] *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 339 ('The requirement of reasonableness and justifiability which attaches to some of the section 33 rights clearly envisages a less stringent constitutional standard than does the requirement of necessity. In both cases, the enquiry concerns proportionality: to measure the purpose, effects and importance of the infringing legislation against the infringement caused. In addition, it will need to be shown that the ends sought by the legislation cannot be achieved sufficiently and realistically by other means which would be less destructive of entrenched rights. Where the constitutional standard is necessity, the considerations are similar, but the standard is more stringent.')

[2] *Ferreira v Levin NO* (supra) at para 181 (Chaskalson P).

[3] *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 47.

[4] Ibid at para 75.

[5] Woolman and Botha defend this proposition elsewhere in this treatise. See Woolman & Botha 'Limitations' (supra) at §34.8*(c)(i)*.

When one looks at the cases, it is immediately apparent that the Constitutional Court takes separation of powers considerations into account at both the first and the second stages of the constitutional inquiry. At the first stage, in engaging with the content of the right, the Court sometimes considers that its own role and function in the constitutional system prevents it from scrutinizing the rights violation to the fullest extent. In these cases, the Court does not define the content of the right in general terms or even at all. Rather, it reduces the right to the requirement that a particular legislative or executive procedure be followed. In some cases, this approach is sufficient to substantiate a finding that the applicant's rights have been violated in a way they cannot be constitutionally justified. In others, the weaker standard of review thus applied results in a finding that the right has not been violated, and therefore that the law in question does not need to be justified under the general limitations clause, or that the conduct in question passes constitutional muster.

The reason for this approach seems to be the view that assessing law or conduct against substantive rights may sometimes result in the usurpation of the legislative or executive branch's powers. In its analysis of a particular constitutional right, the Court thus often looks at the right, not from the perspective of an independent arbiter with final decision-making powers in respect of the content of rights, but as a player in the intergovernmental relations game. On this approach, the content of rights must be defined in a way that leaves interpretive room to the other branches of government.

The most prominent example of this approach, of course, is the Constitutional Court's jurisprudence on socio-economic rights — the rights to housing, health care, food, water and social security in FC ss 26 and 27.[1] The method the Court has used in its engagement with these rights — besides peppering its decisions with the 'rhetoric of restraint'[2] — is to transform the legislature and executive's obligations in respect of these rights into the duty to act reasonably. The consequence of this approach is a jurisprudence that oscillates between deference and interference or, in more traditional language, between judicial restraint and activism.

[1] For more on socio-economic rights, see Kirsty McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55; David Bilchitz 'Health' S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 56A; Anton Kok & Malcolm Langford 'Water' S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 56B; Danie Brand 'Food' S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 56C; and Mia Swart 'Social Security' S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 56D.

[2] Patrick Lenta 'Judicial Restraint and Overreach' (2004) 20 *SAJHR* 544.

On a conceptual level, the Court has rejected the view that there is any real difference between its approach to traditional civil and political rights, on the one hand, and socio-economic rights, on the other. In the *First Certification Judgment*, the Court was explicitly faced with the objection that socio-economic rights were inconsistent with the separation of powers because the judiciary would have to encroach on the domain of the legislature and executive.[1] In particular, the objectors argued that the adjudication of socio-economic rights would necessarily require the courts to dictate to government how its budget should be allocated. The Court held that these concerns were unfounded:

> It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.[2]

In this dictum, the Court adopts what may be described as a 'so-be-it' approach to the consequences for separation of powers of the inclusion of justiciable socio-economic rights in the Final Constitution. In *Soobramoney*, the first socio-economic rights case to come before the Court, its approach was more cautious:

> The provincial administration which is responsible for health services ... has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.[3]

In this passage, the Court appeared to adopt a low-level, 'rational decisions taken in good faith' standard for the review of socio-economic rights. In *Grootboom*, the Court was slightly bolder, and articulated its now familiar reasonableness standard. For current purposes, the crucial point is that the *Grootboom* Court, in developing this standard, expressly took into account the institutional function of the judiciary in the separation of powers:

> The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. ... A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could

[1] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC).
[2] Ibid at para 77.
[3] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) at para 29.

have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.[1]

The Court here sets the review standard for socio-economic rights in a way that ensures that the right is only violated once the challenged executive or legislative conduct has been declared to be unreasonable. The limitations and consequences of this approach are discussed elsewhere in this work,[2] but it is fair to say that this standard is lower than a requirement that specific social services should be provided, and thus makes it easier for the legislature and the executive to survive constitutional challenges, both to their adopted policies and to the quality of services actually delivered. For purposes of this chapter, the important point is that the Constitutional Court's entire approach in this regard starts with the assertion that giving content to socio-economic rights is not 'primarily' its mandate. To be fair, both FC ss 26 and 27 provide that the state must take *reasonable* legislative and other measures, within its available resources, to achieve the progressive realization of socio-economic rights. These textual indicators, however, did not ineluctably determine the particular understanding of reasonableness that the Court has adopted. Instead, it has been the Court's particular conception of separation of powers that has been decisive in the development of this standard.

In *Treatment Action Campaign (2)*, the Constitutional Court confirmed its reasonableness standard of review and emphasized its connection to the judiciary's role in intergovernmental relations:

> Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.[3]

All this does not mean, of course, that the reasonableness standard may not be used to grant constitutional claimants specific benefits — after all, in *Treatment Action Campaign (2)*, the Court held that government was obliged to make a specific drug available to combat mother-to-child transmission of HIV. But the

[1] *Grootboom v Government of the Republic of South Africa & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)('*Grootboom*') at para 41.

[2] See Kirsty McLean 'Housing' (supra) at §55.3*(c)*; David Bilchitz 'Health' (supra) at §56A.3*(c)-(d)*; Mia Swart 'Social Security' (supra) at §56D.3*(c)*.

[3] *Minister of Health & Others v Treatment Action Campaign & Others (2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1075 (CC)('*Treatment Action Campaign (2)*') at para 38.

last sentence of the quoted passage begs the question: does so indeterminate and weak a review standard as reasonableness really bring the judicial, legislative and executive functions into appropriate balance?

From a separation of powers perspective, the first problem with such a review standard is that it allows not only the executive and the legislature, but also the courts to determine the constitutionality of socio-economic rights policies and programmes according to a vague, and therefore discretionary, standard. As David Bilchitz has argued, this approach does not prevent but — on the contrary — may actually give rise to the danger that courts will overstep their mandate and trespass onto the domain of the other branches of government.[1] This may result in an unnecessarily antagonistic relationship between the judiciary and the other branches of government, when 'ideally' the courts should be seen to be supporting the legislature and executive in their task of progressively realizing socio-economic rights.[2] This criticism is certainly valid. The problem with reasonableness is that it is potentially an empty shell, one that may be filled with deference as well as with activism. On the other hand, the Constitutional Court has already suggested considerations that might help to make the reasonableness standard less discretionary. For example, in *Treatment Action Campaign (2)*, the Court held that the effect on the poor and vulnerable in society is an important factor in determining whether a particular government policy is reasonable.[3] Over time, the Court will no doubt define more criteria for the assessment of reasonableness, and in this way prevent the usurpation of the other branches' powers, and provide assistance to the legislature and executive on how best to fulfil their socio-economic rights obligations.

Another, more serious problem with the Constitutional Court's application of the separation of powers doctrine in socio-economic rights cases is that the Court seems to do exactly what it vehemently denies: limiting rights by reference to separation of powers considerations, not at the second stage of the constitutional inquiry, but by way of a particular interpretation of socio-economic rights at the first stage. The Court's decision to adopt a level of scrutiny at the first stage that does not even require a minimum core content to be given to socio-economic rights reduces their potential scope considerably. Although the Court has emphasized that the Final Constitution requires the state to respect, protect, promote, and fulfil the rights in the Bill of Rights, it has rejected the idea that socio-economic rights may found claims for specific services.[4] This stance appears to run counter to the Court's strong statement in *Doctors for Life*[5] that the doctrine of separation of powers should not be used to avoid the judiciary's obligation to prevent the violation of the Constitution.

[1] Bilchitz (supra) at §56A.3*(e)*.

[2] Marius Pieterse 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 *SAJHR* 386, 406.

[3] *Treatment Action Campaign (2)* (supra) at paras 70, 72.

[4] Ibid at paras 35 and 99.

[5] Cf *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 200.

To be clear, the problem with taking separation of powers concerns into account at the first stage of the constitutional inquiry is that such concerns are strictly speaking irrelevant, and may actually prevent the courts from performing their constitutionally appointed task of determining the content of rights and government's corresponding obligations. Once a constitution includes a particular right, the separation of powers doctrine dictates that competent courts must determine the specific claims and entitlements flowing from the right. In so doing, the courts do not usurp the political branches' powers. On the contrary, they fulfil their constitutional mandate to close gaps in the law, solve conflicts, and make choices in the light of ambiguous legal rules. Inevitably, the courts thus make law. This shows no disrespect for the legislature, but merely amounts to the performance by the courts of their institutional function in a constitutional system in which they are given the power of judicial review.

Admittedly, in the context of socio-economic rights, the Constitutional Court has based its reasoning on a particular interpretation of the relationship between subsecs (1) and (2) of FC ss 26 and 27.[1] Nothing in these provisions, however, dictates that separation of powers concerns should be factored into the process of rights interpretation (as opposed to the process of rights limitation, which occurs after the content of rights has been specified). In the context of the Bill of Rights, the separation of powers manifests itself in the fact that, beyond specific guarantees, the legislature and the executive are free to pursue their policy goals. The Final Constitution does not cover every possible aspect of life and leaves considerable leeway for a range of policy decisions, all of which may be in conformity with the Constitution.[2] Nevertheless, it is a core principle of strong-form judicial review that the legislature does not have the final word on the content of human rights guarantees (as would be the case in a system of parliamentary supremacy or weak-form judicial review), but that the legislature's decisions are reviewed against the higher standard of the Constitution itself. To construe legislative and executive conduct as internal modifiers, as the Constitutional Court has done in its socio-economic rights jurisprudence, is to make a mockery of the principle that the legislature and the executive are bound by the Bill of Rights.

In the context of rights interpretation, the separation of powers doctrine requires the courts to determine the appropriate level of scrutiny on the basis of the constitutional text, in the same way as they do in relation to other constitutional provisions, i e by taking into account the purpose of the right, the purpose of the Bill of Rights in general, and the relation of the right to the founding values.[3] It follows that the state will only enjoy a margin of appreciation

[1] *Treatment Action Campaign (2)* (supra) at paras 29–30 and 39.

[2] See Seedorf (supra) 'Jurisdiction' at § 4.3.*(b)*(ii)(bb).

[3] For example, the Constitutional Court has interpreted the right to equality with a view to the underlying value of dignity and it is difficult to see why that should not be the case in the area of socio-economic rights. See Catherine Albertyn & Beth Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Law of South Africa* (2nd Edition, OS, July 2007) § 35.1*(d)(i)*.

or leeway in its policy decisions where the nature and purpose of the right *itself* allows the leeway. On this approach, an applicant may still have no claim to a specific benefit, not because the state may determine the content of the right, but because the *scope* of the right, properly construed, may not extend to the granting of specific benefits. In respect of such rights, the state enjoys a wide discretion and may thus decide on a range of possible measures that all meet its constitutional obligations. In respect of other rights, however, the scope of the right properly construed may give rise to a specific benefit, and to deny this benefit to the applicant on the basis of separation of powers concerns is to renege on the courts' constitutional obligations.[1]

Even if the Final Constitution on a proper interpretation allows for a wide range of possible measures which could be adopted by the state to meet its obligations, the separation of powers doctrine does not mean that these obligations can not be determined. It may be that on a proper interpretation of FC s 26, for example, the right to access to housing does not confer an entitlement to claim shelter or housing immediately upon demand.[2] But this does not mean that separation of powers considerations prevent the courts from giving any content to this right, simply because there is no corresponding obligation to fulfil the right immediately. Budgetary or capacity considerations may be balanced against the state's constitutional obligations during the limitations exercise.

Although the intrusion of separation of powers concerns into the rights interpretation stage manifests itself most clearly in relation to socio-economic rights, the Constitutional Court has adopted this approach in other cases, too. The common thread running through these cases is that they all involved claims for positive action on the part of the state, rather than a mere negative defence of the Bill of Rights.

In the 2004 case of *Kaunda*, a matter in which alleged mercenaries imprisoned in Zimbabwe sought to compel the government to provide them with diplomatic protection, the Court acknowledged that questions of foreign policy generally fall into the domain of the executive and that the Court was ill-equipped to intervene.[3] Chaskalson CJ, writing for the majority, held as follows:

> A decision as to whether protection should be given, and if so, what, is an aspect of foreign policy which is essentially the function of the executive. The timing of the representations if they are to be made, the language in which they are to be couched, and the sanctions (if any)

[1] Chaskalson P made this the focal point of rights interpretation: 'The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.' *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 88.

[2] See *Grootboom* (supra) at para 95.

[3] *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC).

which should follow if such representations are rejected are matters with which courts are ill-equipped to deal. The best way to secure relief for the national in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than judges, and which may be harmed by court proceedings and the attendant proceedings.[1] The fact that foreign policy has traditionally been[2] and in many jurisdictions still is regarded as the domain of the executive[3] is not surprising. In *Kaunda*, however, the Constitutional Court indicates exactly *why* it is prepared to grant the executive broad discretion in matters of foreign policy. In the absence of a political question doctrine, both the majority and the dissenting judgments make it clear that the Court should stick to its general rule that the exercise of *all* public power, including issues of foreign affairs, is subject to constitutional control. The majority emphasizes that foreign affairs are *not* beyond scrutiny — that if government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly.[4] But, as O'Regan J puts it in her dissenting judgment, 'the precise scope of the justiciability will depend on … the nature of the power being exercised'.[5] In the eyes of the majority, the nature of the power to conduct foreign affairs is so multi-layered and complex that a court of law should not apply a one-dimensional review standard to it. Chaskalson CJ and Ngcobo J (in a supporting judgment) both stress that a court simply cannot take all the factors into account that are necessary for the decision whether and, if so, how to provide diplomatic protection. For O'Regan J, a court should 'not presume knowledge and expertise that it does not have'.[6] Both the majority and the minority thus feel that the Court lacks the skills necessary to evaluate comprehensively how foreign affairs should be conducted. Many of the criteria that need to be applied in such an evaluation (Chaskalson CJ states timing, language, and possible consequences) are extra-legal, and thus beyond the realm of the courts. There is simply no legal yardstick by which to judge whether the timing of a particular diplomatic approach, for example, would be appropriate. In the result, the only review standard the *Kaunda* Court

[1] *Kaunda* (supra) at para 77. On the pre-eminence of the executive in the area of foreign policy see also the minority decisions of Ngcobo J at para 172 ('The conduct of the foreign relations is a matter which is within the domain of the executive.') and O'Regan J at para 243 ('It is clear … [that] the conduct of foreign relations is primarily the responsibility of the executive.')

[2] See John Locke's notion of 'federative power', the 'power of war and peace, leagues and alliances', i e foreign affairs, which cannot be conducted subject to predetermined abstract legal rules and in which the executive is *not* subject to the control of the legislature. John Locke *Two Treatises of Government* 2nd Treatise (1688) Chapter XII, paras 145–48.

[3] The Constitutional Court quotes decisions by German and English courts and refers to several other jurisdictions. *Kaunda* (supra) at paras 71–75.

[4] *Kaunda* (supra) at paras 80 (Chaskalson CJ) and 192 (Ngcobo J).

[5] Ibid at para 244.

[6] Ibid at para 247.

feels competent to apply is the (rather low) standard of rationality and absence of bad faith, and a test for whether the request for diplomatic protection was dealt with at all.

The difference between the majority and the dissenting judgments is thus not the analysis of the right at issue (although there is a disagreement over the extra-territorial effect of the Final Constitution): both agree that the Final Constitution does not provide for a clear and unambiguous entitlement to diplomatic protection. (In fact, the Final Constitution does not mention any entitlements with regard to foreign policy at all.) Rather, the difference between the judgments is the consequence that should follow from this finding: what is the Constitutional Court to do when there is no clear normative framework? The majority concludes that it must adopt a low review standard and leave a wide range of options open to the government. O'Regan J, by contrast, thinks that the Court should first look to see whether it can fill an open constitutional standard by reference to other constitutional provisions:

> The question [whether there is an obligation upon government to provide diplomatic protection] has to be answered in the light of the normative commitment to human rights emphasised in our Constitution, the importance accorded to international law and human rights in our Constitution and the conception of democratic government that underlies our Constitution. Most importantly, our Constitution must be interpreted in a way that will promote rather than hinder the achievement of the protection of human rights.[1]

The consequence of this approach is not that the Court may prescribe to the executive what to do in foreign affairs, but that, in light of 'a growing global commitment to the protection and promotion of fundamental human rights', the government is under an obligation to reaffirm the primacy of human rights in the South African constitutional order.[2] On this basis, O'Regan J proposes a declaratory order requiring the South African government to take appropriate steps to protect the applicants from possible egregious violations of international human rights norms.

In the eyes of the majority, the absence of any clear legal obligation indicates that the courts may only apply the review standard of lawfulness. Lawfulness is here defined as being the absence of irrationality — a contingency standard where nothing else is available. The moment the government can show that it has taken the matter seriously and that it has acted rationally in good faith, there is no violation of the Constitution and, hence, the applicants have no further claim. They may demand that the executive exercise its discretion according to this standard, but they cannot demand a specific result. In the eyes of the minority, on the other hand, the wide discretion the majority accords to the executive is reduced by the need to comply with international human rights norms. The

[1] *Kaunda* (supra) at para 237.
[2] Ibid at para 270.

issuing of the minority's declaratory order may not have made much difference to the applicants' situation in *Kaunda*. But it would have suggested that, even in cases falling into the executive's pre-eminent domain, the Bill of Rights fetters the executive's discretion to a certain extent.

The relationship between rights interpretation and separation of powers is also illustrated in cases involving the right to political participation. In these cases, the Constitutional Court has often stated how important political rights are for South Africa's constitutional democracy.[1] But it has nevertheless adopted a deferential review standard based on considerations similar to those taken into account with regard to socio-economic rights. In *New National Party*, for example, the Court (in a majority judgment by Yacoob J) held that the requirement to register as a voter on the national voters' roll was 'a constitutional requirement of the right to vote, and not a limitation of the right'.[2] Given this conceptual framework, the Court inevitably concluded that the only appropriate standard for reviewing electoral legislation was that of rationality:

> It is to be emphasised that it is for Parliament to determine the means by which voters must identify themselves. This is not the function of a court. But this does not mean that Parliament is at large in determining the way in which the electoral scheme is to be structured. There are important safeguards aimed at ensuring appropriate protection for citizens who desire to exercise this foundational right. The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the [electoral] scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional.[3]

The Court ironically uses strict language here to justify a fairly low standard of review. This low standard was criticized by O'Regan J, who, in a dissenting judgment, argued that the importance of the right to vote (which the majority strongly emphasized) demanded 'particular scrutiny by a court to ensure that fair participation in the political process is afforded'.[4] In O'Regan J's view, the majority's rational basis test for determining the constitutionality of an electoral statute was far too deferential. Instead, she held, a provision in an electoral statute that has the effect of limiting the number of eligible voters needs to be reasonably related to an appropriate government purpose.[5]

[1] See, for example, *New National Party v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)('*New National Party*') at para 11 ('The importance of the right to vote is self-evident and can never be overstated. . . . [T]he right is fundamental to a democracy for without it there can be no democracy.') See also *August & Another v The Independent Electoral Commission (IEC) & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC)('*August*') at para 17 (Sachs J).

[2] *New National Party* (supra) at para 15.

[3] Ibid at para 19.

[4] Ibid at para 122.

[5] Ibid at para 122.

The majority in *New National Party* retorted that it was barred from adopting this higher standard by reason of the separation of powers:

> Decisions as to the reasonableness of statutory provisions are ordinarily matters within the exclusive competence of Parliament. This is fundamental to the doctrine of separation of powers and to the role of courts in a democratic society. Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose. In such circumstances, review is competent because the legislation is arbitrary. Arbitrariness is inconsistent with the rule of law which is a core value of the Constitution.[1]

The majority here appears to misunderstand O'Regan J's point and fails to engage with the real separation of powers issue in this case. It is true that the Constitutional Court should not, and does not, review policy decisions by Parliament on the basis of whether there are other or better policy options available. To this extent it indeed does not use a reasonableness standard. But, of course, reasonableness is a perfectly legitimate review standard with regard to legislation, as is expressly envisaged in the limitations clause. What O'Regan J meant, and perhaps might have expressed more clearly, was that a provision in an electoral law restricting the number of eligible voters is a clear limitation on the right to vote and therefore needs to be reasonable and justifiable in an open and democratic society. The importance of the right to vote would in this way be respected by placing the onus on the government to justify any limitation. The majority's approach in *New National Party*, by contrast, means that legislative regulation of the right to vote is unlikely ever to require justification beyond the rational basis standard imposed in that case.[2]

The real separation of powers issue that the majority in *New National Party* fails to address is this: when the Final Constitution provides very little direct guidance on how a legislative scheme should be designed, does the separation of powers doctrine automatically require the Court to adopt the lowest possible review standard? O'Regan J pointed to the dilemma that the right to vote cannot be exercised in the absence of a legislative framework.[3] Indeed, the Final Constitution often requires the Constitutional Court to test legislation against open-ended concepts and vague expressions, such as 'democracy' or the 'rule of law.' The same may be said of socio-economic rights. In all these cases, the Court has to give content to the rights concerned. As argued earlier, however, filling these open-ended concepts is an interpretative exercise in which the Court needs to engage with other constitutional provisions, the founding values and, perhaps, the structure of the Final Constitution as a whole. It does not follow from the

[1] *New National Party* (supra) at para 24.
[2] Ibid at para 24.
[3] Ibid at para 122.

separation of powers principle that merely because a standard is open a deferential approach is required.[1]

The Constitutional Court's decision in *UDM* adds even more complexity to this discussion.[2] In upholding certain constitutional amendments allowing the defection of members of parliament from one party to another ('floor crossing'), the Constitutional Court held that the principle of democracy as set out in the Final Constitution allows for both a system of proportional representation with an anti-defection clause and for such a system without an anti-defection clause.[3] Because the Final Constitution left the precise form of the electoral system open, the decision taken by Parliament to abolish the anti-defection clause passed constitutional muster.

In contrast to its decision in *New National Party*, the *UDM* Court does not reason explicitly that it cannot set a higher review standard by reason of the separation of powers. On a purely technical reading, the holding that an anti-defection clause is not mandated is based entirely on the Final Constitution's democratic principle. The Court simply saw no reason to develop a more robust understanding of democracy, which would have raised the review standard the legislature had to meet.[4] But this dry reasoning needs to be contrasted with the affirmed importance of democracy and the Court's willingness in other cases to adopt a value-based understanding of such concepts.[5] As several commentators have noticed, even without explicit reference to separation of powers, the underlying rationale for the *UDM* Court's decision seems to be the deference it perceived itself to owe to the legislature in cases of this nature.[6]

Although *UDM* may not provide the full inside story of how the Court understands the meaning, relevance and function of the separation of powers principle in South Africa, it nevertheless shows that separation of powers is sometimes an

[1] See Patrick Lenta 'Judicial Restraint and Overreach' (2004) 20 *SAJHR* 544, 547 (Emphasizes that advocating judicial restraint is meaningless when it does not take into account that written Bills of Rights (by way of their open language) allow for divergent judicial approaches within the spectrum of legitimate legal reasoning, that in constitutional democracies judges wield a great deal of discretion and that they are necessarily active participants in governance.)

[2] *United Democratic Movement v President of the Republic of South Africa & Others (2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR (CC)('*UDM*').

[3] Ibid at paras 34–35.

[4] Ibid at para 35 (Court pointed out that no authority was provided obligating a member of a legislature to resign if he or she changed party allegiance during the life of the legislature absent a clear constitutional or legislative requirement to that effect.)

[5] See, for example, *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) at para 21 (Interpretative role of the founding provisions in relation to political participation); *August* (supra) at para 17; and *African Christian Democratic Party v Electoral Commission & Others* 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC) at para 23.

[6] See Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2nd Edition, OS, July 2006) § 10.3*(b)*; Jason Brickhill & Ryan Babiuch 'Political Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2nd Edition, OS, March 2007) § 45.5*(a)*; Patrick Lenta 'Judicial Restraint and Overreach' (2004) 20 *SAJHR* 544, 554.

express principle of constitutional law, while on other occasions it provides a more hidden rationale for the Court to employ other tools of constitutional interpretation to justify a deferential approach.

It is, of course, a matter of speculation what internal reasons might have motivated the Court in UDM to adopt an understanding of separation of powers that resulted in its ultimately allowing the floor-crossing package of legislation to go through where this was hardly the indisputable requirement of strict constitutional logic. The best explanation, in our view, is that the Constitutional Court does not always follow strict constitutional principle, but sometimes trades off principle against pragmatic considerations.[1] Decisions like *UDM* help us to understand how the Constitutional Court has developed its jurisprudence on a strategic basis to ensure that its decisions are respected by the government and Parliament, and, to a lesser extent, by the public. To everyone familiar with the contested role of the judiciary in South Africa, it is not inconceivable that the Constitutional Court may at times take the possible reaction of other political players into account when deciding a case. Sometimes the Constitutional Court prevents the legislature from pursuing a particular policy by subjecting it to a strict constitutional standard and sometimes it defers to the legislature's policy choice — without any apparent logic or coherent legal justification connecting the two sets of cases. This is hardly surprising, however, in a country dominated by a single political party in which the Constitutional Court needs to have regard to its institutional security and sociological legitimacy.

From a separation of powers perspective, there is another interesting factor that contributes to this explanation. The fact that the Constitutional Court feels the need to safeguard its institutional security so that it will be able, over time, to widen the 'tolerance interval' of the other branches for adverse decisions, thus allowing it to enforce the Constitution even in the most difficult cases,[2] is reminiscent of a fundamental aspect of the separation of powers: that only power arrests power.[3] By gradually expanding its de facto political power to enforce the Constitution, the Constitutional Court apparently takes seriously a consideration of which Montesquieu and Madison were acutely aware, i e that it is not enough to have separation of powers on paper. A system of countervailing powers, and checks and balances, also has to be operative in fact. Separation of powers simply does not work — does not prevent 'the gradual concentration of the several powers in the same department' — if those institutions tasked with providing limitations on the concentration and abuse of power lack 'the necessary means or personal motives to resist encroachments of the others', as James Madison put it.[4]

[1] See Theunis Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International J of Constitutional Law* (forthcoming).

[2] Ibid (quoting Lee Epstein, Olga Shvetsova & Jack Knight 'The Role of Constitutional Courts in the Establishment of Democratic Systems of Government' (2001) 35 *Law & Society Review* 117, 128–29).

[3] See § 12.2*(a)* supra.

[4] Alexander Hamilton, James Madison & John Jay *The Federalist No 51* (supra) at 266.

The Final Constitution clearly provides the Constitutional Court with the 'necessary means to resist encroachments' by the political branches, and by all accounts thus far the Constitutional Court judges have shown that they have the personal stature required to live up to this expectation. But the constitutional mandate for judicial review would be meaningless if the Constitutional Court were faced with the prospect of seeing its members replaced by more politically compliant judges or, in the worst case scenario, being closed down or having its powers significantly curtailed. It is therefore precisely because the Constitutional Court's institutional function is to prevent the executive and the legislature from accumulating too much power, that it has to ensure that it stays in the adjudication business long enough to achieve this goal. The Constitutional Court has to ensure its institutional security so that it has the capacity to check and balance the other branches of government, in accordance with its constitutional mandate.

(cc) Separation of powers and remedies

Once the Constitutional Court has found that there has been an unjustified violation of a fundamental right, separation of powers considerations may still play a role with regard to the remedy. Constitutional remedies are governed by the Constitutional Court's authority to make any order that is just and equitable (FC s 172(1)*(b)* in connection with orders of invalidity) and to grant appropriate relief (FC s 38 in connection with an infringement or threatened infringement of the Bill of Rights).[1] Because the Final Constitution is not particularly detailed on remedies, the Constitutional Court has found that it has been left to the courts to decide what constitutes appropriate relief in any particular case, and that the courts' approach must be flexible,[2] provided that the remedy asked for has a sufficiently close connection to the subject matter of the case and the question put to the Court.[3] In essence, appropriate relief is relief that is required to protect and enforce the Constitution and the rights enshrined in it.[4] The Court has

[1] For more details on constitutional remedies, see Michael Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

[2] See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at para 18; *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) at para 38.

[3] See *Satchwell v President of the Republic of South Africa & Another* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC)(The Court was asked not only to extend certain benefits for married couples to partners in a permanent same-sex life partnership (who were unconstitutionally excluded from these benefits), but also to extend the benefits to non-married heterosexual partnerships. The Court rightly rejected this request: 'This Court is not at large to grant any relief under its power to grant "appropriate relief" — it cannot import matters that are remote to the case in question — otherwise it will be intruding too far into the legislative sphere. The intended accommodation of heterosexuals cannot be introduced via the backdoor into this case. It was not properly before us, nor did we hear argument on the complexities involved.' Ibid at para 33.)

[4] *Fose* (supra) at para 19.

emphasized that the legitimacy of its orders rests on the fact that they give effect to the provisions of the Constitution,[1] are effective and can be seen to be effective.[2]

Declarations of statutory invalidity in terms of FC s 172(1) are mandatory once the Constitutional Court has decided that any law or conduct is inconsistent with the Final Constitution. However, sometimes part of the legislative scheme found to be unconstitutional serves a legitimate purpose, and the invalidation of the unconstitutional provision would complicate or even prevent the achievement of this legitimate goal.[3] Furthermore, since statutory invalidity may be rectified in many possible ways, ranging from minor adjustments to a major redesign of the entire scheme, the repair of a defective statutory provision often involves (policy) decisions beyond the function and mandate of the judiciary.[4]

The task of not throwing the baby (the benign legislative scheme) out with the bath water (the unconstitutional provision) becomes particularly difficult when (similar to the cases discussed above concerning positive state obligations) the state grants a benefit or entitlement to some people, but fails to provide the same benefit or entitlement to other people, and an excluded applicant asks to be included in the benefits of the scheme. The Court is here faced with the problem that an unequal distribution of benefits may be rectified in several ways: by extending the benefit to the disadvantaged group (which is what the applicant typically asks for), by not granting the benefit to anybody (which would render the scheme equal by dint of abandoning it), or by redesigning the scheme in a different but constitutional way (so that some people may still not benefit from it, but this time for reasons that may be justified). On the one hand, the decision about which option to choose inextricably involves a policy choice. On the other hand, an unconstitutional statute must be invalidated, and therefore the Court has to choose.

Merely striking down the provision does seem to be the option that shows the most deference to the legislature. The consequence of this option will often be that the benefit is not provided to anybody. If the entitlement is required to be

[1] *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others as Amici Curiae); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at para 171.

[2] *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 200.

[3] See *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 107 ('There may also be situations in which it is necessary for the Court to act to avoid or control the consequences of a declaration of invalidity of post-constitutional legislation where the result of invalidating everything done under such legislation is disproportional to the harm which would result from giving the legislation temporary validity.')

[4] See *Fraser v Children's Court, Pretoria North & Others* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC)('*Fraser*') at para 50; *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council & Others* 1998 (2) SA 61 (CC), 1998 (1) BCLR 1 (CC) at para 12.

provided in terms of a constitutional right, such a decision may itself be unconstitutional, although not from an equality point of view. If the complete repeal of the benefit is constitutionally feasible, the group interested in the benefit may lobby Parliament to get its benefits back. But such a clear-cut decision may appear cruel to those who suffered from the unconstitutional distribution and unfair to those who legitimately relied on the benefit.[1] The Constitutional Court has indicated that it will, as a general rule, rather extend benefits to disadvantaged groups than strike down the beneficial provision altogether:

> Where reading in would, by expanding the group of persons protected, sustain a policy of long standing or one that is constitutionally encouraged, it should be preferred to one removing the protection completely.[2]

The solution then is that the Court should not only strike the invalid provision down, but, in the interests of a just and equitable remedy, supplement the declaration of invalidity with other remedial measures to ameliorate the negative consequences of its order. In this way, the Court effectively re-designs the law, either as an interim matter until the legislature has decided on the route it would like to take, or in a way that grants the applicant permanent and appropriate relief. In both cases, the legislative enactment is altered by the order of a court. Although more tailored to the situation than a simple invalidation, such remedies inevitably see the Court making policy choices that should ideally have been left to the legislature. The principle of separation of powers and the Court's duty to grant appropriate, just and equitable relief necessarily collide with each other in this context. Both principles have their place, but it is the judiciary's first and foremost function to protect the Constitution. This does not mean that a court may ride roughshod over legislative choices. Instead, the task is to use the least invasive remedy possible.[3]

Against this background, the Constitutional Court has emphasized that when it is faced with an unconstitutional statute it will assess whether the purpose served by the statute outweighs the constitutional violation.[4] In so doing, the Court's obligation to provide appropriate relief has to be balanced against separation of powers:

> [A court must keep the principle of separation of powers in mind] and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference

[1] See *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minster of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) at para 88 ('There is every reason not to delay payment of social grants any further to the applicants and those similarly situated.')

[2] *National Coalition for Gay and Lesbian Equality (NCGLE) & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000(1) BCLR 39 (CC)('*NCGLE v Minister of Home Affairs*') at para 75.

[3] Ibid at para 74.

[4] See *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa & Others; Sheard v Land and Agricultural Bank of South Africa & Another* 2000 (3) SA 626 (CC), 2000 (8) BCLR 876 (CC) at para 13.

must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Final Constitution, and for good reason, to the legislature.[1]

When courts consider a remedy following a declaration of invalidity there is a need for 'remedial precision',[2] which pays due respect to the role of the legislature but still acknowledges that the key factor in striking the appropriate balance has to be the Court's function in protecting the Constitution.[3] Perhaps this is why the Court on another occasion held that a declaration of complete invalidity is something like a last resort, while the preferred remedy, if possible, should take the form of severance or reading in so as 'to bring the law within acceptable constitutional standards.'[4] Ironically, the Court here referred to its earlier judgment in *NCGLE v Minister of Home Affairs* where it advocated a much more balanced approach.

In particular, the Constitutional Court has strongly rejected any contention by the other branches of government that there may be cases in which the separation of powers principle requires the Court ipso facto not to give directions to the executive. This was the government's stance in *Mohamed*, a case in which a foreign national had illegally been arrested by South African authorities and extradited to the US without an assurance from the US government that it would not impose or carry out the death penalty on him if convicted.[5] The Court disagreed, and insisted that after a violation of the Bill of Rights any order addressed to the

[1] See *NCGLE v Minister of Home Affairs* (supra) at para 66.

[2] *Khosa* (supra) at para 88.

[3] See *NCGLE v Minister of Home Affairs* (supra) at paras 74–75 ('In deciding whether words should be severed from a provision or whether words should be read into one, a court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and secondly, that the result achieved would interfere with the laws adopted by the legislature as little as possible. In our society where the statute books still contain many provisions enacted by a Parliament not concerned with the protection of human rights, the first consideration will in those cases often weigh more heavily than the second. In deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read words in, unless in so doing a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution.')

[4] *Van Rooyen & Others v S & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 88.

[5] *Mohamed & Another v President of the Republic of South Africa & Others* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC)('*Mohamed*'). The government had argued that it would be wrong for a South African court to issue any declaratory order expressing disapproval of the arrest, detention, interrogation and transfer of the applicant to the USA. In particular the government opposed any order requiring it to intercede with the US authorities as this would infringe the separation of powers between the judiciary and the executive. 'In substance the stance was that Mohamed had been irreversibly surrendered to the power of the United States and, in any event, it was not for this Court, or any other, to give instructions to the executive.' Ibid at para 70.

relevant organs of state in South Africa to do whatever they could to remedy the wrong done or to ameliorate the consequences of the violation would be appropriate:

> To stigmatise such an order as a breach of the separation of state power as between the executive and the judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of state and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights.[1]

Finally, it makes a difference whether the statutory scheme, including the provision found to be unconstitutional, originated in the pre-1994 era or was enacted by the legislature of the new democratic state. Where the Constitutional Court finds that laws enacted before the coming into force of the Interim Constitution are inconsistent with the Bill of Rights it will more readily exercise special remedial powers to fill lacunae resulting from such inconsistencies — and thereby make quasi-legislative choices — than it will in respect of laws passed after the coming into force of the Interim Constitution.[2] The rationale for this principle, of course, is that there is generally a lesser need to defer to the legislative choices of a Parliament that was not concerned with the protection of human rights.[3]

These affirmations notwithstanding, the 'remedial precision' required to balance the effectiveness of a remedy against the principle of separation of powers has often caused the Court problems, with the scale tipping sometimes in one and sometimes in the other direction. This balancing exercise has affected all types of remedial measures, whether explicitly provided for in the Final Constitution or developed by the Constitutional Court in terms of FC s 172(1)*(b)*, such as 'reading in' or 'severance'.[4] By and large, the Court has favoured providing effective relief over deference, although on some occasions the Court has compromised on the effectiveness of an order to avoid trespassing on what it perceived to be the legitimate domain of the other branches of government.

The notion of balancing is expressly provided for in FC s 172(1)*(b)*(ii), which authorizes the Court to suspend an order of statutory invalidity to allow the competent authority to correct the defective statute. In the interests of separation of powers, in other words, the Court may suspend the coming into effect of such

[1] *Mohamed* (supra) at para 72.

[2] See *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 108;

[3] *NCGLE v Minister of Home Affairs* (supra) at para 74. It may be argued, though, that the difference is much less pronounced now than it was under the Interim Constitution. In 2008, it is fair to assume that, 14 years after the transition to democracy, pre-1994 statutes still on the books are there because the democratic legislature wants them to be valid.

[4] On these and other remedial strategies following a finding of constitutional invalidity, see Michael Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) § 9.4.

an order — although the Court itself has recognized that often an effective remedy is one that takes effect immediately.[1] FC s 172(1)*(b)*(ii) not only authorizes the Court to allow the competent authority (the legislature with regard to Acts of Parliament, the executive with regard to delegated legislation) to correct the defective law. It also allows the judiciary to exert some degree of pressure on the political branches and 'to put Parliament on terms to correct the defect in an invalid law within a prescribed time'[2] Parliament is, however, free to decide how it is going to redesign the unconstitutional provision — provided that the new provision complies with the Final Constitution — and may decide to do nothing if it has no objection to the law being invalidated.[3]

The general assumption, though, is that an unconstitutional provision is invalid with immediate effect and that a party wishing the Court to suspend its order of invalidity must provide persuasive reasons for the Court to do so.[4] If those reasons are presented to the Court, it will engage in a balancing exercise to determine whether the purpose served by the challenged statute outweighs the constitutional violation effected under its provisions.[5] In this balancing exercise, the Court considers the nature of the law in question and the character of the defect to be corrected,[6] the potential for prejudice being suffered if an order of invalidity is not suspended, the interests of the parties as well as those of the public, and the need to promote the constitutional project and prevent chaos.[7]

The Court has not always been particularly responsive to the person*(s)* affected by an unconstitutional provision. In its early years, the Court tended to show greater deference to the legislature than to the need to protect the Bill of Rights. This is evident in the Court's grudging admission in *Ntuli* that the further perpetuation of the unconstitutional law in that case was 'unfortunate', but that the applicant was nevertheless required to live with it until the legislature had cured the defect.[8] In another case it rejected an application because it regarded the consequences of invalidity to be too complex and held that the legislature

[1] *NCGLE v Minister of Home Affairs* (supra) at para 89.

[2] *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 106.

[3] For the consequences of a suspension order, see Bishop 'Remedies' (supra) at §9.4*(d)(i)*.

[4] See *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 30; *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 51.

[5] See *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa & Others; Sheard v Land and Agricultural Bank of South Africa & Another* 2000 (3) SA 626 (CC), 2000 (8) BCLR 876 (CC) at para 13.

[6] See *Mistry v Interim Medical and Dental Council of South Africa & Others* 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC) at para 37. The Court here sets out as a general rule, that a 'party wishing to keep an unconstitutional provision alive should at least indicate the following: what the negative consequences for justice and good government of an immediately operational declaration of invalidity would be; why other existing measures would not be an adequate alternative stop-gap; what legislation on the subject, if any, is in the pipeline; and how much time would reasonably be required to adopt corrective legislation.'

[7] See *Matatiele Municipality & Others v President of the RSA & Others* 2007 (1) BCLR 47 (CC) at para 91.

[8] *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC) at para 28.

would need to apply its mind to the problem.[1] On yet another occasion, the Court held that if a party could establish that the suspension of its order of invalidity would cause it substantial prejudice, the party could approach the Court for a variation of the order.[2]

In recent years, however, the Constitutional Court has increasingly tried to reconcile the conflicting principles of separation of powers and the need for an effective remedy by granting interim relief to the successful litigant pending the rectification of the defective legislation. For example, the Constitutional Court has ordered the executive to apply and interpret an unconstitutional statute in a particular way until the defect is corrected (in particular, when the statute is incomprehensible).[3]

At first glance, the suspension of an order of invalidity combined with interim relief seems to be the way out of every situation in which the Court has to choose between the effective protection of a violated right (with immediate effect for the aggrieved party) and leaving it to the 'competent authority' to make the necessary (policy) decision on how to correct the defect. Such a solution allows the judiciary to have it both ways: to be a bold guardian of the Constitution and to achieve an appropriate constitutional balance between the three branches of government. One may assume, therefore, that the availability of this solution would have emboldened the Court to strike down legislation. And indeed, in *Dawood*, the Constitutional Court (in a unanimous judgment by O'Regan J) emphasized that interim relief and deference to Parliament are related:

> Where . . . a range of possibilities exists and the Court is able to afford appropriate interim relief to affected persons, it will ordinarily be appropriate to leave the Legislature to determine in the first instance how the unconstitutionality should be cured. This Court should be slow to make those choices which are primarily choices suitable for the Legislature.[4]

Consequently, an order of suspension married to an order for interim relief should be the preferred option for the Court. One important exception suggests itself. Where the Court (for whatever reason) is *not* able to give appropriate

[1] *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council & Others* 1998 (2) SA 61 (CC), 1998 (1) BCLR 1 (CC) at para 12.

[2] *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at para 42.

[3] *Executive Council Province of the Western Cape v Minister for Provincial Affairs; Executive Council KwaZulu-Natal v President of the Republic of South Africa* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at para 135; *Janse van Rensburg & Another v Minister of Trade and Industry NO & Another* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC) at para 35–36; *Moseneke & Others v Master of High Court* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC) at para 27; *South African Liquor Traders Association & Others v Chairperson Gauteng Liquor Board & Others* 2006 (8) BCLR 901 (CC) at paras 44–45. See also Bishop 'Remedies' (supra) at §9.4*(d)(i)*.

[4] *Dawood & Another v Minister of Home Affairs; Shalabi & Another v Minister of Home Affairs; Thomas & Another v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC)('*Dawood*') at para 64.

interim relief to the persons affected, the Court might wish to issue a 'stricter' order by the Court – even if such an order would require the Court to make choices 'primarily … suitable' for other branches of government.

But in several judgments the Court has not followed this route. Rather it has given another remedy instead, on the grounds that the combination of suspension and interim relief did not constitute a just and equitable remedy. In *Satchwell*, for example, the Constitutional Court was faced with a challenge to the constitutionality of certain provisions of the Judges Remuneration and Conditions of Services Act and the regulations promulgated under this Act, which gave benefits to the spouses of judges, but not to same-sex life partners.[1] Not surprisingly, the Court found that this omission constituted an infringement of the right to non-discrimination on the grounds of sexual orientation.[2] Turning to the question of a just and equitable remedy, the Court had to choose between a suspended declaration of invalidity (because a simple striking down would have had the effect that no-one would have been entitled to any benefits), perhaps combined with interim relief, and reading the entitlement for partners in a permanent same-sex partnership into the impugned provision. The Court decided on the latter option:

> The remedy of reading in is far more preferable to an order striking down and suspending such declaration which would not afford the applicant the relief she seeks.[3]

Unfortunately, the Constitutional Court did not provide any further reasons for its choice. Perhaps the judges thought that it was a clear case. From the judges' perspective, any reduction of the benefits for fellow judges' spouses was apparently not an option.[4] So, further extension was the only way to go. Perhaps the Court just saw no point in waiting for the extension. From this perspective, a suspended striking down would have been a mere nicety, making even less sense when combined with an interim order basically providing same-sex life partners with all that they had asked for anyway.

In *Khosa*, a case concerning the entitlement of permanent residents to social grants, the Constitutional Court (in a majority judgment by Mokgoro J) explicitly rejected the possibility of interim relief because this would have helped only the applicants, and not other persons in a similar situation.[5] The Court wanted to

[1] *Satchwell v President of the Republic of South Africa & Another* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC)('*Satchwell*').

[2] Ibid at para 21.

[3] Ibid at para 34.

[4] Ironically, Constitutional Court judges were not included in the challenged benefits scheme, because the Constitutional Court did not exist when the provisions entered into force. This was changed by legislation in 2001 — while the *Satchwell* case was pending — and again the legislature omitted to include permanent same-sex life partners. These new provisions were challenged, too, and the Constitutional Court repeated its earlier 'reading in' order with regard to these new provisions. See *Satchwell v President of South Africa & Another* 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC).

[5] *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minster of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) at para 88 (Striking down without an order of suspension was not appropriate either, as it would have made the grants instantly available to all residents including visitors within South Africa who satisfy the other criteria.)

help all other permanent residents who were excluded from the social grant scheme, and therefore resorted to reading the words 'permanent residents' into the impugned legislation as the most appropriate remedy.[1]

Just how fragile the balance between respect for the separation of powers and granting an effective remedy is, is evident in those cases in which the Constitutional Court was divided over this very question. The leading case here is *Fourie*.[2] The Court was unanimous in finding that both the Marriage Act[3] and the common-law definition of marriage were unconstitutional to the extent that they discriminated against homosexual couples by failing to provide them with the means to enjoy the status and the benefits, together with the responsibilities, that marriage accorded to heterosexual couples. It was, however, divided on the remedy. The majority (in a judgment by Sachs J) suspended the order of invalidity for twelve months in order to give Parliament time to remedy the defect (which it did in November 2006).[4] If Parliament had failed to cure the defect within that time, the words 'or spouse' would automatically have been read into the relevant section of the Marriage Act (the common law would just have become invalid). In a dissenting judgment, O'Regan J proposed that the Court should not have suspended the order of invalidity and additionally should have made the necessary orders to permit same-sex couples to marry with immediate effect, i e by developing the common law and reading in the words 'or spouse' into the relevant section of the Marriage Act.

The majority and the minority judgment in *Fourie* illustrate two different approaches to the Court's relationship to the legislature in respect of violations of the Bill of Rights. In the majority judgment, Sachs J spends thirty paragraphs dismissing claims by the government and the amici that, even if the Marriage Act and the common law do discriminate against same-sex couples, the remedy against such discrimination should not be to alter the law of marriage to include same-sex couples, but rather to provide alternative forms of recognition to same-sex family relationships. The rejection of these arguments forms part of the first stage of the enquiry, because after this Sachs J goes on to engage the limitations

[1] *Khosa* (supra) at para 89.

[2] *Minister of Home Affairs & Another v Fourie & Others; Lesbian and Gay Equality Project v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)('*Fourie*').

[3] Act 25 of 1961.

[4] In response to *Fourie*, on 30 November 2006 (just one day short of the window period), the President signed the Civil Union Act 17 of 2006 into law. The Act introduces the new institution of a 'civil union' between persons either in the form of marriage or a civil partnership, both forms available to heterosexual as well as same-sex partners, solemnized before the state and with all legal consequences of a marriage. The Marriage Act of 1961 is still valid and still only allows heterosexual partners to conclude a marriage. For an insightful view of the drafting history behind the new Act, see Pierre de Vos 'The "Inevitability" of Same-Sex Marriage in South Africa's Post-apartheid State' (2007) 23 *SAJHR* 432, 458–63. See also David Bilchitz & Melanie Judge "For Whom Does the Bell Toll?" — The Challenges and Possibilities the Civil Union Act Creates for Family Law in South Africa' (2007) 23 *SAJHR* 466.

stage, where again it was contended that marriage should not be extended to include same-sex couples. In this context, Sachs J makes an interesting remark about the relationship between the rights inquiry stages and the remedy (or order) stage:

> The factors advanced [in support of justification] might have some relevance in the search for effective ways to provide an appropriate remedy that enjoys the widest public support, for the violation of the rights involved.[1]

This sentence seems to indicate that the majority takes the state's concerns about the full extension of marriage to same-sex couples more seriously than it elsewhere admits — not with regard to the rights violation, but with regard to the appropriate remedy.[2] It is at this point that separation of powers concerns weigh heavily with the Court. It begins by acknowledging that Parliament has included same-sex partners as beneficiaries of several statutory schemes. The problem with these 'advances', however (the Court says), is that they 'continue to be episodic rather than global'.[3] This allows it to reiterate its earlier call for comprehensive legislation regularizing same-sex relationships in *J & B*.

> It is unsatisfactory for the courts to grant piecemeal relief to members of the gay and lesbian community as and when aspects of their relationships are found to be prejudiced by unconstitutional legislation. . . . The executive and legislature are therefore obliged to deal comprehensively and timeously with existing unfair discrimination against gays and lesbians. Moreover, courts considering unfair discrimination cases of this sort need carefully to evaluate the context and nature of the discrimination and, where unfair discrimination is found, remedies must be carefully tailored to that context.[4]

Ironically, in *J & B* (which involved a challenge to the exclusion of same-sex partners from becoming joint parents of a child born to them as a result of artificial insemination), the Constitutional Court had no problem in reading the words 'permanent same-sex life partner' into the Children's Status Act.[5] Furthermore, the Court explicitly rejected the suspension of that order: first because, after the vindication of an infringed right by way of reading in, there is no lacuna left that the legislature needs to fill; secondly, because, when the unconstitutionality is cured, there would usually be no reason to deprive the applicants of the benefit of such an order by suspending it; and, finally, because the legislature is anyway at liberty to change the law whenever it pleases.[6]

[1] *Fourie* (supra) at para 113.

[2] See De Vos (supra) at 457 ('[T]here seems to be a contradiction at the heart of the rhetoric employed by the Court.') See also *Fourie* (supra) at para 143 (Court notes that the SALRC considered it advisable from a policy point of view not to disregard the strong objections against recognition, and rather to accommodate religious sentiments to the extent possible in the development of a further proposal.)

[3] *Fourie* (supra) at para 116.

[4] *J & B v Director General: Department of Home Affairs & Others* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC)('*J&B*') at paras 23 and 25.

[5] Act 82 of 1987.

[6] *J & B* (supra) at para 22.

In *Fourie*, however, the majority of the Court emphasized that matters were not that simple, and referred to a pending South African Law Reform Commission (SALRC) project on the topic of Domestic Partnerships, which had outlined several alternative forms of relief to which same-sex couples might be entitled.[1] Given that different ways of accommodating the legitimate interests of such couples were already in the public domain and were soon to be considered by Parliament,[2] the Court felt that it needed to have regard to the complexity and variety of the statutory and policy alternatives available to the legislature, even though a successful litigant should usually receive at least some practical relief.[3]

Against this background, the Court reasoned that the benefits of suspending the order of invalidity outweighed the interests of the successful litigants. The first reason given for this was that same-sex marriage is a matter of 'status' and thus requires a remedy that is 'secure', 'firmly located within the broad context of an extended search for emancipation', and part of an 'enduring and stable legislative appreciation'.[4] A temporary remedial measure, on the other hand, would be far less likely to achieve the enjoyment of equality promised by the Constitution.[5] Secondly, in the eyes of Sachs J, the claim by Mrs Fourie and Mrs Bonthuys to get married should not be regarded as a narrow wish 'to enter into a legal arrangement' but rather as part of a bigger picture.[6] The validity of these arguments is debatable.[7] Nevertheless they allowed the majority of the Court to show respect for the separation of powers and (particularly in the light of the progress made by the SALRC) to give Parliament an opportunity to deal appropriately with a matter 'that touches on deep public and private sensibilities'.[8] The sleight of hand in the

[1] South African Law Reform Commission, Project 118, Discussion Paper 104 (August 2003). The SALRC proposed that same-sex relationships should be acknowledged by the law and identified three alternative ways of effecting legal recognition for such relationships: *(a)* opening up the common-law definition of marriage to same-sex couples by inserting a definition to that effect in the Marriage Act; *(b)* abolishing secular marriage as a legal institution and replacing it with a civil union which would produce effects similar to marriage but be available for both heterosexual and same-sex couples; and *(c)* providing a 'marriage-like alternative', according same-sex couples the opportunity of concluding civil unions with the same legal consequences as marriage.

[2] For previous use of this argument, see *Volks NO v Robinson & Others* 2005 (5) BCLR 446 (CC) at para 29.

[3] *Fourie* (supra) at paras 133–34 (with reference to *Fraser* (supra) and *Dawood* (supra)).

[4] Ibid at para 136.

[5] Ibid at para 136.

[6] Ibid at para 137 ('the comprehensive wish to be able to live openly and freely as lesbian women emancipated from all the legal taboos that historically have kept them from enjoying life in the mainstream of society'.)

[7] The first argument begs the question why an order by the Constitutional Court should not be a 'secure' remedy. In several other judgments the Court had relied on the fact that 'reading in' does constitute such a remedy, granting to successful litigants the fruits of their constitutional efforts and providing for legal certainty. The second argument made by Sachs J seems to be a bit speculative, and assumes a very altruistic motivation on the part of the applicants for which there was no indication in the facts of the case. Maybe Mrs Fourie and Mrs Bonthuys really just wanted to get married.

[8] *Fourie* (supra) at paras 138–39.

majority judgment was, as Theunis Roux has pointed out, that it implied that this very deference to the legislature would actually enhance the effective protection of the constitutional right at issue.[1]

The most interesting part of the *Fourie* judgment from a separation of powers perspective follows immediately after these considerations. Although throughout his reasoning on the remedy Sachs J emphasizes why the legislature should be free to map out what it considers to be the best way forward for same-sex marriage, the judgment ultimately defines the scope Parliament has in its deliberations on this issue rather narrowly. On the pretext that it would be 'helpful to Parliament to point to certain guiding principles of special constitutional relevance' for the prospective legislation,[2] the Court in effect pre-determines the path the legislature has to follow if it is to avoid further constitutional challenges.[3] In the process of drafting the new legislation and in academic writing, for example, it was argued that the creation of a separate institution for same-sex couples ('civil partnership') would run against the 'guidelines' in the *Fourie* judgment (even if such an option bestowed exactly the same set of legal rights on same-sex civil partners as it did on heterosexual married couples). The civil partnership option, it was said, would contravene the very clear prohibition of a 'separate but equal' remedy in the judgment.[4]

In our view, the deference the Constitutional Court paid to the legislature in *Fourie* was given with one hand and taken away with the other. The Court tied the legislature's hands with regard to the policy choices it could make, in a way that did not show a particularly high regard for Parliament's pre-eminent domain. This is not to suggest that the reasoning in *Fourie* was wrong from a Bill of Rights perspective. In addition, if one contrasts this case with the deference shown towards the legislature and the executive in the cases discussed above,[5] the Court in *Fourie* did what we argued it should have done in cases like *UDM*: the Court closed constitutional leeways potentially open to the political branches by a process of constitutional interpretation that included reference to supporting

[1] See Theunis Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International J of Constitutional Law* (forthcoming).

[2] *Fourie* (supra) at para 147.

[3] See *Fourie* (supra) at paras 148–53 (The Court outlined the following principles: The objective of the new measure must be to promote human dignity, the achievement of equality and the advancement of human rights and freedoms; the new law should not create equal disadvantage for all, i e it should not assume that if same-sex couples cannot enjoy the status and entitlements coupled with the responsibilities of marriage, nobody should; the new regime should (while on the face of it provide equal protection) in fact reproduce new forms of marginalization and would reiterate a 'separate but equal' repudiation of homosexuals; finally, the legislative remedy chosen must be as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved.)

[4] De Vos (supra) at 458–59; Bilchitz & Judge (supra) at 481; Jaco Barnard 'Totalitarianism, (Same-Sex) Marriage and Democratic Politics in Post-Apartheid South Africa' (2007) 23 *SAJHR* 500, 516.

[5] See § 12.3.*(d)*(ii)(bb) supra.

constitutional principles,[1] the adoption of a historic perspective,[2] and resort to comparative law. In the end, the separation of powers concerns in *Fourie* were not as pressing as they first appeared to be, or, perhaps, they were experienced in a more indirect way. The genius of the decision is the way the Court was able to pass responsibility for the recognition of same-sex marriage to the legislature, shrouding its interest in avoiding blame for the 'destruction of marriage' in a resounding tribute to Parliament's greater democratic legitimacy, and a stated belief in the value of legislative choice and competence. At the same time, however, the Constitutional Court made very sure that the legislature's choice was in fact quite limited and designed an order that put considerable pressure on the political branches not to exceed the period given for a legislative solution.

The price paid for this bit of ingenuity, of course, was that same-sex couples who wished to get married had to wait a further year. For O'Regan J in dissent, the principle that successful litigants should ordinarily obtain the relief they seek could not be strategically traded off in this way.[3] The weak point in the majority judgment, as she pointed out, was that, even on its approach, the legislature was not left with a wide range of options from which to choose.[4] This fact undermined the majority's invocation of separation of powers:

> The doctrine of the separation of powers is an important one in our Constitution but I cannot see that it can be used to avoid the obligation of a court to provide appropriate relief that is just and equitable to litigants who successfully raise a constitutional complaint. The exceptions to … [the immediate effect of invalidity orders] must arise in other circumstances, where the relief cannot properly be tailored by a court, or where even though a litigant would otherwise be successful, other interests or matters would preclude an order in his or her favour, or where an order would otherwise produce such disorder or administrative difficulties that the interests of justice served by an order in favour of a successful litigant are outweighed by the social dislocation such an order might occasion.[5]

She continues:

> It would have been desirable if the unconstitutional situation identified in this matter had been resolved by Parliament without litigation. The corollary of this proposition, however, is not that this Court should not come to the relief of successful litigants, simply because an Act of Parliament conferring the right to marry on gays and lesbians might be thought to carry greater democratic legitimacy than an order of this Court. The power and duty to

[1] See *Fourie* (supra) at para 149 ('At the heart of these principles lies the notion that in exercising its legislative discretion Parliament will have to bear in mind that the objective of the new measure must be to promote human dignity, the achievement of equality and the advancement of human rights and freedoms.')

[2] Ibid at para 150 (the Court refers to an apartheid-era case to illustrate that the traditional notion that separate but equal institutions are no longer permissible ('unthinkable') in the post-1994 constitutional democracy.)

[3] Ibid at paras 165–67.

[4] Ibid at para 168.

[5] Ibid at para 170.

protect constitutional rights is conferred upon the courts and courts should not shrink from that duty. The legitimacy of an order made by the Court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.[1]

With these words, O'Regan counters the majority's (somewhat superficial) respect for the domain of the legislature with a reminder about the need to respect the Court's own domain, adding that no order by the Court would preclude Parliament from addressing the law of marriage in the future.

In the final analysis, both the majority and the minority's approach in *Fourie* are plausible. The Court, after all, did fulfil its major obligation to protect the Constitution. The difference between *Fourie* and those cases in which the Constitutional Court employed the separation of powers doctrine to reduce the level of review is that the substantive question of constitutional law in *Fourie* was undisputed. It is thus debatable whether the majority really 'shr[a]nk' from its duty to protect constitutional rights, as O'Regan J implies in the quote above. To whom does the Court owe its duty to protect the Constitution: only or primarily the litigants in the case before it, or also all affected persons and society in general? If one accepts that the Constitutional Court is just one actor in South African politics and needs to involve other players in the constitutional project (not least in order to protect its capacity to make controversial judgments), then one must also accept that the majority's decision in *Fourie* to sacrifice the applicants' interests in an immediately enforceable order in favour of the long-term health of South Africa's constitutional democracy was probably justified.[2] The separation of powers doctrine in the context of remedies needs to find an appropriate balance between two conflicting domains: the judiciary's power and duty to give effect to the Constitution and the political branches' prerogative to make policy choices within the framework of the Constitution. The Final Constitution anticipates this tension by providing for just and equitable remedies, such as the suspension of orders of invalidity. Attaching greater importance to one of the two domains in the abstract does not do this careful constitutional scheme justice.

(iii) *Delegation of legislative authority and subordinate legislation*

The most obvious example of the performance by the executive of a legislative (ie abstract rule-making) function is the making of subordinate legislation.[3] Generally

[1] *Fourie* (supra) at para 171.

[2] Cf Roux 'Principle and Pragmatism' (supra) (Suggesting that, for the majority of the Constitutional Court in *Fourie*, it was important to enlist the legislature's co-operation in the enforcement of a legal change that was likely to be highly divisive, and ran the risk of further weakening public support for the Court.)

[3] Subordinate legislation is also referred to as delegated legislation, governatorial legislation or secondary legislation. The term basically refers to law made by an executive authority under powers given to it by an empowering Act ('primary legislation') in order to implement and administer the requirements of that Act. The advantage of such legislation is that it allows rules dealing with rather technical matters to be prepared by those with the relevant expert knowledge in the governmental departments. The legislature does not need to be occupied with such details and is free to determine broader policy decisions. Finally, it can usually be changed faster than a formal Act of Parliament allowing the government to deal swiftly with changing circumstances.

speaking, countries within the English tradition of parliamentary supremacy are less concerned about the delegation of law-making power to the executive. In legal systems with a strong tradition of a constitutionally mandated separation of powers, on the other hand, the extent to which the legislature may transfer rule-making powers to the executive is a contested issue.

The most extreme example of the parliamentary supremacy tradition is the United Kingdom itself, where there is no formal limit on the power of Parliament to delegate legislative power to the government.[1] This power extends as far as the delegation of the power to amend Acts of Parliament. However, since the Statutory Instruments Act of 1946, most delegated legislation is subject to parliamentary control, either in the form of a 'negative resolution procedure', requiring Parliament formally to veto the delegated legislation within a certain time period to prevent its coming into force, or in the form of an 'obligatory positive affirmative resolution' as a precondition for the delegated legislation's coming into force. In either case, the empowering Act must state the form of parliamentary control to which the delegated legislation is subject. Parliament's control is typically limited to approving or rejecting the delegated legislation as laid before it, i e it can usually not amend it.

In Australia, the High Court, in a 1931 decision, followed the English tradition of allowing for wide-ranging delegation of law-making powers by Parliament to the executive.[2] The Court explicitly rejected the argument that separation of powers considerations prevented the legislature from delegating even the widest powers to the executive, precisely because the very nature of Parliament's legislative power involves the power to confer law-making powers upon authorities other than itself. However, the High Court at the same time declared that Parliament could not 'abdicate' its legislative powers in a particular area entirely. Delegation needed to be specific, because an overbroad delegation would fall outside the legislative competence of the Commonwealth Parliament (in contrast to state parliaments in Australia, which retain all residual legislative powers):

> [A] law confiding authority to the Executive will [not always] be valid, however extensive or vague the subject matter may be . . . There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power.[3]

A generally more critical approach to subordinate legislation exists in Germany, where delegation is possible, but only as provided for in the Constitution. According to Article 80 of the Grundgesetz, the executive at both the federal and the provincial (Länder) level may be authorized by a law to issue subordinate legislation provided that the content, purpose, and scope of the authority conferred on

[1] See Anthony Bradley & Keith Ewing *Constitutional and Administrative Law* (14th Edition, 2007) 682–87.
[2] *Victorian Stevedoring and General Contracting Co Pty Ltd & Another v Dignan Informant* (1931) 46 CLR 73.
[3] Ibid at 101 (Dixon J).

it are specified in the empowering law. The Federal Constitutional Court has on many occasions been asked to decide whether a particular empowering act was sufficiently precise in this regard. The general thrust of these decisions is restrictive and has resulted in the so-called 'theory of essentialness' (*'Wesentlichkeitstheorie'*), which emphasizes the importance of parliamentary authority for limitations of the Bill of Rights against the background of separation of powers concerns:

> The principles of the rule of law and democracy impose on the legislature a duty of formulating more or less by itself those regulations that are essential for the realization of basic rights — and of not leaving this to the discretion and decision-making authority of the executive. To what extent the legislature must by itself set the necessary guidelines depends, in a given area, predominantly on the fundamental right involved. It has a duty to act in this way when competing liberty rights clash, and their boundaries are fluid and hard to discern. … Here, the legislature itself is obligated to determine the limits of the conflicting guarantees of liberty, at least to the extent that such limits are essential for the exercise of these liberty rights.[1]

According to the Court, the theory of essentialness does not only answer the question of whether a particular subject must be statutorily regulated before the executive may make any rules in relation to it. It is also decisive in determining how far such statutory regulation should go, how precise it needs to be, and how much discretion may be left to the executive in its application.[2] Obviously, the question of what is essential is highly dependent on the particular subject matter, and the Federal Constitutional Court's jurisprudence is accordingly quite fragmented in this respect. The involvement of Bill of Rights issues generally reduces the legislature's capacity to delegate law-making powers to the executive, but an Act of Parliament regulating complex situations or addressing potentially fast-changing facts may be given greater leeway to delegate decisions to the executive.[3]

In South Africa, the issue of whether and to what extent Parliament may empower the government to make abstract rules and thus to delegate its law-making power was first addressed under the Interim Constitution. The constitutional text provided no assistance as it did not mention subordinate legislation at all, but only stated in very general terms that Parliament had the power to make laws in accordance with the Constitution (IC s 37).

[1] *BVerfGE* 83, 130 (*'Josephine Mutzenbacher'*) 142 ('Rechtsstaatsprinzip und Demokratiegebot verpflichten den Gesetzgeber, die für die Grundrechtsverwirklichung maßgeblichen Regelungen im wesentlichen selbst zu treffen und diese nicht dem Handeln und der Entscheidungsmacht der Exekutive zu überlassen. Wie weit der Gesetzgeber die für den fraglichen Lebensbereich erforderlichen Leitlinien selbst bestimmen muß, richtet sich maßgeblich nach dessen Grundrechtsbezug. Eine Pflicht dazu besteht, wenn miteinander konkurrierende grundrechtliche Freiheitsrechte aufeinandertreffen und deren jeweilige Grenzen fließend und nur schwer auszumachen sind. … Hier ist der Gesetzgeber verpflichtet, die Schranken der widerstreitenden Freiheitsgarantien jedenfalls so weit selbst zu bestimmen, wie sie für die Ausübung dieser Freiheitsrechte wesentlich sind.' (References omitted.)) This judgment was published in an English translation in Bundesverfassungsgericht (ed) *Decisions of the Bundesverfassungsgericht 1958–1995* Volume 2/II (1998) 474.

[2] See BVerfGE 83, 130, 152 (*'Josephine Mutzenbacher'*).

[3] *BVerfGE* 49, 89, 133 (*'Kalkar I'*).

The practice of delegating law-making power to the executive was challenged as early as 1995 in *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others*.[1] The case concerned the validity of certain amendments to the Local Government Transition Act by presidential proclamation. The Act had explicitly empowered the President to make amendments to it in this way, provided that any such amendment should first have been approved by the relevant Parliamentary committees and that Parliament as a whole did not later disapprove of any such proclamation or any provision thereof.

The *Executive Council of the Western Cape Legislature 1995* Court began its assessment with the general observation that delegated legislation was not only allowed by the Interim Constitution, but also unavoidable in complex contemporary societies:

> In a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution parliament can pass legislation delegating such legislative functions to other bodies.[2]

Historically, South Africa had followed English law in terms of which it is accepted that Parliament may delegate power to the executive to amend or repeal Acts of Parliament.[3] The Court considered, however, whether the principle of separation of powers entrenched in the Interim Constitution and the departure from the former system of parliamentary supremacy had changed this. Reasoning that the explicit description of the law-making process in the Interim Constitution[4] guaranteed the exercise of legislative authority by Parliament, the Court held that this procedure was mandatory whenever a law was amended.[5]

> There is . . . a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including . . . the power to amend the Act under which the assignment is made.[6]

The empowerment of the President formally to amend the Act by proclamation (or by any other form of subordinate legislation) was therefore held to be invalid.

The Final Constitution, in contrast to its predecessor, *does* mention subordinate legislation. FC s 239 (the definitions clause) states that national legislation includes

[1] *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC)('*Executive Council of the Western Cape Legislature 1995*').
[2] Ibid at para 51 (Chaskalson P).
[3] See *R v Maharaj* 1950 (3) SA 187 (A) and *Binga v Cabinet for South West Africa & Others* 1988 (3) SA 155 (A).
[4] IC ss 59–65; FC ss 73–82.
[5] *Executive Council of the Western Cape Legislature 1995* (supra) at para 62.
[6] Ibid at para 51.

'subordinate legislation made in terms of an Act of Parliament'. The only requirement that may be deduced from this definition is that all subordinate legislation must be made 'in terms of' an empowering statute. FC s 101(3) provides that '[p]roclamations, regulations and other instruments of subordinate legislation must be accessible to the public', thereby not only guaranteeing some degree of transparency, but also indicating that the meaning of 'subordinate legislation' is not limited to proclamations or regulations, but also includes by-laws and other rules made by executive bodies.[1]

As with the Interim Constitution, the Final Constitution does not determine the extent to which Parliament may make use of its power to delegate legislative authority to the executive. In 1999, however, the Constitutional Court confirmed its earlier decision in *Executive Council of the Western Cape Legislature* that delegation short of 'plenary legislative power' is possible.[2] In the 1999 judgment, the Court emphasized that the real inquiry was whether the Constitution authorizes the delegation of the particular power in question.[3]

This decision leads to the more specific question, which was left open in the 1995 judgment: When does a legitimate delegation to make (subordinate) legislation become a constitutionally prohibited delegation of 'plenary legislative power'? In *Executive Council of the Western Cape Legislature* the Constitutional Court adopted a formalist approach and relied on the fact that the Act in question provided for a formal amendment power by the President. According to the formalist approach, an Act *of* Parliament needs to be and remain an Act *by* Parliament: a set of rules created and if necessary amended in the proper legislative process. Thus, Parliament may delegate law-making authority to the executive, but not statute-making or statute-amending authority — save in exceptional circumstances, such as times of war or natural catastrophe.[4] But the insertion of the word 'including' in the Court's dictum in *Executive Council of the Western Cape Legislature* — as quoted above[5] — seems to suggest that an unconstitutional assignment of plenary legislative power is also possible short of formal amendment powers.

In the 1999 judgment, Ngcobo J also began cautiously by suggesting a formalist approach:

> The Constitution uses a range of expressions when it confers legislative power upon the national legislature in Chapter 7. Sometimes it states that 'national legislation must'; at other times it states that something will be dealt with 'as determined by national legislation'; and at other times it uses the formulation 'national legislation may'. Where one of the first two

[1] The content of FC s 101(3) is mirrored for the provincial sphere in FC s 140(3).

[2] *Executive Council Province of the Western Cape v Minister for Provincial Affairs; Executive Council KwaZulu-Natal v President of the Republic of South Africa* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC)('*Executive Council Province of the Western Cape 1999*') at para 124 (Ngcobo J)('Although [in *Executive Council of the Western Cape Legislature 1995* (supra)] the Court was concerned with the interim Constitution, it seems to me that the same principle applies to the present Constitution.')

[3] *Executive Council Province of the Western Cape 1999* (supra) at para 124.

[4] *Executive Council of the Western Cape Legislature 1995* (supra) at para 62.

[5] Ibid at para 51.

> formulations is used, it seems to me to be a strong indication that the legislative power may not be delegated by the legislature, although this will of course also depend upon context.[1]

The problem with this approach, however, is that FC s 239 makes it very clear that 'national legislation' includes subordinate legislation. This provision would be meaningless if the constitutional requirement that a particular issue should be regulated by national legislation could be construed to mean that every detail had to be determined by an Act of Parliament. Nevertheless, in its 1999 judgment, the Constitutional Court interpreted FC s 159(1), which requires the term of a municipal council to be 'determined by national legislation', to mean that such terms of office could not be determined by ministerial notice in the *Government Gazette*.[2]

However unconvincing such reasoning may be in the light of FC s 239, the outcome of the Court's decision seems right. In addition to relying on the words 'determined by national legislation', Ngcobo J also pointed out that the determination of the term of office of an elected legislative body such as a municipal council is a crucial aspect of the functioning of that council and of importance to the democratic political process.[3] This factor contributed to the Court's finding that the term of office had to be decided by Parliament and could not be delegated to the executive.[4] This argument is persuasive, since the Court here uses a substantive rather than formal criterion (importance for the democratic process) to assess whether the Final Constitution authorizes the delegation of the power in question.

In general, the use of substantive criteria is a better way of assessing whether subordinate legislation is permissible or not. Formal criteria may provide for a minimum standard, but often miss the real separation of powers concern raised by the delegation of lawmaking authority. In practice, 'plenary legislative power' may be assigned to another body without authorizing the formal amendment of a statutory provision. The crucial question, therefore, is the extent to which Parliament may delegate major policy decisions to the executive by way of an empowering provision to make subordinate legislation. To recall, subordinate legislation was traditionally supposed to cover matters of a complementary nature; technical matters that the legislature did not need to occupy itself with; and subordinate matters incidental to the subject matter of the statute, which did not need to be discussed in public, but could rather be adjusted to the overall purpose of the statute by technical experts in the administration.

There is certainly no need slavishly to look for the 'technical nature' of matters before subordinate legislation may be approved, and it would be inappropriate to reject the conferral of even the slightest discretion on the executive. Such an

[1] *Executive Council Province of the Western Cape 1999* (supra) at para 124.
[2] Ibid at para 126.
[3] Ibid.
[4] Ibid. Ngcobo J pointed out that Parliament could easily have determined the term of office itself.

approach would just go to the opposite extreme. Nevertheless, the principle of separation of powers in the Final Constitution precludes the delegation of any power to legislate on matters of general policy. It is also incompatible with the separation of powers principle for such a wide discretion to be conferred on the executive in regulating a matter that it is impossible to know from the statutory provision the scope, content and limitations of the subordinate legislation. In English law, such an empowering statute is aptly referred to as 'skeletal' as it lacks any substantive flesh and amounts to nothing more than a licence to legislate.[1] 'Plenary legislative power' has been assigned to the executive when an empowering statute leaves room for subordinate legislation to adopt not just one particular principle, but also its exact opposite. In such a case, in which opposing policy decisions could be taken 'in terms of' the same statutory provision, parliamentary oversight and scrutiny of executive action is substantially weakened.

Thus far, this question has not been explicitly addressed in South Africa. In the 1999 decision discussed earlier, *Executive Council Province of the Western Cape v Minister for Provincial Affairs; Executive Council KwaZulu-Natal v President of the Republic of South Africa*, the Constitutional Court was asked to consider whether an empowering Act had to provide safeguards against 'abuse and arbitrary application' of the power it conferred on the executive, and whether Parliament, when delegating its law-making functions, should provide clear or adequate criteria for the exercise of the delegated power. The Court held that it was not necessary to decide either of these questions,[2] but nevertheless seemed to be quite sympathetic to answering them in the affirmative. Regarding the need for clear or adequate criteria for the exercise of the delegated power, it stated that the challenged Act prescribed the framework within which the Minister had to exercise his delegated authority with sufficient precision and therefore that the delegation did not amount to the assignment of plenary legislative power.[3]

This approach is in line with the Constitutional Court's later decision in *Dawood*, which concerned the exercise of discretion by officials on the basis of an Act of Parliament.[4] The Court found fault with the fact that the discretion had been conferred without proper guidance on how it should be exercised. The crucial factor in this case was that the discretionary decisions that the officials were empowered to take potentially limited constitutional rights. At least in such a case, the Court held, the legislature needs to provide guidance to the executive on how to apply a discretionary norm.[5] As the Court put it: 'Affording the executive

[1] Bradley & Ewing (supra) at 677–78.
[2] *Executive Council Province of the Western Cape 1999* (supra) at paras 94, 116–18.
[3] Ibid at para 94 (our emphasis).
[4] *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC).
[5] Ibid at para 54.

a power to regulate such matters is not sufficient. The legislature must take steps where the limitation of rights is at risk to ensure that appropriate guidance is given.'[1]

This principle is a sound one, and may also be used to determine the constitutional limits of the delegation of legislative authority: where the implementation of a statutory provision may lead to a violation of a right in the Bill of Rights the essential circumstances under which such violation is justified need to be determined by the democratically elected legislature. If it is left to the executive (by way of a discretionary decision or by way of subordinate legislation) it is impossible to determine whether the executive has acted in accordance with the will of the legislature or not. As Steven Budlender has argued, the constitutionality of a delegation will depend on the nature of the delegated power involved and the effect that the exercise of such power has.[2] The more a delegated law-making power affects the democratic process, the institutional function of Parliament or the legislatures in other spheres of government, and the more it poses a threat to the protection, promotion and fulfilment of the rights in the Bill of Rights, the more detail the legislature needs to specify in the empowering law itself and the less it may leave to the executive to specify in subordinate legislation.

Similar separation of powers concerns are raised when rule-making authority is delegated to bodies other than organs of state, either directly by Parliament or by way of sub-delegation by the executive. In a number of decisions, courts have had to decide whether rules created by private institutions were subject to judicial review — a problem related to the definition of organs of state in FC s 239 and the application of the Final Constitution in the private sphere.[3] From a separation of powers point of view, however, the crucial question is the legitimate source of such private bodies' power to make abstract rules in the first place.

The leading case in this regard is *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & Another*.[4] The legislature here had clearly empowered the Minister of Trade and Industry to make certain regulations, but the empowering Act remained silent on whether the Minister could — as he had done — further delegate this rule-making power to a private body. The majority of the Constitutional Court had no objection to such sub-delegation (provided that it fell short of the delegation of plenary legislative power), even in the absence of express authorization in the statute.[5] In a compelling dissenting judgment, however,

[1] *Dawood* (supra) at para 54 note 74.

[2] See Steven Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) § 17.3*(e)(i)*.

[3] See, for example, *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange & Others* 1983 (3) SA 344 (W) for a pre-1994 case; *Directory Advertising Cost Cutters v Minister of Posts, Telecommunications and Broadcasting* 1996 (3) SA 800 (T); *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds* 1997 (8) BCLR 1066 (T).

[4] 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC).

[5] *AAA Investments* (supra) at paras 48, 125–31.

Langa CJ disagreed with the majority's view. Citing established case law, he held that the doctrine 'delegatus delegare non potest' requires that, where the legislature has delegated powers and functions to a subordinate authority, it must be assumed to have intended that authority to exercise those powers and to perform those functions itself, and not to delegate them to someone else, and that the power delegated in the Act did not therefore include the power to sub-delegate.[1] Only an express authorization to sub-delegate or the deduction of such authority by necessary implication from the statute could have legitimated the further delegation of law-making power to a private body.[2]

(iv) *Executive-controlled dispute resolution*

Although the judicial authority is vested in the courts (FC s 165(1)), several specialized bodies, tribunals, agencies, commissions, boards and other structures outside the court system are entrusted with adjudicative functions, such as the Competition Commission, the Competition Tribunal and the Competition Appeal Court;[3] the Commission for Conciliation, Mediation and Arbitration;[4] the Complaints and Compliance Committee of the Independent Communication Authority of South Africa;[5] and the South African Human Rights Commission (with its internal adjudication system).[6] All these bodies were set up to provide efficient, cost-effective and fair dispute-resolution procedures using adjudicators with specialist knowledge of technical expertise in the particular subject matters dealt with. Other legitimate considerations for the establishment of extra-curial dispute-resolution mechanisms include the need to use less formal procedures (dispensing with legal representation, for example) and the need for decentralized systems more accessible to people living outside major urban areas.

However, as appealing as the idea of lightening the judiciary's case load and providing more efficient alternatives might be to prospective litigants, the danger exists that such institutions may not be subject to the same strict standards of independence and impartiality as the courts. A litigant will not gain anything from efficiency if the dispute is not resolved according to the same professional standards as he or she rightly expects from the courts. From a separation of powers perspective, the judicial function may be undermined not only by declaring certain subject matters and disputes to be outside the review powers of courts ('ouster clauses'), but — in a more subtle way — by establishing dispute-resolution mechanisms that are under the control of the executive, and thereby 'outsourcing'

[1] *AAA Investments* (supra) at para 81.
[2] Ibid at paras 82–83.
[3] See Competition Act 89 of 1998 ss 19 (Competition Commission), 26 (Competition Tribunal) and 36 (Competition Appeal Court).
[4] See Labour Relations Act 66 of 1995 s 112.
[5] See Independent Communication Authority of South Africa Act 13 of 2000 s 17A as amended by the ICASA Amendment Act 3 of 2006.
[6] See Jonathan Klaaren 'South African Human Rights Commission' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (eds) (2nd Edition, OS, December 2005) § 24C.3*(c)*(ii).

certain adjudicative functions. Such outsourcing is constitutionally problematic, not because judges are always better at dispute resolution, but because the positive aspect of separation of powers — the prevention of bad government by reducing the concentration of power — is seriously threatened when administrative decisions are not checked and balanced in a review process by independent institutions, such as the courts.

In other jurisdictions, particularly within the common law tradition,[1] the 'outsourcing' of dispute-resolution mechanisms to special adjudicative bodies is a matter of great concern. Violations of the separation of powers doctrine are particularly real when such policies bring the adjudicative function under the influence and possible control of the executive.

In Australia, the High Court has from 1915 onwards taken the view that the judicial power has to be exercised independently and impartially by bodies meeting the traditional description of a court.[2] The legislature is prevented from establishing alternative bodies that may issue judicial remedies and from establishing new 'courts' if those courts are not structured in a way comparable to traditional courts, i e with life tenure for the judges.

In the UK, a tribunal system separate from the courts of law has developed as a standard mechanism for dispute resolution in several subject areas.[3] By and large, this no longer results in many separation of powers concerns as there is a lot of overlap between the courts and tribunals, both with regard to the decisions they take and with regard to the procedures they apply. However, in the 1950s, after a series of allegations of misconduct by government officials, a committee was established to look at the working of administrative tribunals and inquiries. The committee's subsequent report recommended three crucial criteria for the operation of non-court tribunals: openness, fairness and impartiality. The report noted:

> Take openness. If these procedures were wholly secret, the basis of confidence and acceptability would be lacking. Next take fairness. If the objector were not allowed to state his case, there would be nothing to stop oppression. Thirdly, there is impartiality. How can a citizen be satisfied unless he feels that those who decide his case come to their decisions with open minds?[4]

[1] In continental European jurisdictions this problem is not as prevalent because, first, legal disputes have traditionally to be decided exclusively by judges while, secondly, the specialized court structure allows for more judicial resources. For example, administrative and executive decisions in France are exclusively challenged in a 'tribunal administratif', which, despite its name, has the status of a court of law. In Germany, Article 19(4) of the Basic Law constitutionally guarantees that any (alleged) rights violation by a public authority can be challenged in a court of law, usually in a 'Verwaltungsgericht'.

[2] *New South Wales v Commonwealth* (1915) 20 CLR 54 ('*Wheat Case*'); *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.

[3] See Bradley & Ewing (supra) at 695–704.

[4] Oliver Franks *Report of the Committee on Administrative Tribunals and Enquiries*, UK Parliament Command Paper, 5th Series, Cmnd 218 (1957)('Franks Report') at paras 23–24.

The 'Franks Report' of 1957 established the UK practice of regarding tribunals and similar bodies, not as ordinary courts, but nevertheless as institutions involved in adjudication, and hence subject to the judiciary's standards of independence rather than being seen as part of the administration.[1]

The Final Constitution explicitly addresses this potential problem. FC s 34 (the right of access to courts) provides that any legal dispute has to be resolved before a court 'or, where appropriate, another independent and impartial tribunal or forum'.[2] According to the Constitutional Court, this section must be read with FC s 165(2), which provides that the courts are 'independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice'. The purpose of FC s 34 in this context is

> to emphasise and protect generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the Judiciary from the other arms of the State. [FC s 34] achieves this by ensuring that the courts and other fora which settle justiciable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional State, the 'regstaatidee', for it prevents legislatures, at whatever level, from turning themselves by acts of legerdemain into 'courts'.[3]

Accordingly, any such tribunal or forum must prima facie enjoy the same independence and impartiality as the courts mentioned in FC s 166. There are several ways, however, in which such independence and impartiality may be achieved, either by ensuring institutional or, as a minimum, personal independence. Institutional independence is guaranteed in the area of criminal law. FC s 35(3)*(c)* specifically states that an accused person has the right to a public trial before an ordinary court of law, i e the adjudication of criminal offences can not be transferred to any other forum. The Constitutional Court has interpreted this provision to mean that, generally, deprivations of physical liberty either have to be authorized by a court or, at least, by a forum presided over by a judge or a magistrate, i e a judicial officer of the court structure established under the Final Constitution and in which FC s 165(1) has vested the judicial authority of the Republic.[4] On the other hand, public servants who answer to higher officials in the executive branch do not enjoy the same independence as the judiciary and therefore may not deprive a person of his or her personal liberty. Consequently, even fora that do not enjoy the same independence as courts *institutionally* may be 'upgraded' if their adjudicative functions are performed by a judicial officer. In assessing whether a particular dispute-resolution function is performed by sufficiently independent and impartial bodies, the Constitutional Court looks at the structure of the body, not its name.

[1] Bradley & Ewing (supra) at 694.

[2] See Jason Brickhill & Adrian Friedman 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (eds) (2nd Edition, OS, November 2007) Chapter 59.

[3] *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 105.

[4] *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 74.

In *Metcash v SARS*,[1] which concerned a challenge to the procedure for resolution of disputes over the payment of Value-Added Tax (VAT), the Constitutional Court analyzed the independence of the Special Income Tax Court,[2] a forum in which a taxpayer may challenge the assessment of VAT by the SARS Commissioner. The Court held, first, that applications (so-called 'appeals') to the Special Court were not 'forensic' but proceedings in terms of a statutory mechanism specially created for the reconsideration of this particular category of administrative decisions by a specialist tribunal.[3] This did not infringe the taxpayer's right of access to courts, however, because the tribunal was independent and impartial:

> The Special Court operates to all intents like an ordinary court and has extensive powers to interfere with, amend or set aside decisions of the Commissioner. Although the procedure is referred to in the legislation as an appeal, it is a full hearing more akin to a trial. The relevant provisions of the Income Tax Act that establish the Special Court and prescribe its procedure . . . are eminently fair and afford a dissatisfied vendor more than a merely formal right of appeal. The court is presided over by a judge, who sits with an accountant and a representative of the business community. There is a right to legal or other expert representation, to adduce evidence and to challenge or rebut adverse evidence in a full-blown trial on the issues raised in the taxpayer's notice of appeal. Withal, therefore, a hearing before the Special Court meets the criteria of section 34 of the Constitution.[4]

In 2007, the Islamic Unity Convention (the operator of a radio station) challenged the status and powers of the Broadcasting Monitoring and Complaints Committee and its successor, the Complaints and Compliance Committee of ICASA, as (among others) being contrary to FC s 34.[5] The Constitutional Court considered whether the structure of, and the powers conferred on, the two committees ensured fairness, independence and impartiality.

> [T]he BMCC, when investigating and adjudicating a complaint, [has] to afford the complainant and the licensee a reasonable opportunity to make representations and to be heard [and] . . . both [are] entitled to legal representation. . . . [T]he Chairperson of the BMCC must be a judge of the High Court, whether in active service or retired, a practising advocate or attorney with at least ten years' appropriate experience, or a magistrate with at least ten years' appropriate experience. This requirement, in my view, was aimed at ensuring fairness, impartiality and independence. The Chairperson was an experienced, legally trained person. In my view, the scheme adequately ensured fairness.[6]

Although both the BMCC and the CCC seem to meet all the requirements, they are not courts of law concerned with the fair resolution of social conflict, but regulatory bodies performing an administrative function in the interests of the

[1] *Metcash Trading Ltd v Commissioner, South African Revenue Service, & Another* 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC)('*Metcash v SARS*').

[2] According to Value-Added Tax Act 89 of 1991 s 33, the Special Income Tax Court (constituted under Income Tax Act 58 of 1962 s 83) also has jurisdiction with regard to VAT disputes.

[3] *Metcash v SARS* (supra) at para 32.

[4] Ibid at para 47.

[5] *Islamic Unity Convention v Minister of Telecommunications & Others* 2008 (3) SA 383 (CC).

[6] Ibid at para 49 (Mpati AJ).

administration to which they belong, and hence prone to 'institutional bias'. However, in this particular case, FC s 34 was not even implicated, because the BMCC and the CCC do not take final decisions, but rather refer their findings and recommendations to ICASA for final decision-making. Before an administrative agency has taken a final decision, the *Islamic Unity Convention* Court held, there is no 'dispute' that can be resolved by the application of law.[1]

The separation of powers doctrine requires that all adjudicative functions be performed by substantially independent and impartial bodies according to a fair procedure. These essential requirements apply to both courts and other dispute-resolution bodies and do not depend on the name of the adjudicatory body. It is crucial that neither side may dictate to the adjudicatory body the way in which it should decide the matter, that the matter should be looked at from both sides, and that adjudicators should not fear punishment or dismissal when a state body is unhappy with their decision. In cases where internal, non-independent administrative review procedures are a precondition for further review (such as in the case of the BMCC and the CCC), it is crucial for the separation of powers (and FC s 34) that a truly independent body or a court of law should exercise full review powers. This means that the independent body should in no way be bound by the findings and decision of the earlier body, but should consider the case de novo.

At some stage in all (new) areas of regulation disputes will arise concerning the application of the legislation. The separation of powers principle does not prescribe whether such disputes should be settled by courts or law or some (newly established) commission or tribunal system. As pointed out, the criteria of institutional and functional independence apply to both kinds of dispute-resolution structure. And both FC s 34 and the separation of powers principle allow for an appeal to the Constitutional Court if an applicant challenges the decision made by the commission, tribunal or committee on the basis that the decision-maker lacked the required independence and impartiality.

[1] *Islamic Unity Convention* (supra) at para 55.

13 Founding Provisions

Christopher Roederer

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Republic of South Africa

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

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Supremacy of Constitution

2. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

Citizenship

3. (1) There is a common South African citizenship.

(2) All citizens are:

(a) equally entitled to the rights, privileges and benefits of citizenship; and

(b) equally subject to the duties and responsibilities of citizenship.

(3) National legislation must provide for the acquisition, loss and restoration of citizenship.

National anthem

4. The national anthem of the Republic is determined by the President by proclamation.

National flag

5. The national flag of the Republic is black, gold, green, white, red and blue, as described and sketched in Schedule 1.

Languages

6. (1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

(2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.

(3) *(a)* The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.

(b) Municipalities must take into account the language usage and preferences of their residents.

(4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.

(5) A Pan South African Language Board established by national legislation must

(a) promote, and create conditions for, the development and use of

(i) all official languages;

(ii) the Khoi, Nama and San languages; and

(iii) sign language; and

(b) promote and ensure respect for

(i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and

(ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.[1]

13.1 INTRODUCTION

The founding provisions in FC Chapter 1 have yet, as a whole, to exert a determinate influence on South African constitutional law.[2] A search of the literature[3] and case law[4] turns up very few references to the founding provisions as a whole.

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[1] Constitution of the Republic of South Africa 1996 ('FC' or 'Final Constitution'). See also Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

[2] Like the Interim Constitution's Constitutional Principles, the Founding Provisions have largely vanished. The Constitutional Court in the *First Certification Judgment* made it clear that once the draft constitution was certified the Constitutional Principles ('CPs') from the Interim Constitution could not be raised again as dispositive rules of law. See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)(*'First Certification Judgment*) at para 18; AJH Henderson 'Cry, The Beloved Constitution? Constitutional Amendment, the Vanished Imperative of the Constitutional Principles and the Controlling Values of s 1' (1997) 114 *SALJ* 542, 548 ('With its certification of the text of the Constitution, the court has bade the Principles farewell'); A Butler 'The 1996 Constitution Bill, its Amending Power, and the Constitutional Principles' (1996) 1(3) *HRCLJSA* 24(Voicing concerns that the proposed New Text failed to secure the continued relevance of the principles.) Of course, the Court and other commentators have noted that the 34 Constitutional Principles do live on in the form of precedent. See S Woolman 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 20. Indeed, the *First Certification Judgment* is the most cited judgment — and it is often mined for general statements about the values that underwrite the Final Constitution.

[3] See, eg, GE Devenish *A Commentary on the South African Constitution* (1998) 33–40; Z Motola & C Ramaphosa *Constitutional Law: Analysis and Cases* (2002). Motola and Ramaphosa do not include a chapter or section on the founding provisions and do not even mention them in the index. They do begin Chapter 2 'Interpretation of the constitution' with the text of FC s 2. Ibid at 13. For these authors, '[t]he Supremacy of the Constitution' (which is part of the value of 'constitutionalism') appears to be more foundational to the interpretation of the Final Constitution than FC s 39. Ibid. This makes sense given the fundamental shift signalled by FC s 2: a shift away from a system of parliamentary sovereignty to a system of constitutional supremacy. When it comes to the background values used to interpret the Final Constitution, they mention FC s 39(1)*(b)*, which requires the consideration of international law, FC s 8(3), which requires the development of the common law, and the Constitutional Court's jurisprudence, which requires the taking into account of indigenous values in giving expression to the Bill of Rights. Ibid at 35–36. They then address these 'values' in the remainder of the chapter.

[4] A search of the South African Law Reports reveals no references at all to FC Chapter 1 as a whole. There are under a dozen cases that refer to FC s 1 generally, and even fewer that address FC s 1*(c)* and 1*(d)*. There are no references in the case law to FC ss 1*(a)* or 1*(b)*. There are few references to FC ss 2 and 3. There are only a few references to FC s 6. There are no references in the cases to FC s 4 or FC s 5. There are, of course, numerous references to the foundational nature of dignity and equality which are embodied in FC s 1*(a)* and *(b)*. See *Bhe & Others v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)(*'Bhe'*) at para 50 ('Not only is the achievement of equality one of the founding values of the Constitution, s 9 of the Constitution also guarantees the achievement of substantive equality to ensure that the opportunity to enjoy the benefits of an egalitarian and non-sexist society is available to all, including those who have been subjected to unfair discrimination in the past.') See also *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) at para 62 ('Dignity is a founding value of our Constitution. It informs most if not all of the rights in the Bill of Rights and for that reason is of central significance in the limitations analysis.')

There appear to be two reasons for this: first, Chapter 1 does not contain all the principles or values that might be, and indeed, have been, considered foundational to the new constitutional order; secondly, not all of the provisions in Chapter 1 are really foundational.

These two points are considered further in §13.2 below. §13.3 and §13.4 address two constitutional concepts that appear to subsume many of the founding provisions in FC Chapter 1, namely, that the Final Constitution contains an 'objective, normative value system' (§13.3) and that it contains a 'basic structure' (§13.4). Both these concepts significantly overlap with FC Chapter 1 but draw on foundational values and ideas that go beyond the text of this chapter. §13.5 explores the function of the various provisions of FC Chapter 1, while §13.6 addresses whether some of these provisions give rise to absolute rights (ie rights that are not subject to limitation in terms of FC s 36) or, alternatively, whether they are more important than other constitutional provisions, given their foundational status. Finally, §13.7 addresses the question whether some of the provisions of FC Chapter 1 give rise to justiciable rights despite the fact that they do not appear in FC Chapter 2, the Bill of Rights.

13.2 FC Chapter 1 does not contain all the foundational values and not all the provisions in FC Chapter 1 are foundational

(a) Not all the foundational values are found in FC Chapter 1

Although neither settled nor exhaustive, the list of foundational constitutional values thus far recognized by the courts or expressly mentioned in the Final Constitution includes: (1) social justice and the advancement of human rights and freedoms,[1] with particular emphasis on human dignity, substantive equality, non-racialism and non-sexism; (2) constitutionalism; (3) the rule of law; (4) open and accountable democratic government; (5) separation of powers; (6) co-operative government; (7) transformation; (8) *ubuntu*; and (9) cosmopolitanism. Although many of these values appear in FC Chapter 1, several do not. Some are embodied in the Preamble and elsewhere in the Final Constitution. Others are not mentioned in the Final Constitution at all but are implicit in its structure.[2] The value of co-operative government is, for example found in FC Chapter 3, but,

[1] This value, arguably the most important value of the Final Constitution, is found in the Preamble, FC s 1*(a)–(b)* and FC Chapter 2. O'Regan J has called it '[t]he leitmotif of our Constitution.' See *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC)('*Kaunda*') at para 220.

[2] See I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005)('Currie & De Waal *Handbook*') 7. The authors refer somewhat obliquely to the founding provisions, but they do so in general terms by referring to the 'basic principles of the new constitutional order'. This raises the question as to how basic, fundamental or foundational they are. See also I Currie & J De Waal *The New Constitutional and Administrative Law Vol 1* (2001)('Currie & De Waal *The New Law*') 73 (Currie and De Waal address what they call the 'Basic Features of the New Constitutional Order' which includes these same features or principles. Currie and De Waal do not offer an argument for either the radiating effect doctrine or a basic features doctrine.)

clearly animates the entire text of the Final Constitution.[1] Similarly, the notion of separation of powers, whilst explicit in CP VI,[2] is only implicitly embodied in the Final Constitution.[3]

The commitment to social justice and human rights as foundational values is found in the Preamble and FC s 1, and is, of course, given further expression in FC Chapter 2, the Bill of Rights.[4] The relationship between FC s 1 and the Bill of Rights is a complex one, but the clear textual import of FC s 1*(a)* and *(b)* is to single out, from amongst the rights in the Bill of Rights, the rights to human dignity, substantive equality[5] and freedom from racial and sexual discrimination[6] as rights to states of affairs that are so fundamental to the South African constitutional order that the Final Constitution's commitment to those states of affairs forms part of the values on which the entire constitutional order is founded.

Transformation, which is not listed in FC s 1, can be found in the text of the Preamble and has been expressly recognised as a foundational value by the Constitutional Court.[7] According to one commentator, it consists in the value of moving from a society with an 'unjust past' to a 'society based on democratic values, social justice, and fundamental human rights', which is concerned to

[1] See S Sibanda & A Stein 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 12.

[2] CP VI read: 'There shall be a separation of powers between the legislature, the executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness, and openness.'

[3] The fact that some of these values are 'only' implicit does not mean that they are less foundational. Separation of powers is clearly embedded in the way the Final Constitution structures the powers of the branches of government. There are numerous references to this basic value in the case law. See Sibanda & Stein (supra).

[4] The Bill of Rights is not an exhaustive list of the rights that exist in South Africa. See FC s 39(3).

[5] FC s 1*(a)* refers to 'the achievement of equality'. For such an achievement to occur might require the state to commit itself to the realization of substantive equality. Substantive equality, like 'the advancement of human rights' is an affirmative goal and requires more than non-discrimination. See C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 35. While the goal of substantive equality is a goal for all persons in South Africa, those persons and groups who have historically been denied equal treatment are in the most need of positive steps being taken on their behalf. See FC s 9(2) and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA'). Arguably, the value of transformation is embodied in these affirmative goals.

[6] FC s 1*(b)* lists 'non-racialism and non-sexism' as foundational values. This may lead one to think that unfair discrimination based on race and sex is more strictly scrutinized in South African constitutional law than other forms of unfair discrimination (as is the case in the US). In practice, however, this is not the case. Neither FC s 9, nor the jurisprudence of the courts, supports this view. FC s 9(5) applies the presumption of unfairness to discrimination on any of the 17 listed grounds, and PEPUDA further expands the list.

[7] See *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC)('*Soobramoney*') at para 8 ('We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty . . . These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order.')

'[i]mprove the quality of life of all citizens and free the potential of each person'.[1] As Mahomed J stated in *S v Makwanyane:*

> In some countries the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from and ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution.[2]

More recently, Ngcobo J stated in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others*:[3]

> South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the interim Constitution, which was designed 'to create a new order based on equality in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms'. This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution 'recognises the injustices of our past' and makes a commitment to establishing 'a society based on democratic values, social justice and fundamental rights'. This society is to be built on the foundation of the values entrenched in the

[1] See GE Devenish *A Commentary on the South African Constitution* (1998) 28–29. Devenish appears to treat the non-justiciable Preamble as foundational. Following Rautenbach and Malherbe, Devenish sees the Preamble as a statement of values that inform the interpretation of all provisions of the Final Constitution as well as legislation, customary law and common law. Ibid at 32. See I Rautenbach & EHJ Malherbe *Constitutional Law* (4th Edition 2003). See also Currie & De Waal *Handbook* (supra) at 13–15, 16; Currie & De Waal *The New Law* (supra) at 82, 89. (The authors here refer to the Preamble when addressing the foundational principle of democracy. They are not, however referring to the transformative values mentioned above but to the value of an 'open and democratic society'.)

[2] 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) para 262 (*'Makwanyane'*). Karl Klare has argued that the constitutional text trumpets a post-liberal, re-distributive, egalitarian and caring form of politics. KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146, 151–53. Klare was writing in the context of the Interim Constitution, but the Final Constitution is no less progressive. He notes the following elements found in the Interim Constitution in support of his view: (1) social rights and substantive equality, (2) affirmative state duties, (3) horizontality, (4) participatory, decentralized and transparent governance, (5) multi-culturalism, and (6) historical self consciousness. Ibid at 153. All of these values can be found in the Final Constitution. See also S Woolman & D Davis 'The Last Laugh*: Du Plessis v De Klerk,* Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights Under the Interim and Final Constitutions' (1996) 12 *SAJHR* 36; C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248; H Corder 'Prisoner, Partisan and Patriarch: Transforming the Law in South Africa 1985–2000' (2001) 118 *SALJ* 772; A Chaskalson 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order' (2000) 16 *SAJHR* 193; D Moseneke 'The Fourth Bram Fischer Lecture: Transformative Adjudication' (2002) 18 *SAJHR* 309; C Roederer 'Post-matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law' (2003) 19 *SAJHR* 57; C Roederer 'The Transformation of South African Private Law after Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy' (2006) 37 *Columbia Human Rights Law Review* (forthcoming)(Roederer 'The Role of Torts').

[3] 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC)(*'Bato Star Fishing'*) at para 73.

very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms.[1]

Although there may be considerable dispute over what the value of transformation entails,[2] there is little dispute that it is a value that animates the Final Constitution.[3] It is also clearly linked to the value of *ubuntu*, which was part of the Post-amble to the Interim Constitution.[4] As Pieterse writes, '[t]he Nguni word *ubuntu* represents notions of universal human interdependence, solidarity and communalism which can be traced to small-scale communities in pre-colonial Africa, and which underlie virtually every indigenous African culture.'[5] In *S v Makwanyane*, Langa J said the following of the concept:

> [*Ubuntu*] is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such a person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.[6]

[1] Ngcobo J seems to limit the transformative aspirations of FC s 9 to equality between men and women and between the races rather than to the entire range of people and groups who have suffered discrimination in South Africa. *Bato Star Fishing* (supra) at para 73. O'Regan J leaned on the same language in her opinion. *Kaunda* (supra) at para 219.

[2] What the value reflects is largely dependent on what one thinks the evil of apartheid was, for this defines what it is that is in need of transformation. For instance, was the libertarian approach to the private law part of the problem or was the problem the distortion of the libertarian system? My view is that the apartheid cancer did spread to private law and that to the extent that it did not infect private law, the private law with its libertarian values acted as a carrier and facilitator of apartheid values and policies, perpetuating the inequities of apartheid. Further, the development of private law was arrested under apartheid and finally, even if some areas of private law were not infected by the apartheid cancer, many of the values that animated private law under apartheid are inconsistent with the values, goals and aspirations of the democratic transformation of South Africa. See Roederer 'The Role of Torts' (supra).

[3] Frank Michelman argues that the 'supremacy of the Constitution and the rule of law signifies the unity of the legal system in the service of transformation by, under, and according to law'. F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 11. Thus, even the values of FC s 1*(c)* are infused with the value, goal or object of transformation.

[4] Devenish treats *ubuntu* as being implicit in the foundational values of FC s 1. See Devenish (supra) at 33. See also Rautenbach & Malherbe (supra) at section 3.4 (Authors have a separate subsection on the concept and correctly point out that the Constitutional Court in *Makwanyane* referred to the concept as one that underlies both the Interim Constitution and the Final Constitution, and that *ubuntu* informed the Court's treatment of the constitutionality of the death penalty throughout the judgment in *Makwanyane* (supra) at paras 130–31, 223–7, 237, 243, 250, 307–313, 263, 308, 516.) Currie and De Waal do not include the concept in their index and only refer to it briefly in the context of the *Makwanyane* decision in their chapter on the right to life. See Currie & De Waal *Handbook* (supra) at 281.

[5] M Pieterse '"Traditional" African Jurisprudence' in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 441.

[6] *Makwanyane* (supra) at paras 224–25. Mahomed DP and Mokgoro J both addressed the meaning of *ubuntu*. Ibid at paras 263 and 308, respectively. Both Justices emphasized the notion of humaneness and reciprocity, while Mokgoro J placed particular emphasis on the centrality of the notion for South Africa's democracy.

Reducing the role of traditional values in the South African Constitution to one concept may smack of neo-colonialism or eurocentrism.[1] For better or worse, however, there are few references to *ubuntu* and even fewer positive references to traditional or indigenous South African values in the law reports. Early in the Constitutional Court's history, Sachs J called on the Court to pay due regard to the values of all sections of South African society when interpreting the Constitution, stating:

> In broad terms, the function given to this Court by the Constitution is to articulate the fundamental sense of justice and right shared by the whole nation as expressed in the text of the Constitution . . . Whatever the status of earlier legislation and jurisprudence may be, the Constitution speaks for the whole of society and not just one section . . . The preamble, post-amble and the principles of freedom and equality espoused in ss 8, 33 and 35 of the Constitution require such an amplitude of vision. The principle of inclusivity shines through the language provisions in s 3 and underlies the provisions which led to the adoption of the new flag and anthem and the selection of public holidays. The secure and progressive development of our legal system demands that it draw the best from all the streams of justice in our country . . . Above all, however, it means giving long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice. We cannot, unfortunately, extend the equality principle backwards in time to remove the humiliations and indignities suffered by past generations, but we can restore dignity to ideas and values that have long been suppressed or marginalised.[2]

Since this attempt to explore the relationship of traditional values to the question of the constitutionality of the death penalty, however, there have been very few references to indigenous or traditional values as informing the interpretation of the Final Constitution.[3] And, in those cases where traditional values have been mentioned, it has most often been the case that they have been interpreted so as to conform to other values in the Final Constitution. As Ngcobo J stated in *Bhe & Others v Magistrate, Khayelitsha & Others:*

[1] See FC ss 211 and 212. See also TW Bennett & C Murray 'Traditional Leaders' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 26.

[2] *Makwanyane* (supra) at paras 262–65. See also *Makwanyane* (supra) at para 366 ('Redressing the balance in a conceptually sound, methodologically secure and functionally efficient way will be far from easy. Extensive research and public debate will be required. Legislation will play a key role; indeed, the Constitution expressly acknowledges situations where legal pluralism based on religion can be recognised (s 14(3)), and where indigenous law can be applied (s 181). Constitutional Principle XIII declares that "... (i)ndigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.'")

[3] But see *NK v Minister of Safety & Security* 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC)('*NK*') at para 24. (In *NK*, O' Regan J suggested that vicarious liability is not alien to the South African customary law tradition, for under customary law the kraal head is liable for all the delictual acts of inhabitants of the kraal.) See *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC)('*Dawood*') at paras 1 and 29 ('The State shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.') See also *Dawood v Minister of Home Affairs* 2000 (1) SA 997, 1034 (C)(Refers to the protection of the family as a value underlying and sustaining tradition values, and quotes from the African Charter on Human and Peoples' Rights article 18, which provides that '[t]he family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.')

> Our Constitution contemplates that there will be a coherent system of law built on the foundations of the Bill of Rights, in which common law and indigenous law should be developed and legislation should be interpreted so as to be consistent with the Bill of Rights and with our obligations under international law. In this sense the Constitution demands a change in the legal norms and the values of our society. And indigenous law must reflect this change.[1]

The value of cosmopolitanism is perhaps the most controversial value on the abovementioned list. Nonetheless, it is a value that finds expression in the Preamble to the Final Constitution, the Bill of Rights and the interpretative provisions of FC ss 39 and 233. The cosmopolitan character of South African constitutional interpretative practice is nicely captured in the judgment of O'Regan J in *Kaunda v President of the Republic of South Africa* when she states:

> [O]ur Constitution recognises and asserts that, after decades of isolation, South Africa is now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law. The Preamble of our Constitution states that the Constitution is adopted as the supreme law of the Republic so as to, amongst other things, 'build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.' Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Courts, when interpreting the Bill of Rights, 'must consider international law', and, when interpreting legislation, must prefer any reasonable interpretation consistent with international law over alternative interpretations that are not.[2]

Like the value of transformation, the value of cosmopolitanism is a product of South Africa's political transition, part of the break from South Africa's past, a past in which the white minority regime isolated and marginalized itself from the international community, and was in turn ostracized. South Africa's re-integration into the international community was part of the struggle to rid South Africa of apartheid; and those in the struggle reached out to that community, not only for political support, but also for the normative framework for the new order that came from international human rights law. The Final Constitution accordingly directs those interpreting its provisions to look both to international law and to comparative law,[3] not as afterthoughts, but as primary aids to interpretation.[4]

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[1] *Bhe* (supra) at para 218 quoting *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC) at para 56.

[2] *Kaunda* (supra) at para 222.

[3] See FC s 39(1). Although the text requires those interpreting the Bill of Rights to consider international law and makes the consideration of foreign law optional, the practice of the Constitutional Court has been to routinely consult foreign law and only occasionally to consult international law. On the use of international law by the Constitutional Court, see D Hovell & G Williams 'A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' (2005) 29 *Melbourne University Law Review* 95; See H Strydom and K Hopkins 'International Law' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 30. See also *Makwanyane* (supra) at paras 262–373 (Sachs J calls on the courts to consult traditional African values as well as international values when considering whether the death penalty was cruel, inhuman and degrading punishment.)

[4] See J Sarkin 'The Development of a Human Rights Culture in South Africa' (1998) 20 *Human Rights Quarterly* 628.

(b) Not all the provisions of FC Chapter 1 are foundational

The second preliminary point about the founding provisions in FC Chapter 1, namely, that not all these provisions are indeed 'foundational', evinceé by the fact that the major commentaries on South African constitutional law do not contain a separate chapter on them,[1] but rather have chapters that either address a broader category of 'basic features' or, 'fundamental principles', or some of the ideas behind the founding provisions.[2] This work contains the present separate detailed chapters on the more important foundational values of FC Chapter 1, namely, democracy[3] and the rule of law,[4] as well as other foundational values, such as a foundational value not expressly contained in FC Chapter 1 — separation of powers and co-operative government.[5] The question of just how foundational the provisions in FC ss 3–6 actually are is discussed in §13.5 below.

13.3 Relationship between the founding provisions and an 'objective, normative value system'

One concept that strongly resonates with the Final Constitution's founding values is the idea that the Final Constitution embodies an 'objective, normative value' system.[6] While no case has yet outlined the parameters of this concept, a number

[1] But see GE Devenish *A Commentary on the South African Constitution* (1998).

[2] See I Rautenbach & EHJ Malherbe *Constitutional Law* (4th Edition 2003) 53–63 and 102–106 (Contains discussions of 'The Rule of Law', 'The Constitutional State', '*Ubuntu*' and the 'Bill of Rights' in terms comparable to the language of foundational values. They address citizenship and the symbols and official languages elsewhere in the text.)

[3] See T Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 10.

[4] See F Michelman 'Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11.

[5] See S Sibanda & A Stein 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 12. See also S Woolman, T Roux & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 14 (Addresses what some believe to be a foundational value or basic principle of the Final Constitution.) For more on citizenship, see J Klaaren 'Citizenship' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 67. Linguistic and cultural rights are addressed in I Currie 'Community Rights: Culture, Religion and Language' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 58; I Currie 'Official Languages and Language Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 65.

[6] For a critical appraisal of this phrase, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31. See also F Michelman 'Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11.

of cases have drawn from the 'grab-bag' of values found within this 'system'.[1] These cases do not confine themselves to FC s 1, nor even to FC Chapter 1, but instead draw on a number of the values listed in §13.1*(a)* above. What is clear is that the notion of an 'objective, normative value system' functions, like the founding values, as a measuring standard for all governmental conduct; as a set of values that influence the interpretation of the Final Constitution, the Bill of Rights and other legislation; and as a set of values that influences both whether and how the common law is to be developed. Given that constitutional values are the proper grounding for all South African law and that the Final Constitution 'is the legal embodiment of the values of post-apartheid South Africa',[2] it is doubtful that the parameters of the concept will ever be settled. Nonetheless, as the case law develops, one might expect that the core aspects of the concept will coalesce.

The first indication that the South African Constitution embodied an 'objective, normative value system' can be found in the concurring opinion of Mahomed DP in *Du Plessis v De Klerk*.[3] Although he does not explicitly endorse the Federal Constitutional Court's gloss on the German Basic Law, he notes that: 'the basic rights entrenched by the GBL not only establish subjective individual rights but an objective order of values or an objective value system ('eine objektive Wertordnung').[4] This objective order of values in the German system acts as a 'guiding principle' and 'stimulus' for all three branches of government.[5]

The notion is not picked up again until *Carmichele v Minister of Safety and Security & Another (Centre for Applied Legal Studies Intervening)*,[6] where the Court stated:

> Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court:

[1] It may in fact be charged that this so called 'objective values system' operates in what Alfred Cockrell described as the land of 'rainbow jurisprudence'. In this land, our founding values are always consistent with one another and never in conflict. See A Cockrell 'Rainbow Jurisprudence' (1996) 12 *SAJHR* 1. Indeed, the Court often invokes the phrase without a discussion of its content or scope. As a virtual grab-bag, the Court can simply pick the relevant value needed to bolster a particular decision without having to worry about describing the difficult take of assessing the overall scheme or its limits. See Woolman 'Application' (supra) at §31.4*(e)*(viii).

[2] C Roederer 'Post-Matrix Legal Reasoning: Horizontality and the Rule of Values in South Africa' (2003) 19 *SAJHR* 57, 80.

[3] 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC)('*Du Plessis*').

[4] Ibid at para 94 citing 7 BVerfGE 198, 203–7; 35 BVerfGE 79,112–14; Von Münch & Kunig *Grundgesetz-Kommentar Band* 1 (1992) Vorb Art 1–19 Rn 22, 31. Mahomed DP invokes the German approach to horizontal application for the purposes of showing that the Interim Constitution Bill of Rights should be applied indirectly to private persons rather than directly. Ibid. He does not explicitly tell us that the Interim Constitution embodies an 'objective, normative value system' nor what that system entails. Ibid. He does point out, as he did in *Makwanyane*, that, '[i]n reaction to our past, the concept and values of the constitutional State, of the 'Regstaat' . . . are deeply foundational to the creation of the 'new order' referred to in the preamble (of the Constitution).' Ibid at para 97 citing *Makwanyane* (supra) at para 156.

[5] Ibid at para 94 quoting 39 BVerfGE 1, 41.

[6] 2001 (4) SA 938 (CC), 2002 (1) SACR 79 (CC), 2001 (10) BCLR 995 (CC)('*Carmichele*') at para 54 citing 39 BVerfGE 1, 41; *Du Plessis* (supra) at para 94; *S v Acheson* 1991 (2) SA 805, 831 (NmHC).

> 'The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the Legislature, Executive and Judiciary.'
>
> The same is true of our Constitution. The influence of the fundamental constitutional values on the common law is mandated by s 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed.

In this passage the Court is addressing FC s 39(2)'s requirement that, when developing the common law, the courts 'must promote the spirit, purport and objects of the Bills of Rights'. The contrast mentioned by the Court is one between constitutions that embody 'defensive subjective rights of the individual' and those that embody an 'objective value system'. This is a slightly odd juxtaposition. The contrast is not so much between subjective rights and objective values, but between a constitution (like that in the US), which provides freedom from or rights against government interference, and a constitution that attempts to ensure that government provides its citizens with the requisite material resources, to pursue a meaningful existence. The contrast, in other words, is between a purely liberal constitution, which at most embodies a thin conception of the good for society,[1] and a more full-blown republican constitution, which has a thicker conception of the good at which society is to aim.[2] On the liberal view, the government and court are best described as neutral referees, whose job it is to ensure that players play by the rules of the game.[3] On the liberal view, courts should be hesitant to make law, for this would be like the refereee joining

[1] See J Rawls *A Theory of Justice* (1971).

[2] See, eg, J Habermas 'Three Normative Models of Democracy' in S Benhabib (ed) *Democracy and Difference* (1996)(Contrasting liberal and republican theories of democracy with the idea of deliberative democracy.)

[3] The liberal view dominated the development of private law domain under apartheid. See C Roederer 'The Transformation of South African Private Law after Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy' (2006) 37 *Columbia Human Rights Law Review* (forthcoming). See also A Cockrell, 'The Hegemony of Contract' (1998) 115 *SALJ* 286, 309ff. However, the Court's view in *Carmichele* appears to be that under apartheid the courts also operated under a normative value system:

> Before the advent of the IC, the refashioning of the common law in this area entailed 'policy decisions and value judgments' which had to 'reflect the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people'. A balance had to be struck between the interests of the parties and the conflicting interests of the community according to what 'the *(c)*ourt conceives to be society's notions of what justice demands'.

Carmichele (supra) at para 56 (quoting *Minister of Law and Order v Kadir* 1995 (1) SA 303, 318 (A) quoting, in turn, MM Corbett 'Aspects of the Role of Policy in the Evolution of Our Common Law' (1987) 104 *SALJ* 52, 67.)

Of course, one may argue that liberalism — any kind of liberalism — is a normative value system. For such a view, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31; S Woolman & D Davis 'The Last Laugh*: Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights Under the Interim and Final Constitutions' (1996) 12 *SAJHR* 36.

the game for one side. Thus, a judiciary with this mindset would be inclined to ignore the strictures of FC s 39(2) and thereby avoid the need to develop the common law. However, the court in *Carmichele* made it clear that FC s 39(2) not only required that the courts consult this 'objective value system' if and when they decided to develop the common law, but that they are required to consult it proactively to see if in fact the common law is in need of development.[1]

All of this begs the question of what the objective value system that underlies the Final Constitution is.[2] What is the State's view of the good at which the law is to aim? Although the *Carmichele* Court did not directly address the question, it contrasted the English and the German approaches to such questions and noted that under the German approach the Basic Law has a 'radiating effect' on the 'general clauses' of the German Civil Code.[3] In South Africa, therefore, the idea seems to be that the objective value system embodied in the Final Constitution should come to enrich the existing 'policy decisions and value judgments' reflecting 'the wishes … and the perceptions … of the people' and 'society's notions of what justice demands',[4] and that this enriched value system should then radiate through the common law. In *Carmichele*, the Court did not limit itself to the values detailed in FC s 1 in deciding if the police had a duty towards the complainant. Rather, the Court looked to the values found in the rights to life, dignity and freedom and security of the person,[5] and in the constitutional provisions that point towards a positive duty to prevent harm.[6] The *Carmichele* Court found that these duties are accentuated in the case of women, both because of the historically vulnerable place of women in South African society, and because of South Africa's international obligations under the Convention on the Elimination of All Forms of Discrimination Against Women.[7] Thus, the Court seems to be drawing on a range of foundational values, from transformation for South African women and cosmopolitanism, to the promotion of various rights in the Bill of Rights.[8] The *Carmichele* Court nowhere claims that the values it draws on are the only foundational values, and it makes no attempt to address all the values, but rather picks and chooses those values that are helpful to resolving the case.[9]

[1] *Carmichele* (supra) at para 39.

[2] I would not put much store in debates over how 'objective' the value system is. The value system is contested and the word 'objective' adds little value to our inquiry. Arguments about the import of values stand or fall on the reasons offered on their behalf, and the uses to which the values are put.

[3] *Carmichele* (supra) at para 56. (The Court refers to such examples as 'good morals', 'justified', 'wrongful', 'contra bonos mores', 'good faith'.) See also *Du Plessis* (supra) at paras 39–40, 56, 93–94; 103–105.

[4] *Carmichele* (supra) at para 56.

[5] Ibid at para 44.

[6] Ibid at paras 44–45.

[7] Ibid.

[8] See *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at paras 17, 20 (Nugent JA locates the value of transparent, coherent and accountable government not in FC s 1*(d)* but in FC s 41(1).)

[9] But see Woolman (Dignity) supra at §36. (Argues that dignity in *Carmichele* operates as a second order rule that determines the outcomes of the dispute.)

This Alice in Wonderland approach to language — in which the Final Constitution means whatever we say it means — is evident in a series of recent judgments. O'Regan J, in *Kaunda*, states that the Final Constitution 'embodies "an objective, normative value system" as is asserted in the opening clause of the Constitution'.[1] Although she begins with a reference to FC s 1, in the paragraphs that follow she relies on the values of transformation[2] and cosmopolitanism.[3] Both of these values are seen as contributing to the foundational value of protecting and of promoting human rights,[4] and all of this influenced her assessment of whether the South African government owed the claimants a duty to provide them diplomatic protection.[5] They simply re-inforced her view that it was appropriate for the Court to issue a declaratory order regarding the government's obligations in this regard.[6]

In *S v Thebus & Another*, Moseneke J relied upon the phrase 'objective, normative value system' to develop the common law with regard to the common purpose doctrine.[7] The complainants argued that this doctrine, by severing the requirement for a causal connection between the defendant and the crime committed, infringed their rights to freedom and dignity.[8] In determining if these rights had indeed been infringed, the Court noted that they could only be limited for just cause and that '[t]he meaning of "just cause must be grounded upon and [be] consonant with the values expressed in s 1 of the Constitution and gathered from the provisions of the Constitution.'"[9] However, the *Thebus* Court did not explicitly rely on FC s 1 or other provisions in the Final Constitution, but rather alluded to the legitimate interest in deterring criminal conspiracies as a way of deterring crime.[10]

In *Geldenhuys v Minister of Safety and Security & Another*, Davis J notes both the need for an effective remedy and for the common law to be developed in accordance within the 'matrix' of the Final Constitution's 'objective normative value system'.[11] He emphasizes not only the Preamble and FC s 1's language of establishing a society based on human dignity, equality and freedom as well as

[1] *Kaunda* (supra) at para 218 (Concurring in part and dissenting in part).
[2] Ibid at para 220 (Refers to Preamble and FC s 1.)
[3] Ibid at paras 221–223 (Refers to the Preamble, the political history leading up to the Interim Constitution and Final Constitution and South Africa's international law obligations.)
[4] Ibid at paras 220–221 (Refers to the Preamble, FC s 1 and FC s 7(2).)
[5] Ibid at paras 261–264, 268, 270, 271.
[6] Ibid at para 269.
[7] 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC)('*Thebus*') at paras 27–28.
[8] Ibid at para 34.
[9] Ibid at para 39 citing *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) BCLR 361 (CC) at para 38. Farlam and Navsa JJA, in their partially dissenting judgment, used the idea of an 'objective value system' to give a broader interpretation to 'public interest' than that given by the majority and the other concurring opinions. See *Transnet Ltd t/a Metrorail & Others v Rail Commuters Action Group & Others* 2003 (6) SA 349 (SCA), 2003 (12) BCLR 1363 (SCA) at para 68.
[10] *Thebus* (supra) at para 40.
[11] 2002 (4) SA 719 (C)('*Geldenhuys*') citing *Carmichele* (supra) at para 55.

'institutions of government which are open, transparent and accountable to the people whom they serve,'[1] but also the transformative values of the Final Constitution:

> The content of this normative system does not only depend on an abstract philosophical inquiry but rather upon an understanding that the Constitution mandates the development of a society that breaks clearly and decisively from the past and where institutions that operated prior to our constitutional dispensation had to be instilled with a new operational vision based on the foundational values of our constitutional system.[2]

Davis J then recounted how the facts of the case recalled the grim past of the 'systematic destruction of human dignity of people who were in the custody of the police'[3] and added: 'That was our past and it can no longer be our future, for if it is, then the wonderful aspirations and magnificent dreams contained in the Constitution will turn to post-apartheid nightmares.'[4]

O'Regan and Sachs JJ, in their partially concurring and partially dissenting opinions in *S v Jordan*,[5] confronted the issue of whether certain provisions of the Sexual Offences Act were unconstitutional because they embodied and enforced a particular view of private morality.[6] They argued that the Final Constitution does not bar the state from enforcing morality because in fact the Bill of Rights is 'founded on deep civic morality',[7] and that evidence of this deep civic morality is found in the language of *Carmichele* regarding the Constitution's 'objective, normative value system'.[8] The upshot is that:

> The state has accordingly not only the right but the duty to promote the foundational values of the interim Constitution. One of the most important of these is to 'create a new order in which all South Africans will be entitled to citizenship in a democratic constitutional state in which there is equality between men and women.'[9]

The question was not whether the Act was inspired by unconstitutional values, but whether, today, the purpose of the Act could be deemed consonant with the values now manifest in the text of the Final Constitution.[10] They wrote that: 'In our view, the Act does overall continue to pursue an important and legitimate constitutional purpose, namely the control of commercial sex'.[11] They were not convinced

[1] *Geldenhuys* (supra) at 728.
[2] Ibid at 728–29 ('The transformation of our legal concepts must, at least in part, be shaped by memory of that which lay at the very heart of our apartheid past.')
[3] Ibid at 728I.
[4] Ibid at 728J–729A.
[5] 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC)('*Jordan*').
[6] Ibid at para 103.
[7] Ibid at para 104.
[8] Ibid quoting *Carmichele* (supra) at para 54.
[9] *Jordan* (supra) at para 106 citing the Preamble to the Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution'). IC Chapter 1 was entitled 'Constituent and Formal Provisions' rather than 'Founding Provisions' and, while it contained sections on the national symbols, languages, and supremacy of the Constitution, it did not contain a section on citizenship, as in FC s 3, nor a section on constitutional values as found in FC s 1.
[10] *Jordan* (supra) at paras 106 and 112.
[11] Ibid at para 114.

'that that the overall purpose of the legislation is manifestly inconsistent with the values of our new order'.[1] Are these the same values — is this the same objective normative value system — that animates Davis J's judgment in *Geldenhuys*? The judges do not say.

Cameron JA, in his concurring opinion in *Brisley v Drotsky*,[2] attempted to shed light on why the Supreme Court of Appeal was hesitant to deploy the concept of *boni mores* or the legal convictions of the community.[3] While noting that *boni mores* is to be replaced with the 'appropriate norms of the objective value system embodied in the Constitution',[4] that latter concept does not give the courts 'jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith'.[5] This is because contractual autonomy is said to embody both the values of freedom and dignity, at least when stripped of its 'extreme excesses'.[6] He thus concluded that: 'The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual "freedom", and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity'.[7] Although Cameron JA does not shed much light on content of our objective value system it is clear from his discussion that it does include the values of freedom and dignity found in FC s 1.

In *S v Ndhlovu & Others*,[8] Cameron JA again referred to the 'norms of the objective value system.'[9] Here the concept was used to determine if the scheme in s 3 of the Law of Evidence Amendment Act (which conflated admissibility of hearsay evidence with its reliability) was compatible with those norms and thus the Final Constitution. He determined that the statute's fundamental test, the 'interests of justice', and the criteria it posits to determine if the test was satisfied, did comport with the Final Constitution and its values.[10] Cameron J noted that, 'in making the admission of hearsay evidence subject to broader, more rational and flexible considerations, the 1988 Act's general approach is, moreover, in keeping with developments in other democratic societies based on human dignity, equality and freedom.'[11]

13.4 Founding Provisions and the Basic Structure Argument

FC s 74(1) entrenches the foundational values in FC s 1 by providing that any amendment to FC s 1, and to FC s 74(1) itself, must be in the form of a Bill passed by a 75 per cent supporting vote in the National Assembly and by the

[1] *Jordon* (supra) at para 114.
[2] 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA)('*Brisley*').
[3] Ibid at para 93.
[4] Ibid at 93 referring to *Carmichele* (supra) at para 56.
[5] *Brisley* (supra) at 93.
[6] Ibid at para 94.
[7] Ibid at para 95.
[8] 2002 (6) SA 305 (SCA)('*Ndhlovu*') at para 16.
[9] Ibid at 16 referring to *Carmichele* (supra) at para 56.
[10] *Ndhlovu* (supra) at para 23.
[11] Ibid (Refers to FC ss 39(1)*(c)* & 36(1).)

National Council of Provinces 'with a supporting vote of at least six provinces'. This provision clearly identifies the foundational values as higher norms. It may also subsume, or at least overlap with, what is known in other jurisdictions as the basic structure doctrine, ie the notion that there are certain provisions in, or elements of, a constitution that are so fundamental to the constitutional legal order as to be incapable of amendment, either at all or except by special majority.[1] Logically, the inclusion of FC s 74(1) in the Final Constitution allows two mutually exclusive possibilities: either (1) the basic structure of the Final Constitution is contained in FC s 1 and there are no further substantive barriers in the way of the amendment of the Final Constitution once the procedural requirements of FC s 74(1) have been met; or (2) in addition to the values in FC s 1, there are values so fundamental to the constitutional legal order that any attempt to amend the Final Constitution in a way that contradicts those values will be unconstitutional, whatever the level of support for such an amendment in the National Assembly and the National Council of Provinces.

In *United Democratic Movement v President of the Republic of South Africa & Others (No 2)*, the Court was asked to decide the constitutionality of a series of amendments and pieces of legislation that removed the anti-defection clauses from the Constitution and allowed for members of Parliament to cross the floor and join other parties without losing their seat.[2] Among the applicant's contentions was an argument that 'the right to vote and proportional representation are part of the basic structure of the South African Constitution, and as such, are not subject to amendment at all.'[3] The Court had earlier invited such an argument by remarking obiter in *Premier of KwaZulu-Natal & Others v President of the Republic of South Africa & Others* that '[i]t may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganising the fundamental premises of the Constitution, might not qualify as an "amendment" at all.'[4] In *UDM*, the Court again declined to settle this issue, holding that the impugned amendments did not threaten 'to undermine democracy itself', and therefore that the question whether there is something akin to the basic structure doctrine in South African constitutional law did not need to be decided.[5]

The additional question whether the impugned amendments violated the foundational values in FC s 1 was treated separately in *UDM*, thereby suggesting that the basic structure doctrine may not be coterminous with the special protection given to the foundational values in FC s 1 by FC s 74(1). This is an important point because, as the *UDM* Court makes clear, the test for the constitutionality of amendments established by FC s 74(1) is a purely procedural one. That is, once it is established that a purported amendment of the Final Constitution does indeed

[1] See, eg, *Indira Nehru Gandhi v Raj Narain* (1975) SC 2299, 2461.
[2] 2003 (1) SA 678 (CC), 2002 (11) BCLR 1220 (CC)('*UDM*') at para 3.
[3] Ibid at para 15.
[4] 1996 (1) SA 769 (CC), 1995 (12) BCLR 1561 (CC)('*Premier of KwaZulu-Natal*') at para 47.
[5] *UDM* (supra) at para 17.

conflict with the foundational values in FC s 1, the only question is whether the amendment was properly passed under FC s 74(1).[1] If so, there can be no further basis, apart from the basic structure doctrine, for a finding of unconstitutionality. The possibility of there being a substantive check on constitutional amendments that enjoy the special majorities mentioned in FC s 74(1) depends, in other words, on the recognition of something like the basic structure doctrine. In the absence of such a doctrine, and assuming these special majorities are achieved, FC s 74(1) and the foundational values in FC s 1 present no substantive barrier to the amendment of the Final Constitution. Of course, if these special majorities are *not* achieved, then FC s 1 (read with FC s 74(1)) does present a substantive barrier, since any constitutional amendment that contradicts FC s 1 and fails to satisfy the procedural requirements of FC s 74(1) will be unconstitutional.

The two constitutional amendments impugned in *UDM* had been passed in terms of FC s 74(3), which regulates the procedure for the passing of amendments that affect neither the foundational values nor a provision in the Bill of Rights (FC s 74(2)). Having decided that the case did not require it to settle the existence in South African constitutional law of the basic structure doctrine, the Constitutional Court accordingly moved on to consider whether the amendments were inconsistent with the foundational values in FC s 1 or citizens' right to vote in FC s 19(3). The Court's detailed reasoning in respect of these two questions is discussed in §13.5*(a)* and elsewhere in this volume.[2] Suffice it to say that neither the commitment to multi-party government in FC s 1*(d)* nor to the rule of law in FC s 1*(c)* was found to preclude an amendment to South Africa's electoral system making it possible for members of parliament, elected on the basis of a party list proportional representation system, to cross the floor without losing their seat.[3] The clear implication of this decision, especially when read together with the decision in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) & Others* that FC s 1 does not give rise to justiciable rights,[4] is that the threshold for the deployment of the foundational values to protect the basic structure of the South African constitutional legal order is very high, and that only extraordinary amendments to that order will trigger the protection afforded by FC s 1. Even in this case, the protection afforded by FC s 1 is limited in the sense that FC s 1 does not present a substantive barrier to amendment of the Final Constitution once the requirements of FC s 74(1) have been met.

[1] *UDM* (supra) at para 12. The same is true of amendments duly passed in terms of FC s 74(2)(amendments to the Bill of Rights) and FC s 74(3)(all other amendments).

[2] See T Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 10.

[3] *UDM* (supra) at paras 23–27 and 55–75.

[4] 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)(*'NICRO'*)(Discussed at §13.7*(a)* infra).

13.5 Function of the various sections of FC Chapter 1

As may be evident from the above discussion, not all of the sections in FC Chapter 1 are of equal importance. FC s 1 sets out the foundational values in their most general terms. FC s 2 further specifies the effect of the supremacy of the Final Constitution in FC s 1*(d)*. FC s 3 provides for the equal rights and duties of citizenship. FC ss 4 and 5 address the national anthem and what the flag looks like, and FC s 6 details the Republic's official languages.

As we have seen, FC s 1 stands on a different footing from the other sections in FC Chapter 1 in as much as its provisions are more firmly entrenched. The other sections in FC Chapter 1 do not even receive the same status as the rights in FC Chapter 2, the Bill of Rights, which has stricter requirements for amendment than the rest of the Final Constitution, with the exception of FC s 1.[1]

This fact sends something of a mixed message regarding the importance of the founding provisions in FC ss 2–6. Why was the special status of FC s 1 not extended to all the provisions in FC Chapter 1? In particular, why was FC s 2 not given this status, or placed within FC s 1? Alternatively, FC ss 3 and 6 may have made more sense within the Bill of Rights, since they appear to delineate the rights of equal citizenship and of the Republic's official languages. FC ss 4 and 5 are more straightforward, informational provisions prescribing the manner in which the national anthem shall be determined and specifying the colours of the national flag, the detailed design of which is contained in Schedule 1.

(a) FC ss 1 and 2

FC ss 1 and 2 are the strongest candidates for being 'true' founding provisions. FC s 1 contains the foundational values, and FC s 2 further specifies the most central value of the Final Constitution, its supremacy.[2] The Constitutional Court in *UDM* stated that the foundational values have an important place in the Final Constitution as they both 'inform the interpretation of the Constitution and other law, and set positive standards with which all law must comply to be valid.'[3]

These twin functions implicate both the interpretation provisions and the limitations analysis. FC 39(1)*(a)* tells us that, when interpreting the Bill of Rights, a court or tribunal 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. The most logical place to

[1] Compare FC s 74(2) with FC s 74(3).

[2] Currie and De Waal argue that the basic principles should not be invoked until more detailed provisions of the Final Constitution run out. Currie & De Waal *Handbook* (supra) at 8. Thus it would make sense that one turns to FC s 2 before relying on FC s 1*(c)*. FC s 2 functions much more like a rule which gives effect to the value of supremacy of the Final Constitution as found in FC s 1*(c)*. There are very few references to FC s 2 in the case law, most likely due to the clarity of the rule it states.

[3] *UDM* (supra) at para 19. Currie and De Waal argue that 'the "basic principles" of the Final Constitution tie the provisions of the Final Constitution together, help define the constitutional order, influence the interpretation of other provisions of the Constitution, influence legislation that is interpreted or drafted and influence how the common law will be developed'. Currie & De Waal *Handbook* (supra) at 7–8. See also I Currie & J De Waal *The New Constitutional and Administrative Law Vol 1* (2001) 73. Their list of 'basics' overlaps with the contents of FC ss 1 and 2. But it both includes principles not found in these sections and excludes principles found in these sections.

start looking for these values is FC s 1, which specifies the values that the Republic is said to be founded upon. Thus, these values or principles have an organizing and radiating effect on the Bill of Rights.[1] As noted above, there is nothing that stops us from recognizing that there are other foundational values or principles that underlie this open and democratic society, be it the separation of powers,[2] transformative values[3] or even *ubuntu*.

[1] *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) at para 104 ('The founding values will inform most, if not all, of the rights in the Bill of Rights.') Note that it is hard to imagine how FC ss 4 and 5 might have a radiating effect. FC ss 3 and 6 may have some radiating effect on other provisions but this effect is unclear at best.

[2] For instance, the separation of powers had a profound impact on the standard of judicial review in all of the opinions in *Kaunda*. *Kaunda* involved the review of the conduct of government in living up to its duty to act positively to protect its citizens against human rights abuses abroad (diplomatic protection). In this context, the *Kaunda* Court wrote: 'This, however, is a terrain in which courts must exercise discretion and recognize that government is better placed than they are to deal with such matters.' *Kaunda* (supra) at para 67. The test arrived at for reviewing whether the government responded appropriately to a request for diplomatic protection was a simple 'rationality test'. Ibid at para 79. This test allows for broad discretion on the part of the government. Ibid at para 81. *Kaunda* reflects an about–face on the position adopted by the Court in *Mohamed v President of the Republic of South Africa*. 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC). In *Mohamed*, the Court held that the notion of separation of powers could not trump the value of the supremacy of the Final Constitution and the rule of law in order to defeat a potential order of the court to the government to 'do whatever may be within their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him' by the unlawful rendering of him to FBI agents to be tried in New York, for '. . .[to] stigmatise such an order as a breach of the separation of State power as between the Executive and the Judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law'. Ibid at para 71. For more on the problems and the tension in the Constitutional Court's approach to issues of extraterritorial application of the Bill of Rights, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) §31.6.

[3] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 69 (Ngcobo J began his concurring opinion: 'I write separately to emphasise the importance of transformation in the context of the Marine Living Resources Act [Act 18 of 1998]'); *Bekker & Another v Jika* 2002 (4) SA 508 (E) at para 28 (Notes the strong influence of the transformative effect of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 in determining if the provisions of the Act apply to an owner who remains in occupation despite his ownership having terminated. In coming to the conclusion that the Act did apply, Somyalo JP writes: 'The Act in question is clearly intended, not only to enforce the provisions so as to ensure fairness and human dignity and to protect the vulnerable but its transformative effect cannot be overemphasised.') See also *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C), 2004 (12) BCLR 1328 (C) at paras 83–106 (Value of transformation has bearing on determination of whether the rates charged by the City of Cape Town amounted to unfair discrimination against those who own residences with higher property values); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC).

FC 39(2) tells us that when interpreting any legislation (including, presumably, the Final Constitution),[1] and when developing the common law and customary law, the 'court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. Unlike FC s 39(1), FC s 39(2) provides a narrower scope for the interpretation of legislation and development of the law. Rather than being required to promote the values underlying an open and democratic society, or even the values underlying the Final Constitution as a whole, FC s 39(2) merely directs us to the purport and objects of the Bill of Rights. On a narrow reading, this may mean that only FC ss 1*(a)* and *(b)* would have a radiating effect since they are the only provisions of FC s 1 that have clear Bill of Rights counterparts.[2]

There are three approaches that one could take to this issue: (1) one could conclude that FC s 1*(c)* and *(d)* (and any other foundational value not found in the Bill of Rights) are irrelevant to the interpretation of the rest of the Final Constitution; (2) one could conclude that the values in FC s 1*(c)* and *(d)* (and other foundational values) are part of the spirit, purport and objects of the Bill of Rights and are therefore relevant to interpreting the rest of the Final Constitution; or, finally, (3) one could argue that, as there is no principled reason for excluding the founding provisions, it makes sense to speak of the values of the Final Constitution rather than the values of the Bill Rights under FC s 39(2).

The first approach is tempting since one would assume that there must be a reason for the difference in language between FC ss 39(1) and 39(2). Although plausible on its face, a deeper analysis of the Final Constitution reveals that the other two approaches are more attractive.

The values of supremacy of the constitution and the rule of law found in both FC s 1*(c)* and FC s 2 as well as the values of accountability, responsiveness, and openness found in FC s 1*(d)* are part of the values underlying the Bill of Rights.[3] One of the many points of a justiciable bill of rights is to promote these values and to place certain rights beyond the majority's will. Those rights provide for accountability, responsiveness and openness[4] and the values which underlie

[1] On the relationship between the Bill of Rights and the rest of the Final Constitution, see Woolman (supra) at §31.5/

[2] The values in FC s 1*(a)* and *(d)* are arguably less clearly reflected in the values of the Bill of Rights.

[3] See Z Motola & C Ramaphosa *Constitutional Law: Analysis and Cases* (1998)(Authors start their chapter on interpretation with the text of FC s 2.)

[4] Accountability, responsiveness, and openness have become important values in the interpretation of legislation and the development of the common law under s FC 39(2), particularly in cases involving the state. In *NK* (supra) at para 23, O'Regan J uses these values from FC s 1 to argue that the courts need to address the doctrinal area of vicarious liability in terms of the normative imperatives of FC s 39 (2): 'Denying that the principles bear such normative implications will only bedevil the exercise by rendering inarticulate, premises that in a democracy committed to openness, responsiveness and accountability should be articulated.' See also *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2002 (6) SA 180 (C)(Reversed in *Premier, Western Cape v Faircape Prop Developers (Pty) Ltd.* 2003 (6) SA 13 (SCA)); *Van Duivenboden v Minister of Safety and Security* 2001 (4) All SA 127 (C); *Minister of Safety & Security v Van Duivenboden* 2002 (6) SA 431 (SCA); *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail &*

them form part of a 'culture of justification'.[1] Thus, the interpretation of legislation and the development of the common law and customary law that promotes these values also promotes the spirit, purport and objects of the Bill of Rights. Further, FC Chapter 2, the Bill of Rights, begins with FC s 7(1), which states that 'the Bill of Rights is the cornerstone of democracy in South Africa'. Thus, there can be little question that democratic government, accountability and responsiveness are among the fundamental objects of the Bill of Rights and that their fulfilment requires attention to the values of FC s 1*(c)* and *(d)*.

Finally, there does not seem to be a principled reason for drawing a distinction between those values that underlie the entire Final Constitution and those that underlie the Bill of Rights.[2] The value of transformation found throughout the Final Constitution is also embodied in the Bill of Rights. Perhaps most importantly, since the interpretation of the Bill of Rights is accomplished by promoting the broader set of values, it would be quite odd to say that they were not part of the values of the Bill of Rights themselves. In effect, there are no values informing the Bill of Rights that are prior to an interpretation of the Bill of Rights, and since that interpretative act requires that they be interpreted in light of the values underlying an open democratic society, those values are part of the Bill of Rights. In particular, they are part of the spirit, purport and objects of the Bill of Rights.[3]

Thus, it makes sense that O'Regan J refers to the values of the Final Constitution rather than merely the Bill of Rights in her treatment of how the common law of vicarious liability should be developed under FC s 39(2) in *NK v Minister of Safety and Security*. As she stated:

> The overall purpose of section 39(2) is to ensure that our common law is infused with the values of the Constitution. It is not only in cases where existing rules are clearly inconsistent with the Constitution that such an infusion is required. The normative influence of the

Others 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC)(Holding that Transnet Ltd had a legal duty to keep its passengers reasonably safe from crime on its trains), *rev'g Rail Commuter Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2003 (6) SA 349 (SCA), 2003 (12) BCLR 1363 (SCA)(Holding that Transnet Ltd did not have a legal duty to keep its passengers safe from crime, for that duty was one placed generally on the shoulders of the police services), *rev'g Rail Commuter Action Group & Others v Transnet Ltdt/a Metrorail & Others* 2003 (5) SA 518 (C), 2003 (3) BCLR 301 (C)(Davis and Van Heerden JJ)(Holding that Transnet did have such a duty.)

[1] This culture is one in 'which every exercise of power is expected to be justified.' E Mureinik 'A Bridge to Where: Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31–32. The idea here is that the new dispensation makes a break from the authoritarian ethos of apartheid under which the exercise of power by the state was neither justified nor justifiable. Mureinik is clearly drawing on Dworkin's notion that the overall point of law is the justification of coercion, ie the principles underlying the law must be able to justify the coercive power that the State exercises in the name of the law. See R Dworkin *Law's Empire* (1986) 93, 109–10, 127, 190, 400. One of the mechanisms that clearly support this culture of justification is FC s 36 of the Bill of Rights. See S Woolman & H Botha 'Limitation' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March June 2006) Chapter 34.

[2] But see Woolman 'Application' (supra) at §31.5 (Discusses the extent to which the Bill of Rights applies to other sections of the Final Constitution).

[3] See C Roederer 'Post-matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law' (2003) 19 *SAJHR* 57.

> Constitution must be felt throughout the common law. Courts making decisions which involve the incremental development of the rules of the common law in cases where the values of the Constitution are relevant are therefore also bound by the terms of section 39(2). The obligation imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue.[1]

As noted above, constitutional values also help set standards and are thus implicated in determining the content of rights under FC s 39 as well as the jusification for the limitation of a right under FC s 36. A right or the limitation of a right will be given greater weight when they are furthering foundational values.[2] Given the extent of the influence of the founding provisions on both rights interpretation and limitations analysis, one may be tempted to argue that the founding provisions cannot — short of being eliminated — be altered at all.[3]

As noted above, *UDM* raised not only the issue of basic structure, but of whether the floor crossing amendments were compatible with the founding values of the Final Constitution.[4] After dismissing the basic structure argument, the Court addressed the argument that the amendments were inconsistent with the founding provisions as set out in FC s 1.[5] If so, then the amendments would be unconstitutional since they were not passed under the FC s 74(1) procedure required for amending these provisions.[6] Here it was contended that the amendments conflicted with both the requirement of a multi-party system of democratic government and with the rule of law.[7] The *UDM* Court dismissed the argument

[1] *NK* (supra) at para 17.

[2] See *National Coalition for Gay and Lesbian Equality & Other v Minister of Home Affairs & Others* 1999 (3) SA 173, 186–187 (C), 1999 (3) BCLR 280 (C)(Davis J wrote: 'At this stage of the constitutional enquiry respondents must bear the onus of pleading and proving justification in terms of s 36(1) of the Constitution . . . There was no evidence before the Court to suggest that this breach of the guarantee against discrimination on the grounds of sexual orientation could possibly be justified.') As Mahomed DP (as he was then) said in *Fraser v Children's Court, Pretoria North, & Others*:

> [T]he guarantee of equality lies at the very heart of the Constitution [and] it permeates and defines the very ethos on which the Constitution is premised. A breach of this right can only be sanctioned if there is a clear and sustainable justification therefor. *This becomes a more difficult onus to discharge in the case of foundational values such as equality.* To consider a limitation to be viable, it would have to represent in the first place an important purpose.

1997 (2) SA 261 (CC), (1997 (2) BCLR 153 (CC) at para 20 (emphasis added).

[3] *Qozeleni v Minister of Law and Order* 1994 (3) SA 625, 634 (E)('[T]he fundamental rights set out in chap 3 of the [Interim] Constitution, together with the general limitation clause in s 33, will, in each instance of an alleged breach of those rights, have to be examined to ensure that expression is given to the values already referred to.')

[4] See §13.4 infra.

[5] Ibid.

[6] *UDM* (supra) at para 18.

[7] Ibid at paras 19–20.

[8] Ibid at para 20. In other words, FC ss 1*(d)* and 1*(c)*.

that proportional representation was part of the founding values since it was not included in the text of FC s 1*(d)*.[1] It also dismissed the argument that floor crossing undermines the system of proportional representation,[2] since representatives are really not accountable between elections anyway.[3] In the end, while the Court almost concedes that anti-defection clauses may be good for multi-party democracy, it does not consider them necessary for democracy.[4] Although the *UDM* Court acknowledged that the 10 per cent formula would work to the detriment of smaller parties it found that this fact did not mean that it was unconstitutional.[5]

The *UDM* Court next addressed the argument that the legislation violated the rule of law. The Court captured the appellant's argument on this point as contending that the legislation was not rationally related to a legitimate government purpose, was therefore not consistent with the rule of law, and was, as a result, invalid.[6] The alleged illicit purpose was that the legislation was passed so that the ANC and the New National Party could take advantage of the break-up of the Democratic Alliance.[7] The Court's response was that this conflated motive and purpose. In any case, not only did the legislation secure overwhelming support (86 per cent in the National Assembly, including some Democratic Party members), it also had the legitimate purpose of allowing floor crossing without the penalty of losing one's seat. The real problem was that the legislation failed the requirement

[1] That part of CP VIII was not incorporated into the final constitutional text.

[2] Although not developed by the Court, the argument would be that if parliament wanted to allow for floor crossing it should have chosen an electoral system that could accommodate that possibility without sacrificing democratic accountability. For instance, floor crossing does not really undermine the US system because people vote for individuals rather than the party they represent. The Court in *UDM* in fact quotes the recommendation from a special committee that had been set up to investigate South Africa's electoral system which opposed floor crossing. *UDM* (supra) at para 62. The committee was opposed to the idea based on democratic grounds in 1998 ('it would be neither fair nor democratic to lift the ban'). It was, however, open to re-evaluating the matter after the 1999 elections, but only if the new electoral system included constituency voting.

[3] Ibid at paras 31 and 49. This response rejected again the contention that this switch in allegiance was mid-election and thus undermined the people's right to vote. Ibid at paras 48–51. The reasoning is rounded off with the circular argument that the voters exercised their franchise knowing that the Constitution could be amended in such a way as to defeat their vote. Ibid at para 51.

[4] Ibid at para 35.

[5] Ibid at para 47. The Court thereby finesses the argument that this was not some random benefit to some parties and a random burden on others, but a clear benefit to the governing party given to itself which worked to the detriment of smaller parties. Ibid at para 56.

[6] Ibid at para 55.

[7] Ibid at para 56.

of item 23A of Annexure A, Schedule 6 of the Final Constitution.[1] The Court further relied on the fact that there was considerable debate about whether floor crossing should be allowed and that all these contrasting views seemed to be supported on democratic grounds.[2] The final contention was that it was irrational and contrary to multi-party democracy to allow those who switch parties to take their seats with them.[3] The *UDM* Court's response here seems to amount to a *de minimis* argument: it states that given 'the limited term for which a defecting member will remain a member of the legislature it seems neither irrational nor inconsistent with multi-party democracy to provide that the seat should be regarded as the seat of the new party for the remainder of that member's term.'[4]

While the legislation may have met some technical requirement of legitimacy, it seems less clear that floor crossing can be justified on democratic grounds. The fact that these amendments were contemplated by Amendment A to Schedule 6 and that an overwhelming number of politicians supported them does not mean that they comport with the founding values that underlie the Final Constitution.[5] Neither the Indian situation of rampant floor crossing between 1967 and 1972,[6] nor the potential consolidation of power into a de facto one-party system, are ideal grounds for democracy and the protection of minority rights. Although reluctant to identify this dispute as an incursion on democratic rights, it did abdicate responsibility for protecting minority rights.[7] The failure to more strictly scrutinize the amendments or to read the demands of multi-party democracy more broadly is somewhat troubling given the unequal impact of the legislation on minority parties. Although the Court may have been worried about its political capital, a decision that the amendments altered FC s 1 and thus required

[1] *UDM* (supra) at para 57.

[2] Ibid at paras 63–67. The Court is not clear if anyone supported floor crossing and retaining the proportional system or if support for floor crossing was contingent on constituency voting.

[3] Ibid at paras 71 and 73.

[4] Ibid at para 74.

[5] The 'power and self-interest regarding' justifications are clear, but the Court did not clearly demonstrate what the 'public-regarding reasons' were for the amendments. See C Sunstein *One Case at a Time* (1999) 27 (For the use of these terms.)

[6] *UDM* (supra) at para 60. The Court notes that the Indian experience brings out two main problems with floor crossing: instability and corruption. It does not, however, respond to these concerns but merely points to the cacophony of voices on the issue.

[7] See J Ely *Democracy and Distrust* (1983) 73–75(In laying out the foundations of process theory, Ely argues for judicial intervention when the court is following a 'participation-oriented, representation reinforcing approach' that promotes democracy.) Sunstein also recognizes the need for judges to set aside their 'judicial humility' and their 'reluctance to disturb the results of the democratic process . . .when it can be shown that the political process is defective' and 'excludes people from political participation.' Sunstein (supra) at 258.

the FC s 74(1) procedures might have been democracy-promoting.[1] Given the overwhelming support for the amendments, such a decision would not have taken the amendment out of the political reach of Parliament, and would therefore not have undermined the will of the majority. Furthermore, such a decision might have signalled the Court's concern with amendments that have the effect of altering the outcomes of elections long after the vote has taken place.

(b) FC ss 3 and 6

The founding provision on citizenship is unique because, unlike the provisions on equality and dignity (FC s 1*(a)*) or non-racialism and non-sexism (FC s 1 *(b)*), FC s 3 is actually much more detailed than the Bill of Rights provision, FC s 20, which simply states: 'No citizen may be deprived of citizenship.' A further oddity is that FC s 20 appears to conflict with the authorization of legislation for the 'loss of citizenship' in FC s 3(3). For it is difficult to see how one could lose one's citizenship without being deprived of citizenship.[2]

FC s 3(1)'s language is a reaction both to the denationalization and forced removal of many South Africans to the Bantustans under apartheid and to the push for autonomy from proponents of a *Volkstaat* and traditional leaders. While the text accomodates claims of cultural autonomy elsewhere, FC s 3 makes it clear that there is only one kind of South African citizen and those citizens are to share equally in the rights and duties of citizenship under FC s 3(2).

Although FC s 3 is more detailed than FC s 20, its provisions do not add a great deal to FC s 20's rights.[3] The equality rights provisions themselves apply to citizens, but they also apply to 'everyone'.[4] The implication of FC s 3 is that non-citizens might not get the same benefits nor have the same burdens as citizens, but this is also specified in the rights that clearly do not apply to citizens.[5] FC s 3 does not appear to reinforce FC s 20, or any of the other rights in the Bill of Rights.

[1] See Sunstein (supra) at 27.

[2] See J Klaaren 'Citizenship' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, September 2006) Chapter 67.

[3] FC s 20 states in its entirety: 'No citizen may be deprived of citizenship.' This could easily have been added to FC s 3. However, if it had been put in FC s 3 without duplication in the Bill of Rights then its status as a right may have been placed in doubt. The failure to put FC s 3 in FC s 20 or in the Bill of Rights may lead some to question whether it is a right and/or duty-conferring provision.

[4] FC s 9.

[5] Several sections are specific to citizens: FC s 19 (political rights), FC s 21(3)–(4)(movement, residence, and the right to a passport), FC s 22 (trade, occupation and profession), FC s 37(8)(non-citizens deprived of rights under s 37(6)–(7) if detained under international armed conflict and those rights are substituted with the rights under international humanitarian law), FC s 47 (membership in National Assembly), FC s 106 (membership in provincial legislature), and FC s 158 (membership in municipal councils). For more on the benefits afforded citizens (as opposed to non-citizens) under the Bill of Rights, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) §31.3.

The provisions of FC s 6 on official languages differ in character from the Bill of Rights provisions that engage language in that they read more like directive principles. The founding provisions on official languages speak of 'taking positive measures', 'promoting and creating conditions for development and use of' as well as 'promoting and ensuring respect for' the languages and language groups within South Africa. This aspirational language stands in contrast to the language of FC ss 30 and 31, which do not require the State to do anything except refrain from infringing the rights in question.[1]

(c) FC ss 4 and 5

FC ss 4 and 5 deal with matters that are foundational only in the sense of identifying two important national symbols: the flag and the national anthem. While their significance should not be downplayed, they are not foundational in the sense of providing a foundation for the rest of the Final Constitution or for South African democracy. This is particularly true of FC s 4, which merely provides that the President will determine the national anthem by proclamation. In comparison to the pregnant provisions of FC s 1, FC s 4 is about as empty a vessel as a provision can be. Unlike some of the other founding provisions, this provision has no more work to do. In contrast to FC s 1, FC s 4 does not tie the provisions of the Final Constitution together, help define the constitutional order or influence the interpretation of other provisions of the Final Constitution, legislation, or the common law.[2]

Thus, the question remains, why are FC ss 3–6 part of the founding provisions when they seem to be so different from those sections that are more basic, or foundational? The best explanation is that they symbolize certain pillars or foundational values that accommodate both the history of the struggle for democracy in South Africa and the desire for recognition by certain groups. This is particularly true of the language and citizenship provisions, which, on the one hand, are

[1] Moreover, FC s 30, the right to language and culture, and FC s 31, the right to cultural, religious and linguistic communities, are internally modified by a requirement of consistency with all other provisions in the Bill of Rights. See I Currie 'Community Rights: Culture, Religion and Language,' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 58.

[2] I refer to the possible conflict between the descriptions of the flag as containing the colour red in FC s 5 and chilli red in Schedule 1. See C Roederer 'Post-Matrix Legal Reasoning — Horizontality and the Rule of Values in South African Law' (2003) 19 SAJHR 57, 77, n 101 (Argues that should dispute over colours of the flag arise, the values of the Final Constitution would need to be invoked to resolve it.)

[3] Currie and De Waal set out a number of tasks for the basic principles of the new constitutional order. See Currie & De Waal *Handbook* (supra) at 7–8. Unlike these provisions, FC s 4 does not tie the provisions of the Final Constitution together, or help define the constitutional order, influence the interpretation of other provisions of the Final Constitution, or influence the way legislation is interpreted or drafted or how the common law will be developed.

reactions to the denial of citizenship, and the denigration of the languages of so many South Africans under apartheid, and, which on the other, reflect the pressure to identify a common unified citizenry and to embrace and to protect languages previously underprivileged.

13.6 Are the founding provisions absolute or at least more important than other provisions in Final Constitution?

As noted above, a number of the founding provisions appear to provide for rights, or at least could be interpreted to give rise to rights. If this is so, it is unclear from the text if they can be limited, since the limitations clause (FC s 36) refers only to rights in the Bill of Rights. If the founding provisions are in fact foundational, then there is room to argue that either they should be absolute and not subject to limitation, or at least that the rights they protect should be considered more important and more difficult to limit. The latter view represents a common approach to the rights to equality and to dignity, which are foundational values under FC s 1*(a)*.[1] For instance, the applicants in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) & Others*, who were citizen prisoners denied the right to vote, argued that the sections of the Electoral Act which disenfranchised them were contrary to FC ss 1*(d)* and 3(2) 'which are absolute and not subject to limitation in terms of the Constitution'.[2] While the text of the Final Constitution does not mandate this

[1] See, for example, Kriegler J's treatment of the right to freedom of expression versus dignity in *S v Mamabolo* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC) at para 41. In her treatment of the competing rights to dignity and freedom of expression in *Khumalo*, O'Regan J noted that dignity was foundational while the right to freedom of expression was not paramount. *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at para 25. For a critique of *Khumalo* with regard to the privileging of dignity over freedom, and the inconsistencies in the Court's jurisprudence on the value of expression in our democracy, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) §31.4. See also *Sayed v Editor, Cape Times* 2004 (1) SA 58, 62–63 (C). *Khumalo* appears to indicate that rights in the Bill of Rights that have the backing of the foundational values in FC s 1 outweigh those that do not. It is an indication of at least some radiating effect of the founding provisions. O'Regan J in *Dawood* wrote:

> The value of dignity in our Constitutional framework cannot . . . be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels.

Dawood (supra) at para 35. Note that this quote connects the foundational value of dignity to the Preamble's value of transformation. Compare this view to Kriegler J's view of equality. See *President of the RSA & Another v Hugo* 1997 (4) SA 1997 (CC), 1997 (6) BCLR 708 (CC) at para 74 ('The South African Constitution is primarily and emphatically an egalitarian Constitution . . . [I]n light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution's focus and its organizing principle.') See also *Lotus River Ottery Grassy Park Residents Association v South Peninsula Municipality* 1999 (3) SA 817, 833 (C), 1999 (4) BCLR 440, 456 (C); *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 1999 (3) SA 174, 186I-187A, (C), 1999 (3) BCLR 280, 292–293 (C).

[2] *NICRO* (supra) at 18.

conclusion, there is a clear gap in the letter of the law here: that gap is the absence of an express provision as to how rights or powers outside of FC Chapter 2 ought to be limited.[1] Rather than tell us why this gap should be filled one way or another, the Court in *NICRO* simply preferred the conclusion that the provisions in question are not absolute and that the FC s 36 was appropriate to the task of deciding whether FC s 18 could be limited.[2] The Court stated that: 'Neither of these sections requires voting rights to be absolute and immune from limitation'.[3]

FC ss 1*(d)* and 3(2) might have had an impact on the limitations analysis in *NICRO* but that may have been due as much to the fact that the rights to vote and to equality were also infringed. The right to equal citizenship overlapped with the right to equality. Another right that was not equally accorded to these prisoners/citizens was the right to vote. It is unclear that the verdict would have come out differently if the founding provisions did not, in fact, exist. While the Court notes that FC s 3's equal citizenship rights are modified by the equal duties provision of FC s 3, these duties are just as easily articulated as limitations, in terms of FC s 36, of the right to vote.[4]

13.7 Do the founding provisions create justiciable rights?

It can be argued that the limitations analysis in *NICRO* was appropriate because of the infringement of the rights to equality in FC s 9 and the right to vote in FC s 19(3)*(a)*, and not because FC ss 1 and 3 were infringed. Notice that a limitation or infringement of the equal rights of citizenship provisions will, by definition, require the denial of a right and although the right in question need not be a right in the Bill of Rights (see FC s 39(3)), the denial of the right to an individual or group of citizens is likely to raise FC s 9 equality rights concerns. Should it not, there is still a good argument to be made that a founding provision that so clearly provides for equal rights of citizens should be both justiciable and afforded at least the same protection as the rights in the Bill of Rights.[5]

[1] See, in this regard, S Woolman 'Application' §31.5 (First rule: harmonization; 2nd rule: read non rights provisions in lights of rights; 3rd rule: rights trump exercise of the government power, but not the power itself.)

[2] The *NICRO* Court made this point when it stated that

> Section 36 of the Constitution is dealt with more fully in paragraph 33 and later paragraphs below. It makes provision for the limitation of rights in the Bill of Rights and the criteria according to which this [the limitation of the right to vote of citizens] can be done.

NICRO (supra) at 19.

[3] Ibid.

[4] Ibid at paras 24 and 57 ('The rights include the right to vote in elections. The duties and responsibilities include at least an obligation to respect the rights of others and to comply with the law'. The Court characterized the policy justification put forward by the State as 'denounc[ing] crime and . . . communicat[ing] to the public that the rights that citizens have are related to their duties and obligations as citizens. Such a purpose would be legitimate and consistent with the provisions of s 3 of the Constitution.')

[5] See Currie & De Waal *Handbook* (supra). In chapter 20, 'Citizenship', the authors place FC s 3 in the shaded box along with FC s 20, indicating that this is a rights-granting provision to be treated the same as FC s 20.

The status of the FC s 6 'Languages' provisions is even less clear. While their denial may raise equality concerns (language is listed as one of the prohibited grounds under FC s 9(3)), if viewed as positive rights, they may be denied without infringing other rights, not even the language and cultural rights in the Bill of Rights. One view is that, given their socio-economic-rights-like structure, the FC s 6 provisions should be in the same camp as FC s 3, which would arguably make them justiciable and subject to the FC s 36 limitations analysis. This is reinforced by the FC s 2 command that 'the obligations imposed by it [the Final Constitution] must be fulfilled'.

(a) FC s 1 does not create justiciable rights

The Court has not given us any guidance on whether FC s 6 gives rise to enforceable rights, but it has addressed the question of the enforceability of FC s 1. Given that the FC s 1 provisions are truly foundational and substantially more entrenched than any other provision in the Constitution (save the entrenching provision) it is arguable that they should be interpreted as giving rise to justiciable rights. However, as Frank Michelman points out in his chapter on the rule of law, the Constitutional Court in *NICRO* held that the founding values of FC s 1 do not 'give rise' to 'enforceable rights'.[1] As the Court stated:

> The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. *They do not, however, give rise to discrete and enforceable rights in themselves*. This is clear not only from the language of section 1 itself, but also from the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights.[2]

At first blush, this holding raises a concern for the rule of law because, in addition to there being no justiciable right to the 'rule of law' in FC s 1*(c)*, there are no other provisions in the Bill of Rights that clearly give rise to a justiciable right to the rule of law.[3] This leaves the second of the two values in FC s 1*(c)* without apparent protection.[4] However, as Michelman points out, in a

[1] See F Michelman 'Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) §11.2, citing *NICRO* (supra) at paras 21, 23.

[2] *NICRO* (supra) at para 21 (emphasis added).

[3] See Michelman (supra) at §11.2. See also S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005)(Dignity as right gives rise to justifiable rules, dignity as value do not). Ch 36.

[4] The same concern is not present for the other values mentioned in FC s 1 since there are clear justiciable provisions relating to paras *(a)*, *(b)*, the rest of *(c)* and *(d)*. Paragraph *(a)* finds expression in FC ss 9–10, 7(2), 38, 39 and throughout the Bill of Rights; paragraph *(b)* in FC s 9; the rest of paragraph *(c)* in FC ss 2, 38, 172(1)); and paragraph *(d)* in FC ss 19, 46(1), 236 and 237.

series of decisions the Constitutional Court has recognized the principle of legality, one of the core components of the rule of law, as a justiciable right.[1] Many of the concerns that might have been raised in response to the decision in *NICRO* are therefore unwarranted. In addition, in *President of the Republic of South Africa & another v Modderklip Boerdery (Pty) Ltd*, the Court appeared to qualify the *NICRO* ratio somewhat by suggesting that FC s 1(c)'s commitment to the rule of law may be given justiciable content through other rights, in this case the FC s 34 right of access to courts.[2]

(b) Other provisions in FC Chapter 1 may give rise to justiciable rights

It could be argued that, if FC s 1 does not give rise to justiciable rights, then none of the Chapter 1 founding provisions should be interpreted to give rise to justiciable rights. There may be two grounds for this: (1) justiciable constitutional rights are placed in FC Chapter 2, and thus, if the drafters wished to create justiciable rights in respect of the matters covered by FC Chapter 1, they could and should have placed them there; and (2) given that FC s 1 enjoys pride of place in FC Chapter 1, it would be odd if its provisions did not give rise to justiciable rights while other provisions in the same chapter did. The first argument can be found in the passage from *NICRO* quoted above, and is equally applicable to the other sections in FC Chapter 1.

The Court's second argument in *NICRO*, that the language of FC s 1 does not evince an intention to create rights, is not, however, equally applicable to the rest of FC Chapter 1. Given that the Court in *NICRO* did not say that the other sections of FC Chapter 1 did not give rise to enforceable rights, the difference in language of the other provisions may be enough to outweigh the structural arguments that they be treated the same as FC s 1. While FC s 1 clearly states that paras *(a)-(d)* specify the values that the Republic of South Africa is founded upon, it does not state that the values create rights, and does not clearly impose any duties on anyone. FC s 2, by contrast, in addition to providing that 'law or conduct inconsistent with [the Final Constitution]' is invalid, imposes a general duty to fulfil the obligations imposed by the Constitution. This section, which expressly creates a duty of fulfilment, arguably also creates the correlative right to fulfilment. As FC s 1 does not impose any obligations, FC s 2 cannot gain traction on it to create any rights. But, this is not the case with FC ss 3(2) and (3), which provide for equal rights and duties of citizenship, and impose an obligation on the State to pass legislation providing for 'the acquisition, loss and restoration of

[1] Michelman (supra) at 11-15–11-33.
[2] 2005 (5) SA 3 (CC).

citizenship'.[1] It is also not the case with FC s 6, which imposes a number of obligations on the state with regard to the promotion of official, indigenous and other languages.[2] If these provisions, along with FC s 2, create constitutional duties, one could argue that they also create constitutional rights.[3] Any attempt to limit these rights would then either be unconstitutional (if FC Chapter 1 creates justiciable rights) or subject to the discipline of the general limitations clause.[4]

[1] See *Kaunda* (supra) at paras 62–67 (Chaskalson CJ addressed the right or the entitlement to equal citizenship in FC s 3 in the context of the right to request diplomatic protection of the state. Although he did not find that FC s 3 gave rise to a right to diplomatic protection, it did give rise to a right to request diplomatic protection and to have the request properly considered. The right to request entailed a corresponding duty to address the request in a manner consistent with the Final Constitution. In his treatment of the issue, Chaskalson CJ noted that the FC s 1 value of equality was part of FC s 3 and the FC s 1 values of advancing human rights and freedoms should inform the way government responded to such a request.)

[2] The High Court, in *S v Damoyi,* held that::

> It is quite evident that in terms of ss 6(2) and (4) of the Constitution both the national and the provincial governments have a constitutional duty to realise the objective envisaged in the aforementioned subsections, not only as regards the affairs of either the national and provincial governments but also as regards the conduct of court proceedings. Whether both the national and the provincial governments have the political will to do so remains to be seen.

2004 (2) SA 564 (C)(*'Damoyi'*) at para 8.

[3] But see Currie 'Official Languages and Language Rights' (supra) at §65.5 (Currie contends that FC s 6 does not create justiciable rights and that these provisions should be read as non-justiciable directives. On this view, the detailed language provisions appear to be mere symbols of the rainbow nation.)

[4] The practicalities of delivering on the guarantee in FC s 6 of some level of parity with regards to the 11 official languages and the 11 other languages mentioned in this section have led some to take the view that there should just be one language of record in court proceedings. The court in *Damoyi* noted that other courts were split on whether it was contrary to the democratic values of the Constitution to have English as the language of record to the exclusion of the 10 other languages. See *Damoyi* (supra) at para 11. Yekiso J sided with the view taken by the High Court *S v Matomela*. In *Matomela* Tshabalala J stated:

> In my judgment the best solution is to have one official language for courts . . . All official languages must enjoy parity of esteem and be treated equitably *but for practical reasons and for better administration of justice one official language of record will resolve the problem. Such a language should be one which can be understood by all court officials irrespective of mother tongue.*

1998 (2) All SA 1, 4 (Ck) (my emphasis). This view is contrary to the view expressed by the court in *S v Pienaar*. 2000 (2) SACR 143 (NC). See also JJ Malan 'Die Gebruik van Afrikaans vir die Notulering van Hofverrigtinge Gemeet aan die Demokratiese Standaarde' (2003) 28 *Tydskrif vir Regswetenskap/Journal for Judicial Science* 36 (Argues against making English the sole official languagge of the Courts.). The views in *S v Pienaar* were based on the practicality of using English and the substantial costs of trying to embrace the other 11 official languages. See also G Devenish *A Commentary on the South African Constitution* (1998) 40.

14 Co-operative Government & Intergovernmental Relations

Stu Woolman & Theunis Roux

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14.1 INTRODUCTION*

Prior to 1994, co-operative government and intergovernmental relations were largely foreign terms in the South African political lexicon. While different levels of government existed, all meaningful decision-making processes were concentrated in the national government.

The MPNF at Kempton Park apparently gave little consideration to the processes necessary to facilitate intergovernmental relations. According to De Villiers,[1] the consequent lacuna in the Interim Constitution[2] reflects: *(a)* a lack of familiarity with how other multi-tiered dispensations operate; and *(b)* a politically charged debate between the ANC and NP on the relative merits of federal and unitary systems.[3]

The absence of express rules, procedures and systems for intergovernmental co-operation in the Interim Constitution did not preclude various government departments from developing both vertical and horizontal channels of communication.[4] These ad hoc rules and practices, as well as the pragmatism of government actors necessitated by the allocation of concurrent powers under the Interim Constitution, had a knock-on effect with respect to the drafting of the Final Constitution.[5]

The Constitutional Assembly — in FC ss 40 and 41 — laid out principles designed to promote co-ordination, rather than competition, between the various tiers of government and organs of state. To emphasize this shift in relations, FC ss 40 and 41 employ the term 'sphere' rather than 'level'. Sphere intimates differ-

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[1] See B De Villiers 'Intergovernmental Relations in South Africa' (1997) 12 *SAPL* 198 ('IGR in SA').

[2] Constitution of the Republic of South Africa, Act 200 of 1993('IC' or 'Interim Constitution').

[3] Advocates of a unitary state believed that provincial and local governments should be largely subordinate to the national government. Federalists argued that each level of government should be allocated specified and entrenched powers and that any fundamental encroachment or limitation of such powers functions be deemed unconstitutional. See B De Villiers 'Intergovernmental Relations: The Duty to Co-operate — A German Perspective' (1994) 9 *SAPL/PR* 430 ('A German Perspective'). See also B De Villiers 'Intergovernmental Relations: A Constitutional Framework' in B De Villiers (ed) *The Birth of a Constitution* (1994); N Haysom 'The Origins of Co-operative Government: The "Federal" Debates in the Constitution-making Process' in N Levy & C Tapscott (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001) 43, 45 (The negotiators shelved heated but unenlightening debates over taxonomy and 'embark[ed] on an inquiry into an appropriate system of constitutional government whose objective would be to promote nothing other than good and effective government'); C Murray & R Simeon 'Multilevel Governance in South Africa: An Interim Report' (unpublished paper) as quoted in K McLean 'Housing Provision through Co-operative Government' (2002)(Unpublished manuscript on file with authors) 15 ('ANC leaders came to see advantages in effective regional governments both for the delivery of services and for the empowerment of citizens. Their exposure to foreign models of federalism, especially in Germany, convinced them that regional governments could be combined with strong leadership from the centre'); N Haysom 'Federal Features of the Final Constitution' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions*: *Perspectives on South Africa's Basic Law* (2001) 504.

[4] For a discussion of this type of legislation in the context of pre-1996 intergovernmental relations, see *Ex Parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC)('*National Education Policy*').

[5] Constitution of the Republic of South Africa, 1996 ('FC' or 'Final Constitution').

ent sets of responsibilities. (By implication, level denotes a hierarchy in structures of government). But that is as far as the break with the old order goes. Despite the emphasis on 'spheres' with particular, and sometimes exclusive, competencies, the Constitutional Assembly did not create a strong federal state.[1] As other chapters in this work indicate,[2] the national government retains both the power of the purse and the ability to override provincial and local government decisions. Moreover, the current dominance of the ANC means that technically independent political actors will be subject to the internal party discipline of that organization.[3] Of course, if the 2007 ANC Polokwane Conference and the 2009 elections have taught us anything, then it is that we operate in a complex, fluid and unpredictable political environment. The 2007 ANC Polokwane Conference split closely along provincial lines — with Zuma ousting Mbeki. (However the actual margin was greater when one takes into account the support of the ANC Women's League and the ANC Youth League for Zuma). Subsequent events such as the formation of a new (non-minority) party (the Congress of the People (COPE)), sustained period of mass action, demonstrations and strikes by unions (precipitated by a clear strategy of destabilization by COSATU, the SACP and their affiliates), and inevitably clear divisions within the governing faction of the ANC (between moderate populists, on the one hand, and leftists, from COSATU and the SACP, on the other) suggest that internal ANC politics are anything but settled. The 2009 electoral triumph of the Democratic Alliance in the Western Cape — and its cotemporaneous control of the Cape Town metropole — will also test national government, provincial government and municipal relations. The frission between these three levels of government will be keenly felt around spending issues. As we shall see, the national government's current constitutional and statutory control over provincial revenue, taxation and spending allows it to exercise extremely tight control (through conditional grants) over provincial and local imperatives. The independence of spheres of government secured by the Final Constitution ensures that provincial and municipal officials, with sufficient political will, can take decisions that simultaneously oppose current national policy and influence its future formulation.[4]

[1] De Villiers suggests that multi-tiered levels of government ensure greater public participation in societies riven by ethnic, religious or racial strife. See De Villiers 'A German Perspective' (supra) at 430-431.

[2] See, eg, V Bronstein 'Legislative Competence' in S Woolman, T Roux, M Bishop J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15; S Budlender 'National Legislative Authority' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17.

[3] N Steytler 'One Party Dominance & the Functioning of South Africa's Decentralized System of Government in R Kubek (ed) *Political Parties and Federalism* (2004) 159.

[4] For example, the resistance of the Gauteng provincial government to national government policy regarding the distribution of the anti-retroviral drug Nevirapine to prevent mother-to-child transmission of HIV/AIDS led to a shift in national policy. See *Minister of Health v Treatment Action Campaign* (No 2) 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 ('*TAC*'). As Nico Steytler and Yonathan Fessha note, challenges to the hierarchical statutory arrangements will become more pronounced as greater party pluralism becomes the norm in local, provincial and national government. See N Steytler & Y Fessha 'Provincial Intergovernmental Forums: A Preliminary Assessment of Institutional Compliance' (2006) (available at www.cage.org.za).

14.2 Comparative Concepts of Co-operative Government

Comparative constitutional law throws up a whole range of models of co-operative governance. So-called divided federal states are generally marked by a clear division of functions between the national government and provincial governments, independent taxing powers for regions or provinces, and few formal mechanisms of co-operation between the various levels of government. Separate levels of government must negotiate agreement on issues of mutual concern. The United States,[1] Canada,[2]

[1] A good example of a very weak divided federal dispensation was the post-revolutionary war government of the United States. The Articles of Confederation granted the federal government little more than the power to defend the thirteen states against foreign enemies. The federal government lacked an executive, a judiciary and the power of the purse. Nor did it possess any authority to intervene or to override the 13 sets of laws contrived by the founding States. The carefully calibrated system of shared and divided power crafted by the Constitutional Convention in 1787 was largely an answer to problems of co-ordination that threatened the very existence of the new nation. The federal government possessed only those powers articulated by the US Constitution. Article I, Section 8. All other powers vested in the states that made up the union. Tenth Amendment. Two hundred years later, the constitutionally recognized power of US federal government is such that there are relatively few areas of legislative and executive competence that are not at least shared by federal, state and local authorities. However, sharing competence does not mean coordinated action. Coordinated action is generally a function of mediation and not institutional arrangement.

The US is not without institutional arrangements designed to ensure that the national government takes cognisance of regional and local concerns. One house of Congress, the Senate, is made up of representatives from each of the 50 states. The other house, the House of Representatives, is made up of representatives from generally smaller constituencies — read local communities — from each of the 50 states. As a result, regional and local concerns feature prominently in national debate. See *Garcia v San Antonio Metropolitan Transit Authority* 469 US 528, 550-551, 105 SCt 1005 (1985) ('[T]he principle means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by the Congress.') Indeed, political careers at the national level are often measured by the ability of representatives to bring home the 'pork' — that is, to ensure that local or regional communities benefit from national government largesse. See L Tribe 'Model I: The Model of Separated and Divided Powers' *American Constitutional Law* (3rd Edition, Volume I, 2000) 118 — 206.

[2] See P Hogg *Constitutional Law of Canada* (4th Edition, Volume I, 2001) 5–43–5–45. Hogg describes the Canadian system as one of 'co-operative federalism'. He notes that while the 'formal structure of the Constitution carries a suggestion of eleven legislative bodies each confined to its own jurisdiction, and each acting independently of the others . . . in many fields, effective policies require the joint, or at least complementary, action of more than one legislative body. . . . [T]he essence of co-operative federalism is a network of relationships between the executives of central and regional government. Through these relationships, mechanisms are developed, especially fiscal mechanisms, which allow a continuous redistribution of powers and resources without recourse to the courts or the amending process. The area where cooperative federalism has been most dominant is in the federal-provincial financial arrangements. At any given time, there are over 150 organizations, conferences and committees involved in intergovernmental liaison, indicating a vast array of consultative organisms within the Canadian federation.'

Hogg's description of the Canadian system sounds remarkably similar to the South African model. An architect of the South African system, Firoz Cachalia, has described the system as one of 'co-operative federalism'. See De Villiers 'IGR in SA' (supra) at 199. See also Report of the Commission of Inquiry into Constitutional Problems ('Tremblay Report') (1956, Volume II) 97–131 (Discussion of the nature and the goals of the Canadian federal state.)

Australia,[1] India,[2] Brazil[3]

[1] See, generally, T Blacksmith & G Williams *Australian Constitutional Law and Theory* (2nd Edition, 1998) 213–244; Constitutional Commission *Final Report of the Constitutional Commission* (1988) 53–54 ('[T]he minimum essential features of a federal system as it has come to be understood in Australia are a high degree of autonomy for the government institutions of the Commonwealth and the States, a division of power between these organizations, and a judicial umpire.' The Constitution protects the States from discrimination through taxation, duties, tariffs or regulation of trade, commerce or revenue by the Commonwealth. Likewise, it ensures that citizens of one State are not discriminated against by another. Finally, the equal representation of the States in the Commonwealth Senate ensures a certain even-handedness in the formation of national government policy.) See also 'Australia's System of Government' Department of Foreign Affairs and Trade (2004) http://www.dfat.gov.au. Much like the United States, Australia's federal government powers are enumerated. Sections 51 and 52 of the Australian Constitution. The states' plenary powers find their source in s 107. See R Watts 'Intergovernmental Councils in Federations' in *Constructive and Co-operative Federalism? A Series of Commentaries on the Council of the Federation* (2003). Watts notes that Australia, like South Africa, combines federal and parliamentary institutions. While intergovernmental relations are not expressly provided for in the Constitution, Australia has established a number of major formal intergovernmental councils. The Council of Australian Governments (COAG) is Australia's primary intergovernmental institution. COAG consists of the Prime Minister, all the State Premiers and Territory Chief Ministers, and the President of the Australian Local Government Association. The 30-odd intergovernmental ministerial councils charged with various sectoral responsibilities make even more important contributions to IGR. Several of these councils have decision-making mandates assigned by legislation. This assigned authority — along with articulated deliberative and voting processes — makes them genuine intergovernmental co-decision mechanisms. They are quite similar in this respect to South Africa's MINMECs. See § 14.4*(d)* infra. For more on IGR in Australia, see DM Brown *Market Rules, Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada* (2002) 162, 204-11, 226, 259 – 262; R Wilkins & C Saunders 'Intergovernmental Relations in Australia' in P Meekison (ed) *Intergovernmental Relations in Federal Countries* (2002) 17-23.

[2] India's Constitution provides expressly for the functional interdependence of various tiers of government. Article 263 allows for the creation of an Inter-State Council (ISC) designed to harmonize federal and state policies. (Despite this constitutional dictate, the ISC only came into being in 1990. The delay, justified in part by a desire to develop a set of best practices for federal-state relations, sheds at least some light on the South African government's delay in bringing into being IGR dispute resolution legislation in terms of FC s 41(2).) The National Development Council, created in 1952, is the setting for intergovernmental debate about Union five-year plans. The Finance Commissions provided for by Article 280 governs constitutionally mandated transfers between Union and State governments. Much like the South African Constitution, the Indian Constitution assigns government competencies according to a Union list, a State list and a Concurrent list. Article 246, Schedule VII, Lists I, II, III. The Union's list of powers embraces such standard national responsibilities as defence, foreign affairs, banking, currency control, taxes and levies. The State list contains such competencies as public order and police, local government, public health, education and state taxes. However, the Union's legislative powers may pre-empt state authority with respect to matters enumerated in the Union and concurrent list of competences. The Union government may also intervene directly in the affairs of the states. Subject to a two-thirds majority of the Council of States (a body similar in function to South Africa's National Council of Provinces), the Union may declare a state of emergency and appropriate the power to legislate with respect to matters covered by the State list. Article 249. All state governors are appointed by the President of the Union. As a result, the federal government retains oversight powers vis-à-vis the affairs of any given state. See HM Seervai 'Federalism in India' *Constitutional Law of India* (4th Edition, Volume 1, 1991) 281–303.

[3] See C Souza *Constitutional Engineering in Brazil* (1997). According to the 1988 Brazilian Constitution, the three tiers of government (federal, state and local) have both distinct and concurrent competencies. To get a sense of the relative power of each tier, Souza looks at both the fiscal and expenditure responsibilities of each tier. Ibid at 37-53. The federal government retains the lion's share of responsibility for taxation: through income tax, large fortunes tax, import/export duties, rural property and industrial products taxes. States possess the ability to tax incomes, inheritances, capital gains and motor vehicles as well as to create value-added tax. Local governments enjoy the right to tax property, services and fuel. Interestingly, once the distribution of fiscal revenue occurs, the federal government

and Switzerland[1] are good contemporary examples of divided federal states. So-called integrated federal states generally provide for the exercise of both exclusive and concurrent powers by different levels of government and develop procedures designed to enhance co-operation between levels and organs of state. The national and sub-national governmental structures of Germany have been quite consciously designed to co-operate with each other.[2] South Africa's system replicates many of the best practices of the German system.

receives but 36.5% of the total. States receive 40.7% and local governments 22.8%. With respect to areas of expenditure, the federal government exercises authority over such expected fields as defence, international trade currency, national highways, postal services, federal police, social security and water. The federal, state and local government share competence over health, welfare and public assistance, culture and education, housing and sanitation, poverty and social marginalization, traffic safety and tourism. The states have residual powers over areas not assigned to the federal or municipal levels by the constitution. Local governments possess exclusive competence over local transport, primary schooling and land use. Despite the constitutionally prescribed competencies of the states, the Brazilian federal government can override state legislation in a set of prescribed circumstances (quite similar to those found in the FC in s 44(2)): (1) where the national interest is threatened, (2) where there is extreme public disorder or (3) when a state's finances are seriously in arrears. Such interventions must be certified by the Brazilian Supreme Court. In general, such an override will only take place after mediation between the federal government and the state government involved has failed. IGR in Brazil is largely informal. It relies on extensive political lobbying and brokered deals between the different tiers of government. While much of the lobbying flows upwards from municipal councillors and mayors to state legislatures and from state officials to congressmen, senators, federal ministers and the president, the 'federal government [post-1988] cannot take decisions about national issues without negotiating with the sub-national spheres.' Ibid at 172.

[1] Switzerland has a unique federal structure. The Federal Council is a collegial executive elected by the federal legislature. It sits for a fixed term and is composed of seven councillors. This structure is mirrored in cantonal political arrangements. Two things set this arrangement apart: (1) the guaranteed representation of the four major political parties in the Federal Council; (2) the possibility of dual membership in the cantonal and federal legislatures; and (3) a constitutional provision that potentially subjects all federal legislation to challenge by referendum. As a result of these unique features, Swiss politics reflects both a high degree of co-operation and a high degree of cantonal autonomy. Provision is made for cantonal participation in decision-making processes at the federal level with respect to federal legislation (Article 45(1)) and foreign policy (Article 55), while inter-cantonal co-operation is promoted through treaties, common organizations and institutions (Article 48). Federal Constitution of the Swiss Confederation, 1999. See JF Aubert & E Griesel 'The Swiss Federal Constitution' in F Dessemontet & T Ansay (eds) *Introduction to Swiss Law* (1995) 15–26.

[2] See De Villiers 'A German Perspective' (supra) at 432 fn 6 (Co-operative federalism is described as follows: '*(i)* horizontal and vertical co-operation between the various levels of government; (ii) bilateral and multilateral co-operation; (iii) the involvement of the legislative, executive and judicial branches of government; (iv) a combination of voluntary and obligatory co-operation'). The partnership between the German national government (Bund) and the various regions (Länder) is based on the principle of federal trust (Bundestreue). According to the German Constitutional Court, Bundestreue is a right enforceable by both the national and regional governments. See B Verf GE 1, 300. See also B Verf GE 12, 205, 256. That said, there is no exact checklist to measure compliance with the principle of Bundestreue. It is a constitutional norm given content by the demands of the specific circumstances with which the court is confronted. See De Villiers 'A German Perspective' (supra) at 432.

The principle of Bundestreue has informed South Africa's commitment to co-operative government and intergovernmental relations. However, notwithstanding the many shared elements of an integrated model, the South African national government retains a dominant position in intergovernmental relations. The South African model is far more centralised in comparison with its German counterpart. For more on German co-operative governance, see D Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989) 78–92; D Currie *The Constitution of the Federal Republic of Germany* (1994) 77–80; B De Villiers 'Bundestreue: The Soul of an Inter-governmental Partnership' *Konrad Adenauer — Stiftung Occasional Papers* (March 1995); B De Villiers 'Foreign Relations and the Provinces — International

Three cautionary notes are in order. First, the vast majority of nations are unitary, not federal. The concept of 'co-operative governance' has meaningful application in the fewer than 50 nations that may be properly described as federal. Second, taxonomy is often misleading. Distinctions between divided and integrated federal states obscure what is truly interesting: the conventions and the institutions that make a federal system work. Third, the Final Constitution creates space for two competing forms of federalism. Each form of federalism reflects a different conception of intergovernmental relations (IGR) and cooperative governance. As Ronald Watts and Nico Steytler note, the first form of integrated South African federalist state contemplated by the Final Constitution — call it cooperative IGR — assumes relative parity of power between the national government and our subnational constituents (the provinces and the municipalities.)[1] The second form of integrated South African federalist state contemplated by the Final Constitution — call it coercive IGR — reflects a hierarchical distribution of power: national government largely dominates the nation's subnational constituent parts.[2] As we shall see, the Constitutional Court's initial gloss on Chapter 3 suggests a cooperative form of IGR and relative parity between the country's three spheres of government. However, several important pieces of legislation — the Intergovernmental Relations Framework Act 13 of 2005, the Provincial Tax Regulation Process Act 53 of 2001, the Intergovernmental Fiscal Relations Act 97 of 1997, and the annual Division of Revenue Act (as well as many complicated constitutional provisions that determine the parameters of provincial and local fiscal autonomy) concentrate political power in our national government. The marriage of political culture — ANC dominance — to political structures that favour the national government — and ANC dominance — underwrite Watt and Steytler's contention that we currently operate with an integrated federal state that employs a coercive form of IGR and cooperative government.[3]

Experience' (1996) 11 *SAPL/PR* 204; B De Villiers 'Local-Provincial Intergovernmental Relations: A Comparative Analysis' (1997) 12 *SAPL/PR* 469. To show up the limits of these conceptual categories, it is worth noting that an exemplar of the divided model, the US, has much stronger regional and local representation at the national level than does South Africa.

[1] N Steytler 'Cooperative and Coercive Models of Intergovernmental Relations: A South African Case Study' in *Intergovernmental Relations: A Festhschrift for Ronald Watts* (forthcoming, 2009, on file with author); R Watts *Intergovernmental Relations*: *A Report for the Department of Constitutional Development and Provincial Affairs* (1999).

[2] In 1997, Ronald Watts contended that the Final Constitution 'represents an innovative hybrid combining some federal features with some constitutionally decentralized unitary features'. R Watts *Federalism: The Canadian Experience: Theory and Practice Volume 2* (1997) 2. See also N Steytler 'One Party Dominance and the Functioning of South Africa's Decentralised System of Government' in Rudolf Hrbek (ed) *Political Parties and Federalism* (2004) 159.

[3] R Watts 'Intergovernmental Relations: Conceptual Issues' N Levy and C Tapscott (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001) 22; C Leuprecht & H Lazar, 'From Multilevel to "Multi-order' Governance?" *Spheres of Governance: Comparative Studies of Cities in Multilevel Governance Systems*' in H Lazar & C Leuprecht (2007) 1. Steytler writes: 'While the object of providing "coherent government" may seem a neutral goal, the coherence is, however, premised on the "realisation of national priorities"... Given that the nature and extent of these [provincial and municipal] services are prescribed in national policies and legislation, the focus then shifts to [the] "monitoring implementation" of [national] policy and legislation' and not the coordination of varying policy initiatives. N Steytler 'Cooperative and Coercive Models of Intergovernmental Relations' (supra) at 7. Steytler and Watt's analyses carry more than a whiff of disappointment — as if things might have

14.3 Co-operative Government and the Final Constitution

(a) The general framework of co-operative government

Co-operative governance is reflected in any number of different ways in the Final Constitution. FC ss 40 and 41's use of the terms 'spheres' reflects a linguistic turn away from a hierarchal relationship between national, provincial and local government. All spheres of government, be they national, provincial or local, must co-operate vertically and horizontally. For example, municipalities must not only co-operate with one another but also with provincial governments and the national government.[1] Finally, FC ss 40 and 41 require that different spheres of government and different organs of state should exhaust all political means of dispute resolution before turning to the courts.[2]

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been different. But given 15 years of political dominance by the ANC and its longstanding resistance to fully devolved federalism, it is hard to imagine how things might have turned out otherwise.

[1] See G Devenish *A Commentary on the South African Constitution* (1998) 109.

[2] The constitutional framework for co-operative government is not exhausted by the provisions of FC ss 40 and 41.

FC Schedules 4 and 5 specifically provide for concurrent and exclusive legislative competencies for the national and provincial governments. See V Bronstein 'Legislative Competence' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15. Although the Interim Constitution made no express reference to co-operative government, the Constitutional Court appeared to recognize the need for just such a system. See *Ex Parte of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC) at para 34. (A national education policy bill that called for the (executive) co-operation between the provinces and the national government was the subject of abstract review. The Court wrote: 'Where two legislatures have concurrent powers to make laws in respect of the same functional areas, the only reasonable way in which these powers can be implemented is through co-operation.' The Court held that Parliament was entitled to make provisions for such co-operation of matters set out in IC schedule 6 and that the objection to such provisions on the grounds that they encroached upon the executive competence of the provinces could not be sustained.) See also *Fedsure Life Assurance v Greater Johannesburg TMC* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC)('*Fedsure*')(Court confirmed that the Interim Constitution recognized three distinct, but interdependent, levels of government: namely national, provincial and local); *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 290 ('*First Certification Judgement*') ('The Constitutional Court held that Intergovernmental co-operation is implicit in any system where powers have been allocated concurrently to different levels of government and is consistent with the requirement of CP XX that national unity be recognised and promoted. The mere fact that the NT has made explicit what would otherwise have been implicit cannot in itself be said to constitute a failure to promote or recognise the need for legitimate provincial autonomy.)

Other provisions crosshatch national, provincial and municipal powers. FC ss 146 and 44 delineate the desiderata for national override of provincial legislative prerogatives. FC s 100 sets out the guidelines for national executive supervision and intervention in provincial administrative affairs. Such a supervisory role remains subject to approval, to review and to termination by the National Council of Provinces. The NCOP, as a general matter, represents provincial interests in the national legislature. See FC s 42(4). FC s 125 (3) requires that national government must assist the provinces 'by legislative or other measures to develop the administrative capacity required for the effective exercise' of their functions, powers and duties. National and provincial governments have similar obligations to assist local governments throughout the country. See FC s 154. FC s 238 enables any organ of state in a sphere of government to delegate executive functions from one organ of state to another, and to perform any function for any other organ of state. Parliament may also delegate legislative powers to governments in other spheres, except the power to amend the Constitution. See FC s 44. Provincial legislatures may assign any legislative power to a municipality. See FC s 104. A member of cabinet may assign to a member of a provincial executive council or municipality a power or a function that must be performed in terms of an act of parliament. See FC s 99. A member of the executive council of a province (MEC) may assign any power (executive) to a municipality. See FC s 126.

The Chapter 3 jurisprudence of the Constitutional Court suggests that this 'new philosophy' of co-operative government is governed by two basic principles.[1] First, one sphere of government or one organ of state may not use its powers in such a way as to undermine the effective functioning of another sphere or organ of state. Second, the actual integrity of each sphere of government and organ of state must be understood in light of the powers and the purpose of that entity. In short, while the political framework created by the Final Constitution demands that mutual respect must be paid, a sphere of government or an organ of state may be entitled to determine the objectives of another sphere of government or an organ of state and to dictate the means by which those objectives are achieved.[2]

It is worth noting at the outset that the extant case law on co-operative government can appear a bit 'soft'. The highly qualified nature of many of the Constitutional Court's holdings in this area is a function of the textual, political and procedural environment. First the Court has been regularly forced to contract the imprecise drafting of FC ss 40 and 41. When faced with the choice of offering broad readings that would enable the various subsections in FC ss 40 and 41 to cohere, or narrower, more finely grained readings of individual subsections that would create doctrinal dissonance, the Court generally chooses the former route. Second, the principles of co-operative government are designed to facilitate political solutions to conflicts between different branches of government. The Court has rightly shied away from using Chapter 3 to impose judicial solutions on

[1] See *Ex parte President of the Republic of South Africa: in re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC)('*Liquor Bill*') at para 40 (Chapter 3 'introduced a 'new philosophy' to the Constitution, namely that of co-operative government and its attendant obligations. In terms of that philosophy, all spheres of government are obliged in terms of [FC] s 40(2) to observe and adhere to the principles of co-operative government set out in chap 3 of the Constitution.') See also *First Certification Judgment* (supra) at paras 287-288.

[2] See *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC) ('*DVB Behuising*')(Court held that the functional areas of concurrent legislative authority had to be interpreted in a manner which would enable the national parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively); *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC) ('*Premier, WC v President*') at paras 54-55, 83 (Court wrote that 'the provisions of chapter 3 of the Constitution are designed to ensure that in fields of common endeavour the different spheres of government co-operate with each other to secure the implementation of legislation in which they all have a common interest. Co-operation is of particular importance in the field of concurrent law-making and implementation of laws.' As a result, a procedure requiring the President and the Premier to seek agreement concerning the legality of a proposed restructuring of the public service within a provincial administration is entirely consistent with the system of co-operative government prescribed by the Constitution); *National Educational Policy Bill* (supra) at para 34 (Court held that the principles of co-operative government must be understood such that the powers assigned to an organ of state for one purpose — read education — may not be employed by the organ of state for another.) But see *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1360 (CC) ('*Grootboom*') at paras 39–40 ('[A] co-ordinated State housing program must be a comprehensive one determined by all three spheres of government in consultation with each other. But the national sphere of government must ensure responsibility for ensuring that laws, policies, programs and strategies are adequate to meet the State's s 26 obligations'); *Member of the Executive Council for Local Government, Mpumalanga v Independent Municipal and Allied Trade Unions and Others* 2002 (1) SA 76 (SCA)(National and provincial governments have the responsibility to ensure that municipalities function effectively and to intervene in their affairs if necessary.)

quintessentially political problems. Third, principles of co-operative government are rarely dispositive of a matter. In the main, they engage a host of preliminary issues that determine whether or not a matter ought to be before a court at all. The flexibility of many of our co-operative government doctrines affords the courts a significant amount of latitude in deciding whether an intrinsically political issue is sufficiently ripe for judicial intervention. Finally, the promulgation of the Intergovernmental Relations Framework Act 13 of 2005 has largely, but not entirely, displaced the court's role in articulating rules designed to govern the better part of intergovernmental disputes.

(b) FC s 40

> 40 (1) In the Republic, government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated.
> (2) All spheres of government must observe and adhere to the principles in this chapter and must conduct their activities within the parameters that the chapter provides.

(i) *FC s 40(1): Distinctive, interdependent and interrelated*

The phrase 'distinctive, interdependent and interrelated' seems tailor-made for conceptual confusion. And yet, despite the inapt wording, the courts have managed to make sense of it.

The phrase stands for the following propositions. 'Interdependent' and 'interrelated' must be understood in light of FC s 1's provision that South Africa is '*one* sovereign, democratic state'.[1] (Emphasis added). While the different spheres of government have distinct responsibilities, they must work together in order for the South African government as a whole to fulfill its constitutional mandate.[2] Despite textual intimations that the spheres are equal, there is a clear hierarchy

[1] See *Premier, WC v President* (supra) at para 50 ('Distinctiveness lies in the provision made for elected governments at national, provincial and local levels. The interdependence and interrelatedness flow from the founding provision that South Africa is 'one sovereign, democratic State', and a constitutional structure which makes provision for framework provisions to be set by the national sphere of government.')

[2] See *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC)(*'IEC v Langeb*erg*')* at para 26 ('All the spheres are interdependent and interrelated in the sense that the functional areas allocated to each sphere cannot be seen in isolation of each other. They are all interrelated. None of these spheres of government nor any of the governments within each sphere have any independence from each other. Their interrelatedness and interdependence is such that they must ensure that, while they do not tread on each other's toes, they understand that all of them perform governmental functions for the benefit of the people of the country as a whole. Sections 40 and 41 were designed in an effort to achieve this result'); *Grootboom* (supra) at paras 39–40 ('[A] co-ordinated State housing program must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by chapter 3 of the Constitution. . . . Each sphere of government must accept responsibility for the implementation of particular parts of the program, but the national sphere of government must accept responsibility for ensuring that laws, policies, programs and strategies are adequate to meet the State's s 26 obligations.')

that runs from national government down to provincial government down to local government.[1]

(ii) *FC s 40(2): Parties bound by Chapter 3*

Another potential source of conceptual confusion is FC s 40(2). It reads, in pertinent part: 'All spheres of government must observe and adhere to the principles in this chapter.' FC s 41(1), however, applies to 'all spheres of government and all organs of state.' To further complicate matters, FC s 41(3), uses the term 'organ of state' without reference to spheres of government. The text thereby raises thorny questions as to how, when and which Chapter 3 obligations apply to a given dispute between state institutions. As we shall see, it is not enough to parrot the text and simply say that Chapter 3's obligations are sometimes imposed solely on spheres of government, sometimes on both spheres of government and organs of state, and sometimes on organs of state alone.

One way of reconciling this terminological confusion is to insist that the term 'spheres of government' should be reserved for relations *between* the different spheres of government (so-called vertical intergovernmental relations). The term 'organs of state within each sphere' could then be used to describe relations *within* a particular sphere (so-called horizontal intergovernmental relations). The problem with this reading is that at least two of the principles in FC s 41(1) — which purports to bind all spheres of government and all organs of state — do not apply to horizontal intergovernmental relations. They are FC ss 41(1)*(e)* and 41(1)*(g)*. The absence of any textual support for creating such exceptions gives the lie to this particular attempt to reconcile FC ss 40 and 41.

The courts have given meaningful content to this miasma of terminology. In *IEC v Langeberg*, the Constitutional Court began by remarking that 'the national sphere of government comprises at least Parliament and the national executive including the President.'[2] Parliament and the national executive were not organs of state as defined in s 239 'because they are neither departments nor administrations within the national sphere of government.'[3] Left unqualified, this dictum might have been read to imply that Parliament and the national executive were *not* bound by FC s 41(3) since that provision applies only to organs of state.

[1] See *Cape Metropolitan Council v Minister for Provincial Affairs and Constitutional Development & Others* 1999 (11) BCLR 1229 (T) ('*Cape Metro Council*') at para 29 (The High Court wrote that the 'apparent autonomy and independence' of the local government sphere is 'relative and limited by unequivocally expressed constitutional restraints. Its status is, to a large extent, that of a junior partner in the trilogy of spheres which make up the government of the country'); *Fedsure* (supra) at para 48 (Constitutional Court held that the Interim Constitution recognized three distinct levels of government and that each level of government derived its powers from the IC, but that local government's powers were subject to definition and regulation by either national or provincial governments.) See also *Member of the Executive Council for Local Government, Mpumalanga v Independent Municipal and Allied Trade Unions and Others* 2002 (1) SA 76 (SCA)(Although FC ss 40 and 41 contemplate distinct spheres of government, the national and provincial governments have the responsibility to ensure that municipalities function effectively and to intervene in their affairs if necessary.)

[2] *IEC v Langeberg* (supra) at para 25.

[3] Ibid.

In *National Gambling Board,* the Court held that its remarks in *IEC v Langeberg* should be construed narrowly, such that 'Parliament, the President and the Cabinet are not organs of state within the meaning of paragraph *(a)* of the definition [in s 239].'[1] The *National Gambling Board* Court qualified the dictum in *IEC v Langeberg* such that Parliament, the President and the Cabinet might be regarded as organs of state in terms of s 239*(b)*. Since none of these state institutions or functionaries was party to *National Gambling Board*, the Court did not have to decide this point. It did, however, endorse the parties' agreement that the Minister of Trade and Industry and the Premier of KwaZulu-Natal were organs of state as contemplated in s 239*(b)(i)*.[2]

The *National Gambling Board* Court's gloss on *IEC v Langeberg* was recently revisited in *Uthukela District Municipality v President of the Republic of South Africa*.[3] In *Uthukela District Municipality*, three municipalities sought an order from the Constitutional Court confirming a High Court order directing the President, the national Minister of Finance and the national Minister of Provincial Government — and several other respondents — to pay them their equitable share of national revenue as required by FC ss 214(1)*(a)* and 227(1)*(a)*. Although the matter had been settled prior to the confirmation hearing, the Court used the hearing as an opportunity both to clarify the extension and the application of the terms used in Chapter 3 and to offer an assessment of the chapter's requirements. Municipalities were expressly identified as 'organs of state in the local sphere of government.'[4] The three respondents — the President, the national Minister of Finance and the national Minister of Provincial Government — were expressly identified as 'organs of state in the national sphere of government.'[5] All parties — as organs of state — were found to be subject to the dispute resolution requirements of FC s 41(3)[6] and 41(1)*(h)*(vi).[7] Finally, the two sets of organs of state thus identified were found to have failed to make use of the dispute resolution mechanism created by the Intergovernmental Fiscal Relations Act 'for fiscal disputes between organs of State in the national and local spheres.'[8]

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[1] *National Gambling Board v Premier of KwaZulu-Natal & Others* 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 (CC) ('*National Gambling Board*') at para 21.

[2] Given that *National Gambling Board* bound provincial premiers in terms of s 239*(b)*, the President, as head of the national executive, was almost certain to be regarded as an organ of state for the purposes of FC s 239*(b)*, and therefore bound by FC s 41(3). *Premier, WC v President* provided additional support for this proposition. In *Premier, WC v President* the Constitutional Court assumed exclusive jurisdiction under FC s 167(4)*(a)* of the Constitution to hear a dispute between a provincial premier and the President. FC s 167(4) provides that '[o]nly the Constitutional Court may — *(a)* decide disputes between organs of state in the national or provincial sphere concerning the status, powers and functions of any of those organs of state.' The Court's decision to assume jurisdiction was based upon an express finding that the President was an organ of State in the national sphere. Ibid at para 2. It followed that the President would be bound by the general duty in FC s 40(2) to adhere to the principles in Chapter 3, the specific duties attached to these principles in FC s 41(1) as well as the duty to engage in extra-judicial dispute-resolution in FCs 41(3) prior to any litigation.

[3] 2003 (1) SA 678 (CC), 2002 (1) BCLR 1220 (CC)('*Uthukela District Municipality'*).

[4] Ibid at para 18 citing, in support, *IEC v Langeberg* (supra) at para 19.

[5] Ibid at para 18 citing, in support, *National Gambling Board* (supra) at paras 19–21.

[6] Ibid at para 19.

[7] Ibid at para 22.

[8] Ibid at paras 20–23.

Despite the Constitutional Court's view that the President and the national Cabinet are organs of state as defined in FC s 239*(b)*,[1] the distinction drawn in FC ss 40 and 41 between spheres of government and organs of state within a particular sphere may still turn out to be significant. If it is decided that Parliament is not an organ of state, the duty imposed by s 41(3) to engage in extra-judicial dispute resolution will not bind the National Assembly and the National Council of Provinces and, by extension, provincial legislatures and municipal councils. It seems difficult, at first blush, to believe that the drafters of the Final Constitution intended to immunize these bodies from the dictates of FC s 41(3). However, when interpreting the Intergovernmental Framework Relations Act, the Court in *Matatiele* held that the Act does not apply to disputes between Parliament and Provincial Legislatures.[2]

The decision in *Uthukela District Municipality* resolves the issue of whether provincial executive councils are to be treated as organs of state for purposes of FC s 41. *Executive Council, WC* was only authority for the proposition that a provincial government, represented by its executive council, will be regarded as a sphere of government for the purposes of FC ss 41(1)*(e)* and *(g)*.[3] It was agnostic as to the status of a provincial executive council as an organ of state. Given that *Uthukela District Municipality* holds that members of the national cabinet are organs of state for the purposes of FC s 41, it seems unlikely that provincial cabinets would not be similarly bound.

In *IEC v Langeberg,* the Court suggested, in something of a throwaway line, that '[a]n intergovernmental dispute is a dispute between parties that are part of government in the sense of being either a sphere of government or an organ of State within a sphere of government.'[4] Taken at face value, this dictum might make the distinction between these two types of party irrelevant for the purposes of FC s 41(3). The problem with this remark is that it contradicts the clear wording of the subsection. FC s 41(3) refers only to 'organs of state'.

After *Uthukela District Municipality*, and the Court's holding that the President and the members of the Cabinet should be regarded as organs of state, the distinction between organs of state and spheres of government begins to look a bit less significant. There is, however, a limit to the effects of this elision. For there is, as yet, no authority for the proposition that the national legislature or provincial

[1] FC s 239*(b)*('In the Constitution, unless the context indicates otherwise, . . . 'organ of state' means *(b)* any other functionary or institution: *(i)* exercising a power or performing a function in terms of the Constitution or a provincial constitution; or ii. exercising a public power or performing a public function in terms of any legislation.')

[2] See *Matatiele Municipalilty & Others v President of the RSA* 2006 (5) SA 47 (CC). The *Matatiele* Court reads the IGRFA so that disputes between national and provincial legislatures remain governed by other sections of the Final Constitution, primarily FC ss 146-150. It may also be that disputes between legislatures — over the implementation of legislation — invariably become disputes between executives and organs of state. The execution of the will of the legislatures — by the executive or some organ of state — would invariably be subject to the dictates of FC s 41(3) and the IGRFA.

[3] *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa & Others* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC)(*'Executive Council, WC')* at paras 29 and 79.

[4] *IEC v Langeberg* (supra) at para 21.

legislatures are bound by FC s 41(3). Indeed, *Matatiele* points rather emphatically, the other way.

With those caveats firmly in mind, *IEC v Langeberg* and *National Gambling Board* still provide clear authority for two propositions.

First. *IEC v Langeberg* holds that the Independent Electoral Commission referred to in FC ss 190 and 191 is not 'an organ of State which can be said to be within the national sphere of government.'[1] Three reasons are advanced for this proposition: (1) the Commission is not a department or an administrative agency that is subject to the national executive's co-ordination function in terms of FC s 85(2); (2) the Commission is expressly described in Chapter 9 as being a state institution strengthening 'constitutional democracy' and 'state' is a broader concept than 'national government'; and (3) the Commission is described in FC s 181(2) as 'independent', a description that is incompatible with the notion of 'interdependence' in FC s 40(1).

All three reasons apply equally to the other institutions listed in FC s 181(1): the Public Protector; the Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; and the Auditor-General. One can assert, with a certain amount of confidence, that: *(a)* none of these Chapter 9 institutions is bound to observe the principles in Chapter 3; and *(b)* a dispute involving any one or more of these institutions is not an intergovernmental dispute for the purposes of FC s 41(3).

Second. Most national and provincial regulatory authorities are organs of state within the national or the provincial spheres of government and are therefore bound by FC ss 40 and 41(1) and (3). In *National Gambling Board*, the Court endorsed the parties' agreement that the National Gambling Board and the KwaZulu-Natal Gambling Board were organs of state in the national and provincial spheres respectively.[2] Once again, the grounds for this particular finding (that the boards exercise a public power or performed public functions in terms of legislation in one or the other of these spheres) applies to a host of similarly situated regulatory bodies. For example, the dispute between the City of Cape Town and the National Electricity Regulator over the former's power to cross-subsidise the provision of free electricity would probably have been regarded as an intergovernmental dispute to which FC s 41(3) applied. On the other hand, the constitutional status of the Independent Communications Authority (ICASA) is closer to that of the Chapter 9 institutions. Although not mentioned in the list of state institutions strengthening constitutional democracy in FC s 181(1), at least some of ICASA's regulatory powers derive from FC s 192. FC s 192 — part of Chapter 9 — provides for 'an independent authority to regulate broadcasting.'[3] Following *IEC v Langeberg*, ICASA, as the successor to the IBA, should not be regarded as an organ of state within a particular, 'interdependent' sphere of government.

[1] *IEC v Langeberg* (supra) at para 27.

[2] *National Gambling Board* (supra) at paras 19–21.

[3] FC s 192 reads: 'National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.'

(c) FC s 41

Principles of co-operative government and intergovernmental relations:

(1) All spheres of government and all organs of state within each sphere must:
- *(a)* preserve the peace, national unity and the indivisibility of the Republic;
- *(b)* secure the well-being of the people of the Republic;
- *(c)* provide effective, transparent, accountable and coherent government for the Republic as a whole;
- *(d)* be loyal to the Constitution, the Republic and its people;
- *(e)* respect the constitutional status, institutions, powers and functions of government in the other spheres;
- *(f)* not assume any power or function except those conferred on them in terms of the Constitution;
- *(g)* exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
- *(h)* co-operate with one another in mutual trust and good faith by:
- *(i)* fostering friendly relations;
  - (ii) assisting and supporting one another;
  - (iii) informing one another of, and consulting one another on, matters of common interest;
  - (iv) co-ordinating their actions and legislation with one another;
  - (v) adhering to agreed procedures; and
  - (vi) avoiding legal proceedings against one another.

(2) An Act of Parliament must
- *(a)* establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
- *(b)* provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

(3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.

(i) *FC s 41(1)*

The principles set out in FC s 41(1) stand for two basic propositions. First, co-operative government does not diminish the autonomy of any given sphere of government.[1] It simply recognizes the place of each within the whole and the need for co-ordination in order to make the whole work.[2] Second,

[1] See, eg, *First Certification Judgment* (supra) at para 292 (The principles set out in FC s 41 'are not invasive of the autonomy of a province in a system of co-operative government.')

[2] See *Van Wyk v Uys NO* 2002 (5) SA 92 (C)(Court held that because FC s 41(1) enjoins the central, provincial and local spheres of government to support and assist each other, the MEC for local government could not act *mero motu* in a case where the municipal council had already taken definite steps to investigate an alleged breach of the code of conduct by councillors. Rather, FC s 41(1) required the provincial MEC to await the outcome of the council's own investigation and take cognisance of the council's recommendations before acting in terms of item 14 of Schedule 1 to the Local Government: Municipal Systems Act 32 of 2000.)

FC ss 41(1)*(e)*, *(g)* and *(h)* re-inforce the notion that each sphere of government is distinct.[1]

(aa) FC s 41(1)(d): The rule of law

The majority of cases in which the principles of co-operative government have been invoked have not been disputes between different spheres of government and/or organs of state. The majority of these cases involve private parties suing some arm of the government. As a result, FC s 41(1)*(d)*'s injunction that 'all spheres of government and all organs of state within each sphere must . . . be loyal to the Constitution, the Republic and its people' has been interpreted much like an adjunct to the Constitution's commitment to the rule of law and the legality principle. For example, the *Permanent Secretary, Department of Welfare, Eastern Cape, & Another v Ngxusa & Others* Court wrote:

> [W]hen an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies [ss 41(1)*(d)* and 195(1)*(e)*] of the Constitution, which commands all organs of State to be loyal to the Constitution and requires the public administration to be conducted on the basis that 'people's needs must be responded to'. It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard.[2]

It would seem reasonable, then, to read FC s 41(1)*(d)* — along with FC s 41(1)*(b)* and FC s 41(1)*(c)* — as designed to promote fairness in the administration of the state. Indeed, the *Hardy Ventures v Tshwane Metropolitan Municipality* court wrote that FC s 41(1), when read as a whole, required 'all spheres of government and all organs of state within each sphere' to provide 'effective, transparent, accountable and coherent government.'[3]

(bb) FC s 41(1)(e): Respect for institutional integrity

At least one court has held that this provision can be read to re-inforce the separation of powers doctrine. In *Bushbuck Ridge Border Committee v Government of the Northern Province*, the High Court held that FC s 41(1)*(e)* bolstered 'the constitutional separation of powers — in particular the principle that the courts should not usurp the function of the legislature.'[4] How exactly this provision accomplishes this feat is difficult to discern. While it may prevent different spheres of government from violating each other's institutional integrity, the subsection does not refer to the courts, nor are the courts generally thought to be engaged by these principles of co-operative government. They are the arbiters of disputes between spheres of government and organs of state, and not parties to such disputes.

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[1] See *Cape Metro Council* (supra) at para 34 (FC ss 41(1)*(e)*, *(g)* and *(h)* reinforce the protection afforded to municipalities by FC s 154(1)).

[2] 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039 (SCA)('*Ngxusa*').

[3] 2004 (1) SA 199 (T)('*Hardy Ventures*').

[4] *Bushbuck Ridge Border Committee v Government of the Northern Province* 1999 (2) BCLR 193, 200-202 (CC).

(cc) FC s 41(1)*(f)*: Enumerated powers

According to the Constitutional Court in *Liquor Bill,* the chapters following Chapter 3 should be 'read and understood' in light of the subordination of all spheres of government to the requirements of co-operative government.[1] These requirements include the duty imposed by FC s 41(1)*(f)* 'not to assume any power or function except those conferred on them in terms of the Constitution.' FC s 41(1)*(f)* is of a piece with FC ss 41(1)*(e)* and *(g)*. The three subsections remind each sphere of government and every organ of state that the best way to realize co-operative governance is to ensure that all branches do exactly what they are empowered to do — and no more.

(dd) Section 41(1)*(g)*: Abuse of power

FC s 41(1)*(g)* provides that '[a]ll spheres of government and all organs of state within each sphere must exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.' Because all the intergovernmental disputes that have come before the courts to date have concerned the proper allocation of powers and functions between the different spheres of government, determining the extension of this provision requires some precision. The provision requires one to distinguish between legitimate disputes about the ambit of a particular organ of state or sphere of government's powers, and the constitutionally forbidden encroachment by one organ of state or sphere of government onto the terrain of another.

In *Premier, WC v President,* the Court articulated this distinction as being one between 'the way power is exercised' and the question 'whether or not a power exists.'[2] In theory, this approach means that FC s 41(1)*(g)* becomes relevant to the determination of the dispute only once it is established that the powers on which the parties are relying exist. If a particular power does not exist, the dispute must be resolved on the basis that the party concerned is acting unlawfully. Only once it is established that the parties are acting lawfully may the further question arise as to whether any of the parties is exercising its powers in such a way as to 'encroach on the geographical, functional or institutional integrity' of the others. With regard to this question, the Court held that:

> The functional and institutional integrity of the different spheres of government must be determined with due regard to their place in the constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government.[3]

Unfortunately, this passage blurs the neat distinction between 'the way power is exercised' and 'whether or not a power exists' by implying that the question as to whether FC s 41(1)*(g)* has been infringed must be answered *relationally*: that is, by looking at the place of the parties in the co-operative government system, including their respective powers and functions. In practice, this means that the

[1] *Liquor Bill* (supra) at para 41.
[2] *Premier, WC v President* (supra) at para 57.
[3] Ibid at para 58.

lawfulness of the exercise of a power and the alleged abuse of that power may not always be as easy to separate as the Court at first indicates. Where it is not crystal clear from the text of the Final Constitution that a sphere of government or an organ actually possesses the power it asserts, the Court's FC s 41(1)*(g)* doctrine suggests that the more constitutionally dubious thestatus of the asserted power is, the greater is the likelihood that it will be found to have been abused.[1]

In *Premier, WC v President*,[2] the Constitutional Court was asked to resolve a dispute between the Western Cape provincial government and the national government relating to the constitutional validity of certain amendments to the Public Service Act[3] as introduced by the Public Service Laws Amendment Act.[4] The Court held that the provisions of Chapter 3 of the Final Constitution were designed to ensure that in fields of common endeavour the different spheres of government co-operate with each other to secure the implementation of legislation in which they all have a common interest. In particular, FC s 41(1)*(g)* was crafted so as to prevent one sphere of government from using its powers in ways that could undermine other spheres of government.[5] In this respect, the national legislature's constitutional power to establish a single public service had to be exercised so as not to encroach on the ability of the provinces to carry out the functions that are constitutionally entrusted to them.[6]

[1] See *Cape Metro Council* (supra) at para 122 ('Section 41(1)*(g)* places a limitation or constraint on the manner in which a sphere of government or an organ of State may exercise its powers or perform its functions. It may be interpreted to mean that no interference with, or encroachment upon, the inviolate sphere of activities of another organ of State is to be tolerated. This is consonant with the spirit of co-operation based on mutual trust and good faith, as envisaged in section 41(1)*(h)*. . . [S]ection 41(1)*(g)* appears to be directed at preventing one sphere of government from undermining others, thereby preventing them from functioning effectively. Such conduct could, indeed, be regarded as an abuse of power. In deciding whether or not there has been conduct constituting an abuse of power, however, all relevant facts and circumstances should be considered. This would include, as the said dictum suggests, the complainant sphere of government's position in the constitutional order or hierarchy and the relative weight of their applicable powers and functions'); *Executive Council, WC* (supra) at para 80 (Court holds that FC ss 41(1)*(e)* and *(g)* 'underscore the significance of recognising the principle of the allocation of powers between national government and the provincial governments. The Constitution therefore sets out limits within which each sphere of government must exercise its constitutional powers. Beyond these limits, conduct becomes unconstitutional.') See also *Executive Council, WC* (supra) at para 29 ('The Constitution therefore protects the role of local government and places certain constraints upon the powers of Parliament to interfere with local government decisions. It is neither necessary nor desirable to attempt to define these constraints in any detail. It is sufficient to say that the constraints exist, and if an Act of Parliament is inconsistent with such constraints it would to that extent be invalid.')

[2] 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC).

[3] Proclamation 103 of 1994.

[4] Act 86 of 1998.

[5] Ibid at para 58 ('Although the circumstances in which FC s 41(1)*(g)* can be invoked to defeat the exercise of a lawful power are not entirely clear, the purpose of the section seems to be to prevent one sphere of government using its powers in ways which would undermine other spheres of government, and prevent them from functioning effectively. The functional and institutional integrity of the different spheres of government must, however, be determined with due regard to their place in the constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government.')

[6] *Premier WC v president* (supra) at paras 54–61.

The *Premier, WC v President* Court further held that a procedure requiring an agreement between the President and the Premier with respect to the legality of a proposed restructuring of the public service within a provincial administration was entirely consistent with the system of co-operative government.[1] The Court held that s 3(3)*(b)* of the amended Public Service Act, which permitted the Minister to direct that the administration of provincial laws be transferred from a provincial department to a national department or other body, impaired the ability of the executive authority of the province to administer its own laws. Section 3(3)*(b)* of the amended Act was therefore inconsistent with the Final Constitution to the extent that it empowered the Minister to make the determination without the consent of the Premier.[2]

(ee) FC s 41(1)*(h)*: The duty to avoid litigation

FC s 41(1)*(h)*(vi) reads, in relevant part, that:

> all spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith by avoiding legal proceedings against one another.

This principle is reinforced by FC s 41(3). FC s 41(3) provides that:

> An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

FC s 41(4) provides that '[i]f a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.' The meaning of these provisions has been considered at length in three cases: *First Certification Judgment, National Gambling Board*, and *Uthukela District Municipality*.

In *First Certification Judgment*, the Constitutional Court held that FC s 41(1)*(h)*(vi) had to be read together with FC s 41(3).[3] It implied that the latter provision was the primary source of the duty to avoid litigation: FC s 41(3) meant that 'disputes should where possible be resolved at a political level rather than through adversarial litigation.'[4] The inclusion of this provision did not, however, oust the courts' jurisdiction to hear intergovernmental disputes or 'deprive any organ of government of the powers vested in it under [the Final Constitution].'[5]

[1] *Premier, WC v President* (supra) at para 83. (Procedure requiring the President and the Premier to seek agreement concerning the legality of a proposed restructuring of the public service within a provincial administration cannot be said to invade either the executive power vested in the Premier by the Constitution, or the functional or institutional integrity of provincial governments.')

[2] Ibid at para 99.

[3] *First Certification Judgment* (supra) at para 291.

[4] Ibid. Although the *Langeberg* Court was not asked to decide on the relationship between FC s 41(1)*(h)*(vi) and s 41(3) — and ultimately found FC s 41(3) not to apply to the organs of state before the Court — it appeared to assume that had the IEC been an organ of state within the national sphere of government, FC s 41(3) would have applied. *IEC v Langeberg* (supra) at paras 30–31.

[5] *First Certification Judgment* (supra) at 291.

In *National Gambling Board*, the Constitutional Court effectively reversed the normative hierarchy it had established between FC s 41(1)*(h)*(vi) and FC s 41(3) in *First Certification Judgment*.[1] The stated reason for the reversal was that, in the five years separating the two decisions, the Act of Parliament contemplated in FC s 41(2) had not been passed. As a consequence, no formal 'mechanisms and procedures' had been put in place to resolve intergovernmental disputes. Given the absence of such mechanisms and procedures, some doubt was expressed as to whether the Court could enforce FC s 41(3). In order to avoid having to decide this point, the Court held that the duty to avoid litigation could be independently founded on s 41(1)*(h)*(vi).[2] The Court then enunciated what this duty entailed.[3]

The first two judgments on the duty to avoid litigation can be reconciled by reading *National Gambling Board* as giving content to the Court's statement in *First Certification Judgment* that intergovernmental disputes should be resolved at a 'political level'. In both decisions, the Court drew a line between political and legal forms of dispute resolution. The question as to whether or not FC s 41(1)*(h)*(vi) has been violated, and by extension whether the requirements of FC s 41(3) have been met, depends on whether all extra-judicial avenues for resolving the dispute have been exhausted. Three factors are relevant to this inquiry: (1) the seriousness of each party's commitment to the extra-judicial resolution of the dispute; (2) the extent to which the dispute turns on a question of legal interpretation which might have been resolved amicably; and (3) the preparedness of the parties to strike compromises (i.e. each party's willingness to discharge its duty 'to re-evaluate its position fundamentally').[4]

Two more years passed before the Court was again asked to consider the relationship between FC s 41(1)*(h)*(vi) and FC s 41(3). In *Uthukela District Municipality*, the Court first analysed a dispute between several municipalities and the national government in terms of FC s 41(3). After setting out FC s 41(3)'s two-fold obligations, the Court found that a statutory dispute resolution mechanism exists for fiscal disputes between organs of State (in the form of the Intergovernmental Fiscal Relations Act[5]). The *Uthukela District Municipality* Court then addressed the issue of what an organ of State is to do if the dispute resolution mechanism in question does not actually apply to the conflict in question. (The Court deemed it unnecessary to decide the actual merit of the contention that the Act did not apply to the dispute in question.) The Court held that, according to FC s 41(1)*(h)*(vi), organs of state are obliged 'to avoid litigation against one another irrespective of whether special structures exist or not.'[6]

Uthukela District Municipality confirms *National Gambling Board's* gloss on the requirements of FC s 41(1)*(h)*(vi) and FC s 41(3), and strengthens the view that

[1] *National Gambling Board* (supra) at para 33.
[2] *National Gambling Board* (supra) at para 31.
[3] Ibid at paras 35-36.
[4] *National Gambling Board* (supra) at paras 35-36 (The Court wrote that disputes about 'questions of interpretation' should be resolved 'amicably'. . . '[O]rgans of state's obligation to avoid litigation entails much more than an effort to settle a pending court case. It requires of each organ of state [involved in the dispute] to re-evaluate its position fundamentally').
[5] Act 97 of 1997.
[6] *Uthukela District Municipality* (supra) at para 22.

the two sections re-inforce one another. *Uthukela District Municipality* stands for two further propositions. First, neither s FC 41(1)*(h)*(vi) nor FC s 41(3) has primacy of place. Second, and more importantly, FC s 41(3) analysis can take place without the legislation contemplated by FC s 41(2). Of course, that lacuna in the law — with the enactment of the IGRFA — no longer exists. What matters, for FC s 41(3) analysis, is whether there is a dispute-resolution mechanism in place. The fact that the Intergovernmental Fiscal Relations Act expressly required parties to use structures such as the Budget Forum prior to approaching a court was more than sufficient to justify the imposition of the obligations of FC s 41(3).

FC s 41(1)*(h)*(vi) has other implications for litigation flowing from intergovernmental disputes. Should a party request direct access to the Constitutional Court to adjudicate an intergovernmental dispute, the *MEC for Health, KZN v Premier, KZN* Court indicated that the Constitutional Court will refuse such an application if the applicant has failed to comply with the duty to avoid litigation.[1]

(ii) *FC s 41(2)*

When this chapter was initially published in 2004, the Act of Parliament envisaged by FC s 41(2) had yet to tabled, let alone passed. Initially, the courts and commentators seemed vexed by Parliament's failure to act. The *National Gambling Board* Court wrote that:

> It could be argued that the failure of Parliament to comply with its obligations in terms of s 41(2) has rendered the important provisions of ss 41(3) and 41(4) inoperative. For reasons that follow, it is not necessary to decide that now. However, even the possibility that such an argument could be raised emphasises the urgent need for the envisaged legislation. Co-operative government is foundational to our constitutional endeavour. The fact that the Act envisaged in section 41(2) has not been passed requires the attention of the Minister for Justice and Constitutional Development.[2]

As the discussion of *Uthukela District Municipality* indicates, the Court appears to have backed away from this aggressive stance. FC s 41(3) — and by necessity FC s 41(4) — would appear to be operational even in the absence of a FC s 41(2)-mandated Act.

There were a number of compelling explanations for the decade long delay in promulgating the IGRFA contemplated by FC s 41(2) — and hence the willingness on the part of the Constitutional Court not to be overly sanctimonious about the state's 'failure'. First, many parties seem inclined to allow a significant period

[1] *MEC for Health, KwaZulu-Natal v Premier, KwaZulu-Natal: In Re Minister of Health and Others v Treatment Action Campaign* 2002 (5) SA 717 (CC), 720, 2002 (10) BCLR 1028 (CC)*('MEC for Health, KZN v Premier, KZN')*(Constitutional Court held that it will rarely grant direct access to organs of state who have not duly performed their co-operative governmental duties under Chapter 3. Such duties are a privileged factor in deciding whether it is in the interests of justice to grant an organ of state leave to appeal directly to the court. Because the matter before the Court involved a political dispute and the parties had not complied with their obligation to effect co-operative government, leave to appeal was denied.) See also *National Gambling Board* (supra) at paras 33 and 37 ('If this Court is not satisfied that the obligation has been duly performed, it will rarely grant direct access to organs of state involved in litigation with one another.')

[2] Ibid at para 32.

to pass in order for various government actors and sectors to develop a regime of 'best practices' upon which any legislation might draw. Second, as the decision in *Uthukela District Municipality* appears to confirm, many parties believe that government sectors are better served by having sector-specific dispute-resolution mechanisms crafted to meet their particular needs than they would be by a general dispute-resolution framework. An audit undertaken by the Department of Provincial and Local Government reflects both lines of thought:

> An act of Parliament is required under s 41 (2)*(b)* of the Constitution to provide for such alternative [non-judicial] mechanisms. In the absence of such an Act, disputes have to be settled politically and/or by means of intergovernmental relations. The Audit addresses these and recommends that legislation be *delayed*. It sees no compelling *urgency* to enact this legislation. Moreover, delay might allow best practices to emerge which can later be captured in effective legislation. The duty to exhaust all procedures before resorting to judicial remedies will obviously continue to apply. Sectorally-based legislation is however encouraged for settling disputes within a sector [eg, the National Environmental Management Act]. Such legislation is essentially issue-sensitive and can give content to a normative framework in terms of which disputes can be settled.[1]

Even if one agrees with the general sentiments of this 1999 DPLG Audit, it is fair, in 2009, to ask two questions. Had not a reasonable amount of time elapsed in which to pass constitutionally mandated legislation? The Audit suggested delaying enactment so that best practices might have time to emerge. The Audit could not — in the face of express constitutional dictates to the contrary — put forward the case for permanently shelving the legislation.[2] (However, the Audit's emphasis on sectoral legislation intimates just that.) Was it not possible to set out a basic set of principles — and perhaps a default forum — designed to govern intergovernmental disputes, without displacing the sectoral legislation that caters to the specific needs of a particular governmental domain? Such a two-track approach would appear to best fit the relationship already established between FC s 41(1)*(h)* (vi) and FC s 41(3). That is, if sectoral legislation provides an adequate forum for

[1] 'Executive Summary' *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* Department of Provincial and Local Government (1999) 6 ('DPLG Audit'). See also 'Conclusions and Recommendations' *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* Department of Provincial and Local Government (1999) 11('The audit revealed that intergovernmental disputes include constitutional issues, legislative interpretation and policy, and factual disagreements. The nature of the disputes differs as well as the need for expeditious settlement. It would neither be desirable nor practicable to prescribe a uniform mechanism and procedure for the settlement of all these disputes. The fear was expressed by interviewees that legislation should not make the process of dispute resolution inflexible or too cumbersome which would then defeat the object of the exercise. Examples were mentioned where a dispute had to be resolved within 24 hours. In view of the wide variety of disputes that may arise between a wide array of organs of state, the Act should list the broad range of dispute settlement mechanisms and procedures' available to parties rather than attempt to shoehorn all disputes into a single rubric.)

[2] India took several decades to create the Inter-State Council — an intergovernmental relations body designed to mediate federal-state disputes and to provide a forum for the discussion of policy initiatives of national and/or regional interest — despite the express mandate of Article 263 of the Indian Constitution. See § 14.2 supra. One important difference between FC s 41(2) and Article 263 is that the former is mandatory and the latter is permissive.

dispute resolution, then it ought to be the first port of call for potential litigants.[1] As we shall see, in para 14.5 below, the Intergovernmental Relations Framework Act largely — and rightly — renders these questions moot.

The major intergovernmental disputes resolved by the Constitutional Court prior to 2005 did provide some guidance to the drafters of the IGRFA. These decisions also intimate that space remains for litigation under FC Chapter 3 without any initial recourse to the IGRFA. Five 'pure' intergovernmental disputes involved challenges to the constitutionality of legislation allegedly impinging on the powers and the functions of an organ of state in another sphere of government. The first four, *Premier, WC v President, Cape Metro, Council Executive Council, WC* and *Uthukela District Municipality*, concerned challenges by provincial or local governments to national legislation. In the fifth, *National Gambling Board*, the dispute turned on regulations promulgated under a provincial statute. *National Gambling Board* may be further distinguished from the others on the grounds that the challenge was brought by organs of state in the national sphere and the fact that private companies were party to the dispute. This last point indicates that the mere fact that a private citizen or body is party to a particular dispute does not remove it from the domain of intergovernmental disputes. However, it only becomes or remains an intergovernmental dispute if the main dispute lies between organs of state. The sixth case, *MEC for Health, KZN v Premier, KZN*, presented the Constitutional Court with a conflict between two members of the same provincial executive, each seeking to represent the province in another matter. The Court rapped both parties across the knuckles for 'proceed[ing] with an issue that should not have been brought before this Court and for failing to comply with their obligations to co-operate in government.'[2]

One can adduce at least four guiding principles from the case law (and these principles remain relevant to any future challenge to the IGRFA in terms of Chapter 3 or another section of the Final Constitution). The main type of dispute that the FC s 41(2) Act of Parliament was meant to regulate is a clash between organs of state over legislation passed by one sphere of government that allegedly impinges on the powers and functions of an organ of state in another sphere if government. The FC s 41(2) Act ought not to displace sector-based dispute resolution mechanisms which are more finely attuned to the kinds of issues raised in a given governmental domain. The FC s 41(2) Act ought to provide for expedited dispute resolution so that a matter that has yet to be politically engaged, and thus is not yet ripe, does not get placed before a court. The FC s 41(2) Act ought to distinguish clearly between disputes between state actors — to which it must apply — and disputes between the state and private persons — to which it

[1] When discussing both formal and informal MINMECs, the DPLG Audit contemplated a broadly principled framework, rather than a highly detailed code. The provisions of the envisaged Act could be applied asymmetrically to each structure, provided that any asymmetries are not inconsistent with the basic principles of the legislation. The Audit views the MINMECs as optimal sites for the settlement of political-sectoral disputes. See 'Conclusions and Recommendations' *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* Department of Provincial and Local Government (1999) 4.

[2] *MEC for Health, KZN v Premier, KZN* (supra) at para 13.

must not apply.[1] As we shall see below, in § 14.5, the Intergovernmental Relations Framework Act addresses all the concerns directly.

(iii) *FC s 41(3)*

FC s 41(3) appeared, for a time, to be something of a dead letter. In *National Gambling Board*, the Constitutional Court wrote that 'in the absence of the Act of Parliament contemplated in s FC 41(2), the obligation on organs of state to avoid litigation against one another is founded on FC s 41(1)*(h)*(vi) rather than FC s 41(3) and (4).'[2] As we have already noted, the *Uthukela District Municipality* Court rejected the notion that the desiderata of s 41(3) do not obtain absent a singular FC s 41(2) Act.[3] *Uthukela District Municipality* stands for the proposition that FC s 41(3)'s requirements have purchase even when only a statutory dispute resolution mechanism specific to a given sector applies to the parties to a dispute.[4]

The requirements of FC s 41(3) — along with those of FC s 41(1)*(h)*(vi) — have been spelled out in a number of cases.[5] FC s 41(3) demands that organs of state: (1) make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose; and (2) must exhaust all other remedies before they approach a court to resolve the dispute. The case law has put the following gloss on this two-part inquiry. A court interrogating the behaviour of parties to an intergovernmental dispute will appraise: (1) the seriousness of each party's commitment to the extra-judicial resolution of the dispute; (2) the extent to which the dispute turns on a question of legal interpretation which might have been resolved amicably; and (3) the preparedness of the parties to strike compromises which would require that they re-evaluate their positions.

Who is, and who is not, bound by the dictates of FC 41(3) has been covered in some detail in the discussion of parties bound by FC s 40(2).[6] To the extent that there was any doubt prior to *Uthukela District Municipality*, it now seems clear that the President, members of the national Cabinet, municipalities, as well as provincial premiers and MECs should be regarded as organs of state for the purposes of FC s 41(3) analysis. It also seems clear from the decision in *IEC v Langeberg* that Chapter 9 institutions supporting constitutional democracy are not organs of state 'which can be said to be within the national sphere of government.'[7] *National*

[1] See *Member of the Executive Council for Local Government, Mpumalanga v Independent Municipal and Allied Trade Unions and Others* 2002 (1) SA 76 (SCA)(Supreme Court of Appeal held that although national and provincial governments had responsibility to ensure that municipalities functioned effectively, such responsibility could not turn a dispute between the province and its employees into an intergovernmental dispute for the purposes of FC ss 41(3) and (4)).

[2] *National Gambling Board* (supra) at 33.

[3] See § 14.3*(a)*(iii)(ee) supra.

[4] It seems reasonable to extend *Uthukela District Municipality*'s holding vis-à-vis FC s 41(3) to informal dispute resolution within a given sector. After all, FC s 41(3) reads, in pertinent part, that parties 'must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose.' It does not say that the mechanisms must be creatures of statute or take the form of a statute enacted as required by s 41(2).

[5] See § 14.3*(a)*(iii)*(ee)* supra.

[6] See § 14.3*(b)(i)(bb)* supra.

[7] *IEC v Langeberg* (supra) at para 27.

Gambling Board supports the proposition that most national and provincial regulatory authorities will be regarded as organs of state within the national or provincial sphere of government.[1] None of the cases thus far has addressed the question of whether national or provincial legislatures are bound by FC s 41(3).

(iv) *FC s 41(4)*

Now that FC s 41(3) has been recognized by the courts as an ineradicable part of the apparatus for settling intergovernmental disputes involving organs of state, FC s 41(4) will be invoked whenever a court is not satisfied that the requirements of FC s 41(3) have been met.

14.4 Intergovernmental relations in Practice

(a) Defining intergovernmental relations ('IGR')

This chapter has been concerned almost entirely with dispute resolution. It goes without saying that the main business of governance is policy construction and that the various arms of the state generally execute policy without dispute. The engines, mechanisms, procedures and structures by which spheres of government and organs of state co-operate to achieve their various ends are collectively known as intergovernmental relations.[2]

(b) Structures and Statutes for Intergovernmental Relations

The institutions that have greased the wheels of IGR in the last ten years include: (1) the National Council of Provinces ('NCOP'); (2) the Intergovernmental Forum ('IGF'); (3) the Presidential Co-ordinating Council ('PCC'); (4) Statutory and non-Statutory MINMECs; (5) the Forum for South African Directors' General ('FOSAD'); (6) the Fiscal and Financial Commission; (7) the Intergovernmental Fiscal Relations Act; (8) the Division of Revenue Act; (9) the Public Finance Management Act; (10) the Provincial Tax Regulation Process Act; (11) the Borrowing Powers of Provincial Government Act; (12) the Medium Term Budget Statement; and (13) Provincial intervention in local government. This section is not meant to be an exhaustive overview of the various engines of IGR. It is, rather, an attempt to show how the Final Constitution, a burgeoning body of statutes and the gov-

[1] *National Gambling Board* (supra) at paras 19-21.

[2] The DPLG Audit defined intergovernmental relations 'as an interacting network of institutions at national, provincial and local levels, created and refined to enable the various parts of government to cohere in a manner more or less appropriate to our institutional arrangements.' 'Executive Summary' *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* Department of Provincial and Local Government (1999) 1. See also C Mentzel & J Fick 'Transformation Perspectives on Policy Management: Dynamics of Intergovernmental Relations with Specific Reference to the Eastern Cape' (1996) 2 *Africanus* 26 (Intergovernmental relations are a set of mechanisms for 'multi- and bi-lateral, formal and informal, multi-sectoral and sectoral, legislative, executive and administrative interaction entailing joint decision-making, consultation, co-ordination, implementation and advice between spheres of government at vertical as well as horizontal levels and touching on every governmental activity'); P Brynard & L Malan 'Conservation Management and Intergovernmental Relations: The Case of South African National and Selected Provincial Protected Areas' (2002) 21*Politeia* 101.

ernment actors at the coalface have attempted to make manifest the concept of co-operative governance.

(i) *The National Council of Provinces*

The NCOP is charged with promoting provincial interests through the legislative process.[1] The NCOP's role with respect to constitutional amendments and legislation deemed not to affect the provinces is marginal. FC s 74 contains provisos designed to circumvent NCOP consideration of amendments. With respect to legislation deemed not to affect the provinces, FC s 75 allows the National Assembly to pass legislation with a simple majority — with or without NCOP approval. As a result, the primary function of the NCOP is the introduction and consideration of FC s 76 bills — legislation deemed to affect the provinces.[2]

The NCOP members are selected by the Provinces — some by the legislature, some by the Premier. This chamber, even with its diminished powers, exercises an important deliberative function. It is *the* national forum for debate of provincial issues. The NCOP also provides a structure within which national officials introduce national laws over which there is concurrent jurisdiction with the provinces.[3]

The legislative work of the NCOP is not inconsequential. Approximately 20% of the bills passed from 1999 through 2001 were FC s 76 bills. Perhaps the most important piece of FC s 76 legislation is the Division of Revenue Bill. According to s 227(1)*(a)*, each province is entitled to an 'equitable share of the revenue raised nationally to enable it to provide basic services and functions allocated to it.' Five out of nine NCOP provincial delegations must approve the bill.[4]

Critiques of the NCOP as an IGR structure are legion. Reddy has suggested that the NCOP lacks focus, suffers from a lack of internal cohesion created by the presence of permanent and special delegates, allows the national Cabinet to dictate its agenda, does not challenge either national ministries or the National Assembly on matters of provincial interest and fails 'to express distinctive regional interests.'[5]

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[1] See S Budlender 'National Legislative Authority' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17.

[2] The NCOP has 90 members — 10 member delegations from each of the 9 provinces. See FC s 60. Of the ten members from each delegation, only six are permanent. Four special delegates serve at the pleasure of the Premier of the province. Additional provision is made in FC s 67 for 10 part-time, non-voting representatives of local governments. The actual formula for political party representation in the NCOP is set out in FC Schedule 3.

[3] See FC s 68 ('In exercising its legislative power, the National Council of Provinces may consider, pass, amend, propose amendments to or reject any legislation before the Council, in accordance with this chapter; and initiate or prepare legislation falling within a functional area listed in Schedule 4 or other legislation referred to in section 76(3), but may not initiate or prepare money Bills.') See also FC s 42(4)(NCOP 'represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.')

[4] See 'The NCOP: A Forum for Intergovernmental Relations' *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* Department of Provincial and Local Government (1999) 4 ('The NCOP and Intergovernmental Relations Audit')(The Audit makes the case that the NCOP should spend less time debating the finer points of the national Appropriations Bill, and more time engaging the 'conditional grants that the Division of Revenue Bill allocates to provinces.')

[5] P Reddy 'Intergovernmental Relations in South Africa' (2001) 20 *Politeia* 21, 32–33.

De Villiers, while slightly more sanguine about the capacity of the NCOP, likewise notes its legislative impotence, its largely advisory function and the manner in which MINMECs usurp the second chamber's role in the formation of policy.[1] The Audit conducted by the Department of Provincial and Local Government ('DPLG') observes that not only are MINMECs the primary venue for 'productive discussion of new legislation and policy affecting the provinces, but that even when NCOP delegation votes must be cast on legislation, the decision on how to vote is made at the provincial level by MPLs and Premiers.'[2]

The DPLG Audit identifies a number of other structural problems. First, the 90-member NCOP cannot meaningfully review all FC s 75 and FC s 76 bills. Because the 4 special delegates in each delegation do not participate adequately in the committee system, the assessment of most bills rests with the permanent delegates. The 54 permanent delegates simply lack the time to engage in an adequate review of pending legislation. Second, provincial legislatures, which often take the important decisions for their respective NCOP delegations, likewise lack the capacity 'to cope with the exacting demands of legislative scrutiny or to deal with bills expeditiously within the legislative cycle.'[3] Neither the NCOP nor the Provinces are able to offer considered opinions on matters that affect them. Third, in addition to being a rubber-stamp for the National Assembly, the Audit suggests that the NCOP's limited resources impair its capacity to carry out its oversight responsibilities competently. This concatenation of flaws leads Reddy, De Villiers and the DPLG to describe the NCOP as an insignificant IGR actor.

(ii) *The Intergovernmental Forum ('IGF') and the President's Co-ordinating Committee ('PCC')*

The IGF was the most representative consultative body on IGR. It numbered the Ministers and Deputy Ministers of the national government, provincial Premiers and MECs, representatives from SALGA and the NCOP, Directors-General of all national and provincial departments, Chairpersons from select parliamentary committees as well as the Chairpersons from the Financial and Fiscal Commission and the Public Service Commission among its many members. While it quite consciously concerned itself with the business of co-operative governance, the IGF was abolished because it was unwieldy, met too infrequently, cost too much, was mainly an information-sharing exercise and had a marginal influence on the construction of national, provincial and local government policy.

The IGF has been replaced by the PCC. The PCC is both leaner and more focused than its predecessor. It is composed of the President, the Minister of Provincial and Local Government and the nine provincial Premiers.[4] It has been charged with the more limited task of developing provincial policy and ensuring

[1] De Villiers 'IGR in SA' (supra) at 202-204.
[2] DPLG 'The NCOP and Intergovernmental Relations Audit' (supra) at 4–8.
[3] Ibid at 8.
[4] See R Sizane 'The Nuts and Bolts of the South African Intergovernmental Relations System: A Practitioner's Perspective' *Department of Provincial and Local Government* (2001) 5.

adequate provincial administration of concurrent functions.[1] As with the IGF, the success of the PCC will turn on its ability to work effectively with the various MINMECs.

(iii) *Intergovernmental Relation Committees of Ministers and Members of Executive Councils ('MINMECs')*

Intergovernmental Relation Committees of Ministers and Members of Executive Councils consist of the national line-function Ministers and the equivalent provincial Members of the Executive Council of provinces. Some MINMECs are informal, advisory executive structures. Other MINMECs are creatures of statute with clearly delineated responsibilities. As a rule, MINMECs concern themselves with drafting intergovernmental line-function policies, guiding the different spheres of government in the formulation of their own sector-specific policies, harmonising legislation that engages concurrent competencies, transferring information and ensuring the optimal utilisation of financial resources.

A good example of a statutory MINMEC is the Budget Council.[2] The Council was established by the Intergovernmental Fiscal Relations Act.[3] It consists of the Minister of Finance and the MEC of Finance for each province.[4] It meets at least twice annually and is charged with ensuring adequate consultation between the national and provincial governments on 'any fiscal, budgetary or financial matter affecting the provincial sphere,' 'any proposed legislation or policy which has a financial implication for the provinces,' and 'any matter concerning the financial management, or the monitoring of the finances, of the provinces.'[5] One strength is that a panel was set up to determine the 'best practices' for national-provincial fiscal relations prior to the passage of the enabling legislation for the Council. One

[1] FC ss 125(1) and (2), and ss 127(1) and (2), set out the extensive executive and administrative authority of provincial Premiers.

[2] Other examples of statutory intergovernmental relations bodies are the Committee for Environmental Co-ordination (as provided for by the National Environmental Management Act 107 of 1998) and the Council of Education Ministers (as provided for by the National Education Policy Act 27 of 1996). However, because the representation for the Committee for Environmental Co-ordination is not identical to that of the MINMEC for Environmental and Nature Conservation, each consultative body captures different constituencies and sometimes produces different outcomes. Each remains a valuable, if sometimes redundant, cog in the wheel of IGR. With respect to the limited number of IGR mechanisms created by statute, see C Murray 'The Constitutional Context of Intergovernmental Relations' in N Levy & C Tapscott (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001) 66, 76.

[3] Act 97 of 1997. The Act, by creating the Council, gives indirect effect to the process of revenue sharing among the three spheres of government required by FC s 214. On the other hand, the Financial and Fiscal Commission Act 99 of 1997, by creating the Financial and Fiscal Commission, gives direct effect to the constitutional requirements of FC s 220. For more on intergovernmental fiscal relations, see R Kriel and M Monadjem 'Public Finance' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27. See also G Penfold and P Reyburn 'Public Procurement' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 25.

[4] The Act also makes provision for a Budget Forum. The Forum is charged with oversight of national-local fiscal relations. The Forum consists of the Minister of Finance and the MEC for Finance for each province, five representatives from SALGA and one representative of local government from each of the nine provinces.

[5] Section 3 *(a)–(c)* of Act 97 of 1997.

weakness, consistent with the experiences of other MINMECs, is that the Council is under-resourced and incapable of providing all of the anticipated benefits of co-ordination.

Because no formal procedures govern the establishment and the operation of MINMECs, they vary in structure and competence.[1] However, several common problems surface across the MINMEC spectrum. First, departments may be organized differently at the national and provincial level. For example, discrete national ministries of culture, health and welfare may be combined into one department at the provincial level. The provincial MEC is thus left with responsibility for three MINMECs. Not surprisingly, this asymmetry may mean that the provinces lack the time and the energy necessary to make meaningful interventions. The result is that policy is determined de facto by the national government.[2] Second, under-resourced provincial MECs often do not have sufficient time to attend all meetings or to respond to all communiqués designed to set agendas. Once again, the result may be that shared national-provincial policy decisions fall primarily within the purview of the national government.[3]

(iv) *Forum for South African Directors-General ('FOSAD')*

FOSAD is made up of national and provincial Directors-General. Its broad terms of reference are to ensure the requirements of good governance in the public service as set out FC ss 41 and 195.[4] Its five cluster committees co-ordinate policy implementation between national and provincial departments and offer advice to the national Cabinet and the provincial Executive Councils.

(v) *Fiscal and Financial Commission*

FC s 220 requires the creation of the Financial and Fiscal Commission ('FFC'). This statutory body offers recommendations to the three spheres of government on the vertical division of nationally raised revenue and the horizontal division of revenue between provinces and municipalities. Section 9 of the Intergovernmental Fiscal Relations Act requires the FFC to make similar suggestions. The FFC's role in intergovernmental relations does not end there. In terms of FC ss 214, 218, 228-230 — and various Acts — the FFC has a responsibility to provide opinions on loan guarantees, provincial tax legislation, municipal fiscal powers and functions, and provincial and municipal borrowing.[5]

The FFC has also been relatively vocal about how monies allocated ought to be spent. More pointedly, it has suggested that the national government ought to determine — through conditional grants and other modalities — to a significant degree the actual content of provincial and local government budgets. It

[1] See De Villiers 'IGR in SA' (supra) at 207–210. See also Reddy (supra) at 32.

[2] De Villiers 'IGR in SA' (supra) at 208.

[3] See De Villiers 'IGR in SA' (supra) at 209. See also Reddy (supra) at 32.

[4] See A Bodasing 'Public Administration' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) Constitutional Law of South Africa (2nd Edition, OS, March 2007) Chapter 23A.

[5] For more on matters of public finance generally, see R Kriel and M Monadjem 'Public Finance' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, Original Service, March 2007) Chapter 27.

has recently written that: 'National government departments should clearly define minimum norms and standards for delivery in areas of concurrent responsibility. They should also monitor the performance of provinces in complying with these norms to ensure that the minimum requirement for the use of conditional grants is met.'[1] Similar sentiments have been articulated by members of the national treasury.[2]

(vi) *The Intergovernmental Fiscal Relations Act*[3]

The Intergovernmental Fiscal Relations Act provides a framework for the division of revenue between the three spheres of government. The Act also establishes the Budget Council. This consultative body is primarily designed to serve provincial needs: it creates the space for consultation on financial matters — including legislation — that may affect the provinces.

(vii) *The Division of Revenue Act and the Explanatory Memorandum for the Division of Revenue*

The Division of Revenue Act ('DORA')— passed annually — sets out the division of national revenue amongst the three spheres of government in quite substantial detail. The Act adumbrates the transfer of conditional and unconditional grants from the national government to the provinces and to municipalities. It also sets out the rules that govern the purpose and the use of these grants.

The Act is preceded by a Division of Revenue Bill. Perhaps the most important feature of that Bill is the Explanatory Memorandum for the Division of Revenue. This memorandum — required by section 10 of the Intergovernmental Fiscal Relations Act — explains how the Bill meets the criteria set out in FC s 210(2)*(a)* — *(j)*. It also contains the 'government's response to the annual recommendations of the FFC, and any assumptions and formulae used in arriving at the respective divisions among provinces'.[4]

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[1] Fiscal and Financial Commission *Submission for the Division of Revenue 2007/08* (2007).

[2] Former Minister of Finance, Trevor Manual wrote:

> On the back of a robustly growing economy and [an] efficient South African Revenue Service (SARS) we often find ourselves having more money than we are able to use. I say this with the full knowledge that there may be many people who will find it hard to believe. However, . . . if one examines the spending patterns for the first quarter of this year as contained in the section 32 report published in July it is not very hard to come to this conclusion. The report . . . showed that after three months or 25% of the financial year, spending on some of these [conditional] grants was around 14%. Given past trends it is not hard to predict that if nothing changes during the course of the year we might witness some underspending on some of these grants, yet again.

Department of Provincial and Local Government *Provincial Budgets and Expenditure Review and Local Government Budgets and Expenditure Review* (2006) 4-5.

[3] Act 97 of 1997.

[4] Department of Provincial and Local Government *Provincial Budgets and Expenditure Review: 2002/03 — 2008/09* (2007) 6.

(viii) *The Public Financial Management Act* [1]

This Act, discussed at length elsewhere in this treatise, promotes greater accountability and strives to eliminate waste and corruption.

(ix) *The Provincial Tax Regulation Process Act* [2]

The Provinces, as we have already noted, have a limited capacity to raise their own revenue and are largely dependent on national government largesse. This Act ostensibly seeks to correct this constitutional imbalance and, on its face, provides a mechanism for provinces to introduce new taxes. In short:

> A province contemplating a new tax submits a detailed tax proposal developed according to the guidelines that have been agreed to with the Minister of Finance. After examining the proposal and taking account of the recommendations of the Financial and Fiscal Commission, the Minister approves or disapproves the requested tax.[3]

That, in any event, is how the Act is supposed to work *in theory*. However, in its eight years of existence, the Act has led to an approved provincial tax just once: the Western Cape fuel levy. Indeed, the fairly onerous steps required to secure approval — and the veto power that the Minister of Finance may exercise — means that no tax will be approved unless it is deemed to serve national, as opposed to provincial, priorities. Recent attempts by the Gauteng Provincial Government to promulgate a provincial tax designed to improve provincial roads and public transportation met with resistance from both SANRAL (the national roads agency) and other sectors of the national government. Even though the tax's purposes were entirely benign — and constituted one of the first major attempts to use toll roads to subsidize public transport — the national government's entrenched interest in maintaining control over the fiscus led to the untimely demise of this initiative.

(x) *The Borrowing Powers of Provincial Governments Act*[4]

The Borrowing Powers of Provincial Governments Act is another act that promises the provinces substantially more than it delivers. In the discussions that led to the passage of this Act, the Budget Council stated that

> provincial borrowing would have to be linked to specific infrastructure programmes or projects; would not encumber any specific revenue stream for any funds borrowed, and the total amount of funds each province is allowed to borrow would be determined by its capacity to raise its own revenue, as well as the amount of funding it receives in the form of national infrastructure grants to provinces.

Given the onerous conditions placed upon provincial borrowing — along with the strictures placed upon their borrowing powers by the Final Constitution itself

[1] For more on the Public Financial Management Act 1 of 1999, see R Kriel and M Monadjem 'Public Finance' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, Original Service, March 2007) Chapter 27.

[2] The Provincial Tax Regulation Process Act 53 of 2001.

[3] Department of Provincial and Local Government *Provincial Budgets and Expenditure Review: 2002/03 — 2008/09* (2007) 6.

[4] The Borrowing Powers of Provincial Governments Act 48 of 1996.

— it comes as no surprise that not a single province has borrowed money under the existing framework.

(xi) *Medium Term Budget Policy Statement (MTBPS) and Medium Term Expenditure Framework (MTEF)*

The Medium Term Budget Policy Statement is released several months before the annual budget is tabled. The statement is both a product of intergovernmental fora on financial and fiscal matters and mechanism intended to elicit responses from various state and civil actors over how the government wishes to spend public resources.

The Medium Term Expenditure Framework provides 'the first signal of the division of revenue and the transfers from nationally-raised revenue to provinces over the next three years and the policy priorities that underpin them'.[1] The Framework, published well before the statement and the budget, allows for greater intergovernmental and public debate over national policy and expenditure priorities.

(xii) *Provincial intervention in local government*

Since 1998, 5 provincial governments have intervened in local government affairs on at least 16 occasions in terms of FC s 139. FC s 139(1) reads, in relevant part,

> When a municipality cannot or does not fulfill an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by . . .
> *(a)* issuing a directive to the Municipal Council . . . stating any steps required to meet its obligations;
> *(b)* assuming responsibility for the relevant obligations in that municipality…

According to the *15 Year Review Report on the State of Intergovernmental Relations in South Africa*, these provincial interventions 'fell into three broad categories':

1. Governance: political infighting, conflict between senior management and councillors, human resource management issues.
2. Financial: Inadequate revenue collection, ineffective financial systems, fraud, misuse of municipal assets and funds.
3. Service delivery: Breach of sections 152 and 153 of the Final Constitution [outlines service delivery obligations of municipalities].[2]

Mot of the interventions took place in terms of FC s 139(1)*(b)*. The national government's Department of Provinces and Local Government suggested that directives issued in terms of FC s 139(1)*(a)* ought to precede direct intervention in terms of FC s 139(1)*(b)*.

[1] Department of Provincial and Local Government *Provincial Budgets and Expenditure Review: 2003/04 – 2009/10* (2008) 9.

[2] Department of Provincial and Local Government *15 Year Review Report on the State of Intergovernmental Relations in South Africa* (2008) 41.

(c) An Assessment of Intergovernmental Relations and Cooperative Government by the State and Civil Society

Naturally, one might expect the South African government — dominated for 15 years by the African National Congress — to paint a rosy picture of intergovernmental relations. And while the government does issue reports that emphasize improvement as well as compliance with constitutional and statutory obligations, it is hard to not arrive at the conclusion that the national government — as it is currently constituted — would rather not be bothered with co-operative government or more efficient and normatively legitimate intergovernmental relations.

The State's rather Manichean view of IGR and cooperative governance is on full display in its recent report on the subject: *15 Year Review Report on the State of Intergovernmental Relations in South Africa*.[1] It expresses great pride in *(a)* the Acts that make the current system work (the Public Finance Management Act, the Municipal Finance Management Act, the Intergovernmental Relations Framework Act, and the annual Division of Revenue Act); *(b)* its fairly transparent budget and policy formulation processes; and *(c)* an IGR system that allows for discretion and flexibility.[2] At the same time, it complains, rather bitterly, about:

> First, … misalignment between policy objectives and resource allocation. This can cause a divergence between policy intentions and actual outcomes. Budgets are an important link between policy objectives and policy outcomes. Policies that are not funded or that are inadequately funded are hardly implemented, and their objectives are therefore nor properly realised. . . .
>
> [S]econd . . . delivery: Sometimes the wrong sphere is blamed. A policy might fail because it has been badly designed. In that case it is not appropriate to blame the implementer. Conversely, a policy might not deliver intended outcomes because it has not been properly funded, and this could be due to decisions at the provincial level. In this case it is not appropriate to blame the policy maker. . .
>
> [T]hird . . . the assignment or configuration of certain [competences and] functions lends itself to inefficiency and ineffectiveness.[3]

In short, the national government often views provinces (and local governments) as impediments to the realization of national priorities. National government may ascribe this problem to a lack of qualified personnel, incompetence or malfeasance — but the song remains the same: the provinces are a problem. At the time of writing this revision (July 2009), national government has even floated the idea of eliminating the provinces in toto. Given that FC s 74(8) would appear to require the assent of the provincial legislatures to such an eventuality — and that one province currently remains in the hands of the Democratic Alliance — such

[1] Department of Provincial and Local Government *15 Year Review Report on the State of Intergovernmental Relations in South Africa* (2008).

[2] Department of Provincial and Local Government *Provincial Budgets and Expenditure Review: 2003/04 – 2009/10* (2008) 3.

[3] Ibid.

a proposed constitutional amendment would appear to be no more than saber rattling.

Ronald Watts and Nico Steytler have reached similar conclusions about the national government's view of co-operative government and intergovernmental relations. However, both authors view the increased centralization of power as both a missed opportunity and a potential calamity.

Ronald Watts recognized, fairly early on, that both the Interim Constitution and the Final Constitution created 'a hybrid system which contained many of the characteristics of a federation, but combined these with some features more typical of a unitary system with constitutional regionalization.'[1] Watts was less interested in taxonomy, however, and far more concerned about 'whether the new political framework can reduce the sense of insecurity or suppression within the regional communities and thereby win their loyalty and support for nation building in South Africa.'[2]

While an active participant in the creation of South African IGR, Watts remained skeptical of its tripartite system and its commitment to 'interconnectedness'.[3] That interconnectedness posed two potential problems: *(a)* policy gridlock and *(b)* top-down decision-making.[4]

Nico Steytler's assessment of current IGR and cooperative governance is particularly scathing — but, interestingly enough, not substantially different from the views of the national government or Ronald Watts. In casting his eye over the recently promulgated Intergovernmental Relations Framework Act, Steytler's gaze comes to rest on s 4, and the more detailed objects of the Act:

(a) coherent government;
(b) effective provision of services;
(c) monitoring implementation of policy and legislation; and
(d) *realisation of national priorities*. (emphasis added)

Steytler writes that:

> While the object of providing "coherent government" may seem a neutral goal, the coherence is . . . premised on the 'realisation of national priorities' . . . . Provinces and local government [become] the principal implementers of national legislation and policies . . . [and] the focus then shifts to "monitoring implementation" of those policy and legislation. . . . This focus … on the "realisation of national priorities" by provinces and local government … [turns] … national IGR forums [into] … monitoring rather than consultative forums.[5]

In sum, Steytler concludes, 'the model underpinning the [IGRFA] is the pursuit of national priorities as defined by the national government.'[6] Indeed from

[1] R Watts 'Is the New South African Constitution Federal or Unitary?' in B de Villiers (ed) *Birth of a Constitution* (1994) 75, 86.

[2] Ibid.

[3] R Watts *Intergovernmental Relations*: *A Report by Dr Ronald Watts for the* Department of Constitutional Development and Provincial Affairs (1999) 10-11.

[4] R Watts 'Intergovernmental Relations: Conceptual Issues' in N Levy and C Tapscott (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001) 22, 24.

[5] N Steytler 'Cooperative and Coercive Models of Intergovernmental Relations: A South African Case Study' (supra) at 7.

[6] Ibid at 9.

Steytler's analysis of the IGRFA, it would appear that the national government has ultimately secured what the pot-apartheid state (and the ANC) have always wanted: 'a traditional public administration model of government — hierarchical and rule-bound structures and procedures — rather than a decentralised system of government.'[1]

As a descriptive matter, the national government, Watts and Steytler are in accord as to what they see: a fairly centralized state with features of a federation. As a prescriptive matter, they differ. The ANC-led national government would like to see the provinces — in so far as they are impediments to the realization of national policy — removed. Watts and Steytler, on the other hand, view the provinces (and local government) as important sites for both policy experimentation and enhanced political participation.

14.5 The Intergovernmental Relations Framework Act 13 of 2005[2]

(a) The Purpose of the Act

The IGRFA finally fulfills the constitutional obligation contained in FC s 41(2):

(2) An Act of Parliament must—

(a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and

(b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

The IGRFA rehearses many of the standard tropes on co-operative government found in the Final Constitution. For example, it states that the government of the Republic of South Africa consists of national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

Section 4 of the IGRFA further elaborates on the purpose of the Act:

> to provide within the principle of co-operative government… a framework for the national government, provincial governments and local governments, and all organs of state within those governments, to facilitate co-ordination in the implementation of policy and legislation, including—

(a) coherent government;

(b) effective provision of services;

(c) monitoring implementation of policy and legislation; and

(d) realisation of national priorities.

The Preamble places an additional, and rather striking (if not odd), gloss on the IGRFA. According to the Preamble, cooperative government is necessary for the progressive realization of our constitutional rights. It identifies the big-

[1] *Stoytler* (supra) at 9 citing D Schmidt 'From Spheres to Tiers: Conceptions of Local Government in South Africa in the Period 1994-2006' in *Consolidating Developmental Local Government: Lessons from the South African Experience* (2008).

[2] Preamble, Intergovernmental Relations Framework Act 13 of 2005 ('IGRFA' or 'the Act'). The Intergovernmental Relations Framework Act 2005 came into force August 15, 2005.

gest challenges facing the nation as the 'need for government to redress poverty, underdevelopment, marginalization of people and communities and other legacies of apartheid and discrimination' and notes that these longstanding structural problems are best combated through 'a concerted effort by government in all spheres to work together and to integrate as far as possible their actions in the provision of services, the alleviation of poverty and the development of our people and our country'. It is odd that the IGRFA should be thought the appropriate vehicle to eradicate poverty and to promote development. As Chaskalson P noted in *Premier, Western Cape*, constitutional (or statutory) principles of co-operative government possess a two-fold purpose: *(a)* to enable our still new democracy to develop a system of government that enables each sphere to work together in a coherent fashion; and *(b)* to allow each sphere of government to function relatively autonomously within its scope of legislative competence.[1]

(b) A Reasonable Period for Promulgation of the IGFRA?

One might ask — as a preliminary question when reflecting upon the constitutionality and the efficacy of the Act — whether the enactment of the IGRFA occurred 'within a reasonable period of the date the new Constitution took effect' in terms of FC s 21 of Schedule 6. On its face, the eight and a half year period — from the certification of the Final Constitution to the promulgation of the Act — might seem 'unreasonable'. Indeed, the Constitutional Court in *United Democratic Movement* found a piece of floor-crossing legislation — contemplated (if not required) by the Final Constitution — constitutionally infirm even though it had been promulgated within a much briefer period of time. Moreover, as we have already noted, the Department of Provincial and Local Government had defended the delay on the more than plausible grounds that the eight years was necessary in order to allow intergovernmental 'best practices' to develop and to enable Parliament to codify those practices in terms of the IGRFA.[2] Some commentators, such as Rassie Malherbe, have cast doubt on the constitutionality of the Act because it does not, as the DPLG would have it, reflect 'best practices' passed 'within a reasonable period of time'. They note that the Act implements an entirely new set of new procedures for resolution to intergovernmental disputes — nothing akin to what we have seen in South African law or practice. These commentators contend, in addition, that the delay merely allowed the perpetuation of a top-down system of governance in which provincial governments and municipalities were obliged to implement policy decisions made by the national government.[3] On this account, the strong words of the Constitutional Court in *National Gambling Board*, regarding the failure of the government to enact the leg-

[1] See *Premier, Western Cape* (supra) at para 58 (The Court, after examining FC s 41(1)*(g)*, states that the purpose of the section (and Chapter 3 as a whole) 'seems to be to prevent one sphere of government from using its powers in ways which would undermine other spheres of government, and prevent them from functioning effectively.')

[2] *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 6.

[3] See, eg, Rassie Malherbe 'Does the Intergovernmental Relations Framework Act 13 of 2005 Confirm or Suppress National Dominance' (2006) (4) *Tydskrif vir die Suid-Afrikaanse Reg* 810.

islation required by FC s 41(2), could buttress the claim that the IGRFA failed to meet 'within a reasonable period' requirement of s 21 of FC Schedule 6.[1]

But there are good reasons to believe that no such contestation of the constitutionality of the IGRFA would succeed. First, the IGRFA is on the books — and no one has suggested that it is infirm on any other grounds. The *UDM* Court, it might be argued, opted to deploy technical arguments for dispatching with a constitutional challenge that offered other more substantive reasons for finding the legislation at issue infirm. Second, surely the novelty — one might even say ingenuity — of the legislation counts in its favor. That we did not see much evidence of the use of implementation protocols in law or practice prior to the promulgation of the IGRFA might well suggest that other methods for resolving intergovernmental disputes proved less successful. Indeed, that we have witnessed only one instance of an intergovernmental dispute being litigated in our courts over the past 4 years could well mean that the framework and dispute resolution mechanisms adumbrated in the IGFRA might have quite a lot going for them.

(c) How the IGRFA Works

(i) *The Main Forums for Intergovernmental Cooperation and Coordination*

The IGRFA deploys a number of innovative mechanisms designed to coordinate action between different spheres of government. These same structures and procedures are also designed to resolve any disputes that may arise in the course of such action: they thereby make good FC Chapter 3's clearly stated preference for political, rather than judicial, resolution of intergovernmental disputes. As the text of the Final Constitution clearly states, and as the Constitutional Court has repeatedly confirmed, only after these political measures have been exhausted can resort be had to judicial mechanisms.

Given the present dominance of the ANC in all spheres of government, and the resulting appointment of Premiers by the National government, some commentators have been quick to diminish the importance of FC Chapter 3 principles

[1] See *National Gambling Board v Premier of KwaZulu-Natal* (supra) at para 32: 'The Act of Parliament envisaged in section 41(2) has not been enacted yet. In view of the words in subsection (3) that have been underlined, it could be argued that the failure of Parliament to comply with its obligation in terms of subsection (2) has rendered the important provisions of subsections (3) and (4) inoperative. For reasons that follow, it is not necessary to decide that now. However, even the possibility that such an argument could be raised emphasizes the urgent need for the envisaged legislation. Co-operative government is foundational to our constitutional endeavour. The fact that the Act envisaged in section 41(2) has not be passed requires the attention of the Minister of Justice and Constitutional Development.' However, the Constitutional Court's view of the lacuna in the law appeared to soften and to shift in *Uthukela District Municipality v President of the Republic of South Africa*, even as it endorsed its previous holdings in *First Certification Judgment* and *National Gambling Board*. In short, all extra-judicial avenues for resolving a dispute had to have been exhausted before they became justiciable. It then added the proposition that FC s 41(1)*(h)*(vi), when read with FC s 41(3), obliged organs of state 'to avoid litigation against one another irrespective of whether special structures [for dispute resolution] exist or not'. 2003 (1) SA 687 (CC)('*Uthukela District Municipality*') at para 22. The *Uthukela District Municipality* Court's change in heart can be explained by a belief shared by many parties: the state should allow a significant period to pass in order for various government actors and sectors to develop a regime of 'best practices' upon which any FC s 41(2) legislation might draw.

of cooperative governance and those statutory provisions of the IGRFA that amplify those constitutional principles. They often contend that, at present, both the principles and the statutory provisions are 'largely superfluous.[1] With respect, if the 2007 ANC Polokwane Conference and the 2009 elections have taught us anything, then it is that we operate in a complex, fluid and unpredictable political environment. The 2007 ANC Polokwane Conference — which split the party along provincial, patronage and ideological lines — and subsequent events such as the formation of a new (non-minority) party (the Congress of the People (COPE) by disgruntled (former) members of the ANC), a sustained period of mass action by unions and clear divisions within the governing faction of the ANC (between moderates, on the one hand, and leftists, from COSATU and the SACP, on the other) suggest that internal ANC politics are anything but settled. The electoral triumph of the Democratic Alliance in the Western Cape and in Cape Town will also test national government and provincial government relations.

The Act envisages the creation of several intergovernmental forums — some mandatory, some optional. These forums are designed to increase the flow of information to various affected actors and to thereby better enable them to co-ordinate their activities in areas of either shared competence or devolved administration. The obligatory forums — the President's Co-ordinating Council,[2] the Premiers' Intergovernmental Forums[3] ("PIFs"), and the District Intergovernmental Forums[4] ("DIFs") — are composed primarily of high-ranking office bearers from various spheres of government. However, non-elected, non-political individuals may be invited to attend.

The Act contemplates at least five different optional forums. Any Minister can establish a National Intergovernmental Forum that relates to his or her area of functional competence. The forum consists of the appropriate representatives from National, Provincial and Municipal government.[5] Premiers can establish additional Premiers' Intergovernmental Forums to facilitate effective intergovernmental relations in either a particular functional or geographical area;[6] The Premiers of two or more provinces can jointly establish an Interprovincial Forum to promote intergovernmental relations between a discrete set of provinces.[7] Similarly, two or more municipalities may establish an Inter-municipality Forum[8]. Any of these forums can establish a Technical Support Structure. These structures — made up of members of the state bureaucracy — are designed to assist elected officials in any of the forums mentioned above.[9] Finally, and most importantly, these consultative forums — which may adopt resolutions and make

[1] See V Bronstein 'Conflicts' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition. OS, July 2006) Chapter 16.
[2] IGRFA s 6-8.
[3] IGRFA s 16-21.
[4] IGRFA s 24-27.
[5] IGRFA s 9-15.
[6] IGRFA s 21.
[7] IGRFA s 22-23.
[8] IGRFA s 28-29.
[9] IGRFA s 30.

recommendations — do not qualify as executive decision-making bodies for the purposes of the Act or the Final Constitution.[1]

(ii) *Implementation Protocols*

To facilitate policy formation and dispute resolution, the IGRFA created a new tool called 'implementation protocols'.[2] As section 35 of the IGRFA notes, implementation protocols are binding agreements between organs of state in different spheres of government,

> [w]here the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service depends on the participation of organs of state in different governments, [and] those organs of state must co-ordinate their actions in such a manner as may be appropriate or required in the circumstances.[3]

Implementation protocols are not contracts — although they may appear that way.[4] They are meant to co-ordinate the actions of co-operating organs of government and to ensure that all parties to the agreement discharge their responsibilities in terms of the protocol. The last proviso is important: there will be circumstances in which government actors disagree about the manner in which a responsibility ought to be discharged, or there may be instances in which the parties fail to discharge their duties in terms of the implementation protocol.

The implementation protocol serves first as a reminder of that which the parties must do. As the IGRFA makes clear, however, they also provide the text which governs the resolution of disputes between organs of state in different spheres of government. Nevertheless, the IGRFA makes it exceptionally difficult for parties to an implementation protocol — or some other intergovernmental project — to "litigate" a dispute. First, it ensures that all existing sector-specific statutory dispute mechanisms are employed before resort is had to the IGRFA's dispute-resolution mechanisms. More importantly, it does not displace national or provincial interventions undertaken in terms of FC ss 100 or 139.[5] Second, it reinforces the constitutional duty of different organs of state to avoid litigation. It attempts to do so by ensuring that all formal agreements between organs of state

[1] IGRFA s 32.

[2] Implementation protocols ensure that organs of state collaborate and thereby vouchsafe 'the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service.'

[3] Implementation protocols are, essentially, written agreements outlining a plan to execute effectively co-ordinated action. They must also provide dispute settlement provisions. See IGRFA s 35(3)*(g)*

[4] Protocols are an 'optional tool' to be utilized by parties to joint action. However, they must be considered if: the action in question concerns subject matter identified as a national priority; it would materially assist the national or provincial government to satisfy its constitutional obligation to build capacity in the area in question in the local sphere of government; it would materially assist the organs of state to co-ordinate their actions; the organ of state responsible for the action does not have the capacity to fulfill its responsibility. IGRFA s 35(2).

[5] IGRFA s 39(1): 'This Chapter does not apply — *(a)* to the settlement of specific intergovernmental disputes in respect of which other national legislation provides resolution mechanisms or procedures; or *(b)* to a dispute concerning an intervention in terms of section 100 or 139 of the Constitution.'

contain dispute resolution mechanisms.[1] It also makes getting to court extremely difficult: before non-judicial dispute resolution can occur, a party must declare that such a dispute exists. However, before such a declaration can be made, section 41(2) of the IGRFA states that,

> the organ of state in question must, in good faith, make every reasonable effort to settle the dispute, including the initiation of direct negotiations with the other party or negotiations through an intermediary.

After efforts in terms of sections 40 and 41 of the IGRFA have been exhausted, sections 42 and 43 set out the terms in which the parties, assisted by a facilitator, must go about resolving the dispute. Indeed, section 44 of the IGRFA ensures that an appropriate Minister or an MEC will take ultimate responsibility for resolving the dispute through political compromise. Only when the various mechanisms outlined in the IGRFA have failed — from the implementation protocols identified in section 35 of the IGRFA to the dispute resolution mechanisms set out in sections 30 to 44 of the IGRFA — may a party seek judicial intervention to resolve the dispute.

(iii) *Settlement of Intergovernmental Disputes*

The IGRFA defines an intergovernmental dispute as:

> a dispute between different governments or between organs of state from different governments concerning a matter—
> *(a)* arising from—
> (i) a statutory power or function assigned to any of the parties; or
> (ii) an agreement between the parties regarding the implementation of a statutory power or function; and
> *(b)* which is justiciable in a court of law, and includes any dispute between the parties regarding a related matter.[2]

If an intergovernmental dispute does arise, then an organ of state that is party to such a dispute with another government or organ of state can declare a Formal Intergovernmental Dispute ('FID') by making such a declaration in writing to the other party.[3] However, again, such a declaration may occur only after the organ of state in question has made every reasonable effort to resolve the dispute.[4] An FID declaration triggers an obligation to call a meeting that identifies the issues in dispute, mechanisms other than judicial proceedings available to resolve the dispute, and an appropriate facilitator to help resolve the dispute.[5] Depending on the identity of the parties to the dispute, the Minister or MEC for local govern-

[1] IGRFA s 40(2): 'Any formal agreement between two or more organs of state in different governments regulating the exercise of statutory powers or performance of statutory functions, including any implementation protocol or agency agreement, must include dispute-settlement mechanisms or procedures that are appropriate to the nature of the agreement and the matters that are likely to become the subject of a dispute.'

[2] IGRFA s 1.

[3] IGRFA s 41(1).

[4] IGRFA s 41(2).

[5] IGRFA s 42(1).

ment in the province can call this meeting if the parties fail to do so.[1] The parties must also satisfy any other legislative dispute resolution mechanisms that may be applicable to the dispute in question.[2] It is only upon making a declaration of a Formal Intergovernmental Dispute, and the failure of these procedures to resolve the dispute, that judicial proceedings can be initiated.[3]

Since the implementation of the IGRFA, we have witnessed a dramatic reduction in the number of legal disputes between different spheres of government brought to court. On it face, it appears that this reduction could well testify to the effectiveness of the Act.

But the truth may well lie elsewhere — in the hurly-burly of South African politics. The sole dispute resolved by the courts in terms of the IGRFA occurred in *City of Cape Town v Premier, Western Cape, & Others*.[4] The City of Cape Town — controlled by the Democratic Alliance — had received information that one of the councillors on the council of the City was guilty of certain misconduct. It engaged the services of a firm of private investigators to investigate the allegations. The probe culminated in a finding by a City disciplinary committee that the councillor in question was guilty of misconduct. The City council then requested that the responsible provincial MEC remove the councilor from office.

The provincial MEC and the Premier — both members of the ANC — refused. They proceeded instead to launch their own investigation in terms of s 106(1)*(b)* of the Municipal Systems Act 32 of 2000. The Premier established a commission of enquiry into 'Possible Occurrences of Fraud, Corruption, Maladministration, Serious Malpractice and other unlawful conduct in the City and George Municipality'. While the Premier created the commission as an adjunct to the MEC's investigation, he did not rely on s 106(2) of the Systems Act. Nor did he rely on the apposite provision of the Systems Act when he shut down the first commission and established a new commission. The City, later joined by the Democratic Alliance as an intervening party, then approached the High Court seeking the following relief: (1) a declaration that the MEC's decision to establish his investigation under s 106(1)*(b)* of the Systems Act was unconstitutional; and (2) a declaration that the Premier's decisions to establish the first commission and the second commissions were unconstitutional. The substance of the High Court's findings are not especially germane to this discussion. However, the High Court did note that the Premier's power to appoint a commission to investigate the conduct of a municipality were not located in s 106(2) of the Systems Act but in FC s 127(2)*(e)*, FC s 139, s 37(2)*(e)* of the Western Cape Constitution, and s 1(1)*(a)* of the Western Cape Commissions Act and that the Premier could not appoint the second commission as an adjunct to the MEC's initiative under s 106(1)*(b)* of the Systems Act without relying on s 106(2) of that Act. Not only did the Premier's actions lack a legal foundation, the Court held that

[1] IGRFA ss 42(3) and (4).
[2] IGRFA s 42(2).
[3] IGRFA s 45.
[4] 2008 (6) SA 345 (C).

> The Premier therefore did not possess an honest belief that good reasons existed for establishing the Second Erasmus Commission, and possessed such an ulterior motive. As a result his decision was not rationally related to the purpose for which the power was conferred, was arbitrary and therefore unlawful. Consequently, the decision of the Premier to establish the Second Erasmus Commission falls to be set aside.[1]

More pointedly, the High Court held that the Premier had lacked good reasons for establishing the second commission, and had acted with the ulterior motive of embarrassing political opponents. According to the High Court, the appointment of the judge was meant to obscure the Premier's ulterior motive.[2]

Our concern, of course, is how this 'dispute' was mediated by FC Chapter 3 and the IGRFA. Given the High Court's assessment that the Premier had acted *male fides*, it is not surprising that the judge finessed the relationship between FC Chapter 3 and the IGRFA. On the High Court's reading of both documents (together), FC ss 41(3) and (4) employs a relaxed standard that only obliges an organ of State to make 'every reasonable effort' to exhaust political channels before resorting to court. Despite the fact the IGRFA, as the super-ordinate legislation contemplated by FC s 41(2), would appear to require specific steps to be taken before resort is had to a judicial forum, the High Court found that, given the clear and uncontroverted 'bad faith' by the MEC and the Premier, the City 'could not reasonably have been expected to take the steps envisaged in the Framework Act before instituting the present proceedings', and that the court accordingly 'had the power to entertain the proceedings in terms of [FC] s 41(4)'.[3]

What to make of this single case? One might read the case as standing for the principle that under normal circumstances, all parties ought to follow the procedures and employ the mechanisms laid out in the IGRFA. However, if, as in *City of Cape Town v Premier, Western Cape, & Others*, the court's findings clearly suggest that no political resolution is possible, and that at least one of the parties to the dispute has acted illegally or unconstitutionally, then a court may decide that the strictures of the IGRFA may be loosened so as to allow judicial resolution of the conflict. As matters stand in 2009, a major city (Cape Town) and a province (the Western Cape) in Democratic Alliance control may well give rise to similarly intractable (and potentially 'unconstitutional') disputes.

(d) What Disputes the IGFRA Does Not Cover

(i) *Conflicts between National Legislation and Provincial Legislation*

The first kind of governmental dispute completely exempt and expressly excluded from the application of the Act involves any clash between national legislation and provincial legislation in functional areas of concurrent competence.[4] Such conflicts are addressed at length from FC ss 146 to 150 and seem to require no further amplification by the Act. The Constitutional Court addressed this express

[1] *City of Cape Town v Premier, Western Cape* (supra) at para 163.
[2] Ibid at para 176.
[3] Ibid at para 24.
[4] IGRFA s 2(2).

exclusion, albeit briefly, in *Matatiele Municipality & Others v President of the RSA & Others.*[1] In challenging the validity of the Twelfth Amendment, the applicants contended that the State had failed to fulfil their constitutional obligations in terms of FC s 41 and their statutory obligations in terms of the IGFRA. The Constitutional Court, per Ngcobo J, swiftly dispatched this contention:

> It is difficult to make out what the precise complaint is in this regard. What is clear, however, is that s 41(2) contemplates that an Act of Parliament will be enacted that will establish structures and institutions to promote and facilitate intergovernmental relations. In addition, this statute will provide appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. The respondents submitted that this legislation is the Intergovernmental Relations Framework Act 13 of 2005 … The applicants did not contend otherwise. Nor could they. .... Section 2(2) provides that the Framework Act does not apply to Parliament and the provincial legislatures. On its face, therefore, this statute excludes Parliament and provincial legislatures from its ambit. It follows that the submission relating to co-operative government must fail. We are not called upon, and we express no view on whether the Framework Act can constitutionally exclude from its ambit Parliament and provincial legislatures. That is not the question before us.[2]

Although the *Matatiele* Court refused to engage the question as to whether the IGRFA Act's exclusion from its ambit of the actions of Parliament and provincial legislatures is constitutional, it seems fair to conclude — given the Court' previous judgments as to what Chapter 3 does and does not cover — that the IGFRA is neither suspect nor infirm with respect to this exclusion.

(ii) *Intra-governmental Disputes between Provincial Departments*

(aa) The Problem

As we have already noted, for years lawyers, jurists and academics bemoaned a great gaping hole in our law: the Final Constitution had promised to establish a legal regime to mediate and to resolve intergovernmental conflicts. During the first decade of post-apartheid South African life (1996 — 2005), Parliament failed to make good FC s 41(2)'s guarantee that intergovernmental disputes would be resolved by legislation that prevented different spheres of government and opposing organs of state from going to war (or court) over vital policy matters.

The courts did their part in holding things together. Although initially vexed by Parliament's failure to produce FC s 41(2)'s constitutionally mandated super-

[1] 2006 (5) SA 47 (CC)('*Matatiele*').
[2] Ibid at paras 55 – 57.

ordinate legislation, the Constitutional Court gradually became less sanctimonious about this lacuna in the law.[1]

In the absence of FC s 41(2) legislation, the Court did the best with what it had. In *First Certification Judgment*, the Constitutional Court held that FC s 41(1)*(h)* (vi) had to be read together with FC s 41(3).[2] It seemed to imply that the latter provision was the primary source of the duty to avoid litigation. In particular, FC s 41(3) meant that 'disputes should where possible be resolved at a political level rather than through adversarial litigation.'[3] The inclusion of this provision did not, however, oust the courts' jurisdiction to hear intergovernmental disputes or 'deprive any organ of government of the powers vested in it under [the Constitution].'[4] In *National Gambling Board*, the Court effectively reversed the normative hierarchy it had established between FC s 41(1)*(h)*(vi) and FC s 41(3) in *First Certification Judgment*.[5] The stated reason for the reversal was that, in the five years separating the two decisions, the Act of Parliament contemplated in FC s 41(2) had not been passed and no formal 'mechanisms and procedures' were put in place to resolve intergovernmental disputes. Given the absence of such mechanisms and procedures, some doubt was expressed as to whether, in the absence of FC s 41(2) legislation, the Court could enforce FC s 41(3). In order to avoid having to decide this point, the Court held that the duty to avoid litigation could be independently founded on FC s 41(1)*(h)*(vi).[6] The Court then enunciated what this duty entailed.[7] The first two judgments on the duty to avoid litigation can be reconciled by reading *National Gambling Board* as giving content to the Court's statement in *First Certification Judgment* that intergovernmental disputes should be resolved at a 'political level'. In both decisions, the Court drew a line between political and legal forms of dispute resolution. The question as to whether or not FCs 41(1)*(h)*(vi) has been violated, and by extension whether the requirements of FC s 41(3) have been met, depends on whether all extra-judicial

[1] *National Gambling Board v Premier of KwaZulu-Natal & Others* 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 (CC)('National Gambling Board') at para 32 ('I]t could be argued that the failure of Parliament to comply with its obligations in terms of [FC s 41(2] has rendered the important provisions of [FC ss 41(3) and 41(4)] inoperative. For reasons that follow, it is not necessary to decide that now. However, even the possibility that such an argument could be raised emphasizes the urgent need for the envisaged legislation. Co-operative government is foundational to our constitutional endeavor. The fact that the Act envisaged in section 41(2) has not been passed requires the attention of the Minister for Justice and Constitutional Development.')

[2] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1458 (CC)('*First Certification Judgment*') at para 291.

[3] Ibid.

[4] Ibid.

[5] *National Gambling Board* (supra) at para 33.

[6] Ibid at para 31.

[7] Ibid at paras 35-36.

avenues (or remedies) for resolving the dispute have been exhausted.[1] Three factors are relevant to this inquiry: (1) the seriousness of each party's commitment

[1] We have consciously chosen to avoid the use of the term remedies — as it appears in FC s 41(3). Peter Birks taxonomy of remedies captures five different denotations of the term in English law: 'a cause of action', to 'a right born of a wrong', to 'a right born from a court order', 'a right born of an injustice' and 'right born of a court's order issued on a discretionary basis.' P Birks 'Rights, Wrongs and Remedies' (2000) 20 *Oxford Journal of Legal Studies* 1, 9–17 (The two meanings not mentioned in the text are or grievance, and.) See also R Zakraewski *Remedies Reclassified* (2005). A panoply of purposes for the term exist in South African law: a statutory right (*Fedsure Life Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) at para 2: 'The 1956 Act . . . created a statutory remedy for the commission of what was referred to as an "unfair labour practice" which was soon interpreted by the Courts to C include the unfair dismissal of an employee'); a common-law right (*Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811, 821A (A)('Its remedy, if any, was to sue oneanate by way of a condictio'); an order of summary judgment (*First National Bank of SA Ltd v Myburgh* 2002 (4) SA 176 (C) at para 8 ('Summary judgment is designed to give plaintiff a speedy and cost-effective remedy in the case where the defendant does not disclose a valid and bona fide defence. It is an extraordinary and stringent remedy'); a right of appeal (*S v Dzukuda & Others; S v Tshilo* 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC) at para 48 ('If the provisions are misapplied the accused has an appeal remedy or may use the special entry mechanism of the CPA in case of irregularity'); a the court's order (*Gory v Kolver NO & Others* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) at para 21 ('The Starke sisters argue that reading words into section 1(1) as ordered by the High Court is not the appropriate remedy in this case'). See, generally, M Bishop 'Remedies' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9. See also I Currie and J de Waal *The Bill of Rights Handbook* (5th Edition 2005). As the case law and the denotations of emedies above suggests, a remedy generally requires a specific dispute resolution process that parties much exhaust before moving on to the next process — or to court. The IGFRA does not specify a remedy — but leaves it open to the parties to use informal 'political structures' — MINMECS, Premier Councils, for example — to secure a positive outcome. The reasons are obvious: normal dispute resolution mechanisms — in adversary structures like courts — often generate zero sum outcomes out of their zero sum games. Political solutions are to be preferred as a normative matter for two reasons: (1) deliberation and conversation may elicit more information and produce better outcomes; (2) multiple stakeholder processes create greater normative legitimacy. On information deficits: A growing contingent of constitutional law scholars have recognized that problems of information deficit, lack of cross-cultural understanding and limited institutional competence can be 'solved' by a subtle recasting of existing constitutional doctrines and judicial remedies that extract better information and thereby achieve *more mindful* results. See, e g, M Dorf & C Sabel 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia LR* 267; M Dorf & B Friedman 'Shared Constitutional Interpretation' (2000) *Supreme Court Review* 61; C Sabel & W Simon 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard LR* 1015; C Sunstein *Infotopia* (2007); R Thaler & C Sunstein *Nudge* (2008) For the application of experimental constitutionalism to South African jurisprudence, see S Woolman 'Application' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* 2 ed (OS February 2005) Chapter 31; S Woolman & H Botha 'Limitations' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* 2 ed (OS July 2006) Chapter 34; S Woolman *The Selfless Constitution: Experimentation and Flourishing as the Foundations of South Africa's Basic Law* (forthcoming 2010). For more on the possibility of normative legitimacy arising out of conflict about the fundamental norms undergirding a heterogeneous society, see R Cover 'Nomos and Narrative' (1983) 97 *Harvard LR* 42. More importantly, perhaps, the novelty of South Africa's constitutional design — as reflected in Chapter 3 and in the IGRFA — is that it tries through both constitutional provisions and a subordinate piece of legislation to ensure that politics remains relatively cabined, and that disputes that courts are ill-equipped to handle remain in the political domain. See C Murray and R Simeon 'Recognition without Empowerment: Minorities in a Democratic South Africa' (2007) 5 *ICON* 699 (The authors pay particular attention to the manner in which 'South African constitutional design, … gives strong recognition to diversity and difference in private life, while seeking to the greatest extent possible to prevent ethnocultural differences entering the public sphere … [and] trace this through the fundamental principles set out in the Constitution, the Bill of Rights, the designation of a multisphere [and co-operative] government.')

to the extra-judicial resolution of the dispute; (2) the extent to which the dispute turns on a question of legal interpretation which might have been resolved amicably; and (3) the preparedness of the parties to strike comprises (ie each party's duty 'to re-evaluate its position fundamentally') and by extension whether the requirements of FC s 41(3) have been met, depends on whether all extra-judicial avenues for resolving the dispute have been exhausted. Three factors are relevant to this inquiry: (1) the seriousness of each party's commitment to the extra-judicial resolution of the dispute; (2) the extent to which the dispute turns on a question of legal interpretation which might have been resolved amicably; and (3) the preparedness of the parties to strike comprises (ie each party's duty 'to re-evaluate its position fundamentally').[1] The *National Gambling Board* Court wrote that disputes about 'questions of interpretation' should be resolved 'amicably'. . . '[O]rgans of state's obligation to avoid litigation entails much more than an effort to settle a pending court case. It requires of each organ of state [involved in the dispute] to re-evaluate its position fundamentally.'[2]

In *Uthukela District Municipality v President of the Republic of South Africa*, the Constitutional Court endorsed its previous holdings in *First Certification Judgment* and *National Gambling Board*. In short, all extra-judicial avenues for resolving a dispute had to have been exhausted before they became justiciable. It then added the proposition that FC s 41(1)*(h)*(vi), when read with FC s 41(3), obliged organs of state 'to avoid litigation against one another irrespective of whether special structures [for dispute resolution] exist or not'.[3] The *Uthukela District Municipality* Court's change in heart can be explained by a belief shared by many parties: the state should allow a significant period to pass in order for various government actors and sectors to develop a regime of 'best practices' upon which any FC s 41(2) legislation might draw.[4]

The Intergovernmental Relations Framework Act reflects the wisdom of the Constitutional Court's patient approach and adopts many of the Court's views as to how intergovernmental conflicts should be resolved. For the purposes of this section, what is important is that the Act defines intergovernmental relations as a 'relationships that arise between different governments or between organs of state from different governments in the conduct of their affairs.'[5] The Act is silent with regard to the problem of how co-operation between provincial departments within any given province should be regulated. We will call this 'horizontal

[1] *National Gambling Board* (supra) at paras 35 -36.

[2] Ibid. See, further, R Simeon & C Murray 'Multilevel Government in South Africa: An Interim Assessment' (2001) 31 *Publius: The Journal of Federalism* 65.

[3] 2003 (1) SA 687 (CC)('*Uthukela District Municipality*') at para 22.

[4] See Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999); C Mentzel & J Fick 'Transformaion Perspectives on Policy Management: Dynamics of Intergovernmental Relations with Specific Reference to the Eastern Cape' (1996) 2 *Africanus* 26.

[5] IGRFA s 1.

intra-governmental relations'.[1] Neither the Final Constitution's provisions on Co-operative Government in FC ss 40 and 41 nor the Act speak directly to these 'horizontal intra-governmental relations'.[2] The Final Constitution's muteness and the Act's silence with regard to 'horizontal intra-governmental relations' are important for two primary reasons. First, departments within the same sphere of government are often required to co-operate with respect to the discharge of their functions. Second, it is simply not possible to regulate horizontal relations through contracts or binding agreements between departments. Why? Provincial departments lack autonomous legal personality.

One object of this section is to determine whether the Act and its mechanisms for formalizing relationships and resolving disputes between organs of state by way of implementation protocols could be employed to manage intra-governmental relationships. This determination turns, in large part, on what constitutes an intergovernmental dispute for the purposes of the Act and the Final Constitution. Again, our reading of the constitutional provisions on co-operative government and the apposite provisions of the Act is that they are not meant to address or to resolve horizontal provincial intra-governmental conflict. However, both of these constitutional and statutory frameworks — and the case law that has arisen under them — suggest a set of best practices that might assist provincial departments in crafting documents that should ensure greater cooperation between departments and that could assist provincial MECs and the Premier with the resolution of any disputes that might arise between provincial departments.

The second and more important object of this section is to note that the silence of the Final Constitution and the Act is an unavoidable consequence of how provincial power is allocated. In terms of the Final Constitution, all authority over provincial departments, agencies and organs vests within the Premier. Disputes that arise within and between departments, agencies and organs must be resolved by the Premier or other members of the Executive Council.

As we shall see, the constitutional powers of the Premier — along with recent statutory developments and a venerable line of case law — determines the entire landscape for the resolution of provincial horizontal intra-governmental disputes. If the Premier, or the MEC responsible for the implementation of a given policy, wish to hold heads of department or other senior officials culpable for their actions, or their failure to act, then they can do so. I would contend that the most powerful tools for this purpose are performance agreements with heads of department and senior officials. Co-operation between provincial departments can, therefore, be regulated by making satisfaction of co-operation protocols or implementation protocols a component in performance agreements. In addition, the Premier can establish dispute resolution principles and intra-governmental

[1] 'Horizontal intra-governmental disputes' is Stu Woolman's neologism. The denotation is clear. We have constitutional and statutory provisions regarding 'intergovernmental relations' — but none specifically aimed at intra-governmental disputes. We simply want to highlight that they exist, that there is a lacuna in the law regarding their regulation and that there are a couple of constructive ways of mediating those disputes.

[2] The Act does engage co-operation between distinct municipalities. For the purposes of this section, however, horizontal co-operation is restricted to co-operation — or lack thereof — between departments within a province.

forums, akin to those contemplated by the Final Constitution and the Act. Ultimately, however, the power to resolve provincial intra-governmental disputes lies wholly within the hands of the Premier.

(bb) Executive Authority of Provinces

FC s 125 tells us that 'executive authority is vested in the Premier of the Province.' In particular, it tells us that

> The Premier exercises the executive authority, together with the other members of the Executive Council, by *(a)* implementing provincial legislation in the province; *(b)* implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise; . . . *(d)* developing and implementing provincial policy; *(e)* co-ordinating the functions of the provincial administration and its departments.

The language of FC s 125 leads, almost inexorably, to the conclusion that the Premier — along with members of the Executive Council (whom he may appoint and fire at will) — may determine how policy is implemented and how various departments are to work together to realize that policy. Should the Premier and his various line managers wish to establish dispute resolution mechanisms, there is nothing in the Final Constitution to prevent them from doing so. However, in the absence of such dispute resolution mechanisms — say in the form of provincial legislation or internal guidance documents or policy — the responsibility for deciding how disputes are resolved ultimately rests with the Premier and his deputies.

In sum, contrary to intergovernmental disputes in which the courts may, ultimately, be asked to resolve conflicts between organs of state within different spheres of government, the resolution of horizontal intra-governmental disputes between organs of state within the same province will remain the sole prerogative of the Premier. As we shall see in the next section, this result is legally necessary because different departments do not possess separate legal personality and cannot contract with each other or litigate against each other. Should a Premier wish to rearrange Departments — through merger, through disaggregation of responsibilities or through the shifting of portfolios — she has the constitutional power to do so.[1] A department that exists and functions largely at the behest of the Premier can hardly be expected to contest decisions taken by another department that exists and functions largely at the behest of the Premier. Both departments not only exist to serve the Premier. The departments are, at their most basic level, merely different manifestations of the Premier. The Premier can hardly be expected to contract with herself or sue herself for some breach of performance.

And yet, differences between provincial departments are commonplace, and many departments operate under the misapprehension that they can enter legally

[1] See C Murray & O Ampofo-Anti 'Provincial Executive Authority' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 20.

binding, and judicially enforceable, contracts with one another. In the next section, we attempt to further demonstrate exactly why provincial departments lack, under South African law, the legal personality necessary to enter contracts with other provincial departments in the same province. Having shown that provincial departments lack the legal personality to enter contracts with other intra-provincial departments, we will turn to the practical question that that animates the last portion of this section: How might a Premier might establish mechanisms for the resolution of disputes between entities that are, in the end, manifestations of her authority?

(cc) A Lack of Departmental Personality

The Final Constitution does not create provincial departments. Instead it creates nine provinces.[1] Each province, as FC s 125 declares, has a single executive headed by the Premier. Departments themselves are created by section 7(2) of the Public Service Act ('PSA').[2] Departments can be established or abolished by the President (of the national government). He or she may do so simply by amending Schedule 2 of the PSA by proclamation. Amendments of this kind are made 'at the request of the Premier of a province'.[3]

As a day-to-day matter, provincial departments function relatively autonomously. Each department, for example, has its own accounting officer.[4] Were the Premier to have to sign off on every decision, provincial government would grind to a halt. However, despite the appearance of departmental autonomy, the province produces consolidated finance statements for all its Departments, has a single provincial revenue fund controlled by the provincial treasury,[5] and has a single budget which controls the expenditure of Departments.[6]

The case law buttresses our contention that provincial departments lack the legal personality to contract legally and formally with other provincial Departments within the same province.[7] In *Natal Provincial Administration v South African Railways and Harbours*, the Natal Provincial Administration attempted to sue the South African Railway.[8] The railway was, at the time, located in another depart-

[1] See FC s 103(1).

[2] Proclamation No. 103 of 1994.

[3] PSA s 7(5)*(a)*(ii).

[4] See Public Finance Management Act 1 of 1999 ('PFMA') s 36(1). It is also accountable for its own financial management. See PFMA s 38.

[5] PSA s 21.

[6] PSA s 39(1)*(a)*.

[7] We are not suggesting that departments lack the capacity to take decisions and enter into various contracts (but they do so on behalf of the Premier). Intragovernmental service agreements — unlike other service contracts — are not subject to resolution through litigation. The power to resolve these disputes vests in the Premier. The Premier may create or disband the entities in question.

[8] 1936 NPD 643. The courts have been clear that pre-1994 case law that coheres with the Constitution is still good law. In a number of relatively recent cases, the Constitutional Court and the Supreme Court of Appeal have deployed the doctrine of *stare decisis* in a manner that dramatically curtails the ability of High Courts to use the Bill of Rights, for example, and FC s 39(2), in particular, to develop the common law or to re-interpret legislation in ways that depart from Constitutional Court, Supreme Court Appeal, or Appellate Division precedent. The Constitutional Court in *Walters* restricted its conclusions about *stare decisis* to precedent handed down by the Constitutional Court, the Supreme Court of Appeal and the Appellate Division in the (rather ambiguously described) 'constitutional era.' *Ex parte Minister of Safety and Security & Others: In re S v Walters & Another* 2002 (4) SA 613 (CC), 2002

ment within the 'Crown'. The Province's claim was dismissed by the court because, given that both the province and the railway were departments of the Crown, the suit would be tantamount to the Crown suing itself.

Years later — in *Government of the Republic of South Africa v Government of KwaZulu* — the Appellate Division confirmed the 'general principle of our law that one organ of the State cannot sue another organ of the State.'[1] Despite this general statement of the law, the *KZN* Court permitted KwaZulu, a self-governing territory or 'Homeland', to sue the South African government. The Appellate Division found, in the instant matter, that 'there is sufficient separation in identity between the [the South African government], on the one hand, and … [KwaZulu], on the other hand, to entitle [KwaZulu], . . . to approach the Court for relief.'[2] However, the result in *KZN* is the exception — a natural anomaly thrown up by the absurdities of apartheid. The notion of 'indivisible sovereignty' is a doctrine that will not, therefore, always dispose of internecine conflicts. Indeed, today's South Africa is not an indivisible sovereign. Municipalities, provinces, and public entities have separate legal personality.[3] Thus, while the outcome of *KZN* seems incontrovertible, its principle applies only within a given organ of state.

The IGRFA, as we have seen, defines an 'intergovernmental dispute' as 'a dispute between different governments or between organs of state from different governments'. 'Government', in turn, is defined in IGRFA s 1, as '*(a)* the national-government; *(b)* a provincial government; or *(c)* a local government.' IGRFA s 40 contemplates a "formal agreement between two or more organs of state in different governments" (emphasis added) and regulates dispute resolution between those governments. But no provision is made whatsoever for agreements or disputes within a provincial government between provincial departments. This silence, read against the background of the Final Constitution, and the pre-constitutional case law, is a powerful indication that such agreements are, strictly speaking, not legally enforceable.

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(7) BCLR 663 (CC)('*Walters*') at para 61. The Supreme Court of Appeal in *Afrox* extended binding precedent — backwards — past the very beginning of even the most controversial understanding of the constitutional era. *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA)('*Afrox*'). The *Afrox* Court recognized that High Courts could retain constitutional jurisdiction for any direct attack on a rule of law grounded in a preconstitutional decision of the Appellate Division. However, where a High Court is persuaded that a pre-constitutional decision of the Appellate Division should be developed through FC s 39(2), so that it accords with the spirit, purport and objects of the Bill of Rights (true indirect application), its hands are tied. The High Court is bound to follow the pre-constitutional decisions of the Appellate Division. Brand JA, for the *Afrox* Court, writes: 'Die antwoord is dat die beginsels van stare decisis steeds geld en dat die Hooggeregshof nie deur artikel 39(2) gemagtig word om van die beslissings van hierdie Hof, hetsy pre- hetsy post-konstitusioneel, af te wyk nie. Ibid at para 29. There can be no doubt, as the law currently stands, about the continued binding authority of pre-1994 decisions handed down by South African courts. See further S Woolman & D Brand 'Is There a Constitution in This Courtroom: Constitutional Jurisdiction after *Afrox* and *Walters*' (2003) 18 *SA Public Law* 38.

[1] 1983 (1) 164, 205 (AD)('*KZN*').

[2] Ibid at 205A – 206 A (Emphasis added).

[3] Local Government: Municipal Systems Act 32 of 2000 s 2*(d)*. For more on the legal personality of municipalities, see N Steyler & J de Visser *Local Government Law of South Africa* (2007); N Steyler & J de Visser 'Local Government' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 22.

Moreover, the existence of a single provincial revenue fund means that the result of any such disputes would be that the unsuccessful party would make a payment from the provincial revenue fund to the successful party, who, in turn, would place the payment back into the revenue fund. Any intention to reallocate funds between the two departments — for whatever reason — could be more efficiently and less awkwardly achieved through a provincial adjustment in the budget.[1] The presence of a single revenue fund for both 'potential' litigants is one more strong indication that there is an insufficient separation in juristic identity for two governmental entities in the same province to sue each other.[2]

Furthermore, if provincial Departments could be established or abolished merely by amending the schedule to the Public Service Act, and provincial departments were treated as independent entities, then it would throw into doubt the status of all contractual claims against all abolished provincial departments. Who would pick up the tab if the department were abolished? As a matter of law, no provision is made in the PSA or the PFMA for the succession of departments. In addition, when provincial departments enter into contracts with third parties, they do so 'on behalf of' the province. Indeed, the State Liability Act states that the Minister or MEC of a department concerned with contractual litigation will be cited as the 'nominal defendant or respondent.'[3]

The Final Constitution, the IGRFA, the PSA, the PFMA, the State Liability Act, the extant case law, the organization of provincial revenue funds and the ability of a Premier to chop and to change departments at will points to a single conclusion. Provincial departments lack the legal personality necessary to enter formal legal agreements and to sue when other provincial departments — in the same province — fail to uphold their end of a bargain.

(dd) Finding a Legal Nexus

Inter-departmental co-operation is a necessary feature of effective provincial government. Even though provincial departments are not legally separate from each other, they develop their own performance requirements and their own organisational identity. They tend to interact with one another on an 'arm's length basis'. These practices have generated pressure for legally-binding protocols or memoranda that regulate inter-departmental co-operation. In other words, some provincial departments would like to be able to sue other provincial departments that fail to discharge obligations undertaken through inter-departmental memoranda — or at least to deal with disputes in a legally formal manner.

As we have already noted, the manner in which power vests within different spheres of government precludes the treatment of intra-governmental disputes between departments in the same province as formal legal disputes. Because departments are a creation of the provincial premier, and may be rationalised, re-organised, established or abolished at the discretion of the Premier, they do not

[1] See PFMA s 31.

[2] See *South African Railways v Kemp* 1916 TPD 174, 177 (The existence of a separate Railway Fund undermined the notion of a unified sovereign.)

[3] Act 20 of 1957 s 2.

possess separate legal identity. Hence, contracts with a provincial department of health are, in fact, contracts with the province, and litigation against a provincial department of health is, in fact, litigation against the province. Thus, just as it is impossible for a person to litigate against himself, so too is it impossible for provincial departments to litigate against each other.

There are two possible responses to this problem. The first response is to develop protocols that regulate intra-governmental co-operation and are enforced by the Premier or the executive of the province. In the next section, we suggest how the Act can be used as a guide in developing such protocols for resolving intra-governmental disputes. (Of course, it follows from the logic of our argument that such disputes can also be resolved by the Premier by fiat.) The second (and related) response is to develop performance-based contracts of employment with senior officials within the Province. Compliance with memoranda of co-operation or intra-governmental implementation protocols can be made a key performance area monitored by MECs or the Premier. Failure to achieve key performance indicators within this performance area can result in reduced bonuses, lack of promotion, re-assignment or even dismissal. In short, because it is not possible to create binding agreements between provincial departments, one compelling alternative is to use the employment agreements of heads of departments or senior officials within the province to enforce memoranda of co-operation. The most effective legal mechanism for ensuring provincial inter-departmental co-operation is to be found in employment contracts — and nowhere else.

If a provincial department intends to pursue this second response, it will be necessary to review current employment contracts with senior officials and obtain labour advice on the possibility of amending these contracts to insert additional performance requirements. Further elaboration of this rather novel legal mechanism falls beyond the scope of this chapter.

(ee) Using The IGRFA as a Guide to Intra-Governmental Disputes

Although the Act cannot resolve a dispute between two or more departments of the same provincial government, we wish to suggest that it may serve as a "guide" to the formation of documents that might assist the province in the resolution of such conflicts. Section 35 of the Act introduces the concept of implementation protocols ('IPs'). IPs have, heretofore, often been referred to as memoranda of co-operation. The advent of the Act has refined the meaning and the scope of such agreements. As we have already noted, section 35(1) of the Act emphasises that where the implementation of a policy, the exercise of a statutory power or the performance of a statutory function, or the provision of a service is dependant on different state organs acting in concert, the state actors involved must coordinate their actions. They may do so by entering into an implementation protocol. This proviso means that while an IP is not compulsory, some form of agreement of cooperation is necessary. Section 35(2) demands that an IP must be considered in the following situations:

> an implementation protocol will materially assist the organs of state participating in the provision of a service in a specific area to co-ordinate their actions in that area; or an organ of state to which primary responsibility for the implementation of the policy, the exercise

of the statutory power, the performance of the statutory function or the provision of the service has been assigned lacks the necessary capacity.[1]

(ff) Dispute Settlement

As we have been at pains to point out, neither FC Chapter 3 nor the Act provide mechanisms for the resolution of intra-governmental provincial dispute resolution. The power to determine such mechanisms vests in the Premier.

However, both FC Chapter 3 and the Act suggest how government officials might best resolve such disputes. One non-judicial mechanism might be an intra-governmental forum. Such a forum could be composed of designated officials from the relevant departments, the appropriate MECs and the Premier. The Act also suggests the following dispute resolution mechanisms: *(a)* the provincial Premier or relevant MECs could provide a facilitator; and/or *(b)* the facilitator could submit a non-binding report to the Premier.

(gg) Enforcement

Neither Chapter 3 of the Final Constitution nor the Act speak to intra-governmental dispute resolution. The reason for this silence is that intra-governmental disputes between provincial departments do not generate justiciable constitutional or legal conflicts. The power to resolve such disputes vests solely in the Premier of the province.

That the power to resolve such disputes vests solely in the Premier of the province does not mean that the Premier lacks the capacity to prevent intra-governmental conflicts. The Premier has an array of tools at his disposal to prevent — and to resolve — such conflicts. Agreements between departments — though not contracts in the normal justiciable sense — can be crafted in a manner that permits third parties to determine whether the provincial departments in question have discharged their duties. The Act's provisions regarding Implementation Protocols offer a reasonably good template for such agreements.

Ultimately, however, an intra-governmental agreement is only as good as the penalties in place for non-compliance. Such penalties for non-compliance might range from the withholding of performance bonuses for the parties responsible for the breach to the actual discharge of officials who repeatedly failed to comply with their statutory, ministerial or IP responsibilities. Agreements between provincial departments in the same province must make absolutely certain that all parties concerned understand that failure to discharge their duties may result in the imposition of such severe penalties.

(e) Practical Problems with the IGFRA: Premiers' Intergovernmental Forums and the District Intergovernmental Forums

Several studies have suggested that two types of forum envisaged by the IGRFA — the Premiers' Intergovernmental Forums (PIFS) and the District Intergovern-

[1] IGRFA s 35(2)*(c)-(d)*. The Act then elaborates, in IGFRA 35(3), the features that an IP must possess.

mental Forums (DIFS) — are not living up to expectations. The primary problem is that their membership often suffers from being both over-inclusive and under-inclusive.

As we noted above, forum membership should consist largely of those politicians responsible for the issues under consideration. Research conducted by Nico Steytler, R Baatjies and other academics at the University of the Western Cape reveals a 'doors open' approach to attendance. As a result, forums often contain as many bureaucrats as politicians.[1] Such openness has its virtues: bureaucrats and politicians may exchange useful information. However, other avenues exist for the transmission of technical information. The purpose of the forums is the coordination of policy. The over-inclusiveness has three untoward effects. First, 'too many chefs' may well reduce the effectiveness of forum discussions. Second, the regular presence of bureaucrats may lead to their 'politicization' — when their function, in a well operating democracy, is to provide politicians with fairly objective assessments. Third, the research conducted by Steytler and others suggest that the presence of bureaucrats in these open forums is largely intended to intimidate politicians who hold opposing or minority views.[2] Indeed, the very possibility of such intimidation is one reason the Act sought to limit forum membership in the manner it did.[3]

The exclusion of local municipalities from PIFs appears to have based upon the assumption that information would be shared with local municipalities through DIFs. However, DIFs have not played this role. The under-inclusivity of PIFs is of particular import where a given municipality supplies a significant portion of the economic resources required to carry out the mandate of a given PIF.[4]

The studies conducted by the University of the Western Cape also reveal some confusion regarding the obligations each sphere of government and each organ of state have in terms of the IGRFA.[5] For example, many municipalities operate under the mistaken impression that the inclusion of bureaucrats in the DIFs amounts to the establishment of a Technical Support Structure.[6] Technical Support Structures are independent bodies and consist solely of governmental officials. If a sphere of government wishes to establish such structures, then they must comply with the requirements of the IGRFA.

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[1] R Baatjies & N Steytler *District Intergovernmental Forums and Premiers Intergovernmental Forums: A Preliminary Assessment of Institutional Compliance with the Intergovernmental Relations Framework Act* (2006) Local Government Project, Community Law Centre, University of the Western Cape.

[2] Ibid.

[3] The Intergovernmental Relations Audit reports confusion, especially in the DIFs, as to who is a formal member and who is merely an invitee.

[4] Ibid.

[5] R Baatjies & N Steytler 'Intergovernmental Relations in Practice' (2006) 8(5) *Local Government Bulletin*.

[6] R Baatjies & N Steytler *District Intergovernmental Forums and Premiers Intergovernmental Forums: A Preliminary Assessment of Institutional Compliance with the Intergovernmental Relations Framework Act* (2006) Local Government Project, Community Law Centre, University of the Western Cape. See also Y Fessha & N Steytler (2006) *Provincial Intergovernmental Forums: A post–Intergovernmental Relations Framework Act Compliance Assessment* Local Government Project, Community Law Centre, University of the Western Cape (November 2006).

Finally, it comes as no surprise that provincial government officials often dominate PIFS and leave little opportunity for district officials to voice their opinions.[1] The PIFs appear to replicate many of the problems we have already identified with national/provincial fora such as the President's Co-ordinating Council.

(f) ANC Dominance and the Efficacy of the IGFRA

As we noted earlier, the Final Constitution creates space for two competing forms of federalism. Each form of federalism reflects a different conception of intergovernmental relations (IGR) and cooperative governance. The first form of integrated South African federalist state contemplated by the Final Constitution — call it cooperative IGR — assumes relative parity of power between the national government and subnational constituents (the provinces and the municipalities.)[2] The second form of integrated South African federalist state contemplated by the Final Constitution — call it coercive IGR — reflects a hierarchical distribution of power: national government largely dominates the nation's subnational constituent parts.[3] However, several important pieces of legislation — including the Intergovernmental Relations Framework Act, the Provincial Tax Regulation Process Act 53 of 2001, the Intergovernmental Fiscal Relations Act 97 of 1997, and the Division of Revenue Act — and constitutional provisions that determine the parameters of provincial and local fiscal autonomy tilt our body politic in the direction of coercive IGR. The marriage of political culture — ANC dominance — to political structures that favour the national government — and ANC dominance — underwrite this contention.[4] However, Steytler and Watt's analyses in this regard carry more than a whiff of disappointment — as if things might have been different. Mahlerbe likewise writes: 'The Intergovernmental Relations Framework Act reflects the present centralizing tendency from the side of the national government, and it will serve to confirm, no, reinforce, the de facto status

[1] R Baatjies & N Steytler *District Intergovernmental Forums and Premiers Intergovernmental Forums: A Preliminary Assessment of Institutional Compliance with the Intergovernmental Relations Framework Act* (2006) Local Government Project, Community Law Centre, University of the Western Cape.

[2] N Steytler 'Cooperative and Coercive Models of Intergovernmental Relations: A South African Case Study' in *Intergovernmental Relations: A Festhschrift for Ronald Watts* (forthcoming, 2009, on file with author); R Watts *Intergovernmental Relations*: *A Report for the Department of Constitutional Development and Provincial Affairs* (1999).

[3] In 1997, Ronald Watts contended that the Final Constitution 'represents an innovative hybrid combining some federal features with some constitutionally decentralized unitary features'. R Watts *Federalism: The Canadian Experience* in *Federalism: Theory and Practice Volume 2* (1997) 2. See also N Steytler 'One Party Dominance and the Functioning of South Africa's Decentralised System of Government' in Rudolf Hrbek (ed) *Political Parties and Federalism* (2004) 159.

[4] See R Watts 'Intergovernmental Relations: Conceptual Issues' N Levy and C Tapscott (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001) 22; C Leuprecht and H Lazar, 'From Multilevel to "Multi-order' Governance?" in H Lazar and C Leuprecht (eds) (2007) *Spheres of Governance: Comparative Studies of Cities in Multilevel Governance Systems*' 1. Steytler writes: 'While the object of providing "coherent government" may seem a neutral goal, the coherence is, however, premised on the "realisation of national priorities"... Given that the nature and extent of these [provincial and municipal] services are prescribed in national policies and legislation, the focus then shifts to [the] "monitoring implementation" of [national] policy and legislation' and not the coordination of varying policy initiatives. N Steytler Cooperative and Coercive Models of Intergovernmental Relations' (supra) at 7.

of the other spheres as delivery agents of the national government.'[1] But given 15 years of political dominance by the ANC (65% of the electorate is still 65%) and its longstanding resistance to fully devolved federalism, it is hard to imagine how things might have turned out otherwise.

One incident serves as anecdotal evidence for the realpolitik view that 'coercion' animates current IGR and the manner in which the IGRFA is brought to bear on specific disputes. In 2006, the Democratic Alliance, with a plurality of the local government vote, secured sufficient support from other opposition parties to form a majority in the municipal government of Cape Town. The ANC controlled provincial government in the Western Cape attempted to change existing regulations in order to enable an ANC coalition to retain control of the municipality. The National government was, not surprisingly, strangely slow to intercede and to mediate the dispute.[2] Ultimately, the National government did intervene and a compromise was reached.[3] Such responses are indicative of coercive IGR and do little to demonstrate a genuine commitment to the Final Constitution's vision of three distinct, interdependent, and interrelated spheres of government.

[1] See R Malherbe 'Does the Intergovernmental Relations Framework Act 13 of 2005 Confirm or Suppress National Dominance' (2006) (4) *Tydskrif vir die Suid-Afrikaanse Reg* 810.

[2] P Joubert 'Zille: ANC Top Dogs in the Loop' Mail & Guardian (25 September 2006) available at http://www.mg.co.za/articlePage.aspx?articleid=284876&area=/insight_national, accessed on 1 May 2009.

[3] See D Dyzenhaus 'The Pasts and Future of the Rule of Law in South Africa' (2007) 124 *SALJ* 734.

15 Legislative Competence

Victoria Bronstein

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15.1 INTRODUCTION

This chapter explores how the division of power amongst national and provincial governments in our Constitution affects the validity of legislation. Legislative competence is an important issue in all constitutional regimes with federal characteristics.[1]

The South African Constitution allocates legislative powers between central and provincial governments on the basis of the subject matter of the legislation.[2] According to the Final Constitution[3], the nine provincial legislatures in South Africa are entitled to legislate, *inter alia*, on a number of subjects that are listed in schedules 4 and 5 of the Final Constitution.[4] These subjects are called 'functional areas'. National and provincial governments share legislative competence in functional areas listed in schedule 4. Schedule 4 embraces crucial matters like 'health services' and 'housing'. The functional areas in schedule 5 are usually the exclusive domain of provincial and local governments. Residual matters, not mentioned in either schedule, are reserved for the national legislature.[5] For example, foreign affairs would be the preserve of the national government.[6]

In all litigation that turns on questions of legislative competence, one must first determine the subject matter of the legislation under scrutiny. In some cases this

[1] South Africa is a state with federal characteristics. However, only governmental practice married to judgments of the Constitutional Court will, over time, determine where South Africa rests on a continuum of states with different degrees of decentralization. For a discussion of the contours of various models of federalism and their influence on South Africa's political structures, see S Woolman, T Roux and B Bekink, 'Cooperative Government' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein and S Woolman (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14.

R L Watts describes our Constitution as a 'unique South African hybrid' and adds:

> The Constitution is predominantly federal in character, although the label 'federation' has not been adopted. In my view, debates about whether South Africa is 'federal' or not are fruitless. More important is whether this particular form of hybrid makes possible effective governance and policy-making at both the national and sub national levels to meet the needs of the South African people, and whether modifications would help to meet these objectives.'

R L Watts 'Forward: States, Provinces, Lander, and Cantons: International Variety Among Sub National Constitutions' (2000) 31 *Rutgers L J* 941, 950. See also R L Watts 'Is the New South African Constitution Federal or Unitary' in B de Villiers (ed) *Birth of a Constitution* (1994) 75-88. (This analysis of the Interim Constitution would still be relevant as Constitutional Principle XVIII.2 provided that 'the powers and functions of the provinces' could not be substantially reduced by the Final Constitution).

[2] See R L Watts *Federalism: The Canadian Experience* (1997) 36-49; H M Seervai *Constitutional Law of India* (vol 1, 4 ed 1991) 287-289; Philip M Blair *Federalism and Judicial Review in West* Germany (1981) 71-92; P Hanks *Australian Constitutional Law: Materials and Commentary* (5 ed 1994) 348. See also *In re National Education Policy Bill 1995*, 1996 (3) SA 289 (CC); 1996 (4) BCLR 518 (CC) at para 22; B De Villiers (ed) *Evaluating Federal Systems* (1994); J Rose and J C Traut (eds) *Federalism and Decentralization: Perspectives for the Transformation Process in Eastern and Central Europe* (2002); D J Elazar *Federalism: an Overview* (1995); C Bolick *European Federalism: Lessons from America* (1994).

[3] Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC').

[4] FC ss 104(1)*(b)*(i) and 104(1)*(b)*(ii).

[5] FC s 33(1)*(a)*(iii).

[6] See *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC) *('Liquor Bill')* at para 46.

assessment is straightforward. For example, in *In re National Education Policy Bill 1995*,[1] the National Education Policy Bill[2] was automatically characterised as being about 'education'. Other cases are more difficult. The categorisation of legislation may raise challenging questions of statutory interpretation that force the Court to engage delicate political issues.[3]

If Parliament or a provincial legislature is held not to have had the competence to pass specific legislation, the resulting law will be invalid. In many cases about provincial powers, there is only an apparent conflict between specific provincial and national legislation. Thus, the first step in all competence and conflicts cases is to examine both legislative schemes individually to determine whether they are independently competent. If either the provincial legislation, or the national legislation, or both, fail the test of competence, the offending statute or statutes are invalid and the conflict is illusory. In some cases both pieces of conflicting legislation will be fully competent and valid: as we have already noted, our Constitution allows for vast and important areas of concurrent national and provincial legislative competence.[4] (The resolution of such conflicts is dealt with in the next chapter.[5]) It must, however, be remembered that legislative conflict presupposes that the conflicting legislation is competent and valid. The question of competence is always logically prior to the question of conflict.

This chapter starts by explaining the way in which the Constitution regulates the division of powers between the national legislature and the provincial legislatures. It then explores three major interpretive issues: (1) the categorisation function; (2) the scope of the section 44(2) override; and (3) the scope of the incidental power.

15.2 The Legislative Authority of the Republic

In South Africa, the legislative authority of the national sphere of government is vested in Parliament by FC s 44. The legislative authority of the provincial sphere of government is vested in the provincial legislatures in terms of FC s 104.[6] There is at least one signal difference in the way the Final Constitution treats the two kinds of authority. FC s 43 reads:

> When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.

[1] 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC).
[2] Act 83 of 1995.
[3] See *DVB Behuising (Pty) Limited v North West Provincial Government and another* 2001 (1) SA 500 (CC), 2000 (4) BCLR 347(CC) ('*DVB Behuising*').
[4] See FC Schedule 4.
[5] See V Bronstein 'Conflicts' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein and S Woolman (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 16.
[6] FC s 43.

In principle, a provincial legislature is also only bound by the Final Constitution when it legislates.[1] However, in cases where a particular province has passed a Provincial Constitution, that province is bound by both the national and the provincial Constitution in question.[2]

(a) Schedule 4: Concurrent legislative competence

The functional areas listed in schedule 4 cover fields of concurrent legislative competence.[3] Both the national and the provincial legislatures may pass legislation that fits into these functional areas.[4] For example, both the national legislature and a provincial legislature may pass valid legislation about 'housing'.

Determining the priority of legislation in a shared area of competence is not always so simple. A complex provincial legislative scheme may contain a provision that intrudes into a matter that should be regulated nationally. It would obviously be undesirable to be too rigid about disallowing such provisions where they are necessary for the coherence of legislation. In other federations, judges have needed to find creative judicial solutions in order to preserve the element of common-sense flexibility that is necessary to avoid legislative paralysis.[5] South Africans are assisted by the following provision in the Final Constitution:

[1] FC s 104(3).

[2] FC s 104(3).

[3] The areas of concurrent legislative competence listed in Part A of schedule 4 are 'Administration of indigenous forests; Agriculture; Airports other than international and national airports; Animal control and diseases; Casinos, racing, gambling and wagering, excluding lotteries and sports pools; Consumer protection; Cultural matters; Disaster management; Education at all levels, excluding tertiary education; Environment; Health services; Housing; Indigenous law and customary law, subject to Chapter 12 of the Constitution; Industrial promotion; Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence; Media services directly controlled or provided by the provincial government, subject to section 192; Nature conservation, excluding national parks, national botanical gardens and marine resources; Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence; Pollution control; Population development; Property transfer fees; Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5; Public transport; Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law; Regional planning and development; Road traffic regulation; Soil conservation; Tourism; Trade; Traditional leadership, subject to Chapter 12 of the Constitution; Urban and rural development; Vehicle licensing; Welfare services'. Part B of schedule 4 includes 'the following local government matters to the extent set out in section 155(6)*(a)* and (7): Air pollution; Building regulations; Child care facilities; Electricity and gas reticulation; Firefighting services; Local tourism; Municipal airports; Municipal planning; Municipal health services; Municipal public transport; Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law; Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto; Stormwater management systems in built-up areas; Trading regulations; Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems'.

[4] The national legislature has the power in terms of FC ss 44(1)*(a)*(ii) and 44(1)*(b)*(ii). The provincial legislature has the same power in terms of FC s 104(1)*(b)*(i).

[5] See K Swinton 'The Supreme Court and Canadian Federalism: The Laskin-Dickson Years' in P Macklem, R C B Risk, C J Rogerson, K E Swinton, L E Weinrib, J D Whyte *Canadian Constitutional Law* (Vol 1 1994) 143, 145.

> Provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes legislation with regard to a matter listed in Schedule 4.[1]

The scope of this power (referred to as the 'incidental power' in this chapter) raises interesting interpretive questions that will be looked at in more detail below.[2]

(b) Schedule 5: Exclusive provincial legislative competence.

Schedule 5 of the Final Constitution contains a list of discrete and (it is fair to say) relatively minor functional areas of exclusive provincial legislative competence.[3] Some functional areas possess slightly broader implications: for example, 'provincial cultural matters'. One or two, like 'liquor licenses', may have material financial implications.

The provincial legislatures have the power to pass legislation for their provinces with regard to any matter within a functional area listed in Schedule 5.[4] The general rule is that the national parliament does not have the power to legislate in these areas.[5] This rule is subject to an exception contained in FC s 44(2). This proviso allows the national legislature to 'intervene' and to legislate in Schedule 5 areas when the legislation is:

> Necessary to maintain national security; to maintain economic unity; to maintain essential national standards; to establish minimum standards required for the rendering of services; or to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

[1] FC s 104(4). See also FC s 44(3) which states: 'Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.'

[2] M Chaskalson and J Klaaren have suggested that there is also an incidental power that enables provincial legislation to have some operation outside the territory of a particular province. See M Chaskalson and J Klaaren 'Provincial Government' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, and S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) 4-2.

[3] Part A of Schedule 5 lists the following areas of exclusive provincial competence: 'Abattoirs; Ambulance services; Archives other than national archives; Libraries other than national libraries; Liquor licences; Museums other than national museums; Provincial planning; Provincial cultural matters; Provincial recreation and amenities; Provincial sport; Provincial roads and traffic; Veterinary services, excluding regulation of the profession'. Part B of Schedule 5 includes 'the following local government matters to the extent set out for provinces in section 155(6)*(a)* and (7): Beaches and amusement facilities; Billboards and the display of advertisements in public places; Cemeteries, funeral parlours and crematoria; Cleansing; Control of public nuisances; Control of undertakings that sell liquor to the public; Facilities for the accommodation, care and burial of animals; Fencing and fences; Licensing of dogs; Licensing and control of undertakings that sell food to the public; Local amenities; Local sport facilities; Markets; Municipal abattoirs; Municipal parks and recreation; Municipal roads; Noise pollution; Pounds; Public places; Refuse removal, refuse dumps and solid waste disposal; Street trading; Street lighting; Traffic and parking.'

[4] FC s 104(1)*(b)*(ii).

[5] FC s 44(1)*(a)*(ii).

When FC s 44(2) applies, the national legislation automatically prevails.[1] If the subsection does not apply, the national legislation will be invalid.[2]

For this reason disputes about Schedule 5 powers will tend to be disputes that are primarily about legislative competence rather than conflict. *Ex Parte President of the Republic of South Africa in re: Constitutionality of the Liquor Bill* illustrates this point. The judgment, which deals with a Schedule 5 area, focuses on competence rather than conflict.

(c) Exclusive national legislative competence[3] and assignment of powers by the national legislature.

'The national level of government has exclusive power in respect of all matters other than those specifically vested in the provincial legislatures' by the Constitution.[4] The general principle is that residual matters outside the scope of the functional areas in Schedules 4 and 5 are the preserve of the national legislature.[5] The Final Constitution also contains provisions that specifically empower the national legislature to enact legislation. For example, the security services must be 'structured and regulated by national legislation' in terms of FC s 199(4).

It must, however, be remembered that valid provincial legislation can regulate matters that are reasonably necessary for, or incidental to, the effective exercise of a power concerning a matter listed in Schedule 4.[6] Consequently, provincial powers can bleed into areas of exclusive national jurisdiction.[7] A provincial legislature can also acquire extra powers by assignment: Parliament may 'assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government.'[8] Finally, a provincial legislature may play an advisory role in matters outside its authority.[9]

(d) Other provincial legislative powers

Provincial legislatures have the power to pass and to amend provincial

[1] FC s 147(2).

[2] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) *('First Certification Judgment')* at para 335.

[3] The words 'exclusive national legislative competence' are not used in the Final Constitution. But see the substance of the formulation in *First Certification Judgment* (supra) at fn 163.

[4] Ibid at para 256.

[5] J Klaaren believes that the following matters fall within this residual legislative competence: 'justice, prisons, foreign affairs, labour, mining, energy, land, water, national public enterprises, broadcasting and posts and telecommunications.' See J Klaaren 'Federalism' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, and S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) 5-5, fn 1.

[6] FC s 104 (4).

[7] The implications of FC s 104 (4) are dealt with at § 15.2 infra.

[8] FC s 44(1)*(a)*(iii) read with s 104(1)*(b)*(iii). See T Madlingozi and S Woolman 'Provincial Legislative Authority' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein and S Woolman (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 19.

[9] FC s 104(5).

Constitutions.[1] They may pass legislation with regard to 'any matter for which a provision of the Constitution envisages the enactment of provincial legislation.'[2] They can assign any of their legislative powers to a municipal council in their province.[3] (Other specific competences in respect of local government are dealt with in the chapter on 'Local Government'.[4]) The provinces possess limited provincial taxing powers.[5] A provincial legislature may impose:

(a) Taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property or customs duties; and

(b) flat-rate surcharges on any tax, levy or duty that is imposed by national legislation, other than on corporate income tax, value-added tax, rates on property or customs duties.[6]

These powers 'may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour.'[7] Furthermore, provincial taxes 'must be regulated in terms of an Act of Parliament, which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.'[8] Hence, provincial taxing powers are subject to national legislation that may significantly restrict their ambit. However, as Chaskalson and Klaaren argue, the national legislature may not completely 'extinguish the provincial taxing power.'[9]

Parliament has passed the Provincial Tax Regulation Process Act[10] to regulate provincial taxes.[11]

[1] FC s 104(1)*(a)*.

[2] FC s 104(1)*(b)*(iv). See also *First Certification Judgment* (supra) at para 256.

[3] FC s 104(1)*(c)*.

[4] See R Kriel, M Monadjem and Barry Bekink 'Local Government' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein and S Woolman (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 20.

[5] See T Madlingozi and S Woolman 'Provincial Legislative Authority' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein and S Woolman (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 19.

[6] FC s 228 (1).

[7] FC s 228 (2)*(b)*.

[8] FC s 228(2).

[9] M Chaskalson and J Klaaren 'Provincial Government' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz and S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) 4-19.

[10] Act 53 of 2002

[11] A full analysis of this Act is beyond the scope of this chapter. But for commentary on the Act when it was still in Bill form see P Surtees 'Bill Would Allow South African Provinces to Impose Taxes' Worldwide Tax Daily (11 June 2001), available at: http://www.deneysreitz.co.za/news/news.asp?This-Cat=5&ThisItem=76) (accessed on 28 January 2004).

15.3 INTERPRETIVE ISSUES

(a) The categorisation function: Allocating legislation to functional areas

According to the Constitutional Court in *DVB Behuising,* assigning legislation to functional areas 'involves the determination of the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about.'[1] An analysis of the subject matter of legislation is not just a global assessment of an entire Act. Different parts of a legislative scheme may be split up and characterized in different ways. The *DVB Behuising* Court writes:

> A single statute may have more than one substantial character. Different parts of the legislation may thus require different assessment in regard to a disputed question of legislative competence.[2]

[1] *DVB Behuising* (supra) at para 36. In Canada, Albert Abel has argued that the process of categorization should be divided into the following three separate steps that should not be conflated. (1) Identify the matter of the legislation; (2) Delineate the 'scope of the competing classes' in the Constitution; (3) Determine the class into which the legislation falls. Swinton believes that it is impossible to keep these three questions apart. The answers to the initial questions are 'affected by the ultimate objective of linking the statute to the classes of subjects in the constitution.' K Swinton 'The Supreme Court and Canadian Federalism: The Laskin-Dickson Years' in P Macklem, R C B Risk, C J Rogerson, K E Swinton, L E Weinrib, J D Whyte (eds) *Canadian Constitutional Law* (Vol 1 1994) 143, 144.

The outcomes of categorisation analysis can sometimes be unexpected. In *German Television*, the Land (Province) of Hamburg had given a broadcasting monopoly to Norddeutscher Rundfunk. 12 BVerfGE 205 (1961). The problem was whether the federal government was entitled to make provision for broadcasts into the province which would have the effect of subverting this monopoly. The national government was unsuccessful despite the fact that 'telecommunications' was an area of exclusive federal authority under the Basic Law. In its interpretation the Court explored the constitutional 'text, context, structure, purpose, and history [which] combined to give the provision for exclusive federal power over telecommunications a narrower scope than an untutored observer might have expected'. D Currie *The Constitution of the Federal Republic of Germany* (1994) 38. Currie writes:

> As a textual matter, said the Constitutional Court, the term 'telecommunications' [embraced only] 'the technical processes of transmitting signals,' not the field of broadcasting as a whole. This conclusion was confirmed, the Court added, by the use of the broader term broadcasting ('Rundfunk') in connection with freedom of expression in Article 5(1). Moreover, radio and television programming was a cultural matter, and the 'fundamental decision' of the Basic Law to leave cultural matters to the Lander (by omitting them from the list of federal powers) made it impossible to uphold federal authority over anything cultural in the absence of clear language. In addition, the reason for the grant of federal authority was to prevent the 'chaos' that might result from disuniform regulation of such matters as the location and strength of transmitters and the allocation of frequencies; there was no comparable need for uniformity with respect to the content of broadcasts. Tradition was not to the contrary since the Lander had disputed the exercise of federal authority over programming throughout the Weimer period; and the record of the Constitutional Convention confirmed that the cultural side of broadcasting was not within the new grant of federal power. Accordingly, the monopoly granted by Hamburg was invalid as to the technical aspects of transmitting radio and television signals but valid as to everything else; and for similar reasons the competing federal network could be authorised only to transmit signals, not to determine what was to be transmitted.

Ibid at 37-8. It is essential to note that in German constitutional law there is a pattern of powers being construed against the central government and in favour of the provinces. Ibid at 38. Our law contains no such presumption.

[2] *DVB Behuising* (supra) at para 63.

When characterizing legislation, the Constitutional Court has expressly approved a purposive approach to interpretation.[1] The Court has also said that the effects of the law are relevant[2] and that statutes should be looked at in historical context.[3] With respect to categorization, it is not just a matter of what the Court has said, but what it actually does. For example, a functional approach to categorisation dominates the analysis in *Liquor Bill*. (These approaches are discussed below.[4] The section on different models of federalism in the next chapter may also be relevant to characterization.[5])

(i) *Presumptions and politics*

Federal constitutions tend to reflect pragmatic responses to political cleavages or pressures.[6] South Africa is no exception. It is fair to say that from the start of constitutional negotiations the African National Congress championed strong national government at the expense of provincial powers. Opposition parties with strong regional support — the Inkatha Freedom Party in KwaZulu-Natal and the National Party in the Western Cape — advocated decentralized distributions of power.[7] The Constitutional Court has been strikingly even-handed in its treatment of federalism cases. The two *Certification* judgments demonstrate the Court's desire to maintain a dignified distance above the political fray.[8]

The Court has correctly attempted to use rigorous legal discipline in order to insulate itself from the claim that it pursues a particular political agenda. The history of the characterization issue in *DVB Behuising (Pty) Limited v North West Provincial Government and another* can be used to support the proposition that

[1] See *DVB Behuising* (supra) at para 36; *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995* 1996 (4) SA 653 (CC), 1996 (7) BCLR 903 (CC) at para 19.

[2] Ibid at para 36.

[3] Ibid.

[4] See § 15.3*(a)*(1)-(10).

[5] See V Bronstein 'Conflicts' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein and S Woolman (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 16.

[6] See D J Elazar *Exploring Federalism* (1987).

[7] See, eg, W Beinart *Twentieth-Century South Africa* (2001) 276, 279. See also S Friedman and R Humphries (eds) *Federalism and its Foes* (1993).

[8] *First Certification Judgment* (*supra*) and *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of The Republic of South Africa, 1996* 1997(2) SA 97 (CC), 1997(1) BCLR 1 (CC) *('Second Certification Judgment')*. South Africa does not have judges who are associated with an aggressive federalist stance. In some countries judges develop definite profiles in division of powers matters. For example in Canada, Katherine Swinton has contrasted the 'centralist' views of Judge Bora Laskin with the federalist or provincial vision of Judge Jean Beetz. K Swinton 'The Supreme Court and Canadian Federalism' (supra) at 229-234.

classification questions are not merely questions of politics. There are objectively better and worse legal answers to federalism questions.[1]

In the court a quo in *DVB Behuising*, Mogoeng J held that:

> *(a)* Provincial legislatures have a 'clearly defined and very limited legislative authority' and have to operate 'within the strict parameters' of that authority. *(b)* In construing the powers of provincial legislatures the relevant provisions of the Constitution must 'be given a strict interpretation. This is necessary to ensure that no provincial legislature is allowed to exercise the authority it does not have and thereby usurp the functions of Parliament.[2]

In light of these initial conclusions, Mogoeng J had to establish whether an apartheid Proclamation made under the Black Administration Act fell under national or provincial competences in terms of the Interim Constitution. He found that the Proclamation was predominantly about 'land, land tenure or ownership, the registration of deeds and the establishment and abolition of townships'[3] (national competences) rather than 'housing', 'local government', 'trade' and 'industrial promotion' (provincial competences).

When the case came before the Constitutional Court, Justices O'Regan, Sachs and Goldstone expressed concern about the consequences of a finding that would place the Proclamation within the sphere of provincial competence. Despite this fear, they were unable to support Mogoeng J's finding that the predominant legal subjects of the Proclamation were national competences.[4] They could not do so because the argument that the Proclamation chiefly regulated 'local government' issues was more compelling.

The Constitutional Court made it clear that there is no presumption in the text that assists judges in deciding how to categorise legislation. On behalf of the majority of the Court, Justice Ngcobo wrote:

> I respectfully disagree with the view expressed by Mogoeng J to the effect that the functional areas of provincial legislative competence set out in the schedules should be 'given a strict interpretation'. In the interpretation of those schedules there is no presumption in favour of either the national legislature or the provincial legislatures. The functional areas

[1] There is a level of indeterminacy in characterisation questions. When the different methods of interpretation run out, R Lederman suggests a last resort: 'In the making of these very difficult relative-value decisions, all that can rightly be required of judges is straight thinking, industry, good faith and a capacity to discount their own prejudices. No doubt it is also fair to ask that they be men [and women] of high professional attainment, and that they be representative in their thinking of the better standards of their times and their countrymen [and women].' R Lederman 'Classification of Laws and the British North America Act' in R Lederman *Continuing Canadian Constitutional Dilemmas* (1981) extracted in P Macklem, R C B Risk, C J Rogerson, K E Swinton, L E Weinrib, J D Whyte *Canadian Constitutional Law* (Vol 1 1994) 166, 169.

[2] *DVB Behuising* (supra) at para 16 (Ngcobo J). The judgment of the court a quo in *DVB Behuising (Pty) Ltd v North West Provincial Government and Another*, Bophuthatswana High Court, Case No 308/99 (27 May 1999) is not yet reported.

[3] *DVB Behuising* (supra) at para 16.

[4] Ibid at para 102.

must be purposively interpreted in a manner which will enable the national Parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively.[1]

(ii) *A functional approach*

When judges use a functional approach to federalism problems they consider how different levels of government can function most effectively within the given framework of a constitutional scheme. Decisions are 'guided by . . . beliefs about the optimal balance of power between the federal and provincial governments.'[2] Judges explicitly weigh the 'values of uniformity and diversity'[3] in specific contexts.

In *Liquor Bill*, the Bill under scrutiny had been passed by the National Legislature.[4] It was referred to the Constitutional Court by the President for a finding on its constitutionality.[5] The Bill aimed to regulate comprehensively 'the manufacture, distribution and sale of liquor on a uniform basis' throughout South Africa.[6] This objective was fraught with difficulty. 'Liquor licenses' is, after all, an exclusive provincial legislative competence listed in Schedule 5.[7]

The initial question in this case was one of characterisation. It was necessary to establish the scope of the term 'liquor licenses' in Schedule 5 in order to determine whether the national legislature had strayed into an area of exclusive provincial legislative competence. Categorisation is always a problem because the topics in the schedules are not watertight and discrete. For example, the functional area 'liquor licenses' overlaps with the concurrent functional areas 'trade' and 'industrial promotion.'[8] Despite this natural linguistic overlap, the Court found that an analysis of the overall constitutional scheme reveals that Schedule 5 matters need to be interpreted as having distinct identities which can be differentiated from other functional areas.[9]

[1] *DVB Behuising* (supra) at para 17. The majority of the Constitutional Court is protective of provincial legislative power and respectful of democracy. Ngcobo J acknowledges that: 'The North West legislature is itself a democratic institution and, it was fully entitled to make the legislative choice [that it did]'. Ibid at para 69. The minority take a much more interventionist position. They engage with the situation created by the legislation and try to achieve the best substantive outcome. The majority's position is easier to defend- but there may be some justification for the minority approach in our broken legislative reality.

[2] K Swinton 'The Supreme Court and Canadian Federalism: The Laskin-Dickson Years' in P Macklem, R C B Risk, C J Rogerson, K E Swinton, L E Weinrib, J D Whyte *Canadian Constitutional Law* (Vol 1 1994) 143, 145.

[3] Ibid.

[4] B 131B-98.

[5] *Liquor Bill* (supra) at para 2.

[6] Ibid at para 21.

[7] The Western Cape government formulated the following complaint:

> The Bill exhaustively regulates the activities of persons involved in the manufacture, wholesale distribution and retail sale of liquor; and that even in the retail sphere the structures the Bill seeks to create reduce the provinces, in an area in which they would (subject to section 44(2)) have exclusive legislative and executive competence, to the role of funders and administrators. The province asserts that the Bill thereby intrudes into its area of exclusive legislative competence.

Ibid at para 38.

[8] Ibid at para 48.

[9] Ibid at para 56.

The Court's functional approach in *Liquor Bill* becomes even more evident when it distinguishes matters on the basis of whether they require regulation 'inter-provincially, as opposed to intra-provincially.'[1] It concludes 'that where provinces are accorded exclusive powers these should be interpreted as applying primarily to matters which may appropriately be regulated intra-provincially.'[2] The functional area 'liquor licenses' is consequently interpreted to mean 'intra-provincial liquor licenses.'[3]

The elegance of this analysis becomes evident when it is applied to the Liquor Bill's 'three-tier' structure.[4] The Bill contains schemes of regulation for (1) control of manufacturing or production of liquor, (2) distribution and (3) retail trade in liquor. The *Liquor Bill* Court concludes that both manufacturers and distributors of liquor are likely to operate across provincial boundaries:

> If production and distribution of liquor were to be regulated by each province, manufacturers and distributors would require licences from each province for the purpose of conducting national trading, and possibly a national licence for export.[5]

On the other hand, retail trade in liquor rarely operates across provinces and it is appropriate for it to be regulated provincially. As a result, retail licensing was held to be exclusively within the legislative competence of the provincial legislatures.[6] Thus, it could not be interfered with by the National Legislature in the absence of a ground to be found in FC s 44(2).[7]

One should keep in mind that not all characterisation problems are the same. The fact that *Liquor Bill* involved the delineation of an exclusive provincial legislative competence had an important impact on the Court's reasoning. The reasoning in the judgment would not apply to the interpretation of Schedule 4 competences because the Constitution regulates those areas so differently.

It is interesting to note that the *Liquor Bill* Court chose not to mention the Constitutional Principles.[8] (The way in which the Constitutional Principles form a background to the Constitutional text and their interpretive role is discussed elsewhere in the book.[9]) The text of Constitutional Principle XX1.1 would have made a compelling addition to *Liquor Bill*'s functional arguments. The Principle states:

> The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.

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[1] *Liquor Bill* (supra) at para 53.
[2] Ibid.
[3] Ibid at para 75.
[4] Ibid at para 73.
[5] Ibid at para 74.
[6] Ibid at para 80. This category includes 'micro-manufacturers whose operations are essentially provincial.' Ibid at paras 84 and 88.
[7] See § 15.3*(b)* infra.
[8] But see *Liquor Bill* (supra) at para 52 (Alluding to the principles).
[9] See J Kentridge and D Spitz 'Interpretation of the Bill of Rights' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein and S Woolman (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 31.

The Court's reluctance to breathe new life into the Principles is understandable. However, they could have meaningful interpretive force in the context of federalism.

(iii) *The purpose and effect of the legislation*

The Constitutional Court 'has regard to' the purpose and effect of legislation when categorising it in terms of functional areas.[1] The purpose of a statute is what the law 'was enacted to achieve.'[2] Although the following statement was made in the context of Schedule 6[3] of the Interim Constitution, the form of analysis remains the same under the Final Constitution. The KwaZulu-Natal Provincial Legislature wrote:

> If the purpose of legislation is clearly within schedule 6, it is irrelevant whether the Court approves or disapproves of its purpose. But purpose is not irrelevant to the schedule 6 enquiry. It may be relevant to show that although the legislation purports to deal with a matter within schedule 6 its true purpose and effect is to achieve a different goal which falls outside the functional areas listed in schedule 6. In such a case a Court would hold that the province has exceeded its legislative competence. It is necessary, therefore, to consider whether the substance of the legislation, which depends not only on its form but also on its purpose and effect, is within the legislative competence of the provincial legislature.'[4]

The preamble and the legislative history of a statute are also relevant in establishing the purpose of legislation.[5]

The effect of legislation may also be relevant. For example, in *Texada Mines v AG BC*[6] the Canadian Supreme Court decided that 'Where a provincial tax had the effect of making a commodity too expensive to sell in interstate commerce, the tax was held to relate to the Canadian federal power of interprovincial commerce.'[7]

(iv) *An historical approach*

Legislative history is a useful tool to help establish the purpose of legislation and hence its characterisation.[8] The Court is also receptive to, although not necessarily persuaded by, broader historical arguments presented to it. In *Liquor Bill*, the Minister of Trade and Industry argued that Parliament had the competence to

[1] *DVB Behuising* (supra) at para 36.
[2] Ibid.
[3] Schedule 6 of the Interim Constitution listed functional areas in which the provinces had legislative competence.
[4] *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature* (supra) at para 19.
[5] *DVB Behuising* (supra) at para 36.
[6] [1960] SCR 713.
[7] J Klaaren 'Federalism' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein and S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) 5-6.
[8] *DVB Behuising* (supra) at para 36.

pass the Liquor Bill in the light of the 'history of overt racism in the control of the manufacturing, distribution and sale of liquor' in South Africa.[1] Historical arguments about apartheid land law figured prominently in all the judgments in *DVB Behuising*. Historical analyses also pay attention to an Act's social context.

(b) Interpreting the scope of the section 44(2) override

FC Section 44(2) provides:

> Parliament may intervene, by passing legislation in accordance with section 76 (1), with regard to a matter falling within a functional area listed in schedule 5, when it is necessary:
> *(a)* to maintain national security;
> *(b)* to maintain economic unity;
> *(c)* to maintain essential national standards,
> *(d)* to establish minimum standards required for the rendering of services, or
> *(e)* to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

In the *First Certification Judgment*, the Court held that the 'power of intervention [under 44(2)] is defined and limited. If regard is had to the nature of the schedule 5 powers and the requirements of [s 44(2)], the occasion for intervention by Parliament is likely to be limited.'[2] This dictum implies that the five requirements for intervention will be interpreted narrowly. (The Court does hedge its bets slightly by using the word 'likely'.) The Justices are somewhat less equivocal in the *Second Certification Judgment*: They speak of the 'compelling importance of the matters referred to in' FC s 44(2).[3] This phrase implies that intervention will not be easily countenanced under this subsection.

There is, however, one possible interpretation of *Liquor Bill* that suggests that FC s 44(2)*(b)* may be more easily satisfied when economic activity is understood to take place at a national level rather than an intra-provincial one. Cameron AJ wrote:

> In the context of trade, economic unity must in my view therefore mean the oneness, as opposed to the fragmentation, of the national economy with regard to the regulation of inter-provincial, as opposed to intra-provincial, trade. In that context it seems to follow that economic unity must contemplate at least the power to require a single regulatory system for the conduct of trades which are conducted at a national (as opposed to an intra-provincial) level.[4]

The Justices are correct to be concerned about the possibility of provincial powers being used to create barriers to trade within the national economy. But provincial legislation need not create barriers. A province may want to deregulate a sector in order to allow operators easier access. In such a case, it is hard to

[1] *Liquor Bill* (supra) at para 32.
[2] *First Certification Judgment* (supra) at para 257.
[3] *Second Certification Judgment* (supra) at para 106.
[4] *Liquor Bill* (supra) at para 76.

imagine why, in principle, the national government would be able to intervene in order 'to maintain economic unity.'[1] It must be remembered that the Court said that 'the desirability from the national government's point of view of consistency' cannot, on its own, warrant FC s 44(2) intervention.[2] That said, in some cases such provincial deregulation could cause intervention to be justified on the basis of the need to 'maintain essential national standards' (FC s 44(2)*(c)*); or to 'establish minimum standards required for the rendering of services' (FC s 44(2)*(d)*).

Acting Justice Cameron's statements are set against the background of an industry that most agree requires a high level of regulation. Indeed, the Minister of Trade and Industry convinced the Court that multiple regulators across the country would be inimical to the maintenance of economic unity in the context of the liquor manufacturing and distribution sectors.[3] Readers must locate the reasoning of the judgment in its particular context.

(c) Interpreting the scope of the incidental power

(i) *The current source of the incidental power*

FC Section 104(4) states that:

> Provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in schedule 4, is for all purposes legislation with regard to a matter listed in schedule 4.

FC 44(3) reads the same with respect to national legislative authority:

> Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in schedule 4 is, for all purposes, legislation with regard to a matter listed in schedule 4.

I refer to both of these powers as 'incidental' powers. Acting Justice Cameron has stated that '[t]he phrase 'reasonably necessary for, or incidental to' should be interpreted as meaning 'reasonably necessary for and reasonably incidental to'.'[4]

(ii) *Implicit use of the incidental power in 'DVB Behuising'*

The incidental power was an important factor in the outcome of *DVB Behuising*. The case arose because the North West Provincial legislature purported to repeal Proclamation R293 of 1962 in the North West Province. The Proclamation, which had been issued in terms of the Native Administration Act 38 of 1927, was a relic of old apartheid land law that was based on a policy of 'residential segregation.'[5] It made provision for the establishment of special types of

[1] FC s 44(2)*(b)*.
[2] *Liquor Bill* (supra) at para 81.
[3] Ibid at para 79.
[4] Ibid at para 81.
[5] *DVB Behuising* (supra) at para 41.

townships on land held by the South African Native Trust in which African South Africans could only acquire inferior types of insecure tenure. The proclamation also contained provisions relating to the control of trading and other activities in the affected townships.[1]

The constitutional analysis in *DVB Behuising* is complicated by transitional provisions that affected the Proclamation in question.[2] However, one of the central issues turns on a simple question of categorization. Could the proclamation be classified as fitting into the list of legislative competences of the provinces as set out in schedule 6 of the Interim Constitution?

The majority of the Court held that the Proclamation '[disclosed] an orchestrated scheme for the establishment, management and regulation of informal townships and establishment of local government.'[3] The Proclamation was found in substance to be in the functional areas of 'regional planning and development, urban and rural development and local government': all are provincial competences under the Interim Constitution. However, these areas were not the only functional areas engaged by the Proclamation. The Proclamation also contained provisions that dealt with land tenure, which is a national competence. Justice Ngcobo held for the majority:

[1] DVB Behuising Pty Ltd sold houses to individuals in the North West. As a result of the repeal of Proclamation R293 of 1962 in the North West, the limited tenure rights known as 'deeds of grant' that new home-owners acquired could not be registered. Consequently the banks refused to provide finance for these new buyers. DVB Behuising argued that the repeal of parts of the Proclamation was beyond the legislative competence of the North West legislature. *DVB Behuising* (supra) at para 3.

[2] The case illustrates the operation of IC s 235 of the Interim Constitution, particularly IC ss 235(6) and (8). The Constitutional Court had previously explained the role of IC s 235 by saying:

> The overall purpose to be achieved through the application of s 235 [was] a systematic allocation of the 'power to exercise executive authority' in terms of each of the 'old laws', to an authority within the national government or authorities within the provincial governments The purpose of this power is clearly to provide a mechanism whereby a fit can be achieved between the old laws and the new order.

Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at para 84.

The power to exercise executive authority in respect of Proclamation R293 of 1962 had been assigned to the North West by Government Notice 110 of 1994. The assignment could only have been made – under s 235(6)*(b)* of the Interim Constitution – and was only made, in respect of the parts of the Proclamation that fell within the legislative competences listed in schedule 6 of the Interim Constitution. Schedule 6 of the Interim Constitution exhaustively listed the legislative competences of provinces. Hence the assignment only applied in the areas of concurrent competence between the national and the provincial government.

The definition of 'provincial legislation' in the Final Constitution includes 'legislation that was in force when the Constitution took effect and that is administered by a Provincial Government'. FC s 239. Consequently, in as far as the assigned Proclamation falls within the functional areas listed in schedule 6 ('and does not deal with matters referred to in paragraphs *(a)* to *(e)* of s 126(3)), it is provincial legislation and it can be validly repealed by the North West legislature. Ibid at paras 20 and 26.

Hence the central question in *DVB Behuising* became whether the proclamation dealt with a matter that was listed in schedule 6 of the Interim Constitution. This same type of characterization exercise would have occurred in all cases of provincial legislative competence under the Interim Constitution.

[3] *DVB Behuising* (supra) at 48.

> I am satisfied that the 'tenure' and deeds registration provisions of the Proclamation were inextricably linked to the other provisions of the Proclamation and were foundational to the planning, regulation and control of the settlements. These provisions were an integral part of the legislative scheme of the Proclamation and accordingly fell within schedule 6.[1]

Hence, the tenure provisions were within the competence of the provincial government.

In the minority judgment, Justices O'Regan, Sachs and Goldstone expressed doubt about this characterization of the subject matter:

> There is much to be said, in our view, for the proposition that [the tenure provisions] are provisions regulating matters which fall outside schedule 6 of the Interim Constitution. It is clear that 'land tenure and registration' are not functional areas within the scope of schedule 6 as Mogoeng J observed. We accept that regulating the allocation of sites for trading and residential purposes are matters which fall within the functional areas of local government and/or urban development. Similarly, we accept that establishing a township involves creating sites and selling them or leasing them to the public and even attaching specific conditions to title. However, the proposition that it is an integral part of local government or urban development to establish specific and limited forms of land tenure or procedures for their registration, seems much less certain. In our view, the functional area of urban development requires the process of land alienation and allocation within the framework of the land tenure and registration system provided nationally. We find it hard to accept that establishing novel forms of land tenure or registration is an aspect of the functional area concerned with local government or that concerned with urban development.[2]

This statement does not really get to grips with the force of the majority judgment. The majority see the tenure issues as integral to the particular legislative scheme in the proclamation and thus as a valid part of the assignment to North West Province. The general proposition 'that it is an integral part of local government or urban development to establish specific and limited forms of land tenure or procedures for their registration'[3] is dubious at best. More importantly, it is not the proposition defended by the majority of the Court. The majority holds that the tenure provisions were an integral part of a legislative scheme that was predominantly within functional areas of provincial competence.

One problem with *DVB Behuising* is that although the reasoning of the majority judgment is convincing, it provides no clear system for establishing the scope of the incidental power.[4] Readers of the judgment might think that there are no meaningful doctrinal grounds for judges to regard a particular power as incidental to a provincial power or to regard the matter as one that should be reserved for the national legislature. As I will show below, there are indeed better — and worse — ways of delineating incidental powers.

[1] *DVB Behuising* (supra) at 96 (Madala J, concurring). Ibid para 58 (Ngcobo J).
[2] Ibid at 102.
[3] Ibid.
[4] This result may flow from the fact that the Court was not called upon to decide a simple question of provincial legislative competence using the sections of the Constitution that provide for the incidental power. (The provision dealing with incidental power in the Interim Constitution was 126(2).) Rather it was confronted with a messy case involving high apartheid legislation and transitional arrangements mediated by both the Interim and Final Constitutions.

A second problem with the majority judgment is that it does not explore the proper perspective for looking at a legislative scheme when assessing whether provisions — which are essentially out of place in a piece of provincial legislation — are acceptable on the basis of the incidental power. The perspective you adopt plays an important role in determining what you see. The broader your perspective, the more likely you are to see the provisions under scrutiny as necessary or incidental to a broader scheme. As you narrow your focus, the less likely the provisions are to appear necessary and redeemable. If you fixate exclusively on the problematic provisions, the possibility of incidentality or necessity disappears altogether. The next section looks at how this problem of perspective can best be approached.

(iii) *Approaching the incidental power*

Comparative law must be used with caution in federalism cases. Each federal system reflects pragmatic and context-specific responses to political power relations in a particular country.[1] Each federation creates and responds to its own functional problems. Despite this initial caveat, a number of Canadian cases provide useful heuristic devices for exploring the limits of our incidental power.

Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture) involves 'culturally modified trees' which are heritage objects of significance to many of the aboriginal peoples of Canada.[2] The Heritage Conservation Act is a statute of the province of British Columbia.[3] It provides for the protection of heritage objects in the Province and gives administrative discretion to a Minister to consent to destruction of these artefacts in some circumstances.[4] In *Kitkatla Band,* the Minister had made an administrative decision allowing a logging company to cut down approximately 40 out of 120 culturally modified trees in a specific area.[5]

The aboriginal litigants attacked the Heritage Conservation Act on federalism grounds. It was common cause that the Act was within provincial jurisdiction: 'property and civil rights' within the province. However, in Canada, 'Indians and Land reserved for the Indians' is a national competence.[6] Hence the litigants argued — unsuccessfully — that the power to allow for the removal or alteration of Native American cultural objects was beyond the scope of the provincial legislature. They contended that the Act should be struck down 'to the extent

[1] *Ex Parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC) at paras 21-3.
[2] *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture) ('Kitkatla Band')* 2002 SCC, 31 [2002] 2 SCR 146.
[3] R.S.B.C 1996, c. 187
[4] Ibid at para 37.
[5] Ibid at para 64.
[6] Ibid at para 29.

that it [allowed] for the alteration and destruction of *native* cultural objects.[1] The province argued that the Heritage Conservation Act was within provincial competence and that 'any intrusion into federal jurisdiction [was] simply incidental and constitutionally permissible.'[2]

In Canadian jurisprudence, subject classifications for division of powers purposes are known as 'pith and substance' analyses. Identifying the 'pith and substance' of a law involves finding 'the dominant or most important characteristic' of that law.[3] Canadians also speak of 'pith and substance' describing the dominant purpose of a particular provision.[4] The different parties in *Kitkatla Band* wanted to employ different methods of analysis. As Judge LeBel stated:

> There is some controversy among the parties to this case as to the appropriate approach to the pith and substance analysis where what is challenged is not the Act as a whole but simply one part of it. The appellants [the band] tend to emphasize the characterization of the impugned provisions outside the context of the Act as a whole. The respondents and interveners take the opposite view, placing greater emphasis on the pith and substance of the Act as a whole. The parties also disagree as to the order in which the analysis should take place: the appellants favour looking at the impugned provisions first, while the respondents and interveners tend to prefer to look at the Act first.[5]

This statement clearly illustrates the need for a relatively straightforward and uncontroversial method of analysis. What must be incidental or necessary to what? The Canadian Supreme Court has set out a useful analytical framework in *General Motors of Canada Ltd. v. City National Leasing*.[6]

First, the *City National Leasing* test requires the court to inquire into the subject matter of the specific provisions that are being challenged (hereafter referred to as the 'impugned provisions').[7] The impugned provisions need to be interpreted naturally in context, but after that, their role has to be looked at in isolation for the purpose of characterisation.[8] If the impugned provisions 'can stand alone' because they are within the powers of the particular legislature, they need 'no

[1] *Kitkatla Band* (supra) at para 1 (Emphasis added).
[2] Ibid at para 37.
[3] *P W Hogg Constitutional Law of Canada* (Volume 1, 3rd Edition, 1992) § 15.7. See also R L Watts *Federalism: The Canadian Experience* (1997) 45-6 ('Many statutes have one feature or aspect that comes under a provincial, and another under a federal, head of power. For example, a law prohibiting careless driving has a criminal aspect, which is federal, and a highway regulation aspect, which is provincial. The courts make a judgment as to the most important feature of the law and characterize the law by that primary feature- its 'pith and substance.')
[4] *See Kitkatla Band* (supra) at para 58 and *General Motors of Canada Ltd v City National Leasing* [1989] 1 SCR 641, 58 DLR (4th) 255 (*'City National Leasing'*).
[5] *Kitkatla Band* (supra) at para 55.
[6] *City National Leasing* (supra) at para 54, available at http://www.lexum.umontreal.ca/csc-scc/en/pub/1989/vol1/html/1989scr1_0641.html para 54.
[7] *Kitkatla Band* (supra) at para 58.
[8] *City National Leasing* (supra) at para 42.

other support'. If not, it is necessary to continue with the analysis.[1] If the impugned provisions intrude into the exclusive legislative sphere of another level of government, it is necessary to establish the extent of the incursion. That is, the court must determine how invasive the intrusion is.[2]

Second, the Court must ask whether the impugned provision is part of a broader legislative scheme that is within the competence of the relevant legislature. (Identifying the scheme is a conceptual matter. It may include the entire statute. It may only consist of part of a statute that could have been enacted alone and can be severed from the rest of the law.[3] In some cases a regulatory scheme may embrace a number of statutes intended to govern different aspects of a common field.)

If the legislative scheme is within the competence of the relevant legislature, 'the relationship between the particular impugned provision and the scheme' comes under scrutiny. The court then asks '[h]ow well [is] the provision integrated into the scheme of the legislation and how important [is it] for the efficacy of the legislation.'[4]

At this stage the Canadian courts engage in a proportionality exercise. Earlier we asked how far the impugned provision pushes the boundaries of the appropriate legislative sphere. The more the provision encroaches, the more essential the provision must be to an otherwise valid legislative scheme in order to be considered incidental. The less it intrudes, the easier it will be to persuade a court that it should survive.[5]

[1] *Kitkatla Band* (supra) at para 57. See also *City National Leasing* (supra) at para 44.

[2] *City National Leasing* (supra) at para 46.

[3] Ibid at para 48. Dickson CJC, for the *City National Leasing* Court, wrote:

> A regulatory scheme may be found in only a part of the act in question, if that part can stand alone, or it may found in the entire act. The portion of the statute necessary to establish the existence of a regulatory scheme will not always be easy to discern. In those instances where a challenged provision, taken alone, comprehends a complete regulatory mechanism, the provision itself constitutes the appropriate starting point. In other cases, it will be necessary to examine the entire statute before a regulatory scheme may be identified. Once the presence of a regulatory scheme has been shown it will be necessary to determine its constitutional validity.

[4] Ibid at para 49.

[5] Ibid at para 53. Dickson CJC wrote:

> In numerous cases courts have considered the nature of the relationship which is required, between a provision which encroaches on provincial jurisdiction and a valid statute, for the provision to be upheld. In different contexts courts have set down slightly different requirements, viz.: 'rational and functional connection' in *Papp v Papp* [1970] 1 OR 331; *R v Zelensky* [1978] 2 SCR 940, and *Multiple Access Ltd v McCutcheon* [1982] 2 SCR 161; 'ancillary', 'necessarily incidental' and 'truly necessary' in the *Regional Municipality of Peel v MacKenzie*, supra; 'intimate connection', 'an integral part' and 'necessarily incidental' in *Northern Telecom Ltd v Communications Workers of Canada* [1980] 1 SCR 115; 'integral part' in *Clark v Canadian National Railway Co* [1988] 2 SCR 680; a 'valid constitutional cast by the context and association in which it is fixed as a complementary provision' in Vapor Canada,

(iv) *Is there a point beyond which the incidental power cannot go as implied by the minority judgment in 'DVB Behuising'?*

The Canadian approach seems sensible. Moreover, it coheres with the majority judgment in *DVB Behuising*. When interpreting the scope of the incidental power, it seems best to start with a broad assumption that almost any impugned provision can be saved (and found to be 'legislation with regard to a matter listed in schedule 4' in terms of FC ss 44(3) or 104(4)) if the above tests are satisfied. This assumption is justified because any incidental power automatically operates in an area of de facto provincial and national concurrency. When a court needs to draw a line beyond which a provincial legislature cannot go, it is not appropriate to limit the scope of the incidental power. Section 146 of the Final Constitution (which regulates conflicts between provincial and national legislation) is the more appropriate place for the analysis.[1]

(v) *Another approach*

Another rule of thumb has been suggested to help define the scope of the incidental power. Where the 'end' intended by the legislation is competent, the 'means' are likely to be acceptable.[2]

(vi) *The scope of the incidental power in relation to schedule 5 competences.*

No specific constitutional provision regulates powers that are ancillary to Schedule 5 competences. However, in *First Certification Judgment* the Court states:

> [T]he provinces would necessarily also be the repository of powers incidental to the powers vested in them in terms of NT schedule 5.[3]

supra; and 'truly necessary' in *R v Thomas Fuller Construction Co* (1958) [1980] 1 SCR 695. I believe the approach I have outlined is consistent with the results of this jurisprudence. These cases are best understood as setting out the proper test for the particular context in issue, rather than attempting to articulate a test of general application with reference to all contexts. Thus the tests they set out are not identical. As the seriousness of the encroachment on provincial powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained.

[1] See V Bronstein 'Conflicts' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein and S Woolman (eds) Constitutional Law of South Africa (2nd Edition, OS, December 2004) Chapter 16.

[2] P M Blair *Federalism and Judicial Review in West Germany* (1981) 115. See also L H Tribe *American Constitutional Law* (3rd Edition, Vol 1, 2000) 798-9.

[3] See *First Certification Judgment* (supra) at para 244. The *First Certification Judgment* Court also wrote:

> Although the NT does not specifically authorise provinces to enact legislation authorising the imposition of user charges, such a power would be within the express or implied power to legislate with regard to matters reasonably necessary for or incidental to the effective exercise of an NT sch 4 or 5 competence. It cannot seriously be suggested that provinces cannot pass legislation making provision for a user charge for abattoirs, health services, public transport etc. In so far as charges might be raised which are unrelated to the actual use of services provided, they would be within the general power to impose rates and levies.

Ibid at para 438.

Our discussion of incidental powers demonstrates that provincial legislatures may sometimes validly legislate in areas of exclusive national legislative competence. The opposite contention, that the national legislature can legislate incidentally in the area of Schedule 5 functional areas, is more controversial. In *Liquor Bill,* Acting Justice Cameron wrote:

> Determining the place of section 44(3) in the constitutional scheme, and in particular its relationship to the exclusive provincial legislative competences in schedule 5, is not free from difficulty . . . On one approach, section 44(3) authorises an enlarged scope of encroachment on the exclusive competences by permitting national intrusion into schedule 5 where this is reasonably necessary for, or incidental to the effective exercise of a schedule 4 power.[1]

The question of the impact of FC s 44(3) on Schedule 5 competences was ultimately left unanswered.

(d) When is competence tested?

The determination of competence would appear to be a one-off test that applies at the date that the legislation was passed. For example, legislation that was competent when it was passed cannot later become incompetent. This position coheres with the attitude to assignment taken by a number of commentators when they talk about assignment of legislative powers by the national legislature to the provinces.[2] They argue that even if the national legislature retracts an assignment of its powers, the provincial legislation properly made under the assignment remains valid.

Although the above approach seems to be the most coherent, the answers to these questions are not self-evident. For example, take the case of a legislative provision that is valid by virtue of the incidental power. What happens if that provision is left standing while the rest of the legislative scheme upon which it depends is repealed? Can the hypothetical provision survive on the basis that it was valid at the time that it was originally enacted? It is reasonable to conclude that the provision would be invalidated on the ground that it is no longer 'reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in schedule 4.'[3]

[1] *Liquor Bill* (supra) at para 44.

[2] See M Chaskalson and J Klaaren 'National Government' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, and S Woolman (eds) Constitutional Law of South Africa (1st Edition, RS5, 1999) Chapter 3; S Budlender 'National Legislative Authority' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein and S Woolman (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17.

[3] FC s 104(4).

16 Conflicts

Victoria Bronstein

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CONFLICTS

146. (1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.

(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:

(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing —

(i) norms and standards;

(ii) frameworks; or

(iii) national policies.

(c) The national legislation is necessary for —

(i) the maintenance of national security;

(ii) the maintenance of economic unity;

(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;

(iv) the promotion of economic activities across provincial boundaries;

(v) the promotion of equal opportunity or equal access to government services; or

(vi) the protection of the environment.

(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that —

(a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or

(b) impedes the implementation of national economic policy.

(4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2)*(c)* and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.

(5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.

16.1 Introduction

(a) Textual background

The Final Constitution[1] allocates legislative powers between central and provincial governments on the basis of the subject matter of the legislation. According to the Final Constitution, the nine provincial legislatures in South Africa are entitled to legislate on a number of subjects listed in FC Schedule 4.[2] FC Schedule 4 contains areas of concurrent national and provincial legislative competence. As a result, both Parliament and the provincial legislatures may pass legislation on these topics.[3] This chapter focuses on conflicts between national legislation and provincial legislation in functional areas listed in Schedule 4.

As we shall see, the Final Constitution contemplates four discrete phases of Schedule 4 conflict's analysis. First, one must establish the competence of the national legislation. Second, the provincial legislation must be subjected to the same test.[4] Third, once both the national legislation and the provincial legislation have passed the test of competence, one must establish whether a conflict between them exists. The latter question is called 'the threshold question'. Fourth, if the answer to the threshold question is affirmative, then the analysis proceeds to FC s 146.[5]

(b) Political background

Although the vast and important areas of concurrent legislative competence listed in FC Schedule 4 create the theoretical possibility of frequent significant legislative conflict, the political reality is rather different. At the time of writing [2013], the African National Congress ('ANC') exercises control over eight of the nine provinces. The Western Cape is currently in the hands of the Democratic Alliance ('DA'). In 2001, when the ANC dominated only seven of the nine provinces, Nico Steytler observed:

> [T]he dominance of the ANC … does not result in the passing of competing [provincial] legislation. This party has a very centralised system of political governance… . Questions of

[1] Constitution of the Republic of South Africa, 1996 ('FC' or 'Final Constitution').

[2] FC s 104(1)*(b)*(i).

[3] The national legislature has the power in terms of FC ss 44(1)*(a)*(ii) and 44(1)*(b)*(ii) while the provincial legislature has the same power in terms of FC s 104(1)*(b)*(i). Schedule 4 powers are also deemed to include incidental powers. FC s 104(4) reads: 'Provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes legislation with regard to a matter listed in Schedule 4.' FC s 44(3) provides: 'Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.' For detailed treatment of the incidental power, see V Bronstein 'Legislative Competence' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15.

[4] For a discussion of competence, see V Bronstein 'Legislative Competence' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15.

[5] See, generally, G Devenish 'Federalism Revisited: The South African Paradigm' 2006 (1) *Stellenbosch Law Review* 129, 154–157.

> policy and its implementation through legislation are dealt with in a closed party hierarchy rather than in the open political and legislative processes.[1]

ANC dominance, and the centralization of power within the party's National Executive Committee, has meant that when the central government issues instructions, most provincial executives and legislatures simply accede to its demands.[2]

Another dimension of the problem is that the provincial legislatures are simply not performing their expected roles.[3] In 2004, the DA Provincial Leader of the Free State, Andries Botha, was quoted as saying: 'The legislature is not functioning at all. It's comatose.'[4] Another commentator asked whether the Eastern Cape Provincial Legislature, with a budget of R95 million as of 2005, served any purpose at all:

> To what extent does it serve any real function other than generally being a rubber stamp for executive action? Certainly it is a comfortable billet with a certain amount of somewhat ill-founded status, but given the socio-economic challenges facing the Eastern Cape, should it not perhaps be reduced to a part-time institution? … The bulk of the laws are passed in Cape Town and apply to South Africa as a whole. There is very little that the provincial legislature can do by way of passing laws.[5]

Little has changed in the intervening years.

Because of the centripetal force and the centrifugal force exerted by the ANC's NEC through the central government, constitutional provision for legislative conflict has created little dynamic tension between the national government and the provinces. This state of affairs will only change if and when control over the citadel becomes more hotly contested.

How might our conflicts jurisprudence shape 'cooperative' federal relationships in a more politically polycentric South Africa? The courts could play a dual role in relation to conflict resolution:

First, they should continue to support the provinces. Provincial diversity needs to be viewed as a healthy manifestation of democracy. (Regional differences have already played an important role in the dispute about the distribution of nevirapine to combat mother-to-child transmission of HIV/AIDS.) Second, they need to protect national unity and the indivisibility of the Republic. This chapter suggests that the courts should retain a residual power to invalidate protectionist provincial legislation even in the absence of conflicting national legislation.

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[1] N Steytler 'Concurrency and Co-operative Government: The Law and Practice in South Africa' (2001) 16 *SA Public Law* 241, 245. See also S Choudhry '"He Had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1 (Discusses the consequences of continued ANC dominance for constitutional law generally); H Klug 'Finding the Constitutional Court's Place in South Africa's Democracy: The Interaction of Principle and Institutional Pragmatism in the Court's Decision Making' (2010) 3 *Constitutional Court Review* 1.

[2] See R Simeon & C Murray 'Multi-level Governance in South Africa' in B Berman, D Eyoh & W Kymlicka *Ethnicity and Democracy in Africa* (2004) 277, 288-89.

[3] See Simeon & Murray (supra) at 290-91.

[4] See J Rademeyer & S Ndlangisa 'Free State Governance Crisis Reaches Breaking Point' *Sunday Times* (14 November 2004).

[5] P Cull 'All Has Been Said and Done before in Bisho' *Eastern Province Herald* (6 December 2005).

16.2 Overview of legislative conflict in areas of concurrent competence

Four questions have to be answered when solving problems of legislative conflict in terms of FC Schedule 4:
1. Is the national legislation competent and valid? If yes:
2. Is the provincial legislation competent and valid? If yes:
3. Is there conflict between the national and the provincial legislation? If yes:
4. Does the national legislation prevail in terms of FC s 146?

The first two questions deal with legislative competence. It is logically impossible to have conflict in the absence of competent and valid provincial legislation and national legislation.[1] Once both pieces of legislation have independently passed the test of competence, it is necessary to establish whether a conflict between them exists. (I call question 3 the 'threshold question'.) Only once 'conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4'[2] has been established, can the fourth question engaging FC s 146 be asked.

But it is not so easy to establish genuine conflict. Indeed, FC s 150 is designed to avoid such a finding.[3] It reads:

> When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict.

Iain Currie and Johan de Waal argue that:

> A court will, and indeed must, prefer an interpretation of legislation that avoids conflict, rather than one that results in conflict … . The Constitutional provisions relating to conflict only apply when it is *not possible* to resolve the conflict through interpretation.[4]

[1] For a more detailed examination of this issue, see V Bronstein 'Legislative Competence' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15. It is also important to keep in mind that FC s 146 applies only to conflicts in FC Schedule 4 areas. See *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC), 2012 (7) BCLR 690 (CC), [2012] ZACC 7 at para 50 ('Section 146 finds no application to the present dispute for the reason, among others, that the MPRDA is not legislation falling within a functional area listed in Schedule 4 of the Constitution.').

[2] FC s 146(1).

[3] Compare the much softer language of other interpretation clauses in the Final Constitution. For example, FC s 39 reads:

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

[4] I Currie & J de Waal *The New Constitutional and Administrative Law: Volume 1* (2001) 221.

FC s 150 can be read as yet another manifestation of the spirit of reconciliation, compromise, harmonization and co-operation that marked South African politics in the 1990s. It could also be read as consistent with Chapter 3 of the Final Constitution's commitment to co-operative government.[1]

FC s 150 may not, however, be as innocuous as it seems. The routine harmonization of conflicting legislation could have deleterious effects. Later on in the chapter, I offer a gloss on FC s 150 that coheres with my preferred reading of the Final Constitution's approach to legislative conflict.

16.3 THE THRESHOLD QUESTION: WHEN DOES CONFLICT EXIST BETWEEN NATIONAL LEGISLATION AND PROVINCIAL LEGISLATION?

(a) A preliminary issue: the relevance of comparative jurisprudence

The Constitutional Court has warned against over-reliance on comparative law in federalism cases.[2] The Court is justified in being cautious because regional arrangements are generally pragmatic responses to specific political pressures, and basic principles of federalism differ dramatically from country to country.[3]

(b) Test for direct conflict

How do we establish that conflict exists between national legislation and provincial legislation? The most tempting solution is a simple test for direct conflict. The test asks whether both the national legislation and the provincial legislation can be obeyed at the same time. Citizens have a duty to obey the laws promulgated by both their national legislature and their provincial legislature. Consequently '[w]here the two laws can be obeyed at the same time there is no inconsistency' or conflict.[4]

The Constitutional Court has already employed the test for direct conflict. In *Certification of the Constitution of the Province of Kwazulu-Natal, 1996*,[5] the Court had to deal with inconsistencies between a Bill of Rights in the proposed provincial Constitution of KwaZulu-Natal and the Bill of Rights in the Interim Constitution.[6] The Court wrote:

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[1] See S Woolman and T Roux 'Co-operative Government and Intergovernmental Relations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 1, July 2009) Chapter 14.

[2] See *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC) at paras 21–23.

[3] Vicki Jackson points out that:

> [F]ederalism questions are particularly likely to raise difficult comparability problems, for two related reasons. First, federalism arrangements are, by nature, interdependent and complex package deals. Second, these packages are likely to be the result of specific, historically contingent compromises, serving as a practical rather than a principled accommodation of competing interests and thus arguably less amenable to transnational understandings.

V Jackson 'Comparative Constitutional Federalism and Transnational Judicial Discourse' (2004) 2 *International Journal of Constitutional Law* 91.

[4] See *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 504 ('Clyde Engineering').

[5] *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996* 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC)('Certification of the Constitution of the Province of KwaZulu-Natal, 1996').

[6] Constitution of the Republic of South Africa, Act 200 of 1993 ('IC' or 'Interim Constitution').

> For purposes of the present inquiry as to inconsistency we are of the view that a provision in a provincial bill of rights and a corresponding provision in Chapter 3 are inconsistent when they cannot stand together, or cannot both be obeyed at the same time. They are not inconsistent when it is possible to obey each without disobeying either. There is no principal or practical reason why such provisions cannot operate together harmoniously in the same field.[1]

The Court has thus far limited use of the direct conflict test to the specific context of certification of a provincial constitution.[2]

The test for direct conflict minimizes conflict. This effect emerges clearly from Higgins J's defence of the test in the Australian case of *Clyde Engineering*. In his dissenting judgment, Higgins J writes:

> When is a law 'inconsistent' with another law? Etymologically, I presume that things are inconsistent when they cannot stand together at the same time; and one law is inconsistent with another law when the command or power or other provision in one law conflicts directly with the command or power or provision in the other. When two Legislatures operate over the same territory and come into collision, it is necessary that one should prevail; but the necessity is confined to actual collision, as when one legislature says 'do' and the other says 'don't.' But in the present case the [Federal] award says 'don't work the employee beyond 48 hours,' and the State law says, as to the State citizens, 'don't work the employee beyond 44 hours.' By obeying the State law the award is obeyed also.[3]

In the same case, Powers J makes a similar point in the following hypothetical example:

> If 9s. a day is allowed by a State law as a minimum wage and 10s. a day by a Federal award as a minimum wage, they are not inconsistent laws and both can be obeyed, because the payment of a minimum wage of 9s. required by the State Act is obeyed by paying 10s. under the Federal award. In the same way, if a State law fixes 10s. a day as a minimum wage and the Federal award fixes 9s. a day as a minimum wage…, they are not inconsistent laws and both can be obeyed by paying 10s. minimum under the State Act. That being the case, if the State Act in question only adds one-eleventh to the Federal minimum rate (12s. instead of 11s.), how can it be held to be inconsistent with the Federal award in question, as both orders can be obeyed by paying 12s.? The test usually adopted by this and other Courts is whether both laws can be obeyed.[4]

In both of the fact patterns described above the provincial (or state) legislature has a more benign policy towards employees than the national legislature. Exponents of the test for direct conflict find no conflict in these cases. The direct conflict test requires employers in the province to comply with the more regulated environment because both laws can be obeyed. However, while the direct conflict

[1] *Certification of the Constitution of the Province of KwaZulu-Natal, 1996* (supra) at para 24.

[2] The allusion to operating 'harmoniously in the same field' also shows that the Court does not regard direct conflict as the only possible test. For a discussion of field pre-emption, see § 16.3*(c)* infra

[3] *Clyde Engineering* (supra) at 503.

[4] Ibid at 517.

test minimizes legislative conflict, it also tends to maximise regulation. For example, it often conduces to multiple licensing requirements for businesses.[1]

If such cases were to arise in South Africa, and one assumed (perhaps erroneously)[2] that the legislation in question was competent, the test for direct conflict would screen out the inconsistencies. In the absence of direct conflict, the questions posed by FC s 146 would never be reached. The substantive issues implicated in raising the minimum wage or lowering working hours in one region of the country would remain constitutionally invisible. (Considerations that relate to the national government's conscious trade-off between minimum conditions of employment and unemployment would be deemed irrelevant.) And they would remain invisible despite the fact that FC s 146 was created to deal with precisely these types of concerns.

The following hypothetical example should help to illustrate the potential problem with the test for direct conflict. Imagine that a legislative scheme could be depicted as a spider's web with each individual provision comprising a strand of the web. A laboratory technician cuts every strand of silk individually and organizes each one thematically. He then pastes each strand onto the bottom of a card so that the fragments of web take the form of a bar graph. Eventually all the rules in the legislative scheme are shown on a bar graph with the vertical lines reflecting legal obligations. Imagine further that all of the pieces of extant national legislation are charted on one graph while all extant pieces of provincial legislation in the same field are charted on to another. What happens when the national grid is superimposed on the provincial grid?

The test for direct conflict tells us that where national and provincial legislation overlap, they should be obeyed at the same time. Where legislative provisions overlap, the bars on the new superimposed graph would often automatically lengthen or the longer lines would automatically prevail. (I will argue later that it is precisely this lengthening that conduces to over-regulation.) In cases where the lines on the grid conflict, the Final Constitution tells us that FC s 146 would be used to determine which legislative provision should prevail. Either the national line or the provincial line on the bar graph would be chosen. In cases of conflict, citizens would never be expected to conform to an elongated combination of the two lines. (In the USA or Australia, the national lines on the grid would normally displace the conflicting provincial lines.)

[1] On the effect of the direct conflict test on multiple licensing requirements by both national government and the relevant provincial government, see *A Raptis and Son v State of South Australia* (1977) 138 CLR 346, 357 ('The State Act forbids any person to take fish unless he holds a licence under the State Act. The Commonwealth Act forbids any person to engage in fishing unless he holds a license under the Commonwealth Act. It is of course possible to obey both laws without disobeying either, by obtaining the licences necessary under both Acts, but since *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 that has not been the test of the inconsistency of the two laws.') For a recent treatment of this problem, see *Council of the Municipality of Botany v Federal Airports Corporation* (1992) 175 CLR 453, *Commercial Radio Coffs Harbour Limited v Fuller & Another* (1986) 161 CLR 47. For more South African jurisprudence on multiple licensing requirements in the context of our quasi-federalist state, see § 16.3*(d)*(i) infra.

[2] See V Bronstein 'Legislative Competence' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15.

The test for direct conflict seems to resonate with FC s 150 by ensuring that 'any reasonable interpretation of the legislation … that avoids a conflict' is preferred 'over any alternative interpretation that results in a conflict'.[1] The direct conflict test read together with FC s 150 would ensure that the minimum number of cases would undergo scrutiny in terms of FC s 146. From one point of view, this non-interventionist approach possesses the virtue of keeping the judiciary out of politics. On the other hand, the direct conflict test tends to function in a manner that leads to the proliferation of regulation in a mechanical, unconsidered manner. The direct conflict test is also difficult to square with the FC s 146 imperative that provincial legislation should prevail unless the national legislative override is specifically justified.

Another potential problem with the direct conflict test arose elliptically in *Abahlali Basemjondolo Movement SA & Another v Premier of the Province of Kwazulu-Natal & Others*.[2] The applicants mounted a challenge to s 16 of the KwaZulu-Natal Elimination and Prevention of the Re-emergence of Slums Act[3] ('the KZN Slums Act') on the basis that the section's procedures for eviction violated the Constitution and were in conflict with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[4] ('PIE'). Justice Yacoob (dissenting) interpreted s 16 of the KZN Slums Act benignly. On his account, both acts conformed to the Constitution and the KZN Slums Act incorporated the principles of PIE.[5] He therefore avoided the possibility of a conflict between the provincial and national laws. Yacoob J's interpretation relied on two basic premises. First, legislation should be interpreted in a way that conduces to constitutionality.[6] Second, the KZN Slums Act expressly referred to PIE. Section 16 therefore incorporated the protections given to illegal occupiers by PIE. FC s 150 was irrelevant because the express mention of PIE in the KZN Slums Act allowed the two to be reconciled. The majority never reached the question of conflict between the Slums Act and PIE because it found s 16 of the KZN Slums Act to be unconstitutional.

However, the exchange between Moseneke DCJ's and Yacoob J foreshadows the type of problems that could easily arise when applying FC s 150. Moseneke DCJ found Yacoob J's interpretation of the Slums Act 'excessively strained' and 'intrusive'. He held that 'the rule of law requirement that the law must be clear and ascertainable' and 'separation of power considerations' do not allow courts to 'embark on an interpretative exercise which would in effect re-write the text under consideration'.[7] The majority cautioned courts against bending over

[1] FC s 150. For a correct finding on absence of conflict, see the facts of *Bingo (KZN) (Pty) Ltd v The Premier, KwaZulu-Natal Province* [2008] 4 All SA 416, 420G (N).

[2] 2010 (2) BCLR 99 (CC), [2009] ZACC 31.

[3] Act 6 of 2007.

[4] Act 19 of 1998.

[5] His approach is similar to that adopted by Tshabalala JP in the High Court. *Abahlali Basemjondolo Movement SA v and Another v Premier of Kwazulu-Natal and Others* 2009 (3) SA 245 (D), 2009 (4) BCLR 422 (D), [2009] 2 All SA 293 (D), [2009] ZAKZHC 1.

[6] FC s 39(2) read with *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC), [2000] ZACC 12 at para 23.

[7] *Abahlali Basemjondolo* (supra) at paras 123-125.

backwards to rescue legislation — whether from unconstitutionality, or FC s 150 conflict — by interpretive means. Even the direct conflict depends, ultimately, on the proper or 'reasonable interpretation' of the two statutes. The questions of 'reasonable interpretation' will occasion further debates regarding the application of FC s 150.[1]

(c) Pre-emption

What are the alternatives to the test for direct conflict? Pre-emption — known in the US as 'field pre-emption'[2] and in Australia as 'covering the field'[3]— is another way of establishing whether conflict exists in a concrete situation.

Pre-emption is a fairly indirect technique for determining whether legislative conflict exists in a specific situation. It is, at bottom, an approach to statutory interpretation. Suppose that, in some imaginary country, the national legislature passes a competent National Housing Act. It passes the National Housing Act despite the fact that one of the provincial legislatures has already passed its own valid Housing Act. In systems that employ a pre-emption doctrine, the adjudicator will ask two questions that should determine whether the national legislature intended to cover the field when it passed the National Housing Act. Did the national legislature intend to regulate the entire area of 'housing' comprehensively and exclusively? Alternatively, did the national legislature intend to allow the provincial legislature to co-regulate the area so that provincial provisions could augment the national legislation?

In the USA and Australia, the pre-emption doctrine is based on the premise that competent national legislation automatically overrides conflicting provincial legislation. Hence it is only relevant to ask about the intention encoded in the national legislation. If the national legislature evinced an intention to cover the field, then the provincial legislation is subordinate.

However, there is, in fact, nothing automatic about pre-emption. The approach only applies where the national legislature expresses or implies its intention to cover the field. In the United States, the courts display some 'reluctance … to infer preemption in ambiguous cases'.[4] State (provincial) action will generally only be pre-empted 'where it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'.[5]

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[1] For more on the limits of statutory interpretation, see M Bishop & J Brickhill '"In the Beginning Was the Word": The Role of Text in the Interpretation of Statutes' (2012) 129 SALJ 681. See also *National Credit Regulator v Opperman and Others* [2012] ZACC 29 (Contains fascinating debate between Van der Westhuizen J (majority) and Cameron J (minority) on how to interpret a vague or meaningless statute); and *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), [2012] 2 All SA 262 (SCA), [2012] ZASCA 13.

[2] See LH Tribe *American Constitutional Law* (3rd Edition, Volume 1, 2000) 1172 ff.

[3] See *Clyde Engineering* (supra) at 478-99 (Isaacs J). See also *Ex parte McLean* (1930) 43 CLR 472, 483; K Booker, A Glass & R Watt 1 (2nd Edition, 1998) 293–296; A Murray-Jones 'The Tests for Inconsistency under Section 109 of the Constitution' (1979) 10 *Federal Law Review* 25.

[4] Tribe (supra) at 1175.

[5] Ibid at 1176 quoting *Hines v Davidowitz* 312 US 52, 67 (1941).

What happens if a court finds that the national legislature did have an intention to cover the field and exclude provincial legislation in the area? Once there is an intention to cover the field, the national regulation can be visualized as a beautiful, intact spider's web. All the strands of the spider's web are significant. The spaces between the strands that give the web its shape are seen as architecturally significant and deliberate. The web covers the legislative field and bits of provincial legislation are not allowed to randomly poke through and damage or disrupt the spider's web. The web is to be viewed as seamless, and provincial legislation in the area must be rendered dormant or invalid.

Pre-emption is not a universally popular doctrine. For instance, it has systematically been rejected by Canadian courts in favour of the test for direct conflict.[1] Provincial powers are jealously guarded in Canada and pre-emption is seen as an interpretive approach that increases the power of the national legislature at the expense of the provincial legislatures.[2] Pre-emption is also perceived by some as granting the judiciary too much discretion with respect to national legislative overrides of provincial legislation.[3] In South Africa, however, the doctrine of 'federal paramountcy' has been displaced by FC s 146. As a result, neither pre-emption nor the test for direct conflict should have any meaningful role to play.

From what has been said, it must already be clear that the doctrine of pre-emption cannot simply be adopted in South Africa. In terms of the Final Constitution, national legislation does not automatically prevail in areas of conflict. Take the following simple example. The treatment of HIV/AIDS falls within the legislative competence of 'health services' listed in FC Schedule 4. Assume that Parliament passes a National HIV/AIDS Act. The Act contains a provision that expressly states that the National HIV/AIDS Act is intended to comprehensively cover the entire field of HIV/AIDS care in South Africa. Despite this statement, the province of Mpumalanga passes its own HIV/AIDS statute. How would such a situation be analyzed? Assuming that Parliament's express intention to cover the field passes constitutional muster in the first place,[4] the effect of covering the field would be to create a conflict between the entire Mpumalanga HIV/AIDS Act and

[1] See P Hogg *Constitutional Law of Canada* (3rd Edition, RS 1, 2004) 16-8, 16-13. See also E Colvin 'Legal Theory and the Paramountcy Rule' (1979) 25 *McGill Law Journal* 82; J Leclair 'The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity' (2003) 28 *Queen's Law Journal* 411, 420–21 (Argues that field pre-emption has recently become part of Canadian law.) I doubt whether the cases cited really back up the argument. For example, in my view, *Husky Oil Operations Ltd v Minister of National Revenue* [1995] 3 SCR 453 reads more like a case of direct conflict than one of field pre-emption.

[2] See Leclair (supra) at 420–421.

[3] Ibid.

[4] The competence of such legislation would be questionable because health services are explicitly included in the list of concurrent legislative competences. One could even take the problem further and imagine a situation that would be unthinkable in the US or Australia. Could a province successfully evince an intention to cover the field in an area of concurrent legislative competence? Would such an intention create explicit conflict that would have to be resolved in terms of FC s 146? See *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In Re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill 1995; In Re the Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995* 1996 (4) SA 653 (CC), 1996 (7) BCLR 903 (CC), [1996] ZACC 15 at para 36.

the national legislation. In the USA or Australia, the national legislation would automatically prevail. In South Africa, the conflict would have to be resolved using FC s 146.

(d) How should the question of a conflict between provincial legislation and national legislation be handled under the Final Constitution?

I have argued that the strict test for direct conflict is too crude a measure for establishing whether legislative conflict exists. Long-term use of the test (in a more politicized federalist environment than the one that exists at the moment) conduces to mechanical over-regulation. It also filters out precisely the type of case that FC s 146 was designed to tackle. Although no coherent rationale for defending the direct conflict test in South Africa exists, one could argue that FC s 150 requires its use.[1]

The doctrine of pre-emption is not an antidote to the test for direct conflict. Advocates of pre-emption have the tools to protect both the coherence of a legislative scheme and the spaces deliberately left open by a legislature. However, they face profound conceptual difficulties because the Final Constitution provides for concurrent legislative competence in the absence of a doctrine of 'federal paramountcy'.[2]

There is a third way. Certain interpretive methods can be used to assist a court charged with establishing whether legislative conflict exists. South African jurists, practitioners and academics need to be taught how to 'hear' legislative silence as deliberate in appropriate circumstances.

(i) *Protecting deliberate regulatory space*

Like spaces in a spider's web, regulatory gaps sometimes reflect a deliberate pattern: a structured silence. On this approach, silence in national legislation is capable of having sufficient texture to conflict with provincial legislation. Gaps in provincial legislation can also conflict with Acts of Parliament. (Once a conflict is found, FC s 146 analysis can take place.)

This method differs markedly from the direct conflict test. For proponents of direct conflict, regulatory spaces are simply holes. On their view, cluttering up the space is always preferable to precipitating conflict. The following paragraphs offer a few examples of the benefits associated with my theory regarding protected regulatory space.

[1] In this way, South Africa differs significantly from Canada. The structure of Canadian constitutional law ensures that the test serves as a bulwark that protects provincial powers.

[2] Rassie Malherbe argues that pre-emption is not part of South African law. See R Mahlerbe 'The Role of the Constitutional Court in the Development of Provincial Autonomy' (2001) 16 *SA Public Law* 255, 271–272.

Assume that the national legislature passes legislation requiring businesses that provide literacy training to be properly accredited. The accreditation process is complex and s 4 of the Act exempts small and micro-enterprises from the requirement. One day the Limpopo legislature passes a law requiring small and micro-enterprises to gain provincial accreditation after undergoing a procedure similar to the one found in the national legislation. Is there conflict between the national legislation and the provincial legislation with regard to small and micro-enterprises? Using the direct conflict test, one could argue that no conflict exists between the national exemption and the provincial accreditation requirement. They can both be obeyed at the same time. An alternative interpretation would treat the national statute's regulatory space as deliberate. Section 4 intentionally creates a regulatory gap for small and micro-enterprises. Thus, the national statute conflicts with the provincial statute in a manner that requires resolution in terms of FC s 146.

Imagine that the national government introduced measures to 'streamline' Environmental Impact Assessments (EIAs) and fast-track 'small, non-destructive projects' so that they could get official approval more easily.[1] Crispian Oliver, the Director-General of the national Department of Environment was quoted as saying: 'We are trying to unclog a system that has virtually ground to a halt. Some developers … wait three years for their plans to be approved.'[2] Some environmental groups expressed displeasure at this loosening up of the existing regulatory scheme.

Moving again from fact to fantasy, imagine that an environmental group successfully lobbies the KwaZulu-Natal provincial legislature to pass a new law subjecting small projects to special environmental scrutiny at the provincial level. Is there conflict between the national legislation and the provincial legislation? It's patently irrelevant that both the national legislation and the provincial legislation can be obeyed at the same time. The national Department is attempting to prevent over-regulation. The KwaZulu-Natal legislation may constitute over-regulation. A clear conflict between the 'purpose' of the national legislation and the 'purpose' of the provincial legislation exists. Of course, a direct conflict would obviously exist if Parliament explicitly stated in the legislation itself that it supercedes all other pieces of legislation. However, even in this hypothetical example, a clear conflict exists, qua purpose, irrespective of whether a specific provision in either piece of legislation expressly creates that conflict. The conflict between national ends and provincial goals needs to be resolved using FC s 146.

It is also possible for spaces in provincial legislation to conflict with specific provisions in national legislation. Imagine South Africa had no comprehensive national legislation requiring EIAs. The Western Cape legislature (which finds itself in an excellent position to evaluate the trade-off between development and environmental control in that province) passes a new Environmental Management Act that requires EIAs for a range of projects. The Act provides

[1] See *Business Report* 'Ministry Proposes Changes to EIA Rules' (June 25 2004), available at www.busrep.co.za/general/print_article.php?fArticleId=2126649&fS (accessed on 21 April 2006).

[2] Ibid.

that promoters of certain types of small project do not have to apply for consent from the Department. At a later date, the national legislature passes a much more comprehensive Environmental Protection Act. The latter Act requires very rigorous EIAs for all small developments. In this case, one could argue that the gaps in the Western Cape legislation that allow some small projects to proceed without scrutiny conflict with the National Environmental Protection Act. This conflict exists irrespective of whether promoters of small projects can comply with both regulatory systems at the same time. A finding that a conflict exists is a good result because such a conflict is just the type of issue that should be considered under FC s 146.[1]

[1] Although overregulation should be avoided, instances obtain in which it is completely appropriate for companies to have to contend with different licensing requirements in different spheres of government. Two cases — *Maccsand* and *Wary Holdings* — raise an array of issues surrounding appropriate multiple regulation. (At the same time, the reader should be aware that they turn on findings about municipal executive competence and not questions of national and provincial legislative conflict already surveyed.) In *Maccsand (Pty) Ltd v City of Cape Town and Others* 2011 (6) SA 633 (SCA), [2011] ZASCA 141 ('*Maccsand SCA*'), a mining company had been granted an appropriate mining permit from the national government in terms of the Minerals and Petroleum Resources Development Act 28 of 2002. ('MPRDA'). The court had to decide whether the company also had to obtain re-zoning approval from the municipality under the provincial Land Use Planning Ordinance 15 of 1985. ('LUPO') before it could begin to mine. Plasket AJA held that LUPO and the MPRDA were 'directed at different ends' and hence 'no duplication' existed. *Maccsand SCA* (supra) at para 34. He continued: '[D]ual authorisations by different administrators, serving different purposes, are not unknown, and not objectionable in principle — even if this results in one of the administrators having what amounts to a veto.' Ibid. This position was effectively upheld by the Constitutional Court. *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC), 2012 (7) BCLR 690 (CC), [2012] ZACC 7 ('*Maccsand CC*'). The *Maccsand* Court also dismissed the argument that national legislation and provincial legislation which might give rise to contradictory licensing requirements in different spheres of government amounted to legislative conflict that fell to be dealt with in terms of FC s 146. Ibid at para 51 ('[FC ss 146 and 148] do not apply because there is no conflict between LUPO and the MPRDA. Each is concerned with different subject matter.') In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another* 2009 (1) SA 337 (CC), 2008 (11) BCLR 1123 (CC), [2008] ZACC 12, the case turned on the definition of 'agricultural land' in the Subdivision of Agricultural Land Act 70 of 1970. The primary issue was the continued role of the national government in regulating land use in light of the increased role of municipalities in the new constitutional structure. Kroon AJ rejected an interpretation that would limit the national government's role. He argued as follows: 'There is no reason why two spheres of control cannot co-exist even if they overlap and even if, in respect of the approval of subdivision of "agricultural land", the one may in effect veto the decision of the other. It should be borne in mind that the one sphere of control operates from a municipal perspective and the other from a national perspective, each having its own constitutional and policy considerations.' *Wary Holdings* (supra) at para 80. This judgment can be contrasted with *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA), 2010 (2) BCLR 157 (SCA), [2010] 1 All SA 201 (SCA), [2009] ZASCA 106 at para 1 (Nugent JA correctly had no tolerance for legislative schemes that cause chaos by creating 'parallel authority in the hands of two separate bodies, with … potential for the two bodies to speak with different voices on the same subject matter'.)

Judges open to the possibility that some regulatory space should be defended possess the tools within our constitutional conceptual framework to undertake the type of analysis that the doctrine of pre-emption affords courts in other systems. However, given the structured silence of a regulatory space, a finding that the space reflects a deliberate regulatory space would have to be the result of an interpretive exercise specific to the individual case.

Some evidence exists for the proposition that the Constitutional Court recognises the value of maintaining regulatory spaces. As discussed earlier,[1] the *Abahlali Basemjondolo* Court was confronted with a potential conflict between a provincial statute and a national statute regulating evictions. The majority never reached the question of conflict because it found the offending provision of the provincial law — s 16 — unconstitutional. There may, however, be a subtle indication in the majority judgment that the Court has some sympathy for the view that in the correct set of circumstances a 'carefully esablished' legislative framework by one sphere of government can overcome the need to assess whether a conflict even exists, let alone which piece of legislation ought to be given preference. As Deputy Chief Justice Moseneke writes:

> There is indeed a dignified *framework* that has been developed for the eviction of unlawful occupiers and I cannot find that section 16 is capable of an interpretation that does not violate this framework. Section 26(2) of the Constitution, the national Housing Act and the PIE Act all contain protections for unlawful occupiers. They ensure that their housing rights are not violated without proper notice and consideration of other alternatives. The compulsory nature of section 16 *disturbs this carefully established legal framework* by introducing the coercive institution of eviction proceedings in disregard of these protections.[2]

While the Court was not engaged in conflict analysis, the value it places on a 'carefully established legal framework' suggests that it recognizes the danger of over-regulation.

(ii) *Finding inconsistency where the 'limits are shifted'*[3]

I have argued that regulatory spaces should sometimes be regarded as deliberate and capable of conflict with other legislation. But take the facts of the Australian case of *Clyde Engineering*.[4] The dispute arose because a full working week in the engineering industry constituted 48 hours in terms of federal (national) law. The New South Wales Forty-Four Hours a Week Act provided that the working week would be forty-four hours.[5] The effect of the legislation was that workers would earn the same minimum for 44 hours in New South Wales as they would for 48 hours elsewhere in the country. Higgins J, in dissent, applied the direct conflict test. He found no conflict between the New South Wales legislation

[1] See §16.3*(b)* above.
[2] *Abahlali Basemjondolo* (supra) at para 122 (my emphasis).
[3] *Clyde Engineering* (supra) at 493.
[4] Ibid at 475.
[5] *Clyde Engineering* (supra) at 503.

and the national legislation. Employers in New South Wales could obey both provisions at the same time by giving employees the benefit of the 44-hour week.

In a judgment particularly useful for South African purposes, Knox CJ and Gavan Duffy J rejected the crude direct conflict test without resorting to the doctrine of pre-emption.[1] They found a conflict between the national legislation and the New South Wales legislation on the grounds that legislation of this type does not simply 'impose duties' on employers.[2] It also confers rights:[3]

> [O]ne statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it.[4]… An award that a person shall pay a certain minimum rate of wage involves, in its negative aspect, that he need pay no more.[5]

Isaacs J expresses the same idea in *Clyde Engineering* in somewhat different terms when he says that inconsistency exists where the 'limits are shifted'.[6]

Let us return to the hypothetical example offered above by Powers J. In that intuition pump, the minimum wage set by provincial law is 10s, while the national minimum wage is 9s. The worker's right to receive 10s in one province contradicts the employer's right to pay only 9s under national law. The conflict between the national minimum wage and the provincial minimum wage cannot be cured simply by requiring the employer to pay the higher amount. This penetrating example shows that the minimum wage cannot just be conceptualized as an entitlement. It is also deliberately gives employers the legal space to pay *only* the smaller, national minimum. Such limits or entitlements create a different type of regulatory space.

The majority of the Court in *Clyde Engineering* views the specific amount or limit that a legislature sets as significant. It is appropriate that the judiciary treat this limit with respect because the setting of a minimum wage or minimum conditions of employment is a delicate matter. It does not only have an impact on the quality of life of employees. It also has an overall impact on growth and employment in a given sector of the economy. Assuming that this case arose in South Africa (and that the legislation was competent), it would be an appropriate case for resolution

[1] Ibid at 474–78. Isaacs J authors a separate judgment on covering the field at 278–99.

[2] Ibid at 478.

[3] Ibid. See Booker, Glass & Watt (supra) at 292 (The authors call this test the 'denial of rights test' and cast it as a development of the direct-conflict test. It is a subsidiary test in Australia. If my argument is accepted, this test should do much more work in South Africa.)

[4] *Clyde Engineering* (supra) at 478.

[5] Ibid at 525 (Starke J).

[6] Ibid at 493.

in terms of FC s 146.[1] It would be far less sound to find that no conflict exists on the basis of the direct conflict test.

(e) Justifying this approach in the light of FC s 150

The strict version of the direct conflict test has severe limitations and it should not be used exclusively. Judges need to be amenable to seeing legislative silence as deliberate in appropriate cases: they need to be open to finding conflict where 'limits are shifted'.[2] But can this approach be squared with FC s 150? FC s 150 reads:

> When considering an apparent conflict between national and provincial legislation … every court *must* prefer any reasonable interpretation of the legislation … that avoids a conflict, over any alternative interpretation that results in a conflict.

A literal interpretation of FC s 150 appears to favour a strict test for direct conflict. The strict FC s 150 test minimizes conflict. However, the section cannot be properly understood in isolation. It needs to be read with FC s 146. FC s 146 anticipates a judiciary that plays an active and substantive role in adjudicating legislative conflict. Eventually judges will have the opportunity to build a body of jurisprudence that clarifies the meaning of FC s 146 and its relationship to FC s 150. However, if FC s 150 is interpreted mechanically, numerous cases will be excluded from principled evaluation merely because there happens to be no finding of direct conflict.

Although the direct conflict test often allows judges to avoid playing politics, in the long term it will hamper the judiciary's ability to discharge its duty to create institutions and doctrines that serve a well-functioning democracy. When the problems discussed above are screened out by a direct conflict approach, judges do not have an opportunity to consider the relative merits of 'uniformity and diversity'[3] in important federalism matters. Moreover, given our express commitment to cooperative government, the courts are denied the opportunity consider whether 'one level [or sphere] of government is undermined in its

[1] Isaacs J treats this approach with scorn. He writes:

> If an award fixes the obligation of an employer at (say) £5 as 'the' minimum wage and a State Act then fixes 'the' minimum wage at another sum, whether £4 or £6, there is necessarily inconsistency. Apply the question to the ordinary affairs of life. If I contract to buy a horse for £5, that is the minimum price. I can be compelled to pay that, but not more. It is not the maximum I may give. I can, no doubt, give more if I please. But if some competent authority says I must pay £6 as minimum, it seems to me hardly possible any person could be found to assert there was no inconsistency between my obligation as stated by the contract and my obligation as declared by the outside authority. But that is precisely what is maintained for by the respondent in the present case; that is, that there is no inconsistency. And the reason given is that I could obey both by giving £6.

Clyde Engineering (supra) at 493.

[2] Ibid at 493.

[3] KE Swinton 'The Supreme Court and Canadian Federalism: The Laskin-Dickson Years' in P Macklem, RCB Risk, CJ Rogerson, KE Swinton, LE Weinrib & JD Whyte *Canadian Constitutional Law* (Vol 1, 1994) 143, 145.

essential functions by the laws of another level of government'.[1] A direct-conflicts test silences meaningful federalism analysis.

One might contend that identifying a pattern of deliberate legislative silence and finding conflict when limits are shifted requires no more than a nuanced form of interpretation that can take place during the direct conflict test. Such considerations could then be incorporated into the test rather than being regarded as part of an entirely separate approach. Not much turns on this semantic distinction. What matters is that the mode of analysis allows for ventilation of a full array of federalism issues.

16.4 Does the national legislation prevail in terms of FC s 146? Creating a meaningful form of federalism

It is counter-productive to routinely harmonize legislation and thereby preclude FC s 146 analysis from taking place. Furthermore, FC s 146 should not become a means for the increased centralization of power. It should, instead, facilitate 'democratic accountability at the most appropriate level' of government.[2]

(a) General

FC s 146 'gives preference to provincial legislation, and protects it against national legislation, unless circumstances exist in which a national override can be justified'.[3] National legislation prevails if 'the substantive requirements of at least one of the override clauses' are met.[4] In addition, '[a] decision by a court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation becomes inoperative for as long as the conflict remains.'[5] In other words, if a provision of national legislation prevails over Limpopo legislation, the Limpopo legislation becomes ineffective, but not invalid. If the national legislation were to be repealed, then the conflict would fall away and the Limpopo legislation would automatically be revived.

(i) *Language*

FC s 146 is formulated in strong language. National legislation will prevail:

- in specific cases of *necessity*;[6]
- if the national legislation deals with a matter that '*cannot* be regulated *effectively*' by the provinces on an individual basis;[7]

[1] D Tucker 'Interpretations of Federalism: The Australian Doctrine of State Immunity and the Problem of Collective Choice' in J Goldsworthy & T Campbell (eds) *Legal Interpretation in Democratic States* (2002) 245, 261.

[2] Ibid at 246.

[3] *Certification of the Amended Text of the Constitution of The Republic of South Africa*, *1996*, 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC), [1996] ZACC 24 ('*Second Certification Judgment*') at para 109.

[4] J Klaaren 'Federalism' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, OS, 1996) 5-12.

[5] FC s 149.

[6] FC s 146(2)*(c)*.

[7] FC s 146(2)*(a)*.

- in matters that *require* '*uniformity* across the nation' in order to 'be dealt with *effectively*';[1]
- to prevent '*unreasonable*' provincial action.[2]

The emphatic language of FC s 146 implies that national override has to be properly justified.[3]

(ii) *The drafting history*

The original version of FC s 146 possessed two major problems that 'weighed heavily' on the *First Certification Judgment* Court when it decided that the 'powers and functions of the provinces in the New [Constitutional] Text as a whole were substantially less than or substantially inferior to their corresponding powers and functions in the Interim Constitution.'[4]

First, the original FC s 146(4) was rejected by the Constitutional Court because it included a presumption of necessity that would tilt the analysis in favour of the national government in FC s 146(2)*(c)* analysis. It provided:

> National legislation that deals with any matter referred to in subsection (2)*(c)* and has been passed by the National Council of Provinces, must be presumed to be necessary for the purposes of that subsection.[5]

The Court found that this presumption might be difficult or even impossible to displace in practice.[6] Thus it was an unacceptable enhancement of the powers of national government at the expense of the provinces. The Constitutional Assembly responded by jettisoning the presumption in favour of a watered-down FC s 146(4).[7]

Second, the original text of FC s 146(2)*(b)* — which allowed national legislation to prevail 'in the interests of the country as a whole' — was also held to substantially reduce provincial powers. The Constitutional Assembly redrafted the subsection to reflect the 'more stringent criterion' that 'the national legislation must deal with a matter that, to be dealt with effectively, requires uniformity across the nation.'[8]

The alterations in the language of FC s 146 indicate that provincial legislation should not be lightly regarded. The tone of the two *Certification Judgments* fortifies the view that FC s 146 ought not to become a rubber stamp for centralism.

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[1] FC s 146(2)*(b)*.

[2] FC s 146(3).

[3] But see *Mashavha v President of the Republic of South Africa & Others* 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC) at para 47.

[4] Constitutional Principle XVIII.2. See *Second Certification Judgment* (supra) at para 153.

[5] *Second Certification Judgment* (supra) at para 152.

[6] *Certification of the Constitution of the Republic of South Africa*, *1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), [1996] ZACC 26 at para 336.

[7] FC s 146(4) reads: 'When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2) *(c)* and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.'

[8] *Second Certification Judgment* (supra) at para 154.

(iii) *Function and democracy*

The judiciary has, as yet, not had an opportunity to explore the various interpretive questions raised by FC s 146. Given how the courts have responded in the first two decades of constitutional democracy, they are more likely than not to use a functional approach to interpretation when they analyze questions of legislative conflict.[1] The functional approach to constitutional interpretation is canvassed in the chapter on legislative competence.[2] In essence, such an approach demands that an appropriate balance be struck between preserving national unity on the one hand and promoting diversity on the other.[3]

How will judges know where exactly to strike that balance? One useful question that courts can ask themselves when confronted with conflicts and competence issues is what outcome will facilitate 'democratic accountability at the most appropriate level'.[4] When confronted with a question of conflicts, courts should be inclined to protect provincial autonomy where 'no collective choice is necessary'.[5]

Tucker argues that judges 'assist in the democratic process' by allowing the legislators 'who have the best claim to make the decision' to regulate the contested area of competence.[6] The most successful judgments in federalism cases manage to keep these axiomatic principles within their line of vision.[7]

(iv) *Form of Analysis*

In order to arrive at a finding as to which piece of legislation prevails, it is necessary to thoroughly analyse both the national legislation and the provincial legislation. Once a conflict has been established, FC s 146 analysis takes place.

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[1] V Bronstein 'Legislative Competence' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) § 15.3*(a)*(ii).

[2] Ibid.

[3] KE Swinton 'The Supreme Court and Canadian Federalism: The Laskin-Dickson Years' in P Macklem, RCB Risk, CJ Rogerson, KE Swinton, LE Weinrib & JD Whyte *Canadian Constitutional Law* (Volume 1, 1994) 143, 145.

[4] Tucker (supra) at 246–247.

[5] Ibid.

[6] Tucker (supra) at 259. See also R Malherbe 'Grondwetlike Bevoegdheidsverdeling: 'n Stap Agteruit vir Provinsiale Regering? *Mashavha v President of the RSA* 2004 (12) BCLR 1243 (KH)' (2005) 4 *TSAR* 862, 869.

[7] See for example, *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA), 2010 (1) BCLR 157 (SCA), [2010] 1 All SA 201 (SCA), [2009] ZASCA 106 (Nugent JA); *Maccsand (Pty) Ltd v City of Cape Town and Others* 2011 (6) SA 633 (SCA), [2011] ZASCA 141 (Plasket AJA). See also *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature and Others* 2011 (11) BCLR 1181 (CC), 2011 (6) SA 396 (CC), [2011] ZACC 25 (Yacoob J and Cameron J dissenting). For more on the negative consequences of *Premier Limpopo*, see R Williams & N Steytler 'Squeezing out Provinces' Legislative Competence in *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature & Others* I & II' (2012) 129 *South African Law Journal* 621. See also J Brickhill & M Bishop 'Constitutional Law' (2009) *Annual Survey of South African Law* 143, 198. Based on the premise that a functional approach to federalism needs to be kept in mind by judges, Brickhill and Bishop criticise *Corrans v MEC for the Department of Sport, Recreation, Arts and Culture, Eastern Cape Government and Others* 2009 (5) SA 512 (ECG), [2009] ZAECGHC 17 (discussed in the next section) for failing to consider the potentially strong argument that 'those closest — physically and culturally — [to objects and buildings] important to their heritage [should be allowed] to determine their fate'.)

In *Corrans v MEC for the Department of Sport, Legislation Recreation, Arts and Culture, Eastern Cape Government and Others,*[1] both the national legislation and the provincial legislation were found wanting.[2] In deciding whether the National Heritage Resources Act[3] prevailed over the Eastern Cape Heritage Resources Act,[4] the judgment examined the long title of the national Act. The long title states that the Act is designed to promote the following objectives:

> To introduce an integrated and interactive system for the management of the national heritage resources; to promote good governance at all levels, and empower civil society to nurture and conserve their heritage resources so that they may be bequeathed to future generations*; to lay down general principles for governing heritage resources management throughout the Republic; to introduce an integrated system* for the identifications, assessment and management of the heritage resources of South Africa; to establish the South African Heritage Resources Agency together with its Council to co-ordinate and promote the management of heritage resources at national level; *to set norms and maintain essential national standards for the management of heritage resources in the Republic* and to protect heritage resources of national significance; to control the export of nationally significant heritage objects and the import into the Republic of cultural property illegally exported from foreign countries; *to enable the provinces to establish heritage authorities which must adopt powers to protect and manage certain categories of heritage resources;* to provides for the protection and management of conservation-worthy places and areas by local authorities; and to provide for matters connected therewith.[5]

The emphasis on the objects of the national Act raises a possible pitfall of FC s 146 analyses: The long titles and preambles of large swathes of national legislation are generally framed in a way that purports to meet the requirements of FC s 146 in cases of legislative conflict. The language of FC s 146 is often imported into Acts precisely for that reason. For purposes of deciding which legislation prevails in conflict cases, it is not enough to show that the Act *purports* to fulfil the requirements for national override in FC s 146. The judgment needs to analyse the content of the legislation carefully in order to show that the Act does indeed do so.[6]

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[1] 2009 (5) SA 512 (ECG), [2009] ZAECGHC 17 ('*Corrans*').

[2] The judgment dangerously dismisses the provincial Act as an 'aberation'. Ibid at para 17. See also Brickhill & Bishop 'Constitutional Law' (supra) at 198 (Criticizing the judgment for failing to closely consider the provincial Act both for purposes of establishing whether conflict existed and also for deciding which legislation should prevail.).

[3] Act 25 of 1999.

[4] Act 9 of 2003.

[5] *Currans* (supra) at para 10 (emphasis on sections of Act added).

[6] This approach follows the lead of In re: *KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995, In re: Payment of Salaries. Allowances and Other privileges to the Ingonyama Bill of 1995* 1996 (4) SA 653 (CC), 1996 (7) BCLR 903 (CC), [1996] ZACC 15 at para 19 (Chaskalson P held that If the purpose of legislation is clearly within [IC] Schedule 6 it is irrelevant whether the court approves or disapproves of its purpose. But purpose is not irrelevant to the Schedule 6 enquiry. It may be relevant to show that although the legislation purports to deal with a matter within Schedule 6 its true purpose and effect is to achieve a different goal which falls outside the functional areas listed in Schedule 6. In such a case a court would hold that the province has exceeded its legislative competence.' In essence, the Court held that a 'provincial legislature would exceed its competence where it enacted legislation purporting to deal with a functional area listed in the said [IC] schedule 6, but the true purpose and effect of which was to achieve a different goal falling outside the functional areas listed in schedule 6.') G Devenish 'Federalism Revisited: The South African Paradigm' 2006 (1) *Stell LR* 129. The same would be true of national legislation which claimed to fulfil the grounds in FC s 146 but in substance failed to do so.

(b) Interpreting the constituent clauses of FC s 146

(i) *Uniform application of national legislation*

In terms of FC s 146(2), only national legislation that applies 'uniformly with regard to the country as a whole' is capable of prevailing over provincial legislation. Jonathan Klaaren has suggested that a law purporting to apply nationally, but crafted to pertain only to a manufacturing process in the Western Cape, may well fail to satisfy the requirement of uniform applicability. Should the province choose to regulate such a matter, its legislation would prevail.[1]

When FC ss 146(2) and 146(3) are read together, it appears that national legislation that is selectively targeted at one or more provinces may not prevail in terms of FC s 146(2). However, selectively targeted legislation may prevail where, in terms of FC s 146(3), it prevents unreasonable provincial action.

(ii) *National overrides*

(aa) Deference

Who decides whether a matter 'requires uniformity across the nation' to be dealt with effectively[2] or if national legislation is 'necessary'[3] for specific purposes? The Constitutional Court has held that 'political' questions are objectively justiciable.[4] The Court is, however, mindful of the need to treat the subjective intention of the national legislature with caution and respect:[5]

> The test in each case is ultimately objective because it is not the subjective belief of the national authority which is the jurisdictional fact allowing the national legislation to prevail over the provincial legislation, but there is inherently some subjective element involved in the assessment of what the interests of the country require or what is necessary. Some deference to the judgment of the national authority in these areas is inevitable.[6]

(bb) Matters that cannot be regulated effectively by individual provinces

In terms of FC s 146(2)*(a)*, national legislation prevails if it 'deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually'. In terms of FC s 146(2)*(b)*, national legislation prevails if it engages matters that require 'uniformity across the nation'.

When interpreting FC s 146(2)*(a)* and *(b)*, the courts should not advance uniformity for uniformity's sake. While the judiciary has a duty to promote national unity,[7] that duty does not require identical regulatory regimes throughout the country. In the United States, Regan contends that there is no 'judicially

[1] *Klaaren* (supra) at 5–13.
[2] FC s 146(2)*(b)*. Logically FC s 146(2)*(a)* should be treated in the same manner.
[3] FC s 146(2)*(c)*.
[4] *Second Certification Judgment* (supra) at paras 155, 157.
[5] Ibid at para 157.
[6] *First Certification Judgment* (supra) at fn 277.
[7] See FC s 1.

enforceable constitutional interest in uniformity of commercial regulation' and that the 'idea that there is a general interest in uniformity is inconsistent with our decision to have separate states with separate legislative competences, including separate competences to regulate commerce.'[1] However, since the 1930s, the US Supreme Court has read the US Constitution's Commerce Clause so as to ensure that virtually all national legislation that has an affect on the country's economy — no matter how local — passes constitutional muster.

The Constitutional Court appeared to acknowledge Regan's point in *Mashavha v President of the Republic of South Africa & Others* ('*Mashavha*'):

> It is inherent in our constitutional system, which is a balance between centralized government and federalism, that on matters in respect of which the provinces have legislative powers they can legislate separately and differently. That will necessarily mean that there is no uniformity.[2]

However, areas of competence exist in which the need for uniformity is absolutely compelling. Transport and communications are two such domains. For example, the United States Supreme Court prevented Wisconsin from prohibiting the operation of trucks longer than 55 feet on their highways because of the burden such a prohibition would place on interstate commerce.[3] An Arizona law that aimed to limit the length of trains to 14 passenger cars or 70 freight cars could not be applied for the same reason.[4] These laws, which would have been extremely disruptive with respect to interstate commerce, could not be successfully defended on safety grounds. In South Africa, FC s 146(2)*(a)* and *(b)* should enable national legislation to prevail in similar situations.

The only meaningful authority on the reach of FC s 146(2)*(a)* and *(b)* is a case that neither deals with legislative conflict nor engages FC s 146.[5] In *Mashavha*, the applicants challenged the presidential assignment to the provinces of almost the whole of the Social Assistance Act.[6] This assignment could only have been validly made in respect of powers that fell within the legislative competences listed in Schedule 6 of the Interim Constitution[7] and did not fall within the parameters of IC s 126(3). (IC s 126(3) was the predecessor of FC s 146(2).) The *Mashauha* Court assumed, without deciding, that the social grant system fell within the functional

[1] DH Regan 'The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause' (1986) 84 *Michigan Law Review* 1091, 1881.

[2] 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC)('*Mashavha*') at para 49.

[3] See *Raymond Motor Transportation, Inc v Rice* 434 US 429 (1978).

[4] See *Southern Pacific Co v State of Arizona ex Rel Sullivan* 325 US 761 (1945).

[5] *Mashavha* illustrates the operation of IC s 235(8). The Constitutional Court previously explained the role of IC s 235 by saying:

> The overall purpose to be achieved through the application of s 235 [was] a systematic allocation of the 'power to exercise executive authority' in terms of each of the 'old laws', to an authority within the national government or authorities within the provincial governments The purpose of this power is clearly to provide a mechanism whereby a fit can be achieved between the old laws and the new order.

Executive Council, Western Cape Legislature & Others v President of the Republic of South Africa & Others 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 84.

[6] Act 59 0f 1992.

[7] IC Schedule 6 listed the legislative competences of provinces.

area 'welfare services',[1] but found that the administration of the social grant system was not validly assigned to the provinces because such administration dealt with a matter *(a)* that could not be regulated effectively by provincial legislation, *(b)* that needed to be regulated or coordinated by uniform norms or standards that applied generally throughout the Republic in order to be performed effectively, and *(c)* that was necessary to set minimum standards across the nation for the rendering of public services.[2]

Despite the fact that the issue in the case was the *administration* of the system of social grants rather than the amount of the grants, the Court noted that:

> Equality is not only recognized as a fundamental right in both the interim and 1996 Constitutions, but is also a foundational value. To pay, for example, higher old age pensions in Johannesburg in Gauteng than in Bochum in Limpopo, or lower child benefits in Butterworth than in Cape Town, would offend the dignity of people, create different classes of citizenship and divide South Africa into favoured and disfavoured areas.[3]

This statement is rather curious. Different amounts of grant money paid throughout the country are likely to be related not to considerations of equality — or systemic discrimination — but to convenience, administrative workability and the desire to prevent regional distortions. The most tenable basis for social assistance grants is *need* and, in theory, if the cost of living is different in different parts of the country, then it is not clear why it would be unacceptable to pay different amounts. The greatest problem with variation in the value of social grants is that such variation could set off a race to the bottom as provinces tried to pay the least attractive welfare grants so as to minimize the number of poor people who might otherwise be attracted to the province. In such circumstances, a standardised rate for social grants may well be necessary. (Of course, even that hypothetical state of affairs fails to account for the possibility that a given province might offer a panoply of other more attractive benefits.)

But once again, such pragmatic concerns are not what drive the *Mashavha* Court. Instead, the Court offers the following justification for requiring uniform grant administration:

> In my view social assistance to people in need is indeed the kind of matter referred to in section 126(3)*(a)*, and in a wider sense envisaged by the meaning of the need for minimum standards across the nation in subsection *(c)*. Social assistance is a matter that cannot be regulated effectively by provincial legislation and that requires to be regulated or co-ordinated by uniform norms and standards that apply generally throughout the Republic, for effective performance. Effective regulation and effective performance do not only include procedural and administrative efficiency and accuracy, but also fairness and equality for example as far as the distribution and application of resources and assistance are concerned. A system which disregards historical injustices and offends the constitutional values of equality and dignity could result in instability, which would be the antithesis of effective regulation and performance.[4]

[1] See *Mashavha* (supra) at 34.
[2] See IC s 126 (3)*(a)*, *(b)* and *(c)*.
[3] *Mashavha* (supra) at para 51.
[4] Ibid at para 57.

The judgment, like the applicants, appears not to have accurately identified the problem. The real issue in the case seems to have been inefficient *administration* of social grants. The intractable problems with grant administration may have caused litigants to aim at the wrong target. Social grant systems must be administered in places where poor people actually are. It matters not whether the administration is controlled regionally or nationally. The ANC government has always had the power and the ability to deploy proper management in the affected provinces. One assumes that the personnel who currently administer the grant system in the provinces will continue to do so under national authority. The Court should have grappled with the question of how the administrative problems of litigants like Mr Mashavha would be solved by the introduction of a national system of administration.

The reasoning in *Mashavha* was shaped, at least in part, by the lack of real opposition to the contention that the grant system should be administered nationally. ANC dominance meant that no provincial MECs resisted the application. The only opposition was contained in one renegade brief from KwaZulu-Natal. The consensus between the litigants on the desired outcome weakens the reasoning in the judgment and ultimately undermines its authority.[1]

One hopes that the *Mashavha* Court's optimism about national grant administration is justified. However, the national government's failure to effect the transition from provincial administration to national administration within the required 18 months suggests that such optimism maybe misplaced.[2]

(cc) Framework legislation

FC s 146(2)*(b)* allows national framework regulation to prevail over provincial legislation when —

> [t]he national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing —
> (i) norms and standards;
> (ii) frameworks; or
> (iii) national policies.

However, the Constitutional Court has indicated that framework legislation will not automatically prevail as 'the criterion of uniformity is a *significant limitation* of the range of national policies and frameworks which may override provincial legislation.'[3]

FC s 146(2)*(b)* was controversial at the time of certification because it seemed to extend the scope of the corresponding provision in the Interim Constitution

[1] See R Malherbe 'Grondwetlike Bevoegdheidsverdeling: 'n Stap Agteruit vir Provinsiale Regering? *Mashavha v President of the RSA* 2004 (12) BCLR 1243 (KH)' (2005) 4 *Journal of South African Law* 862.

[2] See *Ex parte Minister of Social Development & Others* 2006 (5) BCLR 604 (CC).

[3] *Second Certification Judgment* (supra) at 157 (my emphasis). But see *Corrans v MEC for the Department of Sport, Recreation, Arts and Culture, Eastern Cape Government and Others* 2009 (5) SA 512 (ECG), [2009] ZAECGHC 17 (High Court loses sight of this point.) See also J Brickhill & M Bishop 'Constitutional Law' (2009) *Annual Survey of South African Law* 143, 198.

and diminish provincial autonomy. The Interim Constitution only allowed for framework legislation that established 'norms or standards and minimum standards'. FC s 146(2)*(b)* embraces, in addition, 'frameworks and national policies'.[1] The *Second Certification Judgment* Court rejected objections to FC s 146(2)*(b)*. It wrote:

> One of the definitions of 'uniform' given in the Concise Oxford Dictionary is 'conforming to the same standard, rules or pattern'. The achievement of uniformity in the context of AT 146(2)*(b)* therefore requires the establishment of standards, rules or patterns of conduct which can be applied nationally. As we have stated above, this is an objectively justiciable criterion. Under the IC, an override for the purpose of uniformity is permitted where legislation contained norms or standards. Neither of these words is capable of precise definition. The Concise Oxford Dictionary defines 'standard' as 'an object or quality or measure serving as a basis or example or principle to which others conform or should conform or by which the accuracy or quality of others is judged'. 'Norm' is defined as 'a standard or pattern or type'. Given the ill-defined import of the words norms and standards, and the governing criterion of uniformity, it is likely that even under the IC, framework legislation and national policies which sought to establish uniformity by establishing standards, rules or patterns of conduct would have been held to fall within the scope of norms and standards.[2]

I have argued above that courts should be prepared to view legislative silence as deliberate in some circumstances and thus open to finding a conflict between national legislation and provincial legislation in cases where regulatory space has been intentionally left open by a legislature. Given the possibility of such 'silence', a national 'policy', a 'norm' or a 'standard' might be implicit in legislation rather than explicit.

(dd) Necessity

FC s 146(2)*(c)* provides that:

> (2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:
> *(a)* …
> *(c)* The national legislation is necessary for
> (i) the maintenance of national security;
> (ii) the maintenance of economic unity;
> (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
> (iv) the promotion of economic activities across provincial boundaries;
> (v) the promotion of equal opportunity or equal access to government services; or
> (vi) the protection of the environment.

The *Second Certification Judgment* Court clearly stated that the conditions set out in FC s 146(2)*(c)* were objectively justiciable:

> The issue as to whether or not the particular national legislation dealt with a matter which was necessary for the maintenance of national security or economic unity or the protection

[1] *Second Certification Judgement* (supra) at para 159.
[2] Ibid.

> of the common market or any of the others factors listed in NT 146(2)*(c)* is now objectively justiciable in a court without any presumption in favour of such national legislation.[1]

FC s 146(4) provides that:

> When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2)*(c)* and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.

The *Second Certification Judgment* Court placed the following gloss on FC s 146: 'The obligation to pay 'due regard' means simply that the court has a duty to give to the approval or rejection of the legislation by the NCOP the consideration which it deserves in the circumstances.'[2]

FC s 146*(c)*(2)(ii), (iii) and (iv) reflect functional issues that occur in every federation. For example, what happens when a province passes legislation that smacks of economic protectionism? Such legislation is generally condemned in the USA in the absence of compelling justification. Interprovincial (or state) protectionism has a disintegrating effect on the nation as a whole because it encourages retaliation by other provinces.[3] Interprovincial protectionism also 'diverts business away from presumptively low-cost producers' without 'justification in terms of a benefit that deserves approval from the point of view of the nation as a whole'.[4]

Existing case law indicates, however, that FC s 146(2)*(c)*(ii) does not only allow national legislation to prevail over protectionist provincial legislation. In an obiter dictum in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*, national legislation that regulated the manufacture and distribution of liquor was held to be 'necessary to maintain economic unity' for purposes of FC s 44(2)*(b)*.[5] (The language of FC s 44(2)*(b)* is echoed in FC s 146(2)*(c)*(ii).) Cameron J held that it would be too inconvenient to allow provinces to regulate the manufacture and the distribution of liquor.[6] The *Liquor Bill* Court held:

> In the context of trade, economic unity must in my view therefore mean the oneness, as opposed to the fragmentation, of the national economy with regard to the regulation of inter-provincial, as opposed to intraprovincial, trade. In that context it seems to follow that economic unity must contemplate at least the power to require a single regulatory system for the conduct of trades which are conducted at a national (as opposed to an intra-provincial) level. Given the history of the liquor trade, the need for vertical and horizontal regulation, the need for racial equity, and the need to avoid the possibility of multiple regulatory systems affecting the manufacturing and wholesale trades in different parts of the country, in my view the economic unity requirement of section 44(2) has been satisfied … The Minister's affidavit states in this regard that duplicated or varying provincial licensing

[1] *Second Certification Judgment* (supra) at para 155.
[2] Ibid.
[3] DH Regan 'The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause' (1986) 84 *Michigan Law Review* 1091, 1114.
[4] Ibid at 1118.
[5] 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC)('*Liquor Bill*').
[6] V Bronstein 'Legislative Competence' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15, § 15.3*(a)*(ii).

> requirements would be unduly burdensome for manufacturers and that it was therefore economically imperative that control over the activities of manufacturers should take place at national level. He states that major industries, including the liquor industry as a single integrated industry should not have to run the risk of fragmentation arising out of a variety of differing regulatory regimes being imposed upon their operations in different provinces, including what he described as the deleterious effects of cross-border arbitrage between competing provinces. He avers that [w]ithout a national system of regulation and a national standard to which wholesalers will have to adhere the results would be chaotic. The spectre arises of a single business operation having to be separately licensed on differing terms and conditions in different parts of South Africa. For the reasons given earlier, the Constitution entrusts the legislative regulation of just such concerns to the national Parliament, and I am of the view that the Minister has shown, at least in regard to manufacturing and distribution of liquor, that the maintenance of economic unity necessitates for the purposes of section 44(2)*(b)* the national legislature's intervention in requiring a national system of registration in these two areas.[1]

Liquor Bill implies that protectionism is not the only thing that would necessarily trigger FC s 146(2)*(c)*(ii). However, the idea that national regulation of the manufacture and the distribution of liquor is necessary for the maintenance of economic unity seems to overstate the case. (If the matter had arisen in the context of FC s 146, FC s 146(2)*(c)*(iii) and (iv) would have formed the basis for more suitable challenges.)

Similarly, the drafters of the Final Constitution could never have anticipated that the 'protection of equal opportunity or equal access to government services'[2] might require identical treatment between citizens of all provinces in all circumstances. Rassie Malherbe makes a similar point in his assessment of the *Mashavha*:

> Per slot van rekening is elke provinsie beter in staat as die nasionale regering om die behoeftes en omstandighede binne sy jurisdiksiegebied gesaghebbend vas te stel, wat goedskiks daartoe kan lei dat differensiasie tussen die provinsies ter wille van substantiewe gelykheid nodig blyk te wees. Dit is dus moontlik dat die oogmerk van substantiewe gelykheid meer doeltreffend nagestreef kan word deur die provinsies hulle regmatige plek in die regulering van sosiale bystand as konkurrente saak te gee as om alle gesag oor sosiale bystand te sentraliseer. ['After all, each province is in a better position than the national government authoritatively to determine the needs and circumstances within is jurisdiction, from which it may easily be concluded that differentiation between the provinces could be necessary in the interests of substantive equality. It is thus possible that the objective of substantive equality could be more effectively pursued by giving the provinces their rightful place in the regulation of social welfare as a concurrent competence rather than centralizing all power over social welfare.'][3]

Access to state services is one of the most contentious issues in all modern societies. Delivery always involves trade-offs at regional and local levels of government. The model of federalism on display in the Final Constitution requires space for legitimate diversity in service provision by democratically elected governments at provincial

[1] *Liquor Bill* (supra) at paras 75–78.
[2] FC s 146(2)*(c)*(v).
[3] *Malherbe* (supra) at 862.

and municipal spheres of government.[1] Diversity means that 'protection of … equal access to government services' cannot be taken literally in any individual case. It needs to be understood as *aggregate* access to services rather than equal access to individual services. Unfortunately, it also needs to be appreciated that, like the socio-economic rights provisions in the Final Constitution, FC s 146(2)*(c)*(v) has an aspirational quality. The main barriers to equal access to government services are infrastructural rather than legal. Courts need to be realistic about the capacity of national legislation to promote 'equal opportunity or equal access to government services' before they decide that national legislation should override provincial legislation.

Realism does not, of course, entail abdication. FC s 146 contemplates a number of specific instances in which national intervention in provincial affairs is a necessity. For example, judges have to be especially vigilant about protection of the environment, in terms of FC s 146(2)*(c)*(v), in circumstances where provinces may create environmental burdens or negative externalities for other provinces whose citizens are not represented in the provincial legislature.

(ee) Preventing unreasonable action by a province

'Unreasonableness' — a famously difficult legal concept to understand — raises important questions regarding separation of powers and deference.[2] There have, as yet, been no decisions that interpret 'unreasonable action by a province' in the context of FC s 146(3). That does not mean that we are without academic or judicial guidance as to its extension. Jon Klaaren describes the standard of unreasonableness as a 'high threshold' aimed at 'renegade or out-of-place provincial legislation'.[3] He argues that 'provincial legislation which either directly discriminates against out-of-province actors or does so indirectly without justification' is most likely to be overridden by national legislation in terms of this section.[4]

The question of legislative unreasonableness arose in *New National Party v Government of the Republic of South Africa & Others*.[5] In a dictum that will no doubt be enthusiastically invoked by advocates of subsidiarity, the majority of the Court pronounced: 'Decisions as to the reasonableness of statutory provisions are ordinarily matters within the exclusive competence of Parliament.'[6] Although this statement may seem appealing on the surface, it is difficult to see how it could be successfully applied in the particular context of FC s 146(3). Does it mean that the reasonableness of provincial legislation is ordinarily a matter within the exclusive competence of the provincial legislature? Alternatively, should a court

[1] *First Certification Judgment* (supra) at para 24 ('[T]he national legislation authorised by NT 146(2)*(c)*(v) does not per se preclude the provincial governments from also taking such measures as are required to guarantee equality of opportunity or access to a government service.')

[2] On unreasonableness in administrative law, see C Hoexter *The New Constitutional and Administrative Law: Volume 2* (2002) 170–187.

[3] *Klaaren* (supra) at 5-16.

[4] Ibid.

[5] 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)(National legislation that required citizens to have bar-coded identity documents in order to vote was challenged, but ultimately upheld.)

[6] Ibid at para 24 (Yacoob J). O'Regan J adopts an alternative approach consistent with meaningful powers of judicial review and thoroughly appraises the reasonableness of the legislation in a powerful dissent. Ibid at paras 108-16.

defer to Parliament's assurance that 'national legislation is aimed at preventing unreasonable action'[1] by a province? The words 'aimed at' might lend credence to the latter view. However, the better interpretation is that the national legislation should prevail over provincial legislation if it is intended to prevent unreasonable action by a province and it is 'objectively probable' that it will achieve that end.[2] Excessive deference to the national legislature does not resonate with the strength of the word 'unreasonableness' and the Court's insistence that that the matters raised by FC s 146 are objectively justiciable.[3]

16.5 FC s 148 when the court cannot decide whether national legislation prevails

FC s 148 provides: 'If a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial legislation or provincial constitution.' In the *First Certification Judgment*, the Constitutional Court stated that it could not really envisage a situation in which the section would apply.[4] No meaning has yet been assigned to FC s 148.

16.6 Subordinate national legislation and provincial legislation

The general rule is that subordinate legislation validly made in terms of empowering legislation becomes part of that legislation for the purposes of FC s 146.[5] This rule is subject to the proviso that subordinate legislation 'made in terms of an Act of Parliament or *a provincial act* can prevail only if that law has been approved by the National Council of Provinces'.[6] Without such approval, the subordinate law lacks the capacity to prevail.[7]

16.7 Conflicts between national legislation and a provincial constitution

FC s 147(1) regulates conflict between national legislation and provincial constitutions. In cases of conflict, provincial constitutions have no special status

[1] FC s 146(3).

[2] See E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31, 46–48.

[3] In the context of socio-economic rights, national government programmes to provide housing and to prevent mother to child transmission of HIV have been subjected to scrutiny and found to be unreasonable by the courts. See *Government of the Republic of South Africa v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC); *Minister of Health & Others v Treatment Action Campaign & Others* (No 2) 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC).

[4] *First Certification Judgment* (supra) at para 246.

[5] See the definitions of 'national legislation' and 'provincial legislation' in FC s 239.

[6] FC s 146(6) (my emphasis). That the NCOP should approve subordinate provincial legislation may be counter-intuitive to some readers. See C Murray & L Nijzink *Building Representative Democracy: South Africa's Legislatures and the Constitution* (2002) 106-108.

[7] What happens when neither the national subordinate laws nor the provincial subordinate laws have been approved by the National Council of Provinces? Jonathan Klaaren has suggested that FC s 148 might be used in such cases. The national legislation would prevail. See Klaaren (supra) at 5–17.

that elevates them above ordinary provincial legislation. In the *First Certification Judgment*, the Court held that:

> Preference [over the provisions of a provincial constitution] is given to national legislation which is specifically required or envisaged by the [Final Constitution] and to national legislative intervention made in terms of [FC s] 44(2). Conflicts between national legislation and provisions of a provincial constitution in the field of the concurrent legislative competences set out in [FC Schedule] 4 are to be dealt with in the same manner as conflicts in respect of such matters between national legislation and provincial legislation.[1]

FC s 147(1) was controversial at the time of certification. It was, however, ultimately deemed certifiable.

While conflicts between national legislation, provincial constitutions and provincial legislation should formally be treated in the same manner, the substantive position may be subtly different. When interpreting FC ss 146(2) and 44(2), courts need to be sensitive to the fact that provincial constitutions are created by a super-majority of the provincial legislature. The need for such sensitivity flows, as Stu Woolman notes, from the fact that:

> FC s 147 limits, even if it does not quite defeat, the Constitutional Court's efforts to guarantee that the certification of a provincial constitution is both final and certain … . [A] strong reading of FC 147 would make a provincial constitution's certification contingent upon its consistency with the extant legislation identified in categories *(b)*, *(c)* and *(d)*. Any such conflict resolved in favour of the national legislation would render the provision of the provincial constitution inoperative, as an objective matter, from the very moment that the provision of the provincial constitution was certified. Any provision of a provincial constitution that will be stillborn at the moment of birth hardly satisfies the general conditions of finality and certainty said to govern this [certification] process.[2]

In addition, Woolman correctly observes that, while a conflict decided in favour of national legislation will render the particular provision in the provincial constitution inoperative in terms of FC s 147, it will not affect the certifiability of the provincial constitution.[3] As Woolman writes, two good reasons ground this conclusion:

> First, … certification of a provincial constitution or a provincial constitutional amendment only requires that they not be inconsistent with the Final Constitution… . Second, were the Constitutional Court to treat provisions of a provincial constitution that could be inconsistent with national legislation in the same manner as it has treated suspensive clauses and consistency clauses in provincial constitutions, it would make the certification process inordinately more complicated. Provincial constitutions would have to be tested against the text of the Final Constitution, and the texts of existing pieces of national legislation. FC s 147 should be read, therefore, as recognizing the potential for such conflicts with national legislation, but wisely disaggregating such assessments from the certification process.[4]

[1] See *First Certification Judgment* (supra) at para 269.

[2] S Woolman 'Provincial Constitutions' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 21, 21-18–21-19 (citations omitted).

[3] Ibid at 21-19–21-20.

[4] Ibid.

16.8 Conflicts in schedule 5 areas

Conflict in Schedule 5 areas is dealt with in the chapter in this work on legislative competence.[1]

16.9 Building genuine co-operative government: Do courts possess a residual power to invalidate legislation on federalism grounds in the absence of legislative conflict?[2]

Judges might possess a residual power to invalidate legislation on federalism grounds even in the absence of legislative conflict. FC s 41(1) states:

> All spheres of government and all organs of state within each sphere must —
> *(a)* preserve the peace, national unity and the indivisibility of the Republic;
> *(b)* secure the well-being of the people of the Republic …

FC s 41(1) can be read in a manner that grants courts the power to invalidate provincial legislation on the grounds that such legislation seeks to advance the ends of a particular province at the expense of another province. Such protectionism may lead to 'a debilitating and destabilizing spiral of protectionist measures and anti-competitive countermeasures'.[3] The United States Supreme Court has found it necessary to assume the power to prevent certain types of protectionism in the absence of specific textual support in the US Constitution.[4] While our courts are hardly in the thrall of American jurisprudence, our Constitutional Court could well find itself compelled to invalidate provincial legislation on FC s 41(1) grounds.

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[1] V Bronstein 'Legislative Competence' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15.

[2] For more on co-operative governance, see S Woolman & T Roux 'Co-operative Government & Intergovernmental Relations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS1, July 2009) Chapter 14 (In general, cooperative governance — in terms of the both the Final Constitution and various pieces of legislation — requires that all parties to a conflict exhaust every possible means of dispute resolution before a court will consider hearing a matter.)

[3] LH Tribe *American Constitutional Law* (3rd Edition, Volume 1, 2000) 1040. On protectionism, see DH Regan 'The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause' (1986) 84 *Michigan Law Review* 1091, 1112-18.

[4] See Tribe (supra) at 1030. For example the dormant commerce clause has been used to prevent Wisconsin from prohibiting the operation of trucks longer than 55 feet on their highways because of the burden on interstate commerce. *Raymond Motor Transportation, Inc v Rice* 434 US 429 (1978). An Arizona law that aimed to limit the length of trains to 14 passenger cars or 70 freight cars could not be applied for the same reason. *Southern Pacific Co v State of Arizona ex Rel Sullivan* 325 US 761 (1945). A law that made it illegal to sell milk as pasteurized unless it had been pasteurized and bottled at an approved plant within 5 kilometres of the central square of Madison was invalidated. *Dean Milk co v City of Madison, Wis* 340 US 349 (1951). Alaska was barred from requiring timber taken from state land to be processed within the state before export. *South-Central Timber Dev, Inc v Wunnicke* 467 US 82 (1984). For a detailed analysis of the dormant commerce clause jurisprudence, see Tribe (supra) at 1029ff. See also MA Lawrence 'Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework' (1998) 21 *Harvard Journal of Law and Public Policy* 395.

17 National Legislative Authority

Michael Bishop & Ngwako Raboshakga

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17.1 Introduction*

This chapter explores the inner dynamics and the external effects of the National Legislature. The National Legislature occupies a critical space in South Africa's constitutional democracy. It embodies the realisation of the long and bitter struggle for liberation as made manifest by universal representation. It constitutes, at least in form, the primary driver of democratic rule. The Constitution also envisages a legislature that will make good the basic law's many promises. Yet, Parliament — precisely because of its vast powers and popular mandate — often poses the greatest threat (of the three branches of government) to hard won constitutional rights.

With these dangers in mind, the Final Constitution carefully calibrates the need to afford Parliament the necessary power to discharge its constitutional mandates, while cabining those same powers in a manner designed to prevent overreach and abuse. Those limits take a number of forms — most obviously the Bill of Rights and the assignment of certain powers to other spheres of government and organs of state. Parliament is also constrained by the procedures that it must follow in passing laws. Only laws that emerge from procedures clearly delineated in the Constitution are valid. These procedures go beyond purely formal niceties. They give life to forms of participatory democracy and direct democracy expressly contemplated by the Constitution. They likewise entrench our commitment to the rule of law.

Understanding how South Africa's Parliament manages to accomplish these various ends while remaining within constitutional confines first requires a somewhat detailed exploration of how it functions. This chapter cannot, within the space afforded, provide an exhaustive account of how (and how well) Parliament discharges its national legislative authority. To fully understand how Parliament acquits itself one would need to examine the basic principles of democracy from which it draws support,[1] the election of its members,[2] and the manner in which it shares power with the coordinate branches of national government,[3] the provinces,[4] and local government.[5] One would be obliged to traverse the express

* The authors wish to thank Steve Budlender for use of material from the first iteration of this chapter. We have drawn extensively from Steve's work — particularly in §§ 17.2, 17.3 and 17.5. We deeply appreciate his generosity in allowing us to take some of the credit for his excellent efforts. However, all the positions expressed in this chapter — and any errors — are ours alone.

[1] T Roux 'Democracy' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10.

[2] G Fick 'Elections' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 29.

[3] S Seedorf & S Sibanda 'Separation of Powers' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12.

[4] T Madlingozi & S Woolman 'Provincial Legislative Authority' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 19; C Murray & O Ampofo-Anti 'Provincial Executive Authority' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 20; V Bronstein 'Legislative Competence' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2005) Chapter 15; V Bronstein 'Conflicts' S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 16.

[5] N Steytler & J De Visser 'Local Government' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 22; S Woolman & T Roux 'Cooperative Government' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS2, July 2009) Chapter 14.

substantive limits[1] on Parliament's powers to make laws in addition to the implicit limits[2] that flow from the aforementioned relationships and principles. Because these concerns are dealt with in detail elsewhere in this book, we engage them largely in passing. The chapter focuses primarily on the composition of Parliament, the interaction between its two houses, the procedures it follows to pass laws, how it regulates its internal proceedings and some of the more procedural limits on its powers.

§ 17.2 sets the stage by describing the make-up of Parliament and the interaction between the National Assembly ('NA') and the National Council of Provinces ('NCOP'). In § 17.3 we describe in detail — and with diagrammatic representations — how Parliament passes each type of law within its power. § 17.4 initiates the daunting task of considering the constitutional limits on Parliament's power by examining this surprisingly complex question: At what stage in the legislative process can litigants challenge legislation? Once we have established when a challenge can be brought, we examine the types of challenges that can be mounted. §17.5 provides an overview of the range of substantive challenges available: federalism, fundamental rights, extra-territoriality, separation of powers, delegation and legality constraints. The next section — § 17.6 — discusses oft-litigated and now well-ventilated procedural limits on Parliament's powers: public participation and tagging. The penultimate section asks some questions about the internal workings of Parliament. What are the limits of its rule-making power? And, what happens when Parliament breaks its own rules? Finally, we consider the role of the primary players in the legislative process: political parties.

17.2 Composition of Parliament

South Africa has a bicameral Parliament consisting of the NA and the NCOP. The NA 'is elected to represent the people'[3] while the NCOP 'represents the provinces to ensure provincial interests are taken into account in the national sphere of government'.[4] This section details how both houses are constituted, and how they interact with each other. We first discuss each house in general terms, then consider the relationship between the two, before finally looking in more detail at membership of, and defections from, both houses.

(a) The National Assembly

The NA is the first House of Parliament and the House to which the national executive is accountable.[5] The Constitution provides that it must consist of between

[1] All the chapters in this four volume treatise that cover substantive provisions of the Bill of Rights fall into this category.

[2] F Michelman 'Legality, the Rule of Law and the Supremacy of the Constitution' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11.

[3] FC s 42(3).

[4] FC s 42(4).

[5] Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC') s 55(2). If the National Assembly passes a vote of no confidence in the President and the Cabinet, the President and other members of the Cabinet must resign. The national executive is not accountable to the National Council of Provinces. Compare FC s 55(2) with FC s 68.

350 and 400 members elected by an electoral system based on a national common voters roll and producing, in general, proportional representation.[1]

Decisions by the NA are generally decided by majority vote.[2] The quorum of the NA is a majority of its members when a vote is taken on a Bill and one-third of the members in most other matters.[3]

The NA is the primary legislative power in Parliament.[4] It can legislate over the objections of the NCOP: (1) by a simple majority if the legislation does not affect provincial interests[5] and (2) by a two-thirds majority if the legislation does affect provincial interests.[6] It can also veto any legislation passed by the NCOP.[7] Members of the NA and committees of the NA can prepare and introduce in the NA any Bill other than a money Bill.[8]

The NA is chaired by the Speaker.[9] The Speaker is the representative and spokesperson of the Assembly in its collective capacity.[10] The Speaker may therefore give binding undertakings on behalf of the NA. Such undertakings may even embrace the expenditure of moneys in relation to the legislative process.[11] Though the Speaker may be removed by a resolution of the NA,[12] the Speaker must not bow to political pressure and is 'required by the duties of his office to exercise, and display, the impartiality of a judge.'[13]

Section 57(1) of the Constitution gives the NA the power to determine its internal arrangements and procedures and to make rules and orders concerning its business. The scope of these rules and their relationship to the constitutional text has already been the subject of litigation.[14] Section 57(2) requires that the rules of the NA provide *inter alia* for the establishment of committees and requires that minority parties be allowed to participate on these committees in a manner consistent with

[1] FC s 46(1). See also Electoral Act 73 of 1998.

[2] FC s 53(1)*(c)*. The special majorities required for amendments to the Constitution are discussed at § 17.2*(a)* infra.

[3] FC ss 53(1)*(a)* and *(b)*.

[4] See § 17.2 infra for discussion of the national legislative process.

[5] FC s 75.

[6] FC s 76(1) and (2).

[7] FC s 76(2)(i).

[8] FC s 55(1)*(b)* and s 73(2). Only the Minister of Finance may introduce a money Bill in the Assembly.

[9] FC s 52. Note that the section provides also for an office of Deputy Speaker.

[10] *Gauteng Provincial Legislature v Kilian* 2001 (2) SA 68 (SCA), 2001 (3) BCLR 253 (SCA) ('*Killian*') at para 26.

[11] Ibid at para 29. The SCA held that the Speaker of the Gauteng Provincial Legislature had the power to give an undertaking to minority political parties that the Legislature would cover the legal costs incurred in referring a pending bill to the Constitutional Court.

[12] FC s 52(4).

[13] *Kilian* (supra) at para 30.

[14] *Speaker of the National Assembly v De Lille & Another* 1999 (4) SA 863 (SCA), 1999 (11) BCLR 1339 (SCA)('*De Lille*'). See the discussion at § 17.7*(a)* and *(d)* infra.

democracy.[1] For these reasons, the rules of the Assembly provide that parties are to be represented on the committees in substantially the same proportion as they are represented in the NA[2] and that, as far as possible, each party is entitled to at least one representative in each committee.[3] Meetings of the NA's committees are generally open to the public.[4]

The committees contemplated by s 57 include portfolio committees. The portfolio committees play a crucial role in Parliament's legislative and oversight functions.[5] They are responsible for the detailed consideration and debate of Bills after their first 'reading' and are also the institutions to which public comment on Bills is usually addressed. The portfolio committees also play an oversight role by monitoring the performance of members of the national executive and their particular portfolios. The NA's committees also have the powers to summon any person to appear before them to give evidence or to produce documents and the power to require organs of state to report to them.[6] Through the judicious use of these powers the committees can be important tools for responsible, accountable and transparent government.

(b) The National Council of Provinces

The second House of Parliament is the NCOP. The NCOP, as its name suggests, aims to give the provinces representation in the national legislative process. Its composition, powers and processes were designed to offer more effective national representation for provincial interests than was provided by the Senate under the Interim Constitution.[7]

Although the primary function of the NCOP is legislative, it has the secondary role of providing a national forum for consideration of issues affecting provinces.[8] The latter role distinguishes the NCOP from the NA. Another important

[1] FC s 57(2)*(b)*. See *Democratic Alliance & Another v Masondo NO & Another* 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC), [2002] ZACC 28 ('*Masondo*') at para 18 (Constitutional Court held that the 'purpose of these provisions is to ensure that minority parties can participate meaningfully in the deliberative processes of parliament.') For comment on *Masondo*, see T Roux 'Democracy' in S Woolman & M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10. Section 57(2) *(d)* provides for the recognition of the leader of the largest opposition in the Assembly as the "Leader of the Opposition". There is nothing in the Constitution that suggests that this requirement has anything but symbolic meaning.

[2] This general rule does not apply to those committees where a specific composition is prescribed by the Rules. NA Rule 125(1). Note that, generally, parties appoint their members to sit on particular committees. NA Rule 126. Therefore in practical terms, the majority party will be able to control the election of the chairperson of any committee. See NA Rule 129.

[3] NA Rule 125(2).

[4] NA Rule 152.

[5] See NA Rules 199-203. The equivalent NCOP committees are the select committees. See NCOP Rules 151-5.

[6] FC s 56 and NA Rule 138. The NCOP committees have similar powers. See FC s 69 and NCOP Rule 103.

[7] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC'). See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), [1996] ZACC 26 ('*First Certification Judgment*') at paras 318-33, particularly para 331.

[8] FC s 42(4).

difference between the Houses is that the NCOP is not an organ of responsible government. The national executive is accountable to the NA and not to the NCOP.[1]

(i) *Composition and electoral system*

The NCOP consists of nine provincial delegations of ten members each.[2] The delegates are selected by the provincial legislatures on the basis of party political proportional representation.[3] Each delegation has six permanent members:[4] however, even these members are subject to recall by the party which nominated them if they lose the confidence of the provincial legislature.[5] The balance of the delegation is composed of four special members. These special members of the provincial legislature are sent to participate in particular NCOP business.[6] With one exception,[7] voting within the NCOP takes place by delegation. Each provincial delegation casts one vote in accordance with a provincial mandate determined by the provincial legislature.[8] A resolution requires the votes of five provinces to be adopted.[9] This process attempts to subordinate party allegiance to allegiance to the province as a whole.[10] The purpose of the voting procedure is to enhance the representation of provincial interests within the NCOP and to prevent the

[1] Compare FC s 55(2) with FC s 68.

[2] FC s 60(1). Provision is made in FC s 67 for a tenth delegation representing local government to participate in the deliberations of the NCOP when local government matters are discussed. The local government delegation does not have voting rights.

[3] FC s 61(1), read with Part B of Schedule 3, sets out the formula for determining the representation of parties in the provincial delegations. Item 7 of Schedule 6 specifies the number of special delegates and permanent delegates to which the respective parties are entitled in each province. Item 7 applies only for the duration of the term of office of each provincial legislature. Once a new legislature is elected the distribution of special and permanent delegates will be governed by national legislation. See FC s 61(2)*(a)*.

[4] The presence of permanent delegates in the NCOP serves an important function by providing a continuous provincial political presence in Parliament and prevents the legislative process from being taken over entirely by both civil servants and national political interests. By contrast, the German Bundesrat has no permanent delegates and tends to be run by civil servants. For a discussion of the strengths and weaknesses of the NCOP as a mechanism for intergovernmental relations, see S Woolman & T Roux 'Co-operative Government and Intergovernmental Relations' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS 1, July 2009) Chapter 14.

[5] FC s 62(4)*(c)*.

[6] FC s 60(2)*(a)*.

[7] Where the NCOP votes on legislation that does not relate to provincial matters, there is no delegation vote and individual members cast separate votes. FC s 75(2).

[8] FC s 65(1)*(a)*. Section 65(2) requires Parliament to pass national legislation that will provide a uniform procedure by which provincial legislatures will mandate delegations to cast their votes. That legislation — the Mandating Procedures of Provinces Act 52 of 2008 — is discussed in § 17.2*(b)*(ii) below.

[9] FC s 65(1)*(b)*.

[10] It also means that the presence in the NCOP of individual members of provincial delegations is frequently unnecessary. Hence there is no requirement that a minimum number of members of the Council must be present before votes can take place. By contrast, FC s 53(1)*(b)* requires the presence of at least a third of the members of the National Assembly before a vote can be taken on any issue and an actual majority of all members for other votes.

Council from becoming a second House of Assembly in which the national political party Whip prevails over provincial concerns.[1]

(ii) *The National Council of Provinces and the legislative process*

The NCOP exercises a veto over certain constitutional amendments.[2] The ordinary legislative powers of the NCOP are strongest with respect to legislation affecting the provinces.[3] Where there is a dispute between the NCOP and the NA regarding such legislation, mediation between the two houses takes place. Unless a settlement is reached, the NA can pass the legislation only with a two-thirds majority.[4] Where there is a dispute between the NCOP and the NA regarding other legislation, no mediation takes place and the NA is free to enact the legislation by a simple majority.[5]

The different powers of the NCOP with respect to legislation on provincial matters and other legislation are reflected in different legislative processes within the NCOP. The default process in the NCOP — which applies to 'provincial' legislation and constitutional amendments — involves the execution of a provincial mandate, with voting taking place by delegation and not by member.[6] It is for that reason that, in its *Second Certification Judgment*, the Constitutional Court described the NCOP as: '[a] council of provinces and not a chamber composed of elected representatives. Voting by delegation reflects accurately the support of the different provincial legislatures. In this manner the provincial legislatures are given a direct say in the national law-making process through the NCOP.'[7]

During the certification process, the system of mandated voting was challenged as failing to comply with Constitutional Principle ('CP') XIV. CP XIV required minority parties to participate in the legislative process 'in a manner consistent with democracy.' Because each province only has one vote in the NCOP, the challengers contended that minority parties' voices would not be heard. The Constitutional Court rejected the complaint, noting that minority parties would be fully heard in the NA. The Court also held that, '[g]iven the purpose of the NCOP, which is to involve the provinces in the enactment of certain legislation and to provide a forum in which provincial interests can be advanced, the method of voting is not inappropriate.'[8]

Because the vote of the provincial delegation is determined by a decision of the provincial legislature, there is less need for a substantial committee process in the

[1] This usurpation of provincial prerogatives was perceived to have been one of the failings of the Senate under the Interim Constitution. See *First Certification Judgment* (supra) at para 320 (Counsel for the Constitutional Assembly described the Senate as 'a mirror image of the National Assembly'.)

[2] See § 17.3*(a)* infra.

[3] This category encompasses all of the matters in respect of which the NCOP passes legislation in terms of s 76. See § 17.3*(b)* infra.

[4] See § 17.3*(b)* infra.

[5] See § 17.3*(c)* infra.

[6] FC s 65(1).

[7] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC), [1996] ZACC 24 ('*Second Certification Judgment*') at para 61.

[8] *First Certification Judgment* (supra) at para 227.

Council itself on 'provincial' legislation.[1] The mandated nature of the legislative process on Bills involving provincial matters also implies that there is limited scope for debate over such Bills in the Council as a whole. For the purposes of public accountability and transparency, it is appropriate for delegations to give detailed explanations in Council of the reasons for their vote on Bills involving provincial matters.[2] These recommendations should, however, be distinguished from debating the merits of the Bill. Such debate would, for the most part, be irrelevant to the legislative process because delegates are voting on the basis of provincial mandates.

The Constitution requires an Act of Parliament that provides a uniform procedure for provincial legislatures to confer authority on their delegations to cast votes on their behalf.[3] This legislation was finally passed in 2009. Unfortunately, the Mandating Procedures of Provinces Act ('Mandates Act')[4] is not a model of statutory clarity. It distinguishes between four types of mandates: negotiating, final, legislative and voting.

First, a negotiating mandate contains the instructions the province's delegation must follow when the Bill is negotiated in committee and may include proposed amendments to the Bill.[5] Negotiating mandates are conferred by committees of the provincial legislature and are compulsory when an NCOP committee considers a Bill.[6]

Second, a final mandate tells the delegation how to vote on the Bill in committee.[7] They are conferred by the provincial legislature, and are mandatory for decisions on Bills.[8]

Third, the Act provides two complementary (and somewhat conflicting) definitions of a 'legislative mandate'. According to the definitions section, a legislative mandate is 'the conferral of authority by a provincial legislature on its provincial delegation to the NCOP to cast a vote on a question contemplated in [FC ss 64, 74, 76 or 78].'[9] Section 7 indicates that a legislative mandate includes both a negotiating and a final mandate, and is required for decisions under FC ss 74 and 76.[10] The best

[1] One possible NCOP committee function would be to summon the Cabinet member promoting the Bill to give answers to questions on the Bill where they are required. The answers could then be used to inform any provincial debate on the Bill. Provincial portfolio committees may not have the power to require the attendance of national Ministers (FC s 115 is open to conflicting interpretations in this regard). NCOP committees do. See FC s 66(2).

[2] The NCOP's presiding officer may, on request, allow each province to give a declaration explaining the province's vote. NCOP Rule 71*(b)*.

[3] FC s 65(2).

[4] Act 52 of 2008.

[5] Mandates Act s 1.

[6] Mandates Act s 5, which reads: 'A committee designated by a provincial legislature must in accordance with the format prescribed in Schedule 1 confer authority on its provincial delegation to the NCOP of parameters for negotiation when the relevant NCOP select committee considers a Bill after tabling and before consideration of final mandates, and may include proposed amendments to the Bill.'

[7] Mandates Act s 1.

[8] Mandates Act s 6, which reads: 'A provincial legislature must confer authority on its provincial delegation to the NCOP to cast a vote when the relevant NCOP select committee considers a Bill prior to voting thereon in an NCOP plenary.'

[9] Mandates Act s 1. FC s 64 deals with votes for the Chairperson and Deputy Chairperson of the NCOP. FC s 78 concerns decisions of the Mediation Committee.

[10] Mandates Act s 7 actually refers to FC ss 74(1)*(b)*, 74(2)*(b)*, 74(3)*(b)*, 74(8), rather than s 74 generally. However, those specific subsections are all the parts of FC s 74 that require a vote by the NCOP, so it can fairly be replaced with a reference to FC s 74 generally.

interpretation of the definition read with s 7 seems to be that a combination of negotiating and final mandates is required when a delegation votes on a s 74 or s 76 question in committee. Presumably, both mandates must be conferred simultaneously. The omission of FC ss 64 and 78 from the list in s 7 is difficult to explain. The only plausible explanation is that a legislative mandate is permissible, but not required, for those decisions.

Fourth, while the negotiating, final and legislative mandates all apply to votes in committee, the voting mandate conveys the province's vote for a question in an NCOP plenary session. It must be conferred by the provincial legislature.[1] To avoid interminable consultations between the provincial legislature and its delegation, s 8(2) provides: 'If no matter arises from the deliberations of the NCOP select committee when considering final mandates which may necessitate consideration by a provincial legislature, the provincial delegation to the NCOP must table its province's final mandate in the NCOP plenary as that province's voting mandate.'

In addition to categorising the types of mandates, the Mandates Act also sets out basic, formal requirements that all mandates must meet to be valid.[2] Presumably, a mandate that does not meet these conditions will be invalid. But it remains unclear what will happen if the NCOP acts on what later turns out to have been an invalid mandate. We discuss the question of failures to comply with internal procedures generally in the section on the Internal Regulation of Parliament.[3]

However, the Mandates Act is vague on an even bigger question: How must provincial legislatures determine their mandate? Negotiating mandates must be conferred by committees of the provincial legislatures, while final, legislative and voting mandates come from the provincial legislatures themselves. But the Act allows the provinces to decide what process they will follow to confer the non-negotiating mandates. Are provinces required to have a plenary vote, or may they delegate the function — through their rules or practice — to a committee or the speaker? Can provinces adopt different requirements for different types of questions? The only constitutional limitation, in our view, is that a question under s 74(8) must be decided by a plenary vote. Given this omission, the Mandates Act may not actually fulfil its constitutional purpose to 'provide for a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf.' The actual mechanism for conferring authority is left to the provinces. The Mandates Act only regulates the form in which that authority must be expressed in the NCOP.

The mandating procedure has been the topic of litigation several times in the Constitutional Court. All of these cases predated the Mandates Act. However, their disposition by the Constitutional Court remains illustrative of the Court's reluctance to decide some difficult issues. In *United Democratic Movement*

[1] Mandates Act s 8(1), which reads: 'A provincial legislature must confer the authority on the head of the provincial delegation to the NCOP, or a delegate designated by the head of the delegation, to cast a vote in an NCOP plenary.'

[2] Mandating Act s 3 (A mandate must: *(a)* indicate the name and number of the bill; *(b)* indicate how the province votes; *(c)* be signed by the Speaker of the provincial legislature or a delegate; and *(d)* be addressed to the Chairperson of the NCOP or a delegate.)

[3] § 17.7 below.

& Others v President of the RSA & Others,[1] the applicants attempted to rely on the failure of some of the provincial delegations properly to confer and present their mandates in order to challenge the validity of one of the Acts at issue in the case.[2] The respondents, in turn, contended that a court was not competent to enquire into compliance with the NCOP rule that governed mandates; only the NCOP was competent to determine compliance with its internal rules and procedures so long as no violation of the Constitution was alleged.[3] The Constitutional Court in *United Democratic Movement* ducked this question, presumably because the Act in question was declared invalid on other unrelated procedural grounds.

In *President of the Republic of South Africa & Others v Quagliani* the applicants argued that South Africa's extradition treaty with the United States of America was invalid because the mandates in the NCOP had not been properly conferred.[4] In terms of FC s 231(2), treaties must be approved by resolution in both legislative houses.[5] The Court avoided deciding the mandates issue for three procedural reasons. First, the applicants had not joined the speakers of the provincial legislatures.[6] Second, the complaint was inordinately delayed.[7] Finally, the Court held that a bald allegation that mandates were not conferred was insufficient. An applicant had to provide some evidence to indicate that the proper procedure had not been followed.[8] These findings serve as important reminders of the procedural hurdles for anybody planning a future mandates challenge.

The only detailed consideration of the role of mandates occurs in *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others*.[9] The issue in *Merafong* was whether a provincial delegation to the NCOP could propose an amendment to a s 74(8) Bill amending provincial boundaries. We address that question in more detail later.[10] For now, we focus on the Court's comments about the nature of the mandated voting system in the NCOP. Van der Westhuizen J held that '[a]lthough the NCOP fulfils an important function in the protection of provincial interests, there is no scope for debate and for substantive amendments as far as bills altering provincial boundaries are concerned.'[11] Citing an earlier passage from the original iteration of this chapter (which we retain),[12] he argued that

[1] *United Democratic Movement & Others v President of the Republic of South Africa & Others* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC), [2002] ZACC 21 ('*United Democratic Movement*').

[2] Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002.

[3] In making this argument, the respondents relied on FC ss 70(1)*(a)* and 71(2) read with ss 36 and 37 of the Powers and Privileges of Parliament Act 91 of 1963.

[4] 2009 (4) BCLR 345 (CC), [2009] ZACC 1.

[5] FC s 231(2) reads: 'An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces'.

[6] *Quagliani* (supra) at para 27.

[7] Ibid at paras 28-29.

[8] Ibid at para 30.

[9] 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC), [2008] ZACC 10 ('*Merafong*').

[10] §17.3*(a)* below.

[11] *Merafong* (supra) at para 81.

[12] S Budlender 'National Legislative Authority' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2005) 17-5 ('Such debate would, for the most part, be irrelevant to the legislative process because delegates are voting on the basis of provincial mandates.')

'[t]he reason is of course the mandated nature of the process. Delegates to the NCOP vote on the basis of provincial mandates. They cannot agree to support an amendment which they have not been mandated by their provincial legislatures to support.'[1]

This conclusion cannot possibly be correct. What Steve Budlender was (correctly) pointing out in the quoted passage is that the mandated nature of the process makes it pointless for the delegates to engage in substantive debate with each other about a Bill. For ss 74 and 76 Bills the substantive debate occurs through sharing and altering mandates. The NCOP is merely a mechanism through which the provincial legislatures negotiate with each other: the delegates are merely mouthpieces. But that does not mean that it is pointless to propose amendments to ss 74 and 76 Bills. All it means is that the amendments must be proposed in terms of negotiating or legislative mandates received from the provincial legislatures. Those mandates can propose amendments which the other provinces can accept or reject when they confer their final and voting mandates. *Merafong* evinces a serious misunderstanding or mischaracterisation of the mandating process. The Court should revisit this issue at the earliest opportunity to avoid the potential for stifling meaningful discussion between provinces in the NCOP.

In the case of 'non-provincial' s 75 legislation, the considerations outlined above do not apply because voting within the Council takes place by individual members[2] and the provincial mandate does not operate.[3] In the case of such 'non-provincial' legislation, the Constitution also requires that minority parties be allowed to participate in the proceedings of the NCOP and its committees 'in a manner consistent with democracy'.[4] The meaning of this phrase was considered by the Constitutional Court with reference to s 160(8). Section 160(8) imposes a similar obligation on Municipal Councils.[5] Langa DCJ, for the majority, held that the 'purpose of these provisions is to ensure that minority parties can participate meaningfully in the deliberative processes of parliament'.[6] O'Regan J (in dissent) contended that the phrase 'implies that the majority must always be able to determine decisions.'[7]

This requirement does not apply when the NCOP deals with 'provincial' legislation or other matters — in such cases the NCOP rules and orders are required instead to provide for the participation of all the provinces in a manner consistent with democracy and there is, understandably, no reference to minority parties.[8]

[1] *Merafong* (supra) at para 81.
[2] FC s 75(2).
[3] FC s 65(2) applies only to those cases where the provincial delegation casts a single vote.
[4] FC s 70(2)*(c)*.
[5] *Democratic Alliance & Another v Masondo NO & Another* 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC), [2002] ZACC 28.
[6] Ibid at para 18.
[7] At para 61.
[8] FC s 70(2)*(b)*.

This distinction has also been reflected in the NCOP rules regarding its select committees. These committees have to deal both with non-provincial matters under s 75 and with matters that affect the provinces. The rules therefore provide that each province is entitled to an equal number of permanent members on each committee[1] and that each party represented in the NCOP is entitled to proportional representation on the committee or, where this is not possible due to the committee size, at least one representative on the committee.[2] Committee decisions on s 75 matters require a simple majority of the votes cast, whereas committee decisions on 'provincial' legislation or other matters require the supporting vote of five provinces.[3] On matters affecting the provinces, provincial legislatures will, through their committees, facilitate public involvement in their legislative processes in their respective constituencies, making it unnecessary that the same task be undertaken by the NCOP's committees.[4]

(c) Membership and defections

The story of the constitutional regulation of members' defection from political parties is long, complicated and ends where it begins. Under the Interim Constitution, a member of the NA who ceased to be a member of the party that nominated him or her had to vacate his or her seat.[5] This 'anti-defection'

[1] NCOP Rule 154*(a)*.

[2] NCOP Rule 154*(b)*.

[3] NCOP Rule 152(2) and (3). Note that these rules also provide that the quorum requirement is different in each of these situations.

[4] In *Doctors for Life International*, the Court emphasised the interdependency between the work of the NCOP and the provincial legislatures, and consequently their respective committees. *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC), [2006] ZACC 11 ('*Doctors for Life*') at paras 159-163. The Court considered the 'question as to whether the duty of the NCOP to facilitate public involvement in its legislative process may be met through public hearings that are conducted by the provincial legislatures'. It found that functional and practical considerations generally weigh in favour of holding public hearings in the provinces by the provincial legislatures rather than at the seat of the NCOP. The functional advantages include the fact that some members of the provincial delegation in the NCOP are also members of the provincial legislature, able to partake in the facilitation of public involvement at the provincial level. Practically, the Court found it wasteful of the government's limited resources if both the NCOP and provincial legislatures were to hold separate public hearings in the same provinces. However, the Court came short of laying down a hard and fast rule in this regard and held that the 'ultimate question' remains 'whether the provincial interests on the legislation under consideration were taken into account in the national legislative process'. Thus '[w]hether public hearings conducted by provincial legislatures are sufficient to satisfy the obligation of the NCOP under s 72(1)*(a)* ultimately depends on the facts and the nature of the process of facilitating public involvement that has occurred in the provinces, including the extent to which NCOP delegations therein were involved in and have access to the information gathered during that process.' Ibid at para 163. For further discussion of *Doctors for Life*, see § 17.6 below

[5] IC s 43*(b)*.

provision was kept in place under the Final Constitution[1] and was unsuccessfully challenged in the *First Certification* proceedings.[2]

In 2002, Parliament passed four Acts,[3] including two constitutional amendments, that aimed to allow defections at national, provincial and local government levels. The constitutionality of these Acts was challenged in the Constitutional Court in *United Democratic Movement & Others v President of the RSA & Others*.[4] The Court rejected the bulk of the challenges. It held that the constitutional amendments did not destroy the 'basic structure' of the Constitution[5] and that they were not inconsistent with the founding values of the Constitution and the Bill of Rights.[6] The Court also rejected the contention that the amendment allowing defections at local government level was inconsistent with the Constitution.[7] The only challenge that the Court upheld was the challenge to the Loss or Retention of Membership of National and Provincial Legislatures Act ('Membership Act'). This Act, though it amended the transitional provisions of the Final Constitution, had been passed by the procedure for ordinary legislation (s 76(1)) rather than by the procedure for constitutional amendments (s 74(3)). The Court recognised that

[1] FC s 47, which deals with membership of the National Assembly, did not itself contain an anti-defection clause. The anti-defection clause was contained in FC Schedule 6, item 6(3) read with item 23A of Annexure A to Schedule 6, which provided:

(1) A person loses membership of a legislature to which this Schedule applies if that person ceases to be a member of the party which nominated that person as a member of the legislature.

(2) Despite subitem (1) any existing political party may at any time change its name.

(3) An Act of Parliament may, within a reasonable period after the new Constitution took effect, be passed in accordance with section 76(1) of the new Constitution to amend this item and item 23 to provide for the manner in which it will be possible for a member of a legislature who ceases to be a member of the party which nominated that member, to retain membership of such legislature.

(4) An Act of Parliament referred to in subitem (3) may also provide for—

(a) any existing party to merge with another party; or

(b) any party to subdivide into more than one party.

[2] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), [1996] ZACC 26 ('*First Certification Judgment*') at paras 182-7. The Court rejected submissions that, by submitting legislators to the authority of their parties, the anti-defection clause: was inimical to accountable, responsive, open, representative and democratic government; that universally accepted rights and freedoms, such as freedom of expression, freedom of association, the freedom to make political choices and the right to stand for public office and, if elected, to hold office, are undermined; and that the anti defection clause militates against the principles of 'representative government', 'appropriate checks and balances to ensure accountability, responsiveness and openness' and 'democratic representation'.

[3] Constitution of the Republic of South Africa Amendment Act 18 of 2002, Constitution of the Republic of South Africa Second Amendment Act 21 of 2002, Local Government: Municipal Structures Amendment Act 20 of 2002 and Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002.

[4] 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC), [2002] ZACC 21 ('*United Democratic Movement*' or '*UDM*').

[5] Ibid at para 17. The Court found that it did need to decide whether the 'basic structure doctrine' formed part of South African law. See § 17.5*(g)* infra.

[6] *United Democratic Movement* (supra) at para 75. The Court therefore concluded that there had been no need to pass the amendments in accordance with the requirements of FC s 74(1) or (2). The amendments had been correctly passed in accordance with FC s 74(3). See § 17.3*(a)* infra.

[7] *United Democratic Movement* (supra) at para 84. This was on the assumption that Schedule 6A (which was created by the amendment) had the status of ordinary legislation due to the way it could be amended and could therefore be assessed against the provisions of the Final Constitution.

the Constitution had vested a special power in Parliament to amend these particular transitional provisions of the Constitution by an ordinary Act of Parliament, rather than by a constitutional amendment.[1] However, it held that the proviso that the Act had to be promulgated 'within a reasonable period after the new Constitution took effect' meant that the special power had lapsed.[2] The Membership Act was consequently declared invalid on procedural grounds. Following this decision, Parliament duly passed a constitutional amendment[3] to replace the Membership Act. This regime — in place until 2009 — permitted defections at national, provincial and local levels, but only during specified periods and under certain conditions.

In 2008, Parliament passed the Fourteenth and Fifteenth Constitutional Amendment Acts that repealed *all* the 2002 floor-crossing provisions. The amendments came into force on 17 April 2009. The position on defections and floor crossing now is precisely what it was before the 2002 amendments: if a member leaves her political party, she loses her seat. Period. The seat belongs to the party, not the member.

Although we have ended where we began, the floor-crossing saga tells us something important about the nature of our democracy: it is flexible and dynamic. The 'multi-party representative' democracy envisioned in the Constitution is capable of embracing several different variations. At the very least, proportional representation is compatible with a system that links seats partly to individual members rather than entirely to parties.[4]

(d) The Relationship between the NA and the NCOP[5]

It is easy to see the NCOP as the less important house of Parliament. It has fewer powers and can, on most issues, be overridden by a sufficiently determined NA. This description is not inaccurate: where both Houses and the majority of provinces are dominated by a single party, the NCOP tends to play a secondary role.

Despite the actual place of the NCOP in our legislative process, the Constitutional Court has developed and applied a nuanced conception of the NCOP's place in the constitutional firmament.

> Its role is both unique and fundamental to the basic structure of our government. It reflects one of the fundamental premises of our government, which sees national, provincial and

[1] See *United Democratic Movement* (supra) at para 104 and the provisions of item 23A(3) of Annexure A to Schedule 6 of the Final Constitution.

[2] Ibid at para 105 (The Court held that 'In determining what is a reasonable period … it is necessary to have regard to all relevant facts and circumstances. The relevant considerations depend in the first instance upon the nature of the task that has to be performed, and in the second instance upon the object for which the time is given. Here the task to be performed was the passing of legislation to modify transitional provisions that had a limited life… . Having regard to all the circumstances, we are unable to conclude that an amendment passed more than five years after the Constitution came into force, to change a provision which had only another two years to run, was passed within a reasonable period.')

[3] Constitution of the Republic of South Africa Amendment Act 2 of 2003.

[4] For a critique of *UDM*, see T Roux 'Democracy' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10; G Devenish 'Political Musical Chairs — The saga of Floor-crossing and the Constitution' (2004) 15 *Stell LR* 52.

[5] For an excellent discussion on the role of the NCOP, see C Murray & R Simeon 'From Paper to Practice: The National Council of Provinces after its First Year' (1999) 14 *SA Public Law* 96.

> local governments as 'spheres within a single whole' which are distinctive yet interdependent and interrelated. The NCOP ensures that national government is responsive to provincial interests while simultaneously engaging the provinces and provincial legislatures in the consideration of national policy. From this perspective, the NCOP plays a pivotal role 'as a linking mechanism that acts simultaneously to involve the provinces in national purposes and to ensure the responsiveness of national government to provincial interests.'[1]

That account certainly reflects a constitutional ideal. But when eight of the nine provinces and the NA are controlled by the same political party, the NCOP will always fade into the background. We discuss the consequences of the ANC's dominance of the political scene in more detail in § 17.8*(b)* below. For now, we note that the role of the NCOP and the relationship between the two Houses will depend on how political power is actually distributed.

17.3 The National Legislative Process

The Constitution creates four different legislative processes: amendments to the Constitution, Bills affecting provinces, Bills not affecting the provinces, and Money Bills. The processes (except that for Money Bills) are illustrated in diagrammatic form in Figures 17.1, 17.2, 17.3 and 17.4.[2] A narrative description of the three processes follows below. After we have described each process, we consider the final step that all forms of legislation must take: assent by the President. Lastly, we look at the possibility for the President or Members of Parliament ('MPs') to refer legislation to the Constitutional Court.

Before we describe the different processes, we must raise (and immediately bracket) the question of 'tagging'. Tagging is the determination of which process applies to a bill. Tagging constitutes the first step in the legislative process. Voting can only commence once Parliament knows what type of Bill has been tabled. Tagging is dealt with in full in § 17.6*(b)* below.

(a) Bills amending the Constitution

There are several different types of constitutional amendments, each with slightly different requirements. We first address the procedures that apply to all amendments. Next, we consider the different variations and the problems each raises. Lastly, we identify some general difficulties regarding the NCOP's participation in amending the Constitution.

[1] *Doctors for Life* (supra) at para 79 quoting C Murray & R Simeon 'From Paper to Practice: The National Council of Provinces after its First Year" (1999) 14 *SA Public Law* 96, 98 and 101 (footnotes omitted) (The Court noted that the NCOP was modeled on the *Bundesrat* in Germany. 'Like the NCOP, the *Bundesrat* represents the interests of the *Länder*, which in this context are equivalent to the provinces in our country, in the national government. … The members of the *Bundesrat* are members of the state governments and are appointed and subject to recall by the states. They serve in the council as representatives of the *Länder*. The German Constitution provides that the *Länder* shall participate, through the *Bundesrat*, in the national legislative process.' *Doctors for Life* (supra) at para 80.)

[2] Figures 17.1, 17.2, 17.3 and 17.4 are based on diagrams prepared by M Phillips for the Gauteng Legislative NCOP Workshop, October 1996.

Constitutional amendments may only be introduced in the NA.[1] At least 30 days prior to the introduction of a Bill to amend the Constitution, particulars of the Bill must be published in the *Gazette* for public comment and must be submitted to the provincial legislatures for their views.[2] Any written comments on an amendment Bill received from the public or the provincial legislatures must be tabled in the NA on the introduction of the Bill.[3] An amendment Bill may not include provisions other than constitutional amendments and matters connected with the amendments.[4] The NA considers all Bills to amend the Constitution and (with one exception) may pass them only with a supporting vote of two-thirds of its members.[5]

We have identified five types of constitutional amendments:

(i) Amendments to FC ss 1 or 74;
(ii) Amendments to the Bill of Rights;
(iii) Amendments that affect the provinces generally;
(iv) Amendments that affect a specific province or provinces;
(v) All other amendments.

The first variation, set out in s 74(1), is an amendment that affects the Constitution's basic principles. The founding provisions of s 1[6] are specially entrenched and may only be amended with a supporting vote of 75 per cent of the members of the NA,[7] and the vote of six of the nine provinces in the NCOP.[8] There is an argument developed by the Indian Supreme Court — which we discuss later[9] — that there are some principles of the Constitution that are so central to the nature of the Constitution that they are un-amendable. The Constitution does not raise this possibility explicitly and any doctrine of that sort would have to be created by the courts.

Second, amendments that alter the Bill of Rights must garner the ordinary two-thirds majority in the NA *and* six provincial votes in the NCOP.[10]

There is some debate over whether the super-majority of 75 per cent required by s 74(1) applies only when the founding values in s 1 are explicitly amended, or whether it also applies to an amendment to other parts of the Constitution where the proposed amendment is inconsistent with the founding values in s 1. A similar debate could be had about amendments that are inconsistent with — but do not change the language of — the Bill of Rights. In *United Democratic Movement*, the Constitutional Court operated on the assumption that the latter view was correct

[1] Compare FC s 73(1) and FC s 73(3) read with FC s 76(3). See also Joint Rule 173*(b)*.
[2] FC s 74(5).
[3] FC s 74(6)*(a)*.
[4] FC s 74(4).
[5] FC s 74(2) and (3).
[6] For more on the founding values, see, C Roederer 'Founding Provisions' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 13.
[7] FC s 74(1) provides that amendments to the amendment section itself must be passed with a vote of 75% of the members of the National Assembly.
[8] FC s 74(1).
[9] §17.5*(g)* below.
[10] FC s 74(2).

and so the stricter requirements would apply.[1] However, the *UDM* Court expressly left the issue undecided as it was not germane to the disposition of the matter.[2]

In our view, the Court should, when faced with an appropriate matter, adopt a broader construction of s 74(1). The founding values are rarely used directly. They could be severely undermined if the s 74(1) process could be bypassed by using the less onerous s 74(2) and s 74(3) processes to pass amendments inconsistent with the founding values. The same is true of amendments to Chapter 2. It would subvert s 74(2) if it could be avoided simply by locating amendments that affect the Bill of Rights in other parts of the text of the Constitution.

However, that position needs to be tempered by an additional point made in *United Democratic Movement*. The Court stressed that the Constitution, as amended, had to be read as a whole and its provisions interpreted in harmony with one another.[3] Amendments that could be interpreted to be inconsistent with s 1 should, if possible, be read to be consistent with the Constitution. Only if the amended text is not reasonably capable of a harmonious reading should the constitutional amendment have to follow the FC s 74(1)/(2) procedure.

The Court's extant jurisprudence suggests that this more expansive approach relates only to amendments that are inconsistent with the founding values. It will not, and should not, apply to amendments that do no more than influence one's reading of the founding values. In *Premier, KwaZulu-Natal, & Others v President of the Republic of South Africa & Others*[4] the Constitutional Court was faced with an argument that amendments to the Interim Constitution that might affect the scope of the legislative and executive powers of the provinces (contained in IC ss 126 and 144) should comply with the special procedures that governed amendments to those two sections. The Court rejected this argument. It held that since the two amendments did not actually amend either s 126 or 144, the procedures in question did not need to be applied.[5]

In *United Democratic Movement*, the Court also left open the question whether the founding values and Bill of Rights could be amended by inference or whether it is necessary to draw attention to this possibility in s 74(5) notices and to state specifically that the provisions of s 74(1) and (2) are applicable to such amendments.[6] To give full effect to the principles and purposes underlying s 74, the latter view is to be preferred.

The third variation, dealt with in FC s 74(3)*(b)*, is amendments that affect the provinces because they: *(a)* involve the NCOP;[7] *(b)* alter provincial boundaries, powers, functions or institutions;[8] or *(c)* amend a provision of the FC that deals specifically with a provincial matter.[9] These amendments have the same require-

[1] *United Democratic Movement* (supra) at paras 18-20.
[2] Ibid at para 75.
[3] Ibid at para 12.
[4] *Premier, KwaZulu-Natal, & Others v President of the Republic of South Africa & Others* 1996 (1) SA 769 (CC), 1995 (12) BCLR 1561 (CC), [1995] ZACC 10 ('*Premier, KwaZulu-Natal*').
[5] Ibid at paras 27-8, 43.
[6] *United Democratic Movement* (supra) at para 75.
[7] FC s 74(3)*(b)*(i).
[8] FC s 74(3)*(b)*(ii).
[9] FC s 74(3)*(b)*(iii).

ments as those requirements that amend the Bill of Rights: two-thirds in the NA and the votes of six of the nine provinces in the NCOP.[1] The provisions giving this veto power to the NCOP are not themselves directly entrenched against amendment. However, they are indirectly entrenched: Any amendment of such a provision would be an amendment that affects the powers of the Council and would therefore have to be passed with the support of six provinces in the Council.[2]

The fourth variation on the s 74 process applies to an amendment covered by s 74(3)*(b)* and 'concerns only a specific province, or provinces'. In terms of FC s 74(8), the NCOP can only pass those amendments if it has been approved by the provincial legislature*(s)* of the affected province*(s)*. It is important to note a specific variation on the normal mandate procedure here. As we explained earlier, neither the Constitution nor the Mandates Act specifies how a provincial legislature must confer a mandate. It may do so through a committee, a plenary vote, or some other mechanism. However, when it comes to s 74(8) the Constitution requires 'the provincial legislature' to approve that part of the Bill which affects the province. In our view, this process demands a plenary vote.

Section 74(8) effectively gives each province a veto over any constitutional amendment that singles them out. 'It is not difficult,' according to Ngcobo J, 'to imagine the purpose of this provision. Its purpose is to ensure that the boundaries of a province are not reduced without its consent. This protects the territorial integrity of a province.'[3] While it is true that s 74(8) will most often be applicable when provincial boundaries are altered, it is not confined to that arena. It applies whenever provinces are treated differently. An amendment that attempted to reduce the influence of a specific province — or a class of provinces — in the NCOP or to limit their functional areas would be subject to a s 74(8) veto.

[1] A Bill amending the Constitution which affects only a specific province or provinces cannot be passed unless it is approved by the legislature or legislatures of the province or provinces concerned. See FC s 74(8).

[2] *Ex parte the Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*, 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC), [1996] ZACC 24 ('*Second Certification Judgment*') at para 70.

[3] *Matatiele Municipality & Others v President of the Republic of South Africa & Others (1)* 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC), [2006] ZACC 2 ('*Matatiele I*') at para 60. The Court expanded on this theme in *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC), [2008] ZACC 10 ('*Merafong*') at paras 23-24 ('When a constitutional amendment alters provincial boundaries, whole communities may, by the stroke of the proverbial pen, be relocated from one province to another, even though not physically. They may involuntarily end up in another province. … The fundamental right of a citizen to enter, remain in and reside anywhere in the Republic is also at stake. The attachment of people to provinces in which they live should not be underestimated. The very identity of people may be affected. … It must be added that the history of South Africa is — sadly — one of the balkanisation of our country, as well as of the separation and the forcible removal and relocation of our people. …When democracy was about to dawn and a new constitutional dispensation was negotiated, the question of whether South Africa should be a unitary state, or a federation, or a variation of any of these, was hotly debated. The Constitution embodies a carefully crafted balance. … But our country has nine constitutionally entrenched provinces with inhabitants who may well strongly identify with the province in which they live. Thus the boundaries, powers, or functions of provinces may not easily be altered.')

Whether an amendment 'concerns' a province is a more difficult question than it may seem. In *Matatiele II* the Court was confronted with a constitutional amendment[1] that altered the building blocks that defined the area of provinces from magisterial districts to municipalities.[2] The amendment also shifted the boundaries of some, but not all, of the provinces. The government argued that s 74(8) should not apply because the change in how provincial territories are defined affected *all* the provinces. The Court roundly rejected this contention:

> The provisions of section 74(8) are clear and admit of no ambiguity. They apply where a "Bill … or *any part of the Bill* concerns only a specific province or provinces." The plain and ordinary meaning of this phrase is that if any part of a proposed constitutional amendment concerns a specific province or provinces only, the provisions of section 74(8) apply. It is sufficient that a part of the proposed constitutional amendment concerns only a specific province or provinces and not other provinces. The fact that the proposed amendment deals with all provinces matters not. What matters is that there are parts of the proposed amendment which concern "only a specific province or provinces" and not other provinces.[3] (our emphasis.)

While the court certainly arrives at the correct conclusion, its analysis throws up a number of interesting procedural problems. First, how many votes does a province receive when voting on a s 74(8) amendment? In *Matatiele II*, the Court seemed to hold that a province would have two votes: one on the Bill as a whole, and a separate veto on the part of the Bill that affects the province specifically.[4] However, the Court seemed to retreat from this position in *Merafong*. In dissent, Mosenke DCJ adopted the *Matatiele II* position. In criticising advice given to the Gauteng Provincial Legislature that it could only vote 'aye or nay' on the Twelfth Amendment that would alter Gauteng's boundary by moving part of the Merafong municipality to the North West, he wrote:

> [T]his is a misconception of the power and obligation of the Province under the Constitution. The Province could have supported the [Twelfth Amendment] but declined to support that part of the [Twelfth Amendment] relating to the incorporation of Merafong-Gauteng into the North West Province. This is so because the power and duty of a province in relation to the adoption of a constitutional amendment that re-draws its boundary must be distinguished from the power and duty it bears in relation to any other constitutional amendment. … [I]t could have … vot[ed] in favour of the [Twelfth Amednment] while declining to support that part of the Bill which affected its boundary. Despite the early counsel, the Legislature thought that the only option it had was to vote 'aye' or 'nay' on the entire Bill. This demonstrates a failure on the part of the Province to appreciate its nuanced duty under the Constitution. The Province had at least two valid legislative options open to it. It could have, at once, achieved the termination of cross-boundary municipalities by supporting the Bill and defeated the re-drawing of its boundary in relation to Merafong.[5]

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[1] The Constitution Twelfth Amendment Act of 2005.

[2] *Matatiele Municipality & Others v President of the Republic of South Africa & Others (2)* 2007 (1) BCLR 47 (CC), [2006] ZACC 12 ('*Matatiele II*').

[3] *Matatiele II* (supra) at para 21. The Court endorsed this reasoning in *Merafong* (supra) at para 20.

[4] *Matatiele II* (supra) at para 25 ('The legislatures of KwaZulu-Natal and the Eastern Cape were only required to approve those parts of the amendment that concerned them specifically. However, these two provinces were still required to cast their votes on the proposed constitutional amendment as a whole in terms of section 74(3)*(b)*(ii).')

[5] *Merafong* (supra) at para 180.

Van der Westhuizen J, writing for the majority, disagreed. He held that multiple votes are 'not envisaged by sections 74(3) and (8) of the Constitution which refer to a Bill or the relevant part of a Bill that alters provincial boundaries.'[1] However, he does not explain why the sections do not allow for multiple votes. Nor does he indicate precisely how the s 74(8) procedure should work. Several possibilities exist. A province might receive one vote, and if it votes against a Bill it may be deemed to have used its s 74(8) veto power. Or, a province which disagrees with a Bill may have an election to either: *(a)* vote against the Bill, without exercising its veto; or *(b)* exercise its veto. The only option specifically excluded by the *Merafong* majority is that endorsed by Moseneke DCJ: a vote for the Bill in general, *plus* a veto of the part that affects its boundary. In our view, a province must have a choice to vote against the Bill without using its veto. The province may support the part of the Bill that affects it, but disagree with other parts of it. It should be able to formally express that view.

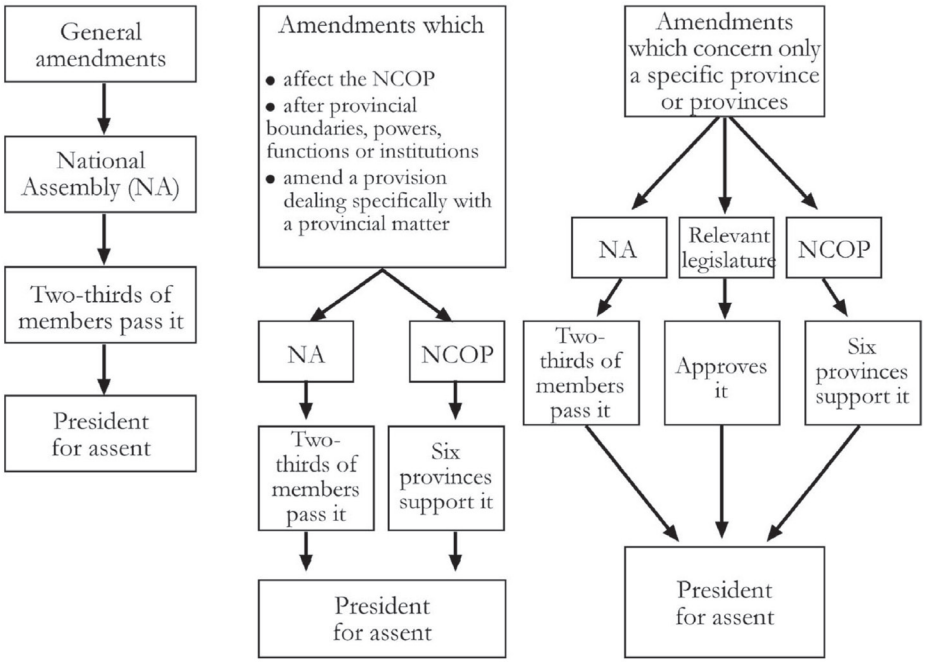
Second, what are the consequences of a veto? Section 74 is silent about whether a veto stops the entire Bill in its tracks, or whether it only affects that part of the Bill being vetoed, while the rest is passed as is. The Constitution does not provide an answer. The Joint Rules do. As the *Merafong* Court noted, in terms of rule 174, the Bill can proceed without the vetoed portion. However, it must be referred back to the NA. The NA must pass it again, without the vetoed portion.

To complete the taxonomy of constitutional amendments we return to the fifth and final type of constitutional amendment. These Bills do not amend FC s 1, the Bill of Rights, or affect the provinces. These Bills are simply passed by the NA with a two-thirds vote. The NCOP is not required to vote on type five amendments. However, particulars of the Bill must be submitted to the NCOP for public debate at least thirty days before the Bill is introduced in the NA.[2]

[1] *Merafong* (supra) at para 105.

[2] FC s 74(5)*(c)*. Paragraph *(c)* of FC s 74(5) makes no express provision for the proceedings of the NCOP debate to be tabled in the Assembly when the Bill is considered (compare paras *(a)* and *(b)*), but this is probably implicit in s 74(5).

Figure 17.1 How the Constitution may be amended (s 74)



Before we move on from constitutional amendments, we need to address whether the NCOP can propose amendments to Bills amending the Constitution. As we have already noted, unlike FC ss 75 and 76, s 74 is silent on this score. As we explain in more detail in the following sections, where the two houses pass different versions of ss 75 or 76 Bills, the Constitution creates a procedure to settle the dispute.[1] Strangely, s 74 simply does not seem to contemplate the possibility that the two houses could pass different versions of a Bill.

The consequence of this omission arose squarely arose in *Merafong*. The applicants argued that the Gauteng Provincial Legislature had acted under the mistaken legal advice that it could not propose an amendment to the Bill that would keep Merafong in Gauteng. They argued that this flawed legal advice rendered the provincial parliament's mandate to its NCOP delegation to support the Bill invalid. To address this challenge, the Court had to decide whether the legal advice was, indeed, wrong. The Court unanimously held that it was not.

Van der Westhuizen J offerred three bases for his conclusion. First, he makes the point that s 74 makes no mention of amendments. Second, the fact that the procedure in the NCOP is mandated makes amendments impractical. In the Court's words:

[1] For s 75 Bills, the NA can simply pass its own version again. When the Bill concerns the provinces, the houses must seek a solution through a mediation committee, although the NA can ultimately override the provinces' concerns with a two-thirds vote.

> Although the NCOP fulfils an important function in the protection of provincial interests, there is no scope for debate and for substantive amendments as far as bills altering provincial boundaries are concerned. The reason is of course the mandated nature of the process.[1] Delegates to the NCOP vote on the basis of provincial mandates. They cannot agree to support an amendment which they have not been mandated by their provincial legislatures to support.[2]

Third, rule 174(3) of the Joint Rules of Parliament only makes provision for amendments following a s 74(8) veto which affects part of a Bill. In that case the Bill reverts to the NA which must reconsider the new version — the Bill minus the vetoed portion. The NA may amend the Bill. And the process starts again. The implication, according to the Court, is that there is no space for amendments that do not follow this process.

These reasons, individually and collectively, fail to support the Court's conclusion. The problem is not that they are 'wrong'; they are all technically correct. The problem is that each of the three rationales is too thin to do the work the Court requires.

In respect of the Court's first reason, it is true that the Constitution is conspicuously silent on the issue of amendments to s 74 Bills. But it does not explicitly prohibit them. It is plausible to interpret this silence, as the Court does, as prohibiting amendments. But is there any underlying principle supporting the reading that such amendments are prohibited?[3] It surely does not serve to enhance any form of democracy. The inability to propose amendments severely restricts the ability of delegations to the NCOP to debate the merits of the amendment. A delegation may be aware of the concerns of other provinces, but if it cannot respond by supporting a change to the legislation that they are considering, then the scope for delegations to inform their provincial legislatures of those concerns and for the provincial legislatures in turn to accommodate those concerns all but disappears. The only option is unattractive: rejecting a Bill altogether. Outright rejection will often not be a real option when most legislation contains a range of provisions, or when it is on an urgent timetable. The *Merafong* rule also renders representatives less able to convey the wishes of their constituents.

The Court's second reason concerned the mandated nature of NCOP voting on s 74 Bills. As we already explained, FC s 65(1) makes a mandated vote the default mechanism for all decisions in the NCOP. Only where the Constitution provides otherwise — as it does, for example, in s 75 for Bills that do not affect the provinces — are votes taken without mandates. The Constitution explicitly contemplates the possibility of amendment within the mandated structure for s 76 Bills, and the Joint Rules explain how that occurs. Is there any reason why amendments are considered eminently practical for ordinary Bills that affect the provinces, but not appropriate for constitutional amendments? No, not one. If

[1] See S Budlender (supra) at 17-5: 'Such debate would, for the most part, be irrelevant to the legislative process because delegates are voting on the basis of provincial mandates.' (original footnote).

[2] *Merafong* (supra) para 80.

[3] For a discussion of this element of *Merafong*, see M Bishop 'Vampire or Prince? The Listening Constitution and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others*' (2009) 2 *Constitutional Court Review* 313, 345-347.

anything, amendments to our basic law require greater deliberation, participation and more effective representation than ordinary legislation. Those goods are largely what prohibition of amendment denies.

How, then, do we deal with the difference between ss 75 and 76 on the one hand, and s 74 on the other? The best explanation is that the Constitution leaves it up to the various legislative bodies — the NA, the NCOP and the various provincial legislatures — to decide how to deal with amendments to s 74 Bills. That leads us to the most glaring omission in the Court's reasoning with respect to its third reason. The Court inexplicably fails to mention that the Joint Rules and the NCOP's rules make *specific provision* for provincial delegations to propose amendments to s 74 Bills in the NCOP.[1] Rule 224(1)*(a)* of the NCOP Rules reads: 'After a [s 74] Bill has been placed on the Order Paper but before the Council decides the Bill a member may place amendments to the Bill on the Order Paper.' The rest of NCOP rule 224 and rules 225 and 228 go on to describe in great detail which amendments can be made, how they must be made, and the procedure to follow after amendment. That procedure is largely replicated in Joint Rules 176-179 and involves referral to a mediation committee virtually identical to the procedure followed for a s 76 Bill.

But isn't there a difference between s 74(8) Bills and other s 74 Bills? Perhaps the Court believed that rule 174(3) deals exclusively with s 74(8) Bills and the other rules that we quote above do not apply to s 74(8) Bills. There is no reason to credit that suggestion. First, the Court's reasoning applies to *all* s 74 Bills. Second, there is nothing in the rules to suggest that s 74(8) Bills can only be amended by veto while other s 74 Bills can be amended ordinarily. Nor is there any principled reason to treat s 74(8) Bills differently. The explanation for rule 174(3) is that it is not at all concerned with the power to propose amendments in the NCOP but with the consequences of exercising the s 74(8) veto. Amendments for *all* s 74 Bills are covered by the detailed procedure in the subsequent rules.

No good textual or principled argument exists to prevent provincial legislatures, through their delegations, from proposing amendments to s 74 Bills in the NCOP. If presented with an opportunity the Court should reconsider the position it took in *Merafong* and permit the sensible practice adopted by the Legislature through its rules.

(b) Bills affecting the provinces

FC s 76 identifies a category of Bills affecting the provinces. The category embraces primarily those Bills relating to Schedule 4 matters.[2] However, it also encompasses Bills relating to a range of specific matters enumerated in the section: the provincial mandate for NCOP delegations,[3] organised local government,[4] the Public Protector,

[1] The GPL's rules do not directly address the question, but they say nothing to suggest that the GPL could not mandate its delegation to propose an amendment.

[2] Schedule 4 covers matters in respect of which there is concurrent national and provincial legislative competence.

[3] FC s 76(3)*(a)* read with s 65(2).

[4] FC s 76(3)*(b)* read with s 163.

the Public Service Commission, the public service and public administration,[1] the Financial and Fiscal Commission,[2] Schedule 5 matters,[3] and matters contemplated in chapter 13 of the Constitution that affect provincial finances.[4]

Bills affecting the provinces may be tabled in either House of Parliament. A Bill passed by one House must be referred to the other House. The second House considering a Bill may then pass it, pass an amended version of it, or reject it. If both Houses pass the same version of the Bill, it is submitted to the President for assent.[5] If the second House passes an amended version of the Bill passed by the House in which the Bill originated, then the amended version is referred to that House for its consideration and, if it is passed, is submitted to the President for assent.[6]

In all cases where the two Houses do not agree on a single version of the Bill, the matter is referred to the mediation committee.[7] The mediation committee is composed of nine members of the NA proportionally representing the parties in that House and one delegate from each provincial delegation in the NCOP.[8] To be carried, decisions in the mediation committee require the support of at least five NA members and five NCOP members.[9] In order to facilitate negotiation and mediation, meetings of the mediation committee are closed to non-members of the Committee, including the public and the media, except with the permission of the committee.[10]

The mediation committee may agree on the Bill in the form passed by either House or in another form.[11] If the mediation committee fails to agree on any version of the Bill within 30 days, the Bill lapses unless it originated in the NA and is again passed by the NA with the support of two-thirds of its members.[12] If the mediation committee does agree on a version of the Bill, the Bill must be referred to the House or Houses that did not pass it in the version accepted by the mediation committee. If the Bill is then passed by the relevant House or Houses, it is submitted to the President for assent.[13] If the Bill as agreed by the mediation committee is not passed by the relevant House or Houses, it lapses unless it (or an earlier version of the Bill passed by the NA) is passed again by the NA with the support of two-thirds of its members.[14]

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[1] FC s 76(3)*(c)-(f)* read with ss 182 and 195-197.

[2] FC s 76(4) read with s 220(3).

[3] FC s 76(4) read with s 44(2). These are the Bills concerning matters in respect of which Parliament is able to intervene in areas which otherwise fall within the exclusive legislative competence of the provinces.

[4] FC s 76(4). Money Bills are excluded from this category of Bills. FC s 77 provides that they are passed in accordance with the procedures of FC s 75.

[5] FC s 76(1)*(b)* and 76(2)*(b)*.

[6] FC s 76(1)*(c)* and 76(2)*(c)*.

[7] FC s 76(1)*(d)* and 76(2)*(d)*. See Joint Rules 104-10.

[8] FC s 78(1)*(a)* and *(b)*. Joint Rule 104(2) provides that a political party which is represented in the National Assembly or NCOP, but which is not represented in the mediation committee, may designate one of its members in the Assembly or NCOP to attend the meetings of the mediation committee. Such a member may speak in the committee, but may not vote.

[9] FC s 78(2)*(a)* and *(b)*.

[10] Joint Rule 110.

[11] FC s 76(1)*(f)-(h)* and 76(2)*(f)-(h)*.

[12] FC s 76(1)*(e)* and 76(2)*(e)*.

[13] FC s 76(1)*(g)* and *(h)* and 76(2)*(g)* and *(h)*.

[14] FC s 76(1)*(i)* and *(j)* and 76(2)*(i)*.

Figure 17.2 Legislative process: Bills affecting provinces initiated by National Assembly (NA) (s 76(1))

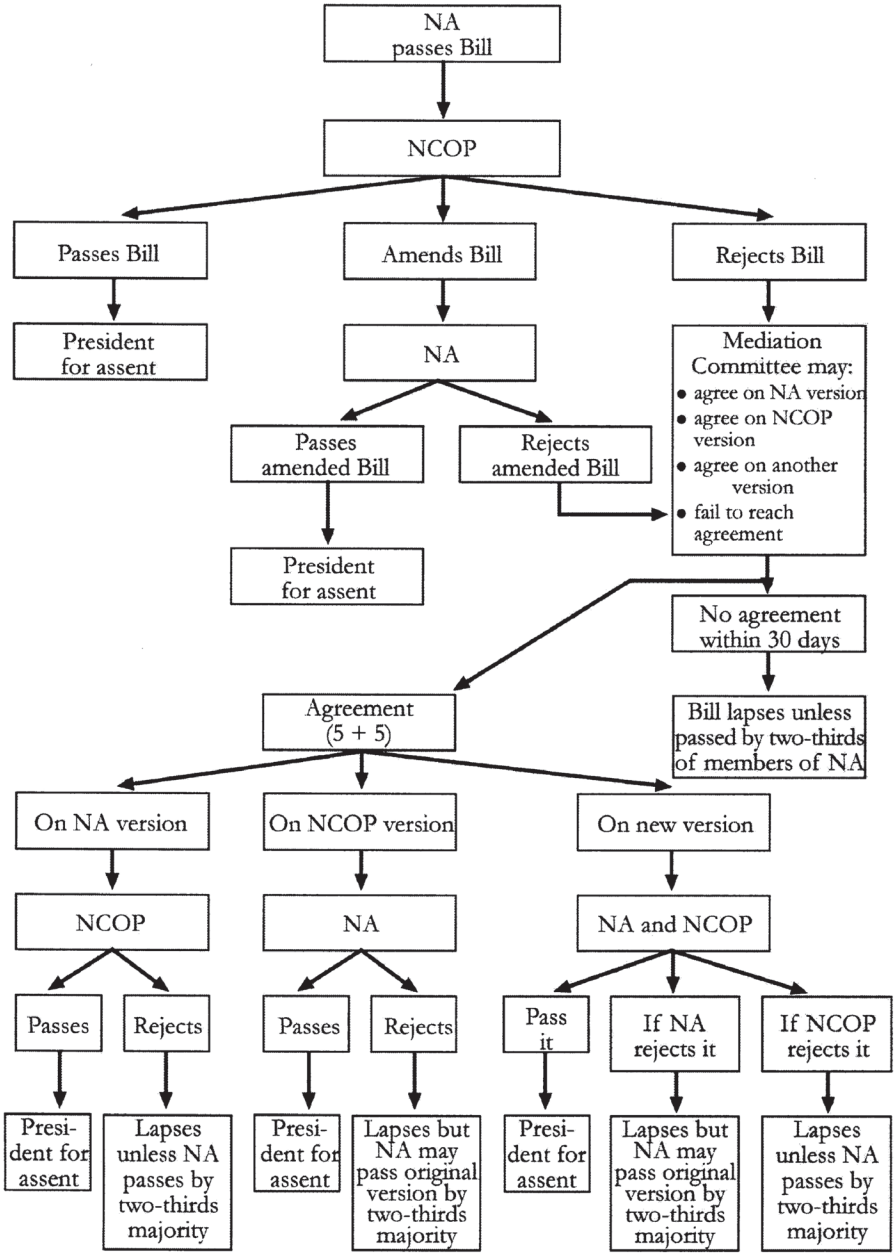
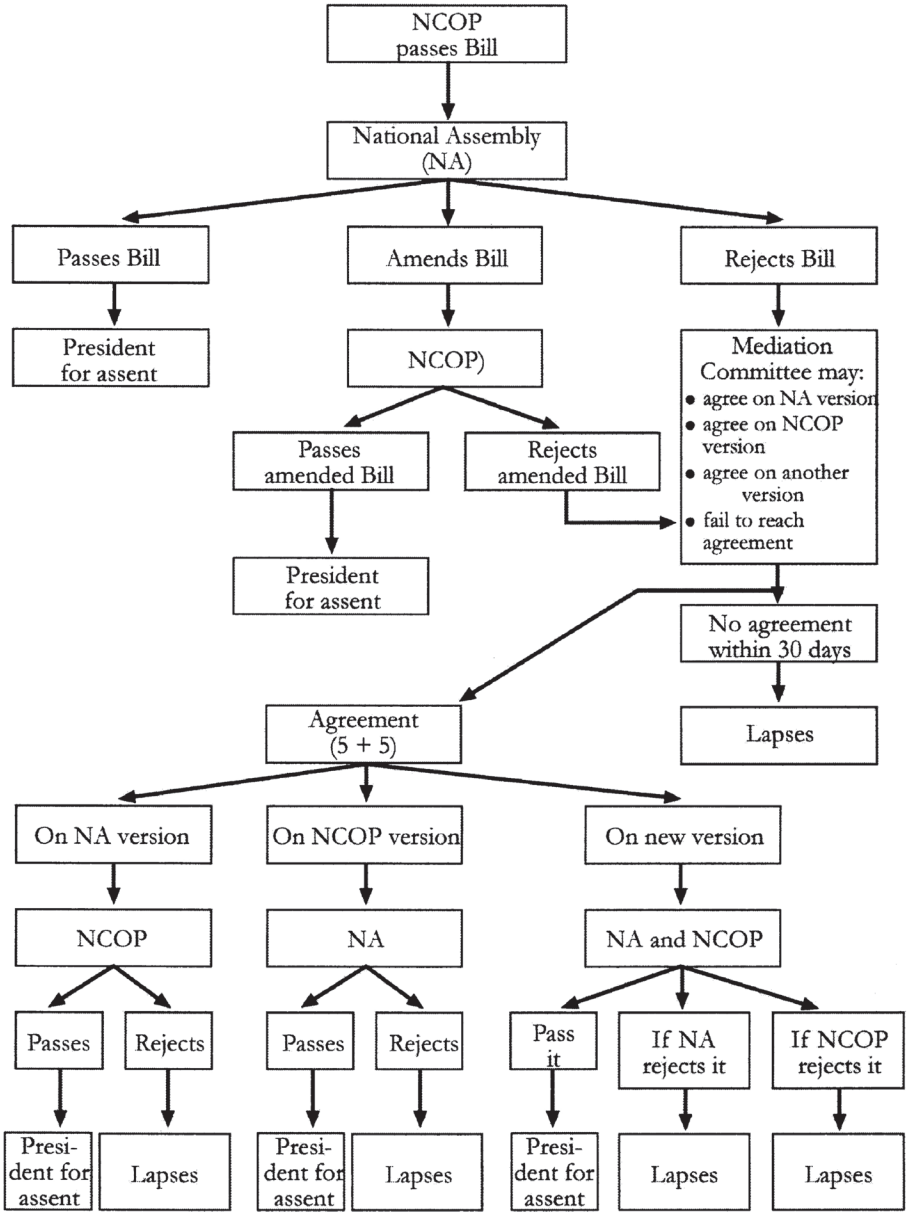


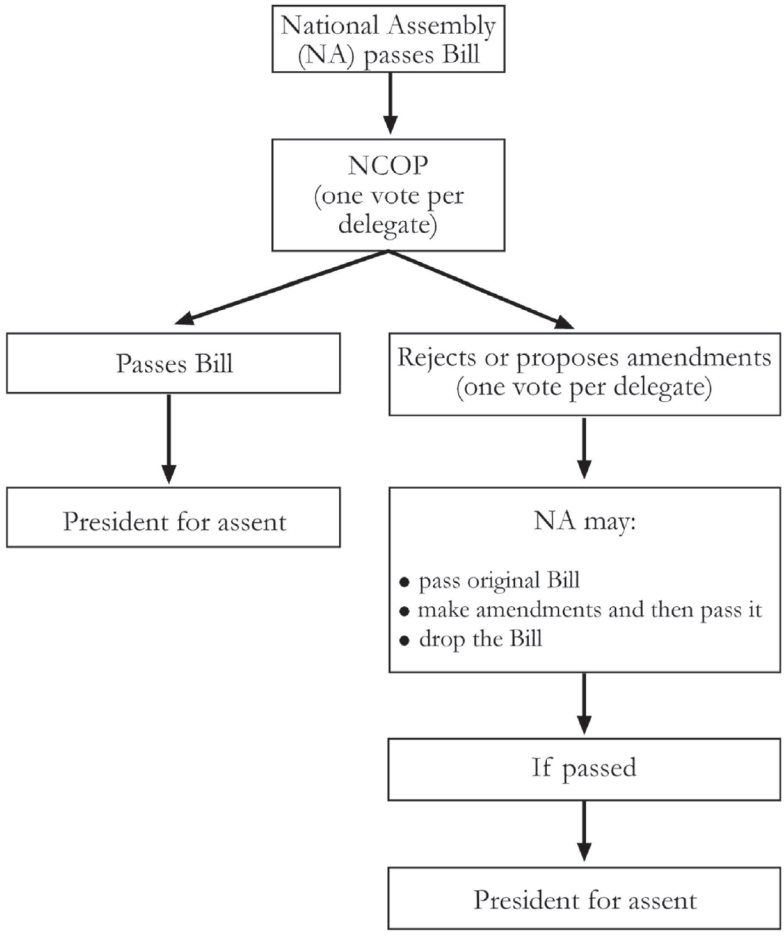
Figure 17.3 Legislative process: Bills affecting provinces initiated by NCOP (s 76(2))



(c) Bills not affecting the provinces

Bills that do not amend the Constitution or affect the provinces, may be introduced only in the NA.[1] If such a Bill is passed by the NA, it must be referred to the NCOP. The NCOP then considers the Bill and votes on it by individual member rather than delegation.[2] If the NCOP passes the Bill, it is submitted to the President for assent. If the NCOP rejects the Bill or passes an amended version of the Bill, the Bill is returned to the NA for reconsideration and the NA may pass the Bill with or without any amendments proposed by the NCOP or may let the Bill lapse.[3] A Bill passed by the NA in any form after a referral from the NCOP is submitted to the President for assent.[4]

Figure 17.4 Legislative process: Bills not affecting provinces (s 75)



[1] Compare FC s 73(1) and FC s 73(3) read with FC s 76(3).
[2] FC s 75(2).
[3] FC s 75(1)*(c)*.
[4] FC s 75(1)*(d)*.

(d) Money Bills and the Division of Revenue Bill

Money Bills are defined in FC s 77(1) as Bills that appropriate money, impose or alter taxes or authorise direct charges against the National Revenue Fund.[1] The Final Constitution states that the procedure for passing money Bills is basically the same as s 75 Bills, with a few important differences. First, money Bills can only be introduced by the Minister of Finance.[2] Second, money Bills cannot contain any provisions that do not fall under FC s 77(1) or are not incidental thereto.[3] Third, until recently there was no legislative procedure for amending money Bills — they either had to be accepted or rejected as presented by the Minister. FC s 77(3) requires an Act of Parliament to regulate how amendments may be made to money Bills. That legislation — the Money Bills Amendment Procedure and Related Matters Act[4] — only came into force on 16 April 2009. The Act creates a detailed framework, timetable and procedure for the passage of several specific forms of money Bills — the Appropriation Bill,[5] a Revenue Bill[6] and an Adjustments Appropriation Bill,[7] other money Bills,[8] and the annual division of revenue Bill in the NA and the NCOP.[9] The Act also provides that the committees of the NA and the NCOP must conduct public participation, in the form of joint public hearings on the fiscal framework (a mandatory framework which must precede all money Bills) and revenue proposals.[10] Further, the standing rules of Parliament must make provision for the relevant committees to conduct public hearings on the Appropriation Bill, a Revenue Bill and the Division of Revenue Bill.[11]

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[1] FC s 77(1) reads in full:

A Bill is a money Bill if it—

(a) appropriates money;

(b) imposes national taxes, levies, duties or surcharges;

(c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or

(d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.

[2] FC s 73(2).

[3] FC s 77(2).

[4] Act 9 of 2009.

[5] Money Bills Act s 10.

[6] Money Bills Act s 11. Revenue Bills are 'Bills which impose or abolish national taxes, levies, duties, surcharges or which abolish, reduce or grant exemption from any national taxes, levies, duties or surcharges.'.

[7] Money Bills Act s 12.

[8] Money Bills Act s 13.

[9] Money Bills Act s 9. A Division of Revenue Bill is not a money Bill, but a prerequisite of annual legislation required in terms of FC s 214 which determines and divides among provinces and local governments their equitable share and other conditional allocations from the revenue raised nationally. In addition to what is provided for in the Money Bills Act, the Intergovernmental Fiscal Relations Act 97 of 1997 provides conditions and procedure applicable to the passing of the Division of Revenue Bill. For more on the division of revenue, see, R Kriel & M Monadjem 'Public Finances' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27.

[10] Money Bills Act s 8(2).

[11] Money Bills Act ss 9(5)*(b)*, 10(8)*(a)* and 11(4)*(a)*.

(e) Presidential assent and publication

When a duly passed Bill is submitted to the President for assent, the President must assent to and sign the Bill. Only if the President has reservations about the constitutionality of the Bill may he or she may refer it back to the NA for reconsideration.[1] The procedure for such a referral is dealt with by the Joint Rules of Parliament[2] and contemplates referrals due to concerns regarding either procedural defects or substantive defects.[3] Once a Bill has been resubmitted to the President, the President must assent to and sign the Bill if it fully accommodates his or her reservations. Otherwise the President must refer the Bill to the Constitutional Court for a decision on its constitutionality.[4]

Once the President has assented to and signed a Bill, it becomes an Act of Parliament and must be published promptly.[5] An Act takes effect either when it is published or on a date determined in terms of the Act.[6] The Constitutional Court has made clear that Parliament has the power to provide that the date an Act comes into operation will be determined by the President.[7] However the Court has also stressed that when Parliament gives such a power to the President, this power must be exercised lawfully. The power cannot be used by the President to veto or otherwise block the implementation of an Act.[8]

The power also cannot be exercised irrationally. On two occasions, the Court has been required to repair faulty attempts by the President to bring legislation into force. In *Pharmaceutical Manufacturers* the President had, based on flawed advice from the Department of Health, brought an Act regulating the use of medicines into force before the necessary regulations had been written.[9] The result was that the use and possession of many dangerous substances inadvertently became legal. The Constitutional Court granted the request, supported by the President, to set aside the proclamation.[10] It held that although the act of bringing legislation into force was not administrative action — Chaskalson P concluded that it was primarily legislative in nature — it was still subject to review under the principle of legality. This standard of review requires that the President act in consonance with the objects of the legislation:

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[1] FC s 79(1). The NCOP must participate in the reconsideration of the Bill if the President's reservations relate to a procedural matter that involves the NCOP or if the Bill is a constitutional amendment bill or a s 76 bill. FC s 79(3).

[2] Joint Rules 202-12.

[3] Joint Rules 205-6.

[4] FC s 79(4). See § 17.3*(e)*(i) infra.

[5] FC s 81.

[6] Ibid.

[7] *Ex Parte Minister of Safety and Security: in re S v Walters* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC), [2002] ZACC 6 at para 71.

[8] Ibid at para 73.

[9] *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC), [2000] ZACC 1 ('*Pharmaceutical Manufacturers*').

[10] The decision of the High Court, which came to the same conclusion, is reported as *Pharmaceutical Manufacturers Association of SA & Another: In re Ex parte President of the Republic of South Africa & Others* 1999 (4) SA 788 (T).

> Powers are not conferred in the abstract. They are intended to serve a particular purpose. That purpose can be discerned from the legislation that is the source of the power and this ordinarily places limits upon the manner in which it is to be exercised. If those limits are transgressed a court is entitled to intervene and set the decision aside.[1]

A power not exercised for the purpose for which it was granted would be irrational and set aside. Rationality has to be judged objectively, not subjectively. The President's good faith belief that his decision is rational is irrelevant if no objective grounds exist for his action.[2]

In the second case of presidential confusion — *Kruger v President of the Republic of South Africa* — the Constitutional Court was confronted with an unusual, perhaps unique, situation.[3] The President had issued a proclamation ('the First Proclamation') bringing into effect certain sections of an Act[4] amending the Road Accident Fund Act.[5] The sections would come into force on 31 July 2006. Unfortunately, he named the wrong sections. Instead of bringing into force ss 1-4, he brought into force ss 4, 6 and 10-12.[6] Before the sections actually came into force, the President realised his error and issued a new proclamation ('the Second Proclamation'). The Second Proclamation aimed to amend the First Proclamation so that it referred to the correct sections. However, the Second Proclamation was only published on 31 July — the day the sections were, in terms of the First Proclamation, due to come into force.

The constitutionality of the First Proclamation was challenged on the ground that it was irrational. The applicant claimed that the consequences of the error had created great uncertainty. The High Court upheld the claim on the basis that the President did not have the power to amend a proclamation bringing an Act into force. Granting the President such a power would permit him 'the power to revoke by proclamation any Act that he or his predecessors have previously brought into operation by publishing a proclamation to that effect in the *Gazette*. … Such a regime will simply be government by decree which is the antithesis of the Rule of Law which is one of the cornerstones of our Constitution.'[7] When the case came before the Constitutional Court, the validity of the Second Proclamation was also in issue.[8]

Skweyiya J, writing for the majority, held, first, that the First Proclamation was irrational. It contained a random selection of sections which, if enacted, would create serious practical problems.[9] Next, Skweyiya J addressed the danger alluded to by the High Court. In his view, the power to enact legislation must necessarily

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[1] *Pharmaceutical Manufacturers* (supra) at para 76.

[2] Ibid at paras 86 and 89.

[3] *Kruger v President of the Republic of South Africa & Others* 2009 (1) SA 417 (CC), 2009 (3) BCLR 268 (CC), [2008] ZACC 17 ('*Kruger*').

[4] Road Accident Fund Amendment Act 19 of 2005.

[5] Act 56 of 1996.

[6] The numbers the President referred to were the sections of the original act that the amending act would alter, not the numbers of the amending act that would do the altering.

[7] [2007] ZAGPHC 352.

[8] Kruger did not challenge the Second Proclamation, but the Road Accident Fund made an application for direct access — which the Court heard — to challenge the Second Proclamation.

[9] *Kruger* (supra) at paras 50-54.

include the power to withdraw an erroneous proclamation, provided it is done *before* the original proclamation takes effect.[1] The Court supported the holding of the High Court that a President cannot undo a proclamation once it has brought legislation into force.

However, in this case the President could not alter or withdraw the First Proclamation because it was invalid from its inception: 'The President cannot have the power to amend a nullity.'[2] The solution in such a situation, Justice Skweyiya reasoned, is to issue both a withdrawal of the invalid proclamation and a new proclamation.[3] The withdrawal was necessary because there might be doubt about whether a proclamation was indeed irrational. If it was in fact irrational, a withdrawal would be unnecessary. The Court recognised that this approach may place form above substance, but held that 'the principle that substance should take precedence over form … must yield in appropriate cases to the rule of law.'[4] Accordingly, the Court declared both proclamations invalid, but suspended the orders to prevent any disruption and to afford the President an opportunity to pass a new, valid proclamation.

In his dissent,[5] Jafta AJ argued that *Kruger* was different from *Pharmaceutical Manufacturers* for two reasons. First, in *Kruger* the President became aware of the defect before the legislation was in force.[6] Second, the error in *Kruger* was purely clerical. What he intended to do was rational, but the proclamation was incorrectly drafted[7] In *Pharmaceutical Manufacturers* the President intended to do something that was substantively irrational. For these reasons, he found that the First Proclamation was not irrational. The problem was instead that the proclamation failed to fully reflect the President's rational intention.[8] Only the part of the Proclamation that failed to reflect the President's true intention was invalid and could be rectified by amending the Proclamation accordingly. While there is something alluring about Acting Justice Jafta's approach, it is flawed. However much sense it makes in theory to distinguish between the express wording of the Proclamation and the President's actual intention, in the context of enacting legislation, the need for publicity and certainty require that courts ought to assume that proclamations in fact reflect the President's intention. The alternative — that the validity of a

[1] *Kruger* (supra) at para 61.

[2] Ibid at para 64. The Court seems to be saying that a withdrawal is always possible, even if the original amendment was invalid. This cannot, technically, be true as you cannot withdraw something that does not exist. However, in many cases it may be unclear to the President whether the proclamation was invalid or not and a withdrawal provides the certainty that, even if the proclamation was originally valid, it no longer is. If the proclamation was originally invalid, the withdrawal does nothing but remove doubt.

[3] Ibid at para 67.

[4] Ibid at para 62.

[5] Yacoob J also dissented. However, his dissent is more about the appropriate remedy. He agreed with Skweyiya J that the First Proclamation was invalid. But he would have held that it was not just and equitable to declare that proclamation invalid *ab initio*. Instead, he would have severed the part of the First Proclamation referring to the wrong sections, and read-in the appropriate alterations to make the First Proclamation rational. Ibid at para 135.

[6] Ibid at para 97.

[7] Ibid at para 98.

[8] Jafta AJ found that only part of the First Proclamation should be declared invalid, as the President had correctly brought s 4 into operation. Ibid at para 95.

proclamation can depend on the intention of its maker alone, and not its content — would lead to unacceptable uncertainty.

(f) Challenges by the President or MPs

The final stage in the legislative process allows for either the President or MPs to refer the legislation directly to the Constitutional Court for a decision on its constitutionality. If, after the President has asked Parliament to reconsider a bill, she still has reservations about its constitutionality, she can refer the Bill to the Constitutional Court for a decision on its constitutionality.

(i) *FC s 79: Referral by the President*

Section 79[1] permits the President to refer a Bill to the Constitutional Court for a decision on its constitutionality before he assents to it. However, he or she may do so only if the Bill has first been remitted to the NA for reconsideration and Parliament has failed to address the concerns relating to the constitutionality of the Bill despite having been given the opportunity to do so.[2] Only the Constitutional Court has jurisdiction to decide on the constitutionality of a Bill at the insistence of the President.[3]

The President has only used this power once. In 1999, the President referred the Liquor Bill — which would regulate the liquor industry — on the basis that he was concerned that it would impair provincial powers. In its decision — *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* — the Constitutional Court made it clear that when the President acts under FC s 79, the Court is required to consider only the reservations the President has expressed.[4] The Court explained that a s 79 referral does not entail a 'mini-certification' process. While the President is entitled to express reservations about as much, or as little, of the Bill as he wishes,[5] the Court is not required to certify conclusively that every part of the Bill accords with the Constitution.[6] Therefore, a finding by the Court under a s 79 referral that a particular Bill was constitutional does not exclude a subsequent constitutional challenge to a different part of the Bill — except to the extent that such a challenge rehearses issues that the Court had already decided in considering the President's challenge to the Bill.[7] In *Liquor Bill*, the Court concluded that part of the Bill was indeed unconstitutional. Parliament

[1] FC s 121 provides a similar process for Premiers to refer the constitutionality of provincial bills to the Constitutional Court.

[2] FC ss 79(1), 79(4)*(b)*, 84(2)*(b)* and 84(2)*(c)*. See also Rule 14 of the Rules of the Constitutional Court, which governs the procedure to be followed in cases of referral of a Bill.

[3] FCS s 167(4)*(b)*.

[4] 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC), [1999] ZACC 15 ('*Liquor Bill*') at para 14. The Court did not decide whether it could ever be appropriate for the Court acting in such circumstances to consider other provisions which are manifestly unconstitutional but which are not amongst the President's reservations. In our view, the need for clarity in the President's reservations and the need for respect to be shown to the legislature would mean that it would never be appropriate.

[5] Ibid at para 16.

[6] Ibid.

[7] Ibid at para 20.

was therefore required to reconsider the Bill and either amend it to accommodate the Court's findings, or abandon it.

(ii) *FC s 80: Referral by MPs*

Unlike the Interim Constitution,[1] the Final Constitution makes no provision for abstract judicial review of Bills by the Constitutional Court at the instance of MPs. However, MPs may refer legislation to the Court once it has become an Act. Section 80 allows one third of the members of the NA to apply for abstract review of an Act within 30 days of the date upon which the President assented to the Act and signed it. When it receives an application for abstract review, the Constitutional Court may grant an interim order suspending the operation of the Act, or those sections of the Act that are subject to review, until the main application has been decided. The discretion of the Court in this regard is limited to cases where the application has reasonable prospects of success and the interests of justice require the suspension of the operation of the legislation.[2] FC s 80 therefore offers a fast-track mechanism to determine whether widely held concerns about the constitutionality of newly enacted legislation are legitimate.

The changes from the Interim Constitution to the Final Constitution concerning abstract review are to be welcomed. FC ss 79 and 80 have none of the uncertainties of s 98(2)*(d)* and 98(9) of the Interim Constitution. The provisions in the Final Constitution ensure that a minority in the legislature is unable to interfere with the legislative process by applying for the review of Bills before they are enacted. It allows them a limited but significant opportunity to challenge legislation.[3] Section 80 places in the hands of the Constitutional Court the decision as to whether legislation will operate pending resolution of the challenge to

[1] In terms of IC s 98(2)*(d)*, the Constitutional Court had jurisdiction over the constitutionality of a Bill before Parliament or a provincial legislature. IC s 98(9) provided that this jurisdiction could be exercised only at the request of the Speaker of the National Assembly, the President of the Senate, or the Speaker of a provincial legislature. These legislative officers seemed to have a general discretion to request abstract review of any Bill, but they were obliged to make such a request when one-third of the members of the National Assembly, the Senate or the provincial legislature petitioned them to do so. Parliament could control the procedure which it followed in relation to the referral of Bills. See *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill No 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC), [1996] ZACC 3 at paras 43-44.

[2] FC s 80(3). See also Rule 15 of the Rules of the Constitutional Court, which governs the procedure to be followed in cases of abstract review of an Act.

[3] See *Gauteng Provincial Legislature v Kilian* 2001 (2) SA 68 (SCA), 2001 (3) BCLR 253 (SCA)('*Kilian*') at paras 25 and 29. The Supreme Court of Appeal held that the determination concerning the constitutionality of a Bill under IC s 98(9) was 'in the interests of the provincial legislature and its effective and efficient functioning' and thus 'part and parcel of the legislative process'. It held further that under such circumstances 'the petitioners acted at all relevant times not in their personal capacities, but in their capacities as members of the legislature and, [unless their action was frivolous, vexatious or due to improper motives,] were not personally liable for costs.' The SCA therefore upheld an undertaking given by the Speaker to pay such costs.

It is unlikely that this principle will be applicable to abstract review proceedings under FC s 80. In terms of FC s 80 abstract review takes place only after the legislative process has been concluded, but before 30 days have elapsed. FC s 80 proceedings should therefore be seen as somewhat outside the legislative process. FC s 80 is a provision which confers on members with the requisite support a form of political standing to bring abstract challenges to Acts of Parliament upon their enactment. Members

its constitutionality and provides the Court with an appropriate framework within which to take this decision.

17.4 Timing of Challenges to Legislation

The next two sections consider the substantive and procedural limits to Parliament's power. But first, we consider the surprisingly complex question as to *when* legislation can be challenged. As we just explained, the final part of the legislative process involves the opportunity for the President or MPs to bring challenges to legislation. The Constitution specifically regulates those powers; the President may question a Bill before he assents, but only after giving Parliament an opportunity to respond. MPs may only challenge legislation directly in the Constitutional Court after it has become an Act. But at what stage can ordinary citizens challenge legislation on either procedural or substantive grounds? Obviously, it is always open to members of the public, with the requisite legal standing, to challenge legislation once it has become law. But may they bring challenges at earlier stages in the legislative process? The short answer is: No. However, the Court has left a tiny amount of wiggle room that may in very rare occasions permit a challenge by members of the public before the President assents to a statute.

The question was first considered in *President of the Republic of South Africa & Others v United Democratic Movement*. The Court concluded that 'on a proper reading of the Constitution, [the Constitutional Court may not], save as provided in [FC s] 79 … , consider the constitutionality of a bill before the National Assembly.'[1] This finding was, strictly speaking, *obiter* as the laws in question had already been signed by the President. But the rule was confirmed in the leading decision on abstract review: *Doctors for Life International v Speaker of the National Assembly & Others*.[2]

Doctors for Life, as we discuss in greater detail below,[3] involved challenges to four pieces of legislation on the grounds that they had been enacted without the necessary public participation. One of those four laws — the Sterilisation Amendment Act[4] — had been passed by Parliament but had not yet been signed by the President. The Court was therefore forced to decide whether it had the power to intervene at that stage of the legislative process. Justice Ngcobo identified three phases in the legislative process, with different rules at each stage: *(a)* while the bill is still being deliberated by Parliament; *(b)* after the bill has been passed by Parliament, but before it has been signed by the President; and *(c)* after the bill had been signed, but before it has come into force.[5] We follow his lead

that exercise this political standing should not be entitled to do so at the expense of the legislature. See also FC s 80(4), which contemplates the award of costs orders against applicants for abstract review.

[1] *President of the Republic of South Africa & Others v United Democratic Movement* 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC), [2002] ZACC 34 at para 26. FC ss 79 and 121 specifically reserve the referral power to the President in terms of national legislation and to the Premier in terms of provincial legislation.

[2] 2006 (12) BCLR 1399 (CC), 2006 (6) SA 416 (CC), [2006] ZACC 11 ('*Doctors for Life*').

[3] See § 17.6*(a)* below.

[4] Act 3 of 2005.

[5] *Doctors for Life* (supra) at para 34.

and consider the position at each stage, while taking into account developments since *Doctors for Life*.

Before we begin, it is important to note that the 'crucial time for determining whether a court has jurisdiction is when the proceedings commenced.'[1] In *Van Straaten v President of the Republic of South Africa & Others*, the Constitutional Court refused to hear a challenge to a bill that had since become an Act because, at the time the case was filed, the bill had not yet been signed by the President.[2]

(a) While a Bill is being deliberated on by Parliament

This is clearly a delicate question as the Court has twice avoided giving a straight answer. Although the question was not in issue in *Doctors for Life*, Justice Ngcobo indicated that '[w]hat courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament is required to fulfil in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand.'[3] He canvassed the law in other Commonwealth jurisdictions,[4] and distilled the following general approach:

> where the flaw in the law-making process will result in the resulting law being invalid, courts take the view that the appropriate time to intervene is after the completion of the legislative process. … But intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object.[5]

In *Glenister I*, the Court's ability to intervene at this stage of the legislative process was squarely on the table.[6] Glenister, a businessman, had challenged the decision of the executive to introduce Bills[7] that would abolish a specialised crime fighting body, the Directorate of Special Operations (known as 'the Scorpions'). The Court had to decide whether it was competent to intercede at that stage, or whether Glenister would have to wait for the Bills to be enacted. Noting the same concerns that troubled the *Doctors for Life* Court, Chief Justice Langa assumed, without deciding, that the Court could intervene. He then set out the circumstances that

[1] *Doctors for Life* (supra) at para 57.

[2] 2009 (3) SA 457 (CC), 2009 (5) BCLR 480 (CC), [2009] ZACC 2.

[3] *Doctors for Life* (supra) at para 70.

[4] Ibid at n52-53. The Court discusses the following foreign case law: *Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong and Another* [1970] AC 1136 (Privy Council); *Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette*; *Poitier v Methodist Church of the Bahamas* [2000] JCJ 31, 26 July 2000 (Privy Council); *Cormack and Another v Cope and Others*; *The State of Queensland and Another v Whitlam and Others* [1974] HCA 28; 131 CLR 432 (High Court of Australia); *In re Canada Assistance Plan* (B.C.) [1991] 2 SCR 525 (Supreme Court of Canada); *In re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1 (SCC) (Supreme Court of Canada).

[5] *Doctors for Life* (supra) at para 69.

[6] *Glenister v President of the Republic of South Africa & Others* 2009 (1) SA 287 (CC), 2009 (2) BCLR 136 (CC), [2008] ZACC 19 ('*Glenister I*').

[7] The National Prosecuting Authority Amendment Bill of 2008 (NPAA Bill) (B23-2008) and the General Law Amendment Bill of 2008, which has been renamed the South African Police Service Amendment Bill of 2008 (SAPSA Bill) (B30-2008).

would justify intervention. Largely adopting the position taken by foreign courts, the Chief Justice adopted the following test:

> Intervention would only be appropriate if an applicant can show that there would be no effective remedy available to him or her once the legislative process is complete, as the unlawful conduct will have achieved its object in the course of the process. The applicant must show that the resultant harm will be material and irreversible.[1]

Although he stressed that '[t]his is a formidable burden',[2] and that 'intervention on this approach will be extremely rare',[3] Langa CJ declined to identify situations that might justify court involvement.

However, we are given some sense of what the Court might require by its conclusion that Glenister had not met the high burden for intervention. Glenister argued that the Bills were already causing irreversible harm as many members of the DSO were leaving because of the perceived threat to their jobs. This exodus threatened to 'undermine the state's capacity to render basic security and cause harm to the constitutional order itself.'[4]

The Court held that Glenister's challenge could not raise the risk of irreparable harm for the following simple reason: 'Parliament may choose to make significant and substantial amendments to the draft legislation or it may choose not to enact the legislation at all. Until the content of the legislation has been determined by Parliament, the effect of the legislation cannot be determined.'[5] The Chief Justice also stressed that Parliament had its own duty to uphold the Constitution and that courts should proceed on the basis that they would do so.[6] Glenister bided his time and ultimately succeeded in having the legislation overturned after it had been passed by Parliament.[7]

The limited room for intervention identified in *Glenister I* only applies to the Constitutional Court — an order cannot be sought in the High Court. This was confirmed by the Supreme Court of Appeal in *Minister of Finance & Another v Paper Manufacturers Association of South Africa*.[8] The applicant sought and obtained an interdict from the High Court preventing the Minister from introducing a Bill to Parliament. The SCA reversed the decision. It held that the High Court did not have the power to grant an interdict with regard to a Bill.[9]

It seems reasonable to ask, given the high threshold for intervention, what possible circumstances could prompt the Court to act. It is probably best to dis-

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[1] *Glenister I* (supra) at para 43.
[2] Ibid at para 43.
[3] Ibid at para 46.
[4] Ibid at para 49.
[5] Ibid at para 50.
[6] Ibid at para 55 ('I must proceed on the basis that Parliament will observe its constitutional duties rigorously. If it is correct that the draft legislation does threaten structural harm to the Constitution or the institution of the NPA, something which I expressly refrain from deciding, then Parliament will be under a duty to prevent that harm. It would be institutionally inappropriate for this Court to intervene in the process of law-making on the assumption that Parliament would not observe its constitutional obligations.')
[7] *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6 ('*Glenister II*')(we discuss *Glenister II* in more detail in §§ 17.5*(b) and* 17.8*(b)* below).
[8] 2008 (6) SA 540 (SCA).
[9] Ibid at para 22.

tinguish between substantive challenges (like *Glenister I*) and procedural challenges (like *Doctors for Life*). It is difficult to imagine a substantive challenge succeeding. Despite any perceived threat to democracy, or the Constitution, the Court must — as the Chief Justice tells us — assume that Parliament will uphold its constitutional duty not to pass legislation that violates the Constitution. Even if a Bill proposed to ban opposition parties or install a president for life, there is no reason for the Court not to allow Parliament the opportunity to debate and decide the issue itself in line with its constitutional responsibilities. While this may seem overly deferential, there truly are very few acts that could not be rectified by judicial action after intervention. The one substantive claim that might succeed is to legislation that would somehow preclude or delay judicial intervention or access to the judiciary by the public after the legislation was enacted. But even then, it is difficult to see how the Court would get around the argument that Parliament must be trusted to uphold the Constitution.

Procedural challenges will also be rare. As *Doctors for Life* demonstrates, procedural flaws that move people to litigation generally concern laws that were passed following a flawed procedure. That harm is not irreparable because the legislation can be set aside and the legislature can be forced to pass the law again, following the correct procedure. There is, however, one possibility: When Parliament acts unconstitutionally to *prevent* a Bill from being passed that *would have been passed* if it had followed the proper process.

The best example is a good faith tagging mistake.[1] If Parliament tags a Bill as s 76, when it is objectively a s 75 Bill, there may be a risk that it will not pass because of the higher threshold set by s 76.[2] In that instance, somebody who will suffer irreparable harm if the Bill is not enacted has no other recourse than a challenge during the legislative process. She cannot wait until the Bill becomes an act, because the tagging mistake has prevented that from occurring. The only solution is for the Court to intervene and re-tag the Bill as a s 75 Bill. This example avoids the 'Parliament must be trusted' argument because Parliament has acted unconstitutionally once it mistags the Bill, or at least once the Bill fails to pass. There may be similar instances where a procedural decision *prevents* a Bill from being passed that may warrant judicial intervention.

(b) After a Bill has been passed by Parliament, but before the President has assented

The *Doctors for Life* Court confirmed the conclusion in *UDM*: The Constitutional Court may only consider the constitutionality of a Bill at this stage when it is raised by the President in terms of FC s 79.[3] After all, the wording of s 167(4)*(b)* — which affords the Court exclusive jurisdiction to hear s 79 claims — explicitly states that it may consider a Bill 'only in the circumstances anticipated in section 79.'

[1] We discuss tagging at length in § 17.6*(b)* below.

[2] It is also possible (although extremely unlikely) that a Bill that would not pass as a s 75 Bill, would pass as a s 76 Bill.

[3] *Doctors for Life* (supra) at para 43.

The *Doctors for Life* applicants tried to get around this problem by arguing that there was a difference between considering the substantive constitutionality of a Bill — which was prohibited under FC s 167(4)*(b)* — and a challenge to the parliamentary procedure in passing the Bill — which was permitted by FC s 167(4)*(e)*. Section 167(4)*(e)* affords the Constitutional Court exclusive jurisdiction to hear challenges that Parliament has failed to fulfil a 'constitutional obligation'.[1] The obligation to facilitate public involvement, they argued, was such a 'constitutional obligation' that could be challenged at any time. They also submitted that the nature of a challenge about the failure to facilitate public involvement had to be enforced 'there and then', to prevent Parliament from passing a Bill without following the necessary procedure.

Ngcobo J rejected this line of argument. He held, first, that FC s 79(3) permitted the President to raise both substantive and procedural reservations to the constitutionality of a Bill.[2] Second, FC ss 167(4)*(b)* and *(e)* had to be read together. This would be best achieved by reading the specific s 167(4)*(b)* to limit the ambit of the more general s 167(4)*(e)*.[3] Finally, he held that it is not only the Court that has a duty to ensure that Parliament fulfils its constitutional obligations in the legislative process. The President also has a constitutional duty to ensure the proper processes are followed. The separation of powers require the Court to permit her an opportunity to perform that duty.[4] This mirrors the holding of Langa CJ about the role of Parliament in *Glenister I*. Justice Ngcobo concluded that the Court could not consider the constitutionality of the Sterilisation Amendment Act.[5]

(c) After a Bill is assented to, but before it comes into force

The Court had earlier held, in *Khosa & Others v Minister of Social Development & Others*,[6] that it had the power to consider acts that had not yet been brought into force. Mokgoro J cited FC s 81 which provides that '[a] Bill assented to and signed by the President becomes an Act of Parliament'. After assent, the law is an Act and the Court can consider it under FC s 172.[7] In *Doctors for Life*, the Court considered an argument not raised in *Khosa*: Does FC s 80 — which empowers 30 per cent of MPs to challenge an Act after it has been assented to — operate in a similar manner to s 79 to remove the Court's jurisdiction to consider a claim to an Act not yet in force? Justice Ngcobo held that it did not:

> There is nothing in the wording of [FC s] 80 that precludes this Court or any other court from considering the validity of an Act of Parliament at the instance of the public. Nor is there anything in the scheme for the exercise of jurisdiction by this Court that precludes it from considering the constitutional validity of a statute that has not yet been brought

[1] For more on FC ss 167(4)*(b)* and *(e)*, see S Seedorf 'Jurisdiction' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) § 4.3*(b)*.

[2] *Doctors for Life* (supra) at para 45.

[3] Ibid at para 52.

[4] Ibid at para 55.

[5] See also, *Van Straaten v President of the Republic of South Africa & Others* 2009 (3) SA 457 (CC), 2009 (5) BCLR 480 (CC), [2009] ZACC 2 (refusing to hear a challenge to legislation that had not yet been signed by the President when the challenge was lodged.)

[6] 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC), [2004] ZACC 11.

[7] Ibid at para 90.

into operation. The legislative process is complete, and there can be no question of interference in such a process. Once a bill is enacted into law, this Court should consider its constitutionality.[1]

17.5 Substantive Constraints on Legislative Authority

The national legislative authority is vested in Parliament.[2] However, in exercising this authority, Parliament is bound by the Constitution and must act within its limits.[3] In this section we discuss the substantive limits on its powers: *(a)* federalism; *(b)* fundamental rights; *(c)* extra-territorial competence; *(d)* separation of powers; *(e)* delegation constraints; *(f)* the legality principle; and *(g)* specific constraints on the power to amend the Constitution. In several of these areas, our discussion is very brief and we simply set out the basic position and refer the reader to the part of this text where the issue is more fully canvassed.

(a) Federalism constraints

In a significant departure from the Interim Constitution, the system of federalism embodied in the Final Constitution imposes clear limitations on the legislative power of Parliament. Under the Interim Constitution, the legislative competence of Parliament was plenary and subject only to a few insignificant exceptions in which provincial legislative competence was exclusive.[4] Under the Final Constitution, however, Parliament has no express legislative competence over matters within the functional areas listed in Schedule 5. It may legislate over matters within the functional areas listed in Schedule 5 only if it meets the requirements set out in FC s 44(2). Various other constraints relating to the legislative powers of Provincial Legislatures and Municipal Councils also limit Parliament's legislative competence.[5]

The Constitution imposes a further federalism-related constraint on Parliament's legislative authority. These provisions relate to conflicts between national and provincial legislation.[6] Thus, even if Parliament is competent to pass a particular piece of legislation, the legislation may become inoperative if it is in conflict with provincial legislation in circumstances where that provincial legislation prevails.[7] The conflicts provisions of the Constitution are discussed elsewhere in this work.[8]

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[1] *Doctors for Life* (supra) at para 64.

[2] FC s 44(1).

[3] FC s 44(4). See also *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development & Another, Executive Council of KwaZulu-Natal v President of the Republic of South Afria & Others* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC), [1999] ZACC 13 at paras 25-6.

[4] IC s 156(1B) gave provinces the exclusive competence to impose taxes in respect of casinos, gambling, wagering, lotteries and betting. Parliament had no legislative power to impose such taxes. The Interim Constitution tacitly precluded Parliament from legislating in respect of provincial official languages, IC s 3(5), and the names of the provinces, IC s 124(1).

[5] See V Bronstein 'Legislative Competence' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15.

[6] FC ss 146-150.

[7] FC s 149.

[8] See V Bronstein 'Conflicts' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 16.

(b) Fundamental rights constraints

The legislative authority of Parliament is constrained by the rights contained in the Bill of Rights. The general framework for rights-based challenges,[1] and the constraints imposed by particular fundamental rights are discussed elsewhere in this work. Parliament must refrain from interfering with any of the rights in the Bill of Rights except to the extent that the Constitution allows. Parliament's legislative authority does not extend to limitations of rights other than those authorised by s 36, the limitations clause.[2]

However, Parliament is not only obliged to refrain from interfering with fundamental rights. It must also give effect to fundamental rights by positive action. This duty is captured in FC s 7(2)'s requirement that the state must 'respect, protect, promote and fulfill' the rights in the Bill of Rights.[3]

This injunction is repeated specifically with regard to a number of individual rights.[4] The Constitutional Court has already pronounced on these positive obligations.[5] 'Positive' and 'negative' obligations often inter-relate and overlap, raising difficult questions about Parliament's obligations with regard to specific rights.[6]

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[1] The general framework for rights analysis goes something like this: *(a)* Does the right apply? *(b)* What is the content of the right and has it been limited? *(c)* Is the limitation justifiable? and *(d)* What is the appropriate remedy? See S Woolman 'Application' S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31; L Du Plessis 'Interpretation' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32; S Woolman & H Botha 'Limitations' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34; and M Bishop 'Remedies' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

[2] See Woolman & Botha 'Limitations' (supra).

[3] *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town & Others* 2003 (3) SA 1 (CC), [2002] ZACC 27 at para 14, *J & Another v Director General, Department of Home Affairs & Others* 2003 (5) SA 62 (CC), 2003 (5) BCLR 463 (CC), [2003] ZACC 3 ('*J & Another*') at para 25.

[4] See, for example, FC s 9(4) (equality and private discrimination), FC s 24*(b)* (environmental rights), FC s 25(5)-(7) (land rights), FC s 26(2) (housing), FC s 27(2) (health, food, water, and social security), FC s 32(2) (access to information), and FC s 33(3) (just administrative action).

[5] See *New National Party v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC), [1999] ZACC 5 ('*New National Party*') at para 23 ('Parliament is obliged to provide for the machinery, mechanism or process that is reasonably capable of achieving the goal of ensuring that all persons who want to vote, and who take reasonable steps in pursuit of that right, are able to do so.') Ibid at paras 118-9 (O'Regan J explains the positive obligations on Parliament and other parts of the state), reaffirmed in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR (CC), [2004] ZACC 10 at para 28. See also *J & Another* (supra) at para 25 ('The executive and legislature are … obliged to deal comprehensively and timeously with existing unfair discrimination against gays and lesbians'); *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), [2000] ZACC 19 ('*Grootboom*') at paras 41-2 (emphasising that the 'precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive' but that 'legislative measures by themselves are not likely to constitute constitutional compliance'.)

[6] See *New National Party* (supra) at para 20. In the context of the right to vote, Yacoob J pointed out that:

> Any scheme designed to facilitate the exercise of this right carries with it the possibility that some people will not comply with its provisions. But that does not make the scheme unconstitutional. The decisive question which arises for consideration in this case is the following: when can it legitimately be said that a legislative measure designed to enable people to vote in fact results in a denial of that right?

In *Glenister II* the Constitutional Court relied on s 7(2) to invalidate legislation that abolished one corruption-fighting organization, the Directorate of Special Operations ('the Scorpions'), and replaced it with another specialised crime-fighting body, the Directorate of Priority Crime Investigation ('the Hawks'), which was somewhat less independent of the executive.[1] We discuss the intricacies of the decision below.[2] At this juncture we need only look at the Court's understanding of s 7(2). In vivid language, Mosenke DCJ and Cameron J[3] described the consequences of corruption:

> There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.[4]

Specifically, the Court held, corruption impacts on the rights to 'equality, human dignity, freedom [and] security of the person, administrative justice and socio-economic rights, including the rights to education, housing, and health care.'[5] Considering the pernicious and pervasive effects of corruption, '[t]he state's obligation to 'respect, protect, promote and fulfil' the rights in the Bill of Rights thus inevitably, in the modern state, creates a duty to create efficient anti-corruption mechanisms.'[6]

Generally, a Court should 'not be prescriptive as to what measures the state takes, as long as they fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt.'[7] The standard therefore goes beyond mere rationality and is some form of reasonableness review akin to that used in socio-economic rights cases, administrative review and public participation challenges. In this case, however, Moseneke DCJ and Cameron J concluded that, considering South Africa's international obligations, 'the state must create an anti-corruption entity with the necessary independence, and that this obligation is constitutionally enforceable.'[8] According to the majority of the Court, the Hawks were insufficiently independent and Parliament was given 18 months to fix the defect.[9]

In dissent, Chief Justice Ngcobo was unwilling to take this final step.[10] While he recognised that FC s 7(2) imposed an obligation on the state to 'take effective

[1] *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC), [2011] ZACC 6 ('*Glenister II*').

[2] See § 17.8*(b)* below.

[3] Froneman, Nkabinde and Skweyiya JJ concurring.

[4] *Glenister II* (supra) at para 166.

[5] Ibid at para 198.

[6] Ibid at para 177.

[7] Ibid at para 191.

[8] Ibid at para 197.

[9] For a discussion of this part of the judgment, see S Woolman 'Security Services' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS 3, May 2011) Chapter 23B.

[10] Mogoeng and Yacoob JJ and Brand AJ concurring.

measures to fight corruption',[1] it did not oblige the state to establish an independent entity to combat corruption. The difference between the majority and the minority seems to operate on two levels. On one level, it is a disagreement about the role of South Africa's international obligations in interpreting the Constitution. But on another level it is about the degree of action required by FC s 7(2), and the latitude given to the state to realise its obligations. The minority stresses that '[h]ow [the FC s 7(2)] obligation is fulfilled and the rate at which it must be fulfilled must necessarily depend upon the nature of the right involved, the availability of government resources and whether there are other provisions of the Constitution that spell out how the right in question must be protected or given effect.'[2] In its view, the majority is guilty of 'read[ing] into our Constitution a constitutional obligation that the Constitution does not expressly create.'[3] To the majority, anything other than establishing an independent entity is not a sufficient attempt to tackle corruption.[4]

Moving on from FC s 7(2), it should be noted that impermissible limitations of fundamental rights are not confined to direct infringements of those rights. Importantly, 'the implementation of an Act which passes constitutional scrutiny at the time of its enactment, may well give rise to a constitutional complaint, if, as a result of circumstances which become apparent later, its implementation would infringe a constitutional right.'[5] Though this provision primarily implicates the executive, it should be borne in mind when Parliament adopts legislation. Furthermore, legislation could be invalid if it grants benefits to individuals on condition that they act in a manner that compromises their fundamental rights.[6]

[1] *Glenister II* (supra) at para 84.

[2] Ibid at para 107.

[3] Ibid at para 109.

[4] Without getting into a long debate about the correctness of either of these approaches, it is worth pointing a significant weakness of the majority decision. The Hawks share the jurisdiction to fight corruption with other units of the South African Police Service ('SAPS'). The only difference is that the Hawks investigate matters which, in the view of its Head, are national priority offences and those offences or category of offences referred to it from time to time by the National Commissioner of the SAPS, subject to any policy guidelines issued by the Ministerial Committee. The majority does not seem to consider that a vast number of the offences of corruption may be investigated by other units of the SAPS, which lack the independence the Court sought of the Hawks. Why does it fulfil the s 7(2) duty if only some corruption offences are addressed by an independent body, while many others are addressed by the clearly less independent (at least by the majority's standards) SAPS?

[5] *New National Party* (supra) at para 22.

[6] An example of such legislation might be a taxation statute which granted rebates to soldiers who took an oath of loyalty to the government. See *Speiser v Randall* 357 US 513, 78 SCt 1332 (1958). This sort of case is dealt with in the United States under the 'unconstitutional conditions' doctrine. For discussion of this doctrine and the confusion surrounding its application, see KM Sullivan 'Unconstitutional Conditions' (1989) 102 *Harvard LR* 1415; C Sunstein *The Partial Constitution* (1993) Chapter 10. The Canadian Supreme Court appears to have contemplated the competence of an individual to bargain away some of his or her rights, provided that the bargaining is rational. See *Douglas College v Douglas/Kwantlen Faculty Association, Attorney-General of Canada et al, Interveners* [1990] 77 DLR (4th) 94, 3 SCR 570, 585.

The Constitutional Court has repeatedly stated that if Parliament intends to limit fundamental rights, it should do so expressly and clearly.[1] Furthermore, when Parliament enacts legislation that gives officials a discretion that could affect someone's fundamental rights, it must provide the appropriate guidance to those officials:

> It is for the legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself, or where appropriate by a legislative requirement that delegated legislation be properly enacted by a competent authority.[2]

At the same time, the Court has been sensitive to the fact that Parliament must be given a wide degree of latitude in its law-making provided that it acts within the constraints of the Constitution:

> The duty of a court is to decide whether or not the legislature has overreached itself in responding, as it must, to matters of great social concern …. [W]hen giving appropriate effect to the factor of 'less restrictive means', the court must not limit the range of legitimate legislative choice in a specific area.[3]

When crafting remedies for violations of rights, the Court has articulated similar concerns and tried to avoid limiting Parliament's options.[4]

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[1] *August & Another v Electoral Commission & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC), [1999] ZACC 3 at para 33; *Lesapo v North-West Agricultural Bank* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC), [1999] ZACC 16 at para 9; and *National Union of Metal Workers of South Africa & Others v Bader BOP (Pty) Ltd & Another* 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC), [2002] ZACC 30 at para 37. See also *Ngcobo & Others v Salimba* 1999 (8) BCLR 855 (SCA), 1999 (2) SA 1057 (SCA) at para 13 (On problems of drafting legislation to meet such a demand).

[2] *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC), [2000] ZACC 8 ('*Dawood*') at para 54.

[3] *S v Manamela & Another* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC), 2000 (1) SACR 414 (CC), [2000] ZACC 5 at para 34. See also *S v Baloyi* 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC), 2000 (1) SALR 81 (CC), [1999] ZACC 19 at para 30; *S v Jordan & Others* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC), 2002 (2) SACR 499 (CC), [2002] ZACC 22 particularly at paras 25-6 and 94. See also *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR (CC), [2004] ZACC 10 at para 35 (Court recognised that 'there may … be cases where the concerns to which the legislation is addressed are subjective and not capable of proof as objective facts. A legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data. When policy is in issue it may not be possible to prove that a policy directed to a particular concern will be effective. It does not necessarily follow from this, however, that the policy is not reasonable and justifiable.')

[4] See, for example, *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC), [1999] ZACC 17 at paras 66, 76, 84-6; *J & Another* (supra) at paras 21, 26. See generally M Bishop 'Remedies' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

(c) Extraterritorial competence constraints

Can Parliament legislate beyond the national boundaries? The answer before the Interim Constitution was in the affirmative.[1] This position seems to have been unaffected by the adoption of either the Interim Constitution or the Final Constitution. There are a number pieces of legislation on the statute book that have extra-territorial application.[2]

(d) Separation of powers constraints[3]

The doctrine of the separation of powers limits the legislative authority of Parliament. The separation of powers under the Constitution, though 'intended as a means of controlling government by separating or diffusing power, is not strict'.[4] Rather the doctrine

> [e]mbodies a system of checks and balances designed to prevent an over-concentration of power in any one arm of government; it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another; this engenders interaction, but does so in a way which avoids diffusing power so completely that government is unable to take timely measures in the public interest.[5]

The constraint placed by the separation of powers on Parliament's authority is most obvious in the context of the separation between the powers of the judicial branch of government, on the one hand, and the legislative and executive branches, on the other. Legislation that brings judicial organs of state under the control of Parliament or the executive can be struck down under the separation of powers doctrine even if such legislation does not conflict with any of the express provisions of the Constitution.[6]

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[1] *S v Fazzie & Others* 1964 (4) SA 673 (A).

[2] Examples include the Regulation of Foreign Military Assistance Act 15 of 1998; the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002; the Prevention and Combating of Corrupt Activities Act 12 of 2004; the Anti-Personnel Mines Prohibition Act 36 of 2003; the Prohibition or Restriction of Certain Conventional Weapons Act 18 of 2008.

[3] See generally, S Seedorf & S Sibanda 'Separation of Powers' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12.

[4] *S v Dodo* 2001 (3) SA 382 (CC), 2001 (1) SACR 594 (CC), 2001 (5) BCLR 423 (CC), [2001] ZACC 16 ('*Dodo*') at para 16.

[5] Ibid.

[6] See *Bernstein & Others v Bester NO & Others*, 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC), [1996] ZACC 2 at para 105 (The doctrine of separation of powers underpins the access to court rights protected by IC s 22. Thus many cases raising the separation of powers of the judicial branch of government can also be argued under IC s 22. Nevertheless, there remain some cases which cannot be brought within the ambit of IC s 22, but may yet be argued on the basis of the separation of powers doctrine.) See also *Ex parte Attorney-General, Namibia: In re the Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1995 (8) BCLR 1070 (NmS)(Case concerned s 35 of the Criminal Procedure Act 51 of 1977. The section provided that the powers of the Prosecutor-General were to be exercised subject to the control and direction of the Attorney-General, a member of the Namibian executive. The section was held to be inconsistent with the Namibian Constitution on the grounds that it allowed a member of the executive to exercise control over the prosecutorial discretion which was the function of the judicial branch of government. The section was also found to be inconsistent with certain express provisions of the Namibian Constitution.)

However, not every legislative venture into the perceived domain of judicial decision-making is a violation of the separation of powers. For example, the Constitutional Court has stressed that it is 'pre-eminently the function of the legislature to determine what conduct should be criminalised and punished.'[1] That said, the Court cautioned that:

> The legislature's powers are decidedly not unlimited. Legislation is by its nature general. It cannot provide for each individually determined case. Accordingly such power ought not, on general constitutional principles, wholly to exclude the important function and power of a court to apply and adapt a general principle to the individual case. This power must be appropriately balanced with that of the judiciary.[2]

Attempts by the legislature to control executive policy may also raise separation of powers issues. For instance, can the legislature specify that it has to be consulted before certain executive action is taken? In one pre-1994 case, a South African court insisted on just such a procedure being followed.[3] Such procedures are likely to have remained valid under the Final Constitution.[4]

Parliament is also constrained by its obligations to the State Institutions Supporting Constitutional Democracy.[5] These constraints are very similar to those produced by the separation of powers. With respect to these Chapter 9 bodies, Parliament's obligations are twofold. Firstly, it must not interfere with the independence and impartiality of these institutions.[6] Secondly, Parliament must provide for funding 'reasonably sufficient' to enable these institutions to carry out their constitutional mandate.[7]

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[1] *Dodo* (supra) at para 22.

[2] *Dodo* (supra) at para 26. The Court therefore upheld the validity of legislation prescribing life imprisonment unless the sentencing court was satisfied that 'substantial and compelling circumstances' exist that justify the imposition of a lesser sentence. See *S v Dlamini; S v Schietekat; S v Joubert; S v Dladla* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC), 1999 (2) SACR 51 (CC), [1999] ZACC 8 at paras 37-44 (The Court held that Parliament was entitled to legislate to provide guidelines concerning factors relevant to the grant or refusal of bail, provided that the existence of such factors or any other factors, and the weight to be attributed to them, was left to the judgment of the presiding judicial officer.) See also *S & Others v Van Rooyen & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC), [2002] ZACC 8 ('*Van Rooyen*')(In the context of the administration of the judiciary, the *Van Rooyen* Court held that the fact that the executive and the legislature make or participate in the appointment of judges is not inconsistent with the separation of powers or the judicial independence that the Constitution requires. Ibid at para 106. The Court also upheld the involvement of Parliament, in appropriate circumstances, in the reduction of magistrates' pay and the removal of magistrates. Ibid at paras 149 and 211.)

[3] *More v Minister of Co-operation and Development & Another* 1986 (1) SA 102 (A) (Court upholds the need for parliamentary resolution before executive can relocate a black traditional group against its will).

[4] See, for instance, s 11(6) of the Provincial Service Commission Act 3 of 1994 (Gauteng), which required that a decision taken by that Commission to dispense with certain procedures had to be reported to the Speaker of the provincial legislature and could be overruled by the legislature.

[5] These are the Public Protector; the South African Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; and the Electoral Commission. For discussions of these institutions, see S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS) Chapters 24A-F.

[6] FC s 181(2), (3) and (4). See also *New National Party* (supra) at para 78.

[7] *New National Party* (supra) at para 98. These institutions are also accountable to the National Assembly and must submit reports on their performance at least once a year. FC s 181(5).

Separation of powers has also been central to determining on which courts can decide whether Parliament has fulfilled its constitutional obligations as contemplated in FC s 167(4)*(e)*. Section 167(4)*(e)* identifies a peculiar set of circumstances in which only the Constitutional Court, as 'the highest court on constitutional matters and … the ultimate guardian of the Constitution and its values', is suited to adjudicate.[1] The obligation on Parliament to facilitate public involvement in its legislative and other processes, for example, is a member of the family of politically consequential questions[2] of high importance that may only be considered by the Constitutional Court.[3]

(e) Delegation constraints

This section outlines Parliament's power to delegate its legislative function to other bodies. The primary form of delegation is legislation that affords the executive the power to make regulations. We address this first. Second, we briefly discuss the delegation of national legislative powers to provincial legislatures and municipal councils. We look, third, at the possibility for those who are delegated powers to sub-delegate them to another actor, including private parties. Finally, we consider whether delegated laws are subject to more stringent review than laws made directly by the national legislature.

(i) *Delegation to the executive*

The Interim Constitution was silent on the question whether Parliament could delegate its authority to legislate. In *Executive Council, Western Cape Legislature & Others v President of the Republic of South Africa & Others* ('*Executive Council 1995*'),[4] the Constitutional Court — in its first year — highlighted that delegating subordinate regulatory authority was not only constitutionally permissible, but was necessary for effective governance.[5] However, the Court also ruled that there were limitations, under the Interim Constitution, on the legislative authority that Parliament could delegate. The 'delegation doctrine' that imposes such limits is derived from the separation of powers doctrine: that law-making,

[1] 2006 (12) BCLR 1399 (CC), 2006 (6) SA 416 (CC), [2006] ZACC 11 ('*Doctors for Life*') at para 22.

[2] These instances are listed in section 167(4)*(e)*.

[3] *Doctors for Life* (supra) at para 22.

[4] *Executive Council, Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC), [1995] ZACC 8 ('*Executive Council 1995*').

[5] Ibid at para 51. After surveying the approach in several foreign jurisdictions, the Court concluded that limited guidance could be found from foreign precedent and that 'where Parliament is established under a written constitution, the nature and extent of its power to delegate legislative powers to the executive depends ultimately on the language of the Constitution, construed in the light of the country's own history.' Ibid at para 61. See also, ibid at para 136 (Mahomed DP, concurring)('The competence of a democratic Parliament to delegate its law-making function cannot be determined in the abstract. It depends inter-alia on the constitutional instrument in question, the powers of the legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject-matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegatee, the circumstances prevailing at the time when the delegation is made and when it is expected to be exercised, the identity of the delegatee and practical necessities generally.')

as the proper domain of the legislature, should not be delegated excessively to the executive branch of government.[1] In *Executive Council 1995*, the Court was asked to address the constitutionality of s 16A of the Local Government Transition Act.[2] The section purported to confer on the President a power to amend the Act itself by Proclamation. A majority of the Constitutional Court held this delegation of legislative power went beyond constitutionally acceptable limits:

> In a modern state detailed provisions are often required for the purposes of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made and assigning plenary legislative power to another body, including, as s 16A does, the power to amend the Act under which the assignment is made.[3]

Permitting the President to amend statutes would be subversive of the provisions of the Interim Constitution that dictate how Parliament can pass laws,[4] and 'could be used to introduce contentious provisions into what was previously uncontentious.'[5] Although *Executive Council 1995* seems to exclude the possibility that Parliament can ever delegate the power to amend legislation, it leaves open

[1] That the excessive delegation doctrine was developed in the United States by American courts intent on frustrating the New Deal does not undermine the coherence of policy considerations underlying it. See *Panama Refining Co v Ryan* 293 US 388, 55 SCt 241 (1935)(Congress had set no policy to guide the President in deciding whether to authorize administrative codes to regulate interstate shipment of oil); *Schechter Poultry Corp v United States* 295 US 495, 55 SCt 837 (1935)(Legislation giving force of law to regulatory codes drawn up by industry associations struck down; in general, delegation of law-making power to private groups disfavoured). More recently, however, the influence of the delegation doctrine in the US has weakened and cases have turned on whether the delegated power touches constitutionally protected rights. Broad grants to administrative agencies that do not affect constitutionally protected rights have been upheld. See *Lichter v United States* 334 US 742, 68 SCt 1294 (1948) (Statute empowering administrative agency to apply standard of 'excessive profits' upheld because sufficient administrative practice had built up to make standard specific).

In countries where the executive is accountable to the legislature the delegation doctrine has not been applied to any significant extent. See *City View Press v An Chomhairle Oiliuna* [1980] IR 381, 399 (In Ireland, the delegation doctrine exists, but not applied in this case: 'the test is whether that which is challenged as an unauthorized delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself'); *Victoria Stevedoring Co v Dignan* 46 CLR 73 (1931) (Australian court refuses to apply delegation doctrine); *Hodge v The Queen* (1883) App Cas 117 (Canadian) (Refusing to apply delegation doctrine).

[2] Act 209 of 1993.

[3] *Executive Council 1995* (supra) at para 51. See also *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others* 2006 (2) SA 311 (CC), 2006 (8) BCLR 872 (CC), [2005] ZACC 14 ('*New Clicks*') at para 113 (Chaskalson CJ)('The making of delegated legislation by members of the executive is an essential part of public administration. It gives effect to the policies set by the legislature and provides the detailed infrastructure according to which this is to be done.')

[4] *Executive Council 1995* (supra) at para 62.

[5] Ibid at para 63.

the possibility that such a power might be delegable in times of war or national emergency.[1]

Like the Interim Constitution, the Final Constitution is silent on the question of delegating legislative authority to the executive. The constitutional position therefore remains the same.[2] Parliament may generally still delegate subordinate regulatory authority to members of the executive, but may not assign plenary legislative power to the executive (save for exceptional circumstances).[3] This delegation doctrine has the virtue of balancing the need for efficiency in government against the need to avoid subverting the constitutional legislative framework.[4] As we discuss in more detail below,[5] the Constitution also permits delegation of legislative powers to private actors.[6]

While this is an accurate description of the general approach, the Constitutional Court pointed out in *Executive Council 1999* that the specific enquiry is

> whether the Constitution authorises the delegation of the power in question. Whether there is constitutional authority to delegate is therefore a matter of constitutional interpretation. The language used in the Constitution and the context in which the provisions being construed occur are important considerations in that process.[7]

The issue in *Executive Council 1999* was whether s 24(1) of the Local Government Municipal Structures Act,[8] which permitted a Minister to determine the terms of municipal councils, was an unconstitutional delegation considering that FC s 159 requires Councils' terms to be 'determined by national legislation.' Ngcobo J stressed that the Constitution uses a range of expressions when it confers legislative power upon the national legislature with regard to local government. Where the Constitution states that 'national legislation must' or 'as determined by national legislation', this constitutes a strong indication that the legislative power cannot be delegated by the legislature.[9] Justice Ngcobo accordingly found that s 24(1) was an unconstitutional delegation of a power that the Constitution determined could only be exercised by the legislature.

Executive Council 1999 raised, but technically left un-answered, two important, related questions about the limits Parliament must place on delegations: *(a)* whether Parliament must provide clear criteria for the exercise of the delegated power; and *(b)* whether a delegation must contain safeguards against the abuse

[1] *Executive Council 1995* (supra) at para 62 and para 140 (Mahomed DP, concurring).

[2] See *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development & Another, Executive Council of KwaZulu-Natal v President of the Republic of South Afria & Others* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC), [1999] ZACC 13 ('*Executive Council 1999*') at para 124 (Holding that the same principles apply to the Final Constitution.) See also *Van Rooyen* (supra) at para 118-9 (Constitutional Court applied the holding in *Executive Council 1995* in evaluating the constitutionality of a delegation of subordinate regulatory authority.)

[3] *Executive Council 1995* (supra) at para 62.

[4] Ibid at para 62-3.

[5] See § 17.5*(e)*(iii) below.

[6] *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council & Another* 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC), [2006] ZACC 9.

[7] *Executive Council 1999* (supra) at para 124.

[8] Act 117 of 1998.

[9] *Executive Council 1999* (supra) at paras 125-6 .

of the delegated power.[1] The Court answered *(a)* In *Affordable Medicines Trust & Others v Minister of Health & Another*.[2] The challenge concerned a delegation to the Director General of Health to prescribe the conditions under which a medical practitioner could be issued a licence to compound and dispense medicine. The challenger complained that there was no direct guidance about the types of conditions the Director General could attach to a licence. Ngcobo J emphasised that, as a general rule, Parliament was permitted to afford those to whom it delegated powers discretion in how they exercise the power.[3] 'However,' he continued,

> the delegation must not be so broad or vague that the authority to whom the power is delegated is unable to determine the nature and the scope of the powers conferred. For this may well lead to the arbitrary exercise of the delegated power. Where broad discretionary powers are conferred, there must be some constraints on the exercise of such power so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. These constraints will generally appear from the provisions of the empowering statute as well as the policies and objectives of the empowering statute.[4]

While the power was not directly limited, it was 'limited by the context in which [the] powers [were] to be exercised.'[5] Ngcobo J reasoned that the power must be exercised in the light of the purpose of the legislation, the purpose of providing the Director General with discretionary powers, and the obligations of medical practitioners. 'All this,' he concluded, 'provides sufficient constraint on the exercise of the discretionary powers conferred by the sub-section.'[6]

This is a fairly narrow restraint on Parliament's ability to delegate. It stands in contrast to the limits the Court has placed on the exercise of administrative discretion that affect fundamental rights. In *Dawood*,[7] the Court held that legislation that gives administrators discretion to take decisions that might infringe a fundamental right must provide guidelines for the exercise of that discretion. As O'Regan J explained:

> There is … a difference between requiring a court or tribunal in exercising a discretion to interpret legislation in a manner that is consistent with the Constitution and conferring a broad discretion upon an official, who may be quite untrained in law and constitutional interpretation, and expecting that official, in the absence of direct guidance, to exercise the discretion in a manner consistent with the provisions of the Bill of Rights. Officials are often extremely busy and have to respond quickly and efficiently to many requests or applications. The nature of their work does not permit considered reflection on the scope of constitutional rights or the circumstances in which a limitation of such rights is justifiable.[8]

[1] *Executive Council 1999* (supra) at paras 116-8.

[2] 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC), [2005] ZACC 3 ('*Affordable Medicines*').

[3] Ibid at para 33 citing *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC), [2000] ZACC 8 at para 53.

[4] *Affordable Medicines* (supra) at para 34.

[5] Ibid at para 38.

[6] Ibid.

[7] *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC), [2000] ZACC 8 ('*Dawood*').

[8] Ibid at para 46 (The legislation at issue in *Dawood* concerned the granting of residence permits for foreign spouses.)

Should delegated lawmaking powers that have the potential to affect constitutional rights be less strictly guided than the implementation of laws with the same effect? Arguably, yes. The concerns that seem to motivate the *Dawood* Court concern the pressures of urgent decision-making. Drafting regulations is a more extended process where the executive will have greater opportunity for reflection on the consequences for constitutional rights. It is therefore sensible to apply the *Affordable Medicines* standard to all secondary legislation, whether it affects rights or not. However, it would also be plausible to adopt a slightly stricter standard of review for delegations of powers that impact on rights. The Court has yet to take a firm position.

As to *(b)* — which is arguably just a variant of *(a)* — the best answer comes in *Executive Council 1999*. Although professing to leave the issue undecided, Ngcobo J basically wrote off the idea that a delegation could be invalid because it was open to abuse: '[T]he enquiry is not whether the delegated power is open to abuse. … The enquiry is whether there is constitutional authority to delegate the power in question. … If delegated power is abused, the conduct of those abusing the power would be unconstitutional and therefore open to challenge.'[1] It is difficult to see how that line of thought could ever permit a challenge based on a delegated power's potential to be misused.

Although we appreciate the logic that informs the Court's answers to both *(a)* and *(b)*, we remain somewhat uncomfortable with the endpoint. *Affordable Medicines* suggests that it will be difficult to find a delegation where the discretion is imperfectly circumscribed. All legislation will have an over-arching purpose or goal, and if adhering to that goal constitutes sufficient guidance for the exercise of delegated law-making power, only the rare legislation that lacks a coherent goal could possibly contain a delegation that gave overbroad discretionary powers. And, as we noted, the Court has in reality excluded the possibility of challenges based on the potential for abuse. This opens the door for Parliament to confer virtually unfettered discretion on the executive to draft laws as long as: *(a)* it does not alter the text of legislation; and *(b)* there is no specific constitutional mandate for the legislature to act. The potential for such transfers of power does not sit easily with traditional notions of the separation of powers.

The answer — which the Court itself gives in *Executive Council 1999* — is that it remains possible to challenge the exercise of a delegated power, just not the delegation of the power. That is, of course, true. But the basis for the challenge is different. A challenge to the exercise of a delegated power alleges that the executive actor has exceeded the bounds of the delegation. A challenge to the delegation alleges that it was improper to afford the executive actor such wide powers, no matter how they are in fact exercised.

There are two problems with relying on exercise-challenges. First, since the Court does not require guidelines, it will be difficult to tell whether the exercise of the power falls within the terms of the delegation. If a power is bound only by the general purposes of the legislation, courts are likely to defer to the executive's interpretation of that purpose. Therefore, although attacks on the exercise of a

[1] *Executive Council 1999* (supra) at para 117.

delegated power are possible in theory, they will seldom succeed in practice, *precisely because* the Court does not require guidelines on how the power must be exercised. Second, an exercise-challenge is a reaction; one must wait until the power is used before attacking it. This creates difficulties for the minority of challenges that will, in fact, succeed. The executive might in good faith interpret legislation to permit it to make a regulation, only to find out later that it has exceeded its powers. In addition, it is likely that the public will be affected by the illegal use of the regulatory power before its illegality is remedied.

While we do not take a strong stance for or against the Court's approach to the limits of the legislature's delegating powers, we do believe that it needs to think more carefully about the consequences of its approach than it has to date. It may be wise to impose slightly stricter constraints. The Court in *Glenister II* could be read to have backtracked slightly on its earlier position. The issue was not technically about delegation, but whether the Hawks — which Parliament had created to deal with national priority offences, including serious corruption — were sufficiently independent from the executive. In concluding that they did not enjoy the necessary degree of independence, Moseneke DCJ and Cameron J were particularly concerned about a provision that permitted a Ministerial Committee to set policy guidelines for the institution. While those guidelines could be 'broad and harmless', 'the power of the Ministerial Committee to determine guidelines appears to be untrammelled. The guidelines could, thus, specify categories of offences that it is not appropriate for the [Hawks] to investigate — or, conceivably, categories of political office-bearers whom the [Hawks are] prohibited from investigating.'[1] The problem for the Court was that the legislation did not 'rule out far-fetched inhibitions on effective anti-corruption activities. On the contrary, it leaves them open.'[2] The thought process of the *Glenister II* majority suggests that the Court might be more open to complaints about the lack of guidelines for delegated law-making; not only when rights are directly at stake, as in *Dawood*, but also when the independence of an institution is threatened.

Finally, we must note that the delegation doctrine cannot be used to challenge the validity of delegated legislation that was made before the Interim Constitution came into effect.[3] It seems likely, however, that the doctrine does apply to regula-

[1] *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC), [2011] ZACC 6 ('*Glenister II*') at para 230.

[2] Ibid at para 231.

[3] *Ynuico Ltd v Minister of Trade and Industry & Others* 1996 (3) SA 989 (CC), 1996 (6) BCLR 798 (CC), [1996] ZACC 12 ('*Ynuico*'). The doctrine drew its constitutional force from IC s 37, which vested the legislative authority of the Republic in Parliament. IC s 37 could have no bearing on the validity of regulations that were made before it came into existence, because the Interim Constitution did not have retroactive effect. In terms of IC s 229, these regulations continued in force. As Didcott J pointed out in *Ynuico*, IC s 229 was designed to avoid the impracticality of dismantling all existing statutory law on 27 April 1994. In so doing it gave continued effect to laws whose genesis was tainted. Whether that taint arose out of the racially exclusive nature of the old Parliament or the fact that legislative authority was vested in executive actors did not affect the operation of IC s 229. Ibid at para 8.

tions made after the commencement of the Interim Constitution but in terms of an enabling statute that was passed before 27 April 1994.[1]

(ii) *Delegation to provincial legislatures and municipal councils*

FC s 44(1)*(a)*(iii) explicitly allows Parliament to assign its legislative powers, except the power to amend the Constitution, to provincial legislatures and municipal councils. This power is known as legislative inter-delegation.

The assignment of legislative competence proceeds by Act of Parliament.[2] An assignment extends legislative powers to the provincial legislature for as long as the Act of Parliament is in force. If the Act is repealed, provincial laws already made under it would continue to be valid. However, the province would not be

[1] See *Ynuico* (supra) at para 5. *Ynuico* does not make clear the attitude of the Court to this question. However, it is submitted that the doctrine must apply to such legislation. The basis of the doctrine is that, with effect from 27 April 1994, the legislative authority of the Republic vested in Parliament. After that date no law could vest plenary legislative authority in an organ other than Parliament. Whether the law itself was passed before or after 27 April 1994 is irrelevant to this inquiry.

In terms of IC s 229 any law passed before the commencement of the Constitution continued in force subject to the Constitution. Provisions of such a law, which purported to confer plenary legislative authority on an executive organ of state, would therefore have been of no force and effect after 27 April 1994. Likewise, Item 2(1) of Schedule 6 of the Final Constitution provides that all law that was in force when the 1996 constitution took effect continues in force subject to consistency with the new Constitution.

But see *Janse van Rensburg NO v Minister van Handel en Nywerheid* 1999 (2) BCLR 204, 213-214 (T) (Van Dijkhorst J reached the contrary conclusion. The learned judge erred by approaching the problem from the incorrect starting point. The constitutional source of the delegation doctrine was that IC s 37 vested the legislative authority of the Republic in Parliament. The effect of IC s 37 was a constitutional principle that no law could vest plenary legislative authority in a body other than the Interim Constitution Parliament. The rule that Parliament under the Interim Constitution could not delegate plenary legislative authority to any other body was a rule which flowed from this constitutional principle, but it was not the beginning and end of the principle itself. In *Janse van Rensburg,* Van Dijkhorst J assessed the constitutionality of s 12 of the Harmful Business Practices Act 71 of 1988 by looking only at the delegation rule and not at the underlying constitutional principle. The applicant in *Janse van Rensburg* argued that s 12 delegated unfettered legislative authority to the Minister of Trade and Industry and was therefore unconstitutional. Van Dijkhorst J rejected this argument on the following grounds: because the Parliament which had passed s 12 was not bound by the delegation rule; the delegation of legislative authority had been valid in 1988; it was therefore preserved by IC s 229 and FC Item 2 of Schedule 6 and remained valid today. By holding that the status of the original delegation of legislative authority in 1988 was decisive of the validity of s 12 after 27 April 1994, Van Dijkhorst J conflated the broad constitutional principle of parliamentary legislative authority with the delegation rule which is but one manifestation of this principle. Both IC s 229 and FC Schedule 6 Item 2 preserved existing legislation only 'subject to the Constitution'. IC s 37 (and FC s 43*(a)*) created a constitutional principle that no law could vest legislative authority in a body other than Parliament. From 27 April 1994, therefore, the validity of s 12 of the Harmful Business Practices Act 71 of 1988 depended not on whether it had been valid in 1988, but on whether it impermissibly purported to clothe the Minister of Trade and Industry with the type of legislative power which IC s 37 vested exclusively in Parliament. If it did, then it was inconsistent with IC s 37 and became prospectively invalid when the Interim Constitution took effect.)

[2] It might be argued that the assignment of legislative power could take place by proclamation. There are, however, indications in the Constitution that this is not permissible. FC s 104(1)*(b)*(iii) provides that assignment must take place by 'national legislation'. This suggests an Act of Parliament rather than a proclamation. Moreover, FC s 44(1)*(a)*(iii) vests the power to assign legislative competence in the National Assembly. There is no corresponding power of assignment vested in the President or any other functionary who makes proclamations.

able to make any further laws in respect of matters covered by the Act because it would no longer have the assigned legislative competence to do so.

National legislation prevails over conflicting provincial laws made under an assigned legislative competence.[1] It does not invalidate that legislation. Parliament does not have the legislative competence to repeal provincial laws — whether those laws are made under an original or an assigned competence.[2]

(iii) *Sub-delegation*

Not only is it possible for the legislature to delegate a power to another, it is also permissible for the delegatee, in turn, to 'sub-delegate' that power to another. It is possible to sub-delegate not only executive and administrative powers — the implementation of regulations — but also legislative powers. This includes the possibility of delegating to private actors.

In general, the legislature may provide for sub-delegation directly in legislation. It may, for example, delegate a regulation-making power to the Minister, and expressly provide that he may delegate some of those powers to the Director General. That is perfectly ordinary and permissible. The difficulty arises where the legislation is silent about sub-delegation. The general principle in those cases is *delegatus delegare non potest* which translates as: 'a person who is delegated a power to do something may not delegate it further.'[3] This is by no means a strict rule, but a starting point for analysis. Sub-delegation will still be permissible where it is 'reasonably necessary' to fulfil the purpose of the statute.[4]

AAA Investments v (Pty) Ltd v Micro Finance Regulatory Council & Another is an excellent example of how these principles play out. Section 15A of the Usury Act[5] permitted the Minister of Finance to exempt certain categories of loans from the strict provisions of the Act. This provision was designed to permit the functioning of the micro-finance industry which could not operate under the stringent limitations of the Act that applied to ordinary lenders. The Minister was also entitled to set the conditions for an exemption in order to provide some consumer protections. The Minister created a set of rules for exemption which included a requirement that lenders register with a regulatory authority. The only authority recognized by the Minister was the Micro Finance Regulatory Council ('the Council'), a not-for-profit company set up by various private and government institutions. The Council in turn created its own set of rules for member-

[1] A conflict between provincial legislation of this nature and a national law would not fall under FC s 146 or FC s 147(2) because the provincial legislation would likely not relate to matters within Schedules 4 and 5. Thus the conflict would, in all likelihood, be one which 'cannot be resolved by a court' within the meaning of FC s 148, and in terms of that section the national legislation would prevail.

[2] See *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill No 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC), [1996] ZACC 3 at paras 16-19. See also FC s 149.

[3] *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council & Another* 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC), [2006] ZACC 9 ('*AAA Investments*') at para 117 (O'Regan J, concurring).

[4] Ibid at para 82 (Langa CJ, dissenting).

[5] Act 73 of 1968.

ship. AAA Investments complained that the rules of the Council were effectively new conditions for exemption that, in terms of s 15A, could only be set by the Minister. It argued that the Council had improperly exercised legislative power, and any implied sub-delegation by the Minister was impermissible.

The High Court had upheld the challenge on the grounds that the Council, as a private body, could not exercise legislative powers.[1] The Supreme Court of Appeal reversed, viewing the matter entirely as a question of the Council's powers under company law.[2] The Constitutional Court disagreed, holding that the Council did exercise public, legislative powers. Provided the powers had been properly delegated to it, it was perfectly constitutional for a private body to, in effect, legislate. In Justice Yacoob's words:

> [T]he Council exercised … a rule-making power aimed at fulfilling the duties imposed by the Minister. They are legislative. But the Council does not, by making rules, or by exercising legislative power properly delegated to it, usurp national, provincial or municipal legislative power. It makes binding rules authorised by law and with the force of law in the fulfilment of a national legislative purpose as set out in section 15A.[3]

O'Regan J (in a concurrence) stressed the necessity of this privatisation of legislative power in the same terms used to justify delegation to the executive in *Executive Council 1995*:

> The power to delegate subordinate legislative authority in a modern state is an important power. No modern state could hope to regulate all its affairs through legislation passed in the national, provincial and local spheres of government. Courts should therefore be cautious to avoid adopting unduly restrictive rules in this area which will limit the possibility of effective ordering of our society by organisations which may not form part of government.[4]

The majority of the Court did not address whether delegations to private bodies should be treated any differently from delegations to the non-legislative branches of the state. However, in dissent Langa CJ made the following commendable observations:

> [A]ccountability is a central value of our Constitution. This means that our law must be developed and interpreted in a manner that ensures that all bodies exercising public power are held accountable. However, to my mind, it also means that courts should be slow to infer the delegation of power to bodies that cannot be held directly accountable through ordinary political processes. … [A]lthough the Council exercises public powers and may be classified as an organ of state, it remains a private company. … The Council is not elected nor is it directly accountable to the public. It is only accountable through the very limited control exercised by the Minister.[5]

[1] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & Another* 2004 (6) SA 557 (T).
[2] *Micro Finance Regulatory Council v AAA Investments (Pty) Ltd & Another* 2006 (1) SA 27 (SCA).
[3] *AAA Investments* (supra) at para 49.
[4] Ibid at paras 122-123.
[5] Ibid (Langa CJ, dissenting) at paras 89-90.

While this did not rule out the possibility of affording private parties the power to make laws, it did countenance caution in monitoring the degree of power private bodies are allowed to exercise. We agree with the Chief Justice. But, although the majority did not contradict his views, they did not support them either. We should also note that, although in *AAA Investments* the Council received its legislative power through sub-delegation, direct delegation from the legislature would be equally permissible.

While the Court was unanimous that the Council could exercise rule-making powers, it split over whether the Minister's rulemaking powers had indeed been properly delegated to the Council. Justice Yacoob wrote for the majority holding that the powers were properly delegated. First, because AAA Investments had not challenged the validity of the regulation requiring lenders to register with the Council, it had to be assumed that the delegation was valid.[1] Second, there was no problem with the Council going beyond the confines of the rules created by the Minister to create its own rules. He held that 'the legislative purpose of empowering the Minister to set the conditions was … to make it possible for the Minister to ensure that the micro-lending industry is sufficiently controlled and that borrowers are appropriately protected.'[2] The Minister chose to do that through a regulatory institution. Once that decision had been taken, the Council had to be afforded all the powers necessary to meet the goal of the legislation, including the power to make rules.[3]

O'Regan J (joined by Ngcobo J) and Langa CJ both wrote separate opinions in which they considered the question of delegation in much greater depth. In their view, the decision to regulate through a private institution was not sufficient to justify whatever rules that institution might make. The Court still had to ask: *(a)* Did the Usury Act in fact permit some sub-delegation to the Council? *(b)* If it did, were the rules the Council made within the bounds of permissible sub-delegation? Langa CJ and O'Regan J agreed that some delegation was permissible, but disagreed on the extent of the delegation. Langa CJ would only have permitted rules that were necessary to implement the regulations passed by the Minister, not rules that 'create new hurdles for exemption.'[4] He would have found invalid several rules that imposed requirements unrelated to the conditions established by the Minister. O'Regan J, on the other hand, gave the Council much greater latitude and would have upheld all the rules the Council had made. While there is not much to separate the two judgments, the Chief Justice's approach is ultimately preferable. He is the only judge to give sufficient weight to the private character of the Council. Affording private bodies legislative powers too easily risks undermining the important principles of accountability that are built into our constitutional system.

[1] *AAA Investments* (supra) at paras 47-48.
[2] Ibid at para 51.
[3] Ibid at para 54.
[4] Ibid at para 93.

Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others involved a more run-of-the-mill case of improper sub-delegation.[1] The case concerned medicine-pricing regulations. Although the Court was splintered on a variety of issues, it unanimously identified three impermissible sub-delegations. First, the Court held that it was impermissible for the Minister of Health to delegate the responsibility to determine the methodology by which prices would be benchmarked to international prices to her Director General. While it was acceptable for the Director General to do the calculations to set individual prices, allowing her to determine the methodology in effect gave her the power to set prices, a power that the legislation reserved for the Minister and a specialist Pricing Committee.[2] Second, the Court set aside a regulation that delegated the duty to conduct an annual review of prices to the Minister, when the Act assigned that duty to both the Minister and the Pricing Committee.[3] Lastly and in a similar vein, while the Act required the Minister to set a logistics fee on the recommendation of the Pricing Committee, the regulations impermissibly assigned the duty to the Minister alone.[4] *New Clicks* demonstrates the importance of both the language of the delegating legislation, and the relative expertise of the various actors involved in determining whether a sub-delegation is permissible. It also shows that it can be an invalid sub-delegation to assign a power that was meant to be exercised jointly to a single actor.

(iv) *Reviewing delegated powers*

An important consequence of delegating legislative powers — rather than exercising them directly — is that they are likely to become subject to stricter judicial scrutiny. Prior to the Interim Constitution, it was accepted that regulations made in terms of delegated powers were administrative action subject to judicial review.[5] The position under the Final Constitution is, surprisingly, far less clear. This issue is discussed in more detail elsewhere in this work,[6] but we provide an outline of the current position.

The proximate cause of the confusion is the Constitutional Court's splintered judgment in *New Clicks*.[7] The Court rejected the High Court's finding that regulations are administrative action under FC s 33(1), but not under the Promotion of Administrative Justice Act ('PAJA'),[8] but still managed to take four different positions, none of which garnered a majority. Writing for himself and Justice O'Regan, Chief Justice Chaskalson held that all regulation making (ie. delegated lawmaking) is subject to the control of both FC s 33(1)

[1] *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others* 2006 (8) BCLR 872 (CC), 2006 (2) SA 311 (CC), [2005] ZACC 14 ('*New Clicks*').

[2] Ibid at para 281.

[3] Ibid at para 286.

[4] Ibid at para 300.

[5] Ibid at paras 101-106 (Chaskalson CJ, plurality).

[6] For a full analysis of the Court's cases on the topic, see G Penfold & J Klaaren 'Just Administrative Action' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) §63.3*(b)*(vi).

[7] *New Clicks* (supra).

[8] Act 3 of 2000.

and PAJA. Ngcobo J, joined by two other Justices,[1] held that the specific regulations at issue in *New Clicks* were administrative action, but was unwilling to extend that finding to all regulations. Four of the remaining Justices[2] signed on to Moseneke J's opinion, which simply avoided the issue. Last, Sachs J held that regulations are not administrative action, but should be subject to a wide conception of legality.

The Court has provided no further guidance since *New Clicks*, so the exact position remains uncertain. The recent change in composition of the Court makes the eventual answer even less predictable.[3] However, it is almost certain that regulations will be subject to some additional level of scrutiny, even if it is not full administrative review. There are very good reasons for courts to show less deference to regulations than they do to legislation. Permitting some delegation is, as we discussed earlier, necessary for a modern state to function. But: The principled justifications for wide judicial deference to legislative rule-making do not apply when the legislature chooses to assign its central function to the executive. Regulations are not made by elected and accountable representatives. They are generally not the result of an open, deliberative, legislative process. Courts should therefore ensure that when legislative powers are exercised by non-legislative bodies, they are subject to some additional scrutiny.

(f) Constraints imposed by the legality principle

The rule of law is one of the founding values of the Final Constitution.[4] The legality principle that flows from the rule of law is binding on all legislative and executive organs of state in all spheres of government. The legality principle was first articulated by the Constitutional Court in *Fedsure v Greater Johannesburg Metropolitan Council*.[5] The *Fedsure* Court held that the legality principle provided that legislative and executive organs of state 'may exercise no power and perform no function beyond that conferred upon them by law'.[6] Thus stated, the legality principle was hardly controversial and would have no impact on the national legislature outside the federalism constraints already discussed. Indeed, its only relevance to the outcome in *Fedsure* concerned questions of jurisdiction, rather than questions of substantive law.[7] However, the far-reaching significance of the legality principle lies in the rationality and vagueness doctrines.

[1] Langa DCJ and Van der Westhuizen J.

[2] Madala, Mokgoro, Skweyiya and Yacoob JJ.

[3] Three of the five justices supporting Chaskalson CJ or Ngcobo J have left (Chaskalson CJ, Langa DCJ and O'Regan J) as have two of those who sided with Moseneke J (Madala and Mokgoro JJ). Sachs J, too, has retired.

[4] FC s 1*(c)*.

[5] *Fedsure v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC), [1998] ZACC 17 ('*Fedsure*') at para 58.

[6] Ibid.

[7] Ibid. See also *President of the Republic of South Africa v South African Rugby Football Union & Others* 1999 (2) SA 14 (CC), 1999 (2) BCLR 175 (CC), [1998] ZACC 21 at para 28.

(i) *Rationality*

In *New National Party of SA v Government of the RSA & Others,*[1] Yacoob J stated that laws and acts that are not rationally related to a legitimate government purpose are unconstitutional because arbitrariness is inconsistent with the legality principle. That the rule of law prohibits all irrational laws was reaffirmed by the Constitutional Court in *United Democratic Movement v President of the RSA*,[2] and has been regularly applied since. The legality principle extends the Final Constitution's commitment to the rule of law and constitutionalism such that even where an Act of Parliament does not affect fundamental rights, it must be rationally related to a legitimate governmental purpose in order to be valid.[3]

That said, the legality principle's rationality standard is a relatively easy one for Parliament to meet. It must not be conflated with the more stringent test of 'reasonableness'[4] applied in limitations analysis and certain other contexts.[5] In *Pharmaceutical Manufacturers*,[6] the Court explained the rationality standard as follows:

> [It] does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.[7]

In *United Democratic Movement*, the Court confirmed that this relatively lenient standard applies 'also and possibly with greater force to the exercise by Parliament

[1] 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC), [1999] ZACC 5 ('*New National Party*') at para 24 ('Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose. In such circumstances, review is competent because the legislation is arbitrary. Arbitrariness is inconsistent with the rule of law which is a core value of the Constitution.')

[2] 2003 (1) SA 488 (CC), 2002 (11) BCLR 1213 (CC), [2002] ZACC 33 ('*United Democratic Movement*' or '*UDM*') at para 55.

[3] This standard is virtually identical to the one imposed by FC s 9(1). Under s 9(1), any differentiation between groups of people must be rationally related to a legitimate government purpose. Technically, the rationality standard rooted in the rule of law does not require a differentiation. However, in practice virtually any law can be framed as a differentiation. Nonetheless, the range of the legality-based rationality standard is wider than its s 9(1) relative because it applies to the limited set of cases that are not covered by the Bill of Rights, particularly constitutional amendments.

[4] The greater scrutiny involved in a reasonableness enquiry is best illustrated by comparing the majority judgment of Yacoob J in *New National Party* with the dissenting judgment of O'Regan J. Yacoob J believed a rationality approach was appropriate. *New National Party* (supra) at para 24. O'Regan J believed a reasonableness test should be applied. Ibid at paras 122-3. Naturally, they reached different conclusions. See also *Bel Porto School Governing Body v Premier of the Province of the Western Cape*, 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC), [2002] ZACC 2 at para 46. See also, A Price 'The Content and Justification of Rationality Review' (2010) 25 *SAPL* 345, 358 ('Whereas an act is reasonable if the reasons for it defeat the reasons against it, an act is merely rational if, notwithstanding the reasons against it, there is at least one reason or rationale for it.')

[5] See, eg, the rights to administrative action, FC s 24, and some socio-economic rights, FC ss 26 and 27.

[6] *Ex parte President of the RSA: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC), [2000] ZACC 1.

[7] Ibid at para 90. Footnote omitted.

of the powers vested in it by the Constitution, including the power to amend the Constitution.'[1]

In dealing with the rule of law and the legality principles in *United Democratic Movement*, the Court emphasised the need to distinguish a legitimate governmental purpose from the motive of those who voted for the legislation. In response to an argument that the purpose of the defection legislation was to enable the African National Congress and New National Party to take advantage of the break-up of the Democratic Alliance, the *United Democratic Movement* Court held that:

> Courts are not … concerned with the motives of the members of the legislature who vote in favour of particular legislation, nor with the consequences of legislation unless it infringes rights protected by the Constitution, or is otherwise inconsistent with the Constitution.[2]

A fuller discussion of rationality jurisprudence lies outside the scope of this chapter. Fortunately, the intricacies of the rationality test are addressed in more detail elsewhere in this work,[3] and one of the authors has provided an extensive account of it in *South African Public Law*.[4] For now, we simply note that rationality review is far more complicated, malleable and subjective than it may, at first, appear.

(ii) *Vagueness*

In addition to irrational legislation, the legality principle also prohibits vague legislation. The standard statement of the law comes from *Affordable Medicines*:

> The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law

[1] *United Democratic Movement* (supra) at para 68. *United Democratic Movement* illustrates well the relatively low level of scrutiny that a rationality enquiry entails. The Court rejected the argument that it was irrational for Parliament to limit defections by members of a legislature to two window periods in the life of a legislature and, in doing so, emphasised the conflicting views expressed in Parliament on the issue and the expert opinions that had been obtained. Ibid at para 69. The Court also stressed that even though other parties would not necessarily have been affected by the break-up of the Democratic Alliance which prompted the legislation, 'it cannot be said to be irrational to pass a law of general application to deal with a concrete situation, rather than a law which would apply only to members of the DA, the DP and the NNP.' Ibid at para 70.

The Court also held that it was not irrational to apply differing procedures to the first defection period while applying the same procedure to all subsequent defection periods. Ibid at para 70. Lastly, the Court held that it was not irrational, in the event of the death or expulsion of a member of parliament who had defected, to allow the new party of the member to fill the seat in question. Ibid at para 74.

[2] *United Democratic Movement* (supra) at para 56.

[3] C Albertyn & B Goldblatt 'Equality' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 35.

[4] M Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' (2010) 25 *SAPL* 312. See also A Price 'The Content and Justification of Rationality Review' (2010) 25 *SAPL* 345; M Bishop 'Vampire or Prince? The Listening Constitution and *Merafong Demarcation Forum v President of the Republic of South Africa*' (2010) 2 *Constitutional Court Review* 313; A Price 'Rationality Review of Legislation and Executive Decisions *Poverty Alleviation Network* and *Albutt*' (2010) 127 *SALJ* 580.

> must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.[1]

Relying on this test, the Court found a regulation that listed factors to be taken into account when granting a medical practitioner a licence to dispense medicines unconstitutionally vague because the government had stated in the litigation that the factors were irrelevant. This contradiction rendered it impossible for medical practitioners to know how their applications would be determined.[2]

The best example of the vagueness principle is the Court's decision in *South African Liquor Traders Association & Others v Chairperson Gauteng Liquor Board & Others* to invalidate provincial legislation regulating shebeens.[3] The problem was the definition of a 'shebeen'. The legislation defined a shebeen as a 'any unlicensed operation whose main business is liquor and is selling less than ten (10) cases consisting of 12 x 750ml of beer bottles'. Unhelpfully, the law did not specify the period within which the 10 cases could be sold: Per day? Per week? Per month? As O'Regan J put it, the legislation's 'meaning cannot … be ascertained with any precision. It is simply not clear which unlicensed liquor traders will fall within the definition and which without.'[4] The Court read-in the phrase 'per week' to cure the vagueness.

While the legislation in *Liquor Traders* was obviously vague, in *Bertie Van Zyl*, the Court split over whether a definition of 'security service' was impermissibly vague.[5] Section 20(1)*(a)* of the Private Security Industry Regulation Act[6] made it a crime for anybody not registered in terms of the Act to perform a 'security service'. The Act defined 'security service' to include 'protecting or safeguarding a person or property in any manner'. The applicant's employees were charged with violating s 20(1)*(a)* for acting as security guards on its farms. It argued that the definition was impermissibly vague, as it was unclear how far it extended. A person providing child care services could be seen as 'safeguarding a person'. Would they have to register under the Act?

The majority of the Court, per Mokgoro J, held that, when read in context, the definition was not unconstitutionally vague. 'The provisions of the Act themselves might not provide absolute clarity,' the Justice wrote, 'in that there may be cases on the margins where it may not immediately be determined whether or not registration is required under the Act. That, however, is the inevitability of broadly stated legislation.'[7] She interpreted the definition, in terms of FC s 39(2), to provide a much more precise meaning than its text would suggest.

Justice O'Regan dissented. 'Language', she held, 'is often imprecise and in many cases it will not be possible to draw with complete certainty the boundaries of a

[1] *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC), [2005] ZACC 3 at para 108.

[2] Ibid at paras 120-121.

[3] 2009 (1) SA 565 (CC), 2006 (8) BCLR 901 (CC), [2006] ZACC 7 ('*Liquor Traders*').

[4] Ibid at para 26.

[5] *Bertie Van Zyl (Pty) Ltd & Another v Minister for Safety and Security & Others* 2010 (2) SA 181 (CC), 2009 (10) BCLR 978 (CC), [2009] ZACC 11 ('*Bertie Van Zyl*').

[6] Act 56 of 2001.

[7] *Bertie Van Zyl* (supra) at para 52.

legislative prohibition. … However, where a provision has no certain core meaning at all, or where it has a significant penumbral scope of uncertainty, it will probably be constitutionally impermissible.'[1] The need for certainty is particularly strong in criminal provisions like s 20(1)*(a)*. She held that the provision could not be interpreted to contain the degree of certainty demanded by the principle of legality.

The disagreement between Mokgoro and O'Regan JJ is both about the content of the vagueness principle and the proper limits of statutory interpretation. In any vagueness challenge, these two elements will inevitably overlap; the more willing a judge is to impute meaning to a statute that is not explicit in the text, the easier it will be for her to find that the statute is not vague. In our view, Mokgoro J stretches the bounds of statutory interpretation too far — and thereby allows impermissibly vague legislation.[2] While it may be possible for judges with the benefit of dense legal argument and ample time to reflect to divine the proper meaning of 'security service', the average policeman, prosecutor or citizen would likely not be able to do so. And if legislation — especially criminal legislation — is impenetrable to those who are bound by it and those who must enforce it, it cannot be constitutional.

(g) Constraints on the power to amend the Constitution

There are no expressly stated substantive limits on the power of Parliament to amend the Final Constitution.[3] The narrow scope, if any, for substantively challenging constitutional amendments has been made clear by the Constitutional Court:

> Amendments to the Constitution passed in accordance with the requirements of s 74 of the Constitution become part of the Constitution. Once part of the Constitution, they cannot be challenged on the grounds of inconsistency with other provisions of the Constitution. The Constitution, as amended, must be read as a whole and its provisions must be interpreted in harmony with one another. It follows that there is little if any scope for challenging the constitutionality of amendments that are passed in accordance with the prescribed procedures and majorities.[4]

This principle was upheld in *Matatiele I*.[5] The Court was confronted with an amendment to the Constitution that changed provincial boundaries and, as a result, also necessitated changes to municipal boundaries. The applicants argued

[1] *Bertie Van Zyl* (supra) at para 102.

[2] For a discussion of *Bertie Van Zyl*, see M Bishop & J Brickhill 'Constitutional Law' (2009) 2 *Juta's Quarterly Review* §2.3.

[3] Compare s 74 of the Interim Constitution, which stated that Parliament had no power to amend any of the provisions of chapter 5, the chapter dealing with the adoption of the Final Constitution by the Constitutional Assembly. Some provisions of chapter 5 of the Interim Constitution were not amendable. See IC s 74(1). The remaining provisions could be amended only by a two-thirds majority of the Constitutional Assembly. See IC s 74(2). There are procedural restraints on the amending power of Parliament under the Final Constitution. See § 17.3*(a)* supra.

[4] *United Democratic Movement* (supra) at para 12 (footnote omitted).

[5] *Matatiele Municipality & Others v President of the Republic of South Africa & Others (1)* 2006 (5) BCLR 622 (CC), 2006 (5) SA 47 (CC), [2006] ZACC 2 ('*Matatiele I*').

that the power to change municipal boundaries was assigned by FC s 155(3)*(b)* exclusively to the Municipal Demarcation Board and Parliament could not, even by constitutional amendment, usurp that power. Ngcobo J held that Parliament had the power to amend provincial boundaries through a constitutional amendment, and that included the power to amend municipal boundaries if doing so was reasonably necessary for changing provincial territories.[1] What Parliament could not do by ordinary legislation, it could accomplish through constitutional amendment.

In addition, *UDM* appears to have to put paid to any suggestion that the Constitutional Principles contained in Schedule IV to the Interim Constitution could place substantive limits on Parliament's amending power.[2] The Court held that although Constitutional Principle VIII required an election system resulting in proportional representation, the founding values in s 1 of the Constitution omitted any reference to proportional representation while including each of the other aspects of Constitutional Principle VIII.[3] *UDM* indicates that while the Constitutional Principles remain useful at the level of interpretation, they cannot provide substantive limits on Parliament's ability to amend the Constitution.

There is, however one accepted substantive limit on Parliament's power to amend the Constitution: amendments must be rational. The rationality of a constitutional amendment has been attacked on three occasions: *UDM*, *Merafong* and *Poverty Alleviation Network*. Interestingly, the Court never explicitly states that the rationality requirement applies to constitutional amendments. Its holdings all seem to be carefully ambiguous. In *UDM* the Court writes that the limited role of the rationality principle 'applies also and possibly with greater force to the exercise by Parliament of the powers vested in it by the Constitution, including the power to amend the Constitution.'[4] This could fairly be interpreted as applying the rationality standard to constitutional amendments. Yet, in *Matatiele I*, the Court directed the parties to address them on whether constitutional amendments are subject to rationality review.[5] It then avoids the issue in *Matatiele II* because it invalidates the amendment on procedural grounds. In *Merafong*, the Court repeats the *UDM* dictum and then writes that, in view of the fact that it rejects the rationality challenge, 'it is not necessary to take this specific point any further.'[6] In *Poverty Alleviation*, the Court never explicitly considers the issue, seeming to assume that

[1] *Matatiele I* (supra) at paras 49-53.

[2] This suggestion was based on the fact that the Final Constitution could not take effect until the Constitutional Court had certified that it complied with all the Principles contained in Schedule IV. See IC s 71(2). It thus appeared anomalous to allow Parliament to amend the Final Constitution so as to introduce provisions that did not comply with the Constitutional Principles, and which thus could not have formed part of the original text of the Final Constitution. However, in the previous edition of this work, Chaskalson and Klaaren evaluated this argument and correctly concluded that as a matter of both legal logic and political necessity, it was not sustainable. M Chaskalson & J Klaaren 'National Government' in M Chaskalson et al (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Chapter 3.

[3] *United Democratic Movement* (supra) at para 28-9.

[4] Ibid at para 68.

[5] *Matatiele I* (supra) at para 86.

[6] *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC), [2008] ZACC 10 ('*Merafong*') at para 64.

the standard applies to constitutional amendments.[1] In our view, despite the lack of an unambiguous statement, the Court's practice indicates that it is willing to hold constitutional amendments to the rationality standard, although it will very seldom find that the standard has been breached.

A more controversial, far-reaching limitation is the 'basic structure doctrine'. This doctrine originated in India where the Supreme Court held that despite the Indian Parliament's apparently unlimited power of amendment,[2] the amending power did not extend to any amendment which would alter the basic structure of the constitution.[3] In *Kesavananda v State of Kerala* the court held:

> We may now deal with the question as to what is the scope of the power of amendment under Article 368. This would depend upon the connotation of the word 'amendment'. Question has been posed during arguments as to whether the power to amend under the above article includes the power to completely abrogate the Constitution and replace it by an entirely new Constitution. The answer to the above question, in my opinion, should be in the negative. … Although it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern.[4]

While the basic structure doctrine has been confirmed by the Indian Supreme Court in later cases, it is applied with caution. For the most part it has been invoked by the Supreme Court to strike down only those constitutional amendments that affect the rule of law and the separation of powers between the judiciary and the legislature.[5] Outside of this domain, the court has allowed Parliament an almost unfettered power of amendment. Even the repeal of particular fundamental rights has been held not to affect the basic structure of the Constitution.[6]

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[1] *Poverty Alleviation Network & Others v President of the Republic of South Africa & Others* 2010 (6) BCLR 520 (CC), [2010] ZACC 5 ('*Poverty Alleviation Network*').

[2] Article 368 of the Indian Constitution provides:

(1) Notwithstanding anything in the Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon, the Constitution shall stand amended in accordance with the terms of the Bill.

[3] The German Basic Law contains an express provision to this effect. Article 79(3) states: 'Amendments to this Basic Law affecting … the principles laid down in Articles 1 and 20 shall be prohibited.' The basic structure doctrine has, however, been rejected by the courts of Sri Lanka and Singapore. See *In re Thirteenth Amendment to the Constitution and the Provincial Councils Bill* [1990] LRC (Const) 1, 13h-14g and *Teo Soh Lung v Minister for Home Affairs & others* [1990] LRC (Const) 490, respectively.

[4] AIR 1973 SC 1461, 1859-1860 at para 1437

[5] See, for example, *Indira Gandhi v Raj Narain* AIR 1975 SC 2299; *Minerva Mills v Union of India* AIR 1980 SC 1789; SP *Gupta v President of India* AIR 1982 SC 149.

[6] In the case which first recognized the doctrine, the repeal of the right to property was held not to affect the basic structure of the constitution. See *Kesavananda v State of Kerala* AIR 1973 SC 1461.

In *Premier, KwaZulu-Natal*,[1] the Constitutional Court left open the possibility that it might subsequently incorporate the basic structure doctrine into South African constitutional law:

> It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganising the fundamental premises of the Constitution, might not qualify as an 'amendment' at all.[2]

However, in both *Premier, KwaZulu-Natal*[3] and *United Democratic Movement*,[4] the Court held that even if this doctrine was to be recognised as part of South African constitutional law, none of the amendments dealt with in either case could 'conceivably fall within [the] category of amendments so basic to the Constitution as effectively to abrogate or destroy it.'[5]

One potential barrier to the adoption of the basic structure doctrine under the Constitution is FC s 74(1). Section 74(1) expressly contemplates the amendment of s 1: the provision that sets out the founding values of the Republic of South Africa.[6] If the founding values of s 1 are subject to amendment — albeit only by a vote with the support of 75 per cent of the NA and the support of six provinces in the NCOP — then it is difficult to argue that the basic structure doctrine means that other provisions of the Constitution are unamendable. However, it may be possible to reconcile s 74(1) with the basic structure doctrine by reading s 1 as shaping the operation of a slightly more limited basic structure doctrine. If s 1 is interpreted to delimit the basic structure of the Constitution, amendments inconsistent with the values of s 1 would be impermissible under the basic structure doctrine unless s 1 itself was amended by the special provisions of s 74(1).[7] It was, arguably, the absence of an equivalent of s 74(1) in the Indian Constitution that motivated the Supreme Court to develop the basic structure doctrine. The presence of s 74(1) in our Constitution makes the basic structure doctrine unnecessary.

17.6 Procedural Constraints on Legislative Authority

This section deals with constitutional limits on the procedure that Parliament must follow in enacting legislation. We discuss the two topics that have been

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[1] *Premier, Kwazulu-Natal & Others v President of the Republic of South Africa & Others* 1996 (1) SA 769 (CC), 1995 (12) BCLR 1561 (CC), [1995] ZACC 10 ('*Premier, KwaZulu-Natal*').

[2] Ibid at para 49.

[3] Ibid at para 47.

[4] *United Democratic Movement* (supra) at para 17.

[5] *Premier, Kwazulu-Natal* (supra) at para 49.

[6] The foundational values are:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the Constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

[7] In *United Democratic Movement* while not addressing the issue directly, the Constitutional Court appeared to reach a similar conclusion, but without using the basic structure doctrine. *UDM* (supra) at paras 18-20 and 75.

litigated thus far: public participation in the legislative process; and tagging of legislation.

As a preliminary note, failure to comply with the procedures discussed in § 17.3 will result in invalidity. We do not discuss these 'manner and form' provisions here in order to avoid duplication. It is enough to say that if they are not followed, the legislation will be invalid.

(a) Public Participation

According to FC s 59(1)*(a)*, 'the National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees.' FC s 72(1)*(a)* imposes an identical duty on the NCOP, as does FC s 118(1)*(a)* for provincial legislatures. We refer to these three provisions collectively as 'the public involvement provisions'. Without doubt they pursue a laudable goal. But is it an enforceable constitutional obligation?

Yes. In 2005, Doctors for Life International — a group of medical doctors opposed to abortion — challenged the constitutionality of four acts related to health issues passed in 2004 and 2005: the Choice on Termination of Pregnancy Amendment Act ('the Choice Act');[1] the Sterilisation Amendment Act;[2] the Traditional Health Practitioners Act ('the Traditional Health Act');[3] and the Dental Technicians Amendment Act ('the Dental Act').[4] They argued that the NCOP had failed in their duty to facilitate public involvement. In *Doctors for Life*[5] the Constitutional Court held that the failure to facilitate public involvement rendered both the Choice Act and the Traditional Health Act invalid.

The Constitutional Court has applied that holding in four subsequent cases: *Matatiele II*; *Merafong*; *Poverty Alleviation Network*; and *Glenister II*. We discuss the five participation cases in three parts. First, we discuss the preliminary issues of jurisdiction and the timing of the challenge. Next we consider the heart of the debate: the reasonableness standard the Court has set to determine whether the obligation has been met. We consider the views of both the majority and minority in *Doctors for Life* and then analyse how the standard has been applied in subsequent cases. Lastly, we provide an assessment of the current state of public participation doctrine and its prospects for future.

(i) *Jurisdiction, standing and timing*

The first question in *Doctors for Life* was whether the Constitutional Court had jurisdiction to consider the challenge as a Court of first instance. The Court's jurisdiction is addressed in detail elsewhere in this book.[6] Here we just outline the Court's the basic position. The Constitutional Court has, under FC

[1] Act 38 of 2004.
[2] Act 3 of 2005.
[3] Act 35 of 2004.
[4] Act 24 of 2004.
[5] *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC), [2006] ZACC 11 ('*Doctors for Life*').
[6] See S Seedorf 'Jurisdiction' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 4.

s 167(4)*(e)*, exclusive jurisdiction to 'decide that Parliament … has failed to fulfil a constitutional obligation'. The *Doctors for Life* Court had to decide whether the public involvement provisions imposed a 'constitutional obligation' in terms of FC s 167(4)*(e)*. Not every obligation imposed on Parliament is a 'constitutional obligation' under s 167(4)*(e)*. Justice Ngcobo held that only obligations that concerned 'crucial political' questions should be reserved for the Constitutional Court. A crucial political issue would arise 'where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation'.[1] The obligation to facilitate public involvement was precisely that sort of question and the Court therefore had exclusive jurisdiction to determine it.

In order to limit the potentially destabilising effect of its newly-minted doctrine, the *Doctors for Life* Court established two requirements for a party to have standing to bring a participation challenge: (1) the applicant must have 'sought and been denied an opportunity to be heard on the Bills'; and (2) the applicant must have 'launched his or her application for relief in this Court as soon as practicable after the Bills have been promulgated.'[2] As Ngcobo J explained: 'Rules of standing of this sort will prevent legislation being challenged … many years after the event by those who had no interest in making representations to Parliament at the time the legislation was enacted. … In my view, this restricted form of standing further reflects this Court's concern to protect the institutional integrity of Parliament, while at the same time seeking to ensure that the duty to facilitate public involvement is given adequate protection.'[3] In *Doctors for Life* and *Matatiele II*[4] the cases were brought timeously.

However, in *Merafong*, *Poverty Alleviation Network* and *Glenister II*, the government argued that the challenge had come too late. In *Merafong*, the legislation was initially passed in March 2006. It was then subject to a participation challenge in *Matatiele II*. While the residents of Merafong waited for the outcome of *Matatiele II*, they still waited almost a year before launching their participation challenge. While noting that the delay was 'troublesome', and reiterating the need for disputes to resolved speedily, the Court found the applicants' explanation sufficient.[5] In *Poverty Alleviation Network*, the Matatiele community was back in court to challenge the constitutional amendment which re-instated the law that they had successfully challenged in *Matatiele II*. However, the second time round they waited nearly nine months to challenge the legislation. They argued that the delay was caused by their attempts to resolve the matter through negotiations with the ANC and submissions to the Human Rights Commission.[6] For Nkabinde J, the

[1] *Doctors for Life* (supra) at para 26.
[2] Ibid at para 216.
[3] Ibid at para 219.
[4] *Matatiele Municipality & Others v President of the Republic of South Africa & Others (2)* 2007 (1) BCLR 47 (CC), [2006] ZACC 12 ('*Matatiele II*').
[5] *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC), 2008 (10) BCLR 969 (CC), [2008] ZACC 10 ('*Merafong*') at para 15.
[6] *Poverty Alleviation Network & Others v President of the Republic of South Africa & Others* 2010 (6) BCLR 520 (CC), [2010] ZACC 5 ('*Poverty Alleviation Network*') at para 26.

explanation was 'not entirely satisfactory.'[1] However, the Court did not decide whether the delay was so serious as to prevent the challenge since the Court in any event found against Matatiele's residents on substantive grounds. In *Glenister II* the applicant had delayed the challenge because the other grounds on which it sought to challenge the legislation would ordinarily be raised in the High Court.[2] The applicant only raised the public participation challenge together with its appeal from the High Court — a year and three months after the President signed the legislation. The Court unanimously held that the explanation was unacceptable and that this delay barred the claim.[3] Instead of approaching the High Court and the Constitutional Court separately, Glenister should have attempted to urge the Constitutional Court to consider his other claims together with the public participation challenge.[4]

While challenges should be brought early, they should not be brought too early. The *Doctors for Life* Court had to decide whether a challenge to Parliament's failure to facilitate public involvement could be brought before the legislative process was complete. We discuss the problem of bringing a challenge to parliamentary procedure too early elsewhere in this chapter, as it applies to all procedural challenges.[5] In short, except in exceptional circumstances, the challenge can only be brought *after* the President has signed the Bill and it has become an act.

(ii) *The place of public participation in the South African democracy and the reasonableness enquiry*

Doctors for Life provides a rich trove of thought on the complex nature of democracy in South Africa, and a paean to the value of civic participation. The Court describes South African democracy as being constituted by 'mutually-supportive' representative and participatory elements.[6] The majority of the Court held that this is implicit in the preamble to the Constitution and the founding values in FC s 1*(d)*. These provisions envisage a democracy where citizens delegate law-making power to elected representatives by participating in periodic elections and in turn the elected representatives must exercise this power in an accountable, responsive and open manner by facilitating public involvement in their governing processes. In Justice Ngcobo's words:

> General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to

[1] *Poverty Alleviation Network* (supra) at para 29.
[2] *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC), [2011] ZACC 6 ('*Glenister II*').
[3] Ibid at para 28.
[4] Ibid at para 27.
[5] See §17.4 above
[6] *Doctors for Life* (supra) at para 115.

> produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.[1]

In order to protect the participatory elements of our democracy, public involvement in the processes of Parliament are considered a fundamental right given effect by the positive obligations in the public involvement provisions.

In summing up the Court's account of the place of public participation in South Africa's conception of democracy, one of the authors has written elsewhere that:

> [*Doctors for Life*] signifies an intensive effort by the Constitutional Court to declare the place and meaning of public involvement in the legislative process within our conception of democracy. This was an exercise of contextual, purposive and historical interpretation of the Constitution. The position, which is now settled, is that our democracy embraces representative and participatory elements which are mutually supportive or at least in constructive tension with each other. This warrants a peculiarly constructive relationship between the government and the governed, where the people elect representatives who are in turn mandated to govern by guaranteeing meaningful consideration of the will of the people in the law-making process. This is constitutive of a right of members of the public to participate in the legislative process and the correlative duty on the concerned legislature to facilitate such public involvement. This is enforceable by the Constitutional Court using the reasonableness standard.[2]

It is against this background that the Court developed the meaning and the scope of the constitutional obligation to facilitate public involvement. The Court split on this question. The majority[3] would require Parliament to take reasonable measures to facilitate public involvement in the passage of each piece of legislation. The dissenters[4] would have limited the Court's role to considering whether Parliament had passed rules that could facilitate public involvement. We unpack the majority's decision in some detail, and then consider the minority's counter-arguments. Finally, we look at how the majority's reasonableness standard has been applied, and what it really means for public participation in Parliament.

(aa) The *Doctors for Life* majority

The majority construed 'facilitate' to mean that Parliament has a duty to 'promote', 'help forward' or 'make it easy or easier' for the public to participate in the legislatures' processes.[5] In short, the legislature must 'tak[e] steps to ensure that the public participate in the legislative process.'[6] The Court 'will consider what Parliament has

[1] *Doctors for Life* (supra) at para 115.

[2] N Raboshakga 'The Adequacy of the Reasonableness Approach in Public Involvement Cases' LLM Research Report, University of the Witwatersrand (2009, on file with authors) 17.

[3] Ngcobo J, joined by Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Nkabinde J, O'Regan J and Sachs J. Sachs J also wrote a concurring judgment.

[4] Yacoob J wrote the chief dissent, joined by Skweyiya J. Van der Westhuizen J wrote a separate dissent, largely supporting Yacoob J.

[5] *Doctors for Life* (supra) at para 119.

[6] Ibid at para 120.

done in [each] case.'[1] Merely passing rules to permit or facilitate public involvement would not be sufficient.

What standard would the Court use to evaluate what Parliament had done? The majority concluded that 'reasonableness' was the standard of review that adequately discharged the underlying purpose of the public involvement provisions. 'Reasonableness,' Justice Ngcobo explained 'is an objective standard which is sensitive to the facts and circumstances of a particular case. "…[C]ontext is all important."'[2] The Court noted that 'reasonableness' is 'used as a measure throughout the Constitution' including, most obviously, as the yardstick for whether the state has fulfilled its positive obligation to realise socio-economic rights.[3]

Ultimately, Parliament must provide a *meaningful and effective* opportunity for public participation in the law-making process.[4] In determining whether the legislature has done enough, 'the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs.'[5]

In that vein, while stressing that 'Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement,'[6] the Court also gave fairly specific guidelines on how the legislatures' attempts to facilitate participation would be judged. To begin, the Court held that there are 'at least two aspects of the duty to facilitate public involvement': *(a)* 'the duty to provide meaningful opportunities for public participation in the law-making process'; and *(b)* 'the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.'[7] The first involves the traditional acts of inviting written representations, holding public hearings, or any other structures that provide a space for people to be heard. The second duty acknowledges the legacy of apartheid that left the majority of the population without the 'education, financial resources, access to knowledge and other areas that are crucial for effective participation in the law-making process. Merely to allow public participation in the law-making process is, in the prevailing circumstances, not enough. More is required.'[8] Steps to close this gap could include 'road shows, regional workshops, radio programs

[1] *Doctors for Life* (supra) at para 146.

[2] Ibid at para 127 quoting *Khosa & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC), [2004] ZACC 11 at para 49.

[3] *Doctors for Life* (supra) at para 126. The Court also identified the sections which permit legislatures to take 'reasonable measures' to regulate access to their hearings. FC ss 59(1)*(b)*, 72(1)*(b)* and 118(1)*(b)*. Other obvious uses of 'reasonableness' in the Constitution are: the guarantee of 'reasonable' administrative action (s 33); and the general limitations clause which only permits limitations of rights that are 'reasonable and justifiable in an open and democratic society' (s 36).

[4] *Doctors for Life* (supra) at para 129 ('In the end … the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less.' Ibid at para 145.)

[5] Ibid at para 146.

[6] Ibid at para 124.

[7] Ibid at para 129.

[8] Ibid at para 130.

and publications aimed at educating and informing the public about ways to influence Parliament'.[1]

Trying to put a bit more meat on the bones of the 'reasonableness' test, Ngcobo J listed the following factors as relevant to determining the reasonableness of a legislature's acts in any case: *(a)* 'rules, if any, adopted by Parliament to facilitate public participation'; *(b)* 'the nature of the legislation under consideration'; *(c)* 'whether the legislation needed to be enacted urgently'; *(d)* 'what Parliament has assessed as being the appropriate method';[2] and *(e)* 'practicalities such as time and expense, which relate to the efficiency of the law-making process'.[3] Of course, the best explication of what sort of efforts will meet the reasonableness bar is to look at how the Court has dealt with the cases that have come its way.

Justice Ngcobo also dealt with the constraints imposed by the doctrine of separation of powers when reviewing compliance with the constitutional obligations of Parliament. He held that legislatures 'have broad discretion to determine *how best* to fulfil their constitutional obligation to facilitate public involvement in a given case [which 'may be fulfilled in different ways and is open to innovation on the part of the legislatures'], so long as they act reasonably'.[4] His approach appropriately views the doctrine of the separation of powers as rights enforcement. The Justice's approach structures the analysis as follows: (1) the true meaning of the Constitution is first construed: (2) the Court determines the minimum way to give it effect, and (3) Parliament is allowed to choose the best way to achieve the constitutional goal while observing the minimum content defined. The majority emphatically rejected the minority's fears that judicial review of the conduct of the legislature in terms of a broad reasonableness test is 'too intrusive into the domain of the legislature'.[5]

To summarise, the majority held: (i) a court must examine whether public participation has been facilitated with regard to each piece of legislation; (ii) the NA, the NCOP and the provincial legislatures all bear an obligation with regard to each piece of legislation; (iii) the steps the legislatures take must be reasonable; (iv) what is reasonable will depend on the legislation in question; and (v) the Court will show appropriate deference to the legislatures in 'determining how best to fulfil their duty to facilitate public involvement'.

[1] *Doctors for Life* (supra) at para 132. It is unclear from the judgment whether a challenge to a specific law can raise these broader, education-related duties. Can a general failure to hold road shows and radio programs result in the invalidity of a piece of legislation? Generally, we do not think so. In our view, challenges to legislation will almost always rely on the first duty, not the second. A case could be brought to force Parliament to do more to fulfil the second part of the duty, but it would aim at a mandamus to force Parliament to change its ways, not the invalidity of a law. There may be some cases where the importance of the legislation is so great that a failure to educate about the specific possibilities to participate would make Parliament's acts unreasonable. But we do not believe the Court requires Parliament to operate a separate education campaign for each act it passes.

[2] Ibid at para 146.

[3] Ibid at para 128.

[4] Ibid at paras 123 and 124 and *Matatiele Municipality & Others v President of the Republic of South Africa & Others* SA 2007 (1) BCLR 47 (CC), [2006] ZACC 12 ('*Matatiele II*') at para 67.

[5] Raboshakga (supra) at 28 and 40.

(bb) The *Doctors for Life* dissents

Yacoob, Van der Westhuizen and Skweyiya JJ took a very different approach regarding the place and the fundamentality of public involvement in our democracy. Although their view did not carry the day, they offer a compelling argument based on text and principle. Ultimately, experience may suggest that their approach — particularly the somewhat cynicial realism of Van der Westhuizen J — more accurately depicts the role that the Court can play in promoting participation in the legislative process.

Yacoob J's departure from the majority's opinion can be split into three parts. First, he has a philosophical disagreement about the role that participation should play in a democracy, and tells a very different story about South Africa's history:[1]

> Citizens of this country cast their votes in favour of political parties represented in the National Assembly and the provincial legislatures. … It is these elected representatives that govern the people and their representative activities are activities of the people. … To undermine these representatives is to undermine the political will of the people and to negate their choice at free and fair elections. … Constitutionally speaking, it is the people of our country who, through their elected representatives pass laws.
>
> …
>
> The oppression and exploitation of people in apartheid was not the result of the absence of public participation in government processes in the sense in which it is used in the Constitution. Oppression and exploitation during apartheid was the result of the painful fact that the majority of people had no vote and were not represented in Parliament. … The failure to accord due weight to the actions and decisions of the representatives of the people of South Africa would demean the very struggle for democracy. … [I]t would, in my view, require the clearest language to justify the construction of any 'public involvement' provision to mean that these elected representatives exercising the power of the people consequent upon their vote cannot pass a law unless they have public hearings or give the public an opportunity to make written or oral submissions before that law can be validly passed.[2]

Yacoob J sees the type of participation at issue in *Doctor for Life* as secondary to the primary means of participation in a democracy: voting and standing for office. The subsidiary form of democracy should not be permitted to undermine the primary. His reading of the Constitution impacts on his criticism and rejection of the reasonableness standard.

Second, he rejects the majority's 'reasonableness' standard for public participation challenges. There is nothing in the text of the Constitution to suggest that the legislature must act reasonably. Indeed, FC s 72(1)*(a)*, which is the source of the obligation to facilitate public involvement, does not make any reference to reasonableness. Instead, the term 'reasonable' is only used in FC s 72(1)*(b)* and FC s 72(2). FC s 72(1)*(b)* allows the legislature to take 'reasonable measures' to regulate public access and search people attending NCOP sittings. Under

[1] For a discussion of the different perceptions of history in *Doctors for Life*, see M Bishop 'Transforming Memory Transforming' in W le Roux & K Van Marle (eds) *Law Memory and the Legacy of Apartheid: Ten Years after AZAPO v President of South Africa* (2007) 31, 41-44.

[2] *Doctors for Life* (supra) at paras 292 and 294. Van der Westhuizen J offers a similar justification. Ibid at para 244.5.

FC s 72(2) the Council may exclude the media or the public if it is 'reasonable and justifiable'. In Yacoob J's view, the fact that these two sub-sections use the term reasonable, while s 72(1)*(a)* does not, is compelling textual evidence that reasonableness is not an appropriate standard.[1] He also dismisses the assertion that the phrase 'to ensure accountability, responsiveness and openness' in FC s 1*(d)* has any relation to public participation in the law-making process. He calims that it only relates to 'a universal franchise, a national voters' roll, regular elections and multi-party system of democracy'.[2]

Third, Justice Yacoob stresses that '[t]he process by which legislation is passed … must be clear, specific and sufficiently comprehensible to enable legislators to know exactly what steps they need to pass any legislation.'[3] The danger of the 'reasonableness' standard is that it is vague and creates uncertainty about whether legislation is valid or not. While this is a legitimate concern, in our view the majority's approach will not introduce undue doubt. For one, there is a strict time limit on when participation challenges can be brought. Moreover, the Court's attitude in applying the standard after *Doctors for Life* has tended to be somewhat deferential. It is unlikely that a court will find that a legislature that honestly attempted to facilitate public involvement has failed to do so. This prediction has been borne out: Since the Court announced the reasonableness standard in *Doctors for Life*, and reaffirmed it *Matatiele II*, all three public participation challenges have failed.

Ultimately, the dissenters preferred an interpretation of the Constitution that reads the obligation to facilitate public involvement in the legislative process and the obligation to make rules with due regard to public involvement together as narrowly requiring Parliament to adopt rules which make provision for public involvement.[4] Accordingly, Parliament would only default on its constitutional obligations if it adopted rules which made no such provision or failed to adopt any rules.[5]

Justice Van der Westhuizen's judgment largely supports and re-iterates the sentiments expressed by Justice Yacoob. But he also made the following prescient observation:

> I do not necessarily know how I might respond if members of the legislature decide to pursue the policies of their political party and in the process reject or ignore submissions made to them by a member of the public, which I may regard as eminently more reasonable. If the will of the Parliamentary majority will in the end mostly prevail in any event, and all that is required is to 'involve' the public by for example mechanically holding public hearings for every piece of legislation — or to make sure that hearings are not promised as in this case — participatory democracy would appear to be quite cosmetic and empty, in spite of any idealistic and romantic motivation for promoting it.[6]

Although the dissenters ultimately lost the fight, their arguments for a more limited judicial role in ensuring public participation have continued to haunt the Court in

[1] *Doctors for Life* (supra) at para 317.
[2] Ibid.
[3] Ibid at para 316.
[4] This requires that FC ss 72(1)*(a)* and 70(1)*(b)* be read together in relation to the NCOP; and FC ss 59(1)*(a)* and 57(1)*(b)* in relation to the National Assembly. See *Doctors for Life* (supra) at para 322.
[5] *Doctors for Life* (supra) at para 325.
[6] Ibid at para 244 (10).

its application of the reasonableness standard. They also show that the majority had to manipulate the text of the Constitution to establish the strong obligation to facilitate involvement in every legislative exercise. As we discuss in more detail later, the dissenters also tacitly adopt a different answer to the difficult question of what role the judiciary should play in regulating Parliament's internal processes.[1]

On the other hand, the dissenters fail to recognise the Constitution's 'deep principle of democracy'. This principle includes mutually-supportive representative and participatory elements.[2] Their drier account of South African democracy does not seem to fit as well with the aspirational and transformative nature of the Constitution. In addition, Yacoob J's interpretation of history and its relevance is debatable. The assertion that the oppression and exploitation of people in apartheid was limited to black people's disenfranchisement is simply judicial notice taken too far. It ignores the fact that even when black people did not vote they also did not participate in law-making in any other manner. It also ignores other patterns of discrimination; colonial and apartheid policies were hostile to women and homosexual people. Even more importantly, in our view, it undermines the corrective nature of the Constitution, which is to prevent recurrence of en masse disregard of sections of society without them having inevitably to approach courts for redress.

Ultimately, the application of the reasonableness standard will demonstrate whether the majority adopted a sustainable approach.

(cc) Application of reasonableness standard

The *Doctors for Life* test has now been applied in five cases. In two cases, the legislation has been set aside. We consider all five cases in order to try and draw some lessons about the impact and future of *Doctors for Life*.

(1) *Doctors for Life*

We begin with the different results in respect of the public involvement challenges to the legislation under consideration in *Doctors for Life*. First, we must note that there was no complaint about the processes followed in the NA. Doctors for Life International complained about the lack of participation in the NCOP and the provincial legislatures. The NCOP had decided that, considering the importance of, and public interest in, the Bills, public hearings should be held for the Choice Act and the Traditional Health Act. The Choice Act concerned abortion, always a hot-button issue. The Traditional Health Act had also generated significant public interest and controversy. In addition, the NCOP determined that the hearings should be held by the provincial legislatures, not by the NCOP itself. Justice Ngcobo noted that it was both more practical and more effective for the provinces to hold public hearings across the country than for the NCOP to do

[1] See §17.7 below.

[2] See T Roux 'Democracy' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10: see also Raboshakga (supra) at 13-17.

so.[1] However, taking the decision was not enough — the hearings would actually have to occur to meet the NCOP's obligation.

In the case of the Traditional Health Act, only three provinces held hearings or invited written submissions. The participation in the Choice Act was even more paltry. Although four provinces wanted to hold public hearings, only Limpopo in fact did so. Justice Ngcobo noted that several provinces had wished to hold public hearings, but had been unable to do so because of the time constraints imposed by the NCOP's legislative timetable. While acknowledging that time was a relevant consideration, he held that 'the temptation to cut down on public involvement must be resisted. Problems encountered in speeding up a sluggish timetable do not ordinarily constitute a basis for inferring that inroads into the appropriate degree of public involvement are reasonable. The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.'[2]

The Court in *Doctors for Life* concluded that, given the importance of the legislation and that the NCOP itself had decided that hearings were necessary, the NCOP had acted unreasonably. Within the framework the Court had created, the decision was fairly easy. The Court did not have to impose its own view of what was appropriate. The Court could simply tell the NCOP that it had failed to follow the process that it had deemed necessary.

(2) *Matatiele II*

The Court was able to perform a similar manoeuvre in *Matatiele II*. The legislation concerned the alteration of provincial boundaries, specifically the boundary between KwaZulu-Natal and the Eastern Cape. Accordingly, under FC s 74(8), each provincial legislature had to approve the amendment.[3] The decision was based on each provincial legislature's duty under FC s 118(1)*(a)*, not the general duty of the NCOP under FC s 72(1)*(a)*. The Eastern Cape held hearings in seven affected areas and invited submissions from relevant stakeholders. The Court therefore concluded that it had fulfilled its obligation.[4] On the contrary, the KwaZulu-Natal legislature held no hearings and did not invite written submissions. Considering the impact the Bill would have on the province's citizens, and the fact that many within the legislature and the NCOP had called for public hearings, the Court found this failure unreasonable.[5]

By contrast to the big issues at stake in *Matatiele II* and the two *Doctors for Life* Bills discussed above, the Dental Act was somewhat inconsequential. Considering its lesser importance, and the fact that it had generated no public interest, the NCOP did not propose public hearings or invite written submissions for the Dental Act. Ngcobo J agreed that, considering the mundane nature of the Bill, it was reasonable not to attempt to solicit further public interest that did not exist.[6]

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[1] *Doctors for Life* (supra) at paras 160-161.
[2] Ibid at para 194.
[3] See §17.3*(a)* above.
[4] Ibid at paras 70-73.
[5] Ibid at paras 76-84.
[6] Ibid at para 192.

(3) *Merafong*

In hindsight, *Doctors for Life* and *Matatiele II* were relatively easy applications of the reasonableness standard. *Merafong* presented a much more difficult question.[1] The Merafong Demarcation Forum ('MDF') challenged the same constitutional amendment at issue in *Matatiele*. This challenge concerned incorporating the whole of the Merafong municipality, the boundaries of which fell mostly in Gauteng, into the North West Province. The twist was that the Gauteng Provincial Legislature ('GPL') had in fact held a public hearing on the Bill, taken account of the community's view and sent a negotiating mandate to the NCOP recommending that the legislation be amended to keep Merafong in Gauteng, thus seemingly having been persuaded during the participation process. However, Gauteng's NCOP delegation was informed that they could not propose amendments to the Bill — they had to either accept it or reject it.[2] Faced with that choice, the GPL reversed course and instructed its delegates to the NCOP to support the Bill.

The MDF had three reasons for alleging that the participation was nonetheless unreasonable. First, they complained that the decision had been taken by the ANC's National Executive Committee, and that the GPL was therefore not open to persuasion. Van der Westhuizen J rejected this argument for lack of evidence. It did not explicitly decide if a claim of this nature might succeed with sufficient evidence. The Court intimates that it could: 'Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public.'[3] If an applicant could show that legislators were not willing to consider the public's representations because they were committed to implementing party policy, it is possible that the participation would not be 'meaningful'. However, that will always be nearly impossible to prove.

Second, MDF submitted that participation was not 'meaningful' because the MDF's desires did not prevail. The Court easily rejected this argument. 'There is no authority', the Court wrote, 'for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views.'[4]

Finally, in oral argument, Justice Sachs suggested that the GPL should have returned to the Merafong community after discovering that it could not propose the required amendment to explain its change of heart as well as the limitations of the legislative process. The majority rejected this proposal. While it may have been 'desirable' for the GPL to have explained themselves to the people of Mera-

[1] For a full discussion of *Merafong*, see M Bishop 'Vampire or Prince? The Listening Constitution and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others*' (2009) 2 *Constitutional Court Review* 313.

[2] See §17.3*(a)* above for a discussion on why the conclusion that provincial delegations cannot propose amendments to s 74(8) Bills — which the Court supported — is wrong. See also, Bishop 'Vampire or Prince?' (supra) at 345-347.

[3] *Merafong* (supra) at para 51.

[4] Ibid at para 50.

fong, it was not constitutionally required. 'If they had gone back to Merafong to explain the situation to the people,' Justice Van der Westhuizen hypothesised, 'a better understanding might have been fostered, but it is unlikely that the majority would have been sufficiently impressed by the explanation to change their strongly held views.'[1] A further danger loomed that 'continuing discussion which does not result in a changed outcome, could strengthen possible perceptions that the consultation was not meaningful.'[2]

Sachs J would have upheld this complaint. Although 'participatory democracy does not require constant consultation by the Legislature with the public',[3] in the unique circumstances of this case, further engagement was required. He held that 'when expectations of candour and open dealing have been established and certain unambiguous commitments have been made', a change of commitment without further consultation can be disruptive of the constitutionally-required relationship of dialogue between the legislature and members of the public.[4] Only continued dialogue would have satisfied the standard of reasonableness and the lack thereof violated the primary purpose of public involvement in law-making.[5] The 'abrupt about-turn' violated the 'civic dignity' of participants; it 'denied any spirit of accommodation and produced a total lack of legitimacy for the process and its outcome in the eyes of the people'; and it gave rise to a strong perception that the GPL in the end merely rubber-stamped a political decision and that the public involvement process was a sham.[6] Considering the importance of the legislation and its impact on the people of Merafong, it was unreasonable not to engage in further discussion.

(4) *Poverty Alleviation Network*

Poverty Alleviation Network[7] possesses a strong family resemblance to *Merafong*. The case was the third time the residents of Matatiele approached the Constitutional Court to try and remain in KwaZulu-Natal. After they successfully set aside the Constitution Twelfth Amendment Act, Parliament passed another constitutional amendment (the Constitution Thirteenth Amendment Act) again altering provincial boundaries to place Matatiele in the Eastern Cape. Parliament learnt its lesson, and this time round, Nkabinde J held, 'there [could] be no doubt that public participation was indeed facilitated by both Parliament and the KwaZulu-Natal Provincial Legislature.'[8] The NA and the NCOP invited written submissions and the NCOP held hearings. The provincial legislatures of both provinces held separate and joint hearings where opponents of the legislation were allowed to freely

[1] *Doctors for Life* (supra) at para 59.
[2] Ibid.
[3] Ibid at para 293.
[4] Ibid at para 291.
[5] Ibid at para 292. See *Doctors for Life* (supra) at para 115. Sachs J came to this conclusion upon taking cognisance of the consciousness on the part of the Legislature's Portfolio Committee that a further consultation with the community may be required but without explanation, they in fact do not do so. *Merafong* (supra) at para 289.
[6] *Merafong* (supra) at para 292.
[7] 2010 (6) BCLR 520 (CC), [2010] ZACC 5.
[8] Ibid at para 38.

express their views. The vast majority again opposed moving Matatiele to the Eastern Cape. Nonetheless, the KwaZulu-Natal Legislature again assented to the alteration of its borders.

The applicants acknowledged the legislature's position, but still contended that the Legislature had not acted reasonably. First, they argued that they should have been consulted as a 'discrete group'. This argument was based on the following statement in *Matatiele II*: 'The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the Legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.'[1] This statement does not mean, Justice Nkabinde held, that 'when seeking to involve an identifiable and *discrete* group, participation of only this group, to the exclusion of all others, is required.'[2] It merely requires that the group, like all others, be afforded a reasonable opportunity to state its views.

Second, they contended that the NA should have accepted oral, in addition to written, submissions. The Court held that the applicants had had numerous other opportunities to voice their concerns. In addition, 'in the context of a constitutional amendment that affects provinces, public participation is facilitated at various levels.'[3] The applicants had made oral submissions to the provincial legislatures.

Third, the Matatiele residents made a similar argument to that made by the residents of Merafong: although they were heard, the decision to move Matatiele had already been taken and 'the public hearings were a formalistic sham'.[4] While allowing that 'lawmakers should keep an open mind and consider the input by the populace',[5] the Court gave the same answer it gave the residents of Merafong: 'Although due cognisance should be taken of the views of the populace, it does not mean that Parliament should necessarily be swayed by public opinion in its ultimate decision. Differently put, public involvement and what it advocates do not necessarily have to determine the ultimate legislation itself.'[6] The record of the participation indicated that the legislature had listened to its constituents concerns, but had ultimately rejected them.

In addition to its public participation challenges, the residents argued that moving them to the Eastern Cape was irrational because it was not related to a legitimate government purpose. The *Poverty Alleviation Network* Court rehearsed the argument made in *Merafong*: abolishing cross-boundary municipalities is a legitimate government purpose. That end is achieved irrespective of whether Matatiele is placed in KwaZulu-Natal or the Eastern Cape and it is not for the Court to second guess the legislature where an end can be achieved in two

[1] *Matatiele II* (supra) at para 68, quoted in *Poverty Alleviation Network* (supra) at para 52.
[2] *Poverty Alleviation Network* (supra) at para 53.
[3] Ibid at para 58.
[4] Ibid at para 59.
[5] Ibid at para 60.
[6] Ibid at para 62.

ways. We think there are limits to this reasoning.[1] For now we just want to draw attention to the relationship between rationality review and public participation. Doctrinally, it makes sense to treat them as separate, unrelated challenges. However, in substance, a great deal connects them. As one of the authors has argued:

> rationality is … connected to deliberation and participation. How carefully the Court is willing to scrutinise the rationality of government action determines the outer boundaries of the quality of deliberation the Constitution demands. The more exacting the Court is, the closer it pushes the legislative (and executive) branch to the ideal of deliberation where only public reasons count and the decision-maker acts only after considering all views. The less demanding the Court's review, the more space it provides for unprincipled decision-making based on private interests and for government to take decisions without listening to alternatives, whether from political parties, interest groups or the general public.[2]

It helps to understand the Court's approach in both *Merafong* and *Poverty Alleviation Network* to see this link between rationality and participation.

(5) *Glenister II*

As we discuss elsewhere, *Glenister II* concerned a challenge to legislation replacing one corruption-fighting organ with another. Although the primary motivation behind the challenge was a concern that the new body was not sufficiently independent, one of the grounds for the challenge was that Parliament had failed to facilitate public involvement. The applicant acknowledged that Parliament had held public hearings, but argued that the Bill should not have been treated as urgent. The law was a result of a resolution taken at the ANC's December 2007 Polokwane Conference. It was approved by Cabinet in April 2008, hearings were held in the NA in August and September, and in the provinces in September and October. The law was passed on 23 October 2008, and signed by the President on 27 January 2009. Ngcobo CJ did not directly engage the urgency complaint, but by looking at the time that was spent on public hearings concluded that Parliament had facilitated public involvement and that the applicant had been given a fair hearing.[3] The lesson seems to be that self-imposed urgency is not a problem when Parliament still acts reasonably to involve the public.

(iii) *Assessment*

The previous section described the judicial application of the public participation rule. In this section, we evaluate the Court's approach, and consider its future.[4]

When it was decided, *Doctors for Life* seemed to be a brave decision that would force the legislature to take the concerns of ordinary people to heart. That view

[1] See M Bishop 'Vampire or Prince? The Listening Constitution and *Merafong Demarcation Forum v President of the Republic of South Africa*' (2009) 2 *Constitutional Court Review* 313, 343-345 and M Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' in D Bilchitz & S Woolman (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy* (2011).

[2] Bishop 'Vampire or Prince' (supra) at 334.

[3] *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC), [2011] ZACC 6, ('*Glenister II*') at paras 35-38.

[4] This section draws, in part, from Bishop 'Vampire or Prince' (supra) and Raboshakga (supra).

was confirmed by *Matatiele II:* a decision that over-turned a constitutional amendment no less. However, *Merafong* and *Poverty Alleviation Network* starkly illustrate the emergence of the initial fears of minority judges in the rest of the Court and points to what are seemingly very real limits of the participation doctrine.

Doctors for Life gave effect to the deep principle of democracy envisioned in the Constitution. This principle possesses supportive, representative, and participatory elements. In turn, according to the *Doctors for Life* Court, this deep principle must inform a reasonableness standard characterised by a meaningful and effective facilitation of public involvement by Parliament. Justice Ngcobo's approach positions the doctrine of separation of powers in a manner that does not undermine the deep principle of democracy.[1] So the *Doctors for Life* Court hopes.

The majority decision in *Merafong* notably de-emphasised the participatory element of our democracy in determining the margins of what constituted reasonable facilitation of public involvement in the circumstances of this case. Van der Westhuizen J found that, notwithstanding the subsequent disregard for their views, a single public hearing afforded the people of Merafong a *real and meaningful opportunity* to be heard. The message from the *Merafong* majority is that politicians hold the upper hand in our democracy. That conclusion reflects the same vision of democracy that Yacoob J endorsed in his *Doctors for Life* dissent. And yet in *Doctors for Life*, the majority had so eloquently repudiated Yacoob J's position in favour of one that placed representative and participatory democracy on a more equal footing. Although the rhetoric remains the same, one is left with the feeling that either something changed or that *Merafong* is merely on aberation.

Not only does *Merafong* undermine the deep principle of democracy pronounced in *Doctors for Life*, it turns what seemed to be a substantive duty to involve people in decision-making into a procedural, tick-the-boxes requirement that can be met without ever actually considering the merits of people's submissions. This pathology manifests in two ways.

First, the majority of the Court in *Merafong* holds the view that where a single public hearing in which interested persons had an opportunity to express their views has been held in good faith, the obligation to facilitate public involvement is fulfilled.[2] The conclusion by Van der Westhuizen J that an ongoing dialogue between interested members of the public and the legislature is not required by previous jurisprudence of the Court is questionable. In *Doctors for Life* and *Matatiele II*, the Court's account of what reasonable facilitation of public involvement in the legislative process entails that there be 'a *meaningful and effective* opportunity for public participation in the law-making process'. Depending on the circumstances of the matter at issue, reasonableness will entail 'a continuum [ranging] from

[1] See Raboshakga (supra) at 40.

[2] *Merafong* (supra) at para 59 (Van der Westhuizen J held: 'In all probability little would have been achieved by another round of exchanging views, other than to inform and perhaps educate the community. *Whereas speculation about the likely outcome of further consultation is not ultimately decisive, the fact is that the community had a proper opportunity to air their views. The previous decisions of this Court, on which the applicants rely, do not require an ongoing dialogue.*' (our emphasis)).

providing information and building awareness, to partnering in decision-making'.[1] Surely, 'partnering in decision-making' potentially requires an ongoing dialogue between the legislature and interested members of the public where the legislature explains its response to the community's concerns and seeks further feedback? The question the Court ought to have answered is whether the circumstances of the case required a bare minimum of merely providing a forum for the community to air its views, or a more substantive, ongoing dialogue with the community.[2]

Second, while the Court states in both *Merafong* and *Poverty Alleviation Network* that legislatures must act with an open mind, as a practical matter in most cases it will be virtually impossible to prove that legislators were not open to persuasion. There were good reasons in both cases to suspect that the provincial legislators were simply taking orders from their political superiors, yet the Court accepted their assurance that they merely came to a different policy conclusion than their constituents. The Court was probably right to take this course — absent very strong evidence, it would be imprudent for a court to find that legislators had failed to fulfil their constitutional obligation to consider the views of the people. The probability is that such strong evidence will seldom be forthcoming.[3]

If we are correct in this assertion, then we are left with a situation where all the legislature need do to fulfil its duty is perform the formal function of holding public hearings or inviting written submissions. Whether those acts have any potential to influence the legislation is irrelevant. This outcome is precisely what Van der Westhuizen predicted in his *Doctors for Life* dissent:

> If the will of the Parliamentary majority will in the end mostly prevail in any event, and all that is required is to 'involve' the public by for example mechanically holding public hearings for every piece of legislation — or to make sure that hearings are not promised as in this case — participatory democracy would appear to be quite cosmetic and empty, in spite of any idealistic and romantic motivation for promoting it.[4]

Now that the participation cases have largely run their course, we appear to be left with a doctrine that is 'quite cosmetic and empty'. Skweyiya J, whose views were concurred in by Yacoob J and Van der Westhuizen J, recognises this disquieting possibility in his concurrence in *Merafong*. For him, the Court has no role to play in the differences between the legislature and members of the public in the process of deciding what is right and wrong.[5] 'While the Constitutional Court is the highest court in the land, it cannot and should not be seen as a panacea.'[6] If politicians act discourteously, disrespectfully or dishonestly, voters should hold them

[1] *Doctors for Life* (supra) at para 129. See *Matatiele II* (supra) at paras 54 and 97.

[2] See Raboshakga (supra) at 34-35.

[3] But see *Mlokoti v Amathole District Municipality & Another* 2009 (6) SA 354 (E)(The Court invalidated a decision by the Municipal Council to appoint a municipal manager. The judgment rested, in part, on a letter by the Mayor to the head of the Regional ANC Executive Committee acknowledging that the Council had ignored the appointment process and recommendations and acted solely on the orders of the ANC.)

[4] *Doctors for Life* (supra) at para 244(10).

[5] *Merafong* (supra) at 306.

[6] Ibid at para 307.

accountable in periodic elections.[1] This tilts the scale almost entirely in favour of representative democracy and away from participatory democracy.

Defenders of the Court could proffer four arguments that identify some substance in our public participation doctrine post-*Merafong*. The Court in *Doctors for Life* initially crafted a strong approach to participation and the possibilities of the *Doctors for Life* approach might redeem the current, less hopeful position.

First, they could argue that there really was no workable alternative. Requiring ongoing engagement or inquiring too deeply into the motives of legislators is neither practically workable nor theoretically desirable. That high level of court involvement would place too heavy a burden on legislators and courts and would vitiate the separation of powers doctrine. There is certainly something to this — courts should be careful not to take over the role of legislators, or to make the business of legislating so complicated or uncertain that legislators cannot pass laws efficiently. Yet, we do not believe the approach proposed by Justice Sachs would have resulted in such an outcome. Sachs J was very careful to note that the obligation to return to the community depended on the circumstances of the case. It is possible that, as Van der Westhuizen argued, continuing dialogue would not have made any practical difference. But it would have recognised the importance of participatory governance and demonstrated respect for the citizens of Merafong. As it would only arise occasionally, and would be fairly limited in scope, we believe Sachs J identified a happy medium that does not result in judicial overreach

Even if it did, there is a weaker option that would have improved the position: reason-giving.[2] Legislators need not go back and engage with the community in further hearings if they reject their views, but they should provide reasons for rejecting the main submissions made by the public. The members of a committee that conduct a public participation process should, presumably, write a report for the legislature on what submissions were made, and why they were accepted or rejected. Requiring that a similar document be made easily available to those who made the submissions does not seem like an undue burden. The advantage of reason-giving is that it holds the lawmakers directly accountable for their decisions and forces them to actively listen. They cannot simply go through the motions; they must provide reasons that the public might find acceptable. If they cannot do so, the voters will know that there is some other reason why their suggestions were rejected.

Second, what if the staunch adherence to separation of powers in *Merafong* is momentary and will only be applied in certain cases that are too politically sensi-

[1] *Merafong* (supra) at para 308 ('A democracy such as ours provides a powerful method for voters to hold politicians accountable when they engage in bad or dishonest politics: regular, free and fair elections.') The majority judgment also records a similar sentiment. Van der Westhuizen J expressed that 'politicians, who are perceived to disrespect their voters or fail to fulfil promises without explanation, should be held accountable [through] the democratic system [provided for by] regular elections.' See *Merafong* at para 60.

[2] For a fuller discussion of this option, see Bishop 'Vampire or Prince?' (supra) at 340-342.

tive? Relying on Theunis Roux's analysis of the decision of the Constitutional Court in *UDM*,[1] Raboshakga has argued as follows:

> Without having adequately recognized the deep principle of democracy and the nature of the proposed amendment and its circumstantial impact on the Merafong community, the majority could not set a minimum content for reasonableness that met the *meaningfulness* requirement. Similarly, the invocation of the separation of powers was also misplaced in the Court's mistaken methodology.
>
> … .
>
> The failure by the majority to follow precedent without offering a viable alternative approach suggests an unwarranted reluctance to contradict the Gauteng Legislature's political decision finally to support the incorporation of Merafong into North West. It may be inferred from the Court's attitude in this regard that it was applying the meta-principle of deferring to [politicians] in politically sensitive cases. Accordingly the *Merafong* decision is … not to be seen as a rejection of the developments in *Doctors for Life International* and *Matatiele II*, but as a once-off compromise of principle in what was clearly a politically sensitive case. After all, a political solution was found in this dispute upon further lobbying of politicians by the community of Merafong.[2]

This passage was written before the Court had decided *Poverty Alleviation Network* and thus did not consider whether the same argument could apply to both cases. The merit of Raboshakga's argument cannot be established until the Court decides one or more participation cases involving different circumstances in future.

The third defence of *Merafong* is that, even if it is purely procedural, it is better than nothing. Even if legislators begin the process with no intention of changing their views, they may nonetheless be convinced or enlightened by the views of the public. As Czapinskiy and Manjoo note: 'It may be difficult … for legislators to listen to people as the decision requires and not take their views into account, at least to some degree. By listening, legislators may learn about the lives of people different from themselves. They may open the door to understanding and empathy.'[3] This is undoubtedly true, and there is no doubt that a procedural right is better than no right at all. But a substantive right is better.

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[1] *United Democratic Movement* (supra). See T Roux 'Democracy' in Woolman & Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) at § 10-69. Roux submits that:

'[*UDM*] cannot be said to have altered the more extended principle discernible in the entire constitutional text. By declining to engage with the substantive values underpinning multi-party democracy, UDM does not stand for a countervailing interpretation of the democratic principle, but for an independent principle of judicial deference in politically sensitive cases, such as those involving the design of the electoral system. Whatever one thinks of the correctness of UDM, therefore, it cannot be said to impact on the principle of democracy. Rather, UDM stands for the meta-principle that where the principle of democracy and the principle of judicial deference in politically sensitive cases conflict, the latter principle must prevail. As it so happens, that part of the UDM decision strikes one as intuitively wrong, but it is not necessary to make a case for that intuition here. It is sufficient to conclude that the statement of the principle of democracy discernible in the constitutional text need not be altered in order to accommodate UDM.'

[2] Raboshakga (supra).

[3] S Czapanskiy & R Manjoo 'The Right of Public Participation in the Law-Making Process and the Role of Legislature in the Promotion of this Right' (2008) 19 *Duke Journal of Comparative and International Law* 1 at 19.

The fourth defence is the most complicated. One of the current authors has argued that *Merafong* needs to be understood in the context of the different types of participation open to the public.[1] Citizens can participate in public affairs outside of formal hearings and requests for submissions. They can march, protest, write petitions and use the media and social networks to get their point across to government and their fellow citizens. Such radical participation is quite consciously contemplated by our Constitution.[2] Moreover,the history of the downfall of apartheid and the recent revolutions in North Africa and the Middle East demonstrate its power. Participation also happens in a more mutual way — citizens engaging with government (normally at a local level) to solve shared problems. All three forms of participation — traditional, radical and mutual — are useful and important. The argument in favour of *Merafong* is that citizens have a limited amount of energy to spend on participation. If the courts were to intervene to make traditional participation more substantive, citizens will be more likely to use it to express their grievances, rather than engaging in radical or mutual participation. This is a danger because, even with greater court intervention, formal participation is limited because government sets the agenda and ultimately holds all the cards. By limiting courts' role in making formal participation substantive, Courts funnel citizens energy into other forms of participation that are, arguably, more productive.

We believe the tale of public participation challenges has already had its climax. First, as we have argued above, the requirement is almost entirely formal — as long as Parliament invites submissions and holds hearings, it will — absent unlikely admissions that the process was a farce — comply with its constitutional obligations. Now that Parliament knows what it is required to do, it is arguable that it is unlikely (especially with important or controversial legislation) that it will make the mistake of failing to go through the motions of facilitating public involvement. On this argument, there will be few future challenges, as there will be no basis to bring challenges. In some sense, this should be seen as a real success of *Doctors for Life*. Whatever the limitations of the Court's attitude, it undoubtedly will increase the opportunities for the public to participate in the legislative process. We have also sought to demonstrate that perhaps only future cases will determine whether the *Doctors for Life* hope is sustained or is completely trumped by the Court's fears or other considerations revealed by *Merafong* and *Poverty Alleviation Network*. Whatever happens, one thing is clear: *Doctors for Life* is a success story and it lives on in our constitutional democracy — but its future role in litigation is uncertain.

A particularly contentious issue that could arise in future cases will be where evidence clearly demonstrates that decisions have been taken by a political party and imposed on legislatures. In his *Doctors for Life* dissent, Yacoob J suggested that the Constitution anticipated that elected representatives would be held account-

[1] Bishop 'Vampire or Prince? (supra).

[2] See also S Woolman 'My Tea Party, Your Mob, Our Social Contract: Freedom of Assembly and the Constitutional Right to Rebellion in *Garvis v SATAWU (Minister of Safety & Security, Third Party).* 2010 (6) SA 280 (WCC)' (2011) 27 *SAJHR* (forthcoming).

able by political parties.[1] Yet, the Court has still held that 'lawmakers should keep an open mind and consider the input by the populace'.[2] And in *Merafong*, Sachs J, in coming to the conclusion that there had not been reasonable facilitation of public involvement, specifically considered the perception by members of the community that the Gauteng Legislature had rubber-stamped the decision taken by the African National Congress.[3] Judging from the pronouncements of the Court in *Doctors for Life International*, *Merafong* and *Poverty Alleviation Network*, the current position must be: the policies of political parties must be seen as mere recommendations to Parliament or provincial legislatures until public involvement has been facilitated by such legislatures where appropriate and the legislatures have made the final decision to enact that legislation or not. Where evidence shows that the party instructed its members to vote in a certain way and neither the MPs nor the party were open to persuasion based on public participation, there may be reason to invalidate the legislation. Again, evidence of this nature will be very hard to come by. To manage potential hostility between the political party and its representatives in the legislature, the party may be further consulted by members of the legislature upon the completion of the public involvement process: as long as rubber-stamping or mere disregard of the views of members of the public does not make itself manifest. We discuss the relationship between party and parliament in more detail below.[4]

(b) Tagging

The different procedures prescribed by the Constitution for different types of Bills create a problem which was probably not contemplated by the Constitutional Assembly. In order to enact a Bill, Parliament has to determine correctly at the outset of the legislative process whether the Bill falls to be processed by FC s 74, s 75, s 76 or s 77. This process — called 'tagging' — may seem simple, but it is not. The Joint Rules of Parliament create a special procedure — the Joint Tagging Mechanism ('JTM') — to tag Bills. The JTM consists of the National Assembly's Speaker and Deputy Speaker and the NCOP's Chairperson and permanent Deputy Chairperson. For the purposes of parliamentary proceedings, the JTM's classification of a Bill is final and binding on both Houses.[5]

While it is relatively easy to determine whether a Bill amends the Constitution or is a money Bill — and must be passed under FC s 74 or s 77 respectively — the distinction between FC s 75 and s 76 Bills is much less precise. While we focus exclusively on the distinction between FC ss 75 and 76, keep in mind that the same principles will apply to mistakes in tagging FC ss 74 and 77 Bills.

[1] *Doctors for Life International* at para 278. He held: 'The citizen's right to participate in the activities of a political party is the route by which any citizen would, in a real way, be able to bring influence to bear on the way in which that representative performs her functions in the relevant legislature… . This is how a multi-party system of democracy ensures accountability, responsiveness and openness.'

[2] *Poverty Alleviation Network* (supra) at para 60.

[3] *Merafong* (supra) at para 292.

[4] §17.7 below.

[5] See Joint Rules 151-8.

Recall: FC s 76 must be used in three general sets of circumstances: *(a)* when Parliament changes its seat in terms of FC s 42(6); *(b)* if the legislation concerns the specific constitutional provisions listed in FC ss 76(3)-(4); and *(c)* if the Bill 'falls within a functional area listed in Schedule 4'.[1] It is the third, general rule that makes tagging a complicated business.

Whether a Bill 'falls within' a Schedule 4 functional area will often be a matter open for considerable debate. To begin with, the functional areas are couched in wide terms — 'trade', 'environment', 'cultural matters' and 'population development', for example — which cover a huge range of potential legislation and cannot easily be defined. Moreover, many Bills deal with multiple topics or impact on areas adjacent to the primary focus of the law. Does 'fall within' mean the Bill must deal only with Schedule 4 issues, that it must directly address a Schedule 4 functional area, or that it must merely affect one of the areas of concurrent competence? And, if a court finds that a Bill was incorrectly tagged, what is the result? Is the legislation automatically invalid? Does it depend on whether Parliament acted in good faith, or on what degree of support the Bill attracted?

As these questions suggest, the two primary questions in tagging jurisprudence are: *(a)* What is the appropriate test to determine if a Bill is a s 76 Bill? and *(b)* What are the consequence of incorrect tagging? Both questions have (largely) been answered by a pair of Constitutional Court decisions. We discuss each issue in turn.

(i) *The appropriate test*

Until recently, Parliament relied on the 'pith and substance' test[2] imported from Canadian, English and Indian law to tag legislation. This test asks what the 'true nature and character of the legislation [is] in order to ascertain the class of subject to which it really belongs.'[3] It is the test endorsed by the Constitutional Court for determining whether the national or provincial legislatures has the competence to legislate in a particular subject area.[4] To pith and substance adherents, every Bill has a single ultimate character, and all other issues addressed by the Bill are incidental and therefore irrelevant for tagging. Despite Parliament's preference for this essentialist approach, the Constitutional Court has considered the question

[1] This is the wording used in FC s 77(3). FC s 44(1)*(b)* — which confers legislative authority on the NCOP — uses slightly different wording. It gives the NCOP the power to pass, in accordance with FC s 76, 'legislation with regard to any matter within a functional area listed in Schedule 4'. We do not believe that the slight difference in phrasing has any significance.

[2] C Murray & R Simeon '"Tagging" Bills in Parliament: Section 75 or Section 76?' (2006) 123 *SALJ* 232, 244. See also, *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others* 2010 (6) SA 214 (CC), 2010 (8) BCLR 741 (CC), [2010] ZACC 10 ('*Tongoane*') at para 47 (Reproducing the Speaker of the NA's defence of Parliament's tagging process based on the 'pith and substance' test).

[3] *Russel v The Queen* (1882) 7 App Cas 829, 839-40.

[4] See *Western Cape Provincial Government & Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government & Another* 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC), [2000] ZACC 2 at para 36; and *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995* 1996 (4) SA 653 (CC), 1996 (7) BCLR 903 (CC), [1996] ZACC 15 at para 19; *Tongoane* (supra) at para 49. See generally, V Bronstein 'Legislative Competence' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15.

on two occasions, and has twice rejected the 'pith and substance' test in favour of one that accounts for the multiple purposes that modern legislation often serves.

In *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* the Court considered a challenge to national legislation attempting to regulate liquor licensing.[1] 'Liquor licenses' is listed in Schedule 5 as an area of exclusive provincial competence. The primary dispute in *Liquor Bill* was whether Parliament could invoke the FC s 44(2) override to legislate in the zone ordinarily reserved for the provinces. The tagging question arose in the following way. The Bill had been passed in terms of FC s 76. When the matter came to Court, the Government tried to avoid the complaint that the Bill didn't satisfy FC s 44(2) by arguing that in reality the Bill was primarily concerned with issues within the national competency and only incidentally affected liquor licenses. The Western Cape government — who opposed the Bill — retorted that, if that was true, the legislation was really a national concern, and should have been tagged as a s 75 Bill, not a s 76 Bill.

Ultimately, the *Liquor Bill* Court found that Parliament had properly followed the s 76 procedure. Cameron AJ held that, s 76(3) 'must be understood as requiring that any Bill whose provisions in *substantial measure* fall within a functional area listed in Schedule 4 be dealt with under section 76.'[2] Even if the Bill did not trench on the exclusive Schedule 5 power to regulate liquor licenses, it did 'fall within' the Schedule 4 functional areas of 'trade' and 'industrial promotion' and was therefore properly tagged as a s 76 Bill.[3]

In *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others* the Court endorsed the 'substantial measure' test developed in *Liquor Bill* and explicitly rejected the pith and substance approach.[4] Various communities affected by the Community Land Rights Act ('CLARA')[5] challenged it on the basis that it had been incorrectly tagged. The Act had been tagged as a s 75 Bill. The applicants argued that, although the legislation was targeted primarily at land reform, it would have a substantial impact on indigenous law — a functional area listed in Schedule 4 — and therefore should have been tagged as a s 76 Bill. The High Court agreed with the applicants that CLARA had been incorrectly tagged, but for reasons we discuss below, held that this should not render the Act invalid.[6] The communities took their complaint to Braamfontein.

Chief Justice Ngcobo upheld the High Court's finding that CLARA had been incorrectly tagged. First, the Court endorsed the 'substantial measure' test enunciated in *Liquor Bill*. The Court explained how it differed from the 'pith and substance' test: 'Under the [pith and substance test], provisions of the legislation

[1] 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC), [1999] ZACC 15 ('*Liquor Bill*').

[2] Ibid at para 26 (our emphasis).

[3] Ibid at paras 27-9.

[4] For commentary on *Tongoane*, see Rassie Malherbe 'Parlementêre Prosedure as Demokratiese Instrument: Inagneming van Provinsiale Standpunt in Parlementêre Besluitneming' (2010) *TSAR* 826; M Bishop & J Brickhill 'Constitutional Law' 2010(2) *Juta's Quarterly Review* § 2.1.

[5] Act 11 of 2004.

[6] *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others* 2010 (8) BCLR 838 (GNP) [2009] ZAGPPHC 127.

that fall outside of its substance are treated as incidental. By contrast, the tagging test … focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4 and not on whether any of its provisions are incidental to its substance.'[1] In sum, the 'substantial measure' test would require Bills to be tagged as s76 Bills when 'the main substance … falls within the exclusive national competence, but the provisions … nevertheless substantially affect the provinces.'[2]

The need for two different tests for seemingly similar concerns was dictated by the specific purpose served by establishing different mechanisms for legislation affecting the provinces:

> Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.[3]

As Ngcobo CJ notes, if the s 76 procedure only applied where provinces were competent to legislate concurrently, it would have little practical purpose as they could simply enact their own, preferred laws. 'Yet it is where matters substantially affect them *outside* their concurrent legislative competence that it is important for their views to be properly heard during the legislative process.'[4]

Applying this reasoning, the Court concluded that CLARA had been incorrectly tagged. CLARA's purpose was 'to introduce a new regime that will regulate the use, occupation and administration of communal land'.[5] That task was currently regulated, largely, by indigenous law. This was sufficient to satisfy the 'substantial measure' test.

(ii) *Consequences of mistaken tagging*

Probably because it did not need to decide the issue (as it found the Bill had been properly tagged) the *Liquor Bill* Court fudged the question of the consequence of bad tagging. Cameron AJ first highlighted the three principal differences between the s 75 procedure and the s 76 procedure.[6] First, s 76 gives more weight to the position of the NCOP, primarily because of the role of the Mediation Committee.[7] The second difference is that where a s 76 Bill is introduced in the National Assembly, the Assembly can override the objections of the NCOP only by passing the Bill with a two-third majority. By contrast, under s 75, only a simple majority in the Assembly is needed to override the objections of the NCOP.[8]

[1] *Tongoane* (supra) at para 59.
[2] Ibid at para 72.
[3] Ibid at para 60.
[4] Ibid at para 63.
[5] Ibid at para 95.
[6] *Liquor Bill* (supra) at para 25.
[7] Ibid.
[8] Ibid.

Third, when the NCOP votes on a s 76 Bill, each province has a single vote cast on its behalf by the head of the province's delegation and five votes are required to pass the Bill. By contrast, when the NCOP votes on a s 75 Bill, each delegate to the NCOP has a vote on the Bill.[1] The Court stressed that the third difference, is 'of import since whether a provincial delegation votes corporately through its head of delegation, as prescribed by s 65, or individually by each member casting a vote, as prescribed by s 75(2), may in defined circumstances be determinative as to whether the NCOP passes a Bill.'[2]

Cameron AJ then made the following *obiter* comment about what the consequences might be if a Bill were incorrectly tagged:

> It would be formalistic in the extreme to hold a Bill invalid on the ground that those steering it through Parliament erred in good faith in assuming that it was required to be dealt with under the s 76 procedure, when the only consequence of their error was to give the NCOP more weight, and to make passage of the Bill by the National Assembly in the event of inter-cameral disputes more difficult. It is hard to see how a challenge based on the first two differences between the relevant parliamentary procedures can invalidate the enactment of a statute.[3]

If we applied Cameron AJ's approach, tagging would only result in invalidity if Parliament acted in bad faith. The final sentence suggests that invalidity might also result if there is evidence to suggest that the Bill would not have passed if the vote had been taken by mandates instead of individually (or vice versa).

Relying on this statement, the High Court in *Tongoane* did not declare CLARA invalid. Despite finding that it had been improperly tagged, Ledwaba J held that as Parliament had acted in good faith, and the provinces had an adequate hearing, CLARA was valid.[4]

The Constitutional Court in *Tongoane* reversed both the High Court and the *Liquor Bill* approach to tagging. It held that where a Bill that was objectively a s 76 Bill was passed as a s 75 Bill, the result would always be invalidity. It rejected the suggestion in *Liquor Bill* that invalidity should not be the result when Parliament had acted in good faith. Quoting *Doctors for Life*, Ngcobo CJ re-iterated that '[f]ailure to comply with manner and form requirements in enacting legislation renders the legislation invalid. … [The Constitutional] Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid.'[5] However, the Court was not willing to commit itself on the consequences of the reverse situation: where a s 75 Bill was incorrectly passed under the more onerous s 76 procedures. 'It may well be,' the Chief Justice mused, 'that different

[1] *Liquor Bill* (supra) at para 25.
[2] Ibid.
[3] Ibid at para 26.
[4] *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others* 2010 (8) BCLR 838 (GNP), [2009] ZAGPPHC 127 at paras 24-26.
[5] *Tongoane* 2010 (6) SA 214 (CC) at para 106, quoting *Doctors for Life* (supra) at paras 208 and 211.

considerations apply where the section 76 procedure is followed instead of the one prescribed by section 75.'[1]

(iii) *Discussion*

In sum, the law on tagging is: A Bill must be tagged as s 76 if it will affect in 'substantial measure' any of the functional areas in Schedule 4. If a Bill is mistakenly tagged s 75 instead of s 76 and passed on that basis, the resultant Act is invalid. It is uncertain what the consequences are if the Bill is tagged s 76 when it should have been tagged s 75. *Tongoane* provides a lucid explanation of the law and rightly rejects the 'pith and substance' approach. Yet, certain difficulties remain.

First, it is difficult to conceive why Bills mistakenly tagged s 75 should be treated differently from those incorrectly tagged s 76. The logic justifying the conclusion that incorrect tagging must result in invalidity is that any failure to follow a constitutionally prescribed process renders the resulting legislation invalid. The only meaningful difference is that, because the s 76 procedure requires more votes from the NCOP (and the NA if it wishes to override the NCOP) it is only when Bills are mistakenly tagged s 75 that they will be passed without the necessary number of votes. There are two gaps in this argument.

One, it omits the theoretical possibility that, because s 76 is a mandated procedure and s 75 is not, a Bill that would pass in the NCOP under s 76 might not pass under s 75. It is also possible that the NA would decide not to override the NCOP. The Constitution clearly contemplates that the NA might decide not to use the override — even though it had already passed the Bill — otherwise there is no purpose in requiring the NA to reconsider the legislation.

Two, and more importantly, the Court has made clear in its public participation cases — *Doctors for Life*, *Matatiele* and *Merafong* — that it is irrelevant whether following the proper procedure would affect the outcome of the legislative process. If we were concerned only with whether following the correct procedure would have changed the result, then we should enquire even in a case like *Tongoane* how many votes the legislation received. If it had been passed with 90 per cent of the votes in both Houses, it would still have been passed had the correct, s 76 procedure been followed. The *Tongoane* Court is uninterested in this vote-counting exercise precisely because the practical consequences of following the wrong procedure do not matter. And if that is true, there is no room to prevaricate about the alternative, *Liquor Bill* scenario.

If we accept that mistaken tagging in either way results in invalidity,[2] then a bigger dilemma raises its head. While the 'substantial measure' test is easier to apply consistently than the 'pith and substance' approach, it does not provide

[1] *Tongoane* (supra) at para 103.

[2] If you are convinced that only Bills like CLARA that are wrongly tagged as s 75 Bills should be declared invalid, a different difficulty awaits. The consequence will be that Parliament will be incentivized to tag any Bill where there is any doubt as a s 76 Bill to avoid the possibility of it being declared invalid. This will skew the balance the Constitution tries to strike between the powers of the national and provincial governments. Some Bills that should be passed under s 75 (with less provincial input) will be passed under s 76 (with greater provincial influence). We may think this is a good thing, but it is probably not what the Constitution envisages.

bright line rules. In some cases there will be room for reasonable debate about how to tag a Bill. We can assume that the accumulation of judicial opinion will, over time, provide greater guidance as to exactly where the line between ss 75 and 76 lies, but in the interim Parliament is stuck with a difficult conundrum. Even acting with the best of intentions, it might accidently tag a Bill incorrectly. The consequence (if the law is challenged) will be invalidity either way, resulting in a huge waste of government resources. To avoid that, we need a more finely grained test than *Tongoane* supplies.

Murray and Simeon have suggested a nifty five-part tagging test that could help to provide greater clarity. Although proposed prior to *Tongoane*, the Murray-Simeon test tries to give more definite content to the 'substantial measure' approach.[1] It does so by identifying the circumstances where a province should legitimately have a greater say in the passage of law — either for reasons of federalism, or efficacy. The test is as follows:

(a) Does the Bill expect provinces to implement any part of it under FC s 125(2)*(b)*? If so, the Bill should follow the s 76 procedure.

(b) Does the Bill contain provisions that would normally fall for implementation by the provinces under s 125(2)*(b)* but over which the national government retains the responsibility for implementation? If so, the Bill should follow the s 76 procedure.

(c) Could this law, in the future, conflict with a provincial law? Or, in other words, are there provisions in this law that deal with matters over which a province has jurisdiction? If so, the Bill should follow the s 76 route.

(d) Does the Bill have implications for any policy or law which provinces are already implementing or may implement? If so, the Bill should follow the s 76 procedure.

(e) Is the intrusion of the national Bill on a Schedule 4 matter trivial? If so, the Bill should follow the s 75 route.[2]

Were Parliament and the Court to adopt this test — or something similar — it would bring much greater clarity to the tagging process. While there may be some Bills that still escape easy classification, it is likely to be a far smaller set.

The alternative solution to the tagging problem, that Parliament has in fact adopted, is to create a new procedure to deal with difficult to classify Bills. In an effort to alleviate some of the difficulties involved in classifying and separating s 75 and s 76 matters, the Joint Rules of Parliament provide for a Bill to be classified as a 'mixed section 75/76 Bill'.[3] This is a Bill which contains provisions that must to be passed under s 75 as well as provisions that must to be passed under s 76. The Joint Rules provide that such a Bill may only be proceeded with where the Bill is of a nature that a dispute between the two houses is unlikely to arise, where the Bill is drafted in a way that its s 75 and s 76 components can be isolated if necessary and where the Bill is unlikely to lead to any unmanageable procedural complications.[4] The procedure to be used for passing mixed Bills attempts to ensure that the requirements of both s 75 and s 76 are met. For example, mixed

[1] C Murray & R Simeon '"Tagging" Bills in Parliament: Section 75 or Section 76?' (2006) 123 *SALJ* 232.

[2] Ibid at 256-259.

[3] Joint Rules 191-201.

[4] Joint Rule 191.

Bills may not be introduced in the NCOP[1] as this would conflict with s 75, and when the NCOP considers a mixed Bill it must first vote by province to satisfy s 76 and then by individual member to satisfy s 75.[2] Where a mixed Bill runs into procedural difficulties, such as where the two houses disagree, it must be split into separate s 75 and s 76 Bills and these separate Bills must be retabled accordingly.

While this is a novel solution, it is, alas, unconstitutional. The Constitution makes no reference at all to mixed Bills — the procedure and classification derives solely from the Joint Rules of Parliament. It is presumably for this reason that although the procedure for mixed Bills has been approved by the Joint Rules Committee, it has not yet been implemented pending clarity on its validity.[3] It could be argued that the mixed Bill procedure is constitutionally unobjectionable because it is more onerous than the constitutionally required procedure.[4] The Court's suggestions in both *Liquor Bill* and *Tongoane* that Bills mistakenly classified as s 76 might not be invalid gives some credence to that line of thought.

However, as we argued earlier, the reasoning involved in accepting the mixed Bills procedure is flawed. The mixed Bills procedure is not merely more onerous than the s 75 and s 76 procedures; it is different to these procedures and is in fact unknown to the Constitution. While it may well be within Parliament's power to make the passing of particular Bills more complex by, for example, requiring extra consultation with the public or local government, it is altogether a different matter when Parliament imposes additional voting requirements on certain Bills that may prevent them being passed at all — thus undermining the constitutional legislative process. Therefore, however much the mixed Bills procedure may be considered a pragmatic solution to the difficulties involved in separating and classifying s 75 and s 76 Bills, the courts should be slow to accept the procedure as being consistent with the Constitution.

A final interesting question is worth considering. Thus far, we have only considered tagging challenges to a Bill that was passed. But would there be any recourse if a Bill was incorrectly tagged and for that reason failed to pass? Imagine Parliament mistakenly tags a s 75 Bill as a s 76 Bill. The NA passes it with a slim majority. The NCOP rejects it, mediation fails, and the NA is unable to muster the two-thirds necessary for an override. Could somebody with an interest in the Bill being passed challenge the tagging of the Bill and force Parliament to reconsider it under the correct procedure? We deal with the general form of this question earlier,[5] and suggest that this would be one example where a court might be justified in interfering before Parliament concludes the legislative process.

(c) Bills requiring extra-parliamentary consultation

The Constitution provides that certain categories of Bills may not be passed by Parliament unless appropriate bodies have been consulted or have had the

[1] Joint Rule 193.
[2] Joint Rule 197.
[3] See the comment in the Joint Rules, at Joint Rule 191.
[4] See I Currie and J De Waal *The New Constitutional and Administrative Law* (2001) 188.
[5] See § 17.4 above.

opportunity to make representations beforehand. The following is a list of the categories with the corresponding bodies to be consulted:

- Bills affecting the status, institutions, powers or functions of local government: organized local government, municipalities and other interested parties (s 154(2));
- Bills providing for the equitable distribution of national revenue between national, provincial and local governments: provincial governments, organised local government and the Financial and Fiscal Commission (s 214(2));
- Bills regulating the powers of national, provincial and local governments to raise and to guarantee loans: the Financial and Fiscal Commission (ss 218(2) and 230(2));
- Bills providing a framework for the salaries, allowances and benefits of elected representatives and traditional leaders: the commission on the remuneration of elected representatives and traditional leaders (s 219(3)); and
- Bills regulating the taxing powers of provinces and local governments: the Financial and Fiscal Commission (ss 228(2)*(b)* and 229(5)).

17.7 Internal Regulation of Parliament

While the Constitution determines a great deal of how Parliament functions, the day-to-day details of parliamentary process are left for Parliament to figure out for itself. The Constitution affords the NA and the NCOP the power to control their internal proceedings and to make rules and orders to manage their business. This section examines the limits of those powers. First, we discuss Parliament's general power to regulate its proceedings and the ancient principle that the judiciary should not interfere in the inner workings of the Legislature. Second, we consider Parliament's rule-making power. We ask what the limits of the power to make rules are, and what consequences (if any) flow from breaking the rules. Last, we look at the right of MPs to speak their mind in legislative proceedings.

(a) Control over the internal proceedings of Parliament

Sections 57(1)*(a)* and 70(1)*(a)* of the Final Constitution confer on the NA and the NCOP, respectively, the general power to 'determine and control [their] internal arrangements, proceedings and procedures'. The subsequent grant of power to create rules and orders — FC ss 57(1)*(b)* and 70(1)*(b)* — is best understood as an element of that power.

The right of legislatures to regulate their own proceedings without interference by other branches of government is a hallmark of democratic government. As long ago as 1884, Lord Coleridge held:

> What is said or done within the walls of Parliament cannot be inquired into in a court of law. … The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive.[1]

[1] *Bradlaugh v Gossett* (1884), 12 QBD 271, 275 (Eng QB).

In *Bloem & Another v State President of the Republic of South Africa & Others*, MT Steyn J quoted this passage and confirmed that, prior to 1994, the principle of Parliamentary immunity was part of South African law.[1]

Apartheid South Africa was by no means alone; the House of Lords,[2] the Supreme Court of Canada,[3] the High Court of Australia[4] and the Supreme Court of the United States[5] all endorse some variation on the theme that, as long as the lawmaking branch complies with the manner and form provisions of the Constitution, courts should not inquire into how Parliament manages its domestic affairs. While the jurisdictions differ on the details, the position in most is that once a court decides that an act falls under one of the recognised 'parliamentary privileges', a court has no jurisdiction to question its exercise, even if it might violate a constitutional right.[6]

[1] 1986 (4) SA 1064 (O)(The court quoted extensively from *Bradlaugh* and other English decisions, and concluded that 'the exclusive right of Parliament to establish and control its own domestic procedure and the denial of jurisdiction to the Courts of law to pronounce thereon, [has] been embodied in our own Constitution.' Ibid at 1088E.)

[2] *British Railways Board v Pickin* [1974] AC 765, 790 (Lord Morris of Borth-y-Gest)('It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its Standing Orders and further to decide whether they have been obeyed: it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders.')

[3] *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 ('*New Brunswick*')(McLachlin J held that 'Canadian legislative bodies properly claim as inherent privileges those rights which are necessary to their capacity to function as legislative bodies.' Ibid at para 125. Once a court established that a certain type of conduct or decision was necessary, Parliament's decisions in that area were completely immune from judicial review, including compatibility with the Charter. The court held that the right to exclude strangers from proceedings and to regulate their conduct was such a power. A broadcasting company could not, therefore, rely on the right to freedom of expression for permission to film the proceedings of the Nova Scotia House of Assembly.)

[4] *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 162, ('it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise.' Quoted with approval in *Egan v Willis* [1998] HCA 71 at para 27.)

[5] *Marshall Field & Co v Clark* 143 US 649, 12 S.Ct. 495 (1892)(The court created what is known as the 'enrolled bill doctrine'. The doctrine holds: 'The signing by the speaker of the house of representatives, and by the president of the senate … of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed congress …. And when a bill, thus attested, receives [the President's] approval, and is deposited in the public archives, its authentication as a bill that has passed congress should be deemed complete and unimpeachable …. The respect due to coequal and independent departments requires the judicial department to … accept, as having passed congress, all bills authenticated in the manner stated'. Ibid at 672, as paraphrased in I Bar-Siman-Tov 'Legislative Supremacy in the United States?: Rethinking the "Enrolled Bill" Doctrine' (2009) 97 *Georgetown LJ* 323, 328-329. This principle, it seems, does not exclude courts from examining *constitutional* manner and form requirements, only from compliance with its own rules. *United States v Munoz-Flores* 495 US 385 (1990)(The court held that it could enquire whether Congress had complied with the constitutional requirement that revenue bills originate in the House of Representatives.))

[6] The US is different. It requires Congress to abide by the Bill of Rights in all its internal processes. *United States v Ballin* 144 US 1, 5, 12 SCt. 507, 509 ('The constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just.')

A trio of Canadian cases demonstrates how this rule operates. The Supreme Court of Canada has held that a broadcaster could not rely on the right to freedom of expression to gain permission to film the sessions of a provincial legislature because the right to remove strangers from Parliament and to regulate visitors' behaviour is a parliamentary privilege.[1] However, the Court also held that parliament's privileges did not extend to hiring and firing its chauffeurs, and so held that an ex-chauffeur could sue Parliament for discrimination.[2] Applying these precedents, the Ontario Court of Appeal held that a provincial legislature was immune from a challenge that its practice of reading a prayer at the start of each session violated the religious liberty rights of one of its members.[3] It reasoned that since standing rules were an element of Parliament's exclusive zone of competence, and the prayer was required by the rules, a court could not intervene.

Before we go further, a quick note about terminology is necessary. The phrase 'parliamentary privilege' is used in two ways. It is used to describe both the right of Parliament as an institution to be free from outside interference, and the right of individual MPs to speak their minds when in Parliament. The second is really an element of the first, but to avoid confusion, we try to use the phrase 'parliamentary immunity' when referring to the first, institutional guarantee, and 'parliamentary privilege' when discussing the second, individual protection. However, the case law does not make a similar distinction, so readers should be careful to note the context in which the phrase 'parliamentary privilege' is employed.

There is a dual rationale behind the rule of parliamentary immunity. First, the separation of powers requires each branch to permit the other to perform its functions without interference. As one commentator has put it:

> The reason for, and purpose of, parliamentary [immunity] is not to protect parliament and parliamentarians from individuals; rather it is to protect them from the Courts and the Executive. … Parliamentary [immunity] provides the constitutional space for free and democratic discourse to take place.[4]

While it may often appear to immunise Parliament from legal standards that apply to all other bodies — an appearance that may sometimes be justified — that is deemed necessary to guarantee Parliament's independence.

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[1] *New Brunswick* (supra).

[2] *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 (SCC)

[3] *Ontario (Speaker of the Legislative Assembly) v Ontario (Human Rights Commission)* 201 DLR (4th) 698 at paras 19 and 23 ('In the case under appeal, the privilege asserted by the Speaker on behalf of the Legislative Assembly is the right to establish and regulate the House's own internal affairs without any interference from the other two branches of government, the executive and the judicial. In addressing the problem in this case, we are weighing the constitutional rights of a citizen of the state against the right of legislative assemblies, hard won over the centuries, to control their own affairs independent of the Crown. … The question is not whether the prayers are necessary, but whether the Standing Orders governing the conduct of the business of the Assembly are necessary. If the Standing Orders are determined to be necessary to the proper functioning of the House - and they include the prayers - that is the end of the inquiry. The Standing Orders are protected by parliamentary privilege and neither the courts nor any quasi-judicial body have the right to inquire into their contents or to question whether a particular part of the Standing Orders (including the recitation of prayers) is necessary or indeed lawful.')

[4] S Chaplin '*House of Commons v. Vaid*: Parliamentary Privilege and the Constitutional Imperative of the Independence of Parliament' 2 *Journal of Parliamentary & Political Law* 153.

The second, and more practical, justification for parliamentary immunity is to ensure the smooth functioning of Parliament. The business of Parliament would be far more difficult — if not impossible — if every internal decision could be reviewed in the courts. To employ an evocative phrase from an earlier age: 'They would sink into utter contempt and inefficiency without it.'[1] Or in the words of McLachlin J: 'The rule that the legislative assembly should have the exclusive right to control the conditions in which that debate takes place is … of great importance, not only for the autonomy of the legislative body, but to ensure its effective functioning.'[2]

With this strong historical precedent, foreign support and principled and practical justification, one might expect our Constitutional Courts to adopt a similar approach. But one would be wrong. Although there is not a developed jurisprudence on this issue, the constitutional text and the few cases we have indicate that courts in South Africa will be far less deferential to the legislature. To begin with, FC s 2 states: 'The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.' And FC s 8(1) explicitly states that the Bill of Rights 'binds the legislature'. The most obvious interpretation of these provisions is that the legislature is as bound by the Constitution as any other public body. However, they need to be read in conjunction with the provisions that afford Parliament the ability to determine its own rules. It could be argued that ss 57(1)*(a)* and 70(1)*(a)* create a constitutional bubble of immunity for the legislature when regulating its internal functions. There can be no constitutional conflict, the argument goes, because the Constitution itself envisions that Parliament will not be subject to the ordinary strictures of the Constitution.[3]

The Supreme Court of Appeal has firmly rejected this interpretation. In *Speaker of the National Assembly v De Lille* Mahomed CJ wrote:

> [T]he Constitution of the Republic of South Africa … is Supreme — not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly

[1] *Bradlaugh v Gossett* (1884), 12 QBD 271, 275 (Eng QB).

[2] *New Brunswick* (supra) at para 140.

[3] This is similar to the argument that convinced the Supreme Court of Canada to exempt the legislative branch from compliance with the Canadian Charter. *New Brunswick* (supra).

> authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from Judicial scrutiny in such circumstances.[1]

As we discuss in greater depth below,[2] *De Lille* concerned whether the National Assembly had the power to suspend one of its members as a punishment for remarks made during a debate. The Supreme Court of Appeal held that, although FC s 57(1)*(a)* gave the NA the power to suspend a member to prevent disruption of a debate, it did not afford it the power to use suspension as a punishment. It did not actually reach the question of whether the NA would be bound by the Bill of Rights — or any other restraints — in exercising a power afforded to it by the Constitution,[3] although the tenor of the judgment suggests that it would.

The High Court in *De Lille* was not so hesitant. It held:

> The National Assembly is subject to the supremacy of the Constitution. It is an organ of State and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. … It is subject in all respects to the provisions of our Constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution. It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication.[4]

Hlophe J (joined by King DJP) found that the decision to suspend De Lille violated her rights to freedom of expression, access to courts and administrative justice.

The endorsement of constitutional supremacy and the limited weight afforded parliamentary immunity in both *De Lille* judgments is indirectly supported by the Constitutional Court's attitude in *Doctors for Life*.[5] Recall[6] that the majority, over the vociferous dissent of Yacoob J, read the seemingly bland obligation to 'facilitate public involvement' as a requirement for the validity of legislation and, although affording Parliament significant deference, was willing to examine whether Parliament had acted reasonably in meeting that duty with regard to each and every law that it passed. The Court could have found — as the dissenters did — that

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[1] *Speaker of the National Assembly v De Lille & Another* 1999 (4) SA 863 (SCA), 1999 (11) BCLR 1339 (SCA)(*'De Lille'*) at para 14. See also, *De Lille & Another v Speaker of the National Assembly* 1998 (3) SA 430 (C), 1998 (7) BCLR 929 (C)(*'De Lille HC'*) at para 22 ('In terms of s 2 the Constitution is the supreme law of the Republic and any law or conduct inconsistent with it is invalid. Section 8(1) also provides that the Bill of Rights applies to all law and binds the Legislature, the Executive, the Judiciary and all organs of State. Thus any privilege inconsistent or incompatible with the Constitution is invalid. Surely the extent of privilege is inextricably bound with the exercise thereof. In other words, the determination of the extent of privilege must surely relate to its exercise. The contrary view is untenable. Otherwise Parliament would have a blank cheque to set the limits of its own powers. The Constitution, particularly s 2 thereof, enjoins us to ensure that the obligations imposed by the Constitution - which is the supreme law - must be fulfilled.')

[2] See § 17.7*(c)* below.

[3] Ibid at para 32 (The Court declined to decide the issue that had been at issue in *New Brunswick*: Whether Parliament is bound by the Bill of Rights.)

[4] *De Lille HC* (supra) at para 25.

[5] *Doctors for Life International v Speaker of National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC), [2006] ZACC 11 (*'Doctors for Life'*).

[6] See §17.6*(a)* above.

Parliament need merely enact some rules to promote public involvement, but that courts could not enquire any further than that.

However, *Doctors for Life* does build in a limited form of judicial deference in another way: Courts must — absent exceptional circumstances — wait until Parliament completes the legislative process before it intervenes.[1] This only applies when the internal function at issue concerns the passing of legislation. When — as was the case in *De Lille* — there is no legislative process to complete, the judiciary can intervene at any stage.

The general principles that emerge from the case law are these:

(a) Parliament can only act if there is a legal source for its power;
(b) FC ss 57(1)*(a)* and 70(1)*(a)* are not blank cheques; a court can decide whether Parliament has exceeded its power to 'determine and control its internal arrangements';
(c) The exercise of all Parliament's powers is constrained by the Bill of Rights and the Constitution;
(d) A court is likely to show significant deference to how Parliament chooses to regulate its processes;
(e) Courts cannot intervene before legislation has been passed.

This power is constrained by other provisions of the Constitution, in particular ss 59 and 72, which oblige the Assembly and the NCOP to facilitate public involvement in their processes and to conduct their business in an open manner and in public. The Assembly and the NCOP are entitled to take reasonable measures to regulate public and media access to their proceedings.[2] However, the general public and the media may be excluded from the proceedings of committees of the Assembly and the NCOP only when it is reasonable and justifiable to do so in an open and democratic society.[3]

(b) Rules and orders of the National Assembly and the NCOP

The Assembly[4] and the NCOP[5] have the power to make rules and orders concerning the conduct of their business. In addition, FC s 45 requires the two houses to 'establish a joint rules committee to make rules and orders concerning [their] joint business'. In this section we ask two questions about the rule-making power: *(a)* what are the limits on Parliament's power to make rules? *(b)* what are the consequences, if any, if Parliament fails to comply with a rule?

[1] See § 17.4 above.
[2] It is not clear that this power would entitle the NA or the NCOP to refuse permission for their proceedings to be broadcast on television. Cf *New Brunswick Broadcasting Co v Nova Scotia* 100 DLR (4th) 212 (SC), [1993] 1 SCR 319.
[3] FC s 59(2) and 72(2). See also NA Rule 152 and NCOP Rule 110.
[4] FC s 57(1)*(b)*.
[5] FC s 70(1)*(b)*.

(i) *The limits on Parliament's rule-making power*

We first consider the explicit limits on the rule-making power, then implicit constraints. For the first part, we consider the joint and individual rule-making powers separately, while when discussing the tacit limits we discuss the power to make rules generally.

There are two explicit constraints on the houses' individual rule-making power in the Constitution. First, it has to be exercised with due regard to representative and participatory democracy, accountability, transparency, and public involvement.[1] This limitation has not yet been tested, but it seems likely that a court will give Parliament a great degree of deference in deciding whether a rule runs contrary to these principles. The principles are vague, so there will always be some doubt whether a rule fails to respect transparency or public participation. In addition, the Constitution does not require that the rules promote or comply with the listed principles, merely that they are adopted 'with due regard' to those principles. Even rules that may seem to inhibit, for example, transparency would pass constitutional muster if it was adopted with an attempt to limit the impact on transparency, or for some other justifiable reason. Finally, as the rule-making power concerns the inner working of the legislature, the judiciary will rightly be hesitant to intervene. Absent obviously undemocratic rules, the principled limits in ss 59(1)*(b)* and 70(1)*(b)* will act primarily as largely unenforceable guidelines for Parliament, or as an interpretive guide when rules are unclear.

Secondly, ss 57(2) and 70(2) prescribe constitutionally mandated content for the rules and orders that differs slightly for each house:

(a) In both houses: The establishment of committees;[2]

(b) In the NA: Recognise the leader of the largest opposition party as the leader of the opposition;[3]

(c) In both houses: The participation of minority parties in parliamentary and committee proceedings in a manner consistent with democracy.[4] The Constitutional Court has held that the 'purpose of these provisions is to ensure that minority parties can participate meaningfully in the deliberative processes of parliament.'[5]

(d) In the NA: Ensure that all parties represented in the NA are given sufficient financial and administrative assistance to operate effectively in the Assembly;[6] and

[1] FC ss 57(1)*(b)* and 70(1)*(b)*. These provisions are reinforced by the requirements of openness imposed by ss 59 and 71, discussed in § 17.6 *(a)* supra.

[2] FC s 57(2)*(a)* and 70(2)*(a)* read: 'the establishment, composition, powers, functions, procedures and duration of its committees'. The different roles of committees in the Assembly and the NCOP are discussed in §§ 17.1 *(a)* and *(b)*(ii) supra.

[3] FC s 57(2)*(d)*.

[4] FC s 57(2)*(b)* and 70(2)*(c)*. When applied to the NCOP, the provision only applies to s 75 Bills, because that is the only time delegates have an individual vote. When voting as a delegation, party affiliation is irrelevant. See *First Certification Judgment* (supra) at para 224 (Constitutional Court emphasized that this requirement was capable of judicial enforcement.)

[5] *Democratic Alliance & Another v Masondo NO & Another* 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC), [2002] ZACC 28 ('*Masondo*') at para 18.

[6] FC s 57(2)*(c)*.

(e) In the NCOP: The participation of all the provinces, 'in a manner consistent with democracy'.[1]

Requirements *(a)* and *(b)* are basic and are unlikely to provoke controversy. By contrast, the remaining requirements are vital bulwarks against the abuse of the rule-making power by the majority party. Like all other decisions, the adoption of the rules is taken by a simple majority vote.[2] A party with a clear majority could amend the rules to exclude or weaken minority parties and make it easier to push its agenda through without debate.[3] The limits in FC ss 57(2) and 70(2) are a real, enforceable tool to prevent that.

FC s 45 creates a number of specific tasks for the Joint Rules Committee:

(a) It must 'determine procedures to facilitate the legislative process, including setting a time limit for completing any step in the process'. This is an important power; as we discuss in more detail shortly, the Constitution is taciturn about the details of the legislative process and the rules need to provide those details.
(b) Establish joint committees to report on s 74 and s 75 Bills;
(c) Establish a joint committee to review the Constitution at least annually;
(d) Regulate the business of all the joint committees;

Unlike FC ss 57 and 70, FC s 45 does not place any value-based limits on the joint rule-making power. When acting together, the NA and the NCOP are not explicitly required to consider participatory democracy, the representation of minority parties and so on. Should those limits also apply to the writing of the joint rules? Yes. There is no reason of principle to exempt the Joint Rules from respecting basic principles of democracy. Sections 57 and 70 can easily be read to constrain each house's power to make rules whether it is exercising it individually or in conjunction with the other house.

In addition to these two direct limits on the rule-making power, there are also implicit constitutional limits on the rules Parliament can make. Can Parliament make rules that add requirements to the processes set out in FC ss 74-77? The obvious answer is: No. But the real answer is more complicated. The starting point is an obiter remark of the Constitutional Court in *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development & Another*.[4] The Court was concerned, not with Parliament's rule-making power, but with the similar power FC s 160(6) assigns municipal councils to make by-laws regulating their internal arrangements.[5] Interpreting FC s 160(6), the Court compared it to FC s 57:

[1] FC s 70(1)*(b)*.
[2] FC ss 53(1)*(c)* and 65(1)*(b)*.
[3] For more on the possibility of the legislative process being distorted by a dominant party, see §17.8*(b)* below.
[4] 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC), [1999] ZACC 13 ('*Executive Council 1999*').
[5] FC s 160(6) reads: 'A Municipal Council may make by-laws which prescribe rules and orders for–
(a) its internal arrangements;
(b) its business and proceedings; and
(c) the establishment, composition, procedures, powers and functions of its committees

> It is clear that [FC s 57] confers a power upon the National Assembly to regulate its internal proceedings, business and working committees. However, that power must be read in the context of the other provisions of the Constitution regulating the National Assembly, such as the regulation of the election and removal of the Speaker and Deputy-Speaker, the regulation of the voting procedures and quorums in the National Assembly and the regulation of public access to the National Assembly. In addition, it should be noted that in the case of the national legislature, the election, appointment and functioning of what is, in effect, its executive committee, the President and Cabinet, is fully regulated by sections 83 to 102. Thorough constitutional regulation of provincial executives is similarly to be found in sections 125 to 141. These provisions make it plain that the constitutional power of legislatures to regulate the internal proceedings of committees is a narrow power, not a broad one, and is related not to the executive committees of these legislatures, but only to other committees entrusted with specific tasks or portfolios. The power also does not relate to a power to regulate the main structural components of the legislature, which are fully regulated by the Constitution, but only to those working committees which either chamber of the legislature may decide to establish, and also disestablish, from time to time.[1]

This is fair enough. The power to make rules certainly does not extend to altering the constitutional requirements for quorums or votes, nor to controlling the President and the Cabinet. But, the last sentence is too strongly stated; the rulemaking power is not limited 'only to those working committees which either chamber of the legislature may decide to establish'. While Parliament may not alter the 'main structural components of the legislature', it may (and must) fill in the details that the broad language of the Constitution leaves open.

A quick look at the Joint Rules or the rules of either house demonstrates this. While much of the rules are devoted to non-legislative motions and the composition and functioning of committees — matters the Constitution leaves unregulated — they also deal in great depth with the intricacies of parliamentary debate and the legislative process.[2] And, as we explained earlier, FC s 45 explicitly recognises that the Joint Rules can 'determine procedures to facilitate the legislative process' and set time limits. While this power is not explicitly assigned to the NA and the NCOP when they act separately, it is necessary for them to function. We provide a few examples of rules which have nothing to do with committees but which affect the legislative process. Some of them are obviously permissible, while others could arguably be said to exceed the legislature's authority.

1. The power to introduce Bills

The Constitution affords all Ministers, Deputy Ministers, Members of the NA and committees of the NA the power to introduce legislation in the National Assembly.[3] Yet business in the Assembly would likely come to a screeching halt if every one of the 400 members could demand a full consideration of every one of their pet legislative projects. The power could easily be abused to tie up the Assembly with hopeless proposals to prevent it from passing legislation that a minority opposed. There must be some method to filter the proposals so that the

[1] *Executive Council 1999* (supra) at para 100
[2] Chapter 13 of the NA Rules; Chapter 10 of the NCOP Rules; and Chapter 4 of the Joint Rules
[3] FC s 73(2).

Assembly spends its limited time on feasible legislation. The NA Rules provide a careful filter to achieve just that.[1] It could be argued that sifting proposals in this way limits the constitutional right of members to propose legislation. Or, the mechanism could be defended as making the right a workable reality.

2. The Joint Tagging Mechanism

Earlier,[2] we discussed the Joint Tagging Mechanism — the method by which Parliament determines what process to follow in passing a Bill. The Constitution does not require such a process, yet it would be impossible for Parliament to function without some way to decide how to classify Bills.

3. Certification of constitutionality

NA rule 243(1A) requires that Bills introduced by the executive are certified by the Chief State Law Adviser as complying with the Constitution and being 'properly drafted in the form and style which conforms to legislative practice'. While the legislation may be proceeded with even if the Law Adviser does not certify the legislation, the Bill cannot proceed until the Law Adviser expresses her opinion. This extra step is not to be found in the Constitution. Does rule 243(1A) create an extra-constitutional hurdle for the passage of legislation? Or is the NA merely regulating its internal proceedings?

4. Amendments to constitutional amendments

Earlier,[3] we discussed the Constitutional Court's holding in *Merafong*[4] that the Constitution does not permit amendments to constitutional amendments in the NCOP. We explained there why that conclusion is inarguably wrong. Without rehashing that argument, we want to consider the interesting abstract question that situation raises. Unlike FC ss 75 and 76, s 74 makes no provision for what happens if the NA and the NCOP pass different versions of a constitutional amendment. Does Parliament have the power to create a procedure to deal with that eventuality? The *Merafong* Court did not address this question; it denied the NCOP power to propose amendments without acknowledging the fact that Parliament — in its Joint Rules — had in fact created a procedure for it to do so. It could be asserted that the absence of a mediation process in s 74 implies that mediation should not be permitted for constitutional amendments. On this view, Parliament's attempt to establish a procedure is unconstitutional. But there is no

[1] NA rules 234-237 (The Rules require the member to submit a memorandum to the Speaker. The memorandum is tabled in the Assembly and referred to the Committee on Private Members' Legislative Proposals and Special Petitions. The Committee considers the proposal and makes a recommendation to the Assembly on whether it should be considered. The recommendation and the original memorandum are tabled in the Assembly, which votes on whether to consider the proposal. If it votes in favour, the member may prepare a draft Bill which is then referred to the JTM to be tagged, and the legislative process begins.)

[2] § 17.6*(b)* above

[3] § 17.3*(a)* above.

[4] *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC), [2008] ZACC 10 ('*Merafong*').

explicit constitutional prohibition on creating a mediation process for s 74 Bills, no constitutionally prescribed alternative for solving conflicts between the NA and the NCOP, and no principled reason to prevent the NCOP from proposing amendments. This view holds that denying Parliament this power merely promotes inefficiency in the legislative process by forcing Bills that could be passed through mediation to fail and begin the legislative process afresh.

5. Mixed s 75/76 Bills

As we discussed earlier,[1] the Joint Rules make provision for mixed s 75/76 Bills to avoid the possibility of a tagging mistake. These provisions have (wisely) not been implemented because of doubts about their constitutionality. While these might improve the efficiency of the legislative process — by removing the need to split Bills and the possibility of good faith tagging errors — they do not fit the process devised by the Constitution for passing legislation.

Hopefully, these examples demonstrate both that Parliament must have significant power to make rules concerning the legislative process, and that it will sometimes be difficult to tell whether they have moved from making the constitutional process work, to re-writing that process. In our view, the best approach would be twofold. First, a court would ask whether the rule performs a function that is necessary for the law-making process to work. Second, if it is, then the rule will be valid, unless it imposes an unreasonably arduous additional obstacle to passing the legislation. If the rule is not necessary for the law-making process, it will be invalid unless it imposes a negligible obstacle to passing a law. While that is by no means a bright line, it is the beginning of a useful standard.

In addition to limiting Parliament to rules that do not add unnecessary requirements to passing a law, the Legislature must adopt rules that are rationally related to their function. This requirement is best illustrated by the dictum of a US Supreme Court case. In *US v Ballin*, the Supreme Court was confronted with a disagreement about whether a law had in fact obtained the required majority of votes.[2] The parties disputed the method the House of Representatives used to count votes. 'The constitution', the Court noted, 'has prescribed no method of making this determination, and it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact.'[3] It continued:

> [The House] may prescribe answer to roll-call as the only method of determination; or require the passage of members between tellers, and their count, as the sole test; or the count of the speaker or the clerk, and an announcement from the desk of the names of those who are present. Any one of these methods, it must be conceded, is reasonably certain of ascertaining the fact; and as there is no constitutional method prescribed, and no constitutional inhibition of any of those, and no violation of fundamental rights in any, it

[1] § 17.6*(b)*(iii) above.
[2] 144 US 1 (1892).
[3] Ibid at 6.

follows that the house may adopt either or all, or it may provide for a combination of any two of the methods.[1]

This is really a re-iteration of the standard approach our courts have taken to rationality — as long as the means is related to the end, courts will not ask if there was a better way to achieve the end. That principle will undoubtedly apply to any rules Parliament makes.

(ii) *The consequences of non-compliance with the rules*

What happens if the NA or the NCOP breaks one of its own rules? There is, again, no simple answer. First, we need to distinguish between three situations: *(a)* the rule only affects MPs; *(b)* the rule affects third parties; and *(c)* the rule affects the legislative process. For each of these situations, a court is likely to take a different approach both to whether the rule has been violated, and to the consequences of violation.

When the rule only concerns MPs — such as the suspension of MP De Lille — courts are likely to defer to Parliament's interpretation of its rules. If the rule affects third parties — such as a rule governing the testimony of witnesses in committee — courts will rightly require stricter adherence to the rules. A person who testifies before Parliament is entitled to have that body obey its own rules. If it fails to do so, a court will set aside any decision that negatively affects the third party.

The most difficult category consists of rules that deal with the legislative process. Where a rule is relatively unimportant and non-compliance with it does not affect the constitutional manner-and-form requirements or make the passage and debate of the Bill undemocratic, courts should probably let it go. It does not serve anybody if every minor good faith mistake in interpreting the rules could result in the invalidity of legislation — and there is no constitutional reason to take that path. However, where the rules mirror or give effect to a constitutional requirement, the position may be different. For example, where there is no electronic voting mechanism, the NA Rules have a complex, multi-step process to count votes. If this process is not followed, and there is some debate about whether the required number of votes was cast, it could be argued that the legislation should be set aside. The real reason for setting the legislation aside is not that it does not comply with the rules, but that there is doubt about whether it complies with the Constitution.

In addition, wherever Parliament or one of its actors acts in bad faith or irrationally in interpreting or applying rules, a court will be able to set it aside on the basis of the rule of law doctrine.

(c) Parliamentary privilege

FC s 58 provides that cabinet members and members of the National Assembly have freedom of speech in the Assembly, subject to its rules and orders, and may not be held criminally or civilly liable for any statements that they make in

[1] 144 US 1 (1892).

the Assembly or anything arising out of such statements. FC s 71 contains an equivalent provision for the NCOP. The Constitutional Court has held that the purpose of such protections is to 'encourage vigorous and open debate in the process of decision-making. This is fundamental to democracy.'[1] In a later judgment, Mokgoro J wrote:

> Immunising the conduct of members from criminal and civil liability during council deliberations is a bulwark of democracy. It promotes freedom of speech and expression. It encourages democracy and full and effective deliberation. It removes the fear of repercussion for what is said. This advances effective democratic government.[2]

The importance of the privilege was further confirmed in *Speaker of the National Assembly & Another v De Lille*. The Supreme Court of Appeal held in *De Lille* that the freedom of speech conferred by FC s 58(1) was a 'crucial guarantee' and that the remainder of FC s 58 should not be interpreted in a way that would detract from that guarantee.[3]

To understand the scope of this privilege, it is useful to ask four questions. First, in which fora does the privilege apply? Second, to whom does it apply? Third, is there any speech that it does not protect? Fourth, can a member be subjected to internal sanctions for speech?

The geographical scope of the privilege has twice been addressed by the Constitutional Court in the context of s 28(1) of the Local Government: Municipal Structures Act.[4] Since s 28(1) virtually mirrors FC ss 58(1) and 71(1) its interpretation of this section applies with equal force to privilege in the NA and NCOP. In *Swartbooi* the Court held that:

> The words 'said in', 'produced before' and 'submitted to' the council taken together are wide enough to cover all the conduct in the council that is integral to deliberations at a full council meeting and to the legitimate business of that meeting.[5]

Swartbooi also holds that the privilege will apply to all 'legitimate business' of the NA and NCOP[6] and will apply even to resolutions that are subsequently set aside due to unlawfulness or unconstitutionality.[7]

Dikoko v Mokhatla provided a test of the reach of the privilege. Mr Dikoko, a mayor of a municipality in the North West, was called before a provincial legislative committee to explain his excessive cell phone bill. At the meeting, he made

[1] *Swartbooi v Brink* 2006 (1) SA 203 (CC), 2003 (5) BCLR 502 (CC), [2003] ZACC 25 *('Swartbooi')* at para 20.

[2] *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC), [2006] ZACC 10 ('*Dikoko*') at para 39.

[3] *De Lille* (supra) at para 20.

[4] Act 117 of 1998.

[5] *Swartbooi* (supra) at para 12. The Court also commented that the 'function or purpose of a committee might well be relevant to the question whether a municipal councillor is exempted from liability for conduct which amounts to participation in the affairs of the committee of a municipal council in a particular case'. Ibid at para 17. The Court found it unnecessary to resolve this issue in *Swartbooi* because the conduct at issue took place during the full council meeting. However, the issue is equally relevant to the question of privilege in the committees of the NA and NCOP.

[6] *Swartbooi* (supra) at para 18.

[7] Ibid at para 19.

defamatory remarks about Mr Mokhatla, the CEO of the municipality. Mokhatla sued Dikoko for defamation and the latter claimed privilege. Mokgoro J initially suggested that the case would raise the difficult issue of whether the privilege covers the discussion of legitimate legislative business outside of the formal parliamentary setting. Ultimately, she left the question undecided, as Dikoko's remarks could not be considered legitimate council business, no matter where they occurred.[1]

Although our courts have thus far avoided the issue, it is clearly a difficult one. We briefly discuss some cases from Canada and New Zealand to demonstrate the difficulties that can arise. In *Stopforth v Goyer* the defendant — a minister — made comments as part of his testimony before a parliamentary committee that defamed the plaintiff.[2] He then repeated those allegations to reporters on the steps of the legislature. The Ontario High Court held that the later statement was not covered by parliamentary privilege. A similar situation in New Zealand had a similar result. In *Prebble v Television New Zealand Ltd*, the Privy Council held that repeating a statement made in Parliament to reporters was an 'effective repetition' and constituted a fresh act of defamation that was not covered by privilege.[3] The New Zealand Court of Appeal has taken the issue even further: if an MP merely refuses to retreat from defamatory remarks made in Parliament, he can be held liable for defamation.[4] This issue has not arisen in South Africa yet, but it seems that it could threaten the purpose of parliamentary privilege if MPs were unable to repeat or defend their remarks outside of Parliament. An MP would be unable to discuss a statement made in Parliament as part of an ongoing and public debate. As the Constitutional Court has noted, the purpose of the privilege is to promote free debate.

The second question is to whom the privilege applies. FC ss 58 and 71 are fairly explicit: Cabinet members, Deputy Ministers and members of the NA and NCOP. It does not apply to people outside this list testifying before parliamentary committees. In *Dikoko* the Constitutional Court made it quite clear that these words could not be read to include anybody not explicitly listed.[5]

Third, is there any speech that the privilege does not cover? In *Swartbooi*, the Court acknowledged the possibility that there could be conduct 'that is so at odds with the values mandated by our Constitution that … the Constitution … could [not] conceivably have contemplated its protection' but found it unnecessary to decide the point.[6] In doing so, the Court raised the questions whether a council member who admitted during council proceedings that they had committed a serious criminal offence would be protected from criminal proceedings and whether councillors could attract personal liability by utilising the council's processes for a party political or other ulterior purpose. While the Court was correct to leave open the possibility that there may be some situation in which privilege is not

[1] *Dikoko* (supra) at para 40.
[2] 87 D.L.R. (3d) 373.
[3] [1994] 3 NZLR 1 (PC).
[4] *Jennings v Buchanan* [2002] 3 NZLR 145.
[5] *Dikoko* (supra) at para 45.
[6] Ibid at para 22.

protected, it must be emphasised that this must only be in highly exceptional circumstances if the protection is not to be silently eroded through uncertainty amongst MPs over whether they are protected.

Finally, while FC ss 58 and 71 protect MPs from civil and criminal liability, they do not exclude the possibility of punishment through Parliament's own rules — FC ss 58(1)*(a)* and 70(1)*(a)* make the exercise of freedom of speech subject to the house's rules and orders. Whether Parliament had the power to suspend a member for what she said in parliamentary proceedings was the issue in *De Lille*. De Lille was a member of the NA who made a statement in the NA suggesting that certain members of the African National Congress had been informers for the pre-1994 apartheid government. The African National Congress used its parliamentary majority to pass a resolution of the NA suspending de Lille as a punishment for her statement.

The Supreme Court of Appeal held that the NA could legitimately exclude members who were 'disrupting or obstructing its proceedings or impairing unreasonably its ability to conduct its business in an orderly or regular manner acceptable in a democratic society.'[1] This was inherent in its power to regulate its own proceedings. However, while it was necessary for Parliament to be able to suspend members who were disrupting debate, Parliament did not need the power to suspend a member after the infraction as punishment.[2] The Court concluded that the suspension imposed on de Lille was not authorized by the Constitution itself nor by any relevant legislation or the rules of the Assembly.[3] The resolution was accordingly held to be void.

This strict reading of FC s 58 is correct. Freedom of speech in Parliament is essential to the political process. The proper functioning of representative democracy depends on MPs having the freedom to speak openly in Parliament. Any issue that is placed beyond the protection of freedom of speech in Parliament is an issue that cannot be addressed by the political process. Moreover, if MPs do not know what they can or cannot say in Parliament without exposing themselves to internal punishment, they will incline towards self-censorship. Such a sword of Damocles would undermine deliberative democracy. In order to avoid these consequences, exceptions to freedom of speech in Parliament must be confined to a minimum and must be clearly defined. FC s 58(1)*(a)* and 71(1)*(a)* address these concerns by requiring all such limitations to be codified by the NA and the NCOP in rules which themselves have to be made with due regard to representative and participatory democracy, accountability and transparency.

In terms of FC ss 58(2) and 71(2), national legislation may prescribe additional privileges and immunities of the Assembly, the NCOP, Cabinet members, mem-

[1] *De Lille* (supra) at para 16.

[2] Ibid at para 17, citing *Kielly v Clarkson* [1842] EngR 593; [1842] 13 ER 225 (PC).

[3] *De Lille* (supra) at para 30. See also *De Lille & Another v Speaker of the National Assembly* 1998 (3) SA 430 (C), 1998 (7) BCLR 929 (C)('*De Lille HC*') at para 35 (Hlophe J reached the same conclusion as the Supreme Court of Appeal on a similar, but somewhat broader basis. He held that the s 58(1) guarantee was not subject to general limitation under s 36 of the Constitution, but could be limited only in terms of the rules and orders of the Assembly. Because the suspension imposed on de Lille was not authorized by the rules of the Assembly, the resolution was held to be an unconstitutional violation of her freedom of speech in the Assembly.)

bers of the Assembly and delegates to the NCOP, beyond those provided by FC ss 58(1) and 71(1). The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act has now fulfilled this role, but has only minimally extended the privileges and immunities already conferred by the Final Constitution.[1]

The Act does, however, specifically permit the suspension of a member as punishment.[2] This solves the authorization problem identified by the Supreme Court of Appeal in *De Lille*. It could still be argued that ex post facto punishment violates FC s 58(1) and the right to freedom of expression. This was the conclusion of the High Court in *De Lille*. However, the challenge would have to take the form of a constitutional challenge to the Act. As discussed above, a court reviewing the Act is likely to give the legislature a significant degree of deference as it concerns the internal functioning of Parliament.

17.8 Political Parties

Political parties are integral to the legislative process. They are, ultimately, the bodies that, through their influence over both Parliament and the executive drive, direct and determine the legislative agenda and the outcomes of the legislative process. The role of political parties is particularly intense when one party has a clear majority in both houses.[3] The line between party and government is often blurred and Parliament loses some of its autonomy and may be perceived as a mere implementing agent of the ruling party's policies.

Yet how the law should regulate political parties is a very difficult question. Political parties are the quintessential voluntary association. There is not only a general constitutional right to association,[4] but also a specific right to form a political party[5] and participate in the activities of a political party.[6] State interference in the decisions parties take, or the way they are structured would risk violating these elemental political rights.

Yet, at the same time, political parties take decisions that are decidedly public in character. They effectively determine the membership of the legislature by writing party lists for elections, controlling their own membership and nominating delegates to the NCOP. They often initiate policy, and have enormous power over the executive and the legislature concerning the implementation of policy. It would be naïve to pretend that political parties are just another voluntary association, like a

[1] Section 6 of the Act extends the existing privileges and immunities to joint sittings of the two houses.

[2] Powers Act ss 12 and 13.

[3] For a critical discussion of the role of a dominant ANC in South Africa and its relationship with the Constitutional Court, see S Choudhry '"He Had a Mandate"; The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1.

[4] FC s 18(1). See S Woolman 'Application' in S Woolman & Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

[5] FC s 19(1)*(a)*.

[6] FC s 19(1)*(b)*. For a discussion of FC s 19(1), see J Brickhill & R Babiuch 'Political Rights' in S Woolman, Bishop & Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) §45.8.

chess club, a stokvel or a neighbourhood watch organisation. Political parties are different and should be treated differently, but where exactly do we draw the line?

Are they private entities like any other voluntary association, unbound by the strictures that regulate the state? Or are they elements of our constitutional system of government that bear the same constitutional responsibilities and limitations as other organs of state? The answer falls somewhere between these two extremes. In this section we discuss the general role and status of political parties. We then look at how the Constitutional Court has dealt with their role in the legislative process.

(a) Public or Private

There are several decisions that consider whether political parties are public or private bodies. Most of them arise in the context of the right to administrative justice, which is addressed elsewhere in this book.[1] No coherent position has yet emerged as there is significant disagreement at High Court level.

First, in *Bushbuck Ridge Border Committee*, a local association attempted to force the ANC (and the governments it controlled) to honour a promise made prior to the 1994 elections to move the area where they lived from the Northern Province (now Limpopo) to Mpumalanga.[2] The ANC had attempted to amend the Interim Constitution to that end, but failed to secure the required votes in the NA. The applicants argued that the ANC's failure to fulfil its promise violated their right to just administrative action. Kirk-Cohen J easily rejected the claim directed at the ANC: '[I]t is a political party which did not perform any administrative act, nor could it do so. It merely made promises, as did all concerned, which promises were of a political nature.'[3]

In *Marais v Democratic Alliance* the court considered whether a decision to strip the mayor of Cape Town of his membership of a political party — and thereby remove him from office — constituted administrative action.[4] Van Zyl J concluded that the decision was a purely political one that, despite the public interest in the outcome, could not be described as administrative action. However, the court nonetheless set the party's decision aside for failing to comply with the rules of natural justice.[5]

[1] J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 63.

[2] *Bushbuck Ridge Border Committee & Another v Government of the Northern Province & Others* 1999 (2) BCLR 193 (T).

[3] Ibid.

[4] 2002 (2) BCLR 171 (C).

[5] This decision applied the common law standard of administrative review and so is not directly applicable under the new, constitutionalised system of administrative law. However, the decision may still be used to interpret the meaning of administrative action under PAJA.

Third, in *Van Zyl v New National Party & Others*[1] — a case that reflects naked political maneuvering[2] — the High Court held that the decision of a political party to recall a provincial delegate to the NCOP was administrative action under the Promotion of Administrative Justice Act ('PAJA').[3] Van Reenen J concluded that PAJA applied to all juristic persons — including political parties — who performed administrative acts as defined in PAJA. The main question was whether the decision to recall Van Zyl was 'public'. The Judge reasoned that the decision to recall 'has an influence on how the NCOP; the delegations of the respective provinces; and the joint committees on which delegates may serve, are constituted and may affect the manner in which those bodies perform their functions and duties, and that in turn may impact upon the interests of the community on provincial and national levels. Accordingly the exercising of that authority has a strong public component.'[4]

While *Marais* and *Van Zyl* support the proposition that that decisions of political parties that impact on who holds public office are 'public', the disclosure of who funds political parties is not, according to *Institute for Democracy in South Africa & Others v African National Congress & Others*, a public issue.[5] IDASA — an NGO working in support of good government — wanted to use the Promotion of Access to Information Act ('PAIA')[6] to force the four main political parties to disclose records of the donations they had received. One of the questions the High Court had to answer to decide the claim was whether political parties were public or private bodies in terms of PAIA.[7] The Act defined public bodies as including any 'functionary or institution when — (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation.' The important word here, as Griesel J noted, is 'when'. PAIA later makes explicit[8] that an institution can be public with respect to certain functions, but private regarding other actions. The *IDASA* Court concluded that, with respect to soliciting and receiving donations, political parties were acting entirely as private, voluntary associations.[9]

[1] 2003 (10) BCLR 1167 (C)('*Van Zyl*').

[2] Van Zyl — a member of the Western Cape provincial legislature — was subject to party disciplinary proceedings for proposing a motion of thanks to a disgraced former Premier. While those proceedings were ongoing, the Party nominated her as a delegate to the NCOP. In order to accept the post, she resigned her membership of the Provincial Legislature. Immediately following her appointment to the NCOP, the Provincial Legislature (dominated by the Party's members) passed a vote of no confidence in her ability to represent the province in the NCOP. The Party then resolved to recall her from the NCOP. The offer of the NCOP position was simply an elaborate political ploy to strip Van Zyl of her political influence without concluding the internal disciplinary process.

[3] Act 3 of 2000.

[4] *Van Zyl* (supra) at para 76.

[5] 2005 (5) SA 39 (C), [2005] 3 All SA 45 (C), [2005] ZAWCHC 30 ('*IDASA*'). For a discussion of the case, see S Bosch '*IDASA v ANC* — An Opportunity Lost for Truly Promoting Access to Information' (2006) 123 *SALJ* 615.

[6] Act 2 of 2000.

[7] This was an important distinction because public bodies have a wider duty of disclosure than private bodies. Private bodies need only disclose information that is 'required for the 'exercise or protection of any rights'. PAIA s 50(1)*(a)*.

[8] PAIA s 8(1).

[9] *IDASA* (supra) at paras 30-32.

'Such activities, insofar as they relate to the *private* funding of political parties, are not regulated by legislation. The respondents are, accordingly, entirely at liberty to generate an income from any lawful means, including donations, soliciting contributions from members, the sale of merchandise, the realisation of investments, and the like.'[1]

IDASA nicely demonstrates the current position: some activities of political parties are 'public', others are not. This is likely to be the case whether the challenge is based on PAJA, PAIA, other legislation, or the Constitution. Political parties occupy a strange hybrid position between a private voluntary association and organ of state. The law needs to recognise both faces — public and private. The courts have yet to develop a full theory identifying which powers or functions are public and which are private. And we do not attempt to do so here. It is an issue that is likely to be decided, to indulge in cliché, 'one case at a time'.

(b) The Role of Political Parties in the Legislative Process

While the previous section considered the general question of the nature of political parties and how the law regulates their actions, this section looks at the relationship between parties and the legislature. Some of the most contentious political struggles in recent years have raised the complicated relationship between the ANC as a political party, the ANC-led government, and the political strucutres that mediate and dictate the actions and policies of both the party and the state. The Court has uniformly declined to police the boundary between party and legislature.

When the Constitutional Court considered the challenge to floor-crossing legislation in *United Democratic Movement*,[2] the applicants argued that the legislation was irrational because its purpose was to promote the interests of the ANC and the New National Party. The Court was not impressed. In its view, the argument improperly 'equate[d] purpose with motive.'[3] Courts, it held, should not be 'concerned with the motives of the members of the legislature who vote in favour of particular legislation'.[4] In hewing to a clear separation between law and politics, the Court defined its role as confined to determining whether the legislation itself is constitutional.

In *Glenister I* the Court rejected an argument that it should intervene to prevent Parliament from considering a Bill on the basis that the Bill was introduced by Cabinet on the instruction of the ruling party.[5] The applicant contended that the purpose of abolishing the Directorate of Special Operations (better known as 'the Scorpions') was its success in prosecuting corruption within the ruling party. This allegation was not enough to move the Court to action. '[T]here is nothing wrong,'

[1] *IDASA* (supra) at para 30.

[2] *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening ; Institute for Democracy in South Africa & Another as Amici Curiae) (No 2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC), [2002] ZACC 21 ('*UDM*').

[3] *UDM* (supra) at para 56.

[4] Ibid.

[5] *Glenister v President of the Republic of South Africa & Others* 2009 (1) SA 287 (CC), 2009 (2) BCLR 136 (CC), [2008] ZACC 19 ('*Glenister*').

Langa CJ wrote, 'in our multi-party democracy, with Cabinet seeking to give effect to the policy of the ruling party.'[1]

A similar issue arose in *Merafong*.[2] The challengers alleged that the facilitation of participation by the Gauteng Provincial Legislature was a charade because the issue invoked in the proposed legislation had already been decided by the ANC National Executive Committee ('NEC'). The NEC had allegedly instructed its members in Parliament and the provincial legislatures to vote in favour of the proposed change. The Court took a slightly different approach.

The Court did not reject this submission outright. Van der Westhuizen J held, first, that the community had failed to prove that the members present at the hearings were not open to their concerns. He also held that public participation does not mean that 'the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government.'[3] However, finding that the public's views are not binding 'is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public.'[4] The *Merafong* Court's holding implies that legislators have a duty to be willing to consider views opposed to the views of the party they represent. Of course, this duty is extremely difficult, if not impossible, to enforce.[5] However it does suggest that the Court now possesses a more nuanced vision the relationship between parties and Parliament.

One of the Court's more recent direct examination of the ANC's influence on Parliament — *Poverty Alleviation Network*[6] — also concerned provincial boundary legislation, and seems to close down some of the space left open in *Merafong* (although in a different doctrinal context). As discussed earlier,[7] Matatiele Municipality had been moved from KwaZulu-Natal to the Eastern Cape. The Court found that the KwaZulu-Natal provincial legislature had not met its constitutional obligation to facilitate public involvement and struck the law down. The legislature — in line with the ANC policy on the matter — duly passed the legislation again,[8] this time following the correct procedure. The people of Matatiele again took their case to the Constitutional Court. They argued that the law was irrational because the legislators simply voted as they were instructed by the ANC. Rehashing the Court's reasoning in *UDM* and *Merafong*, Nkabinde J complained that the 'argument requires the Court to go behind the rationally enacted constitutional

[1] *Glenister I* (supra) at para 53. We must note one caveat about this holding: It was based on the very high hurdle for intervention before a Bill becomes an act.

[2] *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC), [2008] ZACC 10, ('*Merafong*').

[3] Ibid at para 50.

[4] Ibid at para 51.

[5] In the absence of some sort of 'smoking gun', it will be impossible to prove that an MP was not open to convincing as she will always be able to allege that she simply weighed the arguments and came down on the side of government policy.

[6] *Poverty Alleviation Network & Others v President of the Republic of South Africa & Others*, 2010 (6) BCLR 520 (CC), [2010] ZACC 5 ('*Poverty Alleviation Network*').

[7] See §17.6*(a)*(ii)*(cc)*(4) above.

[8] Thirteenth Constitutional Amendment, 2007.

amendment and investigate the motives of Parliament and the ruling party. This the Court cannot do.'[1] She continued:

> The Court cannot concern itself with the individual motives of legislators. There is good reason for this: if the Court preoccupies itself with what precedes the passing of the legislation (the motive), to the exclusion of its actual purpose, it would fail to focus on the proper object of the enquiry, which is the rationality of the legislation and not necessarily the motives of those who enacted it.[2]

Together, *UDM*, *Glenister I*, *Merafong* and *Poverty Alleviation Network* paint a picture of a Court unwilling to ensure that the legislatures retain some autonomy from the ruling party's internal decision-making bodies. While it would probably prefer parties to afford legislators some leeway, it will not prevent a party from forcing its members in the country's legislative bodies from adhering to party discipline.

Sujit Choudhry has recently argued that these cases 'reflect[ ] the Court's inadequate understanding of the concept of a dominant party democracy, its pathologies, the pressure it puts on what is otherwise a formally liberal democratic system because of the lack of alternation of power between political parties, and how this pressure is generating constitutional challenges.'[3] He has suggested an alternative set of doctrines that would afford the Court a central role in regulating the relationship between party and state.

South Africa, Choudhry argues, is a dominant party democracy — a democracy where one party retains power for a significant period of time. 'Dominant party democracies', he argues, 'display a characteristic set of pathologies:'

> *(a)* the use of public resources by dominant political parties as political [resources] to distort electoral competition;
> *(b)* deliberate attempts by dominant parties to change the rules of electoral competition to fragment opposition parties and diminish their ability to offer a credible alternative;
> *(c)* the erosion of federalism to undermine the ability of opposition parties to form governments at the sub-national level and deploy the political resources provided by incumbency to enhance their competitiveness at the national level;
> *(d)* the subordination of the parliamentary wing of a dominant political party to its non-parliamentary wing, thereby shifting politics into the party and out of the legislature, diminishing the central role of the legislature in national political life.[4]

All of these practices are present — to varying degrees — in South Africa.

Choudhry argues that the Constitutional Court should play a strong role in trying to avoid the dangers of dominant party democracy. He suggests five doctrines that the Court could employ to achieve that end. First: 'anti-domination'. This doctrine would outlaw 'any exercise of public power that has as its principal goal the preservation, enhancement or entrenchment of the dominant status of a dominant political party.'[5] *UDM* is an example of this phenomenon because floor-crossing

[1] *Poverty Alleviation Network* (supra) at para 73.
[2] Ibid.
[3] S Choudhry "'He Had a Mandate"; The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1.
[4] Choudhry (supra) at 32.
[5] Ibid at 34.

was designed — at least in part[1] — to increase the ANC's majorities in the national and provincial legislatures. Although the Court was rightly hesitant to examine legislators' motives in all cases, Choudhry's anti-domination doctrine is limited to laws which are motivated by a desire to entrench the power of the dominant party.

Second, Choudhry argues that courts should not permit the dominant party to capture independent institutions. In a dominant party democracy, independent institutions prevent abuse of power by the ruling party by taking decisions that would otherwise be taken by the state. The role of courts is to 'focus their efforts on strengthening and buttressing the institutional structures that check partisan abuse in dominant party democracies, as opposed to checking those individual abuses themselves.'[2]

Third, the non-usurpation doctrine aims to prevent elected representatives from having all of their actions determined by unelected structures and members of the party. *Merafong* and *Poverty Alleviation Network* are, on Choudhry's telling, examples of this unwelcome phenomenon. 'The real problem', he contends, 'is not abdication; it is the seizure of public power. The purpose of the [non-usurpation] doctrine is to protect public officials who are democratically elected, and through them, the democratic process, from unelected party officials who lack democratic legitimacy and attempt to usurp and wield public power.'[3] The Constitutional Court should, Choudhry argues, have relied on this doctrine — rather than public participation or rationality — to invalidate the ANC's attempt to instruct legislators how to vote on the boundary amendments. While enthusiastic about this doctrine in theory, Choudhry notes that the evidentiary difficulties of determining who took a decision will cause courts to under-enforce the doctrine.[4]

Finally, Choudhry takes on cadre deployment. In his view, the ultimate evil of the ANC's dominance is the deployment and removal at whim of its members from legislative and executive posts. The ANC's power to dictate to MPs and MPLs how to vote ultimately 'depends on the threat of deployment, and redeployment, to be effective. If political office-holders do not toe the party line, they can be removed by the ANC NEC, and replaced with cadres who will be compliant. Thus, dictation presupposes deployment.'[5] Choudhry's opposition to cadre deployment takes two forms: anti-seizure and anti-centralisation. Drawing on decisions of the German Constitutional Court,[6] he argues that cadre deployment 'directly rob[s] voters of their power', because '[i]nstead of voters electing MPs through their inclusion

[1] The main opposition party, the Democratic Alliance, also supported the legislation as it hoped to gain seats as a result.

[2] Choudhry (supra) at 52.

[3] Ibid at 67.

[4] Choudhry (supra) at 70 ('The relationship between the parliamentary and non-parliamentary wings of political parties in fact lies on a continuum, between the poles of complete independence and subservience. There will be numerous situations in which the interplay between both wings of the party will defy easy categorisation. The evidence will be ambiguous. Moreover, the precise location of ultimate decision-making power may vary by issue. … Indeed, judicial self-doubt regarding the dangers of over-enforcement — ie to label a public decision as occurring under dictation, when in fact, it did not — may prompt courts to systematically under-enforce the doctrine of nonusurpation.')

[5] Ibid at 70.

[6] Ibid at 72 citing DP Currie *The Constitution of the Federal Republic of Germany* (1995) 106-7.

in a list, MPs can be removed and appointed by the ANC NEC.'[1] The anti-seizure doctrine would find the ANC's statutory power to deploy MPs unconstitutional. The anti-centralisation doctrine applies the anti-seizure doctrine to the provinces. The anti-centralisation doctrine recognises that the Constitution's commitment to 'co-operative government' between distinct spheres or levels of government is undermined by the concentration of power that should be held by the majorities of provincial legislatures in a single, unelected, national body: the ANC NEC.[2]

Choudhry offers a coherent and comprehensive alternative to the Court's current evasion of the problem of continued ANC dominance of the political scene. We remain agnostic about whether his approach is, all-things-considered, to be preferred. While attractive, it has significant weaknesses. First, were the Court to enforce these doctrines in the manner that Choudhry suggests, it would place itself on a direct collision course with the ANC. That may put the Court's very existence at risk. Second, all Choudhry's doctrines rely on clear evidence of who took a decision or why the decision was taken. That will often be impossible to determine with any certainty. A court — while generally sympathetic to Choudhry's concerns — may feel unable to assume that the ANC or the legislature has acted with a nefarious motive unless there is unquestionable proof. Third, Choudhry's approach means that practices that are permissible in a competitive political environment become threats to democracy when one party controls all the levers of power. There are sound interpretative reasons to believe that the Constitution should remain constant no matter what the current balance of political power might be.

Finally, several of Choudhry's doctrines — particularly the anti-domination doctrine — could themselves be seen as anti-democratic. When an overwhelming majority of the population places their votes and their faith in a party, does it really promote democracy for an unelected judiciary to put obstacles in its way? Our objection does not simply re-hash the counter-majoritarian chestnut. Choudhry's thesis is not merely that courts should apply the law and if that thwarts the ruling party, so be it. His thesis is that the courts should actively interpret the law so as to try and curb the power of a dominant party: The stronger the democratic mandate, the more courts are justified in hindering it. Can Choudhry's suspicion of centralised control really be reconciled with our proportional representation, list-based electoral system where voters vote for the party — with all its policies, structures and leadership — rather than individual candidates?[3] While we take no stand, that is a possible troublesome implication.

Despite our skepticism regarding both the practical utility and the substantive virtue of the Choudhry doctrine, in 2011 the Court indicated that it might be willing at least to start down that path. In *Glenister II*, a narrow majority of the Constitutional Court held that the Constitution imposed a duty on the legisla-

[1] Choudhry (supra) at 73 (Moreover: 'The ANC NEC can remove a President, regardless of whether she has lost the confidence of the National Assembly. The ANC NEC can likewise remove a member of the cabinet, regardless of whether she has been dismissed by the President, or whether the National Assembly has passed a motion of no-confidence in the cabinet.' Ibid.)

[2] Ibid at 76.

[3] We thank Jason Brickhill for alerting us to this problem.

ture to enact an independent corruption-fighting body.[1] The decision needs to be understood against the political background that led to the challenge. The original anti-corruption body — the Scorpions — was housed in the National Prosecuting Authority. It investigated several high-ranking ANC officials, including Jacob Zuma. It was accused — not without possible justification — of being used as a political weapon by one faction against another within the ANC. When Zuma won the ANC presidency from Thabo Mbeki at the 2007 ANC Polokwane Conference, one of the primary resolutions of the ruling party was to abolish the Scorpions. They were ultimately replaced with a new body called 'the Hawks'. The Hawks, unlike the Scorpions were located in the South African Police Service.[2] Hugh Glenister — a concerned businessman — challenged the legislation on various grounds.

While the Court rejected public participation[3] and rationality challenges, the majority accepted the argument that the legislation violated the government's s 7(2) duty to respect, protect and promote the Bill of Rights. Moseneke DCJ and Cameron J held that s 7(2) requires the government to establish an independent unit to fight corruption. In their view, the Hawks were insufficiently independent. We discussed the wisdom of the Court's use of s 7(2) above.[4] Here, we consider the details of the majority's views on the Hawks' independence.

There were two primary reasons why the *Glenister II* Court found the Hawks' structural guarantees of independence inadequate. First, the security of employment was insufficiently guarded. In sum: 'the lack of employment security, including the existence of renewable terms of office and of flexible grounds for dismissal that do not rest on objectively verifiable grounds like misconduct or ill-health, are incompatible with adequate independence. So too is the absence of statutorily secured remuneration levels. We have further found that the appointment of its members is not sufficiently shielded from political influence.'[5]

Second, the Court's 'gravest disquiet' lay with the political oversight of the Hawks. The legislation empowered a Ministerial Committee to set policy guidelines for the Hawks. While it acknowledged that the Committee could issue perfectly innocent guidelines, it was also possible that the guidelines could 'specify categories of offences that it is not appropriate for the [Hawks] to investigate — or, conceivably, categories of political office-bearers whom the [Hawks] is prohibited from investigating.'[6] In the clearest suggestion that the history of corruption investigations of senior government officials was playing on their minds, Moseneke DCJ and Cameron J wrote:

[1] *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC), [2011] ZACC 6 ('*Glenister II*').

[2] For more on the demise of the Scorpions and the rise of the Hawks, as well as *Glenister I* and *Glenister II*, see S Woolman 'Security Services' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS3, 2011) Chapter 23B.

[3] § 17.6*(a)*(iii)*(cc)*(5) above.

[4] § 17.5*(f)*(i) above.

[5] *Glenister II* (supra) at para 249.

[6] Ibid at para 230.

> It cannot be disputed that those very political executives [on the Ministerial Committee] could themselves, were the circumstances to require, be the subject of anti-corruption investigations. They "oversee" an anti-corruption entity when of necessity they are themselves part of the operational field within which it is supposed to function.[1]

The majority could easily have said that they should presume that the power to issue guidelines would not be abused. The Court's heightened suspicion can best be explained by a fear that the political elite would exploit the power for its own ends. That makes the finding a classic example of Choudhry's 'anti-capture' and 'anti-domination' doctrines in action. *Glenister II* must encourage those who hope that the Court can be an effective tool to manage the ANC's continued political dominance nationally and the DA's control of the Western Cape.

[1] *Glenister II* (supra) at para 232.

18 The President and the National Executive

Christina Murray & Richard Stacey

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18.1 Introduction

The President, who is elected by the National Assembly, is both Head of State and head of the national executive. In exercising powers as Head of State, the President acts alone.[1] However, when the President exercises 'executive authority'[2] he or she must do so together with the other members of Cabinet.[3] The Cabinet consists of the President, the Deputy President and Ministers,[4] all but two of whom must be drawn from the National Assembly. It is the Cabinet that governs the country, and all members of Cabinet are accountable to Parliament for the exercise of their powers.[5]

These apparently simple provisions frame a complicated, and sometimes unclear, set of legal and political relationships. The relationships between Cabinet and the President when 'Head of State' powers are exercised and between the President and the incumbents sof positions established by the Final Constitution, for instance, are particularly unclear. Secondly, the relationship between Cabinet and Parliament, briefly sketched in the Final Constitution, must be understood in the context of a complex matrix of constitutional, political and administrative arrangements that characterise the modern state. Thirdly, as government itself changes, and the influence of the New Public Management is felt in public administration in South Africa, relationships between Ministers, parastatals, privatised institutions providing public services and Parliament, are changing. Difficult questions of accountability are thrown up by these changes.

This chapter considers these issues. Its focus, like Chapter 5 of the Final Constitution, is the national executive. It is not concerned with what the Final Constitution terms the 'public administration' (often referred to as the public service and dealt with elsewhere in this work).[6] Instead it covers the constitutional arrangements that relate to the politicians who are collectively responsible for government in South Africa: the President and Ministers who form the national executive, as well as Deputy Ministers. Thus, following the Final Constitution, it uses the term 'the executive' more narrowly than many commentators who might include under it the Presidency, departmental Directors General and others.[7]

The way in which what the Final Constitution terms 'executive authority' is exercised is a central concern of the chapter. The Final Constitution uses the term 'executive authority' to describe the power vested in the National Executive

* We would like to thank Jeremy Raizon for excellent research assistance.

1 FC s 84(2).

2 Under FC s 85(1) the executive authority of South Africa is vested in the President.

3 FC s 85(2).

4 FC s 91(1).

5 FC s 92.

6 See A Bodasing 'Public Administration' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 23A.

7 See, for example, A Butler *Contemporary South Africa* (2004) 92-95.

but does not define it. Instead, FC s 85(2) explains how executive authority may be exercised. The list the section provides — which includes developing policy, coordinating the functions of government departments and implementing legislation — describes the familiar role of government: the national executive is responsible for implementing laws. But, more broadly, it also has the power to carry out the political agenda of the governing party provided that it acts within the constraints of the Final Constitution and has the support of Parliament.

(a) A parliamentary system

Political scientists often divide systems of government into three broad categories: parliamentary, presidential and 'hybrid'.[1] Usually, a purely presidential system has (i) a directly elected president,[2] who (ii) serves a fixed term; (iii) is both head of state and head of the national executive; (iv) is not accountable to the legislature; and (v) is subject to removal by the legislature only in special circumstances. On the other hand, a parliamentary system is characterised by a separate head of state and chief executive officer (usually called a Prime Minister) and an executive that (i) is comprised of members of the legislature; (ii) serves terms that are not fixed; and (iii) is accountable to Parliament. In parliamentary systems accountability to Parliament means that the executive must retain the confidence of Parliament to govern and can, usually, be dismissed by a simple majority. Most democratic systems, and almost all of those in Africa, now fall somewhere between these two models. The French system is, of course, the most famous hybrid, and many African jurisdictions have emulated it. There is a large number of variations. In Africa, elements of a presidential system tend to dominate political structures, and South Africa is one of just seven sub-Saharan countries that can be said to have a parliamentary system.[3]

Of course, no two systems of government are identical and South Africa's departs in a number of ways from the Westminster model of parliamentary democracy from which it was derived. First, in South Africa, the President is both Head of State and head of the executive and, although he or she must be elected from amongst the members of the National Assembly, once elected, the President

[1] This characterization risks oversimplification. Many studies propose more categories. See, for instance, A Siaroff 'Comparative Presidencies: The Inadequacy of the Presidential, Semi-presidential and Parliamentary Distinction' (2003) 42 *European Journal of Political Research* 287; A Siaroff 'Varieties of Parliamentarianism in the Advanced Industrial Democracies' (2003) 24 *International Political Science Review* 445. However, for the purposes of understanding the South African system, the key differences are captured by the traditional tripartite division used here.

[2] In other words, such a president is elected by the people on a ballot that is separate from the election and the ballot for the national legislature.

[3] The other parliamentary systems in Africa are in Botswana, Lesotho, Mauritius, Eritrea, Ethiopia and, depending on one's definition, Swaziland.

relinquishes his or her seat in the Assembly.[1] Second, two Cabinet Ministers may be chosen from outside the National Assembly.[2] Third, the term of Parliament is fixed to the extent that usually the National Assembly may not be dissolved within three years of an election.[3] These features distinguish South Africa's system from many in the Commonwealth. In particular, the fusion of head of state and head of executive in a single 'president' who is not a member of Parliament prompts the idea that the system is a presidential one. This deviation from the traditional parliamentary model may affect the manner of political leadership, but it has very little impact on the formal constitutional or legal operation of government. It is likely that the restriction on the National Assembly's power to call early elections is the more meaningful departure from the usual parliamentary arrangements. It is intended to introduce stability into the system by stopping opportunistic elections. But even this change to the system is not absolute. If the National Assembly does not elect a new President after a vote of no confidence under FC 102(2), the Acting President must call an election even if fewer than three years have elapsed since the last national election.[4]

Currently, three political, rather than constitutional, considerations distinguish South Africa from the parliamentary systems on which it is modelled: (1) dominance of the governing African National Congress Party (leading to South Africa's classification as a one-party-dominant state);[5] (2) the absence of parliamentary practices such as a regular and robust 'question time' in which the President as head of the executive and other Cabinet members must defend government policy;[6] and (3) the very limited chance of a change of government in the foreseeable future. These differences mean that government in South Africa often

[1] FC s 83. The Constitution Eighteenth Amendment Bill introduced in the National Assembly as a private member's Bill in June 2007 proposed the substitution of the President as Head of State and head of the national executive by a President as Head of State and a Prime Minister as head of the national executive. The preamble and the explanatory memorandum to the Bill argue that an executive Head of State is besmirched by ordinary politics while a Head of State 'above … political influence' can better fulfil his or her role as guarantor of the Constitution and institutional integrity. Similarly, an executive Prime Minister is able to carry out executive and policy responsibilities of government without concerning him- or herself with matters of State. For discussions of the roles of Presidents and Prime Ministers, see R Rose 'Presidents and Prime Ministers' (1988) 25/2 *Society* 61 and M Shugart & J Carey *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (1992) 28ff

[2] FC s 91(3)*(c)*. Ministers may be appointed from outside Parliament in other parliamentary systems. Such appointments occur occasionally in the UK and Canada but then arrangements will be made to secure a seat for that person as soon as possible. On Canada, see P Hogg *Constitutional Law of Canada* (2001-1) 9.7. Australia allows ministers to be chosen from outside Parliament but they must secure a seat in Parliament within three months. Constitution of Australia s 64.

[3] FC s 50(1).

[4] FC s 50(2).

[5] On the governing dominance of the ANC and South Africa's classification as a one-party dominant state, see H Giliomee and C Simkins (eds) *The Awkward Embrace: One Party-Domination and Democracy* (1999).

[6] For criticism of the question-time practices in the National Assembly and the NCOP, see C Murray and L Nijzink *Building Representative Democracy: South Africa's legislatures and the Constitution* (2002) 92-96; J February 'More than a Law-Making Production Line? Parliament and its Oversight Role' in S Buhlungu, J Daniel, R Southall and J Lutchman (eds) *South Africa 2005-2006: State of the Nation* (2006) 137-138; L Nijzink 'Opposition in the New South African Parliament' (2001) 8 *Democratization* 53.

looks very different from that in other parliamentary systems in the Commonwealth. Nevertheless, while South Africa develops its own practices, it is helpful to understand the way in which the systems with which it has most in common operate. Accordingly, we refer to practice in other parliamentary democracies where that is appropriate.

18.2 The President as Head of State and Head of the National Executive

FC s 83 opens Chapter 5 of the Final Constitution with the emphatic statement that '[t]he President … is the Head of State and head of the national executive'.[1] It continues that the President must 'uphold, defend and respect the Constitution as the supreme law of the Republic',[2] and, somewhat more generally, 'promote[] the unity of the nation and that which will advance the Republic'.[3] As the Final Constitution is the only source of power, the President may exercise only those powers conferred on him or her by the Final Constitution or by law that is consitent with the Final Constitution.[4] Where the President acts ultra vires, his or her actions are inconsistent with the Final Constitution and invalid.[5]

These constitutional arrangements mean that whenever the President acts, he or she must do so either as Head of State or as head of the national executive. FC ss 84 and 85 set out the powers of the two positions. The Constitutional Court has accepted that the powers and functions listed in FC s 84(2) are incidences of the President's role as Head of State, while those listed in FC s 85(2) are incidences of the President's role as head of the national executive:[6] even though the Final Constitution itself is not explicit in this regard. Indeed, the only explicit difference between the powers and functions of the President under FC ss 84 and 85 is the requirement of collective action in the latter section. The President exercises or performs the powers and functions set out in FC s 85(2) 'together with the other members of the Cabinet', while the President alone 'is responsible for' the functions set out in FC s 84(2). The exercise of executive authority in terms of FC s 85(2) is thus 'a collaborative venture in terms of which the President acts together with the other members of Cabinet'.[7] As

[1] FC s 202(1) establishes the President as Commander-in-Chief of the defence force but stipulates clearly that this power is an incident of the President's position as head of the executive.

[2] FC s 83(2)*(b)*.

[3] FC s 83(2)*(c)*.

[4] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the RSA and Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC)('*Pharmaceutical Manufacturers'*) at paras 17-20. See further I Currie & J De Waal *The New Constitutional & Administrative Law Volume 1: Constitutional Law* (2001) 235-237 (On the position of presidential powers not enumerated in the Constitution or national legislation.)

[5] FC s 2.

[6] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC)('*SARFU III')* at para 144. See also *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)('*Hugo'*) at paras 5-7 and § 18.2 *(a)*, *(b)* and *(c)* infra.

[7] *SARFU III* (supra) at para 41. See § 18.3 *(d)* infra.

Head of State, however, the President need consult no one when exercising a power or performing a function.[1]

(a) Distinguishing the President as Head of State and as head of the national executive

FC s 84(2) provides a precise list of the functions that the President performs as Head of State while FC s 85(2) describes broadly the ambit of executive authority that must be exercised by the President together with Cabinet. These constitutional provisions suggest that when the President merely formalises a decision made elsewhere, he or she usually acts as Head of State. But, where the exercise of a power involves some element of political discretion, that power usually falls within the President's capacity as head of the national executive and triggers the requirement that Cabinet support the decision.[2]

The presidential power of appointment provides a useful platform from which to distinguish the President's powers as Head of State and as head of the national executive because the President makes appointments in each of these roles. FC s 84(2)*(e)* empowers the President to make 'any appointments that the Constitution or legislation requires [him or her] to make, other than as head of the national executive'. FC s 85(2)*(e)*, in turn, contemplates that the President will exercise any power and perform any function provided for in the Constitution or in national legislation together with the Cabinet, which may include appointments. FC ss 173(3) and (4), for example, empower the President, 'as head of the national executive', to appoint the Chief Justice, Deputy Chief Justice, the President and Deputy President of the Supreme Court of Appeal, and the remaining judges of the Constitutional Court. Similarly, FC s 209(2) requires the President 'as head of the national executive' to appoint the heads of the national intelligence agencies. On the other hand, using the language of Westminster, FC s 174(6) states that the President must make other judicial appointments 'on the advice of the Judicial Service Commission' (JSC). No mention is made of the capacity in which the President acts in this section, but the absence of the qualification 'as head of the national executive' and the language of the provision (indicating that the President has no discretion and is bound to appoint the candidates that the JSC selects), support the view that the President acts as Head of State under FC s 84(2)*(e)* in such cases.[3] Similarly, FC s 193(4) requires the President to appoint members of the Chapter 9 institutions 'on the recommendation of the National

[1] But see the discussion of FC s 101, § 18.2 *(d)* infra.

[2] This requirement is captured in the South African system by the words 'together with the other members' in FC s 85(2).

[3] The term 'on the advice of' means 'on the instruction of' and leaves no discretion. See C Murray 'Who Chooses Constitutional Court Judges?' (1999) 116 *SALJ* 865, 865; H Corder 'Judicial Authority in a Changing South Africa' (2004) 24 *Legal Studies* 253, 263; Currie & De Waal *New Constitutional and Administrative Law* (supra) at 304.

Assembly'. No discretion can be exercised here and the President acts as Head of State, formalising decisions made in the National Assembly.

This interpretation of the different roles of the President, which categorises those functions which are formalities as Head of State functions and those which require discretion to be exercised as head of executive functions is supported by practice. The *Manual of Executive Acts of the President* states that '[t]he Office of the President interprets … Head of State appointments to be those appointments that the President makes for ceremonial or similar reasons such as when he is required to merely confirm candidates selected by another body or when he appoints persons under his powers listed under section 84(2) of the Constitution'.[1]

However, the division of the President's position into Head of State and head of the national executive with the power to act alone only in the first role and an obligation to act 'together with' Cabinet in the second, is not as clear cut as the opening words of Chapter 5 of the Final Constitution may suggest. First, FC s 84(1) is ambiguous: 'The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.' This section cannot be read to mean that the President has powers other than those that fall under one or other of the two named roles. The language of FC s 83, the absence of any other indication in the Final Constitution that the President has some other functions, and the fact that such a grant of authority would be a significant departure from usual understandings of the functions of the head of executive in both parliamentary and presidential systems, do not admit this interpretation. Instead, the better interpretation is that FC s 83 is a catch-all provision inserted to ensure that the President has all the power necessary to carry out the functions that he or she is given under the Final Constitution or legislation.[2]

A second question linked to the constitutional division of presidential powers between those exercised as Head of State and those exercised as head of the national executive is whether or not the list in s 84(2) is exhaustive of the powers of the president as Head of State. It is clear that none of the old common-law prerogative powers (that are not listed) continue to exist.[3] But the fact that the prerogative no longer exists is not conclusive of the question of whether all the powers that the President may exercise as Head of State are listed in FC s 84(2). Although the structure of the Final Constitution and the

[1] Executive and Legal Services: Office of the President *Manual of Executive Acts of the President of the Republic of South Africa* (March 1999) at para 3.10.

[2] In a careful interpretation of this provision, Currie & De Waal argue similarly, pointing to the distinction between 'powers' and 'functions'. They contend that the subsection ensures that the President has the powers necessary to carry out his functions or legal responsibilities. See I Currie & J De Waal *New Constitutional and Administrative Law* (supra) at 235-236. Of course, FC s 84(1) reflects a 'belts and braces' approach to drafting typical of the tradition of statutory drafting in South Africa but not particularly appropriate to a constitution which necessarily includes broad provisions that must be interpreted in context.

[3] For a brief discussion of prerogative powers, see § 18.2 infra.

tenor of the Court's judgments in *Hugo*, *SARFU III* and *Mohamed* make it clear that additional 'Head of State' powers should not be readily assumed, a couple of constitutional functions of the President that are not listed in FC s 84(2) seem to be best categorised as functions exercised as Head of State. For instance, FC s 177 requires the President to suspend and remove judges under certain circumstances. Here the decision is made by Parliament and the President has no discretion. It is not a function in which the Cabinet has any role and to require the President to act together with Cabinet in such cases would be meaningless. Such an action is thus best categorised as falling under the President's power as Head of State. Similarly, FC s 50 requires the President to dissolve the National Assembly if a majority of its members support such a motion and three years have passed since the last election. Again, here the President merely fulfils a formal role and presumably acts as Head of State. On the other hand, following the principle that where the Final Constitution is silent on the role in which the President fulfils a function, but discretion is to be exercised, the President must act together with the rest of Cabinet, the choice of the national anthem (FC s 4) and calling and setting dates for elections (FC s 49) are decisions taken as head of the national executive.[1]

A third ambiguity in the dual roles of the President is that some functions that seem most appropriately classified as 'head of the national executive functions' are not exercised 'together with' Cabinet. These intensely political functions relate to the formation of government and allocation of Cabinet responsibilities. Thus, the President acts alone in selecting, appointing and dismissing the Deputy President, the other members of Cabinet,[2] and Deputy Ministers, in allocating their portfolios, and in designating a Cabinet member as leader of government business in the National Assembly. In addition, the power to reallocate Cabinet portfolios must be one which the President may exercise alone — although it too is best understood as an aspect of his or her role as head of the National Executive.[3]

[1] Many of the sections in the Final Constitution that confer a power on the President state expressly that the power is to be exercised by the President as head of the national executive. See, for example, FC s 173(3) and (4) empowering the President, 'as head of the national executive', to appoint the Chief Justice, Deputy Chief Justice, the President and Deputy President of the Supreme Court of Appeal, and the remaining judges of the Constitutional Court, and FC s 209(2) requiring the President 'as head of the national executive' to appoint persons as heads of the national intelligence agencies.

[2] See FC s 91(2); *Mphele v Government of the Republic of South Africa* 1996 (7) BCLR 921 (Ck)(For the view that the power to appoint and dismiss includes a power to suspend.) See, further, § 18.3 *(a)* infra.

[3] The Presidency treats the reallocation of responsibility for specific Acts under FC s 97 as actions taken by the President as head of the executive as they are signed '[b]y order of the President-in-Cabinet'. Currie & De Waal classify the appointment of the Deputy President, other members of the Cabinet, Deputy Ministers and the leader of government business as acts which the President performs as Head of State. Currie & De Waal *New Constitutional and Administrative Law* (supra) at 241. Certainly, these actions could fall under the appointment power in FC s 84(2). However, that provision does not cover the power to assign portfolios. Moreover, although the classification does not appear to have any practical consequences, the suggestion that these functions are Head of State functions seems to undermine the constitutional intention to create some distinction between those activities that are political, and thus appropriately partisan, and those that should not be so.

Often the distinction between the President's roles as Head of State and head of the national executive will not matter. However, as we discuss below, the President must exercise the powers in FC s 84(2) him or herself. On the other hand, when acting as head of the national executive, the President must have the support of his or her Cabinet colleagues.

(b) The President as Head of State[1]

These powers exercised by the President as Head of State are, in general, different in nature to the powers and functions conferred on the President as head of the national executive and can usually be distinguished from decisions as head of the national executive by a lack of political discretion. Some of the President's powers as Head of State cast him or her as 'overseer' of the democratic process, such as the powers relating to abstract review of Bills in FC ss 84(2)*(a)*, *(b)* and *(c)*.[2] Others anticipate him or her activating mechanisms to resolve political problems, such as the power to summon extraordinary sittings of Parliament (FC s 84(2)*(d)*)[3] or to call a referendum (FC s 84(2)*(g)*). Some of the powers and functions are, in essence, ceremonial: the receiving and recognising of foreign diplomatic and consular representatives (FC s 84(2)*(h)*), and conferring honours (FC s 84(2)*(k)*). Other powers of appointment require the President merely to confirm decisions taken elsewhere in the political process (FC s 84(2)*(e)*). The FC s 84 power to appoint judges other than Constitutional Court judges and the President and Deputy President of the Supreme Court of Appeal is just such an example.

Under FC s 79, President must assent to a bill passed by Parliament for it to become law. The exercise of this Head of State power, covered in FC ss 84*(a)*, *(b)* and *(c)*, is not a formality. FC s 79(1) contemplates that if the President has concerns about the constitutionality of a Bill he or she can refer it back to the National Assembly for reconsideration. If, after the National Assembly has reconsidered a Bill, the President is still concerned about its constitutionality he or she 'must either *(a)* assent to and sign the Bill; or *(b)* refer it to the Constitutional Court for a decision on its constitutionality' (FC s 79(4)).[4] Importantly, in deciding whether or not to assent to a bill, the President may raise 'constitutional' reservations only,

[1] For a review of the principal powers as Head of State, see Currie & De Waal *New Constitutional and Administrative Law* (supra) at 239-245.

[2] C Murray 'Who Chooses Constitutional Court Judges?' (supra) at 866.

[3] President Thabo Mbeki summoned an extraordinary sitting of both Houses of Parliament in June 2005 when he dismissed Deputy President Jacob Zuma. See 'Deputy President Sacked' *Mail & Guardian Online* (14 June 2005) available at http://www.mg.co.za/articlePage.aspx?articleid=243121&area=/breaking_news/breaking_news__national (accessed 20 June 2007).

[4] On the Constitutional Court's powers of abstract review see S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17. See also *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC).

and not political ones.[1] And, where the National Assembly accommodates the President's concerns following a referral in terms of FC s 79(4), the President must assent to and sign the Bill. Similarly, where the Constitutional Court decides that a Bill referred to it by the President is constitutional, he or she must assent to and sign the Bill (FC s 79(5)). As with other obligations borne by the President as Head of State, failure to perform these functions would amount to a failure to perform a constitutional obligation and would be justiciable before the Constitutional Court (FC s 167(4)*(e)*).

It would overstate the matter to claim that no Head of State functions have a potentially partisan element. In particular, the pardoning power is a powerful political tool — as its use since 1994 demonstrates.[2] Similarly, a decision to consti-

[1] See Currie & De Waal *New Constitutional and Administrative Law* (supra) at 240-241. This section was used three times under Mandela's five year presidency and once since 1999 (Broadcasting Bill B94F-98, Tobacco Products Control Amendment Bill B117F-98, Liquor Bill B131B-98, Independent Communications Authority of South Africa Amendment Bill B32D-2005). The Liquor Bill was the first bill to be sent to the Constitutional Court by the President, pursuant to his powers under FC ss 84(2)*(c)*/79(1). The Liquor Bill was passed by Parliament in November 1998. The President referred it back to the National Assembly for reconsideration but the National Assembly returned it to the President without amendments. The President then referred it to the Constitutional Court for a decision on its constitutionality. See *Ex Parte President of the Republic of South Africa NO: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), 2000 (1) BCLR 1.. In April 2006, President Mbeki sent the Independent Communications Authority of South Africa Amendment Bill back to the National Assembly under FC s 84. Parliament approved changes and the President assented to the Bill (now the Independent Communications Authority of South Africa Amendment Act 3 of 2006). See Parliament of the Republic of South Africa *Announcements, Tablings and Committee Reports* 44 -2006 (26 April 2006) 562; L Gedye 'Mbeki Bounces Icasa Bill' *Mail & Guardian Online* 21April 2006 available at www.mg.co.za/articlePage.aspx?articleid=269702&area=/insight/insight__national/ (accessed 5 February 2008) and South African Associated Press, 'Committee Approves Draft Changes to Icasa Bill' *Mail & Guardian Online* 26 May 2006 available at http://www.mg.co.za/articlePage.aspx?articleid=272820&area=/breaking_news/breaking_news__national/ (accessed 5 February 2008).

[2] On 27 June 1994, acting pursuant to his powers under IC s 82(1)*(k)* , President Mandela and the Executive Deputy Presidents De Klerk and Mbeki signed a document styled Presidential Act No. 17, in terms of which special remission of sentences was granted to certain categories of prisoners. The category of direct relevance to the *Hugo* proceedings was 'all mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years'. The Presidential Act provided, inter alia, that:

> In terms of section 82(1)*(k)* of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), I hereby grant special remission of the remainder of their sentences to:
>
> — all persons under the age of eighteen (18) years who were or would have been incarcerated on 10 May 1994; (except those who has escaped and are still at large)
> — all mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years;
> — all disabled prisoners in prison on 10 May 1994 certified as disabled by a district surgeon.
>
> Provided that no special remission of sentence will be granted for any of the following offences or any attempt, soliciting or conspiracy to commit such an offence:
>
> — murder; culpable homicide; robbery with aggravating circumstances; assault with intent to do grievous bodily harm; child abuse; rape; any other crimes of a sexual nature; and trading in or cultivating dependence producing substances.'

See *Hugo* (supra) at para 2, fn 3.

In 1999 Allen Boesak, who at the time charges were laid was chairperson of the Western Cape branch of the ANC, was convicted on four counts of fraud and sentenced to prison (http://www.sahistory.org.za/pages/people/bios/boesak-a.htm). Boesak applied for a pardon twice. On 15 January 2005, acting pursuant to his powers under FC s 84(2)*(j)*, the President granted Boesak a pardon and

tute a commission of enquiry and the choice of its members may serve partisan political purposes even if the commission itself operates within a legal framework that protects its independence.

What is clear is that if the President allows the powers in FC s 84(2) to be exercised by another person, as a result of an abdication, a delegation or what is referred to in administrative law as unlawful referral or dictation,[1] that election would be inconsistent with FC s 84(2) and invalid.[2] Nevertheless, although the President must make the final decision when acting as Head of State, the Constitutional Court has held that 'it is not inappropriate for him or her to act upon the advice of the Cabinet and advisers.'[3]

his criminal record was expunged. See statement of the Department of Justice and Constitutional Development; 'The Process for Presidential Pardon in terms of section 84(2) *(j)* of the Constitution of the Republic of South Africa, 1996 to expunge criminal records a special reference to Dr Allan Aubrey Boesak's case' 18 January 2005, available at http://www.info.gov.za/speeches/2005/05011815151001.htm (accessed 3 February 2008).

On 21 November 2007, pursuant to FC s 84(2)*(j)*, the President, announced a process for the consideration of pardon requests from 'people convicted for offences they claim were politically motivated, and who were not denied amnesty by the TRC'. He stated that Government was 'in possession of at least 1062 applications for presidential pardons by people who have been found guilty of offences which were allegedly committed with a political motive, arising from the conflicts of the past'. Relying on the Constitutional Court decision in *Hu*go the President stated; 'I believe that the sum total of all this is that the President has an obligation to consider all requests made to him or her to pardon or reprieve offenders and remit any fines, penalties or forfeitures. At the same time, having thus applied his or her mind, the President is under no obligation to accede to the requests made to him or her, provided that she or he proceeds in a rational manner.' The President established a Parliamentary Reference Group made up of representatives of each political party represented in the National Assembly to assist him in properly discharging his constitutional responsibility to consider the requests made to the President to pardon those who have been convicted of the crimes in issue. The President noted, however, that the Reference Group would 'not in any way subtract from the obligation placed by the Constitution on the President, and described by the Constitutional Court, for the President to grant pardons, etc. In other words, the constitutional task to grant pardons and so on will remain with the President'. The cut off date for applications for pardon under these arrangements is 15 April 2008. 'Address of the President of South Africa, Thabo Mbeki, to the Joint Sitting of Parliament to Report on the Processing of some Presidential Pardons — Cape Town' (21 November 2007) available at http://www.thepresidency.gov.za/main.asp?include=president/sp/2007/sp11211540.htm (accessed 3 February 2008). The pardoning power is discussed in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* (supra) at paras 114–117.

[1] See C Hoexter *Administrative Law in South Africa* (2007) 243-46. See also *Minister of Environmental Affairs and Tourism and another v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) at para 20; *Hofmeyr v Minister of Justice* 1992 (3) SA 108, 117 *(c)*.

[2] *SARFU III* (supra) at para 38. See also FC s 2.

[3] *SARFU III* (supra) at para 41. However, many functions listed in FC s 84 give the President no discretion. FC ss 101(1) and (2) require any decision by the President taken in terms of legislation or with legal consequences to be in writing and countersigned by the member of Cabinet whose functions the decision concerns. See § 18.2 *(a)*(ii)(aa) infra.

As the Constitutional Court has noted on a number of occasions, the powers of the Head of State, listed in FC s 84(2), 'have their origins in the perogative powers exercised under former constitutions by heads of state'.[1] Indeed, they are often referred to as 'prerogative powers'. But their status changed fundamentally by their express inclusion in the Final Constitution. Before 1994, following the Westminster model, the 'prerogative' was a source of power for South African Heads of State, derived not from the Constitution or other statutes, but from the common law. Over time, in Britain, most of the once immense prerogative powers of the Crown (or Head of State) were brought under the control of Parliament. Nevertheless, some remained outside parliamentary control. Thus Dicey states that '[t]he prerogative is the name for the remaining portion of the Crown's original authority….Every act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative.'[2] More recently, in Britain, South Africa and elsewhere, the view that courts could not examine the way in which the remaining prerogative powers were exercised was challenged and gradually eroded.[3] The Interim Constitution brought the debate to an end in South Africa. The Constitutional Court has said emphatically that the Head of State has none of the old prerogative powers other than those listed in FC 84(2)[4] and that these powers are subject to review under both the Interim Constitution and the Final Constitution.[5]

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[1] *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC) para 31. See also *SARFU III* (supra) at para 144 and, for the same proposition in relation to IC s 82(1), *Hugo* (supra) at para 8. In keeping with a constitutional democracy in which all power is derived from the Constitution, neither the Interim Constitution nor the Final Constitution uses the language of the royal prerogative. Under the South Africa Constitution Act 32 of 1961, the President 'as Head of the State' was expressly authorised to exercise the powers that the Queen was entitled to exercise 'by way of prerogative' prior to the commencement of the Act (s 7(4)). The South Africa Constitution Act 110 of 1983 contained a similar provision, again referring expressly to prerogative powers. The Interim Constitution made no reference to the prerogative powers, but the powers of the President as Head of State which originated from the royal prerogative were to be found in IC s 82(1). This approach is followed in FC s 84(2). See *Hugo* (supra) at para 7. Although derived from the prerogative powers traditionally exercised by the English Monarch, these powers are not identical in all respects to the royal prerogatives. See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 116.

[2] A Dicey *The Law of the Constitution* (10th ed 1959) 424-5 as quoted in C Turpin *British Government and the Constitution Text, Cases and Materials* (5th ed 2005) 420. For role of English law relating to the prerogative in South Africa, see *Pharmaceutical Manufacturers Association of South Africa In re: The Ex Parte Application of the President of the RSA* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 36.

[3] See Hoexter *Administrative Law* (supra) at 32-34 especially fn 183.

[4] *SARFU III* (supra) para 144; *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC) at para 31. See also *Hugo* (supra) at para 8 for the same proposition in relation to IC s 82(1).

[5] *Hugo* (supra) at para 13. The position is the same under the Final Constitution. FC s 8(1) states that the Bill of Rights applies to all law and binds the executive. Further, while IC s 75 required the President to exercise and perform his or her powers and functions subject to and in accordance with this Constitution', FC s 83*(b)* states that the President 'must uphold, defend and respect the Constitution as the supreme law of the Republic'. See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 116.

The critical question is what level of review applies to such action. The broad distinction between administrative action and other exercises of state power needs to be kept in mind. Administrative action is subject to a more searching form of review than 'executive action'.

President of the Republic of South Africa v Hugo was the first case concerning the review of the President's powers as Head of State and settled the initial question by finding that such actions are reviewable. However, the context and circumstances of *Hugo* limit the extent of the finding. The question in *Hugo* was whether a decision by the President to pardon female prisoners with children below the age of 12 was inconsistent with the equality provisions of the Interim Constitution because it discriminated against male prisoners in the same position. The basis of the complaint was that the President's conduct was invalid in light of IC s 4, which, like FC s 2, stated that the Constitution 'is the supreme law of the Republic' and 'conduct inconsistent with it is invalid'. The Court held that where the substance of a presidential decision is inconsistent with a provision of the Final Constitution, or the effect of the decision is to violate a right in the Bill of Rights, the decision will be found invalid. *Hugo* did not deal with the question of whether courts are able to regulate the exercise of presidential power on grounds other than the substance or effect of the action.

The question in *President of the Republic of South Africa v South African Rugby Football Union* (*SARFU III*)[1] was whether the President's decision in terms of FC s 84(2)*(f)* to appoint a commission of inquiry into the functions of the South African Rugby Football Union (SARFU) amounted to an administrative action for the purposes of FC s 33(1). If it did, the President would have had to comply with the requirements of lawfulness, reasonableness and procedural fairness imposed by FC s 33(1).[2] In considering this question the Court made several important

[1] 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC).

[2] FC s 33(1) and (2) reads:

'(1) Everyone has the right to administrative action that is lawful, reasonable, and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.'

In terms of Item 23(2)*(b)* of Schedule 6 to the Constitution, FC s 33(1) and (2) were, until the enactment of national legislation required by FC s 33(3) to 'give effect to' these rights, deemed to read as follows:

Every person has the right to –

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.

At the time *SARFU III* was decided the provisions of Item 23(2)*(b)* of Schedule 6 were still operative but the Court was nevertheless called on to decide whether the President's decision constituted administrative action or not.

observations as to the rest of the powers listed in FC s 84(2). It held that the powers in FC s 84(2)*(a)-(c)* are 'directly related to the legislative process', and in exercising these functions 'the President is clearly not performing administrative acts within the meaning of s 33'.[1] FC s 84(2)*(d)* and *(e)* are 'similarly narrow constitutional responsibilities which are not related to the administration of legislation but to the execution of provisions of the Constitution'.[2] The remaining powers in FC s 84(2), the *SARFU III* Court held, are closely related to policy and are not concerned with the implementation of legislation.[3] These powers too, are not within the ambit of FC s 33. The appointment of a commission of inquiry, the *SARFU III* Court concluded, is 'an adjunct to the policy formulation responsibility of the President', and cannot be described as administrative in character.[4]

However, *SARFU III* also stated that presidential action in terms of FC s 84(2) is subject to a range of constraints[5] and can be scrutinised by the courts on the basis of any of these constraints:

> [T]he President is required to exercise the powers personally and any such exercise must be recorded in writing and signed; …the exercise of the powers must not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers.[6]

Of these constraints on presidential power, the requirement to act consistently with the doctrine of legality has proved most important. In *New National Party of SA v Government of the Republic of South Africa and others,*[7] the Constitutional Court held that '[a]rbitrariness is inconsistent with the rule of law', and that legislation not rationally connected to a legitimate government purpose is arbitrary and therefore unconstitutional.[8] In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the RSA and Others,*[9] this aspect of the rule of law was held to apply equally to exercises of public power, generally, and presidential power, in particular:

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1 *SARFU III* (supra) at para 145.
2 Ibid.
3 Ibid at para 146.
4 Ibid at para 147.
5 *SARFU III* drew on *Hugo* and *Fedsure Life Assurance and Others v Greater Johannesburg Transitional Metropolitan Council*. 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC). In *Fedsure*, the Constitutional Court introduced the concept of the doctrine of legality. South Africa is a democratic state founded on the supremacy of the Constitution and the rule of law (FC s 1*(c)*). As a result, every exercise of public power must conform to the principles of the rule of law. The doctrine of legality is implicit in these principles, and it requires every act of public power to be lawful. The executive 'may exercise no power and perform no function beyond that conferred upon them by law' Ibid at para 58. Every exercise of a public power must be rooted in law, and can be scrutinised by a court for compliance with the terms of the empowering law. See F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11.
6 *SARFU III* (supra) at para 148 (footnotes omitted).
7 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)('*NNP*').
8 Ibid at para 24.
9 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC)('*Pharmaceutical Manufacturers*').

> It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement.[1]

The *Pharmaceutical Manufacturers* Court did go on to note the limitations of this doctrine:

> The setting of this standard [of rationality] does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.

The conclusions of the Court in the *SARFU III* and *Pharmaceutical Manufacturers* cases are to a large extent codified in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). A decision or action must fit the definition of 'administrative action' in s 1 of PAJA before it can be reviewed by a court or tribunal against the grounds of review listed in s 6 of the Act.[2] Importantly, a number of specific actions and decisions are excluded from the definition of 'administrative action', putting them beyond the scope of PAJA and FC s 33.[3] Among the exclusions are responsibilities of the President acting as Head of State including assent to legislation under FC s 79(1) and (4) and all but two of the s 84(2) functions. Consistent with the reasoning of *SARFU III*, the presidential power to appoint commissions of inquiry in FC s 84(2)*(f)* is excluded from the definition of administrative action. The two 'Head of State' powers that are conspicuously absent from the list of exclusions are the powers listed in FC s 84(2)*(e)* (appointments) and *(j)* (pardons and related matters).

Despite this omission, the reasoning of *SARFU III* is that where a power is closely related to policy rather than to the implementation of legislation, the

[1] *Pharmaceutical Manufacturers* (supra) at para 85.

[2] See J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) Chapter 63.

[3] The possibility that the meaning given to 'administrative action' in PAJA is not consistent with the understanding of the term contemplated in FC s 33 has been raised in a number of forums. See *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 97 (per Chaskalson CJ) and para 423 (per Ngcobo J); *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA); C Hoexter *Administrative Law in South Africa* (supra) at 216-17, R Stacey, 'Substantive Protection of Legitimate Expectations in the Promotion of Administrative Justice Act – *Tirfu Raiders Rugby Club v SA Rugby Union*' (2006) 22 *SAJHR* 664, 664. A court would be entitled to engage with the constitutionality of the definition in PAJA only where a litigant directly challenged PAJA's definition of administrative action as under-inclusive and inconsistent with FC s 33 (for cases setting out the principle that legislation can be declared unconstitutional only consequent upon a direct challenge to that effect, see *Ingledew v Financial Services Board: In Re Financial Services Board v Van Der Merwe and Another* 2003 (4) SA 584 (CC) at paras 20 and 22; *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC) at paras 61-2; and *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 29).

exercise of that power should not be treated as an administrative action. Applying the same reasoning to the omitted powers suggests that they do not constitute administrative action — they are all more closely related to policy than the implementation of legislation.[1] However, the omission of certain and specific executive powers from the list of exclusions in PAJA, alongside the inclusion of others, cannot be overlooked.[2]

There are differences in the nature of the various executive powers listed in the Final Constitution. This difference has to do with the extent of the discretion exercised by members of the executive when exercising executive powers. The broad extent of the discretion conferred by FC s 84(2)*(j)*'s power to grant pardons suggests that the power is policy-laden rather than administrative in nature and does not constitute administrative action in terms of FC s 33.

In this light it is hard to make sense of the omission of FC s 84(2)*(j)* from the list of exclusions in the definition of administrative action in PAJA. The intention of the legislature in pointedly enumerating specific executive powers to be excluded from the definition of administrative action seems clear: the executive powers set out in s 84(2) not excluded from the definition are to be considered administrative action if their exercise meets the other requirements of the definition of administrative action in s 1 of PAJA. A possible explanation of this apparent contradiction is that, by implicitly including the FC s 84 pardoning power, the scope of the definition of 'administrative action' in section 1 of PAJA simply exceeds the scope that FC s 33 contemplates for the term, and that section 1 of PAJA is unconstitutional to the extent of this inconsistency. A more productive approach is to notice that those executive powers not excluded from the definition of PAJA do not for that reason alone constitute administrative action. An action must still, in terms of PAJA, be 'a decision of an administrative nature' (see the definition of 'decision' in section 1 of PAJA). The determining characteristic is thus whether the decision is of an administrative nature. When it omitted FC s 84(2)*(j)* from the list of exclusions in PAJA, the legislature has anticipated that a decision to pardon or reprieve prisoners will on occasion be 'administrative in nature'.

[1] Hoexter argues that the powers 'to appoint ambassadors, to recognise diplomatic representatives, to confer honours and pardon offenders all refer to policy-laden activities likely to bear little or no relation to the implementation of legislation.' Hoexter *Administrative Law in South Africa* (supra) at 34.

[2] *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Innovative Medicines SA as* Amici Curiae*)* 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 (CC) at para 126. Chaskalson CJ concluded on the basis of this reasoning that regulations made by the Minister of Health constituted administrative action and were reviewable as such (para 135). Four members of the Court concurred (Langa DCJ, Ngcobo J, O'Regan J and Van der Westhuizen J), while five judges found the question of PAJA's applicability need not be decided (Madala J, Mokgoro J, Skweyiya J and Yacoob J concurring in the judgment of Moseneke J). No clear authority in this regard has yet been established, and courts continue to struggle with whether ministerial regulation-making is subject to review in terms of PAJA. See *McDonald and Others v Minister of Minerals and Energy and Others* 2007 (5) SA 642 *(c)* at para 25.

The omission from the list of executive actions excluded from the definition of administrative action of FC s 84(2)*(e)*, conferring on the President the power to make appointments as Head of State, should be seen in the same light. It must be assumed that the legislature envisaged that certain appointments made by the President as Head of State will be 'administrative in nature'. Where the President is required to make appointments as Head of State, however, the exercise of the power is usually purely formal. Where the President appoints judges to courts other than the Constitutional Court in terms of FC s 174(6), he or she is afforded no discretion, and 'must' make the appointment recommended by the Judicial Service Commission. The 'mechanical' nature of this power does not itself imply that it is not 'administrative'.[1] Even so, where the President exercises the power in FC s 176(4), there will be little to review. If the President failed to discharge the obligation to make the appointments recommended by the Judicial Service Commission, then he or she would have 'failed to fulfil a constitutional obligation'.[2]

In short, it seems unlikely that an FC s 84(2) power will ever fall within the definition of administrative action. But where the exercise of presidential power does not satisfy the requirements of the definition, it can nonetheless be reviewed against the less exacting standards of lawfulness and rationality inherent in the doctrine of legality. All presidential actions and decisions are thus subject to some form of regulation by the courts.

(c) The President as head of the national executive

As noted above, national executive authority is vested in the President but is exercised by the President 'together with the other members of the Cabinet'. This wording reflects the collaborative nature of a Cabinet in a parliamentary system and means, among other things, that Cabinet members are collectively responsible for decisions that are made in the exercise of national executive authority, whether or not they were party to the decision. This matter is discussed more fully below. Here we consider the functions of the President as head of the Cabinet.

Currently the Cabinet has 30 members — the President and Deputy President and 28 Ministers, all of whom are members of Parliament. As head of Cabinet, the President chairs Cabinet, may manage its agenda and determines its committee system. Currently, the President also appoints directors general (the bureaucratic heads of national departments). Taken together with the power to appoint and dismiss Ministers, these powers are considerable and have led observers of the British system, in which the Prime Minister wields similar powers, to argue that 'Cabinet government' has given way to 'prime ministerial government'.[3] However,

[1] See Hoexter *Administrative Law in South Africa* (supra) at 45-6.

[2] FC s 167(4)*(e)*. A complaint is justiciable before the Constitutional Court alone.

[3] See C Turpin *British Government and the Constitution: Text, Cases and Materials* (2005) 222ff; Butler *Contemporary South Africa* (supra) at 94-95.

studies in Britain suggest that the power of the head of the executive in parliamentary systems is in large part dependent on the political support that he or she commands and his or her particular style of leadership.

The short history of South Africa's new Cabinet system tells us little about the degree to which practice here will mirror that elsewhere. On the one hand, one might expect the electoral system of closed-list proportional representation through which all politicians are heavily dependent on their political party for their positions, rather than the electorate, to increase the power of the President over Cabinet. Individual Cabinet members have less incentive to promote the views of the electorate. On the other hand, the ANC's constitution requires its politicians to 'carry out loyally decisions of the majority and decisions of [ANC] higher bodies'.[1] When, as is currently the case, the party is controlled by a group that is different from that supporting the President, this schism may reduce the control of the President over his Cabinet colleagues.

We do know that during Mandela's presidency, the business of government was largely under the control of his deputy, Thabo Mbeki, and that Mbeki had some influence over the President's selection of ministers and deputy ministers.[2] Generally it is believed that since Mbeki became President, he has managed Cabinet firmly. And there is some speculation about whether the president's advisers in the Presidency are more powerful than ministers.[3] But the AIDS controversy shows how even a very powerful President, who may desire to exercise considerable control over government, must be responsive to political pressures. So, in 2002, in the face of the pressure of his Cabinet colleagues and the National Executive Committee of the ANC and despite his strong views on the subject, President Mbeki largely withdrew from the HIV/Aids debate and the government embarked on a major treatment programme with which he disagreed.[4]

(i) *Specific powers allocated by the Constitution to the President as head of the national executive*

The Final Constitution allocates some specific responsibilities to the President acting in his or her role as head of the national executive. These responsibilities encompass the appointment of the judges of the Constitutional Court, the President and Deputy President of the Supreme Court of Appeal,[5] four members of

[1] Clause 5.2 *(g)* African National Congress Constitution (As amended by and adopted at the 51st National Conference, December 2002) available at http://www.anc.org.za/show.php?doc=./ancdocs/history/const/const2002.html (accessed 11 February 2008).

[2] M Gevisser *Thabo Mbeki: The Dream Deferred* (2007) 659.

[3] R Calland *Anatomy of South Africa* (2006) 27ff, 61-62; N de Jager 'The ANC Government, Co-optive Power and the Perpetuation of Party Dominance' *Konrad-Adenauer Stiftung Seminar Report No 17* Johannesburg (October 2006) *Challenges to Democracy by One-Party Dominance: A Comparative Assessment* 19-20.

[4] Gevisser (supra) at 755-761; Butler (supra) at 95.

[5] FC s 174(3) and (4).

the Judicial Service Commission,[1] the National Director of Public Prosecutions,[2] the 'military command' of the defence force,[3] the National Commissioner of the police force,[4] heads to any intelligence services that may be established,[5] an inspector responsible for monitoring any intelligence services,[6] and members of the Financial and Fiscal Commission;[7] authorisation of the use of the defence force 'in co-operation with the police service; … in defence of the Republic; or …in fulfilment of an international obligation';[8] the declaration of a 'state of national defence';[9] and the establishment of any intelligence services.[10] In addition, in terms of FC s 202(1), the President is Commander-in-Chief of the defence force. Of course, although the Final Constitution states that the President must make the appointments noted above and fulfil various responsibilities relating to the security services, he or she must always act 'together with the other members of Cabinet'. This requirement means that he or she must have the support of the Cabinet.

In *Masetlha v President of the Republic of South Africa*,[11] the power to appoint heads of the intelligence services under FC s 209(2) was held to include the power to dismiss:

> [T]he power to dismiss a head of the Agency is a necessary power without which the pursuit of national security through intelligence services would fail. Without the competence to dismiss, the President would not be able to remove the head of the Agency without his or her consent before the end of the term of office, whatever the circumstances might be. That would indeed lead to an absurdity and severely undermine the constitutional pursuit of the security of this country and its people.[12]

But the power to dismiss is *not* an automatic ancillary to the power of appointment.[13] The exercise of this power turns on the constitutional role of the office concerned[14] and the language of the relevant provisions. The *Masethla* argument does apply

[1] FC s 178(1)*(j)*.
[2] FC s 179(1)*(a)*.
[3] FC s 202(1).
[4] FC s 207(1).
[5] FC s 209(2).
[6] FC s 210*(b)*.
[7] FC s 221(1).
[8] FC s 201(2).
[9] FC s 203.
[10] FC s 209(1).
[11] 2008 (1) BCLR 1 (CC).
[12] Ibid para 68.
[13] See, further, O Ampofo-Anti, K Robinson & S Woolman 'Security Services' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 23B.
[14] In *Masetlha,* Moseneke DCJ notes the importance of the 'operative constitutional and legislative scheme' (para 31) and Sachs J concurring notes the particular relationship that the Constitution envisages between the President and the head of the National Intelligence Agency in contrast, for instance, to that between the President and Ministers. *Masetlha* (supra) at para 228.

to the appointment of the military command of the defence force and the National Commissioner of Police because the primary responsibility of the incumbents of these positions is to execute government policy. Although the wording changes slightly in each case, the constitutional provisions under which the positions are established clearly stipulate that incumbents are directly responsible to Cabinet.[1] On the other hand, the power to appoint certain judges does not encompass a power to dismiss them because, to secure the independence of the judiciary, the Final Constitution sets out a special procedure for the removal of judges.[2] FC s 221(3) deals expressly with removal of members of the Financial and Fiscal Commission, permitting it on grounds of 'misconduct, incapacity or incompetence' only. Similarly, the role of the National Assembly in the appointment of the inspector of intelligence services suggests that the President could not dismiss that person without at least the involvement of the National Assembly.[3] The removal of those members of the Judicial Service Commission chosen by the President should also follow the appointment process. FC s 178(1)*(j)* requires the President to consult 'leaders of all the parties in the National Assembly' when making the appointments and thus he or she would need to consult similarly when removing them.[4]

The situation in relation to the removal of the National Director of Public Prosecutions (NDPP) is not spelt out but is evident from the broader constitutional role of the NDPP. First, unlike the head of an intelligence service, the military command of the defence force and the National Commissioner of the Police, each of whom must implement policy determined by Cabinet, the NDPP and the relevant Minister jointly determine prosecuting policy.[5] Second, FC s 179(4) states that national legislation 'must ensure' that the prosecuting authority can exercise its functions 'without fear, favour or prejudice'. Together these provisions point

[1] Under FC s 202(2) the defence force is 'directed' by a member of Cabinet. A Cabinet member must be 'responsible for' policing (FC s 206(1)) although the police are under the 'control' of the National Commissioner and not the Minister.

[2] FC s 177. It could also not be argued that the President could 'demote' judges by removing them from the specific positions to which he or she has appointed them without infringing their independence.

[3] Section 7 of the Intelligence Services Oversight Act 40 of 1994 limits grounds of removal to 'misconduct, incapacity, withdrawal of his or her security clearance, poor performance or incompetence'.

[4] IC s 105 (1)(i) provided for presidential nominees on the Judicial Service Commission. The Judicial Services Commission Act 9 of 1994 was promulgated to give effect to IC s 105. It has not been amended to bring it in line with FC s 178. On the removal of JSC members, section 2 states:

> (1) The members of the Commission designated as such in terms of section 105(1)*(c)*, *(e)*, *(f)*, *(g)*, *(h)* and (i) of the Constitution shall hold office for a term not exceeding five years: Provided that —
>
> *(a)* the President shall remove any such member from office at any time if the designator who or which designated such member, so requests; or
>
> *(b)* any such member may resign from office by giving at least one month's written notice thereof to the chairperson.

[5] FC s 179(5)*(a)*.

to a level of independence in the prosecuting authority not shared by members of the security forces. It would be impossible for the NDPP to act 'without fear, favour or prejudice' if he or she were subject to dismissal on the same terms as the National Commissioner of Police. The legislation enacted under FC s 179(4) is the National Prosecuting Authority Act.[1] The most significant protection it offers the prosecutorial service is to limit the grounds on which the NDPP may be dismissed.[2] The grounds are limited to 'misconduct; … continued ill health; … incapacity to carry out his or her duties of office efficiently; or …[a finding that] he or she is no longer considered a fit and proper person to hold the office concerned'.[3]

(ii) *Allocating portfolios, transferring functions under FC s 97 and temporary assignment of functions under FC s 98*

FC s 91(2) states the President must assign powers and functions to the Deputy President and Ministers. This is commonly referred to as the allocation of portfolios. The only constitutional formality is FC s 101's requirement that decisions taken by the President that have legal consequences must be in writing. Nevertheless, following the practice in other parliamentary systems, until June 1999 Cabinet appointments and changes in the allocation of portfolios were reported by a general notice in the *Government Gazette*.[4]

Acts of Parliament commonly specify the Cabinet member who should be responsible for their administration. Thus, legislation dealing with immigration will usually identify the Minister of Home Affairs as the responsible minister; legislation on courts, the Minister of Justice and so on.[5] FC s 97 anticipates that, in managing the allocation of responsibilities, the President may, nevertheless, wish to allocate the responsibility for a particular Act to another minister by proclamation.[6] This process allows the President to arrange Cabinet responsibilities in the way that he or she thinks will work best.[7]

[1] Act 32 of 1998.

[2] FC s 179(4) also means that one cannot argue that the Act unconstitutionally limits a power (the power to dismiss) that the President may exercise under the Constitution.

[3] Section 12(6)*(a)*.

[4] See, for example, GN 1065 *Government Gazette* 15792 3 June 1994; GN 1792 *Government Gazette* 16027 21 October 1994; GN 213 *Government Gazette* 16263 17 February 1995; and GN 1392 *Government Gazette* 20261 2 July 1999. There appear to be no similar Notices since July 1999.

[5] A problem with this approach is that the titles of ministerial portfolios may change. Some recent Acts are more sophisticated. Thus, the National Forests Act 84 of 1998 s 1 states that '"Minister" means the Minister to whom the President assigns responsibility for forests in terms of section 91 (2) of the Constitution'.

[6] See, for example, GN 21 *Government Gazette 26164* 26 March 2004 transferring responsibility for the National Key Points Act 102 of 1980 from the Minister of Defence to the Minister of Safety and Security and GN 27 *Government Gazette 17875* 27 March 1997 transferring responsibility for the Administration of the Land Bank Act 13 of 1944 from the Minister of Finance to the Minister of Agriculture.

[7] FC s 97, of course, limits the power of Parliament to regulate the allocation of responsibilities amongst Cabinet members. It also implies that Ministers may not reallocate functions amongst themselves. Only the President may do this. As we discuss below, at § 18.3*(a)*, FC s 99 is concerned with the assignment of functions between spheres of government and is not concerned with the allocation of responsibilities amongst Cabinet members.

FC s 98 serves a different purpose. It allows the President to assign the powers and functions of a member 'who is absent from office or is unable to exercise that power or function' to another member on a temporary basis. In such cases, no proclamation is necessary.[1]

(iii) *Review of executive decisions taken by the President as head of the national executive*

Action by the President that falls within the definition of administrative action will be subject to review under PAJA and FC s 33. Those actions that are not classified as administrative action must nonetheless comply with the principle of legality and can be reviewed against the standards of lawfulness and rationality.[2] The President therefore does not have an entirely unfettered or 'personal' discretion.[3]

(d) Formalities and executive decision making by the President — FC s 101

According to FC s 101, decisions of the President taken in terms of legislation or which have legal consequences must be in writing.[4] A written decision of the President must be countersigned by another Cabinet member 'if that decision concerns a function assigned to that other Cabinet member'.[5] Many presidential decisions, whether taken as Head of State or head of the national executive have legal consequences.[6] However, because FC s 101 is headed 'Executive decisions', it has been argued that the provisions of ss (1) and (2) do not apply to 'Head of State' decisions. This argument runs counter to the Constitutional Court's view of executive powers in *Hugo*. There, speaking for the majority, Goldstone J asserts unambiguously that actions of the President are always 'executive':

> There are only three branches of government viz. legislative, executive and judicial. The powers of the President, other than those set out in section 82(1), are without question executive powers. The question is whether those referred to in section 82(1) fall within a different category. In my opinion they do not. Whether the President is exercising constitutional powers as head of the executive (ie the Cabinet) or as head of state, he is acting as an executive organ of government. His powers are neither legislative nor judicial and there is no fourth branch of government.[7]

[1] There is some debate about the meaning of the word 'assign' in this and other constitutional contexts. See § 18.3*(l)*infra.

[2] See § 18.2 *(b)* supra; Klaaren & Penfold (supra) at Chapter 63.

[3] See also IM Rautenbach & EFJ Malherbe *Constitutional Law* (4th Edition, 2004) 190.

[4] FC s 101(1).

[5] FC s 101(2).

[6] *Manual of Executive Acts of the President* (supra) at para 1.6 (Notes that decisions that do not have legal consequences would be 'purely political or policy decisions relating to the administration of the Cabinet which do not themselves constitute legal authority of the exercise of any Executive powers. A decision, for example, to host a banquet or to attend a function need not be reduced to writing.')

[7] *Hugo* (supra) at para 11.

The *Hugo* Court decided this matter under the Interim Constitution. But, as the Constitutional Court confirmed in *SARFU III,*[1] the provisions of the Interim Constitution and Final Constitution relating to the dual role of the President as Head of State and head of the National Executive are similar.

This interpretation of FC s 101 — that it covers all presidential decisions that have legal consequences or are taken in terms of legislation — seems right even if it were to be argued that the Constitutional Court was too hasty in deciding that all head of state functions are 'executive'. The wording of the provision is clear. Moreover, it is entirely appropriate that, in a system in which lawful government action is the central principle, the decisions described in FC s 101(1) should be reduced to writing. Nevertheless, this reading creates a puzzle. Why should decisions that are taken by the President acting in his or her capacity as Head of State, and thus unconstrained by the requirement that Cabinet support the decision, be countersigned by a minister? And, what role does the ministerial signature play? What are the consequences of a failure to secure the countersignature? When the President takes decisions as head of the executive, the requirement of the countersignature of the relevant minister imposed by FC s 101(2) is entirely consistent with the notion of collective Cabinet responsibility. In making decisions that affect the portfolio of a Cabinet colleague, the President must confer with that Cabinet member. If he or she refuses to sign, the absence of Cabinet support is apparent and the decision of the President cannot take effect.[2] But this argument cannot apply to the requirement of a countersignature when the President exercises his powers as Head of State. The best way of interpreting the FC s 101(2) requirement in such cases is that it ensures that the relevant Cabinet member is aware of the exercise of a power that affects that Cabinet member's portfolio.[3] Here the provision simply promotes coordination and transparent government. Thus, for example, appointments of ambassadors, plenipotentiaries and diplomatic and consular representatives,[4] the exercise of the power to pardon and the appointment of a commission of inquiry would have to be countersigned by the responsible minister. And, because the signature of the minister in such cases merely confirms that he or she has been informed of the President's act, it would not be appropriate for the Cabinet member to refuse to sign: there is no Cabinet veto right.[5] Despite the absence of such a veto, such a presidential decision will be

[1] *Hugo* (supra) at para 144.

[2] See Currie & De Waal *New Constitutional and Administrative Law* (supra) at 246. The *Manual of Executive Acts of the President* asserts that a countersignature will be considered proof that appropriate Cabinet consultation has taken place. *Manual* (supra) at para 2.14.

[3] See *Manual* (supra) at para 2.6, which, citing L Baxter *Administrative Law* (1984), notes that before 1983, by convention, the Governor General or President was required to have decisions countersigned. Section 23 of the 1983 Constitution and IC s 83(1) expressly required countersignatures.

[4] See Currie & De Waal *New Constitutional and Administrative Law* (supra) at 243.

[5] Currie & De Waal argue that a failure to obtain a countersignature where a presidential power as Head of State is exercised will result in invalidity only where the President deliberately withholds information from the relevant Cabinet member or acts in a grossly negligent fashion. Ibid at 240). A better approach, one less likely to lead to uncertainty about the validity of presidential decisions and avoiding the need to interrogate the behaviour of the President, may be to argue that the Minister concerned may be ordered to sign. If he or she does not sign it, then the President may replace the Minister.

incomplete and thus ineffective until it is countersigned as the Final Constitution requires.

Presidential decisions are recorded by means of two instruments: President's Minutes and President's Acts. President's Minutes are recorded when the instrument recording the decision of the President must be countersigned by a Cabinet member. President's Acts, on the other hand, are recorded when the President exercises his powers and functions without consulting the Cabinet and without obtaining the countersignature of a Minister.[1] Such Acts are not common as most decisions with legal consequences concern the functions of another Cabinet member.

(e) Appointment, end of term and removal

The National Assembly must elect a President from amongst its members at its first sitting after its election or at another time if the presidency is vacant.[2] A person elected as President by the National Assembly ceases to be a member of the National Assembly.[3]

The President's term of office begins when he or she is sworn into office by the Chief Justice or another judge, and expires either when the next person elected President by the National Assembly assumes office[4] or if the term is ended for another reason such as resignation or death. The President's term of office is thus usually tied to the duration of the National Assembly: five years.[5]

The President may leave office before the expiry of his or her term if a motion of no confidence is passed by the National Assembly under FC s 102(2), if the National Assembly removes him or her,[6] or if he or she resigns or dies. When a vacancy occurs in the office of the President, an acting President must be appointed,[7] and the National Assembly must elect a new President. If a new President is not elected within 30 days, the acting President must dissolve the National Assembly and elections must be held.[8]

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[1] See *Manual* (supra) at para 1.5. The term Executive Act covers both President's Minutes and President's Acts.

[2] FC s 86(1). The Chief Justice or a judge designated by the Chief Justice presides over the election of the President. FC s 86(2). Part A of Schedule 3 to the Final Constitution contains the procedure for the election of the President.

[3] FC s 87. The President is not directly elected by the electorate. There have been suggestions that the method by which the President is appointed should be changed and that an individual should be directly elected as President by the electorate. See for a criticism of these views, J Kane-Berman 'Presidents should be elected by the people' *Business Day* (26 April 2007), available at http://www.businessday.co.za/articles/topstories.aspx?ID=BD4A447515 (accessed 19 June 2007).

[4] FC ss 87(1) and 88(1) as well as Schedule 2. The President may be sworn in by oath or solemn affirmation.

[5] FC s 49(1).

[6] FC s 89(1). See § 18.2*(a)*(iv) infra.

[7] FC s 90.

[8] FC ss 50(2) and 49(2).

Two sets of constitutional provisions allow the National Assembly to remove the President. First, under FC s 89, the President may be removed from office by a resolution adopted in the National Assembly with a supporting vote of at least two thirds of its members.[1] This process of impeachment may be used for the removal of the President only if the President is responsible for a serious violation of the Final Constitution or the law, has engaged in serious misconduct or is unable to perform the functions of office.[2] A person removed from the office of President on either of the first two of these three grounds may not receive any benefits of the office, and may not again serve in any public office.[3]

Secondly, as in other parliamentary systems, the Final Constitution requires the President and Cabinet to have the support of the National Assembly. Thus, FC s 102(2) requires the President, the rest of Cabinet and any Deputy Ministers to resign if the National Assembly, by a vote supported by a simple majority of all its members, passes a motion of no confidence in the President.[4] In parliamentary systems, a vote of no confidence removing the government of the day will usually occur only after floor-crossing or if a substantial number of the governing party back-benchers fear the party's electoral prospects under the current leader. The electoral system of closed list proportional representation, which gives the party considerable control over individual members of Parliament and the limited opportunities for floor-crossing, may suggest that a successful vote of no confidence in the President is very unlikely. However, in the current context of ANC governance — in which the party is controlled not by its public representatives in the National Assembly but by its National Executive Committee — another situation in which a vote of no confidence may occur suggests itself: a change of leadership in the party or a significant shift in party policy that is not supported by the national President and Cabinet may trigger efforts to remove the President by MPs whose membership of the party requires that they promote party policy.[5]

No person may serve more than two terms as President. However, when someone fills a vacancy between national elections, the period served as President until the next national elections is not regarded as a term.[6]

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[1] FC s 89(1).

[2] FC s 89(1)*(a)*, *(b)* and *(c)*.

[3] FC s 89(2). The question whether courts may review parliamentary decisions to impeach has exercised Nigerian courts. See, for instance, *Abaribe v The Speaker of the Abia* [2000] FWLR (Pt. 9) 1558; *Inakoju v Adeleke* [2007] All FWLR (Pt. 353) 3; *Ekpenkhio v Egbadon* [1993] 7 NWLR (Pt. 308) 717; and *Asogwa v Chukwu* [2004] FWLR (Pt. 189) 1204. See, generally, E Nwauche 'Is the End Near for the Political Question Doctrine in Nigeria' (Paper presented at the African Network of Constitutional Lawyers Conference, Niarobi, April 2007).

[4] FC s 102(2).

[5] Clause 5.2 of the ANC Constitution (African National Congress Constitution (As amended by and adopted at the 51st National Conference, December 2002)) available at http://www.anc.org.za/show.php?doc=./ancdocs/history/const/const2002.html (accessed 11 February 2008)), requires ANC members who hold elective office to abide by the decisions of the ANC. See also T Lodge 'The Future of South Africa's Party System' (2006) 17 *Journal of Democracy* 152, 159 (A Code of Conduct stipulates that ANC MPs are subordinate to the ANC National Executive Committee).

[6] FC s 88(2).

(f) The President in court

The fundamental constitutional principle that every exercise of power must be according to law raises the question of how the lawfulness of presidential acts may be tested. President Mandela gave evidence in person in the Transvaal High Court in *South African Rugby Football Union & Others v President of the Republic of South Africa & Others*.[1] The case engaged the question of whether the President had exercised his power to establish a commission under FC s 84(2) improperly. The decision to order the President to give evidence was challenged in the Constitutional Court. The *SARFU III* Court held that while the President is a competent and compellable witness,[2] he or she should be compelled to testify in exceptional circumstances only:

> [T]wo aspects of the public interest which might conflict in cases where a decision must be made as to whether the President ought to be ordered to give evidence. On the one hand, there is the public interest in ensuring that the dignity and status of the President is preserved and protected, that the efficiency of the executive is not impeded and that a robust and open discussion take place unhindered at meetings of the Cabinet when sensitive and important matters of policy are discussed. Careful consideration must therefore be given to a decision compelling the President to give evidence and such an order should not be made unless the interests of justice clearly demand that this be done. The judiciary must exercise appropriate restraint in such cases, sensitive to the status of the head of state and the integrity of the executive arm of government. On the other hand, there is the equally important need to ensure that courts are not impeded in the administration of justice.[3]

In *SARFU III*, the Constitutional Court commented that there was no evidence that 'the administration of justice would have been injured in any way if the President had not been ordered to submit himself to cross-examination'.[4] Accordingly the court a quo was wrong to have ordered the President to testify. The 'special dignity and status of the President together with his busy schedule and the importance of this work' also mean that usually it will be appropriate to make special arrangements for taking testimony.[5]

Different considerations may arise if the President is not a witness but an accused. The Final Constitution does not grant a President immunity from

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[1] 1999 (4) SA 147 (CC), 1998 (10) BCLR 1256 (CC).

[2] *SARFU III* (supra) at paras 240-245. See also PJ Schwikkard and SE van der Merwe *Principles of Evidence* (2002) 400; DT Zeffertt, A Paizes and A St Q Skeen *The South African Law of Evidence* (2003) 682. See, for a discussion of American Presidents giving testimony, RD Rotunda 'Presidents and ex-Presidents as Witnesses: A Brief Historical note' (1975) *University of Illinois Law Forum* 1. For the head of state immunity doctrine in the United States see MJ Rozell 'The Law: Executive Privilege: Definition and Standards of Application' (1999) 29 *Presidential Studies Quarterly* 918 and J Isenbergh 'Impeachment and Presidential Immunity from Judicial Process' (2000) 18 *Yale Law and Policy Review* 53.

[3] *SARFU III* (supra) at para 243.

[4] Ibid at para 244.

[5] Ibid at paras 242 and 245.

criminal suits. The US Constitution also does not contain any express presidential immunity from criminal prosecution and the question whether the President is, nonetheless, immune from prosecution has engaged Americans. An implied immunity from civil proceedings was urged in *Mississippi v Johnson*,[1] but the Court found it unnecessary to reach this question. In *United States v Nixon*[2] it was argued that respect for the doctrine of the separation of powers implies immunity from criminal prosecution. The Supreme Court held that the doctrine of separation of powers cannot sustain an absolute and unqualified immunity from judicial process. In another case, the Supreme Court said:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.[3]

The arguments usually made in favour of a presidential immunity in the United States are 'functionalist'. Their proponents urge that prosecution of the president would immobilise the executive branch and '[put] the entire executive branch at the mercy of the judiciary'.[4] The US Supreme Court was unconvinced by this argument.[5] In South Africa, where executive authority is to be exercised by the President 'together with the other members of the Cabinet', this argument is even less compelling. Moreover, the focus of the inquiry should not be whether a President subject to criminal prosecution is able to exercise executive authority, but whether, in the words of *SARFU III,* the 'interests of justice clearly demand' that the President appear in court. The absence of express presidential immunity

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1 71 US (4 Wall) 475 (1866).

2 418 US 683 (1974).

3 *United States v Lee* 106 US 196 (1882), 220.

4 AR Amar & BC Kalt 'The Presidential Privilege against Prosecution' (1997) 2 *Nexus* 11, 17. See also AR Amar 'On Prosecuting Presidents' (1999) 27 *Hofstra Law Review* 671. See, frrther,, the testimony of Professors Amar and Bloch before the US Senate hearings into the prosecution of incumbent American Presidents: *Is a sitting President subject to compulsory criminal process? : Hearings before the Subcommittee on Constitutionalism, Federalism, and Property Rights of the Senate Judiciary Committee on S105-964, 'Indictment or Impeachment of the President'*, 105th Congress 23 (9 September 1998), quoted by J Turley "'From Pillar to Post": The Prosecution of American Presidents' (2000) 37 *American Criminal Law Review* 1049, 1076-7.

5 In *Clinton v Jones,* the US Supreme Court, dealing with the question of immunity from civil suit, held that President Clinton

> errs by presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions….As Madison explained, separation of powers does not mean that the branches 'ought to have no *partial agency* in, or no *control* over, the acts of each other.' The fact that a federal court's exercise of its traditional…jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution.

520 US 681, 702-703 (1997).

from criminal prosecution in the South African Constitution, the unpersuasiveness of the functionalist argument, and the requirement that courts are not impeded in the administration of justice urge the conclusion in the South African context that the President is not immune to criminal prosecution.

18.3 Cabinet

As in other modern democracies, the executive is the dominant branch of government in South Africa. It controls policy-making, Parliament's legislative agenda and the implementation of both laws and policy. Although FC s 85(1) states that '[t]he executive authority of the Republic is vested in the President', this authority is exercised 'together with the other members of the Cabinet'. This section first describes the way in which Cabinet is constituted and the assignment of portfolios to ministers. Secondly, it considers the current institutional arrangements for the management of Cabinet affairs. Thirdly, it sets out the powers of the executive. Fourthly, it considers the principle of collective Cabinet responsibility and Cabinet decision making. The fifth part deals with individual ministerial responsibility and the rest of the section covers accountability for outsourced and privatised functions, votes of no confidence, ethics, the Minister of Finance, the control of the defence force, foreign affairs and assignment and delegation of executive functions.

(a) Appointment and dismissal of Cabinet members and deputy ministers and assignment of portfolios

Cabinet, FC s 91(1) tells us, 'consists of the President, … a Deputy President and Ministers'. As we note above, the President appoints the members of Cabinet. He may choose as many Cabinet members as he or she wishes, but the Deputy President and all but two Ministers must be drawn from the National Assembly. The Final Constitution specifically empowers the President to appoint Deputy Ministers.[1] Although Deputy Ministers now attend Cabinet meetings, they are not members of Cabinet.

The President assigns powers and functions to the members of Cabinet with few constitutional constraints. The Final Constitution requires one Cabinet member to be appointed leader of government business in the National Assembly.[2] It also anticipates that individual members of the Cabinet will be identified as responsible for finance, local government affairs, the administration of justice, defence and policing.[3]

[1] FC s 93. Only two deputy ministers may be drawn from outside Parliament. There are currently 20 deputy ministers.

[2] FC s 91(4).

[3] See FC s 224 (2) (Cabinet member responsible for national financial matters); FC s 139 (2)*(a)*(i) (Cabinet member responsible for local government affairs); FC s 175(2)(Cabinet member responsible for the administration of justice); FC s 201(1)(Cabinet member responsible for defence); FC s 206(1) (Cabinet member responsible for policing).

Provisions of the Interim and Final Constitutions relating to the Government of National Unity, which applied until 30 April 1999, put certain constraints on the President's choice of Cabinet members and his or her power to dismiss them. In the case of reallocation of portfolios or dismissal, the President was required to consult the leader of the political party to which an affected Cabinet member belonged and was permitted to make such changes only if they 'become necessary for the Constitution or in the interests of good government'.[1] No such constraints exist now. Under the Final Constitution, the choice of members, reallocation of Cabinet portfolios and dismissal of members is entirely at the discretion of the President. Improving government and political interests, such as ensuring that an influential political constituency is adequately represented in Cabinet or avoiding dissent amongst Cabinet members, dominate these decisions. Because Cabinet members hold office at the discretion of the President and the choice of Cabinet members is a highly political decision, Ministers do not have a right to a hearing prior to dismissal or suspension.[2] However, political parties may impose some restraints on the discretion of the President to compose a Cabinet. Thus, the British Labour Party requires Cabinet positions for members of its Parliamentary Committee[3] and a similar practice prevailed in the Australian Labour Party until the 2007 elections. This does not appear to be the practice in South Africa.

[1] IC ss 88(4)*(d)* and *(e)*.

[2] On 27 March 1995, President Mandela dismissed Winnie Mandela from the post of Deputy Minister of Arts, Culture, Science and Technology. No reasons were given for the dismissal but the media cited grounds of continued insubordination which included an unauthorized trip abroad, clashes with other black leaders, and repeated jibes at the government. On 12 April 1995, Mrs Mandela applied to court for her reinstatement, arguing, among other things, that President Mandela failed to write her letter of dismissal on stationery bearing the government seal and did not consult with all of his partners in the coalition government. Acting President Thabo Mbeki revoked the dismissal 'to spare the government and the nation the uncertainties which might follow protracted litigation on this issue'. However, upon the return of President Mandela, Mrs Mandela was dismissed again, in compliance with technicalities raised (presumably consultation with partners in the government of national unity as required by the IC). See B Keller 'Winnie Mandela out of Cabinet for defying presidential orders' *The New York Times* (28 March 1995); World News Briefs 'Winnie Mandela sues to get her job back' *The New York Times* 12 April 1995; B Keller 'Winnie Mandela is Reinstated on Technicality' *The New York Times* (13 April 1995). See also ANC Press Statement 'Reinstatement of Winnie Mandela' (12 April 1995) and ANC Press Statement 'Statement by the African National Congress on the dismissal of Mrs Winnie Mandela from her Deputy Ministerial Post' (14 April 1995), both available from http://www.anc.org.za/ancdocs/pr/1995/index.html (accessed 6 February 2008). The power to suspend a Minister (or Deputy Minister) is an incident of the power to dismiss. See *Mpehle v Government of the Republic of South Africa*, 1996 (7) BCLR 921 (Ck). In *Mpehle*, an MEC suspended by the Premier of the Eastern Cape argued that he had a right to a hearing. Because this was conceded by the respondent the matter was not decided. Insofar as *Mpehle* might be read to suggest that there should be consultation before dismissal, the decision must be read to apply to the special circumstances under the IC and not to the FC. Ibid at 943G. Nevertheless, it appears that President Mbeki did consult former Deputy President Jacob Zuma before dismissing him in June 2005. Usually such consultation is intended to give the person concerned an opportunity to resign. The former Deputy President declined to resign. See 'Zuma Axed' *The Star* (14 June 2005) available at http://www.iol.co.za/index.php?set_id=1&click_id=2976&art_id=vn20050614071051531C805432, (accessed 21 June 2007)). Note Sachs J's distinction between Ministers and officials such as the Director of Public Prosecutions in *Masetlha. Masetlha v President of the Republic of South Africa* 2008 (1) BCLR 1 (CC) at para 228.

[3] Turpin *British Government* (supra) at 227.

Moreover, although the vertical division of the state into national, provincial and local spheres of government shapes the practice of government, it has had no obvious impression on the composition of cabinet and the allocation of portfolios. Unlike Canada, in South Africa no expectation exists that provinces will be 'represented' in the Cabinet. Similarly, no Cabinet members have responsibility for different regions.

FC s 219 requires Parliament to pass an Act that provides a framework for determining the salaries of Cabinet members (including the President) and deputy ministers. Salaries and limits on other forms of remuneration are discussed in Chapter 20: Provincial Executive Authority.[1]

(b) The President, the Presidency and Cabinet committees

Modern Cabinets rely on Cabinet (or ministerial) committees to enable them to handle the large volume of work they must do, to facilitate coordination amongst government departments and to give ministers who must work together, but who may disagree, an opportunity to resolve their disagreements properly. In 1998, the Report of the Presidential Review Commission identified poor coordination of government activities and policy as a significant problem.[2] In response to this report, the existing, relatively small Cabinet committee system was transformed into what is now commonly referred to as the system of 'Cabinet clusters'. The clusters consist of six Cabinet committees that draw together related departments and parallel clusters of departmental directors general. According to the Presidency, 'Cabinet Committees meet to discuss areas of work, facilitate collaborative decision-making, and make recommendations to Cabinet'.[3] The Cabinet committees are chaired by the President or the Deputy President. They are large — for instance the Committee for the Social Sector has twenty members — and many ministers serve on a number of the committees: the Minister of Education serves on five of the six committees.

The British Ministerial Code of 2001 stated that an effective system of ministerial committees means that few appeals may be made to the full Cabinet. Most

[1] See C Murray & O Ampofo-Anti 'Provincial Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 20, 20.3*(g)*.

[2] 'Report of the Presidential Review Commission on the Reform and Transformation of the Public Service in South Africa' (27 February 1998) para 2.4.1.1 available at http://www.info.gov.za/otherdocs/1998/prc98/index.html (accessed 4 February 2008).

[3] 'Presidency Annual Report 2004-5' para 3.2 available at http://www.thepresidency.gov.za/main.asp?include=docs/reports/annual/2005/index.htm (accessed 30 January 2008). The six Cabinet Committees are the Cabinet Committee for the Economic Sector (ES); the Cabinet Committee for Investment and Employment (IE); the Cabinet Committee for Justice, Crime-Prevention and Security (JCPS); the Cabinet Committee for the Social Sector (SS); the Cabinet Committee for Governance and Administration (G&A); and the Cabinet Committee for International Relations, Peace and Security (IRPS).

matters must be settled in the committees.[1] There is little information about how successful the South African Cabinet committees are when assessed in terms of this criterion. What is clear is that proposed legislation and major policy initiatives are considered by the full Cabinet at its weekly meetings. Generally, it appears that Cabinet does not vote — although voting has occurred on occasion.

Administrative support for Cabinet and the Cabinet committees is supplied by the Cabinet Office in the Presidency. According to the *2004-2005 Annual Report of the Presidency*, the Cabinet Office:

> implements administrative systems and processes to ensure the overall optimal functioning of the Cabinet and its committees. It facilitates the management of decision-making processes of the Cabinet and its Committees, and ensures that the decisions of the Cabinet are acted upon through mechanisms that enable the Cabinet to monitor itself. It maintains the integrity of the decisions of the Cabinet, and acts as custodian of such decisions. It also promotes the integrated decision-making system and co-operative approach to governance.

This role is clearly not merely administrative. It anticipates that, through the Cabinet Office, the Presidency will maintain control over Cabinet.[2]

(c) Powers of Cabinet

The Final Constitution does not list the powers of Cabinet. Instead, FC s 82(2) describes the way in which executive authority is exercised. Executive authority is exercised by —

(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
(b) developing and implementing national policy;
(c) co-ordinating the functions of state departments and administrators;
(d) preparing and initiating legislation; and
(e) performing any other executive function provided for in the Constitution or in national legislation.

This list sets out the usual functions of an executive in a parliamentary system and ends with a broadly worded provision which ensures that the executive will be able to fulfil any functions that are legally authorised. Thus, the national executive has those powers that the Final Constitution and legislation grant it.

Paragraph *(a)* sets out the main function of the executive — to implement laws. It also recognises that not all national laws will be implemented by the national

[1] See Turpin *British Government* (supra) at 233. The Code has been revised three times since 2001. The latest Code (Cabinet Office *Ministerial Code* (July 2007) available at http://www.cabinetoffice.gov.uk/upload/assets/www.cabinetoffice.gov.uk/propriety_and_ethics/ministerial_code_current.pdf (accessed 19 February 2008)) is much briefer and does not explain the purposes of Cabinet practices. However, it appears that the purpose of Cabinet committees remains unchanged.

[2] N de Jager (supra) at 19 — 20.

government. First, in terms of FC s 125(2)*(b)*, it is provinces and not the national executive that will ordinarily be responsible for the implementation of national acts that fall under Schedule 4 and thus within the concurrent competence of provinces and the national sphere of government. Secondly, in modern states much law is implemented not by government but by other agencies ranging from parastatals over which the executive has considerable control to institutions such as the Stock Exchange which act independently within a framework provided by law.

FC s 85(2)*(d)* captures another central function of the executive: preparing (ie drafting) and initiating legislation (ie, introducing it in either the National Assembly or the NCOP). Despite the fact that Parliament is designated the 'law-making' authority, executives actually drive the law-making process in parliamentary systems. Very few laws are initiated by parliaments. In fact, paragraph *(b)*, which asserts the role of the executive in 'developing and implementing national policy', is more controversial in South Africa. Members of the executive and bureaucrats have used paragraph *(b)* to resist attempts by Parliament to question government policies. They assert that Parliament has no role (or at best a limited role) in relation to government policy: its functions are to consider bills and oversee the executive in its implementation of the law. Although Parliament has resisted this claim, in practice its engagement with new policy has been relatively weak.

Finally, paragraph *(e)* is a catch-all provision that ensures that the executive will be able to carry out functions not covered by the preceding paragraphs. The critical limitation here is the word 'executive'. In an implicit recognition of the separation of powers, paragraph *(e)* puts judicial and legislative functions outside the ambit of executive authority.[1]

Cabinet members 'are responsible for powers and functions of the executive assigned to them by the President'.[2] In practice, the President allocates portfolios, while the extent of the portfolio is usually largely determined by Acts of Parliament that allocate responsibility for particular laws to specific ministers.[3] In *Magidimisi NO v Premier of the Eastern Cape*, Froneman J considers the responsibility that provincial Premiers and MECs bear as members of provincial Executive Councils. His findings apply equally to members of the national Cabinet. Thus,

[1] See S Seedorf & S Sibanda 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12.

[2] FC s 92(1).

[3] The Constitutional Court has held that this provision indicates that where ministers perform other ministerial duties in terms of legislation, they 'exercise no more than subordinate, delegated authority'. *Minister of Home Affairs v Liebenberg* 2002 (1) SA 33 (CC), 2001 (11) BCLR 1168 (CC) para 13. This holding must not be read to mean that ministers are not accountable in terms of FC s 92(2) for ministerial duties performed in terms of legislation. Indeed, FC s 85(2)*(e)* provides that executive authority, the exercise of which Cabinet is undoubtedly accountable for, includes any other executive function provided for in national legislation. The Court in *Liebenberg* was seized with the question of whether regulations made by a minister in terms of legislation constituted an Act of Parliament for purposes of a declaration of invalidity by a High Court in terms of FC s 172(2)*(a)*. The judgment offers no clear statement about the limits or extent of ministerial accountability.

following Froneman J, the President 'bears the ultimate responsibility' to ensure that the national government fulfils the law and other Cabinet members bear responsibility for the operation of their departments.[1]

(d) A collaborative venture — Cabinet decision making

(i) *Cabinet solidarity*

As already noted, the Constitutional Court has described the exercise of executive authority in South Africa as 'a collaborative venture in terms of which the President acts together with the other members of Cabinet'.[2] Three constitutional provisions provide the basis of this understanding: FC s 85(2), from which the Court quotes, states that '[t]he President exercises the executive authority, together with the other members of the Cabinet'; FC s 92, which stipulates that members of Cabinet are 'accountable collectively and individually to Parliament'; and FC s 102, which gives the National Assembly the power to pass a vote of no confidence in the Cabinet as a whole and thus forcing it to resign.

The idea that members of Cabinet must act together and share responsibility for their actions is often referred to as 'Cabinet solidarity' or collective Cabinet responsibility. Although the exact parameters of the doctrine are not fixed, as Marshall describes, '[t]here are three traditional branches to the collective responsibility convention: the confidence rule, the unanimity rule and the confidentiality rule.'[3] The 'confidence rule', which requires the Cabinet to retain the support (or confidence) of Parliament to remain in power, is constitutionalised in South Africa in the provision concerning a vote of no confidence. The 'unanimity rule' is implied in FC ss 85(2) and 92: in the references to Cabinet acting 'together' and its collective accountability to Parliament. The 'confidentiality rule', which protects the confidentiality of discussions in Cabinet, is not specified in the Final Constitution but is applied in practice.

The convention was developed in Britain as politicians sought to assert greater control of government. Of 19th century British practices, Pares writes:

> The king did nearly all business with the ministers in the room called his closet. He normally saw them one by one…. The business of the closet does not appear, at first sight, to have afforded the ministers much opportunity for collective action. But they know how to counteract the tendency to separate and confine them. On any question of general political importance, they would agree beforehand what to say, and then go into the closet, one by one, and repeat the identical story.[4]

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[1] Eastern Cape High Court, Case No 2180/04, Unreported (Decided 25 April 2006) at paras 20-23. See also C Murray & O Ampofo-Anti 'Provincial Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) § 20.3.

[2] *SARFU* III (supra) at para 41.

[3] G Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability* (1989) 55.

[4] R Pares *King George III and the Politicians* (1953) 148-149 cited in House of Commons Research Paper 04/82 *The Collective Responsibility of Ministers — An Outline of the Issues* (15 November 2004) at 7 available at http://www.parliament.uk/commons/lib/research/rp2004/rp04-082.pdf (accessed 11 February 2008).

Over the two centuries since the practice developed, the reasons for the retention of the principle of collective responsibility have changed. In most of the countries in which it currently applies, it has become both less rigid and more controversial. Now, governments usually rely on it to 'present a united front against the Opposition'.[1] But it also contributes to effective and democratic government. In this regard, collective Cabinet responsibility or Cabinet solidarity performs two broad functions. First, the practice ensures government cohesion, and enables the government to administer public affairs in a coherent way and to implement policies relatively consistently over a reasonable period. Second, together with its counterpart, individual accountability, the convention strengthens Parliament's ability to hold the government to account.[2] At the same time, critics note that it contributes to secrecy in government.

The *Ministerial Code* issued by the British Cabinet Office in 2007 describes the principle as follows:

> Decisions reached by the Cabinet or Ministerial Committees are binding on all members of the Government…. Collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees should be maintained.[3]

There is no similar statement of the doctrine in South Africa[4] but the British formulation appears to reflect practice in South Africa. Moreover, the confidentiality of Cabinet discussions is protected by PAIA[5] and its importance has been acknowledged by the Constitutional Court.[6]

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[1] See Turpin *British Government* (supra) at 215 (Offers a description of practice in Britain which is generally applicable to parliamentary systems in the Commonwealth.)

[2] For a useful summary of the history of the development of ministerial government in England in the 19th Century which emphasises these two strands, see M Flinders *The Politics of Accountability in the Modern State* (2001) 2-9.

[3] Cabinet Office *Ministerial Code: A code of Conduct and Guidance on Procedures for Ministers* July 2007 available at http://www.cabinetoffice.gov.uk/upload/assets/www.cabinetoffice.gov.uk/propriety_and_ethics/ministerial_code_current.pdf (accessed 19 February 2008). The Australian *Cabinet Handbook* issued by the Department of the Prime Minister and Cabinet (5th edition updated 2005) 4ff and the Irish *Cabinet Handbook* issued by the Department of the Taoiseach (1998) para 1.1 — 1.5 describe the convention of collective responsibility in similar terms but the Irish *Handbook* provides more detail.

[4] The *Manual on Executive Acts of the President* (1999) presents the government's understanding of the requirements of FC s 85(2). See § 18(3)*(d)*(ii) infra. See also *Egan v Willis* (1998) 195 CLR 424, 451 (Australian High Court said that '[i]t should not be assumed that the characteristics of a system of responsible government are fixed in time or that the principles of ministerial responsibility which developed in New South Wales after 1855 necessarily reflected closely those from time to time accepted at Westminster'.) The same might be said for South Africa. However, just as the Australian court nonetheless consulted practice in Britain in *Egan*, at least until practices are better established in South Africa, an understanding of the way in which Cabinet solidarity and ministerial responsibility function in other parliamentary systems is useful to understanding the South African constitutional framework.

[5] Section 12 *(a)* of the Promotion of Access to Information Act 2 of 2000 exempts the provisions of the Act from applying to records of 'the Cabinet and its Committees'.

[6] *SARFU III* (supra) at para 243.

As noted above, collective Cabinet responsibility is usually assumed to mean that a Cabinet member may not vote or speak out against government policy. If a Cabinet member is unable to support a policy, he or she should resign. Secondly, decisions by individual members of Cabinet are regarded as decisions of the whole government whether or not other members are party to them. Thirdly, as the statement of the principle quoted above indicates, it requires confidentiality. In other words, Ministers should not reveal the content of discussions in Cabinet nor should former Cabinet ministers reveal Cabinet secrets.[1]

In most modern systems, practice is a great deal more nuanced than the description above allows. Thus, although there are examples in other parliamentary systems (but not post-apartheid South Africa) of members of Cabinet resigning in the face of policies that they cannot support,[2] other 'safety valves' are used to allow Ministers to remain in government while indicating that they hold views that differ from government policy on a particular matter. Brazier describes the 'unattributal leak' as the 'life-saver of collective responsibility'.[3] An 'unattributable leak' ensures that the views of the dissenting Cabinet member are known to the public whose support he or she wishes to maintain — usually without jeopardising his or her membership of Cabinet. At the same time, the head of Cabinet does not have to contend with open dissent. Moreover, as Brazier and others note, the unattributable leak 'has another general and beneficial side effect. Ministerial solidarity involves the stifling of open dissent: it thereby contributes to secrecy in government…. The leak will … occasionally draw that screen to one side.'[4] British practice also shows that not all leaks will reflect dissent in Cabinet. They may be used strategically by Cabinet to test proposed policies. If the policy receives strong public opposition, it can then be abandoned with a claim by government that it had, in fact, never intended to pursue such a course of action.[5]

[1] See British Cabinet Office *Ministerial Code* para 18. In Britain the question of ministerial memoirs has been controversial. See House of Commons Research Paper *The collective responsibility of Ministers* 36 and *Attorney-General v Jonathan Cape* [1976] 1 QB 752 concerning the publication of Crossman's diaries. The present formulation in the Cabinet Office *Code* incorporates recommendations made by a Committee of Privy counsellors under Lord Radcliffe after Crossman.

[2] For example, on 17 March 2003 Robin Cook resigned his Cabinet post as Leader of the British House of Commons in opposition to the Cabinet position on the war in Iraq. In announcing his resignation Cook said 'It is with regret I have today resigned from the cabinet…I can't accept collective responsibility for the decision to commit Britain now to military action in Iraq without international agreement or domestic support' ('Cook Quits over Iraq Crisis' *BBC Online* (17 March 2003), available at http://news.bbc.co.uk/1/hi/uk_politics/2857637.stm (accessed 11 February 2008)). Brazier cites earlier British examples of Ministers of all ranks resigning or being required to resign because they could not accept collective responsibility for some decision or other including the resignations of Mr Heseltine as Secretary of State for Defence in 1986, Mr Nigel Lawson as Chancellor of the Exchequer in 1989 and Sir Geoffrey Howe as Leader of the House of Commons, Lord President of the Council and Deputy Prime Minister in 1990. See R Brazier *Constitutional Practice* (2nd Ed, 1994) 140-141, esp. fns 71-74. For further examples of Cabinet resignations in the United Kingdom between 1945 and 1986, see Marshall *Constitutional Conventions* (supra) at 62-66.

[3] Brazier *Constitutional Practice* (supra) at 141.

[4] Ibid at 141-2.

[5] AP Tant '"Leaks" and the Nature of the British Government' (1995) 66 *Political Quarterly* 197 cited in Turpin *British Government* (supra) at 220.

Two other safety valves are seen at work when the public statements of Cabinet ministers fall just short of open dissent with government policy, but nonetheless signal likely disagreement, and when ministers develop policy without prior Cabinet support. Whether or not Cabinet members will do engage in such behaviour turns, to a large extent, on whether or not they will be reprimanded or dismissed will depend greatly on the issue and on the style of the President. The response of the head of the Cabinet will be a matter of political strategy. A weak leader may be unable to act against such behaviour. A strong leader may not need to respond. Thus far, South Africa has little experience of open Cabinet dissent since 1994. That said, it appears that some Cabinet reshuffles that cost ministers their jobs may have been triggered by dissent within Cabinet.

In Britain, a final safety valve that may soften the effect of a rigid application of the principle of collective Cabinet responsibility is 'an agreement to differ'. As the name suggests, an agreement to differ allows individual Cabinet members to speak against government policy.[1] It is controversial in Britain and is used infrequently but, in the case of the 1975 decision to remain a member of the European Community, it held the government together. In a system of single member constituencies, in which Ministers need to look to their individual electoral support as well as the concerns of their party, it provides a useful, if drastic, way of dealing with hotly contested policies. In a system of closed-list proportional representation, with its even greater emphasis on the positions of the governing party, it may be unnecessary.

The practice of collective Cabinet responsibility need not freeze all debate. For instance, Cabinet members have been relatively open in the debate about proposals to introduce a 'Basic Income Grant'. It is well known that the Minister of Finance, Trevor Manuel, is opposed to such a grant, while the Minister of Social Development, Zola Skweyiya supports it.[2]

In coalition Cabinets collective responsibility or Cabinet solidarity may operate in a very different way. Most commonly, coalition partners will be bound by Cabinet solidarity on certain matters, usually set out in the agreement on which the Cabinet is based. On other matters, Cabinet members will be able to express divergent views openly.

(ii) *Executive decision making*

Collective Cabinet responsibility or Cabinet solidarity does not dictate a decision-making process.[3] It does not mean that all or even certain executive decisions must be made by the entire Cabinet. Nor does it mean that every Cabinet member

[1] See Brazier *Constitutional Practice* (supra) at 143; Commons Research Paper *The Collective Responsibility of Ministers* (supra) at 24.

[2] C Terreblanche 'Basic Income Grant on the Cards' IOL (11 February 2007), available at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20070211081742198C653630, accessed 5 April 2008.

[3] For a discussion of the some of the ways in which Cabinets operate, see E McLeay 'Buckle, Board, team or Network? Understanding Cabinet' (2006) 4 *NZJ Pub & Int'l L* 37.

need be aware of all executive decisions for which they are collectively responsible. Certainly, as Turpin notes, the principle of collective responsibility makes most sense when executive decisions are indeed made collectively.[1] Nowadays, however, collective decision making is necessarily limited. As we have described above, many significant policy decisions are made in Cabinet committees rather than the full Cabinet. Yet others are made outside Cabinet structures altogether. These practices do not mean that the principle does not apply to such decisions.[2] The modern functions of collective responsibility are to ensure coherent government and avoid competing policies within government through an insistence that the government presents a unified face, and to secure the ability of Parliament to hold the executive to account. As a result, the principle must apply to all executive decision-making. A Cabinet member could not disown a government policy or refuse to answer questions about a policy merely because he or she was not present when the policy was agreed to or because the policy or decision was not brought to Cabinet by the responsible Minister or Cabinet committee.[3]

How the Cabinet operates will depend largely on the style of the President and the political context. The President is at liberty to decide what matters should be discussed by Cabinet as a whole, what can be dealt with in Cabinet committees and what matters need not come to Cabinet at all. The South African *Manual on Executive Acts of the President* captures this well. It says that the requirement that the President must act 'together with the Cabinet'

> implies that the president takes his decisions in accordance with the 'way of working together' that the Cabinet and President have determined….[The] phrase captures the idea of collective responsibility but allows the Cabinet and the President to determine the way and procedure by which they work together, including leaving certain matters or kinds of matters to be dealt with by a single member of the Cabinet.[4]

The *Manual* states that the current way of working in the Cabinet is that consultation is not needed on all matters but that

> matters of substance — whether ministerial or Presidential should be brought to Cabinet. Accordingly, if a matter is not routine … it must first be referred to Cabinet as must all matters that Cabinet itself has decided should come to it….Whether a matter was routine or not is a question for the Minister's judgement…. [B]oth the President and individual Ministers are duty-bound to take to the Cabinet issues of policy, significant decisions, decisions with financial consequences outside a department's approved budget and any matter the Cabinet has referred to it.[5]

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[1] See Turpin *British Government* (supra) at 215.

[2] Cf Currie & De Waal who suggest that members of Cabinet are collectively accountable to Parliament only for those decisions taken collectively. Currie & De Waal *New Constitutional and Administrative Law* (supra) at 256. This view, which implies that it is consistent with the idea of collective Cabinet accountability for a Cabinet member to disagree in Parliament with the position adopted by a Cabinet colleague, is simply wrong.

[3] Of course, there will be situations in which it would be reasonable for a member of Cabinet may say that he or she does not have the information necessary to answer a question. Under such circumstances, the responsible minister should attend Parliament. If that minister were not to attend it would be reasonable for Parliament to expect his or her colleagues to deal with the issue.

[4] *Manual of Executive Acts of the President* (1999) para 2.9.

[5] Ibid at 2.10 — 12.

The *Manual* suggests that a failure to take such decisions to Cabinet could undermine their validity. But, as we have already noted, the Final Constitution does not specify what procedures are necessary for the 'collaborative' exercise of Cabinet government in South Africa. This omission is surely deliberate. Different Presidents may run their cabinets in different ways while complying with the constitutional imperative that executive decisions should be made together with Cabinet. This view is consistent with the framework of parliamentary government with which FC s 85 must be read. The appropriate remedy for the President when he or she believes that a Minister is not pursuing the government's policy or has failed to consult Cabinet when he or she ought to have done so is to dismiss that Minister.[1] Thus the decision in *Eisenberg* is wrong. There HJ Erasmus J set aside regulations made by the Minister of Home Affairs under the Immigration Act 13 of 2002 in part because he found that making such regulations, involving matters of national policy, was a matter of collective responsibility and thus required Cabinet approval, which had not been secured.[2] Again it misunderstands parliamentary government to read the Final Constitution as identifying which decisions must be taken to Cabinet and which may be taken without a full meeting of Cabinet.

Currie and De Waal also misunderstand the doctrine when they state that:

> [i]n principle, the President and the other members of the Cabinet are individually responsible to Parliament for powers exercised individually, and collectively responsible for powers exercised collectively. …[T]his means that the Cabinet is collectively responsible for major policy decisions. The President is individually responsible for the exercise of head of State powers and powers conferred to the President in terms of ordinary legislation. Ministers are individually responsible for the exercise of powers conferred on them by ordinary legislation, which is not of a nature where the approval of Cabinet is necessary.[3]

This gloss on the doctrine suggests far too rigid an approach. Cabinet members cannot escape responsibility for major policy decisions by absenting themselves from the decision-making process. The notion of Cabinet solidarity implicates all Cabinet members in the policy of the government. Certainly, in practice, a

[1] The reciprocal remedy for ministers who believe that the FC s 85(2) principle of Cabinet solidarity is not being honoured by the President is to resign or to refuse to countersign presidential decisions.

[2] See *President of the Republic of South Africa v Eisenberg & Associates (Minister of Home Affairs Intervening)* 2005 (1) SA 247, 264 *(c)*. *Eisenberg* was not wrong because it did not apply the understanding of FC s 85(2) adopted in the *Manual on Executive Acts of the President* (1999). It is courts, not politicians or bureaucrats, who provide authoritative interpretations of the constitution. It is wrong because it misunderstood the constitutional provision. Currie & De Waal assert that in certain circumstances, such as where the President's decision affects government 'as a whole' or has 'real political importance', the approval of Cabinet must be obtained. See Currie & De Waal *New Constitutional and Administrative Law* (supra) at 245-246. Again, their position seems wrong, as does their suggestion that Cabinet can delegate decision making powers to individual members under FC s 238. This argument seems to be derived from the fact that IC 82(3) expressly allowed Cabinet to delegate particular functions to particular ministers. However, that provision was necessitated by the power sharing arrangements in Cabinet under the government of national unity. The FC does not provide for a government of national unity and so such a provision become redundant. If South Africa were to have a coalition government, then it is possible that a similar provision might be included in the agreement establishing the coalition.

[3] Currie & De Waal *New Constitutional and Administrative Law* (supra) at 256.

government is unlikely to fall if a single minister mismanages his or her department or is responsible for a failed or unpopular policy initiative. Similarly, Parliament is unlikely to expect a minister to account for matters that fall within the portfolio of a colleague. But, as described above, ministers are expected to defend government policies and the application of the doctrine of collective accountability is not limited by a distinction between those powers that may be exercised only with the approval of Cabinet and others that can be exercised independently by individual ministers. If legislation requires a particular minister to act or make a decision, then that too is considered a decision of Cabinet for which members are collectively accountable to Parliament.[1]

(iii) *Accountability and responsibility*

FC s 92 is headed 'accountability and responsibilities' and states:

> (1) The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.
> (2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.
> (3) Members of the Cabinet must-
> *(a)* act in accordance with the Constitution; and
> *(b)* provide Parliament with full and regular reports concerning matters under their control.

Subsections (1) and (2) suggest a distinction between 'responsibility' and 'accountability'. Cabinet members are *responsible* to the President and *accountable* to Parliament for the performance of their functions. Sometimes accountability is defined as the obligation 'to give a reckoning or account' while 'responsibility' is said to include 'liability to be blamed for loss or failure'.[2] This definition provides an adequate initial description of the relationship between Parliament and the executive. Members of Cabinet, including the President, must provide an account to Parliament of matters that fall within their responsibility. Still, FC s 102 confirms that Cabinet members also owe political responsibility to the National Assembly for decisions that they make and the performance of the departments under their control. Should they fail, they may be dismissed collectively in a vote of no confidence.

[1] See P Hogg *Constitutional Law of Canada* (2003 — Rel 1) at 9.9 ('Where a statute requires that a decision be made by a particular minister, then the cabinet will make the decision, and the relevant minister will formally authenticate the decision. Of course a cabinet will be content to delegate many matters to individual ministers, but each minister recognises the supreme authority of the cabinet should the cabinet seek to exercise it.'). But there may be exceptions. For instance, in Britain '[b]y convention some kinds of decision are taken on the personal responsibility of the minister concerned, without engaging the collective responsibility of ministerial colleagues. This applies, for instance, to decisions of the home Secretary in extradition cases.' Turpin (supra) at 212.

[2] For a discussion of the debate on this matter in Britain, see G Drewry 'The Executive: Towards Accountable Government and Effective Governance?' in J Jowell & D Oliver (eds) *The Changing Constitution (*5th Edition 2004) 280, 294ff . For a discussion of the position in South Africa in relation to parastatals and other similar organs of state, see § 18.3 *(f)* below.

Although only the National Assembly may dismiss Cabinet in a vote of no confidence, Cabinet members are accountable to both the National Assembly and the NCOP.[1] That they are accountable to the National Assembly is unremarkable. The National Assembly provides their budget and represents the electorate in matters of concern to the national sphere of government. The accountability of Cabinet members to the NCOP requires more explanation. The NCOP is a house of the provinces in which provincial governments and legislatures are represented. Cabinet members are not drawn from the NCOP nor are they directly responsible for government in the provinces. However, the system of shared powers established by the Final Constitution means that the implementation of law and policy often involves close cooperation between the national and provincial spheres of government.[2] The power of the NCOP to call Cabinet members to account ensures that provincial governments can engage with the national government on its responsibilities in the provinces.[3]

FC s 92(3) adds the specific obligation to provide Parliament, and thus the public, with regular reports but Parliament's power to hold Cabinet members to account extends beyond receiving periodic reports. FC ss 56 and 69 back up Parliament's power to call Cabinet members to account under s 92 by specifying the power of the National Assembly and NCOP to summons people and demand reporting.[4]

(iv) *Who is bound by Cabinet solidarity and for what are Cabinet members accountable?*

FC ss 85(2) and 92 address members of Cabinet only. They exclude Deputy Ministers. The focus of FC s 92 is understandable. It identifies those members who are accountable to Parliament for managing government. However, because the principle of collective responsibility is concerned not only with accountability to Parliament, but is also a mechanism to secure party cohesion, it is likely that political leaders will expect Deputy Ministers to adhere to it as well. Practice in

[1] FC s 92(2) holds Cabinet members accountable to Parliament.

[2] On shared legislative competence, see V Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15. On shared powers and co-operative government, see S Woolman, T Roux and B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14.

[3] For further discussion of the role of the NCOP in holding the national Cabinet to account, see C Murray, D Bezrui, L Ferrell, J Hughes, Y Hoffman-Wanderer and K Saller *Speeding Transformation — The Oversight Role of the NCOP: A Report for NDI and the South African National Council of Provinces* (2004).

[4] See *Egan v Willis* (1998) 195 CLR 424. The High Court of Australia confirmed that the upper house of the New South Wales legislature could punish a minister for his failure to comply with a resolution that he should table certain papers in the house. However, a subsequent case, *Egan v Chadwick,* held that Parliament could not demand the presentation of Cabinet papers. [1999] NSWCA 176. See C Mantziaris '*Egan v. Willis* and *Egan v. Chadwick*: Responsible Government and Parliamentary Privilege' Parliament of Australia Parliament Library Research Paper 12 1999-2000, available at http://www.aph.gov.au/library/Pubs/rp/1999-2000/2000rp12.htm (accessed 20 February 2008).

South Africa since 1994 bears out this understanding. In 2007, in dismissing the Deputy Minister of Health, President Mbeki referred to her constitutional obligation to 'work collectively to develop and implement national policies', an obligation, he implied, she had not fulfilled.[1] As Turpin notes, 'collective responsibility, if strictly observed, exacts its price. By stifling open dissent it contributes to secrecy in government.'[2] The competing interests are apparent. Politicians depend on the President for executive positions and thus will seldom be inclined to gainsay mainstream policy. Presidents and Prime Ministers often take advantage of this indebtedness.[3] Nevertheless, in selecting Ministers and, particularly, Deputy Ministers, the President may also need to include people from different sectors of the governing party. These Ministers and Deputy Ministers may not be willing to forego the right to express views that are not shared by their Cabinet colleagues.

The more important, related question is how far the accountability of Cabinet members extends. This concern has grown recently: in part triggered by the rise of big government, and, in part, by the increasing tendency to establish parastatals to carry out government functions and the privatisation of many others. Under these circumstances, one must ask how a Cabinet member can reasonably be held responsible for actions of public servants and institutions over whom he or she has no direct control. Accordingly, in the UK, when confronted with embarrassing examples of government failure, ministers have argued that while they are responsible for policy matters, they are not responsible (or accountable) for operational matters in their departments or in government agencies and parastatals. This question is considered in section *(f)* below.

(e) Individual ministerial accountability

FC s 92(2) holds Cabinet members accountable — both collectively and individually — to Parliament. While collective accountability requires Cabinet members to act in a collaborative way, individual accountability ensures that Parliament can identify the Cabinet member who is responsible for a particular matter and can call that person to explain the government's actions. The traditional, text book definition of individual ministerial responsibility would have ministers responsible for everything that is done in the departments under their control — with an obligation to resign if things go seriously wrong. It is not clear that this view ever had purchase outside the classroom. Both its components are contested. First, as

[1] C Terreblanche and F Kockott *Sunday Independent* (August 12, 2007) 1.

[2] *British Government and the Constitution* 217.

[3] Burnell talks of the 'payroll vote' in Zambia where, in 2002, 68 ministers and deputy ministers were appointed from a 158-seat Parliament. See P Burnell 'Legislative-Executive Relations in Zambia: Parliamentary Reform on the Agenda' (2003) 21 *Journal of Contemporary African Studies* 47, 58. In Namibia 'almost all Swapo [governing party] MPs are members of Cabinet or tasked to attend Cabinet meetings on behalf of their ministers.' H Melber 'People, Party, Politics and Parliament: Government and Governance in Namibia' in MA Mohammed Salih (ed) *Between Governance and Government: African Parliaments* (2005) 142, 151. In Britain, Parliament controls this practice to some extent by limiting the number of ministerial salaries that can be paid (Ministerial and Other Salaries Act 1975). The Indian constitution restricts the number of ministers to 15% of the members of the legislature. Indian Constitution Section 75 (1-A)(Inserted in 2003).

already noted, many argue that it is unreasonable to hold ministers accountable for matters of which they have no knowledge and of which, in an age of big and complex government, they could not be expected to know. Second, resignation is an extreme sanction and there is little evidence to substantiate assertions that it is a firm convention of parliamentary government.[1] Resignations seem more often to be a response to public pressure by the party in power, used by the party to demonstrate accountability for the mismanagement or the misjudgement in question. British practice suggests that Cabinet members can survive even serious problems if their colleagues are prepared to ride the storm.[2]

The best explanation of what Cabinet members are accountable for takes into account both the size and complexity of government and the importance of having elected representatives bearing responsibility for the actions of government. As Turpin comments, there 'should be a limit to the ability of ministers to escape responsibility by attributing blame to their officials'.[3] Thus, Parliament can at least expect a Cabinet minister to explain what measures have been taken to ensure that the department under his or her control is properly run and, in case of mismanagement, what steps have been taken to rectify the maladministration.[4] This view, which insists that the accountability of Cabinet members covers more than matters of policy, is consistent with the FC's strong, overall commitment to accountable government. Nevertheless, the line between matters for which officials bear responsibility and matters for which the minister must shoulder the blame, is difficult to draw n practice. Following British practice, the Public Finance Management Act (PFMA)[5] acknowledges this difficulty in stipulating, in s 64, that

[1] The Final Report of the Ad-Hoc Committee on Ministerial Accountability of the Gauteng Legislature states that '[a]n Executive Council member could be required/or expected to resign on four counts' (see 'Final Report' 8 December 2003) 6.2.9.2. Only one of these falls within the usual ambit of individual accountability — inept or corrupt policies. The others (embarrassment in his or her personal life; disagreement with the government; and lying to the legislature) seem to demand resignation for the member's personal unsuitability for the position.

[2] See Turpin (supra) at 453ff.

[3] See Turpin (supra) at 461

[4] This principle may be thought to be compromised by the present practice that the bureaucratic heads of departments (Directors General) are appointed by the President. However, the doctrine of collective responsibility means that a minister cannot avoid accounting to Parliament by claiming a lack of control over the choice of Director General.

[5] Act 1 of 1999. The PFMA is legislation required by FC s 216. The relevant part of FC s 216 provides:

Treasury control

(1) National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing-
   (a) generally recognised accounting practice;
   (b) uniform expenditure classifications; and
   (c) uniform treasury norms and standards.

(2) The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures.

The object of the Act is to ensure transparency, accountability and sound financial management in the institutions to which it applies. Preamble read with section 2.

a departmental accounting officer is responsible for unauthorised expenditure that he or she has been directed to incur by a minister unless that accounting officer has informed the minister in writing that the expenditure is unauthorised and, nonetheless, been directed, in writing, to proceed. This procedure ensures that the responsibility lies with the minister.

Yet more complicated questions of accountability arise in the case of parastatals and other, privatised or partially privatised government functions. The general position is that Cabinet members are accountable to Parliament for all matters that fall within their portfolios, including public entities operating as companies.[1]

The question of what sanctions Parliament can impose when Cabinet members fail to fulfil their responsibilities adequately is a vexed one. As already noted, resignations are rare — and there have been none in South Africa since 1994. In a system in which the balance of power between government and opposition is fine, Cabinet members are constantly aware of the need to retain the confidence of their parliamentary colleagues. This peer pressure encourages them to take their accountability to Parliament seriously. Parliament also has other mechanisms to enforce accountability. FC s 92(3) requires Cabinet members to report to Parliament regularly. This requirement is supplemented by parliamentary practices such as question time. Nevertheless, the dominance of government business in Parliament, and the ability of the majority party to control proceedings and the agenda, reduce the effectiveness of the convention of individual accountability of Cabinet members.

Interesting questions arise here: Could the opposition rely on the (unusual) fact that Cabinet accountability is spelt out in the Final Constitution to insist that Cabinet members attend Parliament and answer questions even if the Speaker and programme committee of the National Assembly does not require this? Is it a matter that is appropriately adjudicated by a court or is it a matter of internal proceedings of Parliament? As the Constitutional Court recognised in *Doctors for Life International v Speaker of the National Assembly and others*,[2] although the 'constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings…[c]ourts are required by the Constitution "to ensure that all branches of government act within the law" and fulfil their constitutional obligations.'[3] Moreover, following *Doctors for Life*, a

[1] The Gauteng Legislature's Report classifies the responsibility of members of the executive to account to the legislature under five headings. One of these is 'redirectory responsibility'. This responsibility, according to the Report, requires the member of the Executive to 'redirect questions from members [of the legislature] to the relevant quasi-government or parastatal agency for which she/he is accountable' (6.2.9.2.1). However, the Report does not take this matter further instead recommending that the question of accountability for public entities receive further attention (7.1). Note that the British Cabinet Office *Ministerial Code* (2007) states that 'ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and *agencies*' (emphasis added) (para 1.2*(b)*).

[2] 2006 (6) SA 416 (CC), 2006 (12) BCLR (CC).

[3] Ibid at paras 37 and 38.

failure by Parliament to hold Cabinet members to account would touch upon a matter central to the model of democracy established by the Final Constitution.[1] *Doctors for Life* suggests that such a failure may, in a proper case, be justiciable.[2]

(f) Outsourcing, privatisation and Cabinet accountability

In South Africa, as in many parts of the world, functions that have been performed by government in the past fifty or so years are increasingly being performed by corporate entities at some remove from government.[3] The trend of privatising and outsourcing government services and government functions is often considered from the perspective of administrative law. These measures raise questions of the extent to which courts can review powers exercised by non-governmental entities.[4] But consideration must also be given to whether members of Cabinet are accountable to Parliament for the performance of governance functions delegated to non-governmental entities. At least part of the justification for delegated governance is the replacement of sometimes ineffective methods of political accountability with accountability to shareholders.[5] However, in Britain, some argue that the delegation of functions to organisations with some degree of autonomy from direct ministerial control has 'challenged constitutional processes of accountability' and reduced individual ministerial accountability to Parliament.[6] In the United States, delegated governance has been accompanied by a shift in attitude from legal process to performance, wherein accountability to Congress is sometimes seen as a hindrance to performance and a nuisance to be avoided.[7] Although managers are thus institutionally insulated from political accountability, the idea is that they remain accountable for the achievement of 'real results'.[8]

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[1] Ibid at para 32. In the context of FC s 92 the principle would be accountable government, enshrined in FC s 1 and elsewhere.

[2] See T Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd edition, OS, July 2006) Chapter 10.

[3] See Y Burns 'Government Contracts and the Public/Private Divide' (1998) 13 *SA Public Law* 234; R Malherbe 'Privatisation and the Constitution: Some Exploratory Observations' (2001) *Tydskrif vir die Suid Afrikaanse Reg* 1. In relation to Britain, see generally, G Drewry 'The executive: Towards accountable government and effective governance?' in Jowell & Oliver *The changing constitution* 280; M Flinders 'MPs and Icebergs: Parliament and Delegated Governance' (2004) 57 *Parliamentary Affairs* 767. In relation to the United States, see R C Moe 'The Emerging Federal Quasi Government: Issues of Management and Accountability' (2001) 61 *Public Administration Review* 290.

[4] See, for example, Hoexter *Administrative Law* (supra) at 147-150; S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd edition, OS, February 2005) Chapter 31; J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 63.

[5] JF Handler *Down from Bureaucracy: The Ambiguity of Privatization and Empowerment* (1996) 3; Hoexter *Administrative Law* (supra) at 148.

[6] Flinders 'MPs and Icebergs' (supra) at 767.

[7] Moe 'The Emerging Federal Quasi-government' (supra) at 306; Flinders 'MPs and Icebergs' (supra) at 774.

[8] Moe (supra) at 305-306.

There are arguments, however, that these institutions are, ultimately, totally unaccountable. The relevant question in the context of this section is the extent to which the national executive remains responsible or accountable for governance functions once they have been delegated.

In South Africa, the transfer of governmental functions usually takes one of two forms. An outsourcing arrangement involves the conclusion of a contract between government and a corporate entity in terms of which the entity undertakes to perform certain traditionally governmental functions.[1] Privatisation involves the formation of a corporate entity with its own legal personality distinct from government to which responsibility for the performance of a function or provision of a service is transferred.

(i) *Outsourcing arrangements*

Outsourcing involves the 'contracting out' of specific state functions to the private sector, wherein a person, group, company or entity other than the state is enlisted by means of a contract to provide services directly to the public.[2] Before the constitutional era the power to enter into contracts was an element of the executive's common-law authority derived from English prerogative powers.[3] While the Final Constitution does not expressly mention an executive power to contract, Floyd argues that, in light of item 2(1) of Schedule 6 to the Final Constitution, providing that all law in force at the time the Constitution took effect continues in force to the extent of its consistency with the Final Constitution,[4] the common-law empowerment of the state to conclude contracts remains valid.[5] Public contracts may also be expressly authorised by statute.[6]

[1] See Burns (supra) at 235-236.

[2] See Burns (supra) at 236. See also C Turpin *Government Contracts* (1972); ACL Davies *Accountability: A Public Law Analysis of Government by Contract* (2001); C Saunders & K Yam 'Government Regulation by Contract: Implications for the Rule of Law' (2004) 15 *Public Law Review* 51; JB Auby 'Comparative Approaches to the Rise of Contract in the Public Sphere' (2007) *Public Law* 40, 43-44; and J Freeman 'The Contracting State' (2000) 28 *Florida State University Law Review* 155, 164-165.

[3] See *Minister of Home Affairs and Another v American Ninja IV Partnership and Another* 1993 (1) SA 257 *(a)*; *Sedgefield Ratepayers' and Voters' Association and Others v Government of the Republic of South Africa and Others* 1989 (2) SA 685 *(c)*.

[4] See M Chaskalson 'Transitional Provisions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 28.

[5] T Floyd 'The Capacity of Government to Conclude Contracts: Still an Unlimited Power?' (2005) 20 *South African Public Law* 378, 387. See also P Bolton *The Law of Government Procurement in South Africa* (2007) 73ff. The FC s 82(2) power to implement legislation and policy may also be interpreted to authorise state contracts.

[6] On the power of local government executives to contract, see s 10C(7)*(a)* of the Local Government Transition Act 209 of 1993 and *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA) at para 18. On the power of provincial governments to contract. See Provincial Tender Board Act (Eastern Cape) 2 of 1994 and *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others* 1999 (1) SA 324 (CkH).

A frequently voiced concern is that widespread 'contracting out' of services impedes parliamentary oversight and supervision, and allows the executive body as well as the non-governmental entity to escape scrutiny for the provision of services outsourced in terms of a contract.[1] Saunders and Yam explain the problem:

> Representative democracy assumes the accountability of elected representatives to the people for the exercise of public power. Parliament is accountable directly, through its public procedures and through the electoral process. Governments are accountable to Parliaments between elections. …Theoretically, governments are also responsible to Parliament for action that they take pursuant to statute and in the course of administration. However, the consistency of this in practice is open to question. The difficulties of enforcing the responsibility of government to Parliament are further augmented by any departure from the traditional governance model.[2]

Responsibility for the fulfilment of the governmental functions of service provision remains with the executive even where the executive outsources the actual provision of services through contract. Accordingly, the executive remains accountable to Parliament for these outsourced functions. Unlike the case of privatisation, in which national legislation makes provision for the formal delegation of responsibility to a non-government entity, a contract regulates only who performs a particular service and not who bears ultimate political responsibility for the provision of that service. In this context, the most crucial difference between privatisation and outsourcing arrangements is that Parliament is involved when a privatisation scheme delegates responsibility for a service previously provided by the government, while an outsourcing arrangement can be concluded by a contract to which Parliament is not privy.[3] Where a national department seeks to outsource the provision of a service or performance of a function for which it is responsible by means of a contract, without parliamentary involvement, it is clear that the Cabinet member in charge of that department and, indeed Cabinet as a whole, remain accountable to Parliament for the provision of that service or the performance of that function. As we discuss below, where Parliament is involved in the delegation of a function or power, as in the case of a privatisation, the situation is more complicated.

The difficulty created by outsourcing arrangements is not one of mere theory. It does not present conceptual problems of where accountability does or ought to

[1] Auby writes: 'Contractual public policies are often conducted in such a way that they are largely out of the reach of any parliamentary supervision.' Auby (supra) at 54. Freeman echoes this concern and indicates that the weakening of executive and legislative oversight places a greater burden on the judiciary. Freeman (supra) at 201.

[2] Saunders & Yam (supra) at 58 (footnotes omitted).

[3] Although the authority of an executive organ to enter into a contract may be conferred by legislation, the conferral of an authority to contract does not amount to a delegation of responsibility for the subject-matter of the contract. On the differences between delegation and contracting out, see Saunders and Yam (supra) at 62-64.

fall. Rather, the difficulty is a practical one inherent in parliamentary oversight of executive functions performed in fact by entities other than the executive.[1]

(ii) *Privatisation*

Privatisation has been succinctly described and promoted by its supporters as 'the systematic transfer of appropriate functions, activities or property from the public to the private sector, where services, production and consumption can be regulated more efficiently by the market and price mechanisms'.[2] The corporations to which functions are transferred are sometimes referred to as quasi-autonomous non-governmental organisations or 'quangos', non-departmental public bodies or institutions of the New Public Management in Britain, and as hybrid organisations in the United States.

In South Africa, the Public Finance Management Act (PFMA)[3] regulates the financial management of various government and non-governmental bodies. The PFMA captures privatised institutions within a range of institutions that fulfil public functions with varying degrees of independence from government. It establishes lines of financial accountability for government and provincial departments as well as corporations that perform public functions, and refers to these corporations as national or provincial 'public entities'. Public entities are defined in section 1 of the PFMA to include national and provincial 'government business enterprise[s]'. The latter are in turn are defined as juristic persons under the

[1] This section does not consider how these practical problems may be resolved. See Saunders and Yam (supra) at 61-67; Freeman (supra) at 201-207; and SL Schooner 'Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government' (2005) 16 *Stanford Law and Policy Review* 549, 571-572.

[2] N Kusi 'The Fiscal Impact of Privatisation in South Africa' *South African Network for Economic Research Working Paper 18* (November 1998) 4 cited in Malherbe 'Privatisation and the Constitution' (supra) at 1. For a discussion of the extent to which privatisation and outsourcing out to permit a government entity to insulate itself from constitutional scrutiny see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd edition, OS, February 2005) Chapter 31.

[3] Act 1 of 1999. The PFMA is legislation required by FC s 216. The relevant part of FC s 216 provides:

Treasury control

(1) National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing-
   (a) generally recognised accounting practice;
   (b) uniform expenditure classifications; and
   (c) uniform treasury norms and standards.

(2) The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures.

The object of the Act is to ensure transparency, accountability and sound financial management in the institutions to which it applies (Preamble read with section 2).

control and ownership of the national or provincial executive, which have been assigned financial and operational authority to carry on a business activity. Quangos, institutions of the New Public Management and hybrids will be referred to in this section in accordance with the nomenclature of the PFMA.

In the case of 'formal privatisation', where the entity to which a function is transferred remains wholly or mainly state-owned, private accountability to shareholders for the achievement of results seems to offer no justification for the transfer or delegation of the function. On the contrary, formal privatisation may be seen to be a cunning way of avoiding both the direct political accountability that members of the national executive owe to Parliament and the private commercial accountability that directors of companies owe to shareholders. In South Africa, there are a number of commercial entities performing public or governmental functions that are wholly or mostly owned by the state.[1]

While dilution or attenuation of accountability seems an inevitable consequence of privatisation, executive accountability is maintained to some degree by statutory structures. FC s 92(2) means that Ministers remain accountable for institutions that fall within their policy portfolios. The PFMA establishes mechanisms by which financial accountability is maintained, designating Cabinet members as executive authorities in relation to national public entities.[2] The respective

[1] For example, section 3(1) of the Post Office Act 44 of 1958 (as amended) contemplates the incorporation of two public companies to conduct postal and telecommunications services. These companies have since been incorporated as the SA Post Office Limited and Telkom SA Limited. Shares in the companies are in terms of sections 3(4)*(a)* and 5(1) issued to the state, and the powers and duties of the state as shareholder are exercised and performed by the Minister (section 3(6)). Similar structures are in place in regard to the South African Broadcasting Corporation Limited (Broadcasting Act 4 of 1999, section 8(1)-(2)), Transnet Limited (Legal Succession to the SA Transport Services Act 9 of 1989, section 2(1)), the Armaments Corporation of South Africa Limited (Armaments Corporation of South Africa Limited Act 51 of 2003, section 2(2)), the Airports Company of South Africa (Airports Company Act 44 of 1993, section 3(3)) and Eskom Holdings Limited (Eskom Conversion Act 13 of 2001, section 2). The Central Energy Fund holds funds for the financing and promotion of fossil-fuel energy resources, and is controlled by a proprietary company, CEF (Pty) Ltd, established in terms of the Central Energy Fund Act 38 of 1977. While the legislation establishing the other entities mentioned so far contemplates that the state may transfer its shares to any other person, usually subject to some form of ministerial approval, the Central Energy Fund Act provides that shares in CEF (Pty) Ltd are to be taken up the state only and cannot be transferred (section 1D(2) and (5)).

[2] In terms of section 1 of the PFMA, each member of Cabinet accountable to Parliament for a national department is designated as the 'executive authority' for that department for the purposes of the PFMA. Various duties and functions of 'executive authorities' are provided for in the PFMA. The executive authority must, for example, receive the annual report, the audited financial statements and the Auditor-General's report in relation to the national department for which he or she is responsible (s 40(1)*(d)*) and must table these reports in the National Assembly (s 65(1)*(a)*). The 'executive authority' of a national public entity is defined in the PFMA as 'the Cabinet member who is accountable to Parliament for that public entity *or* in whose portfolio it falls'. (our italics) The PFMA thus seems to contemplate two situations: one where a Cabinet member is accountable to Parliament for a national public entity and another where the Cabinet member is not accountable for the public entity but is responsible for the field of activity in which the entity's activities fall. However, this distinction does not appear to be sustained in the PFMA which refers directly to Ministers 'responsible for' public entities and which, in section 65(1)*(a)* provides that a Cabinet member is responsible, as the executive authority of a public entity, for tabling reports.

legislative frameworks establishing public entities supplement this broad requirement. Nevertheless, the statutory framework is not absolutely clear.

The PFMA's definition of national public entities embraces national government business enterprises, but also recognises a class of public entities that are not government business enterprises. This category of public entity is defined as any board, commission, company, corporation, fund or other entity other than a national government business enterprise that is established in terms of national legislation and accountable to Parliament.[1] The definition of this second class of national public entities suggests that its member entities are *directly* accountable to Parliament. Such direct accountability may be read to displace the accountability of the relevant Minister. But Parliament cannot by legislation remove accountability which the Final Constitution demands of members of Cabinet. Under the Final Constitution, Cabinet remains responsible for the exercise of the executive authority of the state.

As already indicated, under the PFMA, national government business enterprises are a subcategory of public entities. The PFMA defines national government business enterprises as juristic persons under the 'ownership control of the national executive'. An entity in which the state is the sole or majority shareholder is, if it meets the other criteria set in the definition, a national government business enterprise.[2] In the case of the South African Broadcasting Corporation, a major public entity listed in Schedule 2 of the PFMA, the state is the sole shareholder.[3] The situation is the same for Transnet Limited,[4] the Central Energy Fund (Pty) Ltd,[5]

[1] The definition states:
"national public entity" means —
(a) a national government business enterprise; or
(b) a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is —
(i) established in terms of national legislation ;
(ii) fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and
(iii) accountable to Parliament.

[2] The definition in its entirety reads:
"national government business enterprise" means an entity which —
(a) is a juristic person under the ownership control of the national executive;
(b) has been assigned financial and operational authority to carry on a business activity;
(c) as its principal business, provides goods or services in accordance with ordinary business principles; and
(d) is financed fully or substantially from sources other than —
(i) the National Revenue Fund; or
(ii) by way of a tax, levy or other statutory money.

[3] Section 8A(2) of the Broadcasting Act 4 of 1999 reads: 'The Corporation must have a share capital as contemplated in section 19 of the Companies Act [61 of 1973] with the State as its sole shareholder.'

[4] Legal Succession to the SA Transport Services Act 9 of 1989, section 2(1). The Act does contemplate, though, that at some point the state may cease to be hold all the shares of the company.

[5] Central Energy Fund Act 38 of 1977, section 1D(2).

Eskom Holdings Limited,[1] the Airports Company,[2] Telkom SA Limited and the SA Post Office Limited.[3] In the case of Transnet, the Airports Company, Telkom and the Post Office, the relevant ministers exercise the state's rights as member and shareholder of each company on behalf of the state.[4] Each minister is responsible for these functions and powers as shareholder, and is in terms of FC s 92(2) accountable to Parliament for their performance and exercise.[5]

Parliament may be able to hold national government business enterprises directly accountable in terms of FC s 55(2)*(a)*. The section requires the National Assembly to provide for mechanisms to ensure that all '*executive* organs of state in the national sphere of government are accountable to it'. Most of the entities referred to above fit the definitional requirements of organ of state set in FC s 239.[6] If these public entities are executive organs of state, rather than merely organs of state, they will be accountable to the National Assembly. What an executive organ of state is remains an open question. However, FC s 238 also refers to an 'executive organ of state' and grants executive organs of state the power to delegate executive authority and enter into agency agreements. This wording suggests that an 'executive organ of state' is an organ of state that exercises some executive authority, or forms part of 'the executive'. One possible reading of FC s 55(2)*(a)* is that it is the counterpart of FC 92: it confirms Parliament's obligation to oversee members of Cabinet who in terms of s 92 are accountable to it.[7] On this view, a member of Cabinet who exercises rights as a shareholder in a national government business enterprise that is wholly or mostly owned by the state would

[1] Eskom Conversion Act 13 of 2001, section 2. Section 4(2) does contemplate that, as with Transnet, the state may cease to be the sole or majority shareholder of the company.

[2] Airports Company Act 44 of 1993, section 3(3).

[3] Post Office Act 44 of 1958, sections 3(4)*(d)* and 5(1).

[4] See the relevant Acts of Parliament referred to above at sections 2(3); 3(3) and (4); and 3(6) respectively.

[5] One of these powers is the removal of directors. Section 220 of the Companies Act 61 of 1973 confers the power to remove directors before the expiry of their term on the general meeting of the members of a company. As the sole or majority shareholding member of a company, the executive, acting through the relevant Minister, is empowered to remove directors. In May 2007, the Minster of Communications dismissed the CEO of the SA Post Office Limited. See SAPA 'Post Office Boss Dismissal Confirmed' available at http://business.iafrica.com/news/903487.htm (accessed 6 June 2007)). In 2003 the Minister of Transport dismissed the chairman of the Airports Company. See J Sikhakhane 'Johncom's Mashudu Ramano Tries to Crack the BEE Nut' *Business Report* (5 July 2006) available at http://www.busrep.co.za/index.php?fSectionId=553&fArticleId=3323722 (accessed 6 June 2007)).

[6] See *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2000 (1) SA 853 SCA; *Transnet Ltd v Chirwa* 2007 (2) SA 198 (SCA); *Chirwa v Transnet Ltd* CCT 78/06 (Decided 28 November 2007).

[7] Stuart Weir talks of 'executive quangos' in the UK, but uses the term to describe bodies which have been created or pressed into service to 'perform public functions or deliver public services.' s Weir 'Quangos: Questions of Democratic Accountability' (1995) 48 *Parliamentary Affairs* 306. This description is of no assistance in South Africa in defining executive organs of state, since all organs of state perform public functions or exercise public powers.

be accountable to Parliament for the operation of that entity.[1] Another view is that these entities are directly accountable to the National Assembly. But, it is unclear what direct accountability to Parliament would mean in such cases. Parliament may insist that the entity concerned itself accounts for its activities but has little power to act when things are amiss. Thus, the concomitant accountability of Cabinet is essential.

In this regard, Cabinet's response to the 2007 outcry concerning Eskom, a major public entity which is established as a company, is instructive. President Mbeki himself accepted the government's responsibility for Eskom's inability to maintain an adequate supply of power to the country.[2]

The situation is a great deal more complicated in the case of a substantial privatisation where the state ceases to be the sole or majority shareholder. Presumably Cabinet ceases to be fully accountable to Parliament for the exercise or performance of powers and functions as a shareholder. Similarly, directors of such a company cease to be directly accountable to Parliament as the company ceases to be an executive organ of state. The mechanisms of price and market and accountability to private shareholders take over. In such cases, the activities of private companies performing traditionally governmental functions and providing public services can be regulated effectively even in the absence of direct ministerial accountability. The National Assembly exercises oversight by holding regulating bodies to account. In terms of FC s 55(2)*(b)*(ii), however, the Assembly must establish mechanisms 'to maintain oversight' of any organ of state.[3]

(g) Votes of no confidence under FC s 102

FC 102 states:

> (1) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet.

[1] See *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC). The Constitutional Court held that a private not for profit organisation established to regulate the micro finance industry in terms of the now-repealed Usury Act 73 of 1968 was an organ of state within the meaning of FC s 239. Although not owned or operated by the executive, the Usury Act contemplated that the minister of Trade and Industry would exercise significant oversight of the Council. This oversight role would have constituted an executive function provided for in national legislation within the meaning of FC s 85(2)*(e)*, and is a role for which the Minister would have been accountable to Parliament. The mechanisms in the Usury Act by which the Minister remained involved in and accountable for the affairs of the Council follow the reading of FC s 55(2)*(a)* as referring to Cabinet. On this view it is not clear the FC s 55(2)*(a)* contemplates direct accountability of executive organs of state to Parliament.

[2] 'Government to blame for South Africa blackouts: Mbeki' 11 December 2007 http://www.haaba.com/tags/electricity?q=node/65918 (accessed 19 February 2008) and 'State of the Nation Address of the President of South Africa, Thabo Mbeki: Joint Sitting of Parliament' 8 February 2008 http://www.info.gov.za/speeches/2008/08020811021001.htm (accessed 19 February 2008).

[3] Flinders points out that status as a non-departmental public body 'does not provide protection from forms of parliamentary scrutiny, such as parliamentary questions.' Flinders (supra) at 779. Cole suggests that the contribution to accountability of parliamentary questions put to ministers about public entities within their portfolios is relatively small. M Cole 'Accountability and Quasi-government: The Role of Parliamentary Questions' (1999) 5 *The Journal of Legislative Studies* 77.

(2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.

This provision constitutionalises the central element of a parliamentary democracy: the executive must retain the confidence of Parliament to remain in office. Successful votes of no confidence are likely to be rare. First, in all parliamentary systems, members of the legislature depend on the support of the party for their continued careers as politicians: members of the majority party rarely vote their leadership out of government. In an the electoral system of closed list proportional representation, the dependence of MPs on the party is even greater because bank-benchers are not subject to pressure from members of a constituency. Thus, for a vote of no-confidence to be carried by a majority of MPs requires a major political upheaval. Secondly, although a vote of no confidence does not require the dissolution of the National Assembly, unless another leader who carries the support of the majority is lined up, dissolution of the Assembly and a national election is a likely consequence. MPs will not readily embark on a process which threatens their seats and requires them to fight an election.

(h) Ethics

Cabinet members are expected to conduct themselves in an ethical way. FC s 96(2) outlines the basic principles that are applicable in this regard. It states that:

Members of the Cabinet and Deputy Ministers may not-
(a) undertake any other paid work;
(b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

This section is not intended to be comprehensive. FC s 96(1) anticipates a more extensive code of ethics for Cabinet members stating that '[m]embers of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation'.

The national legislation envisaged in FC s 96(1) was passed in 1998 in the form of the Executive Members Ethics Act (Ethics Act).[1] Section 2 of the Ethics Act requires the President, in consultation with Parliament, to publish a code of ethics to govern the behaviour of all national Cabinet Ministers and deputy Ministers. The Executive Ethics Code was eventually published in July of 2000.[2] The standards outlined in the Code elaborate upon the provisions of FC s 96(2). The Code requires Cabinet members to submit a list of their financial interests to the Secretary of Cabinet. The Secretary then maintains a register of financial interests.

[1] Act 82 of 1998.
[2] *GG* No 21366 of 28 July 2000.

Breaches of the Ethics Code are to be investigated by the Public Protector,[1] who on receipt of a complaint,[2] must complete an investigation and submit a report within 30 days. If the complaint was laid against a Cabinet Member or Deputy Minister, the report must be submitted to the President. The President must, within 14 days of receipt, submit a copy of the report together with his or her comments to the National Assembly.[3] A 'Cabinet member' includes the President[4] and the same procedure applies to complaints against the President. In practice the President would receive the report on an investigation into his or her actions, have the opportunity to comment and then submit it to the National Assembly. The National Assembly could then avail itself of the power to impeach, to investigate or to question the President.

(i) The Minister of Finance

As in other parliamentary systems, the Minister of Finance has a distinct constitutional role and is central to the system of public finance that the Final Constitution established. Ross Kriel and Mona Monadjem discuss the constitutional and statutory framework in more detail in their chapter on Public Finance.[5] In the context of this chapter, however, it is important to note the exclusive power that the Minister of Finance has under FC s 73 to introduce money bills (which are defined in FC s 77). As the National Assembly currently believes (mistakenly) that it may not amend a money bill until the Act regulating the procedure for such amendments anticipated by FC s 77 is passed, the Minister now possesses absolute control over money bills — subject only to the principle of Cabinet solidarity and the remote threat of a vote of no confidence.

The responsibility that the Minister of Finance has for public expenditure necessarily means that he or she has an interest in the policies of all government departments. The combination of the definition of a money bill as any bill that raises a tax and the provision that bills raising taxes may contain no other matters ensure that the Minister of Finance is in control of all tax bills before Parliament.

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[1] Section 3 of the Ethics Act.

[2] In terms of s 4(1) of the Ethics Act an investigation must be initiated if a complaint is lodged by:

(a) the President, a member of the National Assembly or a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet member or Deputy Minister; or

(b) the Premier or a member of the provincial legislature of a province, if the complaint is against an MEC of the province.

In terms of s 4(3) members of the public may also lodge complaints. However, such complaints must be lodged in terms of the relevant sections of the Public Protector Act 23 of 1994.

[3] Ethics Act s 3.

[4] Section 1 (ii) of the Ethics Act.

[5] See R Kriel and M Monadjem 'Public Finances' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd edition, OS, March 2007) Chapter 27.

This consolidation of responsibility (and power) is intended to ensure that the national Treasury can control the national tax burden and that other departments do not increase it by adding ad hoc tax measure to legislation that they initiate.[1]

(j) Executive control of the defence force[2]

The President is the Commander-in-Chief of the defence force.[3] In addition, a member of Cabinet must be politically responsible for defence.[4] While both the President and the Cabinet member responsible for defence are politically accountable to Parliament under FC 92(2), executive control of the defence force rests directly with the President.[5] Under FC s 201 only the President may authorise the employment of the defence force '*(a)* in co-operation with the police service; *(b)* in defence of the Republic; or *(c)* in fulfilment of an international obligation'.[6] The President must appoint the military command of the defence force[7] and command of the defence force 'must be exercised in accordance with the directions of the Cabinet member responsible for defence'. However, this direction occurs 'under the authority of the President'.[8] In addition, under FC s 203(1) the President may, as head of the national executive, declare a state of 'national defence'.[9]

Parliament has significant oversight powers in regard to any decision the President makes to employ the defence force. This is consistent with the statement in FC s 198*(d)* that national security is 'subject to the authority of Parliament and the national executive'. The strongest of these powers is the requirement that a state of national defence must be approved by Parliament.[10] The Final Constitution

[1] Here the troublesome distinction between taxes and user charges arises. 'User charges' are not taxes and can be imposed in ordinary bills. .

[2] See, further, O Ampofo-Anti, K Robinson & S Woolman 'Security Forces' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 23B.

[3] FC s 202(1).

[4] FC s 201(1). As the President is a member of Cabinet this position could presumably be assumed by the President.

[5] In terms of FC s 101, any exercise of these powers by the President would nevertheless need to be in writing and countersigned by the Cabinet member responsible for defence.

[6] FC s 201(2).

[7] FC s 202(1). This function is performed as head of the national executive.

[8] FC s 202(2).

[9] For a brief summary of the distinction between a 'state of emergency' and a 'state of national defense', see N Fritz 'States of Emergency' in in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 61. See also J Brickhill & A Friedman 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 59.

[10] FC s 203(3). Although the Constitution does not explicitly empower Parliament to conditionally approve a declaration of a state of national defence or attach terms to such approval, political reality as well as FC s 198*(d)* and the review powers of s 18(5) of the Defence Act suggest that Parliament can amend a declaration before approving it . See S Ellmann 'War Powers under the South African Constitution' (Unpublished paper on file with the authors) 9.

does not explain what a state of national defence is nor does it give the President any particular powers once a state of national defence is declared. But the fact that a state of defence lapses unless it is approved by Parliament suggests that it is in fact a state of armed conflict (or, to use the old fashioned word, war). This reading of the provision is adopted by the Defence Act: the declaration of a state of national defence allows the President to draft civilians into the Defence Force, impose certain limits on freedom of movement in the country and regulate the 'control and use of transport systems, air traffic and use of the territorial waters' inter alia.[1] In addition, the President must inform Parliament 'promptly and in appropriate detail' when the defence force is employed in terms of FC s 201(2).[2]

The Final Constitution does not require the declaration of a state of national defence whenever the President involves South Africa in military action. Although the Defence Act extends the requirement that the President inform Parliament of the use of the Defence Force beyond the list in FC s 201, neither the Final Constitution nor the Act expressly require the notification of Parliament when the Defence Force is used outside the borders of South Africa. One presumes, however, that activity by the defence force outside South Africa's borders would either be in defence of the country or be in terms of an international agreement and thus fall under FC s 201(2).[3] If it were not it would be construed as an act of aggression, and outlawed by FC s 198*(c)*.

However, s 18(5) of the Defence Act 42 of 2002 grants Parliament a review power over the President's exercise of military powers in terms of FC s 201(2). This provision allows Parliament, by resolution within seven days of receiving information from the President about the authorisation of the employment of the defence force, to confirm or order the amendment, substitution or termination of that authorisation. If Parliament takes no action in terms of s 18(5) of the Defence Act, a decision under FC s 201(2) stands.

The most difficult legal question that arises in relation to the deployment of the defence force is whether or not courts can review it and, if so, what the scope of

[1] Act 42 of 2002 ss 90 and 91.

[2] FC s 201(3) which requires the president to provide details of '*(a)* the reasons for the employment…; *(b)* any place where the force is being employed; *(c)* the number of people involved; and *(d)* the period for which the force is expected to be employed'. FC s 201(4) provides that if Parliament does not sit within seven days after the employment of the defence force the President must provide the required information to the appropriate oversight committee.

[3] South Africa's decision to send troops into Lesotho in 1998 was a decision in terms of FC s 201(2), and thus although the Constitution required Parliament to be informed, the action did not need to be confirmed or approved by Parliament See s Ellmann 'War Powers under the South African Constitution' (supra) 4-5.

such review would be. Motala and Ramaphosa suggest that presidential decisions as Commander-in-Chief of the defence force are not justiciable.[1] They rely on the American political question doctrine for this submission, arguing that there are 'no manageable judicial standards' against which decisions on defence can be tested, and that the judiciary is consequently poorly-placed to 'second-guess' the political branch's use of military resources.[2] Judicial intervention could also embarrass the executive abroad where, for example, a commitment to employ the defence force in combat is overruled by the courts.[3] However, the constitutional insistence that all executive action is subject to the law, reiterated in FC s 198*(c)*, suggests that decisions taken by the President as Commander-in-Chief are reviewable.[4] Of course, as O'Regan J implies in *Kaunda v President of the Republic*, provided that the action is procedurally lawful, courts are likely to be deferential.[5] But courts can insist that the President acts in good faith when exercising these powers.[6] *De Lille v Speaker of the National Assembly* suggests that since Parliament too must act in good faith,[7] Parliament's oversight power of executive military powers is subject to review on the same ground.

(k) Foreign affairs

The conduct of foreign affairs or foreign relations and the formulation of foreign policy are matters falling within the domain of the executive and for which Cabinet is collectively responsible.[8] The clearest statement of this principle is to be

[1] Z Motala & C Ramaphosa *Constitutional Law: Analysis and Cases* (2002) 218.

[2] Ibid at 220.

[3] Ibid. See also *Baker v Carr* 369 US 186, 217 (1962) (Adumbrates factors American courts have considered relevant to determining whether a question before a court is a non-justiciable political question.)

[4] FC s 198*(d)* states that '[n]ational security is subject to the authority of Parliament and the national executive'. This section cannot be interpreted as ousting the jurisdiction of the courts.

[5] 2005(4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) at paras 224 and 225.

[6] *SARFU III* (supra) para at 148.

[7] 1998 (3) SA 430, 445 *(c)*. The decision was confirmed on appeal by the SCA, but on a quite different basis. See *Speaker of the National Assembly v De Lille and Another* 1999 (4) SA 863 (SCA).

[8] *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) per Chaskalson CJ at 77, Ngcobo J at para 172 and O'Regan J at para 243; *Rootman v The President of the Republic of South Africa* [2006] SCA 80 RSA, [2006] JOL 17547 (SCA)(SCA referred to the President and the Minister of Justice and Constitutional Development collectively as 'the State' in a mater concerning relations with a foreign state (see further below).) O'Regan J in *Kaunda* relied on the President's responsibilities under FC s 84(2)*(b)* and (i) to receive and recognise foreign diplomatic and consular representatives and to appoint ambassadors, plenipotentiaries and diplomatic an consular representatives, and the national executive's responsibility under FC s 231(1) to negotiate and to sign international agreements to conclude that foreign affairs is an executive function. It is worth noting, though, that the President's powers under FC s 84(2) are powers as Head of State, to be exercised alone without the concurrence of Cabinet. The responsibilities referred to in FC s 84(2)*(b)* and (i) are thus, not executive powers for which Cabinet is collectively responsible, but powers for which the President alone is responsible. See also J Dugard *International Law: A South African Perspective* (3rd Edition 2005) 70 ff.

found in FC s 231 which states that the 'negotiation and signing of international agreements is the responsibility of the national executive'. Currently agreements which must be ratified by Parliament under FC s 231 are first submitted to Cabinet for its consent. Once Parliament has ratified the agreement (by a resolution in both the National Assembly and NCOP), the Minister of Foreign Affairs signs an instrument of ratification and deposits it with the relevant body.[1] International agreements, for which parliamentary ratification is not required, are dealt with by President's Minutes (which require the signature of the President and the relevant Minister). As with other matters, the convention is that, if such an agreement is contentious in any way, which includes having an impact on domestic law, or has financial consequences, it must go to the Cabinet.[2]

The question that has arisen in a number of cases in the South African courts recently is whether the executive can be compelled to engage in foreign relations in order to achieve a particular objective.[3] The source of this stream of cases is the Constitutional Court's decision in *Mohamed and Another v President of the Republic of South Africa and Others*.[4] In that case a foreign national was extradited from South Africa to the United States to stand trial on charges relating to the bombing of a US embassy in Dar es Salaam.[5] The applicant's complaint was that the South African authorities had infringed his constitutional rights to human dignity (FC s 10), to life (FC s 11) and not to be treated or punished in a cruel, inhuman or degrading way (FC s 12(1)*(e)*) by allowing the extradition to the United States to go ahead without first obtaining an assurance from the US authorities that the applicant would not face the death penalty if convicted of the crimes of which he was accused.[6] The applicant sought and was ultimately granted declaratory relief to this effect.[7] He also sought mandatory relief directing the South African Government to pursue diplomatic routes to securing an assurance from the United States authorities that the death penalty would not be imposed, or if imposed not carried out, should the applicant be convicted on the criminal charges.[8] The South African government opposed this relief, submitting that 'any such order would infringe the separation of powers between the Judiciary and the Executive'.[9]

[1] *Manual of Executive Acts of the President* (1999) 5.8-5.12.

[2] *Manual of Executive Acts of the President* (1999) 5.13-5.18. It is arguable that when an international agreement impinges on the responsibility of provinces, FC chapter 3 requires provincial governments to be consulted before it is signed (see C Murray & S Nakhjavani 'South Africa' in *International Relations in Federal Countries* ed H Michelmann (2008) forthcoming). However, the *Manual of Executive Acts* simply notes that provinces do not have the power to conclude international agreements.

[3] See *Operation Dismantle Inc v Canada* [1985] 1 SCR 441 (Offers for cautious support for the reviewability of executive decisions on foreign affairs.)

[4] *Mohamed v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa Intervening)* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC).

[5] Ibid at paras 1-7.

[6] Ibid at paras 3-4.

[7] Ibid at para 73(3.1.1).

[8] Ibid at para 4.

[9] Ibid at para 69.

The Court did not agree. It indicated that such an order is, in principle, acceptable.[1] The *Mohamed* Court held that it would not

> necessarily be out of place for there to be an appropriate order on the relevant organs of State in South Africa to do whatever may be within their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him. To stigmatise such an order as a breach of the separation of State power as between the Executive and the Judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of State and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights.[2]

The kind of judicial intervention foreshadowed by *Mohamed* has not materialised in any of the matters where similar mandatory relied has been sought. Each of these matters can be distinguished from *Mohamed* on the facts, however, and they do not detract from the Court's stance in *Mohamed*.[3] *Kaunda* concerned 69 South African citizens who were arrested in Zimbabwe and held on a variety of charges including a charge of plotting a coup against the government of Equatorial Guinea.[4] They approached the South African courts seeking an order compelling the South African government to make diplomatic representations on their behalf to the governments of Zimbabwe and Equatorial Guinea, and to take steps to ensure that their rights to dignity, freedom and security of the person, and fair conditions of detention and trial were respected and protected in those countries.[5] Chaskalson CJ, writing for the majority, dismissed the applicants' reliance on *Mohamed*. Since the South African Bill of Rights has no application beyond the borders of South Africa and applies only to people in South Africa,[6] the South African authorities could not be said to have perpetrated any wrong against the applicants.[7] Whereas in *Mohamed* the Court held that it would not be inappropriate to order the South African executive to engage in diplomatic relations to remedy or ameliorate the effects of a breach of a constitutional right caused by its own actions, no constitutional rights could be said to have been

[1] S Peté & M du Plessis 'South African Nationals Abroad and their Right to Diplomatic Protection – Lessons from the "Mercenaries Case"' (2006) 22 *SAJHR* 439, 467.

[2] Ibid at para 71 (footnotes omitted). The Court did not grant the mandatory relief sought on the basis that proceedings in the United States were already at an advanced stage and was in the Court's view not the most effective means of vindicating the applicant's rights.

[3] For a critique of *Mohamed* for not being sufficiently forceful regarding extraterritorial application of the Bill of Rights, and for an indictment of the more conservative judgments that followed — eg, *Kaunda* — see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31. See also J Brickhill & A Friedman 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 59.

[4] *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at paras 1-2.

[5] Ibid at para 3.

[6] Ibid at paras 36-7.

[7] Ibid at paras 50-3 and at paras 98-100.

breached by the conduct of the South African authorities in *Kaunda*. The gloss that *Kaunda* puts on *Mohamed* in this respect is that where South African organs of state infringe the constitutional rights of any person (which can happen only in South Africa), an obligation rests on the executive to do everything in its power to remedy or ameliorate the prejudice that person suffers in another country as the result of that infringement. This obligation is justifiable.

Further, the majority said in *Kaunda* that although there is no right to diplomatic protection under the South African Constitution, South African citizens are 'entitled to request South Africa for protection under international law against wrongful acts of a foreign state'.[1] When a request is received in circumstances where South African citizens face gross abuses of international human rights, the majority went on, government bears a duty to protect its citizens.[2] A decision refusing such a request would be justifiable, and a court could order the government to take 'appropriate action'.[3] Appropriate action, however, admits of very wide interpretation indeed. It may be that the best the courts can require the executive to do in such circumstances is consider the request for diplomatic protection. It is the executive which must ultimately decide on the appropriate course of action — and that need not include diplomatic engagement:

> A decision as to whether protection should be given, and if so, what, is an aspect of foreign policy which is essentially the function of the Executive. The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill-equipped to deal. The best way to secure relief for the national in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than Judges, and which could be harmed by court proceedings and the attendant publicity.[4]

Any decision taken by the executive in this regard is an exercise of public power, and is as such subject to constitutional control. Although the majority in *Kaunda* carved a very wide discretion for the executive in its powers of foreign affairs, requests for diplomatic protection must nevertheless be dealt with in accordance with the rule of law.[5] In terms of the rule of law doctrine, irrationality and bad faith are grounds upon which a court could review the executive's response to a request for diplomatic protection.[6]

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1 *Kaunda* (supra) at para 60.

2 Ibid at para 69.

3 Ibid.

4 Ibid at para 77. See also F Michelman 'The Rule of Law, Legality and Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 11.

5 See §§ 18.2*(b)* and 18.3 *(j)* supra.

6 Ibid at para 80. See also S Peté & M du Plessis 'South African Nationals Abroad' (supra) at 447-449. For a critical discussion of the tendency of courts to defer to the executive in such matters, in the context of the apartheid reparations case (*In re South African Apartheid Litigation* 346 F Supp 2nd 538 (SDNY 2002)), see M Osborne 'Apartheid and the Alien Torts Act: Global Justice meets Sovereign Equality' in M du Plessis and S Pete (eds) *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses* (2007) 231.

The minority judgments of Ngcobo J and O'Regan J take a different approach. But they do not lead to significantly different outcomes. Ngcobo J finds that there is a constitutional duty on the executive to ensure that all South African national abroad enjoy the benefits of diplomatic protection,[1] while O'Regan J finds that a constitutional duty rests on the executive to provide diplomatic protection to its citizens to prevent or repair 'egregious breaches of international human rights norms.'[2] Both judgments conclude that this duty finds its corollary in the right to citizenship in FC s 3(2)*(a)*. This right encompasses the 'privilege' or 'benefit' of diplomatic protection.[3] O'Regan J fills in the important logical step when she contends that although the Final Constitution contains no express provision to gainsay Chaskalson CJ's conclusion that the Bill of Rights has no extraterritorial application, the executive remains bound by the Bill of Rights in all its action — including its actions in the international domain.[4] Despite these differences, the minority judgments offer little support for a more exacting standard of judicial control of executive diplomatic functions. O'Regan J proposed a declaratory order obliging the executive to take appropriate steps to provide diplomatic protection to the applicants.[5] Ngcobo J agreed with the majority that the government has a wide discretion in deciding whether to grant diplomatic protection and in what form to do so.[6] In addition to the rule of law requirements

[1] *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC)(per Ngcobo J) at para 188.

[2] Ibid at para 238.

[3] Ibid at at paras 185-88 (Ncgobo J) and at paras 236-238 (O'Regan J). On whether diplomatic protection is a right that can be claimed by an individual or an international law right at the instance of states, see M E Olivier 'Diplomatic Protection: Right or Privilege? *Kaunda v President of the RSA* (2004) 10 BCLR 1009 (CC)' (2005) 30 *South African Yearbook of International Law* 238; G Erasmus & L Davidson 'Do South Africans have a Right to Diplomatic Protection?' (2000) 25 *South African Yearbook of International Law* 113; K Hopkins 'Diplomatic Protection and the South African Constitution: Does a South African Citizen have an Enforceable Constitutional Claim against the Government?' (2001) 16 *South African Public Law* 387.

[4] *Kaunda* (supra) at para 228. See also Woolman 'Application' (supra) at § 31.6 (Contends that where *Mohamed* took a step toward extending the extraterritorial reach of the Bill of Rights, *Kaunda* took two steps back.) A similar argument was presented in *Thatcher v Minister of Justice and Constitutional Development and Others*. 2005 (4) SA 543 *(c)*. The matter arose from the same events as *Kaunda*. The government of Equatorial Guinea had requested the South African government to render it assistance by allowing it to question an individual whom it suspected of involvement in the alleged coup plot. The same individual, Thatcher, was however facing charges in South Africa relating to the same events, and he argued that allowing the authorities of Equatorial Guinea to question him before the conclusion of criminal proceedings against him in South Africa would violate constitutional rights to silence and protection against self incrimination contained in FC s 35(1) and (3). Ibid at para 85. He argued that the failure of the South African authorities to consider his constitutional rights rendered the decision to comply with Equatorial Guinea's request irrational and unconstitutional in light of the principles of the rule of law. The court held that South Africa's compliance with the request did not violate any of Thatcher's rights, and that failure to consider those rights could not have rendered the decision irrational. See also S Peté & M du Plessis 'South African Nationals Abroad' (supra) at 463.

[5] *Kaunda* (supra) at para 271.

[6] Ibid at para 191.

of rationality and good faith, however, Ngcobo J added that the government must follow a fair procedure in processing a request for diplomatic assistance and may be required to provide reasons for its decision.[1]

In *Rootman v The President of the Republic of South Africa*, the applicant sought the diplomatic assistance of the government of South Africa in executing a judgment debt against the government of the Democratic Republic of Congo (the 'DRC').[2] He argued that the evasion of the DRC of its commercial debt undermined the dignity and effectiveness of the courts and the rule of law, and interfered with rights to judicial resolution of disputes in terms of FC s 34. The applicant further contended that obligations on organs of state in terms of FC s 165(4) to take steps to ensure the effectiveness of the courts and in terms of FC s 7(2) to 'respect, protect, promote and fulfil' rights in the Bill of Rights, oblige the state to intercede on his behalf.[3] The SCA rejected this argument. It held that the DRC's conduct is no more damaging to the rule of law than that of any other commercial debtor who evades a judgment debt and in respect of whom the state has no obligation to intercede.[4] Furthermore, the SCA followed *Kaunda* in saying that while the South African government is free to negotiate with the DRC through diplomatic channels, it cannot be ordered to do so.[5]

(l) Assignment and delegation of executive powers under FC ss 99 and 238

FC s 99 deals with the assignment of responsibilities by Cabinet members to the provincial or local sphere of government. It states that:

> A Cabinet member may assign any power or function that is to be exercised or performed in terms of an Act of Parliament to a member of a provincial Executive Council or to a Municipal Council. An assignment -
> *(a)* must be in terms of an agreement between the relevant Cabinet member and the Executive Council member or Municipal Council;
> *(b)* must be consistent with the Act of Parliament in terms of which the relevant power or function is exercised or performed; and
> *(c)* takes effect upon proclamation by the President.'

[1] *Kaunda* (supra) at para 192. It is unclear whether Ngcobo J is of the view that such a decision must adhere to the requirements of administrative justice imposed by FC s 33. He states that '[t]he decision to extend diplomatic protection in a given case is the exercise of a public power and as such it must conform to the Constitution, in particular s 33 of the Constitution.' Ibid at para 193. The conduct of foreign affairs falls within the domain of the executive, however, and is therefore an executive function contemplated in FC s 85(2)*(e)*. The Promotion of Administrative Justice Act 3 of 2000 explicitly excludes such executive functions from the definition of 'administrative action', and it is thus difficult to see on what basis Ngcobo J would scrutinise decisions on whether to extend diplomatic protection against constitutional standards of administrative justice such as procedural fairness.

[2] [2006] SCA 80 RSA, [2006] JOL 17547 (SCA).

[3] Ibid at para 12.

[4] Ibid.

[5] Ibid at para 13. See also *Van Zyl v Government of the RSA* [2007] SCA 109 RSA (Follows *Kaunda*, emphasising the restraint that courts ought to show in reviewing acts of foreign states.)

It is common for constitutions in multilevel systems of government to attempt to establish clear boundaries between different levels of government. The norm is to avoid overlapping responsibilities and functions. The South African system is different. It is characterised by soft boundaries amongst the three spheres of government.[1] FC s 99 is an example of this as it anticipates powers originally allocated to the national sphere of government being exercised by the provincial or local sphere. In the absence of FC s 99, it would have been appropriate to conclude that it was not permissible for a provincial executive or a municipal council to perform functions allocated to the national executive by an Act of Parliament.

The meaning of 'assignment' under FC s 99 must be understood in context.[2] The Constitution makes a distinction between delegation, which is referred to in s 238, and assignment. Baxter provides an authoritative description of the distinction between delegation and assignment in South African public law: 'When powers are assigned the authority and duty to exercise them, and the responsibility for their exercise, is transferred in full. A less complete transfer of powers is *delegation*, in terms of which one public authority authorises another to act *in its stead*.'[3] Some writers add a further distinction between assignment and delegation and assert that assignments can be revoked only by an Act of Parliament. This view is based, in part, on a passage in *Executive Council, Western Cape Legislature and others v President of the Republic of South Africa and others*.[4] In *Executive Council, Western Cape,* the Constitutional Court dealt with the distinction between the assignment of executive authority under IC s 235(8) and the delegation of such authority under IC 144. It wrote:

> [IC s] 235(8) deals with assignment, ie the transfer to a province of the executive authority to which it is entitled in terms of the Constitution. It is not concerned with delegation. Delegation postulates revocable transmission of subsidiary authority. The assignment contemplated by [IC] s 235 relates to the formal vesting of authority derived from the Constitution.[5]

However, IC 235 deals with the initial transfer of functions to provinces: it sets out a process for implementing the system of government established by the Interim Constitution. In this context, an assignment under IC s 235(8) must be 'final'. There is no reason that assignments under FC s 99 should be similarly

[1] See C Murray & R Simeon 'Multi-level Government in South Africa: A Progress Report' (2001) 31 *Publius: The Journal of Federalism* 65-92. See also S Woolman, T Roux & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14.

[2] In other constitutional provisions the term 'assign' is used without the more technical sense of a transfer of obligations and responsibilities to mean 'allocate'. See FC ss 28(1)*(h)* and 35(2)*(c)*. See also FC s 206(4). FC s 206(4) involves a tricky distinction between the assignment of responsibilities by law and the allocation of (apparently equally binding) responsibilities by policy.

[3] Delegation is also easier than assignment. FC s 238 does not require a proclamation for a delegation to take effect.

[4] 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 ('*Executive Council, Western Cape*').

[5] Ibid at para 173.

irrevocable. On the contrary, such an interpretation would permit the national executive to rewrite the constitutional division of powers and require the relatively onerous process of adopting an Act of Parliament to reverse it.

The practical effect of the distinction between assignment and delegation as set out by Baxter is that complete responsibility for a function is transferred through assignment whereas in the case of delegation the authority to ensure that the power is properly exercised remains with the delegating authority. FC s 238*(b)* captures this relationship when it states that delegation allows an organ of state to exercise a power 'for any other executive organ'.

FC s 99 constrains the power of a member of Cabinet to assign powers and functions in two ways. First, the assignee must agree. This is consistent with the principles of co-operative government which underpin the division of powers amongst the spheres of government in South Africa. To allow members of the national executive to impose functions unilaterally on their counterparts in provincial and local governments would infringe the principle of functional and institutional integrity enshrined in FC s 41(1)*(g)*. Thus, one would expect the party to whom the assignment is to be made to take fiscal, capacity and political considerations into account in entering an agreement under FC s 99.

This understanding of assignment under FC s 99 suggests that all intergovernmental assignments should be subject to the agreement of the assignee. However, FC s 125(2), which lists the ways in which provincial executive councils exercise provincial executive authority, raises the possibility that there is a separate form of assignment that takes place in terms of an Act of Parliament: FC s 125(2)*(c)* states that executive authority may be exercised by 'administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament'. FC s 125(2)*(g)* supplements this proviso by adding to the list of activities of an executive council 'performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament'. It is possible to read paragraph *(g)* to include assignments under FC s 99 and paragraph *(c)* to permit, in addition, assignments in terms of an Act of Parliament — unconstrained by the conditions set in FC s 99. However, as we have already indicated, allowing assignments without the concurrence of the provincial executive conflicts with the basic constitutional principle of co-operative government.[1] Thus, one must assume that assignment by an Act of Parliament must always be accompanied by the agreement of the governments that must assume the assigned responsibilities.[2]

[1] Because FC s 125(2)*(c)* covers national laws that fall outside Schedules 4 and 5 not even the diluted agreement of provinces through the NCOP is secured in the national legislative process.

[2] An alternative reading of FC s 125(2)*(c)* is to interpret it as qualifying FC s 99 by requiring, in addition to the agreement of the provincial executive, express statutory authorisation when full responsibility for administering a national Act is assigned to a province. On this reading, which is supported by FC s 125(2)*(g)*, particular powers and functions may be assigned under FC s 99 without explicit statutory authorisation, but to assign the administration of an Act, express authorisation by Parliament is required.

The second constraint on the power to assign functions is that the assignment must 'be consistent with' the law in terms of which the power is exercised or the function performed. A similar constraint is placed on the power to delegate under FC s 238. The common law has always placed limits on the legitimate delegation of public power: but the language of 'consistency' in FC ss 99 and 238 is unfamiliar. At the very least, it must mean that assignment and delegation cannot take place against the wishes of Parliament. However, the best interpretation is that the phrase protects the common-law position in terms of which, in the absence of express authority to assign or to delegate in the Act under which the power is exercised or the function performed, the legitimacy of assignment or delegation will depend on the nature of the power, the extent to which it is transferred, the importance of the delegee and practical necessity.[1]

18.4 Multisphere Government[2]

The decision to create a system of multisphere government — with both provincial and local powers protected in the Constitution — was a central element of the constitutional settlement in 1993.[3] But, the Final Constitution's otherwise detailed chapter on the national executive barely mentions the responsibilities that the system of shared powers may place on the national executive.[4] The absence of any express reference to multilevel government in the constitutional description of the responsibilities of the national executive in FC s 85 is striking because so much of what the national executive does involves provinces and local governments.[5] Most significantly, the Final Constitution anticipates that provinces will implement national laws that fall under Schedule 4 of the Final Constitution.[6] These laws embrace laws relating to education, health and welfare services, housing and the environment. Thus, the national government effectively determines what provinces will do and depends on provinces to implement many national laws. It also funds, monitors, supervises, and regulates them. It can take few decisions without considering their impact on provinces.

The implementation role of provinces ties national policy closely to their capacity to perform. It also demands complex coordination between national departments

[1] See Hoexter *Administrative Law* (supra) at 133-136.

[2] See C Murray 'South Africa' in C Saunders and K Le Roy (eds) *Legislative, Executive and Judicial Governance in Federal Countries* (2006) 258 — 288.

[3] N Steytler 'Federal Arrangements as a Peacemaking Device during South Africa's Transition to Democracy' (2001) 31 *Publius: Journal of Federalism* 93.

[4] Although section 100 does provide for intervention by the national executive in the affairs of a province if the province is failing to fulfil its responsibilities.

[5] See N Bamforth & P Leyland (eds) *Public law in a Multi-layered Constitution* (2003)(Discusses the implications of the distribution of power in the UK.)

[6] FC s 125 (2)*(b)*. For further discussion, see S Woolman, T Roux & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14; C Murray & O Ampofo-Anti 'Provincial Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 20.

responsible for national competences (such as justice and water) and both national and provincial departments working in related areas (such as social services and agriculture). For instance, policy relating to the detention of children awaiting trial by the national Department of Justice depends for its implementation on the provision of 'places of safety' by the nine provincial welfare departments. In theory, these programs should be coordinated by the national government through national norms and standards and properly assured intergovernmental coordination. Indeed, since the 1997 report of the Presidential Review Commission, much attention has been paid to making Cabinet more effective. Nevertheless, despite the fact that provinces are written into the plans, they remain junior partners, instructed on their responsibilities rather than consulted.

Since 1994 a special Cabinet portfolio and national department has existed to manage the relationships between the national, provincial, and local spheres of government and to build the capacity of provinces and municipalities. The role of the national Department of Provincial and Local Government is to ensure a 'capable and well integrated system of government working together to achieve sustainable development and enhanced service delivery in a developmental state'.[1]

(a) FC ss 100 and 139: Interventions in provinces and municipalities

FC s 100 concerns national interventions in provinces. FC s 139 concerns provincial interventions in municipalities. These intergovernmental relations powers are considered in Chapters 14, 20, 22 and 27 of this treatise.[2] Here it is important to note the responsibilities that FC s 100 and FC s 139 place on the national executive. Firstly, although the national government's power to intervene in a province that it not fulfilling its responsibilities is discretionary, FC s 139 (7) imposes an obligation on the national executive to intervene in municipalities which are in financial difficulty if the provincial executive does not. Moreover, if a province assumes responsibility for a municipal function or dissolves a Municipal Council under FC s 139(1), the Cabinet member responsible for local government affairs may 'disapprove' the provincial action, bringing it to an end.

[1] Department of Provincial and Local Government 'Vision', available at http://www.thedplg.gov.za/index.php?option=com_content&task=view&id=12&Itemid=29 accessed 17 February 2008.

[2] See S Woolman & Theunis Roux 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14; C Murray & O Ampofo-Anti 'Provincial Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 20; N Steytler and J de Visser 'Local Government'. See also M Chaskalson 'Transitional Provisions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 22; R Kriel & M Monadjem 'Public Finances' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27. See also N Steytler and J de Visser *Local Government Law of South Africa* (2007) 15.5. For a discussion of the constitutionality of a national government programme to manage struggling municipalities outside the framework of FC 139, see C Murray and Y Hoffman-Wanderer 'The NCOP and Provincial Intervention in Local Government' 2007 *Stellenbosch LR* 7, 26ff.

(b) FC s 125

FC 125(3) places a responsibility on the national government to 'assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions'.

19 Provincial Legislative Authority

Tshepo Madlingozi and Stuart Woolman

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19.1 Composition, Election and Term of Provincial Legislature

(a) Composition and electoral system[1]

The Final Constitution provides for single-chamber provincial legislatures in which the legislative authority of a province vests.[2] Provincial legislatures may consist of between 30 and 80 members. The Electoral Commission determines the actual number of legislators in each provincial legislature based upon a very simple algorithm: One seat per one hundred thousand inhabitants.[3] The 30/80, min/max arrangement may, however, be altered by the provisions of a provincial constitution.[4]

Provincial elections must take place in terms of an electoral system prescribed by national legislation.[5] This system must produce, in general, proportional

*The authors would like to thank Christina Murray for her incisive comments and editorial 'oversight'. We would also like to thank Matthew Chaskalson and Jonathan Klaaren for permission to make liberal use of their work. See M Chaskalson & J Klaaren 'Provincial Goverment' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Chapter 4. Because provincial legislative authority doctrine is often parasitic on national legislative authority doctrine, we rely quite heavily on Steven Budlender's analysis of that latter body of doctrine. See S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 17. All errors remain our responsibility alone.

[1] Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC'), s 105 reads, in pertinent part:

> (1) A provincial legislature consists of women and men elected as members in terms of an electoral system that *(a)* is prescribed by national legislation; *(b)* is based on that province's segment of the national common voters roll; *(c)* provides for a minimum voting age of 18 years; and *(d)* results, in general, in proportional representation. (2) A provincial legislature consists of between 30 and 80 members. The number of members, which may differ among the provinces, must be determined in terms of a formula prescribed by national legislation.

[2] FC s 104(1) reads, in relevant part: 'The legislative authority of a province is vested in its provincial legislature.'

[3] See FC s 105(2). The Independent Electoral Commission determines the number of legislators of each province. See Electoral Act 73 of 1998, Item 2 of Schedule 3, as amended by Electoral Laws Amendment Act 34 of 2003. This Act's formula awards one seat per 100 000 inhabitants: with a minimum of 30 and a maximum of 80 members. It follows therefore, that the number of provincial legislators may differ from province to province depending on the size of a province's population. See also Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC')(IC s 127(1) allowed provincial legislatures to have between thirty and one hundred members. The number of MPL's in different legislatures range from 30 MPL's in the Free State, Mpumalanga and the Northern Cape to 73 and 80 MPLs in Gauteng and Kwazulu-Natal, respectively. See D Besdziek 'Provincial Government' in A Venter (ed*) Government and Politics in the New South Africa* (2001) 182; C Murray & L Nijzink *Building Representative Democracy: South Africa's Legislatures and the Constitution* (2002) 17. The number of members of a principal legislature ('MPLs') in the Western Cape is fixed at 42 — even though the population size of this province is just under four million See Constitution of the Province of the Western Cape s 13. The Northern Cape, with a population of just under 900 000, is still entitled to the minimum number of 30 seats fixed by the Final Constitution.

[4] For the extent to which a provincial constitution may alter the provincial legislative and the executive structures and procedures set out in the Final Constitution, see S Woolman 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 21.

[5] FC s 105(1)*(d)*.

representation.[1] Attempts to alter the electoral system for the provincial legislature through provincial constitutions have thus far failed.[2]

(b) Duration and dissolution

The ordinary term of a provincial legislature is five years. According to FC s 108, however, the provincial legislature may adopt a resolution dissolving the legislature prior to the expiry of its term. The resolution must be passed by a majority of the provincial legislature's members and must take place no less than three years after the previous election.[3] According to FC s 109, the provincial legislature must be dissolved when there is a vacancy in the office of the Premier and the legislature fails to elect a new Premier within thirty days after the vacancy has occurred.[4]

(c) Qualifications, defections and membership

Membership qualifications in a provincial legislature are governed by FC s 106.[5] The only genuine controversy that has arisen with regard to membership qualifications concerns the ability of MPLs to receive remuneration for other state appointments.

The relationship between party defection and membership has been the subject of legislation and litigation that have altered significantly the political landscape in both Parliament and the provincial legislatures. In 2002, Parliament passed four acts, including two constitutional amendments, designed to permit defections by members of one political party to another at national, provincial and local government levels.[6] In *United Democratic Movement & Others v President of the RSA & Others*, the Constitutional Court rejected the challenges to the two constitutional amendments because both constitutional amendments satisfied the procedural

[1] See Electoral Law Act 73 of 1998, s 57A read together with Schedule 1A, as amended by Electoral Laws Amendment Act 34 of 2003.

[2] See *Ex Parte Speaker of the Western Cape Provincial Legislature: In re Certification of the Constitution of the Western Cape, 1997*. 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC)('*First Certification of Constitution of the Western Cape*')(Court rejects attempt to create multi-member, geographically defined constituencies.)

[3] FC s 108 has not yet been invoked. However, between the end of 2002 and the beginning of 2003, the Inkatha Freedom Party, with the support of the Democratic Alliance and the United Democratic Movement, did threaten to dissolve the KwaZulu-Natal legislature. See 'IFP's Last-Gap Bid to Keep KwaZulu-Natal' *Mail and Guardian* (3 January 2003), available at http://www.archive.mg.co.za (accessed on 28 August 2003).

[4] FC s 109(2). Such a vacancy can occur if the provincial legislature adopts, with a majority vote, a motion of no confidence in the Premier. See FC s 141 (2).

[5] FC s 106.

[6] Constitution of the Republic of South Africa Amendment Act 18 of 2002, Constitution of the Republic of South Africa Second Amendment Act 21 of 2002, Local Government: Municipal Structures Amendment Act 20 of 2002 and Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002 ('Membership Act').

requirements of the Final Constitution.[1] The Constitutional Court also found that the piece of ordinary legislation that allowed defections in municipal councils passed constitutional muster.[2] The *UDM* Court did, however, uphold the challenge to the Loss or Retention of Membership of National and Provincial Legislatures Act ('Membership Act'). The Membership Act had been passed by the procedure for ordinary legislation, FC s 76(1), rather than by the procedure for constitutional amendments, FC s 74(3). While the Final Constitution granted Parliament the power to amend the transitional provisions governing membership by an ordinary Act of Parliament,[3] the *UDM* Court held that this power had to be exercised 'within a reasonable period after the new Constitution took effect' and that this reasonable period had lapsed.[4] Thus, the Membership Act was struck down on procedural, not substantive, grounds. Given the technical nature of the UDM Court's finding, Parliament was able to remedy the defect by passing a constitutional amendment to replace the Membership Act. The two original constitutional amendments, the Local Government: Municipal Structures Amendment Act and the new amendment effect an arrangement that permits defections that meet certain threshold criteria during specific periods of time.[5]

Resignations by MPs, MPLs or MCs that take place outside these defection periods are governed by the pre-existing legal regime. A member of the National Assembly, a provincial legislature or a municipal council who ceases to be a member of the party that nominated her must vacate her seat.[6] A claim of good faith error based upon an erroneous reading of the Final Constitution will not serve to rehabilitate the resignation.[7] Moreover, the resignation cannot be rehabilitated even if the member and his or her 'former' party reach a subsequent agreement on the matter.[8]

As Steven Budlender notes, changes in the composition of the provincial legislatures may affect the composition of provincial delegations to the National Council of Provinces ('NCOP'). FC s 61(2)*(b)* now creates a process that enables

[1] *United Democratic Movement & Others v President of the Republic of South Africa & Others* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC)('*United Democratic Movement*' or '*UDM*'). For a discussion of this case in terms of national legislative authority, see See S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 17. For an analysis of this case in the context of elections and constitutionally permissible electoral systems, see G Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 29. Moreover, neither amendment destroyed the 'basic structure' of the Final Constitution. *United Democratic Movement* (supra) at para 17.

[2] *United Democratic Movement* (supra) at para 84.

[3] See *United Democratic Movement* (supra) at para 104; Item 23A(3) of Annexure A to Schedule 6 of the Final Constitution.

[4] *United Democratic Movement* (supra) at para 105.

[5] The defection process, in so far as it governs the composition of provincial legislatures, is set out in FC s 106(3)*(c)* read with Items 2, 3 and 4 of Schedule 6A.

[6] *Speaker of the National Assembly v Makwetu & Others* 2001 (3) BCLR 302, 308 (C)('*Makwetu*')

[7] *African National Congress v United Democratic Movement & Others* 2003 (1) SA 533 (CC), 2003 (1) BCLR 1 (CC) at para 24.

[8] *Makwetu* (supra) at 308.

the provincial legislature to alter the composition of the provincial delegations to the NCOP in light of any defections.

(d) Structures and procedures

(i) *Committees*

FC s 116(2)*(a)* obliges a provincial legislature to make rules providing for the establishment of committees. The committees contemplated by this section include portfolio committees, the provincial equivalent of parliamentary select committees. Portfolio committees are responsible for the detailed consideration and debate of Bills after their first reading. Portfolio committees also possess the power to summon any person to appear before them to give evidence or to produce documents, and to require organs of state to report to them.[1] In theory, these powers ought to transform committees into a species of political ombudsman. In theory, committees also execute the core functions of legislatures: law-making, oversight and public involvement. (When they do so execute these functions, committees earn their reputation for being the 'engine rooms' of legislatures.[2]) However, in many of the smaller provincial legislatures, some committees remain idle for extended periods of time.[3] In addition, although FC s 119 enables committees to initiate legislation, at the time of writing, no provincial committee had invoked this power.[4]

(ii) *Office bearers*

A provincial legislature is chaired by a Speaker. The Speaker, by convention, acts on behalf of the legislature as a whole.[5] The Leader of the House represents the interests of the executive in the legislature and thereby provides a link between the two branches of government. Chairs run the specific committees, which makes the Chair of Chairs the third most important member of the legislature (after the Speaker and the Deputy Speaker).

[1] FC s 115.

[2] See Murray & Nijzink (supra) at 63 ('[P]oliticians routinely say that their most important work is done in committee. Observers confirm this, pointing to the thorough and often non-partisan or less partisan discussion that occurs in committee meetings.') See also E Maloka 'The Gauteng Legislature: The First Five Years' in Y Muthien, M Khosa & B Mgubane (eds) *Democracy and Governance Review: Mandela's Legacy 1994–1999* (2000) 112.

The number and structure of committees vary from legislature to legislature, but only loosely correlate with the size of the legislature. Mpumalanga has 13 committees, whereas KwaZulu-Natal features 24. While the Northern Cape, with 30 MPLs, has 18 committees, Gauteng, with 73 MPLs, has only 17 committees.

[3] See Murray & Nijzink (supra) at 69–70 ('Some of the small provincial legislatures still have too many committees for the number of members they have available. . . . Timetabling thus becomes very difficult and members have no opportunity to develop a proper understanding of the matters that come before their committees.')

[4] See Murray & Nijzink (supra) at 78 (MPL's complain of little assistance with respect to research and drafting.)

[5] See, eg, *Kilian v Gauteng Provincial Legislature* 1999 (2) BCLR 225 (T) at para 30.

Party whips are not officials of the legislature. However, they do organize the work of MPLs in the party caucuses and decide which MPL will represent a party on a given committee.[1]

(iii) *Organization of business*

The Leader of the House (sometimes referred to as the Leader of Government Business) together with the whips of various parties or the chief whip determine the schedule of the legislature.[2] Most of the legislature's work is conducted in committee or in party caucuses. (Unlike the committees, party caucuses are usually limited to party members and are not open to the public.) But while most of the legislature's work occurs in committee, legislative authority vests solely in the legislature's plenary. Plenaries also offer the opportunity for 'question time' and thus the discharge of the legislature's duty to engage in executive oversight.

19.2 Provincial Legislative Process

(a) Decisions[3]

Unlike Parliament, the rules for decision-making in provincial legislatures are quite straightforward. All votes on Bills — ordinary or money — demand the presence of a majority of the members. Passage of a Bill requires, in turn, a majority of the votes cast.[4]

The presence of one-third of the legislature's members satisfies the quorum criterion for decisions on other matters. Once again, a majority of the votes cast will suffice for passage of such a measure.

Only a provincial constitution requires a special majority. Two-thirds of the members must approve a provincial constitution before it can be signed by the Premier and then sent on to the Constitutional Court for certification.

(b) Ordinary bills and money bills[5]

Members of the legislature or members of the Executive Council can introduce ordinary Bills. Only the member of the Executive Council responsible for finance

[1] See, eg, KwaZulu-Natal Legislature's Rules of Procedure, Rule 29(1): 'The Whips and Party Representatives must ensure the attendance of members of their respective parties at committee meetings and must collectively ensure that a quorum is present, except under the circumstances when the party is exercising its right to boycott proceedings.'

[2] See Mpumalanga Provincial Legislature Agenda, available at www.mpuleg.gov.za/about (accessed on 1 March 2005). Western Cape Provincial Legislature Programme of Sittings, available at www.wcpp.gov.za/display.asp?id=45&linktyp=1 (accessed on 1 March 2005). See also Gauteng Legislature and NCOP Programme of Sittings, available at www.gautengleg.gov.za/Publish/Legislative%20Programme/Provincial%20Programme%20(Speakers%20Office)/Third%20Legislature 2005/2005-01–17%201st%20Term%20Programme%20(adopted%2002%20Dec%2004).doc (accessed on 1 March 2005)

[3] See FC s 112.

[4] See FC s 112(1)*(b)*.

[5] See FC s 119.

can introduce a money Bill.[1] According to FC s 120(2), a provincial Act must create a procedure that enables the provincial legislature to amend a money Bill. The Final Constitution leaves most other details of the provincial legislative process to the legislatures themselves.[2] Ordinary Bills and money Bills take slightly different routes.

(i) *Process for ordinary bills*

The process for ordinary Bills is not uniform across the country. That said, the process followed in provincial legislatures share a family resemblance. Ordinary Bills are usually initiated by the relevant member of the executive, an ordinary member of the legislature or a particular committee. After being tabled on the Order Paper, the Speaker introduces the Bill to the House. Thereafter, the Bill is referred to the relevant committee and is published in the Provincial Gazette. Notices are then published in local newspapers. Thereafter the public enjoys fourteen to twenty-one days to comment on the Bill.

In committee, the responsible MEC generally defends the Bill. What makes the process followed by provincial legislatures highly unusual for a commonwealth jurisdiction is that committees often amend Bills. The committee sends this amended version to the House — and not the original submitted by the executive. Each party may voice their opinion on the Bill and request additional amendments. If the requisite majority votes in favor of the Bill, the Bill is sent to the Premier for his or her assent.[3] After the Premier's assent, the promulgated Act is published in the Provincial Government Gazette.

(ii) *Process for money bills*

The modus operandi for money Bills is somewhat more complicated, in large part because a money Bill will have a bearing on almost everything that the provincial legislature does. As a general matter, MECs for Finance introduce a Provincial Appropriation Bill by means of a budget speech. Thereafter, various committees interrogate the Bill. Only once all of the various committees have weighed in with their respective reports does the money Bill move out of committee and on to the floor for a vote. As with an ordinary Bill, a favourable majority vote in the legislature and the Premier's assent results in promulgation of the Act.

(c) Assent by the Premier[4]

The Premier's assent is largely *pro forma*. There are two exceptions. If the Premier has reservations about the Bill, she can send it back to the legislature for reconsideration. If the legislature accommodates the Premier's concerns, then she

[1] See FC s 120 ('A Bill that appropriates money or imposes taxes, levies or duties is a money Bill. A money Bill may not deal with any other matter except a subordinate matter incidental to the appropriation of money or the imposition of taxes, levies or duties. (2) A provincial Act must provide for a procedure by which the province's legislature may amend a money Bill.')

[2] FC s 116(1)*(b)*.

[3] See § 19.2 *(c)* infra.

[4] FC s 121.

is obliged to sign the Bill in to law. However, if the revisited Bill does not accommodate the Premier's concerns, she has only two choices: (1) to assent; or (2) to refer the Bill to the Constitutional Court for a decision on its constitutionality.[1] Should the Constitutional Court determine that the Bill is constitutional, then the Premier has no alternative but to sign the Bill into law.

19.3 Substantive Constraints on Provincial Legislative Authority

(a) Exclusive competence, concurrent competence, conflicts and override[2]

(i) *Exclusive provincial legislative competence*

FC s 104(1)*(b)*(ii) grants the provinces exclusive original legislative authority over all matters listed in FC Schedule 5.[3] 'Exclusive' might suggest that only provincial legislatures are competent to pass legislation in those domains identified in Schedule 5.[4] However, FC s 44(2) permits Parliament 'to intervene' — that is, to legislate — with respect to functional areas of exclusive provincial legislative competence. This override authority may only be exercised in so far as national legislation is necessary to: (1) maintain national security; (2) maintain economic unity; (3) maintain essential national standards; (4) establish minimum standards required for the rendering of services; and (5) prevent unreasonable action taken by a province, which is prejudicial to the interests of another province or the country as a whole.[5]

[1] See *In Re: The Constitutionality of the Mpumalanga Petitions Bill, 2000* 2002 (1) SA 447 (CC), 2001 (11) BCLR 1126 (CC)('*Mpumalanga Petitions Bill*').

[2] Issues of exclusive legislative competence, concurrent legislative competence, overrides and conflicts are dealt with exhaustively in V Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 15 and V Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, August 2004) Chapter 16.

[3] Where the Final Constitution contemplates the passage of provincial legislation — say a provincial name change, FC s 104(2) — Parliament may *not* pass legislation on the same subject matter. See also *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & Another; Executive Council, Kwa-Zulu Natal v President of the Republic of South Africa & Others* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at paras 28–30 (Court held that the necessary implication of FC s 164 — '(a)ny matter concerning local government not dealt with in the [Final] Constitution may be prescribed by national legislation or by provincial legislation within the frame work of national legislation' — was that Parliament did not possess concurrent legislative authority with 'provincial governments in relation to the establishment and supervision of local governments.')

[4] On the relationships between functional areas of exclusive competence and concurrent competence, see *Ex Parte the President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC) at para 61 (The Court pointed out that although the Final Constitution creates exclusive provincial legislative competences, the separation of the functional areas in Schedules 4 and 5 can never be absolute: 'Whenever a legislature's authority is limited some rule must be adopted to address the possibility that a [single] law may touch upon a subject matter [both] within and outside legislative competence.') See also V Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 15.

[5] See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 250 ('[T]his power of intervention is defined and limited. Outside that limit the exclusive provincial power remains intact and beyond the legislative competence of Parliament.')

(ii) *Concurrent national and provincial legislative competence*[1]

FC s 44(1)*(a)*(ii) and FC s 104 (1)*(b)*(i) confer upon Parliament and provincial legislatures, respectively, concurrent legislative powers over matters contained in FC Schedule 4.[2] Concurrency means that both Parliament and the various provincial legislatures possess the power to pass laws on the same matters.[3]

Concurrent legislative competence has several practical implications for the exercise of legislative authority by the national government. Parliament cannot: (1) prevent provincial legislatures from enacting legislation on any of the listed functional areas;[4] (2) veto provincial legislation; or (3) block provincial initiatives that deal effectively with matters over which they possess concurrent competence.[5]

The shared authority contemplated by FC s 44(1)*(a)*(ii) and FC s 104 (1)*(b)*(i) would seem to invite conflict. FC s 146 provides a rubric for the analysis and the resolution of such conflicts.[6] FC s 146(2) reads:

> National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:
> *(a)* The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.[7]
> *(b)* The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing
> (i) norms and standards;
> (ii) frameworks; or
> (iii) national policies.
> *(c)* The national legislation is necessary for
> (i) the maintenance of national security;
> (ii) the maintenance of economic unity;
> (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
> (iv) the promotion of economic activities across provincial boundaries;
> (v) the promotion of equal opportunity or equal access to government services; or the protection of the environment.

[1] See V Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 15.

[2] IC s 126(1) delineated areas of concurrent legislative competence. Residual legislative powers, by implication, vested in Parliament. See D Brand 'Development of Concurrent Legislation - A New South African Perspective' (1999) 37, available at http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_5112_2.pdf (accessed on 5 December 2004) 37.

[3] See E Bray 'The Constitutional Concept of Co-operative Government and its Application in Education' (2002) 4 *THRHR* 514, 516.

[4] See *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill no 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC).

[5] See Bray (supra) at 522 (This 'sharing of powers' does not diminish a provincial legislature's ability 'to enact on its own legislation that is necessary for the effective exercise of school education.')

[6] For a detailed account of conflict resolution with respect to enactments that flow from concurrent competences, see V Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, September 2005) Chapter 16.

[7] FC s 146(2)*(a)*.

Despite a decade of such concurrent competence, only one case has required the Constitutional Court to determine whether a national law or a provincial law prevailed: *Mashavha v The President of the Republic of South Africa.*[1] Though of recent vintage, *Mashavha* does not engage FC s 146. The challenge to the assignment of administrative responsibility for a national act to provincial government engaged IC s 126(3) — the predecessor to FC s 146 — and IC s 235's transitional provisions regarding executive authority.[2]

That said, the *Mashavha* Court's analysis of IC s 126(3) adumbrates the general framework within which the courts will appraise conflicts that might arise in terms of FC s 146.[3] The *Mashavha* Court was asked to assess the constitutionality of a presidential proclamation that assigned the administration of the Social Assistance Act ('SAA') to provincial governments.[4] The SAA regulated, amongst other matters, the payment of grants. The High Court in *Mashavha* found that social assistance was not a matter that could be regulated effectively by provincial legislation. The Constitutional Court agreed. It reasoned as follows. First, South Africa's history of racial, ethnic and geographical discrimination compromised provincial administration of social assistance.[5] Second, because apartheid's radically inegalitarian system of distributive justice continued to be re-inscribed by differences in capacity between extant provincial governments, the provinces could not be trusted to deliver social assistance in a manner that did not offend the Interim Constitution's commitment to equality.[6] As a result, IC s 126(3) — and FC 146 — required a uniform framework for the distribution of social assistance across all nine provinces. Only national legislation administered by

[1] 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC)('*Mashavha*') at para 51.

[2] For more on the transitional provisions in the Interim Constitution relating to executive authority, see M Chaskalson 'Transitional Provisions on Executive Authority, Assets and Liabilities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 28.

[3] See *Mashavha* (supra) at para 38 ('The purpose of section 126(3) is to determine the extent to which an Act of Parliament prevails over a provincial law inconsistent therewith, in the case of a functional area where Parliament as well as a provincial legislature have concurrent competence.')

[4] Act 59 of 1992.

[5] See *Mashuvha* (supra) at para 51.

[6] Ibid at para 53. The Constitutional Court rejected claims that the views of the provinces or the President on the capacity of the provinces to deliver equal and uniform access to social assistance could play a meaningful role in its assessment of the validity of the assignment. The test set out in IC s 126 and FC s 146 is objective and the assessment of competence and capacity is the sole province of the courts. It wrote:

> It is for this Court to give proper meaning to section 126(3) in context. Then the Court must apply the section to the facts of the case before it. It is clear that section 126(3) contemplates that there are matters which fall within the legislative competence of provinces which nevertheless may be regulated by national legislation. One of the criteria to determine whether the matter may be regulated by national legislation is whether it will be effective to do so; another is whether it is a matter which needs uniform norms and standards to be set; a third is whether it is necessary to set minimum standards for the delivery of public services. All three criteria recognize that there are times when uniformity is appropriate. The question that arises in this case is whether any or all of these criteria are present. It may be that reasonable people may legitimately differ in the application of these standards, but it is the standards set by the Constitution which must guide this Court's determination of the case, not the political philosophy of individual judges.

Ibid.

the national government could ensure uniform and equal treatment. The *Mashavha* Court confirmed the High Court's order declaring the proclamation's assignment unconstitutional.

Given that the concurrent legislative authority exercised by the national government and the provincial governments traverses such diverse terrain as agriculture and welfare, the lack of litigation may seem remarkable. The absence of conflict is largely a function of the current lay of the South African political landscape. ANC control of the national government and all nine provincial government — and the coordination of policy through party structures as well as MINMECs — eliminates the partisan politics and ideological differences that often animate such disputes.

It is also worth remembering that the Final Constitution attempts to minimize the need to resort to the courts to resolve disputes arising from the exercise of concurrent legislative authority both through a commitment to cooperative government and through express canons of statutory interpretation. With respect to such canons of interpretation, Victoria Bronstein notes that FC s 146's conflict provisions *only* become relevant when a conflict *actually* arises between national and provincial legislation on concurrent matters.[1] FC s 150 obliges courts to prefer an interpretation or a set of interpretations that reconciles the pieces of legislation under scrutiny to one that does not. FC s 148 states that where a court cannot resolve a dispute concerning a conflict between national legislation and provincial legislation, national legislation will prevail. FC s 148, like FC ss 41(3) and (4), actively discourages the use of courts to resolve political disputes. However, while FC s 41(3) and (4) require spheres of government and organs of state to exhaust non-judicial dispute resolution forums before turning to the courts, FC s 148 stands for the proposition that where no dispute resolution mechanism in FC Chapter 6 speaks to a dispute, a provincial law will fall before a national law. In such circumstances, a province will be forced to exploit political channels to achieve its ends.

(b) Provincial constitutions[2]

FC ss 142 and 143 grant each province a constitution-making legislative competence. This competence appears to extend the legislative competence conferred

[1] See V Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 15. See also *Ex Parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill no 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC)('*National Education Policy*') at paras 14–16. This rule of statutory construction is similar to the 'express contradiction' doctrine in Canadian law. See *Husky Oil Operations v Minister of National Revenue* [1995] 3 SCR 453 at para 120 ('[T]he rationale behind this restrictive use of paramountcy is self-evident: governmental regulation in Canada operates through a complex web of federal and provincial legislation. The regimes structuring many areas of public policy, such as bankruptcy actively involve both levels of government. To this end, barring a situation where obeying the enactment of one level places a citizen in disobeyance of the legislation of the other level, an attempt must be made to read overlapping provincial and federal regulation in a complementary manner.')

[2] See S Woolman 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2004) Chapter 15. For reasons of economy the analysis found in that chapter is not repeated in any meaningful way here.

on a provincial legislature by FC s 104. However, the judgments of the Constitutional Court in provincial constitution certification cases suggest that this textually distinct competence may be only notionally different than the legislative competence conferred on the provinces by other sections of the Final Constitution.[1] Put pithily, FC ss 142 and 143 do not create a meaningfully independent basis for the exercise of power by the provinces. Unless the Constitutional Court alters fundamentally its reading of the apposite provisions of the Final Constitution or those provisions are amended, provincial constitutions will never amount to anything more than window-dressing.[2]

(c) Co-operative government[3]

The Constitutional Assembly — in FC ss 40 and 41 — laid out principles designed to promote co-operation and co-ordination, rather than competition, between the various tiers of government and organs of state. Indeed, to emphasize this shift in relations, ss 40 and 41 employ the term 'sphere' rather than 'level'. Sphere intimates different sets of responsibilities. (By implication, level denotes a hierarchy in structures of government). But that is as far as the break with the old order goes. Despite the emphasis on 'spheres' with particular, and sometimes exclusive, competencies, the Constitutional Assembly did not create a strong federal state. Provinces, and in particular provincial legislatures, generally remain subordinate to their national counterparts.[4]

[1] See *Ex Parte Speaker of the KwaZulu-Natal Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal 1996* 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC)('*Certification of the Constitution of the Province of KwaZulu-Natal*'); *Ex Parte Speaker of the Provincial Legislature of the Western Cape: In re Certification of the Constitution of the Western Cape, 1997* 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC)('*First Certification of the Constitution of the Province of the Western Cape*'); *Certification of the Amended Text of the Constitution of the Western Cape 1997* 1998 (1) SA 655 (CC), 1997 (12) BCLR 1653 (CC)('*Second Certification of the Constitution of the Province of the Western Cape*').

[2] The Constitutional Court gives the lie to its claim that provincial constitution-making power is 'significant' when it notes both that provinces need not enact a provincial constitution and that Chapter 6 of the Final Constitution — along with the rest of the Final Constitution — 'provides a complete blueprint for the regulation of government within provinces . . . [and] provides adequately for the establishment and functioning of provincial legislatures and executive.' *First Certification of the Constitution of the Province of the Western Cape* (supra) at paras 36 and 15.

[3] See S Woolman, T Roux & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 14.

[4] The FC Chapter 3 jurisprudence of the Constitutional Court is governed by two basic principles. See *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC)('*Liquor Bill*') at para 40. First, one sphere of government or one organ of state may not use its powers in such a way as to undermine the effective functioning of another sphere or organ of state. Second, the actual integrity of each sphere and organ of state must be understood in light of the powers and purpose of that entity. In short, while the political framework created by the Final Constitution demands that mutual respect must be paid, there are circumstances in which the basic law clearly contemplates a hierarchy of political authority. Compare *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC)('*DVB Behuising*')(Court held that the functional areas of concurrent legislative authority had to be interpreted in a manner which would enable the national parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively) with *Government of the Republic of South*

(d) Fundamental rights and rule of law constraints

The exercise of provincial legislative authority is expressly constrained by the rights enshrined in FC Chapter 2.[1] The exercise of provincial legislative authority must also satisfy the legality principle. Although this doctrine imposes a rationality test that most pieces of provincial legislation will meet, the standard still has teeth.[2]

19.4 DELEGATION

(a) From Parliament to Provincial Legislature

FC s 44(1)*(a)*(iii) allows expressly the National Assembly to assign its legislative powers to a provincial legislature.[3] This power is known as legislative inter-delegation.

The assignment of legislative competence proceeds by an Act of Parliament.[4] An assignment extends legislative powers to the provincial legislature for as long as the Act of Parliament is in force. As Currie and De Waal note, however, '[o]nce the power to legislate is assigned to the province, Parliament is no longer

Africa v Grootboom 2001 (1) SA 46 (CC), 2000 (11) BCLR 1360 (CC)('*Grootboom*') at paras 39–40 ('[A] co-ordinated State housing program must be a comprehensive one determined by all three spheres of government in consultation with each other . . . [B]ut the national sphere of government must ensure responsibility for ensuring that laws, policies, programs and strategies are adequate to meet the State's s 26 obligations.') For a good example of national authority overreach, see *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC)('*Premier, WC v President*')(Court found that a procedure requiring an agreement between the President and the Premier with respect to the legality of a proposed restructuring of the public service within a provincial administration was entirely consistent with our system of co-operative government. As a result, a section of the amended Public Service Act, which permitted the Minister to direct that the administration of provincial laws be transferred from a provincial department to a national department or other body, clearly infringed the executive authority of the province to administer its own laws.)

[1] For a detailed account of how fundamental rights curb the abuse of national legislative authority — an account that applies equally to provincial legislative authority — see S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 17. For an account of how the substantive provisions of the Bill of Rights are to be reconciled with the exercise of powers in terms of other constitutional provisions — say, provincial legislative authority, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31.

[2] For a comprehensive restatement of how the rule or law and the legality principle set limits on the exercise of public power, see F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11.

[3] FC 44, reads, in relevant part: '(1) The national legislative authority as vested in Parliament . . . *(a)* confers on the National Assembly the power . . . (iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government.'

[4] FC s 104(1)*(b)*(iii) provides that assignment must take place by 'national legislation'. FC s 44(1)*(a)*(iii) vests the power to assign legislative competence in the National Assembly. It seems reasonable to conclude, as Steven Budlender does, that since the Final Constitution vests no corresponding power of assignment in the President or any other functionary who makes proclamations, assignment may only take place in terms of national legislation. See S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 17.

competent to legislate in this area, until the assignment is repealed by national legislation.'[1]

If the Act is repealed, provincial laws already made under the now repealed Act continue to be valid. However, the province would no longer possess the power to make any further laws in respect of matters covered by the Act because it would no longer possess the requisite assigned legislative competence. But neither, as the Constitutional Court pointed out in *Western Cape Provincial Government & Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government & Another*, would Parliament have the power to amend or to repeal extant provincial laws.[2]

Only by passing new national legislation would Parliament be able to overcome the existing provincial law enacted under the previously assigned competence. Given that the existing provincial law was enacted under the previously assigned competence, the new national legislation and the existing provincial legislation are not technically governed by FC s 147's conflict resolution regime. As Matthew Chaskalson and Jonathan Klaaren have argued, FC s 148 suggests that the absence of an express means of resolving this conflict results in the subordination of the provincial legislation to the new national legislation.[3] Such provincial legislation is not, technically, invalidated.[4] It remains dormant for so long as the conflict persists. In addition, Parliament does not have the legislative competence to repeal provincial laws — whether those laws are made under an original competence or an assigned competence.[5]

(b) From Provincial Legislature to Provincial Executive

The Final Constitution is silent on the question of whether a provincial legislature may delegate authority to the provincial executive. The Constitutional Court has, however, held that while the national legislature may delegate subordinate regulatory authority to the national executive, it may not assign plenary legislative power.[6] As Steven Budlender notes: 'This delegation doctrine has the virtue of

[1] I Currie & J De Waal *The New Constitutional and Administrative Law, Volume I* (2001) 209. See also *Executive Council, Western Cape Legislature & Others v President of the Republic of South Africa &d Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC)('*Executive Council 1995*').

[2] 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC)('*DVB Behuising*').

[3] See FC s 148: 'If a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial legislation or provincial constitution.'

[4] FC s 149: 'A decision by a court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation becomes inoperative for as long as the conflict remains.' See *National Education Policy* (supra) at para 19 ('If the conflict is resolved in favour of either the provincial or the national law, the other is not invalidated; it is subordinated and to the extent of the conflict rendered inoperative.')

[5] See *National Education Policy* (supra) at paras 16–19.

[6] *Executive Council 1995* (supra) at para 62 (Constitutional Court asserts that its 'delegation doctrine' was derived from the constitutional commitment to separation of powers. This commitment meant that law-making, as the proper domain of the legislature, could not be delegated excessively to the executive branch.) See also *Executive Council, Western Cape v Minister for Provincial Affairs and Constitutional Development*

balancing the need for efficiency in government against the need to avoid subverting the constitutional legislative framework.'[1] Although the Constitutional Court has yet to address the delegation of provincial legislative authority to a provincial executive, it seems reasonable to conclude that it will permit the provincial legislature to delegate some subordinate regulatory power to an MEC or to a provincial administrative agency.

19.5 Assignment to Local Government

FC s 104(1)*(c)* allows a provincial legislature to assign any of its legislative powers to a municipal council. The assignment proceeds by an Act of the provincial legislature. An assignment extends legislative powers to the municipal council for as long as the Act is in force. If the Act is repealed, local government by-laws which have already been made under it would continue to be valid. However, the municipal council would no longer be able to make any further laws in respect of matters covered by the Act: it would no longer possess the assigned legislative competence to do so.

Local government by-laws made under an assigned legislative competence from a provincial legislature may conflict with provincial legislation. In such circumstances, provincial legislation prevails. The local government by-law will be declared invalid and not merely inoperative.[2]

2000 (1) SA 661 (CC), 1999 (12) BCLR 136 (CC)('*Executive Council 2000*')(Holding that delegation doctrine developed in *Executive Council 1995* remained good law under the Final Constitution.) See also *Van Rooyen v The State* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC), 2002 (2) SACR 222 (CC) ('*Van Rooyen*') at paras 118–9 (Constitutional Court applied the holding in *Executive Council 1995* in evaluating the constitutionality of a delegation of subordinate regulatory authority); Constitutional Principle XIX (Principle required inter-delegation in the Final Constitution: 'The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government'); *Ynuico Ltd v Minister of Trade and Industry & Others* 1996 (3) SA 989 (CC), 1996 (6) BCLR 798 (CC)(Delegation doctrine could not be used to challenge delegated legislation promulgated before Interim Constitution came into effect because doctrine drew its constitutional force from IC s 37, and IC s 37 could have no bearing on the validity of regulations made before the Interim Constitution came into existence. The same logic would extend to any challenges made to pre-Interim Constitution delegated legislation challenged under FC s 44.)

[1] See S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 17. See also *National Education Policy* (supra) at paras 16–19.

[2] FC s 156 (3) reads: 'Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid.' FC s 151(4) reads: 'The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.' For more on such conflicts, see V Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, September 2005) Chapter 16.

19.6 Abstract Review of Bills and Acts[1]

Unlike the Interim Constitution, the Final Constitution makes no provision for abstract judicial review of provincial bills at the instance of members of the provincial legislature. However, at the end of the legislative process, the Premier may refer a Bill to the Constitutional Court for a decision on its constitutionality. The Constitutional Court, in *In Re: The Constitutionality of the Mpumalanga Petitions Bill, 2000*, held that it does not possess jurisdiction to consider the constitutionality of any provision in a Bill raised by the premier, 'unless the Premier's reservation concerning such provision has been referred to the legislature as envisaged' by FC ss 121(1) and (2).[2] That is, she must first remit the Bill to the legislature for reconsideration, and the legislature must refuse to address her concerns. A Premier cannot raise reservations about a Bill that have not been raised by her with the legislature.

FC s 122 allows one-fifth of the members of a provincial legislature to apply to the Constitutional Court for abstract review of a provincial Act within thirty days of the Premier's assent and signature.[3] When it receives a FC s 122 application for abstract review, the Constitutional Court may grant an interim order suspending the operation of the Act, or those sections of it that are subject to review, until the main application has been decided. The discretion of the Constitutional Court with respect to interim orders is limited to cases where the application has a reasonable prospect of success and the interests of justice require the suspension of the operation of the legislation.[4]

[1] FC s 122, Application by members to Constitutional Court, reads:
(1) Members of a provincial legislature may apply to the Constitutional Court for an order declaring that all or part of a provincial Act is unconstitutional. (2) An application *(a)* must be supported by at least 20 per cent of the members of the legislature; and *(b)* must be made within 30 days of the date on which the Premier assented to and signed the Act. (3) The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application if *(a)* the interests of justice require this; and *(b)* the application has a reasonable prospect of success. (4) If an application is unsuccessful, and did not have a reasonable prospect of success, the Constitutional Court may order the applicants to pay costs.

[2] *In Re: The Constitutionality of the Mpumalanga Petitions Bill, 2000* 2002 (1) SA 447 (CC), 2001 (11) BCLR 1126 (CC).

[3] Under the Interim Constitution, the Supreme Court — now the High Court — could hear applications for abstract review of a provincial Bill. See IC s 101(3)*(e)*. Under the Final Constitution, the Constitutional Court possesses exclusive jurisdiction over an application by the Premier for abstract review of provincial Bills. See FC s 167(4)*(b)*.

[4] FC s 122(3). For the meaning of 'reasonable prospects of success' and 'in the interests of justice', see, generally, *MEC for Development Planning and Local Government, Gauteng v Democratic Party* 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC); *S v Pennington* 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC); *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (2) SACR 277 (CC), 1995 (7) BCLR 793 (CC). See also J Klaaren, M Chaskalson & S Budlender 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, October 2005) Chapter 9.

19.7 Powers and Privileges of Provincial Legislatures[1]

(a) Control over the internal proceedings

FC s 116 confers on provincial legislatures the power to control their internal arrangements. This power is constrained by other provisions of the Final Constitution, in particular FC ss 116(1)*(b)* and 118*(a)*. These provisions oblige provincial legislatures to facilitate public involvement in their processes and to conduct their business openly. While legislatures may regulate public and media access to their proceedings, the general public and the media may be excluded from the proceedings of the committees of the legislatures only when it is reasonable and justifiable.[2] Exercise of the power conferred by FC s 116 is subject to the Bill of Rights.[3]

(b) Rules and orders

Legislatures have the power to make rules and orders concerning the conduct of their business.[4] The Final Constitution constrains this power in two primary ways. First, the rules and order must pay due regard to such imperatives as representative and participatory democracy, accountability, transparency, and public involvement.[5] Secondly, FC s 116(2) prescribes constitutionally-mandated content for the rules and orders. The rules and orders of legislatures must provide for the establishment of committees[6] and for the participation of minority parties in parliamentary proceedings in a manner consistent with democracy.[7] The rules of the legislatures must recognize a role for the leader of the opposition[8] and must ensure that all parties represented in the legislature are given sufficient financial and administrative assistance to operate effectively in the legislature.[9]

(c) Privilege

FC s 117 provides that MPLs and the province's permanent delegates to the NCOP have freedom of speech in the legislatures, subject to the legislatures' rules and orders, and may not be held criminally or civilly liable for any statements made therein.[10] Although provincial legislatures are not expressly directed

[1] FC ss 114, 115, 116, 117 and 118. See S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 17 (Discussion of this matter in relation to Parliament applies equally to provincial legislatures.)

[2] FC s 118(2).

[3] On the extent to which the exercise of such power is subject to the direct application of the Bill of Rights, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 31.5.

[4] FC s 116(1)*(b)*.

[5] FC s 116(1)*(b)*.

[6] FC s 116(2)*(a)*.

[7] FC s 116(2)*(b)*.

[8] FC s 116(2)(d.)

[9] FC s 116(2)*(c)*.

[10] See *De Lille & Another v Speaker of the National Assembly* 1998 (3) SA 430 (C), 1998 (7) BCLR 929 (C)(Rules and orders of the National Assembly subject to guarantees of freedom of speech.)

by the Final Constitution to promulgate legislation on the powers, privileges and immunities of members of their provincial legislatures, various provincial legislatures have done so.[1] Given that FC s 117(2) provides that other additional privileges and immunities of a provincial legislature and its members are to be prescribed by national legislation, and that the Powers, Privileges and Immunities Act was enacted pursuant to this provision, the provisions in extant provincial legislation on the subject of privilege are probably constitutionally infirm.[2]

(d) Public participation and petitions

Public participation in the legislative process is a constitutional obligation.[3] Effective public involvement enhances representative democracy and secures the benefits of compensatory legitimation that attend to such relatively innocuous grants of power.[4] Many provincial legislative committees encourage this particular form of participatory democracy through open days, public hearings, and submissions on specific bills.[5] Petitions constitute another particularly important form of direct democracy in South Africa.[6] The value of these pre-promulgation forms of participation would be greatly enhanced by post-enactment hearings to evaluate the impact of legislation.[7]

[1] See, eg, Powers, Privileges and Immunities of the Free State Provincial Legislature Act 12 of 1996, Powers, Privileges and Immunities of the Gauteng Provincial Legislature Act 2 of 1995, North-West Provincial Legislature's Powers, Privileges and Immunities Act 5 of 1994 and Powers and Privileges of the Western Cape Provincial Legislature Act 3 of 1995.

[2] Act 4 of 2004. However, those provisions in provincial legislation that determine the procedures for, say, a summons fall within the competence of provincial legislatures and are surely valid. Correspondence with Christina Murray (25 July 2005).

[3] FC s 118.

[4] See T Rapoo 'Reflections on Provincial Government in South Africa since 1994' in Y Muthien, M Khosa & B Magubane *Democracy and Governance Review: Mandela's Legacy 1994–1999* (2000) 101–102.

[5] Murray & Nijzink (supra) at 65 ('[I]n KwaZulu-Natal and Gauteng, for instance, closed meetings are rare . . . [I]n some provinces, however, the exclusion of the public is more routine — in some cases probably in violation of the Constitution').

[6] See S Woolman 'Freedom of Assembly' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 43 (Definition of 'petition' under FC s 17.) The restrictive approach to 'petition' in the KwaZulu-Natal Legislature Rules — rule 141 and rule 148(2)*(f)* — permits submission of a petition only when all other legal avenues for relief have been exhausted by a petitioner. These rules appear to be constitutionally infirm. The Gauteng Petitions Act is substantially more generous. Act 14 of 1998. It defines a 'petitioner' as a natural or juristic person acting: *(a)* on his or her or its interests; or *(b)* in the interest of another person who is not in a position to seek relief in his or her or its own name; or *(c)* as a member of or in the interest of a group or class of persons; or *(d)* acting in the public interests. The Act also provides for a Public Participation and Petitions Committee to deal with petitions and a Public Participation Office to enable under-resourced communities to participate in the legislative process. Gauteng Petitions Act, s 8.

[7] The KwaZulu-Natal Legislature has initiated post-enactment hearings to determine how the legislation is affecting communities. See *KwaZulu-Natal Annual Report 2002/2003* (2004) 3.

19.8 Provincial Legislatures and the National Council of Provinces

The National Council of Provinces ('NCOP') is the second chamber of South Africa's national Parliament. According to FC s 42(4), the NCOP 'ensures that provincial interests are taken into account in the national sphere of government' and provides a national forum for public consideration of issues affecting the provinces. Provincial legislatures determine much of what occurs within the NCOP: they not only selects its members but also control their votes.

Each of the nine provincial legislatures selects ten delegates. Six of the ten delegates are permanent delegates and four are special delegates.[1] Each delegation is led by the Premier or a member of the provincial legislature designated by the Premier.[2] The special delegates represent the provinces on particular matters.[3] The rules of most provincial legislatures make provision for the selection of special delegates.[4]

One especially vexed question with regard to provincial control of NCOP delegations concerns mandates. With respect to 'Section 76' bills — those bills deemed to affect the provinces — each provincial delegation possesses one vote. According to FC s 65 s (1)*(a)*, this vote must be cast in accordance with the express preference of the provincial legislature. FC s 65(2) anticipates an act of Parliament that creates a uniform procedure for the conferral of such mandates by provincial legislatures on their delegations. This Act has not yet been promulgated. At the present time, different legislatures follow different procedures. As

[1] Permanent delegates must be appointed by provincial legislatures, in accordance with the nomination of parties in the provincial legislatures, within 30 days after the result of an election of a provincial legislature is declared. FC s 61(2). Section 2(b) of the Constitution of the Republic of South Africa Second Amendment provides that this procedure should also be done within 30 days if a change of composition of the provincial legislature occurs as a result of a change in party membership, merger between parties, or subdivision of parties. Act 21 of 2002.

A person ceases to be a permanent delegate if, *inter alia,* that person ceases to be eligible to be a member of the provincial legislature for any reason other than being appointed as a permanent member that person has lost the confidence of the provincial legislature and is recalled by the party that nominated that person or that person ceases to be a member of a party that nominated that person and is recalled by the party. FC s 62(4)a, FC s 62(4)c, FC s 62(4)d. But see Constitution of the Republic of South Africa Second Amendment Act 21 of 2002 (Enables members who have become members of another party to retain their membership in the NCOP.)

According to FC s 61(2), parties represented in a provincial legislature are entitled to delegates in the provinces' delegation in accordance with the formula set out in Part B of Schedule 3. The number of permanent delegates to which each party is entitled in each provincial delegation is calculated according to an algorithm set out in the Determination of Delegates (NCOP) Act. Act 69 of 1998.

[2] FC s 60(2).

[3] See EFJ Malherbe 'The South African National Council of Provinces: Trojan Horse or White Elephant' 1998 *TSAR* 77, 88 ('Special delegates [will] . . . normally, but not necessarily . . . be members of the provincial executives.') See also C Murray and L Nijzink *Building a Representative Democracy* (2002) 46 ('[W]hen representing the province in the NCOP, the members of the executive and legislature on the delegation should not be seen as coming from separate branches of government but as partners mandated to ensure that the province's interest are properly understood in the national sphere.')

[4] See, eg, Rule 77 of the Standing Rules of the KwaZulu-Natal Legislature; Rule 196 of the Standing Rules of the Western Cape Legislature.

Murray and Nijzink note, the provinces differ as to whether provincial parliamentary committees can confer mandates on provincial delegations or whether such a power vests solely in the provincial legislature.[1] Those opposed to committee conferrals argue that FC s 65 makes no mention of committees. Those who favour committee conferrals contend that since FC s 116 permits provincial legislatures to establish their own internal procedures, FC s 116 likewise permits provincial legislatures to delegate the mandate power to a provincial parliamentary committee. Murray and Nijzink suggest that the debate over the mandate flows from very practical concerns: '[P]rovincial legislatures do not meet frequently but mandates may be needed at short notice and at a time when the provincial legislature is not sitting.'[2] So, for example, the rules of the KwaZulu-Natal Legislature allow the KwaZulu-Natal Legislature's National Council of Provinces Matters Committee to confer a mandate upon a provincial delegation provided that 75% of the committee's members agree to the content of the particular mandate.[3] The Gauteng Legislature and the Western Cape Legislature, on the other hand, only allow the provincial legislature, as a whole, to confer mandates on their respective NCOP delegations.

[1] Murray & Nijzink (supra) at 51–52.
[2] Ibid.
[3] Rule 83 of the Standing Rules of the KwaZulu-Natal Legislature.

20 Provincial Executive Authority

Christina Murray & Okyerebea Ampofo-Anti

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20.1 INTRODUCTION

The responsibilities and functions of provincial executives, like all other provincial institutions, are largely determined by the role of provinces in South Africa's system of multi-level government. The primary responsibility of provincial executives is to implement national legislation. The system also expects members of provincial executives to play a substantial role in the adoption of national legislation that falls within the concurrent competence of provinces and the national government.

However, the distinct role of provincial executives is hardly mentioned in the constitutional provisions that determine the formal structure of South Africa's nine provincial executives. Eight of these executives are governed by the Final Constitution and, in particular, FC Chapter 6. The sole exception is the Western Cape. But, although the Western Cape provincial executive is governed by the Western Cape Constitution, there are no significant differences between the Western Cape model and the Final Constitution.

The provisions of FC Chapter 6 relating to provincial government are themselves almost identical to those governing the national executive. Like the national executive, all provincial executives operate on the parliamentary model. The Premier, who is head of the executive, is usually drawn from the majority party in the provincial legislature and selects his or her cabinet — called an Executive Council — from the legislature. The executive is accountable to the legislature and, under FC s 141, can be removed at any time by a vote of no confidence. In the language of the Westminster system, the executive 'serves at the discretion of the legislature' or needs to retain the confidence of the legislature. Even the two most substantial deviations from the national model in the provisions relating to the design of provincial governments in FC Chapter 6 are minor. First, whereas the President is both head of state and head of the national executive, the Final Constitution does not formally create two separate roles for a Premier. Secondly, a Premier remains a member of the provincial legislature after his or her election, while the national President relinquishes his or her seat in Parliament upon election.

The model set out in FC Chapter 6 is also very close to traditional forms of parliamentary government. The most important departure from the parliamentary model of other Commonwealth countries such as India, Canada or Australia is that a provincial legislature, like the National Assembly, may not usually be dissolved for three years after an election. In other words, an election cannot be called within that period. The only exception is that an election must be called if there is a vacancy in the office of Premier and the legislature is unable to reach agreement on the election of a new Premier within 30 days of the occurrence of the vacancy.[1] The three year moratorium on elections after a new legislature is constituted is intended to increase the stability of the system and to prevent governments from dissolving the legislature and calling elections in an opportunistic manner.

[1] FC s 109(2).

However, while the Westminster parliamentary model and the system of government in South Africa's provinces set out in FC ss 125 to 141 are similar, the responsibilities and the functions of provincial executives differ fundamentally from those of the national executive and of executives in other parliamentary systems. The Final Constitution divides power both horizontally and vertically amongst the spheres of government. It is divided vertically by reference to subject matter. It is divided horizontally by reference to function. Provinces, by virtue of the vertical divide, have exclusive authority over certain subject matter (particularly that listed in Schedule 5 of the Constitution) and by virtue of the horizontal divide, have the responsibility to administer much national legislation. The implications for provincial executives of this division of authority in South Africa's system of multi-level government are profound. This division of authority affects the relationship of the provincial executive with the national executive and Parliament as well as the relationship between the provincial executive and the provincial legislature. In addition, although the Final Constitution establishes three distinct spheres of government, it anticipates a role for provincial governments in supporting and regulating local government. In short, the constitutional provisions governing provincial executives must be understood in terms of the system of multi-level government established by the Final Constitution.

This chapter discusses the constitutional role of provincial executives. As the role of the national executive is discussed fully in Chapter 18, here we focus on aspects of the role of provincial executives that distinguish them from their national counterpart. In addition, the manner in which a system of government develops cannot be understood in isolation from its political environment. Accordingly, where it is relevant, we note the way in which different provisions have been implemented in different provincial environments.

20.2 Premiers

(a) Appointment and removal

According to FC s 128, Premiers are elected by the provincial legislatures at the first sitting after the legislature's election. The election must be presided over by a judge designated by the Chief Justice. If the office of the Premier becomes vacant for any reason, the provincial legislature concerned must select a new Premier on a date determined by the Chief Justice.

In the initial version of its provincial constitution, the Western Cape attempted to alter the requirement that the Chief Justice designate a judge. It provided that the Judge President of the Western Cape or a judge designated by him or her would preside over the election of the Premier. The Constitutional Court rejected this alteration on the ground that members of the judiciary wield powers entirely independent of the powers exercised by the provinces. Provinces do not have the competence to alter the powers and the functions that have been assigned to particular judges by the national constitution.[1]

[1] *Ex parte Speaker of the Western Cape Provincial Legislature: In re Certification of the Constitution of the Western Cape 1997* 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC) at para 56.

There is, however, an anomaly in FC s 128 that the Western Cape Constitution did not try to rectify. One might expect a provincial constitution to stipulate that the first election in a newly-elected legislature should be that of the Speaker, and that the Speaker would then preside over all other elections. This procedure would accord with the constitutional status of legislatures as bodies which elect the head of the relevant executive and to which the executive must account. Such a variation in a provincial constitution from the provisions of FC Chapter 6 should pass constitutional muster. It would, on all but the narrowest reading of the section, constitute a 'legislative procedure' under FC s 143(1)*(a)*.[1]

The constitutional requirement of an election for the office of Premier is a deviation from the practice of older parliamentary systems in which the leader of the largest party in the legislature is invited to form a government by the head of the state (or head of the subnational unit such as a province) and then becomes Prime Minister or Premier. However, the election does not itself distinguish the system in South Africa's provinces from other parliamentary systems. The largest party will still choose the Premier. In the case of coalition governments, where no single party holds the majority, an agreement must be reached amongst the parties seeking to form a governing coalition as to who should be Premier. The more significant difference between traditional parliamentary systems and that in South Africa lies in current political practice. The policy of the African National Congress (ANC), which commands the majority in all the provinces, is for Premiers to be identified by the party's president and to be 'deployed' to the premiership.[2] This practice — combined with a closed list system of proportional representation that allows voters only a very limited opportunity to express preferences as to who their public representatives should be — weakens the democratic basis of provincial government. In effect, Premiers gain their political legitimacy from and are politically accountable to the president of the ANC and the central party structures rather than the provincial legislature or even regional party structures.

Despite the controversy that has surrounded the ANC practice of allowing the President to identify Premiers, it has been used to good effect to increase the

[1] For further discussion of the extent to which provincial constitutions may vary their executive and legislature structures from those structures provided for in the Final Constitution, see S Woolman, 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 21.

[2] Prior to 1997, Premiers were selected from within the party through an electoral list process. However, at the ANC National Conference in 1997, it was decided that the ANC president in conjunction with the National Executive Committee of the ANC should be given the power to 'deploy' Premiers. See D Besdziek 'Provincial Government in South Africa' in A Venter & C Landsberg (eds) *Government and Politics in the New South Africa* (2006) 117. This power has since caused a number of conflicts within the party, with some regional party structures rejecting their appointed Premiers and appointing other candidates as provincial party leaders. It has also caused a certain degree of factionalism within party structures, particularly in cases where the Premier is different from the elected head of the party in that region. See M Malefane 'Anti-Mbeki Vote Ensures Victory for Free State's Magashule' available at http://www.sundayindependent.co.za/index.php?fSectionId=1042&fArticleId=2600167 (accessed 12 October 2006). See also T Lodge *Politics in South Africa: From Mandela to Mbeki* (2002) 38.

number of women holding the office. After the 2004 elections, the number of women Premiers was increased to four — thus the number of male and female Premiers is almost equal.[1] This outcome is consistent with the ANC's general policy of increasing the representation of women in prominent political posts.[2]

The terms of Premiers begin when they assume office, which must be within five days after their election.[3] The term ends when a vacancy occurs or when the next Premier assumes office.[4] Like the national President, Premiers may not serve for more than two terms. However, if a person has assumed the office of Premier to fill a vacancy then the period between the vacancy and the next election is not counted as a term.[5]

Premiers may be removed from office in two ways. First, a Premier who has lost the support of the majority in the legislature may be removed through a vote of no confidence by the provincial legislature.[6] Secondly, under FC s 130(3), a Premier who is not fulfilling his or her functions properly may be removed by a vote of at least two thirds of the members of the provincial legislature.[7] Removal may occur 'only on the grounds of *(a)* a serious violation of the Constitution or the law; *(b)* serious misconduct; or *(c)* inability to perform the functions of office'. A Premier who has been removed from office under FC s 130(3)*(a)* or *(b)* may not receive any of the benefits of the office and may not hold any other public office in future.[8]

To date no provincial legislature has attempted to remove a Premier through the use of either of the above mentioned procedures. The Premiers that have relinquished their office were forced to resign through decisions taken by the ANC National Executive.[9]

An acting Premier may be appointed if the Premier is absent or temporarily unable to fulfil his or her duties or if the office of the Premier becomes vacant. FC s 131(1) specifies who should be appointed as acting Premier. The first choice

[1] Prior to 2004, only two women had served as Premiers, both in the Free State. Ivy Matsepe-Casaburri held the position between 1996 and 1999. She was replaced by Isabella Winkie Direko, who served from 1999 to 2004. The four current women Premiers are Beatrice Marshoff (Free State), Edna Molewa (North West), Nosimo Balindlela (Eastern Cape) and Dipuo Peters (Northern Cape).

[2] See *ANC's Women's Charter for Effective Equality* (1994), available at http://www.anc.org.za/ancdocs/policy/womchart.htm (accessed 21 February 2007). Piombo notes that the ANC has a formal requirement that at least 30 per cent of electoral candidates be women. At present, 38 per cent of ANC MPs in both Houses of Parliament are women. See J Piombo 'The Results of the Election 2004: Looking Back, Stepping Forward' in J Piombo and L Nijzink (eds) *Electoral Politics in South Africa: Assessing the first democratic decade* (2005) 281-2.

[3] FC s 130(1). The period within which a Premier must assume office is dealt with in FC s 129.

[4] FC s 130(1).

[5] FC s 130(2).

[6] We discuss this subject at § 20.3 infra.

[7] FC s 130(3). Note that the section requires two thirds of all the members of the legislature to support the decision to remove the Premier, not merely two thirds of the members present.

[8] FC s 130(4).

[9] T Lodge (supra) at 42-8.

must be a member of the Executive Council designated by the Premier. The second choice is a member of the Executive Council designated by other members of the Council. The third choice is the Speaker of the provincial legislature. An acting Premier has all the powers and may perform all the functions of the Premier.[1]

(b) Powers and functions

Although the Final Constitution does not formally create two distinct roles for Premiers, they have two broad sets of powers and functions: *(i)* those that are performed by virtue of their status as the head of the province and that are similar to those performed by the President acting as Head of State; and (ii) those that they perform in conjunction with the Executive Council.[2]

Most of the powers of the Premier exercised by virtue of his or her status as head of the province are listed in FC s 127(2). The nature of these powers and the fact that they are listed separately from the 'executive powers' listed in FC s 125(2) suggests that they are to be distinguished from those powers and need not be exercised 'together with' the rest of the Executive Council. Instead, like the President's powers under FC s 84, they may be exercised by the Premier on his or her own. However, FC s 140 stipulates, firstly, that decisions taken by a Premier must be in writing if they are taken in terms of legislation or have legal consequences and, secondly, that written decisions that concern the portfolio of an MEC must be countersigned by that MEC. Some decisions taken under FC s 127(2), such as a decision to establish a commission of inquiry or to refer a bill back to the provincial legislature because of concerns about its constitutionality, will concern the portfolio of an MEC. So although FC s 127(2) does not require the Premier to act 'together with' the Council, under these circumstances FC s 140(2) is usually taken to require the countersignature of the MEC as an indication that the MEC is informed about the decision but not as an indication of his or her agreement.[3]

The powers that the Premier exercises as head of the province include assenting to and signing Bills,[4] referring Bills back to the provincial legislature or to the Constitutional Court for consideration of their constitutionality,[5] summoning the

[1] FC s 131(2).

[2] The functions of the Premier that are exercised in conjunction with the Executive Council are discussed in § 20.3*(b)* infra.

[3] This matter is discussed in greater detail in C Murray & R Stacey 'National Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, Original Service, July 2007) Chapter 18.

[4] For a brief discussion on this subject, see T Madlingozi & S Woolman 'Provincial Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) § 19.2*(c)*.

[5] The power of a Premier to refer provincial bills to the Constitutional Court has been used only once. See *In re: Constitutionality of the Mpumalanga Petitions Bill, 2000* 2002 (1) SA 447 (CC), 2001 (11) BCLR 1126 (CC). For a brief discussion of this case, see T Madlingozi & S Woolman (supra) at § 19.6.

provincial legislature to extraordinary sittings to conduct special business, appointing commissions of inquiry and calling a referendum. A Premier must also dissolve the provincial legislature if it takes a resolution to dissolve — provided that at least three years have elapsed since the last election.[1] When a provincial legislature has been dissolved, or if its term has expired, the Premier must proclaim the date on which new provincial elections will be held.[2] These powers are distinct from those powers that the Premier exercises together with the Executive Council under FC s 125. The expectation is that they will be exercised in a non-partisan manner. In a number of instances, such as the power to assent to Bills, the Premier possesses no discretion at all.

A number of other functions are specifically allocated to Premiers by the Final Constitution. These embrace heading the province's delegation to the NCOP,[3] nominating a commissioner to serve on the Public Service Commission as a representative of the province and serving on the Judicial Service Commission when a vacancy on the bench in the province exists.[4] In fulfilling these functions, the Premier plays a distinctly political role and acts as head of the provincial executive. In addition, as Froneman J puts it in *Magidimisi NO v Premier of the Eastern Cape*, under the Final Constitution, the Premier is vested with the 'ultimate executive authority of the province'. What Froneman J means, among other things, is that the Premier 'bears the ultimate responsibility to ensure that the provincial government honours and obeys all judgments against it'.[5] When the Premier exercises such executive authority, he or she must act 'together with the other members of the Executive Council' and thus needs the support of the Council.[6]

20.3 Executive Councils

(a) Composition, appointment and removal

The Executive Council is a province's Cabinet. It consists of the Premier and between five and ten other members (MECs) appointed by the Premier from amongst the members of the provincial legislature.[7] FC s 132(2) expects a Premier to choose the Executive Council for the province. However, in provinces

[1] FC s 109(1).

[2] FC s 108(2). No provincial legislature has ever been dissolved so it has not been necessary to hold fresh elections in any of the provinces. Thus far, the dates on which new elections for provincial legislatures whose terms have expired have coincided with the dates for national elections.

[3] FC s 60(2)*(a)(i)*.

[4] FC s 196(7)*(a)*. This is more of a ceremonial function. In terms of FC s 196(8)*(b)*, the commissioner must be recommended by a committee of the provincial legislature in which all political parties must be proportionally represented and selected by a majority vote of the provincial legislature.

[5] Eastern Cape High Court Case No 2180/04 (Unreported, 25 April 2006) at para 20. See § 20.3*(d)* infra.

[6] FC s 125(2).

[7] FC s 132. This provision is retained in s 42(1) of the Western Cape Constitution.

controlled by the ANC, MECs, like the Premier, are 'deployed' by the national executive of the ANC.[1] Similarly, while the Premier also has the constitutional power to dismiss MECs, ANC control of the provinces means that dismissal occurs at the behest of the national executive of the ANC.[2]

Under the Final Constitution, MECs are accountable both to the Premier, since he or she holds the power to dismiss them, and to the provincial legislature. These arrangements are identical to those for the national Cabinet and, like FC s 92(2), FC s 133(2) spells out the principle of cabinet accountability.[3]

Although FC s 132(2) gives Premiers the power to dismiss MECs, it does not spell out the circumstances under which an MEC can be removed. In keeping with the tradition in parliamentary systems, the Premier may dismiss MECs at will. This power is, of course, subject to political constraints.

The legislature can remove the Executive Council through a vote of no confidence. In terms of FC s 141(1,) '[i]f a provincial legislature, by a vote supported by a majority of its members, passes a motion of no confidence in the province's Executive Council excluding the Premier, the Premier must reconstitute the Council'. If the legislature has lost confidence in the entire Executive Council, including the Premier, then, in terms of FC s 141(2), it can pass a vote of no confidence in the Premier, who must then resign together with the MECs. FC s 141(2) captures a longstanding practice in parliamentary systems. Such a vote of no confidence usually precipitates a change of government: the vote signifies that the party in government is no longer able to command a majority in the legislature. However, FC s 141(1) is unusual — perhaps unique. It is difficult to envisage circumstances in which it would be used. A Premier, sensing discontent amongst backbenchers, is likely to reshuffle the Council before being subject to the indignity of having his or her chosen team dismissed.

The 'no confidence removal' procedure under FC s 141(2) must be distinguished from the procedure under FC s 130(3) which, as discussed above, allows the Premier to be removed for reasons other than loss of confidence. The two are different in four significant ways. First, a two-thirds majority of all the members of the legislature is required to remove a Premier in terms of FC s 130(3) whereas only a majority vote (fifty percent plus one of the members of the legislature) is required to force a resignation through a vote of no confidence. It is therefore significantly more difficult to dismiss a Premier under FC s 130(3). Second, the rest of the Executive Council need not resign if the Premier is removed in terms of FC s 130(3). Third, the consequences for a Premier who has been removed in terms of FC s 130(3)*(a)* or *(b)* are more prejudicial, as under FC s 130(4) that

[1] For a fuller discussion on politics in the provinces, see T Lodge *Politics in South Africa* (supra) at 32-53. See also J Arenstein 'Mpumalanga gets New Chief Whip' available at http://www.lowveldinfo.com/news/showstory. asp?story=722 (accessed 22 October 2006).

[2] FC s 132(2).

[3] For a more detailed discussion on collective responsibility, see C Murray & R Stacey 'National Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds), *Constitutional Law of South Africa* (2nd Edition, Original Service, July 2007) Chapter 18.

person may not receive any of the benefits of the office or assume public office again. Finally, FC s 130(3) would appear to be justiciable. Its precise wording, limiting its use to a few, narrowly defined circumstances, suggests that the Final Constitution is concerned that the process should not be misused and thus contemplates the possibility of judicial review. On the other hand, one could contend that the special majority required for removal of a Premier under FC s 130(3) suggests that the Final Constitution did not intend a court to second-guess the legislature on such matters, but, instead, was content to place full responsibility upon the legislature. This reading would avoid a three-way power struggle between the executive, the legislature and the courts. In any event, the question may be academic. A provision such as this one is likely to be used only in the context of a breakdown of party government. Conceivably, a legislature might rely on it, rather than moving for a vote of no confidence, in an attempt to indicate that it is not calling for a change of government. However, in circumstances where two thirds of the legislature can be rallied to remove a Premier, one would ordinarily expect party structures to ensure that he or she resigns before facing that embarrassment.[1]

Members of the Executive Council will ordinarily be members of the provincial legislature. Although the Final Constitution is silent on whether an MEC (including the Premier) may remain in office if he or she leaves the provincial legislature, the obvious interpretation of the FC s 132 requirement that the Premier and other MECs be chosen from the legislature is that, to retain their office, they should remain members of the legislature. This interpretation accords with the parliamentary system of government that the Final Constitution establishes for provinces.

There is one, narrowly circumscribed, exception to the requirement that MECs must be members of the legislature. FC s 135 deals with the situation that arises after an election but before a new Premier has been chosen. It stipulates that, after an election, 'the Executive Council and its members remain competent to function until the person elected Premier by the next legislature assumes office'. For this short period, it is possible that a person who no longer holds a seat in the legislature will serve as an MEC.

[1] FC s 106(3)*(c)* stipulates that members of provincial legislatures (MPLs) lose their seats in the legislature if they are expelled from their party. One consequence of FC s 106(3)*(c)* is that a Premier would have to relinquish office on being expelled from the party and having lost his or her seat. FC s 106(3)*(c)* does however contain the proviso that an MPL who crosses the floor as provided for by FC Schedule 6A — which governs floor crossing in general — will not lose his or her seat. The prospect therefore exists that a Premier could cross the floor to another party and retain the Premiership. However, to avoid being dismissed pursuant to a vote of no confidence, either a majority of the members of the legislature would have to accompany the Premier across the floor or a majority of the members of the legislature — in the form of a new coalition — would have to continue to provide him or her with the requisite level of political support.

(b) Powers and functions

The executive authority of a province is vested in the Premier,[1] who must exercise that authority 'together with the other members of the Executive Council'.[2] As noted above, this arrangement makes the Premier the 'ultimate executive authority in the province'.[3] The phrase 'together with' and the stipulation in FC s 133(2) that the Premier and other MECs are collectively accountable for the government of the province capture the idea of cabinet government that is central to parliamentary systems. In this tradition, a Premier is primus inter pares (first among equals). Thus, despite the fact that the executive power is formally vested in the Premier alone, the responsibility for government is shared. Of course, as studies of parliamentary government in the United Kingdom have shown, the management of cabinet and the amount of authority that a Premier actually wields depends on the particular political context of the time and the personalities involved.[4]

FC s 125(2) outlines the general powers and functions of Executive Councils. These powers and functions are:

(a) implementing provincial legislation in the province;
(b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;
(c) administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;
(d) developing and implementing provincial policy;
(e) co-ordinating the functions of the provincial administration and its departments;
(f) preparing and initiating provincial legislation; and
(g) performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament.

Much of this list captures the expected functions of a government: to develop and to implement policy for the polity over which they have authority. However, as we noted in the introduction to this chapter, the role of South Africa's provincial governments is very different from that of most of their foreign counterparts.[5]

[1] FC s 125(1).
[2] FC s 125(2).
[3] *Magidimisi* (supra) at para 20.
[4] See R Brazier *Constitutional Practice* (1994); J Simon *British Cabinet Government* (1999); N Manning *Strategic Decision-Making in Cabinet Government* (1999).
[5] The role of the governments of Germany's Länder is perhaps closest to that of the provinces. Those governments have more autonomy than the provinces but, like the provinces, their main responsibility is to implement national laws. See C Saunders 'Legislative, Executive and Judicial Institutions: A Synthesis' in K le Roy & C Saunders (eds) *Legislative, Executive, and Judicial Governance in Federal Countries: A Global Dialogue on Federalism, Vol 3* (2006) p 361ff.

FC s 125(2)*(b)*, *(c)* and *(g)* underscores these differences and points to the extensive responsibility that provincial governments have for the development and implementation of *national* laws.

FC s 125(2)*(b)* is the key provision here. It sets out what is currently the main function of the provincial governments — the implementation of national laws in the areas of shared responsibility listed in Schedule 4.[1] Schedule 4 embraces such functions as health services, welfare services, education and housing. These functions, and many of the other functions listed in Schedule 4, are critical to the transformation of the country. In other words, the Final Constitution envisages that many, very significant national laws will be implemented by provincial governments. Currently, most of the national laws concerned are comprehensive and provide detailed instructions to their provincial implementers. Indeed, many pieces of legislation cast provincial governments in the role of implementing agents with little of the discretion that one might expect an elected government to possess. But that may simply be a function of the exigencies of the moment. In due course, and building on their experience in administering these national laws, provincial executives might assume a different role and propose provincial laws that tailor the national laws to suit local needs. The importance of FC s 125(2)*(b)* might recede as national legislation is restricted to establishing national norms and standards and provinces take fuller responsibility for achieving and maintaining such standards. However, as things stand, the limited capacity of provincial governments and the high level of agreement on what should be done make provincial innovation rare. Most provinces are content to implement programmes within the tight parameters set by the national government.[2]

FC s 125(2)*(c)* extends the range of provincial governments as executors of national laws still further. It anticipates the provincial administration of national legislation that falls outside Schedules 4 and 5 but which the national government has assigned to the provincial executive. The wording of paragraph *(c)* suggests that the role of provincial executives in relation to assigned legislation (which they are to 'administer') might be different from that in relation to Schedule 4 and 5 laws (which they 'implement'). However, it is unlikely that this semantic distinction would mean anything in practice. When the 'administration' of legislation is assigned to a provincial government, the precise responsibilities of the province are likely to be set out in the assignment agreement.[3]

[1] Few national laws fall under Schedule 5.

[2] In the seven-year period between 1994 and 2000, the provincial legislatures passed between 46 (Northern Cape) and 78 (North West) Acts. Many of these provincial Acts were routine — for instance, the annual budget and laws relating to salaries. Parliament, by comparison, produced approximately 70 national Acts each year. See C Murray & L Nijzink *Building Representative Democracy: South Africa's Legislatures and the Constitution* (2002) 74 - 75.

[3] FC s 99 requires an assignment to be agreed to by the provincial MEC concerned. See § 20.4*(v)* infra. For a fuller discussion of the FC s 99 power of assignment, see C Murray & R Stacey 'National Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, Original Service, July 2007) Chapter 18.

There is one striking omission from the list in FC s 125(2). It does not mention the participation of provincial executives in the formation of the national legislation that they will be expected to implement or in the allocation of revenue to provinces in terms of FC s 214. In fact, provincial executives have a significant national role here, both through their participation in the intergovernmental forums mandated by FC Chapter 3, and in the passage of national legislation, including the annual Division of Revenue Act, in the NCOP.[1]

Although the main responsibility of provincial executives, at least at present, is the implementation of national laws, provinces may develop and implement their own policies and provincial laws. Following the practice of other parliamentary systems, provincial laws are usually prepared and introduced in the legislature by the executive. And, again in line with other parliamentary systems, money bills may be introduced only by the MEC responsible for finance.[2] The power to implement provincial legislation in terms of FC s 125(2)*(a)* is an exclusive power of the provincial executive and the national government may restrict it only in the circumstances laid out in FC s 100.[3] As we have already noted, provinces have made little use of their law-making power.

Some provinces have attempted to use their FC s 125(2)*(d)* right to develop and to implement provincial policy. This practice is uncontroversial in relation to Schedule 5 matters over which provinces have exclusive responsibility. However, the power of provinces to make policy on Schedule 4 matters has been controversial, particularly in provinces that were not controlled by the same party as the national government. National government contended that it is the role of the national government to make policy and the role of provincial executives to implement it. This is simply wrong. First, the Final Constitution does not oblige provinces to implement national policy: it obliges them to implement national laws.[4] That means that unless policy is enshrined in law, it does not bind the provinces. Secondly, a province can choose to depart from national policies spelt out in national laws by passing their own provincial laws. In such cases, under FC s 146, the national laws will give way to the provincial laws unless they meet the tests set out in FC s 146(2) and FC s 146(3). These provisions clearly do not anticipate that national policies bind provinces. Certainly, Chapter 3's principles of

[1] See § 20.4 infra.

[2] FC s 119.

[3] FC s 125(5). FC s 100(1) empowers the national executive to intervene in a province if the provincial executive fails to fulfil any of the obligations that are imposed on it by the Constitution or legislation. See C Murray & R Stacey 'National Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, Original Service, July 2007) Chapter 18. FC s 238 may permit a province to delegate responsibility for 'implementing' legislation to another sphere of government, but technically responsibility for ensuring that the law is properly implemented would remain with the province.

[4] See *Ex Parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC) at para 24 (Court seems to accept that had the impugned legislation required provinces to adhere to national education policy then the law would have been unconstitutional.)

co-operative government contemplate that provinces will discuss any desire to depart from national policy with the national government. However, FC Chapter 3 does not privilege national policies. Nevertheless, as a general rule, provinces have not implemented policies in Schedule 4 areas that are inconsistent with those of the national government. The most significant exception has been provincial opposition to national HIV/AIDS policy. In 2001, a national policy stated that the anti-retroviral Nevirapene, effective in preventing mother-to-child transmission of HIV, would be tested at only two research sites per province. The drug was not to be made generally available. However, in 2002, Gauteng took the decision to provide Nevirapene to HIV-positive pregnant women at all public hospitals and large community centres.[1]

(c) The role of MECs

The MECs are responsible for the specific areas that are assigned to them by the Premier — eg, finance, health, transport.[2] It is now also common for Acts to stipulate which MEC will be responsible for the Act's implementation. As a result, an MEC, on being allocated the health portfolio, will automatically assume responsibility for the implementation of certain laws. The Premier always has the power to reallocate portfolios. However, the Final Constitution also envisages the transfer of specific functions of MECs in two additional circumstances. First, under FC s 137, responsibility for implementing a particular piece of legislation may be transferred from the portfolio of one MEC to that of another. FC s 137 thus ensures that the Premier is able to change the content of portfolios on the Executive Council and to redefine the responsibilities of MECs. In 2006, this provision caused a dispute in the Eastern Cape when the Premier sought to transfer responsibility for the implementation of an Act from the MEC designated in the Act to another MEC.[3] The legislature's legal adviser objected and suggested that the only way in which such a transfer could be made was through the amendment of the Act. In order to avert a legal dispute, the Premier eventually withdrew her proclamation and transferred the responsibilities back to the MEC designated by the Act.[4] But the objection raised in this dispute appears misconceived because FC s 137 addresses this set of circumstances directly. The section protects the Premier's right to manage the administration of the government of the province. In fact, FC s 137 introduces a limit on the powers of the provincial legislature. This limit, consistent with the doctrine of separation of powers, vests responsibility for decisions concerning how executive responsibilities should be

[1] N Steytler 'Federal Homogeneity from the Bottom Up: Provincial Shaping of National HIV/AIDS Policy in South Africa' (2003) 33 *Publius: The Journal of Federalism* 59, 65-66.

[2] FC s 132(2). See also *Magidimisi* (supra) paras 21 and 22 (MECs bear responsibility for decisions and conduct of their departments.)

[3] 'ECDC in Limbo after Sacking of Minister' *The Herald* (12 April 2006), available at http://www.epherald. co.za/herald/news/n03_12042006.htm (accessed 14 April 2006).

[4] 'Premier Transfers ECDC back to Economic Affairs' *Dispatch* (14 April 2006), available at http://www.dispatch. co.za/2006/04/14/Easterncape/abal.html (accessed 3 February 2007).

allocated in the Premier. The requirement that transfers of responsibility be formally announced by proclamation is intended to check the Premier's power, albeit in a limited way, and to ensure that the public is aware of who bears responsibility for the law concerned.

FC s 138, headed 'Temporary assignment of functions', deals with a rather different situation. It allows the Premier to deal with the temporary inability of an MEC to do his or her job. Under circumstances such as the illness, travel or vacation of an MEC, another MEC may be asked to bear responsibility for the absent MEC's portfolio for a limited time.

Only two portfolios in provincial executives are identified by the Final Constitution: policing finance. In terms of FC s 206(8) the MECs responsible for policing are members of a national committee that ensures the coordination of police services. In terms of FC s 119, only the MEC responsible for financial matters is allowed to introduce a money bill in the provincial legislature.[1] So although the legislature possesses the power to decline to adopt a provincial budget, it does not have the power to introduce it.[2]

(d) The Executive Council and provincial administration

In terms of FC s 125(2)*(e)*, the Executive Council is responsible for co-ordinating the provincial administration and its departments. The ability of Executive Councils to control the administration in the province is limited by the fact that, in terms of FC s 197(1), there must be one, unified public administration for the whole country. This unified public administration must be structured by national legislation.[3] The provincial government may only recruit, promote, transfer and dismiss employees within the provincial administration:[4] even these powers must

[1] FC s 120(1) defines a money bill as follows:
(1) A Bill is a money Bill if it-
(a) appropriates money;
(b) imposes provincial taxes, levies, duties or surcharges;
(c) abolishes or reduces, or grants exemptions from, any provincial taxes, levies, duties or surcharges; or
(d) authorises direct charges against a Provincial Revenue Fund.'

[2] The question whether a provincial legislature may amend a money bill remains controversial. FC 120(3) states that '[a] provincial Act must provide for a procedure by which the province's legislature may amend a money Bill'. No province has passed such an Act and the received wisdom is that, in the absence of the Act, legislatures may not amend money bills. But this interpretation runs against both the language of the provision and its intention. The language does not suggest that the legislatures may not amend a money bill and, had the Constitution intended this one would have expected s 114(1)*(a)* which gives provincial legislatures the power to 'consider, pass, amend or reject any Bill before the legislature' to have expressly excluded the power to amend money bills just as, in the following paragraph, it confers on provincial legislatures the power to 'initiate or prepare legislation, except money Bills'.

[3] FC s 197(1) states: 'Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.' For general comment on this aspect of public service in South Africa, see A M Sindane 'Politicisation of the Public Service: An Unavoidable Consequence of the Political History in South Africa' (2003) 1 *Journal for New Generation Sciences* 59; TJ Mokgoro 'The Public Service as Promoter and Sustainer of Democracy' (1997) 32 *Journal of Public Administration* 241. See also A Bodasing 'Public Administration' in S Woolman, T Roux, T Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 23A.

[4] FC s 197(4).

be exercised in accordance with nationally determined standards.[1]

The question of the extent to which provincial governments may exercise control over the structure of the public administration in their province was considered by the Constitutional Court in *Premier, Western Cape v President of the Republic of South Africa*.[2] The case concerned a dispute between the Western Cape government and the national government about certain provisions of the Public Service Laws Amendment Act,[3] which amended the Public Service Act.[4] The amendments significantly restructured the public administration within the provinces. The Western Cape objected to the amendments on the basis that they infringed the province's constitutionally conferred power to structure its own administration. Its principal contention was that FC s 197(1) should not be interpreted as conferring a power to the national government to structure the public administration as well as the public service. It argued that, instead, a distinction should be made between the public service and the public administration; the former could be structured by the national government, whilst the latter fell within the sphere of the provincial government. The Court rejected this argument. It held that the proper interpretation to be given to FC s 197(1) was that it empowered the national government to structure both the public service and the public administration, and that the two terms were virtually synonymous. It further held that adopting the construction of FC s 197(1) suggested by the Western Cape would be incorrect because it would result in an implied power that contradicted the express provisions of the Final Constitution and would empty FC s 197(1) of its content.[5] However, the Court did find that s 3(3)*(b)* of the Public Service Act, as amended, was unconstitutional insofar as it gave the Minister of Public Service and Administration the power to transfer the administration of any legislation, including provincial legislation, from a provincial department to a national department without the consent of the Premier. This section was found to be in conflict with the province's power to administer its own legislation.[6]

After *Premier, Western Cape*, it is clear that the power to structure public administration within the provinces is vested in the national government. However, the *Premier, Western Cape* Court warned that, in light of the principles of co-operative government outlined in FC s 41, the power vested in the national government

[1] FC s 197(4). FC s 197(2) further stipulates that '[t]he terms and conditions of employment in the public service must be regulated by national legislation.' For a more detailed discussion of the public service, see LP Dicker and GE Devenish 'Public Service' in WA Joubert (ed) *The Law of South Africa* (First Reissue, 2000) Volume 21, para 414ff. See also A Bodasing 'Public Administration' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 23A.

[2] 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC)('*Premier, Western Cape*').

[3] Act 86 of 1998.

[4] Act 103 of 1994.

[5] *Premier, Western Cape* (supra) at paras 44-48.

[6] Ibid at paras 86-88.

should be exercised very carefully and in a manner that does not undermine the ability of the provinces to carry out their functions.[1]

Although FC s 197 places significant limits on the power of provincial executives to structure their administrations, it does not absolve them of the responsibility for 'coordinating the functions of the provincial administration and its departments' as listed in FC s 125(2)*(e)*. This responsibility entails maintaining oversight over the actual running of the administration within the province and ensuring that their departments fulfil their responsibilities.[2]

(e) Oversight by provincial legislatures

The Final Constitution is unusually emphatic in its insistence that legislatures must oversee the conduct of government. Echoing provisions relating to the national Parliament, FC s 114(2) contains direct instructions to provincial legislatures to oversee the executive. FC s 115 affords the legislatures substantial powers with which to carry out this responsibility. FC s 133(2), which makes members of Executive Councils collectively and individually responsible to the provincial legislature, complements these provisions. Lest this not be clear enough, the Final Constitution takes the unusual step in FC s 133(3)*(b)* of specifying that MECs must 'provide the legislature with full and regular reports concerning matters under their control'.

Although more detailed than provisions relating to oversight found in most constitutions, these provisions might suggest that the oversight relationship between the provincial legislature and its executive follows the usual pattern in parliamentary democracies. Legislatures usually pass laws introduced by the executive and then oversee their implementation.

However, this division of labour does not exist in South Africa. Because the main responsibility of provincial executives is to implement national laws, provincial legislatures do not hold them to account only for implementing laws that the provincial legislatures themselves have passed. Instead, the greater part of the oversight work of a provincial legislature is to oversee the way in which the provincial executive implements national laws. Thus, provincial legislatures may be seen to be exercising oversight on behalf of the national Parliament.

The consideration of departmental annual reports is the focus of oversight activities in most provincial legislatures. These reports are tabled in terms of s 65 of the Public Finance Management Act (PFMA).[3] The PFMA was enacted to

[1] *Premier, Western Cape* (supra) at para 60. On Chapter 3 and the principles of co-operative government generally, see S Woolman, T Roux and B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14

[2] *Magidimisi* (supra) at paras 21, 22, 24 (In particular, MECs are responsible for ensuring that court orders are obeyed.)

[3] Act 1 of 1999. See R Kriel & M Monadjem 'Public Finance' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27.

comply with the requirement in FC s 215 that national legislation should ensure, amongst other things, transparency, accountability and sound financial management of national, provincial and municipal budgets. Section 65(1)*(a)* of the PFMA requires executive authorities to table annual reports together the financial statements and audit report of their departments in their respective provincial legislatures. If an MEC fails to submit the annual report within six months of the end of the financial year, then he or she will have to table a written explanation for the delay.[1]

At the beginning of each new financial year, every provincial department tables a strategic plan and budget. The annual report focuses on service delivery by indicating the extent to which each government department has met the targets outlined in its strategic plan and in the budget for the preceding year. It provides both a record of the financial performance of the department and a non-financial performance report. It must detail the extent to which service delivery targets have been met.[2] Annual reports are prepared in accordance with guidelines issued by the National Treasury.[3]

(f) Ethical accountability

MECs and Premiers are expected to conduct themselves in an ethical way. FC s 136(2) outlines the basic principles that are applicable in this regard. It states that:

> (2) Members of the Executive Council of a province may not —
> *(a)* undertake any other paid work;
> *(b)* act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
> *(c)* use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

This section is not intended to be comprehensive. FC s 136(1) anticipates a more extensive code of ethics for MECs stating that '[m]embers of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation'.[4]

[1] Section 65(2)*(a)*. As the financial year ends on 1 March, all reports must be tabled by no later that 30 September of each year.

[2] National Treasury *Guideline for Legislative Oversight through Annual Report*s (2005) 12.

[3] Section 76 of the PFMA empowers the National Treasury to make regulations concerning certain matters. This grant of power accords with FC ss 216(1) and (2), which require the Treasury to enforce compliance with nationally legislated standards regarding budgets and expenditure. The National Treasury therefore issues treasury regulations that govern the production of annual reports. These regulations are simplified in the 'Guide for the Preparation of Annual Reports by National and Provincial Departments'. The guide is issued annually by the Treasury. The Treasury also provides guidelines on non-financial reporting. Individual provinces can add their own requirements for the annual report as long as these do not conflict with those of the National Treasury. See National Treasury *Guideline* (supra) at 23.

[4] Such a code could not depart from the provisions of FC s 136(2).

The national legislation envisaged in FC s 136(1) was passed in 1998 in the form of the Executive Members Ethics Act (Ethics Act).[1] Section 2 of the Ethics Act requires the President, in consultation with Parliament, to publish a code of ethics to govern the behaviour of all MECs, Premiers, and national Cabinet Ministers and deputy Ministers. The Executive Ethics Code was eventually published in July of 2000.[2] The standards outlined in the Code elaborate upon the provisions of FC s 136(2). The Code requires MECs and Premiers to submit a list of their financial interests to the Secretary of the Executive Council. The Secretary then maintains a register of financial interests.

Breaches of the Ethics Code are to be investigated by the Public Protector.[3] The Public Protector must complete the investigation and submit the report within 30 days.[4] If a complaint is lodged against the Premier, then the report of the Public Protector is submitted to the President. However, if a complaint is lodged against an MEC, then the report goes to the Premier of that province.[5] Upon receipt of a report on a complaint against a Premier, the President must submit the report together with his or her comments within 14 days to the National Council of Provinces (NCOP).[6] A Premier who receives a report on an MEC must present it, together with a report on any action to be taken against the MEC, to the provincial legislature.[7]

The requirement in the Act that reports concerning Premiers be submitted to the President is yet another reflection of the prevailing attitude that provincial politicians are accountable to the national government. As Premiers are formally chosen by provincial legislatures, and can be dismissed by them only, it would be most appropriate for the Public Protector to deliver such a report to the Speaker

[1] Act 82 of 1998.

[2] *GG* No 21366 of 28 July 2000.

[3] Section 3. In terms of s 4(1) of the Ethics Act an investigation must be initiated if a complaint is lodged by:

(a) the President, a member of the National Assembly or a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet member or Deputy Minister; or

(b) the Premier or a member of the provincial legislature of a province, if the complaint is against an MEC of the province.'

In terms of s 4(3) members of the public may also lodge complaints. However, such complaints must be lodged in terms of the relevant sections of the Public Protector Act 23 of 1994.

[4] Section 3(2) of the Ethics Act.

[5] Section 3(2)*(a)* and *(b)*.

[6] Section 3(5)*(b)*. See also *GG* No 21366 of 28 July 2000. In terms of s 4(1) of the Ethics Act an investigation must be initiated if a complaint is lodged by:

'*(a)* the President, a member of the National Assembly or a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet member or Deputy Minister; or

(b) the Premier or a member of the provincial legislature of a province, if the complaint is against an MEC of the province.'

In terms of s 4(3) members of the public may also lodge complaints. However, such complaints must be lodged in terms of the relevant section of the Ethics Act.

Section 3(6) of the Ethics Act.

of the provincial legislature.[1] In any event, FC s 182 requires reports of the Public Protector to be made public in all but exceptional circumstances. A report that alleges unethical behaviour by a Premier could hardly warrant secrecy. The requirement that the President should submit reports concerning Premiers to the NCOP rather than to the provincial legislature concerned adds another twist. It acknowledges that it is appropriate for the President to engage with provinces through the NCOP. But, as the NCOP has no power to censure or remove a Premier, it is not clear what the NCOP would do with such a report. As far as MECs are concerned, despite the fact that the Ethics Act does not require the Public Protector to submit his report to the provincial legislature concerned, it is reasonable to assume that any such report will be brought to its attention. The Public Protector has not, however, had occasion to undertake any investigations pursuant to a complaint filed under the Ethics Act with regard to a member of an Executive Council.[2]

The adherence of Executive Councils to the financial disclosure requirements of the Ethics Code was examined in research conducted by IDASA in 2003.[3] The research found that registers are being kept and updated in all the provinces. However, the IDASA report revealed a lack of awareness amongst officials in implementing offices about the requirements of the Ethics Act.[4] In most of the

[1] The Public Protector would be empowered to take such action under s 6(4)*(c)* of the Public Protector Act 23 of 1994 which empowers the Public Protector

(c) at a time prior to, during or after an investigation-

. . .

(ii) if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting there from or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.

[2] Although no complaints have been made against Executive Council members under the Ethics Code, the Public Protector has in the past taken action when necessary. In 1999, prior to the promulgation of the Code, the Public Protector launched an investigation into a public statement that had been made by the erstwhile Premier of Mpumalanga, Ndaweni Mahlangu, to the effect that it was acceptable for politicians to lie. The investigation report concluded that Mr Mahlangu's statement contravened his obligation in terms of FC s 136(2)*(b)* not to act in a manner which was inconsistent with his office. It recommended that the Mpumalanga Legislature table the matter for debate and take appropriate action against the Premier. The report also expressed the view that, as Premiers are accountable only to provincial legislatures, legislatures have a constitutional obligation to take action against them when necessary. Office of the Public Protector 'Report No 12: Report on the Investigation of a Public Statement made by the Premier of Mpumalanga, Mr N Mahlangu' on 22 June 1999 available at http://www.publicprotector.org/reports_and_publications/report12.htm#06 (accessed on 16 November 2006).

[3] Institute for Democracy in South Africa 'Government Ethics in Post Apartheid South Africa' available at http://www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=445 (accessed on 15 November 2006).

[4] Not all the provinces have adhered strictly to the requirement in the Ethics Code that the register be maintained by the Secretary of the Executive Council. In most of the provinces, this function is performed by the Provincial Director General. Gauteng is unique in that the provincial legislature has appointed an Integrity Commissioner to maintain a register of member's interests for all members of the provincial legislature. MECs file the annual disclosures required under the Ethics Act with the Integrity Commissioner.

provinces, it was extremely difficult for members of the public to access the register. In some cases the register was wholly confidential: the Ethics Code expressly provides for both a public section and a confidential section of the register.[1] The IDASA report also notes that although registers are being kept, there is no mechanism in place for evaluating the contents to determine whether the conduct of MECs and Premiers is in order. This omission constitutes a fundamental flaw in the Code as well as the Ethics Act. Attempts by civil society and members of the public to take the initiative in this regard are hampered by difficulties in accessing the registers.

(g) Salaries

FC s 219(1)*(b)* requires national legislation to be enacted to determine 'the upper limit of salaries, allowances or benefits of members of provincial legislatures, members of Executive Councils and members of Municipal Councils of the different categories'. FC s 219(2) and FC s 219(4) further require an independent commission to make recommendations with regard to salaries, benefits and allowances and further stipulates that the national legislation regarding salaries may be implemented by the provinces only after they have considered the recommendations of the commission.

The Independent Commission on the Remuneration of Public Office Bearers was set up in terms of the Independent Commission on the Remuneration of Public Office Bearers Act (Commission Act).[2] In accordance with the Commission Act, the Commission publishes its recommendations on the upper limit of

[1] See s 7 of the Ethics Code.

[2] Act 92 of 1997. In terms of s 3 of the Commission Act, the Commission consists of eight members appointed by the President. Section 5(1) requires the President to determine the conditions of employment of the members of the Commission. Section 10 requires the Commission to present its annual report directly to the President, who then tables it in Parliament. Section 11(1) of the Act stipulates that the offices of the Commission are to be situated in the office of the President and the administrative requirements of the Commission are serviced by the office of the President. The Act does not provide for any oversight or approval of appointments to the Commission by Parliament or any other independent body. It also does not provide for administrative independence of the Commission and appears to make the Commission answerable to the President by requiring that it submit its activity report directly to him. The only provision in the Act that may protect the independence of the Commission is found in s 5(2) which provides members with security of tenure by stipulating that they will serve for a non renewable term of five years. In light of these provisions, it is uncertain whether the Final Commission meets the requirement of independence stipulated by FC s 219. In *First Certification Judgment*, the Constitutional Court held, in the context of the independent institutions established by the Constitution under Chapter 9, that the powers and functions of an institution need to be understood in order to determine whether the provisions for securing its independence are sufficient. *First Certification Judgment* (supra) at para 160. Issues to be considered include appointment, removal, tenure and institutional independence. We would suggest that the purpose of the Commission is to act as a check against government structures, including the executive, giving themselves exorbitant salaries. In light of this purpose, the Commission Act gives the President an unacceptably high degree of influence over the Commission and it is unlikely that the Act meets the standards that are necessary to secure the independence of the Commission required by the Final Constitution. In *Van Rooyen v The State,* the Constitutional Court was faced with a challenge to certain provisions of the Magistrates Court Act 32 of 1944. 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC). The applicants challenged, amongst other things,

salaries, benefits and allowances of Premiers and MECs in the *Government Gazette* on an annual basis after tabling the recommendations in Parliament.[1]

Following these recommendations, the Remuneration of Public Office Bearers Act (Remuneration Act) requires that the upper limit of salaries of MECs and Premiers must be published by proclamation in the *Government Gazette* by the President.[2] The proclamation must take into consideration, amongst other things, the recommendations of the Commission. Although the President may determine the upper limits of salaries, the specific salaries of MECs in each province are determined and published by the Premier of that province after the upper limits have been published by the President.[3] The Premier cannot, however, dictate his or her own salary. Instead, the provincial legislature of each province determines the salary of the Premier by a resolution taken within 30 days of the presidential proclamation. If the legislature is in recess, then the resolution must be adopted within 30 days after it resumes sitting.[4]

20.4 Provincial Executives and Multi-sphere Government

As we noted above, the South African system of multi-sphere government shapes the role of provincial governments. It draws them into national law-making, requires them to implement many national laws and demands that they support and regulate municipalities. In addition, provinces have acquired responsibilities in relation to traditional leaders.

The boundaries between the three spheres of government have been described as 'soft': there are few bright lines, many responsibilities are shared, and the obligation to cooperate is the system's driving principle.[5] Here we discuss some of the implications of the system for provincial executives.

provisions relating to the appointment of magistrates and the determination of their remuneration and conditions of service. In coming to the conclusion that the provisions of the Act were not unconstitutional, one of the factors that the Court considered was that, even though substantial powers were vested in the Minister, in each case he or she had to consult the Magistrates Commission before taking a decision. Unlike the Magistrates Court Act, the Commission Act does not make provision for the President to consult with any independent body before taking decisions regarding the Commission. This factor, combined with those mentioned above, casts serious doubt on whether the Commission Act complies with FC s 219.

[1] Section 8(4)*(b)* and (5) of the Commission Act.

[2] Section 6(1) ofAct 20 of 1998.

[3] The salaries of MECs must be published in the Provincial Gazette within 30 days after the presidential proclamation. Remuneration Act s 6(3)*(a)*.

[4] Remuneration Act s 6(3)*(b)*.

[5] For a more extensive discussion of the principles and the case law on co-operative government, see S Woolman, T Roux and B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14; R Simeon 'Considerations on the Design of Federations: The South African Constitution in Comparative Context' (1998) 13 *SA Public Law* 42; R Simeon and C Murray 'Multilevel Government in South Africa: An Interim Assessment' (2001) 31 *Publius: The Journal of Federalism* 65.

(a) Provincial executives and the national sphere of government

(i) *Law-making*

The Final Constitution expects provincial executives to be deeply involved in the adoption of national legislation on Schedule 4 and 5 matters and a number of other matters listed in FC ss 76(3), (4) and (5). The Final Constitution demands this involvement when laws are considered in the NCOP. In practice, however, provincial involvement in the law-making process starts long before bills reach the NCOP. MECs and staff in provincial departments engage their colleagues in the national government in discussions concerning policy and proposed legislation in an array of intergovernmental forums.

In its description of the system of co-operative government, FC Chapter 3 anticipates intergovernmental forums in which the national and provincial governments interact without competition and in which the different roles of each sphere are respected. In this system, MECs and provincial departmental officials are meant to contribute to the development of national legislation in order to ensure that such legislation reflects the most urgent concerns of the provinces. Intergovernmental forums ostensibly allow for the development of coherent national and provincial policies that are responsive to differing needs across the country. The Final Constitution offers provinces real leverage in such forums: the national government requires the support of the provinces in the NCOP if proposed legislation that falls under Schedule 4 or 5 is to be approved by Parliament. Should the national government not succeed in bringing provincial executives on board in the intergovernmental forums, its bills may not be passed by Parliament.[1]

The actual practice of intergovernmental relations in South Africa — now governed, in part, by the Intergovernmental Relations Framework Act[2] — does not reflect the type of relationship amongst the spheres of government contemplated by the Final Constitution. The Act, adopted pursuant to FC s 41(2), seeks to formalise a number of the intergovernmental forums that have been established over the past 12 years. Under the Act the forums established for national-provincial intergovernmental relations are convened by the national government. The national government remains firmly in control of the agenda and rarely uses

[1] It is frequently asserted that the NCOP's role in Parliament is limited because, under FC s 76(1)*(e)*, the National Assembly can override an NCOP veto with a two-thirds majority. However, this argument overlooks the likely political dynamics in such a situation. A Bill rejected by the NCOP will not have been able to secure the support of five of the nine provinces. It seems unlikely that the National Assembly will be able to, or even desire to, override the wishes of so large a part of the country.

[2] Act 13 of 2005.

the forums as an opportunity to collaborate with the provinces.[1] While the degree of participation and influence of provinces in these intergovernmental forums varies, the provinces have come to accept the role of subordinate entities.[2]

A number of factors led to this distortion of the system. First, all of the provinces are controlled by the ANC. As a result, MECs are willing to accept the leadership of the national government. MECs may also be more comfortable with discussion of policy matters in party structures than in more formal ones. Secondly, the capacity and the skills of provincial executives are severely limited. In no more than a handful of cases have the provinces engaged fully with proposed national legislation.

Once a national bill has been considered by the relevant intergovernmental forums and approved by the Cabinet, it is introduced in Parliament. Provincial executives have a leading role in the NCOP and are expected to participate fully in this process. The Premier of a province is the leader of the provincial delegation to the NCOP.[3] Three other delegates, referred to as 'special delegates', are chosen from time to time by the provincial legislature 'with the concurrence of the Premier'.[4] In theory, the Premier and the three 'special delegates' constitute the most important part of the 10-person provincial delegation. The remaining six are 'permanent' delegates. They are based in Cape Town and are expected to manage the day-to-day business of the NCOP and to ensure that their provincial legislatures are adequately briefed on matters of importance. However, because the permanent members are based outside the province, they are often ill-equipped to deal with those matters in which the provincial government have a strong interest.[5]

Each time a provincial delegation in the NCOP votes in support of a piece of national legislation that falls under Schedule 4 or 5, it also affirms its willingness and ability to implement that new law. Such laws have obvious funding and other capacity implications for the provinces — thus the mandatory participation of provincial executives in the provincial delegation. Ideally, provinces would choose specialists to send to the NCOP. Special delegates would discuss the law that

[1] The language of ss 7 and 11 of the Intergovernmental Relations Framework Act reflects this proposition. Section 7, dealing with the President's Co-ordinating Council, describes the Council as a forum 'for *the President* to raise matters of national interest with provincial governments and organised local government and *to hear their views* on those matters' (emphasis added). Section 11 is similarly worded in relation to the Cabinet Ministers and MECs intergovernmental forums (Minmecs). It provides that Minmecs are consultative forums in which Cabinet ministers responsible for the relevant functional area can raise matters with provincial and local government in order to hear their views on those matters. The legislation does not envisage that the Minmecs or the President's Council will be available to provincial executives as forums for the discussion, formulation or pursuit of provincial goals.

[2] See, eg, L Malan 'Intergovernmental Relations and Co-operative Government in South Africa: The Ten Year Review' (2005) 24 *Politeia* 226.

[3] FC s 60(3).

[4] FC s 61(4).

[5] See C Murray & R Simeon 'From Paper to Practice: The National Council of Provinces after its First Year' (1999) 14 *SA Public Law* 96, 113; C Murray, Y Hoffman-Wanderer & K Saller *NCOP Second Term 1999-2004: A Review* (Report for the NCOP 2004).

enages their expertise in select committees. One would also expect provincial delegations to send the relevant MEC. Once again, the system does not work as it should. The participation of provincial MECs in the NCOP is largely restricted to making speeches in plenary, not to hammering out the details of laws in the committees.[1]

Some argue that it is a breach of separation of powers for MECs to participate either in deliberations in provincial legislatures on those national bills on which their delegations must vote in the NCOP or in the NCOP select committees themselves. But this approach misapprehends the role of provincial MECs at the national level. The provincial delegations to the NCOP deliberately include both members of the provincial legislature and MECs to ensure that provincial interests are properly represented in the NCOP. Separation of powers concerns are irrelevant here because the issue of limiting the powers of the provincial executive does not arise in the NCOP. On the contrary, the balance of powers that the NCOP is intended to maintain is that between the national sphere and the provincial sphere of government. To ensure that this balance is maintained, provinces need to draw on the experience of both their MEC and their legislators in their participation in the NCOP.

A second common justification for minimal participation in the NCOP by MECs is that all relevant issues will have been dealt with in intergovernmental forums. Often that is true. But many pieces of legislation are altered in Parliament and provincial executives need to be alive to — and present for — such eventualities.[2]

(ii) *Provincial budgets, the Budget Council and the annual Division of Revenue Act*

The annual Division of Revenue Act divides revenue collected nationally amongst the national, provincial and local spheres of government and then allocates an equitable portion of the provincial share to each province.[3] As provinces have very limited revenue raising power, the allocation of revenue to provinces by the Division of Revenue Act largely determines provincial budgets. In *First Certification Judgment*, the Constitutional Court addresses the question whether the Division of Revenue Act should be passed according to the procedure prescribed by FC s 75 or s 76. It notes that the Act does not deal with the appropriation of revenue or direct charges against the national revenue fund, and thus is not a money bill.[4]

[1] Permanent delegates tend to dominate select committees in the NCOP.

[2] The failure of provinces to engage fully in NCOP procedures is the most important reason for the NCOP's failure to contribute as it should to the national law-making process. It seems wrong to argue, as the *1999 Intergovernmental Relations Audit* does, that the size of the NCOP is a major cause of its ineffectiveness. In fact, through the appointment of special delegates, the NCOP can draw on every member of each provincial legislature to contribute to its work. See Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 4-8; S Woolman, T Roux and B Bekink 'Co-operative Government' (supra) at § 14(4)*(b)*.

[3] See FC s 214(1).

[4] *First Certification Judgment* (supra) at paras 420-1.

Instead, as a bill which affects the financial interests of the provincial sphere of government, it must be passed according to FC s 76. FC s 76 requires the support of at least five provincial delegations in the NCOP for a bill to pass and thus gives provinces — and accordingly their executives — real influence over the law.

The role of provincial MECs responsible for finance in the adoption of the Division of Revenue Bill starts in the Budget Council. The Budget Council was established in terms of the Intergovernmental Fiscal Relations Act[1] and consists of the finance MECs from each province, the national Minister of Finance, the Deputy Minister of Finance and officials from the provincial and national treasuries. The Council serves as a forum for negotiation on how revenue will be divided amongst the provinces.[2] The process is concluded when the Division of Revenue Bill is approved in the NCOP.

(iii) *Subordinate legislation*

Hidden away in FC s 146 are three provisions concerning provincial and national subordinate legislation on matters that fall under Schedule 4. FC s 146 deals, generally, with conflicts between national laws and provincial laws that fall within the concurrent jurisdiction of provinces and the national government set out in FC Schedule 4. It stipulates that, in the case of a conflict between a national law and a provincial law, the provincial law will prevail unless the national law meets certain criteria set out in subsections (2) and (3). Subsection (6) adds an additional requirement for subordinate legislation to prevail.[3] It states that in the case of a conflict, a piece of subordinate legislation can prevail only if it has been approved by the NCOP. This proviso applies both to subordinate legislation adopted by provinces and to subordinate legislation adopted by the national government.

This provision places a dual responsibility on MECs. First, they should ensure that their delegation to the NCOP tables provincial regulations and other instruments of provincial subordinate legislation in the NCOP. Secondly, they should scrutinise national regulations (many of which they will have to implement) to ascertain whether or not their delegation should support them when they are referred to the NCOP for approval.

[1] Act 97 of 1997

[2] For a discussion of the allocation of equitable shares to provinces, see R Kriel & M Monadjem 'Public Finances' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27.

[3] See V Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 16, 16-25. Bronstein suggests that under FC s 239 subordinate legislation 'becomes part of' the Act in terms of which it was adopted. With respect, Bronstein misreads FC s 239. That section defines the terms 'provincial legislation' and 'national legislation' in terms that cover both Acts and subordinate legislation. That does not mean that subordinate legislation becomes part of the Act. The definition is important because some constitutional provisions require the adoption of law. When the Final Constitution requires 'legislation' rather than an Act, it implies that either an Act or subordinate legislation is acceptable.

(iv) *Police*

FC Chapter 11 deals with the three branches of the security establishment — the defence force, the police and the intelligence services. Its opening provision states unambiguously that '[n]ational security is subject to the authority of Parliament and the national executive'.[1] However, the provisions relating to the police impose a number of responsibilities on provincial executives.

This division of powers reflects one of the compromises embodied in the Final Constitution. The Constitutional Principles with which the Final Constitution was to comply stipulated that the powers of provinces should be no less than those in the Interim Constitution. In *First Certification Judgment*, the Constitutional Court found that the powers of provinces had been reduced and identified provincial powers in relation to the police as one area in which this uncertifiable diminution had occurred.[2] In fact, the Final Constitution reflects a totally new conception of the roles of the national government and provincial governments in relation to policing. Under the Interim Constitution, provinces were responsible for most policing services. The version of the Final Constitution first presented to the Constitutional Court for certification effectively nationalised policing. It vested the responsibility for policing, and the determination of national policy with regard to all policing, with the Minister. In addition, by requiring provincial police commissioners to report directly to the National Commissioner, it gave the National Commissioner considerable influence over provincial police policy. The role of provinces was reduced to monitoring police conduct in the province, exercising an oversight role in policing including receiving reports on police service, and liaising with the national Minister with regard to crime and policing in the province.

In response to *First Certification Judgment*, the Constitutional Assembly increased the role of provinces and, in particular, provincial executives. The Final Constitution restores provincial participation in the appointment of provincial police commissioners,[3] allows provincial executives to initiate proceedings for the 'removal or transfer of, or appropriate disciplinary action against' a commissioner in whom the province has lost confidence, and permits a province to investigate complaints against the police.[4]

Despite these changes, the arrangement remains one in which the national government controls the police and the provinces fulfil what is essentially an oversight or monitoring role. Provinces have very limited authority to deal with problems that they may identify and must rely on the National Commissioner and national Minister.[5]

[1] FC s 198*(d)*.

[2] *First Certification Judgment* (supra) at para 401.

[3] FC s 207(3) requires the concurrence of the provincial executive in the choice of provincial commissioner and, if agreement cannot be reached, requires the national Minister to mediate. The Final Constitution is silent on what is to happen in the face of unsuccessful mediation.

[4] FC s 206(5).

[5] For a description of these complicated relationships, see J Rauch 'The Role of Provincial Executives in Safety and Security in South Africa: A Policy Analysis' Centre for the Study of Violence and Reconciliation (1998) http://www.csvr.org.za/papers/paprovex.htm (accessed 25 Sept 2006).

(v) *Oversight*

As we note above, the Final Constitution requires members of Executive Councils to account to provincial legislatures. However, the relationship between provincial executives and their provincial legislatures differs from that in most parliamentary systems. Under FC s 114, provincial legislatures are expected 'to maintain oversight of … the exercise of provincial executive authority in the province, including the implementation of legislation'. Because provincial executives are largely concerned with implementing national legislation, this provision puts provincial legislatures in the unusual position of overseeing the implementation of legislation that they have not passed.

The national executive also has an interest in overseeing the implementation of such legislation. This interest is indirectly acknowledged in FC s 100. FC s 100 authorises the national executive to intervene in provincial matters when a province does not fulfil its responsibilities. Implicit in the intervention power of the national government is a responsibility to see that provinces are functioning properly. This means that the national executive must have some power to monitor the way in which provinces carry out their functions. The Final Constitution does not address the ways in which the national sphere of government may monitor provincial governments. However, FC Chapter 3 provides a principled framework within which any such monitoring (or oversight) should occur.[1]

A related need for interaction between the national and provincial executives occurs when provinces encounter problems in the implementation of national laws which they themselves cannot remedy. For instance, a province may discover that it does not have the resources to fulfil obligations imposed by a national law, that it cannot provide services expected within an imposed timeframe or that aspects of a programme established under a national law are simply impractical in the particular context of the province. The usual practice in a parliamentary system when legislation needs revision is for the executive to introduce an amendment. But here authority to amend the law itself lies outside the jurisdiction of the province. One possibility may be for the provincial executive concerned to introduce a provincial bill that would prevail over the national law to remedy the problem. However, the solution will often lie in the hands of the national sphere of government.

Initially MECs should raise such issues at the relevant intergovernmental forum. If the national executive fails to take heed, the NCOP becomes the appropriate forum in which to articulate concerns. Indeed, in some ways the NCOP is a better forum to address such issues. It certainly avoids some of the

[1] The responsibility of the national executive to oversee the way in which provinces implement laws is discussed more fully in C Murray & R Stacey 'National Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 18.

problems of executive intergovernmental forums[1] because it offers a platform for the public discussion of matters of provincial interest and the opportunity for other interested parties (including members of opposition parties and the public) to engage with the contested issue.

(vi) *Assignment*

We note above that FC s 125(2)*(c)* anticipates that a provincial executive will administer legislation that falls outside Schedules 4 and 5 but which is assigned to it in terms of an Act of Parliament.[2] This provision is complemented by FC s 99, which authorises national Ministers to make such assignments. However, a difficulty arises in reading these two sections together. FC s 125(2) anticipates that functions will be assigned 'in terms of an Act of Parliament'. FC s 99 appears merely to require that the assignment be 'consistent with the Act of Parliament in terms of which the relevant power or function is exercised or performed'. One reading of the two provisions is that there are two forms of assignment — one authorised by an Act of the national Parliament without the concurrence of the provincial executive, the other agreed to by the provincial MEC but not necessarily expressly authorised by an Act. However, it would be inconsistent with the principles of co-operative government in FC Chapter 3 to suggest that a national Act could, in effect, order an independently elected member of a provincial government to fulfil functions that fall outside the constitutional mandate of the provinces. The better interpretation seems to be that, read together, FC s 125(2) and FC s 99 require that all assignments are authorised in a national Act and in an agreement with the province concerned.[3]

(b) Provincial executives and the local sphere of government[4]

FC s 152(1) spells out the role of municipalities:

> The objects of local government are—
> *(a)* to provide democratic and accountable government for local communities;
> *(b)* to ensure the provision of services to communities in a sustainable manner;
> *(c)* to promote social and economic development;
> *(d)* to promote a safe and healthy environment; and
> *(e)* to encourage the involvement of communities and community organisations in the matters of local government.

[1] These problems include lack of transparency and self-interested decision making. See FW Scharpf 'The Joint-Decision Trap: Lessons from German Federalism and European Integration' (1988) 66 *Public Administration* 239.

[2] FC s 125(2)*(g)* appears to repeat this provision.

[3] Assignment of executive powers or functions by provinces to municipalities can take place under FC ss 126 and 156(4). Sections 9 and 10 of the Local Government: Municipal Systems Act 32 of 2000 (Systems Act) set out requirements for FC s 156(4) assignments. See also Department of Provincial and Local Government *A Guideline Document on Provincial Local Intergovernmental Relations* (undated) http://www.thedplg.gov.za/index.php?option=com_docman &task=doc_view&gid=27 (accessed 28 February 2007).

[4] For more on local government, see, generally, N Steytler & J de Visser 'Local Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 22.

The establishment of municipalities, with special responsibility for social development across the entire country, is one of the most ambitious projects in the Final Constitution. Under apartheid, local government had been patchy at best. White urban municipalities were well serviced by representative bodies and skilled administrators. Other areas were more or less neglected. Recognising the challenge of establishing democratic structures with effective administrations at the local level, the Interim Constitution put in place a process of gradual transition to democratic local government.[1] This process was formally completed in 2000 with the new municipal elections.

The construction of effective administrations in the 283 newly demarcated municipalities was to take much longer than their design and formal establishment. Anticipating this, the Final Constitution accordingly places responsibility on both the national and provincial spheres of government to ensure that municipalities develop the capacity to fulfil their substantial responsibilities. The implications of such provincial oversight and assistance responsibilities are considerable. In part, the relationship between provincial governments and municipalities mirrors that between the national government and provinces. Just as under FC s 125(3) the national government is expected to assist provinces to develop their administrative capacity to fulfil their functions properly, FC ss 154(1) and 155(6) require provinces to support municipalities and to promote their ability to fulfil their responsibilities. In *First Certification Judgment*, the Constitutional Court commented that the competencies of provinces in relation to local government

> are considerable and facilitate a measure of provincial government control over the manner in which municipalities administer those matters in parts B of NT schedules 4 and 5. This control is not purely administrative. It could encompass control over municipal legislation to the extent that such legislation impacts on the manner of administration of [local government] matters.[2]

[1] IC s 245 provided that until elections were held in terms of the Local Government Transition Act 209 of 1993 (LGTA), local government would not be restructured except in terms of the LGTA. Any 'transitional' councils established in terms of the LGTA were deemed to be institutions or bodies established by the old order Provincial Government Act 32 of 1961, and any laws applying to local authorities were to be read as applying also to transitional councils. IC s 245(2) required that any restructuring of local government after local elections in terms of the LGTA would have to be in accordance with chapter 10 of the interim Constitution. FC s 155 establishes the structures of local government, providing for different categories of municipalities. In the *First Certification Judgment*, the Constitutional Court held that the draft of the new constitutional text (NT) did not comply with the requirement in Constitutional Principle XXIV that the Final Constitution establish a framework for local government. The Court wrote:

> At the very least, the requirement of a framework for LG [local government] structures necessitates the setting out in the NT of the different categories of LG that can be established by the provinces and a framework for their structures. In the NT, the only type of LG and LG structure referred to is the municipality. In our view, this is insufficient to comply with the requirements of the CP XXIV. A structural framework should convey an overall structural design or scheme for LG within which LG structures are to function and provinces are entitled to exercise their establishment powers. It should indicate how LG executives are to be appointed, how LGs are to take decisions, and the formal legislative procedures demanded by CP X that have to be followed.

First Certification Judgment (supra) at para 301.

[2] Ibid at para 371.

The constitutional relationship between provincial governments and municipalities is complex. It demands both engagement and restraint on the part of the provincial executive. The newness of municipalities, the fragility of their political and administrative structures, and the importance of the services that municipalities must provide mean that the provincial support required is considerable. But provinces must always also respect the integrity of municipalities. The Constitutional Court describes the relationship this way:

> What the [final Constitution] seeks ... to realise is a structure for LG [local government] that, on the one hand, reveals a concern for the autonomy and integrity of LG and prescribes a hands-off relationship between LG and other levels of government and, on the other, acknowledges the requirement that higher levels of government monitor LG functioning and intervene where such functioning is deficient or defective in a manner that compromises this autonomy. This is the necessary hands-on component of the relationship.[1]

The fact that this responsibility is shared with the national government adds a further layer of complexity to the manner in which provinces discharge their duties. Under FC s 154(1), *both* provinces and the national sphere of government must 'by legislative and other measures ... support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions'. FC s 155(7) also gives *both* the national and provincial governments 'the legislative and executive authority to see to the effective performance by municipalities of their functions'. The most explicit requirement of support for municipalities remains, however, directed exclusively at provinces. FC s 155(6) requires provinces to '*(a)* provide for the monitoring and support of local government in the province; and *(b)* promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs'.

In practice, the national government has taken the lead. In a comprehensive set of laws governing municipal government, the national government has attempted to delineate the respective responsibilities of the national sphere and the provincial spheres towards municipalities. National legislation governing areas such as health services instructs provinces on their responsibilities towards municipalities.[2] In addition, a substantial programme to manage struggling municipalities,

[1] *First Certificaton Judgment* (supra) at para 373.

[2] For example, the Systems Act requires municipalities to draw up 'integrated development plans' (IDPs), sets out the 'core contents' of these IDPs, and establishes processes for the planning, drafting, adopting and review of IDPs. Provinces are to monitor and to support municipal activities in regard to IDPs (ss 31-3). Similarly, chapter 2 of the Local Government: Municipal Finance Management Act 56 of 2003 ('MFMA') is headed 'Supervision Over Local Government Finance Management', and sets out the roles to be played by national and provincial treasuries in assisting municipalities to meet their obligations in terms of the MFMA. Section 32 of the National Health Act 61 of 2003 provides that provincial Executive Councils are to assign responsibility for such health services to municipalities as are contemplated in FC s 156(4). Some element of control or oversight is implicit in this assignment process.

developed by the National Department of Provincial and Local Government in 2004, carefully stipulates the role of provinces.[1] Although the Final Constitution anticipates national and provincial legislation contributing to the development of municipalities, the responsibilities of provinces are chiefly executive. The provincial responsibility for municipalities, in practice, falls on the MEC for Local Government.

(i) *IGR responsibilities*

As we note above, FC s 41(2) requires the national Parliament to set up institutions to 'promote and facilitate intergovernmental relations' and to 'provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes'. The Intergovernmental Relations Framework Act, which implements this provision, does not limit itself to national forums. It also establishes a Premier's intergovernmental forum in each province[2] and identifies other forums which provinces may establish. In so doing, it spells out the specific responsibilities of Premiers and MECs responsible for local government.[3]

A Premier's forum follows the model of the President's Co-ordinating Council and includes the Premier, the MEC responsible for local government affairs and mayors of metropolitan and district councils in the province. Although the Premier is free to draw up the agenda of the forum, the controlling hand of the national sphere of government is evident in the description of the role of Premier's forums set out in the Act. The forum is intended to consider 'matters arising in the President's Co-ordinating Council and other national intergovernmental forums affecting local government interests in the province; …draft national policy and legislation relating to matters affecting local government interests in the province; [and arrange for] the implementation of national policy and legislation with respect to such matters'.[4] A Premier's forum must report annually to the President's Co-ordinating Council on 'progress with the implementation of national policy and legislation within the province.'[5] Presumably, this report is generated by the forum's chairperson, the Premier.

[1] The Department of Provincial and Local Government's initiative in this regard is known as 'Project Consolidate'. The Department describes it as a 'Hands-on Local Government Engagement Programme for 2004-2006'. The base document for the project requires the national govenment and the provincial governments to 'find new, creative, practical and impact-oriented modes of engaging, supporting and working with local government', and goes on to list a number of ways that this should be done. See *Project Consolidate: A Hands-on Local Government Engagement Programme for 2004 — 2006* (May 2004) http://www.projectconsolidate.gov.za/docs/Base_Document.pdf (accessed 23 February 2007).

[2] Section 16.

[3] For a more detailed discussion on provincial and local government relations, see Department of Provincial and Local Government *A Guideline Document on Provincial Local Intergovernmental Relations* Department of Provincial and Local Government *A Guideline Document on Provincial Local Intergovernmental Relations* (undated) http://www.thedplg.gov.za/index.php?option=com_docman &task=doc_view&gid=27 (accessed 28 February 2007).

[4] Section 18*(a)*(i)-(iii).

[5] Section 20.

These provisions in the Intergovernmental Relations Framework Act structure and direct a province's intergovernmental relations. They are also clearly drafted against the background of the current dominance of the national governing party and its 'trust' that provincial politicians will serve the national interests in their consultations with local government. It is not clear how effective these forums would be if views on appropriate policy diverged greatly. It is unlikely that the national government would want to rely on the results of a consultation process conveyed by a provincial government that is controlled by an opposition party.

There is also no reason for a provincial executive to restrict its relationships with local governments to the structures established under the Act. The Act acknowledges the provinces' discretion in a catch-all provision which 'allows' a provincial Premier to establish other intergovernmental forums in the province.[1] The overriding constitutional responsibility of provincial executives is to support the municipalities within their jurisdiction. To do so, they need to employ whatever institutions are most effective.

(ii) *FC s 139*

FC ss 154 and 155(6) and (7) set out the responsibility that provinces have in monitoring and providing support to municipalities. In allowing provinces to 'regulate' the affairs of municipalities, FC s 155(7) suggests that the scope of provincial involvement is fairly wide.[2] Nevertheless, FC s 139 goes a great deal further. It ensures that provinces may, and, in some cases must, respond to situations in which municipalities are failing to fulfil obligations.

FC s 139(1) identifies those circumstances in which a provincial executive has the discretion to intervene in a municipality: namely, when a 'municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation'. The province may then take 'appropriate' steps including —

> *(a)* issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;
> *(b)* assuming responsibility for the relevant obligation in that municipality to the extent necessary to—
> (i) maintain essential national standards or meet established minimum standards for the rendering of a service;

[1] Section 21. For a more detailed discussion on intergovernmental forums in the different provinces, see N Steytler, Y Fessha & C Kirkby *Status quo Report on Intergovernmental Relations Regarding Local Government* (undated) http://www.cage.org.za/documents/pdf/UWC.%20Community%20Law.%20Paper%20on%20status%20quo%20of%20IGR%20forums.pdf (accessed 28 February 2007).

[2] In the context of the power of the national government to 'regulate' the provincial taxing power the Constitutional Court has said: '"Regulation" however, is habitually used in statutes in conjunction with the word "control" to signify the object of legislative authorisation, the directing and commanding of that which has been authorised to be regulated'. *First Certification Judgment* (supra) at para 439. For a discussion of the ambit of the powers to monitor and to support, see *First Certification Judgment* (supra) at para 366ff.

(ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
(iii) maintain economic unity; or

(c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.

No Constitutional Court case deals directly with FC s 139. However, the Constitutional Court discusses its national counterpart, FC s 100, in both certification judgments.[1] In the judgments, the Court emphasises the strictness of the test for an intervention by the national government that requires the assumption of the responsibilities of a provincial government. The high threshold for intervention is reflected in the use of the word 'necessary' in FC s 139*(b)* and the closed list of circumstances in which such an intervention may be undertaken. The Court also notes that FC s 100(1) sets out a process in which the assumption of responsibilities by the national government cannot occur before a directive has been issued giving the province an opportunity to fulfil its obligations.[2]

These observations about FC s 100 apply to interventions under FC s 139. However, an amendment to FC s 139 in 2003 extended provincial powers and obligations considerably. The amendment confers on provinces the power (in FC s 139(1)*(c)*) to dissolve municipal councils and imposes an obligation on provincial executives to intervene in municipalities under certain circumstances.[3] The obligation to intervene is contained in new ss (4) and (5). Both relate to the financial management of municipalities. Subsection (4) provides a mechanism to deal with a situation in which a municipality fails to approve a budget or raise taxes. As both the adoption of a budget and the imposition of taxes require legislative action, the provinces did not apparently possess the power to intervene under FC s 139 as it was originally drafted. Now the Final Constitution not only makes it clear that a provincial executive can put a budget in place for a municipality, it also requires the provincial executive to do so if a municipality has not

[1] FC s 100 gives the national government the power to intervene in provinces and its wording is very close to that of FC s 139. Before the amendment of FC s 139 in 2003, the two sections were almost identical. In 2000, the Department of Provincial and Local Government issued a Manual for the Application of FC s 139 to clarify the manner in which provinces are to apply FC s 139 and to promote a uniform procedure for intervention. The guidelines are still relevant to the extent that they have not been affected by the amendment. See N Steytler, J de Visser and J Mettler *Manual for the Application of Section 139 of the Constitution* (2000) http://www.thedplg.gov.za/subwebsites/annualreport/reports/igrmanual.pdf (accessed 28 February 2007).

[2] See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC); 1997(1) BLCR 1 (CC) at paras 111 — 127

[3] For a discussion of the power to dissolve Municipal Councils under FC s 139, see Y Hoffman-Wanderer & C Murray 'Suspension and Dissolution of Municipal Councils under s 139 of the Constitution' 2007 *TSAR* 141.

adopted its own budget or tax laws or if a municipality in a financial crisis does not adhere to a recovery plan imposed by the province. Subsection (5) provides a process for replacing councils with administrators when the financial management of a municipality is in 'crisis' and, again, obliges the provincial executive to act in such cases.

(c) Provincial executives and traditional leaders

'Traditional leadership' and 'indigenous law and customary law' fall under FC Schedule 4.[1] National government and provincial governments therefore have concurrent legislative authority over traditional leaders. The national Traditional Leadership and Governance Framework Act imposes considerable responsibilities on provinces in relation to traditional leaders.[2] Most provinces with traditional leaders have passed legislation implementing the Act.[3] Among other things, the Act grants premiers an important role in granting and withdrawing recognition from traditional communities, senior traditional leaders, headmen and headwomen. The Act also enables provinces to establish (new) local houses of traditional leaders capable of settling disputes.[4]

[1] Both are 'subject to chapter 12 of the Constitution'. For a general discussion of traditional leadership, see T Bennett & C Murray 'Traditional Leaders' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 26, 26-34ff.

[2] Act 41 of 2003.

[3] See, for example, the North West Traditional Leadership and Governance Act 2 of 2005, the Eastern Cape Traditional Leadership and Governance Act 4 of 2005, the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005, the Limpopo Traditional Leadership and Institutions Act 6 of 2005, the Free State Traditional Leadership and Governance Act 8 of 2005, and the Mpumalanga Traditional Leadership and Governance Act 3 of 2005. See also T Bennett & C Murray 'Traditional Leaders' (supra) at 26-21–26-26.

[4] Sections 2, 11, 12, 17 and 21.

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Provincial Constitutions[1]

Adoption of provincial constitutions[2]

142. A provincial legislature may pass a Constitution for its province or, where applicable, amend its constitution, if at least two thirds of its members vote in favour of the Bill.

Contents of provincial constitutions

143 (1) A provincial constitution, or constitutional amendment, must not be inconsistent with this constitution, but may provide for —

(a) provincial legislative or executive structures and procedures that differ from those provided for in this Chapter; or

(b) the institution, role, authority and status of a traditional monarch, where applicable.

(2) Provisions included in a provincial Constitution or constitutional amendment in terms of paragraphs *(a)* or *(b)* of subsection (1) —

(a) must comply with the values in s 1 and with Chapter 3; and

(b) may not confer on the province any power or function that falls-

(i) outside the area of provincial competence in terms of Schedules 4 and 5; or

(ii) outside the powers and functions conferred on the province by other sections of the Constitution.

Certification of provincial constitutions

144 (1) If a provincial legislature has passed or amended a constitution, the Speaker of the legislature must submit the text of the Constitution or constitutional amendment to the Constitutional Court for certification.

(2) No text of a provincial Constitution or constitutional amendment becomes law until the Constitutional Court has certified —

(a) that the text has been passed in accordance with section 142; and

(b) that the whole text complies with section 143.

[1] Constitution of the Republic of South Africa Act 108 of 1996 ('FC' or 'Final Constitution'), ss 142–145. See also Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution'), s 160. IC s 160, Adoption of Provincial Constitutions, read as follows:

(1) The provincial legislature shall be entitled to pass a constitution for its province by a resolution of a majority of at least two-thirds of all its members. (2) A provincial legislature may make such arrangements as it deems appropriate in connection with its proceedings relating to the drafting and consideration of a provincial constitution. (3) A provincial constitution shall not be inconsistent with a provision of this Constitution, including the Constitutional Principles set out in Schedule 4: Provided that a provincial constitution may — provide for legislative and executive structures and procedures different from those provided for in this Constitution in respect of a province; and where applicable, provide for the institution, role, authority and status of a traditional monarch in the province, and shall make such provision for the Zulu Monarch in the case of the province of KwaZulu/Natal. [*Sub-s. (3) substituted by s. 8 (a)* of Act 2 of 1994 and amended by s. 1 of Act 3 of 1994.] (4) The text of a provincial constitution passed by a provincial legislature, or any provision thereof, shall be of no force and effect unless the Constitutional Court has certified that none of its provisions is inconsistent with a provision referred to in subsection (3), subject to the proviso to that subsection. [*Sub-s. (4) substituted by s. 8 (b)* of Act 2 of 1994.] (5) A decision of the Constitutional Court in terms of subsection (4) certifying that the text of a provincial constitution is not inconsistent with the said provisions, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof.

[2] See also IC s 160(1). A provincial constitution adopted before the commencement of the Final Constitution had to comply with the requirements of the Interim Constitution. See Item 13 of Schedule 6 of the Final Constitution.

Signing, publication and safekeeping of provincial constitutions

45. (1) The Premier of a province must assent to and sign the text of a provincial constitution or constitutional amendment that has been certified by the Constitutional Court.
(2) The text assented to and signed by the Premier must be published in the national Government Gazette and takes effect on publication or on a later date determined in terms of that constitution or amendment.
(3) The signed text of a provincial constitution or constitutional amendment is conclusive evidence of its provisions and, after publication, must be entrusted to the Constitutional Court for safekeeping.

Other conflicts

147. (1) If there is a conflict between national legislation and a provision of a provincial constitution with regard to *(a)* a matter concerning which this Constitution specifically requires or envisages the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution; *(b)* national legislative intervention in terms of section 44(2), the national legislation prevails over the provision of the provincial constitution; or *(c)* a matter within a functional area listed in Schedule 4, section 146 applies as if the affected provision of the provincial constitution were provincial legislation referred to in that section.

21.1 INTRODUCTION

FC ss 142 and 143 grant each province a constitution-making legislative competence. This competence appears to extend the legislative competence conferred on a provincial legislature by FC s 104.[1] However, the judgments of the Constitutional Court in provincial constitution certification cases suggest that this textually distinct competence may be only notionally different than the legislative competence conferred on the provinces by other sections of the Final Constitution. Put pithily, FC ss 142 and 143 do not create a meaningfully independent basis for the exercise of power by the provinces. Unless the Constitutional Court alters fundamentally its reading of the apposite provisions of the Final Constitution or those provisions are amended, provincial constitutions will never amount to anything more than window-dressing.[2]

[1] For more on the legislative competence of the provinces, see V Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 15; T Madlingozi & S Woolman 'Provincial Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 19.

[2] Provincial constitutions, as currently conceived, can only serve to limit the exercise of provincial power. Provincial legislation or executive conduct in a province without a provincial constitution is measured only against the Final Constitution. Provincial legislation or executive conduct in a province with a provincial constitution would have to satisfy the requirements of both the provincial constitution and the Final Constitution. This potential contraction of the space for action suggests that it is not in the interest of any of the 8 provinces without a constitution to bother promulgating one.

One interlocutor, Professor Robert Williams, wondered whether this assessment of the possibilities for provincial constitutions was not overly pessimistic and whether it failed to take account of the Constitutional Court's recognition that a province could extend its own Bill of Rights beyond the minimum floor established by Final Constitution. Communication with RF Williams, Rutgers University (11 March 2005). Professor Williams misconceives my point. The additional rights enshrined in a provincial constitution will, potentially, subject state action — and private action — to additional constraints. Viewed through the prism of provincial legislature authority, it is hard to see why a province

The Constitutional Court is neither solely nor even primarily culpable for the superfluity of provincial constitutions. Responsibility must be properly apportioned. History, party politics, the electoral system, and, finally, the constitutional text have all conspired to blunt federalist ambitions within the provinces.

The historical moment stretching from CODESA and the MPNF, onto the Interim Constitution and the 1994 elections, through the Constitutional Assembly ('CA') to the certification process for the Final Constitution represented the high-water mark for provincial possibilities. Brinkmanship by the Inkatha Freedom Party ('IFP') from CODESA through the drafting of the Interim Constitution forced the African National Congress ('ANC') to embrace constitutional principles for the drafting of the Final Constitution that accorded far more power to the provinces than they would have otherwise been inclined to provide. Indeed, the Constitutional Court refused to certify the first draft of the Final Constitution in large part because the draft failed to satisfy the minimum conditions for provincial power set out in the Constitutional Principles ('CPs'). But the IFP overplayed its hand. By refusing to participate in the negotiations around the drafting of the Interim Constitution and the Final Constitution, the IFP surrendered what little control they might have had over how the relationship between national government and provincial government would be structured. So although the

would employ a relatively static document — a provincial constitution — to do its bidding when it can realize the very same ends through normal legislation. The rest of this chapter functions as my considered response to Professor Williams' ruminations. As we shall see, FC s 143's consistency requirement sets an extraordinarily high bar for provisions that differ materially from those found in the Final Constitution. Moreover, a province has no authority to pass a constitution that arrogates to the province powers for which it has no pre-existing competence in terms of the Final Constitution. Second, we have no independent set of provincial judiciaries that might develop a more progressive rights-based jurisprudence — grounded in a provincial document — than that found in the national judiciary. Third, South African politics is already beset by problems of unfunded mandates and limited provincial administrative capacity. Just where would the provincial resources — fiscal and human — be found to make a meaningful dent in social domains left untouched by the Final Constitution? Fourth, to the extent that any new provincial initiative conflicts with nationally set imperatives, the provincial initiatives will have a rough go of it. In strictly legal terms, FC s 147 tells us that conflicts between provisions of a provincial constitution and national legislation and/or the Final Constitution will be resolved in favour of the national law. In purely political terms, the ANC's national executive still calls the shots.

Perhaps the differences in our positions are differences in emphasis and I am guilty of overemphasizing the differences. But I think Professor Williams' own writings tend to support my assessment. Professor Wiliams claims, as a general matter, that 'it is a set of political choices as to whether to take advantage of available subnational constitutional space.' Communication with Professor Williams, Rutgers University (11 March 2005). At the same time, he himself notes that when one measures

> in legal terms the quantity of subnational constitutional space . . . the United States and Switzerland, at one end, represent[s] a very high quantity of subnational constitutional space . . . The other end of this quantitative continuum might be represented, for example, by South Africa, in which the subnational constitutionmaking space is relatively restricted, with most of the structure of the subnational units (provinces) being contained or 'embodied' within the national constitution itself.

See RF William & GA Tarr 'Subnational Constitutional Space: A View from the States, Provinces, Regions, Länder and Cantons' in GA Tarr, RF Williams & J Marko (eds) *Federalism, Sub-national Constitutions and Minority Rights* (2000) 3, 5. I simply fail to see how such limited legal space, married to a highly centralized closed list proportional representation system thoroughly dominated by one party, can provide any cause for optimism.

Constitutional Court 'found the provincial powers in the first draft . . . insufficient and sent back the text' so that these powers might be increased, the IFP lacked the ability to influence the re-drafting process.[1] The Constitutional Assembly quite consciously limited its brief to curing the text of the defects identified by the Constitutional Court. As Carmel Rickard notes, once the Constitutional Court had certified the amended text the IFP's goose was cooked:

> [A]s a mechanism to increase provincial powers in the final constitutional text, the CPs (on which Inkatha had pinned some hope) had become a spent force; the CA, which at least to some extent was fuelled by the impetus of negotiation, had completed its work; in Parliament, where the federalists are hopelessly outnumbered, the dictating force is, increasingly, power politics and no longer, as in the past, consideration for negotiation partners or pressure to finalise a mutually agreeable text.[2]

The IFP's failed political strategy not only torpedoed its overweening, over-reaching provincial constitution. It sabotaged any possibility that South Africa would opt for a political system with robust provincial powers. Our political system, grounded firmly in a closed-list proportional representation electoral scheme, concentrates power in political parties. The party chooses the candidates that appear on its lists. As a result, power moves inexorably from the periphery to the centre, or if you prefer, from the bottom to the top. Whatever your preferred locution, the ANC's control of the national government and all nine provincial governments turns the ANC's National Executive Committee into the ultimate arbiter of all political disputes. The consequent absence of political independence in the provinces diminishes the likelihood that any province will bother to draft a provincial constitution that might test the limits of the text or previous certification judgments.[3]

[1] C Rickard 'The Certification of the Constitution of South Africa' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 224, 283. For two first-rate accounts of the federalist debates in both sets of constitutional negotiations, see K Govender 'Federal Features of the Interim Constitution' (1996) 111 *Revue d'Etudes Constitutionelles* 77; N Haysom 'Federal Features of the Final Constitution' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 504.

[2] Rickard (supra) at 283–284.

[3] This conclusion may strike some as overly speculative. But only two provinces have attempted to draft a provincial constitution. Both provinces — the Western Cape and Kwa-Zulu Natal — were controlled at the time of the drafting of the provincial constitutions by parties other than the ANC. All nine provinces are currently under ANC control. A true test of provincial autonomy — and perhaps of provincial constitution-making power — will only occur when provinces possess the political independence and the political will to test the centre.

Kwa-Zulu Natal is taking another stab at drafting a provincial constitution. Three drafts — by the ANC, the IFP and the DA — are currently on the table. See Draft Constitution of Kwa-Zulu Natal, 2004, Kwa-Zulu Natal Provincial Gazette No 6300, Notice A (10 November 2004). The desire to accord some form of permanent recognition for the King appears to be driving this project. Although the IFP has, historically, identified itself as the party of the Zulu people, the ANC has close political ties with the reigning King. Thus both parties have a horse in this race. Whether the significant differences in the ANC and IFP drafts can be overcome is another matter. Neither party has the votes necessary to pass the provincial constitution on its own. However, the ANC has suggested that if agreement cannot be reached on constitutional recognition of the King, then legislation designed to achieve the same ends will be passed by a simple majority. Interview with Professor W Freedman, University of Kwa-Zulu Natal

That we have but one written provincial constitution may not be such a bad thing. Indeed, the proposition that we have but one written provincial constitution is not entirely correct. As the Constitutional Court has noted, Chapter 6 of Final Constitution lays out a detailed blueprint of provincial structures, processes and powers. This blueprint is the functional equivalent of a provincial constitution. Whether this general blueprint — married to the 'unwritten' constitution sourced in each set of provincial statutes — is an adequate substitute for nine stand-alone provincial constitutions is an inquiry that lies beyond the scope of this chapter.

21.2 The Content of a Provincial Constitution

(a) The basic architecture of the FC ss 142 and 143

In *Ex Parte Speaker of the KwaZulu-Natal Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal 1996*, the Constitutional Court confirmed that FC ss 142 and 143 guarantee that a province has the power to design a constitution that regulates the structures, responsibilities and relationships of organs of provincial government.[1] In *Ex Parte Speaker of the Provincial Legislature of the Western Cape: In re Certification of the Constitution of the Western Cape, 1997*[2] the Constitutional Court placed the following gloss on provincial constitution-making powers:

> [T]he power is a significant one, enabling a province to regulate its governance in its own fashion, subject to the provisions of [FC] 143. It includes organising the provincial government, regulating, distributing and circumscribing the functions of its different departments, and prescribing the manner in which the powers it derives from the [FC] are to be exercised. It also includes powers incidental to such competences and making provision for or regulating other powers of the type normally found in a Constitution that are not inconsistent with the [FC] or the power relationship it establishes.[3]

The *First Certification of the Constitution of the Province of the Western Cape* Court is, however, quick to add that provinces need not enact a provincial constitution. The Court notes that:

(15 March 2005). (I am indebted to Professor Freedman for his patient explanation of KZN constitutional politics.) The ANC's fallback position underscores the largely symbolic purpose of the provincial constitutional, its limited practical consequences and the relatively equal status of a provincial constitution and provincial legislation with respect to conflicts with national legislation or the Final Constitution. See § 21.5, infra, on conflicts between provincial constitutions, subsequent amendments to the Final Constitution and national legislation.

[1] 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC) at para 4 ('*Certification of the Constitution of the Province of KwaZulu-Natal*').

[2] 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC) at para 8 ('*First Certification of the Constitution of the Province of the Western Cape*').

[3] See *First Certification of the Constitution of the Province of the Western Cape* (supra) at para 36.

> [C]hapter 6 provides a complete blueprint for the regulation of government within provinces which provides adequately for the establishment and functioning of provincial legislatures and executive.[1]

It seems fair to ask how 'significant a power' provincial constitution-making can, in fact, be, when Chapter 6 of the Final Constitution provides a '*complete blueprint for the regulation of government within provinces.*'[2] FC s 143 provides a partial answer to this question.[3]

[1] *First Certification of the Constitution of the Province of the Western Cape* (1997) (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC) at para 15. See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 350 ('What is contemplated by [FC] 142 and 143 is not a provincial constitution suitable to an independent or confederal State but one dealing with the governance of a province whose powers are derived from the [Final Constitution].') See also RF Williams 'Comparative Sub-national Constitutional Law: South Africa's Provincial Experiments' (1999) 40 *South Texas LR* 625, 642, 635 ('To this extent, the new South African Constitution serves both as a national and a provincial constitution. It is therefore, much less 'incomplete' than the American and some other federal constitutions. . . . . In the American federal system, there are few national requirements governing the structure and relationship of state government institutions. States are not even . . . required to have constitutions. The American states remain relatively free to devise and change governmental institutions as their citizens see fit.') I M Rautenbach and E F J Malherbe write that: '[I]n contrast, the American, Australian, Canadian and German Constitutions do not contain such provisions and every state of the federation must have its own Constitution in order to function effectively.' *Constitutional Law* (3rd Edition, 1999) 271. With respect, Professors Rautenbach and Malherbe overstate two distinct propositions: *(a)* the extent to which other national constitutions contain provisions comparable to FC ss 142 and 143; and *(b)* whether every state or province in these federations require their own constitution to function effectively. The German Basic Law, in articles 28, 30 and 31, does set out parameters for Lander constitutions similar to those found in FC ss 142, 143 and 147. At the same time, it is not clear that the Lander constitutions contribute meaningfully to governance. See U Karpen 'Subnational Constitutionalism in Germany' Center for the Study of State Constitutions Conference on 'Federalism and Subnational Constitutions: Design and Reform' (2004) available at http://www-camlaw.rutgers.edu/statecon, (accessed on 5 February 2005). The Canadian Constitution permits written provincial constitutions. Only one province — British Columbia — has one. See C Sharman 'The Strange Case of a Provincial Constitution: The British Columbia Constitution Act' (1980) 27 *Canadian J of Political Science* 1. Even this provincial constitution has a status not substantially different from that of an ordinary statute. Yet, by all accounts, the provinces in Canada — aided by a detailed list of enumerated powers in the federal constitution — possess a significant degree of autonomy. The absence — or presence — of a provincial constitutions would appear to have no palpable effect on the ability of a province to function effectively. See N Wiseman 'Clarifying Provincial Constitutions' (1999) 6 *National J of Constitutional Law* 269; E Forsey 'Powers of the National and Provincial Governments' *How Canadians Govern Themselves* (5th Edition, 2003).

[2] *First Certification of the Constitution of the Province of the Western Cape* (supra) at para 15 (emphasis added).

[3] See C Saunders 'Constitutional Arrangements of Federal Systems' (1995) 25 *Publius* 1; C Saunders 'Legacies of Luck: Australia's Constitution and National Identity in the 1990s' (1999) 15 *SAJHR* 328. Professor Saunders observes that in those jurisdictions where the states/provinces predate the creation of the federation, very few direct controls of sub-national Constitutions exist. Section 106 of the Australian Constitution, for example, recognizes the continued validity of the constitution of each state. This observation is of limited value. First, the simple fact of pre-existing state constitutions seems to have had little influence on Australian High Court doctrine regarding the relationship between the national and sub-national spheres of government. Australian constitutional law is tilted decidedly in favour of the federal government. See *Amalgamated Society of Engineers v Adelaide Steamship Company* (1920) 28 CLR 129. The federal structure of the Australian Constitution can, perhaps, be read to allow the states to contest those actions of the national government that 'threaten the existence of the state government institutions or their capacity to function.' C Saunders 'The Relationship Between National and Sub-national Constitutions' (1999) 1, 11 available at http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_5112_2.pdf, (accessed on 29 November 2004). Second, no more than a handful of existing

According to FC s 143, a provincial constitution cannot be inconsistent with the Final Constitution. As we shall see, the Constitutional Court's construction of this rule has proved the primary inhibitor of provincial constitution-making power.

There are two exceptions to FC s 143's general rule. Under FC s 143(1)*(a)*, a provincial constitution may create legislative or executive structures and procedures that differ from those provided for in the Final Constitution. Under FC s 143(1)*(b)*, a provincial constitution may provide for a traditional monarch.

These two exceptions are, themselves, subject to the following two provisos. First, according to FC s 143(2)*(a)*, any provision in a provincial constitution authorized by FC ss 143(1)*(a)* and *(b)* that differs from a comparable provision in the Final Constitution must comport with FC s 1 and FC ss 40 and 41.[1]

nations are made up of pre-existing sub-national units that were actually independent entities already in possession of written and entrenched constitutions that governed their internal affairs. For example, the British North America Act of 1867, s 3, created one dominion of Canada out of its several provincial parts. But those provincial parts were never truly autonomous. Moreover, these pre-existing Canadian provinces were granted only those powers enumerated in the British North America Act. The federal government retained all residual powers. That distribution of power is repeated in the Constitution Act of 1982. See P Hogg 'Peace, Order and Good Government' *Constitutional Law of Canada* (4th Edition, 2001) Chapter 17. Canadian constitutional and political history serves as a cautionary note to those who would make too much of the text. Canadian provinces can flex their muscles today because they have a long history of doing so. More recently, the crisis Quebecois contributed to the mobilization of regional interests elsewhere that, in turn, led to the increased exercise of political independence in other provinces.

So while the *National Education Policy Bill* Court correctly notes that the drafters of the Final Constitution did not contemplate independent or confederal states, that intent is hardly dispositive. See *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC)('*National Education Policy Bill*')('Unlike their counterparts in the United States of America, the provinces in South Africa are not sovereign states. They were created by the Constitution and have only those powers that are specifically conferred on them under the Constitution.') Moreover, the *National Education Policy Bill* Court's comparative constitutional history lesson does not do the work claimed on its behalf. Whatever the status of the 13 former colonies between 1776 and 1791 — the period between the Declaration of Independence and the ratification of the US Constitution — the American Civil War put paid to any notion that state sovereignty entails a correlative right of succession. Many students of South African history would likewise claim that a number of provinces were, at one time, independent states, without claiming that they still possess some residual right of succession.

[1] Requirements in a national Constitution that subnational constitutions must comply with certain principles or values are not uncommon. Article 28 of the Federal Republic of Germany's Basic Law reads: 'The constitutional order of the Lander must conform to the principles of republican, democratic, and social government based on the rule of law, within the meaning of the Basic Law'. Article 28 not only sets general normative limits in the Lander's constitutional autonomy, it ties the understanding of those norms to the Basic Law. In so doing, the Basic Law — and its interpretation by the Constitutional Court — is made the measure of the provisions in a Lander's constitution. Moreover, while article 30 states that 'all government powers not expressly granted in the Basic Law are matters for the Lander,' article 31 holds that '[f]ederal law takes precedence over Land law.' Because the federal government in practice is the dominant political partner, article 30's grant of residual power to the Lander means very little. Articles 28 and 31, read together, ensure that that a provision in the Basic Law will trump a comparable, but conflicting, provision in a Land constitution. See Karpen (supra) at para 13. The federal constitutions in Brazil, Spain, Austria, Russia, Ethiopia and Australia impose similar constraints on sub-national constitutions.

The United States remains a partial, but meaningful, exception to this rule. Although the US Constitution places few express constraints on federal power, many provisions presuppose 'the separate and independent existence' of the states. *National League of Cities v Usery* 426 US 833, 845 (1976)('*National League*'). Moreover, unlike article 30 of the German Basic Law, the residual power clause in the US Constitution retains its teeth. The Tenth Amendment of the US Constitution reads: 'The powers not reserved to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' Over time, the Tenth Amendment — read with other 'tacit postulates' of state power found in the US Constitution — has been interpreted to mean that Congress may not exercise power in a fashion that impairs a state's integrity or its ability to function effectively in the federal system. See *Nevada v Hall* 440 US 410, 433 (1979)(That general statement echoes South Africa's own understanding of the principles of co-operative governance.) Debates over the exact contours of state sovereignty — and what federal government action is inconsistent with such sovereignty — have roiled constitutional waters for the last 70 years. Before 1936, American courts regularly struck down federal legislation that attempted to ensure better working conditions for women, children and the poor on the grounds that said legislation violated state or local government sovereignty. After *Carter v Carter Coal Company,* four decades passed in which the US Supreme Court did not invalidate a single federal statute on such grounds. 298 US 238 (1936). Many thought the Tenth Amendment had lost its value as an independent check on federal power. But in 1976, the Supreme Court, in *National League*, held that the Tenth Amendment prevented the national government from making federal minimum wage law applicable to state and local government employees. The Tenth Amendment was back in business. Then a range of cases litigated in the 1980s cut back the effect of *National League*. In *Garcia v San Antonio Metropolitan Transit Authority*, the Supreme Court held that if Congress, acting pursuant to the Commerce Clause power, regulated the states, the Supreme Court would view such regulation in the same manner as regulation of a private party. 469 US 528 (1985)('*Garcia*'). *Garcia* remained good law for all of seven years. The Supreme Court's 'new federalism' once again prevents the federal government from coercing states into creating or promoting federal regulatory schemes. See, eg, *New York v United States* 505 US 144 (1992); *Arden v Maine* 527 US 706 (1999).

Extant South African case law on legislative competence suggests that our own federalism doctrines could follow a similar trajectory. See *DVB Behuising (Pty) Limited v North West Provincial Government & Another* 2001 (1) SA 500 (CC), 2000 (4) BCLR 347(CC)('*DVB Behuising*') at para 17 (Constitutional Court holds that '[i]n the interpretation of the schedules [governing legislative competence] there is no presumption in favour of either the national legislature or the provincial legislatures. The functional areas must be purposively interpreted in a manner which will enable the national Parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively.') See also *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC)('*Liquor Bill*'); V Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 15 (Bronstein suggests that the functional approach of the Constitutional Court to competence questions is best captured by the language of Constitutional Principle XX1.1: 'The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.')

Perhaps more germane for our analysis of South African provincial constitutions is the relative status of US state constitutions vis-à-vis the US federal constitution. Neither the 'certification' process nor the canons of interpretation for US state constitutions constrict subnational constitutional space to quite the same degree as South Africa's Final Constitution.

The US Constitution enables the US Congress — and the President — to place some conditions on US state constitutions. Article IV, s 3, reads, in relevant part: 'New States may be admitted by the Congress into this Union.' Article IV, s 4, reads, in relevant part: 'The United States shall guarantee to every State in this Union a Republican Form of Government.' Should a state constitution 'contain provisions of which Congress or the President disapprove', they can force the state to alter the offending provision before consenting to the enabling legislation granting their admission. See RF Williams & GA Tarr 'Subnational Constitutional Space: A View from the States, Provinces, Regions, Länder and Cantons' in GA Tarr, RF Williams & J Marko (eds) *Federalism, Sub-national Constitutions and Minority Rights* (2000) 3, 5. But this power is of limited duration. For example, as Professors Williams and Tarr note, Congress was able to dictate the terms of constitutions that 'southern states adopted in the aftermath of the Civil War' by 'requiring an acceptable constitution as a condition for 'readmission' to the Union.' (The irony, if course, was that the Union had not recognized the secession.) Ibid at 6. These states soon

Second, according to FC s 143(2)*(b)*, no provision in a provincial constitution may confer on a province more powers than it already possesses under the Final Constitution.[1]

(b) The requirement of legislative competence

The Constitutional Court has given this second proviso both a narrow reading and an expansive reading. The *Certification of the Constitution of the Province of KwaZulu-Natal* Court held that a provincial constitution could not contain provisions on any matters upon which the Final Constitution does not already give the province the power to legislate.[2] So, for example, a provincial constitution may purport to arrogate powers to the province by repeating verbatim averments in the Final Constitution. However, to the extent that the Final Constitution does not actually grant the provinces the power to exercise authority over such matters — say, because they fall within the purview of another sphere of government —

disowned these documents and supplanted them with constitutions designed to entrench white political power. However, neither Congress nor the President sought to use Article IV, s 4 to thwart the obvious threat such changes posed to the US Constitution's commitment to republican government. Ibid. See also JVE Ely Jr *An Uncertain Tradition: Constitutionalism and the History of the South* (1989). The initial power over admittance does not grant Congress or the courts the authority to supervise and to certify, on an ongoing basis, the consistency of a state constitution with the US Constitution. That said, other provisions of the US Constitution do constrain subnational constitutional space. Under the Supremacy Clause, Williams and Tarr write, 'national law is superior to state law, so that in cases of conflict, valid national enactments — be they constitutional provisions, statutes or administrative regulations — prevail over state constitutional provisions.' Williams & Tarr (supra) at 7.

With respect to the interpretation of a state constitution, it is the state's highest court, and no federal court, not even the US Supreme Court, that is the ultimate arbiter of its meaning. See, eg, *Michigan v Long* 463 US 1032 (1983)(Where an adequate and independent state ground for a decision exists, US Supreme Court exercises no appellate jurisdiction); *Murdoch v Memphis* 87 US 590 (1874). See also R Althouse 'How to Build a Separate Sphere: State Courts and Federal Power' (1987) 100 *Harvard LR* 1485 (Adequate and independent state ground doctrine protects the autonomy of states at the same time that it ensures supremacy and uniformity of federal law). When it comes to the content of the state constitutions, state constitutions can provide more rights than the US Constitution. See *Pruneyard Shopping Centre v Robbins* 447 US 74 (1980)(State constitution may provide more rights, and those rights may constitute adequate and independent grounds of a state court decision so long as they do not impair the exercise of a right guaranteed in the US Constitution.) See also W Brennan 'State Constitutions and the Protection of Individual Rights' (1997) 90 *Harvard LR* 489. They cannot, as a practical matter, provide less. Were a state court to interpret its own constitution as providing fewer rights than the federal constitution, it would still have to 'enforce the higher federal standards' because those standards are the supreme law of the land. R F Williams 'American State Constitutional Law' Center for the Study of State Constitutions Conference on 'Federalism and Sub-national Constitutions: Design and Reform' (2004) available at http://www-camlaw.rutgers.edu/statecon, (accessed on 5 February 2005).

[1] See *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at para 8. See also *Minister of the Interior v Harris* 1952 (4) SA 769, 790 (A)(Court, in striking down the Separate Representation of Voters Act, held that 'No legislative organ can perform an act of levitation and lift itself above its own powers by the bootstraps of method.')

[2] *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at para 24.

identically worded provisions in a provincial constitution that purport to grant the province such authority cannot be certified.[1]

The *First Certification of the Constitution of the Western Cape* Court, on the other hand, held that it was permissible for a provincial constitution to contain certain kinds of provisions not expressly contemplated by the extant legislative competence of the province.[2] Such matters range from qualifications for membership in provincial legislatures to the creation of procedures that would enable members of the provincial legislature to seek abstract review of a piece of provincial legislation.[3]

The *First Certification of the Constitution of the Western Cape* Court explains its willingness to depart from the *Certification of the Constitution of the Province of KwaZulu-Natal* Court's strict construction of FC s 143(2) as follows. The proposed Constitution of the Province of KwaZulu-Natal ('KZN text') repeated phrases from the Final Constitution Court that 'had nothing to do with provincial powers or competence.'[4] The proposed Constitution of the Province of Western Cape ('WC text') repeated phrases from the Final Constitution Court that 'directly affect governance within the province.'[5]

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[1] *Certification of the Constitution of the Province of the KwaZulu-Natal* (supra) at para 26. For example, because the creation of a court system does not fall within the purview of the provinces, provinces cannot meaningfully protect the right to a fair trial. Similarly, since a province has no authority to call for a state of emergency, the provincial constitution cannot purport to regulate the conditions for a state of emergency. So while the language of the two constitutions with regard to these provisions might be perfectly consistent, or even identical, the purpose of the provisions is not. See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at paras 349–350 citing *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at para 5:

> [I]n the proceedings for the certification of the KwaZulu-Natal Constitution, we . . . said: '. . . whatever meaning is ascribed to 'structures and procedures' they do not relate to the fundamental nature and substance of the democratic State created by the interim Constitution nor to the substance of the legislative or executive powers of the national Parliament or Government or those of the provinces.' We also make clear in that judgment that a provincial legislature manifestly does not have the power, through adopting a constitution, to alter the power relationship between itself and the national level of government, or to usurp powers which are not vested in it under the IC. It follows that . . . [FC] 143(2) is no different in substance from IC 160(3). It is true that in . . . [FC] 143(2)*(a)* there is a directive that provincial constitutions must comply with . . . [FC] chapter 3 and the values in . . . [FC] 1, but in the context of . . . [FC] 142 and 143 this does not mean that what is contemplated is a constitution in which these values must be separately identified. What it does mean is simply that nothing in a provincial constitution may conflict with . . . [FC] chap 3 or the values in . . . [FC] 1. It makes clear that the inconsistency referred to in . . . [FC] 143(1) extends to such matters and that they do not fall within the exemption made in . . . [FC] 143(1)*(a)*. In the result, what is contemplated by . . . [FC] 142 and 143 is not a provincial constitution suitable to an independent or confederal State but one dealing with the governance of a province whose powers are derived from the . . . [FC]. On that analysis there is no real departure from the power of constitution-making which a provincial government enjoys in terms of IC 160. That power, properly analysed, is a power subject to the same limitations and the same potential which we have identified in . . . [FC] 142 and 143.

See also *Executive Council, Western Cape Legislature, & Others v Government of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 62 (Supports proposition that any attempt to make Parliament's legislative authority subject to the will of a province is unconstitutional.)

[2] See *First Certification of the Constitution of the Province of the Western Cape* (supra) at para 36. See also Iain Currie & Johan De Waal *The New Constitutional & Administrative Law* (2001) 205.

[3] See *First Certification of the Constitution of the Province of the Western Cape* (supra) at paras 24–25, and 51.

[4] Ibid at para 22.

[5] Ibid.

(c) The limits of difference: Structures and procedures and powers

FC s 143(1)*(a)* allows a provincial constitution to provide for 'legislative or executive structures and procedures that differ from those provided for in' the Final Constitution. The *First Certification of the Constitution of the Western Cape* Court held that this limited exception to the consistency principle goes to the form of provincial legislative or executive structures and procedures, and not their substance.

'Form as structure' captures the 'composition and organization of a province's institutions.'[1] The WC text changed the numbers of members in both the Western Cape legislature and the Western Cape executive from those prescribed by the Final Constitution. Since these alterations went solely to form of the institutions and had no effect on the kind of power they exercise, the Constitutional Court found the changes to be unobjectionable.[2]

'Form as procedure' captures 'the manner in which [provinces] exercise their powers.'[3] The WC text allowed members of the Western Cape legislature to seek abstract review of a piece of provincial legislation. Since these provisions had no effect on the substance of provincial legislation, but merely regulated the process by which legislation is vetted and passed, the Constitutional Court found the modifications to be innocuous.[4]

But neither 'form as structure' nor 'form as procedure' is infinitely elastic. The *First Certification of the Constitution of the Province of the Western Cape* Court refused to certify the WC text because the WC text attempted to substitute a geographic multi-member constituency system for the closed-list proportional representation system set out in the Final Constitution. The province contended that a variation in the electoral system was a matter of form. The Court did not view this mutation as simply incidental to the province's constitution-making powers. Though the Court's reasoning remains somewhat opaque, the judgment must stand for the proposition that the manner in which votes in elections are converted into the seats of representatives goes to the heart — the substance — of the power exercised by the legislature.[5] But why, exactly, is abstract review of legislation a matter of procedure and the electoral system a matter of power? Or better still, why is an increase in the number of legislators a matter of form, but the manner of selection a matter of substance?

The Court's first answer is that 'the choice of electoral system has a material

[1] *First Certificate of the Constitution of the Province of the Western Cape* (supra) at para 16.
[2] Ibid at paras 51 and 59–61.
[3] Ibid at para 16.
[4] Ibid at paras 24–26.
[5] Ibid at para 48 ('When [FC] 143(1)*(a)* permits a provincial Constitution to provide for a provincial legislative structure different from that provided for in [FC] chap 6, it permits no more than a difference regarding the nature and number of the elements constituting the legislative structure. An electoral system not only does not constitute one of these elements but also has no effect on the nature or the number of such elements. It is accordingly not encompassed within the permissive provisions of [FC] 143(1)*(a)*.')

bearing on the degree of correspondence between votes cast and seats won.'[1] Well, on those terms, the increase in the number of legislators also has a 'material bearing on the degree of correspondence between votes cast and seats won.' Increase the number of seats in a provincial legislature and the degree of correspondence between votes cast and seats won also increases. The Court's first answer proffers a distinction without a difference.

The Court's second answer is that the electoral system is not a legislative or an executive structure: a change to the number of MPLs does change the legislative structure; a change in the electoral system does not change the legislative structure. This is an unadulterated boot-strapping exercise. The change in the electoral system is held not to alter 'the nature or the number of . . . constitutent elements' in a legislative structure because the extension of the terms 'nature' or 'constituent elements' — for the purposes of FC s 143 analysis — embraces only numbers, seats, or posts. So, *ipso facto*, a change in the electoral system cannot be a change in the legislative structure.[2]

This test may, as the *First Certification of the Constitution of the Province of the Western Cape* Court asserts, have the virtue of being clear.[3] Whether the test amounts to much more than a tautology is another matter. What the Court really seems to want to say — but has a hard time saying straight out — is that the selection of representatives — and thus the issue of who governs whom — is too inextricably bound up with actual substantive outcomes to be treated as mere window dressing.[4]

[1] *First Certificate of the Constitution of the Province of the Western Cape* (supra) at para 45.

[2] The Court's logic is reflected in the following passage:

> When [FC] 143(1)*(a)* permits a provincial constitution to provide for a provincial legislative structure different from that provided for in [FC] chapter 6, it permits no more than a difference regarding the nature and number of the elements constituting the legislative structure. An electoral system not only does not constitute one of these elements but also has no effect on the nature or the number of such elements. It is accordingly not encompassed within the permissive provisions of [FC] 143(1)*(a)*.

Ibid at para 48.

[3] Ibid at para 49.

[4] The Court's rejection of a system of 'geographic multi-member constituencies' suggests that members of the Court had not forgotten how instrumental the gerrymandering of geographic constituencies had been in creating the requisite political environment for apartheid. However, the Constitutional Court's subsequent judgment in *United Democratic Movement v President of the Republic of South Africa (No 2)* reflects its reluctance to make pronouncements on the link between electoral systems and substantive outcomes. 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC)('*UDM*'). The *UDM* Court rightly noted that the political institutions of a multi-party democracy can take many forms commensurate with the general dictates of the Final Constitution. (FC ss 46 (1) and 105 (1), governing the composition of and election to the National Assembly and provincial legislatures, respectively, require electoral systems that 'result, in general, in proportional representation.') The *UDM* Court could finesse the more treacherous question as to whether the floor-crossing legislation met the minimum requirements for the kind of democracy contemplated by the Final Constitution because Parliament had failed to satisfy the technical timing requirements for floor-crossing legislation. See also *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at para 5 ('Whatever meaning is ascribed to "structures and procedures," they do not relate to the *fundamental nature and substance of the democratic State* created by the interim Constitution nor to the *substance* of the legislative or executive powers of the national Parliament or Government or those of the provinces.' (Emphasis added).)

(d) Consistency clauses

The crafty drafters of the Constitution of KwaZulu-Natal ('KZN text') sought to circumvent IC 160(3)'s consistency requirement by including two consistency requirements of their own. Chapter 1, s 1(9) of the KZN text stated that

> This Constitution, to the extent that it is not inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993, shall be the supreme law of the Province.

Chapter 4, s 1(1) of the KZN text read, in relevant part:

> Any provision of this Constitution . . . including the allocation of powers and functions, but excluding the provisions relating to legislative and executive structures and procedures as set out in s 160(3) of the Constitution of the Republic of South Africa Act 200 of 1993, which is inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993, shall have no force and effect.

The Constitutional Court rejected these attempts both to pre-empt the Constitutional Court's assessment of *all* the provisions of the KZN text and to ensure that any constitutionally suspect provisions in the KZN text did not prevent certification. In short, the Constitutional Court held that it was obliged to evaluate every provision of the provincial constitutional text, and that IC s 160 prevented the Court from certifying anything except a complete and a compliant constitutional text.[1] Ironically, even if that the rest of the KZN text had been consistent with the Interim Constitution, these clauses themselves would have prevented certification because they conflicted with the desiderata of IC s 160(4).

(e) Suspensive clauses

Another clever, if defective, dodge by the authors of the KZN text took the form of two suspensive clauses. Chapter 4, s 1(2) of the KZN text stated that Chapters 5 and 8 of the KZN text would come into effect *(a)* 'only when the interim Constitution is replaced by the Final Constitution'; *(b)* 'only to the extent that their provisions are consistent with the Final Constitution'; and only if the powers of KZN are 'not . . . substantially reduced' by the provisions of the Final Constitution. Chapter 14, s 2(12), read, in relevant part:

> The provisions of this Constitution shall have no force and effect if and to the extent that they are not consistent with the constitution referred to in chapter 5 of the Constitution of the Republic of South Africa Act 200 of 1993, provided that the powers and functions of this Province with regard to its legislative authority and its power to pass a constitution are consistent with the constitution referred to in chapter 5 of the Constitution of the Republic of South Africa Act 200 of 1993, and further provided that such powers are not substantially inferior to those provided for in the Constitution of the Republic of South Africa Act 200 of 1993.

[1] *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at paras 36–38.

Chapter 14, s 2(12) was not, strictly speaking, a suspensive clause. It bears more than a passing resemblance to the consistency clauses in the KZN text. What turns this clause into a suspensive clause is the proviso that the KZN text must be consistent with the provisions of the Final Constitution. Given that the Final Constitution itself had yet to be certified, final certification of the KZN text was effectively suspended. These two suspensive clauses, along with the clauses they alleged suspended, were held to be constitutionally infirm on three distinct grounds.

First, the KZN text could not make its certification contingent upon the content of the Final Constitution. IC s 160 only empowered a provincial legislature to adopt a constitution consistent with the constitutional order governed by the Interim Constitution. IC 160 could not govern — nor did it make provision for — the certification process under the Final Constitution. To the extent that the KZN text was contingent upon the content of the Final Constitution, it could not be certified. Second, the text of the suspended provisions — found in Chapters 5 and 10, Chapter 6, s 2(1) and Chapter 13 — were patently inconsistent with the Interim Constitution and could not be certified under the Interim Constitution. Third, the KZN text suspended numerous provisions for a period of six months from commencement of the KZN Constitution. The enactment of these provisions was made contingent upon the outcome of various future votes within the provincial legislature and the House of Traditional Leaders.[1] The Constitutional Court held that satisfaction of IC s 160 required 'a constitutional text that has been adopted; not one that *might* be adopted or *might* be repudiated dependent on decisions still to be taken.'[2] Once again, the Constitutional Court held that IC s 160 prevented the Court from certifying anything except a complete and compliant constitutional text. The suspensive clauses, like the consistency clauses before them, made the KZN text anything but final.

21.3 Certification of a Provincial Constitutional Text

FC s 144 attempts to create greater certainty in provincial law.[3] It does so in the

[1] *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at para 45 ('Chapters 1 and 3, and certain provisions of chapter 9, were suspended for a period of six months from the commencement of the KZN Constitution, and will not come into force if during that period a resolution to that effect is passed by 40% of the members of the provincial Legislature; at the same time it is provided that chapter 8 and certain provisions of chapters 9, 12 and 13 will have no force and effect unless they are approved during that period by the provincial Legislature by two-thirds of all its members after consideration of the relevant provisions by a Constitutional Commission; and certain other provisions of chapter 9 only if, in addition, the House of Traditional Leaders has been consulted.')

[2] Ibid at para 46 (Emphasis added).

[3] Ibid at paras 11 and 37.

following manner. FC s 144(2)*(b)* precludes the Constitutional Court from certifying a provincial constitution in a piecemeal fashion. It must certify the entire document or nothing at all.[1] Once certified by the Constitutional Court, the exercise of provincial power in terms of the provisional constitution is not vulnerable to constitutional challenge on the grounds that the provincial constitution *in toto* is invalid.[2] However, as FC 147 makes abundantly clear, the Final Constitution contemplates the possibility that subsequent amendments to the Final Constitution and both extant and future pieces of national legislation may conflict with a provision of a provincial constitution.[3] The problem — apparently unnoticed by the Constitutional Court and commentators alike — is that FC s 147 contemplates conflicts between extant national legislation and a provincial constitution. As I note below, such a conflict, if resolved in favour of the national legislation would render a provision of the provincial constitution inoperative, as an objective matter, from the very moment that the provision of the provincial constitution is certified.[4]

21.4 PROVINCIAL CONSTITUTION CERTIFICATION CASES

(a) Certification of the Constitution of the Province of KwaZulu-Natal[5]

The KZN text, as we have already seen, was fatally flawed.[6]

[1] *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at para 10.

[2] IC s 160(5) barred expressly any court from enquiring into the validity of a provision of a provincial constitution once that provincial constitution had been certified. Such a provision does not appear in the Final Constitution. The lack of consistency between the Interim Constitution and the Final Constitution in this regard could have created two distinct legal regimes for provincial constitutions. Provincial constitutions certified under the Interim Constitution would have been immunized entirely — at least in the abstract — from constitutional challenges as to the validity of all those provisions certified under the Interim Constitution. Provincial constitutions certified under the Final Constitution are not so immunized. Fortunately, no provincial constitutions were certified under the Interim Constitution. No inconsistency in treatment can arise.

[3] See § 21.5 infra, on conflicts between provincial constitutions, subsequent amendments to the Final Constitution and national legislation.

[4] See § 21.5 infra, on how such a conflict can be squared with the certification requirements of consistency and finality.

[5] 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC). *Certification of the Constitution of the Province of KwaZulu-Natal* was brought under the Interim Constitution, s 160. However, the Court's reasoning applies to certification cases brought under the Final Constitution. See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 350 (Court stated that the constitution-making power of a province under the Final Constitution was subject to the same limitations as it had been under the Interim Constitution.) For an illuminating account of the political machinations behind the KZN text, see G Devenish 'The Making and Significance of the Draft Kwazulu-Natal Constitution' (1995) 9 *Yearbook of South African Law* 3.

[6] So flawed was the KZN text that the *Certification of the Constitution of the Province of KwaZulu-Natal* Court felt obliged, at the end of its judgment, to note that the grounds upon which the Court refused certification did not exhaust the grounds for such refusal. It wrote:

The KZN text's greatest offence was to attempt to structure relationships and to assign powers that fell well beyond the competence of a provincial constitution. Chapter 1, s 1(1) described KwaZulu as a 'self-governing province'. Chapter 1, s 1(5) revised the relationship between the province and the national government. Chapter 1, s 1(8) asserted that the KZN text set out the basis of interaction between the province and the rest of the Republic. Chapter 5 conferred certain exclusive powers on the province and vested other exclusive powers in the national government. As the *Certification of the Constitution of the Province of Kwa-Zulu-Natal* Court noted, 'the provinces are the recipients and not the source of power' and 'no provision in the Interim Constitution … empowers a province to regulate its own status' or 'its relationship to the national government.'[1] These provisions violated, with a vengeance, the consistency requirement of IC s 160.[2]

The KZN text's other major sin, as discussed at length above, were its efforts to circumvent the Constitutional Court's certification process through consistency clauses[3] and suspensive clauses.[4] In short, the inclusion of suspensive clauses and consistency clauses defeated the ends of 'finality and certainty' that the Interim Constitution's certification process was designed to achieve.[5]

Our analysis has been directed to the flaws relating to what we have categorised as the usurpation of national powers, the consistency clauses and the suspensive conditions. It is necessary to emphasise that our discussion does not purport to be an all-embracing one, for to have done so would have been supererogatory, given the widely flawed nature of the provincial constitution. It should therefore not be seen as definitive, either in regard to the three categories we have identified or in other respects. Should the KZN Legislature decide to adopt a new or amended provincial constitution, and in the interest of avoiding disputes over the future certification of a replacement, account will no doubt be taken of the detailed objections lodged this time and on which we pass no judgment now.

Certification of the Constitution of the Province of KwaZulu-Natal (supra) at para 47. See also *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at para 35 (After identifying some of the many ways in which the KZN text usurped national power, the Court wrote: 'We have not attempted to detail all the offending provisions. It is not necessary to do so.')

[1] *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at paras 14 - 16. See also *Ex Parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 Of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC)('Unlike their counterparts in the United States of America, the provinces in South Africa are not sovereign states. They were created by the Constitution and have only those powers that are specifically conferred on them under the Constitution.')

[2] *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at paras 14–35. The Court described each of these violations as a usurpation of national powers. However, it should be clear from our discussion of the requirement of legislative competence that not every assertion of a novel legislative competence in a provincial constitution constitutes a usurpation of national government prerogatives. See § 21.2*(b)* supra.

[3] See § 21.2*(d)* supra.

[4] See § 21.2*(e)* supra.

[5] The Constitutional Court rejected the KZN text because the suspensive conditions and consistency clauses in the provincial constitutional text barred (or at least attempted to bar) the 'Court from testing any provision in the provincial Constitution against the requirements of [IC s] 160(3)' and prevented the Court from finding that any of the provincial constitution's provisions were either consistent or inconsistent with the Interim Constitution. *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at para 36.

Finally, the KZN text contained provisions within its Bill of Rights on the right to a fair trial and states of emergency.[1] These provisions neither fall within FC s 143(1)*(a)* or *(b)*'s exceptions nor comply with FC s 143's consistency requirement.

(b) First certification of the Constitution of the Province of the Western Cape

The Constitution of the Western Cape ('WC text') fared far better than the KZN text. Nevertheless, the Constitutional Court declined to certify the WC text on three separate grounds. First, the geographic multi-member constituencies endorsed by the provincial constitution could neither be squared with the closed list proportional representation system found in the Final Constitution nor saved by the legislative structure exception found within FC s 143(1)*(a)*.[2] Second, the WC text's insistence that the Judge President of the High Court of the Western Cape perform certain ceremonial functions and administer various oaths of office was inconsistent with the Final Constitution's requirement that that the President of the Constitutional Court discharge these same duties.[3] Third, WC text s 46(3) did not simply restate the Final Constitution's bar on paid work by MECs: it went on to grant the provincial legislature the power to promulgate legislation governing the meaning of paid work. The Constitutional Court held that ethical concerns about unpaid work by MECs did not fall within FC s 143(1)*(a)*'s executive structure or procedure exception.[4] The Constitutional Court then found that FC s 136(2) proscribed paid work by MECs, that 'paid work' could only have one meaning and that any debate over the meaning of 'paid work' would have to be decided by the courts. The WC text's assertion that the province could weigh in on the meaning of 'paid work' created the possibility that each province would arrive at a different conclusion about the meaning of 'paid work'. The Constitutional Court held that because 'paid work' under the Final Constitution could have only one meaning, any potential for deviation from that univocal — but still undetermined — definition created the conditions for inconsistency.[5]

This final argument over 'paid work' is not particularly coherent. It is not clear that only one meaning can be attached to 'paid work' — compensation takes many forms. It is not clear that FC s 136(2) bars parties other than the courts from giving content to the term 'paid work'. It is hard to understand how the Constitutional Court can assert simultaneously that that there is but one definition for paid work and that the courts alone are empowered to resolve disputes about the meaning of 'paid work'. There is either one meaning or there isn't. If only the courts have the power to decide the meaning of 'paid work', how would a

[1] See *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at paras 17–31.
[2] For a more detailed discussion of the Constitutional Court's objection to geographic multi-member constituencies, see § 21.2*(c)* supra.
[3] See *First Certification of the Constitution of the Province of the Western Cape* (supra) at paras 52–56.
[4] Ibid at para 65.
[5] Ibid at para 66.

dispute ever arise? Normally, one would expect some disagreement between state actors over the correct understanding of a term of art like 'paid work' to give rise to a dispute. One would expect that disagreement to arise, in part, out of legislation that gives the term content. Moreover, FC s 136(2) does not say that determining the extension of the term 'paid work' by MECs is the prerogative of national government or the object of super-ordinate legislation promulgated by Parliament.

What may actually drive the *Western Cape* Court's conclusion is not FC s 143(1)*(a)* or FC s 136(2), but FC s 143(1)*(b)* and FC s 136(1). The refusal to allow the provincial government to pass such legislation makes some sense if viewed in the context of legislative competence. Neither FC Schedule 4 nor FC Schedule 5 speaks to codes of ethics or conditions of employment. Thus, FC s 143(1)*(b)* offers no safe harbour for a provision of a provincial constitution that engages the meaning of 'paid work'. FC s 136(1) makes legislation on the ethical conduct of MECs the prerogative of national government. It seems reasonable to assume — from the text alone — that national legislation will engage the meaning of 'paid work' in the context of a code of ethics.[1] But FC s 136(2) does not demand that national legislation do so. This textual silence around the content of super-ordinate national legislation on a code of ethics and whether the meaning of 'paid work' is to be addressed in the legislation contemplated by FC s 136(1) means that FC s 143's consistency requirement is not expressly violated.

The three 'defects' in the WC text identified by the *Western Cape* Court were easily remedied. The amended WC text was submitted for certification without opposition and duly certified.[2]

21.5 Conflicts between Provincial Constitutions and National Legislation or the Final Constitution

FC s 147 contemplates the possibility of conflicts between certified provincial constitutions and *(a)* subsequent amendments to the Final Constitution; *(b)* super-ordinate national legislation *(c)* national override legislation and *(d)* national legislation in areas of concurrent legislative competence. Such conflicts are dealt with at length elsewhere in this work.[3] It is worth noting that FC s 147 limits,

[1] The Executive Members Ethics Act 82 of 1998, s 2(1), contemplates the prohibition of other paid work by MECs in the context of a code of ethics: 'The President must . . . publish a code of ethics prescribing standards and rules aimed at promoting open, democratic and accountable government and with which Cabinet members, Deputy Ministers and MECS must comply in performing their official responsibilities. (2) The code of ethics must — *(b)* include provisions prohibiting Cabinet members, Deputy Ministers and MECS from — (i) undertaking any other paid work.' See the Draft Code of Ethics for Members of Cabinet, Deputy Ministers, and Members of Executive Councils (National Council of Provinces, 16 May 2000)(The code has not yet been promulgated).

[2] *Certification of the Amended Text of the Constitution of the Western Cape 1997* 1998 (1) SA 655 (CC), 1997 (12) BCLR 1653 (CC)('*Second Certification of the Constitution of the Province of the Western Cape*'). For a brief account of the drafting history of the WC text, see D Brand 'The Western Cape Provincial Constitution' (2000) 31 *Rutgers LJ* 961.

[3] See V Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 16.

even if it does not quite defeat, the Constitutional Court's efforts to guarantee that the certification of a provincial constitution is both final and certain.[1]

As I suggested above, a strong reading of FC s 147 would make a provincial constitution's certification contingent upon its consistency with the extant national legislation identified in categories *(b)*, *(c)* and *(d)*.[2] Any such conflict resolved in favour of the national legislation would render the provision of the provincial constitution inoperative, as an objective matter, from the very moment that the provision of the provincial constitution was certified. Any provision of a provincial constitution that will be stillborn at the moment of birth hardly satisfies the general conditions of finality and certainty said to govern this process.

Two good reasons explanations exist, however, for why the Constitutional Court has not remarked upon this possibility and why no one ought to be particularly vexed by the interaction between FC s 147 and FC ss 142, 143 and 144. First, as a strictly technical matter, certification of a provincial constitution or a provincial constitutional amendment only requires that they not be inconsistent with the Final Constitution. Certification does not require consistency with national legislation. Second, were the Constitutional Court to treat provisions of a provincial constitution that could be inconsistent with national legislation in the same manner as it has treated suspensive clauses and consistency clauses in a

[1] Recall that one of the primary grounds for rejecting the KZN text was the presence of clauses that made it 'impossible' to determine whether a given provision in the provincial constitution was 'inconsistent with provisions of the interim Constitution.' Such a result, the Constitutional Court said, could not be tolerated because it would defeat '[t]he objectives of finality and certainty.' *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at para 36. At the same time, the *Certification of the Constitution of the Province of KwaZulu-Natal* Court states that:

> If the conflict is resolved in favour of one of the conflicting laws the other is not invalidated, 'it is subordinated and, to the extent of the conflict, rendered inoperative'. A law so subordinated is not nullified; 'it remains in force and has to be implemented to the extent that it is not inconsistent with the law that prevails (and) (i)f the inconsistency falls away the law would then have to be implemented in all respects.

Ibid at para 9 citing *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC) at paras 16 and 19. Even if a provision in a provincial constitution cannot be invalidated in terms of FC s 147, a result in favour of the national government under FC s 147 would have the effect of rendering inoperative a provision of a provincial constitution. See also *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 272 ('[FC] 147 does not encroach upon the legitimate political autonomy of the provinces. It does no more than preserve the relationship between the [FC] and provincial constitutions. It makes clear that a provincial constitution cannot alter the power relationship established by the [FC], that it cannot increase the powers vested in the provincial government under the [FC] and that it cannot reduce or otherwise seek to modify the powers vested in Parliament by the [FC]. In doing so it gives effect to CP IV which states: 'The Constitution shall be the supreme law of the land. It shall be binding on all organs of State at all levels of government.' The provisions of [FC] 147 do not in our view encroach upon the legitimate autonomy of the provinces.')

[2] See § 21.3 supra.

provincial constitution, it would make the certification process inordinately more complicated. Provincial constitutions would have to be tested against the text of the Final Constitution and the texts of existing pieces of national legislation. FC s 147 should be read, therefore, as recognizing the potential for such conflicts with national legislation, but wisely disaggregating such assessments from the certification process.[1]

[1] FC ss 149 and 150 lend some support to this proposition. FC s 150 provides a canon of interpretation for conflicts between national legislation and a provincial constitution. It reads: 'When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict.' So until a real conflict arises, we should not anticipate one. FC s 149 suggests that there is a signal difference between a conflict that renders a provision inoperative, and a conflict that renders a provision invalid. FC s 149 reads: 'A decision by a court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation becomes inoperative for as long as the conflict remains.' Thus a provision of a provincial constitution that falls before a piece of national legislation does not offend the Final Constitution. It is, therefore, not inconsistent with the Final Constitution for the purposes of certification analysis. It is merely inoperative. Some might argue that the status of a provincial constitutional provision that remains dormant for the duration of a conflict with national legislation bears a striking similarity to the status of the KZN text suspensive provisions that ran afoul of the IC's consistency requirement. The answer, I think, is that such a hypothetical provision would not offend the Final Constitution. Suspensive conditions do.

22 Local Government

Nico Steytler & Jaap de Visser

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22.1 INTRODUCTION[1]

Local government as an identifiable institution of government has been in existence from at least 1836 when an ordinance of the Cape Colony provided for municipal boards in towns and villages. Until the new dispensation, local authorities were termed "creatures of statute", wholly subject to the direction and control of central and, subsequently, provincial governments. Upon commencement of the Interim Constitution[2] and then the Final Constitution,[3] however, local government has undergone a formal and substantive revolution. It is now recognized as a distinct sphere of government existing alongside the national and provincial governments:[4] a municipality, as the constituent unit of this sphere of government, 'has the right to govern, on its own initiative, the local government affairs of its community'.[5]

While no longer the handmaiden of the national or provincial governments, local government autonomy remains a relative matter. It is to be exercised 'subject to national and provincial legislation, as provided in the Constitution."[6] This limitation on local government autonomy is, itself, subject to three conditions. First, this national and provincial legislation must be provided for in the Final Constitution: thus setting the parameters of legislative oversight. Second, the nature and the quality of such intervention is subject to an inner core of local autonomy. FC s 151(4) reads as follows: 'The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.' Third, the local government's 'right to govern' imposes a duty on the other two spheres of government to allow a municipality to govern within its demarcated space.

(a) History

The constitutional history of local government is short but not sweet.[7] During the colonial era, municipalities were creatures of colonial laws. An exception was the 1889 Grondwet of the Zuid Afrikaansche Republiek ('ZAR').[8] The Grondwet granted the white population the power to establish district councils and town or

[1] This chapter draws substantially on the loose-leaf work of the authors: Nico Steyler & Jaap de Visser *Local Government Law of South Africa* (2007).
[2] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').
[3] Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)('Final Constitution' or 'FC').
[4] FC s 40(1).
[5] FC s 151(3).
[6] FC s 151(3).
[7] See Steytler & De Visser (supra) at 1-3.
[8] 19 November 1889.

village management structures where they so desired.[1] When the Union of South Africa was formed in 1910, a very attenuated form of decentralized government was established. Four provinces possessed limited legislative authority: one area of such authority was over local government.

This arrangement followed the pattern established in several other British dominions. The Canadian Constitution Act of 1867 listed municipal institutions as falling within exclusive provincial competencies.[2] The federal constitution of Australia of 1901 followed a different route but with the same effect. As the constitution made no mention of local government, the matter was deemed to fall squarely within the states' residual powers.[3] Following the Canadian model of the allocation of competencies, s 85(vi) of the South Africa Act of 1909 empowered provincial legislatures to make ordinances on 'municipal institutions, divisional councils, and other local institutions of a similar nature'. Given South Africa's centralized form of government, the assent by the Governor-General-in-Council was required for the validity of any ordinance. Moreover, in any conflict between an ordinance and a national law, the latter prevailed. Following the model of the Cape local government laws, the provinces in due course passed ordinances regulating almost all aspects of local government.[4]

All local government institutions were creatures of statute, possessing such rights and powers as were expressly or impliedly granted to them by the ordinances. It also rendered all their actions, including the passing of by-laws, administrative in nature and thus subject to review.

Because the national government could legislate on all matters, it could also do so in the area of local government — even though such legislation was, ostensibly, a provincial competence. The national government increasingly asserted its authority over local government in order to realize the broad and brutal constitutional architecture of apartheid. The entrenchment of apartheid at the level of local government meant that the vast majority of South Africans — black, coloured, Indian and others, could be moved about and displaced by an array of ignominious national acts and policies (eg, the Group Areas Act of 1950.)

[1] Art 140. The district council was to be elected by the burghers of the district but headed by the landdrost *ex officio*. Some basic principles resonate with today's debates on local government. Self-sufficiency was an objective and all expenses of the district council (except salaries determined by law) were to be borne by the district itself (art 142). The supervision by the central government was, however, paramount. The annual budget, adopted by the district council, had to be approved by the central Executive Council. The annual financial statements had also to be submitted to the Executive Council. For the levying of taxes a district council had to obtain the approval of the *Volksraad* (art 142). The same principles applied to town and village managements (art 143).

[2] See Harvey Lazar & Aron Seal 'Local Government: Still a Junior Government? The Place of Municipalities in the Canadian Federation' in Nico Steytler (ed) *The Place and Role of Local Government in Federal Systems* (2005) 28.

[3] See Cheryl Saunders 'Constitutional Recognition of Local Government in Australia' in Steytler *The Place and Role* (supra) at 48.

[4] Local Government Ordinance 10 of 1912 (Cape); Local Government Ordinance 9 of 1912 (Transvaal); Local Government Ordinance 4 of 1913 (Orange Free State); and Municipal Ordinance 11 of 1918 (Natal).

The 1961 Constitution, while heralding a republican form of government for the white minority, reaffirmed in identical language the position of local government as a subject of provincial governance.[1] However, this arrangement was restricted to 'white' local government. The governance of the majority of South Africans — coloureds, Indian and blacks — remained subject to the central government.

Despite the ideology of 'separate development' and the creation of black ethnic homelands, the governance of blacks in white urban areas proved the Achilles heel of apartheid. In response to the 1976 uprisings, elected community councils with limited powers were introduced in 1977. By 1982 black local authorities had powers similar to white municipal bodies. However, they lacked any sustainable funding base or legitimacy. In the homelands, tribal authorities, under the leadership of traditional leaders, provided some local services.

The 1983 Constitution[2] employed a new divide and conquer strategy in order to further entrench the division between white, coloured, and Indian South Africans, on the one hand, and black South Africans, on the other. The white, coloured and Indian groups were represented in their own legislative chamber to deal with their 'own affairs', namely 'matters which specially or differentially affect a population group in relation to maintenance of its identity and the upholding and furtherance of its way of life, culture, traditions and customs'.[3] As the provision of sewage, water and electricity was conceived of as essential to maintain group identity if not the furtherance of culture, traditions and customs, 'local government' appears on the list of 'own affairs'. As before, all matters dealing with black South Africans, including local government, were 'general affairs'. The 1983 Constitution further galvanized black opposition to urban apartheid. Much of the open rebellion in the 1980s was focused on black local authorities. The declaration of successive states of emergency rendered inert most of those local authorities.

The only move towards a non-racial form of local government was the establishment of regional services councils and joint services boards in Natal and KwaZulu. These councils and boards provided bulk services to municipalities and assistance to black local authorities. The councils, consisting of representatives of the various race-based local authorities, were the first, faltering step towards an inclusive local authority.

During the early days of multi-party constitutional democracy and a universal franchise in 1994, a wide variety of race-based local authorities covering mainly the urban and built-up areas remained in place. However, virtually no local institutions existed in rural areas. Cameron JA describes existing local authorities thus:

[1] Constitution Act 32 of 1961 s 84(1)*(f)*(i).
[2] Constitution of the Republic of South Africa Act 110 of 1983.
[3] Ibid at s 14(1).

> Under the pre-constitutional dispensation, municipalities owed their existence to and derived their powers from provincial ordinances. Those ordinances were passed by provincial legislatures which themselves had limited law-making authority, conferred on them and circumscribed by Parliamentary legislation. Parliament's law-making power was untrammeled, and it could determine how much legislative power provinces exercised. The provinces in turn could largely determine the powers and capacities of local authorities. Municipalities were therefore at the bottom of a hierarchy of law-making power: constitutionally unrecognised and unprotected, they were by their very nature 'subordinate members of the government vested with prescribed, controlled governmental powers'.[1]

As a result, all municipal actions, including the passing of by-laws, were subject to administrative law review.

These creatures of statute reflected the inequities of a prolonged and pernicious period of discrimination. In the words of the Constitutional Court:

> Those in historically "White" areas were characterized by developed infrastructure, thriving business districts and valuable rateable property. Those in so-called "Black", "Coloured" and "Indian" areas, by contrast, were plagued by underdevelopment, poor services and vastly inferior rates bases.[2]

The consequences of apartheid at local level were profound:

> The apartheid city, although fragmented along racial lines, integrated an urban economic logic that systematically favoured white urban areas at the cost of black urban and peri-urban areas. The result are tragic and absurd: sprawling black townships with hardly a tree in sight, flanked by vanguards of informal settlements and guarded by towering floodlights, out of stonethrow reach. Even if only a short distance away, nestled amid trees and water and birds and tarred roads and paved sidewalks and streetlit suburbs and parks, and running water, and convenient electrical amenities . . . we find white suburbia. How did it happen? Quite simply: '. . . in reality the economic relationship between the white and black (African, coloured and Indian) halves of the city was similar to a colonial relationship of exploitation and unequal exchange'.[3]

The de-racialization of local government was one of the more important consequences of the process of democratization ushered in by the Interim Constitution. In reconstructing these institutions from the ruins of apartheid, the participation of local communities was of the utmost concern. From the liberation movement side, the Freedom Charter spoke of institutions of self government.[4] The critical role that community organizations in the townships played in the struggle against apartheid demanded that the entrenchment of democracy occur from the bottom up.

[1] *CDA Boerdery (Edms) Bpk & Others v The Nelson Mandela Metropolitan Municipality & Others* 2007 (4) SA 276 (SCA) at para 33 (footnotes omitted).

[2] *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC)('*Fedsure*') at para 2 (Chaskalson P, Goldstone & O'Regan JJ). See also *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at paras 19 and 46.

[3] *Fedsure* (supra) at para 122 (footnotes omitted)(Kriegler J).

[4] See Rudolf Mastenbroek & Nico Steytler 'Local Government and Development: The New Constitutional Enterprise' (1997) 1(2) *Law, Democracy and Development* 233.

(b) Comparative constitutional recognition of local government

The constitutional recognition of local government as an order of government in federal or decentralized systems of government is a modern phenomenon. The first federal constitutions of the modern era did not mention local government as a sphere of government. The Constitution of the United States, from 1791, is silent on the matter. Local government thus falls under the residual powers of the states. They are 'creatures of the state' and in terms of the so-called *Dillon*-rule, formulated in the 19th Century,[1] municipal corporations have and can exercise only those powers expressly granted, those powers necessarily or fairly implied there from, and those powers that are essential and indispensable to their corporate status.[2] As noted above, the Canadian Constitution of 1867 mentioned local government only as a field of competence of the provinces. The Australian federal constitution of 1901 was entirely silent on the matter. Only after the Second World War did the importance of local government as an institution of state come to the fore. And it was primarily motivated by the desire to deepen democracy.

Although the constitution of the Weimar Republic of 1919 guaranteed local government the right of self-government within the limits of the law, only the post-war Basic Law of 1949 guaranteed a meaningful measure of local autonomy. Article 28(2) reads:

> The Municipality shall be guaranteed the right to manage all the affairs of the local community of their own responsibility within the limits set by law. Within the framework of their statutory functions the association of municipalities likewise has the right of self-government in accordance with the law. The right of self-government shall include responsibility for financial matters. The municipalities have the power to levy trade taxes according to the rates for assessment determined by them.

The second wave of federal constitutions confirming local self-government also coincided with the return to democracy. The Spanish Constitution of 1978 focused on the creation of the 'Autonomous Community'. In art 137 the general principle concerning the territorial organization of Spain is stated as follows:

> The state is organized territorially into municipalities, provinces and any Autonomous Communities that may be constituted. All these bodies shall enjoy self-government for the management of their respective interests.

Article 140 also provides that 'the Constitution guarantees the autonomy of the municipalities, which shall enjoy full legal personality.' Further regulation may occur, through law, at both the state and the regional level.

Although the Nigerian Constitution of 1979, reintroducing democracy after years of military rule, was short lived (1978-1981), the local government provisions, entrenching it as an order of government, was faithfully reproduced twenty

[1] *City of Clinton v Cedar Rapids and Missouri River RR Co* 24 Iowa 455 (1868).

[2] Ronald K Vogel 'Multilevel Governance in the United States' in Harvey Lazar & Christian Leuprecht (eds) *Spheres of Government: Comparative Studies of Cities in Multilevel Governance Systems* (2007) 258.

years later in the 1999 constitution. The position of local government independent, but still subordinate is expressed in section 7(1) as follows:

> The system of local government by democratically elected local government councils is under this Constitution guaranteed; and accordingly, the Government of every State shall . . . ensure their existence under a Law which provides for the establishment, structure, composition, finance and functions of such councils.

Brazil's return to civilian rule was also marked by the extensive protection of local self-government in the Constitution of 1988. Article 1 proclaims that the Federal Republic of Brazil is 'formed by the indissoluble union of States, municipalities (*municipios*), as well as the federal district'. The elevation of municipalities as a constituent element of the state is reiterated in article 18: 'The political and administrative organization of the Federal Republic of Brazil includes the Federal Government (*Uniao*), States, Federal District and Municipalities, all autonomous, in terms of this Constitution.'

In India, democracy from the bottom up through local government structures, called *panchayats*, was an article of faith of the independence movement. The Constitution of 1947, however, ineffectually reflected this principle. One of the 'Directive Principles of State Policy', section 40, provides: 'The State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.' The 1993 constitutional amendments, prompted by development concerns, constitutionalized the system of *panchayat* — defined as 'institutions of self-government'.[1] The 73rd Amendment dealt with rural local government. The 74th Amendment was concerned with urban municipalities. The structures created by the two amendments are, however, very similar: they provide an outline of the general form and the election of local authorities, but leave the range and substance of their powers to state legislation.

The common themes in the more modern constitutions are decentralized local governance driven by local participatory democratic institutions that aim at the realization of an array of developmental concerns. That said, nowhere are the institutions of local government given the same level of autonomy as states or provinces. They generally continue to operate within the framework set by provinces or states.[2] However subservient they are to states or provinces, their recognition has redefined multi-level government functions. The constitutional recognition of local government has opened the space for two new sets of emerging relationships: local-provincial; and local-central. The result has been that it has made governance more complex but also more inclusive.

[1] IC s 243*(d)*.

[2] See Christian Leuprecht & Harvey Lazar 'From Multilevel to 'Multi-order' Governance?' in Lazar & Leuprecht (supra) (2007) 18.

In comparison to other multi-level governments, the Final Constitution has taken the recognition of local government a step forward. The Final Constitution has entrenched local autonomy by listing the powers of municipalities, limiting the oversight powers of the other spheres of government and, most importantly, securing a stable base for municipal revenue. These features were the key issues during the process of constitution making.

(c) Process of constitutionalization[1]

Local government was never at the heart of the constitutional negotiations during the early 1990s. Other structures of state captured the attention of the political parties. Yet local government authority ultimately proved to be the most difficult to negotiate. It not only generated the majority of changes during the drafting of and the certification process of the Final Constitution: it has also undergone a radical transformation, through constitutional amendments, over the past decade.

A National Local Government Negotiating Forum (NLGNF) was established in March 1993. It was composed of representatives of the main stakeholders — half of them drawn from statutory bodies (the then existing municipal authorities) and the other half from non-statutory bodies (the civic movements in the townships).[2] Functioning alongside the Multi-Party Negotiating Forum that produced the Interim Constitution, it delivered, among others things, the Local Government Transition Act (LGTA)[3] and the provisions of IC Chapter 10 — "Local Government". The LGTA, adopted by the tri-cameral Parliament, came into operation on 2 February 1994, with the aim of providing the mechanisms of moving from a race-based system of local government to a non-racial system.[4] This initial transformation would occur in three phases. The first, the pre-interim phase, commenced with the coming into operation of the LGTA and the establishment of the negotiating forums in local authorities pending the first local government election. The second phase was the first local government elections: these elections established integrated, although not yet fully democratically elected, municipalities. The third, and final, phase would commence with the local government election in terms of the Final Constitution.[5]

[1] See further Nico Steytler & Jaap de Visser *Local Government Law of South Africa* (2007) 1-10ff.

[2] See further Fanie Cloete 'Local Government Transformation in South Africa' in Bertus de Villiers (ed) *Birth of a Constitution* (1994); Gideon Pimstone 'Local Government' in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz & Stu Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS 5, 1998) 5A-2; Mirjam van Donk & Edgar Pieterse 'Reflections on the Design of a Post-apartheid System of (Urban) Local Government' in Udesh Pillay, Richard Tomlinson & Jacques de Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) 107, 112.

[3] Act 209 of 1993.

[4] See *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC)('*Executive Council Western Cape*') at para 6 (Chaskalson P).

[5] See *Executive Council Western Cape* (supra) at paras 162*(e)* and *(f)* (Kriegler J).

The Interim Constitution set the scene for placing local government on an entirely different constitutional footing.[1] First and foremost, IC s 174(1) provided that local government received constitutional recognition: 'Local government shall be established for the residents of areas demarcated by law of a competent authority.'[2] More importantly, IC s 174(3) provided that '[a] local government shall be autonomous and, within the limits prescribed by or under the law, shall be entitled to regulate its affairs.'[3] Such autonomy was, however, subject to national and provincial regulation in that '[t]he powers, functions and structures of local government shall be determined by law of a competent authority.'[4] However, the essential content of the autonomy should remain untrammeled: 'Parliament or a provincial legislature shall not encroach on the powers, functions and structure of a local government to such an extent as to compromise the fundamental status, purpose and character of local government.'[5] One method of guarding against such an encroachment was the duty of the superior legislatures, before enacting legislation affecting the status, powers, functions or boundaries of local governments, to provide local government, including organized local government, with a reasonable opportunity to comment thereon.[6]

The purpose of local government was focused on service delivery. Given the regulation of local government powers, the two superior legislatures were under an obligation to assign 'such powers and functions as may be necessary to provide services for the maintenance and promotion of the well-being of all persons within its area of jurisdiction.'[7] Within the framework of enabling national or provincial legislation, local government had to make provision for access by all persons within its jurisdiction 'to water, sanitation, transportation facilities, electricity, primary health services, education, housing and security within a safe and healthy environment, provided that such services and amenities can be rendered in a sustainable manner and are financially and physically practicable.'[8]

To finance its service mandate, local government was competent to levy property rates, levies, fees and taxes and tariffs, 'based on a uniform structure for its area of jurisdiction'.[9] Such self-generated revenue was to be supplemented by unconditional grants by the provincial governments.[10]

[1] *Executive Council Western Cape* (supra) at para 153 (Ackermann & O'Regan JJ).
[2] IC s 174(1).
[3] See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('*First Certification Judgment*') at para 359; *Fedsure* (supra) at paras 35-37.
[4] IC s 175(1). See Pimstone (supra) at 5A-21; Jaap de Visser *Developmental Local Government* (2005) 63.
[5] IC s 174(4).
[6] IC s 174(5).
[7] IC s 175(2).
[8] IC s 175(3).
[9] IC s 178(2).
[10] IC s 178(2).

Local governments were to be elected democratically. They were to use an electoral system which included both proportional and ward representation.[1] Traditional leaders in the homelands were not excluded from the system and were given *ex officio* membership of municipal councils established in their area of jurisdiction.[2]

In the same manner as the executives at national and provincial level, inclusive decision-making was also the objective in municipal councils. The budget was to be adopted by a council with the support of two-thirds of all its members.[3] Councils had to elect, on the basis of proportional representation, an executive committee.[4] This committee, in turn, had to 'endeavour to exercise its powers and perform its functions on the basis of consensus among its members.'[5]

While the Interim Constitution gave direction to the transformation process, the restructuring of the local government would primarily occur in terms of the LGTA.[6] After the first elections, transformation could proceed in terms of legislation that complied with the principles embodied in the Interim Constitution.[7] For the first election forty percent of the councillors were to be elected on a proportional basis and the remaining 60 percent in wards.[8] Of the ward councillors, 50 percent had to be elected in areas that fell under the jurisdiction of the abolished three Houses of the tri-cameral Parliament (white, coloured and Indian local government authorities). The remaining 50 percent would be elected from all other areas (Black administration areas).[9] The two areas were referred to as 'statutory' and 'non-statutory' areas respectively.

As the precursor to the Final Constitution, the Constitutional Principles in the Interim Constitution also contained a broad framework for local government. First of all the status of local government as a constitutionally recognized level of government was to be entrenched: 'Government shall be structured at national, provincial and local levels.'[10] The most pertinent provision was Constitutional Principle XXIV:

> A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in the provincial legislation or both.

[1] IC s 179(2).
[2] IC s 182.
[3] IC s 176*(a)*.
[4] IC s 177.
[5] IC s 177*(b)*.
[6] IC s 245(1); *Executive Council Western Cape* (supra) at para 162 (Kriegler J); *First Certification Judgment* (supra) at para 356.
[7] IC s 245(2).
[8] IC s 245(3)*(b)*.
[9] IC s 245(3)*(b)*.
[10] IC sch 4 CP XVI.

This framework had to make provision 'for appropriate fiscal powers and functions for different categories of local government.'[1] A further source of local government revenue was the entitlement to national transfers.[2] A final principle that became relevant in the certification process was Constitutional Principle X: 'Formal legislative procedures shall be adhered to by legislative organs at all levels of government.'

The text adopted on 8 May 1996 rang in significant changes to the position of local government. The most important change was that local government was removed as a functional area of competence of the provinces.[3] Moreover, the status of local government was enhanced and placed alongside national and governments as a 'distinctive' sphere of government that was 'interdependent and interrelated' to the other two.[4] Of the word 'sphere of government', the Natal High Court commented:

> [It] is suggestive of an equality as between the concepts of national, provincial and local governmental structures, as opposed to the more traditional hierarchical levels of power and importance.[5]

The autonomy of local government was dramatically increased. A municipality 'has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.'[6] In view of local government's self-governing status, the national and provincial government must respect this right and 'may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.'[7] This new form of democratic local government was extended to the entire country.[8] This change effectively excluded the possibility of full-membership of traditional leaders in democratically elected municipal councils.[9]

[1] IC sch 4 CP XXV.

[2] IC sch 4 CP XXVI.

[3] On the political reasons for the change in approach to local government, see Rudolf Mastenbroek & Nico Steytler 'Local Government: The New Constitutional Enterprise' (1997) 1(2) *Law, Democracy and Development* 233, 238; De Visser (supra) at 66-68. Robert Cameron advances a number of reasons why local government was promoted in the FC, including the following: First, the ANC fears that white dominated local authorities would become the last bulwark of apartheid largely dissipated with the creation of non-racial integrated municipalities after 1995/6 and ANC victories in most of the major municipalities. Second, cities became to be seen as dynamic arenas for economic, social and cultural development, participating in the global marketplace. Third, strong local government was seen as a way of empowering people. Fourth, given that some provinces were struggling to find their feet, local government was generally in a better state than provincial administrations. 'The Upliftment of South African Local Government?' (2001) 27(3) *Local Government Studies* 97, 110-111.

[4] FC s 40(1).

[5] *Uthukela District Municpality & Others v President of the Republic of South Africa & Others* 2002 (5) BCLR 479, 485G-H (N). See further De Visser (supra) at 65-66.

[6] FC s 151(3).

[7] FC s 151(4).

[8] FC s 151.

[9] See Tom Bennett & Christina Murray 'Traditional Leadership' in S Woolman, T Roux, M Chaskalson, J Klaaren, A Stein & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 26.

When the May 1996 text was reviewed by the Constitutional Court for compliance with the Constitutional Principles,[1] the local government provisions raised three issues.[2] The most important was that the enhanced status of local government ostensibly meant a diminution of provincial powers. Second, there was, allegedly, a failure to set up an adequate framework for local government powers, functions and structures. Third, the provision that municipalities could impose 'excise taxes' was challenged on the ground that such powers of taxation were not an 'appropriate fiscal power' for municipalities

On the question of an appropriate framework, further discussed below,[3] the Court faulted the text for not providing an adequate one. On the third issue regarding 'excise taxes', the Court found that the ordinary meaning of 'excise taxes' usually entails a retail tax targeted at specific commodities such as alcohol, tobacco and fuel. This understanding of excise taxes made these commodities inappropriate vehicles for municipal taxation.[4] The main complaint that the powers of provinces were substantially diminished through, among other provisions, the removal of local government as a competency of provinces, placed the new status of local government in dispute. The Constitutional Court agreed that 'LG structures are given more autonomy in the NT than they are in the IC' but that this autonomy was at the expense of both Parliament and provincial legislatures. The effect of the new text is that 'the ambit of provincial powers and functions in respect of [local government] is largely confined to the supervision, monitoring and support of municipalities.'[5] Although the Court found that these powers were not insubstantial, they still constituted a diminution of provincial powers and functions.[6] Furthermore, the national government was also given regulatory powers over local government, thereby precluding or circumscribing provincial powers.[7] When the Court weighed up all the instances where there was a diminution of provincial powers, it reached the conclusion that provincial powers were substantially less than those powers found in the Interim Constitution and thus refused to certify the new text also on this ground.

In response to the Court's critique of the local government provisions, the Constitutional Assembly effected three changes in the amended text. First, a framework for the establishment of three categories of municipalities was provided. While Category A was a self-standing municipality, 'shared' local authority was created for Category B and C municipalities.[8] Second, the framework for the

[1] IC s 71(1).
[2] *First Certification Judgment* (supra) at para 299. See also Steytler & De Visser (supra) at 1-16.
[3] See § 22.2*(a)* infra.
[4] *First Certification Judgment* (supra) at para 305.
[5] Ibid at para 367.
[6] Ibid at para 374.
[7] Ibid at para 380.
[8] FC s 155(1)*(c)*.

functioning of municipal councils was considerably expanded. Third, the levying of 'excise taxes' was replaced by the power to impose 'surcharges on fees for services provided by or on behalf of a municipality'.[1] Of great significance for local government was the fact that the Constitutional Assembly, in addressing the complaint that provincial powers were significantly diminished, did not change the status of local government. It merely effected a few minor adjustments to the relationship between the provinces and the national government. When the Constitutional Court reviewed the amended text,[2] it concluded that there was no change in the powers of provinces in respect of local government. The amended text constituted the same degree of diminution of provincial powers as before.[3] However, because of other changes to provincial powers unrelated to local government, the Court certified the amended text.[4]

The Final Constitution provided that key sections relating to the establishment, powers and functioning of municipalities[5] were subject to the LGTA. Under the Final Constitution, the LGTA would remain in force until 30 April 1999:[6] the date for municipal elections.[7]

(d) Statutory framework

The slow process of constructing a new system of local government commenced with the White Paper on Local Government of 1998. The paper charted a new course for 'developmental local government'.[8] This constitutional goal was defined as 'local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives.'[9] This policy goal was grounded on four premises.[10] First, the municipal powers and functions should be exercised to ensure social development by meeting basic needs through the provision of government services and the promotion of economic development. Second, development can only be effected through the integrated and coordinated effort of all role players (both public and private) in local governance, notably through integrated development planning. Third, while municipal councils play a central role in promoting local democracy, they must involve citizens and community groups in the design and delivery of municipal programmes. Finally, in playing a strategic policy-making and visionary role, the developmental municipality must mobilize a range of resources to meet the basic needs of the community.

[1] FC s 229(1)*(a)*.
[2] *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC)('*Second Certification Judgment*').
[3] *Second Certification Judgment* (supra) at paras 171, 172 and 175.
[4] Ibid at paras 203-204.
[5] FC ss 151, 155, 156 and 157.
[6] FC sch 6 item 26(1)*(a)*.
[7] The Constitutional Court found that the transition period was reasonable to ensure the orderly transition to the new dispensation. *Second Certification Judgment* (supra) at paras 85-87.
[8] On the drafting of the White Paper on Local Government, see Van Donk & Pieterse (supra) at 114-117.
[9] *White Paper on Local Government* (1998) 17.
[10] Ibid at 18-22.

The White Paper laid the policy framework for the laws that followed shortly afterwards. First came the Local Government: Municipal Demarcation Act of 1998.[1] It established the Municipal Demarcation Board — which was tasked with drawing municipal boundaries. The Local Government: Municipal Structures Act[2] set out the details of the categories of municipalities, the criteria for their demarcation and internal governance structures. In preparation for the election scheduled for 2000,[3] the Local Government: Municipal Electoral Act[4] was passed in 2000. Barely a month before the 5 December 2000 elections, the Local Government: Municipal Systems Act (Systems Act)[5] came into being. The final phase of the local government transition commenced with the election of 284 councils on 5 December 2000. The statutory framework was, however, still incomplete. The Local Government: Municipal Finance Management Act (MFMA)[6] was only adopted in 2003 and the Local Government: Municipal Property Rates Act in 2004.[7] Completing the suite of new legislation was the Local Government: Municipal Fiscal Powers and Functions Act of 2007.[8] During this time, the constitutional framework for local government was also in flux. Of all the subject matter covered by the Final Constitution, local government has been subject to the most amendments. Some of these amendments shrink the constitutional space for local self-government.

(e) Constitutional amendments

The first amendment of 1998 was inauspicious. It indirectly provided for the dissolution of a municipal council:[9] by providing that if a municipal council is dissolved in terms of national legislation, an election must be held within 90 days.[10]

In a second constitutional amendment of that year, the functionality of municipalities was asserted. By entrenching the provincial boundaries of the Interim Constitution, the Final Constitution had thwarted the creation of functional municipalities in a number of places. Using the magisterial districts as the building blocks of the provinces, apartheid spacial configurations were used in a manner that separated black townships from white town centres. Moreover, to establish functional municipalities, several municipalities had to cross provincial boundaries. A provision was thus added to the Final Constitution.[11] It permitted a municipal boundary to extend across a provincial boundary if

[1] Act 27 of 1998.
[2] Act 117 of 1998.
[3] In 1998, the life of the LGTA was extended to 30 April 2000 (Constitution Second Amendment Act of 1998).
[4] Act 27 of 2000.
[5] Act 32 of 2000.
[6] Act 56 of 2000.
[7] Act 6 of 2004.
[8] Act 12 of 2007.
[9] Constitution Amendment Act 65 of 1998.
[10] FC s 159(2). Section 34(3) of the Structure Act 117 of 1998 provided for the dissolution of a municipality.
[11] Constitution Amendment Act 87 of 1998.

that is the only way to fulfil the criteria for demarcating municipal boundaries.[1] The boundary could only be determined with the concurrence of the provinces concerned and after national legislation has authorized the provincial executives to establish a municipality in that municipal area.[2] Such national legislation would provide for the establishment in that municipal area of a municipality of a type agreed to between the provinces concerned.[3] It could also provide a framework for the exercise of provincial executive authority in that municipal area and with regard to that municipality.[4] It might finally provide for the re-determination of municipal boundaries where one of the provinces concerned withdraws its support of the municipal boundary.[5] This constitutional framework proved to be a totally unworkable solution. FC s 155(6A) was repealed in 2005.[6]

The constitutional amendments of 2001 were a mixed bag. On the one hand, they extended a municipality's borrowing power by enabling a council to bind itself and future councils in order to secure long term loans and investment.[7] The same amendment, however, gave the national government a freer hand to regulate the raising of loans. The amendment removed the limitation that national legislation may impose only 'reasonable conditions' on the raising of loans by municipalities.[8] In a second amendment, in the same year, the power of organized local government to 'nominate' persons to the Financial and Fiscal Commission, was watered down; the President now selected two persons from a list compiled by organized local government.[9]

Unlike the attempt to permit the crossing of the floor in the National Assembly and provincial legislatures through ordinary legislation,[10] the creation of two window periods in which councillors could change party allegiance was effected through a constitutional amendment.[11] The most far reaching amendment affecting local government was the amendment of FC s 139 in 2003.[12] First, the dissolution of councils was placed on a more secure footing. Second, it watered

[1] FC s 155(6A).
[2] FC s 155(6A)*(a)*.
[3] FC s 155(6A)*(b)*(i).
[4] FC s 155(6A)*(b)*(ii).
[5] FC s 155(6A)*(b)*(iii).
[6] Constitution Twelfth Amendment Act of 2005 and Cross-boundary Municipalities Law Repeal and Related Matters Act 23 of 2005. See further *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2007 (6) SA 477 (CC), 2007 (1) BCLR 47 (CC)(On the constitutionality of the adoption of the Amendment Act.)
[7] Constitutional Amendment Act 34 of 2001 s 17, inserting FC s 230A. See further § 22.5*(b)* infra.
[8] See Ross Kriel & Mona Monadjem 'Public Finances' in S Woolman, T Roux, M Bishop, M Chaskalson, A Stein & J Klaaren (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27.
[9] Constitutional Amendment Act 61 of 2001 s 7, amending FC s 221(1) and (1A). See further De Visser (supra) at 243.
[10] *United Democratic Party v President of the Republic of South Africa & Others* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1213 (CC).
[11] Schedule 6A was added by s 2 of Constitutional Amendment Act 18 of 2002. The following year, when a constitutional amendment authorised the crossing of the floor in the national and provincial legislatures, the Schedule was renumbered as 6B by s 6 of Constitutional Amendment Act 2 of 2003.
[12] Constitutional Amendment Act 3 of 2003 s 4.

down the two-fold review process by the Minister responsible for local government and by the NCOP that occurs when a provincial executive assumes the responsibility for an unfulfilled executive obligation. Third, it excluded the review process altogether when drastic measures are adopted in times of a financial crisis.[1]

(f) Local self-government

Despite the slow narrowing of constitutional space over the past decade, the constitutional recognition of local autonomy is one of the central innovative aspects of the Final Constitution. Kriegler J had — prior to the certification of the Final Constitution — already remarked that 'for the first time in our history, provision was made for autonomous local government with its own constitutionally guaranteed and independent existence, powers and functions.'[2] He described the new status of local government as follows:

> The constitutional status of a local government is thus materially different to what it was when Parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures. The institution of elected local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. That is no longer the position. Local governments have a place in the constitutional order, have to be established by the competent authority, and are entitled to certain powers, including the power to make by-laws and impose rates. [3]

While the Interim Constitution materially changed the nature of local government, the Final Constitution consolidated that status.[4] The result was that '[t]he Constitution has moved away from a hierarchical division of government power in favour of a new vision, in which local government is interdependent, and (subject to permissible constitutional constraints) inviolable and has latitude to define and express its unique character.'[5]

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[1] See further §§ 22.6*(e)* and *(f)* infra.

[2] *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 126.

[3] Ibid at para 38.

[4] *CDA Boerdery (Edms) Bpk & Others v The Nelson Mandela Metropolitan Municipality & Others* 2007 (4) SA 276 (SCA)('*CDA Boerdery*') at para 38.

[5] Ibid. In constitutional theory a major shift has taken place. However, the statutory framework giving effect to the constitutional mandate and the policies that breathe life into local government may hark back to the pre-constitutional paradigm of central control and direction. David Schmidt argues that there has been an ambivalent acceptance by national government of the concept of 'spheres of government'. In reality they are still cling to the hierarchical notion of 'tiers of government'. 'From Spheres to Tiers — Conceptions of Local Government in South Africa in the period 1994-2006' in Mirjam van Donk, Mark Swilling, Edgar Pieterse & Susan Panell (eds) *Consolidating Local Government: Lessons from the South African Experience* (2008) 109. He argues that the Final Constitution is an expression of the so-called 'network governance' model, a model in competition with the earlier models of the traditional public administration approach and the 'new' public management. The traditional public management paradigm which emphasised hierarchy, rules and procedures, was complemented by the 'new' public management emerging in the 1970s which sought to introduce private sector management practice and private involvement in the provision of services. In reviewing the way the national government has regulated local government, Schmidt argues that the traditional public administration approach still prevails. While the Systems Act may reflect the new public management ethos with an emphasis on public-private partnerships, the MFMA is pure old-style bureaucracy.

22.2 Municipal Governance

(a) Establishment of municipalities[1]

FC s 151(1) provides that the local sphere of government consists of municipalities that must be established for the whole of the territory of the Republic. The Final Constitution thereby establishes the notion of 'wall-to-wall' local government. With regard to the establishment of municipalities, the Final Constitution performs a two-fold function. First, it provides for a division of responsibilities between the national and provincial sphere with regard to the establishment process. Second, the Final Constitution outlines the parameters for the determination of certain municipal features, namely the municipal boundary, the municipal category, the municipal type and the official languages. The establishment process has mainly been regulated in the Local Government: Municipal Demarcation Act[2] ('Demarcation Act') and in the Local Government: Municipal Structures Act ('Structures Act').[3]

The Final Constitution sets out the responsibilities of national and provincial governments as regard the establishment process. In *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development*,[4] it was argued, on the basis of FC s 44(1)*(a)*(ii), that national government has concurrent powers with provincial and local government with regard to all powers dealt with in FC Chapter 7. This conclusion would have entitled national government to deal with all matters related to the establishment of municipalities. The Constitutional Court dismissed the national government's argument with reference to FC s 164 — this provision empowers national government to deal with matters 'untouched' in FC Chapter 7. This provision would serve no purpose in the context of concurrent powers over Chapter 7. The Court's holding underscores the importance of a division of responsibilities between national and provincial governments as regards the establishment process.

The ultimate executive act of establishing a municipality is a provincial responsibility. FC s 155(6) instructs each provincial government to 'establish municipalities in its province'. However, provinces must operate in terms of the national legislation that regulates the boundaries, categories and types of municipalities, as well as the division of powers between district and local municipalities.[5]

National legislation must establish criteria and procedures for the determination of municipal boundaries and ward boundaries through an independent authority.[6] The Constitutional Court expressed the rationale for an independent authority as follows:

[1] See Nico Steytler & Jaap de Visser *Local Government Law in South Africa* (2007) Chapter 2.
[2] Act 27 of 1998.
[3] Act 117 of 1998.
[4] 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC)('*Executive Council Western Cape*') at paras 34–59.
[5] FC s 155(6).
[6] FC s 155(3)*(b)*.

> The purpose of section 155(3)*(b)* is 'to guard against political interference in the process of creating new municipalities.' For, if municipalities were to be established along party lines or if there was to be political interference in their establishment, this would undermine our multi-party system of democratic government. A deliberate decision was therefore made to confer the power to establish municipal areas upon an independent authority.[1]

The Final Constitution itself introduces three municipal categories.[2] FC s 155(3)*(a)* requires national legislation to establish criteria for determining whether an area should have a single category A (metropolitan) municipality or when it should have municipalities of both category B (local municipalities) and C (district municipality). FC s 155(3)*(c)* requires national legislation to make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C.

National legislation must define the different types of municipality that may be established within each category.[3] Provincial legislation must define the types of municipality that may be established in the province.[4]

National legislation may provide criteria for determining the size of a municipal council.[5] As a result of the electoral system of ward and proportional representation, an important 'knock-on effect' of determining the size of the municipal council is that it determines the number of wards that must be delimited in a municipality.

The above scheme puts beyond doubt that local governments are established in terms of a national constitutional and statutory framework. Provincial governments primarily play an implementation role. Provincial legislation on typology remains the only area where provincial governments exercise legislative authority.[6]

(i) *Boundaries*

An essential feature of the transformation of local government was the demarcation of municipal boundaries. Local government boundaries needed to be demarcated afresh in order to ensure redistribution of wealth and financially viable and accountable municipalities.[7] The Final Constitution thus required the

[1] *Matatiele Municipality & Others v President of the RSA & Others* 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC)('*Matatiele I*') at para 41 (footnotes omitted) as discussed in Steytler & De Visser (supra) at 2-3. See O'Regan J's dissenting opinion in *Executive Council Western Cape* (supra) at paras 164-169 where she downplays the need for an independent arbiter in boundary determinations. See also Rob Cameron 'Local Government Boundary Reorganisation' in Udesh Pillay, Richard Tomlinson & Jacques du Toit (eds) *Democracy and Delivery Urban Policy in South Africa* (2006) 84 (Cameron indicates that independent boundary arbiters are a rarity in Africa.)

[2] FC s 151(1).

[3] FC s 155(2).

[4] FC s 155(5).

[5] FC s 160(5)*(a)*.

[6] See *Executive Council Western Cape* (supra) at paras 39-43, 70-76 and 82.

[7] For an analysis of the Municipal Demarcation Board's first term of office, including the demarcation of 843 interim local government structures into 284 new municipal areas, see Cameron 'Boundary Reorganisation' (supra) at 84ff.

establishment of an independent authority that demarcates municipal boundaries. It establishes criteria and procedures for this process.[1] An independent authority is also required to delimit the wards within a municipality.[2] The Demarcation Act provides for a Municipal Demarcation Board. The independence of the institution is secured through the appointment procedure for its members,[3] the limited grounds for removal from office,[4] the criminalization of any efforts to improperly influence its decision making[5] and the fact that it is accountable to Parliament and not to the national executive.[6]

In *Matatiele*, the Constitutional Court dealt with aspects related to the limits on the Demarcation Board's powers. When a constitutional amendment was passed altering provincial boundaries in a way that affected municipal boundaries, it was argued that Parliament had usurped the powers of the Board to determine municipal boundaries. The Constitutional Court disagreed. It ruled that the Board's powers to demarcate municipal boundaries are limited by Parliament's authority to establish provincial boundaries.[7] The Court found that 'once provincial boundaries have been redefined, it is the task of the Board to demarcate municipal boundaries in terms of the Demarcation Act'.[8]

Because the Municipal Demarcation Board is an independent organ of state, it is in a similar position to the IEC, in respect of which the Constitutional Court held that it does not fall within the purview of FC Chapter 3.[9] Consequently, the Municipal Demarcation Board, like the IEC and other Chapter 9 Institutions, is not bound by the obligation of cooperative government set out in FC Chapter 3. Where there is a dispute between a municipality and the Demarcation Board, there is no need to avoid disputes being settled in court.

(ii) *Categories of municipalities*

FC s 155(1) establishes three categories of municipalities:

(a) Category A: metropolitan municipalities that have exclusive authority over their jurisdiction;
(b) Category B: local municipalities that share authority with district municipalities; and
(c) Category C: district municipalities that share authority with local municipalities.

[1] FC s 155(3)*(b)*.
[2] FC s 157(4).
[3] Demarcation Act s 8.
[4] Demarcation Act s 13(4).
[5] Demarcation Act s 42.
[6] Demarcation Act s 39.
[7] *Matatiele I* (supra) at para 49.
[8] Ibid at para 51. Steytler & De Visser (supra) at 2-4.
[9] See *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC)('*Langeberg*') at para 22.

The original text of FC s 155(1) submitted for certification by the Constitutional Court did not make reference to any categories of municipalities. Instead, the issue of categories was relegated to statutory legislation.[1] The Court reviewed this delineation of responsibility in *First Certification Judgment*.[2] CP XXIV required a framework for local government powers, functions and structures be set out in the Constitution.[3] In addition, CP XXV required that this framework make provision for appropriate fiscal powers and functions for different categories of local government. The Court held that the requirement of a framework for local government structures necessitated 'at the very least' the setting out in the Final Constitution of the different categories of local government that can be established by the provinces, as well as a framework for their structures.[4] This requirement had not been met.[5] The requirement of appropriate fiscal powers and functions for different categories had also not been met. No such provision appeared in the text. The Constitutional Assembly then amended FC 155(1) to provide for the above three categories. In *Second Certification Judgment*,[6] the Court reviewed and approved the amended text. In this judgment, the Constitutional Court labeled the three categories as follows:

(a) self-standing municipalities,
(b) municipalities that form part of a comprehensive co-ordinating structure, and
(c) municipalities that perform co-ordinating functions.[7]

Municipal governance in a specific area is thus provided either by a metropolitan municipality[8] or by a combination of district and local municipalities. The choice between these two modes of municipal governance is governed by FC s 155(4). This provision requires national legislation to establish criteria in terms of which the choice is made. Furthermore, the Final Constitution requires an

[1] See Steytler & De Visser (supra) at 2-19.

[2] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('*First Certification Judgment*') at para 301.

[3] IC sch 4 CP XXIV provided: 'A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both.'

[4] *First Certification Judgment* (supra) at para 301.

[5] Ibid. See Nico Steytler 'District Municipalities: Giving Effect to Shared Authority in Local Government' (2003) 7(2) *Law, Democracy and Development* 228.

[6] *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC)('*Second Certification Judgment*') at paras 73–82.

[7] Ibid at para 77.

[8] For a discussion of the objectives of introducing the unitary metropolitan system, see Robert Cameron 'The Upliftment of South African Local Government' (2001) 27 *Local Government Studies* 105.

appropriate division of powers and functions between the two tiers of local government that operate outside of metropolitan areas. The need to provide municipal services in an equitable and sustainable manner must be taken into account by this legislation.[1]

Section 2 of the Structures Act provides that an area must be regarded a metropolitan municipality if it can reasonably be regarded as a conurbation featuring areas of high population density, intense movement of people, goods and services, extensive development, multiple business districts and a number of industrial areas. An integrated development plan for the entire single area must also be desirable. Finally, the social and economic linkages between the constituent units should be strong. An area that does not comply with these requirements must, instead, be regarded as a combination of district and local municipalities.[2]

The question as to who decides which category applies to a specific municipal areas became an area of contestation soon after the promulgation of the Structures Act. In its original iteration, the Act provided that the national Minister for local government was vested with the power to declare metropolitan municipalities. This scheme was deemed unconstitutional by the Constitutional Court.[3] The Court held that the Minister should not be vested with the power to determine municipal categories because such a power interfered with the power of the independent Demarcation Board. The Court remarked that 'the Demarcation Board can only determine boundaries if it knows what it is determining boundaries for.'[4] The Structures Act was amended to locate the power to decide on the appropriate municipal category in the Municipal Demarcation Board.[5]

The Structures Act provides for a division of powers and functions between district municipalities and local municipalities as required by FC s 155(3)*(c)*.[6] This division will be further discussed below.[7]

(iii) *Types*

The Final Constitution requires national legislation to define the different types of municipalities that may be established within each category.[8] In *Second Certification Judgment,* the Constitutional Court dismissed the argument that Constitutional Principle XXIV required the Final Constitution to describe the types of municipalities. The Court held that this reading of CP XXIV was only one of many possible readings of the phrase 'framework for local government … structures'.[9] The types of municipalities are thus described in the Structures Act.

[1] FC s 155(4). See Steytler & De Visser (supra) at 2-20.
[2] Structures Act s 3. See Steytler & De Visser (supra) at 2-20.
[3] *Executive Council Western Cape* (supra) at paras 34–59.
[4] Ibid at para 51.
[5] See Structures Act s 4; Steytler & De Visser (supra) at 2-20; Cameron 'Boundary Reorganisation' (supra) at 86.
[6] See Chapter 2 of the Municipal Structures Amendment Act 33 of 2000.
[7] See § 22.3 *(d)* infra.
[8] FC s 155(2).
[9] *Second Certification Judgment* (supra) at para 82.

Whereas the category of municipality determines whether or not powers and functions will be shared, the type of municipality determines three other issues, namely:[1]

(a) the institutional relationship between the municipality's executive and its legislative function. This relates to whether the municipality's council must exercise municipal executive authority itself (plenary executive system), whether it may elect an executive committee (collective executive system) or whether it may elect an executive mayor (mayoral executive system);[2]

(b) whether a metropolitan or local municipality is permitted to establish ward committees,[3] and

(c) whether a metropolitan municipality is permitted to establish subcouncils that exercise delegated powers for parts of the municipality.[4]

The content given by national legislation to the typology means that it also responds to FC s 160(5). FC s 160(5) envisages national legislation that will provide criteria for determining, amongst other things, whether a municipal council may elect an executive committee.

FC s 155(5) (and section 12 of the Structures Act) instructs provinces to produce legislation to 'determine the different types of municipality to be established in the province'. These sections confer both the legislative and executive power to establish types of municipality upon the provincial government. In an earlier version of the Structures Act, the national Minister for local government could promulgate guidelines to assist MECs for local government in selecting a type of municipality for a municipal area. The MEC was obliged to take them into account. When this provision was challenged before the Constitutional Court,[5] the Court observed that it 'tells the provinces how they must set about exercising a power in respect of a matter which falls outside the competence of the national government'.[6] The fact that the guidelines were not binding was not important, according to the Court: national government had legislated on a matter which fell outside of its jurisdiction and the provision was declared unconstitutional.

National limits on provincial decision-making with regard to typology are thus to be found only in the national law envisaged in FC s 155(2). Are there, however, implicit limits informed by the notion of local government autonomy? When the constitutional scheme for selecting the municipal typology was challenged in the Constitutional Court, the Court wrote:

[1] See Steytler & De Visser (supra) at 2-24.
[2] Structures Act s 7*(a)*, *(b)* and *(c)*.
[3] Structures Act s 7*(e)*.
[4] Structures Act s 7*(d)*. See also Bernard Bekink *Principles of South African Local Government Law* (2006) 126-135.
[5] *Executive Council Western Cape* (supra) at paras 77-84.
[6] Ibid at para 83.

> The provisions to which objection is taken are those dealing with typology and they are sanctioned by section 155(2). The municipal power to elect executive or other committees is therefore subordinate to these provisions and to the provincial power to select types of municipalities. If this has the effect of precluding particular municipalities from electing executive or other committees, that results from the provisions of the Constitution itself and cannot be challenged as being a breach of section 160(5)*(b)*.[1]

From this remark of the Constitutional Court, it could be deduced that the determination of a municipality's executive structure is indeed within the provincial executive's discretion.[2] However, the challenge to which the Court responded was not directed at the power of the MEC to determine the typology but at sections 7, 10 and 33 of the Structures Act. These sections provide a national menu of types and criteria for the establishment of committees. The MEC's decision on the municipal typology takes place in the context of a different provision: FC s 155(6). FC s 155(6) engages the establishment of municipalities.

Another significant dimension to the discussion of the provincial power to determine municipal executive structures vis-à-vis municipal autonomy is the fact that the proclamation of a municipal type does not necessarily determine the executive structure. The effect of the provincial decision on a type for a municipality is that it permits that municipality to decide to establish a particular structure.[3] This decision-making power is particularly relevant with regard to ward committees and subcouncils. In the absence of a municipal decision, no ward committees or sub-councils will be established in the municipality, regardless of the fact that the type permits their establishment. With regard to the executive structure, the typology may be 'open-ended' in theory but not in practice: in reality, a municipality that is permitted to establish an executive committee does not have a choice but to establish an executive committee. Similarly, a municipality that is permitted to elect an executive mayor cannot but elect an executive mayor.[4] Not to follow the provincial suggestion on the executive structure, embedded in the typology, would be tantamount to the absence of an executive structure. That is not an option. Nevertheless, the scheme set out by the Act is clearly premised on the notion that the municipal type does not become a reality without the concurrence of the municipality. This balance of powers must be interpreted to mean that the Act calls for a relationship of co-operation between the provincial government and the municipality when it comes to determining the executive structure. An MEC, in exercising this power, is subject to the principles of co-operative government. These principles require respect for the institutional integrity of local government.[5] This provision, read together with

[1] *Executive Council Western Cape* (supra) at para 87. As discussed in Steytler & De Visser (supra) at 2-26.
[2] See Nico Steytler & Jaap De Visser *Local Government Law in South Africa* (2007) 2-26.
[3] See Structures Act ss 43(1), 55(1), 61(2) and 72(2).
[4] That said, a municiplity may forego such an election, if its council is small enough to operate as an executive structure.
[5] See Stu Woolman, Theunis Roux & Bernard Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14.

the message sent out by the balance of powers set forth in the Act, should prevent an MEC from exercising this power unilaterally without the concurrence of the municipality.[1]

(iv) *Official languages*

The choice of official languages is a critical aspect of the establishment of a municipality's presence in a particular area.[2] The Final Constitution lists the official languages of the Republic and instructs the state to take practical and positive measures to elevate the status and advance the use of these languages.[3] The Final Constitution does not state explicitly, in the same way as it does for national and provincial governments,[4] that a municipality may use any of the 11 official languages 'for the purposes of government'.[5] However, section 21(2) of the Systems Act, in dealing with communication with the local community, provides that the municipal council must determine the official languages of the municipality. It is suggested that these official languages must be used 'for the purposes of government', that is for both internal and external communication. The Final Constitution provides two criteria that municipalities must take into account when dealing with the issue of official languages. The first is a demographic criterion, namely the language usage of the residents of the municipality. The second is an attitudinal criterion, namely the preferences of their residents.[6] In dealing with national and provincial governments, the Final Constitution lists more criteria, such as practicality and expense. The question then arises whether the absence of those factors in FC s 6(3)*(b)* removes them from the ambit of municipal decision making on the issue. Strijdom argues for an integrated reading of FC s 6. He argues that the effect of this reading is that factors such as practicality, expense, parity of esteem and equitable treatment must be taken into account by municipalities. This view appears correct, especially in relation to the integrated reading of FC ss 6(3)*(a)* and 6(3)*(b)*. FC s 6(3)*(a)* provides that national and provincial governments may use any two official languages. Although it further provides that municipalities must take certain criteria into account, it still follows that municipalities have some degree of choice — even though the extent of this discretion is not made explicit.[7] An important question is whether the integrated reading also applies to the requirement of a minimum of two official languages that applies to national and provincial governments.[8] While the two languages requirement

[1] See Steytler & De Visser (supra) at 2-26.
[2] Ibid at 2-28.
[3] FC s 6(1) and (2).
[4] FC s 6(3)*(a)*.
[5] FC s 6(3)*(a)*.
[6] FC s 6(3)*(b)*.
[7] For a different view, see Iain Currie 'Official Languages' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 65.
[8] FC s 6(3)*(a)*.

makes sense for national and provincial governments, its rationale is not so compelling with regard to municipalities. One language may be so dominant in a municipality that it merits a single language policy. However, we believe that a municipality may not employ only one official language. The integrated reading, as well as the fact that section 21(2) of the Systems Act refers to 'official languages' (plural), indicates that at least two languages must be identified and used.[1]

(b) Municipal elections

The Final Constitution was adopted so as to lay the foundations for a democratic and open society in which government is based on the will of the people.[2] Universal adult suffrage, a national common voters roll, regular elections and a multiparty system of democratic government are foundational values underpinning the functioning of the state at all three levels.[3] FC s 152(1) specifically commits local government to transparency and accountability. The right to vote in local government elections is extended to all who are registered on the municipality's segment of the national common voters roll.[4]

(i) *Term of office of municipal councils*

National legislation determines the term of office of a municipal council. However, the Final Constitution sets the limit at five years.[5] When an earlier version of the Structures Act empowered the Minister to determine the term of office of municipal councils by notice in the *Government Gazette,* the Constitutional Court ruled that Parliament could not have delegated such power to the Minister.[6] General elections must be held within 90 days of the expiry of a council's term.[7] If a council is dissolved,[8] an election must be held for that council within 90 days of the date that the council was dissolved.[9]

(ii) *Electoral system*

FC s 157(1) states that a municipal council must consist of elected members, appointed members or a combination of elected and appointed members.

[1] Once again, Iain Currie demurs from this interpretation.
[2] FC Preamble.
[3] See Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10; Chris Roederer 'Founding Provisions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 13.
[4] FC s 157(5).
[5] FC s 159(1) as amended by Constitution Second Amendment Act, 1998 and Structures Act s 24(1).
[6] *Executive Council Western Cape* (supra) at paras 120–127.
[7] FC s 159(2).
[8] A council may dissolve itself, as long as it has been in office for a minimum of two years. Structures Act s 34(1)-(2). A council can also be dissolved by the provincial executive in terms of an intervention. FC s 139. See further § 22.6*(d)*(v) infra.
[9] FC s 159(2).

FC s 157(2) provides that the system for electing members of municipal councils must be based on proportional representation (PR) elections or on PR elections combined with constituency (ward) elections. PR elections must be based on that municipality's segment of the national common voters roll and provide for the election of members from lists of party candidates drawn up in a party's order of preference.[1] A choice to combine PR with ward representation is subject to the requirement of general proportionality found in FC s 157(3). FC s 157(3) requires that the electoral system 'must result, in general, in proportional representation'.[2] If the system includes ward representation, then an independent authority must delimit the wards in terms of procedures and criteria prescribed by national legislation.[3]

The Structures Act determines the percentages for ward and PR elections: 50 percent of councillors are elected from party lists on a proportional basis[4] and 50 percent of ward councillors are elected in a 'winner-takes-all' system in Category A (metropolitan) council and Category B (local) councils.[5] Candidates for a ward election can be independent or nominated by a political party.[6]

The provision for appointed members enables Parliament to regulate the composition of Category C municipalities. Category C municipalities encompass more than one local municipality.[7] Whether or not the council of a Category C municipality is made up of only appointed members or of a combination of appointed and directly elected members is left for legislative determination. The Final Constitution does provide that the latter category of councillors must be appointed 'by other municipal Councils',[8] which presupposes an appointment procedure that entails decision making by the full council. Furthermore, these councillors 'must represent those other councils',[9] indicating that the appointees do not enjoy a free mandate. Finally, any legislation dealing with the appointed councillors must ensure that parties and interests reflected within the council that makes the appointment are fairly represented on the council to which the appointment is made.[10] This provision rules out the appointment of officials to the other council

[1] FC s 157(2)*(a)*.

[2] Before it was amended in 2002, FC s 157(3) required that the electoral system ensure 'that the total number of members elected from each party reflects the total proportion of the votes recorded for those parties'. The principle of proportionality was thus relaxed to accommodate changes in the electoral system that would allow party representatives to 'cross the floor'.

[3] FC s 157(4)*(a)*.

[4] Structures Act item 6*(b)* sch 1.

[5] Most local municipalities comprise wards. According to s 22(4) of the Structures Act, a municipality that has a council of fewer than seven members has no wards. These municipal councils consist of PR councillors only. See also Structures Act sch 1 item 7. Structures Act s 22(1)-(3) and sch 1 item 6*(a)*. See Steytler & De Visser (supra) at 4-10–4-13 for the calculation of seats.

[6] Municipal Electoral Act s 16(1).

[7] FC s 155(1).

[8] FC s 157(1)*(b)*(i).

[9] FC s 157(1)*(b)*(i).

[10] FC s 157(1)*(b)* and (6).

and makes the appointments by the council subject to the principle of 'fairness'. The constitutional principle of fairness demands more than simple majority rule; a procedure that allows a council majority to determine the appointment is thus not in keeping with the Final Constitution. At the same time, following the holding adopted in *Democratic Alliance v ANC*,[1] fairness does not necessarily demand proportionality[2] but connotes a notion of meaningful participation.

The Structures Act provides for the system envisaged in FC s 157(1)*(b)*(ii), i.e., a combination of appointed and directly elected members of a district council. Voters in the district elect 40 percent of the district council according to a party list system.[3] The remaining 60 percent is made up of representatives of local municipalities[4] and, if applicable, district management areas (DMA).[5] The number of district council seats to which a local council or a DMA is entitled, depends on the number of registered voters that reside in that particular area.[6]

In dealing with the system for appointing representatives, the Structures Act stays well within the limits set by FC s 157(6). It establishes a system that is based on proportionality: an internal election based on lists of candidates submitted by parties or individuals represented on the council determines the composition of the delegation of appointees.[7] The composition of a local council's delegation to the district council will thus reflect the composition of the local council. The system of proportionality in district representation is important when it comes to dealing with the 'recall' of a district representative by a local municipality. According to section 27*(e)* of the Structures Act, the local council can, by majority decision, 'replace' a district representative. When this occurs, a vacancy arises on the district council. The term 'replace' in the Structures Act could be interpreted to mean that the local council can appoint its new representative in the same resolution as the one that recalls its existing representative. Such an interpretation would, however, result in proportionality being replaced by majority rule — and that interpretation runs counter to the intention of the Structures Act. Therefore, the process outlined in the Structures Act for the filling of district council vacancies should be used.[8] This means that the new district representative must be selected from the candidate list that produced the district representative that was recalled. This method preserves the degree of proportionality envisaged by the Structures Act. The fact that the Structures

[1] 2003 (1) BCLR 25 (C).

[2] The general principle of proportionality, put forward in FC s 157(3), does not apply to the system of appointments.

[3] Structures Act s 23(1)*(a)* read with s 23(3).

[4] Structures Act s 23(1)*(b)*.

[5] Structures Act s 23(1)*(c)*. District Management Areas are sparsely populated areas in which the establishment of a local municipality is not viable. Structures Act s 6. See Steytler & De Visser (supra) at 4-13–4-16 for the calculation of seats.

[6] Structures Act item 15 sch 2.

[7] See Structures Act part 2 sch 2.

[8] Structures Act sch 2 items 11 and 23.

Act goes beyond the constitutional instruction of 'fairness' and demands such proportionality ought not to be viewed as constitutionally suspect. The Structures Act does not violate FC s 157(6) by providing greater protection for minorities than the constitutional provision requires.

(iii) *Membership*

Anyone who is registered on a municipality's segment of the national common voters' roll is eligible to be a member of that council.[1] The exceptions are listed in subsections 158(1) of the Final Constitution.[2] They concern:

(a) Paid municipal staff members.[3]
(b) Paid provincial or national government staff members who have been disqualified in terms of national legislation.[4]
(c) Members of the National Assembly, National Council of Provinces or any of the provincial legislatures.[5]
(d) Members of another municipal council.[6]
(e) Anyone who is disqualified from voting for the National Assembly.[7]
(f) Unrehabilitated insolvents, persons declared to be of unsound mind and persons convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine.[8]

Despite these disqualifications, anyone who is registered on a municipality's segment of the national common voters' roll can be a candidate, with the exception of the categories referred to under *(e)* and *(f)* above.[9]

A PR councillor also vacates his or her office if he or she ceases to be a member of the political party. Of course, floor-crossing is an obvious exception to that rule.[10] The same applies to ward councillors. Party-aligned ward councillors vacate office if they lose party membership outside of the scheme for floor-crossing.[11] Independent ward councillors vacate office if they become members of a political party

[1] FC s 158(1) read with s 157(5).
[2] See Steytler & De Visser (supra) at 4-8.
[3] FC s 158(1)*(a)*.
[4] FC s 158(1)*(b)*.
[5] FC s 158(1)*(d)*. This disqualification does not apply to members of a municipal council representing organised local government in the National Council of Provinces.
[6] FC s 158(1)*(e)*. This disqualification does not apply to appointed council members.
[7] FC s 158(1)*(c)*.
[8] FC s 158(1)*(c)* read with s 47(1)*(c)*, *(d)* and *(e)*. The latter disqualification applies only to people convicted after the 1996 Constitution took effect (7 February 1998) and lapses five years after the sentence has been completed. Section 119(4) of the Systems Act seeks to reiterate the disqualification mentioned under FC s 158(1)*(c)* read with FC s 47(1)*(e)*. However, it contradicts the Final Constitution by providing that the disqualification is applicable 'during a period of five years *as from the conviction*' (emphasis added). Therefore, not only is section 119(4) of the Systems Act superfluous (as the issue is fully governed by the Constitution), it is also unconstitutional. See Steytler & De Visser (supra) at 4-8 n 47.
[9] FC s 158(2) read with Structures Act s 21(1)*(a)*.
[10] FC item 1(1) sch 6B.
[11] FC item 1(2)*(a)* sch 6B.

outside of the scheme for floor crossing.[1] The Structures Act provides for other instances where a councillor vacates office.[2]

Whether or not councillors should have the ability to change party allegiance without losing their seats has long been a contentious issue.[3] Generally, the ability to cross the floor creates tension with the general principle of proportionality.[4] National and provincial parliamentarians were not permitted to cross the floor in terms of the Interim Constitution.[5] The same principle obtained under the Local Government Transition Act;[6] on losing party membership, a councillor lost his or her seat.[7] The principle of an imperative mandate still applied in an unmitigated way until 2002.[8] In 2002 amendments to both the Final Constitution and the Structures Act, permitting floor-crossing, were passed. The principle of proportionality in FC s 157(3) was reworded to state that the electoral system 'must result, *in general*, in proportional representation'.[9] A new schedule 6A[10] was inserted in the Final Constitution to deal with changes in party membership in between general elections.[11] The significance of the opening up of the ability to cross the floor in the context of the overall proportionality requirement lies in the fact that crossing of the floor inevitably results in a degree of disproportionality.

In *United Democratic Movement v President of the Republic of South Africa (1)* the United Democratic Movement (UDM) challenged the floor crossing legislation.[12] The UDM argued that the amendments affected the basic values of the Final Constitution contained in FC 1 and that the amendments should therefore have been passed in terms of FC s 74(1)[13] instead of FC s 74(3).[14] In its substantive argument, the UDM put forward the proposition that proportional representation

[1] FC sch 6B item 1(2)*(b)*.

[2] Structures Act s 27.

[3] See Steytler & De Visser (supra) at 4-21. It is important to note that, at its latest Conference, the African National Congress adopted a resolution that floor-crossing be abolished. The discussion of the legal framework for crossing of the floor is thus discussed against the backdrop of this intention to remove it. At the time of writing, the Constitution Fourteenth Amendment Bill 2008 and the Constitutional Fifteenth Amendment Bill 2008 were under discussion in Parliament. They seek to abolish floor-crossing in all three spheres of government.

[4] See also Glenda Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) 29-12.

[5] See IC ss 43*(b)*, 51(1)*(b)* and 133(1)*(b)*.

[6] Act 209 of 1993.

[7] See, for example, s 82(1) of the Election Regulations (Western Cape), referred to in *Villiers v Munisipaliteit van Beaufort-Wes* 1998 (9) BCLR 1060 (C).

[8] Structures Act s 27*(c)* and *(f)* provided that ward or PR councillors who changed party allegiance have to vacate office.

[9] Emphasis added.

[10] Later amended into schedule 6B by Constitution Amendment Act 2 of 2003.

[11] Originally, the schedule could be amended by ordinary legislation passed in accordance with FC s 76(1). This provision was repealed by s 5 of Constitution Amendment Act 2 of 2003.

[12] 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC)('*UDM*').

[13] FC s 74(1) requires a 75 percent majority in the National Assembly and the support of at least six provinces in the NCOP.

[14] FC s 74(3) requires a two-thirds majority (66 percent) in the National Assembly and the support of at least six provinces in the NCOP.

is protected by the anti-defection clause, and that it is a fundamental element of South Africa's multi-party democracy. The party — not the member — is entitled to the seat. If a member is allowed to defect, then the proportionality of the elected body is distorted. The challenge was directed at the entire suite of legislation on floor-crossing at national, provincial and municipal level. A distinction can be made, and was made, between local government and the other two spheres of government. National and provincial elections are based on a closed list PR system while municipal elections have, in the words of Glenda Fick, 'a majoritarian element which more readily accommodate[s] floor crossing'.[1] Nevertheless, the Final Constitution makes no distinction between PR councillors and ward councillors in setting out the possibilities and criteria for floor-crossing. Neither the Constitutional Court nor the parties before it in *UDM* sought to make the distinction.[2]

In *UDM*, the Constitutional Court disagreed with most of the arguments leveled against the floor-crossing legislation. It held that the changes do not affect the founding values of the Final Constitution and concluded that multi-party democracy, as required by FC s 1*(d)*, is not the same as proportional representation.[3] Furthermore, the Court observed that the system of proportional representation as envisaged by the Final Constitution does not necessarily require a prohibition on floor-crossing.[4] An important consideration for the Court in this respect was the notion that voters, in any jurisdiction, have no control over the conduct of their representatives once they have been elected: 'The fact that political representatives may act inconsistently with their mandates is a risk in all electoral systems.'[5] When the argument was raised that the 10 per cent formula benefited larger parties, the Court observed that the fact that an electoral system works in favour of particular parties does not necessarily make it unconstitutional.[6] The Court also dismissed the argument that schedule 6B (formerly schedule 6A) was inconsistent with FC s 157(3)'s 'general' requirement of proportionality.

Item 2(1)*(b)* of schedule 6B provides that a party-aligned ward councillor can change party membership or become independent without losing his or her seat. It also provides that an independent ward councillor can join a party without losing his or her seat. Item 2(1)*(a)* stipulates that a PR councillor can change party membership without losing his or her seat.

[1] Fick (supra) at 29-16 and 29-25. For a fine-grained reading of *UDM*, see Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10.

[2] Fick (supra) at 29-16–29-18 (criticises the absence of the distinction and argues that the Court should have addressed the tension between a closed-list PR system and floor-crossing.)

[3] See Christopher Roederer 'Founding Provisions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) 13-23.

[4] *UDM* (supra) at para 53. See also Fick (supra) at 29-16.

[5] *UDM* (supra) at para 50.

[6] See Roederer (supra) at 13-23.

The Final Constitution does place restrictions on floor crossings.[1] Firstly, councillors may only change party membership (or become independent) if 10 percent of their party's total members in the council simultaneously cease to be members.[2] This percentage prevents, as far as possible, individual defections and the instability and possibility of political corruption that attach to such individual defections.[3] Secondly, a councillor may only cross the floor during a so-called 'window period'. These 'window periods' are:

(a) from 1–15 September of the second year after a general election; and
(b) from 1–15 September of the fourth year after a general election.[4]

Thirdly, a councillor may only change party membership, become a party member or cease to be a party member once during such a 'window period'.[5]

In *Julies v Speaker of the National Assembly,* the High Court dealt with the matter of the 10 percent requirement, albeit in the context of the National Assembly.[6] The court held that compliance with this requirement is to be determined immediately prior to the commencement of the relevant window period. The outcome of that assessment remains static throughout the window period, notwithstanding any floor-crossing during that window period. The rationale for the window period is 'to freeze membership of the National Assembly for a period of 15 days, during which a member who wishes to change his party allegiance would nevertheless retain his seat in the Legislature'.[7] It is suggested that the same principles apply to municipal councils.

During a window period, a party is prevented from suspending or terminating a councillor's membership without the written consent of the councillor. Similarly, a party may not do anything that may cause a councillor to be disqualified from holding office without such written consent.[8]

The fact that a councillor enjoys 'immunity' only during the window period begs the question as to what may happen if a political party becomes aware of a councillor's intention to resign prior to the start of the window period. Expulsion before the window period is clearly possible. But what happens if the councillor appeals against the party's decision, by using internal party appeal procedures or by resorting to the courts when internal means have been exhausted? Such an

[1] See Nico Steytler & Jaap de Visser *Local Government Law in South Africa* (2007) 4-23.
[2] FC sch 6B item 2(1)*(b)*(ii). The 10 percent-rule naturally cannot be applied to an independent ward councillor who joins a party. It also did not apply for the first round of floor-crossing immediately after the constitutional amendments came into effect (item 18 Constitution Amendment Act 18 of 2002).
[3] It is suggested that, in the translation of the 10 percent into actual members, fractions must be rounded upwards. For example, if a party has 15 members on a council, the 10 percent requirement would mean that two members must cross together. To disregard fractions would not be in keeping with the intention of the requirement, which is to restrict floor crossing.
[4] FC sch 6B item 4(1)*(a)*.
[5] FC sch 6B item 4(2)*(a)*.
[6] 2006 (4) SA 13 (C), [2006] 4 All SA 457 (C).
[7] Ibid at para 14.
[8] FC item 4(2)*(c)* sch 6B. Steytler & De Visser (supra) at 4-24.

appeal procedure generally suspends the expulsion and may very well last until the window period has ended. The councillor may then still cross the floor without losing his or her seat. The importance of 'timing' the crossing in the context of a pending appeal came to the fore in *Mathew Shunmugam & Others v Newcastle Local Municipality & Others*.[1] If the councillor crosses the floor prior to the conclusion of the appeal, the seat is lost to the party from which he or she resigned. In *Shunmugam*, eighteen councillors, who were members of NADECO, had been expelled prior to the window period. They challenged this expulsion in court and obtained interim relief that set aside the expulsion. NADECO then sought an application reconsidering the interim relief. As the matter could not be finalized before the commencement of the window period, the court set aside the interim order and ruled that, pending the final outcome, the members remained suspended and that NADECO would not replace them before the commencement of the window period. The matter was set down for argument on a date within the window period so as to enable the Court to finalize the matter before the end of that period. During the window period and before the matter could be finalized before the court, the chickens flew the coop and joined other parties. The central question was thus whether they were members of NADECO on the eve of the window period. Rall AJ decided that they were not. They had abandoned their right to challenge their expulsion by joining other parties. In the words of the learned judge:

> To me there can be no clearer and more unequivocal statement by conduct of a wish to no longer have anything more to do with their political home, NADECO, than their joining other political parties. If they were still members of NADECO, then this amounted to a resignation from that party and if they were no longer members this was a statement that they had no intention of regaining their membership. This conduct is plainly inconsistent with an intention to enforce the right to set aside their expulsion from the party and hence regain membership thereof.[2]

If the councillors had waited for the finalization of the court proceedings and had obtained an order setting aside the expulsion, then they could have crossed without losing their seats. By jumping the gun they effectively waived their right to challenge the expulsion and rendered the argument about their expulsion moot.

The somewhat unfortunate wording of the order, referring to the continued 'suspension' of the councillors pending final outcome, was the subject of another argument. A suspended member of a party remains a member of it and is capable of resigning from that party (and if this is done in a window period, to carry the seat along). However, the court interpreted the word 'suspended' to be a synonym

[1] [2007] ZAKZHC 16 (4 December 2007).
[2] Ibid at para 19.

for 'expelled': it did so mainly because of the *quid pro quo* arrangement. The 'suspension' continued and NADECO, in turn, was not able to replace the 'suspended' councillors. Clearly, it is only an 'expelled' councillor who requires protection against replacement.

The question arises as to whether expulsion is permissible during the window period if the transgression of the councillor was detected before the window period commenced. A remark in passing of Davis J in *Diko v Nobongoza*[1] appears to deal with this issue. The High Court stated that immunity 'in respect of offences genuinely raised before the window period' may 'not be correct'. Even though the judgment deals with members of Parliament and members of provincial legislatures, it found that a party may expel a councillor during the window period, but only if the offence was 'genuinely raised' before the window period. For an offence to be 'genuinely raised' it requires clear evidence of the offence. This evidence must be dated before the commencement of the window period. It is not sufficient to use the benefit of hindsight and link a manifestation of disloyalty during the window period with acts or omissions that took place before the window period began.

Finally, is expulsion or termination of party membership completely ruled out during the window period? Does it apply to the termination of membership for reasons that have nothing to do with party allegiance? Schedule 6B suggests otherwise: the title of the schedule is 'Loss or Retention of Membership of Municipal Councils after a change of Party Membership'. It follows that the immunity is intended to prevent political parties from undermining a councillor's (relatively) free mandate during the window period. Its intention is *not* to prevent political parties from exercising 'normal' disciplinary oversight over councillors. A party may thus still expel or suspend its members for offences that are manifestly unrelated to party allegiance (e.g., corruption, sexual harassment).

(c) Political structures and procedures

(i) *Constitutional development*

The Final Constitution provides a broad framework for a municipal council's political structures and procedures. Much of what councils do is left to national legislation.

CPs X and XXIV form the background for this framework. CP XXIV demanded that the Constitution deals with a framework for local government powers and functions. CP X demanded that 'Formal legislative procedures shall be adhered to by legislative organs at all levels of government'.

When the Constitutional Court first measured the original text of the Final Constitution against these principles, it concluded that they were not met.[2] In *First Certification Judgment*,[3] the Court held that the Principles required the Final

[1] 2006 (3) SA 126, 137A-B (C).
[2] Steytler & De Visser (supra) at 3-7.
[3] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 301.

Constitution to indicate how local government executives are to be appointed, how local governments are to take decisions, and the formal legislative procedures that have to be followed. The amended text, which was subsequently submitted by the Constitutional Assembly, was approved by the Court in *Second Certification Judgment*.[1]

A variety of provisions in the Final Constitution — and an entire chapter, Chapter 7 — establish the necessary framework for local government. For example, FC s 160(6) provides that a municipal council may make by-laws which prescribe rules and orders for its internal arrangements, its business and proceedings and the establishment, composition, procedures, powers and functions of its committees. In interpreting the scope of FC s 160(6), the Constitutional Court compared FC s 160(6) with FC s 57. FC s 57 deals with Parliament's powers to determine its 'rules and orders'.[2] The comparison produced a number of important limits on the scope of councils to determine 'rules and orders'. Firstly, the power of the council to regulate the internal proceedings of its committees does not relate to the power to regulate the establishment or the functioning of the executive of municipal councils.[3] Secondly, it naturally excludes the structural components of the council: these components are fully regulated by the Final Constitution. Instead, it extends only to those working committees which the council may decide to establish, and also disestablish, from time to time.[4] Thirdly, it does not relate to the power to regulate the office of the speaker.[5] Fourthly, it does not regulate the legislative process. That process is detailed elsewhere in the Final Constitution.[6] The *DA v ANC* Court therefore concluded with regard to FC s 160(6) that

> its scope is relatively narrow and does not relate to the power to regulate the establishment or functioning of the executive of municipal councils, whatever form that executive may take, or any other committee of the municipality which is a key part of its democratic structure. It relates only to task and working committees which may be established and disestablished from time to time.[7]

However, it is clear that national or provincial legislation, detailing the manner in which a municipal council must conduct its meetings or establish its working committees (in the way the pre-1994 local government ordinances did) is no longer permitted. There is, therefore, no support for Bekink's contention that municipal rules and orders 'may [not] be different from provisions regarding such aspects that have been determined in the legislation of the two higher spheres of government'.[8] Such legislation is required by the Final Constitution to respect a municipality's rights in terms of FC s 160(6).

[1] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at paras 73-82.
[2] *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development* 2000(1) SA 661 (CC), 1999 (12) BCLR 1360 (CC)('*Executive Council Western Cape*') at para 99.
[3] Ibid at para 100.
[4] Ibid at para 100.
[5] Ibid at para 110.
[6] Ibid at para 111.
[7] Ibid at para 101.
[8] Bernard Bekink *Principles of South African Local Government Law* (2006) 266.

An essential part of the framework set forth in the Final Constitution can be found in FC s 160(8). This section provides that members of the council are entitled to participate in its proceedings and those of its committees in a manner that allows fair representation of all parties and interests reflected in the council. In *Democratic Alliance v ANC & Others*[1] the Cape High Court sought to give meaning to the phrases 'fairly represented' and 'consistent with democracy'.[2] It accepted that, in the context of the composition and the functioning of council committees, the latter requirement can be equated with majority rule.[3] However, the principle of fairness is more elusive. Our interest in fairness may not necessarily accord with the principle of proportionality that underpins local government electoral systems. The potential for a conflict between these two principles yields an interesting question: do minority parties have the right to a certain minimum level of participation on council committees?[4] The High Court accepted that fairness does not entail an entitlement to a specific number of seats. It does not even demand a rational connection between a party's representation in the council and the number of seats it is afforded on a particular committee. The High Court did not proffer a definition of fairness. It limited itself to the proposition that the principle of fairness 'can be met by a system of representation other than proportional representation or a system approximating one of proportional representation'.[5] An important consideration for the High Court was the notion that fairness generates a right to participate as opposed to a right to a particular composition.[6] Textually at least, this approach does not dovetail neatly with the requirements of FC s 160(8).

In *Democratic Alliance v Masondo*,[7] the Constitutional Court determined that the requirements of democracy and fairness in FC s 160(8) 'finds expression in the municipal council and those committees elected by it'.[8] Other committees, not established and elected by the municipal council, but that may still exist within a municipality are not subject to this principle. Examples of such committees are the mayoral committee,[9] a ward committee[10] or an audit committee.[11] The primary focus

[1] 2003 (1) BCLR 25 (C)('*DA v ANC*').

[2] See Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) 10-40.

[3] *DA v ANC* (supra) at 11. In this context, Roux warns that the term 'democracy' will be understood as a reference to majority-rule, rather than the deeper principle of democracy. He also argues that this case highlights the court's reluctance to super-impose its own conception of democracy and (therefore) the limited normative effect of unqualified references to 'democracy' in the Constitution. Roux (supra) at 10-40.

[4] See FC s 157(3).

[5] *DA v ANC* (supra) at 27.

[6] Ibid at 25.

[7] 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC)('*DA v Masondo*').

[8] Ibid at para 18.

[9] Structures Act s 60.

[10] Structures Act ss 72-78.

[11] Municipal Finance Management Act 56 of 2000 s 166.

of those committees is *not* the deliberative process that characterizes the municipal council and its committees.[1]

(ii) *Municipal Council*

The Final Constitution does not separate legislative and executive roles at local government level: FC s 151(2) vests both the executive and legislative authority of a municipality in its municipal council. The Constitutional Court has described local government as 'a hybrid' system'.[2] Consequently, the council makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality.[3] In *Democratic Alliance v Masondo*, two different interpretations of the absence of a constitutional separation of powers at local government level were offered.[4] O'Regan J, in her dissenting judgment, explained the difference between local government and the other spheres of government (as regards the separation of powers) in the light of the nature of the functions of local government:

> They are not the high affairs of state — defence, foreign affairs, justice and security, but matters concerning delivery of services and facilities to local communities: power, water, waste management, parks and recreation and decisions concerning the development and planning of the municipal area. Thus executive decisions of municipal councils will ordinarily be decisions which have direct effect on the lives and opportunities of those living in the area.[5]

O'Regan J further elaborates on her view of the exclusive nature of the executive mayoral committee when she writes:

> Those tasks involve primarily municipal planning as well as the provision of services such as power, water, waste removal, municipal clinics and fire-fighting services and the provision of amenities such as sports grounds, parks, libraries, markets and municipal transport. Without doubt, these are important services and facilities relied upon by all members of the community. They are not areas of executive authority which require the confidentiality and political cohesion of an exclusive executive team modelled on the cabinet for national government.[6]

Sachs J, in his concurring judgment, took a more pragmatic approach and observed that '[b]ecause the Constitution is silent on the question of the kind of executive leadership that councils may have, I regard it as one of the areas not dealt with in the Constitution and accordingly left for legislative determination.'[7]

[1] *DA v Masondo* (supra) at paras 19-33. See also Roux (supra) at 10-40 and Nico Steytler & Jaap de Visser *Local Government Law in South Africa* (2007) 3-40.
[2] *DA v Masondo* (supra) at para 21.
[3] FC s 160 (1).
[4] Ibid.
[5] Ibid at para 60.
[6] Ibid at para 77.
[7] Ibid at para 48.

Justice Sachs' interpretation is to be preferred, particularly in light of the variety of local governments that exist in terms of the Final Constitution. Firstly, all but one of Justice O'Regan's examples of 'high affairs' are exclusive national government functions. That they are exclusive national powers undercuts the juxtaposition of local government and provincial governments. Furthermore, the emergence of metropolitan municipalities with more autonomy, the responsibility to oversee the lion's share of national economic activity and bigger budgets than some provinces, suggests a somewhat different landscape than the community services view espoused by Justice O'Regan.

The consolidation of both legislative and executive roles in the council does not mean that the council takes all decisions.[1] Decision-making powers may be delegated to other structures and office-bearers within the municipality.[2] However, the council makes decisions concerning the exercise of all powers and the delegation of powers does not divest the council of any of its responsibilities. The Final Constitution provides that certain functions may not be delegated by the council. They are —

(a) the passing of by-laws;
(b) the approval of budgets;
(c) the imposition of rates and other taxes, levies and duties; and
(d) the raising of loans.[3]

The absence of a constitutionally determined separation of powers at municipal level should be viewed in light of a municipality's specific developmental mandate. The Final Constitution charges a municipality with the duty to provide 'democratic development' in its area of jurisdiction.[4] The objects of local government, as provided in FC s 152, are useful in the interpretation of this mandate. The Final Constitution not only formally instructs a municipality, in FC 152(1)*(b)*,*(c)* and *(d)* to guarantee adequate service delivery, social and economic development and a safe and healthy environment — it provides some substantive guidelines as to how a municipality should go about fulfilling these responsibilities. FC s 152(1)*(a)* and *(e)* make it clear that a municipality should do so in a manner that not only enhances and nurtures democracy, but in a fashion that also promotes participation and inclusiveness. Consistent with these desiderata is the notion that the municipal council, where a variety of parties, interests and views prevalent in the municipality are present, is the organ that 'makes decisions concerning the exercise of all powers'. The Final Constitution's intention here is not to limit the imperative of open debate in a transparent setting only to legislative decisions. Instead, the

[1] We believe that Bekink is wrong on this point. See Bekink (supra) at 229 n 73.
[2] See also *DA v Masondo* (supra) at para 21.
[3] FC s 160(2).
[4] As Cameron puts it, '[t]he role of local government has to shift from traditional local service delivery and administration to local socio-economic development'. Robert Cameron 'The Upliftment of South African Local Government' (2001) 27 *Local Government Studies* 104.

Final Constitution sought to extend this imperative to all council decisions. The fact that a council may delegate powers to organs within the municipality does not undermine this duty to provide open, accountable and transparent government. The ultimate responsibility for decisions taken in terms of delegated authority remains with the council. In the same vein, the council has the ability to revisit any decision taken in terms of delegated authority[1] or revisit the delegation of authority.

The Final Constitution provides that national legislation may provide criteria for determining the size of a municipal council.[2] The Structures Act provides that the councils of local and district municipalities may not be bigger than 90 members.[3] Metropolitan councils may not be bigger than 270 members.[4] The Act[5] instructs the Minister for local government to promulgate a formula, based on the number of voters in the municipal area, which produces the size of a particular municipal council.[6] The MEC for local government eventually determines the size of the council when he or she establishes the municipality.[7] Under certain circumstances, the MEC can deviate from the Minister's formula.[8]

A majority of the members of a council must be present at a meeting of the council before a vote may be taken on any matter.[9] The question arises as to whether the phrase 'a majority of the members of a Council' refers to a majority of council seats or to a majority of councillors. In other words, does the meaning of 'a majority of the members of a Council' change when the total number of councillors is (temporarily) reduced due to a vacancy? In *Oelofse v Sutherland,* the High Court interpreted the quorum requirement as set out in FC s 160(3)*(a)* as follows: '[A] municipal council must have at least one half plus one of the number of potential council seats, allocated to the particular council by the MEC for local government, to be filled by incumbents before the council can function.'[10] The quorum therefore does not change when the total number of councillors is reduced due to a vacancy.[11]

Council decisions are taken by a majority of the votes cast.[12] That means that a majority of the councillors present in a (quorate) council meeting must vote in

[1] The principle of inclusivity has found further expression in s 59(3)*(a)* of the Municipal Systems Act 32 of 2000 which provides that a quarter of the municipal council can demand a review of a decision taken in terms of delegated authority.

[2] FC s 160(5)*(a)*.

[3] Structures Act 20(1)*(b)*.

[4] Structures Act 20(1)*(c)*.

[5] Structures Act 20(1)*(a)*.

[6] See *Executive Council Western Cape* (supra) at paras 89-95 (Constitutional Court dismissed a claim that this section is unconstitutional because it encroaches on provincial powers by providing a 'mandatory formula' instead of criteria to be taken into account.)

[7] Structures Acts 18(3).

[8] See further Steytler & De Visser (supra) at 3-2.

[9] FC s 160(3)*(a)*; Structures Act s 30(1). See also Steytler & De Visser (supra) at 3-12.

[10] *Oelofse & Others v Sutherland & Others* 2001 (4) SA 748, 751 (T).

[11] See Steytler & De Visser (supra) at 3-12. See also Bekink (supra) at 264.

[12] FC s 160(3)*(b)*.

favour of a particular proposal before a decision can be taken. The Structures Act provides for a solution in the event of an equality of votes, namely that the presiding councillor casts an extra vote.[1] Certain matters can only be determined by a majority vote of the councillors. With regard to those matters, a majority of all the councillors must vote in favour of a particular proposal before a decision can be taken. All those matters are listed in FC s 160(2):

(a) passing of by-laws;
(b) approving the budget;
(c) imposing rates and other taxes, levies and duties; and
(d) raising loans.[2]

In line with the interpretation of FC s 160(3)*(a)* offered above, FC s 160(2) must refer to a majority of seats and not councillors.

FC s 160(1)*(b)* provides that a municipal council must elect its chairperson. The implementation of this provision in the Structures Act has resulted in a separation of the chairperson of the council (speaker) from the mayor.[3] In nearly all municipalities,[4] the chairperson is called a speaker and is not the same person as the mayor. This is not the inevitable consequence of the Final Constitution's requirement that each municipal council elects a chairperson. The legislator can still opt to collapse the chairperson and the mayor into one office — as often occurred prior to the Structures Act. The fact that, in some limited instances (the so-called 'plenary-type' municipalities) the two offices are occupied by one office-bearer bears out this thesis.

The Final Constitution provides two important principles that support open and transparent debate at council meetings. Firstly, it provides for the privileges and immunity of councillors. Secondly, it provides that council meetings must be open to the public.

FC s 161 provides that national legislation can determine a framework for provincial legislation on the privileges and immunity of municipal councils and their members.[5] Section 28 of the Structures Act provides this national framework. It states that this provincial legislation must provide at least:

(a) that councillors have freedom of speech in a municipal council and in its committees, subject to the rules and orders;[6] and

[1] Structures Act s 30(4).
[2] FC s 160(3)*(b)*.
[3] Structures Act s 36.
[4] Municipalities of the plenary type are not included. See § 22.2 *(a)*(iv) supra. See also Structures Act ss 9*(c)* and 36(5).
[5] See Steytler & De Visser (supra) at 3-15.
[6] Structures Act s 28(1)*(a)*. Cf Bekink (supra) at 270. Bekink appears to suggest that the freedom of speech does not exist if not provided for in a municipality's rules of order when he advises councils to make provision for privileges and immunities in view of the phrase 'subject to the rules and orders'. This view cannot be supported: (the absence of) a by-law cannot trump a constitutional right or some other constitutional protection. The phrase 'subject to the rules and orders' refers to the limits on freedom of speech imposed by such rules and not to the granting of freedom of speech.

(b) that councillors are not civilly or criminally liable for anything that they have said in, produced before or submitted to the council or any of its committees or for anything revealed as a result of anything that they have said in, produced before or submitted to the council or any of its committees.[1]

In provinces where this provincial legislation has not (yet) been enacted, section 28(1) applies as the basis for privileges and immunities of councils and councillors.[2]

Can a councillor be held personally liable for a vote he or she cast in a council meeting or for statements made during a council meeting? *Swartbooi v Brink* dealt with an appeal against a High Court ruling, setting aside an unlawful council resolution and holding all councillors who voted in favour of the resolution personally liable for damage caused by the resolution.[3] On appeal, the councillors invoked FC s 161 (and Structures Act s 28). The Constitutional Court had to consider a number of arguments. The first contention was that these provisions protect legislative functions (i.e., deliberations on a proposed by-law) only and do not extend to executive and administrative functions. The Court disagreed and held that the protection offered by said provisions is not dependent on whether the councillor participated in legislative, executive or administrative activities.[4] It was also argued that section 28 of the Structures Act exceeds the parameters set by the Final Constitution because it includes conduct in committees, while FC s 161 makes no mention of committees. As the conduct in question took place in full council, the Court did not need to address this issue. However, it hinted that the function or the purpose of the committee may be relevant to the question as to whether a participating councillor is exempted from liability for anything said or done in that committee.[5] The third argument was that immunity could not apply to conduct in support of acts later set aside. This argument, too, was dismissed by the Court: protection of lawful acts only would be too limited to fulfil the provision's purpose of encouraging open debate.[6] Importantly, the Court ruled that the statements made by the mayor outside the council meeting fell outside of the immunity protection offered by the Final Constitution and the Structures Act. Conduct is protected if it is related to the council: statements or submissions must be made to the council or things must be produced before the council.[7]

[1] Structures Act s 28(1)*(b)*.
[2] Structures Act s 28(2).
[3] *Swartbooi & Others v Brink & Another (2)* 2006 (1) SA 203 (CC), 2003 (5) BCLR 502 (CC).
[4] Ibid at paras 13-16.
[5] Ibid at para 17.
[6] Ibid at paras 19-20.
[7] See also *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC) (Constitutional Court held that a councillor's immunity does not extend to his or her appearance in the provincial legislature, pursuant to FC 115.)

The municipal council must conduct its business in an open manner, and may close its sittings only when it is reasonable to do[1]. The same principle applies to its committees.[2] Not all committees provided for in the Structures Act are subject to this principle. Whether or not a committee is a committee 'of the council' is the deciding criterion. In *Democratic Alliance v Masondo*, Langa DCJ, writing for the Court, investigated the various provisions in the Constitution that refer to committees of the council.[3] He concluded that 'the committees referred to in sections 160(6)*(c)* and 160(8) (the committees of a municipal council) are the same committees that are referred to in sections 160(1)*(c)* and 160(5)*(b)*, namely, committees which are elected by the municipal council.'[4] For example, the mayoral committee, established for the purpose of assisting the executive mayor, and made up of councillors selected by the executive mayor, is not a committee 'of the council'. It is therefore not bound by FC s 160(7).[5] The executive committee, however, is constituted by councillors elected by the council, and is bound by FC s 160(7).

(iii) *Executive*

As discussed earlier, the Final Constitution does not deal elaborately with executive leadership at local government level. As Sachs J noted in *Democratic Alliance v ANC*,[6] the exact contours of executive leadership was left for legislative determination. Only three provisions make direct reference to executive leadership. FC s 160(1)*(c)* provides that a municipal council may elect an executive committee (and other committees) subject to national legislation. FC ss 160(5)*(b)* and *(c)* state that national legislation may provide criteria for determining *(a)* whether municipal councils may elect an executive committee, and *(b)* what the size of the executive committee may be. The national legislation, envisaged by all three provisions, is the Structures Act. This Act entitles only a municipality of the 'collective executive type' to elect an executive committee. In *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development*, it was argued that FC s 160(5)*(b)* limits section FC s 160(1)*(c)*.[7] That is, the applicant contended that national legislation on executive committees may only deal with the size of executive committees and may not preclude municipalities from electing an executive committee. The Constitutional Court dismissed this argument by pointing out that FC s 160(1)*(c)* clearly conveys the message that 'the right of municipalities to elect committees will *not* prevail where there is national legislation to the contrary'.[8]

[1] FC s 160(7).
[2] FC s 160(7).
[3] 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC)('*DA v Masondo*').
[4] Ibid at para 20.
[5] See, for example, Bernard Bekink *Principles of South African Government Law* (2006) 268.
[6] *DA v Masondo* (supra) at para 48.
[7] *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at paras 86-88.
[8] Ibid at para 87 (emphasis added).

(iv) *Traditional leaders*

Since the adoption of the Interim Constitution, there has been considerable contestation in local government about the role of traditional leadership.[1] The undisputable trend, however, is that the transformation of local government has resulted in a progressive curtailment of traditional authority in local government matters.[2]

Prior to the Local Government Transition Act (LGTA),[3] traditional authorities often performed local government functions in the former 'homelands'.[4] When Interim Constitution s 179(1) stipulated that 'a local government shall be elected democratically', the writing appeared on the wall for the role of traditional authorities in local government. However, two aspects of the transitional system for local government offered practical solutions that served to maintain much of the status quo. Firstly, the LGTA provided for the possibility that traditional authorities could be recognized as local government bodies.[5] Secondly, Interim Constitution s 182 afforded traditional leaders the right to be *ex officio* members of the municipal council in their area (with full voting rights).[6]

The Final Constitution limited the official role of traditional authorities by providing that municipal councils be elected and by requiring the establishment of democratic local government for all parts of South Africa.[7] However, the delay associated with many of the Final Constitution's provisions on local government postponed, temporarily, the traditional authorities' fate. The provision in FC Chapter 12 that national legislation may provide a role for traditional leadership as an institution at local level on matters affecting local communities did little to clarify the status of traditional authorities.[8]

The demarcation of 'wall-to-wall' municipalities in 2000, pursuant to the instruction in the Constitution, did away with the recognition of traditional authorities as local government bodies. The simultaneous coming into operation of the Structures Act closed the chapter on the voting rights of traditional leaders by reducing the role of traditional authorities in municipal councils to an advisory capacity.

[1] See Bekink (supra) at 195-211.

[2] After the writing of this chapter, the Constitutional Court considered the role of traditional leaders in *Shilubona & Others v Nwamitwa* [2008] ZACC 9 (4 June 2008).

[3] Act 209 of 1993.

[4] See Tom Bennet & Christina Murray 'Traditional Leadership' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) 26-39.

[5] LGTA s 1(2).

[6] See Bennet & Murray (supra) at 26-35 fn 4.

[7] Ibid at 26-36.

[8] FC s 212(1).

Traditional leaders, identified by the MEC for local government,[1] may participate in the proceedings of the municipal council in the municipal area where they 'traditionally observe a system of customary law'.[2] That said, they possess no right to vote. In addition, before a municipal council takes a decision affecting the area of a traditional authority, it must give the relevant traditional leader an opportunity to express a view on the matter.[3] This right exists independently of the rights of selected traditional leaders to participate in the council.

22.3 Municipal Powers and Functions

(a) Introduction

The Final Constitution repositions local government in the intergovernmental arena. It does so by not only introducing local government as one of the three 'spheres' of government but also by investing local government with constitutionally protected powers.

Before the constitutional scheme for these powers is examined, it is necessary to consider the judgment of the Constitutional Court in *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others*.[4] Even though the matter was decided in terms of the Interim Constitution[5], the judgment is important because of the statement made by the Constitutional Court about the status of local government in the post-1994 constitutional framework.

The parties in the conflict were the insurance company Fedsure and the four metropolitan substructures and the metropolitan council of Johannesburg. Fedsure agitated against revenue raising measures imposed by one of Johannesburg's substructures. It argued, amongst other things, that the municipality's decisions were *ultra vires*.[6] Alternatively, Fedsure argued, the budgets of two of the four substructures of the metropolitan area had been approved in an irregular manner. On appeal, the Constitutional Court had to determine whether or not the above resolutions constituted 'administrative action' and were therefore subject to IC s 24 — the right to just administrative action. The relevant municipal councils contended that the resolutions constituted *legislative* rather than *administrative* action, and accordingly were not subject to IC s 24.

The Court agreed with the councils and held that the power of a municipal council to set taxes or rates or make an appropriation out of public funds 'is a

[1] See Bennet & Murray (supra) at 26-37 (The authors seem to suggest that the local House of Traditional Leaders has the power to identify the traditional leader eligible for participation. We would argue that the Act places that authority with the MEC for local government with an advisory role for the local House.)

[2] Structures Act s 81(1).

[3] Structures Act s 81(3).

[4] 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC)('*Fedsure*').

[5] At the time when the proceedings were instituted, the Interim Constitution was in force.

[6] Jonathan Klaaren 'Redlight, Greenlight: *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council; Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*' (1999) 15 *SAJHR* 200, 211.

power peculiar to elected legislative bodies'.[1] This finding prompted the Court to examine the status of municipal legislation. Prior to 1994, the principle of parliamentary sovereignty rendered legislation duly enacted by Parliament immune from any form of judicial review. 'Subordinate legislation', however, was subject to judicial review. In terms of such review, a court would establish whether the subordinate legislature had exceeded its powers or whether it had exercised them 'in a manner inconsistent with the limitations ordinarily attaching to the delegation of legislative power'.[2] Municipal legislative powers were delegated powers, and by-laws were subject to judicial review on the basis of reasonableness and the rules of natural justice. Moreover, they were treated as if they were executive acts.[3]

The Interim Constitution did away with the supremacy of Parliament. Parliament's legislation and every exercise of public power is now subject to constitutional control. The Interim Constitution further recognized and made provision for three levels of government. Thus, as the *Fedsure* Court stated, the constitutional status of a municipality is materially different from what it was when Parliament was supreme. The *Fedsure* Court made it clear that 'local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognized in the Constitution itself'.[4] Thus, the Court concluded that the enactment of legislation by an elected local council acting in accordance with the Constitution is a legislative and not an administrative act, and is therefore not subject to challenge by 'every person' affected by it on the grounds of administrative justice.[5]

In sum, the Court made two things clear.[6] Firstly, the institution of local government as a sphere of government and the powers of municipalities are now recognized and protected by the Final Constitution. Secondly, the exercise of municipal legislative power is no longer a delegated function subject to administrative review, but a political process that represents the will of the municipal residents.

(b) FC section 151(3)

(i) *'Right to govern'*

A municipality has the right to govern. Two observations can be made with regard to this phrase. Firstly, the Final Constitution does not employ a 'rights

[1] *Fedsure* (supra) at paras 44–46.
[2] Ibid at para 29.
[3] 'The rules of administrative justice are of cardinal importance in matters affecting local government. These are the rules which determine the validity of *both the legislative* and the executive acts of local bodies'. Gretchen Carpenter *Introduction to South African Constitutional Law* (1998) 433 (emphasis added).
[4] *Fedsure* (supra) at para 26.
[5] See Nico Steytler & Jaap de Visser *Local Government Law in South Africa* (2007) at 5-10ff.
[6] Ibid at 5-11.

terminology' with reference to national or provincial government authority but uses the word 'right' in FC s 151(3) and (4). The Final Constitution thus emphasizes the existence of a municipal entitlement to govern that can be legitimately claimed and defended in terms of the Final Constitution. Secondly, the use of the verb 'govern', which again does not appear elsewhere in the Constitution, connotes a regulatory and policy making role. The two most appropriate dictionary meanings given to the word 'govern' are 'to conduct the policy and affairs' and to 'constitute a rule, standard, or principle'.[1] Both suggest that a municipality's right to govern is more than the right to implement or to administer laws.

The Final Constitution gives further content to a municipality's right to govern by presenting three instruments that a municipality may employ. Firstly, FC s 156(1) provides that a municipality has 'executive authority', which, in the case of a municipality can be defined as the authority to implement national, provincial and municipal laws. Secondly, the same provision affords municipalities 'the right to administer', which connotes the daily running and management through planning and decision-making of a particular public service or matter. Finally, FC s 156(2) complements the executive authority and the administrative authority with the authority to 'make and administer by-laws'. In somewhat circular reasoning, the Final Constitution affords the municipality the authority to administer by-laws for the effective administration of the matter which it may administer. The emphasis on administration in FC s 156(2) is sometimes interpreted as an indication that the legislative role of municipalities is subservient to its administrative role.[2] However, in *Fedsure,* the Constitutional Court made it clear that municipal councils are deliberative legislative assemblies with legislative powers that are guaranteed in the Final Constitution. The linking of municipal legislative powers to the administration of various matters does not limit local government's legislative power.[3] The phrase 'matters which the municipality may administer' is aimed at delineating the functional scope of municipal legislative authority rather than inserting an inherent qualification into a municipality's power to legislate within that functional scope. In addition, an inferior legislative role for municipalities cannot be reconciled with FC s 43. This provision vests the Republic's legislative authority in Parliament, provincial legislatures and municipal councils. In doing so, it does not treat a municipal council differently from its provincial or national counterparts.

The Final Constitution contains a number of provisions that relate to the 'manner and form' of municipal law making. As explained earlier, the first text

[1] *South African Concise Oxford Dictionary* (2002).

[2] See Christina Murray 'The Constitutional Context of Intergovernmental Relations in South Africa' in Norman Levy & Chris Tapscott (ed) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001) 66, 71. See also Bernard Bekink *Principles of South African Local Government Law* (2006) 216 and 229 (Bekink even goes so far as argue that 'the authority to exercise legislative authority follows from the authority to exercise executive authority'.)

[3] See further Jaap de Visser *Developmental Local Government — A Case Study of South Africa* (2005) 114.

that was submitted for certification to the Constitutional Court did not comply with CP X.[1] CP X demanded that '[f]ormal legislative procedures shall be adhered to by legislative organs at all levels of government'. In the *Second Certification Judgment*, the Court was satisfied that the amended text met the demands of CP X.[2] The Final Constitution demands due process during the law making process by, firstly, providing that, before the adoption of a by-law, members of the Council must be given reasonable notice.[3] A municipality's internal rules should give precise content to the term 'reasonable notice'. Bekink contends that national legislation should prescribe a minimum notice period.[4] However, we suggest that this falls within municipal autonomy. Municipalities have the discretion to determine a notice period, provided that the period satisfies the reasonableness requirement of FC s 160 (4) in the Final Constitution. This requirement governs both the time period for councillors to familiarize themselves with the draft before the relevant council meeting and the manner in which councillors are given access to the draft by-law. In addition, the Final Constitution places a high premium on transparency and consultation before and after the adoption of a by-law. A proposed by-law must be published for public comment[5] and, once it is in force, it must be accessible to the public.[6] A by-law may be enforced only after it has been published in the official gazette of the relevant province.[7] The provincial authorities that manage a provincial gazette must publish a municipal by-law upon request by the municipality.[8]

(ii) *'On its own initiative'*

When the Final Constitution provides, in FC s 151(3), that a municipality may govern 'on its own initiative', it marks the end of the era when municipalities were the implementers of national and provincial legislation and had no policy making authority of their own. Under the Final Constitution, municipalities do not have to await legislative or executive instruction before using their legislative, executive and administrative authority.

When Bekink contends that 'the detailed powers and functions of local governments have to be determined by laws of a competent authority', he assumes

[1] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 301.

[2] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at paras 73-82.

[3] FC s 160(4).

[4] Bekink (supra) at 231. The author seems to contradict himself when he suggests that municipal rules and orders should address issues such as 'reasonable notice'. Ibid at 232.

[5] FC s 160(4).

[6] FC s 162(3).

[7] FC s 162(1).

[8] FC s 162(2).

that such detail in statutory law is required before a municipality may exercise any of its original powers. This assumption is not correct: it constricts a municipality in its right to exercise powers 'on its own initiative'. This view is supported by the jurisprudence of the Constitutional Court on the meaning of 'original powers'. In *Robertson*, for example, the Constitutional Court made it clear that the original power to levy rates is not dependent on enabling national legislation.[1]

Original powers are not boundless. A municipality must exercise its legislative, executive and administrative authority within the parameters set by national and/or provincial law. An important consequence of the constitutional encouragement to municipalities to govern on their own initiative is that, should there be no national or provincial law on an original local government matter, there is no limit on the municipality's scope to determine the content of its legislative, executive or administrative decisions. The only limits are those limits imposed by the Final Constitution itself. That said, limits on municipal powers may still be imposed after the exercise of original municipal powers by national legislation and/or provincial legislation.

(iii) *'Local government affairs of its community'*

A municipality's right to govern, using its own initiative and employing the governance instruments available to it, extends to the 'local government affairs of its community'. It could be argued that this phrase in FC s 151(3) suggests that municipalities possess plenary powers over local government affairs. On such a reading, a municipality would then have authority over any matter that concerns the local affairs of its community. The granting of autonomous plenary powers to local government in the Final Constitution is not out of step with international practice. The Constitution of the Netherlands, for example, grants municipalities the authority 'to regulate and administer their domestic affairs'.[2] This phrase refers to local matters that have not attracted any provincial or national regulation.[3] However, we would contend that FC s 151(3) does not contain a separate description of the functional scope of municipal powers. Such a residual or plenary power interpretation would not accord with the structure of the Final Constitution. The Final Constitution allocates plenary, residual powers to the national government alone. It limits provincial and municipal authority to matters listed in schedules 4 and 5. The phrase 'local government affairs of its community' must, therefore, be read to refer to the functional scope of municipal authority as defined in the relevant sections of the Final Constitution.

[1] *City of Cape Town v Robertson* 2005 (2) SA 323 (CC), 2005 (3) BCLR 199 (CC)('*Robertson*') at para 60. See § 22.5*(c)*(i) infra.

[2] Constitution of the Kingdom of the Netherlands art 124(1) translated in Leonard Besselink *Kingdom of the Netherlands Charter and Constitution* (2004).

[3] E Brederveld *Gemeenterecht* (7th Edition, 2005) 9.

FC s 156(1) defines the functional scope of municipal authority by linking the governance instruments (i.e., legislative, executive and administrative authority) to the local government matters listed in schedule 4B and 5B of the Final Constitution and any other matter assigned to a municipality by national or provincial legislation. These provisions make clear the distinction and the difference between original powers and assigned powers. The Constitutional Court has stated that: '[A municipality's] power may derive from the Constitution or from legislation of a competent authority or from its own laws'.[1] The Final Constitution allocates a further set of original powers in the form of fiscal authority. A municipality's right to impose rates on property and surcharges on fees for services rendered is constitutionally guaranteed.[2] This provides local government with a firm base for generating revenue from property rates and charges on user fees (especially electricity). National legislation can authorize local government to impose other taxes, levies and duties.[3] The obvious significance of the notion of original powers lies in the fact that these powers of local government cannot be removed or amended by national or provincial legislation. They cannot be changed other than by an amendment to the Final Constitution itself. Moseneke J recognizes the import of these original constitutional powers for local government's institutional integrity when he writes:

> A municipality under the Constitution is not a mere creature of statute otherwise moribund save if imbued with power by provincial or national legislation. A municipality enjoys 'original' and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent that the Constitution permits.[4]

Whereas the Final Constitution protects these original local government powers, it does not define them. There is considerable overlap between the functional areas, mentioned in schedules 4B and 5B and the functional areas mentioned in schedules 4A and 5A. Often, the Final Constitution distinguishes a local government competency from a national and/or provincial competency by the mere addition of the word 'municipal' — schedule 4A's 'health services' and schedule 4B's 'municipal health services' being a case in point. Another phenomenon is the appearance of national and/or provincial competencies that are inclusive of a local government competency. For example, schedule 4A's 'pollution control' is inclusive of schedule 4B's 'air pollution'. The Final Constitution itself does not offer clear solutions for the uncertainty created by these overlapping powers.[5]

[1] *Robertson* (supra) at para 60.
[2] FC s 229(1). See also *Robertson* (supra) at para 61.
[3] FC s 229(1)*(b)*.
[4] *Robertson* (supra) at para 60.
[5] Cf Bekink (supra) at 216 (Bekink suggests that the Constitution provides 'an exact indication of such powers and functions'. He appears to underestimate the difficulties surrounding the interpretation of the Schedules.) For a discussion of the type of solutions for overlap between competencies, see Nico Steytler & Yonatan Fessha 'Defining Provincial and Local Government Powers and Functions' (2007) 124 *SALJ* 320.

FC s 156(5) affords local government 'incidental' powers: 'A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions'.[1] This section should not be interpreted in a narrow or literal sense.[2] Instead, local government's developmental mandate should be broadly construed.[3]

The incidental power doctrine was applied in *Ex parte Western Cape Provincial Government and Others: In re: DVB Behuising (Pty) Limited v North West Provincial Government and Another*[4] — albeit in respect of provincial powers. In *DVB Behuising*, the Constitutional Court concluded that certain tenure and deeds registration provisions in a provincial proclamation, although strictly falling within a national competence, were within the competence of the provincial government. It arrived at this conclusion on the basis of the fact that these provisions were 'inextricably linked to the other provisions of the Proclamation and were foundational to' the planning, regulation and control of settlements, which the Court had already held to be of provincial competence. [5]

The incidental powers may include legislative powers.[6] The only requirement would be that the by-law is promulgated in terms of FC s 156(5) and is therefore 'reasonably necessary for, or incidental to the effective performance of its functions'. Some incidental matters, when subject to a literal interpretation, fall outside local government's core competencies. They remain, however, critical to the success of the administration of a particular matter. For example, while the Final Constitution does not explicitly grant local government criminal jurisdiction, the ability to impose penalties for transgressing a by-law may be enforced by the courts. Few would argue that this power is not 'incidental to the effective performance' of a local government function.[7] FC s 156(5) is not intended to increase the number of functional areas upon which local government can legislate.[8] It serves rather as an instruction to the courts to adopt a purposive approach to interpreting local government powers.

The interpretation of FC s 156(5) should be informed by two principles. Firstly, the purposive interpretation should clearly be linked to local government's developmental mandate. When plumbing the depths and limits of a municipal power, the constitutional promise of a local government that is equipped to initiate and to facilitate development should always be on the horizon. Secondly, FC s 156(5) should not be used to increase the functional ambit of local government's powers but rather to enhance the efficacy of administering an existing functional area.

[1] See also Municipal Systems Act 32 of 2000 s 8(2).
[2] Victoria Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) 15-20.
[3] See Steytler & De Visser (supra) at 5-6ff.
[4] 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC)('*DVB Behuising*').
[5] Ibid at para 96. See also Bronstein (supra) at 15–14.
[6] See Steytler & De Visser (supra) at 5-7 ff.
[7] See, for example, Bekink (supra) at 235 fn 105.
[8] See, generally, Jaap de Visser *Developmental Local Government — A Case Study of South Africa* (2005).

The authority of a municipality to establish and to direct municipal administration is an area that may be regarded as incidental to the performance of its functions. It is nevertheless afforded specific attention in the Final Constitution. The Final Constitution stipulates that a municipal council makes decisions concerning the exercise of all the powers and functions of the municipality.[1] In the same vein, it provides that the municipal council may employ the personnel it needs for the effective performance of its functions.[2] The municipality's autonomous authority over personnel affairs sets it apart from provincial government. Both national and provincial administrations are part of a single public service 'which must function, and be structured, in terms of national legislation'.[3] This requirement embraces the terms and conditions of employment in the public service. Even though provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations, such actions must occur within a uniform national framework.[4] This unique aspect of municipal autonomy is unlikely to be long-lived. At the time of writing, legislative amendments designed to realize a single public service, including local government, are on the cards.

(iv) *'Subject to national and provincial legislation'*[5]

FC s 151(3) also makes it clear that municipal authority is not boundless; the right to govern is subject to national and provincial legislation. With respect to assigned powers, it follows from the nature of the power that the legislative or executive act of assignment may place parameters on the exercise of municipal authority. These parameters determine the scope of the assigned authority. With respect to local government's original powers, it is important to note that these powers are not only constrained by the Final Constitution itself (e.g. by the Bill of Rights) but may also be constrained by national government and the provincial governments. As noted above, local government has authority over schedule 4B and 5B matters. However, the Final Constitution does not allocate the matters in schedule 4B and 5B exclusively to local government. National government and provincial government may still regulate those matters.[6] The local government matters listed in schedule 4B are part of the concurrent provincial and national legislative competence 'to the extent set out in section 155(6)*(a)* and (7)'.[7] Similarly, the local government matters listed in schedule 5B are part of the exclusive provincial competence 'to the extent set out for provinces in section 155(6)*(a)* and (7)'.[8]

[1] FC s 160(1)*(a)*.
[2] FC 160(1)*(d)*.
[3] FC s 197(1).
[4] FC s 197(4).
[5] See Nico Steytler & Jaap de Visser *Local Government Law in South Africa* (2007) 5-1.4 and 3.3.
[6] See ibid at 5-16ff.
[7] FC schedule 4.
[8] FC schedule 5.

Furthermore, national government and provincial governments have the authority to ensure that municipalities adequately perform in respect of these matters.[1] FC s 156(3) provides that, subject to FC s 151(4), a by-law that conflicts with national or provincial legislation is invalid.[2] Thus 'interference' by national government and provincial government in terms of schedule 4B and 5B matters is not only constitutionally permitted — it is required by their oversight responsibilities. In the words of the Constitutional Court:

> The powers and functions of municipalities are set out in section 156 but it is clear from sections 155(7) and 151(3) that these powers are subject to supervision by national and provincial governments, and that national and provincial legislation has precedence over municipal legislation. The powers of municipalities must, however, be respected by the national and provincial governments which may not use their powers to 'compromise or impede a municipality's ability or right to exercise its powers or perform its functions'.[3]

(v) *'As provided for in the Constitution'*

When FC s 151(3) subjects local government authority to national legislation and provincial legislation, it immediately continues by emphasising that these limits on local government authority must be 'provided for in the Constitution'. A similar approach is followed in FC s 156(3). FC s 156(3) establishes precedence of national legislation and provincial legislation over municipal legislation, provided that this legislation, in turn, does not contradict FC s 151(4). It is argued that the phrase 'as provided for in the Constitution' in FC s 151(3) refers to the constitutional basis and reach of national and provincial authority over local government.[4] The Final Constitution provides a general principle for determining the reach (and overreach) of national authority and provincial authority by providing that the national government and provincial governments 'may not compromise or impede a municipality's ability or right to exercise its power or perform its functions.'

This principle applies to both assigned and original powers. The reach of national or provincial authority over assigned powers may be contained in the legislative or executive act of assignment. However, the authority of the national or provincial government to set parameters on an assigned power is not unfettered. For example, the assignment of a power without ensuring the necessary resources would fall foul of FC s 151(4). Similarly, the assignment of a power that is made subject to unduly restrictive or burdensome criteria, conditions or monitoring requirements would constitute a breach of FC s 151(4).

[1] *White Paper on Local Government* (1998) 30.

[2] FC s 156(3).

[3] *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at para 29.

[4] This combination is not, as Bekink argues, a *contradictio in terminis*. There is no contradiction in the constitutional imposition of limits on how far national and/or provincial governments may go in circumscribing local government powers. Bekink (supra) at 220.

The reach of national or provincial authority over original powers requires careful examination and is considered in detail below.[1] This discussion of the validity of provincial and national legislation concerning original local government power differs from the debate on the concurrency of powers between provincial and national spheres on schedule 4A matters.[2] The concurrency of powers between provincial and national spheres means that both spheres share the same legislative competency. The override provisions found in FC ss 146, 148-150 determine which law prevails in a case of conflict. National and provincial authority over schedules 4B and 5B is not held concurrently with local government. National government and provincial governments are afforded certain legislative powers over local government. But these powers are themselves constrained,[3] as will be explained below. These powers and the concommittant constraints explain why Gideon Pimstone remarks that local government powers 'cannot in truth be termed concurrent with other spheres'.[4]

At times, national and provincial law-makers interpret their supervisory powers to mean that their legislation always prevails over municipal law. They err in this regard. For example, s 29(1) of the National Building Regulations and Building Standards Act[5] provides that 'the provisions of any law applicable to any local authority are hereby repealed in so far as they confer a power to make building regulations or by-laws regarding any matter provided for in this Act'. The provision aimed at 'sweeping up' any authority over building regulations that had been conferred on local government by any law in order to relocate that authority within national government. It is very hard to reconcile this intention with the Final Constitution's express grant of original legislative and executive authority to local government over 'Building Regulations' in schedule 4B. The Final Constitution does not give blanket regulatory power concerning schedule 4B and 5B matters to national and provincial government. National legislation or provincial legislation on local government matters must be enacted within, and are limited by, their respective FC Chapter 7 competencies.[6]

(vi) *National and provincial powers over original local government matters*

FC s 151(3) both sanctions and limits the national and provincial constraints on original local government matters. What follows is an analysis of the provisions in

[1] See § 22.3.6 (vi) infra.

[2] See Steytler & De Visser (supra) at 5-17.

[3] See *Basson & Others v City of Johannesburg Metropolitan Municipality & Others and Eskom Pension and Provident Fund v City Of Johannesburg Metropolitan Municipality & Others* 2005 JDR 1273 (T) at paras 40–42. The Development Facilitation Act 67 of 1995 was challenged as a violation of local government's power over 'municipal planning' (a schedule 4B competency). The Court rejected the argument with, amongst others, an interpretation that incorrectly assumes that local government powers are held concurrently with other spheres of government.

[4] Pimstone (supra) at 5A-28.

[5] 103 of 1977.

[6] See further Steytler & De Visser (supra) at 5-17.

the Final Constitution that inform these constraints. In our analysis, the location of a matter in either schedule 4B or schedule 5B of the Final Constitution has important consequences for the extent to which national or provincial governments can regulate that particular matter.

National government derives law-making powers over local government matters from two sources, namely FC ss 155(7)[1] and 44(1)*(a)*(ii). FC s 155(7) affords national government the power to 'regulate' the exercise by municipalities of their executive authority. This power is circumscribed by the qualification that it may be used to 'see to the effective performance by municipalities of their functions in terms of schedule 4 and 5' and by the use of the term 'regulating'. The legislative authority to regulate schedule 4B and 5B matters refers to the power of Parliament and provincial legislatures to enact legislation. The executive authority to regulate schedule 4B and 5B matters refers to the power of national and provincial executives to enact subordinate legislation. The executive authority to regulate schedule 4B and 5B matters should not be read so as to enable national executives and provincial executives to enact subordinate legislation without any empowering provisions in a national law or provincial law. The term 'regulating' in the context of FC s 155(7) has been held by the Constitutional Court to connote 'a broad managing or controlling rather than direct authorization function'.[2] The fact that it may be used only to see to the effective performance of functions reinforces this qualification. Thus, in terms of FC s 155(7), the powers of national government and provincial government are not meant to extend to the detail of schedule 4B matters, but rather envisage a framework within which local government is to exercise these powers. In other words, the regulatory power enables national government and provincial government to set essential national standards, minimum requirements, monitoring procedures, etc.[3]

National government may also legislate on schedule 4B matters on the basis of FC s 44(1)*(a)*(ii). The fact that there is no limitation in this provision could be construed as meaning that the national government possesses a broad legislative power that encompasses every aspect of the schedule's matters. However, the introduction to schedule 4B stipulates that the schedule contains local government matters that are of concurrent national and provincial legislative competence 'to the extent set out in section 155(6)*(a)* and (7)'. This raises two questions: does this qualification also apply to Parliament's legislative power in terms of s FC s 44(1)? Does FC s 155(7) qualify FC s 44(1) or is FC s 44(1) limited only by the general principles of FC ss 151(4) and 41*(g)*?

One might, on the text also, be inclined to argue that FC s 155(7) does not qualify FC s 44(1). Schedule 4B limits the competence of national government to FC s 155(7). However, FC s 155(7) in turn makes its application 'subject to section 44'. FC s 44 forms the bedrock of national law-making and it mentions the power of Parliament to legislate on schedule 4B immediately after the power to

[1] See the heading of FC sch 4B.

[2] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification Judgment*') at para 377.

[3] Steytler & De Visser (supra) at 5-21.

amend the Final Constitution itself. The argument that FC s 155(7) qualifies FC s 44(1) would not be consistent with the critical position FC s 44 occupies in the Final Constitution.

However, in *Premier of the Province of the Western Cape v President of the RSA & Others*,[1] the Constitutional Court made a remark that implies that Parliament's powers over schedule 4B are limited. The Court stated that '[l]ocal governments have legislative and executive authority in respect of certain matters but national and provincial legislatures both have competences (. . .) for *overseeing* its functioning.'[2] The use of the term *overseeing* is important — as is the reference to FC s 155(7) in the footnote. It would appear that the Court views national government's role in schedule 4B matters as regulatory rather than determinative and that the source for this limitation is FC s 155(7). In *Langeberg,* the Constitutional Court confirmed this view:

> [N]ational legislative authority includes the power to make laws for the country concerning all matters *except the functional areas described in Part 2* (sic) *of Schedule 4 and Part 2* (sic) *of Schedule 5*. In these areas, Parliament has *limited* legislative authority.[3]

These hints as to Constitutional Court's position can be supplemented by an argument based on the mandate of developmental local government. This mandate guides the interpretation of local government powers in a manner that recognizes the need for sufficient municipal discretion in regulating these matters while simultaneously maintaining the need for national oversight and regulation. Therefore, the answer to the question of whether or not FC s 155(7) qualifies FC s 44(1)*(a)*(ii) must be that *it does*. In sum, national government's legislative power concerning schedule 4B matters does not extend to the detail of schedule 4B matters. Rather, it is limited to the setting of a legal framework, including minimum standards and monitoring requirements.[4]

Not all national legislation on schedule 4B matters meets this standard. Provisions that offend the allocation of powers and functions set forth in the Final Constitution can, for example, be found in statutes that predate the Final Constitution. Section 29(8)*(a)* of the National Building Regulations Act is a case in point.[5] It provides that '[a] local authority which intends to make any regulation or by-law which relates to the erection of a building, shall prior to the promulgation thereof submit a draft of the regulation or by-law in writing and by registered post to the Minister for approval.' Section 29(8)*(b)* of the Act makes the consequences of non-approval clear by providing that '[a] regulation or by-law referred to in paragraph *(a)* which is promulgated without the Minister previously having approved of it shall, notwithstanding the fact that the promulgation is effected in accordance with all other legislative provisions relating to the making and promulgation of the regulation or by-law, be void'.

[1] 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC).
[2] Ibid at para 51 (emphasis added).
[3] *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) at para 25 (emphasis added).
[4] See further Steytler & De Visser (supra) at 5-22ff.
[5] Act 103 of 1977.

In a recent decision, the Supreme Court of Appeal was asked to assess the requirement in the Cape Ordinance 20 of 1974 that a municipality obtain the Premier's approval for the imposition of property rates.[1] The imposition of property rates is another original competency of local government: it is conferred on municipalities in FC s 229 but subject to national regulation. The *CDA Boerdery* Court concluded that the requirement of prior approval did not survive the radical change to local governments powers brought about by the Final Constitution. The *CDA Boerdery* Court held that said provisions were 'impliedly repealed'. The Court made it clear that its judgment does not render unconstitutional all provisions that require provincial approval of municipal legislative acts. Its judgment 'does not pre-judge the different question whether the enactment of such a requirement within the new constitutional framework would be constitutionally valid'.[2] Therefore, even if it were assumed that a requirement of national approval would receive the same treatment as a requirement of provincial approval, the judgment does not provide finality on the question as to whether section 29(8) of the National Building Regulations is constitutional. However, the judgment is instructive, particularly in light of the pre-constitutional rationale and spirit of the National Building Regulations Act described above. The *CDA Boerdery* Court reached its conclusion by comparing the local government context that prevailed during the enactment of the approval requirement with the vastly different local government context that prevails now. With regard to the now impugned role for the Premier in the Cape Ordinance, the Court stated that

> the Administrator's role in approving or disapproving rates must be understood in that specific pre-constitutional setting. . . . The approval requirement was a specific product of the old-order constitutional scheme, tailored to its hierarchy and matched to the Administrator's supervisory control over municipalities and his executive role in relation to them.[3]

The requirement of prior approval of building regulations in terms of the National Building Regulations Act must be interpreted, and set off against the new constitutional dispensation for local government, in much the same way. It is a product of the pre-constitutional era. It must be modified or tailored to meet the new local government dispensation. In terms of this new dispensation, the operation of FC s 156(3) would render a by-law on building regulations that has not been approved invalid unless the National Building Regulations Act violates FC s 151(4). The National Building Regulations Act would appear to offend FC s 151(4). To require the national approval of or concurrence with a municipal by-law goes much further than regulation. National government is permitted by the Final Constitution to regulate the municipal exercise of its functions related to building regulations with a view to seeing to the effective performance of it. As outlined above, the Constitutional Court has described this power as 'a broad

[1] *CDA Boerdery (Edms) Bpk & Others v The Nelson Mandela Metropolitan Municipality & Others* 2007 (4) SA 276 (SCA).
[2] Ibid at para 41.
[3] Ibid at paras 34-35.

managing or controlling rather than direct authorisation function'. It is hard to see the requirement of prior approval of all municipal by-laws on a particular original competency as anything other than direct authorization. It replaces a municipal decision with a national decision. That arrangement is inconsistent with the express wording of the Final Constitution and its scheme of co-operative government.

The sources of provincial power to legislate on schedule 4B and 5B matters can be found in two provisions: FC ss 155(6)*(a)* and 155(7).[1] In terms of FC s 155(7), provincial government has a regulatory power. The same considerations that apply to national government's powers under FC s 155(7) apply here: provincial legislation on schedule 4B and 5B matters must be limited to framework legislation that does not extend to the detail of these local government matters. Section 26 of the KwaZulu-Natal Road Traffic Act[2] is an example of provincial legislation that exceeds the limits set by section 155(7). It states that local authorities can only make by-laws 'with the concurrence of the MEC for Transport'. For the same reasons as outlined above with regard to the National Building Regulations Act, this provision is unconstitutional. Similarly, any provision whereby automatic provincial 'overrides' are built into the regulatory framework, or any provision that permits the provincial government to ignore municipal law, would go further than the Final Constitution currently permits.[3]

FC s 155(6)*(a)* states that provincial government has a duty to monitor and support local government in its jurisdiction. This responsibility can entail legislative measures that are aimed at either establishing a monitoring framework or influencing the manner in which local government administers such matters. The Constitutional Court has held that:

> the legislative and executive powers to support [local government] are . . . not insubstantial. Such powers can be employed by provincial governments to strengthen existing [local government] structures, powers and functions and to prevent a decline or degeneration of such structures, powers and functions.[4]

The *First Certification Judgment* Court held further that this power is to be understood in conjunction with the legislative and executive role granted to provincial government in FC ss 155(6)*(b)* and 155(7). In terms of these sections, the provinces must assert legislative and executive power in order to promote the development of local government's capacity to perform its functions and to manage its affairs. They may do so by regulating municipal executive authority, thus ensuring the municipalities' effective performance of their functions in respect of listed local government matters:

[1] See the heading of FC sch 4B.
[2] Act 7 of 1997.
[3] See, for example, Jaap de Visser 'Demarcating Provincial and Local Powers regarding Liquor Retail' (2004) 19(2) *SA Public Law* 376.
[4] *First Certification Judgment* (supra) at para 371.

> Taken together, these competences are considerable and facilitate a measure of provincial government control over the manner in which municipalities administer those matters in part B of [Schedules] 4 and 5. This control is not purely administrative. It could encompass control over municipal legislation to the extent that such legislation impacts on the manner of administering local government matters.[1]

The word 'monitor' (used in FC s 155(6)) was not interpreted by the Court as bestowing additional or residual powers of provincial intrusion on the domain of local government. 'Monitor' should be read as the power to measure or test, at intervals, its compliance with national and provincial legislative directives or with the Constitution itself.

Schedule 5 matters are of 'exclusive provincial legislative competence'. The heading of schedule 5B bears testimony to this when it includes local government matters 'to the extent set out *for provinces* in section 155(6)(a) and (7)'.[2] This exclusivity is, however, subject to FC s 44(2). FC s 44(2) enables national government to makes laws on schedule 5B matters when it is necessary for one of the grounds mentioned in FC s 44(2).

The next question is whether the Final Constitution prevents Parliament from extending its legislative efforts concerning schedule 5B to the 'details' of these local government matters. There appears to be no textual indication in the Final Constitution that could justify this conclusion. The heading of schedule 5B is of no use because it does not envisage national legislation on schedule 5B. On a purposeful reading of FC s 44(2), it must be concluded that such constraints have not been built into the constitutional scheme for national laws on schedule 5B matters.[3] In view of the fact that FC s 44(2) affords Parliament the power of legislative intervention, it should be able to extend its legislation to the particular details as well. In summary: if national legislation on a Schedule 5B matter passes the test outlined in the FC s 44(2), it is valid with respect to all aspects of the functional area.[4]

The example of 'traffic and parking' may be instructive. 'Traffic and parking' are local government matters on account of their location in schedule 5B. The power to pass framework legislation for the municipal exercise of lawmaking on these matters is reserved for provinces. However, Parliament can intervene if necessary for one of the reasons mentioned in FC s 44(2). The National Road Traffic Amendment Act enables, through s 80A(1)*(c)*, municipalities to make by-laws, with the concurrence of the Premier of the relevant province, on the appointment and licensing of parking attendants.[5] Local government's lawmaking

[1] *First Certification Judgment* (supra) at para 371. See also Pimstone (supra) at 5A-30.

[2] Emphasis added.

[3] This argument runs counter to what was previously argued by one of the authors. See Jaap de Visser 'Local Government Powers' (2002) 17 *SA Public Law* 232.

[4] See Nico Steytler & Jaap De Visser *Local Government Law in South Africa* (2007) 5-25.

[5] Act 21 of 1999. Section 80A(1)*(c)* of the National Road Traffic Amendment Act enabales municipalites to undue by-laws.

power concerning parking attendants is thus made subject to the concurrence of the Premier. The constitutionality of this requirement must be gauged by its necessity for and satisfaction of one of the grounds listed in FC s 44(2) (because, as outlined earlier, national legislation on Schedule 5B in terms of FC s 44(2) can extend to the detail of local government matters). It would defy common sense to maintain that the licensing of parking attendants requires national intervention in order to achieve national security or economic unity, to maintain national standards or to establish minimum standards. On the contrary, local government's developmental mandate provides a strong argument for the issue of parking attendants to be left to the municipality's discretion without requiring provincial approval. The maximization of the developmental impact of such policies whilst ensuring order and safety on municipal roads requires localized solutions. Thus, sound reasons exist to entrust municipalities with the authority to arrive at innovative approaches that are tailored to local circumstances. Section 80A(1)*(c)* of the National Road Traffic Amendment Act thus goes beyond what is constitutionally permitted.[1]

The limits imposed on national and provincial legislation in respect of the local government matters discussed above must be understood in light of the principle established in FC s 151(4). The protection of local government powers afforded by FC s 151(4) extends beyond the mere question as to whether or not authority to deal with a particular matter exists; it also deals with the manner in which the power is exercised.[2] This distinction is derived the Constitutional Court's holding in *Premier of the Province of the Western Cape v President of the RSA*.[3] The Constitutional Court emphasized that FC s 41(1)*(g)*, which contains the same message, is concerned with the way power is exercised, not with whether or not a power exists. The competency requirement deals with the question of whether or not the national or provincial government has the power to make laws on schedule 4B or Schedule 5B matters. Once it has been determined that national or provincial authority indeed extends to the subject matter at hand, FC s 151(4) protects local government against the use of that authority in a way that unduly interferes with a municipality's ability or right to exercise its powers or perform its functions.

If, for example, a provincial government enacts legislation containing a monitoring regime regarding the manner in which municipalities perform their function in relation to child care facilities (a schedule 4B matter), it is within the province's constitutional powers to do so. However, if this monitoring regime

[1] See Steytler & De Visser (supra) at 5-26.

[2] Bekink argues that FC s 151(4) represents the only protection for municipal law-making when he argues that it is 'the only protection given to municipalities regarding a total domination by national or provincial laws'. Bernard Bekink *Principles of South African Local Government Law* (2006) 220. The foregoing discussion on the limits to national and provincial law-making imposed by the headings to schedules 4B and 5B in conjunction with FC ss 155(6) and (7) point towards a broader protection than the one found by Bekink.

[3] *Premier of the Province of the Western Cape v President of the RSA & Others* 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC) at para 29.

is unduly burdensome — and compromises or impedes a municipality's ability to perform its functions — it falls foul of FC s 151(4)[1]

(c) Division of powers and functions within local government

The powers and functions discussed above are vested in local government as a sphere of government. Metropolitan municipalities have exclusive authority over these powers and functions.[2] However, the Final Constitution provides that a local municipality 'shares municipal executive and legislative authority in its area with a [district] municipality within whose area it falls'.[3] The Final Constitution requires that national legislation must make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both categories B and C.[4] The division does not have to be symmetrical; a division between one local municipality and a district municipality may differ from the division between another local municipality and the same district municipality. However, despite such differences, the legislation must take into account the need to provide municipal services in an equitable and sustainable manner.[5]

(d) Additional powers and functions[6]

The 'local government affairs of [a] community' embraces both original and assigned functions. That is, the Final Constitution envisages that additional powers and functions may be transferred to local government. Two modes of transferring powers and functions to local government need to be distinguished: namely assignment and delegation.[7] Assignment is the most important instrument for transferring additional functions to local government that national and provincial governments may employ. FC s 156(1)*(b)* provides that a municipality has authority over matters assigned to it by national or provincial legislation. Matters may be assigned to local government, in general, and individual municipalities, in particular. The legal regime for assignment is regulated in the Final Constitution and in the Municipal Systems Act.[8] Delegation is provided for in FC s 238*(a)*. FC s 238*(a)* provides that an executive organ of state in any sphere of government may delegate a power or function to any other executive organ of state.

[1] Cf Bekink (supra) at 220. Bekink contends that FC s 151(4) is triggered in the context of conflicting laws 'when national or provincial legislation is mainly directed at or has the effect of compromising or impeding a municipality's ability or right to exercise its powers or perform its functions'. To the extent that this interpretation underwrites the survival of legislation that compromises or impedes the authority and the autonomy municipalities, Bekinks reading cannot be supported.

[2] FC s 155(1)*(a)*.

[3] FC s 155(1)*(b)* and *(c)*.

[4] FC s 155(3)*(c)*.

[5] FC s 155(4). Parliament has provided for this legislation in Chapter 5 of the Municipal Structures Act. See further Steytler & De Visser (supra) at ch 5 para 4.

[6] See Steytler & De Visser (supra) at ch 5 para 5.

[7] Contractual agreements, such as agency, may also be utilized as a means of transferring certain operational elements of a national or provincial function.

[8] Act 32 of 2000 ss 9 and 10.

An assigning agent may set the parameters for the exercise of the assigned authority in the legislative act of assignment. However, these parameters may not be set in a manner that contravenes FC s 151(4). Conditions such as prior approval of municipal decisions or the imposition of national or provincial overrides of municipal decisions are not in keeping with FC s 151(4) — they conflict directly with the intention in the Final Constitution to separate assignment from delegation. As Gideon Pimstone notes: 'Sight should not be lost of the significance of the word 'assign', which contemplates not a delegation of the power but a taking over'.[1] The assignment is intended to be a complete transfer of the function: and it entails the final decision-making power in individual matters. The instrument of assignment is unsuitable for a transfer of power that leaves the final say in individual matters with the national government or the provincial government.

In terms of FC ss 44(1)*(a)*(iii) and 104(1)*(c)*, the national legislature or provincial legislatures can assign any of their legislative powers to specific municipal councils.[2] Parliament may assign any matter listed in schedule 4A, or any matter that falls within its residual competence. For example, Parliament could assign the power to regulate 'animal control' (a schedule 4A matter) to a municipality. This would give that municipality the right to regulate those matters within its area of jurisdiction. Provincial legislatures may assign any matters listed in schedules 4A or 5A.[3]

The question arises whether Parliament or a provincial legislature can assign powers and functions to local government in general. The abovementioned provisions refer to assignments to individual municipal councils. It would, however, be unduly rigid to hold that there is no constitutional basis for assignment of legislative powers to local government in general.[4] An Act of Parliament could assign a matter that falls outside schedules 4B or 5B to the entire local government sphere or to a category of municipalities. A provincial legislature can do the same and assign a matter to local governments in the province.[5]

For as long as the assigning Act is in force, a municipal council would possess the relevant legislative powers. The repeal of an assigning Act does not affect the validity of a municipal by-law that has already been passed.[6] A legislative power, whether original or assigned, is always discretionary. The municipality 'on the

[1] Pimstone (supra) at 5A-27.

[2] For Parliament, this power to assign excludes the power to amend the Final Constitution.

[3] See Steytler & De Visser (supra) at 5-40.

[4] See Steytler & De Visser (supra) at 5-40.

[5] See also 'Guidelines on Allocation of Additional Powers and Functions to Municipalities' GN 490, *Government Gazette* 29844 (26 April 2007)('Assignment and Delegation Guidelines') item 1. The item defines a 'legislative assignment' as an assignment in a national or provincial Act to local government in general or to a category of municipalities.

[6] Tshepo Madlingozi & Stu Woolman 'Provincial Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, Matthew Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) 19, 19-14.

receiving end' of the assignment is therefore not compelled to legislate. The assignment Act may, of course, circumscribe the scope of the municipality's legislative power.[1]

FC ss 99 and 126 allow Cabinet members and provincial MECs to assign executive powers to specific municipal councils. The assignment must be consistent with the Act in terms of which the relevant power or function is exercised or performed.[2] It takes effect upon a proclamation by the President or the Premier.[3] This mode of assignment differs from the aforementioned assignments. Firstly, it concerns executive powers only. Secondly, it entails compulsion; the relevant sections speak of the assignment of a matter 'that is to be exercised'. Therefore, whereas the assignment of legislative power allocates discretionary powers, the assignment of executive power allocates a duty to undertake a particular action. FC ss 99 and 126 executive assignments must be concluded by means of an agreement with a specific municipality.[4]

The requirement of an agreement means that the national government or a provincial government cannot be compelled to assign the relevant powers and functions to a municipality. Similarly, without consensus, a municipality cannot be compelled to accept the assignment of such powers and functions.[5] The requirement of an agreement also means that the assignment is terminated when either of the parties withdraws from the agreement.[6]

The discretionary nature of the assignment of powers and functions by the executive is curtailed by FC s 156(4). FC s 156(4) is a manifestation of the principle of subsidiarity. Generally, the principle of subsidiarity requires that the exercise of public power takes place at a level as close as possible to the citizenry. National government and provincial governments must, in terms of FC s 156(4), assign the administration of a matter listed in schedules 4A or 5A to a municipal council if four conditions are met:

(a) The matter in question 'necessarily relates' to local government;
(b) the matter would most effectively be administered locally;
(c) the municipality has the capacity to administer it; and
(d) the municipal council agrees to the assignment.

The subsidiarity principle applies only to the functional areas of schedule 4A and schedule 5A. Residual matters that fall within the sole domain of national competency[7] are not the proper subject of the subsidiarity principle.[8]

[1] See Steytler & De Visser (supra) at 5-40.
[2] FC ss 99*(b)* and 126*(b)*.
[3] FC ss 99*(c)* and 126*(b)*.
[4] FC ss 99*(a)* and 126*(a)*. See Steytler & De Visser (supra) at 5-40 ff.
[5] See Assignment and Delegation Guidelines (supra) items 9(2), 10(3) and 11(2). See also Bekink (supra) at 218 n 16.
[6] See Assignment and Delegation Guidelines (supra) item 9(4).
[7] See FC s 44(1).
[8] See Steytler & De Visser (supra) at 5-41.

A number of questions arise surrounding the intersection of FC s 156(4) and the above modes of assignment. The difficulties in harmonising FC s 156(4) and the other provisions on assignment may be solved by viewing FC s 156(4) as a principle or standard, rather than the articulation of a specific set of procedures. Does FC s 156(4) permit, for example, the assignment of legislative power? The provision itself deals with the assignment of the 'administration' of a matter. It does not refer to the assignment of legislative powers. However, this appears to be of little consequence as FC s 156(2) states that a municipality can make by-laws for the effective administration of the matters which it has the right to administer. The right to make by-laws flows from the right to administer a matter assigned in terms of FC s 156(4). Others contend that the act of an 'agreement' through which power is transferred points towards a limitation of FC s 156(4) to executive powers. Yet again, FC s 156(4) is directed at national and provincial 'governments': governments are generally understood to include their legislatures. Is FC s 156(4) then a basis for assignment that exists in addition to the legal basis offered by FC ss 44, 99, 104 and 126? We suggest that it is not. It refers to the assignment, by agreement, of the administration of a schedule 4A or 5A matter to a specific municipality. All of these ingredients point towards the assignments that have their basis in FC ss 99 and 126. Again, FC s 156(4) is not an additional procedure or basis for assignment, but is rather a principle or a set of standards that sets out the circumstances under which assignment in terms of FC ss 99 or 126 becomes compulsory.

Another important question is whether, as a principle, FC s 156(4) is justiciable. In principle, the provision is, as any other provision in the Final Constitution, justiciable. However, the arguments we offer below point out that, due to the phraseology and nature of this provision, as well as its position within the intergovernmental context, the level of scrutiny applied by the courts may be so low as to make the provision unenforceable. Firstly, the fact that an assessment of effective governance is central to the application of the principle renders it less open to judicial interpretation.[1] The courts may be reluctant to be drawn into debates on the technical merits of locating a function at municipal level. Such reluctance turns on the technical nature of such issues such as the efficiencies generated by municipal performance of the function, intergovernmental fiscal ramifications of the transfer, economic imperatives such as spill-over effects and intergovernmental efficacy and capacity assessments of municipalities. Secondly, FC s 156(4) requires assignment 'by agreement'; the impact of this proviso on judicial enforceability is unclear. It is common for a court to order parties to return to the negotiating table and work towards a settlement. However, it is not possible for a court to determine and to impose upon the parties the content of an agreement. Judicial enforceability of FC s 156(4) suggests that after a court order requires 'assignment', it must be left up to the parties to formulate an agreement. Thirdly, whose obligation is it to assign schedule 4A matters?

[1] Dawid Van Wyk 'Subsidariteit as Waarde wat die Oop en Demokratiese Suid-Afrikaanse Gemeenskap ten Grondslag lê' in Gretchen Carpenter (ed) *Suprema Lex: Opstelle oor die Grondwet aangebied aan Marinus Wiechers* (1998) 257.

Schedule 4 matters are concurrent national and provincial matters. Both national and provincial executives thus have the authority to assign a schedule 4A matter to a municipality within their jurisdiction. Arguably, a municipal claim for assignment can be exercised against both national and provincial executives — but which one of the two must be compelled to do so under the operation of FC s 156(4)? For example, can a provincial government, when confronted with a legal challenge on the basis of FC s 156(4), escape liability by arguing that national government must assign the power in question? Fourthly, a calculated, programmatic approach to devolution that is managed through intergovernmental relations fits in better with a functional approach to the division of powers and functions adopted by the court. Thus far the jurisprudence condemns an automatic bias or a presumption in favour of any sphere of government.[1] This approach fits the dictates of our scheme of co-operative government — in which courts are always a last resort for the resolution of disputes — better than a 'rights-based' approach that enables courts to determine decidedly political issues. A rights-based approach creates the spectre of 'slapstick asymmetry'. FC s 156(4) would be used by individual municipalities in a manner that had functions and powers 'tumbling up and down'. It would leave — as FC Chapter 3 says it should not — courts in the unenviable task of mediating the endless intricacies of governance. The Constitutional Court has made it clear, in the context of national/provincial relations, that cooperative government, rather than 'competitive federalism' is the guiding principle.[2] A competition for competencies, refereed by the courts, does not accord with this trend in our jurisprudence. That said, as a guiding principle it should play a role in the adjudication of disputes over competencies if they do reach the courts. David Van Wyk, for example, argues that the Final Constitution leaves room for 'a competency bias in favour of the smaller sphere', especially where there is uncertainty about the interpretation of the scope of competencies.[3]

FC s 238*(a)* provides that an executive organ of state in any sphere of government may delegate a power or function to any other executive organ of state. The Final Constitution does not offer a definition of delegation. However, it is possible to highlight a number of features that distinguish delegation from assignment. Firstly, the fact that FC s 238 is located under the heading 'Other matters' in FC Chapter 14, which is the very last chapter of the Final Constitution and is entitled 'General Provisions' suggests that it is not meant to be a basis for devolution of powers across spheres. Any provision that intends to be the basis for fundamental alterations to a constitutional division of powers between spheres would have been given a more prominent location in an earlier chapter.[4] Secondly, assignments transfer the individual responsibility and accountability to the

[1] See Nico Steytler & Jaap De Visser *Local Government Law in South Africa* (2007) 5-18.

[2] *Ex Parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 287.

[3] See Van Wyk (supra) at 268.

[4] See Steytler & De Visser (supra) at 5-47.

municipality, and the municipality acts in its own name when it exercises powers or performs functions in terms of an assigned power.[1] Thirdly, the assignment of a function also transfers the financial risk to the municipality. The corollary is that the municipality attracts financial streams in terms of the annual appropriation of funds from national government to local government. If a function is delegated, then the risk and funding obligations remain with the delegating agency. Fourthly, after a function has been assigned, it is no longer possible to issue individual instructions. In contrast, a delegating agency can issue instructions at any given time after a function has been delegated.[2] It is clearly permissible for national government or a provincial government to ensure the success of an assignment through legislating a regulatory framework consisting of minimum norms and standards. This is, however, different from the issuing of individual instructions. After a function has been delegated, however, the delegating authority remains competent to issue individual instructions. Finally, the assigning agency can no longer perform the function — barring the event of intervention in terms of FC s 139. If the assigning agency were still able to perform the function, then it would subvert the transferring of authority. It would in essence mean that individual instructions can be given. Once a function has been assigned, the assigning agency is responsible only to the extent that it has regulatory and supervisory powers. Its supervisory powers are limited to intervention in terms of FC s 139. By contrast, delegating a function does not absolve the delegating agency of the responsibility for the entire function[3] and, if need be, the delegating agency may revoke the delegation and resume performing the function.

Must the municipality agree to the delegation for it to be valid? FC s 238 does not mention agreement as a requirement. Surely a delegation of authority must be able to ensure that a local government performs certain tasks. FC ss 99 and 126, which deal with the assignment of executive powers, speak directly to this issue of compulsion and suggest that delegation requires agreement by the municipality. In our view, FC s 238 must be interpreted harmoniously with FC ss 99 and 126 and be read to require the agreement of the municipality.[4]

22.4 Municipal Services

The provision of services by a municipality is not merely a matter of defining competences. Rather it is an issue that defines and constitutes the very nature of

[1] Assignment and Delegation Guidelines (supra) at item 2*(a)*(i)-(ii) and *(b)*(ii)-(iii).
[2] Ibid item 12(3)*(a)*.
[3] Ibid item 12(3)*(b)*.
[4] Ibid schedule 1, item 12(5) suggests 'that agreement should, as a matter of principle, always be sought before powers and functions are delegated to municipalities'. Item 33 provides that 'delegations should be effected by agreement and that a municipality cannot be obliged to accept a delegation'. See also Assignment and Delegation Guidelines (supra) at item 13. See Steytler & De Visser (supra) at 5-49.

this state institution. Of all the three spheres of government, the notion of a government in service of its community is perhaps most compelling with respect to local government. Not only is the role of the municipality that of service provider, but also, very distinctively that of developer of the community. The notion of developmental local government should therefore be the *leitmotif* in interpreting the constitutional mandate with regard to municipal services. In addition, local government provides the best opportunity for citizens to assist government in the shaping of solutions to problems of local concern.

The developmental mandate raises a number of important questions: first, what is the scope for providing services that make sense within a developmental paradigm? second, what are the duties to provide such services? The obligation to provide services to the community also highlights the relationship of the municipality with the residents as recipients of services. The municipality's provision of 'sustainable' services is inevitably bound up with the consumers' duty to pay for such services.

(a) Scope of municipal services

A municipal service is usefully defined in the Municipal Systems Act ('Systems Act') as 'a service that a municipality in terms of its powers and functions provides or may provide to or for the benefit of the local community irrespective of whether … fees, charges or tariffs are levied in respect of such a service or not.'[1] The definition correctly indicates that municipal services are primarily determined by the general powers of a municipality as demarcated and protected in FC schedules 4B and 5B.[2] The scope of services is thus confined to what a municipality may legally do. Second, the activity is directed to or for the benefit of the local community. Municipal services are thereby distinguished from those activities that are aimed at the internal functioning of the municipality. Third, municipal services include both services for which fees are charged to identifiable consumers and those services provided for the benefit of the community in general.

Schedules 4B and 5B contain a list of 38 functional areas: some important and others trivial. Central to any municipality are the services delivered directly to residents on a daily basis that meet the necessities of life, such as water, sanitation, electricity and refuse removal. A key focus of the schedules is the management of the built environment, including municipal planning, the building and maintenance of roads and stormwater systems, fences, public places and street lighting. Complementing the physical side of the built environment is the management of its use. Functional areas in this regard include traffic and parking, the control of public nuisances, the control of selling of liquor and food to the public and street trading. The responsibility for the built environment speaks to the object of social and economic development, e.g., tourism and trade regulations. In order to realize

[1] Act 32 of 2000 s 1(1).

[2] The power to provide local policing is less secure. FC s 206(7) provides that national legislation may provide a framework for the establishment, powers, functions and control of municipal police services.

the object of promoting a safe and healthy environment, municipal functional areas encompass municipal health services, air pollution, noise pollution, the burial of animals, fire fighting and cleansing.

Some functions and powers are located outside the schedules. The primary example is municipal police services.[1] As required by FC s 206(7), the South African Police Services Amendment Act sets out the legal framework for the establishment of municipal police services.[2] The Act identifies the functions of a municipal police service as follows: traffic policing; the policing of municipal by-laws and regulations; and the prevention of crime. The first two provisions — traffic policing, policing municipal by-laws and regulations — are not new. Those powers would be implicit in the functional areas of road traffic and any of the other functional areas. Crime prevention is, however, a significant new area of municipal policing.[3]

The key question that has surfaced in assessing the functional areas is whether they indeed enable municipalities to execute their developmental mandate.[4] The central theme in the White Paper on Local Government of 1998 was that developmental local government should work for and through citizens.[5] Municipalities should exercise its powers and functions in a way that has a maximum impact on economic growth and social development of communities. Local government should also become the vehicle through which citizens work to achieve their vision of the kind of place in which they wish to live. Consequently, municipalities should build social capital, stimulate the finding of local solutions for increased sustainability, and stimulate local political leadership.

The functional competences of local government should reflect the constitutional vision of developmental local government. The decentralized developmental strategy can only bear fruit if the institutional framework for local government gives expression thereto. Part of this expression must be the allocation of powers and functions that are relevant to the developmental mandate of local government.

Before the Final Constitution, a wide variety of functions were performed by municipalities. A municipality's functions depended on, *inter alia*, the institutional framework of the various local government ordinances, the administration's capacity and which racial group it was supposed to serve. FC schedules 4B and 5B list functions that the majority of municipalities were already performing (with some additions, such as child care facilities and air pollution). Some functions were

[1] See Okeyrebea Ampofo-Anti, Kim Robinson & Stu Woolman 'Security Forces' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 23B.

[2] Act 83 of 1998.

[3] See further Nico Steytler 'Municipal Police Services: Towards a Safer Environment' (1999) 1(2) *Local Government Law Bulletin* 5.

[4] See Jaap de Visser & Annette Christmas 'Review of Schedules 4B and 5B' (2007), Community Law Centre, UWC, available at www.communitylaawcentre.org.za.

[5] Ibid at 17-20.

removed from local government. For example, prior to the Final Constitution, municipalities in a number of provinces were responsible for libraries, a competence the Final Constitution allocated to provinces.[1] The result has been that the listed local government functional areas do not enable municipalities to maximise the social and economic impact envisaged by the Final Constitution and the White Paper on Local Government. There has been a growing concern in government about this mismatch between the goal of developmental local government and the allocated powers of local government. The President's Coordinating Council PCC) resolved on 14 December 2001 that FC schedules 4 and 5 should be reappraised. In July 2007, the Department of Provincial and Local Government (DPLG) embarked on a White Paper process for provincial government and a review of the White Paper on Local Government. This process envisages a review of the two schedules.[2]

Two key functional areas that have been at the core of the debate about equipping local government with the necessary competencies to give effect to its developmental mandates have been housing and transport. Given the primary concern of local government with the built environment, housing should be a primary municipal competency. In *State of the Cities Report 2006*, this link was formulated as follows: 'Local government is … responsible for livelihoods contextualized within the framework of built environment functions: municipalities are responsible for basic service provision and the creation of an enabling environment for the growth of business enterprises.'[3] In urban South Africa, a critical connection exists between housing and transport. These two competencies are located at the provincial level.[4] A further area of contention is that despite the fact that 'local economic development' is one of the objects of local government,[5] there is considerable confusion about local government's role in economic development.

(b) Obligation to provide basic services

FC s 156(1) bestows on a municipality the authority and the right to administer the matters listed in schedules 4B and 5B. The use of the terms 'authority' and 'right' immediately suggests that a municipality may exercise its powers in the demarcated functional areas, but that a municipality has no obligation to do so. On its 'own initiative'[6] a municipality may decide to provide a sport facility or a public park. But what of the basic needs of its citizens? When it comes to the

[1] FC Schedule 5A.

[2] See Nico Steytler 'President's Coordinating Council Sets Agenda for Local Government' (2002) 4(1) *Local Government Law Bulletin* 1, 2.

[3] South African Cities Network *State of the Cities Report 2006* (2006) 5-23.

[4] See Peter Wilkinson 'Reframing Urban Passenger Transport as a Strategic Priority for Developmental Local Government' in Mirjam van Donk, Mark Swilling, Edgar Pieterse & Susan Panell (eds) *Consolidating Local Government: Lessons from the South African Experience* (2008) 203.

[5] FC s 152(1)*(c)*.

[6] FC s 151(3).

questions of the provision of potable water and municipal health services, these functional areas invoke the obligation of local government to 'respect, protect, promote and fulfil the rights in the Bill of Rights',[1] including, say, the rights of access to 'sufficient water' [2] and 'health care services'.[3] Some socio-economic rights clearly intersect with local government competencies. And in some instances, the full realization — or at least the ultimate administration — of programmes designed to make good the promise of these rights rests on municipalities.[4] However, these rights are limited, and given the uncertainty of their reach, a limited number of municipal services can be reinforced through socio-economic rights. The basis for a wider range of services, such as electricity, paved roads and recreational facilities, lies in the broad development objects and duties of a municipality to prioritise the basic needs of the community.[5]

Both the Final Constitution and dicta from the Constitutional Court suggest that there is an obligation to provide basic municipal services, an obligation that is broader than the focus and application of socio-economic rights. First, one of the objects of local government is 'to ensure the provision of services to communities in a sustainable manner'.[6] While this is an 'object' and not a function or obligation, the developmental duty of a municipality includes 'giving priority to the basic needs of the community' by structuring and managing 'its administration and budgeting planning processes' to this end.[7] The language in which local government's entitlement to an equitable share of the revenue raised nationally is couched is a bit more forthright. The very purpose of local government's entitlement to the equitable share is, in terms of FC s 227(1)*(a)*, 'to enable it to provide basic services and perform the functions allocated to it.' If the provision of basic services is discretionary, then the claim to an equitable share becomes a function of a municipality's decision to provide a particular service or not. Such a reading runs counter to FC s 227(1)*(a)*'s logic for determining the equitable share.[8] Importantly, the entitlement to an equitable share is linked to the notion of providing 'basic' services.

The direct reference to *an obligation* to provide basic services is the result of an amendment to FC s 139 in 2003. One of the grounds for a provincial intervention in a municipality, including the dissolution of its council, is when a municipality, 'as result of a crisis in its financial affairs, is in serious or persistent material breach of *its obligations to provide basic services*'.[9] A provincial executive must then

[1] FC s 7(2).
[2] FC s 27(1)*(b)*.
[3] FC s 27(1)*(a)*.
[4] See Steytler & De Visser (supra) at 9-8ff.
[5] The statutory duty to provide a service, such as referred to in s 73(1) of the Municipal Systems Act 32 of 2000 can only be sustained on a sound constitutional footing.
[6] FC s 152(1)*(b)*.
[7] FC s 153*(a)*.
[8] See § 22.5*(j)*(i) infra.
[9] FC s 139(5) (emphasis added).

impose a recovery plan 'aimed at securing the municipality's ability to meet its obligations to provide basic services'. The underlying assumption of FC s 139(5) is that there is an obligation to provide basic services and the failure to do so because of a financial crisis provides a basis for an intervention.

Some of the dicta in *Mkontwana v Nelson Mandela Metropolitan Municipality & Another, & Other Cases* proceed from the premise that there is indeed a constitutional duty to provide basic services.[1] O'Regan J placed this duty in a historical context. With reference to the constitutional objects of local government,[2] she wrote:

> Local government thus bears the important responsibility of providing services in a sustainable manner to their communities. This task is particularly important given the deep divisions in our towns, the scars of spatial apartheid which still exist and the fact that many poor communities are still without access to basic facilities such as water, adequate sewerage systems, refuse collection, electricity and paved roads. The ability of local government to carry out its constitutional mandate depends on its financial stability.[3]

In the same case, Yacoob J said that municipalities were obliged to provide water and electricity to the residents in their areas 'as a matter of public duty'.[4] As authority for this 'public duty', Yacoob J refers[5] to the right of access to sufficient food and water,[6] the service objects of local government listed in FC s 152(1), the development duties of local government in FC s 153 and s 73(1) of the Municipal Systems Act.[7]

While using socio-economic rights as the basis for the provision of some basic municipal services is useful, thus far the relief any applicant can secure is rather

[1] 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC)('*Mkontwana*').

[2] FC s 152(1).

[3] *Mkontwana* (supra) at para 105. See also *Beck v Kopanong Local Municipality* Case No 3772/2002 (Unreported, Orange Free State). Having listed a number of well-known municipal functions (from water services to recreational parks service) Rampai J wrote: 'It is the constitutional imperative of the local municipality to provide these various community services and many more to its own community, and to ensure that these services are provided in an effective and systematic and sustainable manner.' Ibid at para 19.

[4] *Mkontwana* (supra) at para 38. See also *Mkontwana* (supra) at para 52.

[5] Ibid at para 38, fn 49.

[6] FC s 27(1)*(b)*.

[7] Act 32 of 2000 s 73(1) reads: 'A municipality must give effect to the provisions of the Constitution and *(a)* give priority to the basic needs of the local; *(b)* promote the development of the local community; and *(c)* ensure that all members of the local community have access to at least the minimum level of basic municipal services.' In *Occupiers of 15 Olivia Rd, Berea Township v City of Johannesburg* 2008 (3) SA 208 (CC) at para 16 Yacoob J, for the Constitutional Court, reiterated this broad brush approach. In dealing with an eviction matter, he wrote as follows:

> The City has constitutional obligations towards the occupants of Johannesburg. It must provide services to communities in a sustainable manner, [FC s 152(1)*(b)*] provide social and economic development, [FC s 152(1)*(c)*] and encourage the involvement of communities and community organisations in matters of local government [FC s 152(1)*(e)*]. It has an obligation to fulfil the objectives mentioned in the preamble to the Constitution to '[i]mprove the quality of life of all citizens and free the potential of each person". Most importantly, it must respect, promote and fulfil the rights in the Bill of Rights.

limited. Moreover, only some services are regarded as basic: water and health services.[1] Finally, if the right of access to water is conceptualized as a claim by those who cannot afford to pay for this commodity, then the claims of the business community for the supply of water to their factories and enterprises are bound to flounder. The objects of local government in FC s 152 are by themselves a weak basis for an enforceable duty. As they provide no authority upon which to base a plenary municipal power or function, they can *a fortiori* not sustain a claim for an obligation to act. While FC s 153 uses the term developmental duties in the title to the section, it deals with priorities rather than duties. Section 73(1)*(c)* of the Structures Act would also appear to beg the question of what duties are enforceable: it creates a statutory duty that a municipality must 'ensure that all members of the local community have access to at least the minimum level of basic municipal services'?

While neither FC ss 152(1)*(b)* or 153 by themselves provide a sufficient constitutional basis for an enforceable duty, the language of FC ss 139(5) and 227(1)*(a)* is much clearer and to the point. Both sections work on the assumption that there is a duty to provide services, but that such services are limited to those that can be labeled as basic. This view reflects the very purpose of a municipality standing in the service of its community; it runs counter to any notion of a municipality being able to claim that the provision of water, electricity, refuse removal or road maintenance is a matter of discretion. This reading also has important consequences for the implementation of FC s 139. A provincial executive's power of intervention is premised on the failure of a municipality to fulfil a a constitutional obligation.[2]

The obligation to provide services does not make a municipality liable for the provision of services in all 38 functional areas. Both FC ss 139(5) and 227(1)*(a)* limit such claims to services that are 'basic'.

The notion of a basic municipal service is a recurrent theme in local government legislation.[3] As yet, a precise and concrete definition has not been offered by our courts. The White Paper on Local Government, however, views the provision of 'good basic services' as follows:

[1] Key services such as road building and maintenance and streetlighting in a dangerous area would, at first blush, appear to fall outside their ambit of basic services underwritten by a duty to fulfil fundamental rights. However, the FC s 12(1)*(c)* right not to be subjected to public or private violence might imply a duty to provide streetlighting. There is no reason, in principle, why only the traditional socio-economic rights can impose positive duties to provide service delivery on municipalities.

[2] FC s 139(1).

[3] In terms of the Municipal Finance Management Act 56 of 2000 s 14(1) a municipality may not transfer ownership as result of a sale or other transaction or in any way permanently dispose of a capital asset needed to provide the minimum level of basic municipal services.

> Local government is responsible for the provision of household infrastructure and services, an essential component of social and economic development. This includes services such as water, sanitation, local roads, storm water drainage, refuse collection and electricity. Good basic services, apart from being a constitutional right, are essential to enable people to support family life, find employment, develop their skills or establish their own small business. The provision of household infrastructure can particularly make a difference to the lives of women, who usually play the major role in reproductive (domestic) work which sustains the family and the local society.[1]

What this description indicates is that a basic service entails more than a service that provides a resident with a consumable commodity. Household infrastructure such as refuse removal, roads, and stormwater drainage are required for a secure and healthy environment. When the White Paper was translated into law, 'basic services' were given a more generic definition. The Systems Act defines the concept of 'basic municipal services' as a service that is 'necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment'.[2] The Municipal Finance Management Act ('MFMA') gives an identical definition.[3]

While the criterion of 'acceptable and reasonable quality of life' may be too vague to be of much value, the second part of the definition provides more promising possibilities. The quality of life that relates to the health or safety of communities narrows the scope. The first element of the definition is that the measuring rod is not the individual but the public. The reference is to *public* health and safety, not that of an individual. Second, the quality of life must relate to public health and safety. Refuse removal and the control of air pollution are essential components of a healthy environment, while they could not be easily fit within the currently narrow definition of the socio-economic right of access to health services. On this account, some services would also by definition not accrue to individuals. An individual would hardly be entitled to a stormwater drainage system; a community may well be entitled to such a system where its absence would place the physical security of the community in danger.

However, as we noted above, some constitutional benefits might well accrue to individuals. The provision of 'streetlighting', for example, speaks directly to an individual's FC s 12 right to be free from public and private forms of violence.

Where the focus is no longer on the physical security of the individual, additional constitutional obligations might still be said to flow to the community. FC s 24*(b)* sets out the right 'to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources

[1] *White Paper on Local Government* (1998) 23.
[2] Systems Act s 1(1) 'basic municipal service'.
[3] Act 56 of 2000 s 1(1).

while promoting justifiable economic and social development.'[1] Such environmental duties would fall within such functional areas as 'municipal planning', 'refuse dumps and solid waste disposal', 'municipal parks', 'fences and fencing', 'domestic waste-water and sewage disposal systems'.

We have demonstrated, in the above passages, that both individual claims and communal claims can be made for the provision of a basic service and that such claims are justiciable. If a province can intervene by imposing a financial recovery plan and, if need be, dismiss a municipal council that fails to provide basic municipal services,[2] then perhaps less drastic measures such as a court action should first be entertained. What should the test for judicial intervention be? Given that the required relief would be the provision of a particular service, the similarities with enforcing socio-economic rights are obvious. In interpreting the obligation to fulfil the socio-economic rights, as qualified with reference to reasonable measures, progressive realization and available resources, the Constitutional Court has crystallized a number of principles that delineate their reach.[3] First and foremost, there is no minimum core obligation that would entail the provision of a commodity.[4] In both *Grootboom*[5] and *Treatment Action Campaign,*[6] the Court rejected arguments that an individual can claim a commodity such as shelter or medical treatment. While it rejected the core content argument, the Court is willing to review the reasonableness of policies, legislation and other measures that are said to reflect the state's commitment to the discharge of socio-economic rights. Reasonableness review itself will be guided by the following criteria:[7]

(a) There must be a comprehensive, coherent and coordinated programme to give effect to a right;
(b) The programme must be capable of facilitating the realization of the right in the long run;
(c) The programme must be reasonable in conception and implementation;
(d) The programme must be able meet both short-, medium-, and long-term needs; and

[1] See Morne van der Linde & Ernst Basson 'Environment' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 50.

[2] FC s 139(5).

[3] See Sandra Liebenberg 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?" (2002) 6(2) *Law, Democracy and Development* 159, 189.

[4] But see *Mazibuko & Others v The City of Johannesburg & Others* [2008] ZAGPHC 128 (30 April 2008).

[5] 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)('*Grootboom*').

[6] *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721(CC), 2002 (10) BCLR 1033 (CC).

[7] See Sandra Liebenberg 'Evolving Jurisprudence' (supra) at 171; Danie Brand 'Between Availability and Entitlement: The Constitution, *Grootboom* and the Right to Food' (2003) 7(1) *Law, Democracy and Development* 7, 7-10. See also David Bichitz 'Health' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 56A; Kirsty McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55; Anton Kok & Malcolm Langford 'Water' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 56B.

(e) The programme must be able to provide relief for those in desperate circumstances, although not for individual relief.[1]

Given the Court's current approach, the reasonableness review of a municipal programme will likely be guided by similar criteria. Residents can expect from their municipality a programme to deliver a particular service that is comprehensive, coherent and coordinated. However, no one can claim relief in the form of an order of immediate implementation. A plaintiff can ask that the programme must be capable of facilitating the provision of the claimed service and that it would meet the short-, medium- and long-term needs of the community. Most importantly perhaps, and as close to a minimum core requirement as the Court has come, an applicant could ask a court to order a municipality to conceive of a programme that responds to members of a community in urgent need or in desperate circumstances.

(c) Realising socio-economic rights through service provision

A municipality's duties in relation to the realization of socio-economic rights are circumscribed by its defined areas of competence.[2] The critical question for municipalities is whether there is an intersection between the socio-economic right and the particular functional area of a municipality. Two types of intersection can be identified. The first is a direct intersection where the realization of the right falls foursquare within a municipality's functional areas. In the second, the functional area does not cover the right directly but a municipality nevertheless plays an important contributory or supportive role in its realization.

In the first type of intersection the nature and the scope of a socio-economic right corresponds with a municipality's functional area or areas. The schedule 4B functional area of 'water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal system' intersects directly with the right of access to sufficient water. Local government is then responsible for the full spectrum of responsibilities to implement this right.[3]

In the second type of intersection, a socio-economic right does not directly overlap with a local government functional area, but the fulfillment of that right is dependent on local government playing a supportive role. For example, the right of access to housing does not directly intersect with any municipal functional area, but the Constitutional Court emphasized in *Grootboom* that all spheres of government 'must ensure that the housing programme is reasonably and appropriately implemented in the light of all the provisions of the Constitution.'[4]

[1] This duty has been described by Brand as follows: 'On paper, a policy *may not leave out of account*, and must make *at least some* provision for those who, for what ever reason, whether temporarily or permanently, find themselves in dire straights regarding access to housing, food, water and health care services.' Brand (supra) at 8 (emphasis in the original).

[2] See Jaap de Visser, Edward Cottle & Johann Mettler 'Realising the Right of Access to Water: Pipe Dream or Watershed?' (2003) 7(1) *Law, Democracy and Development* 27, 29.

[3] Ibid at 29.

[4] *Grootboom* (supra) at para 82.

The *Grootboom* Court noted, that '[e]ach sphere of government must accept responsibility for the implementation of particular parts of the [national housing] programme.[1] The right to housing entails more than 'bricks and mortar' and includes 'appropriate services such as the provision of water and the removal of sewage'.[2] The particular parts of a national housing programme that a municipality must perform are thus the provision of water and sanitation.

(d) Method of providing services

The Final Constitution does not describe how municipal services should be delivered, but there is an indirect reference that the municipality need not be the actual provider. FC s 229(1)*(a)* authorizes a municipality to impose 'surcharge on fees for services provided *by or on behalf of the municipality*'. This phrase suggests that a municipality need not be the only institution or organ of state that is authorized to provide a service; some other institution or body may do so on its behalf. In the White Paper on Local Government one of the strategies for addressing the backlog in services was the use of the private sector to provide services on behalf of a municipality.[3] This service provision could occur through partnerships with non-governmental organizations or contracting out to the private sector. The White Paper adopted, however, a neutral position. The paper favoured neither inhouse service provision nor externalising the services. Instead it presented a range of options from which a municipality could choose.[4]

The Systems Act has established an elaborate system for choosing a service provider, be it an inhouse service or an external provider.[5] However, the details of the system have made the option of outsourcing services difficult to exercise. In addition, the MFMA has added further provisions and regulations where the use of an external service provider entails a public-private partnership.[6] The inevitable conclusion is that the current system demonstrates a clear bias in favour of continuing to provide services through internal mechanisms; this result does not offend the policy position taken in the White Paper.[7]

(e) Reciprocal nature of providing services: duty to pay for consumption

(i) *The power to charge fees*

One of the objects of local government is 'to ensure the provision of services to communities in a *sustainable* manner'.[8] Although the charging of fees for the

[1] *Grootboom* (supra) at para 40.
[2] Ibid at para 35.
[3] White Paper on Local Government (supra) at 97ff.
[4] Ibid at 92, 101. See Victoria Johnson *Outsourcing Basic Municipal Services: Policy, Legislation and Contracts* (2005) (Unpublished LLM thesis, University of the Western Cape), 15.
[5] See Nico Steytler & Jaap de Visser *Local Government Law of South Africa* (2007) 9-23–9-35.
[6] Ibid at 9-35–9-42.
[7] Johnson (supra) at 62.
[8] FC s 152(1)*(b)* (emphasis added).

so-called trading services (services where there is an identifiable consumer) is one of the long standing methods of generating municipal income,[1] it has not been given the imprimatur of direct constitutional approval. However, the constitutionally entrenched right to impose a surcharge on fees for services provided by or on behalf to the municipality[2] necessarily implies the constitutional power to charge fees for those services.[3] The basis of this power is best conceived as flowing from the incidental power with regard to matters reasonably necessary for or incidental to the effective exercise of a schedule 4B or 5B competence.[4] This power is now forthrightly expressed in s 4(1)*(c)* of the Systems Act: a council has the right to 'finance the affairs of the municipality by (i) charging fees for services; and (ii) imposing surcharges'. In a 2002 amendment to the Systems Act this power has been made more explicit: a municipality has the power to levy and recover fees, charges or tariffs in respect of any function or service it provides.[5]

As the power to charge fees does not arise from FC s 229(1)*(a)* (the right to levy rates on property or a surcharge on fees) or FC s 229(1)*(b)* (any other tax authorized by national legislation), it does not fall under the regulatory regime envisaged in that section.[6] The tariff set for the fees charged for services then falls to the discretion of the municipality. However, on the basis that the charging of fees is an incidental power flowing from the right to administer and to legislate on matters listed in schedules 4B and 5B, the national and provincial governments may regulate the exercise of such powers in terms of FC s 155(7).[7] Such regulation is effected by the Systems Act which structures the setting of tariffs for service fees.[8] The MFMA also assumes that the capping of tariffs is possible; a national or provincial organ of state may impose such measures in terms of national or provincial legislation.[9] The question that follows is how is this propositoin to be squared with the ability of a municipality to agree to a tariff increase with an external service provider which exceeds the cap?[10] The MFMA's answer to the question is to provide that the capping of a tariff may not interfere with a municipality's long term contractual or debt obligations.[11] If such obligations provide for an annual or periodic escalation of payments by the municipality, then the capping of the tariff does not apply. The imposition of an upper limit

[1] See Ross Kriel & Mona Monadjem 'Public Finances' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) 27-10.
[2] FC s 229(1)*(a)*.
[3] *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C) at para 71.
[4] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('*First Certification Judgment*') at para 438. See also Kriel & Monadjem (supra) at 27-10.
[5] Systems Act s 75A(1)*(a)*. See *Rates Action Group v City of Cape Town* 2006 (1) SA 496 (SCA) at para 15.
[6] See § 22.5*(d)*(i) infra.
[7] On the ambit of FC s 155(7) see § 22.3 supra.
[8] Systems Act ss 74-75A.
[9] MFMA s 43(1).
[10] See Kriel & Monadjem (supra) at 27-11.
[11] MFMA s 43(3).

would impair the municipality's ability to meet the escalation of its payment under the contract.[1] This is, of course, the only constitutional way out of the conundrum. Where a capping of a tariff would have infringed on a municipality's contractual obligations, it would be a prime example of a national organ of state falling foul of the basic principle of local autonomy. The national organ of state would be compromising or impeding the municipality's ability to exercise its powers.[2]

(ii) *The nature of the tariff setting*

In *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Metropolitan Council & Others,* the Constitutional Court held that when a government, be it national, provincial or local,

> exercises the power to raise taxes or rates, or determines appropriations to be made out of public funds, it is exercising a power under our Constitution which is a power peculiar to elected legislative bodies. It is a power that is exercised by democratically elected representatives after due deliberation.[3]

Thus when the legislature raises revenue through the imposition of taxes and determines how such income is to be spent, it engages in a legislative act. Consequently, not being an administrative act, the levying of rates or the appropriation of revenue is not subject to administrative review. As the decision in *Fedsure* dealt with the narrow question of levying rates and the imposition of levies, the question of whether the determination of tariffs is also a legislative act is not answered. Kriel and Monadjem simply assume, on the basis of *Fedsure*, that 'tariff setting is a legislative act'.[4] The underlying argument is that in as much as appropriations out of the revenue fund of a municipality are legislative acts, so must be all revenue-raising measures done in terms of legislation. A number of contra-indications exist to this reading of *Fedsure*. First, *Fedsure* dealt with the Interim Constitution — where all revenue-raising powers (property rates, levies, fees, taxes and tariffs) were lumped together.[5] The Final Constitution has made a clear distinction between the taxing powers and the power to charge fees. FC s 229 makes no mention of fees.[6] Second, when the Constitutional Court asserted in the *First Certification Judgment* that provinces had the power to charge user fees in terms of an implied power, this power was described as the power 'to *enact legislation authorising* the imposition of user charges'.[7] One might conclude that such legislation authorizes the setting of tariffs, and not the tariffs themselves. Third, FC s 160(2) requires only that the approval of the budget and the imposition of rates and other taxes, levies and duties must be determined by the council. It makes no reference to fees and tariffs. FC s 160(2) indicates that this decision may be delegated to another body.

[1] MFMA s 43(3).
[2] FC s 151(4).
[3] 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC)('*Fedsure*') at para 45.
[4] Kriel & Monadjem (supra) at 27-12.
[5] IC s 178(2).
[6] See Kriel & Monadjem (supra) at 27-10.
[7] *First Certification Judgment* (supra) at para 438 (emphasis added).

The question turns, it would seem, on whether there is any fundamental difference between raising revenue by fees and charges in terms of a tariff and levying rates, duties and levies. In our view there is a difference. The difference is that fees and tariffs relate to a business transaction where the intention is to recoup the cost of the service provided. For a municipality to function, tariffs must relate to the actual costs of providing a particular service.[1] Rates and other taxes are fundamentally different. They are policy driven and not designed to fund a particular service. As long as there is legislation authorising the imposition of a service fee and a tariff policy that guides the determination of the tariffs, the actual tariff setting can be an administrative act undertaken on the basis of projected input costs. The Systems Act prescribes just such an arrangement. After adopting a policy on tariffs,[2] the policy must be captured in a by-law.[3] On the basis of such a by-law, then, the actual amounts of the tariffs are set by resolution passed by the supporting vote of a majority of the councillors.[4] That tariff resolution, then, unlike that of a resolution setting rates,[5] is an administrative act.

(iii) *The duty to charge fees?*

The power to levy fees and tariffs for services rendered falls within the discretion of the municipality and gives effect to the constitutional principle that a municipality may govern on its 'own initiative'.[6] In *Rates Action Group v City of Cape Town* the applicants argued that where the cost of consumption of a service can be attributed to individual ratepayers, such costs should be recovered not through the imposition of property rates but through individualized service charges.[7] Consequently, it was argued that the City's policy of charging for sewage and refuse removal in terms of both a consumption charge and a property rate was invalid. The High Court rejected the claim and made it clear that nothing in the Final Constitution or the Systems Act supported this contention.[8] The Systems Act made it clear in the definition of a 'municipal service'[9] that there is no obligation on a municipality to levy fees, charges or tariffs in respect of all the services it provides.[10] The High Court concluded that the City was 'entitled to impose property rates to recover its costs in relation to services which it provides and it is also entitled to impose user charges. There is no reason why it may not do both.'[11] The Supreme Court of Appeal likewise confirmed this approach.[12] In sum, the Systems Act does not preclude the levying of a property rate as a general 'charge' for services.

[1] Systems Act s 74(2)*(d)*.
[2] Systems Act s 74(1).
[3] Systems Act s 75(1); Local Government: Municipal Property Rates Act 6 of 2004 s 6.
[4] Systems Act s 75A(2).
[5] See § 22.5*(e)*(iii) infra.
[6] FC s 151(3).
[7] *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C)('*Rates Action Group HC*').
[8] Ibid at para 56.
[9] Systems Act s 1(1).
[10] *Rates Action Group HC* (supra) at para 58.
[11] Ibid at para 76.
[12] *Rates Action Group v City of Cape Town* 2006 (1) SA 496 (SCA).

(iv) *Duty to pay fees*

The duty of residents to pay for the services they receive corresponds to the right of communities to basic services.[1] While the Final Constitution is silent on the imposition of any such duty, the Systems Act has made it explicit. In as much as members of the local community have a right 'to have access to municipal services', there is also the corresponding duty of payment for such services.[2] The Systems Act thus provides that members of the local community have a duty, where applicable, 'to pay promptly services fees [and] surcharges on fees' that the municipality may impose.[3] Such a duty is, however, subject to the municipality's credit control and debt collection policy: that policy must make provision for indigent debtors.[4]

The Constitutional Court has taken a dim view of residents who fail to pay for services as a political stratagem out of protest against poor service delivery. The 'culture of non-payment' that existed before 1994 the Constitutional Court has explained as 'political protest against discriminatory policies under apartheid and an expression of dissatisfaction regarding the low standard of services which were provided.'[5] After 1994 whites, the main beneficiaries of apartheid, also sought to ventilate grievances about services through the withholding of payment for services.[6] For Langa DP, as he then was, non-payment was a practice that had 'no place in a constitutional state in which the rights of all persons are guaranteed and all have access to the courts to protect their rights.'[7] Langa DP nudges the Court towards articulating a reciprocal duty between the resident and the municipality in the following terms:

> Local government is as important a tier of public administration as any. It has to continue functioning for the common good; it however cannot do so efficiently and effectively if every person who has a grievance about the conduct of a public official or a government structure were to take the law into their own hands or resort to self-help by withholding payment for services rendered. That conduct carries with it the potential for chaos and anarchy and can therefore not be appropriate. The kind of society envisaged in the Constitution implies also the exercise of responsibility towards the systems and structures of society. A culture of self-help in which people refuse to pay for services they have received is not acceptable.[8]

Where a council charges a fee for a service, the question that inevitably comes to the fore in a country with massive income disparities is how to provide services to millions of people living in poverty. From a constitutional perspective, the

[1] See further Steytler & De Visser (supra) at 9-45ff.
[2] Systems Act s (1)*(g)* with reference to Act s 5(2)*(b)*.
[3] Systems Act s 5(2)*(b)*.
[4] Systems Act s 5(2)*(b)* read with s 97(1)*(c)*.
[5] *City of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)('*Walker*') at para 92.
[6] See, for example, *Walker* (supra); *Senekal Inwonersvereniging en 'n Ander v Plaaslike Oorgangsraad* 1998 (3) SA 719 (O).
[7] *Walker* (supra) at para 92.
[8] Ibid at para 93.

question is whether there is a principle that instructs municipalities to accommodate the indigent by providing services even when they cannot pay for them. This principle is recognized in our statutes. The obligatory tariff policy must reflect the principle that 'poor households must have access to at least basic services'.[1] This policy can be achieved by setting tariffs that cover only operating and maintenance costs, 'life line tariffs for low level of use or consumption of services or for basic level of services', or other direct or indirect methods of subsidization for poor households.[2] The focus is again on 'basic services' and the constitutional basis can be twofold: a socio-economic rights basis or a community right basis.

(v) *Duty to collect debts and the constitutionality of enforcement mechanisms*

In order to provide 'sustainable service', a municipality is under an obligation to collect fees that are due. This obligation, which is implicit in the Final Constitution, has been expressly articulated by the Constitutional Court. Given the ever rising debt burden of municipalities, Yacoob J emphasized in *Mkontwana* that it is 'imperative for municipalities to do everything reasonable to reduce the amounts owing, [o]therwise, the sustainability of the delivery of municipal services is likely to be in real jeopardy.'[3] In a similar vein, O'Regan J said that 'municipalities bear an important constitutional obligation and a statutory responsibility to take appropriate steps to ensure the efficient recovery of debt.'[4]

The Systems Act equips municipalities with a range of measures to enforce payment of fees due, including the termination or restriction of the provision of services.[5] These measures, the Constitutional Court said, should be used by municipalities to guard against an unreasonable accumulation of outstanding consumption charges: 'The municipality has a duty to send out regular accounts, develop a culture of payment, disconnect the supply of electricity and water in appropriate circumstances, and take appropriate steps for the collection of amounts due.'[6] A further measure is a temporary delay in the transfer of property where there are unpaid service charges.[7]

Where the municipal service that is to be terminated or restricted has a socio-economic rights dimension, constitutional issues come to the fore.[8] In *Residents of Bon Vista v Southern Metropolitan Local Municipality*,[9] the applicants challenged the

[1] Systems Act s 74(2)*(c)*.
[2] Systems Act s 74(2)*(c)*.
[3] *Mkontwana v Nelson Mandela Metropolitan Municipality & Another, & Other Cases* 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC)('*Mkontwana*') at para 62.
[4] Ibid at para 124.
[5] Systems Act s 102(1)*(c)* read with s 97(1)*(g)*.
[6] *Mkontwana* (supra) at para 47 (Yacoob J). The Court also wrote: 'The municipality must comply with its duties and take reasonable steps to collect amounts that are due.' Ibid at 49.
[7] Systems Act s 118(1).
[8] See Steytler & De Visser (supra) at 9-53.
[9] 2002 (6) BCLR 625 (W)('*Bona Vista*').

threatened termination of their water supply by the municipality as a violation of the right of access to adequate water. The question was whether the municipality was in breach of its duty to respect the applicants' rights of access to water by disconnecting their existing water supply. Budlender AJ held that the act of disconnection was *prima facie* in breach of the council's constitutional duty to respect the community's existing right of access to water.[1] However, such a deprivation may be justified in terms of FC s 36 — assuming that the deprivation occurred in terms of a law of general application. The onus then falls on the council to justify the deprivation. The Water Services Act provides that a service provider must set the conditions in terms of which water services may be provided: including the circumstances and procedures for limiting or discontinuing them.[2] However, this procedure must be 'fair and equitable' and provide for reasonable notice of the intention to limit or to discontinue the water services and for an opportunity to make representation.[3] Furthermore, the procedure may 'not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.'[4] Because of the latter requirement, a genuine opportunity to make representations must be afforded before a person is denied access to water because of the inability to pay for such services.[5]

A mandatory enforcement mechanism of many years standing has been the preferential claim for outstanding rates, taxes and fees when property ownership is sought to be transferred.[6] Section 118(1) of the Systems Act places a temporary restriction on the ability of an owner of property to alienate that property if there are outstanding charges owed to the municipality. A registrar of deeds may not register the transfer of property unless the municipality issues a certificate stating that 'all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies, and duties during the two years preceding the date of the application for the certificate have been fully paid.'[7]

In *Mkontwana*, the Constitutional Court held that the charges 'in connection with' the property are not confined to those incurred by the owner only, but apply also to the charges of all occupiers of the property.[8] The effect of the provision is that where the owner of a property wants to transfer the property to another

[1] *Bona Vista* (supra) at para 20
[2] Act 108 of 1997.
[3] Water Services Act s 4(3)*(a)* and *(b)*. These procedural requirements do not apply where other consumers would be prejudiced, there is an emergency situation, or the consumer has interfered with a limited or discontinued service. Water Services Act s 4(3)*(b)*(i)-(iii).
[4] Water Services Act s 4(3)*(c)*.
[5] *Bona Vista* (supra) at para 26.
[6] See Steytler & De Visser (supra) at 9-54.
[7] Systems Act s 118(1)*(b)*.
[8] *Mkontwana* (supra) at paras 30-31.

person, all outstanding charges on the property for the two-year period must be paid before transfer can take place, including those charges incurred by occupiers other than the owner. The constitutionality of s 118(1) was thus contested as being a violation of the right to property as enshrined in FC s 25(1). The South Eastern Cape Local Division of the High Court declared the provision inconsistent with FC s 25(1) because the section permitted an arbitrary deprivation of property.[1] This view was not shared by the Natal High Court.[2]

Having found that the requirement of a certificate as a precondition for transfer constituted a deprivation, albeit it temporary, of property within the meaning of FC s 25(1), the Constitutional Court addressed the question as to whether the deprivation contained in s 118(1) was arbitrary. A law is arbitrary when it fails to provide 'sufficient reason' for the deprivation or is procedurally unfair. The sufficiency of the reason for a permitted deprivation entails the evaluation of the relationship between the purpose of the law and the deprivation effected by that law.[3] If the purpose bears no relationship to the property or owner, then the law is arbitrary.[4] There must be a relationship between the means and the end; the more invasive the deprivation, the closer the relationship between the means and the end must be.[5]

For the *Mkontwana* Court, the object of s 118(1) was the furnishing of a form of security to municipalities for the payment of amounts due in respect of consumption charges.[6] It effectively places the risk — when non-owner occupiers fail to pay consumption charges — on the owner rather than on the municipality. The Court found that this purpose was 'important, laudable and has the potential to encourage regular payments of consumption charges and thereby to contribute to the effective discharge of municipalities of their constitutional mandated functions.'[7] In addition, the measure had 'the potential to encourage owners of property to discharge their civic responsibility by doing what they can to ensure that money payable to a government organ for the delivery of services is timeously paid.'[8]

Because the consumption of electricity and water on the property is part and parcel of the enjoyment of the occupation of the property, a close relationship exists between deprivation of the property and the consumption charges.[9] This relationship applies irrespective of the status of the occupiers, be they tenants,

[1] *Mkontwana* (supra) at para 3.
[2] *Geyser & Another v Msunduzi Municipality & Others* 2003 (5) SA 18 (N), 2003 (3) BCLR 235 (N).
[3] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 100; *Mkontwana* (supra) at para 34. See, generally, Theunis Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) § 46.5.
[4] *Mkontwana* (supra) at para 34.
[5] Ibid at para 34.
[6] Ibid at para 38.
[7] Ibid at para 38.
[8] Ibid at para 38.
[9] Ibid at para 39.

persons exercising rights of usufruct, or *fideicommissum,* squatters or other unlawful occupiers. Even in the case of unlawful occupiers, the Court said that it is the duty of owners to safeguard their property by taking reasonable steps to ensure that it is not unlawfully occupied,[1] and given the available measures of evictions, the owner should bear the risk of the unpaid consumer charges by such occupiers.

However, the assertion that s 118(1) entailed an unfair procedure — because there was no obligation on the municipality to keep property owners informed of the amounts owing by occupiers at reasonable intervals when this is requested by owners in writing — met with some success. The Court held that '[f]airness requires that a municipality provide an owner of property with copies of all accounts if the owner requests them.'[2]

Having s 118(1) as a lever for extracting charges from owners, the Court stressed, did not relieve a municipality from its duty to collect consumption charges. A failure to do so, the Court warned, could lead to the municipality's liability for the delictual damages if its inefficiency to collect charges amounted to negligence that occasioned damage to property owners.[3]

22.5 Municipal Revenue Raising Powers

(a) Introduction

A major component of local government's ability to govern on its own initiative is that municipalities have significant original revenue-raising powers entrenched in the Final Constitution.[4] Unlike provincial governments, which are almost exclusively dependent on national transfers to fund their functioning,[5] municipalities are by and large self-sustainable. They raise, on average, 76 percent of their revenue.[6] That said, local government is also dependent to varying degrees on national transfers to sustain their activities.[7]

[1] *Mkontwana* (supra) at para 59.

[2] Ibid at para 67.

[3] Ibid at para 62. O'Regan J noted: 'Should a municipality not perform its statutory or constitutional obligations [of recovering debt], appropriate relief should be sought.' Ibid at para 124.

[4] See Ross Kriel & Mona Monadjem 'Public Finances' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27.

[5] National Treasury *Provincial Budgets and Expenditure Review 2003/04-2009/10* (2007) 4.

[6] National Treasury *Local Government Budgets and Expenditure Review 2001/02-2007/08* (2006) tables 2.1 and 2.2.

[7] Philip van Ryneveld 'The Development of Policy on the Financing of Municipalities' in Udesh Pillay, Richard Tomlinson & Jacques de Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) 157, 160; Dave Savage 'Key Themes and Trends in Municipal Finance in South Africa' in Mirjam van Donk, Mark Swilling, Edgar Pieterse & Susan Parnell (eds) *Consolidating Local Government: Lessons from the South African Experience* (2008) 285, 297-299.

The principal sources of revenue for municipalities are service fees, rates on property, surcharges on service fees, other taxes and duties and transfers. Service fees — mainly for electricity and water — make up 38 percent of income on average, property rates 18 percent, other charges, taxes, duties and levies 30 percent and transfers 14 percent. Of the transfers, two thirds was contributed by local government's equitable share of revenue raised nationally and a third from conditional grants.[1] An additional source of income — mainly for the large metropolitan municipalities — is borrowing in the open market.[2]

The source of local government's fiscal prowess lies in FC s 229. FC s 229 entitles municipalities to impose rates on property and surcharges on fees for services, and, if authorized by national legislation, other taxes, levies and duties 'appropriate to local government'. Excluded from the latter category are income tax, value-added tax, general sales tax and customs duty.[3] The power to levy property rates and user surcharges is subject to the general limitation that it may be not be exercised 'in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour' and may be regulated by national legislation.[4] Local government is entitled to an 'equitable share of the revenue raised nationally to enable it to provide basic services and perform the functions allocated to it'.[5] Municipalities may also receive conditional grants from the national government.[6] Finally, a municipality's borrowing powers are governed by FC s 230A.

(b) Fiscal powers and responsibility for financial health

What is distinctive about local government's revenue streams is that most of the income is derived from municipalities' own efforts of charging and collecting fees and taxes. The entitlement to an equitable share of revenue-raised nationally serves only as a supplementary income (although in the poorer municipalities it constitutes the bulk of income). One leitmotif of the Final Constitution is that a municipality's access to significant sources of revenue is accompanied by the responsibility for its own financial health.[7] Municipalities must exploit the direct access given to significant revenue streams of rates and surcharges on fees. The comfortable situation of relying on the national government to provide the necessary funding, while their own taxing sources lie fallow, is not to be tolerated. FC s 227(2) provides that there is no obligation on national government 'to compensate … municipalities that do not raise revenue commensurate with their fiscal

[1] National Treasury *Local Government Budgets* (supra) at 8.
[2] Ibid at 17. See further Savage (supra) at 306.
[3] FC s 229(1).
[4] FC s 229(2).
[5] FC s 227(1).
[6] FC s 227(1)*(b)*.
[7] See Robert Cameron 'Central-local Financial Relations in South Africa' (2002) 28 *Local Government Studies* 113, 122.

capacity and tax base'. This provision enforces the notion of local accountability: residents taxed by their own municipality are more likely to demand from their civic leaders to account for spending of their taxes. Conversely, municipalities receiving transfers from the national government for the bulk of their income may fail to be accountable to their residents and place the responsibility for a lack of services on national government.[1]

Having access to a variety of revenue streams should enable municipalities to balance their books. In this endeavour the constitutional principle is that revenue must be real, rather than borrowed. Kriel and Monadjen argue convincingly that the limitation on short-term borrowing only for bridging purposes and long-term debt only for capital projects[2] means that a municipality cannot borrow to cover a deficit in its current expenditure.[3] This limitation sets many municipalities up for financial failure: they will not be able to pay accounts due if funds do not come from sources other than debt. Moreover, the national or provincial governments are not standing in as guarantors for municipal debt. If municipal 'insolvency' does occur, FC s 139 provides the out: the mandatory intervention by the provincial executive where a municipality either fails to approve the necessary revenue-raising measures to give effect to its budget,[4] or where the municipality fails to meet its financial commitments.[5] The MFMA, in turn, states that where a municipality fails to meet its financial commitments, a provincial intervention must take place and the municipality may approach a court to terminate its financial obligations to its creditors.[6]

The constitutional principle of financial responsibility has also been enforced by the courts. First, the Supreme Court of Appeal has ruled that there is no implicit guarantee that the national or provincial government will step in as guarantor of a local debt.[7] In *MEC for Local Government, Mpumalanga v Independent Municipal and Allied Trade Union (IMATU),* a municipality was not able to meet its salary commitments to employees due to its dire financial position.[8] Acting on

[1] Savage observes that the growth of municipal reliance on intergovernmental grants 'increasingly blur lines of accountability to citizens as "the point of origin and destination of funds do not match", which can create ambiguities about the actual expenditure preferences of residents.' Savage (supra) at 295 (reference omitted).

[2] FC s 230A.

[3] Ross Kriel & Mona Monadjem 'Public Finance' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) 27-35.

[4] FC s 139(4).

[5] FC s 139(5).

[6] See Steytler & De Visser (supra) at 15-51.

[7] See Public Finance Management Act ss 66 and 77 on the issuing of guarantees by the national and provincial governments.

[8] 2002 (2) SA 76 (SCA).

the knowledge that the municipality could not meet any claim, IMATU, the trade union acting on behalf of its members, sought an order against the provincial government to effect payment of the amounts due. Their claim was based on FC ss 139 and 154. The Court found that FC s 139 (as it then read)[1] was not applicable: a province's decision to intervene in a municipality lay within the province's discretion. FC s 154, imposing a duty on national and provincial government to support and strengthen the capacity of municipalities,[2] was also not of assistance. Assuming a court could order a province to support and strengthen a municipality, the Court held that the duty to support does not entail providing security for unpaid debts. The MFMA confirms this approach. MFMA s 51 explicitly provides that the national or provincial government guarantees a debt of any municipality only to the extent provided in chapter 8 of the Public Finance Management Act.

Failure to meet its financial commitment may further lead to the eventual attachment of municipal property to satisfy creditors' claims. Where judgment is given against a municipality, a private party may execute the judgment by means of the usual civil remedies, including the attachment and the sale in execution of municipal assets. In *Mateis v Plaaslike Munisipaliteit Ngwathe & Andere*[3] the Supreme Court of Appeal held that a municipality was not covered by the State Liability Act, because the Act only gives the national or provincial government immunity from attachment.[4] While the Supreme Court of Appeal is correct that the Act, dating from 1957, makes no mention of municipalities, the elevation of local government to a sphere of government in the Final Constitution places the Act at odds with the new constitutional dispensation. The *Mateis* Court could have read the Act so that local government is, for the purposes of the Act, to be regarded as forming part of the state.

No correction of the State Liability Act followed. Instead the MFMA, adopted after *Mateis*, sought a compromise — only non-core assets are subject to liquidation. As it is not a viable option to liquidate municipalities which must continue to deliver basic municipal services, there should be a limit to the extent that a monetary claim can be recovered by liquidating municipal assets. The MFMA establishes the general principle that where a municipality cannot meet its financial commitments, assets not necessary for the delivery of basic services may be liquidated in order to pay creditors. Where a municipality seeks debt relief in terms of the MFMA, it may only liquidate non-core assets.[5] Non-core assets

[1] See § 22.6*(a)*(i) infra.
[2] See § 22.6*(b)*(ii) infra.
[3] 2003 (4) SA 361 (SCA).
[4] State Liability Act 20 of 1957 s 3. After the writing of this chapter, the Constitutional Court declared s 3 of the State Liability Act unconstitutional. *Nyathi v MEC for Department of Health, Gauteng & Another* [2008] ZACC 8 (2 June 2008).
[5] MFMA s 154.

are defined as assets not reasonably necessary to sustain effective administration or to provide the minimum level of basic municipal services. Given this limitation on a municipality's power to meet its financial obligations, a creditor should have no greater powers of liquidating municipal assets through attachment and sale in execution.

(c) Constitutional nature of the revenue-raising powers

(i) *Original powers*[1]

The power of a municipality to impose a rate on property or a surcharge on user fees stems from the Constitution[2] and can thus be described in terms of the Constitutional Court's jurisprudence as an 'original' power.[3] In contrast, before the Interim Constitution, all municipal powers, including the rating power, were 'delegated' powers conferred on a local authority by another organ of state.[4] The new status of local government, first recoggnized by the Constitutional Court in *Fedsure* in terms of the Interim Constitution, has thus been strengthened by the revenue raising powers found in the Final Constitution.

As an original power, a municipality's power to levy rates or impose a surcharge is not dependent on enabling national legislation. This power sets it apart from a province's comparable power which, in terms of FC s 228(2)*(b)*, must be regulated in terms of an Act of Parliament. In the absence of national legislation, a municipality may, on the basis of FC 229(1)*(a)* alone, levy rates and impose surcharges. The Constitutional Court thus stated: 'Now the conduct of a municipality is not always invalid only for the reason that no legislation authorizes it. Its power may derive from the Constitution or from legislation or a competent authority [national government] or from its own laws.'[5]

(ii) *Legislative powers*[6]

The exercise of the power to impose rates and taxes, the Constitutional Court held in *Fedsure*,[7] constituted a legislative act:

> It seems plain that when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates, or determines appropriations to be made out of public funds,

[1] See Nico Steytler & Jaap de Visser *Local Government Law of South Africa* (2007) 13-6; Kriel & Monadjem (supra).

[2] *City of Cape Town v Robertson* 2005 (2) SA 323 (CC), 2005 (3) BCLR 199 (CC)('*Robertson*') at para 62; *CDA Boerdery (Edms) Bpk & 'n ander v Nelson Mandela Metropolitaanse Municipaliteit en andere* [2005] JOL 14785 (SE)('*CDA Boerdery SE*') at para 6.

[3] *Robertson* (supra) at para 56.

[4] *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC)('*Fedsure*') at para 39.

[5] *Robertson* (supra) at para 60.

[6] See Steytler & De Visser (supra) at 13-7.

[7] *Fedsure* (supra) at para 53-59. See also *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C) at para 17. See also § 22.3*(a)* supra.

> it is exercising a power that under our Constitution is a power peculiar to elected legislative bodies. It is a power that is exercised by democratically elected representatives after due deliberation.[1]

The fact that the setting of rates is a legislative act does not imply, however, that such act is unbounded. The Constitutional Court emphasized in *Fedsure* that a council is still bound by the principle of legality, a core element of the foundational constitutional commitment to the rule of law.[2] The principle of legality requires that a council functions in terms of the Final Constitution and the constraints it imposes on the local government, and that any legislation is legitimately adopted in terms of the Final Constitution. To the extent that a local government acts 'in breach of one of the direct and mandatory provisions of chapter 10 [of the Interim Constitution relating to local government] it is clear that that infringement will be in breach of the Constitution and subject to constitutional challenge.[3] The same principle applies to relevant regulatory provisions imposed constitutionally by the national legislature or provincial legislatures.[4] In addition, any legislative act of a council, including the setting of rates, must be consistent with the Bill of Rights.[5]

The proposition that the imposition of taxes is a legislative act also necessitated changes to the rules for the supervision of municipalities. In its initial form, FC s 139 confined provincial intervention in a municipality only to the non-fulfilment of an *executive* obligation.[6] The statutory failure to impose a budget and taxes to meet the budget thus fell outside the scope of provincial intervention. To meet this failure in municipal governance, the Final Constitution was amended to mandate an intervention where a municipality fails to pass a budget or to impose sufficient revenue-raising measures.[7]

As the legislative acts of approving a budget and imposing revenue-raising measures lies at the heart of municipal governance, they are functions that only the municipal council may perform. FC s 160(2) thus determines that such functions as approving a budget, imposing rates and other taxes, levies and duties and raising loans may not be delegated by a municipal council. Moreover, given the importance of the function, these decisions must be taken by a municipal council with the supporting vote of a majority of council members.[8]

(iii) *Division of powers between district and local municipalities*

Because jurisdiction is shared by district and local municipalities in non-metropolitan areas, the fiscal powers and functions must also be divided among the

[1] *Fedsure* (supra) at para 45.
[2] Ibid at para 56. See also *CDA Boerdery SE* (supra) at para 6.
[3] *Fedsure* (supra) at para 53.
[4] Ibid at para 53
[5] Ibid at para 54.
[6] See further § 22.6*(d)* infra.
[7] See further § 22.6*(e)* infra.
[8] FC s 160(3). See § 22.2*(c)* infra.

two. The Final Constitution thus requires that 'an appropriate division' of these powers be made in terms of national legislation.[1] This division may be made after Parliament has taken into account at least the following criteria:[2]

(a) the need to comply with sound principles of taxation;
(b) the powers and functions performed by each municipality;
(c) the fiscal capacity of each municipality;
(d) the effectiveness and efficiency of raising taxes, levies and duties; and
(e) equity.

The first criterion deals with general principles of sound taxation that should include the avoidance of double taxation. In the case of property rates, the Local Government: Municipal Property Rates Act has allocated this power to local municipalities, allowing districts to impose rates only on those areas falling outside the jurisdiction of local municipalities, namely district management areas.[3] The second criterion follows on the division of functions; where a district municipality is the direct service provider to end-users, such as water and sanitation, the power to impose a surcharge should flow from the power to charge fees for services rendered. The third criterion introduces a measure of flexibility; the legislation should be flexible enough to allow for differentiation between municipalities. Such flexibility suggests a certain degree of executive discretion in accommodating fiscal capacity. Whereas fiscal capacity relates to the available revenue base, the next criterion seeks to accommodate the skill and the capacity of a municipality to collect taxes. Again, this criterion promotes individualized assessment. The last criterion is a broad all-encompassing consideration. The term 'equity' is used in the Final Constitution to denote fairness in the allocation of resources as judged from the perspective of need.[4] However, a strict division of powers is not necessary. The Final Constitution explicitly provides that '[n]othing in this section precludes the sharing of revenue raised in terms of [FC s 229] between municipalities that have fiscal power and functions in the same area.'[5] This provision allowed the district municipalities to share the RSC levies they collected in the district with the local municipalities. In terms of the Municipal Fiscal Powers and Functions Act, the Minister of Finance may make regulations regarding an appropriate division of fiscal powers and functions between district and local municipalities having the same fiscal powers and functions with regard to the same area.[6]

(iv) *Discretionary powers*

As we have noted, the power to impose taxes is an 'original power': it grants a municipality the authority to decide how and when to exercise the power. The

[1] FC s 229(3).
[2] FC s 229(3).
[3] Act 6 of 2004 s 2(2)*(a)*.
[4] See Nico Steytler 'Public Funding of Represented Political Parties Act 103 of 1997 and the Implementation of section 236 of the 1996 Constitution' (1998) 2 *Law, Democracy and Development* 243.
[5] FC s 229(4).
[6] Act 12 of 2007 s 10(1)*(b)*.

decision not to impose taxes is constrained by the need to raise sufficient income to balance the budget. A failure to balance the budget may lead to a provincial intervention in terms of FC s 139. Where a municipality does not fulfil an obligation in terms of the Constitution or legislation to approve any 'revenue-raising measures necessary to give effect to the budget', the provincial executive is obliged to intervene, including taking the necessary steps to ensure that those revenue-raising measures are taken.[1]

How the municipality balances its books through the use of its revenue-raising powers falls to the discretion of the municipality. Budlender AJ's view is that there is no principle of law that a property rate could not be charged to cover the cost of services where the costs of consumption of the service can be attributed to individual ratepayers.[2] This assumption is given further expression in the Systems Act. The definition of a municipal service makes it clear that a municipality is not obliged to levy fees, charges or tariffs in respect of the services it provides.[3] A municipality therefore has a choice as to whether to recover costs of a service through levying rates or charging service fees.

(v) *Authorization of further taxing powers*

In terms of FC s 229(1)*(b)* a municipality's access to other taxes may be authorized by national legislation. However, such a tax falls within in the discretion of the national government; there is no constitutional claim that the national government must give such authorization. This position is apparent when contrasted with the taxing powers of provinces. In terms of FC s 228(1), a province may impose taxes, levies and duties (excluding some taxes and duties) and a flat-rate surcharge on some national taxes. This power cannot be exercised in the absence of some regulatory national legislation.[4] However, one could argue that the national government is under a constitutional obligation to provide such regulatory legislation. It cannot deny a province its constitutional taxing power by simply failing to adopt such legislation. In contrast, a municipality cannot claim that it is entitled to any additional taxing powers. The language of the Final Constitution is clear: only 'if authorized' does the taxing power arise.

It may be further argued that the national government must exercise its discretion in a rational way. Where local government is starved of resources with ever increasing obligations to provide basic services (and especially free basic services to the indigent[5]), a blanket refusal to authorize further taxes may be tested against the criterion of rationality. Where authority for a new tax is given in national legislation, the detail of such taxing powers may be further regulated in that legislation.[6] As we will argue below, such regulations should allow some

[1] FC s 139(4). See further § 22.6*(e)* infra.
[2] *Ratepayers Action Group v City of Cape Town* 2004 (12) BLCR 1328 (C) at para 56.
[3] Systems Act s 1(1) 'municipal service'.
[4] FC s 228(2)*(b)*.
[5] On the government policy of free basic services, see Tim Mosdell 'Free Basic Services: The Evolution and Impact of Free Basic Water Policy in South Africa' in Udesh Pillay, Richard Tomlinson & Jacques de Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) 283.
[6] FC s 229(2)*(b)*.

scope for municipalities to determine the contours of such taxes. The national government does not have the authority to grant additional taxing powers to local government (e.g., to charge income tax, value-added tax, general sale's tax or customs duty.)[1]

(d) Supervision of the exercise of a municipality's revenue-raising powers

The exercise by a municipality of its revenue-raising powers is subject to supervision by both the national government and provincial governments. At the national level, a regulatory framework may be provided for the exercise of 'original' taxing powers. Such a framework should, however, be informed by intergovernmental relations. However, national or provincial intervention may still occur when the manner in which the power exercised falls foul of the normative framework provided in the Final Constitution.

(i) *Regulatory framework*

The supervisory power of the national government is restricted to regulating the power to impose rates on property, surcharges or any other authorized tax, levy or duty. The Constitutional Court has accepted that the ordinary meaning of the word 'regulate' connotes 'a broad managing or controlling rather than direct authorization function.'[2] In exercising its regulatory function, Parliament is not at liberty to impose any type of limit or restriction on municipal powers to levy rates. Any prescription that compromises or impedes a municipality's ability to discharge its powers or to perform its functions is inconsistent with FC s 151(4) and thus open to constitutional challenge.

The regulatory framework for property rates is provided by the Local Government: Municipal Property Rates Act of 2004 ('Rates Act').[3] The surcharges and other authorized taxes, levies and duties are now governed by the Municipal Fiscal Powers and Functions Act of 2007 (MFPFA).[4] Given that most aspects of municipal revenue raising are now governed by new order national legislation, the relevance of old order provincial ordinances has largely become moot. It has been argued that in terms of FC Chapter 13, provincial legislatures are no longer competent to deal with the regulation of municipal finances and thus provincial ordinances regulating the area were impliedly repealed.[5] Such a view of the constitutionality of provincial ordinances has not been supported by our courts. The

[1] FC s 229(1)*(b)*. The broad rubric of 'income tax' encompasess both personal income tax and corporate income tax. The reference to value-added tax and general sale's tax deals with consumer taxes at the point of sale or production. Customs duties refer to the levying of a tax or duty on the importation or exportation of goods or services.

[2] *Ex Parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 377. For a discussion on the regulatory framework of FC s 155(7), see § 22.3*(d)* supra.

[3] Act 6 of 2004.

[4] Act 12 of 2007.

[5] Kriel & Monadjem (supra) at 27-46.

courts generally ask not whether an entire old ordinance or new ordinance is invalid, but rather whether specific aspects of the ordinance in question undermine the Final Constitution's treatment of local government as an autonomous sphere of government.[1]

In *CDA Boerdery (Edms) Bpk v The Nelson Mandela Metropolitan Municipality & Others*,[2] the High Court was confronted with a provision in the Cape Provincial Ordinance[3] that required the permission of the provincial administrator (now premier) before a rate over two cents in the Rand could be imposed. Froneman J found that requiring the premier of a province to give such approval was inimical to the new constitutional dispensation: the Final Constitution clearly grants a municipality power to impose a rate.[4] The Supreme Court of Appeal agreed.[5] In the majority judgment,[6] Cameron JA held that, in view of the new status of local government in terms of the Final Constitution, the requirement of obtaining the Premier's permission was impliedly repealed when s 10G of the Local Government Transition Act ('LGTA')[7] was enacted after the IC took effect and when s 10G was re-enacted after the FC took effect.[8] The approval requirement was a product of the pre-1994 dispensation, 'tailored to its hierarchy and matched to the Administrator's supervisory control over municipalities and his executive role in relation to them.'[9] Under the Final Constitution, the judge continued, the Premier enjoys no 'special supervisory powers over the exercise of local government functions, or special duties in relation to the determination of rates.'[10]

As the phasing in of the new order legislation is completed, old order provincial ordinances are either explicitly or by implication repealed. The focus of attention has shifted to the nature and the approach of the new order national legislation Courts will ask whether the manner in which municipal finances are regulated overreaches constitutionally mandated parameters. We will return to questions of regulatory overreach when dealing with rates, surcharges and other taxes below.

(ii) *Procedure for adoption*

Before national legislation is enacted authorizing additional taxing powers or providing a regulatory framework, the Financial and Fiscal Commission (FFC)[11]

[1] Provincial ordinances could exist side by side with the LGTA and were not repealed by implication by the LGTA. *Rates Action Group v City of Cape* Town 2004 (12) BCLR 1328 (C) at paras 44-48; *Howick v uMngeni Municipality* [2005] JOL 13714 (N) 7. See also *CDA Boerdery SE* (supra) at para 11.

[2] *CDA Boerdery SE* (supra).

[3] Ordinance 20 of 1974 (Cape) s 82(1).

[4] *CDA Boerdery SE* (supra) at para 11.

[5] *CDA Boerdery (Edms) Bpk & Others v The Nelson Mandela Metropolitan Municipality & Others* 2007 (4) SA 276 (SCA)('*CDA Boerdery*').

[6] Conradie JA, in his minority judgment, argued that during the transition period no untrammelled rating powers were conferred on municipalities, thus retaining the premier's power to grant permission.

[7] Act 209 of 1993.

[8] *CDA Boerdery* (supra) at para 44.

[9] Ibid at para 35.

[10] Ibid at para 40.

[11] See generally Ross Kriel & Mona Monadjem 'Public Finances' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) 27-51ff.

and organized local government must have been consulted and any recommendations of the Commission must have been considered.[1] The object of consultation with the FFC is to obtain objective expert advice from a body that is concerned with intergovernmental fiscal relations. The duty to consult organized local government flows from the principle of co-operative government that when legislation affecting local government is considered, the latter's view on the matter must be sought.[2]

The duty to consult defines the form and the process of the legislative process and failure to comply with this duty may lead to the invalidation of the legislation. In *Robertson v City of Cape Town & Another; Truman-Baker v City of Cape Town*, the applicants argued that the Structures Amendment Act,[3] containing a provision dealing with a municipality's fiscal powers, was invalid because there was no consultation with the FFC.[4] The Cape High Court agreed. It held that since the amended section of the Structures Act was legislation envisaged by FC s 229(5),[5] consultation was required. Parliament did not request the FFC's comment on the draft provision in question, and the FCC could not, as required, formulate a response. Because consultation is a bi-lateral process, no consultation took place.[6] The High Court concluded that the law was not passed in a manner consistent with the Final Constitution and was thus invalid. In the confirmation hearing, the Constitutional Court held that the impugned legislation served only to clarify the law and thus did not invoke the consultation requirement of FC s 229(5). It thus declined to consider the constitutionality of the legislation with regard to the manner and the form of its adoption.[7]

The consultation process raises a number of questions. First, what bodies must consult with the FFC and organized local government? In *Robertson,* the challenge was based on Parliament's failure to consult with the FFC. Would it have mattered if the National Treasury had consulted with the FFC before the bill was tabled in Parliament? We would argue that the body consulting with the FFC is not outcome determinative. The answer to the question of whether proper consultation has occurred should, as the Constitutional Court noted, turn on the substance of the legislation. The general consultation duty in FC 154(2) suggests that legislation that affects the status, the institutions, the powers or the functions of local government must be published — as draft legislation — for public comment *before* it is introduced in Parliament. FC 154(2) contemplates a process that affords organized local government and the FCC, among other interested

[1] FC s 229(5).
[2] See FC s 154(1) and § 22.7*(d)* infra.
[3] Act 51 of 2002, amending s 93 of the Structures Act by adding a number of subsections dealing with provisions of LGTA s 10G(6) pertaining to the imposition of property rates.
[4] 2004 (5) SA 412 (C), 2004 (9) BCLR 950 (C)('*Robertson HC*').
[5] *Robertson HC* (supra) at para 93.
[6] Ibid at para 109.
[7] *City of Cape Town & Another v Robertson & Another* 2005 (2) SA 323 (CC), 2005 (3) BCLR 199 (CC) at paras 76-77.

parties, the opportunity to make representations regarding the substance of the bill. If substantive provisions of the bill are changed in Parliament after the consultation process (and not as a result of the consultation), then a further round of consultation should follow. FC 154(2)'s object is to ensure that these two stakeholders — amongst others — can comment on the substantive provisions of the bill.

The duty of consultation required by FC s 229(5) is more onerous than the general consultation process demanded by FC s 154(2). While the latter provision merely requires that stakeholders be afforded the opportunity to make representations (which they may or may not avail themselves of), consultation in terms of FC 229(5) entails an approach that requires the views of the stakeholders to be actively sought out. The definition of consultation in the Intergovernmental Relations Framework Act (IGRFA) is instructive in this regard: consultation 'means a process whereby the views of another on a specific matter are solicited, either orally or in writing, and considered.'[1] The emphasis falls on the positive act of 'soliciting' comments and not waiting passively for representations.[2]

What are the implications of the requirement that 'recommendations of the Commission [must] have been considered'?[3] The omission of any reference to the need to consider recommendations of organized local government certainly does not mean that Parliament or the National Treasury may simply ignore any views that the South African Local Government Association (SALGA) may offer. The IGRFA definition, quoted above, correctly embraces a definition of consultation in which the solicited views of a party must be 'considered'. Thus the National Treasury can only demonstrate that the views of the FFC have been considered by giving reasons as to why the FCC's recommendations have or have not been accepted. In fact, the National Treasury does employ such a process: when introducing the annual Division of Revenue Bill, the National Treasury provides a detailed set of comments on the FFC's recommendations.

(iii) *Material impact of the exercise of revenue-raising powers*[4]

FC s 229(2)*(a)* provides that a municipality may not exercise its power to levy rates, surcharges or taxes in a way that 'materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour.' The provision reflects the view that the economy of the country functions as an integrated system and that actions taken at local level could have a spillover effect that could harm the national economy. The tax regime of large metropolitan municipalities, if poorly conceived, could easily have a negative impact on the national economy. National

[1] Act 13 of 2005 s 1(1) 'consultation'.

[2] See further § 22.7*(d)*(ii) infra.

[3] A similar requirement is included in the consultation process with regard to the enactment of the annual Division of Revenue Act (FC s 214(2)).

[4] See Nico Steytler & Jaap de Visser *Local Government Law of South Africa* (2007) 13-23.

interests are captured, in the Final Constitution and in relevant statutes, by such terms expressed as 'national economic policies' and the 'national mobility' of goods, services, capital and labour.[1] Municipal tax policies could also be deemed constitutionally suspect if they have a much more localized detrimental effect. The exercise of taxing powers that prejudices 'economic activities across municipal boundaries' is also proscribed. The proscribed conduct in both cases should be both material and unreasonable. For example, if a small municipality with an insignificant impact on the national economy increases its rates above the national government's inflation targets, it may be deemed unreasonable (in so far as it formally appears to prejudice national economic policy). However, given the insignificance of the tax, the court may find that the requirement of materiality has not been met.

The prohibition applies to the exercise of original and authorized taxing powers and deals with the manner in which they are exercised. Two issues have emerged in this context. First, can the courts give effect to the principles of good tax behavior? Second, how can the national government police tax behaviour proactively and reactively?

The first question was addressed in *CDA Boerdery v Nelson Mandela Metro*.[2] The applicants claimed that the drastic increase in rates on agricultural land would prejudice national economic policy. While not giving a final answer to the question, Froneman J suggested two reasons why courts should be cautious when approaching this question. First, a matter of national economic policy (or any of the matters listed in FC s 229(2)*(a)*) must be set within the context of cooperative government set out in FC Chapter 3. With reference to the duty to avoid litigation in settling intergovernmental disputes, the judge noted that courts have a limited role to play in the settlement of such disputes. Because the dispute before court centred around 'national economic policies', the matter could not be resolved without identifying the relevant national organs of state in the different spheres as parties. Second, given the nature of the matters listed in FC s 229(2)*(a)*, the courts are not well equipped to judge when a rates policy materially and unreasonably prejudices national economic policies or activities. In as much as courts generally do not want to pronounce on the merits of policies decisions that raise complex questions and create polycentric conflicts, the separation of powers doctrine grants courts the space to avoid difficult problems raised by disputes over the matters listed in FC s 229(2)*(a)*.[3] Appropriate remedies regarding such policies tend to lie outside the courts: in our democratically accountable institutions, in the commitment to cooperative government and, finally, in regularly held democratic elections. With no national organs of state joined in the proceedings,

[1] In the MFPFA 'national economic policy' is defined as including 'the tax policy for the Republic as determined by the national government' (s 1(1)).

[2] [2005] JOL 14785 (SE) at para 12.

[3] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 46.

the High Court concluded that a judgment could thus not be made since there was no evidence of what the national economic policies were. On appeal, Cameron JA shared Froneman J's reservations about the justiciability of FC s 229(2)*(a)*. He refrained, however, from expressing a final view on the issue.[1] He also agreed that it would be wrong for the SCA to decide on the matter without first hearing the national government's view on the subject.[2]

Two conclusions can be drawn from *CDA Boedery*. First, the courts are naturally reluctant to become parties to disputes over macro-economic policy. Second, since the primary actors in the matter are the national government and the municipality, FC Chapter 3 requires that a political solution should first be sought before the courts are approached.[3]

Can the national legislation prescribe beforehand what should be regarded as taxing behaviour falling foul of FC s 229(2)*(a)*? In the legislation on municipal finance, the constitutional restrictions on the imposition of taxes are repeated in the Rates Act [4] and the MFPFA.[5] The details of the enforcement mechanisms are discussed under rates[6] and taxes.[7] In seeking to enforce the prescripts of sound taxing practice, the national government can preemptively prescribe what behaviour would fall foul of FC 229(2)*(a)* by using its regulatory powers in terms of FC s 229(2)*(b)*. To deal with national economic policy concerns, such as inflation targeting, it should be permissible to set maximum increases in rates and taxes. It is thus constitutionally permissible to state that one of the objects of the MFPFA is to ensure that municipal fiscal powers and functions are exercised in a manner that accords with FC s 229(2)*(a)*.[8] In seeking to regulate the potentially deleterious consequences of surcharges, the MFPFA focuses on setting an upper limit for all municipalities (or a class of municipalities). However, as argued below, such regulatory prescriptions should not impede the ability of a municipality to perform its functions. A further question is whether, given the regulatory nature of supervision, the Minister of Finance can intervene with respect to an individual municipality to assert the principle and interests articulated in FC s 229(2)*(a)*? This question is addressed in the discussion of capping rates of a specified municipality.[9]

[1] *CDA Boerdery (Edms) Bpk & Others v The Nelson Mandela Metropolitan Municipality & Others* 2007 (4) SA 276 (SCA) at para 46.
[2] Ibid.
[3] See *Uthukela District Municpality & Others v President of the Republic of South Africa & Others* 2003 (1) SA 678 (CC), 2002 (11) BCLR 1220 (CC). See, generally, Stu Woolman, Theunis Roux & Barry Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) 14-8.
[4] See also Rates Act s 16(1).
[5] See MFPFA s 2*(b)*.
[6] See § 22.5*(e)*(ii) infra.
[7] See § 22.5*(g)* infra.
[8] MFPFA s 2*(b)*.
[9] See § 22.5*(e)*(ii) infra.

(e) Rates

(i) *Defining property rates*

Property rates have historically been associated with local government in most countries.[1] It has developed a standard meaning overtime, a meaning that the Supreme Court of Appeal has endorsed.[2] The Supreme Court of Appeal accepted the dictionary and ordinary meaning of rates as 'the assessment levied by local authorities at so much per pound of assessed value of buildings or land owned'.[3] There are thus two elements to rates: the property must be valued and a rate in a money unit (so many cents in the Rand) is set. The rates due are then the value of property multiplied by the rate. This meaning of rates, the *Gerber* Court found, was not changed by the new constitutional dispensation.[4] However, the constitutional power of levying property rates has acquired an independent meaning. For example, a service 'charge' based not on consumption but as a rate against the value of the property, is a property rate, whatever it may otherwise be called.[5]

(ii) *Municipal powers over the setting and collection of rates*

The Rates Act sets out in detail how a municipality ought to proceed to set and to collect property rates. A municipality must first adopt a rates policy which is then translated into a by-law. Each year the council must adopt a resolution that sets the rates for the next financial year. However, this chapter limits its analysis to the constitutional dimensions of this process.

In setting a rates policy, the municipality makes choices with regard to properties that may be excluded from being rated, that may differentially rated with respect to different categories of property and categories of residents that may receive rebates on the rates due. While the Rates Act gives considerable scope for local policy choices, it structures a council's discretion to a limited degree. Firstly, a rates policy must allow the municipality to promote the objects of local government, namely local, social and economic development.[6] In pursuing these objects, the Constitutional Court said in *Fedsure* that 'it is a legitimate aim and function for local government to eliminate the disparities and disadvantages that are a consequence of the policies of the past and to ensure, as rapidly as possible, the upgrading of services in the previously disadvantaged areas so that equal services will be provided to all residents.'[7]

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[1] Richard Bird & Enid Slack 'Introduction and Overview' in Richard Bird & Enid Slack (eds) *International Handbook of Land and Property Taxation* (2004) 10.

[2] *Gerber & Others v MEC for Development Planning and Local Government, Gauteng, & Another* 2003 (2) SA 344 (SCA) ('*Gerber*'). See also *Ratepayers Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C)('*Ratepayers Action Group*') at para 52.

[3] *Gerber* (supra) at para 23.

[4] Ibid at para 24.

[5] *Ratepayers Action Group* (supra) at para 68.

[6] Rates Act s 3(3)(i).

[7] *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC)('*Fedsure*') at para 80.

The second broad requirement is that the policy must treat ratepayers 'equitably'.[1] In contrast to the right to equal treatment of persons in the same position, 'equity' refers to the broad concept of fairness. Fairness possesses at least three connotations. The first connotation, as used in the Final Constitution[2] and by the Constitutional Court,[3] refers to acting in the interest of those in need. Owners of valuable properties cannot complain that they must pay a form of wealth tax that will be used to cover the costs of services for the poor. The second connotation relates to the differential treatment of different categories of ratepayers. How should the proper balance be struck between promoting industrial development — by offering businesses low rates on industrial properties — and residential property owners who are often asked to carry the bulk of the overall rates charged? The third connotation engages the exchange relationship between the ratepayer and the municipality: is it fair that agricultural land, which receives hardly any services, is rated in the same manner as urban properties that receive extensive municipal services? While this elusive concept of 'equity' is justiciable,[4] a court will be reluctant to interfere in a council's view of what is equitable. Rate policies entail, by definition, policy choices which lie at the core of municipal autonomy.

While the Rates Act provides an open structure for the development of local policy, it also permits the Minister to prescribe, by regulation, a framework that may deal with such important features as exemptions, rebates and reductions.[5] The Minister may also determine that the rate on non-residential properties may not exceed a prescribed ratio to the rate on residential properties.[6] However, such a national framework should not have the effect of compromising or impeding a municipality's ability or right to exercise its powers.[7] It follows then that the

[1] Rates Act s 3(3)*(a)*.
[2] See FC ss 155(4), 214 and 236.
[3] *Fedsure* (supra) at para 80.
[4] See also *Howick District Landowners Association v uMgeni Municipality* [2005] JOL 13714 (N) 19.
[5] Rates Act s 3(5).
[6] Rates Act s 19(1)*(b)*.
[7] An example of regulation that may fall foul of the constitutional parameters are draft regulations (Local Government: Municipal Property Rates Act (6/2004) *Government Gazette* 30584, GN 1172 (19 December 2007)) proposing rate ratios between residential and non-residential categories of properties, including that rates on state-owned properties may not be more than 25% of the rate on residential properties. Apart from questions about the rationality of the ratios proposed, in imposing a very low maximum on the rate for state-owned properties, the national government may be compromising or impeding a municipality's ability or right to exercise its powers or to perform its functions within the meaning of FC s 151(4). A municipality is entitled to impose rates as long as it does not unreasonably prejudice national economic policies; economic activities across boundaries; or the national mobility of goods, services, capital or labour. None of these goals is served by the proposed ratio for state-owned property. The regulations have the effect of depriving municipalities who service substantial state properties from legitimate and much needed revenue collection. While it may be argued that the rates bills for national, provincial and other state-owned properties are settled from the same national revenue fund from which local government grants are apportioned, such settlements can not eclipse the obvious violation of FC s 151(4).

framework should not have the effect of removing policy choices from a council and determining all rate-making outcomes. Should the national legislation have such an effect, it will not be regarded as merely regulating the rating power of a municipality in terms of FC s 229(2)*(b)* and should be found constitutionally infirm.

In terms of the Rates Act, the annual rates resolution may also be structured by national intervention. The Minister for Local Government may, with the concurrence of the Minister of Finance, set an upper limit on the percentage by which rates in general or on a specific category of property may be increased. The Minister has a wide discretion and may set different levels for different kinds of municipalities. These different levels may reflect the different categories of municipalities or take some other consideration into account.[1] In individual cases, the Minister may also exempt a municipality that has, in writing, shown good cause why it should be exempted from the upper limit set.[2] Again, the key question is whether an imposed maximum allows a sufficient discretion for the municipality to exercise its constitutionally recognized powers. If the maximum in effects predetermines the outcome of the municipality's choice, by allowing little or no discretion, the bounds of permissible regulation may well be overstepped.[3]

The Rates Act also empowers the Minister for Local Government to intervene in an individual municipality when he or she deems that the rate does not comply with FC s 229(2)*(a)*.[4] The process may be iniated by complaints from the private sector or the Minister may initiate the process. Where the Minister is convinced that the rate on a specific category of property materially and unreasonably prejudices any of the matters listed in FC s 229(2)*(a)*, the municipality must be given notice that the rate will be limited as specified in the notice.[5] The notice must give reasons why the rate is in conflict with FC s 229(2)*(a)*'s criteria.[6]

Is the ministerial power consistent with the Final Constitution? That is, given that the determination of a rate is a legislative act, can the minister intervene in a

[1] Rates Act s 20(2)*(a)*.

[2] Rates Act s 20(3).

[3] Another good example of regulatory overreach are the recent draft regulations: 'Local Government: Municipal Property Rates Act (6/2004)' *Government Gazette* 30583, GN 1171 (19 December 2007). These regulations prescribe an upper limit on the percentage by which rates on properties or a rate on a specific category of properties may be increased. The upper limit, proposed in the draft regulations, is the Consumer Price Index (excluding interest rate on mortgage bonds) as published by Statistics South Africa. Where the actual upper limit that is prescribed provides insufficient scope for municipalities to set their rates in a manner that allows them to meet their expenditure, a municipality's ability or right to exercise its powers is compromised and the upper limit falls foul of FC s 151(4). We would argue that the determination of a generic ceiling, linked to a standard inflation benchmark, such as the Consumer Price Index, deprives municipalities of any flexibility in effecting policy choices through rates increases. A municipality that, for example, wishes to differentiate rates increases among categories of property will be prevented from doing so as a result of this regulation. Increasing property rates on a specific class of properties to finance special infrastructure projects is not possible under this new configuration.

[4] Rates Act s 16(2)*(a)*.

[5] Rates Act s 16(2)*(a)* and (3)*(b)*.

[6] Rates Act s 16(4).

municipality's legislative domain? In *CDA Boerdery (Edms) Bpk & Others v The Nelson Mandela Metropolitan Municipality & Others,*[1] the Supreme Court of Appeal held that the requirement in the Cape Provincial Ordinance[2] requiring that the premier of a province had to approve municipal rates was impliedly repealed by the LGTA because it was inconsistent with the new status of local government. The *CDA Boerdery* court quite consciously expressed no opinion as to whether legislation enacted in terms of FC s 229(2)*(b)* can allow the premier to approve — or reject — municipal rates.[3] The *CDA Boerdery* court also expressed no opinion on the curbs on municipalities' rating powers in terms of the Property Rates Act. It does, however describe s 16 of the Property Rates Act as conferring 'limited and carefully defined powers of supervision and limitation regarding rates on the Cabinet member responsible for local government.'[4]

In our view, the constitutionality of this power is questionable. This power does not constitute regulation, as permitted by FC s 229(2)*(b)*. It does not set a framework in terms of which all municipalities must operate. It is exercised in respect of a single municipality in the form of a directive with which a municipality must comply. Such regulatory interference by the Minister flies in the face of the Constitutional Court's clear attempt in *Fedsure* to protect the integrity of the council's legislative authority.

(ii) *The process of determining market value of properties*

A key element of property rates is the value of the rated property. The rated value is the market value of the property and any improvements.[5] As the market value is a highly contested issue, the Rates Act has provided for an elaborate system of determining such value. The valuation is done by a municipal valuer who is appointed by the municipality. After the compilation of the valuation roll, it is opened for objections by the public and the municipality. If a complaint is not upheld by the valuer, then an appeal lies with a valuation appeal board. The decision of the board is final and binding on the municipality. The composition of this body, charged with giving an independent and impartial reassessment of the valuer's decision, raises constitutional questions regarding municipal autonomy. Under the current scheme, the provincial government plays an important role in the creation of the appeals boards.

The MEC for Local Government establishes a number of valuation appeal boards required for the needs of the municipalities. He or she appoints between two and four members to each board as well as its chairperson. All serve for a

[1] *CDA Boerdery (Edms) Bpk & Others v The Nelson Mandela Metropolitan Municipality & Others* 2007 (4) SA 276 (SCA)('*CDA Boerdery*').
[2] Ordinance 20 of 1974 s 82(1).
[3] *CDA Boerdery* (supra) at para 41.
[4] Ibid at para 42 fn 27.
[5] Rates Act s 11(1)*(a)*.

renewable period of four years.[1, 2] The MEC, in addition, may remove a member on the ground of misconduct, incapacity or incompetence.[3] The boards have the same investigative powers as a municipal valuer, and its hearings are not merely appeals on the record of the lower tribunal. They are full rehearings of the entire matter. All costs incurred in the adjudicatory forum, including review in a High Court,[4] are borne by the municipality.[5]

This framework raises two questions. First, what is the justification for the provincial intervention? The appointment of valuation appeal boards creates provincially appointed structures that take a final decision on municipal actions. The presumable rationale for this method of appointment is that a body other than the municipality must ensure that an independent and impartial body is the final decision-maker on valuations. The underlying assumption is that a municipality could not be trusted to make such appointments because it has a vested interest in the outcome of any appeal. In the past, under the various provincial ordinances, this task was given to a valuation court presided over by a judicial officer.[6]

Second, what is the constitutional basis for the provincial entry into the valuation process? Whatever merit this 'independence' rationale may have, there does not appear to be a sound constitutional basis for provincially appointed appeal boards. The constitutional scheme of local autonomy places a large amount of discretion in the hands of the municipalities to make decisions on a wide range of issues. Yet, no right of appeal to the provincial government (or bodies appointed by the provincial or national government) is afforded residents on other matters. For example, no right to appeal to provincial government exists with respect to municipal planning or zoning matters. As we have already noted, the national government and provincial governments have limited powers of supervision: namely regulation, monitoring, support and intervention. The appointment of appeal boards exceeds the accepted understanding of regulation — and it constitutes neither monitoring nor support. Finally, it is also not an intervention in terms of FC s 139. Does it matter that it is not the MEC that makes the decision but a body independent from the MEC that is entrusted with the task of making a final determination? Does the fact that the boards do not fall under the control of the provinces make a difference? We think not because final decisions on local government matters are made by institutions falling outside the domain of local government. Furthermore, if independence and impartiality are the objectives, the national framework could easily have provided for appeal tribunals appointed by the municipalities themselves. In the absence of a clear constitutional basis for the boards, the provincially appointed appeal boards are certainly constitutional suspect.

[1] Rates Act ss 58(1) and 60.
[2] Rates Act s 51. The Minister for local government provides a regulatory framework for the conditions of appointment of the members.
[3] Rates Act s 63(1)*(c)* and (2).
[4] Rates Act s 76(2).
[5] Rates Act s 76(2).
[6] See, for example, Natal Local Authorities Ordinance 25 of 1974 s 160.

(f) Surcharges

The second original taxing source is 'surcharges on fees for services provided by or on behalf of the municipality'.[1] A surcharge is defined in the Municipal Fiscal Powers and Functions Act ('MFPFA') as 'a charge in excess of the municipal base tariff that a municipality may impose on fees for a municipal service provided by or on behalf of a municipality'.[2] A municipal base tariff is defined, in turn, as 'the fees necessary to cover the actual cost associated with the rendering of a municipal service'.[3] This tax is a charge not in return for a service and, consequently, can be used for a purpose not necessarily related to the service for which it has been collected.

The imposition of surcharges is now regulated by the MFPFA. Recognizing that the competence of a municipality to impose a surcharge flows from the Final Constitution, the object of the Act, on its face, is merely to regulate the exercise of this power. The Act thus provides that the Minister of Finance may prescribe 'national norms and standards' for imposing municipal surcharges. Such surcharges may include maximum surcharges.[4] The norms and standards relating to maxima on surcharges may also provide bands or ranges within which municipal surcharges may be imposed.[5] This statutory authorization for further regulation by the Minister of Finance provides a very loose structure. As we have argued above, the essential aspect of the regulation is that it must provide for a framework within which municipalities can determine outcomes. The reference to national norms and standards appears to meet this criterion. It does not prescribe outcomes. However, the actual determination of such maxima or bands or ranges in which surcharges may be set will determine whether the municipal surcharges are permissible. If they leave little or no discretion, the rate of municipal surcharges has effectively been set. Such a result would appear to be beyond the constitutionally permissible regulatory competence of the national government.

(g) Other taxes, levies and duties

The MFPFA follows an even more restrictive approach to the imposition of other taxes, duties and levies. This approach may likewise exceed constitutionally permitted regulation of municipal affairs.

[1] FC s 229(1).

[2] Act 12 of 2007 s 1(1).

[3] MFPFA s 1(1). 'Actual costs' include the following: '*(a)* bulk purchasing costs in respect of water and electricity reticulation services and other municipal services; *(b)* overhead, operation and maintenance costs; *(c)* capital costs; *(d)* a reasonable rate of return, if authorised by a regulator of or the Minister responsible for that municipal service.' MFPFA s 1(1).

[4] MFPFA s 8(1). The maximum may be expressed as a ratio, a percentage of the municipal base tariff or a Rand value. MFPFA s 8(2)*(a)*(i).

[5] MFPFA s 8(2)*(a)*(ii).

As we have argued above, the granting of additional taxing powers falls within the discretionary competence of the national government. The MFPFA s 4(1) enables the Minister of Finance, on his or her own initiative or at the request of a municipality, a group of municipalities or organized local government, to authorize a municipal tax. The Act further prescribes a consultative and timely process that the Minister must follow before he or she authorizes a municipal tax by prescribing it in regulations. Where the process is initiated by local government, the Act prescribes an extensive list of requirements the application must meet. These desiderata require the municipality to demonstrate that the proposed tax complies with FC s 229(2)*(a)* and does amount to a tax prohibited by FC s 229(1)*(b)*.[1] Where the Minister rejects an application, reasons must be provided for such a decision.[2] The Minister's decision must, however, be framed by a number of constitutionally-relevant considerations. Principles of co-operative government, in terms of FC s 154(1), require that the national government must by legislative measures support and strengthen the capacity of municipalities to manage their own affairs and exercise their powers and functions. Where the additional revenue is important to this end, it becomes a compelling reason for ministerial approval. On the other hand, the taxation principles of FC s 229(2)*(a)* could weigh against the further imposition of taxes. Unless the Minister can show that the proposed tax would prejudice any of the stated tax objectives of FC s 229(2)*(a)*, the Minister may be bound — by the Final Constitution — to grant the application.

Where the Minister approves an application, the new tax is extensively regulated. It is in the extent of this tax regulation that the contrast with the regulation of a surcharge is apparent. Not only must the regulations determine the tax base on which the tax is to be levied but also the rate at which the tax may be levied.[3] The only exception is where the tax is not a specific purpose tax or a tax levied on the same tax base as that of national taxes. In such cases, the Minister may determine the bands or ranges within which the tax may be imposed.[4] As the Minister determines the most important outcome of the tax by setting the rate, it is no longer regulation but amounts to determination. As we have argued above, original and authorized taxing powers are subject only to regulation.[5] Statutory powers which exceed the express constitutional parameters of regulation ought to be found constitutionally infirm.

(h) Borrowing[6]

FC s 230 initially provided a similar framework for provincial and local government borrowing. In a constitutional amendment in 2001, municipal borrowing

[1] MFPFA s 5(1)*(c)* and *(d)*.
[2] MFPFA s 5(3).
[3] MFPFA s 6*(c)*(i) and (ii).
[4] MFPFA s 6*(c)*(ii)(bb).
[5] FC s 229(2)*(b)*.
[6] See Nico Steytler & Jaap de Visser *Local Government Law in South Africa* (2007) 12-27.

was removed from the section and placed in FC s 230A. The amendment effected a number of important changes.[1] First, whereas the old FC s 230 provided that national legislation could only impose 'reasonable conditions' for the raising of loans for capital or current expenditure, FC s 230A omits any reference to 'reasonable conditions'. This omission may give Parliament a freer hand to impose conditions as it pleases. Second, in a new paragraph, a municipal council may 'bind itself and a future Council in the exercise of its legislative and executive authority to secure loans or investments for the municipality'.[2] The object of this provision is to provide greater security for long-term loans.

The constitutional framework for municipal loans entails, first, that the council's power to raise loans must the exercised in accordance with national legislation.[3] Second, loans may be raised for current expenditure,[4] but only when necessary for bridging purposes during a financial year. Third, loans for capital expenditure are permissible. In such a case, a council may bind itself and a future council in the exercise of its legislative and executive authority to secure loans or investments for the municipality.[5] Fourth, before enacting any authorising national legislation, any recommendation of the Finance and Fiscal Commission must be considered.[6] Fifth, listed among the functions that a municipal council may not delegate to any other body or person is 'the raising of loans'.[7]

(i) *Short-term debt*

In giving effect to the Final Constitution, the Municipal Finance Management Act ('MFMA') provides that a municipality may incur short-term debt only when necessary to bridge shortfalls within a financial year and in expectation of specific and realistic anticipated income to be received within that financial year.[8] A short-term loan may also be incurred for capital needs within a financial year when they will be repaid from specific funds to be received from an enforceable transfer[9] by another organ of state or long-term debt commitment.[10]

[1] Constitution of the Republic of South Africa Amendment Act 34 of 2001 s 17.
[2] FC s 230A(1)*(b)*.
[3] FC s 230A(1).
[4] See Ross Kriel & Mona Monadjem 'Public Finances' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) 27-35 (Current expenditure is defined by the authors as salaries, wages, goods and services utilised by government and transfers and subsidies.)
[5] FC s 230A(1)*(b)*.
[6] FC s 230A(2). See *Robertson v City of Cape Town & Another; Truman-Baker v City of Cape Town* 2004 (9) BCLR 950 (C)(On the meaning and significance of the consultation duty.).
[7] FC s 160(2)*(d)*.
[8] Act 56 of 2000 s 45(1)*(a)*.
[9] A transfer or an allocation refers to a municipality's equitable share, a conditional grant from the national government, a grant in the provincial budget or an allocation from another municipality or organ of state which is not in terms of a commercial or business transaction (MFMA s 1(1) 'allocation').
[10] MFMA s 45(1)*(b)*.

(ii) *Long-term debt*

The primary purpose of a long-term loan, defined as a debt 'repayable over a period exceeding a year',[1] is for capital expenditure on property, plant or equipment that will be used in pursuit of achieving the constitutional objects of local government.[2] A secondary purpose may be to re-finance existing long-term debt.[3] Capital expenditure may include financing costs,[4] costs of professional services directly related to the capital expenditure and such other costs as the National Treasury may prescribe.[5] An elaborate process must be followed before a municipality binds itself to long-term debt: this process allows for public input and input from the National Treasury.[6]

The import of the provision that a council has the authority to 'bind itself and a future Council in the exercise of its legislative and executive authority to secure loans or investments for the municipality' is not clear.[7] The redemption of many, if not most, long-term loans would extend beyond the five year term of the council. All loans taken out in the last year of a council's term would burden the next elected council. Where a council concludes a long-term loan contract, the municipality is bound by such contract beyond the life of the council that passed the resolution. If the successor council fails to honour its predecessor's contractual obligations, then it would be legally liable. If a successor council reneges on the loan by passing a legislative act to cancel the contract, then it could still be liable for a constitutional claim for the deprivation of property. The failure to meet its financial commitments may also lead to a provincial intervention.[8] The impetus for this constitutional provision most likely lies in the desire of the drafters of the Final Constitution to enable a municipality to maintain a predetermined tariff policy in order to repay a loan.[9]

A municipality may provide security for any of its debt obligations, any debt obligation of a municipal entity under its sole control, or contractual obligations of the municipality undertaken in connection with the outsourcing of municipal services.[10] Security may be provided for through a wide variety of measures.[11] Any security commitment must be approved by a resolution of the council.[12] The

[1] MFMA s 1(1).
[2] MFMA s 46(1)*(a)*.
[3] MFMA s 46(1)*(b)*.
[4] Such finace costs include capitalised interest for a reasonable initial period, costs associated with security arrangements, discounts and fees in connection with the financing, fees for legal, financial, advisory, trustee, credit rating and other services directly connected to the financing. MFMA s 46(4)*(a)*.
[5] MFMA s 46(4).
[6] MFMA s 46(3).
[7] FC s 230A(1)*(b)*.
[8] FC s 139(5).
[9] See Kriel & Monadjem (supra) at 27-12.
[10] MFMA s 48(1). See further Steytler & De Visser (supra) at 12-30.
[11] MFMA s 48(2).
[12] MFMA s 48(1).

council bears the obligation to ensure that any security given does not impede its constitutional mandate of providing basic municipal services. The council resolution must state whether the asset, or right subject to the security, is necessary for providing the minimum level of basic municipal services.[1] If it is, then the resolution must indicate the manner in which the availability of the asset or right for the provision of basic services will be protected.[2] The use of the secured asset or right by the lender or investor is also restricted. Where the resolution reflects a determination that the secured asset or right is necessary for providing the minimum level of basic services, the security holder may not deal with the asset or right in a manner that would preclude or impede the continuation of that minimum level of service provision.[3] Where the council resolution reflects no such determination, the council remains bound to pay the secured debt in full.[4]

(f) Transfers

The Final Constitution provides for two forms of transfers: (1) an entitlement to an equitable share of the revenue raised nationally and (2) other grants (either conditional or not) from the national government's share of the revenue raised nationally. Provinces may also provide grants to municipalities.

(g) Equitable share

Local government is entitled to an 'equitable share of the revenue raised nationally to enable it to provide basic services and perform the functions allocated to it'.[5]

(i) *Nature of entitlement*

The use of the term 'entitlement' to an equitable share suggests an enforceable claim on the revenue raised nationally. It would appear that the standard employed to determine whether such a claim is enforceable is the rather vague principle of equity elaborated in FC s 214. However vague this principle may be, local government's claim to an equitable share is justiciable. At least that was the conclusion reached by the Natal High Court in *Uthukela District Municipality & Others v President of the Republic of South Africa & Others.*[6] In the first Division of Revenue Act (DORA)[7] after the December 2000 local government elections and the establishment of local and district municipalities, no allocations were made with respect to district municipalities. This omission was challenged by a number of district municipalities in KwaZulu-Natal. The High Court held that FC s 214

[1] MFMA s 48(3)*(a)*. See s 1(1) MFMA for the definition of 'basic municipal service'.
[2] MFMA s 48(3)*(a)*.
[3] MFMA s 48(4).
[4] MFMA s 48(5).
[5] FC s 227(1). See further Steytler & De Visser (supra) at 12-7.
[6] 2002 (5) BCLR 479 (N)(*'Uthekela HC'*).
[7] Act 1 of 2001.

did not allow an entire category of municipality to be deprived of an equitable share where the clear intention of FC s 214 was that an entitlement accrued to local government as a whole.[1] District municipalities, forming part of the local sphere of government, are thus entitled to their equitable share because without such a share these municipalities would not be able to discharge the duties they have to their community. Moreover, the High Court concluded, a denial of an equitable share would likely threaten the very existence of many municipalities.[2] The High Court declared s 5(1) of the DORA 2001 invalid. When the confirmation hearing before the Constitutional Court took place, the 2001 DORA had already been repealed and the 2002 DORA did not exclude district municipalities in the equitable share division. The Constitutional Court declined to exercise its discretion to consider the invalidity of the repealed provision because, among other factors, the applicants did not seek to resolve the dispute by other means before approaching the High Court.[3]

The High Court's decision is certainly correct. Apart from the general proposition that virtually all of the provisions of the Final Constitution are justiciable, an enforceable claim to revenue raised nationally gives effect to the overall constitutional scheme of decentralized government. If the principal recipient of income tax is the national government, and the national government controls the conditions of additional sources of revenue, the only means of securing access of adequate funding to enable local government to 'perform basic services',[4] is to have a claim to a portion of the money in the national fiscus. This argument is *a fortiori* most compelling for provinces. The provinces are almost entirely dependent on national transfers. It is equally compelling for those municipalities without an adequate tax base.

In contrast to the entitlement of each province, FC s 227(2) refers only to 'local government' in general. In *Uthekela,* a category of municipalities, the districts, successfully argued that local government includes all the categories of municipalities. The question is, now, whether the entitlement can be enforced by individual municipalities for their own individual benefit. Could it be argued that when a municipality turns a surplus on its budget, that, as long as transfers are made to all categories of municipalities, individually well-resources municipalities could be omitted? We submit that such an argument cannot stand. FC s 227(2) clearly indicates that an equitable share is an individual entitlement: additional revenue raised by 'municipalities may not be deducted from their share of the revenue raised nationally'. Individual effort and industry may thus not lead to a loss of the slice of the national pie. The size of that slice is determined by a constitutionally prescribed process.

[1] *Uthekela HC* (supra) at 491E.
[2] Ibid at 492D.
[3] *Uthukela District Municpality & Others v President of the Republic of South Africa & Others* 2003 (1) SA 678 (CC), 2002 (11) BLCR 1220 (CC)('*Uthekela*') at para 14.
[4] FC s 227(1)*(a)*.

(ii) *Prescribed process*

In terms of FC s 214(1), the vertical allocation of the equitable shares between the three spheres of government must be done in terms of an Act of Parliament, the annual DORA.[1] While the horizontal split between the nine provinces of the provincial share must be included in the Act,[2] the horizontal split among the 283 municipalities is not explicitly required. The Act must also provide for any other allocation to provinces, local government or municipalities from the national share.[3] The horizontal split of local government share may take a variety of forms.

The national legislative process that must precede the adoption of the Act first requires an intergovernmental consultative process and, then, requires the consideration of a list of specified factors. This Act may be enacted only after the provincial governments, organised local government and the Financial and Fiscal Commission have been consulted.[4] The FFC is an independent institution providing advice to government and Parliament on, among other things, the allocation of the equitable shares.[5] Organised local government is represented in the FCC.[6] Again, because of the centrality of the FFC to fiscal decentralization, the duty to consult requires consideration of the FFC's proposals.[7]

(iii) *Substantive principles*

The substantive principles underpinning the entitlement to an equitable share are set out in the factors listed in FC s 214(2). Of the ten factors listed, four refer directly to local government. The first is 'the need to ensure that provinces and municipalities are able to provide basic services and perform the functions allocated to them.'[8] Of relevance in this context would be the provision of basic municipal services and the obligations imposed by socio-economic rights.

The second factor is 'the fiscal capacity and efficiency of the provinces and municipalities'.[9] While the Act is primarily concerned with the division of revenue between the three spheres of government and the horizontal split between provinces, this factor underscores the basic law's legitimate concern about the individual fiscal capacities of municipalities. While FC s 214(2)*(e)* states the factor in a

[1] FC s 214(1)*(a)*.
[2] FC s 214(1)*(b)*.
[3] FC s 214(1)*(c)*.
[4] FC s 214(2).
[5] FC s 220.
[6] FC s 221(1)*(c)*.
[7] See § 22.5*(d)*(ii) supra. The constitutional process has been elaborated upon by the Intergovernmental Fiscal Relations Act 97 of 1997 The Act establishes a Budget Forum in which the Minister of Finance consults with the MECs for finance and organized local government. Intergovernmental Fiscal Relations Act s 5.
[8] FC s 214(2)*(d)*.
[9] FC s 214(2)*(e)*.

neutral manner, FC s 227(2) fleshes out the basic principles relating to fiscal capacity and efficiency. Any additional revenue raised by municipalities 'may not be deducted from their share of revenue raised nationally, or from other allocations made to them out of national government revenue.'[1] The Natal High Court has thus noted: 'The clear intention is that local government structures should not be penalized for showing industry and initiative in revenue gathering.'[2] The reverse applies equally. Because municipalities are entitled to raise their own revenue through property rates and surcharges, 'there is no obligation on the national government to compensate … municipalities that do not raise revenue commensurate with their fiscal capacity and tax base.'[3] Even if the Act does not make allocation to individual municipalities, the objectively determined overall capacity to raise their own income with the required measure of efficiency is a relevant factor.

The third factor is the 'developmental and other needs of provinces, local government and municipalities'.[4] It should be noted that, as with the previous factor, the needs of individual municipalities are relevant. The abstract notion of the developmental needs of 'local government' is only sensible when those needs are the sum of the needs of individual municipalities.

The fourth factor is: 'obligations of the provinces and municipalities in terms of national legislation'.[5,6] This factor implicitly recognizes the practice of unfunded mandates. Unfunded mandates occur when the national government or provincial governments delegate functions to municipalities through legislative assignment without providing them with funding necessary for the execution of the mandate.[7] Although the inclusion of the factor is necessary, it provides a weak form of protection from unfunded mandates. It does not expressly establish the constitutional principle that no obligation can exist without corresponding financing. The statutory rules in the Municipal Systems Act[8] pertaining to assignment, where the cost implications of any assignment to local government must be determined and met, are more robust.[9]

Each municipality's equitable share is calculated according to a formula. Currently, the formula consists of five components:[10] (i) a basic service component to enable municipalities to provide water, sanitation, electricity, refuse removal and other basic services; (ii) an institutional support component to enable particularly poor municipalities to fund the basic costs of administration and governance;

[1] FC s 227(2).
[2] *Uthukela HC* (supra) at 487G.
[3] FC s 227(2).
[4] FC s 214(2)*(f)*.
[5] FC s 214(2)*(b)*.
[6] As delegation of functions is effected and removed by the executive, the delegation of such functions falls outside this factor. On the assignment and delegation of functions, see § 22.3*(f)* supra.
[7] See Kriel & Monadjem (supra) at 27-22.
[8] Act 32 of 2000.
[9] See § 22.3*(f)* supra.
[10] National Treasury *Local Government Budgets and Expenditure Review 2001/02-2007/08* (2006) 232.

(iii) a development component; (iv) a revenue-raising capacity correction; and (v) a correction and stabilization factor to ensure that municipalities are given what they are promised in the two year budget projections.

Given the broad factors that bind the DORA, the question arises as to whether a court will be willing to entertain an argument that Parliament (or the National Treasury with regard to the horizontal split) have not taken into account all the factors or have not done so adequately. While a demonstrable failure to consider a listed factor should invite judicial review of the legislative process, the courts will try to avoid cases that would require them to determine the appropriate division of the national fiscus.

(iv) *Payment and withholding of equitable share*

A clear distinction is drawn in the Final Constitution between provinces and local government when it comes to the transfer of the equitable share. First, a province's equitable share is 'a direct charge against the National Revenue Fund.'[1] A 'direct charge' is defined by the National Treasury as a statutory or standing appropriation entailing funds earmarked, by prior legislation, for specific purposes and which may not be used for other regular annual expenditure.[2] A direct charge 'must be paid regardless of whether or not [it has] been budgeted for in the national budget.'[3] The object is to give provinces 'a measure of financial autonomy *vis à vis* the national budget process'.[4] The fact that local government's equitable share is not a direct charge to the National Revenue Fund implies that it does not possess the same level of autonomy and the same degree of insulation from the national budget process.

FC s 227(3) reinforces the distinction between the payment of provinces' equitable share and payment of municipalities's equitable share. FC s 227(3) refers only to provinces when it determines that the equitable share 'must be transferred promptly and without deduction, except when the transfer has been stopped in terms of section 216.' No such constitutional obligation applies to municipalities. Although municipalities receive less constitutional protection with respect to the vicissitudes of national government budget priorities, the national government is still under the overall constitutional obligation not 'to compromise or impede the ability or right of a municipality to exercise its powers or perform its functions.'[5] Any tardiness in transfers or unnecessary delays could fall foul of this obligation. While the payment schedule may be manipulated by the National Treasury, it may not have the effect of depriving a municipality of its equitable share.

[1] FC s 213(3).
[2] National Treasury *Budget Review 2001* (2001) 46, quoted in Ross Kriel & Mona Monadjem 'Public Finances' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) 27-32.
[3] Kriel & Monadjem (supra) at 27-32.
[4] Ibid at 27-33.
[5] FC s 151(4).

As the entitlement to an equitable share flows from the Final Constitution, any withholding of such revenue can only be undertaken in terms of constitutionally-sanctioned grounds. FC s 216 provides for the stopping of the transfer of funds to all organs of state that 'commit [ ] a serious or persistent material breach' of the measures prescribed by the National Treasury to ensure both 'transparency and expenditure control'.[1] While FC s 216 imposes specific safeguards when the National Treasury stops the transfer of the equitable share to provinces,[2] no such safeguard is provided to local governments.

However, as the law currently stands, the safeguards enjoyed by the provinces also apply to errant municipalities. First, a stopping is only a temporary measure; a provincial share cannot be stopped for longer than 120 days at a time;[3] a stopping cannot have the effect of depriving a province permanently of its equitable share. Second, some form of review of the decision should take place; the national Treasury's decision is reviewed by Parliament following the procedure for FC s 76 legislation (which gives the NCOP a significant participatory role).[4] Third, this rational process of decision-making must reflect the input of the Auditor-General and the affected province.[5] The MFMA reflects Parliament's decision to make a stop of transfer to a municipality subject to the same constitutional safeguards enjoyed by the provinces.[6] The National Treasury's decision must be submitted to Parliament for review. Unless Parliament approves the decision within 30 days of the Treasury's decision to stop the transfer, the stopping lapses. If the National Treasury enforces its decision immediately, as it may, the stopping lapses retrospectively if Parliament fails to approve the decision.[7] If Parliament approves of the decision, the stopping may last for only 120 days.[8] In reviewing the decision, Parliament must follow a process substantially the same as that established in terms of FC s 76: both the National Assembly and the NCOP must approve the decision. In the NCOP, provinces vote in their delegations and in a case of conflict between the two houses, the conflict settlement process must first be followed, failing which the National Assembly may override the decision of the NCOP by a two-thirds majority. Parliament may renew the decision for 120 days at a time, following the same procedure.[9] In deciding whether to approve or renew a decision, Parliament may request that the Auditor-General issues a report, and, must give the affected municipality the opportunity to answer the allegations against it.[10]

[1] FC s 216(1).
[2] FC s 216(3)-(5).
[3] FC s 216(3)-(4).
[4] FC s 216(3).
[5] FC s 216(5).
[6] FC s 216(3) and (5).
[7] MFMA s 39(1)*(b)*.
[8] MFMA s 39(1)*(a)*.
[9] MFMA s 39(2).
[10] MFMA s 39(3).

As the stopping of funds may undercut the objects of local government, the provincial executive must monitor the continuation of the services.[1] If as a result of the stopping of a transfer, the municipality cannot or does not fulfil its obligations with respect to the provision of those services, the provincial executive may intervene in terms of FC s 139.

(v) *Usage of equitable share*

While the equitable share is an entitlement to cover the costs of providing services, the actual use of the funds falls to the discretion of the municipality.[2] DORA cannot prescribe conditions for municipal spending.

(h) Conditional grants

In contrast to the equitable share transfer, additional grants, whether conditional or not, run contrary to the financial autonomy of municipalities. These grants are used by the national government to incorporate national priorities into the municipal budgets. These priorities include the promoting of national norms and standards, addressing service delivery backlogs and eliminating regional disparities in municipal infrastructure.[3]

FC s 227(1)*(b)* provides that local government (and each province) 'may receive other allocations from national government revenue, either conditionally or unconditionally.' In addition to providing for 'the equitable division of revenue raised nationally', an Act of Parliament must also provide for 'any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.'[4] This Act may be enacted only after the provincial governments, organized local government and the Financial and Fiscal Commission have been consulted.[5] The conditional allocations to local government are set out in the annual DORA. The horizontal division of the allocated amounts for the grants is done administratively by the National Treasury through a notice in a government gazette. The notice indicates the share of each municipality as well as the framework for each allocation. [6] The framework refers to the conditions for and other information about each grant.[7]

While stopping the transfer or the equitable share is linked to the supervisory conditions of FC s 216(1) and subject to external safeguards, in the case of discretionary national grants, stopping is linked to the proper compliance with the conditions of the grants. The stopping can either be temporary or permanent.

[1] MFMA s 38(3).
[2] Kriel & Monadjem (supra) at 27-18.
[3] National Treasury *Local Government Budgets* (supra) at 237.
[4] FC s 214(1)*(c)*.
[5] FC s 214(2).
[6] DORA 2006 s 8(3) read with s 15(1)*(b)*.
[7] DORA 2006 s 1(1) 'framework'.

The transferring department may withhold a transfer for a period not exceeding 30 days if (i) a municipality does not comply with conditions of the DORA or any conditions attached to the grant; or (ii) expenditure on previous transfers during the same financial year 'reflects significant under-spending, for which no satisfactory explanation is given.'[1] The permanent stopping of a transfer by the National Treasury may take place on two grounds. The first ground is persistent and material non-compliance with the DORA or a condition of the grant.[2] The second is the likely under-utilization of the grant where the National Treasury anticipates that the municipality will substantially under-spend on the allocation in that financial year.[3] In both cases there is only post-hoc parliamentary scrutiny. The national department which stopped the transfer must reflect the stopping, together with reasons, in the annual financial statements of the department.[4]

(i) *Provincial transfers*

The scheme of FC Chapter 13 suggests that the main function of provinces is the transmission of funds from the national government to municipalities. FC s 226(3) provides that revenue allocated through a province to local government in that province in terms of FC s 214(1) is a direct charge against the province's Revenue Fund. As outlined above, a direct charge to a provincial Revenue Fund means that the transfer is protected from the provincial budgetary process. While it would be possible to transmit a municipality's equitable share through a province, practice indicates that only some conditional grants follow this route. In a 2001 constitutional amendment, a fourth subsection was added to section 226 which provides, among other things, that national legislation may determine a framework within which revenue allocated through a province to local government must be paid to municipalities.[5] The amendment was designed, it has been suggested,[6] to maintain national regulatory control over direct charges at provincial level. No such legislation has yet been passed.

22.6 Supervision of Municipalities

(a) Introduction

The radical innovation of elevating local government to a sphere of government with its own distinctive powers and functions, including considerable original revenue-raising powers, is countered by a system of supervision in terms of which both the national government and the provincial governments exercise

[1] DORA 2006 s 18(1).
[2] DORA 2006 s 19(1)*(a)*. MFMA s 38(1)*(b)* adds the general ground of the serious and persistent breach of sound financial management encapsulated in FC s 216(1).
[3] DORA 2006 s 19(1)*(b)*.
[4] MFMA s 40.
[5] FC s 226(4) added by Act 61 of 2001 s 8.
[6] Kriel & Monadjem (supra) at 27-33.

limited but nevertheless significant control over municipalities.[1] On the balance struck between municipal autonomy and supervision by 'higher' levels of government, the Constitutional Court in the *First Certification Judgment* commented as follows:

> What the [New Text] seeks hereby to realise is a structure for [Local Government] that, on the one hand, reveals a concern for the autonomy and integrity of LG and prescribes a hands-off relationship between LG and other levels of government and, on the other, acknowledges the requirement that higher levels of government monitor LG functioning and intervene where such functioning is deficient or defective in a manner that compromises this autonomy. This is the necessary hands-on component of the relationship.[2]

The power of supervision, defined as 'the power of one level of government to intrude on the functional terrain of another',[3] the Constitutional Court further contended, 'may be particularly important in the field of LG, where administrative and executive structures are likely to be in need of greater support than are comparable structures in higher spheres of government.'[4]

That there was indeed need for supervision was evidenced by the number of municipalities running into trouble with respect to the management of their finances and the satisfaction of their constitutional obligations. Such basic obligations as the passing of an annual budget and the necessary revenue-raising measures to cover the budget have, at times, simply not been undertaken in newly established municipalities. Given the central role envisaged by the Final Constitution for municipalities in service delivery, these failures undercut a core strut of the developmental state. Given these repeated failures — as documented by the Auditor-General[5] — pressure has steadily increased on both the national government and the provincial governments to intervene in the governance of municipalities.

(i) *Increasing of supervisory powers*

The mainstay of supervision has been FC s 139. In its original form FC s 139 was almost identical to the limited powers of the national government to intervene in a province in terms of FC s 100; it only permitted a provincial executive to

[1] See Christina Murray & Okyerebea Ampofo-Anti 'Provincial Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) 20-29.

[2] *Ex Parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('*First Certification Judgment*') at para 373.

[3] Ibid at para 370.

[4] Ibid.

[5] See Stu Woolman & Yolandi Schutte 'Auditor-General' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B.

intervene in a municipality when the latter failed to comply with an executive obligation. This provision excluded the possibility of corrective measures when a municipality failed to pass a budget and revenue-raising measures: both are legislative acts.[1] Moreover, an intervention was confined to an assumption of responsibility by a province for the execution of the obligation. Two constitutional amendments increased the scope for interventions.

In a 1998 amendment of FC s 159 dealing with the terms of municipal councils,[2] the new provision provided for dissolution of councils contemplated by FC s 139. Without expressly empowering a province to do so, FC s 159(2) simply requires that in the event that a council 'is dissolved in terms of national legislation', an election must be held within 90 days. FC s 159(3) assumes that such dissolution takes place in terms of FC s 139. Accordingly, on this rather weak basis, the Structures Act provided that an MEC could dissolve a council if 'an intervention in terms of section 139 of the Constitution has not resulted in the council being able to fulfil its obligations in terms of legislation.'[3] In 2003, FC s 139 was significantly amended to enable provinces (and the national government) to intervene in municipalities that are experiencing financial problems. The amendment possesses three important features. First, as with FC s 100, the supervisory role of the NCOP is limited. Second, the power to dissolve a council is explicit. Third, two additional grounds for intervention now exist: both impose mandatory action from the provinces.[4]

(ii) *Supervision as a single process*

Supervision is broadly defined as the power of national and provincial governments to exercise hierarchical control over municipalities. At a foundational level, the national government establishes the broad legislative framework in terms of which local government functions are exercised. Likewise, provinces have powers of establishment of municipalities. Both spheres of government also have regulatory powers over the exercise by municipalities of their executive powers.[5] With respect to individual municipalities, supervision entails, first, the monitoring of their performance, second, support if required to exercise their functions and powers, and third, entering the autonomous domain of a municipality through acts of intervention when there is a failure in governance.

[1] *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC). See also Jaap de Visser *Developmental Local Government* (2005) 129.

[2] Constitution of the Republic of South Africa Amendment Act 65 of 1998 s 1.

[3] Structures Act s 34(3)*(b)*. Section 34(4) added the procedural requirements that such dissolution may only occur with the permission of the Minister for local government and the approval of the NCOP.

[4] See Nico Steytler & Jaap de Visser *Local Government Law of South Africa* (2007) 15-17.

[5] FC s 155(7).

At first the Final Constitution equated intervention with supervision. The headings of FC ss 100 and 139 authorizing intervention in provinces and municipalities respectively, referred to the 'National supervision of provincial administrations' and 'Provincial supervision of local government'. The Constitutional Court thus appropriately viewed 'supervision' as a concept distinct from 'monitoring' and 'support'.[1] In the constitutional amendment of 2003, the word 'supervision' in the headings of FC ss 100 and 139 was replaced by the narrower, but correct, concept of 'intervention'.

Supervision encompasses the practice of monitoring. The Constitutional Court describes monitoring as follows: 'The monitoring power is more properly described as the antecedent or underlying power from which the provincial power to support, promote and supervise LG emerges.'[2] Monitoring reveals whether the legislative regulation is complied with, whether support is needed and, if need be, whether an intervention is required.

(iii) *Dual responsibility for supervision*

From the foregoing it is apparent that the supervision of local government is not neatly divided between national government and provincial governments. Supervision is, in effect, a concurrent power.[3] Where a division of supervisory labour exists, the hierarchy between the national government and provincial governments becomes rather evident. The national government is the dominant actor in establishing frameworks for local government. The provinces are generally confined to the establishment of municipalities in their jurisdictions.[4] However, provinces must monitor and support municipalities at the same time as they promote the development of local government capacity to manage their own affairs.[5]

Reflecting the traditional hierarchical model of municipalities falling under the auspices of provinces, the intervention powers of FC s 139 are almost exclusively reserved for provinces. The clear hierarchical lines have somewhat been blurred by the 2003 amendments; the national government has reserved the right to intervene in a municipality should a province fail to exercise its duty to do so. In contrast, the supervisory measure of controlling municipal financial management, the temporary stopping of transfers, falls solely under the control of the National Treasury.

[1] See, for example, *First Certification Judgment* (supra) at paras 367, 370.
[2] Ibid at para 372.
[3] See Murray & Ampofo-Anti (supra) at 20-29.
[4] FC s 155(5) and (6).
[5] FC s 155(6).

The dual nature of supervision has made for a complex system. The system has not been simplified by statutory elaboration. The MFMA, for example, requires overlapping reporting duties to both the National Treasury and provincial treasuries. At provincial level, separate reporting lines exist to the MEC for finance and to the MEC responsible for local government. The end result is a complex and at times confused supervisory framework.

(b) Supervision process: monitoring and support

(i) *Monitoring*

Unlike the reference in FC s 155(6)*(a)* to the provinces' duty to monitor municipalities, the Final Constitution places no such duty on the national government. Such a duty is, however, implicit in the National Treasury's responsibility to enforce financial measures that ensure both transparency and expenditure control in all spheres of government;[1] without a system of monitoring, breaches of the measures would not be detected. Does the absence of an explicit reference to a general monitoring power preclude the national government from doing so in non-financial terrain? The strongest basis for a general monitoring power is FC s 155(7).[2] The national government has the legislative and executive authority 'to see to the effective performance by municipalities' of their functions, but then only 'by *regulating* the exercise by municipalities of their executive authority'.[3] As FC s 155(7) authorizes only regulatory measures, it would only provide a basis for a general system of monitoring: it imposes routine duties of reporting, rather than allowing for individualized monitoring actions. This approach is also followed in the Systems Act. The Minister for local government may require municipalities to submit information concerning their affairs to a specified national organ of state. This instruction must be done by notice in the *Government Gazette*. The Minister can make distinctions in the notice between municipal categories, municipal types or any other kind described in the notice. The notice can require municipalities to submit the information at certain intervals or within a specified period.[4] No power is conferred on the Minister to monitor individual municipalities.

The Systems Act gives full effect to the provinces' mandate of monitoring as provided for in FC s 155(6)*(a)*. The MEC for local government must establish mechanisms, processes and procedures to monitor municipalities. The Act refers specifically to the need for monitoring the ability of municipalities to manage their

[1] FC s 216(2).
[2] See De Visser *Developmental Local Government* (supra) at 180.
[3] Emphasis added.
[4] Systems Act s 107.

own affairs,[1] the need for monitoring municipal capacity[2] and the need for assessing the support requirements of municipalities.[3]

(ii) *Support*

While the duty to support local government falls on both the national government and the provincial governments, a distinction should be drawn between support that takes place in terms of co-operative government and support that occurs within the framework of supervision.[4] The duty of support in terms of FC s 41(1)*(h)*(ii) is reciprocal. The support contemplated by FC s 154(1) reflects the guardianship that the higher levels of government have over local government. While both forms of support would require the participation of the receiving municipality, different consequences could follow a failure to fully participating in the planned supervision. For example, if a municipality does not implement a financial recovery plan suggested by a province, then the province may impose it on the municipality and take further steps including the dissolution of the council. The Constitutional Court in the *First Certification Judgment* also placed support firmly within a supervisory framework:

> The legislative and executive powers to support [local government] are, again, not insubstantial. Such powers can be employed by provincial governments to strengthen existing LG structures, powers and functions and to prevent a decline or degeneration of such structures, powers and functions. This support power is to be read in conjunction with the more dynamic legislative and executive role granted provincial government. . .. In terms hereof, the provinces must assert legislative and executive power to promote the development of LG capacity to perform its functions and manage its affairs and may assert such powers, by regulating municipal executive authority, to see to the effective performance by municipalities of their functions in respect of listed LG matters. Taken together these competences are considerable and facilitate a measure of provincial government control over the manner in which municipalities administer those matters in parts B of . . . schs 4 and 5.[5]

The duty of support that seeks to 'to prevent a decline or degeneration' of local government 'structures, powers and functions',[6] flows from the overall supervisory relationship that both the national government and provincial governments have with local government. This relationship is very different from the mutual duty to assist one another: with respect to co-operative government, where the

[1] Systems Act s 105(1)*(a)*.
[2] Systems Act s 105(1)*(b)*.
[3] Systems Act s 105(1)*(c)*.
[4] Steytler & De Visser (supra) at 15-15.
[5] *First Certification Judgment* (supra) at para 371.
[6] Ibid.

starting premise is the equality of the spheres. The obligation to render supervisory support may also be justiciable and a court may review the reasonableness of steps that the national government or a provincial government has taken in executing their duty of support.[1]

The Municipal Finance Management Act ('MFMA') in chapter 5 on cooperative government expands on the duty of support.[2] The national government must assist municipalities by agreement in building their capacity for efficient, effective and transparent financial management.[3] Support must also be given to a municipality's efforts to identify and to resolve its financial problems.[4] The failure to give effect to these duties does not, however, affect the responsibility of the municipality to comply with the demanding duties of the MFMA.[5]

In light of their significant intervention powers, provincial governments shoulder the principal obligation of support. Like the national government, the provincial government must assist municipalities by agreement in building their capacity for efficient, effective and transparent financial management.[6] Likewise, support must be given to a municipality's efforts to identify and to resolve its financial problems.[7]

Practice has shown that provinces have not been very successful in discharging their financial obligations. The national government has had to step into the breach. In the main the provincial Departments of Local Government (DLG) have the responsibility to oversee the institutional health of the municipalities. However, serious question marks hang over their capacity to do so effectively. They have limited financial resources: the lack of resources leaves little room to develop programmes on monitoring and intervention. Their incapacity is also apparent from their lack of adequate human resources. Most DLGs are carrying a staff complement that does not match their mandate of high level support and oversight of local government. The limitations of provincial supervision has resulted in a gradual displacement of provincial supervision by national initiatives (eg, DPLGs's Project Consolidate). It has thus been suggested that Project Consolidate permits the national government to do what provinces should do in terms of FC s 139.[8] This assessment seems accurate. In 2004 and 2005 provincial interventions in municipalities became more frequent. However, that trend came to a halt with the introduction of Project Consolidate.[9] This intrusion has been a sore point for DLGs. They perceive national government intervention in municipal affairs as marginalizing the role of provinces.

[1] See *IMATU v MEC Local Government, Mpumalanga* 2002 (1) SA 76 (SCA).
[2] Act 56 of 2000.
[3] MFMA s 34(1).
[4] MFMA s 34(2).
[5] MFMA s 34(4).
[6] MFMA s 34(1).
[7] MFMA s 34(2).
[8] See Christina Murray & Yonina Hoffman-Wanderer 'The National Council of Provinces and Provincial Intervention in Local Government' (2007) *Stell LR* 28.
[9] Ibid at 18.

(c) Interventions

The most powerful form of supervision is intervention. Three modes of intervention are now provided for in FC s 139. FC s 139(1) authorizes such drastic measures of assumption of responsibility for a municipal executive obligation and the dissolution of a council. The 2003 constitutional amendments provided a further two forms of intervention. The first relates to the failure of a municipality to adopt a budget or impose revenue-raising measures — two legislative instruments without which the municipality cannot properly function. As the source of the problem is the council's failure to adopt these legislative instruments, the mandatory intervention is the dismissal of the council. The second refers to a crisis in a municipality's financial affairs. As such problems tend to be deep-seated, the solution is a directive to implement a financial rescue plan and, depending on causes of the crisis, measures that may include the dissolution of the council. Given this constitutional basis, the MFMA has regulated the application of the latter two forms of intervention.[1]

(d) Regular intervention in terms of FC s 139(1)

A provincial executive may intervene in a municipality if it cannot or does not fulfil an executive obligation in terms of the Final Constitution or legislation. The intervention can consist of 'any appropriate' step, including —

(a) the issuing of a directive to the municipality that describes the extent of the failure and the steps to be taken;[2]
(b) the assumption of responsibility for the relevant obligation;[3] and
(c) the dissolution of the municipal council.[4]

The importance of this intervention is that it is confined to failures to comply with executive obligations. True to preserving the distinctiveness of a municipality, intervention in the legislative domain of a council is not tolerated. Only in very exceptional circumstances may a council be dissolved and its legislative function taken over by the province.

(i) *Substantive requirement*

The crucial requirement is the failure to fulfil an executive obligation in terms of the Final Constitution or legislation. The reference to constitutional obligations should

[1] MFMA s 137 provides for a third mode of intervention, which combines elements of FC s 139(1) with the latter two. This intervention refers to general financial problems, mainly relating to the inability of a municipality to meet its financial commitments. This is a discretionary intervention which may commence with a directive to the municipality to implement a financial recovery plan, failing which the council may be dissolved. See further Steytler & De Visser (supra) at 15-29–15-38.
[2] FC s 139(1)*(a)*.
[3] FC s 139(1)*(b)*.
[4] FC s 139(1)*(c)*.

include the duty to provide basic municipal services.[1] Legislation refers to an Act of Parliament, a provincial Act, a national and provincial regulation,[2] or any of the municipality's own by-laws. Whether a statutory obligation is executive or not is not always apparent: the council performs both executive and legislative functions. Rather than attempting to carefully define the term 'executive obligation', it is more useful to define the legislative function and conclude that anything that does not fall within that definition is executive in nature and therefore falls within the ambit of FC s 139(1).[3] The legislative functions of a municipal council are threefold: approving by-laws; approving a budget; and imposing rates, taxes, levies, duties and surcharges on fees.[4] Any other function or activity of the municipal council is not legislative in nature and the failure to fulfil obligations in that regard could therefore trigger an intervention in terms of FC s 139(1).

Whether a statutory provision creates an obligation is not always apparent from the statutory text as the use of the word 'must' may not necessarily imply an enforceable obligation. In *Weenen Transitional Local Council v Van Dyk*[5] the Supreme Court of Appeal held that the use of the word 'must' or 'shall' was not determinative of the matter and instead adopted a much more contextual approach.[6]

(ii) *Measures of intervention*

FC s 139(1) empowers a provincial executive to take any 'appropriate' measure. For the Constitutional Court such measures, or 'steps', must be authorised by the Constitution or by constitutionally compatible legislation.[7] FC s 139(1), mentions three steps: the issuing of a directive, the assumption of responsibility and the dissolution of the municipal council. The *Second Certification Judgment* Court, commenting on the original version of FC s 139(1), has indicated that a provincial executive cannot freely choose from these steps. The steps are a process whereby the first step is the issuing of the directive. When the Constitutional Court considered FC s 100, it held that the assumption of responsibility is not possible without first issuing a directive.[8]

[1] See § 22.4*(b)* supra.
[2] FC s 239 'national legislation' and 'provincial legislation'.
[3] See Steytler & De Visser (supra) at 15-19.
[4] See § 22.3*(a)*, 22.4*(e)*(ii) and 22.5*(c)*(ii) supra.
[5] 2002 (4) SA 653 (SCA).
[6] See Steytler & De Visser (supra) at 13-21.
[7] *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC)('*Second Certification Judgment*') at para 124. Although paragraph 124 of the judgment deals with FC s 100, the equivalent of FC s 139 for national intervention into provincial government, the Court's remarks are apposite with respect to the meaning of FC s 139.
[8] Ibid at para 120; Steytler & De Visser (supra) at 15-20.

A further measure is judicial relief. The Constitutional Court held that court proceedings could possibly constitute an appropriate step towards securing fulfilment of such obligations.[1] For example, where a directive is not followed and the other substantive requirements for the assumption of responsibility or the dissolution of the council are not met, judicial relief could be the only viable measure.[2]

(iii) *Issuing a directive*

The issuing of a directive imposes a legally binding obligation on the municipality to fulfil an identified executive obligation. The directive plays a key function in any later intervention measures: it defines the scope of the intervention. Moreover, given the Court's view of the progressive approach to intervention, starting with the least intrusive measures and ending, if need be, with the most intrusive measures, the directive is the usual starting measure. However, it is not necessarily a *sine qua non* for an assumption of responsibility. Where the issuing of a directive would be futile, for example if there is no quorum in the council to lawfully implement the directive, the provincial executive may immediately proceed to the next level of intervention.[3]

(iv) *Assumption of responsibility*

Where a municipality fails to fulfil an identified executive obligation at the direction of the province, the latter may proceed to fulfil that obligation itself by assuming responsibility for that obligation. The municipality's powers in that regard are thus ousted to the extent of the assumption of responsibility. Because this is such a drastic measure, one of three threshold requirements listed in FC s 139(1)*(b)* must be met. First, the assumption of responsibility must be necessary to maintain essential national standards or to meet established minimum standards for the rendering of a service. Second, it must be necessary to prevent a municipal council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole. Third, the assumption of responsibility must be necessary to maintain economic unity.[4] The requirements of FC s 139(1)*(b)* have consequences for both the aim and the scope of the assumption of responsibility. The aim of the assumption of responsibility is to lift the municipality to the required minimum standards, to prevent it from harming the interests of other municipalities or the province or to maintain economic unity in the province. The provincial executive can only assume responsibility to

[1] *Second Certification Judgment* (supra) at para 124 fn 116.
[2] See Steytler & De Visser (supra) at 15-20.
[3] Ibid at 15-21.
[4] Ibid.

the extent necessary to achieve the above goals. In commenting on FC s 100, which provides for a similar national intervention measure in provinces, the Constitutional Court has stressed that a high threshold would apply. This high threshold requires that the intervention must be 'necessary' and that one of a closed list of circumstances must prevail.[1]

Given the fact that the functional integrity of a municipality is ruptured, a review process is automatically triggered comprising of two components — a review by the national executive and a peer review by the NCOP. In line with the underlying hierarchical structure of the Final Constitution, the national minister responsible for local government reviews the decision of a provincial executive and makes a binding decision. Even if such approval is obtained, a second review by the provincial executive's peers ensues. The NCOP, representing all the provinces (including the intervening province), must review the conduct of one of its members. A built-in bias may be inevitable; a very strict interpretation of the circumstances justifying an intervention would eventually bind all the provinces, while a more accommodating approach would stand all of them in good stead when they venture to intervene in the future.[2]

In its original form, the review mechanisms were extremely strict.[3] However, the amendments to FC s 139 in 2003 considerably watered down the tight time frames of the review mechanisms. Within 14 days after the notice of assumption of responsibility has been issued, the provincial executive must notify the Minister for local government of the intervention and request him or her to approve the intervention.[4] The intervention will end automatically if the Minister does not approve the intervention within 28 days or has explicitly disapproved the intervention within 28 days.[5]

The NCOP must also be notified within 14 days after the assumption of responsibility.[6] Even if the Minister has approved the intervention, the intervention ends automatically if the NCOP does not approve or explicitly disapprove the intervention within 180.[7] The NCOP must also 'review the intervention regularly' and can make appropriate recommendations to the provincial executive.[8]

[1] *Second Certification Judgment* (supra) at paras 111-127.

[2] This structural bias is diametrically opposite the 'bias' that occurs when the NCOP reviews an intervention by the national government in one of the provinces; a strict reading of the Constitution would then be in all provinces' interest.

[3] The Minister responsible for local government had to approve the intervention within 14 days, failing which it ended. Even if such approval was obtained, a second hurdle had to be cleared: Notice had to be given to the NCOP and the intervention had to end unless the NCOP approved it within 30 days of its first sitting after the intervention began.

[4] FC s 139(2)*(a)*(i).

[5] FC s 139(2)*(b)*(i).

[6] FC s 139(2)*(a)*(ii).

[7] FC s 139(2)*(b)*(ii).

[8] FC s 139(2)*(c)*.

The provincial executive assumes responsibility only for the identified executive obligations. It cannot perform legislative acts, that is, the passing of by-laws, the approval of budgets or the imposition of rates, taxes or other levies. If the provincial executive needs the municipal council to perform a certain legislative act — for example, the approval of an adjustments budget — it requires the cooperation of the municipal council. However, the fact that the provincial executive has the power to dissolve the municipal council in exceptional circumstances provides an additional incentive for the municipal council to cooperate.[1]

The question has been raised whether in terms of FC s 139(1)*(b)* the provincial executive can also suspend the council. The constitutional difficulty with this proposition is that the suspension is then based on the non-fulfilment of an *executive* obligation but encroaches on both the executive and legislative function of the council. The justification for such overreach is that in order to facilitate an executive intervention the provincial executive may need to prevent the council from obstructing provincial intervention through legislative action. Thus, while the province has no power to assume the legislative role, proponents argue the provinces possess a power to suspend the municipality's legislative function.[2] The problem with this argument is that, in the end, the removal of legislative power is not materially different from the assumption of legislative power. Both constitute an inroad into the legislative powers of the council for which FC s 139(1)*(b)* offers no basis.[3]

(v) *Dissolution of council*

The provincial executive can dissolve a municipal council 'if exceptional circumstances warrant such a step'.[4] While the jurisdictional fact of 'exceptional circumstances' is not defined, the Structures Act gives an indication of its reach. In a provision pre-dating the 2003 constitutional amendment, a dissolution was possible when 'an intervention in terms of FC s 139 has not resulted in the council being able to fulfil its obligations'.[5] The import is clear; if the failure of the intervention is due to the council's unwillingness to comply with its obligations and resolve its problems, 'exceptional circumstances' exist and the dissolution is warranted. The general principle should be that dissolution is an instrument to deal with the situation where the municipal council's conduct is the cause of the continued failure to comply with an executive obligation. This reflects the general principle that intervention comprises a set of successive steps, each more intrusive than the one before. It should be only in rare cases that a council is dissolved where no other steps have been taken prior to the dissolution.[6]

[1] See further Nico Steytler & Jaap de Visser *Local Government Law of South Africa* (2007) 15-24.
[2] See Yonina Hoffman-Wanderer & Christina Murray 'Suspension and Dissolution of Municipal Councils under s 129 of the Constitution' (2007) *TSAR* 141.
[3] See Steytler & De Visser (supra) at 15-25.
[4] FC s 139(1)*(c)*.
[5] Structures Act s 34(3)*(b)*.
[6] Steytler & De Visser (supra) at 15-26 ff.

Given the drastic nature of the intervention, some significant procedural safeguards are provided. The process commences with the provincial executive serving a notice on the municipality, the Minister for local government, the NCOP and the provincial legislature. The dissolution takes effect unless the NCOP or the Minister sets it aside within 14 days from the date of receipt of the notice.[1] The Final Constitution thus provides for a 14 day window period within which the Minister and the NCOP have the opportunity to set aside the dissolution. Importantly, both the Minister and the NCOP can set aside the dissolution, independently from one another.[2] If no decision is made by either body, then the dissolution becomes effective.

After dissolution, the provincial executive must appoint an administrator.[3] His or her task will be to ensure the continued functioning of the municipality until a new municipal council has been declared elected.[4] The powers and functions of the administrator are determined by a combination of two legal instruments, *(a)* the provisions in the Final Constitution and the Structures Act and *(b)* a notice published by the MEC in the *Provincial Gazette*. In terms of the Structures Act, the MEC determines the scope of the administrator's functions and powers in the *Provincial Gazette*.[5] Considering that the municipal council has been 'replaced' by the administrator, the latter is thus vested with all legislative and executive powers that were previously exercised by the municipal council. The provincial executive, could, however, also decide to limit the administrator's powers in the notice.[6]

(e) Dissolution of council after failure to pass a budget or revenue-raising measures in terms of FC s 139(4)[7]

Because the approval of a budget or the raising of rates and taxes are legislative acts,[8] provincial executives were, before the 2003 constitutional amendment,

[1] FC s 139(3)*(b)*.

[2] Structures Act s 34(3)*(b)*, providing for the dissolution of a council, conflicts with FC s 139(3) in a number of respects. The Final Constitution provides that the dissolution takes effect unless the Minister or the NCOP sets it aside. The Structures Act, on the other hand, provides that the provincial executive first needs the Minister's and the NCOP's positive approval. FC s 139(3) states that the dissolution is effective 14 days after the NCOP received the notice while the Structures Act suggests that the day of publication of the notice is decisive. These days do not necessarily coincide: it may not be possible to publish the notice on the same day as the municipal council received the notice. These differences emerged because s 34(3)*(b)* of the Structures Act has been overtaken by the new provisions of FC s 139(3). FC s 139(3) has rendered section 34(3)*(b)* of the Structures Act invalid to the extent of these inconsistencies. See Steytler & De Visser (supra) at 15-27ff.

[3] FC s 139(1)*(c)*.

[4] FC s 139(1)*(c)* and Structures Act s 35(1).

[5] Structures Act s 35(2). In terms of the Final Constitution, the provincial executive, and not the MEC for local government, is vested with the power to appoint the administrator FC 139(4)*(a)*. Section 35(2) of the Structures Act must be interpreted accordingly.

[6] Steytler & De Visser (supra) at 15-28.

[7] Ibid at 15-38ff.

[8] *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC). See further § 22.5*(c)*(ii) supra.

constrained from intervening in legislative matter even when a council was so dysfunctional that it could not agree upon a budget. The amendment of FC s 139 has made it possible for provinces to intervene in the legislative authority of a municipality for a limited purpose. Since the council, in exercising the legislative authority of the municipality, is the source of the financial crisis (a municipality cannot properly function without an approved budget), the solution proferred is the appointment of an administrator — until a new council is elected — and the approval of a temporary budget which operates until the new council approves a final one.

This form of intervention is premised on a municipality's failure to comply with the statutory obligation to adopt an annual budget and the necessary revenue-raising measures to cover it before the commencement of the financial year.[1] The adoption of an annual budget is central to the entire functioning of a municipality. Municipal expenditure may be incurred only in terms of an approved budget.[2]

Where a municipality has failed to adopt a budget or revenue-raising measures, the provincial executive must take 'any appropriate steps' to ensure that the budget or revenue-raising measures are approved, including dissolving the council.[3] Are there any other 'appropriate steps' apart from dissolution? The steps mentioned in FC s 139 are directives and the assumption of responsibility. Neither may be appropriate. After the commencement of the new financial year, there is no legal basis for the municipality to adopt a budget: a directive regarding the budget would therefore be invalid.[4] The only appropriate step in the absence of a budget is, then, the dismissal of the council.

Unlike FC s 139(3), which makes specific provision for the automatic review of a dissolution of a council by senior bodies (the Minister for local government and the NCOP), FC s 139(6) puts only a notification procedure in place. The provincial executive must submit within seven days of the dissolution a written notice of the intervention to the Minister for local government, the relevant provincial legislature, and the NCOP. Why the absence of procedural safeguards? Some might argue that the trigger for a dissolution in terms of FC s 139(3) is 'exceptional circumstances' and that such circumstances require an automatic review procedure to control broad discretion. But the basic law reads otherwise. Dissolution in terms of FC s 139(4) is very specific — the council has failed to approve a budget or revenue-raising measures and the MEC must intervene through the dissolution. If the MEC is obliged to dissolve the council, then the Minister or the NCOP lack any grounds for review.

[1] MFMA ss 16(1) and 24(2)*(a)*.
[2] MFMA s 15*(a)*.
[3] FC s 139(4).
[4] This may, however, be an option where the only problem is the imposition of inadequate tariffs, as the determination of fees and tariffs could be done, as argued above, administratively.

On dissolution of the council, the provincial executive must fill the vacuum by appointing a caretaker administrator and approving a temporary budget. The administrator assumes the executive authority of the council. After the dissolution of a council, the notification duties play an important function. The Minister is informed of the intervention because the national government must monitor the province's performance. If the provincial executive does not perform its supervisory role adequately, then the national government may intervene in its stead.[1] The provincial legislature must be informed as it performs its usual oversight function over the provincial executive. Although the NCOP is not called upon to review the dissolution, the institution should be kept informed of the intervention as part of its overall oversight role with regard to monitoring of and intervention in municipalities.

(f) Imposition of a financial recovery plan after a financial crisis in terms of FC s 139(5)[2]

The second financial intervention involves a financial recovery plan. The plan structures the financial conduct of the municipality and is imposed by the provincial executive. If the municipality is unable to implement the plan, the more intrusive measures may follow, including the dissolution of the council.

For an intervention in terms of FC s 139(5) to take place, the municipality must be, as a result of a crisis in its financial affairs, in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments. FC s 139(5) further provides that the admission by the municipality that it is unable to meet its service obligations or financial commitments will suffice.[3] In determining whether these conditions are present, the MFMA gives some guidance by providing a non-exhaustive list of factors, which singly or in combination, may indicate whether the conditions for intervention are met.[4]

Once the jurisdictional facts are present, the provincial executive must act in terms of FC s 139(5). FC s 139(5) envisages a two stage process. The first stage entails the imposition of a financial recovery plan prepared in terms of national legislation.[5] The second stage follows if the municipality cannot or does not implement the plan. The intervention then constitutes a dissolution of the council or the assumption of responsibilities by the provincial executive — depending on whether or not the plan entails both legislative and executive directives. The central component of this process is the recovery plan. In terms of the MFMA, the National Treasury through the Municipal Financial Recovery Service prepares the plan for the province.[6]

[1] FC s 139(7).
[2] See Steytler & De Visser (supra) at 15-43ff.
[3] FC s 139(5).
[4] MFMA s 140(2).
[5] FC s 139(5)*(a)*(i).
[6] MFMA s 139(1).

When FC s 139(5) has been invoked, FC s 139(6) imposes certain notification requirements. The provincial executive must submit within seven days a written notice of the intervention to the Minister for local government, the provincial legislature, and the NCOP. As with budgetary intervention, the Minister must be informed of the intervention because the national government must monitor the province's performance. If the provincial executive does not perform adequately, then the national government may intervene in its stead.[1]

Should the municipality fail to implement the plan for whatever reason, the province must proceed to the second stage of the intervention: the dissolution of the council or the assumption of the responsibility for the implementation. In both cases an administrator is appointed. The provincial executive must dissolve the council if the latter does not implement the legislative aspects of the plan within the time frames set in the plan.[2] This act of intervention becomes necessary only because, short of a dissolution of the council, the provincial executive cannot, in terms of FC s 139, impose its will on the legislative authority of a municipality.

The substantive requirement reflects a failure on the part of the council to implement the budgetary and revenue-raising measures contained in the recovery plan. The assumption is that there is a budget in place with some revenue-raising measures but both are inadequate to solve the municipality's financial crisis. If there were no budget, then the appropriate route would be an intervention in terms of FC s 139(4).

Because the problem at hand is the unwillingness of the council to amend its budget and revenue-raising measures (and the existing budget is part of the financial problems of the municipality), the provincial executive must set aside the existing budget by approving a temporary budget and revenue-raising measures.[3] The new council must then adopt a new budget upon its election. The Final Constitution further empowers the provincial executive to take any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality.[4]

If the problem flows not from legislative measures (the council has approved the proposed budget or revenue-raising measures), but from the ability or the capacity to implement the plan, then the provincial executive may assume responsibility for the implementation of the executive aspects of the plan.

22.7 Co-operative Government

(a) Constitutional framework

(i) *Local government as a sphere of government*

In FC Chapter 3 on Co-operative Government, government in the Republic is described as being constituted 'as national, provincial and local spheres of

[1] FC s 139(7).
[2] MFMA s 136(3)*(a)*.
[3] MFMA s 146(3)*(a)*(ii).
[4] FC s 139(5)*(b)*(ii).

government which are distinctive, interdependent and interrelated'.[1] In sharp contrast to the Interim Constitution, where local government was a competence of provincial government, the radical innovation of the Final Constitution was to make local government 'equal partners' of national government and provincial government. However, as has been shown above, the relationship between local government and the other spheres is complex. It simultaneously exhibits elements of autonomy and hierarchy. In attributing meanings to the words 'distinctive, interdependent and interrelated',[2] it can be said that 'distinctiveness' refers to the elements of local autonomy, 'interrelatedness' to the supervisory role of national and provincial government over local government, and 'interdependence' to connote the cooperative relationship that must be pursued when the other two characteristics are being played out in practice. Co-operative government thus serves as a constraining principle on all three spheres of government when they exercise their distinctive powers and functions.

In FC s 41, the principles of co-operative government and intergovernmental relations are sketched in broad brush strokes. Given this minimalist approach to co-operative government, the Final Constitution mandates national legislation to '*(a)* establish or provide for structures and institutions to promote and facilitate intergovernmental relations, and *(b)* provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.' After limited sectoral interventions,[3] the Intergovernmental Relations Framework Act[4] was eventually passed in 2005 in response to this constitutional mandate.

In constructing a cooperative system of decentralized government, three additional elements complement FC Chapter 3. First, given the need to draw local government into national governance, and the inevitable large numbers of municipalities, the organization of municipalities into a collective is required. Second, organized local government is given participatory rights in the National Council of Provinces (NCOP) and a representative on the Finance and Fiscal Commission (FFC). Third, the supportive and consultative duties of the national government and provincial governments towards local government are regularly invoked in various constitutional provisions and statutes.

(ii) *Organised local government*

For a large number of municipalities to participate effectively in the system of co-operative government, they must act as a collective to make the voice of local government heard. The Final Constitution thus recognizes and entrenches the

[1] FC s 40(1). See Stu Woolman, Theunis Roux & Barry Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) 14-8.

[2] See Steytler & De Visser (supra) at 16-3.

[3] Intergovernmental Fiscal Relations Act 97 of 1997.

[4] Act 13 of 2005.

need for organized local government to represent municipalities. FC s 163 requires an Act of Parliament to provide for the recognition of national and provincial organizations representing municipalities.[1] The Act must also create procedures through which local government may consult with the national or provincial government, designate representatives to participate in the NCOP, and nominate persons to the FFC.[2]

The Organised Local Government Act[3] authorizes the Minister responsible for local government to recognize a national organization representing the majority of provincial associations.[4] The Minister must also recognize the provincial association representing the majority of municipalities in each province, with the concurrence of the relevant MEC for local government, provided that all the different categories of municipalities are represented.[5]

The South African Local Government Association (SALGA), a voluntary body representing all nine provincial local government associations, was established in 1996. It was recognized, along with its nine constituent provincial members, by the Minister as the body representing local government on 30 January 1998.[6] SALGA is not a statutory body, but has official status through the executive act of recognition. It has a number of statutory and constitutional consultation duties which it executes with varying degrees of success.[7]

(iii) *National Council of Provinces*

The primary function of the NCOP is to serve as the intergovernmental forum for the provincial legislatures in Parliament. This constitutional object is articulated as follows: 'The National Council of Provinces represents the provinces by ensuring that provincial interests are taken into account in the national sphere of government.'[8] The 'lobbying' of provincial interests, FC s 42(4) suggests, takes two distinct forms. The first is a narrow legislative form: the NCOP enables the provinces to participate 'in the national legislative process on matters affecting provinces'.[9] The second is a more general function: it provides 'a national forum for public consideration of issues affecting provinces.'[10] In the elaboration of the

[1] FC s 163*(a)*. The legislation must be enacted in accordance with the procedure established by FC s 76.

[2] FC s 163*(b)* read with FC s 221(1)*(c)*.

[3] Act 52 of 1997.

[4] Organised Local Government Act s 2(1)*(a)*.

[5] Organized Local Government Act s 2(1)*(b)*. The Minister may also withdraw recognition of an organisation if it ceases to meet the recognition criteria. Organised Local Government Act s 2(2)*(a)*.

[6] *Government Gazette* 18645, Regulation Gazette 6087, GN R175 (30 January 1998).

[7] See Robert Cameron 'The Upliftment of South African Local Government' (2001) 27 *Local Government Studies* 97, 108; Mirjam Van Donk & Edgar Pieterse 'Reflections on the Design of a Post-Apartheid system of (Urban) Local Government' in Udesh Pillay, Richard Tomlinson & Jacques Du Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) 107, 124.

[8] FC s 42(4).

[9] FC s 42(4).

[10] FC s 42(4).

functions of the NCOP, additional powers are given to the NCOP. First, it co-determines the ratification of international treaties.[1] Second, it serves as a brake on intervention by the national government in provincial affairs.[2] It also reviews provincial interventions in municipalities.[3] Overall, the NCOP integrates provinces into the national legislative process and some executive processes. Not only do provinces bring their perspective to bear on national legislation that affects their interests, but by being part of the national legislative process, they are also drawn into and made to understand the national agenda that extends beyond parochial provincial interests.

Given the strong provincial focus of the functions of the NCOP, local government's participation in this body would appear to have been an afterthought. FC s 67 perfunctorily provides that '[n]ot more than ten part-time representatives designated by organised local government in terms of section 163 to represent the different categories of municipalities, may participate when necessary in the proceedings of the National Council of Provinces, but may not vote.' In terms of the Organised Local Government Act, each provincial organization may nominate up to six councillors as representatives.[4] SALGA must, then, in terms of criteria determined by it, designate not more than ten persons from the nominees as its representatives.[5]

What is striking about FC s 67 is that it does not articulate the intention behind organized local government participation in national government affairs. The logic behind its inclusion lies in FC s 40(1): recall that FC s 40(1) emphasizes the interrelatedness and the interdependence of the three spheres of government. If there is a need for provinces to articulate and present their interest for consideration in a national public forum,[6] then local government, as a sphere of government, should also be accorded such an opportunity. The hierarchical nature of the spheres does, however, surface and prevail. Local government is not an equal partner of the provinces and their participation in the legislative process is merely consultative. They may make their views known to their provincial colleagues and trust that these NCOP colleagues take local government concerns on board when they interact directly with the National Assembly. It is therefore not surprising that SALGA has put little effort into participating in the NCOP. Direct consultation processes with the national executive or using the public participation opportunities granted by the National Assembly are generally more productive.[7]

[1] FC s 231(2).
[2] FC s 100.
[3] FC s 139.
[4] Organised Local Government Act s 3(1).
[5] Organised Local Government Act s 3(2)*(a)*.
[6] FC s 42(4).
[7] Nico Steytler 'National, Provincial, and Local Relations: An Uncomfortable *Ménage à Trois*' in Harvey Lazar & Christian Leuprecht (eds) *Sphere of Government: Comparative Studies of Cities in Multilevel Governance Systems* (2007) 239.

Nevertheless, some value could be gained by mingling in the corridors of power in Parliament. Organized local government's entitlement to participate in the NCOP turns on the phrase 'when necessary'. However, 'when necessary' should be generously interpreted to allow SALGA to take its seat whenever a matter that affects, or may affect, the interest of local government is before the NCOP — either when the NCOP sits alone or jointly with the National Assembly. In the first place, any legislation that affects local government triggers the participation right. Second, when the NCOP reviews a provincial intervention in a municipality,[1] organized local government has a palpable interest. Finally, when the NCOP exercises its oversight function over intergovernmental relations, the involvement of local government in the system co-operative government should also trigger the need to participate.

(iv) *Financial and Fiscal Commission*

In contrast to local government's ambiguous participation in the NCOP, the constitutional mandate for its participation in the FFC is more forthright. The NCOP is a political institution designed to represent the provincial legislatures and to articulate political positions. The FFC is an advisory body. It consists of experts who ensure the protection of both provincial interests and local government interest in the area of intergovernmental fiscal relations and the national division of annual revenue.[2]

The FFC consists of the following persons appointed by the President:

(a) a chairperson and deputy chairperson,
(b) three persons appointed after consultation with the Premiers,
(c) two persons selected, after consultation with organised local government, from a list compiled by organised local government; and
(d) a further two persons.[3]

Participation in the FCC is not premised on having a mandate from the nominating constituency. Its representatives need not be councilors. SALGA's two nominees must bring an independent local government perspective to the FCC.[4] The FFC is not an intergovernmental relations structure on par with the Budget Forum. It is not a meeting of executives but is an independent expert body advising government on the conduct of intergovernmental relations in the field of finance.

[1] FC s 139.
[2] FC s 220. In terms of the Municipal Systems Act 32 of 2000 s 9(1)*(a)* and (2)*(a)* the FFC must also play an advisory role when a national minister (or MEC) initiates legislation assigning a function or a power to municipalities.
[3] FC s 221 as amended by Seventh Constitutional Amendment Act 61 of 2001 s 7.
[4] See Finance and Fiscal Commission Act 99 of 1997 s 2: the FFC is 'independent and subject only to the Constitution, this Act and the law'.

(b) Principles and statutory provisions of cooperative government

In addition to the general principle of intergovernmental relations and cooperative government listed in FC s 41(1),[1] the Final Constitution imposes two specific co-operative government duties related to local government. Under the heading of 'Municipalities in co-operative government', FC 154(1) places a duty of support on the national government and provincial governments in respect of local government. FC s 154(2) affords local government the opportunity to make representation on any national or provincial draft legislation affecting local government. These principles have been developed in a number of laws over the past decade.

The Intergovernmental Fiscal Relations Act[2] created the Local Government Budget Forum for consultation by organized local government with the Minister of Finance and the MECs for finance on the allocation of revenue raised nationally. The Municipal Systems Act of 2000 refers to co-operative government by merely repeating the general principles of FC Chapter 3. Section 3(1) asserts that municipalities 'must exercise their executive and legislative authority within the constitutional system of co-operative government envisaged in section 41 of the Constitution.' Conversely, national and provincial governments must exercise their executive and legislative authority 'in a manner that does not compromise or impede a municipality's ability or right to exercise its executive and legislative authority.'[3]

In the chapter devoted to 'Co-operative Government', the MFMA confuses supervision with the mandate of cooperative government. The MFMA correctly views as cooperative government the national government's and provincial governments' duty of support and capacity building,[4] the timely transfers of funds to local government, the sharing of information,[5] the predictable allocation of resources to municipalities[6] and municipalities' reciprocal duties in these matters.[7] However, the chapter incorrectly contains provisions relating to the stopping of transfers of funds, including the equitable share, to municipalities due to non-compliance with Treasury norms and standards.[8] The stopping of transfers is a

[1] FC s 41(1)*(b)* instructs all spheres of government and all organs of state within each sphere to 'cooperate with one another in mutual trust and good faith by —
(i) fostering friendly relations;
(ii) assisting and supporting one another;
(iii) informing one another of, and consulting one another on, matters of common interest;
(iv) co-ordinating their actions and legislation with one another;
(v) adhering to agreed procedures; and
(vi) avoiding legal proceedings against one another.'

[2] Act 97 of 1997.

[3] Municipal Systems Act 32 of 2000 s 3(2).

[4] MFMA s 34.

[5] MFMA s 35.

[6] MFMA s 36.

[7] MFMA s 37.

[8] MFMA ss 38-40.

hierarchical measure that punishes (and seeks to correct) errant municipal conduct — the antithesis of co-operation premised on a relationship of equality. Likewise, national powers and provincial powers of capping municipalities' taxes and tariffs[1] are the epitome of top-down regulation, a key aspect of supervision.

The Intergovernmental Relations Framework Act of 2005 ('IGRFA' or 'IGR Framework Act')[2] contains many provisions pertinent to local government. However, the IGRFA provides a default position only. If a provision of another Act regulating intergovernmental relations conflicts with IGRFA, then the former prevails.[3] Thus, the provisions of the Intergovernmental Fiscal Relations Act[4] will trump the IGRFA. However, the Act prevails over any by-law,[5] a provision clearly inconsistent with FC s 156(3). This section provides that a by-law is invalidated by conflicting national legislation or provincial legislation. This provision is subject to FC s 151(4)'s proviso that prohibits national government or provincial government from compromising or impeding a municipality's right to exercise its powers or perform its functions.[6] The IGRFA is concerned only with executive intergovernmental relations. It excludes the national legislatures and provincial legislatures from its reach.[7] In the case of local councils, where no institutional division is made between legislative and executive actions, both are subject to the Act. The Act further institutionalizes a number of intergovernmental forums at national, provincial and district levels and determines local government's participation therein.[8]

(c) Duty of support

FC s 41(1)*(h)*(ii) instructs all spheres of government to 'co-operate with one another in mutual trust and good faith, by … assisting and supporting each other.' Under the heading 'Municipalities in co-operative government' FC s 154(1) imposes a specific duty on national and provincial governments to 'support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.' Both the section heading and coupling the duty of support in FC s 154(1) with local government's entitlement in FC s 154(2) to make its views known on national legislation and provincial legislation affecting its interests, confuse the conceptual distinction between co-operation and supervision.

[1] MFMA s 43.
[2] Act 13 of 2005, coming into operation on 15 August 2005.
[3] IGR Framework Act s 3(1).
[4] Act 97 of 1997.
[5] IGR Framework Act 3(2)*(a)*.
[6] See further § 22.3*(e)* supra.
[7] IGR Framework Act s 2(2)*(a)*-*(b)*.
[8] See § 22.7*(d)*(v) infra.

FC s 41(1)*(h)*(ii) is a general provision. It indicates no hierarchical duty of support. It could be cited as a ground for a metropolitan municipality supporting a province on a specific matter. It could even be used to sustain a claim that one municipality has a duty to assist a neighbour. For example, one municipality should be under an obligation to make available its fire fighting services in the case of a major fire. Any such assistance occurs with the consent and cooperation of the recipient municipality. Thus, the co-operative duty to assist and to support also applies on a horizontal level. Municipalities must be mutually supportive of one another and may also assist provinces and national government should the need arise.

FC s 154(1), on the other hand, is based upon a different premise. The duty of support flows from the hierarchical position that both the national government and provincial governments occupy in relation to local government, and not because they are equal partners in the great endeavour of providing coherent government to the country as whole. Moreover, unlike FC s 41(1)*(h)*(ii), there is no mutual obligation of support. The national government owes a duty of support because it sets the frameworks and benchmarks within which municipalities must operate. The provincial support is reflected in both the establishment powers of FC s 155 and the intervention powers of FC s 139. Appropriately, then, the other provision imposing on provinces the duty to support municipalities forms part of FC s 155. This section is devoted to the establishment by the national government of the broad framework for municipalities, the provinces establishing municipalities, and the overall regulatory power of both the national and provincial government over municipalities.[1] In the case of provincial governments, the establishment power is linked to the duty to get and keep municipalities on their feet. Furthermore, the duty of support is coupled with monitoring. As shown above,[2] the Constitutional Court has placed the duty of support firmly in the context of supervision. We would contend that FC s 154(1) reflects a supervisory hierarchical relationship rather than the more egalitarian co-operative government contemplated by FC s 41(1)*(h)*.

There are, however, similarities between 'supervisory support' and 'cooperative support'. Common to both is the notion that support is a bi-lateral enterprise: the active participation of the recipient is required. In as much as communities cannot be developed as objects and the success of development projects is more assured when such communities are part of the decision-making process, the municipality must actively engage in the support measures. In the case of 'supervisory support', the choice of the municipality is constrained; as shown above, if the proffered assistance is not taken, then an intervention may follow.

(d) Duty to consult

The *grundnorm* of cooperative government is probably the duty in FC s 41(1)*(h)*(iii) of 'informing one another of, and consulting one another on matters of

[1] FC s 155(7). See § 22.3*(e)* supra.
[2] See § 22.6*(a)*(ii) supra, on supervision.

common interest.' FC s 154(2) has concretized this duty for local government as follows:

> Draft national or provincial legislation that affects the status, institutions or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature, in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.

Both provisions establish the obligation to consider the views of the other party before a decision is taken. The two sections indicate that there are differences in the manner in which the views of the other party may be sought.

(i) *Information sharing*

The duty of informing other spheres of government or organs of state, serves a very different function than that of consultation. In the case of consultation, the organ consulting seeks views or information from another party to inform its own decision-making. Such consultation should lead to better decision-making. With information-sharing the direction of influence is the other way. The organ disseminating the information does not seek a response. Rather, the receiving organ of state may take such information into consideration if and when it makes a decision on a related matter.

(ii) *Consultation*[1]

'Consultation' has been defined in IGRFA as 'a process whereby the views of another on a specific matter are solicited, either orally or in writing, and considered.'[2] This definition reflects the common-law understanding of the concept. In *Robertson & Another v City of Cape Town*; *Truman-Baker v City of Cape Town*,[3] the Cape High Court favourably referred to the following definition: 'The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice …'[4] While there is no prescription on the form of consultation, the High Court in *Hayes & Another v Minister of Housing, Planning and Administration, Western Cape & Others*[5] stated that 'as long as the lines of communication are open and the parties are afforded a reasonable opportunity to put their cases or points of view to one another, the form of such consultation will usually not be of great import.' These dicta suggest three basic elements: (1) an invitation to hear the views of a particular party (or public in general) on a specified matter; (2) an adequate opportunity to submit considered views; and (3) the party inviting views must consider those views in good faith.

[1] See Nico Steytler & Jaap De Visser *Local Government Law in South Africa* (2007) 16-12.
[2] IGR Framework Act s 1(1) 'consultation'.
[3] 2004 (9) BLCR 950 (C)('*Robertson HC*') at para 108.
[4] With reference to *Maqoma v Sebe NO & Another* 1987 (1) SA 483, 491E (Ck).
[5] 1999 (4) SA 1229, 1242J-1243A (C).

The invitation to hear the views of other parties can take one of two forms. In its passive form, the party consulting extends a general invitation to interested parties or the public in general. By setting a closing date for responses, it leaves the addressees to decide whether or not to respond. The more active approach is to solicit actively the views of particular parties.

(iii) *Providing opportunities for representation*

The duty to consult in terms of FC s 154(2) is of the passive kind. It requires only the issuing of a general invitation to comment. It is also limited in a number of respects. First, it deals only with national legislation and provincial legislation passed by Parliament or a provincial legislature. Although 'legislation' is defined in FC s 239 as including both legislation passed by Parliament and a provincial legislature and subordinate legislation made in terms of a national or provincial act, the reference in FC s 154(2) to legislation introduced in Parliament or a provincial legislature excludes subordinate legislation. Second, although the substance of the draft legislation is ostensibly concerned only with 'the status, institutions or functions of local government', most aspects of local government would be covered by the broad term 'functions'. Third, draft legislation must be published for public comment before it is introduced in Parliament or a provincial legislature. Any changes affected during the legislative process would not elicit a further opportunity to make representations. However, we might argue that a fundamental change to the legislation during the legislative process should trigger a duty to call for further comments. Fourth, a call for comments is an open invitation to all and sundry, including organised local government and municipalities. Fifth, the duty is to facilitate the participation of local government. Where the deadline for submitting representations is too short for meaningful participation, the legislative process may be invalidated.[1] Sixth, while there is a duty to consider any representations in good faith, the failure to use the opportunity to make representations is no bar to proceed with the introduction of the draft legislation in the legislatures.

(iv) *Consultation — seeking out the views of other parties*

The active form of consultation entails more effort to secure the views of stakeholders. For example, FC s 229(5) requires that national legislation that regulates the powers of municipalities to impose revenue-raising measures may be enacted only after organised local government has been consulted. In *Robertson v City of Cape Town; Truman-Baker v City of Cape Town*,[2] the High Court, after defining

[1] For more on the requirements of public participation in the legislative process, see *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC); *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2007 (6) SA 477 (CC), 2007 (1) BCLR 47 (CC) and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* [2008] ZACC 10.

[2] *Robertson HC* (supra) at para 108.

consultation, noted that consultation was a 'bi-lateral process' that required the engagement with the other party whose advice is sought. In the instant case, the High Court found that there was no consultation on amendments to the Structures Act because neither the Minister for local government nor Parliament 'sought to engage the FFC in consultation'.[1] No formal request was sent to the FFC and the latter's attitude was that it would only engage in consultation if Parliament requested it to do so. This case supports the proposition that when there is a duty to consult with a particular body, there must be conscious effort, directed to that party to achieve that end. Second, it could also be argued that, while the consultant's decision-making cannot unreasonably be delayed by dilatory conduct by the party whose views are being sought, 'an engagement to consult' should amount to more than a simple invitation to submit views.

Where a province considers legislation affecting municipalities (or a particular municipality), the IGFRA has sought to structure both the consultation and the way in which received information must be considered.[2] The consultation must 'be appropriately focused and include a consideration of the impact that such policy or legislation might have on the functional, institutional or financial integrity and coherence of government in the local sphere of government in the province.'[3] Such in-depth consultation suggests more than merely an invitation to comment. It requires bi-lateral engagement.

Given the large number of municipalities, active consultation by the national government or provincial government is usually restricted to organised local government. A wide variety of laws thus require that organised local government be consulted before legislation affecting local government is adopted.[4]

(v) *Use of consultative forums*

In giving effect to the constitutional mandate of establishing structures to promote and facilitate intergovernmental relations, the IGRFA has created a number of forums for the purposes of consultation and discussion. The Act provides specifically that where there is any statutory obligation to consult with organised local government, the consultation may be conducted through an appropriate intergovernmental forum or support structure.[5] An appropriate forum or structure would be one where organised local government is a member. However, where organised local government is not represented on such a forum, the Act provides that it is entitled to participate through a representative with full speaking rights when the relevant matter is discussed.[6]

[1] *Robertson HC* (supra) at para 109.
[2] IGR Framework Act s 36(1)*(c)*.
[3] IGR Framework Act s 36(2).
[4] See Steytler & De Visser (supra) at 16-15ff.
[5] IGR Framework Act s 31(1) read with IGR Framework Act s s 1(1) 'intergovernmental structure'.
[6] IGR Framework Act s 31(2).

From 1994 onwards, a large number of forums have sprung up, all aimed at promoting co-operative government. They were mostly informal and primarily linked the provinces up with the national government. Local government's participation was *ad hoc* and by invitation only in the President's Coordinating Council and the various sector forums called MinMECs. At provincial level there was a wide variety of forums where the premiers met with organised local government in the province. At district level there was the uneven and sporadic establishment of intergovernmental forums bringing the mayors of the district and local municipalities together.[1] The only statutory body with mandatory representation from organised local government was the Budget Forum. The Budget Forum was established in terms of the Intergovernmental Fiscal Relations Act of 1997.[2]

With the passing of the IGRFA, the intergovernmental forums were grounded by statute. At the pinnacle is the President's Co-ordinating Council ('PPC'), consisting of the President, the deputy president and four additional ministers, the nine premiers and a representative of organised local government.[3] At the national level, any cabinet minister may establish a forum with his or her counterparts in the provinces, the so-called MinMECs, and a representative of organised local government, if the subject so requires.[4] At provincial level, every premier must establish a Premier's Intergovernmental Forum, consisting of the premier, a number of MECs, the mayors of metropolitan and district municipalities, and a representative of organised local government in the province.[5] Finally, at the district level, there must be a district intergovernmental forum comprising the mayors of the district and local municipalities.[6]

The national IGR forums are hierarchical structures that affirm the command of the national government.[7] The PCC is conceived as a consultative forum 'for the President'[8] and not a forum where the President, premiers and organized local government operate as equals. The President determines the agenda for the meetings of the PPC.[9] The premiers and SALGA are, however, not totally passive recipients; they may submit suggestions for inclusion on the agenda, but then only through the Minister responsible for provincial and local government and only in terms of a framework determined by the President.[10] The PCC also

[1] See Coel Kirkby, Nico Steytler & Janis Jordan 'Towards a More Cooperative Local Government: The Challenge of District Intergovernmental Forums' (2007) 22(1) *SA Public Law* 143.
[2] See § 22.7*(a)*(i) supra.
[3] IGR Framework Act s 6.
[4] IGR Framework Act s 9.
[5] IGR Framework Act s 16.
[6] IGR Framework Act s 24.
[7] See Christina Murray & Okyerebea Ampofo-Anti 'Provincial Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) 20-21.
[8] IGR Framework Act s 6.
[9] IGR Framework Act s 8(1)*(a)*.
[10] IGR Framework Act s 8(2).

aims to perform a monitoring function with respect to the implementation of policy and legislation and the realisation of national priorities.[1] In addition to the PPC being a forum for consultation with the provinces and organised local government on matters of national interest, the President may use the forum 'to discuss performance in the provision of services in order to detect failures and to initiate preventive and corrective action when necessary'.[2] To this end, the President may use the forum to consider reports 'dealing with the performance of provinces and municipalities.'[3] Instead of focusing on common issues, the focus is on the performance of provinces and local government and their problems.

The same approach is followed with regard to MinMECs. Their role is described as 'a consultative forum *for* the Cabinet member responsible for the functional area'.[4] Again, the national cabinet minister determines the agenda, with the proviso that an MEC may suggest agenda items in terms of a framework determined by the minister.[5] As a forum of consultation for the minister, the MinMEC is to be used for co-ordination and alignment within the sector for strategic and performance plans as well as to discuss performance in the provision of services in the sector.[6]

The role of the Premier's Intergovernmental Forum is 'a consultative forum for the Premier of a province *and* the mayors of metropolitan and district municipalities in the province'.[7] The same inclusive and egalitarian approach is followed with district intergovernmental forums: 'The role of a district intergovernmental forum is to serve as a consultative forum for the district municipality *and* the local municipalities in the district to discuss and consult each other on matters of mutual interest'.[8]

[1] IGR Framework Act s 4.
[2] IGR Framework Act s 7*(c)*.
[3] IGR Framework Act s 7*(d)*(ii).
[4] IGR Framework Act s 11 (emphasis added).
[5] IGR Framework Act s 13(1)*(b)*.
[6] IGR Framework Act s 11*(b)-(c)*.
[7] IGR Framework Act s 18 (emphasis added).
[8] IGR Framework Act s 24(1) (emphasis added).

23A Public Administration

Anshal Bodasing

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195. Basic values and principles governing public administration

1. Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
   a. A high standard of professional ethics must be promoted and maintained.
   b. Efficient, economic and effective use of resources must be promoted.
   c. Public administration must be development-oriented.
   d. Services must be provided impartially, fairly, equitably and without bias.
   e. People's needs must be responded to, and the public must be encouraged to participate in policy-making.
   f. Public administration must be accountable.
   g. Transparency must be fostered by providing the public with timely, accessible and accurate information.
   h. Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
   i. Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.
2. The above principles apply to
   a. administration in every sphere of government;
   b. organs of state; and
   c. public enterprises.
3. National legislation must ensure the promotion of the values and principles listed in subsection (1).
4. The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.
5. Legislation regulating public administration may differentiate between different sectors, administrations or institutions.
6. The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration.

196. Public Service Commission

1. There is a single Public Service Commission for the Republic.
2. The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The Commission must be regulated by national legislation.
3. Other organs of state, through legislative and other measures, must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. No person or organ of state may interfere with the functioning of the Commission.
4. The powers and functions of the Commission are —
   a. to promote the values and principles set out in section 195, throughout the public service;
   b. to investigate, monitor and evaluate the organisation and administration, and the personnel practices, of the public service;

c. to propose measures to ensure effective and efficient performance within the public service;

d. to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195;
e. to report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with; and
f. either of its own accord or on receipt of any complaint —
   i. to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature;
   ii. to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;
   iii. to monitor and investigate adherence to applicable procedures in the public service; and
   iv. to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service; and
g. to exercise or perform the additional powers or functions prescribed by an Act of Parliament.

5. The Commission is accountable to the National Assembly.
6. The Commission must report at least once a year in terms of subsection (4)*(e)*
   a. to the National Assembly; and
   b. in respect of its activities in a province, to the legislature of that province.'
7. The Commission has the following 14 commissioners appointed by the President:
   a. Five commissioners approved by the National Assembly in accordance with subsection (8)*(a)*; and
   b. one commissioner for each province nominated by the Premier of the province in accordance with subsection (8)*(b)*.
8.
   a. A commissioner appointed in terms of subsection (7)*(a)* must be —
      i. recommended by a committee of the National Assembly that is proportionally composed of members of all parties represented in the Assembly; and
      ii. approved by the Assembly by a resolution adopted with a supporting vote of a majority of its members.
   b. A commissioner nominated by the Premier of a province must be —
      i. recommended by a committee of the provincial legislature that is proportionally composed of members of all parties represented in the legislature; and
      ii. approved by the legislature by a resolution adopted with a supporting vote of a majority of its members.
9. An Act of Parliament must regulate the procedure for the appointment of commissioners.
10. A commissioner is appointed for a term of five years, which is renewable for one additional term only, and must be a woman or a man who is —
    a. a South African citizen; and
    b. a fit and proper person with knowledge of, or experience in, administration, management or the provision of public services.
11. A commissioner may be removed from office only on —
    a. the ground of misconduct, incapacity or incompetence;

b. a finding to that effect by a committee of the National Assembly or, in the case of a commissioner nominated by the Premier of a province, by a committee of the legislature of that province; and
c. the adoption by the Assembly or the provincial legislature concerned, of a resolution with a supporting vote of a majority of its members calling for the commissioner's removal from office.

12. The President must remove the relevant commissioner from office upon —
    a. the adoption by the Assembly of a resolution calling for that commissioner's removal; or
    b. written notification by the Premier that the provincial legislature has adopted a resolution calling for that commissioner's removal.
13. Commissioners referred to in subsection (7)*(b)* may exercise the powers and perform the functions of the Commission in their provinces as prescribed by national legislation.

197. Public Service

1. Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.
2. The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.
3. No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.
4. Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform norms and standards applying to the public service.[1]

23A.1 Principles and Objectives of Public Administration in a Constitutional Democracy

The relationship that a democratic state has with its inhabitants manifests itself in two ways: it exercises immense power and control over them on the one hand, and it is duty bound to protect them and provide them with public goods on the other. Its duty to protect and to distribute public goods has long been restricted and controlled by a multitude of common law and statutory sources. The entrenchment of the right to just administrative action[2] and a constellation of other constitutional and statutory mechanisms have brought the bureaucratic processes of government into line with the values and the principles enshrined in the Final Constitution.

Public administration encompasses the delivery of public services to citizens in a manner that contributes to the country's general survival and prosperity.[3] Public administration is, for the purposes of this chapter, a field of study concerned

[1] Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)('Final Constitution' or 'FC').
[2] FC s 33.
[3] See G Van der Waldt & A Hembold *The Constitution and a New Public Administration* (1995) 1-2, 6-7. Van der Waldt and Hembold note that when the state comes into being as a physical and organisational entity, it must be in a position to deliver such basic goods as health care, education, and physical protection.

with administrative processes and the practical implementation by government of policies, laws and orders of court.

In recent years, public administration theory has occasionally shown a heavy orientation toward critical theory and post-modern philosophical notions of government, governance, and power. However, most working public administration scholars support a classical definition of the term 'public administration' that gives appropriate weight to constitutionality, service, bureaucratic forms of organisation, and hierarchical government.[1]

The adjective 'public' usually denotes 'government' (serving the public interest), though it may encompass non-profit organisations such as those of civil society, or any entity and its management not specifically acting in self-interest. In practice, then, public administration is concerned with the day-to-day running of the state through the implementation of laws and policies. It does not include the affairs of policy-making organs like the Cabinet, the President and Deputy-President, or with provincial Premiers and Executive Councils. But it does embrace the various so-called line departments at national and provincial level, such as the Trade and Industry, Justice, Agriculture. The carrying out of public administration and the provision of public services gives rise to 'administrative action'.[2]

Public administration, at minimum, involves what Hoexter refers to as administrative 'acts'.[3] An 'administrative act' (which is a component of 'administrative action') is an act (conduct) which implements or gives effect to a policy, a piece of legislation or an adjudicative decision.[4] In *Grey's Marine Hout Bay*, Nugent JA held that:

> Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so … Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.[5]

This definition emphasizes the operational side of the state: since policies, laws and judgments are not self-executing; they have to be put into operation by public authorities responsible for administering them. Administrative acts include 'every conceivable aspect of government activity' — 'granting a licence, promoting a clerk, stamping a passport, arresting a suspect, [and] paying out a pension.'[6] In fact, as Boulle, Harris and Hoexter put it:

[1] Van der Waldt & Heinbold (supra) at 6-7.

[2] For more on FC s 33, see J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2002) Chapter 61. See also C Hoexter *The New Constitutional & Administrative Law, Vol II* (2002) 28; L Baxter *Administrative Law* (1984) 94-101.

[3] See Hoexter (supra) at 28.

[4] See Hoexter (supra) at 28; ***Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as Amici Curiae)*** 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 (CC)('*New Clicks*') at para 592 (Sachs J).

[5] *Greys Marine Hout Bay (Pty) Ltd & Others v Minister of Public Works & Others* [2005] 3 All SA 33 (SCA) at para 24.

[6] Hoexter (supra) at 28-31.

> A feature of the modern state is that the administration is the most active branch of the state system, and in terms of the extensive authority delegated to it performs all of the functions which characterise contemporary government: formulating policy, regulating, policing, providing services, settling disputes, acting entrepreneurially, consuming, and controlling the economy.[1]

The public administration thus wields enormous power. Where the public administrators' conduct is administrative action, the conduct falls to be dealt with in the realm of administrative law, with its ensuing consequences. But when is the conduct of the state public and what is the exercise of public power? In *Police and Prison Unions v Minister of Correctional Services*, Plasket J noted that 'what makes the power involved a public power is the fact that it has been vested in a public functionary who is required to exercise it in the public interest, and not in his or her own private interest or at his or her own whim.' [2] The learned judge went on to assert that if a power is derived from statute, the body exercising that power is 'presumptively public'.[3] Thus, public power is exercised by a government actor or the state that derives its force from the Final Constitution as well as legislation. In *Steenkamp*, Moseneke DCJ wrote:

> When a tender board procures goods and services on behalf of government it wields power derived first from the Constitution itself and next from legislation in pursuit of constitutional goals. It bears repetition that the exercise and control of public power is always a constitutional matter. Section 195 of the Constitution further qualifies the exercise of public power by requiring that public administration be accountable, transparent and fair.[4]

In a similar vein, this chapter offers a functional account of the constitutional parameters of public power. It does not proffer a forensic analysis of the 'idea' of the South African bureaucracy.

The wording of FC Chapter 10 suggests that the public service is a narrower concept than public administration. The Constitutional Court has found, however, that

> 'Public administration' and 'public service' are not terms of art which have such clearly distinct meanings. On the contrary, they are expressions which are often used interchangeably to connote the organisation as well as the public officials through which an executive implements that which it is empowered to implement.[5]

Presently, public administration in South Africa, as envisaged by the Department thereof, embraces three types of agencies:

[1] L Boulle, B Harris & C Hoexter *Constitutional & Administrative Law* (1989) 85.

[2] [2006] 2 All SA 175 (E) at para 51.

[3] Ibid at para 55.

[4] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* CCT 71/05 (28 September 2006, as yet unreported)('*Steenkamp*') at para 20 (footnotes omitted).

[5] See *Premier of the Province of the Western Cape v President of the RSA,* 1999 (4) BCLR 382 (CC), 1999 (3) SA 657 (CC)('*Premier, Western Cape*') at para 47. The Court, in this instance, made the point that public administration and public service are necessarily linked to each other and are not entirely independent. It therefore rejected the opposite proposition proffered by the applicants. Following the *Premier, Western Cape* Court, I use the terms public administration and public service interchangeably in this chapter.

1. *Administrative agencies,* such as the Department of Public Service and Administration ('DPSA')[1], which provide services directly to other national departments and provincial administrations but not directly to the public;
2. *Service delivery agencies,* such as the departments of Health, Home Affairs and the South African Revenue Services, which deliver services directly to the public;[2] and
3. *Statutory agencies*, such as the Public Service Commission ('PSC') and the Auditor-General, which are established in terms of the Constitution or other legislation as entities independent from the executive with regulatory and monitoring functions in respect of the public service.[3]

To frame the significance of the public administration and the requirement of a functioning public service, it is worth pausing to consider how differently South Africa's apartheid state ran its government. That administration governed all South Africans in a manner that bore the taint of racism and other forms of discrimination. As the Constitutional Court pointed out in *SARFU III*:

> Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability.[4]

The idea of organizing the administration of the state around the values and principles set out in the Final Constitution marks a major departure from the sinister manner in which many apartheid laws were executed. In our recent past, the emphasis was on power, not on duty. The contents of FC s 195-197, then, are crucial for two reasons. First, they reinforce the fact that we have moved away, both in theory and in practice, from the secretive law-making and the discriminatory policies of the pre-constitutional era. Our new dispensation requires transparency, accountability openness and responsiveness to the public.[5] Secondly, by making itself accountable, the public service, and therefore the public administration, theoretically raises public confidence in the government's ability to create and to maintain a functioning democracy.

[1] The DPSA manages the development of administrative policies and the legislative framework for transforming the public service. The policy and the legislative transformation process of recent years has moved from restructuring the fractured employee component to focussing on the restructuring and the modernisation of the public service.

[2] The service delivery agencies are presumably the agencies which the public have the most interaction with, and would be the agencies which perform 'administrative acts' and carry out 'administrative actions'.

[3] DPSA *Green Paper on Transforming Public Service Delivery* (17 December 1996) at para 7 available at http://www.info.gov.za/greenpapers/1996/transformingpublic.htm (last accessed, 14 April 2007).

[4] *President of the Republic of South Africa v South Africa Rugby Football Union* 2001 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC)('*SARFU III*') at para 133.

[5] See *New Clicks* (supra) at paras 620-625.

However, while we have experienced a move away from apartheid-style state conduct, all indications are that the current government and its public administration have yet to observe fully the principles of transparency, accountability and responsiveness. Reports of negligence, fraud and corruption are seldom out of news headlines. Moreover, the Public Service Commission has consistently found that the public service and public administration have failed to meet their obligations in terms of FC s 195.[1]

The sometimes wayward nature of current government officials has not left us in disarray. The Final Constituion, various statutory sources and the common law have all operated as an effective check on abuses of power and omissions of duty.

23A.2 Structure and Function: Chapter 10

Public administration is structured around and functions according to the provisions of FC ss 195-197 and the attendant enabling legislation, the Public Service Act ('PSA'), the Public Service Commission Act ('PSCA') and their respective regulations. The Constitutional Court pointed out in *Premier, Western Cape* that:

> Chapter 10 applies to all aspects of public administration prescribing the basic values and principles that have to be adhered to, making it clear that they apply to 'administration in every sphere of government'. The public service is one of the administrations referred to, but the administrations of public enterprises and other organs of state by which 'public goods' are provided, are also subject to the general requirements of the chapter. Special requirements are laid down for the public service as a distinct administration, and it is in this context that the public service is referred to as being 'within public administration'.[2]

The three sections of Chapter 10 are organised as follows:

1. FC s 195 sets out the principles which 'must' apply to public administration, describes who such principles apply to, and provides for the enactment of national legislation in order to give effect to the principles as well as to provide for the organisation and structure of the public administration;
2. FC s 196 provides for the creation of the Public Service Commission ('PSC'); the PSC must promote the values and principles laid out in FC s 195, investigate the public administration and public service, and report its findings on the public service to the National Assembly or provincial government; and
3. FC s 197 provides for the creation of a public service which functions within the public administration. National legislation must provide for the structure and the organisation of the public service.

Chapter 10 would appear to envisage the enactment of at least three pieces of enabling legislation in order to provide for the requisite amplification and adequate implementation of its provisions: Thus far, only two pieces of enabling legislation have been enacted — the PSA in 1994 and the PSCA in 1997.

[1] See *Public Service Commission White Paper on Transforming Public Service Delivery Government Gazette* 18340 18 Sept 1997. Ideally the White Paper would serve as the practice manual for the public service.

[2] *Premier, Western Cape* (supra) at para 44.

23A.3 FC s 195: Values and Principles Governing Public Administration

FC s 195 makes it *peremptory* for South Africa's public administration to take account of and implement its enumerated values and principles. Furthermore, the notion of good and efficient *management* of the public administration forms a crucial aspect of running government as a business enterprise: that is, the state is required to provide specific services to its client (the public), and the public pays for such services upfront, or by way of rates and taxes. The Final Constitution, enabling legislation, and where applicable, the common law, frame the relationship between the state (represented by government) and the public. These 'constants' are there to ensure that the government, which has been put into power by the people, does its job of serving the public in a just and fair manner, without fear or favour, and within the parameters laid down by the law.

FC s 195 (3) requires enactment of national legislation which gives effect to the principles contained in FC s 195(1). As yet, no single piece of legislation designed to cover the principles and the values enumerated in subsection 1 has been enacted.

That said, various pieces of other legislation give voice to 'fragments' of subsection 1: the Public Service Act[1] ('PSA'), the Promotion of Administrative Justice Act[2] ('PAJA'), the Promotion of Access to Information Act[3] ('PAIA'), the Public Finance Management Act[4] ('PFMA'), the Municipal Systems Act[5] ('MSA') and the Public Service Commission Act[6] ('PSC Act').[7] Moreover, the Department of Public Service and Administration and the PSC have a number of internal policy documents that incorporate the provisions of subsection 1 and thus seek to regulate the public service from within.[8]

The main objective of the PSA is to look after the actual machinery of public administration. This machinery provides the structural configuration of the public

[1] Act 103 of 1994.
[2] Act 3 of 2000.
[3] Act 2 of 2000.
[4] Act 1 of 1999.
[5] Act 32 of 2000. This Act is a component of the legislation which governs local government. The Act emphasises the requirement of an efficient, effective and transparent local public administration which is resonant with the constitutional principles of public administration and which aims to provide a framework for local public administration and human resource development. See *Johannesburg Municipal Pension Fund & Others v City of Johannesburg & Others* 2005 (6) SA 273 (W) ('*Johannesburg Municipal Pensoin Fund*') at para 13.
[6] Act 46 of 1997.
[7] See *Democratic Alliance Western Cape v Western Cape Minister of Local Government and Another* [2006] 1 All SA 384 (C) at para 5.
[8] As noted by the Constitutional Court in *SARFU III*, the public administration is subject to a variety of constitutional controls. *SARFU III* (supra) at para 133. The various pieces of legislation to which I have referred have all been enacted pursuant to constitutional instruction. The Protected Disclosures Act seeks to promote accountability, prevent corruption and protect so-called 'whistle-blowers'. Act 26 of 2000. The policy documents are usually internal, but some are available on goverment websites and on request.

service and the regulatory mechanisms thereof at national and provincial levels. It does not seek to provide South Africans with *protection* when there is a violation by the 'administration' of the requirements of FC s 195.

Of course, other legislation like PAJA and PAIA, promote FC s 195(1) values and principles. For example, the preamble of PAJA states that it was enacted pursuant to the promotion of an efficient administration and good governance; and to create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action.[1] These objectives clearly resonate with FC s 195.[2] Other sections within PAIA recognise that the secretive and the unresponsive culture of public bodies in the past led to abuses of power and human rights violations. PAIA, generally, fosters a culture of transparency and accountability in public and private bodies by granting citizens an effective right of access to information. The PSA — the enabling legislation envisaged by FC s 197 — requires that public administration must 'function' and 'be structured' by national legislation and that national legislation must regulate the 'terms and conditions of employment in the public service'.

Does the lack of a single piece of legislation to 'guard' these ideals leave an unconstitutional gap in our law? Or are FC s 195, FC s 196[3] and other applicable legislation — operating in conjunction with one another — sufficient for the present? While extant constitutional and statutory provisions may go a long way towards defining what ethical and accountable conduct means in the context of public administration, the absence of the super-ordinate legislation contemplated by FC s 195 would appear to constitute an unconstitutional abdication of responsibility by our national government. It goes without saying that the absence of such a statute has been a hindrance to the development of meaningful FC s 195 jurisprudence.

23A.4 Judicial Constructions of FC s 195

In *Trend Fashions (Pty) Ltd v Commissioner for SARS and Another*, the Cape High Court found that 'the Commissioner [of SARS] (and his officials) as part of the public administration, are obliged by virtue of the provisions of section 195(1) of the Constitution of South Africa, 1996, to apply the democratic principles enshrined in the Constitution and should act both ethically and accountably

[1] See also Municipal Systems Act 32 of 2000.

[2] Unlike FC ss 32 and 33, FC s 195 does not form part of the Bill of Rights. It is, however, like the rest of the Final Constitution, covered by and enforceable under FC 2, the supremacy clause. FC s 2 reads: 'This Constitution is the supreme law of the Republic; law or conduct which is inconsistent with it is invalid, and the obligations imposed by it, must be fulfilled.'

[3] Section 196 establishes the PSC. The PSC operates as a watchdog over the public service as a whole and attempts to enforce FCs 195(1).

and without arbitrariness.'[1] As a result, the *Trend Fashions* court found that the existence of a tacit term is to be inferred into any contract with SARS — this tacit term could be inferred from a duty resting on organs of state to act ethically and accountably in terms of FC s 195(1). In *Commissioner for SARS v Hawker Air Services (Pty) Ltd; In Re Commissioner for SARS v Hawker Aviation Services Partnership and Others*, the High Court reached a similar conclusion.[2] It wrote, of SARS and of the public administration in general, that:

> Even, if SARS has a lawful and justifiable claim against a particular party then the applicant must surely act within the bounds of the law and not to subvert the law by misusing the process of the court actuated by impermissible ulterior purpose. The applicant and concomitantly SARS are part of the nation's public administration and they should act both ethically and accountably and not with an ulterior purpose. The very essence of public accountability is encapsulated in section 195(1)*(f)* of the Constitution which provides succinctly: 'Public administration must be accountable'. *The doctrine of public accountability is one of the most important facets of modern public law. Its fundamental purpose is to check the over-zealous and sweeping misuse of power by the public administrator in a democratic State.*[3] (My emphasis)

The *Trend Fashions* court and *Hawker Aviation Services* court reinforce two basic principles: that state conduct must be subject to public scrutiny in a functioning democracy; and that courts must be alive to the manner in which state power is exercised.

The Constitutional Court has played an active role in shaping our understanding of how the state, in a constitutional order committed to the rule of law, must respond to its citizens. In *S v Makwanyane*, Ackermann J wrote:

> We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where *State action must be such that it is capable of being analysed and justified rationally*. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order.[4]

[1] 2006 (2) BCLR 304 (C). This matter involved the demand of payments by the respondents upon the detention of imported shoes pending certain investigations. In respect of the claim for repayment of the provisional payments made in respect of two of the detained consignments, the court held that it was a tacit term of the agreement concluded between the respondents and the applicants (at the time of releasing the consignments when the provisional payments were made) that the provisional payments should be refunded in the event that the Commissioner failed to complete his investigation.

[2] [2005] 1 All SA 215 (T).

[3] The learned judge goes on say:

> The revenue service indeed plays a vital role in the public interest of collecting revenue because the economic well-being of the nation is a legitimate imperative to attain developmental goals to improve the quality of life of all citizens. In pursuit of this objective the revenue service is required to act in a highly principled way. It has an overriding duty to collect taxes in an efficient and effective manner from the one who is really owning rather than engaging in an illegitimate punitive expedition against another even though where the two are separate entities but may be inter-connected in some way or another. Unless provided for by law, the revenue service cannot willy-nilly shift the tax liability of one entity to another. To do so constitutes misuse of fiscal power. In such certain circumstances a court of law will not come to the assistance of the applicant when the applicant acts with an ulterior purpose by not only misusing its fiscal powers but also abusing the process of the court.

Ibid at para 25.

[4] *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 156.

This need to create a culture of justification — especially in relationships between state and subjects — was articulated most powerfully by the Constitutional Court in *Pharmaceutical Manufacturers*:

> It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.[1]

The Constitutional Court has, therefore, consistently held that the constitutional standard for the exercise of state power is *(a)* non-arbitrariness and *(b)* a rational connection between the public power exercised and the decision rendered or the objective to be achieved. In *Police and Prison Unions v Minister of Correctional Services & Others*, Plasket J, in traversing the source and the meaning of public power and the exercise thereof, found that courts play a critical role in determining whether public power has been properly exercised:

> [O]ne of the important roles that courts play in societies such as ours, and in our legal tradition, is to ensure that when statutory powers (and other public powers sourced in common law or in customary law) are given in trust to public functionaries for the purpose of furthering the public interest, those public functionaries do not abuse the trust reposed in them, remain within the bounds of their empowerment and exercise their powers reasonably and in a procedurally fair manner.[2]

For our immediate purposes, it is interesting to note that when matters regarding the conduct of public officials or organs of state have come before South African courts, they have used FC 195(1) values and principles as benchmarks against which state actions are measured.

In *Steenkamp NO v The Provincial Tender Board of the Eastern Cape*, the Constitutional Court had to grapple with the issue of government liability for conduct that led to a monetary loss by the complainant. The Constitutional Court split as to the government's responsibility. However, of greater import than the outcome is that FC s 195 informs both the majority and the dissenting judgments. As Deputy Chief Justice Moseneke writes:

> There are indeed other cogent reasons why the application involves constitutional issues. First, when a tender board procures goods and services on behalf of government it wields power derived first from the Constitution itself and next from legislation in pursuit of constitutional goals. It bears repetition that the exercise and control of public power is always a constitutional matter. Section 195 of the Constitution further qualifies the exercise of public power by requiring that public administration be accountable, transparent and fair.[3]

[1] *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 85.

[2] [2006] 2 All SA 175 (E)('*Police and Prison Unions*') at para 56. See also *Kate v MEC for Department of Welfare, Eastern Cape* [2005] 1 All SA 745 (SE) at paras 1-6; *Johannesburg Municipal Pension Fund* (supra) at para 9 and paras 15–17.

[3] *Steenkamp* (supra) at para 20 (footnotes omitted).

Lower courts have made similar use of FC s 195. In *Waters v Khayalami Metropolitan Council,* the High Court found that FC s 195(1)*(g)* requires that transparency be fostered through the provision of timely, accessible and accurate information to the public.[1] The High Court struck down the Khayalami Council's actions on the grounds that they were inconsistent with constitutional principles of transparency, the right to lawful, fair and reasonable administrative action, the right to freedom of expression and a founding commitment to multi-party democracy. Navsa J wrote that the Khayalami Council, in coming to

> grips with how an open and accountable society ought to operate[,] . . . has to recognise that in a democratic society those who hold power and are responsible for public administration ought to be open to criticism. It is the very cornerstone of democratic government.'[2]

However, courts have also held that there are limits to what the public should expect from the state in effectively and in efficiently carrying out its functions. In *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd*, the municipal council had decided to launch a summons to recover rates due to it.[3] The High Court decided that the launch of a summons was not administrative action. It rather signalled the start of a court process. The High Court wrote:

> There is a constitutional obligation to foster a public administration which is efficient, effective and accountable to the broader public. To expect the plaintiff to afford its debtors a hearing prior to employment of the ordinary civil process to enforce payment is unreasonable and would create administrative inefficiency, a consequence that runs counter to the aforesaid constitutional objectives.[4]

Unfortunately, the *Eastern Metropolitan Substructure* court failed to consider whether the decision of the Municipality to recover the debts constituted a 'decision' for the purposes of PAJA, and if so, whether that may have had a bearing on the outcome. Plasket J put it neatly when he wrote that:

> The subservience of the [Department of Correctional Services] to the Constitution generally and section 195 in particular, the public character of the Department and the pre-eminence of the public interest in the proper administration of prisons and the attainment of the purposes specified in section 2 of the Correctional Services Act all strengthen my view that the powers that are sought to be reviewed in this matter are public powers as envisaged by the common law, the Constitution and the PAJA.[5]

The inextricable link between FC s 195 and FC s 33, as well as PAJA, cannot be overstated. When a public entity is alleged to have misused or abused its powers, a whole range of legal controls come into play: first, a public entity is 'subservient' to FC s 195; second, it may be that FC s 33 was infringed; third, legislation

[1] [1997] JOL 1305 (W).
[2] Ibid at page 24.
[3] 2001 (4) BCLR 344 (W).
[4] Ibid at para 16.
[5] Ibid at para 54.

governing the specific power of that entity may have been infringed; and fourth, the action brought by the aggrieved party may be governed by PAJA. A combination of any or all of these controls may be applicable in a specific matter. Such was the case in *Steenkamp*. In this regard, Moseneke DCJ held that the requirement of FC s 217 (which deals with state procurement), must be read together with administrative justice right in FC 33 and the basic values governing public administration set out in FC s 195(1).[1] In fact, all legislation enacted pursuant to constitutional directive, and which grants certain powers to the state when it interacts with the public in its various forms, implicates the right to administrative action[2] and every impugned action of the state must be assessed in light of the duties imposed by FC s 195.

In *Reuters Group PLC & Others v Viljoen NO & Others*, the applicants' launched a constitutional attack on the National Prosecuting Authority's honesty and integrity.[3] The High Court characterized the applicant's argument in terms of five inter-related propositions regarding the role of public officials in a constitutional state committed to the rule of law: (1) public officials are bound to act honestly and ethically; (2) they are bound by their lawful undertakings; (3) they may not embark on a course of conduct calculated to mislead or to create a false impression; (4) they are bound to make full disclosure of all material facts before seeking to exercise or to invoke the exercise of any power in circumstances where the affected parties are denied a hearing; and (5) they are bound to act fairly and lawfully.[4] The applicants contended that the respondents had undertaken to give

[1] *Steenkamp* (supra) at para 33.

[2] See PSC *State of the Public Service Report 2006* (April 2006) 34. The Report notes that with regard to the public service specifically, the principle of acting without bias, and with fairness and impartiality, PAJA plays an essential role:

> A distinguishing feature that sets our democracy apart from Apartheid is the constitutional commitment to Just Service Delivery that is embodied in this principle. Not only is the capacity for this in the Public Service fundamental to redressing the legacy of the past, but it is also important for legitimising public administration thereby stabilizing our democracy. Here again, the necessary legal, normative and regulatory framework is in place. The primary legal instrument is the Promotion of Administrative Justice Act (PAJA) of 2000. At a normative level, the White Paper on the Transformation of the Public Service has been translated in the Batho Pele principles.
>
> *With the PAJA, the Public Service is as yet to abide by it.* Work needs to be done to enable the Public Service to comply with the PAJA, and senior management seriously needs the capacity to inculcate the Batho Pele principles as the underlying ethos of the Public Service.
>
> The PAJA requires departments to have mechanisms for explaining administrative action and redress where necessary. Most critically this Act requires public officials to understand what constitutes lawful administration and what does not.
>
> The capacity to establish mechanisms for explaining administrative actions and redress as envisaged in the PAJA is totally lacking in public service. This needs urgent attention particularly at senior management.

Ibid at 34.

[3] [2001] JOL 8645 (C)('*Reuters*'). The applicants were members of the press who challenged the respondents' decision on the grounds of honesty and integrity in public administration. The respondents were members of the National Director of Public Prosecutions and were attempting to obtain a certain videotape for the purposes of the trial, and had allegedly undertaken to give the applicants prior notice should they apply for international assistance. However, the National Director of Public Prosecutions then went ahead and applied for international assistance without informing the applicants.

[4] Ibid at paras 2-4.

timeous notice of any application for international co-operation, and, in giving such undertaking, had created a legitimate expectation that it would be honoured.

The High Court held that respondent's failure to honour that undertaking violated the principles enunciated above, and, in particular, FC s 33, FC s 195 and the rule of law.[1] The *Reuters* court specifically found that the correspondence between the parties showed that the respondents had made certain promises to the applicants as alleged and failed to honour them.[2] The court further found that the respondents' disingenuous behaviour constituted a breach of their obligation to behave in an open and transparent manner.[3] The court concluded that a declaration of invalidity was the only appropriate remedy under the circumstances.[4]

Treatment Action Campaign v Minister of Health offers a further example of the courts' interpretation of FC s 195(1).[5] In this matter, counsel for the applicant argued that FC s 195 creates justiciable rights. The High Court, in finding the respondent Ministry accountable,[6] agreed and noted that this point of law had been recognised in several decisions.[7]

[1] *Reuters* (supra) at para 4.
[2] Ibid at paras 34-36.
[3] Ibid at para 44.
[4] Ibid at para 47.
[5] 2005 (6) SA 363 (T)('*Treatment Action Campaign v Minister of Health*'). This matter turned solely on the liability for costs of an application made by the TAC for access to certain information. In making its finding, the High Court held that the Minister and her department had not complied with the constitutional obligations imposed upon them by FC s 195(1)(a), (which compels a high standard of professional ethics), FC s 195(1)(f), (which compels that public administration acts with accountability) and FC s 195(1)(g), (which requires transparency as well as the furnishing of timely and accurate access to information to the public.) The Minister had published references to 'annexures' in the version of the operational plan they released to the public in November 2003 when such annexures were not part of the operational plan. They failed to correct these errors in the published version of the operational plan and continued to make the incorrect version available to the public from their website until as late as October 2004. (The application was heard in November 2004.) For all these reasons, the court held the Ministry in breach of its constitutional obligations.
[6] Ibid at 369.
[7] See *Premier, Western Cape* (supra) at para 44; *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039) at para 15 n 23; *Reuters Group plc and Others v Viljoen NO and Others* (supra) at para 46; *Nextcom (Pty) Ltd v Funde NO and Others* 2000 (4) SA 491, 506J - 507E (T); *Carephone (Pty) Ltd v Marcus NO and Others* 1999 (3) SA 304 (LAC), 1998 (10) BCLR 1326 (LAC) at paras 9–14; *SARFU* (supra) at para 133. In *Johannesburg Municipal Pension Fund v City of Johannesburg*, the High Court offered a similar assessment of the justiciability of FC s 195:

> There appears to be merit in the applicants' contention that PAJA is not and cannot be exhaustive of the right to administrative justice. To hold otherwise would be subversive of the principle of constitutional supremacy. . . . But even if the conduct in question does not constitute 'administrative action' as defined in PAJA and that s 33 of the Constitution cannot be invoked directly, the conduct is subject to constitutional scrutiny under s 195 of the Constitution. Constitutional review is independent of the guarantee of administrative justice, and public administration is subject to a range of other constitutional controls including the Bill of Rights and s 195. . . . Section 195 expresses the broad values and principles upon which public administration is founded. This, however, does not lead to the conclusion that it does not also give rise to justiciable rights: the requirements of s 195 are expressly incorporated into the [Municipal] Systems Act and they have been relied upon in several cases.

Ibid at paras 15-17.

An opposite conclusion was reached on this point of law in *Institute for Democracy in SA and Others v African National Congress and Others*[1] ('*IDASA*'). The High Court in *IDASA* held that the language and syntax of FC s 195(1) is '*not couched* in the form of rights, especially when compared with the clear provisions of Chapter 2 [the Bill of Rights].'[2] The judge therefore found that reliance upon FC s 195(1) for the purposes of demonstrating the infringement of a right was inapposite.

The Supreme Court of Appeal, in *Transnet v Chirwa*, has subsequently found that FC s 195(1) does not confer a right – even though the cause of action in the instant matter was against an organ of state bound by FC s 195.[3] The concurring judgment agreed with this conclusion.[4]

IDASA and *Transnet* offer a minority view on this point. The better part of the extant jurisprudence on public administration suggests that courts are not reluctant to hold the state accountable where it engages in conduct contrary to any of the nine principles enunciated in FC s 195(1). The Constitutional Court has yet to offer a definitive statement on the subject.

It may be that FC s 195(1) serves merely as an interpretative tool which guides a court's finding that the rule of law doctrine, FC s 33, or another justiciable right in the Bill of Rights has been violated. However, it would be absurd to contend that the phrasing of FC s 195(1), or its location in the Final Constitution (outside the Bill of Rights), makes its justiciability constitutionally impossible.[5]

The crisp question then is whether individuals – who are not the direct bearers of any rights that might be found in FC s 195, but who are, importantly, the beneficiaries of a duty owed by the government – can claim that FC s 195 creates justiciable rights? At the very least, the existence of the duties delineated in FC s 195 create an expectation on the part of the public that government will act in a certain manner. Were a member of the public or a state employee to lack legal recourse where an abrogation of FC s 195 duties occurs, FC s 195(1) would lack meaningful content. So while there may not as yet be a straightforward answer to the question of whether FC s 195(1) confers 'rights', it seems impossible to deny

[1] [2005] 3 All SA 45 (C).

[2] Ibid at para 40.

[3] *Transnet Ltd v Chirwa* (2006) 27 ILJ 2294 (SCA)(Mthiyane JA) at para 16. That FC s 195 contained justiciable rights was an argument offered in the alternative by the applicant.

[4] Conradie JA, in his concurring judgment, cited *Minister of Home Affairs v National Institute for Crime Prevention (NICRO) & Others*. 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)('*NICRO*') at para 21. *NICRO* held that FC s 1 did not create discrete rights upon which litigants could rely. With respect, this holding was incorrectly relied on by Conradie J. FC s 1 is an explanatory provision. See C Roederer 'Founding Provisions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds*) Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 13. The values contained in FC s 1 are expressed as rights and duties elsewhere in the Final Constitution. The text of FC s 1 is therefore materially different from that of FC s 195(1). Conradie J's reliance on the text of the former to interpret the latter is, as a result, inapt. The Supreme Court of Appeal decision was, at the time of writing, under appeal in the Constitutional Court.

[5] Again, many of the High Court judgments reinforce the incontrovertible proposition that public power is constrained by the Final Constitution, and that many of these constraints are spelled out in FC s 195. The principle of legality, the rule of law doctrine as well as FC s 33 turn these FC s 195 duties into justiciable constitutional obligations.

that it creates legitimate expectations that the state will indeed conduct itself in a particular manner. If the super-ordinate legislation contemplated in FC s 195(3) existed, then it would, inevitably, provide for causes of action related to the abrogation of FC s 195(1) principles. The failure of the state to promulgate such constitutionally-mandated legislation cannot free the state of its obligation to discharge the duties FC s 195 imposes. The failure to promulgate the super-ordinate legislation contemplated in FC s 195(3) leaves an unusual gap in the law with respect to the operation of the better part of the 'government machinery'. That gap must be viewed as constitutionally suspect.[1]

23A.5 Application of FC s 195(1)

FC s 195(1)'s values and principles should apply to the *administration in every sphere of government*,[2] *organs of state*,[3] and *public enterprises*.[4] The relationship between the three spheres of government — national, provincial and local — are described in Chapter 3 (FC ss 40 and 41.)[5] Organs of state are defined, as follows, in FC s 239:

(a) any department of state or administration in the national, provincial or local sphere of government;[6] or
(b) any other functionary or institution —
  (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
  (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

The definition of 'organ of state' is dealt with a length in Chapter 31 — Application — of this treatise.[7] 'Public Enterprises' is used twice — in Chapter 10 and in

[1] Whether we should be alarmed by the absence of enabling legislation for FC s 195(1) depends upon one's view of the rate at which 'enabling legislation' has been churned out by Parliament. It took Parliament almost 9 years to pass the enabling legislation for cooperative governance required by FC s 41(2): Intergovernmental Relations Framework Act 13 of 2005. The absence of that legislation was neither an impediment to cooperative governance nor a barrier to judicial enforcement of the principles set out in FC Chapter 3. For more on the judicial construction of Chapter 3, and in particular FC s 41(2), in the absence of enabling legislation, see S Woolman, T Roux & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds*) Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14. Similarly, the absence of enabling legislation in Chapter 10 does not in any way derogate from obligation of state, as represented by its public service within its administration, to comply with the principles articulated in Chapter 10. That said, PAJA and PAIA engage directly Chapter 10, and the gap in the law is made manifest when a matter that engages PAIA or PAJA also engages FC s 195(1).

[2] FC s 195(1)*(f)*.

[3] FC s 195(1)*(k)*.

[4] FC s 196(1)*(l)*.

[5] For a discussion of FC ss 40 and 41 — FC Chapter 3 — see Woolman, Roux & Bekink 'Co-operative Government' (supra) at Chapter 14. Each distinct sphere is further described in FC Chapter 5 (the President and the National Executive), FC Chapter 6 (Provinces) and FC Chapter 7 (Local Government).

[6] Departments are created by and disestablished through the provisions of the Public Service Act.

[7] For a detailed discussion of FC s 239 and the meaning of 'organ of state', see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31.

Part 4 of Schedule 4 — but it is not described anywhere in the Final Constitution. The Department of Public Enterprises lists the following as 'state-owned enterprises': Alexcor, Denel, South African Airways, Eskom, Transnet and Safcol. The PFMA would appear to expand that list when it refers to 'national government business enterprises' and 'national public entities'.[1]

FC s 195 contemplates a sophisticated and nuanced framework — in the form of national legislation — for working out the manner in which FC s 195 applies to spheres of government, organs of state and public enterprises. Such 'national legislation' must provide for the regulation of public administration,[2] must regulate the appointment of persons who will serve in the administration,[3] may differentiate between different sectors, administrations and institutions,[4] and should take into account various factors when determining the regulation of public administration.[5]

23A.6 FC s 196: The Public Service Commission

The Public Service Commission ('PSC' or 'Commission') oversees the government's interaction with the South African public. The Commission's role is not exclusively that of watchdog. It also acts as investigator, counsellor and whistleblower.

In *Premier, Western Cape*, the Constitutional Court noted that the current PSC has less control over the public service than its predecessors.[6] While the PSC carries out the various functions listed above, the 'directions' that it may give to the public service are confined to ensuring that procedures relating to employees of the public service comply with the principles set out in FC s 195.[7] The *Premier, Western Cape* Court raised, but did not answer, the question of how the PSC might

[1] For a discussion of public enterprises in the context of public finance, see R Kriel & M Monadjem 'Public Finance' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27. 'National government business enterprise' is defined, in the PFMA, as an entity which —

(a) is a juristic person under the ownership control of the national executive;
(b) has been assigned financial and operational authority to carry on a business opportunity;
(c) as its principal business, provides goods or services in accordance with ordinary business principles; and
(d) is financed fully or substantially from sources other than —
  (i) The National Revenue Fund; or
  (ii) By way of tax, levy or other statutory money.'

'National public entity' is defined, in the PFMA, as meaning:

(a) a national public entity; or
(b) a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is —
  (i) established in terms of national legislation;
  (ii) fully or substantially funded either from the National Revenue Fund, or by way of tax, levy or other money imposed in terms of national legislation; and
  (iii) accountable to Parliament.

PFMA s 1.

[2] FC s 195(3).

[3] FC s 195(4).

[4] FC s 195(5).

[5] FC s 195(6).

[6] *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC)('*Premier, Western Cape*').

[7] Ibid at para 24. See also FC s 196(4)*(d)*.

implement such directions since this question was not squarely before the Court. That question continues to hover over the PSC.

The PSC is required to work in conjunction with other bodies, like the Auditor-General, to ensure that the Public Service complies with its constitutional mandate. As was noted by the Constitutional Court in *Second Certification Judgment*, '[t]he PSC's primary function is to promote a high standard of professional ethics in the public service'.[1] But while the PSC has important supervisory and watchdog functions, much of the PSC's work remains of 'an advisory nature.'[2] The PSC Act provides for an elaboration on the monitoring and reporting role of the Commission.[3] These functions encompass inspections, inquiries, and rule-making. The Act also provides for penalties for obstruction of the Commission and for the assignment of functions by the Commission.

As far as inspections are concerned, the Act provides that the Commission may inspect departments and other organisational components in the public service.[4] It grants the PSC access to official documents and to information from heads of those departments or organisational components or from other officers in the service of those departments or organisational components as may be necessary for the performance of the functions of the Commission under the Final Constitution or the Public Service Act.

In fulfilling its functions, the PSC may conduct an inquiry into any matter in respect of which it is authorised by the Final Constitution or the Public Service Act to perform.[5] For the purposes of the inquiry, the Commission may summon any person who may be able to give information of material importance concerning the subject of the inquiry or who has in his or her possession or custody or under his or her control any book, document or object which may have a bearing on the subject of the inquiry, to appear before the Commission.[6] The PSC may

[1] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97) (CC), 1997 (1) BCLR 1 (CC) at para 142.

[2] The PSC generally submits annual reports. It also submits and publicises other reports which weed out improper and inefficient administration. For example, in August 2006 the PSC released their annual financial misconduct report (2004-2005 financial year). In it, the PSC revealed that five national departments (Trade and Industry, Public Works, Justice and Constitutional Development, Home Affairs and Environmental Affairs and Tourism) failed to submit financial misconduct cases to it in terms of the Public Finance Management Act. In terms of financial irregularities found, the highest number of reported irregularities occurred in the Defence department, followed by Correctional Services and the Police Service. Fraud, theft, misappropriation of funds, gross negligence and bribery were the most common forms of misconduct found, while the positions within the Public Service most abused include Senior Accounting Clerks, Chief Financial Clerks, and in the case of the Police Service, Inspectors. Many cases of abuse were also found at senior managerial levels. This report also indicated that although 77% of state employees who were charged were found guilty, only 33% were fired. Criminal charges were instituted against 155 public servants. In the light of this widespread abuse, the PSC declared that it wished to report on national and provincial departments twice annually, not once. See A Musgrave 'Department not Reporting Misconduct' *Business Day* (4 August 2006), available at http:/www.businessday.co.za/Articles/TarkArticleaspx?id=216634 (last accessed 18 April 2007).

[3] The Act is mandated by FC s 196 and is called the Public Service Commission Act 46 of 1997.

[4] PSC Act s 9.

[5] PSC Act s 10(1).

[6] PSC Act s 10(2)*(a)*.

also call upon and administer an oath to, or accept an affirmation from, any person present at the inquiry who has or might have been summonsed.[1] Finally, the PSC may examine or require any person who has been called upon to produce any book, document or object in his or her possession or custody or under his or her control which may have a bearing on the subject of the inquiry.[2]

Any person who is obliged to appear, or to produce any document or information, and contravenes that obligation without sufficient cause shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.[3] Further, any person who hinders or obstructs the Commission in the performance of its functions under the Final Constitution or the Public Service Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.[4]

The PSC may make rules which are not inconsistent with the Act or the Final Constitution regarding:

(a) the investigation, monitoring and evaluation of those matters to which section 196 (4) of the Constitution relates, the procedure to be followed at any such investigation, the documents to be submitted to the Commission in connection with any such investigation, and the manner in which and the time within which the documents shall be submitted;

(b) the powers and duties of the chairperson, the deputy chairperson or any other commissioner, and the delegation or assignment of any power and duty entrusted to the Commission by or under the Act, the Constitution or the Public Service Act to a commissioner referred to in section 196 (7) *(b)* of the Constitution;

(c) the manner in which meetings of the Commission shall be convened, the procedure to be followed at those meetings and the conduct of its business, the quorum at those meetings, and the manner in which minutes of those meetings shall be kept; and

(d) any matter required or permitted to be prescribed by rule under the Act.[5]

The PSC may delegate to one or more commissioners, or to an officer or officers, any power conferred upon the Commission by or under the Act, the Final Constitution or the Public Service Act, excluding the power to delegate or the power to make rules.[6] The PSC may also authorise one or more commissioners, or an officer or officers, to perform any duty assigned to the Commission by or under the Act, the Constitution or the Public Service Act, excluding the duty to report to the National Assembly and provincial legislatures in terms of section FC s 196 (6).[7]

[1] PSC Act s 10(2)*(b)*.
[2] PSC Act s 10(2)*(c)*.
[3] PSC Act s 10(4).
[4] PSC Act s 12.
[5] PSC Act s 11.
[6] PSC Act s 13(1)*(a)*.
[7] PSC Act s 13(1)*(b)*.

The PSC may revoke or amend any delegation or authorisation at any time.[1]

The PSC, although not a Chapter 9 Institution, certainly functions like one.[2] The PSC is also accountable to the National Assembly, to which it must submit a report annually. The PSC must also report to a provincial legislature when it has undertaken activities in that province.

As far as the staffing of the PSC goes, the Final Constitution provides that fourteen commissioners will make up the Commission. All the Commissioners are appointed by the President. Five of the Commissioners are approved by the National Assembly. These five persons are recommended by a committee of the National Assembly, and must be representatives from all parties represented in the National Assembly. The Assembly will then adopt a resolution which must be supported by a vote by a majority of the members for appointment of those persons by the President.

The Premier of each of the nine provinces chooses one Commissioner. These nine Commissioners are chosen through the same process as in the National Assembly.

Commissioners are appointed for a five-year term, renewable only once. They may be removed from office due to misconduct, incapacity or incompetence. They may only be removed by the President after the National Assembly has adopted a resolution supported by a majority vote of the Assembly.[3]

23A.7 The Public Service Commisson Report

In its 2006 State of the Public Service Report, the PSC notes that:

> The four State of the Public Service Reports preceding this one, although focusing on broader issues, consistently raise the critical issue of the capacity of the Public Service. To ensure that the issue receives urgent and dedicated attention this edition of the State of the Public Service Report focuses singularly on the assessment of its strengths and weakness, and recommends ways in which it can be enhanced. The analytical approach of the report is

[1] PSC Act s 13(2).

[2] For a detailed discussion of Chapter Nine Institutions, see M Bishop & S Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24A; S Woolman & Y Schutte 'Auditor General' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B; J Klaaren 'South African Human Rights Commission' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24C; C Albertyn 'Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D; J White 'Independent Communications Authority of South Africa (ICASA)' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24E, S Woolman & J Soweto-Aullo 'Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24F.

[3] See PSC Act ss 3-7 for more detail on the appointment of Commissioners.

> predicated on the nine Constitutional values and principles for public administration that are enshrined in Chapter 10 of the Constitution as fundamental imperatives for our Public Service.[1]

As part of its constitutional mandate, the PSC produces and publicises an annual report that casts a critical eye on public administration and the public service. It does so by measuring the public service's conduct and performance against each of the nine principles and values of FC s 195(1). In doing so, the PSC gives meaning to each of the enumerated principles. The 2006 State of the Public Service Report briefly explains how the Commission evaluates the Public Service in terms of FC s 195(1)'s utilising the nine constitutional principles and values of public administration in order to determine how each of the 'nine principles and values can reinforce a systematic and holistic approach to strategies to gird the capacity of the Public Service.'[2]

As mentioned above, the Commission bases its evaluation of the public service on the 'fundamental imperatives' contained in FC s 195(1). The first principle, which imposes a duty to promote a high standard of ethics, is important for maintaining a reliable public service. The Commission notes that this duty is particularly crucial for ensuring that economic growth and service delivery are not jeopardised by tardy or dishonest officials. With regard to the requirement for efficiency, economy and effectiveness in the use of resources, it is the Commission's view that the public service should have the capacity for sound financial management and that the respective departments and agencies should have the ability to understand government's plans about service delivery. Departments should also have the capacity to determine success and failure in the course of implementing those plans. The principle of development orientation requires government departments to have the ability to design and to implement effective socio-economic interventions aimed at poverty reduction. The fourth principle, which deals with impartiality, fairness and equity in service delivery, requires the public service to have the ability to show an understanding of what kinds of actions and conduct would constitute bias, how bias should be prevented, and how to interface with the public on an equitable basis. Participatory responsiveness of the public service, which is the fifth of the nine principles, requires the public service to show that, in meeting the needs of the public, it has the capacity to promote and to sustain public participation in its activities.

The next principle has been the subject of a fair amount of litigation against the public service and other organs of state. This is the principle of accountability. From the Commission's perspective, this principle 'requires the public service to have the capacity to hold itself up to scrutiny and be answerable for its conduct and activities.' The PSC expects there to be credible mechanisms in place in order to assess a specific department's accountability. Good management and the ability

[1] 'Executive Summary' *2006 State of the Public Service Report* (2006).
[2] Ibid at 12.

to provide comprehensive reports are deemed to foster accountability. On fostering transparency, the PSC has stated that the activities of the public service must *empower the public to exercise its rights fully*.[1]

The last two principles are those of good human resource management and representivity. These principles speak to both the capacity of and the management of the public service and its ability to implement government policies and become a legitimate service provider.

From a practical and statistical point of view, the PSC report purports to be a crucial gauge for use by both government and the public as to whether and to what extent the public service is complying with its constitutional mandate. It is, in fact, the sole gauge in respect of the performance of the public service. Unfortunately, the PSC lacks the resources to carry out its immense oversight responsibilities. As far as watchdogs go, its bark is worse than its bite. That said, it is alive and barking loudly.

23A.8 FC 197: The Public Service

FC s 197 establishes a Public Service for the Republic. The Public Service operates within the Public Administration. The content of FC s 197 is therefore closely linked to the content of FC s 195. Indeed, the provisions of FC s 195(4)-(6) overlap with the provisions of FC s 197.

The Public Service, once established according to FC s 197(1), is to 'lawfully execute the policies of the government of the day.' FC s 197 requires national legislation to cater for the structure and functioning of the public service. FC s 197 also requires that those who make up the public service execute their duties loyally, regardless of their political affiliation, and should, in turn, not be favoured or prejudiced by such affiliation.

The long title of the Public Service Act states that it was enacted to 'provide for the organisation and administration of the public service of the Republic, the regulation of the conditions of employment, terms of office, discipline, retirement and discharge of members of the Public Service, and matters connected therewith.' FC s 195(4)-(6) also speaks to the 'organisation and administration' of the Public Service. Thus, it would seem that at least part of the FC s 195's 'enabling legislation' requirements have been satisfied by the Public Service Act.

The Public Service Act should be viewed as the organisational backbone of Chapter 10. It creates, as per FC s 197's instructions, a *single* public service that

[1] The report goes on to note that the absence of timely and accurate information can severely handicap the ability of the public to benefit from the services provided by the Public Service.

functions as part of the public administration of the national, provincial and local governments. In *Premier, Western Cape*, the Court explained the rationale for this requirement:

> The Constitution requires that one public service be established to implement national and provincial laws. It is presumably for this reason and in order to avoid any dispute thereon that the competence concerning the structure and functioning of the public service is dealt with specifically in the Constitution, and was not left to be dealt with under the general legislative power conferred on parliament by section 44(1)*(a)*. If the Constitution had provided that the structure and control of all aspects of the public service would reside solely at national sphere, personnel would be employed by and answerable to national functionaries, and as was pointed out in the First Certification Judgment, that would have detracted materially from the legitimate autonomy of the provinces. On the other hand, if each province and the national government had the power to structure and control their respective segments of the public service, there would in substance be several public services and the concept of one public service would be a fiction. The compromise struck by the Constitution is that the framework for the public service must be set by national legislation, but employment, transfers etc. are the responsibility of the various administrations of which the public service is composed. That compromise was certified by this Court as being consistent with the [Constitutional Principles].[1]

A single public service is consistent with the constitutional principles envisaged by the framers. Given the economic and social disparities which exist amongst the nine provinces, a uniform framework that serves the Republic is preferable to disparate services that offer uneven and unequal service delivery.[2] From a practical point of view, the same conditions of service should apply to all public servants. In addition, monitoring compliance with the requirements of the Act is made substantially easier if one is asked to engage a single entity. That said, each province manages its own employment and dismissals — and thus, the provinces create, to some degree, nine different systems of public service.

The PSA applies to persons within the public service and to persons who were previously employed in the public service. The PSA does not apply to certain persons in the employ of 'state educational institutions',[3] 'the services',[4] the 'Academy',[5] the 'Service'[6] or the 'Agency'.[7] The public service is described in

[1] *Premier, Western Cape* (supra) at para 46. This judgment dealt with FC ss 196 and 197 in some detail because the Western Cape challenged the 1998 amendments to the Public Service Act.

[2] *Mashavha v President of the RSA & Others* 2005 (2) SA 476, (CC), 2004 (12) BCLR 1243 (CC) at paras 20 and 59.

[3] The PSA defines 'state educational institution' in section 1 as 'an institution (including an office controlling such an institution), other than a university or technikon, which is wholly or partially funded by the State and in regard to which the remuneration and service conditions of educators are determined by law'.

[4] The PSA defines 'the services' as 'the Permanent Force of the National Defence Force', 'the South African Police Service' and 'the Department of Correctional Services'.

[5] The PSA defines 'the academy' as 'the South African National Academy of Intelligence as defined in section 1 of the Intelligence Services Act, 2002'.

[6] The PSA defines 'service' as 'the Service as defined in section 1 of the Intelligence Services Act, 2002'.

[7] The PSA defines 'Agency' as 'Agency defined in section 1 of the Intelligence Services Act, 2002'.

section 8 of the PSA as consisting of persons who hold posts in the fixed establishment[1] and those persons in state educational institutions, the services, the Agency, the Service or the Academy to whom the Act does apply. Public officials for the purposes of public administration constitute both a broader and a distinct category of employee.

The PSA also provides for the creation and the abolition of departments within the national and provincial spheres. The different departments are identified in column 1 of the two schedules to the PSA and the heads of each department are identified by their designation in column 2 of the two schedules.[2] The creation or the abolition of a national department is a power granted to the Minister of Public Service and Administration. The Minister may advise the President on whether a department should be created or abolished. The President may then amend the relevant schedule accordingly.[3] The Premier of a province also has powers to create or to abolish provincial departments in terms of the PSA.[4]

[1] The PSA defines 'the public service' as 'the posts which have been created for the normal and regular requirements of a department'.

[2] Schedule 1 is a list of the national departments and their respective heads while Schedule 2 is a list of the Provincial departments of all nine provinces and their respective heads. Schedule 3 refers to the Organisational Components and Heads thereof.

[3] PSA s 3(3)*(a)*. The Minister may also transfer and allocate of functions of the different departments in consultation with the executing authorities concerned.

[4] PSA s 3A*(a)* read in conjunction with s 7(5). The Premier also has the power to transfer and allocate functions of the different departments.

23B Security Services

*Stu Woolman**

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23B.1 INTRODUCTION

South Africa has, over the past seventeen years, transformed itself from a rascist, fascist state ruled by a white minority into a non-racial constitutional democracy whose twin grundnorms are respect for human dignity and for the rule of law. Nowhere have these changes had a more profound effect in South African society than on our security services: the police, the military and the intelligence agencies.[1]

From Hobbes onward, the western philosophical tradition has engaged in an ongoing conversation regarding the need to trade off liberty against security, and security against liberty. However, as Jeremy Waldron has noted:

> Trading off liberty against security has a treacherous logic. It beckons us in with easy cases — the trivial amount of freedom restricted when we are made to take our shoes off at the security checkpoint when we board an airplane is the price of an assurance that we will not be blown up by any imitators of Richard Reid. But it is also a logic that has been used to justify spying without a warrant, mass detentions, incarceration without trial, and abusive interrogation. In each case, we are told, some safeguards must be given up in the interests of security.[2]

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* I would like to express my gratitude to Kim Robinson and Okyerebea Ampofo-Anti for their significant contributions to the first iteration of this chapter. Juha Tuovinen's research assistance proved invaluable for this second iteration of the chapter. I save my profoundest thanks for Michael Bishop and Jason Brickhill. Both understand that the vocation of editing requires time-consuming, substantive engagement with a text, that the true calling of editing demands that they ensure that every line scans, that their efforts may cause their authors some consternation and that their hard work will ultimately disappear into the author's final text. The quality of their work is on display throughout this chapter. All errors, however, remain my responsibility alone.

[1] Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC') s 1 provides: '[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values: *(a)* Human dignity, the achievement of equality and the advancement of human rights and freedoms. *(b)* Non-racialism and non-sexism. *(c)* Supremacy of the constitution and the rule of law. *(d)* Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.' The composition of the security services is dealt with in FC s 199(1). Whether South Africa is best described as a multi-party democracy or a one-party dominant democracy is a question taken up by Sujit Choudhry in '"He had a mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1.

Choudhry's views shape, in part, this chapter's analysis of the relationship between the political branches of our constitutional democracy, the judiciary and our security services. See also H Klug 'Finding the Constitutional Court's Place in South Africa's Democracy: The Interaction of Principle and Institutional Pragmatism in the Court's Decision-making' (2010) 3 *Constitutional Court Review* 1. For the ur-text with respect to institutional analysis of the Constitutional Court, see T Roux 'Principle and Pragmatism on the Constitutional Court of South Africa (2008) 7 *I-CON* 106. See also See T Roux *The Politics of Principle: The First South African Constitutional Court 1995-2005* (forthcoming 2012).

[2] J Waldron 'Is this Torture Necessary?' (2007) 54(16) *The New York Review of Books* 40. See also D Cole & J Lobel *Less Free, Less Safe: Why America is Losing the War on Terror* (2007); I Loader & N Walker *Civilizing Security* (2007); L Lazarus *Security and Human Rights* (2007); R Posner *Not a Suicide Pact: The Constitution in a Time of National Emergency (Inalienable Rights)* (2006); C Sunstein *The Laws of Fear: Beyond the Precautionary Principle* (2005); R Posner *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11*(2005); J Waldron 'Safety and Security' (2006) 85 *Nebraska Law Review* 454; N Fritz 'States of Emergency' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 61. If our Constitutional Court's vaunted jurisprudence on the right and the value of human dignity is to retain its currency, it must be able provide a bulwark against the dehumanisation associated with the security state. See S Woolman 'Dignity' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

And yet, physical security, is undoubtedly a prerequisite for the meaningful exercise of democracy and human rights in today's South Africa. In speaking both to the ugliness of our past, and the present's current dangers, former President Mbeki stated that:

> We cannot erase that which is ugly and repulsive and claim the happiness that comes with freedom if communities live in fear; closeted behind walls and barbed wire, ever anxious in their houses, on the streets and on our roads, unable freely to enjoy our public spaces.[1]

The Final Constitution gives additional voice, in manifold ways, to this most basic desire to live in a secure, yet free, environment. FC s 198*(a)* provides: 'National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.' FC s 12(1) reads, in relevant part: 'Everyone has the right to freedom and security of the person, which includes the right … to be free from all forms of violence from either public or private sources.' FC s 200(2) states: 'The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people.' FC s 205(3) declares: 'The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.' Finally, the same agencies that denied us our fundamental rights under apartheid are under a general obligation — found in FC s 7 — to respect, protect, promote and fulfil our fundamental rights.[2]

With respect to the security services, the drafters of the Final Constitution were actually more ambitious than even FC s 7 suggests. The Final Constitution imposes positive obligations on members of the security services to entrench the normative underpinnings of our basic law. Under FC s 199(5), '[t]he security services must act, and must teach and require their members to act in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.'[3]

An exemplary Constitution, a robust Bill of Rights, model pieces of legislation, and oversight mechanisms constitute only the beginning of South Africa's formal efforts to strike the right balance between liberty and security. The proof is, however, in the pudding. Have the policies and the practices of our security services met the demands of the Final Constitution[4] and the statutes that govern their daily operations?[5] According to the first iteration of this chapter, penned in 2007, the interim reviews were 'decidely mixed'. Four years on, and new reviews are in. They are largely negative.

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[1] T Mbeki 'State of the Nation Address' (9 February 2007) available at http://www.polity.org.za (accessed on 5 November 2007).

[2] FC s 7(2) states: 'The State must respect, protect, promote and fulfil the rights in the Bill of Rights.'

[3] FC s 199(5).

[4] FC ss 198–210.

[5] See, eg, J Rauch 'The South African Police and the Truth Commission' (2005) 36(2) *South African Review of Sociology* 224, available at http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_4865_2.pdf (accessed 28 October 2007)(Suggests that, despite substantial efforts to effect the transformation and the reformation of a brutal culture, the SAPS has some distance to go.)

In 2007, I suspected that the Directorate for Special Operations, 'the Scorpions', might well be 'victims of their own success.' And indeed, this highly successful police unit, embedded in the National Prosecuting Authority, was disbanded in 2009. Both its independence and it achievements in rooting out corruption in our one party dominant state made its continued existence politically undesirable. A pale facsimile, the Directorate of Priority Crimes Investigations, or 'the Hawks', supplanted the Scorpions. In observing the Machiavellian maxim, 'keep your friends close and your enemies closer,' the government -– fearful of further revelations — placed the Hawks under the watchful eye of one our most corrupt and inept government agencies: the police.

If virtue and justice have a place in our government today, then recent reports by the Public Protector, the Auditor-General and the Special Investigating Unit ('SIU') on rampant police corruption demonstrate that some members of government are watching the watchers. Indeed, the corruption is so deep and so widespread that the SIU initially stated that it only had the capacity to investigate the top 20 worst cases.

The Constitutional Court has also been quite alive to the damage that a non-independent (and palpably corrupt) police force can inflict on a constitutional democracy committed to the rule of law. In *Glenister II*, the Constitutional Court found the disbandment of the Scorpions unconstitutional.[1] In a somewhat convoluted judgment, the Court held that FC s 7(2), when read with various substantive provisions in the Bill of Rights, South Africa's obligations under international law, and the constitutional obligation of the police, required the creation and the maintenance of an independent investigatory unit that operates free of fear, favour or prejudice.[2] While the government has agreed to abide by the order, precisely how it will do so over the next eighteen months is a matter of conjecture. One can be forgiven for forecasting the inevitable arrival of a *Glenister III* on the Constitutional Court's docket in two year's time.

A final area about which this chapter expressed some concern turns on the Executive's involvement in and control over the Intelligence Services. In a well-functioning constitutional democracy, intelligence services provide relatively unbiased information about potential threats to the commonweal. The danger, of course, exists that the government of the day will manipulate and coerce intelligence into the service of political ends both domestic and foreign. (In this regard, South Africa's intelligence services have suffered no worse a fate than the intelligence services of the United States or the United Kingdom in having their offices and the proper scope of their activities subverted by the office of the President or Prime Minister.) The Constitutional Court's response has been rather muted, given the complexity of the cases

[1] *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC), [2011] ZACC 6.

[2] As I discuss later, *Glenister II* tracks my (pre-*Glenister I* and *II*) circa 2007 claim that the police, and the security forces generally, are subject to FC s 7(2)'s obligation to respect, protect, promote, and fulfil our fundamental rights and FC s 199(5)'s duty to 'teach and require their members to act in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.'

that have come before it. However, in *Independent Newspapers*,[1] the Court extended the principle of open justice first articulated in *Shinga* and *SABC*. This principle should allow citizens greater access to the information used (and sometimes abused) by our intelligence services and the Executive in the context of judicial proceedings. In developing this principle of open justice, the Court has revealed a willingness to subject the national security claims of, and the classification of documents by, the Executive to judicial scrutiny. What remains to be seen is whether this principle of open justice will be robust enough to counter the deleterious conduct of a government whose actions occasionally leave the impression that it believes itself to be above the law and unaccountable to the people of South Africa. What the courts are certain to entertain in this domain in the not too distant future are challenges based upon provisions similar to those that underpin the principle of open justice principle when the controversial Protection of Information Bill[2] currently tabled in Parliament finally becomes law.[3]

The remainder of this chapter provides a brief history of South Africa's post-apartheid security services. It then sets out the powers and the functions of the security services as adumbrated in the Final Constitution and more fully elaborated in enabling legislation. In each functional area, the courts have been deeply engaged with both the constitutional and the statutory constraints placed upon our security forces. They have, in addition to what I have sketched out above, generated a substantial body of jurisprudence about how we should watch the watchers.

23B.2 Historical Background: Transformation and the Development of the Post-Apartheid Security Services

Prior to 1994, the South African security state suppressed political protest and denied basic liberties to the majority of its citizens through a network of highly repressive security legislation and a security service committed to legal forms of law enforcement and extra-legal forms of oppression, abuse and humiliation. The enforcement of apartheid's grossly inhumane system of pass laws, separate amenities arrangements and separate development programmes demanded close co-operation — and constant vigilance — by the armed forces, the police, and the intelligence agencies. Prior to the transition to a democratic South Africa, the security services were 'the face of apartheid': they were brutal, sadistic, corrupt and merciless.

[1] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa & Another* 2008 (5) SA 31 (CC), 2008 (8) BCLR 771 (CC), [2008] ZACC 6.

[2] B 6-2010.

[3] As Jason Brickhill notes, much of the public criticism of the POI Bill is overwrought and levelled by persons and organizations unfamiliar with the text of the Bill. South Africa needs new legislation. As matters stand, the antiquated, apartheid-era 1984 POI Act applies. The irony of the criticism levelled against the current POI Bill is that its delay has already led to the replacement of a functional initial draft (prepared during Ronnie Kasrils' tenure) by a somewhat problematic piece of proposed legislation. So while provisions that create criminal offences for the possession of classified information need to be eliminated and loose definitions need to be tightened, the Bill needs to be passed. (E-mail Correspondence with Jason Brickhill, 5-6 May 2011.) The promulgated Act's constitutional infirmities, if any are left, can then be properly assessed in a court of law.

After 1978, upon PW Botha's assumption of the Presidency, the National Party employed all the means at its disposal to destroy the liberation movements and the putative 'total onslaught' of foreign and domestic communists. The 'total strategy' deployed to contain this Orwellian threat was a co-ordinated approach that drew upon the collective expertise of the entire security establishment. A complex network of security committees known as the National Security Management System ('NSMS'), with about 500 regional, district and local branches, was established to complement the already existing State Security Council ('SSC'). The SSC consisted of the heads of the military, police, intelligence agencies, certain cabinet ministers and the President. The SSC, guided by the NSMS, was responsible for all security related policy and strategic decisions. In this virtually totalitarian security climate, all government policies were seen as potential security issues and could be subjected to scrutiny and to control by the SSC. The various components of the security establishment, namely the police, security agencies and the military, played an increasingly pivotal and pernicious role in policy formulation.[1] And when the security establishment was not meddling in the law-making functions of the state, it busied itself with operations carried out beyond the reach of the law.

The South African Police ('SAP') as they were then known, were trained and equipped for confrontational and militaristic policing. The emphasis of policing, particularly in 'non-white' residential areas, was not crime prevention, but rather the enforcement of the plethora of discriminatory legislation that underpinned the apartheid state.[2] They turned arbitrary detention, torture and the excessive use of force in effecting arrests and quelling demonstrations into the norm for 'law enforcement'.[3] Three quarters of police stations in the country were located in 'white' areas. Townships and other 'non-white' residential areas possessed little or no community orientated police presence.[4] The role of the police in 'non-white' residential areas was to conduct raids and to control political unrest.

Racial discrimination was perpetuated within the ranks of the police force. Although, by the early 1990s, sixty per cent of policemen were black, the officer corps remained ninety per cent white. Women of all races were also heavily underrepresented: and those women who were recruited were consigned to administrative positions or relegated to handling female accused and witnesses.[5]

Police accountability to the general public, particularly the black majority, was virtually non-existent. The generally accepted culture of bigotry and brutality, together with the absence of an independent body for oversight of police activities, cultivated an environment where police officers abused the rights of citizens with impunity. In the limited instances where allegations of violations were investigated, the investigation occurred through commissions of enquiry. These commissions, staffed primarily by the police, seldom handed down findings that resulted in dis-

[1] J Kuzwayo 'Developing Mechanisms for Civilian Oversight over the Armed Forces' (1998) 7 *African Security Review* 55–56.

[2] M Shaw *Crime and Policing in Post-Apartheid South Africa: Transforming Under Fire* (2002) 10–13.

[3] G Cawthra *Policing South Africa: The South African Police and the Transition from Apartheid* (1993) 113–117.

[4] Shaw (supra) at 11–12.

[5] Cawthra (supra) at 78–81.

ciplinary action against the accused.[1] Inquests into the deaths of political activists in custody, presided over by Magistrates, invariably led to the exculpation of police and other members of the security services — even in the face of overwhelming evidence of torture, assault and murder.[2]

The South African Defence Force ('SADF') had a similar image to that of the police. It worked closely with the SAP and was deployed extensively to control unrest in the townships. It was also involved in warfare in other southern African nations: the so-called 'front line states' that provided military bases for the training of the armies of the liberation movements. Elements within the SADF such as the Civil Co-operation Bureau and the notorious 32 Battalion engaged in illegal activities such as assassinations and chemical and biological warfare.[3] The SADF did not have many black members and was composed primarily of white male conscripts.[4]

The intelligence agencies consisted of the SAP Security Branch, the Directorate of Military Intelligence and the Bureau of State Security (later the National Intelligence Service).[5] Like the SADF, the intelligence community worked closely with the SAP. Indeed, most National Police Commissioners were appointed from the SAP Security Branch.[6] As with the SADF and the SAP, the intelligence agencies were virtually unaccountable — to anyone.[7] The covert activities of the intelligence agencies — and the desire of politicians to be able to deny culpability for untoward actions — actually served as justification for this absence of accountability.

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[1] Cawthra (supra) at 174–175. See also N Haysom 'Policing the Police: A Comparative Survey of Police Control Mechanisms in the United States, South Africa and the United Kingdom' (1989) *Acta Juridica* 144–151.

[2] G Bizos *No One to Blame*: *In Pursuit of Justice in South Africa* (1998).

[3] Cawthra (supra) at 173. See also G Cawthra & R Luckham *Governing Insecurity: Democratic Control of Military and Security Establishments in Transitional Democracies* (2003) 34.

[4] Transformation has to be understood in terms of the transition from, and the change of priorities of, the apartheid state to the democratic state. See L Heinecken 'South Africa's Armed Forces in Transition: Adapting to the New Strategic and Political Environment' (2005) 36(1) *Society in Transition* 74 ('The defence budget, which in 1989 increased to 4,3 % of the Gross Domestic Product (GDP) of which most went on internal deployment alongside the police, plummeted to a mere 1,6 % of the GDP in years to come.') See J Cilliers 'From a "Siege Mindset" to a Popular Force: The Evolution of the South African National Defence Force' (1998) 38(3) *Africa Quarterly* 27, 35–36. Heinecken further writes:

> [The transition] meant not only realigning its forces to the new security environment, but reintegration into the political world and in particular African society, as well as a new political dispensation. This affected virtually every facet of the SANDF's being and sparked a process of radical transformation unsurpassed in the history of South Africa. The transformation process covered four main areas: transformation of civil-military relations; organisational restructuring; normative and cultural transformation; and constitutional and legal transformation. Clearly these issues are not mutually exclusive, as the entire process of transformation hinges on the imperatives spelt out in the Constitution of the Republic of South Africa, 1996.

Heinecken (supra) at 79 citing Department of Defence *White Paper on Defence and Defence Review* (1998) 74–76. Despite these pressures, the soldiers who make up the SANDF were (as of 2005) 64 per cent black and 29 per cent white. Department of Defence *Personnel Statistics* (15 February 2005). The critical structural problem remains in the middle ranks – major to colonel: whites still occupy more than half of those positions. Heinecken (supra) at 79.

[5] K O'Brien 'Controlling the Hydra: A Historical Analysis of South African Intelligence Accountability' in H Born, L Johnson & I Leigh (eds) *Who's Watching the Spies? Establishing Intelligence Service Accountability* (2005) 200.

[6] Shaw (supra) at 11–12.

[7] O'Brien (supra) at 200.

The future of the security services under the new democratic order featured prominently in the various talks that led to South Africa's democratic transition.[1] In 1991, a National Peace Accord was signed by the various parties involved in the negotiations to create a framework for greater police accountability. Although discussions between the military wings of the liberation movements and the SADF took place during this period, these talks were largely informal. In 1993, a Transitional Executive Council, established to govern the country in the period leading up to the 1994 elections, set up the Joint Military Co-ordinating Committee. This committee, which consisted of the heads of the military forces in the homelands, the SADF and the armies of the liberation movements, began the process of integrating and restructuring the SADF.[2]

The Multi-Party Negotiating Forum crafted an Interim Constitution[3] and 34 Constitutional Principles that would guide a representative Constitutional Assembly's drafting of the Final Constitution.[4] Constitutional Principle XXXI dealt directly with the security services and provided that 'every member of the security forces (police, military, and intelligence), and the security forces as a whole, shall be required to perform their functions and exercise their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest.'[5]

During the certification process for the Final Constitution, neither Constitutional Principle XXXI nor the security forces themselves occasioned much controversy. However, in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*,[6] the original draft of the Final Constitution was found not to comply with the Constitutional Principles because it conferred insufficient powers on the provinces with respect to, among other things, the police.[7] The Constitutional Assembly thereafter submitted an amended text that was certified by the Constitutional Court.[8]

The Final Constitution wrought a radical reformation of the security services. Under the Final Constitution, the security services are: subject to the rule of law,[9] accountable to Parliament and the national executive,[10] precluded from partisan

[1] Cawthra (supra) at 165–172.

[2] Cawthra & Luckham (supra) at 36–37.

[3] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

[4] See IC Schedule 4.

[5] See IC Schedule 4.

[6] 1996 (4) 744 (CC), 1996 (10) BCLR 1253 (CC), [1996] ZACC 26 ('*First Certification Judgment*').

[7] Ibid at paras 395–401. For a brief discussion on this particular ground for refusal to certify, see C Murray & O Ampofo-Anti 'Provincial Executive Authority' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) § 20.4.

[8] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC), [1996] ZACC 24.

[9] FC s 198*(c)* states: 'National security must be pursued in compliance with the law, including international law.'

[10] FC s 198*(d)* states: 'National security is subject to the authority of Parliament and the national executive.'

conduct in the performance of their duties,[1] subject to parliamentary oversight,[2] subject to civilian authority,[3] prohibited from carrying out illegal orders,[4] and enjoined to protect and to promote fundamental rights.[5]

The Final Constitution has brought about other significant changes in the structure of the security services. We now have a single defence force and a single police service.[6] Any intelligence service other than that of the police and the military must be established by the President under the terms of the Final Constitution.[7] Any military force in the country other than the South African National Defence Force ('SANDF') is unlawful.[8] Armed organisations or services other than the SAPS, the SANDF, and constitutionally authorised intelligence agencies must be created in a manner consistent with national legislation.[9]

In a clear departure from apartheid South Africa, the Final Constitution explicitly places political responsibility for the security services under civilian authority.[10] Likewise, the Final Constitution mandates civilian secretariats for both the military[11] and police.[12] Civilian monitoring of the intelligence agencies occurs through inspector generals appointed in terms of national legislation.[13] The operational command of the police and the military is no longer subject to political control.[14]

Perhaps the most significant paradigm shift with respect to South Africa's security forces is evinced in FC s 198*(a)*: 'National Security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.' This paradigm shift, to which the Final Constitution aspires, is further reflected in a series of

[1] FC s 199(7) states: 'Neither the security services, nor any of their members, may, in the performance of their functions *(a)* prejudice a political party interest that is legitimate in terms of the Constitution; or *(b)* further, in a partisan manner, any interest of a political party.'

[2] FC s 199(8) states: '[T]o give effect to the principles of transparency and accountability, multiparty parliamentary committees have oversight of all security services.'

[3] FC s 204 and FC s 205 require civilian secretariats for defence and police to be established pursuant to national legislation. However, no such constitutional requirement exists for the intelligence agencies. Rather, in terms of the Intelligence Services Control Act 40 of 1994, an Inspector-General must be appointed for each intelligence service. The absence of such a constitutional provision may reflect the desire of the drafters to make the activities of the intelligence services less likely to be subject to judicial oversight and constitutional review.

[4] See FC s 199(6).

[5] See FC s 7(2) and FC s 199(5).

[6] See FC s 199(1).

[7] See FC s 199(1).

[8] See FC s 199(2).

[9] See FC s 199(3).

[10] See FC ss 201, 206, and 209.

[11] See FC s 204; Defence Act 44 of 1957 s 7A.

[12] See FC s 208; South African Police Service Act 68 of 1995 ss 2–4

[13] See FC s 210.

[14] See FC s 202 and FC s 207.

white papers on safety and security, defence and intelligence.[1] The extent to which the aspirations of both the Final Constitution and the white papers have been met is another matter. The amalgamation of apartheid security services with the security and defence forces of the homelands and liberation movements, skills shortages, redistribution of resources, high crime levels and overcoming the culture of impunity entrenched under apartheid, have all proved to be significant barriers to the transformation of the security services.

23B.3 The South African Police Service

(a) Composition, structure and mandate

The SAPS emerged from the amalgamation of the 10 police agencies of the former 'independent homelands' of Transkei, Bophutatswana, Venda and Ciskei, the former 'self-governing homelands' of KwaZulu, Lebowa, QwaQwa, KwaNdebele, KaNgwane and Gazankulu and the South African Police. In 1990, South Africa had 140,000 police officers, of which 112,000 were members of the South African Police.[2] The new SAPS therefore consisted mainly of police officers who had operated under the apartheid regime. The functions, powers and training of these police officers prior to 1994, as discussed above, constituted a major hurdle to establishing a new police service that was suitable for the needs of the new democratic nation. In 2002, the SAPS launched a new recruitment drive that increased the numbers of police officers substantially, decreased the numbers of previous SAP and homeland police officers, and thereby substantially altered the composition of the service.[3]

As a result of its history, the primary challenge facing the newly created SAPS was securing its legitimacy. The SAPS initially met this challenge in three symbolic ways. First, the South African Police became the South African Police Service.

[1] Accordingly, the first White Paper considered the following objectives and the need for enabling legislation in order to realise their varied ends:

> The overarching challenge of transforming defence policy and the armed forces in the context of the Constitution, national security policy, the RDP, and international law on armed conflict. Civil-military relations, with reference to the constitutional provisions on defence; transparency and freedom of information; defence intelligence; the structure of the Department of Defence (DOD); military professionalism; civic education; the responsibilities of government towards the SANDF; and the rights and duties of military personnel. The external and internal strategic environment and the importance of promoting regional security. The primary and secondary functions of the SANDF. Human resource issues, including integration; the maintenance of an all-volunteer force; the Part-Time Force; rationalisation and demobilisation; equal opportunity, affirmative action, non-discrimination and gender relations; and defence labour relations. Budgetary considerations. Arms control and the defence industry. Land and environmental issues.

Department of Defence *Defence in a Democracy: White Paper on National Defence for the Republic of South Africa* (May 1996) 4–5.

[2] See J Rauch 'The South African Police and the Truth Commission' (2005) 36(2) *South African Review of Sociology* 224, available at http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_4865_2.pdf (accessed on 28 October 2007).

[3] See G Newham 'Strengthening Democratic Policing in South Africa through Internal Systems for Officer Control' (2005) 36(2) *South African Review of Sociology* 160, available at http://www.csvr.org.za/docs/policing/strengthening.pdf (accessed on 9 March 2009).

Second, military ranks were eliminated and replaced with new designations.[1] Finally, the menacing Ministry of Law and Order became the Ministry of Safety and Security. Recently, however, some of these symbolic reforms were reversed. The Ministry was renamed 'the Ministry of Police' and military ranks were reintroduced for the SAPS leadership — the National Commissioner now goes by the honorific 'General'.

The police are constitutionally mandated to prevent, to combat and to investigate crime, to maintain public order, to protect and to secure the inhabitants of South Africa and their property and to uphold and enforce the law.[2] The powers and the functions of the police are determined by constitutionally-mandated national legislation: the South African Police Service Act ('SAPS Act').[3]

In terms of FC s 205(1), the SAPS must be 'structured to function at national, provincial and, where appropriate, local spheres of government.' The SAPS does not have separate branches within each province. Provincial priorities are integrated into the SAPS through the control and the management of the SAPS at provincial level. Up until 2006, each province was also divided into 'areas'. Each area consisted of about 26 police stations. However, pursuant to a restructuring process undertaken in 2006, 'areas' have now been replaced with smaller units of approximately six police stations.[4]

FC s 206(7) provides for legislation to govern the establishment of municipal policing. Initially, the SAPS Act did not provide for the establishment of municipal police services ('MPS').[5] However, a 1998 amendment to the SAPS Act introduced this possibility.[6] In terms of s 64(1) of the SAPS Act, a municipality can now establish a municipal police service on application to the relevant MEC in the province concerned. Subsequent to the local government elections of 2000, most of the large municipal councils have created an MPS. An MPS must be funded by municipalities, must comply with national policing standards and may not derogate from the powers and duties of police officers conferred by national legislation.[7] Municipal councils are obliged by the Act to establish civilian oversight mechanisms.[8] MPS do not have the same range of powers as the SAPS

[1] Under the new democratic order, 'general' became 'commissioner'; 'brigadier' became 'director' and 'colonel' became 'senior superintendent.' See J Rauch 'Police Reform and South Africa's Transition' *Centre for the Study of Violence and Reconciliation Working Paper* 6, available at http://www.csvr.org.za/docs/policing/policebeformandsouth.pdf (accessed on 9 March 2009).

[2] See FC s 205(3).

[3] Act 68 of 1995. FC s 205(2).

[4] Rauch 'Police Reform and South Africa's Transition' (supra) at 1. The restructuring process was motivated by a need to increase efficiency within the SAPS by removing excessive layers of authority which served as an impediment to service delivery. Ibid.

[5] Shaw notes that the Final Constitution's provision with regard to municipal policing was inserted at the behest of the Democratic Party. He contends that the reason for the African National Congress ('ANC') government's initial reluctance to allow for the establishment of municipal policing was the fear that municipal police would be used by local government structures for political purposes. Shaw (supra) at 123.

[6] South African Police Service Amendment Act 83 of 1998.

[7] SAPS Act ss 64(2)*(b)* and 64(6).

[8] SAPS Act s 64(2)*(d)*. In terms of SAPS Act s 64J Municipal Councils are also required to appoint a special committee of the council to maintain oversight of the MPS.

and are limited to traffic policing, the enforcement of municipal by-laws and the prevention of crime.[1]

(b) Control and management

Political power over the police vests in the national Minister of Police. The Minister determines national policing policy subsequent to consultation with provincial governments.[2] At provincial level, a member of each provincial government, an MEC, has political responsibility for the police in that province.[3] Co-ordination of the police service and cooperation among the spheres of government is facilitated through a committee comprised of the Minister of Police and the provincial MEC for police.[4] Although FC Schedule 4 lists policing as a concurrent national and provincial competence, the actual concurrency of this authority is limited by the terms of FC Chapter 11. Under FC Chapter 11, the national government retains significant authority over the provinces. For the most part, provincial power has been limited to oversight functions. Beyond this role, the provinces exercise primarily those powers assigned to them in national legislation or by national policing policy.[5]

The National Commissioner, who is appointed by the President, exercises operational and managerial control over the police service at the national level.[6] This power must be exercised in a manner consistent with national policing policy and the directions of the Minister of Police.[7] The removal of a National Commissioner is not mentioned in the Final Constitution. However, in terms of s 8 of the SAPS Act, a National Commissioner can be removed if he has lost the confidence of Cabinet.

Provincial commissioners have operational and management control in their respective provinces, subject to the authority of the National Commissioner.[8] Provincial commissioners are required to report annually to the provincial legislature and to provide a report to the National Commissioner.[9] The provincial MEC responsible for policing has one power that the Minister of Police does not. Where the provincial MEC has lost confidence in the Provincial Commissioner, the MEC may initiate proceedings for the removal of, or disciplinary action against,

[1] SAPS Act 64E. MPS are not empowered to investigate crime, merely to prevent it. SAPS Act s 64H requires that suspects arrested by a municipal police officer must be handed over to the SAPS as soon as possible.

[2] See FC s 206(1).

[3] See FC s 206(4).

[4] See FC s 206(8).

[5] See FC s 206(3) and 206(4).

[6] See FC s 207(1). See also IC s 218. In terms of FC Schedule 6 item 24(1), certain provisions of the Interim Constitution remain in force: IC ss 218 and 219. These sections set out the responsibilities of the National Commissioner and Provincial Commissioners.

[7] See FC s 207(2).

[8] FC s 207(4). See also IC s 219.

[9] See FC s 207(5).

the Provincial Commissioner.[1] With respect to the National Commissioner, that power rests with Cabinet as a whole.

(c) The SAPS and fundamental rights

(i) *Use of force by the police*

Some theorists like to speak of the state retaining a monopoly over the use of force and violence in order to safeguard the physical wellbeing of its citizens. It follows, on this line of thinking, that in order to maintain 'control' and to minimize conflict, citizens may only legitimately use physical force in a limited number of circumstances. The police, on the other hand, are specifically empowered to use force, and even lethal force, where necessary, in order to protect the public.

This discretion to use lethal force creates the potential for abuse. The legislature and the courts face a difficult task in granting the appropriate degree of authority to, and imposing the requisite degree of constraint upon, the police when they use force in life-threatening or otherwise dangerous circumstances. Since 1977, the use of force by the police (or any other person authorised to make an arrest) in effecting arrests of suspected criminals has been governed by s 49 of the Criminal Procedure Act[2] ('CPA'). Prior to its amendment in 2003, CPA s 49 stated that:

> (1) If any person authorized under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person—
> *(a)* resists the attempt and cannot be arrested without the use of force; or
> *(b)* flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees, the person so authorized may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.
>
> (2) Where the person concerned is to be arrested for an offence referred to in Shedule 1 or is to be arrested on the ground that he is reasonably suspected of having committed such an offence, and the person authorized under this Act to arrest or to assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide.[3]

[1] See FC s 207(6) and SAPS Act s 8(2). Section 8(2) of the SAPS Act requires the Executive Council of a province that has lost confidence in a Provincial Commissioner to notify the Minister of Safety and Security who, if he deems it 'necessary and appropriate', will in turn notify the National Commissioner. A board of inquiry is then established by the National Commissioner to look into the matter. The procedure appears to conflict with FC s 207(6), which expressly confers the power to institute proceedings for the 'removal or transfer of, or disciplinary proceedings against' a Provincial Commissioner on the provincial executive. Although this power is required to be exercised 'in accordance with national legislation', the reference to national legislation should be interpreted as a reference to procedural rules to be established in national legislation. The procedure in s 8(2) of the SAPS Act goes even further and subordinates the decision of the provincial executive council to that of the Minister of Safety and Security. It confers on the Minister the discretion not to take further steps against the provincial commissioner concerned unless he deems it to be 'necessary and appropriate'.

[2] Act 51 of 1977.

[3] Schedule 1 includes serious offences such as murder and rape but also non-violent offences such as fraud, forgery, receiving stolen goods and theft.

CPA s 49 — as articulated above — confers a fairly broad degree of discretion on police officers to use force, and if necessary lethal force, as a means to effect an arrest. This degree of discretion has attracted judicial scrutiny for quite some time.

In *Matlou v Makhubedu,* decided some 30 years ago, the Appellate Division (now the Supreme Court of Appeal) held that CPA s 49 demanded that the force used be proportionate to the crime that the suspect had allegedly committed.[1] Despite this holding, the police could still justify the use of lethal force in circumstances where — though the crime was serious — the suspect did not pose a mortal danger to any person and was merely resisting arrest. Even after the advent of the Final Constitution, the statutory framework only changed after judicial intervention by the Supreme Court of Appeal and the Constitutional Court.[2]

(aa) Govender and *Walters*

CPA s 49 was first subject to constitutional challenge in *Govender v Minister of Safety and Security*.[3] The case turned on the shooting of an unarmed 17-year-old boy by the SAPS. The boy, who was involved in the theft of a motor vehicle, was shot by the police whilst trying to evade arrest. In an attempt to prevent his escape, the police officer pursuing the boy attempted to shoot him in the legs. Instead, the officer shot him in the back, rendering him permanently disabled. The initial delictual action for damages by the boy's father was dismissed in the Durban High Court on the basis that the action taken by the police officer was reasonably necessary to prevent the boy's escape and was therefore permitted under CPA s 49(1).[4]

The appellant did not directly challenge the constitutionality of CPA s 49(1). He argued instead that the statute needed to be interpreted in accordance with FC s 39(2) and the values that animated the rights to life, to dignity, to physical integrity, to the presumption of innocence and to equality before the law.[5] The Minister contended that CPA s 49(1) provided a legitimate justification for the

[1] 1978 (1) SA 946, 957 (A).

[2] In 1997 the SAPS issued a Special Service Order in terms of which police officers were instructed to limit their use of lethal force to a specific list of serious offences that were set out in the Order and that were more limited than those listed in Shedule 1 of the CPA. The Order was made in an attempt to bring s 49(2) in line with the provisions of the Final Constitution. Although it was a step in the right direction, the Order did not override s 49(2) and police officers could not be convicted of murder if they could show that they had acted within the bounds of s 49(2). In 1998 Parliament adopted a new constitutionally compliant version of s 49 through the Judicial Matters Second Amendment Act 122 of 1998. The Act provided that the President would fix the date on which the Act would enter into force. However, due to persistent objections from the Ministry of Safety and Security and the SAPS, who insisted that the new provisions were unworkable and impractical, the Act remained dormant until 2003. D Bruce 'Killing and the Constitution – Arrest and the Use of Lethal Force' (2003) 19 *SAJHR* 430.

[3] 2001 (4) 273 (SCA), 2001 (11) BCLR 1197 (SCA)('*Govender*').

[4] *Govender v Minister of Safety and Security* 2000 (1) SA 959 (D), 1999 (5) BCLR 580 (D).

[5] FC s 39(2) states that 'When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum, must promote the spirit purport and objects of the Bill of Rights.'

police officer's actions and that the officer's conduct, properly understood, had not been wrongful.

The Supreme Court of Appeal found for the appellant. The court correctly pointed out that the state possessed both a legitimate interest in apprehending criminals, and a duty to protect its citizens (even those citizens attempting to escape arrest.)[1] It held that the words 'reasonably necessary' in s 49(1) should be read to require proportionality both with respect to the offence and the force used, and with respect to the force used and the threat that the suspect posed to the police officer and to the general public.[2]

In *Ex parte Minister of Safety and Security: In re S v Walters*, the Constitutional Court considered the constitutionality of CPA s 49(1) and CPA s 49(2).[3] In the underlying matter, a father and a son had fatally shot a burglar who had broken into their bakery. It was argued, in their defence, that the homicide was justified by CPA s 49(2). The High Court had declared both CPA s 49(1) and CPA s 49(2) unconstitutional on the grounds that they were inconsistent with the rights to life (FC s 11) and to dignity (FC s 10). The High Court then referred the decision to the Constitutional Court for confirmation.[4]

The Constitutional Court identified the rights to life, dignity and bodily integrity (FC s 12) as the principal rights limited by the use of lethal force under CPA s 49(2).[5] The *Walters* Court wrote:

> [T]he right to life, to human dignity and to bodily integrity are individually essential and collectively foundational to the value system prescribed by the Constitution. Compromise them and the society to which we aspire becomes illusory. It therefore follows that any significant limitation of any of these rights would for its justification demand a very compelling public interest.[6]

As to whether the limitation of rights by CPA s 49 was constitutionally justifiable, the *Walters* Court first held that the Supreme Court of Appeal's reading down of CPA s 49(1) in *Govender* avoided the need for a finding of invalidity. It declined to confirm that part of the High Court's judgment.[7] With regard to CPA s 49(2), however, the *Walters* Court found that restricting the use of deadly force to Schedule 1 offences failed to introduce an appropriate test for proportionality. Schedule 1 offences ranged from violent crimes such as murder and robbery to non-violent crimes such as fraud and forgery.[8] The *Walters* Court also emphasised that the purpose of arrest is to bring a suspected criminal before a court: that purpose would be frustrated if the suspect were to be killed. While the *Walters* Court recognised the high levels of crime in our society, it found that this troublesome fact did not justify the use of lethal force in all the circumstances contemplated by

[1] *Govender* (supra) at paras 12–13.
[2] Ibid at para 21.
[3] 2002 (4) SA 613 (CC), 2002 (2) SACR 105 (CC), 2002 (7) BCLR 663 (CC), [2002] ZACC 6 ('*Walters*')
[4] *S v Walters & Another* 2001 (2) SACR 471 (Tk), 2001 (10) BCLR 1088 (Tk).
[5] *Walters* (supra) at paras 5–7 and 29–30.
[6] Ibid at para 25.
[7] Ibid at para 39.
[8] Ibid at para 41.

CPA s 49(2) and Schedule 1.[1] The Court stated that lethal force can only be used when the police officer has reasonable grounds to believe that the suspect poses an immediate threat of serious bodily harm to themselves or to another person, or that the person has committed a crime involving the infliction of serious bodily harm.[2] The *Walters* Court concluded that CPA s 49(2) was not a justifiable limitation of the rights to life, dignity and bodily integrity and confirmed that part of the High Court's order striking down the section.

(bb) Changes to CPA s 49 in light of *Walters*

According to the order, the state was obliged to pass an amendment to CPA s 49 in line with the holding in *Walters*. The new s 49, promulgated in 2003, states that:

> (2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds—
>
> *(a)* that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;
>
> *(b)* that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
>
> *(c)* that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.

Govender, Walters, and the new text of CPA s 49(2) generate the following principles with regard to the use of force by police officers when effecting an arrest:

(i) Police officers should avoid using force when arresting a suspect unless such force is necessary to overcome the suspect's resistance.

(ii) If force is necessary, then only the minimum force necessary to overcome the suspect's resistance should be used.

(iii) Lethal force may only be used if the suspect poses a danger to the police officer or to members of the public, or if the suspect is suspected of having committed a crime involving the infliction of serious bodily harm. The second justification for the use of lethal force turns on the assumption that if the suspect has (allegedly) committed a violent crime, he poses a danger to the public which justifies the use of force to prevent him or her from committing another violent crime.

[1] *Walters* (supra) at paras 43–50.
[2] Ibid at para 52.

(cc) Shoot to Kill? Proposed Amendments Designed to Undermine Constitutionally Mandated Changes to CPA s 49

At the time of writing, May 2011, the National Assembly has tabled a further amendment to CPA s 49.[1] The amendment was introduced to Parliament shortly after controversial statements made by National Commissioner Bheki Cele about the SAPS' new 'shoot to kill' policy for suspected criminals.[2] Such a policy would be manifestly unconstitutional. Members of the public have expressed concern that the amendments reflect the 'shoot to kill' policy by granting greater leeway for the state's use of lethal force.

A close examination of the text — not to mention statements of the National Commissioner and the Minister[3] — lends credence to these fears. While the preamble to the Bill claims that the amendments are designed to bring the law into line with *Walters* (a dubious proposition given that the 2003 amendments have already done so), the new wording of CPA s 49 certainly broadens the scope for lawfully injuring or killing a person in the course of arrest in a manner not contemplated by the *Walters* Court. The Bill's amended text reads as follows (the text to be removed is placed in square brackets):

> Use of force in effecting arrest
>
> 49. (1) For the purposes of this section
>
> *(a)* 'arrestor' means any person authorised under this Act to arrest or to assist in arresting a suspect; [and]
>
> *(b)* 'suspect' means any person in respect of whom an arrestor has [or had] a reasonable suspicion that such person is committing or has committed an offence; and
>
> *(c)* 'deadly force' means force that is intended or likely to cause death or serious bodily harm.
>
> (2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force [that is intended or is likely to cause death or grievous bodily harm to a suspect,] only if he or she believes on reasonable grounds—
>
> *(a)* that the force is [immediately] necessary for the purposes of protecting the arrestor [or any person lawfully assisting the arrestor] or any other person from imminent or future death or [grievous] serious bodily harm; or
>
> *(b)* [that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or] that the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened

[1] Criminal Procedure Amendment *GG* 33526 of 5 October 2010.

[2] See, eg, SAPA 'Cele Tells Police to Use Deadly Force' *Business Day* (7 December 2009), available at http://www.businessday.co.za/articles/Content.aspx?id=88947 (accessed on 5 May 2011).

[3] See, eg, W Hartley 'Give Police More Firepower, Cele Tells MPs' *Business Day* (6 August 2009), available at http://www.businessday.co.za/articles/Content.aspx?id=77850 (accessed on 5 May 2011); E Ferreira 'Cele Calls for Greater Power for Cops' *Mail & Guardian* (5 August 2009), available at http://mg.co.za/article/2009-08-05-cele-calls-for-greater-powers-cops (accessed on 5 May 2011).

infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.

[*(c)* that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.]

The amendments constitute a blatant roll-back of the 2003 amendments that gave effect to *Walters*. First, the force employed is no longer 'immediately' necessary. The new amendments would not limit deadly force to instances in which a serious crime has occurred and the police responded 'immediately' in an attempt to apprehend and to arrest the suspected criminal. Deadly force could be used — it would appear — during routine investigations or during attempts to arrest a person that are not subject to the same degree of uncertainty associated with the arrest of a person who has just committed a crime and apparently used deadly force. Second, the potential danger to the arrestor or to a third party need only be serious harm — not grievous bodily harm as currently contemplated. Again, this alteration suggests that the arrestor or a third party need not themselves be in mortal danger. Third, the proposed amendment no longer requires that 'substantial risk [exists] that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed.' The existing text contemplates an armed suspect who might turn on police and other standers-by shortly after commission of a crime or a person known to be so dangerous that no chances can be taken when attempting to effect his or her arrest. The current provision draws a clear nexus between the force employed and the circumstances of employment of that force and the immediate danger posed by the suspect. The proposed amendment eliminates the carefully considered justification for the use of deadly force: namely that, in the heat of the moment, a clearly dangerous person poses a genuine risk to the lives of law enforcement officials. The proposed amendment intimates that a mere physical tussle between law enforcement officials and a suspect that occurs long after the crime could justify the use of deadly force.

However, the most obvious departure from the views of the *Walters* Court and the existing provisions is reflected in the excision of the following words: 'that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.' Once again, the *Walters* Court's carefully calibrated balance between the use of deadly force by police and the use of deadly force by a suspect in flight is entirely ignored. Recall that in *Walters*,[1] Kriegler J reasoned that an arrest was never an end in itself, but merely one means of ensuring that a suspect appeared in court. As a result, force could only be justified when an arrest was necessary to achieve that goal. If an arrest is necessary,

[1] *Ex Parte Minister of Safety and Security & Others: In re Ex Parte Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC), [2002] ZACC 6. For a more detailed account of the constitutional dimensions of arrest, see F Snyckers & J le Roux 'Criminal Procedure' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 51. See also I Currie & J De Waal *The Bill of Rights Handbook* (5th Edition, 2005) 309; M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 40.

then the force employed must be the minimum necessary to effect the arrest,[1] and must be proportionate with respect to the offence committed or the continued threat of violence.[2] The proposed amendments appear to ignore the actual goal of arrest, the notion of minimum force necessary to secure arrest and the belief that the use of deadly force could only be justified when death or grievous harm to the police or the public was imminent.

(ii) *Human rights violations by the police*

Despite the tremendous strides made in reforming a police service modelled in many respects upon Nazi Germany's SS, problems inevitably remain in a police force still in transition. The police are faced with enormously high levels of crime, placed in regular mortal danger and are invariably tempted by the power of their position. They engage in rent-seeking behaviour, bribery and more damaging forms of corruption. In 1999, Hamber suggested that the culture and practices of policing in South Africa had changed little after 1994 and the revelations of the TRC:

> The TRC has been relatively successful at uncovering the truth about atrocities of the past through its trade of truth for justice. However the exact impact of amnesty … on ongoing

[1] *Walters* (supra) at para 54 ('Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.')

[2] Ibid ('In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrester or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances.') See also *Govender* (supra) at paras 19–20 (Court interprets statute to only allow use of force when there are reasonable grounds to believe that the suspected offence involved the infliction or threat of serious bodily harm or where the suspect poses an immediate threat of serious bodily harm to him or her, or a threat of harm to members of the public.)

The requirement of proportionality echoes the sentiments of Justice White in *Tennessee v Garner* 471 US 1 (1985) 11–12 ('It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorises the use of deadly force against such fleeing suspects. It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.')

The High Court has twice considered whether allowing the police to order the surgical removal of a bullet from a suspect's leg amounted to a violation of FC s 12(1)*(c)*. See *Minister of Safety and Security & Another v Xaba* 2003 (2) SA 703, 708H (N)(Finding a violation); *S v Gaqa* 2002 (1) SACR 654, 658H (C) (Finding no violation).

The dual duties of the police become particularly complicated when two opposing protesting groups resort to violence. The European Court of Human Rights held that the police have a duty to interfere, with force if necessary, to prevent the two private groups from causing further violence. See *Platform Ärtzte fur das Leben v Austria* (1991) 13 EHRR 204; S Woolman 'Freedom of Assembly' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 43.

> levels of impunity is not yet fully understood … perpetrators have not been punished for gross violations of human rights … As a result, a subtle, but stubbornly residual air of impunity still lingers in South African society and in its police service.[1]

A more sanguine view is offered by Bruce:

> [The] moral climate in South Africa [has changed] from one where police abuse went primarily unsanctioned to one where the potential for that sanction is far greater. The TRC existed at a particular watershed moment, a moment where it was important to demarcate what had happened in the past, from what was to come. Insofar as the new society is willing to, and has the means to, sanction police abuses, the TRC is an important part of what makes such sanction legitimate. The question now is whether South African society has the means and the will to impose such sanction for abuses by the police.[2]

As we shall see below, the South African courts have been quite aggressive in altering the landscape for liability for police brutality. Whether the revolution wrought by the Constitutional Court and the Supreme Court of Appeal translates into a more profound change in behaviour remains to be seen. As things stand, the police still fail to handle suspects properly;[3] they impair the ability of protestors to assemble peaceably;[4] they remain responsible for a large number of deaths in police custody;[5] and are viewed by the public as failing to combat crime effectively.[6] Of particular concern is the maltreatment of foreigners: little

[1] B Hamber 'The Past Imperfect: Exploring Northern Ireland, South Africa and Guatemala' in B Hamber (ed) *Past Imperfect: Dealing with the Past in Northern Ireland and Societies in Transition* (2002) 6.

[2] D Bruce 'Police Brutality in South Africa' in N Mwanajiti, P Mhlanga, M Sifuniso, Y Nachali-Kambikambi, M Muuba & M Mwananyanda (eds) *Police Brutality in Southern Africa: A Human Rights Perspective* (2002).

[3] See Human Rights Watch *Prohibited Persons: Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa* (1998).

[4] See M Memeza 'A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993: A Local Government & Civil Society Perspective' (July 2006); S Woolman 'Freedom of Assembly' in S Woolman M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 43; S Woolman 'My Tea Party, Your Mob, Our Social Contract: Freedom of Assembly and the Constitutional Right to Rebellion in *Garvis v SATAWU (Minister for Safety & Security, Third Party)* (2010) 6 SA 280 (WCC) (2011)' 27 *SAJHR* — (forthcoming)('My Tea Party').

[5] Amnesty International *Report 2007: South Africa* (2007) available at www.thereport.amnesty.org/eng/Regions/Africa/South-Africa (accessed on 9 November 2007).

[6] M Harris & S Radaelli 'Paralysed By Fear: Perceptions of Crime and Violence in South Africa' (2007) available at http://www.markinor.co.za (accessed on 6 November 2007)(Despite the fact that official crime statistics have fallen, '[c]urrently only one third of the adult South African population (33%) believes that government is handling the issue of fighting crime well. South Africans of all population groups view government's ability to fight crime considerably more negatively since the last poll in November last year. Only one in every 10 from minority groups (whites, coloureds and Indians) believes that government is doing very or fairly well in handling crime.')

exists by way of legal control for officers who engage foreigners, whether the foreigners are in South Africa legally or not.[1]

Over the last several years, 2007 through 2011, the police have either exacerbated township violence through their palpable absence during service delivery protests (qua xenophobia) or poured fire on the flames by firing live ammunition into angry crowds.[2] The deaths of hundreds, the rapes of innumerable women, and the displacement of well over a 100,000 denizens (both foreign and South African) during township unrest from 2007 through 2010 at the hands of other South Africans,[3] as well as the police slaying of Andries Tatane in 2011 during

[1] B Harris 'A Foreign Experience: Violence, Crime and Xenophobia during South Africa's Transition' (2001) 5 *Violence and Transition Series* 51, available at http://www.csvr.org.za/wits/papers/papvtp5.htm (accessed on 9 March 2009)('The law thus allows for the apprehension of suspected undocumented foreigners. If a foreigner cannot "satisfy" the officer of his/her legal status, then the officer may apprehend him/her. In this way, the law gives strong powers of apprehension to police officers. These powers rest on subjective terms such as "reasonable grounds" and "satisfy such officer". Consequently, there is scope for abuse within the law. For example, a personal vendetta or extortion-scheme may lie behind the "reasonable grounds" on which a person is apprehended. Alongside the legal potential for abuse, it seems that arresting officers do not always work within the confines of the law. The HRC found that "there was a substantial failure of enforcing officers to comply with even [the law's] minimal requirements". For example, it is not a legal condition that individuals carry proof of identification and the "official policy adopted by the SAPS is that individuals should be accompanied to retrieve their ID if an officer suspects that they are illegally in the country but they allege they do have valid documents". However, in practice, it appears that apprehending officers seldom do this. Suspects are rarely given the opportunity to collect any valid documents that they might have. Rather, they are apprehended immediately. This practice has been criticised as a new form of apartheid because it effectively forces foreigners to carry documented proof of their legal status, in much the same way as black South Africans were obliged to carry pass books to prove their status during the apartheid era. Even if suspects are able to identify themselves, this is no guarantee that they will not be arrested. HRW and HRC report that documents are regularly destroyed by enforcing officers.') See also Human Rights Commission *Report on the Arrest and Detention of Persons in terms of the Aliens Control Act* (1999).

[2] See L Landau 'Loving the Alien?: Citizenship, Law, and the Future in South Africa's Demonic Society' (2010) 109 *African Affairs* 213; JP Misago with L Landau & T Monson *Towards Tolerance, Law and Dignity: Addressing Violence against Foreign Nationals in South Africa* (2009) available at http://www.migration.org.za/sites/default/files/reports/2009/Addressing_Violence_against_Foreign_Nationals_IOM.pdf (accessed on 5 May 2011); S Woolman 'Is Xenophobia the Right Legal Term of Art? A Freudian and Kleinian Response to Loren Landau on Township Violence in South Africa' (2011) 23 *Stellenbosch Law Review* (forthcoming).

[3] See Landau 'Loving the Alien?' (supra) at 1-2 citing T Polzer & V Igglesdon 'Humanitarian Assistance to Internally Displaced Persons in South Africa: Lessons Learned following Attacks on Foreign Nationals in May 2008' *Forced Migration Studies Programme Report* (2009)('On 11 May 2008, residents of Alexandra township turned on their neighbours. The conflict soon spread across Gauteng Province to informal settlements and townships around the country. During two terrible weeks, citizens murdered more than 100 people, raped dozens, wounded close to 700, and displaced over a hundred thousand.')

a demonstration in Ficksburg, bespeak a culture of incompetence and impunity within the police force.[1]

(iii) *Duty to protect the public*

The duty of the police to ensure that members of society are able to fully enjoy their right to be free from violence goes beyond mere apprehension of suspects after crimes have been committed. In certain instances, it gives rise to positive obligations to take reasonable steps to secure the safety of the public. Furthermore, as guardians of the safety of the public, and in terms of the recently revised law of delict, police officers have a duty of care with respect to delicts committed by themselves whilst acting in their official capacity. When the police commit a delict under colour of law, members of the public are entitled to seek redress from their employer, the Minister of Police.

(aa) Carmichele and *K*

Carmichele v Minister of Safety and Security[2] and *K v Minister of Safety and Security*[3] illustrate the Constitutional Court's commitment to stamping out the culture of impunity that still exists within the police force. Both cases concerned brutal and violent attacks on women that turned on police negligence or complicity. A third case, *Minister of Safety v Luiters*, further clarified the extent to which the Minister of Police can be held vicariously liable for the delicts committed by police officers.[4]

In *Carmichele v Minister of Safety and Security*, the perpetrator had previously been convicted of house breaking and indecent assault. At the time of the attack, he was facing charges of rape and had been released on bail upon the recommendation of the investigating officer. Despite a number of requests that the perpetrator be kept in custody, subsequent complaints about his suspicious behaviour, as

[1] 'Andries Tatane Killed by South African Police: 13 April 2011' available at www.youtube.com (accessed on 5 May 2011)(Video leaves no doubt as to the circumstances of Tatane's murder by the police.) As to government complicity, violent service delivery protests have become a regular occurrence in South Africa since 2007. Under such circumstances, national government policy ought to be inclined towards the most limited use of force necessary to protect protestors, onlookers and public and private property. Tatane's death suggests that police General Cele's unofficial 'Shoot to Kill' policy has permeated normal police activities. The use of rubber bullets at a distance of roughly a metre constitutes the use of lethal force where lethal force is clearly neither required nor lawful. (Indeed, police policy proscribes the use of rubber bullets at distances of less than 20 metres.) As to the general, inappropriate response of the state (and the courts) to demonstrations, protests, assemblies and gatherings, see Woolman 'My Tea Party' (supra). That General Cele remained in office despite Tatane's death, the Public Protector's finding of an illegitimate R500 million building lease in Pretoria (with which General Cele 'appears' to have been involved) and the SIU's finding of rampant corruption in the tender for the construction of more than 30 police stations around the country supports charges of complicity in such behaviour by the national government. According to Transparency International, South Africa ranks 54th out of 178 nations on its corruption perception index. Transparency International *Corruption Perceptions Index 2010* (2011) available at www.transparency.org/policy_research/surveys_indices/cpi/2010/results (accessed on 5 May 2011).

[2] 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC), [2001] ZACC 22 ('*Carmichele*').

[3] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC), [2005] ZACC 8 ('*K*').

[4] 2007 (2) SA 106 (CC), 2007 (3) BCLR 287 (CC), [2006] ZACC 21 ('*Luiters*'). See also *Minister of Safety & Security v Luiters* 2006 (4) SA 160 (SCA).

well as evidence that he suffered from psychological problems, neither the police nor the prosecutor opposed his continued release on bail. The perpetrator then committed a brutal and life-threatening assault on Ms Carmichele. Ms Carmichele brought a delictual action against the Minister of Safety and Security based on the failure of the police and prosecutor to oppose bail. She argued that the police and the prosecuting authority had a duty to ensure that she enjoyed her constitutional rights to dignity, freedom and security of the person, privacy and freedom of movement.

Her action failed in both the High Court and the Supreme Court of Appeal. The Constitutional Court in *Carmichele* recognised Ms Carmichele's claim and effectively ordered the High Court to extend the existing duty of care owed by the police and the state prosecutor so that the duty would now, and in the future, cover the kinds of harms suffered by Ms Carmichele. In reaching its conclusions, the Constitutional Court quoted approvingly the following statement by the European Court of Human Rights in *Osman v United Kingdom*:

> It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that art 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.[1]

The Court was unequivocal in linking a woman's physical safety with a woman's rights to dignity and to freedom and security. It wrote:

> In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence… . Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women.[2]

The *Carmichele* Court held that the rights to dignity and to freedom and security of the person impose affirmative duties on the police to prevent violations of physical integrity. The prosecuting authorities also have an affirmative duty to disclose to the courts information pertinent to the decision of whether to grant bail. Further, these rights mandated that the duty of care imposed on the state in delictual actions be expanded to ensure that the state did not allow known violent offenders to jeopardise the rights of its citizens. The Court stated that the possible 'chilling effect' that the imposition of such liability might have on the ability of the police and the prosecutors to perform their functions is minimised by the requirements of proportionality, foreseeability and proximity.[3] One might ask, however, why the imposition of liability for omissions would have such an effect? If police officers and their superiors knew that they would be held liable

[1] *Carmichele* (supra) at para 45 quoting *Osman v United Kingdom* [1998] EHRR 101.
[2] Ibid at para 62.
[3] Ibid at para 49.

for omissions, then one would expect them to be more, not less, vigilant in the discharge of their duties and the protection of ordinary citizens.

In employing FC s 39(2), the Court stated that the common law in this matter had to be developed but declined to do so itself.[1] Instead, it referred the matter back to the High Court for final determination.

In *K*, three uniformed police officers raped the applicant in the back seat of a police vehicle after offering to provide her with a safe ride home. After the High Court and Supreme Court of Appeal rejected her suit, the Constitutional Court found the state vicariously liable under the common law of delict. The *K* Court provided three primary grounds for this conclusion. First, the Court held that the police have a duty under the Final Constitution to protect South Africans and to prevent crime.[2] Second, the rights to security of the person, dignity, privacy and substantive equality are 'of profound constitutional importance' and require that the ordinary common law or statutory law give them full force and effect.[3] To give the rights full force and effect, the Final Constitution required that the common law be developed in a manner consistent with Chapter 2's rights and freedoms and their underlying values.[4]

The *K* Court stated that the new test for vicarious liability has two stages. The first stage determines whether the employee was carrying out his duties or whether he was simply pursuing his own ends. This stage turns on a purely factual determination. The second stage is an enquiry into whether, notwithstanding that the employee may have been pursuing his own ends, the employer should still be held liable because there exists a sufficiently tight nexus between the business of the employer and the conduct of the employee. It is at this second stage that policy considerations play a role and constitutional values are taken into consideration.[5]

In order to determine whether the Minister was vicariously liable, the Court considered the fact that Ms K reasonably relied on an offer of assistance from the uniformed officers, assistance that they are under a duty to provide, and which Ms K would not have sought but for the trust that she placed in these police officers. The Court emphasised that such trust in the police is essential if the police are to fulfil their obligations to protect the public. The rape occurred in the context of the police acting under colour of law and was, in fact, facilitated by their position of authority. The *K* Court wrote:

> [T]he opportunity to commit the crime would not have arisen but for the trust the applicant placed in them because they were policemen, a trust which harmonises with the constitutional mandate of the police and the need to ensure that that mandate is successfully fulfilled. When the policemen — on duty and in uniform — raped the applicant, they were simultaneously failing to perform their duties to protect the applicant. In committing the crime, the policemen not only did not protect the applicant, they infringed her rights to dignity and security of the person. In so doing, their employer's obligation (and theirs) to prevent crime was not met. There is an intimate connection between the delict committed

[1] *Carmichele* (supra) at paras 34–6.
[2] *K* (supra) at para 51.
[3] Ibid at para 18.
[4] Ibid at para 15.
[5] Ibid at para 32.

> by the policemen and the purposes of their employer. The close connection renders the respondent liable vicariously to the applicant for the wrongful conduct of the policemen.[1]

The Court then held that the rights to dignity, freedom and security of the person required that the interpretation of vicarious liability be broadened to ensure that the state was responsible for the conduct of police officers acting under the colour of law.

In *Luiters*, the Court clarified the extent to which the Minister is to be held vicariously liable for the delicts committed by police officers. Mr Luiters had been shot and permanently paralysed by a police constable, Lionel Siljeur, who had gone on a shooting spree during which he injured a number of innocent civilians. While Siljeur was, at the time of the shooting, officially off-duty, the High Court and the Supreme Court of Appeal found that he had subjectively placed himself on-duty in order to arrest certain individuals who had allegedly robbed him.[2] The courts arrived at this conclusion on the strength of testimony from a Mr Davidse who, together with a companion, arrived on the scene soon after the shootings began. Siljeur approached their vehicle and informed them that he was looking for robbers. He did not identify himself as a police officer, and he was not in uniform. However, Mr Davidse's companion noted that the fire arm Siljeur was carrying was of the type usually issued to police officers. Based on this information they concluded that he was a police officer looking for robbers. Siljeur later opened fire on the two men when they attempted to assist Mr Luiters. After the shootings, Siljeur fled the scene.

The Constitutional Court accepted the Supreme Court of Appeal's factual finding that Siljeur had placed himself on duty. The Minister contended that a different test than the one developed in *K* was needed for such situations involving off-duty officers. The Minister argued that when an off-duty officer places himself or herself on duty, the enquiry ought to be whether their conduct (though subjectively intended to be within the scope of their employment) was so far removed from the purpose for which they were employed that the Minister could not be held liable. In the Ministers view, because the police exercised a different level of control over on-duty and off-duty officers, different standards for vicarious liability ought to be set.[3]

The *Luiters* Court rejected the Minister's proposed alteration of the test for vicarious liability, and held that the level of control that an employer has over the employee is already a relevant factor to be considered in the second leg of the test.[4] It also rejected the Minister's suggestion that the standard of care be based on the impunity with which the police officer had acted: 'What it would mean is that the more improper the conduct of the police officer, the less likely the Minister will be held liable. This result is not one that accords with a Constitution that seeks to render the exercise of public power accountable.'[5]

[1] *K* (supra) at para 57.
[2] Police officers are authorised to place themselves on duty when the need arises.
[3] *Luiters* (supra) at paras 20–21.
[4] Ibid at para 32.
[5] Ibid at paras 34.

The legal conclusions of the Constitutional Court are sound. However, the factual findings of the lower courts appear somewhat misguided. The High Court and the Supreme Court of Appeal in *Luiters* were content to conclude that Siljeur had placed himself on duty simply on the basis of his statement that he was 'looking for robbers' and that he possessed a firearm issued by the police. In so doing, the High Court and the Supreme Court of Appeal conflate the two-stage vicarious liability analysis developed in *K*. When employing the two-stage test set out in *K*, courts should be careful not to confuse the factual enquiry contained in the first leg of the test, ie, whether the police officer was on a frolic of his own, with the policy considerations in the second leg of the test, ie, whether the Minister should be held liable for the police officer's actions.

After the decisions in *Carmichele* and *K*, it is clear that the duty of the police to ensure the safety of the public entails a positive duty to take action to prevent possible crimes. The decisions in *K* and *Luiters* indicate that the duty imposed upon the police to protect the public is abrogated when police officers violate the rights of citizens through the commission of crimes themselves. Expanding the scope of vicarious liability for the Minister takes into consideration the considerable power and trust placed in the hands of the police and the concomitant potential for abuse that such power creates. However, protecting the public from unruly police officers should not, and will not, translate into liability for the Minister in all cases where crimes are committed by police officers.

(bb) F: The rollback of *Carmichele* and *K*?

Several cases handed down in 2011 engage *two* critical developments, noted above, in the law of delict as it relates to the police and their (notional) employers.

First, *Carmichele* and *K* made it patently clear that the constitutional rights to dignity and to freedom and security of the person impose affirmative duties on the police to prevent violations of physical integrity and ensure that a police officer's constitutional obligations do not necessarily end when he or she clocks out. These principles may seem quite abstract. Not so. They are decidedly well-grounded in the real world of South Africa — a country with one of the world's highest levels of sexual assault and rape (not currently in a war zone.) The *Carmichele* Court's words, in this regard, are worth rehearsing: 'Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women.'[1] Second, *Carmichele* and *K* may, at the same time, have led to some conceptual confusion regarding the difference between personal delictual liability and vicarious delictual liability for police officers who have breached their constitutional duties.

In *Minister of Safety and Security v F*, the Supreme Court of Appeal was seized with a case that engaged both developments.[2] In short, a 13-year-old girl was raped by a police detective (who had mendaciously described himself as a private detective, but whose police radio and cases files led the girl to conclude

[1] *Carmichele* (supra) at para 62.

[2] The *Minister of Safety and Security v F* [2011] ZASCA 3 (Supreme Court of Aappeal, 22 February 2011)('*F*').

correctly that he was a police officer.) As in *K*, the police officer's status led the girl to accept the offer of a lift home. (It is worth noting that despite her fear of this officer — she had previously lept from the car — the girl's predicament (out on the road in the dead of night) and the notion that our police remain our thin blue line between order and chaos — led her to accept a second invitation of a ride home.) The critical difference between *F* and *K* for three judges on the Supreme Court of Appeal panel was that the police officer in *F* was not officially on duty, but was only 'on call'. This status meant that the officer had an obligation to make himself available for duty should his services be deemed necessary. That he may have been neither fish nor fowl did not, however, influence the girl's decision. Indeed, that the police force allowed him to use an official car while 'on call' did — both courts accepted — (ultimately) convince the girl that a lift from a police officer was a reasonably safe bet.

In a judgment that challenges, fascinates and disturbs, Nugent JA found that the Constitutional Court in *Carmichele*, *K* and *Luiters* (and other courts that had followed its lead) had collapsed the distinction between direct liability and vicarious liability with respect to the delictual actions of police officers. In his view, the Supreme Court of Appeal decisions[1] spawned by *Carmichele K* and *Luiters — Minister of Safety and Security v Van Duivenboden,*[2] *Van Eeden v Minister of Safety and Security,*[3] *and Minister*

[1] The change in this constitutionally driven domain of delict has been dramatic. *Van Duivenboden*, *Hamilton*, *Van Eden* – noted above and below — speak to the extent to which the Supreme Court of Appeal has followed Carmichele's break with tradition.

[2] 2002 (6) SA 431 (SCA), [2002] 3 All SA 741 (SCA)(Nugent J) at para 22 ('Where there is a potential threat of the kind that is now in issue the constitutionally protected rights to human dignity, to life and to security of the person are all placed in peril and the State, represented by its officials, has a constitutional duty to protect them … We are not concerned in this case with the duties of the police generally in the investigation of crime … In this case we are concerned only with whether police officers who, in the exercise of duties on behalf of the State, are in possession of information that reflects upon the fitness of a person to possess firearms are under an actionable duty to members of the public to take reasonable steps to act on that information in order to avoid harm occurring … There is no effective way to hold the State to account in the present case other than by way of an action for damages and, in the absence of any norm or consideration of public policy that outweighs it, the constitutional norm of accountability requires that a legal duty be recognised. The negligent conduct of police officers in those circumstances is thus actionable and the State is vicariously liable for the consequences of any such negligence') Although the facts in F and *Van Duivenboden* differ, the most palpable difference appears to be in Nugent J's approach to vicarious viability.

[3] 2003 (1) SA 389 (SCA), [2002] 4 All SA 346 (SCA) at paras 17-18 (Our Courts have in a number of recent decisions recognised that the entrenchment of the right to be free from violence in s 12(1)*(c)*, read with s 205(3), would, in appropriate circumstances, be strongly indicative of a legal duty resting on the police to act positively to prevent violent crime. In *Van Duivenboden* this Court held that certain police officers who were in possession of information that reflected adversely upon the fitness of a person to possess firearms owed a legal duty to members of the public to take reasonable steps to act on that information in order to prevent harm. In the majority judgment Nugent JA, after referring to the entrenchment of the rights to equality, personal freedom and privacy, to the State's positive duty under s 7 to act in protection of these rights and to the principle of public accountability, went on to say: "However where the State's failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of I accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm."

of Safety and Security v Hamilton[1] — should best be understood as instances of *direct* liability, not *vicarious* liability. Following his own *novel* finding in constitutional law, Nugent J held that the defendant — the Minister of Safety and Security — could not be held vicariously liable for the actions of a policeman (on standby duty) who had raped a minor.

While Nugent JA may have, bravely, chosen this case to draw attention to what he, two other judges on the panel and a brace of academics[2] perceive to be a problem in this relatively new, constitutionally driven development of the law of delict, his judgment suffers from three relatively apparent weaknesses. First, to (ostensibly) set an established body of constitutional law right, one could have legitimately expected the judge to offer a substantially longer and more nuanced expatiation of the legal issues in play, especially given the Constitutional Court's extended exploration over several cases of the constitutional rights at stake Second, as the minority judgment of two members of the SCA panel makes clear: the evidence adduced by the lower court (not the evidence as re-read by Nugent JA, despite his denial of such a re-reading) reflects the actions of a police officer on standby duty, whose identity as a police officer became known to the rape victim during the course of the evening of the untoward events, and who gained the trust, subsequently abused, of the victim through the very nature of his office. Third, Nugent J seems tone deaf to the particular constitutional implications of the matter. The Constitutional Court made it patently clear that police officers have positive duties to uphold the Constitution and the Bill of Rights, and that the Minister has a constitutional obligation to 'teach and require their members to act in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.'[3] Moreover, Nugent JA seems unmoved (though not entirely oblivious) to the implications of *K* and *F* and *Carmichele*: that we have a largely male police force that acts with

[1] 2004 (2) SA 216 (SCA), [2003] 4 All SA 117 (SCA) at paras 35 ('[T]he individual's right to life, bodily integrity and security of the person must be balanced against policy considerations such as the efficient functioning of the police, the availability of resources and the undoubted public importance of the effective control of firearms. To my mind, in the present case, as in *Van Duivenboden*, it can be stated that one is not dealing with a situation involving "particular aspects of police activity in respect of which the public interest is best served by denying an action for negligence". Here too, there "is no effective way to hold the State to account … other than by way of an action for damages". Moreover, the spectre of the opening of the "floodgates of litigation" and the resultant "chilling effect" of potential limitless liability on the efficient and proper performance by the police of their primary functions — relied on very heavily by the appellant as a ground for denying the existence of a legal duty on the relevant police members in the circumstances of the present case — is no A more convincing here than it was in either *Van Duivenboden* or *Van Eeden*. In the words of Vivier ADP in the latter case: '[O]ur Courts do not confine liability for an omission to certain stereotypes but adopt an open-ended and flexible approach to the question whether a particular omission to act should be held unlawful or not. In deciding that question the requirements for establishing negligence and causation provide sufficient practical scope for limiting liability.' (footnotes omitted).)

[2] See S Wagener '*K v Minister of Safety and Security* and the Increasingly Blurred Line between Personal and Vicarious Liability' (2008) 125 *SALJ* 673; A Fagan 'Reconsidering *Carmichele*' (2008) 125 *SALJ* 659; F du Bois 'State Liability in South Africa: A Constitutional Remix' (2010) 25 *Tulane European & Civil Law Forum* 139. Whatever reservations one may have about Nugent JA's judgment, he draws down on a compelling body of academic literature.

[3] FC s 199(5).

impunity and, as the case law he reviews suggests, seems pathologically bent on continuing to commit sexually violent acts against women.

Other readers may find the judgment thorough and persuasive on one of the legal points at issue: that the Constitutional Court, and subsequent Supreme Court of Appeal decisions, have collapsed the distinction between direct liability and vicarious liability in these matters. Nugent JA clearly wishes to return to the halcyon days in which the terms of vicarious liability were clear and unambiguous:

> While 'risk creation' might indeed be capable of giving rise to liability on the part of the employer, … the true basis for liability in [vicarious liability] cases is the failure of the employer, acting through the instrument of the employee, to fulfil the duty that is cast upon the employer to avoid harm occurring through the risk that has been created. For on the traditional approach vicarious liability arises from the existence of the relationship alone and not from any failure of duty by the employer.[1]

And it may well be possible that the Constitutional Court could have given clearer direction on the law in this domain. But to leave matters there would be to miss two critical aspects of the Court's jurisprudence on delicts involving sexual assault and the police. First, the Court has been quite cognizant of its specialized jurisdiction and its (consciously) limited role in the development of the common law. It thus left much of the development of the common law in this domain to lower courts. Second, irrespective of whether South Africa's pre-constitutional law of delict had clearly distinguished between direct liability and vicariously liability, the Constitutional Court has made it palpably clear that it will not tolerate a police force that abuses its powers, especially when those powers are used to sexually abuse women. Nugent JA's opinion would have been decidely more compelling if it had taken to heart the central learning of *Carmichele* and *K*: the objective, normative value system established by the Final Constitution clearly sets its face against systemic, degrading violence against women and that the police have an essential role to play in ridding South African society of one of its most frightful and demeaning features. Seventeen years into our constitutional experiment, and the police appear no closer to accepting direct or vicarious responsibility for this inhumane state of affairs. By engaging in a rather formalistic attempt to narrow the grounds for a finding of vicarious liability, Nugent JA misses the rot at the heart of South African society and the Constitutional Court's attempt to place responsibility for rectifying that wrong where it belongs: with a government and a police force (Ministers of Safety and Security and police detectives alike) charged with vouchsafing our security of the person. In Nugent JA's own words on vicarious liability, the Constitutional Court can be read as finding that persistent neglect by the Minister and the Commissioner has created an ongoing 'material risk' of sexual assault by police officers in the line of duty and on the margins of that line of duty.

A final perplexing feature of Nugent JA's judgment flows from his apparent desire to cabin most delictual claims against the police within the framework of direct liability. Direct liability claims are certainly appropriate for individual police officers. Elements of wrongfulness and fault are more readily established. Nugent JA does

[1] *F* (supra) at para 34.

not say, however, how such elements of a delictual action would be established with respect to a Minister of Safety and Security or a Police Commissioner. One might be forgiven for thinking that Nugent JA had a responsibility to delineate the contours of his preferred understanding of delictual actions flowing from crimes committed by police officers — on and off duty. Instead, he concludes that since no claim of direct liability was brought by the plaintiff/respondent against the Minister of Safety and Security, the Supreme Court of Appeal was not obliged to develop the law in this area.

Three things are certain. The Constitutional Court will be obliged to take the measure of Nugent JA's claim that the two forms of delictual action must be clearly distinguished and that direct liability is the preferred form in police driven delictual matters. The Court will have to assess whether its current doctrine of vicarious liability retains its merit as it stands, whether it needs to be tweaked or, as Nugent JA has it, whether it should be largely discarded. The Court will have to decide whether it wishes to reverse the Supreme Court of Appeal on its errant re-reading of the facts or on its refusal to follow Constitutional Court precedent.[1]

(cc) Novel uses of cost orders as constitutional remedies

Two recent judgments in the North Gauteng High Court demonstrate that other judges are alive to the creative doctrines and remedies available to courts committed to rooting out the rampant ruthlessness reflected in the ranks of our police force. In *Coetzee v National Commissioner of Police* & *Minister of Safety and Security*,[2] Du Plessis AJ found that the unlawful arrest and illegal detention of a person not suspected of any crime (initially) constituted a clear violation of the Constitution that warranted unusual measures by way of remedy and costs. The case is not entirely straightforward. Although he had committed no crime and was not suspected of committing a crime, Coetzee refused to pull his car over at a roadblock and subsequently skipped a red light. (Coetzee justified his action on the grounds that such roadblocks, constructed late at night, had been used by criminals passing themselves off a police officers. He claimed that he feared for the safety of his family.) As a result of his actions at the roadblock and redlight, the SAPS and Metro police officers forced his car off the road and arrested him. Following his arrest, he found himself unable to secure the police bail normally granted in such circumstances. An urgent rule nisi order had to be issued by a judge in order to secure his release. In coming to his conclusion about the parties responsible for this injustice, and their respective degree of liability, Du Plessis AJ writes as follows:

> The Constitution places a very high premium on the right to human dignity and freedom. It is essential that the courts should protect these rights in the most effective way possible. The level of crime in South Africa should not justify a departure from the democratic and constitutional principles enshrined in our Constitution, safeguarding the population from any excess use of power and deprivation of freedom by government institutions and authorities. The spirit of the Constitution, the recognition of basic human rights, and the right to freedom in particular, enshrined in the Constitution should not be compromised in any way whatso-

[1] At the time of writing, the Constitutional Court has set *F* down for hearing (31 May 2011).
[2] *Coetzee v National Commissioner of Police & Others* 2011 (2) SA 227 (GNP)('*Coetzee*').

> ever through the actions of government officials. The courts should therefore jealously guard these rights and act decisively upon the infringement thereof. Furthermore it is important that those who act with impunity, and who think that they can do as they please, simply because they have the force of the whole law enforcing system behind them, should be brought to book and restrained. The whole wrath of the legal system, the rule of law, the courts and the public should be brought upon such officials. It does not appear from the huge amount of damages claims instituted against the second respondent, the Minister of Safety and Security, that a damages claim constitutes a deterrent of any nature whatsoever in respect of unlawful behaviour on the part of the security forces. In fact, the only party being prejudiced as a result of damages claims based on unlawful arrest and detention, is the taxpayer, and therefore the public, who also bears the brunt normally of unlawful actions by the police services. It is in fact those who expect that the hard fought and precious rights to freedom, dignity and not to be detained unnecessarily, should be upheld and enforced, who eventually have to pay for the breach of these rights, by state officials mostly acting with impunity. It is ironic further, that those who sometimes are subjected themselves to such unlawful breach of the aforesaid rights, form part of the taxpayers who have to pay in the form of damages for such breaches. In my view other possibilities should be considered to deter police services and metro police services from breaching the enshrined rights held dear by everybody in this country. The public must be protected. Therefore, if a preferable method of an accused's attendance is through a summons, that procedure should be employed. In this regard the risk of the suspect absconder or committing further crime should be considered. An arrest without any rational reasonable basis therefore should not occur indiscriminately. It does not matter how severe the alleged criminal offence may be. The person to be arrested is still an innocent person whose right to freedom, dignity and right to fair treatment should be upheld. I therefore come to the conclusion that the arrest in this matter was unlawful. His detention in the holding cells at the Pretoria West police station was therefore also unlawful. As I have mentioned above, those responsible for consideration of granting the applicant bail refused to do so. It follows that the applicant was held unlawfully and detained unlawfully at the Pretoria West police station.[1]

However, in a striking departure from form, the Judge does not dig into the deep pockets of the state and thus the taxpayer, in awarding costs. Instead, using constitutional powers granted him under FC s 38 and FC s 173, he writes:

> I have no hesitation to come to the conclusion that appropriate relief in this matter, with reference to the costs of the application, that should never have been brought and that should never have been necessary, is that those responsible therefor, and who were derelict in their duties, and who did not act in accordance with their constitutional obligations, should carry the costs of the application. Furthermore there is no reason why the taxpayer should carry the costs of the actions of these officials. Senior Superintendent Moodley and his assistant, Superintendent Klopper who were on duty at the Pretoria West Police Station that day and evening, should not have allowed the arrest, and should have acted in such a fashion that the infringement of the rights of the applicant had not occurred. The Metro policemen responsible for the arrest, namely Constable Frans Moosa Sivayi had acted completely outside his authority and acted unlawfully by arresting the applicant. Constable Mandla Steven Ntsweni who is the deponent to the opposing affidavit filed, and who tried to justify the actions of the respondents, and who acted together with Constable Sivayi is

[1] *Coetzee* (supra) at paras 43 – 51.

> similarly responsible. The original complaints commander and the commander who took over from him namely Captain Nhlazo and thereafter Inspector Duledu, similarly did not act in accordance with their duties, namely to consider bail and to consider the position and rights of the applicant.[1]

The police officers themselves are held jointly and severally liable for the infringement of fundamental rights and costs incurred by the illegal arrest and the subsequent litigation.[2] The Police Commissioner and the Minister remain on the hook only to the extent that the officers found culpable cannot cover the costs incurred by the applicant and by the two respondents in litigating the matter before the High Court.[3] Although there is nothing new about an order of costs *de bonis propriis*, the use of the award in the context constitutes a novel constitutional remedy for a constitutional breach. At the same time the remedy remains true to the spirit of *Fose* and declines to make the taxpayer liable for the unconstitutional acts of public employees.

The facts, the holding and the order in *Prinsloo v Nasionale Vervolgingsgesag En Andere* track *Coetzee* extremely closely.[4] Once again, an ordinary citizen was deemed to be detained without trial in terms FC s 12 because the responsible police officers failed to bring the accused to court before the expiration of 48 hours (as required by the Criminal Procedure Act). Such mindless and arbitrary deprivations of freedom could not be tolerated and warranted a penalty designed to ensure that future failures of a similar ilk would not occur again. Thus, as in *Coetzee*, the *Prinsloo* court held that costs for litgation can be imposed upon those members of the South African Police Service who have acted, as in the extant matter, mala fide, intentionally, unreasonably and improperly, and thus entirely beyond the scope of their powers.

(d) Limitations on the rights of SAPS members

The SAPS Act contains a number of limitations on the rights of police officers.

SAPS Act s 41(1) prohibits police officers from striking or inducing or conspiring with other officers to strike. The section empowers the National Commissioner, or the Provincial Commissioner, to issue an ultimatum to an officer to desist from engaging in such behaviour. Should the officer fail to stop, she may be dismissed without a hearing.[5] The procedural safeguards provided by the section

[1] *Coetzee* (supra) at para 107.
[2] Ibid at para 107.
[3] Ibid.
[4] 2011 (2) SA 214 (GNP).
[5] SAPS s 41(2) and 41(3).

are quite limited. The officer must be informed in writing of the reasons for the discharge. After such reasons are provided, the officer is afforded the opportunity to make written representations to the Minister for reinstatement.[1] The Constitutional Court's conclusions in *SANDU CC I* and *SANDU CC II* suggest that SAPS Act s 41 should pass constitutional muster. Not even POPCRU contests the proposition that members that provide 'essential services' can be prohibited from striking.[2]

The rights of police officers to demonstrate, to assemble and to form unions are entirely different matter. While *SANDU CC I* and *SANDU CC II* are concerned with the rights of members of the SANDF, they offer a glimpse on what the Court will and will not tolerate with regard to members of the SAPS.

In *South African National Defence Union v Minister of Defence* ('*SANDU CC I*') the Constitutional Court held that a provision of the Defence Act prohibiting members of the armed forces from participating in public protest action and from joining trade unions violated the members' right to freedom of expression and their right 'to form and join a trade union'.[3] Implicit in the majority's decision — and explicit in Justice Sachs' concurrence — was a finding that SANDU members' freedom of association had been infringed. The question for the Court was whether these infringements were justifiable. With respect to the soldiers' right to freedom of expression, the Court found the provisions' limitations a grave incursion into the soldiers' expressive rights and patently unjustifiable. With respect to the soldiers' 'right to form and join a trade union', the Court rejected the Minister's contention that an infringement of the right was justified by the constitutional imperative to structure and to manage the SANDF as a 'disciplined military force'.[4] As the Act stood, it was a constitutionally unjustifiable limitation. However, while deciding that the requirement of strict discipline would not necessarily be undermined by permitting SANDF members to join a trade union, the *SANDU CC I* Court did note that the structure of a trade union might well differ in a military environment and that appropriate legislation might justifiably limit the scope of a soldier's trade union rights.

In *South African National Defence Union v Minister of Defence & Others* ('*SANDU CC II*'),[5] the Constitutional Court consolidated several separate High Court and

[1] SAPS s 41(3).

[2] See *South African Police Services v Police and Prison Civil Rights Union & Another* [2010] 12 BLLR 1263 (LAC), [2010] ZALAC 17 (Currently on appeal, in 2011, in the Constitutional Court.) See also S Woolman 'Freedom of Association' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

[3] 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC), [1999] ZACC 7 ('*SANDU CC II*').

[4] See FC s 199 (7). It reads, in pertinent part: 'Neither the security forces, nor any of its members, may, in the performance of their functions – *(a)* prejudice a political party interest that is legitimate in terms of the Constitution; *(b)* further, in a partisan manner, any interest of a political party.'

[5] 2007 (5) SA 400 (CC), 2007 (8) BCLR 863 (CC), [2007] 9 BLLR 785 (CC), (2007) 28 *ILJ* 1909 (CC), [2007] ZACC 10 ('*SANDU CC II*').

Supreme Court of Appeal cases[1] in which SANDU had challenged the constitutionality of a constellation of subsequent regulations. The *SANDU CC II* Court rejected virtually all of SANDU's challenges to the regulations (most of which concerned rights regarding collective bargaining.) It did, however, uphold a limited right for SANDU members to assemble or to demonstrate (out of uniform) with regard to employment conditions in terms of regulation 8(b),[2] and rejected a claim by SANDF that 'the regulations do not impose an obligation upon it to exhaust the [collective bargaining] procedures set out in the regulations [because] the very purpose of the regulations is to prevent unilateral action by the SANDF in respect of the areas of permissible bargaining until the procedures provided for in the regulations have been exhausted.'[3]

The second noteworthy limitation concerns the political activities in which SAPS members may engage. In terms of SAPS Act s 46(1), members are prohibited from holding posts in, wearing the insignia or identifying mark of, or publicly displaying support for any political party, organisation, movement or body. SAPS Act s 46(2) qualifies the broad prohibition in SAPS Act s 46(1) by providing that SAPS Act s 46(1) does not prohibit membership of a political organisation, nor does it prohibit attendance at meetings of such an organisation. However, the officer may not attend in uniform.

In *Van Dyk v Minister van Veiligheid en Sekuriteit*, the High Court held that a police officer was legitimately terminated from his employment because he stood for election as a member of the Democratic Alliance.[4] The officer argued that because his position in the police force — that of a budget analyst — did not require him to engage the public directly, the officer's candidacy could not prejudice the administration of justice or give the appearance of such impropriety.[5] The High Court found that the purpose of the SAPS Act was to eliminate any perception on the part of the public that the administration and enforcement of the law advanced the fortunes of any political party or undermined the claims

[1] See *South African National Defence Union v Minister of Defence & Others; Minister of Defence & Others v South African National Defence Union & Others* 2007 (1) SA 402 (SCA), 2007 (4) BCLR 398 (SCA); *Minister of Defence & Others v South African National Defence Union; Minister of Defence & Others v South African National Defence Union & Another* 2007 (1) SA 422 (SCA); *South African National Defence Union v Minister of Defence* 2004 (4) SA 10 (T), 2003 (9) BCLR 1055 (T).

[2] *SANDU CC II* (supra) at paras 81-82.

[3] Ibid at para 72.

[4] Unreported, RPD case no 4268/2002 (29 April 2003)('*Van Dyk*'). See further Woolman 'Freedom of Association' (supra).

[5] While on the police force from 1995 to 1999, Van Dyk had represented the Freedom Front on the Greater Pretoria Metropolitan Council (GPMC). In 2000, Van Dyk switched to the Democratic Alliance and openly ran for a seat on the GPMC as a DA candidate. Van Dyk also argued that while s 46 of the SAPS Act and FC s 199(7), set identifiable limits on party political activity, those limits should be read, and if necessary modified, by the political rights found in the FC s 19. The court found that even if s 46(1) was deemed to have infringed FC s 19, the infringement was patently reasonable and justifiable under FC s 36.

of members of other parties to justice.[1] The court found that the elimination of any taint of political party bias in the police force in order to instill greater public confidence in government justified the limitation of the political and associational rights of the particular officer in question.[2] Such a finding is consistent with the needs of a nascent democracy committed to the principle that all are equal before the law and that all can be expected to be treated by the police without fear, favour or prejudice.[3]

A third limitation concerns the right of police officers to resign from the SAPS. SAPS Act s 49(1) states that once a state of emergency or state of national defence has been declared, no member can resign without the written permission of the National Commissioner. Further, in terms of SAPS Act s 49(2), during any period when it becomes necessary to maintain public order in the country, the National Commissioner may declare a 30 day period during which no police officer may resign without written permission. This limitation ensures that the SAPS properly performs its functions and that its ability to do so is not compromised by diminished numbers during a national emergency.

The rationale for this last limitation is consistent with the limits placed on the ability of SAPS members to strike: an issue engaged only glancingly above. As Carole Cooper notes:

> The 1995 [Labour Relations Act 66 of 1995 (LRA)] … limits the right to strike in essential services and minimum services. The ILO recognises that it might be necessary to prohibit strikes in essential services but that such services should be restrictively defined. Without a restrictive definition, the notion would lose all meaning. The ILO defines essential services as those services the interruption of which would endanger the life, personal safety or health of the whole or part of the population. It was not prepared to draw up a definitive list of which services could be determined as essential… . Critically, the ILO requires that where a strike is prohibited, there should be access to quick and impartial mediation

[1] Section 46 of the SAPS Act reads as follows:

(1) No member shall—

(a) publicly display or express support for or associate himself or herself with a political party, organisation, movement or body;

(b) hold any post or office in a political party, organisation, movement or body;

(c) wear any insignia or identification mark in respect of any political party, organisation, movement or body; or

(d) in any other manner further or prejudice party-political interests.

(2) Subsection (1) shall not be construed as prohibiting a member from—

(a) joining a political party, organisation, movement or body of his or her choice;

(b) attending a meeting of a political party, organisation, movement or body: Provided that no member shall attend such a meeting in uniform; or

(c) exercising his or her right to vote.

Section 46(1)*(a)* replaced s 35(1)*(a)* of the Police Act 7 of 1958. The Police Act stated that no member of the Police Force, while still a member of the Police Force, may engage in political activity, stand for election or participate in a municipal council.

[2] See *Van Dyk* (supra) at 10 ("The need for a police force that is seen to be impartial speaks for itself.')

[3] A number of eastern European nations have placed similar laws on the books in order to diminish the public's understandable reluctance to trust a security apparatus that had all too recently used all manner of surveillance and violation of bodily integrity to enforce the repressive policies of the state. Of course, as South Africa's history of overt politicisation of the security services recedes into the past, the rationale for barring party political activity will lose at least some of its force.

> and arbitration procedures for workers hit by the prohibition… . The 1995 LRA basically adopts the definitional approach to essential services. It defines as essential a service 'the interruption of which endangers the life, personal safety or health of the whole or any part of the population'.[1] It also specifically declares as essential the parliamentary service and the South African Police Service. The prohibition of strikes in essential services (including minimum services) provided for in the LRA should pass the requirements of the limitations test in the Final Constitution, particularly as the prohibition is consonant with ILO requirements.[2] The Act's definition of an essential service replicates that of the ILO. Both provide for a prohibition on strikes only in very restricted circumstances. The specific inclusion of parliamentary and police services as essential services, thereby removing the right of employees in these services to strike, is also defensible in terms of the public importance of these functions, and is accepted by the ILO and is common elsewhere. The ILO states that the right to strike may be restricted or prohibited in the public service in so far as such a strike could cause 'serious hardship' to the 'national community' and provided that the limitations are accompanied by certain compensatory guarantees.[3]

Our labour courts have largely tracked Cooper's analysis. However, their judgments also reflect a number of subtle distinctions. *SA Police Services v POPCRU* turns on the reach of s 65(1)*(d)* of the LRA.[4] Section 65(1)*(d)* prohibits employees engaged in essential services from striking. The matter arose in 2007 when POPCRU called on its members in the SAPS to join a general strike. The Labour Court held that only those officers employed under the SAPS Act (actual police officers) were barred from striking. As a result, employees engaged by the SAPS in the service in terms of the Public Service Act retained the right to strike.[5] On appeal, the Labour Appeals Court ('LAC') largely upheld this finding. It noted that the term 'essential service' applies to particular functions performed by that employer: The functions assigned to SAPS by the Constitution are 'to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law'. These functions constitute the 'essential service' contemplated by s 71(1) of the LRA. The LAC held that, unless non-SAPS member are deemed members, non-members employed by the SAPS cannot perform police functions, and therefore do not form part of the police service. The LAC concluded that the SAPS' view that all its employees are prohibited from striking would constitute an unreasonable limitation on non-member employees' constitutional right to strike.

(e) Accountability and Oversight

(i) *Executive and parliamentary oversight*

The executive exercises overall policy control over the SAPS at the national level through the Minister of Police and at the provincial level through an MEC with

[1] LRA s 213.

[2] LRA s 65(1)*(d)(i)*.

[3] C Cooper 'Labour Relations' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) 53–54 – 53–55 citing ILO *Freedom of Association* (1996) 110 at para 533. See also C Cooper 'Strikes in Essential Services' (1994) 15(5) *ILJ* 903–29.

[4] [2010] 12 BLLR 1263 (LAC).

[5] *SAPS v POPCRU* (2007) 28 ILJ 2611 (LC).

a comparable brief. The Final Constitution provides for the establishment of a national secretariat for the SAPS to 'function under' the responsible Minister. With respect to the provinces, s 2(1)*(b)* of the SAPS Act mandates the establishment of provincial secretariats for safety and security.[1] FC s 208 does not specify the functions that the national secretariat is meant to perform under the guidance of the Minister. However, s 3(1) of the SAPS Act states that these functions encompass advising the Minister on the exercise of his powers and performance of his functions, advising the Minister on constitutional matters, promoting accountability and transparency within the SAPS, monitoring the implementation of policy and directions issued by the Minister, conducting research into policing matters and evaluating the functioning of the SAPS. The secretariat is also given certain powers to facilitate the performance of its functions. It can obtain information and documents from the SAPS, enter buildings controlled by the SAPS and is entitled to receive 'all reasonable assistance' from SAPS members.[2]

The mandate of the secretariat, as articulated in the SAPS Act, ought to make it the backbone of executive oversight of the SAPS. Unfortunately, the national secretariat has been largely under-utilised. Pursuant to a policy decision taken in 1999 to decrease the size and the resources of the secretariat, it is no longer in a position to make a meaningful contribution to policy development and oversight.[3] Some commentators have noted that the sidelining of the secretariat reflects a shift in government policy away from building the accountability and the legitimacy of the SAPS to crime fighting.[4] Whatever the reasons may be, the weakening of the secretariat has left an undesirable lacuna in our system of policing.

At the provincial level, provincial executives have an additional oversight mechanism available to them. FC s 206(5)*(a)* permits provincial executives to establish commissions of inquiry into alleged inefficiencies in the SAPS within their province or breakdowns in the relationship between the SAPS and communities. FC s 206(5)*(b)* states that after conducting the inquiry the province 'must make recommendations to the Cabinet member responsible for policing'. FC s 206(5)*(b)* should not be read as a limitation of the ability of the province to take independent action to remedy problems that are identified through an inquiry. On the contrary, FC 206 makes it clear that the steps provided for in FC 206(5)*(a)* and *(b)* are carried out 'in order to perform the functions set out in subsection (3)'. Under FC 206(3) a province is entitled:

(a) to monitor police conduct;
(b) to oversee the effectiveness and efficiency of the police service, including receiving reports on the police service;
(c) to promote good relations between the police and the community;

[1] In terms of s 3(5) of the SAPS Act, the functions and the powers of the provincial secretariats are the same as the functions and the powers of the national secretariat.

[2] SAPS Act s 3(2).

[3] See D Bruce, G Newham & T Masuko 'In the Service of People's Democracy: An Assessment of the South African Police Service' Centre for the Study of Violence and Reconciliation (2007)('CSVR Study') available at http://www.csvr.org.za/wits/papers/papsaps.htm. See also M Shaw *Crime and Policing in Post-Apartheid South Africa: Transforming under Fire* (2002) 38–40.

[4] Bruce et al 'CSVR Study' (supra) at 46.

(d) to assess the effectiveness of visible policing; and
(e) to liase with the Cabinet member responsible for policing with respect to crime and policing in the province.

The appropriate interpretation to be given to FC s 206(5)*(b)* is that once an inquiry initiated by the province has been completed, a report must be provided to the Minister. However, the province is also empowered to take whatever steps it deems necessary to remedy the problems in accordance with its entitlements under FC 206(3).

Parliamentary oversight of the SAPS is given effect through a Portfolio Committee on Safety and Security . In terms of FC s 205, provincial commissioners must present annual reports to the provincial legislature.[1] The effectiveness of the parliamentary portfolio committee in monitoring the SAPS has been limited. Portfolio committees tend to accept government policy and offer little critique.[2]

(ii) *Independent Complaints Directorate*

The Independent Complaints Directorate ('ICD') is the statutory body that investigates complaints against the SAPS.[3] The ICD was established to satisfy the requirements of IC s 222. IC s 222 provided for the establishment of 'an independent mechanism under civilian control, with the object of ensuring that complaints in respect of offences and misconduct allegedly committed by members of the Service are investigated in an effective and efficient manner.' The Final Constitution does not contain a provision comparable to IC s 222. However, FC s 206(6) indirectly requires the establishment of such a body by stating that 'on receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member.'

The ICD is headed by an Executive Director. The Executive Director is appointed for a renewable term of five years.[4] The staff of the ICD is appointed by the Executive Director in consultation with the Minister. The staff is subject to the same terms and conditions of employment as ordinary members of the public service.[5] Provincial Heads of the ICD are appointed by the Executive Director. However, this post is not specifically created in the SAPS Act. The ICD's funds come directly from Parliament and are allocated to it by the Minister of Finance through the national budget.

[1] These reports must also be handed to the National Commissioner.

[2] Bruce et al 'CSVR Study' (supra) at 46.

[3] The ICD is created by Chapter 10 of the SAPS Act. For a critique of the structure and the powers of the ICD as conferred by the SAPS Act, as well as a comparison to practices in other jurisdictions, see B Manby 'The Independent Complaints Directorate: An Opportunity Wasted' (1996) 12 *SAJHR* 417. The ICD is not the only means by which police officers can be held accountable. The SAPS also conducts internal disciplinary enquiries. SAPS Act s 40.

[4] In terms of s 51(1) of the SAPS Act, the Minister is responsible for nominating a candidate for the post of Executive Director. SAPS s 51(2) then provides that the nominee must be confirmed by the Parliamentary Portfolio Committee on Safety and Security before he or she can be appointed.

[5] SAPS Act ss 52(1) and 52(2).

The investigative mandate of the ICD is primarily derived from s 53(2) of the SAPS Act:

> In order to achieve its object, the directorate
> *(a)* may *mero motu* or upon receipt of a complaint, investigate any misconduct or offence allegedly committed by a member, and may, where appropriate, refer such investigations to the Commissioner concerned;
> *(b)* shall *mero motu* or upon receipt of a complaint, investigate any death in police custody or as a result of police action; and
> *(c)* may investigate any matter referred to the directorate by the Minister or the member of the Executive Council.

The ICD has also been granted the authority to exercise the same investigative powers over municipal police services.[1]

An important part of the ICD's mandate arises from s 18 of the Domestic Violence Act.[2] In terms of s 18, if a police officer fails to comply with any of the obligations imposed on her in terms of the Domestic Violence Act, then such failure must be treated as misconduct and referred for investigation by the ICD. (The failure to comply may also provide the grounds for delictual actions against the negligent police officer and the vicariously liable Minister.[3]) The Act also requires that disciplinary proceedings *must* be initiated against such a police officer unless the ICD directs otherwise. This process is overseen by Parliament. Parliament is meant to receive reports from the ICD every six months concerning investigations and recommendations made under s 18. The National Commissioner is also required to present reports to Parliament indicating the steps taken as a result of the recommendation made by the ICD.

The procedure established by s 18 of the Domestic Violence Act has the potential to be a very effective oversight mechanism. But it has not served that function in practice. In its 2005 report on the ICD, the Parliamentary Portfolio Committee on Safety and Security noted that the ICD had fallen behind in the provision of its reports on domestic violence and that the SAPS was not meeting s 18's reporting requirements.[4]

To facilitate its investigations, personnel within the ICD can be designated to perform the functions and to exercise the powers of an ordinary SAPS member.[5] The ICD can, thereby, develop its own internal investigative unit. However, chronic shortages of resources and of staff have severely limited the investigative capacity of the ICD and resulted in a serious backlog of complaints. In addition,

[1] Regulations for Municipal Police Services Government Notice N R710 *Government Gazette* 20142 (11 June 1999).

[2] Act 166 of 1998.

[3] See *Minister of Safety and Security v Venter* [2011] ZASCA 42 (Delictual action against the police for failing to perform their duties under the DVA: currently on appeal to the Constitutional Court.)

[4] *Report of the Portfolio Committee on Safety and Security on the Independent Complaints Directorate (ICD)* (17 August 2005) available at www.pmg.org.za/docs/2005/comreports/050824pcsafetyreport.htm (accessed on 18 September 2007).

[5] Such a designation must be made by the Minister upon a request by the Executive Director. SAPS Act s 53(3)*(a)*.

the ICD has complained of delays in ministerial approval of police powers for investigators: these delays have further hampered their investigative efforts.[1]

The Executive Director has the power to 'request and obtain' information from police officers, police commissioners and the National Director of Public Prosecutions and must receive the co-operation of any police officer.[2] These provisions are rather weak, as they do not specifically compel SAPS members to co-operate with investigations.[3] The ICD has, in the past, called for legislation granting it the specific power to access all documents held by the police. No such legislation is in the pipeline.[4] In addition, members of the SAPS are able to frustrate an ICD investigation, particularly investigations into deaths in police custody, by simply invoking their right to remain silent.[5]

Once an investigation has been completed, the ICD can make recommendations to the commissioner, the Minister, or the MEC concerned.[6] If the matter involves a potential criminal action, then the recommendations may be referred to the National Director of Public Prosecutions for further action.[7] The ICD has no power to compel the National Commissioner to initiate or to participate in disciplinary action. The lack of an effective enforcement mechanism for the recommendations of the ICD is a serious shortcoming of the legislative framework. The implementation of the ICD's findings is effectively left within the discretion of the police commissioners, prosecutors and responsible ministers. The absence of enforcement mechanisms and remedial powers undermines the very purpose for creating an independent body to deal with police misconduct. In order to give its findings real bite, the ICD should be given genuine powers of intervention and control over disciplinary proceedings.[8]

A lack of public awareness is another matter of concern. In order for the ICD to adequately perform its various tasks, the public must be able to contact the ICD and be cognisant of the existence of a complaint mechanism. A further challenge to the effectiveness of the ICD has been the lack of an adequate number of satellite offices in the provinces and rural areas. The lack of sufficient local

[1] *ICD Strategic Plan 2006-2009* available at http://www.icd.gov.za/documents/strategic_documents/2006-2009/StragicPlan2006_2009.pdf (accessed on 18 September 2007).

[2] SAPS Act ss 53(6)*(b)*, 53(6)*(d)* and 53(6)*(f)*.

[3] The weakness of these provisions is especially evident when compared with the investigative powers granted to the Inspector General of Intelligence under s 7(8) of the Intelligence Services Oversight Act 40 of 1994. See § 23B.5*(c)*(ii) infra.

[4] Independent Complaints Directorate *First Annual Report on the Activities of the Independent Complaints Directorate for the Financial Year Ending March 31, 1997* (1997).

[5] See D Bruce, K Savage & J De Waal 'A Duty to Answer Questions? The Police, the Independent Complaints Directorate and the Right to Remain Silent' (2000) 16 *SAJHR* 71 (The authors argue in favour of the development of a duty to answer questions posed by the ICD during its investigations. The proposed duty would be made subject to the exclusion of incriminating testimony from any future criminal trial.)

[6] SAPS Act ss 53(6)*(i)* and 53(6)*(j)*.

[7] SAPS Act s 53(6)*(g)*.

[8] For a critique of the structure and powers of the ICD see B Manby 'The Independent Complaints Directorate: An Opportunity Wasted' (1996) 12 *SAJHR* 417.

offices makes it substantially more difficult for members of the public to lodge complaints of abuse and misconduct.[1]

In recent years, the ICD has undertaken a number of initiatives designed to improve the performance of its mandate. In 2005, a Proactive Oversight Unit was established to conduct research into and analysis of trends in police conduct to make recommendations for policy changes where necessary. Importantly, an Integrity Strengthening Unit was also established in 2005 to oversee ethical conduct within the ranks of the ICD. In an effort to root out police corruption, an Anti-Corruption Command ('ACC') was set up in 2004. Given the scathing reports emanating from the Auditor General in 2009 and the Public Prosecutor in 2011, and the 2011 investigation of the Special Investigation Unit into rampant tender violations, neither the ICD nor the ACC would appear to have responded effectively. The ACC in particular has no presence in the provincial offices and suffers from an ongoing lack of capacity. The ACC has three offices: hardly sufficient to handle complaints emanating from the entire country.[2]

Aside from its external constraints, the ICD has experienced some internal management problems. These difficulties prompted the Portfolio Committee on Safety and Security to table a sharply critical report on the ICD to Parliament.[3] One of the problems identified was an over-centralisation of resources: 47 per cent of the ICD's budget went to national investigations whilst the remainder was distributed between the nine provinces. Over-centralisation of power at the national level has clearly hampered service delivery at provincial level. In terms of reporting, the Portfolio Committee noted inconsistencies in the quality of the reports as well as the information contained therein and specifically pointed out that the ICD appeared to be presenting a rosy picture of its activities and was only willing to present certain information upon specific requests by the Portfolio Committee. These observations, particularly with regards to 'white-washed' reporting, are somewhat troubling.

Moreover, in recent years political support for the ICD appears to have waned. In 2006, the National Commissioner — himself the subject of corruption investigations — publicly expressed doubt about the necessity for the continued existence of the ICD.[4] These comments are more than unfortunate: They reflect the absence of an accountable and transparent police force whose clear mission is to protect the denizens of our fragile democracy.[5]

[1] Portfolio Committee on Safety and Security *Report on the Independent Complaints Directorate (ICD)*(17 August 2005).

[2] Indpendent Compliants Directorate *Annual Report on the Activities of the Independent Complaints Directorate for 2005/2006* (2006) 44.

[3] Portfolio Committee on Safety and Security *Report on the Independent Complaints Directorate* (2006). The Portfolio Committee required the ICD and the Ministry to report back to it within three months on the measures taken to remedy the problems that had been identified.

[4] Amnesty International *Report 2007* (2007) available at http://web.amnesty.org/library (accessed on 18 September 2007).

[5] Ibid.

(iii) *Community Policing Forums*

Community policing forums were first established in the early 1990s during the transition.[1] The main purpose of establishing these forums was to boost the legitimacy of the police by providing communities with an opportunity to become involved in policing activities in their area. However, the forums are really not oversight or accountability mechanisms. They lack the authority to control the police or to take action against errant police officers. Since their establishment, the forums have served more as a consultative platform where police and communities are able to discuss their mutual concerns (and grievances). In some cases, however, the police and the communities have used the forums to develop joint strategies to take action against crime.

The forums have been formalised through the adoption of provisions within the SAPS Act that govern their establishment and composition.[2] The Act provides for the forums to exist on three levels: community, area and provincial.[3] The provincial forums are controlled by provincial commissioners, in consultation with the relevant MEC.[4] The forums are not democratically elected bodies. Rather, they consist of members of the public who volunteer their services.[5]

The forums have a mixed record of success. Police officers tend to see the forums as platforms for the community to criticise the police or view them as 'talk shops' that do not affect day-to-day policing. Another serious problem has been the forums' lack of representivity. Members of the public who become involved in the forums do so on a voluntary basis. Not surprisingly, wealthy sectors of the community or specific interest groups are sometimes overrepresented: the poor and marginalized are generally under-represented.[6]

There have been recent moves towards restructuring the forums to provide for greater community involvement in crime fighting.[7] Whilst the suggested changes may prove useful in enhancing democratic interaction between local government, the police and the communities they serve, broadening the spectrum of issues they engage may actually undermine the forum's focus on policing.

(iv) *Police Malfeasance, Incompetence and Corruption*

Allegations of police corruption and claims of a systemic failure by the police to provide adequate protection to South Africa's denizens have attracted

[1] G Cawthra *Policing South Africa: The South African Police and the Transition from Apartheid* (1993) 165.

[2] SAPS Act Chapter 6.

[3] SAPS Act ss 19, 20, 21.

[4] SAPS Act ss 19(1), 20(1), 21(1). The Minister of Safety and Security is, however, empowered by SAPS Act s 22(2) to make regulations to ensure the proper functioning of the forums.

[5] SAPS Act ss 19(3), 20(3) and 21(3).

[6] See G Newham 'Strengthening Democratic Policing in South Africa through Internal Systems for Officer Control' (2005) 36(2) *South African Review of Sociology* 160, 173–4. See also J Rauch 'Police Reform and South Africa's Transition' *Centre for the Study of Violence and Reconciliation Working Paper* 6, available at http://www.csvr.org.za/docs/policing/policebeformandsouth.pdf (accessed on 9 March 2009) 61-62.

[7] L Johns 'South Africa; New Future Mapped out for Community Police Forums' *AllAfrica.com* (9 September 2007) available at http://allafrica.com/stories/200709100345.html (accessed on 21 September 2007).

investigations and condemnation from two Chapter Nine Institutions and the Special Investigative Unit ('SIU'). The Auditor-General, the Public Protector and the SIU reports paint a bleak picture of malfeasance, incompetence and an absence of sufficient training throughout the ranks of those charged with securing our safety and security.

(aa) The Auditor-General's Report on Police Service Delivery (2009)

The Auditor-General's investigation took place during 2007 and 2008 and assessed the 'basic measures, processes or systems that should be in place at police stations and the police emergency phone line 10111'.[1] By 'basic measures', the Auditor-General's report means sector policing, vehicle management, training, community service centres, and the provision of bullet-proof vests. The report concluded that the existing practices in all of these areas fell short of the standards required by the Constitution. The short-falls ranged from the lack of an approved policy for sector policing to inadequate training and inadequate recording of cases of domestic violence. The Auditor-General found that many of these shortfalls are a result of inadequate training, a lack of funds, or both. The Auditor-General concluded that an underfunded, unskilled police force could not discharge its constitutional responsibility to protect the general population.

(bb) Public Protector's Report (2011): *Against the Rules*

In 2011, the Public Protector Thuli Madonsela released a damning report on irregularities related to the lease of two properties by the SAPS in Pretoria and Durban.[2] The report — *Against the Rules* — strongly suggests that the leases for the buildings were executed because of an untoward relationship between SAPS National Commissioner Bheki Cele and a private property owner. However, the Public Protector's findings of a potentially corrupt relationship are not nearly as important as her conclusions regarding the manifold constitutional breaches reflected in this 'property deal'.

With respect to the SAPS, the Public Protector identified the following constitutional and statutory improprieties:

1. 'Although the SAPS did not sign the lease agreement, its involvement in the procurement process was improper, as it proceeded beyond the demand management phase

[1] Auditor-General *Report on a Performance Audit of Service Delivery at Police Stations and 10111 Call Centres at the South African Police Service 2007-2008* (March 2009)('A-G's Report') 2, available at http://www.agsa.co.za/audit-reports/SAR.aspx (accessed on 10 April 2011).

[2] Public Protector *Against the Rules: Report of the Public Protector in terms of Section 182(1) of the Constitution of the Republic of South Africa, 1996 and Section 8(1) of the Public Protector Act, 1994 on an Investigation into Complaints and Allegations of Maladministration, Improper and Unlawful Conduct by the Department of Public Works and the South African Police Service relating to the Leasing of Office Accommodation in Pretoria* (2011) Report Number 33 of 2010/2011, available at www.info.gov.za/view/DownloadFileAction?id=142293 (accessed on 6 May 2011)('*Against the Rules*').

and it further failed to implement proper controls, as required by the PFMA and relevant procurement prescripts.'[1]

2. 'The SAPS failed to comply with section 217 of the Constitution, the relevant provisions of the PFMA, Treasury Regulations and supply chain management rules and policies. This failure amounted to improper conduct and maladministration.' [2]
3. 'The conduct of the accounting officer of the SAPS was in breach of those duties and obligations incumbent upon him in terms of section 217 of the Constitution, section 38 of the PFMA and the relevant Treasury Regulations. These provisions require from an accounting officer to ensure that goods and services are procured in accordance with a system that fair, equitable, transparent, competitive and cost effective. This conduct was improper, unlawful and amounted to maladministration.'[3]

Based upon these findings, the Public Protector recommended that the National Treasury determine whether there had been any fruitless or wasteful expenditure, that the Minister of Police should take action against the responsible official and that the SAPS should take steps to ensure that the same types of contraventions do not occur again.[4]

(cc) Special Investigative Unit ('SIU'): 2011 Preliminary Reports

After having assisted the Public Protector in the production of the report *Against the Rules*, the SIU announced its own preliminary findings regarding corruption in the SAPS. Willie Hofmeyr, head of the SIU, identified two primary areas of fraud and racketeering in an appearance before the National Assembly's Justice Committee:

> First: 'A lot of the stations are being built on three quotes, not on a tender process. … We have cases where the lowest quotations are not accepted, where the winning bid didn't submit a quote, possible cover quoting and BEE fronting.'[5]
> Second: 'SAPS officials [seem to have] interest in the companies to whom work was given. In many cases the payments exceeded budgeted costs.'[6]

Hofmeyr finished his initial announcement of the preliminary findings by stating the fraud was so widespread that the SIU had decided to concentrate its energies on the 20 most egregious cases.

These findings may seem rather mild. However, given an environment of rather rampant corruption, and the involvement of such role players as General Cele

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[1] T Madonsela *Address by the Public Protector, Adv Thuli Madonsela, During a media Briefing on the Release of the SAPS Lease Report* (22 February 2011) available at http://www.pprotect.org/media_gallery/2011/23022011_sp.asp (accessed on 6 May 2011).

[2] Ibid.

[3] Ibid.

[4] Ibid.

[5] T Mokone 'More Dodgy Tenders Found: SIU Tells Parliament that It Uncovered Serious Irregularities in the Building of 33 Police Stations Which Cost the Country R330,000' *The Sunday Times* (30 March 2011) available at www.timeslive.co.za/politics/article995872.ece/more-dodgy-tender-found (accessed on 6 May 2011); P Craven 'COSATU Welcomes SIU Fight against Corruption' *PoliticsWeb* (1 May 2011) available at www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid (accessed on 10 May 2011; E Ferreira 'SIU Uncovers Massive State Corruption, Says Hofmeyr' *Mail & Guardian* (31 March 2011) available at http://mg.co.za/article/2011-03-31-siu-uncovers-massive-state-corruption-says-hofmeyr (accessed on 6 May 2011).

[6] Mokone (supra).

(a close confidant of President Zuma), both the SIU and the Public Protector deserve credit for discharging their duties without fear, favour or prejudice.

23B.4 The South African National Defence Force

(a) Composition, structure and functions

The SANDF is comprised of a permanent force and a part-time reserve component.[1] The SANDF derives its primary authority from the Final Constitution. However, like the SAPS, it is governed by national legislation: the Defence Act.[2] The Final Constitution requires the SANDF to be set up and trained as a disciplined military force capable of carrying out its functions and of meeting international standards of competency.[3]

The SANDF was created by merging the SADF with the military forces of the homeland states, the ANC's armed wing, Umkhonto we Sizwe ('MK'), the armed wing of the PAC, the Azanian People's Liberation Army ('APLA'), and parts of the Inkatha Freedom Party's self-protection units.[4] The merger of the different armies, who had previously been enemies, as well as the implementation of affirmative action policies, created a significant amount of racial tension within the SANDF. That tension persists.[5] In addition, the merger vastly increased the size of the SANDF — far beyond what was necessary. One consequence of the transformation and downsizing process has been the loss of a large number of experienced SANDF members. Thus, despite its initial overcapacity, the SANDF currently struggles with a significant skills shortage.[6] During 2003, a new strategy, Human Resource Strategy 2010, was launched to eliminate human resource problems.[7] It is not yet clear what impact, if any, the strategy has had.

The primary function of the SANDF is to 'defend the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force'.[8] In terms of FC s 201(1)*(a)*, the SANDF may also be employed in support of, or in co-operation with, the

[1] IC s 226(1). See s 11 of the Defence Act. The SANDF encompasses the South African Army, the South African Navy, the South African Air Force and the South African Military Health Service. See s 12 of the Defence Act.

[2] Act 42 of 2002. See IC s 226(2) and 226(3). The 2002 Act replaces the Defence Act 44 of 1957.

[3] See IC s 226(4) and 226(5) and FC s 200(1).

[4] G Cawthra & R Luckham *Governing Insecurity: Democratic Control of Military and Security Establishments in Transitional Democracies* (2003) 41.

[5] L Heinecken 'South Africa's Armed Forces in Transition: Adapting to the New Strategic and Political Environment' (2005) 36(1) *Society in Transition* 74, 81–85. In an effort to assist and equip SANDF members to cope with the transformed military environment, a Civic Education Task Group was set up to provide training on the Final Constitution, civil-military relations, civil rights, humanitarian law as well as cultural and gender sensitivity. Cawthra & Luckham (supra) at 43. The SANDF has also had to eliminate gender-based discrimination. Women now receive the same training and are eligible to occupy the same positions, including combat positions, as their male counterparts. As a result of these changes there are now women serving in the Army, Navy and Air Force. However, Heinecken notes that a lot more still needs to be done to change attitudes towards female officers in the SANDF. Heinecken (supra) at 85–86.

[6] Heinecken (supra) at 81–85.

[7] Ibid.

[8] FC s 200(2).

SAPS.[1] The Defence Act further increases the field of activity of the SANDF by authorising the Minister of Defence or the President to employ the SANDF to

(a) preserve life, health or property in emergency or humanitarian relief operations;
(b) ensure the provision of essential services;
(c) support any department of state, including support for purposes of socio-economic upliftment; and
(d) effect national border control.[2]

Any such employment must be reported to Parliament. Parliament retains the power to amend the terms of the employment or to cancel it altogether.[3]

Members of the SANDF have substantially the same powers and immunities as members of the SAPS.[4] However, they are specifically precluded from investigating crimes and are obliged to hand over any arrested persons or seized articles to the SAPS, or any other authorised person, as soon as possible.[5] In recent years, the SANDF has been employed primarily to assist the SAPS and national departments, to control national borders and to participate in peace-keeping missions in other African countries.[6]

(b) Civil military relations

The Minister of Defence exercises overall political responsibility for the military through the Department of Defence.[7] However, only the President has the authority to employ the military to defend the country, to serve internationally, or to uphold law and order within the country in conjunction with the SAPS.[8] The President is required to inform Parliament 'promptly' when the SANDF is so employed and must provide reasons for and details about the employment.[9] Parliament has the authority to terminate any of these employments.[10]

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[1] The Minister of Defence must approve a code of conduct and operational procedures to be applied in every operation where the SANDF is employed to co-operate with the SAPS. Defence Act s 19(3) *(c)* (i).

[2] Defence Act s 18(1).

[3] Defence Act s 18(5).

[4] Defence Act ss 20(1), 20(2), 20(5), 20(6) and 20(7).

[5] Defence Act ss 20(3) and 20(4). SANDF members who are involved in border patrolling are specifically authorised to arrest and to detain persons who are 'reasonably suspected' of being illegal immigrants and to request that such persons produce evidence that they are authorised to be in the country. Defence Act s 20(9)*(a)* and *(b)*.

[6] Heinecken (supra) at 76–77.

[7] FC s 201(1).

[8] FC s 201(2). In terms of FC s 203(1) the President also has the power to declare a state of national defence. When doing so he is required to inform Parliament of the reasons and to provide relevant details about deployment of the SANDF. In terms of FC s 203(2), if Parliament is out of session, then it must be summoned to an extraordinary session. Parliament must then approve the declaration or it lapses within seven days.

[9] FC s 201(3). In addition to the requirement that the President must report any employment of the SANDF in conjunction with the SAPS to Parliament, s 19(2) of the Defence Act also requires the Minister of Defence to publish a notice to this effect in the *Government Gazette*.

[10] IC s 228(5).

The President is also the Commander-in-Chief of the SANDF and appoints the Military Command of the SANDF.[1] The Military Command exercises operational control. However, command of the SANDF is subject to the direction of the Cabinet member responsible for defence under the authority of the President.[2] Unlike the Secretary of Defence, the Military Command does not have any financial responsibility and does not report to Parliament.

Further civilian control is provided by the Defence Secretariat. The secretariat serves as the administrative arm of the Department of Defence.[3] The Secretary of Defence, who must be a civilian, is appointed by the President. The Secretary is the head of the Defence Secretariat, and is the accounting officer for the SANDF under the Public Finance Management Act.[4] In addition, the Secretary serves in an advisory capacity, monitors implementation of defence policy, and possesses investigative powers.[5]

Although the establishment of civilian control over the military through the Department of Defence has been largely successful, problems with striking the right balance between oversight and cooperation persist. Few civilians possess the requisite levels of military expertise to meet the requirements of the job. Consequently, the personnel of the Department of Defence consists of a combination of civilians and SANDF members.[6]

Parliamentary oversight is conducted through a multiparty Joint Standing Committee on Defence ('JSCD'). This committee is empowered to investigate and to make recommendations regarding the budget, functioning, organisation, armaments, policy, morale and state of preparedness of the SANDF. The Minister for Defence is accountable to Parliament. Parliament also approves the annual budget for the SANDF.

A Military Ombudsman currently operates out of the Office of the Public Protector. The Ombudsman must address any matters related to military personnel that cannot be resolved through other existing mechanisms. According to Heinecken, the Ombudsman's placement outside defense structures 'has left a vacuum in terms of reporting complaints and malpractice within the DOD.'[7] That role has, instead, been assumed by the South African National Defence Union.[8]

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[1] FC s 202(1).

[2] FC s 202(2).

[3] FC s 204(1). Defence Act s 6 establishes the Defence Secretariat.

[4] Defence Act ss 7(1) and 7(3) and 8*(a)*.

[5] These powers encompass the ability to order investigations by the Chief of the Defence Force or the Military Police. Defence Act s 8. The Military Police consists of SANDF members who perform a police function within the SANDF. Their primary duty is to prevent and to investigate crimes as well as to maintain law and order within the SANDF. They possess the same powers as the SAPS. See Defence Act ss 30–31.

[6] Cawthra & Luckham (supra) at 40. See also Heinecken (supra) at 79.

[7] Heinecken (supra) at 79.

[8] As Heinecken notes:

> SANDU requested an investigation against the Officer Commanding of the South African Military Academy for unilaterally transferring several academic assistants back to their units, racism and mismanagement of the unit's affairs. The union used the media to bring these matters to the attention of the public and the Parliamentary Portfolio Committee on Defence and Minister of Defence.

Heinecken (supra) at 79. Other countries have a military ombudsman that operate within the defence forces. On the ombudsman in the Canadian armed forces, see 'National Defence and Canadian Forces Ombudsman' available at http://www.ombudsman.dnd.ca/au-ns/faq/index-eng.asp (accessed on 6 May 2011).

(c) Military discipline

In *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence*, the Constitutional Court ruled on two cases that raised related issues regarding military discipline.[1] *Potsane* was an appeal by the Minister of Defence ('the Minister') against a judgment declaring sections of the Military Discipline Supplementary Measures Act unconstitutional.[2] Potsane argued that provisions of the Act were inconsistent with FC s 179. Section 179 provides that '[t]here is a single national prosecuting authority' in South Africa headed by the National Director of Public Prosecutions ('NDPP'). The soldiers asserted that the prosecuting authority of the military courts infringes an exclusive power of the NDPP and was, therefore, unconstitutional. The exercise of such power by the military court was also alleged to be a violation of their right to equality under FC s 9.[3] The soldiers argued that the plain language of FC s 179 makes it clear that military courts could not retain any prosecutorial authority.

The Minister rejected the superficial reading offered by the soldiers and contended that historical context and contemporary reality were essential for a proper interpretation of FC s 179. The purpose of FC s 179 was not to preclude military courts from exercising prosecutorial power. The intent of FC s 179 was, rather, to consolidate the multiple prosecutorial offices established under apartheid into one national office in a unified South Africa.[4] The Minister then asserted that FC s 179 must be read in light of other constitutional mandates and the unique role of the military.[5] An efficient and effective system of military justice is a prerequisite for maintaining military discipline.[6] Thus, whereas the priority for a civilian prosecutor is to prosecute civil and criminal claims, military prosecutions are designed to maintain military discipline. The Minister concluded that inserting the NDPP into the military justice process would undermine military discipline.[7]

The *Potsane* Court found that FC s 179 did not render prosecutorial authority within military courts invalid. It agreed with the Minister and reasoned that such

[1] 2002 (1) SA 1 (CC), 2001 (11) BCLR 1137 (CC), [2001] ZACC 12 ('*Potsane*').

[2] Act 16 of 1999. The armed forces have also developed the following Code of Conduct (2000) for SANDF members: 'I pledge to serve and defend my country and its people in accordance with the Constitution and the law and with honour, dignity, courage and integrity. I serve in the SANDF with loyalty and pride, as a citizen and a volunteer. I respect the democratic political process and civil control of the SANDF. I will not advance or harm the interests of any political party or organisation. I accept personal responsibility for my actions. I will obey all lawful commands and respect all superiors. I will refuse to obey an obviously illegal order. I will carry out my mission with courage and assist my comrades-in-arms, even at the risk of my own life. I will treat all people fairly and respect their rights and dignity at all times, regardless of race, ethnicity, gender, culture, language or sexual orientation. I will respect and support subordinates and treat them fairly. I will not abuse my authority, position or public funds for personal gain, political motive or any other reason. I will report criminal activity, corruption and misconduct to the appropriate authority. I will strive to improve the capabilities of the SANDF by maintaining discipline, safeguarding property, developing skills and knowledge, and performing my duties diligently and professionally.'

[3] *Potsane* (supra) at para 4.

[4] Ibid at para 20.

[5] Ibid at para 22.

[6] Ibid at para 23.

[7] Ibid at para 40.

authority was indispensable for the objects of military justice.[1] In order to make sense of the word 'one' in FC s 179, it found that it referred solely to prosecutorial power with respect to civilian matters. FC s 179 did not go so far as to create an exclusive prosecuting authority that would apply in all contexts.[2] The Court concluded that if such a sweeping change had been intended, then it would have been made explicit in the text. (It noted that military prosecutions are not referred to in FC s 179.[3]) The Court recognised that the military constitutes a distinct subculture. The Court continued: 'Although the overarching power of the Final Constitution prevails, and although the Bill of Rights is not excluded, the relationship between the SANDF and its members has certain unique features.'[4] (The Court found it noteworthy that the soldiers could not find any precedent for the system of military prosecution by civil authorities that they sought.[5])

The *Potsane* Court reached two discrete conclusions. First, it held that FC s 179 did not render the challenged sections of the Act unconstitutional. Second, it concluded that military prosecution did not violate the right to equality as it was 'rationally connected to the legitimate government purpose of establishing and maintaining a disciplined military force with a viable military justice system' and did not discriminate on a prohibited ground.[6]

(d) Limitations on the rights of SANDF members

The Constitutional Court has recognised that members of the SANDF are generally entitled to the same constitutional solicitude that ordinary civilians receive. In *SANDU CC I,* the Court stated that '[m]embers of the Defence Force remain part of our society with obligations and rights of citizenship.'[7] And yet, the Court has simultaneously acknowledged that the Final Constitution demands that we differentiate between those in military uniform and those without.

The Defence Act contains a number of limitations on the rights of SANDF members:

(i) members of the permanent force are precluded from holding office in any political party or political organisation or serving in any legislative body;[8]

(ii) the rights of members to join or participate in the activities of trade unions and to demonstrate or picket can be subjected to limitations;[9]

(iii) their private communications with people inside or outside of the SANDF may be subjected to screening 'to the extent necessary for military security and for safety of members of the Defence Force and employees'.[10]

[1] *Potsane* (supra) at paras 24, 26.
[2] Ibid at para 26.
[3] Ibid at para 30.
[4] Ibid at para 21.
[5] Ibid at para 41.
[6] Ibid at para 44.
[7] *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) ('*SANDU CC I*') at para 12.
[8] IC s 226(6). See also Defence Act s 50(8)*(a)*.
[9] Defence Act s 50(6) and (4).
[10] Defence Act s 50(2)*(b)*.

It is noteworthy, ironic, and perhaps symbolic of progress in South Africa, that the members of the armed forces, who were once centrally involved in resisting the transition to democracy, have been fairly active in asserting their rights under the Final Constitution. This activism has been particularly evident in the field of labour rights.

In 1994, the South African National Defence Union ('SANDU') was formed. The government vigorously opposed unionisation of the SANDF. However, through a series of constitutional challenges launched by SANDU, the courts have confirmed the right of SANDF members to form a trade union and to engage in collective bargaining.

In *SANDU CC I*, the Constitutional Court upheld the rights of members of the defence force to participate in public protest and to join trade unions.[1] The Transvaal High Court had found s 126B of the Defence Act 44 of 1957 unconstitutional and invalid to the extent that it prohibited defence force members from participating in protest action and becoming members of trade unions. The Minister of Defence and the Chief of SANDF only challenged the lower court order with respect to the prohibition on trade union membership. However, the court was obliged to analyse the public protest issue so that it could confirm the lower court's order.

The impugned section regarding public protest is worth quoting in full. Section 126B of the Act provided that:

> (1) A member of the Permanent Force shall not be or become a member of any trade union as defined in section 1 of the Labour Relations Act, 1956 (Act 28 of 1956). Provided that this provision shall not preclude any member of such Force from being or becoming a member of any professional or vocational institute, society, association or like body approved by the Minister.
>
> (2) Without derogating from the provisions of sections 4*(b)* and 10 of the Military Discipline Code, a member of the South African Defence Force who is subject to the said Military Discipline Code, shall not strike or perform any act of public protest or participate in any strike or act of public protest or conspire with or incite or encourage, instigate or command any other person (whether or not such person is a member of the South African Defence Force or an officer or employee referred to in section 83A(2) serving in the South African Defence Force or a member of any auxiliary or nursing service established under this Act) to strike or to perform such an act or to participate in a strike or such an act.
>
> (3) A member of the South African Defence Force who contravenes subsection (1) or (2), shall be guilty of an offence.
>
> (4) For the purpose of subsection (2) 'act of public protest' means any act, conduct or behaviour which, without derogating from the generality of the aforegoing, includes the holding or attendance of any meeting, assembly, rally, demonstration, procession, concourse or other gathering and which is calculated, destined or intended to influence, support, promote or oppose any proposed or actual policy, action, conduct or decision of the Government of the Republic of South Africa or another country or territory or any proposed or actual policy, action, conduct or decision of any public or parastatal authority of the Republic or another country or territory or to support,

[1] *South African National Defence Union v Minister of Defence* 1999 (4) 469 (CC), 1999 (6) BCLR 615 (CC), [1999] ZACC 7 ('*SANDU CC I*').

> promote, further, oppose or publicise any real or supposed private or public interest, object, principle, cause, concern, demand or claim, grievance, objection or outrage or to indicate, demonstrate or display real or supposed private or public support for, opposition or objection to, dissatisfaction, sympathy, association or solidarity with, or concern or outrage regarding any such policy, action, conduct, decision, interest, object, principle, cause, concern, demand or claim, grievance, objection or outage, or to do so in relation to any event or occurrence of national or public concern, importance or significance, or eliciting national or public concern or interest, in such manner as to attract or direct thereto, or be calculated, destined or intended to attract or direct thereto, the attention of *(i)* any such Government or authority; (ii) any other country, territory or international or multinational organization, association or body; or (iii) the public or any member or sector of the public, whether within or outside the Republic; 'strike' means any strike as defined in section 1 of the Labour Relations Act 1956.

The Constitutional Court in *SANDU CC I* provides a coherent account of the relationship between the general commitment to freedom of expression (and its concomitant commitment to content-neutrality) and the appropriate conditions under which the content of speech by members of the military may be restricted. *SANDU CC I* holds that the purpose of the mutually supporting expressive rights found in Chapter 2 — FC ss 15, 16, 17, 18, 19 — is to enable

> groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.[1]

That said, the Final Constitution makes its plain that public servants, especially those in the security services, have obligations and duties that may legitimately restrict their expressive conduct. FC s 199(7) states:

> Neither the security services, nor any of their members, may, in the performance of their functions — *(a)* prejudice a political party interest that is legitimate in terms of the Constitution; or *(b)* further, in a partisan manner, any interest of a political party.

The *SANDU CC I* Court concludes that FC s 199(7) stands for the proposition that 'members of the Defence Force may not, in the performance of their functions, act in a partisan political fashion.'[2] However, the prolix 255 word definition of 'act of public protest' found in s 126B covered conduct ranging from 'holding or attendance of a meeting which is calculated to support or oppose any policy or conduct of the government or of a foreign government' to any indication of 'private or public support or opposition regarding any policy, conduct or principle' or 'any event of national or public concern.' The long but still nonexhaustive definition of public protest could capture complaints made by a defence force member to her husband in relation to absolutely any 'event of national or public

[1] *SANDU CC I* (supra) at para 8.
[2] Ibid at para 11.

concern.' Such a complaint could never be accurately described as public protest or partisan political conduct. So while the *SANDU CC I* Court recognised the constitutional imperative of an impartial military, the Court found that these provisions were unnecessary to achieve that objective and unreasonably infringed the soldiers' fundamental rights.[1] As a result, the Constitutional Court held that the Defence Act's gloss on the term 'public protest' in s 126B(2) and the extension of its definition of 'act of public protest' in s 126B(4) were unconstitutional. It severed both subsections from the Act.

Regarding the outright ban on trade union membership, the respondents argued that it was reasonable and essential because of the constitutional mandate of a 'disciplined military'.[2] The respondents so argued despite the applicant's concession that such a right, with respect to the military, did not embrace the right to strike.[3] Pace *Potsane,* the Court was unpersuaded by the respondents' reasoning. The Court found that the term 'worker' in FC s 23 encompassed SANDF members and concluded that the relationship between the soldiers and the military was 'akin', although not identical, to a normal employment relationship that would entitle SANDF members to the protections of FC s 23.[4] O'Regan J then concluded that an outright ban on trade union membership could not be justified in terms of FC s 36.[5]

In *SANDU HC I*,[6] the High Court reviewed the constitutionality of a set of regulations promulgated in response to the decision of the Constitutional Court in *SANDU CC I*.[7] The High Court held that the regulations that specified conditions for peaceful demonstration, prohibited union affiliation or closed shop agreements, barred members from securing union-sponsored legal representation and allowed for withdrawal of union recognition without notice infringed SANDU's and SANDF members' constitutional rights to collective bargaining (FC s 23), assembly (FC s 17), and association (FC s 18).

The High Court, in *South African National Defence Union v Minister of Defence* ('*SANDU HC II*'), found several additional provisions of the Military Regulations[8]

[1] *SANDU CC I* (supra) at paras 11–13. The Court concluded that a well-tailored prohibition regarding the free expression rights of *uniformed* defence force members might be constitutionally acceptable under the limitations clause. Ibid at para 18.

[2] FC s 200(1) reads: 'The Defence Force must be structured and managed as a disciplined military force.'

[3] *SANDU CC I* (supra) at para 33.

[4] Ibid at paras 35–36.

[5] The Court noted that the unique nature of the military might require certain constraints on a trade union and that such constraints might pass constitutional muster if they met the requirements of FC s 36. For more on *SANDU CC I*, see S Woolman 'Freedom of Assembly' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 43; S Woolman 'Freedom of Association' in S Woolman, M Bishop, & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44; M Chicktay 'Mission Impossible: Trade Union and Protest Action Rights in the Military: *South African National Defence Union v Minister of Defence*' (2000) 16 *SAJHR* 324.

[6] 2003 (9) BCLR 1055 (T).

[7] *Government Gazette* No 998 (20 August 1999).

[8] Amendment to the General Regulations for the South African National Defence Force and Reserve *Government Gazette* Vol 411 No. 20425 (1 September 1999).

constitutionally infirm.[1] The *SANDU HC II* court held that regulation 37(1) and (2) contravened the right to engage in collective bargaining protected under FC s 23(2)*(b)*. Under FC s 23(2)*(b)*, 'every worker has the right to participate in the activities and programmes of a trade union.' The *SANDU HC II* court, per Smit J, also ruled that regulation 37 violated the right to engage in collective bargaining. Furthermore, regulation 13*(a)*'s total ban on military trade unions' affiliating or associating with any labour organisation, labour association, trade union or labour federation that is not recognised and registered infringed the right of a trade union to form and join a federation protected under FC s 23(4)*(c)*. Again, the Minister of Defence invoked the constitutional imperative of a 'disciplined military'[2] to argue that the regulation's restrictions on association rights were proper. The Minister asserted that the proscriptions were justified in the interest of keeping the force politically independent.[3] The *SANDU HC II* court dismissed both arguments by the Minister and ordered the constitutionally repugnant provisions severed from the regulations.[4]

In yet another SANDU decision — *South African National Defence Union v Minister of Defence and Others* — ('*SANDU HC III*') — the High Court, per Van der Westhuizen J, was asked to determine whether the Final Constitution, and FC s 23(5), imposed any duty on the Minister and the Department of Defence to bargain

[1] Unreported, TPD case no 15790/2003 (14 July 2003).

[2] See FC s 200(1).

[3] See FC s 199(7).

[4] *SANDU HC II* (supra) at 41 - 42. Regulations 3*(c)*, 8*(b)*, 13*(b)*, 19*(b)*, 25, 27, 36, 37(1), 37(2), 41, 53 and 73 were declared unconstitutional in terms of FC ss 16(1), 17, 18, 23(1), 23(2)*(b)*, 23(4)*(c)*, 23(5), 27*(b)*, 33(1), 34, 35(3). The High Court, as a remedy, either varied the regulations so that they would conform with constitutional dictates or severed them from the rest of the regulations. The order read, in pertinent part, as follows: 'It is declared that the first respondent is under a duty to negotiate with the first applicant within the Military Bargaining Council and otherwise on all matters of mutual interest (including the contents of, and amendments to, the General Regulations promulgated or to be promulgated in terms of the Defence Act) that might arise between the first respondent in his official capacity as the employer on the one hand, and the first applicant and/or its members on the other; The first respondent is directed with immediate effect to negotiate with the first applicant within the Military Bargaining Council and otherwise on all matters of mutual interest that might arise between the first respondent in his official capacity as the employer on the one hand, and the first applicant and/or its members on the other; Subsection 8*(b)* of the regulations is declared to be inconsistent with the Constitution and invalid, and such subsection is severed from the Regulations; Subsection 13*(a)* of the Regulations is declared to be inconsistent with the Constitution and invalid, and such subsection is severed from the Regulations; Section 19 of the regulations is declared to be inconsistent with the Constitution and invalid, and such section is severed from the regulations; The words 'but not to representation' in ss 25*(a)* of the regulations are declared to be inconsistent with the Constitution and invalid, and such words are severed from the regulations; The omission of the words 'and represent' after the word 'assist' in ss 25*(a)* of the regulations is declared to be inconsistent with the Constitution, and ss 25*(a)* of the regulations is to be read as though the following words appear therein after the word 'assist': 'and represent'; The omission of the words 'and represent' after the word 'assist' in ss 25*(b)* of the regulations is declared to be inconsistent with the Constitution, and ss 25*(b)* of the regulations is to be read as though the following words appear therein after the word 'assist': 'and represent'; The proviso to s 27 of the regulations is declared to be inconsistent with the Constitution and invalid, and it is severed from the Regulations; The omission of the words 'and represent' after the word 'assist' in ss 27*(a)* of the regulations is declared to be inconsistent with the Constitution, and ss 27*(a)* of the regulations is to be read as though the following words appear therein after the word 'assist': 'and represent'; The omission of the words 'and represent' after the word 'assist' in ss 27*(b)* of the regulations is declared to be inconsistent with the Constitution, and ss 27*(b)* of the regulations is to be read as though the following words appear therein after the word 'assist': 'and represent';

collectively with a military trade union.[1] The High Court held that although FC s 23(5) recognises the right to engage in collective bargaining, it does not impose a corresponding duty on any of the parties to do so. (Of course, the absence of a duty did not mean that that the employer could 'capriciously, at its mere whim or simply because of inconvenience or difficulty, decide not to negotiate.'[2]) What is, perhaps most striking about *SANDU HC III* is the tone. The High Court found that SANDU's behaviour was unacceptable and could seriously undermine the morale and the discipline within the SANDF. Moreover, the government — in this case, the Minister and the Department of Defense — were viewed as having acted reasonably in setting the preconditions for a new round of negotiations.[3]

The Supreme Court of Appeal, in *South African National Defence Union v Minister of Defence* ('*SANDU SCA I*') revisited the question of whether there is a legally enforceable duty on the SANDF to engage in collective bargaining with SANDU.[4] The Supreme Court of Appeal confirmed the reasoning of Van der Westhuizen J in *SANDU HC III* — and set aside the unreported decision of Bertelsmann J in *SANDU HC I*. In short, the Supreme Court of Appeal, per Conradie JA, held that:

> [T]he Constitution, while recognising and protecting the central role of collective bargaining in our labour dispensation, does not impose on employers or employees a judicially enforceable duty to bargain. It does not contemplate that, where the right to strike is removed or restricted but is replaced by another adequate mechanism, a duty to bargain arises.[5]

The *SANDU SCA I* court went further and found that 'one cannot read an intention to impose judicially enforceable bargaining on the SANDF into the regulations.'[6]

Section 37 of the regulations is declared to be inconsistent with the Constitution and invalid, and such section is severed from the regulations; The word 'certain' in s 3*(c)* of the regulations is declared to be inconsistent with the Constitution and invalid, and this word is severed from the regulations; Section 36 of the regulations is declared to be inconsistent with the Constitution and invalid to the extent that it purports to limit the right of military trade unions to engage in collective bargaining to the matters listed in ss *(a)–(e)*; Section 73 of the regulations is declared to be inconsistent with the Constitution and invalid to the extent that it empowers the first respondent to appoint the members of the Military Arbitration Board.'

[1] The applicant (SANDU) was a trade union which represented somewhere between 33 per cent (according to the applicant) and 28 per cent (according to the respondents) of the SANDF. The applicant was the only military union which, along with the Department of Defence (DOD), as employer, had been admitted to the Military Bargaining Council (MBC). It was the only union which, at that stage, satisfied the required threshold of 15 000 members. The negotiations in the MBC had met with very little progress. A series of threats and counter-threats followed. An ultimately calmer view of the need for continuing negotiations prevailed — but the nature and the conditions for negotiation were viewed differently by the two sides. Those differences led to litigation over the constitutional, the statutory and the regulatory issues raised in the instant matter.

[2] *SANDU HC III* (supra) at 256–257.

[3] Ibid at 261.

[4] *South African National Defence Union v Minister of Defence & Others; Minister of Defence & Others v South African National Defence Union & Others* 2007 (1) SA 402 (SCA)('*SANDU SCA I*').

[5] Ibid at para 25.

[6] Ibid at para 29.

In *Minister of Defence & Others v South African National Defence Union; Minister of Defence & Others v South African National Defence Union & Another* ('*SANDU SCA II*'), the Supreme Court of Appeal revisited many of the issues raised in *SANDU HC II*.[1] The *SANDU SCA II* court found that almost all of the regulations in the General Regulations for the South African National Defence Force and Reserve held to be invalid in *SANDU HC II* were, in fact, constitutionally permissible. The sole regulation held to be constitutionally invalid was regulation 19. As Nugent JA, for the *SANDU SCA II* court, wrote:

> Regulation 19 is clear in its terms. The matters that it purports to exclude from collective bargaining (the negotiation of a 'closed shop or agency shop agreement') are undoubtedly legitimate labour issues … Counsel for the SANDF sought to persuade us that the exclusion of these matters from permitted bargaining was justified in a military establishment, but was not able to articulate precisely why that was so. Whether a closed shop or agency agreement is antithetical to a military establishment seems to me to depend on the terms of the particular agreement, and in particular on the bargaining unit to which such an agreement applies. While it is not difficult to envisage a closed shop agreement that is incompatible with a military establishment, it is also not difficult to envisage such an agreement that is compatible with it. I can see no reason, in the circumstances, why a total prohibition on negotiating such an agreement is reasonable and justifiable, and in my view the regulation was correctly declared to be invalid.[2]

As noted above, the Constitutional Court, in *SANDU CC II*, consolidated all the various *SANDU* cases that had percolated up through the High Courts and the Supreme Court of Appeal. The *SANDU CC II* Court rejected virtually all of SANDU's challenges to the regulations (most of which concerned rights regarding collective bargaining.) It did, however, uphold a limited right for SANDU members to assemble or demonstrate (out of uniform) with regard to employment conditions in terms of regulation 8*(b)*,[3] and rejected a claim by SANDF that 'the regulations do not impose an obligation upon it to exhaust the [collective bargaining] procedures set out in the regulations [because] the very purpose of the regulations is to prevent unilateral action by the SANDF in respect of the areas of permissible bargaining until the procedures provided for in the regulations have been exhausted.'[4]

23B.5 South African Intelligence Services

(a) Composition, structure and functions

The intelligence services consist of two civilian intelligence agencies, the National Intelligence Agency ('NIA') and the South African Secret Service ('SASS'), together with the military intelligence division of the SANDF and the Crime Intelligence Division ('CID') of the SAP. The military intelligence division of the SANDF and the CID are autonomous entities falling under the control and the direction of the Departments of Defence and of Police respectively, whilst the

[1] 2007 (1) SA 422 (SCA)('*SANDU SCA II*').
[2] Ibid at para 16.
[3] *SANDU CC II* (supra) at paras 81-82.
[4] Ibid at para 72.

NIA and SASS were specifically created under the Intelligence Services Act.[1] A National Intelligence Co-ordinating Committee ('Co-ordinating Committee') is responsible for co-ordinating intelligence emanating from these different agencies. As to the membership of the current intelligence services, it is composed primarily of former operatives from the National Intelligence Service of the apartheid regime, the Department of Intelligence and Security of the ANC, the Pan-Africanist Security Service of the PAC, and the intelligence forces of the Transkei, Bophuthatswana, Venda and Ciskei.[2]

The President has the sole authority to establish an intelligence service. However, he possesses no authority to establish an intelligence division within the military or the police.[3] In addition, the President is required to appoint the head of the NIA and the SASS.[4] The President may choose to exercise political responsibility for any intelligence services he establishes. Or he can appoint a member of Cabinet to exercise this function.[5] In practice, the President has appointed a Minister for Intelligence Services, recently renamed the 'Minister for State Security', who works together with a Cabinet Committee on Security and Intelligence Affairs.

The principal task of the NIA is to inform government of threats to domestic security.[6] The SASS is responsible for foreign intelligence, excluding foreign military intelligence, and conducts intelligence regarding external threats, opportunities and other issues with the aim of promoting the national and security interests of South Africa.[7] The CID is restricted to the gathering of intelligence on crime.[8] The military intelligence division of the SANDF is responsible for domestic and foreign military intelligence.[9]

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[1] Act 38 of 1994. This Act has since been repealed and replaced by the Intelligence Services Act 65 of 2002.

[2] K O'Brien 'Controlling the Hydra: A Historical Analysis of South African Intelligence Accountability' in H Born, L Johnson & I Leigh (eds) *Who's Watching the Spies? Establishing Intelligence Service Accountability* (2005) 200, 207.

[3] FC s 209(1).

[4] FC s 209(2). The NIA and SASS are each headed by a Director General appointed by the President. See Intelligence Services Act ss 3*(a)* and *(b)*.

[5] FC s 209(2).

[6] National Strategic Intelligence Act 39 of 1994 s 2(1). Counterintelligence broadly refers to 'the protection of the state and its secrets from other states and organizations.' S Boraz & T Bruneau 'Reforming Intelligence: Democracy and Effectiveness' (2006) 17 *Journal of Democracy* 28, 30. The National Strategic Intelligence Act defines counterintelligence as '… measures and activities conducted, instituted or taken to impede and to neutralise the effectiveness of foreign or hostile intelligence operations, to protect intelligence and any classified information, to conduct security screening investigations and to counter subversion, treason, sabotage and terrorism aimed at or against personnel, strategic installations or resources of the Republic'.

[7] National Strategic Intelligence Act s 2(2).

[8] National Strategic Intelligence Act s (2).

[9] National Strategic Intelligence Act s 2(4). Domestic and foreign military intelligence are separately catered for and defined in the Act. Domestic military intelligence refers to intelligence required for the planning and conduct of military operations within the country to ensure the safety of South Africans. Foreign military intelligence refers to intelligence regarding the war potential and military establishments of foreign countries that can be used by South Africa to plan its military forces in times of peace and for the conduct of military operations in times of war. The conduct of domestic military intelligence is restricted and proper authority must be obtained before the intelligence division of the SANDF can conduct intelligence covertly to support police within South Africa. See National Strategic Intelligence Act s 2(4) read with s 3(2).

The intelligence agencies serve a function quite distinct from that of the SAP and SANDF. Their work is often done surreptitiously, requires close communication with the national executive, and is highly specialised. Moreover, intelligence gathering is inherently political in nature: its ultimate aim is to guide the executive in constructing policy decisions on sensitive issues concerning security and relations with other sovereign nations. Consequently, the constitutional provisions governing political control over the intelligence services differ somewhat from the nature of the oversight of other security services. Thus, while the duties and the responsibilities of the police and the defence forces are expressly provided for in the Final Constitution, these details, with respect to the intelligence services, are enumerated in national legislation.[1] Whereas a secretariat exercises civilian oversight over other services, an Inspector-General of Intelligence ('IG') fulfils this role with respect to the intelligence services.[2] Furthermore, with the exception of the intelligence services for police and defence, the President may exercise direct political control over the intelligence services.[3]

(b) Control, oversight and accountability

Oversight refers to the process of holding the intelligence services accountable to the public for their actions and is largely an ex post facto exercise. An oversight mechanism for the intelligence services can be considered effective if it 'has an independent status from the executive, investigative powers, access to classified documents, and a committee able to keep secrets and sufficient expertise.'[4] Control, on the other hand, refers to the 'day-to-day management' of the intelligence services.[5] Control of intelligence agencies commonly rests with the executive. However, as with all government entities, specific officials are charged with the direct day-to-day functioning of the agencies.

(i) *Parliamentary oversight*

As with the SANDF and the SAPS, a parliamentary committee, known as the Joint Standing Committee on Intelligence ('JSCI'), is responsible for monitoring the intelligence services.[6] The JSCI is empowered to investigate the intelligence community's activities on its own accord or upon receipt of complaints from the public.[7] In

[1] See FC s 210.

[2] See FC s 210*(b)*.

[3] Compare FC s 201(1) and FC s 206(1), which require the appointment of Cabinet members to exercise political responsibility for the defence force and the police, with FC s 209(2), which grants the President the option of assuming direct political responsibility.

[4] H Born & L Johnson 'Balancing Operational Efficiency and Democratic Legitimacy' in Born et al (supra) at 226.

[5] Ibid at 236.

[6] Intelligence Services Oversight Act 40 of 1994 ('Oversight Act') s 2. The composition of the JSCI is determined by the proportional representation of the political parties in Parliament. Oversight Act s 2(2)*(a)*. The deliberations of the JSCI are not open to the public.

[7] Complaints from the public can be referred to the head of an intelligence service or the IG for investigation. Oversight Act s 3*(f)*. If the JSCI is of the opinion that a matter relates to the protection of constitutional rights, it may also refer the matter to the Human Rights Commission. Oversight Act s 3*(g)*.

carrying out its task, the JSCI is permitted to hold hearings, to subpoena witnesses, and to receive any information that is necessary for the performance of its mandate.[1] The JSCI receives annual reports from the Inspector General of Intelligence and the various intelligence services.[2] The committee itself must report annually to Parliament on its activities and those of the intelligence services.[3]

(ii) *Inspector-General*

The Final Constitution requires that civilian monitoring of the intelligence services take place in the form of an Inspector-General appointed by the President and approved by a resolution adopted by at least two-thirds of the National Assembly.[4] In terms of the Intelligence Services Oversight Act ('Oversight Act'), an IG must be nominated by the JSCI and approved by two thirds of the members of the National Assembly. Section 7(1) of the Oversight Act states that the President 'shall' appoint a person who has been duly nominated and approved by Parliament. The import of this wording is that the President has no discretion when it comes to the appointment of an IG. He or she must implement the decision taken by Parliament.

In light of these provisions, the procedure for removal of the IG seems anomalous. Section 7(4) of the Oversight Act empowers the President to remove the IG from office on the basis of '… misconduct, incapacity, withdrawal of his or her security clearance, poor performance or incompetence as prescribed.' No specific provision is made for the JSCI to be consulted with regard to the dismissal of the IG. However, s 7(5) of the Oversight Act states that '[i]f the Inspector-General is the subject of an investigation by the [JSCI] in terms of sub-s (4) he or she may be suspended by the President pending a decision in such investigation.' One might infer from s 7(5) that the JSCI is empowered to undertake an investigation to establish whether the conduct of the IG satisfies any of the grounds for dismissal under s 7(4).

Although the Oversight Act may contemplate two discrete mechanisms for removal, the better reading of the aforementioned section requires that s 7(4) and s 7(5) be read together. Such a reading would permit the President to remove the IG only if the JSCI has undertaken an investigation and concluded that the IG's conduct meets the requirement of s 7(4). Such an interpretation better fits the National Assembly's powers of approval of the IG in terms of FC s 210. So although FC s 210*(b)* does not provide for the removal of the IG, once the National Assembly has approved a particular person for the post of IG, it makes sense that it should be consulted about his or her removal. Furthermore, this reading of the Act and FC s 210 possesses the added virtue of protecting the

[1] See Oversight Act ss 3*(j)*, 4(1) and 4(3). The intelligence services may withhold information concerning the identities of intelligence operatives as well as the identities of sources of intelligence under certain circumstances. Oversight Act s 4(2).

[2] Oversight Act ss 7(6) and 7(11)*(d)*.

[3] Oversight Act s 6(1).

[4] See FC s 210*(b)*.

independence of the IG and of preventing him or her from being subject to undue pressure from the President through the threat of unilateral dismissal.[1]

In addition to oversight, the IG handles complaints from the public, as well as members of the intelligence services, about various forms of misconduct on the part of the intelligence services.[2] In order to carry out these functions, the IG has the power to enter any premises under the control of any intelligence service or any civilian premises that he or she deems it necessary to enter, and to demand intelligence information from members of the intelligence services or civilians in the possession of such information.[3] Over and above his investigative powers, the IG receives information in the form of annual reports as well as reports on '… any unlawful intelligence activity or significant intelligence failure' from the heads of the security services.[4] The IG is supported in his task by staff specifically assigned to him from the office of the Minister of Intelligence.[5] It seems obvious that such an assignment of intelligence staff undercuts the IG's independence. The IG can hardly be called independent when he or she takes direction or relies on operational assistance from the very executive entities he or she may be called upon to investigate.[6] One can owe loyalty to but one master.

Some measure of independence — at least on paper — is secured by Parliament's control over the IG's budget.[7] (Of course, that last proposition assumes an independent Parliament with respect to budgetary matters: thus far, the Executive has demonstrated that it exercises the lion share of power over annual budgets and line items within the budget.)

[1] A further anomaly with regard to the dismissal of the IG is that, in terms of s 8(1)*(d)* of the Oversight Act, the Minister of Intelligence is empowered to make regulations with regard to the suspension or removal of the IG as well as the termination of employment of the IG. As discussed above, the Oversight Act appears to place the decisions regarding the appointment, dismissal and suspension of the IG with the President and the JSCI. The Minister does not have any role to play in this regard. It is therefore unclear how the regulations to be made by the Minister would fit into the sections discussed above. It is suggested that as s 7(4) of the Oversight Act requires that the President may remove the IG on the basis of '… misconduct, incapacity, withdrawal of his or her security clearance, poor performance or incompetence as prescribed' such regulations should be limited to defining the scope of the factors for dismissal listed in s 7(4) and defining the procedural aspects relating to suspension of or dismissal of the IG.

[2] Oversight Act s 7(7)(cA).

[3] Oversight Act s 7(8). In the case of civilians, the IG is only entitled to information if it is 'necessary' for the performance of his functions. An appropriate search warrant under the Criminal Procedure Act 51 of 1977 must also be obtained before civilian premises can be entered. Oversight Act s 7(8)*(c)*. The same principles do not apply to information held by intelligence agencies. On the contrary, the Oversight Act s 7(9) specifically states that '[n]o access to intelligence information or premises contemplated in sub-s 8*(a)* may be withheld from the Inspector-General on any ground.'

[4] Oversight Act s 7(11).

[5] Oversight Act s 7(12). The Minister is responsible for the appointment of such staff: but he or she is required to consult with the IG with regard to such appointments.

[6] Ultimately, the report of the IG was rejected by the National Executive Council of the ANC. The ANC's NEC chose to launch its own investigation. Institute for Security Studies (supra) at 27. The rejection of the IG's report may indicate a lack of confidence and trust in the office. However, the rejection of the report may merely be a function of the hard-ball politics that have become a regular feature of the ANC presidential succession debate. It may not reflect a genuine lack of confidence in the IG.

[7] Oversight Act s 7(13).

The office of the IG has been faced with a number of challenges. Prior to the commencement of the tenure of the previous IG in 2004, the office of the IG remained largely vacant. Government apparently could not attract a suitable candidate to hold down the position for more than a few months at a time.[1] The reason for this high turnover in the post remains unclear. However, the lack of a stable occupant in the post initially stunted the development of the IG's office.[2] The difficulties faced by an office operating under such limitations — and the dangers it posed to an intelligence community serving a constitutional democracy — were candidly summarized by Imtiaz Fazel in 2009:

> Recent investigations conducted by the office have highlighted a number of abuses and malpractices in sections of the intelligence community, which has severely tested our oversight capacity and ability to access information. While we believe that we have acquitted ourselves well under very difficult circumstances, the challenges inherent in pioneering intelligence oversight in South Africa were amplified and many valuable lessons were drawn. In the process, the cardinal requirement upon which the democratic functioning of intelligence hinges, the rule of law and due process, was re-established, and *the notion of bending the rules* was banished from the philosophy of intelligence conduct, while the intelligence mandate was re-examined and tightened up in certain areas.[3]

The position was ultimately given the solidity and stability that it required. ZT Ngcakani held the post for a period of six years — from 2004 through 2010. As a high level ministerial report recognized, however, even a stable IG at the helm cannot make up for other deficiencies if 'there is a substantial gap between the Office of the Inspector-General's legislative mandate and its organizational capacity.'[4] Even with a current complement of 14 staff members — and a potential doubling of that staff to 28 — the report concluded that the IG lacked the manpower necessary to 'prevent and detect misconduct and illegality in the intelligence community … without additional resources.'[5] It deemed the proposed budget increases insufficient to meet the IG's substantial responsibilities (even as it suggested reducing those responsibilities to solely those discharged by an ombudsman). Without substantially significant increases, the report found that the office of the IG could not carry out investigations into illegal or corrupt activity with the requisite independence. Moreover, as already noted above, its dependence on the NIA for both finances and administration compromised its capacity to review objectively the behaviour of the NIA.[6]

Such shortcomings in the office of the IG, and indeed in the intelligence services as a whole, were revealed in 2005 when the office of the IG undertook its

[1] See O'Brien (supra) at 214.

[2] The position was ultimately given the solidity and stability that it required. ZT Ngcakani held the post for a period of six years – from 2004 through 2010.

[3] I Fazel *To Spy or Not To Spy? Intelligence and Democracy in South Africa* Institute For Security Studies Monograph No 157 (February 2009)(emphasis added)(OIG'S COO Fazel's admission regarding 'the bending of the rules' – and the abuse of the rule of law — within the intelligence services is noteworthy.)

[4] J Matthews, F Ginwala & L Nathan *Intelligence in a Constitutional Democracy: Final Report to the Minister of Intelligence Services, Ronnie Kasrils, Ministerial Review Commission on Intelligence* (10 September 2008) 116.

[5] Ibid.

[6] Ibid at 117.

first big investigation. Then Director-General of the NIA, Billy Masetlha, was accused of using the NIA to conduct surveillance operations on a number of South African civilians and abusing NIA structures for partisan political purposes. The alleged surveillance encompassed both physical surveillance by NIA agents and the interception of private communications in the form of telephone calls and e-mails. A prominent businessman and ANC politician complained to the Minister for Intelligence Services that he had been placed under surveillance. The Minister, in turn, requested that the IG conduct an investigation.[1] After examining the report on the Masetlha affair tabled by the IG, the JSCI noted that the office of the IG lacked a standard operating procedure for dealing with such investigations and that the office also suffered from a lack of adequate resources.[2] As I have already noted, the ability of the IG to perform his or her functions effectively hinges on the willingness of Parliament to provide a budget that will guarantee that the IG has a sufficient number of suitably qualified staff members.

[1] See Institute for Security Studies 'Submission on Intelligence Oversight and Governance in South Africa' Document submitted to the Ministerial Review Commission on Intelligence (May 2007) available at http://www.iss.co.za/uploads/intelsubmitmay07.pdf (accessed on 6 May 2011) at 10–11. The surveillance was conducted as part of 'Project Avani'. Project Avani was an intelligence operation that was meant to investigate possible security risks to the country posed by the presidential succession debate within the ANC as well as the protests against poor service delivery that had erupted in many communities across the country. The operation was initiated by Masetlha in his capacity as the DG of Intelligence, allegedly upon the instruction of Cabinet. However, the Minister of Intelligence was never informed of its existence. The report of the IG found that Masetlha had not followed the correct NIA procedures in ordering the surveillance and that the interception of private communications had been illegal because no judicial authorisation was sought as required by s 16 of the Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002. The IG also found that Masetlha had been involved in the so called 'hoax e-mail' saga. The hoax e-mails were a number of e-mails that purported to outline a political conspiracy against the former Deputy President of the country, Jacob Zuma. The IG's investigation concluded that Masetlha and various accomplices had fabricated the e-mails. Institute for Security Studies (supra) at 11–12. Masetlha was charged with fraud. However, the charges were eventually dismissed. In the wake of the Masetlha scandal, the Minister of Intelligence established an independent Ministerial Review Commission on Intelligence to assess the current structure and functioning of the civilian intelligence services. According to the Commission's terms of reference, the purpose of the review was to 'strengthen the mechanisms of control over the civilian intelligence structures in order to ensure compliance and alignment with the Constitution, constitutional principles and the rule of law, and particularly to minimise the potential for illegal conduct and abuse of power'. The Commission reviewed all the relevant legislation and policies around the security services and received submissions from the intelligence services, interested parties, civil society organisations and individual members of the public. The Commission handed its final report to the Minister of Intelligence Services in September 2008. See J Matthews, F Ginwala & L Nathan *Intelligence in a Constitutional Democracy: Final Report to the Minister of Intelligence Services, Ronnie Kasrils, Ministerial Review Commission on Intelligence* (10 September 2008), available at http://www.ssronline.org/edocs/ review_commission_final_report20080910.doc (accessed on 18 May 2011).

[2] Institute for Security Studies (supra) at 27.

(iii) *The National Intelligence Co-ordinating Committee*

FC s 210*(a)* requires that legislation provide for the coordination of all intelligence services. Accordingly, the National Strategic Intelligence Act[1] established the National Intelligence Co-ordinating Committee. Its primary function is to co-ordinate the intelligence supplied by the four intelligence services and to interpret that information so that it might be employed by policy-makers.[2] As a clearing house for the intelligence supplied by different agencies, the Co-ordinating Committee is meant to limit the ability of various intelligence services to manipulate information and, in so doing, to influence improperly the political decisions taken by policymakers.

The Co-ordinating Committee is comprised of the Intelligence Co-ordinator[3] and the Director Generals of the NIA and SASS, the head of the intelligence division of the SANDF, and the head of the CID of the SAPS.[4] The Co-ordinating Committee's direct clients are the President, Cabinet, and the Cabinet Committee for Security and Intelligence Affairs. Other clients include government departments, Premiers, provincial governments and parliamentary committees.

(iv) *Executive control and oversight*

Direct executive control of the NIA, SASS, crime intelligence and military intelligence is exercised by the Ministers of Intelligence, Police and Defence.[5] The Ministers report to the Cabinet Committee for Security and Intelligence Affairs. Since 2000, a National Security Council — comprised of the President, the Deputy President, and the Ministers for Safety and Security, Finance, Home Affairs, Defence, Intelligence and Foreign Affairs — has taken responsibility for general formulation of security policy.

The Masetlha scandal brought into stark relief some of the internal problems within the NIA. The litigation that ensued reflected an additional problem: a lack of clarity, in both the Final Constitution and the legislation on intelligence services, with respect to the suspension and the dismissal of the head of an intelligence service.

In *Masetlha v The President of the Republic of South Africa & Another*, the applicant, former NIA head Billy Masetlha, challenged his suspension and dismissal as Director-General of the NIA by President Mbeki.[6] The suspension was communicated by way of a letter signed by the Minister for Intelligence Services.[7]

[1] Act 39 of 1994.

[2] National Strategic Intelligence Act s 4(2).

[3] The Intelligence Co-ordinator is appointed by the President at his sole discretion. National Strategic Intelligence Act s 5(1).

[4] National Strategic Intelligence Act s 4(1).

[5] Oversight Act s 7(11)*(a)* requires the heads of all the intelligence agencies to submit annual reports to the Minister in charge of that agency.

[6] [2006] ZAGPHC 107 ('*Masetlha HC*').

[7] Masetlha contended that the decision to suspend him had been taken by the Minister and not by the President and was consequently unlawful. The High Court found it unnecessary to decide this issue on the grounds that determining the validity of the dismissal rendered the suspension issue moot. *Masetlha HC* (supra) at 6.

However, the President later recorded the decision as his own by way of a Presidential Minute.[1] Masetlha contended that the Presidential Minute was a belated attempt by the President to legalise Masetlha's suspension by passing it off as his own. The dismissal was effected through a notice bringing forward the date on which Masetlha's term of office was due to expire from 31 December 2007 to 22 March 2006.

Masetlha argued that the suspension and the dismissal constituted administrative action subject to the Promotion of Administrative Justice Act ('PAJA')[2] and that the actions taken had been procedurally unfair. The High Court rejected this argument. It found that — taking into consideration that there are no constitutional or other legislative provisions dealing with the dismissal of the head of the NIA — the President's power to dismiss the head of the NIA was inherent in his power to appoint him in terms of FC s 209(2). As a result, the President's power to dismiss fell within FC s 85(2)*(e)*'s grant of executive power and was not subject to PAJA.[3]

However, the High Court noted that while the powers of the National Executive in FC s 85(2)*(e)* are expressly excluded from the definition of action subject to review under PAJA, the courts still retained the authority to review the President's conduct in terms of the principle of legality or the rule of law doctrine.[4] The High Court concluded that for the exercise of executive power to be lawful, the power must not be exercised in bad faith, arbitrarily or irrationally.[5]

As a factual matter, it was common cause that the relationship of trust between the former Director-General and the President had broken down. (The degree of the breakdown remained a matter of dispute.) The President asserted that the relationship had been compromised by Masetlha's actions subsequent to the Inspector General's report and Masetlha's attacks on the President's integrity.[6] Masetlha contended that the breakdown was not irreparable and the relationship could be repaired if the President made 'appropriate amends' for the harm that the President had caused to Masetlha's reputation by suspending and then dismissing him.[7]

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[1] FC s 101(1) requires all legally binding decisions of the President, or those taken in terms of national legislation, to be in writing.

[2] Act 3 of 2000.

[3] *Masetlha HC* (supra) at 13–14. FC s 85(2)*(e)* provides: '[t]he President exercises the executive authority, together with the other members of the Cabinet, by performing any other executive function provided for in the Constitution or in national legislation.' The definition of administrative action in s 1 of PAJA specifically excludes the 'executive powers or functions of the National Executive'.

[4] *Masetlha HC* (supra) at 14. FC s 1*(c)* provides: '[t]he Republic of South Africa is one, sovereign, democratic state founded on … supremacy of the constitution and the rule of law.' As authority for this proposition, the High Court relied on the decisions of the Constitutional Court where it has held that the exercise of all public power must conform with the principle of legality. See, eg, *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC), [1999] ZACC 11 at paras 142–8. For more on the principle of legality and the rule of law doctrine, see F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11.

[5] *Masetlha HC* (supra) at 15.

[6] Ibid.

[7] Ibid.

The High Court ruled that, based on the role and the functions of the NIA in ensuring national security, the mutual trust between the Director General and the President is essential for the proper functioning of the NIA and for the safety of the public.[1] Given that Masetlha did not argue that the President acted in bad faith, the High Court held that the breakdown of trust — whatever its dimensions — was a rational basis for dismissal. The President's dismissal of Masetlha therefore constituted lawful executive action.[2] Masetlha took the matter on direct appeal to the Constitutional Court.[3]

A majority of the Constitutional Court found that the President — as a matter of fact, not law — had specifically relied on ss 12(2) and 12(4) of the Public Service Act[4] to shorten Masetlha's term of office. The President had not, in fact, relied on his powers of dismissal in terms of FC s 209(2).[5] Moseneke DCJ then held that s 12(2) and 12(4) of the PSA does not confer on a member of the executive the power to appoint or to dismiss a head of department. The provisions simply create a framework for the manner in which such appointment or dismissal may take place. The *Masetlha* Court further concluded that in view of the fact that no written employment contract was entered into with Masetlha, the ordinary principles of employment contracts were applicable to the manner in which the contract could be terminated. The President, as the employer, could not unilaterally change the terms of the contract.

However, the *Masetlha* Court then found that the dispute between the parties could not be reduced to a private law dispute about the unlawful termination of an employment contract. The power to appoint and to dismiss the head of the NIA is a public law power derived from FC s 209(2). So although, as a matter of fact, the President had not relied upon FC s 209(2), as a matter of law, the dispute had to be resolved by first determining whether this power had been properly exercised.[6]

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[1] *Masetlha HC* (supra) at 15–16.

[2] Ibid at 17. Since the dismissal was found to be within the President's legitimate powers and lawful, it was unnecessary for the court to address the issue of the suspension.

[3] *Masetlha v President of the Republic of South Africa* [2007] ZACC 20, 2008 (1) SA 566 (CC), 2008 (1) BCLR 1 (CC)('*Masetlha*'). The Court was willing to grant leave to appeal despite Masetlha's failure to approach the Supreme Court of Appeal on the basis that the issues did not involve development of the common law and there was thus no significant disadvantage in not having the benefit of a decision of the Supreme Court of Appeal.

[4] Act 103 of 1994.

[5] The relevant portions of PSA s 12(2) and 12(4) state: '(2) As from the date of commencement of the Public Service Laws Amendment Act, 1997 *(a)* a person shall be appointed in the office of head of department in the prescribed manner, on the prescribed conditions and in terms of the prescribed contract between the relevant executing authority and such a person for a period of five years from the date of his or her appointment, or such shorter period as that executing authority may approve … . (4) Notwithstanding the provisions of subsection (2), a contract contemplated in that subsection may include any term and condition agreed upon between the relevant executing authority and the person concerned as to … *(c)* the grounds upon, and the procedures according to which, the services of the head of department may be terminated before the expiry of his or her term of office or extended term of office, as the case may be; and *(d)* any other matter which may be prescribed.' PSA s 3B(1)*(a)*, in pertinent part, reads: 'Notwithstanding anything to the contrary contained in this Act, the appointment and other career incidents of the heads of department shall be dealt with by, in the case of *(a)* a head of a national department or organisational component, the President.'

[6] *Masetlha* (supra) at paras 58–63.

Some disagreement exists in academic circles as to the coherence of that last proposition. In *Minister of Education v Harris,* the Constitutional Court specifically held that if an official only has the power to do 'X' under a provision in Statute A, but relies on a provision in Statute B, the decision is invalid.[1] That, as the argument goes, is precisely what happened here. The *Masethla* Court mentions *Harris* in passing but avoids the logical consequences of a *Harris*-inflected syllogism. As Michael Bishop contends: 'The President picked the wrong section. End of story.'[2]

Other commentators such as Jason Brickhill and Jacques de Ville view the *Harris*-inflected position as unduly rigid and overly formalistic. De Ville writes:

> It may occur that a public authority exercises its powers purportedly in terms of a specific statutory provision or it fails to state in terms of which statutory provision it had exercised its powers. [Questions arise] where a specific provision was mentioned [and] that that specific provision does not authorise the action, although another provision does, or — where none was mentioned — that there is in fact a provision that authorises such action. Would the action taken in such instance[s] be invalid? The approach of the courts is that such exercise of powers is not invalid provided the action is indeed authorised by another enabling provision.[3]

The Court agreed with the High Court that the power to dismiss the head of an intelligence service is a necessary corollary to the power to appoint and read this power into FC s 209(2) when read with s 3(3)*(a)* of the ISA[4] It rejected Masetlha's argument that allowing the President to rely on FC s 209(2), as an afterthought, violated the principle of certainty — a core component of the principle of legality. The actual certainty of the President's decision was reflected in his use of s 12(2) and 12(4) read with s 3B(1)*(a)* of the PSA — even if the statute itself did not grant the President the power to dismiss Masetlha. It held that although the President had — improperly — used the mechanism of the PSA to effect the dismissal, the source of the power exercised was ultimately to be found in FC s 209(2).[5]

The *Masetlha* Court then considered the question of whether the President's decision — taken in terms of FC s 209(2) — was nevertheless subject to review for procedural fairness. The majority held that the requirement of procedural fairness could hamper the ability of the executive to take appropriate policy decisions in such a sensitive domain as national security.[6] That said, the Deputy Chief Justice agreed with the High Court that executive decisions must comply with the requirements of the principle of legality. These principles require the exercise of

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[1] 2001 (4) SA 1297 (CC), 2001 (11) BCLR 1157 (CC).

[2] E-mail Correspondence with Michael Bishop (5 May 2011).

[3] J De Ville *Judicial Review of Administrative Action in South Africa* (2003) 101-102, fn 107. Further support for this proposition can be found in *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) at paras 62-63. I am grateful to Jason Brickhill for bringing this line of argument, and this body of literature, to my attention. E-mail Correspondence with Jason Brickhill (6 May 2011).

[4] *Masetlha* (supra) at para 68.

[5] Ibid at para 71.

[6] Ibid at para 77.

power by the President to be rationally related to the purpose for which they were conferred.[1]

The *Masetlha* Court concluded that the decision by the President to dismiss Masetlha based on an irretrievable breakdown of trust complied with the principle of legality. The *Masetlha* Court noted that even if procedural fairness had been required, those requirements had been satisfied. Masetlha had had a number of meetings with the Minister at which he gave his version of events, had been given a chance to hand in a report stating his views on the unauthorised surveillance, and had met with the President to discuss the matter prior to his dismissal.[2]

As far as the breach of the employment contract was concerned, the Constitutional Court held that the breakdown of trust did not entitle the President to terminate the contract unilaterally. However, it also found that reinstatement would not be an appropriate remedy given the trust that must exist between the head of the NIA and the President. Having regard, in particular, to the fact that the President had made a tender to pay out Masetlha for the duration of his contract (an offer which Masetlha declined), the majority then held that Masetlha was still entitled to some form of compensation commensurate with his position.[3] Given its general ratification of the President's dismissal of Masetlha, the majority found it unnecessary to engage the issues surrounding Masetlha's suspension.[4]

[1] *Masetlha* (supra) at paras 78–82.

[2] Ibid at paras 84–6.

[3] Ibid at paras 87–9.

[4] In his dissent, Ngcobo J found that Masetlha's employment had not been validly terminated. The minority was of the view that FC s 209(2) does not deal with the term of office or the terms and conditions of service of the head of a security service. Rather, FC s 209(2) contemplates that such issues would be dealt with in terms of the provisions of the PSA. Ibid at para 152. This conclusion was bolstered by reference to various provisions of the PSA which indicate that members of the NIA – including the Director-General of the NIA — fall within the purview of the PSA. The minority concluded that the power to appoint and dismiss the Director-General is regulated by s 12(2) and 12(4) of the PSA read with s 3B(1)*(a)*. They give effect to FC s 209(2) and are not limited to determining the manner in which such appointment and dismissal is to take place. Ibid at paras 153–7. The minority agreed with the majority that the power to appoint implies the power to dismiss. However, with regard to the question of whether the decision taken by the President is subject to review, the minority decided that any such test of the President's exercise of power warranted much more than mere legality. It concluded that the Final Constitution contemplates that all exercise of public power must not only avoid arbitrariness but must also comply with the principle of fundamental fairness. Ibid at para 179. The minority offered FC s 33, which provides for the right to just administrative action, and FC s 34, which provides for access to courts, as evidence that that the Final Constitution contemplates review of executive decisions that is substantive in nature. Ibid at para 180. According to Ncgobo J, the Final Constitution embodies an objective normative value system that requires fairness, not mere rationality, from its political office bearers. Ibid at para 183. Ngcobo J then concludes that the President does not have the power to unilaterally and arbitrarily alter the term of appointment of the head of the NIA and that the opportunities given to Masetlha to meet with the Minister and the President and to submit a report on the unauthorised surveillance were insufficient to meet the requirement of fairness. Ibid at para 205. Professor Cora Hoexter has criticised the majority decision in *Masetlha*, for 'set[ting] the law of procedural fairness back twenty years'. C Hoexter 'Clearing the Intersection? Administrative Law and Labour Law in the Constitutional Court' (2008) 1 *Constitutional Court Review* 209, 210.

(c) Rights issues facing the intelligence agencies

(i) *Interception of private communications*

The intelligence agencies operate primarily in a covert manner. Their intelligence gathering operations encompass the secret surveillance of individuals and organisations and, as a consequence, the interception of private correspondence and communications between individuals. Such surveillance engages directly FC s 14*(d)*'s express protection of private communications.[1]

The Regulation of Interception of Communications and Provision of Communication-Related Information Act ('Interception Act') was adopted to ensure a proper legal framework for interception of private communications.[2] The preamble offers a glimpse of the sweeping nature of the powers granted to the Intelligence Services and the SAPS:

> To regulate the interception of certain communications, the monitoring of certain signals and radio frequency spectrums and the provision of certain communication-related information; to regulate the making of applications for, and the issuing of, directions authorising the interception of communications and the provision of communication-related information under certain circumstances; to regulate the execution of directions and entry warrants by law enforcement officers and the assistance to be given by postal service providers, telecommunication service providers and decryption key holders in the execution of such directions and entry warrants; to prohibit the provision of telecommunication services which do not have the capability to be intercepted; to provide for certain costs to be borne by certain telecommunication service providers; to provide for the establishment of interception centres, the Office for Interception Centres and the Internet Service Providers Assistance Fund; to prohibit the manufacturing, assembling, possessing, selling, purchasing or advertising of certain equipment; to create offences and to prescribe penalties for such offences; and to provide for matters connected therewith.

A number of the Act's provisions give the reader cause for immediate pause. In many instances, a law enforcement officer is able to intercept any communication — without a warrant — if he or she believes that the interception of the

[1] The right to privacy, FC s 14, states: 'Everyone has the right to privacy, which includes the right not to have
(a) their person or home searched;
(b) their property searched;
(c) their possessions seized;
(d) the privacy of their communications infringed.'
For more on FC s 14, see D McQuoid-Mason 'Privacy' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 38.

[2] Act 70 of 2002. The Act has been amended three times. See Prevention and Combating of Corrupt Activities Act 12 of 2004 (effective as of 20 May 2005); Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (effective as of 20 May 2005); Electronic Communications Act 36 of 2005 (effective as of 19 July 2006).

communication is reasonably necessary.[1] In many instances, judicial oversight, by a designated judge, is ex post facto — to the extent that it is required at all. In other cases, the interception is vindicated by the permission of another party to the communication. These provisions, on their face, would appear to constitute prima facie violations of the right to privacy. Whether these 'reasonably necessary' incursions into private communications are constitutionally justifiable under FC s 36 is another matter. We live, sadly, in an age when all electronic communications can be — and are — analysed by intelligence agencies and private commercial entities around the world. While such incursions cannot be stopped, the courts can assert some authority with respect to the manner in which such private communications are used.

[1] Interception Act ss 4 and 5 read, in pertinent part:

4…

(2) Any law enforcement officer may intercept any communication if he or she is —

(a) a party to the communication; and

(b) satisfied that there are reasonable grounds to believe that the interception of a communication of another party to the communication is necessary on a ground referred to in section 16 (5) *(a)*, unless such communication is intercepted by such law enforcement officer for purposes of committing an offence.

5. Interception of communication with consent of party to communication

(1) Any person, other than a law enforcement officer, may intercept any communication if one of the parties to the communication has given prior consent in writing to such interception, unless such communication is intercepted by such person for purposes of committing an offence.

(2) Any law enforcement officer may intercept any communication if—

(a) one of the parties to the communication has given prior consent in writing to such interception;

(b) he or she is satisfied that there are reasonable grounds to believe that the party who has given consent as contemplated in paragraph *(a)* will

(i) participate in a direct communication or that a direct communication will be directed to him or her; or

(ii) send or receive an indirect communication; and

(c) the interception of such direct or indirect communication is necessary on a ground referred to in section 16(5)*(a)*, unless such communication is intercepted by such law enforcement officer for purposes of committing an offence.

(4) The law enforcement officer who intercepts a communication under subsection (1) or (2) must, as soon as practicable after the interception of the communication concerned, submit to a designated judge

(a) a copy of the written confirmation referred to in subsection (3)

(b) an affidavit setting forth the results and information obtained from that interception; and

(c) any recording of the communication that has been obtained by means of that interception, any full or partial transcript of the recording and any notes made by that law enforcement officer of the communication if nothing in the communication suggests that bodily harm, attempted bodily harm or threatened bodily harm has been caused or is likely to be caused.

(5) A telecommunication service provider who, in terms of subsection (2), has routed duplicate signals of indirect communications to the designated interception centre must, as soon as practicable thereafter, submit an affidavit to a designated judge setting forth the steps taken by that telecommunication service provider in giving effect to the request concerned and the results obtained from such steps.

(6) A designated judge must keep all written confirmations and affidavits and any recordings, transcripts or notes submitted to him or her in terms of subsections (4) and (5), or cause it to be kept, for a period of at least five years.

(ii) *Compliance with the principle of open justice*

(aa) MISS and the missing Open Democracy Bill

It is somewhat ironic that with the end of the apartheid security state, we should then witness the construction of a new security apparatus with powers almost equal to its predecessor. On 4 December 1996 Cabinet approved the Minimum Information Security Standards ('MISS') document as national information security policy.[1] The MISS' purpose, as reflected in its introduction, is:

1. The need for secrecy and therefore security measures in a democratic and open society, with transparency in its governmental administration, is currently the subject of much debate, and will continue to be for a long time.
2. However, the issue need not be controversial, since the intended Open Democracy Act (not yet promulgated at the time of going to press) itself will acknowledge the need for protection of sensitive information, and therefore, will provide for justified exemption from disclosure of such information.
3. Although exemptions will have to be restricted to the minimum (according to the policy proposals regarding the intended Open Democracy Act), that category of information which will be exempted, as such needs protection. The mere fact that information is exempted from disclosure in terms of the Open Democracy Act, does not provide it with sufficient protection. Such information will always be much sought after by certain interest groups or even individuals, with sufficient access to espionage expertise, and highly sophisticated technological backing. The extent of espionage against the new South Africa should never be under estimated - it has actually escalated alarmingly during the past few years.
4. Where information is exempted from disclosure, it implies that security measures will apply in full. This document is aimed at exactly that need: providing the necessary procedures and measures to protect such information. It is clear that security procedures do not concern all information and are therefore not contrary to transparency, but indeed necessary for responsible governance.

At the time of press, the Open Democracy Act remains the Open Democracy Bill.[2] Thus, we continue to have the apparatus of a security state in place without an Act that vouchsafes an open and democratic society. We need an act that grants citizens access to documents of public interest that do not pose any threat to the nation's security. That Act ought to enable civil servants and judges to determine which documents may be released and which documents must remain classified.

(bb) *Independent Newspapers* and the principle of open justice

A good example of the consequences of the absence of such an Act — and the absence of political commitment to the principle of open justice — was reflected in *Independent Newspapers*.[3] Prior to the hearing — concerning the

[1] Available at http://right2info.org/resources/publications/SA_Minimum%20Information%20Security%20Standards.pdf (accessed on 7 May 2011).

[2] B67-98.

[3] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa & Another* 2008 (5) SA 31 (CC), 2008 (8) BCLR 771 (CC), [2008] ZACC 6 ('*Independent Newspapers*').

President's dismissal of the Director General of the NIA — various government documents from the intelligence services forming part of the record were made publicly available on the Constitutional Court's website. A few days before the hearing, the Court noticed that some of the documents were marked 'Secret' and 'Confidential'. It removed all documents related to the case from its website and refused to make them available to journalists. The Independent Newspapers filed an urgent application requesting that the government documents and the record again be made public. Following a hearing on merits of the urgent application, and with the consent of the Minister for Intelligence Services, the better part of the record was again made public. However, the Minister continued to object to the disclosure of a limited set of documents that had been deemed classified or which contained classified information.

The released documents were quite benign. Moreover, most of the documents had not been classified in the first place. Those facts invariably begged the question as to why the Minister objected to their release to the editors and the lawyers of Independent Newspapers. As counsel for Independent Newspapers and the Freedom of Expression Institute argued:

> [T]his Court's commitment to open justice in the conduct of its proceedings … requires a challenge to the grounds for the Minister's continuing objection to the remaining restricted documents. Such a challenge can only be mounted by a party fully apprised of its target. Accordingly, Independent Newspapers' legal representatives and senior editors should be afforded sight of the remaining restricted documents, on the conditions specified or other reasonable conditions, in order to frame their submissions to this Court on whether the Minister's objection thereto should be sustained.

Only such in camera access would enable the senior editors to make a meaningful assessment as to whether the public would benefit from their release.

Counsel for Independent Newspapers grounded their claim for in camera review — or some mechanism that furthers public access to important political documents — in terms of a constitutional principle of 'open justice'. This principle, they argued, is a necessary consequence of a Bill of Rights committed: in FC s 16 to '*(a)* freedom of the press and other media; *(b)* freedom to receive or impart information or ideas'; in FC s 34 to the resolution of 'any dispute that can be resolved by the application of law decided in a fair *public* hearing before a court'; in FC s 35(3)*(c)* to a '*public* trial before an ordinary court' and in FC s 1*(c)*; to the 'rule of law'. Counsel did not create this principle out of whole cloth. The Constitutional Court had previously articulated the grounds and content of this principle in *SABC*[1] and *Shinga*.[2] The *Shinga* Court wrote:

> Closed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based… . Seeing justice done in court enhances public confidence in the criminal justice process and assists victims, the accused and the broader community to accept the legitimacy of that process. Open courtrooms foster judicial excellence, thus rendering courts accountable and legitimate. Were criminal

[1] *South African Broadcasting Corporation Limited v National Director of Public Prosecutions & Others* 2007 (1) SA 523 (CC), 2007 (2) BCLR 167 (CC), [2006] ZACC 15 ('*SABC*').

[2] *S v Shinga* 2007 (4) SA 611 (CC), 2007 (5) BCLR 474 (CC), [2007] ZACC 3 ('*Shinga*').

> [matters] to be dealt with behind closed doors, faith in the criminal justice system may be lost. No democratic society can risk losing that faith. It is for this reason that the principle of open justice is an important principle in a democracy.[1]

In *SABC*, the Court explained the principle of open justice in the following terms:

> [O]pen justice is observed in the ordinary course in that the public are able to attend all hearings. The press are also entitled to be there, and are able to report as extensively as they wish and they do so … . Courts should in principle welcome public exposure of their work in the courtroom, subject of course to their obligation to ensure that proceedings are fair. The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government. The values underpin both the right to a fair trial and the right to a public hearing (i.e. the principle of open courtrooms). The public is entitled to know exactly how the judiciary works and to be reassured that it always functions within the terms of the law and according to the time-honoured standards of independence, integrity, impartiality and fairness.[2]

After a further hearing, a majority of the Court rejected the interim request without reasons. Nevertheless, the *Independent Newspapers* Court then proceeded to hear the main question: Should the documents in question be made publicly available?

Independent Newspapers claimed that the Constitutional Court's commitment to the principle of open justice would require — with respect to allegedly classified documents — that:

(a) Restrictions on public access to proceedings or any part thereof, should be an exceptional occurrence and occur only to the extent demonstrably justifiable;
(b) Any restriction to all or a part of open court proceedings may be imposed only by court order following:
    (i) a formal application to court;
    (ii) on notice to interested parties;
    (iii) a hearing in open court on the issue of whether the proceedings or any part thereof should be subject to restriction;
(c) where necessary the application to close proceedings may be heard partially, or entirely in camera;
(d) this does not, however, dispense with the need for notice and the opportunity to oppose;
(e) in exceptional circumstances the application may be brought ex parte under the usual condition that notice is subsequently given and that any party wishing to oppose may do so subsequently.

When the Constitutional Court did finally opine on the merits of this argument, it handed down a judgment with ramifications many had feared: namely, that in the absence of the promised Open Democracy Act, courts will be forced into constructing, *ab initio*, security classifications and rights to revelation that ought to have first been captured in legislation.

In a split decision, the Constitutional Court in *Independent Newspapers* offered up a number of different visions of the relationship between the principle of open

[1] *Shinga* (supra) at paras 25–26.
[2] *SABC* (supra) at paras 31–32.

justice and the protection of information deemed necessary for national security.[1] The majority judgment by Moseneke DCJ crisply captured the issues before the Court:

(1) Does the right to open justice entitle Independent Newspapers to access to the restricted materials in the court record?
(2) Does the Minister's objection premised on national security constitute adequate justification?
(3) What is the proper approach to harmonising these competing constitutional claims? and
(4) Is it desirable to set guidelines on a procedure to be adopted when a court record is sought to be withheld from the public?[2]

Moseneke DCJ, tracking *Shinga* and *SABC*, begins his analysis by noting that a constellation of fundamental rights inform the Court's determinations as to whether court documents ought to be released:

> There exists a cluster … of related constitutional rights which … may be termed 'the right to open justice'. … First, [FC] s 16(1)*(a)* and *(b)* provides in relevant part that everyone has the right to freedom of expression, which includes freedom of the press and other media as well as freedom to receive and impart information or ideas. [FC s] 34 does not only protect the right of access to courts but also commands that courts deliberate in a public hearing. This guarantee of openness in judicial proceedings is again found in [FC s] 35(3)*(c)*, which entitles every accused person to a public trial before an ordinary court. [Moreover], this systemic requirement of openness in our society flows from the very founding values of our Constitution, which enjoin our society to establish democratic government under the sway of constitutional supremacy and the rule of law in order, amongst other things, to ensure transparency, accountability and responsiveness in the way courts and all organs of State function.[3]

One might have thought that the Deputy Chief Justice would then go on to analyze the restrictions placed on the material in question in terms of this constellation of fundamental rights reinforced, as he notes, by FC s 1's commitment to an open and democratic society based upon the rule of law, constitutional supremacy and other founding values such as transparency, accountability and responsiveness. Not so.

Having noted the jurisprudential basis for the principle of open justice, the Deputy Chief Justice appears to change tack. Rather than analyze the applicant's request in terms of open justice, he writes:

[1] For further analysis of this case, see J Klaaren 'Open Justice and Beyond: *Independent Newspapersv Minister for Intelligence Services: In Re: Masetlha*' (2009) 126 *SALJ* 24; D Milo, G Penfold & A Stein 'Freedom of Expression' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) §§42.9*(c)* and 42.9*(g)*. See also J Klaaren 'Dominant Democracy in South Africa: A Reply to Choudhry' (2009) 2 *Constitutional Court Review* 87; J Klaaren 'Structures of Government in the 1996 Constitution: Putting Democracy Back into Human Rights' (1997) 13 *SAJHR* 3. Klaaren's work is notable for its unwavering commitment to understanding constitutionalism in terms of the interaction of the political institutions the basic law creates, and not simply assessing a constitutional jurisdiction's virtues in terms of the judgments that emanate from its highest court.

[2] *Independent Newspapers* (supra) at para 15.

[3] Ibid at paras 39-40.

> The 'exceptional circumstances' standard advanced is inconsistent with the design of our Constitution and the jurisprudence of this court on several counts. The better approach, I think, is to recognise that the cluster of rights that enjoins open justice derives from the Bill of Rights and that, important as these rights are individually and collectively, like all entrenched rights, they are not absolute. They may be limited by a law of general application provided the limitation is reasonable and justifiable. It is not uncommon that legislation and the common law in this country, and elsewhere in open and democratic societies, limit open court hearings when fair trial rights or dignity or rights of a child or rights of other vulnerable groups are implicated.[1]

But what law of general application does the Deputy Chief Justice have in mind? He does not say.[2] Were there to exist a law of general application in the matter, the first stage of analysis would require the Court to determine whether the law in question impaired the right to open justice or any one of the express substantive rights in the Bill of Rights that give the judicially created principle of open justice substance. Were a limitation found, the Court would then proceed to FC s 36 and determine whether the limitation of the rights asserted was justified.

No such analysis takes place in the majority's judgment.

Instead, Deputy Chief Justice Moseneke rejects the 'exceptional circumstances' argument proffered by the applicants on the grounds that other constitutional and statutory imperatives place duties upon the state to secure information vital to the well-being of the commonweal:

> The Constitution imposes upon the government the duties, amongst others, to preserve the peace and secure the wellbeing of the people of the Republic; to maintain national security; to defend and protect the Republic; to establish and maintain intelligence services; and to prevent, combat and investigate crime. Effect is given to these constitutional obligations through legislation, the establishment of institutions as permitted by law and by the exercise of executive authority vested in the President and the Cabinet. The Minister draws attention to the national information security policy, known as Minimum Information Security Standards (MISS), which was adopted by the Cabinet on 4 December 1998. It applies to all departments of State that handle classified information in the national interest. It provides for measures to protect classified information and empowers the Minister to protect information by classifying it as 'restricted' or 'confidential' or 'secret' or 'top secret'. In addition national legislation and regulations prohibit the disclosure of certain classified information.[3]

[1] *Independent Newspapers* (supra) at para 44.

[2] In his heads of argument, the Minister relied on s 4 of the 1982 Protection of Information Act: 'Section 4 of the Protection of Information Act 84 of 1982 prohibits the disclosure of protected documents or information in relation to, *inter alia*, security matters… . We submit that the definition of "security matter" which includes, but is not limited to, any matter dealt with by the Intelligence Services and any matter which relates to the functions of the Intelligence Services is wide enough to accommodate a legal prohibition on the unauthorised disclosure of information protected in terms of the MISS.' The Deputy Chief Justice would seem to accept the Minister's contention that s 4 authorized the restriction of access to documents that speak to national security concerns. See *Independent Newspapers* (supra) at fn 50. However, as we shall see, he later states that no statute or rule of law governs or speaks directly to the release of the documents under review. Ibid at para 55.

[3] Ibid at para 49.

One might have thought that the principle of open justice would have to be harmonized with these competing constitutional dictates, or that national information security policy — MISS — that restricted access to classified information would have to be tested against the principle of open justice in the context of judicial proceedings. Both approaches would reflect accepted forms of constitutional analysis. Again, the Deputy Chief Justice refuses to follow his own analysis of the matter before him. Instead, he contends that the analysis of the matter before the *Independent Newspapers* Court

> must begin with the fact that ordinarily court proceedings and hence the record are open to the public. A mere classification of a document within a court record as 'confidential' or 'secret' or even 'top secret' under the operative intelligence legislation or the mere ipse dixit of the minister concerned does not place such documents beyond the reach of the courts. Once the documents are placed before a court, they are susceptible to its scrutiny and direction as to whether the public should be granted or denied access.[1] … . The classification of a document as classified does not in itself place these documents beyond the reach of the Court. As part of their inherent power to regulate their own process in terms of section 173, the Court may decide whether to make the documents available to the public or other parties.[2]

The Deputy Chief Justice then dispenses of the remaining leg of the argument advanced by the amicus curiae, the Freedom of Expression Institute: namely that the Court should establish clear procedures for the analysis of those documents that should remain classified and those documents that should enter the public domain. Though sympathetic to the request for clear guidance, the Deputy Chief Justice refuses this invitation. Instead, he falls back on the overused canard that each matter will raise different issues and no rubric for declassifying documents can be laid out in advance of the specific facts brought before a court.[3]

Having refused to engage in rights analysis or establish guidelines for dealing with cases in which a court record is sought to be withheld, the Deputy Chief Justice falls back on FC s 173: Is it in the interests of justice for a court record to be opened or to be withheld? This test, according to the Deputy Chief Justice, becomes an entirely factual matter to be decided on a case-by-case basis:

> It follows that where a government official objects to disclosure of a part of the record before a court on grounds of national security, the court is properly seized with the matter and is obliged to consider all relevant circumstances and to decide whether it is in the interests of justice for the documents to be kept secret and away from any other parties, the media or the public. This forms part of a court's inherent power to regulate its own process that flows from section 173 of the Constitution. In my view, a court in that position should give due weight both to the right to open justice and to the obligation of the state to pursue national security within the context of all relevant factors. As in the present matter,

[1] *Independent Newspapers* (supra) at para 54.

[2] Ibid at para 53.

[3] Ibid at 48. Could it be that the reason the Court refused to accept FXI's submission is because it would require the Court to admit that it had acted improperly in removing the record from the public domain? Had they not done so, it is quite likely that nobody would have noticed (or cared) that a few of the documents had been deemed classified. After all, they were already in the public domain. See M Bishop 'Stamped: A Comparative Analysis of Access to Classified Documents in Court Records' (April 2009)(Paper on file with author.)

> it would not be concerned with a statute or other law of general application as the basis for restricting the disclosure of the material. In deciding whether documents ought to be disclosed or not, a court will have regard to all germane factors which include the nature of the proceedings; the extent and character of the materials sought to be kept confidential; the connection of the information to national security; the grounds advanced for claiming disclosure or for refusing it; whether the information is already in the public domain and if so, in what circumstances it reached the public domain; for how long and to what extent it has been in the public domain; and, finally, the impact of the disclosure or non-disclosure on the ultimate fairness of the proceedings before a court. These factors are neither comprehensive nor dispositive of the enquiry.[1]

Moseneke DCJ goes on to hold that the grounds for refusal need not be 'exceptional':

> I am, however, unable to agree with the submission that a restriction placed on public access to proceedings is only permissible as an exceptional occurrence and that the party seeking to restrict the court record bears a true onus of demonstrating that the restriction is justifiable. The logical consequence of this stance is that all court records may not be restricted except in exceptional circumstances, by a court order after a formal application, on notice to interested parties and after a hearing in an open court. In other words, I accept that the default position is one of openness. My difficulty arises in defining the circumstances in which that default position does not apply.[2]

Since the majority cannot define standards in terms of which the default position would not apply, it concludes that it can offer no standards at all. Its standard-free analysis results in the release of some documents and the refusal to produce others deemed to contain sensitive information, such as the names of agents. The Deputy Chief Justice suggests that the Court's decision to release some documents while denying access to others was motivated, at least in part, by the Minister's determination to protect only those documents 'necessary to achieve specified national security objectives'.[3]

The dissenting judgments are substantially more sanguine about the ability to undertake fundamental rights analysis of open justice matters and to establish frameworks with which other courts could operate when asked to determine whether openness or security should win out. All three dissenting judgments agreed that 'the issue of the appropriate test should … remain open to be decided on another day.'[4] It is an invitation that one trusts the Court will later take up.

One might also hope that any future judgment will be informed by Justice Yacoob's clear commitment to 'openness' and his witty 'Catch-22' take on the notion of 'secrecy' that animates the Minister's objections and the majority's concerns about national security with respect to documents already made public. His Helleresque approach to such matters is expressly reflected in the following broadside that he delivers regarding the Court's ostensible inability to impose appropriate limits and sanctions on the use and the publication of sensitive documents:

[1] *Independent Newspapers* (supra) at para 55.
[2] Ibid. at para 43.
[3] Ibid at para 77.
[4] Ibid at para 81 (Yacoob J).

> I was convinced that the responsible legal representatives and senior newspaper editors would handle the matter with sensitivity and care. I was also persuaded that all were bona fide and would comply with their undertaking not to publish the material. I accordingly concluded that the material should be made available to them. The NIA and the government would have been embarrassed by the information. I saw no possibility that the newspapers would have revealed the bungling, the identity of Mr Fichot, the foreign French intelligence service known as the DGSE, the names of the junior operatives or any information which might endanger them. The legal representatives and the newspaper editors are responsible citizens as much interested in the security of the South African State as anyone else might be, including the NIA, the Minister's attorneys and counsel, Mr Masetlha's attorneys and counsel in the High Court, the prosecuting team in the Hatfield Community Court, Mr Masetlha's legal team in the criminal proceedings before the Hatfield Community Court, certain staff members in the magistrates' court, certain staff members in the High Court, as well as 24 South African clerks and four foreign clerks employed in this court at the time.[1]

To find otherwise, Yacoob J intimates in his disarmingly cheeky concluding paragraph, would force one to describe all the parties to the matter — including the prosecuting authorities and Constitutional Court clerks — as potential 'enemies of the state.' But the true devious genius of his dissent flows from his ability to steal the case from the majority by making *all* of the interesting information in the documents public through his searching analysis — in the judgment — of why the majority was wrong not to disclose the previously classified information (as expressly revealed in the judgment).

Yacoob J's final words — on viewing ordinary citizens as enemies of the state — really belong to Justice Sachs. His dissent not only lays out the philosophical foundations for the 'open and democratic society' contemplated by the Final Constitution, but constitutes a sweeping rejection of the majority's conclusions. In rebuffing the majority's cramped understanding of the Court's role in promoting an open and democratic society, while highlighting its failure to acknowledge the damage done by the security services under apartheid, Sachs J writes that 'special attention [must] be paid to the importance of openness, a theme that until now has not been given much attention in our jurisprudence.'[2] Sachs J writes that 'an open and democratic society', cannot, by definition, 'view its citizens as enemies.'[3] He continues:

> Nor does it see its basic security as being derived from the power of the State to repress those it regards as opponents. Its fundamental philosophy is quite opposed to the authoritarianism of the past. Its starting point is not repression, but the promotion of positive elements of social stability, such as food security and job security. Above all, [our] society is bound together not by ties of arrogance combined with fear, but by a shared sense of

[1] *Independent Newspapers* (supra) at para 149.
[2] Ibid at para 153.
[3] Ibid at para 155.

> security that comes to all citizens from the feeling that their dignity is respected and that each and every one of them has the same basic rights under the Constitution.[1]

Contrary to the holding of the majority, Sachs J concludes that the default position for government documents is disclosure and that those instances that justify non-disclosure are, in fact, exceptional.

Van der Westhuizen J's dissent departs from the Deputy Chief Justice's opinion on the grounds that 'the test put forward in the majority judgment lacks specificity and provides insufficient guidance to courts on how to balance the competing interests of open justice and national security'.[2] His opinion comes closest to identifying the basis upon which future courts should assess the conflicting demands of the principle of open justice and the need for national security. After finding that the withholding of documents constitutes a limitation of the principle of open justice in terms of MISS, Van der Westhuizen J writes:

> Upon a prima facie demonstration that the failure to disclose would implicate the right to a fair trial or any other right in the Bill of Rights, the government has to show that those individual rights are not implicated, or only minimally interfered with, or that non-disclosure is necessary for the preservation of national security. The number of documents withheld, the type of information withheld (such as individual names, locations of military installations, etc), and the percentage of the document withheld have to be evaluated. … A court should take into account the availability of the information in the public domain, how the documents came to be in the public domain … and whether further disclosure would increase the risks to national security… . Even if it is shown that national security requires non-disclosure, it must be shown that the non-disclosure that is specifically being sought is the least restrictive method to achieve the purpose. A court [faced with such a matter should] look favourably upon alternatives to full disclosure, or absolute non-disclosure, for example, redaction of highly sensitive materials, or summaries of documents that allow the public to understand the substance if not the specifics of the material. [Finally], [r] edaction is an especially attractive option when the material sought to be withheld relates to individual names. [3]

Van der Westhuizen J's dissent: *(a)* fits comfortably with approaches to disclosure of sensitive documents in foreign jurisdictions; *(b)* gives the principle of open justice appropriate recognition; and *(c)* suggests that standard two-stage Bill of Rights analysis could provide sufficient guidance to other courts faced with the challenge of whether and how to release sensitive documentation into the public domain.

(iii) *The Protection of Information Bill: A necessary evil with potential constitutional infringements*

The Constitutional Court is likely to be confronted with far greater challenges to the principle of open justice, along with the constitutional ideals of transparency and accountability and the right of access to information, should the Protection of

[1] *Independent Newspapers* (supra).
[2] Ibid at para 170.
[3] Ibid at paras 179-182.

Information Bill become law.[1] The bill gives various organs of state — from the intelligence services to the police force to tourism boards to parastatals to Chapter Nine Institutions to parks boards and virtually every government ministry — broad powers to restrict access to information that they deem sensitive. The bill — as currently structured — is unlikely to pass constitutional muster in its entirety. At the same time, most of the commentary about the content of the bill has generated far more heat, than light. For example, when Nichola de Havilland, director of the Centre for Constitutional Rights contends that 'the Bill facilitates a culture of opacity and its corollary, the abuse of power,'[2] can she really be understood to prefer the out-dated 1982 apartheid-era act currently in place? We need new legislation to handle appropriately the classification of documents and to ensure that the public has access to information essential for well-informed decision-making and necessary for meaningful self-governance. We desperately need new legislation to provide the kinds of mechanisms for handling and revealing sensitive information commensurate with the requirements of a constitutional democracy, as Jason Brickhill contends, flawed as the current bill may currently be.[3]

Human Rights Watch ('HRW') offers a nuanced provision by provision assessment of the Bill. HRW submitted its review to Parliament's Ad Hoc Committee on the Protection of Information Legislation for its consideration in November 2010.[4] Human Rights Watch's evaluation and primary critiques read as follows:

1. As it currently stands, the bill raises serious concerns about its compatibility with South Africa's human rights obligations under both international treaties to which it is a party and its own Constitution… . South Africa's obligations regarding freedom of information and expression derive from a number of sources: Articles 16 and 32 of the Constitution, Article 19 of the International Covenant on Civil and Political Rights (ICCPR), and Article 9 of the African Charter on Human and People's Rights. While these rights may be subject to restrictions on grounds of national security, the restrictions must be provided for in law, necessary to achieve a specific, permitted purpose, and be proportionate to the aim.
2. The burden of demonstrating the validity of the restriction rests with the government, which must show that: (a) the expression or information at issue poses a serious threat to a legitimate national security interest; (b) the restriction imposed is the least restrictive means possible for protecting that interest; and (c) the restriction is compatible with democratic principles.
3. In addition, the Johannesburg Principles state that laws on public information must be accessible, unambiguous, and drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful. The laws should also provide for adequate safeguards against abuse, including access to prompt, full, and effective judicial scrutiny by an independent court or tribunal of any imposed restriction.
4. Weaknesses of South Africa's Proposed Protection of Information Bill:

[1] Protection of Information Bill, B 6-2010 (5 March 2008).

[2] L Donnelly 'The Right to Demand Answers' *Mail & Guardian* (29 April 2011) 13, available at http://mg.co.za/article/2011-04-29-the-right-to-demand-answers/ (accessed on 7 May 2011).

[3] E-mail Correspondence with Jason Brickhill (7 May 2011).

[4] Human Rights Watch 'South Africa: Revise Protection of Information Bill – A Letter to Mr CV Burgess, Chairperson of the Ad Hoc Committee on the Protection of Information Legislation (November 23, 2010), avaliable at www.hrw.org, (accessed on 1 April 2010.)

a. Based on these standards and principles, we believe that South Africa's proposed Protection of Information Bill as currently drafted is overly broad and vague and would promote secrecy over transparency … Its curtailing [of] the right of access to information to an extent that would be very damaging for public participation and good governance, which are central to South Africa's democracy. These concerns are compounded by the bill's proposed creation of a series of broad offences that impose substantial criminal penalties, and the absence of a public interest defense clause.[1]

b. We therefore welcome the indications Minister Cwele has already given that sections … of the Bill, relating to the withholding of information in the 'national interest' and protection of 'commercial information,' respectively, may be withdrawn… . As provided for in the Johannesburg Principles, the law should sanction the restriction of information only to protect a legitimate national security interest that is specifically and narrowly defined (Principle 12).

c. Amend the scope of sections …, which, taken together, allow a very wide category of persons to determine what information may be subject to classification, a situation which is likely to lead to over-classification and abuse. Moreover as pointed out by the Human Rights Commission, the scope of persons empowered under section 16 is inconsistent with the Promotion of Access to Information Act.

d. Amend Chapter [12]: [they] create overly broad offences. These offences, which range from 'hostile activity offences' to 'prohibition of disclosure of state security matter,' are punishable for up to 25 years, yet are very broad, with ill-defined concepts of intent. Under such provisions, a person could face criminal sanctions, for example, for unauthorized communication, delivery, collection, or copying of 'top secret' information without knowledge of the potential harm the information could pose. No person should be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

e. No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

f. Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

g. [The Act ought to embrace] a public interest defense clause that recognizes the standard codified in principle 13 of the Johannesburg Principles: … . all laws concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.

h. [The Act ought to provide] an effective mechanism to oversee classification decisions that would result in information not being subject to disclosure. Any decision to classify information so that it cannot be disclosed should be reasoned and in writing and subject to a review of the merits by an independent judicial authority.[2]

[1] See, eg, POI Bill Chapter 12, ss 44–56.
[2] Ibid.

Human Rights Watch's request for an 'effective mechanism' brings to mind a number of the specialist courts, commissions, tribunals and Chapter Nine Institutions that work so well in various realms of the South African legal system (those fora that engage, for example, issues of competition, labour, tax, human rights, gender relations and alternative dispute resolution). A system in which each and every government information-related request (or denial or punishment) had to be reviewed by a court of law would be unduly cumbersome. An independent, specialized tribunal would likely prove superior in terms of efficacy, efficiency and justice. Thus far, the Minister for State Security has rejected this proposal and only committed the state to the creation of an advisory board that assist the Minister with requests for declassification.

Perhaps the most balanced account of the Bill, as it currently stands, is offered by media law experts Dario Milo and Okyerebea Ampofo-Anti.[1] Milo and Ampofo-Anti credit State Security Minister Siyabonga Cwele for engaging the public on the Bill and for making some necessary changes. That said, they take the Minister to task for doing no more than narrowing the 'overly broad' definition of national interest found in the Bill. (The Minister's failure to keep his word in this regard will disappoint Human Rights Watch as well.) The absence of a public-interest defence is also difficult to explain. Such a defense does not automatically immunize a person who discloses information from potential prosecution. As Milo and Ampofo-Anti note: 'Editors and whistleblowers will have to apply their minds diligently to whether a public interest justification may reasonably be employed to reveal the information, and if they get it wrong there is a risk of imprisonment.'[2] The absence of a carefully crafted defence will invariably chill the ability of the media and other social actors to expose 'wrongdoing, hypocrisy, mismanagement, criminality and gross negligence.'[3] Perhaps the most disheartening provision of the bill can be found in Chapter 13 (said to govern the protection of information in courts). Whereas the principle of open justice currently allows courts to regulate their own processes when it comes to the public disclosure of court documents, the proposed bill would require the court submissions from the 'classifying authority; providing that these submissions 'may not be publicly disclosed'; and that any hearing 'must be held in camera'.' According to Milo and Ampofo-Anti, the public gets the wrong end of the stick: the state should be the party that offers justification for maintaining the secrecy of the classified documents.[4]

Milo and Ampofo-Anti analysis also buttresses the claim made above that a POI Act so constructed will clash directly with the Court's principle of open justice: either the courts may, under FC s 173 and other constitutional provisions, control their own processes and the documents in their possession or they may not. As matters currently stands, the Bill and the principle are on a collision course that cannot but result in constitutional litigation that potentially pits the Constitu-

[1] See D Milo and O Ampofo-Anti 'A Baby Step when a Quatum Leap is Needed' *Business Day* (9 September 2010) available at http://www.businessday.co.za/Articles/Content.aspx?id=122234 (accessed on 11 May 2011).

[2] Milo and Ampofo-Anti (supra).

[3] Ibid.

[4] Ibid.

tional Court against the Executive in the never-ending battle between security and liberty that takes place in societies that claim to be 'open and democratic'.

The Freedom of Expression Institute ('FXI') has added its own well-considered criticism to the mix.[1] FXI identifies a number provisions in the Bill as particularly worrisome and suggests a number of positive mechanisms for engagement between the state and the public over ostensibly sensitive documents:

1. The 'double blind provision' is … fundamentally unconstitutional. It invites an element of untruthfulness, equivocation and obstruction of fair and reasonable enquiry. It is virtually impossible to make any reasonable headway in discovering the true state of affairs when such provisions are in operation. The provision allows public servants rights which are directly contradictory to the obligations that the Bill imposes on all citizens not to provide false information to Intelligence Services.
2. The crucial role of the media … will be adversely affected by the omission of a 'public interest clause.' The severe penalties included in the Bill will have a powerful disincentive effect on investigative journalism. It is cold comfort to purport that prosecutions would not be lightly undertaken since the threat constitutes a proper Sword of Damocles.
3. The creation of an Ombud type office would go a long way to allaying the disquiet of the public regarding intelligence affairs. [An] Ombud would [be] a … cost effective method of addressing inquiries and complaints in respect of the status of classified information.[2]

The concerns expressed by HRW, FXI, Milo and Ampofo-Anti constitute neither idle speculation nor overheated rhetoric.[3] They strike, as Jason Brickhill would have it, the proper balance between constitutionally mandated rights of access to various kinds of information and undue interference with the government's discharge of its responsibilities to protect the commonweal. All agree that the need for a post-apartheid era Act is a matter of pressing concern. As HRW noted in its 2011 Country Report on South Africa, government intimidation of journalists has taken on the appearance of official ANC party policy:

> On August 4, 2010, Mzilikazi Wa-Afrika, a prominent journalist with the *Sunday Times* who had exposed corruption by officials, was arrested without a warrant by 20 policemen in six vans. He was then taken to a secret location in Mpumalanga and interrogated at 2 a.m. without a lawyer. The police also searched his home and took notebooks without a search warrant. Wa-Afrika was eventually released on R5,000 (US$725) bail after his newspaper went to the High Court; the charges cited upon his arrest have since been dropped. The

[1] Freedom of Expression Institute 'Comprehensive Submission to the Ad Hoc Committee on Intelligence Legislation in respect of the Protection of Information Bill (20 June 2008) available at www.fxi.org. D Steward 'South Africa's Orwellian Information Bill' *PoliticsWeb* (14 July 2010) available at www.politicsweb.co.za.

[2] Ibid.

[3] At the time of press, several other prominent voices expressed their opposition to the Bill, including former Intelligence Minister Ronnie Kasrils, the Public Protector, Thuli Mandosela, and ANC-alliance partner COSATU. See South African Press Service 'Rushing Info Bill is Worrying' — Kasrils *News24* (1 June 2011) available at www.news24.com/South Africa/Politics/Rushing-info-bill-is-worrying-kasrils-20110601; SAPA 'COSATU: Proposed Info Bill "Goes Against Will of the People"' *Mail & Guardian* (4 June 2011) available at www.mg.co.zaarticle/2011-06-01-proposed-bill-goes-against-will-of-the-people.

incident heightened fears that such politically motivated intimidation of the press could become the norm if the ANC-proposed tribunal is established.[1]

23B.6 Other Role Players in the Security Sector

(a) The Directorate for Special Operations ('DSO' or 'Scorpions')[2]

The Scorpions were, until 2009, the most 'visible' law enforcement operation in the country. And by visible, I do not mean their 'day-to-day' operations. Rather, the Scorpions made their mark by laying the foundation for the prosecution of a broad array of organized crime syndicates, political officials and prominent private figures.

Jean Redpath, the author of the leading monograph on the activities of the DSO,[3] described the manner in which the DSO decided whether a matter fell within their operational mandate as follows: 'In deciding whether to declare an investigation, … the first criterion [was whether] the matter concerned [fell] within the strategic focus areas of the DSO. The DSO … refined these as being: drug trafficking, organized violence (including taxi violence, urban terror and street gangs), precious metals smuggling, human trafficking, vehicle theft and hijacking syndicates, serious and complex financial crime, and organised public corruption… . A further fourteen general criteria or factors [then had to be] taken into account.'[4] The DSO's broad brief, and the apparent independence with which the DSO operated, garnered significant attention. The DSO initiated or had been drawn into investigations associated with the arms deal, the accusations of bribery surrounding Jacob Zuma, Hout Bay Fishing Industries, Nigerian 419 scams, and high levels of fraud within both the Road Accident Fund and the Land and Agricultural Development Bank of South Africa. Redpath makes out an extremely compelling case for the DSO being quite good at what it was asked to do:

> On average, 90% of cases prosecuted result in convictions. In one region of the DSO, the rate is even higher, at 97%. This suggests that the DSO is astute in choosing to prosecute

[1] Human Rights Watch 'Report on South Africa' *Country Reports* (2011) available at www.hrw.org (accessed on 1 April 2011.)

[2] The Scorpions had a long, venerable and complicated legislative history. Their first predecessor – The Office for Serious Economic Offences ('OSEO') – was established during 1992 in terms of the Investigation of Serious Economic Offences Act 117 of 1991. The OSEO was then incorporated into the National Prosecuting Authority as an Investigating Directorate in terms of s 43(7) of the Act. Proclamation R123 of 1998, *Government Gazette* 19579 (4 December 1998) identifies the categories of offences that fall within the mandate of the Investigating Directorate Serious Economic Offences ('IDSEO'). The Investigating Directorate Organised Crime and Public Safety ('IDOC') was established by Presidential Proclamation R102 of 1998, *Government Gazette* 19372, (16 October 1998). The IDSEO was granted fairly broad discretion to identify and to investigate areas deemed essential for national safety. On 8 July 1999 the Minister of Justice and Constitutional Development, on behalf of the President, announced the establishment of the DSO. A further Investigating Directorate — the Investigating Directorate Corruption ('IDCOR') – was established in terms of Proclamation R14/2000, *Government Gazette* 20997 (24 March 2000). The DSO, although able to operate in terms of the other Investigating Directorates, only came into being in terms of a further Amendment to the National Prosecuting Authority Act. R3/2001, *Government Gazette* 21976 (12 January 2001).

[3] J Redpath *The Scorpions: Analysing the Directorate of Special Operations* Institute for Security Studies Monograph 96 (March 2004) available at http://www.iss.co.za/uploads/Mono96.pdf (accessed on 7 May 2011).

[4] Ibid at Chapter 6.

> only those cases likely to be successful in court. The data also suggests that the DSO is unlikely to make a frivolous arrest: the ratio of envisaged and finalised prosecutions to arrests is 92%, suggesting that almost all arrests lead to prosecutions. The DSO also appears to have been somewhat restrained in carrying out searches: only 166 searches were conducted, which works out to about one per finalised investigation. Again, this suggests that searches are conducted only where necessary, thereby not squandering resources.[1]

In 2007, I opined that the DSO might find itself the victim of its own success. The high conviction rate and the high profile of its targets led many politicians to call for its incorporation into the SAPS.

The relationship between the DSO and the SAPS was particularly acrimonious. While the reasons given for the disputes vary, most turned on the overlap of their respective jurisdictions.[2] By 2005, the relationship was so severely impaired that the President appointed an independent commission headed by Judge Sisi Khampepe ('Khampepe Commission') to inquire into the mandate and the location of the DSO.[3] The Khampepe Commission was asked specifically for advice as to whether the DSO should be relocated from the NPA and incorporated into the SAPS.[4]

The SAPS contended that the DSO, as an entity carrying out investigations and law enforcement, ought to be located within the SAPS and to operate under the political control of the Minister of Safety and Security. The DSO opposed this suggestion.[5] Other parties drew attention to 'excessive' media attention given to the work of the DSO. Still others complained that the DSO and the NIA failed to cooperate sufficiently with regard to intelligence gathering activities.[6]

Ultimately, the Commission recommended that the DSO remain within the NPA. It found that no constitutional restriction existed on having a law enforcement agency located within the prosecuting authority: the only constitutional imperative was that the prosecuting authority remain independent.[7]

The Commission offered a number of recommendations to improve the working relationship between the DSO and other security agencies. The most significant of these suggestions was that the political responsibility or oversight responsibility for the DSO be shared by the Minister of Safety and Security and the Minister of Justice and Constitutional Development. The Minister of Safety and Security would exercise control over the law enforcement component of the DSO's activities. The Minister of Justice and Constitutional Development would

[1] Redpath (supra) at Chapter 7.

[2] P Mashele 'Will the Scorpions Still Sting? The Future of the Directorate of Special Operations' (2006) 17 *SA Crim Quarterly* 25, 25.

[3] Government Communications 'Statement on the Report of the Khampepe Commission' (29 June 2006) available at www.info.gov.za/speeches/2006/06062915451001.htm (accessed on 22 October 2007).

[4] F Blandy 'Khampepe: Leadership must Walk the Same Walk' *Mail & Guardian* (13 October 2005) available at http://mg.co.za/article/2005-10-13-khampepe-leadership-must-walk-the-same (accessed on 7 May 2011). See also E Mabuza 'Report on Elite Unit Still with Mbeki' *Business Day* (19 August 2005) available at http://www.armsdeal-vpo.co.za/articles08/elite_unit.html (accessed on 7 May 2011).

[5] Blandy (supra).

[6] Mashele (supra) at 25–26.

[7] The report is available at http://www.thepresidency.gov.za/docs/reports/khampepe/ (accessed on 7 May 2011).

oversee the DSO's work for the NPA. The Commission further found that the Ministerial Co-Coordinating Committee ('MCC') set up under the NPA Act to co-ordinate the activities of the DSO and the SAPS was not functioning properly. It recommended that a new committee be set up to support the MCC.

With regard to the SAPS, the Khampepe Commission recommended that the SAPS's investigations and law enforcement capacity be enhanced so that it possessed capacity comparable to that of the DSO. The Commission was critical of the DSO's media strategy and recommended that the organisation should refrain from publicising its investigations in a manner that could be prejudicial to the rights of the person under investigation. The Commission also recommended that the Independent Complaints Directorate be empowered to receive and to investigate complaints against the DSO.[1]

The recommendations of the Khampepe Commission were approved and accepted by Cabinet and the National Security Council.[2] But the acceptance and approval of the Commission's recommendations proved hollow indeed. A resolution of the African National Congress' December 2007 National Conference in Polokwane called for the dissolution of the DSO. The ANC-led government ultimately disbanded the DSO in 2009. The National Prosecuting Authority Amendment Act,[3] assented to on 27 January 2009, repealed the enabling provisions that had created the DSO.[4] The DSO was replaced with the Directorate of Priority Crimes Investigation ('DPCI' or 'Hawks') through amendments to the NPA Act and the SAPS Act.

Was the DSO a 'victim of its own success'? While one would rather not entertain idle speculation, the series of events described above — from the Polokwane Conference to the (ignored) Khampepe Commission report to the subsequent disbandment of the DSO — suggest, at the very least, government discomfort with the DSO method of operation and its targets. Moreover, while the Constitutional Court is in no position, as an institutional matter, to discuss the 'naked preferences' that may have motivated the dissolution of the DSO, its finding in *Glenister II* that the subsequent creation of the DPCI failed to meet the constitutional desiderata and the demand for an effective independent law enforcement unit lend some support for the view that the DSO was, in fact, a victim of its own success at rooting out public and private corruption.

(b) Directorate of Priority Crimes Investigation ('DPCI' or 'Hawks')

(i) *Powers and Functions of the DPCI*

The DPCI was created shortly after the dissolution of the DSO through an amendment to the SAPS Act.[5] The DPCI was quite consciously designed to assume the

[1] Government Communications 'Statement on the report of the Khampepe Commission' (29 June 2006). www.info.gov.za/speeches/2006/06062915451001.htm (accessed on 22 October 2007).
[2] Ibid.
[3] Act 56 of 2008.
[4] Preamble.
[5] SAPS Amendment Act 57 of 2008.

'powers, investigations, assets, budget and liabilities of the DSO'.[1] It would be, however, incorrect to infer from the words of the SAPS Amendment Act that the DPCI is identical in function and power to the DSO. The pertinent differences between the two entities are made clear in the Constitutional Court's judgments in *Glenister I* and *Glenister II*.

(ii) Glenister I: Not ripe enough[2]

The *Glenister* litigation began in 2008 when Hugh Glenister, a South African businessman, challenged a bill tabled in Cabinet designed to disband the DSO. Glenister's initial challenge in the North Gauteng High Court was dismissed on 27 May 2008.[3] The High Court held that it did not have jurisdiction to hear the matter. Glenister then appealed directly to the Constitutional Court.

The Chief Justice in *Glenister I* requested argument solely on one point: '[W]hether, in the light of the doctrine of the separation of powers, it is appropriate for this Court, in all the circumstances, to make any order setting aside the decision of the National Executive that is challenged in this case.'[4] The case turned almost entirely on the timing of the application. That is, the Constitutional Court expressed concern about its involvement in the legislative process prior before a bill was enacted as an Act of Parliament. The *Glenister I* Court held that such abstract review should occur only on exceptional occasions and that intervention would only be appropriate 'if an applicant can show that there would be no effective remedy available to him or her once the legislative process is complete, as the unlawful conduct will have achieved its object in the course of the process. The applicant must show that the resultant harm will be material and irreversible.'[5] That standard was not met. The legislation could always be challenged after it was enacted.

Given that *Glenister I* has been supplanted by *Glenister II,* and that the *Glenister I* Court, following *Doctors for Life*, was absolutely correct for dismissing the claims before they were ripe, one might be inclined to overlook (entirely) the *Glenister I* Court's refusal to engage the substantive grounds for the action. In addition to timing issues, the *Glenister I* Court was asked to address substantive concerns regarding the status of ostensibly 'independent' entities — such as the DSO — under the Final Constitution and the extent to which such entities could be undermined by a dominant political party. The question can hardly be said to be new. In the Court's ur-text — *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (First Certification Judgment)*[6] – the most

[1] Preamble.

[2] *Glenister v President of the Republic of South Africa & Others* 2009 (1) SA 287 (CC), 2009 (2) BCLR 136 (CC), [2008] ZACC 19 ('*Glenister I*').

[3] [2008] ZAGPHC 143.

[4] Ibid at para 9.

[5] Ibid at para 43.

[6] 1996 (4) 744 (CC), 1996 (10) BCLR 1253 (CC), [1996] ZACC 26 ('*First Certification Judgment*'). See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC), [1996] ZACC 24 ('*Second Certification Judgment*').

important grounds for refusing certification of the Constitutional Assembly's New (Constitutional) Text were that the New Text failed to vouchsafe the independence of such entities as the Auditor-General and the Public Protector and fell short with respect to the special majority amendment requirements necessary to protect the Bill of Rights. Both shortcomings were deemed to undermine the 34 Constitutional Principles' clear commitment to a constitutional democracy based upon the rule of law and constitutional supremacy. When the question of the politicization of independent organs of state such as the DSO was put before the *Glenister I* Court, it offered a somewhat puzzling answer:

> The role of this Court is established in the Constitution. It may not assume powers that are not conferred upon it. Moreover, the considerations raised by the UDM do not establish that irreversible and material harm will eventuate should the Court not intervene at this stage.[1]

Again: the issue here is not about timing — for the Court's approach is irreproachable on that score. However, it did feel obliged to respond to the quite brazen formulation of the problem by the United Democratic Movement: the Constitutional Court must act 'because nobody else will'.[2]

(iii) Between *Glenister I* and *Glenister II*: Legality, rationality review and an anti-domination doctrine

As Jason Brickhill and others have asked, what if the *Glenister I* Court had been in a position to address the substantive concerns raised by the United Democratic Movement? For starters, as Theunis Roux has repeatedly made clear, the Court in such a charged case would have had to navigate between the Scylla of principal and Charybdis of pragmatism in order to maintain its moral, social, political and institutional legitimacy. [3] But, of course, that would only be a start. Had it concluded that a principled basis existed for the challenge, it would have had to identify the constitutional principle that would support such a challenge. Brickhill suggests that one consequence of a successful constitutional challenge — again assuming the time was right — might have been a more robust conception of the legality doctrine and rationality review. That contention, it turns out, is not an idle arm-chair rumination. Support for Brickhill's intuition pump can be found in recent work by Sujit Choudhry on constitutional courts that operate in a one party dominant democracy. Choudhry's arguments amplify many of Roux's points on the challenges that face our Constitutional Court in our 'one party dominant democracy'.[4] In his analysis of South Africa's Constitutional Court and similarly situated apex courts, Choudhry begins by noting that a social-liberal constitutional

[1] *Glenister I* (supra) at para 43.

[2] Ibid.

[3] See T Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106. See also See T Roux *The Politics of Principle: The First South African Constitutional Court 1995-2005* (forthcoming 2012); F Michelman 'On the Uses of Interpretive Charity: Some Notes on Application, Avoidance, Equality and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa' (2008) 1 *Constitutional Court Review* 1.

[4] S Choudhry '"He had a mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1.

system characterised by the (largely unopposed) dominance of a single party over the political system almost invariably suffers from a common mix of pathologies — from rent-seeking behaviour, corruption in the public domain and the private domain and the use of the political dominance for the economic gain of the party and its further entrenchment as the only party in town.[1] Choudhry does not deny the difficulties faced by constitutional courts that operate in such a political environment. Instead, he identifies legal strategies that can be deployed by a court faced with blatant abuses of power and furtive attempts to skirt the dictates of the basic law. A court with constitutional jurisdiction might well expand its actual jurisdiction by relying, as I noted above, on the kind of rule of law arguments that drove the Constitutional Court's conclusions in the *First Certification Judgment* and in subsequent path-breaking 'legality doctrine' decisions in *Fedsure*[2] *and Pharmaceutical Manufacturers.*[3] The rationality arguments that underpin the legality doctrine are narrow enough so that it can accommodate allegations of corruption without appearing to unnecessarily intrude on domains that clearly remain within executive and legislative prerogatives.[4] Choudhry describes this new spin on the legality doctrine as an 'anti-domination doctrine':

> *Anti-domination* is a doctrine that would render illegitimate any exercise of public power that has as its principal goal the preservation, enhancement or entrenchment of the dominant status of a dominant political party. Deliberate attempts to co-opt and fragment the opposition are two examples of measures that would trigger the operation of the doctrine, although a range of different policies might achieve the same end. The focus is on the purpose underlying the challenged measure. The doctrinal roots of the anti-domination doctrine accordingly lie in the doctrine of rationality.[5]

In brief, the doctrine of rationality emerged from the jurisprudence on the principle of legality, which holds that 'the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. (Although originally set out by the Constitutional Court under the Interim Constitution, the principle of legality was later held to operate under the terms of the Final Constitution.) The principle applies to both the legislature and the executive — that is, to primary legislation and the whole range of exercises of public power (eg, promulgation of

[1] For an 'only game in town' case, see *United Democratic Movement v President of the Republic of South Africa (No 2)* 2003 (1) SA 495 (CC), 2002 (10) BCLR 1086 (CC), [2002] ZACC 21.

[2] *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC), [1999] ZACC 17 at para 58 (Applies the principle of legality to: (a) 'the legislature … in every sphere'; and (b) for each kind of administrative decision to which applicable.)

[3] *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241(CC), [2000] ZACC 1 (Applies legality to all executive action).

[4] For more on the possibilities of the legality doctrine and the rationality doctrine, see M Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' (2010) 25(2) *SAPL* 313; A Price 'The Content and Justification of Rationality Review' (2010) 25(2) *SAPL* 346; M Bishop 'Vampire or Prince? The Listening Constitution and *Merafong v President of the Republic of South Africa*' (2009) 2 *Constitutional Court Review* 313; A Price 'Rationality Review of Legislative and Executive Decisions: *Poverty Alleviation Network* and *Albutt*' (2010) 127 *SALJ* 580.

[5] Choudhry (supra) at 34-35.

secondary legislation, exercise of statutory discretion) undertaken by the executive. The doctrine of rationality is one limb of the principle of legality, and at its core, bars arbitrary state action. At its most abstract level, the requirement of rationality, or non-arbitrariness, holds that all public power must be rationally related to a legitimate government purpose. But the heart of rationality review, as Michael Bishop has argued, is a commitment to root out improper motives, either by holding that the stated motive is illegitimate, or by determining that the stated motive is not the true motive.[1] Spun out as a test of the exercise of public power, rationality review should be understood to have two limbs. As Choudhry notes:

> The first is a requirement of means-ends rationality: that a public power be exercised for the purpose for which it was given. If the means chosen do not further the stated objective, then the measure is arbitrary or irrational. The second is a requirement that the purpose for which power has been exercised itself be legitimate. These two limbs are analytically distinct. The means chosen may further an end that is illegitimate; or the means may fail to further a legitimate end. But the two dimensions of arbitrariness are closely related in practice. In situations where there is a poor fit between means and ends, this is often because the reason proffered in support of a measure is pretextual, and that the true reason for the measure is to be found elsewhere. This true reason has been concealed, because it is illegitimate. The search for a rational relationship between means and ends often culminates in exposing an ulterior motive.'[2]

Clearly then, rationality review can be employed to expose 'naked preferences' and attempts by a dominant party to further entrench its power.

The facts of *NICRO* provide a good example. At issue was a denial of the right to vote to prisoners who were imprisoned without the option of a fine. The reasons advanced in support of the denial of the right to vote were the logistical challenges and expense involved in arranging for special voting facilities (eg mobile voting stations) for those prisoners. But as the Court pointed out, there were two categories of prisoners who retained the right to vote — those who were incarcerated because of their failure to pay a fine, and those awaiting sentence — on whose behalf precisely such arrangements had to be made at the same facilities which housed the excluded prisoners. The government failed to adduce evidence regarding the *additional* logistical and financial hurdles associated with expanding these arrangements to encompass the excluded prisoners. The objective offered by the government was a pretext. The real justification for the measure was to dispel the 'concern that if prisoners are allowed to vote that will send a message to the public that the government is soft on crime'.[3] The Court rightly deemed this motive to be an illegitimate purpose.

Had the *Glenister I* Court possessed jurisdiction to hear the untimely matter, it might been alive to legality doctrine concerns. It might then have developed an anti-domination conception of the principle of legality that would not have

[1] Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' (supra).

[2] Choudhry (supra) at 35-36 citing, in particular, Y Dawood 'The Anti-domination Model and the Judicial Oversight of Democracy' (2008) 96 *Georgetown Law Journal* 1411 and *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC), [2004] ZACC 10.

[3] Choudhry (supra) at 36.

allowed the country to be left without an independent anti-corruption unit for almost three years. That's not how matters panned out, however. Instead, the Court revisited *Glenister I*'s original concerns in *Glenister II*.

(iv) Glenister II: Rights, duties, international law, reasonableness review and a principle of anti-corruption[1]

The laws contested in *Glenister I* were ultimately enacted. Glenister then renewed his challenge. The High Court dismissed the application for lack of jurisdiction.[2] However, it did so on a palpably erroneous interpretation of FC s 167(4)(e). Glenister then appealed to the Constitutional Court. In total, the applicant challenged the impugned laws on five different grounds:

(1) The laws were irrational;
(2) The flawed public participation process that preceded the passing of the two Acts;
(3) The laws were structural unconstitutional because they undermined the NPA and the functions of the NDPP.
(4) The laws infringed the bill of rights;
(5) The laws violated South Africa's international treaty obligations.

Glenister II is an extraordinary judgment. The Court unanimously rejected the challenges based on rationality,[3] public participation[4] and structural unconstitutionality.[5] But the majority's judgment[6] upheld Glenister's challenge on a mix of grounds 4 and 5. In sum, the majority found that both the Constitution as a whole and South Africa's commitments based on international law required that the security services possess the necessary degree of independence to root out corruption. The majority held that the Hawks were not sufficiently independent and that the state had therefore failed to fulfil its duty under FC s 7(2) to respect, protect and promote the rights in the Bill of Rights.

Although the majority opinion does not track Choudhry's deft analysis of both the constitutional text and the Court's own precedent, its message is much the same. Our constitutional regime, with its commitment to the rule of law and the protection of basic fundamental rights, will not tolerate the capture of its police force by a single party. The police, as a creature of the Constitution, must serve the people of South Africa by upholding the various provisions of the Constitution without fear, favour or prejudice. The critical paragraph in the opinion penned by Deputy Chief Justice Moseneke and Justice Cameron reads as follows:

[1] *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC), [2011] ZACC 6 ('*Glenister II*').

[2] *Glenister v Speaker of the National Assembly & Others* [2009] ZAWCHC 1.

[3] *Glenister II* (supra) at paras 55-70.

[4] Ibid at paras 23-39.

[5] Ibid at paras 71-82.

[6] Froneman, Nkabinde and Skweyiya JJ concurred with the majority. Ngcobo CJ wrote the dissenting judgment (although it is the majority judgment for all the other issues) in which Mogoeng and Yacoob JJ and Brand AJ concurred.

> That the Republic is bound under international law to create an anti-corruption unit with appropriate independence is of the foremost interpretive significance in determining whether the state has fulfilled its duty to respect, protect, promote and fulfil the rights in the Bill of Rights, as section 7(2) requires. Section 7(2) implicitly demands that the steps the state takes must be reasonable. To create an anti-corruption unit that is not adequately independent would not constitute a reasonable step. In reaching this conclusion, the fact that section 231(2) provides that an international agreement that Parliament ratifies 'binds the Republic' is of prime significance. It makes it unreasonable for the state, in fulfilling its obligations under section 7(2), to create an anti-corruption entity that lacks sufficient independence.[1]

Much will be made of the novel use of FC s 7(2) to find a statute unconstitutional. It is somewhat disconcerting given that the majority identifies a panoply of rights, several paragraphs later, that have been violated by the legislation under attack:

> [The] failure on the part of the state to create a sufficiently independent anti-corruption entity infringes a number of rights. These include the rights to equality, human dignity, freedom and security of the person, administrative justice and socio-economic rights, including the rights to education, housing, and health care.[2]

One can be forgiven for thinking that straightforward fundamental rights analysis might have done all the heavy lifting necessary in order to find the laws in question infirm. (It seems fair to ask, on the other hand, whether the analysis of any given right would have yielded even a prima facie violation: rights to equality before the law and freedom and security of the person might have shouldered such a load.) Likewise, much will be made of the use (or misuse) of international law in both judgments: the Court seems content to treat international law as an aid to constitutional interpretation in terms of FC s 39. However, the judgment possesses moments in which the majority appears to conflate the binding of the Republic by international agreement (FC s 231(2)) with the incorporation of international law into municipal law (FC s 231(4)). Such moments suggest that the Court may have mistakenly made too much of international law rather than too little. Such criticism — while formally correct, and worthy of the Court's consideration in future cases — misses the dramatic constitutional developments contemplated by Deputy Chief Justice Moseneke and Justice Cameron.

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[1] *Glenister II* (supra) at para 194. The minority opinion, authored by Chief Justice Ncgobo, in canvassing the same terrain reaches a different conclusion with respect to the need for genuine (politically uninflected) independence of the police force:

> Yet more insight is gained by comparing the relative level of political insularity called for by the Constitution with respect to different governmental institutions. The courts, for example, are required to be "independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice." The prosecuting authority, on the other hand, must exercise its functions "without fear, favour or prejudice." By contrast, the constitutional provisions related to the police service are silent as to the need for the service to operate either independently or without fear, favour or prejudice. This distinction is drawn not to support a conclusion that the police, or a specialised unit within the police, may lawfully operate with fear, favour and prejudice. Far from it. The distinction is significant merely because it reflects the Constitution's determination as to the appropriate level of independence from the political system of particular governmental institutions. These determinations must be kept in mind in assessing the specific provisions of the SAPS Act.

Glenister II (supra) at para 131.

[2] Ibid at para 198.

In a form of analysis strikingly similar to the logic employed to develop the principle of legality and the rule of law doctrine, the majority rely on the structure and the basic commitments of the Constitution as a whole. The Bill of Rights, duties imposed upon the state to protect, respect, promote and fulfil those rights, international agreements that require South Africa to possess independent police and prosecutorial entities capable of fighting corruption and positive duties imposed upon the police 'to prevent, combat and investigate crime, to main public order, to protect and secure the inhabitants of the Republic and their protect, and to uphold and enforce the law' (FC s 205) constitute a constellation of constitutional obligations out of which the majority tease out a principle of anti-corruption. So while the Court unanimously found that rationality review was not up to the challenge of finding the apposite provisions of the NPA Act and SAPS Act unconstitutional,[1] the majority do think, as does Choudhry, that the Constitution (read as a whole) is committed to 'anti-domination, anti-corruption, anti-capture, non-usurpation, anti-seizure, and anti-centralisation.'[2] In Deputy Chief Justice Moseneke and Justice Cameron's words:

> The Constitution is the primal source for the duty of the state to fight corruption. It does not in express terms command that a corruption-fighting unit should be established. Nor does it prescribe operational and other attributes, should one be established. There is however no doubt that its scheme taken as a whole imposes a pressing duty on the state to set up a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices. As we have seen, corruption has deleterious effects on the foundations of our constitutional democracy and on the full enjoyment of fundamental rights and freedoms. It disenables the state from respecting, protecting, promoting and fulfilling them as required by section 7(2) of the Constitution.[3]

The majority found five fatal constitutional flaws in the statutory construction of the DPCI. First, unlike their predecessors in the DSO, the members of the DCPI do not enjoy security of tenure. Second, their remuneration and their conditions of service are subject to the whims of the Minister.[4] Third, the DPCI's activities are co-ordinated by a ministerial committee composed of members of Cabinet. The committee determines the policy guidelines for the DPCI. As the Court notes: 'The guidelines could, thus, specify categories of offences that it is not appropriate for the DPCI to investigate — or, conceivably, categories of political office-bearers whom the DPCI is prohibited from investigating.'[5] Fourth, the committee also has the power to engage in hands-on supervision. While the majority accepts that 'financial and political accountability of executive and administrative functions requires ultimate oversight by the executive[,] … the power given to senior political executives to determine policy guidelines … lays the ground for an almost inevitable intrusion into the core function of the new entity by senior politicians, when that intrusion is itself inimical to independence.'[6] Finally, given

[1] *Glenister II* (supra) at paras 55-70.
[2] Choudhry (supra) at 34.
[3] *Glenister II* (supra) at para 175.
[4] Ibid at paras 217-227.
[5] Ibid at para 230.
[6] Ibid at para 236.

the lack of independence granted the DPCI under the NPA Act and SAPS Act, and the potential for its capture without such independence, it follows for the majority that the DPCI cannot discharge its constitutional obligation to respect, protect, promote and fulfil the substantive provisions of the Bill of Rights.

Having found the enabling provisions for the DPCI constitutionally infirm, it does not follow that the majority's opinion requires the resurrection of the DSO. The Court afforded Parliament 18 months to promulgate legislation that creates an independent police task force capable of combating corruption in all sectors of South African society. The new entity may still be housed in the SAPS. However, it must then possess the specific attributes of independence that the Court holds the Constitution to require.

This decision is not, as Pierre de Vos would have it, an outright victory for the poor.[1] (That this 'structural' constitutional argument services any discernable commitment to immediate basic service delivery (when no breach of any specific fundamental rights has been found) seems implausible.) But it does signal a willingness on the part of the Constitutional Court to push back against a government rightly beleaguered by charges of rampant corruption and a failure to make good on the promise of liberation.[2] Such a reading fits a Rouxian understanding of a pragmatic Court that knows exactly when to take a principled stand.[3]

(c) Electronic Communications (Pty) Ltd ('Comsec')

The Electronic Communications (Pty) Ltd Act ('Comsec Act')[4] establishes a communications company wholly owned by the state and commonly known as Comsec. Comsec's primary function is to cater for the electronic communications security needs of the state.[5] With the state as its only shareholder, Comsec is controlled by a board of directors appointed by the Minister of Intelligence. The

[1] P de Vos 'Glenister: A Monumental Judgment in Defense of the Poor' (18 March 2011) available at http://constitutionallyspeaking.co.za/glenister-a-monumental-judgment-in-defense-of-the-poor/ (accessed on 9 May 2011) ('If one understood that section 7(2) … requires the state to respect protect, promote and fulfil the rights in the Bill of Rights' it becomes clear that the failure on the part of the state to create a sufficiently independent anti-corruption entity infringes on the rights to equality, human dignity, security of the person, administrative justice and socio-economic rights – including the rights to education, housing, and health. Corruption was there an assault on the poor and those who suffered from discrimination in the past.')

[2] Have other courts picked up the scent? On 1 June 2011, the Supreme Court of Appeal ordered the Public Protector to re-open an inquiry into 'Oilgate' on the grounds that the previous inquiry was 'cursory' at best. *Public Prosecutor v Mail & Guardian* [2011] ZASCA 108 (Nugent J's strongly worded judgment suggests a complete abdication of responsibility by the previous Public Protector and accused him of 'disemboweling the complaints right from the start'.

[3] For a slightly more extended engagement with Choudhry and the degree to which we can, and should, tease out an 'anti-domination doctrine' from *Glenister II*, see M Bishop & N Raboshakga 'National Legislative Authority' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS3, May 2011) Chapter 17. Moreover, it is important to note that not everyone would describe *Glenister II* as a principled stand. As Michael Bishop notes, we might like the outcome (as opposed to the argument) in *Glenister II*, but that does not make the majority's conclusions any more principled than the conclusions arrived at by Chief Justice Ncgobo when writing for the *Glenister II* minority.

[4] Act 68 of 2002.

[5] Comsec Act ss 3 and 4(2).

Minister of Intelleigence also appoints a Chief Executive Officer to manage the affairs of the company.[1]

Comsec's core business is the provision, the development and the vetting of systems designed to protect the electronic communications of organs of state against unauthorised access.[2] Its principle clients are government departments and organs of state.

Comsec is funded in two primary ways: by budgetary allocations made by Parliament and by payments for services it renders to government departments and organs of state.[3] The financial affairs of Comsec are reviewed annually by the Auditor General. Comsec's CEO is also required to prepare an annual report in accordance with the Public Finance Management Act for review by the Minister of Intelligence and the JSCI.[4]

(d) National communications centre ('NCC')

Despite its rather benign designation, the NCC is responsible for the coordination of all of the government's communication interception activities. Among other things, the NCC plays a role in the development of technology to be used for this purpose. The NCC also provides advice to the Minister for Intelligence Services on matters related to signals intelligence procurement, management and direction.[5]

(e) Office for interception centres ('OIC')

The Regulation of Interception of Communications and Provision of Communication Related Information Act is the enabling legislation for the OIC.[6] The OIC 'reports to the Minister for Intelligence Services' and 'provides a centralised interception service to law enforcement agencies involved in combating threats to national security.'[7]

[1] Comsec Act ss 8 and 13.

[2] Comsec Act s 7.

[3] Comsec Act s 18(1) and (2).

[4] Comsec Act s 18(10).

[5] Information on the NCC is available at http://www.intelligence.gov.za/Functions/national_communications_centre.htm (accessed on 6 November 2007).

[6] Act 70 of 2002.

[7] The tasks of interception and collation of data had previously been undertaken by the Law Enforcement Agency (LEA). The ostensible motivation for the creation of the OIC was improved management of interception, minimal duplication of resources, and increased control over state-sponsored interception.

23C War Powers

Stephen Ellmann

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23C.1 INTRODUCTION*

It may seem strange to inquire into the nature of war powers under South Africa's Constitution[1] — for surely South Africa is not a nation that considers itself embarked on a policy of war. The topic is important nonetheless.

As a matter of principle, there are few greater destroyers of rights, or creators of utter and arbitrary inequality, than war. It demands that soldiers kill, sacrifices others, and potentially rips apart the fabric of civil society. The power to make war is the power to protect and to destroy perhaps the most fundamental right of all: the right to live in an ordered society. A state that leaves this power loosely governed is a state where rights are not entirely secure, no matter how extensively that state protects rights in situations short of war.

Nor are these abstract considerations for South Africa. South Africa is not a warlike state, but it is, compared to other nations in Africa, a well-armed state.[2] Its spending to maintain that military strength is at the heart of a bribery scandal that threatened to derail Jacob Zuma's candidacy for President and may taint others as well.[3] Its troops are already serving, or have served, in peace-keeping or election-support missions in several other African states: Burundi, the Democratic Republic of the Congo (DRC), the Comoros, Côte d'Ivoire, Eritrea, Ethiopia, Lesotho, Liberia, Mozambique, Sudan (Darfur), and Uganda; South African forces have ventured as far as Nepal.[4] Some, fortunately a small

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[1] Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC').

[2] While recognizing that South Africa is a peaceful state, we should not overlook the considerable military force it is accumulating. See, for example, Shaun Benton 'First of SA's Three New Submarines Cruises into Simonstown After 49-Day Voyage' *AllAfrica.com* (7 April 2006)(available on Westlaw WIRES database).

[3] See, for example, Mandy Rossouw, Matuma Letsoalo & Rapule Tabane, 'Mbeki Faces Amnesty Pressure' *Mail & Guardian Online* (20 March 2008), available at http://www.mg.co.za/articlePage.aspx?articleid=335115&area=/insight/insight__national/; 'Cabinet Dismisses Arms-Deal Allegations Against Mbeki' *Mail & Guardian Online* (20 March 2008), available at http://www.mg.co.za/articlePage.aspx?articleid=335107&area=/breaking_news/breaking_news__national/; Sam Sole & Stefaans Brummer, 'Arms Broker *Did* Give Cash to the ANC' *Mail & Guardian Online* (14 March 2008), available at http://www.mg.co.za/articlePage.aspx?articleid=334629&area=/insight/insight__national/(all accessed on 20 April 2008).

[4] 'Foreword by the Honourable MGP Lekota, Minister of Defence' Department of Defence *Annual Report FY 2006 — 2007* (2007) xiii-xiv, available at http://www.info.gov.za/annualreport/2006/defence_annual_rpt07.pdf (accessed on 20 April 2008); Parliamentary Monitoring Group 'Transformation Management Developments; SANDF Deployment to West Indies, Nepal, Mozambique', available at http://www.pmg.org.za/node/9056 (accessed on 20 April 2008); Mosiuoa Lekota 'Address by the Minister of Defence, the Honourable Mosiuoa Lekota, at Media Breakfast at the Defence Headquarters, Pretoria' (5 September 2005), available at http://www.info.gov.za/speeches/2005/05090712451003.htm (accessed on 3 March 2007); Clive Ndou 'South Africa Beefs Up Peace Missions in Africa' *AllAfrica.com* (23 March 2006), available at http://www.buanews.gov.za/view.php?ID=06032311151002&coll=buanew06 (accessed on 7 July 2009). SANDF troops have also been employed in the Central African Republic. Shaun Benton 'South Africa: Cabinet Approves

number, have died in combat outside its borders (in an intervention in Lesotho in 1998 and more recently in the DRC.[1]) War is not entirely absent from South Africa's politics. South Africa's peacekeeping efforts in fact have stretched the nation's current military resources,[2] and the goal of establishing an African Union peacekeeping force will certainly call on South African resources as well.[3]

The Final Constitution addresses the possibility of war, and the deployment of troops, but not at great length. The brevity of these provisions is entirely understandable. South Africa's constitution writers — like their counterparts in every nation — wrote a constitution not for abstract review but for the governance of their nation with its particular and painful history. The legacy of human rights abuses, especially in states of emergency, was fresh in the drafters' minds. They addressed these dangers in detail in the new Constitution, but they did not envision their renewed country as a war-making state. Perhaps they also did not expect that the new South Africa would play as active a role as it does in deploying military force on behalf of peace — a constructive and admirable role, but one not without risks.

War is hell. It is also extremely hard to govern constitutionally. The pressures of military necessity drive the meaning of constitutional language in ways that only experience may fully reveal. South Africa so far has, happily, had little occasion to encounter these questions in its own governance. But war is a great danger, even in a country that takes pride in its commitments to peace. While this chapter

SANDF Deployment in Uganda' *BuaNews* (Tshwane) (20 March 2008), available at http://allafrica.com/stories/printable/200803200328.html (accessed on 27 Sept 2009).

[1] At least nine South African soldiers died in the intervention in Lesotho in 1998. Suzanne Daley 'How Did Pretoria Err? Lesotho Counts the Ways' *New York Times* (27 September 1998) 16. Ten have died in the Democratic Republic of the Congo more recently, mostly not in combat. See Boyd Webb 'Defence Chief Visits Injured Soldiers' *SAPA* (10 June 2004); 'Five of Six Soldiers Drowned in DRCongo to Be Buried Saturday' *SAPA* (16 April 2004); 'Full Military Honours for SANDF Soldier Killed in DRC' *SAPA* (6 April 2004); 'South Africa: Army to Investigate Officer's Death' *UN Integrated Regional Information Networks* (31 March 2004)(all available on Westlaw ALLNEWS database).

[2] These resources have also been affected by AIDS. An estimated 23 % of SANDF troops — and perhaps more — are HIV positive. Xan Rice 'South African Army Facing HIV Crisis' *The Times* (UK) (19 August 2004)(all available on Westlaw ALLNEWS database).

[3] See Peter Honey 'Defence. Battle for Force Readiness' *Financial Mail* (16 September 2005) 46 (available on Westlaw ALLNEWS database); Shaun Benton 'Darfur Peace Mission Is Hurting AU, SA, Financially' *AllAfrica.com* (16 March 2006), available at http://www.buanews.gov.za/view.php?ID=06031616151004&coll=buanew06 (accessed on 7 July 2009). In 1999, South Africa anticipated employing one battalion in peacekeeping operations outside its borders at any one time. See Department of Foreign Affairs *White Paper on South African Participation in International Peace Missions* ('White Paper on Peace Missions')(approved by Cabinet, 21 October 1998; tabled in Parliament, 24 February 1999), 25 available at http://www.info.gov.za/view/DownloadFileAction?id=70438 (accessed on 27 September 2009). A battalion 'is made up of between 700 and 1200 personnel and support staff, as well as weaponry and transport'. Prakash Naidoo 'African Peacekeeping Force. SA Stretched to Its Limits' Financial Mail (18 June 2004) 24 (available on Westlaw ALLNEWS database). In 2004-05, South Africa had approximately three battalions, rather than one, stationed in other nations on such missions. Ibid. South African troops are also part of the Southern African Development Community 'stand-by brigade', officially launched in 2007 and part of the larger African Union stand-by force. See David Masango 'Southern Africa: Stand-By Brigade to Maintain Peace in SADC' *BuaNews* (Tshwane)(17 August 2007), available at http://allafrica.com/stories/20070817075.html (accessed on 27 September 2009).

offers few prescriptions, it aims to provide a guide to the interpretation of those constitutional provisions governing this nation's powers of war.

It should surprise no one that South Africa's constitutional provisions dealing with war and fighting have some ambiguities — all texts have some ambiguities. I do not mean to score debater's points by highlighting linguistic possibilities that may be grammatically coherent but are inconsistent with the fundamental themes of the Final Constitution. On the contrary, where ambiguity in specific clauses can be interpreted by reference to general principles of South African constitutional law, I hope to do just that.

Three such general principles are particularly important. First, and most fundamental, all acts of the South African government are subject to the Final Constitution. The notion of war powers that are wholly beyond the reach of judicial review is implausible.[1] Moreover, the protection of human rights is an absolutely integral part of the South African constitutional order.[2] Second, the Final Constitution contains a specific commitment to subject military power to law. The Final Constitution declares that the security services (including military, police and intelligence services) 'must act … in accordance with the Constitution and the law'.[3] This provision is not just an abstract sentiment. The issue of the armed forces' loyalty during the constitutional transition was both critical and delicate for the negotiating parties.[4] Third, the Final Constitution rejects the idea that war is the province of the executive alone. FC s 198(d) lays out, as one of the 'governing principles' for the security services, that '[n]ational security is subject to the authority of Parliament and the national executive'.[5]

As important as these general principles are, however, they do not remove the need to look carefully at the specific provisions of the Final Constitution that deal with war. We will first look at the provisions governing the declaration

[1] See, for example, *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at para 78 (Chaskalson CJ). However, where issues primarily for other branches are involved — as is surely the case with foreign affairs and war — the Courts' review will be relatively more deferential. Ibid at para 244 (O'Regan J). I am grateful to a reader for calling this decision to my attention.

[2] Ibid at para 66 (Chaskalson CJ); para 159 (Ngcobo J); para 221 (O'Regan J). See FC s 7(2), '[t]he state must respect, protect, promote, and fulfill the rights in the Bill of Rights'.

[3] FC s 199(5). See generally *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC); *South African National Defence Union v Minister of Defence & Others* 2007 (5) SA 400 (CC), 2007 (8) BCLR 863 (CC)(both examining the constitutional rights of members of the South African National Defence Force). For more on the security services, see O Ampofo-Anti, K Robinson & S Woolman 'Security Services' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 23B. (Ed.)

[4] See Nico Steytler & Johann Mettler 'Federal Arrangements as a Peacemaking Device During South Africa's Transition to Democracy' *Publius* (1 October 2001) 93, 95-96. Assuring the military's loyalty to civilian rule is essential in any democracy, and may still require attention in South Africa. See Max du Preez 'SANDF is a Crumbling Excuse for an Army: Strong Leadership and Discipline Are Needed to Validate This Force and Massive Expenditure' *Daily News* (14 February 2008), available at http://www.dailynews.co.za/index.php?fArticleId=4253049 (accessed on 7 July 2009). Indeed, an August 2009 demonstration by unionized soldiers prompted government accusations of 'mutiny'. 'Zuma: Unions can't control the army' Mail & Guardian Online (17 September 2009), available at http://www.mg.co.za/article/2009-09-17-zuma-unions-cant-control-the-army (accessed on 28 September 2009).

[5] Moreover, the Final Constitution provides that '[t]o give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services'. FC s 199(8).

of a state of national defence — the clearest route provided by the Final Constitution for South Africa to enter or to initiate a war. As we will find, the procedural requirements for such declarations are distinctly less demanding than those governing the declaration of a state of emergency. At the same time, the substantive powers conferred on the President by such a declaration — though not beyond Parliament's authority to regulate — are potentially far-reaching, both in military terms and in terms of their impact on at least some human rights. Next, we will ask whether South Africa can become involved in military action without a declaration of a state of national defence. The answer seems to be 'yes'. Moreover, it appears that the President has the authority to initiate a range of potentially risky military involvements without any direct approval by Parliament — although, again Parliament may approve or disapprove this decision, if it so chooses. Finally, in light of the extent of military and Presidential authority that this analysis has identified, the chapter will consider the role of Parliament's power over the budget as a check, albeit an imperfect one, on executive military decisions.

23C.2 The Procedural Requirements for a State of National Defence

The Final Constitution gives no explicit power to anyone to declare 'war'. Perhaps such an authority is still implicit in the general powers of the President and Parliament, but probably not. Instead, it appears that the Final Constitution's drafters carefully avoided giving the nation a power to declare war, and instead gave it a power to declare a 'state of national defence'.[1] Does this mean that South Africa cannot fight a war, or engage its troops in combat 'hostilities'?[2] Surely not. There is no sign that South Africa chose to abandon its military when it abolished apartheid, and a country with a military is a country prepared, at least in some circumstances, to fight. If the country were to be attacked, then the declaration of a state of national defence must have been intended to serve as a means for

[1] FC s 203. This language may owe something to the German Constitution's provision for declaration of a 'state of defence', though the relevant South African and German sections differ in many ways. See generally Grundgesetz arts. 115a-115l (available in English translation at http://www.psr.keele.ac.uk/docs/german.htm) (accessed on 15 September 2006). The same may be said of the Namibian Constitution. See Constitution of the Republic of Namibia 1990 art 24, reprinted in Gisbert H Flanz (ed) & Patricie H. Ward (assoc ed) *Constitutions of the Countries of the World [Namibia]* (2003) 19-20. In any event, as a reader pointed out to me, South Africa's Final Constitution here elaborates on an idea that appeared in the Interim Constitution as well. Constitution of the Republic of South Africa, Act 200 of 1993 ('IC' or 'Interim Constitution') s 82(4)*(b)*(i)(Section empowers the President 'with the approval of Parliament, [to] declare a state of national defence). This Interim Constitution provision retained a tenuous legal existence under FC Schedule 6, Item 24(1). See Iain Currie & Johan de Waal, with Pierre de Vos, Karthy Govender & Heinz Klug, *The New Constitutional & Administrative Law* (Revised Edition, 2002) vol I, 252 n 163. The last Constitution of apartheid South Africa, by contrast, had authorized the 'State President' to 'declare war and make peace'. Republic of South Africa Constitution Act 110 of 1983 s 6(3)*(g)*.

[2] This chapter does not seek to precisely define the term 'war'. My focus is on the Final Constitution's provisions for the engagement of South African troops in combat, short or prolonged. Exactly when the term 'war' becomes applicable to these engagements is not the central issue, for the Final Constitution itself does not make it so.

declaring that the nation was going to fight in order to defend itself.[1] It may well be that South Africa has no constitutional power to fight a war of aggression.[2] But, as we will see, even that constraint still leaves room for many potential military engagements.

What are the procedural requirements for the declaration of a state of national defence? The first part of the answer to this question is explicit, or almost explicit. FC s 203(1) says that '[t]he President as head of the national executive may declare a state of national defence'. Although this language doesn't expressly prohibit Parliament from issuing such a declaration on its own, the overall content of FC s 203 (with its focus on the President's reporting to Parliament, and Parliament's approving the declaration after it has been made) makes it clear that only the President has this authority.

More precisely, only the President, or whoever may be serving as Acting President, can exercise this authority. Because the authority is transferable, it is quite possible that a declaration of a state of national defence could be made by someone chosen by the President to serve as Acting President rather than by someone elected by Parliament to play this role.[3] In actual fact, South Africa's intervention into Lesotho in 1998, though apparently not based on a declaration of national defence but simply on a decision to send troops on the mission, was ordered by Mangosothu Buthelezi in his capacity as Acting President while President Nelson Mandela was out of the country.[4] (Mandela's choice of Buthelezi surely was related to the ANC's efforts to improve relations with this long-time opponent.[5])

It is striking that this power is given to the President. Clearly, explicitly, he or she can declare the nation's involvement in war without any prior approval from Parliament. (It may be that the President must obtain the approval not only of the relevant Cabinet minister but also, for a decision of this magnitude, of the

[1] Again, whether South Africa can also fight *without* a declaration of a state of national defence is a separate question, to which we will return.

[2] Currie and de Waal point out that wars of aggression are now violations of international law as well. Currie & de Waal (supra) at vol I, 252.

[3] See FC s 90(2). The Acting President could even be a Minister chosen from outside Parliament, and thus entirely unelected. FC ss 90(1) and 91(2)-(3).

[4] Buthelezi reportedly did, however, consult with both President Mandela and Deputy President Mbeki (who also was out of the country at the time), before ordering the military entry into Lesotho. Both 'approved the operation'. Gilbert A Lewthwaite 'South Africa Weighs Withdrawal from Messy Lesotho Intervention [–] Resistance Was Fiercer, and Intelligence Less Reliable Than Expected' *Baltimore Sun* (26 September 1998) at 7A (available on Westlaw ALLNEWS database). South Africa apparently expected its entry to be quite uneventful, and initially its troops were supplied only with blank ammunition.) Ibid. I have included the dispatch of troops to Lesotho in this chapter's list of peacekeeping missions, but clearly it was initially seen by many in Lesotho as deeply partisan and aggressive. See also Gilbert A. Lewthwaite 'Lesotho military operation criticized in South Africa Newspapers, opposition say peacekeeping mission is botched and misguided' *Baltimore Sun* (24 September 1988) at 20A (available on Westlaw ALLNEWS database).

[5] See Steytler & Mettler 'Federal Arrangements' (supra) at 102; Richard Ellis 'Zulu Chief Keeps Low Profile on the Campaign Trail' *Scotsman* (2 June 1999)(available on Westlaw ALLNEWS database).

Cabinet as a whole.[1]) Presumably the war can then be prosecuted. However, the declaration 'lapses unless it is approved by Parliament within seven days of the declaration'.[2] This requirement of affirmative approval by Parliament means that a formal declaration of the nation's martial intent rests on the approval of both of the political branches of government. But it must be said that within a week a lot can happen, politically and militarily. If the President begins the war on Monday, and South African troops have fallen by Saturday, will Parliament be prepared to withhold its approval? It has often been suggested that the ability of the United States President to involve the United States in fighting presents Congress with something approaching a *fait accompli*.[3] In any event, the more firmly the executive maintains political control of Parliament, the less likely it is that Parliament will fail to give its approval.

Though Parliamentary approval is required for a declaration of a state of national defence, it is clear that the Final Constitution imposes much clearer and more stringent requirements for a declaration of a state of emergency than it does for the declaration of a state of national defence.[4]

- First, FC s 37(1) specifies the grounds on which a state of emergency can be declared (a threat to 'the life of the nation'), whereas no specific grounds are spelled out for declaring a state of national defence. A state of emergency can only be declared in terms of an Act of Parliament,[5] but no statute is required as a basis for declaring a state of national defence. So while the Defence Act does set out grounds for declaring a state of national defence,[6] these procedures are not mandated by the constitutional text.
- Second, while a state of emergency can last for 21 days without legislative endorsement — compared to 7 days for a state of national defence — once initial approval (the 'first extension') has been issued by Parliament for a state

[1] Currie & de Waal maintain that the President must obtain the countersignature of the relevant Cabinet minister for any action within the sphere of that Minister's authority. See FC s 101(2). In addition, they explain, '[i]f the issue has implications for government as a whole or concerns matters of real political importance, the President cannot act with the concurrence of a Minister, but the approval of Cabinet must be obtained'. Currie & de Waal (supra) at vol I, 246. See FC s 85(2). Thus the President would need the signature of the Minister of Defence for orders to the troops, FC ss 201(1), 202(2), and perhaps the approval of the Cabinet as a whole for a declaration of a state of national defence or other commitments of troops to potential combat. It seems unlikely that these requirements would ordinarily prevent a President convinced of the need for warlike action from proceeding.

[2] FC s 203(3).

[3] In the United States, if the President undertakes military action without a declaration of war, the War Powers Resolution (a statute) normally requires an end to the operation if it does not receive Congressional approval – but 60 days can elapse before that approval is obtained, and by then the fighting may have advanced too far to be easily halted. War Powers Resolution, § 5(b), 50 USC § 1544(b) (2006).

[4] See generally N Fritz 'States of Emergency' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 61. (Ed.)

[5] FC s 37(1).

[6] Defence Act 42 of 2002 ('Defence Act') s 89 (The President may declare a state of national defence 'if, among other things, the sovereignty or territory of the Republic — (a) is threatened by war, including biological or chemical warfare, or invasion, armed attack or armed conflict; or (b) is being or has been invaded or is under armed or cyber attack or subject to a state of armed conflict.')

of emergency, this approval must be renewed at least every three months.[1] A state of national defence, once approved by Parliament, appears to extend indefinitely.

- Third, FC s 37(2) spells out which chamber of Parliament has the power to give or withhold approval of a state of emergency — the National Assembly. The allocation of this authority for states of national defence, however, is not made explicit. What FC s 203(3) says is that 'Parliament' must approve the declaration. FC s 42(1) declares that Parliament consists of the National Assembly and the National Council of Provinces (NCOP).[2] It is not easy to see why the National Assembly should be relied upon to approve or disapprove states of emergency, while the National Council of Provinces as well as the National Assembly are needed for approval or disapproval of states of national defence. But this state of affairs is what the text on its face dictates.[3] Conceivably, however, the NCOP is not meant to play a part in approving a declaration of a state of national defence. It might be argued that the NCOP's powers are limited to 'legislative power', and that approval or disapproval of a declaration of a state of national defence is not actually legislation. Rather, this function might be seen as a form of oversight over executive power, a responsibility apparently reserved to the National Assembly.[4] If, on the other hand, the NCOP does have a role to play in the approval of a declaration of a state of national defence, then how great is that role? If this decision is viewed as a form of legislation, presumably it is legislation of national rather than distinctively provincial concern.[5] If so, then even if the NCOP withholds approval of the declaration after the National Assembly has given its endorsement, the National Assembly can give *Parliament's* approval by re-enacting it.[6] But if this approval did count as legislation triggering the special NCOP powers applicable to bills 'affecting provinces', then very different dispute resolution provisions would apply.[7] Finally, it could be maintained that the approval of a declaration of a state

[1] FC s 37(2)*(b)*.

[2] I am grateful to a reader for pointing this out.

[3] Abstractly, it might seem harder for the executive to obtain the approval of two houses of Parliament than of just one, and so a requirement of bicameral approval might be seen as a way of slowing the march towards war. It would remain unclear why a similar check on the move to a state of emergency was unnecessary. As a practical matter, however, at least in today's South Africa, the chance of such a disagreement between the two houses of Parliament seems small.

[4] See S Budlender 'National Legislative Authority' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) 17-1, 17-3 ('The national executive is accountable to the National Assembly and not to the NCOP'.)(Ed.) Also, compare FC s 68 (section on 'Powers of National Council' detailing only 'legislative power') with FC s 55 (section on 'Powers of National Assembly' separately describing the Assembly's legislative power and its accountability/oversight power). Even if the NCOP does perform oversight functions in practice, perhaps its oversight role is not sufficiently secured by the Constitution to extend to 'oversight' of the declaration of a state of national defence.

[5] See FC ss 75-76.

[6] FC s 75(1); Budlender (supra) at 17-15.

[7] FC s 76. The NCOP also follows substantially different voting procedures ('one legislator, one vote' or 'one provincial delegation, one vote'), depending on which category of legislation it is considering. See FC ss 65, 75(2); Budlender (supra) at 17-4 –17-6.

of national defence is not governed by either of the two sets of procedures for normal legislation, and that some further process, such as an absolute requirement of approval by each House of Parliament, must be inferred for this very special function. The failure to fully clarify this complex of issues is a significant omission, and a potential source of great difficulty should a state of national defence ever be declared.

- Fourth, FC s 37(2) also forbids the National Assembly from approving or extending a state of national emergency without a public legislative debate. No such rule is imposed for approval of a state of national defence. (Other sections require that Parliament's rules in general must have 'due regard' for 'transparency and public involvement'.[1]) It is hard to accept the idea of a state of national defence being approved without a public debate. The sheer unlikelihood of such a step, however, perhaps makes the absence of this textual requirement less important.
- Fifth, the required majorities for approval differ. The National Assembly can only approve a state of emergency by 'a supporting vote of a majority of the members of the Assembly', and can only extend it by 'a supporting vote of at least 60 per cent of the members of the Assembly'.[2] The Final Constitution imposes no supermajority voting requirement for Parliament's approval of a state of national defence. Presumably, therefore, Parliament is to treat this declaration according to one or the other of the two standard models the Final Constitution provides. If the declaration is treated as equivalent to a 'Bill', then the required quorum in the National Assembly is one-half of the members, and the required vote appears to be simply a majority of those voting.[3] If, on the other hand, the declaration is not treated as a bill, then the required quorum in the National Assembly is only one-third of the members; again, approval or disapproval would require simply a majority of the votes cast.[4]
- Sixth, the Final Constitution explicitly provides for judicial review of the validity of states of emergency — their declaration, the approval and extension of their declaration, and any legislation or action taken in consequence of their declaration.[5] It is likely that some form of judicial review of a state of national defence is also available. The legality principle or the role of law doc-

[1] Budlender (supra) at 17-37, citing FC ss 57(1)*(b)*, 70(1)*(b)*. For more on the constitutional requirement of public involvement in the legislative process, see *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC); *Matatiele Municipality & Others v President of the Republic of South Africa & Others (2)* 2006 (5) SA 47 (CC), 2007 (1) BCLR 47 (CC); and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC).

[2] FC s 37(2). Bruce Ackerman characterizes the 60-percent majority requirement for extending a state of emergency as 'the first supermajoritarian escalator in the constitutional world', and sees in it a confirmation of the value of similar structures for the United States. Bruce Ackerman 'The Emergency Constitution' (2004) 113 *Yale LJ* 1029, 1055.

[3] FC s 53(1).

[4] See FC s 53(1). For the decision rules potentially applicable in the NCOP, see FC ss 65(1), 75(2).

[5] FC s 37(3).

trine subjects all government action to constitutional control. [1] But since the Final Constitution contains no explicit, specific provision for such review, that silence might well support arguments that the available judicial review must be particularly deferential.

23C.3 The Powers Granted by the Declaration of a State of National Defence

To address this matter, we must consider three issues:

(a) If Parliament approves a declaration, without more, what powers does the declaration confer on the President to wage war?
(b) To what extent can Parliament limit the authority that the declaration confers by adding restrictions to that authority?
(c) To what extent can the President and Parliament together limit otherwise-applicable constitutional rights based on a declaration of a state of national defence?

Let us take up these three questions in order.

(a) Presidential powers in a state of national defence

The text does not explicitly answer the first question. The most straightforward inference from the text, however, is that when a state of national defence has been declared and authorized, the President has full authority (acting with the responsible cabinet minister and the cabinet as a whole) to deploy and to direct the troops, as their Commander-in-Chief, at least until Parliament in some way restricts that authority.

The President is always the Commander-in-Chief, of course.[2] But what are the powers of a Commander-in-Chief? The text does not specify the extent or the limits of this authority. But, again, the most plausible answer is that as Commander-in-Chief, the President has the authority to order any lawful military action,[3] from preparation for war to actual fighting. Suppose, for instance, that troops from one of South Africa's neighbors massed along the border. One might imagine that South Africa would move its troops to the border in

[1] *Pharmaceutical Manufactures Association of South Africa and Another In Re: The Ex Parte Application of the President of the Republic of South Africa and others* (2000) (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 20 (Chaskalson P); see F Michelman 'The Rule of Law, Legality and Supremacy of the Constitution' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11. But see Ziyad Motala & Cyril Ramaphosa *Constitutional Law: Analysis and Cases* (2002) 218-20 (The authors suggest that the President's use of defence powers would be largely or entirely non-justiciable.)

[2] FC s 202(1).

[3] Lawful, that is, under South African law and also lawful under the international law of war to the extent South Africa is bound by it. See FC ss 231-32. See also K Hopkins & H Strydom 'International Law and International Agreements' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 30. (Ed.) So, for example, the South African Bill of Rights, domestic legislation or the Geneva Conventions would constrain the President's authority to direct the treatment of prisoners of war who were taken during the fighting that the declaration of a state of national defence authorized.

response, and this positioning of forces would be an appropriate exercise of the Commander-in-Chief's powers under a 'state of national defence'. By the same logic, Parliament's approval of the state of national defence would also authorize the President to launch a preemptive attack on the threatening troops (assuming that such an attack could be justified under international law as self-defence against an imminent invasion). Similarly, it would allow the President to repel an attack and to pursue the attackers deep into the attacking country's territory (assuming that such a response fell within legitimate self-defence under the UN Charter and other binding norms of international law). On the same basis, Parliament's approval of the declaration of a state of national defence could authorize, without further legislative action, the President's taking the attacking country's capital by force and overthrowing the aggressor government.

It might be argued, however, that Parliament's approval authorizes much less than I've just suggested. FC s 203(1), which empowers the President to declare a state of national defence, also requires the President to report to Parliament:

(a) the reasons for the declaration;
(b) any place where the Defence Force is being employed; and
(c) the number of people involved.

Parliament's approval of the declaration might be thought to be limited to approving the particular rationale and the particular level of troop engagement that the President has reported. This is a possible reading but not the most plausible one. FC s 203 does not say that the President's use of troops lapses if it is not approved within seven days; rather, it says that the *declaration* lapses if not approved within that period. It seems inevitable that in a war, whatever uses are being made of troops in the first seven days will change over the next seven, or seven hundred, and there is no sign in the text that each such change requires a fresh declaration and a fresh Parliamentary approval.

It is important to add that the question of Presidential power is not only a question of 'what powers' but of 'against whom'. Who can be the target of a declaration of a state of national defence? The broader the range of potential targets, the wider the potential occasions when the war powers of the nation can be brought into play under this mantle. The text does not say who the targets of such declarations can be. It seems reasonable to infer, however, that in rejecting the rubric of 'declarations of *war*', the Final Constitution also puts to one side any possible argument that a declaration can only be directed against another nation-state, as might have been the case with a declaration of war. Assuming that the declaration must be against *someone* (rather than being, simply, a declaration that the nation is in peril, with no specification of the source of the danger), how well must that someone be specified? Would it be constitutional for the President to declare a state of national defence against, say, all those who participated in an act of terrorism against South Africa, or who aided or harbored those who did? Or all those whom the President *concludes* or *finds* participated in the act of terrorism, or aided or harbored those who

did?[1] Or who 'might' commit acts of terrorism in the future?[2] The answers to these questions will help measure the breadth of the President's, and Parliament's, authority under a state of national defence.

(b) Parliament's authority to limit the President's powers

Parliament's approval of the declaration of a state of national defence ordinarily operates to authorize all lawful military action that the President may order. Still it might be that Parliament can, if it chooses, impose limitations on this authorization. The text does not make clear whether Parliament has this power, and this ambiguity is important and potentially troublesome. Given that only the President can issue a declaration of a state of national defence, it is possible (as a reader suggested) that Parliament's only power as to declarations is to approve them or disapprove them, since any Parliamentary modification of the declaration might constitute a new declaration, and one issued by Parliament rather than the President. The basic principle that national security is subject to both Parliamentary and Presidential authority, on the other hand, argues in favor of finding that Parliament *can* amend a declaration before approving it. Even if the division of powers with regard to declarations impliedly limits Parliament's authority in this respect, a sufficiently independent Parliament might be able to compel a President to modify and to re-issue a declaration in order to win Parliamentary approval for it.

In addition, Parliament might well retain authority to approve or to disapprove the broad policies that the President undertakes by virtue of the declaration. So, for example, I would argue that Parliament could choose to forbid the President to invade the aggressor nation imagined earlier, even if the President believed that invasion was necessary to erase the peril that nation posed to South Africa and even though Parliament had approved the declaration of a state of national defence in response to that peril.[3] The constitutional text does not spell out such a power to approve or to disapprove military policies. But it is, likewise, not precluded by the text, and the principle of joint Parliamentary-Presidential responsibility counsels in favor of it. Indeed, precisely because a declaration of a state of national defence can last for an unlimited time, principles of accountability strongly argue in favor of finding Parliamentary power to regulate what is done during the potentially extended duration of hostilities.

In this regard, it is noteworthy that the Final Constitution, in addition to requiring the President to provide Parliament with certain information in connection

[1] *Cf* Authorization for Use of Military Force ('AUMF'), Pub L 107-40, 115 Stat 224, § 2(a) (18 September 2001)(US statute authorizing the use of force against those the President 'determines' were connected to the September 11 attacks or to the attackers.)

[2] Proposed language for the AUMF would have authorized the use of force not only against those connected to the September 11 attacks, but also to 'deter and pre-empt any future acts of terrorism or aggression against the United States'. Tom Daschle 'Power We Didn't Grant' *Washington Post* (23 December 2005)(available on Westlaw ALLNEWS database).

[3] Though US law on this question is decidedly ambiguous, there are early Supreme Court cases supporting the conclusion that Congress retained a power to limit Presidential warmaking discretion, in undeclared wars and even in declared ones. See *Little v Barreme* 6 US (2 Cranch) 170 (1804); *Brown v US* 12 US (8 Cranch) 110 (1814). Language in an important Civil War decision, however, suggests a broader scope for Presidential discretion. See *The Prize Cases* 67 US (2 Black) 635 (1863).

with a declaration of a state of national defence, also imposes in FC s 201(3) a requirement that the President provide information to Parliament concerning a range of 'employment[s] of the defence force', notably including employment 'in defence of the Republic'.[1] If this section is understood to create an ongoing duty of reporting, even during an already-approved state of national defence, and if the function of this reporting is inferred to be not simply to inform Parliament but to empower it to act, then we have reason to find a continuing Parliamentary authority to regulate the military course of a state of national defence.[2] (Parliament's funding power — though limited — is a further check, as we will see below.[3]) It is important to recognize, however, that this reading affirms Parliamentary review power but does not establish any requirement of

[1] These instances of employment of the defence forces are specified in FC s 201(2). and discussed further in § 23C.4 infra. For uses of the military covered by FC s 201(2), s 201(3) requires the President

> to inform Parliament, promptly and in appropriate detail, of —
> (a) the reasons for the employment of the defence force;
> (b) any place where the force is being employed;
> (c) the number of people involved; and
> (d) the period for which the force is expected to be employed.

The Defence Act adds the requirement of a report on 'expenditure incurred or expected to be incurred'. Defence Act ss 18(2)*(e)* and (4). This information is somewhat more extensive than what the President must report in connection with a declaration of a state of national defence. In that context, FC s 203(1)'s reporting requirements do not include discussion of the period for which the declaration is expected to last or of costs. I would view the several requirements as complementary rather than conflicting.

[2] Defence Act s 18(5) explicitly establishes Parliamentary review power over the President's uses of troops for a variety of purposes. It applies under circumstances specified in s 18(1), which provides:

> In addition to the employment of the Defence Force by the President as contemplated in section 201(2) of the Constitution, the President or the Minister may authorise the employment of the Defence Force for service inside the Republic or in international waters, in order to —
> (a) preserve life, health or property in emergency or humanitarian relief operations;
> (b) ensure the provision of essential services;
> (c) support any department of state, including support for purposes of socio-economic upliftment;
> (d) effect national border control.

In these circumstances, under s 18(5), 'Parliament may by resolution within seven days after receiving information [about the employment of troops in question] from the President or the Minister —

> (a) confirm any such authorisation of employment;
> (b) order the amendment of such authorisation;
> (c) order the substitution for such authorisation of any other appropriate authorization; or
> (d) order the termination of the employment of the Defence Force.'

As a reader has pointed out to me, however, this provision appears to cover only the employment of troops in South Africa or in international waters, and only for purposes in addition to those functions, notably including national defence and fulfillment of international obligations, for which FC s 201(2) authorizes the President to employ troops. It appears, therefore, that Parliament has not yet asserted the broader review power which I argue it possesses under the Constitution. Interestingly, a Parliamentary legal adviser has in fact expressed the view that the President's employment of the Defence Force under FC 201(2) 'is not subject to the approval of Parliament and it may not amend, substitute or terminate such employment'. Memorandum – Confidential – to Secretary of the National Assembly from Legal Services Office, 'Employment of the Defence Force' (14 July 2003) at 3, available at http://www.pmg.org.za/files/docs/081024memo.pdf (accessed 4 October 2009). This report was distributed and discussed at a meeting of the Joint Standing Committee on Defence, reported in Parliamentary Monitoring Group, 'Protection of Civilians during Peacekeeping Operations: ACP/EU Draft; Employment of SANDF under Section 201 of Constitution: Legal Opinion', (29 October 2008), available at http://www.pmg.org.za/report/20081024-protection-civilians-during-peacekeeping-operations-acpeu-draft-emplo (accessed 4 October 2009). I discuss the report further at § 23C-18 n 2 infra.

[3] See § 23C.5 infra.

specific Parliamentary approval as a predicate for Presidential action. As long as Parliament does not order otherwise, it seems quite likely that the approval of the declaration of a state of national defence in itself confers, or accepts, unlimited Commander-in-Chief authority bound only by general South African or international law.

Moreover, assuming that Parliament does have this implied authority to limit the President's freedom of action in a state of national defence, it would appear to be subject to a potentially significant limit: Parliament presumably cannot impose modifications that in effect prevent the President from performing the role of Commander-in-Chief. What this limit would entail is by no means certain, and I do not mean to suggest that aggressively expansive notions of executive war-making power would be compatible with South Africa's constitutional order. But still this limit does seem to have at least some content. Parliament probably could not, for example, require that Presidential military orders be co-signed by the Speaker of the National Assembly: the President, not the Speaker, is the Commander-in-Chief.[1] Parliament also cannot order the 'employment' of troops in defence of the nation; '[o]nly the President, as head of the national executive', has that authority, under FC s 201(2).[2] If Parliament cannot order the 'employment' of troops, then its power to order, or to compel the President to order, their 'deployment' during a state of national defence may also be limited. Thus, although I have already urged that Parliament would have the power to regulate the broad outlines of war (for example, to forbid an invasion as a form of self-defence), it is open to question whether Parliament could direct the President in a state of national defence to attack one base rather than another, to defend one town but not a second, or to use armored personnel carriers but not tanks.[3] Once a state of national defence has been declared and approved, some considerable authority may pass to the President in a manner that Parliament cannot restrict.

(c) Limits on human rights during a state of national defence

We can begin to answer the third question by asking another: Does the declaration of a state of national defence also result in the declaration of a state of national emergency? The answer to this question is clearly 'no'. A state of national defence is not a state of emergency, and a state of emergency is not a state of national defence. The brief constitutional text bearing on states

[1] *Cf* Michael D Ramsey 'Torturing Executive Power' (2005) 93 *Georgetown LJ* 1213, 1241 (US 'Congress cannot appoint a commander who does not answer to the President.')

[2] I discuss this provision in much more detail below. See § 23C.4 infra.

[3] In the United States, it has been said that '[t]here is ample evidence that the legislature was not meant to make tactical military decisions once war was initiated'. Stephen Dycus, Arthur L Berney, Willam C Banks & Peter Raven-Hansen *National Security Law* (4th Edition, 2007) 26. But a number of scholars have recently argued that although such tactical choices are normally made by the President as Commander-in-Chief, Congress does have the authority to intervene in many, perhaps even all, of them if it so chooses. See David J Barron & Martin S Lederman 'The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding' (2008) 121 *Harvard L Rev* 692; Jules Lobel 'Conflicts Between the Commander in Chief and Congress: Concurrent Power Over the Conduct of War' (2008) 69/477 *Ohio State LJ* 391; David Luban 'On the Commander-in-Chief Power' (2008) 81 *Southern Cal LR* 477.

of national defence does not suggest a recognition that constitutional rights would be subject to extensive abridgment. The text addressing states of emergency, on the other hand, focuses elaborately on exactly this prospect. It seems reasonable to say that the only time that constitutional rights can be 'derogated' from is in a state of emergency, although the text of FC s 37 (on states of emergency) does not expressly say so.

As we have seen, the constitutional provisions governing the declaration and continuation of states of emergency are in general more demanding than those governing states of national defence. It appears to follow, therefore, that the government is considerably freer to engage troops in battle than it is to deprive people of constitutional rights. This statement is somewhat startling, but not necessarily cause for concern. It may be that states of national defence are so much less tempting as instruments of potential authoritarian oppression than states of emergency are that — so far as human rights are concerned — fewer constitutional limits need to be imposed on the use of states of national defence; *realpolitik* itself will protect the nation's liberties. So, at least we may hope.

However, the powers employed in a state of national defence do have important human rights implications. Sending troops into battle risks depriving them of their lives. FC s 11 protects the right to life.[1] This right cannot be derogated from even in a state of emergency.[2] It must follow that orders sending troops into battle in a lawfully-undertaken war are *justified* under FC s 36 as a limitation on the soldiers' right to life, and so can be issued without effecting a derogation from that right.[3]

There are other ways in which the violent clashes that a state of national defence would authorize would inevitably impair otherwise fully-protected constitutional rights, even if a state of national defence is not meant to authorize limitations of the sort contemplated in states of emergency. I will put aside here the possibility of military conflict so grave that the civil courts cannot stay open. There lies the ultimate recourse of martial law, unmentioned in the Final Constitution, yet still waiting somewhere in the wings.[4]

Far from the realm of martial law, the existence of a state of national defence would raise other issues regarding the limitation of constitutional rights. Suppose, for example, that South Africa faced the likelihood of imminent terrorist attack by a foreign terrorist group, and had declared a state of national defence as a

[1] See generally M Pieterse 'Life' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 39. (Ed.)

[2] FC s 37(5)*(c)*.

[3] FC s 36, to be sure, requires not just a weighing of national need and democratic reasonableness, but also the presence of 'law of general application' or authority elsewhere in the Final Constitution to sustain a limitation on rights. If a statute such as the Defence Act did not provide the necessary legal basis, then Parliamentary approval of the declaration of a state of national defence might, or the Final Constitution itself might indeed be seen as the foundation for orders to fight under such a declaration. For more on the need for a 'law of general application' and its contours, when undertaking FC s 36 analysis, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34. (Ed.)

[4] *Cf Ex parte Milligan* 71 US 2, 78-82 (1866)(on the circumstances in which martial law may and may not be declared).

result. Unless Parliament enacted limitations, presumably the President would be entitled to use all normally lawful military steps to ward off the attack. In an actual war, the armies of one side monitor the communications of the other, and they do not usually stop to obtain court authorization first. It would seem that the President, as commander-in-chief of the South African National Defense Force, would have the authority to order electronic surveillance of communications among members of this foreign terrorist group abroad, though doing so might impair their privacy of communications under FC s 14*(d)*.[1] Would the President have the same authority as to communications by members of the group abroad to their (known? suspected?) confederates within South Africa, assuming those confederates are also not South African citizens? What about communications from outside South Africa into the country, when either the sender or recipient *is* a South African citizen? And what about communications going the other way?[2] And, finally, what if the group against which the state of national defence has been declared is a domestic, South African terrorist group?[3]

I don't mean to suggest that these questions are unanswerable, or that the exercise of such wartime authority would be beyond review by the courts or regulation by Parliament. But it is hard to believe that the rules governing surveillance in a state of national defence would always be the same as those rules that apply in ordinary circumstances. *Some* limitations on normally available rights would likely be justified by the needs of the state of national defence. The power to declare a state of national defence means that military need and domestic constitutional liberty may conflict, and the exact boundaries between them have not yet been worked out.

These inferences may seem feverish. In fact, the Defence Act appears to go considerably further. Section 91(1) of the Defence Act gives the President broad authority to make regulations to deal with the tasks of a state of national defence.

[1] No constitutional question would arise, of course, if the Final Constitution does not apply to actions taken by the South African government outside its own borders and directed at noncitizens whose only connection with South Africa is their intent to attack it. See generally *Kaunda* (supra) at paras 41-44 (Chaskalson CJ) and para 228 (O'Regan J). For an argument in favour of broad extraterritorial application of the Bill of Rights, see S Woolman 'Application' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31 at 31-113 to 31-122. (Ed.)

[2] These questions of course recapitulate the argument in the United States over whether the President has authority, under the post-9/11 AUMF, to order warrantless electronic surveillance of people suspected of links with Al Qaeda. South Africa has prohibited surveillance inside the country in national security matters absent a judicial order. See Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA) ss 2-3. This statute does, however, permit emergency 'interception' of communications without such an order, for the purpose of locating their sender, when a law enforcement officer, including a member of the Defence Force, 'has reasonable grounds to believe that an emergency exists' because another person is in danger of dying or being seriously injured. RICA ss 1 and 8(1)*(b)*. See also RICA s 7 ('Interception of communication to prevent serious bodily harm'). Moreover, it seems arguable that Parliament did not craft this Act's limits with the needs of a state of national defence in mind, and that the President might exercise the authority granted in the Defence Act (discussed in the text in the remainder of this section) to establish different rules to govern surveillance in that context.

[3] As noted earlier the constitutional text does not make clear against whom a declaration of a state of national defence can be issued. See § 23C.3*(a)* supra. But it is certainly possible to imagine domestic threats that are as grave as foreign ones, and so it is quite conceivable that a declaration could target a domestic group.

Section 91(2) in turn makes clear that such regulations can have a very substantial effect on constitutional rights. It remains to be seen, of course, whether the powers conferred in these sections are constitutional. However, the existence of the statute presumably reflects at least the view of Parliament and the President that the Final Constitution does permit these provisions.

The subsections of s 91 cover a considerable range of issues affecting human rights. To begin with, ss 91(2)*(a)* — *(f)* appear to enable the President to impose a draft (referred to as a 'mobilization'). Section 91(2)*(g)* authorizes regulations dealing with 'the security of national key points and other places that may be designated', but does not specify what steps such regulations might require. Section 91(2)*(h)* provides for 'censorship of information', clearly a limitation on free speech. Section 91(2)*(i)* empowers the President to make regulations dealing with 'the evacuation or concentration of persons, including curfew laws'. All such laws impinge on freedom of movement and association. A South African reader may be quickly reminded of pass laws and bantustans or the disease-ridden concentration camps created by the British during the South African War.

Finally, s 91(2)*(l)* addresses regulations of 'places of custody or detention'. On this score, it is worth noting that FC s 37(8) makes clear that the many provisions of s 37 which protect detainees during states of emergency

> do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect to the detention of such persons.

FC s 37(8) appears to apply whether or not a state of emergency is in place, and seems to say that the rules of detention applicable to foreigners detained in consequence of an international armed conflict are simply those required by international humanitarian law, not those that might otherwise be inferred from other provisions of the Final Constitution. Thus a non-South African detained in these circumstances would have neither the rights of a normal detainee under FC s 35, nor the rights of an emergency detainee under FC s 37 (unless international humanitarian law binding on South Africa provided otherwise, either by directly mandating such protections or by requiring that non-South Africans receive the same protections as South Africans enjoy). And this would be true even if the non-South African was detained or (to use a more military term) taken prisoner on South African soil and thereafter detained inside South Africa as well.

To all of the above, it is important to add that the list of topics in s 91(2) of the Defence Act may not be exclusive. Indeed, the breadth of s 91(1)'s general authorization suggests that the specific powers granted in s 91(2) might be viewed as exemplifying a range of other implicit powers that may impinge, where necessary, on constitutional liberties. Whether s 91(2)'s provisions, or broader implications that flow from them, are constitutional remains to be litigated. But the statute does at least confirm the possibility that states of national defence will involve significant limitations on otherwise protected rights, limitations with some resemblance to the 'derogations' that are authorized, but much more carefully addressed, in the state of emergency provisions of the Final Constitution. It might be argued that the differences do not matter, since South Africa can always declare and approve declarations

of a state of national defence and of a state of emergency simultaneously. A state of emergency may be harder to start and is certainly harder to maintain, however, and so the existence of this partially overlapping, less regulated authority is troubling.

23C.4 Hostilities Without a Declaration of a State of National Defence

Although the declaration of a state of national defence under FC s 203 appears to be the way that South Africa can declare its fullest engagement in the use of military force, it is clearly not the only path by which the country can employ its armed forces. Instead, FC s 201(2) creates another route, and one which the President may take the nation along without affirmative Parliamentary ratification. This section declares that:

> Only the President, as head of the national executive, may authorize the employment of the defence force —
> (a) in cooperation with the police service;
> (b) in defence of the Republic; or
> (c) in fulfillment of an international obligation.

Action in defence of the Republic under FC s 201(2)*(b)* presumably is, or at least may be, taken pursuant to a declaration of a state of national defence. The distinction drawn in FC s 201(2) between such defence and the use of force 'in fulfillment of an international obligation', however, suggests that the latter is not encompassed by a 'state of national defence'.[1] Moreover, this reading of FC ss 201(2) and 203 accords with the natural sense of the words 'national defence' — for surely national defence is not directly implicated by peacekeeping missions far from South Africa's borders. This understanding is also consistent with South African practice, under which South African troops have been sent to a number of countries for peacekeeping purposes without, as far as I am aware, any declarations of a state of national defence.[2]

[1] But are there actually any interventions that are mandated by 'international obligation'? It may be that no international agreements to which South Africa is a party actually *demand* the commitment of South African troops. It is also true, however, that South Africa, as a member of the United Nations, the African Union, and the Southern African Development Community, has obligations to preserve human rights in other parts of the world. FC s 201(2) can easily be read to refer to this broader, less insistent form of 'obligation', and to authorize the deployment of troops in its service. The White Paper on South African Participation in International Peace Missions also can be read to reflect such a view. See *White Paper on Peace Missions* (supra) at 34. In any event, it would seem from FC s 201(2)*(c)* itself that South Africa must have the power to enter into international obligations whose fulfillment will entail the employment of troops.

[2] So, too, it appears that 'employment of the defence force … in cooperation with the police service' does not require any declaration. (It is also noteworthy that the list in FC s 201(2) is not explicitly exclusive. Motala & Ramaphosa (supra) at 218. In fact the Defence Act, s 18(1), provides for *other* uses of the defence forces as well. See § 23C-12 n 1 (supra).) The question of how deeply the South African military is, or should be, involved in domestic law enforcement has important potential implications for the long-run strength of civilian democracy. The Defence Act as it now stands appears to empower the defence forces to exercise a considerable range of domestic law enforcement authorities. See Defence Act ss 20(1) and 22. For an American response to this problem, see the longstanding, though ambiguous, Posse Comitatus Act 18 USC § 1385 (2006). But these issues are beyond the scope of this chapter.

Peacekeeping missions do not seek combat, but combat can certainly arise. In point of fact, South Africans engaged in interventions of this sort have taken casualties in both Lesotho and the DRC. Once troops are deployed in a situation of potential strife, active fighting and war are always possibilities. Indeed, even deployments under conditions of peace (say, a deployment of troops to Namibia as a check on any potential rise of territorial ambitions against Namibia in other nations) ultimately pose this risk.

Given that peacekeeping missions carry with them some risk of involvement in actual fighting, as might other military deployments ordered by the President,[1] is affirmative Parliamentary approval required for these steps? The answer seems clearly to be 'no'; as long as Parliament does not affirmatively *disapprove* (and as long as funds are available), the military action can continue. This is apparent from FC s 201(3), which requires the President to 'inform Parliament, promptly and in appropriate detail' of a range of information about any employment of the defence force which he or she has ordered under FC s 201(2). This reporting requirement is a wise one, and has apparently been understood to require the President to provide Parliament with information even on deployments of very small numbers of soldiers. But what the section requires is only reporting; it does not require any vote by Parliament on the matter. In fact, the text does not even explicitly authorize Parliament to vote on the matter, though I believe, as I have already argued in connection with declarations of a state of national defence,[2] that the principle of joint Parliamentary-Presidential control over the military does mean that Parliament *can* vote if it so chooses.[3]

[1] There would be risks entailed in a variety of actions the President might take as part of routine military protection of the nation, especially if South Africa were actually to face any external threats. Today, fortunately, South Africa 'faces no known immediate threat', according to Major-General Roy Andersen, head of the SANDF Reserve Force. Jonathan Katzenellenbogen 'Overlooked Reservists Bolster Ranks of Cash-Strapped SANDF' *Business Day* (13 October 2004)(available on Westlaw ALLNEWS database).

[2] See § 23C.3*(b)* supra.

[3] Parliament, however, has not asserted this power in the Defence Act. See § 23C-12 n 1 supra. Vanessa Kent and Mark Malan have pointed out that the *White Paper on Peace Missions* (which they report was adopted by Parliament in October 1999) envisioned greater responsibility for Parliament than the Defence Act mandates. The White Paper appeared to see Parliamentary approval as a prerequisite to the President's authorising the deployment of troops where 'military enforcement measures' might be required, and seemed to contemplate, as a standard procedure, the President's 'tabling a proposal for ratifying the participation of a South African military contingent in a particular peace support operation'. *White Paper on Peace Missions* (supra) at 32; Vanessa Kent & Mark Malan, 'Decisions, Decisions – South Africa's foray into regional peace operations', Institute for Security Studies Occasional Paper 72 (April 2003), available at http://www.iss.co.za/index.php?link_id=14&slink_id=576&link_type=12&slink_type=12&tmpl_id=3 (accessed on 3 October 2009).

I have found no instance of such a proposal being presented to Parliament or voted on by it. Kent and Malan in 2003 argued that troop deployment decisions were being taken 'at the level of the Presidency' with little input from Parliament (or other actors). Parliamentary committees, perhaps primarily the Joint Standing Committee on Defence, however, do review these letters. Committee practice in carrying out this review appears to have varied. In one instance, two committees decided jointly to draft and support a resolution approving the already-underway employment of South African troops in Burundi. Parliamentary Monitoring Group, 'Joint Standing Committee on Defence; Select Committee on Security and Constitutional Affairs: Joint Meeting, 14 November 2001, "Deployment of the SANDF in Burundi"' available at http://www.pmg.org.za/viewminute.php?id=1240 (accessed on 3 October 2009). It is conceivable that this resolution was voted on by Parliament, but in context

It is important that Parliament have this authority. But it is also important to recognize that if Parliament has this authority, and chooses to take no action whatsoever, then the President's decision stands. Only an affirmative decision by Parliament to modify or reject the President's choice constrains his power; inaction constitutes acceptance (at least as long as funds are available). As already suggested, it is also important to recognize that if the President makes decisions that embroil the nation in fighting, Parliament may find it very hard to respond then by demanding a reversal of the President's judgments. The President has the authority, as long as Parliament does not affirmatively object, to take the nation a substantial distance, perhaps politically an irreversible distance, along the road towards war.

Suppose now that in the course of a deployment of troops ordered by the President, and not objected to by Parliament, fighting does break out. Must a state of national defence now be declared, and Parliamentary approval obtained? Parliament might find it hard to withhold its approval, but still it would have a chance, and indeed an obligation, to endorse or not to endorse such a declaration if it was issued. And unless Parliament gave its approval, the declaration would lapse.

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it seems more likely that the committees themselves adopted the resolution and that Parliament as a whole never voted on it. In contrast, in 2005 the Joint Standing Committee adopted a report on several notifications which took no position at all, and simply declared that the committee, 'having considered the letters from the President on the deployment of the SANDF to areas outside the borders of the country, referred to the Committee, reports that it has concluded its deliberations thereon'. Parliamentary Monitoring Group, 'Deployment of South African National Defence Force: Notification from President's Office' (16 November 2005) available at http://www.pmg.org.za/node/6745 (accessed on 4 October 2009).

For other instances in which the Joint Standing Committee voted to 'adopt' letters from the State President, see Parliamentary Monitoring Group, 'Deployment of SA National Defence Force & Report on finalisation of Armscor employee grievance' (13 February 2009), available at http://www.pmg.org.za/report/20090211-letters-president-deployment-south-african-national-defence-force-san (accessed 4 October 2009); Parliamentary Monitoring Group, 'Letters requesting SANDF Deployment; Defence Committee Reports: consideration' (25 June 2008), available at http://www.pmg.org.za/report/20080618-committee-reports-and-letters-deployment-consideration (accessed 4 October 2009).

It appears that the Joint Standing Committee has grown increasingly discontented with its role. Members of the Committee voiced sharp concerns at a meeting in August, 2008. Parliamentary Monitoring Group, 'SANDF deployment letters: Committee complaints & approval; National Conventional Arms Control Amendment Bill: deliberations' (27 August 2008), available at http://www.pmg.org.za/report/20080827-national-conventional-arms-control-committee-amendment-bill-b-43-2008 (accessed 4 October 2009). Two months later, the Committee reviewed opinions of the Parliamentary Legal Adviser concerning its role under FC s 201, and the Chairperson 'explained that it was not the intention of himself or the Committee to be confrontational against the President. However, there were real concerns that Parliament was being required to rubber stamp decisions and actions by the Executive, and accordingly was not fully performing its constitutionally designated role and function'. According to the Parliamentary Monitoring Group summary, '[m]embers finally resolved that the matter should be referred to the Rules Committee of Parliament, as it seemed that this was a matter finally dependent upon the Rules, and that the situation in times of both war and peace needed to be considered'. Parliamentary Monitoring Group, 'Protection of Civilians during Peacekeeping Operations: ACP/EU Draft; Employment of SANDF under Section 201 of Constitution: Legal Opinion' (29 October 2008), available at http://www.pmg.org.za/report/20081024-protection-civilians-during-peacekeeping-operations-acpeu-draft-emplo (accessed 4 October 2009).

But the constitutional text does not say that a state of national defence must be declared whenever actual fighting breaks out. The fact is that the text does not say that a declaration of a state of national defence is required as a prerequisite, or an accompaniment, even to a full-scale war. Nor is it clear that such a declaration plays any international law role (as a declaration of war might have, especially in earlier times), and so it may be that no implied requirement of such declarations can be inferred in the text based on international law. It would have been possible for the Final Constitution to have explicitly forbidden war or fighting in the absence of a declaration, but no such prohibition has been spelled out.[1] I would infer nevertheless that a full-scale war (unlike the sorts of smaller-scale hostilities discussed above) does need to rest on such a declaration, since the declaration process seems designed to provide notice to the nation and to insure that Parliament's assent is obtained as part of the country's going to war — but the point remains debatable because the text is not explicit.

As to lesser military engagements, moreover, I do not think the same inference follows. The Final Constitution empowers the President to send troops abroad for peacekeeping. Peacekeeping can be violent. To authorize a peacekeeping mission, it seems to me, is necessarily to authorize some limited amount of actual fighting in the course of that mission. There may, in addition, be legitimate reasons for a President's *not* wanting to declare a state of national defence. Such a declaration might trigger domestic responsibilities that the President fears would burden, or upset, the country. It might also carry foreign policy connotations that would fuel a crisis atmosphere internationally that the President would like to dissipate — precisely in order to accomplish the peacekeeping objectives for which the troops have been deployed.[2] Finally, even after South African troops have been shot at, it may not really be the case that 'national defence' is at stake, and so the provision for a declaration of a state of national defence may not truly be applicable in these circumstances. For all of these reasons, it seems to me that some level of combat is possible in the course of an authorized employment of South African troops without the need for a declaration of a state of national defence and therefore, once again, without any need for Parliament to give or to withhold its approval for the enterprise. Exactly what level of combat triggers the need for a declaration remains, inescapably, unclear in the text.

[1] A similar argument has been made by John Yoo to support the inference that the President of the United States does not need a declaration of war by Congress. Yoo notes that the constitutional text *does* explicitly prohibit the states from making war without Congress' consent, and contrasts that to the absence of any explicit textual requirement that the President obtain consent. John C Yoo 'Exchange: War Powers — War and the Constitutional Text' (2002) 69 *U Chicago LR* 1639, 1666-67, citing US Constitution art. I, § 10. I would not take this argument so far, either for South Africa or for the United States, but the absence in the Final Constitution of any textual requirement of Parliamentary assent to fighting does have to be reckoned with.

[2] *Cf Orlando v Laird* 443 F2d 1039, 1043 (2d Cir, 1970), cert. denied, 404 US 869 (1971)(Court notes that a declaration of war might be seen by Congress and the President as 'plac[ing] the nation in a posture in its international relations which would be against its best interests.') The Constitutional Court has recognized 'the government's special responsibility for and particular expertise in foreign affairs'. *Kaunda* (supra) at para 144(6)(Chaskalson CJ). See also *Kaunda* (supra) at para 172 (Ngcobo J) and para 243 (O'Regan J).

Suppose, finally, that the President does declare a state of national defence, but Parliament refuses to approve it. Must the fighting then stop? Again, the text does not provide an answer, but surely it must be the case that where a declaration is constitutionally required, its absence means the fighting must come to a halt. As we have just seen, however, it is not by any means certain exactly when a declaration is constitutionally required. Perhaps the President would argue that the fighting in question didn't actually rise to the level (whatever it might be) for which a declaration of national defence was required, and therefore that although he or she had issued the declaration and sought Parliament's approval as a matter of prudence, Parliament's failure to approve did not remove the President's prerogative to continue the fighting. That position would be especially forceful if Parliament did not actually disapprove the declaration, but simply never brought it to a vote and so failed to approve it. So, too, the President's position would have force if Parliament disapproved the declaration, but at the same time rejected a proposal to de-fund the fighting.[1] Or perhaps the President would argue that although Parliament's failure to approve the declaration meant that the fighting had to be brought to an end, Parliament couldn't possibly have meant that South African troops should be placed in jeopardy as the process of disengaging from the enemy took place. It would follow that if necessary, the fighting could continue for a considerable period in order to insure the safe extrication of South African troops.[2] Whatever the correct view of this matter, it is quite clear that the text leaves it ambiguous. This ambiguity means that in a situation where this point became important, the President could claim various forms of authority to continue. Though South African courts could address such claims, it would not be easy for a court to reject a President's claim of authority while the battle actually raged.

23C.5 The Power of the Purse: Parliament's Budgetary Powers

Let us begin our examination of Parliament's power to limit war through restricting spending by considering the related problem of how, once the President has declared a state of national defence, and Parliament has approved it, it comes to an end. No doubt, if the President wages war and achieves victory, then both branches of government will be happy to recognize the end of the state of national defence. But can the President rescind the declaration of a state of national defence without Parliament's approval? If an Acting President declares it, can the President, on returning to his or her duties, revoke it? If the President has some revocation power, does it last only until Parliament has actually approved the state of national defence, or does it go on indefinitely? Perhaps more importantly,

[1] Such paradoxical votes are possible. In fact, such votes were cast by the members of the US House of Representatives on Operation Allied Force, the NATO bombing campaign against the Federal Republic of Yugoslavia in 1999. See Stephen Dycus, Arthur L Berney, William C Banks & Peter Raven-Hansen *National Security Law* (3rd Edition, 2002) 412.

[2] For an account of the US courts' unwillingness to second-guess the President's efforts to withdraw from Vietnam, despite the years of continued warfare that took place in the process, see Stephen Dycus et al (4th Edition) at 230-239.

can Parliament withdraw its approval once it has given it? Can a single chamber of Parliament withdraw its approval, or must both chambers concur?

All of these questions are left unanswered by the text. It is plausible to infer that since a state of national defence must rest on the assent of both political branches of South Africa's government, each branch can also revoke its consent. But as a practical matter, it may be very hard for either branch to overturn a state of national defence to which the other is committed, and it may be very hard in particular for Parliament to abrogate a state of national defence to which the President remains committed. Moreover, the logic behind the inference of a power for a single branch of government to revoke the declaration is uncertain: once both branches have assented to the declaration of a state of national defence, it might be argued that only a decision by both branches can revoke it. Or (as a reader has suggested) perhaps the declaration of a state of national defence, once approved by Parliament, is so profound a vesting of authority in the President that only the President can end it.

The most important powers Parliament may have to control executive uses of military force may lie elsewhere. I have already argued that Parliament can disapprove the President's uses of force even after approving a declaration of a state of national defence under FC s 203 (as long as Parliament does not interfere with the President's commander-in-chief authority). So, too, I've argued that Parliament can disapprove any Presidential employment of troops under FC s 201. But Parliament does not have to exercise these powers. In contrast, Parliament also has authority to give or to withhold funding for the nation's military engagements, and this power Parliament at least to some extent cannot escape exercising.

As a general proposition, the President cannot spend money without Parliament's having authorized it. The Final Constitution establishes this rule by requiring that all revenues received by South Africa must be paid into the 'National Revenue Fund', unless Parliament legislates to the contrary.[1] Once revenue has been deposited in this Fund, the Final Constitution specifies that it normally can only be withdrawn if Parliament enacts an appropriation or authorises a 'charge'.[2] Hence even if the President engages in peacekeeping missions for which, say, the United Nations provides reimbursement, those UN funds apparently will go into the National Revenue Fund (unless Parliament reasonably provides otherwise) and then become subject to Parliamentary control rather than unilateral Presiden-

[1] FC s 213(1)(Section limits exceptions to those 'reasonably' made by Parliament).

[2] Parliamentary may either enact appropriations (FC s 213(2)*(a)*) or by statute authorize 'direct charge[s]' against the National Revenue Fund (FC s 213(2)*(b)*). Parliamentary action is not required when a direct charge 'is provided for in the Constitution'. FC s 213(2). The text of FC s 213 does not make clear whether Parliament could also provide – as an exercise of its power under FC s 213(1) to make reasonable exceptions to the general rule that all revenues go into the National Revenue Fund – that certain funds received by the government would not go into this Fund but instead would go directly to the President for spending entirely according to his or her unilateral direction for the conduct of war. But the constitutional commitment to budgetary 'transparency and expenditure control', FC 216(1), to say nothing of the broad principle of joint Parliamentary and Presidential responsibility for national security, would seem to weigh against such a reading of the text.

tial disposition. At that point, whether the revenues to be spent come from the United Nations or domestic taxes, unless Parliament has provided the President with spending authority, the President cannot carry on.[1]

In principle, this funding authority appears to be the strongest check on Presidential power in the field of war. I would assume — as elsewhere, in part on the basis of the fundamental principle of shared Parliamentary and Presidential authority — that this power applies whether or not the President has obtained approval of a declaration of a state of national defence. The funding power could also be brought to bear even if the President is in the midst of exercising his or her commander-in-chief and foreign affairs authority in the prosecution of some military objective. The President is commander-in-chief only of those forces the legislature provides, as Justice Robert Jackson pointed out in an important war powers case half a century ago in the United States.[2]

Though it is possible to argue for an implied Presidential authority to take otherwise unauthorized action, including spending money, in a dire emergency,[3] I believe that a general argument for an implied Presidential power to fund wars without Parliamentary approval would be alien to South African constitutionalism, and therefore that Parliament *can* end a war by defunding it. A more difficult issue is whether Parliament can use its funding power to constrict the President's commander-in-chief authority in a war that Parliament has not chosen to end. If there are limits on Parliament's power to directly control the tactical choices the President may make in an ongoing, duly authorized war,[4] then Parliament might well also be barred from using its funding power to impose restrictions on the conduct of the war that it could not directly require. Exactly where the line is to be drawn between Parliament's authority to decide what wars South Africa's money is to be spent on, and the President's authority to decide how to spend the money Parliament has appropriated for war, is no easy question. Despite this ambiguity, the power to end a war by ending its financing is a profound one.

Yet it will undoubtedly be difficult for Parliament to wield this authority, given the degree of executive control of the legislature in South Africa.[5] Two other

[1] The President cannot carry on, that is, unless the spending is a direct charge 'provided for in the Constitution'. FC s 213(2)*(b)*. But FC s 213 itself identifies only one such direct charge, and that one — for revenue sharing with the provinces (FC s 213(3)) — is far from the field of defence.

[2] See *Youngstown Sheet & Tube Co v Sawyer* 343 US 579, 643-644 (1952)(Jackson J concurring). In the United States, this power has on occasion been used with some effect, notably in bringing an end to the late Vietnam War bombing of Cambodia. See generally *Holtzman v Schlesinger* 484 F2d 1307 (2d Cir, 1973); Dycus et al (4th Edition) (supra) at 235-239. Congress' funding power has also been notoriously circumvented. For an extensive account of Congress' efforts to cut off funding to the Nicaraguan Contras, and the Reagan administration's efforts to evade this cut-off with funds received from covert sales of arms to Iran, see Dycus et al (4th Edition) (supra) at 473-522.

[3] See Motala & Ramaphosa (supra) at 216-217, discussing *Executive Council, Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 867 (CC), 1995 (10) BCLR 1289 (CC) at paras 62 (Chaskalson P) and 149-150 (Ackermann & O'Regan JJ).

[4] See § 23C.3*(b)* supra.

[5] See C Murray and O Ampofo-Anti 'National Executive Authority' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 18. (Ed.)

reasons exist for more hesitation about the efficacy of this power than the text might otherwise encourage. The first is the special legislative authority that the executive commands over budgeting under the Final Constitution.[1] Under FC s 73(2) 'only the Cabinet member responsible for national financial matters may introduce [a money Bill] in the Assembly'.[2] (The United States Constitution, by contrast, provides that 'All Bills for raising Revenue shall originate in the House of Representatives'.[3]) No member of Parliament seeking to end a war to which the President and the Cabinet are committed, therefore, can introduce a bill proposing to cut off the war's funds.

However, Parliament is not without power to take spending decisions. Most clearly, Parliament can reject the Executive's war when the Executive proposes legislation to fund it. The significance of this authority, however, depends on whether the President will actually need to apply to Parliament for funds in short order. There does not appear to be a constitutional limit on the period of time for which Parliament can appropriate military spending funds (in contrast to the US Constitution's two-year limit),[4] and so, at least in theory, an extended appropriation at one point could fund a considerable length of military activity without further specific approval. Since South African appropriations are in practice enacted on an annual basis, however, the requirement of annual approval does constrain the President's power – though it also leaves the President with a year's discretion.[5]

In addition, Parliament should be able to amend a money bill already introduced, so as to include a provision barring any further spending for the military operation in question, and to revoke, if need be, any previously-granted appropriation. FC s 77(3) seems meant to insure Parliament's authority to amend money bills, since it declares that '[a]n Act of Parliament must provide for a procedure to amend money Bills before Parliament'.[6] Although more than 12 years would pass before this constitutional mandate was carried

[1] R Kriel and M Monadjem 'Public Finance' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27. (Ed.)

[2] See also FC s 55(1)(b), giving the National Assembly power to 'initiate or prepare legislation, *except money Bills*' (emphasis added).

[3] US Constitution art I, § 7.

[4] US Constitution art I, § 8, cl. 12.

[5] Annual appropriations are required under the Public Finance Management Act 1 of 1999 ('PFMA'), as amended, s 26. The President's discretion is further enhanced because under some circumstances this same statute permits spending prior to specific Parliamentary authorization. See page 23C-25 n 2 infra.

[6] As the Congress of South African Trade Unions (COSATU) has pointed out, it is also noteworthy that FC ss 55(1)*(a)* and 68*(a)*, which describe the legislative powers of the National Assembly and the National Council of Provinces respectively, both refer to these Houses' authority to amend, or in the National Council of Provinces' case to amend or propose amendments to, '*any* legislation' (emphasis added). Congress of South African Trade Unions (COSATU) 'COSATU Submission on the Republic of South Africa Second Amendment Bill, Submitted to the Portfolio Committee on Justice and Constitutional Development' (21 September 2001) at para 4.2, available at http://www.cosatu.org.za/docs/2001/const.htm (accessed on 12 May 2008).

out,[1] the Money Bills Amendment Procedure and Related Matters Act[2] was signed by the President on 16 April 2009. The Act provides a detailed procedure for the amendment of money bills, and specifies that its provisions are to be interpreted to 'give effect to the constitutional authority of the National Assembly and the National Council of Provinces in passing legislation and maintaining oversight of the exercise of national executive authority'.[3]

The second reason for hesitation about the efficacy of the funding power is, perhaps, partly a reminder of the political difficulties of wielding this authority: so far, it appears that the executive has at least on occasion been able to undertake military missions without seeking specific funding approval in advance. At a 2003 parliamentary committee discussion of the White Paper on Peace Missions, General Rautie Rautenbach, Budget Director for the Department of Defence, reportedly

> noted that for the most part peace missions were an unforeseen occurrence and that by their very nature there was normally no budgetary provision for this development. He informed the Committee that the DOD had a deficit of R200 million that had been occasioned by peace-keeping expeditions noting that the current budget did not provide for this kind of money.[4]

[1] In early May 2008, a 'tripartite alliance summit' of the African National Congress, the South African Communist Party, and the Congress of South African Trade Unions reportedly decided 'to allow Parliament to amend money bills' — one of several decisions seen as 'suggest[ing] much greater influence of the ANC's leftist allies on economic policy'. Karima Brown & Amy Musgrave 'South Africa: Leftward Leap If ANC Allies Get Their Way' *Business Day* (Johannesburg) (12 May 2008) available at http://allafrica.com/stories/200805120351.html (accessed on 7 July 2009). COSATU had earlier called for 'the tabling of an adequate money bills amendment procedure bill as a matter of urgency'. 'COSATU Submission' (supra) at 4.2. As COSATU noted in that submission, Article 21(1) of Schedule 6 of the Final Constitution provides that '[w]here the new Constitution requires the enactment of national or provincial legislation, that legislation must be enacted by the relevant authority within a reasonable period of the date the new Constitution takes effect'. Ibid.

[2] Act 9 of 2009.

[3] Money Bills Act s 2*(a)*. A full evaluation of the procedures of the Act is beyond the scope of this chapter.

[4] Parliamentary Monitoring Group 'Minutes for Defence Joint Committee, 26 March 2003, White Paper on Peacekeeping: Discussion' available at http://www.pmg.org.za/viewminute.php?id=2596 (accessed on 26 January 2007). At another Parliamentary committee hearing in 2004, overspending amounts of R25.9 million and R14.3 million for 'peacekeeping support operations' were reported, though 'Mr V Mbethe (National Treasury Chief Director: Justice and Protection Services) pointed out that unauthorized expenditure due to the undertaking of unforeseen peacekeeping missions were [sic] much less likely in the future as such missions were much more regular and well provided for now'. Parliamentary Monitoring Group, 'National Government Unauthorised Expenditure 1998 – 2004: Treasury briefing' available at http://www.pmg.org.za/minutes/20050809-national-government-unauthorised-expenditure-1998-%E2%80%93-2004-treasury-briefing (accessed 4 October 2009). For another suggestion of the degree of operational flexibility possible within defence budgeting, see Wyndham Hartley, 'African Peace Burden Cannot Be SA's Alone, Warns Lekota', Business Day (16 February 2005)(available on Westlaw ALLNEWS database). As recently as October 2008, the chair of the parliamentary Joint Standing Committee on Defence observed that 'participation in peace keeping missions had cost implications for South Africa, as although the country in which the intervention had taken place was supposed to reimburse South Africa, there were long delays before this reimbursement might be received, if it was paid at all, and therefore effectively the Department of Defence (DOD) was being called upon to pay the costs, which impacted upon that Department's ability to maintain a budget approved by Parliament and consequently upon Parliament's competence to oversee the Department of Defence, if the Executive, the Department of Foreign Affairs and possibly the Department of Intelligence were making unforeseen calls upon DOD's budget.' Parliamentary Monitoring Group, 'Protection of Civilians during Peacekeeping Operations' (supra).

That deficit may have been unusual, but budget adjustments to cover unanticipated spending are quite permissible under South African law.[1]

The National Assembly does, finally, have one further recourse: it can expel the President from office. First, it can 'remove the President from office' under FC s 89. That step, however, requires a vote of two-thirds of the members of the Assembly. Moreover, it is not entirely self-evident that the President's determination to continue fighting an unpopular war would constitute one of the specified grounds on which a vote to remove the President can be based: serious illegal conduct, serious misconduct or inability to perform the functions of the office.[2]

Second, and more easily, the National Assembly can require the President (and the entire Cabinet at the same time) to resign, by approving a 'motion of no confidence'. But even this step is not altogether simple — even assuming Parliament is prepared to bring down the entire existing executive — because it requires 'a vote supported by a majority of [the National Assembly's] members'.[3] National Assembly members determined to end a war might find it easier to do so by exercising Parliament's appropriations power. To pass a bill cutting off funding for a war, as few as one-fourth-plus-one of the members of the Assembly would be sufficient,[4] though they would also have to vote to override the National Council of Provinces, if that body opposed the legislation.[5]

23C.6 War Powers as Constitutionally Exceptional Powers

The text of the Final Constitution, in short, imposes only partial limits on the power of South Africa's President to involve the nation in fighting or war (within the limits of international law), and on the simultaneous potential for limitation of constitutional rights South Africa otherwise holds dear. Perhaps South Africa will not actually face the agonizing possibilities of war with any frequency. But it is difficult to be confident of such predictions. Moreover, it is hard to be confident that military power, if it exists and is used, will not be subject to misuse as well. In

[1] The statutory basis for such adjustments ultimately lies in the Public Finance Management Act, under which a government department has a number of statutory routes by which it can increase its spending on a particular function, such as peacekeeping, without prior specific Parliamentary authorization. See PFMA (supra) ss 16, 30, 34, 43, & 92. See also Vanessa Kent & Mark Malan (supra) at 72 (discussing PFMA ss 16 & 30). For an illustrative recent funding bill, see 2006/07Appropriation Bill, as introduced, Schedule, Vote 21 (Defence) available at http://www.info.gov.za/gazette/bills/2006/b2-06.pdf (accessed 5 March 2007)(The bill allocates R820 million specifically and exclusively to 'peace support operations' within a 'force employment' budget of R1.41 billion). For an example of a peacekeeping mission whose costs were expected to be covered without the need for new legislation, see TM Mbeki 'Letter from President T.M. Mbeki to Speaker of the National Assembly: Employment of the South African National Defence Force in Sudan in Fulfilment of the International Obligations of South Africa Towards the African Union' (2 July 2004) available at http://www.pmg.org.za/docs/2003/comreports/040729presletters.htm (accessed on 5 March 2007)(Mbeki notes that costs would be accommodated within the Department of Defence's 'current allocation for Peace Support Operations.') South Africa is not unique in providing considerable flexibility for executive spending in the area of national defence. For a description of practice in the United States, see William C Banks & Peter Raven-Hansen, *National Security Law and the Power of the Purse* 69-85, 168-170 (1994).

[2] FC s 89(1).

[3] FC s 102(2). I am grateful to Christina Murray for calling this section to my attention.

[4] FC s 53(1).

[5] FC ss 77, 75.

other areas of human rights protection, South Africa's constitutional drafters chose to take few chances. They defined a wide range of rights, mandated governmental protection and respect for them, and created a powerful Constitutional Court to make those commitments enforceable. In these areas, South Africa has developed an impressive apparatus for the constitutional protection of individual rights. In the field of war, however, the Final Constitution has taken fewer precautions.

South Africans will need to decide whether to seek changes in the constitutional text or instead to rely on the growing strength of South Africa's constitutional traditions to guide interpretation of the text if and when these issues must be addressed. This chapter has sought both to outline a rights-protective interpretation of the Final Constitution and to point to aspects of that text – notably the procedures for Parliamentary approval of a declaration of a state of national defence, and the absence of a requirement of affirmative Parliamentary approval for Presidential decisions to employ troops, particularly in peacekeeping abroad – where stronger provisions might be desirable. I hope that this chapter will suggest other areas as well that may deserve attention. But I take very seriously a reader's caution that interpretation might be preferable to amendment, because efforts to amend the constitutional text might actually increase rather than limit executive prerogative. Finally, I must close by saying that many centuries of human experience, hard experience, suggest that to regulate killing and chaos – war – by law is always, to some extent, impossible.

24A Public Protector

Michael Bishop
Stuart Woolman

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Functions of the Public Protector

182. (1) The Public Protector has the power as regulated by national legislation —

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.

(3) The Public Protector may not investigate court decisions.

(4) The Public Protector must be accessible to all persons and communities.

(5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

Tenure

183. The Public Protector is appointed for a non-renewable period of seven years.[1]

24A.1 HISTORICAL BACKGROUND

Nobody has a more sacred obligation to obey the law than those who make the law.[2]

Like most ombudsman around the globe,[3] the Public Protector monitors the

[1] Sections 182 and 183 of the Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC').

[2] J Anouilh *Antigone* (1942).

[3] *Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('*First Certification Judgment*') at para 161 ('The Public Protector is an office modelled on the institution of the ombudsman.') The drafters of the Interim Constitution did not favour the term ombudsman. They objected to both 'man', for its possible sexist connotations, and 'ombud', for an unknown reason. See D Basson *South Africa's Interim Constitution: Text and Notes* (Revised Edition, 1995) 173; G Devenish *The South African Constitution* (2005). 'Public Protector' and '*Defenser del Pueblo*' have similar connotations. The later term, employed in Spain and some Latin American countries, emphasises the protection of 'the people' and the public good, as opposed to the 'private' or narrow interests manifest in individual complaints. See M Oosting 'The Ombudsman and His Environment: A Global View' in L Reif (ed) *The International Ombudsman Anthology* (1999)('Reif *Anthology*') 5.

The original ombudsman — the Swedish *Justiteombudsman* — was established in 1809. Finland followed suit in 1919, Denmark in 1955 and Norway and New Zealand in 1962. See Oosting (supra) at 1. Although most modern ombudsmen trace their lineage back to Sweden, the *Control Yuan* of China, the *Quadi Alqudat* of the Ottoman Empire and the *Tribun*e of Ancient Rome are obvious antecedents. See U Lundvick 'A Brief Survey of the History of the Ombudsman' (1982) 2 *The Ombudsman Journal* 85. According to the International Ombudsman Institute, most democracies have such an institution and, in 2004, national ombudsmen numbered 120 worldwide. See *The History and Development of the Public Sector Ombudsman Office* available at http://www.law.ualberta.ca/centres/ioi/eng/history.html (accessed on 1 November 2005). Some writers have described the recent rise in popularity as 'ombudsmania'. See D de Asper y Valdés 'Self Perceptions of the Ombudsman: A Comparative and Longitudinal Survey' (1990–91) 9 *The Ombudsman Journal* 1, 1. Others note that a substantial number of ombudsmen appear to be mere window-dressing — the result of a trend, rather than a truly effective institution. See U Kempf & M Mille 'The Role and Function of the Ombudsman: Personalised Parliamentary Control in Forty-Eight Different States' in Reif *Anthology* (supra) 195, 196.

conduct of state officials and agencies with the aim of ensuring an effective and ethical public service.[1] The office reflects, in both conception and execution, a profound improvement upon its precursor: the Advocate-General. The Advocate-General's brief was limited to investigations into the unlawful or the improper use of public money.[2] The Public Protector's brief, as initially adumbrated in the Interim Constitution, and as now determined by the Final Constitution and the Public Protector Act ('PPA'),[3] is to watch the watchers and to guarantee that the government discharges its responsibilities without fear, favour or prejudice.

24A.2 NATURE OF THE OFFICE

The Public Protector's purpose is profitably compared with the role of the judiciary. Courts handle discrete disputes about law and conduct. They rely on correct procedure and solid, sometimes intricate, legal argument. Courts are simply not designed to handle the large number of complaints that arise from simple misunderstandings or bureaucratic red-tape, nor do they lend themselves to the resolution of injustices that turn more on unfairness than illegality.[4]

The Public Protector occupies a middle space in the politico-constitutional landscape. It serves the public and assists the courts and the legislature. It assists the courts by addressing those complaints about the administration of justice that fall beyond the court's purview. It assists the legislature by monitoring the performance of the executive and answering those complaints that elected representatives are unable to address.[5]

The Public Protector performs these functions, in theory at least, free from political pressure. It is not, however, entirely independent. For while the Public Protector enjoys priority over other institutions in the exercise of its functions,[6] it

[1] The Public Protector was originally established in terms of the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC') ss 100–114.

[2] Ombudsman Act 118 of 1979. For a comprehensive history of the Advocate-General, see JP Fegbeutel *An Ombudsman for South Africa* (Unpublished LLD thesis, University of South Africa, 1990); DJ Brynard *Die Advokaat-Generaal in Publieke Administrasie: 'n Vergelykende Evaluering* (Unpublished DLitt thesis, University of Pretoria, 1987). Although it constituted an important step towards greater public accountability, the Advocate-General could not investigate maladministration. Ibid at 230–1. See also L Baxter *Administrative Law* (1984) 290.

[3] Act 23 of 1994. The Act has been amended four times. See Public Service Laws Amendment Act 47 of 1997; Public Protector Amendment Act 113 of 1998; Promotion of Access to Information Act 2 of 2000; Public Protector Amendment Act 22 of 2003. The PPA repeals the Ombudsman Act. See PPA s 14.

[4] See S Owen 'The Ombudsman: Essential Elements and Common Challenges' in Reif *Anthology* (supra) at 51, 54–5. See also M Zacks 'Administrative Fairness in the Ombudsman Process' (1967–1987) 7 *The Ombudsman Journal* 55, 55 ('Complainants come to Ombudsmen for help to cut through red tape and to deal expeditiously with their concerns. If they wanted technical, legal arguments and approaches, one can say with some justification that they should hire a lawyer and go to court.')

[5] See Owen (supra) at 53 (Ombudsmen enable politicians to address failures in the state bureaucracy.)

[6] *Special Investigating Unit v Ngcinwana & Another* 2001 (4) BCLR 411, 413B (E)(When interpreting the competence of tribunals under the Special Investigating Units and Special Tribunals Act 74 of 1996 with respect to the investigation of maladministration and corruption, the court held that '[c]onstitutional priority would thus seem to lie with the institution of the Public Protector. Any interpretation of the Act's purposes must pay heed to that reality.')

must still often act together with the courts and other Chapter 9 Institutions to fulfil its mandate.[1]

One of the most common criticisms levelled against the Public Protector, and ombudsmen generally, is that the institution lacks the power to make binding decisions. In truth, however, the ability of the Public Protector to investigate and to report effectively — without making binding decisions — is the real measure of its strength.[2] Stephen Owen explains this apparent paradox as follows:

> Through the application of reason, the results are infinitely more powerful than through the application of coercion. While a coercive process may cause a reluctant change in a single decision or action, by definition it creates a loser who will be unlikely to embrace the recommendations in future actions. By contrast, where change results from a reasoning process, it changes a way of thinking and the result endures to the benefit of potential complainants in the future.[3]

The publication of the Public Protector's findings can shame a body into accepting the validity of its recommendations.[4] Its reports to Parliament enable the national legislature to exercise effectively its oversight function and shape important debates on policy and budgetary matters.[5] Whether our Public Protector has sufficient funds to maintain the high standards of investigation and reporting required to be the 'voice of reason' is discussed below.[6]

Another question of moment, as our government toys with the idea of rationalizing our Chapter 9 Institutions, is whether the Public Protector serves as a 'classical ombudsman' or a so-called 'hybrid ombudsman'. The 'hybrid ombudsman' takes up complaints about maladministration and corruption as well as allegations of human rights violations.[7] Although the Public Protector was not specifically assigned the latter task, the brief of the Public Protector is broad enough to permit such investigations. It has, to date, issued a number of noteworthy reports in this regard.[8]

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[1] See § 24A.6 infra, on the relationship between the Public Protector, the courts and forum shopping.

[2] See Owen (supra) at 52; Oosting (supra) at 10.

[3] Owen (supra) at 52.

[4] See Oosting (supra) at 12 ('[T]he mobilisation of shame can constitute a powerful weapon in his arsenal.')

[5] Ibid ('In this world the sweet voice of reason — a well formulated argument, based on meticulous research — does not always fall on attentive ears. Political support for the ombudsman is therefore essential.')

[6] See § 24A.3*(b)* infra, on 'Financial independence and political autonomy'.

[7] See L Reif 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 *Harvard HRLJ* 1.

[8] Ibid at 66. The Public Protector has considered whether official conduct amounts to a constitutional rights violations in a number of investigations. See Office of the Public Protector *Investigation of the Play Sarafina II* (1996), available at http://www.publicprotector.org/reports_and_publications/report1.htm (accessed on 29 November 2005)(Rights to privacy and access to information); Office of the Public Protector *Report on an Investigation by the Public Protector of a Complaint by Deputy President J Zuma Against the National Director of Public Prosecutions and The National Prosecuting Authority in Connection with a Criminal Investigation Conducted Against Him* (2004), available at http://www.publicprotector.org/reports_and_publications/Report26.pdf (accessed on 29 November 2005)('*Zuma Report*')(Right to dignity); Office of the Public Protector *Report by the Public Protector on the Investigation into Allegations of Homophobic and Unconstitutional Statements by Mr Peter Marais MPL, Erstwhile Premier of the Western Cape* (2003), available at http://www.publicprotector.org/reports_and_publications/report21.pdf (accessed on 29 November 2005)(Freedom of expression); Office of the Public Protector *Report on the Investigation into Allegations of Underpayment of Beneficiaries of the Venda Pension Fund* (2002), available at http://www.publicprotector.org/reports_and_publications/report18.htm (accessed on 29 November 2005)(Right to equality).

24A.3 INDEPENDENCE

(a) Appointment and removal

During the certification of the Final Constitution, the Constitutional Court considered whether a provision permitting removal of the Public Protector by a simple majority vote of the National Assembly was sufficient to ensure the independence and impartiality of the Public Protector as demanded by Constitutional Principle ('CP') XXIX.[1] The *First Certification Judgment* Court found that the Public Protector would not be able to investigate politically sensitive matters and review politically sensitive material that could embarrass public officials if it had to concern itself with calls for its removal that could be effected by a simple majority.[2] The *First Certification Judgment* removed that particular sword of Damocles,[3] and the Constitutional Assembly redrafted the apposite provision so as to require a two-thirds vote of the National Assembly to secure removal.[4]

The Public Protector is also subject to a more stringent selection process than are members of other Chapter 9 Institutions. The President appoints the Public Protector after having First recieved a recommendation from the National Assembly in the form of a resolution that has secured a 60% majority.[5]

[1] See *First Certification Judgment* (supra) at paras 162–3. CP XXIX reads: 'The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.'

[2] Ibid. See also Oosting (supra) at 9 ('[G]overnments regard the ombudsman's attempts to expose the abuse of power on the part of government officials as a threat to their position, and react accordingly.') A similar decision was taken regarding the removal of the Auditor-General. See *First Certification Judgment* (supra) at para 165. See also S Woolman & Y Schutte 'Auditor-General' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) § 24B.2. The Court also considered whether the appointment, removal or tenure of the Governor or Board of Directors of the Reserve Bank should be safeguarded by the Final Constitution. It held that unlike the Public Protector and the Auditor-General, 'its primary purpose is not to monitor government.' *First Certification Judgment* (supra) at para 166. Given this different purpose, the Court held that CP XXIX did not require the independence of the Reserve Bank to be protected to the same extent as the Public Protector or the Auditor-General. Ibid at 168.

[3] *First Certification Judgment* (supra) at paras 163–164 ('They are entitled to at least the same protection of their independence as magistrates are. Indeed, in the case of the Auditor-General and the Public Protector, whose functions involve matters of great sensitivity in which there could well be confrontation between the functionaries concerned and members of the Legislature and the Executive, a higher level of protection would certainly not be inappropriate.') See also *Van Rooyen & Others v The State & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC).

[4] FC s 194(2)*(a)*. The Constitutional Court confirmed that this metric met the standard set by CP XXIX. See *Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at para 134.

[5] See FC ss 193(4) and 193(5). The Public Protector must be a South African citizen and be a 'fit and proper person'. See FC ss 193(1)*(a)* and *(b)*. The PPA also lays down detailed experience requirements for appointment as Public Protector. See PPA s 1A(3).

(b) Financial independence and political autonomy

Financial dependence has been recognised both in South Africa[1] and internationally[2] as the greatest threat to the efficacy of the Public Protector. Some commentators have gone so far as to say that its current reliance on the executive is 'inconsistent with independence.'[3]

In *New National Party v Government of the Republic of South Africa & Others,* the Constitutional Court identified two essential desiderata for financial independence.[4] Firstly, the Chapter 9 Institution must have sufficient funding to fulfil its constitutional mandate.[5] Secondly, the funds must come from Parliament and not from the executive.[6] Although the *New National Party* Court views the source of the funds as a requirement for financial independence, the source of funds would seem, at first blush, to only become relevant if the funds provided are insufficient. If the funds are sufficient for the discharge of the Chapter 9 Institution's duties, then any issue regarding the source of the funds could, as a logical matter, never arise.

However, the *New National Party* Court's concerns extend beyond those of mere fiscal viability. The Court's language suggests apprehension over the ability of Chapter 9 Institutions to discharge their oversight responsibilities if the executive retains the discretion to decrease (or increase) funding. When questions of

[1] See H Corder, S Jagwanth & F Soltau 'Report on Parliamentary Oversight and Accountability' Report to the Speaker of the National Assembly (1999), available at www.pmg.org.za/docs/2001/viewminute.php?id=811 (accessed on 10 January 2005)('Corder Report'). The report found that:

> The very direct control by the executive of constitutional institutions can have a devastating effect on the independence and credibility of these offices. . . . In the first place, to make institutions dependent on budget allocations received through the very departments that they are required to monitor is not desirable. Secondly, these institutions must be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of the government.

Ibid at paras 7.2–7.2.1. See also Woolman & Schutte (supra) at § 24B.2; S Woolman & J Soweto Aullo 'Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 24F.3 and § 24F.4*(g)*; and C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) § 24D.3.

[2] See Oosting (supra) at 8 ('The role of the ombudsman as an independent investigator can also be weakened if he is subjected to such budgetary constraints that he cannot perform his role adequately'); de Asper y Valdés (supra) at 256 ('The success of the ombudsmen's mission depends dearly on the material resources granted to the office.')

[3] Corder Report (supra) at par 7.2.1 ('Approval by the executive of budgets, or other issues such as staffing, is thus inconsistent with independence, as well as the need to be perceived as independent by the public when dealing with their cases.')

[4] 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)('New National Party)(Court considered the meaning of 'independence' with respect to the financial and administrative independence of the Electoral Commission. The Electoral Commission, like the Public Protector, is a Chapter 9 Institution.)

[5] Ibid at para 98. ('This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act. This does not mean that it can set its own budget.')

[6] Ibid. ('Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. It is for Parliament, and not the Executive arm of Government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must, accordingly, be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.')

sufficiency of funds do arise, whether the executive is, in fact, the source of those funds will enter into the Court's assessment of the independence of the institution.[1] Thus, it is for reasons of political autonomy that the *New National Party* Court signals its preference for Chapter 9 Institutions such as the Public Protector to be funded directly by Parliament.[2]

Despite constitutional[3] and legislative[4] guarantees of political autonomy, the Public Protector is, today, entirely financially dependant on the executive. The total budget of the Public Protector for 2005 was just over R50 million. All but R1 million of this total was a direct allocation from the Department of Justice and Constitutional Development.[5] Moreover, despite significant increases in the Public Protector's budget allocation since 1996,[6] the Public Protector itself has stated that insufficiency of funds is a 'hindrance' to the fulfilment of its mandate[7] and that its 'very limited budget' prevents it from achieving 'all desired goals.'[8]

[1] The test for independence is whether the relevant body 'from the objective standpoint of a reasonable and informed person will be perceived as enjoying the essential conditions of independence.' *Freedom of Expression Institute & Others v President, Ordinary Court Martial, & Others* 1999 (2) SA 471 (C), 1999 (3) BCLR 261 (C) at paras 23–25. This test was confirmed in *Van Rooyen. Van Rooyen* (supra) at paras 31–4. See also *South African National Defence Union & Another v Minister of Defence & Others* 2004 (4) SA 10, 38 (T). See also Oosting (supra) at 9 ('[L]ack of finances may lead individual citizens to refrain from voicing their complaints, either out of fear or because they do not believe anything will be done about them.')

[2] See Corder Report (supra) at para 7.2 (Argues that each Chapter 9 Institution's budget should be subject to a separate vote and that genuine independence requires the creation of a parliamentary oversight committee that takes responsibility for their efficacy.)

[3] FC s 181(2) reads: 'These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.'

[4] PPA s 3(13)*(a)* obliges all members of the Public Protector's office to serve impartially and independently.

[5] See Office of the Public Protector *Annual Report 2004–2005* (2005), available at http://www.publicprotector.org/reports_and_publications/ annual_report/public_protector_2004_2005.pdf (accessed on 1 November 2005)('*2004–5 Annual Report*') 110 (R49 163 000 was allocated by the Department; R903 000 accrued from interest on favourable balances; R7 000 000 was rolled over from the previous year.)

[6] The current budget of R50 000 000 compares quite favourably with the budget for the 1996/1997 financial year of R4 168 000. See Office of the Public Protector *Second Half-Yearly Report 1996* (1997), available at http://www.publicprotector.org/reports_and_publications/report10.htm (accessed on 1 November 2005).

[7] *2004–5 Annual Report* (supra) at 6 ('We will continue to knock on the doors of the Treasury Department for more funds that will enable us to fulfil our mandate without hindrance.')

[8] Ibid. The most recent annual report offers a number of specific examples of under-funding: 'The target set was to establish nine regional offices but due to financial constraints, approval has been granted to open two additional permanent regional offices.' Ibid at 14. 'A further constraint was the introduction of the Supply Chain Management legislative framework. That required additional compulsory appointment of a manager without additional funding.' Ibid at 18. Earlier reports express similar sentiments. In 1998, the Public Protector wrote that '[a]lthough Parliament and the Department of State Expenditure are continuing to assist us in accessing more resources, we are still not out of the woods in this regard.' Office of the Public Protector *Annual Report 1998* (1998), available at http://www.publicprotector.org/reports_and_publications /report15.htm (accessed on 1 November 2005). In 1999, the Public Protector wrote that '[t]he combination of limited funds, rise in complaints and lengthier investigations resulted in my staff still being under severe pressure to cope with the workload.' Office of the Public Protector *Annual Report 1999* (1999), available at http://www.publicprotector.org/reports_and_publications/report16.htm (accessed on 1 November 2005)('*1999 Annual Report*').

The political nature of the Public Protector's brief means that it must be able to engage other political actors in relatively robust exchange. The sensitivity of the material handled by the Public Protector often means that its investigations and its reports, even if they have no binding authority, can ruffle feathers and bruise egos. In order to protect the independence of the Public Protector, the PPA contains something akin to a shield law. As a result, neither the Public Protector nor any of his staff can be held liable for any good faith submission in a report.[1]

24A.3 Complaints and investigations

(a) Jurisdiction

(i) General

The Public Protector lacks inherent jurisdiction. The PPA establishes — and limits — the Public Protector's jurisdiction both with respect to the entities it may investigate and the type of conduct it may investigate.[2]

The Public Protector may investigate the following bodies: *(a)* government at any level;[3] *(b)* any institution in which the State is the majority or controlling shareholder;[4] *(c)* any public entity;[5] and *(d)* persons performing a public function.[6] The Public Protector can investigate the following types of conduct with respect to the above institutions: *(i)* maladministration;[7] (ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct;[8] (iii) improper or unlawful enrichment, or receipt of any improper advantage, or

[1] PPA s 5(3).

[2] Office of the Public Protector *Report on an Investigation into an Allegation of Misappropriation of Public Funds by the Petroleum Oil and Gas Corporation of South Africa, Trading as PetroSA, and Matters Allegedly Related Thereto: Report No. 30* (2005), available at http://www.publicprotector.org/ reports_and_publications/ petrosa_report_2005.pdf (accessed on 31 October 2005)('*Oilgate Report*') at para 5.1.3.2.

[3] PPA ss 6(4)*(a)(i)*, (iv) and *(v)*.

[4] PPA s 6(5).

[5] PPA s 6(5). The Act uses the definition of a 'public entity' provided in s 1 of the Public Finance Management Act 1 of 1999 ('PFMA'). That act defines a public entity as including a national and a provincial public entity. A provincial public entity is '*(a)* a provincial government business enterprise; or *(b)* a board, commission, company, corporation, fund or other entity (other than a provincial government business enterprise) which is — (i) established in terms of legislation or a provincial constitution; (ii) fully or substantially funded either from a Provincial Revenue Fund or by way of a tax, levy or other money imposed in terms of legislation; and accountable to a provincial legislature.' A national public entity is '*(a)* a national government business enterprise; or *(b)* a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is — (i) established in terms of national legislation; (ii) fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and (iii) accountable to Parliament.' For more on the meaning of public entity in the PFMA, see R Kriel & M Monadjem 'Public Finance' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 27.

[6] PPA s 6(4)*(a)*(ii), (iv) and *(v)*.

[7] PPA ss 6(4)*(a)(i)* and 6(5)*(a)*.

[8] PPA ss 6(4)*(a)*(ii) and 6(5)*(b)*.

promise of such enrichment or advantage by a person;[1] (iv) any act or omission that results in unlawful or improper prejudice to any other person.[2] In addition, the Public Protector may investigate any improper or dishonest act or omission or offences referred to in certain sections of the Prevention and Combating of Corrupt Activities Act[3] and *must* investigate any alleged breach of the Executive Ethics Code.[4] In practice, the most common types of complaints referred to the Public Protector are:

(a) Insufficient reasons given for a decision;
(b) The interpretation of criteria, standards, guidelines, regulations, laws, information or evidence was wrong or unreasonable;
(c) Processes, policies or guidelines were not followed or were not applied in a consistent manner;
(d) Adverse impact of a decision or policy on an individual or group;
(e) Unreasonable delay in taking action or reaching a decision;
(f) Failure to provide sufficient or proper notice;
(g) Failure to communicate adequately or appropriately;
(h) Due process denied;
(i) A public service was not provided equitably to all individuals;
(j) Denial of access to information.[5]

In addition, the Public Protector will not consider a matter referred to it later than two years after its occurrence — unless special circumstances so warrant.[6] Furthermore, he retains the discretion to decline to investigate a matter.[7]

As a general rule, disputes between private persons fall outside the jurisdiction of the Public Protector. However, private persons may attract the scrutiny of the Public Protector if their conduct relates to *(a)* state affairs; *(b)* improper or unlawful enrichment or the receipt or promise of any improper advantage by a person as a result of an act or omission in the public administration or in connection with

[1] PPA ss 6(4)*(a)*(iv) and 6(5)*(c)*.
[2] PPA ss 6(4)*(a)(v)* and 6(5)*(d)*.
[3] Act 12 of 2004.
[4] Section 3(1) of the Executive Members Ethics Act 82 of 1998. This is the only time that the Public Protector can be compelled to investigate a matter. Such an investigation has, in fact, been undertaken and the attendant report recognizes the mandatory duty to investigate imposed on the Public Protector to investigate. Office of the Public Protector *Report on an Investigation of a Complaint Regarding the Alleged Failure of Mr M P Lekota, The Minister of Defence, to Comply With Certain Provisions of the Executive Members' Ethics Act, 1998 and the Executive Ethics Code* Report 23 (2003), available at http://www.publicprotector.org/reports_and_publications/report23.pdf (accessed on 1 November 2005) at para 7.
[5] *2004–5 Annual Report* (supra) at 23. See also Office of the Public Protector *Annual Report 2003–2004* (2004) 20, available at http://www.publicprotector.org/reports_and_publications/annual_report/Annual%20,Report%202003%202004.pdf (accessed on 1 November 2005)('*2003–4 Annual Report*'); Office of the Public Protector *Annual Report 2001–2002* (2002) 19, available at http://www.publicprotector.org/reports_and_publications/annual_report/AR2001_02,part4.pdf (accessed on 1 November 2005)('*2001–2 Annual Report*').
[6] PPA s 6(9).
[7] PPA ss 6(4)*(a)* and 6(5) use the phrase 'shall be competent'.

the affairs of government at any level or that of a public entity; or *(c)* an improper or dishonest act with respect to public money.[1]

The Public Protector's role in the so-called 'Oilgate' scandal provides an instructive example of how these jurisdictional requirements work themselves out in practice.[2] The Freedom Front ('FF') had lodged a complaint about the alleged improper distribution of public funds between PetroSA, a parastatal, and a private company, Imvume Management.[3] The FF further alleged that Imvume served as a front for the African National Congress ('ANC') and that the ANC itself was responsible for the improper distribution of public funds. The Public Protector considered its jurisdiction over each of the three bodies separately. It found that PetroSA, as a public entity, fell within its jurisdiction.[4] The Public Protector refused to investigate Imvume Management on the grounds that it was a private company and did not perform a public function.[5] The Public Protector concluded that the ANC was not a 'person performing a public action' and was therefore beyond the reach of the Public Protector's powers.[6] Although this narrow construction of the PPA's jurisdiction provisions is plausible, the Public Protector could have brought both Imvume and the ANC within its inquisitorial reach on the grounds that they had allegedly engaged in conduct that related to state affairs and that involved the improper use of public money.

(ii) *Judicial functions*

The Public Protector does not possess jurisdiction to investigate the 'performance of any judicial function by a court of law.'[7] The term 'judicial function' appears to extend the constitutional prohibition on the investigation of 'court decisions'.[8]

Too cramped a reading of this restriction on the Public Protector's powers would constitute something of a departure from internationally accepted best practices.[9] Many ombudsmen retain jurisdiction over maladministration,

[1] See *Oilgate Report* (supra) at para 5.1.3.3.

[2] Ibid.

[3] Ibid at paras 6–7.

[4] Ibid at para 5.2. The report states that PetroSA is wholly owned subsidiary of the Central Energy Fund. The Central Energy Fund is listed as a major public entity in Schedule 2 of the PFMA. The PFMA also states that wholly owned subsidiaries of major public entities also fall under schedule 2. PetroSA is therefore a public entity.

[5] Ibid at para 5.3.

[6] Ibid at para 5.4 citing *Institute for Democracy in Southern Africa v African National Congress & Others* 2005 (5) SA 39 (C)('*IDASA*')(High Court held that a political party was not a 'public body' for purposes of the Promotion of Access to Information Act.) The report finds that the meaning of a 'person exercising a public function' is similar to that of a 'public body'.

[7] PPA s 6(6).

[8] FC s 182(3).

[9] Sweden, Finland, Austria, Spain, Venezuela and, to a certain extent, Britain permit such oversight. See D Rowat 'Why an Ombudsman to Regulate the Courts?' in Reif *Anthology* (supra) 527, 532. But a substantial number of ombudsmen do not possess any oversight responsibilities with respect to the judiciary. See T Christian 'Why No Ombudsman to Supervise the Courts in Canada?' in Reif *Anthology*

negligence or inappropriate conduct by judges and other court officials.[1] The benefits that flow from this limited oversight of judicial administration by an ombudsman are said to include: *(a)* access *(b)* independence; *(c)* transparency; and *(d)* the ability to address 'minor and unintentional bungling, mistakes and delay.'[2] Moreover, an ombudsman can only issue reports and recommendations. She cannot prosecute or punish.[3]

The Public Protector has, it would appear, adopted a rather generous approach to this limitation on its jurisdiction. It regularly entertains complaints related to delays in judicial decision-making,[4] and has undertaken systemic investigations into prisoners' appeals[5] and Maintenance Courts.[6] The Public Protector has also held that it has jurisdiction to investigate the conduct of the National Prosecuting Authority.[7]

That said, the extension of the Public Protector's jurisdiction to judicial conduct might legitimately be found to conflict with the powers accorded the Judicial Services Commission ('JSC').[8] In addition, although the Public Protector is an independent entity, the potential exists for such oversight — and any public reporting in light of that oversight — to be viewed as an impairment of judicial independence.

(iii) *Legislative and executive matters*

The Public Protector's brief as government watchdog would not, on paper, look to raise concerns about undue interference in the legislative or the executive

(supra) at 539. Christian argues that the supervision of the judiciary by an ombudsman in the Canadian context is

> . . . mixing up constitutional fundamentals . . . The effect of such a move would be to make the judiciary accountable to an agent of the legislator. However, the legislator itself is subject to constitutional supervision by the judiciary. At a conceptual level this is a recipe for serious confusion and conflict.

One critical difference between the Canadian system Christian describes and our own is that the Public Protector is not an agent of the legislature but an independent institution.

[1] See Rowat (supra) at 530; C Sheppard 'An Ombudsman for Canada' (1964) 10 *McGill LJ* 291, 337.

[2] See Rowat (supra) at 534.

[3] Ibid at 531.

[4] See, eg, Complaint 03/92 in *2004–5 Annual Report* (supra) at 46–7 (Delay by Magistrate's court in setting aside interdict); Complaint 1643/03 in *2004–5 Annual Report* (supra) at 66 (Delay by Magistrate's court in finalising appeal); and Complaint 1996/04 in *2004–5 Annual Report* (supra) at 70 (Delay by Labour Court of over 2 years in delivering judgment.)

[5] *2004–5 Annual Report* (supra) at 54. This type of complaint makes up 17% of the total received by the Public Protector. The investigation is meant to 'identify those courts or institutions where complaints regarding appeals cannot be said to be isolated incidents, but [are] rather due to systemic deficiencies in the administration of appeals, and to address those systemic deficiencies.' Ibid.

[6] Ibid at 55. Because the Commission for Gender Equality ('CGE') has already published a report on the same subject, the Public Protector did not undertake its own investigation. It is, however, working together with the CGE to monitor the implementation of the CGE report's recommendations. Ibid.

[7] Office of the Public Protector *Zuma Report* (supra) at 48. The Public Protector does not have jurisdiction over attorneys or advocates. Complaint 125/03 reported in *2004–5 Annual Report* (supra) at 34.

[8] The JSC is established by FC s 178. It is responsible for making findings regarding the appointment (FC s 174) and removal (FC s 177) of judges. Although the president has the final say in both these matters, he can only act once he has received a recommendation from the JSC. The JSC is also required to submit an annual report to parliament. Judicial Services Commission Act 9 of 1994 s 6.

domain.[1] However, the effective execution of its brief will, firstly, often require the Public Protector to suggest amendments to existing legislation or regulations,[2] and, secondly, sometimes have a bearing on the articulation of policy.[3]

The Public Protector has had a number of opportunities to consider the appropriate limits of its brief and whether its actions constitute a breach of institutional comity. The Gauteng Department of Education ('GDE') challenged the jurisdiction of the Public Protector to act on a complaint by a group of primary and secondary schools regarding the GDE's allocation of educators.[4] The GDE argued that the matter fell outside the Public Protector's jurisdiction as it concerned policy, not administrative action. The Public Protector found that although his office could not change law or issue policy directives, 'it was clear that legislative prescripts and governmental policies that result in conduct that is alleged or suspected to be improper or to result in any impropriety or prejudice, could be investigated by the [Public Protector].'[5] The Public Protector has, on another occasion, refused to offer an opinion as to the constitutionality of

[1] See Owen (supra) at 57 ('Care must be taken to distinguish administrative policy from legislative policy. Developing legislation is a political task which typically involves debating the relative merits of differing social and economic policies. In this, an ombudsman has no business. Only if legislation offends established principles of fairness in an absolute way does an ombudsman have a responsibility to enter the debate.')

[2] Complaint 311/03 in *2004–5 Annual Report* (supra) at 32 ('*GDE Complaint*').

[3] The Constitutional Court has distinguished — or attempted to distinguish — administrative functions from legislative or executive functions on a number of occasions. See, eg, *Fedsure Life Assurance & Others v Greater Johannesburg Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC)(Municipal council's decision to pass a budget and impose levies or taxes is legislative action); *Pharmaceutical Manufacturers Association of South Africa & Another: In Re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC)(President's power to sign legislation into force lies somewhere between administrative and legislative action); *Permanent Secretary for the Department of Education and Welfare, Eastern Cape & Another v Ed-U-College (PE)(Section 21) Inc* 2001 (2) SA 1 (CC), 2001 (2) BCLR 118 (CC)(Allocation of a portion of total budget by an MEC in terms of an explanatory memorandum is legislative action); *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC)(Court holds that the implementation of legislation is administrative action while the formulation of policy is executive action: therefore the creation of a commission of enquiry by the President is executive action.) See, generally, J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) § 63.3*(a)*(iii)-(iv); JR De Ville *Judicial Review of Administrative Action in South Africa* (2003) 59–62.

[4] *GDE Complaint* (supra) at 31–2.

[5] Ibid at 32. The Public Protector did not issue a finding in the matter. Instead it counseled patience and preferred to wait until the GDE completed its own internal review. As Christopher Milton, a former ombudsman of Bophutatswana, notes '[An ombudsman] cannot order an amendment, cannot change the law, demand an about-face of government policy. But [he] can consider and [he] can recommend.' C Milton 'The Wider Aspects of Ombudsmanship' (1984–1985) 4 *The Ombudsman Journal* 59, 62. As a result, Milton says, the correct response to a complaint about the actual law in place is: 'I agree with you. At the moment, that is the law and you must abide by the law. However it is a matter we feel worthy of consideration by the Government and we will recommend that.' Ibid at 61.

legislation on the grounds that such advice fell within the proper purview of the courts.[1]

The small number of precedents makes it difficult to construct a useful rubric with which to assess the scope of the Public Protector's powers to 'review' legislative and executive matters. However, the holding in *GDE Complaint* suggests that the Public Protector's powers of investigation extend further than a court's powers of administrative review under FC s 33 and the Promotion of Administrative Justice Act.[2] Although its remedies in this regard are rather limited, the Public Protector may still provide a useful vehicle for challenges to administrative action that fall beyond the jurisdiction of the courts.

(b) Manner and method of investigation

In addition to determining subject matter competency, the PPA regulates the powers the Public Protector may exercise in carrying out investigations.

(i) *Types of investigations*

The PPA identifies two main categories of investigation: (1) investigations based on the receipt of a complaint; and (2) investigations undertaken at the Public Protector's own initiative.[3] While the overwhelming majority of investigations conducted are based on actual complaints received, the Public Protector has increased the number of 'own initiative' investigations.[4] Recent 'own initiative' investigations engaged allegations of maladministration with respect to the renewal of drivers licences, misconduct by the head of the Johannesburg Metro Police and the non-compliance, and thus apparent contempt, of the Eastern Cape provincial government with respect to court orders.[5] Own initiative investigations are often related to individual complaints. When the Public Protector receives a number of complaints related to a similar constellations of issues, it will institute an investigation into the 'root cause' of the problem with the aim of pre-empting

[1] See Office of the Public Protector *Report on the Investigation into Allegations of Underpayment of Beneficiaries of the Venda Pension Fund* (2002), available at http://www.publicprotector.org/reports_publications/report18.htm (accessed on 29 November 2005) at para 5.15. This decision was confirmed in *Dabalorivhuwa Patriotic Front & Another v Government of the Republic of South Africa & Others*. [2004] JOL 12911 (T) at para 30.3. The applicants sought an order declaring Venda Proclamation 9 of 1993 unconstitutional. Before approaching the court, the applicants had approached the Public Protector for an opinion regarding the constitutionality of the pension fund created by the proclamation. He declined to offer one. The High Court agreed that 'this complaint is manifestly a complaint which is incapable of being adjudicated by the Public Protector and which has to be taken to the courts.' This view was confirmed by the Supreme Court of Appeal in *Dabalorivhuwa Patriatic Front & Another v Government Employees Pension Fund & Another*. Case No 553/04 (unreported decision of 30 November 2005).

[2] Act 3 of 2000.

[3] PPA ss 6(4)*(a)* and 6(5).

[4] In the twelve months from April 2004 — March 2005, the Public Protector considered 22 350 individual complaints. *2004–5 Annual Report* (supra) at 20. It conducted 5 'own initiative' investigations. Ibid at 13.

[5] Ibid at 13.

future complaints.[1] In the past year, the Public Protector has embarked on nine new 'systemic investigations.'[2]

(ii) *Confidentiality*

Issues of confidentiality generate significant tension, if not controversy, within the office of the Public Protector. The office is dedicated to transparency and accountability.[3] At the same time, its effectiveness as a watchdog, and the risk attached to whistle-blowing, demands that the identity of complainants and the information they disclose be kept confidential.[4]

(aa) Confidentiality during investigations

The PPA makes specific provision for the maintenance of confidentiality during an investigation by criminalising the disclosure of any document or the record of any evidence, by anyone involved in the investigation, without the Public Protector's consent.[5] Section 7(1)*(b)(i)* allows the Public Protector to determine the manner or the method to be followed in any investigation.[6] This power has a direct bearing on confidentiality.

Indeed the power to determine the manner of an investigation and its relationship to confidentiality was the subject of a dispute in *South African Broadcasting Corporation & Others v Public Protector & Others*. The applicants had applied to broadcast the proceedings of the 'arms deal investigation' jointly conducted by

[1] See D Jacoby 'The Future of the Ombudsman' in Reif *Anthology* (supra) 15, 27–8 ('Carrying out such investigations is a preventive measure that can actually be helpful to authorities because suggestions can be made to correct deficiencies in standards or administrative procedures.') See also Owen (supra) at 57–8 ('A fundamental aspect of this systemic approach is a belief that public institutions, despite their size and complex responsibilities, are able and willing to respond to individuals in a fair way, on their own initiative. While individual problems will always occur and can be resolved on a case-by-case basis through an ombudsman or internal complaint offices, the vast majority of potential complaints should simply never arise in institutions which are systemically sensitive to their overriding duty to ensure the individual fairness and quality in their administrative actions, decisions and practices.')

[2] *2004–5 Annual Report* (supra) at 54. These systemic investigations embrace such varied concerns as the handling of appeals by the courts, the Compensation Commissioner, social grants in the Eastern Cape, maintenance matters, the protection of 'whistle-blowers', RDP housing, civil pensions, unemployment insurance and the witness protection programme. Ibid at 56.

[3] See *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at paras 72–78 (On the obligation to provide effective, transparent, accountable and coherent government, the Court writes that '[a]ccountability by those exercising public power is one of the founding values of our Constitution and its importance is repeatedly asserted in the Constitution.')

[4] *South African Broadcasting Corporation & Others v Public Protector & Others* 2002 (4) BCLR 340, 347 (T)('*SABC*')(Public Protector refused application to broadcast proceedings on grounds that '[c]onfidentiality is paramount in the mandate of the Public Protector and it is necessary to encourage and preserve the confidence and trust in the [Public Protector]'). See also D Jacoby 'Comments on Relations between Ombudsmen and the Media' in Reif *Anthology* (supra) 711, 714 ('The duty [of confidentiality] is, above all else, one of protecting the complainant, who has a right to assume that neither his or her name will be divulged nor the specifics of his or her dealings with the ombudsman.')

[5] PPA s 7(2) read with s 11(1). The penalty is a fine of R40 000, 12 months imprisonment or both.

[6] PPA s 7(1)(b(ii) specifically empowers the Public Protector to exclude certain people or categories of people from an investigation.

the Public Protector, the Auditor-General and the National Director of Public Prosecutions. A panel — representing the Public Protector, the Auditor-General and the National Director of Public Prosecutions — had refused the application in so far as it concerned live radio and television transmissions of witness testimony. In review proceedings of the panel's decision in the High Court, the applicant's contended that the decision had violated their right to freedom of expression, and in particular, the freedom of the press. The applicant relied heavily on *Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v King NO & Others*: the *Dotcom* High Court had overruled a decision not to allow television or radio broadcasting of the United Cricket Board enquiry into the Hansie Cronje cricket scandal.[1] The *SABC* High Court held that the right to freedom of expression included the right of journalists to use the tools of their trade and that the preclusion of the use of cameras by the panel constituted a limitation on that right.[2] The High Court then considered the justifications offered for this limitation. It observed that the PPA, unlike the legislation at issue in *Dotcom*, did not require public investigations.[3] It found that the purpose of the limitation — 'the fighting of crime and other forms of impropriety' — was a constitutionally valid objective.[4] The Court concluded that the grounds for the panel's refusal to permit televised proceedings — (1) the deleterious effect on witnesses; (2) the violation of contractual confidentiality clauses; and (3) the disclosure of confidential information[5] — were rationally related to the purpose of the PPA's infringement of FC s 16 and therefore constituted a justifiable limitation on the applicant's rights under FC s 16.[6]

(bb) Confidentiality after investigations

Although confidentiality is the norm during an investigation, afterwards it is the exception. Both the Final Constitution[7] and the PPA stipulate that '[a]ny report issued by the Public Protector *shall* be open to the public, unless the Public Protector can convince the apposite parliamentary committee that *exceptional circumstance* require that the report be confidential.'[8] The term 'exceptional circumstances' embraces conditions under which release of the report can be said: (i) to

[1] 2000 (4) SA 973 (C)('*Dotcom*').

[2] *SABC* (supra) at 350.

[3] Ibid. The High Court also distinguished the instant case from *Dotcom* on the basis that the two decisions engaged dramatically different subject matter and that the latter did not address matters of national security. Ibid.

[4] Ibid.

[5] Ibid at 346–7.

[6] Ibid at 354. The High Court held that while it possessed the power to overturn the panel's decision, its powers were limited to rationality review and that neither the particular provisions of the PPA nor the facts of the matter warranted interference with the panel's decision. Ibid at 353. However the use of an administrative standard of review — rationality — in a context that demands a higher threshold — namely reasonableness — goes wholly uninterrogated and unexplained.

[7] FC s 182(5).

[8] PPA s 8(2A)*(a)*(our emphasis). Section 8(2A) was inserted by the Public Protector Amendment Act 113 of 1998. See also PPA s 8(2A)*(b)*. If the reasons given by the Public Protector are accepted, the document will be treated as a confidential document in terms of the rules of Parliament.

endanger the security of the citizens of the Republic; (ii) to prejudice any other investigation or pending investigation; (iii) to disturb the public order or to undermine the public peace or security of the Republic; (iv) to be prejudicial to the interests of the Republic; or *(v)* in the opinion of the Public Protector to have a bearing on the effective functioning of his or her office.[1] The Public Prosecutor has, as yet, not deemed it necessary to keep any report confidential.[2]

(iii) *Powers of search and seizure*

The Public Protector possesses sweeping powers of search and seizure.[3] This

[1] PPA s 8(2A)*(c)*.

[2] A comparable controversy has, however, arisen around the Auditor-General's desire to keep certain records confidential. See *CCII Systems (Pty) Ltd v Fakie NNO & Others* 2003 (2) SA 325 (T). The High Court had to decide whether a refusal by the Auditor-General to supply documents, related to the Arms Deal Investigation, and requested in terms of the Promotion of Information Act, was justified. The Auditor-General refused the request on the grounds that some of the documents were supplied in confidence, others could potentially jeopardise the security of the Republic and that the work required to sort through the vast quantity of documents that could be relevant would compromise the work of the Auditor-General's office. Ibid at para 4. The High Court rejected the Auditor-General's blanket refusal to comply with the PAIA request: 'It is not good enough to hide behind generalities. If it means that the first respondent has to employ extra staff, it must be done.' *CCII* (supra) at para 17. The High Court did, however, accept the contention that certain documents could not be disclosed because their disclosure would breach the confidentiality of third parties. Ibid at paras 19–20 ('One can understand that there is a duty to protect such third parties and that the respondents would be remiss if they did not do so.') Hartzenberg J noted that, in terms of the PAIA, the term 'third parties' does not include public bodies in order 'to prevent technical objections based on what department is really in possession of a document.' The High Court also agreed that the release of some documents could prejudice the interests of the defence force or the state. Ibid at para 22 ('I have come to the conclusion that it may cause prejudice to the Defence Force and the Government to order it to produce the whole reduced record.') The High Court therefore concluded that the Auditor-General was obliged to turn over all documents related to the request that did not fall into either of the two aforementioned categories and that it must to furnish a list of the documents it believed ought not to be disclosed and the specific reasons for the non-disclosure. Ibid at para 22. For more on *CCII*, see Woolman & Schutte (supra) at § 24B.3.

[3] PPA s 7A, inserted by Public Protector Amendment Act 113 of 1998. The original PPA contained no powers of search and seizure. For a discussion of powers of search and seizure under the Final Constitution, see D McQuoid-Mason 'Privacy' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) § 38.3*(a)*(ii). Three conditions must obtain for these powers to be exercised in a constitutionally valid manner. Firstly, they must be properly defined. See *Mistry v Interim National Medical and Dental Council of South Africa & Others* 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC)(Court found that the search and seizure procedures were disproportionately broad for the purpose they were meant to achieve). Secondly, the search must be authorised by an independent authority. See *Park-Ross v Director, Office for Serious Economic Offences* 1995 (2) SA 148 (C), 1995 (2) BCLR 198 (C)(Section 6 of the Investigation of Serious Economic Offences Act 117 of 1991 permitting search and seizure without a warrant unconstitutional); *Janse van Rensburg NO v Minister of Trade and Industry & Another NNO* 2001 (1) SA 29 (CC)(Section 7(3) of the Harmful Business Practices Act 71 of 1988, granting wide powers of warrantless search and seizure, unconstitutional.) Thirdly, the independent authority must be provided with information under oath detailing reasonable grounds for the search. See *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others; In Re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC)('*Hyundai*')(Section 29(5) of the National Prosecuting Authority Act must be read to require proof of the existence of a specified offence before a warrant is granted.)

endowment entitles the Public Protector to search any building or premises and to seize object he believes material to an investigation.[1] The PPA states that a search can only be conducted with a warrant issued by a judge or magistrate convinced by credible information — obtained under oath – that reasonable grounds exist to suspect that the objects relevant to an investigation by the Public Protector are on the premises.[2]

(iv) *Power of subpoena*

Amongst the assorted powers granted to the Public Protector, the ability to subpoena any person to provide evidence or submit affidavits may be the most important.[3] Without this, her ability to conduct meaningful investigations would be severely limited.[4]

(v) *Outcomes of investigations*

The complainant must be informed of the outcome of an investigation. The Public Protector possesses a limited amount of discretion with respect to the timing of that disclosure.[5]

As we note below, the Public Protector possesses any number of different tools to resolve disputes.[6] With respect to completed investigations, the Public Protector's primary means of responding to a complainant's legitimate grievance is to refer the matter to the appropriate public body and to make a recommendation

[1] PPA s 7A(1). The search may be conducted by the Public Protector or anyone else authorised by him to do so.

[2] PPA s 7A(3). PPA s 7A(3) is structured identically to section 29(5) of the National Prosecuting Authority Act ('NPAA'). Act 32 of 1998. The NPAA, s 29(8) deals with search warrants for preliminary investigations for certain offences. It specifies the content of the information that must be supplied and then states that a warrant may be granted if there are reasonable grounds to believe that the object sought is on the premises, without ever specifically requiring that the object be related to any offence. In *Hyundai*, the Constitutional Court held that NPAA s 29(5) can and must be read to permit the issuance of a warrant only where there are reasonable grounds to suspect that an offence has been committed. Similarly, PPA s 7A(3) should only permit a warrant to be issued when there are reasonable grounds to suspect that the objects required are related to the investigation and that there is something worth investigating. It is clear from *Hyundai* that searches are permissible even when no offence is suspected. See *Hyundai* (supra) at para 28. ('I should emphasise at this stage, however, that this judgment is concerned only with the constitutionality of search warrants issued for purposes of a preparatory investigation under s 29. It should not be understood as stating that all searches, in whatever circumstances, are subject to the requirement of a reasonable suspicion that an offence has been committed.') The PPA also adumbrates the conditions for the appropriate use of force (PPA s 7A(5)*(a)* and *(b)*), delivery of a warrant (PPA s 7A(7)), the timing of the search (PPA s 7A(6)), and the procedure for handling privileged information (PPA s 7A(8)).

[3] PPA s 7(4)*(a)* read with s 7(5). Any person appearing before the Public Protector is entitled to legal representation. PPA s 7(8).

[4] See Oosting (supra) at 11 ('The ombudsman must, in principle, have unlimited access to information and must be able to rely on the full cooperation of the government in conducting its enquiries.')

[5] PPA s 8(3). The section is subject to the proviso 'when he or she deems it fit but as soon as possible.' The phrase 'when he or she deems it fit' should apply only to the timing of the disclosure, and have no bearing on its occurrence.

[6] See §26A.6 infra, on 'Access, efficacy and forum shopping'.

to that body as to the appropriate form of redress.[1] If the matter under investigation constitutes a criminal offence, the Public Protector can refer the matter to the relevant prosecuting authority.[2]

24A.5 ANCILLARY FUNCTIONS OF THE PUBLIC PROTECTOR

(a) Public Reporting

The Public Protector must table an annual report in both the National Assembly and the National Council of Provinces.[3] He may also, under certain circumstances, submit the findings of specific investigation.[4]

(b) Alternative Dispute Resolution ('ADR')

The Public Protector possesses a great deal of latitude with respect to the manner in which it addresses complaints. While the PPA places strict jurisdictional limits on the Public Protector's investigative powers, it simultaneously authorizes the Public Protector 'to endeavour, in his or her sole discretion, to resolve *any* dispute or rectify *any* act or omission' in a variety of different ways.[5] The resolution of a dispute or the rectification of a problem can take place in terms of: *(a)* mediation, conciliation or negotiation;[6] *(b)* an advisory opinion as to alternative remedies;[7] or *(c)* a proceedure deemed both efficacious and expedient in the circumstances.[8]

Although some commentators have suggested that this power to employ alternative mechanisms for dispute resolution occur within the context of an investigation and are therefore subject to its jurisdictional limits,[9] we would suggest that this grant of power is distinct from the power to investigate.[10] Moreover, the

[1] PPA s 6(4)*(c)*(ii).
[2] PPA s 6(4)*(c)(i)*.
[3] PPA s 8(2)*(a)*.
[4] PPA s 8(2)*(b)*. The relevant circumstances exist when:
(i) he or she deems it necessary;
(ii) he or she deems it in the public interest;
(iii) it requires the urgent attention of, or an intervention by, the National Assembly;
(iv) he or she is requested to do so by the Speaker of the National Assembly; or
(v) he or she is requested to do so by the Chairperson of the National Council of Provinces.
[5] PPA s 7(4)*(b)*(our emphasis).
[6] PPA s 7(4)*(b)(i)*.
[7] PPA s 7(4)*(b)*(ii).
[8] PPA s 7(4)*(b)*(iii).
[9] See L Reif 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 *Harvard HRLJ* 1, 65.
[10] These powers will often be better suited to solving a problem than a finding of right or wrong. See Owen (supra) at 55 ('In keeping with the general principle that it is the proper role of an ombudsman office to strive for the mutually acceptable resolution of a problem rather than necessarily a finding of fault or absence of it, the office should attempt to provide informal mediation services wherever such an approach may be productive. This approach not only tends to result in greater satisfaction among all parties, but frequently provides a more rapid resolution than a full investigation oriented towards a finding of right or wrong.')

practice of the Public Protector suggests that it views its ADR powers as a complement to, rather than derivative of, its powers of investigation.[1]

24A.6 Access, efficacy and forum shopping

The Public Protector must take those steps necessary to make it 'accessible to all persons and communities.'[2] While meaningful access dictates that the services provided be free — which the Public Protector's services are — they must also be geographically accessible and expeditiously dispatched.

Although provision is no longer made for provincial Public Protectors,[3] the Public Protector now has offices in every province and a national office in Pretoria.[4] The Public Protector has also instituted an outreach programme to improve access for people in remote areas.[5] The pressure to implement these initiatives indicates that the current level of geographical access is less than adequate.

With regard to the speedy handling of claims, in 2004–2005 the Public Protector carried over 9 292 complaints from the previous year and received 22 350 new complaints.[6] Of the 31, 642 complaints in its docket for 2004–2005, only 17 539 were finalised. Thus, 14 103 complaints will be carried over into 2005–2006.[7] Although a special team of investigators has been created to respond to all complaints older than two years, given that most complaints reach their sell-by date after 24 months, this particular strategy might bear far less fruit than anticipated.[8] The real crisis in the Public Protector's office flows from its limited manpower. The office itself claims that the optimal number of active complaints per investigator is between 20 and 100. In 2003, the average was 111. In some provinces, active complaints per investigator average 157.[9] These numbers reflect inadequate levels of funding and threaten both the public perception of and the actual effectiveness of the Public Protector.[10]

[1] See, eg, Complaint 012/02 NC in *2003–2004 Annual Report* (supra) at 57 (Complaint about compensation for electrical damage solved by negotiation); Complaint 64/01 MP in *2004–2005 Annual Report* (supra) at 42 (Complainants alleged that government departments were obliged to provide them with a resource centre. The departments countered that the duty rested with a private party. At the mediation, the private party took responsibility for the provision of services. This resolution illustrates the manner in which the power to mediate disputes extends the jurisdiction of the Public Protector.) See also Complaint 1480/03 in *2004–2005 Annual Report* (supra) at 65 (Successful mediation with Department of Education for reimbursement of fees.)

[2] FC s 182(4) and PPA s 6(1)*(b)*.

[3] The provisions relating to provincial Public Protectors in the Interim Constitution, IC s 144, and the original PPA not included in the Final Constitution, and were deleted from the PPA by the Public Protector Amendment Act 113 of 1998.

[4] See *2004–2005 Annual Report* (supra) at 128–9.

[5] Ibid at 14–5. Forty-three visiting points across South Africa provide service at least once per week. More regional offices are planned.

[6] *2004–5 Annual Report* (supra) at 19 and 20.

[7] Ibid at 21 and 22.

[8] Ibid at 13.

[9] *2003–2004 Annual Report* (supra) at 11.

[10] See § 24A.3*(b)* supra, for a discussion of the financial independence of the Public Prosecutor.

Although these numbers suggest an overwhelmed and understaffed Public Protector's office, the public appears to be getting good value for money. In 2002, 10% of finalised cases found in favour of the complainant.[1] In 99% of these cases, the state rectified the wrong.[2] When a well-founded and properly registered claim is made, the Public Protector appears to be a very accessible and highly effective alternative to the courts.[3]

The Public Protector's relatively high rate of success in securing adequate redress for complainants raises the question of when, and whether, the Public Protector ought to be treated as the preferred forum for ventilation of disputes between a citizen and the state. As it stands, the law provides only limited disincentives with respect to forum shopping.

On the one hand, the PPA permits the Public Protector to refuse to investigate any matter in which the complainant has not exhausted his legal remedies.[4] This power has been exercised in less than 1% of all complaints.[5] On the other hand, the complainant has no obligation to approach the Public Protector for assistance prior to filing suit in a court of law.[6]

If anything, the current case law suggests that a complainant might be well advised to adopt a two-pronged approach to the resolution of a dispute with a

[1] *2001–2002 Annual Report* (supra) at 16. The complainant lost 9% of all cases; 50% of complaints were determined to be either premature or outside the Public Protector's jurisdiction; 4% of complaints were referred to another body to finalise; 1% of complainants were instructed to first exhaust alternative legal remedies; 26% of complaints required no further action due to a deficiency in the claim or the complaint being resolved without the Public Protector's aid. Ibid

[2] Ibid. 98% were finalised before the case closed and a further 1% after the case closed. In only one case did the state refuse to follow the recommendation: it chose to take an alternative route to address the problem.

[3] The Office of the Public Protector increases access through its acceptance of complaints in numerous formats. Personal interviews ensure that persons who are illiterate or who lack sufficient education to draft a document stating the alleged wrong can lay a complaint. Complaints registered by telephone interview ensure that those persons who lack the resources (time or money) needed to travel to a Public Protector's office are still able to file a complaint. Complaints can be also be initiated by letter. See the public information brochure issued by the Office of the Public Protector *Public Protector: South Africa* (2003), available at http://www.publicprotector.org/brochure_faq/11_lang/english.pdf (accessed on 1 November 2005). The brochure is available in all 11 official languages. A toll free number — 0800 11 20 40 — enables members of the public to speak directly with a member of the Public Protector's office. The office will assess both the merits of the claim and the likelihood of success should the complainant pursue it further. Ibid. Although the Office of the Public Protector will act on a purely telephonic complaint, it prefers a written complaint that includes the following: the nature of the complaint; the background and history of the complaint; the reasons why the complaint should be investigated by the Public Protector; the steps that have been taken to solve the problem; the names of the relevant officials; and copies of any correspondence. Ibid.

[4] PPA s 6(3)*(b)*.

[5] *2001–2002 Annual Report* (supra) at 16.

[6] See *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609, 625 (E), 2000 (12) BCLR 1322, 1333 (E)('[The Public Protector and the Auditor-General] are bodies constitutionally mandated to pursue matters of this kind, but where the State fails to provide them with the means to do so it seems almost bizarre to insist that the Courts are precluded from coming to the assistance of the applicants.') See also *Dabalorivhuwa Patriotic Front & Another v Government, RSA & Others* [2004] JOL 12911 (T)('*Dabalorivhuwa*') at para 30.2.

public entity. In *Mothibeli,* the court held that the lodging of a complaint with the Public Protector does not count as sufficient reason for the late lodging of an application.[1] The complainant, in *Mothibeli* had first lodged his labour complaint with the Public Protector. After failing to receive a satisfactory response from the Public Protector, he approached the court — some 18 months after the claim arose. The *Mothibeli* court held that 18 months did not constitute a reasonable time within which to bring suit. The Prescription Act reinforces the view that a complaint to the Public Protector will also not prevent the running of prescription.[2]

The holding in *Mothibeli* makes the Public Protector a somewhat less attractive substitute for litigation. However, the Public Protector remains a free and effective mechanism for dispute resolution. Those complainants who believe that their best chance at securing the required relief is to be found in the courts are not barred from filing in both forums simultaneously. The cotemporaneous pursuit of litigation and alternative dispute resolution can only be said to defeat the purpose of creating the Public Protector if, in fact, the vast majority of complainants are obliged to adopt such a tactic. The evidence, albeit scant, does not support such a conclusion.

[1] *Mothibeli v Western Vaal Metropolitan Substructure* [1999] JOL 5678 (LC) at para 18 ('While the applicant may well have been entitled to approach the Public Protector for assistance, that clearly would have been a parallel exercise to the course of legal proceedings … In any event, he could not reasonably have understood that his referral of the dispute to the Public Protector could excuse him from pursuing the matter under the Labour Relations Act, including the filing of the necessary statement of claim in this Court.') See also *Prinsloo v Development Bank of Southern Africa Pension Fund &Another* [1999] 12 BPLR 439, 443 (PFA)(The Pension Funds Adjudicator denied application for the condonation of late application despite an earlier application to the Public Protector.)

[2] The Prescription Act provides that the running of prescription will only be interrupted by 'service on the debtor of any process whereby the creditor claims payment of the debt.' Act 68 of 1969, s 15. A complaint to the Public Protector does not amount to such service.

24B Auditor-General

Stuart Woolman
Yolandi Schutte

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Functions of Auditor-General

188. (1) The Auditor-General must audit and report on the accounts, financial statements and financial management of

(a) all national and provincial state departments and administrations;

(b) all municipalities; and

(c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.

(2) In addition to the duties prescribed in subsection (1), and subject to any legislation, the Auditor-General may audit and report on the accounts, financial statements and financial management of

(a) any institution funded from the National Revenue Fund or a Provincial Revenue Fund or by a municipality; or

(b) any institution that is authorised in terms of any law to receive money for a public purpose.

(3) The Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

(4) The Auditor-General has the additional powers and functions prescribed by national legislation.

Tenure

189. The Auditor-General must be appointed for a fixed, non-renewable term of between five and ten years.

24B.1 INTRODUCTION

Unlike the other state institutions supporting constitutional democracy,[1] the Auditor-General antedates both the Interim Constitution[2] and the Final Constitution.[3] And unlike most of the other Chapter 9 Institutions, the unique legislative

* The authors would like to thank Gus Washefort for his invaluable assistance with the research for and writing of this chapter.

[1] Constitution of the Republic of South Africa, 1996 ('FC' or 'Final Constitution') s 181(1) provides for the creation of the Public Protector; the Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General and the Electoral Commission. For a discussion of these institutions elsewhere in this work, see, eg, Stuart Woolman & Julie Soweto-Aullo 'Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24F; Cathi Albertyn 'Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24B; Justine White 'Independent Communication Authority of South Africa' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24E; Michael Bishop & Stuart Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24A.

[2] Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution').

[3] The Exchequer and Audit Act gave South Africa its first office designed to control the public purse. Act 21 of 1911. That Act remained essentially unchanged until repealed by a new Exchequer and Audit Act. Act 32 of 1956. In 1975, the Exchequer and Audit Act expanded the Auditor-General's powers to embrace performance auditing. Act 66 of 1975. The problem with the new Act and subsequent legislation was that the Office of the Auditor-General remained dependent upon the executive for its effective administration. See Auditor-General Act 52 of 1989. Only after the passage

environment within which the Auditor-General operates makes this institution the most likely to retain its independence and to discharge its responsibility to ensure that our government operates in an accountable, transparent and equitable manner.[1]

How did the Office of Auditor-General come to be the first among equals? By virtue of its position as 'the supreme audit institution of the Republic,'[2] the Auditor-General must produce financial audits and compliance audits with respect to all national and provincial departments,[3] all municipalities,[4] all public entities and a host of other institutions.[5] The purpose of these audits is to ensure the proper use of public funds. These regular public reports to Parliament and to Treasury — some 1400 annually — provide critical information about how various arms of government are managing their budgets and enable the legislature to

of the Audit Arrangement Act did the Auditor-General finally loose the chains of executive interference. Act 122 of 1992 ('AAA'). See also Office of the Auditor-General *Annual Report of 1990–91* ('The unique statutory responsibilities of the Office, supported by the image of autonomy, objectivity and integrity which it has earned over the years, not only places the Office in a position of trust vis-à-vis the general public but also carries special responsibilities in the new South Africa.') The AAA transferred 'overall supervision and related matters [from the executive] to a Parliamentary oversight body, the Audit Commission.' *Historical Review of the OAG* (2005), available at www.agsa.co.za (accessed on 1 November 2005). See also *Premier, Eastern Cape, & Others v Cekeshe & Others* 1998 (4) SA 935 (Tk), 1997 (12) BCLR 1746 (Tk)(With respect to public entities in the Transkei, the Corporations Act 10 of 1985 s 10(2) provided that the 'accounts of all corporations shall be audited by the Auditor-General' while s 11(1) required the submission to the National Assembly of a financial report 'signed by the Auditor-General stating that, on the information supplied to him and to the best of his knowledge and belief, such balance sheet and statement of income and expenditure are true and correct: Provided that, if the Auditor-General is unable to make such a report or to make it without qualification, he shall set out in such report either the circumstances which prevent him from making such a report or the qualification itself.')

Whereas the Auditor-General Act ('AGA') served as the enabling legislation for the Auditor-General under the Interim Constitution, the Public Audit Act ('PAA') gives proper expression to the Final Constitution's conception of the Office of the Auditor-General. Auditor-General Act 12 of 1995; Public Audit Act 25 of 2004. Perhaps, the two most significant differences between the PAA and its predecessors are the new Act's grant of sweeping powers of search and seizure and the express expansion of the Auditor-General's authority to cover institutions in the public sector. See PAA s 16 and PAA s 4. The PAA, s 53 read with Schedule 1, repeals the Auditor-General Act and the Audit Arrangement Act in their entirety and the Public Finance Management Act 1 of 1999 ('PFMA'), ss 58 - 62.

[1] See *Rail Commuter Action Group & Others v Transet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at para 72 ('Accountability of those exercising public power is one of the founding values of our Constitution and its importance is repeatedly asserted in the Constitution.' The Court cites FC ss 1, 41(1) and 195(1)*(f)* in support of this proposition.) See also *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 4 ('Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution . . . If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state.')

[2] PAA s 1 defines 'the supreme audit institution of the Republic'; as 'the institution which, however designated, constituted or organized, exercises by virtue of the law of a country, the highest public auditing function of that country'.

[3] FC s 188(1)*(a)*. PAA s 4(1).

[4] FC s 188(1)*(b)*. PAA s 4(1).

[5] FC s 188(1)*(c)*. PAA s 4(2).

exercise meaningful oversight over the executive.[1] As the Constitutional Court noted in *President of the Republic of South Africa v South African Rugby Football Union,* the Final Constitution is,

> committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The constitutional goal [of ensuring that the administration observes fundamental rights and acts both ethically and accountably] is supported by a range of provisions in the [Final] Constitution . . . [including the establishment of] the Auditor-General whose responsibility it is to audit and report on the financial affairs of national and provincial State departments and administrations as well as municipalities.[2]

The Auditor-General's powers extend beyond the coercive power of shame and include the threat of forensic audits.[3] Its reports and its forensic audits expose malfeasance, corruption, and incompetence in the discharge of public

[1] See, eg, *Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd* 2002 (3) SA 30 (T)(Enabling legislation for Trust requires annual audit by Auditor-General and tabling of report before the legislature); *Esack No & Another v Commission on Gender Equality* 2001 (1) SA 1299 (W), 2000 (7) BCLR 737 (W)(Commission transactions subject to audit by Auditor-General); *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 77 (Court notes that the Independent Electoral 'Commission's necessary expenditure is to be defrayed out of money appropriated by Parliament . . . and its records are to be audited by the Auditor-General. Comprehensive reporting duties are imposed on the Commission and in particular it is required annually to submit to Parliament . . . an audited statement on income and expenditure and a report in regard to its functions, activities and affairs in respect of such financial year.') See also I Rautenbach & E Malherbe *Constitutional Law* (2002) 212. Of course, someone must watch the watchers. The Auditor-General must submit an annual report to the National Assembly on its activities. See PAA s 10(2)*(a)-(b)*. See also FC s 181(2)("These [Chapter 9] institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.') PAA s 10(3) requires that the National Assembly create the oversight mechanism contemplated by FC s 55(2)*(b)*(ii). Courts may play a role with respect to the oversight of the Auditor-General. See *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs & Others* 2005 (4) SA 212 (SCA)(Court dismisses applicant's suit against Auditor-General for improper discharge of duties that allegedly led to financial irregularities by other officials.)

[2] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at paras 133–134.

[3] See Office of the Auditor-General *Activity Report for 2003 — 2004* RP 211/2004 (2005) 23 ('*Activity Report*')('Forensic auditing is an independent process aimed at preventing or detecting economic crime in the public sector. The process mainly comprises an objective assessment of the measures instituted by accounting officers and other relevant role players to prevent and detect economic crime, but it can also include economic crime investigations when this is appropriate and seems necessary . . . [T]he term "economic crime" is used to describe various crime categories, including fraud, forgery, theft and other contraventions of applicable statutes (e.g. corruption).') See also *Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('*First Certification Judgment*') at para 164.

office that enable other law enforcement agencies to launch criminal investigations.[1] Case law suggests that the Auditor-General himself may even possess standing to seek rescission of decisions or contracts that manifest fraud.[2]

Whilst the breadth of its investigatory powers may distinguish the Auditor-General from other Chapter 9 Institutions, another unique feature of the Auditor-General is its fiscal independence. The Auditor-General's ability to generate significant revenue streams from fees charged for audit services ensures that it has the money necessary to discharge its constitutional duties. These financial resources immunize the Auditor-General from some of the budgetary pressures that have undermined the independence of other Chapter 9 Institutions.[3]

24B.2 INDEPENDENCE OF THE AUDITOR-GENERAL

Chapter 9 Institutions often struggle with two distinct but related forms of independence: political autonomy and financial viability.

The Constitutional Court addressed the nature of the political independence required of the Office of Auditor-General during the certification process for the Final Constitution. The crisp question before the Court in the *First Certification Judgment* was whether the Constitutional Assembly had given adequate effect to Constitutional Principle ('CP') XXIX. CP XXIX read as follows:

> The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.[4]

[1] Although this chapter speaks generally about the Auditor-General's role in rooting out corruption, the term 'corruption' here is broadly construed. As Sole notes, '[c]orruption may vary from the clearly illegal — such as fraud — to more subtle forms of unethical rent-seeking, patronage and abuses of power that may be just as damaging to the social fabric of a nation.' See Sam Sole 'The State of Corruption and Accountability' in John Daniel, Roger Southall & Jessica Lutchman (eds) *State of the Nation: South Africa 2004–2005* (2005) 86. Sole suggests the following definition — one that fits the broad brief of the Auditor-General's Office: 'corruption is the wilful subversion (or attempted subversion) of a due decision-making process with regard to the allocation of any benefit.' Ibid at 87. For example, an Auditor-General's report on Transnet led the National Prosecuting Authority to launch a probe into the inappropriate manner in which medical scheme benefits were handled by officials in the Department of Correctional Services. See Sheena Adams 'Scorpions Probe Medical Aid Fraud' *The Mercury* (5 October 2004). The corruption uncovered by the Auditor-General and the Scorpions in this matter fits a general pattern of political malfeasance. See John Hyslop 'Political Corruption: Before and After Apartheid' *Conference on State and Society in South Africa* (University of the Witwatersrand 2004) 17 ('Under Mandela, and even more, under Mbeki, government policy encouraged rent-seeking behaviour by black entrepreneurs through the economic preferences they were given through a whole gamut of policies, especially those relating to the awarding of state contracting and corporate ownership. The tendency of such policies was to create a climate in which the line between legal forms of rent-seeking and outright corruption and cronyism became . . . blurred. . . . [O]ld struggle networks provided political connections which could be parlayed into economic leverage.')

[2] See *Minister of Local Government and Land Tenure & Another v Sizwe Development & Others: In re Sizwe Development v Flagstaff Municipality* 1991 (1) SA 677, 678 - 679 (Tk).

[3] PAA s 36.

[4] *First Certification Judgment* (supra) at para 160.

Section 194 of the first constitutional text submitted for certification by the Constitutional Assembly stated that a simple majority of the members of the National Assembly could remove the Auditor-General from office. The Constitutional Court held that this removal procedure was insufficient to vouchsafe the Auditor-General's independence and impartiality. The Court wrote:

> [T]he Auditor-General is to be a watch-dog over the government. However, the focus of the office is not inefficient or improper bureaucratic conduct, but the proper management and use of public money. . . . Against the background of the purpose of the office, it is our view that the dismissal provisions . . . are not sufficient to meet the requirements of CP XXIX.

The dismissal provisions were subsequently amended. The Final Constitution now requires that a resolution for the removal from office of the Auditor-General receive the votes of at least two thirds of the members of the National Assembly.[1]

As we noted at the outset, the Auditor-General's ability to generate additional revenue from fees charged for auditing services enhances its political independence.[2] (It also benefits from income streams derived from investments and the alienation of moveable property.) In 2003 and 2004, Auditor-General earned R525 000 000 and R495 000 000 from auditing fees charged to national, provincial and local government as well as other public and international entities.[3] While other Chapter 9 Institutions constantly complain that they are under-funded and under-resourced,[4] and therefore incapable of discharging their constitutional

[1] The Constitutional Court found that the amended provision complied with CP XXIX, and went on to certify the amended text. *Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at para 134 ('*Second Certification Judgement*')('The AT substantially enhances the independence of both the Public Protector and the Auditor-General. AT 193(5)*(b)(i)* now provides that the resolution of the NA recommending their appointment be passed with a supporting vote of at least 60% of the members of the NA and AT 194(2)*(a)* now provides that the resolution of the NA calling for their removal from office must be adopted with a supporting vote of at least two-thirds of the members of the NA. We are now satisfied that the terms of CP XXIX have been met in respect of both the Public Protector and the Auditor-General.')

[2] PAA s 36.

[3] *Activity Report* (supra) at 11 (Table 1). However, the fiscal independence promised by these fees is only as good as the ability or the willingness of the audited entitees to make good. Local government has been notorious for its failure to pay its statutorily required fees. See Linda Loxton 'Fakie Seeks R100m from Municipalities' *Business Report* (12 March 2003).

[4] Under-funding of the Chapter 9 Institutions is a common problem. Parliament has been put on notice that low levels of funding and an executive policy of malign neglect make effective operation of these institutions difficult, if not impossible. The Corder Report is absolutely scathing in this regard. See Hugh Corder, Sara Jagwanth & Fred Soltau 'Report on Parliamentary Oversight and Accountability' Report to the Speaker of the National Assembly (1999), available at www.pmg.org.za/docs/2001/viewminute.php?id=811 (accessed 10 January 2005)('Corder Report'). Corder, Jagwanth and Soltau write that

> In their submissions to us, many constitutional institutions have also pointed out that the present arrangement may result in a very low priority being given to constitutional institutions as government departments may be slow in recognising the interests of an institution which does not form part of the core business of the department. The very direct control by the executive of constitutional institutions can have a devastating effect on the independence and credibility of these offices. . . . In the first place,

duties, the Auditor-General's Office has voiced no similar sentiment.[1] It is, perhaps, the only Chapter 9 Institution to be truly both financially and administratively independent of national government.[2]

to make institutions dependent on budget allocations received through the very departments that they are required to monitor is not desirable. Secondly, these institutions must be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of the government. Approval by the executive of budgets, or other issues such as staffing, is thus inconsistent with independence, as well as the need to be perceived as independent by the public when dealing with their cases. This executive power could render impotent state institutions supporting constitutional democracy through the potential denial of both financial and human resources. Furthermore, the special constitutional features of these institutions are not recognised as executive priorities are set.

'Corder Report' (supra) at paras 7.2 and 7.2.1. The Corder Report suggests that, at a minimum, the budget of each Chapter 9 Institution be subject to a separate vote — a vote distinct from that for the budget for the department with line authority, and a vote distinct from that for the budget of other Chapter 9 Institutions. Ibid at para 7.3. To meet other constitutional imperatives, the Corder Report advocates the passage of legislation — an Accountability and Independence of Constitutional Institutions Act — and the creation of a parliamentary oversight committee — a Standing Committee on Constitutional Institutions. Ibid at paras 1.1, 7.3, 7.4, 8. Parliament has not acted on any of the Corder Report recommendations. Other Chapter 9 Institutions have noted this failure to act with dismay. See N Barney Pityana 'South African Human Rights Commission Presentation to the Justice Portfolio Committee — Budget Review and Programmes 2001/2002' (8 June 2001), available at www.sahrc.gov.za (accessed on 11 January 2005). Chairperson Pityana writes:

After five years of operations, it is very discouraging to have to report that questions about the independence of the Commission have not been resolved. . . . National Treasury continues to relate to the Commission through the Justice Department. This means that we have no direct means of having queries and problems resolved. . . . Since inception, the Commission has constantly raised concerns about the manner in which its budget was set. We pointed out *ad nauseum* that at no stage was there a proper assessment of the mandate of the Commission and the appropriate level of resources necessary to execute the mandate.

Ibid at 4–5. For more on the under-funding of Chapter 9 Institutions, generally, and the under-funding of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, in particular, see Stuart Woolman & Julie Soweto-Aullo 'Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24F.

[1] But see Office of the Auditor-General *Activity Report for 2003 — 2004* RP 211/2004 (2005) 23 ('I am happy to report that over the last three years we have been able to achieve a significant improvement in the quality of our audits. Unfortunately there was some deterioration in the number of findings with regard to the fieldwork stage of the audit process during 2003-04. This is a matter of grave concern to my office and myself, which will be closely monitored in the next audit cycle. We are also implementing an enhanced quality control process to address quality management more holistically. It is envisaged that these measures will ensure that improvement is attained in the quality of our audits.')

[2] As one of the authors has written elsewhere in this work, the Constitutional Court in *New National Party* establishes a two-part test for Chapter 9 Institution independence. See Michael Bishop & Stuart Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24A, citing *New National Party v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)('*NNP*') at paras 98 — 99 (Court defines 'financial independence' as the possession of sufficient funds to discharge its constitutional obligations. 'Administrative independence' denotes the absence of state control over the manner in which the institution performs its functions.) The Constitutional Court identified two essential desiderata for financial independence. Firstly, the Chapter 9 Institution must have sufficient funding to fulfil its constitutional mandate. Secondly, the funds must come from Parliament and not from the executive. Although the *New National Party* Court views the source of the funds as a requirement for financial independence, the source of funds would seem, at first blush, to only become

24B.3 FUNCTIONS OF THE AUDITOR-GENERAL

(a) Constitutional and statutory duties to report

As FC s 188 makes clear, the Auditor-General must audit all state departments and administrations, all municipalities and any other institution or accounting entity so required by national or provincial legislation.[1] The Auditor-General may, in addition, audit other state institutions that receive public monies for public purposes.[2]

relevant if the funds provided are insufficient. If the funds are sufficient for the discharge of the Chapter 9 Institution's duties, then any issue regarding the source of the funds could, as a logical matter, never arise. However, the *New National Party* Court, without saying as much, would appear to have concerns beyond those of mere fiscal viability. The Court seems somewhat vexed by the ability of Chapter 9 Institutions to discharge their oversight responsibilities with respect to the executive if the executive retains the discretion to decrease (or increase) funding. When questions of sufficiency of funds do arise, whether the executive is, in fact, the source of those funds will enter into the Court's assessment of the independence of the institution. Thus, it is for reasons of political autonomy that the *New National Party* Court signals its preference for Chapter 9 Institutions such as the Public Protector to be funded directly by Parliament. See also *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC)('*Langeberg*') at para 27 (On the meaning of independence with respect to the Chapter 9 Institutions, the Constitutional Court wrote that 'independence cannot exist in the air, and it is clear that the chapter [on co-operative government] intends to make a distinction between the state and the government, and the independence of the Commission is intended to refer to independence from government, whether local, provincial or national.')

The courts have also developed an objective test for 'independence' with respect to courts and other tribunals that ought to apply equally to institutions such as the Auditor-General. See *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 71 quoting with approval *R v Valente* (1985) 24 DLR (4th) 161 (SCC)('Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" . . . connotes absence of bias, actual or perceived. The word "independent" in s 11*(d)* reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the Executive branch of government, that rests on objective conditions or guarantees. . . . Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception'); *Van Rooyen & Others v The State & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 164 (With respect to the independence of Magistrates, 'whose functions . . [like those of the Auditor-General] involve matters of great sensitivity in which there could well be confrontation between the functionaries concerned and members of the Legislature and the Executive, a higher level of protection would certainly not be inappropriate'); *Freedom of Expression Institute & Others v President, Ordinary Court Martial, & Others* 1999 (2) SA 471 (C), 1999 (3) BCLR 261 (C) at paras 23–25 ('[T]he appropriate test is whether the tribunal from the objective standpoint of a reasonable and informed person will be perceived as enjoying the essential conditions of independence'); *South African National Defence Union & Another v Minister of Defence & Others* 2004 (4) SA 10, 39 (T), 2003 (9) BCLR 1054 (T) (On application of test for 'independence' to a military tribunal.)

[1] FC s 188(1) and PAA s 4 identify the spheres of government and organs of state subject to mandatory audits and reports.

[2] FC s 188(2) and PAA s 5 make provision for discretionary audits and reports.

The Public Audit Act extends these constitutionally-mandated audit functions to all constitutional institutions[1] and to any public entity listed in the Public Finance Management Act and the Local Government: Municipal Systems Act that may require the Auditor-General's services.[2] The Auditor-General demonstrates its even-handedness through the oversight process itself: on the one hand, it provides advice to legislatures and their committees assessing the performance of an agency or department; on the other hand, it assists auditees with their replies to inquiries launched by legislatures subsequent to the legislatures' review of an audit report.[3]

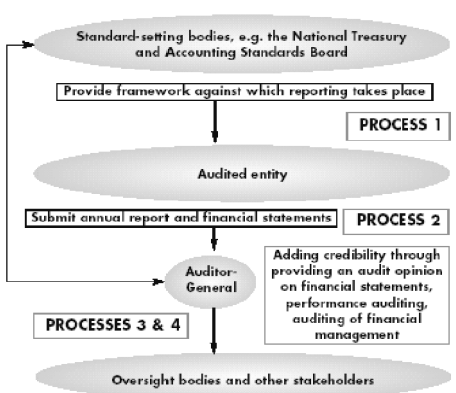
As a general rule, the Auditor-General carries out audits, but does not opine on the merits of particular government programmes. However, while the Auditor-General will not 'question policy laid down by the legislative and executive authority, the arrangements for the implementation thereof, the controls applied, the cost incurred and the results achieved are all legitimate subjects for auditing.'[4] What this means is that although the government's objectives fall beyond the purview of the Auditor-General, the Auditor-General can interrogate the means the government employs to realize its objectives. When it comes to the expenditure of public monies, the Auditor-General has an obligation to state whether the financial audits and the compliance audits reflect a problem with the implementation of a policy or the delivery of services.[5]

[1] PAA s 4(1)*(b)*.

[2] PAA s 4(3)*(a)*. See Public Finance Management Act 1 of 1999 ('PFMA'); Local Government: Municipal Systems Act 32 of 2000 ('LGMSA'). For more on the constitutional and statutory framework to distribute, to control and to monitor the expenditure of public funds, see Ross Kriel & Mona Monadjem 'Public Finances' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 25.

[3] PAA s 5 (1)*(c)*. The PAA and PFMA place a number of substantive constraints on the auditing activities of the Auditor-General designed to ensure its independence and impartiality. First, it may not undertake audits or offer services — for fees — that compromise its constitutional and statutory obligations. Second, the Auditor-General may not provide advice or services that have a direct bearing on the formulation of policy. PAA s 5(1)*(a)*(iii).

[4] Office of the Auditor-General *Report on the Financial Statements of the Provincial Administration of the Northern Cape* (31 March 1998) 7.



[5] For example, the Auditor-General in its *Report on the Financial Statements of the Provincial Administration of the Northern Cape* found that only 1 of 17 departments warranted an unqualified financial audit report — 7 were qualified and 9 had disclaimers — and only 5 out of 17 departments deserved unqualified compliance reports — 11 were qualified and 1 has a disclaimer. These findings stand as a scathing indictment of the provincial administration and raises serious doubts about the capacity of current personnel asked to carry out policy. Ibid at 9. If the capacity does not exist to execute the policy, then the policy itself must be called into question. Activity Report (supra) at 19. This diagram illustrates the role played by the Auditor-General in the accountability process. Parliament — through legislation like the PFMA — and the Department of the Treasury — through

The general reports, the special reports and the individual audits made publicly available by the Auditor-General over the course of the last five years offer a detailed account of both the achievements of and the maladministration in South African government. In 2000, some 38% of financial audits for national departments received qualified reports.[1] The reasons for the qualifications ranged from 'limited or no audit performed, resulting in a disclaimer of opinion or adverse opinion; liabilities and creditors that could not be verified; loans, debtors and investments that were either misstated, or of which the recovery was doubtful; assets, including stock, stores and inventory, that could not be verified; misstatement of income; irregularities in disclosing expenditure; unacceptable financial statements for trading accounts.'[2] The national departments fared even more poorly with respect to compliance audits: over 57% of national departments received qualified reports because of 'serious shortcomings in internal checking and control; non-compliance with other prescripts, including legislation and Treasury regulations; unauthorised expenditure that was incurred; insufficient control over personnel expenditure; and serious deficiencies in provisioning administration.'[3] The financial state of provincial government and local government was abysmal. So few adequate controls existed at the provincial level that

regulations issued in terms of the Division of Revenue Act — establish the reporting requirements that various state actors must follow. The diagram describes this as Process 1. The reporting requirements themselves focus largely 'on the financial performance of the entity.' Ibid. The problem with the information elicited in financial statements — Process 2 — is that the financial statements do not really satisfy the needs of the oversight bodies. What oversight bodies such as the Standing Committee on Public Accounts ('SCOPA') and Treasury really need are qualitative assessments of a public entity's performance. The real benchmark is delivery. Thus, the Auditor-General notes that 'an expectation gap' opens up between what the public entity and the Auditor-General are required by the Final Constitution and statute to provide — financial audits, Process 3 — and what the oversight bodies actually need to determine whether public monies have been well spent. As it stands, while the Auditor-General can undertake the kind of performance audits — Process 4 — meaningful oversight requires, it currently does so only on an ad hoc basis. Ibid at 20.

[1] A financial audit is the examination of financial records of an organization in order to verify that the figures in the financial reports are relevant, accurate, and complete. A financial audit fulfils the 'attest' function: an independent party — in this case the Auditor-General — provides written assurance (the audit report) that financial reports are 'fairly presented in conformity with generally accepted accounting principles.' Unlike financial audits — which interrogate the effectiveness of management — compliance audits examine compliance with statutory and regulatory obligations. A complaince audit requires the review of organizational records so as to determine to test for the adequacy of system controls, to ensure that policy and operational procedures are followed, to detect breaches in security, and to recommend any indicated changes in control, policy and procedures. A qualified report signals the absence of sufficient information, the presence of misinformation or other forms of non-compliance with accepted accounting procedures that does not permit the auditor to come to a meaningful conclusion about the actual fiscal state of the entity under review. A disclaimer indicates a wholesale failure to keep adequate financial records and implies negligence bordering on the criminal.

[2] Office of the Auditor-General *General Report for 1999–2000* RP 75/2000 (2001) 15 ('*General Report 2000*') 3, 15–21.

[3] Ibid at 4, 22–30.

the Auditor-General could not issue a report on the 1999–2000 fiscal year and was obliged to limit his assessments to completed audits from the previous financial year. Even with respect to these audits, the majority had to be qualified because internal departmental audits were largely unreliable and asset registers were either non-existent or incomplete. Given the parlous state of local government at the time — the report noted the 'short-term deteriorating financial position at many municipalities' — some solace could be taken in the fact that 31% of the municipalities audited received unqualified reports.[1]

The most recent general report illustrates both an improvement in the administration of government and the increased vigilance of the Auditor-General.[2] The report noted that nearly 25% of national departments — 8 of 33 — received 'qualified' audit opinions.[3] Of the remaining audits, the Auditor-General identified ongoing problems associated with asset management, administration of transfer payments and internal auditing.[4] Inaccurate asset registers and inadequate administration of transfer payments make national departments susceptible to fraud, irregularities and poor performance and pose a material risk to public funds.[5] Viewed in isolation, the Auditor-General's report would be quite alarming indeed. However, when viewed against the background of earlier reports, the most recent general report warrants a cautious optimism. For not only are the numbers better, the high numbers of qualified audits identified in previous reports have had the intended consequence of forcing improved internal departmental compliance with PAA, PFMA and other statutory reporting requirements.

Even provincial departments — whose history of maladministration regularly elicits calls for their elimination — have fared better. While only 14 out of 27 provincial departments of education, health and social development (52%) received unqualified opinions,[6] that 52% reflects a marked improvement over

[1] *General Report 2000* (supra) at 6, 36–45. A better indication of the improvement in local government internal control mechanisms is reflected in the number of timeous audits. In the financial year 1997–1998, only 3% of municipalities delivered the required information at the end of the financial year. See Office of the Auditor-General *General Report on Local Government* (2003) 12. By 2001–2002, that number had increased to 67%. Ibid. The reporting requirements of the Municipal Finance Management Act ('MFMA') provides another rubric through which one might assess local government capacity. Act 56 of 2003. See Office of the Auditor-General R*eport on the Submission of Financial Statements by Municipalities for the Financial Year Ended 30 June 2005* (2005). In the most recent report, the Auditor-General, acting in terms of MFMA s 126, declared that '[o]f the 284 municipalities, only 148 (52 per cent) met the submission date . . . prescribed by the MFMA and a 'further 35 (12 per cent) submitted annual financial statements' within the month thereafter. Ibid at 3. In the preceding year, 2004, only six per cent met the submission date of 31 August 2004, and a mere twenty-nine per cent submitted annual financial statements in the month thereafter. Ibid.

[2] Office of the Auditor-General *General Report for 2003–2004* RP 210/2004 (2005)('*General Report 2005*').

[3] Ibid at 3–11.

[4] See Ted Keenan 'Auditor-General: Fighting Fraud with the Best of Them' *Finance Week* (12 July 2002) 16 (Explains reports of continued high levels of maladministration in terms of the increase in the Auditor-General's powers, staff and capacity.)

[5] *General Report 2005* (supra) at 12–26.

[6] Ibid.

the mere 15% of provincial departments that received unqualified opinions for 1999.[1] The rest of the news from the provinces will not silence critics. The Auditor-General notes that risks associated with the failure to follow basic accounting protocols and the lack of qualified personnel to enforce such protocols pose short-term and long-term risks for the health of the fiscus.[2]

These Auditor-General's reports — and the problems the reports identify — have a critical role to play in the creation of a polity committed to the rule of law and for the restoration of society's faith in a government of, by and for the people.[3] The power of these reports to shame some government officials into taking appropriate action is reflected in several of the cases that have arisen out of normal audits and forensic investigations undertaken by the Auditor-General.[4] It is also echoed in constructive responses to criticism[5] and promises to root out sources of corruption and inefficiency.[6]

[1] To give one a sense of how significant provincial expenditure is — and how critical proper provincial administration is for both service delivery and the public fiscus — the Auditor-General notes that the total expenditure of R119 billion by the provincial departments of Education, Health and Social Development exceeds the total expenditure of R114 billion for all national departments. See *General Report 2005* (supra) at 12–26.

[2] Public entities appeared to fare even worse. Most had failed to comply with the public reporting requirements of Public Finance Management Act and an equal number had failed to meet statutory requirements for tabling reports before Parliament. In addition, four public entities received disclaimers of audit opinions. Ibid at 27–35.

[3] Experts ranked the Auditor-General second, after the Special Investigating Unit, with respect to their perceived success in combating official corruption. See Lala Camerer *Corruption in South Africa: Results of an Expert Panel Survey* Institute for Security Studies Monograph 65 (September 2001) Chapter 6 ('A significant proportion (48%) of the respondents saw the office of the Auditor-General as effective in fighting corruption, with more than a quarter (26%) seeing it as very effective. Slightly more than a tenth (14%) of the respondents regarded the office as not very effective, while a mere 5% saw it as not effective at all. A total of 7% responded that they did not know enough to rank the office.')

[4] See *Mthembi-Mahanyele v Mail & Guardian Ltd & Another* 2004 (6) SA 329 (SCA), 2004 (11) BCLR 1182 (SCA)(Auditor-General's report of irregularities in tender for housing contract and a call for a commission of inquiry into improper benefits bestowed upon friends of the Minister supported Court's finding that published criticism of the appellant was reasonable under the circumstance and thus not defamatory); *Young v Shaikh* 2004 (3) SA 46 (C)(Arms deal report by the Auditor-General, the Public Protector, and the Director of Public Prosecutions led to accusations, in the media, of corruption. Court finds accusations made by the defendant — based in part on the report, but otherwise not fully corroborated — to be defamatory.) See also *Kruger v Johnnic Publishing (Pty) Ltd & Another* 2004 (4) SA 306 (T)(Findings by Auditor-General of mismanagement and irregularities at a school led to allegations of corruption that prompted an ultimately unsuccessful suit for defamation.)

[5] Yearly criticism of the South African Revenue Service ('SARS') by the Auditor-General in annual reports tabled before SCOPA ultimately led SARS to overhaul its internal auditing systems and to procure the technology necessary to manage its assets. The tabling of an unqualified financial audit of SARS before SCOPA was hailed by a SARS commissioner, Pravin Gordan, as a clear indication that SARS is a 'service organization that handles taxpayers' money efficiently.' Linda Loxton 'Gordhan Delighted with SARS Clean Bill of Health' *Business Report* (24 September 2004).

[6] After receiving two consecutive years worth of disclaimers by the Auditor-General in reports to Parliament, and in the face of mounting evidence that the Unemployment Insurance Fund had failed to comply with the PFMA, the Minister of Labour committed himself to the appointment of managers who would ensure future compliance with the PFMA. See Christine Terrblanche 'Minister under Pressure over UIF' *The Mercury* (20 September 2004). Similarly, a forensic audit by the Auditor-General that revealed millions of rands in losses at Transnet due to an irregular scrap metal contract that had by-passed normal procurement procedures was hailed by SCOPA — which had called for the investigation — as evidence that corruption could be effectively rooted out of government. See 'Audit Finds Transnet Lost Millions through Irregular Scrap Metal Deal' *Business Report* (18 July 2003).

The courts have reinforced this power to shame by expressly recognizing that the Auditor-General is the most appropriate arbiter of disputes over the use or misuse of public funds.[1] Whether the directly accountable branches of government — Parliament and the provincial legislatures — will heed the Auditor-General's words or reduce it to the role of Cassandra remains to be seen.[2]

[1] See *Ritchie & Another v Government, Northern Cape, & Others* 2004 (2) SA 584 (NC) at paras 21 –23 (Court held that that the state's decision to fund the private defamation actions of public officials was an internal provincial government matter not susceptible of review by the courts, and that the matter fell within the domain of the Auditor-General for a determination as to whether the expenditure had been authorized.)

[2] The Office of the Auditor-General has, in the recent past, been quite critical of the government's lassitude with respect to the Office's reports of egregious, and often willful, maladministration by national and provincial departments, municipalities and public entities. In its *General Report 2000*, the Office wrote:

> The extent to which audit information effectively contributes toward accountability and transparency not only depends on the quality of the information provided in the various audit reports. It is also critically dependent on the success with which such information is further processed and the response it evokes in the concluding phase of the accountability process. In this respect the role of the public accounts committee is vital. . . . The Standing Committee on Public Accounts (SCOPA) is the mechanism through which the National Assembly exercises oversight over the receipt and expenditure of public money. The extent to which the committee appreciates the issues raised in the respective audit reports and pursues them through effective oversight practices will determine whether appropriate and sufficient pressure will be brought to bear on the various accountable authorities. . . . The committee also did not always succeed in following up unresolved matters. Given the reconsideration of roles and processes, to a large extent brought about by the Public Finance Management Act, it may be prudent to examine the weaknesses of SCOPA's post-review processes in order to ensure that its recommendations have the desired impact on financial management in the public sector at national level. As it will be in the interests of accountability and useful for the committee and the public, and given the lack of resources of the committee, I shall in future report periodically on the status of implementation of the committee's recommendations. This is in line with international practice

Office of the Auditor-General *General Report of the Auditor-General: Year Ended 31 March 2000* (2001) 10. Recent reports in the media suggest that that SCOPA's post-review process is improving as a result of the pressure applied by the Auditor-General. See Linda Loxton 'Gordhan Delighted with SARS Clean Bill of Health' *Business Report* (24 September 2004)(After years of qualified reports, and criticism from SCOPA, SARS received an unqualified financial audit.) However, the ANC's decision to 'break with tradition and permanently take over the chair' of SCOPA — thus departing from Commonwealth practice of having the chair come from the ranks of an opposition party — have led to inevitable questions over whether SCOPA possesses sufficient independence to operate as a meaningful check on executive power. See Christine Terrblanche & Mzwakhe Hlangani 'Opposition Dismay as ANC Takes Over Control of SCOPA' *Cape Times* (10 May 1994); Sam Sole 'The State of Corruption and Accountability' in John Daniel, Roger Southall & Jessica Lutchman (eds) *State of the Nation: South Africa 2004–2005* (2005) 107 ('Party heavies were deployed to lay down the party line in SCOPA, thus destroying the tradition of non-partisanship the committee had built up.') A recent report by the United Nations Report on Drugs and Crime underwrites the Auditor-General's scepticism about the capacity of Parliament to rein in errant members of the executive and officials in the state apparatus. See *United Nations Report on Drugs and Crime Country Corruption Assessment Report: South Africa* (2003)('*UN Corruption Report*'), available at http://www.info.gov.za/reports/2003/corruption.pdf (accessed on 5 November 2005)('Members of Parliament, who are aware of corruption within the ranks, feel they are supposed to act but, all too often, when a corrupt official is exposed, party discipline is imposed.')

(b) Ad hoc investigative powers

Both the Final Constitution and the Public Audit Act grant the Auditor-General the power to launch ad hoc investigations.[1] The Auditor-General is authorized to carry out any appropriate investigation where the public interest or the gravamen of a particular complaint justifies such an intervention.[2] The Arms Deal Report issued by the Auditor-General, the Public Protector and the National Director of Public Prosecutions offers a portrait of the kinds of challenges that the Auditor-General faces when wielding his investigatory powers in the face of stiff political opposition.[3]

The Auditor-General was involved in the 'arms deal' procurement process from the very beginning. It had recognized the procurement of the Strategic Defence Package ('SDP') as an area fraught with risk as early as November 1998. However, nearly two years elapsed before the Department of Defence ('DoD') and the Parliamentary Standing Committee of Public Accounts ('SCOPA') agreed to a special review of the procurement process.[4] The Auditor-General, the Public Protector and the National Director of Public Prosecutions were then given the authority to conduct a joint investigation.[5] The Auditor-General compared the actual procurement process with the approved process, analyzed possible conflicts of interest and interrogated the reported cost and the real cost of the arms deal to the state.

The Auditor-General's role in the arms deal investigation led to litigation between the Auditor-General and CCII Systems (Pty) Ltd ('CCII').[6] After being

[1] PAA s 5.

[2] PAA s 5(1)*(d)*. These investigations are limited to the bodies identified in PAA ss 4(1) and 4(3). See, eg, *Nextcom (Pty) Ltd v Funde No & Others* 2000 (4) SA 491 (T)(Regarding a dispute over the tender process for, and the subsequent award by the government of, a 3rd cell-phone operator license, a report by the Auditor-General to Parliament expressed concern about the SATRA CEO's apparent conflict of interests with respect to the tender process.)

[3] During the period 1995–1996, the Ministry of Defence engaged in a strategic defence review. The review analyzed current stock and existing shortcomings in the equipment of the South African National Defence Force ('SANDF'). The Department of Defence developed, cotemporaneously, four different force design options. The Strategic Defence Package approved by Parliament served as the template for the SANDF's acquisition and procurement process. Charges of corruption and tainted tenders have plagued the 'arms deal' for almost a decade. *Strategic Defence Packages Joint Report* (2001), available at http://www.agsa.co.za (accessed on 15 September 2005)('*SDP Joint Report*').

[4] *Special Review by the Auditor-General of the Selection Process of Strategic Defence Packages for the Acquisition of Armaments at the Department of Defence* RP161/2000 (2000), available at http://www.agsa.co.za/Reports/special/Special/RP161_2000.pdf (accessed on 15 September 2005). It was not until 28 September 1999 that the Minister of Defence gave authorization for the SDP audit. The report was signed and finalized on 15 September 2000.

[5] The Heath Special Investigation Unit (SIU) did not form part of the joint task force. In January 2001, long after the fact, the President made his reasons for this decision public. He stated that, given the findings of the Constitutional Court in *South African Association of Personal Injury Lawyers v Heath & Others*, the SIU could not, as it was then constituted, contribute meaningfully to an independent investigation of the SDP. 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC)(Court held that a judge cannot head a special investigation unit).

[6] *CCII Systems (Pty) Ltd v SA Fakie NNO & Others* (*Open Democracy Advice Centre, as Amicus Curiae)* 2003 (2) SA 325 (T)('*CCII*').

deselected during the tender process, CCII filed a specific complaint with the joint investigative team. Upon release of the Joint Investigative Team's Report ('JIT Report'), CCII brought suit against the Auditor-General.

CCII had, during the investigation, contended that the product of the contractor chosen for the SDP was inferior to that of CCII, that CCII's competitors were given unfair access to the specifications of CCII products and price structure and that the tender process was rife with irregularities and conflicts of interest.[1] The Joint Investigative Team largely agreed with CCII's contentions. It found that: the list of nominated suppliers did not satisfy the requirement of a 'fair and transparent procurement practice';[2] proper tender procedures were not followed; a 'probable' conflict of interest amounted to non-compliance with good procurement practice;[3] and CCII's bid was solicited solely to lower its competitors' bids.[4]

However, rather than recommend that the DoD initiate a new tender process, the joint report advised that systems be put in place to ensure that such irregularities should not recur.[5] The host of documented irregularities throughout the report married to the Joint Investigative Team's refusal to implicate the government in wrongdoing 'severely compromised' the credibility of the each member of the Joint Investigative Team ('JIT').[6]

CCII was, quite naturally, not satisfied with the purely prospective nature of the remedies recommended in the joint report. In anticipation and in furtherance of litigation to overturn the tender award, CCII applied to the Auditor-General, in terms of s 18 of the Promotion of Access to Information Act ('PAIA'),[7] for access to: *(a)* all draft versions of the report; *(b)* all audit files concerning the SDP for the period 1 January 1998 to 20 November 2001; *(c)* all correspondence concerning the SDP between the Auditor-General and the DoD for the period 1 January 1998 to 20 November 2001; *(d)* all the documents concerning the SDP between the Auditor-General and the Public Protector, again from 1 January 1998 to 20 November 2001.[8] The Auditor-General denied the request on grounds ranging from an assertion that the document production process was so onerous that it would divert the Auditor-General from its core business, to an unsubstantiated contention that the disclosure of some documents would violate third party confidentiality agreements, to the rather pedestrian defence that disclosure of some documents would prejudice

[1] See *SDP Joint Report* (supra) at para 11.3.
[2] Ibid at para 11.11.2.3.
[3] Ibid at paras 11.11.3.4–5.
[4] Ibid at paras 11.11.6.2–3.
[5] Ibid at Chapter 14.
[6] Sole (supra) at 86. See also Gavin Woods 'A Critique of the JIT Report' available at http://www.armsdeal-vpo.co.za/special items/reports/accountability_failure.html (accessed on 3 October 2005).
[7] Promotion of Access to Information Act 2 of 2000.
[8] *CCII* (supra) at para 3.

the defence and security of the Republic.[1] The *CCII* Court found baseless the Auditor-General's blanket rebuff to the PAIA request. Hartzenberg J held that, under PAIA s 81, the onus lay on the Auditor-General to identify the specific documents it wished to withhold and to describe the basis upon which it claimed protection.[2] The Auditor-General's 'overwhelming volume' approach to this document request ran counter to the more nuanced assessment of privilege required by PAIA. As a result, Hartzenberg J held that Auditor-General was obliged to produce the relevant documents and offer reasons for the redaction of or refusal to produce any document.[3] The Auditor-General's role as a government watchdog meant that it had to take extraordinary steps to ensure that it was viewed as impartial and independent — even if that meant the Auditor-General was obliged to employ extra staff.[4]

Despite the rather disconcerting conclusions reached by the Auditor-General with respect to an especially damning body of evidence, the Joint Investigative Team Report led, almost inexorably, to the conviction of Shabir Shaik on three counts of corruption and the axing of former Deputy President Jacob Zuma. Other ad hoc investigations conducted by the Auditor-General have produced probes of correctional services officials by the National Prosecuting Authority,[5] the revocation of the Government Printing Works' overdraft facilities at the Reserve Bank because they contravened national treasury regulations,[6] the identification of several thousand senior and junior officials who had failed to declare their interests in firms doing business with their departments,[7] the mooting of possible criminal charges against a former advisor to the Premier of Mmpumalanga[8] and serious and as yet unresolved allegations of fraud within the Department of Justice and Constitutional Affairs.[9] As we

[1] See *CCII* (supra) at para 4. Perhaps most disappointing to supporters of the Auditor-General's efforts is the willingness to fall-back on this standard refrain of government actors when it comes to non-compliance with statutes and regulations designed to facilitate good governance: it is too time-consuming. See *UN Corruption Report* (supra)(UNODC study finds '[s]erious weakenesses and shortcomings in the capacity and the will of public sector bodies to implement and to comply with the laws. For example, certain public bodies view some of the legislation — (eg, Access to Information) — as too demanding of resources.')

[2] *CCII* (supra) at paras 16–17.

[3] Ibid at para 22.

[4] Ibid at para 17. In addition, Hartzenberg J suggested that given the importance of transparency and accountability in our constitutional democracy, 'one of the objects of [PAIA] must be that citizens can get information regarding wrongs perpetrated against them to enable them to hold the wrongdoers accountable in a court of law.' Ibid.

[5] See Office of the Auditor-General *Report on Findings Arising from a special investigation into Alleged Irregularities among senior officials of the Department of Correctional Services* RP 123/1999 (1999); Sheena Adams 'Scorpions Probe Medical Aid Fraud' The Mercury (5 October 2004).

[6] See Frank Nxumalo & Wiseman Khuzwayo 'State Printer Castigated for Unauthorized Overdraft' *Business Report* (23 January 2004).

[7] See Linda Loxton 'Fakie Fingers the Government's Black Sheep of Financial Management' *Business Report* (20 January 2005).

[8] See Office of the Auditor-General *Special Report on Donor Funding and the Remuneration of a Former Adviser in the Office of the Premier of Mpumalanga* PR 123/1999 (1999).

[9] See Office of the Auditor-General *Report on the Special Review of the Deposit Account Administrated by the Department of Justice and Constitutional Development & Related Matters* RP 196/1999 (1999).

noted near the outset, the PAA effectuates such investigations by granting the Auditor-General quite extensive powers of search and seizure.[1]

[1] The Auditor-General may obtain a warrant from a judge or a magistrate to enter and to search the property, premises or vehicle of a person for documents, books or written or electronic records or information or an asset, if the Auditor-General needs this record to properly conduct a specific audit, and the relevant record is hidden or kept on such property, premises or vehicle. See PAA s 15(1)*(a)–(b)*(When the Auditor-General is performing an audit he will 'have unrestricted access to document, book or written or electronic record or information of the auditee or which reflects or may elucidate the business, financial results, financial position or performance of the auditee; or any of the assets of or under the control of the auditee'.) See also PAA s 16(1)*(a)*; *Janse van Rensburg NO v Minister van Handel en Nywerheid* 1999 (2) BCLR 204, 220 (T)(Search and seizure that invades privacy must be endorsed by an independent authority, i.e. in terms of a warrant.) During such a search the Auditor-General may also search any person on the premises. While this grant of power may limit rights to privacy, property and just administrative action, it would appear to satisfy the three primary constitutional requirements for search and seizure provisions: (1) the authorizing provision properly defines the scope of the power; (2) an independent authority issues the warrant; (3) the warrant is based on evidence taken under oath that there are reasonable grounds for conducting the search. See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 20 (No search and seizure will be constitutionally justifiable in the absence of a reasonable suspicion); *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC); *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC); *Park-Ross v Director, Office for Serious Economic Offences* 1995 (2) SA 148 (C), 1995 (2) BCLR 198 (C).

24C South African Human Rights Commission

Jonathan Klaaren

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Establishment and governing principles

181. (1) The following state institutions strengthen constitutional democracy in the Republic: *(a)* The Public Protector; *(b)* The South African Human Rights Commission; *(c)* The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; *(d)* The Commission for Gender Equality; *(e)* The Auditor-General; *(f)* The Electoral Commission.

(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions.

(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.

Functions of South African Human Rights Commission

184. (1) The South African Human Rights Commission must *(a)* promote respect for human rights and a culture of human rights; *(b)* promote the protection, development and attainment of human rights; and *(c)* monitor and assess the observance of human rights in the Republic.

(2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power *(a)* to investigate and to report on the observance of human rights; *(b)* to take steps to secure appropriate redress where human rights have been violated; *(c)* to carry out research; and *(d)* to educate.

(3) Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

(4) The South African Human Rights Commission has the additional powers and functions prescribed by national legislation.[1]

General Provisions

Appointments

193. (1) The Public Protector and the members of any Commission established by this Chapter must be women or men who *(a)* are South African citizens; *(b)* are fit and proper persons to hold the particular office; and *(c)* comply with any other requirements prescribed by national legislation.

(2) The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.

(3) The Auditor-General must be a woman or a man who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in,

[1] Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC') s 184. Section 4 of the Constitution of the Republic of South Africa Second Amendment Act, 1998 changed the reference of the Final Constitution from 'the Human Rights Commission' to 'the South African Human Rights Commission'. Act 65 of 1998. The Interim Constitution set up the first manifestation of the SAHRC. See Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC'), ss 115–118. Under the Interim Constitution, the Commission was called the Human Rights Commission and was set up alongside the Public Protector and the Commission on Gender Equality as well as a provision providing for an Act of Parliament to govern restitution of land rights. The Final Constitution then placed the Commission within the scheme of Chapter Nine.

auditing, state finances and public administration must be given due regard in appointing the Auditor-General.

(4) The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and the members of *(a)* the Human Rights Commission; *(b)* the Commission for Gender Equality; and *(c)* the Electoral Commission.

(5) The National Assembly must recommend persons *(a)* nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and *(b)* approved by the Assembly by a resolution adopted with a supporting vote *(i)* of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or (ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.

(6) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59(1)*(a)*.

Removal from office

194. (1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on: *(a)* the ground of misconduct, incapacity or incompetence; *(b)* a finding to that effect by a committee of the National Assembly; and *(c)* the adoption by the Assembly of a resolution calling for that person's removal from office.

(2) A resolution of the National Assembly concerning the removal from office of *(a)* the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or *(b)* a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.

(3) The President *(a)* may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and *(b)* must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.

24C.1 INTRODUCTION

The South African Human Rights Commission ('SAHRC') is described by many as the first among equals amongst Chapter Nine's State Institutions Supporting Constitutional Democracy.[1] This chapter offers a brief critical history of the

[1] Chapter Nine, entitled 'State Institutions Supporting Constitutional Democracy', refers to seven institutions: the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General, the Electoral Commission, and the Independent Authority to Regulate Broadcasting. For a discussion of each of these institutions, see M Bishop & S Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24A; S Woolman & Y Schutte 'Auditor-General' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B; S Woolman & J Soweto Aullo 'Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24F; C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D; J White 'Independent Communications Authority of South Africa' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24E; G Fick 'Elections' in S Woolman,

institution. It then focuses on those sections in Chapter 9 that establish the SAHRC and enable it to carry out its primary functions: education, mediation, adjudication, litigation, interpretation and monitoring. The chapter then directs its attention to six discrete constitutional issues that affect the operation of the SAHRC and *all* other Chapter 9 Institutions: (1) the doctrine of the separation of powers; (2) independence and accountability; (3) the duty of state organs to assist and to protect; (4) subject matter jurisdiction; (5) the relationship of the constitutional empowerment provisions to institutional establishment legislation; and (6) appointment and removal procedures.

24C.2 THE SAHRC AFTER TEN YEARS

There has been a curious dearth of empirical and critical work on the South African Human Rights Commission.[1] Even high-profile events such as the Davis-Pityana debate, the withdrawal of the SAHRC as amicus in the Treatment Action Campaign litigation, and the racism in the media inquiry have not sparked such research. What research has been conducted tends to focus on the role of the SAHRC in respect of a particular issue, such as socio-economic rights or the rights and recognition of refugees.[2] This relative lack of research and writing on the Commission cannot be due to the subject matter: a comprehensive history of the SAHRC would operate as a prism through which to view the first ten years of South Africa's constitutional democracy. While such an account is far more ambitious than I can offer in these pages, I will outline briefly the SAHRC's political and organisational history before proceeding to discuss the legal framework within which the SAHRC functions and the novel constitutional doctrines to which its very existence gives rise.

(a) Political and organisational history

While the establishment of a human rights commission in South Africa marked a significant break with the apartheid past, there is a global trend towards national human rights institutions. Such institutions are said to have the effect of

T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 29 (Discusses the Independent Electoral Commission.)

Woolman and Schutte take issue with the description of the SAHRC as the first amongst equals. Unlike the SAHRC, the Auditor-General possesses both political autonomy and financial independence. It produces over 1400 audits per annum that describe, where necessary, malfeasance, maladministration and corruption in government. Its constitutionally-mandated financial audits, compliance audits and forensic audits constitute three of the most powerful tools to ensure transparent and accountable government. The audits have, in many instances, led to dismissals from office and criminal trials. See S Woolman & Y Schutte 'Auditor General' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) § 24B.2

[1] But see K Govender 'The South African Human Rights Commission' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 571 (Govender 'SAHRC').

[2] See J Klaaren 'Contested Citizenship in South Africa' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 571 304 (Discussing work of SAHRC in its first five years in respect of refugee protection.)

improving the legality and fairness of public administration as well as providing a mechanism for the domestic implementation of international human rights obligations.[1] The United Nations resolved in 1993 to encourage member states to develop and strengthen such institutions.[2]

A sketch of the current position between the SAHRC (and other Chapter 9 Institutions) and the government with respect to financial and administrative independence is given below.[3] The remainder of this section will outline the Commission's agenda during its first ten years. Two items have occupied prominent slots on the SAHRC's agenda since its establishment: combating racism and promoting economic and social rights. Together with the less heavily emphasized topic of the rights of non-nationals, these areas have been the subject of more than half of the 28 formal reports (including conference reports) that the Commission has issued between 1999 and 2005.[4]

To combat racism, the SAHRC organized a National Conference on Racism in August/September 2000.[5] The conference was preceded by a provincial consultative process and issued the South African Millennium Statement on Racism and Programme of Action.[6] The South African conference preceded the World Conference Against Racism held in August and September 2001 in Durban.[7] While these conferences were not particularly controversial, the Commission's Inquiry into Racism in the Media held in 2000 certainly was.[8] Some print media organizations particularly resisted the potential use of legal process by the Commission to investigate their operations. By the end of the Inquiry, an uneasy truce had been reached between the media and the Commission as to the appropriate limits of the Commission's investigation and reporting powers.

A second important item on the Commission's agenda has been the constitutionally mandated promotion of economic and social rights.[9] The Commission similarly struggled to find a common understanding with non-governmental organization actors ('NGOs') as it had with the media. NGOs wished both to see a

[1] See L Reif 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 *Harvard Human Rights Journal* 1. For a re-examination of a national human rights institution in an African context, see O Okafor & S Agbakwa 'On Legalism, Popular Agency and "Voices of Suffering": The Nigerian Human Rights Commission in Context' (2002) 24 *Human Rights Quarterly* 662.

[2] See M Bishop & S Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24A (Suggesting that the creation of Public Protector, like many ombudsmen, reflects a global trend towards such oversight institutions.) See also Govender 'SAHRC' (supra) at 571.

[3] See § 24C.4*(b)* infra.

[4] All of the SAHRC's publications are available at http://www.sahrc.org.za/sahrc_cms/publish/cat_index_41.shtml (accessed on 8 February 2006).

[5] SAHRC 'National Conference on Racism' available at http://www.sahrc.org.za/national_conference_on_racism.htm (accessed on 8 February 2006).

[6] SAHRC 'Full version: South African Millennium Statement on Racism and Programme of Action' available at http://www.sahrc.org.za/_racism_and_programme_.PDF (accessed on 8 February 2006).

[7] SAHRC 'World Conference Against Racism' available at http://www.sahrc.org.za/world_conference_against_racism.htm (accessed on 8 February 2006).

[8] C Braude 'Faultlines: Inquiry into Racism in the Media' available at http://www.sahrc.org.za/faultlines.pdf (accessed on 8 February 2006).

[9] See § 24.C*(d)*(i) infra.

stronger role taken by the Commission and to have greater participation themselves within the investigation process. While it met with some initial resistance, the Commission has employed innovative strategies to increase NGO participation, has solicited more general participation through public education campaigns that have employed cross-generational strategies and has promoted the use of the right of access to information by communities to fulfill socio-economic rights.

(b) Institutional structures

The establishment legislation for the Commission, enacted in terms of the Interim Constitution, is the Human Rights Commission Act ('HRCA').[1] The Commission describes its structure as follows:

> The SAHRC is made up of two sections: the Commission, which sets out policy, and a Secretariat, which implements policy. The Chairperson is overall head, and the Chief Executive Officer (CEO) is head of the Secretariat, accountable for the finances of the SAHRC and has responsibility for the employment of staff. To facilitate the work of the Commission, the Secretariat is divided into departments: Legal Services; Research and Documentation; Education and Training; Media and Communications; Human Resources; and Finance and Administration. The SAHRC has also established provincial offices to ensure its services are widely accessible.[2]

The Commission has had a steady growth in capacity and staff over the ten year period.[3] That said, HRCA s 16's provision for a chief executive officer has led, as both reported in the media and the courts, to conflicts between the CEO and the Commissioner who acts as the SAHRC Chairperson.[4]

In terms of the Interim Constitution, the first round of Human Rights Commissioners were interviewed in 1994 by Parliament and recommended by a 75% special majority. These seven full-time and four part-time commissioners were appointed in 1995 and the Commission was inaugurated on 2 October 1995.[5] The Commissioners elected Commissioner Dr Barney Pityana to serve as the Chairperson of the Commission. After several initial Commissioners had resigned and had been replaced, a second round of recommendations and appointments was conducted in terms of the 1996 Constitution. In 2002, Jody Kollapen was elected as the second SAHRC Chairperson.

[1] Act 54 of 1994. The HRCA has been amended once, in respect to the hiring of staff. See Public Services Laws Amendments Act 47 of 1997.

[2] SAHRC 'About the SAHRC: Structure' available at http://www.sahrc.org.za (accessed on 5 January 2006).

[3] Section 5 of the HRCA provides for committees of at least one Commissioner sitting together with other persons. Several of these s 5 committees have been established in order to pursue specific subject matters as well as liaison.

[4] See *Esack NO & Another v Commission for Gender Equality* 2000 (7) BCLR 737 (W)(Noting tension between CEOs and Commissioners in other Chapter Nine Institutions.)

[5] Govender 'SAHRC' (supra) at 592. ('Commissioners were drawn from different political backgrounds and race and gender representivity was clearly taken into account when appointments were made.')

24C.3 THE POWERS AND FUNCTIONS OF THE SAHRC

(a) Overview

The powers and functions of the SAHRC flow primarily from the Final Constitution and from the Commission's establishment legislation. Other pieces of human rights legislation (such as the Equality Act and the Promotion of Access to Information Act) confer additional powers and duties upon the SAHRC.

FC s 184(1) gives the SAHRC a general mandate to promote, to monitor and to assess the observance of human rights in South Africa. In particular, FC s 184(1)*(a)* requires the Commission to 'promote respect for human rights and a culture of human rights'; FC s 184(1)*(b)* requires the Commission to 'promote the protection, development and attainment of human rights'; and FC s 184(1)*(c)* obliges the Commission to 'monitor and assess the observance of human rights in the Republic.' FC s 184(2), which is clearly meant to be read in conjunction with FC s 184(1), provides:

> The Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power — *(a)* to investigate and to report on the observance of human rights; *(b)* to take steps to secure appropriate redress where human rights have been violated; *(c)* to carry out research; and *(d)* to educate.

Finally, FC s 184(4) creates the requisite space for the Commission to acquire additional powers and functions 'prescribed by national legislation.'[1] The subsections of FC s 184 appear to be best read as a whole, granting functions and powers to the Commission already established by FC s 181.[2] The sub-sections below explore the powers of the Commission.

(b) Promotion: public education and information

A significant portion of the Commission's activities thus far has taken the form of public education. In the year ending in March 2002, the Commission conducted 214 workshops and training programmes that reached 8484 people and offered 75 seminars and presentations that reached 11 499 people.[3]

Sectoral specific legislation, such as the Promotion of Access to Information Act ('PAIA'), imposes additional duties on the SAHRC with respect to the promotion of specific human rights. PAIA requires that the SAHRC adopt a promotional role with respect to access to information legislation.[4]

[1] FC s 184(3)(Discussed at § 24C.3 infra).

[2] See § 24C.4*(d)* infra (Discussion of the relationship between these constitutional provisions and the interpretation of the establishment legislation.)

[3] See South African Human Rights Commission *Sixth Annual Report* (2001/2002) 5. Among other topics, the Commission conducts public education on constitutional rights generally, on socio-economic rights and on the right of access to information.

[4] See J Klaaren & G Penfold 'Access to Information' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2002) Chapter 62.

(c) Protection: mediation, adjudication, litigation and interpretation

The SAHRC can protect human rights through a variety of dispute resolution mechanisms.

(i) *Mediation*

Section 8 of the HRCA gives the Commission the power to endeavour to resolve by mediation, conciliation or negotiation any dispute or to rectify any act or omission in relation to a fundamental right. An important part of these powers lies with the Commission's power to make recommendations and findings. Any recommendation or finding made by the Commission as a result of such a process is not directly binding on a public or private body. However, public bodies are under a constitutional duty to assist the Commission to ensure its effectiveness and, in the Commission's experience, its recommendations made in terms of s 8 — even those calling for specific action in specific circumstances — are usually acted on by public bodies.

Section 20(5) of the Promotion of Equality and Prevention of Unfair Discrimination Act ('PEPUDA') empowers an equality court to refer disputes to an alternative forum.[1] In many instances, this forum is the SAHRC. Even before the enactment of PEPUDA, the SAHRC had numerous successes in its mediation efforts.[2] It is likely that the SAHRC's mediation docket will increase, given the flow of mediation referrals from the Equality Courts.

(ii) *Adjudication/Litigation/Interpretation*

To date, the Commission has exercised its power of adjudication in a very limited range of instances.[3] While a decision made in resolving these complaints is not understood to be binding on the parties to the dispute, some state organs have treated the Commission's decisions as binding. The Commission has held adjudication hearings in the context of obtaining information from other state organs

[1] Act 4 of 2000.

[2] For one account of a successful mediation by the SAHRC with respect to tolerance for gay rights in public schools, see K Govender 'Assessing the Constitutional Protection of Human Rights in South Africa during the First Decade of Democracy' in S Buhlungu, J Daniel & R Southall (eds) *State of the Nation: South Africa 2005–2006* (2006)(Govender 'First Decade of Democracy') 93, 107. In 1999, the SAHRC intervened successfully on behalf of a nursing sister who had been detained and treated at Sterkfontein Hospital by her colleagues. The nursing sister was released and allowed to write a scheduled examination '(which she passed!).' SAHRC *Fourth Annual Report* (1999) available at www.sahrc.org.za (accessed on 3 February 2006). In one effort in KwaZulu-Natal, residents living in small flats in the poorest area of Chatsworth faced eviction from their homes for not paying rent: 'Most of them [had] been moved from the Magazine Barracks in terms of the previous Groups Areas Act, and [had] paid rent to the council for more than twenty years. The SAHRC met with the various groups and with their legal representatives to decide on strategy for the defence, reducing issues and preventing unnecessary costs working with the Legal Resources Centre (LRC).' See 'KwaZulu-Natal Evictions' (2000) 2(2) *Kopanong* available at www.sahrc.org.za/kopanong_vol_2_no_2.htm (accessed on 3 February 2006). For further accounts of such mediation, see the SAHRC website at http://www.sahrc.org.za.

[3] See Govender 'SAHRC' (supra) at 589 (Noting the example of the SAHRC's finding of discrimination against foreign doctors, which was rejected initially in the High Court, but subsequently vindicated by the Supreme Court of Appeal.)

via subpoena regarding the fulfilment of socio-economic rights. Most often, these SAHRC hearings have concluded with decisions made against state organs that failed to provide timely or adequate information.[1] Here, the Commission has not only initially issued the subpoena but has also decided upon the adequacy of the state organ's compliance with the duty to provide information in terms of FC s 184(3).[2] The Commission has also held adjudication hearings and published judgments in appeals from complaints made to the Commission. For instance, a three member panel chaired by a Commissioner of the Commission upheld an appeal of a hate speech complaint regarding the slogan 'kill the farmer, kill the boer' which the Commission had previously determined was not hate speech.[3]

In terms of its establishment Act, the SAHRC has express litigation powers.[4] In this respect, the SAHRC differs, at least at the level of establishment legislation, from other Chapter 9 Institutions. The only other institution that has engaged in rights protection through litigation is the CGE. Although the CGE has asserted and exercised a power to intervene in the judicial process as an amicus, it has not as yet initiated a case in its own name.[5] By contrast, the SAHRC has initiated litigation[6] — although it does so infrequently.[7] The Constitutional Court has stated that, in its litigation capacity, the SAHRC enjoys no privileged status which would allow it to be exempted from the Court's rules of procedure.[8] But note that such lack of privileged status does not deny the Commission potential influence in the exercise of the Court's discretion within the rules

[1] See J Klaaren 'A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socio-Economic Rights' (2005) 27 *Human Rights Quarterly* 539 (Klaaren 'A Second Look').

[2] See § 24C.3 infra, for discussion of monitoring the implementation of socioeconomic rights.

[3] *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC).

[4] See HRCA s 7*(e)*.

[5] See S Woolman & J Soweto Aullo 'Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24F, 24–14 — 24–15.

[6] Govender 'SAHRC' (supra) at 589. The Commission has been an amicus or party in numerous cases. See, eg, *Bekker & Another v Jika* 2002 (4) SA 508 (E), [2002] 1 All SA 156 (E); *S v Twala (South African Human Rights Commission Intervening)* 2000 (1) SA 879 (CC), 2000 (1) BCLR 106 (CC), 1999 (2) SACR 622 (CC); *National Coalition for Gay & Lesbian Equality & Another v Minister of Justice* 1999 (1) SA 6 (CC),1998 (12) BCLR 1517 (CC); *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1998 (6) BCLR 726 (W), [1998] 3 All SA 26 (W); *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC); *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; South African Human Rights Commission & Another v President of the Republic of South Africa* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC); *Government of the Republic of South Africa v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)('*Grootboom*'). Other cases are not reported. The Commission has acted against a vacation resort that evicted a family accompanied by two black children. See 'Settlement of the Equality Court case against the Broederstroom Holiday Resort' available at http://www.sahrc.org.za/media (accessed on 3 Februrary 2006). In the magistrate's court, it has won a case on behalf of a learner who was allegedly assaulted and subject to racist remarks. See 'Landmark Victory: Edgemead Race Case' available at http://www.sahrc.org.za/media (accessed on 3 February 2006).

[7] See § 24C.3 infra.

[8] See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC).

of procedure. Lower courts have at times acknowledged the SAHRC's support of litigation in the context of deciding standing and other procedural issues.[1]

One aspect of the SAHRC's role in protecting human rights that may grow more significant is the Commission's power of constitutional interpretation.[2] This interpretive power of the Commission, as a Chapter Nine Institution, is one that the Constitutional Court has acknowledged and encouraged. A five-judge minority of the Court deciding *S v Jordan* stated:

> In determining whether the discrimination is unfair, we pay particular regard to the affidavits and argument of the Gender Commission. It is their constitutional mandate to protect, develop, promote respect for and attain gender equality. This Court is of course not bound by the Commission's views but it should acknowledge its special constitutional role and its expertise. In the circumstances, its evidence and argument that [the legal provision at issue] is unfairly discriminatory on grounds of gender reinforces our conclusion.[3]

There would seem no reason in principle why this privileged interpretive role should not be extended to the SAHRC and other Chapter 9 Institutions.

(d) Respect and fulfill: Monitoring

(i) *Monitoring: Socio-economic rights*

While the content of the function may not be (as yet) precise, the Final Constitution does clearly envisage a separate and special role for the SAHRC with respect to socio-economic rights. FC s 184(3) provides:

> Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

FC s 184(3) is the only place in the Final Constitution where a specific list of socio-economic rights is provided.

The nature of this role has been the topic of debate, both academic and, more importantly, between the Commission and non-governmental organisations. The academic debate has focused primarily on whether the appropriate model for the role of the SAHRC in terms of FC s 183(4) should be an international or a national model.[4]

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[1] See *Nqxuza & Others v Secretary, Department of Welfare, Eastern Cape Provincial Government &Another* 2000 (12) BCLR 1322 (E).

[2] See L Du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 3; C Botha 'Interpretation of the Bill of Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 32.

[3] 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) at para 70.

[4] See Klaaren 'A Second Look' (supra)(In national jurisdictions with established justiciability of socioeconomic rights, effective promotional strategies for a human rights commission should eschew international models and pursue greater participation, transparency, and access to information); C Heyns 'Taking Socio-economic Rights Seriously: The 'Domestic Reporting Procedure' and the Role of the South African Human Rights Commission in Terms of the New Constitution' (1999) 32 *De Jure* 195 (Advocating adoption of the international reporting procedures at the national domestic level.) See also S Liebenberg 'Violations of Socio-Economic Rights: The Role of the South African Human Rights Commission' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 405.

While an uneasy compromise has been reached, non-governmental organisations continue to demand greater participation within and access to the intra-governmental reporting process upon which the SAHRC has embarked.[1] All the while, contestation of this role has continued within government, as the SAHRC has attempted to expand its role with respect to socio-economic rights in the face of government inattention.

(ii) *Monitoring: Remedial orders of courts*

In *Grootboom*, the Constitutional Court endorsed a significant monitoring role for the SAHRC. In its remedy, which took the form of a declaratory order because the applicants had accepted an offer of alternative accommodation, the Court requested that the SAHRC adopt a supervisory role to ensure the government compliance with the Court's order.[2] Such a monitoring role — complementary to the reactive information-gathering function of a court — may become increasingly important in the operation of the Commission. Given the categories of government incompetence, inattentiveness and intransigence identified by Roach and Budlender in their study of government responses to judicial remedies, an enhanced supervisory role for the SAHRC may be necessary to ensure effective rights enforcement.[3]

(iii) *Monitoring: Investigations and hearings*

The investigations undertaken by the Commission reflect proactive enforcement of human rights. The Commission has produced, at the end of its investigations, reports on a wide range of topics: from the effect of road closures on the right to movement[4] to the conflict between the right to equality and the freedom to associate.[5] These investigations, and the subsequent reports, have occasionally provoked intense controversy. The Investigation of Racism in the Media led to the issuance of subpoenas by the SAHRC and equally unusual litigation-like responses from members of the media.[6] The Commission's early reports on the lack of respect for the rights of non-nationals in post-apartheid South Africa and on the conditions of detention at an official repatriation facility, Lindela, were greeted with harsh words by government and department officials (especially the Department of Home Affairs).

[1] See D Newman 'Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda (2003) 19 *SAJHR* 189.

[2] *Grootboom* (supra) at para 97.

[3] K Roach & G Budlender 'Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?' (2005) 122 *South African Law Journal* 325 (Delineating reasons for government violations in terms of government incompetence, inattentiveness, and intransigence.)

[4] SAHRC 'Report on the Public Hearings into the Use of Boom Gates and Road Closures' available at http://www.sahrc.org.za/sahrc_cms/publish/ article_132.shtml (accessed on 8 February 2006).

[5] SAHRC 'Report on the Public Hearings into Equality and Voluntary Associations' (forthcoming) soon to be available at http://www.sahrc.org.za/sahrc_cms/publish (Manuscript on file with authors.)

[6] K Govender 'The South African Human Rights Commission' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 571, 584–86 (Govender 'SAHRC')(Discussing the Investigation into Racism in the Media.)

24C.4 SAHRC AND CHAPTER NINE CONSTITUTIONAL DOCTRINE

Several constitutional issues of great import are common to the SAHRC and to other Chapter 9 Institutions. This section explores six of these doctrines.[1]

(a) Separation of powers

The first issue concerns the relationship of the SAHRC and the Chapter 9 Institutions to the doctrine of the separation of powers.[2] While a separate chapter treats that doctrine, four points specifically relating to Chapter Nine are worth making here.

A first point relates to the status of the institutions established by Chapter Nine. The six institutions listed and established in terms of FC s 181(1)[3] are not mere creatures of statute. As creatures of the Final Constitution, the SAHRC and the other Chapter 9 Institutions enjoy a status and an authority that can potentially override unconstitutional legislative provisions. (The lone institution referred to in Chapter Nine that is not constitutionally established is the independent authority to regulate broadcasting ('ICASA').)

A second more theoretical point concerns the extent to which the Chapter 9 Institutions are a central part of a uniquely South African scheme of constitutional structuring and separation of powers. The argument made here is that the constitutional establishment of a complex of independent institutions apart from the judiciary in order to promote and protect human rights is a fundamental feature — a basic structure — of South African constitutional democracy.[4] If

[1] Treatment of many of these doctrines, as they relate specifically to the six other Chapter 9 Institutions, can be found in Chapters 24A through 24F. See, eg, M Bishop & S Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24A; S Woolman & Y Schutte 'Auditor General' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B; S Woolman & J Soweto Aullo 'Commission for the Promotion and the Protection of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24F; C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D; J White 'Independent Communications Authority of South Africa' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24E; G Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 29 (Discusses the Independent Electoral Commission.)

[2] See S Sibanda & A Stein 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 12.

[3] That section together with FC ss 193 and 194 also covers the Chapter 9 Institutions generally. Although it does not establish ICASA, Chapter Nine does govern the Independent Authority to Regulate Broadcasting once Parliament has acted to establish such an institution. See J White 'Independent Communications Authority of South Africa' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24 E (Noting that the independent authority to regulate broadcasting is not listed in section FC s 181(1)).

[4] While it is not necessary, the constitutional argument made in this paragraph may be bolstered through reference to public international law. In a reading informed by international human rights obligations, Chapter Nine can be seen as part of the national machinery referred to in the Paris Principles as well as in the Beijing Declaration. See K Govender 'SAHRC' (supra) at 571; C Albertyn 'Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D.

correct, this basic structure argument has at least one immediate implication. While constitutional amendments to Chapter Nine may (and arguably at times should) change the internal arrangements of these institutions, any amendment that detracted from the capacity of this set of independent human rights institutions to discharge its responsibilities would need, at the very least, to acknowledge its intention to alter the constitutional structuring and separation of powers doctrine of the Final Constitution.[1] And any constitutional amendment that did away with this complex of independent institutions entirely would eliminate this basic structure. The Constitutional Court itself has noted that amendments to the Final Constitution that alter the basic structure of our constitutional democracy could have their constitutionality challenged on substantive and not merely procedural grounds.[2]

Third, a separation of powers doctrine that claims to arise organically out of the text of the Final Constitution must recognize the complementarity of the SAHRC and the Constitutional Court. Both the SAHRC and the Constitutional Court are designed to protect and to promote respect for human rights. The outlines of this complementarity are only beginning to be defined.[3] According to Karthy Govender:

> [I]nternational standards require that the [national human rights] institutions do more than simply function as a surrogate court of law. Their role is to actively protect and promote human rights and not to exist simply as an investigative mechanism which reacts to human rights violations. The institutions must work systematically and holistically towards the attainment of internationally recognized human rights.[4]

Some of the post-Certification judgments of the Constitutional Court have acknowledged the distinctive role that the SAHRC and other Chapter 9 Institutions will play in creating a new constitutional culture in the Republic. In *New National Party*, Justice Langa wrote:

> The establishment of the Commission and the other institutions under Chapter 9 of the Constitution are a new development on the South African scene. They are a product of the new constitutionalism and their advent inevitably has important implications for other organs of State who must understand and recognise their respective roles in the new constitutional arrangement. The Constitution places a constitutional obligation on the those

[1] I use the term 'constitutional structuring and separation of powers doctrine' here to acknowledge narrow readings of the separation of powers doctrine that limit that doctrine to three branches of government. Although the separation of powers doctrine is not identified as a founding value in FC s 1, the case can be, and has been, made that the doctrine is a basic structure of the Final Constitution. See C Roederer 'Founding Provisions' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 13.

[2] *President of the Republic of South Africa v United Democratic Movement* 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC).

[3] See M Pieterse 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 *SAJHR* 383; J Klaaren 'Structures of Government and the 1996 Constitution: Putting Democracy Back into Human Rights' (1997) 13 *SAJHR* 3.

[4] Govender 'SAHRC' (supra) at 572.

organs of State to assist and protect the Commission in order to ensure its independence, impartiality, dignity and effectiveness.[1]

Finally, a specific strand of the reasoning that should be taken into account in theorizing the position of the SAHRC and other Chapter 9 Institutions vis-à-vis a new separation of powers doctrine is the one that emerges from the Court's decision in *Independent Electoral Commission v Langeberg Muncipality*.[2] The *Langeberg Muncipality* Court reasoned that the IEC was an organ of state, but not one within the national sphere of government.[3] The Court noted that Chapter Nine makes a distinction between the state and the government and that FC s 181 emphasizes the independence of Chapter 9 Institutions.[4] This distinction between the state and the government and the related independence of the Chapter 9 Institutions must be clearly enunciated in any South African doctrine of the separation of powers. In addition to incorporating this Chapter Nine independence, such a doctrine needs to uphold both democracy and human rights, to adopt a historically and culturally contextual approach, and to adopt a critical view of structures of power. The content of this independence for the SAHRC and other institutions is explored further below.

(b) Independence and accountability

A critical constitutional issue concerns the meaning of the independence clearly and fundamentally granted to the institutions referred to in Chapter Nine.[5] The broad outlines of Chapter Nine institutional independence have been sketched by the Constitutional Court in *First Certification Judgment*[6] and two separate cases involving the Electoral Commission.[7]

[1] *New National Party of South Africa v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)('*New National Party*') at para 78.

[2] 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC)('*Langeberg Municipality*').

[3] See S Woolman, T Roux, & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 14.

[4] FC s 181(2).

[5] FC s 181(2) decrees that the Chapter Nine institutions established by FC s 181(1) 'are independent'. FC s 181(3) provides that 'other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity, and effectiveness of these institutions.' FC s 181(4) places a duty of non-interference on persons and other organs of state.

[6] See J White 'Independent Communications Authority of South Africa' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24 E (Noting Constitutional Court discussion of independence and impartiality of Auditor-General, Public Protector, and Public Service Commission).

[7] See *New National Party* (supra) at paras 98–100 (Discussion of nature of the independence of the IEC); *Langeberg Municipality* (supra) at para 27 (IEC is independent and not within national sphere of government). For more on the distinction between 'organs of state; and 'spheres of government' see S Woolman, T Roux, & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 14. See also G Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 29 (Discussion of the independence of the Electoral Commission.) Bishop and Woolman state that the test for financial independence of the Chapter 9 Institutions after *New National Party* Court runs as follows:

Before turning to the Court's pronouncements on the subject, two points are worth making. First, despite (or more likely because of) the complementarity of Chapters Eight (treating the judiciary) and Nine, Chapter Nine 'independence' is qualitatively different from judicial independence. Martin Shapiro's work on the institution of courts in society provides a window on to the independence of the Chapter 9 Institutions that demonstrates that the institutional legitimacy of Chapter 9 Institutions is based not on consent but on the provision of a mediate solution. In this view, the Chapter 9 Institutions do not have the same category of legitimacy problems (in particular, the problems of the perception of bias and the actual introduction of a third interest) as do the courts.[1] Second and relatedly, Chapter 9 Institution independence is grounded in a distinction between the state and the government. As *New National Party* and *Langeberg Municipality* made clear, the Chapter 9 Institutions are not part of the government. As a result, they are not bound to follow the cooperative government principles of Chapter Three and, more importantly, may not be managed by any sphere of government.[2] The non-participation of the Chapter 9 Institutions in government further underwrites their independence.

The Court has identified two important but distinct attributes of Chapter Nine independence as financial independence and administrative independence.[3]

In *New National Party v Government of the Republic of South Africa & Others,* the Constitutional Court identified two essential desiderata for independence. Firstly, the Chapter 9 Institution must have sufficient funding to fulfil its constitutional mandate. Secondly, the funds must come from Parliament and not from the executive. Although the *New National Party* Court views the source of the funds as a requirement for financial independence, the source of funds would seem, at first blush, to only become relevant if the funds provided are insufficient. If the funds are sufficient for the discharge of the Chapter 9 Institution's duties, then any issue regarding the source of the funds could, as a logical matter, never arise.

However, the *New National Party* Court, without saying as much, would appear to have concerns that go beyond those of mere fiscal viability. The *New National Party* Court seems somewhat vexed by the ability of Chapter 9 Institutions to discharge their oversight responsibilities with respect to the executive if the executive retains the discretion to decrease (or increase) funding in future. When questions of sufficiency of funds do arise, whether the executive is, in fact, the source of those funds will enter into the Court's assessment of the independence of the institution. Thus, it is for reasons of political autonomy that the *New National Party* Court signals its preference for Chapter 9 Institutions such as the Public Protector to be funded directly by Parliament.

See M Bishop & S Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, January 2006) Chapter 24A, 24A-5. Justine White identifies similar criteria for any judicial assessment of Chapter 9 Institution independence. See J White 'Independent Communications Authority of South Africa' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24 E, 24E-5:

(1) an independent body is one that is outside government; (2) an independent body is one whose members' tenures are governed by appropriate appointment and removal provisions which ensure that members are appropriately qualified, do not serve at the pleasure of the Executive and can be removed only on objective grounds relating to job performance; (3) an independent body is one that is sufficiently well funded by Parliament to enable it to perform its functions; and (4) an independent body is one that has control over its own functions.

[1] See M Shapiro *Courts: A Comparative and Political Analysis* (1981). The legitimacy of the Chapter 9 Institutions comes from searching for a mediate solution, not resolving a dispute in an unbiased forum.

[2] See S Woolman, T Roux, & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 14, 14–12.

[3] To some extent, the issue of administrative independence overlaps with the duty of state organs to assist and protect the institutions of Chapter Nine, addressed in the next sub-section.

Despite the Constitutional Court's treatment of the issue, the precise content of both these guarantees has remained contested. The Constitutional Court's judgment in *New National Party* began a process of redefining the relationships between Parliament, government, and the Chapter 9 Institutions.[4] The subsequent political process was supposed to address such problems as under-funding and disparate funding among the Chapter 9 Institutions.[5] Despite the complexity of the institutional issues undoubtedly raised by this process, it is cause for comment that the financial and administrative independence called for by the Constitutional Court for the institutions of Chapter Nine has not, over five years later, been achieved.

(c) The duty of state organs to assist and protect

According to FC s 181(3) other organs of state must 'assist and protect' the Chapter 9 Institutions 'through legislative and other measures.' This duty echoes the duties of cooperative government imposed on organs of state in FC Chapter Three and the duties imposed on organs of state to 'assist and protect the courts' found in FC s 165(4).

Although rendered in rather emphatic terms, this duty appears to be honoured in the breach. SAHRC Commissioner Karthy Govender has argued that this duty must be taken more seriously if the SAHRC and the other Chapter 9 Institutions are to discharge effectively their constitutional mandates:

> The challenge facing [the Chapter Nine] institutions is to convince those exercising power that they are not simply to be tolerated but should be pro-actively assisted. There will be a necessary tension between them and organs of state, as there sometimes is between courts of law and the government. What is required is an understanding that the exercise of power in South Africa is subject to constraints and that these institutions together with the courts have been given a legitimate overseeing role by the drafters. There is an unquestionable acknowledgement that the judgments of the Court must be respected and applied. The Constitution seeks to enhance the reputation and stature of the institutions so that its findings and opinions are afforded the necessary respect.[6]

The Constitutional Court has had occasion to enforce this duty. In *New National Party*, the Court held that if the Electoral Commission needed the government to provide staff to participate in the voter registration process, the government had a duty to do so.[7] In the view of the *New National Party* Court, the government had failed to fulfil the duty to assist the Electoral Commission.

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[1] Govender 'SAHRC' (supra) at 581.

[2] See S Woolman & J Soweto Aullo 'Commission for the Protection and the Promotion of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24F, 24F-8–9 (Quoting SAHRC Chairperson Pityana on five years of discouragement in terms of under-funding). With respect to the institutions directly established by Chapter Nine, the pressing issue has been that of financial independence. Ibid. With respect to the independent authority to regulate broadcasting, the apparently more pressing issue has been that of administrative independence. See J White 'Independent Communications Authority of South Africa' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24E.

[3] Govender 'SAHRC' (supra) at 581.

[4] See G Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 29, 29–29.

(d) The relationship of the constitutional empowerment provisions to establishment legislation

The issue of how to understand the relationship between constitutional establishment provisions and the legislative establishment provisions has two faces: (1) to what extent are legislative enactments subject to constitutional strictures; (2) to what extent are the Chapter 9 Institutions creatures of statute and not creatures of the Final Constitution. Surprisingly enough, in South Africa's brief constitutional history, more attention has been paid to the latter issue. While the Independent Communications Authority of South Africa ('ICASA') benefits from the placement of its empowering provision (FC s 192) within the scheme of Chapter Nine, it lacks the express protection of the general provisions — FC ss 193 and 194. I would, however, argue that once Parliament has acted to establish ICASA, using at least in part the authority of FC s 192, that body then enjoys the benefits of the general provisions of Chapter Nine.

The situation of the SAHRC is the obverse of ICASA. FC s 184 sets out, in some detail (especially when read with FC ss 181, 193 and 194), the functions of the SAHRC, while the establishment legislation first passed by Parliament under the Interim Constitution, the Human Rights Commission Act, constitutes an elaboration of the constitutional establishment provisions.

There are some notable differences among the empowering provisions of the various institutions.[1] In FC s 190(1)*(a)* and *(b)*, the Electoral Commission 'must manage elections … in accordance with national legislation' and 'must … ensure that those elections are free and fair'.[2] The Auditor-General must audit and report on the accounts of 'all' departments and 'all' municipalities but the coverage of other institutions is to be 'required by national or provincial legislation' in terms of FC s 188(1). The SAHRC and the Commission for Gender Equality have 'the power[s], as regulated by national legislation, necessary to perform [their] functions'.[3] The Commission for the Promotion of and the Protection of the Rights of Cultural, Religious and Linguistic Communities has diminished powers, enjoying only 'the power, as regulated by national legislation, necessary to achieve its primary objects'.[4] The provisions relating to the Public Protector do not have an initial objects or duties clause and state simply that the Protector 'has the power, as regulated by national legislation' to engage in three specifically listed functions.

[1] The one similarity is in the provisions making clear that each institution 'has the additional powers and functions prescribed by national legislation.' See FC ss 182(2), 184(4), 185(4), 187(3), 188(4), and 190(2). This section and national legislation granting such powers and functions should arguably be read in conjunction with FC s 181(3). Thus, where provincial legislation relating to the institutions of Chapter Nine could be interpreted not to conflict with national legislation, such legislation would comply with these sections. Furthermore, the purpose of these provisions may reflect the pre-Final Constitution enactment of establishment legislation.

[2] There is no reference to national legislation in FC s 190(1)*(b)*, while there is in *(a)* and *(c)*.

[3] See FC ss 184(2) 187(2). The plural is used in FC s 184(2)(SAHRC) and the singular in FC s 187(2)(CGE).

[4] FC s 185(2).

One could, on the basis of these differences, rank the constitutional strength of the Chapter 9 Institutions.[1] Constitutional review would be of varying degrees of intensity for different commissions depending upon their place in the hierarchy. While our jurisprudence could, logically, veer in such a direction, the purposive approach to interpretation adopted by our courts tends to eschew such formal distinctions.

In any case, constitutional challenges to the establishment legislation are not likely to engage questions as to whether the legislation is within the bounds of the 'empowering' constitutional provision. They are more likely to determine whether the legislation is under-inclusive (does not go far enough) with respect to the constitutional provisions.[2] While it is thus broadly correct to regard the establishment legislation as implementing the constitutional provisions with respect to each of the institutions of Chapter Nine, the powers and the functions of the SAHRC and the other institutions are not necessarily congruent with those of their establishment legislation. In some cases, that legislation may fail to recognize the full extent of the institution's constitutional authority. In other cases, that legislation may unduly limit it. In any case, the Chapter Nine constitutional provisions — specific and general — will be of clear assistance in purposively interpreting the details of the establishment legislation.

(e) Subject matter jurisdiction

In terms of the constitutional text, subject matter jurisdiction may, and in some cases, does overlap between various Chapter 9 Institutions. The subject matter of the Public Protector,[3] the CRLC and the CGE overlap with that of the SAHRC.[4] While the SAHRC is clearly the best candidate for having the broadest subject matter, the other institutions enjoy expansive constitutional mandates. This characteristic of overlapping subject matters might support a rather holistic reading of

[1] By establishment legislation, one means the legislation referred to in these sections apart from the legislation prescribing additional functions and powers.

[2] In this sense, such establishment legislation occupies an analogous constitutional position to the national legislation referred to in FC ss 32 and 33 and which gives effect to the rights of access to information and just administrative action. Arguably, Parliament's interpretive competence in institutional design should be taken into account in assessing the constitutionality of such legislation. See, generally, I Currie & J Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) 29–32. Nonetheless, the significant difference is that several sections of constitutional text — indeed the whole of Chapter Nine — explicitly delineate the structures of the human rights institution that are intended to promote and protect human rights.

[3] Both institutions are involved in implementing the Promotion of Access to Information Act, albeit in different roles.

[4] On overlap of subject matter of CGE with SAHRC, see C Albertyn 'Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D, 24D-1. On overlap of subject matter of CRLC with SAHRC, see S Woolman & J Soweto Aullo 'Commission for the Protection and the Promotion of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24 F, 24F-8.

any jurisdictional disputes. Such disputes, however, are likely to be limited since the Chapter 9 Institutions have already put into place referral and other coordination systems so that they may more effectively pursue their individual and collective mandates.[1]

(f) The appointment and removal of persons

The constitutional provisions governing the appointment and removal of members of the SAHRC and the other Commissions as well as the Public Protector and the Auditor-General are contained in the two general provisions of Chapter Nine. The basic template is appointment by the President upon recommendation of the National Assembly. The recommendation follows nomination by a committee proportionally composed of members of all parties represented in the Assembly.

The appointment processes of the various Chapter 9 Institutions do differ. The Final Constitution requires specialized knowledge for the Auditor-General and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. Special majorities (60%) are provided for the appointments of the Auditor-General and the Public Protector, but not for members of the various Commissions. Further distinctions are introduced by the establishment legislation for the various institutions. For example, recommendations for appointment to the Electoral Commission are made by a committee comprised of representatives of three other Chapter 9 Institutions and chaired by the Chief Justice.[2]

With respect to the removal provisions, two potentially significant changes were made in the Final Constitution. The Constitutional Assembly chose to adopt wording apparently reducing the discretion of the President, in acting upon the recommendations of the National Assembly, in making the appointment to the Commissions and wording allowing for the Parliamentary recommendations for appointment to be effected by a simple rather than a special majority.[3] These changes have led some commentators to allege that the selection process has been unduly politicised.[4]

Chapter 9 Institution office bearers may only be removed on the grounds of

[1] See S Woolman & J Soweto Aullo 'Commission for the Protection and the Promotion of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24F, 24F-18.

[2] See G Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 29, 29–27.

[3] Govender 'SAHRC' (supra) at 573.

[4] J Sarkin 'Reviewing and Reformulating Appointment Processes to Constitutional (Chapter Nine) Structures' (1999) 15 *SAJHR* 587 (Criticizing selection process as politicized). The selection process may of course be a political exercise in a number of different senses.

misconduct, incapacity, or incompetence. A National Assembly committee must make a finding of the existence of such a ground. Apart from the Public Protector and the Auditor-General (where a two-thirds majority is required), a simple majority of the National Assembly must approve the removal. The two-thirds majority required for removal of the Auditor-General and the Public Protector was a direct response by the Constitutional Assembly to failure of the first draft of the Final Constitution to secure certification from the Constitutional Court.[1]

In some instances, the establishment legislation adds additional procedural steps to the removal process. For instance, s 3*(b)* of the HRCA goes beyond the constitutional requirement and further requires a 75% majority of Parliament to approve the removal resolution for a member of the SAHRC. Similarly, a National Assembly committee finding that a member of the Electoral Commission be removed must be preceded by a recommendation of the Electoral Court.[2]

At least one writer, Karthy Govender, has argued that a Parliamentary resolution effecting the removal of Chapter Nine commissioners must be preceded by a full and fair hearing before a committee with members capable of impartial adjudication since 'the deliberations and determination of the committee would amount to administrative action.'[3] Govender's argument turns on the proposition that parliamentary committee action amounts to administrative action in terms of FC s 33 and that the committee 'is making a specific determination as required by the enabling legislation.'[4] The weakness in this line of reasoning lies in its characterization of parliamentary committee action as administrative action. The committee's power to take such action is sourced directly in FC s 194(1)*(b)*. Whether fair hearings are required would, therefore, appear not to turn on the requirements of FC s 33.[5]

[1] See *Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('*First Certification Judgment*'). While the Court justified the differential treatment of the Public Protector on the grounds that '[t]he office inherently entails investigation of sensitive and politically embarrassing affairs of government', Karthy Govender has argued that '[f]rom a perspective of principle, there ought to be no difference between the process used to remove the Public Protector and Auditor General from office and that used to impeach other Chapter 9 office bearers.' Govender 'SAHRC' (supra) at 574–5.

[2] G Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 29, 29–27.

[3] Govender 'SAHRC' (supra) at 574–79 (Justifying this argument on the basis of the holdings in *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C); *Pharmaceutical Manufacturers of South Africa & Others In Re: Ex Parte Application of President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC); *President of the Republic of South Africa & Others v SARFU & Others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) and the text of FC ss 33 and 194). In Govender's view, in order to be fair (in addition to the committee being impartial): 'there must be notice of the proposed action and the grounds asserted for it; the commissioner concerned must be offered the opportunity to present his or her case; given the seriousness of the matter, the commissioner must be legally represented; there must be an opportunity to lead and test evidence; and there must a statement of reasons for the final decision.'
Govender 'SAHRC' (supra) at 579.

[4] Ibid.

[5] For more on the extent to which the exercise of constitutional powers by spheres of government or organs of state are subject to the strictures of the Bill of Rights, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31, § 31.5.

24D The Commission for Gender Equality

Catherine Albertyn

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24D.1 INTRODUCTION

Chapter Nine of the Final Constitution[1] creates the Commission for Gender Equality (CGE). As a Chapter Nine entity, the CGE is characterised as a 'state institution strengthening consttutional democracy'[2] that is independent and impartial, subject only to the Constitution and the law.[3]

Section 187 of the Constitution sets out the broad functions of the CGE. The CGE must 'promote respect for gender equality and the protection, development and attainment of gender equality'.[4] In addition, the Constitution identifies specific functions and powers: namely, to 'monitor, investigate, research, educate, lobby, advise, and report on issues concerning gender equality'.[5] These responsibilities are further regulated and amplified by legislation: the Commission on Gender Equality Act[6] ('the Act')[7] and the Promotion of Equality and Prevention of Unfair Discrimination Act[8] ('Equality Act').

24D.2 WHAT IS THE COMMISSION FOR GENDER EQUALITY?

The Commission for Gender Equality is an unusual institution in comparative international terms. Its institutional origins lie both in the concept of an independent Human Rights Commission and in the need to establish specific structures both within and outside government to advance gender equality and women's human rights. The major task of these gender structures is to transform the institutions, policies, procedures, consultative processes, budgetary allocations and priorities of government to take account of the needs and aspirations of women.[9] The objective is 'to achieve equality for women as participants, decision-makers and beneficiaries in the political, civil, social, economic and cultural spheres of life'.[10] Such structures may be specific government ministries devoted to gender issues, specialised gender units within government departments, gender committees within Parliament, or independent gender advisory and monitoring institutions.

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[1] Constitution of the Republic of South Africa Act 108 of 1996 ('FC' or 'Final Constitution').
[2] FC section 181(1).
[3] FC section 181(2).
[4] FC section 187(1).
[5] FC section 187(2).
[6] Act 39 of 1996.
[7] FC ss 187(2) and (3). While the Constitution refers to the Commission *for* Gender Equality, the Act refers to the Commission *on* Gender Equality. (Emphasis added.)
[8] Act 4 of 2000.
[9] C Albertyn 'Mainstreaming Gender — National Machinery for Women in South Africa: A Policy' (1995) Centre for Applied Legal Studies Occasional Paper 24 ('Mainstreaming Gender'). See also 'The Office on the Status of Women: South Africa's National Policy Framework for Women's Empowerment and Gender Equality' (2000) at para 4.2 ('The Office on the Status of Women').
[10] C Albertyn 'Mainstreaming Gender' (supra) at 6. See also 'The Office on the Status of Women' (supra) at para 4.3.

These gender structures (often referred as 'national machinery') have been promoted by the United Nations and other international agencies concerned with gender equality as the best way of mainstreaming women's concerns with government. Hence the Platform for Action of the Fourth World Conference on Women held in Beijing, China in 1995 imposed the following obligation on governments:

> Based on a strong political commitment, create a national machinery, where it does not exist . . . for the advancement of women at the highest level of government; it should have clearly defined mandates and authority; critical elements would be adequate resources and the ability and competence to influence policy and formulate and review legislation. Among other things, it should perform policy analysis, undertake advocacy, communication, co-ordination and monitoring of implementation.[1]

The structure, powers and position of 'national machinery' in South Africa were debated extensively within the country in the early 1990s. A consensus emerged that a 'package' of institutions at all levels of the state and in civil society was the most effective means of mainstreaming gender in the new democracy. As a result, several structures in government and parliament, as well as an independent commission, were established after 1994.[2] They are:

1. A parliamentary structure: the Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women.[3]
2. Government structures; namely, the Office on the Status of Women based in the Office of the Presidency; and Gender Focal Points in national line ministries.[4] These structures are replicated at provincial level.[5]
3. The Commission for Gender Equality: a national, independent monitoring body, which is directly accountable to Parliament.[6]

Overall, '[n]ational machinery acts as a vehicle through which South Africa can meet its constitutional and international commitments to gender equality, human rights and social justice'.[7]

[1] Paragraph 205*(b)* of the Platform of Action (United Nations, 1996 Beijing Declaration and Platform for Action, New York: United Nations Department of Public Information).

[2] See C Albertyn 'National Machinery for Promoting the Status of Women' and B Mbete-Kgotsisile 'National Machinery for Promoting the Status of Women' in S Liebenberg (ed) *The Constitution of the Republic of South Africa from a Gender Perspective* (1995); S Hassim 'The Gender Pact and Institutional Consolidation: Institutionalising Gender Equality in the South African State' (2003) 29 *Feminist Studies* – (forthcoming).

[3] The Office on the Status of Women (supra) at para 4.4.3.

[4] Ibid at para 4.4.2.

[5] Ibid at para 4.5. The document contained proposals for gender structures in local government. Ibid at para 4.6.

[6] Ibid at para 4.4.4.

[7] Ibid at para 4.2.3.

The Commission for Gender Equality was established in 1997. It works closely with the other arms of national machinery, whose roles and functions were elaborated in a national policy document published by the Office of the Status of Women in 2000.[1] The CGE also co-operates with other Chapter Nine institutions (especially the Human Rights Commission and the Public Protector).[2]

24D.3 The Independent Nature of the CGE

The CGE is designated an independent and impartial institution, able to exercise its powers and perform its functions 'without fear, favour, or prejudice'.[3] It is not accountable to government. Rather, it reports, at least annually, to the National Assembly of Parliament.

Despite this political accountability, and ostensible independence, the Commission has been dependent upon government, and particularly the Department of Justice, for its operational funds. Initially, the moneys allocated by the Department barely covered salaries. Funding has improved in subsequent years.[4] In addition, the CGE has secured grants from international donors for its programmes.[5] The CGE, together with the Human Rights Commission and Public Protector, has argued that its financial dependence upon government interferes with its independence. It has advocated a direct relationship with Parliament for budgetary appropriations.[6]

The selection of commissioners is the task of Parliament. However, the President appoints persons nominated by a joint Parliamentary committee and approved by both houses of Parliament in a joint sitting.[7] Commissioners are expected to be duly qualified in terms of their record of commitment to gender equality and their knowledge and experience.[8] The selection process has attracted criticism for being overly politicised.[9]

24D.4 Gender Equality

The CGE has a broad constitutional mandate of promoting and protecting gender equality. Gender equality is a foundational principle of our constitutional democracy. However, it is not defined in the Constitution. The Constitutional Court has concluded that the Constitution enshrines a commitment to substantive

[1] The Office on the Status of Women (supra).
[2] The CGE is required to do so in terms of section 11(1)*(e)* and *(f)* of the Act.
[3] FC section 181(2).
[4] Commission on Gender Equality: Annual Report April 1997–March 1998 (1998) 27 ('CGE 1998'); Annual Report April 1998–March 1999 (1999) 75 ('CGE 1999').
[5] The reliance on independent donors is on all fours with the Commission's status as an independent structure.
[6] CGE 1998 (supra) at 33; CGE 1999 (supra) at 37.
[7] Section 3(2).
[8] Section 3(1).
[9] See J Sarkin 'Reviewing and Reformulating Appointment Processes to Constitutional (Chapter Nine) Structures' (1999) 15 *SAJHR* 587, 603-606.

equality.[1] The CGE articulated the following understanding of substantive gender equality in its first annual report:

> Gender equality means the equal employment by men and women of socially valued goods, opportunities, resources and rewards. Because what is valued differs among societies, a crucial aspect of equality is the empowerment of women to influence what is valued and share in decision-making about societal priorities. Equality does not mean that men and women are the same, but that opportunities and life chances will not depend on sex.[2]

One of the first tasks of the CGE was also to define a vision of a society free from inequality:

> The [CGE] is committed to creating a society free from gender discrimination and all other forms of oppression, in which all people will have the opportunity and means to realise their full potential, regardless of race, gender, class, religion, sexual orientation, disability or geographic location.[3]

The mention of 'forms of oppression' in this vision refers to the existence of inequalities amongst women beyond those enumerated above. The CGE has sought to prioritise the concerns of the most vulnerable and marginalised groups of women. It states that 'while the constituency of the CGE is all the people of South Africa, its target group is people living on the periphery, especially women in rural areas, on farms, in peri-urban areas, and in informal settlements'.[4]

The constitutional mandate of the Commission grants it a privileged status in promoting gender equality and in representing the interests of women in our society. This eminence was recognised by the Constitutional Court in *S v Jordan*[5]. In *Jordan*, the CGE intervened as *amicus curiae* in support of the decriminalisation of sex work.[6] Writing for the minority that supported decriminalisation, Judges O' Regan and Sachs stated that

> In determining whether the discrimination is unfair, we pay particular regard to the affidavits and argument of the Gender Commission. It is their constitutional mandate to protect, develop, promote respect for and attain gender equality. This Court is of course not bound by the Commission's views but it should acknowledge its special constitutional role and its expertise. In the circumstances, its evidence and argument that section 20(1)(*a*A) is unfairly discriminatory on grounds of gender reinforces our conclusion.[7]

[1] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 at para 46.
[2] CGE 1998 (supra) at 13.
[3] CGE 1998' (supra) at 3.
[4] Ibid.
[5] *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as* Amici Curiae) 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC)('*Jordan*').
[6] Ibid at para 70.
[7] Section 11(1)*(a)* of the Act.

24D.5 Scope of Mandate and Functions

The Commission's constitutional mandate of promoting gender is both vertical and horizontal. Its monitoring function extends to the state, statutory and public bodies, as well as 'private businesses, enterprises and institutions'.[1] It is also authorised to investigate 'any gender related complaint' in the public or private domains.[2]

The Commission on Gender Equality Act sets out the details of the Commission's functions and powers. These can be summarised as powers: *(a)* to monitor (the watchdog function); *(b)* to educate; *(c)* to investigate and settle complaints; *(d)* to conduct research; *(e)* to advocate for gender equality; *(e)* to report, advise and make recommendations; and *(f)* to litigate.

(a) The monitoring function

The CGE's most important function is to act as a watchdog for gender equality, and hence of democracy. This watchdog role extends beyond the state to the private sector and civil society. Section 11(1)*(a)* of the Act explicitly authorises the CGE to monitor and to evaluate the policies and practices of all organs of state, statutory bodies or functionaries, public bodies and authorities and private business, enterprises and institutions.[3] Section 11(1)*(c)* requires the CGE to evaluate any Act of Parliament or aspect of the common law, with particular emphasis on systems of personal, family and customary law. In terms of s 11(1)*(h),* the CGE is expected to monitor compliance with relevant international instruments, especially the Convention on the Elimination of All Forms of Discrimination Against Women. It shares this task with the Office on the Status of Women and Parliament's Joint Monitoring Committee of the Improvement of the Quality of Life and the Status of Women.[4]

The monitoring function is linked to a number of other powers and functions, including conducting research and giving advice and making recommendations on how to improve or promote gender equality. Section 11*(d)* empowers the CGE to recommend to Parliament the adoption of new legislation to promote gender equality and raise the status of women. Often such recommendations may be better made to relevant government departments that have the authority to draft and develop laws in their particular area of jurisdiction.

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[1] Section 11(1)*(e)* of the Act.
[2] Ibid at s 11(1)*(a).*
[3] Ibid.
[4] See The Office on the Status of Women (supra) at para 4.4.3.1. The Office on the Status of Women has the official task of reporting to the United Nations, whereas the other institutions have a more internally focussed monitoring role.

Although the scope of the Commission's monitoring function extends across the entire spectrum of the state and civil society, much of its work has been aimed at the state. It has been especially engaged in the development of the government's legal and policy framework. In 1998, it commissioned an audit of discriminatory legislation to identify gaps in laws.[1] It has also made regular submissions to the South African Law Commission and to Parliament on laws affecting gender equality, including customary laws.[2] More recently, it has addressed the issue of implementing law through the idea of an Annual Report Card of progress by various government departments.[3]

The Commission has evaluated the participation of women in politics,[4] and the gender policies of political parties. It has monitored national and local elections to assess the participation of women in political parties and in voting.[5]

As noted above, the CGE's oversight responsibilities capture relationships within civil society. The CGE monitors traditional practices that are harmful to women: it has conducted research and engaged in dialogue with communities and traditional leaders on issues such as witchcraft and virginity testing.[6] The CGE has also developed a particular focus on gender equality in the private sector. It has recently undertaken a survey of the sector and produced a report entitled 'Best Practice Guidelines for Creating a Culture of Gender Equality in the Private Sector'.[7]

The monitoring function of the CGE is extended in the Equality Act. The innovative remedies section of that Act provides for the CGE to receive regular progress reports as to how a person found guilty of unfair discrimination is implementing the court's order.[8] This delegation recognises the particular expertise of the CGE and reduces the burden of 'supervisory jurisdiction' on a court. Obviously the Commission has no power to enforce a court order. It would have to refer the matter back to the court.

The Commission's monitoring role under this Act also extends to powers to 'request' any part of the state or any person 'to supply information on any measures relating to the achievement of equality, including, where appropriate, on legislative and executive action and compliance with legislation, codes of practice and programmes'.[9]

[1] Centre for Applied Legal Studies: Audit of Legislation that Discriminates on the Basis of Sex/Gender (1998). See also CGE 1999 (supra) at 28-29.

[2] The various annual reports of the CGE list submissions on, *inter alia*, customary marriages, religious law, domestic violence, sexual offences and traditional courts.

[3] Commission on Gender Equality Annual Report 2000 (2000) at 21-22 ('CGE 2000').

[4] Commission on Gender Equality 'Redefining Politics–Women and Democracy in South Africa' (1999).

[5] Commission on Gender Equality 'Report on the 1999 General Elections: A Gender Perspective' (1999).

[6] Commission on Gender Equality Annual Report 2000/2001 (2001) 9 ('CGE 2001').

[7] Commission on Gender Equality 'Gender and the Private Sector' (1999).

[8] Section 21(2)*(m)* of the Equality Act (supra).

[9] Ibid at s 25(3)(2).

Finally, the Equality Act permits the Commission to monitor cases that are adjudicated under the Equality Act. Section 25(3)*(c)* authorises the CGE to 'request from the Department [of Justice] . . . regular reports regarding the number of cases and the nature and outcome thereof'.

(b) The educative function

Section 11*(b)* of the Act requires the CGE to develop and conduct public information and education programmes to foster public understanding of gender equality. In terms of section 25(1) of the Equality Act, the Commission must assist the state 'to develop an awareness of fundamental rights in order to promote a climate of understanding, mutual respect and equality'[1] and 'conduct information campaigns to popularise' the Act.[2] These are important functions in addressing the social norms and attitudes that underpin gender inequalities.

One of the Commission's main programmes has been to engage the media on sexism in the media.[3] The CGE also runs public education initiatives through the media and in rural and urban communities on a range of issues relating to women's rights.[4]

The Commission founded the now annual Sixteen Days of Activism on No Violence Against Women.[5] It has produced a 'Working Women's Manual' on the rights of women in workplace.[6]

(c) The investigative function

The CGE is mandated to investigate any gender-related complaint and resolve it through mediation, conciliation or negotiation.[7] Section 11 makes provision for two types of investigations: (1) those related to individual complaints brought to the Commission; and (2) those initiated by the Commission. This flexibility enables the CGE to identify and act upon significant areas of gender inequality in society.

The complaints function sets up a tension between expending resources on addressing the needs of those who bring their problems to the CGE and ensuring that interventions are strategic and have the maximum transformative impact.[8] In order to diminish this institutional and budgetary strain, the Commission has sought to refer complaints to other institutions where possible, and to address the systemic problems that prevent women from using such institutions effectively

[1] Section 25(1)*(a)* of the Equality Act (supra).
[2] Ibid at s 25(1)*(c)*(vi).
[3] CGE 1999 (supra) at 23-25; CGE 2000 (supra) at 31-32.
[4] CGE 2001 (supra) at 6-8.
[5] CGE 1999 (supra) at 37.
[6] CGE 2000 (supra) at 27.
[7] Section 11(1)*(e)* of the Equality Act (supra).
[8] CGE 1999 (supra) at 29-31.

(eg problems with the maintenance system).[1] In addition, the CGE has sought to prioritise complaints received from its target constituency of disadvantaged women. The Commission reports that the majority of individual complaints relate to maintenance, family issues (divorce and custody), and domestic and other forms of gender violence.[2]

The CGE has powerful investigative powers, including the power to subpoena persons and documents,[3] compel evidence[4] and powers relating to entry of premises and search and seizure.[5] These powers have yet to be used.

The CGE plays an important role in settling complaints on unfair discrimination, harassment or hate speech under the Equality Act. This Act identifies the CGE as an 'alternative forum'. This means that Equality Courts can refer matters to the CGE to be dealt with in terms of the CGE's functions and powers, instead of hearing the matter in an Equality Court.[6] In such cases, the Equality Court retains overall jurisdiction should the dispute resist resolution by the CGE.[7]

Section 21(4) of the Equality Act further provides that a court may either before, during or after a hearing, refer a complaint to the CGE for 'mediation, conciliation or negotiation'. The Commission is also competent to conduct investigations into cases that are referred to them by an Equality Court and to make recommendations as directed by the court regarding those cases or the persistent contravention of the Act.[8]

(d) The advocacy and advisory function

As a constitutional protector of democracy, the CGE is expected to advance gender equality and hence contribute to the consolidation of democracy in South Africa. This responsibility demands engagement with the state and civil society on a broad range of issues relating to gender equality. These interventions have the dual objectives of removing barriers that impede progress to equality and developing positive measures to advance equality.

Chapter five of the Equality Act sets out several duties of the state to promote equality. Constitutional institutions, such as the CGE, are expected to assist in these duties. These duties include taking measures to 'develop and implement programmes . . . to promote equality';[9] developing action plans, codes of practice

[1] CGE 1999 (supra) at 29-31.
[2] Ibid at 20; CGE 2000 (supra) at 25-26; CGE 2001 (supra) at 15-17.
[3] Section 12(4)*(b)* of the Equality Act (supra).
[4] Ibid at s 12(5).
[5] Ibid at s 13.
[6] Ibid at ss 20(5) -(7).
[7] Ibid at s 20(8).
[8] Ibid at s 25(3)*(b)*.
[9] Ibid at s 25(1)*(b)*.

and guidelines to promote equality;[1] and 'providing advice and training on equality'.[2] Finally, in terms of s 25(4), read with ss 25(5) and (6), the CGE must assist the Human Rights Commission in receiving and evaluating the equality plans of all government departments.

(e) The litigation function

Although the power to litigate is not expressly mentioned in its Act, the CGE has asserted its prerogative to do so with respect to the enforcement of women's rights. It has tended to do so, however, not by initiating cases, but by lending support to, or participating in, cases that raise important gender issues. The CGE intervenes primarily in those cases that relate to systemic gender inequality or the rights of disadvantaged groups of women.

In some instances, the Commission has been invited by the Constitutional Court to make submissions in a particular case. The CGE has also applied to be an *amicus curiae* in various courts. Here the Commission has argued on behalf of the interests of vulnerable groups of women and/or has placed contextual evidence before the courts on systemic practices of gender inequality. The CGE has also participated as a party in several cases.

The Commission was invited by the Constitutional Court to make representations in *Amod v MMF*[3] and in *S v Baloyi*.[4] *Baloyi* dealt with the constitutionality of a provision of the Prevention of Family Violence Act[5] that arguably placed an onus on a defaulter to prove that he had not wilfully violated an interdict. In finding that this imposed a permissible burden of proof rather than an onus, the Court explicitly recognised that the state was

> under a series of constitutional mandates which include the obligation to deal with domestic violence: to protect the rights of everyone to enjoy freedom and security of the person and to bodily and psychological integrity and the right to have their dignity respected and protected.[6]

These are constitutional mandates that the CGE is well positioned to monitor.

The CGE has acted as *amicus curiae* in several cases. In the Supreme Court of Appeal hearing of *Amod v MMF*,[7] the CGE intervened on behalf of Muslim

[1] Sections 25(1)*(c)*(i) and (iii) of the Equality Act (supra).
[2] Ibid at s 25(1)*(c)*(iv).
[3] 1998 (4) SA 753 (CC), 1998 (10) BCLR 1207 (CC) (dealing with the jurisdiction of the Constitutional Court and the Supreme Court of Appeal).
[4] 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC) ('*Baloyi*').
[5] Act 133 of 1993.
[6] *Baloyi* (supra) at para 11 (Sachs J). See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (1) BCLR 995.
[7] *Amod v Multilateral Vehicle Accidents Fund (Commissioner for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA).

women whose marriages were not legally recognised and who were therefore unable to claim damages from the Motor Vehicle Accident Fund. The CGE argued that the common law should be interpreted to recognise a duty of support in these relationships. The Supreme Court of Appeal found that the appellant's claim was worthy of 'public recognition and protection'.

In *Bannatyne v Bannatyne*,[1] the CGE was admitted by the Constitutional Court as an *amicus curiae* to lodge empirical data on the state of the maintenance system in South Africa and its effect on the rights of women and children in seeking effective relief under the Maintenance Act 99 of 1998. The Court commented that

> [t]his evidence proved most useful and gave the necessary context by providing information regarding the frailties inherent in the functioning of the maintenance system and more particularly its effect on the promotion and advancement of gender equality in this country.[2]

The CGE has also supported cases by appearing as a party. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[3], the CGE supported the National Coalition by appearing as the fourteenth applicant in a case that challenged permanent-residence requirements which discriminated against gay and lesbian partners. The Commission joined the case of *Christian Lawyers Association v Minister of Health*[4] as a party to assist the government in defending a challenge to women's rights to reproductive choice enshrined in the Choice of Termination of Pregnancy Act 92 of 1996. However, the CGE has not yet initiated a case in its own name to address a gender equality issue directly.

The Equality Act also envisages a litigation function by the CGE. It authorises the Commission to institute proceedings in its own name under that Act.[5] It also mandates the CGE to assist persons wishing to bring proceedings under the Act.[6]

24D.6 The Commission, Democracy and the Achievement of Gender Equality

The Commission's constitutional mandate is to promote democracy through the protection and advancement of gender equality. This duty not only refers to the promotion and protection of women's constitutional rights, but also to the task of achieving gender equality in legal, social, economic and political life. The CGE is accordingly authorised to intervene in the affairs of the state, civil society and the

[1] 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC) ('*Bannatyne*').
[2] *Bannatyne* (supra) at para 3. See also paras 26–30 (on the nature of the evidence placed before the Court).
[3] 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC).
[4] *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (4) SA 1113 (T).
[5] Section 20(1)(f) of the Equality Act (supra).
[6] Ibid at ss 20(9) and 25(3)(a).

private sector. This constitutional mandate is, as we have noted above, grounded in, and amplified by, two important laws: The Commission on Gender Equality Act, and the Promotion of Equality and Prevention of Unfair Discrimination Act.

In carrying out this mandate, the Commission is subject to significant fiscal and personnel constraints. As a result it has had to make hard choices about its priorities and the way in which it carries out its mission. It does so through annual planning and review procedures. It does so by co-operating closely with other constitutional institutions and with the governmental and parliamentary structures of the 'national machinery', as well as with civil society organisations. The location of the Commission as an independent, constitutional institution enables it hold government accountable to its mandate of achieving gender equality. Similarly, the Commission facilitates the strengthening of civil society by working independently, and in partnership with other organisations, to ensure that government is accountable, open and responsive to civil society.

24E Independent Communications Authority of South Africa (ICASA)

Justine White

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24E.1 Broadcasting in the Apartheid Era

Broadcasting in the apartheid era was characterised by the near total monopoly of the South African Broadcasting Corporation ('SABC') over the airwaves.[1] In terms of the Broadcasting Act itself, the SABC operated as a state, as opposed to a public, broadcaster. Its governing structures were under tight political control. The State President appointed the SABC Board as well as the chairman and vice-chairman.[2] State control of the SABC was also evident in the make-up of the SABC staff — the *Broederbond* determined the appointments of the SABC Board, its Directors General and 'most top level and many other mid-level managers'[3] — and in broadcast content. The SABC's unwritten policy was 'to ensure National Party . . . control and white privilege.'[4] According to the *TRC Report*, media analysis shows that 'news bulletins maintained and cultivated a mindset among white viewers that apartheid was natural and inevitable'[5] and that SABC programming 'was instrumental in cultivating a "war psychosis" which in turn created an environment in which human rights abuses could take place.'[6]

[1] Apart from the subscription television service M-Net, which carried no news, South Africa radio and television broadcasting activities were carried out entirely by the SABC in terms of the Broadcasting Act 73 of 1976 ('1976 Broadcasting Act'). While there were certain free-to-air broadcasting services based in former TBVC states (Transkei, Bophuthatswana, Ciskei and Venda) that were capable of being received in parts of South Africa, including, Bop TV, Capital Radio and Radio 702, these had limited coverage areas and the majority of South Africans had no access to these services. Radio Freedom, broadcast by the African National Congress ('ANC') from five countries in Africa was capable of being received in South Africa but did not broadcast continuously. *Truth and Reconciliation Commission of South Africa Report* Volume 4, (1998) 172 ('*TRC Report*').

[2] 1976 Broadcasting Act s 4(2) and (3). The 1976 Broadcasting Act contained very little detail as to how the SABC was to go about its broadcasting activities. Section 11*(a)* provided merely that one of the objectives of the SABC was 'to carry on a broadcasting service in the Republic.' As was widely suspected, the proceedings of the Truth and Reconciliation Commission have revealed that the SABC was subject to direct governmental interference in the form of the *Broederbond* and internal security forces. *TRC Report* (supra) at para 25–26.

[3] *TRC Report* (supra) at para 25–26.

[4] Ibid at para 14.

[5] Ibid at para 168.

[6] Ibid. The *TRC Report* contained detailed confirmation of this assessment. Major Craig Williamson told the TRC that 'a "special relationship" existed between the SABC and the intelligence community's units for STRATCOM. The state, he said, was at a disadvantage because it did not own/control any credible print media. It counteracted this by its use of radio and television.' Ibid at para 25. This programming was not aimed only at whites. Government used the SABC as a key strategic resource in both the white and black communities to support its Apartheid policies. The 1976 *Broederbond* 'Master Plan for a White Country' stated that the 'mass media and especially the radio will play important parts. The radio services for the respective black nations must play a giant role here.' Ibid at para 28. The so-called Bantu programming arm (nine radio stations and two television stations in 1984) of the SABC was also under tight political control. Of eighty-five senior employees working in these services, only six were black. Ibid at para 27.

24E.2 Broadcasting in Transition and the Independence of the Broadcast Regulator

In 1990, the National Party government appointed the Viljoen Task Group to investigate the future of broadcasting and the SABC embarked on a process of internal restructuring.[1] The ANC and its allies quite naturally responded that 'any restructuring of South African broadcasting could not be considered under the conditions of old-style secret deliberations by an elite white commission.'[2]

In 1993, the political groupings represented at the Kempton Park negotiations on South Africa's future constitutional dispensation agreed on more than the provisions of the Interim Constitution.[3] They also agreed on two other pieces of legislation: the Local Government Transition Act[4] and the Independent Broadcasting Authority Act.[5]

The IBA Act has been described by commentators as a 'radical piece of legislation.'[6] It introduced a number of significant changes to the broadcasting environment, including:

- a three tier broadcasting system composed of community,[7] commercial,[8] and public broadcasting;[9]
- a competitive commercial broadcasting sector with limitations on the number of licences a single person could control[10] and on the levels of foreign ownership;[11]
- a bar on party political control of broadcasters;[12]
- various categories of signal distribution licences, that is, licences for the distribution of signals for broadcasting purposes;[13]

[1] P Horwitz *Communication and Democratic Reform in South Africa* (2001) 126–7.

[2] Ibid at 129. One of the most important events for the restructuring of broadcasting was the Jabulani! Freedom of the Airwaves Conference. The recommendations coming out of the Jabulani! Conference 'effectively set the terms of the public debate.' Horwitz (supra) at 133. These recommendations included: the need to recognise three levels of broadcasting: (public, commercial and community); the public service broadcaster had to cater for all tastes and be independent of government; all South African indigenous languages had to have access to broadcasting and that education was to be a broadcasting priority. Ibid.

[3] Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution').

[4] Act 209 of 1993.

[5] Act 153 of 1993 ('IBA Act'). Broadcasting had been on the agenda of the CODESA negotiations. 'Broadcasting was placed within the terms of reference of CODESA working group 1, Subgroup 3, which was mandated to examine the creation of 'a climate and opportunity for free political participation, including the political neutrality of and fair access to, the state controlled media.' CODESA, and later the Kempton Park ('MPNF') negotiators, wanted to ensure that the broadcasting regime in a post-apartheid South Africa would not operate as it had under the National Party government. The result was the passage of the IBA Act. See Horwitz (supra) at 139.

[6] Horwitz (supra) at 145.

[7] IBA Act s 47.

[8] IBA Act s 46.

[9] IBA Act s 45.

[10] IBA Act s 49 and 50.

[11] IBA Act s 48.

[12] IBA Act s 51.

[13] Chapter V.

- local content quotas for both radio and television;[1] and
- an independent regulator to regulate broadcasting in the public interest — the Independent Broadcasting Authority ('IBA').[2]

Both the ANC and the NP viewed the restructuring of broadcasting as essential to the success of the 1994 elections. Both parties were anxious about the extent to which the other party might exploit the SABC to improve their showing at the polls.

(a) The Interim Constitution

The Interim Constitution engaged the regulation of broadcasting through IC s 15(2)(freedom of expression). IC s 15(2) provided:

> All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion.

The phrase 'media financed by and under the control of the state' underscores the centrality of the political debates on the future role of the SABC during the transition. The requirement of impartiality and diversity of opinion reflects concerns about past abuse and anxiety over future misuse.[3] The section is, however, oddly silent as to how the state media is to be regulated so as to ensure both impartiality and diversity of opinion.

(b) The Final Constitution

The Final Constitution specifically requires the independent regulation of broadcasting.[4] FC s 192 provides:

> National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.[5]

FC s 192 frames the regulation of broadcasting in manner that differs substantially from its predecessor, IC s 15(2). First, FC s 192 concerns itself with all broadcasting — not only with 'media financed by or under the control of the state.' All broadcasters — not just the SABC — are affected by the provisions of FC s 192. Second, FC s 192 explicitly requires that national legislation establish an independent authority to regulate broadcasting. Third, FC s 192 gives content to the role of the independent regulator. It must regulate broadcasting 'in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.'

[1] IBA Act s 53.
[2] IBA Act s 3 (now repealed).
[3] *TRC Report* (supra) at para 22.
[4] Constitution of the Republic of South Africa Act 108 of 1996 ('FC' or 'Final Constitution').
[5] FC s 192 is found in FC Chapter 9: 'State Institutions Supporting Constitutional Democracy'.

One fascinating anomaly is that the independent authority to regulate broadcasting provided for in FC s 192 is not mentioned in the general provisions that govern the 'State Institutions Supporting Constitutional Democracy' ('Chapter 9 Institutions').[1] Indeed, informal comments by certain members of the Portfolio Committee on Communications indicate that some members of the ANC believe that the only constitutional protection afforded to the independent authority to regulate broadcasting is contained in FC s 192 itself.

A literal reading of FC ss 181, 193 and 194 suggests that they do not apply to the independent authority to regulate broadcasting. However, a number of other theories of statutory interpretation could lead one to a different result. For example, according to the mischief rule, a 'court may have regard to 'the mischief' that the Act was designed to remedy.' The requirement that the broadcasting regulator be independent, ensure fairness and promote a diversity of views supports a generous reading of FC ss 181, 193 and 194 with respect to their application to the broadcasting regulator.[2]

Even if the courts decide that FC ss 181, 193 and 194 do not apply directly to the independent authority to regulate broadcasting, these sections may play an important role in determining whether super-ordinate legislation does indeed provide for the kind of independent authority required by FC s 192. The appointment and removal procedures provided for in enabling legislation require an examination of those statutory provisions in terms of the 'independence' required by the Final Constitution.[3]

[1] See FC ss 181, 193 and 194. FC ss 193 and 194 deal with, respectively, appointment and removal procedures.

[2] Bolstering the independence of the regulator is important for a number of reasons. First, given the history of abuse in respect of government interference in broadcasting, having an independent authority to regulate broadcasting is essential in order to make a decisive break with the past. Second, given high illiteracy rates in South Africa, a significant number of South Africans rely on broadcasting to meet all of their news and information needs. Independent regulation ensures that broadcasting will meet these needs effectively. Third, the authority to regulate broadcasting is required to fulfil the crucial and ongoing role of regulating broadcasting in the public interest. The independence of the broadcasting regulator is of vital and lasting concern to our democracy if South Africa is to vouchsafe access to a diversity of views in broadcasting.

[3] It is instructive to consider how the Constitutional Court has dealt with other issues relating to regulatory independence. In the *First Certification Judgment*, the Constitutional Court held that: '[f]actors that may be relevant to independence and impartiality, depending on the nature of the institution concerned, include provisions governing appointment, tenure and removal as well as those concerning institutional independence.' *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1453 (CC)('*First Certification Judgment*') at para 160. The Constitutional Court found that the removal provisions in the proposed Final Constitution regarding the Public Protector and the Auditor-General did not comply with the Constitutional Principles. The Constitutional Court also found that the fact that the proposed Final Constitution did not specify what the role and the functions of the Public Service Commission would be and did not specify what protections it would have, meant that the Constitutional Court could not certify that the Constitutional Principle requiring the establishment of an independent and impartial public service commission had been met.

(c) International Best Practise

While constitutional provisions securing the independence of the authority to regulate broadcasting are still uncommon, the international trend is toward such basic guarantees.

The Council of Europe's Committee of Ministers has adopted a recommendation to member states on the independence and functions of the regulatory

More recently, the Constitutional Court has commented on the nature of the institutional independence required in respect of the Independent Electoral Commission, another Chapter 9 Institution. In *New National Party of South Africa v Government of the Republic of South Africa and Others*, Langa DP, with respect to the general nature of the IEC's independence, and, with regard to its financial and administrative independence wrote:

> [Financial independence] . . . implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the [1996] Constitution and the Electoral Commission Act. This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. It is for Parliament, and not the Executive arm of Government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must, accordingly, be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees . . . [Administrative independence] implies that there will be control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The Executive must provide the assistance that the Commission requires 'to ensure (its) independence, impartiality, dignity and effectiveness.' The Department [of Home Affairs] cannot tell the Commission how to conduct registration, whom to employ, and so on; but if the Commission asks the government for assistance to provide personnel to take part in the registration process, government must provide such assistance if it is able to do so. If not, the Commission must be given funds to enable it to do what is necessary.
>
> It follows from what I have said that the Department, the Department of State Expenditure and the Minister of Finance have failed to appreciate the true import of the requirements of the Constitution and the Electoral Commission Act which provide that the Commission be independent and subject only to the Constitution and the law, that it has the responsibility for managing elections, that it is accountable to the National Assembly and not the Executive, and that all other organs of State must assist and protect it to ensure its independence and effectiveness.

1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)('*New National Party*') at paras 98–100. See also *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC)('*Langeberg Municipality*') at para 27 (Court held that although the Independent Electoral Commission is an organ of state, it is not within the national sphere of government. It wrote: 'It is a contradiction in terms to regard an independent institution as part of a sphere of government that is functionally interdependent and interrelated in relation to all other spheres of government. Furthermore, independence cannot exist in the air and it is clear that the chapter intends to make a distinction between the State and government, and the independence of the Commission is intended to refer to independence from the government, whether local, provincial or national.') The holdings and the dicta in the *First Certification Judgement* and *Langeberg Municipality*' generate the following criteria for an assessment of independence: (1) an independent body is one that is outside government; (2) an independent body is one whose members' tenures are governed by appropriate appointment and removal provisions which ensure that members are appropriately qualified, do not serve at the pleasure of the Executive and can be removed only on objective grounds relating to job performance; (3) an independent body is one that is sufficiently well funded by Parliament to enable it to perform its functions; (4) an independent body is one that has control over its own functions. These criteria suggest that policies or laws that undermine the independence of the broadcasting regulator violate FC s 192. See, further, S Woolman, T Roux and B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS December 2004) Chapter 24.

authorities for the broadcasting sector.[1] The Recommendation locates the need for independent broadcasting regulation in terms of the predicate conditions of open and democratic societies.[2]

In 2001, a number of participants in a UN/UNESCO conference on the broadcast media developed the Windhoek Charter on Broadcasting in Africa. In respect of regulatory independence, the Windhoek Charter reads:

> All formal powers in the areas of broadcast and telecommunications regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by, among others, an appointments process for members which is open, transparent, involves the participation of civil society and is not controlled by any particular political party.'[3]

In 2002, the African Commission on Human and Peoples' Rights, passed a Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa.[4] Clause VII thereof deals with Regulatory Bodies for Broadcasting and Telecommunications and sets out the following key principles:

- broadcasting and telecommunications must be regulated by a public authority which is independent and protected against interference, particularly of a political or economic nature;

[1] 'Recommendation of the Council of Ministers to Member States on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector' (2000) 23, available at https://www.wcd.coe.int/ViewDoc.jsp?id=393649&Lang=en (accessed on 26 May 2005)('Recommendation').

[2] The appendix to the recommendation contains guidelines concerning the independence and functions of the regulatory authorities. In brief these require:

- rules governing membership of regulatory authorities are a key element of their independence and should be defined so as to protect them from any interference, in particular by political forces or economic interests;
- rules regarding dismissal must ensure that dismissals are not used as a means of political pressure;
- arrangements for funding of regulatory authorities be specified in law in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently;
- regulatory authorities should have the power to adopt regulations and guidelines concerning broadcasting activities and to adopt internal rules, subject to clearly defined delegation by the legislator;
- one of the essential tasks of regulatory authorities in the broadcasting sector is normally the granting of licences;
- regulatory authorities should be accountable to the public for their activities and should publish regular or ad hoc reports relevant to their work;
- in order to protect the regulatory authorities' independence, it is necessary that they should be supervised only in respect of the lawfulness of their activities and the correctness and transparency of their financial activities.

Clauses II–V.

[3] *Windhoek Charter on Broadcasting in Africa* (2001) Clause 2, available at https://www.alc.amarc.org/legislaciones/africa.pdf (accessed on 26 May 2005).

[4] African Commission on Human and Peoples' Rights 'Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa, available at http://www.achpr.org/english/_doc_target/documentation.html?/resolutions/resolution67_en.html (accessed on 24 May 2005).

- the appointment process in respect of such a body shall be open and transparent with participation by civil society and it shall not be controlled by any particular political party;
- such a body must be accountable to the public through a multi-party body.

24E.3 The Independent Communications Authority of South Africa

In 2000, the Independent Communications Authority South Africa Act established an independent authority to regulate broadcasting: the Independent Communications Authority of South Africa ('ICASA').[1]

ICASA's mandate is to regulate both broadcasting and telecommunications in the public interest.[2] In so doing, ICASA is required to perform the duties and exercise the powers that had been given to the previous regulators of broadcasting and telecommunications, respectively, namely the IBA,[3] and the South African Telecommunications Regulatory Authority ('SATRA'). These duties and powers are found in three separate pieces of legislation: the Telecommunications Act,[4] the IBA Act, and the Broadcasting Act[5] (collectively, the 'underlying statutes').

(a) Appointment and Removal of Councillors

ICASA Act s 5 read with ICASA Act s 3(2) provides that ICASA acts through a Council of seven members, including the Chairperson, all of whom are appointed by the President on the recommendation of the National Assembly in accordance with the following principles:

- public participation in the public nomination process;
- transparency and openness;
- publication of a shortlist of candidates who must meet required criteria and who are not subject to disqualification.[6]

The criteria for appointment embrace a commitment to fairness, freedom of expression, openness and accountability on the part of those entrusted with the governance of a public service.[7] Councillors of ICASA must be representative of

[1] Act 13 of 2000 ('ICASA Act') s 3.
[2] ICASA Act s 2*(a)* and *(b)*.
[3] ICASA Act s 4(1)*(a)* and *(b)*.
[4] Act 103 of 1996 ('Telecommunications Act').
[5] Act 4 of 1999 ('Broadcasting Act').
[6] ICASA Act s 5(1).
[7] ICASA Act s 5(3)*(a)*.

a broad cross-section of the population of the Republic[1] and must possess suitable qualifications, expertise and experience of, amongst others, broadcasting and telecommunications policy, engineering, technology, frequency band planning, law, marketing, journalism, entertainment, education, economics, business practise and finance or any other related expertise and qualifications.[2]

Section 8 of the ICASA Act provides for the removal of ICASA councillors. A councillor may be removed from office of the grounds of: misconduct;[3] inability to perform the duties of office efficiently;[4] absence from three consecutive Council meetings without Council permission and without good cause;[5] having other remunerative employment or holding another remunerative office which is likely to interfere with the exercise of the Councillor's duties or which creates a conflict between such employment/office and his or her office as a Councillor;[6] failure of a councillor (or a Councillor's family member or business partner) to disclose an interest in a business on application for a licence;[7] and becoming disqualified as contemplated in terms of section 6(1).[8] Before a Councillor can be removed on these grounds, the National Assembly has to have made a finding that grounds for removal exist and must have adopted a resolution calling for that Councillor's removal from office.[9] The President must remove a Councillor from office upon the adoption of such a resolution by the National Assembly and may suspend a Councillor from office upon the start of the proceedings by the National Assembly for the removal of the Councillor.[10] The current appointment and removal provisions contained in ICASA Act ss 5 and 8 meet the constitutionally required standard of independence laid down in FC s 192 and are sufficiently similar to the appointment and removal procedures for other Chapter 9 Institutions to pass constitutional muster.

The real threat to ICASA's current level of independence is created by the underlying statutes. The three underlying statutes do not satify the criteria for independence required by the Final Constitution and articulated by the Constitutional Court.

[1] ICASA Act s 5(3)*(b)*(i).
[2] ICASA Act s 5(3)*(b)*(ii).
[3] ICASA Act s 8(1)*(a)*.
[4] ICASA Act s 8(1)*(b)*.
[5] ICASA Act s 8(1)*(c)*.
[6] ICASA Act s 8(1)*(d)* read with ICASA Act s 7(6).
[7] ICASA Act s 8(1)*(e)* read with ICASA Act s 12(2)*(a)* and (1).
[8] ICASA Act s 8(1)*(f)*.
[9] ICASA Act s 8(2).
[10] ICASA Act s 8(3).

(b) Legislative Provisions Regarding the Powers, Duties and Independence of ICASA in the Regulation of Broadcasting

The IBA Act constituted a 'decisive break from the past'.[1] This decisive break took the following form:

> The Authority shall function without any political or other bias or interference and shall be wholly independent and separate from the State, the government and its administration or any political party, or from any other functionary or body directly or indirectly representing the interests of the State, the government or any political party.[2]

This statement on the nature of the IBA's independence from political interference appears far more fulsome and categorical than comparable provisions of the ICASA Act.[3] Before the IBA Act was amended by the Broadcasting Act in 1999, it was clear that the IBA was free to formulate broadcasting policy within the broad objectives for the broadcasting sector set out in IBA Act s 2.[4]

In respect of policy formulation and implementation, the member of the Executive responsible for broadcasting, the Minister of Communications, had no stated role in the original IBA Act. Major inroads into the independence of the IBA occurred with the coming into force in 1999 of the Broadcasting Act. The Broadcasting Act was primarily intended to deal with the corporatisation and restructuring of the SABC and to provide a legislative framework for the regulation of satellite broadcasting. The Schedule to the Broadcasting Act, however, contains numerous amendments that reflected increasing executive branch control over broadcasting regulation.

Section 13A is headed 'General role and powers of the Minister'. Section 13A(2) empowers the Minister to direct ICASA (then the IBA):

[1] *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 262 (The late Mahomed DP's used this felicitous phrase in describing the nature of the Interim Constitution.)

[2] IBA Act s 3(3), repealed by ICASA Act Schedule 1.

[3] See ICASA Act s 3(3) and (4).

[4] The IBA Act empowers ICASA (then the IBA) to hold public enquiries in respect of broadcasting matters. IBA Act s 28. The IBA and ICASA have held many such enquiries which have resulted in the formulation of a number of important policy document. See, eg, the Triple Enquiry Report, the Private Sound, Television Broadcasting, Community Broadcasting Report and the Revised Code of Conduct for Broadcasters Report, available at www.icasa.org.za, (accessed on 30 May 2005). The Triple Enquiry Report was ground breaking. It resulted in the privatisation of six of the SABC's regional radio stations and contained important proposals on local content quotas and cross media control (that is control of both broadcasting and print media) that have reshaped the broadcasting landscape. The IBA's policy formulations have also resulted in regulations governing the operation of broadcasters with regard to the imposition of local content quotas, the definition of advertising and the regulation of infomercials, and programme sponsorship in respect of broadcasting activities. See General Notice 245, *Government Gazette* 23135 (22 February 2002); General Notice 2247, *Government Gazette* 25378 (22 August 2003); R 426, *Government Gazette* 19922 (1 April 1999).

(a) to undertake any special investigation and inquiry on any matter within its jurisdiction and to report to the Minister thereon;
(b) to determine priorities for the development of broadcasting services;
(c) to consider any matter within its jurisdiction placed before it by the Minister for urgent consideration.'

While the Minister is required to consult ICASA before issuing such a direction, ICASA may not refuse to comply with a direction where, for example, it believes that the public interest requires it to undertake a special enquiry or to consider urgently a particular matter.[1] Section 13A(2) violates FC s 192 by subjecting ICASA to direct executive control.

Section 13A(5)*(a)* empowers the Minister to issue 'policy directions of general application on matters of broad national policy consistent with the objects mentioned in section 2 of the Broadcasting Act.'[2] Before a policy direction is made the Minister must consult ICASA, engage in a notice and comment procedure in the Government Gazette and refer the proposed direction to the Parliamentary Portfolio Committee for comment.[3] In terms of section 13A(5)*(b)*, ICASA 'must consider' a policy direction issued by the Minister in performing its functions. While ICASA must consider a policy direction, that does not mean that it must act in accordance therewith. Although the ICASA Act creates the opportunity for government to interfere with the regulation of broadcasting by ICASA, the Minister has not yet engaged in the kind of mischief FC s 192 was intended to cure.

Government interference, of course, is not confined to actions by the Executive. ICASA's authority to regulate broadcasting has been undermined by the Legislature on at least two occasions.

First, the Telecommunications Amendment Act introduced section 32C to the Telecommunications Act.[4] Telecommunications Act s 32C(1)*(b)* provides that with effect from 7 May 2002, 'Sentech Limited[5] shall be granted a licence to provide multimedia services to anyone who requests such service.' While this provision appears in the Telecommunications Act, it is clear that a multi-media service, being a quintessentially converged service, involves broadcasting.[6]

[1] IBA Act s 13A(4).
[2] These matters include: the radio frequency spectrum, for the purposes of planning broadcasting and other services, universal service coverage targets of the public broadcasting services and the application of new technologies that interface with broadcasting.
[3] IBA Act s 13A(6).
[4] Act 64 of 2001.
[5] A 100% state-owned company which engages in a variety of broadcasting, broadcasting signal distribution and telecommunications activities, but which is primarily a broadcasting signal distributor.
[6] The broadcasting features in the definition of a multi-media service contained in Telecommunications Act s 1 are as follows: 'a telecommunication service that integrates and synchronises various forms of media to communicate information or content in an interactive format, including. (i) audio; (j) visual content.'

The licensing of Sentech is constitutionally suspect in two respects. The licence to Sentech Limited is granted by Parliament, not ICASA. This legislative grant undermines the independence of the broadcasting regulator because multi-media services by definition involve broadcasting and places under state 'control . . . those matters directly connected with the functions which [ICASA] has to perform under the Constitution.'[1] Any future competition in respect of multi-media services is to be introduced not by the regulator, but by the Minister. In terms of section 32C(3)*(a)* of the Telecommunications Act, it is the Minister who shall invite applications for other multi-media services on a date to be fixed by the Minister and it is the Minister that grants additional multi-media licences. This grant of power by the Legislature to the Executive violates FC s 192. The second legislative act undermining ICASA occurred when the Broadcasting Amendment Act granted two additional regional television licences to the SABC.[2] ICASA's role in this regard was reduced to drafting licence conditions and determining whether or not these regional services were entitled to draw revenues from advertising.[3]

Despite these legislative incursions into ICASA's ostensibly independent domain, South Africa's broadcasting legislation grants ICASA sweeping powers to regulate broadcasting in a fair and impartial manner. These powers include the ability to: (1) determine important policy issues in a range of position papers; (2) invite applications for licences, evaluate these and proceed to grant and issue licences to the successful applicants; (3) impose licence conditions upon broadcasting licenses;[4] and (4) make regulations on a range of broadcasting-related matters without requiring the assistance of any other person or body.[5]

(c) Legislative Provisions Regarding the Powers, Duties and Independence of ICASA in the Regulation of Telecommunications[6]

FC s 192 does not require all electronic communications to be independently regulated. The requirement of independent regulation applies only to broadcasting. With to the regulation of telecommunications, ICASA lacks meaningful institutional independence.[7] The Telecommunications Act enables the the Executive,

[1] *New National Party* (supra) at para 99.
[2] Act 64 of 2002.
[3] Broadcasting Act s 22A(3).
[4] IBA Act s 43(2).
[5] IBA Act s 78.
[6] A number of the ideas contained in this section were first published elsewhere. See J White 'South Africa' in C Long (ed) *Global Telecommunications Law and Practice* (Revision Service 6, 2004).
[7] After the 1994 elections, the first democratically-elected government set to work re-regulating the telecommunications sector. Traditionally, this sector had been controlled by the Post-Master General and, following the incorporation of Telkom SA Limited ('Telkom'), by Telkom, in terms of the Post Office Act. Act 44 of 1958. Telkom was the exclusive provider of all telecommunication services save for mobile cellular telecommunication services.

The Telecommunications Act introduced far-reaching changes in regard to telecommunications. It established: *(a)* SATRA, an independent body to regulate telecommunications in the public interest; *(b)* competitive licensing procedures for certain telecommunications services such as Value-Added Network Services ('VANS') and Private Telecommunications Networks ('PTNs') and *(c)* provided for a period of exclusivity during which no-one other than Telkom could provide certain Public Switched Telecommunication Services ('PSTS') or certain telecommunication facilities.

particularly, the Minister, to so thoroughly determine telecommunications policy that one leading commentator has argued that ICASA has, in respect of telecommunications regulation, been 'capture[d] by government.'[1]

(d) Policy Formation

The signal difference in regard to ICASA's position *viz a viz* broadcasting and telecommunications policy directions issued by the Minister is that according to section 5(4)*(d)* of the Telecommunications Act, ICASA 'shall perform its functions in accordance with a policy direction issued under this section.' ICASA is not free to act independently of the Ministerial policy directions in respect of telecommunications even where it is of the view that the public interest so requires.

(e) Regulation Making

The Telecommunications Act does not empower ICASA to make its own regulations. Every regulation crafted by ICASA must be approved and published by the Minister before it takes legal effect.[2]

This lack of institutional independence with regard to telecommunications is not simply a problem in theory. Regulations passed by ICASA often remain unapproved or unpublished for months. At the time of writing, the Minister's refusal to approve and to publish ICASA's regulations with regard to VANS has deleteriously affected a competitive sector of the telecommunications market.

The regulations regarding Facilities Leasing and Interconnection Guidelines provide yet another example of ICASA's lack of institutional independence. While Telecommunications Act ss 43(3) and 44(5) grant ICASA the authority to prescribe such guidelines, the Minister withdrew these guidelines shortly after approving them.[3] In *Telkom SA Limited v The Independent Communications Authority in South Africa & Others,* the High Court set aside the Minister's withdrawal of the guidelines.[4] The High Court wrote:

> [T]he function of the Minister in respect of an amendment or withdrawal is confined to approving and publishing it. In other words, the amendment or withdrawal cannot emanate from her. It must come from [ICASA]. It would be ludicrous for the Minister to approve a withdrawal of which she is the author. The Minister cannot unilaterally withdraw regulations.[5]

[1] T Cohen 'SA Telecommunications and the Impact of Regulation' (2003) 47(1) *Journal of African Law* 67, 83.

[2] Telecommunications Act s 96(6) read with Telecommunications Act s 95(3).

[3] The Interconnection Guidelines are contained in Notice 1259, *Government Gazette* 20993 (15 March 2000) as amended by Notice 3457, *Government Gazette* 24203 (19 December 2002). The Facilities Leasing Guidelines are contained in Notice 12560, *Government Gazette* 20993 (15 March 2000).

[4] *Telkom SA Limited v The Independent Communications Authority in South Africa & Others* 1904/2000 (Unreported, Transvaal Provincial Division, 2000)(*'Telkom SA'*).

[5] Ibid at 19.

(f) Licensing and Pro-Competitive Determinations

Perhaps the most troublesome aspect of ICASA's lack of independence with regard to telecommunications is to be found in the licensing regime established by the Telecommunications Act. International norms for independent regulation require that licences be awarded without government interference. South Africa's telecommunications regulatory regime, however, requires Ministerial intervention throughout licencing process.[1] The Minister determines the telecommunications market structure by deciding both when invitations to apply for such licences will be issued[2] and who will be granted these licences.[3]

In terms of section 35(2) of the Telecommunications Act, once ICASA has made a recommendation to the Minister, the Minister may accept or reject the recommendation or may request further information from ICASA or may refer the recommendation back to ICASA for further information. It is clear that the statutory regime does not, in fact, allow the Minister to substitute her or his decision for that of ICASA. However, this provision has not been observed in respect of the licensing of the Second National Operator ('SNO'). It appears that the Minister will grant the PSTS licence despite ICASA having twice recommended that the awarding of a 51% stake therein not be granted.

Section 35A of the Telecommunications Act gives the Minister sweeping powers to ignore entirely the existing regulatory regime for licensing created by ICASA.[4] Section 35A(1)*(a)* provides that '[n]otwithstanding the provisions of sections 34 and 35 in the case of the major licences,[5] the Minister may, in specific instances, determine the manner in which applications may be made, such as by way of auction or tender, or both, and the licensing process and the licensing conditions that will apply.'[6] Given the apparently unfettered power to do away with the statutory and the regulatory framework set out in sections 34 and 35 of the Telecommunications Act, s 35A(1)*(a)* may violate both FC s 192 and FC s 44. (The latter provision of the Final Constitution vests national legislative authority in Parliament.) In *Executive Council, Western Cape Legislature v President of the RSA,* the Constitutional Court held that the grant by the legislature to the executive of '[a]n unrestricted power to amend the Transition Act cannot be justified on the grounds of necessity.'[7] While s 35A of the Telecommunications Act does not

[1] See Telecommunications Act s 34(2)*(a)*: a public switched telecommunications service licence, a mobile cellular telecommunications service licence, a national long-distance service licence, an international telecommunication service licence, a multi-media service or any other telecommunication service as prescribed.

[2] Telecommunications Act s 34(2)*(a)*.

[3] Telecommunications Act s 35(2) read with Telecommunications Act s 35(5).

[4] Telecommunications Amendment Act 64 of 2001.

[5] Telecommunications Act s 34(2)*(a)*.

[6] Note that these 'specific instances' are not defined anywhere in the legislation.

[7] *Executive Council, Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 62.

expressly grant the Minister the power to amend sections 34 and 35 of the Telecommunications Act, her unfettered discretion to determine the applications process, the licensing process and the licensing conditions amounts to such a power.[1]

[1] An instructive example of Ministerial intervention in the licensing process has been the 2002–5 licensing of the SNO to bring about a duopoly in the PSTS market. The South African PSTS market has been dominated by Telkom. Telkom's PSTS monopoly officially ended on 7 March 2002. However the licensing of the SNO has been fraught and at the time of writing we have yet to see the licensing of a competitor to Telkom. In brief, invoking her licensing powers in terms of the Telecommunications Act, s 35A, the Minister set out a three stage licensing process:

- 30% of the SNO would be set aside for the electricity and transport para-statal companies which had their own telecommunication networks.
- 19% of the SNO would be set aside for a black economic empowerment shareholder and issued an invitation to apply for that stake.
- An invitation to apply for the remaining 51% stake was issued by the Minister.

The criteria made it clear that an international operator with capital and extensive experience was sought. Unfortunately, given the depressed international telecommunications market and (no doubt) the convoluted SNO licensing process, no such operator applied. ICASA evaluated both of the applicants and recommended that neither be granted the 51% stake in the SNO. The Minister then again invoked s 35A and announced that the 51% stake would be awarded by the Minister following a non-public process that entirely excluded ICASA. Again, invitations to apply where issued. After finding that two of the applicants who responded to the second invitation to apply had 'qualified' for the 51% stake, the Minister then announced that ICASA would be involved in evaluating the applicants. ICASA once again found that neither met the qualification criteria and again recommended that the 51% stake not be granted but that it be warehoused and invitations reissued when the global telecommunications market had recovered sufficiently. The Minister took some months to consider ICASA's recommendation, and then, contrary to the provisions of section 35(2) of the Telecommunications Act — which do not allow her to substitute her own decision for that of ICASA's — announced that each of the applicants would be given 13% in the SNO and that the remaining 25% would be warehoused until a future date. In fact, each of the applicants was given 12% in the SNO. It appears that the remaining 26% is to be given to a consortium of foreign telecommunications operators.

The Minister is also responsible for determining when the telecommunication facilities provisioning market is to be opened up to competition. One of the key features of the current telecommunications regulatory environment is the fact that Telkom, whose largest shareholder remains the South African government as represented by the Minister, is the exclusive provider of certain telecommunications facilities. For example, only Telkom and/or the SNO may provide telecommunication facilities used by VANS licensees and only Telkom and/or the SNO may provide the fixed lines used by mobile cellular service licensees. This facilities-based exclusivity is entirely in the hands of the Minister. She or he decides when each of these exclusivity periods is to end. The precise wording used is 'until a date to be fixed by the Minister by notice in the Gazette'. Similarly, the Minister is responsible for determining when the provision of voice services will be opened up to competition. Section 40(3)*(a)* of the Telecommunications Act provides that no person who provides a VANS 'shall permit that service to be used for the carrying of voice until a date to be fixed by the Minister by notice in Gazette'. On 3 September 2004, the Minister made series of determinations ('Ministerial Determinations') in regard to the above, including setting 1 February 2005 as the date upon which, *inter alia*:

- mobile cellular telecommunications service licensees may utilise 'any fixed lines which may be required for the provision of the service';
- VANS 'may carry voice using any protocol'; and
- VANS 'may also be provided by telecommunications facilities other than those provided by Telkom and the SNO or any of them'.

ICASA then undertook a series of public stake-holder discussions and released a media statement giving its legal interpretation of the Ministerial Determinations, including, in particular, that the effect of section 4*(a)* of the Ministerial Determinations was that from 1 February 2005, VANS 'may self-provide facilities'.

24E.4 ICASA: THE CHALLENGE OF CONVERGENCE

This bifurcated nature of ICASA's independence *viz a viz* broadcasting and telecommunications regulation, will be especially difficult to manage given the fact that convergence of technologies means that the boundaries between telecommunications and broadcasting are increasingly blurred. It is often difficult to say whether a particular technological innovation should be classified as falling within the domain of broadcasting or telecommunications. Indeed, convergence was the rationale for the merger of SATRA and the IBA and the establishment of ICASA in the first place.

Parliament has recently released the Convergence Bill[1] in an attempt to 'promote convergence in the broadcasting, broadcasting signal distribution and telecommunications sectors.'[2] The Convergence Bill will repeal the IBA and Telecommunications Acts and amend the Broadcasting Act.[3]

The Convergence Bill meets the urgent need for a single electronic communications statute through its rationalization of the existing statutory framework for broadcasting and telecommunications. While the Convergence Bill will undoubtedly go through many iterations prior to promulgation, several provisions of the Bill threaten ICASA's independence and appear to be constitutionally infirm.

First, the Minister determines the date when, as well as the geographical area within which, communications network services licences may be granted.[4] ICASA may only accept and consider such licences from a date to be fixed by the Minister by notice in the Gazette.[5] Because broadcasting signal distribution has a significant impact on broadcasting, the regulation thereof should be carried out by the independent authority envisaged by FC s 192 without involvement by the Minister. Second, ICASA is required to submit to the Minister for approval proposed licence conditions in respect of individual licences.[6] The issuance of broadcasting licences is a quintessentially regulatory function and FC s 192 contemplates the

ICASA then set about engaging in a regulation-making exercise to ensure that appropriate VANS licence conditions would be in place before 1 February 2005. Unfortunately, on 25 January 2005, the Minister issued a media statement (which obviously cannot alter the legal status of the Ministerial Determinations made in terms of the provisions of the Telecommunications Act) in which she said, *inter alia*, '[t]he issue of self provisioning was issued in the government's policy determination only in relation to mobile cellular operators in terms of fixed linksit is the intention that value-added networkoperators may obtain facilities from any licensed operator and as specified in the determinations.' The Telecommunications Act does not empower the Minister to substitute the facilities provisioning restrictions found in the Telecommunications Act with her own facilities provisioning restrictions. The Telecommunications Act allows the Minister only to determine when the particular facilities provisioning restrictions set out in the Telecommunications will come to an end. This she has done in the Ministerial Determinations. However, the Minister has refused to approve and publish ICASA's VANS regulations. The disputes between the two parties regarding the self-provisioning issue, has left the entire VANS sector in a state of flux.

[1] B9-2005, *Government Gazette* 27294 (16 February 2005).

[2] Convergence Bill, Preamble.

[3] Convergence Bill s 88 read with the Schedule.

[4] Convergence Bill s 5(5).

[5] Convergence Bill s 5(4).

[6] Convergence Bill s 9(2)*(a)*.

discharge of such a duty by an independent authority.[1] Third, ICASA will be obliged to submit any frequency band plans to the Minister for approval.[2] The regulation of frequency spectrum is another aspect of broadcasting that requires oversight by an independent authority. Fourth, while Parliament and the Executive should bear ultimate responsibility for the development of macro-policy, ICASA should remain solely responsible for micro-policy formulation and implementation of the macro-policy developed by Parliament. ICASA alone should be responsible for conducting enquiries as to how best to implement the macro-policy goals determined by Parliament, making regulations, issuing invitations for applications for licences (where appropriate), granting licences, and regulating the frequency spectrum. Where the current Convergence Bill enables the Minister to determine such micro-policy outcomes, its provisions are, at the very least, suspect.

[1] Convergence Bill s 5(2)*(c)*.
[2] Convergence Bill s 34(7).

24F Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

Stuart Woolman and Julie Soweto Aullo

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THE COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES

24F.1 INTRODUCTION

The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities ('CRLC') was the last of the Chapter 9 Institutions to be launched.[1] This chapter suggests why, in this case, the last shall not be first.

Two bodies of law govern the CRLC. FC ss 185 and 186 set out its objects and composition. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act ('CRLC Act') fleshes out the CRLC's mandate.[2] After the setting the historical stage for the advent of the CRLC, we look at how the political environment of this Chapter 9 Institution will shape these two bodies of law and will shrink the actual space within which the CRLC operates.

24F.2 POLITICAL BACKGROUND

The iniquitous policies of apartheid bequeathed a legacy of division. Yet the divide-and-conquer strategy of apartheid also succeeded in creating conditions for social cohesion.[3] Even where apartheid quite consciously attempted to destroy both 'nations' and the spaces they occupied, oppressed communities

[1] Chapter 9 of the Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC'), s 181, provides for the establishment of seven 'state institutions to strengthen constitutional democracy': *(a)* the Public Protector, FC ss 182–183; *(b)* the Human Rights Commission, FC s 184; *(c)* the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, FC ss 185–186; *(d)* the Commission for Gender Equality, FC s 187; *(e)* the Auditor-General, FC s 188–189; *(f)* the Electoral Commission, FC ss 190–191; and *(g)* the Independent Authority to Regulate Broadcasting, FC s 192. The Interim Constitution contains no similar set of provisions. See Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution').

[2] Act 19 of 2002. The Act came into effect on 30 November 2002.

[3] What explains the resilience of religious, cultural and linguistic communities and their ability to retain a certain level of social cohesion under conditions of enormous economic pressure and political disintegration? Freud's theory of the 'narcissism of minor difference' holds that under conditions of uncertainty and instability, people project their anxiety onto others. These 'others' become the source or the cause of the uncertainty or instability despite the fact that they may bear no responsibility for an internal state or an external state to all affairs. The us/them dynamic reinforces the identification of individuals with the group and turns the group into a safe harbour or a laager. Apartheid drove groups together at the same time as it drove them apart. See S Freud *Civilization and Its Discontents* (1929) 117 ('It is always possible to bind together a considerable number of people in love, so long as there are other people left over to receive the manifestations of their aggressiveness. I once discussed the phenomenon that it is precisely communities with adjoining territories, and related to each other as well, that are engaged in constant feuds and in ridiculing each other — like the Spaniards and the Portuguese, for instance, the North Germans and the South Germans, the English and the Scots and so on. I gave this phenomenon the name of the "narcissism of minor differences".') See also S Freud *The Taboo of Virginity* (1918); S Freud *Group Psychology and the Analysis of Ego* (1921); M Ignatieff *The Warrior's Honor* (1997). One might go so far as to claim that the 'in-group exists [solely] by virtue of a denied egoism and a deflected

demonstrated enormous resilience. They lost neither their voice nor their desire to be heard.[1]

Despite this palpable desire to be heard, the new constitutional dispensation devotes little meaningful political space to the specific aspirations of various volk. And for good reason. Before the velvet revolution of 1994, most political claims based on culture, language, ethnicity and religion were greeted with suspicion, and, sometimes, outright hostility.[2] From the passive resistance of Ghandi, through worker movements of the early 20th century to the Freedom Charter, the preferred language of liberation was that of human rights discourse. The liberation movement's utilisation of rights discourse reflected a considered rhetorical response to romantic assertions of White, Christian, English and Afrikaner supremacy.

The liberation movement's universalist turn provides only a partial explanation for the failure of group-based claims.[3] Much of the white minority political

suspicion; the out-group by virtue of the innate suspicion displaced toward it and rationalized on the basis of difference, however minor.' See AG Burstein 'Ethnic Violence and the Narcissism of Minor Differences' (1999) 3 (Manuscript on file with author). On this account, the CRLC's promotion of difference is likely to produce greater enmity, not greater amity. But Burstein's characterization is too strong by half. Freud understood the extent to which individuals are a function of their constitutive attachments *and* that the individual transcends his basic drives by drawing down on positive group narratives. Freud is neither a methodological individualist nor a pessimist. Freud does, however, sound a cautionary note about the extent to which minor differences obstruct understanding and expedient politicians exploit minor differences. It is an admotion the CRLC ought to take seriously as it sets about this exercise in multi-cultural nation-building. See Dr M Masoga 'Panel on Religious Diversity and Nation Building', National Consultative Conference for the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (Durban, 30 November 2004)('The rainbow is nice. But let's forget about the nation.')

[1] Dr P Madiba 'Opening Remarks' National Consultative Conference for the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (Durban, 29 November 2004)(Text of speech on file with author). Dr Madiba is currently the Chief Executive Officer for the CRLC. See also F Venter 'The Protection of Cultural, Linguistic and Religious Rights: The Framework Provided by the Constitution of the Republic of South Africa, 1996', Konrad Adenauer Stiftung Seminar on Multiculturalism (1999) 19, available at http://www.kas.org.za/Publications/SeminarReports/Multiculturalism/VENTER.pdf, (accessed on 1 April 2004).

[2] A Sachs 'Opening Remarks' Konrad Adenauer Stiftung Seminar on Multiculturalism (1999) 9 available at http://www.kas.org.za/Publications/SeminarReports/Multiculturalism/SACHS1.pdf, (accessed on 1 April 2004); H Giliomee 'The Majority, Minorities and Ex-Nationalities in South Africa and the Proposed Cultural Commission' Konrad Adenauer Stiftung Seminar on Multiculturalism (1999) 37, available at http://www.kas.org.za/Publications/SeminarReports/Multiculturalism/GILIOMEE.pdf, (accessed on 6 January 2005).

[3] Contemporary human rights discourse demands democratic majority rule. In South Africa, democratic majority rule meant black majority rule. Neither the rhetoric of universal human rights nor the actual demographics of South Africa supported the Swiss-like cantonal arrangements that the more sophisticated apologists for the white right offered up.

posturing in the 1980s over alternatives to apartheid focused on the need for a 'broad-based, multi-racial government to contain possibly explosive ethnic or cultural demands.'[1] Representatives of the white minority insisted on various forms of constitutional protection of existing privilege in exchange for relinquishing political power.[2] The African National Congress ('ANC') rebuffed every attempt to entrench what it termed 'racial group rights'.[3] Political power would have to be traded for peace. That peace, and the retention of economic power by the white minority, would be vouchsafed by a firm ANC commitment to a justiciable Bill of Rights.[4]

The Final Constitution's rejection of group political rights[5] led some commentators to seek solace in the 'notable levels of constitutional significance' to which cultural, linguistic and religious matters were elevated.[6] They note that the Final Constitution contains six different provisions concerned with culture, eight with language and four with religion.[7]

[1] See J de Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (4th Edition, 2001) 470. See also Giliomee (supra) at 37.

[2] De Waal et al (supra) at 470.

[3] See I Currie 'Minority Rights: Education, Culture and Language' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Chapter 35.

[4] See Giliomee (supra) at 40. The ANC rightly insisted that minority rights *qua* static, non-demographically representative levels of political representation were unacceptable. The ANC proposed a compromise between two political positions: (1) the demand for unfettered majority rule and (2) the insistence of some whites for structural guarantees. The Bill of Rights is, in large part, the content of that compromise.

[5] See Sachs (supra) at 13 ('The instruments and institutions of government are not based on cultural groups, cultural communities or representation in terms of membership of a particular community.') See also *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC)(Sachs J) at paras 39–42 (Justice Sachs argues that the religious, linguistic and cultural rights found in the Interim Constitution — eg, IC s 32*(c)* — are best understood as efforts to 'concretis[e] . . a certain measure of cultural/linguistic autonomy in the private sphere. . . . Section 32*(c)* appears, therefore, to be an explicit, if limited, acknowledgement of the need in certain circumstances to allow for a departure from the general principles of [non-discrimination found in IC] s 8(2) read with [IC] s 8(4) . . . What appears to be provided for in s 32*(c)* is not a duty on the State to support discrimination, but a right of people, acting apart from, but in practicable association with the State, to further their own distinctive interests.')

[6] See Venter (supra) at 19.

[7] Ibid. Provisions of the Final Constitution dealing with culture, language and religion include, but are not limited to: *(a)* ss 9, 30, 31, 235 (culture); *(b)* ss 6, 29, 30, 31, 35, 235 (language); and *(c)* ss 9, 15, 30, 31 (religion). These various provisions were driven, at least in part, by three constitutional principles enshrined in the Interim Constitution. Two of the principles required recognition of minority rights and another required the inclusion in the Final Constitution of a provision ensuring a right of self-determination by any community sharing a common cultural and language heritage.

The Final Constitution, as a liberal political document, certainly carves out space within which self-supporting cultural, linguistic and religious formations might flourish. However, the drafting histories of FC s 185 and the CRLC Act give the lie to the claim that the basic law sets great store in the vindication of specific group claims based upon language, culture and religion.[1]

24F.3 Constitutional Negotiations, the Peculiar History of FC s 185 and the Travaux Preparatoire for The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act

The problem of accommodating minorities in a democratic state dominated the political negotiations that preceded the enactment of the Interim Constitution. Between 1986 and 1991, the South Africa Law Commission investigated mechanisms for the protection of group rights.[2] To this end, it solicited submissions from white right-wing intellectuals on anti-assimilationist strategies.[3] Conservative Party, Afrikaner Volkswag and Boere-Vryheidsbeweging testimony before the Commission reflected deep dissatisfaction with mere 'minority group protection'. These parties favoured 'national group protection'. National group protection meant self-determination 'in its widest form'. This widest of forms was understood by most Afrikaner nationalists to mean a right to secede.[4]

One substantive outcome of this 'debate' was the establishment of a 'Volkstaat Council'.[5] IC ss 184A and 184B gave effect to an informal agreement between the National Party government, the ANC and those Afrikaner groups who wished to pursue the creation of a Volkstaat.[6]

According to IC ss 184A and 184B, the Council was charged with gathering the requisite data necessary to make an informed decision about the contours, the powers and the political structures of a Volkstaat. The constitutional amendment

[1] The one notable exception is land. The Final Constitution, the Constitutional Court and the Supreme Court of Appeal have recognised the legitimacy of group claims — against both the state and other private parties — grounded largely in dispossession of title based upon racially discriminatory classifications. See, eg, *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC); *Abrams v Allie* 2004 (4) SA 534 (SCA).

[2] South Africa Law Commission *Group and Human Rights* Working Paper 25, Project 58 (1989).

[3] South Africa Law Commission *Group and Human Rights* Interim Report (1991).

[4] Ibid at 39–80.

[5] See Constitution Amendment Act 2 of 1994, s 9 (Inserts Chapter 11A into Interim Constitution). IC ss 184A and 184B created the necessary environment for a Volkstaat Council and established its brief. However, neither IC s 184A nor s 184B required the establishment of either a Volkstaat Council or a Volkstaat.

[6] The exact nature of the bargain is found in the 'Accord on Afrikaner Self-Determination Between the Freedom Front, the African National Congress and the South African Government/National Party' (23 April 1994). This document was signed by General Constand Viljoen, Leader, Freedom Front; Mr. Thabo Mbeki, National Chairman, African National Congress; Mr Roelf Meyer, Minister of Constitutional Development and Communication, Government of the Republic of South Africa. The Accord took note of IC ss 184A and 184B, Constitutional Principle 34 and a previously unsigned

that created the Council also introduced a 34th Constitutional Principle. This principle required that the Final Constitution make some provision for the exercise of the right to self-determination by any community 'sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way.'[1]

Enabling legislation for the Volkstaat Council was enacted in November 1994.[2] In March 1999, the Volkstaat Council concluded its activities with a presentation

memorandum between the ANC, the AVF and the South African government. It read, in relevant part, as follows: '1. The parties agree to address, through a process of negotiations, the idea of Afrikaner self-determination, including the concept of a Volkstaat. 2. The parties further agree that in the consideration of these matters, they shall not exclude the possibility of local and/or regional and other forms of expression of such self-determination. 3. They agree that their negotiations shall be guided by the need to be consistent with and shall be governed by the requirement to pay due consideration to Constitutional Principle XXXIV, other provisions of the Constitution of the Republic of South Africa Act 200 of 1993 as amended, and that the parties take note of the Memorandum of Agreement, as referred to above. 3.1 Such consideration shall therefore include matters such as: 3.1.1 substantial proven support for the idea of self-determination including the concept of a Volkstaat; 3.1.2 the principles of democracy, non-racialism and fundamental rights; and 3.1.3 the promotion of peace and national reconciliation. 4. The parties further agree that in pursuit of 3.1.1 above, the support for the idea of self-determination in a Volkstaat will be indicated by the electoral support which parties with a specific mandate to pursue the realisation of a Volkstaat will gain in the forthcoming election. 4.1 The parties also agree that, to facilitate the consideration of the idea of a Volkstaat after the elections, such electoral support should be measured not only nationally, but also by counting the provincial votes at the level of: 4.1.1 the electoral district; and 4.1.2 wherever practical the polling stations as indicated by the parties to, and agreed to, by the Independent Electoral Commission. 5. The parties agree that the task of the Volkstaatraad shall be to investigate and report to the Constitutional Assembly and the Commission on Provincial Government on measures which can give effect to the idea of Afrikaner self-determination, including the concept of the Volkstaat. 6. The parties further agree that the Volkstaatraad shall form such advisory bodies as it may determine. 7. In addition to the issue of self-determination, the parties also undertake to discuss among themselves and reach agreement on matters relating to matters affecting stability in the agricultural sector and the impact of the process of transition on this sector, and also matters of stability including the issue of indemnity inasmuch as the matter has not been resolved. 8. The parties further agree that they will address all matters of concern to them through negotiations and that this shall not exclude the possibility of international mediation to help resolve such matters as may be in dispute and/or difficult to conclude. 8.1 The parties also agree that paragraph 8.0 shall not be read to mean that any of the deliberations of the Constitutional Assembly are subject to international mediation, unless the Constitutional Assembly duly amends the Constitution to enable this to happen. 8.2 The parties also affirm that, where this Accord refers to the South Africa Government, it refers to the South African Government which rules South Africa until the April 1994 elections.' Talk of a Volkstaat represented the ambitions of some white Afrikaans-speaking South Africans — and the willingness of the ANC to accede to those demands necessary to secure a peaceful election and political transition. See D Basson *South Africa's Interim Constitution: Text and Notes* (1994) 237.

[1] See Constitution Amendment Act 2 of 1994, s 13*(b)*(Inserts Constitutional Principle 34 into Interim Constitution).

[2] The Volkstaat Council Act 30 of 1994. The 20 members of the council provided for in the Interim Constitution were elected from among members of the Freedom Front by a joint session of the National Assembly and the Senate.

to the State President of its 'Final Report' on the logic of and the logistics for an autonomous Afrikaner state.[1]

Express provision for a Volkstaat died with the advent of the Final Constitution.[2] The desire to protect the cultural, religious and linguistic interests of Afrikaners did not. The CRLC is understood by many of the principals in the Constitutional Assembly negotiations to have been the compensation extracted by representatives of white minority parties for the elimination of any textual support in the Final Constitution for a Volkstaat Council or a Volkstaat.[3] The volume of complaints lodged thus far with the CRLC on issues of concern to members of various Afrikaans-speaking communities underwrites this conclusion.[4]

In August 1998, the Department of Provincial and Local Government ('DPLG'), which possessed ministerial authority over the CRLC, initiated discussions on proposed functions and structures of the CRLC. The first pre-commission National Consultative Conference ('NCC') engaged solicited submissions, research by the Human Sciences Research Council ('HSRC'), white papers from government and policy statements from key civil society stakeholders.[5] This process was repeated again, a year later, in September 1999.[6] The second pre-commission NCC debated four theme papers: (1) the appropriate model for the

[1] Volkstaat Council *Final Report: Findings and Recommendations* (31 March 1999).

[2] While a Volkstaat is not mentioned by name in the Final Constitution, FC s 235 still holds out the possibility for 'self-determination' for 'any community sharing a common cultural and language heritage, within a territorial entity in the Republic'. The constitutional basis for the Volkstaat Council disappeared with the certification of the Final Constitution. The Council, as a statutory body, limped on for another two years. The Volkstaat Council Act itself has not been repealed.

[3] Dr C Mulder claims that the Freedom Front engaged the ANC leadership in a vigorous debate about a Volkstaat. The Freedom Front's aspirations for Afrikaner territorial and political self-determination were rebuffed. The ANC would only go so far as to recognise the Freedom Charter's commitment to 'internal' cultural and religious self-determination. Both parties seemed to accept the CRLC as an institution that could satisfy the requirements of 'internal' cultural and religious self-determination. Phone Interview between Dr C Mulder, Spokesman for the Freedom Front, and Dr C Landman (5 January 2005). Interview with Dr C Landman, Commissioner, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (5 January 2005). Confirmation of this assessment comes in the form of then Minister of Provincial and Local Government FS Mufamadi's statement that the Volkstaat Council would be phased out and its responsibilities handed over to the CRLC. Interview with Dr C Landman, Commissioner, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (5 January 2005). The brinkmanship of white minority politicians also meant that agreement on official language policy and state-funded education in minority languages eluded the Constitutional Assembly until the very end. For a brief synopsis of the negotiations regarding the constitutional protection of minority rights, see I Currie 'Minority Rights: Education, Culture and Language' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S. Woolman *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Chapter 35.

[4] See § 24F.4*(e)*(iii) infra.

[5] The first pre-commission NCC was jointly sponsored by the Minister for the Department of Provincial and Local Government and the Minister for the Department of Arts, Culture, Science and Technology and was held in Pretoria on 24 September 1998.

[6] The second pre-commission NCC was sponsored by the Minister for the Department of Provincial and Local Government and was held in Midrand, Gauteng on 23–24 September 1999.

CRLC; (2) the mandate of the CRLC; (3) the relationship between the CRLC and other institutions; and (4) the relationship between cultural councils and the CRLC.[1]

Deliberation on the CRLC Act began in earnest in August 2001. In terms of the initial draft CRLC Bill,[2] the CRLC possessed only five of the powers now present in the CRLC Act.[3] During parliamentary debate, some members of the Provincial and Local Government Select Committees expressed concern over the CRLC's apparent inability to protect the cultural, religious and linguistic rights of communities.[4] Parliamentarians could not agree about whether the CRLC, as a watchdog of community rights, should have as much 'bite' as 'bark'.[5] Earlier drafts of clause 21 of the Bill included powers to 'facilitate the resolution of conflicts of an inter-cultural, inter-religious or inter-linguistic nature' and to 'investigate complaints of a cultural, religious or linguistic nature against any person or organ of state'.[6] These capacities were omitted from the August 2001 draft Bill. In the end, no mention was made of conflict resolution in the CRLC Act. The word 'conflict' was replaced with the word 'friction'.[7] The majority of parliamentarians ultimately preferred to see the CRLC as a mediator between communities.[8]

Mediation was not to be limited to active disputes. The CRLC was also charged with the responsibility of opening up channels of communication that would identify and diffuse incipient civil unrest.[9] This role as mediator, rather than litigator, meant that the CRLC was only granted the power to bring matters of

[1] See 'Final Report: Second National Consultative Conference', Democracy and Governance, Human Sciences Research Council (November 1999) ('Report of the 2nd NCC'). The two most hotly debated issues were the role of the cultural councils and representation on the CRLC. The councils are intended to elicit, to amplify and to mediate local, geographically bounded concerns of religious, linguistic and cultural communities. They are tools for mobilisation and dispute resolution. Stakeholders articulated strong differences about *(a)* how such councils would be recognised; and *(b)* the amount of state support they should receive. Conditions of fiscal austerity have largely solved the latter problem. Financial support will be limited. The issue of how councils will be recognised — and thus who speaks for a particular community — still vexes the CRLC. Interview with T Thitanyana, Corporate Affairs Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (11 January 2005). See § 24F.4(i) infra. The second pre-commission NCC was more decisive with respect to representation. A proposal for direct representation of all communities was rejected. Political legitimacy would be conferred on the CRLC through an open nomination process for its full-time chairperson and some 11 to 17 part-time commissioners.

[2] Bill B62-2002, *Government Gazette* No 22573 (17 August 2001).

[3] Compare CRLC Bill, s 21(1) and CRLC Act, s 5(1).

[4] Debate on the Bill by the Provincial and Local Government Portfolio and Select Committees: Joint Sitting (PLGP Committee) commenced on 25 September 2001.

[5] Minutes of the PLGP Committee hearings of 25 September 2001, available at www.pmg.org.za/docs/2001, (accessed on 04 March 2004).

[6] Minutes of the PLGP Committee hearings of 24 October 2001, Appendix 1, available at www.pmg.org.za/docs/2001, (accessed on 04 April 2004).

[7] See CRLC Act, s 5*(g)*.

[8] Minutes of the PLGP Committee hearings of 24 October 2001, Appendix 1, available at www.pmg.org.za/docs/2001, (accessed on 04 April 2004).

[9] Minutes of the PLGP Committee hearings of 25 September 2001, available at www.pmg.org.za/docs/2001, (accessed on 04 March 2004). See the submission by the South African Council of Churches (SACC).

concern to the attention of 'appropriate authorities'.[1]

The weakness of the CRLC reflects concern about its redundancy.[2] The Pan South African Language Board ('PANSALB'), the Youth Commission, the Commission for Gender Equality ('CGE'), the Human Rights Commission ('SAHRC'), the Public Protector, the Judicial Inspectorate, the National House of Traditional Leaders and the Free State Centre for Citizenship, Education and Conflict Resolution have briefs that overlap with that of the CRLC.[3] Many MPs have expressed anxiety about the expenditure of public funds on an entity that duplicates the functions of existing institutions.[4] However, Parliament's stonewalling and token funding suggest that the motivations for creating a toothless institution lie elsewhere.[5] Without putting too fine a point on it, the CRLC's

[1] Minutes of the PLGP Committee hearings of 02 October 2001, available at www.pmg.org.za/docs/2001, (accessed on 04 March 2004). The prevailing consensus is made manifest in the CRLC Act. The powers of the Commission enable it to: '*(g)* facilitate the resolution of friction between and within cultural, religious and linguistic communities or between any such community and an organ of state, and where the cultural, religious or linguistic rights of a community are affected; *(h)* receive and deal with requests related to the rights of cultural and linguistic communities; *(i)* make recommendations to the appropriate organ of state regarding legislation that impacts, or may impact, on the rights of cultural, religious and linguistic communities.' CRLC Act, ss 5(1)(g–i). Passage of the Act did not end debate about its content. Barely a year after the Act came into force, and prior to the actual establishment of the CRLC, a Bill was introduced in Parliament to amend the powers of the Commission under the Act. A van Niekerk (MP), Private Members Legislative Proposal on 'Enforcement Powers for the Section 185 Commission' (12 September 2003), available at www.pmg.org.za/docs/2003, (accessed on 04 March 2004).

[2] Minutes of the PLGP Committe Hearings of 24 October 2001, Appendix 1, Submission of the Afrikanerbond, available at www.pmg.org.za/docs/2001, (accessed on 04 March 2004).

[3] See Report of the 2nd NCC (supra) at 10–12. For example, the CRLC is given the power, under FC s 185(3), to investigate any matter that falls within the purview of the South African Human Rights Commission. FC 185 (3) was amended by Constitution of the Republic of South Africa Amendment Act 65 of 1998, s 4.

[4] Ibid.

[5] Under-funding of the Chapter 9 Institutions is a common problem. Parliament has been put on notice that low levels of funding and overweening executive oversight make effective operation of these institutions difficult, if not impossible. The Corder Report is absolutely scathing in this regard. See H Corder, S Jagwanth & F Soltau 'Report on Parliamentary Oversight and Accountability' Report to the Speaker of the National Assembly (1999), available at www.pmg.org.za/docs/2001/viewminute.php?id=811, (accessed 10 January 2005)('Corder Report'). Corder, Jagwanth and Soltau write that

> In their submissions to us, many constitutional institutions have also pointed out that the present arrangement may result in a very low priority being given to constitutional institutions, as government departments may be slow in recognising the interests of an institution which does not form part of the core business of the department. The very direct control by the executive of constitutional institutions can have a devastating effect on the independence and credibility of these offices. . . .
>
> In the first place, to make institutions dependent on budget allocations received through the very departments that they are required to monitor is not desirable. Secondly, these institutions must be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of the government. Approval by the executive of budgets, or other issues such as staffing, is thus inconsistent with independence, as well as the need to be perceived as independent by the public when dealing with their cases. This executive power could render impotent state institutions supporting constitutional democracy through the potential denial of both financial and human resources. Furthermore, the special constitutional features of these institutions are not recognised as executive priorities are set.

Corder, Jagwanth & Soltau 'Corder Report' (supra) at paras 7.2 and 7.2.1. The authors then cite a decision by the Constitutional Court in support of the proposition that Parliament, not the executive, is responsible for securing the independence of the Chapter 9 Institutions and for creating oversight mechanisms that ensure that they discharge their duties. See *New National Party of South Africa v Government of*

questionable provenance, its lack of powerful constituencies, and its nominal independence give the government little motivation to take the CRLC seriously.[1]

the Republic of South Africa & Others 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 98 ('It is for Parliament, and not the executive arm of government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.') Parliament has largely abdicated those responsibilities. The Corder Report suggests that, at a minimum, the budget of each Chapter 9 Institution be subject to a separate vote — a vote distinct from that for the budget for the department with line authority, and a vote distinct from that for the budget of other Chapter 9 Institutions. See Corder, Jagwanth & Soltau 'Corder Report' (supra) at para 7.3 ('By giving the constitutional institutions a separate budget vote their status as separate constitutional entities is recognised and they would be able to emerge from the shadow of the executive. We regard this as a minimum to achieve and fulfil the requirements of the Constitution.') To satisfy other constitutional imperatives, the Corder Report advocates the passage of legislation — an Accountability and Independence of Constitutional Institutions Act — and the creation of a parliamentary oversight committee — a Standing Committee on Constitutional Institutions. Ibid at paras 1.1, 7.3, 7.4, 8. (These recommendations are grounded in the requirements of FC ss 55(2), 181(1),181(2), 181(3) 181(4) and 196(3)). Parliament has not acted on any of the Corder Report recommendations. Other Chapter 9 Institutions have noted this failure to act with dismay. See N B Pityana 'South African Human Rights Commission Presentation to the Justice Portfolio Committee — Budget Review and Programmes 2001/2002' (8 June 2001), available at www.sahrc.gov.za, (accessed on 11 January 2005). Chairperson Pityana writes:

> After five years of operations, it is very discouraging to have to report that questions about the independence of the Commission have not been resolved. . . . National Treasury continues to relate to the Commission through the Justice Department. This means that we have no direct means of having queries and problems resolved. . . . Since inception, the Commission has constantly raised concerns about the manner in which its budget was set. We pointed out *ad nauseum* that at no stage was there a proper assessment of the mandate of the Commission and the appropriate level of resources necessary to execute the mandate. Initiatives by the Minister of Finance — such as his requirement in 1996 that we prepare a business plan — . . . .was promptly ignored once it was presented. . . . Another example of this insensitivity to the independence of national institutions is where, without consultation or reference to the affected institutions, the *Public Finance Management Act, 1999* prescribes in Section 66(4) that constitutional institutions 'may not borrow money, nor issue guarantee, indemnity or security, nor enter into any transaction that binds the institution or entity to any future commitment'. The effect of this, of course, is that the Commission cannot rent property in its own name, acquire property for its sole use and in its own name. This is unacceptable especially as the Human Rights Commission Act states clearly that the Commission 'shall be a juristic person'. At a stroke the rights and privileges of an independent institution have been removed without the participation of the Commission. . . . [S]uch a cavalier attitude to the law is worrisome. . . . [Another] concern has been about the treatment of the reports of the Commission by parliament. Some progress appeared to be developing when the Speaker commissioned Professor Hugh Corder to advise on the effective functioning of the oversight responsibility of parliament towards Chapter 9 institutions. . . . We are not aware that any action has been taken by parliament on the report. The rules of parliament still do not allow meaningful participation by national institutions, our reports still do not have a portal that fits in parliamentary procedures and there is no committee dedicated to receiving and reviewing the reports of the Commission.

Ibid at 4–5.

[1] For more on the basis for this assessment, see § 24F.4*(g)* infra. This conclusion is grounded, in part, in Parliament's refusal to release any monies for the CRLC in the fiscal year 2004 until September 2004. Parliament agreed to release monies necessary for the CRLC's operation only when several Commissioners made the Minister and Parliament aware that the CRLC could not host its statutorily-required launch within its first year of operation if it did not receive the requisite funds. The government's identification of the CRLC with the Volkstaat Council and its evident disdain for the CRLC's activities further bear out this assessment. See § 24F.4*(g)* infra. Others are slightly more sanguine about government's attitude towards the CRLC, and attribute government's inaction to a belief, however misguided, that Chapter 9 Institutions generally ought to assist the government in carrying out its policies. Interview with T Thitanyana, Corporate Affairs Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (11 January 2005).

24F.4 THE CRLC

(a) Objectives of the CRLC

The Final Constitution is committed to 'healing the divisions of the past', 'establishing a society based on democratic values, social justice and fundamental human rights', and building a South Africa 'united in [its] diversity'.[1] The CRLC is similarly tasked. It is responsible for deepening our appreciation for the wide array of South African cultures, languages and religions.[2] As the same time it is obliged to build bridges between communities in a country riven by racial, ethnic, cultural and linguistic strife.[3] The CRLC has used its bridge-building mandate to arrogate to itself a third mandate — national identity formation. At a high enough level of abstraction, multicultural recognition and national identity formation appear compatible.[4] But as the debate at the compulsory launch

[1] See Final Constitution, Preamble.

[2] See CRLC Act, s 4. Section 4 states that the mission of the CRLC is:

(a) to promote respect for and further the protection of the rights of cultural, religious and linguistic communities;

(b) to promote and develop peace, friendship, humanity, tolerance and national unity among and within cultural, religious and linguistic communities on the basis of equality, non-discrimination and free association;

(c) to foster mutual respect among cultural, religious and linguistic communities;

(d) to promote the right of communities to develop their historically diminished heritage; and

(e) to recommend the establishment or recognition of community councils.

[3] See CRLC Act, Preamble.

[4] We are not convinced that they are compatible. Indeed, for a society in transition, multicultural recognition and national identity formation appear to pull in opposite directions. Even if individual identities are formed in open dialogue, they are largely shaped and limited by a predetermined set of scripts. Collective recognition becomes important, in large part, because the body politic has denied the members of some groups the ability to form — on an individual basis — a positive identity. In a perfect world, the elimination of group-based barriers to social goods would free individuals to be whatever they wanted to be. But even in a perfect world, claims for group recognition do not dissipate so readily. What is the basis for the demand for group recognition? In any multicultural society, two different kinds of claims for equal respect and two different senses of identity sit uncomfortably alongside one another. The first emerges from what Taylor calls a politics of equal dignity. See C Taylor 'The Politics of Recognition' in A Gutmann (ed) *Multiculturalism* (1996) 1. It is based on the idea that each individual human being is equally worthy of respect. The second issues from a politics of difference. This form of politics tends to revolve, primarily, around the claim that every group of people ought to have the right to form and maintain its own — equally respected — culture. The important distinction between the two is this. The first focuses on what is the same in all of us — that we all have dreams and that we should all be allowed to pursue these dreams. The second focuses on a specific aspect of our identity — our membership in a group or groups — and says that the purpose of our politics ought to be, ultimately, nurturing or fostering that particularity. The power of this second form of liberal politics springs largely from its involuntary character — the sense that we have no capacity to choose this aspect of our identity. It chooses us. See M Walzer 'On Involuntary Association' in A Gutmann (ed) *Freedom of Association* (1998) 64, 67. The problem we face in our own liberal democracy is that it is difficult, if not impossible, to accommodate both kinds of claims. As Taylor himself notes, while 'it makes sense to demand as a matter of right that we approach . . . certain cultures with a presumption of their value . . . it can't make sense to demand as a matter of right that we come up with a final concluding judgment that their value is great or equal to others.' Taylor (supra) at 16. But the demand for political recognition of distinct cultures amounts to just that. Moreover, such recognition reinforces a narcissism of minor difference that, in turn, provokes anxiety about the extent to which members of other groups secure access to the most important goods in a polity. Such anxiety about a just distribution of goods — and the manner in which

of the CRLC in November 2004 suggests, persons and groups silenced by years of oppression often have a greater interest in being heard than they do in pledging allegiance to a nation still in the early stages of gestation. Whether such a broad brief as national identity formation is coherent — or if coherent, even plausible given the political environment and the CRLC's fiscal constraints — will surface and resurface as a theme throughout the rest of this chapter.

(b) Composition of the CRLC

FC s 186(2) provides that the CRLC must:

(a) be broadly representative of the main, cultural, religious and linguistic communities in South Africa;
(b) be broadly reflect the gender composition of South Africa.

Section 9 of the CRLC Act stipulates that the CRLC must consist of:

(a) a Chairperson appointed by the President in terms of the Act; and
(b) no fewer than 11 and no more than 17 other members appointed by the President in accordance with the procedure set out under the Act.[1]

The CRLC Act supplements these compositional desiderata with a requirement that the members of the CRLC be selected in a manner that ensures that it 'collectively possesses sufficient knowledge and experience concerning issues relevant to the promotion and protection of cultural, religious and linguistic communities and nation-building.'[2]

Following an invitation to South Africans to nominate qualified individuals to serve on the CRLC Commission,[3] the first 18 commissioners were appointed by the President of the Republic in late 2003.[4] At present, there are seven female commissioners (including the deputy chairperson).[5] The members of the CRLC

group affiliation distorts that distribution — necessarily interferes with national identity formation. The ANC has, for both historical reasons and for reasons associated with its vision of transformation, refused to lend significant support to politics associated with group recognition. The Constitutional Court is also predisposed towards claims of equal respect grounded in a politics of equal dignity. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at paras 28–30 ('[I]t is clear that the constitutional protection of dignity requires us to acknowledge the value and the worth of all *individuals* as members of society.') See also *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41 ('[D]ignity is at the heart of individual rights in a free and democratic society... [E]quality means nothing if it does not represent a commitment to each person's equal worth as a human being, regardless of their differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second class citizens.')

[1] See FC s 186(1). For the procedure of appointment of the Chairperson and other members of the CRLC Commission, see CRLC Act, ss 12 and 11, respectively.

[2] See CRLC Act, s 4*(c)*.

[3] See CRLC Act, s 11.

[4] Of 196 nominees, 54 candidates were interviewed. The appointments were made on 30 September 2003. See South African Information Service, available at http://www.southafrica.info/ess_info/sa_glance/constitution/culturalrights.htm, (accessed on 4 April 2004).

[5] The CRLC's Chief Executive Officer, P Madiba, is also a woman.

Commission represent a broad range of South African cultural, religious and linguistic groups.[1]

The 'sufficient knowledge' criterion for selection has yet to play a meaningful role in the appointments process. It has, however, become an issue in terms of the operation of the Commission. Administrative officers have argued that the 'nation-building' requirement means that commissioners from a particular demographic group ought not to be used as emissaries to that group. For example, a commissioner who adheres to some form of Judaism ought not to engage members of the Jewish community on matters related to the official business of the CRLC. The ostensible rationale for this policy position is that nation-building requires communication across demographic groups. Several commissioners have rejected this position on the grounds that a commission charged with the protection of cultural, religious and linguistic communities must, in fact, deploy those commissioners best able to understand — from the inside — the concerns of a given community.[2]

(c) Mandate and functions of the CRLC

Given its very recent, and substantially delayed establishment, the CRLC's chief preoccupation is with the consolidation of its power. CRLC commissioners and staff recognize that turning an institution perceived by many as a white elephant into a felt necessity is contingent upon its capacity to discharge its constitutional and statutory obligations.

The CRLC mission statement holds that the CRLC's primary aim is 'to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities. To achieve this mission, the CRLC must:

(a) create channels of communication between the state and communities;
(b) monitor compliance by the state and civil society with its mandate;
(c) mediate in inter-community conflict situations and facilitate harmonious co-existence;
(d) develop programmes that foster sensitivity, respect and understanding for cultural, religious and linguistic diversity;
(e) lobby government departments and legislative authorities in order to recommend amending or repealing laws that undermine its aims or enacting laws in furtherance of its ends.[3]

[1] The profiles of the individual commissioners are available at http://www.crlcommission.org.za/commissioners.html, (accessed on 27 May 2004).

[2] Interviews with Dr C Landman, Commissioner, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (02 June 2004 and 05 January 2005).

[3] See CRLC website, available at http://www.crlcommission.org.za/about.html, (accessed on 27 May 2004).

Section 5 of the CRLC Act sets out the primary responsibilities of the CRLC.[1] These responsibilities encompass public education and information, investigation and dispute resolution, policy and research, the creation of community councils, and the sponsorship of a national consultative conference.

The CRLC, as an independent state institution supporting constitutional democracy,[2] is expected to perform its functions without fear, favour or prejudice.[3] As the experience of other Chapter 9 Institutions attests, budgetary constraints and dependence upon government largesse can make it difficult to discharge constitutional obligations.[4] The CRLC's own experience with fiscal foot-dragging by the government suggests how easily the independence of these institutions erodes.[5]

(d) Public education and information

Section 5*(a)* of the CRLC Act requires the CRLC to conduct information and education programmes that promote public understanding of its objects, role and activities. To achieve this particular end, the CRLC Commission has depended, quite literally, on the good offices of such older and better-established sister institutions as the South African Human Rights Commission ('SAHRC') and the Commission for Gender Equality ('CGE'). The SAHRC's provincial offices have provided the CRLC with the space and the credibility necessary to hold workshops and conferences designed: (1) to introduce itself to the public and (2) to encourage people to speak to sensitive issues regarding race, culture, language, class and religion.

The CRLC has decided that in order to carry out its mandate, it must become a locus for debate and not merely an oracle making orotund pronouncements on identity politics.[6] As a result, the CRLC views its 'constituencies' as vital to its political success: the more communities it mobilises around language, culture and religion, the more likely it is to succeed in shaping its own agenda.[7] Fiscal limits and the capacity constraints will make it difficult for the CRLC to play such a role. Members of the public have already complained that the CRLC has made little effort to follow up on early initiatives and that the CRLC lacks the staff

[1] See also FC ss 185(1), (2) and (3).

[2] See *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC)(Chapter 9 Institutions are independent and thus cannot be a part of the national sphere of government.)

[3] See CRLC Act, s 3.

[4] See Corder, Jagwanth & Soltau 'Corder Report' (supra) at para 7.2.1; Pityana (supra) at 4–5.

[5] Interview with Ms M Bethlehem, Deputy Chairperson, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (1 December, 2004). Interview with Dr C Landman, Commissioner, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (5 January 2005).

[6] Interview with Dr MD Guma, Chairperson, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (14 May 2004)(For example, the Chairperson would like the CRLC to assist in the creation of a receptive environment in traditional communities for debate about AIDs, ARVs and responsible sexual behaviour.)

[7] Ibid.

necessary to maintain connections with the communities to which it has already reached out.[1]

(e) Investigation and dispute resolution

(i) *Power to intervene*

The CRLC possesses the power to monitor, to investigate and to research any issue concerning cultural, religious and linguistic communities and their rights.[2] Similarly, the CRLC may respond to requests related to the rights of cultural, religious and linguistic communities.[3] The CRLC must attempt to mediate conflicts between and within cultural, religious and linguistic communities as well as between any such community and an organ of state. These three functions suggest that the CRLC was designed to enable communities to resolve disputes amicably and to diminish the likelihood that communities would use the courts to ventilate grievances.

Unlike the enabling acts of other Chapter 9 Institutions, the CRLC Act grants the CRLC no independent basis upon which to bring a claim to court. This deficiency was the subject of debate prior to and subsequent to enactment of the CRLC's enabling legislation.[4] Parliament's considered opinion appears to be that the CRLC should not possess the power to protect cultural, religious and linguistic communities' rights or to enforce any of its recommendations. The CRLC may only make recommendations to 'the appropriate organ of state regarding legislation that impacts, or may impact, on the rights of cultural, religious and linguistic communities'[5] or 'bring any relevant matter to the attention of the appropriate authority or organ of state, and where appropriate, make recommendations to such authority or organ of state in dealing with such a matter.'[6]

The limitations placed on enforcement need not be crippling. The CRLC Act leaves open a number of other litigation strategies. The absence of an express right to litigate has not stopped other Chapter 9 Institutions, namely the Commission for Gender Equality ('CGE'), from asserting its right to do so.[7] Although the

[1] Interviews with delegates to National Consultative Conference for the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (29 November – 1 December 2004).

[2] CRLC Act, s 5*(e)*.

[3] CRLC Act, s 5*(b)*.

[4] A proposal to amend the Act in this regard was submitted to the Members and Legislative Proposals Standing Committee on 12 September 2003. See Commission for Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities Amendment Bill, available at http://www.pmg.org.za/docs/2003/viewminute.php?id=3527, (accessed on 4 March 2004).

[5] CRLC Act, s 5*(i)*.

[6] CRLC Act, s 5*(k)*.

[7] See, eg, *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA); *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC); *S v Jordan & Others (Sex Workers Education and Advocacy Task Force & Others as Amici Curiae)* 2002 (6) SA 642 (CC), 2002 (2) SACR 499 (CC), 2002 (11) BCLR 1117 (CC). See also C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) in *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D.

CGE has not yet initiated any case in its own name, it has exercised its litigation prerogative by lending support to or participating in cases that raise important gender issues. The CGE's intervention as an *amicus curiae* has established institutional precedent that the CRLC may well choose to follow. Another strategy, discussed more fully below, is to use other Chapter 9 Institutions — namely the SAHRC — to initiate litigation on the CRLC's behalf.

The absence of express powers to litigate will inevitably influence the role the CRLC crafts for itself. As it now stands, the CRLC views its role primarily as a consciousness raiser and not an agent of change.[1] Its enabling statute — as well as its current complement of commissioners — has created an institution less inclined to adjudicate competing claims and more disposed towards creating the conditions for mutual respect. Given the sensitive nature of the matters that fall within its purview, Parliament may have been wise to ensure that the CRLC uses the blunt cudgel of the law only as a last resort.

(ii) *Complaints and complaint mechanisms*

At the time of writing, the CRLC has no procedure for engaging complaints or requests for intervention.[2] Nor does the CRLC have any draft procedures on the table.[3] This failure to construct adequate mechanisms to field inquiries, to investigate disputes, to reach considered conclusions in law and to use such conclusions to facilitate conflict resolution means that the CRLC currently has no way of discharging meaningfully its constitutional obligations. That no script for dispute resolution exists stands as an indictment of the CRLC and reflects an abdication of responsibility by the government.[4]

[1] Interview with Dr MD Guma, Chairperson, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (14 May 2004).

[2] Complaints are currently assigned to individual commissioners on an ad hoc basis. Interview with Dr C Landman, Commissioner, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (05 June 2004); Interview with T Thitanyana, Corporate Affairs Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (11 January 2005).

[3] That does not mean that Commissioners and staff are without notions about how requests for intervention ought to be handled. The CRLC administration will likely float two proposals. The first would have the Corporate Affairs Officer ('CAO') *qua* Legal Advisor make the initial findings. A panel of commissioners would sit as an appellate body were a party to the dispute inclined to contest the CAO's finding. A second model — based upon the existing dispute resolution mechanisms at the SAHRC — would have one member of the CRLC staff and two outsiders make the initial finding. The finding would be binding on the CRLC. CRLC commissioners would be tasked with running hearings on issues of broader social import. Interview with T Thitanyana, Corporate Affairs Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (11 January 2005).

[4] While the CRLC and its administration bear the lion's share of responsibility for this lassitude, the Minister of Provincial and Local Government is equally culpable. As the Constitutional Court made patently clear in *New National Party of South Africa v Government of the Republic of South Africa & Others*, a Chapter 9 Institution is entitled to craft its own procedures to discharge its brief and the state is obliged to provide the requisite financial and administrative support. 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC). The Minister must accept a significant measure of responsibility for both the absence of adequate funding and the failure to supply adequate counsel to develop the necessary dispute resolution mechanisms.

(iii) *Requests for intervention*

Over the course of its first year of operation, the CRLC has received a number of requests for intervention. At the time of writing, none of the underlying disputes have been resolved.[1] The CRLC's current docket does, however, provide a glimpse of some of the religious, linguistic and cultural fault lines in South Africa.

Not surprisingly, members of Afrikaans-speaking communities have lodged a significant number of complaints. The content of these complaints demonstrates remarkable thematic variation: (1) religious education in secondary schools; (2) government subsidies for former Model C schools; (3) faith-based drug rehabilitation centres; (4) diminution in the status of Christianity; (5) language instruction in secondary school education; (6) a lack of respect for Christianity in advertising copy at an institution of tertiary education.[2] Complaints from other quarters are just as diverse: (1) requests for expansion of the list of 11 existing official languages; (2) a referral from the SAHRC regarding ancestral burial rights; (3) discrimination against a Reformed Presbyterian Church; (4) the predominance of Christian holidays as official holidays; (5) admissions policies for private religious schools; (6) a failure to provide sufficiently for instruction in African languages in public schools curriculum; (7) absence of Department of Education policy on resource allocation for and equity considerations involved in religious studies instruction; (8) a long-standing historical dispute between the Khoi and the San communities.

(f) National Consultative Conference ('NCC')

The CRLC must convene two consultative conferences during each five-year term.[3] The first such conference must take place within 12 months of a new term of the Commission.[4] The dual purpose of the NCC is to evaluate South Africa's progress with regard to the promotion and protection of the rights of cultural, religious and linguistic communities and to take stock of its success in forging a national identity.[5]

The first official NCC took place in the time period required by statute.[6] Whether the NCC achieved its goals depends upon one's perspective.

That almost 600 delegates — representing the entire spectrum of South Africa's religious, linguistic and cultural communities — attended the NCC certainly counts in its favour. That the CRLC was able to arrange for the plenary sessions to be simultaneously translated into the 11 official languages also stands as a remarkable achievement. Groups long silenced had an opportunity to speak and to be heard.

[1] 'List of Complaints Received' Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (07 January 2005)(On file with author).

[2] Ibid.

[3] CRLC Act, s 13(1).

[4] CRLC Act, s 24.

[5] CRLC Act, s 25. See also CRLC Act, ss 26–29 (Prescribes procedures for and persons who must attend NCC).

[6] The first official NCC took place between 29 November and 03 December 2004 in Durban, KwaZulu-Natal.

While we are loath to play the role of Cassandra, the results of the first official NCC do not augur well. As we have already noted, the CRLC battled to secure the funding for this statutorily mandated event.[1] Only after the CRLC noted that the funds for the conference could be drawn down from the unused balance of the CRLC's budget for the preceding fiscal year did Parliament agree to release the monies necessary to hold the conference. A large amount of money — some R5.5 million — was spent on this five-day affair. Given that the entire allocation for the CRLC in 2005 is a mere R10 million, one might well ask whether such a sum for a conference is warranted. The agenda for the NCC promised that the annual report for the CRLC would both be delivered at the beginning of the conference and be addressed by the CRLC Chairperson. No such report was delivered or addressed.[2] One could have reasonably expected the CRLC to provide some public account of its budget, its management structure, its complaint docket and its accomplishments.[3] This lackadaisical attitude dovetails nicely with the demonstrably equal degree of disinterest displayed by the government. The government's disdain is evident in the failure of the State President, the Deputy President or the Minister of Provincial and Local Government to attend any of the NCC proceedings in which they had agreed to participate.[4] The notable absence of government representatives coupled with foot-dragging on funding intimates strongly that the state would be happy to see the CRLC go the way of the Volkstaat Council. The inability of the CRLC to create mechanisms to capture the information generated by this first NCC and to establish itself, at a minimum, as a clearing-house for concerns about religious, linguistic and cultural communities only serves to reinforce the current government's dim view of the CRLC.

(g) Funding

According to both the Final Constitution and the CRLC's enabling statute, Parliament must supply sufficient levels of funding for the CRLC to discharge its

[1] Interview with Ms M Bethlehem, Deputy Chairperson, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (1 December, 2004). Interview with Ms P Madiba, Chief Executive Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (30 November 2004).

[2] The only document produced was the text of the Chairperson's speech. The document does not constitute an annual report nor did it contain any meaningful content. The CRLC had also promised to launch a cultural-religious primer at the first statutorily mandated NCC. Interview with Dr MD Guma, Chairperson, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (14 May 2004). This ecumenical document was supposed to interrogate South African cultural and religious practices and to offer other communities a window into the cultural and religious lives of their fellow citizens. No such primer was produced for the NCC.

[3] The failure to produce such a document after a year of operation bears out the frustration — expressed off the record — of CRLC commissioners with the CRLC's inability to meet even the most minimal indicia of success.

[4] All three accepted the invitation to speak and were accommodated in the NCC programme. All three begged off during the week prior to the launch.

responsibilities. The CRLC Commission may generate additional funding from private sources.[1]

As it stands, it is not clear that Parliament has supplied sufficient funds for the CRLC to operate effectively.[2] The CRLC proposed a budget of R32 million for the fiscal year 2005. Parliament responded with an allocation of R10 million.[3] The political appointees and the administrative staff of the CRLC themselves cannot agree on appropriate levels of funding or the nature of the budget. According to several commissioners, the CRLC administrative staff put forward a budget in which 93% of state monies would support administrative activities and personnel costs and a mere 7% would support CRLC programmes. Moreover, the CRLC administration's decision to put forward a budget without approval by an appropriately constituted CRLC executive body appears to contravene the express wording of the CRLC Act.

(h) Co-operation between the CRLC Commission and other institutions and organs of state

In order to execute its mandate, the CRLC may: *(a)* 'make arrangements with another constitutional institution or organ of state to assist the Commission in the performance of any of its functions' and *(b)* 'delegate any of its powers to a constitutional institution or organ of state with which it has made the necessary arrangements for the rendering of the agreed assistance'.[4] In addition, where the functions of the CRLC 'overlap with those of other constitutional institutions or organs of state', the Commission is obliged to co-operate with those institutions.[5]

To avoid the anticipated overlap, a cross-referral docket system for the CRLC, the SAHRC and the CGE is in the offing.[6] The CRLC has already decided that it

[1] CRLC Act, s 24(2). While private funds have the potential to solve some capacity problems, it is difficult to raise money in the absence of a strategic plan stating the aims of the CRLC. Interview with T Thitanyana, Corporate Affairs Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (11 January 2005).

[2] Other Chapter 9 Institutions have alleged that current levels of funding are inadequate to their respective tasks. See Corder, Jagwanth & Soltau 'Corder Report' (supra) at paras 7.2., 7.3, 7.4; Pityana (supra) at 4–5. However, at least one member of the CRLC does not believe that inadequate funding levels are to blame for the CRLC's and other Chapter 9 Institutions' lack of independence. Interview with T Thitanyana, Corporate Affairs Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (11 January 2005). Advocate Thitanyana suggests that the CRLC and other Chapter 9 Institutions bear part of the responsibility for making themselves irrelevant. Advocate Thitanyana believes that a 'culture of companaros' (our locution) — made up of government officials, NGO staff and academics who all know one another — creates an environment in which little meaningful criticism takes place.

[3] Interview with T Thitanyana, Corporate Affairs Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (11 January 2005).

[4] CRLC Act, s 6(1).

[5] CRLC Act, s 6(2).

[6] Interview with Dr MD Guma, Chairperson, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (14 May 2004); Interview with Dr C Landman, Commissioner, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (05 June 2004).

will only consider 'communal' complaints. Individual complaints are to be referred to the SAHRC and CGE.

(i) Cultural councils

To carry out its mandate, the CRLC must receive significant support from the various religious, linguistic and cultural communities it is meant to serve. To this end the CRLC Act makes provision for the registration of cultural councils.[1] These councils are meant to operate at the coalface of community conflict: serving as a conduit for information to and from the CRLC, and assisting the CRLC in managing disputes. However, issues of 'who' can legitimately represent a community and how many councils can serve any given constituency has led to yet another case of vapour lock at the CRLC. The CRLC has not registered a single cultural council because it still lacks criteria and procedures for their establishment.[2]

[1] CRLC Act, ss 36–38, reads, in relevant part: '36. Recommendation of establishment of community councils: 1.Persons belonging to a cultural, religious or linguistic community may form, join and maintain cultural, religious and linguistic associations and other organs of civil society as envisaged in section 31 of the Constitution. 2. The establishment of such a council would be conducive to: a. the promotion and protection of the rights of such a community; and b. the promotion and development of peace, friendship, humanity, tolerance and national unity among and within the different communities in South Africa. The Commission may recommend to a community, which is not organised, to initiate and establish a community council . . . 37. Recognition of community councils. 1. A community council envisaged in section 36(1) or (2) may, in the prescribed manner, apply to the Commission for recognition. 2. The Commission may in writing recognise a community council for purposes of participation in a national consultative conference and section. 3. A community council recognised in terms of subsection (2) may apply to the Commission or any other organ of state for financial assistance. 38. Aims of community councils. 1. The aims of a community council recognised in terms of section 37 should be to: a. preserve, promote and develop the culture, religion or language of the community for which it is recognised; or b. advise the Commission on, and assist the Commission in, matters concerning the achievement of the objects of the Commission.'

[2] Interview with T Thitanyana, Corporate Affairs Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (11 January 2005).

25 Public Procurement

Glenn Penfold and Pippa Reyburn

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25.1 Introduction: Public Procurement as a Constitutional Principle

With the coming into effect of the Interim Constitution, government procurement was elevated to the status of constitutional principle.[1] This position was confirmed in the Final Constitution.[2] However, it is not only the status of government procurement that has changed since 1994. Whereas the overwhelmingly dominant factor determining the identity of the successful bidder for government contracts before 1994 was price, a number of factors must be taken into account under the new dispensation. Although price is probably still the most important factor,[3] it is not necessarily decisive. Government procurement has been identified as a crucial tool to achieve economic redress for historically disadvantaged persons and the 'empowerment' component of a bid for government contracts is an important factor in determining its likelihood of success.[4]

Not only the factors taken into account in awarding government contracts have changed since procurement became a constitutional issue. The principles applicable to the mechanisms and procedures used to make such awards have also become more complex and nuanced. Fairness, equity, transparency, competitiveness and cost-effectiveness all govern the procurement process, and the award of any government contract can be challenged on the basis that the procedure followed was in violation of those principles.[5]

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[1] See s 187 of the Constitution of the Republic of South Africa Act 200 of 1993, which came into effect on 27 April 1994 ('Interim Constitution' or 'IC').

[2] See s 217 of the Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC').

[3] See for example *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province & Others* 1999 (1) SA 324, 351G-H (CkH), [1997] 4 All SA 363 (CkH) ('*Cash Paymaster Services*'); *SA Post Office Ltd v Chairperson of Western Cape Provincial Tender Board & Others* 2001 (2) SA 675, 686-7 (C), 2001 (5) BCLR 500 (C).

[4] This policy position is clear from recent proposed legislation, the Broad Based Black Economic Empowerment Bill, voted on by the National Assembly on 20 August 2003 as B27B-2003. Section 9 permits the Minister of Trade and Industry to issue codes of practice by notice in the *Government Gazette* on broad-based black economic empowerment (the definition of which includes, *inter alia*, 'preferential procurement'). These codes may include 'qualification criteria for preferential purposes for procurement and other economic activities' (sub-s 9*(b)*). Section 10 of the Bill provides that every organ of state must take into account and, as far as is reasonably possible, apply any relevant code of practice issued in terms of the Bill in, *inter alia*, 'developing and implementing a preferential procurement policy' (sub-s 10*(b)*).

[5] Although the South African legal system is unusual in entrenching the principles of public procurement in the Constitution, the emphasis that FC s 217 places on principles such as transparency, fairness and competitiveness is consistent with international best practice. A number of regional and international initiatives on public procurement reform are aimed at achieving these same goals. See, for example, the World Trade Organisation (WTO) plurilateral Agreement on Government Procurement (to which South Africa is not a party), the latest version of which came into force on 1 January 1996; also the United Nations Commission on International Trade Law Model Law on Procurement of Goods, Construction and Services ('the UNCITRAL Model Law'), and the Common Market for Southern and Eastern Africa (COMESA) public procurement project. With regard to the latter, see S Karangizi 'Regional Procurement Reform Initiative' (2003), a paper presented at the Joint WTO/World Bank regional workshop on procurement reforms and transparency in public procurement for Anglophone African countries in January 2003. Karangizi's paper is available from the WTO website, www.wto.org (use llinks from 'Government Procurement' page).

Before 1994, government procurement was regulated by national and provincial legislation. The State Tender Board Act[1] governed procurement at national and provincial levels, and various provincial ordinances, dealing with local government in their respective provinces, regulated contracting for goods and services at municipal level. The plethora of statutory provisions regulating procurement in the various spheres of government has been supplemented (and replaced) to some extent to take account of the constitutionalisation of public procurement.[2] There is, however, no single, comprehensive public procurement statute.[3]

It is important to note that a number of constitutional provisions, other than the procurement clause itself, are applicable to government tender processes and the adjudication of public procurement disputes. In particular, the right to just administrative action has been applied in several cases to evaluate the conduct of an organ of state in adjudicating a particular tender.

In this chapter, we will begin with an analysis of the constitutional procurement provisions and, in particular, the five principles of fair, equitable, transparent, competitive and cost-effective procurement. We will then discuss the legal position relating to preferential procurement under both the Constitution and the relevant legislation. This discussion will be followed by an examination of tender boards, municipal procurement, public-private partnerships and the right to just administrative action in the context of procurement. Finally, we will briefly deal with the remedies for non-compliance with the relevant rules of administrative and constitutional law.

25.2 The Constitutional Procurement provisions

(a) Interim Constitution

The constitutional regulation of public procurement was first provided for in s 187

[1] Act 68 of 1968.

[2] Most notably by the Preferential Procurement Policy Framework Act 5 of 2000 (the 'PPPFA'), which is mandated by FC s 217, but also by ss 38 and 51 of the Public Finance Management Act 1 of 1999 (the 'Public Finance Management Act'), as well as Treasury Regulation 16 promulgated in terms of the Public Finance Management Act (which relates to public-private partnerships), s 10G(5) of the Local Government Transition Act 209 of 1993 (the 'LGTA'), and in respect of municipal service delivery, chapter 8 of the Local Government: Municipal Systems Act 32 of 2000 (the 'Systems Act').

[3] The lack of clear legal rules or a generic public procurement law, regulating all aspects of the topic, has been identified as an obstacle to a strong and well-functioning procurement system. See R R Hunja 'Obstacles to Public Procurement Reform in Developing Countries' (2003), a paper presented at the Joint WTO/World Bank regional workshop, available from the website www.wto.org. Other such obstacles identified by Hunja include the absence of 'an institutional arrangement that ensures consistency in overall policy formulation and implementation [and a] professional cadre of staff that implements and manages the procurement function'. Ibid at 2.

of the Interim Constitution.[1] This section envisaged the creation of a legislative framework for government procurement. It required the enactment of national and provincial legislation providing for the appointment of independent and impartial tender boards to deal with the procurement of goods and services for any level of government. Section 187(2) added the proviso that the tendering system established in this manner must be fair, public and competitive and that tender boards must, on request, give reasons for their decisions to interested parties. Subsections (3) and (4) then specified that no person may improperly interfere with the decisions and operations of the tender boards and that all decisions of tender boards must be recorded.

The obligation to ensure fair, public and competitive tendering contained in this provision primarily amounted to a directive to the national and provincial legislatures to enact suitable tendering legislation.[2] At a national level, tenders continued to be governed by the State Tender Board Act, as amended. In addition, pursuant to the constitutional command in s 187, provincial legislation was enacted to regulate the functions of provincial tender boards.[3]

(b) Final Constitution

Section 187 of the Interim Constitution was replaced by s 217 of the Final Constitution. FC s 217 provides as follows:

(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for —
   (a) categories of preference in the allocation of contracts; and
   (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

[1] IC s 187, headed 'procurement administration', provided as follows:
'(1) The procurement of goods and services for any level of government shall be regulated by an Act of Parliament and provincial laws, which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.
(2) The tendering system referred to in subsection (1) shall be fair, public and competitive, and tender boards shall on request give reasons for their decisions to interested parties.
(3) No organ of state and no member of any organ of state or any other person shall improperly interfere with the decisions and operations of the tender boards.
(4) All decisions of any tender board shall be recorded.'

[2] See *Olitzki Property Holdings v State Tender Board & Another* 2001 (3) SA 1247 (SCA), 2001 (8) BCLR 779 (SCA)('*Olitzki Property Holdings*') at paras 17-22.

[3] See, for example, the Provincial Tender Board Act (Eastern Cape) 2 of 1994; the Tender Board Act 2 of 1994 (Free State); the Western Cape Provincial Tender Board Law 8 of 1994; and the Gauteng Provincial Tender Board Act 2 of 1994.

Subsection (1) sets out a general requirement that public procurement must comply with certain fundamental principles. Subsections (2) and (3), in turn, stipulate that these principles do not prevent a public body from implementing a preferential procurement policy in terms of national legislation.

The transitional arrangements of the Constitution provide that the national legislation envisaged in subsection (3) must be enacted within three years of the Constitution coming into effect, but that this did not prevent the implementation of a preferential procurement policy under subsection (2) before that date.[1] The legislation enacted in terms of s 217(3) is the Preferential Procurement Policy Framework Act (PPPFA). It came into effect on 3 February 2000.[2]

(c) Application of s 217

Section 217(1) applies to organs of state 'in the national, provincial or local sphere of government' and 'any other institution identified in national legislation'. The interpretation of these phrases is fundamental to the application of s 217. We will consider each of them in turn.

(i) *'Organs of state in the national, provincial or local sphere of government'*

There are two aspects to the phrase, 'organ of state in the national, provincial or local sphere of government'. The entity or functionary must be *(a)* an organ of state; and *(b)* in a sphere of government. While we suggest that a broad approach should be adopted in respect of the former, this may not necessarily be the case for the latter.

The term 'organ of state' is defined in s 239 of the Constitution as:

> *(a)* any department of state or administration in the national, provincial or local sphere of government; or
> *(b)* any other functionary or institution —
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

[1] FC item 21(4) of Schedule 6.

[2] It should be noted that the Parliamentary Select Committee on Finance held public hearings during September 2003 on the effectiveness of the PPPFA, as a result of which a statement was made on behalf of the Cabinet that 'Cabinet examined the issue of procurement reform in line with the objectives of the Public Finance Management Act as well as the Broad Based Black Economic Empowerment Strategy and legislation. A new broad policy proposal was adopted, which includes devolution of responsibility and accountability to accounting officers and/or authorities, uniformity of interpretation across all spheres and minimum reporting requirements. The PPPFA will be revised accordingly'.

There are therefore three categories of organs of state: *(a)* state departments in any sphere of government (which would include, for example, the Department of Defence and a municipality);[1] *(b)* functionaries or institutions exercising a constitutional power or performing a constitutional function (for example, the Auditor-General and the Independent Electoral Commission);[2] and *(c)* functionaries or institutions 'exercising a public power or performing a public function in terms of any legislation'. The latter category extends the scope of organs of state to entities such as the Financial Services Board, the South African Broadcasting Corporation Limited and other bodies exercising public power or performing public functions in terms of legislation.[3] This last category would seem to embrace regulatory bodies, universities and parastatals.[4]

Although there was some initial disagreement, our courts generally adopted the control test for determining whether an institution amounted to an organ of state under the Interim Constitution. According to this test, an institution that was not a state department was an organ of state if it fell under the control of the state.[5] Nevertheless, in our view, the cases decided under the Interim Constitution are only of limited assistance in determining whether a body amounts to an organ of state for purposes of FC s 239. The reason for this is that, while the Interim Constitution defined an organ of state as 'any statutory body or functionary', the Final Constitution shifts the focus to the public nature of the function or power.[6] Accordingly, the focus should now be on whether the function or power performed by the relevant entity is public in nature.[7]

As noted above, s 217 does not simply refer to organs of state, but rather to organs of state 'in the national, provincial or local sphere of government'. There are three possible approaches to the interpretation of this wording. First, it may be argued that the phrase 'in the national, provincial or local sphere of

[1] See *Metro Projects CC & Another v Klerksdorp Local Municipality*, unreported judgment of the Supreme Court of Appeal, case no. 602/2002 (22 September 2003) at para 11 ('*Metro Projects*')(Court held that a municipality is obliged to comply with FC s 217).

[2] See *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) ('*Langeberg*').

[3] See *Nextcom (Pty) Limited v Funde NO & Others* 2000 (4) SA 491, 503 (T).

[4] See, for example, *Hoffman v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC); and *Transnet Limited v Goodman Brothers (Pty) Limited* 2001 (1) SA 853 (SCA), 2001 (2) BCLR 176 (SCA)('*Transnet Limited*').

[5] See S Woolman 'Application' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999)('Application'); J Klaaren & G Penfold 'Access to Information' in M Chaskalson et al *Constitutional Law of South Africa* (2nd Edition, OS, 2002) supra at 62-12–62-13 ('Access to Information').

[6] IC s 233(1)*(x)*. See Y Burns *Administrative Law under the 1996 Constitution* (2nd Edition, 2003) 22-25; I M Rautenbach & E F T Malherbe *Constitutional Law* (1996) 299. See Klaaren & Penfold 'Access to Information' (supra) at 62-13 (a discussion on the meaning of exercising a public power or performing a public function in terms of legislation).

[7] See Woolman 'Application' (supra) at 10-62 and Klaaren & Penfold 'Access to Information' (supra) at 62-13. A detailed discussion of the definition of organ of state for purposes of the Final Constitution falls beyond the scope of this chapter.

government' does not qualify the meaning of organ of state and s 217 therefore applies to all organs of state contemplated in the s 239 definition.[1] This approach is unattractive because it fails to give any meaning to the inclusion of the additional phrase. If the constitutional drafters had intended s 217 to apply to all organs of state, it could have excluded the additional phrase and simply referred to 'organs of state'. Second, it may be argued that s 217 only applies to those entities falling within paragraph *(a)* of the s 239 definition, i.e. departments of state or administration. This interpretation is consistent with the repetition of the phrase 'in the national, provincial or local sphere of government' in both ss 217 and 239. Nevertheless, in our view, this approach is also unsatisfactory in that it fails to explain the reference to organ of state, as opposed to 'department of state or administration', in s 217(1). We would argue that the effect of the additional phrase is that the constitutional procurement provision applies to an organ of state falling within paragraph *(a)* of the s 239 definition, as well as any other organ of state which is controlled by the state in such a manner that it may be considered to fall within the national, provincial or local sphere of government.[2]

Our preferred approach is also consistent with the decision of the Constitutional Court in *Independent Electoral Commission v Langeberg Municipality*. The Court held that the Independent Electoral Commission (IEC) is not an organ of state within the national sphere of government. The reasons for this included, amongst other things, that the IEC is independent of the state and is not subject to executive control.[3] In addition, this approach is consistent with the principal rationale for regulating public procurement, i.e. controlling the expenditure of public funds.[4]

Accordingly, s 217 of the Constitution will only apply to an entity, other than a state department, which exercises a public power or public function in terms of legislation and is controlled by the state. A non-state entity that is not controlled by the state (for example, a law society or a financial exchange) would, therefore, not be obliged to comply with the Constitution's procurement provisions, despite the fact that it may amount to an organ of state.[5] Therefore, although the control

[1] See *Goodman Brothers (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989, 993-7 (W), 1998 (8) BCLR 1024 ('*Goodman Brothers*'). Blieden J applied FC s 239 in assessing whether Transnet Limited qualifies as an organ of state for purposes of s 217. The learned judge simply enquired into whether Transnet amounted to an 'organ of state'. He failed to emphasise the additional wording 'in the national, provincial or local sphere of government'.

[2] *Goodman Brothers* (supra) essentially employs the control test discussed above.

[3] *Langeberg* (supra) at paras 27 and 30.

[4] This rationale, rather than the object of controlling the exercise of public power, means that it is not necessary for the procurement provisions to apply to all organs of state.

[5] It should be noted that, to the extent that such a body performs a public function or exercises a public power in engaging in procurement activities, such activities may amount to administrative action and would then be reviewable on administrative law grounds under the Promotion of Administrative Justice Act 3 of 2000 (the 'AJA').

test is no longer determinative of whether an entity amounts to an organ of state for purposes of the Constitution, this test remains important in deciding whether the constitutional procurement provision applies to that entity.[1]

(ii) *'Any other institution identified in national legislation'*

The second category of institutions to which s 217 applies is those 'identified in national legislation'. One approach to the interpretation of this phrase is that s 217 applies to any institution named in legislation for any purpose. This approach should be rejected. It leads to arbitrary results as to which institutions are bound by s 217 and has no regard to the underlying rationales for controlling public procurement.

The better approach is that the phrase 'identified in national legislation' means those entities identified in legislation as entities to which s 217(1) applies. The effect of this is that s 217(1) applies to all entities governed by the Public Finance Management Act, which, amongst other things, repeats the procurement principles set out in the constitutional provision.[2]

(iii) *The meaning of the phrase 'contracts for goods or services'*

Section 217 of the Constitution applies whenever an applicable entity 'contracts for goods or services'. This provision should be broadly read to include situations where an organ of state may have entered into procurement negotiations or put a contract out to tender, irrespective of whether such actions actually result in the conclusion of a contract.[3] If this were not the case, an organ of state would be free of the requirement to act in a fair, equitable, transparent, competitive and cost-effective manner unless a contract is actually concluded.

The phrase 'contracts for goods or services' should also be interpreted generously. It should apply to contracts for the provision of goods or services to the relevant body as well as contracts for the provision of goods or services on behalf of the body (i.e. the contracting-out or outsourcing of public functions).[4] For example, it would include a contract for the roll-out of anti-retroviral drugs on behalf of the Department of Health. Nevertheless, it would probably exclude

[1] In this chapter, for the sake of convenience and despite the approach suggested here, we generally refer to entities to which FC s 217 applies as 'organs of state'.

[2] See ss 38(1)*(a)*(iii) and 51(1)*(a)*(iii) read with the Schedules to the Public Finance Management Act. It may also include entities identified in the PPPFA.

[3] See *Transnet Limited* (supra) at 862: 'It may well be that the words "contracts for goods and services" must be given a wide meaning, similar to "negotiates for" etc.'

[4] See *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & Others* 2001 (3) SA 1013 (SCA), 2001 (10) BCLR 1026 (SCA) (on outsourcing agreements). See s 83 of the Systems Act, which reiterates the requirements of FC s 217 in relation to contracts for the provision of municipal services by a third-party service provider. See also the discussion on public-private partnerships at §25.7 below.

contracts where the state is providing (rather than procuring) the goods or services or other forms of benefit.[1]

25.3 The Five Principles

Section 217(1) of the Constitution provides that public procurement must be effected in accordance with a system which is 'fair, equitable, transparent, competitive and cost-effective'. This requirement is repeated in the Public Finance Management Act. A similar requirement is included in various provincial tender board statutes[2] and in the Local Government Transition Act[3] in relation to municipalities.

(a) The implications of the principles for public tenders

The extension of these principles is often difficult to discern. It will, therefore, sometimes be difficult to assess whether a particular procurement process complies with them. The most emphatic manner in which an organ of state can demonstrate compliance with these principles is through a public, transparent tender process in which all tenderers are treated fairly and equitably. A public tender is therefore the preferable means of engaging in public procurement.[4] Nevertheless, this does not mean that the use of a tender process is always required in order to comply with s 217(1).[5] In this regard, it is significant that, unlike s 187 of the Interim Constitution, s 217 does not make specific reference to a tender process (or tender boards), but simply provides that the system used

[1] This interpretation is consistent with the heading of s 217, 'Procurement'. The heading indicates that it only applies where public bodies procure goods or services and not where they supply such goods or services (eg a contract between a public utility and the end-user or for the purchase of a state asset). In this regard, art 2 of the UNCITRAL Model Law defines 'procurement' as 'the acquisition' of goods, construction or services.

[2] See, for example, ss 2(3) and 4(2) of the Provincial Tender Board Act (Eastern Cape) 2 of 1994.

[3] Section 10G(5) of the LGTA. See §25.6 below at p 25-26 for a more detailed discussion on local government procurement.

[4] Some of the benefits of tender procedures are reflected in the following statement of Pickard JP in *Cash Paymaster Services* (supra) at 350:

> Tender procedures, as we have come to know them over many years, have been the result of vast experience gained in the procuring of services and goods by government. They have evolved over a long period of time through trial and error and have crystallised into a procedure that has become vital to the very essence of effective government procurement. Strict rules have developed over the years in order to ensure that the system works effectively. The very essence of tender procedures may well be described as a procedure intended to ensure that government, before it procures goods or services, or enters into contracts for the procurement thereof, is assured that the proper evaluation is done of what is available, at what price and whether or not that which is procured serves the purposes for which it is intended.

[5] See D Pretorius 'The Defence of the Realm: Contract and Natural Justice' (2002) 119 *SALJ* 374, 396: '[S 217(1) of the Constitution] does not necessarily mean that the conclusion of each and every contract for goods and services by an organ of state must be preceded by a tender process. The circumstances of each case will dictate whether the requirements of s 217 demand that a tender process be conducted.'

when contracting for goods or services must be 'fair, equitable, transparent, competitive and cost-effective'.[1] If the drafters of the Final Constitution had intended that an organ of state must always follow a tendering process when procuring goods or services, s 217 would have been drafted in a manner that corresponds more closely with s 187 of the Interim Constitution.

A tender process will generally be the most effective way of complying with the principles of fairness, equitability and competitiveness. It may, however, undermine cost-effectiveness, particularly in relation to contracts that are of a relatively minor value. Accordingly, it appears that low-value contracts need not be put out to tender.[2] Nevertheless, an open tender or some comparable procedure should generally be followed in relation to contracts of a substantial value.

Alternatives to an open tender may include choosing from quotations submitted by a list of preferred bidders, which list has previously been compiled following an open and competitive bidding process. In such a case, it is important that both the compilation of the list of preferred bidders and the final choice of a particular service provider comply with the requirements of s 217(1).[3] In addition, it may be acceptable to deviate from an open tender procedure in certain exceptional circumstances, for example, where there is a sole supplier or where the goods or services must be urgently supplied.[4]

(b) Fairness and equitability

The principles of fairness and equitability indicate that the procurement procedure must be procedurally fair. At a minimum, interested parties (including all tenderers) should be given a reasonable opportunity to make representations relating to the award of the relevant contract.[5] In addition, affected persons should be treated fairly and equally. For example, all tenderers should be furnished with the same information and should be given the same opportunity to make representations. These principles will also be undermined, and s 217 contravened, in circumstances where the decision-maker fails to avoid a conflict of

[1] For example, IC s 187 refers to 'the appointment of independent and impartial tender boards' (sub-s (1)); and a 'tendering system' (sub-s (2)).

[2] In fact, the Preferential Procurement Regulations, published under Government Notice R275 in *Government Gazette* 22549 of 10 August 2001, contemplate that contracts of a value of less than R30 000 need not be put out to tender. In such cases an alternative procedure may include obtaining a limited number of quotations or using a list of preferred suppliers on a pre-announced or rotation basis.

[3] Such a procedure of employing approved tenderers is contemplated in para 10 of the State Tender Board's General Conditions and Procedures (ST36).

[4] Section 10G(5)*(c)* of the LGTA provides that a municipality may dispense with the calling of tenders in the case of an emergency or of a sole supplier. Article 22 of the UNCITRAL Model Law provides that a procuring entity may engage in 'single-source procurement' in a number of situations, including where the goods or services are only available from one supplier; the goods or services are urgently required; and procurement from a particular supplier is required for purposes of standardisation or compatibility (taking into account a number of specified factors).

[5] This requirement of procedural fairness overlaps, to some extent, with the constitutional right to administrative action that is procedurally fair.

interest or where the procurement procedure is tainted by actual bias or a reasonable suspicion of bias.[1] The observance of these principles also serves the principle of competitiveness, by placing tenderers on an equal footing.

An illustration of a procurement process that could be said to undermine fairness, equitability and competitiveness may be found in *Premier, Free State & Others v Firechem Free State (Pty) Limited*.[2] In *Firechem*, the Supreme Court of Appeal struck down a contract for the provision of cleaning materials to the Free State Province on the basis that the contract finally concluded with the relevant provincial department differed from the terms of the invitation to tender and the letter of acceptance produced by the provincial tender board. The effect of this difference was to undermine the fairness of the tender process. In holding that the contract was invalid, Schutz JA reasoned as follows:

> [T]o allow a tender board to withhold from the body of tenderers its intention to conclude a secret agreement with one of them, an agreement which the others have never seen and have had no chance to match, would be entirely subversive of a credible tender procedure. One of the requirements of such a procedure is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. Another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms. Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by only one or some of the tenderers knowing what is the true subject of tender.[3]

Another example of a tender process that failed to comply with the fairness requirement is found in the recent decision of the Supreme Court of Appeal in *Metro Projects*. In this case, the court struck down the award of the tender on the grounds that a municipal official, who was involved in the tender adjudication process, had allowed the successful tenderer an opportunity to augment its tender. The augmented offer was first concealed from the committee that decided on the tender and was then represented as being the original tender offer. During the course of his judgment, Conradie JA stated as follows:

> The deception stripped the tender process of an essential element of fairness: the equal evaluation of tenders. Where subterfuge and deceit subvert the essence of a tender process, participation in it is prejudicial to every one of the competing tenderers whether it stood a chance of winning the tender or not.[4]

[1] See J Klaaren & G Penfold 'Just Administrative Action' in M Chaskalson et al *Constitutional Law of South Africa* (2nd Edition, OS, 2002) 63-31–64-32 ('Just Administrative Action') for a discussion of the rule against bias. The most extreme cases in which s 217 would be violated are on payment of a bribe, or a decision-maker having a financial or other interest in the award of the contract.

[2] 2000 (4) SA 413 (SCA), [2000] 3 All SA 247 (SCA) ('*Firechem*'). This case was not decided on the basis of the constitutional procurement provisions of the Interim Constitution as this was neither pleaded nor explored in evidence. Ibid at para 32.

[3] Ibid at 429-30.

[4] *Metro Projects* (supra) at para 14.

(c) Transparency

The principle of transparency promotes openness and accountability. This important principle serves to encourage good decision-making in relation to procurement and combats the ever-present possibility of corruption in the adjudication of tenders and the awarding of contracts. In so doing, it instils public confidence in the procurement process.

In light of this constitutional principle of open procurement, it is difficult to justify the award of a contract by an organ of state in the absence of some form of public process. At the very least, the public should be notified that a public body intends negotiating a contract with a particular entity.[1] The case law also indicates that the principles of fairness and transparency require that reasons for the award (or non-award) of a tender should be furnished to unsuccessful tenderers.[2]

(d) Competitiveness and cost-effectiveness

The principles of competitiveness and cost-effectiveness indicate that an organ of state should, while taking into account other factors, attempt to procure goods or services at the lowest possible cost. In other words, organs of state should strive to achieve value for money. For example, in *Grinaker LTA Limited & Another v Tender Board (Mpumalanga) & Others* ('Grinaker')[3] one of the bases on which the award of the tender for the rehabilitation and construction of a road was struck down was the considerable variance between the higher price of the successful tenderer and the lower price of the unsuccessful tenderer. During the course of his judgment, De Villiers J wrote:

> The award by the first respondent of the tender to a tenderer who has not tendered the lowest price is contrary to the provisions of the guiding document and more particularly s 217(1) of the Constitution in that it results in a contract for services which is not competitive and cost-effective.[4]

[1] Except perhaps where compelling considerations, such as national security, militate against disclosing any issues relating to the proposed contract. This would only arise in highly exceptional circumstances.

[2] See *Goodman Brothers* (supra). This tender process requirement reinforces to the administrative law requirement to furnish written reasons, in terms of FC s 33(2) and s 5 of the AJA. The requirement to furnish written reasons for tender decisions was expressly included in IC s 187(2).

[3] [2002] 3 All SA 336, 356-7 (T) ('*Grinaker*').

[4] Ibid at para 70. On cost-effectiveness, see *Cash Paymaster Services* (supra) at 351: 'The task of the tender board has always been and will always be primarily to ensure that government gets the best price and value for that which it pays. If that were not the prime purpose of the tender board and policy considerations were to override these considerations, the very purpose of the tender board is defeated and no tender board needs to exist.' It should, however, be noted that this view may now overstate the position, given that FC s 217 specifically envisages considerations other than price.

(e) The principles should be taken as a whole

The principles set out in s 217(1) should be taken as a whole in deciding whether a particular procedure is consistent with the provisions of this section. In *South African Post Office Limited v Chairperson, Western Cape Provincial Tender Board & Others*,[1] the provincial tender board stipulated the criteria to be applied in the evaluation of the tender but did not stipulate the points weighting to be allocated to each criterion. The main reasons for this were to avoid price tampering and to discourage tenderers from concentrating on the criteria that carried greater weight at the expense of others. The court upheld this approach because, on the facts of the particular case, it resulted in the department procuring an efficient service at the most cost-effective price. The court came to this conclusion despite the fact that, taken in isolation, the disclosure of the points allocation would have increased the openness and transparency of the tender process.[2]

25.4 Preferential Procurement

(a) Introduction

South Africa is not unique in permitting preferences in the allocation of government contracts for goods and services.[3] In general, international instruments regulating public procurement articulate such preferences as exceptions to the general rule of non-discrimination and restrict the freedom of member states to apply such preferences. The WTO Agreement on Government Procurement, for example, imposes limitations on the ability of parties to use procurement as a policy tool.[4] It recognises, however, that 'developing countries' may have special needs as regards development, finance and trade. Article V of that Agreement provides for differential treatment of such countries and requires parties to take into account developing countries' needs to 'promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backward areas; and economic development of other

[1] 2001 (2) SA 675 (C), 2001 (5) BCLR 500 (C).

[2] Ibid at 689. The court did emphasise that the system of procurement in this case was accessible, visible and subject to examination and inquiry as well as both open and transparent.

[3] For an examination of the use of public procurement as an instrument of social policy in Great Britain, and an evaluation of the extent to which European Community regulation and the WTO Agreement on Government Procurement restricts the ability of member states to apply differential treatment in procurement in order to benefit local suppliers, see S Arrowsmith 'Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation' (1995) 111 *LQR* 235. Arrowsmith commences with the following statement: 'Governments have traditionally used their extensive powers of procurement to promote a variety of objectives unconnected with the immediate object of the procurement: these range from the protection and development of national industry, to social policy goals such as promotion of equal opportunities.'

[4] Ibid at 248-252.

sectors of the economy'.[1] This provision serves as an exception to the main objective of the WTO agreement: to open up government business to international competition and ensure non-discrimination against foreign products or suppliers.[2]

The design of the South African preferential procurement framework is located within the history of apartheid. It is aimed at redressing historical disadvantage and increasing opportunities for those previously prevented from actively participating in the country's mainstream economy.

(b) Preferential procurement in the Constitution

If the first leg of the constitutional procurement provision is the five principles described above, the second leg is that of preferential procurement.[3] While subsection 217(1) of the Constitution imposes an obligation on the institutions to which s 217 applies to comply with the five principles, subsections 217(2) and (3) permit (but do not oblige) those institutions to implement a preferential procurement policy.

Subsection 217(3) of the Constitution was amended during 2002.[4] The effect of this amendment is, in our view, to oblige those institutions which are bound by s 217 and which choose to implement a preferential procurement policy to do so in accordance with the constitutionally mandated PPPFA.[5] This amendment does not obligate every institution referred to in subsection 217(2) to implement a preferential procurement policy.

(c) The PPPFA

(i) *Application of the PPPFA*

The PPPFA applies to all organs of state as defined therein. Somewhat surprisingly, the definition of 'organ of state' in the PPPFA does not precisely mirror the

[1] WTO Agreement on Government Procurement, art V: 1*(b)*.

[2] See the preamble to the WTO Agreement on Government Procurement.

[3] Referred to in FC ss 217(2) and 217(3).

[4] Subsection 217(3) was amended by the Constitution of the Republic of South Africa Second Amendment Act 61 of 2001 ('2001 Second Amendment Act'). Up to 26 April 2002, when the 2001 Second Amendment Act came into effect, s 217(3) read as follows: 'National legislation must prescribe a framework within which the policy referred to in subsection (2) *may* be implemented.' (Our emphasis.) This locution implied, by the use of the word 'may', that even if the institutions to which sub-s 217(2) applied did choose to apply a system of preferential procurement as contemplated therein, they would not be bound to apply it in accordance with the national legislation contemplated in sub-s 217(3). The 2001 Second Amendment Act substituted the word 'must' for 'may'.

[5] The PPPFA came into effect on 3 February 2000. It is one of the four pieces of legislation that Parliament was instructed to enact within three years of the date upon which the Final Constitution came into effect. The other three pieces of legislation are the AJA, the Promotion of Access to Information Act 2 of 2000, and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

definition contained in FC s 239, nor does it attempt to capture all those institutions that are bound by the five principles identified in subsection 217(1). The term 'organ of state' is defined in s 1(iii) of the PPPFA as meaning:

> *(a)* a national or provincial department as defined in the Public Finance Management Act, 1999 (Act 1 of 1999);
> *(b)* a municipality as contemplated in the Constitution;
> *(c)* a constitutional institution as defined in the Public Finance Management Act, 1999 (Act 1 of 1999);
> *(d)* Parliament;
> *(e)* a provincial legislature;
> *(f)* any other institution or category of institution included in the definition of 'organ of state' in s 239 of the Constitution and recognised by the Minister [of Finance] by notice in the *Government Gazette* as an institution to which this Act applies.

To date, the Minister of Finance has not published any notices in the *Government Gazette* purporting to apply the PPPFA to any institution. Therefore, at this stage, the PPPFA applies to a narrower group of entities than do the five principles, since municipal entities[1] and public entities[2] do not fall within the PPPFA definition of 'organ of state'.[3]

[1] Defined in s 1 of the Systems Act as *'(a)* a company, co-operative, trust, fund or any other corporate entity established in terms of any applicable national or provincial legislation and which operates under the ownership control of one or more municipalities, and includes, in the case of a company under such ownership control, any subsidiary of that company; or *(b)* a service utility'. 'Service utility' is also defined in s 1 of the Systems Act as 'a municipal entity established in terms of s 82(1)*(c)*' of the Systems Act. Note that the Local Government: Municipal Systems Amendment Bill, introduced in the National Assembly as B49-2003, proposes that the definitions of 'municipal entity' and 'service utility' be substantially amended. However, the notion of ownership control by the state remains in the new definitions.

[2] Divided into 'national public entities' and 'provincial public entities', both of which are defined in s 1 of the Public Finance Management Act. 'National public entity' is defined as *'(a)* a national government business enterprise; or *(b)* a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is (i) established in terms of national legislation; (ii) fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and (iii) accountable to Parliament'. 'National government business enterprise' is defined as 'an entity which *(a)* is a juristic person under the ownership control of the national executive; *(b)* has been assigned financial and operational authority to carry on a business activity; *(c)* as its principal business, provides goods or services in accordance with ordinary business principles; and *(d)* is financed fully or substantially from sources other than (i) the National Revenue Fund; or (ii) by way of a tax, levy or other statutory money'. The definitions of 'provincial public entity' and 'provincial government business enterprise' are equivalent, but with supervision and funding at provincial level.

[3] The Parliamentary Monitoring Group minutes of the joint meeting of the Finance Portfolio Committee and the Finance Select Committee, held on 12 January 2000, to discuss the Preferential Procurement Policy Framework Bill, state as follows in regard to an amendment proposed by the co-chairperson, Ms B Hogan: 'Clause 1(iv) has changed making the definition of 'organ of state' very specific. Parastatals have been excluded at this stage. The reasoning is that due to privatisation, they have to operate with a commercial interest and this Act would put them at a disadvantage. Their exclusion will allow parastatals more flexibility with regard to deciding what their affirmative action programme will be. The Minister has the power to review this in the future and extend the application of this Bill. In response, Ms J Fubbs (ANC, Gauteng) concurred with this decision saying that the parastatals were involved with strategic development delivery and the country did not want to impede this delivery.' See http://www.pmg.org.za.

As regards the application of the PPPFA, it is important to note that s 3 of the Act provides that the Minister of Finance may, on request, exempt an organ of state (as defined in the PPPFA) from any of its provisions, if: *'(a)* it is in the interests of national security; *(b)* the likely tenderers are international suppliers; or *(c)* it is in the public interest'. It appears that the exemption provision is designed to operate on a case-by-case basis, so that a tendering authority will request an exemption from one or more provisions of the PPPFA in respect of a particular tender or tenders. This fits with the constitutional directive that 'national legislation must prescribe a framework'. The statutorily prescribed framework would be undermined if the Minister had unlimited powers to exempt organs of state from its provisions.[1]

(ii) *Preferential procurement policies*

Section 2 of the PPPFA provides that an organ of state (as defined) must determine its preferential procurement policy and implement it within the framework established by the PPPFA. The question arises whether this provision obliges all organs of state (as defined) to determine and implement a preferential procurement policy, or whether, like subsections 217(2) and (3) of the Constitution, the PPPFA framework must be used only if an institution to which the Act applies, chooses to implement a preferential procurement policy. The wording of s 2 of the PPPFA is not completely clear in this regard. The latter interpretation is to be preferred because it gives effect to, but does not purport to go beyond, the ambit of the constitutional provision. However, it appears from the minutes of the joint meeting of the Finance Portfolio Committee and the Finance Select Committee held on 18 January 2000, at which the Preferential Procurement Policy Framework Bill was formally considered, read with the State Law Advisor's opinion presented at that meeting, that the intention of the drafters was to obligate every organ of state to determine and implement a preferential procurement policy that complies with the framework prescribed by the PPPFA.[2]

[1] The Parliamentary Monitoring Group minutes of the joint meeting of the Finance Portfolio Committee and the Finance Select Committee held on 18 January 2000, record that a legal opinion of the State Law Advisor was presented to the members of the Committees, dealing with various aspects of the Preferential Procurement Policy Framework Bill including the constitutionality of the proposed ministerial power of exemption. The view of the State Law Advisor, which was accepted by the Committees, was that 'the exercise of such a power by the Minister could conceivably be construed as a form of subordinate legislation thus requiring parameters to be set by Parliament if it is not to be held to be unconstitutional'. The State Law Advisor's opinion referred to the decision of the Constitutional Court in *Executive Council, Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC). For the minutes of that meeting and the State Law Advisor's opinion, see http://www.pmg.org.za.

[2] See the minutes of that meeting and the State Law Advisor's opinion at http://www.pmg.org.za.

(iii) *Preference points system*

The system of preferential procurement established by the PPPFA is based on the assumption that tenders are awarded according to the following process: an organ of state invites tenders by the issuing of documents; the tenders received are evaluated according to evaluation criteria stipulated in the tender documentation; and tenders are ranked by the allocation of points for each evaluation criterion. The total number of points that can be allocated is assumed to be one hundred.

The PPPFA establishes a dual-scale preference points system. The scale employed depends upon the value of the contract to be awarded. The rationale behind the dual-scale system is that in order to redress historical disadvantage through public procurement, the government will have to pay more than it would if price were the only criterion. In other words, there is an understanding that historically disadvantaged tenderers are unable to compete effectively for government contracts by offering the best price. However, in acknowledgement of the importance of cost-effectiveness as a factor in government procurement, the dual scale system allocates more preferential procurement points for contracts of low value, and fewer preferential procurement points for contracts of significant value.

Section 2 of the PPPFA thus provides that for contracts with a value above a prescribed amount,[1] a maximum of 10 points may be allocated for 'specific goals' as set out in the PPPFA, with 90 points for price being allocated to the lowest acceptable tender. For contracts with a value equal to or below a prescribed amount,[2] a maximum of 20 points will be allocated for 'specific goals', with 80 points for price being allocated to the lowest acceptable tender.[3] The Regulations

[1] The 90/10 preference points system applies to contracts with a value of more than R500 000 in terms of Regulation 4 of the regulations promulgated in terms of the PPPFA, published under GN R725 in *GG* 22549 of 10 August 2001 (the 'Regulations').

[2] The 80/20 preference points system applies to contracts with a value equal to or above R30 000 but less than R500 000 in terms of Regulation 5.

[3] Section 2*(a)* read with s 2*(b)* of the PPPFA.

to the PPPFA contain formulae for calculating the total number of points to be allocated to each tenderer.[1]

(iv) *Specific goals*

According to s 2*(d)* of the PPPFA, 'the specific goals may include' contracting with persons or categories of persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability ('HDIs'),[2] and the implementation of the programmes of the Reconstruction and Development Programme (RDP).[3] This provision is permissive rather than prescriptive. Therefore, other 'specific goals' (such as environmental best practice) could also be identified as worthy of preference points (up to a maximum of either 10 or 20 out of 100, depending on the value of the contract).[4]

Even if it is correct that the 'specific goals' for which preference points may be allocated may include other goals or categories of preference, such goals would have to be accommodated within the 90/10 or the 80/20 preference points system. The inflexibility of this framework may place undesirable constraints on

[1] Regulations 3(1), 4(1), 5(1) and 6(1).

[2] Regulation 1*(h)* contains a definition of 'historically disadvantaged individual' that is arguably narrower than the description in the PPPFA of persons to whom preferences may be applied. The definition in the Regulations is as follows:

> *(h)* 'Historically Disadvantaged Individual ('HDI') means a South African citizen —
>
> (i) who, due to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa, 1983, (Act No.110 of 1983) or the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) ('the Interim Constitution'); and/or
>
> (ii) who is female; and/or
>
> (iii) who has a disability:
>
> Provided that a person who obtained South African citizenship on or after the coming into effect of the Interim Constitution, is deemed not to be an HDI.

We identify two major potential problems with this definition. The first is that it is framed in terms of individuals rather than groups of persons who/which have suffered historical disadvantage. This could have the result, for example, that a black man born in 1980 (ie too young to vote in 1994) would fall outside the definition because the reason he was unable to vote in 1994 was not because of the apartheid policy in place, but because of his age. The second potential problem is that certain of the qualifications contained in the definition may have unintended consequences. For example, a black Nigerian woman disabled from birth who became a South African citizen on 1 May 1994 will not qualify as an historically disadvantaged individual under this definition, whereas a white South African man disabled in 2002 will qualify as historically disadvantaged.

[3] Section 2*(d)* of the PPPFA. The programmes of the Reconstruction and Development Programme are stated to be those published in *Government Gazette* 16085 of 23 November 1994.

[4] This view is consistent with FC sub-s 217(2)*(a)*, which refers to unspecified 'categories of preference in the allocation of contracts'. However, the Regulations do not contemplate any goals other than those listed in s 2*(d)* of the PPPFA attracting preference points. In this regard, see Regulations 3(2), 4(2), 5(2) and 6(2). To the extent that the goals contemplated in the Regulations are narrower than the framework created by the PPPFA, the applicable Regulations may be *ultra vires*. However if the Regulations are in this respect legally valid, the implications of this dual scale system are restrictive, in that they do not permit the allocation of preference points to any category of preference other than the attainment of HDI and RDP goals.

procuring bodies that want to allocate preference points to more than one specific goal.

In sum, it appears that the PPPFA contemplates that the only tender criteria that can be allocated points are: *(a)* price, and *(b)* specific goals (HDI goals, RDP goals and possibly other unspecified 'categories of preference').[1]

(v) *Other evaluation criteria*

Despite the apparent restrictiveness of the points-allocation system contemplated by the PPPFA, a tender put out in terms of that Act could contain evaluation criteria or specifications other than price and specific goals, as long as these are not used to calculate the points to be awarded to a tenderer. These other criteria would operate at the level of a threshold inquiry, or as what are sometimes called 'qualification criteria'.

Indications of this more expansive qualitative analysis are found in the PPPFA definition of 'acceptable tender'[2] and in s 2*(f)* of the PPPFA. Section 2*(f)* provides that the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in ss 2*(d)* (contracting with HDIs and/or implementing the programmes of the RDP) and 2*(e)* (goals specified in the invitation to submit a tender) justify the award to another tenderer.[3]

Commonly applied evaluation criteria, such as technical capability, would therefore fall — if the PPPFA regime is strictly applied — into the category of criteria or specifications to which points are not allocated. However, a failure to comply with such criteria could result in a tender not qualifying as an 'acceptable tender' and therefore not being evaluated for the purpose of awarding points.

This implied distinction between criteria to which points can be allocated, and those to which points may not be allocated, has the effect of turning all criteria other than price and 'specific goals' into so-called qualification criteria. This necessitates a two-stage or two-level process in order to award any tender that has both qualification criteria and points-criteria. The PPPFA does not explicitly distinguish between the various stages that could be involved in a tender process.

[1] Some attempt to change this position is made in Regulation 8 which provides for evaluation on the basis of 'functionality' as well as price and the specified goals, and combines the points for price and functionality so that a maximum of 80 or 90 points may be allocated in respect of both, depending on the value of the contract. However, to the extent that Regulation 8 conflicts with s 2 of the PPPFA, it may be *ultra vires*. Also, the notion of evaluating functionality with price is not carried through into the formulae set out in Regulations 4, 5 and 6 for calculating the points for price.

[2] 'Acceptable tender' is defined as 'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document'. Therefore, technical capability and other criteria — such as environmental best practice - could arguably be qualification criteria for purposes of identifying compliant tenders, but may not be used in the process of ranking compliant tenders.

[3] See *Grinaker* (supra) at paras 40–64.

Section 2 of the PPPFA goes on to provide that any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a tender.[1] Furthermore, such goals must be measurable, quantifiable and monitored for compliance.[2]

(vi) *Remedies for non-compliance*

As far as remedies for non-compliance with the provisions of the PPPFA are concerned, the PPPFA prescribes no consequences for organs of state that implement a preferential procurement policy other than in accordance with that Act.[3] With regard to the consequences of a contract being awarded on account of false information furnished by a tenderer in order to secure preference in terms of the PPPFA, s 2*(g)* provides that any such contract may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies that the organ of state may have.[4]

(d) PPPFA Regulations

The PPPFA permits the Minister of Finance to make regulations in order to achieve the objects of the Act.[5] Regulations have now been promulgated.[6] The Regulations provide considerably more detail than the PPPFA itself, as to the manner in which the preferential procurement framework created by the primary legislation is intended to operate.

The Regulations apply to all organs of state as defined in the PPPFA. They provide that any such organ of state must, unless the Minister of Finance has directed otherwise, only apply a preferential procurement system that accords with the PPPFA and the Regulations. This requirement means that an organ of state can neither apply a preferential procurement system that is more generous to HDIs than that established by the PPPFA and Regulations, nor may it apply a preferential procurement system that is different but equivalent to the system set

[1] PPPFA (supra) at s 2*(e)*.

[2] Ibid at s 2(2).

[3] The accounting authority of a public entity is responsible for the compliance by the public entity with all legislation applicable to it in terms of s 51(1)*(b)* of the Public Finance Management Act, but the equivalent provision applying to the accounting officer of a department (s 38(1)*(n)* of the Public Finance Management Act) makes him or her responsible for ensuring compliance only with the Public Finance Management Act itself.

[4] See also Regulation 15, discussed further below, which sets out a more extensive range of penalties that could be applied against a fraudulent tenderer to whom a contract is awarded. Penalties for tender offences have also been proposed in s 7 of the Prevention of Corruption Bill, introduced in the National Assembly as B19-2002.

[5] Section 5 of the PPPFA, which provides as follows:

(1) The Minister may make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of this Act.

(2) Draft regulations must be published for public comment in the *Government Gazette* and every *Provincial Gazette* before promulgation.

[6] GN R725, *GG* 22549, 10 August 2001 (the 'Regulations').

out in the PPPFA and Regulations. In practice this requirement is fairly restrictive. Some organs of state are eager to promote the implementation of social and economic objectives (through the award of contracts to HDIs) to a greater extent than is permitted by the preference points system provided for in the PPPFA.

(i) *Application of preference points system*

As mentioned above in relation to the dual-scale preference points system, the Regulations prescribe that, in respect of contracts with a value equal to or above R30 000 and up to R500 000, the 80/20 preference points system must be used. The 80/20 preference points system permits a maximum of 20 points to be awarded to a tenderer for being an HDI (as defined in the Regulations) and/or sub-contracting with an HDI and/or achieving of the specified goals stipulated in the Regulations. A formula set out in the Regulations is applied to calculate the number of points for price, and these are added to the preference points to calculate the total points awarded to each tenderer.[1] Organs of state may apply the same formula to procurement with a value less than R30 000, if and when appropriate.[2]

The Regulations also prescribe that in respect of contracts with a value above R500 000 the 90/10 preference points system must be used. The 90/10 preference points system permits a maximum of 10 points to be awarded to a tenderer for being an HDI and/or sub-contracting with an HDI and/or achieving any of the specified goals stipulated in the Regulations. Again, a formula is applied and the points scored for price are added to the points scored for the specified goals.[3]

[1] To illustrate the application of the preference points system by hypothetical example: the Department of Health invites tenders for the provision of antiretroviral medication. X, an empowerment company, offers the medication for R10 million. Y, which has no empowerment component, offers the medication for R9 million. Y is the tenderer with the lowest price. The contract is worth more than R500 000 so the 90/10 preference points system applies. Regulation 4(1), titled 'The 90/10 preference point system', provides that the following formula must be used to calculate the points for price:
Ps = 90 (1 — ((Pt — Pmin)—Pmin) where
Ps = points scored for price of tender under consideration
Pt = rand value of tender under consideration
Pmin = rand value of lowest acceptable tender.
X gets 90 (1 — 10 000 000 — 9 000 000) = 80 points for price.
Y gets 90 (1 — 9 000 000 — 9 000 000) = 90 points for price.
Therefore, if X gets 10 out of 10 preference points (for achievement of the 'specific goals') and Y gets none, their scores will be equal. If X gets anything less than 10 preference points, Y will be the tenderer who scores the highest points. The PPPFA does not prescribe how to award a contract if the two tenderers with the highest scores get the same number of points.

[2] Regulation 3.

[3] Regulation 4.

The Regulations go on to provide that the same preference points systems must be used in respect of contracts for the sale and letting of assets.[1] These provisions may be *ultra vires*, as the PPPFA does not purport to regulate contracts by organs of state for the sale and letting of assets, only contracts for the procurement or obtaining of goods and services.[2]

An organ of state must, in the tender documents, stipulate the preference points system that will be applied in the adjudication of tenders.[3] Although the stipulation of the preference points system to be applied assists in achieving transparency, it could result in an onerous procedure. Regulation 10 goes on to provide that if, in the application of the 80/20 preference points system, for example, all tenders received exceed the value of R500 000, the tender must be cancelled and the organ of state must re-invite tenders and again stipulate the preferencepoints system to be applied (and *vice versa* as regards the 90/10 preference points system).

The Regulations also provide that, notwithstanding other statements to the contrary in the Regulations,[4] a contract may, on reasonable and justifiable grounds, be awarded to a tenderer that did not score the highest number of points. This provision must be interpreted subject to s 2*(f)* of the PPPFA. Section 2*(f)* contemplates narrower grounds on which a contract may be awarded to a tenderer who did not score the highest points.[5]

(ii) *Permissible preferences*

As stated above, the PPPFA contemplates preference points for contracting with HDIs or for implementing the programmes of the RDP. The Regulations also make provision for the 80/20 or 90/10 preference points systems to accommodate a preference for the procuring of locally manufactured products (although the precise manner in which such a preference must be accommodated is not prescribed). The intention to award preference points for local manufacturing and/or content must be specified in the tender document sent out by an organ of state.

(iii) *Equity ownership as a peremptory preference*

Despite the fact that the PPPFA states the specific goals in permissive rather than peremptory terms ('the specific goals may include'), Regulation 13 provides that preference points stipulated in respect of a tender *must* include preference points

[1] See Regulations 5 and 6.

[2] This reading is consistent with FC s 217. FC s 217, as discussed above, should be interpreted to relate to contracts in terms of which goods or services are supplied to an organ of state. The PPPFA, which provides that the maximum points for price are to be awarded to the 'lowest acceptable tender' (s 2), similarly appears to confine its ambit to the obtaining of goods and services by organs of state by means of tenders.

[3] Regulation 7.

[4] Regulations 3(4), 4(4), 5(4), 6(4) and 8(8) all provide that only the tender with the highest number of points may be selected.

[5] See §25.4*(c)(v)* above.

for equity ownership by HDIs. Equity ownership is equated to the percentage of an enterprise or business owned by individuals or, in respect of a company, the percentage of a company's shares that are owned by individuals who are actively involved in the management of the enterprise or business and exercise control over the enterprise, commensurate with their degree of ownership at the closing date of the tender. Preference points may not be claimed in respect of individuals who are not actively involved in the management of an enterprise or business and who do not exercise control over an enterprise or business commensurate with their degree of ownership. This prohibition is intended to minimise so-called window dressing by corporate entities to meet empowerment criteria. Preference points may not be awarded to public companies[1] and tertiary institutions. Equity claims for a trust may only be allowed in respect of those persons who are both trustees and beneficiaries and who are actively involved in the management of the trust.[2] A consortium or joint venture may, based on the percentage of the contract value managed or executed by their HDI members, be entitled to equity ownership in respect of an HDI.

(iv) *RDP goals*

Regulation 17 provides that, over and above the awarding of preference points in favour of HDIs, certain activities may be regarded as a contribution towards achieving the goals of the RDP. These activities include but are not limited to the following:

(a) the promotion of South African-owned enterprises;
(b) the promotion of small, medium and micro-enterprises;
(c) the creation of new jobs or the intensification of labour absorption;
(d) the promotion of enterprises located in a specific province or region for work to be done or services to be rendered in that province or region;
(e) the empowerment of the workforce by standardising the level of skill and knowledge of workers; and
(f) the upliftment of communities through housing, transport, schools, infrastructure donations, charity organisations and other methods.

(v) *Sub-contracting and penalties*

A person awarded a contract as a result of a preference for contracting with, or providing equity ownership to, an HDI, may not sub-contract more than 25% of

[1] The rationale for this limitation is not entirely clear.
[2] Again, the restrictions on trusts being awarded points for equity ownership are designed to minimise 'window-dressing'.

the value of the contract to a person who is not an HDI or who does not qualify for such preference.[1]

Finally, the Regulations set out various penalties that must be applied by an organ of state upon detecting that a preference in terms of the Act and Regulations has been obtained on a fraudulent basis, or in the event that any of the specified goals are not attained in the performance of the contract. The penalties embrace the recovery of all costs, losses and damages, cancellation of the contract, imposition of a financial penalty, and restricting the contractor from obtaining business from any organ of state for a period not exceeding 10 years.[2] As mentioned above, these penalties go further than those provided for in the PPPFA itself, particularly by including financial penalties and 'blacklisting'.

25.5 The Role of the Tender Boards

(a) Introduction

Tender boards currently exist at both a national and provincial level. At the national level, the State Tender Board is established in terms of the State Tender Board Act 86 of 1968.[3] In terms of this legislation, the Board is, amongst other things, empowered to procure supplies and services for the state and to invite offers and conclude agreements for this purpose.[4]

The State Tender Board Act was amended during 1987 (Act 18 of 1987) to provide for the establishment of regional tender boards.[5] Regional tender boards were established in each of the then-existing provinces. In 1994, however, with the coming into effect of the Interim Constitution, provincial legislation was enacted in each of the new nine provinces and provided for the establishment of provincial tender boards as contemplated by s 187. In other words, the regional tender boards were replaced by provincial tender boards.[6]

[1] Regulation 13(2). This Regulation may well have unintended consequences. It binds contractors who were awarded contracts as a result of HDI content, to a fairly restrictive sub-contracting regime, while permitting a non-HDI contractor to sub-contract freely to other non-HDIs. Another consequence is that in order for this provision to work in practice, the contractor will have to be informed of the causal link between his or her HDI credentials and the award of the contract — which assumes a measure of transparency in the process that may be practically difficult to achieve in every case.

[2] Regulation 15.

[3] Section 2.

[4] Section 4(1).

[5] In this regard, see s 2A of the State Tender Board Act. Section 2A provides that the Minister of Finance shall, on the recommendation of the [tender] board, establish regional tender boards in respect of such regions as the Minister may determine.

[6] For example, s 2(2) of the Provincial Tender Board Act (Eastern Cape) 2 of 1994 states that the powers exercised, for the procurement of supplies and services prior to the establishment of the Provincial Tender Board, by the Province — being the then Cape Province — or the government of any area which now forms part of the national territory — being the former homelands — are 'deemed to have been exercised or performed' by the Provincial Tender Board.

(b) Powers of the State Tender Board

Section 13 of the State Tender Board Act authorises the Minister of Finance to make regulations in respect of its procedure and the procurement of supplies or services on behalf of the state. The most recent regulations promulgated in terms of this section provide that:

> The Board may, subject to the applicable provisions of any Act of Parliament, issue directives to Government departments in regard to the procurement of supplies and services.[1]

This provision does not mean that the Board has powers to determine government policy on procurement. The Board's powers are merely to adjudicate upon the tender process in an objective manner, applying the rules and criteria as laid down by the relevant government department. The relationship between government departments and the Board in the tender process is succinctly described by Pickard JP in *Cash Paymaster Services v Eastern Cape Province & Others*:

> The function of the tender board in considering the tenders according to the rules laid down for it is not to prescribe or pre-empt the policy of government nor to determine what government needs and should or should not have. The task of the tender board is a simple one, namely to determine which tender is to be accepted, having regard to what government has laid down in its tender documents as the various criteria in regard to quality requirements, services and the like.[2]

Directives that the Board issues regarding the procurement of supplies and services by government departments will, where applicable, be subject to the provisions of the PPPFA. Where a department follows a policy of preferential procurement in the tender process, the PPPFA requires that the framework of that Act must apply.[3] Consequently, the State Tender Board is enjoined to operate within this framework in coming to a decision regarding procurement for a government department.[4]

Despite the involvement of government departments in the setting of rules and criteria for the procurement of supplies and services, the State Tender Board Act and regulations currently require, subject to limited exception,[5] that all tenders of the national government go through the Board. Regulation 2 states that 'subject

[1] Regulation 3(1) in GN R1237, *GG* 11382, of 1 July 1988.
[2] *Cash Paymaster Services* (supra) at 351.
[3] See s 2 of the PPPFA, and Regulation 2(2).
[4] See *Grinaker* (supra) at 351.
[5] Section 2 of the National Supplies Procurement Act 89 of 1970 stipulates that the Minister of Trade and Industry may, whenever he or she 'deems it necessary or expedient for the security of the Republic', without recourse to the State Tender Board, amongst other things, acquire or hire any goods or services on behalf of the state.

to the provisions of any Act of Parliament, supplies and services for and on behalf of the State, shall be procured only through the Board.'[1]

The regulations promulgated in terms of the State Tender Board Act allow for circumstances in which government departments may contract with service providers without obtaining the prior consent of the Board.[2] One can imagine circumstances where, due to time constraints in providing a particular service, a government department cannot wait for the Board to convene so as to render its decision. These exceptions are narrowly prescribed and are subject to the Board's override powers to resile from the agreement.[3]

(c) The diminishing role of tender boards

The recent trend is to move away from tender boards and for government departments at national and provincial level to engage in procurement themselves under the Public Finance Management Act. At national level, reassignment of procurement decision-making powers has, to some extent, been achieved through delegations and directives from the State Tender Board. At provincial level, it has happened either through the repeal of provincial tender board legislation,[4] or the delegation of certain procurement powers from the applicable tender board to the departments.[5] Cabinet's stated intention is that procurement will ultimately be

[1] GN R1237 in *GG* 11382 of 1 July 1988. Similar provisions are contained in the relevant provincial tender legislation. For example, s 4(1) of the Provincial Tender Board Act (Eastern Cape) 2 of 1994, provides that: '[T]he board shall have the sole power to procure supplies and services for the province, and, subject to the provisions of any other Act of the provincial legislature, to arrange the hiring or letting of anything or the acquisition or granting of any right for or on behalf of the province, and to dispose of movable provincial property . . .'. See also s 4(1) of the Tender Board Act (Free State) 2 of 1994.

[2] In terms of Regulation 3(4), the Board may approve *ex post facto* any action of a government department exercising a power conferred upon the Board by the Act or regulations, provided the Board is satisfied that the action of the government department 'took place in circumstances of emergency or otherwise was in the best interests of the State and was done without negligence, provided that the State has not suffered any damage as a result thereof'.

[3] Section 4(1)(*e*A) of the State Tender Board Act.

[4] See, for example, the Gauteng Tender Board Repeal Act 2 of 2002. The Act repeals the Provincial Tender Board Act 2 of 1994 and creates a transitional provincial procurement body for the adjudication and awarding of term contracts and special projects.

[5] For example, the KwaZulu-Natal Procurement Act 3 of 2001 gives effect to FC s 217 by establishing, within each department in the province, internal tender committees. In terms of s 28 of this Act, the accounting officer of a department and of the provincial parliament must establish, within their respective administrations, an internal tender committee comprising a single Tender Award Committee and one or more Tender Evaluation Committees. In addition, s 4 of the Act provides for the establishment of a Central Procurement Committee within the Department of Finance to adjudicate tenders where the value of the contract is above the delegated limit or where there is a dispute between a department's Tender Award Committee and its Tender Evaluation Committee. Provision is also made in s 19 for a Tender Appeals Tribunal and, in s 26, a Procurement Administration Office, which is required to report on the procurement practices within the provincial government.

regulated by the relevant government departments themselves under the Public Finance Management Act.[1]

(d) Consequences of non-compliance

In the meantime, should the relevant tender legislation require tender board approval before a tender is awarded, the failure to obtain such approval would render the contract legally invalid. The Supreme Court of Appeal, in *Eastern Cape Provincial Government & Others v Contractprops 25 (Pty) Ltd*, reached just such a conclusion.[2] In *Contractprops*, the Department of Education, Culture and Sport in the Eastern Cape Province purported to enter into lease agreements without reference to the provincial tender board. This action contravened the Provincial Tender Board Act (Eastern Cape) 2 of 1994. The Supreme Court of Appeal held that the leases were invalid, irrespective of the harshness that a declaration of invalidity may cause to either the Department or the lessee.[3] Similarly, in *Premier, Free State & Others v Firechem Free State (Pty) Limited*, the Supreme Court of Appeal decided that a contract concluded with a government department, which subsequently subverts the role of the tender board by contradicting the terms of the tender board's approval, will be invalid.[4]

25.6 Municipal Procurement

(a) Applicability of constitutional procurement principles

Municipalities, as organs of state in the local sphere of government, are bound by s 217 of the Constitution. They are obliged to contract for goods and services in

[1] See above for the Cabinet meeting of 17 September 2003. The decentralisation trend appears to be consistent with the objectives of the COMESA public procurement project. See Karangizi (supra). However, as Karangizi states, the decentralised procurement function that is part of the COMESA model is coupled with a 'centralised policy and monitoring function for public procurement; that body, which should not be operationally involved in procurement proceedings, may also conduct other activities to develop procurement capacity, promote proper implementation, and enforce applicable rules'. Karangizi (supra) at 9.

[2] 2001 (4) SA 142 (SCA) ('*Contractprops*').

[3] Ibid at para 9 (Marais JA): 'As to the consequences of visiting such a transaction with invalidity, they will not always be harsh and the potential countervailing harshness of holding the province to a contract which burdens the taxpayer to an extent which could have been avoided if the tender board had not been ignored, cannot be disregarded. In short, the consequences of visiting invalidity upon non-compliance are not so uniformly and one-sidedly harsh that the legislature cannot be supposed to have intended invalidity to be the consequence. What is certain is that the consequence cannot vary from case to case. Such transactions are either all invalid or all valid. Their validity cannot depend upon whether or not harshness is discernible in the particular case.'

[4] 2000 (4) SA 413 (SCA).

accordance with a system that is 'fair, equitable, transparent, competitive and cost-effective.'[1] They are also bound by the PPPFA as they fall within that Act's definition of 'organ of state'.[2]

A number of post-1994 statutes have been promulgated to give effect to the constitutional provisions relating to local government.[3] The Systems Act permits the creation by municipalities of 'municipal entities'. Municipal entities, as mentioned above, are juristic persons established by and under the ownership control of a municipality or several municipalities.[4] These entities would fall within the constitutional definition of 'organ of state'.[5] They clearly fall within a sphere of government. They are thus probably bound by FC s 217. However, as we noted above, they are not yet bound by the PPPFA.[6]

Just as the Public Finance Management Act regulates government procurement at national and provincial level, the Municipal Finance Management Bill, 2002[7] will, when it becomes an Act, require municipalities to maintain 'an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective'. Municipal entities will be bound by the same principles.[8] In sum, municipalities themselves are bound by both legs of constitutional procurement: the five principles and preferential procurement. Municipal entities, on the other hand, are at this stage bound only by the five principles. In terms of FC s 217, however, they would not be prevented from determining and implementing a preferential procurement policy.

(b) Municipal service provision

A critical and contentious issue for any municipality is when it should provide municipal services using its own staff and resources and when it should provide services through a separate entity, either in the public or in the private sector.

[1] This obligation was captured in s 10G(5) of the LGTA, which obligates municipalities to award contracts for goods and services in accordance with the five principles, but also permits them to allocate preferences in accordance with national legislation. Section 10G(5) goes on to provide that a municipality may 'dispense with the calling of tenders in the case of an emergency or of a sole supplier or within such limits as may be prescribed by a national law.' Regulations have been promulgated in terms of this section of the LGTA providing for the circumstances in which a municipality may dispense with the calling of tenders. See GN R1224 in *GG* 19300 of 2 October 1998, as amended by GN R387 in *GG* 19886 of 26 March 1999, and further amended by GN R750 in *GG* 20172 of 11 June 1999.

[2] Section 1 of the PPPFA.

[3] Local Government: Municipal Structures Act 117 of 1998; the Systems Act; Local Government: Municipal Finance Management Bill.

[4] See s 1 of the Systems Act.

[5] See FC s 239 and §25.2*(c)*(i) above.

[6] See §25.4*(c)*(i) above.

[7] Introduced in the National Assembly as B1 - 2002 ('the MFMB').

[8] Section 36*(a)*(iii) of the MFMB creates this obligation in respect of municipalities, whereas s 59(1)*(a)*(iii) of the MFMB does so in respect of municipal entities.

Municipal service delivery is regulated by parts 2 and 3 of chapter 8 of the Systems Act. These provisions set out mechanisms for deciding whether and when to contract with a separate entity for the delivery of services.[1]

When a municipality contracts with another entity for that entity to provide municipal services on its behalf, the municipality is contracting for goods and/or services and will likely be bound by the constitutional procurement principles. It appears that the relevant provisions in the Systems Act have been drafted with FC s 217 in mind. Provision is made in the Act for a deliberative process and for criteria to decide whether to provide the municipal service through an 'internal mechanism'[2] or an 'external mechanism'.[3] If an external mechanism is to be considered, a process of competitive bidding will be required unless certain pre-conditions are met.[4]

Municipal procurement is not merely subject to the Systems Act. A municipality will be obliged, in every case in which it contracts for goods and/or services, to ensure that such goods and/or services are procured in accordance with a system that complies with the five principles and the PPPFA and its Regulations.

There is provincial as well as national legislation — largely dating from the pre-1994 period - which regulates local government generally and which includes provisions on procurement by municipalities.[5] In general, the provincial ordinances provide for a competitive tender process when goods and/or services are required by a municipality. However, in emergencies or sole supplier situations, the municipality may dispense with a competitive process. Where there is a conflict between the national legislation (s 10G(5) of the LGTA or the Systems Act) and the provincial legislation regulating municipal procurement, resort should be had to FC ss 146 to 150. These sections deal with conflicts between national and provincial legislation.[6]

[1] Part 2 of chapter 8 comprises ss 76 to 82, and part 3 of chapter 8 comprises ss 83 and 84. The Local Government: Municipal Systems Amendment Bill (supra) proposes substantial amendments to these parts of the Systems Act.

[2] Section 76*(a)* of the Systems Act.

[3] Ibid at s 76*(b)*.

[4] Section 78 read with ss 80, 83 and 84 of the Systems Act. Since s 10G(5) of the LGTA, which also deals with municipal procurement, is still in operation, it must be read together with applicable provisions of the Systems Act.

[5] See, for example, s 35 of Transvaal Ordinance 17 of 1939, ss 171 and 172 of the Cape Municipal Ordinance 20 of 1974, ss 185 to 189 of the Natal Local Authorities Ordinance 25 of 1974, and s 143 of the Orange Free State Local Government Ordinance 8 of 1962.

[6] See V Bronstein 'Conflicts' in M Chaskalson et al *Constitutional Law of South Africa* (2nd Edition, Forthcoming, 2004).

25.7 Public-Private Partnerships

(a) Introduction

A number of transactions between organs of state (usually government departments) and private sector entities, with features typical of public-private partnerships (PPPs), were initiated or implemented before the Public Finance Management Act and the Treasury Regulations came into effect.[1] However, PPPs have become increasingly prevalent as a mechanism whereby national and provincial government departments seek to achieve service delivery objectives in a manner that appropriately allocates risk, makes use of private sector resources and gives value for money.

(b) Legislative framework

PPPs are not referred to in any primary legislation. Nevertheless, Regulation 16 of the Treasury Regulations defines the concept and regulates the implementation of PPPs.[2] 'Public-private partnership' is defined in Treasury Regulation 16.1 as follows:

> . . . a commercial transaction between an institution and a private party in terms of which —
> *(a)* the private party either performs an institutional function on behalf of the institution for a specified or indefinite period; or acquires the use of state property for its own commercial purposes for a specified or indefinite period;
> *(b)* the private party receives a benefit for performing the function or by utilising state property, either by way of:
> (i) compensation from a revenue fund;
> (ii) charges or fees collected by the private party from users or customers of a service provided to them; or
> (iii) combination of such compensation and such charges or fees.

The institutions to which Treasury Regulation 16 applies are government departments at national and provincial level, constitutional institutions as defined in the Public Finance Management Act and public entities listed in Schedules 3A, 3B, 3C and 3D of the Public Finance Management Act.[3]

[1] The Public Finance Management Act came into effect on 1 April 2000. The Treasury Regulations were published in *GG* 22219 of 9 April 2001, and amended substantially by GN R740 in *GG* 23463 of 25 May 2002, with effect from 27 May 2002.

[2] A revised version of Treasury Regulation 16 was published for public comment under GN 1535 in *GG* 25605 of 24 October 2003.

[3] The public entities listed in Schedule 3 to the Public Finance Management Act are all those other than the 'Major Public Entities' that are listed in Schedule 2 to the Public Finance Management Act. The major public entities listed in Schedule 2, may therefore enter into transactions identical to those regulated by Treasury Regulation 16 without complying with its provisions. Such transactions would likely, however, be subject to other statutory requirements, either in terms of the Public Finance Management Act (in particular s 51(1)*(a)*(iii) regarding the five principles) or sectoral legislation.

(c) Applicability of constitutional procurement principles and procurement legislation

Where the private party to a PPP performs an 'institutional function' on behalf of an organ of state, in terms of a service delivery or PPP agreement, the procurement provisions in the Constitution may well be applicable.[1] Such a 'partnership' is a contract concluded by a government department for goods and/or services, even though the PPP agreement may provide for the private party to deliver the goods or services to consumers on behalf of the government department (as opposed to delivering the goods or services to the government department for its own use).[2]

PPPs that involve the use of state property for the private party's own commercial purposes, rather than the performance of an institutional function, are arguably not 'contracts for goods or services'. The principles of s 217 may not necessarily apply. On the other hand, the provisions of Treasury Regulation 16 will apply to the PPP. As described below, the application of Regulation 16 means that the principles of openness, transparency, fairness, competitiveness and cost-effectiveness (value for money and affordability) will, invariably, be part of the decision-making process. Since a competitive process is used, the PPPFA will also, generally, be applicable.

Treasury Regulation 16 provides for strict national or (where the institution concerned is a provincial institution and the National Treasury has delegated the appropriate powers to a provincial treasury in terms of s 10(1)*(b)* of the Public Finance Management Act) provincial treasury supervision of transactions that fall within the definition of PPP set out in the Regulation.

The Regulation provides for a series of national or provincial treasury approvals at specified points in the process of concluding a PPP. The first approval must be granted before commencement of the procurement phase (but after having undertaken a feasibility study) and may not be granted unless the relevant treasury is satisfied that the criteria of value for money, affordability and appropriate transfer of technical, operational and financial risk, have been

[1] 'Institutional function' is defined in Treasury Regulation 16.1 (as amended by General Notice 2012, published in *Government Gazette* 25229 dated 28 July 2003), as follows:

'*(a)* a service, task, assignment or other function that an institution performs —

(i) in the public interest; or

(ii) on behalf of the public service generally; or

(b) any part or component of, or any service, task, assignment or other function performed in support of, such a service, task, assignment or other function'.

[2] Treasury Regulation 16.12.1 provides that an agreement between an institution and a private party for the latter to perform an institutional function without accepting significant risks is not a PPP and must be dealt with as a 'procurement transaction'. However, in our view this does not detract from the fact that where a PPP does involve the procurement of goods or services by an organ of state, the constitutional procurement provisions will apply to the process of identifying the private party, as will the provisions of the PPPFA.

met.[1] The criteria applicable to subsequent treasury approvals are in similar terms.[2]

Although Treasury Regulation 16 prescribes certain elements of the procurement procedure for a PPP, the Regulation also states that a PPP agreement 'must be procured in accordance with applicable procurement legislation'.[3] Treasury Regulation 16 does not purport to regulate all aspects of PPP procurement. It must be determined on a case-by-case basis whether the PPPFA or any other legislation regulating procurement is also applicable. Since a tender process will be followed, the PPPFA will likely be applicable to most PPPs.

Treasury Regulation 16 requires that the procurement procedure must include an open and transparent pre-qualification process, a competitive bidding process in which only pre-qualified organisations may participate, and criteria for the evaluation of bids to identify the bid that represents the best value for money.[4] It further states that the procurement procedure may include a preference for categories of bidders, in terms of the relevant legislation, such as persons disadvantaged by unfair discrimination, provided that this does not compromise the value for money requirement.[5] Treasury Regulation 16.6.7 provides that the procedure may also include incentives for recognising and rewarding genuine innovators in the case of unsolicited proposals. However, these incentives may not compromise the competitive bidding process.

While the oversight role of the applicable treasury, in relation to contracting by government departments, is essentially aimed at verifying the cost-effectiveness of the transaction, it can be seen from the above that the principles of competitiveness, transparency and fairness all assist in achieving this objective. The application of the principles encourages the widest range of bidders possible and is designed to instil confidence in the private sector in its dealings with government. The simultaneous applicability of preferential procurement legislation ensures that regard is also had to the government's job-creation and transformation objectives.

25.8 Procurement and the Right to Just Administrative Action

Section 33(1) of the Constitution provides that everyone has the right to lawful, reasonable and procedurally fair administrative action.[6] The Promotion of Administrative Justice Act 3 of 2000 (AJA) was enacted to give effect to this constitutional right. The AJA, amongst other things, sets out the requirements

[1] Treasury Regulation 16.3.2.
[2] See Treasury Regulations 16.4.2, 16.6.1, 16.6.5 and 16.7.1.
[3] Treasury Regulation 16.6.3.
[4] Ibid at 16.6.5.
[5] Ibid at 16.6.7.
[6] See, generally, Klaaren & Penfold 'Just Administrative Action' (supra), in relation to the right to just administrative action.

for procedurally fair administrative action, gives effect to the right to written reasons and provides for the grounds on which administrative action can be judicially reviewed and set aside.

The fundamental question as to whether administrative law applies to a particular form of conduct is whether it amounts to administrative action. The AJA's definition of 'administrative action', when read with the definition of 'decision', essentially comprises six elements: (1) a decision of an administrative nature; (2) made in terms of an empowering provision; (3) not specifically excluded from the definition; (4) made by an organ of state or by another body exercising a public power or performing a public function; (5) that adversely affects rights; and (6) that has a direct, external legal effect.[1]

A number of cases decided in recent years have held that the decision to call for, the adjudication of, and the granting of a tender (whether by a tender board or another public body) constitutes administrative action.[2] In *Transnet Limited v Goodman Brothers*,[3] the Supreme Court of Appeal held that the evaluation of a tender by Transnet Limited, in respect of the supply of long-service gold watches for employees, amounted to administrative action for purposes of the Constitution.

The consideration of a tender will amount to administrative action provided that the tender is adjudicated in the course of exercising a public function or performing a public power. In this regard, our courts have taken a broad approach to the circumstances in which the award of the tender is related to a public function. In *Transnet Limited*, the appellants argued that when Transnet invites tenders for the supply of locomotives, it acts administratively, but when it invites tenders for toilet paper or gold watches, it does not. With regard to the latter type of purchases it was argued that Transnet acts in a purely private, commercial capacity. This argument was rejected by the Supreme Court of Appeal. The tender for the supply of gold watches was held to amount to administrative action.[4] During the course of his separate concurring judgment, Olivier JA emphasised the use of public funds in reaching the conclusion that the adjudication of the tender amounted to administrative action:

[1] Section 1 of the AJA. See Klaaren & Penfold 'Just Administrative Action' (supra) at 63-17.

[2] *Claude Neon Limited v Germiston City Council & Another* 1995 (3) SA 710 (W), 1995 (5) BCLR 554 (W); *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* [1997] 2 All SA 548 (SCA); *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape* 1997 (7) BCLR 907 (C), [1997] 2 All SA 608 (C); *ABBM Printing and Publishing (Pty) Ltd v Transnet Limited* 1997 (1) BCLR 1429 (W), 1998 (2) SA 109 (W), [1997] 4 All SA 94 (W); *Transnet Limited* (supra); *Olitzki Property Holdings* (supra). See also *Logbro Properties CC v Bedderson NO & Others* 2003 (2) SA 460 (SCA), [2003] 1 All SA 424 (SCA), and *Metro Projects* (supra).

[3] *Transnet Limited* (supra).

[4] Ibid at 871. As Schutz JA stated: 'I fail to see how such a distinction is to be drawn, particularly where, as in this case, the purchase of watches is clearly incidental to the exercise of Transnet's general powers. The gold watches are bought so that they may be used to secure the loyalty of employees, much as salaries are paid to secure their services.'

> The power exercised by Transnet arose from the legislation under discussion [the Legal Succession to the South African Transport Services Act] and directly related to affairs not confined to the internal affairs of Transnet. Public funds and eventually State responsibility are involved.[1]

In light of the fact that public procurement invariably involves the expenditure of public funds, it can be said that the award of a contract will be public in nature, provided that the purpose of the contract is incidental to the public powers of the body and is not confined to its internal affairs.[2]

In our view, the AJA does not alter the position that the adjudication and award of a tender amounts to administrative action, notwithstanding the fact that one of the requirements for administrative action under the AJA is that the decision must 'adversely affect the rights of any person'.[3] In our view, 'affect' should be read to mean determine rather than deprive. In other words, administrative action includes decisions which determine one's rights, and not only those decisions which deprive one of a right.[4] Some support for this approach can be found in *Association of Chartered Certified Accountants v Chairman, Public Accountants' and Auditors' Board*. In holding that the relevant decision amounted to administrative action, Borochowitz J said:[5]

> [The Public Accountants' and Auditors'] Board's decision has plainly affected the rights and interests of the applicant. It has determined its rights.

If this is the case, a failure to award a tender will amount to administrative action. Such a decision will invariably determine the unsuccessful tenderer's rights (in the sense that the unsuccessful tenderer does not acquire rights it would have had if it had been granted the tender).[6]

In relation to the specific right to administrative action that is procedurally fair, s 3 of the AJA provides that this right only applies where one's rights or legitimate expectations are materially and adversely affected by administrative action.[7] For the reasons discussed above, an unsuccessful tenderer would generally be able to rely on this right to procedurally fair administrative action. As De Villiers J stated in *Grinaker*:[8]

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[1] *Transnet Limited* (supra) at 867.

[2] D M Pretorius 'The Defence of the Realm: Contract and Natural Justice' (2002) 119 *SALJ* 374, 395. *Transnet Limited* (supra) at 867, 871. The crucial question then becomes whether the contract procurement process affects the rights of interested parties.

[3] See Klaaren & Penfold 'Just Administrative Action' (supra) at 63-20 — 63-22 for a detailed discussion of this requirement under the AJA and the constitutional difficulties that it raises.

[4] Ibid at 63-21.

[5] 2001 (2) SA 980, 997 (W). See also *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) at paras 101-110.

[6] Provided that the other elements of the definition of administrative action are met.

[7] See Klaaren & Penfold 'Just Administrative Action' (supra) at 63-25–63-30 for a detailed discussion on the right to procedural fairness.

[8] *Grinaker* (supra) at 348.

> Bidders in a tender process are entitled to fair administrative action and have the legitimate expectation that their tender will be evaluated fairly, properly, justly and without bias.

An example of the application of the right to procedural fairness to the adjudication of a tender may be found in *Du Bois v Stompdrift-Kamanassie Besproeiingsraad.*[1] In *Du Bois,* a tender for a long lease of a picnic and camping site was not awarded based upon adverse reports relating to the applicant. The court held that the applicant had the right to procedural fairness. It should have been informed of the contents of the adverse reports and been given an opportunity to respond thereto. The decision not to accept the applicant's tender was therefore set aside. In the course of his judgment, Griesel J expressly rejected the argument that the right to procedural fairness cannot be applied to tender procedures because it would make the procedure cumbersome and unmanageable.[2]

An additional implication of a tender process (or other procurement mechanism) amounting to administrative action is that the public body is required to furnish written reasons for the award of the tender to any person whose rights are adversely affected by such decision.[3] An unsuccessful tenderer will therefore invariably be entitled to written reasons for the rejection of its tender.[4]

25.9 Remedies for Non-Compliance

(a) Introduction

A number of different remedies may flow from non-compliance with the constitutional and legislative requirements for public procurement. These remedies include a declaration of invalidity, the granting of an interdict and, in exceptional circumstances, the awarding of the contract or damages. We will briefly discuss each of these in turn.

(b) Invalidity

According to principles of administrative law and the constitutional principle of legality,[5] public procurement that fails to comply with the provisions of the Constitution or relevant legislation will be invalid and may be set aside by a court.[6]

[1] 2002 (5) SA 186 (C). This case did not relate to the procurement of goods or services.
[2] Ibid at 195-6.
[3] FC s 33(2) and s 5 of the AJA.
[4] This conclusion is consistent with the approach of the court in *Grinaker* (supra) at 348.
[5] *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 91 (CC), 1999 (2) BCLR 151 (CC); and *Pharmaceutical Manufacturers Association of SA & Another: In re Ex parte President of the RSA & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC). See Klaaren & Penfold 'Just Administrative Action' (supra) at 63-39–63-41 for a discussion of the principle of legality.
[6] See, for example, *Contractprops* (supra); *Grinaker* (supra); and *Metro Projects* (supra).

A difficult issue which then arises is whether the entire procurement process should be set aside and new tenders called for or whether existing tenders already received by the relevant body should be reconsidered. The usual course would be to refer the decision back to the relevant body for reconsideration on the basis of the existing tenders.[1] However, in *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province & Others,* the court held that new tenders were warranted because: *(a)* circumstances had changed since the original submission of tenders; *(b)* new directives had subsequently been issued regarding tenders; and *(c)* it appeared that the original tender document was deficient (in that it did not provide for the weight to be attached to the RDP factors).[2]

(c) Interdict

In appropriate cases, and in accordance with the normal requirements relating to interdicts, a public body could be interdicted from engaging in unlawful procurement activities. For example, an unsuccessful tenderer may apply to interdict the conclusion of the contract pursuant to a defective procurement process.

(d) Award of the contract

If the award of the tender or the conclusion of the contract also amounts to administrative action, the court may, in exceptional circumstances, decide to award the tender to the unsuccessful applicant.[3] In *Grinaker*, the court held that such exceptional circumstances existed. It was clear to the court, that, on a proper application of the preference points system under the PPPFA, and other documents which were applicable in terms of the tender conditions, the tender board was obliged to award the contract to the applicant. The result of a reconsideration of the tender was, therefore, a foregone conclusion and the court thus ordered that the contract be awarded to the applicant.[4]

(e) Damages

In *Olitzki Property Holdings*, it was argued that the effect of the procurement provision or the administrative justice clause of the Interim Constitution was to give an unsuccessful tenderer the right to claim damages for lost profit (i.e. the

[1] This was, for example, the approach in *Tecmed (Pty) Limited v Eastern Cape Provincial Tender Board & Others* 2001 (1) SA 735, 742 (SCA).

[2] *Cash Paymaster Services* (supra) at 354.

[3] See s 8(1)*(c)*(i)*(aa)* of the AJA.

[4] *Grinaker* (supra) at 361-2. The court stated that, in any event, 'the [tender board] has exhibited such bias and gross incompetence that it would be fair to both sides not to send the matter back to the [tender board]'. Ibid at 362.

profits it would have made had it been awarded the tender). This argument was rejected by the Supreme Court of Appeal, notwithstanding the fact that it was assumed, for purposes of argument, that the tender board had acted irregularly, unreasonably and arbitrarily and that the plaintiff would have been awarded the tender had a proper process been followed.[1]

Although the constitutional claim for lost profits was rejected by the court in this case, the question as to whether an unsuccessful tenderer may be awarded damages for out-of-pocket expenses incurred in submitting or re-submitting the relevant tender was left open.[2] In our view, a public body should be liable in delict for foreseeable, wasted out-of-pocket expenses incurred by unsuccessful tenderers in relation to a tender process that is found to have been unlawful.[3]

[1] It should be noted that this relief was sought on the basis of the particular circumstances of the case which, it was argued, resulted in no other satisfactory remedy being available to the plaintiff for breach of the relevant constitutional provisions.

[2] *Olitzki Property Holdings* (supra) at 1267.

[3] This conclusion is consistent with the holdings of recent cases that public bodies may be delictually liable for a failure properly to perform their functions. See, e.g. *Carmichele v Minister of Safety and Security & Another (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC).

26 Traditional Leaders

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Recognition

211. (1) The institutional status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Role of traditional leaders

212. (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law —

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(b) national legislation may establish a council of traditional leaders.

26.1 INTRODUCTION

The Final Constitution deals with traditional leaders in two short sections, a terseness which reflects the dominant view in the Constitutional Assembly that democracy, not traditional leadership, was to take precedence in South Africa. However, the intense political negotiations between the government and traditional leaders over the eight years since the Final Constitution came into effect demonstrate that the role of traditional leaders in South Africa is more complicated, and more deeply entrenched, than constitution-makers were prepared to concede. The role of traditional leaders in local government is the area of greatest dispute, as it is at the local level that traditional leaders formerly exercised most of their powers. Three key pieces of legislation, two relating to local government (Local Government: Municipal Demarcation Act[1] and Local Government: Municipal Structures Act[2]) and one concerned directly with the role of traditional leaders (Traditional Leadership and Governance Framework Act[3]), have done little to resolve matters. Instead, the context in which traditional leaders now operate is often unclear. Their relationship with the municipal councils that govern the areas within which they fall, for example, remains fuzzy. The impact of the Final Constitution's commitment to equality on succession to leadership positions is contested. The constitutionality of traditional courts is disputed. The power of the provincial and national houses of traditional leaders is the subject of deep unhappiness amongst traditional leaders. The extent to which practices of

* The authors would like to thank Iain Currie for permission to use material from his chapter on 'Indigenous Law' in the first volume of this work and Tendai Nkenga and Coel Kirkby for excellent research assistance. This chapter also relies on material published elsewhere by the authors. See TW Bennett *Customary Law in South Africa* (2004) and C Murray 'South Africa's Troubled Royalty: Traditional Leaders after Democracy' Law and Policy Paper 23, Centre for International and Public Law, Australian National University (2004).

[1] Act 27 of 1998.

[2] Act 117 of 1998.

[3] Act 41 of 2003.

traditional leaders must be revised in the light of the Bill of Rights (in particular, the provisions relating to just administrative action) is the subject of an increasing number of constitutional challenges.

Underlying all these difficulties are profoundly different understandings of government: on the one hand, those held by traditional leaders, and, on the other, those held by elected representatives in the new South African democracy. In modern states, governmental powers are regulated by various rules which are designed to guarantee what is probably the most important principle in a democracy: accountability to the citizen body.[1] Customary law had no specific rules catering for this principle, but the type of controls associated with a bureaucratic state were irrelevant to the personal style of government typical of traditional African society. A ruler's power was general and all-inclusive.[2] It followed that the business of government was neither differentiated according to the western notions of executive, judicial and legislative functions nor allocated to separate institutions.[3] Instead, all the functions of government were located in one body: the chief-in-council.

When the Interim Constitution was promulgated, traditional leaders still held, more or less unchanged, their all-encompassing powers of government under customary law.[4] Although these powers were, in principle, subject to statutory controls, very few had, in fact, been passed during the years of colonial and apartheid rule. The principal legislation was (and remains) the Black Authorities Act,[5] which provides tribal authorities with all the customary powers of government.[6] FC s 211(1) accepts this position in broad principle by providing that '[t]he institution, status and role of traditional leadership, according to customary law, are recognised.' But then follows a significant proviso: 'subject to the Constitution'.

Because traditional rulers are organs of state,[7] and must comply with the Final Constitution,[8] certain customs will have to change and certain specific customary powers are now superseded or limited. The Final Constitution's commitment to

[1] See Constitution of the Republic of South Africa, 1996 ('FC' or 'Final Constitution'), s 1*(d)*.

[2] The most diverse and far-reaching powers relate to land, including the powers to dedicate new land to commonage, farming or residence, to declare the beginning and end of the agricultural cycle and to impose conservation measures.

[3] See AC Myburgh *Die Inheemse Staat in Suider-Afrika* (1986) 7; WD Hammond-Tooke *Imperfect Interpreters: South Africa's Anthropologists 1920–199*0 (1997) 64–5; HO Mönnig *The Pedi* (1967) 253–4; H Ashton *The Basuto* (1952) 209–10.

[4] Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution').

[5] Act 68 of 1951, as amended by the Regional and Land Affairs General Amendment Act 89 of 1993.

[6] Under Black Authorities Act s 4(2) traditional leaders also have the powers given to them by subordinate legislation. The regulations in question are contained in Proc R110 of 1957, as amended by Proc R110 of 1991.

[7] FC s 239 defines an organ of state broadly to include any functionary or institution exercising a power or performing a function in terms of the Final Constitution or exercising a public power in terms of legislation. For the definition of 'organ of State', see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds), *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 31.

[8] See FC s 8(1)(Explicitly binds all organs of state.)

gender equality, for example, has major implications for many customary practices, including succession and the composition of traditional councils. We discuss these matters later in the Chapter. The Final Constitution also explicitly vests the power to raise taxes in national, provincial and local governments.[1] A traditional leader's customary power in this regard is therefore lost.[2] FC s 13, which prohibits servitude or forced labour, would also suggest that rulers must forfeit their power to demand labour from their subjects for public projects.[3]

More general qualifications on the exercise of customary powers flow from the two constitutional frameworks that were designed to differentiate the functions and institutions of government and to ensure limited government in South Africa: separation of powers (accompanied by checks and balances) and multi-sphere government (national, provincial and local). The former is not expressly mentioned in the Final Constitution, but it has been built into the new system of government. Hence, the Constitutional Court has said that there 'can be no doubt that our Constitution provides for such a separation, and that laws inconsistent with what the Constitution requires in that regard are invalid.'[4] The framework of multi-sphere government, on the other hand, is explicit.[5]

[1] See FC ss 228 and 229. See also *White Paper on Traditional Leadership and Governance* (2003) 43, available at http://www.info.gov.za/gazette/bills/2003/b58-03.pdf (accessed on 20 July 2005)('*White Paper on Traditional Leadership*').

[2] A distinction may, however, be drawn between tax and tribute. But see Mönnig (supra) at 287 (Customary law makes no such distinction). Tax is a compulsory contribution to the fiscus for use in promoting the public welfare; tribute is a payment made as a mark deference or respect for a ruler. The power to issue compulsory levies (which implies an ad hoc tax) is encoded in regulation 22 of the Regulations for Tribal and Community Authorities. R2779 of 22 November 1991. Government approval must first be obtained. This regulation is now presumably unconstitutional. See also H Kuckertz *Creating Order: The Image of the Homestead in Mpondo Social Life* (1990) 71–2 (On the general decline of traditional fiscal powers.)

[3] See, generally, S Woolman & M Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 64. In light of FC s 13, the decision in *Sibasa v Ratsialingwa & Hartman NO*, that traditional rulers have a right to require their subjects to work their own lands for the production of official income may no longer be valid. 1947 (4) SA 369 (T). However, if the section is read in light of the Forced Labour Convention No 29 of 1930 there may be grounds on which to defend this customary power under FC s 36. Under FC s 36 a right may be limited by 'law of general application' only, and customary law is law of general application. See *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) at para 136; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1012 (CC), 1997 (6) BCLR 708 (CC) at para 96; S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 34 (On meaning, purpose and criteria for 'law of general application' as used in FC s 36). Moreover, while the Convention obliges states party to suppress forced labour practices, it allows various exceptions, notably, 'minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations.' Article 2(2)*(e)*. In addition, Articles 7 and 10 allow traditional rulers to exact forced labour, provided the work is in the interests of the community, is necessary and not too burdensome, and is in accord with the exigencies of social life and agriculture. The work may include ploughing and harvesting the rulers' own fields.

[4] See *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 22. See also I Currie & J de Waal *New Constitutional and Administrative Law: Vol 1* (2001) 96.

[5] FC s 40(1). See S Woolman, T Roux & B Bekink 'Cooperative Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 14.

Traditional leaders are an awkward element in these structures, because, according to customary law, in its pre-colonial form at least, traditional rulers were full sovereigns, with powers limited only by the people and territory under their jurisdiction. This Chapter discusses the constitutional framework within which traditional leaders now operate in South Africa, as well as some of the most difficult issues arising from attempts to accommodate traditional leadership in a democracy. To better understand the uncertainty and controversy that surround their role, the discussion is set against a description of the traditional form of government.

26.2 The structure of Traditional Government

According to the typical legend, traditional polities were founded when a charismatic individual, the head of a clan, together with various other families attached to the group, guided his people to the land on which they were to settle. Whatever the reasons for migration over the vast spaces of Africa, once favourable conditions were found, the group could settle permanently. The process might involve the conquest and absorption (or even expulsion) of the original inhabitants, or it might involve the negotiation of a right to settle within a more powerful nation. In any event, settlement established a territorial framework within which to structure further political and economic relations. Hence, the leader could mark out land for his own homestead and fields, those for other sections of the clan and accompanying families, and then an area for communal grazing.

In the early days, government of this unit would have been a simple matter, given the small number of people involved. As the unit grew, however, a certain stratification and structure would inevitably develop. Decisions would be made by the leader in consultation with an inner clique, usually composed of senior kin of the founding clan. When occasion demanded, the advisory council could be expanded to include leaders of the associated families.

In the parlance of colonial rule, these units were generally described as 'tribes' and their leaders as 'chiefs'.[1] The former denoted a partially stratified political structure, normally containing no more than a few thousand individuals.[2] Members were assumed to be related by ties of kinship, and, because of their common ancestry, they were believed to be homogeneous groups, bound together by common interests, beliefs and goals.[3] Leadership of tribes fell to their most senior members, the chiefs. This word was the English translation for *inkosi* (Xhosa and Zulu), *morena* (Sotho) and *kgosi* (Tswana). In most of southern Africa, the office was hereditary, generally devolving according to the principle of primogeniture in the male line.

[1] See M Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) 79–82.

[2] See T Earle (ed) *Chiefdoms: Power, Economy and Ideology* (1991) 1ff. For a useful typology, see B Sansom 'Traditional Economic Systems' in WD Hammond-Tooke (ed) *The Bantu-speaking Peoples of Southern Africa* (2nd Edition, 1974)('Hammond-Tooke *Bantu Speaking Peoples*') 249.

[3] See Sansom (supra) at 262–3. It is significant that the courts accepted these criteria for purposes of apartheid legislation. See *S v Bhoolia* 1970 (4) SA 692 (A)(Relied exclusively on kinship or genetic links to determine the concept of tribe.) See also *Mathebe v Regering van die RSA & Andere* 1988 (3) SA 667, 692–3 (A); *Staatspresident & 'n Ander v Lefuo* 1990 (2) SA 679, 685 (A)(Criteria of ethnic and cultural homogeneity.)

Blanket use of the terms tribe and chief obscured not only the true nature of these institutions but also the considerable diversity of political structures in pre-colonial southern Africa.[1] The term tribe is a particularly egregious offender in this regard.[2] Kinship was never the sole basis for membership.[3] Political units might, historically, have been based on ties of blood, but outsiders were always being incorporated, whether by way of conquest, invitation or submission. What is more, from the very earliest days of colonization, traditional polities were divided, merged or reconstituted in order to suit central government policies.[4] Modern tribes therefore bear little resemblance to their pre-colonial forebears.

Chiefs stood at the head of the hierarchy of offices in traditional government. In cases where a particular individual had gained primacy over his neighbours, the colonial powers were sometimes prepared to use the term 'king'.[5] Hence, Sobhuza I, Mswati II, Shaka, Dingane and Moshoeshoe were all referred to as kings of their peoples. Otherwise, where a chief had not yet acquired complete authority over his coevals (as with the Xhosa), or where the polity was simply not considered large enough (as with the Pedi), the principal ruler was described as a 'paramount chief'.[6]

Below the office of chief or king, the polities of southern Africa could, broadly speaking, be divided into two tiers of authority: wardhead and familyhead. Headmen (or wardheads)[7] were normally senior members of leading families within the nation. They controlled clearly defined geographic units, termed 'wards' in the

[1] See EAB Van Nieuwaal 'Chiefs and African States: Some Introductory Notes and an Extensive Bibliography on African Chieftaincy' (1987) 25 & 26 *J Legal Pluralism* 1, 5ff. See also M Hall *The Changing Past: Farmers, Kings and Traders in Southern Africa 200–1860* (1987) 74ff (Historical and archaeological evidence.)

[2] As an analytical concept, 'tribe' is of little value. See Hammond-Tooke *Bantu-speaking Peoples* (supra) at xv; A Mafeje 'The Ideology of Tribalism' (1971) 9 *J Mod Afr Studies* 253; and P H Gulliver (ed) *Tradition and Transition in East Africa* (1969) 7–35. See also P Skalnik in E Boonzaier & J Sharp *South African Keywords: the Uses and Abuses of Political Concepts* (1988) 68ff. Tribe is additionally objectionable because it carries the connotation of 'tribalism'. See L Vail (ed) *The Creation of Tribalism in Southern Africa* (1989) 3–4.

[3] See I Schapera *Tribal Innovators: Tswana Chiefs and Social Change* (1970)('Schapera *Tribal Innovators*') 5 and 205.

[4] The creation of a Tsonga tribe out of a collection of disparate peoples provides a telling, albeit extreme, example of these processes. See P Harries 'The Emergence of Ethnicity among the Tsonga Speakers of South Africa' in Vail (supra) at 83ff.

[5] King may be translated as *ingonyama* (Zulu), *ikumkani* (Xhosa) and *marena a maholo* (Sotho). See M Gluckman 'The Kingdom of the Zulu in South Africa' in M Fortes & E E Evans-Pritchard (eds) *African Political Systems* (1940) 24ff.

[6] See WD Hammond-Tooke 'Chieftainship in Transkeian Political Development' (1965) 35 *Africa* 149, 157–9 (Describes the Xhosa-speaking polities as a 'tribal cluster'). But see J B Peires *The House of Phalo: a History of the Xhosa People* (1981) 27–31 (Regards them as a more unified structure and argues that Hammond-Tooke's view was formulated at a particular time in Xhosa history, namely, when they were trying to extend their control.) See also RB Mqeke *Basic Approaches to Problem Solving in Customary Law: A Study of Conciliation and Consensus Among the Cape Nguni* (1997) 69–70. For the Tswana, see I Schapera 'The Political Organisation of the Ngwato of Bechuanaland Protectorate' in Fortes & Evans-Pritchard (supra) at 56ff.

[7] Headman is a term associated with government usage and wardhead with the anthropological literature. They are used to translate *induna* (Zulu), *ibonda* (Xhosa), *morenana* (Sotho) and *kgosana* (Tswana).

anthropological literature.[1] Wardheads reported directly to the chief, and, in concert with him, they formed a ruling council. Below the wardheads came the patriarchal heads of households, known as '*kraalheads*' in colonial parlance, or, more commonly today, 'familyheads'. Each incumbent of the three (or sometimes four) ranks of office — chief, wardhead and familyhead — exercised similar types of power, but obviously at different levels of authority.[2]

In the eyes of his people, the chief was the most important and powerful member of his nation.[3] Even so, people talked about their chiefs in the idiom of kinship. Thus, subjects called their ruler a 'father', and his great wife a 'mother'. Like the patriarchal head of a household, chiefly powers were generalized and diffuse. He was expected to judge disputes fairly, to govern wisely, to provide for the needy and to tend to the welfare of his people.[4]

Many of these powers derived from the belief that the present ruler was a direct descendant of the founder of the nation. Through a notionally unbroken tie of blood, he provided a channel of communication with the ancestors of his people,[5] and, because of this special relationship, he had the spiritual powers necessary to maintain the natural order.[6] In particular, he was able to ensure good rains and fertile crops. By reason of his control over the processes of nature, the ruler presided at the major national rituals. In farming communities, for example, he decided when the agricultural cycle was to begin and end, and, accordingly, when his people could start to plough or harvest.[7]

[1] On the concept of the ward, see AJB Hughes *Land Tenure, Land Rights and Land Communities on Swazi National Land in Swaziland: A Discussion of Some Inter-relationships Between the Traditional Tenurial System and Problems of Agrarian Development* (1972) 102; J F Holleman 'Some Shona Tribes in Southern Africa' in E Colson & M Gluckman *Seven Tribes of British Central Africa* (1961) 367–9; I Schapera *Native Land Tenure in the Bechuanaland Protectorate* (1943)('Schapera *Native Land Tenure*') 27–32; MFC Bourdillon *The Shona Peoples: An Ethnography of the Contemporary Shona with Special Reference to their Religion* (1976) 123–4; WJO Jeppe *Die Ontwikkeling van Bestuursinstellings in die Westelike Bantoegebiede (Tswana-Tuisland)*(1970) 113; VGJ Sheddick *Land Tenure in Basutoland* (1954) 8–9.

[2] See Sansom (supra) at 145–6; Holleman (supra) at 371–2, 376; Ashton (supra) at 209; M Gluckman *Politics, Law and Ritual in Tribal Society* (1971)('Gluckman *Politics Law and Ritual*') 39.

[3] He embodied all the emotions and values that ensured the integrity of the realm. See Hammond-Tooke *Bantu-speaking Peoples* (supra) at 174. See also Mönnig (supra) at 253; I Schapera *A Handbook of Tswana Law and Custom* (2nd Edition, 1955)('Schapera *Handbook*') 62. Note that the chief represented his people in dealings with outsiders. See Schapera *Handbook* (supra) at 69; Sansom (supra) at 266. Thus, according to *Mathiba v Du Toit*, the chief had *locus standi* to sue for restoration of national land. 1926 TPD 126.

[4] See M Hunter *Reaction to Conquest* (1964) 392; Schapera *Handbook* (supra) at 68; WD Hammond-Tooke *Command or Consensus: The Development of Transkeian Local Government* (1975)('Hammond-Tooke *Command or Consensus*') 30; Mönnig (supra) at 254. In keeping with this paternal image is the principle that a ruler's reputation was enhanced by giving rather than receiving. See Gluckman *Politics, Law and Ritual* (supra) at 50; WD Hammond-Tooke *Bhaca Society* (1962) 199; Ashton (supra) at 212; Mönnig (supra) at 274.

[5] See EM Letsoalo *Land Reforms in South Africa* (1987) 18; WJO Jeppe *Bophuthatswana: Land Tenure and Development* (1980)('Jeppe *Bophuthatswana*') 36; Schapera *Handbook* (supra) at 61–2; Bourdillon (supra) at 87.

[6] See Earle (supra) at 6–7.

[7] See AC Myburgh & MW Prinsloo *Indigenous Public Law in KwaNdebele* (1985) 41; MW Prinsloo *Inheemse Publiekreg in Lebowa* (1983)('Prinsloo *Publiekreg*') 131; W D Hammond-Tooke *Bhaca Society* (supra) at 176; Mönnig (supra) at 159–60. The harvest festival was generally the highlight of the seasonal calendar. It was an occasion to celebrate the first fruits, affirm national unity and honour the ruler for his wisdom and benevolence. See BA Marwick *The Swazi* (1966) 182ff; Hammond-Tooke *Bhaca Society* (supra) at 179ff; Schapera *Native Land Tenure* (supra) at 187–8; EJ Krige *The Social System of the Zulus* (1936) 249; Hunter (supra) at 394.

The ruler also had a range of powers and privileges of a more secular nature. He could order his subjects to work on his lands and provide labour for public works;[1] he could levy taxes[2] and demand tribute from the harvest[3] or the hunt;[4] he was entitled to choose the best land for his homesteads;[5] and he could order his subjects to plough and harvest his fields.[6]

This form of government obviously differed markedly from a modern democracy. Traditional rulers needed no special training; they were qualified for office by their ancestry alone. (Hence the well-known saying, *kgosi ke kgosi ka a tswetswe* [a king is a king because he is born to it].) As we have already noted, the functions of government were not differentiated into judicial, administrative and legislative categories, nor were rulers subject to the scrutiny of an independent judiciary. What seems an alarming concentration of power in one person was circumscribed, normatively, only by a duty to consult councillors and always to act for the benefit of the people.

The most important limitation on the power of traditional rulers came from the reality of day-to-day politics. As the notion of tribe suggests, most pre-colonial African polities were poised halfway between being state and stateless societies.[7] As a result, few rulers had an uncontested hold on their offices. If an office holder is constantly under threat of usurpation, he has to take great care to cultivate goodwill and to appease hostile factions.[8] Thus, a certain degree of political insecurity explains why an African ruler's power could not, in the past at least, have been absolute. Anyone who attempted tyrannical rule would soon face revolt or secession.[9] The wise leader, therefore, did not dictate to his subjects. A common saying has it that *kgosi ke kgosi ka batho* [a chief is a chief through his people].[10]

Rulers kept in touch with their people through councillors. As might be expected, the status and function of these officials varied, as did the composition and tasks of the councils they formed.[11] All rulers tended to rely on their senior

[1] See Myburgh & Prinsloo (supra) at 8; Ashton (supra) at 207–8; Hughes (supra) at 144.

[2] The taxes often paid for public works. See Ashton (supra) at 208; Krige (supra) at 221–2; Hughes (supra) at 109.

[3] Schapera *Native Land Tenure* (supra) at 196; Letsoalo (supra) at 19 and 23; H Kuper *An African Aristocracy* (1947) 150. Cf Marwick (supra) at 164; NJ Van Warmelo & WMD Phophi *Venda Law: Parts 1–3* (1948), *Part 4* (1949), *Part 5* (1967) 1089.

[4] See Holleman (supra) at 378; Bourdillon (supra) at 86; Hammond-Tooke *Bhaca Society* (supra) at 199; Ashton (supra) at 208; Prinsloo *Publiekreg* (supra) at 141; Krige (supra) at 222; HA Junod *The Life of a South African Tribe* (1912) 404–7.

[5] See Schapera *Native Land Tenure* (supra) at 44; Sheddick (supra) at 147; Kuper (supra) at 45 and 149.

[6] The produce was supposed to be used to feed the needy. See Letsoalo (supra) at 18–19; Holleman (supra) at 378, Hughes (supra) at 108; Sheddick (supra) at 33, 148 and 150.

[7] See Fortes & Evans-Pritchard (supra) at 5ff.

[8] See Hall (supra) at 63–4; Hammond-Tooke *Command or Consensus* (supra) at 31ff.

[9] See I Schapera *Government and Politics in Tribal Societies* (1956) 211 Hammond-Tooke *Command or Consensus* (supra) at 35–6; Ashton (supra) at 217; Hunter (supra) at 393–4.

[10] See Prinsloo *Publiekreg* (supra) at 161; Schapera *Handbook* (supra) at 84.

[11] See Schapera *Handbook* (supra) at 75 (Noted that the councils were not formally constituted and had no fixed membership.) The various types of council and national gathering are described in Jeppe *Bophuthatswana* (supra) at 126–7; Ashton (supra) at 216; Hughes (supra) at 103–4; Myburgh & Prinsloo (supra) at 11–13 and 51–3; Prinsloo *Publiekreg* (supra) at 92–7; Schapera *Tribal Innovators* (supra) at 22–5. After the enactment of the Black Authorities Act, the government naturally looked to these councils to provide the future 'tribal authorities'. Act 68 of 1951. See Jeppe *Bophuthatswana* (supra) at 120; Myburgh & Prinsloo (supra) at 53–7.

kinsmen for regular advice. These individuals constituted a close-knit council, which generally met in private. A similar, more representative unit, which also met in private, consisted of members of the family council together with leaders of the community, notably, the wardheads.

Meetings of the ruling aristocracy should be distinguished from popular assemblies (*imbizo* in Xhosa/Zulu or *pitso* in Sotho/Tswana). At the latter, all (male) adults in the realm were called together for the discussion of nationally important matters, such as the imposition of new legislation or levies, the organization of collective labour parties or, occasionally, the resolution of national disputes. Because no important decision could be taken without discussion in council, kinsmen, wardheads or even the people generally were given opportunities to check self-interested action and to voice public opinion.[1] Hence, a ruler's authority was never continuing and unquestioned; it always had to be recreated for specific issues and in specific contexts.[2]

Because of the constant flux in power and authority in the traditional structures of government, historical and anthropological sources were uncertain about the nature of traditional rule. Was it a primordial form democracy or naked despotism?[3] Perhaps predictably, the colonial authorities tended to regard all indigenous rulers as autocrats.[4]

26.3 Conquest, Indirect Rule and Apartheid

The various forces unleashed by colonial conquest inevitably worked to undermine the checks and balances of traditional government.

Initially, dating from their earliest exchanges with the people living on the eastern frontiers of the Cape Colony, the British aimed at eliminating traditional government. When areas of Ciskei were annexed, a conscious attempt was made to reduce the power of the chiefs, who were believed to be the main obstacle to Britain's civilizing mission in Africa.[5] Thereafter, as colonial rule was extended

[1] See Kuckertz (supra) at 80ff; Jeppe *Bophuthatswana* (supra) at 119ff n12; Hammond-Tooke *Bhaca Society* (supra) at 205–6; Prinsloo *Publiekreg* (supra) at 153ff, 165; Myburgh & Prinsloo (supra) at 66ff; Ashton (supra) at 215.

[2] See Hammond-Tooke *Command or Consensus* (supra) at 65. See also JL Comaroff 'Chieftainship in a South African Homeland' (1974) 1 *Journal for Southern African Studies* 36, 41 (Describes traditional authority as follows: '[t]he rights and duties of [a chief] are not immutably fixed: the chief and his subjects are thought to be involved in a perpetual transactional process in which the former discharges obligations and, in return, receives the accepted right to influence policy and command people. The degree to which his performance is evaluated as being satisfactory is held to determine the extent of his legitimacy, as expressed in the willingness of his people to execute his decisions.')

[3] See M Chanock *The Making of South African Legal Culture 1902–1936: Fear, Favour and Prejudice* (2000) 282ff n5.

[4] See *Rathibe v Reid & Another* 1926 AD 74, 81. But see AC Myburgh *Die Inheemse Staat in Suider-Afrika* (1986) 63ff (Notes considerable variation and contradiction in the sources.)

[5] See EH Brookes *The History of Native Policy in South Africa from 1830 to the Present Day* (1924) 90 and 93–4. More formally, British policy was justified by Ordinance 50 of 1828, which required equal treatment for all people in the Colony. See Mqeke (supra) at 75–8 (Brief history of the imposition of British rule in Ciskei and Transkei.)

beyond the Kei River, a similar, although modified form of government was introduced to the Transkeian territories.

A completely different policy developed in Natal.[1] There, Shepstone persuaded the colonial administration to give chiefs governmental and judicial powers,[2] under the leadership of the Lieutenant-Governor, who was deemed Supreme Chief of the African people.[3] In the Transvaal, during the short period of British rule from 1877 to 1881, the same regime was imposed, and, after the retrocession, it was retained.[4] As in Natal, traditional rulers were given both judicial and local government powers, subject to native commissioners and the overriding authority of the State President, who held the office of Paramount Chief.

The policy towards traditional rulers on the northern borders of the Cape colony was similar. In 1885, when Britain declared southern Bechuanaland a Crown colony and northern Bechuanaland a protectorate, traditional rulers were allowed to continue administering customary law more or less undisturbed.[5] Colonial courts had the power to try Africans only 'in the interests of peace, or for the prevention or punishment of acts of violence to persons or property.'[6] In 1895, southern Bechuanaland was incorporated into the Cape, but no attempt was made to impose Cape policy.

The Orange Free State could not be considered to have any fixed policy on traditional rulers. The rulers of the Rolong were allowed to continue governing their people in the Thaba'Nchu Reserve, and those of the small Witzieshoek Reserve were also given minor civil jurisdiction according to customary law, with appeal to the Commandant.[7]

With the exception of the Cape and the Free State, colonial rule in most parts of southern Africa left the customary powers of traditional rulers more or less intact. Although legally subordinate to settler governments, chiefs continued to be the main providers of law and order for their subjects. Nevertheless, in spite of this structure of indirect rule — a policy that Britain was later to implement throughout Africa — the subtle give-and-take of traditional government was gradually supplanted by a more authoritarian rule.[8]

Once African leaders became functionaries of colonial government, the central administration became the primary source of their power and authority, which in turn eroded any sense of accountability to those being governed.[9] In addition,

[1] See Brookes (supra) at 25.

[2] Ordinance 3 of 1849.

[3] Through this means the colonial government could rule African subjects by executive decree, rather than the normal legislative process. See D Welsh 'The State President's Powers under the Bantu Administration Act' 1968 *Acta Juridica* 81, 89–90.

[4] Law 4 of 1885. See Brookes (supra) at 130.

[5] Sections 31 and 32 of Proc 2 of 1885.

[6] Section 8 of an Order in Council of 10 June 1891.

[7] Law 9 of 1889. See H Rogers *Native Administration in the Union of South Africa* (2nd Edition, 1949) 102–3.

[8] See Mamdani (supra) at 52ff (Describes indirect rule as a system of 'decentralised despotism'.)

[9] See, eg, Ashton (supra) at 217; Jeppe *Bophuthatswana* (supra) at 149; Hammond-Tooke *Command or Consensus* (supra) at Chapter 8.

when the colonial powers imposed new provincial and international boundaries, the most effective method for protesting against unpopular rulers — secession — was lost, because those disaffected with a chief's rule were prevented from leaving the chiefdom to settle elsewhere.[1]

The most determined campaign to undermine traditional government was a scheme launched by the Cape administration in the district of Glen Grey in 1894.[2] For complex reasons to do mainly with excluding Africans from Parliament, people living in the area were subjected to new organs of partially elected location councils and more comprehensive district councils. What came to be known as 'the council system' was then extended to the Transkei,[3] where a general council (or *Bhunga*)[4] provided a model for future local government in rural areas.

In 1909, the South Africa Act vested control of 'native' affairs in the Governor-General in Council, who henceforth assumed all the special powers previously held by the governors of the colonies.[5] A national Department of Native Affairs was fashioned out of earlier colonial departments, and this body became the Governor-General's main executive authority.[6] One of the new Department's first tasks was to devise a uniform policy of local government for rural Africans.

The Native Affairs Act was passed in 1920.[7] This law, which represented a high-water mark in the policy of Cape paternalism, extended the Glen Grey council system nationwide. The councils set up under the Act were expected to attend to all the duties that elsewhere were performed by municipalities, such as the building of schools and hospitals and the improvement of agriculture. Councils had authority to make by-laws, prescribe fees for the services they rendered, and levy rates on adult males ordinarily resident within their areas of jurisdiction.

Those who drafted the Native Affairs Act envisaged a close cooperation between the councils and the Native Affairs Department, whereby Africans would be trained to achieve a western style of government under the tutelage of native commissioners. Great emphasis was placed on consultation, with mediation by the Native Affairs Commission.[8] As it turned out, however, very few councils were capable of managing the extensive duties prescribed in the Act,[9] and, within a decade, the entire system began to falter.[10]

[1] See Prinsloo *Publiekreg* (supra) at 29.

[2] Act 25 of 1894 (Cape). See Hammond-Tooke *Command or Consensus* (supra) at 84ff.

[3] Proclamation 352 of 1894. See Rogers (supra) at 40ff.

[4] This Council was formed by an amalgamation of the general councils for Transkei and Pondoland by Proclamation 279 of 1930.

[5] Section 147 of the South Africa Act of 1909.

[6] See Lord Hailey *An African Survey: A Study of Problems Arising in Africa South of the Sahara* (2nd Edition, 1945) 363ff.

[7] Act 23 of 1920.

[8] The Commission was an advisory body of independent experts (presided over by the Minister) which was established under the Native Affairs Act. Act 23 of 1920.

[9] See Rogers (supra) at 66.

[10] See S Dubow *Racial Segregation and the Origins of Apartheid in South Africa, 1919–36* (1989) 107ff.

In any event, a new policy appeared during the course of the 1920s, one designed to 'retribalise' the African population and resurrect traditional rule.[1] In 1927, the government laid the statutory foundation for this policy: the Native Administration Act.[2] Although judicial powers over civil disputes were returned to the chiefs,[3] the state assumed wide powers of control over traditional institutions of government. These powers could be summed up in a single provision: s 1 of the Act made the Governor-General the Supreme Chief of all Africans. Acting in this capacity, he had full authority, with the advice of the Department of Native Affairs, to create and to divide tribes,[4] and to appoint any person he chose as a chief or headman.[5]

The Native Administration Act, although often amended, and now named the Black Administration Act, is still in force.[6] Traditional rulers who opposed the exercise of executive powers, no matter what popular legitimacy they might have enjoyed, could be ousted from office or passed over in matters of succession. Hence, although the Department of Native Affairs was generally prepared to make appointments from the ruling families, it was free to depart from the established order of succession by choosing uncles or younger brothers,[7] or by promoting subordinate headmen.[8] The outcome was a compliant cadre of 'traditional' leaders who provided the personnel needed to realize an increasingly unpopular state policy.[9] Especially after 1948, when the Nationalist Party came to power, chiefs became instrumental in enforcing (or at least facilitating) many of the hated apartheid controls.[10]

For another twenty years, the council system persisted alongside this supposedly traditional form of government, but, in areas where no councils had been

[1] The ultimate aim was to eliminate any vestiges of African participation in central government. This goal was achieved, formally, when the Representation of Natives Act removed Africans from the common voters' roll. Act 12 of 1936.

[2] Act 38 of 1927 ('NAA').

[3] NAA s 12. Later, under NAA s 20, chiefs were given minor criminal jurisdiction.

[4] NAA s 5(1)*(a)*.

[5] NAA s 2(7).

[6] A bill to repeal the Black Administration Act is currently before Parliament: Repeal of the Black Administration Act and Amendment of Certain Laws Bill (2005). The Constitutional Court has commented on the need to repeal the Act on a number of occasions: *Western Cape Provincial Government & Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government & Another* 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC) at paras 1, 2, 41 and 93; *Moseneke & Others v The Master & Another* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC) at para 21; *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at paras 62–64.

[7] See W Beinart & C Bundy *Hidden Struggles in Rural South Africa: Politics and Popular Movements in the Transkei and Eastern Cape, 1890–1930* (1987) 7.

[8] See I van Kessel & B Oomen '"One Chief, One Vote": The Revival of Traditional Authorities in Post-apartheid South Africa' (1997) 96 *African Affairs* 561, 563–4.

[9] See T Quinlan 'The Perpetuation of Myths: A Case Study in "Tribe" and "Chief" in South Africa' (1988) 27 *J Legal Pluralism* 79 (Study of the former homeland of Qwa Qwa.)

[10] Of course, not all traditional rulers were prepared to cooperate. Notable instances of resistance were Albert Luthuli, who was elected ANC president in 1952, and Sabata Dalindyebo and Morwamoche Sekhukune, in Transkei and Lebowa, respectively.

established, chiefs were allowed to continue exercising their customary powers. Eventually, the Bantu Authorities Act signalled the formal demise of the council system and a full return to traditional rule.[1] Under the new Act, the Governor-General could, with due regard to customary law, and after consultation with the tribe concerned, establish three tiers of authority in the reserves (which later became the *bantustans*): tribal, regional and territorial.[2] A tribal authority, which consisted of a chief (or headman) and his councillors, operated at the lowest level. It was responsible for administering the general affairs of a tribe and for advising and assisting the government.[3] Strictly speaking, the councils set up under the 1920 Native Affairs Act ceased to exist when new authorities were established in their areas of jurisdiction,[4] but, whenever possible, the Bantu authorities were simply grafted onto existing council structures.

The Bantu Authorities Act paved the way for the next stage in the apartheid programme: the creation of independent homelands. In 1959, the Promotion of Bantu Self-Government Act created eight (later nine) national units, and it provided a framework for their transition to self-government and ultimately full independence.[5] Africans now fell under the jurisdiction of one of the 'territorial authorities', and each of these authorities was allotted one or more of the *bantustans* as a 'national homeland'. Thus, the North-Sotho authority was allotted Lebowa, the South-Sotho Qwaqwa, the Swazi Kangwane, the Tsonga Gazankulu, the Tswana Bophuthatswana, the Venda Venda, the Ndebele KwaNdebele, the Xhosa Transkei and Ciskei, and the Zulu KwaZulu.

The Bantu Homelands Constitution Act of 1971 gave the State President power to create a legislative assembly for an area in which a territorial authority had been established under the Bantu Authorities Act.[6] This assembly could, in turn, be transformed into a fully self-governing territory. By this means, Transkei was granted independence in 1976, soon to be followed by Bophuthatswana, Venda and Ciskei.[7] Chiefs *ex officio* occupied half the seats in the homeland legislative assemblies, thereby ensuring leading parties a solid basis of support.[8]

The intensified manipulation of traditional leadership under apartheid inevitably led to protest in the 1950s and early 1960s. Thereafter, however, open opposition to the enlisting of chiefs to conduct the business of apartheid government

[1] Act 68 of 1951 ('BAA').

[2] BAA s 2(1). BAA s 3 allowed the Governor-General (later the State President) to recognize tribal authorities that were already functioning according to the laws and customs of the tribes. Under BAA s 3(3), members of regional authority structures were drawn from the traditional rulers who constituted the tribal authorities.

[3] BAA s 4(1). Powers and duties were further specified under Proclamation R110 of 1957.

[4] BAA s 12.

[5] Act 46 of 1959.

[6] Act 21 of 1971, s 1.

[7] Independence was granted in 1976, 1979 and 1981, respectively.

[8] See C Tapscott 'The Institutionalisation of Rural Local Government in Post-Apartheid South Africa' in W Hofmeister & I Scholz (eds) *Traditional and Contemporary Forms of Local Participation and Self-government in Africa* (1997) 294.

declined until the late 1980s, when, ironically, the relaxation of the pass laws in 1986 led chiefs to become more, not less, authoritarian. Once the rural population could work in cities without passes, chiefs lost a substantial source of revenue that had accrued to them under the registration system. They replaced this income with 'tribal levies'. Sometimes these levies were for public services such as building a school or clinic, but often they were used for the direct benefit of the chief.[1]

Not unexpectedly, following growing anger and resistance to apartheid in the townships, political protests grew massively in rural areas. As Maloka & Gordon write:

> Unlike the 1950s-60s revolts, those of the period 1985–1990 were led by the youth and civic/resident associations against chiefs. These organs of civil society challenged the legitimacy and authority of these chiefs, demanding their resignation from Bantustan structures. Many villages consequently fell under the control of the youth and civic organisations, in line with the countrywide strategy of the ANC-aligned political organisations to render apartheid structures unworkable and create organs of "peoples' power" as an alternative. Thus many chiefs fled from their villages, governing from "exile".'[2]

The attitude of South Africa's internal resistance movement, the United Democratic Front, was clear: 'Chiefs must go and the people must run the villages.'[3] The brief (and influential) set of Constitutional Guidelines for a Democratic South Africa, which the exiled ANC circulated in 1988, was also alert to the problems that traditional leadership posed for its vision of a future democratic South Africa. The ANC, however, was less adamant in its wording: 'The institution of hereditary rulers and chiefs shall be transformed to serve the interests of the people as a whole in conformity with the democratic principles embodied in the constitution.'[4]

Traditional leaders were also adjusting to the times, and, in September 1987, 38 'progressive' chiefs met to form the Congress of Traditional Leaders of South Africa ('CONTRALESA'),[5] a body aligned to the ANC. CONTRALESA's Constitution stated that the organization:

[1] See Van Kessel & Oomen (supra) at 567 (Document a case in which a levy paid for nappies for the chief's children.)

[2] See T Maloka & D Gordon 'Chieftainship, Civil Society, and the Political Transition in South Africa' (1996) 22 *Critical Sociology* 37, 42.

[3] See Van Kessel & Oomen (supra) at 568. (Van Kessel & Oomen provide a fuller description of this period.) The United Democratic Front ('UDF') was, in effect, the internal arm of the exiled African National Congress ('ANC').

[4] ANC Constitutional Drafting Committee *Constitutional Guidelines* (1988) para C.

[5] See Maloka & Gordon (supra) at 42. CONTRALESA was created in 1987 in response to the division among traditional leaders in KwaNdebele on the question of independence. Chiefs who were opposed to independence, allied themselves to the UDF and formed the organization. In 1988 and 1989, CONTRALESA delegations were received by the ANC in Lusaka, and the party's media praised the contribution of the organization to the cause of liberation in the rural areas. See B Oomen 'Talking Tradition: The Position and Portrayal of Traditional Leaders in Present-day South Africa' (Unpublished MA thesis, University of Leiden, 1996)(manuscript on file with authors)(Oomen 'Talking Tradition').

> aim[ed] to unite all traditional leaders in the country, to fight for the eradication of the Bantustan system, to 'school the traditional leaders about the aims of the South African liberation struggle and their role in it', to win back 'the land of our forefathers and share it among those who work it in order to banish famine and land hunger' and to fight for a unitary, non-racial and democratic South Africa.[1]

Van Kessel & Oomen note that 'CONTRALESA emerged on the political scene couched in the discourse of liberation politics'.[2]

By June 1989, more than 80 per cent of the chiefs in the Transkei and 50 KwaZulu chiefs were members of CONTRALESA. The participation of Kwa-Zulu chiefs was especially significant, since Mangosuthu Buthelezi was Chief Minister of the Bantustan, and, after being condemned by the ANC in the early 1980s as 'an enemy of the people', he had become heavily dependent on the apartheid regime. He viewed CONTRALESA as an obvious threat to his power and ambitions, and he warned KwaZulu chiefs against joining.[3]

When, in 1990, the first tangible moves towards liberation were made in South Africa, the inevitable end of the *bantustans* became evident. Perhaps seeing the writing on the wall, increasing numbers of chiefs joined CONTRALESA.[4]

When the Interim Constitution was being drafted in 1993, views on traditional leadership were, to say the least, ambivalent. As an institution, the chieftaincy was said to encourage tribalism and ethnic division,[5] and, inevitably, it represented the interests of traditionalist males, rather than women, youths or the landless. A similar ambivalence marked views on the personal abilities of the existing chiefs. Obviously, the degree of efficiency and honesty varied from individual to individual, and so, too, did the degree of control exercised by the state, but many rulers were said to be incompetent and corrupt.[6] Even those who were considered competent rulers were usually too conservative and hardly any had the financial and managerial skills needed to perform the tasks of modern public officials.[7]

All of these views could have been anticipated. Chiefly rulers had long been expected to play the difficult, and often quite contradictory, roles of patriarchal

[1] See Van Kessel & Oomen (supra) at 569 quoting from *Race Relations Survey 1987–1988* (1988) 922.
[2] See Van Kessel & Oomen (supra) at 569. See also Maloka & Gordon (supra) at 42.
[3] See Maloka & Gordon (supra) at 43.
[4] See Van Kessel & Oomen (supra) at 571.
[5] Ibid at 572.
[6] See Tapscott (supra) at 294–6; CR Cross 'Landholding Systems in African Rural Areas' in M De Klerk (ed) *A Harvest of Discontent* (1991) 73; CR Cross 'The Land Question in Kwa-Zulu: Is Land Reform Necessary?' (1987) 4 *Development SA* 428, 437–8; Hammond-Tooke *Command or Consensus* (supra) at 211; WD Hammond Tooke 'Chieftainship in Transkeian Political Development' (1964) 2 *J Mod Afr Studies* 313, 320–1.
[7] See '1986 Report on Workshop on Land Tenure and Rural Development' (1987) 4 *Development SA* 375–7.

leaders and state bureaucrats.[1] The result was a serious discrepancy between the demands of central government and local communities.[2] What is more, few chiefs had the resources needed to develop the rural economy or deliver the basic services expected of modern local authorities. Not only was the homeland infrastructure hopelessly inadequate — and, because of apartheid, bizarrely fragmented — but it was also incapable of generating a proper revenue base. For many years, the homelands had relied heavily on handouts from the central government and, of course, remittances from urban workers.

Dissatisfaction with traditional rule was not peculiar to South Africa. At the time of decolonisation, similar views could be found in most parts of Africa.[3] Even so, few of the newly independent states could afford to dispense with traditional authorities, and attempts made to depose or sideline them nearly always resulted in failure.[4] The main reason for the resilience of traditional authority was clearly popular support for the institution, if not the individual office-holder.[5]

What is more, chiefs were well positioned to run an adaptable form of community government.[6] In spite of all its faults, and in the absence of viable alternatives, the chieftaincy is more in touch with local sentiment than a central state bureaucracy. For many ordinary people, their rulers are a 'legal and constitutional horizon', a 'personification of the moral and political order, protection against injustice, unseemly behaviour, evil and calamity'.[7]

26.4 Constitutional Negotiations and the Final Constitution

In 1991, when the Convention for a Democratic South Africa met to negotiate a new constitution, traditional leaders had no formal status, and their demands to

[1] See AKH Weinrich *Chiefs and Councils in Rhodesia* (1971)(For a detailed study); N Miller 'The Political Survival of Traditional Leadership (1986) 6 *J Mod Afr Studies* 183 (General analysis of role conflicts). See also H Kuckertz *Creating Order: The Image of the Homestead in Mpondo Social Life* (1990) 74; Hammond-Tooke *Command or Consensus* (supra) at 212; EAB Van Rouveroy van Nieuwaal 'Chiefs and African States: Some Introductory Notes and an Extensive Bibliography on African Chieftaincy' (1987) 25 & 26 *J Legal Pluralism* 1 (Van Rouveroy van Nieuwaal 'Chiefs and African States') 28.

[2] See EAB Van Rouveroy van Nieuwaal 'State and Chiefs: Are Chiefs Mere Puppets?' (1996) 37 & 38 *Journal of Legal Pluralism* 39, 64.

[3] See Van Rouveroy van Nieuwaal 'Chiefs and African States' (supra) at 6–7.

[4] See KO Adinkrah 'Legitimacy and Tradition in Swaziland' (1991) 24 *CILSA* 226.

[5] See Comaroff (supra) at 38; Haines & Tapscott (supra) at 167–8. Chiefs have also been active in protecting their own interests. In this regard, they have been able to draw on the powerful legitimating force of tradition. See B Oomen 'We Must Now Go Back to Our History: Retraditionalisation in a Northern Province Chieftaincy' (2000) 59 *Afr Studies* 71ff.

[6] A brief opinion survey conducted in South African in 1994, for instance, showed that two-thirds of the population were willing to support traditional rulers. See N Pillay & C Prinsloo 'The Changing Face of 'Traditional Courts' (1995) 28 *De Jure* 386 ff. See also RB Mqeke *Basic Approaches to Problem Solving in Customary Law: A Study of Conciliation and Consensus Among the Cape Nguni* (1997) 166. More recently, evidence is emerging that the failure of local government in rural areas is causing people to turn back to their traditional leaders for basic needs.

[7] See Van Rouveroy van Nieuwaal 'Chiefs and African States' (supra) at 23.

be included in the proceedings were rejected. They were not without a voice, however, for their interests were represented by the Inkatha Freedom Party, delegations from homeland governments and individual members of political parties. For the ANC, too — despite opposition of organizations aligned to the liberation struggle — chiefs represented an important rural support base. Hence, the ANC was quick to take advantage of the prospect of their support, and the early stages of the transition in government were 'characterised by enthusiasm and co-operation between the ANC and chiefs'.[1]

In 1993, the Multi-Party Negotiating Forum admitted constituencies of traditional leaders, largely as a result of efforts by CONTRALESA and bargains struck with the ANC. Traditional rulers won significant, although temporary, constitutional victories.[2] Under the Interim Constitution, and notwithstanding the constitutional revolution underway, they were allowed to continue exercising all the powers and functions they held under customary law and 'applicable laws', including the Black Authorities Act (although now specifically subject to amendment or repeal).[3]

In addition, they were given new positions in the local, provincial and national spheres of government. At the lowest level, traditional rulers had *ex officio* membership of the municipal structures being created in their areas.[4] At provincial level, all provinces containing traditional authorities were obliged to establish houses of traditional leaders,[5] and, at national level, a similar provision obliged Parliament to create a council (now called a house) of traditional leaders.[6] Although these new bodies lacked law-making powers, they could advise and make proposals on matters concerning traditional authority and customary law, and any bills on these topics had to be referred to them.[7]

Potentially much more significant than the temporary powers granted to traditional leaders under the Interim Constitution was a guarantee that the status of traditional leaders would be specially protected in the Final Constitution. Constitutional Principle XIII.1 of the Interim Constitution stipulated that the institution

[1] Maloka & Gordon (supra) at 44.

[2] The chiefs' proposals were set out in a document submitted to the Negotiating Council 'Joint Position Paper concerning Role of Traditional Leaders' (13 August 1993). See C Albertyn 'Women and the Transition to Democracy in South Africa' in C Murray (ed) *Gender and the New South African Legal Order* (1994) 39.

[3] IC s 181(1). The 'applicable laws' in this section referred, *inter alia*, to the various enactments by the homeland governments specifying the powers and duties of traditional rulers: Transkei Authorities Act 4 of 1965; Bophuthatswana Traditional Authorities Act 23 of 1978; Venda Traditional Leaders Administration Proc 29 of 1991; Ciskei Administrative Authorities Act 37 of 1984; Qwa Qwa Administration of Authorities Act 6 of 1983; KwaNdebele Traditional Authorities Act 2 of 1984; and KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990.

[4] IC s 182.

[5] IC s 183(1)*(a)*. IC ss 183(1)*(b)* and *(c)* stipulated that the Houses had to be established in consultation with the traditional authorities resident within the province.

[6] IC s 184.

[7] The new organs could delay the passing of a Bill. See IC s 183(2)*(d)*(Regarding the provincial Houses); IC s 184(5)*(c)*(Regarding the national Council). A veto on legislation delayed passage of a bill for 30 days.

of traditional leadership, as determined by indigenous law, was to be recognized and protected. Moreover, in an implicit acknowledgement of how anomalous traditional leadership appeared in the new constitutional order, Constitutional Principle XVII provided that, although democratic representation was to prevail in all spheres of government, this principle did not derogate from the provisions of Principle XIII.[1]

Traditional leaders had no formal representatives at the Constitutional Assembly, which drafted the Final Constitution. As a result, the gains of 1993 were largely lost.[2] FC s 211(1) appears to capture Principle XIII.1, almost to the letter: '[t]he institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.'[3] However, FC s 211(2) significantly qualifies what appears to be a blanket confirmation of the status quo by providing that 'a traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.'

FC s 212(2) rounds off the series of provisions on traditional leaders by allowing, but not requiring, a national council of traditional leaders and provincial houses of traditional leaders to be established in order '[t]o deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law.' As for the political role of traditional leadership, under FC s 212(1), 'national legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.' FC s 143(1) provides a footnote. In accordance with Constitutional Principle XIII.2, it states that a provincial constitution

[1] See A Donkers & R Murray in South Africa' in B De Villiers (ed) *The Rights of Indigenous People: A Quest for Coexistence* (1997) 39, 47.

[2] For a description, see TRH Davenport *The Transfer of Power in South Africa* (1998) 70; C Murray 'South Africa's Troubled Royalty: Traditional Leaders after Democracy' Law and Policy Paper 23, Centre for International and Public Law, Australian National University (2004)(manuscript on file with authors). The weakness of the provisions relating to traditional leadership reflect the fact that the champion of chiefly power, the IFP, had boycotted most of the Constitutional Assembly proceedings because the government refused to enter into international mediation over the position of the Zulu monarch in accordance with a Memorandum of Agreement between the erstwhile South African government, the ANC and the IFP (signed on 19 April 1994). An additional factor explaining the absence of any solid entrenchment of chiefly powers in the Final Constitution was the waning influence of CONTRALESA within the ANC and the activities of the organization's controversial president Phatekile Holomisa. CONTRALESA became estranged from the ANC after Holomisa called for a boycott of the local government elections in areas under traditional authority and began associating with senior officials of the IFP. Like the IFP, CONTRALESA opposed certification of the 1996 Constitution on the ground that it made inadequate provision for traditional leadership and customary law. See 'Tension in ANC over Traditional Leaders' *Weekly Mail & Guardian* (8 December 1995). See, on the relationship between the ANC and CONTRALESA, Oomen 'Talking Tradition' (supra).

[3] FC s 212(1) reads: 'National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.' The indeterminate language in this section, however, gives Parliament authority to reduce chiefly powers in local government.

'may provide for … the institution, role, authority and status of a traditional monarch, where applicable.'[1]

When the Final Constitution was being drafted, traditional leaders did not revive, with any conviction, claims they had made in 1993 that customary law should be shielded from application of the Bill of Rights and, in particular, the equality clause. The Bill of Rights expressly states that that both the rights 'to use the language and participate in the cultural life of [one's] choice' (in FC s 30) and rights concerning membership of cultural, religious and linguistic communities (in FC s 31) were to be subject to the other provisions of the Bill of Rights.[2]

When it came to certifying the Final Constitution, the IFP argued that FC s 211, and especially FC s 212, failed to realize the Constitutional Principles, because the powers of traditional leaders had been subjected to national legislation and not customary law. In the *First Certification Judgment*, the Court rejected this argument. The judgment nonetheless contains a clear statement of the tension between the claims of traditional leadership and the values of the Final Constitution:

> In a purely republican democracy, in which no differentiation of status on grounds of birth is recognised, no constitutional space exists for the official recognition of any traditional leaders, let alone a monarch. Similarly, absent an express authorisation for the recognition of indigenous law, the principle of equality before the law … could be read as presupposing a single and undifferentiated legal regime for all South Africans with no scope for the application of customary law — hence the need for expressly articulated CPs [Constitutional Principles] recognising a degree of cultural pluralism with legal and cultural, but not necessarily governmental, consequences.[3]

Because traditional leadership is at odds with republican democracy, the explicit protection of its role in the Constitutional Principles was necessary if it was to survive. The *First Certification Judgment* Court reminds us that, although the Kempton Park agreement required the Final Constitution to recognize a degree of cultural pluralism, it contained no mandatory requirement that traditional leaders be given a role in government. The Court added:

> The CA [Constitutional Assembly] cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how such leadership should function in the wider democratic society, and how customary law should develop and be interpreted, to future social evolution, legislative deliberation and judicial interpretation.[4]

[1] Clause 2 was added to Constitutional Principle XIII by the Constitution of the Republic of South Africa Second Amendment Act 3 of 1994, following the Memorandum of Agreement between the South African government, the ANC and the IFP (signed on 19 April 1994). The Act also amended s 160 of the Interim Constitution to require that the provincial constitution of KwaZulu-Natal make provision for the institution, status and role of the Zulu monarch.

[2] See I Currie 'Community Rights: Culture, Religion and Language' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 58.

[3] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of SA, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('*First Certification Judgment*') at para 195.

[4] Ibid at para 197.

The Constitutional Court therefore treated FC ss 211 and 212 as constitutionally entrenching the existence of traditional leadership, leaving the legislature to deal with traditional leaders' future political role. It followed that whatever legislation was to be enacted could provide for a diminished, even a nominal or purely symbolic, function for chiefs, thereby drastically restricting powers under customary law. But the legislature could not abolish the institution of traditional leadership or customary law altogether.

The Court maintained this approach in the *Second Certification Judgment*, when it addressed an objection that the revised draft of the Constitution did not comply with Constitutional Principle XIII.2 (requiring recognition and protection of provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch). It was argued that FC ss 143 and 147(1), dealing with provincial constitutions and with conflicts between national legislation and the provision of a provincial constitution, recognized the power to provide for a traditional monarchy as required by Constitutional Principle XIII.2, but did not give effect to the requirement of protection. The sections meant that provisions in a provincial constitution dealing with traditional monarchs were liable to be overridden by national legislation.[1]

The Court disagreed. It found that Constitutional Principle XIII.2 did not require the provisions about traditional monarchy in a provincial constitution to be given a position of supremacy in the national Constitution, thereby allowing them to prevail over all other protected interests. Instead, the only requirement was that the monarchy be given the recognition and protection needed to carry out its traditional role and to maintain its status and authority, consistent with the constraints inherent in a republican and wholly democratic constitutional order.[2]

Three other constitutional provisions relate to traditional leaders. These are FC s 166, which describes the courts of South Africa and implicitly includes traditional courts, s 219, on remuneration, and Schedule 4. We deal with each of these issues below. Here we should note that only one of these provisions has a direct impact on the powers of traditional leaders. Constitutional questions concerning the powers of national and provincial governments over traditional leaders and traditional communities (of which the remuneration of traditional leaders forms part) are not disputes that concern their powers.

As we have seen, the Constitution is clear on the powers of traditional leaders. It does not grant them powers beyond those contained in their status as guardians of traditional culture. In every sphere of government, their constitutional role has been reduced from that granted under the Interim Constitution. Hence, as noted above, the Final Constitution allows provincial constitutions to make provision for traditional monarchs, and it allows the establishment of houses of traditional

[1] See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of SA, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at paras 96–98.

[2] Sufficient protection for purposes of Constitutional Principle XIII.2 was provided by FC s 143(1), as read with FC ss 74(3) and 41. See *First Certification Judgment* (supra) at paras 99–105.

leaders at both national and provincial level (although these organs may no longer delay the passing of legislation). Similarly, although traditional leadership may be given a role 'at local level', traditional leaders are constitutionally excluded from voting membership of local councils,[1] and, as the reference in FC s 212(1) to 'local level', rather than 'the local sphere of government' or 'local government', reminds us, they have no constitutionally guaranteed role in local government. The fact that Chapter 12 — Traditional Leaders — is located towards the end of the Final Constitution, and is separated from chapters dealing with the main institutions of government, reflects the view expressed by the Constitutional Court that the role of traditional leadership may not be governmental.

While the Constitutional Assembly might have been resolute in limiting real grants of power to traditional leaders in the Final Constitution, in practice it has proved much more difficult to reach a workable arrangement between traditional leaders and the government. That the former are still a force to be reckoned with is evident from their ongoing protests, which intensify each time elections approach.

According to unverified figures, there are 12 kings or queens and 773 chiefs, supported by 1 640 headmen.[2] Approximately 18 million people, about 40 per cent of the South African population, are said to be subject to traditional rule.[3] Although this figure may be inflated — a recent poll indicates that in the year under review only eight per cent of black South Africans consulted a traditional leader for an important problem or to express their views[4] — the volatile political situation in KwaZulu-Natal and the perceived ability of traditional leaders to influence elections has ensured that they still have influence.

Section 26.5 considers the institution of traditional leadership in the context of South Africa's system of multi-sphere government. Section 26.6 focuses on government by traditional leaders, paying particular attention to the role traditional leaders play in relation to land.

26.5 Traditional Government in the Multi-Sphere System

Although the Constitutional Court has made it very clear that the Final Constitution does not demand a role in government for traditional leaders, the emerging framework of national and provincial laws establishes them as organs of state with governmental responsibilities. As a result, the principles of co-operative government set out in Chapter 3 of the Final Constitution apply to traditional

[1] See FC s 57(1).

[2] These are the numbers of traditional leaders remunerated by the government. See *White Paper on Traditional Leadership and Governance* (2003), available at http://www.info.gov.za/gazette/bills/2003/b58-03.pdf (accessed on 20 July 2004) 49.

[3] See C Botha *The Role of Traditional Leaders in Local Government in South Africa* (Konrad Adenauer Foundation, 1994) 29.

[4] See R Mattes, AB Chikwana & A Magezi *South Africa: After a Decade of Democracy* (2005), available at http://www.afrobarometer.org/SAF-FinalSummaryResults16MAR05.pdf (accessed on 27 September 2005). The survey was conducted in 2004.

leaders and to their relationships with the national, provincial and local spheres of government. The system of houses of traditional leaders, which is to be expanded under the new Traditional Leadership and Governance Framework Act,[1] and the repeated assertions in that Act of the responsibility of both provincial and national government to support traditional institutions, confirms the national government's intention to relate to traditional leaders and councils in accordance with the Chapter 3 principles.

The imperative to transform traditional systems of government remains. The preamble to the Traditional Leadership Act obliges the state to 'respect, protect and promote' traditional leaders 'in accordance with the dictates of democracy in South Africa' and requires transformation of the institution of traditional leadership 'in harmony with the Constitution'. The first move towards this change came about with new legislation regulating the composition of traditional houses and councils.

(a) Traditional communities and councils

During the colonial and apartheid eras, indigenous polities and their political structures changed remarkably little. Of course, the territorial expanse of these domains was drastically reduced, and, especially in the Cape and Transkei, attempts were made to remodel chieftaincies on the British idea of a local authority. By and large, however, central government simply grafted new institutions onto what was already there.

The Traditional Leadership Act, together with provincial legislation, has now swept away this entire regime. The Traditional Leadership Act states that 'tribes' which were previously recognized by the state are now deemed to be traditional communities.[2] In addition, under s 2, a community may be recognized as a traditional community provided that it '*(a)* is subject to a system of traditional leadership in terms of that community's functions; and *(b)* observes a system of customary law'. Draft provincial legislation in each of the six provinces with traditional leaders gives premiers the authority to recognize (and withdraw recognition from) traditional communities. Following instructions in the Traditional Leadership Act, the draft provincial laws require consultation with the provincial house of traditional leaders, any king or queen under whose authority the community would fall and consultation with the community itself.[3]

[1] Act 41 of 2003 ('TLGFA' or 'Traditional Leadership Act').

[2] TLGFA s 28(3).

[3] See Limpopo Traditional Leadership and Institutions Bill (2005) clause 3; North West Traditional Leadership and Institutions Bill (2004) clause 3; Mpumalanga Traditional Leadership and Governance Bill (2004) clause 3; KwaZulu-Natal Traditional Leadership and Governance Bill (2004) clause 2; Free State Traditional Leadership and Governance Bill (2004) clause 3; Eastern Cape Traditional Leadership and Governance Bill (2004) clause 5.

Once a traditional community is recognized, the Act provides that it must establish a traditional council 'in line with principles set out in provincial legislation', and, presumably, in line with the requirements relating to their composition set out in the national Act itself.[1] These latter provisions have been a bitter pill for traditional leaders to swallow, as they require one third of the members of the council to be women and 40 per cent to be democratically elected for terms of five years.[2]

The Act allows the premier to set a lower number for the participation of women 'where it has been proved that an insufficient number of women are available to participate in a traditional council.' It is hard to imagine, however, when this would be the case, since women make up at least half the population of every community in South Africa. Under one possible interpretation, this provision could be used if not enough women make themselves available to serve on councils. The danger with this approach, however, is that it may thwart the goal of involving women. In many rural areas there is strong resistance to women participating in government, and, unless there is real pressure on communities to ensure that women do become involved in the councils, change may never occur.

Some feminists think differently. They argue that, by including women in traditional councils (and the houses of traditional leaders), government can give the appearance of promoting women at no cost and without meaningful change. On this view, the women who serve on these bodies, in a context in which their views are not respected and in which they do not contribute in meaningful ways, will simply serve the purposes of men, thereby legitimating deeply unequal practices. From this perspective, meaningful change will occur only if women are properly empowered — educated and employed — and they should not participate in the new structures until these goals have been achieved. This approach fails to take seriously the reciprocal effect that political power and individual agency have on one another. Because the legislature has few tools with which to change culture in traditional communities, the right to participate in councils is an important way of creating space for women. Although there is disturbing evidence that women are not active participants in many of the bodies on which they serve at the moment, the new legal requirements ensure that, when they wish to engage more actively, they will not have to fight for their place.

Under the Act, tribal authorities already in existence when the Act came into effect were deemed to be traditional councils, but they were given a year within which to comply with the requirements regarding the composition of councils.[3] The implications of failure to observe these provisions are unclear, since the Traditional Leadership Act does not allow recognition of community status to be withdrawn in these circumstances. It may be that councils that do not comply will not be entitled to enter service delivery agreements with the municipalities

[1] TLGFA s 3(1).
[2] TLGFA ss 3*(b)* and *(c)*.
[3] That date passed on 24 September 2005.

under which they fall, but this consequence is not stated expressly.[1] Another possibility is that non-compliant traditional communities will not receive the governmental support contemplated in the Act. But even this is not necessarily the case.

In fact, it is the Communal Land Rights Act that provides the main incentive for transforming the composition of councils.[2] Under this Act, communally-owned land must be administered by a Land Administration Committee, and a traditional council may act as such a Committee only if it is recognized. Indeed, the Communal Land Rights Act supplements the requirements of the Traditional Leadership Act, obliging councils to ensure membership of a person who can represent 'the interests of vulnerable community members, including women, children and the youth, the elderly and the disabled', together with various non-voting members designated by other interested parties in the area.[3]

The newly constituted councils are intended to take over the role of the chiefs' councils of the past. The Act requires them to 'administer the affairs of the traditional community in accordance with customs and tradition' and to advise local government on various matters.[4] The Act does not clarify the relationship between councils and traditional leaders, however, because it appears to assume that this issue will be settled under customary law.

At present, the power to determine the boundaries of traditional areas is still vested in the President,[5] but the imminent repeal of the Black Administration Act will change this situation. The new arrangements have two components. First, the Traditional Leadership Act requires a Commission on Traditional Leadership Disputes and Claims to deal with existing disputes about boundaries.[6] Secondly, it appears that provinces are expected to replace the provisions of the Black Administration Act with their own legislation. The various draft provincial bills on traditional leadership do not have a uniform method for dealing with the boundaries of traditional communities. Some give the Premier the power to determine boundaries,[7] some give the Premier this power only when the Commission on Traditional Leadership Disputes agrees to a boundary change,[8] and one is simply silent on the matter.[9]

[1] The Local Government: Municipal Systems Act allows municipalities to enter service delivery agreements with 'traditional authorities'. Act 32 of 2000. See also TLGFA s 5(3).

[2] Act 11 of 2004.

[3] See TLGFA s 21(3), as read with ss 22 (4) and (5).

[4] See TLGFA s 4(1).

[5] See TLGFA s 1, as read with s 5 of the Black Administration Act 38 of 1927.

[6] See TLGFA s 25(2)*(a)(v)*.

[7] See Limpopo Traditional Leadership and Institutions Bill (2005) clause 20; North West Traditional Leadership and Institutions Bill (2004) clause 5; and Mpumalanga Traditional Leadership and Governance Bill (2004) clause 16.

[8] See KwaZulu-Natal Traditional Leadership and Governance Bill (2004) clause 16; Free State Traditional Leadership and Governance Bill (2004) clause 17. This approach is problematic, because, under the national Traditional Leadership Act, the life of the Commission is limited to five years.

[9] See Eastern Cape Traditional Leadership and Governance Bill (2004). Presumably the power is implied in the Premier's power to recognize and to withdraw recognition from traditional communities.

(b) The Houses of Traditional Leaders

Although the Final Constitution no longer requires houses to be established for traditional leaders, leaving this possibility entirely within the discretion of the national and provincial governments, the number of houses is set to expand. This is because, in addition to the national and provincial houses of traditional leaders established under the Interim Constitution, the Traditional Leadership Act requires provinces to establish local houses of traditional leaders for each district municipality or metropolitan municipality in which there is more than one senior traditional leader.[1] If one takes into account traditional councils operating at local municipal level, this means that there will be a house or council of traditional leaders at every level of government in South Africa: local, district, provincial and national. Nevertheless, an important distinction is to be drawn between traditional councils and the local, provincial and national houses: the latter have advisory powers only, whereas the traditional councils are intended to be central to traditional community decision-making.

In 1994 and 1995, as required by the Interim Constitution, six of South Africa's new provinces established houses of traditional leaders.[2] None were established in Gauteng or the Western Cape, and, as yet, none have been established in the Northern Cape, where Khoi and San authorities are only now beginning to emerge.[3] In 1997, Parliament constituted a Council of Traditional Leaders for the entire country,[4] which changed its name to the National House of Traditional Leaders in 1998.[5]

[1] See TLGFA s 17.

[2] See Free State House of Traditional Leaders Act 6 of 1994 ('Free State TLA'); KwaZulu- Natal House of Traditional Leaders Act 7 of 1994 ('KwaZulu-Natal TLA'); North West House of Traditional Leaders Act 12 of 1994 ('North West TLA'); Limpopo House of Traditional Leaders Act 6 of 1994 ('Limpopo TLA'); Eastern Cape House of Traditional Leaders Act 1 of 1995 ('Eastern Cape TLA'), as amended by Traditional Affairs Notice 13 ECP 1326 of 8 April 2005; and Mpumalanga House of Traditional Leaders Act 4 of 1994 ('Mpumalanga TLA'). As of 3 May 2005, several bills were awaiting consideration: House of Traditional Leaders Amendment Bill 2004 (Eastern Cape) 18 ECP 1274 of 7 February 2005; House of Traditional Leaders Amendment Bill 2003 (Free State) 5 FSP of 5 September 2003; and House of Traditional Leaders Amendment Bill 2004 (North West) 531 NWP 6086 of 19 November 2004. The remaining three provinces did not establish Houses, as only provinces 'in which there are traditional authorities' were required to do so.

[3] Initially, there was lobbying for the establishment of a seventh House in Gauteng. See B Oomen 'Talking Tradition: The Position and Portrayal of Traditional Leaders in Present Day South Africa' (Unpublished MA thesis, University of Leiden, 1996) 83. See also International Labour Office Project for the Rights of Indigenous and Tribal Peoples *Indigenous Peoples of South Africa: Current Trends* (1999) 20.

[4] Council of Traditional Leaders Act 10 of 1997 ('CTLA'). This statute repealed Act 31 of 1994 of the same name, which never came into force.

[5] Council of Traditional Leaders Amendment Act 85 of 1998. There are differing views on why the name was changed. The Deputy Chairperson, Kgosi Kutama, has given two reasons: a desire for uniformity with provincial institutions, and the fact that there are many councils and that the name was therefore confusing. (Telephone interview with K Kutama, 3 August 2005.) A more likely reason is that the word 'house' suggests a legislative body (which is what many traditional leaders believe that the Houses should be) while a council is more obviously an advisory body. The Amendment Act refers to the house as 'a council to be known as the National House of Traditional Leaders.' s 2(1). In addition, the Amendment Act changed the name of the CTLA to National House of Traditional Leaders Act ('NHTLA').

As yet, no local house of traditional leaders has been established in district municipalities, as the necessary enabling legislation has not been passed in the provinces. Nevertheless, the Traditional Leadership Act is detailed in its requirements, and, unless a province takes the unusual step of designing local houses to suit its own particular ideas, the houses will have up to 20 members chosen by an electoral college consisting of the traditional leaders in the district concerned.[1] Their relationship to the district municipality within which they fall will be very similar to that of traditional councils to local municipalities.

(i) *Composition*

The National House of Traditional Leaders has 18 members, each of whom serves five-year terms of office.[2] The number of members in the provincial houses is also usually fixed — the limits range from 18 to 36[3] — and these members also serve five-year terms of office.[4] KwaZulu-Natal is the exception: the enabling legislation sets no limit on the number of members or on the length of the term of office.[5] Under the Traditional Leadership Act, local houses must have between five and ten members.

Membership of the houses is determined by nomination, election or a combination of the two. In the case of the National House, each of the six provincial houses nominates three members.[6] In the case of the provincial houses, however, membership is determined in different ways. In KwaZulu-Natal, some members are nominated by groups specified in the Act and others are elected by regional authorities.[7] In the Eastern Cape, the Premier, assisted by committees of the provincial legislature, is authorized to establish rules for the nomination of members by traditional authorities.[8] Members of the Limpopo House are elected from and by members of districts in the province.[9] In the Free State, members are nominated by the traditional authorities in the province,[10] and in the North West members are elected from defined groups.[11] In Mpumalanga, all the traditional

[1] As traditional leadership is a Schedule 4 matter, provincial legislation need not follow the national Act to the letter. Variation is possible, and, if conflicts arise, they would be resolved under FC s 146.

[2] See NHTLA s 3(1).

[3] North West TLA s 3(1) stipulates 24 members; Mpumalanga TLA s 3(1) 21 members; Eastern Cape TLA s 3(1) 20 members; Free State TLA s 3(1) 18 members; and Limpopo TLA s 3(1) 36 members.

[4] See North West TLA s 3(2)*(a)*; Eastern Cape TLA s 3(4); Free State TLA s 3(2); Limpopo TLA s 3(3). Mpumalanga TLA s 3(3), in addition, makes special provision for members to be re-elected.

[5] See KwaZulu-Natal TLA s 5.

[6] See NHTLA s 4.

[7] See KwaZulu-Natal TLA s 5.

[8] See Eastern Cape TLA s 3(2), as amended by Notice 13 ECP 1726 (8 April 2005).

[9] See Limpopo TLA s 3(1). The Act does not specify whether members of the districts should be traditional authorities.

[10] See Limpopo TLA s 3. Cf the House of Traditional Leaders Amendment Bill 2003 5 FSP 74 (5 September 2003).

[11] See North West TLA s 3.

leaders in the province constitute an electoral college, which then elects members to the House.[1] Members of the local houses will be elected by an electoral college composed of all the senior traditional leaders in the district.[2]

No concession is made to the principles of gender equality or popular democracy in the existing statutes establishing the houses. The Traditional Leadership Act, however, intends to correct this. Section 16(3) cautiously requires provincial legislation to provide for 'mechanisms or procedures that would allow a sufficient number of women *(a)* to be represented in the provincial houses of traditional leaders concerned; and *(b)* to be elected as representatives … to the National House'. Currently, members of the houses are chosen by their peers, and, in all but one case, the only eligible candidates are traditional rulers.[3] By implication, therefore, members will generally be male and belong to a ruling dynasty.[4]

The North West province permits a minor exception to this rule: the Executive Council may appoint four persons to the House on the basis of their expertise in and experience with customary law. The Traditional Leadership Act also states, rather vaguely, that the electoral college constituted to elect members to local houses must 'seek to elect a sufficient number of women to make the local house of traditional leaders representative of the traditional leaders within the area of jurisdiction in question'.[5] Clearly, no affirmative action is envisaged, but each of the houses apparently has women among its members.

Members of Parliament or a provincial legislature may not be members of the National House.[6] On introducing this provision, the government argued that the disqualification was designed to prevent the Council, whose principal function was to advise the legislature, from being made up of members from the very institutions it would be advising. The National Party (as it then was) and the Inkatha Freedom Party were unimpressed with this explanation. There was no disqualification of members of provincial or national legislatures from serving as members of provincial houses. Indeed, the chairman of the KwaZulu-Natal House of Traditional Leaders — Mangosuthu Buthelezi — was a member of Parliament and a Cabinet Minister. The opponents of the Act treated the disqualification as an 'anti-Buthelezi clause', specifically aimed at keeping Buthelezi out of the Council. Whatever the reason for introducing the disqualification, however, it is based on a sound principle: active membership of a political party, which

[1] See North West TLA s 1 of Schedule 1, as read with s 3(2).

[2] TLGFA s 17(2)*(b)*.

[1] Any challenge to the validity of this legislation could presumably be met by the argument that the Constitution makes special provision for the continued recognition of traditional authorities, and, if the agnatic system of succession were abolished, these authorities would no longer be 'traditional'. See AJ Kerr 'Customary Law, Fundamental Rights, and the Constitution' (1994) 111 *SALJ* 720, 727 (On IC s 211).

[2] See North West TLA s 3*(b)*. Otherwise, under ss 3(1)*(a)* and 3(4)*(a)*, members of the House must be *dikgosi, dikgosigadi, dikgosana* or regents.

[3] See North West TLA s 17(1)*(c)*.

[4] See NHTLA s 4.

membership of a legislature must mean, is incompatible with the role of traditional leaders (which is to be guided by the general good of the community in all matters, and to fulfil their functions without regard to party affiliation). The same principle should be extended to the provincial and local houses.

(ii) *Powers*

The powers of the provincial and national houses were initially laid down in the Interim Constitution and their constitutive acts, and were then modified in the Final Constitution. The principal functions of the National House are to advise government or the President,[1] and to make recommendations on questions of traditional leadership, customary law and the customs of communities observing systems of customary law.[2] The House may also investigate these matters and disseminate information.[3] Every year, it must submit a report to Parliament on its activities.[4]

With one significant exception, Parliament and the executive are not obliged to seek advice, although, presumably, the National House is entitled to volunteer its opinion whenever it wishes. Even if advice has been sought and given, neither Parliament nor the President is obliged to take account of it (and the Final Constitution omits any mention of the House's limited power under the Interim Constitution to delay the passage of bills). The House therefore plays a strictly advisory role, even in matters concerning traditional leadership or customary law.

The exception was introduced in 2003 by the Traditional Leadership Act which, in s 18(1), obliges Parliament to refer bills concerning 'customary law or customs of traditional communities' to the National House before they are passed. The House must comment, if it so wishes, within 30 days.

This section was the subject of some controversy in Parliament because certain legal advisers argued that it attempted to add a requirement to the constitutional rules for the passage of legislation. Such changes are not permitted by an ordinary Act, but only by an amendment to the Final Constitution. The opposing view was that the provision did not change the decision-making rules, because it dealt only with Parliament's internal processes. According to this view, the provision (like timetabling, agenda setting and other decisions concerning who should be

[1] See NHTLA s 7(2)*(c)*. The advisory role of the National House (and its provincial counterparts) may be more significant than traditional leaders currently are prepared to admit. For instance, when *Bhe*, which dealt with the customary law of succession and the principle of male primogeniture was entered on the roll, the Constitutional Court notified the House, hoping that it would make submissions. None, however, were received. See *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at para 4.

[2] See NHTLA s 7(2)*(a)*. The objects of the House are described, in NHTLA s 7(1), as promoting the role of traditional leadership within a democratic constitutional dispensation, enhancing unity and understanding among traditional communities and enhancing co-operation between the National House and the Provincial Houses.

[3] See NHTLA s 7(2)*(b)*.

[4] See NHTLA s 7(2)*(d)*.

consulted in the law-making process) did not need to be incorporated in the Final Constitution. Evidently — and correctly — the latter view carried the day. It also gave government the best of both worlds: a constitutional amendment to secure chiefly powers for an indefinite period was unpalatable, while traditional leaders would not have been content with a provision in the internal rules of Parliament, because these are too easily changed.

The provincial houses also enjoy a right to insist that provincial legislatures refer to them any bills on customary law or traditional leadership.[1] The houses then have 30 days within which to comment.[2] If they fail to do so, the bill may be passed. If they raise an objection, the bill is, at most, delayed for another 30 days. The legislatures are not obliged, however, to take account of comments or objections.[3]

The provincial houses have no power to generate their own legislation nor do they have any specific power to initiate bills in provincial legislatures. In KwaZulu-Natal, however, the House may make proposals to Cabinet,[4] and, in the North West, the House may propose legislation to the legislature.[5]

The local houses will also have no law-making powers. Moreover, unless provincial legislation or a municipal by-law stipulates otherwise, the legislatures and councils will not be obliged to refer bills to them for consideration.[6] The fact that these houses will be much closer to traditional communities, however, is reflected in a number of functions that differ from those of the provincial and national houses. They are to advise not only on matters relating to traditional leadership and customary law, and on by-laws, but also on 'the development of planning frameworks' that affect their communities. In addition, they are to participate in local community development programmes and in the oversight of government programmes in rural communities.[7]

(iii) *Procedures, privileges and immunities*

The National House is expressly empowered to make its own rules for the orderly conduct of business.[8] Otherwise, the constitutive Act provides that the House must meet at least once a year, during the sitting of Parliament,[9] that the presence

[1] See North West TLA s 6(2); Limpopo TLA s 8(2); Mpumalanga TLA s 8(2); Eastern Cape TLA s 8(2); Free State TLA s 12B(1); and KwaZulu-Natal TLA s 4(2). Section 4(1) of the latter Act gives the House power to comment on a bill or executive action that may have a bearing on customary law and traditional authorities, even if the bill is not referred to the House. The TLGFA now also 'allows' a provincial legislature or municipal council to adopt the s 18(1) procedure. TLGFA s 18(2).

[2] This procedure is in line with IC s 183.

[3] It is an open question as to whether the provincial Houses may insist on the right to comment on national legislation passed on a functional area of concurrent competence under Schedule 4 of the Final Constitution.

[4] See KwaZulu-Natal TLA s 4 (1).

[5] See North West TLA s 6(1)*(a)*.

[6] See TLGFA s 18(2).

[7] See NHTLA s 17(3).

[8] See NHTLA s 10.

[9] See NHTLA s 9(3).

of a majority of members is necessary to constitute a quorum,[1] and that decisions are made by a majority of the members, present and voting.[2]

Like the National House, the provincial houses are also given the power to establish whatever rules, procedures and orders are necessary for the conduct of their business.[3] The North West legislation differs somewhat. It provides that any rules regulating the procedure and the conduct of house business are subject to the Final Constitution and the approval of the Executive Council.[4] In this province, nothing is said about a quorum. Elsewhere, the quorum is at least one third of the members for ordinary house meetings and half when voting on a bill.[5] In all the provinces, decisions are to be taken by a simple majority.[6]

The provincial houses must meet at least once a year,[7] and some are required to do so during the sittings of provincial legislatures.[8] In the North West, the house must meet at least twice annually.[9] Apart from these requirements, the houses are free to determine the dates and times of their sessions.[10]

The houses are clearly not legislatures. Despite demands by traditional leaders that they should have more power, they remain advisory bodies. Nevertheless, the Acts establishing the provincial houses seek to equip them with some of the trappings of legislatures. The most obvious example is an attempt to confer the traditional parliamentary privileges on house members. The Act creating the National House makes no mention of this subject,[11] but three of the provincial enactments contain detailed provisions.[12] The Limpopo Act, for instance, lists a number of privileges and immunities (notably, freedom of speech and debate).[13] The North West Act provides for immunity from legal proceedings,[14] immunity from arrest[15] and control of entry to the house.[16]

It is unlikely that these provisions are constitutional. Immunities were traditionally given to parliamentarians to protect them from the interference of the

[1] See NHTLA s 11.
[2] See NHTLA s 12.
[3] See Mpumalanga TLA s 10; Eastern Cape TLA s 10; Free State TLA s 8; Limpopo TLA s 10; and KwaZulu-Natal TLA s 12.
[4] See North West TLA s 7.
[5] See Mpumalanga TLA s 11; Eastern Cape TLA s 11; Free State TLA s 9; Limpopo TLA s 11; and KwaZulu-Natal TLA s 13.
[6] See Mpumalanga TLA s 12; Eastern Cape TLA s 12; Free State TLA s 10; Limpopo TLA s 11; and KwaZulu-Natal TLA s 13.
[7] See Mpumalanga TLA s 4(2); Eastern Cape TLA s 4; and Free State TLA s 4.
[8] See Limpopo TLA s 4(2) and KwaZulu-Natal TLA s 6(2).
[9] See North West TLA s 7*(a)*.
[10] See Mpumalanga TLA s 3; Eastern Cape TLA s 4; Free State TLA s 4; Limpopo TLA s 3; KwaZulu-Natal TLA s 6(3); and North West TLA s 7.
[11] See NHTLA.
[12] See North West TLA; Limpopo TLA; and Mpumalanga TLA s 15.
[13] See Limpopo TLA s 15.
[14] See North West TLA s 10.
[15] See North West TLA s 12.
[16] See North West TLA ss 13 and 14.

executive. Now, in stable democracies at least, this protection is often seen to be unnecessary, and many privileges have been limited. For those that remain another reason is often given: they allow members to speak freely and to act on matters that might otherwise attract the operation of the law of defamation. Because freedom of expression is a necessary condition for robust debate, parliaments can fulfil their function only if their speech is largely unfettered.

The cost of such privilege is that the rights of individuals to dignity and to privacy may be infringed, and the question is whether such infringements are justified. The role of the houses of traditional leaders does not suggest either that the executive would interfere with them or that members need to be allowed greater freedom of speech than is already guaranteed by the Bill of Rights. This view is supported by the fact that, although the Final Constitution deals with privilege for the national Parliament, the provincial legislatures and local councils, it does not mention privilege in the context of the houses. Moreover, under the Final Constitution, provincial legislatures do not have the right to determine what privileges apply to their members. This must be done by national legislation.[1] It seems inappropriate, then, that they should be able to confer such immunities on the houses.[2]

Nevertheless, the Acts constituting the houses of traditional leaders secure at least one of the traditional protections associated with legislatures in parliamentary systems. On the issue of remuneration they are all agreed. The Act establishing the National House provides that members must be paid directly from the national revenue fund,[3] and a similar stipulation can be found in each of the provincial Acts.[4]

(c) Traditional government and the national and provincial spheres

On the basis of long-established usage, it is clear that a chief's customary powers may be exercised only within the local sphere of government. Whatever may have been the situation in pre-colonial times, the functions of traditional leaders now concern the everyday needs of their people. Under the system of multi-sphere government embraced by the Final Constitution, however, traditional leadership is included in Schedule 4 and is thus a function over which the national and

[1] See FC s 117(2).

[2] It might be argued that there is a difference between a provincial legislature determining its own privileges and those of another body. In the latter case, there is no concern about self-interested behaviour. However, the most likely reason for the constitutional rule that privileges must be conferred by national legislation is that the needs of the country in this regard are uniform and that privilege cannot be conferred lightly. There can, therefore, be no reason for different regimes for different provinces (and, as argued in the text, no reason at all for privilege outside the parliamentary context).

[3] See NHTLA s 13.

[4] See Mpumalanga TLA s 13; Eastern Cape TLA s 13; Free State TLA s 11; Limpopo TLA s 13; and KwaZulu-Natal TLA s 114. The Eastern Cape TLA s 13 is an exception. It refers to 'moneys appropriated by the Provincial Legislature as determined by the Premier.'

provincial governments have concurrent legislative (and thus executive) competence.[1] If they enact conflicting laws, provincial law will prevail, suggesting a presumption in favour of provincial authority. There is a major qualification, however. National law prevails if it meets the test set out in FC s 146. The Final Constitution lists a wide variety of circumstances that justify national supremacy, including the need for 'efficient government', which may be secured by nationally established norms and standards.[2]

The implications of including traditional leadership as a concurrent function under Schedule 4 have not been tested, and there is little case law on concurrency from which to extrapolate. In particular, because the provinces have passed few laws, FC s 146 has hardly been used. A key, and as yet undecided, issue is the meaning of FC s 146(2)*(b)*. This section allows national law to trump provincial law, if the former 'deals with a matter that, to be dealt with effectively, requires uniformity across the nation' and 'provides that uniformity by establishing (i) norms and standards; (ii) frameworks; or (iii) national policies'. Does this mean, for instance, that procedures for managing succession in traditional communities must be uniform, as the Traditional Leadership and Governance Framework Act suggests, or is provincial variation permissible? Would provincial legislation on the recognition of traditional communities, which departs from the model set out in the national Act, prevail over the provisions of that Act?

Moreover, what limits are placed on prescriptions in national laws by the requirement that they may prevail over provincial law only insofar as they establish norms and standards, frameworks and national policies? In a robust system of multi-sphere government, it would be difficult to argue that anything more is required from the national government than a stipulation that succession be properly managed and that the recognition of communities be effective. If such is the case, then there is nothing to prevent provinces from developing their own procedures, even if these diverge from those laid down in the Traditional Leadership Act. The question is academic at present, however, as there is no indication that those provinces with traditional leaders intend to devise procedures for managing succession or any other aspect of traditional leadership at variance with the national law.[3]

But uniformity has not always been the norm. Although the Interim Constitution delegated legislative and executive powers over traditional authorities and indigenous law to the provinces, in 1995, central government sought to establish

[1] See FC Schedule 4. Indigenous and customary law are also listed in Schedule 4. See also FC s 125 (Provincial executive power.)

[2] See V Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 16.

[3] Some provinces have taken the initiative and dealt with problems that particularly concern them. See, eg, Northern Province Circumcision Schools Act 6 of 1996; Free State Initiation School Health Act 1 of 2004; and Eastern Cape Application of Health Standards in Traditional Circumcision Act 6 of 2001.

a degree of political control over traditional leaders by controlling their remuneration.[1] The Remuneration of Traditional Leaders Act provided that the remuneration and allowances of traditional leaders were to be determined by the President, after consultation with the (then) Council of Traditional Leaders and the Commission on Remuneration of Representatives.[2] Payment was to be made out of the National Revenue Fund. A preamble to the Act justified the passage of national legislation on a matter of provincial competence on the ground that 'the subjects and followers of particular tribal hierarchies do not necessarily reside in a single province and the constituencies of traditional hierarchies transcend provincial boundaries.' Remuneration paid by the central government was to be additional to any salaries traditional leaders received from provincial government.

In response to the Act and the loss of control over traditional leaders that it entailed, the government of KwaZulu-Natal introduced legislation prohibiting traditional leaders and the Zulu monarch from accepting any remuneration other than that provided for in KwaZulu-Natal legislation. Other payments to the King or traditional leaders were to be deposited by the recipients into the provincial revenue fund, to be distributed by the provincial government for the benefit of traditional leaders. The two bills introduced to effect these policies, the Payment of Salaries, Allowances and Other Privileges to the Ingonyama Amendment Bill and the KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill, sought to amend legislation which had been enacted by the KwaZulu legislature before the Interim Constitution came into force.[3] Objections by members of the new KwaZulu-Natal legislature to the constitutionality of the Bills were referred to the Constitutional Court for abstract review in terms of IC s 98(9).

The Court in *Amakhosi and Iziphakanyiswa Amendment Bill* held that the Bills were within the legislative competence of the province, that they did not infringe fundamental rights, and that they were therefore constitutionally valid.[4] Legislation dealing with the appointment and powers of traditional leaders was contemplated by IC s 181 as being within the competence of provincial legislatures. If laws dealing with the appointment and powers of traditional leaders were within the competence of the provinces, then laws providing for payment of salaries and allowances must also be within their competence, since these were matters incidental to the appointment and were attached to the office.[5]

FC s 219 reduces provincial control over remuneration of traditional leaders. It requires an act of Parliament to establish a framework for determining the

[1] See IC s 126, as read with Schedule 6.

[2] See Act 29 of 1995 s 2(1).

[3] After the 1994 elections, control over legislation of the disestablished KwaZulu legislature vested in the KwaZulu-Natal legislature. IC s 235(6)*(b)*.

[4] See *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995* 1996 (4) SA 653 (CC), 1996 (7) BCLR 903 (CC)('*Amakhosi and Iziphakanyiswa Amendment Bill*').

[5] Ibid at paras 20–22.

remuneration of persons holding public office, including traditional leaders,[1] and the establishment of an independent commission to make recommendations concerning such remuneration.[2] In terms of FC s 219(1), provincial legislation (and the provisions unsuccessfully challenged in the Constitutional Court in 1996) would be ineffective if contrary to the remuneration framework established by national legislation.

The framework prompted by the Final Constitution, however, raises new questions. For instance, although FC s 219(1) requires an act of Parliament to establish a 'framework' for remuneration of listed public office bearers, the Act concerned simply allows the President to gazette salaries and allowances from time to time.[3] Whether or not this is what the Final Constitution envisages depends on what 'framework' means. The Act may be said to provide a framework, if the fact that it allows the President to distinguish among the office bearers that it covers and envisages a remuneration package consisting of basic remuneration, pensions and medical aid benefits is thought to be a framework. If, however, the Final Constitution means that the national Act must provide parameters within which salaries are to be determined, then the Remuneration of Public Office Bearers Act does not comply. This question may become significant if an individual province decided that it wished to have some leeway in its payment of traditional leaders.

In regulations issued under the Remuneration Act, the President sets out annually the exact salaries of kings and traditional leaders.[4] The allocation of the function of determining salaries to the President might also provide the basis for provincial objections. Although the Final Constitution does not state who is to implement the framework in respect of traditional leaders, the inclusion of traditional leadership in Schedule 4 suggests that provinces may claim this power. Final Constitution s 219(4), which requires provincial executives to consider recommendations from the Commission before implementing the remuneration framework legislation, strengthens the argument that provincial legislation concerning remuneration of traditional leaders may prevail over the regulations published by the President under the Act.

[1] 'Traditional leaders' includes traditional monarchs. See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at para 102.

[2] See FC s 219(2). The commission referred to by FC s 219 is the Independent Commission for the Remuneration of Public Office Bearers established by Independent Commission for the Remuneration of Public Office-Bearers Act. Act 92 of 1997. The Commission has the power to make recommendations regarding the remuneration of traditional leaders, members of provincial houses and the national House of Traditional Leaders. In terms of s 5 of the Remuneration of Public Office Bearers Act, the President must consult the Commission before determining the remuneration of traditional leaders. Act 20 of 1998.

[3] Remuneration of Public Office Bearers Act s 5.

[4] 'Salaries and Allowances Payable to Traditional Leaders, Members of the National House of Traditional Leaders and Members of the Provincial Houses of Traditional Leaders for the 2004/2005 Financial Year' Proclamation R8, Government Gazette 27279 (11 February 2005).

The 2003 White Paper suggested that these concerns may be temporary, as it noted that the current position (which gives all traditional leaders remuneration based on uniform scales determined by the President) is not 'based on clearly defined roles and functions of traditional leaders'.[1] By implication, once more information is available on these roles, a proper framework will be developed.[2]

In addition to opening the way to both provincial and national legislation on traditional leaders, the inclusion of traditional leaders in Schedule 4 means that national bills relating to traditional leaders should follow the procedure set out in FC s 76.[3] This section captures the notion of cooperative government by ensuring that provinces can participate in the passage of national laws relating to areas over which they share competence with the central government. The implementation of this section, however, has been hugely controversial.

In 1998, Parliament decided that the Recognition of Customary Marriages Act[4] should not follow the FC s 76 route through Parliament. Although it dealt with customary law and traditional leaders (both Schedule 4 matters), its main focus was equality in marriage, and therefore not a matter of concern to provinces. A similar decision was taken in 2004 in relation to the Communal Land Rights Act.[5] Despite the fact that it dealt with communal land, most of which falls within the jurisdiction of traditional leaders, it followed the FC s 75 route through Parliament. FC s 75 affords the provinces very limited influence.

The importance of deciding whether a bill should be dealt with under the FC ss 75 or 76 process concerns mainly the balance of powers between the provinces and the central government. Removing matters affecting traditional leaders and their communities from the FC s 76 process, however, also means that there is less chance that the communities affected by such laws will be able to participate in the legislative process. This was borne out by the passage of the Communal Land Rights Act. Traditional leaders had various opportunities to present their views on the bills to Parliament, but few community members had such access. Had the bills been considered by provincial legislatures, as FC s 76 demands, many more of the affected people would have had the opportunity to participate.

(d) Traditional government and local government

Because traditional rulers have always operated as a species of local authority, the challenge to their rule, since the Interim Constitution, has emerged mainly in this sphere of government. In 1994, when the Interim Constitution came into force, a primary aim of the Government of National Unity was to secure democratic

[1] See *White Paper on Traditional Leadership and Governance* (2003), available at http:\\www.info.gov.za/gazette/bills/2003/b58-03.pdf (accessed on 20 July 2004) 53.

[2] However, the White Paper does not suggest that provinces will be given any role in determining remuneration beyond the requirement in s 5(1) of the Remuneration of Public Office Bearers Act that the President consult premiers when determining remuneration.

[3] See S Budlender 'National Legislative Authority' in in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 17.

[4] Act 120 of 1998.

[5] Act 11 of 2004.

elections. This principle was immediately put into effect in the national and provincial spheres of government. Reforms in the sphere of local government had to be deferred, however, because of the racially divided nature of apartheid local government, the division of existing authorities among former provinces and homelands and the enormity of the task of establishing new non-racial municipalities.

The Interim Constitution nevertheless stipulated that organs of local government were henceforth to be democratically elected.[1] For the first time, chiefs faced the prospect of having to compete with elected officials.[2] Practical politics and the fact that the traditional leaders provided the only viable authorities in rural areas, however, suggested the wisdom of maintaining the status quo, at least for the time being.[3] As a temporary measure, therefore, IC s 182 allowed traditional rulers both *ex officio* membership of local government bodies in their areas and eligibility for election to such bodies.[4]

In 1993, in anticipation of imminent conversion to democratic government, but to ease the process, the Local Government Transition Act was passed.[5] This Act established a framework of temporary authorities that were to operate until 2000. Existing local authorities in the non-metropolitan areas of each province were replaced with transitional local councils ('TLCs') for smaller towns, transitional representative councils ('TRCs') and transitional rural councils for rural areas.[6] Provincial MECs were given the power, if they deemed it to be in the interests of people residing within a traditional ruler's area of jurisdiction, to appoint the traditional ruler as a local government body (a traditional council) for purposes of the Act.[7]

[1] See IC s 179(1).

[2] Prior to 1994, local government elections were held only in urban areas and towns. See TE Scheepers, W du Plessis, C Rautenbach, J William & B de Wet 'Constitutional Provisions on the Role of Traditional Leaders and Elected Local Councillors at Rural Level' (1998) 19 *Obiter* 70. Traditional leaders were especially concerned about the possibility of losing their judicial powers and control over land affairs. Salaries were another controversial matter, for traditional leaders were paid more than municipal councillors and had more perquisites of office. See Oomen *Tradition on the Move: Chiefs, Democracy and Change in Rural South Africa* (2000) 13–14 and 40–3.

[3] See, eg, *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of SA, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 189.

[4] The ANC claimed that this arrangement undermined democratic government. In particular, it objected to KwaZulu-Natal exploiting FC s 182 by making traditional rulers *ex officio* members of the new regional councils. The ANC claims were dismissed, however, in *ANC & Another v Minister of Local Government and Housing, KwaZulu-Natal & Others* 1998 (3) SA 1 (CC), 1998 (4) BCLR 399 (CC) at para 19. The Constitutional Court held that FC s 182 validly sought to defuse the tension arising from the imposition of democratic structures in areas formerly governed by hereditary rulers.

[5] Act 209 of 1993 ('LGTA').

[6] The TRCs contained mainly elected members, although, under LGTA s 9C(1), others could be nominated by an 'interest group', if an MEC considered it desirable. Under LGTA s 9A, traditional leaders represented one of four specified interest groups. The others were farm owners, farm labourers and women.

[7] LGTA s 1(2).

In 1996, the Final Constitution reiterated the principle of democratic and accountable local government,[1] and, at the same time, declared that elected local authorities were to be created for all parts of South Africa: the principle of 'wall-to-wall' municipalities.[2] In practice this means that, for all but five metropolitan areas and a number of sparsely populated areas, there are two levels of local government throughout the country. These are local municipalities located within larger district municipalities.[3]

The Final Constitution changed the position of traditional leaders dramatically. Although it confirmed their *ex officio* membership in TRCs and rural councils until 30 April 1999, their role in local government became dependent on national legislation.[4] FC s 212(1) states that '[n]ational legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local government'.

In 1997, a Green Paper on Local Government investigated, *inter alia*, the ambiguous position of traditional leaders under both the Final Constitution and the Local Government Transition Act.[5] It noted with dismay the uncertainty about responsibility for service delivery, the lack of rural infrastructure, funding and capacity, and the continuing tension over control of land affairs. The Paper observed that traditional authorities and elected municipalities shared powers, functions, jurisdictions and constituencies. Without specifying how the inevitable conflicts were to be solved, it called for cooperation between the two authorities in order to advance rural development.[6]

A White Paper on Local Government followed in 1998.[7] This confirmed the principle that elected local governments should be established for all areas, including those ruled by traditional authorities. Although the White Paper declared that municipalities should have sole competence over the functions of local government, it was prepared to make some concessions to traditional rulers. It therefore recommended that they should be represented in local government structures[8] and that the functions of local government should depend on the circumstances of each area.

[1] See FC s 152(1)*(a)*.

[2] See FC s 151(1). Section 174(1) of the Interim Constitution had simply required the establishment of local authorities in demarcated areas.

[3] In constitutional terms, under FC s 155(1), the 'metros' are category A municipalities, the local municipalities are category B municipalities and district municipalities are category C municipalities. See Barry Bekink 'Local Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 22.

[4] Item 26(1)*(b)* of Schedule 6 to the Final Constitution. See Scheepers *et al* (supra) at 71–7.

[5] Government Gazette 18370 (17 October 1997).

[6] The Paper's position is consonant with the principles of cooperative government and intergovernmental relations laid down in s 41 of the Final Constitution.

[7] Government Gazette 18739 (13 March 1998)('*White Paper on Local Government*'). Traditional authorities in fact received little attention in the White Paper. See K Shubane 'Chiefs and the White Paper' (1998) 15 *Development SA* 313.

[8] *White Paper on Local Government* (supra) at 77.

In 1998, the Local Government: Municipal Demarcation Act started to put into effect the principle of 'wall-to-wall' municipalities.[1] The Demarcation Board created by the Act confronted a number of problems caused by the fragmentation of existing chiefdoms amongst two or more municipalities. Although it was supposed to take account of areas of traditional authority,[2] the Board frequently neglected this requirement or found it impossible to implement. Confusion currently reigns. Traditional authorities may fall into more than one district or local municipality (or, more frequently, more than one ward). The standard of services offered to the subjects of traditional rulers often differs considerably among such municipalities.[3]

In 1998, the process of replacing transitional local authorities also began. Traditional leaders won far less than they had been hoping for. The Local Government: Municipal Structures Act provided that the MEC for local government in a province containing traditional authorities had to request the local House of Traditional Leaders to identify leaders who would participate in local authorities.[4] The leaders so identified could then attend and participate in the meetings of municipal councils.[5] But, significantly, no provision was made for them to vote. The number of traditional leaders entitled to participate in a municipal council was not to exceed 20 per cent of the total number of councillors.[6] After consulting the relevant house of traditional leaders, MECs for local government could regulate the participation of traditional leaders in council proceedings and prescribe their role in municipal affairs.[7]

The White Paper of 1998 had recommended an investigation into traditional affairs, and, to this end, the Department of Provincial and Local Government produced a White Paper on Traditional Leadership in July 2003.[8] The central question posed by this Paper was the extent to which traditional leaders could continue to exercise their pre-constitutional powers. It was assumed that such powers were excluded in the areas for which local government was competent. The White Paper therefore recommended that, in local government, traditional leaders should play, in essence, a support and advisory role.[9]

[1] Act 27 of 1998. ('LG:MDA').

[2] See LG:MDA s 25.

[3] See *White Paper on Traditional Leadership and Governance* (supra) at para 3.5. For a discussion of the process from the perspective of the Demarcation Board, see C Goodenough *Shaping South Africa: Reflections on the First Term of the Municipal Demarcation Board, South Africa 1999–2004* (2004) 25ff.

[4] Act 117 of 1998 ('Municipal Structures Act') s 81. The guidelines for identification are provided in s 81(2)*(a)*, as read with Schedule 6 of the Act: a traditional leader must hold 'supreme office of authority among all the leaders of the traditional authority' and be ordinarily resident within the municipal area concerned. Moreover, Houses of Traditional Leaders have the task of identifying the traditional leaders who will be *ex officio* members of elected local government. Proc R109 of 1995.

[5] See Municipal Structures Act s 81(1).

[6] The Municipal Structures Amendment Act 33 of 2000 (Amended the original figure set in s 81 from 10 to 20 per cent.)

[7] See Municipal Structures Act s 81(4).

[8] See *White Paper on Local Government* (supra) at 76.

[9] See *White Paper on Traditional Leadership and Governance* (supra) at paras 3.2 and 3.3.

This approach was implemented in the Traditional Leadership and Governance Framework Act.[1] The Act lists both the functions of traditional councils and those of traditional leaders. The former have one clear function that authorizes them to act independently: 'administering the affairs of the traditional community in accordance with customs and tradition.'[2] All other items on the list of council functions give them only an advisory role to municipal councils or allow them to 'participate in' municipal activities.[3] The local houses to be established by provinces under the Act will also have only advisory functions and the right to 'participate in' local programmes related to rural communities.[4]

In relation to traditional leaders, the Act vaguely asserts that '[a] traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned, and in applicable legislation'. This ambiguity leaves a critical question unanswered: how is local government action and government by traditional leaders to be distinguished? Perhaps the answer to this question will be provided gradually in the future. In a long list of areas, s 20 of the Traditional Leadership Act stipulates that both the national and provincial governments may 'provide a role for traditional councils or traditional leaders', provided that the allocation of the role is consistent with the Constitution. Here, of course, the most difficult issue will be a possible intrusion on local government powers.[5]

The powers of local authorities are specified, in the first instance, by the Final Constitution,[6] and, in the second, by the Local Government: Municipal Structures Act[7] and the Municipal Systems Act.[8] These enactments list matters typically associated with municipalities, such as building regulations, electricity services, cemeteries, trading regulations, control of liquor, fencing, refuse removal, street trading, roads, traffic, parking and pounds. It can be argued that, because the Final Constitution and the two Acts were intended to define the competence of local authorities, they override only those powers enjoyed by traditional leaders under customary law with which the Final Constitution and the Acts deal explicitly.

On this reading, the powers considered critical to the maintenance of traditional authority — judging disputes, allocating land, convening initiation schools

[1] Act 41 of 2003 ('TLGFA').

[2] See TLGFA s 4(1)*(a)*.

[3] Councils may also enter partnership agreements with municipalities (TLGFA s 5), but these would clearly depend on the willingness of the municipality concerned.

[4] These houses will consist of no more than ten representatives of traditional communities in the area of the district council for which they are constituted. It is entirely unclear how they would participate in municipal initiatives save, once again, in an advisory capacity.

[5] Note that FC s 151 protects the right of municipalities to govern and says that neither the national nor provincial governments may 'compromise or impede' this right.

[6] See FC s 156, as read with Part B of Schedules 4 and 5. Under FC s 151(3), municipalities have jurisdiction over local government affairs, but subject to national and provincial legislation.

[7] See Municipal Structures Act s 83(1).

[8] Act 32 of 2000 s 8(1).

and presiding over national festivals — remain intact.[1] The persistent concerns among traditional leaders about their loss of powers may largely be the result of a misunderstanding of the functions that are to be assumed by local government under the new dispensation. Nevertheless, it is clear that local government will formally bear responsibility for many of the functions traditional leaders previously exercised through the system of indirect rule. This means that, whereas in the past, members of traditional communities were dependent on traditional leaders for almost all of the (minimal) services that they received, they will now have another place to which to turn — their municipality. This threatens to reduce considerably the hold that traditional leaders have over their communities.

In practice, however, the new local governments have battled to establish themselves, and, in rural areas, few have the capacity to provide services. (They are often reduced to a single bare office and just one member of staff.) In addition, the newly demarcated municipalities are enormous, usually covering large areas and many communities. Some traditional authorities, on the other hand, have what Oomen has described as 'the material legacy of fifty years of governance-through-chiefs: large tribal offices, tribal cars, tribal secretaries and (as they are called) tribal cleaners'.[2] Stories abound of people appealing to the new local government officials to solve problems, and, then, in the absence of a response, resorting to a traditional authority instead. In these circumstances, it may be that the proposed cooperative relationship between traditional councils and local government will in fact leave much power in the hands of chiefs.[3]

Customary powers may, of course, be superseded by specific national or provincial legislation, but, in the context of local government, the critical issue is whether municipalities have the same authority. The starting point for this inquiry is FC s 211(2). This section provides that traditional leaders 'may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs'. Does the term 'legislation' in this section include by-laws?[4] Under the Final Constitution, municipalities may make by-laws for the effective administration of matters they are empowered to

[1] In the *White Paper on Local Government*, the authority of traditional leaders was taken to include limited legislative and executive powers, presiding over customary courts, maintaining law and order, consulting with communities, advising government through the provincial Houses and the national Council of Traditional Leaders and making recommendations on land allocation and the settlement of land disputes. See *White Paper on Traditional Leadership and Governance* (supra) at para 3.3.

[2] B Oomen *Tradition on the Move: Chiefs, Democracy and Change in Rural South Africa* (2000) 14.

[3] See L Ntsebeza 'Rural Governance and Citizenship in Post-1994 South Africa: Democracy Compromised?' in J Daniel, R Southall & J Lutchman (eds) *The State of the Nation South Africa 2004 — 2005* (2005) 58.

[4] As a general rule, by-laws are considered legislation. See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31 (On what counts as legislation, by municipalities, for purposes of Bill of Rights analysis); Barry Bekink 'Local Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 22.

administer,[1] but a by-law conflicting with national or provincial legislation is invalid.[2] Thus, whenever customary law is codified in national or provincial legislation — and the two key examples are the Black Authorities Act[3] and the Natal and KwaZulu Codes[4] — it would appear to be immunized from any municipal amendments.

Final Constitution s 156(4) may nullify this effect. It obliges national and provincial governments to assign to municipalities Schedule 4 and Schedule 5 matters (including, therefore, customary law and traditional leadership), if these matters would be most effectively administered in the local government sphere and a municipality has the capacity to do so.

An unanswered question is whether FC s 156(4) requires the transfer of all aspects of a listed function or whether the national or provincial government can retain some aspects and assign others. A literal reading of the text suggests the former interpretation, but this view seems unduly rigid, and would undermine the principle of subsidiarity, which the section clearly intends to capture. However, even on this literal and expansive reading, it is unlikely that the regulation of traditional leadership or customary law would be assigned to municipalities, as these matters include functions related to the administration of justice — a national matter — and the protection of cultural rights, a matter with which local communities should be involved, but of which the national government should have oversight.[5]

If, on the other hand, FC s 156(4) allows the assignment of aspects of the matters listed in Schedules 4 and 5, it is likely that, in due course, municipalities will be able to demand responsibility over some matters relating to traditional leadership and customary law. The danger here is that municipalities will not be persuaded that they should accept a distinction between the incidents of modern and traditional government,[6] and will begin to override the powers of traditional rulers. In these circumstances, traditional leaders will have to rely, like any other group of citizens, on the vagaries and hurly-burly of the democratic political process.

[1] FC s 156(2).

[2] FC s 156(3).

[3] Act 68 of 1951, as amended by Act 89 of 1993. The regulations issued under the Act must also be included. See ss 9, 10 and 11 of Proc R110 of 1957, as amended by Proc R110 of 1991.

[4] Proclamation R151 of 1987 and KwaZulu Act 16 of 1985, respectively.

[5] The concern here would be that local minorities would not be adequately protected if the matter was taken out of the control of the central government.

[6] See A Sachs *Advancing Human Rights in South Africa* (1992) 77–8. Sachs argued that there was no inherent conflict between traditional and democratic forms of government, provided that each operated within its own sphere. Drawing this distinction is not, however, easy, because the powers of traditional rulers are already ill-defined. Some of them are derived from pre-colonial institutions, while others are of more recent origin and have been arrogated by rulers who assumed the multifarious responsibilities of modern government. It could be argued that all of the latter powers are now customary law, which is constantly adapting to changes in society.

(e) Traditional Monarchs

The clause in Constitutional Principle XIII requiring the new constitution to allow a provincial constitution to 'provide for … the institution, role, authority and status of a traditional monarch, where applicable' was added at the eleventh hour as part of a deal to draw the Inkatha Freedom Party back into the transition process, and, even more important, to secure its participation in the 1994 elections. Twelve years later, despite the urgency attached to this principle in 1994, nothing has come of it.

In 1996, in KwaZulu-Natal's first venture at constitution-making, an attempt was made to constitutionalize the Zulu monarch. However, that constitution failed to secure the approval of the Constitutional Court, as required by IC s 160(4).[1] A second attempt is under way now. In 2004, after the ANC won control of the provincial legislature, it initiated a provincial constitution-making process with the specific goal of resolving persistent disputes about the king. From the ANC's point of view, the status of the monarch was the only matter needing attention in the provincial constitution. The requirement of a two-thirds majority for the passage of a constitution, however, meant that any provincial constitution-making process would involve deals with minority parties, and, as a result, many other issues would be brought into the debate.

In 2004, the ANC, IFP and the Democratic Alliance each produced a draft constitution, and a number of smaller parties submitted memoranda dealing with specific issues. Each draft constitution contains provisions concerning the recognition of the monarch, his role, matters of succession and a 'civil list', that is, a secured annual allowance for the royal household. The most significant differences in the three drafts relate to the extent of the monarch's 'kingdom', whether the monarch should be inviolable, and removal.[2]

On the question of the monarch's kingdom, the DA draft limits the king's jurisdiction to 'the Zulu people',[3] while the ANC and IFP propose that the king should be recognized as monarch of the province.[4] Both approaches seem constitutional. In *Certification of the Constitution of the Province of KwaZulu-Natal*, the Constitutional Court considered the constitutionality of establishing the Zulu king as monarch of the province, and found that, in terms of IC s 160(3), this was permissible.[5] Because the requirements of the Final Constitution do not differ in any material way from those of the Interim Constitution, the same decision should be expected now.

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[1] See S Woolman 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 21 (Argues that provincial constitutions confer no new additional powers and are largely window dressing.)

[2] See K Govender, W Freedman & A Annandale *Analysis of Constitutional Proposals for the Province of KwaZulu-Natal* (2005) at paras 287–307.

[3] See *Draft Constitutions of KwaZulu-Natal* (9 February 2005) Democratic Alliance Proposal Clause 3.3.1.

[4] See *Draft Constitutions of KwaZulu-Natal* (supra) Inkatha Freedom Party Proposal ('IFP Draft') Clause 60(1).

[5] See *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal 1996* 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC) at para 3.

However, a DA provision declaring the Zulu king 'traditional monarch of the Zulu people' has raised one concern: it may be read as an attempt to extend the authority of the KwaZulu-Natal legislature beyond the borders of the province, thereby infringing FC s 104, which limits the legislative power of the provincial legislature to the territory of the province. This view seems to depend on an overly zealous reading of the Final Constitution, because it is clear that the province does not have legislative power beyond its borders, and this provision could not achieve that power. Instead, the provision is better read as an attempt to limit the reign of the monarch to Zulus (however they may be defined) in the province, leaving other citizens untouched.[1]

Only the IFP draft constitution stipulates that the monarch is 'inviolable', a term which is then defined to mean 'not subject to civil, administrative or political responsibility or authority'.[2] This provision resembles an equivalent in the draft constitution considered by the Constitutional Court in 1996. Although the Court found that the monarch's inviolability was constitutional, if the matter were to be heard again under the Final Constitution, the same conclusion might not be reached. Section 143(2) now provides that provisions in provincial constitutions regarding traditional monarchs must comply with s 1. This section sets out basic values on which South Africa's new constitutional order is founded, notably, accountability and the rule of law. On both counts, a provision that a monarch is to be inviolable would probably fail, since it contradicts the principle that the monarch, like everyone else, is subject to the Constitution and the law.

The question of removal is perhaps the most interesting of the three areas of disagreement. Only the IFP draft makes provision in this regard. The power is granted to the provincial house of Traditional Leaders 'for just and good cause'.[3] Although this provision gives wide powers to the House, exercise of those powers must nevertheless be constitutional, since FC s 143 gives provinces a free hand in determining the status of kings, provided that its requirements are met. The provision also ensures some level of accountability to the traditional elite, if not the people that traditional rulers are intended to serve.

The main constitutional question raised by the IFP's removal provision, however, is a conflict with the provisions for the removal of kings and queens in the Traditional Leadership and Governance Framework Act. Section 10 of that Act allows royal families to request the President to remove kings or queens in certain specified circumstances. The President must comply. The IFP draft, however, leaves the matter entirely in the hands of the provincial house of Traditional Leaders and gives the house a broader discretion than royal families are given under the national Act. Would the provincial Constitution prevail under FC s 147

[1] In essence this is a conflict between principles of territorial and personal rule. See TW Bennett *Customary Law in South Africa* (2004) 70ff.

[2] See IFP Draft (supra) at Clause 63(7).

[3] Ibid at Clause 66(5).

or would it be overridden by the national Act? For the national Act to prevail, it would have to meet the requirements of FC s 146(2). The national Act claims to fall under FC s 146(2)*(b)*, as it states in its Preamble that it 'set[s] out a national framework and norms and standards'. However, whether the Act meets the other part of the FC s 146(2)*(b)* test, which states that it must '[deal] with a matter that, to be dealt with effectively, requires uniformity across the nation', is doubtful.

It is perhaps arguable that uniformity is required in matters concerning recognition of traditional leaders. In an apparent bid to stop the proliferation of traditional leaders, for instance, the Traditional Leadership Act states that, when recognizing kings and queens, the President must take into account 'the need to establish uniformity in the Republic in respect of the status afforded to a king or queen'.[1] It seems unlikely, however, that this argument could be made with any conviction in the context of removal procedures. On the contrary, the very nature of customary law suggests that different practices will have developed in different areas, and, if tradition is to be preserved, this diversity should be maintained.

At the moment, these constitutional disputes are hypothetical, and the chances of the KwaZulu-Natal politicians reaching consensus on a provincial constitution are slight. Until they do, the status of the Zulu king will be subject to national and provincial law.

26.6 Government in Traditional Areas

(a) Appointment and Succession to Office

The legends and traditions of most South African chieftaincies regard the first person to settle the land as the founding father of the nation. Thereafter, according to the principle of patrilineal succession, his office was inherited by his eldest son. If a deceased ruler had contracted a series of polygamous marriages, his heir would be the eldest son of the principal wife,[2] whose rank was usually denoted by the fact that subjects had contributed towards payment of her *lobolo*.[3]

Although patrilineal succession is considered a cardinal rule of customary law,[4] the transmission of political offices has always been subject to many variations and exceptions. If the eldest son were physically or mentally incapable, for example, he could be barred from taking office.[5] More important, however, was the

[1] TLGFA s 9(1)*(b)*(i).

[2] She need not be the first wife. Certain systems of customary law allow rulers to nominate their principal wives. See *Vikilahle v Zulualiteti* (1904) 1 NAC 77; *Tyelinzima v Sangqu* 4 NAC 375 (1920); *Holi v Tyantyaza* (1923) 5 NAC 206; and *Ngwenya v Gungubele* 1950 NAC 198 (S). This power is encoded in s 75 of the Natal and KwaZulu Codes. See Proclamation R151 of 1987 and Act 16 of 1985.

[3] This practice is specifically recognized in s 75(2) of the Natal and KwaZulu Codes.

[4] See B Sansom 'Traditional Rulers and their Realms' in WD Hammond-Tooke (ed) *The Bantu-speaking Peoples of Southern Africa* (2nd Edition, 1974) 257; I Schapera *Government and Politics in Tribal Societies* (1956)('Schapera *Government and Politics*') 50ff; AC Myburgh & MW Prinsloo *Indigenous Public Law in KwaNdebele* (1985) 5–8; MW Prinsloo *Inheemse Publiekreg in Lebowa* (1983)('Prinsloo *Publiekreg*') 113–14.

[5] See S Zungu 'Traditional Leaders Capability and Disposition for Democracy: The Example of South Africa' in W Hofmeister & I Scholz (eds) *Traditional and Contemporary Forms of Local Participation and Self-Government in Africa* (1997) 162.

reality of power politics. Succession to the chieftaincy seldom went uncontested, and the death of a ruler often occasioned fierce disputes. As a result, the rules of succession were frequently manipulated or even ignored.[1]

The strict rule of customary law has been further undermined by many years of state intervention. Since the promulgation of the Native Administration Act in 1927, and even before, successors to chiefly office needed the support of the Department of Native Affairs. Hence, not only are many of the existing incumbents of office of doubtful ancestry, but so too were their predecessors.[2] Some provincial governments responded to the substantial number of succession disputes in their regions by instituting commissions of inquiry.[3] The best known is the Ralushai Commission, which was established in 1996 by the Premier of Limpopo. The report of this Commission was not made public, but, in a successful court challenge under the Promotion of Access to Information Act,[4] 46 traditional leaders from Sekhukhuneland won access to those portions of the report dealing with them.[5]

The 2003 Traditional Leadership and Governance Framework Act reflects the national government's intention to settle the backlog of disputes.[6] It establishes a Commission on Traditional Leadership Disputes and Claims to deal not only with questions of legitimate succession to title but also cases in which there is doubt whether a leadership position was established under customary law and cases relating to the establishment of 'tribes' and tribal boundaries.[7] When dealing with disputes about succession, the Commission must 'be guided by customary norms' and, in addition, when considering succession to a kingship, the Commission must consider provisions in the Act concerning the recognition of kings and queens.[8] (These require a nationally uniform approach to the status of kings and queens.)

The task, which the Act anticipates will be completed in five years,[9] is immense. The Ralushai Commission apparently estimated that there were over

[1] See M Gluckman *Politics, Law and Ritual in Tribal Society* (1971) 138ff.

[2] In the event of a dispute about an incumbent of office, s 16(2) of the Amakhosi and Iziphakanyiswa Act 9 of 1990 (KwaZulu) requires the MEC in KwaZulu-Natal to institute an inquiry. Similarly, under s 10(2) of the Natal Code, the State President is obliged to institute an inquiry into any case of a disputed succession. See *Government of the Province of KwaZulu-Natal v Ngwane* 1996 (4) SA 943 (A). Disputes have been complicated by failure to decide which department of government should have jurisdiction. See I van Kessel & B Oomen '"One Chief, One Vote": The Revival of Traditional Authorities in Post-apartheid South Africa' (1997) 96 *African Affairs* 561, 577–8.

[3] Eastern Cape, Free State, North West and Limpopo are reported to have established commissions. Ministry for Provincial and Local Government 'Press Statement on the Ralushai Commission's Report' (11 November 2004), available at http://www.dplg.gov.za/speeches/11Nov 2004PR.doc (accessed on 2 August 2005).

[4] Act 2 of 2000.

[5] See *Minister for Local and Provincial Government v Unrecognised Traditional Leaders, Limpopo Province* 2005 (2) SA 110 (SCA), [2005] 1 All SA 559 (SCA).

[6] Act 41 of 2003 ('TLGFA').

[7] See TLGFA s 25(2).

[8] See TLGFA s 26(3)*(b)*.

[9] See TLGFA s 25(5).

300 disputes in Limpopo, and reports from the Eastern Cape and KwaZulu-Natal suggest a similar number of disputes in those provinces.[1] Although by establishing a Commission and by binding itself to accept its decisions,[2] the national government presumably hoped to move the process out of the political arena, customary law is uncertain enough for any decisions to be perceived as politically motivated.[3]

Another less pressing concern is the issue of retirement and deposition. Customary law has no specific rules or procedures to govern these eventualities. Office holders simply ruled until they died. Those who were incapable or unpopular might be persuaded to abdicate through the pressure of relatives or their councils.[4] Ultimately, however, revolt and secession were the only methods for forcing corrupt or incompetent leaders to relinquish office.[5]

Under the Black Administration Act,[6] executive sanction was needed for the appointment of traditional leaders and for their deposition. In 1994, these powers were assigned by the President to the six provinces with traditional rulers. They now lie with provincial premiers.[7]

[1] Conversation with Professor Thandabantu Nhlapo, Chairperson of the National Commission (15 July 2005).

[2] See TLGFA s 26.

[3] This impression may be bolstered by the fact that the staff of the Commission (which will presumably do most of the work) is drawn from government (the Departments of Justice and Provincial and Local Government and from the National Prosecuting Authority). It is noteworthy that the Act does not require the Commission to consult the provincial or national houses of traditional leaders. This was a wise move, as the involvement of the houses would increase the likelihood of the Commission's work being politicized. But see C Keulder *Traditional Leaders and Local Government in Africa: Lessons for South Africa* (1998) 308–10 (Keulder argues that it would be unwise to remove illegitimate chiefs, partly because it is impossible to unravel historical claims and partly because some chiefs, regardless of their origins, now have legitimacy in the eyes of their people.)

[4] Cf I Schapera *A Handbook of Tswana Law and Custom* (2nd Edition, 1955) 84. While Schapera gives examples of rulers being tried in their own courts for abuse of powers, the traditional form of government does not contemplate an independent judiciary holding rulers to account.

[5] See Schapera *Government and Politics* (supra) at 209–11; WD Hammond-Tooke *Command or Consensus: The Development of Transkeian Local Government* (1975) 35–6; H Ashton *The Basuto* (1952) 217; M Hunter *Reaction to Conquest* (1979) 393–4.

[6] Act 38 of 1927.

[7] Under IC s 235(8), the President was given the power to assign by proclamation the administration of certain pieces of legislation to provinces (and was required to do so if the Premier requested it). On 9 September 1994, he assigned ss 2(7), (7)bis, (7)ter and (8) of the Black Administration Act, together with the whole Black Authorities Act 68 of 1951 to the six provinces with traditional leaders. Notice 139 of 1994 Government Gazette 15951. However, the assignment excluded any provisions which fell outside the functional areas listed in IC Schedule 6 'or which relate to matters referred to in paragraphs *(a)* to *(e)* of section 126(3) of the [Interim] Constitution'. On the same basis, the Bophuthatswana Traditional Authorities Act 23 of 1978 was assigned to North West province, the KwaNdebele Traditional Authorities Act 2 of 1984 to Mpumalanga, the Transkei Authorities Act 4 of 1965 and Ciskei Act on Administrative Authorities 37 of 1984 to Eastern Cape and the KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990 to KwaZulu-Natal. The assignment left matters uncertain, as it did not specify which provisions, if any, fell outside Schedule 6 or within IC s 126(3) and thus remained the responsibility of the national government. That the national government believes that some of these powers at least fell outside the Schedule, and thus were not assigned, is suggested by the fact that the new legislation (the 2003 Traditional Leadership and Governance Framework Act) seems to assume that matters covered in those laws are matters for which the national government may lay down a framework and provide norms and standards which, under FC s 146, would prevail over provincial laws on the same matter.

The Traditional Leadership and Governance Framework Act also deals with matters of succession, retirement and deposition. Following s 2(7) of the Black Administration Act, the new Act requires executive sanction for the appointment and deposition of traditional leaders. When leadership positions are to be filled, the royal family concerned must identify a successor 'with due regard to applicable customary law'.[1] The President must formally recognize the new kings and queens identified by the family while provincial legislation must provide for a process under which premiers recognize other traditional leaders. If there are allegations that customary law was not followed properly when a person was identified to fill a leadership position, the President or premier may refuse the certificate of recognition, in which case the matter must be referred back to the royal family concerned for reconsideration.

The President may also refer disputes about succession to the position of king or queen to the National House of Traditional Leaders, while premiers may refer such disputes to the provincial house. Once a house has considered a matter and has identified a suitable candidate, the President (or premier) is obliged to recognize that person, unless there are grounds for thinking that the house did not consider the issue in accordance with customary law. Although the Act is conspicuously silent in this regard, if a dispute cannot be resolved by this process, the matter could presumably be taken to court.

Sections 10 and 12 of the Act deal, respectively, with the removal of kings and queens and other traditional leaders. There are just four circumstances in which removal is possible:

(a) conviction of an offence with a sentence of imprisonment for more than 12 months without an option of a fine;
(b) physical incapacity or mental infirmity which, based on acceptable medical evidence, makes it impossible for that senior traditional leader, headman or headwoman to function as such;
(c) wrongful appointment or recognition; or
(d) a transgression of a customary rule or principle that warrants removal.[2]

In both the case of a king or queen and of a traditional leader, the royal family makes the decision to remove an incumbent of office, and the President (or premier, as the case may be) must then withdraw the certificate of recognition.

[1] See TLGFA s 9(1)(for kings and queens) and s 11(1)(for senior traditional leaders and headmen or headwomen). In the past, although the state intervened in the appointment of traditional leaders whenever it was politically expedient to do so, customary law was never completely disregarded. Indeed, ethnographers in the Department of Native Affairs kept a semi-official register of the genealogies of the 800 ruling families to assist in the appointment procedure. Section 10(1) of the Natal Code provides that the deceased's heir shall be the person whom the Cabinet appoints as successor. Proc R151 of 1987. Section 16(1), as read with s 12, of the Amakhosi and Iziphakanyiswa Act 9 of 1990 (KwaZulu), has a similar provision, although the Minister is obliged to take s 81 of the KwaZulu Code Act 16 of 1985 into account. But see *Minister of Native Affairs & Another v Buthelezi* 1961 (1) SA 766, 769–70 (D)(Held that nothing limited the President's discretion other than the interests of the public and the people concerned.)

[2] See TLGFA s 10(1). Section 12(1) is similarly worded but substitutes 'senior traditional leader, headman or headwoman' for 'king or queen'.

By dividing responsibility for the appointment and removal of traditional leaders between provinces and the national government, the Traditional Leadership and Governance Framework Act has, temporarily at least, created a complicated situation. Under FC s 239, laws administered by provincial governments, when the Final Constitution took effect in February 1997, are defined as provincial laws. This provision covers laws assigned to provinces, as happened to certain provisions of the Black Administration Act. The national Parliament cannot now amend or repeal such laws. As a result, whenever the new Traditional Leadership Act conflicts with sections of the Black Administration Act which were assigned to provinces, the provincial laws prevail, unless the provisions of the Traditional Leadership Act meet the test in FC s 146. It is clearly the intention of the six provinces having traditional leaders that any such conflict should be remedied, since each of these provinces has tabled legislation which will repeal laws conflicting with the national Traditional Leadership Act. Nevertheless, until these laws are passed, uncertainty will exist.

The Final Constitution introduced a new issue to the question of succession, that of gender discrimination.[1] According to customary law, women may not hold political office. There are certain exceptions to this rule, the most famous being the Lovedu since the reign of Modjadji I,[2] and there is evidence to show that practices are changing in response to new ideas of gender equality.[3] Nevertheless, the general rule still holds true: women may, at most, act as regents during an interregnum or if an heir is under age.[4]

Under the Bill of Rights, however, one might argue that if a traditional leader were to die leaving both male and female descendants, the rule preferring male descendants should be ignored, because it constitutes unfair discrimination.[5] The oldest child would have to succeed, whether male or female.[6] The White Paper is quite clear on this issue. It states that the existing rules are in conflict with the

[1] See K Motshabi & SG Volks 'Towards Democratic Chieftaincy: Principles and Procedures' 1991 *Acta Juridica* 104; L Bank & R Southall 'Traditional Leaders in South Africa' (1996) 37 & 38 *J of Legal Pluralism* 407.

[2] See EJ Krige & DJ Krige *Realm of a Rain-Queen: a Study of the Pattern of Lovedu Society* (1943) 177 and 180.

[3] See Keulder (supra) at 319. On the former Transkei, see DS Koyana & JC Bekker *Judicial Process in the Customary Courts of Southern Africa* (1943) 258ff.

[4] A famous example was MmaNthatisi of the Tlokwa. See Ashton (supra) at 197–8.

[5] The rule of primogeniture might constitute unfair discrimination because it differentiates on the basis of age. However, the customary rule may be justified, on the ground that a system of inherited offices, although arbitrary as to age, is necessary if certainty and stability are to be achieved in the political order.

[6] See AJ Kerr 'Customary Law, Fundamental Rights, and the Constitution' (1994) 111 *SALJ* 720, 728–9 (Notes, however, that, if the law governing succession to political office were changed other areas of customary law would also be affected.) See also the South African Law Reform Commission *Discussion Paper on the Customary Law of Succession* Project 90 Discussion Paper (2000) at paras 4.7.1–2 (Recommends that any legislation aimed at improving the position of widows and children should not be extended to traditional leaders.) But see Kerr (supra) at 727–8 (Further arguments against changing the rule of agnatic succession to the chieftaincy.)

Bill of Rights, notes that women often act as regents for many years (implying that there can be no question of their ability to fulfil the role) and cites South Africa's international obligations to prohibit gender discrimination. It concludes that 'custom and customary law should, generally, be the basis for regulating succession' but that custom must be transformed to allow women (and men) who were discriminated against in the past to succeed as traditional leaders.[1]

Despite this bold statement the Traditional Leadership and Governance Framework Act is silent on the issue of female succession. Although a number of court cases have been brought by women claiming the right to succeed to a leadership position, we know of none that has been upheld.[2] Moreover, although the White Paper states that the right of women to succeed will take effect from 27 April 1994, the day the Interim Constitution came into effect, there is no indication in the Traditional Leadership Act that the Commission on Traditional Leadership could recognize women rather than men when it resolves disputes. It has been left to the Commission and the courts to assert this important principle. There are indications that the courts will. In dealing with the customary law of succession, in *Bhe* the Constitutional Court could not be more emphatic: '[t]he primogeniture rule as applied to the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights.'[3] While some different issues are raised by succession to leadership positions, the basic principles remain the same. It is difficult, therefore, to justify a rule reserving positions of leadership to men under the Final Constitution.

(b) Territorial and personal jurisdiction

By using the language of public international law, the traditional concept of sovereignty may be analysed in terms of a ruler's personal and territorial reach of power. Hence, we can say that, although a chief had jurisdiction over all those owing him personal allegiance,[4] the exercise of this power was restricted to the borders of his domain.

Bonds of allegiance were established through the time-honoured processes of birth, marriage, immigration and, in the past, conquest or capture in war.[5] A child born to parents who were already subjects of a particular chief was automatically

[1] *White Paper on Traditional Leadership and Governance* (supra) at 52.

[2] There are women in the houses of traditional leaders. See, for example, 'Cheiftainess Nosiseko Gayika elected in 2000 to Eastern Cape House of Traditional Leaders' (2000), available at http://www.info.gov.za/speeches/2000/0009181218p1005.htm (accessed on 20 July 2005). We do not know whether these women are regents or traditional leaders.

[3] See *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at paras 88–97, 187–190 and 210.

[4] See, eg, Prinsloo *Publiekreg* (supra) at 25.

[5] For what follows, see AC Myburgh *Die Inheemse Staat in Suider-Afrika* (1986) 11–15; MW Prinsloo *Die Inheemse Administratiefreg van 'n Noord-Sothostam* (1981)('Prinsloo *Administratiefreg*') 66–9; Myburgh & Prinsloo (supra) at 2–4.

affiliated to that chiefdom. The significant link was the blood connection, for it was irrelevant whether the child was actually born inside the realm. In the case of marriage, the operative rule was not as clear. The custom of virilocal residence would suggest that a wife should become subject to her husband's chief, because she would be permanently attached to the husband's family.

Immigrants could be accepted as subjects if they were prepared to submit to the authority of a traditional ruler.[1] Submission normally entailed paying some token of submission, which, in earlier times, would have been a beast, but today it is more likely to be cash. Similar, although less stringent, terms applied to the readmission of former subjects.[2] If they lost their original status, because they had rejected the authority of a ruler or had committed a crime, they would be required to settle the issue before being accepted back into the realm.[3]

According to customary law, all subjects resident within a ruler's domain were obliged to submit to local laws (at least those of a public nature).[4] Such laws included a duty to pay taxes, liability to perform public works and, of course, an overall duty to obey the ruler's orders and acknowledge his position.[5] The Regulations Prescribing the Powers and Privileges of Chiefs give traditional rulers additional powers to enforce a range of statutory laws concerning health, the registration of births and deaths, stock dipping, eradication of weeds, and so on.[6] A person failing to comply with the customary or statutory regulations was liable to pay a fine for contempt of authority.[7] Subjects who were persistently disobedient, or those who rejected the authority of the ruler and his council,

[1] See Prinsloo *Administratiefreg* (supra) at 67 (Lists the criteria for admission: evidence from an existing subject that the applicant is suitable, reasons why the applicant left his previous chiefdom, availability of land and payment of an admission fee.)

[2] Ibid at 68.

[3] A subject wanting to leave a traditional ruler's territory must first obtain permission; permission will be given, provided that taxes are paid up to date and outstanding judgments have been settled. Ibid at 69. When the emigrant wants to enter another ruler's territory, he or she will be required to prove an orderly departure from the previous realm.

[4] So far as the central state is concerned, chiefly powers derive from territorial rather than personal jurisdiction. See, for example, *Zulu v Mbata* 1937 NAC (N&T) 6; *Monete v Setshuba* 1948 NAC (C&O) 22; and s 3(2) of the Natal Code Proc R151 of 1987. Moreover, regulation 6 of the Regulations Prescribing the Powers and Privileges of Chiefs refers only to persons resident within a traditional ruler's area of jurisdiction. Proc R110 of 1957.

[5] The relationship between the ruler and subject is signified by the use of certain honorific titles, specific to the particular ruler.

[6] Regulation 9 of Proc R110 of 1957, as amended. This Proclamation was assigned to the six provinces with traditional leaders under IC s 235. Notice 139, Government Gazette 15951 (1994). When the provincial bills designed to implement the national Traditional Leadership Act are passed, the Proclamation will be repealed.

[7] Hence, regulation 6 of Proc R110 allows a traditional ruler to 'take such steps as may be necessary to secure from [all Blacks resident within his area] loyalty, respect and obedience.' Proc R110 of 1957. See, too, s 7 of the Natal Code and s 7 of the Amakhosi and Iziphakanyiswa Act 9 of 1990 (KwaZulu).

might be banished, which resulted in the loss of all rights of membership of the polity, especially of access to land.[1]

Since colonization, the rule of territorial jurisdiction has been subject to certain obvious changes. As we explained above, borders are now more precisely described,[2] chiefly domains have been reduced in size[3] and many traditional polities have been divided by local, provincial and even international boundaries.

(c) Separation of powers with checks and balances

In a constitutional democracy, effective and legitimate government is deemed to depend upon different institutions performing different functions and on a system of checks and balances that control the exercise of power. In particular, the courts must remain independent and impartial so that they can check the activities of the other two branches of government, and dispense justice in a way that is not influenced by the interests of the executive or the legislature.[4] However, as we have already noted, under customary law, traditional leaders, together with their councils, perform all functions of government, which includes running courts for any disputes arising within their areas of jurisdiction.

(i) *Judicial powers*

Predictably, the first reason for objecting to the way in which traditional courts operate was separation of powers. The judicial function of traditional rulers is prescribed by the Black Administration Act, under which the Minister may allow a traditional ruler to constitute the court of a 'chief or headman'.[5] The Act also prescribes the courts' powers of jurisdiction: to hear civil claims 'arising out of Black law and custom brought before [them] by Blacks against Blacks resident

[1] See Myburgh (supra) at 14ff; Prinsloo *Administratiefreg* (supra) at 71 and 194–5; Prinsloo *Publiekreg* (supra) at 136–8. Examples of banishment happening today, however, are rare. In fact, Prinsloo could find no available examples. Prinsloo *Publiekreg* (supra) at 32–3. See Myburgh & Prinsloo (supra) at 29 (Report that banishment is so serious that only immigrants can be punished in this way, and then only for persistent disobedience to the law or contempt for the chief.)

[2] Before the advent of modern techniques of mapping and surveying, boundaries were demarcated with reference to such topographical features as hills, rivers and outcrops of rock: See Myburgh (supra) at 8; Prinsloo *Administratiefreg* (supra) at 185–6; HO Mönnig *The Pedi* (1967) 245–6.

[3] The indigenous polities that survived conquest were segregated from white cities and farms as 'reserves'. These areas became the so-called 'scheduled' and 'released' areas under the Natives Land Act 27 of 1913 and the Native Trust and Land Act 18 of 1936, respectively. Later, under apartheid, they became the bantustans, and eventually the 'homelands'.

[4] See S Sibanda & A Stein 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds), *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 12.

[5] Section 12(1) of Act 38 of 1927 ('BAA'). The Repeal of the Black Administration Act and Amendment of Certain Laws Bill (2005) anticipates the provisions of the BAA relating to traditional courts being replaced by a new Act. However, there is no draft legislation on this matter yet. Presumably, traditional courts will continue to be governed by the BAA until such a law is passed. Transkei (Acts 13 of 1982 and 6 of 1983), Ciskei (Act 37 of 1984), Bophuthatswana (Act 29 of 1979), and KwaNdebele (Act 3 of 1984) constituted traditional courts along the same lines as South Africa, but with occasional modifications in jurisdiction and procedure.

within [their] area of jurisdiction' and criminal claims where the accused is a black person.[1]

The Final Constitution permits the continued operation of these courts, provided that they are consistent with the Constitution.[2] However, because traditional rulers also exercise legislative and, especially, executive powers, it has been argued that, as judges, they are neither independent nor impartial, as is required by FC s 165(2).[3] In *Bangindawo & Others v Head of the Nyanda Regional Authority & Another*, the applicants used this argument to object to the Transkeian Regional Courts (which are statutory tribunals, but constituted by traditional rulers).[4] The High Court dismissed the objection on the ground that the usual common-law tests for independence and impartiality were not applicable.[5] It held that, in Africa, although no clear distinction is drawn between the executive, judicial and legislative functions of government, no reasonable African would perceive bias on the part of traditional leaders merely because they exercise executive powers.

The High Court in *Mhlekwa & Feni v Head of the Western Tembuland Regional Authority & Another* was not prepared to accept this ruling on traditional government.[6] The High Court noted that the Final Constitution does not explicitly mention the doctrine of separation of powers and that FC s 165(2) does not prohibit traditional leaders from being judges simply because they perform other governmental functions. It went on to hold, however, that some of these functions involve controversial public issues and may therefore lead to the perception of an unduly close relationship to the executive.[7]

Mhlekwa's most telling departure from *Bangindawo*, however, is its insistence that all courts must comply with FC s 165. This means that not only must the courts

[1] BAA s 20.

[2] FC s 16(1) of Schedule 6. During the certification proceedings, a contention that the Final Constitution failed to establish traditional or customary courts (as required by Constitutional Principle XIII) was dismissed. See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of SA, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 199. Under FC s 166*(e)*, the customary courts qualify as 'any other court established or recognised in terms of an Act of Parliament'.

[3] IC s 96(2) was FC s 165(2)'s immediate predecessor.

[4] 1998 (3) SA 262 (Tk), 1998 (3) BCLR 314 (Tk)('*Bangindawo*').

[5] Despite ostensibly dismissing the common-law tests, the *Bangindawo* Court held that the idea of judicial independence denoted no 'reasonable apprehension of bias'. In other words, a reasonable person would consider the judiciary independent if it were free from interference by either the executive or the litigants. In this regard, the Court followed the Canadian decision in *R v Valente*. (1986) 24 DLR (4th) 161 at 169–70 and 172–3. However, while *Valente* and at least one Constitutional Court judgment require both a perception of independence and impartiality and independence from an objective point of view, *Bangindawo* was committed to the view that, under an African interpretation of independence, all that was required was a perception of independence in the minds of the public. Cf *De Lange v Smuts* NO 1998 (3) SA 785 (CC), 1997 (11) BCLR 1553 (CC).

[6] 2001 (1) SA 574, 619 (Tk), 2000 (9) BCLR 979, 1018 (Tk)('*Mhlekwa*').

[7] Ibid at 616–17. Moreover, traditional leaders do not enjoy the security of tenure guaranteed other judicial officers by FC s 177.

be perceived to be unbiased but, objectively assessed, they must be independent of the executive. Relying on the Constitutional Court's decision in *De Lange v Smuts*,[1] Van Zyl J found that presiding officers in the Transkei Regional Authority Courts did not have sufficient *individual* independence of the executive. In other words, although the courts themselves were *institutionally* independent of both the executive and the legislature, the relationship of their presiding officers to the executive was too close. This finding was based on an examination of the many tasks of the traditional leaders who presided over these courts, including powers of search and seizure, general responsibility to maintain law and order, and other policing functions.

Mhlekwa's finding that the Regional Authority Courts were unconstitutional was not sent to the Constitutional Court for confirmation under FC s 172, although there is a strong body of opinion that traditional courts presided over by traditional leaders are incompatible with the Final Constitution.[2] *Mhlekwa*, however, did not decide that traditional leaders could never preside over a court nor did it attempt to draw the line between the legitimate non-judicial functions that a presiding officer might carry out and those that would undermine the independence of their courts. This decision provides a starting point for considering modifications of the traditional court system to ensure that traditional courts conform to the Final Constitution, but still retain their strengths - accessibility, understanding of customary practices, sensitivity to the needs of the communities they serve and, in many cases, legitimacy.

The Law Reform Commission's *Report on Traditional Courts and the Judicial Function of Traditional Leaders* suggests some ways in which reforms could be achieved. One option is to allow councillors to be elected to the courts; another is to allow traditional leaders to appoint councillors from panels elected by their communities.[3] There are many possibilities, and it may be best to allow traditional communities to develop their own systems within parameters which require the inclusion of women in the court structure and maintenance of a sufficient distance between court officials and the day-to-day administration of community affairs. One thing seems clear, a current practice whereby traditional leaders delegate authority to preside over customary matters to 'a trusted councillor', but retain a veto over the court's decisions,[4] cannot continue. It may be constitutional to permit a traditional leader to participate in proceedings as one of a

[1] 1998 (3) SA 785 (CC), 1997 (11) BCLR 1553 (CC).

[2] See, for example, I Currie & J de Waal *The New Constitutional and Administrative Law Vol 1* (2001) 311; RB Mqeke 'The Rule of Law and African Traditional Courts in the New Dispensation' (2001) 22 *Obiter* 416, 423.

[3] South African Law Reform Commission *Report on Traditional Courts and the Judicial Function of Traditional Leaders* Project 90, Report (21 January 2003) 7. Note that elections may bring new problems, as the system of elected judges in many states in the United States has shown. In particular, if the job is paid, councillors will have strong incentives to retain their jobs, which may involve appeasing powerful members of the community.

[4] Ibid at 7–8.

group, but, a traditional leader cannot, on his or her own, have final decision-making power, nor can someone who has not participated in the proceedings retain a veto.

(ii) *Legislative powers*

Legislation is not a great feature of customary law, which derives its legitimacy from tradition. It follows that those responsible for maintaining and applying the law are more inclined to preserve existing rules than to generate new ones. Even so, customary law obviously permits the making of new laws, and all rulers, depending on their status in the hierarchy of offices, have some degree of legislative power.[1]

This power is now superseded, however, by the Final Constitution. Final Constitution s 43 provides that legislative authority vests in Parliament (in the national sphere), in provincial legislatures (in the provincial sphere) and in municipal councils (in the local sphere).[2] Nevertheless, traditional leaders retain an involvement in law-making both through their participation in the provincial and national houses of traditional leaders and through the Traditional Leadership and Governance Framework Act, which lists as a function of traditional councils 'participating in the development of … legislation at local level'.[3] In these cases, the role of traditional leadership can be advisory only, although in many municipalities traditional leaders will doubtless be very influential.

(iii) *Executive and administrative powers*

Executive or administrative action in customary law was based on the principles of consultation and rationality. Before making a decision, rulers had to consult their councils, and, for serious matters affecting the commonweal, they had to consult a gathering of all adult males, who represented the interests of the entire nation.[4] Any proposal to be made had to be supported by good reasons, the merits of which would be debated in council.[5] Decisions were supposed to be

[1] See I Schapera *Tribal Legislation among the Tswana* (1943); I Schapera *Tribal Innovators: Tswana Chiefs and Social Change* (1970) Chapter 2 (Gives detailed evidence of the legislative activities of Tswana chiefs.) See also FM D'Engelbronner-Kolff in FM D'Engelbronner-Kolff, MO Hinz & JL Sindano (eds) *Traditional Authority and Democracy in Southern Africa* (1998) 71ff.

[2] In the national and provincial spheres of government, however, special bodies were created to allow traditional leaders to participate in the legislative process by expressing their views on matters of customary law and traditional leadership.

[3] Act 41 of 2003 ('TLGFA' or 'Traditional Leadership Act') s 4(1)*(f)*.

[4] See Myburgh & Prinsloo (supra) at 41–2, 63–4; Prinsloo *Administratiefreg* (supra) at 134–5; MW Prinsloo *Inheemse Publiekreg in Lebowa* (1983)('Prinsloo *Publiekreg*') 154; Hunter *Reaction to Conquest* (supra) at 394; Mönnig (supra) at 284–5; Krige *The Social System of the Zulus* (supra) 219; H Kuper *An African Aristocracy* (1947) 36–8. What constitutes a 'serious matter' is naturally difficult to define. An early case, *Hermansberg Mission Society v Commissioner for Native Affairs & Another*, held that alienation of tribal land required consent of only the chief's council (not the greater tribal council). 1906 TS 135. In *Mogale v Engelbrecht & Others*, the rule in *Hermansberg* was approved as a matter of principle. 1907 TS 836. In *Mathibe v Tsoke* the court noted obiter that only a majority of councillors needed to consent. 1925 AD 105, 114–16. See also *Rathibe v Reid & Another* 1926 AD 74.

[5] See, eg, *Kekane v Mokgoko* 1953 NAC 93 (NE).

unanimous, and unanimity through persuasion was the ideal.[1] In the final analysis, however, the most important check on abuse of power was the need to maintain political support: a ruler who persisted in acting against a council's opinion was courting disaster.[2]

The Final Constitution now sets out a framework within which all government power must be exercised. Most importantly, it requires accountable and accessible government, and it is here that adjustments to the style of traditional government will be required. The Traditional Leadership and Governance Framework Act makes a start in this regard by requiring councils to report to their communities at least once a year 'to give account of the activities and finances of the traditional council'.[3] In addition, the Act requires provincial legislation to:

> regulate the performance of functions by a traditional council by at least requiring it to — *(a)* keep proper records; *(b)* have its financial statements audited; *(c)* disclose the receipt of gifts; and *(d)* adhere to the code of conduct.[4]

These provisions on their own, however, cannot establish a relationship of accountability between leaders and the community, as they give the community no method of holding leaders to account for unsatisfactory performance. This lacuna is most striking in the provisions in the Act dealing with the removal of traditional leaders: no mention is made of a failure to govern in an accountable and responsive way as a ground for removal.[5] In short, a key component of accountability is missing: the power of the person or body to whom account is given to act in case of improper government.[6]

Other elements of accountable government to affect traditional rule concern administrative law. Even before the new Constitution came into force, it was argued that a traditional ruler's administrative powers were subject to the common-law standards. Hence, to the extent that customary law permitted departure from the principles of natural justice, for example, by denying *audi alteram partem*, it was invalid.[7] The common law was, in its turn, superseded by FC s 33(1),

[1] See WJO Jeppe *Bophuthatswana: Land Tenure and Development* (1980) 128; AJB Hughes *Land Tenure, Land Rights and Land Communities on Swazi National Land in Swaziland: A Discussion of Some Inter-relationships between the Traditional Tenurial System and Problems of Agrarian Development* (1972) 105.

[2] See Myburgh & Prinsloo (supra) at 53 (A traditional ruler may not act contrary to the advice of the national council.)

[3] See TLGFA s 4(3)*(b)*.

[4] See TLGFA s 4(2).

[5] A community that wants to remove a leader who fails to provide accountable government might be able to argue that the offender had transgressed customary law in a way which is serious enough to warrant removal. The removal of leaders was always controversial, however, and a non-accountable government will not be an easy ground to argue given the control exercised by royal houses and the increased formalization of leadership positions under the Traditional Leadership Act.

[6] See *White Paper on Traditional Leadership* (supra) at 54. The document gives a hint of the reason for this omission. The drafters appear to have been concerned only with accountability to the government, not with accountability (as it is usually understood in the context of the exercise of public power) to the governed.

[7] See TW Bennett 'Administrative-Law Controls over Chiefs' Customary Powers of Removal' (1993) 110 *SALJ* 276, 288–91.

which provides that administrative action must be 'lawful, reasonable and procedurally fair', and FC s 33(2), which provides that anyone 'whose rights have been adversely affected by administrative action has the right to be given written reasons'.

These provisions were then refined and amplified by the Promotion of Administrative Justice Act.[1] Under s 3 of this Act, any administrative action that 'materially and adversely affects the rights or legitimate expectations of any person' must be 'procedurally fair'.[2] Although procedural fairness depends upon the circumstances of each case,[3] which allows traditional rulers a certain degree of latitude, it is defined to include adequate notice of an action, opportunity to make representations, a clear statement of the action, notice of a right of review (or appeal),[4] and notice of the right to request written reasons (within 90 days).[5] Apart from the last requirement, which may present some difficulties,[6] the customary procedures can easily be adjusted to comply with these provisions (if they do not already comply). Where administrative action is not procedurally fair, a court may review the action.

Section 3 deals only with the *audi alteram partem* rule. Under the common law, however, procedural fairness also required an absence of bias, which is expressly recognized in the Act, as well as a provision allowing the courts to review administrative action if administrators were reasonably suspected of bias.[7] Here traditional leaders may be confronted with the same challenges as they face in their judicial role. As decision-makers and administrators, leaders may struggle to show sufficient distance from issues, and may thus fall foul of the requirement of impartiality.

The requirement that administrative action be both reasonable and rational is perhaps more easily met. The Constitutional Court has found that what is reasonable will depend on the circumstances of each case. Factors that assist in the determination of the reasonableness of a decision include the nature of the decision, the identity and expertise of the decision-maker, the complexity and breadth of underlying factors, what reasons are given, the nature of competing interests involved, as well as the impact of the decision.[8] For decisions taken in traditional communities, the participation of a traditional council and the ensuing transparency and openness of the decision-making would be relevant.

[1] Act 3 of 2000 ('PAJA').

[2] See PAJA s 3(1). Section 4 lays down even more stringent requirements for action affecting the public.

[3] See PAJA s 3(2).

[4] See PAJA s 3(2)*(b)*.

[5] See PAJA s 5.

[6] In a predominantly oral culture, governmental acts are not necessarily recorded in writing. Section 5(4) of PAJA, however, allows an administrator to depart from the requirement to give adequate reasons 'if it is reasonable and justifiable in the circumstances'.

[7] See PAJA s 6(2)*(a)*(iii).

[8] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 45.

Application of both the Bill of Rights and the Promotion of Administrative Justice Act depends on the classification of an act as 'administrative action'[1] and the judicial functions of traditional leaders are expressly excluded from the definition of administrative action in the Administrative Justice Act.[2] The Constitutional Court has affirmed that it is the nature of the function rather than the functionary that must be taken into account in determining whether the requirements of administrative justice apply.[3] Even in this regard, customary law does not clearly differentiate the functions of government, and so it may well happen that statutory requirements are inadvertently breached.

(d) Land

In 2004, the Communal Land Rights Act[4] was passed, primarily with a view to giving landholders under customary law greater security of tenure as required by FC s 25. It is designed to override customary interests over communal land and generate an entirely new system of land tenure, similar to that provided by the Communal Property Associations Act.[5] Because the former Act is not yet in force, we first describe the existing customary powers of traditional leaders and their councils, and then consider the impact of the Final Constitution on this regime. Thereafter we discuss the Communal Land Rights Act.

As leaders of their nations, chiefs enjoyed a range of rights and privileges over land, including a right to demand tribute from the harvest or the hunt and a right to choose the best land for their own purposes. They also represented their people in any dealings with the land. As a result of this conglomeration of powers, certain rulers have, perhaps inevitably, described themselves as 'owners' of their domains, and, therefore, entitled to sell mineral rights and charge rents for businesses.[6] This type of claim, however, is a calculated misinterpretation of the general principles of customary law, because the exercise of customary powers must always be for the benefit of the nation, and all major decisions must be endorsed, at least by the ruling council, if not the national council.

[1] Section 1(1)*(a)* of PAJA defines 'administrative action' to mean any decision (or failure to take a decision) by an organ of state. A distinction must, however, be drawn between administrative and executive acts, the former denoting implementation of a law or judicial decision and the latter formulation of policy. Although executive acts do not fall within the purview of the Act, they must comply with the broad principle of 'legality' that was developed in *Fedsure Life Assurance Ltd v Greater Transitional Metropolitan Council*. 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC). See also *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC). While the content of this principle is still uncertain, it means, at the very least, that a functionary must act rationally within powers granted by the Final Constitution. Ibid at para 85.

[2] See PAJA s 1*(b)*(ee).

[3] See *President of the RSA v South African Rugby Football Union* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at para 141. See C Hoexter *New Constitutional and Administrative Law* (2001) 93–4.

[4] Act 11 of 2004.

[5] Act 28 of 1996.

[6] See, for example, I Schapera *Native Land Tenure in the Bechuanaland Protectorate* (1943)('Schapera *Native Land Tenure*') 258–60; JF Holleman 'Some Shona Tribes of Southern Africa' in E Colson & M Gluckman *Seven Tribes of British Central Africa* (1961) 379.

(i) *Traditional power to allot land*

All the chiefdoms in South Africa have been settled for many decades, and all of them are hopelessly overcrowded. Rulers are therefore seldom, if ever, called upon to exercise such traditional powers as establishing new realms, marking out royal homesteads or zoning land into sections dedicated to grazing or farming.[1] Of greater day-to-day importance is the power to allot plots of land to subjects who need places to live and farm.

In practice, however, because most land has already been allotted, the ruler is more often required to do no more than approve a transfer between existing landholders.[2] Although he is under no obligation to accede to a request, the ruler is supposed to behave as a benevolent father with a general responsibility for his subjects' welfare. His power is therefore construed as a duty.[3] What can be done to meet all the demands, however, obviously depends upon the amount of land available, and many rulers must now fall short of the ideal notion that they are providers for their people.

As it happens, everyday allotments are seldom the responsibility of high authority. A subject's entitlement to land within a chiefdom arises not from affiliation to the nation, but, rather, from attachment to one of its wards.[4] The applicant for land on which to build a house, church, store or school, or on which to grow crops must, in the first instance, approach the local wardhead.[5] Unfortunately, the likelihood is that all available land has already been taken. Hence, someone looking for a site will generally be obliged to arrange for a transfer from an existing resident.[6]

[1] See AJ Kerr *Customary Law of Immovable Property and of Succession* (3rd Edition, 1990) 30 (Botswana is probably the only exception to this rule.) See Schapera *Native Land Tenure* (supra) at 59ff; NJ Van Warmelo & WMD Phophi *Venda Law: Parts 1–3* (1948), *Part 4* (1949), *Part 5* (1967) 1065–6. Cf Jeppe *Bophuthatswana* (supra) at 22.

[2] The extent to which a ruler intervenes depends largely on his personal power. Weak rulers do little more than rubber stamp decisions that have already been reached by a neighbourhood. See C R Cross 'The Land Question in Kwa-Zulu: Is Land Reform Necessary?' (1987) 4 *Development SA* 428 (Cross 'The Land Question') 436.

[3] See Hughes (supra) at 110–11; Jeppe *Bophuthatswana* (supra) at 24.

[4] This entitlement is termed a 'right of avail'. See VGJ Sheddick *Land Tenure in Basutoland* (1954) 32; Hughes (supra) at 62; Jeppe *Bophuthatswana* (supra) at 13–14; P Duncan *Sotho Laws and Customs* (1960) 86–7; EM Letsoalo *Land Reforms in South Africa* (1987) 19; I Hamnett *Chieftainship and Legitimacy: An Anthropological Study of Executive Law in Lesotho* (1975) 65. Wards are clearly defined geographic units that are usually ruled by heads of aristocratic families. On the concept of the ward, see Hughes (supra) at 101–2; Holleman (supra) at 367–9; Schapera *Native Land Tenure* (supra) at 27–32; MFC Bourdillon *The Shona Peoples: An Ethnography of the Contemporary Shona with Special Reference to their Religion* (1976) 123–4, WJO Jeppe *Die Ontwikkeling van Bestuursinstellings in die Westelike Bantoegebiede (Tswana-Tuisland)*(1970) 113; Sheddick (supra) at 8–9.

[5] If no wardhead exists, then the person must approach the authority directly in charge of the area. See C De Wet & M Whisson (eds) *From Reserve to Region: Apartheid and Social Change in the Keiskammahoek District of (former) Ciskei 1950–1990* (1997) 17.

[6] See CR Cross *Informal Tenure in South Africa: Systems of Transfer and Succession* (1993) 16 (Notes that the wardhead then does little more than act as an intermediary to facilitate the claim.)

Although the allotment of land is not governed by set rules or procedures, it is not a matter of pure discretion. Wardheads must achieve at least a fair distribution of the land in their areas so that all householders have enough according to their needs. To this end, decisions to allot land are taken on the advice of elders and the applicant's future neighbours.[1] In common-law terms, this is an administrative act, and is therefore subject to the principles of administrative law.[2]

Strictly speaking, all allotments are gratuitous,[3] but nowadays it is usual to pay some form of consideration. These payments could, of course, be treated as bribes, but they can also be construed as a form of naturalization fee (or thank offering), that traditionally betokened submission to political authority.[4] Proof of corruption is therefore difficult to sustain.[5] Nevertheless, the receipt of gifts in return for services sits uncomfortably with a traditional leader's position as a paid state official. The Code of Conduct in the Schedule to the Traditional Leadership and Governance Framework Act[6] now requires traditional leaders to disclose any gifts received, and this provision may provide an incentive to bring the system to an end.

To provide evidence of a landholder's rights, the act of allotment and a description of the land concerned must, in some way, be publicized.[7] In certain areas, registers of allotments are kept,[8] but, if neither an official document nor a witness to the initial act is available, customary law gives no indication of how landholders are to prove their titles.

[1] See BA Marwick *The Swazi* (1966) 162; Hughes (supra) at 129; Kuper (supra) at 48–9; Cross 'The Land Question' (supra) at 436. So far as the applicant for land is concerned, the temptation is obviously to shorten this process by simply buying or leasing rights. See CR Cross 'Informal Tenures against the State Landholding Systems in African Rural Areas' in M De Klerk (ed) *A Harvest of Discontent* (1991) 74.

[2] See FC s 33 and PAJA. Because an applicant has no definite rights before an allotment is made, the decision is administrative, not judicial. See Duncan (supra) at 88 and *Nzama v Nzama* 1942 NAC (N&T) 8. Regarding allotment by the state, see *Gaboetloeloe v Tsikwe* 1945 NAC (C&O) 2 and *Dlomo v Dlomo* 4 NAC 181 (1922). Cf Hamnett (supra) at 63–5.

[3] According to Kuper, the Swazi use the verb *kuphakela* to describe allotment. Kuper (supra) at 45. This is the same word that is used to denote serving food - and every individual has a right to be fed.

[4] See Hamnett (supra) at 72; RJ Haines & CPG Tapscott 'The Silence of Poverty: Tribal Administration and Development in Rural Transkei' in CR Cross & RJ Haines (eds) *Towards Freehold: Options for Land and Development in South Africa's Black Rural Areas* (1988) at 169–70; N Bromberger 'Introduction to the land tenure debate from reality' in Cross & Haines (supra) at 208; and Jeppe *Bophuthatswana* (supra) at 24–5.

[5] Nevertheless, control of land provides good opportunities for bribery, which has been the cause of widespread complaint throughout southern Africa. See WD Hammond-Tooke *Command or Consensus: The Development of Transkeian Local Government* (1975) 211; WD Hammond Tooke 'Chieftainship in Transkeian Political Development' (1964) 2 *J Mod Afr Studies* 313, 320–1; Hunter *Reaction to Conquest* (supra) at 114; H Ashton *The Basuto* (1952) 147–8; Hamnett (supra) at 76.

[6] Item 1*(l)* of Act 41 of 2003.

[7] See Hughes (supra) at 132–3; Ashton (supra) at 147. Without a public record, officials in control of land are given even better opportunities for corruption. According to Hamnett, they may declare that land had never, in fact, been allotted, or that it had been lent on a temporary basis. See Hamnett (supra) at 69.

[8] See Duncan (supra) at 89. In Lesotho, traditional rulers appoint special officials whose job is to supervise allotments. See Hamnett (supra) at 69.

(ii) *Traditional power to regulate common resources*

Although all subjects have free access to common resources, in customary practice, rulers may determine when and how these resources are to be used. This power, which may be exercised only for the public good, requires a careful balancing of the people's welfare and a need to protect the environment.[1] Thus, in times of scarcity, rulers may be obliged to impose restrictions on use, and there is ample evidence to show that they have reacted swiftly when the need arose. Over fifty years ago, for instance, Tswana leaders banned the killing of certain species of game,[2] and prohibited the practice of annually burning pasturage to encourage new spring growth.[3]

Formally, customary law gives traditional leaders all the powers necessary to safeguard the environment.[4] However, three factors militate against effective action. First, a coherent policy requires central planning and an administrative infrastructure for implementation. Where political authority is diffuse and decentralized, prompt, co-ordinated action is much more difficult to achieve.[5] Secondly, the very ethic of customary law is to give priority to human needs. Hence, traditional rulers tend to be more concerned with social support networks than the environment.[6] Thirdly, the painful fact remains that very little can be done to conserve natural resources when chiefdoms are suffering all the problems of poverty and overpopulation.[7]

(iii) *Traditional powers of expropriation and confiscation*

Under customary law, traditional authorities have a general power to order landholders or, occasionally, even whole communities to relinquish the lands they were allotted. The reasons for issuing such orders are various, but they may be loosely grouped into two, or possibly, three categories.

In the first, land may be expropriated for a general public purpose. The tract in question may be needed for constructing public works, such as roads or dams,[8] or the soil may be exhausted and in need of conservation measures.[9] In these

[1] See, eg, B Sansom 'Traditional Economic Systems' in WD Hammond-Tooke (ed) *The Bantu-speaking Peoples of Southern Africa* (2nd Edition, 1974) 137–8 (On the problem of deciding when grass may be cut.) Although pre-colonial peoples are often depicted as 'children of nature', living in harmony with their environment, scholars today portray them as regulators. See W Beinart & P Coates *Environment and History, The Taming of Nature in the USA and South Africa* (1995) 3–4.

[2] See Schapera *Native Land Tenure* (supra) at 257.

[3] See I Schapera *A Handbook of Tswana Law and Custom* (2nd Edition, 1955)('Schapera *Handbook*') 209.

[4] Of course, insofar as traditional rulers exercise administrative powers, they must comply with the requirements of FC s 33 and PAJA.

[5] It is noticeable, for instance, that the main examples of environmental control come from relatively centralized polities in Lesotho and Botswana. See Schapera *Handbook* (supra) at 212; Schapera *Native Land Tenure* (supra) at 42–4 and 263; Sheddick (supra) at 124; Duncan (supra) at Chapters 37, 46 and 49.

[6] Cross 'The Land Question' (supra) at 438.

[7] See, eg, EM Preston-Whyte 'Land and Development at Indaleni' (1987) 4 *Development SA* 401, 415.

[8] See AC Myburgh & MW Prinsloo *Indigenous Public Law in KwaNdebele* (1985) 41–2.

[9] See Sheddick (supra) at 170. See also M Wilson & MEE Mills *Keiskammahoek Rural Survey Vol 4* (1952) 26; Schapera *Native Land Tenure* (supra) at 183.

cases, the dispossessed landholder is compensated with land elsewhere in the realm.

In the second category, a removal order is issued to penalize a landholder for committing an offence,[1] typically a violation of one of the rules governing land use, such as starting to plough before permission was given. In addition, however, this type of order may be made in order to rid the community of the disruptive influence of criminal delinquents. Unfortunately, a more self-serving motive — to put down political dissent — may well underlie the ostensible reason.[2]

In cases of criminal confiscation, no form of compensation is paid, and the offending landholder may even lose whatever improvements were made to the land. At most, he or she will be allowed to dismantle buildings and harvest the crops that happen to be standing in the fields.[3] If the wrongdoing was serious and persistent, the dispossessed holder may lose all entitlement to land in the realm (which is tantamount to banishment or expulsion).[4]

There is, perhaps, a third reason for issuing removal orders. Land may be taken away from holders who are not occupying it beneficially or who have more than is necessary for their subsistence needs.[5]

The power of removal, which is comparable with the common-law doctrine of eminent domain, has both good and bad features. On the one hand, removal orders can be used to achieve an equitable distribution of land, and, for this purpose, they may be issued to penalize absentee landholders and to encourage productive farming.[6] On the other hand, removal orders are a convenient weapon for silencing political opposition, and, in the hands of corrupt and unpopular rulers, they are open to abuse.[7]

[1] See Myburgh & Prinsloo (supra) at 42; Prinsloo *Publiekreg* (supra) at 137 (Landholder may be dispossessed only for commission of several serious offences.)

[2] See Ashton (supra) at 149–50; Sheddick (supra) at 62 and 155.

[3] See Prinsloo *Publiekreg* (supra) at 137; Hughes (supra) at 228–9. See also Sheddick (supra) at 72.

[4] In customary law, banishment is the appropriate sanction for rejecting the authority of a ruler and his council. See Prinsloo *Die Inheemse Administratiefreg van 'n Noord-Sothostam* (1981)('Prinsloo *Administrafiereg*') 71 and 194–5; Prinsloo *Publiekreg* (supra) at 136–8. But see Myburgh & Prinsloo (supra) at 29 (Report that banishment is so serious that only immigrants can be punished in this way, and then only for persistent disobedience to the law or for contempt of the ruler.) Cf Kuper (supra) at 149. See, further, Schapera *Native Land Tenure* (supra) at 107–8; Letsoalo (supra) at 22; Hughes (supra) at 146–9. The customary duties of loyalty and respect for traditional leaders received statutory support in regulation 6 of the Regulations Prescribing the Duties and Powers of Chiefs. Proc R110 of 1957.

[5] See Hamnett (supra) at 68; Ashton (supra) at 145–6; Prinsloo *Publiekreg* (supra) at 137; Sheddick (supra) at 155; Schapera *Handbook* (supra) at 207; Schapera *Native Land Tenure* (supra) at 181–2.

[6] By the same token, however, frequent removals can create a sense of insecurity, especially among those who, by hard work and good husbandry, increase their farming yields. See Hamnett (supra) at 75–6; Hughes (supra) at 149; N Vink *Systems of Land Tenure: Implications for Development in Southern Africa* (1986) 40–1. See also Hughes (supra) at 148 (Notes that fear of banishment in Swaziland tended to inhibit agricultural development, because a man who was too successful ran the risk of being told that he had land surplus to his family's subsistence needs.)

[7] See Haines & Tapscott (supra) at 169–70; DR Tapson 'Rural Development and the Homelands' (1990) 7 *Development SA* 561, 572. See also Hamnett (supra) at 66. Hamnett argues that the power to issue an order of ejectment is even more effective in controlling people than the threat of criminal prosecution.

Customary law provides no clearly defined restraint on the power to issue removal orders, apart from a procedural requirement that the ruler should consult his council[1] and give reasons for his decision.[2] It is uncertain, however, when a matter should go to council or which council is to be consulted. (And, of course, consultation offers no more than an assurance that an issue is considered; a ruler is not bound by the council's advice.) What is more, customary law does not always give the affected landholder a right of *audi alteram partem*. He or she may be allowed to make submissions to the ruler in council, but, when land is expropriated for public purposes, there is no automatic right to a hearing.[3]

The former Supreme Court often had cause to consider customary removal orders, which, in the language of the day, were termed 'trekpas'.[4] The Court might have been expected to find the absence of a right of *audi alteram partem* incompatible with the principles of natural justice,[5] but surprisingly, this was not the view of the leading case: *S v Mukwevho*; *S v Ramukhuba*.[6] In general, the courts did little other than to confirm customary practice, namely, that a council had to be consulted and that good and sufficient reasons had to be given.[7]

The Final Constitution and the Interim Protection of Informal Land Rights Act[8] now demand changes to these traditional practices. First, the Act removes the power of removal from traditional leaders, and, instead, vests it in a majority of landholders. Thus, it is provided that, although an individual may be deprived of an 'informal right to land'[9] in accordance with the custom of a community, that custom must be modified to reflect principles of democratic governance. The Act does this by redefining custom to include:

> the principle that a decision to dispose of any such right [namely, a customary interest in land] may only be taken by a majority of the holders of such rights present or represented at

[1] If the order involves a number of families, the more representative national council should be consulted. See Myburgh & Prinsloo (supra) at 41–2 and 63–4; Prinsloo *Administratiefreg* (supra) at 134–5; Prinsloo *Publiekreg* (supra) at 154; Hunter (supra) at 394; HO Mönnig *The Pedi* (1967) 284–5; Krige (supra) at 219–20. Cf Interim Protection of Informal Land Rights Act 31 of 1996.

[2] The merits of a removal order will obviously be debated in council. See, eg, *Kekane v Mokgoko* 1953 NAC 93, 97 (NE).

[3] See Prinsloo *Administratiefreg* (supra) at 70 and 138; Prinsloo *Publiekreg* (supra) at 154.

[4] See *Mokhatle & Others v Union Government* 1926 AD 71, 77 ('*Mohkatle*'). Trekpas was described as 'the power to direct the removal, by means of expulsion from the tribal property, of any natives who have committed acts of insubordination and hostility to the duly constituted authority of the chief or of any sub-chief under him.' Although trekpas is widely reported in the ethnographic literature, *S v Mukwevho*; *S v Ramukhuba* held that not all systems of customary law would permit traditional rulers to issue such an order. 1983 (3) SA 498, 501 (V)

[5] See the so-called repugnancy proviso in s 1 of the Law of Evidence Amendment Act 45 of 1988.

[6] 1983 (3) SA 498, 500–1 (V). This case was consistent with previous judgments. See *Mokhatle* (supra) at 77; *Kuena v Minister of Native Affairs* 1955 (4) SA 281 (T). Most of the earlier cases, however, dealt with the 'customary' power that used to vest in the Governor-General (later State President), as Supreme Chief, under s 5(1)*(b)* of the Black Administration Act. Act 38 of 1927.

[7] See *Mokhatle* (supra) at 78–9; *Kekane v Mokgoko* 1953 NAC 93, 97 (NE).

[8] Section 2 of Act 31 of 1996 ('Informal Land Rights Act').

[9] See Informal Land Rights Act s 1(1)(iii)*(a)(i)*(Defines informal land rights to include customary interests.)

a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate.[1]

As its name indicates, the Act was initially intended as a temporary measure, and it required annual renewal by the Minister to remain in effect. The Communal Land Rights Act, however, removes the renewal requirement.[2] It now seems that, when this Act comes into force, the Interim Protection of Informal Land Rights Act will lose its temporary nature.

As far as customary law is concerned, this Act has introduced a number of problems. In particular, the requirement that a majority of landholders are to support the removal order raises a problem of determining which landholders are to participate, members of a ward or the entire nation? It also appears improper to have a penal removal order taken by majority vote. Critics of the Act add that customary landholders are already protected by various constitutional rights, most of which guarantee a process of fair decision-making by the chief-in-council. The obvious concern here is that it is difficult for people in rural areas to assert constitutional rights. But this is a difficulty that is not addressed by the Interim Protection of Informal Land Rights Act, as decisions by meetings of landholders will, appropriately, be subject to the same scrutiny under the Bill of Rights as decisions of traditional leaders and their councils — democratic decision-making cannot on its own limit a right.

Removal orders are obviously now subject to the Bill of Rights, as well as the Promotion of Administrative Justice Act.[3] The undifferentiated powers of government in customary law allow traditional rulers to exercise their removal powers on different grounds without specifying which. In order to assess the lawfulness of an order, however, its reason and purpose must be investigated, for only then will it be apparent which function of government is being exercised, and hence which section of the Bill of Rights is applicable. For instance, if a landholder were deprived of rights for committing an offence, and, if the ruler performed a judicial (or quasi-judicial) function to determine guilt, s 34 of the Constitution would be applicable. The landholder would then be entitled to present a defence at a fair public hearing.[4] Alternatively, guilt may already have been established in a separate hearing, in which case the removal is more likely to be an administrative function. If so, FC s 33, together with the Promotion of Administrative Justice Act, is applicable. The landholder would then be entitled to just administrative action.

[1] See Informal Land Rights Act ss 2(2) and (4).

[2] See Informal Land Rights Act Schedule 1, Part 1.

[3] Act 3 of 2000 ('PAJA').

[4] Because the grounds for issuing removal orders vary, the courts have not been consistent in classifying them. See, eg, *Gaboetloeloe v Tsikwe* 1945 NAC (C&O) 2 (Considered the act to be administrative rather than judicial.) See also *Mokhatle* (supra) at 77–8; *Masenya v Seleka Tribal Authority & Another* 1981 (1) SA 522, 525 (T)(Held that it was not an exercise of criminal jurisdiction.)

If land is expropriated so that it can be used for a public cause, FC s 25 (the property clause) may also be applicable.[1] FC s 25(2) permits 'expropriation only in terms of law of general application — *(a)* for a public purpose or in the public interest; and *(b)* subject to compensation . . .'.[2] To determine the applicability of FC s 25, however, a distinction must be drawn between expropriation and control of use.[3] The former refers to the removal of private rights for public purposes, whereas the latter refers to regulation of the use of property in order to protect citizen from citizen. Whenever an order is intended to extinguish rights permanently, it falls within the ambit of s 25(2), and the affected landholder must be duly compensated. FC s 25 is not applicable if an order is simply aimed at regulating the way land is to be used.[4]

Regardless of whether a removal order was intended to expropriate land or regulate use, it may still be subject to FC s 33.[5] FC s 33(1) imposes a requirement of 'lawful, reasonable and procedurally fair' action, and subsection (2) provides that anyone 'whose rights have been adversely affected by administrative action has the right to be given written reasons'. Both provisions have been refined by the Promotion of Administrative Justice Act, which requires any administrative action[6] that 'materially and adversely affects the rights or legitimate expectations of any person' to be 'procedurally fair'.[7]

(iv) *The Communal Land Rights Act*[8]

Once implemented, the Communal Land Rights Act will create an entirely new system of land tenure in traditional areas. To this end, land subject to customary

[1] Orders issued pursuant to the commission of an offence fall outside the ambit of this section, because they are acts of penal confiscation. FC s 25(1) allows individuals to be deprived of their property, provided that the deprivation occurs under a law of general application and the law does not permit arbitrary action.

[2] Because FC s 25(2) provides that rights may be expropriated only 'in terms of law', it could be taken to imply a legislative enactment. On this interpretation, the power of removal would no longer be valid. On the other hand, if 'law' is read to include customary law, which appears the more reasonable construction, then removal powers remain valid. In other respects, customary law is consonant with the requirements in FC s 25(2)*(b)* governing payment of compensation.

[3] See J Murphy 'Property Rights in the New Constitution: An Analytical Framework for Constitutional Review' (1993) 26 *CILSA* 211, 218–19. See also T Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46.

[4] See *Cape Town Municipality v Abdulla* 1976 (2) SA 370, 375 (C)(On control of resources.)

[5] In this case, the act must be administrative, as opposed to executive, in the sense that it implements a rule or law already issued or promulgated. For the distinction between executive and administrative action, see *President of the RSA v South African Rugby Football Union*. 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at para 147.

[6] Removal orders intended to expropriate land for public purposes or to regulate its use fall within s 1 of the Act, which defines 'administrative action' as action by 'an organ of state, when exercising a power in terms of the Constitution which adversely affects the rights of any person.'

[7] See PAJA s 3(1). Section 4 lays down the even more stringent requirements for action affecting the public, but the choice of procedures is left to the official concerned. PAJA s 4(1)*(d)*.

[8] Act 11 of 2004 ('CLR Act').

tenure or a permission to occupy[1] is to be transferred to 'communities'.[2] The 'communities' are constituted as juristic persons and thus the registered title-holders of the land.[3] The area of land involved is then to be subdivided into portions, and each portion must be registered in the names of individual persons.[4]

The powers to represent the community, dispose of rights in communal land, allocate and register individual rights and, generally, promote and safeguard the community's interests vest in land administration committees.[5] If a community is already subject to a traditional council (established under the Traditional Leadership and Governance Framework Act),[6] the council may exercise the committee's powers.[7] Otherwise, communities may create new committee structures.[8] The Act does not specify the number of members, but it does provide that one third must be women, one person must represent the interests of vulnerable members of the community (women, children, the elderly and the disabled), and that non-voting members may be designated by the Minister of Land Affairs, the chairperson of the appropriate land rights board, the MECs for agriculture and local government, and the municipality in whose area the committee falls. Subject to the rule allowing a traditional council to perform the functions of a committee, traditional leaders may not be elected.[9]

Section 19 of the Act provides that, prior to establishing a committee, the community must draw up a code of rules to regulate the use and administration of communal land. If it fails to draw up its own set of rules, those prescribed in regulations to be passed under the Act will apply. Provided that the rules comply with the Final Constitution and the Act, they may be registered, and they then become binding.

On the face of it, the Act deprives traditional rulers of all their customary powers over land. However, because traditional leaders are likely to constitute the dominant members of the land administration committees, they will continue to wield considerable influence. This possibility has provoked serious disquiet among women's groups and others doubtful of the value of traditional leadership.[10]

[1] The generalized terms in the text find fuller and more precise definition in CLR Act s 2(1).

[2] 'Communities' are defined in s 1 as groups of 'persons whose rights to land are derived from shared rules determining access to land held in common by such group.'

[3] See CLR Act ss 3 and 5.

[4] See CLR Act ss 18(3)*(a)* and *(b)*.

[5] See CLR Act s 24.

[6] See Section 3 of Act 41 of 2003.

[7] See CLR Act s 21(2).

[8] See CLR Act s 21(1).

[9] See CLR Act s 22.

[10] See, eg, B Cousins & A Claassens 'Communal Land Rights, Democracy and Traditional leaders in Post-Apartheid South Africa' in M Saruchera (ed) *Securing Land and Resource Rights in Africa: Pan-African Perspectives* (2004); B Cousins '"Embeddedness" versus Titling: African Land Tenure Systems and the Potential Impacts of the Communal Land Rights Act 11 of 2004' (2006) *Stellenbosch LR* — (forthcoming) (manuscript on file with authors).

Research driven by the theory of legal pluralism has shown that statutes such as the Communal Land Rights Act are unlikely to succeed in supplanting the role of chiefs. Members of rural communities will have to be strongly committed to the new regime, otherwise, strict enforcement will be necessary. To this end, the Department of Land Affairs will monitor land administration committees through Land Rights Boards.[1] According to current estimates, however, the Department has neither the finance nor the personnel necessary to ensure a fully effective set of enforcement mechanisms.[2]

26.7 Traditional Leadership: An Institution in Transition

Over the past ten years, attempts to fill out the sparse framework provided by the Constitution have proved to be hugely controversial. The two new laws that are at the centre of the government's attempts to bring the traditional practice of traditional leadership into line with South Africa's new democratic values, the Traditional Leadership and Governance Framework Act and the Communal Land Rights Act, remain deeply problematic. They satisfy neither the traditional leaders who are seeking more security nor those who argue that traditional government needs to transform radically to serve the new democracy.

The main contribution to democracy in the new Acts is their requirement that decisions in traditional communities must be made by groups which include a percentage of democratically elected people and women. Thus, for the development of democratic practices, they rely on increasing pressure from the communities themselves and gradual change in customary practices. Their lack of clarity on the relationships between traditional leaders and their councils, on the one hand, and traditional leaders and local government, on the other, provides little incentive for traditional leaders to reconsider their roles. Admittedly, the new laws show some attempt to develop the accountability of traditional leaders and their councils, but, in general, the accountability provisions are weak, and, with decisions about succession to leadership positions placed firmly in the hands of traditional elites, ordinary community members are left with limited influence.

A number of serious constitutional problems posed by the institution of traditional leadership also remain unresolved by the new legal regime. The first, and most prominent, is probably the rule of patrilineal succession. It seems as if the courts have been left with the problem of finding a solution. Secondly, as *Mhlekwa & Feni v Head of the Western Tembuland Regional Authority & Another* found, the system of customary courts fails to meet the Constitution's requirements of judicial independence and impartiality.[3] The progress made on passing a new law to regulate customary courts, however, has been painfully slow. Thirdly, for similar

[1] See CLR Act, Chapter 8.

[2] See A Claassens 'Women, Customary Law and Discrimination: The Impact of the Communal Land Rights Act' 2005 *Acta Juridica* 42, 77.

[3] 2001 (1) SA 574 (Tk), 2000 (9) BCLR 979 (Tk).

reasons, the administrative functions of traditional leaders are also likely to be challenged. This matter appears not to have received attention from the Law Reform Commission, Parliament or the executive.

Finally, a matter of greater concern to democrats: the new Acts may insert traditional leaders between members of rural traditional communities and their democratically elected representatives. This possibility is most likely to be realized in the local sphere of government, as the Traditional Leadership and Governance Framework Act anticipates considerable interaction between traditional councils and municipalities. There is already evidence, however, that bureaucrats and politicians in both the provincial and national spheres of government assume that consultation with traditional leaders is equivalent to consultation with the communities themselves. This trend is encouraged by the convenience of speaking to chiefs (rather than members of the public), by the fact that they are easily identified as leaders of their communities and by the likelihood that chiefs will be well informed on local affairs (because of their participation in the houses of traditional leaders). As submissions to Parliament on both the Traditional Leadership and Governance Framework Act and the Communal Land Rights Act demonstrated, however, the views of traditional leaders and those of different groups in their communities can differ considerably.

The question is whether the current position, which leaves change in the hands of communities, can serve the goals of the new constitutional framework. Many writers have emphasized the capacity of traditional communities to change, but, change, of course, has no predetermined outcome. In her study of several communities in Limpopo, Oomen gives a persuasive demonstration of this situation. In some cases democracy influenced traditional processes, in others, tradition displaced the democratic practices that had been introduced by the political struggle.

The record of 'living customary law' has a similar message. The idea of a 'living' law was expounded by writers who were concerned that the written law, as applied in the courts, did not reflect the actual practices of communities. Practice, it was argued, is generally progressive, and it adapts law to the needs of a modern society. But the rural women who came to Parliament in 2003 to protest about the chiefly powers protected in the Traditional Leadership and Governance Framework Act described oppressive customary practices which left them destitute, sometimes homeless, and often deprived of their children.

In this regard, it seems that the new laws, rather than allowing for the dynamic development of customary practice, in fact, introduce a rigidity. They offer no framework for the gradual democratization of traditional communities. Instead, there is a real danger that the Acts will maintain the dependence of leaders on government, which was the hallmark of colonial rule and apartheid. It is true that the Traditional Leadership and Governance Framework Act will change the composition of many tribal councils, but, like so much law, neither this nor the Communal Land Rights Act offers a programme for change. What is more,

neither suggests ways in which the capacity of communities to change could be harnessed to ensure that hereditary leadership indeed comes to 'serve the interests of the people as a whole' in a democratic way.[1]

It may be that, as local governments develop the capacity to fulfil their constitutional roles, members of traditional communities will come to rely on them for the services that are usually provided by accountable government. Traditional leaders will then exert the cultural influence which is appropriate to their status, not exercise governmental powers.

[1] The Acts might, for instance, have given communities periodic opportunities to choose — and change — their form of government. They could require important decisions to be put to the vote, thereby insisting on community engagement in civic decision-making.

27 Public Finance

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213. National Revenue Fund

(1) There is a National Revenue Fund into which all money received by the national government must be paid, except money reasonably excluded by an Act of Parliament.

(2) Money may be withdrawn from the National Revenue Fund only—

(a) in terms of an appropriation by an Act of Parliament; or

(b) as a direct charge against the National Revenue Fund, when it is provided for in the Constitution or an Act of Parliament.

(3) A province's equitable share of revenue raised nationally is a direct charge against the National Revenue Fund.

214. Equitable shares and allocations of revenue

(1) An Act of Parliament must provide for—

(a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government;

(b) the determination of each province's equitable share of the provincial share of that revenue; and

(c) any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.

(2) The Act referred to in subsection (1) may be enacted only after the provincial governments, organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered, and must take into account—

(a) the national interest;

(b) any provision that must be made in respect of the national debt and other national obligations;

(c) the needs and interests of the national government, determined by objective criteria;

(d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;

(e) the fiscal capacity and efficiency of the provinces and municipalities;

(f) developmental and other needs of provinces, local government and municipalities;

(g) economic disparities within and among the provinces;

(h) obligations of the provinces and municipalities in terms of national legislation;

(i) the desirability of stable and predictable allocations of revenue shares; and

(j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.

215. National, provincial and municipal budgets

(1) National, provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector.

(2) National legislation must prescribe—

(a) the form of national, provincial and municipal budgets;

(b) when national and provincial budgets must be tabled; and

(c) that budgets in each sphere of government must show the sources of revenue and the way in which proposed expenditure will comply with national legislation.

(3) Budgets in each sphere of government must contain—

(a) estimates of revenue and expenditure, differentiating between capital and current expenditure;

(b) proposals for financing any anticipated deficit for the period to which they apply; and

(c) an indication of intentions regarding borrowing and other forms of public liability that will increase public debt during the ensuing year.

216. Treasury control

(1) National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing —

(a) generally recognised accounting practice;

(b) uniform expenditure classifications; and

(c) uniform treasury norms and standards.

(2) The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures.

(3) A decision to stop the transfer of funds due to a province in terms of section 214 (1)*(b)* may be taken only in the circumstances mentioned in subsection (2), and—

(a) may not stop the transfer of funds for more than 120 days; and

(b) may be enforced immediately, but will lapse retrospectively unless Parliament approves it following a process substantially the same as that established in terms of section 76(1) and prescribed by the joint rules and orders of Parliament. This process must be completed within 30 days of the decision by the national treasury.

(4) Parliament may renew a decision to stop the transfer of funds for no more than 120 days at a time, following the process established in terms of subsection (3).

(5) Before Parliament may approve or renew a decision to stop the transfer of funds to a province —

(a) the Auditor-General must report to Parliament; and

(b) the province must be given an opportunity to answer the allegations against it, and to state its case, before a committee.

217. Procurement

(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

3) National legislation must prescribe a framework within which the policy referred to in (subsection (2) must be implemented.

218. Government guarantees

(1) The national government, a provincial government or a municipality may guarantee a loan only if the guarantee complies with any conditions set out in national legislation.

(2) National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

(3) Each year, every government must publish a report on the guarantees it has granted.

219. Remuneration of persons holding public office

(1) An Act of Parliament must establish a framework for determining—
   (a) the salaries, allowances and benefits of members of the National Assembly, permanent delegates to the National Council of Provinces, members of the Cabinet, Deputy Ministers, traditional leaders and members of any councils of traditional leaders; and
   (b) the upper limit of salaries, allowances or benefits of members of provincial legislatures, members of Executive Councils and members of Municipal Councils of the different categories.

(2) National legislation must establish an independent commission to make recommendations concerning the salaries, allowances and benefits referred to in subsection (1).

(3) Parliament may pass the legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).

(4) The national executive, a provincial executive, a municipality or any other relevant authority may implement the national legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).

(5) National legislation must establish frameworks for determining the salaries, allowances and benefits of judges, the Public Protector, the Auditor-General, and members of any commission provided for in the Constitution, including the broadcasting authority referred to in section 192.

Financial and Fiscal Commission

220. Establishment and functions

(1) There is a Financial and Fiscal Commission for the Republic which makes recommendations envisaged in this Chapter, or in national legislation, to Parliament, provincial legislatures and any other authorities determined by national legislation.

(2) The Commission is independent and subject only to the Constitution and the law, and must be impartial.

(3) The Commission must function in terms of an Act of Parliament and, in performing its functions, must consider all relevant factors, including those listed in section 214(2).

221. Appointment and tenure of members

(1) The Commission consists of the following women and men appointed by the President, as head of the national executive:
   (a) A chairperson and deputy chairperson;
   (b) three persons selected, after consulting the Premiers, from a list compiled in accordance with a process prescribed by national legislation;
   (c) two persons selected, after consulting organised local government, from a list compiled in accordance with a process prescribed national legislation; and
   (d) two other persons.

(A) National legislation referred to in subsection (1) must provide for the participation of—
   (a) the Premiers in the compilation of a list envisaged in subsection (1)*(b)*; and
   (b) organised local government in the compilation of a list envisaged in subsection (1) *(c)*.

(2) Members of the Commission must have appropriate expertise.

(3) Members serve for a term established in terms of national legislation. The President may remove a member from office on the ground of misconduct, incapacity or incompetence.

222. Reports

The Commission must report regularly both to Parliament and to the provincial legislatures.

Central Bank

223. Establishment

The South African Reserve Bank is the central bank of the Republic and is regulated in terms of an Act of Parliament.

224. Primary object

(1) The primary object of the South African Reserve Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic.

(2) The South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, but there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters.

225. Powers and functions

The powers and functions of the South African Reserve Bank are those customarily exercised and performed by central banks, which powers and functions must be determined by an Act of Parliament and must be exercised or performed subject to the conditions prescribed in terms of that Act.

Provincial and Local Financial Matters

226. Provincial Revenue Funds

(1) There is a Provincial Revenue Fund for each province into which all money received by the provincial government must be paid, except money reasonably excluded by an Act of Parliament.

(2) Money may be withdrawn from a Provincial Revenue Fund only—
   (a) in terms of an appropriation by a provincial Act; or
   (b) as a direct charge against the Provincial Revenue Fund, when it is provided for in the Constitution or a provincial Act.

(3) Revenue allocated through a province to local government in that province in terms of section 214(1), is a direct charge against that province's Revenue Fund.

(4) National legislation may determine a framework within which—
   (a) a provincial Act may in terms of subsection (2)*(b)* authorise the withdrawal of money as a direct charge against a Provincial Revenue Fund; and
   (b) revenue allocated through a province to local government in that province in terms of subsection (3) must be paid to municipalities in the province.

227. National sources of provincial and local government funding

(1) Local government and each province—
   (a) is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it; and
   (b) may receive other allocations from national government revenue, either conditionally or unconditionally.

(2) Additional revenue raised by provinces or municipalities may not be deducted from their share of revenue raised nationally, or from other allocations made to them out of national government revenue. Equally, there is no obligation on the national government to compensate provinces or municipalities that do not raise revenue commensurate with their fiscal capacity and tax base.

(3) A province's equitable share of revenue raised nationally must be transferred to the province promptly and without deduction, except when the transfer has been stopped in terms of section 216.

(4) A province must provide for itself any resources that it requires, in terms of a provision of its provincial constitution, that are additional to its requirements envisaged in the Constitution.

228. Provincial taxes

(1) A provincial legislature may impose—

(a) taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property or customs duties; and

(b) flat-rate surcharges on any tax, levy or duty that is imposed by national legislation, other than on corporate income tax, value-added tax, rates on property or custom duties.

(2) The power of a provincial legislature to impose taxes, levies, duties and surcharges—

(a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour; and

(b) must be regulated in terms of an Act of Parliament, which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

229. Municipal fiscal powers and functions

(1) Subject to subsections (2), (3) and (4), a municipality may impose—

(a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and

(b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.

(2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties—

(a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and

(b) may be regulated by national legislation.

(3) When two municipalities have the same fiscal powers and functions with regard to the same area, an appropriate division of those powers and functions must be made in terms of national legislation. The division may be made only after taking into account at least the following criteria:

(a) The need to comply with sound principles of taxation.

(b) The powers and functions performed by each municipality.

(c) The fiscal capacity of each municipality.

(d) The effectiveness and efficiency of raising taxes, levies and duties.

(e) Equity.

(4) Nothing in this section precludes the sharing of revenue raised in terms of this section between municipalities that have fiscal power and functions in the same area.

(5) National legislation envisaged in this section may be enacted only after organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered.

230. Provincial and municipal loans

(1) A province may raise loans for capital or current expenditure in accordance with national legislation, but loans for current expenditure may be raised only when necessary for bridging purposes during a fiscal year.

(2) National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

230A. Municipal loans

(1) A Municipal Council may, in accordance with national legislation—

(a) raise loans for capital or current expenditure for the municipality, but loans for current expenditure may be raised only when necessary for bridging purposes during a fiscal year; and

(b) bind itself and a future Council in the exercise of its legislative and executive authority to secure loans or investments for the municipality.

(2) National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.[1]

27.1 INTRODUCTION

(a) Public Finance as a Creature of the Final Constitution, Statute, Institutions, Regulations and Practice

The structure of public finance in South Africa is created by a surprisingly few provisions in FC Chapter 13. These provisions support (and sometimes constrain) a mature body of legislation, policy, institutions and practice that has developed in the last ten years. The rapid development of this public finance regime has been promoted by a confident and assertive National Treasury, itself a product of public finance legislation.

The two primary finance statutes enacted in the last decade are the Public Finance Management Act[2] ('PFMA') and the Local Goverment: Municipal Finance Management Act[3] ('MFMA'). Each of these acts has produced important regulations — the oft-amended Treasury Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities[4] ('Treasury Regulations') and the recently-promulgated Municipal Supply Chain Management Regulations,[5] Municipal Invest-

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[1] Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)('Final Constitution' or 'FC').

[2] Act 1 of 1999.

[3] Act 56 of 2003.

[4] Originally published as Government Notice No 345 *Government Gazette* 22219 (9 April 2001), subsequently published in amended form in Notice R 740 *Government Gazette* 23463 (25 May 2002) and Notice R 225 *Government Gazette* 27388 (15 March 2005) and most recently amended by Notice R 146 *Government Gazette* 29644 (20 February 2007).

[5] Notice 868 of 2005 in *Government Gazette* 27636 (30 May 2005).

ment Regulations,[1] and Municipal Public-Private Partnership Regulations.[2] In addition to the MFMA and the PFMA, another particularly important Act is the Division of Revenue Act ('DORA'). DORA is enacted each year to allocate 'equitable share' and other intergovernmental grants and is typically accompanied by a long memorandum describing developments financial and conceptual in South African public finance. Several other Acts create public finance institutions and regulate public finance: the Borrowing Powers of Provincial Governments Act,[3] the Financial and Fiscal Commission Act[4] and the Intergovernmental Fiscal Relations Act.[5] Finally, there is a large body of guidance and practice notes generated under the PFMA and the annual inter-governmental fiscal reviews. We draw on these instruments to more fully understand FC Chapter 13 and the system of public finance it supports.

(b) Structure of the Chapter

The structure of this chapter attempts to follow a notional 'life cycle' for public funds. That cycle begins with the raising of revenue by the three spheres of government and then considers the allocation of responsibility for public expenditure across governments, the control of budgeting and expenditure, the monitoring and withholding of public funds by national regulators and the intervention by regulators in moments of financial crisis. Chapter 13 does not follow this structure. Indeed, it is difficult to discern an underlying structure in its eighteen provisions. Nevertheless, Chapter 13 covers and controls all these issues.

Because of the lack of case law or literature that considers Chapter 13, our intention is to discuss some basic questions about the structure of South Africa's fiscal system contemplated by the Final Constitution.[6] We also cover (belatedly and in less detail) some of the institutions that have been established to regulate and to shepherd South Africa's public funds — including the Financial and Fiscal Commission and the Central Bank. In addition, the chapter explores the regulatory authority of national government over financial matters in other spheres of government.

[1] Notice No R 308 *Government Gazette* No 27431 (1 April 2005).
[2] Notice No R 309 *Government Gazette* No 27431 (1 April 2005).
[3] Act 48 of 1996.
[4] Act 99 of 1997.
[5] Act 97 of 1997.
[6] Such a structure must determine among other things the percentage of total government expenditure made by sub-national governments, the size and character of inter-governmental transfers and the level of fiscal autonomy of sub-national governments. See E Yemek 'Understanding Fiscal Decentralisation in South Africa' *IDASA Occasional Paper* (July 2005) 3.

27.2 Raising revenue

(a) Sources of Revenue

When it comes to sources of revenue, the language of FC Chapter 13 is terse. FC ss 227(1) and (2) identify three sources of revenue, namely 'revenue raised nationally';[1] 'other allocations from national government revenue';[2] and 'additional revenue raised by provinces or municipalities'.[3] 'Revenue raised nationally' is synonymous with what is termed 'equitable share' and is allocated between the three spheres of government. Prior to allocation, this revenue is not yet 'national government revenue', even though it is received into the National Revenue Fund. Only when national government has received its portion of equitable share, through a constitutionally controlled allocation process, is this revenue called 'national government revenue'. The other spheres of government may receive 'other allocations' from this national government revenue in the form of conditional or unconditional grants (terms later to be elaborated). In practice, however, these other allocations are always conditional. Finally, provinces and municipalities may raise 'additional revenue' of their own — subject to limitations set out in FC Chapter 13.

(b) Raising National Revenue

The Final Constitution is very clear on how revenue is raised (sometimes called 'revenue assignment'). As indicated above, South Africa's fiscal structure is premised on primary collection of revenue by the national government. This revenue is supplemented by some additional revenue raised by provincial governments and local governments. Because Chapter 13 nowhere mentions national government's revenue-raising powers, and mentions provincial and municipal powers in a way that restricts their powers to those expressly mentioned, it is clear that national government has plenary revenue-raising powers. In practice, revenue is raised nationally through several different sources — personal and corporate income tax, value added tax and customs duties. These are all forms of tax that provinces and municipalities are expressly prevented from imposing.[4]

(c) Raising Provincial Revenue

Provincial revenue-raising powers are the most limited of the three spheres of government. Provinces may not impose national forms of taxes — income tax, value-added tax, general sales tax and customs duties; nor may Provinces impose municipal forms of tax, that is, rates on property.[5] Provinces are left with the

[1] FC s 227(1)*(a)*.
[2] FC s 227(1)*(b)*.
[3] FC s 227(2).
[4] See FC ss 228(1) and 229(1)*(b)*.
[5] See FC s 228(1).

capacity to raise revenue through 'other taxes, levies and duties' and 'flat-rate surcharges on the tax bases of any tax, levy or duty that is imposed by national legislation'.[1] Provincial taxation powers are further circumscribed by FC s 228(2):

> The power of a provincial legislature to impose taxes, levies, duties and surcharges *(a)* may not be exercised in way that materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour; and *(b)* must be regulated in terms of an Act of Parliament, which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

The national legislation contemplated in FC s 228(2)*(b)* has been enacted in the form of the Provincial Tax Regulation Process Act.[2] Aside from repeating the limitation imposed in FC s 228,[3] the most important purpose of the Act is to regulate the process that a province must follow prior to imposing a provincial tax.[4] The only extant provincial tax of which the authors are aware is the Cape fuel levy.[5] This tax was approved by the National Treasury in mid-2006. Although other provincial taxes have been mooted from time-to-time, none have been enacted. FC 227(2) prevents additional revenue raised by provincial taxes from being deducted from their equitable share. At the same time, the national government is not required to compensate provinces which fail to 'raise revenues commensurate with their fiscal capacity and tax base'.

(d) Raising Municipal Revenue

There are two primary sources of local government funding: inter-governmental transfers and own revenue. Inter-governmental transfers can be further divided into equitable share and grants from government departments ('other allocations'). Own revenues ('additional allocations') are raised through the imposition of user charges (tariffs) and local taxes (rates on property and, previously, RSC levies).[6] The power to raise municipal own revenues is set out in FC s 229(1)*(a)*: 'a municipality may impose rates on property and surcharges on fees for services provided by or on behalf of the municipality'.[7] In terms of FC s 229(1)*(b)*, municipalities

[1] See FC s 228(1).
[2] Act 53 of 2001.
[3] See Provincial Tax Regulation Process Act s 2(1).
[4] See Provincial Tax Regulation Process Act s 3.
[5] See National Treasury *Provincial Budgets and Expenditure Review: 2002/03–2008/09* (2004) 6.
[6] The memorandum to the Municipal Fiscal Powers and Functions Bill explains why RSC levies were phased out (at 15). The bill is available at http://www.treasury.gov.za (accessed on 9 May 2007) ('Municipal Fiscal Powers and Functions Bill').
[7] The meaning of 'rate' in the context of FC s 229(1)*(a)* has been elaborated in *Gerber v MEC for Development Planning and Local Government, Gauteng* 2003 (2) SA 344 (SCA)('*Gerber*') at para 23. *Gerber* emphasizes the requirement that a rate be calculated in relation to the size or value of properties and not on a flat basis. Ibid at para 24.

may also impose 'other taxes, levies and duties appropriate to local government'[1] if authorised by national legislation.[2] However, FC s 229(1)*(b)* adds the proviso that 'no municipality may impose income tax, value-added tax, general sales tax or customs duty'. Furthermore, the fiscal powers of municipalities are limited in that they 'may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour';[3] and that they 'may be regulated by national legislation'.[4] A striking feature of FC s 229 is that it does not empower municipalities to impose fees or charges for services. The heading of FC s 229, 'Municipal Fiscal Powers and Functions', suggests a deliberate omission of charges for services — the imposition of such charges not being the expression of a municipal fiscal power. This view is buttressed by the fact that the local Goverment: Municipal Systems Act[5] treats fees for services separately from taxes, levies and duties.[6] Indeed, the tendency to treat rates and fees as distinct has been called 'a recurring theme of the Systems Act'.[7] It might be argued that taxation, as contrasted with fees for services, requires an express empowering provision. By contrast, the municipal capacity to impose user fees is a well-entrenched, long-standing practice that may fall within the description of an 'implied power' in terms of FC s 156(5).

The unsettling omission of charges for services in the Final Constitution is accentuated by the somewhat awkward treatment of user fees in the Systems Act. Prior to amendment, it required Municipal Councils to adopt and to implement tariff policies on the levying of fees for municipal services, but set out the actual power to charge fees for services in passing in a separate chapter of the Act.[8] This lacuna in the Systems Act was subsequently rectified by the insertion in 2002 of a new section 75A.[9] This section enables municipalities to 'levy and recover fees, charges or tariffs in respect of any function or service of the municipality'. Based on our earlier conclusion that tariffs are not covered in FC s 229, it is not clear that a tariff is a tax, levy or duty that the Systems Act could introduce through FC s 229(2)*(b)*. And yet, courts considering the meaning of FC s 229 and the Systems Act do not appear to have been especially vexed by this potential problem.[10]

[1] The distinction between a rate and a levy is alluded to in *Gerber*. *Gerber* (supra) at para 28. A rate is proportionate to the size or value of a property; a levy is a flat amount for erf.

[2] The national legislation is being developed in the form of the Municipal Fiscal Powers and Functions Bill.

[3] See FC s 229(2)*(a)*.

[4] See FC s 229(2)*(b)*.

[5] Act 32 of 2000.

[6] See Systems Act s 4(1)*(c)*.

[7] See *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C) at para 73.

[8] See Systems Act s 4(1)*(c)*(i).

[9] The amendment was made by the Local Government Laws Amendment Act 51 of 2002 s 39. It is possible that prior to the amendment of the Systems Act, the power to impose tariffs arose from section 10G(7)*(a)*(ii) of the Local Government Transition Act 209 of 1993. See *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C) at para 62.

[10] See *Rates Action Group v City of Cape Town* 2006 (1) SA 496, 501 (SCA)('*Rates Action Group SCA*')(The Supreme Court of Appeal considered whether a municipality has the power to charge for a service by imposing a rate. The court accepted, without hesitation, that the Systems Act is the regulatory legislation contemplated in FC s 229(2)*(b)*.)

Municipal tariff setting is politically and legally complex.[1] The Final Constitution is clear that setting prices for services is a political matter vested in Municipal Councils and is not capable of delegation.[2] Notwithstanding what may be viewed as an affirmation of local democratic control over municipal pricing, the Systems Act allows the national Minister responsible for local government to regulate limits on tariff increases[3] — a power that the Minister has never exercised. The intersecting political control of pricing at both municipal and national level has historically raised concerns about municipal contractual commitments. It is not unusual for contracts with service providers to include provisions that require tariffs to escalate at an agreed rate. The question that arises is whether these contractual undertakings are binding if, at some time *after* conclusion of the contract, tariffs are levied by a Municipal Council at lower levels than the contract requires or if an agreed tariff escalation is precluded by the Minister under the Systems Act. The MFMA has attempted to answer both questions in the affirmative. In respect of the latter question, section 43(3) of the MFMA provides that if a municipality has entered into a contract which 'provides for an annual or other periodic escalation of payments to be made by the municipality under the contract, no determination of the upper limits of a municipal tax or tariff applies to that municipality in so far as such upper limits would impair the municipality's ability to meet the escalation of its payments under the contract'. While the MFMA may appear to settle contractual concerns that flow from potential ministerial intervention in municipal tariff setting, some may argue that section 43(3) does not, in fact, achieve this intended purpose.[4]

The next question is whether a Municipal Council can bind itself to tariff escalations set out in a contract with a service provider? This question is

[1] Because spatial patterns in South Africa are still a proxy for race, tariff and rating decisions which impact different areas disproportionately tend to have discriminatory impacts. Two cases have considered equality challenges in this area: *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C)('R*ates Action Group HC*') and *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)('*Walker*'). R*ates Action Group HC* found that the discrimination arising from a shift towards property rates as a mechanism for paying for services was not unfair discrimination within the meaning of the Final Constitution. *Rates Action Group HC* (supra) at para 111. By contrast, the Court in *Walker* found that a practice of imposing different charges on consumers in the 'old' Pretoria and consumers in former black townships did constitute unfair discrimination. *Walker* (supra) at para 81.

[2] See FC s 160(2)*(c)*.

[3] See Systems Act s 86A(1)*(c)*.

[4] The provision postulates 'municipal payments' to service providers, presumably, in the form of a fee for services. However, it is not unusual for contracts to remunerate service providers by transferring to them the revenue collected from consumers. System Act s 81(2)*(a)*(vi) expressly allows service providers to be remunerated in this way. The effect of such provisions is to transfer to the service provider the risk of non-payment or short-payment by consumers (so-called 'collection risk'). Indeed, it is particularly in the case of such contracts that investors would be concerned about the prospect of a ministerial cap on tariff increases. However, on a strict interpretation, section 43(3) of the MFMA may not apply to those contracts which do not involve municipal payments (in the sense of a service fee) to service providers. However, it might be argued that the transfer of revenue from the primary account of the municipality to a service provider does constitute a municipal payment for the purposes of section 43(3).

particularly interesting in light of the Constitutional Court's decision in *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* ('*Fedsure*'). For our purposes, the most important holding in *Fedsure* is that tariff setting is a legislative act.[1] In light of *Fedsure,* a Municipal Council may not be able to fetter its legislative discretion by making a contractual undertaking to escalate tariffs at an agreed level. Several interesting questions arise here. First, municipalities as executive bodies may enter into agreements in which they undertake that a certain revenue will be generated from the provision of a service. In our view, such an agreement this is not an undertaking about how the Municipal Council will legislate, but an undertaking that in the event of future legislation that disturbs the revenue stream, the municipality bears the risk of financial loss to the service provider. The MFMA expressly allows for such undertakings. MFMA s 48(1)*(c)* allows a municipality by resolution of its Municipal Council to provide security for 'contractual obligations of the municipality undertaken in connection with capital expenditure by other persons on property, plant or equipment to be used by the municipality or such other person for the purpose of achieving the objects of local government in terms of section 152 of the Constitution'. MFMA s 48(2)*(g)* then explains that such security includes an 'undertaking to retain revenues or specific municipal tariffs or other charges, fees or funds at a particular level or at a level sufficient to meet its financial obligations'. Since such a contractual undertaking is made by the municipality *qua* executive, it does not constrain the municipality *qua* legislature. Accordingly, this provision should be read as authorising the municipality to indemnify the lender against the political risk of future tariff reductions. There is some indication in the case law that this interplay of contractual commitment and legislative power forms part of a normal set of dilemmas that characterise the budget process.[2] Hence, while the case law has emphasised that Municipal Councils are democratically elected deliberative bodies which are subject to political considerations in adopting budgets,[3] the MFMA makes it clear that the political process involved in adopting budgets and setting tariffs cannot ignore or subvert contractual undertakings that bind the municipality.

[1] 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 45 (The Constitutional Court held '[t]hat when a legislature whether national, provincial or local, exercises the power to raise taxes or rates, or determines appropriations to be made out of public funds, it is exercising a power that under our Constitution is a power peculiar to elected legislative bodies.')

[2] The imperative to balance a municipal budget, and a consideration of a range of financial pressures, persuaded the Cape Provincial Division to find that a 19% increase in the levy in respect of property rates violated certain equality rights, but that the violation was ultimately justifiable. See *Lotus River, Ottery, Grassy Park Residents Association and another v South Peninsula Municipality* 1999 (2) 817, 833B (C). The decision shows that courts may be sensitive to the narrow parameters that confine legislative decisions in respect of tariff setting. Since a municipality may not budget for a year-end deficit on its operating accounts, a contractual undertaking in terms of s 48(2)*(g)* may compel a Municipal Council *qua* legislature — by a combination of statutory duty and contractual obligation — to maintain the tariffs at the required level. If it fails to increase tariffs, the contractual commitment may produce a year-end operational deficit.

[3] See *Rates Action Group HC* (supra) at para 17; *Fedsure* (supra) at para 41.

A second point is that even if *Fedsure* characterises tariff setting as a legislative act (and hence insulates it from administrative review), legislation is not immune from constitutional challenge. Indeed, in *Fedsure*, the Constitutional Court developed the idea that the 'rule of law' is generally understood to be a fundamental principle of constitutional law.[1] According to the legality principle developed in *Fedsure*, every exercise of government power is subject to the law and the Final Constitution, and the state may perform no function beyond that conferred on it by law.[2] Soon after *Fedsure*, the Constitutional Court developed the rule of law doctrine further in *New National Party of SA v Government of the RSA & Others*.[3] Yacoob J, writing for a majority of the Court, stated that that there must be:

> a rational relationship between the scheme which [Parliament adopts] and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional.[4]

The principle of legality or the rule of law doctrine provides an alternative basis for reviewing primary legislation in addition to inconsistency with the Bill of Rights or the procedural provisions of the Final Constitution. Many constitutional principles fall within the more basic rubric of legality. A Municipal Council which legislates in conflict with its own contractual undertakings, the imperatives of sustainability and its own tariff policy by-laws may act with an impermissible legislative arbitrariness. This conclusion would be more easily reached if the legislation caused significant prejudice to service providers and was not strictly necessary to protect the interests of consumers. The principle of legality and the rule of law doctrine are designed to produce stable and credible legislative institutions, and could perform a useful role in the highly politically-charged setting of tariff increases.

A final technical point arises out of *Fedsure*. The amended Systems Act in section 75A(2) empowers municipalities to levy tariffs 'by resolution passed by the municipal council with a supporting vote of a majority of its members'. This procedure had been previously imposed by section 10G(7)*(a)*(ii) of the Local Government Transition Act.[5] However, recall that *Fedsure* characterised tariff-setting as a legislative act: presumably conducted by enacting municipal legislation. It seems to us that, on a reasonable reading of *Fedsure*, tariffs cannot be levied by resolution. This conclusion is strengthened by considering section 12 of the Systems Act, which carefully regulates the process of enacting by-laws. The effect of

[1] See *Fedsure* (supra) at para 56.

[2] For more on the legality principle and the rule of law doctrine, see F Michelman 'The Rule of Law, Legality, and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11.

[3] 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC).

[4] Ibid at para 19.

[5] In terms of Local Government Transition Act 209 of 1993 s 10G(7)*(a)*(ii): '[a] municipality may by resolution supported by a majority of the members of the council levy and recover levies, fees, taxes and tariffs in respect of any function or service of the municipality.'

section 75A(2) is to remove these procedural controls in respect of tariff setting. It is not at all clear why the Systems Act would reduce the formality of municipal decision-making in the politically sensitive case of tariff setting. If this analysis is correct, then the proper procedure for tariff setting is uncertain. Since Systems Act s 75A(2) may be constitutionally suspect in light of *Fedsure*, municipalities should take the cautionary measure of enacting tariffs in by-laws and not just by resolution.

27.3 Allocating revenue

(a) Responsibility for Expenditure

While the Final Constitution is clear on how revenue is raised and which spheres of government are responsible for doing so, it struggles, notoriously, to allocate responsibility for public expenditure (also known as 'expenditure assignment'). This is really a struggle about functional allocation: namely, what functions should be allocated to which spheres of government. The link we have drawn between expenditure assignment and functional allocation is not made explicit in the Final Constitution. However, because every allocation of functional responsibility involves expenditure, the link between expenditure assignment and functional allocation has been enshrined in the phrase 'finance follows function' and given the recent imprimatur of the legislature.[1] Moreover, some have proposed an ideal sequencing of function, finance and functionaries in which 'sub-national governments should first be given clarity about their functions and associated expenditure responsibilities and based on these, the proper assignment and design of tax instruments and transfer systems should be done.'[2] When the link between expenditure assignment and functional allocation is severed, so-called 'unfunded mandates result'. Unfunded mandates occur when municipalities become responsible for national or provincial functions without formal assignments. Sections 9 and 10 of the Systems Act have attempted to prevent unfunded mandated of this kind.[3]

(b) The Functional Allocation

The job of functional allocation belongs to schedules 4 and 5 of the Final Constitution which are ill-suited to the task. The language used in the schedules is vague and technically imprecise and often elides critical differences between the separate elements of a service. (For example, the term 'reticulation', used in the context of electricity, elides the difference between 'generation', 'transmission' and

[1] See Division of Revenue Act 7 of 2003 s 27(2).

[2] See J Ahmad, S Devarajan, S Khemani & S Shah 'Decentralization and Service Delivery' *World Bank Policy Research Working Paper 3603* (May 2005) 12. See also See E Yemek 'Understanding Fiscal Decentralisation in South Africa' *IDASA Occasional Paper* (July 2005) 6.

[3] For more on this issue, see § 27.3*(g)* infra.

'distribution'.[1]) The schedules create porous boundaries between spheres of government and in some cases such as 'provincial roads' and 'municipal roads' create vertically integrated functions with question-begging dividing lines.[2] In these cases, the schedules deliberately prevaricate on where the dividing line should be. Finally, several functions fall within what might be termed the 'plenary' legislative and executive powers of national government and are neither listed nor mentioned.[3] These elisions and omissions have created uncertainty about where responsibility falls for key functions. For example, the allocation of responsibility for water and energy resources is unclear. In practice, they have become concurrent national and local functions.[4] Perhaps the drafters of the Final Constitution imagined that the functional allocation would be resolved over time through the natural evolution of best practices. Since functional allocation is a highly complex process, the drafters may have had no alternative in the early 1990s but to accept that experience and a future national legislative process would resolve the matter. Although this resolution has occurred, to some extent, it has placed significant strain on our system of co-operative government.[5] A detailed dissection of the

[1] The meaning of 'reticulation' is pivotal in allocating responsibility between national and local governments for electricity provision and has featured centrally in the reform of the electricity distribution industry. Its meaning was about to be considered by the Pretoria High Court in litigation between the City of Cape Town and the National Electricity Regulator, when another installment in the ever unfolding narrative of political control of the City prematurely settled the litigation.

[2] See IDASA 'Local Government Powers and Functions' *IDASA Occasional Papers* (February 2004) at 3.

[3] National Treasury's 'Trends in Intergovernmental Finances: 2000/01–2006/07' (2004), refers at 2 to 'National government's exclusive functions' and lists national defence, the criminal justice system, higher education, water and energy resources and administrative functions such as home affairs and the collection of national taxes. However, these functions are not listed in the Constitution which contains no schedule of exclusive national functions. It is accurate to say that the national sphere enjoys 'plenary' legislative powers (an implicit list of exclusive national powers) subject to a list of concurrent provincial and legislative powers set out in Schedule 4 of the Final Constitution and a smaller list of exclusive provincial powers set out in Schedule 5.

[4] For example, in the case of water resources, bulk water systems are currently being transferred to municipalities (examples include assets owned by various Water Boards including Botshelo Water, Lephelle Water, iKangala Water and Amatole Water) and there are existing cases of municipal ownership of bulk assets and involvement in bulk water provision (the primary example being the City of Cape Town). However, Water Boards still continue to provide bulk water as their primary function under the Water Services Act.

[5] A good example is housing. Although housing couples naturally with municipal services, the function was allocated to national government and provincial government as a concurrent function. As a legal matter, municipalities can only become responsible for housing provision if the function is assigned or if municipalities enter into contracts with national and provincial government. Although assignments are possible under the Housing Act 107 of 1997, they have not occurred to date. Nevertheless, even in the absence of contracts, several municipalities have become responsible for housing provision. In principle, their lack of constitutional competence has a range of highly complex implications. See K McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55, 55-24 – 55-26.

schedules would take us away from a focus on FC Chapter 13 and will not be further pursued.[1]

An important difference exists between provincial and municipal governments in respect of functional allocation. Provinces are responsible for highly capital intensive, typically non-revenue generating, social services: health care (including academic and regional hospitals as well as primary health care), schooling, housing and roads.[2] And yet they have few of their own tax instruments for raising the requisite funds for these functions. Municipalities, by contrast, provide services that typically are revenue generating — water, sanitation, electricity and waste collection — and have the tax and other revenue-raising powers required for funding those services.[3]

A final point is that functional allocation is not static. Through assignment it is possible to reallocate functional responsibility from one sphere of government to another — typically 'downward' to municipalities. The primary current example is housing. The Housing Act ('Housing Act')[4] envisages the accreditation of municipalities to assume housing responsibility.[5] The assignment of functions to municipalities is carefully regulated in the Systems Act (which ensures that the financial implications of the assignment are vetted by the Financial and Fiscal Commission) and by the annual Division of Revenue Acts (which affirm the 'finance follows function' principle).[6] It is a curious fact that these controls can be side stepped with ease through so-called 'agency agreements' in which municipalities assume contractual responsibility for provincial or national functions. This alternative to assignment, also called inter-governmental delegation, is not precluded by legislation. Indeed, the Final Constitution expressly allows for it in FC s 238*(b)*. FC s 238*(b)* empowers an executive organ of state in any sphere of government to 'exercise any power or perform any function for any other executive organ of state on an agency or delegation basis'. These arrangements are

[1] For discussions elsewhere in this treatise on problems associated with functional allocation, see V Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 15 ; V Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 16; C Murray & O Ampofo-Anti 'Provincial Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 20.

[2] National Treasury *Trends in Intergovernmental Finances: 2000/01 — 2006/07* (August 2004) 5.

[3] Further important differences between provincial and municipal governments are explored below. See § 27.5*(c)* infra, for a discussion of the difference between provincial borrowing and municipal borrowing.

[4] Act 107 of 1997.

[5] Housing is not a local government matter listed in Part B of FC Schedule 4 and 5 respectively. Housing is therefore not a municipal function or service. However, s 9 of the Housing Act 107 of 1997 expressly sets out a clear role for local government in housing delivery. This role is largely supportive of the other spheres of government, and allows municipalities to act as developers and to enter into joint ventures with private developers in executing national housing programmes. See Housing Act s 9(2)*(a)*. See, further, McLean 'Housing' (supra) at Chapter 55.

[6] See, example, Division of Revenue Act 7 of 2003 s 27(2).

temporary in nature and do not transfer the so-called 'authority role' for the function (that is, the responsibility — among other things — for levying tariffs and receiving revenues or grant money).[1] The danger is that municipalities will assume responsibility for functions without necessarily securing the associated revenue. In the case of housing, where municipal responsibility has mushroomed in the absence of assignment, the state of affairs is highly problematic.[2]

(c) Imbalances Between Revenue and Expenditure

Most South African revenue is raised nationally. Expenditure responsibility, however, is assigned across the three spheres of government. Because the fiscal system is characterised by centralised taxation and decentralised service delivery, there are imbalances between revenue and expenditure termed 'vertical fiscal imbalances'.[3] The greatest fiscal imbalance is in the provincial sphere: provinces raise only a fraction of the revenues that they are required to expend. In this section, we discuss the equitable share mechanism created by FC section 214 to correct this imbalance[4] and the attempts of provinces to augment revenues through borrowing.[5]

Before we begin this discussion, it is necessary to clarify the technical language that is used to describe grants. Grants may be conditional or unconditional, direct or indirect, or in cash or in kind. A grant is conditional if conditions are used to direct the spending of the grant in receiving municipalities or provinces, whereas it is unconditional if it has only limited conditions relating to the transfer. In the case of a direct grant, the entire grant flows directly from the transferring department to the receiving municipality or department; whereas in the case of an indirect grant, the grant flows via an intermediary (for example, a provincial department to a municipality). Finally, grant funds in a grant in kind are directly

[1] As organs of state have begun to contract out their institutional functions, South African legislation has introduced a distinction between an 'authority role' and a 'service provider role'. The former role cannot be contracted out and covers areas of essential executive and legislative responsibility. Acting as an authority usually implies the following responsibilities: the statutory responsibility for administering the function; planning to ensure that the function is effectively administered; determination of user fees or the imposition of taxes (such as property rates) to pay for the provision of the service; the entitlement to receive grant funds; developing policy in relation to the function such as service levels and pricing structures; preparing legislation that relates to undertaking the function (in the municipal context, these would be by-laws); contracting with and monitoring service providers; and ownership of the fixed assets associated with the function. See IDASA 'Local Government Powers and Functions' *IDASA Occasional Papers* (February 2004) 6. For examples of where this distinction is implicit or explicit, see Systems Act ss 11(3) and 81; Division of Revenue Act 1 of 2005 s 9(3)*(b)*; Water Services Act 108 of 1997 s 19; and National Land Transport Transition Act 22 of 2000 s 10.

[2] For further discussion, see McLean 'Housing' (supra) at Chapter 55.

[3] See E Yemek 'Understanding Fiscal Decentralisation in South Africa' *IDASA Occasional Paper* (July 2005) 18.

[4] See § 27.3*(d)* infra.

[5] See § 27.5*(c)* infra.

administered by the transferring department; whereas the money in cash grants is transferred directly to the receiving municipality or Department. These three main distinctions produce the six kinds of grant that are used in South Africa.[1]

In order fully to describe a grant, each of these three main distinctions will be necessary. The language of 'conditional' and 'unconditional' grants is used in FC s 227(1)*(b)*. The other distinctions have developed through use. It is worth mentioning that only equitable share is an unconditional grant, that is, no conditions are imposed on its use.[2]

(d) Equitable Division of Revenue

Imbalances between revenue-raising powers and expenditure responsibility are corrected by intergovernmental grants which allocate revenue across the three spheres. The most important of these grants is 'equitable share' which is mandated and controlled by Chapter 13. The result of the vertical fiscal imbalance for provinces is a massive transfer of nationally-raised revenue to the provinces. In fact, the bulk of equitable share revenue is allocated to provinces. By contrast, because municipalities have their own taxation powers and source revenue through user fees, the legislature has tended to allocate a smaller portion of equitable share to municipalities[3] and has largely treated municipalities as financially autonomous and capable of financial failure.[4] The equitable share of

[1] See P Whelan 'The Local Government Grant System Paper One: A Researcher's Guide to Local Government Grants' *IDASA Occasional Papers* (July 2003) 7.

[2] Even though equitable share is unconditional, DORA 2005 imposes duties on the transferring Department and the receiving municipality in respect of these grants. A key requirement is that accounting officers submit information to the transferring Department as part of the monthly budget reports required in terms of MFMA s 71.

[3] For the 2005/06 financial year, provinces received 57.7% of total revenue collected nationally; while municipalities received only 4.7%. See E Yemek 'Understanding Fiscal Decentralisation in South Africa' *IDASA Occasional Paper* (July 2005) 5. See also Chapter 2 of National Treasury's 'Trends in Intergovernmental Finances: 2000/01 — 2006/07' (2004). Some additional transfers are made from provinces to municipalities so that an average figure of 14% has been suggested for the proportion of municipal budgets consisting of national and provincial transfers. See IDASA 'Local Government in Budget 2005' (9 May 2005) 154 *Budget Briefs* available at http://www.idasa.org.za/ (accessed on 19 April 2007). However, where a municipality has limited sources of own revenue, the proportion of its budget dependent on national allocations can be significantly higher than the average (over half and up to 92%). See National Treasury *Trends in Intergovernmental Finances: 2000/01 — 2006/07* (2004) 30, Table 3.9.

[4] The MFMA makes provision for financial failure — a form of government insolvency — and prohibits long-term borrowing for operational purposes. Although the treatment of provincial government is slightly ambiguous, in practice the national and provincial spheres of government are not capable of financial failure. See, further, § 27.5*(c)* infra.

national revenue is allocated to each sphere based on a formula which is designed to maximise allocations in proportion to levels of indigency (among other factors).[1]

The instrument for allocating nationally raised revenue, and sharing it equitably between spheres of government, is the annually-enacted Division of Revenue Act ('DORA'). The process for enacting DORA and the content of the Act are prescribed in FC s 214. Enacting DORA requires consultation with provincial governments, organised local government (that is, the South African Local Government Association) and the Financial and Fiscal Commission. The consultation process is regulated by the Intergovernmental Fiscal Relations Act.[2] This Act creates two fora for consultation: namely a Budget Council and a Local Government Budget Forum.[3] The former is the body in which the national government and the provincial governments consult on (among other things), 'any fiscal, budgetary or financial matter affecting the provincial sphere of government'.[4] The latter is the body in which the national government, the provincial governments and organised local government consult on (among other things), 'any fiscal, budgetary or financial matter affecting the local sphere of government'.[5] It is an interesting feature of the Act that it creates separate consultation fora to settle provincial and local equitable share. Separate consultation processes are certainly not required in FC s 214(2). The important consequences of two separate consultation processes is that one happens *before* the other. Under these circumstances, it has been suggested that because the Budget Council meets before the Local Government Budget Forum, the local government portion of equitable share tends in practice to be a *fait accompli*.[6] If one assumes that the different spheres of government compete for equitable share, the prospect of provincial discussions having priority over local discussions is troubling, even if justified by practical considerations.

In addition to procedural requirements, the annual enactment of DORA is also subject to substantive requirements. FC s 214(2) requires that national parliament take into account several prescribed factors, namely:

[1] The formula for calculating equitable share is calculated using a formula that determines the entitlement of each municipality. The formula has recently been revised in Division of Revenue Act 1 of 2005 ('DORA 2005') and consists of four main components. Instead of several 'windows' which fund different services, the new basic services component supports only poor households earning less than R800 per month and recognises water supply, sanitation, refuse removal and electricity supply as the core services to be funded. Another component the institutional support element, also develops the previous 'I Grant'. This support element offers a 'base allocation' which goes to every municipality in the new basic services component. This base allocation takes account of the size of the municipality the cost of maintaining councilors in their legislative and oversight role. A problem with the application of the formula in practice is that it is based on the data in census 2001 which, in the intervening years since 2001, has become less accurate in its measures of indigency.

[2] Act 97 of 1997.

[3] See Intergovernmental Fiscal Relations Act s 2 and s 5, respectively.

[4] See Intergovernmental Fiscal Relations Act s 3*(a)*.

[5] See Intergovernmental Fiscal Relations Act s 6*(a)*.

[6] See P Whelan 'The Local Government Equitable Share' *IDASA Occasional Papers* (February 2004) 8.

> *(a)* the national interest; *(b)* any provision that must be made in respect of the national debt and other national obligations; *(c)* the needs and interests of the national government, determined by objective criteria; *(d)* the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them; *(e)* the fiscal capacity and efficiency of the provinces and municipalities; *(f)* developmental and other needs of provinces, local government and municipalities; *(g)* economic disparities within and among the provinces; *(h)* obligations of the provinces and municipalities in terms of national legislation; *(i)* the desirability of stable and predictable allocations of revenue shares; and *(j)* the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.

It is clear from the above factors that national interests will prevail — particularly national debt and other national obligations.[1] Indeed, when FC s 214 turns its attention to provinces and municipalities, it emphasizes their obligations in terms of national legislation.[2] As regards provinces and municipalities, FC 214 focuses on the provision of 'basic services',[3] performance of allocated functions,[4] fiscal capacity and efficiency,[5] 'developmental and other needs'[6] and national statutory obligations.[7] Mixed in with these factors are principles such as the need for 'stable and predictable allocations of revenue shares',[8] the need to correct economic disparities within and among the provinces (so-called 'horizontal imbalances'),[9] and the need to respond flexibly to emergencies and 'other factors based on similar objective criteria'.[10]

There is an internal tension in FC s 214. On the one hand, it acknowledges that the allocation of revenue is a matter of political judgment and, accordingly, makes the vehicle for allocation an act of Parliament. On the other hand, the section attempts to super-impose on this political process a layer of objectivity and justification. Whether it succeeds in doing so is another matter. Some have suggested that resource distribution across sub-national governments cannot be explained by efficiency and equity considerations alone: for these critics, the interests of central political agents are additional and significant determinants of DORA outcomes.[11] In short, it may be argued that notwithstanding the language

[1] See FC ss 214(2)*(a)* to *(c)*. As we explore in § 27.5*(c)* below, national government cannot fall into financial failure and hence it can undertake long-term borrowing for operational reasons. FC s 214*(b)* also supports this notion by indicating the priority of national debt obligations.
[2] See FC s 214(2)*(b)*.
[3] See FC s 214(2)*(d)*.
[4] See FC s 214(2)*(d)*.
[5] See FC s 214(2)*(e)*.
[6] See FC s 214(2)*(f)*.
[7] See FC s 214(2)*(b)*.
[8] See FC s 214(2)*(i)*.
[9] See FC s 214(2)*(g)*.
[10] See FC s 21492)*(j)*.
[11] See J Ahmad, S Devarajan, S Khemani & S Shah 'Decentralization and Service Delivery' *World Bank Policy Research Working Paper 3603* (May 2005) 7.

of objectivity in FC s 214, the practice of determining the prioritisation for funding remains largely a matter of political judgement.[1] This criticism is belied, to some extent, by the memorandum accompanying DORA. The memorandum offers careful and well-argued justifications for DORA's distributions. Indeed, the formula for equitable share is detailed and sophisticated and enhances the predictability and 'own revenue' properties of equitable share. It is arguable that what FC s 214 produces (and intends to produce) is a political judgment constrained by considerations of efficiency and equity.

(e) Other Allocations

The expression 'other allocations' is the language used in the Final Constitution to describe the forms of intergovernmental grants aside from equitable share. In practice, other allocations are always conditional grants: the conditions specify financial management and institutional requirements, the purpose of the expenditure and the required outcomes from the expenditure.[2] What this means in practice is that municipalities have little discretion with respect to how they spend funds received through conditional grants. Hence if Parliament were to increase conditional grant levels in relation to equitable share, this shift would indicate, rather roughly, that Parliament was not supporting local autonomy or decentralisation.[3] Research indicates that this is not so.[4]

When it comes to conditional grants, there are three broad categories — capital grants, capacity building and restructuring grants and grants in kind. The current trend is towards the consolidation of grants. Hence the municipal infrastructure grant ('MIG') was created in 2003 to consolidate all funds for municipal infrastructure (capital grants).[5] If the primary purpose of equitable share is to cover the operational costs of providing services to indigent households; the primary purpose of MIG is to eliminate basic infrastructure backlogs.[6]

(f) Compliance with grant conditions

Supervising compliance with grant conditions is a key role of National Treasury. We have already mentioned that the Final Constitution introduces a distinction

[1] See P Whelan 'The Local Government Grant System Paper Two: Evaluating the Local Government Grant System' *IDASA Occasional Papers* (July 2003) 6.

[2] See P Whelan 'The Local Government Grant System Paper One: A Researcher's Guide to Local Government Grants' *IDASA Occasional Papers* (July 2003) 8.

[3] See IDASA 'Local Government in Budget 2005?' (9 May 2005) 154 *Budget Briefs* 7, available at http://www.idasa.org.za/ (accessed on 19 April 2007).

[4] Ibid at 7. See, further, § 27.8 infra.

[5] A formula is used to allocate MIG across sectors (eg water and sanitation, electricity and so on) and across municipalities. The B Component (basic residential infrastructure) represents the largest component of MIG and within this component the largest allocation is to water and sanitation.

[6] See National Treasury *Trends in Intergovernmental Finance 2000/2001 — 2006/07* (2004) 31–32.

between conditional and unconditional allocations in FC s 227(1)*(b)*. It provides no further content to the notion of a conditional allocation. The elaboration of the conditions and their enforcement falls to DORA. In terms of DORA, National Treasury may withhold conditional allocations if there is a 'serious or persistent material breach of the measures contemplated in section 216(1) of the Constitution'. Conduct relevant to determining whether a serious breach of FC s 216(1) has been committed encompasses 'non-compliance with the conditions to which an allocation is subject and the mismanagement of an allocation'.[1] It must be emphasised that the enforcement of grant conditions does not apply to equitable share. Stopping equitable share allocations to provinces is carefully controlled in FC ss 216(3) to (5). In terms of these controls, the transfer of equitable share may not be stopped for more than 120 days; the decision to stop equitable share is subject to parliamentary approval and the intervention of the Auditor-General who must report to Parliament; and before a decision is taken to stop a transfer, the affected province has the right to a hearing before a parliamentary committee. Moreover, the question of whether there has been a breach of the standards that would warrant stopping equitable share is justiciable.[2] Conditional grants can be stopped without meeting these requirements.[3]

Interestingly, the protections accorded to equitable share in FC ss 216(3) to (5) only apply to provincial equitable share. Equitable share allocated to municipalities is protected by MFMA s 39. MFMA s 39 introduces process requirements for stopping equitable share that are the same as those found in FC s 216. It is not clear why the Final Constitution has protected provincial equitable share allocations and not municipal allocations. MFMA s 39 has, in any event, neutralised this difference.

(g) Unfunded mandates

The term 'unfunded mandate' is used to describe an expenditure assignment that is not funded. In other words, unfunded mandates occur where a government agency has the responsibility of conducting a function but lacks suitable revenue raising capacity or does not receive a grant necessary for the performance of the function. Unfunded mandates are unacceptable within any fiscal structure; hence the principle that 'finance follows function'. This principle has been given the legislature's imprimatur of approval through DORA.[4] DORA requires that equitable share allocations for the funding of a particular function must be paid to the

[1] See, for example, DORA 2001 s 23(3)*(d)*.

[2] See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('*First Certification Judgment*') at para 283. The regulatory role of National Treasury in relation to inter-governmental grants is explored in § 27.6*(a)* infra.

[3] See § 27.6*(a)*, infra, 'Stopping Transfers of Grants and Equitable Share'.

[4] See, for example, Division of Revenue Act 7 of 2003 s 27(2).

organ of state that is responsible for the function. Conditional grants, both operating and capital, also follow function. The principle that finance follows function can be taken a step further: it implies that the organ of state responsible for the function should be allocated any revenue-raising powers *associated with the function*. While such powers must be consistent with national fiscal policy, they would typically include the right to charge users of the service.

The danger of an unfunded mandate typically arises in the context of intergovernmental assignments and delegations, both of which involve the transfer of responsibility for the performance of a function between spheres of government. However, there is a fundamental distinction between assignments and delegations: the former permanently transfers responsibility for the function; the latter merely transfers a temporary contractual responsibility.[1] It is important to distinguish assignments and delegations in respect of intergovernmental grants. While it will often be necessary for the delegating authority to pay operating or capital funds to the municipality undertaking the service on their behalf, such payments do not represent transfers between spheres of government in terms of DORA. They are payments for the provision of a service, and the applicable provisions of the PFMA govern compliance.[2]

27.4 THE BUDGET PROCESS

(a) Introduction

The Final Constitution treats budgeting in three provisions of FC s 215. The first provision articulates abstract virtues to be satisfied by budgets and budget processes. The second provision envisages regulatory national legislation. The third provision sets out primary content requirements for budgets. The rather technical treatment of budgeting in these provisions — in which the language of management predominates — belies a complex political process,[3] the failure of which undermines government.[4] Budgets, as financial plans, show how government's

[1] See IDASA 'Local Government Powers and Functions' *IDASA Occasional Papers* (February 2004) 8.

[2] Typically an agency agreement will constitute a 'future financial commitment' regulated by PFMA s 66 and will require authorisation by the Act and the signature of the Minister. See PFMA s 66(2)*(a)*). Furthermore, the department's accounting officer would have to comply with various obligations under PFMA s 38 if it was going to transfer funds to the municipality including written assurances from the municipality in respect of its financial management and control systems. PFMA s 38(1)*(j)*.

[3] The act of budget-making is legislative in nature, whether it occurs at national, provincial and local level. See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1991 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 45 (Constitutional Court held that the new constitutional order confers on local government the status of an autonomous and distinct component of government, such that the municipal councils are legislative assemblies entitled to carry out legislative acts, which acts include levying taxes and adopting budgets (that is, using the Court's language, determining 'appropriations to be made out of public funds.')

[4] PFMA s 29 deals with a failure to pass a budget. In summary, the province is limited to spending as per the previous budget, and has limitations on how much it can spend in the first six months in which the budget should have been passed, and in each following month. There are no constitutional penalties for a failure to pass a budget.

resources will be generated and used over the fiscal period, and are the key instruments for promoting national objectives, strategies and programs. Our discussion in this section fills out these provisions and attempts to convey the centrality of the budget process in public finance.

(b) Constitutional Budgeting Principles

FC s 215(1) imposes a set of abstract principles on national, provincial and municipal budgets and on budgetary processes, namely that they 'must promote transparency, accountability and the effective financial management of the economy, debt and the public sector.' Because the national legislation envisaged in FC s 215(2) is designed to 'give effect' to FC s 215(1), it is possible to test judicially the extent to which national legislation (and the practice of all governments) satisfy FC s 215(1)'s rather abstract principles.

Transparency

Although the word 'transparency' is rather widely used, in the Final Constitution and in public finance legislation,[1] there has been no judicial consideration of its meaning in the context of public finance legislation and apposite public finance provisions in the Final Constitution. Discussions of the meaning of transparency in other contexts are not illuminating for our purposes.[2] Transparency reflects the government's candour about its structures, functions and operations. International instruments such as the Code of Good Practices[3] on Fiscal Transparency set out in the IMF Manual on Fiscal Transparency[4] ('the Code') provide useful guidance on the meaning of transparency. Three key ideas emerge from the Code: first, the need for clarity on the roles and responsibilities in budget-making with clear mechanisms for the co-ordination and management of budgetary and extra-budgetary activities; second, the need for a clear legal and administrative framework for fiscal management where public spending is governed by comprehensive laws, and the need for openly available administrative rules where revenue raising measures have an explicit legal basis; and third, the requirement that the public be provided with full information on the past, current, and projected fiscal activity of government and that the budget documentation should specify fiscal policy objectives, the macro-economic framework, the policy basis for the budget, and identifiable major fiscal risks.

Our view is that South African legislation and practice meets this standard for

[1] See, for example, FC ss 41, 57, 70, 195, 215 and 216 and the objects clause in PFMA s 2.

[2] See *Minister of Health and Another NO v New Clicks & Others* 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 (CC). Chaskalson P refers to transparency, but does not discuss or describe what it means. Sachs J likewise refers to transparency, but refuses to be drawn on the content of principles transparency.

[3] Note that this Code is implemented on a voluntary basis.

[4] International Monetary Fund, Fiscal Affairs Department *Manual on Fiscal Transparency* (2001).

transparency. The elaborate oversight mechanisms found in the PFMA[1] and the MFMA[2] largely correspond to each of the three requirements in the Code as regards the budget process. As regards the implementation of the budget, the PFMA sets out the roles and the responsibilities of various office-bearers in monitoring expenditure and in achieving spending priorities and service delivery goals.[3] Stringent financial reporting and information requirements enable the National Treasury to track public spending per vote and at all levels of government. Monthly reports on expenditure at all levels of government are standard.[4] Thus, deviations from the budget, whether through under-spending, overspending, or wasteful spending are timeously noted and quick responsive action can be taken in order to control out-of-budget expenditure and to enforce limits on deviation from the budget. Independent regulatory oversight is also provided by the Auditor-General.[5] Although the legislative framework in which budgeting

[1] The national budget-making process is slightly different from the spheres in so far as the national government also undertakes revenue sharing discussions as part of its budget-making process. Chapter 4 of the PFMA introduces national and provincial budgets, but the details of the process are set out in Part 3 of the PFMA Regulations. The regulations are aimed at assisting the accounting officers of departments (national and provincial) to fulfill their responsibilities in relation to budget making. To this end, there are prescriptions as to content as well as format. Chapter 6 of Part 3 of the PFMA Regulations provides, for example, that national and provincial budgets must conform to the formats determined by the National Treasury (regulation 6.2.1). As regards content, departments are limited in their ability to provide for roll-overs (regulation 6.4), and require approval of their treasury before introducing new transfers and subsidies to other institutions (regulation 6.3.1*(b)*). At the provincial level, the budget is tabled before the provincial legislature by the MEC for Finance in the form of a money bill. The money bill is called the Provincial Appropriation Bill. This bill is then discussed by committees of the provincial legislature, with provision for public comment on their reports on the draft Bill. The committees report back to the legislature with their recommendations on adoption of the Bill.

[2] At the level of local government, each municipal council is required in terms of MFMA s 16 to 'approve an annual budget for the municipality before the start of the financial year'. Prior to the legislative act of budget-making lies a consultative process where budgets are determined. The Minister for Finance, acting with the concurrence of the Minister for Provincial and Local Government, may prescribe the format of municipal budgets and their supporting documents. The budget preparation process at local government level is headed by the Mayor and consultation with a variety of stakeholders is envisaged. Local and district municipalities are required to engage in budget-related consultations, and all municipalities are required to engage in consultation with the provincial treasury and, when requested, with the National Treasury. See MFMA s 21(2)*(d)*. Subsequent to the tabling of a local budget, a municipality is required in terms of MFMA s 23 to consider the views of, among others, the local community, the National Treasury and relevant provincial treasury.

[3] See PFMA s 32, where monthly reports are required; PFMA s 39 which sets out the accounting officers' responsibilities in respect of budgetary controls; and PFMA s 40, on accounting officers' reporting responsibilities.

[4] See PFMA s 32 and MFMA s 71.

[5] For more on the Auditor-General, see S Woolman & Y Schutte 'Auditor-General' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B. In terms of FC s 193, the Office of the Auditor-General is required to: 'audit and report on the accounts, financial statements and financial management of *(a)* all national and provincial state departments and administrations; *(b)* all municipalities; and *(c)* any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.' The powers and duties of the Auditor-General are set out in the Public Audit Act 25 of 2004 (Section 29 provides that the Auditor-General may carry out investigations and special audits if the Auditor-General considers it to be in the public interest or upon the receipt of a complaint or request.).

takes place has been criticized,[1] the criticism has focused on the allocations of roles and responsibilities by the Final Constitution and not on than the budget process itself.

In addition to legislative prescriptions, a key facet of current government practice is the rolling three-year Medium-Term Expenditure Framework ('MTEF'). This projection of macro-economic assumptions, revenue and expenditure publicizes the government's fiscal policies, spending priorities and expenditure. National Treasury introduced the MTEF for the 1998/99 fiscal year and has entrenched the practice of demonstrating how revenue and spending will develop over the medium term.[2] The MTEF system clearly promotes the virtues articulated in FC s 215(1), particularly transparency and effective financial management through predictability.

Accountability

Accountability requires those responsible for discharging public office to account for or to take responsibility for their actions.[3] In developing this idea, we would suggest that there is an internal setting and an external setting for accountability. On the internal side, public officials are accountable to the executive for their conduct and performance such that 'they can and should be held accountable to *(i)* obey the law and not abuse their powers, and (ii) serve the public interest in an efficient, effective and fair manner'.[4] Internal monitoring of its own performance, and exposure of failures and misdeeds, is a powerful tool against corruption within the executive. Several actions and mechanisms have been introduced in the PFMA and the MFMA to hold public officials and public servants accountable

[1] See IDASA 'How Transparent is the Budget Process in South Africa?' (1 October 2002) 109 *Budget Briefs* available at http://www.idasa.org.za/ (accessed on 19 April 2007):

> [S]orting out national and provincial roles and responsibilities and identifying who is accountable for what is by no means a simple task. The allocation of roles and responsibilities is complicated by the following factors: firstly, the constitution requires the equitable division of nationally collected revenues between national, provincial and local government; and secondly, it assigns joint or concurrent responsibilities for a number of important functions to the national and provincial spheres. While there has been progress in clarifying roles, they are still not well known or understood. As a result media, civil society, the public at large and even people within government, struggle to come to grips with the division of roles and responsibilities and have a poor understanding of who is responsible for what. This obviously impedes stakeholders from holding government to account.

[2] The MTEF is not expressly prescribed in the Final Constitution or the PFMA. It was introduced in a budget speech by the Minister of Finance in 1998. The Minister stated the goals of the MTEF as follows: (1) to strengthen political decision-making in the budget process by linking budget allocations and service delivery; (2) to strengthen co-operative governance and decision making; (3) to enhance efficiency in spending so as to improve service delivery; and (4) to enable planning over the medium term. See T Manuel *Budget Speech of 1998* (1998), available at http://www.treasury.gov.za/.

[3] C Malena, R Forster & J Singh 'Social Accountability: An Introduction to the Concept and Emerging Practice' *Social Development Papers, Participation and Civic Engagement Paper No 76* (December 2004) 31–42.

[4] Ibid at 2.

for meeting their individual responsibilities.[1] Other institutions, such as the Office of the Public Protector, are also intended for this purpose.[2] A consideration of whether the Public Protector is adequately performing this task is dealt with elsewhere in this treatise.[3]

The external setting of accountability considers whether government as an institution is being held accountable for meeting its strategic planning goals and spending priorities. Only when the structure and the functions of government are apparent can it discharge this second form of accountability. Chapter 1 of the *Manual on Fiscal Transparency* states that '[e]stablishing clear roles and responsibilities for government and the rest of the public sector is a key aspect of fiscal transparency, because it provides a basis on which accountability for the design and implementation of fiscal policy can be assigned'.[4]

Effective Financial Management

The third and final constitutional principle is that of effective financial management of the economy, debt and the public sector.[5] The National Treasury sets financial management norms and standards for state departments. It monitors their performance and reports any deviations to the Auditor-General. The principle of effective fiscal management requires the establishment of a legal and administrative framework for fiscal management, which, in turn, implies a system

[1] One example is the responsibilities of accounting officers set out in PFMA s 38. These responsibilities include ensuring that the relevant department or institution has and maintains effective, efficient and transparent systems of financial and risk management and internal control; reporting on the particulars of any unauthorised, irregular or fruitless and wasteful expenditure to the relevant treasury; and taking effective and appropriate disciplinary steps against any official who fails to comply with the PFMA or makes or permits unauthorised, irregular or fruitless and wasteful expenditure. The financial misconduct provisions in Chapter 10 define financial misconduct. They also provide for disciplinary proceedings against officials guilty of an act of financial misconduct, and offences and penalties for officers guilty of an offence of financial misconduct. Similarly, the MFMA s 32 provides for liability for political office bearers, accounting officers and officials in respect of unauthorised, irregular or fruitless and wasteful expenditure and requires reporting to the MEC for local government in the relevant province as well as to the Auditor-General. The accounting officer is required to report to the South African Police Service in the event that the expenditure constituted a criminal offence or if theft or fraud have occurred.

[2] The Public Protector has the power to investigate and report on a wide range of activities within the public service and to take appropriate remedial action. Such remedial sction is limited in the Public Protector Act to mediation, conciliation and negotiation. The Public Protector may also offer advice on other appropriate remedies. As with the Auditor-General, the Public Protector plays an important role in accessing information and providing public reports on specific instances of alleged public service maladministration or corruption.

[3] For more on the Public Protector, see M Bishop & S Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24A.

[4] International Monetary Fund *Manual on Fiscal Transparency* (2001)('IMF *Manual*').

[5] See I Abedijan 'Fiscal and Monetary Policy Management in South Africa' *1994-2005 Pan-African Investment and Research Services* (October 2005) 11, available at http://www.aprm.org.za/docs/APROct05.pdf (accessed on 4 May 2006)(Provides a history of fiscal policy in post-apartheid South Africa and a review of the reform process undertaken by the government.)

that regulates budgetary and extra-budgetary activities, taxation and ethical standards of behavior.[1] We have shown that the legislative framework in South Africa systematically sets out the roles and the responsibilities of state institutions as regards budgeting, spending, and reporting on public. This legislative framework offersd a performance management assessment framework for budgeting and financial management.[2] The essential elements of the legislative reform process that gave rise to this oversight framework have been described at length elsewhere in the secondary literature.[3]

Municipalities are subject to the Treasury norms and standards contemplated in FC s 216(1)*(c)* as well as significant national regulation and supervision. Municipalities, however, assume responsibility for their own effective financial management in the budget process.

(c) Legislation Regulating Budgets

FC s 215(2)*(a)* requires that national legislation prescribe the form of national, provincial and municipal budgets. The 'form' of the budget is something more than the functional layout of the document, although the layout too has been prescribed.[4] The legislation has understood its task in FC s 215(2)*(a)* in substantive terms and the tendency has been to provide for the minimum content of budgets.[5] At national and provincial level, budget formation is guided by the PFMA and the Treasury Regulations. At local level, this process is governed by the MFMA and National Treasury guidelines.[6]

The Final Constitution requires that national legislation provide a schedule for when national and provincial budgets must be tabled. The PFMA accomplishes this task by requiring the Minister for Finance to table the annual budget (national) for a financial year in the National Assembly before the start of that financial year.[7] Provincial legislatures are required by the same provision to table

[1] IMF *Manual* (supra) at 26.

[2] Abedijan (supra) at 11.

[3] Ibid: 'The main aims of these legislative reforms may be highlighted as follows: *(a)* establish an appropriate link between strategic objectives and expenditure plans; *(b)* ensure fiscal discipline within the constraints of what can be afforded; *(c)* promote the efficient use of resources, by decentralising and delegating decisions to where they are best made; *(d)* improve incentives and empowering managers to make effective decisions – while at the same time keeping public sector executives accountable for their managerial decisions. *(e)* introduce transparency and promotion of accountability; and, *(f)* introduce accessibility of information and budget estimates.'

[4] A unified approach makes sense in so far as monitoring of diverse forms of budgets is logistically challenging. Coherence promotes greater accountability and transparency in respect of the budgets as the opportunity for comparison between municipalities becomes possible.

[5] See PFMA s 27(3) for national and provincial budgets and MFMA s 17 for municipal budgets.

[6] There are many budget guidelines available for local government. One example is the *MFMA Circular No 28 — Budget Content and Format for the 2006/07 MTREF* available at http://www.treasury.gov.za/mfma/circulars (accessed on 21 April 2007). This circular provides guidance on content and format for municipal budget documentation for the 2006/07 financial year.

[7] See PFMA s 27.

the provincial annual budget for a financial year in the provincial legislature not later than two weeks after the tabling of the national budget. The MFMA regulates the timing of municipal budgets, requiring such budgets to be tabled 90 days ahead of the new financial year.

FC s 215(2)*(c)* also requires each sphere of government to show the sources of revenue and the way in which proposed expenditure will comply with national legislation. The specific nature of these requirements are reflected in MFMA s 17 for municipal budgets and PFMA s 27(3) for national and provincial budgets.

(d) Content of Budgets

Requirements relating to the content of budgets are prescribed in FC s 215(3):

> Budgets in each sphere of government must contain *(a)* estimates of revenue and expenditure, differentiating between capital and current expenditure; *(b)* proposals for financing any anticipated deficit for the period to which they apply; and *(c)* an indication of intentions regarding borrowing and other forms of public liability that will increase public debt during the ensuing year.

Estimates of Revenue and Expenditure

Revenue referred to in the constitutional provision refers to all money collected by the government in the course of its operations. For accounting purposes, receipts are divided into taxes, sales, transfers, fines, interest, dividends and rent on land as well as financial transactions in assets and liabilities.[1] Expenditure is categorized[2] and referred to as 'payments' and is divided into three broad categories: namely current payments, transfers and subsidies and payments for capital assets.

[1] See National Treasury *Budget Review — 2006* (2006), available at http://www.treasury.gov.za (accessed on 21 April 2007):

> *Taxes* are classified according to the type of activity on which they are levied, including income, profits, consumption of domestic goods and services, and international trade. *Sales* are disaggregated into sales of capital assets and other sales. Transfers are unrequited receipts; i.e. the party making the transfer does not receive anything of similar value directly in return. These are classified according to unit, for example, other government units, private corporations, households, etc. *Fines* consist of all compulsory receipts imposed by a court or quasi-judicial body. *Interest, dividends and rent on land* includes all revenue associated with ownership of financial assets and land.

Ibid at Annexure D, 'Government Accounts' 205.

[2] Each government payment is classified in two ways, according to its functional and economic characteristics:

> The main function of the economic classification is to categorize transactions according to type of object or *input*, for example, compensation of employees, interest payment, etc. This is crucial, as data must be classified this way for calculation of the surplus or deficit, as well as government's contribution to the economy in the form of output, value added and final consumption. The functional classification is complementary to the economic classification. It serves to distinguish transactions by policy purpose or type of outlay. This is also referred to as expense by *output*. Its main purpose is to facilitate understanding of how funds available to government have been spent. Examples would be health, education, administration, judicial services, and so on. The broad categories in the functional classification are listed below: *General government services* refer to those indispensable activities performed by the state, the benefits of which cannot be allocated to specific groups, businesses or individuals. These include fiscal management, general personnel management,

Current payments encompass compensation of employees, payment for goods and services,[1] interest and rent on land[2] and financial transactions in assets and liabilities.[3]

Transfers and subsidies include funds that are transferred by government to other institutions, businesses and individuals. This item encompasses payments for which no goods or services are received in return. The category is further subdivided into the recipients of funding, separating transfers from expenditure controlled directly by departments (which would fall under current payments). The category includes current as well as capital transfers. The National Treasury has reported that

> [i]n the past, capital expenditure included capital transfers. This led to ambiguity, because these numbers could be interpreted as exaggerating the actual contribution to capital formation made by government. By including capital transfers with other transfers, a much clearer picture is provided of government spending on capital.[4]

The third category, 'payment for capital assets', otherwise referred to as capital expenditure, represents expenditure on capital works: such expenditure may cover capital goods or durable goods, and assets such as roads and bridges, dams, power plants, schools and hospitals. This category also covers purchases of new assets, as well as extensions and improvements to existing assets and includes own-account construction. Own-account construction occurs when government units engage in capital projects on their own account.[5] Capital expenditure is stated as a separate item because it shows government's contribution to capital formation and its spending on new infrastructure, including improvements or extensions to existing infrastructure. Capital assets are divided into five categories: buildings and other fixed structures, machinery and equipment, cultivated assets, software and other intangible assets and land and sub-soil assets.[6]

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and conduct of external affairs, public order and safety. *Protection services* include all services that ensure the safety and security of communities, namely defence, police, justice and prisons. *Social services* are supplied directly to the community, households or individuals, and include education, health care, social security and welfare, housing, community development and recreational and cultural activities. *Economic services* cover government expenditure associated with the regulation and more efficient operation of the business sector. This category incorporates government objectives such as economic development, the redressing of regional imbalances and employment creation. Economic services provided to industries include trade promotion, geological surveys and the inspection and regulation of particular industries.

Ibid at 207.

[1] According to the National Treasury, '[t]his item refers to all government payments in exchange for goods and services, but excluding capital assets and goods used by government for construction of and improvements to capital assets'. *Budget Review — 2006* (supra) at 205.

[2] Ibid at 205: 'This item is defined as payment for the use of borrowed money (interest on loans and bonds) and use of land (rent). It is distinguished from the repayment of borrowed money, which is classified under *financing*.'

[3] Ibid: 'This item consists mainly of lending to employees and public corporations for policy purposes. The reason for expensing this payment rather than treating it as financing is that, unlike other financial transactions, the purpose of the transaction is not market oriented.'

[4] Ibid at 206.

[5] Ibid.

[6] Ibid.

Differentiating between capital and current expenditure

FC s 215(3)*(a)* requires a distinction between capital and current expenditure. Presumably, this distinction is aimed at improving accountability.[1] Critics argue that such a regime allows governments to hide deficits, especially if annual capital depreciation costs were not charged as current expenses, a normal accounting practice. Another view is that capital budgeting might encourage governments to use debt to finance capital expenditures since most public capital projects that might benefit society do not generate revenues that can be directly seen to cover depreciation and interest expense. Moreover, some capital expenditures are not easy to account for on an accrual basis because of the difficulties in measuring the depreciation of public capital.

Proposals for financing any anticipated deficit

This category, identified in FC s 215(3)*(b)*, refers principally to government debt, whether raised through government bonds, direct loans, foreign loans or otherwise. In the budget, the category 'financing' sets out 'all financial transactions other than *financial transactions in assets and liabilities*, which are included as part of receipts and payments. Items recorded under *financing* reflect the sources of funds obtained to cover a government deficit or the use of funds available from a government surplus.'[2] The main items in this category include government borrowing, repayments of the principal component of loans incurred in previous periods, and transactions in government deposits and cash balances.[3] In our view, the terms 'proposals for financing' and 'an indication of intentions regarding borrowing' in FC ss 215(3)*(b)* and *(c)* are a reference to the fact that the debt has not been not raised at the time the budget is drafted.

27.5 Spending public funds

Expenditure has many dimensions: control of revenue funds and bank accounts, contracting, liabilities and security, borrowing, investments and wrongful expenditure. Very few of these issues are covered in FC Chapter 13. Chapter 13 covers only national and provincial revenue funds, procurement, government guarantees, and municipal and provincial loans. Some important issues relating to so-called

[1] A capital expenditure account should include the flows and stocks related to public assets and liabilities setting out clearly the net capital position of the government. Without capital budgeting, proponents argue that deficit-constrained governments would defer major expenditures on capital programs and maintenance, since the benefits of such expenditures would not be immediate relative to the costs that would be incurred. According to proponents of this approach, governments would be more willing to invest in infrastructure if capital expenditures were accounted for separately over the life of an asset. See J Mintz & R Preston (eds) *Capital Budgeting in the Public Sector* (1993) available at http://strategis.ic.gc.ca/epic/internet/ineas-aes.nsf/en/ra00003e.html (accessed on 22 June 2006).

[2] See National Treasury *Budget Review — 2006* Annexure D 'Government Accounts' (supra) at 206 (Items under 'financial transactions in assets and liabilities' represent transactions in items on the balance sheet.)

[3] Ibid.

'sub-sovereign' liability are suggested but not developed in Chapter 13. These issues have been left for parliament and government to resolve through legislation and regulation. We discuss the manner of government's resolution of these expenditure issues in the remainder of this section.

(a) The Revenue Funds

The treatment of the revenue funds in the Final Constitution has a practical importance that requires further elaboration. There are two dimensions regulating the flow of funds in and out of the revenue funds. The first is that *all* revenue raised by national government must be paid into the National Revenue Fund.[1] This proposition does not mean that national government has only one bank account, but that all money is accounted for in one government-controlled fund and all money is deemed to have been paid out of the same fund. This first dimension impacts outsourcing and security arrangements in which service providers and lenders often seek to exercise control over the flow of revenue.[2] The second dimension controls withdrawals from the funds. It is a constitutional principle — which might be termed the *appropriation principle* - that no funds can be withdrawn from a National or Provincial Revenue Fund under the Final Constitution, unless they are 'appropriated' in terms of an Act of Parliament, or a Provincial Act, or are paid by way of a 'direct charge' which is provided for in the Final Constitution or an Act of Parliament or a Provincial Act.[3] This requirement is reflected in PFMA ss 11(1)*(b)(i)* and (ii) and MFMA s 15. 'Appropriation' and 'direct charge' are not defined in the Final Constitution or the public finance legislation.

We understand an 'appropriation' to be an authorisation made by an Act of Parliament directing payment out of the National Revenue Fund for specific purposes.[4] Appropriations are divided into votes. These votes determine the funds available to be spent in a financial year. Parliament debates and votes on how these funds will be spent. By contrast, a 'direct charge' constitutes an authorised payment from the National Revenue Fund for which no appropriation is necessary. Liabilities or payment obligations which involve direct charges must be paid regardless of whether or not they have been budgeted for in the national

[1] FC s 213(1). One exception is permitted, namely that of money reasonably excluded by an Act of Parliament.

[2] For example, borrowings are sometimes secured by the inflow of a revenue stream. The creditor has an interest in isolating this inflow of revenue from other income streams of government. Often, a separate bank account will be established for this revenue stream. This separate account satisfies the requirement that the money must first be paid into the revenue fund, before being paid out in terms of an authorized appropriation, while also satisfying the creditor's requirement that the revenue be kept separate from other revenue of the branch of government involved in the deal.

[3] See FC ss 213 and 226 (Apply to appropriations from the national and provincial revenue funds respectively.)

[4] National Treasury describes direct charges as a statutory appropriation. These are called statutory or standing appropriations because they are funds that have already been earmarked, by prior legislation, for these purposes and are therefore not available for other regular annual expenditures. All other appropriations are made by vote and are referred to as 'votes'. See National Treasury *Budget Review — 2001* (2001) 46, available at http://www.treasury.gov.za (accessed on 22 April 2007).

budget. This arrangement has important implications for non-national spheres of government and creditors. For example, a province's equitable share is a direct charge against the National Revenue Fund (see FC s 213(3)) and gives provinces a measure of financial autonomy *vis a vis* the national budget process. The PFMA has also elevated payments 'under a guarantee, indemnity or security' to the level of direct charges.[1] The intention behind the elevation of direct charges is to give government creditors an assurance of immediate payment that need not be mediated by a future legislative process. Prior obligations of the national government are also direct charges against the national revenue fund.[2]

The provincial revenue funds are similarly regulated. Each province has a provincial revenue fund into which all revenue raised by the province is paid.[3] Money is withdrawn by way of appropriations or direct charges. This process is provided for in the province's constitution, if it has one, or other provincial legislation.[4] Direct charges against a provincial revenue fund include revenue allocated through a province to local government in that province in terms of FC s 214(1), that is, equitable share.[5] Once again, this arrangement gives municipalities autonomy *vis a vis* the provincial budget process. Provincial direct charges are further regulated by FC s 226(4)*(a)*. It provides that national legislation may determine a framework within which a provincial Act may in terms of subsection (2)*(b)* authorise the withdrawal of money as a direct charge against a Provincial Revenue Fund. This provision was introduced by the Constitution of the Republic of South Africa Second Amendment Act 61 of 2001 and is presumably designed to maintain national regulatory control over direct charges at provincial level. We are not aware of any legislation enacted under FC s 226(4).

There is no municipal revenue fund. However, a primary municipal bank account is required by the MFMA.[6] The regulation of the primary municipal account in the MFMA has in common with national and provincial revenue funds the requirement that all money for the provision of municipal services be paid into this account.[7] One clear difference between national and provincial revenue funds and municipal funds if that there is no equivalent of a direct charge at municipal level on the primary municipal bank account.

(b) Contracting

Government contracting is regulated by FC s 217. The section is often-cited in the case law although the individual virtues it imposes on government contracting

[1] See PFMA s 70(2)*(a)*.
[2] The direct charges raised in the 2006 national budget are the state debt cost, provincial equitable share, skills development funds, other statutory amounts, and standing appropriations. See National Treasury Budget Review — 2006.
[3] FC s 226(1).
[4] FC s 226(2).
[5] FC s 226(3).
[6] MFMA s 8.
[7] See MFMA s 8(2).

have not been judicially considered. Aside from the elevation of competition to a constitutional requirement and the allowance made for affirmative procurement, FC s 217 has little practical impact on government contracting. The process of contracting is regulated in an ever-growing body of South African legislation that covers standard procedural and substantive controls[1] and affirmative procurement.[2] In practical terms, the constitutional provisions that are most significant for contracting are those that regulate payments from the revenue funds and those that control borrowing and guarantees.[3]

(c) Government Borrowing

We have placed government borrowing within this section dealing with expenditure because it is not a source of funding recognised in FC s 227. It neither moves through the inter-governmental system nor is it an own source of revenue. Borrowing is also typically tied directly to expenditure. Most other sources of revenue, such as taxes and unconditional grants, flow into a pool of funds that is subsequently allocated for expenditure. Although the treatment of borrowing in the Final Constitution is sparse, the text does set out principles that have implications far wider than borrowing per se.

Borrowing for capital and current expenditure

FC s 230 was amended by the Republic of South Africa Second Amendment Act[4] and subsequently bifurcated into two rather important provisions dealing, separately, with provincial loans and municipal loans. Both provisions allow provincial and municipal borrowing for capital and current expenditure but restrict borrowing for current expenditure such that these loans 'may be raised only when necessary for bridging purposes during a fiscal year'. This seemingly innocuous

[1] Process and substance controls are set out in the Municipal Supply Chain Management Regulations Notice 868 of 2005 *Government Gazette* 27636 (30 May 2005), the PFMA and regulation 16A of the Treasury Regulations. In addition, various practice notes have been issued under the PFMA. Practice Note Number SCM 1 of 2003 provides general conditions of contract ('GCC') and standardised bidding documents. Practice Note Number SCM 2 of 2003 provides threshold values for the invitation of price quotations and competitive bids. Practice Note Number SCM 3 of 2003 provides detailed guidelines on the appointment of consultants. In addition, policy statements have been published by National Treasury. See, eg, National Treasury 'Policy Strategy to Guide Uniformity in Procurement Reform Processes in Government' (September 2003).

[2] Affirmative procurement is regulated (not always coherently) by the Preferential Procurement Policy Framework Act 5 of 2000, the Preferential Procurement Regulations, 2001 (Government Notice No R 725 *Government Gazette* No 22549 (10 August 2001)), the Broad-Based Black Economic Empowerment Act 53 of 2003 and the recent codes issued under the BEE Act.

[3] For a detailed treatment of FC s 217, see P Reyburn & G Pennfold 'Public Procurement' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 25.

[4] Act 61 of 2001.

qualification has profound implications, particularly for municipalities. In order to understand these implications, it is necessary to explain the distinction between capital and current expenditure.

'Capital expenditure' is undefined in the legislation, but has an accounting definition alluded to in regulation 6.7.1*(d)* of the Treasury Regulations.[1] The Economic Reporting Format referred to in regulation 6.7.1*(d)* is set out in Annexure A to the 'Budget 2006 — National Medium Term Expenditure Estimates'. In this document 'capital assets' are defined 'either as a) goods that can be used continuously or repeatedly in production for at least a year and from which future economic benefits or service potential are expected to flow to the owner of the asset or b) land and sub-soil'. In summary 'capital expenditure' is government expenditure on assets that last for a year or more, such as buildings, land, infrastructure and equipment or immovable property. 'Current expenditure', by contrast, largely means salaries and wages, goods and services utilised by the government, and transfers and subsidies.[2] In effect, it deals with those expenses not related to expenditure for capital assets. Finally, the phrase 'bridging purposes' or the equivalent, 'bridging finance', is not defined in the PFMA or the Treasury Regulations. In the Borrowing Powers of Provincial Governments Act ('BPPG'),[3] the phrase is defined as 'funds raised during a financial year in the Republic and denominated in rand to finance current expenditure in anticipation of the receipt of current revenue during that particular financial year, and includes an overdraft on a bank account.'

Given these various meanings for *capital expenditure* and *current expenditure*, FC s 230 and 230A make municipal and provincial financial failure a genuine possibility because neither may raise long-term loans to avoid deficits in current expenditure. It is important to note that default of this kind is not envisaged for

[1] Regulation 6.7.1*(d)* states that 'Capital expenditure referred to in the PFMA is the same as payments for capital assets in the new Economic Reporting Format.'

[2] For the more detailed accounting treatment of current expenditure, see National Treasury *Budget 2006 Medium Term Expenditure Estimates* (2006) Annexure A 6. For a statutory definition of capital expenditure, see the Borrowing Powers of Provincial Government Act 48 of 1996 ('Any payment by a provincial government for the procurement of new or existing tangible or intangible assets with a value higher than a prescribed value and with a normal life expectancy of more than one year, and includes payment for the acquisition of goods and services for the purpose of improving, prolonging the expected working life of, and rebuilding or reconstructing an existing fixed asset; a capital transfer to another person or body; the granting and payment of a money loan of which the proceeds will be used by the recipient of such a loan for capital expenditure; any other expenditure which is from time to time classified by regulation as a capital expenditure; the repayment of an outstanding loan which is due for redemption or conversion, provided that the proceeds of such conversion shall be used for the financing of expenditures contemplated in subparagraphs *(a)*, *(b)*, *(c)* and *(d)*, but excludes a payment by a provincial government in connection with the normal maintenance of a capital asset intended to keep such asset in its original state of repair.')

[3] Act 48 of 1996.

national government. The Final Constitution nowhere prohibits national government from raising long-term loans for current expenditure. PFMA s 71*(a)* expressly allows such loans.[1] National legislation has placed a somewhat less onerous gloss on these provisions and, at the same time, has introduced important differences between provincial borrowing and local borrowing.

Provincial Borrowing

In principle, provincial borrowing is subject to the same constraints as municipal borrowing: namely, long-term loans cannot be raised for current expenditure. This restriction finds it way into national legislation such as the BPPG.[2] One reason for the restriction at the provincial level may be that Provinces are primarily funded through equitable share, a revenue source that tends to expand to meet expenditure requirements. However, it may also be argued that the Final Constitution does not support provincial fiscal autonomy. Indeed, while FC s 214(2)*(b)* expressly requires that deliberations around equitable share — that culminate in DORA allocations — take account of national debt and national obligations, there is no equivalent mention of provincial debt or local debt. Accordingly, there is no constitutional guarantee that the legislature will cater appropriately for the debt and other obligations of provincial governments. However, the tendency of equitable share to meet provincial expenditure needs is reflected in BPPG s 2 which concerns the establishment and responsibilities of the Loan Co-ordinating Committee. Section 2*(c)* provides that the Committee 'shall in its deliberations take account of the total debt of each provincial government and the bodies controlled by it and of their contingent liabilities, risks, and ability to service their debt, and which shall report thereon to the Commission'. In short, it is arguable that provincial equitable share is intended to render provincial borrowing largely unnecessary. While this makes the prospect of provincial financial failure unlikely, it has the further consequence of restricting provincial borrowing.[3]

Having provided a legislative basis for maintaining provincial solvency, the BPPG whittles down the enabling constitutional provision for provincial borrowing in FC s 230(1) and imposes legislative barriers to provincial borrowing that are not provided for in the Final Constitution. One extraordinary limitation set out in BPPG s 3(3) provides that, '[a] provincial government shall not commit itself to any financial product other than bridging finance, loans or such other

[1] This section provides that the Minister may borrow money in terms of PFMA s 66(2) to 'finance national budget deficits'.

[2] Act 48 of 1996.

[3] The interaction between the BPPG and the PFMA warrants mention. PFMA s 66(1)(c) clearly subjects provincial loans to the limits set out in the BPPG. This restriction does not apply to other future financial commitments including guarantees, suretyships and other financial transactions.

product as may be prescribed, which creates *an interest or any other exposure* of a financial or equivalent kind' (emphasis added). The Act provides no definition of what is meant by either 'financial product' or 'an interest'. If one confines one's analysis to the four corners of the English text, it is difficult to determine precisely what was intended by BPPG s 3(3).

However, the Afrikaans text of the Act offers some insight. The Afrikaans text suggests that the provincial government cannot bind itself to a 'financial product' which creates 'rente' or 'any other exposure of a financial or equivalent kind'. If one were to make use of the *ejusdeum generis* rule as an aid to interpretation, it would suggest that the 'other exposure' shares some common denominator with 'rente'. 'Rente' signifies not 'an interest' of a generalised nature, but 'interest' in the sense of 'interest which is payable'. The 'other exposure' would therefore be an exposure to the payment of something that is similar to interest (in the form of 'rente') such as finance charges and the like.

If interest is taken to mean a form of finance charge, then BPPG s 3(3) is highly restrictive of provincial borrowing. It would extend to loans for capital expenditure which are not limited by FC s 230.

A further limitation to provincial borrowing should be mentioned in this context. This limitation is on the borrowing powers of provincial public entities. In terms of PFMA s 66, only provincial government business enterprises may be authorised to borrow money for capital expenditure.[1] The determining factors in the classification of a provincial government business enterprise are the fact that it is not funded from the provincial revenue fund, and that it carries out business activities in accordance with ordinary business principles.

The effect of the limitations in the BPPG and the PFMA is that a province may only carry out capital expenditure by funding the expenditure itself, by entering into a public private partnership ('PPP') agreement or by setting up a business enterprise that has sufficient revenues to borrow money. In this regard, many provinces do not have the ability to raise finance in the market cheaply. Furthermore, provincial government business enterprises are not easy to establish, and the authorisation to borrow follows scrutiny by National Treasury. As a result, provinces have limited access to the borrowing market. The legislative barriers to provincial revenue raising and borrowing may have had an impact on the service delivery ability of provincial government. Provincial goverment is incentivised in this way to collaborate with the private sector on capital expenditure projects, either through PPP projects or joint ventures that involve private investment outside of the PPP framework.

Municipal Borrowing

National Treasury has developed a highly coherent framework for municipal borrowing. A key document is National Treasury's 'Policy Framework for

[1] Certain provincial public entities may be authorised to borrow money for bridging purposes.

Municipal Borrowing and Financial Emergencies' ('the Municipal Borrowing Policy') which was gazetted in 2000.[1] The policy emphasises the need to enhance municipal access to private capital markets but stresses,

> that in pursuing this goal, central government wishes to avoid the apartheid-era practice of generally underwriting municipal borrowing and, in effect, transferring municipal liabilities onto itself. Government's central objective is not to produce a short-term inflow of 'soft' or subsidised funds to municipalities. It is, rather, to develop a sustainable market for municipal debt where risk is properly priced. In the long term an environment needs to emerge where loan finance becomes increasingly available and decreasingly costly to municipalities because the regulatory and institutional frameworks encourage appropriate behaviours, municipalities are increasingly well managed, and ancillary market facilitators are increasingly active.[2]

National Treasury's vision (as set out in the policy document) has four core elements: the restriction on borrowing for current or operational expenditure; the prohibition of sovereign guarantees for municipal borrowing;[3] the expansion of permitted forms of municipal security; and the creation of an institutional framework for municipal default and bankruptcy.[4] FC s 230A provides constitutional support for the first and third of these elements.[5] FC s 230A(1)*(a)* allows Municipal Councils to raise loans for capital or current expenditure, but allows loans for current expenditure to be 'raised only when necessary for bridging purposes during a fiscal year'. The MFMA expresses this restriction by creating a distinction between long-term and short-term debt and restricting the uses of long-term debt. Hence, MFMA s 46(1) states that, '[a] municipality may incur long-term debt … only for the purpose of *(a)* capital expenditure on property, plant or equipment to be used for the purpose of achieving the objects of local government …; or *(b)* re-financing existing long-term debt.' The key consequence of these provisions is that municipalities may not borrow to avoid operational deficits and hence can default on their financial obligations for financial reasons. Furthermore, this outcome is not softened by national legislation as is the case with provincial borrowing. Indeed, section 153(1)*(c)* of the MFMA provides expressly for default in a detailed chapter dealing with financial problems. The provision states that '[a] municipality may apply to the High Court for an order … to terminate the municipality's financial obligations to creditors, and to settle claims in accordance with a distribution scheme referred to in section 155'

A further key element is set out in FC s 230A(1)*(b)*. According to the section, a 'Municipal Council may, in accordance with national legislation … bind itself and

[1] The Borrowing Policy was published in Government Gazette No 21423 (28 July 2000).
[2] Ibid at 6.
[3] See § 27(5)(c) infra, under the heading 'Sub-Sovereign Debt'.
[4] See § 27(6)(c) infra.
[5] FC s 230A is the result of an amendment introduced through Constitution of the Republic of South Africa Amendment Act 34 of 2001.

a future Council in the exercise of its legislative and executive authority to secure loans or investments for the municipality'. The national legislation referred to is the MFMA which provides impressive security provisions. In terms of MFMA s 48(2), appropriate security includes, 'ceding as security any category of revenue or rights to future revenue [which would include equitable share] … undertaking to retain revenues or specific municipal tariffs or other charges, at a particular level or at a level sufficient to meet its financial obligations … undertaking to make provision in its budgets for the payment of its financial obligations, including capital and interest … agreeing to restrictions on debt that the municipality may incur in future until the secured debt is settled or the secured obligations are met'. These provisions allow for a fettering of legislative and executive discretion and indicate how seriously the national legislature considers the issue of political risk in respect of municipal borrowing.[1] The scope of the constitutional and MFMA provisions are, however, limited to security for loans and investments, and do not extend to security for the payment of monies in respect of general contracts.

FC s 230A is not undercut by national legislation. There is no equivalent of the BPPG at municipal level and borrowing for capital expenditure occurs and is encouraged.[2] Indeed, National Treasury considered limiting the amount of long-term debt (for example, by prescribing ratios of the debt service burden to revenues) and chose not to do so.[3] Furthermore, the security arrangements permitted in FC s 230A(1)*(b)* and the MFMA are expansive and are presumably intended to counter-balance the exclusion of national and provincial guarantees.[4]

Sub-Sovereign Debt

An issue closely aligned to the question of borrowing for current expenditure is that of national government guarantees for provincial and municipal debt. This critical issue follows from the premise that the national government cannot fail financially, while municipal governments can. National guarantees of municipal debt would insulate municipalities from financial failure, if they were possible.

[1] In a speech given by the National Minister of Finance on the Second Reading Debate on the Municipal Finance Management Bill on the 11th September 2003, it is stated that the intention of the insertion of section 230A was to reduce the risk premium for municipalities when they borrow funds. The Minister referred to national government's commitment to facilitating a municipal borrowing market and allowing municipalities to lower their costs of borrowing for capital expenditure and to attract investors. Accessed from http://www.treasury.gov.za/speech/2003091102.pdf on 24 April 2007.

[2] See National Treasury (2004) 33.

[3] See Municipal Borrowing Policy (supra) at 16.

[4] MFMA s 48 provides a long list of legitimate security options in s 48(2). However, certain restrictions should be noted. For example, a municipality may undertake to effect payments directly from a source to secure payment of a debt, however, s 8(2) provides for categories of money to be paid directly into the primary bank account of the municipality. A further example pertains to the s 48(4) restrictions over the way that security over capital assets may limit their availability in service provision.

The Final Constitution allows this matter to be settled by national legislation.[1] National legislation sets its face emphatically against national or provincial guarantees for municipal debt. However, the terms national legislation employs in barring such guarantees are rather peculiar. MFMA s 51 states that '[n]either the national nor a provincial government may *guarantee* the debt of a municipality or municipal entity except to the extent that Chapter 8 of the Public Finance Management Act provides for such guarantees'.[2] The PFMA regulates financial management in the national government and provincial governments and Chapter 8 relates to the loans, guarantees and other commitments of these governments. Chapter 8 of the PFMA does not expressly provide at all — let alone to some extent — for national or provincial governments to guarantee the debts of municipalities. It is curious that the drafter of the MFMA refers to Chapter 8 of the PFMA in this context, knowing full well that the PFMA does not provide for such guarantees. It is possible that the drafters of the MFMA anticipated an amendment of Chapter 8 of the PFMA which has not yet occured. As things stand, however, the MFMA and the PFMA, read together, prohibit national and provincial guarantees of municipal debt.

Further clarification of terminology used in this context illuminates other important issues involving municipal debt. The term 'sub-sovereign' is used to describe municipal debt that is explicitly or implicitly guaranteed by national or provincial governments. In circumstances where a local government is a 'sub-sovereign', creditors understand that the sovereign will not allow for municipal financial failure, and under these circumstances the municipal credit rating will be the same as that of the national or provincial governments that guarantee their debts. The MFMA (in Chapter 13 and elsewhere) makes it clear that South African municipalities are not sub-sovereign in this sense.

[1] See FC s 218(1).

[2] Given that the prohibition in the MFMA relates to guarantees it is necessary to provide a brief parenthetical background on the meaning of the word 'guarantee' which, in the context of South African law, is ambiguous. A distinction is made in South African law between the contract of indemnity, which imposes an *original* obligation to make good any loss suffered by a creditor — and the obligation of a surety, which is *accessory* to that of the principle debtor. Documents which are often called 'bank guarantees' are not contracts of suretyship at all but are promises to pay conditional upon the happening, or non-happening, of a stated event. See *Hazis Transvaal & Delagoa Bay Investment Co Ltd* 1939 AD 372, 384; *SA Warehousing Serevices (Pty) Ltd and Others v South British Insurance Co Ltd* 1971 (3) SA 10 (A). When the word 'guarantee' is used in a contract it may mean either indemnity or suretyship. It is a question of interpretation in which the use of the word is not viewed in isolation. See *List v Jungers* 1979 (3) SA 106 (A). The question to be answered is whether 'guarantee' means indemnity, or suretyship, or both, in the context of the MFMA. In our opinion it means both those legal concepts since the tenor of the statute is to instill the need for financial probity and responsibility in local government by way of making certain transactions independent of aid from national or provincial government. Consequently, the widest meaning should be given to the word since that reading, in our view, gives effect to the legislative intention.

27.6 Monitoring and withholding public funds

(a) Regulation by National Treasury

The final stop on the pathway through raising, allocating, budgeting and spending public funds is monitoring, withholding and regulating the use of public funds. This legally and politically complex area involves a primary regulatory role for National Treasury and (perhaps surprisingly) an important intervention role by provinces during moments of municipal crisis.

Because the functioning of National Treasury must be established through legislation, two questions arise: first, whether the Final Constitution has a particular vision of National Treasury's role (in FC s 216 and elsewhere); and second, whether the legislation that establishes National Treasury's role is in keeping with this constitutional vision. These questions are important because National Treasury is, arguably, the most important government department, and its role is, at times, contested.

The Scope of National Treasury's Regulatory Role

FC Chapter 13's vision for National Treasury seems to be a narrow one. However, to understand even the limited role contemplated by FC Chapter 13, a basic command of the lexicon is necessary. The phrase 'treasury control' relates to rather formal matters set out in the sub-provisions of FC s 216(1). FC s 216(1)*(a)* relates to 'generally recognised accounting practice' (sometimes known as 'GRAP') which is one of many forms of accounting treatment.[1] 'Uniform expenditure classifications' referred to in FC s 216(1)*(b)* is expanded in the MFMA into 'uniform expenditure and revenue classification systems'.[2] Such classification systems are presumably designed to standardise financial information in budgets and reports. Finally, the 'treasury norms and standards' mentioned in FC s 216(1)*(c)* appear to relate in practice to informational requirements around financial, budget and fiscal matters.[3] FC s 216(2) then provides a powerful (although blunt) remedial tool to enforce the accounting treatment, expenditure classification and treasury norms and standards envisaged in FC s 216(1) — namely stopping inter-governmental grants.[4] Both the scope of National Treasury's current role and the remedial instruments used to enforce compliance with its measures would appear to have expanded beyond their modest beginnings in FC s 216.

[1] GRAP is prescribed for municipalities in MFMA s 122(3).
[2] See MFMA s 5(2)*(c)*(ii).
[3] See, eg, DORA Act 7 of 2003 s 5(7).
[4] Only National Treasury may stop equitable share. Once equitable share is allocated to local government and transferred via a provincial revenue fund, it must be paid to the municipalities in that province. See FC s 226(3).

Stopping Transfers of Grants and Equitable Share

The Final Constitution limits the stopping of funds in terms of FC s 216(2) to breaches of generally recognised accounting practice, uniform expenditure classifications and uniform treasury norms and standards. This power is reflected in MFMA s 5(2)*(e)*. It is important to distinguish stopping funds under FC s 216(2) and interventions under FC ss 100 and 139. The former reflect an enforcement measure designed to achieve compliance with formal National Treasury Standards. By contrast, FC ss 100 and 139 posit serious executive failures that require direct intervention with serious political consequences.

FC s 216(2) is triggered by 'serious or persistent material breach' of the measures set out in FC s 216(1). The Constitutional Court, in *First Certification Judgment*, heard a challenge to the provision that alleged that the provision would encroach upon the legitimate autonomy of provinces.[1] In affirming the certifiability of FC s 216, the Court mentioned that the exercise of the power to stop the transfer of funds would be subject to the external controls in FC s 216(3) to (5) and '[t]he question whether there has been a serious or persistent material breach of the provisions would also be justiciable'. The issue has not arisen since and has not been subject to judicial consideration.

The phrase, 'serious or persistent material breach', is a standard triggering phrase. It appears in FC s 139(5), in the equivalent MFMA provision dealing with financial problems,[2] and in the Division of Revenue Act.[3] Whereas MFMA s 140 sets out criteria for determining when there has been a 'serious or persistent material breach' of *financial commitments,* the Final Constitution does not offer similar criteria for a breach of FC s 216(1). As was suggested by the Constitutional Court in the *First Certification Judgment*, the phrase is intended to create a high threshold for the FC s 216(2) remedy which can be invoked *only* if there has been a serious or persistent material breach. The word 'persistent' suggests continuing in some action 'against opposition' and may indicate a remedy of last resort. Furthermore, not only must the breach of the standard in FC s 216(1) be 'serious' but it must be a 'material breach'. These separate requirements indicate that not only must the breach be related to a fundamental aspect of FC s 216(1) — and thus material — but that this material breach must be a serious material breach. This rather awkward formulation clearly indicates a high threshold of non-compliance before FC s 216(2) applies. Furthermore, even if these standards are met, provincial transfers may not be stopped for more than 120 days at a time, and the stopped transfer must be approved by Parliament.[4] Failure by Parliament to approve a decision to stop the transfer will cause the order to stop the transfer to lapse retrospectively.[5]

[1] See *Ex Parte* Chairperson *of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('*First Certification Judgment*') at para 279.

[2] See MFMA s 139.

[3] See DORA 7 of 2003 s 30 and DORA 1 of 2005 s 39.

[4] See FC ss 216(3)*(a)* and 216(4).

[5] See FC s 216(3)*(b)*.

If the exercise of FC s 216(2)-powers is justiciable, then a related issue is whether the remedy can be used to enforce compliance with statutory requirements that do not relate directly to FC s 216(1). Since national legislation harnesses FC s 216(2) for its own purposes, this question is not an abstract inquiry. The PFMA, which establishes National Treasury, allows for a withholding of funds 'in terms of section 216(2) of the Constitution, to address a serious or persistent material breach *of this Act* by a department, public entity or constitutional institution' (emphasis added).[1] Because many aspects of the PFMA go beyond formal treasury standards (such as approval of disposals of assets, or approval of contracts or corporate plans), one could argue that the FC s 216(2) remedy has been torn from its proper context.[2] Similarly, DORA uses the remedy in FC s 216(2) to enforce compliance with the conditions of inter-governmental grants.[3] Again, this purpose is not contemplated by FC s 216(1). Equitable share is a constitutional entitlement the allocation of which is settled by national parliament. The view that the power of National Treasury to stop transfers is limited to the enforcement of the matters set out in FC s 216(1) is supported by the Constitutional Court's affirmation of the external controls related to the FC s 216(2) remedy. Under these circumstances, we would suggest that the use of the FC s 216(2) remedy to enforce statutory (and not constitutional standards) goes beyond the powers envisaged for National Treasury in FC s 216.

Economic and Contract Regulation

The second case in which National Treasury powers may have expanded beyond the contemplation of the drafters of FC s 216 is the regulatory role of National Treasury. Although the Final Constitution does not describe National Treasury as *regulating* public finance, we think it useful to use this term and intend by it three mechanisms of control, namely: standard setting; monitoring of compliance with the standard and enforcement of the standard. These three mechanisms are set out (explicitly or implicitly) in FC s 216. FC s 216(1) contemplates the introduction of generally recognised accounting practice, uniform expenditure classifications; and uniform treasury norms and standards; and FC s 216(2) compels National Treasury to 'enforce compliance with the measures established in subsection (1)'. Monitoring of compliance is not mentioned in FC s 216, but is implicit as an intermediate step between introducing and enforcing the standard.

The difficulty is that the legislation — the MFMA and the PFMA — and the practice indicates significant National Treasury involvement not only in matters suitable for uniform standards but specific executive and legislative decisions. A representative sample of the actual powers of National Treasury under national

[1] See PFMA s 6(2)*(f)*.

[2] See also PFMA s 18(2)*(g)*(Gives a similar power to Provincial Treasures vis-a-vis provincial departments and public entities.)

[3] See, eg, DORA 7 of 2003 s 22.

legislation includes the following: the authorisation of public private partnership agreements pursued by national and provincial government;[1] recommendations on whether a municipality should enter into 'contracts having future budgetary implications',[2] recommendations on whether a municipality should form a municipal entity;[3] the delegation of powers by the council to an executive committee or executive mayor or chief financial officer of decisions to make investments on behalf of the municipality may only be made within a policy framework determined by the Minister of Finance;[4] the delegation of powers by the accounting officer for a department, trading entity or constitutional institution may be limited or controlled by the National Treasury;[5] the limit of councillors and officials on a governing board of a municipal entity;[6] commenting on price increases of bulk resources for the provision of municipal services;[7] the approval of three-year borrowing programmes submitted by certain public entities (national government business enterprises or major public entities);[8] and approving the corporate plans of certain public entities (which would include such matters as dividend policy).[9] The powers accorded to National Treasury are accentuated by drafting which in some cases vests an untrammelled discretion in National Treasury to approve transactions[10] or exempt agencies from compliance with regulations or legislation.[11] Furthermore, while National Treasury may only have the power to comment or make recommendations, its approval powers are so significant that agencies may have the perception that they depart from Treasury recommendations at their peril. The result is that in practice National Treasury exercises a power in respect of transactions and plans that may come close to a veto. A power of this kind involves a far more interventionist role for National Treasury in executive decision making than FC s 216 suggests.

[1] See Treasury Regulations reg 16.
[2] See MFMA s 33.
[3] See MFMA s 84.
[4] See Systems Act s 60(2).
[5] See PFMA s 44(2)*(a)*.
[6] See Systems Act s 93E.
[7] See MFMA s 42.
[8] See Treasury Regulations reg 29.1.3*(a)*.
[9] See PFMA s 52.
[10] An important example is the approval power of National Treasury vis-à-vis PPPs. The definition of 'public private partnership' in reg 16 of the Treasury Regulations is important because it acts as a filter — only those transactions that are 'PPPs' will be subject to the somewhat onerous requirements set out in reg 16. The latest definition of 'public-private partnership', as set out in regulation 16 of the Treasury Regulations, means a commercial transaction between an institution and a private party in terms of which the private party (among other things) 'assumes substantial financial, technical and operational risks in connection with the performance of the institutional function and/or use of state property'. The difficulty is that 'substantial risk' is a rather porous filter. In practice, a discretion is exercised by the PPP Unit of the National Treasury which establishes the scope of Regulation 16. Neither the PFMA nor the regulations guide the exercise of this discretion or even expressly acknowledge it. Although National Treasury formally exercises weaker powers vis-à-vis municipal PPPs, the practice is likely to be akin to national and provincial PPPs.
[11] For example, in terms of MFMA s 170, the National Treasury 'may on good grounds approve a departure from a treasury regulation or from any condition imposed in terms of this Act'.

Our conclusions here must be stated carefully. One can make a strong argument that this interventionist role of National Treasury exceeds the rather narrow and formal role contemplated in FC s 216. However, it is also possible that National Treasury is performing the regulatory role allocated to national government in several other provisions of the Final Constitution, rather than performing the role strictly allocated to National Treasury in FC s 216. Indeed, FC s 216 itself does not state that the role of National Treasury is limited to the enforcement of the matters in FC s 216(1). If FC s 216 does not limit enforcement matter to those enumerated in FC s 216(1), then an expanded role for National Treasury is not problematic — provided that the expanded role is itself defensible under the Final Constitution as a national regulatory role. This proviso raises a question that requires a more general assessment of how the spheres of government interact and whether national economic regulation through the National Treasury is consistent with the executive autonomy of provinces and municipalities. An argument that National Treasury's role ought to be restricted to formal regulation of norms and standards is buttressed by the idea that sub-national spheres of government have executive authority and constitute the government within their sphere.[1] Indeed, in the case of local government, the Final Constitution is at pains to assert the 'right' of a municipality to govern, on its own initiative, 'the local government affairs of its community'.[2] National and provincial governments 'may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions'.[3] It might be argued that a limited and formal role is envisaged for National Treasury because a more extensive role — such as price controls, approval of contracts and approval of budgets — may undermine the autonomy of the non-national spheres of government.

However, an interventionist role for National Treasury does not necessarily compromise the exercise of municipal powers and functions. Indeed, it may serve to enhance them by protecting macro-economic stability and local government structures. In short, the Final Constitution cannot be read as requiring national government to adopt a 'hands off' regulatory approach in the face of executive incapacity or failure. Indeed, the Constitutional Court, in its certification of the Final Constitution, described the 'support' role of national and provincial governments vis-à-vis local government as a 'considerable' competency facilitating a 'measure of provincial government control over the manner in which municipalities administer' their functions.[4] The dilemma of how to regulate sub-

[1] On co-operative government and the independence and interdependence of the three spheres of government, see, generally, S Woolman, T Roux & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14.

[2] See FC s 151(3).

[3] See FC s 151(4).

[4] See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('*First Certification Judgment*') at para 371.

national governments in a decentralized structure is further considered below and indicates that the choice of how intrusively to regulate is as much strategic as legal.

(b) Provincial Role in Regulating Public Finance

FC s 216 establishes the National Treasury in order to enforce public finance standards. Although there are provincial treasuries which are also given a regulatory role under national legislation, our view is that provinces have no general supervisory role in respect of finance. It is a cliché of the new constitutional framework that municipalities are no longer creatures of provincial ordinance.[1] As a result, provincial local government ordinances have a rather ambiguous status. Our view, based on a reading of Chapter 13 and the constitutional schedules, is that financial regulation of municipalities is no longer a provincial legislative competence and that provincial ordinances regulating this area are impliedly repealed. This conclusion eviscerates lengthy provisions in provincial ordinances dealing with, among other things, procurement, contracting, budgeting and borrowing. All this legislation conflicts now with so-called 'new-order' legislation and in our view is redundant. Many provinces, lead by Gauteng, have enacted repeal legislation to harmonise their statute book with new-order legislation.[2]

MFMA s 5 spells out the new role of provinces *under national legislation* in regard to financial regulation of municipalities. MFMA s 5(4) states that '[t]o the extent necessary to comply with subsection (3), a provincial treasury *(a)* must monitor—*(i)* compliance with [the MFMA] by municipalities and municipal entities in the province; (ii) the preparation by municipalities in the province of their budgets; (iii) the monthly outcome of those budgets; and (iv) the submission of reports by municipalities in the province as required in terms of this Act; *(b)* may assist municipalities in the province in the preparation of their budgets; *(c)* may exercise any powers and must perform any duties delegated to it by the National Treasury in terms of [the MFMA]; and *(d)* may take appropriate steps if a municipality or municipal entity in the province commits a breach of [the MFMA].' Although, in our view, the Final Constitution has ended the provincial role in regulating municipal finance, it still strongly affirms the intervention role of provinces in the case of municipal financial failure.

(c) Intervention Powers of the Provinces

In addition to the intervention powers of national government and parliament under FC s 216(2), the provinces (and not national government in the first instance) are given an important power of intervention under FC s 139. There is an interesting legislative history to FC s 139 which has a direct bearing on municipal borrowing and financial autonomy.

[1] See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1991 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 38.

[2] See, for example, the Gauteng Local Government Laws Amendment Act 1 of 2006.

The existing version of FC s 139 was introduced by the Constitution of the Republic of South Africa Second Amendment Act 3 of 2003. The original FC s 139 provided for provincial supervision. This supervision entailed issuing directives and, in more serious cases, assuming responsibility for the relevant obligation. However it was something of a blunt tool and perhaps an ineffective one as well. In particular, it did not clarify the extent to which an intervening province could assume municipal executive and legislative powers in order to restore service provision. Furthermore, in the context of municipal borrowing, it did not appreciate that because it is not legally or practically possible to liquidate a municipality, the ability of creditors to satisfy their claims in the event of default is likely to be closely tied to the restoration of the fiscal position of the municipality to normality. This appreciation comes through strongly in National Treasury's Policy on Municipal Borrowing. The policy sees the development of an institutional framework for municipal default and bankruptcy as a fuller expression of a decentralised framework for municipal finance. Hence,

> ... the corollary of moving towards a modern, decentralised framework for municipal finance where moral hazard is minimised, capital is allocated efficiently, risk is properly priced and incentives for prudent financial management are real is a clear legal and institutional framework for dealing with municipal default and bankruptcy.[1]

The Municipal Borrowing Policy then develops and affirms the idea of a judicially authorized administrative agency with some independence from the executive. This agency oversees fiscal and financial 'turn-arounds' analogous to judicial managements in the private sector but designed for the particular circumstances of the municipal sector.[2] The agency, suitably equipped with the necessary powers, would develop and implement municipal turn-around plans. Chapter 13 of the MFMA gives full legal expression to this idea by establishing and regulating the Municipal Financial Recovery Service.[3] A key dilemma for the drafters of the constitutional amendment, in developing the idea of a Municipal Financial Recovery Service, was how to deal with a case where a financial recovery plan was developed for the municipality, but a Municipal Council could not or would not act in accordance with the plan. Because financial recovery would require the adoption or adjustment of budgets, and the determination of tariffs and taxes (all legislative functions under *Fedsure*), a Municipal Council could frustrate implementation of the recovery plan. Originally, the Municipal Borrowing Policy contemplated that the Municipal Financial Recovery Service would have 'all the powers of a municipal council' including its legislative powers. Accordingly, an early version of the Constitution of the Republic of South Africa Amendment Bill, 2001 added a new section 155(8) to the Final Constitution

[1] The Municipal Borrowing Policy (supra) at 31.
[2] Ibid.
[3] See MFMA ss 157–162.

which stated that: '[n]ational legislation may provide for the exercise of executive and legislative authority on behalf of a municipal council to the extent necessary — *(a)* to govern the municipality when the council for any reason cannot function; or *(b)* to resolve a serious and persistent financial emergency in the municipality.' This amendment was not made, arguably because the drafters were self-conscious about the prospect of a non-elected body enacting legislation. The dilemma was resolved through the Constitution of the Republic of South Africa Second Amendment Act 3 of 2003 which inserted the current version of FC s 139. The amended section empowers the provincial executive in FC s 139(5) to 'dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to [a] recovery plan'. Hence, the current section affirms municipal legislative powers, but allows for dissolution of municipal councils if these powers are inappropriately exercised during times of crisis. On dissolution, an administrator gives effect to the recovery plan (including approving a temporary budget and required revenue-raising measures) until a new Municipal Council is elected.[1] Arguably, dissolution of a Municipal Council, rather than enactments on its behalf, is an appropriate balance between municipal political autonomy and the need to manage municipal financial crises. Once the constitutional amendment had been passed, it was possible to enact the MFMA which elaborated a detailed framework on municipal borrowing and financial emergencies.

The text of FC s 139 requires interpretation, an exercise that would take us away from our focus on Chapter 13 of the Final Constitution. There is already analysis elsewhere of some of the key textual issues, including the meaning of the phrase which triggers intervention under FC s 139(1), namely that a 'municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation'.[2]

The MFMA Treatment of Intervention

The MFMA has turned the provisions of FC s 139 into a lengthy and important chapter. The Final Constitution distinguishes three types of financial problem: first, a case in FC s 139(1) where 'the municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation'; second, a case in FC s 139(4) where 'a municipality cannot or does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures necessary to give effect to the budget'; and third, a case in FC s 139(5) where as a result of a crisis in its financial affairs, [the municipality] is

[1] See FC s 139(5)*(b)*.

[2] See J De Visser *A Legal Analysis of Provincial Intervention in a Municipality* (1999) 6, LLM Thesis, University of the Western Cape, available at http://www.sn.apc.org/users/clc/localgovt/thesisjdv.rtf (accessed on 22 April 2007)(Discussing the legal framework for provincial intervention in terms of FC s 139.)

in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments'. The Final Constitution makes provincial intervention discretionary in the first case and mandatory in the latter two cases. The MFMA offers a more fine grained account of these distinctions in chapter 13. It terms the first case a 'financial problem' and sets out the steps a provincial executive may take in response to such a problem. These steps are termed 'discretionary provincial interventions' in MFMA s 137. The third case is called a 'financial crisis' and requires (as prescribed in the Final Constitution) 'mandatory provincial interventions' under section 139 of the MFMA. The second case is treated separately in section 26 of the MFMA (and is not further considered here). The MFMA sets out criteria that describe when a municipality is in a financial crisis[1] or when it has encountered a serious financial problem.[2] A very important factor in the determination that there is a financial crisis rather than a serious financial problem is that the municipality has failed to make '*any* payment to a lender as and when due'.[3] Because a financial crisis has more serious consequences than a financial problem, the MFMA makes a failure to provide payment to a lender or an investor more serious than a simple non-payment of a debt to other creditors. This distinction elevates the status of lenders and creates a more enabling regulatory environment for municipal borrowing.

As suggested above, each kind of intervention results in differing consequences for the municipality. While a discretionary intervention in response to a serious financial problem may result in nothing more than a directive from the province to the municipality to act or refrain from acting in a particular manner, a mandatory intervention in response to a financial crisis requires the province to request the intervention of the Municipal Financial Recovery Service[4] which is required to draw up a financial recovery plan.[5] Provinces are given wide powers

[1] See MFMA s 140.

[2] See MFMA s 138.

[3] See MFMA s 140(2)*(a)*(emphasis added). Because the indicator relates to 'any payment' it would presumably include part payments (such as cases where interest was paid but not installments relating to the principal amount).

[4] This service forms part of the National Treasury in terms of MFMA s 157.

[5] MFMA s 142 sets out the requirements for financial recovery plans. These documents are aimed at securing the municipality's ability to meet its obligations to provide basic services or dischange its financial commitments. The first aim is to identify the problems of the municipality, and then to design a response that puts the municipality in a sound and sustainable financial condition as soon as possible. The Financial Recovery Plan identifies those human and financial resources needed to achieve the aims of the Plan. The Plan also identifies what needs to be done for its implementation. The Plan may call for the liquidation of assets other than those needed for the provision of the minimum level of basic municipal services and may provide for debt restructuring or debt relief. If a recovery plan is prepared in a mandatory provincial intervention, then s 146(1)*(a)* lays down that the municipality must implement it and report to the MEC for finance in the province about its implementation. See s 146(1)*(c)*. National intervention is contemplated to meet a situation where the province does not adequately perform any of the mandatory intervention obligations. In such cases the national executive enjoys the powers and functions of the provincial executive. See 150(2)*(a)*.

of intervention: including the right to intervene in the provision of services as well as the right to dissolve a Municipal Council and appoint an administrator. These rights are essentially the last form of protection afforded to a local community, whose social welfare and development the municipality is considered to have failed to serve.

It is important to note that although financial crises prompt *mandatory* provincial interventions, it is necessary for provincial executives to determine that the conditions of a financial crisis have, in fact, been met. These are the conditions described in FC s 139(5): namely, that as a result of a crisis, the municipality is in 'serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments'. The factors that indicate that this criterion is met are set out in section 140 of the MFMA. It should be stressed that even though the provincial executive must make the assessment that the criterion for a financial crises has been met, this assessment does not make the intervention 'discretionary'. The provincial executive must make a finding of fact based on the indicators set out in section 140(2). Once it has been determined that the facts exist, the provincial executive is compelled to act under section 139 of the MFMA. This point is strengthened by examining the factors set out in section 140(2) which intend, in our view, to make the trigger for a mandatory intervention objective.[1]

(d) Municipal Financial Failure

It is a striking feature of South African public finance that municipal financial failure is possible. We do not use the word 'insolvency' to describe municipal financial failure because municipalities cannot be 'wound up'. Indeed, the purpose of debt relief is to provide a form of protection from creditors in the absence of which a financial recovery plan may fail.[2] However, the MFMA does make provision for a municipality to apply to the High Court for an order 'to terminate the municipality's financial obligations to creditors, and to settle claims in accordance with a distribution scheme referred to in section 155'.[3] In short, the MFMA creates a process that is akin in some respects to insolvency. Prior to termination of financial obligations, provision is made for lesser forms of relief: where a municipality is unable to meet its financial commitments, it may, in terms of section 152, apply to the High Court for an order to stay all legal proceedings by persons claiming money from it (or a municipal entity) for a period not exceeding 90 days. Provision is also made for extraordinary relief in the form of a suspension of the municipality's financial obligations or a portion of such obligations until the municipality can meet those obligations.[4]

[1] See, eg, MFMA s 140(2)*(c)*, which quantifies the extent of the failure, or MFMA s 140(2)*(a)* which refers to 'any payment', that is, at least one payment.
[2] See MFMA s 153(2)*(b)*.
[3] See MFMA s 153(1)*(c)*.
[4] See MFMA s 153(1)*(b)*.

To our knowledge the provisions of chapter 13 of the MFMA have not been applied — even though provincial interventions under the Final Constitution have occurred. Instead, National Treasury and the Department of Provincial and Local Government have focused on capacity building initiatives and rescue plans for weak municipalities. Project Consolidate is the best known of such plans.[1] The question that arises is whether, notwithstanding the provisions of the MFMA, national government would 'rescue' a municipality to prevent its financial failure. Even though MFMA s 51 prohibits national and provincial guarantees of municipal debt, it would, in principle, be possible for national government to provide additional equitable share to a municipality in order to enable to the municipality to discharge its financial obligations. Section 6(3) of the Division of Revenue Act 1 of 2005 empowers '[t]he national government [to] appropriate a portion of its equitable share or excess revenue to make further allocations in an adjustments budget to municipalities, as a conditional or an unconditional allocation'. However, it is uncertain whether national government will exercise this power to assist municipalities with financial problems and we do not wish to speculate in this regard.

27.7 Other institutions

(a) Financial and Fiscal Commission

FC Chapter 13 creates the Financial and Fiscal Commission and the Central Bank. For our purposes, the former is a more important organisation. The Financial and Fiscal Commission is established in terms of FC s 220. The Financial and Fiscal Commission Act clarifies its functions, powers and composition.[2] Its purpose is to act as an impartial and independent body which makes recommendations and gives expert advice to organs of state in the national, provincial and local spheres of government on financial and fiscal matters. These matters would include the fiscal policies of government, whether national, provincial or local; the role of province in raising revenue through taxation; borrowing by local and provincial governments; and fiscal allocations. The body is constituted in terms of FC s 221 from members appointed by the President. However, the Premiers of provincial government and organized local government participate, to some extent, in the appointment process.

In fulfilling its constitutional mandate, the Commission focuses primarily on intergovernmental revenue sharing and fiscal issues that arise from DORA.

[1] Project Consolidate is a program implemented by the Department of Provincial and Local Government to assist local government with the following: basic service delivery and infrastructure; local economic development; municipal transformation and institutional development; municipal financial viability; and good governance and community participation. See Department of Provincial and Local Government *Project Consolidate: A Hands on Local Government Engagement Programme for 2004-2006* (May 2004)('*DPLG Project Consolidate*').

[2] Act 99 of 1997.

DORA may not be passed until the Commission has been consulted and its recommendations considered. The recommendations of the Commission are presented to both Houses of Parliament and provincial legislatures and address the following issues: the equitable division of revenue as between national, provincial and local government; the determination of the equitable share of each province; and other allocations including the conditions on which they are made.[1] Secondary functions have been allocated to the Commission in the Borrowing Powers of Provincial Governments Act and the Intergovernmental Fiscal Relations Act. In terms of the former Act, the Commission may make recommendations regarding loans to provincial governments by national government as well as the total interest a provincial government may incur on its debt in a financial year. In respect of the latter act, the Commission may be represented at meetings of the Budget Council and may make recommendations on revenue sharing and the allocation of money.[2] This Act also provides for the Commission to provide input on DORA prior to its enactment in terms of FC s 214(2).

Assessments of the Commission have been mixed. One assessment is that the Commission has lost influence since 1994:

> Several countries, such as India and South Africa, have adopted independent commissions to oversee and protect fiscal transfers from the center to the sub-national from political vagaries. But, the performance of these commissions have been mixed. In the case of India, many states have not implemented state level finance commissions. In South Africa, the Financial and Fiscal Commission, while playing an important role in the initial years of the new democracy, has progressively lost its influence as the country made its transition from conflict years.[3]

(b) Central Bank

The central bank, known as the South African Reserve Bank, is contemplated in FC s 225 and regulated by the South African Reserve Bank Act.[4] The primary object of the South African Reserve Bank, as set out in FC s 224(1), is the protection of the value of the currency in the interest of balanced and sustainable economic growth in the Republic. From this constitutional mandate, the Bank has understood its mission as ensuring 'the achievement and maintenance of price stability'.[5] The Reserve Bank is co-responsible for formulating South Africa's

[1] Intergovernmental Fiscal Relations Act 97 of 1997 s 9(1).

[2] For a discussion on Budget Council and the Local Goverment Budget Form, see § 27.3*(d)* supra.

[3] See J Ahmad, S Devarajan, S Khemani & S Shah 'Decentralization and Service Delivery' *World Bank Policy Research Working Paper 3603* (May 2005) 7.

[4] Act 90 of 1989. FC s 225, provides that: 'the powers and functions of the South African Reserve Bank are those customarily exercised and performed by central banks, which powers and functions must be determined by an Act of Parliament and must be exercised or performed subject to the conditions prescribed in terms of that Act.'

[5] See 'Mission Statement of the South African Reserve Bank' at http://www.reservebank.co.za/ (accessed on 20 April 2007).

monetary policy, and is largely responsible for implementing this policy. The Final Constitution requires the Reserve Bank to perform this function and its other functions independently and without fear, favour or prejudice. However, it also provides that there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters. The Reserve Bank and the National Treasury together constitute the monetary authority in South Africa.

The South African Reserve Bank acts as the central bank for the country and its banking institutions. It thereby provides so-called 'accommodation' to various banks.[1] The Reserve Bank is the custodian of the statutory cash reserves which all registered banks are required to maintain, and it provides facilities for clearing and settlement of inter-bank obligations. In addition, the Reserve Bank is the custodian of the greater part of South Africa's gold and other foreign exchange reserves, controls the South African Mint Company, and issues banknotes printed by the South African Bank Note Company, a wholly owned subsidiary of the Bank.

27.8 Local government in South Africa's fiscal structure

(a) Decentralised structure

In considering the place of local government in South Africa's fiscal structure, the key question is whether FC Chapter 13 envisages fiscal and other forms of decentralisation. The question has practical importance: decentralised systems imply, among other things, a high-level of autonomy in respect of sub-national spending decisions. This autonomy would, in turn, have implications for the nature of the inter-governmental grant system and the nature of national regulation of sub-national budgeting and spending. In considering the extent of decentralisation in South Africa, the literature postulates a continuum from 'deconcentration' (the lowest level of decentralisation), through 'delegation' to 'devolution' (the highest level of decentralisation).[2] This terminology is somewhat unreliable and is not always used consistently. Nonetheless, it is clear that the Final Constitution does contemplate a level of decentralisation that is closer to the devolution end of the continuum. There are four components that define the fiscal dimensions of decentralization: '*(i)* allocation of expenditure responsibilities by central and local tiers of government; (ii) assignment of taxes by government tiers; (iii) the design of an intergovernmental grant system; and (iv) the budgeting

[1] See http://www.reservebank.co.za/internet/Publication.nsf/ (accessed on 22 April 2007) for clarification of the Reserve Bank's system of accommodation.

[2] See P Whelan 'The Local Government Grant System — Paper Two: Evaluating the Local Government Grant System' *IDASA Occasional Papers* (July 2003) 5. See also Ahmad et al (supra) at 12.

and monitoring of fiscal flows between different government tiers.'[1] When applied to South Africa, these criteria yield fairly clear conclusions: sub-national governments are directly elected; they have a constitutional responsibility for service delivery, a constitutional entitlement to nationally-raised revenue and the autonomy to formulate their own budgets and determine their own expenditure priorities (within broad strategic objectives). On this basis, it is fair to conclude that the Final Constitution does contemplate fiscal decentralisation.[2] Indeed, some commentators have called this conclusion 'self-evident'.[3] Actual fiscal practice, however, is not clearly aligned with this constitutionally-mandated structure.

Although it might be argued that the push towards decentralisation and local financial accountability is supported by the constitutional provisions earlier described, the extent to which municipalities have been forced into financial autonomy post-1994 is also an expression of policy choice. In other words, it would have been possible for more money to have been transferred to local government — particularly through equitable share — without sacrificing key aspects of decentralisation. Not surprisingly, these choices and the associated pressures on municipalities of cost recovery, credit control and disconnection of services have been the subject of sustained criticism in the literature.[4] Failures in the delivery of municipal services have been exacerbated by 'unfunded mandates' that have widened the gap between functional allocation and funding.[5] Some national government departments have acknowledged these problems. For example, a leading policy document cites among the challenges facing local government, 'financial and capacity constraints within local government and [t]he uncoordinated devolution of powers and functions to local government by national and provincial government.'[6]

(b) The Shift to Intervention

As under-funded municipalities with inadequate capacity have produced disappointing performance, the constitutional model of decentralised service provision has become contested. It is arguable that national government has become less convinced that the benefits of local democracies outweigh the costs of inadequate

[1] See Whelan 'The Local Government Grant System' (supra) at 8.
[2] See E Yemek 'Understanding Fiscal Decentralisation in South Africa' *IDASA Occasional Paper* (July 2005) 5. See also Whelan 'The Local Government Grant System' (supra) at 5.
[3] See Whelan 'The Local Government Grant System' (supra) at 5.
[4] See, eg, DA McDonald & J Pape *Cost Recovery and the Crisis of Service Delivery* (2002); G Hart *Disabling Globalization: Places of Power in Post-Apartheid South Africa* (2002); P Bond *Unsustainable South Africa* (2002).
[5] See § 27.3*(g)* supra.
[6] DPLG *Project Consolidate* (supra) at § 7.3*(g)*.

service delivery.[1] The result, in our view, has been ambiguous patterns of law-making and governmental practice. Some momentum away from decentralisation is clearly discernible. We have suggested a shift in national legislation towards economic regulation of local government.[2] At the level of policy it is possible to show significant national intrusion. For example, the policy of free basic services ('FBS'), which is a centre piece of municipal service provision, can be read as a *national* policy on municipal services rather than the expression of local democratic will.[3] At the level of operations and asset ownership, the Cabinet decision to shift from municipal provision of electricity to regional provision through six regional electricity distributors ('REDs') — all of which will be public entities under the PFMA — is a significant shift away from decentralized provision of a core municipal service.[4]

However, the basic decentralized model remains deeply entrenched. At a legislative level, efforts to amend the Final Constitution in order to allow for legislative authority to be exercised *on behalf of* a municipal council in times of financial crisis have not succeeded[5] and the PPP regime under the MFMA envisages a weaker role for National Treasury in respect of municipal PPPs than is the case for national and provincial PPPs. Indeed, the prospect of municipal financial failure under the MFMA clearly underscores the significant financial autonomy accorded to local government. Other indications of the survival of decentralisation include the assertive role of organised local government[6] and the fact that in comparison to conditional grants, the proportion of equitable share is increasing — a trend that increases municipal financial autonomy.[7] In addition, the approach of creating funding windows within

[1] It should be recalled that the premise for decentralization is that, 'devolving decision making power and responsibilities increases citizens engagement in local governance decisions and makes local governments more efficient and accountable. This implies that decentralization shifts power to citizens and local governments (elected and administrative) thereby enhancing their capacities to make effective choices — that is, to translate their choices into desired actions and outcomes'. See U Raich 'Fiscal Determinants of Empowerment' *World Bank Policy Research Working Paper 3705* (September 2005) 5. Poor municipal service provision has tested this justification for decentralisation.

[2] See § 27.6*(a)* supra.

[3] This assessment is suggested in passing by Paul Whelan. See P Whelan 'Local Government and Budget 2004' *IDASA Occasional Papers* (June 2004) 6–7, fn 3.

[4] A media statement issued on 26 October 2006 by EDI Holdings (Ltd) (the government body which oversees restructuring of the electricity distribution industry) expressed the strong belief that 'the regulation of a large, monopolistic integrated national system such as the Electricity Distribution Industry should be conducted by a professional independent regulator reporting to central government, rather than by hundreds of municipalities'. The statement is available at http://www.ameu.co.za/library/restructuring (accessed on 24 April 2007).

[5] See § 27.6*(c)* supra.

[6] Local Government is organised through the South African Local Government Association ('SALGA'). SALGA has been assertive on issues that impact financial autonomy or viability. A good example is the reform of the South African electricity distribution industry ('EDI') in which municipalities individually, and through SALGA, have actively engaged national policy formation.

[7] See IDASA 'Local Government in Budget 2005?' 154 *Budget Briefs* 7 (9 May 2005), available at http://www.idasa.org.za/ (accessed on 19 April 2007).

equitable share, andhence diminishing its unconditional nature has not survived in the current formula for equitable share. Furthermore, the Department of Water Affairs and Forestry has strongly affirmed the authority function of municipalities in its cabinet-approved proposals for institutional reform of the water sector. In doing so the Department has departed from the 'top-down' approach favoured for the restructuring of the electricity distribution industry.[1]

The question is whether municipal failures, when they have occurred, are related to inadequate access to finance — whether by way of an adequate tax base, sufficient inter-government grants or access to the money markets — or whether there are inherent structural deficiencies in the South African model of fiscal decentralisation. The former problem is arguably resolved by municipal capacity building, increased equitable share and national strategies to reduce poverty. These issues demonstrate a dilemma around decentralisation that is particularly acute in its earlier phases and is well-described in the literature:

> [d]uring the early phases of decentralization, as lower-tier governments adapt to their new responsibilities, the results in terms of service delivery may be disappointing. How can we distinguish between weak outcomes because of the transition and weak outcomes because of a fundamental flaw in the design of decentralization? In addition, decentralization opponents can use any early disappointing outcomes to build political momentum to slow down or even reverse decentralization. If the problem is one of transition, then how can these political forces be balanced by those who favor decentralization, even if they have little to show for it at the start? One obvious approach to managing the politics of decentralization is try to show early results on service delivery. This leads to a second dilemma. In order to show early results, it may be necessary to intervene and provide resources and technical assistance to lower-tier governments in ways that are different, and perhaps even inimical, to the long-run, sustainable success of decentralized service delivery.[2]

The indicators of momentum towards and away from decentralisation may suggest that National Treasury and the South African Parliament ought to confront these dilemmas directly. Because Chapter 13 and Chapter 7 of the Final Constitution give decentralisation a constitutional imprimatur, the pressure to improve service provision has favoured solutions that preserve the basic autonomy of local government while attempting to enhance service provision. These solutions have included a separation between the authority role and the service provision role, restructuring of the electricity and water sectors, grant funding to support national policy initiatives and increasingly interventionist regulation of service provision. At times, the outcomes have not been optimal. From the national perspective, the

[1] See Strategic Framework for Water Services s 3 (September 2003), available at http://www.info.gov.za/otherdocs/2003/waterstrat.pdf (accessed on 24 April 2007). The document states that '[p]rovision of water services is the constitutional responsibility of local government. Developmental and democratic local government is in the best position to make accountable decisions related to how services should be provided, taking into account the social and environmental aspects of water services.' Ibid at 10.

[2] See Ahmad et al (supra) at 22.

unconditional nature of equitable share does not make it optimal as a funding instrument for free basic services. Other devices, such as the separation of the authority and provider role, are very useful in reconciling local democratic will with the urgent need to improve service provision.

Chapter 13, and the legislation it has spawned, is central to an understanding and a resolution of these debates. At times, as we have shown, Chapter 13 and the Final Constitution do not settle key questions, such as where to allocate responsibility for public expenditure. Leaving these questions unsettled has inflamed the decentralisation debate. In other cases, the provisions of Chapter 13 are unambiguous. Local government is politically responsible for determining its own budget. It has its own revenue base. It has a right to a share in nationally raised revenue and to be involved in decision making around the allocation of nationally-raised revenue. No doubt, until service provision has stabilised, municipal autonomy will ebb and flow and the constitutional model of decentralised service provision will be tested in legislation and in practice.

28 Transitional Provisions On Executive Authority, Assets and Liabilities

Matthew Chaskalson

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28.1 Introduction

Much of the legislation on the South African statute books is 'old order' legislation that was enacted before 27 April 1994. Accordingly, it confers powers on executive authorities created by the constitutional regimes that governed South Africa prior to the enactment of the Interim Constitution.[1] In terms of Interim Constitution s 229 and Final Constitution[2] Schedule 6, Item 2(1), all old order legislation that has not been repealed continues in force subject to its consistency with the Interim and Final Constitutions respectively. The Interim Constitution regulated in some detail the transfer of executive power in respect of this old order legislation to the national and provincial executive authorities it created. The Interim Constitution also made corresponding provision for the transfer of State assets and liabilities from the old order executive authorities to the new national and provincial authorities. The transitional scheme of the Interim Constitution in respect of old order executive powers and old order State assets and liabilities was recognised and carried over into the period after 4 February 1997 by the Final Constitution. In order to understand the current position with respect to executive powers created by old order legislation and State assets and liabilities which existed prior to 27 April 1994, it is necessary to examine the transitional provisions of the Interim Constitution. This laborious exercise remains of relevance to contemporary constitutional law and litigation for two reasons. First, it determines whether national or provincial executive authorities may now lawfully exercise particular executive powers created by old order legislation, and whether national or provincial executive authorities have succeeded to specific old order assets. Second, it determines whether national or provincial legislatures may lawfully repeal or amend particular provisions of old order legislation. The latter consequence flows from the decision by the Constitutional Court in *DVB Behuising* that old order legislation may be amended or repealed by a provincial legislature only if it is legislation that was administered by provincial executive authorities immediately prior to the commencement of the Final Constitution.[3] As a result, the national or provincial succession under the Interim Constitution to executive authority in respect of old order legislation determines, under the Final Constitution, the legislative competence of Parliament and the provincial legislatures to repeal or amend the old order legislation in question.[4]

[1] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').
[2] Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC').
[3] *Western Cape Provincial Government and Others: in Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC)('*DVB Behuising*') at paras 18–34.
[4] See further Victoria Bronstein 'Legislative Competence' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz and S Woolman (eds) *Constitutional Law of South Africa* (2nd Edition, Forthcoming, 2004) ('*Constitutional Law 2nd Edition')* Chapter 15.

28.2 The Succession to Executive Authority in Relation to Old Order Legislation

(a) Transitional provisions in the Interim Constitution relating to executive authority[1]

(i) *Assignments of executive authority*

Under the Interim Constitution, the succession to executive authority in respect of old order legislation was governed by IC s 235. Section 235 reads, in relevant part, as follows:

> (1) A person who immediately before the commencement of this Constitution was —
> *(a)* the State President or a Minister or Deputy Minister of the Republic within the meaning of the previous Constitution;
> *(b)* the Administrator or a member of the Executive Council of a province; or
> *(c)* the President, Chief Minister or other chief executive or a Minister, Deputy Minister or other political functionary in a government under any other constitution or constitutional arrangement which was in force in an area which forms part of the national territory,
>
> shall continue in office until the President has been elected in terms of s 77(1)*(a)* and has assumed office . . .
>
> . . .
>
> (6) The power to exercise executive authority in terms of laws which, immediately prior to the commencement of this Constitution, were in force in any area which forms part of the national territory and which in terms of s 229 continue in force after such commencement, shall be allocated as follows:
> *(a)* All laws with regard to matters which –
> (i) do not fall within the functional areas specified in Schedule 6; or
> (ii) do fall within such functional areas but are matters referred to in paras *(a)–(e)* of s 126(3) . . .
>
> shall be administered by a competent authority within the jurisdiction of the national government . . .
> *(b)* All laws with regard to matters which fall within the functional areas specified in Schedule 6 and which are not matters referred to in paras *(a)–(e)* of s 126(3) shall –
> (i) if any such law was immediately before the commencement of this Constitution administered by or under the authority of a functionary referred to in ss (1)*(a)* or *(b)*, be administered by a competent authority within the jurisdiction of the national government until the administration of any such law is with regard to any particular province assigned under ss (8) to a competent authority within the jurisdiction of the government of such province; or

[1] The transitional provisions relating to executive authority are discussed in *Executive Council, Western Cape Legislature, & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) ('*Executive Council, Western Cape*') at paras 66–98 (Chaskalson P) and paras 162–89 (Kriegler J) and in *DVB Behuising* (supra) at paras 18–34.

(ii) if any such law was immediately before the said commencement administered by or under the authority of a functionary referred to in ss (1)*(c)*, subject to ss (8) and (9) be administered by a competent authority within the jurisdiction of the government of the province in which that law applies, to the extent that it so applies: Provided that this subparagraph shall not apply to policing matters, which shall be dealt with as contemplated in para *(a)*.

(c) In this subsection and ss (8) 'competent authority' shall mean -

(i) in relation to a law of which the administration is allocated to the national government, an authority designated by the President; and

(ii) in relation to a law of which the administration is allocated to the government of a province, an authority designated by the Premier of the province.

...

(8) *(a)* The President may, and shall if so requested by the Premier of a province, and provided the province has the administrative capacity to exercise and perform the powers and functions in question, by proclamation in the *Gazette* assign, within the framework of s 126, the administration of a law referred to in ss (6)*(b)* to a competent authority within the jurisdiction of the government of a province, either generally or to the extent specified in the proclamation.

(b) When the President so assigns the administration of a law, or at any time thereafter, and to the extent that he or she considers it necessary for the efficient carrying out of the assignment, he or she may -

(i) amend or adapt such law in order to regulate its application or interpretation;

(ii) where the assignment does not relate to the whole of such law, repeal and re-enact, whether with or without an amendment or adaptation contemplated in subpara (i), those of its provisions to which the assignment relates or to the extent that the assignment relates to them; and

(iii) regulate any other matter necessary, in his or her opinion, as a result of the assignment, including matters relating to the transfer or secondment of persons (subject to ss 236 and 237) and relating to the transfer of assets, liabilities, rights and obligations, including funds, to or from the national or a provincial government or any department of State, administration, force or other institution.

(c) . . .

(d) Any reference in a law to the authority administering such law, shall upon the assignment of such law in terms of para *(a)* be deemed to be a reference mutatis mutandis to the appropriate authority of the province concerned.

(9) *(a)* If for any reason a provincial government is unable to assume responsibility within 14 days after the election of its Premier, for the administration of a law referred to in ss (6)*(b)*, the President shall by proclamation in the Gazette assign the administration of such law to a special administrator or other appropriate authority within the jurisdiction of the national government, either generally or to the extent specified in the proclamation, until that provincial government is able to assume the said responsibility.

(b) Subsection (8)*(b)* and *(d)* shall *mutatis mutandis* apply in respect of an assignment under para *(a)* of this subsection.

Section 235 was designed to deal with the practical reality that, on 27 April 1994, a new constitutional framework was superimposed on a public administration that was not yet federal. According to IC s 235, most executive powers vested in the national government. Executive powers relating to 'provincial matters' (ie the functional areas listed in IC Schedule 6 which defined the ambit of provincial legislative authority) were to be assigned to the provinces as they developed the administrative capacity to deal with these powers. To this end, IC s 235 distinguished four categories of existing legislation:

(1) laws with regard to matters which did not fall within the functional areas specified in IC Schedule 6 (IC s 235(6)(*a*)(i));
(2) laws with regard to matters which fell within the functional areas specified in IC Schedule 6, but which fell within the ambit of the national government legislative override covered by IC s 126(3)(*a*)–(*e*) (IC s 235(6)(*a*)(ii));
(3) laws with regard to matters which fell within the functional areas specified in IC Schedule 6, which were not covered by the national government legislative override, and were, immediately prior to 27 April 1994, administered by provincial or national authorities within South Africa (IC s 235(6)(*b*)(i)); and
(4) laws with regard to matters which fell within the functional areas specified in IC Schedule 6, which were not covered by the national government legislative override, and were, immediately prior to 27 April 1994, administered by homeland authorities (IC s 235(6)(*b*)(ii)).

In terms of IC s 235(6), executive authority in respect of the first three categories of existing laws was allocated on 27 April 1994 to the national government. Executive authority in respect of the fourth category of laws was allocated to the relevant provincial governments. However, by virtue of Proclamation R102 of 1994,[1] promulgated by the President under IC s 235(9) on 4 June 1994, executive authority over the fourth category of laws was removed from the relevant provincial governments and assigned to the national government. Accordingly, the effect of IC s 235(6) and Proc. R102 was that executive authority over all old order legislation was initially reserved for the national government. The only way in which provincial governments could acquire executive authority over old order legislation was by presidential assignment under IC s 235(8). The express allocation of executive authority in respect of laws under IC s 235(6) was therefore superceded in all practical respects by the discretionary power of assignment of executive authority in respect of laws under IC s 235(8).[2]

IC s 235(8)(*a*) addressed only laws contemplated by IC s 235(6)(*b*). These laws fell within the third and fourth categories described above (ie laws with regard to matters which fell within the functional areas specified in IC Schedule 6, and

[1] *Regulation Gazette* 5344, *Government Gazette* 15781, 3 June 1994.
[2] The categorisation of laws under IC s 235(6) remains important only insofar as IC ss 235(6)*(b)*(i) and (ii) identify which laws may be assigned to the provinces under IC s 235(8).

which were not covered by the national government legislative override in IC s 126(3)). IC s 235(8)(*a*) provided that once the provinces had the necessary administrative capacity, the President was able, and, if requested by the Premier, was obliged, to assign by proclamation the administration of IC s 235(6)(*b*) laws to 'a competent authority within the jurisidiction of the government of a province'.[1]

Because IC s 235(8)(*a*) was confined in its operation to laws contemplated by IC s 235(6)(*b*), the validity of any assignment under IC s 235(8)(*a*) could be challenged on the grounds that the law assigned falls outside the scope of IC s 235(6)(*b*). In *Executive Council, Western Cape & Others v President of the Republic of South Africa & Others*[2] a majority of the Constitutional Court held that the purported assignment to the provinces under IC s 235(8) of the Local Government Transition Act[3] was invalid because the Act did not fall within the categories covered by IC s 235(6)*(b)*. Similarly, in *Western Cape Provincial Government & Others: in Re DVB Behuising (Pty) Ltd v North West Provincial Government & Another*,[4] a majority of the Court held that the purported assignment of certain provisions of Proclamation R293 of 1962 was invalid because the provisions in question did not fall within the categories covered by IC s 235(6)*(b)*. Both *Executive Council Western Cape* and *DVB Behuising* illustrate some of the difficulties of categorizing legislation for the purposes of IC ss 235(6) and 235(8).[5] Nevertheless, it is possible to identify certain general principles applicable to the categorisation exercise. First, it is not necessary, for the purposes of IC ss 235(6) and 235(8), to fit the whole of a given statute within a single category. If, within a single statute, there are some provisions which fall within the categories contemplated by IC s 235(6)*(b)* and others which do not, the former provisions will be capable of assignment under IC s 235(8) but the latter provisions will not.[6] Second, when classifying a law or provision for the purposes of IC s 235(6)*(a)* and *(b)*, the purpose of the legislation is the critical component of the inquiry. A law, the subject matter of which *prima facie* appears to fall outside IC Schedule 6, may nevertheless be classified as an IC s 235(6)*(b)* law if its true purpose is to regulate a matter within IC Schedule 6. The converse is equally true.[7] Finally, although IC s 235(6)*(b)* refers only to provisions falling within functional areas specified in IC

[1] IC s 235(6)(*c*)(ii) defined 'competent authority' as 'an authority designated by the Premier'.
[2] 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC).
[3] Act 209 of 1993.
[4] 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC).
[5] These difficulties are, in essence, those raised by the processes of categorising legislation for the purposes of determining provincial legislative competence and determining whether national or provincial legislation prevails in particular cases of legislative conflict. See M Chaskalson & J Klaaren 'Federalism' in M Chaskalson et al *Constitutional Law* (1st Edition, RS5, 1999) Chapter 5; Victoria Bronstein 'Conflicts' in M Chaskalson et al *Constitutional Law* (2nd Edition, Forthcoming 2004) Chapter 16; Victoria Bronstein 'Legislative Competence' in M Chaskalson et al *Constitutional Law* (2nd Edition, Forthcoming 2004) Chapter 15.
[6] *DVB Behuising* (supra) at para 23.
[7] Ibid at paras 37-38.

Schedule 6 and not to provisions which are necessary or incidental to such matters,[1] the Constitutional Court has held that such necessary or incidental provisions are also to be categorised as IC s 235(6)*(b)* provisions.[2]

(ii) *Administrative responsibility, executive authority and the interpretation of assigned legislation*

(aa) Administration of laws and power to exercise executive authority

The use of the terms 'administration of a law'[3] and 'power to exercise executive authority' in IC s 235 is potentially confusing. The terms may appear to have been used interchangeably in the section. This, however, is not the case. 'Power to exercise executive authority' is the authority to exercise powers conferred by law. 'Administration of laws' refers to political responsibility for the implementation of the laws in question. In *Zama v Minister of Safety and Security*,[4] Levinsohn J distinguished the two concepts in the following manner:

> The concepts of 'power to exercise executive authority in terms of laws' and 'laws administered by a competent authority within the jurisdiction of a national government' seem to me to be different . . . Both [paras] (6)(a) and (*b*) provide for these laws to be administered by 'competent authorities' within the jurisdiction of the national government or the provincial government, whatever the case may be. This appears to confer management functions upon the particular 'competent authority' rather than investing them with executive powers . . . In my view [subsec] (6) does not confer executive authority in terms of the existing laws upon the 'competent authorities' designated by the president. The subsection seeks to allocate the administration of the laws to either the national government or to a province.[5]

As Levinsohn J points out, the 'competent authorities' contemplated by IC s 235 do not necessarily acquire all the executive powers created by the laws in respect of which they were designated. The laws in question may have conferred different executive powers on a range of functionaries. The 'administration of the law' cannot therefore have meant the exercise of executive power under that law. Rather, it referred to the managerial control of the exercise of executive powers created by that law. Thus the significance of the designation of the competent authority was that he or she was the member of the Executive Council or Cabinet Minister under whose portfolio an assigned law would fall, and he or she became the party who was held politically responsible for the proper administration of the law in question.

[1] See IC s 126(2) in which legislative competence over matters incidental to the exercise of their legislative competence over schedule 6 matters expressly vest in the provinces.

[2] *DVB Behuising* (supra) at paras 55–59.

[3] Section 235(8) refers to 'administration of a law'. Section 235(6)(*a*) and (*b*) refer to 'laws [which] . . . shall be administered'.

[4] 1994 (4) SA 699 (D) ('*Zama*').

[5] Ibid at 703C–F.

(bb) Interpretation of assigned legislation

The IC s 235(8) proclamation assigning administration of laws to a province could amend any law to regulate its application or interpretation.[1] The extent of this power of amendment by proclamation was never clarified. In *Executive Council, Western Cape Legislature*[2] the Constitutional Court split evenly between judges who construed this power narrowly and those who construed this power broadly. The former read the power to embrace those amendments objectively necessary to achieve functional efficiency in the administration of the assigned laws.[3] The latter read the power to encompass any amendments that the President *bona fide* considered necessary for the efficient carrying out of an assignment.[4]

Where any relevant IC s 235(8) proclamation did not amend assigned legislation, the allocation of executive powers created by such legislation was a matter of statutory interpretation. Here the crucial transitional provisions of the IC were IC s 232(1)(*c*) and s 235(8)(*d*). Where the administration of an old order law was assigned to a province,[5] IC s 232(1)(*c*) provided that a reference in that law to 'a State President, Chief Minister, Administrator or other chief executive, Cabinet, Ministers' Council or executive council' should, 'unless it is inconsistent with the context or clearly inappropriate', be construed as a reference to the Premier acting in accordance with the Constitution.[6] Thus, all executive powers in laws assigned to a province which vested in a person or body referred to in IC s 232(1)(*c*) ordinarily vested in the Premier. IC s 232 provided no guidance on how references to Cabinet Ministers were to be construed. However, IC s 235(8)(*d*) provided that any reference in a law assigned to a province under IC s 235(8)(*a*) should 'be deemed to be a reference *mutatis mutandis* to the appropriate authority of the province concerned'.[7] Accordingly, where executive powers in old order

[1] Section 235(8)(*b*).

[2] *Executive Council, Western Cape* (supra)(Didcott, Kriegler and Langa JJ did not express a view on this issue).

[3] Ibid at paras 96–8 (Chaskalson P). Ibid at paras 146 and 198 (Ackermann, O' Regan and Sachs JJ concurring).

[4] Ibid at paras 144–6 (Mahomed DP)(Mokgoro J concurring). Ibid at paras 228–30 (Madala and Ngoepe JJ).

[5] The allocation of laws takes place under s 235(6). The assignment of laws takes place under s 235(8). See § 28.2*(a)*(i) above. See *President of the Republic of Bophuthatswana & Another v Milsell Chrome Mines (Pty) Ltd & Others* 1995 (3) BCLR 354, 366E–G (B). Waddington J seems to suggest that all old order legislation relating to IC Schedule 6 matters was, for the purposes of IC s 232(1), allocated to the provinces by IC s 147(2). With respect, that reading cannot be correct. IC s 232 contemplated only allocations effected by virtue of IC s 235(6).

[6] This would mean a reference to the Premier acting in consultation with the Executive Council because IC s 147(2) provided that, with some specified exceptions, none of which are relevant for present purposes, the President was to exercise his or her powers in consultation with the Executive Council.

[7] IC s 235(8)(*d*).

laws vested in Cabinet Ministers, the new order assignment by President of the laws in question to a province meant that executive powers vest in the relevant member of the Executive Council.[1] Likewise, where powers in old order laws vested in the administrative head of a department, under the new dispensation the administrative head of the relevant department of the provincial administration exercised the requisite power.

(b) Transitional provisions in the Final Constitution relating to executive authority

FC Schedule 6 gives continuing effect to any assignments effected under IC s 235(8). FC Schedule 6, Item 2(2) provides that pre-1994 legislation continues in force and is administered by the authorities that administered it when the Final Constitution took effect.[2] Thus assignments of administrative authority under IC s 235(8) of the Interim Constitution endure.

FC Schedule 6, Item 14 is the successor to IC s 235(8). It provides for the assignment to provinces of executive powers under legislation that *(a)* relates to Schedule 4 or 5 matters and *(b)* pre-dates the Final Constitution. The President is given the discretion to make such assignments by proclamation. Unlike IC s 235(8), Item 14 does not give the provinces the right to demand the assignment. The President may refuse to assign the relevant powers. Another significant difference is that Item 14 permits the assignment of *any* executive powers conferred by Schedule 4 or 5 legislation. It is not limited to matters in respect of which the national legislative override does not operate.

[1] There was no tension between IC s 232(1)(*c*) and IC s 235(8)(*d*) because the Premier was usually the 'appropriate authority' in respect of powers which vested in any person or body referred to in IC s 232(1)(*c*). In *Zama,* Levinsohn J stated:

> 'In my judgment, once it is found that the KwaZulu Police Act is a law which in terms of the Constitution has been allocated to the national government, then the situation which was envisaged in s 232(1)(*c*)(i) comes into effect and "Cabinet" is construed as a reference to "the President acting in accordance with this Constitution". In my view, the intention was that the President should assume the executive functions which were invested in those erstwhile functionaries. *That, to my mind, is totally consonant with the President's position as the principal arm of executive government.*'

Zama (supra) at 703J–704B (emphasis added). Where the Premier is not the appropriate authority in respect of powers which vested in a s 232(1)(*c*) body or functionary, the section will not operate to construe references to that body or functionary as references to the Premier because that would, of necessity, be 'clearly inappropriate'.

[2] FC Schedule 6 Item 2(2) reads, in relevant part, as follows: 'Old order legislation that continues in force . . . continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution.'

28.3 The Transfer of Old Order State Assets and Liabilities

IC s 239 regulated the allocation of state assets and liabilities existing on 27 April 1994 between the national and provincial governments. The first principle was that assets[1] associated with the administration of a particular law vested, at any given time, in the authority that had been allocated or assigned administrative responsibility in respect of that law in terms of IC s 235.[2] Assets not associated with the administration of any particular law were divided into two categories. In the first category, those assets that were to be applied in connection with a matter referred to in IC Schedule 6 that was not subject to the national government legislative override vested in the relevant provincial governments.[3] In the second category, those assets that were to be applied in connection with matters not covered by IC Schedule 6 or matters covered by IC Schedule 6 but subject to the national government legislative override vested in the national government.[4] IC s 239(1)*(d)* provided that, where assets could not be classified according to these principles, disputes between a provincial government and the national government were to be referred to the Commission on Provincial Government.[5] All public debts and liabilities that existed on 27 April 1994 were assumed by the national government.[6]

The Final Constitution contains no provisions relating to the succession to public assets that vested in governments disestablished by the Interim Constitution.[7] Ordinarily this textual silence will not create any difficulties. The national and provincial governments under the Final Constitution succeed the identical governments that existed under the Interim Constitution. Thus assets that were owned by any particular government under the Interim Constitution will remain the property of that government under the Final Constitution. Where, however, a public asset that pre-dated the Interim Constitution was not capable of allocation

[1] 'Assets' were defined by IC s 239(1) to include funds and administrative records. The broad use of the term suggests that it covered all debts owed to a government. See *Government of the Republic of South Africa v Malevu* 1995 (8) BCLR 995, 998I–J (D).

[2] IC s 239(1)(*c*). The provisions relating to the assignment of administrative responsibility over existing legislation are discussed above at . . . 28.2(*b*). The relationship between these provisions and IC s 239, the transitional provision relating to state assets, was described by Kriegler J in *Executive Council, Western Cape* (supra) at para 176.

[3] Section 239(1)(*b*). The wording of s 239(1)(*b*) was confusing. The section referred to any 'matter which is not a matter referred to in paragraphs (*a*) to (*e*) of section 126(3)', but it obviously ought to have referred to 'any matter falling within a functional area specified in Schedule 6 which is not a matter referred to in paragraphs (*a*) to (*e*) of section 126(3)'. Cf the wording of IC s 239(1)(*a*).

[4] IC s 239(1)(*a*).

[5] IC s 239(1)(*d*).

[6] IC s 239(3)(*a*) as amended by s 11 of the Constitution of the Republic of South Africa Second Amendment Act 44 of 1995.

[7] It appears to have been drafted on the assumption that all such questions of succession to assets would have been resolved under the Interim Constitution, either by operation of law in terms of ss 239(1)(*a*)–(*c*), or by agreement in terms of s 239(1)(*d*).

in terms of the rules of IC ss 239(1)(*a*)–(*c*), and was not allocated in terms of s 239(1)(*d*), a problem arises. IC section 239(1)(*d*) no longer exists and the Final Constitution contains no procedure comparable to IC s 239(1)(*d*) by which to allocate such an asset. In such a situation, while the asset would vest in the State, there would be no obvious mechanism for its allocation to the provincial or national governments as agents of the State.[1]

The Final Constitution does not regulate the succession to public liabilities that pre-date 27 April 1994. Unlike assets, however, there is no need for it to do so. The Interim Constitution provided that all these liabilities were assumed by the national government.[2]

[1] In the absence of any legislation regulating the issue, the allocation of the asset between provincial and national governments would have to be negotiated between the governments concerned, having regard to the principles of co-operative government set out in Chapter 3 of the Final Constitution.

[2] IC s 239(3)(*a*) as amended by s 11 of the Constitution of the Republic of South Africa Second Amendment Act 44 of 1995.

29 Elections

Glenda Fick

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29.1 INTRODUCTION

In a representative democracy, elections provide the primary means through which citizens express the general will of the polity.[1] The Final Constitution vouchsafes free, fair and regular elections for every legislative body established in terms of the Constitution[2] and guarantees those political rights such elections require.[3]

While the Final Constitution and our electoral laws refer to free and fair elections, they do not tells us what free and fair actually means. The standard embraces several related concerns. An election is free and fair if *(a)* all candidates and voters have the opportunity to exercise all relevant rights; *(b)* each voter counts as one; and *(c)* all candidates and parties campaign on a formally equal basis.[4]

This chapter will canvass both the constitutional provisions and the enabling legislation designed to secure free and fair national, provincial and municipal elections.[5] This chapter will also engage those constitutional provisions and legislative enactments that govern the Electoral Commission.[6]

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[1] Sunstein makes the point that '[a] good constitution ensures democratic elections and a free press.' He goes on to say that the central goal of a constitution is to create the preconditions for a well functioning democratic order, one in which citizens are genuinely able to govern themselves. See C R Sunstein *Designing Democracy: What Constitutions Do* (2001) 6.

[2] Constitution of South Africa Act 108 of 1996 (the 'Final Constitution' or 'FC'), s 1*(d)*, reads, in relevant part: The Republic of South Africa is one, sovereign, democratic state founded on the following values . . . [u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

[3] FC s 19 reads, in relevant part: (1) Every citizen is free to make political choices, which includes the right to form a political party, to participate in the activities of, or recruit members for, a political party, and to campaign for a political party or cause. (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution. (3) Every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret, and to stand for public office and, if elected, to hold office.

[4] See P De Vos 'Free and Fair Campaigning in N Steytler et al (eds) *Free and Fair Elections* (1994) 119 (Free and fair elections form the bedrock of a democratic society, instilling popular confidence in the system of government and in the governors themselves as representing the will of the people.) See also J Elklit and P Svensson 'The Rise of Election Monitoring: What Makes Elections Free and Fair?' (1997) 8(3) *Journal of Democracy* 32-46. Free and fair elections is the internationally accepted standard. See Centre for Human Rights *Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections* (1994); *SADC Principles and Guidelines Governing Democratic Elections* (2004) 3.

[5] The provisions relating to the election of the national and provincial legislatures are set out in FC ss 46 and 105, respectively. FC s157 addresses the election of legislative structures in local government. The most important pieces of electoral legislation are the Electoral Commission Act 51 of 1996, the Electoral Act 73 of 1998 and the Municipal Electoral Act 27 of 2000. See also *Mketsu & others v African National Congress & others* 2003(2) SA 1 (SCA), 2002(4) All SA 205 (SCA). In *Mketsu*, the Supreme Court of Appeal pointed out that the Electoral Act was to be applicable to national, provincial and municipal elections under FC s 3. Parliament provided that the Act was to come into effect at a date to be proclaimed and that s 3*(c)*, which addressed municipal elections, would come into effect later than the rest of the Act. As it turned out, no such date making the Act applicable to municipal elections was proclaimed. Instead, Parliament passed the Municipal Electoral Act 27 of 2000. The provisions of this Act are similar to the Electoral Act. Indeed, s 78 of the former contains the same provisions as s 96 of the latter.

[6] FC s 190(1)*(a)-(b)*.

29.2 VOTING IN NATIONAL, PROVINCIAL AND MUNICIPAL ELECTIONS

The right to vote is qualified by the requirement that one must be a registered voter. Unlike the 1994 election, for which there was no voters' roll, the Final Constitution, contemplates an electoral system based on the national common voters' roll for the election of the National Assembly.[1] Elections for the provincial legislatures and municipal councils are based on the province's segment and the municipality's segment of the national common voters' roll respectively.

The Electoral Act 73 of 1998 creates an environment for free and fair elections of the national and provincial legislatures. Although the Act does not define a free and fair election, compliance with its provisions results in elections that can be regarded as free and fair. The Electoral Act ensures that all South African citizens whose names appear on the voters roll have the right to vote.

The compilation of the national common voters' roll by the chief electoral officer requires a voter registration process.[2] Any South African citizen in possession of an identity document may apply for registration as a voter. The required identity document is a bar-coded identity document that contains computerised information about a potential voter. The information contained in the barcode that is used to construct the voters' roll.

The necessity of possessing a bar-coded identity document as a prerequisite for registering as a voter proved controversial in the run-up to the 1999 national and provincial elections. Many South Africans citizens did not possess the required identity document.[3]

(a) Identity documents and voter registration

In *New National Party of South Africa v Government of the Republic South Africa*,[4] the Constitutional Court recognised the significance of free and fair elections in relation to the right to vote.[5] The Court stated:

> The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised.[6]

This broadly stated principle has two concrete implications. First, each citizen must be entitled to vote only once in an election. Secondly, only those persons

[1] FC ss 46, 105 and 157.

[2] Section 6 of the Electoral Act.

[3] For purposes of the general registration of voters prior to the 1999 elections, an identity document included a temporary certificate, issued by the Director-General of Home Affairs, to a South African citizen from particulars contained in the population register and who had applied for an identity document.. Therefore, citizens who had taken steps to apply for an identity document and who were in possession of a temporary registration certificates were eligible to register and once registered, qualified to vote in the second democratic election of the National Assembly and provincial legislatures.

[4] 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) ('NNP').

[5] Ibid.

[6] Ibid at para 12.

entitled to vote should be permitted to do so. In order to ensure the proper exercise of the right to vote, [t]he process of registration and voting needs to be managed and regulated in order to ensure that the elections are free and fair.[1] The *NNP* Court held that the Electoral Act creates the appropriate mechanisms for voter registration, voting and the construction of the national common voters roll. In particular, the *NNP* Court was satisfied that a bar-coded identity document constituted a rational means of realizing the legitimate government purpose of enabling the effective exercise of the right to vote.

In *Democratic Party v Minister of Home Affairs* the constitutionality of the provisions of the Electoral Act that provide for the documents necessary for registration and voting were challenged.[2] Goldstone J, writing for the Court, took the view that the issues relating to the constitutionality of the Electoral Act in the present case were substantially similar to those addressed by the court in *New National Party*. In the Electoral Act, Parliament expressly excluded certain citizens from registering as voters. The Act provides that the chief electoral officer may not register a person as a voter if the person has not registered in the prescribed manner or has applied for registration fraudulently. Other bars to registration (and voting) are: being declared by the High Court to be of unsound mind or mentally disordered, detention under the Mental Health Act, and not being ordinarily resident in the voting district for which a person has applied for registration.[3]

(b) Voting rights of prisoners

The Interim Constitution contained provisions that permitted Parliament to qualify the right to vote.[4] Section 16*(d)* of the Electoral Act 202 of 1993 denied the right to vote to prisoners who had been convicted and sentenced without the option of a fine in respect of murder, robbery with aggravating circumstances and rape; or who had been convicted and sentenced without the option of a fine for any attempt to commit these offences. The Electoral Act 73 of 1998 did not expressly deny any category of prisoner the right to vote in a South African election.

Just prior to the 1999 elections, the Constitutional Court considered the voting rights of prisoners. In *August v Electoral Commission*, the Court held that prisoners were not excluded from voting by the provisions of s 8(2) of the Electoral Act, were entitled to register as voters and could not be disenfranchised.[5] Furthermore, all prisoners who had registered to vote were entitled to vote in the election of the national and provincial legislatures in 1999.

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[1] *NNP* supra at para 16.

[2] 1999 (3) SA 254 (CC), 1999 (6) BCLR 607 (CC).

[3] Section 8(2) of the Electoral Act.

[4] Section 6*(c)* and s 21(2) of the Constitution of the Republic of South Africa 200 of 1993 (the Interim Constitution or 'IC').

[5] 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) ('*August*').

In its prefatory remarks in *August*, the The Constitutional Court quoted the following dictum from *Haig*:

> All forms of democratic government are founded on the right to vote. Without that right, democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is the proud badge of freedom. While the Charter guarantees certain electoral rights, the right to vote is generally granted and defined by statute. That statutory right is so fundamental that a broad and liberal interpretation must be given to it. Every reasonable effort should be made to enfranchise citizens. Conversely, every care should be taken to guard against disenfranchisement.[1]

After establishing that the Constitution did not disenfranchise prisoners, the *August* Court had to determine whether there was any basis in law to do so. According to the court, [r]ights may not be limited without justification, and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.[2] Since Parliament had failed to limit the voting rights of prisoners in terms of a law of general application that was reasonable and justifiable under FC s 36, prisoners were entitled to the full and effective citizenship.[3] That includes the right to vote.

In *August*, the Court was also required to interpret the phrase 'ordinarily resident' in s 7(1) of the Electoral Act. It held that the phrase had to be interpreted to allow for the enfranchisement of voters. In the circumstances of the case, those prisoners imprisoned during the period of voter registration would be considered ordinarily resident in prison.[4]

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[1] *Haig v Canada* 105 DLR (4th) 577, 613 (SCC) cited in *August* (supra) at para 18. The textual argument in August had a number of different sources. FC s 1*(d)* recognises universal adult suffrage, a national common voters roll and a multi party system of democratic government to ensure accountability, responsiveness and openness. Under the Constitution, there is a common South African citizenship. All citizens are equally entitled to the rights privileges and benefits of citizenship, and equally subject to the duties and responsibilities of citizenship. FC ss 3(1) and (2). Section 3(3) requires legislation to determine the acquisition, loss and restoration of citizenship. The Constitution does not define citizenship, but states that [n]o citizen may be deprived of citizenship. FC s 20. In *August* the court was concerned with citizenship but offers no interpretation of the right to citizenship set out in s 20. Citizenship is a contested concept. TH Marshalls' influential conception of citizenship depicts it as a complex interplay of social, political and civil rights. T Marshall *Citizenship and Social Class* (1950) extract reprinted in P Clark (ed) *Citizenship* (1994) 173. These three components are adequately provided for in the Constitution. Under Marshalls' account of citizenship, the political element means the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body. See R Lister *Citizenship: Feminist Perspectives* (1997) 15-16. The Constitution gives effect to this aspect of citizenship in s 19(3). It links all political rights, including the right to vote, to citizenship. FC s 19(3) grants the right to vote for all legislative bodies to all adult citizens. As the section stands, it must be read to include prisoners. To this end, the *August* Court stated:

> The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally it says that everybody counts.

August (supra) at para 16.

[2] *August* (supra) at para 17.

[3] Ibid at para 16.

[4] Ibid at para 27.

After the Constitutional Courts' decision in *August*, Parliament amended s 7 of the Electoral Act.[1] The amendment states that a person is regarded as ordinarily resident at the home or place where that person normally lives and to which that person regularly returns after any period of temporary absence. The amendment also states that a person is not regarded as ordinarily resident at a place where that person is lawfully imprisoned or detained, but at the last home or place where that person normally lived when not imprisoned or detained.

The matter of the prisoners' franchise was revisited before the 2004 national and provincial elections. Parliament had amended the Electoral Act so as to rescind the right to vote from convicted prisoners who were in prison without the option of a fine.[2] In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)*, the Constitutional Court held that these provisions that denied convicted prisoners serving sentences without the option of a fine of the right to register for and to vote in elections during the period of imprisonment were unconstitutional.[3]

In *NICRO,* the Constitutional Court, pointing out that in a justification analysis facts and policy are intertwined, required the Minister of Home Affairs to justify a legislative enactment limiting the right to vote.[4] In *NICRO* the Court heard from counsel that government had distinguished three classes of prisoners: (1) awaiting trial prisoners who were entitled to be presumed innocent, (2) prisoners who had been sentenced to a fine with the alternative of imprisonment, and who were in custody because they had not paid the fine; and (3) prisoners incarcerated without the option of a fine. Only the third group was to be excluded from registering and voting. The government argued that since there were law-abiding citizens who were, for various reasons, unable to get to registration and voting stations, then it was both reasonable and justifiable to prefer to allocate its scarce resources for the enfranchisement of such citizens to vote and rather than continued enfranchisement of the third group of prisoners.[5] Considerations of equity, and the perception that the electorate would view the government as soft on crime were it to allow the prisoners to vote, were also said to have animated the government's decision.[6]

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[1] See Schedule 2 to the Local Government: Municipal Electoral Act 27 of 2000.

[2] Section 8(2) reads, in relevant part: 'The chief electoral officer may not register a person as a voter if that person:*(f)* is serving a sentence of imprisonment without the option of a fine.' Section 24B(1) reads, in relevant part: 'In an election for the National Assembly or a provincial legislature, a person who on election day is in prison and not serving a sentence of imprisonment without the option of a fine and whose name appears on the voters roll for another voting district, is deemed for the for that election day to have been registered by his or her name having been entered on the voters roll for the district in which he or she is in prison.' Section 24B(2) reads, in relevant part: 'A person who is in prison on election day may only vote if he or she is not serving a sentence of imprisonment without the option of a fine.'

[3] 2004 (5) BCLR 445 (CC) (*'NICRO'*).

[4] *NICRO* (supra) at para 35.

[5] Ibid at para 44.

[6] Ibid at para 55.

With respect to the structure of the government's argument for restricting the franchise of prisoners, the *NICRO* Court wrote:

> Where justification depends on factual material, the party must establish the facts on which the justification depends. Justification may, however, depend not on disputed facts but on policies directed to legitimate government concerns. If that be the case the party relying on justification should place sufficient information before the court as to the policy that is being furthered, the reasons for that policy, and why it is considered reasonable in pursuit of the policy to limit a constitutional right.[1]

The Court then concluded that while resources cannot be ignored in assessing whether reasonable arrangements have been made for enabling citizens to vote, the mere assertion by the government that it could not afford to reach out to non-incarcerated citizens at the same time as it continued to facilitate prisoner enfranchisement did not satisfy the aforementioned standard of justification. [2] So although the government had asserted that it would be costly and logistically difficult[3] to make the necessary electoral arrangements for prisoners, it had failed to provide the court with sufficient information on the actual costs of such an endeavour.[4]

With respect to policy, the Court rejected the governments desire to enhance its image and to correct a public misconception as to its true attitude to crime as grounds for the disenfranchisement of the third class of prisoners.[5] The Court assumed, for the sake of argument, that what the government actually intended to convey was that it is important for [it] to denounce crime and to communicate to the public that the rights that citizens have are related to their duties and obligations as citizens.[6] But even this argument, against the background of the the almost tangential manner in which the government justified its policy arguments for the disenfranchisement of the prisoners, could not save the challenged amendment. The Court ordered the Electoral Commission and the Minister of Correctional Services to ensure that all prisoners who were entitled to vote were

[1] *NICRO* (supra) at para 36.
[2] Ibid at para 48.
[3] Ibid at para 50
[4] Ibid at para 49 (The factual basis for the justification based on cost and the lack of resources had not been established.)
[5] Ibid at para 57.
[6] Ibid at para 57. These duties and obligations include at least an obligation to respect the rights of others and to comply with the law. Ibid at para 57. Embedded in the courts statement is a conception of citizenship that it does not elaborate on. The balancing of rights and obligations are essential to an understanding of the concept of citizenship. In relation to citizenship, Lister writes '[f]ew would dispute that responsibilities as well as rights enter the citizenship equation. The questions is what is the appropriate balance between the two and how does that balance reflect power relations.' R Lister *Citizenship: Feminist Perspectives* (1997) 21. Besides saying that the rights of citizenship under FC s 3 include the right to vote in elections and that the duties and responsibilities include at least an obligation to respect the rights of others and to comply with the law the court says nothing else about what citizenship under FC s 3 and FC s 20 might entail. *NICRO* (supra) at para 24.

afforded the opportunity to register as voters and to vote in the 2004 national and provincial elections.[1]

29.3 Election of the National and Provincial Legislatures

(a) Calling for elections

The National Assembly and provincial legislatures are elected for a period of five years.[2] If the National Assembly is dissolved or if National Assemblys term expires, the President must call for and set dates for an election that must be held within 90 days of the date of either the dissolution or term expiration. A proclamation calling and setting dates for an election may be issued either before or after the expiry of the term of the National Assembly. The election must take place on a single day announced by the President after consultation with the Electoral Commission.

FC s 109 sets out a set of similar provisions applicable to the election of provincial legislatures. The Premier calls for these elections.

The Electoral Commission may request that the person who called an election postpone the voting day if is satisfied that such postponement is necessary for the ensuring a free and fair election and that the voting day will still fall within the period required by the Constitution or by national or provincial legislation.[3] If the request is acceded to, the President or Premier, by proclamation or notice in the *Government Gazette*, must postpone an election to a day determined by the President or Premier. However, the new voting day must fall within the period required by the Constitution or national or provincial legislation.[4]

(b) Composition of the National Assembly and provincial legislatures

The National Assembly is elected to represent the people and to ensure government by the people under the Constitution.[5] It consists of 400 elected women and men. They are elected in terms of an electoral system that is prescribed by national legislation[6]; is based on the national common voters roll; provides for a minimum voting age of 18 years and results, in general, in proportional

[1] *NICRO* also had a bearing on the 2005 municipal elections. Section 7 of the Municipal Electoral Act states that a person may vote only if registered as a voter on the certified segment of the voters roll for a voting district which falls within the municipality. The compilation of the voters roll takes place in accordance the provisions of s 8 of the Electoral Act. After *NICRO*, s 8(2)*(f)* was found to be unconstitutional. Prisoners are now allowed to register to vote and should be allowed to vote in the municipal elections.

[2] FC ss 49(1) and 108(1).

[3] Section 21(1) of the Electoral Act.

[4] Ibid at s 21(2).

[5] FC s 42(3).

[6] See schedule A to the Electoral Act 73 of 1993. The schedule was introduced by the Electoral Laws Amendment Act 34 of 2003 and provides for a system of close-list proportional representation.

representation.[1] An Act of Parliament must provide a formula for determining the number of members of the National Assembly.[2] This formula is set out in schedule 3 to the Electoral Act.

A provincial legislature should be elected according to an electoral system based on the same principles applicable to the election of the National Assembly. It should have between 30 and 80 members.[3] Schedule 3 to the Electoral Act sets out the formula for determining the number of seats held by parties in the provincial legislatures.

In *Premier of the Province of the Western Cape v The Electoral Commission*, the Constitutional Court found the number of seats in a provincial legislature provided for in a provinces constitution would prevail over the number of provincial seats determined by the Electoral Commission in accordance with schedule 3 to Electoral Act.[4] The Constitutional Court held that FC s 105(2) has no application to the composition of a provincial legislature that is otherwise provided for in a provincial constitution. If FC s 105(2) did not apply to said composition, then neither would any legislation authorised by that section.[5]

The Constitution confers on a provincial legislature the power to make its own provincial constitution.[6] FC s 143(1) permits provincial legislatures to provide for different legislative structures and procedures to those provided for in the default provisions in chapter 6 of the Constitution.[7] In *Certification of the Constitution of the Province of Kwa-Zulu Natal,* the Constitutional Court had held that legislative and executive structures and procedures did not relate to the fundamental nature and substance of the democratic State created by the Interim Constitution nor to the substance of the legislative or executive powers of Parliament or government of the provinces. In *Certification of the Constitution of the Western Cape*, the Constitutional Court found that structures of the legislature or executive pertained to the component parts of the legislature or the executive. With respect to these component parts, a provincial constitution could depart from the default provisions. Hence,

[1] FC s 46(1).

[2] See s 114 of the Electoral Act. The formulae referred to in sections 46(2) and 105(2) of the Constitution are set out in schedule 3 to the Electoral Act.

[3] FC s 105.

[4] 1999 (11) BCLR 1209 (CC) (*'Premier of the Province of the Western Cape'*). The factual background of *Premier of the Province of the Western Cape v The Electoral Commission* is as follows. Before the June 1999 election, the Electoral Commission determined that there would be 39 seats allotted to the Western Cape legislature. However, the provinces constitution allowed for 42 seats. The parties were unsuccessful in resolving the dispute and on an urgent basis approached the court for a declaratory order. The respondents contended that the conflict between the provincial constitution and national legislation was to be resolved in accordance with s 147 of the Constitution.

[5] FC s 105(2) provides that a provincial legislature consists of between 30 and 80 members and that the number of members, which may differ among the provinces, must be determined in terms of national legislation.

[6] The scope of the constitution-making powers of the provinces was considered by the Court in *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of Kwa-Zulu Natal 1996,* 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC) and *Ex Parte Speaker of the Western Cape Certification Provincial Legislature: In re Certification of the Constitution of the Western Cape, 1997* 1998 (1) SA 655 (CC), 1997 (12) BCLR 1653 (CC) (*'Speaker of the Western Cape'*).

[7] *Premier of the Province of the Western Cape* (supra) at para 9.

a province could provide in its constitution that its legislative and executive component parts could operate quite differently from those provided for in the national Constitution. However, any difference would have to comply with FC s 143. Section 143(2)*(a)* requires compliance with the founding values and the principles of co-operative government. Section 143(2)*(b)* states that a provincial constitution may not confer on a province any powers beyond those conferred upon it by the Constitution. Read together *Certification of the Constitution of the Province of Kwa-Zulu Natal* and *Certification of the Constitution of the Western Cape* lead to the conclusion that the determination of the number of seats in a provincial legislature pertained to a legislative structure and could therefore be addressed by a provincial constitution.[1]

In *Ex Parte Speaker of the Western Cape Certification Provincial Legislature: In re Certification of the Constitution of the Western Cape, 1997*, the Constitution Court was asked to decide whether a provincial electoral system is a provincial structure contemplated by FC s 143(1)*(a)*.[2] An electoral system provides a mechanism for converting votes cast by the electorate to seats in an elected body. The degree of correspondence between the number of votes cast and the seats won is determined by the choice of electoral system. The system of proportional reprsentation provided for in the provincial constitution of the Western Cape was not consistent with the one provided for in Annexure A to Schedule 6 of the Final Constitution. The province argued that an electoral system related to the structure of the provincial legislature. Since it was allowed to provide for legislative structures different from those set out in Chapter 6 of the Final Constitution, then it was similarly allowed to alter the electoral system. The Constitutional Court dismissed this argument. The Court held that when FC s 143 permits a provincial legislative structure different to that provided for in FC Chapter 6, it envisages no more than a difference regarding the nature and the number of the elements constituting the legislative structure. An electoral system does not constitute one of these elements. It also has no effect on the nature or the number of such elements.[3] Hence, the provisions of the provincial constitution that allowed for an electoral system that was predominantly based on representation in geographic multi-member constituencies were held to be inconsistent with the electoral scheme provided for in the Final Constitution

(c) The electoral system applicable to the national and provincial elections

Item 6(3) of Schedule 6 to the Final Constitution sets out a variety of transitional arrangements. It states that:

[1] Given that there was no conflict between national legislation and the provisions of the provincial constitution, the dispute resolution mechanism provided for in FC s 147(1)*(a)* did not apply.

[2] 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC).

[3] *Speaker of the Western Cape* (supra) at para 48.

Despite the repeal of the previous Constitution, schedule 2 to that Constitution, as amended by Annexure A to this schedule, applies:

(a) to the first election of the National Assembly under the new Constitution;

(b) to the loss of membership of the Assembly in circumstances other than those provided for in section 47 (3) of the new Constitution; and

(c) to the filling of vacancies in the Assembly, and the supplementation, review and use of party lists for the filling of vacancies, until the second election of the Assembly under the new Constitution.

Schedule 2 to the Interim Constitution (as amended by Annexure A to schedule 6 to the 1996 Constitution) sets out the details of the closed-list proportional representation system that applied to the 1994 and 1999 national and provincial elections. Item 11(1) of schedule 6 contains similar provisions relating to the election of the provincial legislatures.

During the 1994, 1999 and 2004, national and provincial elections in South Africa relied on a system of closed-list proportional representation (PR). Under this system, a political party receives a share of seats in a legislature in direct proportion to the number of votes cast for the party in the election.

There is no constitutional or legislative provision that extended the closed-list proportional representation system beyond 1999. After the 1999 elections, South Africa experienced the unusual situation of not having in place an electoral system applicable to national and provincial elections. An amendment to the Electoral Act in 2003 corrected the situation.[1] The Act constitutes the national legislation contemplated by ss 46(1) and 105(1). Schedule 1A of the Electoral Laws Amendment Act 34 of 2004 sets out the closed-list PR system applicable to future elections.

Under this system political parties compile lists containing the names of the candidates they have nominated. The parties rank their candidates in order of preference, with the leader of a party topping its list. The lists are closed. That is, a voter is not able to express with his or her vote any preference for a particular candidate on the list over another. The essence of the system is that the proportion of all the votes cast for a party is translated into a proportionate number of seats in the legislature. All votes are equally weighted and no votes are wasted. The system is valued for its simplicity. Voters make a mark next to the name and symbol of the party for which they wish to vote.

An important feature of this system is that the seat held by a member of a legislature belongs to the party that nominated the candidate and not to an individual candidate.[2] Another feature of the electoral system is its inclusiveness. It

[1] See Schedule 1A to the Electoral Act 73 of 1998 introduced by the Electoral Laws Amendment Act 34 of 2004.

[2] See *Speaker of the National Assembly v Makwetu* 2001 (3) BCLR 302, 308 (C)(Hlope JP and Davis J held that the amount of seats allocated to each party was dependent on the votes cast in favour of such party at the general election. Once a member of the National Assembly ceased to be a member of a particular political party, that party was entitled to fill the vacancy by nominating a person whose name appeared on the list of candidates from which the vacating member was originally nominated and who was the next qualified and available person on the list.)

requires no minimum threshold of votes to secure representation in a legislative body. The system is capable of accommodating a wide spectrum of political parties representing a range of voters interests.[1]

Compared to constituency-based systems, closed-list PR more readily enables higher levels of womens representation in legislative bodies. One reason advanced for this outcome is that the electorate is required to vote for a party rather than for an individual. It is argued that voting in this manner allows voters and parties to overcome the negative stereotyping of women in politics. Of course, party lists only increase the chance of female representation in legislatures when women appear in winnable places on a partys list.[2]

South Africas closed-list PR electoral system is often criticised for falling short on accountability. According to one definition political accountability refers to the constraint placed on the behaviour of public officials by organisations and constituencies with the power to apply sanctions to them.[3] Lodge notes that under South Africa's electoral system, elected representatives are directly accountable to their leaders, not the electorate.[4] PR lacks the responsiveness and accountability that exists in the constituency-based system.[5]

The electoral system received the attention of the government appointed Electoral Task Team (ETT) in 2002. In order to address the lacuna in South Africa's constitutional and electoral law mentioned earlier, the ETT's brief was to prepare draft legislation for an electoral system that would meet the requirements of FC ss 46(1)*(a)-(d)* and 105(1)*(a)-(d)*. These sections require that national legislation

[1] See *United Democratic Movement v President of South Africa* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1213 (CC) ('*United Democratic Movement*'). The Court wrote that a multi-party system of democratic government required by FC s 1*(d)*:

> . . . clearly excludes a one-party state, or a system of government in which a limited number of parties are entitled to compete a multi-party democracy contemplates a political order in which it is permissible for different political groups to organise, promote their views through public debate and participate in free and fair elections. These activities may be subjected to reasonable regulation compatible with an open and democratic society. Laws which go beyond that, and which undermine multi-party democracy, would be invalid. What had to be decided, therefore, was whether the disputed legislation had this effect.

[2] In South Africas 1994 and 1999 elections the percentage of women in the National Assembly was 27 per cent and 30 per cent respectively. High levels of womens representation are more likely to occur when closed-list PR is used along with a quota that favours women candidates. For example, the ANCs policy in 1994 and 1999 made women one third the candidates on its list. See J Ballington 'Political Parties, Gender Equality and Elections' in South Africa in G Fick, S Meintjes & M Simons (eds) *One Woman, One Vote*: *The Gender Politics of South African Elections* (2002) 75-102. In 2004, the ANC increased the number of women candidates on its lists to 40 per cent. After the 2004 elections women now hold 123 of the 400 seats (31 per cent) in the National Assembly. It is unclear how many women voters voted for parties which reflected their interests and which promoted gender equality and non-sexism. It is also worth noting that SADC Heads of State signed the Gender and Development Declaration in Blantyre, Malawi in 1997. The Declaration's provisions include a commitment on the part of Heads of State to ensure the equal representation of women and men in the decision-making of member states and SADC structures at all levels, and the achievement of at least 30 per cent target of women in political and decision-making structures by year 2005. The ANC has made a public commitment that by 2009 half of its members of parliament and other public representatives would be women.

[3] PIMS & The Right to Know Programme Regulation of Private Funding to Political Parties IDASA Position Paper (October 2003) 10.

[4] T Lodge 'How the System Works' *Election Update (South Africa)* Number 1 (February 2004) 2.

[5] Ibid.

prescribes an electoral system that is based on the national common voters' roll; that provides for a minimum voting age of 18 years; and that results, in general, in proportional representation. FC s 46(2) requires an act of Parliament to provide a formula for determining the number of members in the National Assembly. FC Section 105(2) governs membership in provincial legislatures.

The ETT reviewed the closed-list PR system that had applied to the 1994 and 1999 national and provincial elections. All members of the ETT recommended that this electoral system apply to the 2004 election.

A minority of ETT members proposed no changes to the electoral system. Under this system, of the 400 members in the National Assembly, 200 are elected from the national lists and 200 from the regional lists submitted by political parties. The regional lists are derived from the nine provinces.[1]

The majority of ETT members proposed a change to the electoral system for the 2009 national and provincial elections. It took the view that under the 1994 and 1999 electoral system, each of the nine provinces could readily be regarded as a multi-member constituency. In its view, the number of multi-member constituencies could be increased if the each of the provinces was broken down into smaller constituencies.[2] It was proposed that the nine multi-member constituencies be increased to 69 multi-member constituencies countrywide. The number of representatives to be elected in each of these constituencies would vary from 3 to 7 depending on the number of registered voters in a constituency. Of the 400 members in the National Assembly, 300 would be elected from closed party lists applicable to the 69 multi-member constituencies and 100 members would be elected from the national lists. The national lists would be used to achieve overall proportionality.

This proposal for closed-list PR in multi-member constituencies was driven by concerns about accountability and a desire to establish a closer link between the voter and his or her representative. The majority of the ETT was of the opinion that [g]iven that the lists [would] be short and that candidates [would] have to campaign in their constituencies and represent them afterwards, there will clearly be a face to representation and a much closer link with the electorate than is presently the case.[3] The ETT's majority did not advocate a parallel system or a mixed member proportional (MMP) system. That is, it does not call for single-member constituencies in which members of the National Assembly would be elected on a first-past-the-post basis accompanied by a compensatory closed national list. It remains to be seen whether the recommendations of the majority of members of the ETT will be debated in Parliament at some point in the future.

[1] Item 25 of schedule 2 to the Interim Constitution defines a region as the territorial area of a province and defines a regional list as a party's list of candidates for the election of the National Assembly.

[2] The boundaries of the constituencies would be those of district councils and metro councils and the same outer boundaries wold apply for national, provincial municipal elections. No constituency boundary would transcend a provincial boundary and electoral demarcation would not be required. See *Report of the Electoral Task Team* (2003) 23.

[3] Ibid at 25.

(d) Floor-crossing and electoral systems

The Final Constitution now allows for floor crossing in legislatures in the three spheres of government.[1] A vexing question is whether there is a need for a move towards a PR system applicable to the election of representatives in the national and provincial legislatures that more readily accommodates floor-crossing than closed-list PR does. While not as responsive as a first-past-the-post single-member constituency system, closed-list PR in multi-member constituencies still require elected officials to answer to identifiable constituencies.[2]

In *United Democratic Movement v President of South Africa*[3] the court alluded to the awkwardness of allowing floor crossing under a (closed-list) proportional representation in the following terms:

> There is a closer link between the voter and party in proportional representation systems than may be the case in constituency-based electoral systems, and that for this reason the argument against defection may be stronger than would be the case in constituency-based elections. But even in constituency-based elections, there is a close link between party membership and election to a Legislature. Floor-crossing, in the absence of a meaningful link between the voter and the political party he or she votes for under a closed list PR system, has the potential to make a relatively unresponsive system even less responsive.[4]

(e) Membership in the national and provincial legislatures

Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly.[5] There are several exceptions to this

[1] Constitution of the Republic of South Africa Amendment Act 2 of 2003.

[2] *Report of the Electoral Task Team* (supra) at 26 (Closed-list PR in multi-member constituencies increase the the degree of accessibility and responsiveness between voter and representative.)

[3] 2003(1) SA 495 (CC), 2002 (11) BCLR 1213 (CC) (*'United Democratic Movement'*).

[4] *United Democratic Movement* (supra) at para 34. In this paragraph the Court was referring to a first-past-the-post or majoritarian constituency-based system in which there are single-member constituencies. See A Reynolds & B Reilly 'Proportional Representation Systems' in *The International IDEA Handbook of Electoral System Design* (1997) 66 (Of closed-list PR systems generally, the authors write: Voters have no ability to determine the identity of the persons who will represent them, and [have] no identifiable representative for their own town, district or village, nor do they have the ability to easily reject an individual if they feel that he or she has behaved poorly in office.')

[5] FC s 47(2). B Van Heerden, A Cockrell and R Keightley (eds) *Bobergs' Law of Persons and the Family* (2nd Edition 1999) (The authors point out that '[i]n as much as minors who have attained the age of 18 years are eligible for nomination as candidates for election to the National Assembly, the National Council of Provinces and a provincial legislature, it seems that such minors would have *locus standi* in proceedings relating to their candidacy'). See FC s 47(1) read with FC s 46(1)*(c)*, and FC s 62(1) read with FC s 106 (1).

rule.[1] Any disqualification contemplated by FC s 47(1)*(e)* ends five years after the sentence has been completed.[2] In addition, a person who is not eligible for membership of the National Assembly on the grounds mentioned in s 47(1)*(a)* or *(b)* may be a candidate for the Assembly, subject to any limits or conditions established by national legislation.[3] Similar qualifications and exceptions apply in relation to membership in provincial legislatures. [4]

A person loses membership of the National Assembly if he or she ceases to be eligible, or is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership.[5]After a recent amendment to FC s 47(3*(c)*, a person loses membership of the National Assembly if he or she ceases to be a member of the party that nominated him or her as a member of the National Assembly, unless he or she has become a member of another party.[6] This scenario was made possible after the introduction of Schedule 6A to the Final Constitution and the lifting of the prohibition on floor crossing in the national and provincial legislatures. The provisions of Schedule 6A are discussed below.

The Final Constitution requires that vacancies in the National Assembly and provincial legislatures be filled in terms of national legislation.[7] The filling of vacancies in both legislative bodies is now covered by item 23 of schedule 1A to the Electoral Act. In the event of a vacancy in a legislature, the party which the vacating member represented must fill the vacancy by nominating a person whose name appears on the list of candidates from which the party's members were originally nominated and who is the next qualified and available person the list.

(f) Floor-crossing in the national and provincial legislatures

Item 23(A) of Annexure A to schedule 6 to the Final Constitution provided:

[1] See FC s 47(1)*(a)-(e)*.

[2] FC s 47(1)*(e)*. Grounds for disqualification include anyone who is appointed by, or is in the service of the state and receives remuneration for that appointment or service other than the President, Deputy President, Ministers and Deputy Ministers. The exceptions to the rule include other office-bearers whose functions are compatible with those of a member of the Assembly, and have been declared compatible with those functions by national legislation, permanent delegates to the National Council of Provinces or members of a provincial legislature or Municipal Council and extend to un-rehabilitated insolvents, anyone declared to be unsound mind by a South African court or anyone who, after the coming into effect of the section, is convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine, either within or outside of South Africa if the conduct constituting the offence would have been an offence in South Africa. No one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired.

[3] FC s 47(2).

[4] FC s 106.

[5] FC s 47(3)*(a)* and *(b)*.

[6] Constitution of the Republic of South Africa Amendment Act 2 of 2003.

[7] FC s 47(4).

(1) A person loses membership of a legislature to which this schedule applies if that person ceases to be a member of the party which nominated that person as a member of the legislature.
(2) Despite sub-item (1) any existing political party may at any time change its name.
(3) An Act of Parliament may, within a reasonable period after the new Constitution took effect, be passed in accordance with section 76(1) of the new Constitution to amend this item and item 23 to provide for the manner in which it will be possible for a member of a legislature who ceases to be a member of the party which nominated that member, to retain membership of such legislature.
(4) An Act of Parliament referred to in sub item (3) may also provide for:
(a) any existing party to merge with another party; or
(b) any party to subdivide into more than one party.

The constitutional framework created by the above provisions was altered after a series of political realignments in the Western Cape. The initial realignment was the result of the withdrawal of the NNP from the Democratic Alliance. Later on all parties seized upon the possibility of creating mechanisms for such realignments that might help them shift the political landscape in their own favour.

In June 2002 Parliament passed two amendments to the Constitution and two Acts of Parliament aimed at allowing members of national, provincial and local government legislatures to defect or to cross the floor. The Acts were:

(a) the Constitution of the Republic of South Africa Amendment Act 18 of 2002 (the First Amendment Act);
(b) the Constitution of the Republic of South Africa Second Amendment Act 21 of 2002 (the Second Amendment Act);
(c) the Local Government: Municipal Structures Amendment Act 20 of 2002 (the Local Government Amendment Act); and
(d) the Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002 (the Membership Act).

In short, the four Acts allowed members of the National Assembly, the provincial legislatures and local government to cross the floor or to form new parties without loss of their membership. That is, a member of the National Assembly or a provincial legislature or local government could change parties while retaining his or her seat. The First Amendment Act and the Local Government Amendment Act both related to floor crossing in the local government sphere. The Second Amendment Act and the Membership Act related to floor crossing in the National Assembly and provincial legislatures. The Membership Act removed the constitutional prohibition on floor crossing. The United Democratic Movement and other parties challenged the suite of floor crossing legislation in *United Democratic Movement v President of South Africa*.[1]

[1] 2003 (1) SA 495 (CC), 2002 (11) BCLR 1213 (CC). See also *United Democratic Movement* (supra) and *President of the Republic of South Africa v United Democratic Movement* 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC) (Addressed the issuing of interim orders by the High Court and Constitutional Court respectively.)

One leg of the applicant's argument was that an anti-defection provision was an essential component of an electoral system based on proportional representation. This argument did not emphasise that South Africas electoral system was a closed-list system. There are other PR systems such as those that rely on open lists or have a majoritarian element which more readily accommodate floor crossing. The electoral system applicable to South Africas local government elections is an example of the latter.

The applicants regarded an anti-defection provision as necessary to ensure that the results of an election would not be affected by the defection of persons who gained their seats in a legislature solely because of their position on the party list. The applicants correctly pointed out that it is the party, and not the members, which is entitled to the seats. Addressing the relationship between voters and their elected representatives the *United Democratic Movement* Court observed that '[t]here is a tension between the expectation of voters and the conduct of members elected to represent them.'[1] It then quoted from its holding in the *First Certification Judgment*:

> Under a *list* system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate. A party which abandons its manifesto in a way not accepted by the electorate would probably lose at the next election. In such a system an anti-defection clause is not *inappropriate* to *ensure that the will of the electorate is honoured*. An individual member remains free to follow the dictates of personal conscience. This is not inconsistent with democracy.
>
> . . . An anti-defection clause enables a political party to prevent defections of its elected members, thus ensuring that they continue to support the party under whose aegis they were elected. It also prevents parties in power from enticing members of small parties to defect from the party upon whose list they were elected to join the governing party. If this were permitted it could enable the governing party to obtain a special majority which it might not otherwise be able to muster and which is not a reflection of the views of the electorate (emphasis added).[2]

The court recognised that requiring a member of a legislature to resign if he or she changes party allegiance during the life of the legislature though possibly desirable cannot be implied as a necessary adjunct to a proportional representation system [3] However, the Court's description of the electoral system as a proportional representation system is not sufficiently precise. The system in South Africa is, as we have seen, a closed-list proportional representation in which a party receives a number of seats in a legislature in proportion to the total number of votes it receives in an election. The Court correctly noted that '[a]lthough voters might have been influenced by the names of candidates, and possibly their place on the list, they voted for parties and not for particular candidates.'[4]

[1] *United Democratic Movement* (supra) at para 31.

[2] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) (*First Certification Judgment)* at paras 186-187.

[3] *United Democratic Movement* (supra) at para 35.

[4] Ibid at para 37.

As we have already seen, South Africa's closed-list proportional representation system is but one of many systems of proportional representation. Moreover, a number of other proportional representation systems – for example, the mixed member proportional (MMP) representation system – that possess features of majoritarian and list proportional representation that more readily accommodate floor crossing.[1] In these other systems, lists compensate for any disproportionality in party support brought about by voting in constituencies or wards.

The Final Constitution itself implicitly recognises the variety of PR systems. IC s 46(1) of the Constitution requires a system that results, in general, in proportional representation. Reynolds and Reilly note that the rationale underpinning all proportional representation systems is to consciously reduce the disparity between a party's share of the national vote and its share of the parliamentary seats.[2] The system relied on in South Africa's 1994 and 1999 elections results in pure proportional outcomes.[3] However, Parliament has a range of options under FC s 46(1). A closed list PR system with pure proportional outcomes would meet this requirement, but so would a system which had an overall (or general) outcome of proportionality.

In *United Democratic Movement*, the Constitutional Court did not emphasise the features of a closed-list PR system. In *United Democratic* it simply reiterated the view expressed in *First Certification Judgment* that it did not follow that a proportional representation system without an anti-defection clause is inconsistent with democracy.[4] To what aspect of democracy was the Court referring? At a minimum, the judgment should have engaged directly the coherence of allowing floor crossing in a closed list PR system in which representatives could not, at the time of their election, defect.

For reasons that are not entirely clear, the *United Democratic Movement* Court seemed less inclined to recognise the importance of the will of the electorate than in the *First Certification Judgment*. It was likewise uninterested in assessing the aptness of the provisions of the Membership Act for the existing closed list PR

[1] Under the MMP system in Lesotho the 40 members on the compensatory seats (those coming from party lists) are not allowed to cross the floor while those members elected in constituencies can do so. See J Elklit 'Lesotho 2002: Africas first MMP elections' (2002) 1(2) *Journal of African Elections* 4.

[2] Reynolds & Reilly (supra) at 19.

[3] M Krennerich Electoral Systems: A Global Overview in J de Ville & N Steytler (eds) *Voting in 1999: Choosing an Electoral System* (2000) 12.

[4] Ibid at para 34.

system. It is true that item 23A granted Parliament the power to amend the provisions of the Final Constitution by an Act of Parliament (the Membership Act) under FC s 76(1). It is also true that the purpose of the legislation was to make provision for members of the national and provincial legislatures to change their political parties without losing their seats in the legislature. However legitimate the textual authority for this legislation may be, it creates an anomalous situation under a system of closed-list PR. So while the Constitutional Court could not take issue with Parliament's power to do what it did, it had an obligation to press down on the tension between floor-crossing and a closed-list PR system. Its lack of engagement with such issues is reflected in the following two remarks: :

> Where the law prohibits defection that is a lawful prohibition, which must be enforced by the courts. But where it does not do so, the courts cannot prohibit such conduct where the legislature has chosen to do so.[1]
>
> . . . .
>
> We were referred in argument to a number of democratic countries with proportional representation systems in which defection is not allowed. No case was cited to us, however, in which a court in any country has ever held that, absent a constitutional or legislative requirement to that effect, a member of the legislature is obliged to resign if he or she changes party allegiance during the life of a legislature.[2]

A deeply reasoned judgment on the electoral system offering an opinion on the relationship between voters and their representatives in South Africas democracy, even if obiter, would have provided valuable guidance to Parliament when it reconsidered the Membership Act after the Courts finding of unconstitutionality Such analysis might have deterred the raw political expediency which drove the legislature to turn the Membership Act into a constitutional amendment less than two years before the 2004 national and provincial elections.

Prior to 2002, and the run-up to the next elections, Parliament had showed little inclination to take up the Final Constitution's invitation to change our electoral system. In fact, a parliamentary committee appointed in 1997 had reported that floor-crossing in the context of the closed-list system was not fair or democratic and recommended that Parliament should not make use of the option given to it by the Constitution.[3] At the time, the ANC agreed. It took the view that:

> Parties are represented in the legislatures, on the basis of party lists, in proportion to the votes they had received in elections Our system does not provide scope for the role of an independent individual MP or of a group of MPs not directly elected by votes on the basis of a party list There are many difficulties with the qualified right to cross the floorThe crucial problem here is that it is difficult to establish what constitutes a significant shift in public opinion, when such shift has occurred and to what extent the desire of a group of MPs to defect, reflects this shift. More fundamentally, if there has been a significant shift, surely the answer is fresh elections?

[1] *First Certification Judgment* (supra) at para 35.
[2] Ibid.
[3] See *Report of the Natinal Assembly's Ad hoc Committee on Membership of Legislatures* (25 May 1998).

By 2002, the ANC had changed its tune. Unfortunately for the party, the Constitutional Court concluded that the Membership Act, passed by Parliament more than five years after the Final Constitution came into effect and was not passed within a reasonable period. The *United Democratic Movement* Court held that the FC s 76 procedure was an option only during the reasonable period stated in item 23A, and that having expired, the amendment of the Final Constitution in a manner not contemplated or sanctioned by the Final Constitution itself, was invalid.[1]

29.4 THE CONSTITUTION AMENDMENT ACT 2 OF 2003

After the Constitutional Court's decision in *United Democratic Movement,* Parliament passed the Constitution Amendment Act 2 of 2003. The Amendment Act repeals The Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002. It introduces a new schedule 6A to the Final Constitution.

The schedule stipulates that a member of the legislature who becomes a member of a party other than the party which nominated that person remains a member of that legislature if the member on his or her own or together with one or more other members (who ceased to be members of a party that nominated them) represent not less than 10 per cent of the total number of seats held by the nominating party in the legislature.[2] (These provisions apply whether the party of which a person becomes a member participated in an election or not. The seat held by a member is regarded as having been allocated to the party that an individual joins (the party which did not nominate the member). Ceasing to be a member of the party that nominated an individual must take place in the time periods specified in item 4(1)*(a)* or *(b)* of the schedule. The provisions of item 2 apply for fifteen days from the first to the fifteenth day of September in the second year after an election of the legislature and for a period of fifteen days during the same period in September in the fourth year after an election of the legislature.

Any party represented in a legislature is permitted to merge with another party.[3] It does not matter whether the latter participated in an election or not. Furthermore, any party may subdivide into more than one party.[4] After a sub-division, any party may merge with another party whether the latter participated in an election or not. After a sub-division, members leaving their original party must represent not less than 10 per cent of the total number of seats held by the original party in any legislature. The time periods set out in item 4(1)*(a)* and *(b)* also apply to item 3.

[1] *United Democratic Movement* (supra) at para 113.
[2] Item 2(1).
[3] Item 3(1)*(a)*.
[4] Item 3(1)*(b)*.

If there is a merger of parties or a sub-division or subdivisions and merger of parties contemplated in items 3(1)*(a)* and *(b)*, the members retain membership of the legislature to which they were elected and the seats they held are regarded as having been allocated to the party which they represent after any merger, subdivision or subdivision and merger envisaged under item 3(1). During the periods referred to in items 4(1)*(a)* and *(b)* a member of the legislature may change membership of a party on one occasion only. Similarly, during the periods referred to in items 4(1)*(a)* and *(b)* a party may merge with another party, subdivide into more than one party or subdivide and merge with another party on one occasion only. Within seven days after the expiration of a period mentioned in item 4(1)*(a)* or *(b)* a party represented in the national Assembly or a provincial legislature must submit a list of its members to the secretary of the legislature.[1] The number of seats held by each party represented in that legislature and the name of and party represented by each member will be published in the *Government Gazette*.

The provisions of items 2 and 3 of schedule 6A allow parties representation in the national and provincial legislatures without requiring them to contest an election. Members of political parties who are elected under the aegis of one political party and after crossing the floor or after the merger and/or subdivision of parties may end up representing a different party. The result is that new parties may acquire representation between elections.

Who do the members of new parties represent? They would have been elected by voters supporting the party that nominated them as electoral candidates. The seats they retain would be seats that belonged to the party that nominated the member or members and which were allocated to a party based on the electorates support for that party. When a member ceases to be a member of the nominating party, the provisions in items 2 and 3 permit a member to transfer the seat of his or her original party to a different or new (non-elected) party in a legislature.

No party represented in a legislature may suspend or terminate the party membership of any one of its members representing it in that legislature without the written consent of the member concerned.[2] Furthermore, a party may not perform any act which causes a member to be disqualified from holding office as a member without the written consent of the member concerned.[3] A party that does not register as a political party under the Electoral Act 73 of 1998 may still be regarded as a party for purposes of schedule 6A. However, the party must register as a political party within the periods set out in items 4(1)*(a)* and *(b)*. If it fails to do so within four months after the expiration of these periods, the party will cease to exist. In these circumstances the affected seats are to be allocated to the remaining parties in accordance with applicable law.

During the first fifteen-day period following the date of the commencement of schedule 6A, members of the National Assembly and the provincial legislatures

[1] Item 5(2).
[2] Item 4(3)*(c)*(i).
[3] Item 4(3)*(c)*(ii).

were allowed to become members of political parties which had not nominated them while retaining their seats in a particular legislature. The schedule also allowed party mergers and the subdivision of parties. In these situations members were allowed to hold their seats and the seats were regarded as seats belonging to the members new party and not the one which, in the first place, had nominated the members.

Schedule 6A contains provisions which recognise the reality of party politics. Members of political parties become disgruntled with their parties. The provisions permit them to shift allegiance to a party whose policies are more aligned with their own. The provisions also accommodate situations in which a political party splits because of differences in opinion between groups or factions in a party. New parties may be formed through subdivisions and mergers. That said, the tension between floor-crossing and closed list PR remains. The will of the electorate expressed at the time of an election – for parties and their policies – morphs into the will of the individual representatives and the parties and policies for whom they express a preference.

29.5 Funding of Political Parties in the National and Provincial Legislatures

FC s 236 states that to enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis. The national legislature passed the Public Funding of Represented Political Parties Act in accordance with this constitutional directive.[1] The Act established the Represented Political Parties Fund. The fund making provisions for already-elected political parties participating in Parliament and provincial legislatures rather than those who aspire to participate in the multi-party government envisaged by the Final Constitution.[2] The chief electoral officer of the Electoral Commission manages the Fund and serves as the accounting officer and chief executive officer of the Fund.[3] Allocations from the fund cover activities related to: developing of the popular will of the people; bringing a political party's influence to bear on the shaping of public opinion; inspiring and furthering political education; promoting active participation by individual citizens in political life; exercising and influence on political trends; and ensuring continuous, vital links between the people and organs of state.

Aspirant political parties and those who already have representation in South Africas legislative bodies may receive unlimited and unconditional funding from private sources. No legislative framework similar to that applicable to public funding is in place. There is therefore no mechanism to control the impact of

[1] Act 103 of 1997.
[2] Section 2(1) of the Public Funding of Represented Political Parties Act 103 of 1997.
[3] Ibid at s 4(1).

such funds on a political party's policies and on what they include in their manifestos. In the absence of any legislative framework the electorate cannot know or easily obtain information on where political parties derive their funding from. The electorate is unable to form an opinion on the measure of influence brought to bear upon a political party by a private donor. Such unregulated funding creates incentives for corruption.

IDASA has launched a campaign to promote greater transparency by political parties. It uses the Promotion of Access to Information Act to elicit documentation about the source of their private political party funding. Political parties represented in the legislatures are required by the Act to provide details of any private funding over R50,000.00. IDASA makes the compelling argument that regulation of party funding will strengthen democracy, curb opportunities for corrupt practices and promote several constitutionally enshrined rights.[1]

29.6 Election of Municipal Councils

The Municipal Electoral Act 27 of 2000 regulates municipal elections. The Constitution and the Local Government: Municipal Structures Act 117 identify three categories of municipality[2]: A, B and C.[3] Municipal councils consist of members elected in accordance with the electoral options set out in FC s 157(2). They are elected for terms of five years.[4] Whenever necessary, the Minister, after consulting the Electoral Commission, must, by notice, call and set dates for an election of all municipal councils. The election must be held within 90 days of the date of the expiry of the term of municipal councils.[5]

(a) The electoral system applicable to municipal elections

The Constitution envisages an electoral system based on closed-list proportional representation and reliant upon that municipality's segment of the voters roll.[6] It also provides for an alternative of a semi-proportional system made up of a component of proportional representation and representation on a ward basis, based on that municipalitys segment of the voters roll.[7] The electoral system

[1] PIMS & The Right to Know Programme Regulation of Private Funding to Political Parties *IDASA Position Paper* (October 2003) 4.

[2] Several sections of the Local Government: Municipal Structures Act 117 of 1998 were challenged in *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development, Executive Council, Kwa Zulu- Natal v President of the Republic of South Africa* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC).

[3] Section 7 of the Municipal Structures Act lists several types of municipality. See R Kriel, M Monadjem & B Bekink 'Local Government' in M Chasklason, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein & S Woolman (eds) *Constitutional Law of South Africa* (2nd Edition, Original Service, August 2005) Chapter 20.

[4] Section 24 of the Municipal Structures Act.

[5] Ibid.

[6] FC s 157(2)*(a)*.

[7] FC 157(2)*(b)*.

applicable to local government elections must result, in general, in proportional representation.[1]

The Municipal Structures Act 117 of 1998 provides for a system that allows for semi-proportional representation. This type of semi-proportional system is often favoured in new democracies. It generally benefits from the broad representation of parties that accompanies voting under a closed-list proportional representation system. It possesses direct accountability.[2] A system that combined proportional representation (PR) and voting in wards on a first-past-the-post basis was employed in the local government elections in 1995 and 1996. In that election, voters cast their ballots for councillors on a 40% PR and 60% ward basis. In this parallel system the proportional representation and first-past-the post elements operated separately from each other. Currently these elements are combined in a mixed member proportional (MMP) system. Under this system, 50% of the councillors represent wards and the other 50% are elected by PR. The difference between a parallel system and a mixed member proportional system is that the latter allows for the adjustment of distortions to party representation brought about by voting in wards on a first-past-the-post basis. The former does not. This change to the system was necessary.[3] After the 1995-96 local government elections – for which there was no demarcation process – residents in the formerly White, Coloured and Indian areas were over-represented in the 843 transitional councils. The number of councils was reduced to 284 for the 2000 elections. The new demarcation process ensured that wards consisted of the roughly the same population size.[4] The introduction of the current system allows for an increase in the number of councillors elected by proportional representation.

The Municipal Structure Act provides that a metro council (a municipal council of a metropolitan municipality or category A municipality) and a local council (municipal council of a local municipality or category B municipality) with wards must be elected according to a system of proportional representation from party lists and direct representation from wards. In an election for a metropolitan or local council with wards, each registered voter has two votes, one for a party, by proportional representation, and one for a ward candidate. If a local council has no wards, all the councillors must be elected from the party lists according to a system of proportional representation. In an election for a local council that has no wards, each registered voter has two votes, one for the local council and one for the district council. If a local council has wards, councillors must be elected from the party list according to a system of proportional representation and direct representation for the wards.

[1] FC 157(3).

[2] Ministry for Provincial Affairs and Constitutional Development *The White Paper on Local Government* (March 1998) 88. (This type of system has two excellent features, namely, an element of representivity – the proportional matching of council seats with votes cast, and an element of accountability – the identification of individual councillors to particular wards).

[3] See T Lodge 'Local Government Reform' in *Politics in South Africa: From Mandela to Mbeki* (2002) 86-100.

[4] See Local Government: Demarcation Act 27 of 1998.

Importantly, district councils (municipal councils of a district municipality or category C municipality) may be comprised of representatives elected from party lists by registered voters in local councils, with or without wards and voters registered in a district management area. Sparsely populated or mountainous areas and game parks would be classified as district management areas. If a voter is registered in a local council with wards he or she will have a third vote in respect of a 40 per cent proportional representation election of the district council in which area the local council (with wards) is located. Registered voters in district management areas will have two votes, one for the representative in the district management area, and one for the district council.

Sixty per cent of the seats in district councils will be allocated on the basis of proportional representation to the candidates from the district management areas and representatives elected to the district council from the local councils. The Municipal Structures Act contemplates that local council elections will take place first. Thereafter representatives from these councils, in an internal election, will be nominated and elected to the district council. The remaining 40 per cent of the seats will be allocated to those proportional representation candidates voted onto the district council by registered voters.

Political parties who have complied with the registration requirements can contest an election by submitting a list of the names of candidates to stand as its representatives for the election of members of the council or by nominating ward candidates to stand a representatives of the party in a ward; or may comply with both of these requirements.[1] Item 11(3) of schedule 1 of the Municipal Structures Act that every party must seek to ensure that women and men candidates are evenly distributed throughout the list.

In this regard, item 11(3) is distinguishable from s 26 of the Electoral Act 73 of 1998. Each requires the submission of lists of candidates under an electoral system that relies on closed-list proportional representation. Item 11(3) does more than s 26 to ensure the participation of women in local government elections, but only just. It does not place a clear obligation on political parties to ensure that women candidates are included on party lists when it states '[e]very party must seek to ensure that fifty per cent of the candidates on the party list are women and that women and men candidates are evenly distributed through the list, but encourages them to do so.' Had Parliament excluded the words seek to it could have been interpreted as introducing a statutory quota geared towards ensuring the equal distribution of women candidates on party lists and a consequent increase in the number of women councillors.[2] Section 26 of the Electoral Act leaves the decision to include women candidates entirely to political parties.

[1] Local Government: Municipal Electoral Act 27 of 2000.

[2] After the 2000 local government elections 20% of all the councillors elected were women. Twenty-nine per cent of the councillors elected by proportional representation were women, while only 11% of councillors elected to ward seats were women.

(b) Membership of municipal councils

In *United Democratic Movement*, the Constitutional Court upheld the Constitution of the Republic South Africa Amendment Act 18 of 2002 that amended FC s 157 and the Local Government: Municipal Structures Amendment Act 20 of 2002. The amendments permitted floor crossing in the sphere of local government. The court held that the wording of the amended FC s 157(1) – subject to schedule 6A, a Municipal Council consists of members elected in accordance with subsections (2) and (3) – did not subordinate the Final Constitution to the schedule.[1] FC s 157(3) states that '[a]n electoral system in terms of FC s 157(2) must result, in general, in proportional representation.' According to the *United Democratic Movement* Court, FC s 157(3) is to be harmonized with FC s 157(1) and the schedule.[2] In its effort to harmonise the relevant provisions, the Court wrote:

> In the light of the reference to schedule 6A, the reference in subsection 3 to the need for the electoral system to result, in general, in proportional representation must be construed as reference to the voting system and not to the conduct of elected members after the election.[3]

The *United Democratic Movement* Court draws a distinction between the voting system and the conduct of elected members after the election. The conduct of elected members refers to a situation in which an individual ceases to be a member of the party that nominated him or her to the legislative body in favour of another party. Such conduct (giving up membership of the nominating party and joining another) might well affect the overall support for the members original party if the member is allowed to retain his or her seat after changing parties. So while it is correct that, in general, proportional representation refers directly to the electoral system, a member's conduct might well affect the overall result of an election determined by the voting system.

Concerns about floor-crossing still arise in relation to the PR segment of a mixed member proportional system. Floor-crossing under the municipal electoral system is less objectionable when it occurs in terms of first-past-the-post wards. In these wards, voters express support for individual candidates to whom seats in the municipal council are assigned. The seats belong to the candidate no matter what his or her party affiliation.

(c) Floor-crossing in the municipal councils

Every citizen who is qualified to vote for a municipal council is eligible to be a member of the council.[4] The Final Constitution lists a number of persons who would not be eligible for membership in a municipal council.[5] Anyone

[1] *United Democratic Movement* (supra) at para 84.
[2] Ibid at para 83.
[3] Ibid at para 84.
[4] FC 158(1).
[5] FC 158(1)*(a)-(e)*.

disqualified from voting for the National Assembly or disqualified in terms of s 47(1)*(c)*, *(d)* or *(e)* may not be a member of the council.

The participation of traditional leaders in municipal councils is addressed by the Municipal Structures Act.[1] Traditional leaders are allowed to participate in the meetings of a municipal council, but have no voting rights.[2] The number of traditional leaders participating in a council is restricted to no more than 10% of the total number of councillors in the council. If there are fewer than 10 councillors, only one traditional leader is allowed to participate. A traditional leader must be allowed to express a view on any matter directly affecting the areas under his or her rule. In the light of these sections traditional leaders have lost some of the status and power on municipal councils that they enjoyed under IC s 182. They now fulfil a largely consultative and advisory function. As a result, the new local government dispensation set out in the Municipal Structures Act was not well received by traditional leaders. Lodge reminds us that opposition from this quarter resulted in the postponement of the second local government election in 2000.[3]

29.7 THE ELECTORAL COMMISSION

(a) Establishment of the Commission

The Electoral Commission has the role of ensuring that all elections will be free and fair.[4] The Electoral Commission is established by FC s 181 and, unlike the Independent Electoral Commission set up to oversee the 1994 national and provincial elections, it is a permanent institution. It is also one of the Chapter 9 institutions strengthening constitutional democracy.

The Electoral Commission Act 51 of 1996 lists the functions of the Electoral Commission. They embrace the promotion of democratic electoral processes,[5] the managing of elections of national, provincial and municipal legislative bodies, compiling a national common voters roll and declaring the results of an election.[6] The Final Constitution grants Parliament the power to prescribe any additional powers and functions of the Electoral Commission.[7] In *New National Party of South Africa v Government of the Republic of South Africa* the Constitutional Court noted that the provisions of the Electoral Commission Act accord the Commission a role that was never intended to merely supervisory[8]. Its management functions are active, involved and detailed.[9]

[1] Section 81. The identification of traditional leaders for the purposes of s 81 is addressed in schedule 6 of the Act.

[2] See Lodge (supra) at 94 ('[W]ithin the rural areas 800-odd chiefs and some 10 000 headmen would sit on councils *ex officio*, the law giving them no voting rights.')

[3] Ibid at 95.

[4] FC s 190(1)*(b)*.

[5] Section 4 of the Electoral Commission Act.

[6] FC s 190. See also s 5 of the Electoral Commission Act.

[7] FC s 190(2).

[8] 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) (*New National Party*).

[9] Ibid at para 76.

(b) Composition of the Commission

The Electoral Commission must be composed of at least three persons.[1] The exact number of commissioners and their terms of office is provided for by the Electoral Commission Act. It allows for the establishment of a commission made up of five members. One of the members of the Commission must be a judge.[2] South African citizenship is a requirement for appointment to the Commission.[3] A further requirement is that an appointee must not have a high party-political profile.[4]

Recommendations for appointment are made from a list of candidates prepared by a panel of representatives from the Human Rights Commission, the Commission on Gender Equality and the Public Protector. The Chief Justice is a member and chairperson of the panel.[5] The panel is required to submit a list of no fewer than eight recommended candidates to a committee of the National Assembly.[6] In preparing the list, the panel must act in accordance with the principles of transparency and openness. The panel must make its recommendations to the committee after taking into account a person's suitability, qualifications and experience.[7] The committee proportionally composed of members of all parties represented in the National Assembly, in turn, forwards a list of nominated candidates to the National Assembly, which after the adoption of a resolution a majority of its members, recommends candidates for appointment by the President.[8]

The President appoints commissioners to seven-year[9] terms in either a full-time or a part-time capacity.[10] Commissioners appointed in a full-time capacity are not allowed to perform any duty or obligation arising out of other employment unless the President authorizes such employment.[11] The President designates a chairperson and vice-chairperson from among the commissioners. Commissioners terms of appointment can be cut short by resignation or death, or by removal from office on grounds of misconduct, incapacity or incompetence.[12]

Commissioners may be removed from office by the President after a finding of misconduct, incapacity or incompetence by a committee of the National Assembly upon the recommendation of the Electoral Court.[13] A majority of the

[1] FC s 191.
[2] Section 6 of the Electoral Commission Act (ECA).
[3] Ibid.
[4] ECA, s 6(2).
[5] ECA, s 6(3)*(a)*.
[6] ECA, s 6(4).
[7] ECA, s 6(5).
[8] ECA, s 6(20)*(c)*.
[9] ECA, s 7(1).
[10] ECA, s 7(2).
[11] ECA, s 9(1)*(b)*.
[12] FC s 194. Section 7(3) of the Electoral Commission Act reiterates these grounds.
[13] The Electoral Court is established in terms of s 18 of the Electoral Commission Act. See also the definition of Electoral Court in s 1 of the Electoral Act.

members of the National Assembly of must adopt a resolution calling for a commissioner's removal from office. A commissioner may be suspended from office by the President at any time after the start of the proceedings of the committee and may be re-appointed, but only for one further term of office.[1]

The Commission must appoint a suitably qualified and experienced person as the chief electoral officer.[2] The chief electoral officer heads the administration of the Commission.[3]

(c) Independence of the Electoral Commission

The Electoral Commission, like the other Chapter 9 institutions, is independent, and subject only to the Constitution and the law.[4] It is required to be impartial and to exercise its powers and perform its functions without fear, favour or prejudice.[5] Every member of the Commission must serve impartially and independently.[6] The income necessary for the Commissions functioning is derived from Parliament. The Commission may receive funds from other sources. The Electoral Commission is accountable to the National Assembly and is required to report on its activities and performance of its functions and funding to the National Assembly at least once a year.[7]

In *New National Party*, the Constitutional Court recognised the creation of an Electoral Commission as an essential component of managing a free and fair election. The appellant alleged that the government had not acknowledged the independence of the Commission and had thereby undermined its capacity to run free and fair elections. First, the government refused to accept the advice of the Commission that bar-coded identity documents should not be the only means of identification acceptable for registering as a voter and for voting. Second, insufficient funding had been made available to the Commission. As a consequence, it had not been unable to appoint the necessary officials to attend to the registration of voters prior to the 1999 elections. The government had assumed this function.

Addressing the relationship between the government and the Commission, the Court asked whether the conduct of government had been demonstrated to have impinged on the affairs of the Commission in a manner which affected its independence in the carrying out of its functions, or whether such conduct constitute[d] a threat to do so.[8] When considering this question, the Court highlighted three areas: the responsibility for elections, the system of financial accounting and problems in relation to the engagement of the staff of the Commission.

[1] ECA, s 7(3)*(c)*.
[2] ECA, s 12(1).
[3] ECA, s 12(2)*(c)*.
[4] FC s 181(2). Section 3 of the Electoral Commission Act 51 of 1996 provides for a Commission that is independent and subject only to the Final Constitution and the law.
[5] ECA, s 3(2).
[6] ECA, s 9(1).
[7] FC s 181(5).
[8] *New National Party* (supra) para 79.

With respect to responsibility for the elections, the Court noted that Parliament had the competence to pass the Electoral Act. Parliament's decision to provide for bar-coded identity documents did not impair the independence of the Electoral Commission.

The court then distinguished financial independence from administrative independence.[1] It held that financial independence related to the Commission having access to funds reasonably required by it to enable it to discharge the functions it is required to perform constitutionally and legislatively. Parliament – and not the executive – ought to assess what is reasonably required by the Electoral Commission to enable it to perform its functions. Administrative independence related to those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act.[2]

The court observed that the establishment of the institutions supporting constitutional democracy is a new development on the South African scene and that other organs of state needed to assist and protect the chapter 9 institutions to ensure their independence, impartiality, dignity and effectiveness.[3] The Court held that a government department ought not to instruct the Commission on how to conduct voter registration or whom to employ. However, if the Commission required the governments assistance to provide staff to participate in the voter registration process, the government was under an obligation to assist in so far as possible. If not, the Commission was to receive the financial assistance to enable it to do what was necessary. In the instant case, the Department of Home Affairs, the Department of State Expenditure and the Minister of Finance did not fully appreciate the independence the Commission required. However, since these were not the issues canvassed by the appellant in its application, the Court held that the appellant had failed to show that the independence of the Electoral Commission had been infringed.

The independence of the Electoral Commission arose again in *Independent Electoral Commission v Langeberg Municipality*.[4] This time the independence of the Commission engaged the principles of co-operative government delineated in Chapter 3.[5] The dispute related to the Commission's decision to allocate a single voting station to the residents of the town of Stilbaai. The municipality argued that many voters would be deterred by the distance they would have to travel in order to exercise their right to vote.

The appeal brought before the Constitutional Court addressed the issue of whether the municipality had to comply with those provisions of FC ss 40 and 41 that required parties in intergovernmental disputes to make every effort to settle the dispute before approaching a court. The Court noted that both the

[1] *New National Party* (supra) at para 98.
[2] Ibid at para 99.
[3] Ibid at para 78.
[4] 2001 (3) 925 (CC), 2001 (9) BCLR 883 (CC)(*Langeberg*).
[5] For a detailed discussion of this case, please see S Woolman, T Roux and B Bekink 'Co-operative Government' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein & S Woolman (eds) *Constitutional Law of South Africa* (OS, 2nd Edition, June 2004) Chapter 14.

municipality of Stilbaai and the IEC were organs of state.[1] The more difficult question was whether Commission could, for the purposes of Chapter 3 analysis, be located within the national sphere of government. The Court concluded that could not. It is simply a state institution supporting democracy. The Court reasoned that since 'state' is a broader term than 'national government' and embraces all spheres of government,[2] then Chapter 9 of the Final Constitution must make a distinction between the state and the government, whether local, provincial or national.[3] Moreover, the Court found that the Commission is established as *independent* and subject only to the Constitution and the law.[4] The independence accorded the Electoral Commission by the Constitution would be undermined if it were viewed as part of any sphere of government.

Since the Commission is not an organ of state within the national sphere of government, the dispute between the Commission and the Stilbaai municipality could not be classified as an intergovernmental dispute. The upshot of the judgment is that when another organ of state seeks to bring an action against the Electoral Commission it can do so without having to comply with FC s 41(3).

29.8 THE ELECTORAL COURT

The Electoral Court is established under the Electoral Commission Act.[5] It possesses the status of a High Court.[6] The President on the recommendation of the Judicial Service Commission appoints the members of the court. They are: the chairperson, a judge of the Supreme Court of Appeal; two High Court judges and two other members. All members of the Electoral Court must be South African citizens.[7]

The Court has the power to review any decision of the Commission. It can hear appeals against decisions of the Commission provided that the decision relates to the interpretation of any law or matter for which an appeal is provided by law. The Court has the power to investigate any allegation of misconduct, incapacity or incompetence of a member of the Commission. The Rules Regulating Electoral Disputes and Complaints about Infringements of the Electoral Code of Conduct made by the Electoral Court, in terms of s 20(4) of the Electoral Commission Act, stipulate that the High Courts and Magistrates Courts have jurisdiction to hear any electoral dispute or complaint about an infringement of the Code.[8]

The Electoral Court has jurisdiction to impose all of the s 96(2) listed penalties. The High Court may impose all penalties except those penalties that result in the

[1] *Langeberg* (supra) at 27.
[2] Ibid.
[3] Ibid.
[4] FC s 181.
[5] Act 51 of 1996.
[6] FC s 18 of the Electoral Commissions Act.
[7] ECA, s 19.
[8] *Government Gazette* No 19572 (4 December 1998).

disqualification of a person's candidature or that result in an order cancelling the registration of a political party. The Magistrates' Courts may impose all penalties except those that result in the disqualification of a persons candidature or that result in an order cancelling the registration of a political party. The Magistrates' Courts may also not prohibit the receipt of any funds from the state or foreign sources.[1] Only in circumstances when an order that results in the disqualification of a person's candidature, or in an order cancelling the registration of a political party is sought, may a party approach the Electoral Court directly. Direct access is granted with leave of the chairperson and at least two members of the Electoral Court. Rules 3, 4 and 5 set out the procedures for bringing an electoral dispute or complaint about a breach of the Electoral Code of Conduct before the courts.[2]

The Electoral Court has final jurisdiction in respect of all electoral disputes and complaints pertaining to the infringement of the Code.[3] No decision or order of the Electoral Court is subject to appeal or review.[4] Section 96(2) of the Electoral Act must be read in conjunction with s 20(4)*(b)* of the Electoral Commission Act. The latter section states that the Electoral Court shall have the power to determine which courts of law have jurisdiction to hear particular disputes and complaints about infringements, and appeals against decisions arising from such hearings.

In *Mketsu v African National Congress* the appellants, members of the African National Congress (ANC) challenged the selection processes of the party's list and ward candidates for the 2000 local government elections.[5] They claimed that these processes were flawed and did not comply with the party's procedures. They sought an order in the Eastern Cape Division of the High Court. The respondents opposed the application on a number of bases – one being that the High Court lacked jurisdiction to hear the application. The High Court upheld this defence.

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[1] Rule 2(2) and 2(3) of the Rules Regulating Electoral Disputes and Complaints about Infringements of the Electoral Code of Conduct.

[2] Rule 2(4) stipulates that the offences in Part 1 of chapter 7 and in s 107, 108, 109 of the Act are to be dealt with in accordance with the legislation applicable to criminal matters. These offences will be heard in a court with criminal jurisdiction. In terms of s 98 *(a)*, a court may, upon conviction of an offence mentioned in s 87(1)*(b)*, *(c)*, or *(d)*, 89(2), 90, 91, 93 or 94, impose a penalty of a fine or term imprisonment not exceeding 10 years. According to s 98*(b)* a court may, upon conviction of an offence mentioned in s 87(1)*(a)*, *(e)*, or *(f)*, (2), 3, or 4, 88, 89(1), 92, 107(4), 108 or 109, impose a penalty of a fine or term imprisonment not exceeding 10 years. According to s 96(3), a penalty imposed in terms of s 96(2), in certain cases, will be in addition to any penalty imposed in terms of ss 97 and 98 of the Act. Section 98*(a)* specifies that if a person is convicted of an offence in terms of s 94 (breaching the Code), the possible penalties are a fine or term of imprisonment not exceeding 10 years. The latter penalty would be in addition to an appropriate penalty in terms of s 96(2)*(a)*-(i).

[3] Section 96(1) of the Electoral Act ('EA').

[4] FC s 167(6) states:

'National legislation or the rules of the Constitutional Court must allow a person when it is in the interests of justice and with leave of the Constitutional Court —

(b) to appeal directly to the Constitutional Court from any other court.'

Decisions reached under section 96(1) of the EA are therefore susceptible to constitutional challenge under this section of the Final Constitution.

[5] 2003 (2) SA 1 (SCA), 2002 (4) All SA 205 (SCA) (*Mketsu*).

On appeal the appellants again argued that the High Court had jurisdiction to hear and resolve the objection to the ANC selection process. The Supreme Court of Appeal considered the meaning of s 65 of the Municipal Electoral Act. The section deals with objections concerning any aspect of an election that is material to the declared result. It found that such objections would occur only after an election. It also considered the provisions of s 78(1) of the Municipal Electoral Act. The section reads: 'the Electoral Court has jurisdiction in respect of all electoral disputes and complaints about infringements of the Code subject to s 20(4) of the Electoral Commission Act'. The court found that these disputes and complaints would typically, but not necessarily, be heard and resolved prior to the declaration of an election result.

After considering these statutory provisions the court came to the conclusion that s 65 was concerned with objections concerning any aspect of an election that is material to the result. The jurisdiction conferred on the Electoral Court by s 78(1), on the other hand, was intended to be exclusive. That exclusivity is only subject to the power of the Electoral Court to determine which courts of law would exercise concurrent or exclusive jurisdiction to hear particular electoral disputes and complaints about infringements of the Code.[1] The court observed that the language in s 78(1) was similar to that in s 20(4). Both sections referred to electoral disputes and complaints about infringements of the Code. However, s 78(1) is subject to s 20(4). The Electoral Court therefore retains the power to determine which courts have jurisdiction to hear disputes under both s 20(4) and s 78(1).

The court held that s 78(1) addressed matters that were not referred to in s 65 of the Municipal Electoral Act. Objections under s 65 were not addressed by s 20(4) of the Electoral Commission Act. The court held that the process relied on to choose candidates was one concerning any aspect that is material to the declared result and that the Electoral Court and not the High Court had the jurisdiction to hear such an objection.[2] Although the inherent jurisdiction of the High Court is not readily ousted, the Court observed that the process set out in s 65 of the Municipal Electoral Act was intended by the legislature to be mandatory. It rejected the appellant's principal argument that the High Court retained its jurisdiction to hear the applications and dismissed the appeal.

[1] *Mketsu* (supra) at para 11.
[2] Ibid at para 9.

30 International Law

Hennie Strydom
Kevin Hopkins

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231.

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

Customary international law
232.

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Application of internatioal law
233.

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Interpretation of Bill of Rights
39.

(1) When interpreting the Bill of Rights, a court, tribunal or forum:
- *(a)* must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- *(b)* must consider international law; and
- *(c)* may consider foreign law.[1]

30.1 International Law and its Relationship with Domestic Law

(a) The nature of international law

(i) *Definition*

International law is traditionally defined as that body of law which binds or regulates states in terms of their relationships with other states.[2] While there is some debate as to whether international law constitutes a system of law separate

[1] Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC').
[2] H Waldock (ed) *The Law of Nations* (6th Edition, 1963) 1.

and distinct from the domestic law of states, most domestic systems automatically incorporate, or else incorporate through a separate act of adoption, many rules of international law into their system of municipal law.[1] International law also influences the manner in which courts interpret domestic law. This chapter is concerned with those provisions of the Final Constitution that deal with the manner in which international law determines or informs our municipal law.

(ii) *The transformation of international law*

Traditionally, states were considered to be the only subjects of international law.[2] State sovereignty and firm adherence to the principle of non-intervention in the affairs of other states meant that international law did not concern itself with the manner in which states treated their own citizens.[3]

Since the Second World War and the advent of the United Nations, however, international law has increasingly concerned itself with protecting the rights of

[1] The relationship between international law and municipal law is controversial. It has long troubled both theorists and courts, mainly because international lawyers have for some time been divided on which of two main approaches to adopt — monism or dualism. The monists see all law as a unified body of rules. Since international law is law, monists regard international law as automatically forming part of the same legal structure that includes municipal law. For them, international law is incorporated directly into municipal law without any specific act of adoption. State judges, argue monists, are consequently obliged to apply the rules of international law in their municipal courts. Dualists, by contrast, see international law and municipal law as completely different legal systems. For a dualist, the question of which legal system ought to govern a dispute is dependent on both the nature of the dispute and the forum in which the matter arises (ie. whether the adjudicating body is a municipal court or an international tribunal). Obviously, dualists accord international law primacy over municipal law in the international arena; for example, where the dispute is one between states. Similarly municipal law enjoys primacy in domestic disputes. The two legal orders are thus, for a dualist, quite distinct and separate — both in their application and purpose. For this reason, a dualist will never see international law as being applicable in a municipal court unless there has first been a specific act of adoption. As we will illustrate below, South Africa has traditionally adopted a mixed approach to the incorporation of international law into our domestic law — adopting a dualist approach in respect of treaties and a monist approach in respect of customary international law. The Final Constitution maintains this mixed approach. Most standard international law textbooks contain some literature on this long-standing debate. See, for example, J Dugard *International Law: A South African Perspective* (2nd Edition, 2000) 43-44; D Harris *Cases and Materials on International Law* (5th Edition, 2004) 66-72; R Wallace *International Law* (3rd Edition, 1997) 36-37; M Shaw *International Law* (5th Edition, 2003) 120-123. For a more detailed analysis of the debate, see A Aust *Modern Treaty Law and Practice* (2000) 146-161.

[2] Dugard (supra) at 1.

[3] Article 2(7) of the United Nations Charter endorses this view when it states that 'nothing contained in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state'. This anti-human rights stance adopted by earlier international law is probably the reason for the international community's acceptance of the atrocities committed in South Africa during the apartheid era. Of course this changed as international law became more human rights friendly. See K Hopkins 'Assessing the World's Response to Apartheid: An Historical Account of International Law and its Part in the South African Transformation' (2002) 10 *Univ of Miami Int and Comparative LR* 241; MD Prevost 'South Africa as an Illustration of the Development in International Human Rights Law' (1999) *South African Yearbook of International Law* 211.

individuals. This transformation was largely a reaction to the atrocities committed by the Nazi German government. Since then numerous multi-lateral and regional treaties that protect individual human rights have been adopted by states.[1]

Many of the rights afforded by these treaties have been incorporated into the domestic law of states — often in the form of justiciable bills of rights. Our own Bill of Rights, Chapter 2 of the Final Constitution, quite consciously echoes the language found in international human rights instruments. Moreover, FC s 39(1)*(b)* turns international law into a mandatory canon of constitutional interpretation.[2]

(b) Sources of international law

There are four sources of international law:

(a) International conventions, otherwise known as treaties;
(b) Customary international law;
(c) The general principles of law recognized by civilized nations; and
(d) Judicial decisions, and the teachings of the most highly qualified publicists.[3]

The source of the law will often determine the manner in which it is incorporated into domestic law.

(i) *Treaties*

Treaties are international agreements entered into between states in terms of which states expressly agree to be bound by the terms of the treaty.[4] Treaties can be bi-lateral, where two states enter into a treaty to regulate a particular aspect of their relationship (for example, extradition arrangements or trade relations) or they may be multi-lateral, where a number of states enter into a treaty (as is the case with human rights conventions such as the ICCPR and the ICSECR). Multi-lateral treaties normally have the purpose of codifying international law with regard to the subject-matter in question.

[1] Some of the most important international human rights treaties are: the International Covenant on Civil and Political Rights ('ICCPR') (ratified by South Africa in 1998); the Covenant on Economic, Social and Cultural Rights ('ICSECR') (signed by South Africa in 1994 but yet to be ratified); the International Convention on the Elimination of All Forms of Racial Discrimination (ratified by South Africa in 1998); the Convention on the Elimination of All Forms of Discrimination Against Women (ratified by South Africa in 1995); the Convention on the Rights of the Child (ratified by South Africa in 1995); Convention on the Crime of Genocide (ratified by South Africa in 1998) and the Torture Convention (ratified by South Africa in 1998). South Africa also ratified the African Charter on Human and Peoples' Rights in 1996.

[2] FC s 39(1)*(b)* reads: 'When interpreting the Bill of Rights, a court, tribunal or forum must consider international law.'

[3] See Statute of International Court of Justice, art 38(1).

[4] In terms of article 2(1)*(a)* of the Vienna Convention on the Law of Treaties (1969), a treaty means 'an international instrument concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.'

Treaties are usually negotiated and signed by the executive branch of government. In many systems, however, the legislature has a role to play in the treaty-making process. In some instances treaties only become binding upon the state concerned if ratified by the legislature. In addition, they often only become part of the domestic law if the legislature promulgates a law incorporating the contents of the treaty into domestic law. Under the old constitutional dispensation in South Africa, the power to enter into treaties was entrusted solely to the executive branch of our government.[1] The legislature played no part in the treaty-making process, and treaties did not become part of our domestic law unless they were incorporated through legislation.[2]

In terms of FC s 231, although treaties are still negotiated and signed by the executive, a treaty only becomes binding on the South African state at the international law level if approved by a resolution of both houses of the national legislature.[3] Unlike under the old constitutional dispensation, ratification by Parliament is therefore a necessary component of the treaty-making process under the Final Constitution. Consistent with the dualist approach to the incorporation of treaties, a further enactment by the national legislature is required to make the treaty part of domestic law.

(ii) *Customary international law*

Customary international law is that source of international law developed through state custom or practice. It is the 'common law' of the international legal system.[4]

A custom will become a rule of customary international law where it is a sufficiently widespread practice adopted by states out of a sense of legal obligation. There are, accordingly, two elements to customary international law — settled practice (*usus),* and *opinio iuris et necessitatis* (the psychological element of acceptance of an obligation to be bound).

According to the International Court of Justice in *The Asylum Case*, for a practice to become a rule of customary international law, the practice must be 'constant and uniform'.[5] Such a practice may be evinced in a number of ways: through decisions of national and international courts, diplomatic correspondence, the opinions of state law advisors and resolutions of international organizations like the United Nations.[6]

[1] Republic of South Africa Constitution Act 110 of 1983, s 6(2)*(c)*.

[2] See *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150, 161 (A); *S v Tuhadeleni & Others* 1969 (1) SA 173, 175 (A); *Maluleke v Minister of Internal Affairs* 1981 (1) SA 707, 712 (B); *Binga v Administrator-General, South West Africa & Others* 1984 (3) SA 949, 968 (SWA); *Tshwete v Minister of Home Affairs* 1988 (4) SA 586, 606 (A); *S v Muchindu* 1995 (2) SA 36, 38 (W); *Azapo v President of the Republic of South Africa* 1996 (4) SA 671 (CC), 1996 (8) BCLR 1015 (CC)('*Azapo*') at para 26.

[3] Treaties of a 'technical administrative or executive nature' or any other treaty 'which does not require ratification or accession' binds us without ratification by the National Assembly. FC s 231(3).

[4] Dugard (supra) at 26.

[5] *Columbia v Peru* (1950) ICJ Reports 266 ('*Asylum*').

[6] Dugard (supra) at 28.

The creation of international customary law rules through resolutions by the political organs of the United Nations is a hotly contested practice, especially with regard to UN resolutions that are non-binding and that fall under the category of mere recommendations. The International Court of Justice in *Legality of the Threat or use of Nuclear Weapons* explains its treatment of such resolutions as follows:

> The Court notes that General Assembly resolutions, even if they are not-binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.[1]

(iii) *General principles of law recognised by civilised nations, and judicial decisions and the writings of highly qualified publicists*

Although less seldom invoked, these residual sources of international law may be drawn upon in the absence of treaty law or customary international law.

(iv) *The impact of overriding principles and values*

While there is generally no hierarchy of lower and higher norms making up the international legal system, two concepts of recent origin suggest that certain principles, norms or values may have such overriding importance for international co-existence and that their enforcement trumps other international obligations of states.

Jus cogens denotes the peremptory nature of certain norms. According to Brownlie, the least controversial examples of such norms are the prohibition of the use of force in international relations, the law of genocide and crimes against humanity, the principle on racial non-discrimination, and the rules prohibiting piracy and the trade in slaves.[2]

The concept has found its way into the 1969 Vienna Convention on the Law of Treaties. Article 53 of the Convention states that a treaty will be void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. Such a norm, Article 53 continues, is one that is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

Erga omnes obligations have been defined by the International Court of Justice as obligations a state owes 'towards the international community as a whole' as opposed to obligations that arise vis-à-vis another state.[3] In contemporary international law, such obligations arise, according to the Court, from the 'outlawing

[1] (1996) ICJ Reports 226.
[2] I Brownlie *Principles of Public International Law* (6th Edition, 2003) 488, 489.
[3] *Belgium v Spain* (1970) ICJ Reports 3, 32 ('*Barcelona Traction*').

of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.'[1]

In *Prosecutor v Furundzija,* the International Criminal Tribunal for the former Yugoslavia ('ICTY') clarified the distinction between *erga omnes* obligations and *jus cogens.*[2] In ruling that the prohibition against torture has acquired the status of *jus cogens*, the ICTY made clear that at the level of international enforcement:

> the violation of such an [*erga omnes*] obligation [to enforce the prohibition] simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfillment of the obligation or in any case to call for the breach to be discontinued.[3]

With respect to international treaty monitoring bodies, the findings of such bodies regarding *jus cogens* 'enjoy priority over individual States in establishing whether a certain State has taken all the necessary measures to prevent and punish torture.'[4] Such *jus cogens* status, for example, deligitimates any legislative, executive or judicial measure authorizing or condoning torture or absolving its perpetrators through an amnesty law.[5]

At the national level, the *jus cogens* nature of a norm would mean that individual victims of a violation could institute proceedings in a competent national or international tribunal with a view to having the violating measure annulled. The *jus cogens* nature of a norm also means that a civil action can be instituted in a foreign court for the claiming of damages and that the perpetrators can be held criminally responsible either in a foreign state or in their own state under a subsequent regime.[6]

(c) The constitutionalisation of international law in South Africa

As we shall see below, the Final Constitution contains provisions that govern the manner in which international law is incorporated or adopted into our domestic law to form part of our substantive law — FC ss 231 and 232 – and provisions that determine the kind of influence international law has on the interpretation of our domestic law — FC ss 39 and 233.[7]

[1] See also *Bosnia and Herzegovina v Yugoslavia* (1996) ICJ Reports 615–616 ('*Genocide*').
[2] (2002) 121 International Law Reports 213.
[3] Ibid at 260.
[4] Ibid.
[5] Ibid at 261.
[6] Ibid.
[7] See also FC s 35(3)(1)(Everyone has the right 'not to be convicted of an act or omission that was not an offence under either national or international law at the time when it was committed or omitted'); FC s 37(4)('Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that the legislation is consistent with the Republic's obligations under international law applicable to states of emergency'); FC s 201(2)('[T]he primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.')

30.2 The Incorporation of International Law into Substantive Domestic Law in South Africa

A substantive rule of international law can become part of a state's domestic law if it is incorporated into the body of domestic law in that particular state. The incorporation of international law into domestic law can occur in one of two possible ways: (1) automatically; (2) by a specific act of adoption. Whether or not a special act of adoption is required is a matter to be determined by the domestic laws of each individual state. The Final Constitution is clear that customary international law automatically forms part of our domestic legal system, whilst treaties only become a part of our law through a separate act of adoption.

(a) Customary international law as part of South African domestic law

The South African common law has long regarded international law as part of South African domestic law.[1] FC s 232 endorses the common law's recognition subject to the condition that the international law in question is not inconsistent with the Final Constitution itself or else an Act of Parliament. This process of incorporation is monist. It should, however, be noted that the place of customary international law in the hierarchy of laws renders it subordinate to the Final Constitution itself and to Acts of Parliament.[2] It is superior to all other sources of South African domestic law.

International law differs quite radically from domestic law in that it knows no doctrine of *stare decisis*. This means that the doctrine of judicial precedent 'cannot be invoked as an obstacle to the application of a new rule of international law.'[3] In *Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia,*[4] the Supreme Court followed the reasoning of an English court in *Trendtex Trading Corporation v Central Bank of Nigeria.*[5] The *Trendtex* Court had held that:

> International law knows no rule of *stare decisis*. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change — and apply that change in our English law — without waiting for the House of Lords to do it.[6]

Trendtex and *Kaffraria Property* thus allow for an exception to the doctrine of judicial precedent where international law has changed since the earlier domestic decision was delivered. For example, a High Court can arrive at a different legal conclusion in a similar matter already decided by the Supreme Court of Appeal

[1] *Ex Parte Belli* 1914 CPD 742, 745-6; *Crooks and Company v Agricultural Co-operative Union Ltd* 1922 AD 423; *R v Lionda* 1944 AD 348, 352; *S v Penrose* 1966 (1) SA 5, 10 (N).
[2] Whilst an Act of Parliament will trump customary international law, subordinate legislation will not.
[3] Dugard (supra) at 52.
[4] 1980 (2) SA 709, 715 (E)('*Kaffraria Property*').
[5] [1977] QB 529 ('*Trendtex*').
[6] Ibid at 554.

where it finds that the relevant rule of customary international law upon which that SCA decision was based has subsequently changed. The absence of stare decisis at international law thereby frees the High Court to depart from the domestic precedent in question.

It is, of course, another matter to convince the High Court that a particular rule or practice ought to be regarded as a rule of customary international law, or that customary international law has itself changed. As we noted above, a rule or practice will be recognized as a rule of customary international law only when it meets the twin requirements of *usus* and *opinio juris*. A court making such an assessment would need to consult the decisions of international courts and tribunals (or those of other domestic courts addressing the same point, as well as academic works.[1]) This is not always easy to do and there is very little consistency in South African domestic courts on how this ought to be done.

Some South African decisions wrongly suggest a test for such determinations that is far stricter than the test laid down by international law itself. International law requires that before a customary rule of international law be accepted as such, there needs to be 'evidence of a general practice accepted as law.'[2] The South African decisions that require evidence of a 'universal' practice should be viewed as incorrect statements of law.[3] Rebecca Wallace states the correct position as follows:

> How many states must be involved in a particular activity before the practice is accepted as law? Universal practice is fortunately not necessary. Article 38(1)*(b)* speaks not of a universal practice, but of a general practice. A practice can be general even if it is not

[1] See *Kaunda v President of the Republic of South Africa* 2004 (5) SA 191 (CC), 2004 (10) BCLR 1009 (CC)('*Kaunda*'). The Constitutional Court had to consider whether or not there was a constitutional duty on South Africa to afford diplomatic protection to its nationals when their fundamental human rights were being violated in a foreign state. It stands to reason that if such a duty exists under customary international law then it also exists under South African domestic law through the operation of FC s 232 — the duty under customary international law would automatically be incorporated into our domestic law. The *Kaunda* Court accepted the view that states, under customary international law, have the right to espouse a claim on behalf of a national. The Court also accepted (based on a report from the International Law Commission) that there is in fact evidence that the municipal laws of many states actually make diplomatic protection obligatory. However, the Court still held that 'this is not the general practice of states.' Ibid at para 29. The Court, in fact, found that the general practice of states was that 'diplomatic protection remains the prerogative of the state to be exercised at its discretion.' Ibid. The Court went on to state that 'it must be accepted, therefore, that the applicants cannot base their claims on customary international law.' Ibid. There simply was not sufficient evidence of state practice to say that the rule had developed from a mere right into a legally binding duty.

[2] See Article 38(1)*(b)* of the Statute of the International Court of Justice.

[3] See *Du Toit v Kruger* (1905) 22 SC 234, 238 (De Villiers CJ stated that 'the rules which are laid down by some writers for exempting the private property of an enemy from capture have not been so universally accepted and acted upon as to justify this court in treating them as binding principles of law.') See also *Nduli v Minister of Justice* 1978 (1) SA 893, 906 (A)(Rumpff CJ wrote that 'it was conceded by counsel for the appellants that according to our law only such rules of customary international law are to be regarded as part of our law as are either universally accepted or have received the assent of this country. I think that this concession was rightly made.')

> universally followed, and there is no precise formula indicating how widespread a practice must be. What is in fact more important than the number of states involved, is the attitude of those states whose interests are actually affected.[1]

In the *North Sea Continental Shelf Cases*[2] the ICJ likewise held that something less than 'universal' acceptance is required:

> an indispensable requirement would be that within the period in question . . . state practice, including that of states whose interests are specifically affected, should have been both extensive and virtually uniform.[3]

Conradie J in *S v Petane* recognized that the Appellate Division itself had erred in this regard when he wrote:

> It is not clear to me whether Rumpff CJ in giving the judgment [in *Ndull*] meant to lay down any stricter requirements for the incorporation of international law usages into South African law than the requirements laid down by international law itself for the acceptance of usages by states. International law does not require universal acceptance for a usage of states to become a custom.[4]

The correct approach ought to be that if a rule is accepted at international law as customary international law then the rule must also be accepted by our domestic courts as customary international law. There is only one exception to this: the persistent objector principle. As far as South Africa is concerned, a practice to which it has persistently objected is simply not a customary rule of international law and can thus never be regarded as part of substantive South African domestic law.

(b) Treaties and conventions as part of South African domestic law

According to FC s 231, the incorporation of treaties and conventions follows the dualist approach.

Treaty-making falls exclusively within the competence of the executive. Treaties are negotiated and signed by the executive. Parliament then ratifies them by means of a resolution. Only those treaties specifically incorporated by an Act of Parliament become part of South African domestic law.[5] The rationale for the dualist approach flows from the separation of powers doctrine. If treaties could become part of our domestic law without any participation or endorsement from

[1] R Wallace *International Law* (3rd Edition, 1997) 11.

[2] *Federal Republic of Germany v Denmark and Federal Republic of Germany v Netherlands* ICJ Reports (1969) 3 ('*North Sea Continental Shelf*').

[3] Ibid at 43. See also *Spain v Canada* ICJ Reports (1974) 3, 23-6 ('*Fisheries Jurisdiction*').

[4] 1988 (3) SA 51, 56 (C).

[5] According to John Dugard, the legislature in South Africa employs three principal methods to transform treaties into domestic law — 'in the first instance, the provisions of a treaty may be embodied in the text of an Act of Parliament; secondly, the treaty may be included as a schedule to a statute; thirdly, an enabling Act of Parliament may give the executive the power to bring a treaty into effect in municipal law by means of a proclamation or notice in the Government Gazette.' Dugard (supra) at 57. Mere publication of a treaty for general information does not, according to Dugard, constitute an act of incorporation.

the legislature, then wide law-making powers would be conferred on the executive. It is not, according to the separation of powers doctrine, the function of the executive to make law.[1]

Where South Africa has ratified a treaty, it is bound by international law to honour the provisions of that treaty. As Mohamed DP notes in *Azapo v President of the Republic of South Africa*:

> International conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment.[2]

Thus, where a treaty has been ratified but has not been incorporated in municipal law by Parliament, and domestic courts cannot enforce our international obligations, the state may be found in breach of international law.[3] Under the Vienna Convention on the Law of Treaties, Article 26 places an obligation upon a state that has become a party to a treaty to execute the treaty in good faith, while Article 27 prevents the state party from invoking the provisions of its domestic law as justification for its failure to perform in terms of the treaty.

[1] Some of these issues were dealt with in *Harksen v President of the Republic of South Africa*. 2000 (2) SA 825 (CC), 2000 (5) BCLR 478 (CC)(*'Harksen'*). The State President is empowered by s 3(2) of the Extradition Act to consent to the surrender of a person on an ad hoc basis, in other words, even where there is no extradition treaty between South Africa and the requesting state Act 67 of 1962. One of the issues raised in this case was the constitutionality of s 3(2) given that it seems to conflict with FC s 231(2). The Constitutional Court's decision is rather disappointing. The *Harksen* Court held that the President's consent under s 3(2) did not constitute an 'international agreement' and it was thus not subject to the provisions of FC s 231. Accordingly Parliamentary approval was not required. Ibid at paras 22-23. According to the Constitutional Court, the effect of Presidential consent is merely a domestic act and not conduct on the international plane because Germany (the requesting state in this instance) was 'not entitled to rely on the President's consent to establish any enforceable obligation against South Africa.' Ibid at para 28. We find it difficult to see how there could have been no agreement between South Africa and Germany — even if only an informal one. Call it what you will, the President agreed, unilaterally, to extradite Harksen to Germany, and this had consequences on both the domestic and international planes. To allow the State President to act unilaterally when it comes to the surrender or extradition of individuals is, we submit, contrary to the spirit of transparency and accountability which underlies FC s 231, if it is not, in fact, in direct violation of FC s 231(2) itself. The effect of the Court's ruling would allow the executive to extradite South Africans to states which may have extremely poor human rights records — and to do so contrary to the wishes of Parliament. See J Dugard & G Abraham 'Public International Law' (2000) *Annual Survey of South African Law* 114-118. Dugard and Abraham make the point that s 3(2) was inserted into the Extradition Act in 1962, at the height of apartheid, so as to allow South Africa to extradite fugitives at a time when very few states had treaties with South Africa. But it has no place in the new constitutional order because 'transparency and accountability in treaty-making are important values recognized in the Final Constitution.' Ibid at 118.

[2] 1996 (4) SA 671 (CC), 1996 (8) BCLR 1015 (CC)(*'Azapo'*) at para 28.

[3] A state could feasibly ratify an international treaty in which it undertakes (to the international community) to prosecute persons within its territory who are responsible for the commission of industrial acts that are destructive to the environment. If the state ratifies the instrument, it will then incur responsibility under international law to the international community where it fails to make the relevant prosecutions. The reality, however, is that the state will be unable to meet its international obligations until it incorporates the treaty into its domestic law. Domestic courts cannot enforce prosecutions in the absence of domestic laws that prohibit such conduct. This principle is known as *nullum crimen sine lege*.

(c) United Nations resolutions

Resolutions adopted by the Security Council in terms of chapter VII of the UN Charter are binding on all members of the United Nations. In terms of article 25 of the UN Charter member states undertake to carry out such resolutions. Consequently, if domestic measures are needed to give proper effect to such resolutions, domestic authorities must see to it that such measures are in place. In South Africa, the Application of Resolutions of the Security Council of the United Nations Act authorises the incorporation of such resolutions into national law by proclamation in the *Government Gazette*.[1]

Non-binding resolutions, such as those adopted by the General Assembly or by the organs of other international organizations, do not have direct legal effect in the national legal system and must be transformed into national law by means of a legislative measure.[2]

30.3 International Law as an Aid to Interpreting a Provision in the Bill of Rights

In recognition of the important influence that international human rights law has had on the drafting of our Bill of Rights, FC s 39(1)*(b)* makes it mandatory for our courts to *consider* international law when interpreting the Bill of Rights.

Although evidence of real *consideration* and application of international law is scant,[3] there has been significant *reference* to international human rights jurisprudence in a number of the judgments of the Constitutional Court.[4] In *S v Makwanyane*, Chaskalson P set out the approach that ought to be employed by a court when considering how to use international law in interpreting the meaning of a provision in the Bill of Rights:

> In the course of the arguments addressed to us, we were referred to books and articles on the death sentence, and to judgments dealing with challenges made to capital punishment in the courts of other countries and in international tribunals. The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention. They may also have to be considered because of their relevance to section 35(1) of the Constitution . . .

[1] Act 172 of 1993

[2] See *Welkom Municipality v Masureik and Herman T/A Lotus Corporation & Another* 1997 (3) SA 363, 371-372 (SCA) .

[3] See M Olivier 'South Africa and International Human Rights Agreements, Policy and Practice' (2003) 2 *Journal of SA Law* 293.

[4] Many of the initial judgments making reference to international law in the interpretation of the Bill of Rights were decided under IC s 35(1). It read: 'In interpreting the provisions of the [interim Bill of Rights] a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in [the bill of rights], and may have regard to comparable foreign case law.' Although there is a slight difference in emphasis, the two subsections are, in essence, identical and the jurisprudence of the Constitutional Court decided under IC s 35(1) remains relevant to the application of FC s 39(1)*(b)*.

> . . . In the context of section 35(1) public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights and the European Court of Human Rights and in appropriate cases, reports of specialized agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].
>
> . . . In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.[1]

Two important guidelines emerge from these extracts. The first is that the obligation to consider international law when interpreting the Bill of Rights includes both treaty law and customary international law. Such law embraces both binding and non-binding international law. Thus, where there is a relevant treaty to which we are not yet bound, the obligation to consider international law would include such a non-binding treaty. Second, although there is an obligation to consider applicable international law,[2] our courts are not bound to apply it.[3] International law is merely a tool of interpretation, and the differing contexts of the applicable international law instrument or principle and our Bill of Rights should be borne in mind by the courts in assessing its influence. In *Coetzee v Government of RSA,* the Court held that what IC s 36 and FC s 39 require is not a rigid application of 'formulae' but rather that due regard be paid to the principles that can be extracted from international experience.[4]

While *Makwanyane* clarified the respective positions of both binding and non-binding international law, the Court's understanding of what should qualify as non-binding international law is less certain. One finds for instance no reference to non-binding standards, also known as 'soft law', and no explanation as to whether multilateral treaties not ratified by South Africa would qualify as

[1] *S v Makwanyane* 1995(3) SA 391 (CC), 1995 (6) BCLR 665 (CC)('*Makwanyane*') at paras 34, 35 and 39.

[2] IC s 35(1) only required consideration of international law 'where applicable', whereas the obligation under FC s 39(1)*(b)* is not similarly qualified. However, in our view, it seems clear that a court is only obliged to consider 'applicable' international law.

[3] See *S v Williams* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at paras 21 and 23 (Court held that 'valuable insights' may be gained from international law, and that FC s 35(1) required the Court to 'have regard' to 'international consensus.' Courts are 'not bound to follow it, but neither can they ignore it.')

[4] 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC) at para 57.

non-binding international law. The Constitutional Court offered some clarification of its position in *Grootboom*.[1] In considering the use of international law to advance the Court's gloss on the right to housing in FC s 26, Yacoob J wrote:

> The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.[2]

In a footnote appended to the phrase 'binds South Africa', Yacoob J refers to FC s 231 in its entirety which can only mean that a binding international law norm can be inferred from a treaty ratified by Parliament, but not enacted into domestic law. It seems reasonable to conclude that the above understanding of the relevance of international law aims at a distinction between international law as an aid in constitutional construction and international law as directly applicable law. In terms of this understanding, the role of non-binding international law will be limited to providing guidance as to the correct gloss to place on a given provision. Thus, *Grootboom* invokes a non-binding international standard to give content to a specific constitutional provision.[3] The Court took a similarly restrictive view in *Treatment Action Campaign*.[4]

The Court's reluctance to venture beyond the wording of the Final Constitution in interpreting fundamental rights has certain implications for the role of international law as an aid to interpretation. While directly applicable convention law still has a chance of receiving some *consideration*, non-binding norms of whatever kind are likely to be met with indifference. One must also not lose sight of the fact that, in general, South African courts have always favoured case law when applying comparative source material from other jurisdictions and the fact is that

[1] *Government of the Republic of South Africa & Others v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1160 (CC)('*Grootboom*').

[2] Ibid at para 26.

[3] At issue was whether FC s 26 must be interpreted in a way that ensures compliance with the minimum core obligations to fulfil socio-economic rights articulated in General Comment No 3 (1990) by the Committee on Economic, Social and Cultural Rights. The *Grootboom* Court accepted that what the Committee intended was to set a minimum essential level below which state conduct must not drop with respect to socio-economic rights. It determined that, in international law, this minimum essential level means that regard must be had to the needs of the most vulnerable groups in society. However, the Court was quick to point out the difficulty in determining a minimum core obligation where needs in relation to adequate housing were diverse. Ibid at para 31. In addition, the Court rejected the argument that it was obliged to determine the minimum core content of a right, since FC s 26 states that the apposite test is whether the state has taken reasonable steps, within the state's available resources, to achieve the progressive realization of the right to housing. Ibid at 33.

[4] *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1075 (CC)('*TAC*'). The *TAC* Court concluded that FC s 27 should not be interpreted to provide for minimum core obligations, and that such benchmarks should be treated as *possibly* relevant only to the question whether the state's measures were reasonable or not. Ibid at paras 34–38.

they now *may* do so. That international law *must* be considered is unlikely to change that sentiment. It is also interesting to note that the preference for staying as close as possible to the Final Constitution has been entrenched in the Promotion of Equality and Prevention of Unfair Discrimination Act.[1] Section 3 of this Act determines that any person interpreting the Act *must* do so with a view towards giving effect to the Final Constitution, and in doing so *may be mindful* of international convention law or customary law and comparable foreign case law. Here international law is put on the same footing as foreign case law, a position that differs from that assigned to international law in terms of FC s 39. Against the background of these developments there is much to be said for the comment that 'the distinction between foreign and international law has not been fully realized [by the South African courts]; that reference has often been passing, cursory and largely 'ceremonial'; and that the number and nature of international sources used, has, by and large, been uncreative to say the least.'[2]

30.4 State Conduct and Obligations

(a) Jus ad bellum and *jus in bello*

The right to use armed force (*jus ad bellum*) is now constitutionally regulated. The primary function of the defence force is 'to defend and protect the Republic, its territorial integrity and its people in accordance with the constitution and the principles of international law regulating the use of force.'[3] The primary function referred to here is the defence of the Republic against external military aggression. The use of the military for internal policing is limited to exceptional circumstances.[4] The reference to 'international law regulating the use of armed force' outlaws the use of the defence force for a war of aggression and limits the deployment of the force to instances involving action to restore or to maintain international peace and security,[5] enforcement action under a regional arrangement,[6] and individual or collective self-defence action.[7] The South African Defence Review, undertaken in 1998 to elaborate upon the defence force's policy framework contained in the 1996 White Paper on National Defence, makes it clear that the 'government does not currently, and will not in the future, have aggressive intentions towards any state.'[8] It regards the use or threat of military force as a measure of last resort in the face of aggression 'when non-violent forms of conflict resolution have failed.'[9]

[1] Act 4 of 2000.

[2] N Botha 'The Role of International Law in the Development of South African Common Law' (2001) 26 *SA Yearbook of Int Law* 253, 255.

[3] FC s 200(2).

[4] *White Paper on National Defence for the Republic of South Africa: Defence in a Democracy* (1996), available at http://www.info.gov.za/whitepapers/1996/defencwp.htm (accessed on 1 October 2005)('*White Paper*') 7.

[5] UN Charter Article 42.

[6] UN Charter Article 53.

[7] See also *White Paper* (supra) at 8.

[8] *South African Defence Review* (1998) Chapter 1, para 35, available at http://www.dod.mil.za/documents/defencereview/defence/20review1998.pdf (accessed on 13 September 2005).

[9] Ibid.

The deployment of the defence force for purposes commensurate with international law on the use of force must be understood in terms of the roles assigned to the executive and the legislature by the Final Constitution.[1] Only the President, as head of the national executive, may authorize the deployment of the defence force. This function must be exercised together with other members of the cabinet.[2] The purposes for which deployment is authorized are limited to co-operation with the police force, defence of the Republic and fulfillment of an international obligation.[3] If deployment takes place for any of these purposes, Parliament must be promptly informed, and in appropriate detail of: (1) the reason for the deployment; (2) the place where the defence force will be deployed; (3) the number of people involved in the operation: and (4) the period for which the force will be deployed.[4] Although it is not spelled out in the Final Constitution, once informed about the particulars of the operation, Parliament could either endorse or veto the deployment. Such an oversight role is often assigned to the legislature.[5]

It is unclear whether, in the case of deployment in defence of the Republic, a prior declaration of a state of national defence is a pre-condition for deployment. The Final Constitution authorizes the President to declare a state of national defence in a provision that is textually and structurally unrelated to the provision that determines when the defence force can be deployed.[6] However, the word 'may' in this context indicates authority rather than possibility. Once a declaration has been made, Parliament must be informed about the reasons for the declaration, the place where the defence force will be deployed and the number of people who will be involved. Here, the President is not required to state the period for which the deployment will be effected, presumably because the period of deployment will coincide with the time during which the declaration remains in force. A declaration of national defence will lapse unless Parliament approves of it within seven days of the declaration.[7]

One difficult institutional issue in a constitutional democracy is the ability of the courts to pass judgment on matters concerning national security. In *Hamdi*,

[1] According to FC s 198*(d)*, national security is subject to the authority of Parliament and the national executive.

[2] FC s 85(2).

[3] FC s 201(2).

[4] FC s 201(3).

[5] For comparative developments, see LF Damrosch 'The Interface of National Constitutional Systems with International Law and Institutions on Using Military Forces: Changing Trends in Executive and Legislative Powers' in C Ku & H Jacobson *Democratic Accountability and the Use of Force in International Law* (2003) 39.

[6] FC s 203.

[7] FC s 203(3).

the US Supreme Court rejected the government's assertion that the separation of powers doctrine divested the Court of its power to hold the executive accountable in times of war.[1] It asserted its right and its duty to assess the constitutionality of any limitations placed on *habeas corpus* rights of enemy combatants.

The judicial branch is, however, unlikely to assess the substantive grounds for the actual deployment of the defence force. In *Turp v Chretien*, the applicants applied to a federal court for judicial review of an executive decision to involve Canadian forces in a military intervention in Iraq on the basis that such an intervention was not authorized by the Security Council and would be contrary to international law.[2] In addition, the applicants moved for interim relief prohibiting the Canadian government from participating in any military intervention in Iraq pending the outcome of the court's ruling. The applicants further argued that a declaration of war, without the approval of Parliament, would be contrary to Canada's democratic commitments and that any executive decision to deploy the armed forces must be supervised by Parliament and be subject to both the Canadian Charter and international law. The motion for interim relief was dismissed on the basis that it was not yet ripe. As to the gravamen of the complaint, the court held that, unless there is a breach of the Canadian Charter, questions of 'high policy' are not reviewable by the courts.[3]

The conduct of the military during armed conflict is now explicitly regulated by the Final Constitution. It states that the security services 'must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic'.[4] From this it follows that 'no member of any security service may obey a manifestly illegal order.'[5] As it stands, 'manifestly illegal order' must be interpreted as referring to an order that violates the principles in any of the sources mentioned in the previous provision.[6] A more open-ended reference to 'international humanitarian law' applies to the detention of aliens in consequence of an international armed conflict. In terms of FC s 37(8), which forms part of the Bill of Rights, the state must comply with the 'standards binding on the Republic under international humanitarian law in respect of the detention of such persons.' FC s 37(8) embraces both international customary and treaty law.

[1] *Hamdi v Rumsfeld* 542 US 507 (2004). See also HA Strydom 'The Case of the Gunatanamo Detainees in United States (and Other) Courts' (2004) *TSAR* 294.

[2] 111 CRR (2003) 184.

[3] In coming to this conclusion the *Turp* court relied on *Black v Canada*. (2001) 54 OR (3rd) 215, (2001) 199 DLR (4th) 228 (CA)('*Black*'). The *Black* Court held that executive decisions involving the signing of a treaty or a declaration of war concern public policy and public interest considerations that far outweigh the rights of individuals or their legitimate expectations. See also *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] 1 All ER 655 (CA).

[4] FC s 199(5).

[5] FC s 199(6).

[6] According to Article 33(2) of the Rome Statute of the International Criminal Court, an order to commit genocide or a crime against humanity is a manifestly illegal order.

The role of customary international law as a source of international humanitarian law principles must be read in conjunction with the constitutional provision that customary international law is *law in the Republic* unless it is inconsistent with the Final Constitution or an Act of Parliament.[1] Although this provision ranks customary international law below the Final Constitution and an ordinary Act of Parliament in the case of an inconsistency, inconsistencies will be rare. As far as treaty law is concerned, only treaties to which South Africa has become a party are law. South Africa is party to the Hague Conventions and Regulations (1899 and 1907),[2] the Geneva Conventions (1949)[3] and their Additional Protocols (1977).[4] In addition, South Africa is party to a number of multi-lateral treaties limiting the use of weapons designed to cause unnecessary suffering.[5]

Although the Final Constitution only refers to humanitarian law treaties to which South Africa has become a party, relevant and supplementary principles present in other sources cannot be left out of the equation. Though not coextensive, human rights law and humanitarian law do overlap.[6] Thus, where the courts are called upon to apply and interpret the Bill of Rights as part of a humanitarian law issue, binding as well as non-binding international law will become part of the reference material.[7] FC s 233 obliges courts to follow international humanitarian law in instances in which a legislative measure is open to multiple interpretations: the courts must choose an interpretation of a legislative measure that is consistent with international law over an alternative interpretation that is inconsistent with international law.[8]

The Geneva Conventions place the domestic effect of these multi-lateral treaties in doubt.[9] While the lack of an enactment in terms of FC s 231(4) could pose a problem for the domestic prosecution of individuals for the commission of war crimes, that problem is largely obviated by the domestic implementation of the Rome Statute of the International Criminal Court[10] through the Implementation

[1] FC s 232.

[2] The following conventions were ratified on 29 July 1899: Convention (II) with Respect to the Laws and Customs of War on Land and Regulations concerning the Laws and Customs of War on Land; Declaration (IV, 2) concerning Asphyxiating Gases; Declaration (IV, 3) concerning Expanding Bullets. Ratified on 18 October 1907 were the following: Convention (III) relative to the Opening of Hostilities; Convention (IV) Respecting the Laws and Customs of War on Land and its Regulations Concerning the Laws and Customs of War on Land; Convention (VII) relating to the Conversion of Merchant Ships into War Ships; Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines; Convention (IX) concerning Bombardment by Naval Forces in Time of War; Convention (XI) relative to certain Restrictions with regard to the Exercise of the Rights of Capture in Naval War.

[3] Ratified by South Africa on 31 March 1952.

[4] Ratified by South Africa on 21 November 1995.

[5] For such a list, see J Dugard *International Law: A South African Perspective* (2nd Edition, 2000) 432, 433.

[6] See, eg, T Meron 'The Humanization of the Law of War' (2003) 24 *Recuiel des Cours* 301.

[7] See FC s 39(1)*(b)*; *Makwanyane* (supra) at 413-4.

[8] FC s 233.

[9] See Dugard (supra) at 439.

[10] The Rome Statute was ratified by South Africa on 27 November 2000.

of the Rome Statute of the International Criminal Court Act.[1] This Act gives the South African courts jurisdiction to adjudicate cases involving the Statute's core crimes in accordance with the principle of complementarity in article 17 of the Rome Statute. It directs the courts to consider and to apply, in addition to the Final Constitution and the domestic law of South Africa, conventional international law, customary international law and comparable foreign law.[2]

(b) Diplomatic immunity

Diplomatic immunity is regulated by the Diplomatic Immunities and Privileges Act.[3] The Act incorporates certain important provisions of the Vienna Convention on Consular Relations (1963) and the Vienna Convention on Diplomatic Relations (1961).[4] In case of an ambiguity between the statutory and convention law on diplomatic immunities and privileges, the courts must prefer any reasonable interpretation of the statutory law that is consistent with international law.[5] In addition to statutory and convention law, the rules of customary international law will be applicable unless such rules are inconsistent with the Final Constitution or an Act of parliament.[6]

Apart from convention rules and customary international law, the privileges and immunities in question here can also be extended to foreign dignatories by agreement entered into with a foreign state, government or organization[7] and can even be conferred on the recipient by executive notice in the Government Gazette. Agreements of this nature must comply with FC s 231. That entails both parliamentary approval and the enactment of legislation incorporating the agreement into domestic law.[8]

(c) State immunity

Jurisdictional immunity, which is granted to a foreign sovereign, forms part of the general principles of international law. In the words of Marshall CJ in *The Schooner Exchange v McFaddon*

> One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign

[1] Act 27 of 2002 ('Implementation Act').
[2] Implementation Act, s 2.
[3] Act 37 of 2001 ('DIPA').
[4] DIPA, s 2(1). It also incorporates the Convention on the Privileges and Immunities of the United Nations (1946) and the Convention on the Privileges and Immunities of the Specialized Agencies (1947). See also FC s 231(4).
[5] FC s 233.
[6] FC s 232.
[7] DIPA, ss 4(1)*(a)* and *(b)* and 4(2)*(a)* and *(b)*.
[8] FC s 231(2) and (4).

> territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him. This perfect equality and absolute independence of sovereigns, and the common interest compelling them to mutual intercourse, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation.[1]

Since the 1970's a number of states have started moving away from the absolute nature of this rule by adopting a restrictive approach to jurisdictional immunity.[2] Such immunity will only apply to the official acts (*acta jure imperii*) of a foreign state while rendering commercial transactions (*acta jure gestiones*) to which the foreign state is a party subject to domestic law.[3] South Africa endorsed this position in the Foreign States Immunities Act.[4] Consequently, while foreign states enjoy immunity from the jurisdiction of the courts of the Republic,[5] immunity will not apply to commercial transactions[6] entered into by the foreign state[7] or to a contractual obligation incurred by a foreign state if the contract falls to be performed wholly or partly in the Republic.[8]

The erosion of the absolute doctrine of state immunity by excluding commercial transactions from its operation is only one phase in adapting the doctrine to changing circumstances. The doctrine is likely to be further eroded by two recent developments. The first is the entrenchment of the effective remedy provision in international human rights instruments. The second is the conflict between immunity and the institution of criminal and civil proceedings against immunity-bearing persons accused of gross human rights violations.

Both international and regional human rights instruments contain express provisions relating to the right of persons to an 'effective remedy' for acts violating human rights.[9]

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[1] (1812) 7 Cranch 116.

[2] The restrictive theory of state immunity has been endorsed in the first multi-lateral instrument on the issue of jurisdictional immunity. See *United Nations Convention on Jurisdictional Immunities of States and Their Property*, A/Res/59/38 (16 December 2004), reprinted in 44 ILM 803 (2005). Exceptions to the immunity of a state and its Property include claims arising from: (1) commercial transactions; (2) employment contracts; (3) personal injury and damage to property; (4) ownership, possession and use of property; (5) intellectual and industrial policy; (6) state-owned or state-operated ships used for purposes other than governmental non-commercial purposes; (7) arbitration proceedings; and (8) situations involving consent to jurisdiction. Ibid at articles 7–18.

[3] *I Congreso del Partido* [1983] 1 AC 244 (HL); *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 (2) SA 111 (T).

[4] Act 87 of 1981 ('FSIA').

[5] FSIA s 2(1).

[6] FSIA, s 4(3)(For a definition of 'commercial transaction'.)

[7] FSIA, s 4(1)*(a)*.

[8] FSIA, s 4(1)*(b)*.

[9] Article 8 of the Universal Declaration of Human Rights links the effective remedy requirement to the remedies of national tribunals; article 2(3)*(a)* of the International Covenant on Civil and Political Rights places an obligation on states partie to ensure that a person whose rights have been violated 'shall have an effective remedy'; article 6 of the Convention on the Elimination of All Forms of Racial Discrimination obliges state parties to assure to everyone 'effective protection and remedies'; article 25 of the Inter-American Convention on Human Rights proclaims the right of every person to simple and prompt recourse, 'or any other effective recourse' for protection against acts that violate fundamental rights; and article 13 of the European Convention on Human Rights states that everyone whose rights and freedoms are violated 'shall have an effective remedy before a national authority.'

References to a right to some form of restitution is also not uncommon.[1] The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power contains, for example, provisions relating to questions of restitution and mentions 'prompt redress' for harm done, 'fair restitution to victims, their families or dependants for harm or loss suffered', 'reimbursement of expenses incurred as a result of victimization', and the obligation of states to provide 'financial compensation' when compensation is not fully available from the offender.[2] In a more recent declaration on the obligations of individuals and organs of civil society to protect human rights, the General Assembly has once again drawn attention to the need for effective remedies by stating that:

> In the exercise of human rights and fundamental freedoms. . .everyone has the right. . .to benefit from an effective remedy and to be protected in the event of the violation of those rights. To this end everyone . . . has the right . . . to complain to and have that complaint reviewed in a public hearing before . . . a competent judicial or other authority . . . and to obtain from such authority a decision . . . providing redress, including any compensation due, . . . as well as enforcement of the eventual decision and award.[3]

In *Velásques v Honduras*, the Inter-American Court of Human Rights offers a clear statement regarding the victims of human rights abuses and the provision of reparation of damages resulting from violations committed by state actors.[4] Reaffirming this state obligation in *Barrios Altos*, the Inter-American court ruled that:

> all amnesty provisions, provisions of prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial summary or arbitrary execution and forced disappearance.[5]

The Human Rights Committee, established in terms of article 28 of the International Covenant on Civil and Political Rights (ICCPR), has also addressed this issue and concluded as follows in its General Comment 20:

> The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of states to investigate such acts;

[1] Article 9(5) of the International Covenant on Civil and Political Rights speaks of an 'enforceable right to compensation' in the case of unlawful arrest or detention; article 14 of the Convention Against Torture states that each state party must ensure that the victim of an act of torture 'obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible'; article 6 of the Convention on the Elimination of All Forms of Racial Discrimination provides for a right to seek 'just and adequate reparation or satisfaction for any damage suffered'; article 63(1) of the Inter-American Convention on Human Rights entitles the courts to rule that the consequences of a breach 'be remedied and that fair compensation be paid to the injured party.'

[2] GA resolution 40/34 of 29 November 1985.

[3] GA resolution 53/144 (1998) — *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms.*

[4] 28 *ILM* (1989) 294.

[5] 41 *ILM* (2002) 93 at para 41.

> to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.[1]

It stands to reason that an immunity arrangement, whether under the diplomatic or state immunity doctrine, creates a procedural bar to a legal remedy. The Rome Statute of the International Criminal Court limits the reach of such arrangements in article 27. Article 27 states that 'immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'[2] The enactment of this rule in South African domestic law further suspends immunity as a defence for past heads of state or government or other government officials or representatives regardless of whether a contrary rule exists by virtue of any other law, including customary and conventional international law.[3] Since the South African courts now have jurisdiction over the crimes listed in the Rome Statute, the courts' approach to immunity should be altered accordingly.[4]

As far as civil proceedings against violators are concerned, immunity is still a bar to claims against state officials.[5] Although this approach was recently reinforced in decisions handed down by the European Court of Human Rights,[6] there are definite signs of erosion in this doctrine as well. In *Al-Adsani* the applicant was the victim of torture committed by public officials in Kuwait. When civil proceedings were initiated in a British court against the government of Kuwait, the applicant learned that immunity legislation conferring immunity on foreign governments frustrated his attempts to obtain compensation for the physical and mental harm done to him. His further claim before the Strassbourg court that the immunity rule denied him access to court in violation of article 6(1) of the European Human Rights Convention was turned down on the basis that, despite the *jus cogens* nature of the prohibition on torture, state immunity still applies in respect of civil claims for damages. However, the ECHR Court split nine to

[1] General Comment 20 of 1992 reprinted in J Steiner & P Alston *International Human Rights in Context* (2000) 531, 532.

[2] 28 *ILM* (1989) 294. See also Article 7(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted on the 25 May 1993 by Security Council resolution 827); Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda (adopted on the 8 November 1994 by Security Council resolution 955); Article 6(2) of the Statute of the Special Court for Sierra Leone (established pursuant to Security Council resolution 1315 of 14 August 2000).

[3] The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ('Implementation Act'), s 4(2).

[4] Implementation Act ss 3*(d)* and 4(3).

[5] See, eg, *R v Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte* (No 3) [1999] 2 All ER 97 (HL) 157 (Lord Hutton) 179 (Lord Millet) 182 (Lord Phillips). See also J Dugard 'Immunity, Human Rights and International Crimes' (2005) *TSAR* 482, 485; H Strydom & SD Bachmann 'Civil Liability for Gross Human Rights Violations' (2005) *TSAR* 448.

[6] *Al-Adsani v United Kingdom* (2002) 34 EHRR 273 ('*Al-Adsani*'); *Fogarty v United Kingdom* (2002) 34 EHRR 302; *McElhinney v Ireland* (2002) 34 EHRR 322 ('*McElhinney*').

eight on this issue. For the minority, the distinction between criminal and civil proceedings lacked merit. The only question, they argued, was the difference in status between the prohibition on torture and the immunity rule. Once the *jus cogens* nature of the prohibition on torture was established, reasoned the minority, a state could no longer invoke hierarchically lower rules such as immunity to avoid the consequences of a violation of the norm.[1]

Although not dealing with a *jus cogens* matter, the minority judgment in *McElhinney v Ireland* further illustrates this shift in sentiment.[2] The applicant, an Irish police officer, was involved in a rather bizarre incident at a British checkpoint that resulted in the applicant driving two miles into the Republic of Ireland with a British soldier clinging to his vehicle. The British soldier eventually discharged his weapon at the applicant's car and at the applicant. The applicant suffered from post-traumatic stress disorder as a result of the incident and sued the British government in the Irish courts, only to find himself barred by the principle of state immunity. The *McElhinney* Court concluded that:

> there appears to be a trend in international and comparative law towards limiting State immunity in respect of personal injury caused by an act or omission within the forum state, but that this practice is by no means universal. Further, it appears from the materials referred to above that the trend may primarily refer to 'insurable' personal injury, that is incidents arising out of ordinary road traffic accidents, rather than matters relating to the core act of State sovereignty such as the acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security.[3]

The dissent found a clear violation of article 6(1) of the ECHR and grounded its finding on the principle that state immunity had long ceased to be a blanket rule exempting states from the jurisdiction of courts of law. This evolution, the minority argued, is reflected in exceptions to absolute immunity recognised by national legislatures and courts, in the codification of international law on state immunity and in international treaty law. The convergence of these developments was, according to the minority, 'sufficiently powerful to suggest, at any rate, that at present there is no international duty, on the part of States, to grant immunity to other States in matters of torts caused by the latter's agents.'[4]

As the law on immunity currently stands, immunity could still be granted in the case of civil proceedings regardless of the unlawful character of the conduct. Lord Millet, in the English House of Lords decision in *Pinochet*, wrote:

> The international community had created an offence for which immunity *ratione materiae* could not possibly be available. International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose.

[1] *Al-Adsani* (supra) at 297.
[2] *McElhinney* (supra) at 322.
[3] Ibid at 335.
[4] Ibid at 340.

> In my opinion, acts which attract state immunity in civil proceedings because they are characterised as acts of sovereign power may, for the very same reason, attract individual criminal liability. The respondents relied on a number of cases which show that acts committed in the exercise of sovereign power do not engage the civil liability of the state even if they are contrary to international law. I do not find those decisions determinative of the present issue or even relevant. In England and the United States they depend on the terms of domestic legislation; though I do not doubt that they correctly represent the position in international law. I see nothing illogical or contrary to public policy in denying the victims of state sponsored torture the right to sue the offending state in a foreign court, while at the same time permitting (and indeed requiring) states to convict and punish the individuals responsible if the offending state declines to take action.[1]

Despite the clear distinction made between civil and criminal proceedings, the International Law Commission reached the conclusion that *Pinochet* stands for the proposition that 'State officials should not be entitled to plead immunity for acts of torture committed in their own territories in both civil and criminal actions.' Whether this gloss on the *Pinochet* case is accurate or not, Bianchi is surely correct to point out that *Pinochet* creates a 'manifest inconsistency which ought to be remedied by denying immunity to state and state officials in civil proceedings' because 'human rights atrocities cannot be qualified as sovereign acts' and because the characterisation of certain offences as *jus cogens* 'should have the consequence of trumping a plea of state immunity … in civil proceedings as well.'[2]

(d) Diplomatic protection

In *Barcelona Traction Company,* the ICJ held that domestic law may lay upon the state an obligation to protect its citizens abroad and may even confer a right upon the national to demand the performance of such an obligation and further clothe the right with a corresponding sanction.[3] This remedy, also known as diplomatic protection, normally arises in situations where the fundamental rights of a national of a state are under threat in a foreign country and there are no proper remedies in the foreign state upon which the national can rely.

At its forty-eighth session in 1996, the International Law Commission (ILC) identified the topic of diplomatic protection as one that warrants codification and progressive development.[4] In 2003, the ILC published its Draft Articles on Diplomatic Protection in which the following definition of diplomatic protection was given:

[1] R *v Bow Street Metropolitan Stipendiary Magistrate, ex Parte Pinochet Ugarte No 3* 1999 2 All ER 97 (HL) 179f–g.

[2] A Bianchi 'Immunity versus Human Rights: *The Pinochet Case*' (1999) 10(2) *European JIL* 237, 264–265.

[3] *Belgium v Spain* (1970) ICJ Reports 3.

[4] *General Assembly Official Records*, 51st Session, Supplement No 10 (A/51/10) par 249 and Annex II, Addendum 1.

> Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.[1]

By holding that a state 'has the right to exercise diplomatic protection' the Draft Articles made it clear that there is no legal duty that rests on a state to come to the rescue of its national who faces denial of justice in a foreign country.[2] Furthermore, the state may not bring an international claim in respect of an injury to its national before the injured person has exhausted all local remedies.[3] For this purpose, 'local remedies' are defined as 'remedies which are as of right open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for the injury.'[4] However, in the following instances local remedies need not be exhausted:

- When the local remedies provide no reasonable possibility of effective redress;
- When there is an undue delay in the remedial process attributable to the state;
- When the circumstances of the case make the exhaustion of local remedies unreasonable;
- When the responsible state has waived the requirement that local remedies be exhausted first.[5]

Since diplomatic protection involves intervention by the executive, judicial control over executive action or inaction raises separation of powers concerns. In *Abbasi v Foreign Secretary,* a United Kingdom citizen detained by American forces in Guantanamo Bay petitioned a British court for an order instructing the foreign office to intervene on his behalf because his due process rights were ignored by the United States government.[6] While acknowledging that nationals of a state may, in certain instances, have a legitimate expectation that their government would act upon a request for assistance, it was also made clear that the remedy in such instances is fairly limited. This is so because the consideration of the request and what will constitute an appropriate response to it are matters only the executive can decide and are therefore not justiciable. Only in an extreme case where, for instance, the executive refuses to consider an application, will it be appropriate for a court to grant an order directing the executive to apply its mind to the matter. The most a court can do is to enquire into the nature and consequences of the action taken and to expect the executive to provide reasons for its decision.[7]

[1] *Report of the International Law Commission,* 55th Session (2003), General Assembly Official Records, 58th Session, Supplement No 10 (A/58/10) 81, Article 1(1).
[2] Ibid at Article 2.
[3] Ibid at Article 8(1).
[4] Ibid at Article 8(2).
[5] Ibid at Article 10.
[6] *Abbasi v Foreign Secretary* 42 *ILM* 359 (2003)('*Abbasi*').
[7] Ibid at 381–382.

South African jurisprudence follows the same approach. In *Kaunda v President of the Republic of South Africa,* the Constitutional Court ruled that the currently prevailing view is that diplomatic protection is not recognized by international law as a human right and cannot be enforced as such.[1] Consequently, 'diplomatic protection remains the prerogative of the State to be exercised at its discretion.'[2] Although the *Kaunda* Court accepted that such matters remain largely within the discretion of the executive, it pointed out that in the case of a material breach of a human right that forms part of customary international law, the courts ought not to simply acquiesce. Two constitutional provisions were cited for the argument that in such cases there is a positive obligation on government to act. The first is FC s 7(2). FC s 7(2) places an obligation on government to not only respect and protect, but also to promote and to fulfill the rights in the Bill of Rights. The second is FC s 3. FC s 3 guarantees all South African citizens equal entitlement to the rights, privileges and benefits of citizenship. The *Kaunda* Court interpreted this section to mean that citizens have a right to request that government provide them with diplomatic protection and that there is a corresponding obligation on government to consider the request and to deal with it in a manner commensurate with the Final Constitution. There may even be a duty on government to act on its own initiative.[3] However, a court cannot tell a government how to respond to the request for diplomatic protection, since the decision 'as to whether, and if so, what protection should be given is an aspect of foreign policy which is essentially the function of the executive.'[4] In exercising this function, the executive has broad discretion which must be respected by the courts.[5] That respect has its limits. Since the exercise of all government power is subject to constitutional review, the courts retain jurisdiction to review instances of bad faith or irrational responses to a request for diplomatic review.[6]

Kaunda was followed by the High Court in *Van Zyl & Others v Government of the Republic of South Africa & Others.*[7] In this matter a number of companies registered in Lesotho and their South African shareholders unsuccessfully applied for a mandamus instructing the South African government to espouse their claims for compensation against the Lesotho government. The claims arose out of a longstanding legal battle with the Lesotho government over compensation for the

[1] *Kaunda v President of the Republic of South Africa* 2004 (5) SA 191 (CC), 2004 (10) BCLR 1009 (CC)('*Kaunda*').
[2] Ibid at para 29.
[3] Ibid at paras 66, 67, 69, 70.
[4] Ibid at paras 73, 77.
[5] Ibid at para 77.
[6] Ibid at paras 78–80.
[7] *Van Zyl & Others v Government of the Republic of South Africa & Others* Case No 20320/2002 ('*Van Zyl*')(Unreported, 20 July 2005, Transvaal Provincial Division).

expropriation and cancellation of certain mining leases granted to the companies by the Lesotho government.[1] Apart from the fact that the companies were registered in Lesotho and could therefore not claim entitlement to diplomatic protection by the South African government, the High Court also ruled that FC s 3, on which the judgement in *Kaunda* was partly premised, does not apply to legal *personae*. Such persons cannot claim the guarantees citizens of the Republic have in terms of FC s 3.[2] However, the *Van Zyl* Court also ruled that where a company is a national (i.e. registered in the Republic) and seeks diplomatic protection, the executive is obliged to consider the request and exercise its discretion whether to provide diplomatic protection or not. In this instance, the source of the duty to consider the case for the company is grounded in FC ss 41*(a)–(c)*'s requirement of accountability. While FC ss 40 and 41 are predominantly about the relationship between the national, provincial and local spheres and organs of state, these sections have also been relied upon by private parties in disputes with the state. Whatever the textual basis for its conclusions might have been, the Court rightly noted that executive discretion is constrained by customary international law.[3]

(e) Extradition

The rule that the courts of one country will not sit in judgement of the transactions of another country no longer applies in extradition cases where the standards of justice in the requesting state have implications for the fundamental rights of the person to be extradited.[4] In South Africa, the extradition of a person sought by a country with a poor human rights record may be successfully challenged.[5]

In *Mohamed v President of the Republic of South Africa* Mohamed, a Tanzanian national indicted in the United States on various charges carrying the death

[1] See *Attorney-General of Lesotho & Another v Swissborough Diamond Mines (Pty) Ltd & Others* 1997 (8) BCLR 1122 (CA); *Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa & Others* 1992 (2) SA 279 (T).

[2] *Van Zyl* (supra) at para 93.

[3] Ibid.

[4] See *Kuwait Airways Corporation v Iraqi Airways Co* (Nos 4 & 5) [2002] 2 WLR 1353; *Buttes Gas and Oil Co v Hammer* (No 3) [1982] AC 932.

[5] In this respect it must also be noted that in terms of the United Nations Model Treaty on Extradition (1990), it is mandatory for the requested state to refuse the extradition of a person if that state has substantial grounds for believing that the extradition has been requested for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality, ethnic origin, political opinions, sex or status. Another ground for a mandatory refusal is when the person to be extradited would be subjected to torture or cruel, inhuman or degrading treatment or would not receive the minimum guarantees in criminal proceedings as contained in article 14 of the International Covenant on Civil and Political Rights. South Africa's obligations in this regard would also arise under the 1990 Commonwealth Scheme relating to the Rendition of Fugitive Offenders whose principles were included in the 1996 amendments to the Extradition Act 67 of 1962 and under the European Convention on Extradition (1957) and Additional Protocols (1975 and 1978 respectively) to which South Africa acceded on 13 May 2003.

penalty, challenged his removal from South Africa to the United States for trial.[1] Mr Mohamed's lawyers contended that his handing over to the US authorities was not a deportation but an extradition in disguise and that, as such, it constituted a clear breach of the Aliens Control Act.[2] They also sought an order directing the South African government to submit a written request to the US authorities that the death penalty would not be sought, imposed or carried out upon Mohamed's conviction.

On the validity of the deportation, the Constitutional Court pointed out the need to distinguish between extradition and deportation. While extradition involves co-operation between states for the delivery of an alleged criminal for the purpose of trial or sentence in the requesting state, deportation is a unilateral act by a state to get rid of an undesired alien. It was clear that the state's power to deport was regulated by the Alien Controls Act. Neither this Act, nor the Final Constitution, contains any *prerogative* power to deport or to determine the destination of the deportation. Thus, since the United States was not a destination in terms of the Act, the South African authorities acted unlawfully in deporting Mohamed to the US.[3] In ruling on the death penalty, the *Mohamed* Court held that since the South African authorities were actively involved in the deportation of Mohamed, it was incumbent upon them to secure a prior undertaking from the US government that the death sentence would not be imposed. Failure to have done so constituted a violation of Mohamed's constitutional rights under South African constitutional law. Although the unlawful deportation was irreversible and the US proceedings against Mohamed were already at an advanced stage, the *Mohamed* Court nevertheless found it appropriate to order the South African authorities to do whatever might still be possible to ameliorate the deleterious consequences of the State's unconstitutional acts.[4]

In *Harksen v President of the Republic of South Africa*, the constitutionality of section 3(2) of the Extradition Act[5] was challenged on the grounds that the President's ad hoc exercise of powers of extradition — in the absence of an extradition treaty – did not comply with FC s 231's requirement that international agreements on such subjects must be enforced.[6] The *Harksen* Court held that FC s 231 did not govern the implemention or the interpretation of a piece of legislation that neither initiates nor concludes an agreement on extradition.[7]

[1] *Mohamed v President of the Republic of South Africa & Others* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC)('*Mohamed*'). See also N Botha 'Deportation, Extradition and the Role of the State' (2001) *SAYIL* 227.

[2] Act 96 of 1991.

[3] *Mohamed* (supra) at 696–698, 701.

[4] Ibid at 711.

[5] Act 67 of 1962.

[6] *Harksen v President of the Republic of South Africa* 2000 (2) SA 825 (CC), 2000 (5) BCLR 478 (CC) ('*Harksen*').

[7] Ibid at 484, 485.

31 Application

Stuart Woolman

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Application
8 (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.[1]

31.1 INTRODUCTION

(a) A road map

There is more, much more, to 'application' than the text above might suggest. One purpose of this introduction is to offer a road map of the complex terrain this chapter will traverse.

When jurists, lawyers and academics say they wish to talk about the application of the Bill of Rights under the Final Constitution, by and large, they have a single vexed question in mind: Upon whom do the burdens of the Bill of Rights fall? That is, they want to know (or they want to tell us), as a general matter, which kinds of persons or parties may have the substantive provisions of the Bill of Rights enforced against them, what kinds of laws attract meaningful scrutiny and what conditions or circumstances must obtain for a substantive provision to be said to apply to a given dispute. But let's bracket this question of burdens for just a moment.

Application embraces a host of other issues that are all at least notionally associated with the benefits of the Bill of Rights. Even that characterization, however, subordinates substance to style. In § 31.3, we look at 'benefits' in their most obvious sense. The text of most of the rights that appear in FC ss 9 through 35 tell us that 'everyone' enjoys them. That said, some rights expressly constrain the universe of persons entitled to their benefit — eg, citizens or children. With respect to others rights, the extension of their benefits is unclear. In the case of juristic persons, aliens and foetuses, the question of benefits may still generate controversy.

In § 31.7, we look at benefits through the prism of 'waiver'. Many jurists, lawyers and academics like to speak as if the persons entitled to the benefit of

* I have benefited enormously from extended discussions on this subject with Frank Michelman and Danie Brand. Their very substantial contributions are recognized throughout the text. Anthony Stein's and Theunis Roux's discipline, as editors, has saved me more than once from myself. Any remaining errors in argument or infelicities in style are my responsibility alone.

[1] Constitution of the Republic of South Africa 108 of 1996 ('Final Constitution' or 'FC').

a right may waive that same right. As we shall see, however, like talk of ghosts, the grammar of 'waiver-talk' creates the illusion that we are in fact referring to something that exists. Waiver is a great example of language gone on holiday. For, in truth, there is no such thing as waiver.

In § 31.8, we look at benefits from the perspective of temporal application. Temporal application encompasses two discrete questions. First, and most importantly, can the Bill of Rights benefit persons retrospectively? Secondly, which Constitution, Interim or Final, applies to matters in respect of which the cause of action arose before the Final Constitution's commencement, but after the Interim Constitution's commencement, and are being heard now, after the Final Constitution's commencement? As one might expect, issues of temporal application will recede with time.

In § 31.6, we look at a question of benefits that will certainly not recede with the passage of time. That question is whether the Bill of Rights has extraterritorial effect. This question itself generates two different, though related, queries. When, if at all, does the Bill of Rights benefit some persons — and burden others — in disputes that occur beyond South Africa's borders? To what extent, if any, does the Bill of Rights benefit South African nationals in legal proceedings adjudicated in foreign courts by foreign states under foreign law. Both questions, but especially the latter, have troubled the Constitutional Court of late.

In § 31.5, we look at benefits in terms of how courts go about reconciling substantive provisions of the Bill of Rights and other constitutional provisions that appear, at first blush, to conflict with one another. While the Bill of Rights contains a number of operational provisions that guide the courts with respect to conflicts between fundamental rights, no provision speaks directly to the resolution of tensions between Chapter 2 and non-Chapter 2 provisions. As a result, our courts have been obliged to develop doctrine designed to harmonize the demands of fundamental rights with the dictates of constitutional provisions that engage the exercise of power by various other branches or spheres of government.

By now it should be clear that talk about benefits is more than a mere throat clearing exercise. But, of course, what I really want to talk about *is* the big question: *when and against whom* can a beneficiary enforce her fundamental rights. The answer to this question appears, in various forms, in § 31.2, in § 31.4, and the appendix to this chapter.

In § 31.2, I rehearse briefly the terms and the outcome of the application debate under the Interim Constitution.[1] I do so because past is, quite obviously, prologue: the drafters of the Final Constitution spoke directly to concerns about the text of the Interim Constitution; the Constitutional Court accepts the invitation of the drafters of the Final Constitution's invitation to revisit — and to recast — the application doctrine developed under the Interim Constitution. In addition to an abbreviated analysis of the Court's application doctrine under the Interim Constitution, § 31.2 contains an assessment of the general jurisprudential concerns that framed the initial debate and that recur, albeit in transmogrified form, under the Final Constitution.

[1] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

This discussion retains its currency because I have chosen not to repeat these arguments within § 31.4.

In § 31.4, I take on more immediate concerns of what application doctrine is, and ought to be, under the Final Constitution. My manner of approach to application doctrine in § 31.4 warrants a few prefatory remarks.

§ 31.4 begins with the Constitutional Court's articulation of the black letter law on application in *Khumalo v Holomisa*.[1] The *Khumalo* Court does not explain in any detail what the various sections of FC s 8 mean or how they are designed to work. This lack of transparency requires me to offer a good faith reconstruction — an amplification if you will — of the application doctrine articulated by the *Khumalo* Court.

This good faith reconstruction cannot be the last word on the application doctrine under the Final Constitution. Although the good faith reconstruction fleshes out the *Khumalo* Court's conclusions in a manner that coheres with the judgment's various textual and jurisprudential premises, even a reconstructed *Khumalo* is unsatisfactory and, ultimately, unredeemable.

§ 31.4 engages this good faith reconstruction in a number of different ways. § 31.4 sets out four primary doctrinal objections to the *Khumalo* Court's statement of the law. These four objections are grounded, to varying degrees, in conflicting statements by the Constitutional Court — as well as courts of more general jurisdiction — about what each of the subsections in FC s 8 and FC s 39 should be understood to mean. § 31.4 thus offers an account of a second body of black letter law: namely, what the courts have said the discrete subsections — FC ss 8(1), 8(2), 8(3) and 39(2) — denote. (For lawyers, jurists and academics who *only* want to know what the courts have said about FC ss 8(1), 8(2), 8(3) and 39(2), § 31.4 provides an exhaustive account.) This black letter law governs subjects as diverse as the meaning of the term 'all law', the binding of the judiciary, the legislature, the executive and organs of state, how the common law is to be developed and transformed, the creation of new remedies under the Bill of Rights, as well as such doctrines as reading down, shared constitutional interpretation, *stare decisis* and objective normative value systems.

In an ideal world, the general framework articulated in *Khumalo* would be internally (logically) consistent and would be externally consistent with (map directly on to) the courts' express understanding of what the specific sections in FC s 8 and FC s 39 signify and the manifold doctrines they generate. In other words, *Khumalo* would provide the edifice, and other cases that had a bearing on our understanding of application would slot neatly into its structure. As we shall see in § 31.4, the dissonance created by the disjunction between the black letter law on the general framework for application analysis and the black letter law on the meaning of its various textual components constitutes one of the primary grounds for rejecting the Court's current application doctrine. In its stead, § 31.4 offers a *preferred reading* that meets all of the doctrinal objections to *Khumalo* and, concomitantly, gives each of the constituent parts of the text, and the related doctrines they generate, a reading that fits the general framework for application.

For those readers who wish to immerse themselves in the finer points of

[1] *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)('*Khumalo*').

application doctrine, a detailed appendix takes stock of the most important interventions made by other commentators on this subject. These academic contributions ought not to be considered mere arcana. At their best, these arguments develop, in full, theories of application merely hinted at in judicial opinions and about which the text is, inevitably, mute.

I hope that this road map gives the general reader an initial sense of how this chapter addresses the existing law on application. To further facilitate this understanding, I have set out directly below both a brief account of the black letter law — and a digest of my preferred readings — under both the Interim Constitution and the Final Constitution. This discursive effort is followed by two decision trees that attempt to lay bare the mechanics of application analysis under the Interim Constitution after *Du Plessis* and under the Final Constitutional after *Khumalo*.

(b) Application Doctrine under the Interim Constitution

The Constitutional Court answered the question of burdens under the Interim Constitution in *Du Plessis & Others v De Klerk & Another*.[1] The facts, the holdings, and the reasoning in that case are discussed at length below in § 31.2. This thumbnail sketch of *Du Plessis* merely adumbrates the choices that the Constitutional Court had before it under the Interim Constitution and some of the arguments that the Constitutional Court once again engaged, at least tacitly, in *Khumalo* under the Final Constitution.

According to the prevailing pre-*Du Plessis* discourse, the Constitutional Court had two options. It could take a vertical approach. On such a reading of the text, the Bill of Right's substantive provisions engaged directly only legal relationships between the state and the individual. It could take a horizontal approach. On such a reading, all legal relationships between the state and the individual *and* all legal relationships between private persons would have been subject to direct review for conformity with the specific substantive rights set out in IC Chapter 3.

Despite this basic difference in orientation, every jurist, practitioner or academic interpreting the Interim Constitution was committed to the following three propositions. Statutes, when relied upon by the state, were subject to constitutional review. Statutes, when relied upon by a private party in a private dispute, were subject to constitutional review. The common law, when relied upon by the state, was subject to constitutional review. Moreover, almost every jurist, practitioner and academic agreed that the heart of the application debate was whether the common law, when relied upon by a private party in a private dispute, was subject to constitutional review.

On this heart of the matter, the majority of the Constitutional Court in *Du Plessis v De Klerk* came firmly down on the side of verticality. The *Du Plessis* Court held that the substantive provisions of the Bill of Rights of the Interim Constitution applied only to law emanating from the legislature or the executive and to the conduct of these two branches of government. Driven by a 'traditional' view of what constitutions do, and bewitched by a text that ostensibly did not apply to all law or bind the judiciary, the *Du Plessis* Court endorsed a doctrine whose most

[1] 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC)('*Du Plessis*').

notable feature was its insulation of common law disputes between private parties from direct application of the substantive provisions of the Bill of Rights.

This chapter offers several demurrals to the *Du Plessis* doctrine. As three dissenting justices in *Du Plessis* noted, the text did not settle the debate. But it did lead the *Du Plessis* Court to the jurisprudentially untenable conclusion that while rules of common law that govern disputes between private parties are not subject to direct application of the substantive provisions of the Bill of Rights, (because constitutions traditionally do not apply to relations between private parties), rules in statutes or regulations that govern disputes between private parties are subject to direct application of the substantive provisions of the Bill of Rights. So the 'fact' that a legal dispute is between private parties would appear to be a necessary *but not a sufficient* condition for the *Du Plessis* Court's conclusion. Indeed, it is hard to know whether it should be called a 'condition' at all. I call the very logic of the *Du Plessis* Court into question because whether the law governing a dispute between private parties was subject to direct application under the Interim Constitution was entirely and fortuitously contingent upon the form the law took. Embedded in the *Du Plessis* Court's differential treatment of these two bodies of law is the premise that the common law — unlike legislation — protects a private ordering of social life that is neutral between the interests of various social actors. That premise is false. Moreover, abstention from constitutional review of common-law rules functions as a defence of deeply entrenched and radically inegalitarian distributions of wealth and power by immunizing from review those rules of property, contract and delict that sustain those inegalitarian distributions. The differential treatment of the two bodies of law also rests on a traditional distinction between the public realm and the private realm. At a minimum, this distinction fails to recognize the extent to which the state structures all legal relationships. With the ineluctable erosion of the public-private divide, one of the last justifications for treating common law and legislation differently disintegrates as well. What we are left with is a doctrine that traditionally produces an incoherent body of decisions and that cannot explain why courts, perfectly capable of vindicating autonomy interests when asked to review statutory provisions governing private relationships for consistency with the Bill of Rights, prefer not to subject common-law rules governing private relationships to the same form of scrutiny.[1]

[1] I have employed the terms verticality and horizontality above and shall continue to do so in this chapter where necessary. However, it seems fairly clear that these two terms have outlived their usefulness and that the current debate over application warrants a change in nomenclature. The post-*Khumalo* black letter law on application and the preferred reading of those same application provisions eschew any mention of verticality or horizontality. The debate over application of the Bill of Rights is now best characterized solely in terms of direct and indirect application. Direct challenges describe instances in which the prescriptive content of at least one specific substantive provision of the Bill of Rights applies to the law or to the conduct at issue. Indirect challenges describe instances in which the prescriptive content of no specific provision of the Bill of Rights applies to the law or to conduct at issue. Indirect challenges rely upon the spirit, purport and objects of the entire Bill to interpret or to develop the law in order to settle the dispute before the court. (That is not to say that a specific right might not be relevant — in some way, say as value, and not as a rule — to an indirect challenge. I only claim that there must be a distinction with a difference between the direct application of a right and the relevance of a right to a more amorphous assessment of whether a rule of law remains in step with the general spirit of our constitutional order. See *Minister of Home Affairs v National Institute for Crime Prevention* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)(On the difference between how constitutional norms operate as values and how they operate as rules.))

(c) Application Doctrine under the Final Constitution

Du Plessis effectively foreclosed debate on the direct application of the substantive provisions of the Interim Constitution's Bill of Rights to rules of common law governing private disputes. The drafters of the Final Constitution, however, reconsidered the Interim Constitution's provisional position on application. Unlike the Interim Constitution, the Final Constitution's Bill of Rights points unequivocally toward a much broader conception of direct application: FC s 8(1) states that the Bill applies to 'all law' and binds 'the judiciary'; FC s 8(2) states that the provisions of the Bill will bind private persons.

In *Khumalo*, the Constitutional Court accepted the Final Constitution's invitation to broaden its conception of the law and the relationships to which the substantive provisions of the Bill of Rights apply directly. The signal difference between *Du Plessis* and *Khumalo* is that the *Khumalo* Court reads FC s 8(2) to mean that some of the specific provisions of the Bill of Rights will apply directly to some disputes between private parties some of the time.

The black letter law on application in terms of *Khumalo* takes the following form.

FC 8(1) stands for the following two propositions:

- All law governing disputes between the state and natural persons or juristic persons is subject to the direct application of the Bill of Rights.
- All state conduct that gives rise to disputes betwen the state and natural persons or juristic persons is likewise subject to the direct application of the Bill of Rights.

FC 8(2) stands for the following proposition:

- Disputes between natural persons and/or juristic persons *may* be subject to the direct application of the Bill of Rights, if the specific right asserted is deemed to apply.

FC 8(3) stands for the following proposition:

- Where direct application of the right asserted occurs in terms of FC s 8(2), and the court further finds a non-justifiable abridgment of that right, then the court must develop the law in a manner that gives adequate effect to the right infringed.[1]

For reasons the judgment does not adequately explain, the *Khumalo* Court chose to ignore FC s 8(1)'s injunction that the Bill of Rights applies to 'all law'

[1] FC s 39(2), although not engaged expressly in *Khumalo*, stands, under a secondary body of black letter law, for the following three propositions:

- Where an asserted right is, under FC s 8(2), deemed not to apply directly to a dispute between private parties, the court may still develop the common law or interpret the apposite provision of legislation in light of the more general objects of the Bill of Rights.
- Even where a right is asserted directly, the court may still speak as if a finding of inconsistency or invalidity requires that a new rule of common law be developed in terms of FC s 39(2).

and binds 'the judiciary'. One might have thought that such an explanation was warranted, given that it was precisely the absence of these phrases — 'all law' and binds 'the judiciary' — in a comparable section of the Interim Constitution that led the *Du Plessis* Court to reach the conclusion that the Interim Constitution's Bill of Rights did not apply directly to disputes between private parties governed by the common law. The *Khumalo* Court claims instead that had it given FC s 8(1) a gloss that ensured that the substantive provisions of the Bill of Rights applied to all law-governed disputes between private parties — regardless of the provenance of the law — it would have rendered FC s 8(3) meaningless. That particular assertion is unfounded — or at the very least radically under-theorized.

While it is quite easy to poke holes in the gossamer thin fabric of *Khumalo*, such victories, pyrrhic as they are, do not advance understanding. In § 31.4, I offer a good faith reconstruction of *Khumalo*. This good faith reconstruction fleshes out the *Khumalo* Court's conclusions in a manner that simultaneously coheres with its jurisprudential commitments, avoids surplusage in so far as these commitments permit, and satisfies basic considerations of textual plausibility and naturalness. The good faith reconstruction begins with a perfectly understandable and workable distinction between a constitutional norm's range of application and that same norm's prescriptive content. The 'range of application' speaks to FC s 8(1)'s commitment to ensuring that each and every genus of law is at least formally subject to the substantive provisions of the Bill of Rights. The 'prescriptive content' speaks both to FC s 8(2)'s invitation to apply the substantive provisions of the Bill of Rights to disputes between private parties and to the interpretative exercise required to determine whether a given substantive provision of the Bill is meant to engage the kind of dispute before the court. However, even this effort to put *Khumalo* on the most solid footing possible comes up short in four significant ways.

The *Khumalo* Court quite consciously crosses over the public-private divide. The text of the Final Constitution left it little choice. But *Khumalo*'s one step forward is followed by two steps back. Whereas *all* disputes between the state and an individual are subject to the direct application of the Bill of Rights under the Final Constitution, *Khumalo* tells us that only *some* disputes between private parties will be subject to *some* of the provisions of the Bill of Rights. This revised public-private distinction in application jurisprudence creates the following anomaly.

In *Du Plessis*, the traditional view of constitutional review was used to *suppress* direct application of the Bill of Rights with respect to disputes between private parties governed by the common law. In *Khumalo*, the traditional view of constitutional review is used to *defer* — and potentially suppress — direct application of the Bill of Rights with respect to disputes between private parties. Here's the rub. Direct application is deferred — and by that I simply mean turned into a question of interpretation — with respect to *all* disputes between private parties. It matters not whether the law governing disputes between private parties is grounded in statute, subordinate legislation, regulation, common law or customary law. Put slightly differently, whereas the Interim Constitution's Bill of Rights was understood to apply directly, and unequivocally, to legislation that governed private disputes, the Final Constitution's Bill of Rights does not. Less law is subject to the direct unqualified application of the Bill of Rights under the *Khumalo* Court's reading of the Final

Constitution than it was under the *Du Plessis* Court's reading of the Interim Constitution.

Doctrinal tension generates a second objection. The Constitutional Court has constructed a powerful set of doctrines in which (1) every exercise of state power is subject to constitutional review and (2) every law is subject to the objective theory of unconstitutionality. Much is rightly made of the Constitutional Court's bold assertion in *Fedsure*,[1] *Pharmaceutical Manufacturers*[2] and their progeny that all law derives its force from the basic law — the Final Constitution — and that all law, and all conduct sourced in the law, must as a logical matter be consistent with the basic law. Despite the first requirement — and despite the fact that FC s 8(1) applies to all law and binds both the legislature and the executive — primary legislation or subordinate legislation that governs a dispute between private persons will not necessarily be subject to the direct application of the Bill of Rights. Those same provisions in legislation or subordinate legislation would, however, automatically be subject to the direct application of the provisions of Bill of Rights if they were invoked by an individual in a dispute with the State. The absurdity of this distinction is brought into even sharper relief by the Court's own doctrine of objective unconstitutionality. (The relative desuetude of this doctrine is offset by the fact that it has, as yet, not been repudiated by the Constitutional Court.[3]) In its most general form, the doctrine holds that the validity or the invalidity of any given law is in no way contingent upon the parties to the case. If a provision of legislation would be deemed to be unconstitutional when invoked by an individual in a dispute between the State and an individual, then it must likewise be unconstitutional when invoked by an individual in a dispute between that individual and another individual. However, the Court's differentiation between FC s 8(1) disputes that are invariably subject to the direct application of the Bill of Rights and FC s 8(2) disputes that are not invariably subject to the direct application of the Bill of Rights is logically incompatible with the doctrine of objective unconstitutionality. The *Khumalo* application doctrine relies upon the ability to distinguish constitutional cases — and thus the constitutionality of laws — upon the basis of the parties before the court. The doctrine of objective unconstitutionality denies the ability to distinguish constitutional cases — and thus the constitutionality of laws — upon the basis of the parties before the court. This contradiction is a direct consequence of the *Khumalo* Court's refusal to give the term 'all law' in FC s 8(1) its most obvious construction and the Court's preference for making FC s 8(2) the engine that drives the analysis of all disputes between private parties. Not even the good faith reconstruction of *Khumalo* can meet this second objection.

The third objection flows from the *Khumalo* Court's refusal to say anything

[1] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC)('*Fedsure*').

[2] *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of The Republic of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC)('*Pharmaceutical Manufacturers*').

[3] See *Ingledew v Financial Services Board: In re Financial Services Board v Van der Merwe & Another* 2003 (4) SA 584 (CC), 2003 (8) BCLR 825 (CC) at para 20 ('This court has adopted the doctrine of objective constitutional invalidity.') See also *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC)(Confirms continued validity of doctrine.)

about FC s 8(1)'s binding of the judiciary. Perhaps the most damning consequence of this structured silence is that it offends a canon of constitutional interpretation relied upon by Justice O'Regan in *Khumalo* itself: 'We cannot adopt an interpretation which would render a provision of the Constitution to be without any apparent purpose.'[1] Not only does Justice O'Regan refuse to give the provision 'any apparent purpose', we cannot, even on the good faith reconstruction, give it any apparent purpose. The good faith reconstruction gains its traction through a distinction between a constitutional norm's range of application and that same norm's prescriptive content. That creates the interpretational space to argue that while FC s 8(1) speaks to each specific constitutional norm's range of application — and does not distinguish one genus of law from another — FC s 8(2) speaks to the prescriptive content of each specific constitutional norm and directs us to consider whether that prescriptive content ought to be understood to govern the private conduct of the private parties that constitutes the gravamen of the complaint. This good faith reconstruction does no work with respect to the phrase 'binds the judiciary' because the distinction between 'range' and 'prescriptive content' engages the relationship between constitutional norms and ordinary law. It does not speak to the provenance of a given law. The reason it cannot be recast in a manner that speaks to the differing concerns of FC s 8(1) and FC s 8(2) is that FC s 8(2) does not concern itself with our different law-making institutions — legislative, executive or judicial. What is left? A weak reading in which the judiciary is bound — not in terms of the 'law' it makes — but purely in terms of its 'conduct' (or 'non-law-making conduct'). It seems to me to defy both logic and common sense to argue that when FC s 8(1) binds the legislature and the judiciary, it means to bind the actions of legislators or judges solely in their personal capacity. When we bind the legislature, we must bind both the law it makes and the non-law-making actions it takes. The text offers no reason to treat the judiciary any differently. While we do want state actors — legislators and judges alike — to care about the manner in which they comport themselves, we care primarily about the law they make. But that is not what *Khumalo* says, nor can it be reconstructed in such a manner as to say so.

The final objection to *Khumalo*'s construction of FC s 8 turns on the style of the argument. In short, before Justice O'Regan decides whether to engage the applicant's exception to the action in defamation in terms of freedom of expression, she has already concluded: *(a)* that the law of defamation is in pretty good shape post-*Bogoshi*;[2] *(b)* that freedom of expression is important but not central to an open and democratic society; and *(c)* that dignity — especially as viewed through the lens of reputation — is of paramount concern. Only after having reached these conclusions does Justice O'Regan decide that this matter warrants direct application of freedom of expression to the common law of defamation in a dispute between private parties. Based upon the Court's own jurisprudence and our good faith reconstruction of *Khumalo*, a court should first decide whether the

[1] *Khumalo* (supra) at para 32.
[2] *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA), 1999 (1) BCLR 1 (SCA)('*Bogoshi*').

provisions of Chapter 2 apply to the dispute before the court. If, as in *Khumalo*, the court determines that freedom of expression applies directly, then the generally accepted approach to rights analysis has us begin with a determination of the scope of freedom of expression and follows with an assessment of whether the law of defamation constitutes a prima facie infringement of that right. In *Khumalo*, it would most certainly have been found to be such. The second question is whether the law of defamation — as currently constructed — is a justifiable limitation of the right to freedom of expression. Instead, the judgment looks, in manner of delivery, much like the kind of judgment in which, under FC s 39(2), the common law is developed via indirect application of the Bill of Rights.

The style of the judgment suggests that the *Khumalo* Court considers it relatively unimportant to engage this dispute as if, in fact, direct application takes place. Or more accurately, by packaging *Khumalo* as if it were simply a common law judgment, the *Khumalo* Court intimates that the difference between direct application and indirect application of the Bill of Rights is minimal, if not non-existent. I might be inclined to accept this elision of the analytical processes required by FC s 8 and FC s 39(2) were it not for the fact that the Supreme Court of Appeal and the Constitutional Court have handed down judgments regarding constitutional jurisdiction, *stare decisis* and indirect application under FC s 39(2) that manifest a clear desire not to disturb settled bodies of common law precedent and that cannot help but immunize a substantial body of apartheid-era decisions from reconsideration by lower courts. This claim requires some amplification.

Leaving aside the problem of surplusage raised by our courts' occasional interchangeable use of FC s 8 and FC s 39(2), the Supreme Court of Appeal in *Afrox*,[1] extending the reasoning of the Constitutional Court in *Walters*,[2] has held that there is at least one critical difference between direct application under FC s 8 and indirect application under FC s 39(2). A High Court may revisit pre-constitutional Appellate Division precedent only where a party has a colourable claim grounded in the direct application of a substantive provision of the Bill of Rights. High Courts may not alter existing common law precedent (whether pre-constitutional or post-constitutional) through indirect application of FC s 39(2). (The rest of our appellate courts' novel doctrine of constitutional *stare decisis* further constrains the High Courts' constitutional jurisdiction.) What happens when our appellate courts' marry this restrictive doctrine of *stare decisis* to an incrementalist gloss on indirect application in terms of FC s 39(2)? It spawns an application doctrine that effectively disables the High Court from undertaking meaningful constitutional review of existing common law precedent (as well as all other constructions of law) and thereby protects 'traditional' conceptions of law and existing legal hierarchies. This observation about the manner in which our existing array of application doctrines — as well as related doctrines of *stare decisis* and constitutional jurisdiction — conspire to blunt the transformative potential of the basic law is one of the strongest rejoinders to those jurists and commentators

[1] *Afrox Healthcare Bpk. v Strydom* 2002 (6) SA 21 (SCA)('*Afrox*').

[2] *Ex parte Minister of Safety and Security & Others: In re S v Walters & Another* 2002 (4) SA 613 (CC), 2002 (2) SACR 105 (CC), 2002 (7) BCLR 663 (CC)('*Walters*').

who have suggested that whether one relies upon FC s 8 (1) or FC s 8 (2), or FC s 39(2), the song remains the same: namely, how should the law governing a dispute be developed, re-formulated or re-interpreted?

There is a better way. In § 31.4, I offer a preferred reading that satisfies the demands of naturalness, textual plausibility, coherence, surplusage and ideology, and, just as importantly, meets the objections lodged against both *Khumalo* and the good faith reconstruction of *Khumalo*. That preferred reading takes the following form.

FC s 8(1) covers 'all law' — regardless of provenance, form, and or the parties before the court. FC s 8(1) also covers all state conduct — by all branches of government and all organs of the state — whether that conduct takes the form of law or reflects some other manifestation or exercise of state power.[1] In sum, FC s 8(1) should be understood to stand for the following proposition:

- *All* rules of law and every exercise of state power are subject to the direct application of the Bill of Rights.

FC s 8(2) covers dispute-generating conduct between private actors not 'adequately' governed by an express rule of law. There are two basic ways to read 'not governed adequately by an express rule of law.' First, it could contemplate the possibility of a dispute over an aspect of social life that is not currently governed by any rule of law at all. Such instances are rare. Indeed there is good reason to believe that such instances do not exist at all. The second and better reading views non-rule governed conduct in a much narrower sense. In many instances a body of extant rules — or even background norms — may be said to govern a particular set of private relationships. FC s 8(2) calls our attention to the fact that these rules of law may not give adequate effect to the specific substantive provisions of the Bill of Rights and may require the courts to develop a new rule of law that does give adequate effect to a particular provision in the Bill of Rights in so far as a dispute between private persons requires it to do so. In sum, FC s 8(2) should be understood to stand for the following proposition:

- While, on the Hohfeldian view, a body of extant legal rules — or background norms — will always govern a social relationship, those same rules will not always give adequate effect to a provision in the Bill of Rights. FC s 8(2) calls attention to the potential gap between extant rules of law and the prescriptive content of the Bill of Rights, and, where necessary, requires the courts to bridge that gap by bringing the law into line with the demands of particular constitutional norms.

[1] The cosmology of common law jurisdictions is such that some lawyers express discomfort with the notion that a common law rule found inconsistent with the Final Constitution could occasion a finding of invalidity. But that locution is, in fact, endorsed by the Constitutional Court. See *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (2) SACR 556 (CC), 1998 (12) BCLR 1517 (CC) at para 73 (Court declares 'common-law offence of sodomy . . . inconsistent with the 1996 Constitution and invalid.') See also *Shabalala v Attorney General, Transvaal* 1996 (1) SA 725 (CC), 1995 (2) SACR 761 (CC), 1995 (12) BCLR 1593 (CC); *S v Thebus* 2003 (6) SA 505 (CC), 2003 (2) SACR 319 (CC), 2003 (10) BCLR 1100 (CC)(Court notes that a finding of inconsistency with respect to common law may occasion an order that goes beyond invalidity to develop a new rule of law.)

If we decide that the right invoked engages the conduct in question and that the right has been unjustifiably infringed, then we move on to FC s 8(3). FC ss 8(3)*(a)* and *(b)* enjoin the court to develop new rules of law and remedies designed to give effect to the right infringed. Thus, where FC s 8(2) acknowledges gaps in existing legal doctrine, FC s 8(3) aims to fill those gaps. In sum, FC s 8(3) should be understood to stand for the following proposition:

- If the court finds that the right relied upon warrants direct application to the conduct that has given rise to the dispute, and further finds a non-justifiable abridgment of the right, then the mechanisms in FC ss 8(3)*(a)* and *(b)* must be used to develop the law in a manner that gives adequate effect to the right infringed.

It may be, however, that the prescriptive content of the substantive provisions of the Bill of Rights does not engage the rule of law or conduct at issue. Two things can happen. A court can decide that the Bill of Rights has nothing at all to say about the dispute in question. A court can decide that although no specific provision of the Bill of Rights is offended by the law or the conduct in question, the Bill of Rights warrants the development of the law in a manner that coheres with its general spirit, purport and objects. In sum, FC s 39(2) should be understood to stand for the following proposition:

- Where no specific right can be relied upon by a party challenging a given rule of law or the extant construction of a rule of law, the courts are obliged to interpret legislation or to develop the law in light of the general objects of the Bill of Rights.

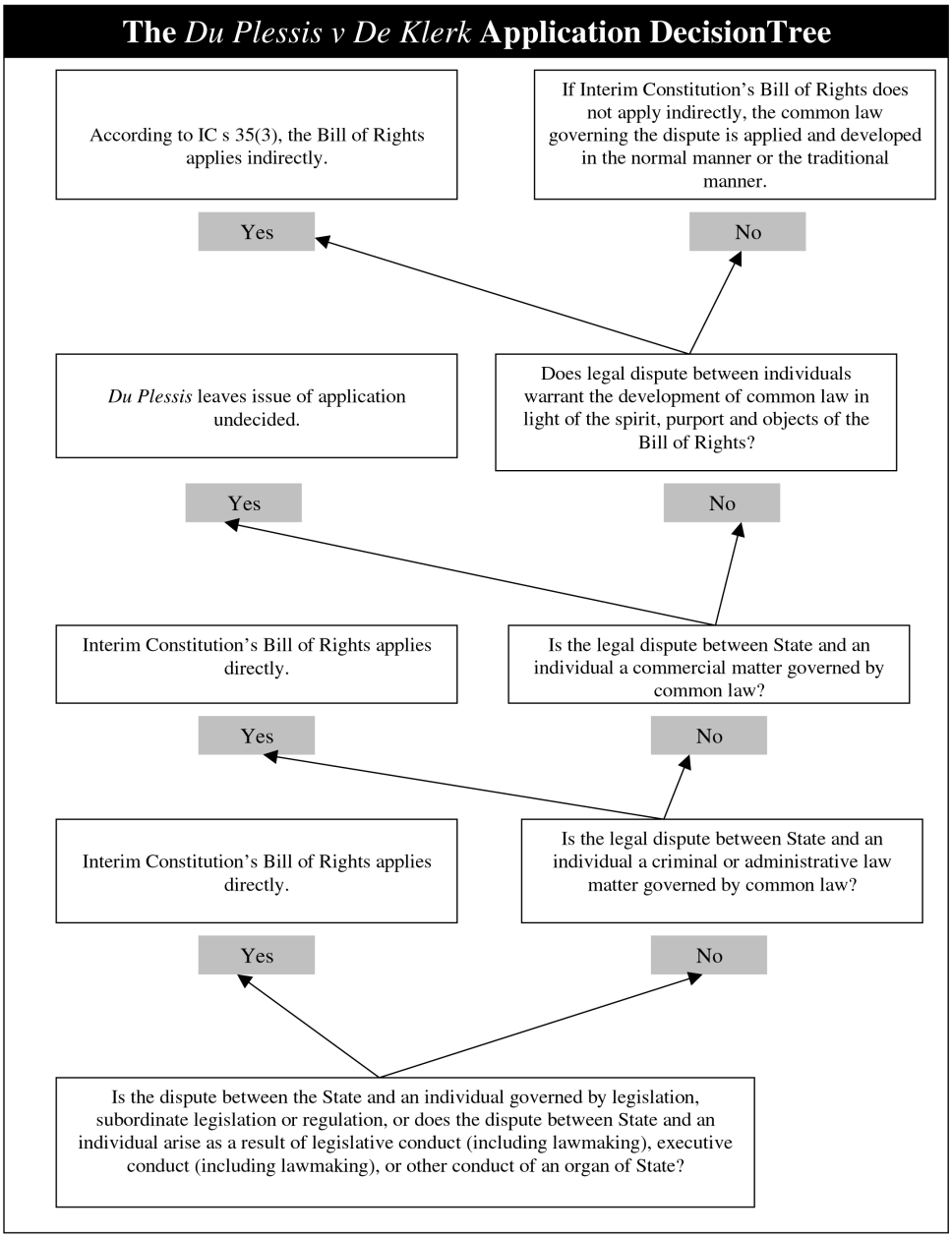
The preferred reading, unlike the good faith reconstruction of *Khumalo*, is untroubled by fortuitous differences between forms of law. It does not suppress or defer application of the Bill of Rights to disputes between private persons governed by either legislation or common law. The preferred reading, unlike the good faith reconstruction of *Khumalo,* generates no tension between the legality principle and the doctrine of objective unconstitutionality. It recognises all forms of law as exercises in state power and makes each and every exercise of state power subject to constitutional review. It does not rest on a distinction between the parties before the court and thus does not offend the doctrine of objective unconstitutionality. The preferred reading, unlike the good faith reconstruction of *Khumalo,* does not offend the surplusage canon of constitutional interpretation. It alone gives the phrase 'binds the judiciary' meaningful content by recognising that the phrase engages all emanations of law from the courts. The preferred reading, unlike the good faith reconstruction of *Khumalo*, is not plagued by a host of conflicting doctrinal commitments that blunt the transformative potential of the Bill of Rights. Proper apportionment of analytical responsibilities between FC s 8(1), FC s 8(2), FC 8(3) and FC 39(2) finesses the many difficulties created by a hide-bound doctrine of *stare decisis* that

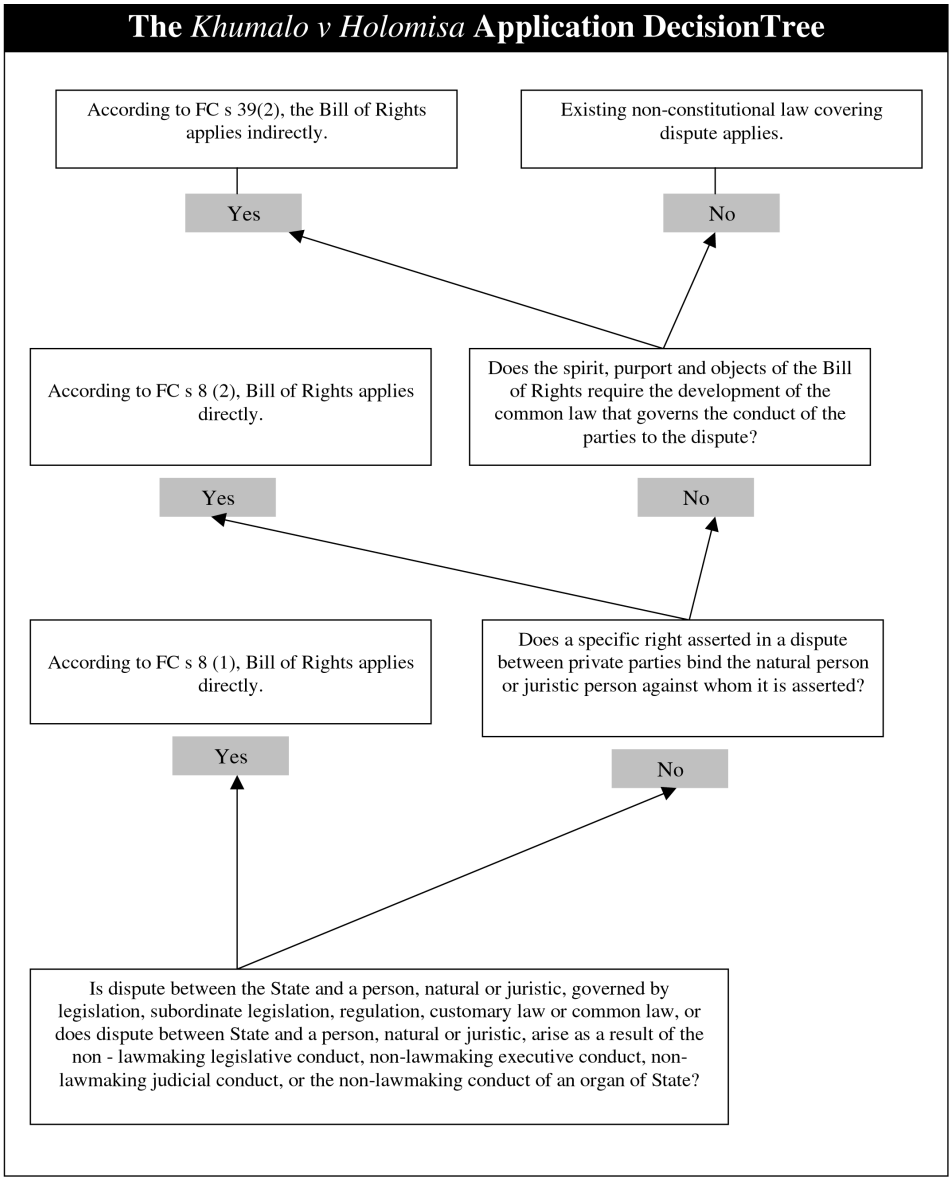
permits little, if any, development of the common law in light of FC s 39(2). The arguments that support the preferred reading of Chapter 2's application provisions are explored at length in § 31.4 below.[1]

[1] A caveat and a codicil are in order.

The caveat is that there is no unassailable answer to the question of burdens raised by FC s 8. Shoddy drafting left us with a text — FC s 8 — that generates multiple possible readings and that resists a simple mechanical explanation because its component parts are difficult to reconcile. That does not mean that no grounds exist for preferring one reading over another. Indeed, the appropriate response to that standard academic trope — 'so what' — is to construct an analytical framework for direct application under FC s 8 that coheres with the manifold doctrinal demands of indirect application, *stare decisis*, the rule of law, constitutional jurisdiction, objective unconstitutionality, textual plausibility and naturalness. This chapter constitutes one such answer.

The codicil reflects the recognition that questions of application in terms of FC s 8 are, at bottom, questions of interpretation. This proposition has two dimensions: one logical, one historical. As a logical matter, we could function perfectly well without a provision on application. Whether the provenance of the law at issue or nature of the parties before the court have some bearing on the disposition of a matter could well be accommodated as part of the interpretation of a right. The presence of FC s 8 reflects the judgment of the drafters that our Final Constitution must speak to the application of the Bill to the exercise of both public and private power, and that constitutional texts have always done so (even where those texts have operated to protect existing hierarchies of private power.) Because the drafters of the Final Constitution set their face against the traditional immunization of certain kinds of private dispute from constitutional review, all legal disputes are now notionally subject to the strictures of the Bill of Rights. As a result, the line drawing exercise that animated the debate around the Interim Constitution's application provisions ought to have proved of diminished import by now. That the application debate has not withered away cannot be explained by the logic of the text alone. The text points towards such a withering away. The continued debate over application reflects the extent to which the meaning of our basic law is determined by extant historical conditions: the echo of the Interim Constitution, the limited jurisdiction of the Constitutional Court versus the plenary jurisdiction of the Supreme Court of Appeal and, perhaps most importantly, the felt need to chart a careful course between the Scylla of transformation and the Charybdis of tradition.


The Du Plessis v De Klerk Application DecisionTree
According to IC s 35(3), the Bill of Rights applies indirectly.
If Interim Constitution's Bill of Rights does not apply indirectly, the common law governing the dispute is applied and developed in the normal manner or the traditional manner.
Yes
No
Du Plessis leaves issue of application undecided.
Does legal dispute between individuals warrant the development of common law in light of the spirit, purport and objects of the Bill of Rights?
Yes
No
Interim Constitution's Bill of Rights applies directly.
Is the legal dispute between State and an individual a commercial matter governed by common law?
Yes
No
Interim Constitution's Bill of Rights applies directly.
Is the legal dispute between State and an individual a criminal or administrative law matter governed by common law?
Yes
No
Is the dispute between the State and an individual governed by legislation, subordinate legislation or regulation, or does the dispute between State and an individual arise as a result of legislative conduct (including lawmaking), executive conduct (including lawmaking), or other conduct of an organ of State?


The Khumalo v Holomisa Application DecisionTree
According to FC s 39(2), the Bill of Rights applies indirectly.
Existing non-constitutional law covering dispute applies.
Yes
No
According to FC s 8 (2), Bill of Rights applies directly.
Does the spirit, purport and objects of the Bill of Rights require the development of the common law that governs the conduct of the parties to the dispute?
Yes
No
According to FC s 8 (1), Bill of Rights applies directly.
Does a specific right asserted in a dispute between private parties bind the natural person or juristic person against whom it is asserted?
Yes
No
Is dispute between the State and a person, natural or juristic, governed by legislation, subordinate legislation, regulation, customary law or common law, or does dispute between State and a person, natural or juristic, arise as a result of the non - lawmaking legislative conduct, non-lawmaking executive conduct, non-lawmaking judicial conduct, or the non-lawmaking conduct of an organ of State?

31.2 Application under the Interim Constitution

(a) Application doctrine enunciated in *Du Plessis* v *De Klerk*[1]

(i) *Facts*

In 1993 the *Pretoria News* published a series of articles dealing with the supply of arms by South Africa to UNITA in Angola. The articles suggested that private air operators and airstrip owners — the plaintiffs — were aiding the Department of Foreign Affairs in fuelling the Angolan war.

The plaintiffs instituted a defamation action in May 1993. The defendants filed pleas denying that the articles suggested wrongful conduct by the plaintiffs or defamed the plaintiffs. The defendants argued, in the alternative, that even if the articles were defamatory, they were published in the public interest. In October 1994 — after the Interim Constitution came into effect — the defendants asked to amend their plea in order to claim that the right of freedom of expression, IC s 15, afforded them a new defence.[2]

(ii) *Holding*

The court held that the substantive provisions of Bill of Rights of the Interim Constitution were not, in general, capable of application to any legal relationship other than that between legislative or executive organs of state at all levels of government and natural or juristic persons. In particular, IC s 15, freedom of expression, was not capable of application to any legal relationship other than that between persons and legislative or executive organs of the state at all levels of government and natural or juristic persons.

[1] 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC). The leading judgment and the court's order in *Du Plessis* was written by Kentridge AJ and concurred in by Chaskalson P, Langa, O'Regan, and Ackermann JJ. While Ackermann J concurred with both the judgment and the order of Kentridge AJ, he authored a separate judgment designed to amplify points made in Kentridge AJ's decision. Sachs J also concurred with the judgment and order of Kentridge AJ, but suggested that there were alternative grounds for the judgment. Mahomed DP penned a separate judgment, but agreed with the order as formulated by Kentridge AJ. Langa J and O'Regan J concurred with Mohamed J's judgment. Mokgoro J concurred with the judgment and order proposed by Kentridge AJ, agreed with Mahomed DP and added an opinion of her own. Kriegler J dissented from the majority's judgments and order regarding application under the Interim Constitution. He was joined in his dissent by Didcott J. Madala J agreed with the majority's order regarding retrospectivity, but dissented from the majority's order regarding application.

[2] See *De Klerk & Another v Du Plessis & Others* 1995 (2) SA 40, 46–47 (T), 1994 (6) BCLR 124, 130–131 (T). Van Dijkhorst J refused the defendant's application to amend on two grounds: IC s 241(8) precluded retrospective application of the Constitution, IC s 15 did not apply horizontally and thus could not be invoked as a defence in a civil action for defamation. He wrote: 'Traditionally bills of rights have been inserted in constitutions to strike a balance between governmental power and individual liberty . . . It would . . . be correct . . . to take the view that our Constitution is a conventional constitution unless there are clear indications to the contrary.' The Constitutional Court requested argument on both points. With respect to the question of retrospectivity, the Constitutional Court held that the defendants were not entitled to invoke the provisions of the Interim Constitution. For a further discussion of retrospectivity, generally, and the holding on retrospectivity in *Du Plessis*, see § 31.8*(a)* infra. See also Cheryl Loots & Gilbert Marcus 'Jurisdiction and Procedures of the Court' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Chapter 6. Both Kentridge AJ and Mohamed DP wrote that IC s 98(6) might permit retrospective application 'in the interests of justice and good government.' See *Du Plessis* (supra) at paras 14 and 69. Retrospective application has, for obvious reasons, receded in importance over time.

Kentridge AJ did not limit his plurality judgment to these two propositions. A necessary consequence of these two general propositions was that while the constitutional guarantees of IC Chapter 3 could be invoked in private disputes where a litigant contended that a statutory provision relied upon by the other party impaired the exercise of a specific fundamental right enshrined in IC Chapter 3, the same guarantee could not be invoked in private disputes where a litigant contended that a rule of the common law relied upon by the other party was invalid. Not all rules of the common law were immunized from constitutional challenge. The majority held that governmental acts or omissions in reliance on the common law *may* have their consistency with specific substantive provisions of IC Chapter 3 challenged by a litigant in a dispute with the state.[1] This exception had a rider attached. Kentridge AJ was willing to find that common-law rules relied upon by government in its classically public activities — ie, the administration of criminal justice — could be attacked directly. He seemed far less inclined to allow common-law rules governing state activities in the commercial or contractual sphere to be similarly subject to direct attack. As if these various caveats and codicils were not enough, Kentridge AJ concluded that while the rights and freedoms in IC Chapter 3 did not *generally* have direct application to common-law rules governing legal relationships between individuals, it remained possible that a litigant in some future case could assert, successfully, that a particular provision of IC Chapter 3 must have direct application to such relationships. Barring such an eventuality, potential litigants could take solace in IC s 35(3). This section provided for the development of common-law rules in light of the 'spirit, purport and objects' of the Bill of Rights. But even this sop to those who wished to see the common law transformed had a disclaimer. Kentridge AJ wrote that the initial development of the common law was 'not a matter which falls within the jurisdiction of the Constitutional Court under s 98.'[2] Such initial development lay within the purview of Supreme Courts (now High Courts) and the Appellate Division (now the Supreme Court of Appeal).[3]

[1] See *Shabalala & Others v Attorney-General, Transvaal, & Another* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC)(Common-law docket privilege relied upon by the state found unconstitutional.)

[2] *Du Plessis* (supra) at para 63.

[3] Kentridge AJ qualified this remark by writing that the Constitutional Court retains 'jurisdiction to determine what the spirit, purport and objects of Chapter 3 are and to ensure that, in developing the common law, the other courts have had due regard thereto.' Ibid. The exact boundaries of such limited appellate jurisdiction were left open to future cases. For a discussion of the effect of this decision on the assertion of constitutional jurisdiction by the AD and the SCA, as well as constraints that imposed on High Court constitutional jurisdiction, see Stu Woolman & Danie Brand 'Is There A Constitution in This Courtroom: Constitutional Jurisdiction after *Afrox* and *Walters*' (2003) 18 *SA Public Law* 38. The Constitutional Court has, under the Final Constitution, asserted its jurisdiction with respect to all constitutional matters means that 'all law' and every exercise of public power is potentially subject to review for compliance with the basic law. See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC); *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC). See, generally, Frank Michelman 'The Rule of Law, Legality and Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11. See also § 31.4*(e)(x)* infra (On the relationship between jurisdiction, *stare decisis* and the transformation of the common law.)

(b) Analysis of *Du Plessis*

(i) *Court's approach to the text*

For the Constitutional Court in *Du Plessis*, the provisions in IC Chapter 3 that had a bearing on application looked ineluctably vertical. The primary textual support for this reading flowed from IC ss 7(1), 7(2), 33(4) and 35(3).

IC s 7(1) appears to narrow IC Chapter 3's applicability to legislative and executive law-making and conduct. IC s 7(1) read: 'This Chapter shall bind all legislative and executive organs of state at all levels of government.' The clause was silent about the Chapter's extension to the judiciary and judicial decisions. The vertical reading of this structured silence is that the drafters meant to insulate judicial enforcement of the common law that governs private relations from constitutional review.[1]

Kentridge AJ read IC s 7(1) together with IC s 7(2). On this account, IC s 7(1) modified IC s 7(2)'s injunction that 'this Chapter shall apply to all law'. Rather than reading IC s 7(2) literally, so that all provisions at least notionally apply to all legal relationships, reading IC s 7(2) in light of the strictures of IC s 7(1) yields the traditional, vertical view. Statutes, subordinate legislation, regulation, executive conduct or legislative conduct, when relied upon by the state, or which give rise to a dispute between the state and an individual, are subject to direct Bill of Rights review. Statutes, subordinate legislation, or regulations, when relied upon by a private party in a private dispute, are subject to direct Bill of Rights review. The common law, when relied upon by the state, is (sometimes) subject to direct Bill of Rights review. Private disputes governed by the common law are *not* subject to the direct application of the substantive provisions of the Bill of Rights.

Kentridge AJ's gloss on IC s 35(3) provides further support for this thesis. IC s 35(3) read:

> In the interpretation of any law *and the application and development of common law* and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter. (Emphasis added).

The phrase 'the application and development of the common law' was said to reflect the intent of the drafters of the Interim Constitution not to extend the Bill of Rights' application directly to the common law and, particularly, the private relations governed by the common law. If the drafters had intended unqualified,

[1] See Technical Committee on Fundamental Rights *Tenth Report* 4, 31 (5 October 1993). See also Lourens M du Plessis & Jacques de Ville 'Bill of Rights Interpretation in the South African Context (3): Comparative Perspectives and Future Prospects' (1993) 4 *Stellenbosch LR* 356, 390; Hugh Corder 'Towards a South African Constitution' (1994) 57 *Modern LR* 491, 511. The argument that the textual silence reflects an intentional omission of the judiciary is that much more compelling when IC s 7(1) is compared with IC s 4(2) and when one consults the full set of technical committee notes. Unlike IC s 7(1), IC s 4(2) states that the Interim Constitution 'shall bind all legislative, executive and judicial organs of state at all levels of government'. The notes of the Technical Committee on Fundamental Rights demonstrate that the committee flirted repeatedly with the inclusion of the judiciary in the application clause. It then decided against inclusion.

direct application, so the argument went, this provision would have been unnecessary. At the same time, the drafters were said to have wished the rights enshrined in IC Chapter 3 to permeate the entire legal culture.[1] They made provision, through IC s 35(3), for the Bill of Rights to influence the interpretation of law produced by non-legislative and non-executive branches or organs of the state.

(ii) *An alternative approach to the text*

That was not the only way to read IC ss 7(1), 7 (2) and 35 (3). Several disabling strategies were available.[2] First, IC ss 7(1) and (2) could have been read sequentially — not cumulatively. IC s 7(2)'s broad injunction that IC Chapter 3 applies to 'all law' might have meant that 'all law' was subject to the direct application of the substantive provisions of the Bill of Rights.[3] Second, IC s 7(1) continues to do work even after one concludes that it need not modify IC s 7(2). IC s 7(1) rejects the age-old principle that Parliament and the executive were neither bound by their own acts nor subject to substantive review of the content of the laws they promulgated.[4] Third, while it may have been accurate to claim that IC s 35(3) appears in Chapter 3 as a sop to those who would have preferred unqualified direct application and to ensure some seepage of fundamental rights into common law disputes between private parties, it was not necessary to read the section as Kentridge AJ did. The section could just as well have meant that, in the

[1] See Lourens M du Plessis 'A Note on the Application, Interpretation, Limitation and Suspension Clauses in South Africa's Transitional Bill of Rights' (1994) 5 *Stellenbosch LR* 86, 88 (A member of the Technical Committee on Fundamental Rights which drafted the section, Du Plessis writes: 'Section 35(3) is the provision allowing for a seepage of the provisions of Chapter 3 to horizontal relationships by requiring a court interpreting any law and applying and developing the common law and customary law, to have due regard to the spirit, purport and objects of the chapter.') See also Lourens Du Plessis 'The Genesis of the Provisions concerned with the Application and Interpretation of the Chapter on Fundamental Rights in South Africa's Transitional Constitution' (1994) 4 *TSAR* 706, 711 ('There were . . . quid pro quos for the deletion (in s 7) of explicit reference to the (possible) horizontal operation of Chapter 3. The first one is reflected in the present s 35(3)'); Martin Brassey 'Labour Relations under the New Constitution' (1994) 10 *SAJHR* 179, 187 ('[Section] 35(3) . . . is an enemy, not a friend, of those who say private action is reviewable [directly] under the Chapter.')

[2] More detailed critiques of Kentridge AJ's textual arguments appear in the first edition of this work. See Stu Woolman 'Application' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) §§ 10.3*(a)*(i), 10.3*(a)(v)*, and 10(3)*(b)*. The entire first edition is housed at www.chr.up.ac.za. See also Stu Woolman & Dennis Davis 'The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and Application under the Interim and the Final Constitutions' (1996) 12 *SAJHR* 361.

[3] See *Du Plessis* (supra) at para 129 (Kriegler J, in dissent, maintained just that.)

[4] See *Motala & Another v University of Natal* 1995 (3) BCLR 374, 381 - 382 (D)('It seems to me that the reason for the presence of s 7(1) is to stress that the State and its minions are to honour the entrenched rights both in legislation and administration.') The new principle — that the legislative and executive branches of government have a duty to make good the promise of the rights enshrined in Chapter 3 — which was implicit in both readings of IC 7(1) was made explicit in FC s 1 *(c)*, FC s 7(1) and FC s 7(2). FC s 7(2) reads: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.' FC s 7(1) reads: 'This Bill of Rights is a cornerstone of democracy in South Africa.' FC s 1*(c)* reads, in relevant part: 'The Republic of South Africa is one, sovereign, democratic state founded on . . . *(c)* Supremacy of the constitution.' Indeed, it is worth considering whether such a reading was the only way to make sense of the socio-economic rights enshrined in IC ss 29, 30(1)*(c)* and 32. See, eg, Sandy Liebenberg 'Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chasklason (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33.

'interpretation of *any* law and the application and the development of common law and customary law' in a context where *no* specific constitutional right is asserted, a court should infuse its interpretation of the law with the general values of the Chapter.[1] Such an interpretation treats, statute, subordinate legislation, regulation, common law and customary law as equally appropriate objects for constitutional infusion. When so read, IC s 35(3) is neutral on the issue as to whether the rights in IC Chapter 3 apply vertically or horizontally, directly or indirectly.[2] It certainly would not have been, as Kentridge AJ contended,

[1] The Constitutional Court places exactly this spin on FC s 39 (2). See § 31.4*(e)* infra.

[2] Kentridge AJ's judgment inadvertently advertises several other disabling strategies. First, he argues that although the limitation clause, IC s 33(1), applies to all law of general application, including common law, 'applying 33(1) to private relationships governed by the common law seems almost insurmountable.' *Du Plessis* (supra) at para 55. Why? According to Kentridge AJ:

> The common law addresses problems of conflicting rights and interests through a system of balancing. Many of these rights and interests are now recorded in the Constitution and on any view that means that as a result of the terms of the Constitution the balancing process previously undertaken may have to be reconsidered. A claim for defamation, for instance, raises a tension between the right to freedom of expression and the right to dignity. The common-law compromise has been to limit both rights to a certain extent, allowing damages to be recovered for what is regarded as 'unlawful expression' but allowing 'dignity' to be infringed in circumstances considered to be privileged. Section 33(1) could hardly be applied to such a situation.

Ibid. But Kentridge AJ contradicts both himself and the existing precedent of the Court. He had already agreed that IC s 33(1) applied to rules of common law. See *Shabalala & Others v Attorney-General, Transvaal, & Another* 1996 (1) SA 725, 736 (CC), 1995 (12) BCLR 1593, 1604 (CC)(Common-law docket privilege held unjustifiable under IC s 33(1) — 'law of general application within the meaning of s 33(1) would ordinarily include a rule of the common law.') Second, the fact that the common law as it currently exists tries to balance these competing rights does not mean that the existing body of defamation law has struck the balance correctly. The common law, like any other body of law, may have struck that 'balance' incorrectly. The Interim Constitution and the Final Constitution both require that we revisit these issues, and both clearly state that the limitations clause is one of the mechanisms by which such issues will be re-analysed. As we shall see below, the *Khumalo* Court expressly rejects Kentridge AJ's reasoning. The common law is just as susceptible to constitutional 'balancing' as any other form of law. Third, Kentridge AJ states that IC s 4 supports the proposition that the rights in IC Chapter 3 do not apply directly to common law rules that govern private disputes. He notes that while IC s 4 states that any law inconsistent with the Interim Constitution must be nullified and that the Interim Constitution binds the legislature, the executive and the judiciary, it contains the proviso 'unless otherwise provided expressly or by necessary implication in this Constitution.' He then concludes that 'if on a proper construction of Chapter 3, [the Bill of Rights] . . . operation is intended to be vertical only, the [horizontal] argument based on s 4 loses any force which it may have had.' *Du Plessis* (supra) at para 48. But this conclusion simply begs the central question. Do the provisions of Chapter 3 — and provisions found elsewhere in the Interim Constitution — 'necessarily imply' that acts of the judiciary and common law disputes between private parties are not directly subject to the rights and freedoms enshrined in the Chapter? On its own, IC s 4(1)'s proviso does no work in favour of Kentridge AJ's position. Finally, Kentridge AJ's argues that direct unqualified application cannot be squared with the Constitutional Court's limited jurisdiction:

> If . . . [IC] s 15 had a direct horizontal application the task of formulating an appropriate law of defamation would fall to this Court on appeal. But that could not be reconciled with our limited jurisdiction under IC s 98(2). Our jurisdiction, which is to interpret, protect and enforce the provisions of the Constitution, cannot empower us to choose one among a number of possible rules of common law all of which may be consistent with the Constitution. It would be equally impossible, for reasons which I have already explained, for this Court simply to declare that a particular rule of the law of defamation is invalid, leaving a lacuna in the law.

Ibid at para 59. This reasoning suffers from several flaws. First, IC s 98(2) did not expressly or implicitly preclude the Constitutional Court from exercising the inherent power to craft new rules of law and to

superfluous.[1]

(c) Jurisprudence of *Du Plessis*

The *Du Plessis* Court, and other advocates of a vertical approach to application, offered a concatenation of history lessons, liberal politics and democratic theory

create new remedies. IC s 98(2) simply defined the exclusive jurisdiction of the Constitutional Court. Kentridge AJ then contends that that 'the Constitution allows for the development of the common law and customary law by the Supreme Court in accordance with the objects of Chapter 3' in terms of IC s 35(3). Ibid. But IC s 35(3) said absolutely nothing about the Supreme Court having exclusive jurisdiction over the development of the common law' and nothing in the text supports the Justice's inference that 'the requisite development of the common law and customary law is not to be pursued through the exercise of the powers of this Court under section 98 of the Constitution.' Ibid at para 60. (Under FC s 39(2), the Constitutional Court has asserted the power to ensure that all courts have developed the common law — or interpreted legislation — as the 'objective normative value system' manifest in the Bill of Rights requires. See §§ 31.4*(e)*(viii) infra.) Finally, according to Justice Kentridge, IC s 33(4) would also have been unnecessary if the Chapter's rights were meant to have direct horizontal application. IC s 33(4) read: 'This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7(1).' Proponents of this position argued that unless the Chapter's extension was limited to the bodies bound by IC s 7(1) — unless the vertical reading was assumed — the drafters would not have needed to ensure that some other line of attack on private discrimination was possible. See Lourens Du Plessis 'The Genesis of the Provisions Concerned with the Application and Interpretation of the Chapter on Fundamental Rights' (supra) at 712 (IC s 33(4) — 'the second quid pro quo [for deleting from s 7 explicit reference to the possible horizontal operation of Chapter 3] — was included at the insistence of the ANC as part of the limitation clause.') This conclusion is hardly inevitable. Whether IC s 33(4) was present or not, the legislature could pass legislation banning various kinds of private discrimination. IC s 33(4) does no more than attempt to immunize civil rights legislation affecting non-governmental bodies from such constitutional attacks. While IC s 33(4) may have been a quid pro quo for deleting references to horizontal application from IC s 7(1), such horse-trading does not alter the words of IC s 33(4). The words support neither a vertical reading nor a horizontal reading of IC Chapter 3. See Stu Woolman 'Limitations' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) §§ 12.11, for more on IC s 33(4) and the extent of its success in immunizing civil rights legislation from review.

[1] Kriegler J offered similar textual arguments in his dissenting opinion. *Du Plessis* (supra) at para 128. One argument, not discussed above, is that IC ss 4(1) and (2) were meant to support the proposition that all three branches of government — the judiciary expressly included — were subject to the dictates of the Interim Constitution. IC Section 4(2) reads: 'This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government.' In short, all decisions by all branches of government are to be subject to and subordinate to the Constitution. Judicial decisions applying, interpreting or developing the common law should therefore be subject to constitutional review. On the other hand, the presence of the term 'judiciary' in IC s 4 makes its absence palpable in IC s 7. The drafting history also makes clear that the committee charged with responsibility for crafting this section was quite familiar with the word and repeatedly toyed with its inclusion in the text. See, eg, Technical Committee on Fundamental Rights *Fifth Report* (11 June 1993)(Judiciary included); *Sixth Report* (15 July 1993)(Judiciary dropped); *Seventh Report* (29 July 1993)(Judiciary included); *Tenth Report* (21 August 1993)(Judiciary dropped). Martin Brassey contends that 'the cumulative effect of . . . these interpretive materials is simply too overwhelming to justify an argument based upon inadvertence.' Brassey 'Labour Relations' (supra) at 185. But the drafting history does not, in fact, close the book on a direct, unqualified approach to application. The pace of the drafting — and the political pressure on all parties to generate an 'acceptable' rather than an optimal product — suggests a somewhat unusual canon of interpretation: 'incompleteness'. See *Motala v University of Natal* 1995 (3) BCLR 374, 381–382 (D)('Given the high-powered, perhaps almost frantic milieu in which the Constitution was forged . . . it would be a mistake . . . to attribute too much significance to the presumption against redundancy and some of the other highly clinical tenets of interpretation at the risk of attributing too little to the professed spirit and objectives of the enactment.')

in support of their claim that the application provisions of the Interim Constitution's Bill of Rights ought to be restrictively interpreted.

Proponents of this approach began with the unassailable truism that the traditional function of most constitutions is to protect individuals from abuses of state power. They argued that we should not depart from this widely accepted model unless the text indicated clearly that another was intended.[1] This emphasis on the need to control state power is then used to explain why IC s 7(1), by not mentioning the judiciary, should be understood to place private disputes governed by the common law beyond the reach of the Bill of Rights.

Liberal theory places the following gloss on this public-private distinction. Because individuals and groups pursue the ends that give their lives meaning primarily within the private domain, we should be loath to endorse a mode of constitutional analysis that permits greater state interference in those relationships and practices we deem to be constitutive of our being.[2] There is, on the liberal account, no good reason to allow a judge to supplant the beliefs of individual citizens about the nature of the good life with her own idiosyncratic vision.

Democrats are likewise sceptical of any claims that judges possess such privileged access. However, democrats believe that state intervention in the private domain — and thus interference with individual conceptions of the good life — can be justified by reference to a more representative and legitimate decision-making body: the legislature. Democrats also insist that the legislature is better equipped institutionally than are the courts to tackle polycentric social problems.[3]

Textual arguments, supplemented by prudential concerns and comparative jurisprudence, largely exhaust Kentridge AJ's rhetorical strategies in *Du Plessis*. What is missing from the judgment is a principled engagement with the real issues underlying the application debate.[4]

[1] See *De Klerk & Another v Du Plessis & Ohers* 1995 (2) SA 40, 46–47 (T), 1994 (6) BCLR 124, 130–131 (T)(Van Dijkhorst J)('Traditionally bills of rights have been inserted in constitutions to strike a balance between governmental power and individual liberty . . . It would . . . be correct . . . to take the view that our Constitution is a conventional constitution unless there are clear indications to the contrary.') See also Brassey 'Labour Relations' (supra) at 191 ('The normal role of a constitution is rather to establish and regulate the institutions of government than to . . . impose duties on private citizens. If the mandate had been to draw up the Final Constitution, the drafters might have been more adventurous; but in framing an Interim Constitution, designed to exist for a mere two years, they can be forgiven for preferring to progress gradually'); Peter Hogg *Constitutional Law of Canada* (3rd Edition 1992) § 34.2*(g)*('In deciding that the Charter does not extend to private action, the Supreme Court of Canada has affirmed the normal role of a constitution. A constitution establishes and regulates the institutions of government, and it leaves to those institutions the task of ordering the private affairs of the people.')

[2] See, eg, Johan Van der Vyfer 'The Private Sphere in Constitutional Litigation' (1994) 57 *THRHR* 378, 388 ('As a matter of political freedom, excessive control by the state of purely private matters would result in a totalitarian regime.')

[3] One additional argument, which may have informed Kentridge AJ's jurisdictional concerns, was that if we extend the application of constitutional rights to private relationships, we risk diluting the effectiveness of fundamental rights as a brake on state power. See William Marshall 'Diluting Constitutional Rights: Rethinking "Rethinking State Action"' (1985) 80 *Northwestern University LR* 558, 569 ('Characterizing every shouting match or every decision with whom to associate as actions that may lead to constitutional liability is to trivialize the meaning of constitutional protection and thereby to weaken the force of a claim of 'true' constitutional violation by overexposure.')

[4] Kentridge AJ pauses to remark that 'difficulties and anomalies arise on the vertical as well as

(d) Critique of the Jurisprudence of *Du Plessis* v *De Klerk*

Critiques of the jurisprudence of *Du Plessis v De Klerk* fall into six basic categories: the fortuity of legal form; the inevitable arbitrariness in judicial application of the Bill of Rights; the artificial defence of the *status quo*; the untenability of the public-private distinction; judicial boundedness; and the specific pressures that South Africa's radically inegalitarian distributions of wealth and power places on the interpretation of the text of our basic law.

(i) *Fortuity of form*

On the *Du Plessis* Court's reading of IC s 7(1), whether or not law governing private relations was subject to the direct application of the substantive provisions in IC Chapter 3 was entirely contingent upon the form the law took. If a party to a dispute challenged legislation, then IC Chapter 3 applied to that law and the private relations that the law governed. If, on the other hand, the party challenged common-law rules governing a dispute (or challenged the conduct sanctioned by those common-law rules in a dispute) between private parties, then the substantive provisions of IC Chapter 3 did not apply directly. Laws governing private disputes were not, therefore, immunized entirely from direct application of the substantive provisions of the Bill of Rights.

(ii) *Arbitrariness of application*

Foreign experience supports the thesis that such distinctions invite arbitrary enforcement. While application doctrines vary from jurisdiction to jurisdiction, the basic plot remains the same. Some decisions expand the parameters of state action to include behaviour and relationships heretofore thought of as private, while others strive to give content to the state/non-state action distinction in order to restrict the application of constitutional rights.[1]

In one case, a court might hold that since a company town possesses all the indicia of a regular municipality and provides all the services of a local government, it is legitimately subject to the same constitutional constraints that limit the

horizontal approaches … [but] that the supposed irrationalities of the vertical interpretation are exaggerated.' *Du Plessis* (supra) at para 51. 'Such as there may be,' he writes 'flow from the structure and wording of the Constitution.' Justice Kentridge may have been correct in arguing that the text of the Interim Constitution pointed toward verticality. But a vertical approach's irrationalities, difficulties and anomalies were, and still are, issues entirely independent of the text. Kentridge AJ simply chose not to engage these broader jurisprudential problems. See, further, Stu Woolman & Dennis Davis 'The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and Application under the Interim and the Final Constitutions' (1996) 12 *SAJHR* 361.

[1] For basic statements of application doctrine in foreign jurisdictions, see *Retail, Wholesale and Department Store Union v Dolphin Delivery* (1987) 33 DLR (4th) 174, [1986] 2 SCR 573 (Canadian Charter applies to acts of the legislature and the executive, not courts, and thus not to common law governing private disputes); *Luth* 7 BVerfGE 198 (1958)(Although German Basic Law was primarily intended to protect individual liberty against state encroachment, the Bill also embodies an objective order of values that necessarily determines the broad outline of private law and public law); *Civil Rights Cases* 109 US 3 (1883)(State action consists of: *(a)* statutes or regulations enacted by national, state and local bodies; *(b)* the official actions of all government officers. The expansive understanding, reflected in Harlan J's dissent, asks whether a private actor is performing a government function or is sufficiently 'involved with' or 'encouraged by' the state to warrant being held to the state's constitutional obligations.) Even

exercise of state power.[1] In another case, it might hold that despite the fact that modern shopping complexes tend to possess all the indicia of public forums and may acquire a monopoly on places suitable for effective political communication, their suppression of expressive conduct does not engage the constitution.[2] A court might hold that statutory authority for an arbitrator to make binding orders against an employer implicates the state and subjects the actions in question to constitutional scrutiny; in a subsequent matter, it may find that collective bargaining agreements governed by statute do not implicate the state.[3]

South African case law throws up similar anomalies. In one case, a creature of statute, the Health Professions Council — which fulfils the important public function of regulating medical practitioners — was deemed not to be an organ of state because it was not under the direct control of the state.[4] In another case, a creature of statute, the Truth and Reconciliation Commission — which fulfilled

defenders of the vertical position tend to admit that current bodies of application or state action jurisprudence 'cannot be defended without resort to intellectual dishonesty.' See Marshall (supra) at 570. For a similar broadside by a long-time critic of the doctrine, see Lawrence Tribe 'Refocusing the 'State Action' Inquiry: Separating State Acts from State Actors' *Constitutional Choices* (1985) 246.

[1] See *Marsh v Alabama* 326 US 501 (1946)(Circumscribes the right of private property owners to engage in unconstitutional forms of discrimination by finding that a company town's refusal to allow a woman to distribute literature on behalf of the Jehovah's Witnesses was a violation of her free speech rights.)

[2] See *Hudgens v NLRB* 424 US 507 (1976)(No state action in judicial enforcement of common law of trespass — thus foreclosing possibility of a hearing on the merits of the freedom of speech challenge — and allows union to be barred from picketing a store in a shopping centre). Compare *Burton v Wilmington Parking Authority* 365 US 715 (1961)(US Supreme Court found that the refusal of the Eagle Coffee Shoppe — a private establishment located in a building owned and operated by an agency of the state of Delaware — to serve Mr Burton because he was African-American constituted a denial of Mr Burton's right to the equal protection of the laws under the Fourteenth Amendment) with *Moose Lodge No 107 v Irvis* 407 US 163 (1972)(US Supreme Court found that the refusal of the Moose Lodge — a privately owned club licensed by the Pennsylvania liquor board — to serve Mr Irvis, an African-American, because of his race did not constitute state action denying him equal protection of the law.) What does the variable nature of the court's intervention mean? Some commentators argue that the courts are willing to intervene in so-called private disputes where they believe that the most fundamental of fundamental rights are being violated. See Sue Davis 'The Supreme Court: Finding State Action . . . Sometimes' (1983) 26 *Howard LR* 1395, 1406 ('An examination of state action cases reveals that whether the nature and extent of the state involvement in a given case will be sufficient to constitute state action depends upon the importance of the interest sought to be vindicated by the party claiming discrimination, when weighed against the interests of the person said to discriminate.') Others argue that the courts' refusal to intervene in private disputes reflects the belief — however misguided — that the existing common law is neutral between the competing parties and that the courts ought not to disturb the private consensual ordering of social life. See Charles Black Jr 'Foreword: State Action, Equal Protection and California's Proposition 14' (1967) 81 *Harvard LR* 69; Cass Sunstein 'Lochner's Legacy' (1987) 87 *Columbia LR* 873.

[3] Compare *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038, (1989) 59 DLR (4th) 416 (Adjudicator empowered under Canada Labour Code to make orders against employer held to be 'statutory creature' deriving all coercive powers from statute and state, and therefore subject to Charter) with *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211, (1991) 81 DLR (4th) 545 (Closed-shop provision in collective bargaining agreement authorized by labour legislation found to be private agreement beyond reach of Charter.)

[4] *Korf v Health Professions Council of South Africa* 2000 (1) SA 1171 (T).

the important public function of composing an initial record of apartheid — was deemed to be an organ of state despite the fact that it was not under the direct control of the state.[1]

Perhaps, as Mark Tushnet has suggested, the central purpose of the Final Constitution — to subject private parties, as well as state parties, to the basic law's provisions — makes these fine distinctions between state and non-state entities less pressing than they might otherwise be.[2] But several points are worth keeping in mind. Our courts often use the permissive wording of both FC s 8(2) and FC s 39(2) in order to decline Chapter 2's invitation to constitutionalize 'private law' disputes.[3] Even in socio-economic rights cases, where the state is almost always going to be a party to litigation in matters traditionally or historically placed within the private domain, a version of the state action doctrine has established a beachhead.[4] This 'legitimate expectations' doctrine, as a species in the genus of state action doctrines, enables the court to suppress a finding on the merits of a claim for specific relief.

[1] *Inkatha Freedom Party v TRC* 2000 (3) SA 119 (C), 2000 (5) BCLR 534 (C).

[2] See Mark Tushnet 'The Issue of State Action/Horizontal Effect on Comparative Constitutional Law' (2003) 1 *Journal of International Constitutional Law* 79. Tushnet identifies two factors — with respect to South Africa — that may influence the extent to which any given set of application provisions will be more or less likely to result in the constitutional transformation of existing bodies of private law: (1) a specialized Constitutional Court that lacks powers of general jurisdiction has a limited capacity to change non-constitutional bodies of law and concomitantly less control over courts of general jurisdiction; and (2) a commitment to strong social democracy — through either socio-economic rights or state policy or both — diminishes the impact of public-private distinctions in constitutional law because the ends of social transformation are likely to be secured through either socio-economic rights or government programmes. See also Steven Ellmann 'A Constitutional Confluence: American State Action Law and the Application of Socio-Economic Rights Guarantees to Private Actors' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 444 (Arguing that a broad understanding of FC s 8(1)'s application of the Bill to organs of state, FC s 8(2)'s invitation to apply the Bill of Rights to private disputes, and the presence of socio-economic rights narrows the gap between constitutional and non-constitutional bodies of law.) For more on Professor Ellmann's account see § 31, Appendix, 4*(c)*.

[3] See §§ 31.4*(c)*–*(e)* infra.

[4] In these cases, individuals who have already received a particular government benefit are distinguished from those individuals who have not. The former class may ask the court to order the state to continue provision of the benefit. See *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC)('*Kyalami*') at paras 34, 48, 51 (Constitutional Court concludes that the state, having already committed itself to housing persons on state land, a prison, incurred an obligation to find other suitable land for housing in the event that such persons had to be moved.) The latter class of litigant may only request an order that requires the government to take those steps necessary to ensure the reasonable and progressive realization of the right for all of the right's intended beneficiaries. The second class of litigants are, generally speaking, never entitled to specific relief. See, eg, *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)('*Grootboom*'). By finding no pre-existing benefit or entitlement, the courts avoid requiring the government to alter radically its budgetary priorities and to commit significant amounts of funds to particular individuals or communities. See, eg, *Van Biljon v Minister of Correctional Services* (*B & Others v Minister of Correctional Services & Others*) 1997 (4) SA 441 (C), 1997 (6) BCLR 789 (C). Four prisoners diagnosed as HIV positive sought orders declaring that, under FC s 35(2)*(e)*, they had the 'the right . . . to . . . the provision, at State expense, of adequate . . . medical treatment.' All four had CD4 counts of less than 400/ml and presented with symptoms of HIV. All four therefore satisfied generally accepted criteria for anti-retroviral treatment. Two of the prisoners had

(iii) *An artificial defence of the status quo*

Does it make sense to hold — as the *Du Plessis* Court effectively did — that the state is acting when the legislature passes legislation and the executive enforces legislation that applies to relations between private parties, but that the state is not acting when the courts make laws, apply them to private parties, and have their decisions enforced by the executive? According to Cass Sunstein, this disjunction reflects the 'traditional' view that legislation interferes with the existing nexus of private relationships while the common law simply provides a neutral backdrop for the private, consensual ordering of individual preferences.[1] Given that this distinction is incorrect as a descriptive matter — no body of law can be neutral with respect to existing distributions of wealth and power, and the state backs up each and every legal regime with the threat of force — it makes no sense to treat the autonomy interests at stake in a dispute governed by legislation any differently than the autonomy interests at stake in a dispute governed by common law. The real point of the basic law, as Justice Kreigler points out in his dissent in *Du Plessis*, is to transform all legal regimes that offend current constitutional commitments. As it so happens, the Justice notes, the common law of property, contract and delict are amongst those regimes in need of the greatest reform.[2]

(iv) *Untenability of the public-private distinction*

Each of the previous three critiques of *Du Plessis* is a variation on a single theme: the untenability of the public-private distinction with respect to the application of constitutional rights. As a general philosophical matter, the public-private divide is largely a product of natural law jurisprudence.[3] Natural law jurisprudence, as elaborated in the seventeenth and eighteenth centuries, portrayed individuals as the possessors of inalienable rights. Constitutions were intended, on this account, to enable individuals and groups to exercise rights of expression, conscience, religious practice, association and property free from interference by both state and non-state actors. They were not originally conceived as tools to eradicate private discrimination and redistribute wealth.[4]

already been prescribed appropriate anti-retrovirals by medical practitioners. The other two prisoners had not had any anti-retroviral treatment prescribed by the state. The court held that the two prisoners who had been prescribed a combination of AZT and ddl by medical practitioners were entitled to provision of that cocktail at state expense, but that the two prisoners who had not as yet been prescribed either anti-viral mono-therapy or anti-viral combination therapy were not entitled to provision of any treatment at state expense. Only *de minimus* state action — namely that someone, somewhere in the state apparatus has seen a prescription — enables the first two applicants to secure the protection of FC s 35(2). See also D Brand 'Food' in S Woolman, T Roux, J Klaaren, A Stein & M Chakalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 56C; Chemerinsky (supra) at 537 (State action doctrine 'is no more than a disguised abstention doctrine: courts utilize it to avoid the fundamental issues presented by the cases.')

[1] Cass Sunstein *The Partial Constitution* (1993) 66–9 and 171–3.

[2] *Du Plessis* (supra) at para 146.

[3] See Paul Brest 'State Action and Liberal Theory: A Casenote on *Flagg Brothers v Brooks*' (1982) 130 *University of Pennsylvania LR* 1296, 1300 (While '[t]he connection between natural rights and state action is not one of logical necessity . . . the doctrines are mutually sympathetic.')

[4] Natural rights theory does not logically require one to take a vertical view of constitutional application. Natural law is not only concerned with the relationship between state and citizen. Natural rights protect each citizen against undue interference by his fellow citizens and require state intervention

This natural law understanding of the relationship between the state and individuals, and between the law and private affairs, is not the only available understanding. Positivist jurisprudence tends to view all law and all rights as emanating from the state.[1] Moreover, on the positivist account, the law mediates all social relations. There is nothing beyond it. As a consequence, the positivist believes that every social transaction is governed by law, or at a minimum, underwritten by the power of the state. Put another way, all 'private actions' are acquiesced in by the state and the state is free to withdraw its authorization for these actions — and for the law that permits them — at will.[2]

The implications of positivism for application doctrine are relatively clear.[3] A positivist must object to *Du Plessis'* ample cleavage: a public domain determined by the state and a private domain unencumbered by the state. That does not mean that a positivist cannot, in good faith, articulate a normative theory of rights committed to some form of a public-private distinction. I have elsewhere vigorously defended zones of so-called 'autonomy' that enable individuals and groups to pursue ways of being in the world largely free from state interference. I do not, however, claim that the state would not be implicated in sustaining such 'private'

where an individual's inviolable sphere of liberty is breached by his compatriots. On this account some rights – if not all rights – ought to have horizontal applicability. See Frank Goodman 'Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone' (1982) 130 *University of Pennsylvania LR* 1331, 1335; Erwin Chemerinsky 'Rethinking State Action' (1985) 80 *Northwestern LR* 503, 529 ('[T]he concept of state action makes no sense under a regime of natural law. . . [P]rivate invasions of liberty are just as intolerable as governmental violations because both deprive a person of inherent rights.') Natural rights were deemed compatible with verticality because it was assumed that the common law would provide sufficient protection for individuals in private disputes. It is, perhaps, worth offering two additional observations. First, placed in its proper historical context, natural law was a progressive doctrine that helped carve out a space for individual autonomy and subjectivity to develop free of the overweening control of public authority. Second, natural rights are not adequate to the task of reorganizing democratic societies along more open, participatory and egalitarian lines.

[1] See Thomas Hobbes *Leviathan* (1651)('Where there is no state, there is no law.')

[2] Commentators in civil-law jurisdictions are more inclined towards such a view because judge-made common law does not play the same obfuscatory role. Hans Kelsen argued that the 'logically, entirely untenable' distinction between public law and private law

> has no theoretical, but only an ideological character. Developed by constitutional doctrine, it is designed to secure for the government and its administrative machinery . . . a freedom not from law, which . . . is impossible, but from statutes, from the general legal norms created by the Parliament as the representation of the people . . . The differentiation in principle between a public (or political) and private (or unpolitical) legal sphere is designed to prevent the recognition that the private right created by the legal transaction of a contract is just as much the theater of the political dominion as the public law created by legislation and administration. But the so-called private law, the complex of norms whose core is the legal institution of private property, is a method of creating individual norms characteristic of the capitalistic system.

Hans Kelsen *Theory of Pure Law* (1960) 283–4. See also Hans Kelsen *General Theory of Law and State* (1945) 207 ('The distinction between public law and private law is useless as a common foundation for a general systemization of law.') See, further, Chemerinsky (supra) at 526 ('The critical point here is that under a positivist analysis . . . the common law is state law and court enforcement is state action. Under positivism, the concept of state action makes no sense because state action is always present.')

[3] Let me not be misunderstood. I do not assert that positivism — in any form — by logical necessity leads to the application doctrine preferred in these pages.

arrangements. Quite the opposite. I argue that the state should acknowledge its complicity in sustaining associations from which we derive the better part of life's meaning.[1]

While most contemporary legal theorists' sympathies lie with the positivist rendering of the relationship between the state and the individual, these theorists are more accurately described as constructivists. Constructivists argue that all natural rights theories may be manipulated to make any set of private social circumstances appear 'natural' and that these circumstances have, more often than not, been used to turn race or sex or age or disability into an unfortunate destiny under law.

Constructivists suggest that we should stop conceiving of the state as something separate and apart from the individuals who live within it. It is not a thing that occasionally crosses the chasm between the public and the private to act on individuals. The state is, rather, a locus of relationships, rules, norms and ideas that determine the way we understand ourselves.[2] The recognition of this influence does not mean that our political life exhausts our self-understanding. But it does mean that we can never look at people and events as being pre-political. Whether they know it or not, their identities have been shaped by political institutions and legal doctrines. A vertical or quasi-vertical approach to application is, on the constructivist account, difficult to justify. If a state's laws and conduct so profoundly determine our public and private lives, then it seems hard to understand why we should subject only those acts immediately traceable to two specific arms of the state to constitutional scrutiny and immunize from constitutional attack those acts backed by the power of the state but traditionally described as private.

(v) *Judicial Boundedness*

The fiction of the public-private divide also played out in the notion that the judiciary could not be bound by the Bill of Rights. The judiciary could not be bound because it was simply responsible for discovering and then applying common-law rules — common-law rules that ostensibly did not emanate from the state.

[1] See Stu Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

[2] See Laurence Tribe 'The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics' (1989) 103 *Harvard LR* 1, 7–8 and 20 ('Just as space cannot extract itself from the unfolding story of physical reality, so also the law cannot step back, establish an Archimedean point of detached neutrality, and selectively reach in, as from the outside, to make fine-tuned adjustments to highly particularized conflicts. Each legal decision restructures the law itself, as well as the social setting within which the law operates, because, like all human activity, the law is inevitably embroiled in the dialectical process whereby society is constantly recreating itself. . . . A court cannot behave as if all that mattered is rendering a result on the case concerning the parties before it. It must realize that the very process of legal observation (judging) shapes both the judges themselves and the material being judged. The results the courts announce . . . will . . . have continuing effects that reshape the nature of what the courts initially undertook to review, even beyond anything they directly order anyone to do or refrain from doing. The law is thus not simply a backdrop against which the action may be viewed . . . but is itself an integral part of that action.')

But even on the vertical approach endorsed by *Du Plessis*, the courts were bound by some of the provisions of IC Chapter 3. IC s 25's rights to silence,[1] against self-incrimination,[2] of the accused being presumed innocent,[3] to a trial within a reasonable time,[4] to reasonable bail,[5] to a fair trial,[6] to speedy sentencing,[7] and not to be subject to cruel, inhuman and degrading punishment[8] apply to the judiciary.[9] A court order for scandalizing the court is subject to review as an abridgement of the freedom of expression.[10]

The text of the Final Constitution should have resolved this problem. After all, FC s 8(1) binds the judiciary. But the *Khumalo* Court rebuffed counsel's request to give the phrase 'binds the judiciary' content. According to *Khumalo*'s black letter law on application, FC s 8(1)'s 'binds the judiciary' does not mean that the common law — as the legal product of the courts — is invariably subject to the direct application of the Bill of Rights. And yet, despite this holding in *Khumalo*, the Constitutional Court has, in other judgments, interpreted FC s 8(1)'s binding of the judiciary in such a manner as to ensure that the Constitutional Court always retains the authority to decide whether any gloss placed by any tribunal on any rule of common law or provision of statute comports with constitutional dictates.[11] Those two positions are logically incompatible.

(vi) *History and power*

Three opinions in Du Plessis demur from the application doctrine proffered by the majority. What all three opinions share is a common belief that the majority failed to come to grips with how issues of history and power ought to shape our interpretation of the Interim Constitution and the Final Constitution.

The majority opinion[s], Justice Kriegler writes:

> reflect pervading misconception[s] held by some and . . . egregious caricature[s] propagated by others . . . That is that so-called direct horizontality will result in an Orwellian society in which the all-powerful state will control all private relationships. The tentacles of government will, so it is said, reach into the marketplace, the home, the very bedroom. The minions of the state will tell me where to do my shopping, to whom to offer my services or merchandise, whom to employ and whom to invite to my bridge club. That is nonsense. What is more, it is

[1] See, eg, *Osman v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC), 1998 (11) BCLR 1362 (CC).

[2] See, eg, *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC); *Park-Ross v Director for Serious Economic Offences* 1995 (2) SA 148 (C), 1995 (2) BCLR 198 (C).

[3] See, eg, *S v Zuma* 1995 (2) SA 652 (CC), 1995 (4) BCLR 401 (CC).

[4] See, eg, *Bate v Regional Magistrate, Randburg* 1996 (7) BCLR 974 (W).

[5] See, eg, *S v Dhlamini* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC).

[6] See, eg, *Scagell v Attorney-General of the Western Cape* 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC).

[7] See, eg, *Wild v Hoffert* 1998 (3) SA 695 (CC), 1998 (6) BCLR 656 (CC).

[8] See, eg, *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC).

[9] See, eg, *R v Rahey* [1987] 1 SCR 588, 39 DLR (4th) 481 (Supreme Court of Canada held that a criminal court's delay in ruling on an application for directed verdict was a breach of s 11*(b)* of the Canadian Charter.)

[10] See, eg, *S v Mamabolo (E TV & Others Intervening)* 2001 (3) SA 409 (CC), 2001 (1) SACR 686 (CC), 2001 (5) BCLR 449 (CC)(Citation for contempt for scandalizing court will attract review under FC s 16.)

[11] See § 31.4*(b)*(i)–(ii) infra.

> malicious nonsense preying on the fears of privileged whites, cosseted in the past by laissez faire capitalism thriving in an environment where the black underclass had limited opportunity to share in the bounty. I use strong language designedly. The caricature is pernicious, it is calculated to inflame public sentiments and to cloud people's perceptions of our fledgling constitutional democracy. 'Direct horizontality' is a bogeyman.[1]

Justice Madala's dissent is a far more polite affair. Madala J takes the majority to task for their failure to read Chapter 3 in light of the remedial purposes of the Interim Constitution. To this end he quotes the coda of the Interim Constitution:

> The postamble reminds us that the Constitution is a '. . . historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.[2]

He then reminds the majority that the Court functions in South Africa — not in an advanced Western liberal democracy — and that every provision of the Interim Constitution should be construed with South Africa's particularly troubled history and present in mind.[3] He writes:

> Ours is a multi-racial, multi-cultural, multi-lingual society in which the ravages of apartheid, disadvantage and inequality are just immeasurable. The extent of the oppressive measures in South Africa was not confined to government/individual relations but equally to individual/individual relations. In its effort to create a new order, our Constitution must have been intended to address these oppressive and undemocratic practices at all levels. In my view our Constitution starts at the lowest level and attempts to reach the furthest in its endeavours to restructure the dynamics in a previously racist society.[4]

Most significantly, Justice Madala warns his fellow justices that they must come to terms with the abuse of power *simpliciter* — whether it is privately or publicly sourced — or risk blunting the transformative powers of the law:

> Those who widen the scope of the operation of the Bill of Rights hold the view that the verticality approach is unmindful of modern day reality — that in many instances the abuse of power is perpetuated less by the State and more by private individuals against other private individuals.[5]

The late Chief Justice Mahomed's concurrence largely tracks the textual analysis of Kentridge AJ. It is imbued, however, with an entirely different spirit. This

[1] *Du Plessis* (supra) at para 120. Kriegler J adds that despite the learning reflected in the other judgments, he cannot 'see the dire consequences' of the unqualifiedly direct approach to application. 'Indeed', he says, 'as I see it, it makes no fundamental difference with regard to such consequences whether the horizontal application of Chapter 3 is direct or indirect. It has little, if any, effect jurisprudentially or socially whether the Chapter 3 rights are enforced directly or whether they 'irradiate' private legal relationships. I stress this point not only because of the impending doom Ackermann J perceives in the direct horizontal application of Chapter 3. I do so also because it would be foolish to ignore the public utterances of political and legal commentators in a similar vein.' Ibid.

[2] Ibid at para 157.

[3] Ibid at para 162.

[4] Ibid at para 163.

[5] Ibid at para 154.

difference is captured in two statements: one on the nature of law; one on the relationship between the basic law and the harsh realities of South African life. On the untenability of the public-private divide in law, Mahomed CJ, then DP, writes:

> I am not persuaded that there is, in the modern State, any right which exists which is not ultimately sourced in some law, even if it be no more than an unarticulated premise of the common law and even if that common law is constitutionally immunized from legislative invasion. Whatever be the historical origins of the common law and the evolutionary path it has taken, its continued efficacy in the modern State depends, in the last instance, on the power of the State to enforce its sanction and its duty to do so when its protection is invoked by the citizen seeking to rely on it. It is, I believe, erroneous to conclude that the law operates for the first time only when that sanction is invoked. The truth is that it precedes it and is indeed the ultimate source for the legitimization of any conduct. Freedom is the fundamental ingredient of a defensible and durable civilization, but it is ultimately secured in modern times, only through power, the sovereignty and the majesty of the law activated by the State's instruments of authority in the protection of those prejudiced through its invasion by others. Inherently, there can be no 'right' governing relations between individuals *inter se* or between individuals and the State the protection of which is not legally enforceable, and if it is legally enforceable it must be part of law.'[1]

The preceding paragraph suggests the late Chief Justice's ambivalence about the majority's order. Mahomed DP writes that although the text constrains him to agree with many of Kentridge AJ's conclusions, he remains concerned that the majority's construction of the provisions on application

> could in practice [mean] that the Constitution was impotent to protect those who have so manifestly and brutally been victimized by the private and institutionalized desecration of the values now so eloquently articulated in the Constitution. Black persons were previously denied the right to own land in 87% of the country. An interpretation of the Constitution which continued to protect the right of private persons substantially to perpetuate such unfairness by entering into contracts or making dispositions subject to the condition that such land is not sold to or occupied by Blacks would have been for me a very distressing conclusion.[2]

[1] *Du Plessis* (supra) at para 79.

[2] Ibid at para 84. Rather than dissent, Mahomed DP sought solace in the promise of indirect application under IC s 35(3). Justice Mohamed wrote: '[IC] s 35(3) can, in appropriate circumstances, accommodate much of the concern felt by those like me who are anxious to avoid giving to s 7 of the [Interim] Constitution an interpretation which would leave the courts substantially impotent in affording the proper protection of constitutional values to those victimized by their denial to them in the past.' Ibid at para 87. It is through IC s 35(3), he continues, that the courts could avoid being 'trapped within the limitations of the past.' Ibid. Exactly how IC s 35(3) would enable the courts to escape that trap was not — and is still not under FC s 39(2) — entirely clear. For example, in *Du Plessis*, Kentridge AJ said that he agreed with the view articulated by Cameron J in *Holomisa v Argus Newspapers* that IC s 35(3) made much of the vertical/horizontal debate irrelevant. 1996 (2) SA 588 (W). But Cameron J in *Holomisa v Argus Newspapers* operates as if the method of constitutional analysis for common law rules under IC s 35(3) is identical to the method employed by the Constitutional Court when it analyses legislation, subordinate legislation or state conduct. He holds expressly that IC 's 35(3) requires the fundamental reconsideration of any common law rule that trenches on a fundamental rights guarantee and that in reviewing the

(e) The jurisprudence of unqualified direct application

Unqualified direct application of the substantive provisions of the Bill of Rights is derived from the interaction of two simple axioms. The state constructs and enforces all law no matter what form the law takes.[1] Legislation, subordinate legislation, common law and customary law shape both relationships between the state and its citizens and relationships between individuals.

Two conclusions follow. Coherence dictates that since the state constructs and enforces all law, all law should be measured against constitutional standards. Candour demands that an assessment of the constitutionality of a particular law should not be artificially suppressed because of the form the law takes.[2]

These two conclusions come with three closely related caveats. First, not all action is state action subject to constitutional scrutiny. As Cass Sunstein notes,

common law for consistency with the Bill of Rights, one ought to adopt the Constitutional Court's two-stage approach to rights analysis. Unlike Cameron J, Kentridge AJ argues that by choosing words such as 'due regard' 'the lawgiver [could not have meant] that courts should invalidate rules of common law inconsistent with Chapter 3 or declare them unconstitutional.' *Du Plessis* (supra) at para 60. He suggests that when reviewing or developing the common law in light of constitutional values the 'judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.' Ibid at para 61 citing *R v Salituro* [1991] 3 SCR 654, (1992) 8 CRR (2d) 173, 189. Cameron J's position presages radical transformation, Kentridge's approach accords with the nothing new or unusual position reflected in *R v Salituro.* See also *Lappeman Diamond Cutting Works v MIB Group Ltd* 1997 (4) SA 908 (W)(Joffe J)('The manner in which statutory discretion is to be exercised must likewise not be trapped in the past. Should . . . discretion be exercised in a manner inimical to the spirit, purport and objects [of] the [Interim] Constitution, such binding authority need not be followed.') But see *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA)('*Afrox*'). The Constitutional Court and the Supreme Court of Appeal have not warmed to the notion of a radical transformation of the common law under FC s 39(2). See the discussions of the transformative role of FC s 39(2), at § 31.4*(e)*(iii)–(iv) infra, and the relationship between application and *stare decisis*, at § 31.4*(e)*(ix). Nor are they particularly moved by the alleged need for doctrinal harmony. See, eg, *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA), 2003 (11) BCLR 1220 (SCA) at para 35 (Supreme Court of Appeal notes that the Constitutional Court in *Carmichele* had 'quoted with approval a passage to the effect that the Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.') See also *Metcash Trading Ltd v Commissioner, South African Revenue Service, & Another* 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC)(Rule of law does not require identical outcomes in cases based upon the same factual and legal substratum.)

[1] See Morton Horowitz & Kenneth Karst 'The Proposition 14 Cases: Justice in Search of a Justification' (1966) 14 *UCLA LR* 37, 41–45 ('[T]here always exists some state law (statutory, decisional or declarable in a court of first instance) determining the legal characteristics of any private discriminatory conduct . . . State action, in the form of state law, is present in all legal relationships among private persons.') See also *New York Times v Sullivan* 376 US 254, 265 (1964)('We may dispose at the outset of . . . the proposition relied on by the State Supreme Court — that "the Fourteenth Amendment is directed against State action and not private action." That proposition has no application to this case. Although this is a civil law suit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedom . . . It matters not that the law has been applied in a civil action and that it is common law only. . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.')

[2] See Erwin Chemerinsky 'Rethinking State Action' (1985) 80 *Northwestern LR* 503, 536 ('[W]e must remember . . . [i]n each case when a question of state action arises, both the freedom of the violator and the freedom of the victim are at stake. No matter how a court decides, someone's liberty will be expanded and someone's liberty restricted. To assert that the state action doctrine is desirable because it preserves autonomy and liberty is to look at only one side of the equation.')

'[w]hen one person excludes another from his own home, there is no state action; the state action consists only in the availability or actual use of the trespass laws.'[1] Second, challenges to existing rules of common law do not entail the subversion of the common law. In some cases, a rule of common law being relied upon by one party in defence of their property interests will trump another party's claim to equal treatment. In another contest between such rights and interests, a rule of common law may fall. In all cases, the court will be forced candidly to determine the priority of rules, and not hide behind the artifice of government action or inaction. Third, the commitment to direct application does not mean that 'there is no line between public and private action.'[2] Where laws intended to protect a particular comprehensive — or even partial — conception of the good life can meet the requirements of constitutional justification, that 'private' understanding of 'the good' will be protected and the line between the public and the private will be maintained.[3] Where a rule of common law meant to protect a 'traditional' legal arrangement fails to secure the necessary level of judicial solicitude, a new line between the public and the private will be drawn.[4]

31.3 Application under the Final Constitution: Benefits of the Bill of Rights

There were few express changes from the language of the Interim Constitution to the Final Constitution with respect to the intended beneficiaries of the Bill of Rights. One change is that 'every person' has become 'everyone'. This change was motivated by a desire to simplify the language of the text. Another change is that the right to freedom of trade, occupation and profession — formerly freedom of economic activity — no longer extends to 'every person' or 'everyone'. Its protection is limited to every 'citizen'. The obvious rationale for the change is that non-citizens are now permitted to ply a trade or work in this country only at the

[1] See Sunstein (supra) at 159–160 (The lesson 'is that the law of contract, tort, and property is just that — law. It should be assessed in the same way in which other law is assessed. When the trespass law is used to evict someone from private property, the state is involved. The real issue is whether that action offends the Constitution.') See also Mark Tushnet 'The Issue of State Action/Horizontal Effect on Comparative Constitutional Law' (2003) 1 *Journal of International Constitutional Law* 79.

[2] Sunstein (supra) at 159.

[3] Supplementing vertical application with horizontal application — to yield a doctrine of unqualified direct application — does not mean that private actors will be subject to the same standards as state actors. There may well be justifications for private behaviour that would not underwrite similar governmental conduct. See Chemerinsky (supra) at 506.

[4] A comparison of Canadian and Irish jurisprudence shows up the difference between a basic law that endorses direct application of a Bill of Rights to common law disputes between private parties and a basic law that bars such direct application. As recently as 1991, five of Canada's ten provinces maintained and enforced the rule of dependent domicile. Because the Charter has been deemed inapplicable to litigation between private parties, it was impossible — in the absence of government action — to challenge a facially inequitable rule. See Annalise Acorn 'Gender Discrimination in the Common Law of Domicile and the Application of the Canadian Charter of Rights and Freedoms' (1991) 29 *Osgoode Hall LJ* 419, 438–443. In Ireland, such an inequitable rule has been successfully challenged because the courts recognize that the common law is created and maintained by the state, the court is an organ of state, and that the Irish Constitution — the Bunreacht — 'lays down standards relevant to the conduct of interpersonal relations.' Andrew Butler 'Constitutional Rights in Private Litigation: A Critique and Comparative Analysis' (1993) 22 *Anglo-American LR* 1, 23. See, eg, *CM v TM* [1988] ILRM 456, 470 (Irish High Court held that the dependent domicile rule infringed a woman's right to equality and declared the law 'patently unconstitutional.')

discretion of the national government.[1] Juristic persons are treated under the Final Constitution much as they were under the Interim Constitution. Where a particular right is deemed to apply to a particular kind of juristic person, the right applies. The issue is thus less one of application than it is of interpretation.[2]

The Bill of Rights identifies six kinds of entity entitled to the protection of the rights enshrined therein: natural persons, citizens, children, juristic persons, workers, and employers. It goes without saying that not all members of the aforementioned six classes are entitled to the benefit of every right. The object of this section is to show *what* kinds of entities are entitled to *which* Chapter 2 rights.

[1] But see *Booysen v Minister of Home Affairs* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC)(Requirement that alien spouse be required to be outside South Africa in order to secure work permit violates right to dignity in terms of FC 10 of South Africans and their alien spouses. However, the status and the dignity rights of aliens without spousal attachment was not addressed.)

[2] See *First National Bank of SA Ltd T/A Wesbank v Commissioner, South African Revenue Service & Another, First National Bank of SA Ltd T/A Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 45 (After noting the invitation of FC s 8(4) to analyze the applicability of a right to juristic persons, the Court wrote that '[e]ven more so than in relation to the right to privacy, denying companies entitlement to property rights would . . . lead to grave disruptions and would undermine the very fabric of our democratic State. It would have a disastrous impact on the business world generally, on creditors of companies and, more especially, on shareholders in companies. The property rights of natural persons can only be fully and properly realised if such rights are afforded to companies as well as to natural persons'); *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at paras 18 ('Juristic persons are not the bearers of human dignity. Their privacy rights, therefore, can never be as intense as those of human beings. However, this does not mean that juristic persons are not protected by the right to privacy. Exclusion of juristic persons would lead to the possibility of grave violations of privacy in our society, with serious implications for the conduct of affairs. The State might, for instance, have free licence to search and seize material from any non-profit organisation or corporate entity at will. This would obviously lead to grave disruptions and would undermine the very fabric of our democratic State. Juristic persons therefore do enjoy the right to privacy, although not to the same extent as natural persons'); *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 57–58 (The Court held that FC s 8(4) was not in conflict with Constitutional Principle II. It reasoned that many 'universally accepted fundamental rights' would be fully recognised only if afforded to juristic persons as well as natural persons, and it was furthermore wrong to equate juristic persons with powerful and wealthy corporations as there were countless small companies and close corporations that needed and deserved protection no less than natural persons did); *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)(Jurisitic person, a newspaper, allowed to assert defense under FC s 16.) See also *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds* 1997 (8) BCLR 1066 (T). A local authority contended that its right to associate had been violated by its statutory obligation to contribute to a municipal pension fund that serviced employees throughout the province. Cameron J concluded that there is no reason, in principle, why an organ of government cannot enforce a right against another person or organ of state. Although it may seem odd — if not wrong — to claim that the state could enforce a fundamental right *qua* beneficiary, the courts have acknowledged that an organ of state or a state official has standing to represent the interests of others under FC s 38. See *Minister of Health and Welfare v Woodcarb* 1996 (3) SA 155 (N). In the instant case Cameron J decided that the right in question — association — could not be meaningfully stretched to cover the purely fiscal relationship between a local authority and a municipal pension fund. Cf Stu Woolman, Theunis Roux & Bernard Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, Original Service, June 2004) Chapter 14 (In the event of a conflict between state actors, FC Chapter sets the framework for resolution of the dispute.).

(a) Everyone

With a few minor exceptions, Chapter 2 speaks about benefits almost exclusively in terms of 'everyone'.[1] Despite the fuzzy extension of the term 'everyone', the case law enables us to draw several conclusions about the persons who might legitimately expect protection from abridgements of various fundamental rights.

(i) *Aliens*

Where the text employs 'everyone' instead of the more restrictive 'citizen', we can assume that the right in question protects both citizen and alien alike. In particular, the text gives us no reason to assume that resident aliens — who have legally entered the country and who remain in good legal standing — will receive anything less than the levels of constitutional protection required for personhood.[2] That does not mean that every right extended to persons will afford equal levels of protection to all classes of alien. That illegal or undocumented aliens may receive diminished levels of procedural or substantive protection in specific situations — such as prior to making entry into the country — does not, as the Constitutional Court in *Lawyers for Human Rights v Minister of Home Affairs* correctly reasoned, extinguish their rights entirely.[3] Moreover, as the Supreme

[1] The replacement of 'every person' with 'everyone' reflects the move towards more natural locutions in the Final Constitution and the apparent linguistic requirement of Constitutional Principle II that '"*everyone*" shall enjoy all universally accepted fundamental rights, freedoms and civil liberties.'

[2] The position of aliens under the Final Constitution has shown marked improvement. See *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC)(Court holds that refusal of temporary residence permit to alien spouse violated dignity rights of both the South African spouse and the alien in terms of FC s 10); *Booysen v Minister of Home Affairs* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC)(Requirement that alien spouse be required to be outside South Africa in order to secure work permit violates right to dignity in terms of FC 10 of South Africans and their alien spouses); *Patel v Minister of Home Affairs* 2000 (2) SA 343 (D)(Aliens possess same rights under Final Constitution — FC ss 9, 10, 12, 21 and 33 in particular — unless contrary position expressly required by the Final Constitution.) For a cautionary note on the current status of aliens, see Jonathan Klaaren 'South African Human Rights Commission Report on Treatment of Person Arrested and Detained under the Aliens Control Act' (1999) 15 *SAJHR* 132. For a discussion of the rather parlous state of alienage under the Interim Constitution, see Jonathan Klaaren 'So Far Not So Good. An Analysis of Immigration Decisions under the Interim Constitution' (1996) 12 *SAJHR* 605. See also *Xu v Minister van Binnelandse Sake* 1995 (1) SA 185 (T), 1995 (1) BCLR 62 (T)(IC s 20 applies only to citizens and not to every person, and thus not to aliens); *Parekh v Minister of Home Affairs* 1996 (2) SA 710 (D)(Dismisses alien's request for reasons from Home Affairs under IC ss 23 and 24); *Naidenov v Minister of Home Affairs* 1995 (7) BCLR 891 (T)(Dismisses request for reasons for rejection of political asylum claim made in terms of ss IC 23 and 24). But see *Baloro v University of Bophuthatswana* 1995 (4) SA 197 (B), 1995 (8) BCLR 1018 (B)(Aliens are persons in terms of IC s 8 and are entitled to that section's protections.) For the position in the US, see *Plyler v Doe* 475 US 202, 210 (1982) ('[A]n alien is surely a 'person' in any ordinary sense of the term' and therefore entitled to protection afforded persons under both the due process and equal protection clauses.')

[3] *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC)('*Lawyers for Human Rights*'). The Constitutional Court construed several provisions of the Immigration Act in a manner that expands the level of due process to which undocumented persons on board ships are entitled. The *Lawyers for Human Rights* Court described the basis for this expansion as follows:

> [We are] concerned with a delicate issue that has implications for the circumstances in and the extent to which we restrict the liberty of human beings who may be said to be illegal foreigners. The determination of this question could adversely affect not only the freedom of the people concerned but also their dignity as human beings. The very fabric of our society and the values embodied in our Constitution could be demeaned if the freedom and dignity of illegal foreigners are violated in the process of preserving our national integrity.

Ibid at para 20.

Court of Appeal noted recently in *Watchenuka*, our immigration laws cannot be used to visit extra-judicial penalties on persons seeking asylum in order to advance policies designed to create disincentives for illegal immigration.[1] The courts will err in favour of extending non-citizens the full panoply of guarantees whilst they reside in South Africa.[2] Non-citizens outside South Africa's borders are not, generally speaking, entitled to the benefits of the Bill of Rights.[3]

(ii) *Individuals*

That the text employs primarily the term 'everyone', and does not use 'individuals', means that the interpretive space exists for juristic persons to benefit from many, if not all, of Chapter 2's provisions. FC s 8(4) makes explicit this commitment. The benefits afforded corporations and other juristic persons by the rights and freedom found in Chapter 2 are dealt with below.[4]

[1] The Supreme Court of Appeal, in *Minister of Home Affairs v Watchenuka*, found unconstitutional regulations issued by the Minister and rules emanating from the Standing Committee for Refugee Affairs that visited blanket prohibitions, with respect to employment and study, on asylum seekers. 2004 (4) SA 326 (SCA), 2004 (2) BCLR 120 (SCA)('*Watchenuka*'). The *Watchenuka* Court held that such prohibitions constituted a violation of the right to dignity because the state refused to offer support to asylum seekers and left persons exercising their right to apply for asylum no alternative but to turn to crime, begging or foraging. The Court also held that such prohibitions constituted a violation of the right to education because children lawfully in country to seek asylum may not be deprived of such resources at a critical period of their development. The *Watchenuka* Court recognizes that a right to asylum only becomes meaningful if immigration laws actually permit a person to seek asylum. Read together, *Lawyers for Human Rights* and *Watchenuka* support the dual proposition that our immigration laws must be construed in a manner that permits the actual, and not merely theoretical, exercise of every person's fundamental rights.

[2] See *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa)* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC)(Person who entered country illegally still entitled to protection of Bill of Rights. Collusion of state officials with US authorities seeking Mr Mohamed's extradition for trial constituted a clear violation of Mr Mohamed's South African constitutional rights.) Canadian cases are similarly expansive when it comes to according aliens within Canada rights under the Charter. See *Singh v Minister of Employment and Immigration* [1985] 1 SCR 177, 202, 17 DLR (4th) 422 (Section 7, fundamental justice, could be asserted by 'every human being who is physically present in Canada.') See also Peter Hogg 'Application' *Constitutional Law of Canada* (4th Edition 2002) 34–5 (Even persons inside Canada illegally entitled to most Charter rights.)

The South African record on the fundamental rights of aliens prior to the Interim Constitution was execrable. See *Cabinet for the Territory of South West Africa v Chikane & another* 1989 (1) SA 349 (A)(Fundamental rights often restricted to nationals of states with charters of human rights and therefore restrictions on an alien's to rights to enter and to move did not contravene rights to equality or due process); *Lewis v Minister of Internal Affairs & another* 1991 (3) SA 628 (B)(Since it was never the intention of the legislature to allow individual rights to prevail over the interests of the state or public safety, an alien may not contest a Minister's decision on the grounds that he was denied a hearing, reasons for his deportation, or treated unequally.)

[3] *Kaunda & Others v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa Amicus Curiae)* 2005 (1) SACR 111 (CC), 2004 (10) BCLR 1009 (CC)(Non-citizens not entitled to benefit of South African Constitution beyond South Africa's borders.) See § 31.6 infra (On extra territorial effect of Bill of Rights.) See also *Nishimura Ekiu v US* 142 US 651, 659 (1892)(Constitutional protections afforded aliens limited by generally recognized power of Congress to 'forbid the entrance of foreigners within its dominions, or to admit them in only such cases and such conditions as it may see fit to prescribe.') While aliens in the United States are entitled to basic constitutional protections, aliens outside the US are entitled to little or none. See *United States ex rel Knauf v Shaughnessey* 338 US 537, 544 (1950)('Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.')

[4] See § 31.3*(d)* infra (Discussion of protection afforded juristic persons under the Bill of Rights.)

(iii) *Foetus*

Both recent case law and statute suggest that the term 'everyone' does not include a foetus.[1] In *Christian Lawyers Association of SA v Minister of Health*, the court held that because FC s 11 — the right to life — does not apply to a foetus, it could not be used as a grounds for attacking the Choice on Termination of Pregnancy Act.[2] In support of this conclusion, McGreath J held that because FC s 12 safeguards a women's right to control her body and, in particular, her right to reproduction, the drafters of the Final Constitution could not have possibly intended FC s 11 to protect a foetus.[3] Similarly, he opined that because FC s 28 protected children and children were defined as persons under the age of 18, the foetus was not protected by FC s 28 since it did not possess an 'age'.[4] The judge then concludes that since FC s 28 does not protect a foetus, no other right in the Bill of Rights could.[5]

The last three arguments are tendentious at best. First, constitutional rights conflict. Drafters of constitutions and statutes alike often refuse to address contentious issues and leave them for courts to decide. FC s 12(2) in no way forecloses attribution of personhood to a foetus in terms of FC s 11. Secondly, the argument from FC s 28 does no work. Only if you define age as beginning at birth does a foetus not possess an age. Thirdly, as we have just noted, the claim that if one right is understood not to include a foetus, then all other rights do not protect a foetus is simply fallacious. It does not follow that because a foetus is not entitled to the protection afforded by FC s 28, that it possesses no rights at all. These critiques should not be understood as a rejection of the outcome in *Christian Lawyers I*.[6] The court, and the public, would have been better served if the court had addressed the issues of conflicting imperatives openly rather than engaging in an aridly textual, and ultimately casuistic, exercise.[7]

[1] *Christian Lawyers Association of SA v Minister of Health* 1998 (4) SA 1113 (T), 1998 (11) BCLR 1434 (T)('*Christian Lawyers I*'). See also *Christian Lawyers Association v National Minister of Health & Others* 2005 (1) SA 509, 526 (T), 2004 (10) BCLR 1086, 1103 (T)('*Christian Lawyers II*'). A foetus is not entitled to any rights under the Canadian Charter. See Peter W Hogg *Constitutional Law of Canada* (4th Edition 1999) § 34.1*(b)*. See also *Borowski v Attorney General of Canada* (1987) 39 DLR (4th) 731 (Sask CA)(Foetus not included within s 7's 'everyone' or s 15's 'individual'); *R v Morgentaler* (1988) 44 DLR (4th) 385, [1988] 1 SCR 30 (Abortion provisions of Criminal Code declared unconstitutional impairment of mother's s 7 right to fundamental justice — without ruling on foetus' s 7 right to life.) A foetus is entitled to some rights under the US Constitution. See *Roe v Wade* 410 US 113 (1973)(State claims a sufficiently compelling interest in the foetus to prevent abortion only when it may survive outside the womb.) The German Federal Constitutional Court has held that the human dignity and the right to life of the foetus take precedence over woman's right to self-determination. However, it is important to note that quite a number of circumstances exist in which a woman's rights will trump those of the foetus, and the FCC has declined to equate its refusal to sanction abortion with efforts to criminalize the procedure. See 88 *BVerfGE* 203 (1993); 39 *BVerfGE* 1 (1975)(Striking down federal abortion legislation.)

[2] Act 92 of 1996.

[3] *Christian Lawyers I* (supra) at 1441–1444.

[4] Ibid.

[5] Ibid.

[6] See Michelle O'Sullivan 'Reproductive Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 37; Tjakie Naude 'The Value of Life: *Christian Lawyers Association of SA v Minister of Health*' (1999) 15 *SAJHR* 542.

[7] The structure of analysis under the Interim Constitution — in particular the proscription of limitations that negated the essential content of the right — might have complicated the outcome of a challenge to pro-choice legislation. An abortion case brought under the Final Constitution will not be

(b) Citizens

The term 'citizen' is used to qualify the entitlement to four of FC Chapter 2's rights: citizenship rights,[1] political rights,[2] some of the rights to freedom of residence and movement,[3] and the freedom of trade, occupation and profession.[4] The Constitutional Court's equality and dignity jurisprudence does, however, extend certain kinds of trade, occupation, profession and residence entitlements to permanent residents.[5]

Citizens are, by logical implication of the other qualifiers (persons, children, workers), entitled to the benefit of all of Chapter 2's rights. But not all citizens are entitled to exercise all of Chapter 2's rights at any given moment. For example, not all citizens are entitled to the protection of children's rights. Only persons under the age of 18 are entitled to the rights enumerated in FC s 28.

(c) Children

Rights that do not benefit children are the exception. The courts have already used many of the other rights in Chapter 2 to buttress the children-specific rights found in FC s 28.[6]

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subject to the same structural impediments. With the elimination of the essential content of the right requirement in the limitation clause, it is now possible to find that a foetus is a person under FC s 11 — the right to life — and still hold that pro-choice legislation is reasonable and justifiable under FC s 36(1). The structure of analysis required by IC Chapter 3 dictated that if the court was to uphold a pro-choice statute, it would either have to find that a foetus was not a person or have to finesse, somehow, the issue of whether an abortion negated the essential content of the foetus' right to life. See *Van Heerden & Another v Joubert NO & Others* 1994 (4) SA 793 (A)(Appellate Division showed that it was conscious of the constitutional implications of its decisions regarding the standing of a foetus by holding that a stillborn baby is not a 'person' as envisaged by provisions of Inquests Act 58 of 1959.)

[1] See Jonathan Klaaren 'Citizenship' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2005) Chapter 66.

[2] See Anthony Stein 'Political Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 45.

[3] See Jonathan Klaaren 'Residence and Movement' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, August 2005) Chapter 67.

[4] See Dennis Davis 'Freedom of Trade, Occupation and Profession' in S Woolman, T Roux, J Klaaren & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 54.

[5] Such claims on behalf of permanent residents must be grounded in those rights — dignity and equality — whose extension embraces non-citizens. See, eg, see *Booysen v Minister of Home Affairs* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC)(While requirement that alien spouse be outside South Africa in order to secure work permit found to violate right to dignity of South Africans and their alien spouses, the failure to recognize similar rights of aliens without South African spouses suggests the outer limits of economic activity related claims.)

[6] See Adrian Friedman & Angelo Pantazis 'Children's Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 47. The courts' assessment of the child's best interests is informed by a slew of other rights: equality, dignity, freedom and security of the person, housing, health, social security, education. See, eg, *Fraser v Children's Court, Pretoria North, & Others* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC)(Court found s 18(4)*(d)* of the Child Care Act 74 of 1983 to be unconstitutional as a violation of the right to equality); *Petersen v Maintenance Officer & Others* 2004 (2) SA 56 (C), 2004 (2) BCLR 205 (C), [2004] 1 All SA 117 (C)(Common-law rule that did not allow an extra-marital child to claim maintenance from its paternal grandparents, while legitimate children could so claim, found to constitute unfair discrimination and to violate of the right to dignity); *S v Williams & Others* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC)(Children have the right not to be subject to cruel and degrading punishment.); *Christian Education*

One could argue that children are not entitled to the political rights identified in FC s 19. Children are not entitled to vote. Only adult citizens have such a constitutional entitlement. Of course, that is the wrong way round this particular benefit question. Children could have the ability to vote extended to them under new legislation. The legislation — say, dropping the voting age below 18 — might then be subject to constitutional scrutiny. The constitutional text does not provide a clear and unequivocal answer to the question of whether children may possess the franchise. To the extent that it says anything at all, FC s 9 states that no one may be discriminated against on the basis of age.[1]

One good reason for the absence of a clear and unequivocal answer to the voting rights question is that notions of adulthood and childhood are reasonably flexible — which is another way of saying that childhood as a category is often over-inclusive, and sometimes under-inclusive.[2] Adulthood can begin later (and capture fewer young persons) or start earlier (and capture more children). Moreover, the bright line drawn at age 18 by FC 28 applies only to the rights guaranteed to young persons by that right. The benefits of other rights are not made age contingent.

(d) Juristic persons

FC s 8(4) reads:

> Juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons.[3]

Whether a juristic person may benefit from a right in the Final Constitution is *not* an issue of application, but an issue of interpretation.[4] While FC s 8(4) holds out the promise of constitutional solicitude for juristic persons, the courts were left to decide whether they possess rights to property, privacy or expression. As it turns out, they do.

SA v Minister of Education 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC)(Children have right to be free from physical violence.) The US Supreme Court has held that 'whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.' *In re Gault* 387 US 1, 13 (1967). See also *Planned Parenthood of Cent Missouri v Danforth* 428 US 52 (1976)(Minor possesses right to privacy and, therefore, abortion); *Tinker v Des Moines Independant Community School District* 393 US 503 (1969)(Minor possesses right to freedom of expression.) But see *Carey v Population Services International* 431 US 678, 693 (1977)(Restrictions on the exercise of fundamental rights by children will be subject to less rigorous scrutiny than similar restrictions on adults.)

[1] *Minister of Education v Harris* 2001 (4) SA 1297 (CC), 2001 (11) BCLR 1157 (CC); *Harris v Minister of Education* 2001 (8) BCLR 796 (T).

[2] See Laurence Tribe 'Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles' (1975) 39 *Law & Contemporary Problems* 8.

[3] IC Section 7(3) provided that 'all juristic persons are entitled to the rights entrenched in Chapter 3 where, and to the extent that, the nature of the right permits.' That position has changed under the Final Consitution. The court now must take account of the nature of both the right asserted and the juristic person claiming its benefits. See Lourens du Plessis 'The Genesis of the Provisions Concerned with the Application and Interpretation of the Chapter on Fundamental Rights in South Africa's Transitional Constitution' (1994) 4 *TSAR* 706, 714 (Noting the striking similarity between IC s 7(3) and s 19(3) of the German Basic Law, and arguing that IC s 7(3) linked the application of the right to the nature of the right, and not the nature of the juristic person, so as to more readily restrict the entitlement of juristic persons to fundamental rights.)

[4] See *First National Bank of SA Ltd T/A Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd T/A Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC)('*FNB*') at para 45 (Noting the invitation of FC s 8(4) to analyze the applicability of a right to juristic persons.)

The courts have repeatedly noted that the failure to accord juristic persons the protection of fundamental rights would 'undermine the very fabric of our democratic state.' Implicit in this view is the recognition that the resources of juristic persons — and in particular corporations — will ensure that the courts have an opportunity to hear constitutional challenges that natural persons might not be able to afford to bring.[1]

Of course, some rights are clearly not designed to benefit corporations. Corporations have neither conscience nor religious belief within the meaning of FC s 15. They are neither citizens for the purposes of FC s 19 or FC s 20, nor children for the purposes of FC s 28. They have neither life in terms of FC s 11, nor human dignity in terms of FC s 10.[2] They can associate (FC s 18). But they would be hard pressed to assemble (FC s 17). Other rights must apply to corporations if their presence in the text is to be even partially vindicated.[3]

Newspapers, radio stations and television networks must be able to benefit from the freedom of expression.[4] Only such entities are capable of exercising the right in its robust and intended sense.[5]

Similarly, it is difficult to imagine the rights to property and economic activity belonging to natural persons and not to juristic persons. Even in a regulated

[1] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC)('*FNB*'). Concerns that corporations would skew rights analysis are, as yet, not reflected in the case law. For example, only 3 of the 26 Constitutional Court judgments reported in the 2002 South Africa Law Reports involved juristic persons relying on provisions in the Bill of Rights.

[2] See *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC)('*Hyundai*')(Juristic persons are not the bearers of rights to human dignity.) Cf JR Midgley 'An Artifical Situation' (1988) 105 *SALJ* 415 (Juristic persons should possess personality rights in appropriate circumstances, citing supportive obiter from *Universiteit van Pretoria v Tommie Meyers Films (Edms) Bpk* 1979 (1) SA 441 (A).) See also *Sage Holdings v Financial Mail* 1993 (2) SA 451 (A)(Jurisitic persons have right to privacy.)

[3] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 57–58 (Court held that FC s 8(4) was not in conflict with Constitutional Principle II. It reasoned that many 'universally accepted fundamental rights' would be fully recognised only if afforded to juristic persons as well as natural persons, and it was, furthermore, wrong to equate juristic persons with powerful and wealthy corporations as there were countless small companies and close corporations that needed and deserved protection no less than natural persons did.) See also *AK Entertainment CC v Minister of Safety and Security & Others* 1994 (4) BCLR 31, 38 (E)(Bill of Rights must protect juristic persons to be effective.)

[4] *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)(Media plays an indispensable role in creating conditions for an open and democratic society); *Sayed v Editor, Cape Times* 2004 (1) SA 58, 62–63 (C)(High Court suggests that given democracy's place as an animating value of the Final Constitution, when the media publishes political speech the bar to defamatory action needs to be somewhat higher.) See also Dario Milo & Anthony Stein 'Freedom of Expression' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS September 2005) Chapter 42.

[5] See *Laugh It Off Promotions CC v SAB International (Finances)* Case 42/04 CT (27 May 2005)(Closed corporation entitled to rely on FC s 16 in defense of claim of trademark infringement); *Government of the Republic of South Africa v Sunday Times Newspaper & Another* 1995 (2) SA 221 (T)(Press and other media afforded protection of IC s 15 because of role juristic persons play in vindicating the values which animate the right.) See also *Edmonton Journal v Alberta (AG)* [1989] 2 SCR 1326, 64 DLR (4th) 577.

market economy, corporations must be able to form some strong expectations about what kind of property they can hold and transfer.[1]

Privacy might be a right normally associated with intimacy, and intimacy with personhood. But commercial concerns have an interest in not being subject to unwarranted searches and seizures.[2]

Extending the equality right to juristic persons met with initial resistance. A number of courts and commentators argued that expanding the ambit of IC s 8 or FC s 9 so as to serve the interests of corporations threatened the primary purpose of the equality clause: the amelioration of the discriminatory effects of apartheid and the creation of a more egalitarian society.[3]

The Constitutional Court rejected this restrictive approach because it artificially suppresses questions worth asking. While FC s 9(3) relies on various indicia of human personhood for a finding of unfair discrimination, FC s 9(1) — the right to equality before the law and to equal protection of the law — asks whether the law reflects irrational distinctions or naked preferences. As Justice O'Regan wrote in *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council and Others*:

> The first question to be answered in any equality challenge, therefore, is whether the governmental action or regulation under consideration is rational. The question is not

[1] See *FNB* (supra) at para 45 (After noting the invitation by FC s 8(4) to apply the right to property to juristic persons, the Court wrote that '[e]ven more so than in relation to the right to privacy, denying companies entitlement to property rights would . . . lead to grave disruptions and would undermine the very fabric of our democratic State. It would have a disastrous impact on the business world generally, on creditors of companies and, more especially, on shareholders in companies. The property rights of natural persons can only be fully and properly realised if such rights are afforded to companies as well as to natural persons.') Where the US Constitution affects property, corporations are generally permitted to seek vindication of their rights. The 'takings' and 'contract' clauses offer corporations benefits equal to those extended to natural persons. See *United States Trust Company of New York, Trustee v New Jersey* 431 US 1 (1977)(State's impairment of its contractual obligations with either corporations or individuals will be constitutional only if the impairment is 'reasonable and necessary to support an important public purpose.') The 'equal protection' clause offers corporations less protection than many so-called 'suspect' classes of natural person. Compare *Lindsey v Natural Carbonic Gas Company* 220 US 61 (1911)(Economic regulation will not be struck down if the means employed bear some rational relation to a legitimate government objective) with *Strauder v West Virginia* 100 US 303 (1880)(Racial classifications will only be upheld if they are necessary and narrowly tailored to promote a compelling state interest).

[2] See *Hyundai* (supra) at para 18 ('Juristic persons are not the bearers of human dignity. Their privacy rights, therefore, can never be as intense as those of human beings. However, this does not mean that juristic persons are not protected by the right to privacy. Exclusion of juristic persons would lead to the possibility of grave violations of privacy in our society, with serious implications for the conduct of affairs. The State might, for instance, have free licence to search and seize material from any non-profit organisation or corporate entity at will. This would obviously lead to grave disruptions and would undermine the very fabric of our democratic State. Juristic persons therefore do enjoy the right to privacy, although not to the same extent as natural persons.')

[3] Giving corporations equality rights in order to pursue commercial ends, it was said, would diminish the symbolic purpose of the clause and weaken the standards employed by the judiciary. (That is, the judicial deference paid to legislative restrictions on commercial concerns would result in similar forms of deference in non-commercial cases.) Corporations, so the argument went, are perfectly capable of taking care of themselves in the democratic process and do not need the solicitude FC s 9 affords. See Azhar Cachalia, Halton Cheadle, Dennis Davis, Nicholas Haysom, Penuell Maduna & Gilbert Marcus 'Application' in *Fundamental Rights in the New Constitution* (1994) 21–3 (Arguing that IC s 8 ought not to be

> whether the government may have achieved its purposes more effectively in a different manner, or whether its regulation or conduct could have been more closely connected to its purposes. The test is simply whether there is a reason for the differentiation that is rationally connected to a legitimate government purpose.[1]

Such a relatively deferential test is well-suited to corporations. By extending equality rights to juristic persons, the Court gives corporations the opportunity to reveal manifestations of irrationality and corruption in the law-making process.[2] By limiting such equality enquiries to the kind of irrationality unlikely to correct itself through democratic political processes, the Court has answered the objection that the extension of equality rights to corporations will undermine the more important remedial ends of FC s 9.

31.4 Application under the Final Constitution: Burdens of the Bill of Rights

(a) Application doctrine enunciated in *Khumalo v Holomisa*[3]

(i) *Facts*

Bantu Holomisa, the leader of the United Democratic Movement, sued the *Sunday World* over an article that alleged that Mr Holomisa was involved with a gang of bank robbers and under police investigation for his involvement. In the High Court, the *Sunday World* averred, by way of exception, that because the contents of the article 'were matters in the public interest' and that the respondent had failed 'to allege in his particulars of claim that the article was' false, Mr Holomisa had failed to satisfy the requirements for a cause of action in defamation. The High Court dismissed the

extended to corporations). But see Cathi Albertyn & Janet Kentridge 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 *SAJHR* 149, 167–72 (While calling for a restrictive approach to IC s 8(2) that would largely track the reasoning of the Canadian Supreme Court in *Andrews*, the authors suggest that corporations might successfully seek solace under the more general provisions of IC s 8(1). IC s 8(1) is now FC s 9(1).) See also *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 174, (1989) 56 DLR (4th) 1 (Protection of Charter s 15 flows only to those individuals or groups who can establish discrimination based upon a personal characteristic either enumerated in s 15 or shown to be analogous to one of those grounds); Cathi Albertyn 'Equality' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 51.

[1] 1998 (2) SA 61 (CC), 1998 (1) BCLR 1 (CC) at para 24. See also *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 25 ('It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as 'mere differentiation'. In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation.')

[2] See *AK Entertainment CC v Minister of Safety and Security & Others* 1994 (4) BCLR 31, 38 (E) '[I]t is difficult to appreciate why a corporation should not be entitled to enforce [IC] s 8 where an executive or administrative functionary blatantly treats it unequally from all other persons.')

[3] 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC).

applicant's exception.[1] The High Court did so on the grounds that it was bound by the Supreme Court of Appeal's decision in *National Media Ltd v Bogoshi*.[2]

(ii) *Holding*

Given that there could be no appeal to the Supreme Court of Appeal in terms of a dismissal of an exception, the applicants had no choice but to seek leave to appeal to the Constitutional Court. To succeed the applicants had to show that the common-law rules of defamation as they stood post-*Bogoshi* violated the Final Constitution.

The applicants relied primarily on FC s 16. In the alternative, the applicants relied upon FC s 39(2). Either way, asserted the applicants, the role of the mass media in an open and democratic society vindicated their position that the current law of defamation had to be altered.

The Constitutional Court rejected the applicants' claims. While noting the value of a robust exchange of ideas in any democracy, the Court found that the Final Constitution's commitment to human dignity — and thus to self-worth and reputation — was of greater import. The *Khumalo* Court held that the defense of reasonableness developed in *Bogoshi*, rather than a requirement that the plaintiffs prove an allegedly defamatory statement false, better struck the desired balance between these competing interests.

More importantly for the purposes of this chapter, the *Khumalo* Court addressed the question of whether the common law of defamation was subject to the direct application of the substantive provisions of the Bill of Rights. The *Khumalo* Court held that, contrary to the applicants' contention, FC s 8(1) did not subject the law that governed disputes between private parties to the direct application of the substantive provisions of the Bill of Rights. It held instead that FC s 8(2) determined the conditions under which direct application of the substantive provisions of the Bill of Rights to disputes between private parties would occur. Under FC s 8(2), the substantive provisions of the Bill of Rights apply directly to disputes between private parties where a specific provision is interpreted by a court to bind the party against whom the right is asserted. In the instant case, the *Khumalo* Court found that FC s 16 bound the private party relying upon the existing common-law rules of defamation.

(iii) *Court's reasoning*

The *Khumalo* Court's application analysis begins at paragraph 29 of the judgment. It reads, in pertinent part:

> The applicants' exception relies directly on section 16 of the Constitution, despite the fact that none of the parties to the defamation action is the state, or any organ of state.[3]

The *Khumalo* Court then goes on to rehearse the language of FC s 8. Note, for now, that the provisions of the Chapter apply to 'all law' and 'bind … the

[1] *Holomisa v Khumalo & Others* 2002 (3) SA 38 (T).
[2] 1998 (4) SA 1196 (SCA), 1999 (1) BCLR 1 (SCA)('*Bogoshi*').
[3] *Khumalo* (supra) at para 29.

judiciary'. Recall that Justice Kentridge's argument in *Du Plessis v De Klerk* for indirect application relied heavily on the absence of the 'judiciary' in IC s 7(1) and the notion that 'all law' in s IC 7(2) was modified by 'legislative and executive' in IC s 7(1). Together IC s 7(1) and IC s 7(2) were read to exclude emanations of law from the judiciary — in particular, the common law — and disputes between private persons — since no state actor was present — from the direct application of the Bill of Rights.

In paragraph 30, Justice O'Regan, for a unanimous *Khumalo* Court, notes that applicants' counsel made the comparison between the texts of the Interim Constitution and the Final Constitution the basis for their contention that the Final Constitution must be read to apply to all law and to bind private parties no matter what kind of law governs a dispute. Counsel placed great emphasis on the inclusion of those phrases — 'all law' and 'binds . . . the judiciary' in FC s 8(1) — that were absent from IC s 7(1).

In paragraph 31, the *Khumalo* Court says that this argument cannot succeed. Why? Because the Final Constitution ostensibly distinguishes between two kinds of parties burdened: state actors in FC s 8(1) and private actors, potentially, in FC s 8(2). But look closer at what the *Khumalo* Court does — or doesn't do. It forgets to analyze the phrase 'applies to all law'. Justice O'Regan writes: 'Section 8(1) binds the legislature, executive, judiciary and all organs of state without qualification to the terms of the Bill of Rights.' Despite argument from counsel, the *Khumalo* Court ignores the phrase 'all law' entirely. The *Khumalo* Court then fails to take cognizance of the phrase 'binds . . . the judiciary.' The *Khumalo* Court never actually engages the applicants' arguments: the Court's cursory conclusions in this regard are all the more surprising given that it framed the application debate in these very terms in *Du Plessis*.

In paragraph 32, Justice O'Regan writes:

> Were the applicants' argument to be correct, it would be hard to give a purpose to section 8(3) of the Constitution. For if the effect of sections 8(1) and (2) read together were to be that the common law in all circumstances would fall within the direct application of the Constitution, section 8(3) would have no apparent purpose. We cannot adopt an interpretation which would render a provision of the Constitution to be without any apparent purpose.[1]

For starters, the *Khumalo* Court's textual argument is wrong on several crucial counts. First, FC s 8(1) alone makes 'all law' subject to the direct application of the Bill of Rights. One does not need FC s 8(2) for that particular purpose. Second, the applicants' argument does not render FC s 8(3) meaningless.[2] The notion that FC s 8(3) would be meaningless if FC s 8(1) really applies to 'all law' is completely inconsistent with the Court's own jurisprudence — before and after *Khumalo* — on the many uses of FC s 8(3).[3] The Court's own (non-*Khumalo*) jurisprudence supports an alternative account — my preferred reading — that gives every provision in FC s 8 a purpose and still makes good the drafter's intent to apply the Bill of Rights directly to disputes between private parties governed by the common law.

[1] *Khumalo* (supra) at para 32.
[2] See § 31.1*(c)*(Precis of the preferred reading of FC s 8).
[3] See § 31.4*(d)*(i) infra (On the meaning of FC s 8(3)).

(iv) *The black letter law and the preferred reading*

The black letter law on application in terms of *Khumalo* takes the following form.

FC s 8(1) stands for the following two propositions:

- All law governing disputes between the state and a natural or juristic person is subject to the direct application of the Bill of Rights.
- All state conduct that gives rise to a dispute between the state and a natural or juristic person is subject to the direct application of the Bill of Rights.

FC s 8(2) stands for the following proposition:

- Disputes between natural and/or juristic persons *may* be subject to the direct application of the Bill of Rights if the specific right asserted is deemed to apply.

FC s 8(3) stands for the following proposition:

- Where direct application of the right asserted occurs in terms of FC s 8(2), and the court further finds a non-justifiable abridgment of that right, then the court must develop the law in a manner that gives adequate effect to the right infringed.[1]

The preferred reading on application takes the following form.

FC s 8(1) covers 'all law' — regardless of provenance, form, and or the parties before the court. FC s 8(1) also covers all government conduct — by all branches of government and all organs of state — whether that conduct takes the form of law or reflects some other manifestation or exercise of state power.[2] In sum, FC s 8(1) should be understood to stand for the following proposition:

- *All* rules of law and every exercise of state power are subject to the direct application of the Bill of Rights.

FC s 8(2) covers dispute-generating conduct between private actors not 'adequately' governed by an express rule of law. There are two basic ways to read 'not governed adequately by an express rule of law.' First, it could contemplate the possibility of a dispute over an aspect of social life that is not currently governed by any rule of law at all. Such instances will be rare. Indeed, there is good reason to believe that such instances do not exist at all. The second and better reading views non-rule governed conduct in a much narrower sense. In many instances a

[1] FC s 39(2), although not engaged expressly in Khumalo, stands, under a secondary body of black letter law, for the following three propositions:

- Where an asserted right is, under FC s 8(2), deemed not to apply directly to a dispute between private parties, the court may still develop the common law or interpret the apposite provision of legislation in light of the more general objects of the Bill of Rights.
- Even where a right is asserted directly, the court may still speak as if a finding of inconsistency or invalidity requires that a new rule of common law be developed in terms of FC s 39(2).

[2] The cosmology of common law jurisdictions is such that some lawyers express discomfort with the notion that a common law rule found inconsistent with the Final Constitution could occasion a finding of invalidity. But that locution is, in fact, endorsed by the Constitutional Court. See *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (2) SACR 556 (CC), 1998 (12) BCLR 1517 (CC) at para 73 (Court declares 'common-law offence of sodomy . . . inconsistent with the 1996 Constitution and invalid.') See also *Shabalala v Attorney-General, Transvaal* 1996 (1) SA 725 (CC), 1995 (2) SACR 761 (CC), 1995 (12) BCLR 1593 (CC).

body of extant rules — or even background norms — may be said to govern a particular set of private relationships. FC s 8(2) calls our attention to the fact that these rules of law (common law or legislation) may not give adequate effect to the specific substantive provisions of the Bill of Rights and may require the courts to develop a new rule of law that does give adequate effect to a particular provision in the Bill of Rights in so far as a dispute between private persons requires it to do so. In sum, FC s 8(2) should be understood to stand for the following proposition:

- While, on the *Hohfeldian* view, a body of extant rules — or background norms — will always govern a social relationship, those same rules will not always give adequate effect to a provision in the Bill of Rights. FC s 8(2) calls attention to the potential gap between extant rules of law and the prescriptive content of the Bill of Rights, and, where necessary, requires the courts to bridge that gap by bringing the law into line with the demands of the particular constitutional right or rights deemed to apply.

If we decide that the right invoked engages the conduct in question and that the right has been unjustifiably infringed, then we move on to FC s 8(3). FC ss 8(3)*(a)* and *(b)* enjoin the court to develop new rules of law and remedies designed to give effect to the right infringed. Thus, where FC s 8(2) acknowledges gaps in existing legal doctrine, FC s 8(3) aims to fill those gaps. In sum, FC s 8(3) should be understood to stand for the following proposition:

- If the court finds that the right relied upon warrants direct application to the conduct that has given rise to the dispute, and further finds a non-justifiable abridgment of the right, then FC ss 8(3)*(a)* and *(b)* guide the court's development of the law in a manner that gives adequate effect to the right infringed.

It may be, however, that the prescriptive content of the substantive provisions of the Bill of Rights does not engage the rule of law or conduct at issue. Two things can happen. A court can decide that the Bill of Rights has nothing at all to say about the dispute in question. A court can decide that although no specific provision of the Bill of Rights is offended by the law or the conduct in question, the Bill of Rights warrants the development of the law in a manner that coheres with the general spirit, purport and objects of Chapter 2. In sum, FC s 39(2) should be understood to stand for the following:

- Where no specific right can be relied upon by a party challenging a given rule of law or the extant construction of a rule of law, the courts are obliged to interpret legislation or to develop the law in light of the general objects of the Bill of Rights.

The black letter law and the preferred reading establish the parameters of the debate. As I noted at the outset,[1] the justification for the black letter law requires a good faith reconstruction of the arguments in *Khumalo*. That reconstruction follows directly below. Thereafter, I entertain arguments that justify the preferred reading.

[1] See § 31.1*(c)* supra.

(v) *A good faith reconstruction of Khumalo*

The thinness of *Khumalo*'s reasoning makes several of its arguments appear tendentious.[1] However, a good faith reconstruction suggests that *Khumalo* may not be entirely wrong, just much less than optimal.

Let us begin this exercise by concerning ourselves with questions of textual plausibility or what Frank Michelman calls naturalness. That does not mean we set aside forever questions about what would be the ideologically or pragmatically preferable way to parse the first three subsections of FC s 8. I only postpone them.

One straightforward way to parse FC ss 8(1), (2), (3) — one that I believe closely tracks Justice O'Regan's intent in *Khumalo* — begins with a perfectly understandable and workable distinction between a constitutional norm's range of application and that same norm's prescriptive content.[2] It is entirely possible — the Justice might say — that FC s 8(1), and the Bill of Rights, applies to all law in the following sense. FC s 8(1) rules out any contention that a piece of law is exempt from the demand for conformity with the requirements of the Bill of Rights because that piece of law falls within some genus of law — say, private law, or common law — with which the Bill of Rights is not concerned. It does not follow from this reading of FC s 8(1), however, that the extension or the prescriptive content of the substantive provisions of the Bill of Rights engage the content of every rule of law.

Take the following two norms — constitutional norm A and non-constitutional norm B. To say, as per FC s 8(1), that Norm A applies to Norm B is to say that Norm B cannot stand insofar as Norm B is inconsistent with Norm A. To see whether it is inconsistent, we have to know the content of both Norm A and Norm B, or be in a position to determine the content of one or both norms by what would normally be an act of judicial interpretation. Suppose, then, that the content of Norm A is (or is determined by some judge to be) exhausted by the proposition that 'no state lawmaker or state official may exercise lawmaking or other official powers in such a way as to limit any person's freedom of expression.' Norm A does not engage actions by any non-state actor or any other set of circumstances. Suppose that the content of Norm B is (or is determined by some judge to be) exhausted by the proposition that 'private employers have complete freedom, subject to contractual modification, to fire employees for saying things the employer does not like, on or off the work site.' Norm A undoubtedly applies, in a general or a formal sense, to Norm B (or, if you prefer, it applies to conduct justified in terms of Norm B). But in so far as Norm B is undoubtedly required to pass a test of compliance or harmony with Norm A, Norm B does, indeed, pass

[1] Not everyone believes that the five paragraphs on application in *Khumalo* are a disappointment. See, eg, Chris Roederer 'Post-Matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law' (2003) 19 *SAJHR* 57 and the discussion of this article at § 31, Appendix 3*(a)*, infra.

[2] I am deeply indebted to Frank Michelman for working through this good faith reconstruction of *Khumalo* with me. Much of the language in this section is drawn directly from our e-mail correspondence, and the better turns of phrase belong to him. Any mistakes made in this good faith reconstruction remain mine alone.

the test. Why? Because Norm A is solely concerned about censorship by state actors wielding official powers and has nothing to say, so to speak, about Norm B's content — expression in the workplace.

Armed with such a distinction between the range of application of constitutional norms and the prescriptive content of constitutional norms, one can generate an orderly set of definitions for the first three subsections of FC s 8 that assigns independent meaning to each subsection. FC s 8(1) stands for the proposition that no genus of law is exempt from testing against the norms in the Bill of Rights. (This general claim is neither empty nor idle: as we saw in *Du Plessis* — and in our treatment of the application jurisprudence of other jurisdictions — there remains an abiding inclination to exempt the common law from constitutional inspection.) FC s 8(2) stands for the proposition that the prescriptive content of one or another norm in the Bill of Rights may engage or 'bind' conduct other than that of state officials wielding official powers. That is, FC s 8(2) stands for the proposition that the prescriptive content of one or another norm in the Bill of Rights 'may' engage or 'bind' the conduct of a natural person or a juristic person. (This general claim is neither empty nor idle: as we saw in *Du Plessis* — and in our treatment of the application jurisprudence of other jurisdictions — the prevailing instinct is to hold that the norms in a Bill of Rights are largely unconcerned with private conduct.) FC s 8(3) provides direction for courts in cases in which: (i) they find that a specific substantive provision binds the conduct of a private party in terms of FC s 8(2); and (ii) the law relied upon by that private party fails the test of compliance with the specific substantive provision deemed to bind the private party.

There may not, at first glance, appear to be any serious flaw in the foregoing textual exegesis. This exegesis also coheres with a perfectly plausible set of intentions to be attributed to the drafters. First, that there is but one system of law and all of the law in that system derives from the basic law — as reflected in the norms of the Final Constitution. Second, since all rules of law must comport with the dictates of the basic law, and since the law structures, or governs, all conduct, then all conduct must, ultimately, comport with the dictates of the basic law.

(aa) The First Objection

The *Khumalo* Court quite consciously crossed over the public-private divide in the application debate. The text of the Final Constitution left it little choice. *Khumalo*'s one step forward is, however, followed by two steps back. The judgment does not endorse the proposition that all legal disputes are grounded in exercises of public power that must comport with constitutional dictates. Whereas *all* disputes between the state and an individual are subject to the direct application of the Bill of Rights, *Khumalo* tells us that only *some* disputes between private parties will be subject to *some* of the provisions of the Bill of Rights. This revised public-private distinction in application jurisprudence creates the following anomaly.

In *Du Plessis*, this traditional view of constitutional review was used to *suppress* direct application of the Bill of Rights with respect to common law disputes

between private parties. In *Khumalo*, the traditional view of constitutional review is used to *defer* — and potentially suppress — direct application of the Bill of Rights. Direct application of the substantive provisions is deferred — and by that I simply mean turned into a question of interpretation — with respect to *all* disputes between private parties. It matters not whether the law governing disputes between private parties is grounded in statute, subordinate legislation, regulation common law or customary law. The Interim Constitution's Bill of Rights was, in terms of *Du Plessis*, understood to apply directly, and unequivocally, to legislation, subordinate legislation or regulations that governed private disputes. The Final Constitution's Bill of Rights, in terms of *Khumalo*, does not. The two steps back: less law is subject to the unqualifiedly direct application of the substantive provisions of the Bill of Rights under the *Khumalo* Court's reading of the Final Constitution than it was under the *Du Plessis* Court's reading of the Interim Constitution.

(bb) The Second Objection

The Constitutional Court has created a legal regime in which (1) every exercise of state power is subject to constitutional review[1] and (2) every law is subject to the objective theory of unconstitutionality.[2] Much is rightly made of the Constitutional Court's bold assertion in *Fedsure*, *Pharmaceutical Manufacturers* and their progeny that all law derives its force from the basic law (the Final Constitution) and that all law and all conduct sourced in the law must, as a logical matter, be

[1] *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of The Republic of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC)('*Pharmaceutical Manufacturers*'); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC)('*Fedsure*').

[2] See *National Coalition for Gay & Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at paras 28–29 ('On the objective theory of unconstitutionality adopted by this Court a litigant who has standing may properly rely on the objective unconstitutionality of a statute for the relief sought, even though the right unconstitutionally infringed is not that of the litigant in question but of some other person'); *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party & Others* 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC) at para 64 (In re-affirming its commitment to the objective theory of unconstitutionality, the Court wrote that 'the practice that has been urged upon this Court carries with it the distinct danger that Courts may restrict their enquiry into the constitutionality of an Act of Parliament and concentrate on the position of a particular litigant'); *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at paras 26–28 ('The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach.') The generous conditions for standing ensure that the objective theory of unconstitutionality will continue to operate in practice — even if the Court refuses to announce or to renounce its position on the doctrine. See, especially, *Minister of Home Affairs v Eisenberg & Associates: In re Eisenberg & Associates v Minister of Home Affairs & Others* 2003 (5) SA 281 (CC), 2003 (8) BCLR 838 (CC)(Attorneys' firm whose practice concerned mainly immigration matters was granted standing — in its own interest and as an interested member of the public — to mount constitutional challenge to immigration regulations passed without requisite notice and comment. Although the regulations did not effect the firm's members directly, the Court found that the firm had an interest in proper notice and comment procedures being followed. Said regulations were found unconstitutional.)

consistent with the basic law.[1] Despite the first requirement — and despite the fact that FC s 8(1) applies to all law and binds both the legislature and the executive — legislation, subordinate legislation or regulation that governs a dispute between private persons will not automatically be subject to the direct application of the Bill of Rights. Those same pieces of legislation, subordinate legislation or regulation would automatically be subject to the direct application of the provisions of the Bill of Rights if they were invoked by an individual in a dispute with the State. The absurdity of this distinction is brought into even sharper relief by the Court's own doctrine of objective unconstitutionality. (The relative desuetude of this doctrine is offset by the fact that it has, as yet, not been repudiated by the Constitutional Court.[2]) In its most general form, the doctrine holds that the validity or the invalidity of any given law is not contingent upon the circumstances (say, the timing) of the case, or, more specifically, the parties to the case. If a provision of legislation would be deemed to be unconstitutional when invoked by an individual in a dispute between the State and an individual, then it must likewise be unconstitutional when invoked by an individual in a dispute between that individual and another individual. However, the Court's differentiation between FC s 8(1) disputes that are invariably subject to the direct application of the Bill of Rights and FC s 8(2) disputes that are not invariably subject to direct application of the Bill of Rights is logically incompatible with the doctrine of objective unconstitutionality. The *Khumalo* application doctrine relies upon the ability to distinguish constitutional cases — and thus the constitutionality of laws — upon the basis of the parties before the court. The doctrine of objective unconstitutionality denies the ability to distinguish constitutional cases — and thus the constitutionality of laws — upon the basis of the parties before the court.

That legislation governing a dispute between private persons is not automatically subject to the direct application of the Bill of Rights is, I think, one of the strongest objections to the *Khumalo* Court's construction. Not even the good faith reconstruction of Justice O'Regan's position can meet this objection.

Several readers, upon encountering this objection, were puzzled. Others denied its truth. What explains the bemusement? It seems obvious that when a statute's constitutionality is challenged, appropriately, in a dispute between private persons, the Constitutional Court — post-*Khumalo* — will not hesitate to apply provisions of the Bill of Rights directly. It will not even consider submitting the law at issue to the 'test' set out in FC s 8(2). (That test is described above in the good faith reconstruction.) Examples of this refusal to submit a dispute between private parties governed legislation post-*Khumalo* to FC 8(2) analysis are legion. For example, in *Daniels v Campbell*, the Intestate Succession Act governed the distribution

[1] The finest restatement of the law on this subject is to be found in Frank Michelman's chapter in this work. See Frank Michleman 'The Rule of Law, Legality, and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11.

[2] See, especially, *De Reuck v Director of Public Prosecutions, WLD* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC)(Confirms expressly the continued vitality of the objective theory of unconstitutionality.) See also *Ingledew v Financial Services Board: In re Financial Services Board v Van der Merwe & Another* 2003 (4) SA 584 (CC), 2003 (8) BCLR 825 (CC) at para 20 ('This Court has adopted the doctrine of objective constitutional invalidity.')

of an estate that was the subject of a dispute between private litigants.[1] A provision of the Bill of Rights, FC s 9(3), was applied directly by the High Court to invalidate the Act. My claim, in short, is that the Constitutional Court's construction of FC s 8(2) in *Khumalo* — on both Justice O'Regan's account and the good faith reconstruction — bars it from confirming the High Court's order without first deciding whether FC s 8(2) permits the application of FC s 9(3) to this particular private dispute. Justice Moseneke's minority opinion, which supports the High Court's disposition, fails, in terms of the Constitutional Court's own precedent, to analyze the Intestate Succession Act and the parties before the court in terms of FC s 8(2), before applying FC s 9 and invalidating that provision of the Act that discriminates against partners that enter into marital covenants under Muslim law.

Perhaps, as one interlocutor has suggested, few would care to raise such an objection to Justice Moseneke's analysis. No member of the Constitutional Court would dream of raising it. (And, of course, none did.) *Khumalo* could not possibly have committed them to the position I have just attributed to them. (But, of course, it did.)

My point is not primarily empirical. I am not saying that the Constitutional Court does do what Judge Moseneke fails to do. My point is one of logic and consistency. The Constitutional Court has, in *Khumalo*, committed itself to a particular analytical framework and Justice O'Regan's justification for this framework relies heavily on her assertion that her construction of FC s 8 is the only one that can give all the words in FC s 8 independent meaning. And yet, despite the fact that our acceptance of *Khumalo* turns on it being the only 'possible' account of how FC s 8 operates, neither the Court nor its individual members feel compelled to discipline themselves in the manner that they themselves have decided FC s 8 demands.

This general claim is neither idle nor empty. We can expect that the Constitutional Court will continue to do what Justice Moseneke did in *Daniels*. They will routinely apply the Bill of Rights to private disputes without feeling obliged to honour the demands of the official *Khumalo*-construction of FC s 8(2).

In order to clarify exactly what is at stake here with respect to my claim of a logical contretemps, let us return to the distinction made, in the good faith reconstruction, between a norm's range of application and its prescriptive content. Suppose the Constitutional Court had concluded in *Daniels* that 'spouse' cannot be construed to cover Juleiga Daniels. Direct application of FC s 9(3) to the Intestate Succession Act is, then, the only line of constitutional argument left open to her. On the good faith reconstruction of Justice O'Regan's account, the next question must logically be whether, according to the inquiry required by FC s 8(2), the prescriptive content of FC s 9(3) reaches the conduct, in these circumstances, of the natural and juristic persons with whom Ms Daniels contends for a share of the estate. Only if we answer 'yes' to FC s 8(2)'s application inquiry do we reach the point where we can test the Act's discriminatory treatment of Muslim-rite marital partners against the normative demands of FC s 9(3).

However counter-intuitive this account may seem, that (re)construction is exactly what the *Khumalo* Court endorses. The thinness of Justice O'Regan's argument simply masks its 'unnaturalness', its 'textual implausibility'.

[1] *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC), 2004 (6) BCLR 735 (CC).

Does the Constitutional Court offer an alternative, somewhere in its jurisprudence, to this rather laborious mode of analysis? Given the Final Constitution's generous provisions for standing, a litigant in Juleiga Daniels' position will generally be able to launch litigation in the name of some public official responsible for carrying out the obnoxious statutory directive, thus avoiding FC s 8(2) altogether. That simply invites the reply — from me — that such a move is not contemplated by *Khumalo* and is fundamentally at odds with how Justice O'Regan expressly states that FC s 8 must be read. (Indeed it should be obvious that such a move is consistent only with my preferred reading.)

(cc) A Third Objection

The good faith reconstruction has nothing to say about the binding of the judiciary. At most, it may allow us to follow the weak reading of the phrase 'binds the judiciary' offered below.[1] In short, the weak reading holds that the judiciary's behaviour as a government institution — as manifest in tenders for contracts or hiring practices — is subject to constitutional norms.

This weak reading is strained for three reasons. First, one would have expected that judicial actions as government conduct would be subject to constitutional dictates regardless of whether they were expressly mentioned in the text or not. Second, the plain meaning of the text suggests that all judicial actions — including judicial emanations such as the common law — are without express exception (since none is offered) measured for harmony with the dictates of the Bill of Rights. Third, it defies both logic and common sense to argue that when FC s 8(1) binds the legislature and the judiciary, it is intended to bind the actions of a legislator or a judge solely in their official, but non-lawmaking, capacity. When we bind the legislature, we must bind both the law it makes and the actions it takes. The text offers no grounds for treating the judiciary any differently. While we do want state actors — legislators and judges alike — to care about the manner in which they comport themselves, we care primarily about the law that they make. But that is not what *Khumalo* says, nor can it be reconstructed in such a manner as to say so.

What should really trouble the Constitutional Court — and any other reader of the judgment — is that the *Khumalo* Court refuses to give the phrase 'binds the judiciary' any meaning at all. Perhaps the most damaging consequence of this structured silence is that it offends the 'surplusage' canon of constitutional interpretation articulated in *Khumalo* itself: The canon reads:

> We cannot adopt an interpretation which would render a provision of the Constitution to be without any apparent purpose.[2]

Not only does Justice O'Regan not give the provision any apparent purpose, she cannot, even on the good faith reconstruction, give it any apparent purpose. Remember that the good faith reconstruction gains its traction through a distinction between a constitutional norm's range of application and that same norm's

[1] The strong reading and the weak reading — as well as the case law that engages the phrase 'binds the judiciary' — are covered below at § 31.4*(b)*(iii).

[2] *Khumalo* (supra) at para 32.

prescriptive content. That creates the interpretational space to argue that while FC s 8(1) speaks to the norm's range of application — namely to every conceivable genus of law — FC s 8(2) speaks to the prescriptive content of a norm and directs us to consider whether that prescriptive content ought to be understood to govern the private conduct (of the private party) that constitutes the gravamen of the complaint. This good faith reconstruction does no work with respect to the phrase 'binds the judiciary' because the distinction applies to 'law' and not to a sphere of government. The reason the good faith reconstruction cannot be recast in a manner that speaks to the differing concerns of FC s 8(1) and FC s 8(2) is that FC s 8(2) does not concern itself with the lawmaking activity of any lawmaking institution — legislative, executive or judicial.

Can we save *Khumalo* by generating a second good faith reconstruction? No, we cannot. There is simply no way to create another account of the meaning of FC s 8 that takes cognizance of the phrase 'binds the judiciary' and that fits the first good faith reconstruction. At best, we will have two separate accounts of the single set of phenomena to which FC s 8 addresses itself. As with all phenomena, we ought to prefer the simpler of two explanations and not engage in any unnecessary multiplication of entities and theories to explain them. By choosing not to give content to the phrase 'binds the judiciary', Justice O'Regan may have saved the Court from an obvious violation of Occam's Razor. But that choice does nothing to save *Khumalo*'s account of the phenomena it claims to explain.

(dd) A Fourth Objection

The final objection to *Khumalo*'s construction of FC s 8 turns on the style of the argument. Recall that the Court only concludes that the common law dispute between *Khumalo* and *Holomisa* requires direct horizontal application at paragraph 33 of the judgment. One would have thought that the Court would have dealt with application in its natural place, after deciding whether the court has jurisdiction and whether the case is justiciable. It doesn't. After deciding whether the appeal has been properly lodged with the Constitutional Court,[1] the Court initiates its discussion of the substantive law with an overview of the recently revised law of defamation.[2] The Court vindicates *Bogoshi*'s 'new' defense of reasonableness and its elimination of strict liability. It endorses the *Bogoshi* Court's view that media organs may not claim the absence of an intent to harm as a defence.

After this discussion of defamation, the Court offers a rather peculiar account of the role of the media in creating the conditions for an open and democratic society.[3] The concluding paragraph about freedom of expression and its role in our democracy is particularly telling. Justice O'Regan writes:

> although freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality.[4]

[1] *Khumalo* (supra) at paras 1–5.
[2] Ibid at paras 16–21.
[3] Ibid at paras 21–25.
[4] Ibid at para 26.

FC ss 39 and 36 tell us that, with regard to the interpretation of the Final Constitution, we are to aim for 'an open and democratic society based upon human dignity, equality and freedom.' An open and democratic society should be based, at least in part, upon freedom.[1] Indeed, Justice O'Regan, writing for a unanimous Court in *South African National Defence Union v Minister of Defence,* states that freedom of expression and a panoply of related guarantees — assembly, association, belief, the franchise — 'lie at the heart of a democracy.'[2] Freedom of expression, she continues:

> is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters . . . [F]reedom of expression [FC s 16] . . . freedom of religion, belief and opinion [FC s 15], the right to dignity [FC s 10], as well as the right to freedom of association [FC s 18], the right to vote and to stand for public office [FC s 19] and the right to assembly [FC 17] . . . taken together protect the right of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where these views are controversial.[3]

What makes freedom of expression a 'non-paramount value' in the context of defamation and *Khumalo* goes unexplained. Justice O'Regan then goes on to describe how the foundational value of dignity vindicates an array of personality rights.[4]

In sum, before Justice O'Regan decides whether to engage the applicant's exception on the basis of freedom of expression, she has already told us in a rather roundabout way that: *(a)* the law of defamation is in pretty good shape post-*Bogoshi*; *(b)* that freedom of expression is important but not central to an open and democratic society; and *(c)* that dignity is a foundational constitutional value and that individual dignity — as viewed through the lens of reputation — is of paramount concern. Only then does Justice O'Regan decide that this matter warrants direct application of the Bill of Rights.

Based upon the Court's own jurisprudence and our good faith reconstruction of *Khumalo*, a court should first decide whether the provisions of Chapter 2 apply

[1] See *Sayed v Editor, Cape Times* 2004 (1) SA 58, 62–63 (C)(Constitutional Court in *Khumalo* supported the Supreme Court of Appeal in *Bogoshi* in rejecting an onus shift where the defamatory statement related to free and fair political activity. High Court suggests that given the primacy of place of democracy as an animating value in our constitutional enterprise, when the media publishes political speech, the bar to defamatory action needs to be somewhat higher.)

[2] 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC)('*SANDU*') at paras 7–8.

[3] Ibid at paras 7–8. The Constitutional Court's minimalist approach means that while freedom of expression in *SANDU* is a paramount value for a democratic society, one that quite consciously embraces controversy at the same time as it signifies the moral agency — and thus the dignity — of each citizen, in *Khumalo*, freedom of expression is not a paramount value, and certainly not one that embraces controversy at the same time as it manifests a commitment to the moral agency of the speaker.

[4] *Khumalo* (supra) at paras 27–28.

to the dispute before the court. If, as in *Khumalo*, the court determines that freedom of expression applied directly, then the generally accepted two-stage rights enquiry would have begun with a first stage analysis of the scope of freedom of expression and whether the law of defamation resulted in a prima facie infringement of that right. In *Khumalo*, it would most certainly have been found to constitute such limitation. The second question would be whether the law of defamation — as currently constructed — was a justifiable limitation the right to freedom of expression. The Constitutional Court in *Khumalo* certainly would have found the law as concurrently construed to be 'proportional' under FC s 36. *Khumalo* fails to follow the accepted form of fundamental rights analysis in cases of direct application.[1] The judgment looks, in manner of delivery, much like the kinds of judgments in which, under FC s 39(2), the common law is developed via indirect application of the Bill of Rights.

The style of judgment suggests that the *Khumalo* Court considers it relatively unimportant to engage this dispute as if there is, in fact, direct application. Or more accurately, by structuring *Khumalo* as if it were simply a common law judgment, the *Khumalo* Court intimates that the difference between direct application and indirect application of the Bill of Rights is minimal. I might be inclined to accept this elision between the analytical processes required by FC s 8 and FC s 39(2) were it not for the fact that the Supreme Court of Appeal and the Constitutional Court have handed down judgments regarding constitutional jurisdiction, *stare decisis* and indirect application under FC s 39(2) that manifest a clear desire not to disturb settled bodies of common law precedent and that cannot help but immunize a substantial body of apartheid-era decisions from reconsideration by lower courts.

This last point requires some amplification.

Leaving aside the problem of surplusage raised by our courts' occasional interchangeable use of FC s 8 and FC s 39(2), the Supreme Court of Appeal in *Afrox*, extending the reasoning of the Constitutional Court in *Walters*, has held that there is at least one critical difference between direct application under FC s 8 and indirect application under FC s 39(2).[2] A High Court may revisit pre-constitutional Appellate Division precedent only where a party has a colourable claim grounded in the direct application of a substantive provision of the Bill of Rights. High Courts may not alter existing common law precedent through indirect application of FC s 39(2). (The rest of our appellate courts' doctrine (whether pre-constitutional or post-constitutional) of constitutional *stare decisis* further constrains the High Courts' constitutional jurisdiction and is discussed at length below.[3]) What happens when our appellate courts marry this restrictive doctrine of *stare decisis* to an incrementalist gloss on FC s 39(2)? The spawn is an application doctrine that effectively disables the High Court from undertaking meaningful constitutional review of existing common law precedent (as well as all other

[1] See *S v Thebus* 2003 (6) SA 505 (CC), 2003 (2) SACR 318 (CC), 2003 (10) BCLR 1100 (CC); *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC); *Shabalala & Others v Attorney-General, Transvaal, & Another* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC).

[2] *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 2 (SCA); *Ex parte Minister of Safety & Security: In re S v Walters* 2002 (4) SA 613 (CC), 2002 (2) BCLR 663 (CC).

[3] See § 31.4*(e)(x)*, '*Stare decisis*', infra.

constructions of law) and thereby protects 'traditional' conceptions of law and existing legal hierarchies. This observation about the manner in which a set of related doctrines that affect application, *stare decisis* and constitutional jurisdiction conspire to blunt the transformative potential of the basic law is one of the strongest rejoinders to those jurists and commentators who have suggested that whether one relies upon FC s 8 (1) or FC s 8 (2), or FC s 39(2), the song remains the same: namely, how should the law governing a dispute be developed, re-formulated or re-interpreted? If I am correct in my characterization of the Constitutional Court's proliferating doctrines on the status of the 'basic law' and their consequences in terms of the development of the case law, then *(a)* it does very much matter where one comes down on issues of application and *(b)* FC s 39(2) does not, in fact, offer nearly as much promise of transformation as some would hope.[1]

(b) Section 8(1)

(i) *What the courts say FC s 8(1) means*

To understand FC s 8(1), we need first to remind ourselves of the content of the comparable text of the Interim Constitution. The Interim Constitution read:

> 7(1): This Chapter shall bind all legislative and executive organs of state at all levels of government.
> 7(2): This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.

The Final Constitution reads:

> 8(1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all other organs of state.

The black letter law on the meaning of FC s 8(1), following *Khumalo*, takes the following form: All law and all conduct at issue in disputes between the state and a natural person or a juristic person is subject to the direct application of substantive provisions of the Bill of Rights. *Khumalo* intimates — without expressly saying — that 'the law' referred to in FC s 8(1) is not law that governs disputes between private parties.

(ii) *What FC s 8(1) should mean*

(aa) The real meaning of 'all law'

FC s 8(1) places the phrase 'applies to all law' prior to any mention of a sphere or branchof government. The text no longer allows for an argument comparable to that offered by Kentridge AJ in *Du Plessis*, that 'legislature' and 'executive' modify 'all law'. To be aridly textual about it, 'all law' means 'all law'. In short, on the preferred reading, 'all law' embraces legislation, subordinate legislation, regulation, common law and customary law.

[1] See § 31.4*(e)*(ii)*(bb)*, 'Obligation to develop the common law', infra; § 31.4*(e)*(iv)*(bb)*, 'FC s 39(2) and the transformation of the common law', infra; and § 31.4*(e)*(viii), 'An objective normative value system', infra.

Recall that on the good faith reconstruction of the *Khumalo* Court's account of FC s 8, if one distinguishes between the range of application of and the prescriptive content of constitutional norms, one can generate an account in which FC 8(1) stands for the proposition that no genus of law is exempt — in the abstract — from testing against the norms in the Bill of Rights and still assign independent meaning to FC ss 8(2) and (3). In this respect, the good faith reconstruction and the preferred reading give 'all law' its common sense extension.

(bb) The application of FC s 8(1) to the Common Law

As a matter of black letter law post-*Khumalo*, FC s 8(1) subjects the common law governing disputes between the state or an an individual to the direct application of the substantive provisions of the Bill of Rights. As a matter of common sense, the black letter law post-*Khumalo* on FC s 8(1) should make the common law governing private relationships subject to direct constitutional scrutiny as well.

The Constitutional Court seems confused about what 'law' in FC s 8(1) actually denotes. In *President of the Republic of South Africa v South African Rugby Football Union*, the Court suggests that 'all law' refers to the common law irrespective of the kind of dispute it governs:

> the right to a fair trial has now been entrenched in our Constitution. Section 35(3) of the Constitution which deals with criminal proceedings provides that 'every accused person has a right to a fair trial'. Section 34 of the Constitution … applies to other proceedings … These provisions must be read with s 8(1) of the Constitution … It follows that s 34, which is part of the Bill of Rights, applies to the Judiciary. Moreover, the common law, which is 'law' within the meaning of s 8(1), is also subject to s 34 and in terms of s 39(2) must be developed in accordance with its provisions.[1]

'Law' and the 'binds the judiciary' appear in *SARFU* to possess their common sense extension.

(iii) *The binding of the judiciary*

FC s 8(1) contains the phrase 'binds … the judiciary'. Recall that the absence of 'binds … the judiciary' in IC ss 7(1) or 7(2) of the Interim Constitution enabled Kentridge AJ to argue that judicial emanations, namely common law precedent and rulings based thereon, were immunized from direct application of the Bill of Rights.[2] The presence of the phrase 'the judiciary' in the Final Constitution should have driven the *Khumalo* Court to the conclusion that the emanations of the judiciary — its interpretation of legislation and its common law rulings — count as law directly subject to Chapter 2's Bill of Rights. It did not.

The *Khumalo* Court seems obliged — even on the good faith reconstruction — to adopt a much weaker reading of FC s 8(1). On such a reading, the binding of the judiciary simply means that the judiciary's behaviour as a government institution — as manifest in tenders for contracts or hiring practices — is subject to

[1] 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC)('*SARFU*') at para 28.
[2] See § 31.2*(a)* supra.

constitutional norms.[1] This reading is strained for three reasons. First, one would have expected that judicial actions as government conduct — state action simpliciter — would be subject to constitutional dictates regardless of whether they were expressly mentioned in the text or not. Secondly, the plain meaning of the text suggests that all judicial actions — including judicial emanations such as the common law — are without express exception (since none is offered) measured for harmony with the dictates of the Bill of Rights. Third, it defies both logic and common sense to argue that when FC s 8(1) binds the legislature and the judiciary, it intended to bind the actions of legislators or judges in their official capacity but not in their law-making capacity. As I have already noted above, while we care about the manner in which legislators and judges comport themselves,[2] we care primarily about the law that they make.[3]

The rejection of the weak reading of the phrase suggests a gloss on 'binds the judiciary' that is on all fours with the preferred reading. 'Binds the judiciary' covers the 'law' that the judiciary generates. Such a reading is consonant with the obvious — and accepted reading — of 'binds the legislature'. Moreover, by mapping the primary meaning of 'binds the judiciary' onto 'all law' we avoid two of the primary objections to *Khumalo*: *(a)* the failure to give meaning to a term in the Final Constitution; and *(b)* the need for two different, incompatible accounts of the various sections of FC s 8. Pace *Khumalo*, the preferred reading avoids both surplusage and silence.[4] Pace *Khumalo*, the preferred reading affords interpretive space for FC s 8(3).[5]

[1] Thus, if a judicial actor was to infringe the freedom of assembly by ordering, on his own motion, that picketers or protestors on government property must vacate the premises, then the Bill of Rights would apply to the actions of that judicial actor. However, if the judicial actor was merely arbitrating the dispute between two other social actors — let us say an employer and a picketing union — then the Bill of Rights would not apply to the judicial actor's decision. It would apply only to the law at issue. How one distinguishes between the judicial actor's decision and the law at issue is another matter.

[2] See *De Lille v Speaker of the National Assembly* 1998 (3) SA 430, 455 (C), 1998 (7) BCLR 916 (C) (Parliament's conduct impaired the exercise at freedom of expression in terms of FC s 58 and FC s 16. Because Parliament's treatment of parliamentary privilege amounted to conduct not governed by a law of of general application, it could not be saved by FC s 36.)

[3] There are obvious exceptions to this general rule. See, eg, *S v Mamabolo (E TV & Others Intervening)* 2001 (3) SA 409 (CC), 2001 (1) SACR 686 (CC), 2001 (5) BCLR 449 (CC)(Citation for contempt for scandalizing court will attract review on FC s 16); *BCGEU v British Columbia (Attorney General)* [1988] 2 SCR 214, 53 DLR (4th) 1 (Supreme Court of Canada held that an injunction issued by a judge on his own motion to restrain picketing by union in front of his courthouse was subject to the Charter — despite the fact that a court is not a government actor for the purposes of Charter review. Court found this dispute to be more 'public' than 'private' and thus the appropriate object for direct application of the Chater.)

[4] Prior to *Khumalo*, some courts read FC ss 8(1), 8(2) and 8(3) in a manner consistent with the preferred reading proferred in these pages: namely, FC s 8 gives us direct, unqualified application subject only to the condition that the application of any provision to a given dispute is contingent upon the interpretation of — the prescriptive content of — a right. See *Protea Technology Ltd v Wainer* 1997 (9) BCLR 1225, 1238 (W)('The new Constitution admits of both horizontal and vertical application for the Bill of Rights. Whether it does have application in a given case will require interpretation of the provision in question.')

[5] While FC ss 8(3)*(a)* and *(b)* anticipate just such an occurrence, the courts could formulate a new rule or a new remedy even in the absence of specific FC s 8(3) direction. The courts have already read FC ss 39, 7, 38, 167, 172 and 173 as authorizing the development of the common law where the Bill of Rights requires it. See § 31.4*(e)*(iii) infra, 'The development of the Common Law and the interaction between FC s 39(2) and FC ss 7, 8, 38, 167, 172 and 173.'

Despite *Khumalo*, the Constitutional Court has endorsed a strong reading of FC s 8(1). It has authored a set of decisions over the past five years that have had the collective effect of subjecting every exercise of judical power to constitutional review. In *Bannatyne v Bannatyne (Commission For Gender Equality, As Amicus Curiae)*, the Court wrote: 'In terms of s 8 of the [Final] Constitution the judiciary is bound by the Bill of Rights.'[1] As I noted above, the *SARFU* Court extended the notion of judicial boundedness to the common law: 'The common law, which is 'law' within the meaning of s 8(1), is also subject to s 34 and in terms of s 39(2) must be developed in accordance with its provisions.'[2] Deploying a concatenation of provisions, the Constitutional Court in *Boesak* ventured that:

> [t]he development of, or the failure to develop, a common law rule by the Supreme Court of Appeal may constitute a constitutional matter. This may occur if the Supreme Court of Appeal developed, or failed to develop, the rule under circumstances inconsistent with its obligation under s 39(2) of the Constitution or with some other right or principle of the Constitution. The application of a legal rule by the Supreme Court of Appeal may constitute a constitutional matter. This may occur if the application of a rule is inconsistent with some right or principle of the Constitution.[3]

Similarly, from *Pharmaceutical Manufacturers* through *Carmichele* to *Thebus*, the Constitutional Court has made it abundantly clear that all law-making activity — no matter what its provenance — must comply with the requirements of the Final Constitution. The *Thebus* Court, quoting from *Pharmaceutical Manufacturers*, wrote:

> There is . . . only one system of law and within that system the Constitution is the supreme law with which all other law must comply.[4]

The High Court in *Westley v Attorneys Fidelity Fund* likewise reasoned that FC s 8(1) — read with FC s 39(2) — requires the courts '(in circumstances where the point is central to a proper decision of a matter) to raise a constitutional issue *mero motu*.'[5] In *S v Lubisi*, the High Court found that because FC s 8 binds the judiciary, FC s 8, when read with FC ss 173, 7 and 39(2), obliges every court to interpret and to develop the law in a manner that promotes the spirit, purport and objects of the Bill of Rights.[6] In *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*, the High Court found that the binding of the judiciary in FC s 8, when read alongside the general obligations placed by FC s 7 upon the state, meant that 'all statutes must be interpreted through the prism of the Bill of Rights [and] all law-making authority must be exercised in accordance with the Constitution.'[7] Failure by a lower court to interpret legislation

[1] 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC) at para 19.
[2] 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) at para 28. See § 31.4*(b)*(ii)*(bb)* supra.
[3] *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) SACR 1 (CC), 2001 (1) BCLR 36 (CC)('*Boesak*') at para 15.
[4] *S v Thebus* 2003 (6) SA 505 (CC), 2003 (2) SACR 319 (CC), 2003 (10) BCLR 1100 (CC)('*Thebus*') at para 25.
[5] 2004 (3) SA 31 (C) at para 31 citing *De Beer v Die Raad vir Gesondheidsberoepe van Suid-Afrika* (Case No 13598/02)(Unreported judgment, Bertelsmann J, 16 April 2003).
[6] *S v Lubisi: In Re S v Lubisi & Others* 2004 (3) SA 520, 530 (T), 2003 (9) BCLR 1041,1051(T).
[7] 2004 (5) SA 124, 141 (W).

properly in light of the dictates of the Bill of Rights invites appellate constitutional review of the judicial decision itself.

However, despite *Boesak* and *Pharmaceutical Manufacturers*' very expansive understanding of judicial boundedness, not every action of the judiciary is meat for review under the Final Constitution. In *Mphahlele v First National Bank of SA Ltd*, the Constitutional Court held that the binding of the judiciary does not always require a court to supply reasons for its decisions.[1]

(iv) *The binding of the legislature*

FC s 8(1) states that the Bill of Rights 'binds the legislature' in addition to applying to 'all law'. A plain meaning approach to the two phrases, read together, should yield the proposition that all legislation, whether passed by Parliament or a provincial legislature, is always subject to the direct application of the Bill of Rights. Of course, in light of *Khumalo*, it is clear that legislation is not always automatically subject to the direct application of the Bill of Rights. Legislation is only invariably subject to the Bill of Rights when it forms part of the substratum of a dispute between the State and an individual. When legislation governs a dispute between private parties, then *Khumalo*'s gloss on FC s 8(2) tells us that the Bill of Rights only applies to such disputes — and thus to the underlying legislation — if and when the right invoked is deemed to bind the natural or juristic person in question. So while FC s 8(1) applies to all conduct of legislatures, and conduct that produces law that governs the relationships between the state and the individual, it does not apply to that conduct of the legislature which produces law that governs private conduct. If one finds that proposition palatable, then *Khumalo's* gloss on FC s 8(1) may seem plausible.

Two other questions shall detain us but briefly.

The first question, dealt with at greater length below, is whether legislative powers exercised in accordance with other sections of the Final Constitution are subject to Chapter 2's rights and freedoms.[2] For example, to what extent are rules regarding parliamentary privilege — even if drawn from the provisions of the Final Constitution itself — subject to the Bill of Rights? In *De Lille v Speaker of the National Assembly*, the High Court suggests how, when, and why the exercise of power by a legislature sourced directly in the Final Constitution is subject to the strictures of the Bill of Rights.[3]

The second question is whether, or when, municipal councils count as legislatures. Municipal councils exercise both legislative and executive powers. FC s 151(2) reads: 'The executive and legislative authority of a municipality is vested in its municipal council.' FC s 156 reads, in relevant part:

> i. A municipality has executive authority in respect of, and has the right to administer a. the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and b. any other matter assigned to it by national or provincial legislation.

[1] 1999 (2) SA 667 (CC), 1999 (3) BCLR 253 (CC) at para 4. See also *Metcash Trading Ltd v Commissioner, SARS* 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC).

[2] See § 31.5 infra.

[3] 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C).

ii. A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

Prior to the Interim Constitution, by-laws were viewed 'as a form of subordinate legislation' and were 'fully reviewable by the courts.'[1] That view changed with the advent of the Interim Constitution. The power to pass by-laws is clearly a legislative function. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*, the Constitutional Court found that IC s 24 and FC s 33 — the administrative justice provisions — may apply to the exercise of executive powers delegated by a municipal council to its functionaries, but could not be meaningfully applied to the by-laws made by the municipal council itself.[2] When crafting by-laws, the municipality must be viewed as a deliberative legislative body.[3] The *Fedsure* Court wrote: 'The enactment of legislation by an elected local council in accordance with the Constitution is, in the ordinary sense of the words, a legislative and not an administrative act.'[4]

(v) *The binding of the executive*

FC s 8(1) states that the Bill of Rights 'binds … the executive' in addition to applying to 'all law.' A plain meaning approach to the interpretation of the two phrases, read together, should yield the proposition that all executive action, including subordinate legislation and regulation, is always subject to the direct application of the substantive provisions of the Bill of Rights.

After *Khumalo*, it is clear that executive action is not always subject to the direct application of the Bill of Rights. When executive action, say in the form of subordinate legislation, governs a dispute between natural and juristic persons, then *Khumalo's* gloss on FC s 8(2) tells us that the Bill of Rights only applies to such disputes — and thus to the underlying legislation — if and when the right invoked is deemed to bind the natural or juristic person in question.

Executive action is, however, invariably subject to the Bill of Rights when it arises in a dispute between the State and an individual. A host of cases support this proposition. In *President of the Republic of South Africa & Others v South African Rugby Football Union & Others,* the Constitutional Court observed:

> Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls . . . . First, in the Bill of Rights there is the right of access to information and the right to just administrative action . . . . Secondly, all the provisions of the Bill of Rights are binding upon the Executive and all organs of State.[5]

[1] Lawrence Baxter *Administrative Law* (1984) 151.
[2] *Fedsure* (supra) at para 41.
[3] Ibid at para 26. See also *Hardy Ventures CC v Tshwane Metropolitan Municipality* 2004 (1) SA 199 (T).
[4] *Fedsure* (supra) at para 42.
[5] 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at paras 133–134. See also *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd & Others; In Re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 41 ('The Constitution also prescribes that all conduct of the State must accord with the provisions of the Bill of Rights. This is evident from s 8(1) of the Constitution which provides that '*(t)*he Bill of Rights applies to all law, and binds the Legislature, the Executive, the Judiciary and all organs of State'); *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC)

The same problem we face when trying to understand when legislation is covered by FC s 8(1) under *Khumalo* applies with equal force to the Court's characterization of executive law-making covered by FC s 8(1). While FC 8(1) applies to all conduct of all executives, and conduct that produces law that governs the relationships between the state and the individual, *Khumalo* dictates that FC s 8(1) does not apply to that conduct of the executive which produces law that governs private conduct.

(vi) *The binding of organs of state*

The definition of organs of state is covered by FC s 239. For that reason, the discussion of the manner in which organs of state are bound by the Bill of Rights appears below.[1]

(c) Section 8(2)

Section 8(2) reads:

> A provision in the Bill of Rights binds all natural and juristic persons, if, and to the extent that, it is applicable, taking into account the nature of the right and any duty imposed by the right.

(i) *What FC s 8(2) means in Khumalo*

As we have already noted, the black-letter law in *Khumalo* on FC s 8(2) reduces to this proposition: disputes between natural persons and/or juristic persons *may* be subject to the direct application of the Bill of Rights, if the specific right is deemed to apply to the private party whose conduct (which oddly, reduces to a reliance on ordinary law) is challenged.

The good faith reconstruction of *Khumalo* runs as follows. FC s 8(1) speaks to the range of the specific substantive provisions of the Bill of Rights. It tells us that no law is exempt from the demand for conformity to the requirements of the Bill of Rights simply because that piece of law falls withinsome genus of law. It does

at para 4 ('Government, as part of a formidable array of responses to the pandemic, devised a programme to deal with mother-to-child transmission of HIV at birth and identified Nevirapine as its drug of choice for this purpose. The programme imposes restrictions on the availability of Nevirapine . . . The applicants contended that these restrictions are unreasonable when measured against the Constitution of the Republic of South Africa Act 108 of 1996, which commands the State and all its organs to give effect to the rights guaranteed by the Bill of Rights. This duty is put thus by ss 7(2) and 8(1) of the Constitution respectively'); *Fredericks v MEC For Education and Training, Eastern Cape* 2002 (2) SA 693 (CC), 2002 (2) BCLR 113 at para 11 ('In this case, the applicants have alleged an infringement of their rights under ss 9 and 33 of the Constitution. The respondents who are alleged to have infringed the rights are all bound to observe the provisions of the Bill of Rights in terms of s 8(1) of the Constitution.') See also *Mohamed v President of the Republic of South Africa (Society For The Abolition of the Death Penalty in South Africa & Another Intervening)* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC) at paras 70–71; *South African National Defence Union v Minister of Defence* 2004 (4) SA 10 (T); *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W).

[1] See § 31.4*(f)*, 'Section 239: organ of state', infra.

not follow, however, that the substantive provisions of the Bill of Rights engage, jointly and severally, the content of each and every rule of law. FC s 8(2) speaks to the prescriptive content of the right and tells us, effectively, that we must consider whether the right asserted by one party was meant to cover the contested conduct of another party. What is important to note is that this is not a question of application. It is a question of interpretation. Even on a good faith reconstruction of *Khumalo*, FC s 8(2) simply sidesteps general issues of application and drives one straight to the right. Note, however, that the shape of this interpretation exercise — determined as it is by the parties before the court — does not map directly on to a standard determination of the content of a right. FC s 8(2) identifies a preliminary interpretative step.[1] That FC s 8(2) does not really do anything meaningful by way of application may explain why the courts regularly fail to acknowledge the need to undertake this preliminary interpretive step.

(ii) *What FC s 8(2) should mean and the courts' support for the preferred reading*

I have, above, identified four discrete reasons why we should abjure even the good faith reconstruction of *Khumalo*'s gloss on FC s 8(2).

First, whereas the Interim Constitution's Bill of Rights was, per *Du Plessis* understood to apply directly, and unequivocally, to legislation or subordinate legislation that governed private disputes, the Final Constitution's Bill of Rights does not. The counter-intuitive consequence of the *Khumalo* Court's approach is that legislation that governs the conduct of private persons is not necessarily engaged by the substantive provisions of the Bill of Rights. As with a rule of common law, FC s 8(2) makes the application of the Bill of Rights to such legislation contingent upon the preliminary interpretative exercise identified above. To be able to attack the legislation in question, one must either demonstrate that the right asserted was meant to cover the private conduct contested (or find a state actor who bears responsibility for the enforcement of the rule of law asserted). Despite the dramatic assertion that there is now direct application for private conduct, less law is immediately and unequivocally subject to the substantive provisions of the Bill of Rights under the Final Constitution than under the Interim Constitution. (The force of this conclusion is in no way diminished, but rather reinforced by the fact the Constitutional Court has, itself, failed to follow its own rules regarding FC s 8(2), and acted, instead, as if it were analyzing legislation governing private conduct in terms of the preferred reading of both FC ss 8(1) and 8(2).)

Second, the objective theory of unconstitutionality holds that the validity or

[1] With respect to direct application of a provision of the Bill of Rights to a dispute governed by FC s 8(1), the interpretation stage of rights analysis concentrates on the scope of the right's protection and the infringement of the right by law or conduct. In FC s 8(2) cases, the interpretation of the right requires, as a threshold matter, that the court decide whether a right is meant to burden the party against whom it is asserted. Only then, it would appear, is the court to move on to questions of scope and infringement. Of course, it seems impossible to separate out entirely an FC s 8(2) examination of burdens without determining, to some degree, what the actual scope of a right is.

the invalidity of any given law is in no way contingent upon the circumstances of the case, or, more specifically, the parties to the case. Whereas this doctrine tells us that the validity or the invalidity of any given law cannot be made contingent upon the parties to the case, the *Khumalo* Court tells us exactly the opposite. For even under the good faith reconstruction of FC s 8(2), if the right asserted is deemed not to apply to the conduct contested, then there is no 'direct' application of the substantive provision of the law. So, the Constitutional Court has created, as a purely logical manner, a doctrine in which a provision of legislation deemed to be unconstitutional when invoked by the State in a dispute between the State and an individual would not necessarily be held to be unconstitutional when invoked by an individual in a dispute between that individual and another individual. The reason for this is that a negative response to an FC s 8(2) inquiry into 'conduct' would prevent the court from actually determining whether the right has been impaired by the 'law' in question. Put slightly differently, a negative response precludes the court from undertaking an objective assessment of the law's constitutionality.

Third, neither the *Khumalo* Court's reading of FC s 8(2) nor the good faith reconstruction can make much sense of the Final Constitution's addition of the term 'binds the judiciary'. The notion that the phrase was added to ensure that non-law-making conduct of judges would be subject to constitutional norms but not the law that judges actually make simply beggers belief.

Fourth, apart from considerations of surplusage and supervenience, the Court's elision of the analytical processes required by FC s 8(2) and FC s 39(2) has at least one other major untoward consequence. We have seen that the Court's restrictive doctrine of *stare decisis* — a doctrine that effectively bars High Court review of existing precedent in terms of FC s 39(2) — married to an incrementalist gloss on the indirect application required by FC s 39(2) spawns an application doctrine that protects 'traditional' conceptions of law and existing legal hierarchies. This observation about the manner in which our existing array of doctrines conspire to blunt the transformative potential of the basic law is one of the strongest rejoinders to those jurists and commentators who believe that the analytical processes of FC s 8(1) or FC s 8(2) or FC s 39(2) require little or no differentiation.

The difficulties that attend even the good faith reconstruction of *Khumalo* create the space for an account of FC s 8 that possesses greater internal consistency and greater explanatory power. The *Khumalo* Court expressed concern about the redundancy of FC s 8(2), if FC s 8(1) is given the preferred reading. However, pace *Khumalo*, FC s 8(2) retains a purpose even if we give FC s 8(1) an appropriately expansive gloss. FC s 8(1) ought to govern all disputes governed by a rule of law *or* involving a government actor. If the rules of law that govern the conduct in question do not give adequate effect to the provisions of the Bill of Rights, and no government actor is involved, then the court is instructed by FC s 8(2) to consider whether a given provision of the Bill of Rights binds the 'conduct' of the natural or juristic party against whom the provision is being invoked.

Unlike the good faith reconstruction, which relies on a workable, but not especially efficacious distinction between the range of a constitutional right and its prescriptive content, the distinction that gives FC s 8(2) more desirable content is the rather familiar distinction between law and conduct. That distinction runs as follows. While most conduct is law governed, there are instances in which private conduct is not governed by an express rule of law. For example, a plaintiff sues a defendant for refusing to hire the plaintiff for an open position. The defendant claims absolution on the ground that there is no common law norm imposing on the defendant a duty, in the current set of circumstances, to hire the plaintiff. If the defendant's claim regarding the content of the common law is upheld by a court, then quite a significant number of lawyers are inclined to endorse the two-fold proposition that *(a)* the defendant's conduct is not unlawful, and *(b)* the defendant's conduct remains conduct not governed by law.

This distinction is not philosophically sound. Indeed, I have argued against the pure form of the law/conduct distinction in an earlier iteration of this very chapter and would have preferred, *ceterus paribus*, not to have to consider it.[1] That said, South African lawyers and jurists continue to draw the distinction.[2] In addition to being underwritten by the accepted practice — or legal cosmology — of a fair number of South African lawyers, the traditional distinction between law-governed conduct and non-law-governed conduct appears to have informed the drafting of FC s 8.[3]

This reading of FC s 8(2) covers two possible sets of disputes between private actors. First, it contemplates the possibility of a dispute over an aspect of social life that is not currently governed by any rule of law at all. (For reasons assayed in the footnote below, this locution describes a linguistic practice and not an empirical fact.[4]) Second, it describes the gap between the prescriptive content of constitutional norms and extant express rules of law. While a body of extant legal

[1] See § 31.2*(d)*(iv)–(v) infra.

[2] An anecdote is instructive (though it does not, admittedly, qualify as incontrovertible evidence.) I gave a talk at the Legal Resources Centre in which the 'law never runs out' thesis did a certain amount of heavy lifting in favour of a direct, unqualified approach to application under the Interim Constitution. Despite the fact that a direct, unqualified approach better fit the progressive legal agenda of the LRC, none of the participants, at least a half dozen of whom had appeared before the Constitutional Court, accepted the proposition that the law never runs out. There were, on the accepted understanding of the common law, express rules of law and background conditions. The general thesis that the common law permits what it does not expressly proscribe did not count as 'law'. Nor was my audience moved by the Hohfeldian notion — discussed below — that a court ruling that grants a party absolution because it finds that the common law imposes no duty still cloaks the defendant's conduct in a legal relationship called 'privilege'. Rather, in such an eventuality, it was, my audience insisted, more appropriate to say that there was 'no law' and certainly, no express rule of law, that governed the conduct of the parties before the court.

[3] See Halton Cheadle 'Application' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law* (2002) 19.

[4] Some argue that the existence of such areas is quite limited (proposition 1). Others argue that it is always possible to characterize a dispute as one governed by a rule of law (proposition 2). As an empirical matter, the first proposition is true. As a philosophical matter, the second proposition is true. How can one hold that both propositions are true: how can the law never run out (proposition 2) and how can the law sometimes run out (proposition 1)? Like this. Proposition 1 is grounded in the fact that the law exists as a body of express, clearly articulated rules covering most, *but not all*, conduct and a court will sometimes have to craft new rules to govern the conduct of the parties before it. Proposition 2 recognizes that law as a system of rules, principles and background norms offers a sufficiently dense latticework of materials from which a court can fashion a remedy: that is, the law always supplies an answer. (Footnote continued on next page.)

rules — or even background norms — may always be said to govern any particular set of relationships, it remains possible to understand FC s 8(2) as requiring that the courts develop a new rule of law *where the current rules do not give adequate effect to a provision in the Bill of Rights*.

Dennis Davis has described *Khumalo* as a perfect example of the second set of circumstances.[1] Davis argues that we should understand counsel's argument in *Khumalo* through the prism of the pleadings. That is, when counsel for Khumalo took an exception to the argument as framed by counsel for Holomisa, what they were effectively saying was that no rule of common law governed the relationship between the parties in a manner contemplated by the Bill of Rights. Counsel, on Davis' view, should have characterized its argument as a request that the Court develop the law to fill a gap in existing defamation doctrine created by the presence of a new, more basic, norm — the constitutional right to freedom of expression.

Danie Brand and I think that there is an additional way of describing the problem that supplements Davis' gloss. We would prefer not to emphasize the pleadings, but rather the relationship between rights interpretation and remedies. On our account, FC ss 8(2) and 8(3) contemplate situations in which there exists no adequate legal remedy for a rights infringement. That is, FC ss 8(2) and 8(3) anticipates that existing law will not always provide *adequate* remedies in terms of what a given right requires. In *S v Thebus*, the Constitutional Court wrote that: '[I]t is in this context that courts are enjoined . . . to develop the common law in order to give effect to a protected right.'[2] Likewise, while the Constitutional Court in *Fose* found that the common law at the time was adequate for the vindication of

Let us expand on the scenario introduced in the text above. The plaintiff (P) sues the defendant (D) for refusing to hire P for an open position. D claims absolution on the ground that there is no common law norm imposing on D a duty, in the current set of circumstances, to hire P. If D's claim regarding the content of the common law is upheld, then the judgment is that D's conduct has not been unlawful. As a philosophical matter, there is and can be for a judge or lawyer no gap between such a judgment and a judgment that the conduct is lawful. In Hohfeldian terms, the result is a judgment to the effect that the common law cloaks D's conduct, relative to P, with the legal relation called 'privilege'. Privilege is not the absence of law. When the judge grants D's plea for absolution, she is applying the law in D's favour.

The linguistic — and legal sociological — gap is created, as I noted above, by the deeply entrenched inclination to say that when the judge rules in D's favour she merely relies on a background condition of the common law that runs as follows: when there is no other relevant law — or no legal duty imposed by a rule of law — the defendant prevails. This is the heart of the strong 'no law thesis'. Its truth is fixed by reference to a definition of law that restricts the extension of the term to express rules of law that impose duties.

The discomfort occasioned — in some — by accepting such a restrictive definition flows in part from the obvious counterfactual. Assume that the judge rules in P's favour and crafts a new remedy that imposes a duty on D in the very circumstances that gave rise to the suit. The judge's ruling in favour of P is law. How else would one describe it? So too then was the ruling in favour of D in the original hypothetical. We are, on the Hohfeldian account, never lawless.

I think that the difference between the Hohfeldian account and the no-law thesis can be split by my second variation on FC s 8(2): namely where a body of extant rules — or even background norms — may be said to govern a particular set of relationships, FC s 8(2) requires the courts to develop a new rule of law where the current rules do not give adequate effect to a provision in the Bill of Rights. We are, on this account, never lawless. What we lack are rules of law adequate to the task of giving content to the new universe of legal norms imposed by the basic law — the Final Constitution.

[1] Dennis Davis 'Presentation on the Horizontal Application of the South African Bill of Rights' *RULCI Conference*, University of the Western Cape (9 August 2004.)

[2] *Thebus* (supra) at para 25.

the constitutional rights asserted, the *Fose* Court left open the possibility that another set of facts would throw up constitutional interests not adequately vindicated by existing remedies.[1]

Recent case law offers numerous examples in which the existing body of rules do not do adequate justice to the demands of a given right. The High Court in *Afrox v Strydom* can be understood as viewing existing principles of the law of contract — say, *pacta sunt servanda* — that would uphold negligence waiver clauses in hospital admission forms as a failure to vindicate the constitutional right of access to health care services.[2] It filled this gap in existing doctrine with a rule of common law grounded in the requirements of FC s 27.[3] The new rule ultimately creates a remedy heretofore unavailable at common law.[4]

Similarly, the High Court in *Ross v South Peninsula Municipality* should be understood as attempting to revisit existing property law in light of FC s 26(3)'s requirement that 'no one may be evicted from their home … without an order of court made after considering all the relevant circumstances.'[5] By shifting the onus to the owner of the property to demonstrate that the circumstances required

[1] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC). See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC)('*Carmichele*'). Had *Carmichele* been decided in terms of ss 8(2) and 8(3), it might have provided a perfect fit for the scenario contemplated here. *Carmichele* does not create a constitutional remedy distinct from delictual remedies available at common law. What it did do is force the High Court and the Supreme Court of Appeal to revisit the existing law of delict and expand the duty of care. The new rule of common law thereby gives effect to the rights protected in the Bill. See, especially, *President of the Republic of South Africa & Others v Modderklip Boerdery (Pty) Ltd* CCt 20/04 (May 15 2005)(Court creates a constitutional remedy grounded in FC s 34 and FC s 1*(c)*).

[2] The High Court found a disclaimer in a private hospital's admissions contract unenforceable. *Strydom v Afrox Healthcare* [2001] 4 All SA 618 (T)('*Afrox I*'). See Dire Tladi 'One Step Forward, Two Steps Back for Constitutionalising the Common Law*: Afrox Healthcare v Strydom'* (2002) 17 *SA Public Law* 314–315 and 317 (Discussion of *Afrox I*). Mavundla AJ began his analysis with the unassailable proposition that a common law rule with a contractual term contrary to the public interest is unenforceable. (This rule was recognised and applied in a host of cases. See *Wells v South African Alumenite Company* 1927 AD 69; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); and *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A). For more recent discussions of the rule, see *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 389 (SCA); *De Beer v Keyser* 2002 (1) SA 827 (SCA) and *Brisley v Drotsky* 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA).) Relying upon FC ss 27(1) and 39(2), Mavundla AJ further reasoned that the rule must be interpreted in light of the Bill of Rights and, in particular, the respondent's constitutional right to have access to health care services. Access to health care was, in turn, read to mean 'access to health care, whether private or public, administered by professional and trained people with skill and care.' *Afrox I* (supra) at 627. The right to have access to health care services, so the High Court reasoned, entitled the claimant to have access to health care services provided in a professional manner and with reasonable care. The contract's disclaimer, insulating the appellant against claims for negligence, impaired the respondent's right to health care services provided with the requisite professionality and care. The High Court found the disclaimer unenforceable. Ibid at 627–628. Because the common law prior to *Afrox I* did not contemplate the extension of the 'contrary to the public interest' proviso to such disclaimers, Mavundla AJ was obliged to craft a new rule of common law that vindicated the FC s 27 right to health care.

[3] The Supreme Court of Appeal reversed the *Afrox I* High Court in *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA)('*Afrox*').

[4] It is beyond the scope of this section of the chapter to engage in an extended discussion about the ontological status of rules and values in the common law. But for my considered view on the subject in so far as it relates to application, see my criticism of Chris Roederer's position at § 31, Appendix 3*(a)*.

[5] 2000 (1) SA 589 (C)('*Ross*').

for an eviction order are present, the High Court in *Ross* crafts a new rule of common law grounded in the requirements of FC s 26.[1] The *Ross* Court's emphasis on changing the common law in order to shift the onus of proof and the attendant alteration of the form and the content of the pleadings provides a paradigmatic example of how Dennis Davis' pleadings analysis and my own conduct analysis (sometimes) reinforce one another. What starts off in *Ross* as an *exception* to an existing common law rule based upon the direct application — through FC s 8(2) — of FC s 26(3) to the *conduct* under scrutiny, becomes a new common law rule — generated through FC s 8(3) — that vindicates the right.[2]

The subject matter of *Mahambehlala v MEC for Welfare, Eastern Cape, & Another* — a failure by the State to pay timeously a welfare grant — requires that application analysis take place in terms of FC s 8(1). However, the court's analysis still provides a guide as to how to understand common law rule and remedy creation under FC ss 8(2) and 8(3).[3] The *Mahambehlala* High Court found that the failure to pay a welfare grant at the appropriate time was a function of the responsible department's negligence. The High Court concluded, however, that existing remedies at common law would not enable the plaintiff to recover amounts lost — including the interest that should have accrued — as a result of the delay. Leach J wrote:

> I do not see how the applicant can recover an amount in respect of that period under common law review. She would probably be able to institute an action for damages based upon the negligent failure to process her application timeously, but one cannot lose sight of the fact that she is in straightened [sic] financial circumstances and may well be unable to

[1] *Ross* (supra) at 596.

[2] Ibid at 596. Josman AJ describes the constitutionally mandated change in the common law as follows:

> Section 26(3) of the Constitution in effect requires a court hearing an application or action for the eviction of a person from his or her home not to issue the order until it has had an opportunity to consider all the relevant circumstances . . . At issue is how those circumstances should be placed before the court . . . . As the court has to consider all the relevant circumstances, the adversarial system predicates that the plaintiff should place such information before the court as it considers relevant, to which the defendant can plead by answering the allegations as well as by raising additional issues. The plaintiff in turn can respond to those allegations in reply. In this manner the pleadings will introduce the issues and define them, the evidence will provide the substance and detail, and the court will then be able to exercise its discretion after having considered all the relevant circumstances. In this manner the adversarial system allows for and in most instances will ensure that all such circumstances are placed before the court. The court can presumably call for amplification if, after considering the issues raised in the pleadings, it deems it necessary. If both parties to a case involving eviction from a home raise the issues which they consider to be relevant, the court should ultimately have sufficient information before it to consider all the relevant circumstances prescribed by the Constitution.

Ibid. Of particular relevance to my analysis is the very end of the very last sentence. While the common law and statute covered evictions prior to the enactment of the Final Constitution, the enactment of the Final Constitution — and in particular FC s 26(3) — creates new prescriptive content for the law of eviction. Whether the law of eviction as it stood prior to enactment of the Final Constitution meets the demands of the basic law is a question about which the courts have differed. The Supreme Court of Appeal reversed *Ross* in *Brisley v Drotsky* 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA). But, consistent with my view of FC s 8(2), Josman AJ found that the Final Constitution required the courts to develop a new rule of law where the current rules did not give adequate effect to a substantive provision in the Bill of Rights.

[3] 2002 (1) SA 342 (SE), 2001 (9) BCLR 890 (SE)('*Mahambehlala*').

> fund such an action. In those circumstances, the knowledge of a potentially successful right of action is a poor balm to relieve the loss of a social grant for five months. In my opinion, in the light of these considerations, the applicant's common law remedies are insufficient to be regarded as appropriate relief as envisaged by s 38 of the Constitution . . . . In the light of this, I am of the view that it is incumbent upon this Court to attempt to fashion what may loosely be referred to as 'constitutional relief' to cater for the fact that the common law relief to which the applicant would be entitled is insufficient to address the effects of the delay of her social grant for five months and that it is unrealistic to expect her to institute a separate action to claim damages.[1]

The appropriate new 'constitutional' remedy for the negligent conduct of the State is the award of an amount equal to that which the plaintiff would have received had the grant been paid timeously. The court then turns its attention to the issue of interest. Leach J finds that 'the general rule of the common law is that interest is not payable.' Once again Leach J holds that a meaningful constitutional remedy requires the award of such interest.[2] The direct application of the Final Constitution to 'conduct' by the state requires the crafting of new rules of and remedies at 'constitutional common law'. In form, Leach's approach to direct application of the Final Constitution to state conduct where the statute is insufficient to vindicate a constitutional entitlement is no different than it would be for direct application of the Final Constitution to private conduct where the common law, or any other rule of law, is deemed insufficient to vindicate a constitutional entitlement.[3]

[1] *Mahambehlala* (supra) at 354–355.

[2] Leach J leans heavily on dicta in *Fose* as the basis for his crafting new rules of and remedies at 'constitutional common law'. See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC). Leach J quotes Ackermann J to the effect that 'appropriate relief will in essence be relief that is required to protect and enforce the rights enshrined in the Constitution.' *Fose* (supra) at para 19. He endorses Kriegler J's observation in Fose that when courts grant relief, 'they attempt to synchronise the real world with the ideal construct of a constitutional world.' *Fose* (supra) at para 94.

[3] The following example is meant to demonstrate this proposition. Imagine that a farmer prevents workers from leaving the property in order to vote. The farmer may be guilty of unjustifiable detention under existing common law. However, no existing rule of law covers expressly the situation in which an employer refuses to allow his workers to leave the property in order to vote. (In other words, the employer currently has no specific duty to enable his workers to leave the property to vote.) To see that the existence of such a rule may well matter, one might ask whether the existing remedies for unjustified detention gives the workers what they want: namely, the right to vote or damages designed to make good any interference. If the law and its existing remedies do not do so, then it seems reasonable to conclude that such conduct by private parties is both repugnant to the right to vote and requires the crafting of a new, more specific, rule of common law and the creation of remedies adequate to the right. See *Bel Porto School Governing Body & Others v Premier, Western Cape, & Another* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC)('*Bel Porto*')(Mokgoro J and Sachs J, dissenting, note that 'if a court finds law or conduct inconsistent with the Constitution, it must declare that law or conduct to be invalid to the extent of its inconsistency. In addition to the declaration, the court may proceed to provide additional appropriate relief. Sometimes a declaration of invalidity may not be sufficient, or appropriate on its own. The

(iii) *The preferred reading, the no-law thesis and the problem of surplusage*

It should be clear, from the jurisprudential arguments in § 31.2 regarding fortuity of form, the arbitrariness of application, the untenability of the public-private distinction, and judicial boundedness, coupled with the detailed textual arguments already offered in § 31.4, that FC s 8(1) alone could do all of the application work required by the Bill of Rights (without engendering a problem of surplusage.) In short, FC s 8(1) functions as a reply to all of the primary objections of Justice

constitutional defect might lie in the incapacity of the common law or legislation to respond to the demands of the Bill of Rights. Section 8(3) then requires that the Court should develop a suitable remedy. No particular remedy, apart from the declaration of invalidity, is dictated for any particular violation of a fundamental right. Because the provision of remedies is open-ended and therefore inherently flexible, Courts may come up with a variety of remedies in addition to a declaration of constitutional invalidity. An 'all-or-nothing' decision is therefore not the only option.') See also *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) at para 27 (Kriegler J writes that '[o]ur flexibility in providing remedies may affect our understanding of the right.' Kriegler J's comment requires amplification. The flexibility of which he speaks should not be viewed as a negative capability. Rather an expansive approach to remedies has the attendant consequence of expanding our understanding of what a right protects. Indeed, Kriegler J notes that South Africa compares quite favorably to other jurisdictions in terms of the 'broad range of remedial options [available] when rights are threatened or infringed.')

The hypothetical voting rights case reminds us of the fact that FC s 8(2) raises questions not of application, but of interpretation. Having said that FC s 8(2) raises questions not of application, but of interpretation, there remain two possible readings of the section: a strong reading and or a weak reading. On the strong reading, a right will apply to a natural person or a juristic person unless the right makes expressly clear that only certain kinds of relationships are meant to be protected by it. For example, the rights to property, housing, health care, food, water, social security, education, information and the rights of children and arrested, detained and accused persons contain wording that may seem to limit the ambit of those rights — in large part or whole — to relationships between the state and individuals and thereby resist application to relationships between natural and/or juristic persons currently ungoverned by any express rule of law. But appearances can be deceiving. As Frank Michelman presciently pointed out several years ago, a compelling case can be made for extending the rights to housing, food and water to the many feudal private relationships which currently operate in both agricultural and urban communities. Assume that an NGO committed to providing adequate, affordable housing to South Africa's poor attempts to lease a large unused expanse of land from a landowner on the outskirts of Johannesburg. The landowner refuses. He says he would prefer the land to lie fallow. The NGO institutes an action against the landowner asserting that FC s 26(1)'s right to adequate housing applies to private relationships ungoverned by statute or regulation and that it trumps the common-law right to alienate one's property as one wishes. The argument that FC s 26(1) applies to private relationships is given greater force when FC s 26(1) is compared with FC s 26(2). FC s 26(2) requires that the state take 'reasonable legislative and other measures . . . to achieve the progressive realization of this right.' FC 26(1), so the argument goes, would have been unnecessary — redundant — unless it applied to relationships other than the state-citizen relationships contemplated by FC s 26(2). Michelman's example asks us to reconsider our initial intuitions regarding the applicability of socio-economic rights to private relationships ungoverned by statute or regulation. Remarks of Frank Michelman *Centre for Applied Legal Studies Seminar on Horizontality and the 1996 Constitution* (28 January 1997). Indeed, the Constitutional Court recently took a significant step in that direction. See *President of the Republic & Others v Modderklip Boerdery (PTY) Ltd* CCT 20/4 (13 May 2005) at para 26 (Constitutional Court acknowledges possible horizontal application of FC s 25(1) to land invasions.) See also Danie Brand 'Socio-Economic Rights in FC s 27: Health Care, Food, Water and Social Security' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 56. The weaker reading of FC s 8(2) precludes, tout court, the application of certain rights to conduct by and relationships between natural and/or juristic persons. Michelman's example, and the recent decisions identified above, undercut this second, weaker reading of FC s 8(2).

Kentridge in *Du Plessis*: namely, that the absence of the phrases 'all law' and 'the judiciary' from IC s 7(1) indicated that IC Chapter 3 did not apply horizontally.

As we have already seen, the additional presence of FC ss 8(2) and (3) generates multiple possible readings.[1] Some surplusage seems inevitable. Even allowing for the possibility of surplusage, the good faith reconstruction of *Khumalo* produces so many anomalies as to warrant rejection. The question, of course, is whether the preferred reading offered in this chapter better meets the challenges of the text and the charge of surplusage.

As Frank Michelman notes, according to the preferred reading, I am obliged to defend some form of a 'no-law thesis' (NLT) in order to give FC s 8(2) a meaningful role. In its strongest possible form (a form I do not defend), the NLT stands for the proposition that FC s 8(2) covers dispute-generating conduct between private actors over an aspect of social life that is not currently governed by any rule of law *at all*. As a philosophical matter, I agree with Michelman that the NLT so characterized is vulnerable to the charge that, in fact, all social disputes that are disposed of by a court of law are governed by some rule of law. On the Hohfeldian account of law — which I employed as part of the critique of *Du Plessis* — when a judge grants a defendant's claim of absolution on the grounds that the common law imposes no duty on the defendant, the judgment cloaks the defendant's conduct, relative to the plaintiff, in a legal relation called 'privilege'. Privilege is not the absence of law. When the judge grants the plea for absolution, she is applying the law in the defendant's favour.

I am not defending the strongest possible form of the NLT. I am defending a much narrower version of the NLT which stands for the proposition that while a body of extant rules — or even background norms — may be said to govern a particular set of private relationships, the purpose of FC s 8(2) — along with FC s 8(3) — is to get us to recognize that the law as it stands may not give adequate effect to a provision, or multiple provisions, in the Bill of Rights. This narrow version of the NLT — and the narrow construction of FC s 8(2) — does not offend the Hohfeldian account to which both Michelman and I subscribe. It merely emphasizes an obvious aspect about our extant jurisprudence to which the drafters of the Final Constitution clearly wanted us to attend: that there is a gap between the body of law to which we are currently subject and the idealized, but still inchoate, account of the law to which we aspire under the Final Constitution. Justices Mokgoro and Sachs recognize this 'gappiness' in our law in *Bel Porto* when they write that:

> [I]f a court finds law or conduct inconsistent with the Constitution, it must declare that law or conduct to be invalid to the extent of its inconsistency. In addition to the declaration, the court may proceed to provide additional appropriate relief. Sometimes a declaration of invalidity may not be sufficient, or appropriate on its own. The constitutional defect might lie in the incapacity of the common law or legislation to respond to the demands of the Bill of Rights. Section 8(3) then requires that the Court should develop a suitable remedy.[2]

[1] One could imagine background conditions in which all readers would arrive at the same conclusion about the meaning of FC s 8. But the current differences in political orientation towards this issue, coupled with the text's flawed phrasing, over-determine the grounds for disagreement on the meaning of FC s 8.

[2] *Bel Porto* (supra) at para 180. Though all law may, as the Constitutional Court states, derive its force from the Final Constitution, not all law adequately reflects the basic law's dictates. The Constitutional

It would seem, therefore, that to be saddled with the weaker version of the NLT is not quite the burden Professor Michelman initially anticipated. The weaker version of the NLT splits the difference between the strong version of the NLT and the Hohfeldian notion that the law never runs out. The distinction with a difference is the weak NLT's acknowledgement of the 'gap' identified by the Final Constitution, in general, and FC ss 8(2) and (3), in particular. That gap is the space between our extant body of express rules of law — the 'law that is' — and the prescriptive content of the substantive provisions of the Bill of Rights — the 'law is what it is becoming'. So to recap. It is true that there is, in fact, never any conduct that is not law governed; it is also true that there will be conduct that is not governed by an express rule of law that is consistent with the Final Constitution.

It should be apparent now that the preferred reading attempts to meet the surplusage challenge in four discrete but related ways. The first two arguments are grounded in intention and in perception. Because my preferred reading of FC s 8 is an idealist account, the gloss these arguments place on FC s 8(2) ought not to be understood in terms of, nor framed by, theories of original intent.

Despite the persistence of views to the contrary, FC s 8(2) makes little sense other than as textual response to the outcome in *Du Plessis*. However one chooses to read FC s 8(2), it must stand — at a minimum — for the proposition that some of the substantive provisions in the Bill of Rights will apply to some disputes between private parties currently governed by rules of common law. That proposition is different in kind from the *Du Plessis* Court's conclusion that no such general invitation to apply the Bill of Rights to private disputes could be gleaned from IC ss 7(1) and 7(2). For a South African audience inclined not to apply the Bill of Rights to common law disputes between private parties, such an invitation does real work.

By distinguishing between 'law' and 'no-law', FC s 8(2) — on my account — fits the jurisprudential predispositions of a fair number of South African lawyers. We need not agree as to whether the Hohfeldian account is correct. 'The truth of the matter' is besides the point for any attempt to understand what the drafters meant and how they expected to be read. Many lawyers are accustomed to seeing 'gaps', 'holes', 'no-law spaces' where the law imposes no duty on a party to act in a particular way. FC s 8(2) and FC s 8(3) speaks to that way of perceiving the law by telling us that conduct which does not warrant censure under the current non-constitutional regime of law will still be subject to the provisions of the Bill of

Court had, under the Interim Constitution, refused to extend the force of such an argument to the question of whether common law disputes between private parties are subject to the direct application of the Bill of Rights. FC s 8(2) invited, as Steve Ellmann gently puts it, the Constitutional Court to revisit that judgment. Steven Ellmann 'A Constitutional Confluence: American State Action Law and the Application of Socio-Economic Rights Guarantees to Private Actors' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 444; See discussion of Steven Ellmann's work at § 31, Appendix 4*(c)* infra.

Rights, and, if that conduct fails the FC s 8(2) mandated 'test' for Bill of Rights consistency, then the courts are, under FC s 8(3), obliged to craft a rule of law that does impose duties on the party whose conduct or reliance on a rule of law can no longer be justified. FC ss 8(2) and 8(3) fill in the gaps. For an audience that tends not to buy the Hohfeldian account, my preferred reading of FC s 8(2) does real work.

These two intentionalist readings serve both pragmatic and rhetorical ends. Pragmatic: the reading relies upon what these words in FC s 8 are generally understood to mean. Rhetorical: the reading opens up the interpretive space for my idealist account by relying on what most readers understand the words to mean and thus securing initial acceptance for the propositions that follow. (NB: If there is still surplusage after all is said and done, then there is surplusage for a reason — namely a pre-disposition of the drafters and the readers to talk a certain way.) It should also be clear that while these two intentionalist readings support just about every account of FC s 8(2) — *Khumalo*, the good faith reconstruction, and my idealist account — they do not exhaust the possible meanings of the clause. My reading of FC s 8(2) narrows the space afforded by the two intentionalist readings in a manner that will permit FC s 8(2) to still fit my readings of FC ss 8(1) and 8(3). My reading, while anchored to a broadly shared understanding of the words in the text, is not, however, constrained by a particular version of the drafting history.

Despite having given FC s 8(2) apparent purpose, I am not yet home free. While this construction of FC s 8(2) gives it something distinctive to do in the eyes of the drafters and the readers, it still must cohere with my reading of FC s 8 as a whole. And it does. The gap identified by FC s 8(2) is not between the absolute absence of law and express rules of law. The gap is between extant rules of law and those rules of law that must exist in order for our law to be consistent with the Final Constitution. Again, FC s 8(2) reminds us of the inevitable, but not ineffable, presence of such gaps, and tells us to fill them in where appropriate.

Does this reading cohere with the preferred reading of FC s 8(1)? It certainly does to the extent that the weak NLT construction of FC s 8(2) eliminates any doubt *(a)* about the application of the substantive provisions of the Bill of Rights to disputes between private parties, in general, and *(b)* about the ability to use the Bill of Rights to develop new rules of law and new remedies that will give adequate effect to the specific provisions of the Bill, in particular.

One response is that this notion of an aspirational gap is equally true of express rules of law engaged by FC s 8(1) — be they statute, regulation, common law, or customary law. A second response — again along Hohfeldian lines — is that one could make do with FC s 8(1) alone. (Then again, I would say, we could make do without FC s 8 in its entirety.[1]) Both assertions are true. An application doctrine

[1] FC s 8(1), FC s 8(2) and FCs 8(3), properly understood, express canons of constitutional interpretation. In this instance, they tell the courts what kinds of law are engaged by the substantive provisions of the Bill of Rights, what conduct is engaged by these provisions and how to remedy any defects or deficiences in the law. So, for example, *Du Plessis* told us that one canon of constitutional interpretation under the Interim Constitution's Bill of Rights was that the substantive provisions of the Bill did not apply directly to disputes between private persons governed by common law. *Khumalo* rejects

grounded solely in FC s 8(1) would be neat, comprehensive and require no special pleading. But in constitutional law, as in life, 'you must dance with who brung ya.' FC s 8(2) forces us to linger a little longer on the floor.

(d) Section 8(3)

FC s 8(3) reads:

> In applying the provisions of the Bill of Rights to natural and juristic persons in terms of subsection (2), a court —
> *(a)* in order to give effect to a right in the Bill, must apply, or where necessary develop, the common law to the extent that legislation does not give effect to that right; and
> *(b)* may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(i) *What the courts say FC s 8(3) means*

According to *Khumalo*, under FC s 8(3)*(a)*, a court will be called upon to craft a new rule of common law if, in the normal course of Bill of Rights analysis under FC s 8(2), the right is deemed to have been infringed. In arriving at its conclusions, the *Khumalo* Court made much of the potential redundancy of FC s 8(3) if FC s 8(1) was to be given the reading pressed upon it by counsel. But as the above discussion of FC s 8(2) is meant to demonstrate, the Constitutional Court has ignored both the logic and the content of its construction of FC s 8(3) in a welter of other cases.

As it turns out, FC s 8(3) does work without FC s 8(2). Lots of work.

For example, the Constitutional Court in *Thebus* states that where a court undertakes the development of the common law under FC s 39(2), the 'courts are enjoined,' under FC ss 8(3)*(a)* and *(b)*, 'to apply and, if necessary, to develop the common law in order to give effect to a protected right, provided that any limitation is in accordance with s 36'.[1] *Thebus* is not a FC s 8(2) case.

In *Du Plessis v Road Accident Fund*, the Supreme Court of Appeal wrote that '[i]n terms of s 8 of the Constitution a Court, in order to give effect to a right in the Bill of Rights, must develop the common law to the extent that legislation does not give effect to that right.'[2] *Road Accident Fund* is not a FC s 8(2) case.

In *Bel Porto School Governing Body v Premier, Western Cape*, several justices on the Constitutional Court observed that

> '[t]here are several provisions in the Constitution which are important to bear in mind when considering constitutional remedies, in particular ss 38, 172(1), *8(3)*, and 39(2) . . . . In

that canon with respect to the question of whether the substantive provisions of the Final Constitution's Bill of Rights can apply directly to disputes between private persons governed by common law. The new canon reads that they *may*. More than that FC s 8 does not say.

[1] *Thebus* (supra) at para 25.

[2] 2004 (1) SA 359 (SCA), 2003 (11) BCLR 1220 (SCA)('*Road Accident Fund*') at para 35.

> addition to [a] declaration of invalidity, the court may proceed to provide additional appropriate relief. Sometimes a declaration of invalidity may not be sufficient, or appropriate on its own.[1]

Bel Porto is not a FC s 8(2) case.

In *Petersen v Maintenance Officer, Simon's Town Maintenance Court,* the Cape High Court found that 'an existing common law rule violated an extra-marital child's constitutional rights to equality and dignity', that the 'common law rule [was] unreasonable and unjustifiable and should be declared unconstitutional and invalid,' and FC 's 8(3)*(a)* of the Constitution enjoins the Court in order to give effect to a right in the Bill of Rights set out in Chap 2 of the Constitution, where necessary, to develop the common law to the extent that legislation does not give effect to that right.'[2] *Petersen* is not — at least on the Court's own analysis — a FC s 8(2) case.

Why does FC s 8(3) feature in non-FC s 8(2) cases? As I note below in the discussion of the development of the common law under FC s 39(2), a profusion of provisions — from FC ss 1, 7, 8, 38, 39, 167, 172 to 173 — inform the courts' assessment of the judiciary's capacity to craft new common law remedies. FC s 8(3) is simply one of the sections that the courts routinely cite when they intend to create a new common law rule and a new common law remedy.

As for the general response of the courts to the specific demands of the text of FC ss 8(3)*(a)* and *(b)*, perhaps van der Westhuizen J, in *Holomisa v Khumalo*, put it best: 'I am not going into the philosophical and academic debate around the meaning and interpretation of this sub-clause.'[3] Whatever FC s 8(3) *really* means, the Constitutional Court has, before and after *Khumalo*, attributed to the sub-clause meaning that is both independent of and not exhausted by the meaning that counsel in *Khumalo* (and I) would attach to FC s 8(1). Given that this is the case, the judgments in *Thebus* and *Bel Porto* have already effectively responded to the surplusage objection raised in *Khumalo*.

(ii) *What FC s 8(3) should mean*

It should be obvious that, pace *Khumalo*, (FC s 8(3) does have a purpose once we give both FC s 8(1) and FC s 8(2) their appropriate extension.) Where law or conduct is found to violate a constitutional right, FC s 8(3) provides the mechanism for the creation of a new rule of law and a new remedy. On its own terms, FC s 8(3) provides the mechanism for the creation of a rule where, heretofore, neither an express rule of common law nor a provision of legislation gave adequate expression to the demands of a specific constitutional right.

As a matter of black letter constitutional law, FC s 8(3) retains a purpose even where FC s 8(2) is not part of the application or the interpretation analysis on a given case. It has been deployed both in terms of direct application under

[1] 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) at para 180.
[2] 2004 (2) SA 56 (C), 2004 (2) BCLR 205 (C) at para 8.
[3] 2002 (3) SA 38 (T).

FC s 8(1) and indirect application under s 39(2). FC s 8(3) simply reinforces the courts' inherent power to create rules and remedies where the Bill of Rights so demands.[1]

(iii) *Meaningless phrases in FC s 8(3)*

There are several phrases in FC s 8(3) to which the courts have refused to attend. Part of the reason that these phrases have not been defined is that the phrases may well be meaningless.

The phrase 'must apply' in that part of FC s 8(3)*(a)* that says a court 'must apply, or where necessary develop, the common law', adds nothing. If applying the existing common law was all that was necessary to give effect to a right, then that would be identical to saying that the extant common law is consonant with the dictates of the right in question. One does not need FC s 8(3)*(a)* to keep the common law as it is.

The phrase 'to the extent that legislation does not give effect to that right' in that part of FC s 8(3)*(a)* which states that a court 'must … develop … the common law to the extent that legislation does not give effect to that right,' adds nothing. As with the phrase 'must apply … the common law', if applying the protection of existing legislation were all that was necessary to give effect to a right, then that would be the same as saying that no new remedies need be created. The Constitutional Court in *National Education Health and Allied Workers*

[1] The language of FC s 8(3) is certainly confusing and misleading. In the First Edition of this work, I suggested that the section appeared to be designed to cut back on the extent to which the Bill of Rights can be used to effect radical alterations to the existing body of common law and that it made the existing body of common law the departure point for analysis of the constitutionality of particular rules of common law. I was wrong: at least about the intent of the drafters. According to Halton Cheadle, all the parties in the Constitutional Assembly supported direct horizontal application. They simply differed on the best language to make such intent manifest. Remarks of Halton Cheadle *Centre for Applied Legal Studies Seminar on Horizontality and the 1996 Constitution* (28 January 1997). See also Halton Cheadle, 'Application' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 19. On this view, the changes made to FC ss 8(2) and (3) between 23 April 1996 and 8 May 1996 reflect nothing more than the efforts of the parties to achieve optimal transparency of their intent. Halton Cheadle may be correct about the general intent of the drafters. But his remarks shed absolutely no light on the content of FC s 8(3). To get a better sense of how FC s 8(3) should be understood, it is worth comparing the wording of FC s 8(3) in the 23 April 1996 draft with the final wording of FC s 8(3). The 23 April 1996 version read, in relevant part: 'When a right in the Bill of Rights binds a natural or juristic person, and there is no law of general application that grants a remedy based upon that right, a court must develop a remedy based upon that right . . .' The 23 April 1996 version of FC s 8(3) requires a court to create a new remedy or a cause of action that makes good the requirements of an impaired right where no adequate remedy at common law or statute exists. So understood, this earlier incarnation of FC s 8(3) does not appear to demand that one take a position on whether FC s 8(2) engages law or conduct or both. Whether one believes that the common law never runs out or that common law consists of only those rules that have been expressly articulated by a court, the 23 April 1996 version of FC s 8(3), when read with FC ss 8(1) and (2), reminds us that: (1) rules of common law are, in fact, subject to direct constitutional review; and (2) where no legal remedy gives effect to the demands of a specific provision in the Bill of Rights, a new remedy must be formulated to do so. That is exactly how we should read the final version. See *S v Zuma* 1995 (2) SA 642, 651 (CC), 1995 (4) BCLR 401 (CC)(Discussing the relationship between constitutional law and rules of common law, the Court wrote: 'Proper attention to our legal history, traditions and usages does not imply that constitutional rights should be cut down by reading implicit restrictions into them, so as to bring them into line with the common law.')

Union v University of Cape Town captures the logic — or the lack thereof — of this part of FC s 8(3)*(a)*'s formula:

> In many cases, constitutional rights can be honoured effectively only if legislation is enacted. *Such legislation will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution.* Where the Legislature enacts legislation in the effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose. Moreover, the proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and as such will be a constitutional matter. *In this way, the courts and the Legislature act in partnership to give life to constitutional rights.*[1]

As the *NEHAWU* Court makes clear, the existence of legislation designed to give effect to the right does matter. But it only matters to the extent that the legislation gives constitutionally adequate effect to the requirements of the right. Should an act, say the Labour Relations Act at issue in *NEHAWU*, fail to effect constitutional objectives or fail to achieve constitutional objectives by constitutionally permissible means, it does not satisfy FC s 8(3)*(a)*. If it does satisfy constitutional obligations within constitutional limits, then the issue ostensibly addressed by FC s 8(3)*(a)* never arises. One does not need FC s 8(3)*(a)* to keep both the common law and legislation as it is.[2]

The final phrase in FC s 8(3) to which the courts have refused to attend is that part of FC s 8(3)*(b)* that says a court 'may develop rules of the common law to limit *the* right, provided that the limitation is in accordance with section 36(1).' One would have thought that the whole point of FC s 8(3) was to give adequate effect to a provision of the Bill of Rights where no express rule of law currently does so. It is difficult to fathom how the injunction to create such new remedies to give effect to 'the' right can possibly constitute a limitation on that same right. To see that the right limited is the same right to which the new remedy gives effect, look at the word 'the'. If the drafters had meant to specify that another right was infringed by the new rule of or remedy at common law, then it would have been necessary for them to use either 'a' or 'another'. Moreover, 'the right' referred to in FC s 8(3)*(b)* must refer to that same right referred to in FC s 8(3)*(a)* in order for either to make any sense.

(e) Section 39(2)

FC s 39(2) reads:

> When interpreting any legislation and *when* developing the common law and customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights (emphasis added).

[1] 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC)('*NEHAWU*') at para 14 (emphasis added).

[2] As I note below in the section on 'Shared constitutional interpretation', both the *NEHAWU* Court and FC s 8(3)*(a)* indicate that the courts and legislatures must work together to give effect to the rights enshrined in the Final Constitution. See § 31.4*(e)*(vii) infra.

(i) *What FC s 39(2) means*

What is the import of FC s 39(2), now that, post-*Khumalo*, FC s 8 subjects *all* disputes between the state and the individual and some disputes between individuals to the direct application of the substantive provisions of the Bill of Rights? At a minimum, FC s 39(2) requires the courts to interpret legislation or to develop the common law in light of the general objects of the Bill of Rights where no specific right can be relied upon by a party challenging a rule of law, the extant construction of a rule of law, or conduct.

(ii) *FC s 39(2) and the process of developing the common law*

The Constitutional Court, in *Carmichele*, wrote as follows:

> It needs to be stressed that the obligation of Courts to develop the common law in the context of the s 39(2) objectives, is not purely discretional. On the contrary, it is implicit in s 39(2) read with s 173 that where the common law as it stands is deficient in promoting the s 39(2) objectives, the Courts are under a general obligation to develop it appropriately. We say a 'general obligation' because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under s 39(2).[1]

As to what the FC s 39(2) inquiry requires of any tribunal, the *Carmichele* Court wrote:

> [T]here are two stages to the inquiry a court is obliged to undertake . . . The first stage is to consider whether the existing common law, having regard to the s 39(2) objectives, requires development in accordance with these objectives. This inquiry requires a reconsideration of the common law in the light of s 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the s 39(2) objectives.[2]

Despite the fact that these passages from *Carmichele* have been repeatedly quoted with approval, the subsequent case law has thrown up several problems with this initial construction of FC s 39(2).

(aa) FC s 39(2) and the over-determination of changes to the common law

The *Thebus* Court's gloss on FC s 39(2) obligation 'to develop the common law in the context of the s 39(2) objectives' is, perhaps, the most perplexing. Justice Moseneke, for the *Thebus* Court, writes:

> It seems to me that the need to develop the common law under s 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule

[1] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC)('*Carmichele*').
[2] Ibid at para 40.

> of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the 'objective normative value system' found in the Constitution.[1]

The *Carmichele* Court's use of the term FC s 39(2) objectives does not seem to embrace the two-fold meaning that the *Thebus* Court attributes to FC s 39(2). Fulfilling FC s 39(2) objectives is not about direct challenges to laws that conflict with specific provisions of the Bill of Rights. That is why we have the various provisions of FC s 8. This gloss of the *Thebus* Court on FC s 39(2) offends the 'no surplusage' canon of constitutional interpretation by making parts of FC s 8 redundant.

As I note below, the approach of the *Thebus* Court does not merely suffer from a lack of analytic precision.[2] The over-determination of the textual bases for changing the common law contradicts the Constitutional Court's own distinctions between (1) direct application and indirect application and (2) those remedies that flow from findings of constitutional invalidity and those remedies that flow from a re-formulation or a re-interpretation of the law in light of the spirit, purport and objects of the Bill of Rights. If the Constitutional Court's judgments in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[3] or *Khumalo* tell us anything, it is that FC ss 8(1) and s 8(2) engage rules of common law directly, and that remedies for any violation of a specific provision take place in terms of FC ss 172*(a)* and 172*(b)* or 8(3). The Constitutional Court in *Amod* appears to address the distinction between changes to the common law via FC ss 8(2) and (3) and changes to the common law via FC s 39(2). The *Amod* Court writes:

> Section 8(2) makes the Bill of Rights [directly] binding on natural and juristic persons . . . Section 8(3) requires Courts in giving effect to s 8(2) to 'apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right . . .' The development of a coherent system of law may call for the development of the common law under . . . s 39(2) of the 1996 Constitution to be done in a manner consistent with the way in which the law will be developed under s 8(2) and (3) of the 1996 Constitution . . . When a constitutional matter is one which turns on the direct application of the Constitution . . . considerations of costs and time may make it desirable that the appeal be brought directly to this Court. But when the constitutional matter involves the development of the common law, the position is different. The Supreme Court of Appeal has jurisdiction to develop the common law in all matters including constitutional matters. Because of the breadth of its jurisdiction and its expertise in the common law, its views as to whether the common law should or should not be developed in a 'constitutional matter' are of particular importance.[4]

The *Amod* Court recognizes that the unitary system of law contemplated by the Final Constitution '*may*' require development of the law as a result of the

[1] *Thebus* (supra) at para 28.
[2] See § 31.4*(e)*(ii)(aa), 'FC s 39(2) and the over-determination of changes to the Common Law', infra.
[3] 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)('*NCGLE I*') at paras 90 and 96.
[4] *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC), 1998 (10) BCLR 1207 (CC)('*Amod*') at paras 31–33. See also *De Freitas & Another v Society of Advocates of Natal (Natal Law Society Intervening)* 1998 (11) BCLR 1345 (CC) at paras 20–21.

indirect application of the Bill of Rights in a manner that coheres with the development of the law as a result of the direct application of the Bill of Rights. It is difficult to make any sense of this observation unless FC s 8 analysis and FC s 39(2) analysis are different in kind.

Is there any further evidence for the proposition that FC s 39(2) is not the intended engine for changes in the common law that flow from the direct application of the Bill of Rights? Kentridge J held in *Du Plessis* that the purpose of FC s 39(2)'s predecessor — IC s 35(3) — was to enable the judiciary to develop common law through the indirect application of the Bill of Rights.[1] High Courts in both *Eastern Metropolitan Substructure v Peter Klein Investments (Pty)*[2] and *Bongoza v Minister of Correctional Services*[3] have noted that the complainants before them 'did not contend that a specific constitutional right was violated,' but rather requested that the courts engage in 'the process of developing common law in the context of s 39(2).'[4]

(bb) The obligation to develop the Common Law

Carmichele's general, and not purely discretionary, obligation to develop the common law reflects an attempt to chart a course between the Scylla of transformation and the Charybdis of tradition.[5] On the one hand, the Constitutional Court's constitutional supremacy doctrine has expanded its limited jurisdiction such that every common law case — and any other exercise of judicial authority — is, potentially, a constitutional matter.[6] As the Constitutional Court notes in *Boesak*:

> The development of, or the failure to develop, a common law rule by the Supreme Court of Appeal may constitute a constitutional matter. This may occur if the Supreme Court of Appeal developed, or failed to develop, the rule under circumstances inconsistent with its obligation under s 39(2) of the Constitution or with some other right or principle of the Constitution. The application of a legal rule by the Supreme Court of Appeal may constitute a constitutional matter. This may occur if the application of a rule is inconsistent with some right or principle of the Constitution.[7]

[1] *Du Plessis* (supra) at paras 60 and 61.

[2] 2001 (4) SA 661 (W) at para 40 (Citing *Du Plessis*, the *Eastern Metropolitan* Court wrote that 'the facts of this case call for an indirect application of the fundamental rights provisions embodied in the Constitution. The degree of development required is of a limited nature. What is required, in the present instance, is not a setting aside of the common-law rule but an incremental change in its application, necessary to ensure that the underlying values and constitutional objectives are achieved. Instead of permitting a barrier to the raising of estoppel against a public authority exercising public power, the common law should be developed to emphasise the equitable nature of estoppel, and its function as a rule allocating the incidence of loss.')

[3] 2002 (6) SA 330 (TkH) at para 7 quoting *Carmichele* (supra) at para 36.

[4] Ibid at para 7.

[5] See § 31.4*(e)*(iv), 'FC s 39(2) and the transformation of the common law', infra.

[6] For more on the jurisdictional implications of the Court's constitutional supremacy doctrine, see Frank Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11.

[7] *Boesak* (supra) at para 15.

In *S v Pennington*, the Constitutional Court unequivocally places itself at the top of the constitutional food chain. It wrote:

> On a proper construction of the 1996 Constitution there can be no doubt that this Court has appellate jurisdiction, including jurisdiction to hear appeals from decisions of the Supreme Court of Appeal on constitutional matters. Section 167(3)*(a)* of the 1996 Constitution provides that the Constitutional Court 'is the highest court in all constitutional matters'. Section 168(3) provides that the Supreme Court of Appeal 'may decide appeals in any matter. It is the highest court of appeal *except in constitutional matters*.' The 'highest' Court of appeal in respect of constitutional matters is therefore the Constitutional Court.[1]

On the other hand, the Constitutional Court has assured the Supreme Court of Appeal and the High Courts that this radical doctrine of constitutional supremacy does not mean that every judicial decision is meat for constitutional review or that the Constitutional Court will supplant the Supreme Court of Appeal as the guardian of the common law. In *S v Bierman*, the Constitutional Court wrote:

> It is clear that special leave to appeal against a decision of the Supreme Court of Appeal will be granted only when it is in the interests of justice to do so. This Court has . . . also held that where the development of a rule of the common law is in issue, this Court will be reluctant to grant an applicant leave to appeal directly to this Court and ordinarily requires the application to be heard first by the Supreme Court of Appeal . . . [W]here an applicant asserts that the common-law rules require reconsideration in the light of the Constitution, such arguments must be placed before the Supreme Court of Appeal before being raised in this Court.[2]

But while the Constitutional Court will accord due deference to the Supreme Court of Appeal with respect to the latter's role in the development of the common law, the Constitutional Court's retention of ultimate appellate jurisdiction in constitutional matters places a sword of Damocles over the Supreme Court of Appeal and any High Court that shirks the 'general' obligation to ensure the development of the common law in light of constitutional dictates.[3]

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[1] 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC) at para 10. FC s 167(6) makes the Constitutional Court's position absolutely clear: 'National legislation or the Rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court — *(a)* to bring a matter directly to the Constitutional Court; or *(b)* to appeal directly to the Constitutional Court from any other court.' The Pennington Court holds that the 'words "any other court" include the Supreme Court of Appeal.' Ibid.

[2] 2002 (5) SA 243 (CC), 2002 (10) BCLR 1078 (CC) at para 7.

[3] Lower courts have acceded to this hierarchy and division of labour. In *Carmichele v Minister of Safety and Security*, the High Court admitted that it had erred in failing to recognize its obligations under FC s 39(2). 2003 (2) SA 656 (C), 2002 (10) BCLR 1100 (C). Chetty J wrote:

> In upholding the appeal, the CC refrained from itself deciding whether the law of delict should be developed on the basis contended for on behalf of the plaintiff. What it did hold, however, was that 'where the common law deviates from the spirit, purport and objects of the Bill of Rights, the courts have an obligation to develop it by removing that deviation.' It furthermore held that under the Constitution, courts are obliged to develop the common law under s 39(2) of the Constitution and that both I and the SCA 'assumed that the pre-constitutional test for determining the wrongfulness of omissions in delictual actions of this kind should be applied,' and in so doing 'overlooked the demands of s 39(2)'. I must confess that I did not have regard to the demands of s 39(2).

Ibid at para 5.

How then should we understand the obligation that courts are under with respect to the development and interpretation of law in light of FC s 39(2)'s general objectives? As Danie Brand has pointed out, FC s 39(2)'s obligation should be read with both FC s 7(2)'s injunction that the judiciary must protect and promote the Bill of Rights and FC s 8(1)'s binding of the judiciary. These textual provisions, along with the Constitutional Court's jurisprudence on the unity of the law and constitutional jurisdiction, frame the preferred reading of FC s 39(2)'s obligation:

- Where courts decide that the rights asserted by a party do not apply directly to the dispute before the court in terms of either FC s 8(1) or FC s 8(2), then the court may still apply the Bill of Rights indirectly to the dispute before the court and modify the law accordingly;
- The language — 'when interpreting any legislation and when developing the common law and customary law' — obtains in a context in which specific constitutional rights are not being asserted expressly;
- A court *must* always infuse any law with the general spirit purport and objects of the Bill;[1]
- The courts must be prepared to raise, of their own accord, constitutional issues that may affect the interpretation of legislation or the development of the common law;[2]
- However, simply because an interpretation of a statutory provision or a common law rule could, in the abstract, raise some kind of constitutional issue does not mean that counsel must offer a free-standing constitutional argument in every dispute or that a tribunal must provide a constitutional analysis of the status of the common law, or a piece of legislation in every case in which such a rule is dispositive.[3]

(iii) *The development of the Common Law, interaction between FC s 39(2) and FC ss 7, 8, 38, 167, 172 and 173, and a difference in remedies*

The logic of the relationship between FC s 8 and FC s 39(2), post-*Khumalo*, is one

[1] The word 'must' marks a subtle shift in emphasis from IC s 35(3) to FC s 39(2). IC s 35(3) reads, in relevant part, that '[i]n . . . the development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter'. On the other hand, FC 39(2) reads, in relevant part, that 'when developing the common law and customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. Although 'shall' is rarely read as permissive in South African case law, the change to 'must' clearly reflects an intent both to make the language more natural and to make the contemplated development of the common law mandatory.

[2] The idea behind this reading is that there is now a core set of values — an objective normative value system — which undergirds our entire legal system. For a discussion of the meaning of 'an objective normative value system' in the context of FC s 39(2), see § 31.4*(e)*(viii) infra. See also *S v Thebus* 2003 (6) SA 505, 524–525 (CC), 2003 (10) BCLR 1100, 1119–1120 (CC)("The Constitution embodies an "objective normative value system" and . . . the influence of the fundamental constitutional values on the common law is authorized by s 39(2). It is within the matrix of this objective normative value system that the common law must be developed. Thus, under s 39(2), concepts which are reflective of, or premised upon, a given value system 'might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.')

[3] See *Bongoza v Minister of Correctional Services* 2002 (6) SA 330 (TkH) at para 8 (In refusing to develop the common law with regard to the laws of evidence, the court found 'that there is no reasonable possibility of another court coming to a different conclusion regarding the development of the common law involved in the present matter.')

that should require the courts to interpret legislation or to develop the common law in light of the general objects of the Bill of Rights *only* where no specific right can be relied upon by a party challenging a given rule of common law, the extant construction of a provision of legislation or conduct.[1] But the plethora of provisions that courts have relied upon when engaging the constitutionality of various rules of common law — from FC s 7, 8, 39, 167, 172 through 173 — has led to some confusion in the Constitutional Court itself about how FC s 39(2) operates. It is worth returning, in this regard, to the language of Moseneke J's judgment in *S v Thebus*:

> It seems to me that the need to develop the common law under s 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the 'objective normative value system' found in the Constitution.[2]

As we have already noted, textual over-determination for the development of the common law is just fine, until it leads the Constitutional Court to contradict its own textual grounds for distinguishing between different forms of application and various kinds of remedies. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Court wrote the following with regard to the common law offence of sodomy:

> In this judgment the conclusion has already been reached that this offence should be declared constitutionally invalid in its entirety. *This conclusion has been reached by a direct application of the Bill of Rights to a common law criminal offence, not by a process of developing the common law.*[3]

The *NCGLE I* Court is obliged by FC s 172(1)*(a)* to make an order of invalidity. FC s 172(1)*(b)* then empowers the Court to make any order that is 'just and equitable.' The *NCGLE I* rightly concludes that it is impossible to make an order under FC s 172(1)*(b)* which is just and equitable in relation to the invalidity of the inclusion of the offence of sodomy in the statutory schedules, without at the same time making such an order in relation to the invalidity of the common law offence itself.

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[1] Again, to risk repetition, direct challenges, which occur in terms of FC s 8, describe instances in which the prescriptive content of a specific provision or provisions of the Bill of Rights governs the law or the conduct at issue. Indirect challenges, which occur in terms of FC s 39(2), describe instances in which no specific provision of the Bill of Rights applies to law or to conduct. Indirect challenges rely upon the spirit, purport and objects of the entire Bill to interpret or to develop the law in order to settle the dispute before the court. A particular right may be relevant to the more amorphous assessment of whether a rule of law remains in step with more general spirit of our constitutional order. But it is relevant as a value, *not* a rule. For more on the distinction between rules and values, see Frank Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaarern, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11; *Minister at Home Affairs v National Institute of Crime Prevention* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC); § 31, Appendix 3*(a)*, infra.

[2] *Thebus* (supra) at para 28.

[3] *National Coalition for Gay &Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)('*NCGLE I*')(Emphasis added).

Similarly, in *Khumalo*, the Court wrote:

> In this case, the applicants are members of the media who are expressly identified as bearers of constitutional rights to freedom of expression. There can be no doubt that the law of defamation does affect the right to freedom of expression. Given the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by s 8(2) of the Constitution. The first question we need then to determine is whether the common law of defamation unjustifiably limits that right. If it does, it will be necessary to develop the common law in the manner contemplated by s 8(3) of the Constitution.[1]

Where an order of invalidity for a rule of common law that violates a specific provision of the Bill of Rights is sufficient, the courts should rely upon FC s 172. Where the common law violates a specific provision of the Bill of Rights and requires development in order to comport with constitutional dictates, courts should rely upon FC s 8(3).

The error made by the *Thebus* Court is quite similar to that which the Constitutional Court itself identified in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*. The *National Coalition for Gay and Lesbian Equality II* Court wrote:

> There is a clear distinction between interpreting legislation in a way which 'promote[s] the spirit, purport and objects of the Bill of Rights' as required by s 39(2) of the Constitution and the process of reading words into or severing them from a statutory provision which is a remedial measure under s 172(1)*(b)*, following upon a declaration of constitutional invalidity under s 172(1)*(a)* . . . The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid.[2]

In sum, FC ss 172 and 8(3) apply to instances in which the *direct* application of the Bill of Rights to a rule of common law requires one form of remedy. FC s 39(2) applies to instances in which the *indirect* application of the Bill of Rights to a rule of common law is ultimately determined to require the development of the common law and thus another form of remedy.

Assuming a court is able to keep straight the different remedial requirements that flow from direct application and indirect application, FC s 39(2) may be read together with a range of other provisions. But that probably assumes too much. At the moment the courts are apt to rely on a dizzying array of provisions in the Final Constitution when they choose to develop the common law: FC ss 7, 8, 38, 39(2), 167, 172 and 173. In *S v Lubisi: In re S v Lubisi & Others*, the High Court read FC s 173's protection of the courts' 'inherent power to protect and regulate their own process' — together with FC s 7 and FC s 8 — as 'establishing the Bill of Rights as the cornerstone of democracy and underlining the fact that the Judiciary is bound thereby, … as well as

[1] *Khumalo* (supra) at para 33.
[2] 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC)('*NCGLE II*') at para 24.

[FC] s 39(2).'[1] In *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*, the High Court read FC s 39(2) together with FC s 7 and FC s 8.[2] In *Petersen v Maintenance Officer, Simon's Town Maintenance Court,* the High Court runs FC s 39(2) into FC s 173 and FC s 8.[3] The *Petersen* Court makes clear our courts' general confusion about the textual bases for the development of the common law by saying too much about the provisions it invokes. In deciding that a common law rule articulated in *Motan* violated an extra-marital child's constitutional rights to equal support from maternal and paternal grandparents, Fourie J in *Petersen* writes that while he is

> bound by the decision in *Motan* with regard to the interpretation of the common law, . . . s 173 of the Constitution provides that the Court has the inherent power to develop the common law, taking into account the interests of justice. Section 8(3)*(a)* of the Constitution enjoins the Court in order to give effect to a right in the Bill of Rights set out in Chap 2 of the Constitution, where necessary, to develop the common law to the extent that legislation does not give effect to that right. Section 39(2) of the Constitution provides that when developing the common law, the Court must promote the spirit, purport and objects of the Bill of Rights.[4]

The common law rule articulated in *Motan* was deemed to have impaired, specifically, the rights to equality and dignity. Where, as in *Petersen*, rights bind directly a state actor under FC s 8(1), FC s 8(3)*(a)* is the appropriate mechanism for development of the common law.

The Supreme Court of Appeal is equally guilty of running these disparate and incompatible provisions together. In *Juglal v Shoprite Checkers (Pty) Ltd T/A Ok Franchise Division*, the Supreme Court of Appeal read the FC s 39(2) requirement to develop the common law in terms of FC ss 8 and 173. In *Du Plessis v Road Accident Fund,* the Supreme Court of Appeal used the same formula.[5] The *Road Accident Fund* Court wrote that:

> Section 173 of the Constitution provides that the Constitutional Court, this court and the High Courts have the inherent power to develop the common law, taking into account the interests of justice. In terms of s 8 of the Constitution a Court, in order to give effect to a right in the Bill of Rights, must develop the common law to the extent that legislation does not give effect to that right. A Court should in terms of s 39(2), when developing the common law, promote the spirit, purport, and objects of the Bill of Rights.[6]

The mistake the *Road Accident Fund* Court makes is identical to that made by the *Petersen* Court. In cases of direct application, the development of the common law proceeds under FC s 8(3). In cases of indirect application, the development of the common law proceeds under FC s 39(2).

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[1] 2004 (3) SA 520, 530 (T), 2003 (9) BCLR 1041, 1050 (T).
[2] 2004 (5) SA 124, 141 (W).
[3] 2004 (2) SA 56 (C), 2004 (2) BCLR 205 (C).
[4] Ibid at para 8.
[5] 2004 (1) SA 359 (SCA), 2003 (11) BCLR 1120 (SCA)('*Road Accident Fund*').
[6] Ibid at para 35.

(iv) *FC s 39(2) and the transformation of the common law*

As we noted already, much of the Constitutional Court's jurisprudence that engages FC s 39(2) attempts to chart a path between transformation and tradition. The combination of the legality principle or the rule of law doctrine and the doctrine of constitutional supremacy — as articulated in cases such as *Fedsure, Pharmaceutical Manufacturers* and *Carmichele* — radically expands the Constitutional Court's limited jurisdiction. By making every exercise of public power and every judicial construction of both law and conduct a 'constitutional matter', the Constitutional Court retains the capacity to review each and every judicial decision.[1] At the same time, the Constitutional Court has attempted to assuage the fears of courts of general jurisdiction that every judicial decision is in fact meat for constitutional review by the Constitutional Court.[2]

Not surprisingly, the Supreme Court and the High Courts have responded to this manichean construction of the doctrine of constitutional supremacy in a variety of different ways. The Supreme Court of Appeal has often cautioned against — and resisted — radical doctrinal change. It prefers to characterize FC s 39(2)'s obligation to transform the common law as one that requires incremental, not punctuated, evolution. In *Road Accident Fund*, the Supreme Court of Appeal noted that the Constitutional Court in *Carmichele* had 'quoted with approval a passage to the effect that the Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.'[3]

Some High Courts have adopted the Supreme Court of Appeal's incrementalist approach. In *Bongoza v Minister of Correctional Services*, the High Court emphasized the dicta in *Carmichele* that '(i)n exercising their powers to develop the common law, Judges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary.'[4] The *Bongoza* Court, in light of this dicta, concluded that: (1) FC s 39(2)'s obligations did not require an analysis of the constitutionality of common-law rules of evidence; and (2) no court — and by implication the Constitutional Court — could find that FC s 39(2) required a different conclusion.[5]

Other High Courts have accepted the Constitutional Court's invitation to revisit common law doctrine in light of the demands of FC s 39(2). In *S v Lubisi: In Re S v Lubisi & Others*, Bertelsmann J wrote that '[a]lthough the powers granted' to the court in terms of FC ss 39(2) and 173 'have to be exercised with caution

[1] See *S v Pennington* 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC) at para 10 ('On a proper construction of the 1996 Constitution there can be no doubt that this Court has appellate jurisdiction, including jurisdiction to hear appeals from decisions of the Supreme Court of Appeal on constitutional matters.') See also *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC), 1998 (10) BCLR 1207 (CC).

[2] *Bierman* (supra) at para 7. See also *Metcash* (supra) at para 14.

[3] *Road Accident Fund* (supra) at para 35.

[4] 2002 (6) SA 330 (TkH) at para 7 quoting *Carmichele* (supra) at para 36. See also *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W).

[5] Ibid at para 8.

and circumspection, the Constitution has broadened the scope for judicial activism where such appears to be in the interest of justice.'[1] He further wrote that:

> The debate on the rewards to be reaped by imaginative orders made by activist Judges on the one hand, and the dangers associated with an overzealous approach to usurp the function of the Legislature, or to transgress into the domain of the Executive on the other, are the subject of ongoing and vigorous debates in the European Union, the United States and other countries. In general, the conclusion may be drawn that an innovative approach is justified in all instances where it is motivated by a teleological interpretation of a constitution or treaty and has as its aim the proper realisation of the principles, ideals and values underlying the constitution or treaty concerned. The Constitutional Court has repeatedly emphasised that constitutional rights must be generously interpreted.[2]

(v) *FC s 39(2) as a mandatory canon of statutory interpretation*

The Constitutional Court has made it quite clear that FC s 39(2) creates a mandatory constitutional canon of statutory interpretation. In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit*, the Constitutional Court wrote: 'This means that all statutes must be interpreted through the prism of the Bill of Rights.'[3] The Constitutional Court amplified this point in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*:

> [N]o matter how indispensable they may be for the economic well-being of the country . . . [fiscal statutory provisions] are not immune to the discipline of the Constitution and must conform to its normative standards. In . . . *Carmichele* . . . , this Court held that the obligation of courts to develop the common law, in the context of the s 39(2) objectives, is not purely discretionary . . . The courts are under a general obligation to develop the common law appropriately where it is deficient, as it stands, in promoting the s 39(2) objectives. *There is a like obligation on the courts, when interpreting any legislation — including fiscal legislation — to promote those objectives.*[4]

The Constitutional Court had previously offered a similar, though not identical, gloss on FC s 39(2) in *National Coalition For Gay and Lesbian Equality v Minister of Home Affairs*.[5]

Lower courts have tracked the Constitutional Court's language in *Hyundai* and *FNB*. The High Court in *Bezuidenhout v Bezuidenhout* found that when 'determining whether to make a redistribution order and, if so, the extent of such order, [it

[1] 2004 (3) SA 520, 532 (T).
[2] Ibid at 532–533.
[3] 2001 (1) SA 545, 588 (CC), 2000 (2) SACR 349 (CC), 2000 (10) BCLR 1079 (CC)('*Hyundai*') at para 21.
[4] 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC)('*FNB*')(Emphasis added).
[5] *NCGLE II* (supra) at para 24 ('There is a clear distinction between interpreting legislation in a way which "promote[s] the spirit, purport and objects of the Bill of Rights" as *required* by s 39(2) of the Constitution and the process of reading words into or severing them from a statutory provision which is a remedial measure under s 172(1)*(b)*, following upon a declaration of constitutional invalidity under s 172(1)*(a)*. The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning.' (Emphasis added).)

was] required to interpret . . . the Act' in terms of FC s 39(2)'s requirement that all statutory interpretation 'must promote the spirit, purport and objects of the Bill of Rights.'[1] In *Paola v Jeeva NO*, the High Court found that it was bound to consider any and all constitutional implications of the statutory construction relied upon by the parties. Kondile J wrote that '[a]lthough the parties have not raised the issue of the constitutionality of s 7(1)*(b)*(ii) of the Act, this Court is constrained to advance the spirit, purport and objects of the Constitution in interpreting this section.'[2]

(vi) *Reading down*

FC s 39(2) enables courts to read down legislation so that it conforms to the dictates of the Bill of Rights.[3] In *S v Bhulwana*, the Constitutional Court held that a court may save a legislative section which is 'reasonably capable' of a more restrictive, but still constitutional, interpretation.[4] How does one read down? The wrong way round, as the court in *Zimbabwe Township Developers v Lou's Shoes Ltd* noted, is to 'interpret the Constitution in a restricted manner in order to accommodate the challenged legislation.'[5] The *Zimbabwe Township* court wrote that '[t]he Constitution must [first] be properly interpreted,' and '[t]hereafter the challenged legislation must be examined to see whether it can be interpreted to fit into the framework of the Constitution.'[6] The process of reading down presupposes: (1) an assessment by the court of the ambit of the right or rights in question and (2) a determination of whether the impugned statutory provision limits the right or rights so interpreted.[7]

Because FC s 39(2) — unlike its precursors IC ss 35(2) and 35(3) — does not distinguish between indirect application and reading down, courts have erroneously assumed that when courts are asked to read legislation in light of the spirit, purport and object of the Bill of Rights, they are *always* charged with the task of attempting to read legislation so that it conforms to the demands of a particular right or set of rights. But this cannot be so. First, there will inevitably be instances in which no particular right enshrined in FC Chapter 2 engages a given piece of legislation. In other words, the universe of legislation subject to the direct application of a particular right, or even all the rights in Chapter 2, is not coextensive with the universe of legislation subject to 'normal' legal analysis. Legis-

[1] 2003 (6) SA 691, 707 (C).
[2] 2002 (2) SA 391, 405–406 (D)('*Paola*').
[3] See *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) at para 21 quoting *Paola* (supra) at 405–406 ('Although there is no equivalent in s 39 of the Constitution to s 35(2) of the interim Constitution, the presumption of consistency with the Bill of Rights exists independently of its expression in s 35(2) of the interim Constitution.')
[4] 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 28.
[5] 1984 (2) SA 778, 783 (SCA).
[6] Ibid.
[7] *NCGLE II* (supra) at para 24. See also See Stu Woolman & Danie Brand 'Is There a Constitution in this Classroom? Constitutional Jurisdiction after *Walters* and *Afrox*' (2003) 18 *SA Public Law* 38; Jonathan Klaaren 'Remedies' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Chapter 9.

lation that is subject to two-step fundamental rights analysis as a result of direct application of the Bill of Rights is a subset of legislation subject to judicial interpretation. Second, the instruction to read legislation in light of the spirit, purport and objects of the Chapter is, in cases where no right can be said to apply directly, a constitutionally-mandated canon of statutory interpretation. This new canon requires that given two possible readings of a provision, one that takes into account the general value commitments to be found in Chapter 2 and one that does not take these values into account (assuming only two such possible readings), the former is to be preferred. In sum, FC s 39(2) contemplates at least two different kinds of interpretation of legislation. A court may be asked to read down legislation so that it conforms to the dictates of a particular right (or rights) in the Bill of Rights. A court may be asked to interpret legislation so that it offers the best fit with the Chapter's general commitments.[1]

It should also be obvious that reading down is a fundamentally different process than reading in. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the Constitutional Court wrote:

> There is a clear distinction between interpreting legislation in a way which 'promote[s] the spirit, purport and objects of the Bill of Rights' as required by s 39(2) of the Constitution and the process of reading words into or severing them from a statutory provision which is a remedial measure under s 172(1)*(b)*, following upon a declaration of constitutional in-

[1] In *Govender v Minister of Safety and Security,* the SCA thought that, in reinterpreting section 49(1)*(b)* of the Criminal Procedure Act 51 of 1977 ('CPA'), it was engaging in 'reading down'. 2001 (4) SA 273 (SCA), 2001 (11) BCLR 1197 (SCA), 2001 (2) SACR 197 (SCA)('*Govender*'). That is, it believed that it was reinterpreting section 49(1)*(b)* to accord with constitutional dictates, as part of a process of direct application, so as to avoid having to invalidate it. This characterization suggests that the High Court's broader finding that the SCA 'overstepped its constitutional mandate' — by engaging in direct rather than indirect application — is on target. Throughout *Govender*, Olivier JA appears to assume that the SCA had the power to apply the Interim Constitution's Bill of Rights directly to section 49(1)*(b)* of the CPA. (It did not.) For instance, at the outset of his constitutional inquiry, Olivier JA makes the following statement: 'Section 49(1) of the Act self-evidently imposes a limitation on these [constitutional] rights. The question then is whether the limitation it imposes as properly interpreted passes the tests laid down in s 33(1) of the interim Constitution'. *Govender* (supra) at 280. Further on he states that after determining the 'objects and purport of the Act or the section under consideration', a judge must '*examine the ambit and meaning of the rights protected by the Constitution*', 'ascertain whether it is reasonably possible to interpret the Act or section under consideration in such a manner *that it conforms with the Constitution, ie by protecting the rights therein protected*', 'if such interpretation is possible, to give effect to it, and', 'if it is not possible, *to initiate steps leading to a declaration of constitutional invalidity*.' *Govender* (supra) at 280–281 (my emphasis). Olivier JA operates as if the SCA possessed the power under the Interim Constitution to interpret specific rights of the Bill of Rights and to test section 49(1)*(b)* against those rights. (It did not.) He also seems to believe that the SCA possessed the power to find that an infringement of the rights in question had occurred, and then go on to consider the justifiability of section 49(1)*(b)*, in terms of IC s 33, and to invalidate s 49(1)*(b)* if it chose to do so. These beliefs are predicated upon a wholly erroneous underlying presupposition that the SCA under the Interim Constitution had the power to engage in direct application. In formal terms, this error means that the SCA did indeed 'overstep its constitutional mandate'. In terms of the substantive outcome of the case, the High Court's characterization may lack any meaningful purchase. Regardless of what it thought it was doing and what it was entitled to do, the SCA in *Govender* can be re-read as having re-interpreted section 49(1)*(b)* in light of the general constitutional objects of the IC's Bill of Rights. This particular truth about *Govender* does not mean that distinctions between direct application and indirect application and between reading down and indirect application could not, in principal, affect the outcome of a case. Nor does it mean that we should tolerate sloppy elisions in the kinds of analysis the Bill of Rights contemplates.

validity under s 172(1)*(a)* . . . . The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid.[1]

(vii) *Shared constitutional interpretation and FC s 39(2)*

FC s 39(2) — as construed by our courts — contemplates a regime of shared constitutional interpretation. What is 'shared constitutional interpretation'? In short, it stands for four basic propositions:

First. It supplants the notion of judicial supremacy with respect to constitutional interpretation. All branches of government have a relatively equal stake in giving our basic law content. Second. It draws attention to a shift in the status of court-driven constitutional doctrine. While courts retain the power to determine the content of any given provision, a commitment to shared constitutional interpretation means that a court's reading of the constitutional text is not meant to exhaust all possible readings. To the extent that a court consciously limits the reach of its holding regarding the meaning of a given provision, the rest of the judgment should read as an invitation to the co-ordinate branches or other organs of state to come up with their own alternative, but ultimately consistent, gloss on the text. Third. Shared constitutional competence married to a rather open-ended or provisional understanding of the content of the basic law is meant to increase the opportunities to see how different doctrines operate in practice and maintain the space necessary to make revision of constitutional doctrines possible in light of new experience and novel demands. In this regard, the Constitutional Court might be understood to engage in norm-setting behaviour that provides guidance to other state actors without foreclosing the possibility of other effective safeguards for rights or other useful methods for their realization. Fourth. A commitment to shared interpretation ratchets down the conflict between co-ordinate branches of government. Instead of an arid commitment to separation of powers — and empty rhetorical flourishes about courts engaging in legal interpretation not politics — courts are freed of the burden of having to provide a theory of everything and can set about articulating a general framework within which different understandings of the basic text can co-exist. The courts and all other actors have more to gain from seeing how variations on a given constitutional norm work in practice.[2]

In *National Education Health and Allied Workers Union v University of Cape Town*, the Constitutional Court recognizes that the process of interpreting the Labour Relations Act in light of the demands of both FC s 39(2) and FC s 23(1) requires an appreciation of the legislature's and the courts' shared responsibility for interpreting the Final Constitution. It wrote:

The LRA was enacted 'to give effect to and regulate the fundamental rights conferred by s 23 of the [Final] Constitution.' In doing so the LRA gives content to s 23 of the [Final] Constitution and must therefore be construed and applied consistently with that purpose. Section 3*(b)* of the LRA underscores this by requiring that the provisions of the LRA must be interpreted 'in compliance with the Constitution'. Therefore the proper interpretation

[1] *NCGLE II* (supra) at para 24.

[2] Stu Woolman & Li Yu 'The Selfless Constitution: Flourishing & Experimentation as the Foundations of the South African State' (2006) 21 *SA Public Law* — (forthcoming). See also Michael Dorf & Barry Friedman 'Shared Constitutional Interpretation' 2000 *Sup Ct Rev* 61.

> and application of the LRA will raise a constitutional issue. This is because the Legislature is under an obligation to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. In many cases, constitutional rights can be honoured effectively only if legislation is enacted. Such legislation will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution. Where the Legislature enacts legislation in the effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose. Moreover, the proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and as such will be a constitutional matter.*In this way, the courts and the Legislature act in partnership to give life to constitutional rights.*[1]

The creation of remedies for rights violations requires a similar sort of institutional comity. The *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* Court wrote:

> It should also be borne in mind that whether the remedy a Court grants is one striking down, wholly or in part; or reading into or extending the text, its choice is not final. Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, 'fine-tuning' them or abolishing them.[2]

Shared responsibility for interpreting the Final Constitution has its limits. The legislature — or the executive — must make a good faith attempt to revisit an issue in a new and constitutionally permissible way. In *Satchwell v President of the Republic of South Africa*,[3] the Constitutional Court was asked to assess the con-

[1] 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC) at para 14 (Emphasis added). See also *Institute for Democracy in SA & Others v ANC & Others* [2005] JOL 14201 (C)('*IDASA*') at paras 16–18. In *IDASA*, Griesel J reinforces this understanding of the shared responsibility for constitutional interpretation, especially with regard to constitutionally-mandated super-ordinate legislation. He writes that:

> Currie & Klaaren express preference for the view that [FC] s 32 remains, after the commencement of PAIA, as 'a free-standing constitutional right of access to information'. As to *when* such constitutional right of access to information can be directly invoked, however, the learned authors are more guarded: When can the constitutional right of access to information be directly relied on? The answer is only in the exceptional case where a provision of the AIA, other legislation or conduct beyond the reach of the AIA is challenged as an infringement of s 32. This answer is in accordance with the principle of avoidance which dictates that remedies should be found in common law or legislation (interpreted or developed, as far as possible, so as to comply with the Constitution) before resorting to direct constitutional remedies. It is related to the principle that norms of greater specificity should be relied on before resorting to norms of greater abstraction. Most compellingly, however, deference must be given to the constitutional authority that [FC] s 32(2) accords to Parliament to give effect to the constitutional right of access to information. This means that the Act must be treated as the principal legal instrument defining and delineating the scope and content of the right of access to information, establishing the mechanisms and procedures for its enforcement and limiting the right where necessary. The constitutional right therefore recedes to the background, indirectly informing the interpretation of the Act but rarely directly applicable. It appears, therefore, that the learned authors envisage a two-fold role for s 32: the one is to 'inform' the interpretation of PAIA; the other is to serve as a basis for a possible challenge to the constitutionality of PAIA for being either under-inclusive or over-restrictive.

Ibid at para 16 quoting Iain Currie & Jonathan Klaaren *The Promotion of Access to Information Act Commentary* (2002) § 2.12 and citing Jonathan Klaaren & Glenn Penfold 'Access to Information' in S Woolman, T Roux, J Klaaren, A Stein and M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2002) Chapter 61.

[2] *NCGLE II* (supra) at para 76.

[3] 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC)('*Satchwell II*').

stitutionality of a statutory and regulatory framework almost identical to one that it had declared unconstitutional only a year earlier in *Satchwell v President of the Republic of South Africa*.[1] In *Satchwell I,* the Constitutional Court had declared ss 8 and 9 of the Judges' Remuneration and Conditions of Employment Act[2] unconstitutional because they discriminated against homosexual Judges' same-sex partners. The *Satchwell I* Court ordered that the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' be read into the provisions after the word 'spouse'. Subsequent to the judgment in *Satchwell I*, Parliament promulgated a new Act, the Judges' Remuneration and Conditions of Employment Act.[3] This Act took no notice of the *Satchwell I* Court's order. In *Satchwell II*, the Constitutional Court refused to accord Parliament any deference, declared the new provisions discriminatory, and read into the new legislation the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support.'[4]

[1] 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC)('*Satchwell I*').

[2] Act 88 of 1989.

[3] Act 47 of 2001.

[4] See Michael Dorf & Barry Friedman 'Shared Constitutional Interpretation' (2000) *Sup Ct Rev* 61, 81–83. Dorf and Friedman use the cases of *Miranda* and *Dickerson* on to great effect in explaining how shared constitutional interpretation works. See *Miranda v Arizona* 384 US 436 (1966)('*Miranda*'); *US v Dickerson* 530 US 428 (2000)('*Dickerson*'). As any viewer of US police dramas knows, *Miranda* rights take, in part, the form of warnings that law enforcement officers must give detained persons prior to any custodial interogation. What few viewers appreciate is the extent to which most of those warnings were intended as judicial guidelines and not as excavations of constitutional bedrock. The *Miranda* Court, as Dorf and Friedman point out,

> explains that it granted certiorari 'to explore some facets of the problems . . . of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.' The Court sets out its 'holding' at the outset, and that holding is only that the prosecution may not use statements made in custodial interrogation 'unless it demonstrates the use of procedural safeguards effective to secure' the privilege. And '[a]s for the procedural safeguards to be employed, unless other fully effective means are devised to inform the accused persons of their right of silence and to assure a continuous opportunity to exercise it' the specific Miranda guidelines are required. The Court then devotes an entire paragraph to encouraging governmental bodies to devise their own ways of safeguarding the right. At least twice more, the Court repeats the holding and re-extends the invitation.

Dorf & Friedman (supra) at 81–83. Congress accepted the invitation. But as the judgment in *Dickerson* reflects, it willfully misconstrued the nature of the invitation. Congress did not, as the Supreme Court suggested, come up with equally effective ways of safeguarding the right to remain silent and not to have statements made in custodial interrogation used by the prosecution unless adequate safeguards have been put in place. Instead, Congress simply enacted as legislation the pre-*Miranda* test that the voluntariness of a confession would be assessed in terms of a totality of the circumstances. The *Miranda*-specific warnings were merely included as factors to be taken into account when determining voluntariness. Not surprisingly, the *Dickerson* Court rejected Congress' 'new' take on the voluntariness of custodial confessions. It did so, as Dorf and Friedman argue, because Congress had failed to take seriously the Court's concerns about the 'compulsion inherent in custodial interrogation' and had failed to offer an alternative that could be deemed 'equally effective in ameliorating this compulsion.' Dorf & Friedman (supra) at 71. While the 34 years between *Miranda* and *Dickerson* might have witnessed confusing dicta from the Court regarding the status and the reach of the holding in *Miranda*, Dorf and Friedman convincingly show that Congress and other government actors did indeed possess significant space to place their own gloss on the Fifth Amendment's protections. What they were not free to do was ignore entirely even the narrowest possible construction of the *Miranda* Court's holding.

(viii) *An objective normative value system*

How does one know 'how' to develop the common law in terms of FC s 39(2)? The Constitutional Court recognizes that there are any number of notionally different approaches one could take when pruning this bramble bush. There is, however, only one true way: '[I]t is within the matrix of … [the Final Constitution's] objective normative value system that the common law must be developed.'[1] Exactly what this phrase means — cribbed as it is from German constitutional jurisprudence — remains unclear.[2] The courts have done little to delineate its extension. The use of synonyms such as 'normative' and 'value' and the adjective 'objective' might lead one to conclude, correctly, that the phrase does no heavy lifting. It would be wrong, however, to say it does no work at all.

It is no coincidence that the phrase is borrowed from the Germans.[3] For both Germans and South Africans, the phrase attempts to address the anxiety that the judgments of constitutional courts might simply reflect the parochial for the idiosyncratic views of the individual judges. Post-Third Reich, Germans want to be able to say that the Basic Law speaks directly to and for everyone. Post-apartheid, South Africans want to say that the Final Constitution speaks directly to and for everyone. As Davis J writes in *Geldenhuys v Minister of Safety and Security*:

> The content of this normative system does not only depend on an abstract philosophical inquiry but rather upon an understanding that the Constitution mandates the development of a society that breaks clearly and decisively from the past and where institutions that operated prior to our constitutional dispensation had to be instilled with a new operational vision based on the foundational values of our constitutional system. The facts of this case recall a sad part of the apartheid past, of individuals left to die in cells, of a systematic destruction of human dignity of people who were in the custody of the police. That was our past and it can no longer be our future, for if it is, then the wonderful aspirations and magnificent dreams contained in the Constitution will turn to post-apartheid nightmares. The transformation of our legal concepts must, at least in part, be shaped by memory of that which lay at the very heart of our apartheid past. When considering police action, the past is of great importance in assisting to shape legal concepts which are congruent with our constitutional future.[4]

As Davis J suggests, the phrase 'objective normative value system' reflects a modernist response to post-modern anxiety about how memory and power turn

[1] *Carmichele* (supra) at para 54. See also *Thebus* (supra) at para 27.

[2] See *Luth BVerfGE* 7, 198 (1958)('The basic rights are primarily of the citizen against the State (negative rights); the basic rights of the Basic Law, however, also embody an objective system of values, to be taken as the basic constitutional determination for all areas of law . . . . [N]o provision of private law may contradict [the Basic Law]; each must be interpreted in its spirit.') See also Gerhard Casper 'The Karlsruhe Republic — Keynote Address at the State Ceremony Celebrating the 50th Anniversary of the Federal Constitutional Court' (2001) 2 (18) *German Law Journal* at paras 18–21, available at www.germanlawjournal.com (accessed on 17 September 2004); Donald Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989) 368, 370.

[3] See *Carmichele* (supra) at para 54 ('Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: "The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the Legislature, Executive and Judiciary." The same is true of our Constitution.' (Citation omitted.))

[4] *Geldenhuys v Minister of Safety and Security* 2002 (4) SA 719, 728 (C).

law into hotly contested political terrain. The appeal to universally shared values ostensibly blunts the force of assertions that the Court plays politics or that its judgments reflect controversial ethical positions.

Moreover by stating that the Final Constitution embodies an 'objective normative value system', the Constitutional Court would appear to reject a purely procedural approach to constitutional interpretation in favour of an approach that rests upon comprehensive vision of the good life. In *S v Jordan & Others (Sex Workers Education & Advocacy Task Force & Others as Amici Curiae)*, the Court wrote:

> To posit a pluralist constitutional democracy that is tolerant of different forms of conduct is not, however, to presuppose one without morality or without a point of view. A pluralist constitutional democracy does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but it is not neutral in its value system. Our Constitution certainly does not debar the State from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep civic morality . . . . Yet, what is central to the character and functioning of the State is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.[1]

Whether our courts possess the capacity to give meaningful content to such a comprehensive vision of the good life is quite another matter. In *S v M*, the High Court found that the common law offence of bestiality was perfectly consistent with the civic morality enshrined in our Final Constitution.[2] That take on the content of our civic morality was consistent with previously articulated Constitutional Court dicta on the very same point.[3] In *Transnet Ltd T/A Metrorail v Rail Commuters Action Group*, however, the Supreme Court of Appeal differed with the Cape High Court over the content of the civic morality enshrined in the Final Constitution.[4] In *Rail Commuter Action Group v Transnet Ltd T/A Metrorail*, the High Court had found that the Final Constitution imposed a legal duty on Transnet to ensure that all railway commuters — regardless of race or class — enjoyed a certain level of physical safety.[5] While recognizing the 'objective' moral content of our basic law, the Supreme Court of Appeal rejected the proposition that our constitutionally mandated morality demanded that a legal duty of care be imposed on Transnet in order to remedy the endemic violence visited upon commuters from historically disadvantaged communities.

The Court is not really concerned with making fine distinctions between the right and the good. What animates this line of thought are more mechanical matters: namely how does a specialized constitutional court ensure that the basic law transforms the manner in which courts with plenary jurisdiction dispose of ordinary disputes. Like the legality principle, an 'objective normative value system' grounded in the 'objectives' of FC s 39(2) has the potential to expand dramatically the jurisdiction of the Constitutional Court. If the FC s 39(2)

[1] 2002 (6) SA 642 (CC), 2002 (2) SACR 499 (CC), 2002 (11) BCLR 1117 (CC)('*Jordan*') at para 104.
[2] 2004 (3) SA 680 (O) at paras 18–25.
[3] Justice Sachs provides the putative grounds for such distinctions in *NCGLE I*: 'There are very few democratic societies, if any, which do not penalize persons for engaging in inter-generational, intra-familial, and cross-species sex, whether in public or in private . . . The privacy interest is overcome because of the perceived harm.' *NCGLE I* (supra) at para 118.
[4] 2003 (6) SA 349 (SCA), 2003 (12) BCLR 1363 (SCA).
[5] 2003 (5) SA 518, 573 (C), 2003 (3) BCLR 288 (C).

objectives map directly on to this 'objective normative value system', then the Constitutional Court may assert constitutional jurisdiction through FC s 39(2) whenever it believes that a rule of the common law or the interpretation of a statute does not conform with its understanding of our basic constitutional norms. The Constitutional Court relies on this characterization of FC s 39(2) in *Carmichele* in order to compel the Supreme Court of Appeal and the High Court to develop the common law of delict. So despite the *Thebus* Court's admission that FC s 39(2) 'does not specify what triggers the need to develop the common law or in which circumstances the development of the common law is justified', the failure of any court to adhere to the FC s 39(2) obligation to develop the common law in light of the demands of the Final Constitution's 'objective normative value system' risks reversal by our highest constitutional tribunal.

(ix) *Customary Law*

Where customary law is found to be in conflict with a specific provision of the Bill of Rights, it must be declared invalid to the extent of its inconsistency and, where necessary, a new rule of customary law must be crafted. Where customary law is found to be out of step with the spirit of the Bill of Rights, it must be developed so that it comports with FC s 39(2)'s objectives. In *Mabuza v Mbatha,* Hlophe JP wrote:

> [A]ny custom which is inconsistent with the Constitution cannot withstand constitutional scrutiny. In line with this approach, my view is that it is not necessary at all to say that African customary law should not be opposed to the principles of public policy or natural justice. That approach is fundamentally flawed as it reduces African law (which is practised by the vast majority in this country) to foreign law - in Africa! The approach whereby African law is recognised only when it does not conflict with the principles of public policy or natural justice leads to an absurd situation whereby it is continuously being undermined and not properly developed by the Courts, which rely largely on 'experts'. This is untenable. The Courts have a constitutional obligation to develop African customary law, particularly given the historical background referred to above. Furthermore, and in any event, s 39(2) of the Constitution enjoins the Judiciary when interpreting any legislation, and when developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights.[1]

The Constitutional Court endorsed this very approach to customary law in *Bhe v Magistrate, Khayelitsha.*[2]

(x) *Stare decisis*

(aa) Walters and *Afrox*

In a number of recent cases, the Constitutional Court and the Supreme Court of

[1] 2003 (4) SA 218 (C) at paras 30–31.

[2] See, eg, *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('*Bhe*') at paras 42–46 (Succession based upon male primogeniture found unconstitutional. The Court wrote: 'At the level of constitutional validity, the question in this case is not whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are consistent with the Constitution. This status of customary law has been acknowledged and endorsed by this Court.') For an extended discussion of the various tropes employed by the courts when transforming customary law. See the analysis of both *Bhe* and *Mabuza* in Stu Woolman & Michael Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 64.

Appeal have deployed the doctrine of *stare decisis* in a manner that dramatically curtails the ability of High Courts to use the Bill of Rights, generally, and FC s 39(2), in particular, to develop the common law or to re-interpret legislation in ways that depart from Constitutional Court, Supreme Court Appeal, or Appellate Division precedent. The Constitutional Court in *Walters* restricted its conclusions about *stare decisis* to precedent handed down by the Constitutional Court, the Supreme Court of Appeal and the Appellate Division in the (rather ambiguously described) 'constitutional era.'[1] The Supreme Court of Appeal in *Afrox* extended binding precedent — backwards — past the very beginning of even the most controversial understanding of the 'constitution era'.[2] The *Afrox* Court recognized that High Courts could retain constitutional jurisdiction for any *direct* attack on a rule of law grounded in a pre-constitutional decision of the Appellate Division. However, where a High Court is persuaded that a pre-constitutional decision of the Appellate Division should be developed, through FC s 39(2), so that it accords with the spirit, purport and objects of the Bill of Rights (true *indirect* application), its hands are tied. The High Court is bound to follow the pre-constitutional decisions of the Appellate Division. Brand JA, for the *Afrox* Court, writes:

> Die antwoord is dat die beginsels van *stare decisis* steeds geld en dat die Hooggeregshof nie deur artikel 39(2) gemagtig word om van die beslissings van hierdie Hof, hetsy pre- hetsy post-konstitusioneel, af te wyk nie.[3]

As Danie Brand and I have argued elsewhere, the problems with *Walters* and *Afrox* on the issue of *stare decisis* and the constitutional jurisdiction of the High Courts are legion.[4] What is particularly troublesome for the purposes of application analysis is that the Constitutional Court and the Supreme Court of Appeal have said that FC s 39(2) is the appropriate vehicle for development of the common law — both directly and indirectly — but that the High Courts may not disturb settled precedent through FC s 39(2).[5]

[1] 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC)('*Walters*') at para 61.

[2] 2002 (6) SA 21 (SCA)('*Afrox*').

[3] Ibid at para 29 ('The answer is that the principles of *stare decisis* still apply and that the High Court is not authorised by section 39(2) to depart from decisions of this Court, whether pre-constitutional or post-constitutional.' (Danie Brand's translation).)

[4] See Stu Woolman & Danie Brand 'Is There a Constitution in This Classroom? Constitutional Jurisdiction after *Walters* and *Afrox*' (2003) 18 *SA Public Law* 38–83 (Sets out the doctrine of *stare decisis* for all courts with constitutional jurisdiction, and the limits the doctrine imposes on the High Courts.)

[5] One other space remains within which to contest existing precedent. The *Afrox* Court states that High Courts will be able to deviate from SCA, AD and CC precedent with respect to how they understand such open-ended notions as *boni mores* and public interest. *Afrox* (supra) at para 28. A second line of attack may be open to the High Courts. Where the Supreme Court of Appeal has assiduously avoided constitutionalising an issue of law, then the Constitutional Court's doctrines of legality, the unity of the law, constitutional supremacy and an objective normative value system suggests that the High Courts should have an opportunity to test such a rule of law against the basic law's dictates. To this end, the Constitutional Court in *Boesak* writes:

> The development of, or the failure to develop, a common-law rule by the Supreme Court of Appeal may constitute a constitutional matter. This may occur if the Supreme Court of Appeal developed, or failed to develop, the rule under circumstances inconsistent with its obligation under s 39(2) of the Constitution or with some other right or principle of the Constitution. The application of a legal rule

(bb) After *Afrox* and *Walters*

Since *Afrox* and *Walters* were handed down, several cases have engaged the principle of *stare decisis* and the development of the common law through FC s 39(2). None have altered the manner in which the *Afrox* and *Walters* doctrine shapes constitutional jurisdiction and the development of the common law.[1]

The Constitutional Court has not had its authority with respect to precedent, jurisdiction or the development of the common law challenged. It has even extended ever so slightly the reach of its precedent. In *National Director of Public Prosecutions v Mohamed*, the Constitutional Court noted that not only does the holding of a case constitute binding precedent, the reasons supporting the holding themselves constitute 'an objective precedent, with such binding force on other courts as the principles of *stare decisis* and the status of the Court delivering the judgment dictate.'[2]

The Supreme Court of Appeal has had its authority to develop or to interpret the law under FC s 39(2) contested on a number of occasions. In *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd*, the Supreme Court of Appeal dressed down a High Court judge for having the temerity to suggest that the Supreme Court review its conclusions in an earlier decision.[3] The *Blaauwberg Meat Wholesalers* Court wrote: 'In the absence of a constitutional challenge, to which other considerations would apply, perceived equities are not a legitimate basis to depart from a decision of a higher Court or to avoid the strictures of a statute.'[4]

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by the Supreme Court of Appeal may constitute a constitutional matter. This may occur if the application of a rule is inconsistent with some right or principle of the Constitution.

Boesak (supra) at para 15. Neither the *Boesak* Court nor the *Walters* Court make clear whether such a failure can be remedied by all courts with constitutional jurisdiction or only by the Supreme Court of Appeal and the Constitutional Court. Cf *K v Minister of Safety and Security* CCT 52/04 (13 June 2005).

[1] High Courts have accepted the 'dominant principles' set out in *Afrox* and *Walters*. See *Harper v Morgan Guarantee Trust Co of New York, Johannesburg* 2004 (3) SA 253, 267 (W)('It is argued that this Court is bound by the principles of *stare decisis*. Confirming that both the inherent and the constitutional right of the Supreme Court to develop the law are subject to the principles of *stare decisis* is *Afrox Healthcare Bpk v Strydom* . . . That was stated to be the case in respect of post-1994 judgments in *Ex parte Minister of Safety and Security & Others: In re S v Walters & Another* . . . There is no decision deciding on the appellant's argument specifically, but there are decisions about dominant principles.') See also *Ritchie v Government, Northern Cape* 2004 (2) SA 584 (NC)('None of the issues before us require a decision whether or not a politician (for example MEC Block) is competent to sue the applicants . . . I am nevertheless also of the respectful view that Joffe J's decision that a cabinet minister does not have the right to sue for damages falls foul of the principles enunciated by the Constitutional Court in *Khumalo v Holomisa* . . . . and that in accordance with the established principles of *stare decisis* the learned Judge was bound thereby. See *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* . . . [and] *Afrox Healthcare Bpk v Strydom*.')

[2] 2003 (4) SA 1 (CC), 2003 (5) BCLR 476 (CC) at para 57.

[3] 2004 (3) SA 160 (SCA).

[4] Ibid at para 20 quoting *Dischem Pharmacies (Pty) Ltd v United Pharmaceutical Distributors (Pty) Ltd* 2003 CLR 9 at para 13 and citing *Walters* (supra) at para 61 and *Afrox* (supra) at paras 25–26. See *S v Kgafela* 2003 (5) SA 339, 341(SCA)(Court *a quo* granted leave to appeal to the Supreme Court of Appeal, and 'after setting out a full review of the general sentencing rules, . . . felt "impelled to venture" that [the Supreme Court of Appeal] might welcome the opportunity to revisit the decision in *Malgas* in order to give more definition or formulation to the phrase "substantial and compelling circumstances", and to reverse the order of the enquiry. The Supreme Court of Appeal tersely dismissed the High Court's invitation and wrote: This is an approach to granting leave that cannot be accepted.' The Supreme Court

What these 'constitutional' considerations are, the *Blaauwberg Meat* Court does not say. In *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*, the Supreme Court of Appeal refused the invitation to revisit its own precedent and to develop the common law of delict.[1] It did not merely view its own precedent as dispositive. It suggested that only the legislature should initiate the dramatic change in the law that a departure from its own precedent would require. With regard to the displacement of its own precedent, the *Wagener* Court found that while it might be obliged to reverse itself in 'a situation … in … which there was no remedy at all in existence or a patently inadequate one, and the dictates of the Constitution led to the need for change, … that is not the situation we have before us.'[2]

The *Wagener* Court's view, that the development of the common law under FC s 39(2) — or FC s 8(3) — requires that there be either no remedy at law or a patently inadequate one, sets an almost insuperable threshold for revisiting existing precedent. Marry the Supreme Court of Appeal's resistance to doctrinal development to a refusal to afford High Courts the space to alter existing Appellate Division or Supreme Court of Appeal precedent via FC s 39(2) and it is hard to imagine why any given litigant would seek to challenge such precedent in either a High Court or the Supreme Court of Appeal. Moreover, given the Constitutional Court's reluctance to alter the common law without the Supreme Court of Appeal having first fully vetted a particular rule or doctrine of common law, it seems reasonable to conclude that few litigants will underwrite expensive challenges to existing rules of law via FC s 39(2).

Some challenges to existing common law precedent via direct application of the Bill of Rights have succeeded. In *Victoria & Alfred Waterfront (Pty) Ltd v Police Commissioner, Western Cape (Legal Resources Centre As Amicus Curiae*) Desai J noted counsel's reliance on 'the judgment of the Supreme Court of Appeal in *Afrox Healthcare Bpk v Strydom*.'[3] He then wrote as follows:

> As I understand … *Afrox* … , if I am convinced that any common law rule is in conflict with the Constitution, I am obliged to differ from it … The obligation to differ from the common law is, for obvious reasons, more compelling where it is in conflict with the fundamental liberties entrenched in the Bill of Rights contained in the Constitution.[4]

In *Petersen v Maintenance Officer, Simon's Town Maintenance Court*, the High Court found that while it was technically 'bound by the [AD's] decision in *Motan* with regard to the interpretation of the common law', the rule articulated in *Motan* violated an 'extra-marital child's constitutional rights to equality and dignity enshrined in [FC] ss 9 and 10 … and is contrary to the best interest of the child' according to

of Appeal then quoted, in support of this contention, *Cassell and Co Ltd v Broome & Another* [1972] AC 1027. The House of Lords in *Cassell* wrote: 'The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers.') See also *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd* 2003 (2) SA 253 (SCA).

[1] 2003 (7) BCLR 710 (SCA).

[2] Ibid at para 30.

[3] 2004 (4) SA 444, 449 (C).

[4] Ibid at 449–450.

FC s 28(2).[1] Direct application of these three rights resulted in a finding that the *Motan* rule was unconstitutional. The *Petersen* Court then crafted a new rule of common law using its powers under FC s 173, FC s 8(3) and FC s 39(2).

Other challenges to existing common law precedent via direct application of the Bill of Rights have failed. In *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council,* decided prior to both *Afrox* and *Walters*, the High Court recognized that, unlike IC 7(1), FC s 8(1) 'applies to all law and binds, inter alia, the Judiciary' and thus might be understood to change the body of law being applied to the case before the court.[2] Cloete J wrote:

> I am fully aware that in terms of s 8(1) of the final Constitution the Bill of Rights applies to all law and binds, inter alia, the Judiciary. I am also aware that, whereas s 35(3) of the interim Constitution required a court, when interpreting a statute, to have 'due regard' to the spirit, purport and objects of the chapter on fundamental rights, s 39(2) of the final Constitution goes further and provides that a court 'must promote' the spirit, purport and objects of the Bill of Rights.[3]

But Cloete J refused to accept the proposition that the shift in the language from the Interim Constitution to the Final Constitution in any way altered the 'law' being applied to the case before the court.[4] He wrote:

> I respectfully agree with the view of Cameron J in *Holomisa v Argus Newspapers Ltd* . . . that the Constitution requires that its provisions and values 'must be given primacy over the rules of the common law, even when those rules have been invested with the highest stature of pre-constitutional judicial authority.' *But where a superior Court has decided what the effect of the Constitution is on established law, whether substantive or procedural, a lower court must in my view follow that decision, the supremacy of the Constitution notwithstanding.* . . . To hold otherwise would be to invite chaos.[5]

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[1] 2004 (2) SA 56 (C), 2004 (2) BCLR 205 (C) at para 7.

[2] 1999 (4) SA 799 (W)('*Bookworks*').

[3] Ibid at 810–811.

[4] But see Stu Woolman & Danie Brand 'Is There a Constitution in this Classroom? Constitutional Jurisdiction after *Walters* and *Afrox*' (2003) 18 *SA Public Law* 38. We argue that the Final Constitution is a different body of law from the Interim Constitution. The differences in the provisions governing direct application and indirect application require that decisions made using the application provisions of the Final Constitution are, for the purposes of *stare decisis*, not identical with decisions made using the provisions under the Interim Constitution. However, even if that thesis is controversial, the application of the substantive provisions of the Bill of Rights from either the Interim Constitution or the Final Constitution to any legal dispute must change the body of law applied from that body of law applied prior to the enactment of the Interim Constitution. The willingness of the Constitutional Court to acquiesce to the Supreme Court's bold assertion that pre-constitutional precedent binds High Courts in terms of the development of the common law — or the interpretation of statutes — would appear to fly in the face of the Constitutional Court's assertion that all law now derives its forced from the Final Constitution and that the Final Constitution makes manifest an objective normative value system. Can the body of law being applied by the High Court under the Final Constitution truly be said to be the same body of law applied before either the Interim Constitution or the Final Constitution came into effect?

[5] *Bookworks* (supra) at 810 (Emphasis added). Cloete J's take appears consistent with the *Afrox* Court's restrictive understanding of *stare decisis*. Other judges, however, continue to push the envelope of *stare decisis*. Davis J, in *Sayed v Editor, Cape Times*, averred that the Constitutional Court had erred in *Khumalo & Others v Holomisa* when it confirmed the Supreme Court of Appeal's position on defamation in *National Media Ltd & Others v Bogoshi*. 2004 (1) SA 58 (C). Davis J suggested that given the primacy of place of 'democracy' in 'our constitutional enterprise', the bar to defamatory action with respect to political speech 'needed to be somewhat higher'. Davis J, having thrown the gauntlet down, was forced to concede that '*Khumalo* was now the law which the Court was obliged to follow.' Ibid at 61–62.

What Cloete J appears to be saying is that where the Supreme Court of Appeal (or the Appellate Division) have decided that neither the Interim Constitution nor the Final Constitution has any meaningful effect on a rule of law — even when the Court lacked the jurisdiction to apply the Interim Constitution directly or did not realize that it possessed the jurisdiction to apply the Interim Constitution indirectly — a High Court would not be free to depart from such SCA or AD precedent.

(f) Section 239: Organ of State

FC s 239 reads, in relevant part, as follows:

> Definitions
> In the Constitution, unless the context indicates otherwise — . . .
> 'organ of state' means —
> *(a)* any department of state or administration in the national, provincial or local sphere of government; and
> *(b)* any other functionary or institution —
> (i) exercising a public power or performing a public function in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation.
> but does not include a court or a judicial officer.

FC s 8(1) tells us that 'organs of state' are amongst the bodies bound directly by the Bill of Rights. FC s 239 tells us that organs of state come in two varieties: those identified in FC s 239*(a)*; and those identified in FC s 239*(b)*. While the courts have no problem identifying organs of state, they have thus far been reluctant to fit them into either of these two categories.

Laundry lists may not seem especially helpful when one is attempting to understand the analytical framework that has been developed for determining whether an entity is an organ of state. Still, such an inventory may give the reader a better sense of the constellation of bodies that have already been identified as being part of this universe. 'Organs of state' embraces Transnet,[1] South African Airways,[2] the Commission for Conciliation, Mediation and Arbitration,[3] the Magistrates' Commission,[4] the President,[5] the Ministers of Finance and

[1] *Hoffman v SAA* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC); *Claase v Transet* 1999 (3) SA 1012 (T); *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W), 1998 (8) BCLR 1024 (W), [1998] All SA 336 (W).

[2] *Hoffman v SAA* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC).

[3] *Mkhize v Commission for Conciliation, Mediation and Arbitration* 2001 (1) SA 338 (LC); *Carephone v Marcus* 1999 (3) SA 304 (LAC).

[4] *Van Rooyen & Others v The State & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (2) SACR 222 (CC), 2002 (8) BCLR 810 (CC) citing *Van Rooyen & Others v The State & Others* 2001 (4) SA 396 (T), 2001 (9) BCLR 915 (T); *De Kock & Others v Van Rooyen* 2005 (1) SA 1 (SCA); *Chevron Engineering (Pty) Ltd v Nkombule & Others* 2004 (3) SA 495 (SCA); *Ruyobeza & Another v Minister of Home Affairs & Others* 2003 (5) SA 51 (C); *Moldenhauer v Du Plessis & Others* 2002 (5) SA 781 (T).

[5] *Uthukela District Municipality & Others v President of the Republic of South Africa & Others* 2003 (1) SA 678 (CC), 2002 (11) BCLR 1220 (CC).

Provincial Affairs,[1] the Minister of Trade and Industry,[2] provincial premiers in Kwa-Zulu Natal,[3] the Western Cape,[4] and the Eastern Cape,[5] the National Gambling Board,[6] the Kwa-Zulu Natal Provincial Gambling Board,[7] the University of Bophuthatswana,[8] the Permanent Secretary of the Department of Welfare for the Eastern Cape,[9] the Western Cape's Minister of Education,[10] the Western Cape's Department of Education,[11] the Greater George Municipal Council,[12] the Public Accountants' and Auditors' Board,[13] the Independent Electoral Commission,[14] the Langeberg Municpality,[15] the Cape Metropolitan Council,[16] Port Elizabeth Municipality,[17] the Eastern Cape Appropriate Technology Unit,[18] the Director of Public Prosecutions, Cape of Good Hope,[19] and the Truth and Reconciliation Commission.[20]

(i) *'Any department of state or administration in the national, provincial or local sphere of government'*

While much of the legal action and the academic commentary around the meaning of 'organ of state' has been driven by FC s 239*(b)*, it is worth pausing to see exactly what is meant by FC s 239*(a)*. FC s 239*(a)* binds departments of state or administrative bodies whether or not they act 'in terms of' the Final Constitution, a provincial constitution or a piece of legislation. As a result, FC s 239*(a)* stands, at a minimum, for three propositions.

[1] *Uthukela District Municipality & Others v President of the Republic of South Africa & Others* 2003 (1) SA 678 (CC), 2002 (11) BCLR 1220 (CC).
[2] *National Gambling Board v Premier, Kwa-Zulu Natal & Others* 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 (CC).
[3] *MEC for Health, KwaZulu-Natal v Premier, KwaZulu-Natal: In Re Minister of Health & Others v Treatment Action Campaign* 2002 (5) SA 717 (CC), 2002 (10) BCLR 1028 (CC).
[4] *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC).
[5] *Cekeshe v Premier, Eastern Cape* 1998 (4) SA 935 (Tk).
[6] *National Gambling Board v Premier, Kwa-Zulu Natal & Others* 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 (CC).
[7] Ibid.
[8] *Baloro & Others v University of Bophuthatswana & Others* 1995 (4) SA 197 (B), 1995 (8) BCLR 1018 (B).
[9] *Permanent Secretary, Department of Welfare, Eastern Cape, & Another v Ngxusa & Others* 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039 (SCA).
[10] *Naptosa v Minister of Education* 2001 (2) SA 112 (C), 2001 (4) BCLR 388 (C).
[11] Ibid.
[12] *Pedro v Breater George Transitional Council* 2001 (2) SA 131 (C).
[13] *Association of Chartered Certified Accountants v Chairman, the Public Accountants' and Auditors' Board* 2001 (2) SA 980 (W).
[14] *Independent Electoral Commission v Langeberg Municpality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC).
[15] Ibid.
[16] *Cape Metropolitation Council v Metro Inspection Services (Western Cape) CC & Others* 2001 (3) 1013 (SCA), 2001 (10) BCLR 1026 (SCA).
[17] *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2001 (4) SA 759 (E).
[18] *Mgijima v Eastern Cape Appropriate Technology Unit* 2000 (2) SA 291 (TkH).
[19] *Director of Public Prosecutions, Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C), 2000 (2) BCLR 103 (C).
[20] *Inkatha Freedom Party v Truth and Reconciliation Commission* 2000 (3) SA 119 (C), 2000 (5) BCLR 534 (C).

One. Even when a 'Department of State or Administration' does not act within the express terms of a constitution or piece of legislation, they are bound by constitutional dictates. In other words, all conduct of FC s 239*(a)* entities is subject to the Bill of Rights.

Two. As a consequence of this first position, a 'Department of State or Administration' is bound by the Bill of Rights in the commercial or contractual realm. The position under the Final Constitution marks a notable shift from the position under the Interim Constitution.[1]

Three. The phrase 'a Department of State or Administration' does not generate a bright line rule. As Stephen Ellmann has persuasively argued, there are good reasons to conclude that parastatals and entities privatised by the state, but still functionally public, are captured by FC s 239*(a)*.[2] With regard to parastatals, Ellmann relies on the reasoning of the US Supreme Court in *Lebron v National Railroad Passenger Corporation*.[3] In *Lebron*, the Court held:

> That where, as here, the Government creates a corporation by special law, for the furtherance of government objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for the purposes of the First Amendment [of the Constitution].[4]

The Constitutional Court reached a similar conclusion in *Hoffmann v South African Airways*.[5] In finding that the parastatal Transnet, and thus SAA as a wholly owned subsidiary of Transnet, was an organ of state, the *Hoffmann* Court held that SAA satisfied FC s 239 because it was both a statutory body and controlled by the State.[6] The *Hoffmann* Court wrote as follows:

[1] See *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC). Kentridge AJ was willing to find that government reliance on common-law rules with respect to the criminal law could be attacked directly. He seemed less inclined to allow common law rules governing state activities in the commercial or contractual sphere to be similarly subject to direct attack. See also J De Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (4th Edition 2001) 50. The authors agree that what was once an open question under the Interim Constitution is now closed under the Final Constitution. However, the authors are surely wrong to suggest that common law rules governing state activities in the commercial or contractual sphere are governed by the application provision of FC s 8(2). Even if one accepts their *Khumalo*-like assessment of the split between FC s 8(1) and FC s 8(2), there is certainly no good reason to accept the conclusion that legal relationships between a government actor and a natural or juristic person are governed by FC s 8(2). Organs of state are bound by FC s 8(1). The text is unequivocal about that. (The only possible way in which FC s 8(2) could apply would be if we read FC s 8(2) to always govern the conduct of a private party being challenged, even when the other party in the dispute is the state. Such a reading would expand implausibly the disputes captured by FC s 8(2).)

[2] S Ellmann 'A Constitutional Confluence: American State Action Law and the Application of Socio-Economic Rights Guarantees to Private Actors' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 444, 446–448.

[3] 513 US 374 (1995).

[4] Ibid at 400.

[5] 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC)('*Hoffmann*').

[6] The *Hoffmann* Court also held that Transnet, and thus SAA, was an organ of state that possessed public powers and that exercised public functions, in terms of legislation, in the public interest. Ibid at para 23. Its analysis of the statutory basis for this finding is worth quoting in full:

Transnet Ltd has its origin in the South African Railways and Harbours Administration, which was

> Transnet is a statutory body, under the control of the State, which has public powers and performs public functions in the public interest. It was common cause that SAA is a business unit of Transnet. As such, it is an organ of State and is bound by the provisions of the Bill of Rights in terms of s 8(1), read with s 239, of the Constitution. It is, therefore, expressly prohibited from discriminating unfairly.[1]

In reaching its conclusion, the *Hoffmann* Court notes that under the South African Transport Services Act, South African Transport Services [Transnet's precursor] was 'not a separate legal person, but a commercial enterprise of the State.'[2] In the *Hoffmann* Court's eyes, neither a name change nor a statutory change alters Transnet's status as part of the State:

> Pursuant to ss 2(1) and 3(2) of the Legal Succession to the South African Transport Services Act 9 of 1989 Transnet was incorporated as a public company and took transfer of the whole of the commercial enterprise of the South African Transport Services.[3]

The Constitutional Court's inclination to avoid fitting its findings into a pre-conceived test makes it difficult to press down particularly hard on its FC s 239 analysis in *Hoffmann*. The facts and the holding are, however, consistent with the reasoning offered by both Ellmann and the *Lebron* Court.

A knottier question, but one of some moment in South Africa, is whether the 'privatisation and sale' of a parastatal 'removes it from government for the purposes of [FC] s 239*(a)*?'[4] One should suppress any initial intuition that such a sale removes the entity from the *orbit* of government — and thus the ambit of FC s 239 — if various indicia of government and government control remain present. If, as Ellmann suggests, 'the government retains some seats on the privatised entity's board of directors' or supplies the entity with 'subsidised electricity or guaranteed contracts', then there is every reason to believe that the entity 'has never actually departed from the government's ambit.'[5] Failure to hold such entities

administered by the State under the Railway Board Act 73 of 1962. In terms of s 2(1) of the South African Transport Services Act 65 of 1981 the South African Railways and Harbours Administration was renamed the South African Transport Services. In terms of s 3(1) it was not a separate legal person, but a commercial enterprise of the State. It was empowered, in terms of s 2(2)*(a)*, amongst other things, to 'control, manage, maintain and exploit . . . air services (under the title 'South African Airways' or any title in the Minister's discretion)'. Pursuant to ss 2(1) and 3(2) of the Legal Succession to the South African Transport Services Act 9 of 1989 Transnet was incorporated as a public company and took transfer of the whole of the commercial enterprise of the South African Transport Services. SAA is a business unit within Transnet, established in terms of s 32(1)*(b)* of that Act. In terms of s 2(2), the State is the only member and shareholder of Transnet. Section 15 requires it to provide certain services in the public interest. Its services must be performed in accordance with the provisions of Schedule 1 to the Act.

Ibid at para 23, fn 17. The language of the *Hoffman* Court implies that Transnet qualifies as an organ of state in terms of both FC s 239*(a)* and FC s 239*(b)*.

[1] Ibid at para 23.

[2] Ibid at para 23, fn 17.

[3] Ibid.

[4] Ellmann (supra) at 447.

[5] Ibid.

accountable as organs of state would permit the state to escape its constitutional obligations 'under a veneer of privatisation.'[1]

This last line of analysis cannot be avoided by arguing that FC s 239*(b)* was designed for just such an eventuality. If one proffers a very literal — and potentially cramped — reading of FC s 239*(b)*, and the privatised entity under scrutiny is no longer exercising a power or function in terms of the Final Constitution or a piece of legislation, then the entity's para-governmental function might escape both FC ss 239*(a)* and *(b)*. In such cases, where the entity lies at the very periphery of our vision of what constitutes an organ of state, the courts are under some obligation to craft two sets of tests adequate to the taxonomic task of determining which entities count as government and which entities do not.[2]

(ii) *Any other functionary or institution*

Given the other changes wrought by the Final Constitution with respect to issues of application, one would expect a similar sea-change with respect to the definition of 'organ of state' under FC s 239*(b)*. Under the Interim Constitution, only institutions

[1] Ellmann (supra) at 447. Ellmann pushes the envelope for those kinds of private entities that could be captured by FC s 239*(a)* when he argues that private building contractors, if they possess a significant fraction of the tenders for a government programme designed to deliver adequate housing as per FC s 27, might legitimately be taken to be part of the state apparatus. One implicit ground for this argument is that because the progressive provision of adequate housing is a constitutional obligation imposed upon the state, the state should not be able to avoid any irregularities in its programme simply through the privatization of the work. That implication seems relatively uncontroversial. However, as soon as Ellmann starts creating distinctions between builders or a building association with a significant fraction of the total budget for housing and smaller contractors, the coherence of his argument collapses. Ibid at 450. No percentage of such work can, save by fiat, create an *institutional* link between the state and the party employed to do its bidding. A *functional* test that grounds the finding that an entity is an organ of state avoids such a mathematical miasma.

[2] Of course, it remains possible to interpret both FC ss 239 *(a)* and *(b)* with sufficient generosity as to capture such entities at either stage. As Ellmann's analysis suggests, what matters is whether the entity possesses the requisite indicia of government. As with all state action enquiries, the analysis is going to be driven less by the text and more by the court's inclination towards making the Bill of Rights applicable directly to a wider or a narrower body of actors. For example, the judgments of Van Djikhorst evince a clear desire to draw sharp lines between state and non-state actors and to hold as few of the latter as possible subject to the direct application of the Bill of Rights. See *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting* 1996 (3) SA 800 (T); W*ittmann v Deutscher Schulverein, Pretoria, & Others* 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T)(Van Dijkhorst J holds that state-aided secondary school was not an organ of state under the Interim Constitution); *Korf v Health Professions Council of South Africa* 2000 (1) SA 1171 (T), 2000 (3) BCLR 309 (T)(Van Dijkhorst J holds that test employed for organs of state under Interim Constitution remains the same under the Final Constitution.) The judgments of Davis J reflect a more expansive approach to 'organ of state' analysis and a recognition that for purposes of application the important questions are not how power has been traditionally described, but how power is actually exercised. See, eg, *Inkatha Freedom Party v TRC* 2000 (3) SA 119, 133 (C)(To be defined as an organ of state, entity need not be under direct control of government but must merely 'fulfill objectives indentified in the Constitution' or a piece of legislation.) See also J De Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (4th Edition 2001) 51 (Narrow construction of organ of state inconsistent with a 'central objective' of the Final Constitution: to impose a 'culture of justification and openness on private persons and institutions' that 'perform public functions'.)

under the direct control of the government were considered organs of state.[1] In *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting*, Van Dijkhorst J set out the basic contours of this restrictive definition:

> By control, I do not mean inspection or supervision in respect of the quality of his services, but the right to prescribe what the function is and how it is to be performed. He must be part of the government apparatus . . . The concept must be limited to institutions which are an intrinsic part of government, . . . ie where the majority of members are appointed by the state or where the functions of that body and their exercise is prescribed by the state to such an extent that it is effectively in control. In short, the test is whether the state is in control.[2]

By contrast, the Final Constitution provides expressly that those institutions and individuals bound by its dictates are those exercising 'public power' or engaging in a 'public function' in terms of some underlying legislation or constitutional provision. These institutions and individuals need not be an 'intrinsic part' of what we have commonly or historically considered to be the 'government'. They need not be subject to the effective control of elected legislative or executive bodies. The drafters of the Final Constitution have crafted this section in such a manner as to ensure that if the state created the conditions for the exercise of some power or function, then the institutions produced and the individuals so empowered are going to have to answer for their actions in the same manner as those institutions and officials to whom we have no trouble ascribing the appellation 'government'.[3]

To understand the difference this distinction makes one must first appreciate what the control test allowed. The government control test, as elaborated by Van Dijkhorst J, sought to allow institutions created by government, but not under its direct control or supervision, to operate without fear of constitutional sanction.[4]

[1] 1996 (3) SA 800, 810 (T)('*Directory Advertising Cost Cutters*'); *Wittmann v Deutscher Schulverein, Pretoria, & Others* 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T)(Holds that state-aided secondary school was not an organ of state under the Interim Constitution.)

[2] *Directory Advertising Cost Cutters* (supra) at 810.

[3] For an extended discussion of the case law concerning 'organ of state' under the Interim Constitution, see the version of this chapter in the first edition. Stuart Woolman 'Application' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) § 10.3*(a)*(iv)(cc).

[4] The control test, borrowed as it is from Canadian constitutional jurisprudence, has a certain amount of give in it. In the early 1990s, the Canadian Supreme Court held that the Charter did not apply to a publicly created and funded university because it fell outside the state's direct control. See *McKinney v University of Guelph* [1990] 3 SCR 229, 76 DLR (4th) 545. See also *Connell v University of British Columbia* [1990] 3 SCR 451 (Limited state supervisory role and significant fiscal control did not make university 'government' for purposes of Charter.) The *McKinney* Court found that although the University of Guelph was subject to government regulation and dependent upon government funding, it was not a state actor because it managed its own affairs and allocated those funds along with tuition moneys, endowment funds and other sources. Similarly, in *Stoffman v Vancouver General Hospital,* the Canadian

Perhaps, as Mark Tushnet has suggested, the central purpose of the Final Constitution — to subject private parties, as well as state parties, to the basic law's provisions — makes these fine distinctions between organs of state and non-organs of state less pressing than they might otherwise be.[1] But given the Constitutional Court's penchant for avoiding the constitutionalization of 'private' disputes, the characterization of a legal relationship as one between the state and an individual — as opposed to one between private parties — retains its value.

The courts have not, as yet, tested the outer limits of FC s 239 analysis in the manner suggested by Ellmann and Canadian case law. However, a clutch of cases largely confirm the conclusion that our courts have rejected the restrictive, anachronistic understanding of 'organ of state' offered up by Van Djikhorst J in *Direct Cost Cutters* and *Korf* and that they are inclined to prevent the state from delegating responsibilies so as to immunize itself from liability for the actions of its creations.[2]

Supreme Court found that the Charter did not apply to hospital regulations even though fourteen of sixteen hospital board members were government appointees and the Minister had the power to veto and compel regulations made by the board and to compel the board to enact regulations. [1990] 3 SCR 483 ('*Stoffman*'). The Court held that Charter did not apply because government presence was only supervisory and did not effect actual operation of hospital. Recently, however, the Canadian Supreme Court has adopted a more relaxed approach to the control test. In *Eldridge v British Columbia*, the Canadian Supreme Court found that a hospital was subject to the Charter despite the absence of direct control over the hospital's operation. [1997] 3 SCR 624 at paras 43–51. That the hospital was, in significant part, governed by and funded under British Columbia's Hospital Services Act was sufficient to secure review under the Charter. Although there is little difference, factually, between *McKinney*, *Stoffman* and *Eldridge*, the legal conclusions are worlds apart. In *McKinney* and *Stoffman*, the absence of state actors ends the Supreme Court's constitutional analysis. In *Eldridge*, the finding of a sufficient quantum of government presence underwrites the Supreme Court's decision to review the hospital's conduct under s 15 of the Charter.

Peter Hogg notes the factual similarities and legal differences with some dismay. He concludes that *Eldridge* was wrongly decided and that the Charter should not have applied. See Hogg, 'Application' in *Constitutional Law of Canada* (4th Edition 2001) Chapter 34. But given this difference in outcome, it is hard to maintain, as Hogg does, that the control test looks solely to 'an institutional or structural link' with government as opposed to a 'functional' link. Ibid at 34–17. At a minimum, the control test now enables a Canadian court to rely either on institutional affiliation alone or public function (when tied to some state foundation).

[1] See, eg, Mark Tushnet 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1 *Journal of International Constitutional Law* 79.

[2] Cf Duncan Kennedy 'The Stages of the Decline of the Public-private Distinction' (1982) 130 *University of Pennsylvania LR* 1349 (While Kennedy argues, correctly, that public-private distinctions rarely do any meaningful work, we, in South Africa, do not have the same liberty to dispense with that distinction for the purposes of FC s 239 organ of state analysis.)

In *Hoffmann*, the Constitutional Court found that a change of legal form from a state commercial enterprise to a state-owned public company was insufficient to take Transnet and SAA out of the orbit of government. A public function and the exercise of public power — in the public interest and in terms of legislation — makes both Transnet and SAA organs of state for the purposes of FC s 239*(b)* and thus FC s 8(1). Similarly, non-governmental professional regulatory bodies and public service entitites that possess all the trappings of state power have been found to satisfy the requirements of FC s 239*(b)*. In *Association of Chartered Certified Accountants*, the High Court found that the Public Accountants and Auditors Board is an 'organ of state' as defined in FC s 239*(b)*(i) and (ii).[1] The *Association of Chartered Certified Accountants* Court reasoned as follows:

> The Board clearly exercises a public power; it is a creation of statute and the source of its power is to be found in the Public Accountants and Auditors Act 80 of 1991. The Board also appears to fulfil a public function in terms of the said legislation. The Board is a regulatory body entrusted with the task of ensuring that proper standards are maintained in the accounting and auditing profession. It functions in close co-operation with structures of State authority, its members are appointed by the Minister and include persons selected among the persons holding office as State functionaries, it is also dependent upon the State for infrastructural support.[2]

The High Court in *Mkhize* employed similar reasoning regarding the FC s 239*(b)* status of the Commission for Conciliation, Mediation and Arbitration ('CCMA').[3] The CCMA was established in terms of a statute — the Labour Relations Act[4] — and exercises a public function and a public power. *Mkhize* seems especially close in facts, reasoning and outcome to *Eldridge v British Columbia*. In both cases, the hook was the enabling legislation. Once the entity was demonstrated to be a statutory body, the court only needed to show that the entity operated as an extension of the state, or furthered state objectives or played a role traditionally associated with the state.

31.5 Application of the Bill of Rights to other sections of the Constitution

The wording of FC s 8 offers no indication as to how the substantive provisions in the Bill of Rights engage other sections of the Final Constitution. However, the text — especially where it has changed from the Interim Constitution to the Final Constitution — intimates when and where the substantive provisions of the Bill engage other constitutional provisions.

[1] *Association of Chartered Certified Accountants v Chairman, the Public Accountants' and Auditors' Board* 2001 (2) SA 980 (W).
[2] Ibid at 996.
[3] *Mkhize v Commission for Conciliation, Mediation and Arbitration* 2001 (1) SA 338 (LC).
[4] Act 66 of 1995.

The supremacy clause of the Interim Constitution, s 4(1), read as follows:

> This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, *unless otherwise provided expressly or by necessary implication*, be of no force and effect to the extent of the inconsistency. (Emphasis added.)

The supremacy clause of the Final Constitution, s 2, reads:

> This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and obligations impose by it must be fulfilled.

At a minimum, the Interim Constitution contemplated the possibility that a constitutional provision — and government action taken in terms of that provision — could, in the abstract, conflict with the requirements of another constitutional provision. I say 'in the abstract' because the Constitutional Court has committed itself to the proposition that all constitutional provisions must be read in a manner that permits them to be harmonized with one another.[1] While harmonization as a canon of constitutional interpretation implies that a substantive provision in the Bill of Rights might have to bow before the requirements of another constitutional provision, the text of the Final Constitution indicates that harmonization ought, as a general matter, to cut the other way.[2] FC s 7(1) provides that:

> The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic rights of human dignity, equality and freedom.

By making fundamental rights an indispensable component of South Africa's political process, FC s 7 provides support for the argument that where another provision can be read either to undermine a fundamental right or to give effect to a fundamental right, it should be read so as to do the latter.[3]

One further section of the Final Constitution deserves our attention. FC s 36(2) reads, in relevant part, that:

> Except as provided in subsection (1) or in any other provision of this Constitution, no law may limit any right entrenched in this Chapter.

The phrase 'any other provision of this Constitution' should give us pause. On one reading, the phrase would appear to permit the override of fundamental

[1] *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening: Institute for Democracy in South Africa & Another as Amici Curiae)(No 2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC)('*UDM*') at para 12 (Court held that 'amendments to the Constitution passed in accordance with the requirements of s 74 of the Constitution became part of the Constitution. Once part of the Constitution, they could not be challenged on the grounds of inconsistency with other provisions of the Constitution. The Constitution, as amended, had to be read as a whole and its provisions had to be interpreted in harmony with one another.') See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) 744 (CC), 1996 (10) BCLR 1253 (CC).

[2] *UDM* (supra) at para 12 (Since an amendment to the Final Constitution must be read as part of the Final Constitution, all other provisions must harmonized with the new provision So although FC s 19 or FC s 1 could be given a gloss that would put them at odds with the practice of floor-crossing any interpretations consistent with floor-crossing must be given precedence.)

[3] *De Lille & Another v Speaker of the National Assembly* 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C)('*De Lille*').

rights by other provisions of the Final Constitution without the requirement that they be justified by reference to the test laid out in FC s 36(1).

There is, however, a better reading. Given the primacy of place the Final Constitution accords the Chapter's fundamental rights, and their express purpose of placing clear limits on the exercise of government power, it would be counter-intuitive to subordinate automatically these rights to the exercise of government power. At the very least it should remain an open question as to whether or not the exercise of power expressly provided for by the Final Constitution should be permitted to limit a fundamental right. While we may not want to subject such limitations to the justificatory test set out in FC s 36(1), another kind of justificatory test is warranted. Such a test would treat the kinds of justification for a constitutional-power-based incursion into a fundamental right quite differently than FC s 36(1) treats the justifications for statutory, executive, common law or customary law infringements of fundamental rights.

The position adumbrated above is consistent with the Canadian learning on 'internal' constitutional conflicts. No part of the Canadian Constitution is deemed to be superior to any other part. The Charter, therefore, may not be used to invalidate other provisions of the Constitution.[1] The Canadian Supreme Court has crafted a more subtle distinction that permits application of the Charter to *acts* performed in the *exercise* of a constitutional power.[2] The test the Supreme Court employs turns on whether acceding to the Charter argument negates or removes a constitutional power (part of the tree itself). If so, the Charter does not apply. If, however, the attack merely engages the exercise of a constitutional power (the fruit of the tree), then a court can entertain the Charter argument.[3]

Both *De Lille* and *UDM* provide some clarity on the South African courts' take on this complex set of issues.

In *De Lille* the applicant was found by Parliament to have violated alleged rules of parliamentary procedure.[4] She was duly punished and suspended. The question for the court was whether the constitutional provisions dealing with the powers of Parliament could justifiably limit the constitutional rights of the applicant: especially the rights to administrative justice, political participation and freedom of expression. Parliament had taken the position that the rules of parliamentary privilege — which, amongst other things, include the power of the National Assembly to

[1] See *Reference re Act to Amend Education Act (Ont)* [1987] 1 SCR 1148, (1987) 40 DLR (4th) 18. With regard to the determination of whether a law is constitutional or not, Peter Hogg argues for the logical priority of the constitutional provisions regulating the legislative process over the rights and freedoms found in the Charter as follows: 'It is impossible for a nation to be governed without bodies possessing legislative powers, but it is possible for a nation to be governed without a Charter . . . . Another point in favour of the logical priority of federalism issues over Charter issues is the presence in the Charter of Rights of the power of override.' 'Judicial Review on Federal Grounds' *Constitutional Law of Canada* (4th Edition 2002) 15-2–15-5.

[2] See *New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 SCR 319, (1993) 100 DLR (4th) 212.

[3] Ibid at 373. See Peter Hogg 'Application' *Constitutional Law of Canada* (4th Edition 2002) 34-9–34-12.

[4] The decision of the Cape High Division was confirmed by the Supreme Court of Appeal, but on non-constitutional grounds. See *Speaker of the National Assembly v De Lille & Another* 1999 (4) SA 863 (SCA), 1999 (11) BCLR 1339 (SCA)(Court found suspension beyond the scope of Paliament's authority — *ultra vires* — in the absence of legislation or rules that might permit such punishment.)

order its own affairs — were not an appropriate object for judicial review. The *De Lille* court rejected this view.

The *De Lille* court observed that, in terms of FC s 2, the Final Constitution is the supreme law of the Republic and that any law or conduct inconsistent with the Final Constitution is invalid. The court then noted that, according to FC s 8(1), the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state.[1] Any conduct or legislation regarding privilege inconsistent with the Final Constitution — even if drawn from the provisions of the Final Constitution itself — must be found infirm. In *De Lille*, the court found that power to craft rules or make decisions regarding parliamentary privilege was so inextricably bound up with the exercise of that power that the two could not be distinguished. The *De Lille* court was therefore obliged to hold that the determination of the extent of this privilege must relate to its exercise, and that both must therefore be subject to judicial review. If the court had decided otherwise, Parliament would have had a blank cheque to set the limits of its own powers.[2] Most importantly, this specific exercise of judicial review enabled the court to find that Parliament had *exercised* its powers in breach of the substantive provisions of Chapter 2. *De Lille* suggests that where a non-fundamental rights provision of the Final Constitution appears to contemplate a limitation of a fundamental right, no such limit should be permitted without clear and convincing textual evidence.

De Lille also supports the proposition that the exercise of powers sourced from non-Chapter 2 constitutional provisions that impair the exercise of a substantive provision of Chapter 2 cannot — unless authorized by a law of general application — be justified by reference to FC s 36. Judge Hlophe writes:

[1] Judge Hlophe reinforces this point when he writes that:

> Ours is no longer a parliamentary state. It is a constitutional state founded on the principles of supremacy of the Constitution and the rule of law. A new political and Constitutional order has been established in South Africa. The new Constitution shows a clear intention to break away from the history of parliamentary supremacy. There are many other provisions in the Constitution which do not support Mr. Heunis' contention. For example: (i) s 1*(c)* says the Republic of South Africa is a democratic state founded on the supremacy of the Constitution and the rule of law; (ii) s 2 provides that the Constitution is the supreme law of the Republic and law or conduct inconsistent with it is invalid; (iii) s 34 states that everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court of law or, where appropriate, another independent and impartial tribunal or forum; (iv) s 38 entitles anyone alleging that a right in the Bill of Rights has been infringed or threatened to approach law courts for appropriate relief; *(v)* s 165(3) provides that no person or organ of state may interfere with the functioning of the courts; (vi)s172(1)*(a)* provides that when a court decides a Constitutional matter within its power it must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; (vii) s 8 provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state; and (viii) other relevant sections include s 165(2), s 39(1)*(a)* and 39(2).

Ibid at 452.

[2] Ibid at 446–447.

[3] Ibid at 455.

> The suspension of the first applicant fails the first leg of the limitations test because it did not take place in terms of law of general application. There is no law of general application which authorises such suspension. It is not authorised by the Constitution, the Powers and Privileges of Parliaments Act of 1963 or the Standing Rules of the National Assembly. The law of Parliamentary privilege does ot qualify as a law of general application for purposes of s 36. It is not codified or capable of ascertainment. Nor is it based on a clear system A of precedent. Therefore there is no guarantee of parity of treatment. It is essentially ad hoc jurisprudence which applies unequally to different parties. . . . Accordingly, the law of privilege fails the 'law of general application' leg of the limitations test.[1]

When can the parliamentary right to free speech afforded by FC s 58, and reinforced by FC s 16, be justified by reference to FC s 36(1)? Beyond finding that any restrictions on privilege must be justified in terms of a law of general application, the *De Lille* court does not say.

The Constitutional Court in *UDM* offers a somewhat different, although ultimately consistent, take on the subject.[2] In June 2002, Parliament passed four Acts that aimed to allow members of national, provincial and local government to change parties without losing their seats. The four Acts were: (1) the Constitution of the Republic of South Africa Amendment Act 18 of 2002 (the First Amendment Act); (2) the Constitution of the Republic of South Africa Second Amendment Act 21 of 2002 (the Second Amendment Act); (3) the Local Government: Municipal Structures Amendment Act 20 of 2002 (the Local Government Amendment Act); and (4) the Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002 (the Membership Act).

With regard to the constitutional attack on the validity of two constitutional amendments — the First Amendment Act and the Second Amendment Act — the *UDM* Court was quite clear:

> Amendments to the Constitution passed in accordance with the requirements of s 74 of the Constitution become part of the Constitution. Once part of the Constitution, they cannot be challenged on the grounds of inconsistency with other provisions of the Constitution. The Constitution, as amended, must be read as a whole and its provisions must be interpreted in harmony with one another. It follows that there is little if any scope for challenging the constitutionality of amendments that are passed in accordance with the prescribed procedures and majorities.[3]

Only in extraordinary circumstances, where the 'basic structure' of the Final

[1] *De Lille* (supra) at 455. See also *Speaker of the National Assembly v De Lille & Another* 1999 (4) SA 863 (SCA), 1999 (11) BCLR 1339 (SCA)(Finding that Parliament acted *ultra vires* consistent with High Court finding that Parliament did not act in terms of any cognizable law.)

[2] *United Democratic Movement v President of the Republic of South Africa and others (African Christian Democratic Party and others Intervening; Institute for Democracy in South Africa and another as Amici Curiae)(No 2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC)('*UDM*').

[3] *UDM* (supra) at para 12.

Constitution is threatened by an amendment, will the Constitutional Court even consider challenges to amendments 'passed in accordance with the prescribed procedures.'[1] As a result, various challenges to the two amendments failed.

A normal act of Parliament — even one married to constitutional amendments — is not due such deference. The Membership Act — having failed to comply with the requirements of Item 23A of Annexure A to Schedule 6 to the Final Constitution — was held to be unconstitutional.[2]

Read together, *De Lille* and *UDM* provide support for the following propositions:

- Chapter 2's fundamental rights and freedoms will take precedence over law and conduct that is generated in terms of other constitutional provisions.
- While the primacy of place of fundamental rights in the Final Constitution militates against subordinating fundamental rights to constitutionally articulated government powers, fundamental rights have no automatic claim of priority over constitutionally articulated government powers.
- Accepted canons of constitutional interpretation require that the courts must attempt to harmonize Chapter 2 and non-Chapter 2 claims.
- When harmonizing the rights and freedoms found in Chapter 2 with constitutionally articulated government powers, a court should construe constitutionally articulated government powers in a manner that gives greatest effect to the rights and freedoms at issue.

The last proposition points to one of the strengths of *De Lille*. As I noted at the outset of this section, Chapter 2's Bill of Rights is, in the words of FC s 7, a 'cornerstone of democracy in South Africa'. *De Lille* recognizes this relationship of reciprocal effect between rights and democracy and quite consciously reads the constitutional provisions regarding rules and orders of Parliament in terms of the Final Constitution's commitment to freedom of speech. As *UDM* demonstrates, however, this reciprocal effect may sometimes cut the other way. The Constitutional Court in *UDM* is surely correct in noting that there as many types of multi-party democracy as there are tokens and that the Final Constitution did not commit itself to a type of multi-party democracy that precluded floor-crossing.[3]

[1] *UDM* (supra) at paras 14–17. The *UDM* Court referred to *Premier, KwaZulu-Natal & Others v President of the Republic of South Africa & Others*, in which Mahomed DP had written, with the full support of the Court, that:

> There is a procedure which is prescribed for amendments to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable. It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganising the fundamental premises of the Constitution, might not qualify as an 'amendment' at all.

1996 (1) SA 769 (CC), 1995 (12) BCLR 1561 (CC) at para 47.

[2] Item 23A of Annexure A to Schedule 6 to the Final Constitution contained the anti-defection provision relevant to the national and provincial legislatures and could be amended by ordinary legislation 'within a reasonable period after the new Constitution took effect' to make it possible for a member of the legislature who ceased to be a member of the party which nominated that member to retain membership of such legislature. The *UDM* Court found that Parliament had failed to Act in a reasonable period of time after the Final Constitution took effect.

[3] If anything, the presence of Item 23A reinforces the argument the Final Constitution contemplates a type of democracy that permits floor-crossing. If this last proposition is true, then the Constitutional

31.6 Extraterritorial Effect of the Bill of Rights of the Final Constitution

The Final Constitution, and Chapter 2 in particular, applies to various forms of law and conduct within South Africa. What the text does not indicate is whether persons outside South Africa's borders can benefit from the rights in Chapter 2, whether the exercise of state power by the South African government outside South Africa's borders is subject to the strictures of Chapter 2, and whether the Bill of Rights has anything to say about disputes governed by foreign law in foreign jurisdictions. The next two sections speak to these fundamental questions in some detail. But first a brief set of responses.

Is the South African government obliged to abide by the Final Constitution's requirements outside South Africa's border? The initial, short answer was yes. The Constitutional Court in *Mohamed* found that the state was subject to constitutional dictates even though the person subject to the exercise of state power was neither legally resident in South Africa nor still within its borders.[1] At present the answer is unclear. The Constitutional Court in *Kaunda* muddied the waters by running together two discrete issues: whether state action outside South Africa's borders can be subject to the requirements of Chapter 2, and whether disputes governed by foreign law in foreign jurisdictions can be subject to the requirements of Chapter 2.[2] The *Kaunda* Court held that the Bill of Rights of the Final Constitution did not apply extraterritorially, for reasons largely to do with the comity of nations, but that South African law might apply to nationals abroad in special circumstances.

Are foreign legal regimes in any way subject to the dictates of the Bill of Rights? The short answer is no and yes. Respect for the sovereignty of foreign countries — along with the practical realization that the review of foreign laws apparently in conflict with the Bill of Rights would be logistically and politically impossible for our courts — demands that we restrict the application of the Final Constitution. However, where, as in *Mohamed*, a South African court properly exercises jurisdiction in a matter that potentially involves the extradition of a person for trial in a foreign jurisdiction, the Constitutional Court has found that a South African court is required to take into account the penalties to be exacted upon that person if extradited to another country and then convicted in its courts. The court must determine the extent to which such penalties would constitute a breach of his or her fundamental rights under the South

Court was correct in harmonizing the Final Constitution's provisions in such a fashion as to give the maximum possible effect to both the floor-crossing amendments and the existing provisions against which they were being measured. For more on *UDM*, floor-crossing and representative democracy, see Steven Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17; Glenda Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 29 and Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 9.

[1] *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa)* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC)('*Mohamed*').

[2] *Kaunda & Others v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa Amicus Curiae)* 2004 (1) SACR 111 (CC), 2004 (10) BCLR 1009 (CC)('*Kaunda*').

African Constitution. A significant breach would require intervention. A court order requiring the South African government to intervene in the proceedings of a trial in a foreign jurisdiction in order to correct a violation of South African constitutional law by South African officials was not understood, by the *Mohamed* Court, to be a violation of the principle of separation of powers.

Kaunda cuts back *Mohamed*'s understanding of extraterritoriality. Pace *Mohamed*, the Constitutional Court in *Kaunda* found that the South African government is under no obligation to intervene in a trial of a South African national under foreign law in a foreign jurisdiction until there is an imposition of a penalty that would constitute a significant breach of his or her rights under the South African Constitution. The *Kaunda* Court characterized as a violation of separation of powers any order by a South African court requiring government intervention prior to the meting out of punishment by a foreign court.

(a) Persons outside South Africa's borders

Chapter 2 is clearly concerned with the South African government's treatment of people within its borders. There seems to be no good reason why abuses of state power within South Africa's borders should be subject to Chapter 2, but abuses of state power outside the borders should not be similarly subject. To relax the strictures on extraterritorial exercise of state power — and even private power — seems to offer a licence to the state — or another party burdened by Chapter 2 — to abuse persons abroad in ways it would never contemplate at home.[1] FC s 8(1) tells us that the Bill of Rights binds the conduct of the government. It does not distinguish home from abroad.

The United States Constitution provides some protection for US citizens outside US borders.[2] Aliens abroad are far less likely to benefit from the US Constitution's protections.[3] Where aliens abroad are concerned, the US courts regularly 'uphold' law enforcement violations of the Fourth Amendment's

[1] South Africa was ahead of the curve on this issue even before the post-1994 constitutional dispensation. See *S v Ebrahim* 1991 (2) SA 553 (A)(Appellate Division held that a cross-border warrantless kidnapping by security forces violated the fundamental rights of the accused. The court further justified its landmark opinion on the grounds that to permit such cross-border kidnappings would violate the sovereignty of other states and undermine the dignity and integrity of the judicial system asked to endorse such acts.)

[2] See *Rochin v California* 342 US 165 (1952)(Citizens abroad are protected against government violations so egregious that they 'shock the conscience'. These protections are, however, 'diluted'.) See also *In Re Ross* 140 US 453 (1891)(No right to jury trial abroad); *Reid v Covert* 354 US 1, 75 (1957)(Not every 'provision of the Constitution must be automatically applicable to American citizens in every part of the world'); *US v Warren* 578 F2d 1058 (5th Cir 1978)(Coast Guard stoppage of American vessel, apparently without reasonable grounds for suspicion, not deemed violation of Fourth or Fifth Amendments). Even the Hungarian Constitution, a document of more recent vintage, maintains this citizen/non-citizen distinction. According to Article 69(3): 'Every Hungarian citizen is entitled to enjoy the protection of the Republic of Hungary, during his/her legal stay abroad.'

[3] But see *Rasul v Bush* 542 US —, 124 SCt 2686 (2004)(Foreign nationals held at Guantanamo Bay entitled to bring legal action in Federal Court challenging the alleged grounds for their detention.)

prohibition of unreasonable searches and seizures.[1] It is not clear why benefits should flow to non-citizens within the United States' borders when subject to state power, but not to non-citizens outside the borders when subject to that same state power.[2]

Persons outside Canada's borders are entitled to the benefit of some Charter rights.[3] The Canadian Supreme Court has even held that non-citizens abroad are entitled to the Charter's protection when subject to the exercise of police power by Canadian officials in a foreign jurisdiction.[4] The Supreme Court of Canada implicitly recognizes that to hold otherwise valorizes state sovereignty and treats all government action abroad as the legal equivalent of war in defense of the nation.[5]

The limited succour to be had by non-citizens in American courts makes the Constitutional Court's decision in *Mohamed* that much more remarkable.[6] At the time of the Constitutional Court hearing on the matter, the appellant was on trial in a US federal court on capital charges related to the bombing of the United States embassy in Dar es Salaam, Tanzania in August 1998. Although the applicant was now beyond the Constitutional Court's jurisdiction, his representatives asked the Court to find: (i) that the interrogation and the handing over of Mr Mohamed by South African officials to US agents was unlawful, and (ii) that the government had breached Mr Mohamed's constitutional rights by handing him over to the US government without first obtaining an assurance that the death penalty would not be imposed or carried out in the event of Mr Mohamed's conviction. Furthermore, the appellants sought an order 'directing the Government of the Republic of South Africa to submit a written request … to the Government of the United States of America that the death penalty not be sought, imposed nor carried out' in the event of conviction.[7] By and large, the Constitutional Court granted the relief sought by the applicant. In rejecting claims made by the government that a court order in this matter was 'futile', beyond the Constitutional Court's powers, and a breach of the separation of powers, the *Mohamed* Court wrote:

[1] *US v Verdugo-Uriquidez* 494 US 259 (1990); *Lujan v Gengler* 510 F2d 62 (2d Cir 1975). But see *US v Toscanino* 500 F2d 267 (2d Cir 1974)(Abduction of alien abroad so shocks conscience as to violate constitution) Poll case. See, generally, Louis Henkin *Foreign Affairs and the Constitution* (1972) 251–70.

[2] See *Johnson v Eissentrager* 339 US 763 (1950)(Non-resident enemy aliens outside territorial jurisdiction of United States not entitled to a writ of habeas corpus.)

[3] See *R v A* [1990] 1 SCR 995. But see Peter Hogg 'Application' *Constitutional Law of Canada* (3rd Edition 1992) 34–5, fn 23. Despite the changes in Canadian law cited herein, Hogg maintains that the extraterritorial benefit of rights ought to extend only to Canadian citizens. See Peter Hogg 'Application' *Constitutional Law of Canada* (4th Edition 2002) 34–5, fn 23.

[4] *R v Cook* [1998] 2 SCR 597(US citizen arrested in US for murder committed in Canada still entitled to protection of Charter when interrogated by Canadian police officers in the US. Failure to apprise the accused of right to counsel violated Charter. Moreover, the enforcement of the Charter did not constitute a violation of US sovereignty.)

[5] See Jonathan Klaaren 'Human Rights Legislation for a New South Africa's Foreign Policy' (1994) 10 *SAJHR* 260 (Klaaren argues that human rights ought to be a linchpin of South African foreign policy.)

[6] 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC).

[7] *Mohamed* (supra) at para 4.

> To stigmatise such an order as a breach of the separation of State power as between the Executive and the Judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of State and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights.[1]

Having found the government's actions unlawful under the Aliens Control Act and unconstitutional under FC ss 10, 11, and 12, the *Mohamed* Court then ordered that a copy of its judgment be sent, as a matter of urgency, to the apposite US federal district court. On the more general issue of the Constitutional Court's — and thus the Final Constitution's — reach, the *Mohamed* Court's judgment stands for the proposition that the Final Constitution applies to aliens both within and without South Africa's borders and that the government cannot undo our basic law's fetters simply by claiming that a case concerns sensitive political issues or foreign affairs. Moreover, even if a court has a limited capacity to affect directly the manner in which the government carries out its foreign affairs, a finding that the government violated the constitutional rights of a person within its borders might support an action in delict and thereby influence the government's behaviour in the future.[2]

If *Mohamed* is an advance with respect to the extraterritorial application of the Bill of Rights to the exercise of state power beyond our borders, then *Kaunda* must be viewed as a retreat. The Constitutional Court in *Kaunda* was approached by 69 South African citizens held in Zimbabwe on a variety of charges related to alleged mercenary activities. They requested relief ranging from an order directing the South African Government to seek the release and the extradition of the applicants from Zimbabwe and Equatorial Guinea back to South Africa, to a more limited order directing the South African Government to seek assurance from the Zimbabwean and Equatorial Guinean Governments that they would not impose the death penalty on the applicants. The Constitutional Court denied all seven forms of requested relief.

The textual basis for the *Kaunda* Court's rejection of the claim that the Bill of Rights applies to extraterritorial legal proceedings begins with a curiously cursory appraisal of FC s 7(2) and ends with what ultimately amounts to a very narrow construction of the holding in *Mohamed*. The *Kaunda* Court writes:

[1] *Mohamed* (supra) at para 71 citing, in support of these various proposition, FC s 1*(c)*, and FC s 7(2) read with FC ss 38 and 172(1)*(a)*. See also *Metlika Trading v South African Revenue Service* 2005 (3) SA 1 (SCA)(Enforceability or effectiveness of order not sole criterion granting requested relief.)

[2] See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC). In *Carmichele*, the failure by the state to protect adequately a person it knew to be in danger led to the development of the common law of delict so as to create a duty of care that would enhance the likelihood that state actors would not fail to exercise this duty in the future. It is reasonable to imagine that a court, having placed the government on notice that violations of the rights of aliens at home or abroad is unconstitutional, will be willing to extend the duty of care in a delictual action to include government agents responsible for the care or the welfare of aliens at home or abroad. Moreover, the recent decision of the Constitutional Court in *Modderklip* strengthens the claim that the failure of the state to discharge a constitutional duty may occasion a finding that the state must bear the costs incurred by its conduct or its omission. *Modderklip* (supra) at para 68.

> The starting point of the enquiry into extraterritoriality is to determine the ambit of the rights that are the subject matter of section 7(2) . . . . [T]he rights in the Bill of Rights on which reliance is placed for this part of the argument are rights that vest in everyone. Foreigners are entitled to require the South African state to respect, protect and promote their rights to life and dignity and not to be treated or punished in a cruel, inhuman or degrading way while they are in South Africa.[1]

Foreigners are entitled to all but a few of the rights enshrined in Chapter 2 — when they are in South Africa. That is what *Mohamed* told us.

The *Kaunda* Court continues: 'Clearly, [foreigners] lose the benefit of that protection when they move beyond our borders.[2]' There is nothing clear about the basis for this assertion. The text says nothing about what foreigners do and do not possess with respect to extraterritorial application. Nor does it make any distinction between citizens and non-citizens. The *Kaunda* Court then turns to the extraterritorial entitlements of citizens. It asks:

> Does section 7(2) contemplate that the state's obligation to South Africans under that section is more extensive than its obligation to foreigners, and attaches to them when they are in foreign countries?[3]

This rhetorical use of FC s 7(2)'s ostensible treatment of foreigners primes the Court's intuition pump with respect to its subsequent analysis of the appropriate constitutional contours of the state's obligations to South African nationals. Unfortunately, FC s 7(2) has nothing to say about the treatment of foreigners or nationals. The *Kaunda* Court looks to FC s 7(1) for an answer. FC s 7(1) reads:

> This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people *in* our country and affirms the democratic values of human dignity, equality and freedom. (My emphasis.)

It is difficult to discern in FC s 7(1) the basis for denying the extraterritoriality of the Bill. The *Kaunda* Court writes:

> The bearers of the rights are people *in* South Africa. Nothing suggests that it is to have general application, beyond our borders.[4]

The *Kaunda* Court's entire textual argument on the lack of extraterritoriality turns on the presence of a word — the preposition 'in' — that could never have been intended to carry such weight. The *Kaunda* Court cites no authority — neither travaux preparatoires nor academic writing — in support of this proposition.[5]

There are better textual sources than the preposition 'in' with regard to the extraterritoriality. Under FC s 8(1), the Bill of Rights binds the executive as well

[1] *Kaunda* (supra) at para 36.
[2] Ibid.
[3] Ibid.
[4] *Kaunda* (supra) at para 37 (My emphasis).
[5] Anthony Stein offers another perfectly tenable, and to my mind more plausible, reading of 'in' that would turn not on a literal sense of time or place, but on the broader connotation of 'in' — namely 'of the people of South Africa'. The *Kaunda* Court's reading leads to a reductio ad absurdum: it suggests that if all of us in South Africa today were to go to Mozambique for a holiday tomorrow, the Bill of Rights would, tomorrow, cease to enshrine the rights of any and all South Africans.

as the other two branches of government. Under FC s 2, all laws and all conduct inconsistent with the provisions of the Final Constitution are invalid. Neither provision gives the State a free ride when it acts outside the borders of South Africa. As Justices O'Regan and Mokgoro note in their dissent:

> There is nothing in our Constitution that suggests that, in so far as it relates to the powers afforded and the obligations imposed by the Constitution upon the executive, the supremacy of the Constitution stops at the borders of South Africa. Indeed, the contrary is the case. The executive is bound by the four corners of the Constitution. It has no power other than those that are acknowledged by or flow from the Constitution. It is accordingly obliged to act consistently with the obligations imposed upon it by the Bill of Rights wherever it may act.[1]

The *Kaunda* Court's error flows from the conflation of two discrete issues: (1) the exterritorial application of the Bill of Rights to state conduct and persons beyond our borders; and (2) the exterritorial application of the Bill of Rights to the law of foreign jurisdictions. As a result, the *Kaunda* Court concludes that:

> There may be special circumstances where the laws of a state are applicable to nationals beyond the state's borders, but only if the application of the law does not interfere with the sovereignty of other states. For South Africa to assume an obligation that entitles its nationals to demand, and obliges it to take action to ensure, that laws and conduct of a foreign state and its officials meet not only the requirements of the foreign state's own laws, but also the rights that our nationals have under our Constitution, would be inconsistent with the principle of state sovereignty. Section 7(2) should not be construed as imposing a positive obligation on government to do this.[2]

This conflation of issues has its source in the failure by the *Kaunda* Court to recognize the textual basis for the extraterritorial application of the Bill of Rights to every exercise of power by the South African state. As Justice O'Regan writes:

> So, the extraterritorial application of the provisions of the Bill of Rights will be limited by the international law principle that the provisions will only be enforceable against the government in circumstances that will not diminish or impede the sovereignty of another state. The enquiry as to whether the enforcement will have this effect will be determined on the facts of each case. As a general principle, however, our Bill of Rights binds the government even when it acts outside South Africa, subject to the consideration that such application must not constitute an infringement of the sovereignty of another state.[3]

Justice O'Regan's exemplary analysis of the distinction between the Bill of Rights' application to the South African state and the Bill of Rights' application to

[1] *Kaunda* (supra) at para 228. Justice O'Regan continues: 'It is not necessary to consider in this case whether the provisions of the Bill of Rights bind the government in its relationships outside of South Africa with people who have no connection with South Africa.' Ibid. However, as Justice O'Regan intimates later on in her dissent, the logic of the proposition that the exercise of state power is always circumscribed by the Bill of Rights creates a rebuttable presumption that the Bill of Rights does indeed bind the state in its actions beyond its borders — whether or not citizens or foreigners are involved. Whether such a rebuttable presumption may be overcome more easily beyond our borders is another matter and beyond the scope of this chapter.

[2] *Kaunda* (supra) at para 44.

[3] Ibid at para 229.

foreign law invites some future majority of the Constitutional Court to reconsider its cramped understanding of the extraterritorial application of the Bill of Rights.

(b) Foreign law and the Final Constitution

A different set of considerations militates against the subjection of foreign law to Chapter 2's strictures. Here the issue is not the exercise of South African state power against individuals, but respect for the sovereignty of another country. Such respect generally demands both the recognition that the laws of other countries may differ fundamentally from our own and the practical realization that we cannot subject foreign laws to review every time they might appear to abrogate Chapter 2 rights.[1] Leaving aside questions of time, capacity and enforcement, the courts would quickly find themselves embroiled in the kinds of international political disputes that clearly fall outside their proper domain.

That said, *Mohamed* forces the reader to rethink the Final Constitution's relationship to foreign affairs and the law of foreign jurisdictions.[2] While no South African court can expect its judgment to have the force of law in another jurisdiction, *Mohamed* suggests that a South African court can expect that its

[1] See *Swissborough Diamond Mines Ltd v Government of the Republic of South Africa* 1999 (2) 279 (T)(Court held that, given the act of state doctrine (or a doctine of judicial restraint in foreign affairs), a court must be extraordinarily circumspect when applying South African law to the behaviour of the Government of Lesotho within its own borders. Court described request for review of decisions taken together by the governments of South Africa and Lesotho as a 'judicial no-man's land'.) See also TW Bennett 'Redistribution of Land and the Doctrine of Aboriginal Title in South Africa' (1993) 9 *SAJHR* 444 (On how the act of state doctrine may interact with discontinuities in rule — between various pre- and post-apartheid legal regimes — and aboriginal land claims in South Africa; effectively asks age-old question of whether a new regime can take cognizance of legal relationships in previous regimes, and thus whether the past is, in fact, a foreign country.) The 'act of state' doctrine in US jurisprudence severely curtails the application of US constitutional law to foreign bodies of law. It holds that 'the courts of one nation will not sit in judgment on the acts of another nation within [the latter's] own territory.' *Banco Nacional de Cuba v Sabbatino* 376 US 398, 416 (1964). A domestic tribunal is only competent to examine the validity of foreign law where a treaty or some other agreement clearly establishes controlling legal principles. Canada has recently rejected a similarly restrictive doctrine. In the first few years of the Charter, the Canadian Supreme Court refused to apply Charter rights to foreign law. See *Canada v Schmidt* (1987) 39 DLR (4th) 18, [1987] 1 SCR 500 (Canadian Charter cannot be given extraterritorial effect to govern how criminal proceedings in a foreign country are to be conducted); *Kindler v Canada* (1991) 84 DLR (4th) 438. (Since Charter was not applicable to foreign law, a fugitive could legitimately be extradited to the US, even though he might be executed and such execution violated Charter's s 7.) However, the Canadian Supreme Court expressly reversed itself in *United States v Burns.* [2001] 1 SCR 283 ('*Barns*'). In *Burns*, the Court wrote that 'in the absence of exceptional circumstances, . . . assurances in death penalty cases [that the penalty will not be sought] are always constitutionally required.' In *Suresh v Canada*, the Canadian Supreme Court extended the holding in *Burns* to cover cases in which deportation of a foreign national was likely to result in torture of that person. [2002] 1 SCR 72. However, as Peter Hogg notes, the Supreme Court has allowed extradition to the United States when the 'fugitive faced penalties that were more severe than penalties for similar crimes in Canada' and which, if imposed in Canada, would be deemed contrary to the Charter. Hogg (supra) at 34–29 citing *US v Jamieson* [1996] 1 SCR 465; *US v Ross* [1996] 1 SCR 469; *US v Whitley* [1996] 1 SCR 467.

[2] *Metlika v South African Revenue Service* 2005 (3) SA 1 (SCA)(Court held that the possible lack of effectiveness did not prevent it from granting an order that might have to be enforced in and by another state.)

judgment will exert influence over the conduct of foreign affairs in a number of different ways. First, a South African court should expect that its own government will fashion its actions in a manner consistent with the South African Constitution. Second, the increased use of comparative (foreign) constitutional materials and the enhanced status of international law means that a foreign court will likely take note of a specific South African judgment that speaks directly to that court. Third, the Final Constitution also ties more closely the jurisprudence of other jurisdictions to our own by: *(a)* making some international agreements a part of domestic law;[1] *(b)* treating some international law as authority falling somewhere between the Final Constitution and Acts of Parliament, on the one hand, and such bodies of law as the common law or subordinate legislation, on the other;[2] and *(c)* employing international law as a guide to the interpretation of the Final Constitution and many pieces of legislation.[3] The influence of international law on our constitutional law ensures that there will be a reciprocal effect of South African constitutional law on international law. (That reciprocal effect is one of the engines that powers the development of international law.)

Kaunda rolls back *Mohamed*. It sets very strict limits on the extent to which the Final Constitution requires the South African government to intervene in the internal legal affairs of a foreign state and the extent to which foreign tribunals, after being put on notice by the South African government, must take cognizance of South African law. The *Kaunda* Court concludes that FC s 3 does not create an enforceable right to 'diplomatic protection'. At best, 'South African citizens are entitled to request South African protection under international law against wrongful acts of a foreign state.'[4] The *Kaunda* Court writes:

> [G]overnment policy concerning nationals in foreign countries, who are required to stand trial there on charges for which capital punishment is competent, is to make representations

[1] FC s 231, International Agreements, reads, in relevant part: (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

[2] FC s 232, Customary International Law, reads as follows: Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

[3] See FC s 233, Application of International Law, and FC s 39(1)*(b)*, Interpretation. FC s 233 reads as follows: When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. FC s 39 (1)*(b)*, reads, in relevant part: When interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law. For more on the effect of international law on South African constitution analysis, Kevin Hopkins & Hennie Strydom 'International Law and Agreements' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, September 2004) Chapter 30.

[4] *Kaunda* (supra) at para 60.

> concerning the imposition of such punishment only if and when such punishment is imposed on a South African citizen. This policy adopted by South Africa in its relations with foreign states is not inconsistent with international law or any obligation that the government has under the Constitution.[1]

In addition to loosening considerably, and somewhat disconcertingly, the South African state's specific obligation to intervene with respect to the death penalty, *Kaunda* curbs significantly the doctrine of extraterritorial application articulated in *Mohamed*.

The *Kaunda* Court distinguishes *Kaunda* from *Mohamed* on the facts. According to the *Kaunda* Court, the South African Bill of Rights has bite in *Mohamed* because the accused had been subject to the exercise of South African state power while *in* South Africa. The *Mohamed* Court's requirement that the South African government pass along its judgment to the apposite US federal district trial court is, ostensibly, grounded in the South African state's failure to adhere to the South African Bill of Rights. There is, here, an obvious sleight of hand. The *Mohamed* Court's intervention in the affairs of a foreign tribunal in a foreign state is required because a foreign national who has passed rather quickly through the legal apparatus of South Africa is now potentially subject to a legal penalty that could never have been imposed within South Africa. The Constitutional Court found itself obliged to put the US trial court on notice that the death penalty ought not to be imposed because it would violate the South African Constitution. The 'absence' of the exercise of South African state power in *Kaunda* ostensibly takes the matter out of the *Mohamed*-recognized orbit of the Bill of Rights. Of course, the South African government in *Kaunda did* exercise power comparable to that exercised in *Mohamed*. In *Kaunda*, the South African government informed the government of Zimbabwe of the presence of the alleged mercenaries. This information led, ineluctably, to the arrest of the alleged mercenaries. At a minimum, the South African government ought to have been under a comparable constitutional obligation to make efforts to ensure that the death penalty was not imposed. Recall that in *Mohamed*, South African agents assisted US agents in secreting the accused back to the US for trial. The South African government then found itself under a constitutional obligation to make efforts to ensure that the death penalty was not imposed.[2]

One cannot help but wonder whether the identity of the foreign states involved in the respective cases influenced the Constitutional Court's disparate decisions. After acknowledging substantial deficits in the administration of justice in both Equatorial Guinea and Zimbabwe, the *Kaunda* Court writes:

> The situation which exists in the present case is one which calls for delicate negotiations to ensure that if reasonably possible the fears that the applicants entertain can be put to rest, and that the trial, if one takes place, is conducted in a way that meets internationally accepted standards. The assessment of the risk, the best way of avoiding it and the timing

[1] *Kaunda* (supra) at para 144.

[2] Even if the *Kaunda* Court had articulated a principled distinction between the treatment of nationals, who, of their own accord, subject themselves to the full force of a foreign legal system, and the treatment of nationals, who, through the interposition 'or action' of the South African state, find themselves subject to the full force of a foreign legal system, such a distinction would not, in the hands of this court, have led to a different result.

> of action are essentially matters within the domain of government . . . . The situation that presently exists calls for skilled diplomacy the outcome of which could be harmed by any order that this Court might make. In such circumstances the government is better placed than a court to determine the most expedient course to follow. If the situation on the ground changes, the government may have to adapt its approach to address the developments that take place. In the circumstances it must be left to government, aware of its responsibilities, to decide what can best be done.[1]

No such reservations about the wisdom of court-sanctioned state intervention in the legal processes of the United States are voiced in *Mohamed*.

The second problem with *Kaunda* is that state intervention with respect to the imposition of the death penalty — even with respect to nationals — has become a matter of policy not constitutional law. The South African government's concerns regarding any imposition of the death penalty need only be articulated after a death sentence has been imposed. Both aspects of the holding in *Kaunda* appear to roll back the protections afforded to the non-national accused in *Mohamed*.

Once again, Justice O'Regan's dissent invites some future majority of the Court to reconsider its highly permissive reading of the constitutional obligations of the South African government with regard to the treatment of South African nationals subject to foreign law in foreign tribunals. According to Justice O'Regan, FC s 3(2) creates an entitlement to diplomatic protection. That entitlement creates a state obligation. Justice O'Regan writes:

> [G]overnment [is] not . . . constitutionally permitted simply to ignore a citizen who is threatened with or has experienced an egregious violation of human rights norms at the hands of another state. Were government to be entitled to do so, the achievement of human rights would be obstructed and international human rights norms undermined. Accordingly, and in the light of my understanding of the values of our Constitution, I would conclude that it is proper to understand section 3 as imposing upon government an obligation to provide diplomatic protection to its citizens to prevent or repair egregious breaches of international human rights norms. Where a citizen faces or has experienced a breach of international human rights norms that falls short of the standard of egregiousness, the situation may well be different. Thus, I conclude that to the extent that section 3(2) states then that 'citizens are equally entitled to the . . . privileges and benefits' of citizenship, it is not only an entitlement to *equal* treatment in respect of the privilege and benefit of diplomatic protection, but also an entitlement to diplomatic protection itself.[2]

31.7 The Waiver of Rights

(a) A Category Mistake

Whether the beneficiaries of constitutional rights can waive their rights is an underdeveloped and confusing area of constitutional law. It is underdeveloped and confusing because *(a)* no constitutional provision is made for waiver and *(b)* few meaningful discussions of the notion of 'waiver' have percolated up through the courts.

For reasons that will become clear, the 'waiver' of constitutional rights should

[1] *Kaunda* (supra) at paras 132–133.
[2] Ibid at para 238.

never be tolerated. But to say waiver should never be tolerated is to speak the language of waiver. It is the thesis of this section that *there is no such thing as waiver*. The basis for this thesis is not at all obvious. It is not obvious because many courts and commentators have failed to see that what is at issue in all of these cases is not actually the waiver of a right, but the interpretation of a right. To talk of waiver is to make a category mistake.[1]

What is a category mistake? A category mistake is the attribution to one, sometimes non-existent, entity attributes that properly belong to another entity, and the unnecessary multiplication of explanations for a single phenomenon. For example, you may take a visitor for a tour around the firm at which you work — introduce her to the managing partner and your articles clerk, show her the boardroom and the library, have her sit in your chair in your office. If, at the end of your tour, she asked you 'But where is the firm?', as if it were something different, something over and above what she had already seen, you would be perplexed. The cause of her confusion — and yours — is that she has made a category mistake. This is the kind of error made by those who speak of waiver as if it were an entity — a phenomenon — over and above the content of the specific substantive rights found in Chapter 2. It isn't.

The clearest Constitutional Court statement on the subject of waiver occurs in *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa)*.[2] In *Mohamed*, the South African government handed Mr Mohamed over to US authorities for prosecution on capital charges related to the bombing of the United States embassy in Dar es Salaam, Tanzania in August 1998. In defense of its handing over a person within South Africa and within South African government control to the representatives of a state in which Mr Mohamed could receive the death penalty if convicted, the South African government claimed that Mr Mohamed had waived those constitutional rights that would have *(a)* barred his extradition or *(b)* made such extradition subject to assurance by the United States that it would not seek the death penalty if Mr Mohamed were convicted. The *Mohamed* Court rejected both of the government's contentions. First, the Court wrote:

> It is open to doubt whether a person in Mohamed's position can validly consent to being removed to a country in order to face a criminal charge where his life is in jeopardy. The authorities ought not to be encouraged to obtain consents of such a nature.[3]

Second, assuming for the sake of argument, and no more, that the government could secure legitimately such a waiver of rights, the *Mohamed* Court held that:

> To be enforceable, however, it would have to be a fully informed consent and one clearly showing that the applicant was aware of the exact nature and extent of the rights being waived in consequence of such consent.[4]

Third, the *Mohamed* Court declared that '[t]he onus to prove such waiver is on the government.'[5] As a matter of fact, the *Mohamed* Court found that under no

[1] See Gilbert Ryle *The Concept of Mind* (1951).
[2] 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC)('*Mohamed*') at para 61.
[3] Ibid at para 61.
[4] Ibid at para 62.
[5] Ibid at para 64.

plausible construction of the case history could the government demonstrate that it had discharged its obligations. The *Mohamed* Court is a bit fuzzy, however, as to whether, as a matter of law, the government could have discharged its obligations. Earlier in the judgment, the *Mohamed* Court makes much of the government's failure to even attempt to seek assurance that the death penalty would not be imposed: assurance that seemed to be required because of South Africa's commitment to the rights to dignity, to life and to not be punished in a cruel, inhuman or degrading way. The *Mohamed* Court seems to suggest that absent such assurance, no extradition could be justified. But the entire discussion of waiver undercuts this conclusion. The extradition to the United States ultimately turns on whether Mr Mohamed 'was aware of his crucial right to demand [that the South African government secure such assurances as necessary to] protect against exposure to the death penalty.'[1] One must assume, from the manner in which the Court writes, that had Mr Mohamed possessed legal counsel, had he been in a position to offer or to withhold meaningful consent and had he still reached the conclusion that he wished to go to the United States to stand trial without any assurance regarding a death sentence, the Court would have allowed him to go.[2] If this invitation to a beheading is what the *Mohamed* Court actually had in mind, then there seems to me to be good reason to decline to follow its reasoning about waiver.

The Supreme Court of Appeal has taken a firmer line on waiver. In *Transnet Ltd v Goodman Brothers (Pty) Ltd,* the respondent (Goodman Brothers) had unsuccessfully tendered to supply wristwatches to the appellant (Transnet).[3] The respondent, relying on FC s 33 read with FC Item 23(2)*(c)* of Schedule 6, contended that the part of the tender conditions that provided that Transnet would not 'assign any reason for the rejection of a tender/quotation' was unconstitutional and that Transnet was obliged to furnish reasons for rejection of the respondents tender.[4] The applicant argued that since the Bill of Rights contains no general rule barring the waiver of rights, contracting parties could, with respect to at least some rights, stipulate to their waiver. The Supreme Court of Appeal rejected the applicant's argument. It reasoned as follows:

> The correct approach to the question of waiver of fundamental rights is to adhere strictly to the provisions of s 36(1) of the Constitution. It provides that 'the rights in the Bill of Rights may be limited only in terms of law of general application . . .' A waiver of a right is a limitation thereof. One must be careful not to allow all forms of waiver, estoppel, acquies

[1] *Mohamed* (supra) at para 65.

[2] The *Mohamed* Court writes:

> Here South African government agents acted inconsistently with the Constitution in handing over Mohamed without an assurance that he would not be executed and in relying on consent obtained from a person who was not fully aware of his rights and was moreover deprived of the benefit of legal advice.

Ibid at 68. The *Mohamed* Court's vacillation on whether consent to extradition would suffice seems difficult to square with such pronouncements as 'the rights to life and dignity are the most important of all human rights, and the source of all other personal rights.' *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC) at para 144.

[3] 2001 (1) SA 853 (SCA), 2001 (2) BCLR 176 (SCA)('*Transnet*').

[4] The contract read in relevant part: '10*(a)* The Company does not bind itself to accept the lowest or any tender/quotation nor will it assign any reason for the rejection of a tender/quotation.'

> cence, etc to undermine the fundamental rights guaranteed in the Bill of Rights. In my view, a strict interpretation of s 36(1) is indicated. Transnet has not made out a case that the waiver it relies upon is warranted by law of general application.[1]

The reasons for the *Transnet* Court's conclusions are sound: with two very important exceptions. First, it is not clear why the correct approach to waiver is to adhere to the provisions of FC s 36(1). There is nothing about FC s 36 that has any obvious bearing on questions of waiver. One way to understand the *Transnet* Court's remark about limitations is to read it as part of a characterization of waiver as 'conduct' that does not qualify as law of general application. Second, the *Transnet* Court's approach to waiver begs the primary question: does the waiver amount to or lead to the violation of a right? The *Transnet* Court assumes — which it is not entitled to do — that *all* assertions of waiver are *always* parasitic on the violation of a right. (As we shall see, in many instances of alleged waiver, there is no right upon which one party may simultaneously rely and waive.) Only if one defines a right in a fashion that excludes the possibility of waiver does limitations analysis under FC s 36 ever begin to matter. (Again, in many instances of alleged waiver, there is, in fact, no right upon which a party may rely, and thus, there is no issue of waiver.) And it goes without saying, if there is no infringement of a right, there can be no question about limitations — for there are none.

The *Transnet* Court was certainly correct on the facts of *this* case. The respondent was entitled to be furnished with reasons for the rejection of its tender. Given that the case law holds that a tenderor's rights are always adversely affected by the rejection of a tender, and a tenderor is entitled to the provision of reasons for a rejection, the failure to supply those reasons is a violation of the right to just administrative action.

When it looks beyond the facts, the *Transnet* Court seems inclined to establish the following rule: waiver ought not to be allowed to undermine the rights enshrined in Chapter 2. It would have been more interesting if the *Transnet* Court had taken a stronger line: no waiver can take place in the context of an infringement of a fundamental right. As it stands, the *Transnet* Court and the *Mohamed* Court seem uncomfortable with waiver, but not adamantly opposed to it. Neither court is able to articulate, in any principled way, when we should permit waiver and when we should bar it.

Here then is the strong coherent line that courts should adopt. No fundamental right can ever be waived. Consent to a given state of affairs — *contractual waiver* — can only occur where no right can be violated. The basis for this conclusion is not as casuistic as it may appear. Some rights in Chapter 2 will rarely, if ever, permit an interpretation of their scope that will create the space for legal and social relations that, at least notionally, enable rights' bearers to forego them. Some rights do permit interpretations of their scope that enable both rights bearers and other parties to engage in a *wide* array of activities and to form legal relationships that appear, at least notionally, to engage the subject matter

[1] *Transnet* (supra) at paras 47–48.

of those rights, but do not result in their abrogation. Put pithily, what is at issue in all these cases is not the waiver of a right, but the interpretation of a right.

Academic commentary on this subject has only aided and abetted our courts' confusion. Some of this analysis is worth further consideration if only to set out in somewhat starker relief the choices before us.

The least attractive position — and one given the Constitutional Court's imprimator of approval in *Mohamed* — is that there exists a hierarchy of rights: at the top, those rights that are so important as to never permit waiver; at the bottom, those rights that are of such little consequence that waiver is effectively built into their exercise. With such a hierarchy clearly in mind, Halton Cheadle simply asserts that the 'rights to life, dignity and non-discrimination cannot be waived.'[1]

Johan De Waal, Iain Currie and Gerhard Erasmus bear some responsibility for Halton Cheadle's assertion. They contend that the nature of the 'rights to human dignity . . . , to life . . . . the right not to be discriminated against or the right to a fair trial does not permit them to be waived.'[2] Other rights — say, the freedoms of expression, religion, assembly, property, occupation, association — may be waived. Part of this distinction appears to rest on a rather obtuse if not orotund distinction that De Waal, Currie and Erasmus draw between rights that have a positive and a negative dimension and rights that do not have both dimensions. The authors do not tell us what such dimensions mean, save to say, rather enigmatically, that the right to 'dignity cannot be exercised by being abused,'[3] but that freedom of expression can be exercised by being silent.[4]

More disconcerting are the following paired set of claims. The first claim reads: 'a waiver cannot make otherwise unconstitutional laws or conduct constitutional and valid;'[5] and '[t]he actions of a beneficiary can have no influence on the invalidity of unconstitutional law or conduct. That is why a person cannot undertake to behave unconstitutionally.'[6] The second claim reads: '[w]hat individuals may do is waive the right to exercise a fundamental right. The individual may undertake not to invoke the constitutional invalidity of state or private conduct.'[7] The first leg of the first claim seems unobjectionable. The second leg of the first claim raises a flag. As an empirical matter, the actions of a beneficiary of a right *will* have an influence on a finding of validity or invalidity of law or conduct because it is only as a result of the beneficiary's attempt to exercise and enforce her rights that we will come to know whether law or conduct of a particular kind is or is not unconstitutional.

It is true, as the *Handbook* authors suggest, that a person cannot agree to behave unconstitutionally. But not for the reasons that De Waal, Currie and Erasmus think. A successful annulment of a contract on constitutional grounds stands for the

[1] Halton Cheadle 'Application' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 19 citing with approval Johan De Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* (4th Edition 2001).
[2] De Waal, Currie & Erasmus *The Bill of Rights Handbook* (supra) at 43–44.
[3] Ibid at 44.
[4] Ibid at 43.
[5] Ibid at 42.
[6] Ibid at 43.
[7] Ibid.

proposition that there never really was a *valid* contract in the first place and that the applicant's constitutional right was not waived. When a party goes to court to have an agreement annulled on constitutional grounds and loses, she was, the court tells us, never in a position to assert legitimately that the right in question trumped the agreement in question. The prescriptive content of the substantive provision of the Bill of Rights is deemed not to cover the conduct at issue. In this second case, the party never possessed a constitutional right that she could waive.

We can see now that De Waal, Currie and Erasmus have things the wrong way around. Individuals may not, as a logical matter, choose to allow other individuals or the state to treat them — via law or conduct — in unconstitutional ways. There is nothing for them to choose in this regard. What De Waal, Currie and Erasmus should have said is that when we *interpret* the freedom to trade, occupation and profession or the freedom of expression or the freedom of religion to permit two parties to contract, we really mean that these various rights, correctly interpreted, do not proscribe the kinds of activities or relationships or contracts engaged in or entered into by the respective parties.[1] Now that is a method of proceeding profoundly different from the creation of *(a)* hierarchies of rights, or *(b)* categories of negative and positive dimensions of rights, or *(c)* distinctions between freedoms and rights. Whether we are talking about life, dignity, torture, slavery, religion, expression or property, the question is always the same: does the right permit the kind of activity, relationship or status contemplated — at some point in time — by the parties before the court. If it does not, then, as we noted above, the right bars the law or conduct contemplated and no such thing as waiver can occur. If the right in question permits the kind of activity or agreement in question, then the parties may do as they wish and the question of waiver never arises.

Kevin Hopkins' recent work on the problem of waiver reflects how deeply entrenched the language of waiver is, and how difficult the language is to shrug off.[2] Hopkins begins his discussion in the thrall of Currie's arguments. He quotes Currie's explanation of the 'waiver' permitted by the Court in *Garden Cities Incorporated Association Not for Gain v Northpine Islamic Society*[3] as follows:

> [The waiver is permissible] because freedom rights can be positively or negatively exercised. Just as one can exercise the right to freedom of expression by choosing to remain silent, one is free to practise one's religion and equally free to choose not to. A waiver therefore amounts, as it were, to an undertaking to exercise the right negatively. The undertaking in clause 20 *(b)* [of the contract of sale] not to make calls to prayer would be similar to a contractual undertaking not to disclose certain information, or not to work in one's chosen

[1] In talking about the concept of unconstitutional conditions — in which the government may withhold benefits or privileges subject to conditions designed to encourage a given set of policy aims and which bear a family resemblance to notions about waiver — Lawrence Tribe writes:

> Independently unconstitutional conditions — those that make the enjoyment of a benefit contingent on sacrifice of an independent constitutional right — are invalid; whether a condition is unconstitutional depends on whether government may properly demand sacrifice of the alleged right in a given context.

American Constitutional Law (2nd Edition 1988) 781.

[2] 'Constitutional Rights and the Question of Waiver: How Fundamental are Fundamental Rights' (2001) 16 *SA Public Law* 122 (Hopkins 'Waiver').

[3] 1999 (2) SA 268 (C).

> profession, or to perform nude on stage, or to attend religious instruction in a private school. These are respectively waivers of the rights to freedom of expression, to occupational freedom, to privacy and to freedom of religion. There should, in principle, be no objection to enforcing contractual undertakings such as these since they are not violations of a constitutional right.[1]

Note the last sentence. 'There should, in principle, be no objection to enforcing contractual undertakings such as these since they are not violations of a constitutional right.'[2] Currie and Hopkins each run right past the easiest possible answer to this entire problem: there is no issue or problem of waiver, because there is no violation of a constitutional right about which we need be worried.[3]

[1] Iain Currie 'Bill of Rights Jurisprudence' (1999) *Annual Survey of South African Law* 54–55.

[2] Ibid.

[3] See *Garden Cities Incorporated Association Not for Gain v Northpine Islamic Society* 1999 (2) SA 268 (C). The contract between the two parties for the sale of land had been concluded in 1979, well before either the Interim or Final Constitution came into effect. The respondent had been formed with the objective of erecting and maintaining a mosque and madressah in the area being developed. The agreement for sale of land between the applicant and the respondent contained provisions that the respondents would not conduct any activities that would be the source of nuisance or disturbance to other owners in the township, particularly prohibiting the use of sound amplification equipment. Instead, the agreement stated that the call to prayer would be made by the use of a light on the top of the minaret that would be switched on at the appropriate time. In spite of these provisions, the respondent installed sound amplification equipment and added a loud speaker to the mosque that it had built on the property purchased. In response to complaints from the residents of the surrounding properties, the applicant had applied for an interdict barring the respondent from using any sound amplification equipment and obliging it to remove such equipment. The Court held that the agreement — with its various restrictions — did not violate FC s 15. It did not discuss the concept of waiver. (Instead, it made a rather spurious distinction between calls to prayer and amplified calls to prayer — the former it identified as an integral part of the religion, the latter it found not to be an integral part of the religion.) The correct basis for the decision — the conclusion itself is correct — is that the right to freedom of religion does not entitle a party to engage in practices that disturb the general peace of the community. (Indeed, the parties' agreement to such restrictions reflects the recognition by both parties that such practices as amplification of calls to prayer, in fact, constitute a breach of the peace.) For a general account of the grounds for judicial intervention in religious affairs, and a relatively strict test for such intervention, see Paul Farlam 'Freedom of Religion, Thought, Belief and Conscience' S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 41. But see Stu Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44 (Defending a test for religious association that takes such ways of being seriously but does not simply concede the arguments made by religious groups with regard to the centrality of particular beliefs.)

Similarly, Iain Currie, Johan De Waal & Gerhard Erasmus wrongly describe *Wittmann v Deutscher Schulverein, Pretoria & Others* as an instance of constitutional waiver of the right to religious freedom. 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T). In *Wittmann*, a learner was expelled from an independent school for refusing to attend compulsory religious instruction classes. Van Dijkhorst J correctly notes that the case turns on questions of associational freedom, not religious freedom:

> In respect of these educational institutions, the fundamental freedom of religion of 'outsiders' is limited to the freedom of non- joinder. Outsiders cannot join on their own terms and once they have joined cannot impose their own terms.

Ibid at 455A–B. See, further, Stu Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44. In sum, the right of a student to religious freedom is not impaired by her agreement to attend compulsory religion classes at a private religious educational institution in which she has chosen to enrol. It would be comparable to saying that when I attend Sunday Mass at my local parish church that I am waiving my right to read the Torah amongst my fellow Catholic congregants. I never had a right to read the Torah there. No reasonable understanding of religious freedom could embrace any other thesis.

Having failed to take heed of Currie's own words, Hopkins continues to use the categories of inalienable and alienable rights with which he has been saddled. Only at the conclusion of his article does Hopkins begin to realize that the distinctions he is both relying upon and making up are rendered meaningless by a few basic propositions to which he rightly adheres:

> To summarize the position on the waiver of a constitutional right (other than an inalienable right) is in effect to re-iterate my argument that contracts are enforceable unless contrary to public policy. This is the position in the common law as it currently stands. But, as I have also argued, public policy must now be informed by the values that underlie the Constitution generally, and in particular it must be informed by the provisions contained in the Bill of Rights. *This means that contracts whose enforcement would entail the violation of a right in the Bill of Rights are unenforceable because they are contrary to public policy.* Enforcement of such a contract (waiver) would mean, in effect, the limitation of a contractant's constitutional right — this can only be done if the requirements (for the valid limitation of a constitutional right) in the limitations analysis are met. Two of these requirements are 'reasonableness' and 'proportionality'. And so in addition to there being 'good reason' for the limitation, there must also be proportionality.
>
> My argument that all contracts which purport to waive a fundamental right are unenforceable because they are contrary to public policy seems at first blush to render redundant the need to distinguish between rights that are alienable and rights that are inalienable. This is because, one might argue, the respective contracts purporting to waive either type of right (alienable or inalienable) are both effectively unenforecable. Although I concede that this is so, the distinction becomes relevant not at the interpretation stage of the enquiry but rather at the limitation stage. This, I argue, is because only alienable rights are capable of being justifiably limited; inalienable rights on the other hand are, by their definition, incapable of limitation — therein lies the need for treating the rights differently and by implication drawing the distinction.[1]

Let us make clear the two points with which Hopkins does battle. First, 'all contracts which purport to waive a fundamental right are unenforceable because they are contrary to public policy seems at first blush to render redundant the need to distinguish between rights that are alienable and rights that are inalienable.'[2] Correct. Once a right is interpreted to proscribe either law or conduct, no amount of fair bargaining can save the contract or agreement in question. Second, the issue is ultimately whether 'the respective contracts purporting to waive either type of right (alienable or inalienable) are both effectively unenforceable.'[3] Correct. But Hopkins will simply not let go of an unworkable distinction. So he puts it to new, and equally useless, service. He tells us the distinction continues to do work 'because alienable rights are capable of being justifiably limited; inalienable rights on the other hand are, by their definition, incapable of limitation.' Two further points put this distinction out of our misery. One. If we have just found that a right renders a contract or an agreement unenforceable, then there is no

[1] Hopkins 'Waiver' (supra) at 137–138 (Emphasis added).
[2] Ibid.
[3] Ibid.

saving it under the limitation clause. The *Transnet* Court was certainly correct in holding that a contract or an agreement is not a law of general application. FC s 36 cannot, therefore, be used to justify them. Two. No rights are inherently or textually beyond the limitations exercise. We have no limitation-proof rights.

(b) Waiver and the Law of Contract as Neutral Backdrop

What is the explanation for this pervasive category mistake? Elsewhere in this chapter we have noted how the traditional conception of the common law as a neutral backdrop for a variety of social contracts between 'autonomous' individuals shaped the *Du Plessis* Court's views on IC s 7 and informed the drafters' views of the distinction between law and conduct in FC s 8. The 'common law as neutral backdrop' does similar work here.

The traditional view of the common law is wedded to the idea of the sanctity of contract. Even in those areas of social life where the language of contract is far less appropriate — say where law enforcement officials are holding an alleged terrorist incommunicado, and thus out of the reach of any potential legal assistance — we cling to the notion that, just perhaps, Mr Mohamed consented to his extradition to stand trial on capital charges. The predisposition to describe even non-contractual relationships in terms of contract coupled with the inclination to make common-law rules the departure point for constitutional analysis explains why many academics and jurists accord the 'contract' between parties primacy of place and describe constitutional rights in contractual terms. But in a country where 'all law derives its force from the constitution', and all law is measured for its consistency with the basic law, to describe constitutional rights in contractual terms gets things back to front. One can contract only to do those things that are constitutionally permitted. And since one cannot do what the Final Constitution does not permit, there is nothing to waive.

(c) The Poverty of Waiver

The doctrine of waiver is worth worrying about because contracts of adhesion are still relatively pervasive. In *Afrox Healthcare Bpk v Strydom*, an agreement was concluded between the appellant, the owner of a private hospital, and the respondent, a party seeking medical treatment.[1] After an operation at the hospital, negligent conduct by a nurse led to complications that caused further injury to the respondent. The respondent argued that the negligent conduct of the nurse constituted a breach of contract by the appellant and instituted an action holding the appellant responsible for the damages suffered. The hospital's admissions document contained an exemption clause in which the respondent:

> [a]bsolved the hospital and/or its employees and/or agents from all liability and indemnified them from any claim instituted by any person (including a dependant of the patient) for damages or loss of whatever nature (including consequential damages or special damages of any nature) flowing directly or indirectly from any injury (including fatal injury) suffered by

[1] 2002 (6) SA 21 (SCA)('*Afrox*').

> or damage caused to the patient or any illness (including terminal illness) contracted by the patient whatever the cause/causes are, except only with the exclusion of intentional omission by the hospital, its employees or agents.[1]

The appellant relied on the above clause to avoid liability. The respondent advanced several reasons — including a constitutional claim based upon FC s 27(1)*(a)* — as to why the provisions of the exclusion clause could not operate against him. The Supreme Court of Appeal rejected the respondent's claims on the grounds that such contractual terms are the norm and that the courts are duty bound to enforce the contractual terms unless the Final Constitution or the *boni mores* of the community clearly dictate otherwise. The reasoning of the Supreme Court of Appeal in *Afrox* is tantamount to a construction of the hospital admissions form that holds that the respondent 'waived' whatever constitutional (or other) rights he possessed when he signed the form. If we are concerned about contracts entered into *(a)* by parties who do not possess the requisite capacity to understand fully the document they sign or *(b)* by parties in radically unequal bargaining positions, then we should be concerned about a constitutional doctrine that supports the enforcement of such contracts on the grounds that lack of knowledge or compulsion is equivalent to 'waiver'.[2] *Afrox* rests on the fiction identified above — namely that the common law constitutes a neutral contractual backdrop for relations between fully autonomous individuals. Waiver now looks less like an innocent category mistake and more like a potentially pernicious pre-constitutional relic.

(d) The relationship between waiver and the benefits of fundamental rights

The behaviour of beneficiaries influences whether the conduct of private parties will be found to be unconstitutional. Only the beneficiaries of rights are going to ensure that their rights — even those ostensibly compromised by a contract to which they are a party — are protected. And they will have to go to court to do so. How a court views the behaviour of the party who asserts the benefit of a right and the party who allegedly bears the burden determines whether or not the conduct at issue passes constitutional muster.

What makes the doctrine of waiver more pernicious than it might otherwise be is that we are unlikely to see too many cases in which parties contest contracts of adhesion. This is so because the persons who need to contest their alleged waiver of constitutional rights are the least likely to be in a position to bargain effectively

[1] *Afrox* (supra) at para 3.

[2] For critical perspectives on *Afrox*, see Danie Brand 'Disclaimers in Hospital Admission Contracts and Constitutional Health Rights' (2002) 3:2 *ESR Review* 17–18; Pieter Carstens & Anton Kok 'An Assessment of the Use of Disclaimers Against Medical Negligence by South African Hospitals in View of Constitutional Demands, Foreign Law, Medical Ethics and Medical Law' (2003) 18 *SA Public Law* 430**;** Dire Tladi 'One Step Forward, Two Steps Back for Constitutionalising the Common Law: *Afrox Health Care v Strydom*' (2002) 17 *SA Public Law* 473; Stu Woolman & Danie Brand 'Is There a Constitution in this Courtroom? Constitutional Jurisdiction after *Afrox* and *Walters*' (2003) 18 *SA Public Law* 38.

to protect their constitutional rights and are, similarly, unlikely to be in a position to litigate subsequent claims. The poverty and powerlessness of many South Africans shapes the content of our constitutional rights through the structured silence of disputes that never make it to court. The doctrine of waiver, however, assumes — wrongly — what my understanding of this structured silence denies: that all contracting parties are in a position to make an informed and freely willed choice about their bargaining position as well as their legal remedies.

31.8 Temporal Application of the Bill of Rights

As the term 'temporal' indicates, we are concerned here with issues of application as they relate to time. Such issues fall into two broad categories: (1) retrospective application; (2) application of the Interim and the Final Constitution to matters pending upon commencement of the Final Constitution. As time goes on, issues of temporal application will recede in importance.[1]

(a) Retrospectivity

Neither the Interim Constitution nor the Final Constitution applies retrospectively.[2] In other words, neither constitution applies to conduct that took place before they came into operation. Before we interrogate this claim, and limn the precedents for the exceptions to the rule, let me first set out the general framework for retrospectivity analysis.

In *Du Plessis v De Klerk*, the defendants based part of their defense to a claim of defamation on IC s 15 — the freedom of expression. It was common cause that the conduct at issue occurred in March 1993, well before the commencement of the Interim Constitution on 27 April 1994. After placing a gloss on some early precedents that would have otherwise undermined the *Du Plessis* Court's conclusions, Justice Kentridge wrote:

> The difficulty facing the defendants in this Court was their inability to point to anything in the Constitution which suggests that conduct unlawful before the Constitution came into force is now to be deemed to be lawful by reason of chapter 3. Indeed, all indications in the text are to the contrary. First, there is IC s 251(1) itself, which fixes the date of commencement. Then there is s 7(2), which provides that chapter 3 should apply 'to all law in force and all administrative decisions taken and *acts performed during the period of operation of this Constitution*.' .... Again, IC s 98(6) provides: 'Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or a provision thereof — *(a)* existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or *(b)* passed after such commencement, shall invalidate everything done or permitted in terms thereof.' That subsection enables this Court, where the interests of justice and good government require it, to antedate the operation of a declaration of invalidity. Although there is no

[1] For an excellent account of temporal application, see Johan De Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* (4th Edition 2001) 57–62.

[2] *Northern Province Development Corporation v Attorneys Fidelity Fund Board of Control* 2003 (2) SA 284 (T) citing *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (1) SACR 568 (CC), 1995 (4) BCLR 401 (CC) and *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC).

> express limit on the power to antedate a declaration of invalidity, it could hardly be suggested that any such declaration could refer to a date earlier than the date of the commencement of the Constitution.[1]

After rejecting both claim *(a)*, that the damages in delict were analogous to sentences of capital punishment, and claim *(b)*, that it would be arbitrary and absurd — and therefore unjust — to allow 'one category of persons … to enjoy the human rights guarantees of the Constitution' and to deny such entitlements to a similarly situated group simply because the dates of the conduct differed, Justice Kentridge concluded that 'the Constitution does not turn conduct which was unlawful before it came into force into lawful conduct.'[2] Justice Kentridge then formulated the following exception to the rule:

> The consequences of that general principle are, however, not necessarily invariable .... [W]e leave open the possibility that there may be cases where the enforcement of previously acquired rights would, in the light of our present constitutional values, be so grossly unjust and abhorrent that it could not be countenanced, whether as being contrary to public policy or on some other basis. It is not necessary to spell out examples. It is sufficient to say that cases such as the one before us obviously do not fall into that category.[3]

The truly interesting developments with respect to retrospectivity have not involved a direct constitutional challenge to a rule of law in order to make unlawful conduct lawful or offensive laws unconstitutional. They have, rather, involved the use of the concept of indirect application of the Bill of Rights to develop the

[1] *Du Plessis* (supra) at para 15 (Kentridge J's emphasis) citing *S v Zuma* 1995 (2) SA 642 (CC), 1995 (1) SACR 568 (CC), 1995 (4) BCLR 401 (CC).

[2] *Du Plessis* (supra) at para 20.

[3] Ibid at 20. See also *Tsotetsi v Mutual & Federal Insurance Co Ltd* 1997 (1) SA 585 (CC), 1996 (11) BCLR 1439 (CC). The *Tsotetsi* Court confirmed the existence of the exception created in *Du Plessis* but rejected its application to the instant case. Justice O'Regan wrote:

> It is unnecessary in this case to decide the question to which I have referred in para [7] which was expressly left open in *Du Plessis v De Klerk*. Even if it is accepted that there may be exceptional cases where the general rule of non-retroactivity may not apply, it cannot be said that this is such a case. Such a case could only arise, first, if it was clear that the challenged provision or conduct was a gross violation of the provisions of the Bill of Rights, and, secondly, if there were special and peculiar reasons which would suggest that an order with retroactive effect should be made in a particular case. No such circumstances exist in this case. Even if the applicant were to persuade this Court that the impugned provisions of the Schedule do constitute a breach of the equality clause, it cannot be said that those provisions constitute such a gross breach of that clause that a special exception to the general rule concerning the retrospective application of the Constitution should be made.

Tsotetsi (supra) at para 9. With respect to retrospectivity and the Final Constitution, see *S v Pennington & Another* 1997 (4) SA 1076 (CC), 1999 (2) SACR 329 (CC), 1997 (10) BCLR 1413 (CC). The *Pennington* Court wrote:

> There is nothing in the 1996 Constitution which suggests that the decision as to retroactivity in *Du Plessis v De Klerk* is no longer applicable, or that it was intended that the 1996 Constitution should have retroactive application. It should perhaps be added that even if the phrase 'unless the interests of justice require otherwise' was wide enough not only to make the provisions of the 1996 Constitution applicable to pending proceedings in appropriate cases, but also to make them applicable retroactively, it could hardly be said to be in the 'interests of justice' to allow completed trials to be re-opened and to be dealt with in accordance with laws of procedure and evidence which were not in force at the time of the trial.

Ibid at para 36.

common law in such a manner as to make unlawful conduct lawful or offensive laws unconstitutional. In cases such as *Gardener v Whitaker*,[1] *Key v Attorney General*[2] and *Brummer v Gorfil Brothers Investments*,[3] the Constitutional Court has acted as if it possesses the discretion to develop the common law — in line with either IC s 35(3) or FC s 39(2) — and thus change what may have been unlawful conduct before the commencement of either constitution into lawful conduct thereafter.[4]

De Waal, Currie and Erasmus lament the lack of forthrightness by the Constitutional Court about the consanguinity of indirect application and retrospectivity. They hold both that FC s '39(2) demands … development' of the common law in light of the spirit, purport and objects of the chapter and that 'judge-made law is always retrospective.'[5] With respect, the courts legitimately feel somewhat queasy about this back-door retrospective application of the Final Constitution. There can be no doubt that the courts are changing conduct unlawful at the time it was undertaken into lawful conduct and that the instrument for such change is the Final Constitution. De Waal, Currie and Erasmus are wrong to think that by calling a process of constitutional interpretation 'indirect application' rather than 'direct application' that one thereby disposes of the problem of retrospectivity.

(b) Application of the Bill of Rights to matters pending upon commencement of the Final Constitution

FC Schedule 6, Item 17 reads as follows:

> All proceedings which were pending before a court when the new Constitution took effect, must be disposed as if the new constitution had not been enacted, unless the interests of justice require otherwise.

In *S v Pennington & Another*, the Constitutional Court held firm the line on

[1] 1996 (4) SA 337 (CC), 1996 (6) BCLR 775 (CC). In *Gardener*, Justice Kentridge wrote:

> Both the issue of retrospectivity and the issue of horizontality have, however, now been dealt with by this Court in the case of *Du Plessis and Others v De Klerk and Another*. It follows from the judgment in that case that, although Froneman J was correct in his interpretation of s 241(8), the right of freedom of speech under s 15 cannot be invoked as providing a defence to an action for damages founded upon a defamation uttered before the Constitution came into force. The judgment and order of Froneman J nonetheless stand. *As I have indicated, the Judge in my view reached his decision not on a direct horizontal application of s 15, but by purporting to develop the common law, having regard, inter alia, to the values embodied in s 15 and, I emphasise, by applying it as so developed to the case before him.*

Ibid at para 13. (My emphasis).

[2] 1996 (4) SA 187 (CC), 1996 (2) SACR 113 (CC), 1996 (6) BCLR 788 (CC) at para 13 (Despite bowing to the rules on retrospectivity set out in *Du Plessis*, the *Key* Court held that a criminal trial court would always have to ensure that the accused enjoyed the benefit of the right to a fair trial guaranteed by IC s 25(3) and that the benefits of that right might require that evidence obtained unconstitutionally — and prior to the date of the Interim Constitution's commencement — be excluded.)

[3] 2000 (2) SA 837 (CC), 2000 (5) BCLR 465 (CC) at para 7 (Court asserts that it possesses the discretion to develop common law retrospectively.)

[4] But see *Mthembu v Letsela* 2000 (3) SA 867 (SCA)(Supreme Court of Appeals assumes that retrospective application of the Final Constitution means just that. It refuses to find that the case before it fits the *Du Plessis* exceptions of gross injustice and abhorrence before the law nor does it use indirect application of the Final Constitution to alter a rule of customary law that prevented illegitimate children from securing inheritance.)

[5] De Waal, Currie & Erasmus (supra) at 59.

retrospectivity.[1] It also refused to read the phrase 'unless the interests of justice require otherwise' as a license to re-open completed trials and dispose of them according to the constitutional rules 'of procedure and evidence which were not in force at the time of the [original] trial.'[2]

In *Sanderson v Attorney-General (Eastern Cape)*, the Constitutional Court put a slightly more generous spin on the phrase 'unless the interests of justice require otherwise.'[3] It wrote that the phase 'denotes an equitable evaluation of all the circumstances of a particular case.'[4] In particular, a court would be required to determine 'whether [an] individual's position is substantially better or worse under the Final Constitution than under the Interim Constitution.'[5]

This rule on taking the respective benefits of the Final Constitution and the Interim Constitution into account has both substantive and procedural dimensions. In *S v Naidoo*, the High Court found that because FC s 35(3) barred the admission of evidence that would have been deemed legally obtained under the Interim Constitution, the accused was entitled to the benefit of FC s 35(3).[6] In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*, the Constitutional Court held that if the application of the procedures and the provisions of the Final Constitution would not prejudice any party to a case, then the Final Constitution should be used to guide the courts.[7] For example, if a High Court or the Supreme Court of Appeal would have lacked jurisdiction to hear particular kinds of claims under the Interim Constitution — say challenges to the constitutionality of an Act of Parliament — but would possess such jurisdiction under the Final Constitution, then goods like increased systemic efficiency and diminished litigation costs would favour treating cases in which such issues arose as if the proceedings had commenced after the Final Constitution was enacted.[8]

[1] *Pennington* (supra) at para 36.
[2] Ibid.
[3] 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC).
[4] Ibid at para 17.
[5] Ibid.
[6] 1998 (1) BCLR 46 (D).
[7] 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) reversing *Fedsure Life Asurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (2) SA 1115 (SCA), 1998 (6) BCLR 671 (SCA).
[8] For a similar view, see *S v Meaker* 1998 (8) BCLR 1038 (W), 1998 (2) SACR 73 (W).

APPENDIX: ACADEMIC CONTRIBUTIONS TO THE APPLICATION DEBATE

Quite a bit jurisprudence has been generated about the meaning of and relationship between FC ss 8(1), 8(2), 8 (3) and 39(2). It is worth taking stock of the broad range of opinion on the subject, not simply as an academic exercise, but because the arguments made elsewhere shed light on a host of concerns not yet engaged by our courts. I did not engage these significant contributions within the body of the chapter so that I might hew to a 'relatively' tight narrative line and focus the reader's attention on the deficiencies in the Constitutional Court's current doctrine and the grounds for the preferred reading.

The writers canvassed in this appendix fall into roughly four camps.

The first find that nothing fundamentally changed from the Interim Constitution to the Final Constitution. According to Michael Osborne and Chris Sprigman, the position articulated by the Constitutional Court in *Du Plessis* remains the best possible reading of the Final Constitution's comparable provisions on application.

The second surmise that even if the language of the Interim Constitution and the Final Constitution is palpably different — and points towards very different conceptions of application — the courts should act, consistent with a commitment to avoidance, as if the final text demands indirect application if and when it requires any application of the Bill of Rights at all. Iain Currie, Johan de Waal and Gerhard Erasmus champion this cause.

The third opine that it does not fundamentally matter whether we employ direct application or indirect application: the 'values' enshrined in the Final Constitution demand that we use whatever tools we have at our disposal to bring public and private relationships into line with the basic law. Chris Roederer and Kevin Hopkins offer variations on this theme.

The fourth map out a constellation of positions not dissimilar from those on offer in *Khumalo*. The virtue of Halton Cheadle and Dennis Davis' account is its candour about the textual hooks for the argument and their unwavering commitment to the proposition that the drafters of the Final Constitution meant the Bill of Rights to apply unequivocally to all forms of law and all manifestations of private power. Johan Van der Walt likewise acknowledges a signal difference between the interim text and the final text. Unlike most other authors, he sets great store in the extension of FC s 8(1). The strength of Van der Walt's normative claims about the ability of FC s 8(1) to reach all law — and ultimately all conduct — makes it unclear as to whether his subsequent view about the sufficiency of a doctrine he describes as 'progressive indirect application' constitutes an empirical claim about what the courts have done and will do, or expresses a preference as to how we, as a community, ought to proceed. Steven Ellmann's preoccupation is with the variety of different ways in which the Final Constitution extends the application of the Bill of Rights — from socio-economic rights, to organs of state, and, ultimately to private disputes. Ellmann takes care to note that while the Final Constitution invites direct application with respect to legal disputes between private parties, it does so with great circumspection.

(1) Sprigman and Osborne[1]

In 1999, Chris Sprigman and Michael Osborne found themselves in the unenviable position of having to argue against the grain of the text of the Final Constitution in order to resurrect *Du Plessis*. Such a sysiphean task earns the authors more than grudging respect.[2]

The difficulty of their task does not make weak textual arguments any more compelling. Sprigman and Osborne begin by writing that:

> Section 7 of the Interim Constitution provided that '[the Bill of Rights] shall bind all legislative and executive organs of state at all levels of government.' The *Du Plessis* majority noted that s 7 binds only the legislature and executive, and not the judiciary. Had the drafters of the Interim Constitution intended that the Bill of Rights bind the judiciary, the majority argued, all common law disputes, even those between private parties, would be subject to constitutional scrutiny for the simple reason that a court, if it were bound in all cases by the Bill of Rights, could not issue an order inconsistent with any provision of the Bill of Rights. If that were the intent of the drafters, they would expressly have included the judiciary as an organ of state bound under s 7(1).[3]

This argument is correct, so far as it goes. It fails to note the *Du Plessis* majority's gloss on IC s 7(2), its take on the relationship between IC ss 7(1) and (2), the distinction made between IC s 4 and IC s 7, arguments based upon IC ss 33(1) and (4) and 35 (3) and various assertions about the implicit limits of the Constitutional Court's jurisdiction under the Interim Constitution.

These are minor cavils. Let us suppose that a *Dolphin Delivery*-like argument based upon the exclusion of the judiciary from IC s 7(1) were sufficient for the *Du Plessis* court to have reached its ultimate conclusion about the limits of direct application. The authors go on to note that:

> In contrast to s 7, s 8(1) of the 1996 Constitution provides explicitly that the Bill of Rights binds the judiciary, in addition to the legislature, the executive, and all other organs of state. Moreover, s 8(2) of the 1996 Constitution provides that a right in the Bill of Rights: 'binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'[4] (Quotation marks added.)

[1] Chris Sprigman & Michael Osborne '*Du Plessis* is not Dead: South Africa's 1996 Constitution and The Application of the Bill of Rights to Private Disputes' (1999) 15 *SAJHR* 25.

[2] I must, however, note that Sprigman and Osborne's powerful arguments are undermined by careless errors with respect to the correct characterization of other works of commentary or the Final Constitution itself. These errors, when viewed cumulatively, suggest a practice of disregard for the actual content of other texts. For example, they attribute Johan Van der Walt's work to Andre Van der Walt. They ascribe a remark made by me in the chapter on 'Application' in the first edition of this work to the chapter written by me on Limitation in that same text. In quoting from the German Basic Law ('GBL'), the authors write that the GBL 'shall bind the legislature, the executive and the judiciary as directly enforceable law. In as much as it specifically includes the judiciary, that provision mirrors s 8(2).' FC s 8(2) contains no such language. FC s 8(1) mirrors the language of the GBL.

[3] Sprigman & Osborne (supra) at 30.

[4] Ibid.

Does the authors' studious refusal to mention that 'all law' appears in FC s 8(1) and that the term can no longer be restricted — as under IC s 7(2) — to legislative and executive enactments warrant censure? Maybe not. But it is hard to know how to respond to an argument that relies on the intent of the wording of the interim text at the same time as it refuses to infer that a change in wording in the final text manifests a change in intent. Having agreed, by more than mere implication, with the *Du Plessis* Court's conclusion that the text of the Interim Constitution immunized private legal disputes governed by common law from direct application of the Bill of Rights, they provide little by way of argument for the proposition that the express binding of 'the judiciary' under the Final Constitution does not, as one might expect, subject those very same private legal disputes governed by common law to direct application of the Bill of Rights. Instead, they claim that while the Final Constitution allows 'horizontal application', it does not require it: They write:

> [W]e believe that the best reading of s 8 is that it simply defers the question of application. *Whatever* the intentions of the men and women involved in the drafting and the ratification of the 1996 Constitution's application provision actually were, they settled on language that leaves entirely to the courts the determination of when, if ever, horizontal application is appropriate.[1]

There is, as I have already noted, a sense in which the authors' suggestion that questions of application are by their nature always deferred is correct.[2] To say that the Bill of Rights applies as a general matter to a given 'kind' of dispute is not to say that that the interpretation of a particular right (or set of rights) has anything to say about the specific law or conduct being challenged.[3] The good faith reconstruction of *Khumalo* rests on just such a distinction between the range of application of a specific right and the prescriptive content of that right. The authors mean to say something stronger. They mean to say that however strong the textual and drafting indications to the contrary might be, the courts still have the power to ignore the text's invitation to engage in direct horizontal application *per se*.

Let us ignore, since the authors do, FC s 8(1)'s injunction that the Bill of Rights 'applies to all law'. Can Sprigman and Osborne make the running when only faced with the single hurdle of the phrase 'binds … the judiciary'? Much of their argument that the binding of the judiciary does not 'inevitably give rise to horizontal application' rests on comparative constitutional jurisprudence. With respect to the German Basic Law ('GBL'), the authors argue that the GBL applies only indirectly to disputes between private parties.[4] How to best describe — or understand — application analysis under the GBL is certainly contested terrain.

[1] Sprigman & Osborne (supra) at 30–31.

[2] See § 31.4*(a)-(c)* supra.

[3] As I have noted above, however, interpretation of the ambit of a right is — at least in so far as FC s 8(1) application analysis is concerned — a wholly separate enquiry. See § 31.4*(a)-(c)* supra. FC s 8(2) creates a threshold interpretation inquiry not required by FC s 8(1).

[4] Sprigman & Osborne (supra) at 32 citing *Du Plessis v De Klerk* (supra) at paras 98–106 (Ackermann AJ concurring).

Both Johan Van der Walt and Mark Tushnet resist Sprigman and Osborne's characterization in their most recent work.[1] In Van der Walt's estimation, the Federal Constitutional Court has applied the Basic Law directly to the rulings of lower courts with regard to disputes between natural persons and/or juristic persons. The authors' contentions about American jurisprudence often appear oddly anachronistic. It would be churlish to deny the merits of federalism arguments when *Shelley* was handed down in 1948. However, in the face of a long line of cases that take an expansive view of the extent to which the 'state action' doctrine engages non-federal bodies of law, such federalism arguments lose much of their purchase. Moreover, it is not clear how arguments from federalism inform application analysis in South Africa's decidedly non-federal judicial system. The authors' observation that American legal academics excoriated the Court for its expansive view of state action in *Shelley* is underwritten solely by two well-regarded pieces by Herbert Wechsler and Louis Henkin. It ignores the subsequent history of the American legal academy and its long-standing and now almost universal agreement that the US Supreme Court's position on 'state action' is incoherent because the Court fails to endorse the view that state power structures all legal relationships and that the state action required for purposes of constitutional review is, in fact, notionally present in all legal disputes. This selective engagement with a complex body of jurisprudence and scholarship lends little support to the dubious proposition that FC s 8(1)'s binding of the judiciary does not extend to all law that emanates from the courts.

The most powerful weapons in Sprigman and Osborne's arsenal are their arguments from democracy. They contend that we should not subject disputes between private parties governed by common law to direct application because it inevitably requires us to do limitations analysis that courts are ill-equipped to undertake. Assuming, for the sake of argument, that this is true, then it must likewise be true of disputes governed by common law between the state and its subjects. Moreover, it is unclear, as always, how direct application of the Bill of Rights to a statute that governs a private dispute is different from direct application of the Bill of Rights to a rule of common law that governs a private dispute. If anything, the author's arguments from democracy should have them prefer the direction application of the Bill of Rights to the common law over direct application of the Bill of Rights to statute.

Sprigman and Osborne aver that courts are often ill-equipped to deal with 'the voluminous, confusing and contradictory factual evidence submitted by the state in support of … [the] justification' of the statutory or common law rule in

[1] Johan Van der Walt 'Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-operative Relationship between Common Law and Constitutional Jurisprudence' (2001) 17 *SAJHR* 341; Mark Tushnet 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1(1) *Journal of International Constitutional Law* 79, 84. When writing about the subjection of all state action — including judicial pronouncements — to the German Basic Law, Tushnet articulates a thesis pressed throughout the pages in this chapter: 'It is not clear to me why a theory of state duty [to uphold the Constitution] is less radical than a theory that individuals are directly bound. I believe that . . . the theories are precisely equivalent.' Indeed, South Africa's Final Constitution makes this point about equivalence clear by having the Bill of Rights apply to 'all law', bind 'the judiciary' and apply, if applicable, to natural and juristic persons.

question.[1] If this proposition is true, then it has significant implications not simply for the judicial process and constitutional review (about which the proposition would appear agnostic at best). It is a scathing indictment of the democratic process of law-making. If the justifications for a statute are contradictory or confusing or both in court, then one must have reason to doubt whether they are any less so in Parliament. If our elected officials en masse are not even able to offer a patina of plausible intent for legislation, then it is difficult to understand what the institutional argument against judicial review of legislation (or common law) is. The baggy pants of democracy are not big enough to hide a problem of that magnitude. It is simply impossible to square the authors' initial negative assessment of the democratic state's ability to construct justificatory arguments for its laws with their subsequent hackneyed appeal to 'the exhaustive investigation, committee deliberation, publicity, debate, negotiation' that ostensibly distinguish parliamentary processes and secure their legitimacy.[2]

The authors then reverse gears and claim that standard two-stage Bill of Rights analysis is possible for legislation — despite the inadequacies of evidentiary record — but too unduly complicated for a rule of common law. The authors make this assertion despite that fact that the Constitutional Court has engaged in two-stage analysis of both kinds of legal rules under the Interim Constitution and the Final Constitution.[3] Their empirically false assertion is not rehabilitated by the equally tendentious thesis that while vertical disputes 'pit individual rights against the state, horizontal disputes pit individual rights against one another.'[4] Both legs of this claim are, at best, misleading. Classically vertical challenges to a statute often occur in the context of disputes between private persons. One natural or juristic person relies on the statute; another natural or juristic persons attacks it. Moreover, while the party challenging the constitutionality of a statute must invoke a provision of the Bill of Rights, it is also quite common — though not necessary — for the party relying on the statute in question to invoke another, competing right as part of its argument in justification. With regard to the second leg, an individual relying upon a rule of common law will not necessarily

[1] Sprigman & Osborne (supra) at 41.

[2] Ibid at 46.

[3] See, eg, *NCGLE I* (supra) at para 57 (Common-law offence of sodomy found inconsistent with rights to equality, dignity and privacy and 'the criminalisation of sodomy in private between adult consenting males' and the 'limitation in question in our law regarding such criminalisation cannot be justified under [FC] s 36(1).') See also *S v Thebus & Another* 2003 (6) SA 505 (CC), 2003 (2) SACR 319 (CC), 2003 (10) BCLR 1100 (CC) at para 65 (An arrested person had the right to remain silent and drawing an adverse inference on credibility from silence limited the right. The Court wrote: 'The rule of evidence that the late disclosure of an alibi affects the weight to be placed on the evidence supporting the alibi is one which is well recognised in our common law. As such, it is a law of general application. However, like all law, common law must be consistent with the Constitution. Where it limits any of the rights guaranteed in the Constitution, such limitation must be justifiable under s 36(1). Whether this rule is justifiable in terms of s 36(1) is a question to which I now turn'); *Fidelity Guards Holdings (Pty) Ltd T/A Fidelity Guards v Pearmain* 2001 (2) SA 853, 862 (SCA)('Insofar as . . . restraint [of trade clauses constitute] . . . a limitation of the rights entrenched in [FC] s 22, the common law as developed by the Courts, in my view, with the requirements laid down in [FC] s 36(1). Any party to any agreement where a restraint clause is regarded as material is free to agree to include such a clause in the main agreement and the common law in this regard is therefore of general application.')

[4] Sprigman & Osborne (supra) at 42.

invoke a constitutional right. The mere fact that a party defending a common law rule believes that she can rely upon a given right does not support the proposition that the party is, in fact, entitled to the protection afforded by the right invoked.

(2) De Waal and Currie

Johan De Waal and Iain Currie offer one of the most detailed, and complicated, arguments in favour of any given take on application. While De Waal and Currie admit that the Bill of Rights of the Final Constitution contemplates direct application, they argue that the direct application of specific provisions of the Bill of Rights should be studiously avoided.

They initiate their discussion of the latter, and more controversial half, of their conclusions as follows:

> Traditionally, a bill of rights regulates the relationship between the individual and the state. However, the 1996 Bill of Rights goes further than is traditional. It recognises that private abuse of human rights may be as pernicious as violations perpetrated by the state. For this reason, the Bill of Rights is not confined to protecting individuals against the state. In certain circumstances, the Bill of Rights protects individuals against abuses of their rights by other individuals.[1]

They then appear to take the textual bull by the horns:

> It may be argued that since s 8(1) provides that the Bill of Rights applies to all law and binds the judiciary, the subsection precludes 'all law' and 'the judiciary' from upholding private conduct that conflicts with the Bill of Rights. If this is so, private persons will not be able to seek the assistance of the law, or the courts, to enforce their unconstitutional behaviour.[2]

The above two points suggest that if *(a)* the Bill of Rights applies to abuses of private power and *(b)* the Bill of Rights prevents reliance on express rules of law or judicial constructions of law inconsistent with its provisions, then *(c)* the Bill of Rights governs disputes between individuals in the same manner as it governs disputes between the state and an individual. That is not the conclusion De Waal and Currie draw. Instead they write that:

> Such an interpretation confuses the two application issues that we identified at the outset. The reach of the Bill of Rights must be considered before its relationship with the ordinary law is considered. Its reach must be determined with reference to the actors it binds. The result determines the extent to which the Bill of Rights applies directly to the law. By providing that the Bill of Rights 'applies to all law', s 8(1) merely recognizes that when the Bill of Rights does not apply directly to the law, it does apply indirectly to the law.[3]

This paragraph, articulated with De Waal and Currie's customary elan, obscures a rather critical distinction: that of 'reach' and 'application.' The fact that no mention of 'reach' is made in the Final Constitution is not, in and of itself, fatal to the argument. [The good faith reconstruction of *Khumalo* requires

[1] Johan de Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* (4th Edition 2001) 45.
[2] Ibid at 46.
[3] Ibid.

such artifice.] But it does require that the reader search the book in order to determine the extension of 'reach'. Elsewhere, in a section entitled 'Direct Application', the authors write:

> *Direct Application.* The *reach* of the Bill of Rights (beneficiaries, duties and time) demarcates the types of legal disputes to which the Bill of Rights *applies* as *directly* applicable law. Within this demarcated area, the Bill of Rights overrides ordinary law and any conduct inconsistent with the Bill of Rights and ... generates its own set of remedies.[1]

Reach appears to mean direct application. But it is direct application of a rather desiccated sort. Read together, these two paragraphs reduce to a single supposition: when the Bill of Rights states that it applies to 'all law', it does not, in fact, apply to all law. All that 'all law' means is that when the Bill of Rights is deemed to 'reach' a certain set of duties or beneficiaries or time, then it may apply directly or indirectly. It might be tempting to conclude that the authors mean to offer a variation on the good faith reconstruction of *Khumalo* and its use of the distinction between the range of application of a norm and the prescriptive content of the norm to explain the difference between FC s 8(1) and FC s 8(2). However, De Waal and Currie make clear that this clever fiction of 'reach' simply services their more general thesis that indirect application is always to be preferred to direct application:

> It is convenient to consider the reach of the Bill of Rights before looking at its application in legal disputes and its relationship with the ordinary law. Once the reach is determined, a consideration of the relationship between the Bill of Rights and ordinary law can be sensibly divided between direct application to law and conduct and indirect application of the Bill of Rights to law.[2]

It would be 'convenient' if we knew what 'reach' was or understood the textual hook for this lexical ordering of our analysis: reach before application. Instead of being told what 'reach' is, and told how 'reach' analysis precedes 'application' analysis, we are told, again, that the indirect application of the Bill of Rights must always be considered before its direct application of the Bill of Rights:

> It must be stated at the outset, however, that in practice the indirect application of the Bill of Rights must always be considered before its direct application to law or conduct. The reason for this is the principle, laid down by the Constitutional Court in an early decision, that where it is possible to decide a case without reaching a constitutional issue, that is the course that should be followed. Where a legal dispute cannot be resolved without reference to the Constitution, the principle clearly prefers indirect application ... over direct application.[3]

The reason to prefer this canon of interpretation over any other, the authors opine, is that the Constitutional Court prefers to avoid constitutional issues where it is possible to do so. To put it pithily, we are to prefer some kind of application

[1] De Waal, Currie & Erasmus (supra) at 37 (Emphasis added).
[2] Ibid.
[3] Ibid at 37 citing *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 59.

of the Bill of Rights of the Final Constitution (let us say indirect), because the Constitutional Court has told us to avoid applying the Final Constitution (including the Bill of Rights) where it is possible to do so. But by making avoidance the canon of choice, the authors offend quite a number of other canons of constitutional construction in the process.

For starters, De Waal and Currie's commitment to avoidance turns FC s 8(1) into surplusage. FC s 8(1)'s injunction 'all law' appears to mean that the Bill of Rights will apply — indirectly or directly — if the Bill of Rights is deemed to apply in terms of benefit, time and duty.[1] Aside from the difficulties that attend any reconstruction of the logic of this reading, 'law' does no work. The Bill of Rights applies only if the benefit of the right, the time of the conduct in question and the duties imposed by the right in question require it — and then it should apply indirectly, rather than directly. Is this a plausible interpretation of FC s 8(1)?

FC s 8(1) creates another insuperable problem for De Waal and Currie. The authors defend the proposition that when FC s 8(1) 'binds … the legislature', the Bill of Rights applies to legislation. They defend the proposition that when FC s 8(1) 'binds … the executive', the Bill of Rights applies to subordinate legislation.[2] But when asked to defend the proposition that when FC s 8(1) binds the judiciary, it binds the common law or any judicial construction of law, De Waal and Currie balk. They do not say why FC s 8(1) embraces the law-making function of the legislature and the executive, but does not encompass the law-making function of the judiciary. To the extent that De Waal and Currie offer a defence of their position, it takes the form of an explanation of what it means for the judiciary to make law:[3]

> On the one hand, every court order can be considered to become part of the common law and add to the common law. That is, unless or until it is overturned by a higher court or the legislature. If this is so, no court order may give legal effect to private conduct that is inconsistent with the Bill of Rights. For practical purposes, private persons will then always be bound to [sic] the Bill of Rights.
>
> On the other hand, all court orders can be considered to be the application of a pre-existing common law principle to a new set of facts. This approach rests on the fiction that the judiciary does not make law, but 'finds' the law and then applies it. If this is so, then the judiciary will find that the Bill of Rights sometimes does not directly apply to private conduct, leaving them to apply the common law to the dispute.[4]

[1] De Waal, Currie & Erasmus (supra) at 46.

[2] On their reading, the Bill 'binds' these two branches only if the benefit of the right, the time of the conduct in question and the duties imposed by the right in question require it. This reading is neither natural nor plausible. Even the cramped reading the *Du Plessis* Court offered of IC s 7(1) subjected legislative and executive enactments to direct application *tout court*.

[3] Ibid at 54 (Emphasis added).

[4] Ibid.

The authors' seem inclined to view the former position as the most accurate characterization of judicial law-making. They take comfort from the latter because it best fits their approach to application analysis. Their preference for this 'fiction' results in the following difficulties.

If the judiciary takes law as it finds it, but does not make law each time it applies it, then it is — apparently — free to apply the law without worrying about the constitutionality of the rules it applies. This move begs every question. It is not clear why previously created judicially-made law is not bound by FC s 8(1), but previously created legislatively-made law or previously created executively-made law is so bound. It is not clear why, when a court 'finds' an applicable common law rule, FC s 8(1) does not bind either this 'finding' of the court. The emphasis on time and whether each instantiation of a rule of common law entails the creation of a new rule is a red herring. It does no work.

It is also simply untrue that 'every court order can be considered to become part of the common law and add to the common law.'[1] Some court orders — and here the authors must mean judgments — are simply a gloss on legislation, subordinate legislation, customary law, executive conduct, the actions of organs of state or even non-law-making judicial behaviour.

Even if FC s 8(1) only recognizes that the Bill of Rights might apply to 'all law', and might bind the legislature and the executive assuming other conditions are met, what meaning do we attach to FC ss 8(2), 8(3) and 39(2)? We are, I think, to assume that FC s 8(2) and FC s 8(3) indicate that the Bill of Rights might apply to private conduct and might require the development of new rules of law and new remedies assuming other conditions — benefit, duty, time — are met. This gloss on FC s 8(2) and FC s 8(3) may fit the overall structure of De Waal and Currie's argument, but it is most unnatural. In terms of what the drafters intended or what a reader might have expected the words to mean, it is implausible. But worst of all, the sections have no real independent meaning. Their meaning is entirely parasitic on a distinction between indirect application and direct application.

Which brings us to the meaning of FC s 39(2). Unless the two processes of application are identical — which the authors themselves tell us they are not — then the various sections of the Bill of Rights that deal with application must contemplate at least two distinct modes of analysis and must employ language that reflects such a distinction. Moreover, as a matter of logic, one must know when direct application is or is not required in order to know when indirect application is or is not required. Direct application means that the prescriptive content of the substantive rights found in FC ss 9 through 35 engage the law or conduct at issue. Where the prescriptive content of the substantive rights found in FC ss 9 through 35 does not engage the law or the conduct at issue, then FC s 39(2) tells us that the more general spirit, purport and objects of the chapter may inform our efforts to bring all law into line with the Final Constitution. If we reverse the spin, and we first use FC s 39 to bring the law into line with the

[1] De Waal, Currie & Erasmus (supra) at 54.

general spirit, purport and objects of the Bill of Rights, there is simply nothing left to be done in terms of direct application. The reason is obvious. If the general spirit, purport and objects of Chapter 2 — which embraces the entire value domain constituted by the substantive provisions of the Bill of Rights — does not require a change in the law, then no narrower set of values and purposes reflected in a single provision could be expected to do so.

The jurisprudence of avoidance does not appear to stop with a reversal of the lexical ordering of indirect application and direct application. Avoidance, on their account, means that we rely, whenever and wherever possible, on the use of extant rules of ordinary law as the departure point for dispute resolution. At the same time, the authors write that 'the Bill of Rights overrides ordinary law.' Given that our existing corpus of law provides an answer to almost all legal disputes, the priority given the avoidance principle would effectively render almost all disputes immune to constitutional review. The Bill of Rights would actually never override ordinary law. That cannot be right. But if it is, the authors have contradicted themselves.

Again, as a logical matter, the authors seem to be saying: 'A(pplication) = not A(pplication)'. We have seen that avoidance equals indirect application *and* that the principle of avoiding application entails a preference for (indirect) application over (direct) application. So, if the principle of non-application of the Final Constitution does *not* obtain (and we have seen that non-application equals indirect application), then the principle of non-application entails (indirect) application of the Final Constitution over (direct) application. One cannot both apply and not apply the Final Constitution. This is, quite literally, nonsense.

Even a good faith reconstruction seems implausible. A strong view of avoidance prevents ordinary rules of law from ever being displaced by the Final Constitution. A weaker view holds that to the extent that avoidance does not preclude application, then we must engage in indirect application. But even on the weaker view, indirect application exhausts the universe of possibilities for application of the Bill of Rights and we would never be required to engage in direct application.

Let us attempt a reconstruction of their argument from avoidance that is weaker still. Assume that the authors mean 'reading down' when they say avoidance. On this account, they are attempting to avoid a finding of invalidity through direct application and even a 'change' in the law through indirect application. But 'reading down' does not avoid constitutional analysis. It is a mandatory canon of constitutional interpretation that enables a court to skirt a finding that a rule of law is unconstitutional and, therefore, invalid. Before one can 'read down' a rule of law, one must first ascertain what the ambit of the applicable constitutional provision is. Only when one has determined that ambit — and this is hardly avoidance — is one in a position to determine whether a preferred gloss on a rule is or is not consistent with constitutional dictates. Analysis of the Final Constitution is logically prior to the analysis of the common law.

The logical incoherence of this approach flows from the authors' commitment to minimalism and their attempt to make minimalism a theory of everything. Minimalism stands for the proposition that courts ought to develop the body of substantive constitutional law 'one case at a time' and that the basic law ought to upset existing doctrine no more than is absolutely necessary. With

respect to some constitutional doctrines, say, how one approaches the interpretation of individual rights, minimalism may be a plausible jurisprudential line. But it works only as a 'style', not as a rule. When minimalism is converted into a rule, as the authors must do in order to give the specific provisions of FC s 8 and FC s 39 content, it does too much work and turns all of FC s 8 into surplusage.

(3) Roederer and Hopkins

(a) Roederer

Chris Roederer's strategy in 'Post-*Matrix* Legal Reasoning' bears a family resemblance to De Waal and Currie's account.[1] Neither Roederer nor De Waal and Currie feel particularly constrained by the text. De Waal and Currie, however, are primarily concerned with safeguarding extant non-constitutional rules of law from unnecessary constitutional alteration. Roederer demonstrates no appreciable concern for law as a rule-governed exercise. The novelty of Roederer's project is that it depicts constitutional interpretation, generally, and application analysis, in particular, as a value-driven, but largely rule-free, exercise.

Roederer's conclusions about the application of the Bill of Rights under the Final Constitution are as follows. First, there is no meaningful difference between direct application of the Bill of Rights under FC s 8 and indirect application under FC s 39(2). Second, those who believe a meaningful difference exists between analysis under FC ss 8 and 39 rely on a clear cleavage between rules and values. Third, since no clear cleavage exists between the rule-governed analysis and the value-governed analysis under the Final Constitution, then any distinction between the two sections grounded in the belief that they require different kinds of analysis collapses. Fourth, the collapse of both the rule/value distinction and the direct application/indirect application distinction liberates the courts from the yoke of South Africa's traditional legal matrix and unleashes the full transformative potential of the Final Constitution. Fifth, *Khumalo* offers a perfect example of a decision that recognizes that there is no meaningful difference in the analysis that occurs under FC s 8 and FC s 39(2).

This no-text, no rule, approach may seem like an odd interpretive strategy. But Roederer has two aims that seem to require this technique: *(a)* to offer a particular kind of justification for the Constitutional Court's decision in *Khumalo*; *(b)* to make an intervention in the debate about application which allows him to argue that there is no longer anything worth arguing about.

Roederer's first contention is that there is no meaningful difference between direct application of the Bill of Rights under FC s 8 and indirect application under FC s 39. But despite sections entitled 'Is there a distinction based on the text?' and 'The distinction is an illusion', Roederer never actually tells us what the sections should mean. It is therefore impossible to gauge whether there is, in fact, a legitimate distinction based on the text, whether such a distinction could

[1] Christopher Roederer 'Post-Matrix Legal Reasoning: Horizontality and the Rule of South African Law' (2003) 19 *SAJHR* 57.

be deemed meaningful and what the alternative is.[1] At minimum, one might expect an explanation as to why FC s 8 is entitled *Application* and FC s 39 is entitled *Interpretation*.

The differences between the interpretive technique Roederer employs and the interpretive technique employed by the *Khumalo* Court in the decision he seeks to defend are difficult to reconcile. The refusal to take the text seriously and to then claim that there is effectively no meaningful distinction between FC s 8 and FC s 39 flies directly in the face of Justice O'Regan's injunction that we should not attribute meaning to one section of the Final Constitution that renders another section, quite literally, senseless.[2] If they both mean the same thing, then one of those sections is entirely superfluous.

The attribution of distinct purposes to the two sections is an absolutely essential exercise. FC s 8(1) requires that the substantive provisions of the Bill of Rights apply to each and every 'kind' of law. It does not mean that the prescriptive content of the substantive provisions in the Bill of Rights cover each and every legal dispute. Put another way, while the specific provisions in the Bill of Rights cover a large domain of law-governed activity, they do not engage all law-governed activity. The independent purpose of FC s 39(2) is to cover those law-governed activities that are not engaged by any of the specific provisions set out in Chapter 2.

A counterfactual makes this distinction clear. Assume that FC s 39(2) and FC s 8 do require the same mode of analysis. Assume, as Roederer would have us do, that this mode of analysis is purely a value-driven exercise. Why even have a Bill of Rights? Why not just have a grocery list of a few general goods? Or even one longer list that embraces all of the values made manifest in the substantive provisions in Chapter 2? The correct reply is that the drafters intended for there to be two different processes. The first process — direct application — takes the rights and freedoms — and the general rules derived from them — as our departure point for determining whether law or conduct is invalid. The second process allows for a mode of analysis that neither specifies a particular right that demands vindication nor permits a finding of invalidity. Instead, as *Carmichele* and *Thebus* tell us, the courts operate under a general injunction to bring all law into line with the 'spirit, purport and objects' of the Bill of Rights and the 'objective, normative value system' made manifest in the text of the Final Constitution as a whole.

Roederer's second contention is that those who believe a meaningful difference exists between analysis under FC s 8 and FC s 39 rely incorrectly on a cleavage between rules and values. He claims that since FC ss 39 and 36 require that we

[1] Roederer (supra) at 71–80.

[2] Does the putative collapse in the rule/value distinction better justify the result in *Khumalo*? Once we make this move, there is only one question we could ask when faced with any allegation of a rights violation: Stepping back from it all, is the law or conduct under review the kind of law or conduct that the 'entire scheme of the Bill of Rights . . . is meant to achieve?' Such a broad inquiry inevitably makes questions about the particular kinds of application of fundamental rights required by FC ss 8 and 39 superfluous. But this interpretative strategy floats so free of the text that it makes any analysis of the specific rights in FC ss 9 through 35 superfluous. That would seem to violate with a vengeance the non-redundancy or non-surplusage requirement articulated by Justice O'Regan in *Khumalo*.

analyze both rights and limitations of rights in light of the same five core values that we must necessarily be engaged in the same kind of 'global' assessment of provisions and values whether we are doing direct application or indirect application. This is false. When we ask whether a statutory provision or a rule of common law violates the equality clause, we do not engage in some global assessment of competing Bill of Rights considerations. We know that FC s 9 requires us to ask very specific kinds of questions about 'differentiation', 'discrimination,' 'unfairness,' 'systemic disadvantage' and 'impairment of dignity.' Likewise, it could hardly be the case that when we interpret the right to housing in light of those five cores values we end up with the same content as when we interpret the right to access to court in light of those five core values. However general their wording might be, these provisions are rules with real purchase. Roederer should know that simply because there is never an incontrovertible answer to the skeptical challenge as to exactly how a rule will be applied in some future instance it does not follow that we are not engaging in rule-governed behaviour when we try to follow a given rule or to apply the rule to a case in court.[1] His second effort to blur the rule/value distinction takes the following form:

> Any rule-like provision is subject to the interpretive exercise enunciated in s 39. The broader the interpretation, the more likely there will be conflict with or limitations on other rights. The more tailored and limited the application the less likely that it will heavily impact on

[1] Though Roederer is sometimes careful to say that he is merely talking about supplanting old rules of law with new justifiable rules, when he talks about constitutional provisions a sort of naïve skepticism creeps into the discussion. He writes:

> For the most part, the provisions in the Bill of Rights of the 1996 Constitution and the rights included therein are not rule-like self-interpreting provisions. They do not appear in the form of statutory entitlements or administrative regulations.

Roederer (supra) at 75–76. True, the rights in the Final Constitution are not like administrative regulations. However, the distinction or the comparison does no work. No rule is self-interpreting in the sense that Roederer implies. Perhaps Roederer's anxiety is that the very breadth of a constitutional provision makes it impossible to apply. This view of language and rules Wittgenstein describes as follows:

> This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made to conflict with it. And so there would be neither accord nor conflict here.

See Ludwig Wittgenstein *Philosophical Investigations* (1953) § 201. That sounds like what Roederer is saying. However, Wittgenstein's point is not to entertain such naïve skepticism, but rather to oppose it. Following rules — or trying to follow rules — is what meaningful action is all about. Roederer's exhortation to not engage in rule-following behaviour is meaningless unless it reduces to something like 'Don't follow those rules, follow these rules.' Roederer, wanting to be inside and outside the legal community simultaneously, is loath to supplant one form of rule-following behaviour with another. The result is the use of extant rules articulated in cases like *Khumalo* (though he doesn't call them rules) that suggests an end-run around his initial opposition to rule-following. He cannot have it both ways. Wittgenstein puts this point crisply when he writes:

> There is an inclination to say: every action according to the rule is an interpretation. But we ought to restrict the term 'interpretation' to the substitution of one rule for another.

Ibid. For a full account of Wittgenstein's views on rule-following as well as the skeptical answer to the skeptic's challenge, see Saul Kripke *Wittgenstein: On Rules and Private Language* (1982); for an account of Wittgenstein's view of rule-following that abjures skeptical moves entirely, see GP Baker & PMS Hacker *Skepticism, Rules and Language* (1984).

> other horizontally applicable rights. In the end, a balancing must take place between the various rights in issue. The balancing cannot be done, or rather, should not be done by a myopic technical evaluation of competing provisions. It can only be done properly by stepping back and looking at the entire scheme of the Bill of Rights and what it is meant to achieve.[1]

But it is not clear which interpretive exercise in FC s 39 Roederer is talking about. He must be talking about FC s 39(1) and not FC s 39(2). If he were talking about FC s 39(2), he would simply be comparing FC s 39(2) analysis to FC s 39(2) analysis. I do not believe he could have intended a tautology. If, however, he is talking about how FC s 39(1) informs Bill of Rights analysis, then Roederer has overshot the mark. What FC s 39(1) tells us is that 'when interpreting the Bill of Rights, a court ... must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.' FC s 39(1) is intended to help us think about how we determine the content of any given right. But it is not a substitute for applying our mind to the particular purposes or the specific values that determine the ambit or the prescriptive content of a substantive provision. When he then writes that 'the broader [and I assume here that he means something like the more notional or the more generous] the interpretation [of the right], the more likely there will be conflict with or limitations on other rights,' he assumes two things that he is not entitled to assume. He assumes that a broad interpretation will inevitably yield an infringement of the right. There is no reason to grant Roederer this assumption. If it were true, then it would be an argument against both Bill of Rights analysis generally and a notional approach to Bill of Rights analysis in particular. He also assumes that every infringement of a right that leads to limitations analysis invariably leads to a balancing of conflicting rights. However, unless we believe that we can reconfigure every justification for a limitation into a rights claim itself, I see no reason to grant this assertion. The state can limit the right to smoke dagga — and thus infringe a Rastafarian's right to engage in a particular religious practice — and make no reference to a countervailing constitutional right. Its concerns — concerns the *Prince* Court vindicated — are captured by a desire to limit drug-trafficking and to limit the kinds of gateway drug abuse that may lead to hard-core drug abuse and to higher levels of crime. The state may proscribe bestiality and thereby limit a person's right to privacy.[2] The court may uphold such a proscription. However, since there is no constitutional right that entitles an animal to be free from bestiality, then it would

[1] Roederer (supra) at 76.

[2] The Constitutional Court is on record as having some sympathy for the criminalisation of just these sorts of victimless crimes. See *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC)(*'Case'*) at para 99. See also *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)(*'NCGLE I'*) at para 118.

be incorrect to say that a countervailing right justifies the state's limitation of my privacy rights. There is, in this instance, no balancing of rights claims.[1]

In considering the explanatory power of Roederer's collapse of the rule/value distinction, it may be worth reflecting upon the Constitutional Court's own take on the distinction between rules and values and the different uses to which the Final Constitution puts them. In *Minister of Home Affairs v National Institute for Crime Prevention*, Chaskalson CJ writes:

> The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights.[2]

Values are one thing, the *NICRO* Court appears to be saying, rules another. While it is certainly true that the fundamental values articulated in the Final Constitution will shape the rules expressed therein, and that the rules will have a reciprocal effect with respect to our understanding of those fundamental values, there remains a distinction with a difference. Rights give rise to rules and enforceable claims. Values do not.

(b) *Hopkins*

Kevin Hopkins is primarily interested in how FC s 39(2) can be used to develop the common law in light of the spirit, purport and objects of the Bill of Rights.[3] He has written that:

> Each and every pre-Constitutional precedent will need to once again be scrutinized, this time against the *values* that permeate through the Bill of Rights, so as to make sure that all

[1] As this analysis makes clear, Roederer has used FC s 39 to jettison rights analysis completely and somehow get us to the point where, under FC s 36, we are balancing conflicting rights. But we have already seen that the justificatory analysis required by FC s 36 does not presuppose the assertion of a countervailing right. What then does he mean when he writes that: 'The more tailored and limited the application the less likely that it will heavily impact on other horizontally applicable rights.' Roederer (supra) at 76. What he must mean is: 'the more narrowly circumscribed the content of a right is, the less likely it will be to impair the exercise of another right.' Is this true? In any event, constitutional analysis does not normally proceed in terms of pitting rights against rights. We are generally measuring ordinary law for consistency with constitutional dictates. If a law impairs the exercise of a right, then we ask whether that impairment can be justified. We may well do so by reference to the values made manifest in other rights. But it need not be so. If the law or the conduct in question does not impair the exercise of a right, then we do not get to ask whether that impairment can be justified by reference to some value made manifest in another right. Roederer wants to set up the balancing of rights as an ineluctable part of Chapter 2 analysis. It clearly isn't.

[2] 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)('*NICRO*') at para 21.

[3] See, eg, Kevin Hopkins 'The Common Law is Indeed a Living Creature: A Noteworthy Decision is Handed Down in the Cape High Court' (2001) 118 *SALJ* 149; Kevin Hopkins 'Constitutional Rights and the Question of Waiver: How Fundamental are Fundamental Rights?' (2001) 16 *SA Public Law* 122.

> law (including case law) is constitutionally compliant. That it is our duty to do this is beyond question — the common law must be developed so that it is brought into line with our Constitution.[1] (Emphasis added)

But Hopkins' writings rarely mention 'how' the Bill of Rights applies and how courts are to understand their obligations. His writings appear to reflect a two-fold inclination to view: (1) the common law as a rather seamless web that should be preserved in so far as it is can; and (2) direct constitutional application of the Bill of Rights as an intrusion upon the well considered assessments of equity and fairness made manifest in the common law. He writes:

> Certainty in the common law is supposed to be maintained by the doctrine of precedent and it is in the judges of our courts that we trust to correctly (and carefully) apply this doctrine when they go about resolving legal disputes. This is a far easier task in an established common law system such as the one that existed in South Africa before the new constitutional era was ushered in. But now, in this new era, the emphasis seems to have shifted from consistency to compliance so that a new imperative now rests with judges: that all law, including the common law, be made constitutionally compliant [with FC 39(2)] . . . . [However,] [j]udges need to be more disciplined when using the Constitution: unless they give clear reasons articulating how they arrive at their decisions we run the risk of eroding the certainty created by centuries of well-thought out and carefully applied common-law rules.[2]

FC s 39(2) is Hopkins' preferred mechanism for development of the common law because the invocation of direct application under FC s 8 ostensibly forces the courts to come up with new constitutional remedies. Hopkins orientation towards FC s 39(2) seems to have been informed by the Constitutional Court's very cautious approach to the creation of new and self-standing constitutional remedies in damages — as distinct from common law and statutory remedies — for rights violations.[3] However, the creation of a novel constitutional remedy for damages need not be the outcome of direct application of the Bill of Rights to a rule of common law. *National Coalition for Gay and Lesbian Equality v Minister of Justice* is a good example of direct application of the Bill of Rights to a rule of common law and a finding that the rule is unconstitutional.[4]

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[1] Kevin Hopkins 'The Influence of the Bill of Rights on the Enforcement of Contracts' 2003 (August) *De Rebus* 22.

[2] Kevin Hopkins 'Constitutional Values and The Rule of Law: They Don't Mean Whatever You Want Them To Mean' (2004) 19 *SA Public Law* 433 ('Constitutional Values')(Emphasis added).

[3] See, eg, *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC)('*Fose*'); *Carmichele v Minister of Safety and Security & Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC), 2002 (1) SACR 79 (CC), 2001 (10) BCLR 995 (CC)('*Carmichele*'). In *Fose*, the Court rejected a request to develop a self-standing constitutional action — above and beyond an action in delict — that could result in the award of damages on top of those awarded at common law. In *Carmichele*, the Court modified slightly its views in *Fose* and required the development of the law of delict in light of the spirit, purport and objects of the Bill of Rights. But see *Modderklip* (supra) at para 68 (Court creates a new constitutional remedy grounded in the violation of FC s 34 and the rule of law.)

[4] *NCGLE I* (supra) at para 90 ('In this judgment the conclusion has already been reached that this offence should be declared constitutionally invalid in its entirety. This conclusion has been reached by a direct application of the Bill of Rights to a common-law criminal offence, not by a process of developing the common-law'.)

Hopkins argues that direct application of the Final Constitution requires

> a two-part enquiry. In the first part we ask whether the right has been limited, and in the second part (assuming that the first part is answered in the affirmative) we ask whether the limitation is reasonable and justifiable.[1]

For reasons that go unexplained, Hopkins then asserts that

> direct application' works well with attacks on legislation — because the claim is usually that the infringing legislation limits a specific constitutional right in an unreasonable and unjustifiable way.[2]

Direct application, he claims, does not work for attacks on rules of common law.

This claim is wrong as a matter of law.[3] First, there have been any number of successful, direct attacks on rules of common law in which the standard two-stage approach has been employed by the courts.[4] Second, there is no reason to conclude that an attack on legislation is based upon one right alone. Constitutional challenges to law are often grounded in multiple rights.[5]

The claim also seems incorrect as a matter of logic. If a rule of common law and a statutory provision can be articulated in exactly the same language, then there are no grounds to support the claim that a rule of common law and an identically phrased statutory provision cannot both be attacked as *(a)* infringing a specific right and *(b)* infringing that specific right in an unreasonable and unjustifiable way.

(4) Cheadle, Davis, Van der Walt and Ellmann

(a) Cheadle and Davis

Halton Cheadle and Dennis Davis are not reluctant to apply the Bill of Rights directly to disputes between individuals. In their article 'The Application of the

[1] Hopkins 'Constitutional Values' (supra) at 435.

[2] Ibid.

[3] See *Shabalala & Others v Attorney-General, Transvaal, & Another* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC)(Common-law docket privilege relied upon by the state held by Constitutional Court to be unconstitutional.)

[4] *NCGLE I* (supra) at paras 18–90.

[5] The Constitutional Court often deploys rights simultaneously in the service of its arguments — and it often describes rights as interdependent and symbiotic. See eg, *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)(Court twinned privacy and dignity in support of personality rights in a suit for defamation); *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC)(Mutually reinforcing rights of religion and culture were deemed to be in conflict with, and ultimately subordinate to, constellation of equality, dignity, freedom and security of the person and children's rights considerations); *NCGLE I* (supra) at paras 28–29 (The constitutional protection of dignity 'requires us to acknowledge the value and the worth of all individuals as members of society'; moreover, 'the rights of equality and dignity are closely related, as are the rights of dignity and privacy'); *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC)(Concatenation of rights — conscience, expression, assembly, association, political participation — support finding that sections of Defense Act are constitutionally infirm.)

1996 Constitution in the Private Sphere',[1] they express absolutely no doubt that the Final Constitution is meant to 'subject private power to constitutional scrutiny.'[2] Their analysis of the text of FC s 8, however, encounters many of the same problems that manifest in *Khumalo*.

The two authors begin by noting that because 'FC s 8(1) binds the state in its different manifestations to the provisions of the Bill of Rights … the specific inclusion of the judiciary [in FC s 8(1)] will give rise to its own difficulties.'[3] What those interpretive challenges are, Cheadle and Davis do not say. Instead of engaging the extension of FC 8(1), Cheadle and Davis focus their attention almost entirely on FC s 8(2). They write:

> When we say that the executive is bound that means that the executive cannot act in breach of the Constitution. This means in each case that the legislature and the executive do things that the courts have to measure against the Constitution. Can we ever make the same claim in respect of the courts? Their conduct — the processing of law claims and the passing of judgments - is not extraneous action to be tested against the Constitution - it is constitutive of the law, including the Constitution, itself. Section 8(2) reads: 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.' This section puts beyond dispute that the Bill of Rights can bind natural or juristic persons.[4]

While I agree with the last sentence, it is hard to comprehend fully the textual basis for the claim. The binding of the executive — like the binding of the judiciary or the application of the Bill of Rights to 'all law' — occurs in terms of FC s 8(1). The authors assert, without argument, that when the common law — an emanation of the judiciary — governs a private dispute, the Bill of Rights applies only in terms of FC s 8(2).

Cheadle and Davis are quite conscious of, and admirably candid about, the fact their analysis of FC s 8 — and their reliance on FC s 8(2) — resurrects, in a modified form, doctrinal difficulties created by *Du Plessis*. Cheadle and Davis write presciently that:

> The deep convictions that fired the debate and the majority judgment in *Du Plessis* case will fuel the controversy built into this formulation — how far should judges go in binding private persons to the strictures of the Bill of Rights. Those who fear the Constitution's incursion into private law will use the discretion given in this section to put the brakes on the application of the Bill of Rights to private persons. Those who recognise that power is not the sole prerogative of the state, particularly as the state privatises many of its functions, will use the discretion to provide a remedy to bring private conduct into line with the Constitution when the legislature fails to do so.[5]

[1] (1996) 12 *SAJHR* 44, 46 ('As both authors were party to the constitutional negotiations and Halton Cheadle was directly involved in the formulation of Chapter 3 [of the Interim Constitution], we have some justification for believing that Chapter 3 required a constitutional audit of all law. Chapter 3 did not create direct constitutional causes of action against private persons, but if a rule of law was involved in private litigation, Chapter 3 was applicable to that rule of law.')

[2] Ibid at 54–55.

[3] Ibid.

[4] Ibid.

[5] Ibid at 56.

The rest of their article is given over to a detailed explanation of why FC s 8(2) should not be used to avoid subjecting private relationships to constitutional scrutiny. Addressing themselves to the better angels of those who defend the sanctity of the common law, they write:

> The text enjoins a court to take account of the nature of the right and the nature of the duty imposed by the right. The nature of the right may reveal that it is a right capable of being applied to private persons - the right to dignity (injuria, defamation); the right to freedom and security of person (delict), the right to privacy, the right to an environment that is not harmful to health or well-being (nuisance), right to property, and childrens' rights. We have deliberately selected rights already recognised in the common law to demonstrate that there is an imminent horizontality in respect of many of the rights in Chapter 2. The common law recognition of any of the rights does not always cover the whole ambit of the constitutional right, but the fact that part of the right is capable of application suggests that the right is suitable for application to private persons.[1]

The argument draws down on the generally accepted notion that the common law seeks to 'balance' competing rights claims in order to service a comparable claim about fundamental rights. I have my doubts about the persuasive power of this rhetorical move. If one thinks that the legislature is best placed to structure the relationships between private persons, then one will be disinclined to use the Bill of Rights to restructure such legislation. If one thinks that the body of common law that governs relations between private parties is a densely woven tapestry that is best left to the courts to weave, slowly, incrementally, stitch by stitch over time, then one may be disinclined to use the Bill of Rights to alter the fabric of the common law to suit the emerging exigencies of the constitutional order.

In his recent chapter on application, Halton Cheadle rehearses many of the arguments above.[2] The chapter possesses the added virtue of recognizing that FC s 8(1) 'states that the Bill of Rights "applies to all law."'[3] Cheadle then goes on to make the unobjectionable claim that 'all law' means 'law' in all its various manifestions: legislation, subordinate legislation, regulation, common law and customary law. More importantly, he rejects the assertion that the application of the Bill of Rights to legal disputes between the state and an individual differs materially from the application of the Bill of Rights to legal disputes between individuals.[4] Such a distinction, Cheadle writes:

> ... has no basis in law, given the changes made to the [F]inal Constitution. All law is now subject to constitutional scrutiny regardless of how and with whom it arises in litigation. A common law rule is no different from any other legal norm — if it is invalid, a court must declare it invalid.[5]

Such a statement should put to rest the issue of the application of the substantive provisions of the Bill of Rights to common law disputes between private

[1] Cheadle & Davis (supra).
[2] Halton Cheadle 'Application' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 19.
[3] Ibid at 31.
[4] Ibid at 33.
[5] Ibid.

parties. Several pages later, however, Cheadle writes that FC s 8(2) 'limits' the application of the Bill of Rights with respect 'to private power.'[1] Some rights — say FC s 9(4)'s injunction against any and all discrimination — must apply to legal disputes between private parties. Other rights — the criminal process rights in FC s 35 and the political rights in FC ss 19(2) and (3), 20 and 21(2), (3) and (4) — can only meaningfully apply to relations between the state and individuals. As for the rest, the Bill of Rights applies if a right asserted is found to be 'suitable for application.'[2] Perhaps Cheadle means only to draw the distinction offered in the good faith reconstruction of *Khumalo*: namely that while FC s 8(1) commits us to the proposition that the Bill of Rights applies to every kind of law, FC s 8(2) draws our attention to the fact the prescriptive content of the substantive rights may not speak to a particular legal relationship between or to particular kinds of conduct engaged in by private parties.

Cheadle prefers to explain the meaning of FC s 8(2) in terms of what he describes as 'the South African Constitution's special genius.'[3] What is this 'special genius'? Cheadle writes:

> Precisely because generally stated rights are not appropriate vehicles for the imposition of standards of conduct, section 8 seeks to avoid application of the right to conduct of private persons by requiring either legislation or a common law rule 'to give effect to the right.' This constitutional motif of an intermediate law between the constitutional right and the conduct of the state or of the private actor repeats itself throughout the Bill of Rights.[4]

What I understand Cheadle to be saying is that the Bill of Rights rarely, if ever, applies directly to 'conduct'. It applies to law. Is this 'special'? I guess that depends on one's perspective. If one adopts the Hohfeldian view that every dispute that makes it to court is, at bottom, rule-governed, then FC s 8 does not avoid 'application of [a] right to private persons' but rather characterizes the constitutional challenge to the private conduct in question as an attack on a rule of law. FC s 8 may, however, reflect the 'special genius' of its drafters if it is read against the background of a community of practitioners hesitant to adopt the Hohfeldian account and wary of the disruption that generally stated norms might have on a well-settled body of law. The notion that all conduct is, in fact, law-mediated, and mediated through express rules of a statute or the common law, suggests that the Final Constitution is not designed to create a new jurisprudence out of whole cloth but to tailor the existing law to fit the basic law. Is this 'genius'? If Cheadle's elaboration of FC s 8 can convince South African jurists, practitioners and academics that direct application of the specific substantive provisions of the Bill of Rights to all species of law and all kinds of disputes is not something to be feared, but embraced, then his account of FC s 8 is genius incarnate.

I have but one serious qualm about Cheadle's account. For Cheadle, FC s 8(3)*(a)* stands for the proposition that a court is obliged to develop the common law only where no 'mediating' or existing rule of common law or statutory provision exists to

[1] Cheadle (supra) at 36.
[2] Ibid at 37.
[3] Ibid at 29.
[4] Ibid.

give effect to the right that has been violated. I do not agree. If anything, FC s 8(3)*(a)* must be concerned with the absence of appropriate mediating rules of law. In cases where customary law, common law or statute do not give effect to constitutional imperatives, Chapter 2's rights and freedoms become the unavoidable vehicles for the imposition of new standards of conduct. How could it be otherwise? Where the existing common law is out of step with the rights enshrined in Chapter 2, the courts must set the law right and craft a new rule of common law.[1] The same is true of statutes. The preferred modality is to strike down a statute or sever an offending provision. But it is also fair to say that this Constitutional Court has not been shy about 'reading in' words in order to remedy the constitutional flaw in legislation.[2]

'The constitutional motif' of mediating law may also refer to what I have described as the Final Constitution's commitment to 'shared constitutional interpretation.' Various pieces of super-ordinate legislation — the Promotion of Administrative Justice Act, the Access to Information Act, the Equality Act and the Labour Relations Act — give effect to constitutional rights. Such legislation forces the courts to recognize that they share responsibility for giving content to the Final Constitution.[3] Where, however, neither super-ordinate legislation, normal legislation, subordinate legislation nor common law effectively mediate conduct in a manner consistent with the Final Constitution, FC s 8(3)*(a)* makes it incumbent upon the courts to assist other government actors in developing a system of best practices — at least until constitutionally-mandated enabling legislation appears.[4]

[1] If striking down common law rules or statutory provisions that govern private conduct — and potentially replacing these rules — especially common law rules — with rules derived from a constitutional right is an accepted, and indeed necessary, part of constitutional review, then it is hard to explain why an area of the law as yet ostensibly ungoverned by an express common law rule or a statutory provision is exempt from direct application of the Bill of Rights. It is especially difficult to see with respect to the common law. That the courts hate to announce that they are making law has more to do with style — the rhetoric of *stare decisis* and judicial law-making — than it does with substance. See Stu Woolman & Danie Brand 'Is There a Constitution in this Courtroom? Constitutional Jurisdiction after *Walters* and *Afrox*' (2003) 192 *SA Public Law* 38.

[2] See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at paras 67, 68, 70 (Court held that as far as deference to the legislature is concerned, there is 'in principle no difference between a court rendering a statutory provision constitutional by removing the offending part by actual or notional severance, or by reading words into a statutory provision. In both cases the parliamentary enactment, as expressed in a statutory provision, was being altered by the order of a court: in the one case by excision and in the other by addition. The only relevant enquiry was what the consequences of such an order were and whether they constituted an unconstitutional intrusion into the domain of the Legislature. Any other conclusion would lead to the absurdity that the granting of a remedy would depend on the fortuitous circumstance of the form in which the Legislature had chosen to enact the provision in question. Reading in was, depending on all the circumstances, an appropriate form of relief under s 38 of the Constitution and whether a Court read in or struck out words from a challenged law, the focus of the Court should be on the appropriate remedy in the circumstances and not on the label used to arrive at the result.')

[3] *IDASA v ANC* [2005] JOL 14201 (C).

[4] For example, FC s 41(2) requires Parliament to pass legislation designed to mediate disputes between organs of state. While draft legislation on intergovernmental relations has now appeared, the lacuna in the law — the lack of mediating law — did not prevent the Constitutional Court from using FC ss 40 and 41 to develop rules designed to resolve intergovernmental disputes. See Stu Woolman, Theunis Roux & Bernard Bekink 'Cooperative Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14.

(b) *Van der Walt*

Johan Van der Walt has pedalled, of late, a position on application that deviates somewhat from the rather strong line he took shortly after the Constitutional Court delivered *Du Plessis* and certified the Final Constitution.[1] In 'Progressive Indirect Horizontal Application of the Bill of Rights', Van der Walt starts off by defending the proposition that FC s 8(1)'s injunction that the Bill of Rights 'applies to all law' captures both statute and common law alike.[2] He presses the point by further asserting that whether it is statute or common law that governs a legal dispute between private persons, it is state action all the same.[3] It matters not whether the law emanates from Parliament or the Constitutional Court. With respect to common-law rules that govern private legal relations, he asks:

> Is it not strictly speaking still the relationship between state action and citizens of the state that is at issue here, rather than relations between citizens?

To demonstrate that this is not fanciful academic rhetoric, Van der Walt endorses the reasoning of the US Supreme Court in *Shelley v Kraemer*: non-statutory private law rules can be understood to constitute state action.[4] On this account, it matters not whether a rule or a relationship is described as vertical or horizontal. An enforceable legal rule is, whatever its provenance, always backed up by the power of the state. When the state acts, the Final Constitution always applies. Van der Walt's gloss on 'Drittwirkung cases decided by the Bundesverfassunsgericht' backs up his thesis on state action:

> [V]irtually all the important Drittwirkung cases decided by the Bundesverfassunsgericht turn on an application of the [general] rule [regarding state action articulated] in *Shelley*. Nowhere does the [German Constitutional] Court resort to terminology that suggests that a fundamental right was violated by a private legal subject. The violation of the fundamental right is always attributed to an incorrect interpretation of the bearing of the Federal Constitution of Germany or Grungesetz on the private dispute by a trial court.
> . . . .
> The most consistent position to take would be that one can never take the vertical relation or involvement of the state out of horizontal or private legal relationships . . . This implies, of course, that the constitutional review of private legal relations is fundamentally a matter of regular constitutional review of state power.[5]

Van der Walt then equivocates with respect to the proper extension of FC ss 8(2) and (3). Rather than offer a reading of these subsections consistent with his take on FC s 8(1), Van der Walt states that 'I do not wish to again take issue with the interpretive question whether the 1996 Bill of Rights applies directly or indirectly to private disputes.'[6] He further concludes that:

[1] See John Van der Walt 'Perspectives on Horizontal Application: *Du Plessis v De Klerk* Revisited' (1997) 12 *SA Public Law* 1
[2] Ibid at 346–347.
[3] Ibid at 347.
[4] 334 US 1 (1948).
[5] Van der Walt 'Progressive Indirect Horizontal Application' (supra) at 347–348.
[6] Ibid at 351.

> We can assume that the future impact of the Bill of Rights will predominantly take place through what has come to be understood as the indirect horizontal application of the Bill of Rights.[1]

This comment could simply reflect Van der Walt's assessment of how the courts have used both the Interim Constitution and the Final Constitution to alter ordinary law. That the claim is probably descriptive, and not prescriptive, is born out by his subsequent statement that the Constitutional Court's ruling in *Fose* underwrites this conclusion. *Fose* supports the contention that the courts are more comfortable modifying the common law through indirect application via FC s 39(2) than through direct application via FC s 8.

That Van der Walt is not, in fact, content to let the matter rest with a descriptive claim is reflected in the following question:

> Is it so that there are social relations between private individuals which do not found causes of action and on which the law for this reason, and the 1996 Constitution for that matter (if we ignore for the moment s 8(2), as had to be done when *Du Plessis* was decided) have no bearing?[2]

It seems to me that Van der Walt wants to say that it is true — in an arguably trivial sense — that there are instances of private conduct that do not found causes of action and upon which the law and the Final Constitution have no *immediate* bearing: namely those instances of private conduct that do not lead to a dispute that winds up in court. To the extent that a dispute must be resolved by a court, it is inevitably mediated by law, and the Final Constitution may have a material bearing on the outcome. I am less certain about how Van der Walt understands FC s 8(2) and FC s 8(3). I think it safe to say that he would not object too strenuously to my preferred reading: namely, they indicate that the courts must create new rules of law to govern the conduct of private persons in those instances in which extant and express rules of ordinary law do not give adequate effect to a substantive provision in the Bill of Rights.

(c) Ellmann

As I have already noted, Ellmann devotes the better part of his discussion of application jurisprudence in 'Constitutional Confluence' to a patient explanation of how the term 'organ of state' expands the kinds of entities and relationships captured by FC s 8(1).[3] After completing his analysis of organs of state, Ellmann moves directly into an analysis of FC ss 8(2) and (3).[4]

[1] Van der Walt 'Progressive Indirect Horizontal Application' (supra) at 351.

[2] Ibid at 354.

[3] Steven Ellmann 'A Constitutional Confluence: American State Action Law and the Application of Socio-Economic Rights Guarantees to Private Actors' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 444, 446–448.

[4] Just prior to addressing FC ss 8(2) and (3), however, Ellmann indicates that he believes that the inclusion of the phrase 'binds the judiciary' constitutes the second significant shift in the application provisions of the Final Constitution. He fails to offer an explanation of the significance of this change. Ibid at 450.

About FC ss 8(2) and (3), Ellmann writes:

> [S]ection 8(2) states the circumstances in which rights bind private actors — 'if, and to the extent that' they are applicable. Its phrasing seems more instructive than conditional. It does not say that 'rights *may* apply' in certain circumstances, but that they do. Moreover, s 8(3) goes on to specify how courts are to develop the law 'when applying a provision in the Bill of Rights to a natural or juristic person in terms of subsection (2)'; again the import of such phrasing is that there will be such cases. So it does not seem correct to read the new Constitution as 'simply defer[ring] the question of application'; the text is an invitation to such application. What the invitation leaves very much to the Courts, however, is the elaboration of the proper occasions for this horizontal application, and of the proper methods of carrying it out.[1]

This paragraph is meant to dispatch the contention that the text is so open-ended that the courts can still avoid direct application entirely.[2] Ellmann is, however, concerned less with setting out a framework for direct application analysis and concerned more with its ramifications for institutional relations between coordinate branches of government.[3] As a result, two questions dominate Ellmann's analysis: what are the risks that attach to the courts' acceptance of this invitation to apply the Bill of Rights directly to private legal disputes and how will this acceptance affect the shared responsibility that the courts and the legislature have for shaping constitutional doctrine.

Ellmann has a modicum of sympathy for the view expressed by some that direct application of the Bill of Rights to disputes between private parties may impair majority rule. His sympathy, however, has clear limits. He notes that the Final Constitution reflects a political choice by the majority of South Africans. That democratically determined decision commits our polity to justiciable rights and the direct application of these justiciable rights to private disputes, both of which of necessity 'limit[] legislative prerogatives.'[4] Failure to recognize these

[1] Ellmann (supra) at 451.

[2] Ellmann goes on to note that while the dominant tradition in application jurisprudence has been one that eschews direct application to private actors, that tradition 'may be shifting' and that the drafters of the South African Constitution intended to 'depart from [that tradition] to some extent.' Ibid at 452.

[3] Ellmann's failure to address the meaning of FC s 8(1)'s 'applies to all law' and 'binds . . . the judiciary' leads him to speak as if direct application is also something that FC s 8(1) invites rather than demands. As I have noted, application is, in fact, always only an invitation. Application analysis never determines the prescriptive content of a right — although it may serve to shape it. Ellmann's two-fold omission reflects, however, a momentary lapse in analytical rigour. As I have already noted in the body of the chapter, while much of the application debate engages disputes between private parties governed by common law, it is at least important to discuss what it means for Chapter 2 to bind the legislature or to apply to legislation. Ellmann, like most commentators, refuses to draw the unavoidable conclusion that if FC s 8(2) determines the conditions for direct application of the Bill of Rights to all legal disputes between private parties, then it necessarily determines the conditions for direct application of the Bill of Rights to all legal disputes between private parties governed by legislation. Conversely, if the binding of the judiciary in FC s 8(1) is genuinely a noteworthy change, it must be because it means that *all* emanations from the judiciary are subject directly to the provisions in the Bill of Rights.

express incursions into a supposedly pure legislative domain would itself be an affront to 'democratic principles'.[1]

Ellmann notes that the South African Bill of Rights has a way of mitigating 'infringements on majority rule and the impairment of policy-making.'[2] The capacity for 'indirect application' of the Bill of Rights — and the ability to create constitutional common law — 'avoids the potentially undemocratic and inflexible character of constitutional adjudication by turning instead to development of the common law guided by constitutional values.'[3] The apparent advantage of indirect application is that such constitutional common-law rules can be 'overridden freely by the legislature.'[4]

This weaker form of judicial intervention is not a complete solution to separation of powers problems. Ellmann identifies two distinct causes for concern.

Indirect development of the common law does not ensure judicial deference to later legislative interventions in the same area of law. As Ellmann observes in his discussion of the history of the *Miranda* rule in US jurisprudence, even an invitation by the courts to the legislature to address afresh an area of law may later be withdrawn.[5]

Sometimes, however, indirect application may not be intrusive enough. Ellmann writes that the choice to develop the common law under FC s 39(2) means that future violators of the new common law rule will only be guilty of violating the common law and not the Final Constitution. Why this outcome counts as a separation of powers concern is not quite clear. After all, the courts are not guilty of doing too much vis-à-vis the legislature. They seem to be doing too little.

The potential for judicial over-reliance on FC s 39(2) and indirect application forces Ellmann to attend once again to the point of the invitation extended by FC ss 8(2) and (3). He states that we could not possibly be meant to rely entirely on

[4] Ellmann (supra) at 453.

[1] Ellmann (supra) at 453. The Constitutional Court has repeatedly noted that as one of the guardians of the Bill of Rights, it is sometimes obliged to reject the considered opinions of the other two co-ordinate branches of government. *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC); *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of The Republic of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC); *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC); *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC).

[2] Ellmann (supra) at 454.

[3] Ibid.

[4] Ibid.

[5] *Miranda v Arizona* 384 US 436 (1966)('*Miranda*'). While the US Congress enacted such legislation two years later — making a *Miranda*-like warning but one of several considerations for the admissibility of a confession — the statute was rarely utilized because of 'doubts about its constitutionality.' Ibid at 455. When the statute finally arrived at the Supreme Court's doorstep over three decades after its passage, the institutional comity of the initial invitation for a legislative override was itself overridden by the US Supreme Court's view that the decision had now become part of accepted police practice and, perhaps

FC s 39(2) for the development of constitutional common law because that would leave us exactly where we were after *Du Plessis* and 'undercut the symbolic force of [FC] s 8(2).'[1]

One clear virtue of this line of analysis is that it recognizes expressly the distinct processes required by FC ss 8(2) and (3), on the one hand, and FC s 39(2), on the other. FC s 8(2)'s invitation to undertake direct application of the Bill of Rights to private disputes entails that the new remedies anticipated by FC s 8(3) cover cases in which a specific provision of the Bill of Rights applies directly to a dispute between private actors. FC s 39(2) addresses instances in which the 'Bill of Rights [does] not apply' directly, 'but [is] merely guiding.'[2]

For those committed to a transformative vision of the Final Constitution, FC s 8(1), s 8(2), s 8(3) and s 39(2) support the claim that 'there are no legal questions left in South Africa to which the Bill of Rights is simply and inherently irrelevant.'[3] For those concerned about issues of institutional comity, this sliding scale of application allows, on the one hand, for the constitutionalization of private legal disputes through the articulation of clear constitutional rules that emanate directly from specific provisions of the Bill of Rights — rules which are not especially amenable to override — and, on the other hand, makes provision for the creation of constitutional common-law rules that have no clear textual lineage — rules which leave room for 'legislative innovation'.[4]

more importantly, a part of 'our national culture.' See *Dickerson v United States* 530 US 428 (2000).

[1] Ellmann (supra) at 456.

[2] Ibid.

[3] Ibid at 457.

32 Interpretation

*Lourens du Plessis**

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7 Rights

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

39 Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum —

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

32.1 INTRODUCTION

Treatises on statutory interpretation in South Africa, and in other jurisdictions where *Interpretation of Statutes* is a legal discipline in its own right, most often start by posing the question 'what is statutory interpretation?'. They then proceed to proffer a working definition of some sort to get further discussion going.[1] These treatises assume that statutory interpretation is a readily describable, interpretive analysis of enacted law, guided by common- and statute-law canons of construction that manifest as rules and presumptions.

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[1] See, for example, LC Steyn *Die Uitleg van Wette* (5th Edition, 1981) 1:

> [W]at is wetsuitleg? ... Dit is om die wils- en gedagte-inhoud van die wetgewer vas te stel ... aangewese op die woorde wat die wetgewer gebruik het om daardie wils- en gedagte-inhoud te openbaar. ['What is statutory interpretation? ... It is to determine the content of the legislature's will and thinking ... relying on the words that the legislature employed to reveal its will and thinking.']

For a similar approach, see P Langan *Maxwell on the Interpretation of Statutes* (12th Edition, 1976) 1. See also LM du Plessis *The Interpretation of Statutes* (1986) 1:

> The subject *Interpretation of Statutes* is concerned with the pinciples, rules, methods and techniques which jurists employ in order to understand *statutes*, ie legal precepts deriving from legislative activity, and to apply their provisions to concrete, practical situations.

See also C Botha *Statutory Interpretation. An Introduction for Students* (4th Edition, 2005) 1.

A similar introduction to the chapter on 'Interpretation' in this four volume treatise on South African constitutional law would be inadequate and inappropriate. Certain reading strategies in *constitutional* interpretation do require the use of some of the conventional canons of statutory interpretation. And constitutional interpretation also involves an analysis of the written constitutional text to determine meaning. However, constitutional interpretation is also an enterprise that goes much further than any other form of legal interpretation. It is a practice emanating from, rooted in and part of the shaping of a constitutional democracy.[1] Its most distinctive and consequential feature as an interpretive endeavour is its ability to underwrite constitutional supremacy, warding off unconstitutional action, halting the abuse of power, or providing redress for the adverse consequences of unconstitutional conduct. Constitutional interpretation, as mediated by the courts and other political actors, can also use supreme constitutional authority either to undo existing law inconsistent with the Final Constitution, or to keep impugned law intact, but then to develop it so that it conforms with the dictates of the Final Constitution. Constitutional interpretation also activates — and gives content to — the values that underlie and pervade a democratic, constitutional state (*Rechtsstaat*).[2]

The first section of this chapter surveys some of the major notions of constitutional interpretation evident in the case law in the decade or so preceding the advent of constitutional democracy in South Africa on 27 April 1994. These shortcomings in the South African courts' pre-1994 jurisprudence on constitutional interpretation gave rise to the inclusion of interpretive directives in two consecutive written constitutional texts and helped to transform judicial attitudes towards constitutional interpretation shortly after the commencement of the Interim Constitution (IC) in 1994.

The second main section of the chapter focuses on the authorized interpreters of the Final Constitution. The third main section considers the possible relevance of various theories of interpretation to constitutional interpretation. Conventional theories of statutory interpretation are inadequate — though not wholly irrelevant — for purposes of constitutional interpretation. I explore developments associated with the *linguistic turn* in legal thinking, on issues of interpretation, to see if they can help us address some of these inadequacies. In the past (almost) decade and a half of constitutional democracy in South Africa, no clearly discernible theories of constitutional interpretation have emerged. However, several *leitmotivs*, traceable to theoretical positions on constitutional interpretation, have guided our constitutional interpretation in a particular direction.

[1] For a description of 'constitutional democracy', see T Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) 10-18–10-22.

[2] See Chapter 1 (the 'founding provisions') of the Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC').

The fourth main section of this chapter identifies the aids and the waymarks to the interpretation of the Constitution-in-writing that are present in the written text itself, while the fifth main section is devoted to a discussion of methods of and reading strategies in constitutional interpretation.

(a) Aspects of Bill of Rights interpretation in pre-1994 case law

> [T]he Court has a particular duty as guardian of liberty, but it has to exercise its powers of controlling legislation with a scalpel and not with a sledgehammer.[1]

The admonitory metaphor in this *dictum*, dating from 1984, foreshadowed the need eventually to include provisions such as FC ss 7 and 39 in the Final Constitution some twelve years later.[2] Hiemstra CJ, then Chief Justice of the 'homeland'[3] Bophuthatswana, intended the *dictum* as a slap on the wrist for another court whose over-zealous (and, in Hiemstra's view, less than graceful) implementation of Bophuthatswana's justiciable Constitution in an earlier case compromised thoughtful constitutional adjudication.

In *S v Marwane*,[4] Hiemstra CJ in the court *a quo*[5] was first called upon to test the constitutionality of a provision of the notorious (South African) Terrorism Act[6] on the basis of Bophuthatswana's justiciable Constitution.[7] Section 93(1)*(a)* of that Constitution provided that '[s]ubject to the provisions of this constitution' all laws in operation in any district of Bophuthatswana immediately prior to 6 December 1977, the date of commencement of the Constitution, would continue to apply except in so far as such laws were superseded by any applicable law of Bophuthatswana or amended or repealed by Bophuthatswana's legislature. The South African Terrorism Act thus continued to apply in Bophuthatswana. Section 7(1) of the Constitution proclaimed the Constitution to be the supreme law of Bophuthatswana while s 7(2) provided that any statutory provision inconsistent with any constitutional provision — and *enacted after the date of commencement* of the Constitution — would be void to the extent of such inconsistency. For Hiemstra CJ the decisive question in *Marwane* was largely a 'technical' one, namely, whether South African legislation received in Bophuthatswana by virtue of s 93(1)*(a)* could be reviewed and voided on constitutional grounds. Answering this question in the negative, he concluded that the court lacked jurisdiction to pronounce on the constitutional validity of the impugned provisions of the Terrorism Act.

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[1] *Smith v Attorney-General Bophuthatswana* 1984 (1) SA 196, 200C (B)('*Smith*').

[2] IC ss 35(1) and (3) contained provisions akin to those provisions present in FC s 39. See § 32.1*(b)* and § 32.4*(c)*(i)(ff) infra. IC s 35(1) and (3) were thus in essence retained in the Final Constitution. FC s 7 had no predecessor in the Interim Constitution. No provision akin to IC s 35(2) was included in the Final Constitution. See § 32.5*(b)*(ii) infra.

[3] 'Homeland' here understood as defined in FC schedule 6, item 1.

[4] 1982 (3) SA 717 (A)('*Marwane*').

[5] *S v Marwane* 1981 (3) SA 586 (B)('*Marwane a quo*').

[6] Act 83 of 1967 s 2(1((c) read with s 2(2).

[7] Constitution of the Republic of Bophuthatswana Act 18 of 1977: especially ss 12(5), 12(7) and 12(8).

At the time the Appellate Division of the Supreme Court of South Africa in Bloemfontein was still the final court of appeal for Bophuthatswana. *Marwane* then proceeded to South Africa's highest court to have (among other things) a statute of South African origin declared invalid on substantive, constitutional grounds[1] — something which the then South African Constitution (of 1983)[2] precluded any South African court from doing.

A majority of the Appellate Division negotiated with relative ease the technical hurdle over which Hiemstra CJ had stumbled. It then proceeded to test the impugned provision of the Terrorism Act and held it to be unconstitutional. The majority was, as a matter of fact, appreciably more enthusiastic and activist than the circumstances required. They pronounced on provisions of the Terrorism Act which they — and the court *a quo* — were not even called upon to consider.

Hiemstra CJ's scalpel and sledgehammer metaphor, quoted above, was meant to depict the constitutional over-indulgence of the majority in the *Marwane* appeal. His *dictum* comes from *Smith v Attorney-General Bophuthatswana*.[3] *Smith* reflects the virtues of judicial self-restraint and a display of 'carefully balanced constitutional adjudication'.[4]

The number of constitutional cases before high courts in Southern Africa increased during the late 1980s and early 1990s.[5] This increase flowed directly from the growth in the number of 'independent' homelands (with justiciable constitutions) to five,[6] and the presidential proclamation of a justiciable 'interim constitution', with entrenched fundamental rights, for Namibia in anticipation of its independence.[7] In some instances, courts in the homelands (especially the former Ciskei[8]), as well as the Supreme Court in pre-independence Namibia,[9] handed down judgments in constitutional cases that indeed reflected a nuanced

[1] *Marwane* (supra).

[2] See Republic of South Africa Constitution Act 110 of 1983 s 34(3).

[3] *Smith* (supra) at 200C.

[4] See A Thomashausen 'Human Rights in Southern Africa: The Case of Bophuthatswana' (1984) 101(3) *South African Law Journal* 467, 480. See also TJ Kruger *Die Wordingsproses van 'n Suid-Afrikaanse Menseregtebedeling* (Unpublished LLD Thesis, Potchefstroom (1990) 211 and 224-229); LM du Plessis & JR de Ville 'Bill of Rights Interpretation in the South African Context (2): Prognostic Observations' (1993) 4(2) *Stellenbosch LR* 199, 200-202.

[5] For a comprehensive evaluation of Southern African constitutional jurisprudence dating from this period, see LM du Plessis & JR de Ville 'Bill of Rights Interpretation in the South African Context (1): Diagnostic Observations' (1993) 4(1) *Stellenbosch LR* 63; LM du Plessis & JR de Ville 'Bill of Rights Interpretation in the South African Context (3): Comparative perspectives and future Prospects' (1993) 4(3) *Stellenbosch LR* 356.

[6] The 'TBVC states' were Transkei, Bophuthatswana, Venda and Ciskei.

[7] Schedule 1 to Proclamation R101 of 17 June 1985.

[8] See, for example, *African National Congress (Border Branch) & Another v Chairman, Council of State of the Republic of Ciskei & Another* 1992 (4) SA 434 (CkGD); *Bongopi v Chairman of The Council of State, Ciskei & Others* 1992 (3) SA 250 (CkGD); *Bongopi v Chairman, Ciskei Council of State & Others* 1993 (3) SA 494 (CkA).

[9] See, for example, *Ex Parte Cabinet for the Interim Government of South West Africa: In Re Advisory Opinion in terms of s 19(2) of Procl R101 of 1985 (RSA)* 1988 (2) SA 832 (SWA); *Namibian National Students' Organisation and Others v Speaker of the National Assembly for South West Africa & Others* 1990 (1) SA 617 (SWA).

understanding of the ethos of constitutionalism.[1] In Bophuthatswana, on the other hand, constitutional jurisprudence after *Smith* went down the road to perdition.[2] This lasted until Friedman J, in *Nyamakazi v President of Bophuthatswana,*[3] relying on a wide range of authorities and quoting extensively from miscellaneous sources, sought to formulate proper guidelines for 'progressive' constitutional interpretation in the South African context.

The then Appellate Division in South Africa exchanged its controversial boldness in *Marwane* for a wariness to face up to constitutional issues. It often avoided them on technical grounds and deprived litigants of the optimal protection of their constitutional rights. It also denied South African courts an early jump on the inevitable demands of constitutional interpretation in South Africa's post-apartheid constitutional order.[4] Within the territory of what was the Union of South Africa after 1910 and the Republic of South Africa since 1961, substantive (as opposed to formal or *manner and form*) judicial review of (original) legislation was not possible. With the constitutional debacle of the 1950s, manifesting in what became known as the 'Harris cases'[5] and resulting in the disenfranchisement of coloured voters, even manner and form review proved to be controversial.

Mindful of this state of affairs, a number of interpretive waymarks (recognizable as such) were included in the text of the Interim Constitution. Such provisions were ratified over the protests of senior members of the judiciary.[6] For the most part these provisions reappeared in the text of the Final Constitution.

Under the respective headings 'Rights' and 'Interpretation of the Bill of Rights', FC s 7 and FC s 39 count among the more important operational provisions (read 'interpretive aids') of the Bill of Rights (Chapter 2 of the Constitution). In other words, these sections are provisions that facilitate the realization of rights guaranteed in the Bill of Rights by giving, through various modes of interpretive reasoning, content, shape and direction to them — and placing limits on them.

[1] See LM du Plessis & JR de Ville 'Prognostic Observations' (supra) at 200-202 and 205-209.

[2] See *Government of the Republic of Bophuthatswana v Segale* 1990 (1) SA 434 (BA); *Monnakale & Others v Republic of Bophuthatswana & Others* 1991 (1) SA 598 (B)('*Monnakale*') *and Lewis v Minister of Internal Affairs & Another* 1991 (3) SA 628 (B)('*Lewis*').

[3] 1992 (4) SA 540 (BGD), 1994 (1) BCLR 92 (B).

[4] See, for example, such pre-independence Namibian cases as: *Tussentydse Regering vir Suidwes-Afrika en 'n Ander v Katofa* 1987 (1) SA 695 (A); *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) and *Cabinet for the Territory of South West Africa v Chikane & Another* 1989 (1) SA 349 (A).

[5] See *Harris & Others v Dönges NO & Another* 1951 (4) SA 707 (C); *Harris & Others v Minister of the Interior & Another* 1952 (2) SA 428 (A) ('*Harris v Minister of the Interior*'); *Minister of the Interior & Another v Harris & Others* 1952 (4) SA 769 (A) and *Collins v Minister of the Interior & Another* 1957 (1) SA 552 (A).

[6] The then Chief Justice, for instance, thought that it was inadvisable to lay down rules for interpretation of the Bill of Rights. Interpretation is a question of common sense based on judicial experience, he thought, and there was evidence that South African judges sitting in constitutional cases in 'other divisions' had appropriated the well-known rules for interpretation 'developed worldwide', to a point where full confidence in their ability to apply just and equitable rules of interpretation was warranted. See L du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 119.

Other such operational provisions, pertaining to the Bill of Rights in particular, occur in FC s 8 (application of the Bill of Rights), FC s 36 (limitations of rights entrenched in the Bill of Rights), FC s 37 (derogations from rights in states of emergency) and (arguably also) FC s 38 (enforcement of rights). In addition, FC s 7 plays, in respect of the Bill of Rights, an anchoring, depictive and interpretive role akin to that of the founding provisions in FC s 1.[1]

FC ss 7 and 39 also have repercussions for both *private law* and *public law*. These two sections may engender transformative readings of *all* existing law in a manner somehow associable with the protection of the rights entrenched in the Bill of Rights, and with the promotion of the constitutional values embodied in and engendered by those rights. Such readings, provided that they are duly restrained, may also call attention to the received wisdom enshrined in the existing law. As I shall later discuss in full, this constrained transformative mode of interpretation often goes by the name of 'subsidiarity' and takes full advantage of the wording of FC s 39(2).[2] That said, neither FC s 7 nor FC 39 exhausts the tools available for interpretation of the Final Constitution, in general, and the Bill of Rights in particular.

(b) Bill of Rights interpretation as depicted in (early) post-1994 constitutional jurisprudence

Pre-1994 South African constitutional law was informed mainly by the English common law and the commitment to parliamentary sovereignty. English common law and the commitment to parliamentary sovereignty sit somewhat uncomfortably with a preference for constitutional (as opposed to parliamentary) supremacy to secure democracy and to promote the ideals of the constitutional state. As long as there is accountable government and due observance of the *rule of law*,[3] deference to the sovereignty of Parliament, as the incarnation of the highest will of the people, is thought to be consistent with safeguarding individual rights and liberties. Of course, the real source of the problem with human rights in South Africa from 1910 to 1994 was not English common law and the commitment to parliamentary sovereignty: it was colonialism and apartheid. It was, in the first place, the century's long denial of the humanity and dignity of the majority of South Africans under white minority rule – not the absence of a supreme constitution – that must be blamed.

The precedence of legislative authority in common-law systems manifests in a wariness to entrust courts with overly extensive powers of review.[4] Statute law is,

[1] See also Roux 'Democracy' (supra) at 10-32–10-34.

[2] See § 32.5*(b)*(iii) infra.

[3] For an insightful discussion of how the notion of the rule of law interacts with the idea of a constitutional state, see I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 10-13.

[4] See VP Sarathi *The Interpretation of Statutes* (3rd Edition, 1986) 2 (Claims that '[o]ne of the maxims of British jurisprudence is *optima est lex minimum relinquit arbitrio judicis, optimus judex qui minimum sibi* – that system of law is best which confides as little as possible to the discretion of the judge; that judge is the best, who relies as little as possible on his own opinion'.)

as a rule, drafted in detail, endeavouring to cater for as many eventualities as possible and to avoid loopholes — lest the sovereign legislature be 'misunderstood'. This style of draftsmanship,[1] characterized by long-windedness, encourages a literalist reading of statutes.

In civil-law legal systems,[2] on the other hand, the wording of enacted law (that is, all law laid down by a designated law-maker of some sort)[3] is characteristically open-ended: '[T]he expansive terms which are the universal language of constitutional texts' and which enumerate the fundamental rights of people in legal systems worldwide[4] are commensurate with the characteristically broad and indeterminate manner in which enacted precepts in civil-law systems are phrased. Adjudicators working with such expansively and indefinitely couched precepts in specific cases are expected to give concrete expression to them in accordance with a reasoned 'sense of justice'.[5]

Moving from conventional common-law 'interpretation of statutes' to fully-fledged constitutional interpretation calls for a strategic break with a default interpretive assumption, namely, that the most acceptable answers to questions of interpretation are, by and large, 'the obvious ones'. In other words, a constitutional order calls for a departure from the inclination to read the text in a strictly literal and technical manner.

A number of British jurists, in anticipation of the commencement of their country's new Human Rights Act,[6] made some rather instructive observations about the nature and effects of the repositioning mentioned above. The Human Rights Act enjoins courts to read statutes 'so far as possible' to be compatible with fundamental rights guaranteed by the European Convention on Human Rights. If such a reading is not possible, a court may declare legislation to be 'incompatible' with Convention rights. Thereafter, the executive may initiate and Parliament may avail itself of a fast-track procedure to pass remedial legislation.[7] Lord Irvine of Lairg who, as Lord Chancellor, played a key role in shepherding the Human Rights Act through Parliament,[8] reflected on the previously mentioned repositioning as follows:[9]

[1] See R David & JEC Brierly *Major Legal Systems in the World Today* (3rd Edition, 1985) 361-364 and 383-384.

[2] Civil law systems are also referred to as 'Romano-Germanic' or 'Continental' legal systems.

[3] For a further explication of the terms 'enacted law' and 'enacted law-texts' see § 32.3*(e)*(i)(ee) and § 32.5*(c)*(iii) infra.

[4] Lord Irvine of Lairg 'Activism and Restraint: Human Rights and the Interpretative Process' (1999) 4 *European Human Rights Law Review* 350, 352.

[5] David & Brierly (supra) at 95-97.

[6] 1998 c 42.

[7] Sections 3, 4 and 10. See also S Grosz, J Beatson & P Duffy *Human Rights: The 1998 Act and the European Convention* (2000) 28-29.

[8] See C Baker *Human Rights Act 1998: A Practitioner's Guide* (1998) 3-4.

[9] Lord Irvine of Lairg (supra) at 352.

> Interpretation is, at root, an exercise in textual analysis. It is, therefore, the words of a bill of rights with which judges must primarily be concerned as they seek to adjudicate in cases which engage fundamental norms. Although many eminent judges held that the judicial function entailed nothing other than this literal approach to construction, this declaratory theory long ago gave way to more open recognition that law-making – within certain limits – is an inevitable and legitimate element of the judge's role. Acceptance of this truism reveals the real nature of the interpretative process. In particular it indicates that, when construing a statutory provision, the judge may well have to choose between competing meanings by reference, for instance, to the underlying rationale of the legislative scheme.

The Human Rights Act professes to leave the sovereignty of the Westminster Parliament intact,[1] and effects an incomplete incorporation of European human rights law into domestic law.[2] The South African Final Constitution, as the fully justiciable, supreme law of the Republic, goes quite some distance further and has thereby placed issues of constitutional interpretation at the apex of discussions prominently on the agenda of legal interpretation in this country.[3]

In the early days of constitutional adjudication, South African courts (and the Constitutional Court in particular) made several attempts to depict interpretation of the Bill of Rights (Chapter 3 of the IC) as an exceptional mode of legal interpretation. Even though the Interim Constitution — like any statute law — was adopted and 'passed' by a demonstrable law-maker, the courts repeatedly emphasized that 'ordinary' statutory interpretation and rights interpretation are essentially distinct. The latter calls for a less restrictive — and thus more generous — reading in favour of those whose rights enjoy constitutional protection:[4]

> Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law. [5]

Dicta from two specific foreign cases were frequently quoted in support of such a generous approach to constitutional interpretation:[6]

[1] Grosz, Beatson & Duffy (supra) at 30-33.

[2] Some eminent jurists called for full incorporation. See Lord Bingham of Cornhill 'The European Convention on Human Rights: Time to Incorporate' in R Gordon & R Wilmot-Smith (eds) *Human Rights in the United Kingdom* (1996) 1-11 and R Wilmot-Smith 'Incorporation and the Loss of Illusions' in R Gordon & R Wilmot-Smith (eds) *Human Rights in the United Kingdom* (1996) 91-98. For the different models of incorporation that were considered, see Grosz, Beatson & Duffy (supra) at 28-29.

[3] L du Plessis 'Die Sakelys vir Wetsteksvertolking en die Epog van Konstitusionalisme in Suid-Afrika' (1999) 64 *Koers* 223 and LM du Plessis 'Re-reading Enacted Law-texts. The Epoch of Constitutionalism and the Agenda for Statutory and Constitutional Interpretation in South Africa' (2000) 15(2) *SA Public Law* 257.

[4] See, for example, *S v Gumede & Others* 1998 (5) BCLR 530, 542B (D).

[5] *Attorney General v Moagi* 1982 (2) Botswana LR 124, 184 (Kentridge AJ).

[6] See *S v Zuma & Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC)('*Zuma*') at paras 14 and 15 (Kentridge AJ).

The first of these is the much-quoted passage from the judgment of Lord Wilberforce in the Privy Council in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC) ([1979] 3 All ER 21). After referring to the influence of certain international conventions on the constitutions of former colonies of the British Commonwealth, he said that these called for 'a generous interpretation … suitable to give to individuals the full measure of the fundamental rights and freedoms referred to', and that the Constitution called for 'principles of interpretation of its own'. He went on to say:

> This is in no way to say that there are no rules of law which should apply to the interpretation of a constitution. A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and the usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the constitution commences.[1]

In *R v Big M Drug Mart Ltd,* Dickson J said, with reference to the Canadian Charter of Rights:

> The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be … a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter's protection. …[2]
>
> Both Lord Wilberforce and Dickson J emphasised that regard must be paid to the legal history, traditions and usages of the country concerned, if the purposes of its constitution are to be fully understood.[3]

Four conclusions about the distinctive nature of rights interpretation can be drawn from the above quotations. First, rights interpretation is essentially distinct from conventional statutory interpretation because it is overtly value-laden.[4]

[1] See *S v Marwane* 1982 (3) SA 717, 748–9 (A). See also *Minister of Defence, Namibia v Mwandinghi* 1992 (2) SA 355, 362 (NmS).

[2] (1985) 18 DLR (4th) 321, 395-6, 18 CCC (3d) 385.

[3] *Zuma* (supra) at para 15.

[4] See *Matiso & Others v The Commanding Officer, Port Elizabeth Prison & Others* 1994 (3) SA 592, 597B-597H (SE), 1994 (3) BCLR 80, 87B-87H (SE)('*Matiso*'). Froneman J wrote:

> In a constitutional system based on parliamentary sovereignty it makes good sense to start from the premise of seeking 'the intention of the Legislature' in statutory interpretation, because the interpreting Judge's value judgment of the content of the statute is, theoretically at least, irrelevant. As long as the Legislature remains civilised and is broadly representative of the population of the country, the system should work satisfactorily …

Second, it requires judicial exponents of constitutional rights to pass value judgments on a text couched in inclusive and open-ended language. From a common-law point of view this means investing the judiciary with law-making authority that depart from systems committed to parliamentary sovereignty.[1] Third, rights interpretation is thought of as characteristically *purposive*. The notion of 'purposive (constitutional) interpretation' will be dealt with more fully at a later stage.[2] Finally, (purposive) rights interpretation is *generous* (or 'liberal') in that it seeks to optimise safeguards against interference with constitutionally entrenched rights.

Constitutional interpretation is, however, not unrestrained. The following cautionary note sounded by Kentridge JA in *S v Zuma & Others* has been the met with considerable support within the judiciary:[3]

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

The interpretative notion of ascertaining 'the intention of the Legislature' does not apply in a system of judicial review based on the supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the Legislature. This means that both the purpose and method of statutory interpretation in our law should be different from what it was before the commencement of the Constitution on 27 April 1994. The purpose now is to test legislation and administrative action against the values and principles imposed by the Constitution. This purpose necessarily has an impact on the manner in which both the Constitution itself and a particular piece of legislation said to be in conflict with it should be interpreted. The interpretation of the Constitution will be directed at ascertaining the foundational values inherent in the Constitution, whilst the interpretation of the particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms with the fundamental values or principles of the Constitution. Constitutional interpretation in this sense is thus primarily concerned with the recognition and application of constitutional values and not with a search to find the literal meaning of statutes.

Froneman J's observations on the role of the 'intention of the legislature' in statutory interpretation are untenable in the light of contemporary insights into the nature of legal interpretation associated with the 'linguistic turn'. See § 32.3*(b)*(ii) infra.

[1] See *Matiso* (supra) at 597I-598B:

> The values and principles contained in the Constitution are, and could only be, formulated and expressed in wide and general terms, because they are to be of general application. In terms of the Constitution the Courts bear the responsibility of giving specific content to those values and principles in any given situation. In doing so, Judges will invariably 'create' law. For those steeped in the tradition of parliamentary sovereignty, the notion of Judges creating law, and not merely interpreting and applying the law, is an uncomfortable one. Whether that traditional view was ever correct is debatable, but the danger exists that it will inhibit Judges from doing what they are called upon to do in terms of the Constitution. This does not mean that Judges should now suddenly enter into an orgy of judicial law-making, but that they should recognise that their function of judicial review, based on the supremacy of the Constitution, should not be hidden under the guise of simply seeking and giving expression to the will of the majority in Parliament. Judicial review has a different function, but it is still subject to important constraints. And recognition of those constraints is the best guarantee or shield against criticism that such a system of judicial review is essentially undemocratic.

[2] See § 32.3*(a)*(v), *(b)*(iii) and *(c)*(iii) infra.

[3] See § 32.3*(a)*(i) infra.

> [E]ven a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination … I would say that a constitution 'embodying fundamental rights should as far as its language permits be given a broad construction'.[1]

In *S v Gumede & Others* Magid J recognised that FC s 39(1)*(a)* particularly requires 'a liberal interpretation' of the Bill of Rights, but does not:

> permit or encourage courts to ignore the actual language used in the Constitution. If it were felt that the rights of detained persons should be extended, this should be *achieved* by means of legislative action and not by means of judicial activism, or by interpretation which read words into provisions which were not there or excised words which were.[2]

The assumption that language *as such* could restrain an over-generous reading of provisions entrenching rights is controversial. Magid J therefore quite rightly deployed separation of powers (or *trias politica*) considerations as means of judicial restraint. Similarly, Froneman J in *Matiso & Others v The Commanding Officer, Port Elizabeth Prison & Others,* warned that judges should not 'enter into an orgy of judicial law-making' and that '[j]udicial review … is … subject to important constraints', the recognition of which 'is the best guarantee or shield against criticism that … a system of judicial review is essentially undemocratic'. [3]

(c) Rights interpretation and/as constitutional interpretation

In *Kalla v The Master*,[4] Van Dijkhorst J maintained that 'obviously' the construction of clauses of the Bill of Rights 'which set out broad principles' had to take place 'in the spirit of the Constitution': however, such broad principles would 'surely' be unnecessary when a constitutional provision providing for Bloemfontein as the seat of the Appellate Division[5] had to be construed. His suggestion that value-laden Bill of Rights interpretation and the interpretation of the other (especially more technical and mundane) provisions of the Constitution are largely dissimilar draws too definite and superficial a distinction. First, quite a number of the non-Bill of Rights provisions of the Final Constitution are designed to have an immediate 'value impact' and they obviously animate 'the spirit of the Constitution'. One only need review the founding provisions in FC ss 1 to 6 (Chapter 1), FC ss 40 and 41 (Chapter 3) on co-operative government, FC s 59 on public access to and involvement in law-making by the National Assembly, FC s 165 on judicial independence, FC s 195 on the basic values and principles governing public administration, and FC s 237 on the diligent performance of obligations to see that 'broad principles' are required for their construction.

[1] *Zuma* (supra) at paras 17 and 18.
[2] 1998 (5) BCLR 530, 542A-C (D).
[3] *Matiso* (supra) at 598A-B.
[4] 1995 (1) SA 261, 268G (T), 1994 (4) BCLR 79, 87C (T).
[5] See IC s 106(1). The 'Appellate Division' referred to in that section is presently the Supreme Court of Appeal.

Second, even seemingly technical, merely formal (or mundane) provisions of the Final Constitution often make significant value or policy statements when considered in context and read purposively. The constitutional definition of 'organ of state' in FC s 239, for instance, excludes 'a court or a judicial officer'. It thereby affirms the democratic value of judicial independence in atypical value language, and supplements and supports the more conspicuously value-couched provisions on judicial independence in, for instance, sub-ss (2) to (4) of FC s 165.[1] It is indeed hard to conceive of any constitutional provisions (even the most technical ones) in a vacuum of value-neutrality and devoid of 'the spirit of the Constitution'.

The place name 'Bloemfontein' in the Interim Constitution, at any rate, referred not just to a city (and the district in which it is situated), but also to the political compromise made manifest in 1909 in the then South Africa Act,[2] the first Constitution of the Union of South Africa. This political decision — plagued by controversy[3] — meant that while Bloemfontein would be the judicial capital of the Union of South Africa, Cape Town and Pretoria would operate as the legislative and administrative capitals respectively. 'Bloemfontein' in any successor to the South Africa Act — even one as distant in time as the Interim Constitution — would never be just a 'spiritless' or value-neutral indication of locality, but also a reminder, in the (continuing) spirit of the 1909 Constitution, that politics (and, in negotiating the Interim Constitution, *transitional* politics in particular) largely determined the designation of a seat for (what used to be) South Africa's highest court. By the same token the omission of 'Bloemfontein' from the text of the Final Constitution is more than just a formal or 'technical' oversight or non-action: it is a decided and measured silence.

The following is another example of how and why the construction of 'technical' or 'formal' constitutional provisions require the deployment of constitutional values and objectives.[4] FC s 46(1) provides that the National Assembly consists of no fewer than 350 and no more than 400 men and women. Presumably, a National Assembly consisting of 360 men only (or 360 women only) will not meet this requirement because this legislative body must consist of *men and women*. However, in the light of the Final Constitution's overwhelming insistence on gender equality, a national assembly consisting of, for example, 355 men and 5 women will probably also be 'unconstitutional'. To take it further: if members of

[1] FC s 165(2) to (4) reads as follows:

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

See also § 32.4*(c)*(ii) infra.

[2] 9 Edward VII, Ch 9.

[3] See HR Hahlo & E Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 249-251.

[4] See L du Plessis *Re-Interpretation of Statutes* (2002) 146-147.

the National Assembly resign or are killed in an accident, and their numbers drop to below 350, will the remaining members still constitute 'the National Assembly' — at least for the time being? And does it make a difference whether the numbers have dropped below the minimum due to resignations or due to an accident? These questions can be resolved, but they will have to be addressed contextually and purposively, that is, with reference to where and how they fit into the scheme of the Final Constitution as a whole, and with further reference to the constitutional objectives they seek to achieve and the values they were designed to promote. No algorithm provides an easy answer to any of the previous questions.

No South African court has as yet said, in so many words, that the interpretation of the Bill of Rights and the interpretation of non-Bill of Rights provisions of the Final Constitution are in fact inextricably connected. But some courts have suggested that the general approach to Bill of Rights interpretation is very much the same as the approach to the interpretation of other parts of the Final Constitution. The notion of 'purposive interpretation/construction' has been relied on to make the link. In the minority judgment in *S v Mhlungu & Others*[1] Kentridge AJ, for instance, said that a purposive construction of IC s 241(8) — requiring proceedings that were pending immediately before the commencement of that Constitution to be dealt with 'as if this Constitution had not been passed' — would be appropriate given the 'fundamental concerns of the Constitution' and its 'spirit and tenor'. In a similar vein, the Constitutional Court, in two later judgments, contended for a purposive interpretation of the functional areas of provincial legislative competence (in Schedules 4 and 5 of the Constitution) so as to 'enable the national Parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively'.[2]

Finally, in *Executive Council, Western Cape Legislature & Others v President of the Republic of South Africa & Others*, one of the Constitutional Court's earliest landmark judgments, the Court insisted that an important objective of constitutional interpretation is to establish respect for the supremacy of the Constitution.[3] This means that courts with the necessary jurisdiction must always to live up to their duty to 'test' legislation and executive action for consistency with the Constitution, and to declare law and conduct not passing muster invalid.

Is there a need to distinguish between Bill of Rights interpretation and interpretation of the rest of the Constitution? Certainly not, if such a distinction suggests that the 'broad principles' of the Bill of Rights have to be interpreted

[1] 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC)(*'Mhlungu'*) at para 63.

[2] See *Western Cape Provincial Government & Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government & Another* 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC) at para 17. See also *Mashavha v President of the Republic of South Africa* 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC) at para 32.

[3] 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 100. For an appreciative evaluation of this judgment, see H Klug 'Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review' (1997) 13 *South African Journal on Human Rights* 185.

'in the spirit of the Constitution', but other constitutional provisions do not.[1] However, Bill of Rights interpretation is mostly (though not invariably) *rights interpretation* that 'takes the rights and freedoms [entrenched in the Bill of Rights], and the general rules derived from them, as … [a] point of departure for determining whether law or conduct is invalid'.[2] The interpretation of provisions in the rest of the Final Constitution is *norm interpretation*. The outcome of both rights interpretation and norm interpretation is normative (regulatory, prescriptive). However, their starting points differ: the former starts with rights and derives particular, concrete norms from them; the latter starts with a general norm that is then concretized. Because these two forms of interpretation are so similar in outcome, the general distinction between them must be treated with circumspection, and one must remain mindful of three things.

First, there are provisions in the Bill of Rights that do not entrench rights and therefore do not lend themselves to rights interpretation. The conditions for and procedures that must be observed during a state of emergency as set out in FC s 37 (excluding FC s 37(5) — see below), for instance, call for norm interpretation, and so does FC s 39(2), for it requires, without any specific reference to entrenched rights, judicial interpretation of existing statute, common and customary law to promote certain designated values. Subsections (1) and (3) of FC s 39 are not in the same category: they stipulate how rights ought to be construed and are therefore operational provisions, normative in nature, that facilitate the realization of Chapter 2 rights, and give content, shape and direction to them. Other normative Bill of Rights provisions set standards for rights interpretation (and were previously also identified as operational provisions): the limitations clause (FC s 36), the application clause (FC s 8), FC s 37(5) that deals with derogations from rights during a state of emergency (and is therefore a provision akin to FC s 36) and the enforcement clause (FC s 38).

Second, rights interpretation and norm interpretation, though decidedly different in kind, can be mutually supportive. Rights can be protected effectively — and conditions conducive to their protection can be created and enhanced — by giving effect to constitutional norms that are not part of the Bill of Rights. Meaningful protection and enforcement of rights will, for instance, not be possible if the FC s 165 provisions dealing with the independence of the judiciary or the FC s 171 provisions granting the courts certain powers in constitutional matters are not properly construed and duly observed. The political rights entrenched in FC s 19 (which forms part of the Bill of Rights) will also ring hollow in the absence of elections actually held and conducted in accordance with properly construed constitutional norms dealing with such elections (for instance, FC ss 46, 105, 157 and Schedule 3).

[1] See *Kalla v The Master* 1995 (1) SA 261, 268G (T), 1994 (4) BCLR 79, 87C (T).
[2] S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762, 769.

Finally, rights interpretation is not more value-laden or value-driven than norm interpretation. Both forms of interpretation instantiate constitutional interpretation which, in its turn, instantiates (and requires) the realization of constitutional values and an understanding and implementation of the Final Constitution that best promotes such values through efficient and accountable government. Certain provisions in the Final Constitution, both in the Bill of Rights and the rest of the Constitution, articulate values in an 'objective' (norm-like as opposed to a rights-like) manner. Such provisions are mostly to be found among the interpretive waymarks in the written constitutional text that will be discussed at a later stage.[1] In *Carmichele v Minister of Safety and Security & Another,*[2] the Constitutional Court contended that:

> [o]ur Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system.

This phrase — fraught as it is – means that Bill of Rights provisions enshrining fundamental rights do not only safeguard those rights as individual, subjective rights, but also embody an objective value system applicable to all areas of the law and serving as a guiding principle and stimulus for the legislature, executive and judiciary.[3]

FC s 39(2) is a similar guiding principle designed to promote the spirit, purport and objects of the Bill of Rights when interpreting existing law. But is there then still any point in distinguishing between (subjective) rights interpretation and (objective) norm interpretation? A majority of the Constitutional Court in *Barkhuizen v Napier*[4] seemingly thought that there is not. The Court was called upon to test a time limitation clause in a short-term insurance policy against an insured claimant's fundamental right of access to court, entrenched in FC s 34. The impugned clause prevented the claimant from instituting legal action if summons was not served on the insurance company within the time limit set out in the clause. The majority of the court preferred not to go the rights route. Instead, by appealing to FC s 39(2), it determined the constitutionality of the impugned clause with reference to *public policy* informed with constitutional values (including the values in the Bill of Rights).[5]

Stu Woolman objects to such an approach because, in his view, the Bill of Rights and rights interpretation appear to vanish from the scene of constitutional interpretation.[6] He suggests that this troubling approach seems to have become a

[1] See § 32.4*(c)*(i) infra.

[2] 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC)('*Carmichele*') at para 54 confirming a dictum to a similar effect in *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC)('*De Klerk*') at para 94.

[3] See *BVerfGE* 39, 1 ('First Abortion Decision') 41.

[4] 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC).

[5] Ibid at para 30.

[6] See Woolman 'The Amazing, Vanishing Bill of Rights' (supra) at 762.

trend in some recent majority judgments of the Constitutional Court.[1] Rights interpretation, according to Woolman, is the correct approach when law or conduct is challenged on the basis that it infringes a fundamental right or rights enshrined in the Bill of Rights, and norm interpretation à la FC s 39(2) may be resorted to if rights interpretation proves to be incapable of rendering a viable result. FC s 39(2) at any rate requires norm interpretation as a constant reminder to judicial interpreters of the Final Constitution that *all law* must be brought in line with the spirit, purport and objects of (and thereby the objective, normative value system embodied in) the Bill of Rights.[2] Woolman's observations confirm that rights interpretation and FC s 39(2) norm interpretation are two distinct interpretive procedures: each occupies its own rightful place in constitutional interpretation.[3]

(d) The scope of constitutional interpretation

What is a constitution? And what does its interpretation entail? Much has been (and will still be) written about these two questions. However, mindful of the nature and structure of the collective work of which this chapter forms part, these vexed questions will be answered provisionally, for the time being, not so much taking account of all the topics that may possibly be included in a treatise on constitutional interpretation, but rather accounting for the exclusion from the limited account in this chapter of some eminently possible (and relevant) topics. Both questions posed above are decidedly philosophical, and some of the theoretical concerns involved in dealing with them will be considered in due course.[4]

Two texts from classical antiquity, one probably by Aristotle (384–322BC) or a student of his, and the other attributed to Xenophon (ca. 431–355 BC) (but not by him), are both entitled *Athenaion Politeia*: *The Constitution of the Athenians* or *The Athenian Constitution*.[5] Classicists cannot agree on any one English word or phrase adequately rendering 'politeia'. 'Republic', 'polity', 'system of government', 'state organisation', 'form of government' and even 'régime' are all regarded as candidates — each with its own merits and demerits — and then of course 'constitution' is considered to be quite a feasible option too. 'Constitution' as 'politeia' (translated into English) is not just a written document, authored and carried into

[1] See Woolman 'The Amazing, Vanishing Bill of Rights' (supra) at 762 (Woolman shows how in *NM & Others v Smith & Others* 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC) and *Masiya v Director of Public Prosecutions & Others* 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC)('*Masiya*') a similar approach was adopted.)

[2] Woolman 'The Amazing, Vanishing Bill of Rights' (supra) at 769. See also *Carmichele* (supra) at para 54 and *Thebus & Another v S* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC).

[3] Woolman traces the Constitutional Court's failure to recognize and to maintain this distinction and to afford rights interpretation its rightful place — at least in the cases he discusses — to an unwillingness to apply the Bill of Rights directly to relationships between private ('non-state') actors. This matter will be returned to later. See § 32.4*(c)*(i)(dd) infra.

[4] See § 32.3*(b)(ii)* infra.

[5] See, for example, Aristotle *The Athenian Constitution* (1984).

effect by duly designated constitution-makers, and embodying a nation's binding memorandum of understanding — a 'linguistic datum',[1] in other words — but also includes 'the constitutional dispensation', as it has become known in South African constitutional vocabulary.[2]

However, the default and dominant mindset among both jurists and lay citizens in South Africa (and probably in most countries with a written constitution as highest law) is to associate the signifier 'constitution' — especially when verbalized unreflectively — with a linguistic datum manifesting as a document in writing. On the other hand, in a jurisdiction like the United Kingdom, whose constitution is not embodied in a single written document, but is spread over a large number of Acts of Parliament and 'constitutional conventions',[3] *constitution* and *constitutional dispensation* are probably more readily equatable and interchangeable.

The Final Constitution as a written document is clearly a part of the contemporary South African constitutional psyche. The concreteness of the linguistic datum is a tangible, 'readable' reminder of the respect owed to the supremacy of the Final Constitution, as antidote to potential emasculations of constitutional democracy and its institutions.[4] In expositions of constitutional interpretation (such as this chapter) the 'constitutional document' may serve as a lookout onto, an access into and an orientation unto whoever explores the *politeia*.

The Constitution-in-writing is frequently referred to as 'the constitutional text'.[5] However, this turn of phrase may nowadays be confusing due to the many meanings and meaning possibilities that the word 'text' has acquired in postmodern (and, in particular, poststructuralist) discourse on language, meaning and interpretation. The implications of this development for legal and constitutional interpretation will be considered in due course,[6] and until then any reference to the Constitution as 'text' without further ado will be deferred. The Constitution as linguistic datum will mostly be called 'the Constitution-in-writing', 'the written Constitution' or 'the written constitutional text'.

[1] See F Müller 'Basic Questions of Constitutional Concretisation' (1999) 10 *Stellenbosch Law Review* 269, 269. See also § 32.3(e)(ii)(aa) infra.

[2] For the implications of a broad conception of 'constitution' for constitutional interpretation, see WF Murphy, JE Fleming & SA Barber *American Constitutional Interpretation* (2nd Edition, 1995) Chapters 1, 5 and 6.

[3] D McClean 'United Kingdom' in G Robbers (ed) *Encyclopedia of World Constitutions Volume III* (2007) 972, 972.

[4] In this chapter 'constitutional democracy' is used in the same sense as described in T Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) 10-18–10-22.

[5] Telling examples of such a usage occur in the Constitutional Court's two 'certification judgments: *Certification of the Constitution of the Republic of South Africa, 1996, In re: Ex parte Chairperson of the Constitutional Assembly* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('*First Certification Judgement*'); *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, In re: Ex parte Chairperson of the Constitutional Assembly* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC)('*Second Certification Judgement*').

[6] See § 32.3*(b)*(ii) and (iv) infra.

Together with a high esteem for the Constitution-in-writing and its pivotal positioning in a democratic constitutional dispensation, crucial caveats need to be observed. Most important among these warnings is that one ought not to invest the Constitution as linguistic datum with a degree of autonomy sufficient to isolate and, indeed, declare it independent from the *politeia*: separation of the written Constitution and the constitutional dispensation is simply unacceptable! It is a looming pitfall, though, given the fact that conventional approaches to statutory interpretation[1] (which have had an impact on constitutional interpretation too) are premised on the assumption that the interpretation of a statute or statutory provision essentially entails a retrieval or exhumation of meaning — intended and encoded by its law-making author — from the instrument. This belief entails that a provision to be construed has an appreciably independent life of its own, and that a knowledgeable interpreter who heeds the rules of the particular genre of encoding will retrieve from the written provision (and from it alone) the meaning intended by its author. This is then regarded as the 'best' or 'most correct' meaning of the provision in question. Various objections to this key tenet of conventional statutory interpretation will be considered below.[2] However, it is enough for now to point out that the notion of an enacted instrument[3] as *bearer of meaning* implies that it is by and large *autonomous* in *passing on* that meaning. This implication, in turn, kindles the belief that the role of the instrument as conveyer of meaning may be considered in isolation from the sometimes messy 'environment' in which it obtains. If such a bearer and conveyor of meaning is also 'the supreme law of the Republic',[4] it becomes difficult to resist the temptation of placing it on a pedestal somewhere above (and removed from) the day-to-day activities of the 'constitutional dispensation'. One way of countering — or at least minimizing the effects of — such a separationist move is to uphold 'constitution' in its classical signification, thereby contending that a constitution-in-writing is meaningless in isolation from the *politeia*. This move entails, among other things, the presentation and the development of cogent arguments for *contextual interpretation* — an interpretive strategy that features prominently in this chapter.[5]

Conventional approaches to statutory interpretation also underwrite rather thin conceptions of 'constitutional interpretation' — they assume the possibility of observance and application of predetermined canons of construction to retrieve meaning from the (autonomous) written Constitution.[6] The theoretical tenability

[1] See § 32.3*(a)-(b)* infra.

[2] See § 32.3*(b)*(i)-(iii) infra.

[3] For a further explication of the terms 'enacted law' and 'enacted law-texts', see §§ 32.3*(e)*(i)(ee) and 32.5*(c)*(iii) infra.

[4] FC s 2.

[5] See §§ 32.3*(a)*(iv), *(b)*(ii) and *(e)* and § 32.5*(c)*(ii) infra.

[6] For a crude articulation of this notion, see *Government of the Republic of Bophuthatswana v Segale* 1990 (1) SA 434, 448F-G (BA)(Galgut AJA):

> The task of the courts is to ascertain from the words of the statute in the context thereof what the intention of the legislature is. If the wording of the statute is clear and unambiguous they state what the intention is. It is not for the courts to invent fancied ambiguities and usurp the functions of the legislature.

of this idea will be challenged more fully when dealing with the unity of interpretation and application (and the notion of interpretation as concretization).[1] At this stage, it is enough to note that on the broad understanding of constitutional and Bill of Rights interpretation contended for in this chapter, what were previously referred to as 'operational provisions' of the Bill of Rights[2] form part of the arsenal of means and strategies of constitutional interpretation and could therefore quite appropriately have been dealt with under the heading constitutional and/or Bill of Rights *interpretation*. Constitutional interpretation indeed has everything to do with the realization of constitutional provisions — and in particular Bill of Rights provisions in which rights are guaranteed — by giving them content, shape and direction. However, issues regarding the application of the Bill of Rights,[3] limitations of rights entrenched in the Bill of Rights,[4] derogations from rights in states of emergency,[5] and the enforcement of rights[6] are sufficiently specialized, complex and wide ranging also to warrant their treatment in separate chapters.

Constitutional interpretation is about employing *generally* applicable principles, procedures and strategies to read and apply the Constitution, starting with and centred on the Constitution-in-writing. However, especially in the context of Bill of Rights interpretation, *specialist* readings of the various provisions entrenching different rights are also required. Rights differ in nature because they refer to dissimilar interests and entitlements. For the interpretation of certain rights, unique principles, procedures and reading strategies may apply, or general principles, procedures and strategies may have to be invoked in special ways. In principle the various manifestations of specialized rights interpretation do belong under the heading of constitutional interpretation. However, this treatise is sufficiently broad enough in scope — 76 chapters — to allow for the analysis of different rights in discrete chapters.

It is debatable whether interpretive procedures and strategies for the interpretation of existing statute and common law, but necessitated by the exigencies of construing existing law subject to the supreme Constitution, could be referred to as procedures and strategies of *constitutional interpretation*. Reading in conformity with the Constitution (sometimes also referred to as 'reading down' or 'the

[1] See § 32.3*(b)*(ii) and § 32.3*(d)* infra.

[2] See § 32.1(a) and also § 32.1*(c)* supra.

[3] FC s 8. See also S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

[4] FC s 36. See also S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[5] FC s 37. See also N Fritz 'States of Emergency in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 61.

[6] FC s 38. See also A Friedman & J Brickhill 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 59; M Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

presumption of constitutionality') is a telling example of such a procedure.[1] It probably does not really matter whether, strictly speaking, such procedures may appropriately be described as 'constitutional interpretation': they must at any rate be discussed in a chapter on constitutional interpretation.

FC ss 7 and 39 — quoted at the beginning of this chapter — certainly fall squarely within the scope of constitutional (and, in particular, Bill of Rights) interpretation. But they are not primarily what constitutional interpretation is all about. With the exception of FC s 39(2) (and perhaps FC s 39(1)*(b)* and *(c)*), FC ss 7 and 39 have to date not been thoroughly and systematically analyzed in the constitutional case law. They have been relied on, instead, as *ad hoc* rhetorical stratagems.[2] The role of FC ss 7 and 39(1)*(a)* and (3) as sources of interpretive waymarks in the written constitutional text will be considered together with sources of other such waymarks below.[3] The focus will be on the courts' articulation of how they understand these sections and the possibility of a comprehensive and coherent ('model') construction of them. FC s 39(2) will feature in several 'capacities' in this chapter, but especially as a source of a new canon of statutory interpretation[4] and as part of the subsidiarity landscape.[5] FC s 39(1)*(b)* and *(c)* will be dealt with under the heading of comparative interpretation (or transnational contextualization) towards the end of this chapter.[6]

(e) The mechanics of rights analysis

As a general matter, the Bill of Rights offers two different ways in which to undertake rights analysis: direct application and interpretation (and potentially limitation) of a specific substantive right and indirect application of the spirit, purport and object of the Bill of Rights to the legal dispute that confronts a court. Although I shall make the case that subsidiarity — a particular form of indirect application — is often to be preferred to direct application, it is important to know how each form of interpretation operates.

[1] See § 32.5*(b)*(ii) infra.

[2] The absence of thorough and systematic analyses of FC sections 7 and 39 is a definite shortcoming in our constitutional jurisprudence. But I do not mean to suggest that reliance on rhetorical stratagems in constitutional interpretation and jurisprudence is impermissible. It is in fact unavoidable. See WJ Witteveen *De Retoriek in het Recht: Over Retorika en Interpretatie, Staatsrecht en Demokratie* (1988) 149; Du Plessis 'Re-reading Enacted Law-texts' (supra) at 282-283.

[3] See § 32.4*(c)*(i)(cc) and (ff) infra.

[4] See § 32.3*(b)*(i) infra.

[5] See § 32.*5(b)*(iii)*(bb)* infra.

[6] See § 32.5*(c)*(v) infra.

(i) *Direct application and interpretation of a specific substantive right*

As Woolman and Botha write:

> As a general matter, constitutional analysis under a specific substantive provision in the Bill of Rights takes place in two stages. First, the applicant must demonstrate that the exercise of a fundamental right has been impaired, infringed, or, to use the Final Constitution's term of art, limited. This demonstration itself has several parts. To begin with, the applicant must show that the conduct or the status for which she seeks constitutional protection is a form of conduct or status that falls within the ambit of a particular constitutional right. If she is able to show that the conduct or the status for which she seeks protection falls within the value-determined ambit of the right, then she must show, in addition, that the law or the conduct she seeks to challenge impedes or limits the exercise of the protected activity. If the court finds that a challenged law infringes the exercise of the fundamental right, the analysis may move to a second stage. In this second stage of analysis, the party that would benefit from upholding the limitation will attempt to demonstrate that the infringement of a fundamental right is justifiable. This second stage of analysis occurs, generally speaking, not within the context of the fundamental right or freedom, but within the limitation clause.[1]

Woolman in his chapter on 'Application' and Woolman and Botha in their chapter on 'Limitations' provide fuller, more nuanced accounts of the stages of — and justifications for – direct application and interpretation of a specific substantive right that need not be rehearsed here.[2]

(ii) *Subsidiarity and indirect application as preferred modes of interpretation*

On one account, indirect application must occur where no specific substantive right applies directly to a specific dispute, but the spirit, purport and object of the Bill of Rights requires a court to view or to interpret the law — and potentially remake the law — in light the general values which animate FC Chapter 2 and the Final Constitution as a whole. But the commitment to subsidiarity means that we look at such matters somewhat differently. As I shall contend at greater length below, a host of good reasons exist for using existing bodies of non-constitutional law — be they statute, common law or customary — to adjudicate disputes before we turn to specific provisions of the supreme law for relief. That said, subsidiarity is not to be confused with avoidance. For when one relies on non-constitutional law as the source of relief, one still invites constitutional interpretation. That invitation extends primarily to recasting — where necessary — non-constitutional forms of law in light of constitutional desiderata. Subsidiarity — so understood — draws simultaneously upon the richness and depth of existing bodies of law while recognizing that our basic law — the Final Constitution — is the 'text' from which all other law derives its power.

[1] Woolman & Botha 'Limitations' (supra) at 34–3–34-6.
[2] See also Woolman 'Application' (supra) 31-1–31-136.

32.2 Interpreters of the Constitution

According to *The Shorter Oxford English Dictionary* one of the meanings of 'interpreter' is '[a] person who interprets laws, texts, etc., in an official capacity'. [1] Peter Häberle contends that a constitution is a 'public process' (*öffentlicher Prozeß*) in the interpretation of which an open society (*offene Gesellschaft*) participates.[2] 'Offen' means 'open' as well as 'public' and indicates the space for the concrete realization of the Constitution not only within the sphere of authority of the state, but in civil society too:[3]

> All organs of state, all public powers and all citizens and groups are potentially involved in the processes of constitutional interpretation. There is no fixed number of constitutional interpreters![4]

The South African Constitution proclaims its own supremacy as follows:

> The Constitution is the supreme law of the Republic; law or conduct inconsistent with it, is invalid, and the obligations imposed by it must be fulfilled.[5]

All those who are obliged by and who somehow benefit from this statement of supremacy — not only (or even primarily) the courts of law (with the Constitutional Court at the helm) — are *authorized* readers and therefore *interpreters* of the Constitution. Other organs of state, organs of civil society, citizens and other individuals under the authority (and protection) of the South African state are equally important interpreters of the basic law. This contention is commensurate with the doctrine of shared constitutional interpretation,[6] which, properly

[1] *The Shorter Oxford English Dictionary on CD-ROM* (5th Edition Version 2.0, 2002).

[2] P Häberle *Verfassung als Öffentlicher Prozeß: Materialen zu einer Verfassungstheorie der Offenen Gesellschaft* (1978) 155.

[3] See LM du Plessis 'Legal Academics and the Open Community of Constitutional Interpreters' (1996) 12 *South African Journal on Human Rights* 214, 215.

[4] P Häberle (supra) at 156 (present author's translation):

> In die Prozesse der *Verfassungs*interpretation sind potentiell *alle* Staatsorgane, alle öffentliche Potenzen, alle Bürger und Gruppen eingeschaltet. Es gibt keinen numerus clausus der Verfassungsinterpreten!

He continues:

> Constitutional interpretation has up to now, *consciously* and with but a scant sense of reality, too much been made into a matter for a 'closed, guild-like community' of juristic interpreters of the Constitution and for *formal* participants in the constitutional process. In reality it is much more a matter for an open community (in other words all public powers in so far as they are *material* participants) because constitutional interpretation always co-constitutes this open community anew and is itself constituted by it. Its criteria are as open as the community is pluralistic.

[Verfassungsinterpretation ist *bewußtsein*smäßig, weniger realiter, bislang viel zu sehr Sache einer geschlossenen Gesellschaft: der 'zunftmäßigen' juristischen Verfassungsinterpreten und der am Verfassungsprozeß *formell* Beteiligten. Sie ist in Wirklichkeit weit mehr Sache einer offenen Gesellschaft, d.h. aller — insoweit *materiell* beteiligten — öffentliche Potenzen, weil Verfassungsinterpretation diese offene Gesellschaft immer von neuem mitkonstituiert und von ihr konstituiert wird. Ihre Kriterien sind so offen, wie die Gesellschaft pluralistisch ist.]

[5] FC s 2.

[6] For a discussion of the doctrine of shared constitutional interpretation, see Woolman & Botha 'Limitations' (supra) at 34-7–34-8. See also Woolman 'Application' (supra) at 31–90.

understood, also recognizes authorized readers of the Final Constitution that fall outside our expressly political domain.[1] The following important interpreters contribute to and enrich the open process of constitutional interpretation in the *politeia*:[2]

(a) Constitution-makers

Proximity in time to a major constitution-making process has made South African constitutional scholars privy to how original authors of a constitutional text cultivate their own confident (though by no means unanimous) understandings of what their 'creation' says — and will say, according to them, in time to come. Authorial interpretations of a written constitution-in-the-making may come from those actually drafting and writing it (a technical committee of experts, for instance), from authorized constitution-makers debating the draft (in committees or bilateral discussions or plenary deliberations, for instance) and from members of the deliberative body (a constitutional assembly, for instance) that eventually have to agree to and pass the written text. Interpretations of a constitution in the course of deliberations preceding its adoption are significant because these interpretations anticipate possible meanings that can be attributed to constitutional provisions. This results in specific formulations and preference for certain inclusions in (and exclusions from) the written constitutional text — formulations and preferences most often negotiated by the constitution-makers among themselves. Traditionally, preceding deliberations were not regarded as sources readily available to aid the subsequent interpretation of any enacted text.[3] However, the Constitutional Court in *S v Makwanyane & Another*[4] (*per* Chaskalson P) held that '[b]ackground evidence may … be useful to show why particular provisions were or were not included in the Constitution'.[5]

The process agreed on for the adoption of the Final Constitution furthermore yielded an interpretive aid of considerable significance. According to IC s 71, the Final Constitution could come into effect only after the Constitutional Court had certified that the proposed text complied with the 34 Constitutional Principles agreed on by the multi-party negotiators responsible for drafting the Interim Constitution.[6] There were two *Certification Judgments*. The Constitutional Court referred the first text submitted for certification back to the Constitutional

[1] See S Woolman *The Selfless Constitution: Experimentation and Flourishing as the Foundations of South Africa's Basic Law* (2009).

[2] For the meaning of 'politeia', see § 32.1*(d)* supra.

[3] LM du Plessis *The Interpretation of Statutes* (1986) 133-134. For a further explication of the terms 'enacted law' and 'enacted law-texts' see §§ 32.3*(e)*(i)(ee) and 32.5*(c)*(iii) infra.

[4] 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC)('*Makwanyane*') at para 19.

[5] For reliance on *travaux préparatoires* in constitutional interpretation, see § 32.5*(c)*(iv) infra.

[6] These principles were included in Schedule 4 to the Interim Constitution.

Assembly after holding, in *First Certification Judgment* that the text did not comply, in 9 discrete respects, with the 34 Constitutional Principles. In the *Second Certification Judgment* the Court thereafter certified a text that met and satisfied its initial objections.

In the *First Certification Judgment,* the Constitutional Court held that where one of the permissible meanings of a particular provision of the new text did comply with the Constitutional Principles, but another did not, it would 'adopt the interpretation that gives to the *new constitutional text* a construction that would make it consistent with the *Constitutional Principles*'.[1] The *First Certification Judgment* Court explained the further significance of this reading strategy for the interpretation of the Final Constitution as follows:

> Such an approach has one important consequence. Certification based on a particular interpretation carries with it the implication that if the alternative construction were correct the certification by the Court in terms of *[the interim Constitution]* s 71 might have been withheld. In the result, a future Court should approach the meaning of the relevant provision of the *[new constitutional text]* on the basis that the meaning assigned to it by the Constitutional Court in the certification process is its correct interpretation and should not be departed from save in the most compelling circumstances. [2]

(b) Courts

South Africa's Constitution was meant to be justiciable, and was, indeed, required in terms of the Constitutional Principles to be justiciable.[3] The constitutional text therefore, in several ways, waymarks the exercise of a judicial testing right that derives from and crucially depends upon the supremacy of the Final Constitution. FC s 1*(b)* proclaims the '[s]upremacy of the Constitution and the rule of law' to be among the values on which the Republic of South Africa as 'one, sovereign, democratic state' is founded. FC s 172 deals with the powers of courts in constitutional matters and *enjoins* a 'court deciding a constitutional matter within its powers' to 'declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency' ('a court … *must declare* …' — *emphasis added*).[4] To this end, FC s 165 Constitution vouchsafes the independence of the judiciary. FC s 165(2) states: '[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice'. FC s 165(5) makes '[a]n order or decision issued by a court' binding on 'all persons to whom and organs of state to which it applies'.

[1] *First Certification Judgment* (supra) at para 42. See also *Dawood v Minister of Home Affairs* 2000 (1) SA 997, 1033C–G (C).

[2] *First Certification Judgment* (supra) at para 43.

[3] See, in particular, Constitutional Principles I and IV in Schedule 4 to the Interim Constitution. See also § 32.1*(a)* supra.

[4] FC s 172(1)(a). FC ss 167(3)-(7), 168(3), 169(a) and (by implication) 170 indicate the extent to which constitutional matters are within the powers of the Constitutional Court, the Supreme Court of Appeal, High Courts and magistrates' courts respectively.

Issues of constitutional interpretation that come before courts are pronounced upon in a conventionally judicial manner, both in terms of style and consequence. *Stare decisis*, as conventionally understood in the case law, has moreover also been preached and practised in our constitutional jurisprudence since 1994.[1] A court judgment is meant to end a particular dispute, but its *ratio decidendi* may also, in cases to come, provide binding, 'model' answers to general or specific questions of constitutional interpretation. The authority of a particular court's answers will largely depend on its ranking in the *stare decisis* hierarchy. A Constitutional Court judgment on an issue of constitutional interpretation can, for instance, wield considerable authority — both as an exercise of consequential constitutional power at a particular time, and as a binding precedent in time to come. But this still does not mean that courts, with the Constitutional Court at the pinnacle, are the only *de facto*, competent and authentic interpreters of the Constitution. Non-judicial interpreters understand and construe the constitutional text from day to day, and only a small number of questions of constitutional interpretation are eventually adjudicated upon in court.

Courts are thus, in terms of the Constitution, powerful and consequential interpreters of the Constitution. In litigation, they are often, with regard to certain particular constitutional issues, final interpreters of the Constitution. However, to look upon them as the only constitutional interpreters of consequence will be to impoverish constitutionally based life in the *politeia*.

(c) Legislative and executive organs of state

Among the most significant non-judicial interpreters of the Constitution are legislative and executive organs of state.[2] A former American president, Andrew Jackson, pointed out in 1832, in his veto of a bank bill, that every public official takes an oath to uphold and support the US Constitution, *but not* the Supreme Court's interpretation of it.[3] He thereby emphasized his *own* responsibility to construe the US Constitution in order to be able to discharge the presidential duties and responsibilities it imposes. There are ample examples of the South African Constitution imposing a particular responsibility on various executive and legislative organs of state to construe the Final Constitution in order to be able to discharge their constitutional duties and responsibilities.

[1] See, eg, *Shabalala & Others v Attorney-General, Transvaal, & Others; Gumede & Others v Attorney-General, Transvaal* 1995 (1) SA 608, 618D–H (T), 1994 (6) BCLR 85, 95B–F (T); *Ex Parte Minister of Safety and Security & Others: In Re: S v Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC)('*Walters*') at paras 55-61. See also § 34.5*(b)*(i) infra.

[2] See Murphy, Fleming & Barber (supra) 262-344. The same, of course, holds for ordinary legislation. See FAR Bennion *Statutory Interpretation: A Code* (3rd Edition, 1997) 16-24. See, further, L du Plessis *Re-Interpretation of Statutes* (2002) 136.

[3] See Murphy, Fleming & Barber (supra) at 267, 313-314.

A constitutional injunction to uphold, defend and respect the Final Constitution as the supreme law of the Republic,[1] for instance, prefaces the South African Constitution's entrustment of the president with various distinctive head-of-state powers and functions.[2] The presidential oath of office includes a solemn undertaking to 'obey, observe, uphold and maintain the Constitution and all other law of the Republic'.[3] The oaths of office of other executive office-bearers (such as the deputy president,[4] ministers,[5] deputy ministers,[6] and the premiers and members of the executive councils of provinces[7]) include a similar undertaking. Public administration must be governed by 'the democratic values and principles enshrined in the Constitution' — and these principles are spelt out in more detail in FC s 195(1).[8] These provisions require knowledge and understanding — and thus authorize interpretation — of the Final Constitution to inform the exercise of executive authority in every sphere of government. This interpretive authority exists with respect to the security services,[9] other constitutional institutions such as the Public Service Commission,[10] the Central Bank[11] and, in particular, the Chapter 9 'State Institutions Supporting Constitutional Democracy'[12] (for example, the Public Protector,[13] the South African Human Rights Commission[14] and the Auditor-General[15]).

Legislatures in the three spheres of government (national, provincial and local) are under a duty to pass legislation consistent with the Final Constitution — otherwise, they will find themselves in breach of the undertaking in their oath of office to 'obey, respect and uphold the Constitution'.[16] More importantly, their legislation is likely to be found constitutionally infirm.[17] The National Assembly is 'elected to represent the people and ensure government by the people under the

[1] FC s 83(b).
[2] FC s 84.
[3] FC Schedule 2(1).
[4] FC Schedule 2(2).
[5] FC Schedule 2(3).
[6] FC Schedule 2(3).
[7] FC Schedule 2(5).
[8] FC s 195(1).
[9] Established in terms of FC Chapter 11.
[10] FC s 196.
[11] FC ss 223-225.
[12] See, in general, FC s 181.
[13] FC ss 182-183. See, generally, M Bishop & S Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24A.
[14] FC s 184. See, generally, J Klaaren 'South African Human Rights Commission' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24C.
[15] FC ss 188-189. See, generally, S Woolman & Y Schutte 'Auditor General' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B.
[16] FC Schedule 2(4).
[17] See FC s 2.

Constitution'.[1] Provincial legislatures are bound by the national Constitution (and their own provincial constitutions where these have been adopted).[2] Municipal councils are required to comply with a number of constitutional objects.[3] Legislatures in all three spheres of government thus bear responsibilities which they can fulfil only if they understand the Constitution — pursuant to an implicit authorization (and duty) to construe it.

(d) Citizens and other non-state organs protected, empowered and obliged by the Constitution

A Constitution, founding the type of state South Africa professes (and wishes) to be, invites all those it protects and empowers (citizens and non-citizens alike) to understand and put its promises to the test — and this, in turn, calls for interpretation of the Constitution. Constitutional litigation (begetting consequential constitutional jurisprudence on key issues) often springs from citizens' and other beneficiaries' (concrete, existential) understandings of the Constitution.

The Constitution is furthermore particularly amenable to civil involvement in public processes such as law-making[4] and public administration.[5] To be of optimal consequence, such involvement has to be informed with knowledge of what the Constitution says, and the need for such knowledge once again emphasizes the legitimacy of 'civil interpretations' of the Constitution.

Within the open community of constitutional interpreters in the *politeia,* various civil society actors constantly engage in a process of defining rights and entitlements peculiar to spheres of activity that matter to them. Labour, religious, business, cultural and sports organizations are all examples of such actors. Their endeavours sometimes result in specialist written declarations of rights.[6] Two examples are the *Business Charter of Social, Economic and Political Rights* adopted by the South African Federation of Chambers of Industry in 1986 and a *Declaration of Religious Rights and Responsibilities* adopted by representatives of various religious communities at a National Inter-faith Conference in 1992. Any court called upon to construe provisions of the Final Constitution affecting the rights of such interest groups would do well to take into account the persuasive force of such focused declarations of rights.

[1] FC s 42(3).
[2] FC s 104(3).
[3] FC s 152.
[4] FC ss 59, 72 and 118. The Constitutional Court's judgments in two recent cases demonstrates how immensely important public participation in law-making is. See *Doctors for Life v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC)('*Doctors for Life*'); *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2007 (1) BCLR 47 (CC)('*Matatiele*').
[5] FC ss 195(1)(e), (f) and (g).
[6] The Final Constitution, at least by implication, seems to lend support to the idea of producing such documents, in that FC s 234 provides that Parliament may adopt Charters of Rights consistent with the provisions of the Constitution '[i]n order to deepen the culture of democracy established by the Constitution.'

Citizens' and other beneficiaries' initial, mostly 'non-expert' readings of the Final Constitution, in response to the exigencies of states of affairs in everyday *politeia* life, may have a profound effect on our constitutional jurisprudence. A non-expert interpretation of the Constitution may generate an interpretive endeavour rich in 'public' consequence even if, in the expert view of the court finally deciding the issue, such an interpretation is 'wrong'. Non-expert understandings of the Final Constitution may moreover result in extra-judicial political action or may initiate administrative or legislative action.

Specialist interpretations of the Constitution are not inevitably 'better' than or superior to non-specialist interpretations.[1] The active involvement of any authorized interpreter — specialist and non specialist alike – co-determines (at the very least) 'what the Constitution eventually says'.[2]

That said, specialist readings of the Final Constitution (as with other genre texts such as literary texts, philosophical texts, religious texts and other law texts[3]) have something of a leg-up on non-specialist readings. The expert usually has knowledge and experience of the different reading strategies prevalent in his or her field of expertise as well as of the techniques that authors use to produce texts, and of the tradition of the subject matter from which the text derives. Such skill and training should enable the specialist to reveal the text's full richness of meaning and to explore various avenues of dealing with interpretive issues and controversies. However, expertise can also blinker an interpreter's perspective and thereby result in a failure to take account of 'realities' beyond the 'technical' facets of the text. Some legal experts, for instance, maintain that they can, effortlessly and correctly, deduce meaning from a provision couched in 'ordinary, clear and unambiguous language'.[4] Specialist readings of constitutional provisions should, by contrast, be alert to the plurality of meanings that can be attributed to a provision due to the expansiveness, elasticity and thus perpetual openness of the natural language in which it is couched.

32.3 Theories of Interpretation and their Relevance for Constitutional Interpretation

In legal parlance, the word 'theory' is used rather loosely. Sometimes it is a synonym for 'rule' or 'precept'. The 'expedition theory' in the law of contract, for instance, actually is a rule stipulating that a contract concluded by mail comes into existence the moment that the written acceptance of an offer is posted.[5] In a

[1] See HL du Toit 'The Contribution of Hermeneutics and Deconstruction to Jurisprudence: A Response' (1998) *Acta Juridica* 41, 46-47.

[2] See § 32.3*(b)*(ii) infra.

[3] As to the meaning of 'law-texts' see §§ 32.3*(b)*(ii) and *(e)*(i)(aa) infra.

[4] For criticism of this position, see § 32.3*(b)*(ii) infra.

[5] See W J Hosten, A B Edwards, F Bosman & J Church *Introduction to South African Law and Legal Theory* (2nd Edition, 1995) 704–705.

more conventional sense a 'theory' is, on the one hand, an 'explanation' or 'explication'.[1] The *consensus theory* in the law of contract, for instance, explains that a contract is based on a *concursus animorum* of the parties involved.[2] On the other hand, a theory can also be an idea accounting for a situation or, especially in law, justifying a certain course of action. The theory then advances the principles on which the practice of an activity is based.[3] The *consensus theory* in the law of contract will, for instance, account for (and justify) a finding that, in the absence of evidence of a *concursus animorum*, the parties have not concluded a contract. Thus, *theories* of interpretation are explanatory and justificatory at the same time and can also be referred to as 'interpretative approaches'.[4]

(a) Common-law theories of statutory interpretation[5]

The six conventional theories of statutory interpretation that will briefly be discussed under this heading have evolved and taken shape over time in England, the motherland of common law, but have also spread to other common-law jurisdictions (including South Africa). Broadly speaking, however, the first three theories (literalism, intentionalism and literalism-cum-intentionalism) are usually regarded as representing the more or less 'conventional' positions in interpretive legal thinking while the last three (contextualism, purposivism and objectivism) are mostly associated with more recent developments.[6] These latter three interpretive developments maintained a rather subdued presence in statutory interpretation in South Africa prior to 1994, playing second fiddle to especially literalism-cum-intentionalism. Since 1994, they have gained greater prominence in the case law — even if they have not yet displaced entirely the three conventional approaches.

(i) *Literalism* maintains that the meaning of an enacted provision can and must be deduced from the very words in which the provision is couched, regardless of consequences.[7] Clear language is placed on the same footing as plain or

[1] See J Pearsall (ed) *The New Oxford Dictionary of English* (1998) 1922. Scholarly or scientific theories are examples of such explanatory models.

[2] See F du Bois (ed) *Wille's Principles of South African Law* (9th Edition, 2007) 736–737.

[3] Pearsall (supra) at 1922.

[4] See, eg, FI Michelman 'A Constitutional Conversation with Professor Frank Michelman' (1995) 11 *South African Journal on Human Rights* 477, 482.

[5] For a more elaborate discussion of these theories, see Du Plessis *Re-Interpretation of Statutes* (supra) at Chapter 5.

[6] Among the latter category of theories there are, however, also some that have antecedents in the distant past. The mischief rule, as a manifestation of purposivism, for instance, dates back to *Heydon's Case* in the late sixteenth century. See § 32.3*(a)*(v) infra. See also JMT Labuschagne 'Die Opkoms van die teleologiese Benadering tot die Uitleg van Wette in Suid-Afrika' (1990) 107 *South African Law Journal* 569 (Provides a succinct depiction of the evolution of theories of statutory interpretation in South Africa as described above.)

[7] For examples see LC Steyn *Die Uitleg van Wette* (5th Edition, 1981) 64–67.

ordinary language,[1] in other words, the language that a native speaker would use and understand.[2] However, experience has shown that ordinary language as 'natural language' is not characteristically clear and unambiguous, and strict adherence to the words of a provision may produce results that are absurd and repugnant to 'common sense'. Thus developed the golden rule[3] of interpretation, of which Lord Wensleydale's *dictum*[4] is the classical exposition:

> [T]he grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no farther.

Crude literalism has 'probably reached its apogee and is on the wane'.[5] However more nuanced versions are alive and kicking — in South African constitutional law too.[6] Kentridge JA,[7] for instance, in a previously cited *dictum* from the Constitutional Court case of *S v Zuma & Others*,[8] contended that 'the Constitution does not mean whatever we might wish it to mean' and that as a legal instrument its language must be respected. The language used by the lawgiver may therefore not be ignored 'in favour of a general resort to "values"' lest interpretation turns into divination. Kentridge JA's contentions have been regularly relied upon to justify resort to literalism in constitutional interpretation.[9]

In *S v Mhlungu & Others*[10] the Constitutional Court disagreed on precisely how strictly to abide by the very language in which the apparently 'technical'

[1] PB Maxwell *The Interpretation of Statutes* (12th Edition, 1976) 28–29.

[2] R Cross *Statutory Interpretation* (3rd Edition, 1995) 1.

[3] DV Cowen 'The Interpretation of Statutes and the Concept of "The Intention of the Legislature"' (1980) 43(4) *THRHR* 374, 379 (Refers to the golden rule as 'the second canon of literalism'.)

[4] See *Grey v Pearson* [1843–60] All ER Rep 21 (HL) 36. The golden rule is well established in South African case law. See, eg, *Venter v* R 1907 TS 910, 914–915 ('*Venter*'); *Principal Immigration Officer v Hawabu & Another* 1936 AD 26, 30–31; *S v Toms; S v Bruce* 1990 (2) SA 802, 807H–J (A); *Van Heerden v Joubert* 1994 (4) SA 793, 795E–G (A); *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA) at paras 10-13.

[5] See GE Devenish *Interpretation of Statutes* (1992) 26.

[6] See, eg, *Abrahamse v East London Municipality and Another; East London Municipality v Abrahamse* 1997 (4) SA 613, 632G (SCA); *Standard Bank Investment Corporation Ltd v Competition Commission & Others; Liberty Life Association of Africa Ltd v Competition Commission & Others* 2000 (2) SA 797, 811A–H (SCA)('*Standard Bank*').

[7] See § 32.1*(b)* supra, for the full quotation.

[8] *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at paras 17-18 (Kentridge AJ)('Zuma').

[9] See, for example, *Standard Bank* (supra) at 811A–D. See also JD van der Vyver 'Constitutional Free Speech and the Law of Defamation' (1995) 112 *South African Law Journal* 572, 574–575 ('[T]he South African Constitutional Court in its first judgment clearly endorsed the view that the rules of interpretation pertaining to the Chapter on Fundamental Rights [in the Interim Constitution] do not authorize the courts to go beyond the wording of the instrument itself.')

[10] 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC)('*Mhlungu*').

IC s 241(8) was couched. The minority[1] understood the above-cited *dictum* from *Zuma*[2] to be a narrowly tailored prescription to the effect that — however important it may be not to ignore 'fundamental concerns' or 'the spirit and tenor of the Constitution'[3] — a court's interpretive conclusion may never amount to rewriting or reformulating the *ipsissima verba* of the written constitutional text. The majority,[4] on the other hand, after identifying constitutional objectives beyond the 'ordinary meaning' of the *ipsissima verba* of the provision in question, was comfortable to fill gaps in the wording of IC s 241(8). They arrived at this conclusion to prevent the denial of 'the equal protection of fundamental rights guaranteed by [IC] Chapter 3' to 'a substantial group of people'.[5]

(ii) *Intentionalism* claims that the paramount rule of statutory interpretation is to discern and give effect to the real intention of the legislature:[6]

> The governing rule of interpretation — overriding the so-called 'golden rule' — is to endeavour to ascertain the intention of the law-maker from a study of the provisions of the enactment in question.[7]

What is actually stated in this classical *dictum* is not a rule, but a fundamental (theoretical) assumption or premise about the interpretation of enacted law to which most South African jurists traditionally (and often with a rhetorical lack of reflection) subscribe. As it stands, it is too general and unspecific to be a rule — let alone *the paramount rule* of statutory interpretation. The designation 'intention of the legislature' has become a rhetorically malleable device lending weight to judicial pronouncements on the meaning of enacted law.[8] Instead of averring that a provision 'means X or Y', a court will typically assert that 'the legislature intended X or Y'.

Intentionalism in practice cannot be understood in isolation from its alliance with literalism (*literalism-cum-intentionalism*) and purposivism (*intentionalism-cum-purposivism*).[9]

[1] *Mhlungu* (supra) at paras 72–80 (Kentridge AJ).
[2] Ibid (supra) at para 77.
[3] Ibid at para 63.
[4] Ibid at paras 2–34 (Mahomed J).
[5] Ibid at para 33.
[6] See Steyn (supra) at 2.
[7] *Farrar's Estate v Commissioner for Inland Revenue* 1926 TPD 501, 508. See also *SANTAM Versekeringsmaatskappy Bpk v Roux* 1978 (2) SA 856, 868E–F (A); *Suliman v Minister of Community Development* 1981 (1) SA 1108, 1120A–B (A); *S v Masina* 1990 (4) SA 709, 713G (A); *Dodd v Multilateral Motor Vehicle Accidents Fund* 1997 (2) SA 763, 769D (A); *Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Other Workers & Others* 1998 (1) SA 685, 688E (C).
[8] See Du Plessis *Reinterpretation of Statutes* (supra) at 106. For a further explication of the terms 'enacted law' and 'enacted law-texts', see §§ 32.3*(e)*(i)(ee) and 32.5*(c)*(iii) infra.
[9] Cowen (supra) at 382.

(iii) Premised on a combination of literalist and intentionalist assumptions, *literalism-cum-intentionalism* has traditionally been the dominant theory of statutory interpretation in South Africa.[1] The principal purpose of interpretation is said to be determining the intention of the legislature. The legislature couches or encodes its intention in the language of the statutory provision to be construed. When the words used for this purpose are clear and unambiguous, their literal, grammatical meaning must prevail and they must be given their ordinary effect. This, it is believed, will disclose and convey, without further ado, the true intention of the legislature and thereby the 'correct' meaning of the provision construed.

Literalism-cum-intentionalism is more literalist than intentionalist. First, it assumes that there is a grammatical structure that allows for a fixed and stable 'ordinary effect' of language. Second, it assumes that the 'correct' (both auctorial and interpretive) use of language — honouring the ordinary meaning of its words, its grammatical structure and its rules — will make the intention inherent in a statutory text equally clear to all users of the language. On these two assumptions an 'objective' determination of the meaning of a provision seems unproblematic. Only when the language used is ambiguous or obscure to some extent will it be practicable to consider resort to interpretive aids other than those associated with ordinary language, literally understood, in order to determine the intention of the legislature.

The default approach to statutory interpretation just described has attracted criticism from legal scholars who claim that it does not accord with recent developments in interpretive theory at all.[2] First, statutory language is *natural* and not *formal* language.[3] The same applies to the language of the Constitution. Natural language is always open-ended and makes for a proliferation of meanings.[4]

[1] For a classical articulation of this theory, see *Venter* (supra) at 913 (Innes J). For recent examples of the Supreme Court of Appeal's continued adherence to this approach, see *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 (1) SA 98, 107A–B (SCA); *Public Carriers Association & Others v Toll Road Concessionaries (Pty) Ltd & Others* 1990 (1) SA 925, 942I–J (A); *Manyasha v Minister of Law and Order* 1999 (2) SA 179, 185B–C (SCA); *Commissioner, SA Revenue Service v Executor, Frith's Estate* 2001 (2) SA 261, 273G–I (SCA).

[2] See, eg, NJC van den Bergh *Die Betekenis van die Strukturele Hermeneutiek vir die Uitleg van Wette* (1982)(LLD Thesis, University of the Orange Free State 680); L du Plessis 'Die Sakelys vir Wetsteksvertolking en die Epog van Konstitusionalisme in Suid-Afrika' (1999) 64(2 & 3) *Koers* 223, 238–240 and L du Plessis 'Re-reading Enacted Law-texts: The Epoch of Constitutionalism and the Agenda for Statutory and Constitutional Interpretation in South Africa' (2000) 15(2) *SA Public Law* 257, 283–286.

[3] See F Müller 'Observations on the Role of Precedent in modern Continental European Law from the Perspective of "Structuring Legal Theory" '(2000) 11 *Stellenbosch LR* 426, 432-433. For the distinction between natural and formal language, see R Audi (ed) *The Cambridge Dictionary of Philosophy* (2nd Edition, 1999) 318, 673.

[4] 'Not only is its meaning constantly in flux, but also ever and again in conflict — especially so with law that has to regulate massive and mostly antagonistic conflicts'. See F Müller 'Observations' (supra) at 432. See also P Cilliers *Complexity and Postmodernism: Understanding Complex Systems* (1998) 37–47.

Second, linguistic form and clear language cannot neutralize or dilute our *pre-understanding* which thoroughly, inevitably and decisively shapes and shepherds our understanding of anything. Kentridge AJ's *dictum* in *S v Zuma & Others*[1] — about respecting the language of the Interim Constitution when construing it — was accompanied by an acknowledgement (albeit in passing) that as a judge engaged in constitutional interpretation it is not easy 'to avoid the influence of one's personal intellectual and moral preconceptions'.[2] This remark unsettles the belief that deference to linguistic form guarantees objective interpretation, uninfluenced by interpreters' inarticulate premises, but is not an outright renunciation of the idea that language can be clear. Stanley Fish, however, challenges the very notion of 'clear and unambiguous language':

> Meanings only become perspicuous against a background of interpretive presumptions in the absence of which reading would be impossible. A meaning that seems to leap off the page, propelled by its own self-sufficiency, is a meaning that flows from interpretive assumptions so deeply embedded that they have become invisible.[3]

What can be clear to an interpreter of a statutory provision is, in other words, not the language or meaning of *the text* ('objectively' speaking), but the interpreter's subjective *understanding* of what the provision in question stipulates with regard to a given concrete situation. This understanding is determined not just by the language in which the provision is couched, but very much by 'personal intellectual and moral preconceptions' too, and by the interpreter's familiarity with (and the embeddedness of her or his faculties of understanding in) the context.

Third, the advent of constitutional democracy in South Africa and the linguistic turn in legal interpretation have led to diagnoses of ailments weighing on literalism and literalism-cum-intentionalism in interpretive practice. These two relatively recent phenomena and their impact on legal interpretation will be examined more fully in due course.[4]

(iv) *Contextualism* is the theory of statutory interpretation that holds that the meaning of an enacted provision and its words and language can only be determined in light of its context or 'background conditions'.[5] Actually, contextualism and purposivism, the theory that will be discussed next,[6]

[1] *Zuma* (supra) at paras 17 and 18. See also § 32.1*(b)* supra.

[2] *Zuma* (supra) at para 17. See also *SACCAWU v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (8) BCLR 886 (CC) at para 13.

[3] S Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Legal Studies* (1989) 358.

[4] See §§ 32.3*(b)*(i) and (ii) infra.

[5] See *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245, 261; *Secretary for Inland Revenue v Brey* 1980 (1) SA 472, 478A–B (A), *Makwanyane* (supra) at para 10; *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)('*Ferreira*') at paras 52, 54, 57 and 70 (Ackermann J) and para 170 (Chaskalson P); *S v Motshari* 2001 (2) All SA 207 (NC) at para 8.

[6] See § 32.3*(a)*(v) infra.

share a family resemblance.[1] Both are post-literalist-cum-intentionalist positions, though some versions of contextualism, such as the classical *ex visceribus actus* canon of statutory interpretation[2] (invoked in constitutional interpretation too[3]) do not really contradict literalism, but seek to augment and enrich it instead.[4]

The South African *locus classicus* on the significance of context in statutory interpretation is Schreiner JA's seminal articulation (in a minority judgment in *Jaga v Dönges NO & Another; Bhana v Dönges NO & Another*[5]) of an interpretive strategy that honours the exigencies of both language and context. The approach he suggests does not represent a decided break with literalism-cum-intentionalism,[6] but it does go beyond 'an excessive peering at the language to be interpreted without sufficient attention to the contextual scene'.[7] This judgment is one of the most frequently cited *minority judgments* in the history of South African case law.[8] Its broadmindedness (compared to crude

[1] See *Ferreira* (supra) at para 46 (Ackermann J) and para 172 (Chaskalson P).

[2] See *S v Looij* 1975 (4) SA 703, 705C–D (RA). See also *New Mines Ltd v Commissioner for Inland Revenue* 1938 AD 455; *Hleka v Johannesburg City Council* 1949 (1) SA 842, 852–853 (A); *City Deep Ltd v Silicosis Board* 1950 (1) SA 696, 702 (A); *Soja (Pty) Ltd v Tuckers Land and Development Corp (Pty) Ltd* 1981 (3) SA 314, 321H (A); *Principal Immigration Officer v Bhula* 1931 AD 323, 335 (This approach also facilitates the harmonisation of ostensibly conflicting provisions of one and the same statute on the assumption that 'the legislature is . . . consistent with itself'.) See also *Le Roux v Provincial Administration (OFS)* 1943 OPD 1, 4; *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC)('*Dlamini*') at para 84.

[3] See *Makwanyane* (supra) at paras 115 and 278; *Mhulungu* (supra) at paras 15, 45, 105 and 112; *Zantsi v Council of State, Ciskei & Others* 1995 (10) BCLR 1424 (CC)('*Zantsi*'), 1995 (4) SA 615 (CC) at para 35; *Executive Council of the Western Cape Legislature & Others v President of the RSA & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC)('*Executive Council of the Western Cape 1995*') at para 204; *S v Rens* 1996 (1) SA 1218, 1996 (2) BCLR 155 (CC) at paras 17–21; *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) at para 123; *S v Lawrence; S v Negal; S v Solberg* (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at para 148; *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 116; *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC)('*De Lange*') at para 30; *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party* 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC) at paras 43-46 and 59; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)('*National Coalition 1999*') at para 87.

[4] Examples of *dicta* that allow for a departure from the 'plain meaning' of the words of a statute if compelled by the context of a provision do exist. See, for example, *Naboomspruit Munisipaliteit v Malati Park (Edms) Bpk* 1982 (2) SA 127, 133F (T); *Oertel v Direkteur van Plaaslike Bestuur* 1983 (1) SA 354, 370D–G (A); *Reynolds Bros Ltd v Chairman, Local Transportation Board, Johannesburg* 1984 (2) SA 826, 828G (W).

[5] 1950 (4) SA 653, 662D–667H (A)('*Jaga*').

[6] Du Plessis *Re-Interpretation of Statutes* (supra) at 113-114.

[7] *Jaga* (supra) at 664H.

[8] See for example *Secretary for Inland Revenue v Sturrock Sugar Farm (Pty) Ltd* 1965 (1) SA 897, 903G–H (A); *S v Radebe* 1988 (1) SA 772, 778D–G (A); *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903, 913I–914E (A); *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710, 726H–J (A); *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036, 1044A–B (SCA); *Fei Lui and Others v Commanding Officer, Kempton Park & Others* 1999 (3) SA 996, 1005G–C (W); *Standard Bank* (supra) 810G–811H; *Paltex Dyehouse (Pty) Ltd v Union Spinning Mills (Pty) Ltd* 2000 (4) SA 837, 852C–E (BHC); *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at para 12 (Marais JA, Farlam JA and Brand AJA); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC)('*Bato Star Fishing*') at paras 89 and 90.

literalism-cum-intentionalism, for instance) seems to appeal to judges who seek to justify a mode of interpretive reasoning that goes beyond linguistic formalism. Unsurprisingly, *dicta* from this judgment have been cited with approval in South African constitutional jurisprudence.[1]

Schreiner JA in *Jaga v Dönges* intimated that 'context' does not only include the language of the rest of the statute, but also its matter, its apparent purpose and scope and, within limits, its background.[2] 'Background', understood as 'history', is a contextual element that in the case law has been taken into account for interpretive purposes[3] especially where vague language shrouds 'the intention of the legislature' in obscurity.[4] The Constitutional Court has also emphasized the importance of construing constitutional provisions in context, holding that this includes the history of and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions entrenching fundamental rights (IC Chapter 3 and FC Chapter 2).[5] The role of the history of a constitution's making in its subsequent interpretation will be considered at a later stage.[6]

(v) A proponent of *purposivism,* looking at a particular legislative provision as part of a more encompassing instrument, will attribute meaning to such a provision in the light of the purpose or object it has (most probably) been designed to achieve. Where 'clear language' and purpose are at odds, the latter supposedly has to have the upper hand. Judicial interpreters of statutes in South Africa have not always agreed on this *sequitur*. As will be shown below, the more accepted view seems to have been that only vague and ambiguous (as opposed to clear and unambiguous) language may play second fiddle to statutory purpose.

How can 'purpose' be discerned? According to the classical version of purposivism in the common-law tradition, the so-called *mischief rule* in *Heydon*,[7] the prime purpose of enacted law is to suppress mischief. A court interpreting a provision is constrained to ask four questions: first, what the common law was before the enactment of the provision; second, what the mischief and defect were for which the common law did not provide; third, what remedy Parliament resolved and appointed 'to cure the disease of the commonwealth'; and, fourth, the true reason for the remedy:

[1] See, for example, *Makwanyane* (supra) at para 10; *Bato Star Fishing* (supra) at paras 89 and 90.
[2] *Jaga* (supra) at 662G–H.
[3] *S v Nel* 1987 (4) SA 276, 290F–J (O).
[4] See *Santam Insurance Ltd v Taylor* 1985 (1) SA 514, 527C and 527A–B (A). See also JR de Ville 'Legislative History and Constitutional Interpretation' (1999) *Tydskrif vir Suid-Afrikaanse Reg* 211, 212–214 (De Ville quite correctly observes, that it is not history 'out there' that is invoked by an interpreter, but his or her interpretation of history: '(s)he creates a text with which the statutory text is then approached.')
[5] *Makwanyane* (supra) at para 10; *Ferreira* (supra) at para 172 (Chaskalson P).
[6] See § 32.5*(c)*(iv) infra.
[7] (1584) 3 Co Rep 7a, 7b.

> [T]he office of all judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*.

The last sentence of the *dictum* implies that the true intention of the legislature (to remedy mischief) and the purpose of the Act (to be instrumental in this remedial endeavour) can hardly be at odds — and this creates room for a notion of *intentionalism-cum-purposivism*.

The mischief rule has been applied in South African case law and was (re-) stated in *Hleka v Johannesburg City Council*.[1] This line of reasoning likewise informs constitutional interpretation: it holds that the 'previous constitutional system of this country was the fundamental "mischief" to be remedied by the application of the new Constitution'.[2] Looked at in this way, the Final Constitution is a remedial measure that must be construed generously in favour of redressing the mischief of the past and advancing its own objectives for the present and the future.

It has long been recognized in South African case law on statutory interpretation that giving effect to the policy or object or purpose of legislation is an accepted strategy of statutory interpretation.[3] However, as was suggested above, it has also been made clear that this strategy is appropriate only if the language of a provision is insufficient.[4] The purposive approach has, in other words, mostly run a distant second to the literalist-cum-intentionalist approach: as a rule, 'ordinary' or 'clear and unambiguous language' has trumped other indicia of policy, object or purpose.[5]

In some cases, however, purposivism is understood to be an ally of especially the intentionalist leg of literalism-cum-intentionalism. As in *Heydon*, the intention of the legislature and the purpose of an Act are then understood to be identical.[6] This version of *purposivism-cum-intentionalism* usually goes together

[1] 1949 (1) SA 842, 852–853 (A). See also *Harris & Others v Minister of the Interior & Another* 1952 (2) SA 428, 459F–H (A); *S v Conifer (Pty) Ltd* 1974 (1) SA 651, 655D–H (A); *Glen Anil Development Corp Ltd v Secretary for Inland Revenue* 1975 (4) SA 715, 727H–728A (A); *Sefalana Employee Benefits Organisation v Haslam & Others* 2000 (2) SA 415 (SCA) at para 8.

[2] *Qozoleni v Minister of Law and Order* 1994 (3) SA 625, 634I-635C (E), 1994 (1) BCLR 75, 81G–H (E)('*Qozoleni*'). See also *Potgieter v Kilian* 1995 (11) BCLR 1498, 1515B–F (N).

[3] See, for example, *Stellenbosch Farmers' Winery Ltd v Distillers Corp (SA) Ltd & Another* 1962 (1) SA 458, 473F (A); *Nasionale Vervoerkommissie van Suid-Afrika v Salz Gossow Transport* 1983 (4) SA 344, 357A (A); *Kanhym Bpk v Oudtshoorn Munisipaliteit* 1990 (3) SA 252, 261C–D (C); *Raats Röntgen and Vermeulen (Pty) Ltd v Administrator Cape and Others* 1991 (1) SA 827, 837A (C); *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice & Others* 2000 (1) SA 113 (SCA) at para 21.

[4] See *Goldberg NO v P J Joubert Ltd* 1960 (1) SA 521, 523D (T).

[5] See *Dadoo Ltd & Others v Krugersdorp Municipal Council* 1920 AD 530, 543 (Relied on in *Standard Bank* (supra) at 810C–G as the classic exposition of purposivism). There are, however, also examples of manifest differences among judges on the appropriate relationship between language and purpose. See *Ebrahim v Minister of the Interior* 1977 (1) SA 665 (A)(Manifold differences in the interpretive modes employed in the majority and minority judgments.)

[6] *Konyn & Others v Special Investigating Unit* 1999 (1) SA 1001, 1007H–1008B (Tk).

with a readiness on the part of a judicial officer to proceed beyond the literal form of a provision that stands to be construed and to 'go by the design or purpose which lies behind it'.[1] Much is made of, for instance, the preamble to an Act as well as explicit statements of purpose in the body of the written text. Preambles, traditionally reserved for legislation of a formal and solemn nature and therefore only exceptionally and sparingly used,[2] have become a feature of post-1994 legislation, while statements of purpose, which were previously unheard of, are quite readily included, especially in Acts with potentially far-reaching policy effects.[3] Statutes enacted with the specific aim of promoting constitutional values or fulfilling constitutional duties or obligations are often construed with reference to the preambulatory and other value statements in the Constitution itself.[4]

With *purposiveness* fast becoming a substitute for *clear language* (and *authorial intent*) as a primary consideration in constitutional interpretation,[5] caution is warranted. As will be argued below,[6] glib purposivism cannot be allowed to dominate constitutional interpretation in the same manner and to the same extent that literalism-cum-intentionalism has conventionally been dictating statutory interpretation.

(vi) *Objectivism* is intended as an antidote to the (apparent) subjectivism of intentionalism. Its proponents contend that once a law has been enacted the legislature has had its say and the text assumes an existence of its own.[7] Objectivism entrusts the concretizing of enacted law to the courts.[8]

[1] *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1977] 1 All ER 518, 522j–523b cited with approval in *Baloro & Others v University of Bophuthatswana* 1995 (8) BCLR 1018, 1061H–J (B); *Dulabh & Another v Department of Land Affairs* 1997 (4) SA 1108 (LCC)('*Dulabh*') para 48. See also *MV Golden North Governor and the Company of the Bank of Scotland v Fund Constituting the Proceeds of the Judicial Sale of the MV Golden North (Maritime Technical Co Ltd Intervening)* 1999 (1) SA 144 (D), 152A–B.

[2] See LM du Plessis *The Interpretation of Statutes* (1986) 123–124.

[3] See Du Plessis *Re-Interpretation of Statutes* (supra) at 239-244.

[4] See, for example, *Dulabh* (supra) at paras 52 and 53.

[5] See, for example, D Davis, M Chaskalson & J de Waal 'Democracy and Constitutionalism: The Role of Constitutional Interpretation' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 122–126; D Dennis, H Cheadle & N Haysom *Fundamental Rights in the Constitution. Commentary and Cases* (1997) 11–13. See also I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 148–150 (on the place and role of purposive interpretation in the jurisprudence of the Constitutional Court.)

[6] See § 32.3*(b)*(iv) infra.

[7] For a discussion of this approach, see DV Cowen 'Prolegomenon to a Restatement of the Principles of Statutory Interpretation' (1976) *Tydskrif vir Suid-Afrikaanse Reg* 131, 156–158; Devenish *Interpretation of Statutes* (supra) 50–51.

[8] See F Müller 'Basic Questions of Constitutional Concretisation' (1999) 10(3) *Stellenbosch Law Review* 269, 269.

JMT Labuschagne has propounded quite a far-reaching variant of objectivism, with substantial merit, premised on the assumption that a statutory provision acquires meaning only once it is interpreted and applied in a concrete situation.[1] This contention echoes Hans-Georg Gadamer's seminal insight about the oneness of interpretation and application.[2] According to Labuschagne a statute as promulgated is only a *structure statute*: it contains merely a 'structure norm' and only becomes 'real' or 'complete' (ie a *function statute*) once it is applied to a specific case, thereby effecting its outcome. Since the 'function norm' operates with reference to a particular, unrepeatable, concrete situation only, it is unique and legal norms (*qua* 'function norms') can therefore not conflict with one another. The legislative process, according to Labuschagne, proceeds from the generality of the structure norm to the particularity of the function norm.[3]

According to Labuschagne, 'interpretation' as an independent concept has too mechanical a connotation — and has thus become increasingly inappropriate — to depict the realization of the law in day-to-day situations where legal norms are *not* just *interpreted* but actually *formed*[4] (he speaks of 'regsnormvorming').[5] He traces an evolutionary shift in word cultures from iconic (authoritarian) to communicative (egalitarian) justice.[6] In most contemporary legal systems, judicial action inevitably co-constitutes legal norms and the judges have inevitably become part of the legislative process.[7]

Objectivism, generally speaking, reminds the interpreter that statutes ought to be construed with reference to the continuing time frame within which they function.[8] Regard should accordingly be had to the policies that existed

[1] See JMT Labuschange 'Regsdinamika: Opmerkinge oor die Aard van die Wetgewingsproses' (1983) 46(4) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 422. See W le Roux 'Undoing the Past through Statutory Interpretation: The Constitutional Court and Marriage Laws of Apartheid' (2005) 26(3) *Obiter* 526, 537.

[2] H-G Gadamer *Wahrheit und Methode: Grundzüge einer Philosophischen Hermeneutik* (4th Edition, 1975) 308. See also L du Plessis 'Die Sakelys vir Wetsteksvertolking en die Epog van Konstitusionalisme in Suid-Afrika' (1999) 64(2 & 3) *Koers* 223, 247–251; Du Plessis 'Re-reading Enacted Law-texts' (supra) at 295–299.

[3] See Labuschagne 'Regsdinamika: Opmerkinge oor die Aard van die Wetgewingsproses' (supra) at 426.

[4] JMT Labuschagne 'Die Opkoms van die Rasionele en van Individualiserende Geregtigheid by Regsuitleg en —vorming: Opmerkinge oor die Disintegrasie van Refleks- en Ikongeregtigheid' (2004) 67(4) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 614, 616.

[5] See, for example, JMT Labuschagne 'Regsnormvorming: Riglyn vir 'n nuwe Benadering tot die tradisionele Reëls van Wetsuitleg' (1989) 4 *SA Public Law* 205.

[6] Labuschagne 'Opmerkinge oor die Disintegrasie' (supra) at 615.

[7] JMT Labuschagne 'Die Opkoms van die teleologiese Benadering tot die Uitleg van Wette in Suid-Afrika' (1990) 107(4) *South African Law Journal* 569, 573. See also JMT Labuschagne 'Die heilige Oervader, Regsevolusie en redematige Administratiefregspleging' (1995) 10(2) *SA Public Law* 444; JMT Labuschagne 'Gewone Betekenis van 'n Woord, Woordeboeke en die organiese Aard van Wetsuitleg' (1998) 13(1) *SA Public Law* 145; JMT Labuschagne 'Die Leemtebegrip by Wetsuitleg as Anachronisme: 'n Regsantroplogiese Verklaring' (1999) 62(2) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 300.

[8] RWM Dias *Jurisprudence* (5th Edition, 1985) 170; Devenish *Interpretation of Statutes* (supra) 51.

at the time when a statute became law as well as to the changes that may have been made to these policies in the interim. ' "Application" is a continuing process and the application of a provision in a particular case is only one step in a journey.'[1] DC du Toit speaks of the dimension of futurity in the law.[2] Subscribing to a key tenet of objectivism, he rejects the idea that statutory interpretation merely involves discovering the 'past intention' of a legislature. The interpretation of a text (and of a statute) is the 'present realisation' of the meaning possibilities contained in the original draft instead.[3] 'Past meaning' must, in other words, be transposed into present terms, while 'present meaning' opens up vistas of futurity. Understanding a statute is tantamount to its existential application.[4]

Judicial or *free theories* of statutory interpretation constitute a theoretical position closely associable with objectivism. In moderate form, these theories recognize and justify judicial activism. In a more radical form, they strongly advocate judicial activism: this conclusion is predicated upon the belief that judges have a creative role to play in the interpretation and application of statute law. 'Moderate free theorists' contend that determining the intention of the legislature necessarily entails the filling in of gaps in an enactment, making sense of an open-ended provision.[5] A 'wait and see' attitude with regard to legislative reform is deemed inappropriate.[6] The judiciary, with the help of the common law, must intervene in order to remedy defects in statute law, since legislative processes are not sufficiently expeditious and streamlined to cope with deficiencies that show up in day-to-day practice.

More radical adherents of judicial activism do not reject the tenets that inform the moderate approach. But they do take the piercing of the veil of ostensible judicial objectivity further.[7] The interpretation of enacted law is seen not as a science, but as an art that essentially involves the making of choices. Interpretation is not really guided by 'objective' canons of construction. Instead the exigencies of an intuitively arrived at or desired interpretation, induce preferential reliance on certain preferred canons of construction to justify a particular interpretive result.

[1] Dias (supra) at 170.
[2] DC du Toit 'The Dimension of Futurity in the Law: Towards a Renewal of the Theory of Interpretation' (1977) 2 *Tydskrif vir Regswetenskap* 11.
[3] Ibid at 16.
[4] Ibid at 18–19.
[5] See *Magor and St Mellons Rural District Council v Newport Corp* 1950 (2) All ER 1226, 1236 (CA).
[6] See *Shaw v Director of Public Prosecutions* 1961 (2) All ER 446, 452–453 (HL).
[7] See J Dugard *Human Rights and the South African Legal Order* (1978) 367–372.

Constitutionalism and constitutional interpretation are quite amenable to objectivist and free-theory forms of adjudication. However objectivist and free-theory forms of adjudication do not generally constitute self-sufficient theoretical positions,[1] but usually give momentum and direction to contextualist and purposivist reasoning in both statutory and constitutional interpretation.[2]

(b) Constitutional interpretation and the inadequacy of common-law theories of statutory interpretation

The advent of constitutional democracy in South Africa more or less coincided with a modest but mounting realization among South African jurists, and legal scholars in particular, that conventional theories of statutory interpretation, and especially the dominant literalist-cum-intentionalist approach, are insufficient to the task of constitutional interpretation. Since the mid-1980s, for example, all South African monographs on statutory interpretation, written by legal scholars for use by academics, students, judicial officers and legal practitioners, have been critical of literalism-cum-intentionalism as a theoretical position and have questioned its basic propositions and assumptions.[3] The disenchantment with conventional theories of interpretation deepened as, in anticipation of constitutional democracy, their shortcomings were exposed in an emerging literature predicting that, with a supreme constitution in place, interpretive business would be unable to proceed 'as usual'.[4] The *de facto* and *de jure* onset of constitutional supremacy dealt the reign of 'clear and unambiguous statutory language' in legal and statutory interpretation a decided blow. Key insights associated with the linguistic turn started winning credence and increasingly informed the emerging discourse on legal interpretation. These developments have manifested in growing support for a *purposive interpretation* of, firstly and definitely, the Constitution, as *a distinctive linguistic datum* with a far-reaching impact on the whole legal system, but also of statutes and other laws.

[1] For an explanation of the meaning of 'theoretical position' when used in this chapter, see § 32.3*(c)*(i) and (ii) infra.

[2] See, for example, *In re Former Highlands Residents: Sonny v Department of Land Affairs* 2000 (2) SA 351 (LCC); *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E), 2000 (12) BCLR 1322 (E)('*Ngxuza*'); *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 200 (2) SA 1074 (SE)('*Peoples' Dialogue*').

[3] See LM du Plessis *The Interpretation of Statutes* (1986); C Botha *Statutory Interpretation* (4th Edition, 2005); Devenish *Interpretation of Statutes* (supra); JR de Ville *Constitutional and Statutory Interpretation* (2000); L du Plessis *Re-Interpretation of Statutes* (2002). See also EA Kellaway *Principles of Legal Interpretation: Statutes, Contracts and Wills* (1995)(Kellaway's positions may be the exception to the norm — but not clearly so.)

[4] See, for example, JR de Ville *Moontlike Veranderinge in die Administratiefreg na Aanleiding van 'n Menseregteakte* (1992)(LLD Thesis, University of Stellenbosch); TJ Kruger *Die Wordingsproses van 'n Suid-Afrikaanse Menseregtebedeling* (1990)(LLD Thesis, Potchefstroom University); J Kruger & B Currin (eds) *Interpreting a Bill of Rights* (1994); L du Plessis, & H Corder *Understanding South Africa's Transitional Bill of Rights* (1994) Chapter 1; Davis, Chaskalson & De Waal 'Democracy and Constitutionalism' (supra); IM Rautenbach *General Provisions of the South African Bill of Rights* (1995) 21-35.

(i) *Constitutional democracy and the end of the dominance of literalism-cum-intentionalism*

It is difficult to reconcile constitutionalism — the '-ism' of constitutional supremacy and justiciability at the heart of constitutional democracy[1] — with literalist-cum-intentionalist (constitutional and statutory) interpretation. That said, intentionalism and its place in constitutional interpretation remains a live issue in the world's oldest constitutional democracy: in the United States of America, originalists have maintained that the US Constitution must be read and understood as faithfully as possible in accordance with the original intent of its framers.[2] Indeed, it is fair to say that in some form or another, original intent is endorsed by a plurality if not a majority of the US Supreme Court. The main objection to this viewpoint is that originalist intentionalism does not allow either for the interpretive growth engendered by radically different circumstances or the desirability of limited readings for antiquated provisions.[3] Constitutional interpretation, the objectors maintain, is not about finding and giving effect to the original intent of the 'founding fathers' more than two centuries ago, but about attributing present-day meaning, significance and relevance to constitutional provisions rooted far back in history.

In quite a number of South African Constitutional Court cases reference has been made to what the framers of both the Interim and Final Constitutions would (or would not) have thought or foreseen or 'intended'.[4] These conjecture-like assertions, reminiscent of intentionalist-speak in statutory interpretation, have in most instances been invoked to justify the court's specific understanding of a provision in a particular situation and/or with reference to a specific issue, still clutching at trusted literalist-cum-intentionalist sentiments along the unbeaten track of constitutional interpretation. Such conventionalism is not to be mistaken for embracing the *theory* of originalism, however, for the court itself has voiced its

[1] For a fuller description, see § 32.3*(e)*(ii) infra.

[2] See R Dworkin *Life's Dominion. An Argument about Abortion and Euthanasia* (1993) 132–144 (Offers some helpful and insightful perspectives on this debate); FI Michelman 'Constitutional Authorship, "Solomonic Solutions", and the Unoriginalist Mode of Constitutional Interpretation' (1998) *Acta Juridica* 208-234. See also H Corder 'Lessons from (North) America (Beware the "Legalization of Politics" and the "Political Seduction of the Law")' (1992) 109 *South African Law Journal* 204, 206–214 (Deals in some detail with the contributions of Robert Bork, regarded as one of the main proponents of originalism.) See also 32.3*(c)*(i)(B) infra.

[3] For the role of 'present circumstances' in constitutional interpretation, see LM du Plessis & JR de Ville 'Bill of Rights Interpretation in the South African Context (3): Comparative Perspectives and Future Prospects' (1993) 4 *Stellenbosch Law Review* 356, 376–377.

[4] See, for example, *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC)('Makwanyane) at para 392; *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at paras 100, 102 and 105; *Ferreira* (supra) at para 15; *Bernstein & Others v Bester & Others* 1996 (4) BCLR 449 (CC) at para 53; *De Klerk* (supra) at para 45; *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the RSA; Executive Council of KwaZulu-Natal v President of the RSA* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC)('*Executive Council of the Western Cape 1999*') at paras 39-41; *S v Twala (Human Rights Commission Intervening)* 2000 (1) SA 879 (CC), 2000 (1) BCLR 106 (CC) at paras 9-17.

rejection of 'the doctrine of original intent' in no uncertain terms. In *South African Association of Personal Injury Lawyers v Heath & Others*,[1] Chaskalson P, for instance, held that there are perfectly valid and operative constitutional provisions not directly discernible from visible linguistic signifiers occurring in the written constitutional text (*unexpressed provisions*, in other words). By analogy with unexpressed but operative terms of a contract,[2] the Court, however, drew a distinction between *tacit* and *implicit/implied* provisions of the Constitution. It explained its preference for the adjective(s) 'implicit / implied' to depict such provisions as follows:

> In the law of contract a distinction is drawn between tacit and implied terms. The former refers to terms that the parties intended but failed to express in the language of the contract, and the latter, to terms implied by law. The making of such a distinction in this judgment might be understood as endorsing the doctrine of original intent, which this Court has never done. I prefer, therefore, to refer to unexpressed terms as being 'implied' or 'implicit'.

The trend in constitutional jurisprudence to bring 'what the framers of the Constitution had in mind' into arguments on the interpretation of constitutional provisions can thus not be a reconfirmation of allegiance to intentionalism as it has always functioned in statutory interpretation, for the intention of the legislature, conventionally regarded as the prime force that must be given effect to in statutory interpretation, has irrevocably been toppled by the supremacy of the Constitution. This is clear from FC s 39(2)'s interpretive injunction that a statutory provision is firstly and most importantly to be understood in conformity with the Constitution,[3] and not necessarily in accordance with what its (supposedly) clear and unambiguous language conjures up. The decisive question of statutory interpretation can therefore not be what the legislature intended a provision to mean, but which one of its possible meanings is most compatible with the Constitution and most conducive to the promotion of its objectives and values. The 'intention of the legislature' plays second fiddle at best:

> The interpretative notion of ascertaining 'the intention of the Legislature' does not apply in a system of judicial review based on the supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the Legislature.[4]
> or

[1] 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 19.

[2] As to the law of contract in this regard, see *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506, 526C-F (A); J Salmond & J Williams *Principles of the Law of Contracts* (2nd Edition, 1945) 37-40. The issue was (re-)considered by the Supreme Court of Appeal in *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC* [2005] 2 All SA 256 (SCA). For a discussion of the latter judgment, see S Cornelius 'The Unexpressed Terms of a Contract [A Discussion of the Judgment of Lewis JA in *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC* [2005] 2 All SA 256 (SCA)]' (2006) 17 *Stellenbosch Law Review* 494.

[3] See § 32.5*(b)*(ii) infra.

[4] *Matiso & Others v The Commanding Officer, Port Elizabeth Prison & Others* 1994 (3) SA 592, 597B-597H (SE), 1994 (3) BCLR 80, 87B-87H (SE)('*Matiso*'). For fuller dictum, see § 32.1*(b)* supra.

All statutes must be interpreted through the prism of the Bill of Rights.[1]

This means that FC s 39(2) actually establishes a new canon of statutory interpretation, namely, that legislation must be construed to promote the spirit, purport and objects of the Bill of Rights. This canon cannot be overridden by 'legislative intent' couched in (allegedly) 'clear and unambiguous language'. The 'intention of the legislature', in all its possible significations, is always subject (and second) to the Constitution, and not only when a statute is allegedly inconsistent with a provision or provisions of the Constitution.[2] An interpretive strategy known as *reading in conformity with* the Constitution, which will be discussed below,[3] helps to give specific effect to this new canon of statutory interpretation in s 39(2).

The Constitutional Court's decided rejection of original intent as a guiding force in constitutional interpretation rules out the possibility that the notion of the dominant intention of the legislature, as conventionally understood and deferred to in statutory interpretation, could rear its head in constitutional interpretation too. Any reference to the intention of the framers of the Constitution in the jurisprudence of the Constitutional Court is then to be understood as, at most, a rhetorical gateway to *historical interpretation*.[4] From a stylistic perspective the value-laden[5] Constitution-in-writing has also unsettled the notion of 'clear and unambiguous language', the prime partner of intentionalism in constituting the South African judiciary's conventional literalist-cum-intentionalist position on the interpretation of enacted law.[6] Crucial constitutional provisions, such as statements of values in the Preamble, previously referred to sections of the Final Constitution,[7] and the Bill of Rights in its entirety, are couched in all but clear and unambiguous language — and deliberately so. Rights and values can hardly

[1] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd. In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC)('*Investigating Directorate*') at para 21.

[2] See *Investigating Directorate* (supra) at para 21. The *Investigating Directorate* Court described the canon of statutory interpretation derived from FC s 39(2) as follows:

> All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens and includes all in the process of governance. As such, the process of interpreting the Constitution must recognize the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterizes the constitutional enterprise as a whole.

[3] See § 32.5*(b)*(ii) infra.

[4] See § 32.5*(c)*(iv) infra.

[5] See § 32.1*(c)* supra.

[6] See § 32.3*(a)*(iii) supra. For a further explication of the terms 'enacted law' and 'enacted law-texts' see §§ 32.3*(e)*(i)(ee) and 32.5*(c)*(iii) infra.

[7] See, for example, the founding provisions in FC s 1, FC ss 40 and 41 on co-operative government, FC s 165 on judicial independence, FC s 195 on the basic values and principles governing public administration and FC s 237 on the diligent performance of obligations.

be expressed categorically or conclusively. The Final Constitution is furthermore meant to be durable and its expansively formulated provisions have been designed to cater for an inestimable array of exigencies.

The open-endedness of the constitutional text makes the inevitable role of the judicial interpreter's pre-understanding in construing constitutional provisions more visible. Froneman J, in an unprecedented *dictum* in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* was, for instance, quite upfront about the fact that his pre-understanding had co-determined his construction of FC s 38 of the Constitution in relation to subjects' standing in constitutional litigation.[1] Similarly Horn AJ, in *Port Elizabeth Municipality v Peoples' Dialogue on Land and Shelter*,[2] discouraged an overly legalistic approach to the construction of crucial provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act,[3] as 'a piece of welfare legislation formulated upon humanitarian lines'.[4]

(ii) *The linguistic turn*

Meaning is *not* discovered *in* (and *retrieved* from) a construable text, but is *made* in *dealing with* the text.[5] This *key* tenet of the *linguistic* or *hermeneutical turn* in legal interpretation has been enhanced by the advent of constitutional democracy in South Africa. Language cannot 'carry' or 'produce' perspicuous, clear and unambiguous (one and only) meaning(s), but it does determine the meaning that an interpreter ultimately attributes to construable constitutional and statutory provisions in a decisive and most pervasive way — and does so amid (and pursuant to) a dynamic interplay of multifarious meaning-generative forces and phenomena.[6]

The South African judiciary is rather unfamiliar with linguistic-turn reasoning and very rarely will a 'respectable' court admit that it construes a constitutional or a statutory provision by attributing meaning to it, rather than *finding* meaning *in* it. *Rarely* is not, however, *never* — this is evident from a *dictum* of Gildenhuys J in the judgment of the Land Claims Court in *In re: Former Highlands Residents: Sonny v Department of Land Affairs*[7]. The court depicts the statutory interpretation in which it engaged as *giving* meaning *to* a statutory provision rather than *finding* pre-given meaning *in* it.[8] The following *dictum* of Lord Denning MR aptly demonstrates

[1] *Ngxuza* (supra) at 619F–620F, 1327I-J.
[2] '*Peoples' Dialogue*' (supra) at 1081F–G.
[3] Act 19 of 1998.
[4] *Peoples' Dialogue* (supra) at 1080E.
[5] For an insightful discussion of the linguistic turn, see RJ Coombe '"Same As It Ever Was": Rethinking the Politics of Legal Interpretation' (1989) 34 *McGill Law Journal* 603; A Boshoff *Die Interpretasie van Fundamentele Aansprake in 'n heterogene Samelewing* (2000) (LLD Thesis, University of Johannesburg.) For a critical assessment, see MS Moore 'The Interpretive Turn in Modern Theory: A Turn for the Worse?' (1989) 41 *Stanford Law Review* 871.
[6] Du Plessis *Re-Interpretation of Statutes* (supra) xv.
[7] 2000 (2) SA 351 (LCC) at para 10 (Gildenhuys J).
[8] Ibid at para 11 (Gildenhuys J).

how down-to-earth judicial rhetoric (and reasoning) can be commensurate with embracing the theoretical ramifications of the linguistic turn without mentioning it by name:

> So once again we have here the problem of statutory interpretation. It vexes us daily. Not only us. But also the House of Lords. Even the simplest words give rise to acute differences between us. Half of the judges think the interpretation is clear one way. The other half think it is clear the other way.
>
> To get rid of these continuous conflicts, we should throw aside our traditional approach and adopt a more liberal attitude. We should adopt such a construction as will promote the general legislative purpose …
>
> Put quite simply, perhaps too simply, whenever you have a choice between two interpretations, the choice is a matter of policy for the law: Which gives the more sensible result? It is not a semantic or linguistic exercise. Nine times out of ten you will find that judges will agree on what is the sensible result, even though they disagree on the semantic or linguistic result.[1]

The linguistic turn has its origin in theoretical reflections on language, meaning and interpretation in general. Contemporary developments associated with this reflection and with the discourse occasioned by it will be considered in due course.[2] For now it is enough to point out that linguistic-turn discourse emphasizes, from a broad, interdisciplinary perspective, two truisms of considerable importance for constitutional, statutory and, indeed, legal interpretation in general. First, it assumes that language is an open, complex system in which the context of an utterance is a pivotal determinant of meaning. Second, it emphasizes that the dynamics of (natural) language *always* leave an interpreter with the *responsibility* to decide on one of several possible (semantic) meanings of a provision as the best or 'most sensible' (as Lord Denning would have it) response to a problem entertainable by law.

(iii) *'Politics': predicament or prospect?*

Endemic to the mainstream culture of adjudication in South Africa has been the belief that adjudication ought to remain neutral in the sense that adjudicators are required to abstain from interpretations or orders that have decided 'political' (or 'policy' or socio-economic) significance and consequences.[3] A classic statement of this belief came from Holmes JA, almost five decades ago, in *Minister of the Interior v Lockhat & Others*,[4] observing that the politically very controversial Group Areas Act[5]

[1] *R v Sheffield Crown Court, Ex parte Brownlow* [1980] QB 530 (CA) 538.
[2] See § 32.3*(d)* infra.
[3] M Pieterse 'What Do We Mean When We Talk about Transformative Constitutionalism?' (2005) 20(1) *SA Public Law* 155, 164-165.
[4] 1961 (2) SA 587, 602D–E (A).
[5] Act 77 of 1957.

> represents a colossal social experiment and a long-term policy. It necessarily involves the movement out of Group Areas of numbers of people throughout the country. Parliament must have envisaged that compulsory population shifts of persons occupying certain areas would inevitably cause disruption and, within the foreseeable future, substantial inequalities.

Acquiescence in the consequences of this 'colossal social experiment', the court thought, would be the most proper judicial demeanour:

> The question before this Court is the purely legal one whether this piece of legislation impliedly authorises, towards the attainment of its goal, the more immediate and foreseeable discriminatory results complained of in this case. In my view . . . it manifestly does.

In *S v Adams,* King J explained the court's political dilemma in relation to — and its apparent powerlessness in the face of — the same Act as follows:

> [A]n Act of Parliament creates law but not necessarily equity. As a Judge in a Court of Law I am obliged to give effect to the provisions of an Act of Parliament. Speaking for myself and if I were sitting as a Court of Equity, I would have come to the assistance of the appellant.[1]

Prior to the advent of constitutional democracy in South Africa, courts did not maintain impeccable political neutrality and more often than not enforced harsh apartheid legislation.[2] The mixed success with which South African courts handled constitutional adjudication prior to 1994, and especially the tendency to detract attention from substantive constitutional law issues and concentrate on technicalities and formalities instead, can at least partly be attributed to their attempts to hand down politically neutral judgments. This does not mean that those judgments were politically neutral in fact — and nor were the earlier *Lockhat* and *Adams* judgments. A judgment upholding a political *status quo* may in effect be every bit as 'political' as a transformative judgment challenging and overruling it. Courts operating under apartheid quite consciously enforced the law of the apartheid state.

With the exception of objectivism and judicial or free theories of interpretation,[3] all the traditional common-law theories of statutory interpretation previously discussed are largely silent on the political and politicized nature of the interpretation of enacted law. However, some of the presumptions of statutory interpretation, for instance, the presumption that statute law is not unjust, inequitable and unreasonable,[4]and that legislation promotes public interest, may bring to bear 'matters political' upon the interpretation of enacted law.[5] But then again, presumptions have traditionally not ranked high among the canons of construction and have been relied on only as a last resort (as 'tertiary grounds of deduction').[6] Presumptions and whatever politics they may entail have thus mostly and

[1] 1979 (4) SA 793, 801A–B (T).
[2] See *Rossouw v Sachs* 1964 (2) SA 551, 562E-H (A).
[3] See § 32.3*(a)*(vi) supra.
[4] See Du Plessis *Re-interpretation of Statutes* (supra) at 154-164.
[5] Ibid at 165-168.
[6] HS Celliers 'Die Betekenis van Vermoedens by Wetsuitleg' (1962) 79(2) *South African Law Journal* 189, 195. See also § 32.3*(b)*(i) supra.

conveniently been kept out of interpretation, as long as there is sufficient scope for reliance on other more 'neutral' canons of construction. In short, the conventional theories and canons of statutory interpretation are such that the interference of politics in interpretation has been perceived mostly as a predicament.

Generally speaking, constitutional interpretation in South Africa since 1994 seems to have been accompanied by an awareness of the judiciary's unavoidable political involvement in the broad sense of the word. Evidence of this awareness is Kentridge AJ's unprecedented acknowledgement, in *S v Zuma*,[1] of the fact that it is not easy for a judge 'to avoid the influence of one's personal intellectual and moral preconceptions'. The Constitutional Court has produced numerous dicta acknowledging the political nature of constitutional adjudication:

- In *S v Makwanyane & Another*[2] Kriegler J in effect confirmed Kentridge AJ's observation in *Zuma* without referring to it by name:

  > [I]t would be foolish to deny that the judicial process, especially in the field of constitutional adjudication, calls for value judgments in which extra-legal considerations may loom large.

- In *Brink v Kitshoff NO*[3] O'Regan J attributed the different approaches to equality of courts in different national jurisdictions not only to different textual provisions and different historical circumstances, but also to different jurisprudential and philosophical understandings.
- In *President of the RSA v SA Rugby Football Union*[4] the judges of the Constitutional Court were challenged to put their political affiliations on the table and to deal with allegations of their political bias. The Court did not shy away from the fact that its members do have (and have shown) political preferences and predilections, and the court accepted, in so many words and with reference to several authorities, that out-and-out neutrality on the part of a judicial officer cannot be achieved.[5] The Court then proceeded to consider how best to deal with such a-neutrality in order to ensure that justice is done (and also seen to be done).
- Froneman J openly acknowledged, in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape,*[6] that his view of 'the social context in which the law is applied to a particular set of facts' had co-determined his interpretation of s 38 of the Constitution (on the issue of standing in a constitutional action).

[1] *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC)('*Zuma*') at para 17. See also § 32.1*(b)* supra.

[2] *Makwanyane* (supra) at para 207.

[3] 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 39.

[4] 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC).

[5] *President of the RSA v SA Rugby Football Union* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) at paras 42-44.

[6] 2001 (2) SA 609, 619F–620E (E), 2000 (12) BCLR 1322, 1327I-J (E).

However, the Constitutional Court has quite often intimated that it can decide controversial issues in a 'legal' as opposed to a 'political' manner.[1] Thus Sachs J in *S v Makwanyane & Another* opined:

> Our function is to interpret the text of the Constitution as it stands. Accordingly, whatever our personal views on this fraught subject [capital punishment] might be, our response must be a purely legal one.[2]

And perhaps the best known effort of the Constitutional Court to avoid, ostensibly, a political exercise of its powers by falling back on the canard that it is exercising purely a judicial function, appears in the *First Certification Judgment*:

> First and foremost it must be emphasised that the Court has a judicial and not a political mandate. Its function is clearly spelt out in IC 71(2): to certify whether all the provisions of the NT comply with the CPs. That is a judicial function, a legal exercise. Admittedly a constitution, by its very nature, deals with the extent, limitations and exercise of political power as also with the relationship between political entities and with the relationship between the state and persons. But this Court has no power, no mandate and no right to express any view on the political choices made by the CA in drafting the NT, save to the extent that such choices may be relevant either to compliance or non-compliance with the CPs. Subject to that qualification, the wisdom or otherwise of any provision of the NT is not this Court's business.[3]

No judge will find it particularly flattering to learn that her or his judicial work reflects association with particular party political sentiments or genuflections to incumbent powers.[4] At the same time no judge can convincingly plead political innocence. The Constitutional Court, in the first two cases in which it was called upon to give effect to socio-economic entitlements guaranteed in FC ss 26 and 27,[5] made it clear that it would not refrain from setting aside policy (also read: 'political') decisions *simply because they were decisions* of the executive. The Court nonetheless refrained from second-guessing the policies informing these decisions, but demonstrated a willingness to test the decisions against the standards of the Constitution — which is what a vigilant judiciary is expected to do. The Constitutional Court has also indicated that 'a court should be slow to impose obligations upon government which will inhibit its ability to make and implement

[1] See, for example, *Executive Council of the Western Cape & Others v President of the RSA & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC)('*Executive Council of the Western Cape 1995*') at paras 116-122.

[2] *Makwanyane* (supra) at paras 349.

[3] *Certification of the Constitution of the Republic of South Africa, 1996, In re: Ex parte Chairperson of the Constitutional Assembly* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('*First Certification Judgement*') at para 27. This gloss on its own method of constitutional interpretation was roundly and rightly criticized by Matthew Chaskalson and Dennis Davis shortly after the judgment was handed down. See M Chaskalson and D Davis '*Constitutionalism, the Rule of Law, and the First Certification Judgment*' (1997) 13 *South African Journal of Human Rights* 430, 433-434.

[4] See, for example, *Executive Council of the Western Cape 1995* (supra) at paras 116-122.

[5] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC)('*Soobramoney*') and *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)('*Grootboom*').

policy effectively'.[1] However, when called upon to adjudicate state action necessary to provide relief to those in desperate need, the Constitutional Court — in keeping with constitutional injunctions[2] enjoining the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of socio-economic or 'second generation' entitlements — has assumed an uncommonly activist role in ordering or supporting the procurement of such relief.[3] The court's judgment in *Minister of Health & Others v Treatment Action Campaign & Others*[4] is a case in point. Both the court *a quo* and the Constitutional Court found that, at certain state hospitals, the Department of Health unreasonably prevented the administration of the drug, Nevirapine, with its proven record of efficacy and safety in reducing the risk of mother-to-child transfer of HIV, to HIV-positive women and their small children. The government furthermore failed to design and implement a comprehensive national programme to prevent such transfers. The Court — not prevaricating about its power to review the implementation of the government policies involved, especially where compliance with constitutional duties stood to be compromised — made both declaratory and mandatory orders against the state, compelling it to fulfil its constitutional mandate.[5]

The examples of judicial intervention in matters political just mentioned, have been of instances where policy decisions and their implementation resulting in administrative action were impugned. The same reasoning, however, applies *mutatis mutandis* to policy decisions resulting in the adoption of legislation. Not only constitutional interpretation, but statutory interpretation too, is thoroughly political. A court exercising its testing right in respect of legislation is enjoined to assess the policies (or politics) underlying and informing impugned legislation in relation to the Constitution, and then to assign a 'political meaning' to such legislation under, in conformity with and/or informed with the values of the Constitution. This obligation may, among other things, require 'a court to negotiate the shoals between the Scylla of the old-style literalism and the Charybdis of judicial law-making'.[6]

Rationality review could arguably help to 'depoliticize' a judicial assessments of the constitutionality of legislative or administrative exercises of public power.

[1] *Premier of the Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC) at para 41.

[2] For example, FC ss 26(2) and 27(2).

[3] *Grootboom* (supra) at paras 40, 52 and 96; *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (7) BCLR 652 (CC), 2001 (3) SA 1151 (CC) at paras 38–39.

[4] 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC)('*TAC*').

[5] For a discussion of this case and other significant cases on the state's duties regarding the implementation of socioeconomic rights, see S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) 33-24–33-48.

[6] *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA)('*Govender*') at para 11 (Olivier JA).

Rationality is a requirement of the rule of law functioning as a safeguard against arbitrariness or caprice in the exercise of public power. It requires a rational link between a legitimate governmental objective sought to be achieved, and the means adopted to achieve it. Often the rationality requirement allows for more than one way of achieving the said objective. Preference for a particular way of doing so is then regarded as a policy question to be decided by a politically authorised and accountable (legislative or administrative) organ of state, and it is not competent for a court of law to second-guess such a preference once it has passed the rationality muster.[1]

A South African court may sometimes be faced with the dilemma of having to consider the perpetuation of some politically controversial and probably unconstitutional pre-1994 legislative measures which, their racially biased pedigree notwithstanding, could nowadays hold some advantage for at least some of the very people against whom they were initially designed to discriminate.[2] In *Moseneke v Master of the High Court*[3] Sachs J described the court's dilemma in such instances as follows:

> To keep a manifestly racist law on the statute books is to maintain discrimination; to abolish it with immediate effect without making practical alternative arrangements is to provoke confusion and risk injustice. Such a dilemma is inherent in transition. The Black Administration Act, as its very name indicates, both reminds us of South Africa's shameful and 'disgraceful' past and continues to make invidious and wounding distinctions on grounds of race. It survives, however, because it has become encrusted with processes of great practical, day-to-day importance to a large number of people.

In other cases, courts had to decide to what extent and with what political consequences political powers may pursue politics of transformation using statute law.[4] In *S v Baloyi (Minister of Justice Intervening)*[5] the Constitutional Court *per* Sachs J cautioned against undue judicial activism in certain socially sensitive areas, where the legislature (as political decision-maker) is best left with a 'reasonable degree of latitude or margin of appreciation'. *In casu* the court, considering

[1] See *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Other* 2008 (10) BCLR 969 (CC) at paras 62-64,110-115, 166-192, 260-286. See also *Bel Porto School Governing Body & Others v Premier, Western Cape and Another* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) at para 45; *The Pharmaceutical Manufacturers Association of SA. In re: The Ex parte Application of the President of the RSA* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC)('*Pharmaceutical Manufacturers*') at paras 68, 85 and 90; Promotion of Administrative Justice Act 3 of 2000 s 6(2)(f)(ii).

[2] See, for example, *Western Cape Provincial Government & Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government & Another* 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC); *Moseneke v Master of the High Court* 2001 (2) 18 (CC), 2001 (2) BCLR 103 (CC)('*Moseneke*').

[3] *Moseneke* (supra) at para 25.

[4] See *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)(*Walker*'). In this case the empowering act itself was not challenged, but the Court had to deal with the policy implications of legislation read in the light of the Interim Constitution.

[5] 2000 (1) BCLR 86 (CC), 2000 (2) SA 425 (CC)('*Baloyi*').

the constitutionality of s 3(5) of the Prevention of Family Violence Act,[1] observed as follows:[2]

> One may accept that insistence on rigid and inflexible rules would be inappropriate in this developing area, with its complex nuances and new procedures. Provided it remains within constitutionally appropriate limits, the Legislature must enjoy a reasonable degree of latitude or margin of appreciation in choosing appropriate solutions to a grave social ill, particularly when the need for special law enforcement procedures has become manifest. In the present case this requires a construction of s 3(5) that is sensitive to its context and seeks to balance out the interests of all concerned in the fairest manner possible.

The involvement of courts in determining the final outcome of overtly political disputes makes judges susceptible not only to criticism of the 'legal' techniques and justifications on which they rely to sustain their decisions, but also to criticism of their (actual or supposed) political motivation for reaching a decision. In *S v Mamabolo (E TV, Business Day and Freedom of Expression Institute intervening)*[3] the Constitutional Court said that, in a constitutional democracy, politically inspired criticism of the judiciary is not improper *per se*, and that the conventional common-law offence of scandalizing a court simply by criticizing its decisions on political grounds cannot survive constitutional scrutiny. Vocal public scrutiny of the courts' performance may serve as 'a democratic check on the judiciary',[4] and ideally

> robust and informed public debate about judicial affairs promotes peace and stability, by convincing those who have been wronged that the legal process is preferable to vengeance; by assuring the meek and humble that might is not right; by satisfying business people that commercial undertakings can be efficiently enforced; and, ultimately, as far as they all are concerned, that there exists a set of just norms and a trustworthy mechanism for their enforcement.[5]

Finally, theoretical accounts assessing and determining trends in constitutional adjudication make much of the impact of socio-political realities on determining specific outcomes in such adjudication. Far from being perceived as an interpretive predicament, politics, in these accounts, aids an understanding of why constitutional decisions — in general and in specific instances — go a certain way. More will be said about theoretical accounts of constitutional adjudication later on.[6]

[1] Act 133 of 1993.
[2] *Baloyi* (supra) at para 30.
[3] 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC)('*Mamabolo*').
[4] Ibid at para 30.
[5] Ibid at para 31.
[6] See § 32.3*(c)*(v) infra.

(iv) *Purposive interpretation as the increasingly preferred alternative to literalism-cum-intentionalism*

Purposive *interpretation* is slowly supplanting (or has already supplanted, some may claim) literalism-cum-intentionalism as the leading approach to especially constitutional interpretation.[1] The supremacy of authorial intent as alleged prime determinant of meaning is also on unsteady ground. In statutory interpretation 'the intention of the legislature' has, as was pointed out before,[2] been toppled by the supremacy of the Constitution. In constitutional interpretation, original intentionalism has been suspect right from the outset.[3] A key assumption of literalism-cum-intentionalism, namely, that natural language can be clear and unambiguous, is also increasingly being questioned. 'Purpose', in constitutional and statutory interpretation, has probably not and will hopefully not become a prime force akin to 'intention of the legislature' (best expressed in clear and unambiguous language) as it used to reign supreme in mainstream statutory interpretation. Constitutional and legislative purpose can nonetheless pilot interpretive endeavours and outcomes decidedly, as is powerfully illustrated by the majority judgment of the Constitutional Court in *African Christian Democratic Party v The Electoral Commission & Others*.[4]

Section 14(1)*(b)* of the Municipal Electoral Act[5] requires a party contesting a municipal election to pay a deposit equal to a prescribed amount by means of a bank guaranteed cheque submitted to the office of the local representative of the Electoral Commission by a stipulated cut-off date. A notice of a party's intention to contest the election and its party lists must also be submitted together with the cheque.[6] The African Christian Democratic Party (ACDP), proposing to contest an election in the Cape Town Metro Municipality, submitted their notice and party lists to the Cape Town office of the Electoral Commission, but did not pay the prescribed deposit of R3000,00 in the manner s 14(1)*(b)* requires. Instead, it submitted a bank guaranteed cheque to the central office of the Electoral Commission in Pretoria, including in one amount all the deposits payable in respect of all the municipalities in which the party wished to contest the election. A list of these municipalities was submitted together with the cheque, but as a result of an administrative oversight the Cape Town Metro was omitted from the

[1] See § 32.3*(b)*(i) supra.
[2] See § 32.3*(b)*(i) supra.
[3] See § 32.3*(b)*(i) supra.
[4] 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC)('*African Christian Democratic Party*')(O'Regan J). This judgment has enjoyed an enthusiastic reception among proponents of purposive interpretation as interpretive approach of first choice. See W le Roux 'Directory Provisions, Section 39(2) of the Constitution and the Ontology of Statutory Law: *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC)' (2006) 21(2) *SA Public Law* 382; GE Devenish '*African Christian Democratic Party v Electoral Commission:* The New Methodology and Theory of Statutory Interpretation in South Africa' (2006) 123 *South African Law Journal* 399.
[5] Act 27 of 2000.
[6] Section 14(1)(a).

list, and the bulk amount did not include a deposit for the election in Cape Town. The party discovered the mistake after the deadline for the payment of deposits had passed and after it had decided not to contest elections in certain of the municipalities initially included in its list. This meant that the Commission held a surplus amount of money in favour of the ACDP, who then requested the Commission to use that credit (or part of it) as deposit for the election in the Cape Town Metro. The Commission refused to do so, contending that the prescribed procedure and deadline for party registrations were peremptory, and that the ACDP's failure to comply fully with both could not be condoned.

On appeal against this decision, the Electoral Court agreed with the Commission, and the ACDP thereupon turned to the Constitutional Court for relief. The majority of the Court held that payment of the deposit in Pretoria for participation in respect of the election in municipalities subsequently uncontested by the ACDP sufficed as payment of the deposit for the Cape Town Metro election. The Court emphasized that it was not *condoning* the ACDP's non-compliance with peremptory registration requirements. Rather, the Court concluded, by doing what the ACDP did the party *was* indeed *complying* with these requirements.[1] Actual compliance was thus not required to be compliance in accordance with the letter of the law: circuitous and arguably even unintended compliance, duly serving the purpose of the provision in question, sufficed. This conclusion meant reaping the greatest possible advantage from the elasticity of the language of s 14(1) to achieve optimum realization, first, of the immediate purpose of the provision itself, namely 'to ensure that a deposit is paid by a political party to establish that they have a serious intention of contesting the election';[2] second, of the purpose of the Act as a whole, namely to encourage and facilitate participation in (rather than allow exclusion from) municipal elections; and, third and ultimately, of a core purpose of the Constitution, namely, to sustain multi-party democracy through free and fair elections.[3] This core purpose is articulated, as an assertion of values key to multi-party, democratic government, in FC s 1*(d)*. The purposive picture painted by the Court displaces the literal statutory arrangement that a deposit must be paid at a particular designated place (or, for that matter, before the expiration of a stipulated deadline).

Wessel le Roux neatly depicts the Court's *modus operandi* — and the decided shift from literalism to purposivism that it involved — as follows:

> The Court resolves the case, not by asking what the phrase 'office of the Commission's local representative' means linguistically, but by asking what the purpose of that phrase is within the context of election law. The Court is not pursuing an abstract definition but an operative effect. The concern with the linguistic meaning of the phrase is at the same time

[1] *African Christian Democratic Party* (supra) at para 34.
[2] Ibid at para 27.
[3] Ibid at paras 15, 20 and 31-33.

> dismissed as an 'unduly narrow' (read textualist or literalist) approach to statutory interpretation. By contrast, the broader (read purposive) approach which the Court favours includes the following distinct steps: (i) establish the central purpose of the provision in question; (ii) establish whether that purpose would be obstructed by a literal interpretation of the provision; if so, (iii) adopt an alternative interpretation of the provision that 'understands' (read promotes) its central purpose; and (iv) ensure that the purposive reading of the legislative provision also promotes the object, purport and spirit of the Bill of Rights.[1]

Laudable as this shift is, however, it should not to be construed as a *panacea* for all the ills that attach to conventional (literalist and formalist) approaches to constitutional interpretation.[2] The following cautionary reminder by Gildenhuys J still holds:

> Important as the purpose of legislation may be, elevating it to the prevailing factor of interpretation will not, in my view, always provide the key to unlock meaning.[3]

Similar words of circumspection were sounded by Kroon and Froneman JJ slightly more than two months after the onset of constitutional democracy in South Africa:

> [I]t serves little purpose to characterise the proper approach to constitutional interpretation as liberal, generous, purposive or the like. These labels do not in themselves assist in the interpretation process and carry the danger of introducing concepts or notions associated with them which may not find expression in the Constitution itself.[4]

Purposive interpretation, as these judges would agree, has the potential to turn into a rather unruly horse if three caveats are not heeded.

First, the processes involved in constitutional and statutory interpretation are too complex to be captured in one essential(-ist) or predominant catchword. A sensible word of advice to all construing the Final Constitution will thus be to resist this temptation.

Second, it must be realized (and recognized) that a generous or broad interpretation of the Final Constitution, and the Bill of Rights in particular, as envisaged by, among others, the Constitutional Court,[5] is not necessarily tantamount

[1] Le Roux 'Directory Provisions' (supra) at 386.

[2] See GE Devenish 'Review of D van Wyk, J Dugard, B de Villiers and D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1995) *Tydskrif vir die Suid-Afrikaanse Reg* 595, 597.

[3] *In re Former Highlands Residents: Sonny v Department of Land Affairs* 2000 (2) SA 351 (LCC) at para 12. See also C Botha *Statutory Interpretation: An Introduction for Students* (3rd Edition, 1998) 31. For a critique of Botha's position at the time, see J de Ville 'Meaning and Statutory Interpretation' (1999) 62(3) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 373, 377–378.

[4] *Qozoleni v Minister of Law and Order* 1994 (3) SA 625, 633G (E), 1994 (1) BCLR 75, 80D (E)('*Qozoleni*'). See M Sachs (ed) *Grundgesetz Kommentar* (3rd Edition, 2002) 17 (Contends that teleological interpretation is 'nicht ein Synonym für die Auslegung überhaupt, sondern meint die weitergehende, verfeinernde Berücksichtigung eines anderweitig festgestellten Regelungszieles in den jeweiligen Spezialzusammenhängen' ['not a synonym for interpretation as such, but refers to a further, refined consideration of a regulative objective determined in another way within the particular context of the subject-matter'] thereby confirming the sentiments expressed in the two *dicta* here cited.)

[5] See *Zuma* (supra) at para 14; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC), 1998 (12) BCLR 1517 (CC)('*National Coalition 1999*') at para 21. See also § 32.1*(b)* supra.

to construing the Constitution purposively: purposive interpretation can also be restrictive, precisely because a purpose can be restrictive.[1]

Third, purposive interpretation can at any rate not simply begin (and end) by giving effect to the (alleged) purpose of a provision to be construed, because the purpose of a provision can simply not be known *prior to* interpretation. 'Purpose' can be established only *through* interpretation. The interpretation of enacted law is by its very nature *purpose-seeking*.[2] The attempted determination of a constitutional or legislative purpose undisciplined by studious interpretation too easily seduces an interpreter to read a purpose or object into a provision prematurely, and therefore in an arbitrary manner, shedding the responsibility to justify or, at least, explain his or her preference.[3] In pre-1994 South African case law optimum effect was sometimes given to harsh statutory provisions, gratuitously interfering with fundamental rights, precisely because they were construed 'purposively'.[4] Some writers therefore argue that purposive interpretation should enjoy the status of a secondary (as opposed to a primary) mode of interpretation.[5] Similarly, some South African scholars, mindful of the pitfalls of unrestrained purposive interpretation, have put forward what they call a *teleological approach* to constitutional interpretation in particular. This approach, while still thoroughly purposive,[6] takes us beyond *ad hoc* purposivism, and aspires in the interpretation of individual constitutional (and statutory) provisions, to realize the 'scheme of values' on which the constitutional order is premised.[7] This 'value-activating interpretation',[8] in other words, goes beyond the design or purpose that lies behind an individual provision and invokes the entire scheme of values said to inform the legal and constitutional order in its totality.[9] Teleological interpretation has not yet been

[1] See *Soobramoney* (supra) at para 17; *SA National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at para 28. See also § 32.1*(b)* supra.

[2] See L du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 85. For a further explication of the features of 'enacted law', see §§ 32.3*(e)*(i)(ee) and 32.5*(c)*(iii) infra.

[3] Judicial observations to the effect that 'a purposive approach to interpretation does not do away with the ordinary rules of statutory interpretation') must probably be understood as words of caution. See *Richtersveld Community v Alexkor Ltd* 2001 (3) SA 1293 (LCC) at para 51 n 115. See also *Minister of Land Affairs v Slamdien* 1999 (4) BCLR 413 (LCC) at para 16.

[4] See, for example, *Rossouw v Sachs* 1964 (2) SA 551 (A); H McCreath 'The "Purposive Approach" to Constitutional Interpretation' in *Constitution and Law II* (1998) 65–68; E Mureinik 'Administrative Law in South Africa' (1986) 103 *South African law Journal* 615, 620.

[5] See F Müller 'Basic Questions of Constitutional Concretisation' (1999) 10 *Stellenbosch Law Review* 269, 275–276; F Müller *Juristische Methodik I* (8th Edition, 2002) 278–279. See also M Sachs (ed) *Grundgesetz Kommentar* (3rd Edition, 2002) 17 (Sachs claims that teleological interpretation 'hat keinen selbständigen, primären Anknüpfungspunkt, sondern baut auf (den) anderen aspekten auf' ['has no independent, primary starting point, but builds upon (the) other aspects'].)

[6] 'Purposive' and 'teleological' are largely synonyms, but see § 32.5*(c)*(iii) infra.

[7] See Mureinik 'Administrative Law in South Africa' (supra) at 623-624.

[8] See CJ Botha *Waarde-aktiverende Grondwetuitleg: Vergestalting van die Materiële Regstaat* (1996)(LLD Thesis, University of South Africa.)

[9] See G Carpenter 'More about Language, Meaning and Statutory Interpretation' (1999) 62(4) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 626, 633.

explained in the case law in quite this way. However, there have been *dicta* in cases dealing with constitutional interpretation where the line of reasoning that informs the teleological approach, or a line of reasoning akin to it, has been approved.[1] In *African Christian Democratic Party v The Electoral Commission & Others,* the majority of the Constitutional Court convincingly showed how the immediate purpose of a particular provision (*in casu* s 14(1) of the Municipal Electoral Act) can be construed as feeding into the broader purpose of the Act as a whole, and eventually, through its effectual embeddedness in the Act, into constitutional core values informing (even) the founding provisions in the Final Constitution. *In casu* the immediate purpose of the provision in question, namely to procure payment of a deposit establishing that a political party has a serious intention to contest an election, was held to feed into the purpose of the Act as a whole, namely to encourage and facilitate (rather than discourage and hinder) participation in municipal elections, and ultimately, through its effectual embeddedness in an Act designed to promote constitutional objectives, into constitutional core values sustaining multi-party democracy through free and fair elections. These core values are bold assertions of the founding provisions in s 1*(d)* of the Final Constitution. The *modus operandi* of the majority of the Constitutional Court strikingly illustrates that teleological interpretation is an enriched version of purposive interpretation and moves from the effectual acknowledgement of the purpose of a particular provision to the realization and fulfilment of values and purposes key to the legal and constitutional order as a whole.

Can purposive interpretation as teleological interpretation then indeed be proffered as an alternative to conventional literalist-cum-intentionalist interpretation? The answer to this question is not a simple 'yes' or 'no'. That the former has contributed significantly to the demise of the primacy traditionally bestowed upon the latter has been all to the good. However, this recent turn of events still does not justify affording one interpretive approach pride of place among the others. It is preferable and possible to work towards a meaningful and creative coexistence of various interpretive approaches (*qua* reading strategies) that sustain and enrich one another.

(c) Theories of, theoretical positions on, and leitmotivs in constitutional interpretation

The word 'theory' is used rather loosely in legal parlance and in connection with constitutional interpretation too. After almost a decade and a half of constitutional democracy and constitutional jurisprudence in South Africa, it is still not possible to catalogue comprehensively the theories of constitutional interpretation developed and/or named by the courts. It is of course not part of the primary

[1] See, for example, *Coetzee v Government of the Republic of South Africa, Matiso* & Others v Commanding Officer, Port Elizabeth Prison & Others 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC)(*'Matiso 2'*) at para 46 (Sachs J); *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC)(*'De Klerk'*) at para 181 (On the role of the Constitution in the legal order in a constitutional democracy); *Gardener v Whitaker* 1995 (2) SA 672, 684D-E (E), 1994 (5) BCLR 19, 30F-G (E).

business of courts to proclaim theories of constitutional (or any other form of) interpretation by name, and to attend to the sustained and systematic development of such theories.[1] Theory-building is rather what legal scholars do when they observe and try to explain what is happening when role players in various contexts and capacities engage with the Constitution-in-writing. Constitutional scholars focus and reflect mostly on how the Constitution is construed in practice (and mostly by the courts). In South Africa scholarly work on theories of constitutional interpretation has mostly been anticipatory in nature, considering comparative examples of what could in time gain currency as fully-fledged theories of constitutional interpretation in this country.[2] In a similar vein the discussion that follows will explore the possibility and desirability of the development of typical South African theories of constitutional interpretation, and the relevance of the hitherto crystallized (and previously discussed[3]) common-law theories of statutory interpretation in the process. It will also be argued that (and shown how), in the absence of fully-fledged theories of constitutional interpretation in South Africa, *theoretical positions* on constitutional interpretation have been manifest in *interpretive* leitmotivs, in other words, in recurring keynote or defining ideas, motifs or *topoi,* that have to an appreciable extent guided constitutional interpretation in practice.

(i) *Three comparative examples*

Given the breadth of experience with constitutional interpretation in other jurisdictions, it is worth briefly canvassing how 'theory' features in constitutional interpretation in Germany, Nigeria and the USA. The jurisprudence in these states will serve as a preface to a discussion of the (possible) place and role of 'theory' in South African constitutional interpretation.

German constitutional interpretation is not so much concerned with theories of *interpretation* as such, but with theories of *fundamental rights* (*Grundrechtstheorien*) instead.[4] Five such theories have been discernible in the jurisprudence of the Federal Constitutional Court:

(aa) The *classical liberal theory* of fundamental rights emphasizes the primacy of constitutional guarantees of civil rights and liberties crucial to the realization of the freedom of the individual in the constitutional state (*Rechtsstaat*). This is believed to be best achieved by holding the powerful state at bay.

[1] See S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762, 784 ('Courts rarely offer theories of what they do'.)

[2] D Davis, M Chaskalson & J de Waal 'Democracy and Constitutionalism: The Role of Constitutional Interpretation' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 11-19 and 103-121; GE Devenish *A Commentary on the South African Bill of Rights* (1999) 615-617.

[3] See § 32.3*(a)* supra.

[4] See E Böckenförde 'Grundrechtstheorie und Grundrechtsinterpretation' (1974) 27 *Neue Juristische Wochenschrift* 1529. For an English translation of this work, see E Böckenförde *State, Society and Liberty: Studies in Political Theory and Constitutional Law* (1991) 175-203. See also M Sachs (ed) *Grundgesetz Kommentar* (3rd Edition, 2002) 53-55 and Davis, Chaskalson & de Waal (supra) at 85-103. For a comprehensive treatment of the subject, see R Alexy *Theorie der Grundrechte* (1985).

(bb) The *institutional theory* of fundamental rights focuses not so much on safeguarding 'a sphere of individual and social liberty in which individuals, legally speaking, may do as they subjectively wish. They [the fundamental rights] are more like objective organisational principles for the sphere of rights they protect. They emerge and are realised in normative provisions of an institutional nature that are upheld by the idea of order enshrined in the basic rights and as such mould living-conditions.'[1]

(cc) The *value theory* of fundamental rights holds fundamental rights to be elements and instruments in the creation of the state as (ideally) a community of shared experience, culture and values. The fundamental rights standardize a system of values or commodities lending a 'material status' to individuals increasingly integrated as a people and a distinct nation.[2]

(dd) The *democratic-functional theory* of fundamental rights contends for a reading of these rights from the perspective that they fulfil a public, political function. The existence and functioning of free processes in the democratic state (for example, freedom of expression, freedom of assembly and association) indeed constitute such a state, lend meaning to fundamental rights and are therefore to be safeguarded. There is no room for the notion of innate rights, that is, rights preceding the existence of the democratic state.[3]

(ee) The *welfare-state* theory of fundamental rights emphasizes the impossibility of a duly fulfilled safeguarding of 'classical' fundamental rights (and 'freedom rights' in particular) as long as socio-economic needs have not been duly attended to:

> It is [the] gulf between legal and actual liberty as enshrined in the basic rights that the welfare-state theory of those rights seeks to bridge . . . [B]asic rights no longer have a purely negative, delimiting character; they also give individuals certain claims upon the state in respect of social services. The thing to be guaranteed is no longer seen as simply an abstract legal liberty but as real liberty.[4]

None of the theories aforesaid enjoys pre-eminence in the jurisprudence of the Federal Constitutional Court, and the FCC, in particular cases, chooses freely — too freely to the taste of some, it would seem[5] — the theory upon which it will rely. This free choosing, which Michael Sachs[6] positively depicts as *theoretical multifunctionality* (*Multifunktionalität*), is commensurate with the kind of state envisaged in s 20(1) of the German Basic Law — a state which is simultaneously a pluralistic party-state, a constitutional state, a competitive democracy, a social state and a federal state.[7]

[1] Böckenförde *State, Society and Liberty* (supra) at 184.
[2] Ibid at 189.
[3] See § 32.4*(c)*(i)(cc) infra, for an opposite view. For an explanation of this theory, see Böckenförde *State, Society and Liberty* (supra) at 192.
[4] See Böckenförde *State, Society and Liberty* (supra) at 195-196.
[5] Ibid at 198-203.
[6] See Sachs (supra) at 55.
[7] See § 32.4*(c)*(i)(bb) infra.

The theories of fundamental rights as significant determinants of interpretive outcomes are distinguished from the *methods of (constitutional) interpretation* (*Methoden der Verfassungsinterpretation*).[1] In a nutshell, these methods are, first, the *classical hermeneutical method* in which FC von Savigny's four 'methods' of interpretation — grammatical, systematic, teleological and historical interpretation — hold a central place. This Von Savigny Quartet will figure prominently towards the end of this chapter.[2] Second, there is the method of interpretation known as the hermeneutical concretization of norms through rational arguments. Third, the topical method focuses on interpretation as problem solving through free and open argumentation rather than strict adherence to the (supposed) meaning of provisions gleaned from the Constitution-in-writing. Finally, what is known in German as the *wirklichkeitswissenchaftlich orientierte Methode* orients itself toward the meaning and reality of the Constitution rather than its wording and dogmatic conceptuality.

While, as 'ways of doing', the methods of constitutional interpretation can themselves not appropriately be described as 'theories of interpretation',[3] they do reflect discernible theoretical orientations or positions. In addition to the theories and methods of constitutional interpretation the Germans also rely on *principles of constitutional interpretation* (such as reading the Constitution as a whole and giving optimal effect to its norms)[4] and canon-like interpretive means (*Auslegungsmittel*) closely associable with the Savignian quartet of reading strategies.[5]

In Nigerian constitutional jurisprudence — as presented by Chuks Okpaluba[6] — much is made of the essential dissimilarity between constitutional interpretation, as an interpretive genre *sui generis*, and ordinary statutory interpretation.[7] *Principles* of constitutional interpretation have been laid down in the constitutional jurisprudence of courts at the highest level,[8] but no explicit mention is made of *theories* of interpretation. Of course, the principles of constitutional interpretation articulated by the courts do, to some extent at least, manifest theoretical orientations. The Nigerian example is eye-catching in that, with a few exceptions, the

[1] See E Böckenförde 'Die Methoden der Verfassungsinterpretation — Bestandaufnahme und Kritik' (1976) 29 *Neue Juristische* Wochenschrift 2089 features very prominently. See also I Von Münch *Staatsrecht I* (6th Edition, 2000) 11-13; DP Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd Edition, 1997) 42-45; Sachs (supra) at 15-19 (The latter approaches the matter somewhat differently compared to the other sources referred to in this footnote.)

[2] See § 32.5*(c)* infra.

[3] See Davis, Chaskalson & de Waal (supra) at 103-120.

[4] See Von Münch (supra) at 13.

[5] See Sachs (supra) at 15-18.

[6] See C Okpaluba *Judicial Approach to Constitutional Interpretation in Nigeria* (1992) Part I.

[7] Ibid at 8-17. Questions regarding the appropriate relationship between constitutional and statutory interpretation will be dealt with more fully at a later stage. See § 32.4*(a)* infra.

[8] See *Archbishop Anthony Okogie & Others v Attorney-General of Lagos State* (1981) 2 NCLR 337; *Attorney-General of Bendel State v Attorney-General of the Federation & Others* (1982) 3 NCLR 1, 77-78.

formulated principles of constitutional interpretation are equally applicable to constitutional and statutory interpretation and do not really reflect a stance *sui generis* on many of the vexed theoretical questions encountered when reading a constitution. The Nigerian Constitution is to a large extent construed with reliance on the conventional canons of statutory interpretation, including the golden and mischief rules, and rules of restrictive and extensive interpretation, such as the *eiusdem-generis* and the *expressio unius* rules respectively. Far be it for me to suggest that the Nigerian model reflects an untenable state of affairs. Relevant to note for the present discussion and for the moment, though, is that the approach just mentioned has not given rise to a clearly discernible, theory oriented discourse and reflection on *constitutional interpretation* in particular.

In the eye of the South African beholder, the theories of constitutional interpretation in US constitutional jurisprudence and scholarship share a pedigree with English common-law theories of statutory interpretation. US constitutional scholars and adjudicators generally agree on the features and broad categorization of theories of constitutional interpretation. There is, however, no unanimity on exact appellations and detailed classifications. According to a comprehensive yet discerning catalogue of theories of constitutional interpretation, propounded by Walter F Murphy, James E Fleming and Sotirios A Barber,[1] the following types of and specific theories dominate US jurisprudence:

(A) **Textualism**. Theories of this type all somehow assume that provisions of the Constitution-in-writing (autonomously) bear meaning which is readily discernible through a straightforward and uncontroversial reading of words and phrases:

> Most basically, textualists are readers; their principal tools are dictionaries and grammars. The process is not unlike translating from one language to another, a project that requires talent as well as knowledge.[2]

One version of textualism is *clause bound*, and focuses on the various parts of the Constitution-in-writing. *Structuralist* textualism, on the other hand, is alert to the coherent wholeness of the Constitution-in-writing. *Purposive* textualism may be complementary to the other two versions, but it is also different. It professes to be able to establish, through straightforward and uncontroversial reading, the purpose or goal of either any specific provision of the Constitution or of the Constitution as a whole, and then to give effect to such a purpose or goal. Textualism smacks of literalism — probably due to

[1] WF Murphy, JE Fleming & SA Barber *American Constitutional Interpretation* (2nd Edition, 1995) 385-414. The authors point out that approaches to constitutional interpretation in the US are often expressed as distinctions or even dichotomies, for example, strict versus liberal construction, judicial activism versus judicial self-restraint, substance versus proceduralism and interpretivism versus non-interpretivism. Though they briefly discuss these four distinctions, they do not find them very useful because they 'lead into blind analytic alleys'. Ibid at 414–418. For further alternative catalogues of theories of constitutional interpretation in the US, see Davis, Chaskalson & de Waal (supra) 11-19.

[2] Murphy, Fleming & Barber (supra) at 386.

their shared formalist traits — but it also goes well beyond literalism without, however, shedding its formalism. Faith in the written Constitution's ability to be an autonomous source and bearer of meaning is thus not incompatible with — or a decided obstacle to — a contextualist and purposive reading of it, but the contextualism and purposivism involved will inevitably be attenuated.

To call a type of theory — mostly narrow and formalist in its conception and implementation — 'textualism' is in line with what is to be expected in mainstream thinking on constitutional interpretation. However, broad and post-formalist understandings of the word 'text' in contemporary theories of language and interpretation open the possibility for 'textualism' to denote the exact opposite of narrowness and formalism.

(B) **Originalism** typically maintains that the Constitution must be read and understood as faithfully as possible in accordance with the original intent of its framers. This means that provisions of the Constitution-in-writing must be construed as they were supposedly understood at the time of their adoption. There are two major varieties of originalism, the one focusing on the *understanding* and the other on the *intentions* of the Constitution's 'founders' or 'founding generation', in other words, either the people of 1787 to 1789, or the people of the time when the amendment that stands to be construed was adopted.

(C) **Doctrinalism.** Doctrinalists profess to work with a developing rather than a static Constitution, searching out past interpretations relating to specific problems and then trying to organize them into a coherent whole and fit the solution of current issues into that whole: 'In the style of the common law, the object is to preserve continuity even if affecting change.'[1] The Constitution-in-writing is silent on a number of quite significant constitutional doctrines that have been developed through constitutional interpretation, for example, direct and indirect effects', 'separate but equal' and 'liberty of contract'. Doctrinalism is alert to these 'provisions' of the 'wider Constitution' and draws particular attention to them.

(D) **Developmentalism** is a historical approach, but unlike originalism it does not see history as a snap shot of the past, frozen in time. Instead it values history as an ongoing process, 'a moving picture which continues into and beyond the present'.[2] It thus combines elements of both *doctrinalism* and *textualism* to reap interpretive benefit from broader historical events, for example, informal practices, usages and even political culture.

[1] Murphy, Fleming & Barber (supra) at 394.
[2] Ibid at 395-396.

(E) **Philosophic approach.** This approach draws attention to the fact that the moral and political theory to which an interpreter subscribes engenders assumptions crucial to shaping her or his interpretation of the Constitution. This will happen whether or not such assumptions are openly acknowledged or even if the interpreter is not aware of them. The philosophic approach encourages interpreters to 'theorize', starting with an acknowledgement that her or his interpretive endeavours are inevitably co-determined by often far-reaching theoretical assumptions, and then to engage in philosophical discourse seeking and pursuing the meaning of vital words and phrases 'through an open and open-minded exchange of reasons that other people can respect'.[1]

(F) **Systemic and transcendent structuralism.** As was pointed out in paragraph (A) above, structuralist textualism capitalizes on the coherent wholeness of the Constitution-in-writing for interpretive purposes. *Systemic structuralism* does the same with the coherent wholeness of the legal system, seeking out its inner unity and the common end to which its various segments aim. *Transcendent structuralism* involves including moral and political theories in that wholeness and reflecting on how they can help 'bring the text, practices, traditions, and interpretations into a coherent whole with the normative demands of the relevant … theories'.[2]

(G) **Purposivism.** In addition to purposive textualism, Murphy, Fleming and Barber,[3] under the heading 'systemic purpose', distinguish five versions of non-textualist purposivism closely connected with developments peculiar to constitutional interpretation in the USA. The first is *a prudential approach* conceiving of constitutional interpretation as statecraft. It is premised on the assumption that the goal of the Constitution-in-writing and the polity that has developed from it is that the USA must endure and must do so as a constitutional democracy. The second version of purposivism is 'the doctrine of the clear mistake' which 'seeks to maintain a political system that is both democratic and constitutionalist by apportioning interpretive authority in ways congruent with the duality of that objective'.[4] Third, 'reinforcing representative democracy' as a form of purposive analysis 'stresses judges' obligations to support open political processes'.[5] 'A fourth version of a *purposive approach*, "protecting fundamental rights", operates from the premise that, insofar as the broader constitution embraces constitutionalism, it requires interpreters, particularly judges, to be especially protective not only of rights to political participation but also of substantive rights against

[1] Murphy, Fleming & Barber (supra) at 398.
[2] Ibid at 400.
[3] Ibid at 400-409.
[4] Ibid at 403.
[5] Ibid at 404.

threats by officials who were fairly chosen through open elections.'[1] Finally, the aspirational approach 'takes the nation's ideals very seriously and uses them to structure constitutional interpretation'.[2] It sees the Constitution not just as a set of rules for government but, in a very deep sense, as seeking to show the USA how to become a particular kind of society.

(H) **Balancing** conceives of constitutional interpretation as a process of striking an equilibrium between opposing claims in society. It received its impetus from sociological jurisprudence prominent in the USA during the early years of the previous century.

The aforesaid authors refer to the theories they discuss as 'approaches'. To them an approach to interpretation, put simply, refers 'to the intellectual path an interpreter follows to seek meaning from that "thing" to be interpreted'.[3] The path itself is a theoretical construction, made of the explanatory qualities of theory, and maintained by theory as justification.[4] In this context 'theory' and 'approach' may thus, it would seem, be used interchangeably.[5] The authors also state that the theories overlap and interact with one another and that none of them, nor a combination of them, can turn constitutional interpretation into an exact science.[6] (They do not, however, elaborate on this statement.) This implies that a constitutional interpreter never really pledges exclusive allegiance to any one theory. All interpreters, for instance, work with a constitution-in-writing and this means textualism in some form is an inevitable building-block of all 'intellectual paths' associable with constitutional interpretation.[7]

Frank Michelman,[8] relying on a leaner and less detailed (and more 'conventionally American') list of theories of or approaches to constitutional interpretation, makes a similar point which is worth noting in the South African context, where no theories of constitutional interpretation have so far really crystallized. First on Michelman's 'kind of standard list of interpretative approaches or methods available to constitution adjudicators — from which, it's sometimes

[1] Murphy, Fleming & Barber (supra) at 406.
[2] Ibid at 408.
[3] Ibid at 383.
[4] It was pointed out earlier that in legal interpretation the so-called *theories* of interpretation (and especially theories of statutory interpretation) are explanatory and justificatory at the same time and can also be referred to as 'interpretative approaches'. See § 32.3 supra.
[5] See Murphy, Fleming & Barber (supra) at 383–384 (The authors support the proposition without exactly saying so.)
[6] Ibid at 383-384.
[7] Ibid at 383.
[8] See FI Michelman 'A Constitutional Conversation with Professor Frank Michelman' (1995) 11 *South African Journal on Human Rights* 477 (The seminar upon which this article is based took place at the Centre for Applied Legal Studies from 23 to 25 January 1995 and was organised to discuss critical issues relating to the Bill of Rights (Chapter 3) in South Africa's Interim Constitution.)

imagined, a judge chooses one (or perhaps just falls into one)'[1] — is *literalism*, which applies 'the text to the case according to the ordinary meaning of the words, as … a Martian would construe them who was fluent in the country's standard language usages'.[2] Second is *intentionalism*, 'applying the clause as one judges the writer of it would have done', and third is *purposivism*, 'applying the clause in the way that one judges will best accomplish the lawmaker's primary or higher or transcendent purpose, even if the concrete results would somewhat surprise the lawmaker'.[3] Fourth, '*[i]nstrumentalism* is determining the sense of the application of a legal text or doctrine's application to a particular case by first comparing the predicted social consequences of applying it in one or the other sense, and then preferring the sense that has the preferred consequences, as measured by a kind of ad hoc or pragmatic common sense'.[4] Finally, '*[m]oralism* is determining concrete applications by reference to a high-level, substantive moral theory supposed to be instantiated by the Constitution as a whole'.[5] How does a judge (or any other constitutional interpreter for that matter) choose between these approaches? Michelman is adamant that he or she does not choose and in actual fact cannot choose: the approaches

> cannot be alternatives among which a judge chooses; they are multiple poles in a complex field of forces, among which judges navigate and negotiate. I don't believe that any responsible constitutional adjudicator will end up, over any interesting run of cases ignoring any of the factors: perceived verbal significations, perceived concrete intentions, perceived general purposes, perceived and evaluated social consequences, perceived and intuited normative theories or unifying visions.[6]

For argument's sake, Michelman assumes that the five '-isms' above can broadly be classified into two groups that 'may seem to stand on opposite sides of an important divide', namely *objectivist*[7] approaches (literalism, intentionalism and purposivism) and *non-objectivist* (instrumentalist and moralist) approaches.[8] This distinction reflects a popular view which Michelman then criticizes by pointing out that objectivism is by no means a more reliable point of reference to distinguish between interpretive approaches: objectivism more often than not draws on profoundly subjective preferences of the interpreter, while the non-objectivist approaches can quite comfortably be dressed up in the objectivist uniforms of 'external authority'. This observation leads Michelman to the following conclusion:[9]

[1] Michelman 'A Constsitutional Conversation' (supra) at 482.
[2] Ibid at 482.
[3] Ibid at 482.
[4] Ibid at 482.
[5] Ibid at 482.
[6] Ibid at 483.
[7] The 'objectivism' that Michelman here has in mind is the polar opposite of the objectivism previously discussed as an interpretive theory. This theory (also known as the delegation theory) is associated with the freedom for judges to complete and augment the provisions of enacted law through interpretation. See § 32.3*(a)*(vi) supra.
[8] Michelman 'A Constitutional Conversation' (supra) at 483.
[9] Ibid at 485.

> On the constitutional level, legal interpretation succeeds by construing legal words, intentions and purposes, yes, but by construing them decidedly in the light of consequences, and by appraising consequences decidedly in the light of an emergent national sense of justice to which the interpretations are themselves, recursively, contributing.

Michelman's observations provide an opportunity to reconsider the role of theories in interpretation, that is, the conventional common-law theories of statutory interpretation, emerging theories of constitutional interpretation and the undeniable affinities between the two. At least Michelman's three 'objectivist' approaches to constitutional interpretation are found among conventional common-law theories of statutory interpretation in South Africa, with perhaps contextualism — that is, determination of meaning by reading words or language or a provision as a whole *in context*[1] — as a local contender to be added to the list.[2] Judicial flirtation with decidedly 'non-objectivist' approaches to statutory interpretation (such as instrumentalism and moralism) has been rare in South Africa since, as was shown before,[3] the interpretation of enacted law has traditionally been thought of as an apolitical and morally neutral procedure. It was also shown previously how some legal scholars have advocated seemingly (in Michelman's terms) 'less objectivist' approaches to statutory (and, by implication, also constitutional) interpretation, notably *the delegation theory* and other *judicial or free theories* of interpretation.[4] These theories recognize and justify *judicial activism*, premised on the belief that judges have a creative role to play in the realization or concretization of enacted law. Constitutionalism and constitutional interpretation, associated with increased and increasing demands on the judiciary to make and to help ensure the implementation of policy decisions, have thus been conducive to the onset and growth of such 'non-objectivist' theories.[5]

Since a theory is explanatory and justificatory at the same time, a legal interpreter's theory of interpretation may cause him or her to relate, intentionally or intuitively, issues of interpretation in a concrete situation, to broader questions regarding, among others, the role and function of language in law and the possibility of justice through the reading and realization of written law. An interpretive theory also situates an interpreter's interpretive endeavours in a legal and constitutional tradition with its prevailing understandings of matters of interpretive consequence, such as the nature and division of power (as reflected in, for example, *trias politica*) and the role appropriate to authorized (judicial and other) interpreters of the law in the system.[6] An approach to interpretation is premised

[1] See § 32.3*(a)*(iv) supra.
[2] See § 32.3*(a)*(i)-(iii) and (v) supra.
[3] See § 32.3*(b)*(iii) supra.
[4] See § 32.3*(a)*(vi) supra.
[5] Note once more that in the scheme (and terminology) of the discussion in § 32.3*(a)*(vi) supra, that the 'objectivism' discussed there would probably be described by Michelman as a 'non-objectivist theory'.
[6] See § 32.2 supra.

on and shaped by theoretical assumptions about the matters just mentioned and by numerous other matters too. In constitutional interpretation these matters may, for instance, manifest in what Michelman called 'an emergent national sense of justice to which … interpretations … recursively' contribute.[1]

What a theory of constitutional interpretation is and entails can also be shown by developing the previously referred to 'path metaphor' on which Walter, Fleming and Barber[2] base their straightforward description of an interpretive approach. Someone's approach to or theory of constitutional interpretation may then be described as the intellectual path he or she follows to seek meaning from the Constitution.[3] This path is a theoretical construction, made or built of theory as explanation, and maintained by theory as justification.

When the notion of a 'theory of constitutional interpretation' is thought of as a position based on assumptions about the crucial matters previously referred to, or as the complexly constructed path just described, it becomes clear why one-word depictions and one-sentence definitions — all parading as 'theories' of or 'approaches' to constitutional interpretation — are by themselves wholly inadequate explanations or explications of and justifications for the doings that constitute 'constitutional interpretation'. Neither literalism, maintaining that the meaning of an enacted provision can and must be deduced from the very words in which the provision is couched, regardless of consequences,[4] nor intentionalism, claiming that discerning and giving effect to the real intention of a law-making author is the paramount rule of interpretation,[5] nor contextualism, making meaning crucially dependent on context,[6] can, for instance, really be *a theory* of constitutional or statutory interpretation. They can at most help determine *a theoretical position*.

(ii) *Theoretical position(s) in relation to interpretive leitmotiv(s)*

A theoretical position is constituted by the assumptions referred to above and reflected in the previously described theoretically constructed path that the constitutional interpreter travels to come to understand and implement the Constitution.[7] As Michelman correctly points out,[8] it is a constitutional interpreter's theoretical position, rather than any specific, conventional approach to constitutional interpretation on which he or she may rely, that determines interpretive outcome. Making an assumption involves making a choice. Theoretical positions on constitutional interpretation emanating from choices thus made therefore order and rank interpretive preferences — as Michelman rightly suggests.[9]

[1] Michelman 'A Constitutional Conversation' (supra) at 485.
[2] Murphy, Fleming & Barber (supra) at 383.
[3] Ibid at 383.
[4] See § 32.2*(a)*(i) supra.
[5] See § 32.2*(a)*(ii) supra.
[6] See § 32.2*(a)*(iv) supra.
[7] See § 32.3*(c)*(i) supra.
[8] Michelman 'A Constitutional Conversation' (supra) at 484-485. See also § 32.3*(c)*(i) supra.
[9] Ibid at 484-485. See also § 32.3*(c)*(i) supra.

A theoretical *position*, which is a theoretical *disposition* at the same time, cannot just be rationally or even consciously decided on, and also emanates from, for instance, intuitive perception. Covert and subconsciously held theoretical assumptions, as a matter of fact, precisely because of an interpreter's uncritical unawareness of them, often have a more decisive impact on interpretive outcome than overt and consciously reasoned assumptions.[1] 'Jurists in practice' (including judicial officers), in particular, do not habitually devote time to reflect specifically on (and explain or justify) their theoretical positions, which mostly become visible in the arguments they use to justify specific interpretive outcomes.[2] A theoretical position may nonetheless be reflected on, contested, defended, explained and (consciously) changed. It may also, to at least some extent, be shared with others although, due to the uniqueness of each individual, no two theoretical positions can be identical in detail.

A judiciary as a whole therefore does not 'decide' on a particular theoretical position on constitutional or statutory interpretation, and the theoretical position of a particular judge may, in fact, vary from case to case, depending on the exigencies of each case and the measure of latitude that the law and the canons of construction allow for deciding the specific issues involved in that case.[3] However, it is possible that, within a given jurisdiction or tradition, a certain kind of theoretical impulse can become so dominant that, in time, it falls into place as a template for positions on and approaches to interpretation.[4] As was shown before, *literalism-cum-intentionalism*, blending *literalism* and *intentionalism* into an approach with elements of both, has for a long time held such a dominant position in statutory interpretation in South Africa,[5] with *contextualism* and *purposivism* mostly in auxiliary roles.

Since the advent of constitutional democracy in South Africa, the dominant discourse suggests that purposivism has displaced literalism-cum-intentionalism as template for theoretical positions on constitutional (and statutory) interpretation. The present discussion again questions the soundness of this proposition, challenging the misapprehension that reliance on a single preferred approach to constitutional or statutory interpretation can eventually 'make all the difference'. Since 1994 it has mainly been 'an emergent [new] national sense of justice' (à la

[1] See S Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Legal Studies* (1989) 358.

[2] Ibid at 483-485.

[3] See, for example, *Public Carriers Association & Others v Toll Road Concessionaries (Pty) Ltd & Others* 1990 (1) SA 925, 943C–944A (A).

[4] See L du Plessis 'The (Re-)systematization of the Canons and Aids to Statutory Interpretation' (2005) 122 *South African Law Journal* 591. (Showed how such a template position in South Africa occasioned the development of a hierarchical order of primacy involving the canons of and aids to statutory interpretation.)

[5] See § 32.2*(a)*(iii) supra.

Michelman)[1] — and not any particular interpretive approach — that has navigated constitutional and statutory interpretation in South Africa along previously unexplored paths.

Because a theoretical position is so complex, a full picture of it can hardly be given, and it is most often recognized, quite piecemeal, as it were, by effects or consequences in which it manifests (aspects of) itself, and not as a holistic picture of some sort. Theoretical positions, or aspects of them, can and do, for instance, manifest in *interpretive leitmotivs* detectable as recurring keynote or defining ideas, motifs or *topoi* lending direction to specific instances of constitutional interpretation. The same leitmotiv can be a manifestation of aspects of different theoretical positions on constitutional interpretation, but it is hardly conceivable that contradicting or conflicting theoretical positions will manifest in a significant number of similar or corresponding leitmotivs.

Conventional approaches to the interpretation of enacted law, such as literalism-*cum*-intentionalism or purposivism, are not really *leitmotivs* because they do not present ideas. The two interpretive leitmotivs that will be discussed below, namely, *transitional* and *transformative constitutionalism*, are of purposive purport, conceiving of the objectives they pursue as directional ideas. Leitmotivs moreover often manifest as images in metaphors,[2] as is apparent from the two variants of transitional constitutionalism in South Africa. To the one the Constitution is a bridge to a culture of justification. The other works with the Constitution as *memory and promise*, picturing it as both a *memorial* and a *monument*. And as will be seen in due course, transformative constitutionalists criticize the 'bridge version' of transitional constitutionalism with an alternative depiction and explanation of the very metaphor!

(iii) *Transitional constitutionalism*

The Interim Constitution concluded with an unusual Postamble (or Postscript), an exhibition of efflorescent language, entitled *National Unity and Reconciliation* and decreed[3] to form part of the substance of the Constitution. The Postamble anticipated that the Constitution would provide 'a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'. It furthermore verbalized a quest for

[1] Michelman 'A Constitutional Conversation' (supra) at 477, 485.

[2] See on the significance of metaphoric reasoning in law, especially in relation to transformative constitutionalism as interpretive leitmotiv, H Botha 'Metaphoric Reasoning and Transformative Constitutionalism (Part 1)' 2002 *Tydskrif vir die Suid-Afrikaanse Reg* 612 and H Botha 'Metaphoric Reasoning and Transformative Constitutionalism (Part 2)' 2003 *Tydskrif vir die Suid-Afrikaanse Reg* 20.

[3] IC s 232(4).

'the pursuit of national unity, the well-being of all South African citizens and peace' requiring 'reconciliation between the people of South Africa and the reconstruction of society'.[1]

The Postamble found its way into the Interim Constitution as an attempt to break a deadlock in the negotiations. The deadlock turned on the constitution-makers' inability to agree, in precise terms and in time for the adoption of the Constitution, on how to deal with 'gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge' inherited from colonial and apartheid rule.[2] The Postamble thus envisaged, in broad terms, the eventual adoption of cut-off dates and 'mechanisms, criteria and procedures' for amnesty 'in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past'.[3] The Promotion of National Unity and Reconciliation Act[4] was subsequently enacted, stipulating conditions for such amnesty, and laying down the relevant application procedures.

Much of the spirit and tenor of the Postamble has survived in the Preamble to the FC — with implications for the latter as a possible source of transitional constitutionalism as interpretive leitmotiv.[5]

(aa) The Constitution as bridge: Justificatory constitutionalism

'What is the point of our Bill of Rights?' Etienne Mureinik asked in one of the earliest commentaries on South Africa's first Bill of Rights.[6] He then set out to answer this question, exploring the bridge metaphor in the Postamble to the Interim Constitution as follows:[7]

[1] It continued as follows:

> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These aims can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.

[2] For more on the nature of the compromise the parties reached, see D Dyzenhaus *Truth, Reconciliation and the Apartheid Legal Order* (1998) 1-6.

[3] The following guidelines were laid down:

> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

[4] Act 34 of 1995.

[5] See § 32.4*(c)*(i)(aa) infra.

[6] IC Chapter 3.

[7] E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31, 31-32.

> If this bridge is successfully to span the open sewer of violent and contentious transition, those who are entrusted with its upkeep will need to understand very clearly what it is a bridge from, and what a bridge to. What the bridge is from is a culture of authority . . . an indispensable nursery for the feature of apartheid that most people would consider its defining characteristic: the reduction to law of racial discrimination — differentiation on the ground of race that is not justified. Without a culture of authority it is difficult to imagine how its gardeners could have cultivated the forest of apartheid statutes whose most distinctive feature was their want of justification.
>
> If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification — a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.
>
> If the Constitution is to be a bridge in this direction, it is plain that the Bill of Rights must be its chief strut. A Bill of Rights is a compendium of values empowering citizens affected by laws or decisions to demand justification . . . The point of the Bill of Rights is consequently to spearhead the effort to bring about a culture of justification. That idea offers . . . a resource with which to resolve the interpretive questions that it [Chapter 3 of the Interim Constitution] raises.

Justification and transition-as-a-bridge are not intrinsically related, but combining them presented an unusually powerful image of the 'culture of justification' that many — like Mureinik — believed to be the quintessence of the new constitutional dispensation in South Africa. To this day Mureinik's articulation of (especially) what 'the new Constitution' *clearly* 'must be a bridge to' has been cited with approval and appreciation by South African courts and the Constitutional Court in particular,[1] and has thereby indeed established itself as an interpretive leitmotiv of consequence, more aptly depicted as *justificatory* rather than *transitional* constitutionalism.

Many administrative law issues that fall within the precincts of 'the culture of justification' have since 30 November 2000 been subject to the regulative authority of the Promotion of Administrative Justice Act.[2] PAJA is original

[1] Here is a list of examples, by no means complete, spanning the constitutional case law between 1994 and 2007: *Qozoleni v Minister of Law and Order* 1994 (3) SA 625, 634E-F (E), 1994 (1) BCLR 75, 80G-81D (E)('*Qozoleni*'); *Phato v Attorney-General, Eastern Cape & Another; Commissioner of South African Police Services v Attorney-General, Eastern Cape & Others* 1995 (1) SA 799, 813H-I (E), 1994 (5) BCLR 99, 111I-J (E); *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 25; *The Pharmaceutical Manufacturers Association of SA. In re: The Ex parte Application of the President of the RSA* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC)('*Pharmaceutical Manufacturers*') at para 85 n 107; *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2007 (1) BCLR 47 (CC)('*Matatiele*') at para 100; *Union of Refugee Women & Others v Director: Private Security Industry Regulatory Authority & Others* 2007 (4) SA 395 (CC), 2007 (4) BCLR 339 (CC) at para 36. Mureinik's seminal insights, as articulated in the quotation above, manifest a particular view of the justificatory and evaluative significance of judicial review more fully explained by David Dyzenhaus in a posthumous tribute to Professor Mureinik. See D Dyzenhaus 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 *South African Journal on Human Rights* 11.

[2] Act 3 of 2000.

legislation required by FC s 33(3) and enacted to give specific effect to the fundamental right to administrative justice entrenched in the Bill of Rights.[1] Some Constitutional Court judgments have, however, also contributed substantially to establish a culture of justification as the benchmark for administrative action.

Perhaps the finest example of justificatory constitutionalism appears in *Pharmaceutical Manufacturers Association of SA & Another: In re ex parte President of the RSA & Others*.[2] The Constitutional Court, for instance, proclaimed the essential unity of the Constitution and administrative common law in dealing with the exercise of public power.[3] It rejected a suggestion — of the Supreme Court of Appeal in *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennie Group Ltd trading as Renfreight*[4] — that any common law from an era predating the onset of a constitutional culture of justification could survive undisturbed. The judgments in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others*[5] and *Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as* Amicus Curiae*)*,[6] duly accounting for the effects of the Promotion of Administrative Justice Act, have also contributed significantly to the culture of justification in administrative law.

Justificatory constitutionalism is of course not only of consequence in relation to administrative justice. The Constitutional Court's judgment in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*[7] developed a set of guidelines for determining when a deprivation of property is arbitrary and hence *unjustified*. Despite academic criticism, *FNB* looks on its face to be the kind of contribution to justificatory Mureinik must have anticipated when he spelt out his understanding of crossing the bridge of transition in South Africa. Adjudicative determination of the issue of arbitrariness was overdue and necessary for the peace of mind of propertied beneficiaries under FC s 25 (the property clause) and to promote legal certainty. The advantages of this landmark judgment have, however, been eroded to some extent in *Mkontwana v Nelson Mandela Metropolitan Municipality & Another; Bissett & Others v Buffalo City Municipality; Transfer*

[1] FC s 33(1).
[2] 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC).
[3] See also §§ 32.4*(c)*(i)(ff) and 32.5*(b)*(iii)(bb) infra. The judgment predates the commencement of the Promotion of Administrative Justice Act.
[4] 1999 (8) BCLR 833 (CC), 1999 3 SA 771 (SCA).
[5] 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC).
[6] 2006 (1) BCLR 1 (CC), 2006 (2) SA 311 (CC)('*New Clicks*').
[7] 2002 (7) BCLR 702 (CC), 2002 (4) SA 768 (CC)('*FNB*') at para 100.

Rights Action Campaign & Others v MEC for Local Government and Housing, Gauteng & Others.[1] The flexible and context-sensitive manner in which the *FNB*[2] guidelines, as conceptual distinctions, were converted into a multi-factor balancing test in *Mkontwana*[3] probably paved the way for deviation from them in *Mkontwana*.[4]

If *FNB* has the potential to ensure property owners' peace of mind,[5] then the Constitutional Court judgment in *Alexkor Ltd & Another v The Richtersveld Community & Others*,[6] and the preceding judgment of the Supreme Court of Appeal in the same case,[7] certainly have the potential to kindle the aspirations of the landless, prospective beneficiaries of FC s 25 – especially communities and individuals dispossessed under a colonial and apartheid culture of authority.[8] The *Richtersveld* judgments have gone a long way in bringing the common law on indigenous title within the ambit of justificatory constitutionalism — just as *FNB* has accomplished a similar end with respect to Roman-Dutch based common law of property.[9]

A high threshold of justification applies when legislative and administrative action, likely to compromise the rudiments of constitutional democracy, is up for constitutional review. In the course of such review South Africa's two highest courts have emerged as staunch guardians of, for instance, participatory democracy in law-making. Both the Supreme Court of Appeal, in *King & Others v Attorneys Fidelity Fund Board of Control & Another*,[10] and the Constitutional Court, in *Doctors for Life v Speaker of the National Assembly & Others*[11] and *Matatiele Municipality & Others v President of the Republic of South Africa & Others*,[12] required the National Assembly's meticulous compliance with its constitutional obligations[13] to facilitate public involvement in its legislative and other processes, and in its committees, and to conduct its business in an open manner. The absence of thorough compliance with these obligations, it was held, renders legislative action

[1] 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC)('*Mkontwana*'). For a critical discussion of this case, see AJ van der Walt 'Retreating from the *FNB* Arbitrariness Test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng* (CC)' (2005) 122 *South African Law Journal* 75.

[2] *FNB* (supra) at para 100.

[3] See T Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal for Constitutional Law* (forthcoming) and § 32.3*(c)*(v) infra.

[4] See AJ van der Walt 'Retreating from the *FNB* Arbitrariness Test Already?' (supra) at 75-89.

[5] *FNB* (supra) at para 100.

[6] 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC).

[7] *Richtersveld Community & Others v Alexkor Ltd & Others* 2003 (6) BCLR 583 (SCA). See, in particular, the Land Claims Court judgment *Richtersveld Community v Alexkor Ltd* 2001 (3) SA 1293 (LCC).

[8] See Mureinik 'A Bridge to where?' (supra) at 32.

[9] *FNB* (supra) at para 100.

[10] 2006 (1) SA 474 (SCA), 2006 (4) BCLR 462 (SCA)('*King*').

[11] 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC)('*Doctors for Life*').

[12] *Matatiele* (supra).

[13] FC s 59(1).

and legislation ensuing from it null and void.[1] *African Christian Democratic Party v The Electoral Commission & Others* can also be described as an instance of guarding the rudiments of popular democracy — in this instance, however, not by strictly enforcing procedural requirements, but by relaxing them (through purposive interpretation) in order to 'promote enfranchisement rather than disenfranchisement and participation [in] rather than exclusion' from municipal elections.[2]

(bb) The Constitution as memory and promise: memorial constitutionalism

A constitution both *narrates* and *authors* a nation's history. A constitution as *memory*[3] and *promise* memorialises the past, but is also a monument triumphantly shedding the shackles of what went before, and setting the nation free to take responsibility for the future. Memorial constitutionalism, like justificatory constitutionalism, is *transitional constitutionalism*, and in particular then the *transitional constitutionalism of memory*, in a South Africa (still) coming to terms with its notorious past, but eventually also a constitutionalism of *promise* along the way of (still) coming to grips with the future. The 'still' in brackets suggests that the transition cannot be likened to a non-recurrent crossing of a bridge, from a culture of authority to a culture of justification, for instance, and this means that, in vital respects, memorial constitutionalism comes closer to transformative than to justificatory constitutionalism — as will appear from the discussion below.[4]

Memorial constitutionalism as interpretive leitmotiv calls attention to and affirms the power of the unspectacular, non-monumental Constitution as vital (co-)determinant of constitutional democracy in the South Africa of memory and promise. The memorial Constitution does not replace the monumental Constitution, but co-exists with it. The image of the Constitution as monument and memorial emerged from legal scholars' engagement with the work of the South African philosopher, Johan Snyman, on the politics of memory.[5] Memorial

[1] The Supreme Court of Appeal in *King* (supra) could of course not make a declaration of invalidity because adjudication of the National Assembly's fulfilment of this obligation is, in terms of FC s 167(4)(e), within the exclusive jurisdiction of the Constitutional Court.

[2] *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC)('*African Christian Democratic Party*') at para 23.

[3] For an exploration of the 'constitution as memory metaphor', see M Bishop 'Transforming Memory Transforming' in W le Roux & K van Marle (eds) *Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v President of South Africa* (2007) 33.

[4] See § 32.3*(c)*(iv) infra.

[5] See J Snyman 'Interpretation and the Politics of Memory' (1998) *Acta Juridica* 312, 317-321. For South African legal scholars' engagement with the work and ideas of Snyman, see L du Plessis 'The South African Constitution as Memory and Promise' (2000) 11 *Stellenbosch Law Review* 385; LM du Plessis *The South African Constitution as Monument and Memorial, and the Commemoration of the Dead* in R Christensen, & P Bodo (eds) *Rechtstheorie in rechtspraktischer Absicht: Freundesgabe zum 70 — Geburtstag von Friedrich Müller* (2008); K van Marle 'Lives of Action, Thinking and Revolt — A Feminist Call for Politics and Becoming in Post-apartheid South Africa' (2004) 19 *SA Public Law* 605, 607-612; D Cornell & K van Marle 'Exploring *Ubuntu*: Tentative Reflections' (2005) 5(2) *African Human Rights Journal* 195, 202-203; W le Roux 'Undoing the Past through Statutory Interpretation: The Constitutional Court and Marriage Laws of Apartheid' (2005) 26 *Obiter* 526, 529-530.

constitutionalism kindles the hope that duly *and simultaneously* acknowledged, the co-existence of the Constitution's monumental and memorial modes of being — which, at a glance, may seem to be at odds — will be mutually inclusive, constructive and invigorating.

Monuments and memorials have memory in common, but exercise it in distinct ways: a monument celebrates; a memorial commemorates. The difference in the (potential) meaning(s) of the two may be subtle, and some dictionaries may even indicate that 'celebrate' and 'commemorate' are synonyms. However, according to memorial constitutionalists they are not really or, at least, not exactly synonymous. Heroes and achievements can be celebrated or lionised. The same does not apply to anti-heroes, failures and blunders: they may be remembered, but they can hardly be celebrated. 'Commemorate' is a feasible synonym for 'remember', while 'celebrate' is an exultant or jubilant mode of remembering. The closeness in meaning of 'celebrate' and 'commemorate' need not be lamented, however. On the contrary, their actual connotations allows for their co-existence. The German *Denkmal* and *Mahnmal* capture the same tension. A *Denkmal* can celebrate (and may even commemorate), but a *Mahnmal* inevitably also warns (and may even castigate). Monuments and memorials are aesthetic creations, and memorial constitutionalism contends that a constitution may, with interpretive consequences, be thought of as such a creation too. Memorial constitutionalism as both transitional and aesthetic constitutionalism manifests what Wessel le Roux refers to as 'the aesthetic turn in post-apartheid constitutional rights discourse':

> [T]he aesthetic turn in post-apartheid constitutionalism could be interpreted as a direct response to the need for a non-scientific and non-formalised style of public reasoning. That the rejection of science as a model of constitutional law should have resulted in a turn towards art (traditionally regarded as the direct opposite of science) is not at all surprising.[1]

The Final Constitution as product of intense constitution-making deliberations over a period of more than three years can, its plain language notwithstanding, hardly be described as 'a modest text'. Its predecessor, the Interim Constitution, was not such a text either. Both constitutions are monumental 'linguistic data'[2] and it is possible to 'tour their provisions', awestruck by how they evince a diverse and divergent South African nation's most extraordinary, *peaceful* transition to a *non-racial* democracy after more than three centuries of *oppressive racial and racist aristocracy*. The unprecedented Postamble to the Interim Constitution verbalized this transition in monumental language[3] and was then echoed (with interpretive implications) by the Preamble to the Final Constitution.[4] The monumental

[1] W le Roux 'The Aesthetic Turn in the Post-apartheid Constitutional Rights Discourse' 2005(1) *Tydskrif vir die Suid-Afrikaanse Reg* 101, 107.
[2] See § 32.1*(d)* supra (Constitution as linguistic datum.)
[3] See § 32.3*(c)*(iii) supra.
[4] See § 32.4*(c)*(i)(aa) infra.

flare of the Final Constitution furthermore manifests in its affluent enactment of operational democratic and constitutional values meant to help ensure the continued existence of constitutional democracy in South Africa.[1]

Some monumental constitutional judgments have also been handed down by the Constitutional Court, the Constitution's own most significant new creature. Foremost among these decisions was the epoch-making *S v Makwanyane & Another*[2] in which the each of the 11 judges handed down a separate judgment, but all unanimously declared capital punishment unconstitutional.[3] These judgments were remarkably imbued with value statements dealing not only with the rudiments of human rights as enshrined in South Africa's first Bill of Rights, but also with global human rights standards.[4] A number of other remarkable judgments too have, on the superior strength of the nation's monument to its newfound reconciliation, given short shrift to the remnants of long-cherished, undemocratic preconceptions and prejudices, such as denying accused persons access to police dockets,[5] reverse onuses in criminal proceedings,[6] an obligation to answer incriminating questions during liquidation proceedings,[7] civil imprisonment,[8] stereotyped gender roles[9] and parental[10] roles, as well as anti-gay and anti-lesbian bigotry.[11] On the strength of the entrenchment of rights of access to certain commodities and services mentioned in FC ss 26 and 27, the South

[1] See § 32.4*(c)*(i) infra. FC s 1 decrees and depicts the (new) polity as 'one sovereign, democratic state', and then continues to locate human dignity, equality and freedom (among others) at its foundation. § 32.4*(c)*(i)(bb) infra. FC s 7 delineates the features and functions of the Bill of Rights (§ 32.4*(c)*(i)(cc) infra), while FC s 36 prescribes the value-sensitive manner in which constitutional rights may be limited (§ 32.4*(c)*(i)(ee) infra). Section 39, with similar sensitivity, marks the way to interpreting these rights (§ 32.4*(c)*(i)(ff) infra). Chapter 3 verbalises the high values of co-operative government (§ 32.4*(c)*(i)(gg) infra) and Chapter 10 those values that ensure proper public administration (§ 32.4*(c)*(i)(hh) infra).

[2] *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC)('*Makwanyane*').

[3] For further discussion of this case, see § 32.3*(e)*(iv) infra.

[4] For a discussion of the monumental moments of *Makwanyane*, see 32.3*(e)*(iv) infra.

[5] See *Shabalala v Attorney-General, Transvaal* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC)('*Shabalala*').

[6] See *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC)('*Zuma*').

[7] See *Ferreira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)('*Ferreira*').

[8] See *Coetzee v Government of the Republic of South Africa, Matiso & Others v Commanding Officer, Port Elizabeth Prison & Others*('*Matiso 2'*) 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC).

[9] See *Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 11 1489 (CC)(Sachs J). See also AJ van der Walt & H Botha 'Coming to Grips with the new Constitutional Order: Critical Comments on *Harksen v Lane'* (1993) 13 *SA Public Law* 16, 33.

[10] See *Fraser v Children's Court, Pretoria North & Others*, 1997 (2) SA 261 (CC), 1997 (6) BCLR (CC). But see *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC).

[11] See *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)(*National Coalition 1999*); *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC)('*National Coalition 2000*').

African Constitutional Court has also, with monumental flair, flexed its judicial muscle, making it clear to organs of state that their failure to provide these basic services will result in more than just a judicial slap on the wrist.[1]

A democrat and constitutionalist, recalling the oppression of the past, can hardly be cynical about the monumental achievements of South Africa's two supreme constitutions since 1994. But he or she also dare not become complacent about these achievements. One of the key tenets of memorial constitutionalism therefore is that *while the Constitution is indisputably the supreme law of the Republic of South Africa,*[2] *it is not (also) an overarching, all-encompassing, super law*. The restrained Constitution is the Constitution as memorial — a written law-text that does not profess to constitute the moral high ground of justice all by itself; instead it reminds the nation of their pledge (and provides them with appropriate legal means) to achieve social justice. The *human obligation* to do justice cannot, however, ultimately be assigned to any law-text, not even the supreme Constitution, and memorial constitutionalism as interpretive leitmotiv is a reminder, first, that constitutional minimalism[3] and constitutional absolutism are equally unacceptable, and, second, that, on balance and in the long run, restrained constitutionalism is the most propitious mode of deference to constitutional supremacy.

As *Mahnmal* constitutionalism, memorial constitutionalism has resounded, in post-apartheid South Africa, the '*Nicht wieder!*' ('Never again!') that inspired constitutionalism in a post-Holocaust Germany too.[4] On the strength of *Mahnmal* constitutionalism, human dignity as a value has gained an upper hand in our constitutional project in general, and in our constitutional equality jurisprudence in particular. The 'never again!' motif, for instance, underlies groundbreaking judgments that interrogate issues of identity and difference. A resoluteness not to repeat the injustices of the past has resulted in the affirmation of the status and dignity of several vulnerable groups and categories of persons who, under the culture of apartheid authority, had been marginalized and stigmatized for their non-compliance with 'mainstream' morality and its preconceptions about how societal life is best organized. Emblematic of the Court's affirmative endeavours

[1] See *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)('*Grootboom*'); *Treatment Action Campaign & Others v Minister of Health & Others (1)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC)('*TAC*'). For a fuller discussion of these cases, see § 32.3*(c)*(iv) infra.

[2] According to FC s 2: 'law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

[3] Whether minimalist constitutionalism (as opposed to constitutional minimalism) is acceptable, is a different question raised by, amongst others Iain Currie. See I Currie 'Judicious Avoidance' (1999) 15 *South African Journal on Human Rights* 138. The concept of 'minimalist constitutionalism' will briefly be looked at in § 32.5*(b)*(iii)(bb) infra.

[4] L du Plessis 'German *Verfassungsrecht* under the Southern Cross: Observations on South African-German Interaction in Constitutional Scholarship in recent History with particular reference to constitution-making in South Africa' in F Hufen (ed) *Verfassungen–Zwischen Recht und Politik: Festschrift zum 70–Geburtstag für Hans-Peter Schneider* (2008) 531.

is the confidence and forthrightness with which, unperturbed by the conventional public-private divide, it has addressed deficiencies in laws regulating intimate relationships.[1]

Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others, the Constitutional Court judgment in which the statutory and common-law exclusion of same-sex life partnerships from the ambit of 'marriage' was held to be unconstitutional, constitutes a high-water mark in the evolution of constitutional jurisprudence on issues of identity and difference. Sachs J, handing down the majority judgment, erected the following verbal memorial to 'the right to be different':

> The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.[2]

Commenting on religious objections to gay marriages, the Court thought that

> [t]he hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and life styles in a reasonable and fair manner.[3]

In *MEC for Education: KwaZulu Natal & Others v Pillay & Others,* Langa CJ emphasized that our constitutional project does not only affirm diversity, but actively promotes and celebrates it:

> [O]ur Constitution does not tolerate diversity as a necessary evil, but affirms it as one of the primary treasures of our nation[4] . . . [N]either the Equality Act[5] nor the Constitution require (*sic)* identical treatment. They require equal concern and equal respect.[6]

[1] Landmark judgments that come to mind in this regard are *National Coalition 2000* (Court read words into a statutory provision to extend immigration benefits enjoyed by 'spouses' of South African nationals to same sex life-partners); *Satchwell v President of the Republic of South Africa & Another* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC)(Words were read into a statutory provision conferring financial benefits on a judge's 'surviving spouse' so as to extend such benefits to a same sex life-partner); *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC)('*Daniels*')(Surviving 'spouse' reaping benefits from a legislative provision for maintenance was held to include a partner in a Muslim marriage).

[2] 2006 (3) BCLR 355 (CC), 2006 (1) SA 524 (CC)('*Fourie*').

[3] *Fourie* (supra) at para 95.

[4] Ibid at para 92.

[5] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

[6] 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC)('*Pillay*') at 103.

The Chief Justice's assertions amount to proclaiming, with some *monumental* flair, a concern stemming from *memorial* constitutionalism. Thus, the Constitution as monument and the Constitution as memorial can profitably co-exist if the Constitution as monument is not allowed to overpower the Constitution as memorial, and the Constitution as memorial does not enervate the Constitution as monument.

The restrained Constitution as memorial, infused with moral values such as *ubuntu*, has vindicated 'very ordinary citizens' in low profile (non-Constitutional Court) cases, upholding and/or restoring their dignity in an unspectacular but most powerful way. Thus in *Du Plooy v Minister of Correctional Services & Others*[1] the Pretoria High Court, exploring the memorial potential of the Constitution to protect the 'underdog', ordered the release of a prisoner sentenced to 15 years' imprisonment for armed robbery, when within the first year of his imprisonment it came to light that his chronic myeloid leukaemia was developing into acute leukaemia. He was terminally ill and his life expectancy was drastically shortened. He also needed palliative care which was not available in prison. Finding the prison authorities' reasons for not wanting to release the applicant irrational and unreasonable, Patel J remarked as follows:

> The applicant is critically ill. He is dying. Imprisonment is too onerous for him by reason of his rapidly deteriorating state of health to continue remaining in jail and to be treated at a prison hospital. What he is in need of is humanness, empathy and compassion. These are values inherently embodied in Ubuntu.[2]

In *Scott-Crossley & Others v National Commissioner of South African Police Service & Others*[3] the applicants, charged with murder, sought to stay the burial of the remains of a deceased who they allegedly assaulted and whose body they then threw to a pride of white lions in an encampment. What remained of the deceased for the funeral were a skull, broken bones and a finger. The applicants claimed that the funeral had to be postponed because they needed a pathologist to examine those remains in order to assess forensic evidence eventually to be adduced at the criminal trial. Members of the deceased's extended family opposed the application, claiming that in view of certain ritual preparations that had already been made, their custom and belief impelled the burial of the deceased at the precise date, time and place that had been determined for this purpose before the application was brought. Looking at the situation clinically, the Court had to weigh the religious and cultural rights and beliefs of the family against the applicants' right to a fair trial.[4] Patel J found that, in the circumstances of the case, both the

[1] [2004] 3 All SA 613 (T). For a discussion of this judgment as an instance of memorial constitutionalism, see L du Plessis 'Die Grondwet as Gedenkteken en die Werkdadigheid van onopvallende, grondwetlike Kragte' (2005) 70 *Koers* 535.

[2] *Du Plooy v Minister of Correctional Services & Others* [2004] 3 All SA 613 (T)('*Du Plooy*') at para 29.

[3] Ibid.

[4] As intimated previously, it was actually not really necessary for the court to make a finding in this regard because it had already found against the applicants on the issue of urgency. However, Patel J did express a view on the constitutional issue.

deceased's and his relatives' right to human dignity trumped the applicants' right to a fair trial, and he advanced *ubuntu* as the *raison-d'être* for the refusal of the application, explaining that:

> *Ubuntu* embraces humaneness, group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, humanity, morality and conciliation.[1]

The Court's judgment sought to reclaim humanity for the deceased (posthumously, as it were) and for his extended family, in spite of (and beyond) the gruesome events which reduced him, as a human being, to a plastic bagful of bones, and bereft his family in a most barbaric way. The Court did this by invoking their right to human dignity — infused with *ubuntu* — in a powerful yet unspectacular (memorial) manner. The applicants' right to a fair trial was taken seriously, but not treated as an entitlement of monumental proportions overpowering the deceased's and the family's rights from beginning to end.[2]

(iv) *Transformative constitutionalism*

Some critical legal scholars have questioned justificatory constitutionalism's use of the bridge metaphor to depict transition as a one-off, linear progression from 'the old dispensation' to 'the new', and thus from a culture of authority to a culture of justification. André van der Walt contends for a metaphor perceiving law, as a system of tension, to be a bridge which links a concept of reality to an imagined alternative:

> [T]he bridge metaphor . . . allows for another interpretation where the bridge is not simply an instrument for getting out of one place and into another, but an edifice that is inherently related to the abyss which it spans. Here, the focus is not on the two spaces on either side of the abyss, but on the abyss itself — the bridge is functionally and inherently linked to and obtains its significance from the abyss beneath it, so that the bridge is not a temporary instrument for a single crossing, one way, but allows and invites multiple crossings, in both directions, since there is no inherent value attached to being one side of the bridge rather than the other. In this alternative interpretation of the bridge metaphor the danger is to stay on one side, while the bridge allows us to connect one side with the other.[3]

Wessel le Roux adds that it is not the bridge itself which is significant, but the act of bridging, of linking the past and the future, reality and imagination, in order to create new ideas in the present.[4] Memorial constitutionalism as *transitional*

[1] Ibid at para 18. As pointed out previously, the word 'ubuntu' appeared in the Postamble to South Africa's Interim Constitution. It was used there to buttress the contention that a new South Africa required a commitment to national reconciliation and a desire — through mutual understanding – to overcome the atrocities and the divisions of the past. See § 32.3(c)(iii) supra.

[2] See, for example, *Du Plooy* (supra) at paras 11-13 for the court's consideration of this right and a discussion of the possibilities for realising it for purposes of the criminal trial.

[3] AJ van der Walt 'Dancing with Codes — Protecting, Developing and Deconstructing Property Rights in a Constitutional State' (2001) 118 *South African Law Journal* 258, 295-296.

[4] W le Roux 'Bridges, Clearings, Labyrinths: The Architectual Framing of Post-apartheid Constitutionalism' (2004) 19 *SA Public Law* 629, 634.

constitutionalism of memory and promise makes very much the same point: South Africa is *still* coming to terms with its notorious past along the way of *still* getting to grips with the future.[1] The past cannot and should not be left behind — there is in other words no one-off crossing of the bridge — and the promise of the future gains much of significance from engagement with the past.[2]

Michael Bishop calls the bridge that Van der Walt and Le Roux metaphorically envision, 'a transformative bridge', and explains the significance of this bridge as follows:

> [V]an der Walt and le Roux offer a space in which dialogue and transformation are truly possible, in which new ways of being are constantly created, accepted and rejected and in which change is unpredictable and constant. I would call this a transformative bridge because it envisions constant change and re-evaluation without end, rather than a move from one point to another … [T]he transitional bridge is a path, while the transformative bridge is a space.[3]

What emerges from the discussion so far is that *transformative constitutionalism* has the potential to affect constitutional (and, more generally, legal) interpretation profoundly and comprehensively, steering, as leitmotiv, both the interpretive mindset (also read: theoretical positions) and the interpretive style (also read: *modus operandi*) of especially judicial interpreters of the Constitution in an irrevocably new direction.[4] South Africa's Constitution is furthermore thoroughly transformative in character and, as was pointed out earlier, in FC s 7(2) it invites (and arguably compels) optimum realization of the rights entrenched in the Bill of Rights. According to Theunis Roux[5] there are 'two ways of going about the business of transformation':

> first, by prohibiting past practices that are deemed to conflict with society's new conception of justice, and, second, by specifying new governing norms as a guide to future conduct.

[1] See § 32.3*(c)*(iii)(bb) supra.

[2] See Van der Walt 'Dancing with Codes' (supra) at 296:

> The linear interpretation of the bridge metaphor of transformation unnecessarily restricts both the past and the future of constitutional democracy in the post-1994 era. The first fallacy is to think that we can rid ourselves of the legacy of the past as eassily as crossing a bridge, leaving our accepted version of the past (and the possibilty of other versions) behind us decisively. The second fallacy is to think that we should be eager to get to the other side of the bridge and get the whole thing behind us, leaving no room for imagining alternative futures.

[3] M Bishop 'Transforming Memory Transforming' in W le Roux & K van Marle (eds) *Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v President of South Africa* (2007) 37.

[4] On the impact of transformative constitutionalism on constitutional interpretation and adjudication, see K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146; M Pieterse 'What Do We Mean When We Talk about Transformative Constitutionalism?' (2005) 20 *SA Public Law* 155; P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351.

[5] T Roux 'Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) of the Constitution on South African Law' (2004) 121 *South African Law Journal* 466, 467.

Karl Klare, in an article on transformative constitutionalism in which he pays tribute to Etienne Mureinik, the principal proponent of justificatory constitutionalism, typifies the South African Constitution as 'post-liberal' because it simultaneously entrenches the conventional hallmarks of liberal democracy *and* the basic tenets of (and normative preconditions to) an all-out transformation of the South African society[1] — both of which are facets of what Roux would refer to as South African 'society's new conception of justice'. According to Klare,

> [t]ransformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform,' but something short of or different from 'revolution' in any traditional sense of the word. In the background is the idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the 'private sphere.'[2]

Distinctive traits of the transformative South African Constitution are said to be (among others) 'the attainment of substantive equality, the realisation of social justice, the infusion of the private sphere with human rights standards and the cultivation of a culture of justification in public law interactions'.[3] Pius Langa, South Africa's Chief Justice, in an extra-curial writing, conceives of such traits as challenges posed by the transformative Constitution, namely to procure equal access to justice for all, to educate law students who will be able to meet the demands of the kind of legal and social order envisaged in the Constitution, to rid the legal culture of its formalism and to create a climate for and, indeed, encourage national reconciliation.[4] The transformative nature of the Constitution has far-reaching implications for its interpretation and necessitates a decisive makeover of legal culture, especially as it manifests in the conventional manners (and assumptions) of adjudicative reasoning pertinent to the interpretation and implementation of enacted law. Klare writes in this regard, with reference to constitutional interpretation, as follows:

> The Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals. By implication, new conceptions of judicial role and responsibility are contemplated. Judicial mindset and methodology are *part of the law*, and therefore they must be examined and revised so as to promote equality, a culture of democracy and transparent governance.[5]

According to Klare, the drafters of the Constitution, having dramatically reworked substantive constitutional foundations and assumptions, could not

[1] Klare (supra) at 153. See also M Pieterse (supra) at 163-164.
[2] Klare (supra) at 150.
[3] Pieterse (supra) 161. See also Langa (supra) at 353-354.
[4] See Langa (supra) at 354-359.
[5] Klare (supra) at 156.

have intended the new Constitution to be interpreted with reliance on conventional legalist methods of interpretation, thereby having its transformative qualities restrained by 'the intellectual instincts and habits of mind of the traditional common or Roman-Dutch lawyer trained and professionally socialized during the apartheid era'.[1] Transformative constitutionalism thus inspires a preference for non-formalist, non-legalist and non-literalist approaches to constitutional interpretation[2] and, very importantly, it explodes the myth that a-political or non-political legal interpretation — and constitutional interpretation, in particular — is achievable.

The Constitutional Court has, however, tended to rely on a rather conventional formalist, legalist and literalist approach to constitutional interpretation.[3] Whether their conservative approach dashes Klare's hopes that transformative constitutionalism would go together with an innovative mode of constitutional interpretation, turns on whether the notion of a 'transformative constitutionalism' amounts to nothing more than, as Theunis Roux has it, 'a distinction without a difference'.[4]

The Constitutional Court judgments most directly and conspicuously inspired by transformative constitutionalism as an interpretive leitmotiv are probably those dealing with the state's obligation to implement socio-economic rights. *Government of the Republic of South Africa & Others v Grootboom & Others*[5] heralded a wholehearted judicial acceptance of the justiciability of the socio-economic entitlements enshrined in the Bill of Rights (in ss 26 and 27 in particular).[6] It furthermore emphasized competent courts' responsibility to enforce these entitlements by carefully crafting appropriate 'orders with teeth' to redress the disinclination and/or incapacity of government authorities to procure access to the commodities to which the said entitlements pertain. *Grootboom* blazed the trail for the bold and far-reaching declaratory and mandatory orders in *Minister of Health & Others v Treatment Action Campaign & Others*,[7] compelling fulfilment of the state's constitutional mandate (and obligation) to supply and administer Nevirapine to HIV-positive women and their babies.

(v) *Theoretical accounts and assessments of constitutional adjudication*

According to Jacques de Ville,[8] writing in 2000 with reference to the body of constitutional jurisprudence that had accumulated until then, the general approach

[1] Klare (supra) at 156.
[2] Whether this last proposition always holds will be considered more fully in § 32.3*(d)* infra.
[3] See § 32.5*(d)*(ii)(bb) infra.
[4] For a critique of Klare's notion of transformative constitutionalism, see T Roux 'Tranformative Constitutionalim: A Distinction without a Difference (Unpublished manuscript on file with author, paper given at Conference on Transformative Constitution: Stellenbosch University, 8 September 2008.)
[5] *Grootboom* (supra).
[6] See *Grootboom* (supra) at para 20. See also § 32.4*(c)*(i)(cc) infra.
[7] 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC)('*TAC*').
[8] JR de Ville *Constitutional and Statutory Interpretation* (2000) 41.

of the Constitutional Court (and other courts) to constitutional interpretation, at the time, was still very much 'traditionally hermeneutic' (read: 'conventionally legalist').[1] De Ville took courage, however, from seven developments in the Constitutional Court's jurisprudence on constitutional interpretation. First, 'certain judges have explicitly elaborated on the constitutional theory that informs their interpretation of constitutional provisions'. Second, 'the impact of the governmental structures on individuals and communities is taken account of'. Third, 'the interests of marginalised groups in society play a crucial role in determining the meaning of constitutional provisions'. Fourth, 'the need to attain substantive equality and eradicate deeply entrenched patterns of inequality infuses the interpretation that is given to various constitutional provisions'. Fifth, there is a willingness 'to take the perspective of those marginalised by the law in deciding whether legislative or executive action is unconstitutional'. Sixth, 'the Court undertakes interpretation (and the determination of values) with the realities of South Africa's social, economic and political circumstances and the specific context which is under scrutiny in mind'. And finally, 'the importance of the development of constitutional principles in the light of which cases should be decided is acknowledged'.[2]

De Ville's impressions, even if accurate, did not add up to a theoretically rigorous account and assessment of adjudicative performance in constitutional matters, since criteria to systematically test — and verify or falsify — his 'findings' were missing from his description. However, De Ville's tacit assumption that there are affinities between constitutional interpretation, broadly understood, and (tendencies in) outcomes of constitutional adjudication, posits a point of departure for a theoretical discourse that is indeed not absent from the academic literature on constitutionalism in South Africa.

An 'international group of scholars … studying the role of courts in new democracies' has, for instance, asked why the Land Claims Court, a 'pro-poor' institution established under the Restitution of Land Rights Act[3] to oversee the reversal of 80 years of state-orchestrated land dispossession, during the first ten years of its existence, played no really meaningful role in the land restitution process and indeed contributed to a new version of land dispossession.[4] In other words, the jurisprudence of the 'pro-poor court' has yielded 'anti-poor outcomes'. A number of judgments of the Land Claims Court were analyzed, on the assumption that the capacity of courts to act as agents of social transformation is influenced by institutional indicators, indicators of the voice of poor

[1] See § 32.3*(c)*(iv) supra.

[2] De Ville *Constitutional and Statutory Interpretation* (supra) at 41-45 (Provides elaborate reference in footnotes to sources and examples supporting his claims.)

[3] Act 22 of 1994.

[4] T Roux 'Pro-poor Court, Anti-poor Outcomes: Explaining the Performance of the South African Land Claims Court' (2004) 20 *South African Journal on Human Rights* 511, 512.

groups, resource indicators and indicators of access to justice barriers. The group concluded that the influence of legal formalism in the professional legal culture of South Africa adequately explained the anti-poor outcomes in most of the cases studied. In a climate of formalism, social transformation legislation, enacted as detailed, prescriptive rules, is more likely to be successful than legislation couched in general, discretion-conferring language.

Theunis Roux has offered an account and assessment of the adjudicative performance of the Constitutional Court, not based on a fully-fledged theory of constitutional adjudication (yet), but with all the makings of a solid and rigorous theoretical endeavour nonetheless.[1] His point is that by striking a judicious balance between principle and pragmatism in its judgments, the South African Constitutional Court has secured for itself a position of relative institutional security, even though it is lacking in public support. The court has moreover built up an enviable reputation for its 'legitimacy in the legal sense', that is the technical quality of its jurisprudence. He explains this position by analyzing some Constitutional Court judgements with reference to the grid-like (rather than linear) relationship between legal legitimacy, public support and institutional security. Theoretical analyses and explanations of this sort are particularly helpful in showing how attitudinal and strategic patterns in adjudicators' approach to various kinds of issues manifest in interpretive outcomes, and feed into 'more conventional' theoretical reflection on constitutional interpretation as 'working with the Constitution-in-writing'. The assumption that legal and, in particular, constitutional language has the inherent capacity to constrain and rein in the proliferation of meaning has become tenuous, in the light of contemporary theoretical accounts of the power of language to generate meaning. This has appeared from the demise of literalism as described in this chapter so far[2] and as will further be elaborated on under the next heading.[3] One of the principal merits of Roux's work is that it accounts for non-linguistic restraints on the proliferation of meaning in constitutional interpretation and, in particular, for socio-political restraints.[4] On the strength and limits of this aspect of his work — and on a need for further reflection — Roux has the following to say:

> [P]olitical science accounts of constitutional adjudication in new democracies have much to teach legal theorists. The limitation of such accounts, however, is that they lack any real conception of legal legitimacy, and consequently have little appreciation for the restraining influence of legal doctrine on the behaviour of constitutional courts. The problem with currently available theories of judicial review, on the other hand, is that none of them is directed at constitutional courts in new democracies. What is required, therefore, is a new account, drawing on some of the political science insights, but expressed in terms of acceptable legal theory.[5]

[1] See T Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal for Constitutional Law* — (forthcoming).
[2] See, for example, §§ 32.3*(b)*(i), (ii) and (iv) supra.
[3] See § 32.3*(d)* infra.
[4] See Roux 'Principle and Pragmatism' (supra) at Part 3.
[5] Ibid.

Elsewhere I explained that interpretations of enacted law are justified in the course of complex processes of reasoning constituting and sustained by *a matrix of interpretive legitimacy*.[1] This matrix is enriched and extended by interpretive argumentation. (It may of course also be impoverished when such argumentation is lacking or of a poor quality.) The advent of constitutional democracy and constitutional interpretation in South Africa has enriched this matrix to such an extent that interpretive reasoning and outcomes that would previously have been unacceptable are now accepted as legitimate, even if they are sometimes energetically contested. The notion of a matrix of interpretive legitimacy is on all fours with Roux's theoretical explanations for the outcomes of constitutional interpretation. It is important to note that legal doctrine — and not just legal and constitutional language — feeds into the matrix too, and has a restraining effect on interpretive outcomes, and that politics in general can have a similar effect. In Roux's account, politics, conventionally experienced as an interpretive predicament, especially in statutory interpretation,[2] has become a significant ally in enhancing our understanding of why courts — and the Constitutional Court in particular — decide controversial cases in a certain manner. A monumental judgment like *S v Makwanyane & Another*, going against public opinion and therefore lacking public support was, for instance, politically possible (without compromising the institutional security of the Constitutional Court), because the power elite within the ruling party, elected with a considerable majority in South Africa's first democratic election in 1994, supported the abolition of the death penalty.[3] Subsequently, in for instance *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others*, handed down ten years after *Makwanyane*, the Constitutional Court, according to Roux,[4] showed sensitivity to public attitudes not only in the way it justified its decision in the latter case, but also in the remedy it gave. On the other hand, in *Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as* Amicus Curiae*)*, Roux contends, it was politically feasible for the Constitutional Court to go quite boldly against the will of the ruling elite (also without putting its institutional security at risk) because, in the circumstances of that case, this option enjoyed considerable public support.[5]

In short, then, constitutional interpretation as 'working with the Constitution as written text' makes no sense in isolation from a theoretical understanding of how adjudicative performance and interpretive outcomes are shaped by factors and forces not inherent in the written text itself, but present and powerfully operative

[1] See L du Plessis *Re-Interpretation of Statutes* (2002) 126-127.
[2] See § 32.3*(b)*(iii) supra.
[3] For further reference to this case and a discussion of aspects of it, see § 32.3*(e)*(iv) infra.
[4] Roux 'Principle and Pragmatism' (supra).
[5] 2006 (1) BCLR 1 (CC), 2006 (2) SA 311 (CC). See also § 32.3*(c)*(iv) supra.

in the social and political context in which the adjudicative interpreter operates. These factors and forces to a large extent determine a constitutional interpreter's theoretical position which, in its turn, may be reflected in the interpretive approach he or she chooses and in a ranking of interpretive preferences.[1]

(d) Contemporary developments: linguistic-turn thinking and the new textualism

Meaning is not discovered in (and retrieved from) a construable text, but is made in dealing with the text.[2] In South Africa the philosophical thinking sustaining this turn — sometimes also referred to as 'reader response theory' — began to take hold only in apartheid's waning moments. *Linguistic-turn thinking* is associated with postmodernism, post-structuralism and deconstruction, all philosophical appellations (or vogue words, some would say) whose scope, contents and point are contested. Such thinking is controversial among jurists in particular, because it rigorously challenges confidence in the stabilizing ability of language to 'carry' or 'produce' perspicuous, clear and unambiguous meanings, and it saddles the legal interpreter with the ultimate responsibility to work with language in order to attribute or impute meaning to construable law — and this can make for dilemmatic choices.[3] The linguistic-turn discourse moreover focuses on the destabilizing properties of language as an all pervasive, disruptive force. Such an orientation does not sit very comfortably with jurists who count on readily construable law to procure certainty and stability, and who at any rate bemoan the esotericism of a discourse which claims the opposite and is regarded by some as divorced from reality. However, *linguistic-turn thinking* unleashes explanatory potential which, harnessed with due contemplation, offers the promise of an enhanced understanding of vexed issues of constitutional interpretation in a still youthful democracy. Therefore, though this new position has remained a contestedminority position, it has, in South African constitutional literature, asserted a presence substantial enough to belie its modest following.[4]

According to Jacques Derrida, the openness of language is an incidence of a free interplay of signifiers.[5] Linguistic *signifiers* do not signify and give meaning to things, events, concepts, phenomena *et cetera* (in other words, *signifieds*) 'out there'. Derrida rejects a *metaphysics of presence* and with that also the distinction between a

[1] FI Michelman 'A Constitutional Conversation with Professor Frank Michelman' (1995) 11 *South African Journal on Human Rights* 477, 484-485. See § 32.3*(c)*(i) and (ii) supra.

[2] See § 32.3*(b)*(ii) supra.

[3] Du Plessis *Re-Interpretation of Statutes* (supra) at xv.

[4] That it remains a contested position appears from the intellectual skirmishes it sometimes ignites. See, for example, D Davis 'Duncan Kennedy's *A Critique of Adjudication*: A Challenge to the "Business as Usual" Approach of South African Lawyers' (2000) 117 *South African Law Journal* 697, 710-711; J van der Walt 'The Quest for the Impossible, the Beginning of Politics: A Reply to Dennis Davis' (2001) 118 *South African Law Journal* 463.

[5] See P Cilliers *Complexity and Postmodernism: Understanding Complex Systems* (1998) 37-47.

signifier and the signified. Signifieds do not exist — they are not *present*. Meaning results from a complex to-and-fro movement, an action and reaction, of non-constant, non-lasting and non-metaphysical *signifiers* which all contain traces of one another. The one gives meaning to the other, but then only incompletely and provisionally so. Meaning is never, at any given point in time, a fixed and stable presence. The interplay of signifiers constitutes it over and over again, and diverts and shifts it as often. And very important: because meaning depends on the breathtaking yet incomplete interplay of signifiers, the meaning of X is always a meaning with reference to Y and Z and ABC *and therefore meaning-in-context*.

The possibilities for meaning-in-context are boundless. Language is the hyper-complex, open system that makes such a proliferation of meaning inevitable. Meaning is relativized; but language *as generator of meaning* (and only in this capacity) is not. But note: meaning is *open* and not *arbitrary*. It has a context. Moreover, language as generator of meaning is hyper-complex, but it is still a *system* and, most importantly, it is very powerful.[1] In legal interpretation, for instance, preference for one meaning to the exclusion of others may well be described as an act of violence.[2] It is important nonetheless to emphasize that the legal interpreter cannot escape the responsibility to decide on a meaning lest a failure 'to call a halt to the infinite play of the applicable text'[3] is seen as licensing a counterproductive attitude of 'anything goes'.[4] The responsibility to decide is always momentous and may even be abysmal. It can never be 'doing the obvious' because a decision-maker must cross the abyss of indecision in order to decide.[5]

Meaning (in its openness and complexity) always presents itself as (a) text. This is an insight as significant as the insight that a text does not bear or encode or transfer meaning. The conventional meanings of 'text'[6] all somehow indicate that a text is an entity with an existence of its own. A text can, for instance, be a *thematic version* of some kind with a message, tantamount to its meaning, encoded in it. This idea probably underpins the use of the word 'text' in the Final Constitution. FC s 240, for instance, provides that 'in the event of an inconsistency between different texts of the Constitution, the English text prevails'. 'Text' here refers to a rendering of the Constitution in a specific language, in other words, a version of the Constitution. The Interim Constitution required the 'new constitutional *text*' passed by the Constitutional Assembly to comply with the Constitutional Principles contained in Schedule 4 to (and to be adopted in accordance with Chapter 5

[1] See CM Yablon 'Forms' in D Cornell, M Rosenfeld & D Gray Carlson (eds) *Deconstruction and the Possibility of Justice* (1992) 258-262.
[2] See RM Cover 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601.
[3] Davis 'A Challenge to the "Business as Usual" Approach' (supra) at 711.
[4] Cilliers (supra) at 115.
[5] See J Derrida 'Justice, Law and Philosophy — An Interview with Jacques Derrida' (1999) *South African Journal of Philosophy* 279, 281. See also § 32.6 infra.
[6] Du Plessis *Re-Interpretation of Statutes* (supra) at 5-7 for a summary of these meanings.

of) that Constitution,[1] and to be certified by the Constitutional Court.[2] 'Text' here signified 'the (written) version of the Constitution agreed on' — the Final Constitution-in-writing, in other words.[3]

Conventionally, a text (preferably, but not inevitably, a *written* piece as opposed to the spoken word) is also thought of as being *textured*, in other words, coherent or structured with a 'logic' of its own. The Latin *texere*, from which 'text' derives, actually means 'to weave, braid, join or piece together in an artistic manner'.

The conventional text breathes a spirit of *authenticity* or *originality* — it is not a translation, an annotation, a commentary, marginal notes etc — and it wields authority. That is why 'text' is frequently used in connection with religious writings or passages from them or as synonym for '*text*book' which, in its turn, denotes a standard and thereby an authoritative exposition of a topic or subject. Finally, the conventional text is thought to be traceable to the creative efforts of a demonstrable author expressing his or her thoughts in and through the medium of the text.

In linguistic-turn thinking 'a book, poem, ad poster, television program, or anything else that appears to convey information' is a text: *'[A]ll* events, *all* phenomena, are texts.'[4] A text is neither an entity nor a bearer of meaning. It also does not belong to its author and its meaning is by no means tantamount to the intention of the author. Derridathus claims:

> *There is nothing outside of the text* [there is no outside text; *il n'y a pas de hors-texte*].[5]

'Text' and 'meaning' are intimately related. *Whatever is intelligible and therefore interpretable is a text*, but it does not necessarily follow that a text is an autonomous bearer of meaning even though it has most often intentionally been authored to convey meaning. An author of a text cannot control its meaning, for the text as signifier, in a complex interplay with other texts as signifiers and depending on the way it is read, incessantly *generates* or *produces* meaning. As linguistic signifier a text is also not (and cannot be) an autonomous entity built of language — even though language may be its life and soul. Since meaning is only possible in the to-and-fro play of signifiers, the latter are dependent on one another for meaning. Their traces are to be found in one another mutually and reciprocally.

> This interweaving results in each 'element' — phoneme or grapheme — being constituted on the basis of the traces within it of other elements of the chain or system. This interweaving, this textile, is the *text* produced only in the transformation of another text.[6]

[1] IC s 71(1).
[2] IC s 71(2).
[3] See § 32.1*(d)* supra.
[4] H Beard & C Cerf *The Official Politically Correct Dictionary and Handbook* (1993) 73.
[5] J Derrida *Of Grammatology* (1976) 158.
[6] J Derrida *Positions* (1981) 26.

A text itself is, in other words, just like each individual linguistic signifier that generates meaning, a compound[1] signifier in interaction with other signifiers — a writing that refers reciprocally to other writings.[2] This perception of a text has far-reaching implications for grasping what happens when jurists (and others) construe law-texts. Interpretation or construction means working with texts. Jacques de Ville argues this convincingly, contending that the use of linguistic aids in seeking to stabilize the meaning of a law-text (in order to 'understand' it) must fail, because the aids themselves are texts incessantly open to interpretation.[3] Pierre de Vos further elaborates on the consequences of this view and takes a critical look at especially the Constitutional Court's exposition, for interpretive purposes, of a 'grand narrative' of the recent history of South Africa's transition from apartheid to democracy and constitutionalism.[4]

Linguistic-turn thinking has thus yielded the new textualism that was referred to earlier in this chapter, in passing, when textualism as a conventional approach to constitutional interpretation in the USA was described.[5] Traditionally 'text' or 'textual', in discourses on legal interpretation, denotes a narrow and formalistic approach to interpretation which typically manifests in confinement of interpretive doings to an analysis of linguistic signifiers in a text-in-writing as they appear 'on paper'. These signifiers are believed to bear a predefined meaning, derived from an authoritative source such as a dictionary, and they are trusted to be able to convey that meaning because as linguistic givens they are bearers or instruments of meaning.

As appears from the discussion so far 'text' or 'textual' in linguistic-turn discourse signifies just about the opposite. Texts are open, elastic, malleable. They do not have a metaphysical presence, but exist because of and dependent upon an interplay of signifying forces, the one lending meaning to the others partly by showing traces of and partly by distinguishing itself from the others. This new textualism encourages jurists, working mainly and primarily *but not exclusively* with law-texts, to rethink what working with these texts demands and to get clarity about what a law-text is and how various kinds of law-texts are to be distinguished.

Legal interpretation is much more than just invoking recognized rules or canons of construction to determine the meaning of a contested provision. It also goes beyond subsuming facts under appropriate legal norms. It involves

[1] In contradistinction to uncompounded signifiers such as words, *compound* signifiers such as texts are necessarily *complex*.

[2] See M Rosenfeld 'Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptation of the New Legal Formalism' in Cornell, Rosenfeld & Carlson (supra) at 153.

[3] See JR de Ville 'Meaning and Statutory Interpretation' (1999) 62(3) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 373.

[4] See P de Vos 'A Bridge too Far? History as Context in the Interpretation of the South African Constitution' (2001) 17 *South African Journal on Human Rights* 1.

[5] See § 32.3*(c)*(i)(A) supra.

working actively with law-texts instead, and this vindicates theories of legal interpretation that understand the construction of enacted law, such as the Constitution or statutes, as a process of concretization or even the completion of legal norms.[1] These are mainly the theories in the objectivism-delegation theory camp.

Friedrich Müller's *strukturierende Rechtslehre* ('structuring theory of law') is a nuanced version of objectivism endeavouring to give an accurate account of the 'realities' of day-to-day practices of adjudication by invoking post-positivistic, linguistic-turn thinking.[2] The salient message of *strukturierende Rechtslehre* is that legal interpretation is *working with texts* of various kinds, in different manners and at different levels to bring legal norms to fulfilment. Müller himself explains the rudiments and aims of his theory as follows:

> Since the mid-1960s, structuring legal theory has … developed a new, post-positivistic concept of legal theory according to which the *legal norm* (*Rechtsnorm*) has not already been written into legislation. Enactments are but *norm-texts* (*Normtexte*), that is formulations that precede legal norms, and they differ significantly from the eventual, 'actual' legal norms generated, *constructed* or *completed* for each successive concrete case in order to arrive at a judgment. In addition to this, the *normative domain* (*Normbereich*) of legislation constitutes the eventual legal norm. The legal norm is, in other words, a complex phenomenon composed of a *norm-programme* (*Normprogramm*) as well as a *normative domain* (*Normbereich*). 'Concretisation' no longer means that a general legal norm, found in a statute book, is made 'more concrete'. Realistically seen and reflected on, concretisation is the step by step *construction* of legal norms (*Rechtsnormkonstruktion*) for each individual case through which working elements within the text become ever 'more concrete'.
>
> This emphasises the dynamic nature of the efforts of jurists, moving between *norm* and *case*. Realistically understood concretisation is a time-bound process involving:
> - the text of the case as a narrative and the norm-texts in the codification (or statute book(s));
> - the text of the norm-programme and that of the normative domain, and
> - the text of the legal norm and that of the decision-norm (being the tenor of a judgment).[3]

As pointed out earlier, a judicial interpreter of enacted law (including the Final Constitution), faced with a plethora of linguistically possible meanings, cannot escape the responsibility to decide on one meaning (the best, in her or his judgment) befitting the case she or he is adjudicating.[4] The case itself acts a check

[1] See H-G Gadamer *Wahrheit und Methode: Grundzüge einer Philosophischen Hermeneutik* (4th Edition, 1975) 312-313 (Argues in favour of interpretive concretisation in preference to bland subsumption.)

[2] See F Müller 'Basic Questions of Constitutional Concretisation' (1999) 10 *Stellenbosch Law Review* 269. See also F Müller & R Christensen *Juristische Methodik I Grundlagen Öffentliches Recht* (8th Edition, 2002); F Müller & R Christensen *Juristische Methodik II: Europarecht* (2003).

[3] F Müller 'Basic Questions of Constitutional Concretisation' (supra) at 273.

[4] For a further explication of the terms 'enacted law' and 'enacted law-texts' see § 32.3*(e)*(i)(ee) infra.

upon judicial licence. There is another check similar in purpose, but deriving from a different consideration, namely, democracy and, in particular, the horizontal division of powers in the state (or *trias politica*). The judicial interpreter of any enacted law (including the Constitution), partaking in the construction of a legal norm or norms for an individual case, is not an alternative or additional law-maker: she or he is under an obligation to work with and attach due weight to *the specific law* (possibly) applicable in a given situation, that is to say, the text as worded by the authorized author of the law. The wording of an enacted law-text bounds the judiciary (and actually all state authority) for *trias politica* purposes: some German authors speak of *der Wortlaut als Grenze der Staatsgewalt* ('the wording as limit to state power').[1] Amendment of the *ipsissima verba* of the text ('woordwysigende uitleg') is not precluded *per se*, but 'should be an exercise in circumspection and restraint with due deference to one of the cornerstones of constitutional democracy, namely the horizontal division of powers in the state'.[2]

The Final Constitution and statutes as enacted law are made and intended (or meant) to be of effect and their provisions must therefore also be construed to be of effect: '*verba ita sunt intelligenda ut res magis valeat quam pereat*' ['the words of an instrument are to be so construed that the subject-matter may rather be of force than come to naught'.] In this sense the makers of the Final Constitution or a statute have an intention — an intention that what is enacted shall be of force and shall apply. Enacted law is, in other words, effect-directed.[3] This is not just an effect-directedness in the abstract: a provision is also enacted for a reason, and in the case of a constitutional provision this reason may be either to preserve or to transform the legal *status quo*.[4]

Its effect-directedness makes an enacted law-text — a constitution-in-writing or a statute-in-writing — very much like a piece of sheet music. It cannot be grasped sufficiently simply by reading it. Its 'execution' or 'performance' must also be experienced or at least imagined. The full effect of, for example, a constitutional provision cannot be gauged simply from reading and attaching meaning to the signifiers that appear on paper in the Constitution-in-writing, but rather from the manner in which the provision is (or could be) *construed and applied* in a real-life situation. Someone who reads music well can also 'hear' the music when reading a score. The interpreter of enacted law-texts,[5] especially someone with experience, reads that text in a similar way. She or he can imagine what a provision will 'sound' like in a concrete, real-life situation. This could be because she or he is seeking a solution to an actual problem or because she or he hypothesizes

[1] See O Depenheuer *Der Wortlaut als Grenze: These zu einem Topos der Verfassungsinterpretation* (1988); R Ogorek 'Der Wortlaut des Gezetses — Auslegungsgrenze oder Freibrief?' in P Forstmoser et al (eds) *Rechtsanwendung in Theorie und Praxis. Symposium zum 70. Geburtstag von Arthur Meier-Hayoz* (1993) 21-33.

[2] See Du Plessis *Re-Interpretation of Statutes* (supra) 229. See also JR de Ville *Constitutional and Statutory Interpretation* (2000) 135.

[3] See L du Plessis 'Re-reading Enacted Law-texts. The Epoch of Constitutionalism and the Agenda for Statutory and Constitutional Interpretation in South Africa' (2000) 15(2) *SA Public Law* 257, 275-277.

[4] See T Roux 'Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) of the Constitution on South African Law' (2004) 121(2) *South African Law Journal* 466, 467

[5] For a further explication of the terms 'enacted law' and 'enacted law-texts', see §§ 32.3*(e)*(i)(ee) and 32.5*(c)*(iii) infra.

(and thus 'conceives of') potentially problematic situations.[1] Actual or potential applications of any law, including provisions of enacted law and also the Constitution, determine their construction decisively: there is a unity in the duality of what has traditionally been known (and distinguished) as *interpretation* and *application*.

This discussion of contemporary developments associated with linguistic-turn thinking is not meant to undermine or destabilize (or, for that matter, denigrate) language and its pervasive capacity to generate meaning. It does, however, challenge conventional theories of language that rely, unflectively, on the supposed stability of language. It goes without saying that constitutional interpretation or any other form of interpretation irrespective of or beyond language is unthinkable because it is unsayable — unsignifiable. Conventional canons of construction consistent with an actual acknowledgement of the Final Constitution as complex linguistic datum are therefore unavoidable and, indeed, necessary. What the linguistic turn does do is to reflect both 'contemporary developments' in theories of language and underscore the need for the reformulation or, in some instances, reconceptualization of accepted canons of constitutional (and statutory) interpretation.

(e) The Constitution as text *sui generis* among law-texts

It is trite that different reading conventions and strategies apply to, for example, a statute, a poem, a novel, a court case, an article in a scholarly journal and a Biblical or Quranic text. To put it differently: the text genre determines the manner in which text is read and understood. This is because text *genre* has a generative (or productive) and not merely a taxonomic (or classificatory) function. It co-constitutes textual meaning[2] and therefore also the manner in which such meaning is to be determined. For interpretation purposes it is thus vital to establish the genre to which law-texts in general — and the Constitution in particular — belong.

However, the Final Constitution is not just a genre text. Within its genre it is also a unique law-text rendering constitutional interpretation a distinctive mode of legal interpretation and more than just a technique-driven analysis of the provisions of the Constitution-in-writing in order to determine their meaning. Constitutional interpretation is a consequential practice, an observance, sustaining constitutionalism[3] in a democratic, constitutional state (*Rechtsstaat*) founded on and maintained by a supreme Constitution of the sort envisaged in FC ss 1(c) and 2.[4]

[1] See Du Plessis 'Re-reading Enacted Law-texts' (supra) at 295.

[2] NJC van den Bergh 'Wetsuitleg: quo vadis?' (1982) 15 *De Iure* 154, 158 ('Genre het 'n generatiewe funksie en nie 'n taksonomiese funksie nie. Die wetsteksgenre is betekeniskonstituerend.'['Genre has a generative and not a taxonomic function. Law-text genre constitutes meaning.'])

[3] See J de Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (3rd Edition, 2000) 7 ('Constitutionalism is the idea that government should derive its powers from a written constitution and that its powers should be limited to those set out in the constitution'.) See also WF Murphy, JE Fleming & SA Barber *American Constitutional Interpretation* (2nd Edition, 1995) 3 (Describes 'constitutionalism' as 'a theory that accepts the necessity of both government and limited government. It contends that all power, even that of the people, must be limited.')

[4] See § 32.3*(e)*(iii) infra.

The Final Constitution can be depicted as:

(i) a law-text and, more particularly, a prescriptive, abstractly normative, enacted law-text;
(ii) highest law ie the most decisively and the ultimately prescriptive law-text pervading the legal system;
(iii) a negotiated and negotiating law-text.

Point (i) above pertains to the Final Constitution as genre text (the genre being *enacted law*) and points (ii) and (iii) above refer to the Final Constitution in its uniqueness. Points (i) to (iii) above all have decided implications for the interpretation of the Final Constitution.

(i) *The Constitution as prescriptive, abstractly normative law-text*

(aa) Law as text and text(s) as law

Law-texts are compound linguistic signifiers conventionally recognized as 'texts having to do with the law'. In a dynamic and complex interplay with one another (and with other signifiers) these texts render 'law' intelligible and therefore interpretable. Law-texts themselves do not 'bear' meaning and do not tell us 'what the law says'; nor do they express the meaning of legal phenomena 'out there'. Instead, they provide linguistic data to generate meaning in order to deal with the law's business and to find out what the law can be understood to say about the solution of concrete issues or problems. Speaking and thinking about the law are possible only because of law-texts: lawspeak is text and a particular kind of textspeak is law.[1] Random examples of law-texts are constitutions, statutes, reported precedents, contracts in writing, wills, international treaties, heads of argument, pleadings in civil proceedings and so on. These are all texts in writing, but they exist alongside and interact with *oral* or *spoken law-texts*, such as *ex tempore* judgments of courts, oral contracts, the first-hand testimony of a witness in court, oral argument and so on.

The function of the supreme Constitution as law-text is, in a nutshell, to establish and sustain constitutional democracy in South Africa and to render all law relating thereto intelligible and therefore interpretable and realizable. This it does in a dynamic and complex interplay with other law-texts (and texts other than law-texts).[2]

[1] And jurists work with texts and texts work with them. See L du Plessis 'Oor hoe Juriste werk met Tekste. . .en Tekste met hulle. Enkele Gedagtes oor die Postmodernisering van Reformatoriese Regsdenke' (2000) 65 *Koers* 437 and L du Plessis 'Lawspeak as Text. . .and Textspeak as Law: Reflections on How Jurists Work with Texts — and Texts with Them' (2001) 118 *South African Law Journal* 794.

[2] A Constitution may, provisionally and somewhat inelegantly, be defined as:
The decisively and ultimately prescriptive, abstractly-normative, negotiated and enacted law-text which pervades the legal system and which, in a dynamic and complex interplay with other law-texts (and texts other than law-texts) establishes and sustains constitutional democracy in the country and renders the 'law' relating thereto intelligible and therefore interpretable and realisable.

(bb) Narrative and normative law-texts

Law-texts can be characteristically *narrative* or *normative*. Narrative law-texts profess to be linguistic accounts of (f)actual occurrences pertinent to the functioning of (the) law. 'Normative' could mean (i) establishing, (ii) relating to or (iii) deriving from a norm as prescriptive (general) standard.[1] Normative law-texts, predicated mainly on signification (i) above, verbalize a characteristically law-like expectation that diverse future occurrences, sharing certain predefined attributes, will be entertained in a predictably regular or typical manner.

Jurists engaged in untangling questions of law do not actually work with 'concrete facts' or 'concrete norms', but with *linguistic renditions* of what they *understand to be* facts and norms pertaining to 'the law', in other words, narrative and normative law-texts (that they construct). The distinction between narrative and normative law-texts is by no means watertight since all law-texts are always both narrative and normative to some extent. The operational gist or functional thrust of a law-text determines whether to call it 'narrative' or 'normative'. A statutory provision, for example, is to some extent an implicit narrative of the process through which (as part of the more inclusive instrument in which it is contained) it came to exist, and also of factual situations for which it potentially caters, but it is a normative law-text nonetheless because it characteristically purports to provide for the factual situations in a predictably consistent, regular or typical (in other words, a norm-like) manner. An evidentiary narrative, such as the 'story' of a witness during litigious proceedings, on the other hand, has to be adapted, for adjudicative use, to the predictably regular or typical normative standards of, among others, the law of evidence, and then it can exert normative power that co-determines the outcome of the proceedings. It remains a legally processed 'story', nonetheless, and its predominant story-likeness makes it a narrative law-text. A narrative law-text can be a rendition of either an actual or an imaginary (hypothetical) 'story'. Some law-texts are difficult to classify. A contract, oral or in writing, as an account of what the parties agreed to is, for instance, a narrative law-text. However, the contract as a legal instrument activates norms of the law of contract, and its very terms are standards that cater, in a predictably regular or typical manner, for premeditated eventualities, making the contract a normative law-text too.

Law-texts need not be classified rigidly as exclusively narrative or normative. They often have to be named, from case to case, in accordance with their (contingent) mode of operation as co-determined by the peculiarities of the situation in which they are of effect. A distinctive feature of all kinds of law-texts is that they *can be* and indeed *strive to be of effect*, because they are resolution-oriented.[2] *Any resolution* of a legal issue *always* draws on both narrative and normative law-texts. Normative law-texts are devoid of actual, operational significance in isolation from narrative law-texts, and *vice versa*.

[1] J Pearsall (ed) *The New Oxford Dictionary of English* (1998) 1263.
[2] See § 32.1*(d)* supra and § 32.5*(c)*(iii) infra.

(cc) Prescriptive and persuasive (normative) law-texts

Narrative and normative law-texts proclaim their efficacy in distinct ways. The efficacy of a narrative law-text depends on how effectively it poses questions called forth by the exigencies of the situation it narrates. A normative law-text can suggest a solution to a problem in mainly one of two manners: prescriptively or persuasively. In the first instance the text is expected to 'have effect' because it is 'officially' backed by some authority of consequence. In the second instance the effect of the text depends on its power of persuasion in particular circumstances (and on specific conditions). Prescriptive, normative law-texts ('prescriptive texts' for short) are traditionally perceived as instruments or media calling positive law into existence, in other words, as sources of origin of legal rules or norms.[1] In South Africa statutes and the Constitution (*enacted law* for short), precedent and custom are recognized as such sources of origin. The prescriptivity of enacted law can evidently and directly be attributed to a readily identifiable author-with-authority while custom and precedent and some old Roman-Dutch writings (all belonging to the genre of *common law*) may acquire prescriptive authority once they have been found to meet certain criteria.

What sets prescriptive, normative law-texts apart is the status formally assigned to them: they are recognized as (and therefore understood to be) the most obvious contenders among normative law-texts to be of effect in a given situation. It is legitimate to argue that what prescriptive texts can be understood to say about a particular situation or issue takes precedence over what other normative law-texts can be understood to say about the same situation or issue. The supreme Constitution, in its turn, ranks highest among prescriptive, normative law-texts.

A persuasive, normative law-text ('persuasive text' for short) will be of effect in the same manner as any prescriptive text *if*, on account of its persuasive force, its authority as normative text, establishing general standards for dealing with diverse occurrences, is accepted by a decision-making organ of state authorized to concretize law, for instance, an adjudicative forum. Furthermore, if the decision of the said forum has binding force, the persuasive text henceforth becomes a prescriptive text. Statements in textbooks or other writings professing to expound 'the law as it stands', *obiter dicta* in court judgments, the *ratio decidendi* in a non-binding judgment, oral or written argument in litigious proceedings and heads of argument are all examples of persuasive law-texts. Courts often accept the authority of persuasive texts, especially judicial precedents, without referring to their status and ranking in the order of normative law-texts.

(dd) Abstract and concretized normative law-texts

Normative law-texts can be either *abstract* or *concretized* or, to put it in another way, a law-text can be of force in an abstractly normative or concretely normative

[1] L du Plessis *An Introduction to Law* (3rd Edition, 1999) 219.

manner.[1] An abstract, normative law-text is what is usually referred to as a legal rule or precept, that is, a law-text envisaging — and indeed providing — that multifarious eventualities, sharing certain attributes, will be entertained in a predictably regular or typical manner. A concretized, normative law-text, on the other hand, is designed to cater for the exigencies of and/or regulate a particular, concrete situation and can also be either prescriptive or persuasive. When it is prescriptive such a text must be given effect to on account of the official authority that its author wields. An order of court is an example of a prescriptive, concretized, normative law-text. So is a decision of a duly authorized organ of the executive, pursuant to a discretion to 'apply the law' in concrete instances. On the other hand, contentions in legal argument in a specific case for a court order in certain terms, a legal opinion proposing a normative answer to a specific problem or normative solutions proposed for hypothesized (specific) cases, are persuasive, concretized, normative law-texts.

(ee) The Constitution as genre text

The distinctions aforesaid aid (but do not rigidly prescribe) a broad depiction (and not a watertight compartmentalization) of various kinds of law-texts. The permeability of law-texts and the complexity of the interaction among them preclude the calibration of either a rectilinear (or even a more ingenious and complex grid-like) scale according to which the normativity or narrativity, the presciptiveness or persuasiveness and the concreteness or abstractness of a law-text can be measured.

Plotting the Constitution on such a scale is helpful in determining its genre, but not decisive in depicting it in its exceptionality. In the light of the discussion so far, the Constitution is a prescriptive, abstractly normative law-text, but of course not only the Constitution is distinctly that. Statute law is also that — as are rules of the common law and binding *rationes decidendorum* in case law. Statute law and the Constitution have in common a feature absent from common and case law, namely that they are *enacted law*. They have, in other words, been laid down by an authorized 'maker' to whom the business of officially making and carrying into effect law or a Constitution has been assigned. Statute law and the Constitution as *enacted* (or *legislative* or *legislated*) law-texts have consciously, intentionally and authoritatively been authored to be of effect and to this extent there is an authorial intent sustaining them, in other words, an intention of the legislature or of the founding generation of the Constitution.[2] However, 'intention' here does not denote what used to be regarded as the prime determinant of meaning in conventional literalist-cum-intentionalist statutory interpretation,[3] but the *operational*

[1] The notion of concretization is borrowed from Friedrich Müller's *Strukturierende Rechtslehre*. See 32.3*(d)* supra.
[2] See § 32.5*(c)*(iii) infra. For the notion of a 'founding generation' of a constitution, see § 32.3*(c)*(i) supra.
[3] See § 32.3*(b)*(i) and (ii) supra.

intent (or *effect-directedness*) characteristic of enacted law-texts such as the Constitution and statutes, and key to a purpose-consciousness interpretation of such law-texts.[1]

Having located the Constitution within a particular law-text genre, the next step is to try to depict it in its exceptionality, and to this end one must honour the status of the Constitution as supreme (decisively and ultimately prescriptive) law and as a product of negotiation involving constitution-makers (or a founding generation[2]), coming from the various strata of a profoundly pluralistic nation with often divergent aspirations, interests and identities.

(ii) *The Constitution as supreme law*

The Final Constitution declares its own supremacy in two ways. In FC s 1*(c)*, the Republic of South Africa is said to be founded on the values of 'supremacy of the constitution and the rule of law'. In FC s 2 it is stated that the Constitution 'is the supreme law of the Republic' and that 'law or conduct inconsistent with it, is invalid'. Obligations imposed by the Final Constitution must also be fulfilled. One of Frank Michelman's salient contentions in Chapter 11 of this treatise is that constitutional supremacy is a value and not just a rule.[3] The founding statement in FC s 1*(c)* proclaims this value status, causing the Final Constitution to pervade all law in the legal system and to direct it towards the pursuit and realization of the values the Final Constitution espouses.[4]

In the 'plain and simple' or 'trumping sense' supremacy of the Constitution (as proclaimed in FC s 2) means that if any law conflicts with a constitutional provision, the latter is given precedence. In this straightforward sense the Constitution has had a decisive impact on the conventional hierarchy and status of legal rules and especially legislation in South Africa. Laws of Parliament that, until the commencement of the Interim Constitution on 27 April 1994, used to sit atop the legal hierarchy and enjoyed a status of non-reviewability by the courts as to their substance, are now subject to a higher law and to full judicial review. In terms of FC s 43*(c)*, municipal councils, that used to be delegated legislatures, have been elevated to the status of original legislatures[5] whose legislation is no longer reviewable in terms of the common-law standards of review for legislative administrative action,[6] but, as far as matters of substance are concerned, only in terms of the Final Constitution.

[1] See § 32.5*(c)*(iii) infra.
[2] For the use of this terminology see § 32.3*(c)*(i) supra.
[3] FI Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) 11-34–11-36.
[4] See also Michelman 'The Rule of Law' (supra) at 11-36–11-41 and § 32.5*(b)*(iii)(bb) infra.
[5] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC)('*Fedsure Life Assurance*') at para 26.
[6] See L du Plessis *Re-Interpretation of Statutes* (2002) 44-45.

The relevance of recognizing constitutional supremacy as both a value and a trumping force will be dealt with later on when adjudicative subsidiarity is discussed.[1] For the moment some implications of the supremacy of the Constitution as a founding value in terms of FC s 1*(c)* call for further elaboration, for they determine and direct interpretive dealings with the Constitution in its distinctiveness. The supreme Constitution has been designed and enacted to found and uphold a particular kind of *politeia* (or constitutional dispensation) in South Africa. About the potential of the Constitution, as construable highest law, to help establish and sustain the *politeia* for which it was intended, the following three observations are apposite:

(aa) The Constitution as 'supreme law' is the long-lasting, enacted law-text at the apex of the legal system and is the nation's solemn and consequential memorandum of agreement. *It is also just a written document*, however: a law-text-in-writing among others or 'a *linguistic* datum'.[2] The FC is the supreme law of the Republic of South Africa, *but it is not* an overarching, all-encompassing,[3] omni-regulative, super-law.[4] Whoever invokes the protective and remedial powers of the supreme Constitution must treat it as a scalpel and not as a sledgehammer.[5] The fact that the Constitution enjoys precedence among normative law-texts does not mean that it totally overpowers other law-texts and takes their place without further ado.

Courts are moreover required to exercise self-restraint when they summon up the powerful, supreme Constitution because decisions of institutions not accountable to an electorate may not simply engulf deliberative decision-making susceptible to the discipline of democratic accountability. This is a predicament of constitutional review also known as the counter-majoritarian difficulty/dilemma. The demand for judicial self-restraint encourages circumspect modes of interpretation such as reading in conformity with the Constitution or deference to subsidiarity.

(bb) The Constitution is justiciable, in other words, a standard for the assessment of the validity of both 'law' and 'conduct' in every legislative and executive echelon of government. As was shown earlier,[6] the Constitution, pursuant to the founding provision in s 1*(c)* (and the binding Constitutional Principles[7] in the IC) provides for its own justiciability. Section 172(1)*(a)*, in a mandatory mood, enjoins any court 'deciding a constitutional matter within its

[1] See § 32.5*(b)*(iii)(bb) infra.

[2] See Müller 'Basic Questions of Constitutional Concretisation' (supra) at 269. See also § 32.1*(d)* supra.

[3] On the notion of an 'all-encompassing Constitution', see § 32.5(b)(iii)(bb) infra.

[4] L du Plessis 'The Status of Legislation and the Realisation of Constitutional Values in the new Constitutional Dispensation' (2000) 11 *Stellenbosch Law Review* 192, 201; Du Plessis *Re-Interpretation of Statutes* (supra) at 28.

[5] *Smith v Attorney-General Bophuthatswana* 1984 (1) SA 196, 200C (B). See also § 32.1*(a)* supra.

[6] See § 32.2*(a)* supra.

[7] See Constitutional Principles I and IV in Schedule 4 to the Interim Constitution. For a brief historical background, see § 32.1*(a)* supra.

power' to declare 'law or conduct' inconsistent with the Constitution invalid to the extent of such inconsistency. As a check on this power of review, so potently proclaimed, s 172(1)*(b)* leaves room for a just and equitable reining in of the consequences of declarations of invalidity in terms of s 172(1)*(a)*, and it is in the discretion of the court making the declaration to exercise such restraint. This is how, in one of its early landmark judgments[1] that was previously referred to,[2] the Constitutional Court verbalized its understanding of courts' duties or obligations under s 171(1)*(a)* and the relationship between this provision and s 171(1)*(b)*:

> Constitutional cases cannot be decided on the basis that Parliament or the President acted in good faith or on the basis that there was no objection to action taken at the time that it was carried out. It is of crucial importance at this early stage of the development of our new constitutional order to establish respect for the principle that the Constitution is supreme. The Constitution itself allows this Court to control the consequences of a declaration of invalidity if it should be necessary to do so. Our duty is to declare legislative and executive action which is inconsistent with the Constitution to be invalid, and then to deal with the consequences of the invalidity in accordance with the provisions of the Constitution.

The Constitution also provides for and indeed sustains its own justiciability *by necessary implication*, with s 165, for example, vouching for the independence of the judiciary, and s 165(2), maintaining with supreme authority that the courts are subject *only* to the Constitution and the law. That this is not a toothless proposition is borne out by s 165(5), which make court orders binding, in a comprehensive manner, on 'all persons to whom and organs of state to which it applies'. It is significant that especially organs of state are mentioned, for justiciability and powers of constitutional review make sense only if non-judicial authorities cannot and do not undo court orders and/or their consequences.

(cc) The Constitution verbalizes and, indeed, proclaims, in characteristically broad, inclusive and open-ended language, certain values and beliefs associated with democracy and the constitutional state (*Rechtsstaat*) to be law. The kind of language in which the Constitution is couched, distinctive both in form and content, instantiates the uniqueness of the Constitution as enacted law-text. It was shown before how the distinctive style of the Constitution has contributed to an uneasiness with and, in time, a questioning and even a growing dismissal of conventional approaches to statutory interpretation, and has encouraged the blazing of new interpretive trails.[3]

[1] *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 100 ('*Executive Council of the Western Cape 1995*').
[2] See § 32.1*(c)* supra.
[3] See § 32.3*(b)* supra.

(iii) *The Constitution as negotiated and negotiating text*

The Final Constitution is a product of negotiation and deliberation; so too is legislation passed by constitutionally authorized legislative bodies. However, the Interim Constitution and the Final Constitution played an essential role in brokering a peaceful transition from the racist, white minority apartheid regime to a genuine universal multiparty democracy: they are, at bottom, peace treaties. That said, the Final Constitution is a comprehensive memorandum of agreement designed to last. Its negotiationary origins are thus quite conspicuous — more so than is mostly the case with other enacted law — and these origins show especially in ideological tensions traceable in the written text, and always pertaining to it and to its interpretation.[1]

In the phrase 'ideological tensions', 'ideology' does not denote an abstract system of ideas, but rather the means by which people 'give meaning to all things and events which they encounter, and all feelings which they experience' in response to the exigencies of a particular environment.[2] 'Ideology' not only denotes someone's 'personal philosophy', but can also be 'a shared (world-) view' in terms of which, for instance, political groupings perceive the political interests they seek to promote.

The first ideological tension that becomes visible when the Constitution-in-writing is analyzed — and which also often arises in constitutional interpretation — is that *between populism and constitutionalism*, rooted in the polarity of participatory (or 'popular') and constitutional democracy, and of legislative and administrative over and against judicial decision-making. Populism denotes rule by the (majority of the) people through voting and thereafter through their elected (and accountable) representatives, and the people's participation in law-making and administrative processes. Constitutionalism 'is the idea that government should derive its powers from a written constitution, and that its powers should be limited to those set out in the constitution,' and furthermore that there must be an independent authority, the judiciary, enforcing limitations to government powers.[3] The tension between populism and constitutionalism is there, in a supreme constitution, simply because that Final Constitution is the highest law and is *justiciable*, and the said tension raises the spectre of the previously mentioned *counter-majoritarian difficulty*.[4] The competence of unelected judges to assess the constitutional tenability of laws

[1] On these ideological tensions, see LM du Plessis 'The Genesis of a Bill of Rights in a Divided Society: Observations on the Ideological Dialectic reflected in the Chapter on fundamental Rights in South Africa's transitional Constitution' (1995) 3 *Jahrbuch für Recht und Ethik* 353; L du Plessis 'Constitutional Construction and the Contradictions of Social Transformation in South Africa' (2000) 72(1) *Scriptura* 31.

[2] D Nicholson 'Ideology and the South African Judicial Process — Lessons from the Past' (1992) 8 *South African Journal on Human Rights* 50.

[3] I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005)('*Handbook*') 8.

[4] See § 32.3*(e)*(i)(aa) supra.

made by democratically elected, deliberative legislatures and then to strike down whatever (in the courts' view) is inconsistent with the Final Constitution, possibly (but not inevitably) runs counter to the horizontal differentiation of legislative, executive and judicial authority in a modern-day, democratic state—hence the call to the judiciary for self-restraint.[1]

The tension just described is between powers that in terms of *trias politica* are ideally separated *horizontally*. The Final Constitution also reflects a tension between *centralism* and *federalism* pertaining to the *vertical* division of powers.[2] Historical realities precluded the fullest and purest possible form of federalism in post-1994 South Africa, but this did not result in a total exclusion of everything federalist from the Final Constitution. The Constitution does not establish classical federalist structures, but in ss 146 to 150, dealing with conflicting laws in the various *spheres* of government,[3] provision is made for procedures bolstering centrifugal forces that determine the relationship between central government and the nine provinces. These centrifugal forces are subject to centripetal checks and balances which do not, however, totally exclude the attainment of a relatively clearly pronounced federalist state. The arrangements in FC s 146 to FC s 150, read with FC Chapter 3 on co-operative government, makes of South Africa a *co-operative* as opposed to a *competitive* federation.[4]

One of the most prominent ideological tensions in the South African Constitution—and probably in most national and international systems of human rights protection worldwide—is that between *freedom* and *equality* or, in ideological terms, between *libertarianism* and *egalitarianism*. This tension shows up most clearly in the written constitutional text in the triumvirate value statements[5]—in the founding provisions,[6] and in the Bill of Rights[7]—proclaiming human dignity, equality and freedom to be crucial guiding values in the interpretation of the Final Constitution, and the Bill of Rights in particular, and in the limitation of rights. In comparable provisions of the Interim Constitution[8] reference was made to

[1] See M Tushnet 'Anti-formalism in Recent Constitutional Theory' (1985) 83 *Michigan Law Review* 1502, 1503; D Davis, M Chaskalson & J de Waal 'Democracy and Constitutionalism: The Role of Constitutional Interpretation' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 6–19; Currie & de Waal *Handbook* (supra) at 8.

[2] L du Plessis 'Federalisme as 'n Proses: 'n Evaluering van die Federalistiese Momente in die 1996-Grondwet' (1997) 62 *Koers* 189.

[3] For a discussion of these provisions, see V Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 16; S Woolman 'Provincial Constitutions' in in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 21.

[4] I Currie & J de Waal *The New Constitutional and Administrative Law Volume 1* (2001) 119-124.

[5] For the meaning of 'triumvirate value statements', see 32.4*(c)*(i)*(cc)* infra.

[6] FC s 1(a). .

[7] FC ss 7(1), 36(1) and 39(1)(a). See § 32.1*(d)* supra.

[8] See IC ss 33(a)(ii) and 35(1).

freedom and *equality* only. Human dignity entered the picture in the Final Constitution for the first time.

For the freedom-centric libertarian a supreme constitution (and a bill of rights) must basically keep the state at bay, limiting its action *vis-à-vis* the doings of the autonomous individual, to ensure optimal freedom for the latter. Equality-centric egalitarianism, on the other hand, insists that a constitution and bill of rights must essentially help ensure optimal parity among individuals, and positive state action redressing disadvantage is therefore unavoidable. Libertarians experience such state action, impacting directly on the (re-)distribution of means among citizens, as threatening to their freedom. The counter-argument of egalitarians is that freedom can be, and often is, (ab-)used to perpetuate the prosperity rift and other inequalities between the 'haves' and the 'have-nots' and that the state thus has to intervene to procure a more equal access to the resources needed for the enjoyment of a decent life.

In South Africa, liberation movements that represented the political and economic aspirations of the traditional have-nots were by origin egalitarian, while the 'have parties' that somehow benefited from apartheid's unequal distribution of material means (and this includes the previous regime's liberal opponents) were natural libertarians. For many years (up until about 1986) the previous regime was not even libertarian because it turned a blind eye to human rights in its political thinking and planning, and afforded them no special institutional protection.

The Constitution-in-writing holds out the possibility to alleviate the seemingly perennial tension between freedom and equality, for the crucial triumvirate value statements referred to above allow for reliance on *human dignity* to negotiate the tension between freedom and equality.

The last ideological tension of note is that between *traditionalism* and *modernism*. 'Modernism' roughly denotes the 'enlightened' frame of mind from which the idea and practice of constitutional democracy — as typically modernist phenomenon — emerged. Individualism is a pillar of this liberal modernism which, in South Africa, has come up against manifestations of communitarian traditionalism in customary law, religion and gender issues (manifesting in the last instance as an ideological tension of feminism versus patriarchy). The written Constitution itself caters for possible tensions in these areas. FC a 211, for instance, recognizes the institution, status and role of traditional leadership according to customary law[1] and, in broad terms, authorizes traditional authorities to function, subject to applicable legislation and customs 'which includes amendments to, or repeal of, that legislation or those customs'.[2] FC s 211(3) enjoins courts to apply customary law 'when that law is applicable'. However, FC s 211 as a whole is significantly and explicitly made subject to the rest of the Final Constitution. And FC s 39(2) of course also requires development of customary law in a manner promoting the spirit, purport and objects of the Bill of Rights.

[1] FC s 211(1).
[2] FC s 211(2).

Some examples of how the three pairs of ideological tensions just described manifest in constitutional jurisprudence will, by way of illustration, now briefly be looked at. These tensions are actually or potentially present in just about every constitutional precedent, which means that the compilation of a full catalogue of examples would be a mammoth undertaking. The counter-majoritarian difficulty, for instance, looms (larger or smaller) in every case of constitutional review, and with it the ideological tension between populism and constitutionalism too. In *S v Makwanyane & Another*[1] the Constitutional Court, called upon to sit in judgment on the constitutionality of capital punishment, was faced with the prospect of having to make a decision with consequences for which, in the view of a connoisseur constitutionalist, a democratically authorized law- or constitution-maker should rather have been made responsible and held accountable.[2] The written text of the Interim Constitution made no reference to the issue of capital punishment, and this omission was deliberate:[3] the constitution-makers left it to the Constitutional Court to resolve this controversial issue. At first glance it may seem as if the constitution-makers thereby addressed the counter-majoritarian difficulty — and eased possible tensions between populism and constitutionalism — by authorizing the Court to cast the die on capital punishment. This, however, is not quite how the Constitutional Court saw it. Mahomed and Sachs JJ, in their separate concurring judgments, were at pains to point out that the Court was not deciding on the *desirability*, political or otherwise, of capital punishment as a possible sentence for the most serious offences, but on its *constitutionality*. Mahomed J especially made a point of distinguishing a decision reached by the Constitutional Court as a judicial organ from a political choice by a legislative organ.[4]

The ideological tension between populism and constitutionalism is also visible in the way in which Chaskalson P dealt with the state's contention that what is cruel, inhuman or degrading treatment was dependent on attitudes within society, and that South African society did not regard the death sentence for extreme cases of murder as a cruel, inhuman or degrading form of punishment. The gist of the Court's response to this contention was this:

> The question before us … is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence.
>
> Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication.[5]

[1] 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC)('*Makwanyane*').
[2] For previous references to this case, see § 32.3*(c)*(iii)(aa) and (v) supra.
[3] *Makwanyane* (supra) at paras 5 and 25.
[4] Ibid at paras 266 and 349 respectively.
[5] Ibid at paras 87 and 88.

Thus the Court, mindful of the tension between populism and constitutionalism, asserted its authority to do what the Interim Constitution required of it and refused to acquiesce in the 'wisdom' of public opinion.

Given the tenacity of the ideological tension between populism and constitutionalism, authorized adjudicators of constitutional matters cannot just take their authority for granted, but must establish their legitimacy by asserting and exercising their authority in a particular manner. Heinz Klug explains:

> Particular histories and contexts — both international and local — play a significant part in setting the stage upon which judicial review is introduced. While its ability to build legitimacy through its formal judicial role is a source of strength, the comparative institutional weakness of the judicial branch . . . requires the judiciary to be circumspect in its exercise of authority over the more resourced and powerful arms of government. In asserting its constitutional powers the judiciary constantly recognizes its ultimate reliance on both the executive and legislative branches to enforce its holdings on the one hand and to protect its independence on the other.[1]

Klug reminds us that in *Marbury v Madison*,[2] the US Supreme Court asserted, without being granted, a testing right, having earned it through a carefully crafted judgment inspired by an exemplary display of judicious politics. While *S v Makwanyane & Another* was a judicial *tour de force* — a 'bold assertion of constitutional rights and powers' — the Constitutional Court's judgment in *Executive Council, Western Cape Legislature & Others v President of the Republic of South Africa & Others* struck Klug as possessing greater parallels to *Marbury v Madison*.[3]

The particularly sensitive and contentious issue that the Court had to deal with in *Executive Council, Western Cape* concerned a lively interplay of the conflicting forces of populism and constitutionalism (and centralism and federalism). The case concerned power allocation between the central government, where the African National Congress wielded the sceptre, and the provincial government in the Western Cape, where the 'new' National Party, a remnant of the previous apartheid regime, still dominated the scene. The case was brought by the National Party, which sought to quash presidential action of the popular and respected Nelson Mandela. In the end the *Executive Council, Western Cape* Court declared the statutory authorization for the President's impugned action unconstitutional, thereby undoing the action itself but without pointing a reproving finger at the President. According to Klug the upshot of this judgment was that the Court 'successfully traversed the dangers of conflicting powers and managed to insinuate itself as an honest broker by avoiding the claim for regional autonomy, while simultaneously disciplining and empowering the national institutions of democracy'.[4] And the President publicly praised this judgment, mentioning

[1] H Klug 'Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review' (1997) 13 *South African Journal on Human Rights* 185, 189.
[2] 5 US (1 Cranch) 137 (1803).
[3] Klug (supra) at 194.
[4] Klug (supra) at 201.

appreciatively the Constitutional Court's assistance to both the government and society 'to ensure constitutionality and effective governance'.[1]

The issue of direct, horizontal application of the Bill of Rights, as dealt with in the constitutional jurisprudence of especially the Constitutional Court, exemplifies an ideological tension between freedom and equality. This issue will be brought up again in more detail at a later stage and in a different context,[2] and it is also dealt with extensively in Chapter 31.[3] For present purposes, just a few cursory remarks are necessary.

IC ss 7 (1) and (2), read together, left room for either a restrictive understanding of the operation of the Bill of Rights or a reading that permitted direct, horizontal application. In *Du Plessis & Others v De Klerk & Another*[4] the Constitutional Court opted for the former, more restrictive understanding.[5] However, IC s 7(1) and (2) was thereafter replaced by FC s 8(1) to (3), which provides (in s 8(2) in particular) for the direct application of 'a provision of the Bill of Rights' to 'a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the rights and the nature of any duty imposed by the right'. In *Khumalo & Others v Holomisa,*[6] the Court confirmed that there is room for the direct, horizontal application of at least certain rights in the Bill of Rights in certain circumstances. However, according to Stu Woolman,[7] the Constitutional Court has in the recent past shown an unwholesome keenness to avoid the direct horizontal application of the Bill of Rights.[8] It is sufficient, for the time being, to point out that the direct horizontal application of the Bill of Rights remains controversial because it tends to pit freedom and equality against each other. A libertarian, maintaining that the most crucial function of a supreme bill of rights is to keep the state at bay and limit state action *vis-à-vis* the doings of the free and autonomous private individual or entity, will see in the horizontal application of the Bill of Rights an uncalled for threat to 'private freedom'. An egalitarian, on the other hand, will insist that there is no reason why the Bill of Rights cannot be applied to rectify endemic inequalities in 'horizontal relationships' so as to optimize parity among 'private' individuals and entities.

[1] Ibid at 198.

[2] See § 32.4*(c)*(i)(dd) infra.

[3] S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

[4] 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC).

[5] For the full account, see Woolman 'Application' (supra) at 31-16–31-33.

[6] 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at para 33.

[7] S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762.

[8] Woolman analyzes three cases as representative of this interpretive turn: *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC)*, NM & Others v Smith & Others* 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC) and *Masiya v Director of Public Prosecutions & Others* 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC)('*Masiya*').

The tension between the Final Constitution's classically liberal provisions and radical egalitarian norms reveals itself in case after case. Recently, in *Molimi v The State*, the Court refused to accept as evidence statements containing solid but inadmissible allegations against an accused person strongly suspected of involvement in a botched armed robbery.[1] The following (freedom-friendly) *dictum* explained the Court's refusal:

> This Court has said that the right to a fair trial requires a substantive rather than a formal or textual approach and that 'it has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.'[2] . . . [P]roceedings in which little or no respect is accorded to the fair trial rights of the accused have the potential to undermine the fundamental adversarial nature of judicial proceedings and may threaten their legitimacy.[3]

In *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; SA Human Rights Commission & Another v President of the RSA & Another,*[4] the ideological tension between traditionalism and modernism came to the fore. At issue was the constitutionality of the customary law rule of male primogeniture and statutory provision for the applicability of a customary law regime of intestate succession to black people only. Both challenges were based on equality claims, with gender equality prominent in the primogeniture challenge. In its majority judgment, the *Bhe* Court upheld both challenges and further held that the rule of primogeniture was not capable of being developed to bring it in line with constitutional values: it had to be struck down. Such a head-on confrontation of primogeniture with the Final Constitution's modernist equality demands had a far-reaching and wide ranging impact on traditional customary law. In a minority judgment Ngcobo J therefore proposed to soften the severity of the blow by not striking down the rule of primogeniture, but by developing it instead to bring it in line with the Bill of Rights' demand for gender equality. According to Ngcobo J, the rule of primogeniture thus had to be construed to include women as intestate heirs.

What then does the constitutional interpreter do once awareness of these unavoidable ideological tensions arises?

Henk Botha, writing about the counter-majoritarian difficulty, concludes that there is no point in trying to resolve this dilemma, and that living with it instead may be wholesome, because the tensions it generates could be creative (rather than destructive) in sculpting the constitutional order.[5] These tensions may, for instance, help to keep an institutionally mediated dialogue between the legislature

[1] 2008 (3) SA 608 (CC)('*Molimi*') at paras 52-54.
[2] Ibid quoting *S v Jaipal* 2005 (4) SA 581 (CC), 2005 (5) BCLR 423 (CC) at para 29.
[3] *Molimi* (supra) at para 42.
[4] 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC).
[5] H Botha 'Democracy and Rights: Constitutional Interpretation in a Postrealist World' (2000) 63 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 561, 578–581.

and the judiciary alive.[1] Botha's advice on how to deal with the counter-majoritarian difficulty, as manifestation of the ideological tension between populism and constitutionalism, is equally sound counsel for dealing with other ideological tensions too. A reconciliation or synthesis of opposing forces in a higher unity might bring closure, for the time being, but this will be a closure devoid of the invigorating and enervating power of contradiction and tension, and vulnerable to an essentialism that inclines toward oversimplified solutions for complex issues.

It helps if an interpreter of the Final Constitution is aware of the inevitability of the ideological tensions discussed above. This awareness prompts an identification of forces beyond ostensibly 'neutral' procedures of interpretation, pulling vigorously against one another each towards an interpretive outcome best suited to its concerns. The said awareness furthermore aids a pinpointing of actual issues and contestations involved in a particular episode of constitutional interpretation, while it kindles an understanding of why opposing trends and tendencies, describable in terms of the ideological tensions previously mentioned and briefly discussed, can meaningfully co-exist in the constitutional text and jurisprudence of a country.

Finally, the Constitution-in-writing, keeping alive the tensions that have shaped it, is not just a negotiated, written law-text; it has also remained a *negotiating* text — a perennial negotiant. The written text of the Constitution was, in other words, not formulated to suggest that once its wording had been agreed upon, ideological tensions among the constitutional negotiators were settled, and that the negotiators were desirous for the written constitutional text to reflect such a settlement. Agreement on a written text was possible only on the condition that the ideological tensions would remain — and visibly so — to be negotiated and renegotiated every time the text is reread with an interpretive eye.

32.4 The Enacted Constitution-in-writing

It will probably have become clear by now that constitutional interpretation involves quite a bit more than just working with a tangible, readable, written constitutional text in hand (and at hand), but of course it also involves that. How to deal interpretively with the concrete Constitution-in-writing, given its distinctive structural features and peculiar style, is a matter of considerable significance which will now be discussed. First, from the perspective that the supreme Constitution has a far-reaching impact on statute law as existing law, structural and stylistic differences and similarities between the constitutional text and statutory texts will be looked at, also to consider to what extent constitutional interpretation (working with the Constitution-in writing) and statutory interpretation (working with legislation-in-writing) are similar (and dissimilar) procedures. Next the interpretive value of the availability of versions of the written Constitutional text in more than one language will be discussed. Finally, attention will be

[1] JR de Ville *Constitutional and Statutory Interpretation* (2000) 20-26.

drawn to the presence of interpretive indicia in the constitutional text and their possible role in constitutional interpretation. Some of these indicia are quite visible and readily available for use. Other less obvious ones have to be searched out in the written text, as will be shown.

(a) The Constitution and the construction of enacted law

The nature, operation and effect of — as well as the limits to — constitutional supremacy were dealt with earlier in this chapter, and the ramifications of constitutional supremacy as a value are dealt with by Frank Michelman in Chapter 11. The judicially construed Final Constitution has a decided and far-reaching impact on statute law and its interpretation. Constitutional interpretation is in this way inextricably linked to statutory interpretation. Not only are statutes subject to the Final Constitution, but they also have to be read in the light of the Final Constitution in several ways. First, FC s 39(2) requires a mode of statutory interpretation that promotes the spirit, purport and objects of the Bill of Rights. Meaning has to be attributed to this section in accordance with the procedures of constitutional interpretation, but whatever meaning is placed upon it, it is bound to have a decisive impact on the manner in which legislation is construed.[1] The Supreme Court of Appeal's judgment in *Cape Killarney Property Investments (Pty) Ltd v Mahamba*, for instance, illustrates how a constitutional injunction for the protection of a fundamental right can prompt a rights-friendly reading of a statutory provision.[2] The court held that s 4(4) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[3] must be read in a manner affording a respondent in eviction proceedings the maximum benefit of effective notice of such proceedings, since s 4(4) 'has its roots' in FC s 26(3).[4] This constitutional provision states that 'no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances'.

Second, constitutional interpretation, in the course of a court's exercise of its testing right, sparks off an interplay between the constitutional text and an impugned statutory text. The scope and effect of the one has to be considered in the light of the other and since the Constitution is supreme, it determines the parameters within which meaning can be attributed to the statute and not *vice versa*. Third, some aspects of constitutional interpretation as mode of interpretation can, over the course of time, be assimilated into statutory interpretation, especially as differences in style and language between the constitutional text and statutory texts start dwindling.[5] Finally, if there is a possibility that statutory

[1] For a discussion of some implications of FC s 39(2), see § 32.5*(b)*(iii)(bb) infra. For a fuller version, see Woolman 'Application' (supra) at 31-77–31-99.
[2] 2001 (4) SA 1222 (SCA)('*Cape Killarney*').
[3] Act 19 of 1998.
[4] *Cape Killarney* (supra) at para 21.
[5] See § 32.3*(b)*(i) supra.

interpretation can in time be assimilated into constitutional interpretation, then there must certainly always have been vital similarities between these two instances of interpretation. To what extent then can constitutional interpretation be said to be like statutory interpretation — and *vice versa*?

Statutory and constitutional interpretation are both instances of legal interpretation[1] and, to be more exact, instances of construing enacted law-texts.[2] Since text genre co-constitutes textual meaning and therefore co-determines the manner in which the text is to be read and understood and eventually applied,[3] similarities between statutory and constitutional interpretation — at least to the extent that statutes and the Final Constitution belong to the same sub-genre of law-texts — are to be expected. Not all constitutional theorists, however, subscribe to this proposition.

Some authors emphasize the similarity[4] and others the dissimilarity[5] of constitutional and statutory interpretation as modes of interpretation. In South Africa the latter view currently prevails. A dictum from the Canadian case *Hunter et al v Southam Inc*— which highlights the distinctive otherness of constitutional interpretation — has met with approval in South African case law:[6]

> The task of expounding a constitution is different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new, social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind.[7]

[1] See P Schneider 'Prinzipien der Verfassungsinterpretation' (1963) 20 *Veröffentlichungen der Vereinigung der Deutsches Staatsrechtslehrer* 1; H Ehmke 'Prinzipien der Verfassungsinterpretation' (1963) 20 *Veröffentlichungen der Vereinigung der Deutsches Staatsrechtslehrer* 53.

[2] See § 32.3*(e)*(i) supra.

[3] See § 32.3(e) supra.

[4] See E Forsthoff *Zur Problematik der Verfassungsauslegung* (1961) 37-40; R Dreier 'Zur Problematik und Situation der Verfassungsinterpretation' in R Dreier & F Schwegmann (eds) *Probleme der Verfassungsinterpretation* (1976) 13-17.

[5] S Magiera 'The Interpretation of the Basic Law' in C Starck (ed) *Main Principles of the German Basic Law* (1983) 89, 91-97.

[6] *S v Mhlungu & Others* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC)(*'Mhlungu'*) at para 84; *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148, 161A-B (C), 1995 (2) BCLR 198, 208G–H (C); *De Klerk v Du Plessis* 1995 (2) SA 40, 45E-G (T), 1994 (6) BCLR 124, 128A–C (T).

[7] (1984) 11 DLR (4th) 641, 649 (SCC). See also *S v Mhlungu & Others* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC)(*'Mhlungu'*) at para 84; *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148, 161A-B (C), 1995 (2) BCLR 198, 208G–H (C); *De Klerk v Du Plessis* 1995 (2) SA 40, 45E-G (T), 1994 (6) BCLR 124, 128A–C (T).

The differences between constitutional and statutory interpretation have much to do with the uniqueness of the written constitutional text.[1] To briefly recapitulate:

(i) The Constitution, as supreme law, is a long-lasting, enacted law-text at the apex of all legal norms within the legal order.
(ii) The Constitution is justiciable and therefore a standard for the assessment of the validity of both 'law' and 'conduct' in every legislative and executive echelon of government.
(iii) The Constitution verbalizes, in characteristically broad, inclusive and open-ended language, values and beliefs associated with democracy and the constitutional state (or *Rechtsstaat*).
(iv) The Constitution is a product of intense negotiation, harbouring ideological tensions of significance.

It is hopefully becoming ever clearer, as this chapter is proceeding, that constitutional interpretation is indeed, as was stated at the outset,[2] an observance emanating from, rooted in and shaping constitutional democracy, and an activator of the values underlying a democratic, constitutional state. It has far-reaching implications for statutory interpretation, in particular, because the supreme Constitution has a comprehensive impact on 'the intention of the legislature'. The Final Constitution constitutes the foundation upon which all ordinary legal rules are to be interpreted.[3]

Constitutional interpretation certainly calls for a novel interpretive approach, but precisely this means that statutory interpretation too can no longer make do with just the conventional methods and canons of construction:

> The constitutional theory which inspires the interpretation of the Constitution should ... also inform statutory interpretation. The principles for the interpretation of statutes are to be derived from the Constitution.[4]

Structurally the Final Constitution and statutes share many features. This is unsurprising because as *prescriptive, abstractly normative law-texts* they constitute a further sub-genre, namely *enacted law-texts*.[5] They are products of conscious, planned and deliberative norm-making by a demonstrable, authorized constitution-maker or law-maker. A constitution and statutes are therefore meant or intended to be of

[1] See § 32.3*(e)*(ii) and (iii) supra.
[2] See § 32.1 supra.
[3] See T Roux 'Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) of the Constitution on South African Law' (2004) 121 *South African Law Journal* 466, 479.
[4] See JR de Ville *Constitutional and Statutory Interpretation* (2000) 60, n 292 (Finds support for his contention in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC) at paras 2-15 and 55; *Minister of Land Affairs v Slamdien* 1999 (4) BCLR 413 (LCC); and *Dulabh & Another v Department of Land Affairs* 1997 (4) SA 1108 (LCC).)
[5] For an explication of the terms 'enacted law' and 'enacted law-texts', see § 32.3*(e)*(i)(ee) supra.

effect.[1] By replacing statutes and, in particular, Acts of Parliament as highest normative authority, South Africa's two supreme Constitutions since 1994 have not deprived legislation of its worth, status or force, but have given it new direction and dimension. The Final Constitution and statutes also show similarities both in formal and operational style which makes it appropriate to rely on broadly similar reading strategies (conventional canons of statutory interpretation included) for their interpretation. In constitutional interpretation these strategies can be overridden by more pressing constitutional concerns. This is not really new. Traditionally, reading strategies for statutory interpretation as encapsulated and expressed in the canons of construction have not always and necessarily determined interpretive outcomes: 'more pressing concerns' may in certain situations also trump an interpretation resulting from painstaking implementation of canons of construction.[2]

Courts have since 1994 explicitly — but not too frequently — relied on canons of statutory interpretation to construe the two Constitutions. The Constitutional Court has mostly summoned up presumptions (as opposed to rules) of statutory interpretation to act as canons of constitutional interpretation. First among these presumptions is that enacted law is not unjust and inequitable.[3] It is rather surprising that the Court relied on this presumption, because the standards for just and equitable laws contained in the Final Constitution, and the Bill of Rights in particular, obtain with supreme force and are more to the point than those conventionally embodied in and associated with the presumption. However, the presumption may still cater for some concerns not so directly addressed in the Final Constitution and the Bill of Rights.[4] Second, the Constitutional Court has presumed that the Constitution, like statute law, is not invalid or purposeless.[5] Third, the same Court, in *S v Mhlungu & Others*, considered the applicability, in constitutional interpretation, of the presumption that an enacted instrument does not apply with retroactive and retrospective effect.[6] Some members of the Court voiced doubt about such applicability, but the court as whole did not come to a clear-cut conclusion. The presumption that statute law does not violate international law is a fourth presumption that has been recognized in constitutional interpretation.[7] Finally, the 'principle of interpretation' — that where two

[1] See § 32.3*(d)* supra.
[2] See L du Plessis *Re-Interpretation of Statutes* (2002) 123-128.
[3] See *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC)('*De Klerk*') at para 123; *Mhlungu* (supra) at para 36.
[4] See Du Plessis *Re-Interpretation of Statutes* (supra) at 154-164.
[5] See *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party* 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC) at para 52.
[6] *Mhlungu* (supra) at paras 37, 38 and 66-68.
[7] See *Azanian Peoples Organisation (AZAPO) & Others v President of the Republic of South Africa & Others* 1996 (8) BCLR 1015 (CC), 1996 (4) SA 672 (CC)(*AZAPO*) at para 26.

subsections deal with the same subject matter they are usually read together — has been afforded similar recognition.[1]

In *Betta Eiendomme (Pty) Ltd v Ekple-Epoh*[2] Flemming DJP assumed that FC s 26(3) should, like any statutory provision, be construed to alter the existing law or interfere with existing rights only to the extent clearly apparent from and allowed by the words used. This reliance on a conventional presumption of statutory interpretation constitutes an approach inappropriate to interpretation of the supreme Constitution[3] (and actually inappropriate to statutory interpretation in a constitutional democracy too). It is also not really an instance of reliance on any conventional canons of statutory interpretation such as the rules that the words of s 16(3) must be afforded their ordinary meaning (but that 'evict/eviction' and 'order of court' — and 'arbitrary' — must be construed as having a technical legal meaning); that the words 'no one' must be understood in their general signification, or that each word of the provision must be afforded a meaning.[4]

Other instances in which courts, and the Constitutional Court in particular, have been clutching at trusted literalist-cum-intentionalist straws in constitutional interpretation[5] can also not be classified as examples of reliance on any of the conventional canons of statutory interpretation. These instances, just like *Betta Eiendomme,* testify to the hold that literalist-cum-intentionalist statutory interpretation — as an approach to the interpretation of enacted law and not as a canon of construction — still has over judges engaged in constitutional interpretation. However, *the fact* that, in constitutional interpretation, many courts rely on conventional canons of statutory interpretation and resort to commonplace, interpretive rhetoric, does not warrant either an assimilation of literalist-cum-intentionalist assumptions into constitutional interpretation. I am strenuously arguing the opposite position.[6] It is time for such assumptions to go.

Under the stylistic influence of the Final Constitution, statutes are increasingly couched in expansive and open-ended language,[7] and aids to statutory and constitutional interpretation that were not high up in the traditional hierarchy of primacy nowadays fulfil a most basic function in the interpretive doings of the courts and are relied on unqualifiedly right from the outset. Preambles, for

[1] *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the RSA; Executive Council of KwaZulu-Natal v President of the RSA* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC)('*Executive Council of the Western Cape 1999*').

[2] 2000 (4) SA 468 (W).

[3] See Roux 'Continuity and Change' (supra) at 479.

[4] FC s 26(3) reads as follows: 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.' The rules of statutory interpretation mentioned as examples above all fit under the heading 'grammatical interpretation' in § 32.5*(c)*(i) infra.

[5] See § 32.3*(b)*(i) supra.

[6] Ibid.

[7] See the Labour Relations Act 66 of 1995, the Promotion of Administrative Justice Act 3 of 2000 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

example, used to occur in statutes quite infrequently.[1] But they have now become regular inclusions in statutory texts, and they are often amplified by other statements of an introductory nature, such as statements of purpose or explicit guidelines to interpretation.[2] The courts often rely on these aids to attribute meaning to specific statutory provisions without even asking whether the language of such provisions is clear and unambiguous. These developments, occasioned mainly by the advent of constitutional supremacy,[3] undermine whatever was left of the credibility of the conventional order of primacy of canons of statutory interpretation. Why? Again, because they unsettle the notion of clear and unambiguous language.

A growing body of statute law has, especially over the last decade, augmented and given fuller and more detailed effect to constitutional provisions. Provision is made in the Final Constitution — and with reference to certain rights in the Bill of Rights in particular — for the enactment of such legislation. FC 9(4), for instance, obliges the national legislature to enact legislation 'to prevent or prohibit unfair discrimination'. FC s 33(3), in a similar mandatory vein, requires the national legislature to enact legislation to give specific effect to aspects of the right to just administrative action. The Promotion of Equality and Prevention of Unfair Discrimination Act[4] and the Promotion of Administrative Justice Act,[5] respectively, have been enacted to comply with the constitutional obligations in ss 9(4) and 33(3). The Labour Relations Act ('LRA')[6] was enacted 'to give effect to and regulate the fundamental rights conferred by section 27 of the [Interim] Constitution'.[7] FC s 23(5) and (6) envisages and authorizes, in a permissive vein, legislation to regulate collective bargaining and to recognize union security arrangements contained in collective agreements respectively. National legislation giving specific effect to constitutional provisions may thus have been enacted either pursuant to a constitutional obligation or a permissive authorisation to do so, or of the legislature's own accord.

From an interpretive perspective there is a special relationship between the Constitution and statutes giving specific effect to its provisions, irrespective of whether these statutes have been enacted pursuant to an obligatory or permissive constitutional authorization, or of a legislature's own accord. First, when action is taken because an infringement of a constitutional right or rights to which a statute gives specific effect is alleged, a litigant cannot circumvent the statute 'by

[1] For the interpretive significance of the constitutional Preamble, see 32.4*(c)*(i)(aa) infra.
[2] Du Plessis *Re-Interpretation of Statutes* (supra) at 239-244.
[3] See 32.3*(b)*(i) supra.
[4] Act 4 of 2000 required by FC s 9(4).
[5] Act 3 of 2000 required by FC s 33(3).
[6] Act 66 of 1995, another statute in this category, envisaged in FC ss 23(5) and (6).
[7] LRA s 1(a).

attempting to rely directly on the constitutional right'.[1] To do so would be to 'fail to recognise the important task conferred on the legislature by the Constitution to respect, protect, promote and fulfill the rights in the Bill of Rights'.[2] Second, the provisions of a statute giving specific effect to constitutional provisions must, like any other statute, be construed to promote the spirit, purport and objects of the Bill of Rights, and also the specific provision of the Bill of Rights to which the particular statute gives detailed effect.[3] This special nature of such legislation does not, however, mean that the statute must simply be treated as a restatement of the constitutional right, as long as it does not decrease the protection that the constitutional right affords or does not infringe another right.[4] Third, on the two conditions aforesaid, a statute giving specific effect to constitutional provisions 'may extend protection beyond what is conferred by' the particular Bill of Rights and other constitutional provisions to which it gives specific effect.[5]

Can a constitutional provision be understood in the light of a provision or provisions of a statute, and a statute giving specific effect to such constitutional provisions in particular? The rule of thumb is that legislation is to be read in the light of the supreme Constitution and not *vice versa*. However, statutes and, in particular, statutes giving specific effect to constitutional provisions together with jurisprudence on their interpretation, could (and should be allowed to) shape constitutional interpreters' understanding of some of the expansive and open-ended provisions of the Final Constitution in much the same way as the (subordinate) Interpretation Act[6] may shed interpretive light on provisions of the Final Constitution.[7] However, meanings attributed to words and phrases in legislation dating from the apartheid era ought not to be allowed to dictate the attribution of meaning to the same words and phrases when they are used in the Final Constitution.[8]

[1] See *KwaZulu-Natal MEC for Education & Others v Pillay* 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC)('*Pillay*') at para 40. See also *Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amicus Curiae)* 2006 (1) BCLR 1 (CC), 2006 (2) SA 311 (CC)('*New Clicks*') at paras 96 (Chaskalson CJ) and 434-437 (Ngcobo J); *South African National Defence Union v Minister of Defence & Others* 2007 (5) SA 400 (CC), 2007 (8) BCLR 863 (CC)('*SANDU*') at para 51; *NAPTOSA & Others v Minister of Education, Western Cape & Others* 2001 (2) SA 112, 123I-J (C), 2001 (4) BCLR 388, 396I-J (C).

[2] *SANDU* (supra) at para 52. See also *New Clicks* (supra) at para 96. *SANDU* can be read as an instance of (adjudicative) subsidiarity: a subordinate, less encompassing and more specific legal norm is relied on to adjudicate certain cases in preference to a superordinate, more encompassing and general constitutional norm. See § 32.*5(b)*(iii)(bb) infra.

[3] FC s 39(2).

[4] *Pillay* (supra) at para 43.

[5] Ibid.

[6] Act 33 of 1957.

[7] See § 32.4*(c)*(i)(ii) infra and *Ross v South Peninsula Municipality* 2000 (1) SA 589, 599A–B (C).

[8] See *Ex parte President of the RSA. In re: Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC) at para 59.

(b) Multilingualism

Up to 27 April 1994 South Africa had two official languages, Afrikaans and English, but with the commencement of the Interim Constitution nine more were added: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, isiNdebele, isiXhosa and isiZulu.[1] Significant for the interpretation of enacted law in a multilingual state is the availability of versions of the Constitution and statutes in various languages. This is a potentially problematic situation because the various versions of a text may differ or may even conflict. It is also a potentially profitable situation, however, because comparison of different versions, each with its own nuances and emphases, can serve as an aid to interpretation. South African Constitutions between 1910 and 1994 each had a 'conflict provision' to cater for the potentially problematic dimension of statutory bilingualism. These provisions held that when the English and Afrikaans versions of a statute were in conflict, the version signed by the State President prevailed.[2] The courts worked quite creatively with the opportunities bilingualism offered, and did not readily conclude that different versions of a statute were in conflict. Generally speaking, when the occasion arose, profitable use was made of differences between the Afrikaans and English versions of statutes for reciprocal clarification.[3] The Interim Constitution contained[4] — and the Final Constitution still contains[5] — conflict provisions relating to statutes, still giving prevalence to the signed version of a statute in the event of conflict. A novelty in both Constitutions has been the inclusion of conflict provisions dealing with the different versions of the written constitutional text itself. Section 15 of the Constitution of the Republic of South Africa Amendment Act[6] added a conflict provision to the Interim Constitution stating that, notwithstanding the fact that the Afrikaans version of the Interim Constitution was signed by the then State President, its English version had, for the purposes of its interpretation, to prevail as if it were the signed version. FC s 240 provides that '[i]n the event of an inconsistency between different texts of the Constitution, the English text prevails'.

Jurisprudence on the conflict provisions pertaining to either of the new Constitutions has been rather sparse. In *Du Plessis & Others v De Klerk & Another*,[7] with the Interim Constitution still in place, the Constitutional Court concluded,

[1] See I Currie 'Official Languages' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 65.

[2] See 1909 South Africa Act (9 Edw 7 c 9) s 67; Republic of South Africa Constitution Act 32 of 1961 s 65; Republic of South Africa Constitution Act 110 of 1983 s 35.

[3] Du Plessis *Re-Interpretation of Statutes* (supra) at 215-218.

[4] See IC s 65.

[5] See FC s 82 in respect of national legislation and FC s 124 in respect of provincial legislation.

[6] Act 2 of 1994.

[7] 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC)('*Du Plessis*').

with s 15 of the 1994 Constitution Amendment Act in mind, that the English phrase 'all law in force' in IC s 7(2) had to be understood extensively with reference to the Afrikaans version 'alle reg wat van krag is'. 'All law in force' can be read as a reference restricted to statute law. The more inclusive Afrikaans word 'reg', however, indicated that 'law' must embrace common law as well as statute law. This connotation of 'reg' was clear from the Afrikaans wording of other sections. In IC ss 8(1) and 33(1) 'reg' was used as the Afrikaans equivalent for 'law'. In Kentridge AJ's interpretation, IC s 7(2) of the Afrikaans version thus in effect 'prevailed' in spite of the s 15 requirement that, for purposes of the interpretation of the Interim Constitution, the English text had to prevail. Preference for the Afrikaans version, Kentridge JA thought (relying on a 'well-established rule of interpretation'), was possible because there was *no conflict* between the two versions:

> [I]f one text is ambiguous, and if the ambiguity can be resolved by the reference to unambiguous words in the other text, the latter unambiguous meaning should be adopted. There is no reason why this common-sense rule should not be applied to the interpretation of the Constitution. Both texts must be taken to represent the intention of Parliament.[1]

Kentridge AJ finally justified his conclusion on the basis that Afrikaans had remained an official language with undiminished status in terms of IC s 3. Post-*Du Plessis*, no more than oblique reference to the Afrikaans versions of both Constitutions has been on offer.[2]

(c) Interpretive waymarks in the written constitutional text

A waymark, according to the *The Shorter Oxford English Dictionary*,[3] is 'a conspicuous object which serves as a guide to travellers'. There are statements in the Preamble to and in certain provisions and other textual components of the Constitution-in-writing that explicitly present themselves as such to constitutional interpreters travelling the road to a better understanding of the Final Constitution (or aspects of it). Some conspicuous waymark provisions will first be identified and discussed.

To track or to spoor is also a way of travelling, but the guides to the journey are *inconspicuous* — and therefore not readily noticeable — but not *invisible*, and therefore not undiscoverable. The vigilant constitutional interpreter may detect these inconspicuous waymarks, for they are really and effectually *there*, in the written constitutional text, and they are discoverable. Examples of inconspicuous waymarks will be looked at after the discussion on conspicuous waymarks.[4]

Interpretive waymarks seem to occur in provisions of the Constitution in an injunctive, directive or permissive mood. Here are three examples:

[1] *Du Plessis* (supra) at para 44.
[2] *Langemaat v Minister of Safety and Security* 1998 (4) BCLR 444, 448J (T); *Wittman v Deutscher Schulverein, Pretoria* 1998 (4) SA 423, 449C (T), 1999 (1) BCLR 92, 115H (T).
[3] *The Shorter Oxford English Dictionary on CD-ROM* (5th Edition Version 2.0, 2002).
[4] See § 34.2*(c)*(ii) infra.

- The s 39(1) requirements that a court interpreting the Bill of Rights *must* promote certain values and *must* consider international law are, on the face of it, injunctive though the latter requirement — not really requiring a court *to apply* international law, but just *to consider* it — is arguably rather directive.
- The basic principles governing public administration in s 195 are directive.
- The s 39(1)*(c)* commendation of foreign law is permissive.

Not much of interpretive significance, however, turns on a distinction between injunctive, directive and permissive waymarks. The prescriptivity of the language in which a waymark provision is couched may enhance or reduce the initial conspicuity of the waymark, but this will no longer really matter once the waymark is followed.

Waymarks are not typical 'black-letter' legal rules, though, not even those couched in injunctive language. Theunis Roux suggests that the founding values in s 1 of the Constitution must be seen as interpretive guidelines, 'presumptions almost, which favour a certain way of understanding the South African constitutional project and … the nature of the democracy which that project seeks to promote'.[1] To treat value statements as 'presumptions almost' is to honour their normative ubiquity in constitutional interpretation. These 'presumptions' are substantive legal norms which do not obtain in an all-or-nothing manner, but carry sufficient weight to determine interpretive outcomes one way or the other. Conventional wisdom about presumptions in statutory interpretation, namely that they are 'last resorts' or 'tertiary grounds of deduction' to which the interpreter turns if all other interpretive strategies (and especially the literalist-cum-intentionalist ones) have failed, is wholly inappropriate to constitutional interpretation (and is under siege in statutory interpretation too).[2] Constitutional values as presumptions (as well as value-laden presumptions of statutory interpretation) call to mind Ronald Dworkin's[3] distinction between *rules of law* obtaining in an all-or-nothing manner and *principles* whose application is less definite though they carry demonstrable weight in the determination of legally reasoned outcomes. The presumptions aforesaid exert whatever interpretive influence they have in a principle-like manner, rather than in a rule-like manner, even though they can probably not be described as fully-fledged principles in a Dworkinian sense.

(i) *Conspicuous waymarks*

(aa) The Preamble to the Constitution

In statutory interpretation, preambles were traditionally recognized as statements setting out the objects of statutes. They were not frequently included in statutes

[1] T Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) 10-26.

[2] Du Plessis *Re-Interpretation of Statutes* (supra) at 149-154; L du Plessis 'The (Re-)systematization of the Canons and Aids to Statutory Interpretation' (2005) 122 *South African Law Journal* 591, 598.

[3] R Dworkin *Taking Rights Seriously* (1977) 22-28.

and introduced mainly statutory texts of a solemn nature, for example, Constitution Acts[1] or private Acts such as University Acts.[2] It was admissible to consult a preamble to shed interpretive light on the meaning of the provisions of the legislative instrument that they prefaced, but then only where individual provisions that stood to be construed were ambiguous or uncertain due to deficient formulations.[3] However, the attitude of the courts regarding the interpretive value of the preambles to the Interim Constitution and the Final Constitution (and the Interim Constitution's unprecedented Postamble too) has been open and positive right from the outset. Sachs J, for instance, said the following about the Preamble to the Interim Constitution:

> The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes.[4]

The Constitutional Court[5] and, to a lesser extent, high courts[6] have shown a readiness to rely on constitutional preambles for interpretive purposes without

[1] See Republic of South Africa Constitution Act 110 of 1983; Transkei Constitution Act 48 of 1963.

[2] See University of Stellenbosch (Private) Act (House of Assembly) 107 of 1992; University of Natal (Private) Act 7 of 1960.

[3] See Du Plessis *Re-Interpretation of Statutes* (supra) at 240.

[4] See *Mhlungu* (supra) at para 112.

[5] See *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC)('Makwanyane') at paras 130, 155, 156, 262, 278, 307, 514 and 363; *Mhlungu* (supra) at paras 64, 112 and 132; *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC)('*Executive Council of the Western Cape 1995*') at paras 30, 39 and 61; *Shabalala v Attorney-General, Transvaal* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC)('*Shabalala*') at paras 25 and 35; *Ferreira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)('*Ferreira*') at para 255; *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 150; *Ex parte Gauteng Provincial Legislature. In re: Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC) at para 52; *Du Plessis* (supra) at paras 75, 123, 125–126, 132, 157 and 159; *Key v Attorney-General, Cape Provincial Division* 1996 (6) BCLR 788 (CC), 1996 (4) SA 187 (CC) at para 13; *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at paras 33 and 44; *Fraser v Children's Court, Pretoria North, & Others* 1997 (6) BCLR (CC), 1997 (2) SA 261 (CC) at para 20; *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC) at para 32; *Fose v Minister of Safety and Security* 1997 (3) 786 (CC), 1997 (7) BCLR 851 (CC) at para 94; *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 21; *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 123; *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC)('*Soobramoney*') at para 9; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)('*Walker*') at para 108; *New National Party of SA v Government of the RSA* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 119; *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (7) BCLR 702 (CC), 2002 (4) SA 768 (CC)('*FNB*) at para 50; *Kaunda & Others v President of the RSA & Others (2)* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC)('*Kaunda*') at paras 218-221; *Minister of Finance and Another v Van Heerden* 2004 (6) 121 (CC), 2004 (11) BCLR 1125 (CC) at para 23.

[6] See *Qozoleni v Minister of Law and Order* 1994 (3) SA 625, 634I-635C (E), 1994 (1) BCLR 75, 79D–E (E)('*Qozoleni*'); *Khala v Minister of Safety and Security* 1994 (4) SA 218, 221F-G (W), 1994 (2) BCLR 89, 91F–G (W); *Baloro v University of Bophuthatswana* 1995 (8) BCLR 1018, 1044H–1045B (B); *Holomisa v Argus Newspapers* 1996 (2) SA 588, 597G (W), 1996 (6) BCLR 836, 844E (W).

imposing the qualification that such reliance is warranted only where the language of the Constitution is ambiguous and/or unclear. A good example of comprehensive (interpretive) reliance on the Preamble to the Constitution, seeking out the democratic substance in the introductory statements, can be found in Theunis Roux's Chapter 10 entitled 'Democracy'.[1]

The Interim Constitution also included a Postamble[2] which, just like the Preamble to the Interim Constitution, was relied on in an unqualified manner for interpretation purposes.[3] Much of the spirit and tenor of that Postamble has survived in the Preamble to the Final Constitution. The latter, for instance, among other things, recognizes 'the injustices of our past' and honours 'those who suffered for justice and freedom in our land', and furthermore reiterates the need for healing 'the divisions of the past' and for building a 'united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'. Even the monotheistic confession of faith, gleaned from South Africa's national anthem, which concluded the Interim Constitution's Postamble, has remained in the Final Constitution's Preamble: *Nkosi Sikelel' iAfrika* (God bless Africa). The Postamble, it will be remembered, was the textual peg on which two versions of transitional constitutionalism as interpretive leitmotiv — the one picturing the Constitution as a bridge and the other conceiving of it as a monument and a memorial — were first hung.[4] The similarities between the Postamble and the present Preamble buttress the claim that textual support for transitional constitutionalism as interpretive leitmotiv still exists – even though explicit reference to the 'bridge' is no longer made. The more unqualified use of preambles in constitutional interpretation has met with response in statutory interpretation too and it seems to have become a rule of thumb for statutory drafters to include preambles in statutes dealing with a variety of matters.

(bb) The Founding Provisions

FC s 1, reminiscent of article 20 of the German Basic Law, sets out the rudiments of the kind of state (*politeia*) the Final Constitution is meant to found in South Africa. These provisions are therefore arguably the most fundamental and most salient interpretive waymarks in the written constitutional text. Their extraordinary status is underscored by the requirement that an enhanced majority of 75 per

[1] See Roux 'Democracy' (supra) at 10-22–10-24.

[2] On this Postamble, see § 32.3*(c)*(iii) supra. As pointed out previously, this Postamble was designed to pave the way for mechanisms and procedures to 'deal with the past' in a manner that best promoted national unity and reconciliation. By virtue of a provision in the Final Constitution itself, namely FC s 232(4), the Postamble was 'deemed to form part of the substance' of the Interim Constitution.

[3] See *Shabalala* (supra) at para 25; *AZAPO* (supra) at paras 12–14; *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 73; *S v Lawrence; S v Negal; S v Solberg* (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at para 147; *Walker* (supra) at paras 46, 102 and 108.

[4] See §§ 32.3*(c)*(iii)*(aa)* and *(bb)* supra.

cent in the National Assembly, and the support of six out of the nine provinces in the National Council of Provinces, are needed for the amendment of FC s 1.[1] The whole of Chris Roederer's Chapter 13 is devoted to a discussion of the founding provisions and their ramifications.[2]

(cc) FC s 7 (Rights)

FC s 7 has, to date, mostly been relied on as an *ad hoc* rhetorical stratagem. This is unfortunate. FC s 7 contains provisions that amplify the meaning of the Bill of Rights and that are very similar to FC s 1 and its founding provisions for the Final Constitution.

Sceptics may object to the depiction of the provisions of FC s 7 as *interpretive* waymark provisions. Only FC s 7(3) serves as reminder that the fundamental rights in Chapter 2 are subject to limitations contained in FC s 36 or elsewhere in the Bill of Rights — and thus satisfies the desiderata of a typical *interpretive* instruction. FC s 7 is, admittedly, not an 'interpretation clause' in the same sense as FC s 39. However, it embodies weighty assertions about the Bill of Rights as a cornerstone of democracy in South Africa (FC s 7(1)) and the manner in which the state is required to make good on the promise of the specific substantive rights found in Chapter 2 (FC s 7(2)). The statements in these two subsections will remain abstract ideals if not concretized through interpretation. No extraordinary insight is required to realize that lofty constitutional values and ideals will come to naught if they are not invoked to shepherd and shape the way in which authorized interpreters of the Final Constitution (and the Bill of Rights) give effect to the provisions of the country's supreme law. The value statements in FC s 7 are, like those in FC s 1, essentially presumptions that indicate that some understandings of the Bill of Rights are to be preferred to others.[3]

A triumvirate of values, 'human dignity, equality and freedom', affirmed in FC s 7(1), decisively informs four crucial value statements in the Constitution — one among the founding provisions[4] in FC s 1[5] and three in the Bill of Rights.[6] The fundamentality and centrality of the triumvirate values informing s 7(1) rightly raised expectations that case law pronouncements on this provision would abound. The contrary is true. The case law offers few examples of FC s 7(1)-centred assertions of the triumvirate values and, in general, of systematic analyses of their nature, content and scope, as well as measured assessments of their potential impact. Courts have cited FC s 7(1) to affirm the centrality of human dignity as a constitutional value, but have mostly combined this with simultaneous

[1] FC s 74(1).

[2] See C Roederer 'Founding Provisions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 13.

[3] See Roux 'Democracy' (supra) at 10-26. .

[4] See FC Chapter 1.

[5] See FC s 1(a).

[6] See FC s 7(1)(States that the Bill of Rights affirms these *democratic values*); FC s 36(1), the general limitation clause; and FC s 39(1)(a), the interpretation clause.

references to the triumvirate value assertions elsewhere in the Final Constitution.[1] The possible meanings and effects of the triumvirate values have mostly been considered in the course of limitations reasoning centred on s 36(1). In paragraph *(ee)* below it will be explained why the systematic and comprehensive discussions of these values in Stu Woolman and Henk Botha's chapter on 'Limitations'[2] and Theunis Roux's chapter on 'Democracy'[3] suffice (also) for purposes of the present chapter.

The wording of FC s 7(2) admits of and, indeed, invites optimum realization of the rights entrenched in the Bill of Rights. The view that a bill of rights may be relied on to respect and protect fundamental rights against interference by the state has traditionally enjoyed wide acceptance in the context of domestic human rights protection. However, to add to this obligation that the state is also enjoined to take positive action to *promote* and *fulfil* rights entrenched in a bill of rights will probably raise many a traditionalist eyebrow. And yet, FC s 7(2) has been cited in support of such positive state action.

In *S v Baloyi (Minister of Justice Intervening)*[4] the Constitutional Court, on a combined reading of FC ss 7(2) and 12(1) — the latter entrenching the right to freedom and security of the person — concluded that the state is obliged to protect the right of everyone to be free from private or domestic violence, even if it meant (preventative and pre-emptive) state intrusion into the privacy of family life. Legislation authorizing such intrusion[5] was therefore held to be constitutional because the intrusion for which it provides fulfils the state's constitutional obligation. In its landmark judgment in *Carmichele v Minister of Safety and Security & Another,* the Constitutional Court laid down guidelines for the development of the common law so as to promote the spirit, purport and objects of the Bill of Rights.[6] Considered *in casu* was the development of the common law of delict on state liability for injuries suffered by a claimant at the hand of a third party, due to the failure of protective state agencies to take adequate precautionary action. The case originated in the Cape High Court which, on the strength of the 'undeveloped' common law, had previously granted absolution from the instance. The Constitutional Court, having concluded that there was scope for the development of the common law in this area (through FC s 39(2)), referred the case

[1] See, for example, *Dawood & Another v Minister of Home Affairs & Others; Shalabi and Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at paras 34-35; *Pillay* (supra) at para 49.

[2] See S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[3] See T Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10.

[4] *S v Baloyi (Minister of Justice Intervening)* 2000 (1) BCLR 86 (CC), 2000 (2) SA 425 (CC)('*Baloyi*') at para 11.

[5] See Prevention of Family Violence Act 133 of 1993.

[6] *Carmichele v Minister of Safety and Security & Another* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC)('*Carmichele*').

back to the Cape High Court 'so that the trial may continue'.[1] Chetty J, in the latter court, thereupon handed down a judgment in which he applied the Constitutional Court's guidelines for the development of the common law and construed the duties of the state and, in particular, the police and prosecution services, in an activist vein with reference to, among others, the wording of FC s 7(2).[2] In *Modder East Squatters & Another v Modderklip Boerdery (Pty) Ltd; President of the RSA & Others v Modderklip Boerdery (Pty) Ltd*[3] the Supreme Court of Appeal, once again citing FC s 7(2) and FC s 1, emphasized that the extended scope of individuals' entitlement to state protection against harmful action imposes a positive duty on the part of the state to protect every citizen from damaging acts perpetrated by private (third) parties.

In *Government of the Republic of South Africa & Others v Grootboom & Others* the Constitutional Court confirmed that the explicit (yet somewhat restrained) entrenchment of certain socio-economic rights in the Bill of Rights,[4] read with the state's FC s 7(2) duty to promote and fulfil the rights entrenched in Chapter 2, have put beyond question the issue of whether socio-economic rights are justiciable:[5] '[t]he question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case'.[6] The Constitutional Court has also held that the legislature's previously referred to responsibility to enact legislation giving fuller and more detailed effect to fundamental rights entrenched in the Final Constitution[7] is a duty imposed upon it by FC s 7(2).[8]

In *Kaunda & Others v President of the RSA & Others (2)*, a conservative and cautionary construction of FC s 7(2) was held not to authorize the exterritorial application of the Final Constitution.[9] The Court thought that the positive duties that FC s 7(2) imposes on the state do not extend beyond the borders of the Republic *per se*, and that an answer to the question of whether South African

[1] *Carmichele* (supra) at para 84.

[2] Ibid at para 30.

[3] *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)('*Grootboom*') at para 20.

[4] Socio-economic rights are entrenched in FC ss 26 and 27 not as entitlements to the commodities mentioned in those sections (to wit housing, health care, food, water and social security), but as entitlements to have access to the commodities in question. On the construction of socio-economic rights, see S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33.

[5] *Grootboom* (supra) at para 20.

[6] The Court's (arguably still somewhat tentative) view on the justiciability of socio-economic rights as expressed in *First Certification Judgment* (*Ex parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the Republic of South Africa, 1996,* 1996 (10) BCLR 1253 (CC), 1996 (4) SA 744 (CC) at para 78) was hereby (also) confirmed, in what may be described as a modestly activist judgment induced by FC s 7(2).

[7] For examples of such legislation, see § 34.2*(a)* supra.

[8] See *SANDU* (supra) at para 52. See also *New Clicks* (supra) at para 96.

[9] 2004 (10) BCLR 1009 (CC), 2005 (4) SA 235 (CC) at para 32.

nationals' constitutionally entrenched rights attached to them outside of South Africa is co-dependent on whether the Final Constitution can be construed as having extra-territorial effect. As Stu Woolman notes, the *Kaunda* Court — with a simple errant reading of a preposition — arrived at the wrong conclusion.[1]

Finally, in *Doctors for Life International v Speaker of the National Assembly & Others* the Constitutional Court considered the nature of the duties FC s 7(2) imposes on the state, in order to determine which remedies would be available to someone prejudiced by a breach of such duties.[2] The Court suggested that these duties do not count among the 'constitutional obligations' contemplated in FC s 167(4)*(e)* and on the fulfilment of which the Constitutional Court has exclusive jurisdiction to adjudicate. Instead, the Court thought that non-compliance with FC s 7(2) duties has to be regarded (and treated) as similar to non-compliance with any other duties imposed by the Bill of Rights. These remarks seem to indicate that FC s 7(2) is justiciable — not as a right, but as a source of duties!

From the somewhat disparate treatment of FC s 7 there so far there emerges a picture of reasonably frequent — but by no means unimpeachable – reliance on FC s 7(2) to impose positive duties on the state. However, a coherent account of the triumvirate values, taking its cue from s 7(1), is by and large still wanting. And even if FC s 7(3) had indeed been designed as general authorization for limitations to Chapter 2 rights only in accordance with FC s 36 or other relevant provisions of the Bill of Rights, the constitutional case law has actually ignored such status. Limitations jurisprudence, since the commencement of the Constitution, has predominantly hinged on the construction of the provisions of FC s 36[3] or, to a lesser extent, Bill of Rights provisions containing or referring to specific limitations.

'This Bill of Rights is a cornerstone for democracy in South Africa'. A coherent and context-sensitive account of FC s 7, going beyond *ad hoc* explanations of it in the case law so far, presumably has to begin with this crucial opening statement in s 7(1). And yet, judged by the paucity of case law references, this statement seems to be overlooked quite easily. But it does appear, and do some work, now and then. In *De Lange v Smuts NO & Others* the Constitutional Court, for instance, held it to be one of the constitutional indicia compelling 'a clear separation of powers between the legislature, executive and judiciary'.[4] This reliance on FC s 7(1) forges an inextricable link between rights and democracy on the one hand, and democracy and rights, on the other. If ever a constitution could be found to expressly deny the contermajoritarian problem as a problem, then such a denial is to be found in FC s 7(2). Theunis Roux, in Chapter 10 ('Democracy') rightly

[1] See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.
[2] 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at paras 17-18.
[3] See Woolman & Botha 'Limitations' (supra).
[4] 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 44.

forges a link between the FC s 7(1) cornerstone statement and the rudiments of (constitutional) democracy. He suggests that a democracy with a bill of rights as cornerstone is one in which constitutional review by the courts is afforded its due, to the point of recognising that 'there will be at least some occasions when the vindication of a right at the expense of majoritarian wishes will not be undemocratic'.[1] The notion of the Bill of Rights as cornerstone of democracy furthermore presupposes a particular mode of constitutional review. The primary characteristics of this mode of review appear in FC s 36(1) procedures and conditions for limiting rights.[2]

HM Cheadle, DM Davis and NR Haysom attempt to offer a coherent account of FC s 7 based on the assumption that the section as a whole accomplishes five important objectives:[3]

(i) First, it proclaims the Bill of Rights as a cornerstone of our democracy. It is not the only such cornerstone — FC s 1, for instance, fulfils a similar role — but the status of FC s 7 as cornerstone has profound implications for how the rights contained in the Bill of Rights engage with the democratic governance of the Republic. FC s7 is furthermore entwined with FC s 1 to such an extent that, according to the authors,[4] a dilution of the former will inevitably offend the basis of the latter.

(ii) Second, FC s 7 proclaims that the Bill of Rights enshrines the rights of all who live in the country. That means that such rights pre-exist their inclusion in the Final Constitution. They are, in other words, innate rights as contemplated in the American Declaration of Independence which contains the following phrase (included at the behest of Thomas Jefferson):

> We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.[5]

The Final Constitution is therefore not the source or the origin of the rights that it enshrines, but a record of already existing rights.

(iii) Third, FC s 7 affirms a value system on which the Bill of Rights rests. According to the authors the affirmation of these (what were previously referred to as) triumvirate values provides a basis for the Constitutional Court's claim in *Carmichele v Minister of Safety and Security & Another*[6] that the Constitution is not merely a formal document regulating public power, but that '[i]t also embodies, like the German Constitution, an objective, normative

[1] Roux 'Democracy' (supra) at 10-34.
[2] Ibid at 10-34–10-37.
[3] HM Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2006) 2-1–2-6.
[4] Ibid at 2-1.
[5] Ibid at 2-2.
[6] *Carmichele* (supra) at para 54.

value system'.[1] The authors are, however, critical of what they perceive to be a skewed development in the Constitutional Court's jurisprudence of the triumvirate values and its over-emphasis of human dignity.[2]

(iv) Fourth, FC s 7 requires the state to take affirmative measures to respect, protect, promote and fulfil the rights contained in the Bill of Rights. Under this heading — with comparative reference to foreign jurisprudence — the authors endorse the previously described activist trend in South Africa's constitutional jurisprudence. FC s 7(2) saddles the state with certain 'positive' duties.[3]

(v) Fifth, FC s 7 recognizes that the rights in the Bill of Rights may be limited, but only in the manner set out in the Bill itself.

Bringing together what Roux[4] says about the Bill of Rights as cornerstone of democracy, the contentions of Cheadle, Davis and Haysom, and Woolman and Botha's analysis of the role of FC 7(1) in rights interpretation and limitations analysis,[5] it appears that FC s 7 plays, in respect of the Bill of Rights, an anchoring, depictive and interpretive role analogous to that of the founding provisions in FC s 1. FC ss 1 and 7 also complement and sustain each other. The democratic procedures mentioned in s 1 mainly pertain to *populist democracy*: universal adult suffrage, voters' rolls, regular elections, multi-party democracy and accountable, open and responsive government are the matters and concerns raised in FC s 1*(d)*. In FC s 7 the emphasis is, as Roux rightly argues, on *constitutional democracy*. The ideological tension between populism and constitutionalism reveal itself when FC ss 1 and 7 are read together. But the tension between them remains. This tension, kept alive, has the potential to release creative (interpretive) energy that could enrich the construction of both populist- and constitutionalist-inclined provisions in the Final Constitution.

(dd) Section 8 (Application)

Application of the Bill of Rights, as provided for primarily in FC s 8, has been dealt with extensively by Stu Woolman in Chapter 31 and there is no need to revisit or to expand upon that exhaustive discussion here.[6] However, it must be pointed out pertinently, in the present chapter dealing with *interpretation*, that FC s 8 embodies significant *waymarks* to the interpretation of the Bill of Rights. This is unsurprising, given the unity in the duality of what has conventionally been known (and distinguished) as *interpretation* and *application*.[7] Dealing with the

[1] See also § 32.1*(c)* supra.
[2] Cheadle, Davis & Haysom (supra) at 2-2–2-4.
[3] Ibid at 2-4–2-6.
[4] 'Democracy' (supra) at 10-34–10-37.
[5] Woolman & Botha 'Limitations' (supra) at Chapter 34.
[6] Woolman 'Application' (supra) at Chapter 31.
[7] See §§ 32.3*(a)*(vi) and 32.3*(d)* supra.

overriding question of to whom and to what the Bill of Rights applies, FC s 8 significantly demarcates the ambit and determines the impact of the Bill of Rights on the existing law, the functions of the legislature, the executive, the judiciary and organs of state, and on natural persons and on juristic persons.[1] It goes without saying that such an impact is a matter of fundamental interpretive significance.

However, no application issue illustrates the interpretive ramifications of FC s 8 better than the s 8(2) provision for the direct application of 'a provision of the Bill of Rights' to 'a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the rights and the nature of any duty imposed by the right'. FC s 8(1), it will be remembered, introduces the application clause by making the Bill of Rights applicable to 'all law' and binding upon the legislature, the executive, the judiciary and all organs of state. FC s 8(3), in order to effect the direct or 'horizontal' application of a right as envisaged in FC s 8(2), provides for the application or, in a manner reminiscent of s 39(2),[2] the development of the common law. It also authorizes the limitation of such a right 'provided that the limitation is in accordance with section 36(1)' FC (the limitations clause).[3]

IC s 7 sub-ss (1) and (2), predecessors to FC s 8(1) to (3), were agreed on after an intense tug of war between enthusiastic proponents and resolute opponents of the horizontal application of the transitional Bill of Rights.[4] These two subsections, read together, left room for either a restrictive understanding of the operation of the Bill of Rights or a more extensive understanding allowing for its direct, horizontal application. In the then landmark (and now obsolete) Constitutional Court judgment of *Du Plessis & Others v De Klerk & Another*[5] the die was cast in favour of the former, more restrictive understanding of sub-ss (1) and (2) of FC s 7.[6] These two provisions were thereafter replaced by FC ss 8(1), 8(2) and 8(3). In *Khumalo & Others v Holomisa,*[7] the Court acknowledged the explicit,

[1] See Woolman 'Application' (supra) at § 31.4.

[2] See § 32.1*(c)* supra and § 32.5*(b)*(iii) infra.

[3] For an elaborate discussion of the possible meaning(s) and implications of FC ss 8(2) and (3), see Woolman 'Application' (supra) at 31-42–31-77 and for an in-depth consideration of FC s 39(2) in relation to FC s 8 see ibid at 31-7731-100.

[4] IC Chapter 3.

[5] *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC)('*De Klerk*').

[6] For the full account, see Woolman 'Application' (supra) at 31-16–31-33.

[7] 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)('*Khumalo*') at para 33 with O'Regan J concluding as follows about the possible, directly horizontal application of section 16 of the Constitution:

> In this case, the applicants are members of the media who are expressly identified as bearers of constitutional rights to freedom of expression. There can be no doubt that the law of defamation does affect the right to freedom of expression. Given the intensity of the«PR »constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by s 8(2) of the Constitution. The first question we need then to determine is whether the common law of defamation unjustifiably limits that right. If it does, it will be necessary to develop the common law in the manner contemplated by s 8(3) of the Constitution.

unmistakable, written constitutional basis for direct, horizontal application of the Bill of Rights.[1]

Ten years after the commencement of FC ss 8(1), 8(2) and 8(3), and five years after *Khumalo*, the *Du Plessis v De Klerk* scepticism about the direct, horizontal application of the Bill of Rights has either persisted or has been revived. This, at least, seems to be the most feasible conclusion to be drawn from Stu Woolman's 'Amazing Vanishing Bill of Rights'.[2] Woolman revives the debate about application by looking closely at three 2007 judgments of the Constitutional Court: *Barkhuizen v Napier,*[3] *NM & Others v Smith & Others*[4] and *Masiya v Director of Public Prosecutions & Others.*[5] Woolman's consistent objection is that in all three cases *rights interpretation* gave way to the more amorphous FC s 39(2) process of *norm interpretation* in circumstances where the former process was logically and pragmitcally to be preffered.[6] Going the inappropriate norm route deprived the Constitutional Court's interpretive reasoning, in all three judgments, of both analytical rigour and nuance.[7] According to Woolman, the root cause of the court's inappropriate interpretive strategy is its reluctance, if not downright unwillingness, to apply rights provisions in the Bill of Rights directly to the action of (non-state) 'natural or juristic persons'[8] as envisaged in FC s 8(2) and in *Khumalo.*[9] Woolman's analysis demonstrates how an issue of application can decisively determine a strategy of constitutional interpretation. That alone gives Woolman's objections substance.

(ee) FC s 36 (Limitation of rights)

FC s 36 is probably the explicitly articulated interpretive waymark provision in the Bill of Rights (and the Constitution as a whole) relied on most frequently and most openly in constitutional interpretation, for it embodies the operational provisions that set constitutionally passable limits to rights. Rights interpretation will be impossible without (constitutional) provision for the measured limitation of the rights construed. Because of its eminence, the topic 'Limitations' is discussed exclusively in Chapter 34.[10] In that chapter Stu Woolman and Henk Botha extensively consider and canvass the meaning possibilities of — and the meaning(s)

[1] For a full discussion and analysis of this case, see S Woolman 'Application' (supra) at 31-42–31-56 and 31-62–31-74.
[2] S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124(4) *South African Law Journal* 762. See also § 32.*1(c)* supra.
[3] *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC).
[4] *NM & Others v Smith & Others* 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC).
[5] 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC)('*Masiya*').
[6] See § 32.*1(c)* supra.
[7] Woolman 'The Amazing, Vanishing Bill of Rights' (supra) at 769.
[8] Ibid at 762-763.
[9] *Khumalo* (supra) at para 33, for example.
[10] Woolman & Botha 'Limitations' (supra).

attached by the courts to — the value-laden phrase 'an open and democratic society based on human dignity, equality and freedom'.[1] A FC s 36(1) limitation of rights may be effected 'to the extent that the limitation is reasonable and justifiable' in such a society. Theunis Roux, in his discussion of democracy in Chapter 10, reflects incisively, with reference to the written constitutional text and the case law, on the possible meanings of the value-laden phrase above and on its ramifications for democracy.[2] In this chapter, an exercise akin to what Woolman, Botha and Roux have ably and amply undertaken will at best be duplicative. The value-laden phrase above with its incorporation of the triumvirate values can be accessed, in part, in FC s 7(1) and in whole, through FC s 39(1) too. In paragraph *(cc)* above only case law references accessing the phrase via FC s 7(1) were briefly considered and in paragraph *(ff)* below the same will be done with references going the FC s 39(1) route. For more detailed discussions of the phrase and the triumvirate values the reader is referred to Chapters 10 and 34.

(ff) FC s 39 (Interpretation of the Bill of Rights)

FC s 39, like FC s 7,[3] has to date also not thoroughly and systematically been analyzed in the constitutional case law.[4] A coherent and context-sensitive construction of the section and its subsections is therefore also still wanting. However, FC s 39(2) is an exception in this regard because, especially since *Carmichele v Minister of Safety and Security & Another*,[5] it has become a prominent, normative launching pad for the development of existing law to promote the spirit, purport and objects of the Bill of Rights. FC s 39(2) is, in other words, and has fast become, a far-reaching provision dealing with the impact of the Bill of Rights on the interpretation and development of existing law. This topic will be dealt with more fully at a later stage under the heading 'subsidiarity'.[6]

The heading to FC s 39 explicitly states that this operational provision deals with the interpretation of the Bill of Rights though, as was suggested earlier, the section does not encapsulate Bill of Rights interpretation in its entirety. It begins by prescribing the promotion of certain values 'when interpreting the Bill of Rights'[7] and continues by prescribing, in a peremptory vein, reliance on international law[8] and allowing, in a directory vein, reliance on foreign case law[9] in Bill of Rights interpretation. Reliance on these two transnational sources will be dealt with as comparative interpretation (or transnational contextualisation) at a later

[1] Ibid at 34-6734-126.
[2] Roux 'Democracy' (supra) at 10-34–10-37 and 10-65–10-77.
[3] See § 32.4*(c)*(i)(cc) supra.
[4] See § 32.1*(d)* supra.
[5] *Carmichele* (supra).
[6] See § 32.5*(b)*(iii)(bb) infra.
[7] FC s 39(1)(a).
[8] FC s 39(1)(b).
[9] FC s 39(1)(c).

stage.[1] Finally FC s 39(3) provides that the Bill of Rights does not entail a denial of existing rights and freedoms deriving from — and provided for in — other sources of law. For present purposes some observations on how ss 39(1)*(a)* and 39(3) have featured in interpretive constitutional jurisprudence will be appropriate.

FC s 39(1)*(a)* envisages 'an open and democratic' society based on the triumvirate values, namely, human dignity, equality and freedom, and it enjoins judicial interpreters of the Bill of Rights to promote the values that underlie such a society. This same aspirational society is prefigured in FC s 36(1). As pointed out in paragraph *(ee)* above there are, with reference to FC s 36(1), accounts in the case law of what this model society might look like. The values that underlie such a society have also been catalogued methodically in the in Chapters 34[2] and 10[3] of this treatise.

Nothing remotely resembling the accounts and the methodical catalogue just referred to, exists in respect of FC s 39(1)*(a)* in the case law. The courts mainly cite the description in this provision of the model society based on the triumvirate values for rhetorical rather than analytical purposes, and most often in order to lend force to what a judicial interpreter has already concluded, with reference to an issue at hand, an ideal state of affairs in a democratic South Africa should be. In *Soobramoney v Minister of Health, KwaZulu-Natal*Sachs J, for instance, in justifying the Constitutional Court's refusal to interfere with an executive decision not to provide life-saving medical treatment to an ailing applicant, opined (with reference to FC s 39(1)*(a)*) that:

> [i]n all the open and democratic societies based upon dignity, freedom and equality with which I am familiar, the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care.[4]

In *Christian Education SA v Minister of Education* the same judge observed that '[t]here can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important'.[5] In *S v Gumede & Others* it was stated as a general proposition that FC s 39(1)*(a)* 'enjoins the court to apply a liberal interpretation to the Bill of Rights; in other words, where possible, to apply a wider rather than a narrower interpretation thereof'.[6] This then, presumably, is the desired approach to Bill of Rights interpretation in 'an open and democratic society'. If FC s 39(1)*(a)* can be understood to *prescribe*, as it were, a preferred approach to Bill of Rights

[1] See § 32.5*(c)*(v) infra.
[2] Woolman & Botha 'Limitations' (supra) at 34-67–34-126.
[3] Roux 'Democracy' (supra) at 10-34–10-37 and 10-65–10-77.
[4] 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) at para 52.
[5] 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) at para 36.
[6] 1998 (5) BCLR 530, 542B (D). See § 32.1*(b)* supra.

interpretation, then it certainly also authorizes reliance on methods of and reading strategies for constitutional interpretation accepted and brought into play in open and democratic societies. This possibility has not been canvassed *eo nomine* in the case law.[1]

FC s 39(1)*(a)* has, from time to time, been cited in the case law, mostly *ad hoc* and in conjunction with the triumvirate value statements in FC ss 1*(a)*, 7(1) and 36(1), and as point of contact for observations on the meaning and effect of the triumvirate values. Among these observations a remark by the Constitutional Court in *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* is worth noting.[2] The *Mamabolo* Court stated emphatically that the Constitution 'proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom'. This *dictum* is striking because of its even-handed treatment of the triumvirate values — human dignity, for example, is not singled out for special treatment or mention. Langa CJ, in *MEC for Education: KwaZulu Natal & Others v Pillay & Others*, endorsed the *Mamabolo* approach, holding that the triumvirate values 'are not mutually exclusive but enhance and reinforce each other'.[3] He did not refer back to *Mamabolo* though, but to a *dictum* from the minority judgment of Ackermann J in *Ferreira v Levin NO; Vryenhoek v Powell NO*.[4]

In *S v Makwanyane & Another,* Mokgoro J, considering the constitutional significance of the concept of *ubuntu*, made an interesting move: she placed *ubuntu* on a level with concepts like 'humanity' and 'menswaardigheid' ('human dignity') and then stated that '[i]t is values like these that [FC s 39(1)*(a)*] requires to be promoted'.[5] This move was referred to with approval in *Port Elizabeth Municipality v Various Occupiers* and was said to require 'the court to infuse elements of grace and compassion into the formal structures of the law'.[6]

In *S v Dzukuda & Others; S v Tshilo* the Constitutional Court, with reference to FC s 39(1)*(a)*, among others, pointed out that reliance on the triumvirate values — or the 'foundational values of our Constitution' as the court called them — is essential to discover what 'lies at the heart of a fair trial in the field of criminal justice'.[7] In *S v Dodo,* also in the context of criminal justice, but this time with

[1] But see *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC)('*De Lange*') at para 85.

[2] 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC)('*Mamabolo*') at para 41.

[3] 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC)('Pillay') at para 63.

[4] *Ferreira* (supra) at para 49:

> Human dignity has little value without freedom, for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.

[5] 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC)('*Makwanyane*') at para 308. Mokgoro J here still referred to the corresponding section 35 of the Interim Constitution.

[6] 2004 (12) BCLR 1268 (CC) at para 37 n 36.

[7] Ibid at para 11.

reference to the notion of 'cruel, inhuman or degrading' punishment as it occurs in s 12(1)*(e)* of the Constitution, s 39(1)*(a)* was cited alongside the other constitutional provisions verbalizing the triumvirate values, in support of the contention that the s 12(1)*(e)* litmus test is whether impugned punitive acts involve 'the impairment of human dignity, in some form and to some degree'.[1]

As to the meaning of FC s 39(3), in *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the RSA*, the Constitutional Court stated that the purpose of this provision is to ensure, together with FC s 39(2), 'that the common law will evolve within the framework of the [Final] Constitution consistently with the basic norms of the legal order that it establishes'.[2] This purpose presupposes that the Final Constitution is the supreme law against which all other law must be tested:

> Section 39(3) should not be taken to establish a legal apartheid with two separate systems of law, only one of which is effected by the rules and principles of the Constitution.[3]

Cheadle, Davis and Haysom are of the opinion that '[FC] s 39(3) embraces what might be termed a presumption of constitutionality'.[4]

Thus far, the case law dealing with FC s 39(1) and (3) offers little more than *ad hoc* judicial wisdom — though not without some persuasive force. For systemic and comprehensive accounts of the meaning of 'an open and democratic society based upon human dignity, equality and freedom' the reader should, as previously intimated, look to the more speculative readings of Woolman and Botha in Chapter 34 and Roux in Chapter 10 of this treatise.[5]

(gg) FC Chapter 3 (Co-operative government)

FC Chapter 3 demonstrates that South Africa is a co-operative federal state[6] as opposed to a competitive federation.[7] Chapter 3 and FC ss 40 and 41 embody interpretive waymarks of considerable significance for the construction of FC ss 146 to 150 which set out, with remarkable specificity, how conflicts between laws in the various spheres of government, in this co-operative federation, are to be resolved.[8]

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[1] 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC) at para 35.

[2] 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 49.

[3] HM Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2006) 33-4.

[4] Ibid at 33-4–33-5.

[5] See, for example, Roux 'Democracy' (supra) at 10-31–10-32 and 10-35–10-36.

[6] See S Woolman, T Roux & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14.

[7] I Currie & J de Waal *The New Constitutional and Administrative Law Volume 1* (2001) 119-124.

[8] For a discussion of these provisions, see V Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 16. On the fundamental significance of co-operative government especially between the central and provincial governments, see *Doctors for Life v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC)('*Doctors for Life*') at para 81 and *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2007 (1) BCLR 47 (CC)('*Matatiele*') at para 41.

(hh) FC s 195 (Basic values and principles governing public administration)

FC s 195 embodies vital waymarks for the interpretation of constitutional provisions dealing with public administration.[1]

(ii) FC s 239 (Definitions)

The Final Constitution, like many conventional statutes, has a definition clause with explicit directives as to how certain words and phrases occurring throughout the written text ought to be understood.[2] There are actually only three definitions: of 'national legislation', of 'organ of state', and of 'provincial legislation'. The constitutional definition clause is relied on regularly (most often for its definition of 'organ of state')[3] and it is used in much the same way as definition clauses in ordinary statutes. Its definitions obtain 'unless the context indicates otherwise' or unless some sound reason for their exclusion can be shown to exist.

Definitions in the Interpretation Act[4] have been used for constitutional interpretation much in the same way they have been used for statutory interpretation.[5] The use of the Act's definitions to assign meaning to constitutional provisions is precluded, however, if their use would have the effect of subordinating the Final Constitution to the Act.

The Final Constitution has been held to be 'a law' as envisaged in the Interpretation Act. Section 1 of the Citation of Constitutional Laws Act,[6] however, affirms the uniqueness of the Final Constitution by authorizing one reference only, namely 'Constitution of Republic of South Africa, 1996'. A reference such as 'Constitution of the Republic of South Africa, Act 108 of 1996' is therefore not only inapproproate, but statutorily proscribed. The prescribed mode of reference honours the status of the Final Constitution, as amidst enacted law, the only one of its kind. It is an interpretive waymark of considerable consequence even though it does not appear in the written text of the Final Constitution.

[1] See A Bodasing 'Public Administration' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 23 A.

[2] FC s 239.

[3] On the meaning of 'organ of state in FC s 239, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31. The cases offer a picture of such reliance: *Western Cape Provincial Government & Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government & Another* 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC) at para 20; *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) at para 22; *Van Rooyen v The State (General Council of the Bar Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 100; *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at paras 66-67; *Western Cape Minister of Education & Others v Governing Body of Mikro Primary School & Another* 2006 (1) SA 1 (SCA), 2005 (10) BCLR 973 (SCA) at para 18; *Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign & Another as* Amici Curiae*)* 2006 (1) BCLR 1 (CC), 2006 (2) SA 311 (CC)(*'New Clicks'*) at para 121; *Investments (Pty) Ltd v Micro Finance Regulatory Council & Another* 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC)(*'Investments'*) at paras 30 and 149-50.

[4] Act 33 of 1957. See also *Magano v District Magistrate, Johannesburg (2)* 1994 (4) SA 172, 177C (W).

[5] See *Zantsi v Council of State, Ciskei & Others* 1995 (10) BCLR 1424 (CC)(*'Zantsi'*), 1995 (4) SA 615 (CC) at paras 36–37; *Ynuico Ltd v Minister of Trade and Industry* 1996 (3) SA 989 (CC), 1996 (6) BCLR 798 (CC) at para 7; *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 97.

[6] Act 5 of 2005.

(ii) *Inconspicuous waymarks*

Inconspicuous interpretive waymarks in the Constitution-in-writing are not immediately traceable, but they are *there*, nonetheless, available for use, and they have the same force that conspicuous waymarks have. The matters they deal with are also by no means less significant than those that the conspicuous waymarks bring to the fore.

A matter as vital as the separation of powers (or *trias politica*)[7] is, for instance, not explicitly mentioned in the written text of the Final Constitution, and as an unexpressed or implicit provision,[8] it is detectable with the help of, among others, inconspicuous waymarks in the written constitutional text. Such waymarks may present themselves as, amongst others, inferences drawn from the structure of the written constitutional text and/or from its explicit provisions.[9] In *South African Association of Personal Injury Lawyers v Heath & Others*[10] the Constitutional Court *per* Chaskalson P explained:

> I cannot accept that an implicit provision of the Constitution has any less force than an express provision. In *Fedsure,* this Court held that the principle of legality was implicit in the interim Constitution, and that legislation which violated that principle would be inconsistent with the Constitution and invalid.
>
> The constitutions of the United States and Australia, like ours, make provision for the separation of powers by vesting the legislative authority in the legislature, the executive authority in the executive, and the judicial authority in the courts. The doctrine of separation of powers as applied in the United States is based on inferences drawn from the structure and provisions of the Constitution, rather than on an express entrenchment of the principle. In this respect, our Constitution is no different.
>
> In the *First Certification Judgment* this Court held that the provisions of our Constitution are structured in a way that makes provision for a separation of powers . . . There can be no doubt that our Constitution provides for such a separation, and that laws inconsistent with what the Constitution requires in that regard, are invalid.[11]

Interpretive waymarks in the written constitutional text — and especially the inconspicuous ones — do not constitute a *numerus clauses*, and where pressing interpretive exigencies necessitate a meticulous reading of the text, there is always a possibility that 'new' waymarks may be detected.

The explicit and implicit waymarks in the written text do not function in isolation from one another — but often, when read in conjunction, strengthen the force of one another. Guarantees of judicial independence in the written

[1] On the significance of *trias politica*, see *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 105. See S Seedorf and S Sibanda 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12.

[2] See *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC)('*Heath*') at para 19.

[3] See *First Certification Judgement* (supra) at paras 106-113.

[4] *Heath* (supra) at paras 20-22.

[5] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374, 1998 (12) BCLR 1458 (CC)('*Fedsure Life Assurance*') at para 58.

constitutional text offer an apt illustration of this thesis.[1] In the Final Constitution FC s 165 underwrites most conspicuously and directly the independence of South Africa's courts:

> **165 Judicial authority**
> (1) The judicial authority of the Republic is vested in the courts.
> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
> (3) No person or organ of state may interfere with the functioning of the courts.
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
> (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

While FC s 165 is undoubtedly a (if not *the*) leading waymark provision on how powers of the judiciary, given its independence, are to be construed, other implicit (and no less potent) guarantees of judicial independence exist in the Final Constitution:

(aa) FC s 173's entrenchment of higher courts' 'inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice' presupposes the independence of those courts.

(bb) FC s 1*(c)* proclaims the '[s]upremacy of the Constitution and the rule of law' to be two of the values on which the Republic of South Africa is founded. These two founding values, each on its own but especially also in conjunction with each other, are consistent *only* with a constitutional dispensation in which the independence of the judiciary prevails.[2]

(cc) The 'open and democratic society' identified in the interpretation[3] and limitation[4] of rights in the Bill of Rights can hardly be secured without independent courts.

(dd) FC s 37(3) of the Constitution entrusts 'any competent court' with the power to review the declaration and an extension of — as well as legislation and administrative action consequent upon — a state of emergency. This is a far-reaching constitutional acknowledgment of the independence of the judiciary, particularly in difficult times.

[1] See L du Plessis 'How Fragile is Constitutional Democracy in South Africa? Assessing (Aspects of) the Fourteenth Amendment Debate/Debacle — Part 1: Constitutional Guarantees of the Separation of Powers and the Independence of the Judiciary in South Africa' (2007) 21 *Speculum Juris* 193, 200-205.
[2] FC s 74(1).
[3] FC s 39(1)(a).
[4] FC s 36(1).

(ee) FC s 233 decrees preference for a reasonable interpretation of legislation consistent with international law over any interpretation not thus consistent. This makes for an observation of international law standards which, in its turn, is likely to result in constitutional interpretation conducive to judicial independence.

(ff) Oddly — and significantly — the definition clause in the Constitution[1] expressly provides that 'a court or a judicial officer' is not an 'organ of state' — even though 'organ of state' also means any functionary or institution exercising a (public) power or performing a (public) function in terms of the Constitution, a provincial constitution or legislation. Not putting courts and judicial officers on a par with other organs of state is most likely an instance of precautionary, definitional deference to judicial independence.

The six textual indicia above prompt the conclusion that, just like *trias politica*, the independence of the judiciary may also be deduced from the structure and provisions of the Final Constitution.

Finally, choice of words may also function as interpretive waymark. *Having* a right to freedom and security of the person (s 12(1)) or to a basic education (s 29(1)*(a)*) is presumably an entitlement of a different order compared to a right to *have access to* adequate housing (s 26(1)) or health care (s 27(1)*(a)*), or *not to be denied* the right to enjoy one's culture (s 31(1)*(a)*).

32.5 Methods of Constitutional Interpretation

(a) Method(s) as doing(s)

The concept 'method', in the context of constitutional interpretation, previously came into the picture briefly when theories of constitutional interpretation were discussed.[2] The different methods of constitutional interpretation which German scholars have formulated with reference to the constitutional jurisprudence of their *Bundesverfassungsgericht* have been briefly assayed, and passing mention was made of the extent to which such methods reflect discernible theoretical orientations or positions. For present purposes the focus will not be this method-theory relationship, but method as a mode or manner of doing as such. 'Method', like 'theory', is used loosely among jurists. However, the dictionary meanings of the word, apposite to the present discussion, are rather to the point. 'Method', in one of its generic significations is, the *Shorter Oxford English Dictionary on CD-ROM*[3] tells us, a 'procedure for attaining an object', and one possible more specific meaning under the generic heading is 'a mode of procedure, a (defined or systematic) way of doing a thing, esp … in accordance with a particular theory or as

[1] FC s 239.
[2] See § 32.3*(c)*(i) supra.
[3] *The Shorter Oxford English Dictionary on CD-ROM* (5th Edition Version 2.0, 2002).

associated with a particular person'. To this it may be added that the procedure is purposive or goal-directed and conscious planning has gone into designing it. However, a method which has become mere routine will mostly obfuscate such conscious planning.

A synonym for 'method' is 'technique' which, in constitutional interpretation, designates a skilful engagement with the Constitution-in-writing to explore its meaning possibilities. Interpretive method-as-technique can also be described as a reading strategy. Preference will be given to the term 'reading strategy' when reference is made to method as interpretive doing, because the word 'method' itself could be understood as a reference to methods of constitutional interpretation as they occur in, for instance, the German context, and it is not these methods (or phenomena akin to them) that will be discussed in the rest of this chapter.

(b) Reading strategies

South Africa's legal system is a hybrid: rather like Romano-Germanic civil law in some respects and like English common law in others. The common-law phenomenon of *stare decisis*, introduced through colonial British rule, has been the key to the survival and growth of (civil-law oriented) Roman-Dutch law (and all other common law) in South Africa. In respect of content, the South African common law shows traits of both Roman-Dutch and English common law. Traditionally English influence has been strongest in (and English law has actually dominated) areas of the law most closely related to the exercise of political power (constitutional and administrative law), the administration of justice (law of criminal and civil procedure and evidence) and business and industry (company law, bills of exchange, insolvency law).[1] For present purposes the influence of English law in public law and the law of procedure is particularly significant because the idea of having a written constitution as highest law is not indigenous — and arguably even inimical — to English public law.[2]

The discussion of the reading strategies that now follows must be seen against the background just sketched since all of these strategies somehow engage existing law in constitutional interpretation. The strategies themselves are not typically or exclusively 'constitutional'. Reliance on precedents for interpretation purposes, for instance, the first strategy that will be discussed, is apt for the interpretation of

[1] For a general background, see L du Plessis 'German *Verfassungsrecht* under the Southern Cross: Observations on South African-German Interaction in Constitutional Scholarship in Recent History with Particular Reference to Constitution-making in South Africa' in F Hufen (ed) *Verfassungen – Zwischen Recht und Politik: Festschrift zum 70 – Geburtstag für Hans-Peter Schneider* (2008) 524-525; L du Plessis 'Learned *Staatsrecht* from the heartland of the *Rechtsstaat*: Observations on the Significance of South African-German Interaction in Constitutional Scholarship' (2005) 1 *Potchefstroom Electronic Law Journal*, available at http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/2005_1__Du_Plessis_art_tdp.pdf (accessed on 6 July 2008).

[2] 'English public law' in itself is, historically speaking at least, somewhat of a misnomer in the absence of an effectual distinction between private law and public law which has always been of fundamental significance in civil-law legal systems and in South African law too.

all enacted law in a case law system, and for an understanding and development of the common law. The second reading strategy to be considered, namely reading in conformity with the Final Constitution, is a manner of ensuring that existing statute law coheres with the Final Constitution and avoiding unnecessary findings of constitutional invalidity. Much the same applies to the strategy of subsidiarity.

(i) *Construing the Constitution in a case-law context*

As is the case with statute law, the day-to-day application of provisions of the Final Constitution mostly does not emanate from studious interpretive efforts, because the normal rules of *stare decisis* apply and sustain meanings that courts handing down binding judgments have previously attributed to such provisions. Courts equal in status can depart from an earlier court's judgment only when the earlier court is deemed to have clearly erred.[1] The same rules apply to constructions placed upon constitutional provisions by the Constitutional Court and the Supreme Court of Appeal.[2]

Unfortunately, the *stare decisis* jurisprudence of especially the Supreme Court of Appeal and the Constitutional Court over the last number of years seems to have compromised the capacity of high courts to develop the common law in terms of FC s 39(2). As matters stand after *Afrox Health Care Bpk v Strydom*,[3] *Ex Parte Minister of Safety and Security and Others: In Re: S v Walters and Another*[4] and *Govender v Minister of Safety and Security*[5], High Courts must abide by Supreme Court of Appeal, Appellate Division and Constitutional Court decisions where clear precedent exists — unless the challenge to pre-constitutional common law judgments is articulated in terms of a direct application of a substantive provision of the Bill of Rights.[6] These developments are discussed and criticized in Woolman's chapter on 'Application' (Chapter 31), and there is no need to repeat discussion of the issue here.[7] It is enough to say that the advantages of developing constitutional interpretation in a *stare decisis* context are lost if the rules of *stare decisis* are employed in too rigid a manner.[8]

[1] *Collett v Priest* 1931 AD 290, 297; *R v Du Preez* 1943 AD 562, 583; *Robin Consolidated Industries Ltd v Commissioner for Inland Revenue* 1997 (3) SA 654, 666F–H (SCA).

[2] *Ex parte President of the RSA In re: Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC) at para 20.

[3] 2002 (6) SA 21 (SCA)('*Afrox Health Care*').

[4] 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC)('*Walters*') at paras 36-39.

[5] 2001 (4) SA 273 (SCA)('*Govender*').

[6] See S Woolman & D Brand 'Is there a Constitution in this Courtroom? Constitutional Jurisdiction after *Afrox* and *Walters*' (2003) 18(1) *SA Public Law* 37.

[7] See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) 31-95–31-100.

[8] Iain Currie and Johan de Waal contend that while developments in the Supreme Court of Appeal's *stare decisis* jurisprudence may have an adverse impact on the high courts' ability to promote the spirit, purport and objects of the Bill of Rights *when developing the common law*, the same does not necessarily apply to achievement of these FC s 39(2) objectives *when interpreting legislation*, because the jurisprudence in question deals explicitly just with the former and not with the latter. See I Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 71. However, it is difficult to read *Afrox Health Care* and *Govender* as distinguishing common law rules from statutory provisions for the purpose of reading down.

(ii) *Reading in conformity with the Constitution*

Interpretation of legislation in conformity with a justiciable constitution (*Verfassungskonforme Auslegung* in German) is a widely adhered to reading strategy associated with constitutional interpretation.[1] It gives specific expression to the 'new canon of statutory interpretation', traceable to FC s 39(2), that legislation must be interpreted 'through the prism of the Bill of Rights'.[2]

Reading in conformity with the Final Constitution is sometimes also referred to as a presumption of constitutionality.[3] A *prima facie* unconstitutional (and by that token potentially impugnable) provision will survive constitutional scrutiny if it is reasonably possible[4] to read it in conformity with the Final Constitution without distorting or unduly straining its 'plain meaning'.[5] Such a reading is mostly believed to be narrower or more restrictive than other possible readings. It is, in other words, a *reading down*. A more extensive, non-distortional reading of an impugned provision (or a reading that eliminates ambiguity) to the same end is, however, not precluded.[6] A generous reading could, for instance, sustain and enhance provisions of statutes giving specific effect to constitutional provisions, and designed and enacted to promote constitutional imperatives,[7] such as the achievement of equality and the prohibition of unfair discrimination,[8] access to information,[9] or just administrative action.[10] In *Daniels v Campbell NO & Others*[11]

[1] See GF Schuppert *Funktionell-rechtliche Grenzen der Verfassungsinterpretation* (1980); KA Betterman *Die Verfassungskonforme Auslegung: Grenzen und Gefahren* (1986); L du Plessis 'The Jurisprudence of Interpretation and the Exigencies of a New Constitutional Order in South Africa' (1998) *Acta Juridica* 8-20, 13; Currie & de Waal *Handbook* (supra) at 64-67.

[2] See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd. In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC)('*Investigating Directorate*') at para 21. See also § 32.*3(b)*(i) supra; Currie & de Waal *Handbook* (supra) at 65.

[3] See GE Devenish *Interpretation of Statutes* (1992) 210-212; JR de Ville *Constitutional and Statutory Interpretation* (2000) 223-225; HM Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2006) 33-4–33-5.

[4] *Investigating Directorate* (supra) at paras 22-24; *Govender* (supra).

[5] *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC)('*National Coalition* 2000') at para 23; *Investigating Directorate* (supra) at paras 24–26. See also *Laugh it Off Promotions CC v SAB International (Finance) BV t/a Sabmark International & Another* 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC); *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC), 2005 (11) BCLR 1053 (CC) at para 29; and *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC) at para 36 n 31 (Where Ngcobo J stated that '[i]t is by now axiomatic that, where possible, legislation ought to be construed in a manner that is consistent with the Constitution'.)

[6] See Currie & de Waal *Handbook* (supra) at 66.

[7] For more on such legislation, see § 32.4*(a)* supra.

[8] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 enacted pursuant to FC s 9(4).

[9] Promotion of Access to Information Act 2 of 2000 enacted pursuant to FC s 32(2).

[10] Promotion of Administrative Justice Act 3 of 2000 enacted pursuant to FC s 33(3). See generally I Currie & J Klaaren *The Promotion of Administrative Justice Act Benchbook* (2002) 13–20.

[11] 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC)('*Daniels*').

the Constitutional Court understood the term 'spouse' in the Maintenance of Surviving Spouses Act[1] extensively to include partners in a Muslim marriage which had not officially been solemnized in terms of the Marriage Act.[2] The majority of the *Daniels* Court thought that such an extensive reading (or 'reading up') was necessary to vouch for the constitutionality of a provision that would otherwise have to be struck down.

Where one of two conflicting interpretations of a statutory provision better promotes the spirit, purport and objects of the Bill of Rights than the other one, the former is to be preferred.[3]

> By the same token, where two conflicting interpretations of a statutory provision could both be said to be reflective of the relevant structural provisions of the Constitution as a whole, read with other relevant statutory provisions, the interpretation which *better* reflects those structural provisions should be adopted.[4]

The Interim Constitution explicitly authorized the reading down of impugned 'laws' both in relation to the provisions of its Chapter on Fundamental Rights[5] and other constitutional provisions.[6] The Final Constitution contains no similar provision(s). Reading down, and reading in conformity with the Final Constitution in general, are nonetheless valid and, in fact, required reading strategies.[7] They ought not to be confused with FC s 39(2)'s requirement that existing law must be 'developed' in light of the spirit, purport and objects of the Bill of Rights. And they are certainly not equivalent to the remedy of reading in.[8]

Govender v Minister of Safety and Security[9] provides a good example of reading down a statutory provision in order to sustain its constitutionality. The provision in question in that case was s 49(1) of the Criminal Procedure Act:[10]

[1] Act 27 of 1990.
[2] Act 25 of 1961.
[3] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and the Registrar of Deeds, Cape Town (Trustees of the Hoogekraal Highlands Trust and SAFAMCO Enterprises (Pty) Ltd as Amici Curiae; Minister of Agriculture and Land Affairs Intervening)* [2008] ZACC 12 at para 46.
[4] Ibid at para 47.
[5] IC s 35(2). This provision read as follows:
No law which limits any of the Rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.
[6] IC s 232(3).
[7] *De Lange* (supra) at para 85.
[8] *AAA Investments* (supra) at para 72.
[9] *Govender* (supra) at para 24. Ibid at paras 19–21.
[10] Act 51 of 1977.

> If any person authorized . . . to arrest or to assist in arresting another, attempts to arrest such person and such person —
> *(a)* resists the attempt and cannot be arrested without the use of force;
> or
> *(b)* flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees;
> the person so authorized may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.

The Supreme Court of Appeal thought that the use of a firearm or similar weapon to effect an arrest may be warranted — with due regard to an arrested person's constitutional rights — only if the person authorized to arrest has reasonable grounds for believing

1. that the suspect poses an immediate threat of serious bodily harm to him or her [that is, the person authorized to arrest], or a threat of harm to members of the public; or
2. that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm.

These conclusions can follow only from a reading down of s 49(2).

In *Govender,* the Supreme Court of Appeal *per* Olivier JA remarked as follows on its interpretive *modus operandi* and then set out a formula for dealing with constitutional challenges to legislation:

> With the enactment first of the Interim Constitution and later of the Constitution and the vast changes it brought about to the juristic landscape, came a need for a method of interpreting legislation in a manner new to South African lawyers. . . This method of interpreting statutory provisions under the Constitution requires a court to negotiate the shoals between the Scylla of the old-style literalism and the Charybdis of judicial law-making. This requires magistrates and judges
> *(a)* to examine the objects and purport of the Act or the section under consideration;
> *(b)* to examine the ambit and meaning of the rights protected by the Constitution;
> *(c)* to ascertain whether it is reasonably possible to interpret the Act or section under consideration in such a manner that it conforms with the Constitution, *ie* by protecting the rights therein protected;
> *(d)* if such interpretation is possible, to give effect to it, and
> *(e)* if it is not possible, to initiate steps leading to a declaration of constitutional invalidity.[1]

In *Ex Parte Minister of Safety and Security and Others: In Re: S v Walters and Another*[2] the Constitutional Court endorsed the Supreme Court of Appeal's approach in *Govender*[3] to interpretation in conformity with the Final Constitution, as an

[1] *Govender* (supra) at paras 10-11. The *Govender* court cited in support of its approach *De Lange* (supra) at para 85; *National Coalition 2000* (supra) at paras 23-24 and *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 28.

[2] *Walters* (supra) at paras 36-39.

[3] *Govender* (supra) at paras 10-11.

instance of restrained constitutionalism wary of over-reliance on the written constitutional text as supposed super law.[1] As has appeared from the discussion so far, this reading strategy can result in either a restrictive or extensive understanding — a 'reading down' or a 'reading up' — of an impugned statutory provision *in order to prevent it from being struck down because it is unconstitutional*.

There are also judicially more 'activist' ways of either restricting or extending the scope of a statutory provision, namely *severance* and *reading-in* respectively. Both of these *constitutional remedies* are dependent upon finding a statutory provision to be inconsistent with the Final Constitution. Through severance the unconstitutional parts (literally: words and phrases) of impugned legislation are severed or cut off from the rest of the legislation, and struck down, in order to preserve the constitutionally consistent remainder. Reading in refers to the opposite of severance, namely an insertion of words and/or phrases into an impugned legislative provision to render it constitutional, thereby averting a declaration of invalidity. The latter *modus operandi* has been followed in a number of cases dealing with legislation on intimate relationships and the 'meaning of spouse' issue in particular.[2] Again, severance and reading-in are *constitutional remedies* — as opposed to *reading strategies* — provided for in FC s 172(1)*(b)*.[3]

It is not obvious when a court should decide to read impugned legislation in conformity with the Final Constitution or when it should rather grant one of the two aforementioned remedies. Much depends on a court's perception of what a 'reasonably possible', 'non-distortive' and/or not 'unduly strained' reading in conformity with the Final Constitution in a particular case can be. A court inclined to read legislation in a literalist way — assuming that language is the bearer of uncontested, pre-given meaning — will generally speaking be reluctant to read in conformity with the Constitution and will tend rather to grant remedial relief. Wessel le Roux[4] is of the opinion that the Constitutional Court, because of some of its judges' 'extremely reactionary approach to constitutional and statutory interpretation',[5] has predominantly opted for remedial activism in preference to interpretive flexibility, especially in its (judged by outcomes) rather progressive jurisprudence on intimate relationships. The basis for this preference is a narrow understanding of 'interpretation' which excludes the alteration of words from its scope. According to Le Roux this narrow view is also an 'unsound political limitation of the democratic process':[6]

[1] The idea of restrained constitutionalism as manifested in subsidiarity is further explained in § 32.5*(b)*(iii)(bb) infra.

[2] See § 32.3*(c)*(iii)(bb) supra.

[3] See M Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

[4] W le Roux 'Undoing the Past through Statutory Interpretation: The Constitutional Court and Marriage Laws of Apartheid' (2005) 26(3) *Obiter* 526.

[5] Ibid at 548.

[6] Ibid at 547.

> The problem is that the constitutional remedies (unlike the interpretive techniques) are reserved for use by the Constitutional Court itself, or under its direct supervision only . . . [T]he centralising tendencies that are built into this distinction pose a threat to the democratisation of legal meaning in post-apartheid South Africa. In fact, the centralised control of meaning in the apartheid state is perfectly mirrored by the juricentric approach to legal interpretation in its post-apartheid successor.

Moseneke J, however, in *Daniels v Campbell NO & Others*, quite candidly advanced the following institutional (and by that token political) motivation for preferring the remedial rather than the interpretive route to bring statutes in conformity with the Final Constitution:

> Another important consideration relates to the rule of law. The problem of readily importing interpretations piecemeal into legislation is the precedent it sets. Courts below will follow the lead and readily interpret rather than declare invalid statutes inconsistent with the Constitution. However, constitutional re-interpretation does not come to this Court for confirmation. The result may be that high courts develop interpretations at varying paces and inconsistently. This makes for an even more fragmented jurisprudence and would have deleterious effects on how people regulate their affairs. It is highly undesirable to have an institution as important as marriage recognised for some people in some provinces and not in others. The rule of law requires legal certainty.[1]

With both Le Roux's and Moseneke J's remarks in mind, it is hard to escape the conclusion that the choice between reading a statute in conformity with the Final Constitution or remedially rectifying it is at least as much determined by institutional politics as by 'purely interpretive' or 'legally technical' considerations.[2]

(iii) *Subsidiarity*

> I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.[3]

This *dictum* comes from the minority judgment in *S v Mhlungu & Others*,[4] one of the earliest judgments of the South African Constitutional Court. Though it is not often cited (both in the literature and the case law) it seems to articulate a 'principle' of significance[5] or a 'salutary rule'.[6] Some authors refer to it as *the principle of avoidance* according to which (it is said) 'constitutional issues should, where possible, be avoided':

[1] *Daniels* (supra) at para 104.
[2] See § 32.3*(c)*(v) supra.
[3] *S v Mhlungu & Others* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC)('*Mhlungu*') at para 59 (Kentridge AJ). See also *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC), 1997 (6) BCLR 692 (CC) at para 21; *National Coalition 2000* (supra) at para 21; *Minister of Education v Harris* 2001 (4) SA 1297 (CC), 2001 (11) BCLR 1157 (CC) at para 19.
[4] *Mhlungu* (supra) at para 59.
[5] See I Currie & J de Waal *The New Constitutional and Administrative Law: Volume 1* (2001) 328; L du Plessis '"Subsidiarity": What's in the Name for Constitutional Interpretation and Adjudication?' (2006) 17 *Stellenbosch Law Review* 207.
[6] *Zantsi* (supra) at para 2. Ibid at para 8.

> The principle requires the court first to try and resolve a dispute by applying ordinary legal principles, as interpreted or developed with reference to the Bill of Rights, before applying the Bill of Rights directly to the dispute.[1]

This principle is also understood as complementing (and, indeed encouraging preference for) the indirect application of the Bill of Rights, assuming that 'the Bill of Rights respects the rules and remedies of ordinary law, but demands furtherance of its values mediated through the operation of ordinary law'.[2]

The *dictum* in *Mhlungu*[3] cited above can also be read as instantiating (albeit rather crudely) *subsidiarity*,[4] a phenomenon hitherto largely unnamed (but arguably not unused) in constitutional interpretation in South Africa. 'A principle of avoidance', invoked to avoid *constitutional absolutism*, could readily lead to *constitutional minimalism*.[5] Both constitutional absolutism and constitutional minimalism are unacceptable, and their excesses are best prevented by properly invoking subsidiarity as a constitutional reading strategy.

'Subsidiarity' has sporadically been mentioned by name in the South African case law — and but once in a constitutional case — as a rather 'slender' phenomenon fulfilling the limited function of designating reliance on an exceptional or 'last resort' (subsidiary) norm in instances where no other legal norm enjoying priority is available.[6] Here are three good examples of such a restricted use: (1) in *Absa Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers*[7] Van Zyl J agreed with two legal scholars' assertion that, in German law, the availability of an action for *indirect* enrichment only when an action for *direct* enrichment is not possible or enforceable constitutes a 'subsidiarity principle'; (2) in *Ex Parte Minister of Safety and Security & Others: In Re: S v Walters & Another*[8] the permissibility of force to make an arrest *only where there are no lesser means of achieving the arrest* was said to be an instance of 'subsidiarity' and (3) in *AD & DD v DW & Others: The Centre for Child Law (*Amicus Curiae*) and the Department of Social Development (Intervening Party)* dealt with a subsidiarity principle concerning child adoption:

[1] Currie & De Waal *Handbook* (supra) 25.
[2] Ibid at 32.
[3] *Mhlungu* (supra) at para 59.
[4] On the various versions and instances of subsidiarity, see S Pieper *Subsidiarität* (1994); D van Wyk 'Subsidiariteit as Waarde wat die oop en demokratiese Suid-Afrikaanse Gemeenskap ten Grondslag lê' in G Carpenter (ed) *Suprema Lex: Essays on the Constitution presented to Marinus Wiechers* (1998) 251.
[5] See 32.*3(c)*(iii)(bb) supra.
[6] See H Tilch & F Arloth (eds) *Deutsches Rechts-Lexikon Vol 3* (3rd Edition, 2001) 4065 refers to subsidiarity as 'die Nachrangigkeit (der Geltung)' ['being in force at a lower rank']. A subsidiary norm 'kommt . . . nur zur Anwendung, wenn kein vorrangiger Rechtssatz vorhanden ist' ['is applied only when no legal norm higher in rank is at hand'].
[7] 1998 (1) SA 939, 947B (C).
[8] *Walters* (supra) at para 22.

> If a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family.[1]

The distinctive 'designating' ability of subsidiarity can be harnessed, in the context of constitutional interpretation, in two ways: first, to designate an appropriate person or *forum* to construe and implement the Final Constitution in a particular instance; and, second, to sustain preference for an appropriate norm or configuration of norms in a particular instance where existing law stands to be construed under the authority of and in relation to the supreme Constitution, and especially pursuant to FC s 39(2). Section 39(2), it will be remembered, requires that legislation be interpreted and that common and customary law be developed to 'promote the spirit, purport and objects of the Bill of Rights'.[2] It is arguable that, in its second, norm-designating capacity, subsidiarity is not really a reading strategy in *constitutional interpretation*, but rather a mode of *constitutional application*. The latter proposition does not exclude the former, however, due to the unity of interpretation and application.[3]

Before taking a closer look at possible manifestations of subsidiarity in constitutional interpretation and application, the functioning of subsidiarity in other contexts must briefly be sketched out. *The New Oxford Dictionary of English* describes *subsidiarity* 'in politics' as 'the principle that a central authority should have a subsidiary function, performing only those tasks which cannot be performed at a more local level.'[4] This dictionary definition implies that subsidiarity — a principle tracing its origins to Roman Catholic social thought[5] and, more particularly, Pope Pius XI's encyclical *Quadragesimo Novarum* – from the year 1931 — centrifugalizes the power of social institutions or bodies functioning within the ambit of the same social sphere.

According to Stefan Ulrich Pieper, 'logical subsidiarity' (as he calls it) is a methodological criterion designating one of two competing legal norms for application in a given situation, and preferring, as a rule of thumb, the specific to the general norm. The latter ought to be applied only when the former is not applicable.[6] Elsewhere Pieper refers to this criterion as 'the *lex specialis* rule'.[7] This

[1] 2008 (3) SA 183 (CC), 2008 (4) BCLR 359 (CC)('*AD*') at para 37 citing Article 17 of the United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally adopted by the General Assembly on 3 December 1986.

[2] See §§ 32.1*(a)*, *(b)* and *(d)*, 32.3*(b)*(i), 32.4*(a)* and *(c)*(i)(ff) supra.

[3] See §§ 32.3*(a)*(vi) and *(d)* supra.

[4] J Pearsall (ed) *The New Oxford Dictionary of English* (1998). See also *The Shorter Oxford English Dictionary on CD-ROM* (5th Edition Version 2.0, 2002).

[5] DP Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd Edition, 1997) 113; Van Wyk 'Subsidiariteit as Waarde' (supra) at 254; Pieper (supra) at 33-44; Tilch & Arloth (supra) at 4065.

[6] Pieper (supra) at 30.

[7] Ibid at 142.

reminds us that subsidiarity does not only apply when actors (people or entities) in a hierarchy of more and less encompassing social institutions are to be designated, but also when, from a hierarchy of more and less encompassing norms, appropriate norms for problem solving in a particular instance must be decided on.[1] Subsidiarity designating institutional actors is *institutional subsidiarity*, and subsidiarity designating norms for decision-making is *strategic subsidiarity*.

Institutional subsidiarity, as a force in societal life, constrains any more encompassing or superordinate institution (or body or community) to refrain from taking power or authority over matters that more particular subordinate institution (or body or community) can appropriately dispose of, irrespective of whether the latter is an organ of state or of civil society.[2] As a legal principle institutional subsidiarity is well established (and readily relied on) in, among others, the law of the European Union and German constitutional law. In European law, for instance, it helps determine whether an organ of the Union or rather an organ of a member state should dispose of a matter.[3] It has, in this format and at the behest of (among others) Germany (the German *Länder* in particular[4]) and Britain, been incorporated into Article 3b of the *Maastricht Treaty*. In German constitutional law,[5] institutional subsidiarity has had a decisive effect on federalism.[6] Dawid van Wyk is of the opinion that subsidiarity is an implied (or implicit) constitutional value[7] 'at the root of an open and democratic South African society',[8] and he argues that measured reliance on it (can) largely compensate for the dearth of eye-catching federalist markers in South Africa's written constitutional texts.[9]

[1] *PC Bibliothek. Meyers Lexikon: Das Wissen A-Z* (1993). In describing *Subsidiarität,* I envision a situation in which several *legal norms* are as such applicable, but an explicit legal directive — or a directive established through interpretation — excludes one of the (contending) legal norms from consideration for application in that particular situation — the said norm has to 'step down', as it were. Subsidiarity, in other words, manifests as the law's preference for legal norms A and B and C — and the exclusion of legal norm X from — for possible application in a given situation. Subsidiarity is defined as 'das Zurücktreten einer von mehreren an sich anwendbaren Rechtsnormen kraft ausdrückl. oder durch Auslegung zu ermittelnder gesetzl. Anordnung' ['the retreat of one of a number of legal norms, applicable as such, by virtue of an explicit legislative directive or a directive determined through interpretation'].

[2] See EWM Benda & H Jochen Vogel (eds) *Handbuch des Verfassungsrechts II* (2nd Edition, 1995) 1051 ('Nach diesem Prinzip soll das, was die kleineren und untergeordneten Gemeinwesen leisten und zum guten Ende führen können, nicht für die weitere und übergeordnete Gemeinschaft in Anspruch genommen werden.' ['According to this principle a comprehensive, superordinate community ought not to take for its account any matter that a smaller, subordinate community can deal with and bring to a good end.']). See also Pieper (supra) at 86.

[3] See *Maastricht Case* (1993) 89 *BVerfGE* 155. Article 23(1) of the German Constitution (dating from 1993) provides that Germany's relationship with the European Union is based on subsidiarity. See also H Tilch & F Arloth (eds) *Deutsches Rechts-Lexikon Vol 3* (3rd Edition, 2001) 4065.

[4] See Van Wyk 'Subsidiariteit as Waarde' (supra) at 253.

[5] Ibid at 254-259.

[6] See Benda & Vogel (supra) at 1051–1052.

[7] See L du Plessis *Re-Interpretation of Statutes* (2002) 76.

[8] A 'waarde wat die oop en demokratiese Suid-Afrikaanse gemeenskap ten Grondslag lê' [a' value that underlies the open and democratic South African society'].

[9] See also § 32.3*(e)*(iii) supra.

Strategic subsidiarity engages concrete decisions or issues. In *Mhlungu*, the Constitutional Court was asked to deal with the nature of referral of cases to it under IC s 102(1).[1] A case could only thus be referred if it involved adjudication of a constitutional issue – and it was with this scenario in mind that Kentridge J briefly dealt with the notion of 'reaching a constitutional issue'. Deciding, with due deference to constitutional supremacy, on less invasive constitutional norms or other conventional legal norms to deal with a question of law in the course of contentious proceedings is therefore (and will henceforth be treated as) an instance of *strategic* and, more particularly, *adjudicative subsidiarity* in constitutional interpretation.

(aa) Jurisdictional subsidiarity

Jurisdictional subsidiarity, in the context of constitutional interpretation, is concerned with the apportionment of power and responsibility to adjudicating *fora* to deal with the interpretation and application (that is, the concretization) of the Constitution in particular instances. It is, for all intents and purposes, an issue of the jurisdiction of courts in constitutional matters, discussed in detail in Chapter 4.[2] However, a discourse on constitutional interpretation will be poorer if the identification and designation of authorized interpreters of the Constitution[3] are not considered (albeit briefly) *also from a subsidiarity point of view*.

In German constitutional jurisprudence considerations of institutional, and more particularly, jurisdictional subsidiarity preclude the *Bundesverfassungsgericht,* the highest court in constitutional matters, from adjudicating cases with which other *fora* can deal.[4] The South African Constitutional Court has made a similar ruling, holding in *Amod v Multilateral Motor Vehicle Accident Fund*,[5] for instance, that the Supreme Court of Appeal was the more appropriate forum to *develop* the common law in a manner contemplated in IC s 35(3) (the predecessor to FC s 39(2)).[6] Here institutional subsidiarity informed an answer to the *jurisdictional* question of which court should be designated to read and work with the Constitution given the particular issue at hand (and for the time being). The adjudicator-reader thus designated must be in a position to dispose of the matter, but does not have to do so as a *forum* of final instance. The fact that it may be an authorized reader *for the time being* in the sense that some of its findings may be subject to appeal, does not detract from — or reflect adversely on — its authority

[1] *Mhlungu* (supra) at para 59.

[2] See S Seedorf 'Jurisdiction' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 4.

[3] See § 32.2 supra.

[4] See K Hesse *Grundzüge des Verfassungsrecht der Bundesrepublik Deutschland* (19th Edition, 1993) 143.

[5] 1998 (10) BCLR 1207 (CC), 1998 (4) SA 753 (CC)('*Amod*').

[6] These provisions enjoin any court developing the common law to 'promote the spirit, purport and objects of the Bill of Rights'. FC s 39(2).

as adjudicator-reader.[1] In *Carmichele v Minister of Safety and Security*,[2] the Constitutional Court laid down guidelines for strategies to develop the common law.[3] As a result, the Constitutional Court in *Amod v Multilateral Motor Vehicle Accident Fund* cannot be understood to have said that a forum like the Supreme Court of Appeal has a more pivotal say in developing the common law than the Constitutional Court itself has. Rather the Court must be understood as stating that — consistent with subsidiarity — the Supreme Court of Appeal was the more appropriate forum first to deal with the matter.[4] Similarly, in *Carmichele v Minister of Safety and Security*, the Constitutional Court did not end up developing the common law itself. The case was referred back to the court of first instance with a very clear and compelling message about that court's duty to develop the common law and, in the particular case, with clear indications of the relevant constitutional dictates that had to be honoured in doing so. This outcome is quite compatible with the exigencies of jurisdictional subsidiarity: the higher, more comprehensive judicial authority provides lower, more localized doer-authorities with justificatory ammunition empowering them to square up to the task of developing the common law. The term 'subsidiarity', however, has not, as yet, been part of the Constitutional Court's lexicon.

The Constitutional Court has since *Carmichele v Minister of Safety and Security* indicated that the Supreme Court of Appeal is still primarily responsible for the development of the common law, and arguments that the common law has to be brought in line with the Bill of Rights have to be considered first by the Supreme Court of Appeal, before going to the Constitutional Court.[5] However, the

[1] In *Amod,* an appeal would not have been possible. The Constitutional Court referred the case to the Supreme Court of Appeal to dispose of it.

[2] *Carmichele v Minister of Safety and Security & Another* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC)('*Carmichele*').

[3] The *Carmichele* Court held that a court is always under an obligation to develop the common law and 'this duty upon judges arises in respect both of the civil and criminal law, whether or not the parties in any particular case request the court to develop the common law under section 39(2) [of the Constitution],' Ibid at para 36. This obligation is not discretionary, but implicit in FC s 39(2) read with FC s 173. Ibid at para 39. When a litigant contends that, in the light of the Final Constitution, the common law has to be developed beyond existing precedent, a court is obliged to undertake a two-stage enquiry:

> The first stage is to consider whether the existing common law, having regard to the section 39(2) objectives, requires development in accordance with these objectives. This inquiry requires a reconsideration of the common law in the light of section 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the section 39(2) objectives.

Ibid at para 40.Generally speaking, *Carmichele* holds that courts have an obligation to develop the common law in the light of constitutional values and to do so in an activist vein. This injunction is reminiscent (without explicitly citing) the constitutional injunction that the 'state must respect, protect, promote and fulfil the rights in the Bill of Rights', verbalised in FC s 7(2). See § 32.4*(c)*(i)(cc) supra.

[4] See, for example, *Brisley v Drotsky* 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA) at paras 2-3; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA), [2002] 4 All SA 346 (SCA) at para 8; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para 18; *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA), 2003 (11) BCLR 120 (SCA) at para 36.

[5] *S v Bierman* 2002 (5) SA 243 (CC), 2002 (10) BCLR 1078 (CC) at para 7.

Constitutional Court is prepared to consider entertaining appeals from the Supreme Court of Appeal when the latter does not consider the possible impact of the Bill of Rights on the existing law in question. The Constitutional Court will do this even if none of the parties has raised the issue in the Supreme Court of Appeal.[1] Given that every court must consider the impact of the Bill of Rights on the matter before it, Sebastian Seedorf rightly notes that every case in which the application of the common law is considered is potentially subject to appeal to the Constitutional Court:[2] So while the Supreme Court of Appeal retains the primary responsibility for developing the common law, the Constitutional Court — as the court of final constitutional jurisdiction — is able to dangle 'a sword of Damocles' over every court seized with a potential constitutional matter.[3]

The Constitutional Court's contradictory indications of when it will entertain appeal cases dealing with the application of the common law, has brought about further uncertainty. In *Phoebus Apollo Aviation v Minister of Safety and Security,*[4] the Court could find no convincing argument why the common law on vicarious liability needed development and consequently declined to deal with the issue of vicarious liability on appeal. In *K v Minister of Safety and Security*,[5] on the other hand, the same court held that vicarious liability may have a 'policy laden character … imbued with social policy and normative content', and that the common law in this regard *and its application* needed development to bring it fully in line with the spirit, purport and objects of the Bill of Rights.[6] In *Minister of Safety and Security v Luiters* the Constitutional Court indicated that when a litigant has explicitly contended for a development of the common law from the outset, the Constitutional Court is forced 'to consider constitutional rights or values' in order to assess, as final court of appeal, the need for such a development.[7]

While FC s 167(4) gives the Constitutional Court exclusive jurisdiction in some matters, the Constitutional Court has frequently stated that it relies on judgments *a quo* to maximize the quality of its own adjudicative performance:

> It is … not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct

[1] *Phumelela Gaming and Leisure Ltd v Gründlingh & Others* 2007 (6) SA 350 (CC), 2006 (8) BCLR 883 (CC) at para 26.

[2] S Seedorf 'Jurisdiction' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) § 4.3*(d)*(i).

[3] See also Woolman 'Application' (supra) at 31-80–31.82.

[4] 2003 (2) SA 34 (CC), 2003 (1) BCLR 14 (CC).

[5] 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC)('*K*') at paras 22-23.

[6] For a fuller discussion of these two cases, see Seedorf 'Jurisdiction' (supra) at § 4.3*(d)*(i).

[7] 2007 (2) SA 106 (CC), 2007 (3) BCLR 287 (CC) at para 23.

> if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgement is based, and of reconsidering and refining arguments previously raised in the light of such judgement.[1]

The Constitutional Court moreover sometimes prefers to refrain from ruling on the constitutionality of a statutory provision until such time as experienced judges in other *fora* have had the opportunity to assess the consequences of either retaining or striking down an impugned provision.[2] However, the Constitutional Court does not rigidly insist that even appeal cases must come before it only via the Supreme Court of Appeal. In *MEC for Education: KwaZulu Natal & Others v Pillay & Others*, the Court, for instance, thought that where the issues in a case had been fully canvassed in both an equality and an equality appeal court *a quo*, and the Constitutional Court had the benefit of comprehensive argument, presented by the parties and three *amici curiae*, it would not be in the interest of justice 'to require the parties to incur the additional expense of [first] going to the Supreme Court of Appeal'.[3]

In *Masiya v Director of Public Prosecutions & Others*[4] the Constitutional Court dealt with the power of the magistrates' courts to develop the common law, first, in terms of FC s 8(3), in order to provide for the direct horizontal application of the Bill of Rights, and, second, in terms of FC s 39(2) in order to promote the spirit, purport and objects of the Bill of Rights.[5] The Court held that magistrates' courts do not have such a power because FC s 173 confers the power only on the Constitutional Court, the Supreme Court of Appeal and High Court.[6] This conclusion follows from a rather superficial reading of FC s 173. FC s 173 provides for the higher courts' *inherent power* to develop the common law (and regulate their own processes). The section in no way intimates that *only higher courts* have the straightforward (as opposed to inherent) power to develop the common law. FC s 8(3) empowers 'a court' and s 39(2) 'every court, tribunal or forum' to develop the common law. Again, nothing in FC ss 8(3) or39(2) prevents magistrates' courts from doing so.

The *Masiya* Court furthermore referred to s 110 of the Magistrates' Court Act,[7] precluding magistrates' courts from pronouncing on the validity of any law or

[1] *Bruce v Fleecytex Johannesburg CC* 1998 (2) SA 1143 (CC), 1998 (4) BCLR 415 (CC) at para 8. See also *S v Bequinot* 1997 (2) SA 887 (CC), 1996 (12) BCLR 1588 (CC)('*Bequinot*') at para 15; *Christian Education SA v Minister of Education* 1999 (2) SA 83 (CC), 1998 (12) BCLR 1449 (CC) at paras 8 and 12; *Dormehl v Minister of Justice* 2000 (2) SA 987 (CC), 2000 (5) BCLR 471 (CC) at para 5 and *Carmichele* (supra) at para 50–53. The Supreme Court of Appeal has expressed similar sentiments. See *King & Others v Attorneys Fidelity Fund Board of Control & Another* 2006 (1) SA 474 (SCA), 2006 (4) BCLR 462 (SCA)('*King*').

[2] See *Bequinot* (supra) at para 14.

[3] 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC)('*Pillay*') at para 31.

[4] 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC)('*Masiya*') at paras 64-69.

[5] Ibid at para 66.

[6] Ibid at para 66.

[7] Act 32 of 1944.

conduct of the President, to substantiate its view that it is not competent for magistrates' courts to develop the common law. It is not clear why the Constitutional Court did not at the outset (in relation to s 110) rely on the superordinate FC s 170 to come to the same conclusion. Be that as it may, neither s 110 of the Magistrates' Court Act nor FC ss 170 or 173 of the Constitution excludes the power of magistrates' courts to develop the common law.

To conclude: jurisdictional subsidiarity undeniably — but not rigidly or dogmatically — designates authorized readers of the Final Constitution in particular instances, and delineates their authority. It contributes to making constitutional interpretation and adjudication a sensible team effort and plays an important role in empowering a judiciary (and a legal community in general), for whom reading and applying a supreme constitution came as both a novelty and a challenge within the past decade and a half ago.

(bb) Adjudicative subsidiarity

Adjudicative subsidiarity as an instance of strategic subsidiarity is connected with the *adjudication* of substantive issues of law. This version of subsidiarity is present in the *dictum* in *S v Mhlungu & Others.*[1] Kentridge J referred, albeit by implication, to an adjudicator's responsibility to opt for an *appropriate norm* (or configuration of norms, one might add) to decide an issue which could also be understood to be 'constitutional'.

Adjudicative subsidiarity is centred on issues: it suggests a preference for an indirectly (or not strictly) constitutional mode of adjudication over a directly (or strictly) constitutional mode of adjudication whenever the solution of a legal question admits of the former (and does not of necessity require the latter). The authority of the Final Constitution is, in other words, not to be overused to decide issues that can be disposed of by invoking specific, subordinate and non-constitutional legal norms, *on the crucial condition, of course, that the solution arrived at, as well as the norm putting it forward, can withstand constitutional scrutiny*.

In *Zantsi v Council of State, Ciskei,* Chaskalson P explained that the strategy of adjudication just described can allow the law to develop incrementally, and that such incrementalism is desirable in view of the far-reaching implications that attach to constitutional decisions.[2] Adjudicative subsidiarity moreover discourages court rulings 'in the abstract on issues which are not the subject of controversy and are only of academic interest'[3] and also contributes to an appropriate demarcation of the respective spheres of authority of the legislature and the judiciary.[4] Constitutional over-adjudication, especially in reviewing legislation, could, according to the Chaskalson P, deprive the legislature of the opportunity to deal with an

[1] *Mhlungu* (supra) at para 59.
[2] 1995 (10) BCLR 1424 (CC), 1995 (4) SA 615 (CC)('*Zantsi*') at para 5.
[3] Ibid at para 7.
[4] I Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 75-78.

issue of its own accord, in its own distinctive manner and in response to its mandate from the electorate. Here Chaskalson P's argument draws on the standard view of the separation of different kinds of power between the legislative, the executive and the judicial arms of government which is not an instance of subsidiarity. Subsidiarity engages the apportionment of authority and decision-making responsibility among unequal, 'higher' (more comprehensive) and 'lower' (less comprehensive) authorities, all exercising the same kind of power as organs of the same arm of government.

Bland and unthoughtful overreliance on adjudicative subsidiarity may compromise the supremacy of the Final Constitution, and the Constitutional Court has thus, on occasion, found it necessary to limit reliance on this reading strategy. In *Zantsi,* Chaskalson P observed that the Constitutional Court will constitutionalize an issue whenever it *is necessary* to dispose of a matter on appeal.[1] He added that adjudicative subsidiarity cannot stand in the way of 'the interest of justice'. In *Harksen v Lane NO,* Goldstone J also made it clear that there is no 'hard and fast rule to the effect that in no case should referrals be made to this Court where non-constitutional remedies have not been exhausted'.[2] Adjudicative subsidiarity cannot justify an interpretive preference in any way inconsistent with the Final Constitution. Where there are several normative options equally consistent with the Final Constitution, adjudicative subsidiarity can, at best, advise preference for the option also most consistent with the existing non-constitutional law.

In *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the RSA,*[3] the Constitutional Court rejected the conclusion of the Supreme Court of Appeal in *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennie Group Ltd trading as Renfreight* that the review of administrative action has to a large extent remained a procedure determined primarily by common law.[4] Chaskalson P, in no uncertain terms, affirmed the supremacy of the Final Constitution where and whenever the exercise of any form of public power becomes susceptible to judicial assessment:[5]

> The control of public power by the courts through judicial review is and always has been a constitutional matter . . . The common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.[6]

[1] *Zantsi* (supra) at para 4.
[2] *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 26.
[3] 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC)('*Pharmaceutical Manufacturers*').
[4] 1999 (8) BCLR 833 (CC), 1999 3 SA 771 (SCA).
[5] See, for example, *Pharmaceutical Manufacturers* (supra) at paras 17, 20, 27, 33, 44 and 45.
[6] Ibid at para 33.

Pharmaceutical Manufacturers reflects the Constitutional Court's response to the Supreme Court of Appeal's claim that facially constitution-related issues could be disposed of in an 'enlightened', rights-friendly manner without reference to (let alone reliance upon) the Final Constitution.[1] Thus, the South African common law on defamation could conceivably be developed without direct reliance on the 'right' to free speech. The Supreme Court of Appeal did just that in *National Media Ltd v Bogoshi*.[2] That judgment expressly professed not to draw on constitutional resources. Similarly, the law of evidence relating to sexual offences was also 'modernized' in *S v Jackson* — by abolishing the so-called cautionary rule of evidence in rape cases — without mentioning 'the Constitution' even in passing.[3]

On the one hand, some may say that such a tendency is an outcome of profitable reliance on adjudicative subsidiarity, giving effect to a preference of the Constitutional Court itself (that is, the preference verbalized in the *dicta* in *S v Mhlungu & Others*[4] and in *Zantsi v Council of State, Ciskei*[5]). On the other hand, others may object that the Final Constitution is not meant simply to function as a silent background norm whenever the common law needs to be 'liberalized'. The Supreme Court of Appeal's enlightened judgments on free speech and the cautionary rule in sexual offences would most probably not have been handed down had it not been for the existence of the Final Constitution and its Bill of Rights. Does it become any court to allow itself to be influenced by the Final Constitution and then not acknowledge it? The Constitutional Court in *Pharmaceutical Manufacturers* suggested that it does not — especially not when the exercise of public power enters the picture.

In response to the two sentiments just juxtaposed, what the Constitutional Court said in the *Pharmaceutical Manufacturers* case must again be emphasized:

> There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.[6]

The 'one system of law' embraces statute law, common law and customary law — all geared towards the pursuit of justice guided by an all-pervasive Constitution.[7] To speak of a *principle of avoiding* constitutional issues, where possible, is thus inappropriate: all issues of law are ultimately constitutional issues and there is no way of avoiding them or the constitutional dimension to them. Equally inappropriate and unacceptable will be a manner of reliance on subsidiarity promoting

[1] Ibid.
[2] 1998 (4) SA 1196 (SCA).
[3] 1998 (1) SACR 470 (SCA).
[4] *Mhlungu* (supra) at para 59.
[5] *Zantsi* (supra)at para 5.
[6] *Pharmaceutical Manufacturers* (supra) at para 44.
[7] See also FI Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) 11-36–11-41.

constitutional minimalism. Subsidiarity is based on the idea of *restrained* (memorial) constitutionalism,[1] appropriate to a constitutional jurisprudence of restraint,[2] which is wholeheartedly committed to the Constitution as supreme law of the Republic. Nonetheless, subsidiarity sounds a word of caution about venerating the Final Constitution as an overarching, all-encompassing,[3] omni-regulative, super-law. The Final Constitution certainly enjoys precedence among normative law-texts, but does not overwhelm or totally overpower them or simply take their place.[4] Since both constitutional absolutism and constitutional minimalism are equally unacceptable, on balance and in the long run, restrained constitutionalism is the most propitious mode of give effect to constitutional supremacy.

This conclusion entails, first, the acceptance of the truism that the Final Constitution does not have readymade answers to all legal problems. It could, of course, be assumed that it is logically possible to bring, through subsumption, every conceivable legal problem within the prescriptive ambit of the generally formulated norms of the Final Constitution and then deduce answers to specific questions from these norms. (It must be noted, however, that the Bill of Rights is limited to 26 specific substantive provisions. The Final Constitution itself expressly recognizes that it is not meant to apply to all possible legal disputes: we have a right to housing, but not a right to transport.[5]) But why rely on logical deduction, in the abstract as it were, to find an answer,[6] when somewhere in the legal system there already exists a tried and tested answer — or at least some indicia suggesting one? Subsidiarity, then, suggests preference for first seeking the latter type of answer. Of course, if this answer cannot survive constitutional scrutiny, it is susceptible not only to rejection, but also to nullification. On the other hand, if the answer is by constitutional standards inadequate, *development* of the law proffering the answer — instead of the downright nullification of such law — is, in terms of subsidiarity reasoning *and in terms of the Final Constitution*, the required route to follow. Memorial constitutionalism sustains this mode of reasoning: on the way to the future, what was so blatantly offensive in the apartheid legal system of the recent past must be eliminated, if needs be, but at the same time the (continued) existence of the system and its effects must be recognized

[1] See § 32.*3(c)*(iii)(bb) supra. See also L du Plessis 'The South African Constitution as Memory and Promise' (2000) 11 *Stellenbosch Law Review* 385.

[2] W le Roux 'Undoing the Past through Statutory Interpretation: The Constitutional Court and Marriage Laws of Apartheid' (2005) 26(3) *Obiter* 526, 628-630.

[3] On the notion of an 'all-encompassing Constitution', see § 32.5(b)(iii)(bb)(A) infra.

[4] See § 32.3*(e)*(ii) supra.

[5] See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

[6] On (other) shortcomings of subsumption as problem-solving mode of legal reasoning, see LM du Plessis 'Legal Academics and the Open Community of Constitutional Interpreters' (1996) 12 *South African Journal on Human Rights* 214, 216-217.

with due deference to — and in a manner honouring the values and ideals of — the Final Constitution. This recognition may include a slow but sure 'upgrading' of the system by, for instance, developing multifarious aspects of it.

Adjudicative subsidiarity also stands to facilitate compliance with the FC s 39(2)'s constitutional injunction to promote the spirit, purport and objects of the Bill of Rights when developing the common law and customary law.[1] FC s 39(2) — which most writers see not as an interpretation provision, but as an (indirect) application provision instead[2] — is thus bound to come up in any discussion of adjudicative subsidiarity *as an interpretive reading strategy*. FC s 39(2) is, however, not dealt with in all its ramifications in this chapter. Extensive analysis of this provision occurs in Woolman's chapter on 'Application' –Chapter 31[3] – Seedorf's chapter on 'Jurisdiction' — Chapter 4[4] — and Michelman's chapter on 'The Rule of Law, Legality and the Supremacy of the Constitution' — Chapter 11.[5]

A court, with prudent reliance on existing law, can often resolve an issue in a manner quite consistent with — and indeed conducive to — constitutional values (and the spirit, purport and objects of the Bill of Rights), without deducing the particular answer directly from the provisions of the Final Constitution.[6] A case in which the Supreme Court of Appeal could have done so, but failed to do so, was *Afrox Health Care Bpk v Strydom*.[7] Here the question of law was whether an exemption clause in a written standard contract, indemnifying a private hospital against any claim for damages or injury to a patient, even when the hospital or its personnel was negligent, was enforceable against the patient. The *Afrox* Court gave optimum effect (and recognition) to the parties' freedom of contract,[8] taking it to be an incarnation of the prominence which freedom and human dignity enjoy as guiding values in the Final Constitution,[9] and consequently refused to interfere with terms of an agreement which free-willing parties had entered into consciously. The exemption clause was thus held to indemnify the hospital against all negligence short of gross negligence.

The patient relied upon FC s 27(1)*(a)*'s right of access to health care to challenge the exemption clause.[10] However, both parties and the *Afrox* Court failed to

[1] FC s 39(2) constitutes a new canon of statutory interpretation. See §§ 32.3*(b)*(i) and 32.5*(b)*(ii) supra.
[2] Currie & De Waal *Handbook* (supra) at 161.
[3] Woolman 'Application' (supra) at 31-77–31-100.
[4] S Seedorf 'Jurisdiction' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) § 4.3*(d)*(i).
[5] F Michelman 'The Rule of Law' (supra) at Chapter 11.
[6] *Mhlungu* (supra) at para 59.
[7] 2002 (6) SA 21 (SCA)('*Afrox Health Care*').
[8] Ibid at para 8.
[9] Ibid at paras 22-23 referring to FC ss 1(a), 7(1), 36(1) and 39(1)(a). Human dignity is also the substance of an entrenched right. See FC s 10 and S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.
[10] *Afrox Health Care* (supra) at paras 15-16 and 19-20.

notice that the even more obvious constitutional right at stake in this case was a patient's right to the security of her or his person, entrenched in IC s 11(1) (which applied at the time) and presently guaranteed in FC s 12(1). A patient going to a hospital typically puts her or his physical (and psychological) well-being in the hands of the hospital and its personnel because she or he needs special and specialist care. A contractual exemption clause construed with due regard to the spirit, purport and objects of the 1993 Bill of Rights[1] could thus hardly indemnify a hospital against negligent non-performance of precisely that which the patient sought to procure by contracting with the hospital, namely diligent and expert care for the security of her or his person.

Tjakie Naudé and Gerhard Lubbe show that it also follows from sound and solid law-of-contract reasoning that it should not be possible to conclude a contract which, via an exemption clause, negates its own essence.[2] Advocates of adjudicative subsidiarity would endorse an argumentative strategy like that of Naudé and Lubbe as appropriate for a case such as *Afrox Health Care Bpk v Strydom*. But this stratagem does not mean that the Final Constitution and constitutional values exit the picture. On the contrary, the conclusions of Naudé and Lubbe are sustainable *precisely* because they are in conformity with the 'constitutional conclusion' that the exemption clause in the hospital's standard contract is inconsistent with the protection afforded and the value attached to a patient's constitutional right to security of his or her person. For a court to mention this assessment in support of a finding that the exemption clause should not be enforced would not be tantamount to 'reaching a constitutional issue'.[3] It would rather be a judicial intimation (and a recognition of the fact) that the law of contract, in this particular case, is susceptible to an inherent development that will promote the spirit, purport and objects of the Bill of Rights.

In contrast with *Afrox Health Care Bpk v Strydom*,[4] the Supreme Court of Appeal in *Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others*[5] prudently developed the common law in response to a constitutional exigency, without using the Final Constitution as the source of the law needed to resolve the actual issue in question. FC s 38*(c)* confers standing in constitutional (and, in particular, in Bill of Rights) litigation on 'anyone acting as a member of, or in the interest of, a group or class of persons'. IC s 7*(b)*(iv) first anticipated (and authorized) the use of class actions in constitutional litigation in the same explicit terms as FC s 38*(c)* presently does. It thereby created an expectation that the existing common law of civil procedure in respect of this

[1] IC s 35(3).
[2] T Naudé & G Lubbe 'Exemption Clauses — a Rethink Occasioned by *Afrox Healthcare Bpk v Strydom*' (2005) 122 *South African Law Journal* 441, 445-453.
[3] *Mhlungu* (supra) at para 59 (Kentridge AJ).
[4] *Afrox Health Care* (supra).
[5] 2001 (4) SA 1184 (SCA)('*Ngxuza SCA*').

traditionally underutilized mode of litigation would occur in the South African context.[1] *Ngxuza*[2] provided, first, the Eastern Cape Division of the High Court and subsequently, on appeal, the Supreme Court of Appeal[3] with an opportunity to break fresh ground in this regard.

One of the questions that had to be answered was whether potential litigants, identifiable as members of a class but residing outside the area of jurisdiction of the Eastern Cape High Court, could be recognized as members of a class of plaintiffs bringing an action against the Eastern Cape Department of Welfare consequent upon withholding their disability grants unlawfully. The manner in which both courts dealt with this specific question significantly illustrates proper and prudent reliance on adjudicative subsidiarity. Froneman J explained the court *a quo*'s position as follows:

> Even if the members of the class residing outside the area of jurisdiction of this Court but elsewhere in South Africa are not parties to the action in the strict sense of the word as used in s 19(1)(b) of the Supreme Court Act, they may still be regarded as members of the class in the action in this Court . . . The *ratio jurisdictionis* connecting them to the case is the class action itself. If this amounts to a development of the common law, I am of the view that such a development is justified and permissible by virtue of ss 172(1) and 173 of the Constitution. In *Estate Agents Board v Lek* 1979 (3) SA 1048 (A) at 1063F it was stated that the question whether a court has jurisdiction 'depends on (a) the nature of the proceedings, (b) the nature of the relief claimed therein, or (c) in some cases, both (a) and (b)'. Having regard to these factors it is perhaps not even necessary to call ss 172(1) and 173 of the Constitution in aid (compare also s 19(1)(a)(iii) of the Supreme Court Act 59 of 1959).[4]

This *dictum* comes from a constitutional adjudicator who, first, deferred to the constitutional exigency to develop the existing law regarding class actions for purposes of constitutional litigation and, second, resorted to a strategy of adjudicative subsidiarity, finding in the existing case law (and not in the written constitutional text) a point of contact (and a catalyst) to get the constitutionally required development going. This strategy led to the conclusion that it may perhaps not even be 'necessary to call . . . the Constitution in aid' to effect the actual development. The Final Constitution as catalyst or agent for (and 'overseer' of) the development of the existing law is therefore not necessarily also the source of the specific norm or configuration of norms that effects the development.

In the judgment on appeal a similar *modus operandi* was followed. Cameron JA held as follows:

[1] Cameron JA refers to of class actions as envisaged in the Constitution as 'an innovation expressly mandated by the Constitution'. Ibid at para 22.

[2] Ibid.

[3] Ibid.

[4] *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609, 628G-629H (E), 2000 (12) BCLR 1322, 1336F-I (E).

> We are enjoined by the Constitution to interpret the Bill of Rights, including its standing provisions, so as to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. As pointed out earlier we are also enjoined to develop the common law — which includes the common law of jurisdiction — so as to 'promote the spirit, purport and objects of the Bill of Rights'. This Court has in the past not been averse to developing the doctrines and principles of jurisdiction so as to ensure rational and equitable rules. In *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd*[1] this Court held, applying the common-law doctrine of cohesion of a cause of action (*continentia causae*), that where one court has jurisdiction over a part of a cause, considerations of convenience, justice and good sense justify its exercising jurisdiction over the whole cause. The partial location of the object of a contractual performance (a bridge between two provinces) within the jurisdiction of one court therefore gave that court jurisdiction over the whole cause of action. The Court expressly left open the further development and application of the doctrine of cohesion of causes. The present seems to me a matter amply justifying its further evolution. The Eastern Cape Division has jurisdiction over the original applicants and over members of the class entitled to payment of their pensions within its domain. That, in my view, is sufficient to give it jurisdiction over the whole class, who, subject to satisfactory 'opt-out' procedures, will accordingly be bound by its judgment.[2]

Once again a constitutional injunction inspired development of the existing common law on class actions, but *continentia causae*, a recognized legal notion from within the existing law, gave content to it. *Ngxuza* offers a clear example of adjudicative subsidiarity-in-action.

Subsidiarity-induced *preference* for not 'reaching a constitutional issue'[3] is not an attempt to deny or eliminate constitutional issues or to ignore the Final Constitution whenever possible. As was pointed out in *Pharmaceutical Manufacturers*, there are certain issues, for instance, the exercise of public power, which are inevitably and only constitutional issues, and whose resolution depends on a proper *construction* of the *written constitutional text* as the prime source of *constitutional law*.[4] The Final Constitution is, however, not just a source of constitutional law. It is ubiquitous. As an ever-present trump, on the one hand, it scouts out 'bad law' that needs to be invalidated. As an all-pervasive source of values, on the other hand, it is providently ubiquitous, enabling and, where appropriate, developing 'good law' to achieve the ends towards which the Constitution encourages and indeed enjoins us to aspire. Subsidiarity, in the context of constitutional adjudication, is a strategy — not a principle (although a principle of devolution of authority can be said to underlie it).

[1] 1962 (4) SA 326 (A).
[2] *Ngxuza SCA* (supra) at para 22.
[3] See *S v Mhlungu & Others* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC)(*'Mhlungu'*) at para 59.
[4] *Pharmaceutical Manufacturers* (supra) at para 33.

In conclusion, four miscellaneous observations can be made:

(A) Allowance for the all-pervasiveness of the Final Constitution does not require genuflection to an absolutist constitution. The Final Constitution fulfils certain functions (as trump and 'provider of values') for which its considerable power as highest law must from time to time be summoned. This power ought not, however, turn it into an *über*-law that overwhelms and dislodges all other law in the legal system. Nor is the Final Constitution a 'super source' of law from which answers to all legal issues can be deduced. To pervade all law is also not the same as encompassing and engulfing it. The Final Constitution (like any enacted law — or any other legal norm) can of course and does of course encompass other enactments and legal norms. A good example of such laws are the statutes that have been adopted to give specific effect to constitutional provisions and objectives.[1] The point, however, is that the Final Constitution does not (and should not be seen to) encompass all law *per se*.

(B) While constitutional minimalism — based on a 'principle' of avoidance — is unacceptable, there may, in certain situations and circumstances, be merit to a restrained constitutionalism that results (in constitutional adjudication) in a judicious avoidance of: (1) decisions that do not have to be made; (2) first-order reasoning when decisions can be made on a deductive or analogical basis, and (3) large-scale theorizing when substantive decision-making is unavoidable.[2]

(C) The written text of the South African Constitution is 'subsidiarity-friendly'. As becomes a supreme constitution, the Final Constitution (in FC ss 2 and 172(1)) makes the necessary provision for doing away with law (and conduct) inconsistent with it, but then also makes ample provision (in FC ss 8(3) and 173 and then, of course, most notably in s 39(2)) for the development of existing law under the auspices and authority of the Final Constitution. Provision for the development of existing law especially paves the way for adjudicative subsidiarity.

(D) Finally, the introduction of legislation giving specific effect to constitutional provisions occasioned a new version of adjudicative subsidiarity in our constitutional jurisprudence. In litigation dealing with issues for which such legislation caters, a litigant cannot circumvent the relevant statute 'by attempting to rely directly on the constitutional right'.[3] To do so would be to 'fail to recognise the important task conferred on the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights'.[4] A subordinate, less encompassing and more specific statutory norm thus has to be relied on in preference to a superordinate, more encompassing and general norm of the Final Constitution — a telling example of adjudicative subsidiarity.

[1] See §§ 32.4*(a)* supra and 32.5*(b)*(bb)(D) infra.

[2] I Currie 'Judicious Avoidance' (1999) 15 *South African Journal on Human Rights* 138.

[3] See *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC)('*Pillay*') at para 40. See also *Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign & Another as* Amici Curiae*)* 2006 (1) BCLR 1 (CC), 2006 (2) SA 311 (CC)('*New Clicks*') at paras 96 (Chaskalson CJ) and 434-437 (Ngcobo J); *South African National Defence Union v Minister of Defence & Others* 2007 (5) SA 400 (CC), 2007 (8) BCLR 863 (CC)('*SANDU*') at para 51; *NAPTOSA & Others v Minister of Education, Western Cape & Others* 2001 (2) SA 112, 123I-J (C), 2001 (4) BCLR 388, 396I-J (C).

[4] *SANDU* (supra) at para 52. See also *New Clicks* (supra) at para 96.

(c) Method(s) as canon(s) and canon(s) as method(s) (of construction): Canon-guided reading strategies

Back in 1973, HR Hahlo and E Kahn intimated a preference for a more modern attitude toward statutory interpretation. They called for due consideration of the textual or literal, the contextually logical, the teleological and the historical aspects of a statutory text being interpreted.[1] Actually, this attitude is not all that modern. It corresponds with the 'methods of interpretation' advanced by FK Von Savigny[2] for the interpretation of pandectaerian Roman law (also known as the 'Von Savigny quartet'[3]). These methods are canon-like reading strategies that are accepted today, mainly on the European continent,[4] for the interpretation of codifications of the law, statutes[5] and constitutions.[6] This quartet has also met with a reasonably positive academic response in South African writings on constitutional interpretation.[7]

The methods or modes of interpretation or, also, canon-guided *reading strategies* — Labuschagne[8] speaks of 'invalshoeke' (*angles of incidence*) — modelled on a slightly adapted version of the Savignian model, are the following:[9]

- First, *grammatical interpretation* which concentrates on ways in which the conventions of natural language can assist the interpretation of enacted law and can help to limit the many possible meanings of a provision.
- Second, *systematic interpretation*, as a manifestation of contextualism,[10] which calls for an understanding of a specific provision in the light of the text or instrument as a whole and of indicia outside the written text.

[1] See HR Hahlo & E Kahn *The South African Legal System and its Background* (1973) 180.

[2] See F Savigny *System des heutigen Römischen Rechts I* (1840) 206.

[3] See JMT Labuschagne 'Regsdinamika: Opmerkinge oor die Aard van die Wetgewingsproses' (1983) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 422; and JMT Labuschagne 'Die dinamiese Regslandskap, Doelaanpassing en — vervanging en die Geregtigheidswaarde van die Normdop by Regsuitleg en — vorming: Opmerkinge oor die anachronistiese kant van die Stelreël *cessante ratione legis, cessat et ipsa lex*' (2004) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 43, 46.

[4] See, for example, P Côté *The Interpretation of Legislation in Canada* (1984) 193-350.

[5] PB Cliteur *Inleiding in het Recht* (1992) 196-202; Labuschagne 'Die dinamiese Regslandskap (supra) at 46.

[6] E Forsthoff *Problematik der Verfassungsauslegung* (1961) 39-40; K Hesse *Grundzüge des Verfassungsrecht der Bundesrepublik Deutschland* (19th Edition, 1993) 21; DP Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd Edition, 1997) 42-43; F Müller *Juristische Methodik* (8th Edition, 2002) 269-297, and F Müller 'Basic Questions of Constitutional Concretisation' 1999 10 *Stellenbosch Law Review* 269, 275-276. W Brugger 'Konkretisierung des Rechts und Auslegung der Gesetze' (1994) 119(1) *Archiv des Öffentlichen Rechts* 1 (redefines the four methods or techniques of interpretation in a creative manner so as to adapt them to his understanding of the modern-day exigencies of (constitutional) interpretation.)

[7] See J de Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (4th Edition, 2001) 129-140. The authors relied, for purposes of Bill of Rights interpretation, on an interpretive scheme akin to that of Von Savigny. They no longer do so in the 5th edition of their book. See also L du Plessis 'The Jurisprudence of Interpretation and the Exigencies of a new Constitutional Order in South Africa' 1998 *Acta Juridica* 8, 13-16.

[8] Labuschagne 'Die dinamiese Regslandskap' (supra) at 46.

[9] For a summary, see L du Plessis 'The Jurisprudence of Interpretation' (supra) at 8.

[10] L du Plessis *Re-Interpretation of Statutes* (2002) 111-115. See also § 32.3*(a)*(iv) supra.

- Third, *purposive interpretation*[1] which sheds light on the possible meanings of a provision with reference to its purpose or *ratio*. The deepened version of purposive interpretation is *teleological interpretation*.[2]
- Fourth, *historical interpretation* which situates a provision in the tradition from which it emerged and allows qualified recourse to information concerning the genesis of the written text in which the provision occurs (and the provision itself), as well as bigger historical events of which the coming into being of the written text was part.
- In the course of time a fifth 'method' was added to the Von Savigny quartet, namely, comparative interpretation, which facilitates the understanding of a provision, first, in the light of standards of international law and, second, in comparison with counterparts in other domestic legal systems — transnational contextualization, in other words.

I believe that the augmented Savignian model provides a feasible point of departure for the systematic classification and, indeed, implementation of (where necessary, refurbished) canons of construction employable in constitutional as well as statutory implementation.[3]

(i) *Grammatical interpretation*

Grammatical interpretation concentrates on ways in which the conventions of natural language[4] can assist and direct the interpretation of an enacted (statutory or constitutional) provision and helps to contain the proliferation of the possible meanings of such a provision. *Natural language* is language used for everyday purposes, and its dynamism makes for a proliferation of meaning.[5] *Formal* language, by contrast, is artificial language — for example, arithmetic, the predicate calculus and COBOL[6] — created for exclusive use by, for instance, mathematicians, logicians and computer scientists. The meaning of its symbols is precisely defined and the symbols are finite. The system is therefore 'closed' and meaning possibilities limited *on account of the qualities of the kind of language itself*.

> 'Legal language', though interspersed with technical terms, is not formal language, but *natural language* whose meanings are constantly in flux — thence the 'difficulty inherent in the nature of language' that Innes J spoke of in *Venter v R*.[7] Grammatical interpretation

[1] On interpretive purposivism, see du Plessis *Re-Interpretation of Statutes* (supra) at 115-119.
[2] See § 32.3*(a)*(v) supra.
[3] See § 32.4*(a)* supra.
[4] See F Müller 'Observations on the Role of Precedent in modern Continental European Law from the Perspective of "Structuring Legal Theory" ' (2000) 11 *Stellenbosch Law Review* 426, 432.
[5] See P Cilliers *Complexity and Postmodernism: Understanding Complex Systems* (1998) 37-47.
[6] For the distinction between natural language and formal language, see R Audi (ed) *The Cambridge Dictionary of Philosophy* (2nd Edition, 1999) 318 and 673.
[7] *Venter v R* 1907 TS 910, 913:
> [N]o matter how carefully words are chosen, there is a difficulty in selecting language which, while on the face of it expressing generally the idea of the framer of the measure, will not, when applied under certain circumstances, go beyond it, and, when applied under other circumstances, fall short of it.

> actually cautions the interpreter to heed the meaning-generative qualities of natural language and of enacted texts as linguistic signifiers.[1] The importance of language as prolific generator of meaning is at odds with any belief in the possibility of 'clear and unambiguous language'. Such a belief in point of fact truncates and downplays the actual role of language in communication and, eventually, interpretation. Clarity and unambiguousness are not attributes of language as such, but of a reader's assessment of the quality of the language of a given text in certain given circumstances, and this assessment, in its turn, is co-determined by the reader's presuppositions and pre-understanding.[2]

It was pointed out previously that the rights and value language of the Final Constitution is expansive and indefinite because rights and values can hardly be expressed categorically or conclusively. Secondly, the Final Constitution is meant to be a long-lasting text and its expansively formulated provisions must have the quality of being able to cater for an inestimable number of unpredictable situations.[3] The Final Constitution by its very nature thus unsettles the assumption of clear and unambiguous language.

The conventional canons of and aids to grammatical interpretation, heeding conventions in the use of language, limit the plethora of (possible) meanings that the language of an enacted instrument can generate. An example of such a convention is that the author of the instrument is assumed to use 'ordinary language',[4] hence the classical rule in statutory interpretation that 'the language of the Legislature should be read in its ordinary sense' — a rule applied in constitutional interpretation too.[5] It is further assumed that technical language has a technical connotation,[6] that the same word or phrase is meant to mean the

[1] See *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC)('*Zuma*') at paras 17 and 18 (Kentridge J emphasises that the language of the constitutional text must be respected and such 'respect' is best understood as a word of caution to take the language of the text seriously in the sense just explained.)

[2] S Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Legal Studies* (1989) 358. See also *Zuma* (supra) at para 17.

[3] See § 32.3*(b)*(i) supra.

[4] *Union Government* (*Minister of Finance*) *v Mack* 1917 AD 731, 739 (Solomon JA)(Usually cited as the standard authority for this rule which has found extremely wide recognition in the case law and is still recognised as a basic rule of construction.) See also *Mayfair South Townships (Pty) Ltd v Jhina* 1980 (1) SA 869, 879 (T); *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906, 909 (N); *Nyembezi v Law Society Natal* 1981 (2) SA 752, 757 (A); *S v Du Plessis* 1981 (3) SA 382, 403 (A); *S v Henckert* 1981 (3) SA 445, 451 (A).

[5] See, eg, *S v Makwanyane and Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC)('*Makwanyane*') at paras 26 and 278; *Mhlungu* (supra) at paras 76–77; *Zantsi* (supra) at para 37; *Ynuico Ltd v Minister of Trade and Industry* 1996 (3) SA 989 (CC), 1996 (6) BCLR 798 (CC) at para 7; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC)('*Fedsure*') at para 42; *Ex parte President of the RSA. In re: Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC) at paras 55 and 57.

[6] *Beedle & Co v Bowley* (1895) 12 SC 401,402; *Lonrho v Salisbury Municipality* 1970 (4) SA 1, 4 (R); *Association of Amusement and Novelty Machine Operators and Another v Minister of Justice and Another* 1980 (2) SA 636, 660 (A).

same throughout one and the same enacted law-text[1] et cetera. The Interpretation Act[2] and definition clauses in individual enactments[3] fulfil a similar limiting function and so too do interpretive precepts in the Constitution - even though they are couched in expansive and open-ended language.

If the canons of grammatical interpretation are understood in the sense just explained, they no longer function as incarnations of literalist-cum-intentionalist expectations and the status of some of them (and especially the ordinary-meaning rule) as the most basic or primary rules of statutory interpretation in accordance with the conventional order of primacy, is quite rightly undermined.[4]

As was remarked at an earlier stage, classification of the canons of construction in accordance with the Savignian model is not watertight and some canons of grammatical interpretation overlap with canons under the headings 'systematic' and 'purposive interpretation'. The canons of systematic statutory interpretation dealing with adapting, restricting or stretching language (in accordance with the scheme of an Act) can, and have been applied in constitutional interpretation.[5] The rule that provisions framed in general terms must be understood generally expresses a grammatical truism about the use of inclusive language too.[6]

(ii) *Systematic interpretation*

Systematic interpretation contextualizes. First, individual provisions of an enacted instrument-in-writing, that is, the Constitution or a statute, are understood in relation to and in the light of one another and of other components of the more encompassing instrument of which they form part, drawing on the 'system' or 'logic' or 'scheme' of the written text as a whole.[7] Von Savigny referred to such *intra-textual* contextualization as *logical interpretation*.[8] Second, systematic interpretation requires cognisance of the ('extra-textual') *macro-text* too - of meaning-generative signifiers beyond but in the 'environment' of the written text that comprises the provision that is to be construed.[9] According to Von Savigny the very task of systematic interpretation is to forge links with this 'extra-' or, rather, '*macro*-text'.[10]

[1] *Principal Immigration Officer v Hawabu and Another* 1936 AD 26, 33; *Minister of the Interior v Machadodorp Investments (Pty) Ltd and Another* 1957 (2) SA 395, 404 (A); *S v Fazzie and Others* 1964 (4) SA 673, 680 (A); *Sekretaris van Binnelandse Inkomste v Raubenheimer* 1969 (4) SA 314, 319 (A); *S v ffrench-Beytagh (1)* 1971 (4) SA 333, 334 (T); *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990 (1) SA 925, 949 (A); *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC), 1999 (4) SA 623 (CC) at para 47; *Skhosana v Roos t/a Roos se Oord* 2000 (4) SA 561 (LCC) at para 9.

[2] 33 of 1957.

[3] Du Plessis *Re-Interpretation of Statutes* (supra) at 204-205.

[4] On the conventional order of primacy see § 32.3*(b)*(i) above.

[5] See § 32.5*(c)*(ii) infra.

[6] See § 32.5*(c)*(iii) infra.

[7] See, for example, *Janse van Rensburg v The Master* 2001 (3) SA 519 (W) at para 7.

[8] See F Von Savigny *System des heutigen Römischen Rechts I* (1840) 320.

[9] For judicial recognition of both manifestations of systematic interpretation, see *Richtersveld Community v Alexkor Ltd* 2001 (3) SA 1293 (LCC) at para 88.

[10] See Von Savigny (supra) at 262.

Tribe and Dorf, writing about constitutional interpretation in particular, see intra-textual, systematic interpretation as a process of text-integration and warn against two opposite fallacies.[1] *Dis-integration*, on the one hand, turns a blind eye to the systematic interconnectedness of text-components and then tries to understand them in splendid isolation from one another. *Hyper-integration*, on the other hand, links text-components which, according to the scheme of the text, are not inherently coherent.

Systematic interpretation depends on the logical or systematic scheme of the written text, of which much is made nowadays, especially in constitutional interpretation.[2] As far as the conventional canons of construction are concerned, intra-textual, systematic interpretation sustains a restrictive or extensive interpretation of a constitutional (or statutory) provision in certain circumstances, invoking interpretive canons such as the *eiusdem-generis* rule[3] and the rule *cessante ratione legis cessat et ipsa lex*[4] (restrictive interpretation) or analogical interpretation, interpretation *ex consequentibus* and the rule *expressio unius est exclusio alterius* (extensive interpretation).[5] Restrictive or extensive reading may take place in accordance, first, with the scheme of the specific provision that stands to be construed, second, with a logical scheme generally attributed to provisions of the same kind and, third, with an assumed authorial mode of reasoning associated with the making of provisions of that kind. Intra-textual, systematic interpretation furthermore lays the basis for relying on textual elements such as the preamble, schedules to and the long title of an enacted instrument[6] in the interpretation of any of its specific provisions.

The common-law equivalent of intra-textual, systematic interpretation is the *ex visceribus actus* rule that requires any particular provision of an enacted instrument (the Constitution or a statute) as a whole to be understood as part of that encompassing instrument in which it has been included.[7] Treating constitutional and statutory language as language-in-context[8] is an intra-textual, systematic reading strategy.

[1] See LH Tribe & MC Dorf *On Reading the Constitution* (1991) 21-30.

[2] See JR de Ville *Constitutional and Statutory Interpretation* (2000) 143-145 (Provides a detailed yet succinct explanation of schematic constitutional interpretation.)

[3] Du Plessis *Re-Interpretation of Statutes* (supra) at 234-236.

[4] 'Where the reason for the existence of a law ceases, the law itself also ceases'. Ibid at 233-234.

[5] 'Expressly mentioning the one, is excluding the other'. Ibid at 236-239.

[6] Ibid at 239-246.

[7] *S v Looij* 1975 4 SA 703, 705C–D (RA); *Transvaal Consolidated Land and Exploration Co Ltd v Johannesburg City Council* 1972 (1) SA 88, 94F–G (W). See also *New Mines Ltd v Commissioner for Inland Revenue* 1938 AD 455; *Hleka v Johannesburg City Council* 1949 (1) SA 842, 852–853 (A); *City Deep Ltd v Silicosis Board* (supra) *City Deep Ltd v Silicosis Board* 1950 (1) SA 696, 702 (A); *Soja (Pty) Ltd v Tuckers Land and Development Corp (Pty) Ltd* 1981 (3) SA 314 (A).

[8] 1950 (4) SA 653, 662F-663A (A)(Schreiner JA).

In *Matatiele Municipality & Others v President of the Republic of South Africa & Others,*[1] Ngcobo J explained the need for and significance of systematic (or contextual) constitutional interpretation as follows:

> Our Constitution embodies the basic and fundamental objectives of our constitutional democracy. Like the German Constitution, it 'has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.' Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole.
>
> The process of constitutional interpretation must therefore be context-sensitive. In construing the provisions of the Constitution it is not sufficient to focus only on the ordinary or textual meaning of the phrase. The proper approach to constitutional interpretation involves a combination of textual approach and structural approach. Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution. This provides the context within which a provision in the Constitution must be construed.

Another truism confirmed by Ngcobo J's observations is that systematic and purposive (or teleological) interpretation are interlinked.[2] A purposive or purposeful reading of the Final Constitution and statutes (and their individual provisions) must be a holistic (and historically sensitive) reading.[3] The preamble to and long title of the Constitution or a statute, for instance, play a recognizable role in the interpretation of individual provisions, because a systematic reading of individual provisions, in the context of the written text as a whole, requires the broadest possible spectrum of textual elements to be taken into account. The preamble and the long title are, however, also statements of purpose and this then goes to show how systematic and purposive interpretation can join forces.

[1] *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2007 (1) BCLR 47 (CC)('*Matatiele*') at paras 36-37.

[2] Ngcobo J also suggested this connection in an earlier dictum in *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the RSA; Executive Council of KwaZulu-Natal v President of the RSA*. 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC)('*Executive Council of the Western Cape 1999*') at para 52.

[3] This method of reading was also suggested, with reference to statutory interpretation, in *Olitski Property Holdings v State Tender Board & Another*. 2001 (3) SA 1247 (SCA) at para 12 (Supreme Court of Appeal stated that statutory interpretation 'requires consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was designed to prevent.') The judgment of Kriegler J in *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd* provides a telling example of a simultaneously systematic/contextual, teleological and historical(-ly sensitive) reading of a constitutional provision (*in casu* section FC s 179(1)). 2002 (1) SA 1 (CC), 2001 (11) BCLR 1137 (CC) at paras 26-42. The Court's articulate reading strategy makes it clear how and why 'excessive peering at the language to be interpreted without sufficient attention to the contextual scene' can actually undermine longer-lasting value and policy objects of a constitutional or a statutory provision that stands to be construed. Ibid quoting *Jaga v Dönges NO & Another; Bhana v Dönges NO & Another* 1950 (4) SA 653, 664H (A).

But it goes further than that. There may be other less explicit statements of purpose in the written text — part of the inconspicuous interpretive waymarks previously dealt with,[1] for instance — which, only on being read together with other such statements (or other explicit statements), say something purposeful. The purposive potential of all such provisions can only be opened up through a systematic reading of a provision to be construed in the context of the instrument as a whole, and thereby in interaction with the provisions whose purposive potential stands to be released.[2]

The coalescence of systematic and purposive/teleological interpretation furthermore highlights the essential unity of interpretation and application.[3] The interpreter is called upon to make sense of a provision in a purposeful manner catering for the exigencies of an actual or hypothetical concrete situation. The situation poses a question, as it were. An instrument (the Constitution or a statute) is construed to find a possible answer - on the assumption that it can assist finding and formulating an answer. The written text read systematically in relation to the particular situation (and in the expectation that it is purposeful) does not generate any meaning in isolation from the question(s) that the concrete situation poses. Actual or potential applications of a constitutional or legislative provision determine its construction decisively. The provision acquires no meaning in isolation from or irrespective of either its *de facto* or its conceivable (or hypothesized) realization in specific situations where legal solutions and decisions are called for. 'The jurist makes sense of a law from out of a given case and for the sake of the given case.'[4] Friedrich Müller prefers the appellation *Konkretisierung* ('concretization') to *Auslegung* ('interpretation') for this process of bringing to life normative provisions in concrete situations.[5]

The Supreme Court of Appeal, in *Sefalana Employee Benefits Organisation v Haslam*, expressed a similar line of thinking (referring to statutory interpretation in particular):

> When interpreting a statute one is not obliged, of course, to conjure up all manner of fanciful and remote hypotheses in order to test the implications of a construction which one is considering placing upon it. However, where readily conceivable and potentially realistic situations spring immediately to mind it is a salutary practice to test the proposed construction by applying it to such situations. If the exercise produces startling (as opposed to merely anomalous) results, it may become clear that the proposed construction is not correct. This, in my view, is just such a case.[6]

[1] See § 32.4*(c)*(ii) supra.
[2] See § 32.4*(c)*(ii) supra.
[3] See also §§ 32.3*(a)*(vi) and *(d)* supra.
[4] H-G Gadamer *Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik* (4th Edition, 1975) 308 (Der Jurist faßt den Sinn des Gesetzes von dem gegebenen Fall her und um dieses gegebenen Falles willen'.)
[5] See F Müller *Juristische Methodik* (8th Edition, 2002) 212-234.
[6] *Sefalana Employee Benefits Organisation v Haslam & Others* 2000 (2) SA 415 (SCA) at para 6.

It may happen (and the *dictum* just quoted leaves room for the possibility) that a purposeful concretization of an enacted (constitutional or statutory) provision concludes that the provision in question has nothing or nothing meaningful to say about the specific concrete situation. The interpreter must then consider, first, whether the provision indeed applies in that situation; second, whether the written text perhaps contains a *casus omissus*; and, third, whether an interpretive alteration of the *ipsissima verba* of the provision may be appropriate.[1] Concretization may also bring up the possibility of extending ('stretching') or restricting ('shrinking') the meaning(s) that the provision generates - according to the previously referred to procedures of extensive and restrictive interpretation respectively.

Intra-textual, systematic interpretation overlaps with grammatical interpretation, first, insofar as a systematic reading of the written text causes the meaning attributed to linguistic signifiers in, for instance, a definition clause to be spread throughout the written text. The presumption that the same words and phrases in an enacted law-text bear the same meaning throughout fulfils a similar, meaning-distributive function. Second, insofar as recourse to diverse textual elements such as the preamble, long title, and schedules facilitate the attribution of meaning to linguistic signifiers, systematic interpretation sustains grammatical interpretation.[2]

Extra-textual contextualization takes place with reference to meaning-generative signifiers (themselves texts) in the textual environment. There are a great many such signifiers beginning, in constitutional and statutory interpretation, first, with other legal norms and institutions as well as the legal system as a whole. The Final Constitution and statutes are, for instance, always construed as forming part of a wider network of enacted law[3] and other normative law-texts such as precedents.[4] Second, the political and constitutional order, society and its legally recognized interests and the international legal order are all consciously taken account of in constitutional and statutory interpretation. Existing common-law canons of construction do provide for and indeed require cognisance of the 'non-legal' macro-text, for example, the presumption that enacted law promotes the public interest.[5] Actually, it is impossible to separate the written text and macro-text, especially since the macro-text is the 'source of concrete situations' without which, as was argued above, the interpretation of enacted law (the Constitution and statutes) is just not possible. The distinction between intra-textual and extra-textual contextualization is therefore merely a convenient one facilitating a systematization of the canons of construction.

Finally, in order to avoid an enervation of apparently conflicting constitutional provisions, the Constitutional Court has laid down guidelines for dealing — in a

[1] See Du Plessis *Re-Interpretation of Statutes* (supra) at 228-232.
[2] See § 32.*5(c)*(i) supra.
[3] See Du Plessis *Re-Interpretation of Statutes* (supra) at 262-264.
[4] See § 32.5*(b)*(i) supra.
[5] See Du Plessis *Re-Interpretation of Statutes* (supra) at 165-168.

systematic and context sensitive manner — with such provisions.[1] First, an attempt must be made reasonably to reconcile the apparently conflicting provisions, and to construe them in a manner giving full effect to each.[2] Second, where two provisions in the Final Constitution, one general and the other specific, deal with the same subject, the general provision must ordinarily yield to the specific provision:[3]

> The specific provision must be construed as limiting the scope of the application of the more general provision. Therefore, if a general provision is capable of more than one interpretation and one of the interpretations results in that provision applying to a special field which is dealt with by a special provision, in the absence of clear language to the contrary, the special provision must prevail should there be a conflict.[4]

(iii) *Teleological interpretation*

The topic of *purposive/teleological interpretation* has so far been brought up on three occasions. First, in the survey of early post-1994 constitutional case law it was shown how the courts thought of *rights interpretation* as characteristically *purposive* and how they associated purposive interpretation with generous interpretation.[5] Second, purposive interpretation was considered when purposivism as common-law theory of statutory interpretation was discussed[6] and, third, it came quite prominently to the fore when teleological interpretation as a possible substitute for conventional literalist-cum-intentionalism interpretation as prime approach to constitutional and statutory interpretation was considered.[7] The time has now arrived to consider purposive interpretation as an interpretive method or mode or *reading strategy* in constitutional interpretation, mindful of a word of warning that was sounded earlier, namely to desist from affording purposivism pride of place among approaches to constitutional interpretation.[8] In this chapter purposive interpretation is for the most part understood as *teleological interpretation* attributing meaning to a provision mindful of its possible objective(s) or *ratio*, and,

[1] See, generally, *Doctors for Life v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC)('*Doctors for Life*') at paras 48-49.

[2] *Matatiele* (supra) at para 51. See also *S v Rens* 1996 (1) SA 1218, 1996 (2) BCLR 155 (CC) at para 17 (Constitutional Court held that '[i]t was not to be assumed that provisions in the same constitution are contradictory' and that '[t]he two provisions ought, if possible, to be construed in such a way as to harmonise with one another.')

[3] *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996* 1996 (11) BCLR 1419 (CC), 1996 (4) SA 1098 (CC) at para 28.

[4] *Doctors for Life* (supra) at para 49.

[5] See § 32.1*(b)* supra.

[6] See § 32.3*(a)*(v) supra.

[7] See § 32.3*(b)*(iv) supra.

[8] See § 32.3*(b)*(iv) supra.

beyond that, of the fulfilment of aspirational values upholding the system of constitutional democracy as such.[1]

Purpose-consciousness is necessary in constitutional interpretation in order to honour the *operational intent* (or *effect-directedness*) of the Final Constitution belonging to the genre *enacted law*.[2] The interpreter of an enacted provision (of the Constitution or of a statute) starts with the assumption that the provision has a purpose (*ratio legis*) that will emerge in the course of interpretation, in other words, as he or she attributes meaning to the provision (relying *inter alia* on canons of and aids to construction associated with the different modes of interpretation comprising the Von Savigny quartet). This purpose has to be taken seriously (and must eventually, if at all possible,[3] be realized) because it is assumed that an authorized lawmaker had intended the provision to be of effect — there is 'an intention of the legislature' in this sense. This assumption informs the previously referred to mischief rule[4] and the presumption that enacted law is not invalid or purposeless.[5]

The *ratio legis* that emerges as interpretation proceeds can eventually be developed into a response to the exigencies of an actual or hypothetical concrete situation. Purposive and, beyond that, teleological interpretation join forces with systematic interpretation to emphasize the unity of interpretation and application. The partnership of systematic interpretation and purposivism is not insignificant for the determination of a *ratio legis* in accordance with the scheme of an enacted instrument as a whole, thereby reining in the preferences and prejudices of the interpreter. These 'subjective factors' can of course not be totally banned from the interpretive arena. However, they might be left unchecked if a purposive reading in the abstract is acceded to without question — a consequence as delusive as denying the effects of an interpreter's 'inarticulate premises'[6] on interpretive outcomes. What may follow in both instances is what Kentridge AJ, in *S v Zuma*,[7] called 'divination' as opposed to 'interpretation' — and then not necessarily a divination of values (against which Kentridge AJ warned), but of the inarticulate premises of the interpreter. The rule *iudices est ius dicere sed non dare*[8] (reminiscent of the counter-majoritarian difficulty and the tension between

[1] What teleological interpretation is, was explained with reference to the majority judgment in *African Christian Democratic Party v Electoral Commission*. 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC)('*African Christian Democratic Party*'). See § 32.3*(b)*(iv) supra.

[2] For more on 'enacted law' as distinct law-text genre, see § 32.3*(e)*(i)(ee) supra.

[3] The purpose of especially a statutory provision can of course not be realised if, for instance, it is unconstitutional or at odds with higher-ranking values of the legal system as a whole. Invalidity of a provision — especially in an all or nothing sense — is, however, not readily assumed. See L Du Plessis *Re-Interpretation of Statutes* (supra) at 187-188.

[4] See § 32.3*(a)*(v) supra.

[5] Du Plessis *Re-interpretation of Statutes* (supra) at 187-191.

[6] See J Dugard *Human Rights and the South African Legal Order* (1978) 374.

[7] *Zuma* (supra) at para 18 quoted at § 32.1*(b)* supra.

[8] See, eg, *Seluka v Suskin and Salkow* 1912 TPD 258, 270; *Union Government (Minister of Mines) v Thompson* 1919 AD 404, 425; *R v Tebetha* 1959 (2) SA 337, 346G (A); *S v Khanyapa* 1979 (1) SA 824, 835 (A).

populism and constitutionalism associated with it[1]) as well as the rule enjoining an interpreter of enacted law to give general effect to provisions framed in general terms[2] are both canons of teleological interpretation and seek to counter such a divination of the interpreter's preferences and prejudices. The latter of the two canons can also be understood as an injunction to observe the ordinary (grammatical) meaning of a provision.[3]

Teleological interpretation is forward-looking interpretation based on what can be learnt from past experience. While this characterization is a general way of restating the mischief rule,[4] it is also another way of saying that the Final Constitution ought to be construed heedful of the continuing time frame within which it obtains.[5] This observation provides a link between teleological interpretation and historical interpretation.

From Wessel le Roux's depiction of the interpretive *modus operandi* of the majority of the Constitutional Court in *African Christian Democratic Party v The Electoral Commission & Others* the following guidelines adapted for teleological *constitutional* interpretation may be deduced:[6]

(aa) establish, through recognized procedures of interpretation, the central purpose of the provision in question;
(bb) establish whether that purpose would be obstructed by a literal interpretation of the provision, and if so
(cc) opt rather for an alternative interpretation of the provision that 'understands' or promotes its core purpose;
(dd) ensure that the purposive reading of the constitutional provision is consistent with other constitutional provisions and with the value system of the Constitution and that constitutional values are indeed promoted with optimal effect.

Purposive interpretation can also be understood as 'purpose driven or actuated interpretation' ('doelgedrewe uitleg'). Here interpreters of the Final Constitution and statutes must mind their p's and q's. The purpose of a provision is to be determined through interpretation and should therefore not drive or actuate interpretation. On the other hand, purposive interpretation can also be 'purposeful or purpose directed interpretation' ('doelgerigte uitleg') because it directs interpretation in such a way that a purpose is eventually arrived at (and understood) without the interpreter knowing or surmising such purpose right from the outset.

[1] See § 32.3*(e)*(iii) supra.
[2] See § 32.5*(c)*(i) supra.
[3] See § 32.5*(c)*(i) supra.
[4] See § 32.3*(a)*(v) supra.
[5] See RWM Dias *Jurisprudence* (5th Edition, 1985) 170; GE Devenish *Interpretation of Statutes* (1992) 51. See also § 32.3*(a)*(vi) supra.
[6] See Le Roux 'Directory Provisions' (supra) at 386.

(iv) *Historical interpretation*

The historical interpretation of enacted law attributes meaning to a provision, and/or the instrument of which it forms part, in the light of its coming into being as a historical event at a particular point in time. According to Von Savigny, historical interpretation requires the interpreter to enter into and identify with the historical situation from which a law emerged.[1] The spirit of this history is more significant than the 'historical facts' (in other words, the events connected with the genesis of such law). From the 'spirit of history' much can be deduced about the *ratio legis*. Teleological interpretation lacking a historical foundation is in fact empty. The mischief rule, for instance, as manifestation of teleological interpretation,[2] shows alertness to the historicity of an enacted law-text. The provision to be construed is perceived as a response to a mischief that existed as a historical given, and that situation, as well as the law as it then stood, must be appreciated in order fully to apprehend the effects of the provision as the measure aimed at redressing the mischief.[3] The 'new Constitution' has also been described as the remedy to a fundamental tripartite mischief in South Africa's history, namely colonialism, racism and apartheid.[4]

In *De Klerk & Another v Du Plessis & Others* the Transvaal High Court *per* Van Dijkhorst J regarded the drafting history of the Interim Constitution as *irrelevant* to its interpretation.[5] However, in *S v Makwanyane & Another*[6] the Constitutional Court allowed the clear, undisputed and relevant reports of a technical committee (which advised the drafters of the Interim Constitution) as evidence of why no specific reference to capital punishment was included in the Interim Constitution. Reference to a report in writing, the equivalent of *travaux préparatoires* in international law, is of course not the same as relying on the *ipse dixit* of individual constitutional negotiators participating in the making of a constitution. The latter is not an acceptable interpretive aid. Since *Makwanyane* there have been other instances where interpretive reliance was placed on written background materials shedding light on the genesis of constitutional provisions.[7]

The Final Constitution as remedy to a fundamental mischief in South Africa's history, namely white minority rule under apartheid system,[8] is inevitably part of a

[1] F von Savigny *System des heutigen Römischen Rechts I* (1840) 252-253.

[2] See § 32.3*(a)*(v) supra.

[3] See *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA)(Good example of a judicial endeavour to rectify a particular mischief.)

[4] *Qozoleni v Minister of Law and Order* 1994 (3) SA 625, 634I-635C (E), 1994 (1) BCLR 75, 79D–E (E)('*Qozoleni*') (Kroon and Froneman JJ, referring to the Interim Constitution.)

[5] 1995 (2) SA 40 (T), 1994 (6) BCLR 124 (T).

[6] *Makwanyane* (supra) at para 17-18.

[7] *Ferreira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)('*Ferreira*') at para 46, for example.

[8] *Qozoleni* (supra) at 634I-635C, 81G-H (Kroon and Froneman JJ)(Referring to the Interim Constitution.)

political history that can, to a considerable extent, help determine the meaning and significance of many a constitutional provision, not only in the Bill of Rights, but also provisions concerning, for instance, the structure of government.[1] However, as Pierre de Vos[2] makes clear in critical assessment of the Constitutional Court's 'master narrative' of the recent history of South Africa's transition from apartheid to constitutional democracy, one's choice of narrative must avoid a shallowness and exclusivity that results in an overly narrow reading of the Final Constitution. Reliance on various accounts of history in constitutional interpretation, he contends, will counter the inference that only certain interpretive choices are historically inevitable.

(v) *Comparative interpretation (or transnational contextualisation)*

According to FC s 39(1) '[w]hen interpreting the Bill of Rights, a court, tribunal or forum … must consider international law' (section 39(1)(b)) and 'may consider foreign law' (section 39(1)(c)). With these provisions, the Final Constitution acknowledges that the Bill of Rights and the Final Constitution as a whole are embedded also in a transnational constitutional reality that helps determine their meaning in the domestic constitutional reality.

When considering the constitutionality of capital punishment with reference to the kind of transnational (re-)sources envisaged in IC s 35(1) of the Interim Constitution[3] — the predecessor to FC ss 39(1)(b) and (c) — Chaskalson P in *S v Makwanyane and Another*[4] laid down pertinent and consequential guidelines for reliance on international and foreign law in constitutional interpretation.[5] He wrote:

> In the course of the arguments addressed to us, we were referred to books and articles on the death sentence, and to judgments dealing with challenges made to capital punishment in the Courts of other countries and in international tribunals. The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how Courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention. They may also have to be considered because of their relevance to s 35(1) of the Constitution.[6]

[1] See *Executive Council of the Western Cape 1999* (supra) at para 44. Two telling Bill of Rights examples are *Shabalala v Attorney-General, Transvaal* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC)('*Shabalala*') at para 26 and *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 40. For reference to other examples, see I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 152 n 33.

[2] See P de Vos 'A Bridge Too Far? History as Context in the Interpretation of the South African Constitution' 2001 *South African Journal on Human Rights* 1.

[3] The relevant provisions of IC s 35(1) read as follows:
In interpreting the provisions of this chapter a court. . . shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign case law.

[4] 1995 (6) BCLR 665 (CC), 1995 (3) SA 391, 1995 (2) SACR 1 (CC)('*Makwanyane*') at para 19.

[5] 'Having regard to' international and foreign (case) law in the language of IC s 35(1) and 'considering' international and foreign law in the language of FC ss 39(1)(b) and (c).

[6] *Makwanyane* (supra) at para 34.

> Customary international law and the ratification and accession to international agreements is (*sic!*) dealt with in s 231 of the Constitution, which sets the requirements for such law to be binding within South Africa. In the context of s 35(1), public international law would include non-binding as well as binding law. . . International agreements and customary international law accordingly provide a framework within which chap 3 [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments. . . may provide guidance as to the correct interpretation of particular provisions of chap 3.[1]
>
> In dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution . . . We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.[2]

These *dicta* boil down to the following significant points:

First, in construing the Final Constitution, it is competent for a South African court to consider international and foreign authorities (Chaskalson P mentioned them in one breath) *regardless* of FC s 39(1). Such authorities may be considered because they are of value in their own right. Since FC ss 39(b) and (c) refer only to *interpretation of the Bill of Rights*, Chaskalson P in actual fact laid down a binding precedent effectively granting constitutional authorisation to consider international and foreign law when interpreting constitutional provisions not found in the Bill of Rights. He does not, however, explicitly say whether, in the interpretation of such provisions, a court is *enjoined* to consider public international law. Given the language in which the *dictum* is couched, it is probably not *specific* enough to read it as imposing such an *injunction*. It is thus highly advisable (but optional nonetheless) to consider international law in constitutional interpretation, except when, in terms of the 'black-letter' provisions in FC ss 231 and 232 or the presumption in FC s 233 international law must not just be *considered* but indeed *observed* as binding with respect to municipal law.[3]

Second, and of far-reaching significance, is the observation that binding as well as 'non-binding' international law[4] provides a *framework* within which the Bill of Rights 'can be evaluated and understood'.[5] The implications of this 'framework' *dictum* will be considered more fully when the role of international law in constitutional interpretation is discussed below.[6]

Third, the Court in *Makwanyane* articulated a warning that, in the post-*Makwanyane* case law, has been echoed repeatedly: namely that in the interpretation of the Final Constitution — with its own structure and language — transnational

[1] Ibid at para 35.
[2] Ibid at para 39.
[3] On the status of international law, see § 32.5*(c)*(v)(aa) infra.
[4] See § 32.5*(c)*(v)(aa) infra: 'non-binding' international law is strictly speaking a misnomer.
[5] *Makwanyane* (supra) at para 35.
[6] See § 32.5*(c)*(v)(aa) infra.

authorities must be relied on with due regard to the uniqueness of our Constitution, our history and our circumstances. Though assistance may be derived from both international law and foreign law, a court, according to Chaskalson P, is in no way bound to follow either of them. A court must of course always be alert to the possibility that it is indeed bound to follow certain international law.[1] By not distinguishing between the two bodies of law, Chaskalson P overlooked a critical difference between international law and foreign law for the purposes of constitutional interpretation. International law *must* be considered. Foreign law *may* be considered.

In *Sanderson v Attorney-General, Eastern* Cape[2] Kriegler J observed, in passing, that '[b]oth the [I]nterim and the [F]inal Constitutions… indicate that comparative research is either mandatory or advisable'. Of course only comparative research is advisable. It is consideration of international law that is mandatory. What Kriegler J in effect did was to label both '(public) international law'. Again, in doing so, he too conflated the mandatory injunction to consider international law and the interpretive suggestion to consult foreign jurisprudence. This error may explain the persistent lack of engagement with international law and the Court's apparent preference for drawing upon case law in other jurisdictions.

The constitutionalization of international law as well as the internationalization of constitutional law, both of which are manifestations of a globalisation of public law, have rendered the strict boundaries between domestic constitutional law, foreign constitutional law and international law somewhat permeable.[3] However, Kriegler's conflation fails to appropriately acknowledge that the Final Constitution is talking about distinct bodies of law and recognizing their different status: many instruments and kinds of international law bind South Africa; foreign jurisprudence does not. In other words, foreign law, in the domestic context, is *persuasively* normative while international law may well (but will not inevitably) be *prescriptively normative*.[4] The fact that the latter may have the same, normative binding force as domestic law thus sets international law apart from foreign constitutional law — and that difference must be reckoned with in constitutional interpretation.

(aa) International law

A hundred years prior to the advent of constitutional democracy in South Africa a court in the former *Zuid-Afrikaanse Republiek* declared that the municipal law of that republic

[1] See § 32.5*(c)*(v)(aa) infra.

[2] 1997 (12) BCLR 1675 (CC), 1998 (2) SA 38 (CC)('*Sanderson*') at para 26.

[3] See B-O Bryde 'Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts' (2003) 42 *Der Staat* 61. See also A Peters 'The Globalization of State Constitutions' in J Nijman and André Nollkaemper (*eds*) *New Perspectives on the Divide between National and International Law* (2007) 251.

[4] For the distinction between the prescriptive and persuasive normativity of law-texts, see § 32.3(e)(i)(cc).

> must be interpreted in such a way as not to conflict with the principles of international law . . . '[T]he state which disclaims the authority of international law places herself outside the circle of civilized nations.' It is only by a strict adherence to these recognized principles that our young state can hope to acquire and maintain the respect of all civilized communities, and so preserve its own national independence.[1]

This *dictum* signals a resolve to play a constructive role in international affairs which South Africa, during the first half of the twentieth century, as a faithful member of the League of Nations and as a founding member of the United Nations, indeed did.[2] Since the mid-1940s, however, South Africa increasingly came under attack because of its racist minority rule politics, and became, in obviously quite an unintended and indirect manner, a major contributor to the development of post-World War II international law. Apartheid helped international lawyers and organisations to crystallize and concretize a new body of treaties and customary law designed to promote human rights and racial equality.[3]

South Africa's resolve during the 1990s to negotiate a peaceful and a decided transition to constitutional democracy manifested in, amongst others, an openness to 'influences from outside' and, in particular, a positive attitude towards international law as a potentially formative and informative force in the legal order of a new South Africa. This change in attitude started occurring within the judiciary as well.[4]

A feature of most of the 'newer' constitutional texts in the world today is that their drafters had drawn heavily on international instruments — especially human rights declarations and covenants — in formulating their provisions. For comparative purposes a distinction between 'old constitutions' — predating important international instruments such as the European Convention on Human Rights and Fundamental Freedoms of 1950, the International Covenant on Economic, Social and Cultural Rights of 1966 and the International Covenant on Civil and Political Rights of 1966 — and 'new constitutions' drafted with heavy reliance on these instruments, may 'be particularly fruitful, even if it might be unfamiliar'.[5]

The South African Constitution, and its Bill of Rights in particular, reflects the influence of a wide range of international human-rights law instruments:

[1] *CC Maynard et alii v The Field Cornet of Pretoria* (1894) 1 SAR 214, 223.

[2] See J Dugard *International Law: A South African Perspective* (2nd Ed 2000) 19-20.

[3] See Dugard (supra) at 21 ('While apartheid undermined and discredited the law of South Africa, it succeeded, perversely, in injecting notions of racial equality, self-determination and respect for human rights into an international legal order that in 1945 had few developed rules on these subjects.')

[4] See L du Plessis 'International Law and the Evolution of (Domestic) Human-rights Law in post-1994 South Africa' in J Nijman and A Nollkaemper (*eds*) *New Perspectives on the Divide between National and International Law* (2007) 309, 310.

[5] See B-O Bryde 'The Constitutional Judge and the International Constitutionalist Dialogue' (2005) 80 *Tulane Law Review* 203, 208('Çonstitutionalist Dialogue').

international declarations, covenants and conventions.[1] The Constitutional Court in its certification of the written text of the Final Constitution considered Constitutional Principle II[2] which required, amongst other things, that '[e]veryone shall enjoy all universally accepted fundamental rights, freedoms and liberties'. The court concluded that the text complied with this standard as a minimum and in some instances even goes beyond it.[3]

The inclusion in a nation's supreme constitution of provisions derived from international documents and instruments is a direct and most powerful way of incorporating international (human-rights) law into the municipal law of that nation. It gives rise to a somewhat curious situation: constitutional provisions with their origins in *international law*, are required to be construed considering *international law*. Recognised procedures for and aids to the construction of international law — for instance, Articles 31-33 of the Vienna Convention on the Law of Treaties — may be relied on to determine what 'international law' in a given situation and/or with reference to a specific issue is. However, the Final Constitution and Bill of Rights themselves by no means have to be interpreted as if they were forms of international law. They are to be construed in accordance with recognised procedures and reading strategies for the interpretation of domestic highest law.[4] In the South African context a constitutional provision derived from an international law source could thus be found to have a meaning or construction different from its accepted meaning at international law.

FC s 39(1)(b) and (c) are provisions not commonly included in constitutions — and reliance on international and foreign law in constitutional interpretation is, of course, possible without such constitutional authorisation. More commonly and typically, constitutions provide for the recognition — and incorporation into domestic law — of (treaty and customary) international law. The black letter provisions of the Final Constitution geared to achieve these effects (and referred to in passing before) are ss 231 and 232. These provisions are discussed by Strydom and Hopkins in Chapter 30 above.[5] International law thus recognised

[1] In addition to the instruments already mentioned, the Court has freely used the Universal Declaration of Human Rights of 1948, the American Convention on Human Rights of 1969, the African Charter on Human and Peoples' Rights of 1981, the International Covenant on the Elimination of all Forms of Racial Discrimination of 1966, the Convention on the Elimination of all forms of Discrimination against Women of 1979 and the Convention on the Rights of the Child of 1989 (CRC). See Du Plessis (supra) 'International Law' (supra) at 313.

[2] For more on this certification process in terms of the 34 Constitutional Principles in the Interim Constitution, see § 32.2(a) supra.

[3] *Certification of the Constitution of the Republic of South Africa, 1996, In re: Ex parte Chairperson of the Constitutional Assembly* 1996 (10) BCLR 1253 (CC), 1996 (4) SA 744 (CC)('*First Certification Judgment*') at paras 48-51.

[4] But see *Makwanyane* (supra) at para 16.

[5] Hennie Strydom & Kevin Hopkins 'International Law & International Agreements' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 30.

and incorporated is often referred to as 'binding' international law to distinguish it from 'non-binding' international law. As a result, the vast body of international law is not brought directly to bear on the domestic legal system by virtue of FC ss 231 and 232.

What then to make of Chaskalson P's observation in *S v Makwanyane and Another*[1] that 'non-binding' international law was 'public international law' for purposes of IC s 35(1) — and thus FC s 39(1) too? The constitutional injunction to consider international law in Bill of Rights interpretation makes all international law 'binding', but not in the sense that it must be observed as law. It is binding at least to the extent that due regard must be had to it. The presumption in FC s 233, which will be discussed below, could have a similar effect. Chaskalson P's framework *dictum* — that international law thus broadly conceived provides a framework within which the Bill of Rights 'can be evaluated and understood'[2] — has earned the South African Constitutional Court a complimentary reputation for its "universalist interpretation" of constitutional rights, in a series of judgments relating mostly to criminal processes'.[3]

Neville Botha and Michéle Olivier[4] contend that Chaskalson P's reliance on the writing of John Dugard – which he cited in support of his framework *dictum* – was not correct. What Dugard, according to the authors, probably had in mind were the (less than 'free for all') 'traditional sources of international law' recognised in Article 38(1) of the Statute of the International Court of Justice. Dugard has apparently confirmed this latter reading in a subsequent article.[5] Chaskalson P thus misread the source on which he relied and laid down binding (that is, *prescriptive*) case law *per errorem*. This piece of judge-made law has nonetheless turned out to be of considerable consequence in the evolution of South Africa's domestic human rights law drawing on sources of international law in a distinctly direct and monistic manner.[6] As will be shown below, the Constitutional Court in *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* actually retreated from its *Makwanyane* position, but in time this turned out to be an *ad hoc* deviation, and openness to and generous reliance on international law has mostly been the default (judicial) disposition in constitutional interpretation in South Africa.[7]

[1] See *Makwanyane* (supra) at para 35.

[2] Ibid. Mokgoro J, in a similar vein, held that the Interim Constitution 'requires courts to proceed to public international law and foreign case law for guidance in constitutional interpretation, thereby promoting the ideal and internationally accepted values in the cultivation of a human rights jurisprudence for South Africa'. Ibid at para 304.

[3] See Peters, (supra) at 300-301.

[4] See N Botha and M Olivier 'Ten Years of International Law in the South African Courts' *South African Yearbook of International Law* 29 (2004) 42, 46.

[5] See J Dugard 'International Law and the Final Constitution' (1995) 11 *South African Journal on Human Rights* 241.

[6] See Z Motala and C Ramaphosa *Constitutional Law: An Analysis and Cases* (2002) 37.

[7] 1996 (8) BCLR 1015 (CC), 1996 (4) SA 672 (CC)('*AZAPO*').

Another example of the Constitutional Court's generous predisposition towards international law when undertaking constitutional interpretation is Chaskalson P's justification for recourse to *travaux préparatoires* for a better understanding of (certain aspects of) the Interim Constitution. Capital punishment was a profoundly controversial issue among the negotiators and drafters of South Africa's Interim Constitution. They eventually opted for the 'Solomonic solution'[1] of not mentioning capital punishment in that Constitution at all, and leaving it entirely up to the Constitutional Court to cast the die on its constitutionality.[2] Chaskalson P thus thought it necessary in *Makwanyane* to take cognisance of the genesis of the text of the Interim Constitution so as to come to grips with the interpretive implications of the constitution-makers' silence on the issue of capital punishment. However, in seeking to justify his reliance on 'preceding deliberations', Chaskalson P was faced with a South African common law on statutory interpretation prone to pit itself against reliance on preparatory material in the interpretation of enacted law.[3] Proceeding beyond conventional common-law restraints, he argued that reliance on *travaux préparatoires* is appropriate in constitutional interpretation, because it is accepted in other 'countries in which the Constitution is … supreme law'.[4] 'The European Court of Human Rights and the United Nations Committee on Human Rights,' Chaskalson P then continued, 'all allow their deliberations to be informed by *travaux préparatoires*.'[5] He cited Article 32 of the Vienna Convention on the Law of Treaties of 1969 as authority for the contention that *travaux préparatoires* may thus be relied on — also in constitutional interpretation. This Vienna 'Convention on Conventions' is 'international law' as contemplated in IC s 35(1) (and FC s 39(1)(b)) , but Articles 31-33 of the Convention is international law applicable (only or, at least, primarily) to the interpretation of *international* documents and instruments ('treaties') *and not to* the interpretation of a domestic Constitution. However, since the Constitutional Court, as South Africa's highest court in constitutional matters, has held, albeit probably also *per errorem*, that the 'Convention on Conventions' may be relied on to guide interpretation of South Africa's Constitution and Bill of Rights, this has become the law (of interpretation) as it stands in South Africa — an entirely persuasive international law-text, turned into prescriptive domestic law through judicial law-making.

On 25 July 1996, one year, one month and nineteen days after *Makwanyane*,[6] the Constitutional Court's handed down judgment in the politically controversial

[1] *Makwanyane* (supra) at paras 22 and 25.

[2] See also § 32.3*(e)*(iii) supra. Capital punishment is not referred to in the Final Constitution either. However, the reason for this 'silence' is that *Makwanyane* is taken to be the authority that has excluded the possibility of capital punishment once and for all.

[3] See *Makwanyane* (supra) at para 14. See also L du Plessis *Re-Interpretation of Statutes* (2002)268-269.

[4] Ibid at para 16.

[5] Ibid.

[6] *Makwanyane* (supra) at para 16.

Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others.[1] Save for the absence of Kentridge AJ in *AZAPO*, the panels of concurring judges in the two cases were identical. Not only did *AZAPO* retreat from *Makwanyane's* generous reliance on international law in constitutional interpretation, but arguably also reversed the court's position on international law as a framework within which the Bill of Rights 'can be evaluated and understood'.[2] *AZAPO* was, of course, not written so as to have such adverse effects for international law in South Africa. Its primary concern was the constitutionality of granting amnesty for the perpetration of atrocities by both erstwhile protagonists and antagonists of apartheid.

The Postamble to the Transitional Constitution emphasised the need for national reconciliation and a healing of the divisions of the past, and required amnesty to be granted 'in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past'. The Promotion of National Unity and Reconciliation Act[3] was subsequently enacted, stipulating conditions — and putting in place procedures to apply — for amnesty. An Amnesty Committee was authorised to grant perpetrators of human rights violations immunity from both criminal prosecution and civil liability, provided that their acts of violation could be associated with a political objective (as defined in the Act) and that all relevant facts about such acts were fully disclosed. Section 20(7) of the Act provided that individual immunity against criminal and civil liability would be consequent upon a successful application for amnesty, and discharged the state — and other bodies, organisations or persons — from (vicarious) civil liability for acts thus amnestied. AZAPO, the Applicant, challenged the constitutionality of Section 20(7) alleging that it breached every person's right (guaranteed in IC s 22) 'to have justiciable disputes settled by a court of law or … another independent and impartial forum'.[4] AZAPO contended that a state is required by international law, and a series of Geneva Conventions in particular, to prosecute the perpetrators of gross human rights violations, and that section 20(7) thus breached international law.[5] In terms of the said Conventions:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches.

The Constitutional Court thought that '[t]he issue which falls to be determined in this Court is whether section 20(7) of the Act is inconsistent with the Constitution' and 'the enquiry as to whether or not international law prescribes a different

[1] On the politically controversial dimensions of this case, see L du Plessis 'AZAPO: Monument, Memorial. . .or mistake?' in W le Roux & K van Marle (eds) *Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v President of South Africa* (2008) 51.
[2] See *Makwanyane* (supra) at paras 35 and 304.
[3] Act 34 of 1995.
[4] FC s 34.
[5] See *AZAPO* (supra) at para 25.

duty is irrelevant to that determination'.[1] IC s 35(1) —the predecessor of FC s 39(1)(b) — the Court thought, directs it 'only to 'have regard' to public international law if it is applicable to the protection of the rights entrenched in the chapter' [ie the IC Bill of Rights].[2] That is, international law would have to be 'binding' in terms of black-letter constitutional law qualified to be '(public) international law' as envisaged in IC s 35(1) and FC s 39(1). This finding attenuates, if not reverses, the legal effect of Chaskalson P's framework *dictum* in *Makwanyane*.[3] Mahomed DP in *AZAPO* did not treat 'binding' as well as 'non-binding' international law as a framework within which the Bill of Rights 'can be evaluated and understood'. This reading of *AZAPO* renders provisions like IC s 35(1) or FC s 39(1)(b) largely superfluous. For if a court, tribunal or forum is at any rate bound to follow 'binding' international law, there is no need for any additional provisions to push it to do so.

AZAPO illustrates how domestic political pressures can put a court's (and *in casu* particularly the Constitutional Court's) otherwise favourable and generous dealings with international law under pressure. *AZAPO* touched a raw political nerve. Amnesty was central to the politically negotiated truth and reconciliation process in South Africa and held the key to a 'new' democracy memorialising the past without allowing it to eclipse the future. Had the Constitutional Court in *AZAPO* relied on international law to the same degree as it did in *Makwanyane*, it would have had to conclude that section 20(7) of the Promotion of National Unity and Reconciliation Act was unconstitutional. Had it then, pursuant to this finding, struck down the impugned provision, the truth and reconciliation process would certainly have ground to a halt, with potentially ghastly consequences for the more vital project of a closely negotiated, peaceful transition to constitutional democracy in South Africa.

History has shown that *AZAPO* did not irreversibly derogate from the Constitutional Court's 'universalist' attitude towards international law in constitutional interpretation.[4] In *Government of the RSA and Others v Grootboom and Others,*[5] the meaning of FC s 26's right to housing (in the form of passable basic shelter) was at issue. In construing the section, which guarantees everyone's right to adequate housing[6] and enjoins the state to take reasonable legislative and other measures within its available resources to achieve the realisation of this right,[7] the Court considered, amongst others, sources of international law. Yacoob J quoted Chaskalson P's framework *dictum* in *Makwanyane*,[8] but added a significant qualification:

[1] *AZAPO* (supra) at para 26.
[2] Ibid at para 27.
[3] *Makwanyane* (supra) at paras 35 and 304.
[4] See Peters (supra) at 300-301.
[5] 2000 (11) BCLR 1169 (CC), 2001 (1) SA 46 (CC)('*Grootboom*').
[6] Section 26(1).
[7] FC s 26(2).
[8] *Makwanyane* (supra) at para 35.

> The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.[1]

The *Grootboom* Court thus honoured — and, bearing *AZAPO* in mind, indeed restored — the distinction between international law binding on South Africa, and other sources of international law that must, in addition to binding law, be considered in the interpretation of the Bill of Rights. The *Grootboom* Court concentrated its inquiry mainly on Articles 11.1 and 2.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and pointed out differences of interpretive significance between the formulation of the provisions of the Covenant and section 26 of the South African Constitution.[2] However, the Court also thought that the relevant general comments issued by the United Nations Committee on Economic, Social and Cultural Rights regarding the interpretation of the ICESCR 'constitute a significant guide to the interpretation of section 26'.[3] The *Grootboom* Court allowed itself to be guided by the Committee's general comments in order to determine what the notion of 'a minimum core' of socioeconomic rights entails. By doing so, the *Makwanyane* standard on recourse to non-binding international law was not just restored. The standard was further developed to authorise common sense reliance on an applicable text without making that text prescriptive as *international law*.

Makwanyane, *AZAPO* and *Grootboom* constitute a particular (and probably the leading) storyline in the case law narrative of the Constitutional Court's reliance on international law in constitutional interpretation. Not exactly within — but nonetheless supporting — this storyline, are a handful of judgments of the court evincing a certain adjudicative mindset in dealing with human rights issues which are prominent in international law.

The minority judgment of Sachs J in *Ex parte Gauteng Provincial Legislature. In re: Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*[4], with which the majority of the Constitutional Court did not disagree, demonstrated how measured reliance on (relevant) international law can contribute to the resolution of a controversial issue or issues in domestic politics. The petitioners in the case alleged that draft provincial legislation fell foul of guarantees of school learners' right to instruction in the language of their choice,[5] and of a right to establish educational institutions based on a common culture, language or religion.[6] Sachs J considered the petitioners' contentions in the broad domestic historical and constitutional context[7] and made four assumptions in

[1] *Grootboom* (supra) at para 26.
[2] Ibid at para 28.
[3] Ibid at para 29.
[4] 1996 (4) BCLR 537 (CC), 1996 (3) SA 165 (CC)('*Ex parte Gauteng Provincial Legislature*').
[5] This right was guaranteed in IC s 32(b).
[6] The right was subject to the proviso that there shall be no discrimination on the ground of race. This right was guaranteed in IC s 32(c).
[7] See *Ex parte Gauteng Provincial Legislature* (supra) at para 45.

their favour. He then contextualised these assumptions and counterbalanced them with reference to three significant considerations highlighted by the Interim Constitution.[1] This analysis was followed by an assessment of the actual constitutional provision in terms of six universally accepted principles gleaned from various sources of international law on the protection of minorities.[2] Having duly contextualised the interaction of international and municipal human rights law on the issues in dispute, Sachs J concluded that the petitioners' misgivings regarding minority rights and education were unfounded.

International law looms large where the protection of the rights of vulnerable individuals finding themselves on foreign soil is at issue. In *Mohamed and Another v President of the RSA and Others* the Constitutional Court dealt with the unlawful handing over of a foreign national to the United States of America to be prosecuted for his alleged involvement in the bombing of the United States Embassy in Tanzania.[3] The *Mohamed* court strongly condemned this extradition disguised as the deportation of an unlawful immigrant and adamantly (though alas belatedly) insisted on meticulous compliance with due process in such instances, which *in casu* would have had to include procuring an undertaking from the US government that the foreign subject would not be executed if eventually convicted in the US.[4]

Kaunda and Others v President of the RSA and Others (2),[5] on the other hand, was, like *AZAPO*, a politically sensitive matter. Sixty-nine applicants, all South African nationals, arrested and detained in Zimbabwe and then charged with various offences related to their alleged complicity in a plot to overthrow the government of Equatorial Guinea, sought the South African government's intervention on their behalf to secure their release or their extradition to South Africa, and to protect them against assault and detention in atrocious conditions while still in Zimbabwe (and the risk of a death penalty if eventually extradited to Equatorial Guinea). A majority of the Constitutional Court, citing FC s 232 in order to signal reliance on customary international law, narrowly construed the right to diplomatic protection of these South African nationals on foreign soil:

> [t]raditionally, international law has acknowledged that States have the right to protect their nationals beyond their borders but are under no obligation to do so.[6]

The Court attached considerable weight to the opinion of a Special Rapporteur of the International Law Commission on the meaning of 'diplomatic protection',[7]

[1] *Ex parte Gauteng Provincial Legislature* (supra) at para 50.
[2] Ibid at paras 55-68.
[3] 2001 (7) BCLR 685 (CC), 2001 (3) SA 893 (CC)('*Mohamed*').
[4] Ibid at para 68.
[5] 2004 BCLR 1009 (CC), 2005 (4) SA 235 (CC)('*Kaunda*').
[6] *Mohamed* (supra) at para 23.
[7] *Kaunda* (supra) at paras 25-28.

concluding that under current (customary) international law diplomatic protection is not recognised and cannot be enforced as a human right. Diplomatic protection remained the prerogative of the state to be exercised at its discretion.[1]

The Constitutional Court's atypical restraint in drawing on (and its narrow construction of) international law sources in *Kaunda*,[2] is directly proportionate to the controversy of the political issues that were involved. The controversy flowed from fear of possible interference not only with the affairs of, but especially also with the due process of law in a neighbouring state. This judgment was another sobering reminder that political realities can decisively shape reliance on international law in constitutional interpretation.

In FC s 233 a long-standing, common-law presumption of statutory interpretation is constitutionalised:[3] 'Every court' interpreting legislation is required to 'prefer any reasonable interpretation … consistent with international law over any alternative interpretation that is inconsistent with international law'. Erasmus correctly points out that FC s 233, unlike the conventional presumption, is of effect even where there is no ambiguity in the language of the legislation to be construed — all that is needed for the section to take effect is the existence of international law on the topic or issue under consideration against which alternative interpretive outcomes can be assessed.[4] Though it is a rather helpful and significant interpretive aid, FC s 233 has, since the commencement of the Final Constitution, only been referred to twice: almost in passing by Sachs J in *S v Baloyi*[5] to justify his preferred interpretation of a legislative provision, and by Chaskalson CJ in *Kaunda and Others v President of the RSA and Others (2)*.[6] FC s 233 explicitly mentions the interpretation of *legislation* (only), but the Constitutional Court, in the latter judgement, had little difficulty finding that the presumption it creates 'must apply equally to the provisions of the Bill of Rights and the Constitution as a whole'.[7] The *Kaunda* Court set FC s 233 on par with FC s 39(1)(b) — and that can only be done if 'international law' means the same thing in both sections. The effect of FC s 233 will then be that, in the interpretation of the Final Constitution (including the Bill of Rights), due regard to 'non-binding' international law will never be optional: such law will, as a matter of fact, apply whenever the presumption is not rebutted! ('Binding' international law, of course, applies at any rate.) One effect of this far-reaching interpretation is that FC s 39(1)(b) could be rendered superfluous, since FC s 233 applies to the Bill of

[1] *Kaunda* (supra) at para 29.
[2] Ibid.
[3] See Du Plessis *Re-Interpretation of Statutes* (supra) at 173.
[4] See G Erasmus 'The Incorporation of Trade Agreements and Rules of Origin: The Extent of Constitutional Guidance' *South African Yearbook of International Law* 28 (2003) 157, 175.
[5] 2000 (1) BCLR 86 (CC), 2000 (2) SA 245 (CC)('*Baloyi*') at para 13.
[6] See *Kaunda* (supra) at para 33.
[7] Ibid at para 33.

Rights too. There are three possible ways of avoiding this consequence. (I) First, section 233 can be understood to refer to 'binding' international law only. (II) Second, the section can be understood as applying to the interpretation of legislation only (and not to interpretation of the Final Constitution too). (III) Third, and by virtue of the maxim *generalia specialibus non derogant*,[1] FC s 39(1)(b) can be understood as a specific prior provision, pertaining to the Bill of Rights (only), and therefore left unaffected by FC s 233, a general provision similar in substance but pertaining to the Final Constitution as a whole. What the Constitutional Court said about FC s 233 in *Kaunda* rules out (II), does not rule out but also does not strongly support a possibility as restricted as (I) above, and is most likely to be understood as suggesting a preference for (III).

FC s 233 can of course be invoked only where, in construing legislation (or the Final Constitution), there is indeed international law against which alternative interpretive outcomes can be assessed. On the other hand, not to observe the presumption, when such international law is at hand, is an error in law as Gerhard Erasmus[2] quite correctly points out in his critique of *A M Moola Group Ltd and Others v Commissioner, South African Revenue Service and Others*.[3] Given the paucity of references to FC s 233 in the case law, there is every reason to suspect that South African courts commit this error on a regular basis.

(bb) Foreign law

The South African Constitution not only reflects the influence of a wide range of international human rights law instruments: it is fair to say that it in some vital respects it has also been modelled on an array of foreign constitutions, eg the German Basic Law, the Canadian Charter, the US Constitution and Indian Constitution. South African courts (and the Constitutional Court in particular) have furthermore been open to persuasion by comparative (foreign) authorities.[4] O'Regan J in *K v Minister of Safety and Security*eloquently reflected on this openness as follows:

> There can be no doubt that it will often be helpful for our courts to consider the approach of other jurisdictions to problems that may be similar to our own. Counsel for the respondent argued that because our common-law principles of delict grew from the system of Roman-Dutch law applied in Holland, a province of the Netherlands, in the 17th century, we should not have regard to judgments or reasoning of other legal systems. He submitted that the conceptual nature of our law of delict, based as it is on general principles of liability, is different from the casuistic character of the law of torts in common-law countries. These differences, he submitted, render reliance on such law dangerous. Counsel is correct in

[1] See Du Plessis *Re-Interpretation of Statutes* (supra) at 73-74.
[2] Erasmus 'The Incorporation of Trade Agreements' (supra) at 157, 175.
[3] 2003 (6) SA 244 (SCA).
[4] See § 32.5*(c)*(v)(aa) supra.

> drawing our attention to the different conceptual bases of our law and other legal systems. As in all exercises in legal comparativism, it is important to be astute not to equate legal institutions which are not, in truth, comparable. Yet in my view, the approach of other legal systems remains of relevance to us.
>
> It would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those with which we are confronted. Consideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further. It is for this very reason that our Constitution contains an express provision authorising courts to consider the law of other countries when interpreting the Bill of Rights. It is clear that in looking to the jurisprudence of other countries, all the dangers of shallow comparativism must be avoided. To forbid any comparative review because of those risks, however, would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions. Our courts will look at other jurisdictions for enlightenment and assistance in developing our own law. The question of whether we will find assistance will depend on whether the jurisprudence considered is of itself valuable and persuasive. If it is, the courts and our law will benefit. If it is not, the courts will say so, and no harm will be done.[1]

The disposition evinced by these *dicta* stands in stark contrast to parochial sentiments that are made manifest in an intense recent debate that has raged in the United States of America over the use of foreign law in constitutional interpretation and adjudication. Cheryl Saunders, taking the pulse of this debate, thus remarks:

> The practice [ie the use of foreign law] remains a topic of fierce debate among scholars … and among judges writing extra-judicially. It has been the subject of critical comment in the press. It has attracted the attention of Congress, spawning a series of proposed resolutions seeking, in one way or another, to discourage judicial reference to foreign constitutional experience, with impeachment a veiled threat in the background.[2]

Denunciation of 'the practice of comparison' professes to be principled on two accounts. First, reliance on foreign authority is thought to be necessarily at odds with the original intent of the 'the founding generation' responsible, in the first and final instance, for the making of a constitution believed to be in no need of an interpretive adaptation to 'present circumstances'.[3] Second, it is claimed that foreign law is not an authoritative source of law for (domestic) judges, and those among them who invoke it assume a legislative function which is at odds with the horizontal separation of powers (or *trias politica*).[4] They moreover import the ideas

[1] 2005 (9) BCLR 835 (CC), 2005 (6) SA 419 (CC)('*K*') at paras 34-35.

[2] C Saunders 'Comparative Constitutional Law in the Courts: Is there a Problem?' (2006) 59 *Current Legal Problems* 91, 92.

[3] See § 32.3*(b)*(i) and § 32.3*(c)*(i)(B) supra. See also J Murkens 'Comparative Constitutional Law in the Courts: Reflections on the Originalists' Objections' (2008) 41 *Verfassung und Recht in Übersee* 32, 34.

[4] See Murkens (supra) at 34.

of foreign judges, over which the people of the US have no control, into American (constitutional) law, and that is, ostensibly, counter-democratic.

This debate is not particularly relevant in any constitutional democracy where constitutional comparison as interpretive endeavour is practiced, encouraged and, as in South Africa, explicitly authorised by the Final Constitution. The first objection above is premised on an exploded theory of constitutional interpretation (rejected by the South African Constitutional Court in no uncertain terms[1] and by South African scholars too[2]). As to the second objection, the US opponents of the use of foreign law in domestic adjudication are about the only constitutional interpreters in the world today who see constitutional comparativism as an inevitable and (apparently) insurmountable threat to the separation of powers (and democracy). In no jurisdiction where it is allowed to aid constitutional interpretation is foreign law looked upon and invoked as *binding law* (this is actually one of its strengths[3]) and courts do not consult it with a 'legislative frame of mind' or with deference to the opinions of foreign legal authorities. Comparative constitutional jurisprudence, in the presence of powerful constitutional mechanisms and reading strategies safeguarding the separation of powers,[4] is a very unlikely candidate to be the Achilles heel of *trias politica*.

Some commentators, in their account of the use of foreign law in constitutional interpretation so far, tend to describe Constitutional Court judges as comparative constitutional law enthusiasts.[5] What then should one make of Kriegler J's cautionary remark in *Fose v Minister of Safety and Security*[6] that he declines 'to engage in a debate about the merits or otherwise of remedies devised by jurisdictions whose common law relating to remedies for civil wrongs bears no resemblance to ours and whose constitutional provisions have but a passing similarity to our section 7(4)(a)' as both a questioning of 'the value of foreign law' and expression of an opinion in opposition to Ackermann J's readiness to take foreign legal authority into account? Justice Emeritus Laurie WH Ackermann,[7] writing extra-judicially,

[1] See § 32.3*(b)*(i) supra.

[2] See H Corder 'Lessons from (North) America. (Beware the 'Legalization of Politics' and the 'Political Seduction of the Law')' (1992) 8 *South African Law Journal* 204, 206–214.

[3] LWH Ackermann 'Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jörg Fedtke' (2005) 80 *Tulane Law Review* 169, 183-184. See also *Makwanyane* (supra) at para 39.

[4] See eg § 32.3*(e)*(ii)(aa), § 32.4*(b)*(i)(cc) and (ii) and § 32.5*(b)*(iii)(bb) supra.

[5] See HM Cheadle, DM Davis and NRL Haysom *South African Constitutional Law: The Bill of Rights* (July 2006) 33-3. See also B Markesinis and J Fedtke 'The Judge as Comparatist' (2005) 80 *Tulane Law Review* 11, 66-68.

[6] 1997 (7) BCLR 851 (CC), 1997 (3) 786 (CC) at para 90.

[7] LWH Ackermann, 'Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jörg Fedtke' *Tulane Law Review* 80 (1) (2005-2006) 169-193. See also LWH Ackermann 'Constitutional Comparativism in South Africa' *South African Law Journal* 123(3) (2006) 497-515.

has pointed out, with reference to relevant passages from Constitutional Court cases, that Kriegler J was not really a sceptic when it came to the use of foreign law and that references to foreign authority indeed occur in Constitutional Court judgments authored by him. For instance: in *S v Mamabolo (E TV, Business Day and Freedom of Expression Institute intervening)*, Kriegler J explicitly expressed appreciation for the usefulness of 'comparative study':

> particularly where Courts in exemplary jurisdictions have grappled with universal issues confronting us. Likewise, where a provision in our Constitution is manifestly modelled on a particular provision in another country's constitution, it would be folly not to ascertain how the jurists of that country have interpreted *their* precedential provision.[1]

Kriegler J's reluctance to refer to foreign law in certain (over-)publicised instances, stemmed from what he perceived to be his own insufficient, personal mastery of foreign material or his belief that he could concur in a colleague's conclusion without reliance on foreign material.[2] Two observations apropos Kriegler J's dictum above will help to take the present discussion further.

First, the dictum reminds us that — as was pointed out above — not only international law sources, but also the domestic constitutional texts of other jurisdictions have had a definite impact on the making the South African Constitution. Such comparative constitution-making inevitably results in a globalisation of constitutional law which, in its turn, begets and conduces comparative constitutional interpretation.[3]

Second, Kriegler J acted as the sentinel among his peers, constantly on the lookout for uses of foreign law that he thought might flout Chaskalson P's admonition in *S v Makwanyane and Another* that 'we must bear in mind that we are required to construe the South African Constitution … with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution' .[4] A sentiment that weighed heavily with Kriegler J was his profound appreciation for the unique manner in which a political and constitutional settlement in South Africa had been reached through (the give and take of) negotiations and sustained by a 'Damascene about-turn from executive directed parliamentary supremacy to justiciable constitutionalism', about which he said the following in *Du Plessis and Others v De Klerk and Another*:[5]

> Nowhere in the world that I am aware of have enemies agreed on a transitional coalition and a controlled two-stage process of constitution building. Therefore, although it is always instructive to see how other countries have arranged their constitutional affairs, I do not

[1] 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC)('*Mamabolo*') at para 133.
[2] LWH Ackermann 'Comparative Constitutionalism' (supra) at 186. See also *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 132-133.
[3] See F Venter 'Globalization of Constitutional Law through Comparative Constitution-Making' (2008) 41 *Verfassung und Recht in Übersee* 16.
[4] 1995 (6) BCLR 665 (CC), 1995 (3) SA 391, 1995 (2) SACR 1 (CC)('*Makwanyane*') at para 39.
[5] 1996 (5) BCLR 658 (CC), 1996 (3) SA 850 (CC)('*Du Plessis*') at para 127.

> start there. And when I conduct comparative study, I do so with great caution. The survey is conducted from the point of view afforded by the South African Constitution, constructed on unique foundations, built according to a unique design and intended for unique purposes.

Later in the judgment Kriegler J sounded a (further) word of caution, namely that the advent of a new constitution did not warrant 'the wholesale importation of foreign doctrines and precedents'.[1] With constitutional democracy in South Africa still in its infancy at the time, such caution was opportune, for the paucity of home-grown constitutional jurisprudence posed the danger of overreliance on the jurisprudence of others or of reliance on inappropriate foreign sources.

Kriegler J's word of caution, coupled with the last sentence of his *dictum* above, raises the spectre of unreflective reliance on substantive foreign law, regardless of the peculiar structural environment in which it occurs and/or the distinctive procedural matrix in which it took shape. The Chaskalson P admonition in *S v Makwanyane and Another*[2] already hinted at the need for vigilance in this regard.[3] Mark Tushnet, for instance, has shown why and how structural and procedural factors inhibit profitable reliance by US courts and comparativists on much of the (exemplary) substantive law on affirmative action in some other jurisdictions.[4]

Difference in context, however, in the light of the previously quoted *dicta* of O'Regan J in *K v Minister of Safety and Security*,[5] seems to be no insurmountable impediment to the comparison of the constitutions and constitutional law of two systems. Where the differences between systems go to their historical and conceptual roots, one must simply be careful to avoid the dangers of shallow comparativism and determine — on the merits — whether the foreign jurisprudence is valuable and persuasive.[6]

Comparative constitutional interpretation has since 1994 featured quite prominently in our constitutional jurisprudence and not least of all the jurisprudence of

[1] *Du Plessis* (supra) at para 144.

[2] *Makwanyane* (supra) at para 39, see the introductory paragraph to 32.5(c)(v) supra.

[3] See Cheadle et al (supra) at 33-3:

> Great care must be taken to ground comparative borrowing, both within the context of the texts from which that authority emanates and as the nature and purpose of our text. For example, the absence of a general limitation clause in the United States Constitution or the fact that the European Convention of Human Rights is an instrument governing the conduct of national states, has a considerable bearing on the nature of the jurisprudence of the United States Supreme Court and the European Court of Human Rights. To borrow uncritically from these jurisdictions, without considering the appropriate context, is an exercise fraught with danger, a fact which was acknowledged by Chaskalson P in *Makwanyane*.

See also *Sanderson v Attorney-General, Eastern* Cape 1997 (12) BCLR 1675 (CC), 1998 (2) SA 38 (CC)('*Sanderson*') at para 26.

[4] M Tushnet 'Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action' (2004) 36 *Connecticut Law Review* 649. .

[5] *K* (supra) at paras 34-35.

[6] Ibid at para 35.

the Constitutional Court. Laurie WH Ackermann drafted a list of no less than 26 instances and areas in which reliance on foreign law substantially codetermined interpretive and adjudicative outcomes in Constitutional Court cases.[1]

Constitutional comparativism has demonstrable practical value besides and beyond lip-service recognition of the actualities of constitutional globalisation and of the embeddedness of one's own constitution and constitutional dispensation in a transnational reality. At the level of mundanity it makes constitutional interpreters aware of law, and especially foreign precedents, that can be invoked to justify their decisions. Brun-Otto Bryde, speaking from his experience as a constitutional judge, points out that such authority can be particularly helpful in lending additional legitimacy to findings and decisions dealing with difficult issues that might go against public opinion:

> Even an old court with much self-confidence can profit from pointing to persuasive foreign precedents.[2]

Bryde moots the possibility of distinguishing between the interpretive uses of foreign law as inspiration and as legal argument in constitutional adjudication.[3] In the first instance a foreign source is looked at because the way in which it deals with a certain issue 'is interesting' to the same extent (and in the same manner) as the opinion of, for instance, a law professor will be 'interesting'. In this sense there is no *numerus clausus* of persuasive sources of law and it is mostly broad principles (as opposed to particular rules or norms) that are assessed. Even a foreign text misunderstood or taken out of context can, according to Bryde, be inspirational. When relied on as a legal argument, however, a judge must get the foreign law right. Such an argument can draw on foreign experience in the application of national standards, the application of international standards in foreign (domestic) jurisdictions and transnational constitutionalist principles limiting domestic constitutional law.

Constitutional comparativism fulfils, according to Constitutional Court Justice Emeritus Laurie WH Ackermann, two vital functions. First, it features prominently in the identification of the actual problem or problems in a particular case, in other words, the accurate recognition of issues at hand.[4] Ackermann contends that the formulation of a problem is often more essential than its solution. Foreign law, precisely because it is not binding and therefore does not exert any pressure 'to be of effect',[5] creates room for 'creative imagination' and 'to raise new questions, new possibilities, [and] to regard old problems from a new angle'.[6]

[1] Ackermann (supra) at 187-190.
[2] Bryde (supra) at 207-208.
[3] Bryde (supra) at 213-219.
[4] See LWH Ackermann 'Comparative Constitutionalism' (supra) at 183-185.
[5] On the distinctive 'effect-directedness' of prescriptive law-texts, see § 32.3*(d)* and *(e)*(i)(bb), § 32.4*(a)* and § 32.5*(c)*(iii) supra.
[6] LWH Ackermann 'Comparative Constitutionalism' (supra) at 185 (Quoting Albert Einstein).

At a critical stage of judicial reasoning, namely where the judge has arrived at a preliminary conclusion or hypothesis, reference to comparative examples assists him or her in vital (and necessary) attempts to falsify such a conclusion or hypothesis.[1]

Second, the comparative legal approach enables the judge to interrogate his or her own prejudices[2] and to engage in a most crucial dialogue with herself or himself, 'in the course of which hypotheses emerge … intellectual, cultural and other predispositions compete' and 'critical rationalism can come into play to test and adapt hypotheses':

> It is at this stage, consciously or not, that one's philosophical, economic and jurisprudential *Gestalt* enters the picture. At this stage I have found comparative legal concepts to be most helpful.[3]

Another useful perspective on the value of constitutional comparativism is that of AJ van der Walt. He writes:

> Seen as a study of a collection of histories, comparative analysis of foreign property clauses and case law draws our attention to the inevitable and inescapable contextuality of the law and of constitutional property adjudication. As a history of errors, comparative study shows us a range of fallacious doctrines, theories and arguments that have already been discredited and should be avoided. As a history of possibilities, comparative study shows us that certain doctrines, theories and arguments could still be used as possible explanations of or solutions for individual problems. As a history of examples, comparative study shows us the methods, techniques and approaches that are available to us. Like the historical study of law, the comparative study of law liberates us from what we need not do; it cannot and should not enslave us by telling us what we have to do.[4]

Two major challenges face constitutional comparativism (and constitutional comparativists) in South Africa. The first challenge is to account for the comparative significance of South Africa among a number of 'new' constitutional democracies with 'new' constitutions in an era of ever increasing globalisation. 'Newness', as was previously pointed out, can relate to having a Constitution drafted with reference to and drawing on post-World War II international human rights instruments.[5] However, 'newness', alluding to a North-South distinction in comparative

[1] Ackermann 'Comparative Constitutionalism' (supra) at 185.

[2] Ibid at 191:

> No judge is a 'Hercules' or an 'Athena'. The best one can do is to strive consciously to become aware of *all* one's prejudices, to be aware that, this exercise notwithstanding, one will still have subliminal predispositions, and to toil as honestly as one can in the vineyard.

[3] Ibid at 191-192.

[4] Van der Walt (supra) at 38.

[5] Such as the European Convention on Human Rights and Fundamental Freedoms, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Bryde, Brun-Otto 'The Constitutional Judge and the International Constitutionalist Dialogue' *Tulane Law Review* 80 (1) (2005-2006) 203, 208 ('Constitutionalist Dialogue').

constitutional law, can also relate to renewed processes of democratisation and constitution-making worldwide, referred to by some as 'the third wave of democratisation'.[1] Bryde writes:

> This process started with the disappearance of the last right-wing dictatorships in Southern Europe, was followed by the breakdown of communism in Eastern Europe and has become a world-wide phenomenon most remarkably in Latin America but also in Africa and Asia. While setbacks are common the overall process is significant.[2]

This perspective brings with it an awareness of historical possibility (as Van der Walt[3] would have it) or promise (in the idiom of memorial constitutionalism[4]). Looking forward is distinctively part of a new beginning. At the same time the said perspective evokes memory (à la memorial constitutionalism[5]). Memory is also a 'history of errors' (à la Van der Walt) and serves equally as reminder of the achievements and blunders of other constitutional experiences. The unusual success achieved in South Africa with its peaceful transition — and rightly referred to by Kriegler J in *Du Plessis and Others v De Klerk and Another*[6] with hardly disguised pride and appreciation — is no cause for complacency. Constitutional triumphalism is always premature: for a 'history of errors' looms (and may again be in the making). The call to alertness does of course not apply to 'new' democracies only (oldness and smugness are comfortable companions too), but where constitutional democracy is tried anew or for the first time, it is of existential urgency that jurisdictions engaged in the endeavour should learn from one another's positive and negative experiences, and share with one another their expectations of future possibilities and promises.

The second challenge is to harness the theoretical strengths and possibilities of (practical experiences of) constitutional comparison and to design and develop a methodology (or methodologies) of comparative constitutionalism.[7] How does the constitutional comparativist, for instance, decide that, as O'Regan J has it in the previously cited *dictum* from *K v Minister of Safety and Security,*[8] a certain version

[1] B-O Bryde 'North and South in Comparative Constitutional Law — from Colonial Imposition towards a Transnational Constitutionalist Dialogue' in W Benedek, H Isak and R Kicker (*eds*) *Development and Developing International and European Law: Essays in Honour of Conrad Ginther on the Occasion of his 65th Birthday (*1999) 697, 701.

[2] B-O Bryde 'Constitutional Law in "old" and "new" Law and Development' (2008) 41 *Verfassung und Recht in Übersee* 10, 11.

[3] See AJ van der Walt *Constitutional Property Clauses* (1999) 38.

[4] See § 32.3*(c)*(iii)(bb).

[5] See § 32.3*(c)*(iii)(bb).

[6] 1996 (5) BCLR 658 (CC), 1996 (3) SA 850 (CC) at para 127.

[7] See Saunders (supra) at 119-126 (Convincingly argues that it is important for courts also to take comparative methodological issues to heart.) See also F Venter *Constitutional Comparison. Japan, Germany, Canada and South Africa as Constitutional States* (2000); VC Jackson, & M Tushnet (eds) *Defining the Field of Comparative Constitutional Law* (2002) Both texts attempt to deal with issues of comparative methodology.

[8] 2005 (9) BCLR 835 (CC), 2005 (6) SA 419 (CC) at para 35.

of comparativism is 'shallow' or that foreign jurisprudence considered in a particular case 'is of itself valuable and persuasive'? As to Chaskalson P's[1] directional and Kriegler J's[2] constant reminders that 'we must bear in mind that we are required to construe the South African Constitution', what are the criteria and conditions that make interpretive reliance on comparative materials at all possible and when are two systems of constitutional law (and/or aspects of them) sufficiently compatible to be comparable for interpretive purposes? How is a 'wholesale importation of foreign doctrines and precedents' to be distinguished from prudent reliance on whatever (legitimate) instructive value these doctrines and precedents might have?[3] Is the debate about the 'transplantation' versus the 'migration' of foreign law relevant in the South African context?[4] As to the suggestion of Bryde about the distinction between the use of foreign sources of law as inspiration and as legal argument, how is it to be decided where the one ends and the other begins? Bryde suggest that for the former mode of reliance 'there are few normative or methodological requirements' while for the latter mode 'the methodology has to be more thorough'.[5] Apart from suggesting that a thorough methodology entails 'getting it right' as far as a judge's understanding of relevant foreign law is concerned, Bryde is silent on the essential difference between the two methodologies — and it will certainly be worthwhile for reliable constitutional comparativism to get that right!

32.6 Constitutional Interpretation in a Constitutional State

Are there, I ask rhetorically, reliable interpretive formulas or recipes upon which a constitutional interpreter can time and again rely? The answer of the preceding pages is a resounding 'no'!

The text of the Constitution-in-writing is open-ended and generates more and more — instead of being limited to only certain — meanings. Methodological pluralism manifesting as multiple strategy interpretation is preferable to methodological monism seeking to establish a one and only correct manner in which to arrive at 'the best' or the 'most correct' interpretation of *the Constitution* (and, more specifically, any one or more of its provisions).

This 'moreness' or proliferation of meaning does not mean that anything goes or that a distinction between better and worse answers to interpretive questions do not exist. A constitutional state (*Rechtsstaat*), where legal precepts bind all members of the (legal) community in the same way, is a more vital requirement

[1] *Makwanyane* (supra) at para 39.
[2] *Du Plessis* (supra) at paras 127 and 144; *Sanderson* (supra) at para 26.
[3] *Du Plessis* (supra) at para 144.
[4] See S Choudhry 'Migration as a New Metaphor in Comparative Constitutional Law' in S Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 1.
[5] Bryde 'Çonstitutionalist Dialogue' (supra) at 214.

for 'good interpretation' than the availability of 'the right' interpretive methods or techniques. According to Hans-Georg Gadamer, a leading exponent of philosophical hermeneutics, a *Rechtsstaat* is a prerequisite to legal hermeneutics:

> [I]n an absolutist state, where the will of the absolute ruler is above the law, hermeneutics cannot exist, 'since an absolute ruler can explain his words in a sense that goes against the rules of general interpretation'. . .There is a need to understand and interpret only when something is enacted in such a way that it is, as enacted, irremovable and binding.[1]

The will of a despot can blatantly overtrump the interpretation of authorised legal interpreters such as judges. More subtly, however, legal interpreters themselves can evade their *hermeneutic responsibility* — in law most clearly manifested as a *judicial* responsibility — by hiding behind the 'clearly expressed will' of the sovereign. In the latter instance the 'objective adjudicator' assumes that she or he dares not limit or broaden the legislative will, lest she or he lands up in the murky waters of politics. Hermeneutic responsibility, Gadamer argues, requires from the legal interpreter, especially the judge, a *concretisation* of the legal norm (*Konkretisierung des Gesetzes*) which includes its application, and which often requires its completion through augmentation (*Rechtsergänzung*).[2] Judicial decisions may be justified on the strength of either legal dogma or legal hermeneutics, that is to say, either by simply subsuming legal problems under generally applicable legal norms and principles or by concretising normative texts interpretively. Gadamer assigns priority to the latter mode of judicial problem solving and, eventually, decision-making. Interpretive responsibility requires the judicial decision-maker to *hermeneuticize* rather than simply to *dogmatise*.

From Gadamer's contentions it follows that, in constitutional interpretation, the intensity of interpretive engagement with the constitutional text, and other relevant sources, determines the quality of the answers to the initial questions posed. They are mostly not the easy (or readily arrived at) answers. A claim that the language of a constitutional provision or its readily discernable purpose clearly manifests its meaning is suspect. Serious interpretive engagement with a provision will, in addition to considerations of its language and purpose, also entail consideration of its context and its coherence with other law in as well as outside of the Constitution, its history and its relationship to transnational sources of law. Language, purpose, context, history and transnational context, as well as interpretive waymarks in the written text of the Constitution, however, constitute but the hallway to the meaning possibilities of constitutional provisions. Constitutional interpretation in the fullest sense have taken place only when the distinctive interpretive demands of a constitutional democracy, such as the observation and activation of constitutional values, judicial self-restraint, subsidiarity and reading in conformity with the Constitution have been brought into play. Meaning in

[1] H-G Gadamer *Truth and Method* (1975) 294.
[2] Ibid at 312-313.

constitutional interpretation is never given. It has to be decided upon. And before the feet of the decision-maker, Jacques Derrida explains, there is always a gaping abyss of uncertainty simply because he or she is faced with making a decision about something which was not certain beforehand. If you already know what you are going to (or should) do, then there is no need for a decision. The decision-maker therefore has to take full responsibility for the leap he or she makes into (and hopefully across) the abyss, starting from the very point where, with incomplete and even deficient knowledge at his or her disposal, he or she considers a decision, and might then end up at a point where, on the other side of the abyss, he or she has made an own decision:

> You have to go through an ordeal of undecidability in order to decide … Something must remain incalculable for a decision to be a decision.[1]

Each and every authorised interpreter of the Final Constitution (and not only the courts or organs of state) bears interpretive responsibility when and wherever he or she construes the country's highest law, for each and every interpretation of the Final Constitution contributes to (the quality of) constitutional democracy, the very precondition to sustained constitutional interpretation. Ultimately, therefore, constitutional interpretation is not just about reading the Final Constitution. It is about doing it.

[1] J Derrida 'Justice, Law and Philosophy — An Interview with Jacques Derrida' (1999) 18(3) *South African Journal of Philosophy* 279 at 281.

33 The Interpretation of Socio-Economic Rights

Sandra Liebenberg

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33.1 INTRODUCTION*

One of the distinguishing features of the final South African Constitution is its far-reaching commitment to the principle of the interdependency of all human rights — civil and political, as well as economic, social and cultural rights. This principle is explicitly endorsed in a number of human rights declarations and resolutions adopted by the international community.[1] It embraces the notion that human rights should be treated holistically in order to protect human welfare.[2] As Craig Scott writes:

> The term *interdependence* attempts to capture the idea that values seen as directly related to the full development of personhood cannot be protected and nurtured in isolation.[3]

Socio-economic rights are concerned with the material dimensions of human welfare. Their recognition as human rights stems from an acknowledgement that without food, water, shelter, health care, education and social security, human beings cannot survive, live with dignity or develop to their full potential.

The principle of interdependency finds expression within human rights discourse both at a normative and an institutional level. The South African Bill of Rights gives full effect to this principle by delineating a broad array of social, economic and cultural rights[4]. The Constitution ensures that all these rights may be enforced by the courts.[5] Moreover, the Constitution has also created

* In developing this chapter, I was fortunate to have the benefit of a stimulating exchange of ideas and materials with a number of colleagues working in the field of socio-economic rights, particularly Geoff Budlender, Wim Trengove, Danie Brand, Sibonile Khoza, Danwood Chirwa, Theunis Roux and David Bilchitz. Thanks are also due to Stu Woolman for his detailed substantive comments and editorial suggestions.

[1] See, for example, The Proclamation of Tehran 1968, Final Act of the International Conference on Human Rights, Tehran, UN doc A/Conf 32/41, art 13; The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, June 1993, UN doc A/Conf 157/23, part I, para 5.

[2] Apart from being intrinsically valuable to the protection of human life and development, socio-economic rights are also necessary to enable the effective enjoyment of civil and political rights and full participation in society. See N Haysom 'Constitutionalism, Majoritarian Democracy and Socio-Economic Rights' (1992) 2 *SAJHR* 451 ('Constitutionalism'); See also T H Marshall *Citizenship and Social Class* (1959).

[3] C Scott 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27 *Osgoode Hall LJ* 769, 786 ('Interdependence').

[4] These social, cultural and economic rights can be found in ss 22 (freedom of trade, occupation and profession), 23 (labour relations), 24 (environment), 25 (property and land) 26 (housing), 27 (health care, food, water and social security), 28 (children's rights), 29 (education), 30 (language and culture), 31 (the rights of cultural, religious and linguistic communities), and 35(2)*(e)* (the socio-economic rights of persons deprived of their liberty). Many of these rights illustrate that there is no watertight division between civil and political rights on the one hand, and socio-economic rights on the other. For example, the right to form and join a trade union and the right to form, join and maintain cultural, religious and linguistic associations are specific manifestations of the civil right to freedom of association (s 18 of the Bill of Rights).

[5] In terms of s 38 of the final Constitution, 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.'

institutions designed to promote and protect these rights[1].

The danger exists that a Bill of Rights that privileges civil and political rights will become the exclusive instrument of the rich and powerful for protecting their vested interests.[2] The inclusion of socio-economic rights as justiciable rights in the South African Bill of Rights makes the redress of poverty a matter of fundamental constitutional concern.[3] A formalistic interpretation of the Constitution that privileges negative liberty and existing distributions of power and wealth is foreclosed by this text.[4]

Since the last iteration of this chapter, the Constitutional Court has handed down the landmark decisions in *Government of the Republic of South Africa & others v Grootboom & others* ('*Grootboom*')[5] and *Minister of Health & others v Treatment Action Campaign & others* ('*TAC*')[6]. These cases laid the foundations for the Court's approach to the interpretation of the socio-economic rights in sections 26, 27 and 28(1)*(c)* of the Constitution. This chapter aims to elucidate and critique the evolving jurisprudence of the Constitutional Court on these socio-economic rights.[7]

[1] For example, the Human Rights Commission, the Commission for Gender Equality, the Public Protector, and the Auditor-General. See § 33.13 below (Human Rights Commission and Commission for Gender Equality).

[2] For example, civil and political rights may be invoked to undermine social reform legislation, as occurred in *Lochner v New York* 198 US 45 (1905) (maximum hours legislation for bakers declared unconstitutional). For an account of attempts to immunise agrarian and other social reform legislation against challenges based on the Fundamental Rights chapter of the Indian Constitution (Part III), see B P Jeewan Reddy & R Dhavan 'The Jurisprudence of Human Rights' in D M Beatty (ed) *Human Rights and Judicial Review: A Comparative Perspective* (1994) 175, 180.

[3] The Preamble of the Constitution states that one of the aims of the adoption of the Constitution is to '[i]mprove the quality of life and free the potential of each person'. One of the most cogent arguments in favour of justiciable socio-economic rights is that their exclusion from the Bill of Rights would relegate the values and interests protected by this set of rights to the margins of constitutional and political concern. See C Scott and P Macklem 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 *U Penn LR* 1, 26 ('Ropes of Sand'). According to the UN Committee on Economic, Social and Cultural Rights (UNCESCR), excluding socio-economic rights from judicial protection 'would drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society'. General Comment ('GC') 9 (19th sess, 1998), UN doc.E/1999/22, para 10.

[4] Karl Klare characterises the Constitution as 'social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its transformative role and mission'. K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146, 153. As Justice Kriegler has observed, 'We do not operate under a constitution in which the avowed purpose of the drafters was to place limitations on governmental control. Our constitution aims at establishing freedom and equality in a grossly disparate society.' *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) at para 147.

[5] 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

[6] 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC).

[7] The focus of this chapter is on ss 26, 27 and 28(1)*(c)* and the interpretation of socio-economic rights generally. Forthcoming chapters in the 2nd Edition of *Constitutional Law of South Africa* will engage discrete provisions in the Bill of Rights, from ss 22 (freedom of trade, occupation and profession), 23 (labour relations), 24 (environment), 25 (property and land), 26 (housing), 27 (healthcare, food, water and social security), 28 (children's rights), 29 (education), 30 (language and culture), 31 (the rights of cultural, religious and linguistic communities), to 35(2)*(e)* (the socio-economic rights of persons deprived of their liberty). Discussions of these same rights can be found in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS 5, 1999).

33.2 The Inclusion of Socio-Economic Rights in the Final Constitution

(a) Drafting history

The question whether socio-economic rights should be protected in the Constitution and if so, the appropriate form of their inclusion, was the subject of a great deal of academic and public debate in South Africa[1]. The debate was resolved in favour of their inclusion.[2]

During the negotiations process for the final Constitution most of the political parties supported the inclusion of socio-economic rights in some form in the Bill of Rights.[3] The background research relating to the inclusion of socio-economic rights in the Constitution by the Technical Committee advising the Constitutional Assembly on the Bill of Rights are found in their explanatory memoranda.[4]

A perusal of the relevant minutes and memoranda prepared during the drafting process reveals the strong influence of international law on the drafting of the

[1] See, for example, D Basson 'Economic Rights: A Focal Point in the Debate on Human Rights and Labour Relations in South Africa' (1989) *SAPL* 120; C R M Dlamini 'The South African Law Commission's Working Paper on Group and Human Rights: Towards a Bill of Rights for South Africa' (1990) *SAPL* 91; A Sachs 'Towards a Bill of Rights in a Democratic South Africa' (1990) 6 *SAJHR* 1; Haysom 'Constitutionalism' (supra) at 451; E Mureinik 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *SAJHR* 464 ('Charter of Luxuries'); D Davis 'The Case against Inclusion of Socio-economic Rights in a Bill of Rights Except as Directive Principles' (1992) 8 *SAJHR* 475; H Corder, S Kahanovitz, J Murphy, C Murray, K O' Regan, J Sarkin, H Smith & N Steytler *A Charter for Social Justice: A Contribution to the South African Bill of Rights Debate* (1992) 18; SA Law Commission Final Report on Group and Human Rights (Project 58, 1994) 180; B de Villiers 'Social and Economic Rights' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 599; S Liebenberg 'Social and Economic Rights: A Critical Challenge' in S Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 79.

[2] The drafters of the Interim Constitution (Act 200 of 1993) (IC) followed a more minimalist approach by including only a limited number of socio-economic rights. See, for example, ss 25(1)*(b)* (conditions of detention), 26 (economic activity), 27 (labour relations), 29 (environment), 30(1)*(c)* (children), 31 (language and culture), and 32 (education).

[3] A number of civil society organisations also strongly motivated for the inclusion of socio-economic in the Bill of Rights in written submissions to the Constitutional Assembly, and during the public hearing convened by the Constitutional Assembly on 1 August 1995 on the theme of socio-economic rights. For example, the Ad Hoc Committee for the Campaign on Social and Economic Rights, representing a number of respected South African NGOs, petitioned the Constitutional Assembly to include socio-economic rights in the Constitution (document on file with the author dated 19 July 1995). There were also powerful dissenting voices; for example, the Chamber of Mines, and the Institute of Race Relations. See the Memorandum prepared by the Technical Committee to Theme Committee IV entitled *Matters Arising from the Public Submissions* (7 March 1996).

[4] Constitutional Assembly, Constitutional Committee Subcommittee, Draft Bill of Rights, Vol 1: *Explanatory Memoranda of Technical Committee to Theme Committee IV of the Constitutional Assembly* (9 October 1995). Based on a survey of international and comparative law, socio-economic rights such as the right to housing were included within the concept of 'universally accepted fundamental rights' for the purposes of Constitutional Principle (CP) II, IC Schedule 4. See Technical Committee (Theme Committee 4), Memorandum entitled The Meaning of 'Universally Accepted Fundamental Rights' in Constitutional Principle II, Schedule 4 to the Constitution of the Republic of South Africa Act 200 of 1993 (1995).

relevant sections protecting socio-economic rights. For example, the concepts of progressive realisation and resource availability in sections 26 and 27 were based on article 2 of the International Covenant on Economic, Social and Cultural Rights, 1966 (the ICESCR).[1] According to the Technical Committee, this formulation has the dual advantage of facilitating consistency between South Africa's domestic law and international human rights norms, and directing the courts towards a legitimate international resource for the interpretation of these rights.[2]

(b) Certification of the Constitution

During the certification process, objections were raised against the inclusion of socio-economic rights in the Bill of Rights.[3] The objections were that socio-economic rights were not 'universally accepted fundamental rights' for the purposes of Constitutional Principle (CP) II, that they were inconsistent with the separation of powers doctrine in CP VI, and were not justiciable. In rejecting these arguments the Constitutional Court held that although socio-economic rights are not 'universally accepted fundamental rights', 'CP II permits the Constitutional Assembly to supplement the universally accepted fundamental rights with other rights not universally accepted'.[4] Secondly, the fact that socio-economic rights have budgetary implications does not automatically result in a breach of the doctrine of separation of powers. The court pointed out that the enforcement of many civil and political rights such as equality, freedom of speech and the right to a fair trial also often have budgetary implications.[5]

As a consequence of finding that socio-economic rights are not 'universally accepted fundamental rights', the court held that CP II did not require them to be incorporated in the Bill of Rights as justiciable rights.[6] Nevertheless, it observed

[1] See, for example, the Memorandum of the Panel of Constitutional Experts on the meaning of 'progressive realisation' in the Working Draft of the Constitution (6 February 1996); Technical Committee IV Memorandum on Sections 25 and 26 of the Working Draft of the Constitution (14 February 1996). Article 2 of the ICESCR reads as follows:

> Each State party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

[2] Technical Committee IV Memorandum on Sections 25 and 26 of the Working Draft of the Constitution (14 February 1996) at 2.

[3] See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification*') at paras 76–8. The main objectors were the SA Institute of Race Relations, the Free Market Foundation and the Gauteng Association of Chambers of Commerce and Industry. The Legal Resources Centre, the Centre for Applied Legal Studies and the Community Law Centre (UWC) ('CLC'), argued in favour of the inclusion of socio-economic rights at the certification hearings. (See Annexure 3 to the judgment.)

[4] *First Certification* (supra) at para 76.

[5] Ibid at para 77.

[6] Ibid at para 78.

that socio-economic rights 'are, at least to some extent, justiciable'. The fact that socio-economic rights will 'almost inevitably' give rise to budgetary implications is not 'a bar to their justiciability. At a minimum, socio-economic rights can be negatively protected from improper invasion.'[1]

Implicit in this reasoning is the distinction drawn between the positive and negative duties imposed by socio-economic rights, and an indication that the court would, at the very least, be prepared to enforce the negative duties flowing from the rights. The budgetary implications of enforcing socio-economic rights are not in themselves a reason for judicial abstention, but may influence the standard of review applied in particular cases.

(c) Overview of the relevant provisions protecting socio-economic rights

(i) *Categories of socio-economic rights*

The socio-economic rights found in the Bill of Rights follow three main drafting styles. The first category of rights entrenches the right of 'everyone' to 'have access to' adequate housing, health care services, including reproductive health care, sufficient food and water, and social security.[2] In respect of these rights, the State is explicitly required to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'.[3] This first category can be loosely described as the 'qualified socio-economic rights'.

The second category entrenches a set of 'basic' rights consisting of children's socio-economic rights,[4] the right of everyone to basic education, including adult basic education,[5] and the socio-economic rights of detained persons, including sentenced prisoners.[6] These rights are not qualified by reference to reasonable measures, progressive realisation or resource constraints.

The third category of rights is articulated in sections 26(3) and 27(3). The former provides that '[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances'. It goes on to State that '[n]o legislation may permit arbitrary evictions'.

[1] First Certification (supra) at para 78.

[2] Sections 26(1) and 27(1).

[3] Sections 26(2) and 27(2). The sections protecting environmental and land rights (ss 24 and 25(5)) use similar phrases to those contained in ss 26 and 27, although there are important differences in the way they are formulated.

[4] Section 28(1)*(c)* gives every child the right to 'basic nutrition, shelter, basic health care services and social services'. A child is defined in s 28(3) as a person under the age of 18 years.

[5] Section 29(1)*(a)*.

[6] Section 35(2)*(e)* confers the right 'to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at State expense, of adequate accommodation, nutrition, reading material and medical treatment'.

The latter States that '[n]o one may be refused emergency medical treatment'. These rights are couched in the form of a prohibition against certain conduct by the State and, arguably, private parties.[1]

Like all the other rights in the Bill of Rights, the socio-economic rights are subject to the general limitations clause, section 36.

(ii) *The duties to respect, protect, promote and fulfil socio-economic rights*

The Constitution places an overarching obligation on the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.[2] Section 7 establishes that the rights in the Bill of Rights impose a combination of negative and positive duties on the State.[3]

The 'duty to respect' requires the State to refrain from law or conduct that directly or indirectly interferes with people's enjoyment of socio-economic rights, for example, refraining from arbitrary forced evictions of people from their homes. The 'duty to protect' places a duty on the State to take legislative and other measures, including the provision of effective remedies, to protect vulnerable groups against violations of their rights by more powerful private parties (e.g. landlords, banks and insurance companies). The 'duty to promote' is sometimes regarded as a dimension of the duty to fulfil socio-economic rights.[4] It embraces awareness-raising and educational measures concerning the rights, for example, on the available mechanisms for accessing the rights.[5] The duty 'to fulfil' requires the State to take positive measures to ensure that those persons who currently lack access to the rights gain access to them.

[1] See §§ 33.5*(c)* and 33.11 infra ('The socio-economic rights in sections 26(3) and 27(3)', and 'Horizontal application').

[2] Section 7(2). This typology is based on the analysis by Henry Shue of the obligations imposed on States by human rights: *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980) 5. It is also used by the UNCESCR to analyse the duties imposed by various rights in the ICESCR: see, eg GC 12 (20th sess, 1999) The right to adequate food (art 11 of the Covenant*)* UN doc. E/2000/22 para 15; GC 14 (22nd sess, 2000) The right to the highest attainable standard of health (art 12 of the Covenant*)* UN doc. E/C.12/2000/4 paras 33–37; GC 15 (29th sess 2002) The right to water (arts 11 and 12 of the Covenant) UN doc. E/C 12/2002/11 paras 20–29. See also *Grootboom* (supra) at para 20.

[3] For an exposition of these duties, see *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Comm 155/96 October 2001, African Commission on Human and Peoples' Rights ('*SERAC v Nigeria*') paras 44–47; The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998) 20 *Human Rights Quarterly* 691 at para 6; P de Vos 'Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 67, 78 ('Pious Wishes'); S Liebenberg 'Violations of Socio-Economic Rights: The Role of the South African Human Rights Commission' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 405, 410 ('Violations').

[4] See, for example, GC 15 (supra) at para 25.

[5] *SERAC v Nigeria* (supra) at para 46. In GC 15 on the right to water, the UNCESCR refers to the duty on States parties to the Covenant 'to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimise water wastage' (supra) at para 25.

The UN Committee on Economic, Social and Cultural Rights (UNCESCR) has identified two aspects of the duty to fulfil. The first is a duty to enable and assist communities to gain access to socio-economic rights. This would include, for example, adopting enabling policies and legislation that facilitate and regulate access to the various goods socio-economic rights are designed to deliver. The second is a duty to provide these various goods directly whenever an individual or group is unable, for reasons beyond their control, to gain access to the right through the means at their disposal. The latter aspect of the duty to fulfil is thus targeted at groups in especially vulnerable situations.[1]

33.3 Introduction to the Major Cases

There are now three major Constitutional Court judgments dealing directly with the interpretation of the socio-economic rights in sections 26, 27 and 28(1)*(c)*.[2] To facilitate the discussion of the emerging socio-economic rights' jurisprudence, this section briefly describes the facts and decisions in these three cases.

Soobramoney was the first major Constitutional Court case to consider the enforceability of socio-economic rights.[3] The applicant, an unemployed man in the final stages of chronic renal failure, sought a positive order from the courts directing a provincial hospital to provide him with ongoing dialysis treatment and interdicting the provincial Minister of Health from refusing him admission to the renal unit of the hospital. Without this treatment the applicant would die, as he could not afford to obtain the treatment from a private clinic. He relied primarily on section 11 (the right to life), and section 27(3) (the right to emergency medical treatment). The application was dismissed in the High Court and was taken on appeal to the Constitutional Court. The Constitutional Court also considered the applicability of sections 27(1) and (2). It found no breach of the aforementioned sections and dismissed the appeal.

Grootboom concerned a group of adults and children who had moved onto private land from an informal settlement owing to the 'appalling conditions' in which they lived.[4] They were evicted from the private land. Following the eviction, they camped on a sports field in the area. However, they could not erect adequate shelters as most of their building materials had been destroyed during

[1] See GC 12 (supra) at para 15; GC 14 (supra) at para 37; GC 15 (supra) at para 25.

[2] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) ('*Soobramoney*'); *Grootboom* (supra); *TAC* (supra).

[3] *Soobramoney* (supra).

[4] In the words of Judge Yacoob in the Constitutional Court judgment: 'The root cause of their problems is the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing.' *Grootboom* (supra) at para 3.

the eviction. Accordingly, they found themselves in a precarious position where they had neither security of tenure nor adequate shelter from the elements.[1]

They applied to the Cape High Court on an urgent basis for an order against all three spheres of government to be provided with temporary shelter or housing until they obtained permanent accommodation.[2] The High Court held that there was no violation of section 26, but found a violation of section 28(1)*(c)* (the right of children to shelter). On appeal, the Constitutional Court declared that the State's housing programme fell short of compliance with section 26(2), but found no violation of section 28(1)*(c)*.

TAC involved a challenge to the limited nature of the measures introduced by the State to prevent mother-to-child transmission (MTCT) of HIV. Firstly, it was contended that the State unreasonably prohibited the administration of the anti-retroviral drug, Nevirapine, at public hospitals and clinics outside a limited number of research and training sites. This drug was of proven efficacy in reducing intrapartum MTCT of HIV. Secondly, the State failed to produce and implement a comprehensive national programme for the prevention of MTCT of HIV. Both the High Court and the Constitutional Court (on appeal) held that the State's programme to prevent MTCT of HIV did not comply with its obligations in terms of sections 27(1) and (2). The Constitutional Court made both declaratory and mandatory orders against the Government.

33.4 General Approach to the Interpretation of Socio-Economic Rights

(a) The justiciability of socio-economic rights

In the *First Certification* judgment, the Constitutional Court held that, '[a]t the very minimum, socio-economic rights can be negatively protected from improper invasion'.[3] This signalled the Court's willingness to enforce the negative duties imposed by socio-economic rights (the duty 'to respect' socio-economic rights). In *Soobramoney, Grootboom* and *TAC*, the Court was called upon to adjudicate the positive duties imposed by socio-economic rights. In *Grootboom*, the Court indicated that the justiciability of socio-economic rights had been put 'beyond question by the text of the Constitution as construed in the Certification judgment'.[4] The Court also referred to the duties on the State in section 7(2) of the Constitution in relation to the rights in the Bill of Rights, holding that 'the courts are

[1] *Grootbom* (supra) at paras 9-11.

[2] *Grootboom v Oostenberg Municipality & others* 2000 (3) BCLR 277, 281–282 (C) ('*Grootboom I*'). Other relief sought by the applicants in terms of s 28(1)*(c)* was not pursued.

[3] *First Certification* (supra) at para 78.

[4] *Grootboom* (supra) at para 20.

constitutionally bound to ensure that they are protected and fulifilled'.[1] The key issue was the method of enforcement of these rights in a given case. According to Yacoob J, '[t]his is a very difficult issue which must be carefully explored on a case-by-case basis'.[2] Addressing this challenge requires a consideration of 'the terms and context of the relevant constitutional provisions' and their application to the circumstances of the particular case.[3]

(b) Interpreting socio-economic rights in context

In its judgments on socio-economic rights the Constitutional Court has emphasised that, in addition to their textual setting, the rights need to be interpreted in their social and historical context.[4]

In *Soobramoney*, Chaskalson P commences the judgment by recognising the circumstances of poverty and economic inequality that exist in our country. He notes that these conditions 'already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order'.[5] This passage is significant because it establishes the strong link between socio-economic rights and the foundational constitutional values of human dignity, equality and freedom.[6] Furthermore it affirms that the commitment to address these conditions of poverty and inequality and transform our society based on human dignity, equality and freedom is a central constitutional purpose. Finally, it acknowledges that as long as these conditions persist, 'that aspiration will have a hollow ring'.[7] Thus the Court recognises that giving meaningful effect to socio-economic rights is indispensable to the success of South Africa's constitutional democracy and to ensuring that the core constitutional values are meaningful to the whole population.

However, the Court gave an early indication in *Soobramoney* that its approach to the interpretation of the socio-economic rights provisions of the Constitution would be informed by the realities of limited resources, and the 'significant demands' on the State in the light of our historical legacy.[8] It thus held that the rights in sections 26 and 27 'are limited by reason of lack of resources' and that 'an unqualified obligation to meet these needs would not presently be capable of

[1] *Grootboom* (supra) at para 20. See § 33.2*(c)*(ii) supra (on the duties to respect, protect, promote and fulfil rights).
[2] Ibid.
[3] Ibid.
[4] *Grootboom* (supra) at paras 22 and 25; *TAC* (supra) at para 24.
[5] *Soobramoney* (supra) at para 8.
[6] See ss 1*(a)* and 7(1) of the Constitution.
[7] *Soobramoney* (supra) at para 8.
[8] Ibid at para 11.

being fulfilled'.[1] The Court's assessment of what is possible in the light of present circumstances informed both its rejection of the notion of a minimum core obligation and its formulation of the reasonableness standard of review.[2]

A key theme emphasised by the Court in *Grootboom* was the 'interconnectedness' of socio-economic rights. Socio-economic rights serve the foundational values of our society — human dignity, freedom and equality — and enable people to enjoy all other rights in the Bill of Rights.[3] Moreover, there is 'a close relationship' between the various socio-economic rights with the result that a right such as the right of access to adequate housing cannot be seen in isolation.[4] The Court went on to say:

> Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the State has met its obligations in terms of them.[5]

It is not clear how the interconnectedness of socio-economic rights will influence their interpretation. It probably implies, for example, that measures adopted by the State to give effect to the right of access to social assistance (section 27(1)*(c)*) are also relevant to assessing compliance with the obligations imposed by the right of access to sufficient food (section 27(1)*(b)*), and *vice versa*.[6] However, it is important to note that section 27(2) refers to the progressive realisation of 'each of these rights' (the rights in s 27(1)). This proviso suggests that while the measures taken to realise the rights will undoubtedly overlap to some extent, the specificity of each right must be taken into account in designing relevant programmes to give effect to it. The fact that the same measure may sometimes contribute to the realisation of more than one socio-economic right does not diminish the necessity to assess the realisation of each right individually against the criteria in sections 26(2) and 27(2).

(c) International law

The Court affirmed in *Grootboom* that international law, including non-binding international instruments, was an important guide to interpreting the rights in the

[1] *Soobramoney* (supra) at para 11.

[2] See, for example, *TAC* (supra) at para 35, *Grootboom* (supra) at para 43. See also §§ 33.5*(e)* (on minimum core obligations) and 33.5*(f)* (on reasonableness review) below.

[3] *Grootboom* (supra). In addition, the Court observed (at para 23): 'The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.'

[4] Ibid at para 24.

[5] Ibid.

[6] Ibid at paras 36 and 78.

Bill of Rights.[1] However, the Court indicated that the weight to be attached to a particular principle or rule of international law would vary. Thus 'where a relevant principle of international law binds South Africa, it may be directly applicable'.[2]

The pre-eminent international treaty protecting economic and social rights is the International Covenant on Economic, Social and Cultural Rights (1966) (the ICESCR).[3] The ICESCR is the sister Covenant to the International Covenant on Civil and Political Rights (1966) (the ICCPR).[4] Although South Africa has ratified the ICCPR, and many other international human rights treaties protecting socio-economic rights[5], it has not yet ratified the ICESCR.[6] Thus the Covenant is neither binding on South Africa under international law nor does it have any direct legal effect in domestic law. However, it remains an important guide under section 39(1)*(b)* to interpreting the socio-economic rights provisions under our Constitution. As noted above, there are a number of similarities between the formulation of sections 26(2) and 27(2) of the Constitution and article 2(1) of the Covenant: both the Constitution and the ICESCR emphasise the taking of legislative measures, 'progressive realisation', and the limitation of available resources.[7]

[1] See *Grootboom* (supra) at para 26. The Court referred to its position developed in *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 35. Section 39(1)*(b)* of the Constitution requires a court, tribunal or forum to consider international law when interpreting the Bill of Rights.

[2] Ibid at para 26. Sections 231(1)–(3) establish the procedures by which international agreements bind the Republic. Section 231(4) regulates the domestic legal effect of international agreements. Thus an international agreement has domestic legal effect when it is enacted into law by national legislation. However, a self-executing provision of an agreement that has been approved by Parliament is legally binding in domestic law 'unless it is inconsistent with the Constitution or an Act of Parliament'.

[3] The ICESCR (1966) 999 UNTS 3 was adopted on 16 December 1966, and entered into force on 3 January 1976. As at 7 July 2003 there were 147 States parties to the ICESCR.

[4] The ICCPR (1966) 999 UNTS 171 was adopted on 16 December 1966, and entered into force on 23 March 1976. As at 7 July 2003 there were 149 States parties to the ICCPR (Of these, 104 States have ratified its First Optional Protocol concerning individual communications, and 49 have ratified its Second Optional Protocol aiming at the abolition of the death penalty). For the history behind the adoption of two separate Covenants, one protecting civil and political rights, the other economic, social and cultural rights, see M C R Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) 16 ('ICESCR'); Scott 'Interdependence' (supra) at 791-814; S Liebenberg 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 *SAJHR* 359, 360 ('Implications of the ICESCR'*)*.

[5] These include: The African Charter on Human and Peoples' Rights (1981) 21 ILM 59 (acceded to on 9 July 1996); African Charter on the Rights and Welfare of the Child (1990) OAU Doc. CAB/LEG/24.9/49 (ratified on 7 January 2000); the Convention on the Rights of the Child (1989) 28 ILM 1456 (ratified on 16 June 1995); the Convention on the Elimination of All Forms of Discrimination against Women (1979) 1249 UNTS 13 (ratified on 15 December 1995); the International Convention on the Elimination of All Forms of Racial Discrimination (1966) 60 UNTS 195 (ratified on 15 December 1995). The women's and race conventions deal with gender and racial equality respectively, but include a number of provisions specifically relating to the equal enjoyment of economic, social and cultural rights.

[6] However, this treaty was signed on behalf of South Africa in October 1994. Through signature, South Africa has incurred an international obligation to refrain from 'acts which would defeat the object and purpose of the treaty.' Vienna Convention on the Law of Treaties (1969) 8 ILM 679, art 18.

[7] See art 2 of the ICESCR.

That said, the Court highlighted in *Grootboom* the differences in the relevant provisions and indicated that they were 'significant in determining the extent to which the provisions of the Covenant may be a guide to an interpretation of section 26'.[1] These differences in relation to housing are:

(a) The Covenant provides for *a right* to adequate housing while section 26 provides for *a right of access* to adequate housing.
(b) The Covenant obliges States parties to take *appropriate* steps which must include legislation while the Constitution obligates the South African State to take *reasonable* legislative and other measures.[2]

These differences were identified prior to the Court's rejection of the arguments raised by the *amici* in relation to the concept of minimum core obligations endorsed by the UNCESCR.[3] However, the Court accepted the Committee's interpretation of the phrase, 'progressive realisation' as being 'in harmony with the context in which the phrase is used in our Constitution'.[4] It thus held that there 'is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived'.[5]

This confirms that the Court will not adopt concepts from non-binding international instruments that it regards as inconsistent with the text and context of the relevant constitutional provisions protecting socio-economic rights. However, international instruments and their interpretation by treaty bodies remain an important guide in interpreting relevant socio-economic rights provisions, particularly where it can be shown that the particular international jurisprudence is consistent with, if not identical to, our constitutional provisions and is appropriate in the South African context.[6]

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[1] *Grootboom* (supra) at para 28.
[2] Ibid.
[3] See § 33.5*(e)*(i) below (dealing with the minimum core argument in *Grootboom*).
[4] *Grootboom* (supra) at para 45. See § 33.5*(g)* infra (on progressive realisation in *Grootboom*).
[5] Ibid.
[6] The CESCR is responsible for supervising States parties' compliance with their obligations under the Covenant. The main sources for their interpretation of the relevant provisions of the Covenant are the official records of their review of States parties' reports under Part IV of the Covenant, and the General Comments adopted by the Committee. To date the Committee has adopted fifteen General Comments (GC): GC 1 (3rd sess, 1989) UN doc E/1989/22 Reporting by States parties; GC 2 (4th sess, 1990) UN doc E/1990/23 International technical assistance measures (art 22); GC 3 (5th sess, 1990) UN doc E/1991/23 The nature of States parties obligations (art 2(1)); GC 4 (6th sess, 1991) UN doc E/1992/23 The right to adequate housing (art 11(1)); GC 5 (11th sess, 1994) UN doc E/C 12/1994/13 Persons with disabilities; GC 6 (13th sess, 1995) UN doc E/1996/2 The economic, social and cultural rights of older persons; GC 7 (16th sess, 1997) UN doc E/C 12/1997/4 The right to adequate housing (art 11(1)) - forced evictions; GC 8 (17th sess, 1997) UN doc E/1998/22 The relationship between economic sanctions and respect for economic, social and cultural rights; GC 9 (19th sess, 1998) UN doc E/1999/22 Domestic application of the Covenant; GC 10 (19th sess, 1998) UN doc E/1999/22 The role of national human rights institutions in the protection of economic, social and cultural rights; GC 11 (20th sess, 1999) UN doc E/2000/22 Plans of action for primary education (art 14): GC 12 (20th sess, 1999) UN doc E/2000/22 The right to adequate food (art 11); GC 13 (21st sess, 1999) UN doc E/2000/22 The right to education (art 13); GC 14 (22nd sess, 2000) UN doc E/C.12/2000/4 The right to the highest attainable standard of health (art 12); GC 15 (29th sess, 2002) UN doc E/C.12/2002/11 The right to water (arts 11 and 12).

Of course, the status of the ICESCR or any other international treaty containing socio-economic rights would change once it has been ratified and incorporated into domestic law. The courts would then be obliged to give effect to their provisions, and interpretations of its provisions by treaty-monitoring bodies would be of considerable authoritative weight.[1]

One of the problems in deriving interpretative guidance from international instruments protecting socio-economic rights has been the historical absence of individual complaints procedures generating international 'case law'.[2] The international community has consistently affirmed the equal status of economic and social rights and called for their equal protection. However, in reality the enforcement procedures for socio-economic rights have not been as effective as those available for civil and political rights. Treaties protecting civil and political rights usually make provision for an optional individual complaints procedure. This procedure allows individuals subject to the jurisdiction of a State party which has accepted the procedure (or the jurisdiction of the relevant court) to submit a complaint to an international committee or court, alleging a violation of their rights by the State party.[3]

In contrast, the supervision of States parties' obligations in respect of economic and social rights has generally been limited to a periodic reporting system. This development was due to the perceived difficulty of subjecting socio-economic rights to individual adjudication because they were thought to require extensive

[1] On the domestic application of the ICESCR, see M C R Craven 'The Domestic Application of the International Covenant on Economic, Social and Cultural Rights' (1993) XL (3) *Netherlands International LR* 367-404.

[2] Although generally the interpretations of treaty provisions generated by international treaty-monitoring bodies (eg views on individual communications, concluding observations on States' periodic reports and general comments) are not legally binding *per se*, they carry weight as authoritative interpretations of the relevant treaty. On the status of the General Comments issued by the UNCESCR, see Craven 'ICESCR' (supra) at 91-2.

[3] See, for example, the First Optional Protocol to the ICCPR (1966) 999 UNTS 171; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 23 ILM 1027, art 22; the International Convention on the Elimination of All Forms of Racial Discrimination (supra), art 14; the European Convention on Human Rights (1950) ETS 5, arts 25, 46, 48; the American Convention on Human Rights (1969) 1144 UNTS 123, arts 44-51 and ch VIII. Socio-economic benefits may receive indirect protection through the application of the provisions of these treaties in individual complaints procedures. For example, in the cases of *Zwaan-de Vries v The Netherlands* Comm 182/1984 and *Broeks v The Netherlands* Comm 172/1984 (decided under the First Optional Protocol of the ICCPR), the UN Human Rights Committee adopted the view that social security legislation enacted by the Netherlands violated art 26 of the Covenant (the right to equality, and the prohibition on discrimination). This legislation required married women to prove that they were either 'breadwinners' or permanently separated from their spouses in order to qualify for unemployment benefits. A similar burden was not imposed on married men. South Africa is a party to the First Optional Protocol to the ICCPR (by accession on 28 August 2002). It has also accepted the individual complaints procedure under the race and torture conventions.

positive obligations and resource implications. There can be little doubt that the absence of individual complaints procedures in relation to economic and social rights has tended to undermine their status as binding individual rights. It has also meant that the relevant treaty monitoring bodies have not had the opportunity to develop their normative content through application in concrete cases.[1] Efforts to provide more effective mechanisms in the ICESCR and other international instruments for the protection of socio-economic rights have gained momentum in recent years.[2] The general trend in international law is now towards providing complaints mechanisms in respect of treaties protecting socio-economic rights.[3]

Another important international treaty containing socio-economic rights of particular relevance to South Africa is the African Charter on Human and Peoples' Rights. Socio-economic rights appear along with civil and political rights in

[1] See P Alston 'No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant' in A Eide & J Helgesen (eds) *The Future of Human Rights Protection in a Changing World* (1991) 79; A R Chapman 'A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 *Human Rights Quarterly* 23, 39 (recommending that the CESCR focus its efforts more closely on identifying and redressing violations of economic and social rights); S Leckie 'Another Step Towards Indivisibility: Identifying Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 81 ('Indivisibility').

[2] The Vienna Declaration and Programme of Action, UN doc A/Conf 157/23 Part II paras 40 and 75 (encouraging the examination of optional protocols to the Convention on the Elimination of All Forms of Discrimination Against Women and the ICESCR). The CESCR has also gradually developed its mandate under the reporting procedure of the ICESCR to include quasi-judicial features in order to provide more effective protection for socio-economic rights. See M Craven 'Towards an Unofficial Petition Procedure: A Review on the Role of the UN Committee on Economic, Social and Cultural Rights' in K Drzewicki, C Krause & A Rosas (eds) *Social Rights as Human Rights: A European Challenge* (1994) 91 ('Towards an Unofficial Petition Procedure'). Also see K Arambulo *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects* (1999).

[3] In 1995 an Additional Protocol was adopted to the European Social Charter (1961) providing for a system of collective complaints (European Social Charter and its Protocols, ETS 35, 128 and 142). This procedure allows trade unions and employers' organisations as well as certain non-governmental organisations to refer alleged breaches of the Charter to the Committee of Independent Experts, which monitors compliance with the Charter. Case law of the Committee can be accessed on-line at http://www.europarl.eu.int/experts/default_en.htm (accessed 16 May 2003). See also L Samuel *Fundamental Social Rights: Case Law of the European Social Charter* (1997). The Revised European Social Charter, which updates and complements the list of rights protected in the Charter, was opened for signature on 3 May 1996 and entered into force on 1 July 1999 (ETS 163). The Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights (1998) entered into force on 29 November 1999 (OAS Treaty Series 69). This Optional Protocol makes provision for individual petitions to the Inter-American Commission and Inter-American Court on Human Rights in respect of alleged breaches of trade union rights (art 8), and of the right to education (art 13). In 1999, an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women was adopted. It entered into force on 22 December 2000, and provides for both an individual communications procedure and inquiry procedure. In 2001, the UN Commission on Human Rights appointed an independent expert to examine the question of an Optional Protocol to the ICESCR. This was followed, at its 59th session, with the establishment of an open-ended working group with a mandate to consider options regarding the elaboration of an Optional Protocol to the ICESCR. This working group is further mandated to report to the Commission on Human Rights at its 60th session and to make specific recommendations on the Optional Protocol (Commission on Human Rights resolution 2003/18).

the Charter,[1] and no distinction is made between the various rights in the Charter with regard to the submission of communications to the African Commission on Human and Peoples' Rights.[2] There have been relatively few communications under the African Charter dealing specifically with socio-economic rights.[3] However, in 2001, the African Commission handed down its landmark decision, *SERAC v Nigeria*.[4] This communication concerned the destruction of Ogoniland natural resources by an oil consortium (in which a State oil company was a majority shareholder), and the destruction of the homes and livelihoods of the Ogoni communities. The Commission held that the State bears responsibility for protecting its populace against violations of socio-economic rights by both quasi-State and non-State entities. It found that Nigeria had facilitated the destruction of Ogoniland both through its direct actions and by failing to adequately protect the Ogoni people against exploitation by the oil consortium. It accordingly found that Nigeria was in violation of articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter. Significantly, the Commission found that certain socio-economic rights not expressly guaranteed in the Charter such as the rights to housing and food are implicitly protected through other provisions.[5]

Finally, socio-economic rights are also protected in specialised conventions concluded, for example, under the auspices of the International Labour Organisation (ILO) and the United Nations Educational, Scientific and Cultural Organisation.[6]

[1] See, for example, arts 15 (work), 16 (health), 17 (education), and 18 (protection of the family, women, children, the aged and the disabled).

[2] See arts 55-9.

[3] For a discussion of the communications dealt with by the African Commission relating to economic, social and cultural rights, see C A Odinkalu 'Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples' Rights' in M D Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (2002) 178, 209.

[4] Supra.

[5] It derived the right to housing from a combined reading of the right to property (art 14), the right to health (art 16), and the right to the protection of the family (art 18(1)). The right to food was derived from the right to life (art 4), the right to health (art 16) and the right to economic, social and cultural development (art 22). For a discussion of this decision, see D M Chirwa 'A Fresh Commitment to Implementing Economic, Social and Cultural Rights in Africa' (2002) 3 (2) *ESR Review* 19.

[6] See, for example, ILO Convention 117 concerning Basic Aims and Standards of Social Policy (1962) ILO Conventions and Recommendations Vol I 746; and the Convention Against Discrimination in Education (1960) 429 UNTS 93.

There are also a plethora of international declarations, resolutions and reports relevant to socio-economic rights.[1]

(d) Comparative law

Section 39(1)*(c)* of the Constitution also provides that the courts 'may consider foreign law' when interpreting the Bill of Rights. Although socio-economic rights are encountered in a number of national Constitutions, it is rare to encounter the South African commitment to a comprehensive range of socio-economic rights married to judicial enforcement. The absence of a commitment to judicial enforcement per force diminishes their value. However, socio-economic rights are often indirectly protected through the application of various civil and political rights. For example, the right to equality is often employed to extend social benefits to vulnerable groups.[2] Another mechanism developed particularly by the Indian Supreme Court is to draw on directive principles of State policy[3] to give civil and political rights socio-economic content, for example, interpreting the right to life to include the right to a livelihood.[4] Our Constitutional Court has relied on recent Indian jurisprudence in determining the ambit of the right to emergency medical treatment in section 27(3) of the Constitution.[5]

[1] See, for example, the reports of the Special Rapporteurs appointed by the UN Commission on Human Rights on economic, social and cultural rights, accessible on-line at: http://193.194.138.190/html/menu2/2/liststudrepts.htm (accessed on 16 May 2003). To date the Commission has appointed special rapporteurs on the rights to education, housing, food, and health. The work of the following international agencies is of particular relevance to socio-economic rights: the World Health Organisation, the Food and Agricultural Organisation, and the United Nations Children's Fund. Important UN Declarations relevant to the achievement of basic socio-economic rights include: the Report and Declaration of Alma Ata adopted by the International Conference on Primary Health Care in 1978; the World Declaration on Education for All adopted in 1990 by the World Conference on Education for All; the World Declaration on Nutrition adopted in 1992 by the International Conference on Nutrition; and the Istanbul Declaration on Human Settlements adopted in 1996 by the Second United Nations Conference on Human Settlements (Habitat II).

[2] See, for example, the Canadian Supreme Court decision in *Eldridge v British Columbia (Attorney General)* (1997) 151 DLR. (4th) 577 (SCC) (the extension of sign-language interpretation to deaf patients as part of a publicly funded scheme for the provision of medical care). For a commentary on this case, see B Porter 'Beyond *Andrews*: Substantive Equality and Positive Obligations after *Eldridge* and *Vriend*' (Spring 1998) 9 *Constitutional Forum* 71. See also S Liebenberg 'Socio-Economic Rights' in M Chaskalson et al *Constitutional Law of South Africa* (1st Edition, RS 3, 1998) 41-18–41-21 and cases cited in this discussion. ('Socio-Economic Rights'). For a recent Canadian case in which reduced welfare benefits were unsuccessfully challenged under sections 15 (equality) and 7 (security of the person), see *Gosselin v Quebec (Attorney-General)* 2002 SCC 84.

[3] These directives are expressly declared to be unenforceable by any court in section 37 of the Indian Constitution .

[4] See Liebenberg 'Socio-Economic Rights' 1st Edition (supra) at 41-21–41-24.

[5] See *Soobramoney* (supra) citing with approval *Paschim Banga Khet Mazdoor Samity & others v State of West Bengal & another* (1996) AIR SC 2426 ('*Paschim*') at para 18. For a critique of the Court's construal of this case, see C Scott & P Alston 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*'s Legacy and *Grootboom's* Promise' (2000) 16 *SAJHR* 206, 237, 245–248 ('Transnational Context') See also § 33.5*(c)* infra (the socio-economic rights in sections 26(3) and 27(3)).

Given the relative novelty of the constitutional protection of socio-economic rights, the South African courts are likely to regard national case law dealing with socio-economic rights as valuable comparative experiences in interpreting our own constitutional provisions. However, they will naturally be mindful of the differing legal and socio-economic context of comparative case law.[1]

33.5 Interpreting the Socio-Economic Rights in Sections 26 and 27[2]

(a) The relation between the first and second subsections of sections 26 and 27

In *Grootboom*, the Court established its approach to the interpretation of section 26. Owing to the similar drafting style, this approach is also applicable to section 27. In the first instance, the Court observed that subsections (1) and (2) 'are related and must be read together'.[3] It held that the aim of the first subsection is to delineate the scope of the right. It applies to 'everyone including children'.[4] This first section also imposes an implied negative duty on the State.[5]

The second subsection 'speaks to the positive obligation imposed upon the State', requiring it 'to devise a comprehensive and workable plan to meet its obligations in terms of the subsection'.[6] The Court has emphasised that this positive duty is qualified in terms of three key elements: *(a)* the obligation to 'take reasonable legislative and other measures'; *(b)* 'to achieve the progressive realisation' of the right; and *(c)* 'within available resources'.[7] The second subsection thus both defines and limits the positive duties on the State.

(b) The negative duty 'to respect' socio-economic rights

The Court held that section 26(1) incorporates 'at the very least' an implied negative obligation 'placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing'.[8] The

[1] See, generally, S. Liebenberg, 'The Protection of Economic and Social Rights in Domestic Legal Systems' in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (2nd Edition, 2001) 55 ('*Textbook*').

[2] This section is based primarily on the three major cases handed down by the Constitutional Court, interpreting sections 26 and 27. However, the principles enunciated in these three cases apply generally to socio-economic rights. How these principles engage particular rights will be dealt with in each of the chapters on specific socio-economic rights.

[3] *Grootboom* (supra) at para 34.

[4] Ibid.

[5] See § 33.5*(b)* infra (negative duties).

[6] *Grootboom* (supra) at para 38. The UNCESCR has emphasised the duty on the State to formulate and implement a national strategy and plan of action to fulfil socio-economic rights 'on the basis of a participatory and transparent process': GC 4 (supra) at para 12; GC 14 (supra) at para 43*(f)*.

[7] Ibid.

[8] *Grootboom* (supra) at para 34. Later in the judgment, the Court observed that the manner in which the eviction had been carried out in *Grootboom* resulted in a breach of this negative obligation. Ibid at para 88.

phrase, 'preventing or impairing' access to the relevant socio-economic rights is broader than the standard international formulation of the duty to respect socio-economic rights. The international standard engages only a direct or indirect interference with people's enjoyment of socio-economic rights.[1] 'Preventing or impairing' access to a socio-economic right could well cover policies that constitute a barrier to an individual or a group's attempt to secure access to socio-economic rights[2] — rather than the mere interference with their existing access to the rights.[3] Locating this negative obligation in sections 26(1) and 27(1) suggests that the qualifying phrases in the second subsection do not play a role in justifying the impairment of access to the relevant rights at the first stage of constitutional analysis.[4]

In *TAC*, the Court affirmed that the negative duty to refrain from preventing or impairing the relevant socio-economic rights, recognised in *Grootboom*, applied equally to section 27(1).[5] It indicated that this duty was 'relevant' to the challenges to the measures adopted by the government to combat MTCT of HIV.[6] This negative duty presumably related to the first leg of the challenge to Government's MTCT programme, namely, the prohibition of the administration of Nevirapine at public hospitals and clinics outside the research and training sites.[7] Unfortunately, the decision itself does not reflect such analytical precision. The Court's entire analysis was conducted in terms of section 27(2) — the qualified positive duty to take reasonable measures.

One interpretation of the Court's approach in *TAC* is that the negative duties imposed in the first subsections of sections 26 and 27 must be read as being subject to the qualifications in the second subsection. However, this reading runs counter to the widely accepted interpretation amongst commentators that negative violations of the duty to respect socio-economic rights are immediate and not subject to resource-based limitations (at least at the first stage of constitutional analysis). The duty to respect requires only State abstention or restraint.[8] It does

[1] See § 33.2*(c)*(ii) above (duty to respect, protect, promote and fulfil socio-economic rights).

[2] A good example would be *TAC*, where government's policy of restricting the use of Nevirapine for the prevention of MTCT of HIV to a limited number of research and training sites prevented many HIV-positive pregnant women from gaining access to the drug at public hospitals and clinics other than these designated sites. Only 10% of the population was catered for in terms of the test-site policy: *TAC* (supra) at para 119.

[3] Budlender AJ has held that the disconnection of an existing water supply to consumers by a local authority is *prima facie* a breach of its constitutional duty to respect the right of (existing) access to water, and requires constitutional justification. *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) at para 27.1. See also paras 11–20.

[4] See *Grootboom* (supra) at para 38. The Court indicates that the second subsection 'speaks to the *positive obligation* upon the State' [emphasis added]. It further states: 'The second [subsection] establishes and delimits *the scope of the positive obligation* imposed upon the State to promote access to adequate housing [emphasis added].' Ibid at para 21.

[5] *TAC* (supra) at para 46.

[6] Ibid.

[7] As will be recalled the second leg of the challenge related to the State's failure to implement a comprehensive programme for the prevention of MTCT of HIV. See § 33.3 supra (introduction to the cases).

[8] See, eg, Craven 'ICESCR' (supra) at 110–11.

not entail positive conduct or an investment of resources by the State. As Pierre de Vos argues, the internal limitations in the second subsections 'should never be interpreted by the courts as an invitation to water down the negative obligation engendered by the rights'.[1] If the courts accepted this characterisation of the limited insulation afforded negative obligations, it would clearly be to the advantage of litigants to frame their cases, where possible, in terms of a negative violation of socio-economic rights in the first subsection of sections 26 and 27.[2]

However, as *TAC* illustrates, the analysis of negative and positive duties are often closely intertwined, so much so that the Court often collapses the distinction between the two obligations. Classifying the facts of particular cases as a breach of the negative obligation under the first subsections of sections 26 and 27, or as a breach of the positive obligations under the second subsection, is thus likely to be contentious. The facts of *TAC* are a good illustration of this point. Was the prohibition on the prescription of Nevirapine to HIV-positive pregnant women throughout the public health sector a breach of the negative duty not to prevent or impair access to health care services, or of the positive duty to ensure reasonable access to health care services?[3] The Court made two orders relating to the first leg of the challenge to Government's prevention of MTCT policy. The first requires Government to 'remove the restrictions', an apparently negative obligation, that prevent Nevirapine from being made available at public hospitals and clinics that were not research and training sites. The second order places a positive duty on Government to '[p]ermit and facilitate' the use of Nevirapine and 'to make it available' where medically indicated.[4] The Court's order suggests that where effective access to the rights requires even a modest allocation of resources by the State, the Court will apply reasonableness review in terms of sections 26(2) and 27(2).[5]

[1] De Vos 'Pious Wishes' (supra) at 93–4. See also E de Wet 'Recent Developments Concerning the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (1997) 13 *SAJHR* 514, 518.

[2] In *Residents of Bon Vista Mansions* (supra), Budlender AJ did not apply the qualifications in s 27(2) to the violations of the negative duty to 'respect' the right of access to water in terms of s 27(1)*(b)*. In accordance with the two-stage approach to constitutional interpretation, the burden shifted to the Council to justify the breach in terms of a law of general application. In this case, the applicable law was held to be s 4(3) of the Water Services Act. See paras 20–26.

[3] The stage at which a case comes before court will often prove decisive. In *Grootboom,* the pleadings were framed in terms of non-fulfilment of the positive duty to ensure shelter to those who were homeless. However, if the original eviction from the private land had been challenged, the case could have revolved around the negative duty not to impair access to housing in terms of ss 26(1) or 26(3). See *Grootboom* (supra) at paras 88–90.

[4] *TAC* (supra), orders 3*(a)* and *(b)*, at para 135.

[5] *TAC* (supra) at paras 67–73 and 80–81. See § 33.5*(f)* below (discussion of the reasonableness test).

(c) The socio-economic rights in sections 26(3) and 27(3)

Both sections 26 and 27 include a third subsection[1]. Neither of these subsections contain the qualifications or internal limitations found in subsections 26(2) and 27(2).

In *Grootboom*, the Court observed that the negative right that it read into section 26(1) 'is further spelt out in subsection (3) which prohibits arbitrary evictions'.[2] However, this section could also be the source of positive duties on the State to protect the rights in terms of section 7(2). It will be recalled that the duty to protect socio-economic rights requires the State to adopt and implement effective legislative and other measures to restrain third parties from violating the rights of others.[3] These measures would include, for example, legislation protecting people from arbitrary evictions and promoting their tenure security.[4]

The subsection (3) rights could also be the source of positive duties to fulfil the rights, for example, taking measures to establish and maintain sufficient emergency medical facilities in terms of s 27(3). Of course, if the subsection (3) rights were so extended, this positive duty would likely be subject to some kind of reasonableness test.

In *Soobramoney*, the Court held that the applicant's demand to receive renal dialysis treatment at a State hospital did not fall within the scope of the right against the refusal of 'emergency medical treatment' in section 27(3). It observed that the right is cast in negative terms. Its scope is thus restricted to a right to receive immediate remedial treatment that is 'necessary and available'[5] to avert harm in the case of a sudden catastrophe. It does not extend to the provision of ongoing treatment of chronic illnesses for the purpose of prolonging life.[6]

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[1] Section 26(3) reads: 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.' Section 27(3) reads: 'No one may be refused emergency medical treatment.'

[2] *Grootboom* (supra) at para 34.

[3] See § 33.2*(c)*(ii) above (the duties to respect, protect, promote and fulfil socio-economic rights). In its GC 7 dealing with forced evictions (supra), the UNCESCR commented that legislation against forced evictions 'is an essential basis upon which to build a system of effective protection.' It went on to comment: 'Such legislation should include measures which *(a)* provide the greatest possible security of tenure to occupiers of houses and land; *(b)* conform with the Covenant; and *(c)* are designed to control strictly the circumstances under which evictions may be carried out? Moreover, in view of the increasing trend in some States towards the Government greatly reducing its responsibilities in the housing sector, States parties must ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards, by private persons or bodies'. At para 10.

[4] A range of legislation has been adopted to give effect to section 26(3) such as the Extension of Security of Tenure Act 62 of 1997, and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

[5] *Soobramoney* (supra) at para 20.

[6] According to the Court: 'The purpose of the right seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities'. Ibid.

The restriction of the scope of the right to genuine medical emergencies seems appropriate. More problematic is the suggestion that the scope of section 27(3) is confined to *existing* services and facilities providing emergency medical treatment. It remains to be determined to what extent section 27(3) may be relied upon to argue for a positive duty on the State to establish emergency medical facilities where none previously existed. Similarly, it is an open question whether this provision can be relied on to challenge the closure of existing emergency facilities, for example, due to budgetary cutbacks. This possibility is particularly important in circumstances where the closure results in communities being denied any access to emergency medical treatment. A purposive reading of section 27(3) does not support a purely negative interpretation thereof, which limits its scope to a denial of access to *existing* emergency services or facilities.[1]

It is instructive to compare our Court's approach to that of the Indian Supreme Court in *Paschim*.[2] The Indian Supreme Court derived the right to emergency medical treatment from the right to life protected in article 21 of the Indian Constitution. However, the judgment did not confine itself to ordering compensation to the victim for the negative violation of his right. It also focused on the positive measures needed to ensure 'that proper medical facilities are available for dealing with emergency cases'.[3] The order of the Court included far-reaching positive duties on the State to improve emergency health care infrastructure and services. In this regard the Court considered it necessary for 'a time-bound plan for providing these services' to be drawn up and implemented.[4] This case illustrates that positive measures are essential to ensuring the effective enjoyment of the right to emergency medical treatment.[5]

[1] On the contrary, as Scott & Alston point out, the purely negative interpretation given to s 27(3) would appear to make it a redundant right in the light of the negative duty on the State under s 27(1) to desist from preventing or impairing the right of access to health care services: 'Transnational Context' (supra) at 245–248. As discussed above, this negative duty was recognised in *Grootboom* in respect of s 26(1) (supra) at para 34. The concurring judgment of Sachs J suggests a more expansive interpretation of the values and purposes underlying s 27(3):

> The special attention given by section 27(3) to non-refusal of emergency medical treatment relates to the particular sense of shock to our notions of human solidarity occasioned by the turning away from hospital of people battered and bleeding or of those who fall victim to sudden and unexpected collapse. It provides reassurance to all members of society *that accident and emergency departments will be available* to deal with the unforeseeable catastrophes which could befall any person, *anywhere at any time.*

[Emphasis added, footnotes omitted]; *Soobramoney* (supra) at para 51.

[2] See *Soobramoney* (supra) at paras 18 and 20 (court discusses *Paschim*).

[3] *Paschim* (supra) at para 15.

[4] Ibid at para 16. For more on *Paschim*, see Scott & Alston 'Transnational Context' (supra) at 237, 245–248.

[5] It remains to be seen whether the negative duty imposed by section 27(3) also binds private healthcare facilities. At least the negative duty not to turn away someone in need of emergency medical treatment is capable of application to private medical facilities (see s 8(2)).

(d) The right of 'access to' socio-economic rights

The Court in *Grootboom* held that there was a significant difference between the right of 'access to adequate housing' in section 26(1), and the right to adequate housing protected in the ICESCR.[1] The significance attached by the Court to the formulation of 'access to' the right is twofold. First, it implies that the scope of the right extends beyond a physical structure:

> It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself.[2]

Second, the Court suggests that 'access to' implies that the State must empower private individuals and organisations to provide housing. Thus the Court states that 'it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing'.[3] As we have seen, the duty to protect socio-economic rights also implies that the State has a duty to take legislative and other measures to ensure that private parties do not prevent or impair vulnerable groups from enjoying access to socio-economic rights.[4] The significance of the differences in the formulation between our constitutional provisions protecting socio-economic rights and the ICESCR is more apparent than real. For example, the UN Committee reads similar obligations relating to enabling and protective strategies to facilitate access to private housing into the right to adequate housing protected in article 11 of the ICESCR.[5]

(e) Do sections 26 and 27 impose minimum core obligations on the State?

One of the most contentious issues in the development of South Africa's jurisprudence on socio-economic rights has been whether sections 26 and 27 impose minimum core obligations on the State. Crisply put, the Court has been asked to decide whether the socio-economic rights provisions in the Constitution entitle

[1] *Grootboom* (supra) at para 35.

[2] Ibid. The UNCESCR has interpreted the right to adequate housing in art 11 of the ICESCR to incorporate the aforementioned elements, as well as legal security of tenure, the availability of services, materials, facilities and infrastructure and measures to ensure the affordability of housing. See GC 4 (supra) at para 8.

[3] *Grootboom* (supra) at para 35.

[4] See § 33.2*(c)*(ii) supra. Erika de Wet suggests that 'access to adequate housing' implies a duty to regulate the private housing sector (eg relations between landlords and tenants) to prevent excessive rents and other unacceptable practices from barring access to adequate housing: E de Wet *The Constitutional Enforceability of Economic and Social Rights* (1996) 118 ('Constitutional Enforceability'). An example of such legislation would be the Rental Housing Act 50 of 1999.

[5] See, for example, GC 4 (supra) at paras 8*(e)*, 14, 17.

individuals to a basic level of goods and services in particular circumstances or only a right to review the reasonableness of government's social programmes.

(i) Grootboom: *Rejecting minimum core as a primary basis for adjudicating socio-economic rights*

In *Grootboom*, the *amici curiae*[1] invited the Constitutional Court to endorse an interpretation of section 26 that would impose minimum core obligations on the State. Although the parties to the case had based their arguments on section 28(1)*(c),* the *amici* broadened the issues before the Court to include a consideration of section 26 of the Constitution.[2] They pointed to the unjust results of the reasoning of the Court *a quo*: namely the exclusion of adults without children from shelter in crisis situations while those with children obtained relief. A central concern of the *amici* was to advance an interpretation that would reconcile the qualified rights of 'everyone' to adequate housing in section 26 with the unqualified right of children to shelter in section 28(1)*(c)*. They did so by arguing as follows:

1. Section 26(1) read with (2) imposes a minimum core obligation on the State to ensure that those who are truly homeless and in crisis situations receive some rudimentary form of shelter. The State has a burden to demonstrate that it has used all resources at its disposal to satisfy, as a matter of priority, its minimum core obligations. The *amici* derived support for this core obligation from the interpretation by the UNCESCR of the nature of States parties' obligations under the ICESCR.[3]
2. Section 28(1)*(c)* is a specific manifestation of this minimum core obligation, and places it beyond doubt that the basic socio-economic needs of children in especially vulnerable circumstances must be satisfied.

The *amici* located the core within a continuum of positive obligations imposed on the State in section 26(1) read with (2):

> This does not imply that only the 'core' is subject to adjudication, or that meeting the minimum core requirements would satisfy all of the obligations on the State? The 'core' provides a level of minimum compliance to which resources have to be devoted as a matter of priority. This duty clearly has to be balanced with the obligation to put into operation programmes aimed at full realisation of the right, and to move progressively towards full realisation.[4]

[1] The *amici* were the South African Human Rights Commission and the Community Law Centre (University of the Western Cape) ('CLC'), represented by Geoff Budlender of the Legal Resources Centre. The written submissions are available on-line at: www.communitylawcentre.org.za/ser/docs_2002/Grootboom_Heads_of_Arguments.doc.

[2] *Grootboom* (supra) at para 18.

[3] See GC 3 (supra) at para 10:

> The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party . . . In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

[4] Heads of argument on behalf of the *amici curiae*, 10 September 2002 (supra) at para 27.

The Constitutional Court agreed that the foundational values of our society — human dignity, equality and freedom — are denied to those who lack access to socio-economic rights.[1]

Despite this point of departure, the Court was not prepared to endorse the notion of a minimum core obligation in relation to section 26. It rejected a minimum core largely on the grounds that it would be difficult to determine in the abstract what the minimum threshold should be for the realisation of the rights as the opportunities for fulfilling these rights varied considerably,[2] and needs were diverse.[3] The only role envisaged by the Court for the concept of minimum core obligations was possibly as a factor in assessing the reasonableness of the measures adopted by the State in particular cases (the standard of review ultimately adopted).[4] However, it would be necessary to place sufficient information before a court 'to enable it to determine the minimum core in any given context'.[5] In this particular context, the Court rejected the arguments of the *amici* to the effect that section 26(2) read with section 26(1) imposed a minimum core obligation on the State.

(ii) TAC: *no minimum core obligation under section 27(1)*

In *TAC,* two of the *amici curiae* adopted a different tack in attempting to persuade the Court to accept the notion of a minimum core.[6] They argued that every individual is entitled to a basic core of health care services comprising the minimum necessary for dignified human existence in terms of section 27(1) read with

[1] *Grootboom* (supra) at para 23. The Court also wrote that the State's constitutional obligations in relation to housing are 'of fundamental importance to the development of South Africa's new constitutional order'. Ibid at para 1.

[2] 'These will vary according to factors such as income, unemployment, availability of land and poverty.' Ibid at para 32.

[3] '. . . [T]here are those who need land; others need both land and houses; yet others need financial assistance.' Ibid at para 33.

[4] The Court wrote: 'There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable.' Ibid at para 33.

[5] Ibid at para 33.

[6] The CLC (UWC) and IDASA. The submissions of the *amici* are available on-line at: www.community lawcentre.org.za/ser/docs_2002/TAC_MTCT_Case_Heads_of_Arguments.doc.

the duty to fulfil the rights in section 7(2).[1] According to this line of argument, the core right is not subject to the limitations of resource constraints and progressive realisation under section 27(2). Over and above this minimum core entitlement, the State is obliged, in terms of section 27(2), to take reasonable measures within its available resources to achieve progressively *the full* realisation of the relevant rights. In other words, section 27(2) is not exhaustive of the State's positive duties. Instead, it supplements the unqualified core duty in terms of section 27(1) to ensure basic levels of the relevant rights with a qualified obligation to achieve more extensive levels of enjoyment of the rights over time.[2]

They further argued that a purposive approach to the interpretation of socio-economic rights supported a core entitlement to a basic level of services consistent with human dignity.[3] A purposive approach meant that the courts must attend to the 'practical justiciability' of a right. That is, no provision should be interpreted in a way that makes its enforcement practically impossible. If section 27(2) is interpreted to be exhaustive of the State's positive duties, individual right holders have no direct right to claim anything specific from the State. They can only demand that the State take reasonable measures within its available resources in terms of section 26(2) and 27(2).[4] *Grootboom* made it clear that any cause of action under the latter provisions 'would almost always be a matter of such factual and legal complexity as to be beyond the capacity of individual right holders, even if they have the benefit of legal representation'.[5]

In the context of the case, the *amici* argued that the minimum core of health care services to which everyone is entitled to have access includes the provision of Nevirapine to pregnant women with HIV and to their newborn babies. The costs are relatively minor, the potential benefits to mother and child overwhelming.

[1] The position of the *amici* was summarised as follows by the Court in *TAC* (supra) at para 28:

> This minimum core might not be easy to define, but includes at least the minimum decencies of life consistent with human dignity. No one should be condemned to a life below the basic level of dignified human existence. The very notion of individual rights presupposes that anyone in that position should be able to obtain relief from a court.

[2] Although the *amici* agreed that the two subsections of s 27 must be read together, they argued that they should 'not be conflated in a way that deprives subsection (1) of its normative content and reduces it to a mere definition used in the description of the duties imposed on the State in subsection (2).' [Submissions of the CLC and IDASA, April 2003, paras 14 and 23.]

[3] Ibid at paras 30–31.

[4] Ibid at para 26.

[5] Ibid at para 31.

Denying access to the drug to those who are too poor to afford it would be a failure to respect their dignity and intrinsic worth as human beings.[1]

The Constitutional Court rejected this entire line of argument. It held that neither the drafting of the relevant sections, nor a purposive approach to the interpretation of socio-economic rights supported the interpretation advanced by the *amici*. It reaffirmed that section 27(2) defines and limits the full extent of the positive obligations imposed by section 27(1).[2] There is no separate positive right under section 27(1).[3] This means that *all* positive obligations on the State from the most basic to more extensive levels of fulfilment will be subject to the qualifications in the second subsections of sections 26 and 27.[4]

According to the Court, a purposive reading of section 27 'does not lead to any other conclusion'. It is simply 'impossible to give everyone access even to a 'core' service immediately'.[5] All that can be expected from the State 'is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis'.[6] The Court confirmed the approach adopted in *Grootboom*. The minimum core might be relevant to the assessment of the reasonableness of the measures adopted by the State in particular cases, but did not constitute 'a self-standing right conferred on everyone under section 26(1)'.[7]

The Court was at pains to demonstrate that its interpretation of these provisions as developed in *Grootboom* was consistent with the institutional capabilities and functions of courts in a constitutional democracy. It wrote that courts are not 'institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum core standards?should be'.[8] Courts are also 'ill-suited to adjudicate upon issues where court orders could have

[1] *Grootboom* (supra) at para 60. They also referred in support of the above to the core obligations identified by the UNCESCR in respect the right to health under art 12 of the ICESCR. See GC 14 (supra) at paras 43–4.

[2] Thus the reference to 'this right' in s 26(2) and 'each of these rights' in s 27(2) refers to the rights in ss 26(1) and 27(1) respectively. See *TAC* (supra) at paras 29–31.

[3] Ibid at para 39.

[4] According to the Court:

> Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the State to 'respect, protect and fulfil' such rights. The rights conferred by sections 26(1) and 27(1) are to have 'access' to the services that the State is obliged to provide in terms of sections 26(2) and 27(2). Ibid at para 39.

[5] Ibid at para 35.

[6] Ibid.

[7] Ibid at para 34 referring with approval to *Grootboom* (supra) at para 33.

[8] Ibid at para 37

multiple social and economic consequences for the community'.[1] While determinations of reasonableness may have budgetary implications, they were not directly aimed at 'rearranging budgets'.[2]

(iii) *Critiques of the Court's approach*

The Court's rejection of the notion of minimum core obligations has attracted a substantial amount of criticism.[3]

Theunis Roux criticises the Court's failure to require the State to *prioritise* the basic needs of vulnerable groups in accordance with the approach of the UNCESCR in relation to minimum core obligations.[4] He reads this approach as requiring the State to devote *all* the resources as its disposal *first* to satisfy its minimum core obligations. He thus argues that the Court failed to engage in 'priority-setting' in the strict sense of requiring the basic needs of vulnerable groups to be met before 'expending scarce resources on relatively privileged groups (temporal prioritisation)'.[5] Although the Court held that a government programme that did not cater for those in desperate need would fail the constitutional standard of reasonableness[6], Roux argues that the required standard is 'merely *inclusion*':

> Nothing is said about how the State ought to apportion its efforts between competing significant segments or, more importantly, between significant and not so significant segments of society.[7]

In sum, provided the State programme caters in some way for those in desperate need and a reasonable proportion of resources is made available to this

[1] *TAC* (supra) at para 38.
[2] Ibid.
[3] Prior to the *Grootboom* judgment, a number of scholars had argued in favour of an implied minimum core obligation in sections 26 and 27. See Scott & Maklem 'Ropes of Sand' (supra) at 77; Liebenberg 'Socio-Economic Rights' (supra) at 41-43; De Vos 'Pious Wishes' (supra) at 97; G Van Buren 'Alleviating Poverty through the Constitutional Court' (1999) 15 *SAJHR* 52, 57; Scott & Alston 'Transnational Context' (supra) at 250. For an argument against the concept of a minimum core obligation, see De Wet 'Constitutional Enforceability' (supra) at 105–117.
[4] T Roux 'Understanding *Grootboom* – A Response to Cass R Sunstein' (2002) 12 *Constitutional Forum* 41, 47 ('Understanding *Grootboom*'). See also C Sunstein 'Social and Economic Rights? Lessons from South Africa' (2001) 11 *Constitutional Forum* 123. Sunstein praises the Court's approach to the interpretation of socio-economic rights as developed in *Grootboom* for requiring Government to pay 'close attention to the human interests at stake, and sensible priority-setting, but without mandating protection for each person whose socio-economic needs are at risk'. Ibid at 123.
[5] Roux 'Understanding *Grootboom*' (supra) at 46.
[6] *Grootboom* (supra) at paras 44, 56, 66 and 68.
[7] at 49.

group, the programme will pass the reasonableness test even though the overall programme may provide greater benefits to more advantaged social groups.[1]

David Bilchitz takes issue with the Court's characterisation of the minimum core obligation in *Grootboom* as involving complex questions as to the definition of the obligation in the context of the diverse needs and opportunities for the enjoyment of socio-economic rights by different groups. He argues the Court fails to distinguish between 'the invariant, universal standard' that must be met in order for an obligation to be fulfilled, and the varied particular methods that can be adopted to fulfil this standard, and thus comply with a constitutional obligation.[2] He argues that the minimum core obligation represents 'the standard of socio-economic provision necessary to meet people's basic needs'. These needs consist of 'the universal preconditions necessary for human survival'.[3] The obligation to ensure that these needs are met thus represents the universal constitutional standard to which the State must conform. What varies is the ability of different groups in society to access these needs, and thus the measures required of the State to fulfil its obligations in concrete cases. Vulnerable groups 'who are less able to meet their needs from their own resources . . . require greater assistance from the State'.[4] In assessing whether there has been a violation of the minimum core obligation, the actual circumstances of the group affected is thus a relevant factor.[5] Vulnerable groups experiencing severe socio-economic deprivation would have a directly enforceable right to a basic level of material assistance from the State.[6]

Bilchitz views the minimum core obligation as one of two components of the duties imposed by the phrase, 'progressive realisation', in the second subsections of sections 26 and 27. This component requires the State to prioritise the fulfilment of the urgent survival needs of people. The second component refers to the more maximal interest people have in being able to live in 'an environment that is

[1] Roux illustrates this point through a case study of the government's new land distribution policy (as amended in June 2000) which, it is argued, will have the inevitable consequence 'that resources will be diverted away from funding grants to the rural poor towards funding grants to the relatively well off'. Roux 'Understanding *Grootboom*' (supra) at 47-50.

[2] D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance' (2002) 118 *SALJ* 484, 487 ('Teeth').

[3] Ibid at 488. He broadens this slightly (at 490) in his discussion of the basic interests that people have in housing to: '. . . an interest in being free from threats to one's survival, being free from severe physical suffering, and not being exposed to serious health risks that impair one's ability to act'.

[4] Ibid at 489.

[5] This is consistent with the interpretation of the UNCESCR of the duty to fulfil socio-economic rights: see GC 12 (supra) at para 15, and GC 14 (supra) at para 37. Another example of where the vulnerable status of the group in question is a factor in determining whether there has been a violation of a constitutional right is the contextual enquiry into whether discrimination is unfair in the circumstances. See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 112; *Harksen v Lane* 1998 (1) SA 308 (CC), 1997 (11) BCLR 1489 (CC) at paras 50–53.

[6] See Scott & Macklem 'Ropes of Sand' (supra) at 77: 'In effect, a priority of attention is mandated for people who would not be able to meet the most basic of health, nutrition and housing needs without direct government assistance. People who would die or suffer serious consequences for their health if no assistance were immediately forthcoming fit in this category.'

conducive to their flourishing and development on physical, emotional and mental levels'.[1] In respect of the latter interest, the State's duty is to improve gradually over time the 'adequacy' (quality) of the basic standard of housing which was guaranteed to all under the first component.

Expanding on this interpretation in a later article, Bilchitz contends that the right in question gives rise to two obligations: 'the first is to realise a certain minimum level of provision without delay, and the second is to improve the level of provision beyond this lower threshold by taking reasonable measures to meet a higher threshold that must be attained if the right is to be fully realised'.[2]

Finally, he takes issue with the Court's contention that a purposive reading of sections 26 and 27 does not support the minimum core obligation due to the impossibility of its fulfilment. According to Bilchitz, the minimum core approach 'is a means to specifying priorities'.[3] It requires the State to give priority to meeting the urgent survival needs of people:

> The approach thus does not expect an overnight solution to the problem of poverty; rather, it specifies a method by which the problem is to be dealt with. This method involves initially raising everyone to a position in which they have sufficient resources to survive and then developing the quality of the services and goods to which they are entitled to have access as resources permit.[4]

Bilchitz points out that the approach developed by the UNCESCR in GC 3 is not an absolute standard, but allows for a situation where fulfilment of core obligations may be genuinely impossible.[5] It places a burden on the State to show that it has marshalled 'all resources that are at its disposition in an effort to satisfy, as a matter of priority,' its minimum core obligations.[6] In other words, the State bears a heavy, but not impossible, burden of showing that resources are demonstrably inadequate to meet these needs.[7] In our own constitutional context, this can occur at the first stage of constitutional inquiry if the proviso in sections 26(2) and 27(2), 'within available resources', is read to apply also to minimum core obligations.[8] The State also has the possibility of relying on the general

[1] Bilchitz 'Teeth' (supra) at para 490.

[2] D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 1 at 11 ('Laying the Foundations'). He furthermore argues that the notion of a higher degree of protection for 'core' interests is not unique to the field of socio-economic rights, but also has application in the area of a civil right such as the right to privacy. Ibid at 14. This bears similarities with the argument presented by the *amici* in *Grootboom*. See § 33.5*(e)*(i) supra.

[3] Bilchitz 'Laying the Foundations' (supra) at 15.

[4] Ibid at 16.

[5] Indeed, Bilchitz also criticises as overly rigid a later General Comment of the Committee, which states that 'a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations? which are non-derogable'. GC 14 (supra) at para 47. See Bilchitz 'Laying the Foundations' (supra) at 17.

[6] GC 3 (supra) at para 10.

[7] In this context, it is clearly inadequate for the Court to confine its inquiry to existing budgetary allocations. These might have been made without proper consideration of constitutional priorities.

[8] This approach accords more with the one adopted by the *amici* in *Grootboom*. Locating the minimum core in s 27(1) as argued by the *amici* in *TAC*, suggests that justification could only take place in terms of s 36.

limitation clause in section 36(1) to show that its failure to satisfy minimum core obligations is due to genuine lack of resources or capacity. In contrast to the approach of the UNCESCR, requiring proof from the State of its inability to fulfil minimum core obligations, the Constitutional Court simply accepts, without requiring evidence, that it would be impossible to give everyone access to basic services immediately.[1]

It could be argued that the Court has implicitly accepted the notion of minimum core through the component of the reasonableness test that requires short-term relief for those in desperate need.[2] However, an essential difference between the minimum core approach and the reasonableness test as developed in *Grootboom* is that reasonableness review does not appear to confer a right upon any individual to claim concrete goods and services from the State.[3] The right recognised in *Grootboom* is a right to demand that the State adopt a reasonable programme. Such a programme must include a component that ensures relief for a significant number of desperate people, although not all of them need receive it immediately.[4]

This distinction has practical implications for poor individuals or communities who want to use litigation as a tool to gain access to socio-economic rights. It means that they will not receive any direct individual relief, although they may indirectly benefit from a positive order handed down by the courts. As Scott and Alston point out, individual claimants 'will understandably wish to see something geared more to their own situation and are unlikely to wish to bring constitutional cases purely to serve as constitutional triggers for general policy processes'.[5]

Furthermore, individual claimants bear a heavy evidentiary burden to show that government's programmes are unreasonable. They will have to review a wide range of measures adopted by the State and to assess their reasonableness in the light of its available resources. In the context of section 26, litigants will

[1] In a country such as South Africa with its highly unequal distribution of income and resources, the State would be hard pressed to demonstrate that it is unable to afford ensuring that each person has essential survival levels of socio-economic rights. In fact it is arguable that State policy is committed to guaranteeing a core of certain basic services such as water to each person. See, for example, J de Visser, E Cottle & J Mettler 'Realising the Right of Access to Water: Pipe Dream or Watershed?' (2003) 7 *Law, Democracy & Development* 27, 33.

[2] Bilchitz claims that that Yacoob J succeeds in reaching the conclusion he does 'by implicitly building the idea of a minimum core obligation into the notion of reasonableness'. Bilchitz 'Teeth' (supra) at 498.

[3] See *Grootboom* (supra) at para 95: 'Neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand'. See also *TAC* (*supra*) at para 125. For a discussion of the implications of the Court's rejection of the concept of minimum core, see S Liebenberg 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?' 2002 6 *Law Democracy & Development* 159.

[4] See *Grootboom* (supra) at paras 65 and 68, and the critique by Bilchitz 'Teeth' (supra) at 499: 'This is one of the prime reasons for the protection of socio-economic entitlements in the form of rights. Collective goals cannot outweigh protections for the most basic interests of individuals.'

[5] Scott & Alston 'Transnational Context' (supra) at 254–255.

have to consider not only all aspects of the national housing programme, but also a wide range of social programmes adopted by the State.[1]

In contrast, under the minimum core approach, the burden of proof is in favour of the individual litigant seeking relief. The individual will establish a *prima facie* violation once she shows (1) that she lacks access to basic subsistence needs; and (2) that these basic needs (eg food) are neither physically nor economically accessible to her. The State then has the burden of showing that it has marshalled all available resources to satisfy its core obligations as a matter of priority.[2] In effect, it would be required to show that resource constraints make it impossible to provide access to essential levels of socio-economic rights for those who are unable by themselves to secure such access.[3]

There are ample constitutional mechanisms to ensure that the minimum core does not impose unrealistic demands on the State. First the State may advance convincing reasons as to why it should not be required to fulfil the minimum core in the circumstances raised by a case. If the minimum core obligation is derived from the second subsections of sections 26 and 27, the State can rely on a genuine shortage of resources to show that it is impossible to fulfil this core obligation. As noted, the State also has a further opportunity in terms of section 36 to justify a limitation to its obligation to fulfil core entitlements.

Moreover, an acceptance of the concept of minimum core obligations does not require the Court to define in abstract the basket of goods and services that must be provided. Instead. it could define the general principles underlying the concept of minimum core obligations in relation to socio-economic rights and apply these on a case-by-case basis. This approach also implies that a Court need not prescribe in exacting detail, in every case, the precise services that must be rendered to remedy the violation. A Court could do what the High Court did in *Grootboom*. It could indicate the broad parameters of what is required to remedy the breach, while leaving a margin of discretion to the State to decide on the most appropriate means of fulfilling its core obligations.[4] In a situation of a community facing starvation. this discretion would allow the State to choose between, for example, cash grants, food vouchers or the direct delivery of food parcels to the affected community.[5]

[1] Among the measures that the Court indicated would be relevant in promoting access to housing were steps 'to make the rural areas of our country more viable so as to limit the inexorable migration of people from rural to urban areas in search of jobs': *Grootboom* (supra) at para 34. It also indicated that social assistance programmes put in place under s 27 'would be relevant to the State's obligations in respect of other socio-economic rights'. Ibid at para 36.

[2] GC 3 (supra) at para 10.

[3] See, for example, GC 12 (supra) at para 17.

[4] The High Court did this through the medium of a supervisory order: *Grootboom* (supra) 291– 294.

[5] Both s 38 and s 172(1)*(b)* vest the courts with a wide discretion to formulate appropriate remedies and to make any order that is 'just and equitable'. Practical obstacles to providing immediate relief can thus be dealt with through formulating an appropriately flexible remedy, eg a supervisory order. For a discussion see Bilchitz of the application of a temporary suspension order in the context of minimum core obligations, 'Laying the Foundations' (supra) at 18–19.

(iv) *A future role for minimum core obligations?*

As we have seen, the only role envisaged by the Court for minimum core obligations is as a factor in assessing the reasonableness of government measures.[1] This possible role of the minimum core does not relieve individuals of the formidable burden of establishing the unreasonableness of the State's social programmes, nor does it necessarily entitle them to direct individual relief. Nonetheless it does provide an important opportunity for asserting minimum core obligations as essential components of a reasonable government programme.

Supporters of the minimum core obligation could also argue that a failure to fulfil minimum core socio-economic rights obligations renders a government programme *prima facie* unreasonable. The burden would then shift to the State to show why a failure to fulfil core obligations is not unreasonable. This would go some way to improving the practical justiciability of socio-economic rights for disadvantaged groups.

(f) Opting for reasonableness review

(i) Soobramoney: *The standard of rationality*

Having dismissed the appellant's claim under section 27(3), the Court in *Soobramoney* proceeded to consider his claim under section 27(1)*(a),* read with (2).[2] The Court indicated that a large margin of discretion would be given to the setting of budgetary priorities by the provincial government, and the 'difficult decisions' made by the hospital administrators in the context of limited resources:

> A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibilities it is to deal with such matters.[3]

It held that there was no suggestion that the guidelines drawn up by the hospital authorities for determining which patients qualified for dialysis treatment were unreasonable, or that they had not been applied 'fairly and rationally' in the applicant's case.[4] The Court thus declined to order the provision of dialysis treatment.

This result heralded the Court's adoption of a model of reasonableness review in respect of socio-economic rights' claims under section 27 (and, by implication, section 26).[5] However, the real dispute was not whether the medical authorities

[1] *Grootboom* (supra) at para 33. See also *TAC* (supra) at para 34.
[2] *Soobramoney* (supra) at para 22.
[3] *Soobramoney* (supra) at para 29.
[4] Ibid at para 25.
[5] This model of review is similar to the one proposed by Etienne Mureinik in his seminal article in the *SAJHR* arguing for the inclusion of socio-economic rights in the Bill of Rights. See: 'Beyond a Charter of Luxuries' (supra) at 472-474. According to Danie Brand, this amounts to a 'means-end justificatory model' which asks the basic question whether a particular policy or programme can be justified and 'it will be justified if it is reasonably related to the constitutionally prescribed goal of providing access to' the various socio-economic rights. Within this justificatory model, the Court may use a different 'standard of scrutiny' to interrogate the link between the policy measure and the goal. Thus, in *Soobramoney,* he argues that the standard used was one of simple rationality: the court 'simply asked whether the policy was rationally conceived and applied in good faith.' D Brand 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence or "What are Socio-Economic Rights for?" ' in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2004) 33 at 40.

had devised rational guidelines for rationing access to the dialysis treatment that was currently available, but whether sufficient funds had been allocated to provide dialysis treatment to those persons in the appellant's position.[1] A key factor in the Court's reasoning was clearly the degree of interference in social and budgetary policies that an order requiring the State to provide dialysis treatment to the applicant and to all other persons similarly situated would require. The principle would have to be applied not only to all persons suffering from chronic renal failure, but also 'to all patients claiming access to expensive medical treatment or expensive drugs'.[2] This in turn would require the health budget 'to be dramatically increased to the prejudice of other needs which the State has to meet'.[3] While indicating that a wide latitude would be afforded to the State in setting its social and budgetary priorities, scant guidance was provided on the standard of 'rationality review' to be applied and the nature of the circumstances in which the Court would be prepared to intervene.[4] While *Soobramoney* judgment was critiqued for the thinness of its analysis, few took issue with the ultimate finding of the Court that there was no universal right to kidney dialysis treatment under present conditions.[5]

(ii) Grootboom: *Developing the principles of 'reasonableness review'*

The High Court in *Grootboom* held that there was no violation of section 26. According to the court, the respondents had produced 'clear evidence' of a 'rational' housing programme 'designed to solve a pressing problem in the context of scarce financial resources'.[6] It went on, however, to decide in favour of the applicants on the basis of the unqualified right of children to shelter in section 28(1)*(c)*.[7]

On appeal, the Constitutional Court decided the case on the basis of section 26. Having rejected the notion of a minimum core obligation, the Constitutional Court pronounced that the relevant inquiry with regard to the positive duties imposed by section 26 is whether the legislative and other measures taken by the State to realise the rights are reasonable.[8] It emphasised that reasonableness

[1] *Soobramony* (supra) at para 23.
[2] Ibid at para 28.
[3] Ibid.
[4] For, example, classic rationality review generally requires that the Court do no more than inquire whether the relevant policy or legislation bears a rational connection to a legitimate government purpose. This is the standard applied in relation to the first stage of the discrimination inquiry under section 9(1) of the Final Constitution: see *Harksen v Lane* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at paras 50-53.
[5] See, for example: D Moellendorf 'Reasoning about Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims' (1998) 14 *SAJHR* 327 ('Reasoning about Resources'); Scott & Alston 'Transnational Context' (supra) at 233-256. For a discussion of the application of the right to life in the *Soobramoney* judgment, see M Pieterse 'A Different Shade of Red: Socio-Economic Dimensions of the Right to Life in South Africa' (1999) 15 *SAJHR* 372, 380–385.
[6] *Grootboom I* (supra) at 286H–I. The High Court relied on the *Soobramoney* judgment in support of its application of the rationality review standard.
[7] See § 33.7 infra (on children's socio-economic rights).
[8] *Grootboom* (supra) at para 33.

review does not entail a court substituting its view as to what constitutes a reasonable measure to realise socio-economic rights. Government has the latitude to adopt any particular policy choice it deems fit provided it meets the requirement of reasonableness.[1]

The Court proceeded to flesh out the standard of reasonableness to be applied in assessing the State's compliance with its positive obligations to realise socio-economic rights. It identified a number of factors that it would consider in reviewing the reasonableness of a government programme in the context of socio-economic rights:

1. The programme must be a comprehensive and co-ordinated one, which clearly allocates responsibilities and tasks to the different spheres of government and ensures that 'the appropriate financial and human resources are available'.[2] Although each sphere of government is responsible for implementing parts of the programme, national government has the overarching responsibility for ensuring that the programme is adequate to meeting the State's constitutional obligations.[3]
2. The programme 'must be capable of facilitating the realisation of the right'.[4]
3. Policies and programmes must be reasonable 'both in their conception and their implementation'.[5]
4. The programme must be 'balanced and flexible and make appropriate provision for attention to housing crises and to short-, medium- and long-term needs'. A reasonable programme cannot exclude 'a significant segment of society'.[6]
5. The programme must include a component that responds to the urgent needs of those in desperate situations. Thus a reasonable programme, even though it is statistically successful in improving access to housing, cannot 'leave out of account the degree and extent of the denial of the right they endeavour to realise'.[7] Elsewhere in the judgment more detail is provided on what this component requires. Thus the State must 'plan, budget and monitor the fulfilment of immediate needs and the management of crises'.[8] According to the Court:

[1] The Court wrote:

> A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.

Grootboom (supra) at para 41.

[2] Ibid at para 39.
[3] Ibid at para 40.
[4] Ibid at para 41.
[5] Ibid at para 42.
[6] Ibid at para 43.
[7] Ibid at para 44.
[8] Ibid at para 68.

> This must ensure that *a significant number* of desperate people in need are afforded relief, though not all of them need receive it immediately.[1]

The Court justified this central component of a reasonable programme on the basis that we value human beings and the Constitution requires us to treat everyone with 'care and concern'.[2] A society based on human dignity, equality and freedom 'must seek to ensure that the basic necessities of life are provided to all'.[3]

It was on the basis of this final criterion that the government's housing programme was faulted. After a comprehensive evaluation of the State's housing programme, the Court concluded that it represented 'a major achievement'[4] and 'a systematic approach to a pressing social need'.[5] However, it failed to meet the Constitutional test of reasonableness in that it was focused only on medium- and long-term objectives and did not include measures to provide short-term relief to those in desperate need.[6] The Court declared that the State housing programme did not comply with section 26(2):

> . . . in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.[7]

The Court did not leave the State entirely to its own devices in designing a suitable remedy. It made express reference to the Accelerated Managed Land Settlement Programme (which had been drafted, but not implemented by the Cape Metropolitan Council). It was cited as the kind of measure that would be deemed to be appropriate for this type of short-term relief.[8]

(iii) TAC: *Applying the 'reasonableness' test*

The TAC and the other applicants alleged that the State programme for preventing MTCT transmission of HIV was unreasonable in two respects. In the first place, it unreasonably prohibited the administration of Nevirapine at public hospitals and clinics outside the limited number of research and training sites (two in each province). Secondly, the State had failed to formulate and implement a comprehensive national programme to prevent or reduce MTCT of HIV. In granting the orders sought by the applicant in substantially the terms sought, the High Court (Transvaal Provincial Division) followed the reasoning in *Grootboom*.[9]

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[1] *Grootboom* (supra) at 68.
[2] Ibid at para 44.
[3] Ibid. See also para 83 of the judgment on the relationship between human dignity and assessing the reasonableness of the State's conduct in terms of s 26.
[4] Ibid at para 53.
[5] Ibid at para 54.
[6] Ibid at para 69.
[7] Ibid at para 99 (the order, 2*(c)*).
[8] Ibid at paras 99 (the order, 2*(b)*). See also paras 60–61, and 67.
[9] *Treatment Action Campaign & others v Minister of Health & others* 2002 (4) BCLR 356 (T) ('*TAC (High Court)*').

The High Court (per Botha J) held that the policy prohibiting the use of Nevirapine outside the 18 pilot sites in the public health sector constituted 'an unjustifiable barrier to the progressive realisation of the right to health care'.[1] It breached the negative duty to desist from impairing the right to health care.[2] The High Court further held that the State's current MTCT-prevention programme failed the reasonableness test as it did not constitute a comprehensive and co-ordinated plan to prevent or reduce the MTCT of HIV. The State was not prepared to give an 'unqualified commitment to reach the rest of the population in any given time or at any given rate'.[3] According to Botha J, a programme that is 'open-ended and that leaves everything for the future cannot be said to be coherent, progressive and purposeful'.[4]

A bold feature of the judgment is the rejection of the State's arguments that the availability of resources would determine whether there would be a further roll out of a national MTCT-prevention programme. According to Botha J, the obligation to formulate a coherent plan to roll out such a national programme existed independently of the availability of resources. Only once such a plan existed could 'will it be possible to obtain the further resources that are required for a nation-wide programme, whether in the form of a reorganisation of priorities or by means of further budgetary allocations'.[5] The availability of resources could only have an influence on *the pace* of the extension of the MTCT programme, not on the obligation to devise and implement such a plan.[6]

On appeal, the Constitutional Court considered and rejected the range of reasons advanced by the government for restricting the administration of Nevirapine to the research and training sites.[7] These justifications ranged from doubts about the efficacy of Nevirapine where 'a comprehensive package of care' could not be made available[8], the development of resistance to the drug, the drug's safety, to technical and administrative capacity and budgetary concerns.[9]

The Court found that the policy of restricting the provision of Nevirapine impacted seriously on a significant group of HIV-positive mothers and children who did not have access to the research sites. As they were too poor to purchase Nevirapine, they were effectively deprived of access to a 'simple, cheap and

[1] *TAC High Court* (supra) at 384E.

[2] Ibid. In this respect the Court applied the negative duties recognised in *Grootboom* (supra) at para 34. See § 33.5*(b)* above (the negative duty 'to respect' socio-economic rights).

[3] *TAC High Court* (supra) at 385D–E.

[4] Ibid at 385F.

[5] Ibid at 386C.

[6] Ibid at 386B–C.

[7] *TAC* (supra) at paras 48–66.

[8] This package would include counselling, provision of formula milk as a substitute for breastfeeding, antibiotic treatment, vitamin supplements, and monitoring, during bottle-feeding, the mother and children who have received Nevirapine. Ibid at para 49.

[9] Ibid at paras 51–66.

potentially life-saving medical intervention'.[1] This restrictive policy was unreasonable because it was inflexible[2] and did not take into account the needs of a particularly vulnerable group.[3] The Court also held that it was implicit that 'a policy of waiting for a protracted period before taking a decision on the use of Nevirapine beyond the research and training sites' was also unreasonable.[4] Government was thus ordered 'without delay' to 'remove the restrictions' that prevent the use of Nevirapine in the reduction of MTCT of HIV at public hospitals and clinics, and to 'permit and facilitate' its use.[5] It was specifically ordered to make the drug available for this purpose at hospitals and clinics where this is medically indicated, 'which shall if necessary include that the mother concerned has been appropriately tested and counselled'.[6]

In relation to the second prong of the attack on government policy (the failure to adopt and implement a comprehensive MTCT-prevention plan), the Court held that the rigidity of government's policy regarding the restrictive use of Nevirapine affected its whole policy on MTCT of HIV.[7] At the time of the commencement of the proceedings a comprehensive policy for testing and counselling HIV-positive pregnant women was in place, but it was not implemented uniformly.[8] The Court held that the training of counsellors should now include training for counselling on the use of Nevirapine. In addition, government was ordered to take reasonable measures to extend the testing and counselling facilities at public hospitals and clinics throughout the public health sector 'to facilitate and expedite' the use of Nevirapine for the purposes of reducing the risk of MTCT of HIV.[9]

Unlike the High Court, the Constitutional Court declined to make an order relating to the provision of formula milk. In the Court's view it raised 'complex issues', and there was not sufficient evidence to justify an order that formula feed 'be made available by the government on request and without charge in every case'.[10]

A welcome feature of the judgment is the addition of the requirement of transparency to the constitutional requirement of reasonableness.[11] It held that

[1] *TAC* (supra) at para 73.
[2] Ibid at para 80.
[3] The Court considered poverty to be an important indicator of the vulnerability of the group in question: 'There is a difference in the positions of those who can afford to pay for services and those who cannot. State policy must take account of these differences.' Ibid at para 70.
[4] Ibid at para 81.
[5] Ibid at para 135 (orders 3*(a)* and 3*(b)*).
[6] Ibid.
[7] Ibid at paras 82, 95.
[8] Ibid at para 90.
[9] Ibid at paras 95 and 135 (orders 3*(c)* and *(d)*).
[10] Ibid at para 128. The complexities referred to include the risks to the infant of using formula milk when the mother does not have easy access to clean water or the ability to bottle feed safely because of her personal circumstances.
[11] The Court reasoned 'Indeed, for a public programme such as this to meet the constitutional requirement of reasonableness, its contents must be known appropriately.' Ibid at para 123.

the enormous challenge that HIV/AIDS poses to all sectors of society could only be met if there is 'proper communication, especially by government'. In order for a programme to be 'implemented optimally' its contents must be made known to all stakeholders. In this context, the Court regretted the fact that national government and six provinces had not disclosed any programme to extend access to Nevirapine treatment to prevent MTCT of HIV.[1]

The *TAC* case illustrates how the *Grootboom* jurisprudence of reasonableness review can be used strategically to support a broader campaign to advance access to socio-economic rights. The TAC had the organisational resources and capacity to demonstrate the unreasonableness of government's policies relating to MTCT of HIV. They were able to produce an impressive array of expert medical, public health and economics evidence to support their case.

(iv) *Evaluating 'reasonableness review'*

Theunis Roux has observed that the standard of reasonableness review developed by the Court in *Grootboom,* although it incorporates 'means-end rationality' as a minimum requirement, is a stricter standard.[2] Although the Court will not require Government to adopt a particular social programme to give effect to socio-economic rights, it will embark on a substantive review of the measures taken by the State. Thus the Court will evaluate whether the programme is capable of facilitating the realisation of the right, whether it is both reasonably formulated and implemented, and whether it includes reasonable measures to provide immediate relief for those in desperate circumstances.[3]

In both *Grootboom* and *TAC* the outcome of the Court's exercise of its review function was that the State was required to extend social benefits to groups that were excluded from the relevant housing and health programmes. In *Grootboom*, the State's housing programme had to be modified to include reasonable measures to provide short-term relief for those in desperate need of land and housing. The State was opposed to making provision for people in desperate need on the basis that it 'would detract significantly from integrated housing development as

[1] *TAC* (supra) at para 123.

[2] T Roux 'Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court' (2003) 10 *Democratisation* (forthcoming) ('Legitimating Transformation').

[3] Danie Brand observes that taken together the factors referred to by the Court in *Grootboom* for assessing the reasonableness of a government programme require government to show 'a much stronger link between the policy at issue and its constitutionally mandated goal than in *Soobramoney*'. It narrows 'the range of policy options that it would be legitimate for government to choose from and thinks about the relative efficiency of different policy options'. Brand 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence' (supra) at 41.

defined in the [Housing] Act'.[1] In *TAC*, the State was required to take reasonable measures to expand a programme reducing MTCT of HIV, including the provision of Nevirapine, throughout the public health sector. As a result, the government had to amend its firmly held policy of confining the provision of Nevirapine to the limited number of test sites catering for only 10% of all births in the public sector.[2]

According to Roux, the reasonableness test developed by the Court in *Grootboom* 'undoubtedly requires the Court to substitute its view of what the Constitution requires — the inclusion of the excluded group — for that of the political branches'.[3] However, he goes on to observe that the test stops short 'of a full-blown proportionality test':

> The Court's assessment is thus not directed at such issues as whether the State might have adopted less restrictive measures in pursuing the programme in question, but at whether the claimant group has *an equal or better claim* to inclusion relative to other groups that *have* been catered to.[4]

In this way, Roux claims that the Court has struck a skilful balance in its socio-economic rights jurisprudence between the deferential standard of means-end rationality, and the more intrusive standard of a full-blown proportionality test.[5]

It is debatable whether the description of 'relative inclusion' best describes the Court's jurisprudence in relation to the positive duties imposed by sections 26 and 27. It suggests that the State has already adopted a policy to extend a particular socio-economic right, which includes some, but excludes others. This is consistent with the facts of *Grootboom* where the State had adopted a housing policy geared towards advancing access to housing for all in the medium- to long-term. The programme was faulted on the basis that it excluded those in desperate need from short-term relief. However, in *TAC*, an important element of the applicant's claim was that the government had not adopted a comprehensive national programme to prevent or reduce MTCT of HIV.[6] The relief sought was not solely directed at the inclusion of an excluded group from an otherwise coherent policy, but rather that Government adopt such a policy. This is in effect what the Court ordered the government to do, although it stopped short of requiring all elements of a comprehensive MTCT-prevention programme as requested by the TAC.[7]

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[1] *Grootboom* (supra) at para 64.

[2] *TAC* (supra) at para 62.

[3] Roux 'Legitimating Transformation' (supra) at 7.

[4] Ibid. As the Court wrote in *TAC* of Government's MTCT policy: 'We have held that its policy fails to meet the constitutional standards because it excludes those who could reasonably be included where such treatment is medically indicated to combat mother-to-child transmission of HIV.' *TAC* (supra) at para 125.

[5] The standard of proportionality, which is applied under the general limitations clause (s 36), permits the court in reviewing the justifiability of limitations to the rights in the Bill of Rights to consider 'less restrictive means' available to the State to achieve its purposes.

[6] See *TAC* (supra) at para 8.

[7] As noted above, the order includes extending testing, counselling and training facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of Nevirapine for reducing MTCT of HIV. However, it excludes the provision of formula feed as ordered by the High Court.

One can envisage any number of situations where the central issue will not be the exclusion of significant groups from an otherwise coherent social programme, but rather the failure of the State to adopt such a programme. In these cases, the aim of litigation will be to seek to compel Government to initiate such a programme. It is important to bear in mind that this does not automatically entail the Court prescribing particular policy choices to Government. It has remedial mechanisms at its disposal to allow Government an appropriate measure of discretion in its choice of policies to remedy the unconstitutionality.[1]

Consistent with the paradigm of reasonableness review, the *TAC* Court cautioned that its findings did not mean 'that everyone can immediately claim access to such treatment'.[2] The State's duty was to make 'every effort' to extend access to this treatment 'as soon as reasonably possible'.[3]

The reasonableness test has been criticised for being vague and offering inadequate guidance to the State on its obligations in respect of socio-economic rights. According to Bilchitz, the vagueness of the reasonableness test is partially a consequence of the failing to integrate the first and second subsections of sections 26 and 27. The reasonableness enquiry focuses entirely on the second subsection without providing a role for the first subsection in terms of defining the content of the right concerned.[4] Bilchitz suggests that the Court should first determine the ambit or content of the right. Only then 'should it engage in the enquiry of determining whether the measures adopted by the government were reasonable methods of progressively realising the right'.[5] He persuasively argues that an application of the reasonableness test in the context of a particular case, requires 'a prior understanding of the general obligations government is under by virtue of having to realise the rights in question'.[6]

I have argued that the Court does not escape the interpretative difficulties of clarifying the State's obligations in relation to socio-economic rights by rejecting the notion of minimum core obligations in favour of reasonableness review. The review standard of 'reasonable measures' endorsed by the Court does not readily lend itself to easy definition or application. For example, in the context of high

[1] Davis J observed in *Grootboom I*: 'Sections 38 and 172 of the Constitution empower a court to issue an order which identifies the violation of a constitutional right and then defines the reform that must be implemented while affording the responsible State agency the opportunity to choose the means of compliance.' *Grootboom I* (supra) at 292H-I.

[2] *TAC* (supra) at para 125.

[3] Ibid.

[4] Bilchitz 'Laying the Foundations' (supra) at 9.

[5] Ibid.

[6] Ibid at 10.

levels of poverty, it is not easy to identify those groups who should qualify for short-term relief because of their desperate need and intolerable living conditions.[1]

A better approach would be to recognise that the right in the first subsection of sections 26 and 27 gives rises to two types of duties that are delineated in the second subsection. First, the State must ensure that everyone has access to essential levels of goods and services (the minimum core obligation). This requirement would give individuals who are unable to gain access to these essential needs an enforceable claim against the State for basic forms of material assistance. Second, the State must over time, improve the quality of socio-economic rights to which individuals have access. In respect of this second-tier duty, the standard of reasonableness review would be appropriate given that issues of survival will not be at stake.[2]

As I noted earlier, despite the Court's rejection of the minimum core concept as a source of individual entitlement to subsistence requirements, it remains possible to argue that a minimum core of a particular service should be taken into account in assessing the reasonableness of the measures adopted by the State.[3]

(g) Progressive realisation

The second subsection of sections 26 and 27 refers to the duty on the State to 'take legislative and other measures, within its available resources, to achieve the progressive realisation' of the relevant rights. The concept of 'progressive realisation' was clearly borrowed from article 2 of the International Covenant on Economic, Social and Cultural Rights. As the Court implicitly acknowledged in *Grootboom,* 'progressive realisation' has a dual function.[4] It acts as a limitation on the pace of fulfilment by the State of its positive duties in that it recognises that the full realisation of socio-economic rights cannot occur immediately.[5] At the same time, it imposes certain duties of conduct on the State. The State must actually take 'legislative and other measures' towards progressively realising the rights. The Court wrote:

> . . . accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.[6]

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[1] For a further discussion of this issue in the context of the right to social assistance: see S Liebenberg 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) 17 *SAJHR* 232, 234–237 ('Social Assistance').

[2] This approach is similar to that adopted by the *amici* in *Grootboom* and the one proposed by Bilchitz 'Teeth' (supra) at 493 and Bilchitz 'Laying the Foundations' (supra) at 11– 13.

[3] See § 33.5*(e)*(iv) supra (A future role for minimum core obligations?).

[4] See further in this regard, Liebenberg 'Social Assistance' (supra) at 252.

[5] *Grootboom* (supra) at para 45.

[6] Ibid. According to the UNCESCR, progressive realisation 'imposes an obligation to move as expeditiously and effectively as possible towards the goal of full realisation of the rights in the Covenant'. GC 3 (supra) at para 9.

Government's progress in dismantling the range of obstacles that impede access to socio-economic rights will thus be a factor in assessing the reasonableness of its programmes. The Court did not refer to a possible qualitative interpretation of 'progressive realisation'. This qualitative dimension would require not only that a greater number of people have access to housing over time, but also that there are progressive improvements in the standard of housing to which disadvantaged groups have access. A qualitative dimension is included in the scope of the right through the phrase 'adequate housing' in section 26(1).[1]

Proponents of minimum core obligations argue that 'progressive realisation' should not mean 'that some receive housing now, and others receive it later; rather, it means that each is now entitled to basic housing provision, which the government is required to improve gradually over time'.[2]

(i) *A national strategy and plan of action*

The UNCESCR has repeatedly emphasised the importance of formulating a transparent, participatory national strategy and plan of action for the progressive realisation of the relevant socio-economic rights. Any such plan should include targets, indicators and benchmarks, which enable the public, institutions such as Human Rights Commissions, and Government itself to monitor progress. Particular attention should be given to vulnerable or marginalised groups in the process of formulating the plan and its implementation.[3] The duty to formulate a co-ordinated, comprehensive housing programme was the first feature of a reasonable programme in terms of section 26 identified by the Constitutional Court in *Grootboom*.[4] It is also implicit in the Constitutional Court's approval of most

[1] The *amici* in *Grootboom* argued that the phrase progressive realisation 'imposes a duty to adopt an incremental approach both as to numbers, and as to what is provided'. Heads of Argument (supra) at para 58.2. The UNCESCR has identified a number of qualitative factors to be taken into account in assessing the 'adequacy' of housing provision. See GC 4 (supra) at para 8.

[2] Bilchitz 'Teeth' (supra) at 493.

[3] See, for example, GC 4 (The right to adequate housing) (supra) at para 12; GC 12 (The right to adequate food) (supra) at paras 21– 30; GC 14 (The right to the highest attainable standard of health) (supra) at para 43*(f)* [Here the duty to formulate a national health plan is regarded as one of the core obligations of States parties]; GC 15 (The right to water) (supra) at paras 37*(f),* 46–54. The latter two General Comments also refer to the importance of 'framework legislation' 'as a major instrument' in the implementation of the relevant national strategy for realising the right: GC 12 (supra) at para 29; and GC 15 (supra) at para 50. See, in this regard, *Grootboom* (supra) at para 40. On the role of targets, indicators, benchmarks in monitoring the progressive realisation of socio-economic rights, see GC 15 (supra) at paras 53–5. See also: K Tomaševski 'Indicators', A Eide 'The Use of Indicators in the Practice of the Committee on Economic, Social and Cultural Rights'; and A Eide 'Obstacles and Goals to be Pursued' in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (2nd Revised Edition) at 531, 545 and 553 respectively. See also Leckie 'Indivisibility' (supra) at 93–94.

[4] *Grootboom* (supra) at paras 39–41. The Court wrote: 'The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to housing within the State's available means. The programme must be capable of facilitating the realisation of the right.' Ibid at para 41.

aspects of the national housing programme in *Grootboom*.[1] The High Court judgment in *TAC* endorsed the duty of the State to formulate a comprehensive, coherent and time-bound plan for a roll-out of the MTCT- prevention programme.[2] The Constitutional Court also engaged the question whether the government had a comprehensive plan to combat MTCT of HIV.[3]

The duty on the State to formulate a transparent national plan of action for the realisation of socio-economic rights promotes public accountability and participation in the realisation of socio-economic rights. It also lays the foundation for targeted, purposeful action by the State towards the realisation of these rights.

(ii) *Retrogressive measures*

A significant aspect of the *Grootboom* judgment is the Court's endorsement of the views of the UNCESCR relating to an implicit duty on the State to avoid retrogressive measures.[4] According to the Committee:

> . . . any deliberate retrogressive measures...would require the most careful consideration and would need to be *fully justified* by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources' [emphasis added].[5]

The General Comment suggests that measures that have the effect of reducing pre-existing levels of access to socio-economic rights are *prima facie* incompatible with the Covenant and require justification by the State.[6] In the South African context such justification would most appropriately take place in the context of the general limitations clause.[7] Scott and Macklem argue that this approach:

> . . . creates a kind of ratchet effect in that lowering the fulfilment level of a right is presumptively prohibited once that level has been achieved. Existing levels of provision can thereby be used as a baseline, adding further precision to the judicial task.[8]

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[1] The Court observed: 'Allocation of responsibilities and functions has been coherently and comprehensively addressed. The programme is not haphazard but represents a systemic response to a pressing social need.' *Grootboom* (supra) at para 54. The shortcoming of the programme, as has been discussed, was the failure to include short-term measures of relief for those in desperate need.

[2] See *TAC* (supra) at 385C–J and 387C–F (paras 3 and 4 of the order).

[3] *TAC* (supra) at paras 82–89. See also para 123.

[4] *Grootboom* (supra) at para 45.

[5] GC 3 (supra) at para 9. The Court in *Grootboom* wrote: 'The meaning ascribed to the phrase ['progressive realisation' by the Committee] is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived.' Ibid.

[6] The Maastricht Guidelines on Violations of Economic Social and Cultural Rights (1998) 20 *Human Rights Quarterly* 691-705 give the following examples of violations under the ICESCR: *'(e)* The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed; *(g)* The reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone' (paras 14*(e)* and *(g)*). The Maastricht Guidelines are non-binding, but influential, interpretations of the obligations imposed by the ICESCR adopted by a group of experts in international law.

[7] See § 33.10 infra (Limiting socio-economic rights).

[8] Scott and Macklem 'Ropes of Sand' (supra) at 80.

An example of a possible retrogressive measure would be an amendment to the regulations under the Social Assistance Act, 1992, raising the eligible age limit for the child support grant from 7 years to 10 years.[1] This change would have the effect of reducing the number of impoverished children entitled to the child support grant. It is not clear whether a similar burden of justification would apply to measures that reduce the quality or level of benefit that people enjoy.[2]

(h) Within available resources

The State's positive obligations to fulfil the rights are qualified by reference to its 'available resources' in sections 26(2) and 27(2). Like 'progressive realisation', this phrase imposes both a duty on the State and allows the State to raise a defence to a claim alleging that its progress in realising the rights is unreasonable. The Court in *Grootboom* indicated that a reasonable programme to realise socio-economic rights must 'ensure that the appropriate human and financial resources are available'.[3] But the resources available for social programmes will be an important factor in assessing the reasonableness of the measures adopted by the State. This means that:

> . . . both the content of the obligation in relation to the rate at which is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.[4]

Two interrelated questions flow from this conclusion. First, how will the

[1] The child support grant is a social assistance benefit. The right of access to social assistance is protected in FC s 27(1)*(c)* read with 27(2).

[2] For example, reducing the quantum of the child support grant from R160 per child to R100 per child while not altering the age cohort. This may depend on the recognition of a qualitative dimension to 'progressive realisation' as argued for above. See § 33.5(9) above.

[3] *Grootboom* (supra) at para 39. Later in the judgment, the Court says that the effective implementation of programmes 'requires at least *adequate budgetary support* by national government'. A nation-wide housing programme must recognise immediate needs and this requires national government 'to plan, *budget* and monitor the fulfilment of immediate needs and the management of crisis' [emphasis added]. Ibid at para 68.

[4] *Grootboom* (supra) at para 46. Further on, the Court writes:

> There is a balance between goals and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.

Ibid. In *Soobramoney*, the Court indicated that as the rights in sections 26 and 27 are resource dependent, 'the corresponding rights themselves are limited by reason of the lack of resources'. *Soobramoney* (supra) at para 11.

availability of resources be assessed?[1] Will the Court's scrutiny be confined to pre-existing budgetary allocations by the relevant spheres of government or will it be prepared to examine the policy decisions underlying budgetary allocations?[2] Second, how stringently will the Court scrutinise the State's allegations that the relevant social programme is reasonable in the light of its resource constraint?

In *Soobramoney*, the Court considered the claim in terms of section 27(1) and (2) within the context of the budget of the provincial health department in KwaZulu-Natal.[3] Nowhere did the Court suggest that it would be prepared to scrutinise the budget allocation of health resources by the national sphere of government to the provincial sphere.[4] Moreover, as discussed above, the Court applied a very deferential standard of rationality review in respect of the political and medical decisions at issue in the case.[5] However, as Darryl Moellendorf has pointed out, if the scope of the rights in sections 26 and 27 is determined by the State's pre-existing budgetary choices, socio-economic rights could provide no meaningful guide to policy.[6]

As discussed above, the High Court in *TAC* held that the duty to draw up a coherent, nationwide plan to advance socio-economic rights exists independently of resource considerations.[7] The Constitutional Court in *TAC* found that resource constraints were not an issue in relation to the first leg of the challenge — the restriction on prescribing Nevirapine in public health facilities where capacity existed to do so. The manufacturers of Nevirapine had offered to make it available to the government free of charge for a period of five years for the purposes of reducing the risk of MTCT of HIV.[8] Government's concern related to the costs of providing the infrastructure and training for the testing and counselling facilities as well as other elements of the optimal package of treatment for HIV-positive pregnant women and their new-born infants.[9] The Court found that

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[1] As Darryl Moellendorf observes:

> 'Available resources' is, however, ambiguous as it has both narrow and broad senses. It may mean those resources that a ministry or department has been allotted and has budgeted for the protection of the right. Alternatively, it may mean any resources that the State can marshal to protect the right. These are the two extreme senses of the terms. To be sure, between the narrowest interpretation and the broadest lie other senses.

'Reasoning about Resources' (supra) at 330.

[2] This issue is relevant, for example, to claims against local and provincial governments relating to those socio-economic rights falling within their functional areas of competence. As s 214(1)*(a)* of the Constitution indicates, national government has an important role in ensuring 'the equitable division of revenue raised nationally among the national, provincial and local spheres of government'.

[3] This is evident, for example, from *Soobramoney* (supra) at paras 24 and 29.

[4] This was perhaps precluded by the fact that the only respondent was the provincial Minister of Health, KwaZulu-Natal. National government was accordingly not a party to the proceedings.

[5] See § 33.5*(f)*(i) above (*Soobramoney*: The standard of rationality).

[6] See Moellendorf 'Reasoning about Resources' (supra) at 332: 'A broader sense of "available resources" must be employed if socio-economic rights are to guide policy rather than depend on it.'

[7] *TAC High Court* (supra) at 386B–C. See also § 33.5*(f)*(iii) above (*TAC*: Applying the reasonableness test). This is consistent with the views of the UNCESCR: 'The obligation to monitor the extent of realisation, or more especially of the non-realisation, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.' GC 3 (supra) at para 11.

[8] *TAC* (supra) at para 19.

[9] Ibid at para 49.

these resource-related concerns were relevant to the provision of a comprehensive package of care, but not to the provision of Nevirapine at those hospitals and clinics where testing and counselling facilities were *already* in place. Accordingly, it found that its order on this aspect of the claims 'will not attract any significant additional costs'.[1] The uncontested nature of the availability of resources was clearly a significant factor in the Court's finding that the State's blanket policy to limit Nevirapine to research and training sites was unreasonable.[2]

In relation to extending the MTCT programme, the Constitutional Court found that although a comprehensive policy for testing and counselling of HIV-positive pregnant women existed, the policy was not implemented uniformly.[3] The Court also found that it would not be a major burden for government to extend the training of counsellors based at public hospitals and clinics (other than the research sites) to include the use of Nevirapine in reducing the risk of MTCT of HIV.[4] The provincial health authorities responsible for implementing the testing and counselling programme claimed that they faced both financial and capacity constraints in extending the programme. The TAC and the other respondents argued that it was cost-effective to implement a comprehensive policy for the use of Nevirapine, which included testing and counselling. The TAC argued that such a policy would result in 'significant savings' for the State in later years, as it would reduce the number of HIV-positive children who would have to be treated in the public health system.[5]

The Court took the view that it was not necessary to deal with the cost-effectiveness argument, because there had been a significant change in conditions since the proceedings were implemented. Some provinces – such as Gauteng and KwaZulu-Natal — were in the process of expanding their provision of Nevirapine at public health facilitates beyond the test sites.[6] According to the Court, these developments demonstrated that substantial progress could be made 'provided the requisite political will is present'.[7] Moreover, the Court had been informed during the hearing of the appeal that the government has made 'substantial additional funds' available for the treatment of HIV, including the reduction of MTCT.[8] The Court drew the unassailable conclusion that budgetary

[1] *TAC* (supra) at para 71.
[2] The Court wrote:
> A potentially lifesaving drug was on offer and where testing and counselling facilities were available it could have been administered *within the available resources* of the State without any known harm to mother or child. [Emphasis added.] *TAC* (supra) at para 80.

[3] Ibid at para 90.
[4] Ibid at paras 83 and 95. Its' order on this aspect is in sub-para 3*(c)* thereof (at para 135).
[5] Ibid at para 116.
[6] Ibid at para 118.
[7] Ibid at para 119.
[8] Ibid at para 120.

constraints were 'no longer an impediment', and that it should now 'be possible to address any problems of financial incapacity that might previously have existed'.[1] The State was thus required to 'take reasonable measures to extend the testing and counselling facilities to hospitals and clinics throughout the public health sector beyond the test sites to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV'.[2]

We can only speculate as to how the Court would have dealt with the resource constraints argument had the positive political developments that occurred just prior to the hearing not occurred. A serious engagement with the cost-effectiveness arguments raised by the TAC would have drawn the Court into a more direct evaluation of resource allocation decisions, a form of review the Court is clearly reluctant to undertake.

Although sections 26 and 27 clearly allow resource constraints to be raised by the State in defending the reasonableness of its measures, the courts should not simply accept unsubstantiated allegations regarding resource shortages. The Court's role is to scrutinise the validity of this defence. As Justice O' Regan has argued in relation to the *Soobramoney* decision:

> . . . government is under an obligation to show that it acted *bona fide* and rationally in the circumstances. This carries an evidentiary burden. State officials are required to place evidence before the Court of their policy regarding the rationing of scarce dialysis equipment and their budgets.[3]

The courts are unlikely to be receptive to a direct challenge to Government's macro-economic and budgetary decision-making processes. However, both the *Grootboom* and *TAC* decisions illustrate that the orders of the Constitutional Court enforcing socio-economic rights may have indirect budgetary implications. The Court in *TAC* reasoned that while:

> [D]eterminations of reasonableness may in fact have budgetary implications, [they] are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.[4]

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[1] *TAC* (supra) at para 120.

[2] Ibid at para 95. Its order on this aspect is in sub-para 3*(d)* thereof (ibid at para 135).

[3] O'Regan 'Introducing Socio-Economic Rights' (1999) 1 (4) *ESR Review* 2.

[4] *TAC* (supra) at para 38. Roux makes the following comments on the above quote from the *TAC* decision:

> According to this sense of things, the motive behind the intrusion into politics is all-important. If the motive for 'rearranging budgets' is to substitute the Court's view on how resources should be allocated for that of the political branches, the intrusion cannot be justified. However, if the primary motive is rights-enforcement, the political branches should (as a matter of constitutional law) and will (as a matter of practical politics) accept the resource-allocation effects of the Court's decision as an inevitable and necessary element of the constitutional compact.

'Legitimating Transformation' (supra) at 9 (unpublished manuscript on file with author).

33.6 Defending State Assistance to Vulnerable Groups

The principles established in *Grootboom* can also assist the State to defend coming to the aid of vulnerable groups against challenges by powerful private groups. This is illustrated by the case of *Minister of Public Works & others v Kyalami Ridge Environmental Association & others*.[1] In defending its decision to establish a transit camp to house people from Alexandra Township who had been displaced by severe floods, the State relied on its constitutional obligation (as affirmed in *Grootboom*) to assist people in crisis situations.

A neighbouring residents' association challenged this decision on the grounds that there was no legislation authorising the government to establish the transit camp and that the decision was unlawful in that it contravened a town planning scheme as well as land and environmental legislation. The Constitutional Court held that none of the laws relied on by the association excluded or limited the government's common law power to make its land available to flood victims pursuant to its constitutional duty to provide them with access to housing.[2]

The Court held that the fact that property values may be affected by a low cost housing development on neighbouring land is a factor that is relevant to the way in which government discharges its duty to provide everyone with access to housing. However, in the circumstances of the present case this factor did not outweigh the constitutional obligation of the government to address the needs of homeless people and to use its own property for that purpose.[3]

Finally, procedural fairness did not require government to do more in the circumstances than it had undertaken to do: namely to consult with the Kyalami residents in an endeavour to meet to meet any legitimate concerns they might have as to the manner in which the development will take place. The Court observed:

> To require more, would in effect inhibit the government from taking a decision that had to be taken urgently. It would also impede the government from using its own land for a constitutionally mandated purpose, in circumstances where legislation designed to regulate land use places no such restriction on it.[4]

33.7 Children's Socio-Economic Rights

The children's socio-economic rights in section 28(1)*(c)* are neither described as a right of 'access to' the relevant rights, nor are they qualified in a similar form to the second subsections of sections 26 and 27.[5] This absence of qualification has

[1] 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) ('*Kyalami Ridge*').
[2] *Kyalami Ridge* (supra) at para 51.
[3] Ibid at para 107.
[4] Ibid at para 109.
[5] Section 28(1)*(c)* reads: 'Every child has the right . . . to basic nutrition, shelter, basic health care services and social services.'

led many commentators (including this author) to conclude that these rights imposed a direct duty on the State to ensure that those children who lacked these basic necessities of life are provided with them without delay. The commentators inferred that the scope of the rights was confined to a rudimentary or 'basic' level of the various social goods referred to in section 28(1)*(c)*.[1] The more direct nature of the duty owed by the State to children was justified on the basis that children living in poverty are particularly vulnerable and not in a position to meet their own socio-economic needs. Arguments relating to resource and capacity constraints as a justification for not meeting these basic obligations towards children were appropriately raised in terms of section 36. This interpretation gives rise to the difficulty that vulnerable children have a direct claim to material assistance under the Constitution while equally vulnerable adults (for example, persons living with disabilities and the elderly) do not. As discussed above, the *amici* in *Grootboom* attempted to resolve this difficulty by the recognition of a minimum core obligation owed to everyone in need under sections 26 and 27. On this reading, section 28(1)*(c)* is a specific manifestation of the minimum core obligations under sections 26 and 27. Its purpose is to place beyond doubt the core socio-economic entitlements due to vulnerable children.[2]

Having assessed the State's housing programme in terms of section 26, the Constitutional Court in *Grootboom* considered the applicability of the right of children to shelter in terms of s 28(1)*(c)*. According to the Court, the 'carefully constructed constitutional scheme for the progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the State on demand'.[3] It went on to

[1] See, for example, P de Vos 'The Economic and Social Rights of Children and South Africa's Transitional Constitution' (1995) 10 (2) *SA Public Law* 233, 255 (although not identical, s 30(1)*(c)* of the Interim Constitution is in similar form to s 28(1)*(c)* of the Final Constitution); De Vos 'Pious Wishes' (supra) at 87–88; Liebenberg 'Socio-Economic Rights' (supra) at 41–43.

[2] See § 33.5*(e)*(i) above (discussion of *amici's* minimum core argument in *Grootboom*). For a similar approach, see: G van Bueren 'Alleviating Poverty Through The Constitutional Court' (1999) 15 *SAJHR* 52, 57. According to Scott & Alston, 'While such core content would exist by necessary implication within s 26 were s 28 not there, s 28 makes certain that there is no chance of the core entitlements of children being lost in the interpretative evolution of the Bill of Rights'. 'Transnational Context' (supra) at 260. The High Court in *Grootboom* adopted a different approach by holding that a joint reading of ss 28(1)*(b), (c)* and (2) creates a derivative right for parents to shelter with their children. The Court reasoned as follows:

> As the family must be maintained as a unit parents of the children who are granted shelter should also be entitled to such shelter. The bearer of the right now becomes the family. The justification for such a conclusion is that a failure to recognise the parents would prevent the children from remaining within the family fabric. This would penalise the children and indeed their parents who, to a considerable extent owing to the ravages of apartheid, are unable to provide adequate shelter for their own children.

Grootboom I (supra) at 289C–D.

As argued above, the difficulty with this approach is that adults without children (no matter how vulnerable) are not entitled to direct assistance.

[3] *Grootboom* (supra) at para 71.

hold that section 28(1)*(b)* and *(c)* must be read together. The former provision defines those responsible for giving care, while the latter 'lists various aspects of the care entitlement'.[1] Thus the primary duty to fulfil a child's socio-economic rights rests on that child's parents or family:

> It follows that section 28(1)*(c)* does not create any primary State obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families.[2]

This statement implies that a direct entitlement by children to the provision of the socio-economic rights in section 28(1)*(c)* only arises when children lack family care: that is, if they have been orphaned, abandoned or removed from their family's care. As the children in *Grootboom* were in the care of their parents or families, they were not entitled to any relief in terms of section 28(1)*(c)*.[3]

The Court held that the State nevertheless incurred certain obligations towards children who are being cared for by their parents or families. In the first place, the State is obliged to 'provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28'.[4] This obligation would 'normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse of children mentioned in section 28'.[5] Secondly, the Court referred to the State's obligation under sections 25, 26 and 27 to provide access to the relevant socio-economic rights protected by these sections 'on a programmatic and co-ordinated basis, subject to available resources'.[6] It mentioned the provision of maintenance grants and other material assistance to families in need as '[o]ne of the way in which the State would meet its section 27 obligations'.[7]

The Court's reasoning suggests that the socio-economic claims of children living in families who are too poor to provide them with the basic necessities of life fall to be determined in terms of sections 26 and 27. As previously noted, these sections do not impose any direct obligation on the State to provide socio-economic goods and services to anyone. They only require a qualified obligation to adopt a reasonable programme.[8] The Court's analysis illustrates quite starkly its

[1] *Grootboom* (supra) at para 76.
[2] Ibid at para 77.
[3] Ibid at para 79.
[4] Ibid at para 78.
[5] Ibid.
[6] Ibid.
[7] Ibid.
[8] For a discussion of the implications of such reasoning, see: J Sloth-Nielsen 'The Child's Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*' (2001) 17 *SAJHR* 210, 227–230 ('The Child's Right').

reluctance to interpret the socio-economic rights provisions in the Constitution to invite individual claims for direct material assistance from the State.[1]

In *TAC*, the Court clarified that the State's duties to provide children's socio-economic rights were not only triggered when children were physically separated from their families. Thus children are entitled to the protection contemplated by section 28 'when *the implementation of the right to parental or family care is lacking*' [my emphasis].[2] The Court went on to say:

> Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the State to make health care services available to them.[3]

This approach suggests that the State's direct duties to provide the socio-economic rights in s 28(1)*(c)* are also triggered when parents are too poor to provide for their basic needs. Unfortunately, the Court in *TAC* adhered to its reasoning in *Grootboom* and did not conclude that children had a direct, individual entitlement to basic health care services in circumstances where their parents were too poor to afford these services. Instead the Court relied on the right of children to basic health care services in section 28(1)*(c)* to support its finding that government's rigid, restrictive policy on Nevirapine was unreasonable because the policy excluded and harmed a particularly vulnerable group.[4] This conclusion was consistent with the Court's central enquiry throughout the case: namely whether the constitutional standard of reasonableness in section 27(2) had been met.[5]

The current jurisprudence has not resolved whether children have direct entitlements to the socio-economic services in section 28(1)*(c)*. *Grootboom* and *TAC* can be read to suggest that the State is under a direct duty to provide these rights in circumstances where family care is lacking either in a physical or economic sense.

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[1] Sloth-Nielsen argues that 'where children's neglect stems from poverty alone' a directly enforceable claim to material support for family preservation can be derived from section 28(1)*(d)* (the right of the child to be protected from maltreatment, neglect, abuse or degradation). She argues for this interpretation on the basis of the close links between parental poverty and child abuse and neglect in South Africa. 'The Child's Right' (supra) at 230–231.

[2] *TAC* (supra) at para 79.

[3] Ibid.

[4] The Court described their precarious position as follows:

> Their needs are "most urgent" and their inability to have access to Nevirapine profoundly affects their ability to enjoy all rights to which they are entitled. Their rights are "most in peril" as a result of the policy that has been adopted and are most affected by a rigid and inflexible policy that excludes them from having access to Nevirapine.

Ibid at para 78.

[5] Ibid at para 93.

However, the Court has preferred to decide the two cases under discussion on the basis of reasonableness review under sections 26 and 27.[1]

33.8 The Other Unqualified Socio-Economic Rights

The Constitutional Court has not yet decided a case that directly concerns the scope of the positive duties imposed by the right to 'basic education, including adult basic education' in section 29(1)*(a)* or the socio-economic rights of detained persons, including sentenced prisoners in section 35(2)*(e)*. These provisions are not qualified in terms similar to the second subsection of sections 26 and 27.

In *Gauteng School Education Bill*, the Constitutional Court held that the Interim Constitution's section 32*(a)* 'creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education'.[2] This right was specifically contrasted with section 32*(c),* which creates a freedom to establish educational institutions based on a common culture, language and religion. The latter is a 'defensive right' that does not generate a positive claim against the State to establish such institutions.[3]

There have been a number of High Court decisions in which positive orders have been made against the State to provide socio-economic amenities to prisoners in terms of section 35(2)*(e)*. In *B & others v Minister of Correctional Services & others*,[4] the High Court directed the respondents to supply two HIV-positive applicants with anti-viral medication which had been prescribed for them in fulfilment of their right to be provided with 'adequate medical treatment' at State expense.[5] The positive order by the Court followed a finding that the Ministry had failed to make out a case that they could not afford the relevant treatment.[6]

In another case concerning prison conditions, the High Court ruled in *Strydom v Minister of Correctional Services* that the applicant and the other occupants of the Maximum Security Section of Johannesburg Prison have the right to have access

[1] Kenneth Creamer has suggested that a 'higher standard of reasonableness' review is appropriate in assessing the State's programmes impacting on children socio-economic rights. He argues for this higher standard on the basis of a reading of the Constitution that requires children's needs to be prioritised. The higher standard of reasonableness review should include such factors as the rapid implementation of relevant programmes and 'the requirement that the programmes are effectively constructed to reach all children in need.' K Creamer 'The Impact of South Africa's Evolving Jurisprudence on Children's Socio-Economic Rights on Budget Analysis' (2002) IDASA Occasional Paper, unpublished.

[2] *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC) at para 9 ('*Gauteng School Education Bill*').

[3] Ibid. See further in this regard R Kriel 'Education' in M Chaskalson et al *Constitutional Law of South Africa* (1st Edition, RS 5, 1999) Chapter 38.

[4] 1997 (6) BCLR 789 (C) at paras 61–6 ('*B & others*').

[5] Section 35(2)*(e)*.

[6] *B & others* (supra) at paras 56, 60.

to electricity in their cells. Schwartzman J ruled that access to electricity was not a mere comfort or diversion, but could make the difference between mental stability and derangement given the circumstance in which high security prisoners are held. Noting that they spend 18 hours of each day of what remains of their lives, or a substantial portion thereof, in what is in effect solitary confinement, he held:

> To deprive them entirely and in perpetuity of this prospect could also result in their being 'treated and punished in a cruel or degrading manner' (section 12(1)*(c)* of the Constitution) or their being detained in conditions that are inconsistent with human dignity (section 35(2) of the Constitution).[1]

It remains to be seen whether the Constitutional Court will interpret these provisions to confer substantive entitlements on individuals.

33.9 Burden of Proof

Generally, the party claiming a constitutional violation bears the burden of proving an infringement of a right in the Bill of Rights. If a *prima facie* infringement is established at this first stage of constitutional analysis, the party seeking to uphold the provision may seek to invoke the general limitations clause to justify the infringement of the right. The burden of showing that the requirements of section 36 are met rests on the party who seeks to rely on it.[2]

In cases relating to an alleged breach by the State of its positive duties in terms of sections 26(2) and 27(2), the party claiming a constitutional violation would have to establish a *prima facie* case that the measures taken are unreasonable because they violate one or more of the criteria laid out in *Grootboom*.[3] The State would seek to rebut the applicant's case by leading evidence of the legislative measures and other programmes it has adopted and attempting to persuade the court that its programme is reasonable in the context of historical factors as well as its current resource and capacity constraints.[4]

An important question that arises in this context is where the evidentiary burden lies in respect of the qualifying phrase, 'within its available resources'. It would be unreasonable to expect ordinary litigants to identify and to quantify all

[1] *Strydom v Minister of Correctional Services & others* 1999 (3) BCLR 342 (W) at para 15 (353A–E).

[2] *S v Zuma & others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 21; *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at paras 100–102. See S Woolman 'Limitations' in M Chaskalson et al *Constitutional Law of South Africa* (1st Edition, RS 5, 1999) § 12.3.

[3] See *Soobramoney* (supra) at para 36. See also *TAC* (supra) at para 25: 'The question is whether the applicants have shown that the measures adopted by the government fall short of its obligations under the Constitution.'

[4] See *Grootboom* (supra) at para 47: 'In support of their contention that they had complied with the obligations imposed on them by section 26, the appellants [the State] placed evidence before this Court of the legislative and other measures they had adopted.' See also *Grootboom* (supra) at para 43.

the resources available to the State for the realisation of particular socio-economic rights. If the State wishes to rely on a lack of available resources to order to rebut an allegation that it has failed to take reasonable measures, it should bear the burden of proving the alleged unavailability of resources. Relevant organs of state are clearly best placed to adduce this type of evidence.[1]

If the applicant succeeds in establishing a breach of the State's duty to taken reasonable measures under sections 26(2) and 27(2), the State could ostensibly argue that it has justifiably limited the right in terms in terms of the general limitations clause.[2]

The application of the accepted two-stage approach to constitutional analysis is more straightforward in the case of the unqualified socio-economic rights.[3] The applicant bears the onus of proving a violation of the right at the first stage. This showing requires that he or she is a legitimate bearer of the relevant right (e.g. a detained person), and that the duties imposed by the right have not been fulfilled. For example, a prisoner may show that the State has failed to provide him with adequate nutrition as required by section 35(2)*(e)*. If the applicant succeeds in establishing a *prima facie* violation of these rights, the State would bear the burden of proof in respect of the general limitations clause.

The position is similar with regard to a negative violation of the duty not to prevent or impair access to the relevant socio-economic rights.[4] The applicant bears the onus of establishing a breach of this duty at the first stage of constitutional analysis, The State bears the burden in respect of the general limitations clause. This analysis is premised on the argument that the qualifying phrases in the second subsections of sections 26 and 27 do not apply to these negative duties.[5]

33.10 Limiting Socio-Economic Rights

(a) Justifying limitations to socio-economic rights

Section 36(1) establishes that the rights in the Bill of Rights may be limited. Any limitation to a right must be in terms of law of general application and is only permissible 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[6]

[1] See S Liebenberg 'Housing' in D Davis, H Cheadle & N Haysom (eds) *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 350-1. See also the discussion in De Vos 'Pious Wishes' (supra) at 92–4.

[2] For a discussion of the difficulties in applying s 36 to a breach of the positive duties in ss 26(2) and 27(2), see § 33.10 infra.

[3] Sections 28(1)*(c)*, 29(1)*(a)* and 35(2)*(e)*. This conclusion is based on the assumption that these provisions confer a direct entitlement on individuals in appropriate circumstances to claim the specified goods.

[4] *Grootboom* (supra) at para 34.

[5] See § 33.5*(b)* supra (negative duty to respect rights). For an application of this approach, see *Residents of Bon Vista Mansions v Southern Metropolitan Council* 2002 (6) BCLR 625 (W) at paras 20–26.

[6] Section 36(1). See further, in this regard, Woolman 'Limitations' (supra) at § 12.2.

The general limitations clause serves an important purpose in relation to all the rights in the Bill of Rights, including socio-economic rights. Should the State decide to limit its obligations in respect of socio-economic rights, the fact of the limitation and its nature and extent would have to be publicly defined and justified. This exercise promotes public accountability in support of the constitutional commitment to advance access to socio-economic rights.[1]

The relationship between the qualified positive duties of the State in sections 26(2) and 27(2) and the general limitations clause is complex. As we have seen, the State's positive duties are defined in terms of the adoption of *reasonable* measures. Should it be established at the first stage of the constitutional inquiry that the State's conduct or omissions are unreasonable, it is difficult to conceive of situations where it may nevertheless succeed in establishing a reasonable limitation of the right under section 36. Perhaps there are, at the margins, justifications for the measures not captured by the unreasonableness criteria articulated in *Grootboom*. At the limitations stage of constitutional analysis the justificatory requirements are ostensibly stricter.[2]

In the absence of a law of general application, the State is precluded from relying on the general limitations clause. This situation could arise where, for example, the unreasonableness at the first stage of the inquiry under sections 26 and 27 was found to be a failure to adopt legislation necessary to give effect to the particular right.

(b) Resource-based reasons for limiting socio-economic rights

Resource constraints are likely to be the most common justification raised by the State for limiting socio-economic rights. Under sections 26(2) and 27(2), the State is expressly permitted to rely on a lack of available resources as a factor in defending the reasonableness of its measures.[3] If the State does not successfully rely on a lack of available resources at the first stage of constitutional inquiry, it is difficult to imagine how it could succeed on this ground in terms of the general limitations clause. As we have seen, the socio-economic rights of children and detained persons are not expressly qualified by the phrase, 'within available

[1] Etienne Moreinik regarded this 'culture of justification' as one of the primary purposes of entrenching a justiciable Bill of Rights in a Constitution. See Mureinik 'Charter of Luxuries' (supra) at 471–3.

[2] See specifically the factors in s 36(1)*(a)–(e)*. See further, in this regard, Liebenberg 'Violations' (supra) at 405, 423–4.

[3] *Grootboom* (supra) at para 46 ('the availability of resources is an important factor in determining what is reasonable'). See also § 33.5*(b)* supra ('Within available resources').

resources'. The question therefore arises whether resource constraints can be relied on to justify a limitation of these positive rights under section 36.

The proposition that costs and administrative burdens will *generally* not constitute valid reasons for limiting rights has found favour in South African academic writing.[1] However, a court cannot rule out resource-related considerations when assessing whether a limitation to the positive duties imposed by rights is justifiable.

In *Eldridge*[2]*,* cost-related justifications were expressly considered in the limitations enquiry under section 1 of the Canadian Charter of Rights and Freedoms. The Canadian Supreme Court found that the failure of the Medical Services Commission of British Columbia to provide sign language interpretation for deaf patients constituted a *prima facie* violation of their right to equal benefit of the law without discrimination under section 15(1) of the Charter. The Court held that s 15(1) imposed a positive duty on the government to make 'reasonable accommodation' of disadvantaged groups 'adversely affected by a facially neutral policy or rule'. However, this duty extended only to the point of 'undue hardship'. Reasonable limitations to the positive duties inherent in section 15(1) fell to be determined under section 1 of the Charter and 'should not be employed to restrict the ambit of s 15(1)'.[3] During its section 1 (limitations) enquiry, the Court found that the government had 'manifestly failed to demonstrate that it had a reasonable basis for concluding that a total denial of medical interpretation services for the deaf constituted a minimum impairment of their rights'.[4] A key consideration was the 'relatively insignificant sum' that was required to continue and extend the service ($150 000 or 0,0025 % of the provincial health budget of British Columbia).[5] The government raised the argument that the recognition of the appellants' claim would have 'a ripple effect throughout the health care field, forcing governments to spend precious health care dollars accommodating the needs of a myriad disadvantaged persons'.[6] The Court responded as follows:

> The respondents have presented no evidence that this type of accommodation, if extended to other government services, will unduly strain the fiscal resources of the State. To deny the appellants' claim on such conjectural grounds, in my view, would denude s 15(1) of its egalitarian promise and render the disabled's goal of a barrier-free society distressingly remote.[7]

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[1] See Woolman 'Limitations' (supra) at § 12.6. See also *In Re Singh and Minister of Employment and Immigration* (1985) 17 DLR 422, cited by D Davis et al *Fundamental Rights in the New Constitution* (supra) at 311.

[2] *Eldridge v British Columbia (Attorney General)* (1997) 151 DLR (4th) 577 (SC) ('*Eldridge*').

[3] *Eldridge* (supra) at paras 77-80. The concept of reasonable accommodation to the point of undue hardship is common in human rights (anti-discrimination) legislation in Canada. See, for example, the Ontario Human Rights Code, s 11 (Constructive discrimination).

[4] *Eldridge* (supra) at para 87. The Court found that 'Other options, such as the partial or interim funding of the program offered by the Western Institute for the Deaf and Hard of Hearing, or the institution of a scheme requiring users to pay either a portion of the cost of interpreters or the full amount if they could afford to do so, were either not considered or were considered and rejected.' Ibid at para 93.

[5] Ibid at para 87.

[6] Ibid at para 91.

[7] Ibid at para 92.

Eldridge was concerned with the positive duties that arise in respect of the right to equality and non-discrimination. The positive duties imposed by socio-economic rights are more far-reaching, given that the State is required to do more than simply guarantee equal access to existing services. It must in fact initiate social programmes to give effect to socio-economic rights as an essential component of the duties imposed by these rights. The mere fact that the fulfilment of a socio-economic right will require an investment of resources by the State is not in itself a sufficient reason for limiting the right. If this were so, it would defeat the purpose of including socio-economic rights in the Bill of Rights. The State is expected to factor the resource requirements of all constitutional rights into the budgetary process.

Nevertheless, the reasoning in *Eldridge* implies that resource considerations may be a relevant purpose in a limitations inquiry pertaining to the positive duties imposed by constitutional rights. The standard of 'undue hardship' applied in *Eldridge* could be considered as a basis for evaluating the costs-related reasons for limiting socio-economic rights should the analysis reach the general limitations clause. The State must be required to demonstrate convincingly that the costs implications of fulfilling a socio-economic right will impose an 'undue hardship' on its fiscal resources and prejudice the other legitimate needs it is required to meet in a democratic society. The elements of the proportionality test will also have to be satisfied by demonstrating that the right is limited only to the extent required to avoid an undue strain on the State's resources.

33.11 The Horizontal Application of Socio-Economic Rights

The possibility exists under the South African Constitution for socio-economic rights to apply horizontally (that is, in disputes between private parties).[1] The Constitution provides that the Bill of Rights applies to all law and binds all organs of State.[2] A provision of the Bill of Rights also 'binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.[3] In order to provide an effective remedy for violations of socio-economic rights by private parties, the courts 'must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right'.[4] The horizontal application of socio-

[1] On horizontal application generally see S Woolman 'Application' in M Chaskalson et al *Constitutional Law of South Africa* (1st Edition, RS 5, 1999) § 10.8.

[2] Section 8(1).

[3] Section 8(2).

[4] Section 8(3). The court may also 'develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)'. On the development of common-law remedies to give effect to socio-economic rights, see De Vos 'Pious Wishes' at 100–101.

economic rights is significant in a global context where powerful private entities are increasingly controlling access to essential social services and resources.[1]

(a) Negative duties

In *Grootboom*, the Constitutional Court affirmed that section 26 (1) of the Constitution imposes 'at the very least, a negative obligation upon the State *and all other entities and persons* to desist from preventing or impairing the right of access to adequate housing' [emphasis added].[2] Private parties are thus at least required to respect the negative duties imposed by socio-economic rights. For example, landlords should refrain from evicting people arbitrarily from their homes, insurance companies and private health care institutions should not discriminate unfairly against people in their access to insurance or health care services,[3] and industries should not cause an environment that is harmful to people's health.[4] The nature of this duty is capable of application to private parties. It is also appropriate to recognise the horizontal application of this duty given the need to afford effective protection to more vulnerable social groups against being deprived of access to socio-economic rights by powerful social actors.

(b) Positive duties

In contrast to the negative duties, the scope of the positive duties on private parties in relation to socio-economic rights is highly speculative and undeveloped. Sections 26(2) and 27(2) place the duty to take positive measures to improve access to socio-economic rights squarely on the State. The question that arises is whether there are circumstances under which certain private bodies bear positive duties to extend access to the relevant socio-economic rights.[5] This duty may

[1] See further in this regard, C Scott 'Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights' in A Eide et al (eds) *Textbook* (supra) at 563.

[2] *Grootboom* (supra) at para 34. See § 33.5*(b)* above (the negative duty 'to respect' socio-economic rights).

[3] In addition to prohibiting unfair discrimination by the State (s 9(3)), the South African Constitution expressly provides that '*no person* may unfairly discriminate directly or indirectly against anyone' on a range of grounds such as race, gender, sexual orientation, disability and language (s 9(4)). The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 has been enacted to give effect to s 9(4) of the Constitution. Additional grounds of prohibited discrimination recognised in the Act in the form of directive principles include HIV/AIDS status and socio-economic status (s 34). The ground of 'socio-economic status' has a far-reaching potential for challenging the exclusion of the poor from access to social services and resources by both public and private entities. See in this regard: S Liebenberg 'Advancing Equal Access to Socio-economic Rights: The New Equality Legislation' (1999) 2 (1) *ESR Review* 12–13.

[4] Section 24*(a)* of the Constitution.

[5] It has been argued that the positive duties imposed by socio-economic rights are not applicable to private actors. See, for example: H Cheadle & D Davis 'The Application of the 1996 Constitution in the Private Sphere' (1997) 13 *SAJHR* 44. However, other academics have argued in favour of the application of section 8 to socio-economic rights. See Woolman 'Application' (supra) at § 10.7.

arise by virtue of a special relationship or when the body in question has the power to control access to a particular service. Possible examples are duties on —

- parents to provide for the needs of their children[1];
- companies relying on migrant labour to provide decent housing to their employees; and
- multinational pharmaceutical companies holding exclusive patent rights over life-saving drugs to ensure their economic accessibility to poor communities.[2]

An important nexus exists between the duty of the State 'to protect' the socio-economic rights of more vulnerable members of society against powerful private actors,[3] and the imposition of a direct constitutional duty on private actors. In most circumstances the State will be bound to enact and enforce the necessary legislation to regulate the conduct of private actors in socio-economic spheres.[4] Examples of legislation designed to protect people against practices of private parties that could prevent or impair their access to socio-economic rights abound, for example, the Medical Schemes Act 131 of 1998, the Rental Housing Act 50 of 1999 and the Home Loan and Mortgage Disclosure Act 63 of 2000. Litigants will usually seek to enforce such legislation or, where protective legislation is lacking, may seek to compel the State to take the necessary legislative measures. However, as I have attempted to demonstrate, the possibility exists under the Constitution of seeking to hold private actors directly accountable for violations of both the negative and, in certain circumstances, the positive duties imposed by socio-economic rights. In the absence of legislation, the courts must apply, or if necessary develop, the common law to give effect to the relevant socio-economic right.[5]

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[1] As discussed above, the Court has held that the duties imposed by children's socio-economic rights in s 28(1)*(c)* are primarily binding on the parents and families of children. See *Grootboom* (supra) at paras 70–79, *TAC* (supra) at paras 74–79, and the discussion on children's socio-economic rights in § 33.7 above.

[2] See in this regard, S Ellman 'A Constitutional Confluence: American 'State Action' Law and the Application of South Africa's Socio-Economic Rights Guarantees to Private Actors' in P Andrews & S Ellman (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 444, 459–469. Danwood Chirwa has suggested using the 'State action' doctrine to determine the circumstances in which private actors should be bound by the positive duties imposed by socio-economic rights:

> This benchmark could be used to differentiate the positive obligations of various private actors depending on the right and the nature of the obligations involved. For example, a private actor carrying out the functions of the State would be responsible to bear the relevant socio-economic rights obligations that the State would have borne. Similarly, a private actor not linked to the State but exercising power akin to or more than that of the State should be bound by as much positive obligations as the State would have in the specific area of dominance. The 'State action' test could be extended to hold private actors who, however, small, hold positions in society that can result in serious denials or violations of socio-economic rights, responsible for the relevant positive socio-economic rights obligations.

D M Chirwa, *Obligations of Non-State Actors in Relation to Economic, Social and Cultural Rights under the South African Constitution*' (2002) Research Series of the Socio-Economic Rights Project, Community Law Centre (UWC) at 25.

[3] See § 33.2*(c)*(ii) supra (duties to respect, protect, promote and fulfil).

[4] The Court in *Grootboom* noted (at para 35):

> A right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing.'

[5] See s 8(3)*(a)*of the Constitution.

(c) Development of the common law

Section 8(1) of the Constitution applies to 'all law'. All law is generally understood to encompass common law disputes between private parties.

An illustration of the potential for socio-economic rights to influence the development of the common law is the application of section 26(3) to common law eviction proceedings. In *Ross v South Peninsula Municipality*, the Cape High Court held that the prohibition against arbitrary evictions in section 26(3) of the Constitution altered established common law principles relating to the pleadings and onus of proof in eviction proceedings brought by the owner of property.[1] The Court held that it was no longer sufficient for the owner of the property simply to allege in pleadings that it is the owner of the property in question and that the defendant is in unlawful possession.[2] The owner is now required to allege and prove the 'relevant circumstances' that would justify an order for the eviction of the defendants from their home.[3] Although the court did not decide the exact nature of these relevant circumstances, it indicated that some guidance could be obtained from legislative provisions, specifically the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). The special protection to be accorded in the context of evictions to the elderly, children, persons with disabilities and households headed by women was considered particularly relevant.[4]

In *Brisley v Drotsky*[5], the Supreme Court of Appeal held that the 'relevant circumstances' in section 26(3) are those that are *legally* relevant, rather than the personal circumstances of the person facing eviction.[6] The Court affirmed that section 26(3) was not only of vertical, but also of horizontal application.[7] however, in terms of the *Brisley* decision, a court will only consider those circum-

[1] *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C).

[2] This principle was laid down in *Graham v Ridley* 1931 TPD 476.

[3] Since the Constitution only protects eviction from a 'home', the onus to allege and prove relevant circumstances would not apply in the case of eviction from, for example, business premises.

[4] *Ross* (supra) at 599B. The *Ross* judgment was subsequently overruled by the full bench decision in *Ellis v Viljoen* 2001 (4) SA 795 (C). The *Ellis* Court concluded that the right of ownership as recognised before the Constitution has not been affected by s 26(3) at least insofar as it did not place a duty on the owner of property to allege and prove the relevant circumstances that would entitle a court to issue an eviction order. Thus the normal common law rules of pleadings and proof apply where the owner seeks the eviction of an unlawful occupier from his or her property (at 805B—E). *Ross* was also criticised by Flemming DJP in *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W).

[5] 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA).

[6] Ibid at paras 41–45. In his concurring judgment, Olivier JA held that the phrase, 'all relevant circumstances' in s 26(3) enjoined the Court to have regard to considerations of humanity before ordering the summary eviction of tenants following the termination of a lease. In appropriate circumstances, reasonableness and fairness could permit a court at least to suspend the execution of an eviction order for a reasonable period. Ibid at para 87.

[7] Ibid at para 40. In this respect, the Court held that *Betta Eiendomme* (supra) was wrongly decided. Ibid at para 82 (Olivier JA).

stances that are relevant in terms of the common law applicable to eviction proceedings brought by owners of property. In the absence of a statutory discretion[1], a court has no discretion in terms of section 26(3) to refuse an eviction order where the lessee is not entitled to occupation of the property under the common law.

The SCA's narrow rendering of 'relevant circumstances' effectively means that s 26(3) will provide little consolation to persons facing eviction or demolition in the absence of statutory protection. The purpose of section 26(3) must surely have been to place a duty upon the courts to consider the impact of an eviction on the right of access to adequate housing of particularly vulnerable persons and to fashion an order that would take these circumstances into account. Such an order might take the form of staying the execution of the eviction order for a limited period.[2] In certain cases, it may be apparent that evicted persons would find themselves in a crisis situation 'with no roof over their heads'. In these circumstances, relevant organs of State are under a constitutional obligation to assist these persons by providing access to a reasonable programme that provides relief to those in desperate need.[3] In cases where PIE and the Extension of Security of Tenure Act (ESTA) 62 of 1997 are applicable, the courts must ensure that the stringent requirements of procedural fairness in the legislation have been followed.[4] They must also consider substantive factors before granting an eviction order.[5]

An unavoidable consequence of including socio-economic rights in the Constitution is that the complex array of arguments in favour of both property rights and socio-economic rights must be surfaced, and a candid analysis of the competing interests undertaken.[6] Our Constitution should not be read in such a way as to artificially suppress arguments in favour of the socio-economic rights at stake in particular cases.

33.12 REMEDIES

The Constitution gives the courts broad remedial powers.[7] Law or conduct that is inconsistent with the Constitution must be declared invalid to the extent of its inconsistency.[8] In addition, the courts may make any order that is 'just and

[1] See, for example, the discretion conferred in s 8 of the Extension of Security of Tenure Act 62 of 1997.

[2] For example, the judgment by Olivier JA in *Brisley* (supra).

[3] *Grootboom* (supra) at paras 52 and 88–90.

[4] See, for example, *Cape Killarney Property Investments v Mahamba & others* 2000 (2) SA 67 (C). The Supreme Court of Appeal dismissed the appeal against this judgment: *Cape Killarney Property Investments v Mahamba & others* 2001 (2) SA 67 (SCA).

[5] See, for example, ss 4(6) and (7) of PIE; and ss 8(4), 10(2) and 11(2) of ESTA.

[6] See, in this regard, Woolman 'Application' (supra) at §§ 10.3*(b)* and 10.8*(c)*.

[7] In terms of s 38 of the Constitution, a court may grant 'appropriate relief' in respect of an infringement of threatened infringement of a right in the Bill of Rights.

[8] Section 172(1)*(a)*.

equitable', including an order suspending a declaration of invalidity on any conditions to allow the competent authority to correct the defect.[1] In *Fose v Minister of Safety and Security* [2], the Constitutional Court held that '[a]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution'.[3] It went on to say that the courts 'may even have to fashion new remedies to secure the protection and enforcement of these all-important rights'.[4]

Wim Trengove has identified a number of unique features of litigation relating to socio-economic rights 'which call for the development and creation of new and more effective remedies'.[5] Among the innovative remedies he proposes are an award of *preventative damages* against the State made in favour of an independent State institution (eg a Human Rights Commission) or non-governmental organisation with the necessary skills and programmes aimed at preventing future violations of the right in question. Another order that may be more appropriate than awarding monetary compensation is an order for *reparations in kind*. The motivation for this kind of order is that it is often difficult to quantify the harm done to an individual litigant arising from the long-term structural deprivation of services such as education or health care. The State may thus be ordered to provide appropriate remedial services for the benefit of a whole community that has suffered a long-term violation of their socio-economic rights.[6] Orders of this nature usually require on-going judicial supervision to ensure that they are properly implemented.

A critical issue in the enforcement of the positive duties imposed by socio-economic rights (particularly those subject to 'progressive realisation') concerns the circumstances under which the courts should grant mandatory relief, including the assumption by the court of supervisory jurisdiction over their implementation. In terms of such an order, the State will usually be ordered to devise and present to court a plan of action to remedy the violation, and to report back to the court on its implementation at regular intervals. At both the stages of the approval and implementation of the plan, the applicant and other interested parties (including a possible independent 'court monitor') will be given an opportunity to comment.[7] Trengove points out that redressing systemic violations of socio-economic rights often requires far-reaching institutional and structural

[1] Section 172(1)*(b)*.
[2] 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC).
[3] Ibid at para 19.
[4] Ibid.
[5] See W Trengove, 'Judicial Remedies for Violations of Socio-economic Rights' (1999) 1(4) *ESR Review* 8.
[6] Trengove cites *Milliken v Bradley II* (1977) 433 US 267 as an example where the US Supreme Court approved an order requiring the State to provide remedial education to the victims of past race discrimination in the Detroit school system. Ibid at 9.
[7] See the discussion of 'structural interdicts' by J Klaaren 'Remedies' M Chaskalson et al *Constitutional Law of South Africa* (1st Edition, RS 5, 1999) 9-15–9-16.

reforms over a period of time in a manner determined by the legislative and executive branches of government. They cannot be remedied by a single court order made once and for all. Such orders should strive to preserve the choice of means of the legislative and executive as to the precise manner in which to remedy the situation while not abdicating the court's responsibility to ensure that constitutional objectives are fulfilled.[1] The Court thus retains jurisdiction over the enforcement of the order.

In *Grootboom*, the Constitutional Court confined itself to making a declaratory order.[2] In *TAC* the Court confirmed its wide remedial powers, including the granting of mandatory relief with or without the exercise of some form of supervisory jurisdiction.[3] The Courts should be guided by '[t]he nature of the right infringed and the nature of the infringement as to the appropriate relief in a particular case'.[4] The critical consideration is what would constitute an *effective* remedy in the circumstances of the case.[5] Although the *TAC* Court made both declaratory and mandatory orders against the State, it declined to exercise a supervisory jurisdiction as it was invited to do by the applicants. It held that there were no grounds for believing that the government would not respect and execute the orders of the Court.[6] The High Courts have granted supervisory orders in a number of of socio-economic rights cases.[7]

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[1] Trengove (supra) at 9.

[2] *Grootboom* (supra) at para 99. This order has attracted criticism. See K Pillay 'Implementation of *Grootboom*: Implications for the Enforcement of Socio-economic Rights' 2002 (6) *Law Democracy & Development* 255. For a recent case concerning the non-compliance by a local authority with its housing obligations as laid down in *Grootboom*, see *City of Cape Town v Rudolph & others* 2003 (11) BCLR 1236 (C).

[3] *TAC* (supra) at paras 104–106. In this respect the Court rejected the State's contention that the Court's power in the present case was confined to issuing a declaratory order. The State argued that the doctrine of separation of powers precluded the courts from making orders 'that have the effect of requiring the executive to pursue a particular policy.' Ibid at para 97. The power of the Court to make 'supervisory orders' was specifically recognised in *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 96. An order of this nature was made in *August & another v Electoral Commission & others* 1993 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC). In the latter case, the Electoral Commission was ordered to make all the necessary and reasonable arrangements for prisoners to exercise their right to vote coupled with an injunction to submit a detailed plan for scrutiny.

[4] *TAC* (supra) at para 106.

[5] Ibid at para 102 (citing Ackermann J in *Fose* (supra), para 106, and paras 112–113).

[6] Ibid at para 129. In this regard the court indicated that supervisory orders should not be made unless they are necessary to secure compliance with a court order. For a criticism of the Court's reluctance to make a supervisory order in the circumstances of this case, see Bilchitz 'Laying the Foundations' (supra) at 23–26.

[7] In *Grootboom I* (supra), the High Court found a violation of s 28(1)*(c)* of the Constitution. In the first part of its order, the Court declared in broad terms that the appropriate organ or department of State is obliged to provide the applicant children, and their accompanying parents, with shelter until such time as the parents are able to shelter their own children. The second part of the order directs the respondent to present under oath reports to the Court on the implementation of the order within a period of three months from the date of the order. The applicants are given an opportunity to deliver their commentary on the aforegoing reports (at 293H-J–294A-C). See also *Strydom v Minister of Correctional Services & others* 1993 (3) BCLR 342 (W) (respondents ordered to report to court setting out a timetable within which the electrical upgrading of the maximum security section of Johannesburg Prison would be commenced and completed); and *TAC* High Court judgment (supra) at 386J–387H. Perhaps the proximity of the High Courts to the actual circumstance of the applicants makes them more appropriate venues for supervisory orders. The responsibility for supervisory orders in other jurisdictions often falls on the court of first instance.

33.13 The Role of the Human Rights Commission and the Commission for Gender Equality

The Human Rights Commission has been given a general mandate under the Constitution to promote human rights and to monitor and assess their observance in South Africa.[1] To this end it has been given the powers to investigate and report on the observance of human rights, to take steps to secure appropriate redress where human rights are violated, to carry out research, and to educate.[2] The Constitution also imposes a special duty on the Commission in relation to socio-economic rights. Each year it must 'require relevant organs of State to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment'.[3] The Commission has thus a specific information-gathering mechanism at its disposal in relation to socio-economic rights. It can use this information for a variety of purposes related to its general mandate to promote, monitor and assess the observance of human rights.[4] The Commission can use the information generated through this process for the following purposes: (1) reporting to Parliament and the President on the observance of socio-economic rights; (2) making recommendations on policy or legislation to the relevant organs of State; (3) attempting to secure appropriate redress for victims of violations of socio-economic rights;[5] and (4) identifying issues requiring further research and investigation.[6]

The Commission can play an especially valuable role in support of the judicial

[1] Section 184(1).

[2] Section 184(2). These powers are further regulated in terms of the Human Rights Commission Act 54 of 1994.

[3] Section 184(3). For an analysis of the monitoring of socio-economic rights by the Human Rights Commission, see DG Newman 'Institutional monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda' (2003) 19 *SAJHR* 189.

[4] The UNCESCR has developed creative and innovative approaches to its mandate to supervise States parties' reports under the ICESCR. The Commission could usefully draw on aspects of its work in carrying out its mandate under s 184(3). See Craven 'Towards an Unofficial Petition Procedure' (supra); B Borter 'Socio-Economic Rights Advocacy — Using International Law' (1999) 2 (1) *ESR Review* 1–6; GC 1 Reporting by States parties (1989) (supra); and GC 10 The role of national human rights institutions in the protection of economic, social and cultural rights (1998) (supra). For an approach arguing against the international reporting system as an appropriate model for the Commission in relation to socio-economic rights, see J Klaaren 'A Second Look at the South African Human Rights Commission, Access to Information and the Promotion of Socio-Economic Rights' (2004) (unpublished paper on file with author).

[5] In terms of the Human Rights Commission Act, the Commission can use alternative dispute resolution mechanisms (mediation, conciliation and negotiation) to attempt to resolve disputes and rectify violations of human rights (s 8). It can also take cases to court in its own name, or on behalf of a person or a group or class of persons (s 7(1)*(e)*).

[6] The power of the Commission to conduct investigations is contained in s 9 of the Human Rights Commission Act.

enforcement of socio-economic rights.[1] The Commission can monitor the progressive realisation of socio-economic rights, identify structural patterns of inequality and provide evidence, where necessary, of the link between State policies and the constitutional violations experienced by disadvantaged groups. The information generated through the monitoring process and the Commission's annual assessment of the progress made by relevant organs of State may also assist in the preparation of appropriate cases for litigation. De Vos points out that through co-operating with the Commission, organs of State may be in a better position to defend a claim that they have failed to make reasonable progress in realising the rights.[2] At the same time, the information generated by the Commission also provides a source of information for litigants and *amici* in preparing socio-economic rights cases.[3]

There is, furthermore, scope for building a co-operative relationship between the Commission and the courts in the enforcement of orders relating to socio-economic rights. For example, the courts may wish to involve the Commission in the supervision and enforcement of its decisions and orders in respect of socio-economic rights.[4] This potential synergy exists particularly with regard to the supervisory orders discussed above.[5]

Apart from attempting to obtain redress for victims of violations through the courts, the Commission can bring systemic abuses of socio-economic rights to the attention of government and the public. By involving both government officials and civil society organisations in the information gathering and dissemination process, the Commission can gain a greater understanding of the impact of government programmes on disadvantaged communities and whether they are, in fact, being reasonably implemented.[6]

The importance of developing a national strategy and plan of action for the progressive realisation of socio-economic rights cannot be underestimated.[7] The Commission can contribute to the formulation of such plans, drawing on the

[1] Despite the extensive provisions in the Constitution protecting socio-economic rights, it is noteworthy that in the seven years since the adoption of the 1996 Constitution, there has been only a handful of socio-economic rights cases. This indicates the need for a body such as the Commission to play an active role in both the promotion and protection of socio-economic rights.

[2] De Vos 'Pious Wishes' (supra) at 100.

[3] For example, in their joint *amici* submissions in *Grootboom,* the Commission and the CLC (UWC) relied on the information submitted by relevant organs of State to argue that the relevant government departments (housing and welfare) had not adopted adequate measures to give effect to their obligations in terms of ss 26 and 28(1)*(c)*.

[4] In *Grootboom*, the Human Rights Commission undertook to monitor and report on the State's compliance with its s 26 obligations in accordance with the judgment *Grootboom* (supra) at para 97.

[5] See § 33.12 supra ('Remedies'). See also C Albertyn 'Commission for Gender Equality' in M Chaskalson et al *Constitutional Law of South Africa* (2nd Edition, December OS 2003) Chapter 24D.

[6] On the requirement that government programmes must be reasonably implemented, see *Grootboom* (supra) at para 42.

[7] See § 33.5*(g)*(i) supra (plans of action).

experience is has gained in monitoring socio-economic rights. Although the Commission for Gender Equality does not have an express mandate in relation to socio-economic rights, it has a vital role to play in developing the gender dimensions of these rights. The Commission for Gender Equality and the Human Rights Commission should collaborate closely to ensure that the impact of gender factors are fully integrated in the monitoring of socio-economic rights.[1]

[1] The functions and powers of the Commission for Gender Equality are contained in s 187 of the Constitution, and in the Commission for Gender Equality Act 39 of 1996. See in this regard, K Pillay 'The Commission for Gender Equality: What is its Role?' (1998) 1(3) *ESR Review* 13–15. See also Albertyn 'Commission for Qender Equality' (supra) at § 24D.

34 Limitations

Stu Woolman and Henk Botha

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36. Limitations[1]

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —

(a) the nature of the right

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided for in subsection (1) or any other provision of this Constitution, no law shall limit any right entrenched in the Bill of Rights.

34.1 Introduction to Limitation Analysis

(a) Purpose

The limitation clause has a four-fold purpose. First, it functions as a reminder that the rights enshrined in the Final Constitution are not absolute.[2] The rights

* We are deeply indebted to both Theunis Roux and Johan van der Walt for their critical and constructive engagement with our chapter.

[1] Constitution of the Republic of South Africa Act 108 of 1996 ('FC' or 'Final Constitution'). Section 33(1), the limitation clause, of the Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution') read:

The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation —

(a) shall be permissible only to the extent that it is —

(i) reasonable; and

(ii) justifiable in an open and democratic society based upon freedom and equality; and

(b) shall not negate the essential content of the right in question, and provided further that any limitation to

(aa) a right entrenched in section 10, 11, 12, 14 (1), 21, 25 or 30(1)*(d)* or *(e)* or (2); or

(bb) a right entrenched in section 15, 16, 17, 18, 23, or 24, in so far as such rights relate to free and fair political activity,

shall, in addition to being reasonable as required in paragraph *(a)*(i), also be necessary.

[2] See *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & Others* 2002 (6) SA 370 (CC), 2002 (12) BCLR 1285 (CC)('*De Reuck*') at para 89 ('I reiterate that the rights contained in the Bill of Rights are not absolute. Rights have to be exercised with due regard and respect for the rights of others. Organised society can only operate on the basis of rights being exercised harmoniously with the rights of others. Of course, the rights exercised by an individual may come into conflict with the rights exercised by another, and where rights come into conflict, a balancing process is required'); *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 930 (CC), 2000 (8) BCLR 837 (CC)('*Dawood*') at para 57 ('There is a clear limitation of the right to dignity caused by s 25(9)*(b)* read with ss 26(3) and (6). Like all constitutional rights, that right is not absolute and may be limited in appropriate cases in terms of s 36(1) of the Constitution. As stated above, there can be no doubt that there will be circumstances when the constitutional right to dignity that protects the rights of spouses to cohabit may justifiably be limited by refusing the spouses the right to cohabit in South Africa even pending a decision upon an application for an immigration permit. As also stated earlier, it is for the Legislature, in the first instance, to determine what those circumstances will be and to provide guidance to administrative officials to exercise their discretion accordingly'); *S v Manamela & Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC)('*Manamela*')(No right is absolute, and reverse onus provisions may constitute justifiable limitations of FC s 35 where the risk and the consequences of erroneous conviction are outweighed by the risk and the consequences of guilty persons escaping conviction.)

may be limited where the restrictions can satisfy the test laid out in the limitation clause.[1] Secondly, the limitation clause tells us that rights may *only* be limited where and when the stated objective behind the restriction is designed to reinforce the values that animate this constitutional project.[2] As we shall see, the same values that inform our understanding of what constitutes a justifiable limitation on a right — openness, democracy, dignity, equality, and freedom — also flesh out the extension of the individual rights themselves.[3] Thirdly, the test set out in the limitation clause — with a bit of judicial amplification — allows for candid consideration of those public goods or private interests that the challenged law sets in opposition to the rights and freedoms enshrined in Chapter 2.[4] Fourthly, the limitation clause could be said to represent an attempt to finesse the 'problem' of judicial review by establishing a test that determines the extent to which the democratically elected branches of government may craft laws that limit our constitutionally protected rights and the extent to which an unelected judiciary may override the general will by reference to the basic law. But the presence of FC s 36 serves as a reminder that the counter-majoritarian dilemma is neither a paradox nor a problem, but an ineluctable consequence of our commitment to living in a constitutional democracy. So while the language of FC s 36 could never provide guidelines for judicial nullification so precise as to resolve this 'dilemma', the section does function as an interpretative prompt that ensures that the courts

[1] *S v Mamabolo* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC)('*Mamabolo*') at para 72 ('The Constitution makes it clear that freedom of speech is not absolute. . . . [S]ection 36 permits limitations which are reasonable and justifiable in an open and democratic society based on dignity, freedom and equality.')

[2] See, eg, *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)('*Khumalo*') at para 41 ('In deciding whether the common law rule complained of by the applicants does indeed constitute an unjustifiable limitation of section 16 of the Constitution, sight must not be lost of other constitutional values and in particular, the value of human dignity'); *Bhe & Others v Magistrate, Khayelitsha, & Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole & Others; South African Human Rights Commission & Another v President of the Republic of South Africa & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('*Bhe*') at paras 72–73 ('It could be argued that despite its racist and sexist nature, s 23 gives recognition to customary law and acknowledges the pluralist nature of our society. This is however not its dominant purpose or effect. Section 23 was enacted as part of a racist programme intent on entrenching division and subordination. Its effect has been to ossify customary law. In the light of its destructive purpose and effect, it could not be justified in any open and democratic society. It is clear from what is stated above that the serious violation by the provisions of s 23 of the rights to equality and human dignity cannot be justified in our new constitutional order.') For further discussion of relevant case law, see §§ 34.8*(c)*(ii) and (iv) infra.

[3] See, eg, *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC)('*Makwanyane*') at para 104 ('In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society.')

[4] See *Manamela* (supra) at para 32 ('The Court must engage in a balancing exercise and arrive at a global judgment on proportionality. . . . As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.') For a further discussion of related case law, see § 34.8*(b)* infra.

take the concerns of the political branches seriously enough to offer them appropriate levels of deference.[1]

(b) Mechanics

As a general matter, constitutional analysis under the Bill of Rights takes place in two stages.[2] First, the applicant must demonstrate that the exercise of a

[1] See, eg, Technical Committee on Fundamental Rights (Interim Constitution) *Third Report* (28 May 1993) 9–10:

> In choosing the exact formulation of such clauses, most human rights documents attempt to define with a fair degree of precision, the guidelines which the judge should follow in fulfilling their duty in this respect. This is particularly so as the judges are generally secure in tenure . . . and so therefore less democratically accountable than the legislature, on whose laws they sit in judgment. Such guidelines may be all the more necessary in a legal system, moving in to judicial review of legislative action for the first time.

See also *Makwanyane* (supra) at para 104 quoting *Reference re ss. 193 and 195 (1)(c) of the Criminal Code (Manitoba)* (1990) 48 CRR 1, 62 ('In the process regard must be had to the provisions of [IC] section 33(1), and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, "the role of the Court is not to second-guess the wisdom of policy choices made by legislators."') That there is, despite the volumes of writing on the subject, no solution to the counter-majoritarian dilemma is a trite proposition. Suffice it to say that every theory of interpretation offered as a 'solution' to this problem puts judicial review in a constitutional democracy on more solid footing by alerting us to the kinds of, or styles of, arguments that may justify a court's finding that ordinary law cannot be squared with the commitments of the basic law. But no single theory of interpretation, nor any particular gloss on the text of FC s 36, can substitute for reasoned argument. Every exercise of power requires justification — whether the legislature, the executive or the judiciary exercises that power. The legitimacy of each exercise of such authority rises or falls on a combination of reasons given for law or conduct and the outcomes that law or conduct generate. See Laurence Tribe *Constitutional Choices* (1985); Stu Woolman 'Riding the Push-Me Pull-You: Constructing a Test that Reconciles the Conflicting Interests which Animate the Limitations Clause' (1994) 10 *SAJHR* 60 (Any system that permits judicial review invites, by necessity, conflict over the nature of the values said to animate the basic law); Theunis Roux 'Democracy' in S Woolman, Theunis Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 10 (Constitutional democracies protect various forms of democratic participation, and fundamental rights in large, heterogeneous nation-states are necessary conditions for these different forms of participation.) So although no general solution exists to the problem, both the drafters of the Final Constitution and the Constitutional Court have attempted to diminish the difficulties associated with this dilemma by adumbrating a doctrine that makes it somewhat easier for the party seeking to justify an infringement — especially the legislature — to do so. The Theme Committee Four Advisors to the Constitutional Assembly noted that when courts compare the actual limitation in question with other appropriate alternative restrictions on a right, the courts — and by implication the legislature — are not obliged to pick the least restrictive measure: 'Those restricting rights will be left with a discretion to decide on any particular measure within this [acceptable] range . . . . [T]his need not be the least restrictive measure viewed in isolation.' See Theme Committee Four Advisors Memorandum to Constitutional Assembly (Final Constitution)(14 April 1996). In *Case & Curtis*, Mokgoro J concluded that the distinct roles of the judiciary and the legislature in a constitutional democracy demand that the courts afford the legislature a 'margin of appreciation' with respect to the choice of means required to effect a law's constitutionally permissible ends. *Case & Another v Minister of Safety and Security & Others; Curtis v Minister of Safety and Security & Others* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC)('*Case & Curtis*') at para 62.

[2] See *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401, 414 (CC)('*Zuma*')('Fundamental rights analysis under IC Chapter 3 'calls for a two-stage approach. First, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?'); *Makwanyane* (supra) at 707; *Ferreira v Levin NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1, 26 (CC)('*Ferreira*'); *Mamabolo* (supra) at para

fundamental right has been impaired, infringed, or, to use the Final Constitution's term of art, limited. This demonstration itself has several parts. To begin with, the applicant must show that the conduct or the status for which she seeks constitutional protection is a form of conduct or status that falls within the ambit of a particular constitutional right.[1] If she is able to show that the conduct or the

1 ('The first issue was whether the law . . . limited the right to freedom of expression vouchsafed by the Constitution. The second is whether the procedure recognised and sanctioned by our law . . . fell foul of the fair trial rights guaranteed by the Constitution. . . . In respect of each of the first two issues, a finding that the law does indeed limit the fundamental rights in the respects contended for, will in turn require an enquiry whether such limitation is nevertheless constitutionally justified.') We deal, below, with those instances in which all meaningful analysis — of the alleged infringement and justification for the alleged infringement — occurs within the right itself and therefore obviates the need for limitations analysis under FC s 36. For more on internal limitations, see § 34.5 infra. See, eg, *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC)(Test for deprivation of property); *Harksen v Lane* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC)(Test for unfair discrimination); *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)(Test for progressive realization of a socio-economic right); *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC)('*Khosa*) at para 83 ('There is a difficulty in applying s 36 of the Constitution to the socio-economic rights entrenched in ss 26 and 27 of the Constitution.') We also engage those instances in which the Court assumes, for the sake of argument, that a rights violation has occurred and then proceeds directly to limitations analysis under FC s 36 — thus only notionally undertaking two-stage analysis. See § 34.3(a) infra. See, eg, *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC); *Beinash v Ernst & Young* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC); *Ferreira v Levin NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC).

[1] As the Constitutional Court has repeatedly noted, the Bill of Rights' provision on standing, FC s 38, and the Court's doctrine of objective unconstitutionality, mean that the person before the court need not be obliged to show that he or she is the person whose rights have been infringed or threatened with infringement. On the objective theory of unconstitutionality, see *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at paras 28–29 ('On the objective theory of unconstitutionality adopted by this Court a litigant who has standing may properly rely on the objective unconstitutionality of a statute for the relief sought, even though the right unconstitutionally infringed is not that of the litigant in question but of some other person'); *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party & Others* 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC) at para 64 (In re-affirming its commitment to the objective theory of unconstitutionality, the Court wrote that 'the practice that has been urged upon this Court carries with it the distinct danger that Courts may restrict their enquiry into the constitutionality of an Act of Parliament and concentrate on the position of a particular litigant.') For the purposes of two-stage rights analysis, the relaxed position on standing is important. The demonstration of a prima facie infringement of a right is not *necessarily* contingent upon a demonstration that the party before the court is having her exercise of the right impaired by law or conduct. Cf Halton Cheadle 'Limitations' in H Cheadle, D Davis & F Haysom *South African Constitutional Law: The Bill of Rights* (2002) 693, 696. Cheadle asserts, with much merit, that the author of this chapter in the first edition 'confuses issues of *locus standi* with the determination of scope'. But Professor Cheadle did not deign to describe the exact nature of this confusion. It falls to the same author to clarify what Professor Cheadle did not. Cheadle would have been correct if he had simply noted that the author's language suggests that the only person who could challenge the validity of law or conduct was a person whose own exercise of a protected activity has been limited or impaired. FC ss 38*(b)–(e)* clearly grants standing to parties other than those whose 'own interests' have been impaired or threatened with impairment. However, it would be incorrect to suggest, as Professor Cheadle does, that the rules of standing are so relaxed that the applicant need not 'show any need of constitutional protection.' Ibid at 696. FC s 38 relaxes the requirements for standing. It does not eliminate them. See, eg, *Poswa v Member of the Executive Council For Economic Affairs, Environment and Tourism,*

status for which she seeks protection falls within the value-determined ambit of the right,[1] then she must show, in addition, that the law or the conduct she seeks to challenge impedes or limits the exercise of the protected activity.[2]

If the court finds that a challenged law infringes the exercise of the

Eastern Cape 2001 (3) SA 582 (SCA) at para 22 (Although FC s 38 standing requirements are quite generous, the absence of any real interest in the disposition of a matter is manifestly not 'irrelevant to the real question of whether the relief sought and granted was properly sought and granted. The more so when a finding of constitutional invalidity would have to be confirmed by the Constitutional Court for it to have any effect. The prospect of that Court having to devote time and attention to an issue which no longer exists, the resolution of which will have no effect upon the order granted against the appellant and which has not been shown to have any other practical relevance, is a singularly unattractive one. I do not believe that the Constitution requires this Court to inflict so sterile an enquiry upon the Constitutional Court. Generosity in according standing in protection of constitutional values is one thing, profligacy in that regard is another.') Moreover, even taking into account Cheadle's quasi-notional approach to rights interpretation, the activity of the applicant does matter when attempting to determine the scope of the right. It matters in the sense that a court or a commentator committed to a case-by-case approach to rights interpretation often determines the scope of the right, not in the abstract, but in terms of the particular kind of activity, engaged in by the applicant, for which constitutional protection is sought.

[1] See *Matinkinca v Council of State, Ciskei* 1994 (4) SA 472 (Ck), 1994 (1) BCLR 17, 34 (Ck)('[E]stablish[ing] … the meaning or contents … of the relevant fundamental rights [entails] … a value judgment as opposed to a legalistic or positivistic approach.') However, the Constitutional Court is often reluctant to define clearly the ambit of a right, fearing that such an approach to demarcation will bind them, in some future dispute, to an understanding of the right that they had not anticipated and would not endorse but for the existence of some hypothetical precedent. See, for example, *Case & Curtis* (supra) at para 94 ('The less we say meanwhile, in short, the better that will be in the long run.') South African commentators are similarly reluctant to specify what two-stage rights analysis actually requires at each stage of analysis. For example, at the same time as he commits himself to a 'generous' approach to rights interpretation that would not unduly circumscribe a right's protective ambit and would leave the ultimate assessment of the value of a particular form of notionally protected activity to the limitations stage of analysis, Cheadle claims that rights analysis — first-stage analysis — ought to take some account of the competing 'social interests' at stake in a constitutional challenge. Even if it is logically possible to do what Cheadle suggests, he remains, as these authors read him, unclear as to the kind of analysis that occurs at the first stage.

[2] There is, of course, an important distinction to be made between law or conduct that limits expressly or intentionally a fundamental right and law or conduct that has the unintended consequence of limiting a fundamental right. See, eg, *Irwin Toy Ltd v Quebec (Attorney General)* (1989) 58 DLR (4th) 577 (Sets out different tests for government actions which intentionally restrict the protected activity and government actions which effectively restrict the protected activity); *Secretary of State of Maryland v J H Munson Co* 467 US 947 (1984)(Law — backed up by the threat of criminal sanction — may intimidate individuals into not engaging in constitutionally protected activity: such law is said to have a 'chilling effect'.) For example, the doctrine of overbreadth holds that laws which sweep into their proscriptive reach both constitutionally forbidden activity and constitutionally protected activity are invalid. See, for example, *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC)('*SANDU*'). For a discussion of the overbreadth doctrine as articulated in *SANDU*, see Stu Woolman 'Freedom of Assembly' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 43.

fundamental right, the analysis *may* move to a second stage.[1] In this second stage of analysis, the party that would benefit from upholding the limitation will attempt to demonstrate that the infringement of a fundamental right is justifiable.[2] This second stage of analysis occurs, generally speaking, not within the context of the fundamental right or freedom, but within the limitation clause.[3]

We say *may* move to a second stage for two reasons. First, where the limitation does not take place in terms of law of general application, then no opportunity arises to offer a justification in terms of FC s 36. We discuss this threshold issue for justification below.[4] Second, while all rights admit, as an abstract matter, of the possibility of justifiable limitation, not all justification analysis takes place in terms of FC s 36. FC s 9's inquiry into unfair discrimination, in addition to establishing whether a prima facie violation has occurred, exhausts all meaningful inquiry into the justification for any such violation — whether it occurs in terms of law or conduct. Similarly, FC s 25's test for arbitrary deprivation of property consciously incorporates a sliding-scale proportionality assessment — the *sine qua non* of limitations inquiries — into the rights stage of the analysis. Little, if any, space remains for additional forms of justification to be offered under FC s 36. Finally, FC ss 26 and 27 make express provision for limitations on the socio-economic rights found in those sections. Once again, FC s 36 would appear to afford a party seeking to justify a limitation of a socio-economic right few, if any, additional bases for doing so. We discuss the relationship between these rights — and, in particular, their internal limitations clauses — and the general limitations clause at greater length below.[5]

(c) Shared constitutional interpretation, an appropriate normative framework and hard choices

Let us return, briefly, to three points made above. First, the general limitation clause articulates standards for the justification of restrictions placed by law upon the exercise of fundamental rights. Second, these standards are expressed in rather rarefied rules that courts make concrete through their application to

[1] See *Zuma* (supra) at 414 ('Fundamental rights analysis under IC Chapter 3 'calls for a two-stage approach. First, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?') See also *Moise v Transitional Local Council of Greater Germiston* 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC) at para 19 ('It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under s 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing-up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the Court.')

[2] See § 34.6 infra, on why FC s 36 places the burden of justification on the party seeking to uphold the limitation.

[3] See § 34.5 infra, on the manner in which various internal limitations obviate the need for FC s 36 analysis.

[4] See § 34.7 infra.

[5] See § 34.5 infra.

discrete cases. Third, limitations analysis allows for open and candid consideration of competing interests. Taken together, these three statements give expression to what the Constitutional Court has taken to be one of the most basic principles in the Final Constitution: that every exercise of public power derives its force from basic law and needs to be justified by reference to the basic law,[1] and that only open and public processes of rational deliberation produce acceptable forms of justification.[2]

Despite the fact that these standards are produced openly and publicly, or perhaps because of it, they are often hotly contested. Courts cannot, and do not, simply apply the requirements of the text of the limitation clause mechanically. Courts need to explain how they understand the demands of the text and why those demands have certain consequences for the disposition of a case. As a result, judges themselves are subject to the demand for justification. They must be able to explain why they have given the standards the content that they have, and why they have applied them in a given fashion. By doing so, they signal their respect for the parties before them, provide guidance to legislators, fellow judges and prospective litigants, and, perhaps most importantly of all, model rational political discourse through participation in an ongoing debate about the meaning of constitutional norms.[3]

These initial observations suggest that Bill of Rights litigation, rightly conceived, reflects an ongoing dialogue about the meaning of fundamental rights and the cogency of the justifications offered for their limitation.[4] From this perspective, the court's exercise of powers of judicial review are best understood as part of a shared project of constitutional interpretation. This project requires that the courts, through thoroughly reasoned engagement with the constitutional text, produce a normative framework of sufficient density to guide other political actors, organs of state and social agents. At the same time, a doctrine of shared constitutional interpretation encourages other actors to place their own gloss on constitutional norms and to experiment with different policy options consistent with the basic law.

[1] *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC)('*Pharmaceutical Manufacturers*').

[2] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC).

[3] See *S v Steyn* 2001 (1) SA 1146 (CC), 2001 (1) BCLR 52 (CC)(Previous findings of the Constitutional Court do not absolve legislatures from the duty to deliberate about the constitutionality of bills before them, or to justify limitations of fundamental rights. In *Steyn*, the state had not adduced evidence to support its claim that the requirement of leave to appeal from a magistrate's court was necessary to prevent the clogging of appeal rolls and to ensure that hopeless appeals do not waste the courts' time. Since virtually no attempt was made by the state to justify the limitation — presumably because the Court had upheld a similar provision in relation to appeals from High Courts — the Constitutional Court found that the state had failed to justify the measure in question.)

[4] See *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC)('*Mhlungu*') at para 129 (Constitutional interpretation takes the form of 'a principled judicial dialogue, in the first place between members of this Court, then between our Court and other courts, the legal profession, law schools, Parliament, and, indirectly, with the public at large'.) See also Henk Botha 'Rights, Limitations, and the Impossibility of Self-government' in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 13, 24-25.

Put slightly differently, powers of judicial review are best understood not as part of a battle for ascendancy between courts and legislatures (though they may turn into that[1]) or a means of frustrating the will of the political majority, but rather as a commitment of our basic law to shared constitutional competence. This shared competence stands, as we shall see, for five basic propositions: (1) it supplants the notion of judicial supremacy with respect to constitutional interpretation — all branches of government have a relatively equal stake in giving our basic law content; (2) while courts retain the power to determine the content of any given provision, a commitment to shared constitutional interpretation means that a court ought to limit consciously the reach of its holding regarding the meaning of a given provision and to invite the political branches of government or other organs of state to come up with their own alternative, but ultimately consistent, gloss on the text; (3) shared constitutional competence married to a rather open-ended or provisional understanding of the content of the basic law means that the Constitutional Court's limitations analysis might be understood in terms of norm-setting behaviour that provides guidance to other state actors without foreclosing the possibility of other effective safeguards for rights or other useful methods for their realization; (4) a commitment to shared interpretation ratchets down the conflict between the courts and the political branches of government, and enables courts and all other actors to see how variations on a given constitutional norm work in practice;[2] and (5) this experimentalist — or dialogic — framework ought to reveal 'best practices' with respect to the realization of constitutional objectives and should offer us regular opportunities to rethink the meaning — and the constraints — of our basic law.

[1] We are grateful to Johan van der Walt for his attention to this parenthetical and his insistence that the parenthetical may mask the fact that politics never fully disappears from such disputes. See Johan van der Walt 'A Reply to Woolman and Botha on Limitations' in M Bishop, D Brand & S Woolman (eds) *Constitutional Conversations & Proceedings of the Constitutional Law of South Africa Conference and Public Lecture Series (2007)*. The original reply is available at www.chr.up.ac.za/closa.

[2] See Stu Woolman 'The Selfless Constitution: Flourishing and Experimentation as the Foundations of the South African State' (2006) 21 *SA Public Law* (forthcoming). See, especially, Michael Dorf & Barry Friedman 'Shared Constitutional Interpretation' (2000) 2000 *Sup Ct Rev* 61. In *National Education Health and Allied Workers Union v University of Cape Town & Others*, the Constitutional Court recognized that the process of interpreting the Labour Relations Act in light of the demands of both FC s 39(2) and FC s 23(1) requires an appreciation of the legislature's and the courts' shared responsibility for interpreting the Final Constitution. It wrote:

> The LRA was enacted 'to give effect to and regulate the fundamental rights conferred by s 27 of the Constitution.' In doing so the LRA gives content to s 23 of the Constitution and must therefore be construed and applied consistently with that purpose. Section 3(b) of the LRA underscores this by requiring that the provisions of the LRA must be interpreted 'in compliance with the Constitution'. Therefore the proper interpretation and application of the LRA will raise a constitutional issue. This is because the Legislature is under an obligation to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. In many cases, constitutional rights can be honoured effectively only if legislation is enacted. Such legislation will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution. Where the Legislature enacts legislation in the effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose. Moreover, the proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and as such will be a constitutional matter. *In this way, the courts and the Legislature act in partnership to give life to constitutional rights.*

2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC) at para 14 (emphasis added).

In the pages that follow, we assess the ability of the Constitutional Court to delineate clearly rights analysis and limitations analysis, to 'balance' rights, to distinguish the core of a right from its penumbra, and to construct a framework for limitations analysis that both *(a)* enables the parties before the court to make arguments that fully ventilate the issues raised and *(b)* reinforces our democratic law-making processes so that they take adequate account of the constitutional imperative to create 'an open and democratic society' based upon the democratic values of 'human dignity, equality and freedom'. After a critical appraisal of the Court's efforts in this regard, we offer our own thick(er) conception of what limitations analysis ought to look like. We offer this thicker conception not because we think that it is, in the abstract, to be preferred. We proffer the thicker conception because we think that the Court's current approach to rights interpretation and limitations analysis lacks analytical rigour.

That thicker conception begins with an appropriate standard of review for limitations analysis. This standard of review takes the form of, what we called above, a doctrine of shared constitutional interpretation. This doctrine mediates between the doctrine of constitutional supremacy (a doctrine that does not shy away from the necessity of judicial law-making) and the doctrine of separation of powers (a doctrine that often justifies the 'need' for judicial deference). That said, the courts must still articulate a general normative framework that gives the standard of review real purchase and which thereby guides the behaviour of political actors and citizens alike. In the Final Constitution, and in FC s 36 in particular, the creation of a normative framework adequate to the task of limitations analysis turns on giving adequate content to the phrase 'open and democratic society based upon human dignity, equality and freedom'. This task requires that we do something which the courts themselves have only gotten half-right: we offer a description of how the value of dignity and the principle of democracy work — in tandem — to produce, in Theunis Roux's words, a political system in which 'rights . . . lie at the very heart of South African democracy'.[1] Thus, whereas the Court has privileged the value of dignity over the other four values found in the Final Constitution's favourite catchphrase, we reassert the priority of democracy. That reassertion does not, of course, provide an easy algorithm for resolving conflicts between various rights, values and other pressing, constitutionally-mandated, imperatives. Even if, as we have argued previously, and Professor Roux himself notes, fundamental rights analysis and limitations analysis are both driven by a commitment to rights *and* democracy,[2] courts are still left with the

[1] Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 10.3.

[2] For a discussion of the relationship between fundamental rights analysis and limitations analysis, see § 34.3(a) infra. See also Roux 'Democracy' (supra) at § 10.3. ('What is often forgotten when thinking about the two-stage approach to constitutional adjudication is that both stages of the inquiry are driven by considerations of rights *and* democracy: the first stage because it involves an assessment of whether the *right* in question has been infringed, in a context in which FC s 7(1) provides that the 'Bill of Rights is a cornerstone of *democracy*' and 'affirms the *democratic* values of human dignity, equality and freedom'; and the second stage because limitations analysis involves the assessment of whether the *right* has been reasonably and justifiably limited, measured against the standards of 'an open and *democratic* society based

decidedly difficult task of harmonizing constitutionally-permissible, but conflicting, ends. As we suggest in our critique of balancing, the goods reflected in rights and in laws are often incommensurable. Conflict resolution in the face of value incommsurability requires substantially more than the invocation of such patmetaphors as the 'scales of justice'. In our final, highly speculative section, we defend the use of a particular form of judicial narrative-making — storytelling. The difference between story-telling as the preferred form of judicial narrative-making in hard cases and the reliance on cryptic justifications for hard choices is the difference between a good explanation and a bad explanation for the decisions that we take in terms of FC s 36. The better the explanation, the more persuasive it will be. For those who need persuading, the more persuasive the decision, the more legitimate it will be deemed to be. Storytelling, properly understood, is a rhetorical form that enables judges, in Sachs J's words, to challenge the 'hydraulic insistence on conformity to majoritarian standards'[1] and to consider a range of possible outcomes that might not otherwise have occurred to them or their public.

34.2 Drafting History

The limitation clauses of the Interim Constitution and Final Constitutions have a complex history. The text of both clauses reflects a wide array of indigenous concerns and foreign influences. This section uses the drafting history to illuminate the meaning of various sections of the Final Constitution's limitation clause.

(a) Evolution of the clause[2]

The basic form of the Interim Constitution's limitation clause did not change over the course of the twelve reports generated by the Multi-Party Negotiating

on human dignity, equality and freedom'. He continues: 'Of course, resolving the rights-democracy tension is not really this simple. Rights *are* in tension with democracy, and it will not always be readily apparent when a decision to vindicate a right against the will of the majority will serve the democratic values listed in FC s 7(1), and when it will not. But what FC s 7(1) decisively does do is to put beyond question the idea that there will be at least some occasions when the vindication of a right at the expense of majoritarian wishes will not be undemocratic.')

[1] In Sachs J's view, a reasonable accommodation of conflicting interests must avoid two opposite dangers:

> On the one hand, there is the temptation to proffer an over-valiant lance in defence of an under-protected group without paying regard to the real difficulties facing law-enforcement agencies. On the other, there is the tendency somnambulistically to sustain the existing system of administration of justice and the mind-set that goes with it, simply because, like Everest, it is there; in the words of Burger CJ, it is necessary to be aware of "requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards."

Prince v President of the Law Society of the Cape of Good Hope 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC) ('*Prince*') at para 156.

[2] That the Technical Committee or Ad Hoc Committee notes will 'generally' be of 'some' assistance in understanding the meaning and purpose of a constitutional provision is beyond dispute. See *Makwanyane* (supra) at 679 (Chaskalson P wrote: 'Such background material can provide a context for interpretation of the Constitution and where it serves that purpose, I can see no reason why it should be excluded. The precise nature of the evidence, and the purpose for which it may be tendered, will determine the weight to be given to it.')

Forum's Technical Committee on Fundamental Rights. In its Second Report, the Committee identified what it believed to be the primary features of a limitation clause: *(a)* a 'law of general application' threshold test; *(b)* a reasonableness requirement; *(c)* a necessity requirement; *(d)* a 'justifiable in a free, open and democratic society' requirement; *(e)* a proportionality or balancing approach; *(f)* a 'non-derogation from the essential content of the right' requirement; and *(g)* immunization of select rights from any limitation at all. With the exception of the last characteristic, all of these attributes appear in one form or another in the twelfth and final version of the Interim Constitution's limitation clause.[1] That said, the transformation of some of these attributes over twelve drafts gives our exegesis of the text initial direction.

The first significant transformation was the elimination of the immunization proviso. It appeared initially that certain rights would be expressly inviolable.[2] In the seventh draft that proviso — and the concomitant commitment to inviolability — disappeared.[3] However, that certain rights were no longer expressly inviolable did not mean that the drafters believed that these rights were now in fact limitable. By stipulating that no restriction on a fundamental right could negate the essential content of the right, the drafters of the Interim Constitution believed that they had effectively immunized certain rights from limitation.[4]

[1] Cf Etienne Mureinik 'A Bridge to Where: Introducing the Bill of Rights' (1994) 10 *SAJHR* 31 (Argues that the disappearance of a proviso that would immunize select rights from limitation in favour of an analytic structure which would subject all rights to justifiable limitation may overemphasize symmetry at the expense of common sense.)

[2] See Technical Committee on Fundamental Rights 'Third Report' (28 May 1993) 8 ('Typical among those which are regarded as absolutely inviolable are freedom from torture and freedom of conscience, religion, belief, thought and opinion.') See also Fifth Report of the Technical Committee on Fundamental Rights (11 June 1993) 14 ('*With the exception of the rights and freedoms referred to in Section 6(2), 7 (excepting the right not to be subject to forced labour), 9 (excepting freedom of religion), 21 and 27*, the rights and freedoms entrenched in this Chapter may be limited by a law of general application, provided that such limitation — *(a)* shall be permissible to the extent (i) necessary and reasonable, and (ii) justifiable in a free, open and democratic society, and *(b)* shall not negate the essential content of the right or freedom in question.' (Emphasis added.))

[3] Technical Committee on Fundamental Rights 'Seventh Report' (29 July 1993) 10 ('The rights and freedoms entrenched in this Chapter may be limited by a law applying generally and not solely to an individual case, provided that such limitation — *(a)* shall be permissible to the extent (i) reasonable, and (ii) justifiable in a free, open and democratic society, and *(b)* shall not negate the essential content of the right or freedom in question . . .')

[4] Despite the excision of the immunization proviso, the drafters continued to speak of illimitable rights. See Combined Meeting of the Ad Hoc Committee and the Technical Committee on Fundamental Rights (14 September 1993) 22 (The combined meeting generated the following list of illimitable rights: human dignity, freedom and security of the person (in so far as it protects against torture or cruel, inhuman or degrading treatment punishment), rights of detained, arrested and accused persons (in so far as they include the rights to reasons for detention, to detention under dignified conditions, to be informed of the right to remain silent and not to be compelled to make a confession if arrested, and the rights if accused to be informed of the charge, to be presumed innocent, to remain silent during plea proceedings, not to be a compellable witness, not to be convicted of an *ex post facto* crime, not to be subject to two trials for the same crime, to be tried in a language the accused understands, and to be sentenced within a reasonable period of conviction), and the rights of children not to be neglected, abused, or subject to child labour and to be detained in appropriate conditions. How the text was to ensure their illimitability, in the absence of an immunization proviso, the combined meeting did not say.)

The second significant transformation of the limitation clause involved the death and the resurrection of the word 'necessary'. The disappearance of the term from the Fifth Report through the Seventh Report of the Technical Committee signalled either the desire to relax the limitation test or the belief that the term was redundant.[1] The *trauvaux préparatoires* do not say. In the Eleventh Report, the term 'necessary' reappears and comes to occupy a very different place in the architecture of the limitation clause. The Technical Committee's notes make it clear that the term is meant to subject limitations placed upon a particular set of enumerated rights to a stricter form of judicial scrutiny.[2]

(b) Foreign influences

The undeniable debt our limitation clause owes to the Canadian Charter justified the close attention our courts initially paid to Canadian case law.[3] And despite the

[1] Compare Technical Committee on Fundamental Rights 'Fifth Report' (11 June 1993) 14 (Rights and freedoms may be limited 'to the extent (i) necessary and reasonable') with Technical Committee on Fundamental Rights 'Seventh Report' (29 July 1993) 12 (Rights and freedoms may be limited 'to the extent (i) reasonable.')

[2] See Technical Committee on Fundamental Rights 'Tenth Report' (5 October 1993) 30 ('[A] law limiting a right entrenched in sections . . . shall be *strictly construed* for constitutional validity.' (emphasis added)). The debt to American jurisprudence is made explicit in the draft committee notes. Indeed, the rights in s 33(1)(aa) and (bb) had been subject to a 'strict scrutiny' provision in previous drafts of the interpretation clause — and not in the limitation clause. However, when the drafters got wind of the potential for incoherence that would result from having a 'reasonableness' test in a Canadian-style limitation clause and an American-style shifting of standards of scrutiny in the interpretation clause, they excised the offending text in the interpretation clause and modified the limitation clause accordingly. For a fuller explanation of the problems with the original formulation of the limitation and the interpretation clauses, see Cathi Albertyn, Ronalda Murphy, Polly Halfkenny & Stu Woolman 'Critique of the Tenth Progress Report of the Technical Committee on Fundamental Rights' (September 1993)(Memorandum on file with author.) In the Eleventh Report, the Committee explains the change as follows: 'If the Council is of the opinion that laws limiting certain rights should be subject to a stricter form of review than laws limiting other rights, the Technical Committee proposes the inclusion of the second proviso as submitted. This would mean that for the laws limiting rights listed in the proviso, a necessity test will apply in addition to the test for reasonableness already required by clause 34(1)(a)(i). In this way, the further logical development of principles conceived in Canadian jurisprudence will be possible without creating the danger of confusion with the fundamentally different principles enunciated in US jurisprudence.' Technical Committee on Fundamental Rights 'Eleventh Report' (8 November 1993) 14-15. See also Lourens du Plessis 'A Note on Application, Interpretation, Limitation and Suspension Clauses in South Africa's Transitional Bill of Rights' (1994) 5 *Stellenbosch LR* 86, 89 (Committee's attention drawn to potential incoherence of the two clauses by aforementioned memo; offending text in interpretation clause excised and moved to limitation clause.)

[3] The Interim Constitution's limitation clause, the Final Constitution's limitation clause and the Canadian Charter's limitation clause share two important characteristics. First, they apply generally to the constitutionally enshrined rights. (Thus, they differ from those constitutions (and conventions) that have individualized limitation clauses within particular rights, and those constitutions (and conventions) which have no limitation clause(s) at all.) Secondly, the language of the Final Constitution's limitation clause is strikingly similar to the language of the Canadian Charter. Section 1 of the Canadian Charter reads, in relevant part, that the 'guarantees . . . set out in . . . [the Charter are] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' The Final Constitution's limitation clause reads, in relevant part, that the 'rights of this Chapter [on Fundamental Rights] may be limited by law of general application provided that such limitation . . . is . . . reasonable . . . and justifiable in an open and democratic society based upon human dignity, equality and freedom.'

fact that our courts have never followed the fairly stringent test laid down by the Canadian Supreme Court in *R v Oakes*, our jurisprudence has developed along roughly similar lines.[1] Limitations analysis under the Charter and our Bill of Rights possesses such common features as (1) a threshold requirement that a limitation must take the form of a 'law of general application';[2] (2) a threshold requirement that the objective of the impugned law be of sufficiently pressing and substantial import to warrant overriding a constitutionally protected right;[3] (3) a proportionality assessment that demands, at a minimum, that a rational connection exist between the means employed and the objective sought,[4] that the means

[1] [1986] 1 SCR 103, 26 DLR (4th) 200, 227–28 ('*Oakes*'). For a more concise wording of this limitations test, see *R v Chaulk* [1990] 3 SCR 1302, 62 CCC (3d) 193, 216–17. Cf *Edwards Books & Art Ltd v The Queen* [1986] 2 SCR 713, 35 DLR (4th) 1, 41 (While the *Oakes* test required the government to go to great lengths to satisfy each leg, the *Edwards* Court suggests that the government's showing might be subject to a less exacting standard of proof and that the same questions need not be asked in every case). The *Oakes* test was cited with approval in a large number of early South African Supreme Court judgments, but largely abandoned as a point of reference after *Makwanyane*. See *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E), 1994 (1) BCLR 75 (E); *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (Nm), 1994 (3) BCLR 1, 26 (Nm); *S v Majavu* 1994 (4) SA 268 (Ck), 1994 (2) BCLR 56, 83–84 (Ck).

[2] Compare *Dawood v Minister of Home Affairs; Shalabi & Another v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (3) BCLR 331 (CC)('*Dawood*') with *Committee for the Commonwealth of Canada v Canada* (1991) 77 DLR (4th) 385.

[3] Compare *National Director of Public Prosecutions & Another v Mohamed NO & Others* 2003 (5) BCLR 476 (CC), 2003 (4) SA 1 (CC) with *Oakes* (supra) at 227 (The *Oakes* Court suggests that laws which serve such values as the dignity of the individual, social justice, equality, tolerance, cultural diversity, and a commitment to representative and participatory politics — constitutive features of a free and democratic society — could be of sufficient import to justify the infringement of constitutional rights. This list echoes our own quintet, captured in the phrase an 'open and democratic society based upon human dignity, equality and freedom'. Neither list of values or objectives is meant to be exhaustive.) See also *Vriend v Alberta* [1998] 1 SCR 493 (Despite the benevolent and sufficiently pressing objectives of the Alberta Parliament in promulgating a human rights charter, Supreme Court finds that the failure of Alberta's human rights charter to prohibit, expressly, discrimination on grounds of sexual orientation violated, unjustifiably, Charter s 15's right to equality.) But see *Little Sisters Book & Art Emporium v Canada (Minister of Justice)* [2000] — SCR — (The legislation reflected a pressing and substantial parliamentary objective of prohibiting the entry of socially harmful materials into Canada, and the customs procedures under scrutiny were rationally connected to that objective.)

[4] The requirement that the restrictive measure be rationally connected to the achievement of its objective is a test legislation rarely fails in Canadian jurisprudence. But see *Oakes* (supra) at 200 (Reverse onus provision requiring individual in possession of drugs to show that she was not trafficking deemed rationally unrelated to objective of stopping trafficking); *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 56 DLR (4th) 1 (Holds that citizenship requirements for bar membership were unrelated to the objective of ensuring that lawyers carried out their duties in an honourable and conscientious manner); *Benner v Canada* [1997] 1 SCR 358 (Stricter requirements for Canadian citizenship placed upon a person born outside of Canada before 1977 to a Canadian mother than those requirement placed upon a person born to a Canadian father before 1977 were found not to be rationally connected to the objective of keeping dangerous people out of the country.) The rational connection requirement — which provides a minimum floor for justification below which government's explanations may not fall — has been dispositive in a relatively large number of South African cases. See, eg, *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at paras 20, 22–23 (Court held that effective prohibition of the abuse of illegal drugs would not be substantially furthered by a legislative presumption that a person found in possession of 115 grams of dagga is a dealer, and thus that there was no logical connection between such possession and the presumption that the person is trafficking); *S v Dodo* 2001 (3) SA 382 (CC), 2001 (3) BCLR 279, 293–94 (CC)(Court found no rational relationship between a mandatory

employed impair the right as 'little as possible',[1] and that the burdens imposed on those whose rights are impaired do not outweigh the benefits to society that flow from the limitation.[2]

sentence of life imprisonment and the crime for which it was imposed because state could not demonstrate that the penalty would serve as a deterrent); *Lesapo v North West Agricultural Bank & another* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC) at para 26 (Limitation only minimally related to its purpose.) See, for further references to apposite cases, § 34.8*(c)*(iv) infra.

[1] For examples in Canadian jurisprudence, see *Dunmore v Ontario* [2001] 3 SCR 1016 (Canadian Supreme Court finds that the exclusion of agricultural workers from the respondent's labour relations statute did not constitute least restrictive limitation on the right to freedom of expression); *UCFW v Kmart Canada* [1999] 2 SCR 1083 (Prohibition of a peaceful distribution of leaflets by a striking union at sites not included in the labour dispute was found not to be the least restrictive means of minimizing disruption of businesses not involved in the dispute); *Thomson Newspapers Co. v Canada* [1998] 1 SCR 877 (Prohibition of the publication of opinion polls in the final three days of an election campaign was found not to be the least restrictive means of protecting voters from inaccurate information); *Ross v New Brunswick School District* [1996] 1 SCR 825 (Recommendation by board of inquiry that a person employed in a non-teaching position by the school board must be fired if he continued with his distribution of anti-semitic leaflets deemed not to be the least restrictive means of rectifying a discriminatory climate in the school); *RJR-McDonald v Canada* [1995] 3 SCR 199 (Federal ban on all advertising of tobacco products deemed not to be the least restrictive means of reducing the consumption of tobacco.) For examples in South African jurisprudence, see *S v Manamela & Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC) at para 43 (Purpose of a reverse onus provision, in terms of which someone who had acquired stolen goods was presumed to be guilty of a statutory offence, could also be achieved by a less restrictive means, namely a more narrowly tailored reverse onus provision which was confined to certain categories of more expensive stolen goods); *Phillips & Another v Director of Public Prosecutions (Witwatersrand Local Division) & Others* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC) at paras 26–28 (Objective of the limitation — to minimise the harm that may result from the consumption of liquor in public places — could be achieved through measures that were less restrictive of the right to freedom of expression.) For further examples of such cases, see § 34.8*(c)*(v) infra.

However, neither the Canadian Supreme Court nor our Constitutional Court requires perfection — or the least restrictive means in the best of all possible worlds. See *Reference re ss 193 and 195.1(1)(c) of the Criminal Code* [1990] 1 SCR 1123, 1138, 56 CCC (3d) 65 ("The legislative scheme . . . need not be the most 'perfect' scheme that could be imagined by this Court or any other Court. Rather it is sufficient if it is appropriately and carefully tailored in the context of the infringed right.') The Constitutional Court, while accepting the Final Constitution's invitation to consider the availability of less restrictive means, has made it clear that such a requirement does not mean that the legislature must, in fact, have identified and enshrined in law the least restrictive means for achieving the objective of a limitation. See *Case & Another v Minister of Safety and Security & Others; Curtis v Minister of Safety and Security & Others* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) at para 62 (Mokgoro J)(Court affords legislature a 'margin of appreciation' with respect to choosing the most effective means of achieving a constitutionally permissible objective.) Moreover, institutional comity cautions against the substitution of its judgment of what constitutes the least restrictive means for the well-considered opinion of the legislature or the executive. For more on 'less restrictive means', see § 34.8*(c)*(v) infra.

[2] The Canadian Supreme Court has found minimum drug sentences (*R v Smith* [1987] 1 SCR 1045, 40 DLR (4th) 435), laws protecting the confidentiality of matrimonial proceedings (*Edmonton Journal v Alberta* [1989] 2 SCR 1326, 64 DLR (4th) 577), by-pass and notice provisions for abortions (*R v Morgenthaler* [1988] 1 SCR 30, 44 DLR (4th) 385), citizenship requirements for bar membership (*Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 56 DLR (4th) 1), and restrictions on advertising by dentists (*Rocket v Royal College of Dental Surgeons* [1990] 2 SCR 232, 71 DLR (4th) 68) to impose costs and injuries disproportionate to the alleged benefits. On the other hand, it has found measures intended to prevent drunk-driving (*R v Hufsky* [1988] 1 SCR 621, 40 CCC (3d) 398; *R v Thomsen* [1988] 1 SCR 640, 40 CCC (3d) 411), to restrict publication of sex-assault victims' names (*Canadian Newspapers Co v Canada (Attorney General)* [1988] 2 SCR 122, 52 DLR (4th) 690), and to prohibit picketing outside courthouses (*BCGEU v*

While both our Constitutional Court and the Canadian Supreme Court state that limitations analysis ought, in general, to follow the model adumbrated above, they have rejected the ostensibly more mechanical approach to limitations delineated in *Oakes*.[1] Whether the benefits of a flexible test outweigh the potential for confusion with respect to its application by lower courts and its use as a standard by state and private actors is a subject that shall occupy us throughout the remainder of this chapter.[2]

British Columbia (Attorney General) [1988] 2 SCR 214, 53 DLR (4th) 1) to impose costs proportionate to the benefits realized.

In appraising whether the costs imposed by a limitation outweigh the benefits that might otherwise accrue, the Constitutional Court sometimes considers whether the limitation affects the core values underlying a particular right. It has found that the right to be tried in a hearing presided over by a judicial officer is a core component of the right not to be detained without trial. See *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 89. Similarly, reverse onus provisions are said to strike at the heart of the right to be presumed innocent, and so require a clear and convincing demonstration that the benefits of such a provision outweigh its costs. See *Manamela* (supra) at para 49. By contrast, the benefits that flowed from a prohibition of child pornography were found to outweigh considerably the costs imposed upon those persons whose right to freedom of expression had been restricted. See *De Reuck* (supra) at para 59. For more on the notions of 'the core' and 'the periphery', see §§ 34.8*(c)*(iii) and *(d)* infra.

[1] See *Edward Books and Art Ltd v The Queen* [1986] 2 SCR 713, 35 DLR (4th) 1, 41 ('[T]he nature of the proportionality test would vary depending upon the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement, the Court has been careful to avoid rigid and inflexible standards'); *Black v Law Society of Alberta* [1989] 1 SCR 591, 58 DLR (4th) 317, 348 ('[L]egislature must be given sufficient room to achieve its objective'); *USA v Cotroni* [1989] 1 SCR 1469, 1489, 48 CCC (3d) 193 ('[A] mechanistic approach [to the proportionality test] must be avoided'); *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 56 DLR (4th) 1, 41 ('The test must be approached in a flexible manner. The analysis should be functional, focusing on the character of the classification in question, the constitutional and societal importance of the interests adversely affected, the relative importance to the individuals affected of the benefit of which they are deprived, and the importance of the state interest.') The Canadian Supreme Court has said that cases involving the criminal justice system are subject to closer judicial scrutiny and a stricter form of the minimal impairment test than labour or business regulations, because criminal justice is an area in which the court can claim greater expertise. See *McKinney v University of Guelph* [1990] 3 SCR 229, 76 DLR (4th) 545. But in at least one criminal case, the Supreme Court applied a fairly weak version of the minimal impairment test and upheld the extradition of the accused. See *USA v Cotroni* [1989] 1 SCR 1469, 48 CCC 193. See also *Dagenais v Canadian Broadcasting Corp* (1994) 120 DLR (4th) 12 (Court employs weaker version of *Oakes* test in criminal context.)

The *Oakes* test has no special place in South African constitutional jurisprudence. Although the *Oakes* test featured prominently in the *Makwanyane* Court's discussion of comparative limitations jurisprudence, Chaskalson P was quick to point out that 'there are differences between our Constitution and the Canadian Charter which have a bearing on the way in which section 33 should be dealt with'. *Makwanyane* (supra) at paras 105–107, 110. Chaskalson P gave no indication of what the relevant differences might be, but simply echoed the words of Kentridge AJ in *Zuma* that 'I see no reason in this case . . . to fit our analysis into the Canadian pattern.' See *Zuma* (supra) at para 35.

[2] With respect to limitations analysis under the Charter, Ruth Colker has suggested that too loose a proportionality test threatens indiscriminate judicial deference to legislative and executive prerogatives. See Ruth Colker 'Section 1, Contextuality and the Anti-disadvantage Principle' (1992) 42 *University of Toronto LJ* 77, 104. There is also a second danger. A lack of analytical precision may make it more difficult to anticipate the kinds of arguments that would lead the court to conclude that a limitation of a right is (or is not) reasonable and justifiable. The absence of rules of law to which political actors must align their behaviour undermines the ability of other branches of government to comply with the Bill of Rights —

Many of the obvious influences of other constitutional documents on the Interim Constitution's limitation clause have been eliminated from the text of the Final Constitution. IC s 33 required limitations of certain rights to be both 'reasonable' and 'necessary', while other rights could be limited in a manner that was merely 'reasonable'. That distinction, clearly inspired by the doctrines of strict scrutiny, intermediate scrutiny and rationality review found in American equal protection and fundamental rights jurisprudence, was excised in favour of a test that does not pre-judge the importance of the fundamental rights found in Chapter 2. And while the German Basic Law's contribution of the requirement that limitations of fundamental rights can only be justified by reference to a 'law of general application' remains on the books,[1] the drafters of the Final Constitution decided not to retain its proscription of limitations that 'negate the essential content of [a] right'.[2]

34.3 Relationship Between Fundamental Rights Analysis and Limitation Analysis

This section attempts to answer a basic question in Bill of Rights analysis: how does fundamental rights analysis relate to limitation clause analysis? That is, what happens in the first stage of analysis, what remains to be done in the second stage, why do we allocate certain analytical tasks to one stage and not the other, and how do we justify our overall approach to constitutional interpretation?

and places the court in the unnecessarily uncomfortable position of having to reject or to accept government's positions in any given case as if they were ruling *ab initio*. We believe that such considerations constitute some of the strongest arguments against Sunstein's 'one case at a time' approach or Currie's 'jurisprudence of avoidance'. See Cass Sunstein *One Case at a Time* (1996); Iain Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 138. In addition, the absence of clearly articulated rules undermines rational political discourse. Reasoned disagreement can only take place when the parties agree on the terms of the debate. The Constitutional Court abdicates its institutional responsibility to model rational political discourse by refusing to state, in a comprehensive manner, the reasons that lead to its conclusions. Finally, avoidance undermines the 'integrity' of the legal system. It is impossible to create a more coherent jurisprudence without identifying the rules — and the reasons — that ground decisions.

[1] For more on German constitutional jurisprudence and its contribution to the Interim Constitution, see Matthew Chaskalson, Dennis Davis & Johan de Waal 'Democracy and Constitutionalism: The Role of Constitutional Interpretation' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 1. See also Johan de Waal 'A Comparative Analysis of the Provisions of German Origin in the Interim Bill of Rights' (1995) 11 *SAJHR* 1.

[2] Article 19.2 of the German Basic Law reads, in relevant part: '[I]n no case may the essential content of a right be encroached upon.' The inclusion of this clause in the German Basic Law reflects the drafters' belief that legislation under the Weimar Constitution had been interpreted in such a way as to permit the complete evisceration of that constitution's guarantees. The clause was designed to provide a floor below which restrictions on fundamental rights could not fall. See Theodor Maunz & Gunter Durig *Grundgesetz Kommentar* (1991) Art 19, II-9; Gerhard Erasmus 'Limitation and Suspension' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 629, 650.

(a) The value-based approach and the notional approach

The general nature of constitutional interpretation and the interpretation of fundamental rights are dealt with at length elsewhere in this work.[1] To rehearse the conclusions of those chapters briefly, FC s 39 tells us that the content and the scope of the rights enshrined in Chapter 2 should be determined in the light of the five fundamental values which animate the entire constitutional enterprise: openness, democracy, human dignity, freedom, and equality.[2] FC s 39 thereby confirms that the determination of a right's scope is a value-based exercise. However, the scope-determinative values are not limited to the five identified in FC s 39. For each right there are specific values that can be said to have led to its constitutionalization. The specific values that animate each right, along with FC s 39's more general concerns, determine the right's sphere of protected activity.

On this account, if an applicant can show that the exercise of constitutionally protected activity has been impaired, then she has made a *prima facie* showing of a constitutional infringement. If the infringement was authorized by law, then the state or the party relying upon this law will have an opportunity to justify its *prima facie* infringement of the right under the limitation clause.

There is of course another way to go. One could argue that any activity which could notionally fall within the ambit of a right is protected. It remains then to show that law — as opposed to mere conduct — limited the exercise of the right before moving on to the heart of FC s 36 analysis.[3] There are several reasons to prefer the first approach to the second approach. First, it is consistent with the text's admonition that provisions of the Bill of Rights be interpreted in light of the 'values which underlie an open and democratic society based on human dignity, equality and freedom'. The Final Constitution was not meant to protect certain forms of behaviour and a value-based approach permits us to screen out those forms of behaviour which do not merit constitutional protection. Secondly, high value-based barriers for the first stage of analysis mean that only genuine and serious violations of a constitutional right make it through to FC s 36. If only serious infringements make it through, then the court can take a fairly rigorous approach with respect to the justification for the impairment. It could then be fairly confident that when it nullified law or conduct there would be something

[1] Lourens du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 3; Christo Botha & Abdul Fumah 'Interpretation of the Bill of Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2007) Chapter 32.

[2] These five values do not operate on the same normative plane: the conditions required for the realization of the first two values — openness and democracy — are contingent on the realization of the next three — human dignity, freedom, and equality. Perhaps, as we discuss below, one should speak of de-linking the first set of values from the second. See § 34.8*(e)*(ii) infra.

[3] See Gerhard van der Schyff *Limitation of Rights: A Study of the European Convention and the South African Bill of Rights* (2005) 29–124. Van der Schyff defends a notional approach to rights analysis. He argues that 'a wide interpretation should be followed in order to extend protection to as many forms of conduct and interests as possible'. Ibid at 32.

worth protecting. Thirdly, the valued-based approach is consistent with the notion that a 'unity of values' underlies both the rights-infringement determination and the limitation-justification analysis. The language of the interpretation clause and the limitation clause strongly suggests that both inquiries are driven by a desire to serve the five values underlying our entire constitutional enterprise: openness, democracy, human dignity, freedom, and equality.[1]

The desirability of the value-based approach is perhaps clearer when compared with the consequences of the notional or the expansive approach to rights interpretation. First, the notional approach suggests that certain forms of behaviour which we believe do not merit constitutional protection will in fact receive *prima facie* protection. Secondly, the notional approach expands the number of claims that make it to the second stage of analysis. The result is that if the courts wish to curtail their findings of unconstitutionality, their criteria for the justification of government limitations on rights have to become more flexible. The further possibility exists that in order to make their justificatory criteria more flexible the courts will expand the kinds of objectives which justify limitations on constitutional rights. This result would seem to stand in direct conflict with the textual demand that both interpretation and limitations analysis be undertaken in the light of the needs of an open and democratic society based on human dignity, equality and freedom. Finally, by pushing all of the Chapter 2 analysis into the limitation clause, and forcing themselves to be more flexible with respect to the grounds for justification of a limitation, the courts undercut their ability to articulate analytically rigorous conceptions of rights at the first stage of analysis and useful standards of justification for limitations at the second stage of analysis.[2]

(b) The Constitutional Court's approach to two-stage analysis

For the most part, the problem with the Constitutional Court's current position on the two-stage approach to fundamental rights analysis is that it offers little insight or guidance.[3] The Court has neither described in detail the analytical processes

[1] For a similar discussion of how the 'unity of values' affects the structure of fundamental rights analysis under the Canadian Charter, see Lorraine Weinrib 'The Supreme Court of Canada and Section One of the Charter' (1988) 10 *Supreme Court LR* 469. See also § 34.8*(e)*(ii).

[2] The value-based approach should result in a more restrictive interpretation of the scope or the ambit. It would, nevertheless, be wrong to characterize this approach as 'narrow' or 'restrictive' — as opposed to generous. The point is not to restrict the protective ambit of constitutional rights but, rather, to make sense of FC s 39(1)'s injunction to interpret constitutional rights in view of the values of democracy, openness, dignity, equality and freedom, and to effect the best possible division of tasks between the first stage and the second stage of fundamental-rights analysis. Nor can this approach be characterized as 'minimalist.' Minimalism, as a judicial stratagem, is designed to permit judges to avoid deciding difficult doctrinal issues. The result is often judgments that are radically under-theorized. The value-based approach requires judges to articulate the basis for their pronouncements at both stages of the inquiry. If anything, the value-based approach to rights interpretation and limitations analysis reflects 'maximalist' orientation towards constitutional interpretation.

[3] See, eg, *Makwanyane* (supra) at para 100 ('Our Constitution . . . calls for a "two-step" approach, in which a broad rather than a narrow interpretation is given to the fundamental rights enshrined in Chapter 3 and limitations have to be justified through the application of s 33.')

that occur at each step nor has it justified the allocation of certain tasks to particular stages of the analysis.[1] Early on in the Court's tenure, two justices had something relatively substantial to say about the relationship between rights interpretation and limitations analysis. Sachs J states his position*(s)* in a concurrence in *Coetzee* and a concurrence in *Ferreira*. Ackermann J states his position*(s)* in a dissent in *Ferreira* and the majority opinion in *Bernstein*.[2]

In *Ferreira* Sachs J sets out to develop the Court's largely unarticulated understanding of the relationship between rights analysis and limitations analysis in a manner which ostensibly avoids the alleged 'sterility' of the two-stage approach.[3] Sachs J's rationale for his project flows from his belief that the Court 'should not engage in purely formal or academic analyses, nor simply restrict [itself] to ad hoc technism'.[4] Rather the Court should, when undertaking fundamental rights analysis, 'focus on what has been called the synergetic relationship between the values underlying the guarantees of fundamental rights and the circumstances of the particular case'.[5] The judge then concludes that '[i]n [his] view, faithfulness to the Constitution is best achieved by locating the two-stage balancing process within a holistic, value-based and case-oriented framework'.[6] Beyond these generalizations, Sachs J offers little in the way of clear direction for what a new relationship between rights interpretation and limitations analysis would look like. He simply enjoins his fellow judges to 'exercise … a structured and disciplined value judgment, taking account of all the competing considerations that arise in the present case'.[7]

There are several potential problems with Sachs J's intervention on this subject. First, a two-stage approach is not necessarily 'formal' or 'academic'. The quality of the inquiry depends on the nature of the questions asked, not on their number or their order. Secondly, it is impossible to know what Sachs J means by a 'synergetic relationship' between the two stages of analysis or by the 'exercise … of a structured and disciplined value judgment' when he gives neither examples nor further description of these processes. Thirdly, and most disturbing, is Sachs J's vision of a 'two-stage balancing process within a holistic, value-based and case-oriented framework'.

Sachs J's apparent vision of balancing at both stages ignores the clear intention and the structure of a bill of rights which possesses both fundamental rights and a general limitations clause: that different forms of analysis will take place at different stages of analysis. Intentions and structure aside, as a historical matter few

[1] But see *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 35 (Court recognizes difference between definitional questions asked at the rights infringement stage and justificatory questions asked at the limitations stage).

[2] *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC).

[3] *Coetzee v Government of the Republic of South Africa; Matiso & Others v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 651 (CC), 1995 (10) BCLR 1382 (CC)('*Coetzee*') at para 46.

[4] Ibid.

[5] Ibid.

[6] Ibid.

[7] Ibid at para 47.

judges and academics view the first stage of analysis as involving a balancing of interests. The first stage of analysis is generally understood to require the judge to determine the ambit of the right. The determination is made by asking what values underlie the right and then, in turn, what practices serve those values. The judge is not required to compare the importance of the values underlying the right allegedly being infringed with the values said to underlie the policy or right or interest said to support the alleged infringement. This comparison is left for the second stage of analysis under the limitations clause. It is under the limitations clause that we ask whether a party's interest in having a challenged law upheld is of sufficient import to justify the infringement of a right.

Another sense of 'value choice' employed during the process of determining the contours of a right is worth discussing: namely, the fact that not all activity that might notionally qualify as a demonstration merits the right's protection.[1] For example, a group of skinheads tossing trashcans through plate-glass windows, shouting racial epithets, and protesting the presence of immigrant communities might be attempting to convey collectively a 'political' message that is generally not countenanced by mainstream parties. The fact that it is not a peaceful conveyance and, indeed, that the primary motivations for the acts are destructive and not communicative may, however, take this demonstration outside the bounds of protected activity.[2]

What should be clear is that the determination made here is one of definition or demarcation, *not* balancing. We are asking what counts as protected assembly activity, *not* whether this kind of protected activity, when offset against some competing set of public or private interests, still merits protection. We are deciding what values animate and what practices are protected by a particular right. The problem of value conflict between a right and a law that limits the exercise of that right is played out at the next stage of inquiry — the limitations clause.

At the same time, there are occasions in which it makes sense to talk about value conflict within a right. For example, freedom of expression is generally understood to be grounded, at least in part, in the value of political participation. However, the value of political participation may be served by practices which

[1] Stu Woolman 'Freedom of Assembly' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 43.

[2] We have already noted that we are indebted to Halton Cheadle for pointing out that in the first edition of this work one of the authors — Stu Woolman — erred when he suggested that an assessment of the entitlement of the claimant to the benefit of a constitutional right is a part of rights analysis. Cheadle observed correctly that the author had conflated issues of standing and rights analysis. See Halton Cheadle 'Limitation of Rights' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 693, 696. But we must point out that the actual quote from the chapter by Stu Woolman in the first edition of this work, which Cheadle cites in support of this otherwise correct proposition, does not support his subsequent analysis. Ibid at 696.

conflict with one another.[1] Hate speech may be thought by those expressing it to reflect their participation in or contribution to the political process. At the same time the targets of the hate speech — especially when it is directed at small or marginal social groups — may find that the expression of hate speech makes it difficult for them to express themselves fully or equally in the public square. They may feel coerced into silence by the hate speech. They may feel that the hate speech creates invidious conditions in which others will inevitably fail to listen to them or to take them seriously. Hate speech thus creates a paradox. Deny the expression of the hate speakers and you deny them full political participation. Permit the expression of the hate speakers and you deny the targets of their hate speech full political participation. It is a value conflict, under the freedom of expression, which cannot be reconciled. One kind of expression, and its attendant value, must give way to another form of expression, with its attendant value. But this assessment is not a form of balancing. One unconstitutional practice yields to another constitutionally protected practice. So this 'paradox' lends no support to the proposition that balancing occurs at both stages of analysis.

If a general limitations test is cause for concern for those interested in strong rights enforcement, then talk of introducing balancing into the first stage of analysis — where one determines the ambit of the right — should be cause for alarm. Doing balancing at both stages is an open invitation for the worst kind of analytical confusion.[2] How, one must ask, does the balancing at the first stage differ from the balancing at the limitations stage? What 'balancing of what' does one do at each stage? Why have the limitations clause at all? Greater specification of the modalities of both rights interpretation and limitations analysis would seem to be required.[3]

Of course, we may have misinterpreted Sachs J's interventions in *Coetzee*. In his judgment in *Ferreira*, Sachs J approaches the meaning of 'freedom … of the person' in IC s 11(1) in a relatively circumspect manner. In contrast to the expansive interpretation of IC s 11(1) offered by Ackermann J, an approach that Sachs J says might force the court to 'test the reasonableness or necessity of each and every piece of regulation undertaken by the state', Sachs J suggests that 'the Constitution … requires the court to focus its attention on real and substantial infringements of fundamental rights.'[4] A charitable reading of this intervention might lead one to conclude that Sachs J believes that the rights interpretation and limitations analysis differ substantially. But we are not

[1] See Robert Post 'The Constitutional Concept of Public Discourse' (1990) 103 *Harvard LR* 601; Robert Post 'Racist Speech, Democracy and the First Amendment' (1991) 32 *William & Mary LR* 267.

[2] For a detailed discussion of this danger, see Stu Woolman 'The Limitations of Justice Sachs's Concurrence: *Coetzee v Government of the Republic of South Africa*' (1996) 12 *SAJHR* 99, 115–21; Stu Woolman & Johan de Waal 'Voting With Your Feet: The Freedom of Assembly' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 292, 308–14.

[3] See Alfred Cockrell 'Rainbow Jurisprudence' (1996) 12 *SAJHR* 1.

[4] *Ferreira* (supra) at para 252.

convinced, by any other statement in either opinion, that an integrated assessment of Sachs J's conclusions in *Coetzee* and *Ferreira* yields new fruit with respect to our understanding of the relationship between rights interpretation and limitations analysis.

Ackermann J's contributions to this discussion are a bit more difficult to track. Indeed, his decisions in *Ferreira* and *Bernstein* seem to point in opposite directions. In *Ferreira,* Ackermann J starts off as if he might follow a value-based approach to rights analysis. He writes:

> [I]t is necessary, as a matter of construction, to define or circumscribe the s 11(1) right to the extent necessary for purposes of this decision . . . [S]ome attempt must be made at this stage to determine the meaning, nature and extent of the right . . . This court has given its approval to an interpretive approach 'which . . . gives expression to the underlying values of the Constitution'.[1]

But after reading 'freedom' in IC s 11(1) disjunctively from 'security of the person', and then giving a ringing defence of 'freedom' *qua* negative liberty, Ackermann J's real position on rights analysis and limitations analysis becomes clearer. He argues that while a 'broad and generous interpretation does not deny or preclude the constitutionally valid . . . role of state intervention in the economic as well as the civil and political spheres . . . legitimate limitations on freedom must occur through and be justified under the principles formulated in IC s 33(1), not by giving a restricted definition of the right to freedom.'[2] While some interpreters might characterize this approach to rights analysis as both purposive and generous,[3] it seems to possess the same problems that attach to the notional approach to rights interpretation described above: all the difficult inquiries take place within the rather amorphous frame provided by the limitations clause.[4]

Two particular problems with the notional approach — as it was applied to freedom of the person under IC s 11(1) — are worth mentioning. First, one reason that Ackermann J's judgment is rejected by the majority is the relative unboundedness he imputes to IC s 11(1). Although he describes IC s 11(1)'s right to freedom as being a residual right, he says that if an enumerated right cannot first be found upon which to ground a constitutional challenge to some restriction

[1] *Ferreira* (supra) at para 252.

[2] Ibid at para 45, quoting *Makwanyane* (supra) at para 9.

[3] See Halton Cheadle 'Limitation of Rights' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 693, 696.

[4] In fairness to Ackermann J, the problem with his approach to limitations analysis in *Ferreira* and *Bernstein* could be entirely a function of his conception of 'freedom'. However, the Court's judgment in *FNB*, where FC s 25 arbitrariness analysis results in a proportionality test that creates, in Theunis Roux's words, 'a vortex' that captures the entire universe of rights and limitations inquiries, suggests that the Court's — and Ackermann J's — difficulties with maintaining the analytical rigour required by two-stage analysis in *Ferreira* are not at all exceptional. See Theunis Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46.

of individual liberty, then resort may be had to IC s 11(1). The result, of course, is that Ackermann J's judgment practically begs petitioners to rest at least a portion of all their challenges to some alleged constitutional infringement on IC s 11(1). Secondly, on Ackermann J's understanding, a petitioner might fail to succeed at the first stage of a challenge based on the right to privacy, and yet succeed at the first stage of a challenge based on the unenumerated rights found in IC s 11(1). As Chaskalson P points out, the petitioner would then benefit from the fact that restrictions on IC s 11(1) are subject to the 'necessary' standard of review under IC s 33 and thus have a better chance at ultimately convincing the Court to find the restriction unconstitutional.[1] This anomaly would have meant that an applicant bringing a challenge under the Interim Constitution would actually have preferred to fail on a privacy challenge — which received only 'reasonable' review — and succeed on a residual freedom challenge — which received the higher level of limitations review. Chaskalson P bases at least part of his rejection of Ackermann J's interpretation of IC s 11(1) on the possibility of such a scenario. One might well have agreed with Ackermann J's response that the level of scrutiny a restriction of a right receives under the limitations clause of the Interim Constitution should not affect the court's determination of the content of a right — and that according freedom of the person a higher level of limitations review than privacy is not necessarily anomalous. However, it is Ackermann J's largely notional approach to a right's review — and the dumping of all the important analysis into the limitations clause — that creates the aforementioned problem. For reasons already assayed, the majority of the *Ferreira* Court rightly avoided the problems associated with this approach.

Perhaps chastened by the majority's rejection of his interpretation of IC ss 11(1) and 33(1) in *Ferreira*, Ackermann J changes tack in *Bernstein* in analyzing an attack on the Companies Act based upon IC s 13, the right to privacy. He begins with a brief excursus about the meaning of privacy: he surveys its relationship to autonomy, the dependency of autonomy on community, the common law of privacy in South Africa, international instruments, and the comparative constitutional jurisprudence.[2] He then draws the following conclusions. First, 'the "right to privacy" relates only to the most personal aspects of a person's existence, and not to every aspect of his/her personal experience or knowledge.'[3] Secondly, 'in defining the right to privacy, it is necessary to recognize that the content of the right is crystalized by mutual limitation. Its scope is already delimited by the rights of the community as a whole.'[4]

Bernstein's clearly value-based circumscription of the right to privacy is somewhat startling. *Bernstein*'s mode of rights analysis appears antithetical to the mode

[1] *Ferreira* (supra) at paras 173–174.
[2] *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC)('*Bernstein*') at paras 65–79.
[3] Ibid at para 79.
[4] Ibid.

of rights analysis adumbrated by Ackermann J in *Ferreira*.[1] In *Bernstein,* Ackermann J concludes that *not* every activity or experience that could notionally count as private deserves constitutional protection under IC s 13. Only those practices that serve the values understood to underlie the right to privacy fall within the sphere of activity protected by the right. While one may disagree with the content Ackermann J ascribes to privacy,[2] he does give the right some discernible value-based content.

But what promise *Bernstein* offers for a coherent framework for rights interpretation and limitation analysis, *Beinash* takes back.[3] In *Beinash v Ernst & Young*, the Constitutional Court addresses the question of whether s 2(1)*(b)* of the Vexatious Proceedings Act[4] violates the right of access to court under FC s 34.[5] The sum total of the *Beinash* Court's fundamental rights analysis reads as follows:

> The effect of section 2(1)*(b)* of the Act is to impose a procedural barrier to litigation on persons who are found to be vexatious litigants. This serves to restrict the access of such persons to courts. That is its very purpose. In so doing, it is inconsistent with section 34 of the Constitution which protects the right of access for everyone and does not contain any internal limitation of the right. The barrier which may be imposed under section 2(1)*(b)* therefore does limit the right of access to court protected in section 34 of the Constitution.[6]

As a rule, an applicant must run the following gauntlet: (1) ambit determination of the right; (2) impairment of the exercise of the right by law or conduct. Having run this gauntlet, the applicant can rest assured that she has made, at the very least, a *prima facie* showing of a constitutional infringement. But this is hardly the

[1] There is, of course, a more benign interpretation of Ackermann J's approach to the relationship between rights analysis and limitations analysis. One could argue that in *Ferreira* he takes a purposive and generous approach to rights interpretation because the meaning of 'freedom' in IC s 11(1) warrants such a generous approach. One could then argue that in *Bernstein* he takes a purposive and non-generous approach to rights interpretation because the meaning of 'privacy' in IC s 13 warrants such a non-generous approach. The problem with this explanation is that Ackermann J does not explain why one right is generously construed while the other is restrictively construed.

[2] See David McQuoid-Mason 'Privacy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 39.

[3] 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC)(*'Beinash'*).

[4] Act 3 of 1956.

[5] Fevrier J in the High Court had found the applicants to be vexatious litigants in terms of the Vexatious Proceedings Act. *Beinash v Ernst & Young* 1999 (1) SA 1114 (W). This order barred the applicants from bringing any legal proceeding in any court anywhere in South Africa without first securing the appropriate leave from a judge of the High Court. The applicants lodged an appeal with the Constitutional Court. They argued that the provision relied upon by Fevrier J violated their right of access to court under FC s 34. In the alternative, they argued that, as a constitutional matter, Fevrier J had incorrectly exercised his discretion in devising this particular punishment. The Constitutional Court found that the applicable provision of the Vexatious Proceedings Act did indeed infringe the applicants' right of access to court under FC s 34. The Court, however, then held that the Act's infringement of the applicant's right of access to court was both reasonable and justifiable under FC s 36. The Constitutional Court saved the Act on the grounds that the Act establishes an invaluable screening mechanism for the legal system: it ensures that South African courts are not swamped by matters without any merit nor abused by litigants seeking to extort settlements from their innocent adversaries.

[6] *Beinash* (supra) at para 16.

path traversed by Mokgoro J in *Beinash*. Mokgoro J does not ask how FC s 34's right of access to court is to be understood in light of FC s 39's five foundational values. Mokgoro J does not inquire into the drafters' motivations for enshrining the right in Chapter 2 or speculate as to the specific practices served by FC s 34.[1] Mokgoro J does not even seriously question whether the applicant's activity was entitled to the protection of the right. Indeed, if she had asked, and answered, any of these inquiries, she might well have held that the applicant's actions were not protected. As we read the facts in *Beinash* — and the ultimate conclusions of the Court — Mokgoro J ought never to have reached FC s 36.

First, as a matter of logic, it is impossible to guarantee access to court if the court system is awash in frivolous and vexatious litigation. Put another way, one cannot provide access to the courts if such access is blocked by a mountain of pre-existing petty proceedings. If the right of access itself must, of necessity, be understood to exclude those actions which make its exercise impossible, then vexatious litigation is exactly the kind of activity which should *not* fall within the protective sphere of the right. Secondly, other rights indicate the specific ends which FC s 34 was designed to protect. As Mokgoro J herself notes in her limitation analysis, FC ss 7(2), 34, 35 and 165 constitute a constellation of rights and powers whose very essence demands the ever vigilant protection 'of *bona fide* litigants, the processes of the courts and the administration of justice against vexatious proceedings'.[2] FC s 35 protects 'arrested, detained and accused persons' with an extraordinarily detailed set of procedures and prohibitions. However, it is quite clear that no matter how explicit FC s 35's protections are, they will not be able to ensure the proper functioning of our system of criminal justice if the courts are tied up with civil matters. FC s 165(3) and (4) make this point expressly clear. FC s 165(3) reads: 'No person or organ of state may interfere with the functioning of the courts.' FC s 165(4) reads: 'Organs of state . . . must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.' If these rights and powers of necessity preclude vexatious litigation, then it is difficult to imagine why FC s 34 should be understood to provide any solace to the vexatious litigant. Thirdly, it is difficult to see how vexatious litigation — which undermines the rule of law, democratic institutions and civil society — can be said to serve the five foundational values underlying our constitutional enterprise.[3] One must have a very generous understanding of 'openness' or 'freedom' to find that court actions designed to bring the wheels of justice to a grinding halt actually strengthen our nascent democracy. Fourthly, even if one thought that the applicant had made the case for an expansive interpretation of the right, it is not clear that the applicant's right of access to

[1] FC s 34 reads: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

[2] *Beinash* (supra) at para 17.

[3] See *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC)('*Modderklip*')(Meaningful access to a court of law — and that means adequate remedies — is an essential component of a just and well-ordered society based upon the rule of law.)

court has been impaired (or limited) by the provisions in question. As Mokgoro J observes, the applicant has the right to apply to the High Court to lift the order declaring him a vexatious litigant *and* has the right to approach the High Court for relief should a *prima facie* meritorious matter arise.

Yet, instead of a careful exegesis of the right and the provisions under attack, Mokgoro J justifies her overly expeditious approach to rights analysis by noting that FC s 34 'does not contain any internal limitation of the right'. But this argument is a red herring in an opinion brimming with lemmings. As we argue at length below, the presence of an internal limitation or an internal modifier does not alter the basic structure of fundamental rights and limitation analysis.[1] That is, even if the section in question possessed an internal limitation, it certainly would not obviate the need for a thorough-going analysis of the ambit of the fundamental right and a finding as to whether the protected activity has indeed been impaired by the law in question.

The *Beinash* Court's short-circuited rights analysis is saved by its reasoning under the limitation clause. At the time, the upholding of a law at the limitation stage made *Beinash* entirely unique. No rule of law, up until *Beinash*, had been upheld by the Constitutional Court after being subjected to limitations analysis under FC s 36.

But this unique feature of the judgment comes at a cost. The first cost is that the Court's notional approach to rights interpretation drives all of the meaningful assessment of the issues raised in the case into the limitation clause. The second cost is that this inappropriate 'dumping' of rights issues forces the court to fudge its analysis of one of the critical legs of the limitation test. At least two steps of the limitation test employed in *Beinash* reflect determinations that should have been undertaken under the right itself. When considering 'the nature of the right in terms of section 36(1)*(a)*' Mokgoro J writes: '[A] restriction of access in the case of a vexatious litigant is in fact indispensable to protect and secure the right of access for those with meritorious disputes.'[2] As we argued above, this point is logically connected to a determination of the content of the right and whether the applicant's activity was indeed deserving of constitutional protection. When considering 'the importance of the purpose' of the Act according to FC s 36(1)*(b)*, Mokgoro J cites an array of rights — FC ss 7, 35, and 165 — to support the proposition 'that *bona fide* litigants, the processes of the courts and the administration of justice' all require the kind of protection the Act offers against vexatious proceedings.[3] Again, the Court should have made the case — much earlier — that these rights inform our understanding of the content of FC s 34.

It is worth remembering that in order for the respondent to succeed at the limitation stage, he or she must satisfy all of the limitations clause's requirements. These requirements run (1) from the presence of a law of general application (2) to showing that a law's objectives merit constitutional salvation (3) to proof of a

[1] For more on internal modifiers and internal limitations, see §§ 34.4 and 34.5 infra.
[2] *Beinash* (supra) at para 17.
[3] Ibid.

rational relationship between the law's ends and the means it employs (4) to an appraisal of the costs and benefits of the legal regime under scrutiny (5) to a demonstration that the rule of law in question adopts means that are as narrowly tailored as possible to achieve the objectives of the law.

When the *Beinash* Court finally considers leg (5) — FC s 36(1)*(e)* – and asks whether 'less restrictive means to achieve the purpose' of the Act exist, Justice Mokgoro does not squarely address the issue of whether the Act's aims could have been achieved via a more narrowly tailored remedy. Instead, she remarks that the Act has struck an appropriate balance between means and ends. This is, of course, an answer; but not an appropriate answer to the question actually raised by this particular factor.[1] No alternative scheme is considered. No alternative language for the statute is contemplated.[2] We have no way of knowing, from the Court's express deliberations, whether or not the existing provisions of the Vexatious Proceedings Act constitute some of the least restrictive means of achieving the Act's purpose.[3]

And thus there would appear to be at least some evidence for our second contention: by neglecting to engage in any serious examination of the content of FC s 34's right of access to court and by canvassing all of the consequential constitutional issues under the limitation clause, the Court was actually forced to fudge its analysis of FC s 36(1)*(e)*. The *Beinash* Court could have averted the analytical confusion that takes place in its limitations analysis if it had undertaken a value-based approach to its determination of the right's ambit in the first place.

Proof, however, that the Constitutional Court is vaguely aware of (ongoing problems with) the appropriate division of tasks between the two stages of analysis and consciously struggles to fashion a coherent approach to fundamental rights and limitation analysis is evident from its decisions in *August & Another v Electoral Commission & Others*,[4] *New National Party of SA v Government of the RSA & Others*[5] and *Democratic Party v Government of the RSA & Others*.[6]

In *August,* the Court found that FC ss 6 and 19 created an unqualified right of adult suffrage. But the result in *August* was rather easily reached: the Electoral Commission had failed to put in place any mechanism at all that would enable prisoners to exercise the franchise. There was no law to justify the infringement.

The Court in *NNP* and *DP* faced the more daunting task of deciding whether the Electoral Act's bar-coded ID requirement was an infringement of the

[1] *Beinash* (supra) at para 21.

[2] For example, the *Beinash* Court could have suggested that the statute's current infirmities be corrected by making certain that any order issued under the Act which barred a vexatious litigant from court include *a sunset clause*. An order with a sunset clause — unlike an order to which an indefinite time period and penalty attach — would seem to be a less restrictive means of achieving the Act's purpose.

[3] As we note below, the Court does not demand that the law reflect the least restrictive means imaginable, but only that the lawmaker genuinely attempt to employ the least restrictive means in pursuit of its ends. For more on FC s 36(1)*(e)*, see § 34.8*(c)*(iv) infra.

[4] 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC)('*August*').

[5] 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)('*NNP*').

[6] 1999 (3) SA 254 (CC), 1999 (6) BCLR 607 (CC)('*DP*').

franchise, and a justifiable one at that.[1] As was noted above, an applicant must run the following two-step gauntlet when trying to establish a *prima facie* infringement of a right: (1) ambit of the right determination; (2) demonstration that the law or conduct challenged actually impairs or limits the exercise of the right. What the Constitutional Court in *NNP* and *DP* effectively held was that, in order to establish a *prima facie* infringement of the franchise — for the rights-bearer to show that she was *entitled* to exercise the franchise — the rights-bearer would have to show that she acted *reasonably* in an attempt to exercise her right to vote. If her reasonable efforts to exercise the franchise were thwarted by the government's electoral scheme, then she would have demonstrated a *prima facie* infringement. In short, where the meaningful exercise of a right depends upon the positive action of both government and citizenry, then the rights-bearer may be asked to demonstrate that she 'acted reasonably in pursuit of the right' before the court will grant that she is entitled to the protection afforded by the right.[2] If she succeeds at the rights stage, 'the question would then arise whether the limitation [created by the government's scheme] is justifiable under the provisions of s 36'.[3] While taking into account the peculiar demands the franchise places upon both government and citizen, the *NNP* and *DP* Courts were still able to maintain the basic integrity of Chapter 2's two stages of analysis.[4]

[1] Act 73 of 1998. Section 38(2) read with the definition of 'identity document' in s 1(xii) of the Act precluded citizens from voting unless they could prove their identity through an identity document issued under the Identification Act 72 of 1986 or a temporary identity document issued under the Identification Act 68 of 1997.

[2] *NNP* (supra) at para 23.

[3] Ibid at para 24.

[4] The lone dissenter in *NNP* and *DP*, O'Regan J, charts a rather different and undesirable course in her fundamental rights analysis of the franchise. For reasons that are not entirely clear, she imports a reasonableness test for the government electoral scheme into the determination of the ambit of the right to vote. The Justice's departure from form was rejected by the other members of the court — for several good reasons. First, there was no textual basis for this new internal limitations test. The court's overriding commitment to judicial restraint would seem to argue against the creation of internal limitation tests where the text is silent. Secondly, the very test itself is taken almost verbatim from the limitation test devised by the court to reflect the requirements of FC s 36. Thirdly, the reasonableness test does not address the nature of the right itself (or the actions of the rights-bearer) but the relationship between the means the legislation employs and the ends the government seeks to achieve. Fourthly, having previously granted in *August* that suffrage is a core constitutional right, it remains unclear why the Justice in these two judgments engages in no rights analysis at all, but instead begins and ends with limitations analysis. The ostensible justification for standing the Bill of Rights on its head is that this particular right by necessity demands that Parliament pass legislation which contemplates regulations designed to ensure the right's proper exercise by the citizenry. But this is no answer at all. Of course, Parliament must pass laws to make the exercise of the franchise possible. The question is whether or not rules regarding 'the date of the election, the location of polling booths, the hours of voting and the determination of which documents prospective voters will require in order to register and vote' actually impair a voter's right to exercise the franchise. *NNP* (supra) at para 142. If any one of them does, then the question should be whether such impairment can be saved under FC s 36. Thus, the Justice could well have found an infringement of the right to vote, and then decided under the limitation clause that the means employed and ends sought were reasonable and justifiable.

One might wish to compare O'Regan J's judgments in *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC)('*SANDU*') with her judgments in *NNP* and *DP*. In *SANDU* O'Regan J spent a significant amount of space attempting to determine the

That's not to say that there isn't occasional backsliding. In *Christian Education South Africa v Minister of Education*, the Constitutional Court simply assumed that the exercise of FC ss 15 and 31 had been impaired by the South African Schools Acts.[1] The rights interpretation was not even notional. It was non-existent.

The *Christian Education* Court did not have to undertake a less than notional approach to rights analysis — especially with respect to FC s 31. FC s 31(2) affords the party seeking to uphold the law or the conduct in question an opportunity to demonstrate that the conduct for which constitutional protection is sought is inconsistent with the other provisions in the Bill of Rights. Given that the *Christian Education* Court relied directly upon a constellation of rights — dignity, equality, and freedom and security of the person — in upholding the limitation of FC s 31 in terms of FC s 36, it is difficult to understand why those same rights were not deployed by the Court in terms of FC s 31(2). The only compelling explanation for the failure to undertake FC s 31(2) analysis is that the Court would have been required, in terms of FC s 15, to undertake FC s 36 analysis anyway. Of this reconstruction, two things must be said. First, the necessity of undertaking FC s 36 analysis does not obviate the need to undertake rights analysis. Second, the presence of an internal limitation in the form of FC s 31(2) does not mean that the mere assertion of a conflict with another right in Chapter 2 automatically serves to trump FC s 31. As one of the authors has written elsewhere, dignity interests may inform both the assertion of a right in terms of FC s 31(1) and the defence of the challenged law or conduct in terms of FC s 31(2).[2] The Court must still apply its mind as to whether the right, appropriately understood, protects the religious, cultural or linguistic practice under scrutiny.

ambit of FC s 23, whether the soldiers satisfied the definition of worker therein, and thus whether they were entitled to the protection of the right. Having found that the soldiers were 'workers', the Justice then found that the provisions of the Defence Act under scrutiny did indeed infringe the soldiers' FC s 23(2)*(a)* right 'to form and join a trade union'. The Justice then moved on to FC s 36 and rejected the Minister's contention that an infringement of the right was justified by the constitutional imperative to structure and manage the SANDF as a 'disciplined military force'. That O'Regan J is aware of a better approach to rights interpretation and limitations analysis is made manifest in the text. After rejecting overbreadth as a constitutional doctrine appropriate to the resolution of this challenge, she writes:

> The first question to be asked is whether the provision in question infringes the rights protected by the substantive clauses of the Bill of Rights. If it does, the next question that arises will be whether that infringement is justifiable. At the second stage of the constitutional enquiry, the relevant questions are: what is the purpose of the impugned provision, what is its effect on constitutional rights and is the provision well tailored to that purpose?

Ibid at para 18.

[1] 2000 (4) SA 757 (CC), 2000 (4) BCLR 1051 (CC)('*Christian Education*'). See also *Prince v President of the Law Society of the Cape of Good Hope* 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC)('*Prince*').

[2] See Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

34.4 Internal Modifiers, and their Relationship to Rights Analysis and Limitations Analysis

In a world of tersely worded fundamental rights and a general limitation clause we would always proceed in the same way. First, we would make value-based determinations of a right's scope and then assess whether the law or the conduct challenged impaired the exercise of the right; second, if we found that a law had impaired the right in question, we would ask whether that law could be justified in terms of FC s 36. Unfortunately, the Bill of Rights of the Final Constitution is not such a world. Many of the rights it contains possess complex qualifications.[1] The immediate question is whether these differences in construction alter significantly the form of constitutional analysis that these rights receive.[2]

For the purposes of this chapter, it is probably sufficient to note that fundamental rights take three basic forms: (1) unqualified rights; (2) rights that contain internal modifiers; (3) rights that contain internal limitations. A remarkably small number — four — of the 27 rights enshrined in Chapter 2 are unqualified.[3] A significant number of rights — sixteen — contain internal modifiers. Internal modifiers are, in short, words or phrases that serve to determine, with greater specificity, the content of the right in question. For example, the phrase 'peaceful and unarmed' clarifies the kinds of assembly that FC s 17 protects.[4] FC s 16,

[1] The Technical Committee on Fundamental Rights (for the Interim Constitution) suggests that this system of internal modifiers, internal limitations, and general limitations was on the cards from the outset. See Technical Committee on Fundamental Rights 'Third Report' (28 May 1993) 9.

[2] For early attempts to explain the relationship between internal modifiers, internal limitations and a general limitations clause, see Gretchen Carpenter 'Internal Modifiers and Other Qualifications in Bills of Rights: Some Problems of Interpretation' (1995) 10 *SA Public Law* 260; André van der Walt *The Constitutional Property Clause* (1997) 73–74; Stu Woolman 'Riding the Push-Me Pull-You: Constructing a Test that Reconciles the Conflicting Interests which Animate the Limitations Clause' (1994) 10 *SAJHR* 60.

Some authors offer no account of internal modifiers at all. See IM Rautenbach & EFJ Malherbe *Constitutional Law* (3rd Edition, 2000). Other authors correctly note that internal modifiers or 'demarcations' 'circumscribe the right or place certain conditions on its availability', whereas 'special limitations' require the 'state or the person relying on the validity of legislation . . . [to] show that the limitation of the right is justified'. Iain Currie & Johan De Waal *The Bill of Rights Handbook* (5th Edition, 2005) 187. But Currie and De Waal make no effort to spell out the relationship between rights analysis, internal modifiers, internal limitations and general limitations.

More curious, however, is the claim that 'it is wrong to talk about internal limitations'. Halton Cheadle 'Limitations of Rights' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 701. Cheadle then goes on to state the term is 'shorthand for a group of clauses that perform different functions in the different rights, particularly in the more complex rights' and that 'the text always limits the scope of a right'. Ibid. While trivially true, this does not count as an argument except in the sense of the classic Monty Python riposte of 'Yes, it is an argument' to the assertion 'No, it's not an argument'. Cheadle makes no attempt to explain what these different clauses actually do.

[3] Four rights may be described as unqualified: Life, FC s 11, reads: 'Everyone has the right to life'; Slavery, Servitude and Forced Labour, FC s 13, reads: 'No one may be subjected to slavery, servitude or forced labour'; Freedom of association, FC s 18, reads: 'Everyone has the right to freedom of association'; Citizenship, FC s 20, reads: 'No citizen may be deprived of citizenship.'

[4] See Stu Woolman 'Freedom of Assembly' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 43.

freedom of expression, contains two forms of internal modifier. While FC s 16(1) recognizes several types of expressive activity that secure constitutional protection, FC s 16(2) identifies several forms of expressive conduct that ought not to receive such protection: *(a)* propaganda for war; *(b)* incitement of imminent violence; and *(c)* advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.[1] The rights to dignity, freedom and security of the person, privacy, expression, political rights, freedom of residence and movement, labour relations, environment, property, children, education, just administrative action, access to information, access to courts and arrested, detained and accused persons all contain words or phrases intended to amplify the content of the right. The rights to equality, expression, education, housing, health care and arrested, detained and accused persons all contain words or phrases intended to exclude expressly certain types of conduct, status or law from constitutional protection.[2]

But whether the phrases in these rights amplify or exclude, the internal modifier analysis fits naturally within fundamental rights, or stage 1, analysis. The internal modifier is concerned with a determination of the content of the right and not with an analysis of competing rights or interests.[3] At least one consequence of identifying a phrase as an internal modifier is that the burden of justification remains upon the party bringing the challenge to demonstrate that the law or the conduct in question impairs the exercise of the 'modified' right.

34.5 Internal Limitations, and their Relationship to Rights Analysis and Limitations Analysis

While internal modifiers concern themselves primarily with the content of a right, internal limitations import a variety of considerations not normally associated with fundamental rights, or stage 1, analysis. The language of FC ss 9(3), 15(3), 24*(b)*, 25(2), 25(3), 25(5), 26(2), 27(2), 29(1)*(b)*, 29(2), 30, 31(2) and 32(2) require forms of justification generally associated with limitations analysis and the comparison of competing constitutional imperatives.

[1] See Dario Milo & Anthony Stein 'Freedom of Expression' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2007) Chapter 42.

[2] The kernel of truth in Cheadle's statement that 'it is wrong to talk about internal limitations' is that it may appear difficult to fit the various rights — with their respective modifiers and limitations — into a simple yet powerful explanatory framework. For example, FC s 9(2), the provision for restitutionary measures, is an affirmative defence that carves out of FC s 9 space for inegalitarian measures that pursue egalitarian ends. FC s 9(2) does not expressly modify FC s 9(1) or FC s 9(3) or FC s 9(4), but it does so just the same. However, FC 9 as a whole, like FC ss 26 and 27, does not fit easily into the two-stage model of fundamental rights analysis. See Cathi Albertyn & Janet Kentridge 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 *SAJHR* 149, 177 (Adopt an assimilationist approach with respect to the treatment of the restitutionary measures provision as an internal modifier that assists in the demarcation of the right to equality.)

[3] Cf Halton Cheadle 'Limitations of Rights' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 701 (Claims, without argument, that the ambit of the right should be determined, at least in part, by social interests that have nothing to do with the purpose or the objective of the right.)

The most commonly employed internal limitation is the unfair discrimination analysis found within the *Harksen* test.[1] The unfairness assessment required by FC s 9(3) takes into account justifications for discriminatory practices at the same time as it requires the court to take cognizance of systemic discrimination and the impairment of the plaintiff's dignity.

FC ss 26(2) and 27(2) require the court to assess whether the state — or some other party — has taken reasonable steps to ensure the progressive realization of the rights to access to adequate housing, health, food, water and social security. The focus of this inquiry — as laid out in *Grootboom* and other socio-economic rights cases — is generally on whether the state has created and implemented a comprehensive and coordinated plan to realize progressively the right in question. The primary desideratum of this test is 'reasonableness'. Reasonableness in FC ss 26(2) and 27(2) raises many of the same contextual considerations that would otherwise be the focus of the FC s 36 inquiry.[2] Similar language, that appears to do similar work, appears in FC s 29(1) and (2).[3]

Other internal limitations take a somewhat different form. FC ss 15(3)*(b)*, 30 and 31(2) require that the exercise of the right in question be consistent with the other rights in Chapter 2. In short, the Final Constitution makes it clear that a community's religious, cultural or linguistic practices enjoy constitutional protection only where they do not interfere with — limit — the exercise of other fundamental rights.[4] This formally correct articulation of the relationship between FC s 31 and the rest of the Bill of Rights is often assumed to imply that the other substantive rights — including dignity — trump collective religious, cultural and linguistic concerns. That, however, is untrue. Indeed, rights to dignity and to equality may re-inforce claims to religious autonomy. For example, the Constitutional Court in *Gauteng School Education Bill* recognized the importance for

[1] For more on the *Harksen* test, see Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36; Cathi Albertyn & Beth Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2007) Chapter 35.

[2] For more on internal modifiers and internal limitations and their effect on the interpretation of socio-economic rights, see Sandra Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33. See also Pierre de Vos 'Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 6, 91 n 97 (Argues that the distinction between internal modifiers and internal limitations does not hold for socio-economic rights.)

[3] With regard to the provision of further education, FC s 29(1)*(b)* contains the phrase, 'through reasonable measures, must make progressively available and accessible,' while FC s 29(2) states that education in the official language of choice ought to be offered 'where that education is reasonably practicable.'

[4] FC s 31(2) could be construed to preclude all exclusionary and discriminatory policies. But that assumes that all such practices are inconsistent with various provisions in the Bill of Rights, in particular, the rights to equality and dignity. The Constitutional Court has made it quite clear that not all discrimination is unfair discrimination. See, eg, *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC).

individual dignity, and collective claims for equal respect, of granting communities the right to create schools based upon a common culture, language or religion.[1]

(a) Internal limitations and burden shifts

Where an internal limitation is in play there may appear to be a burden shift within the fundamental rights stage of analysis that requires the state or another party to make the requisite demonstration of 'fairness', 'reasonableness' or 'consistency'. But the case law does not support such a global generalization. FC s 9(5) definitely requires a burden shift where discrimination occurs on a prohibited ground in terms of FC s 9(3). It does not, however, appear clear that the state or some other party bears the burden of demonstrating inconsistency in terms of FC ss 15(3)*(b)*, 30, and 31. Nor is it clear that the burden falls, entirely or even in large part, on the state to show that it has taken reasonable steps to discharge its responsibilities to progressively realize the socio-economic rights found in FC s 26, 27, and 29.[2] The more interesting analytical question is whether an internal limitation affects the analysis undertaken under the general limitations clause, FC s 36.

(b) Internal limitations and general limitations

What, if any, analysis will remain for the court to do after undertaking some form of internal limitations analysis will turn on the particular kind of internal limitation at issue.

(i) *Internal limitations in FC ss 15(3)(b), 30 and 31*

With respect to FC ss 15(3)*(b)*, 30, and 31, the courts often appear to ignore the internal limitation entirely. In *Christian Education South Africa v Minister of Education*, the Constitutional Court simply assumed — without needing to do so — that the exercise of FC ss 15 and 31 had been impaired by the South African Schools Act. It then proceeded to FC s 36 and found that, on balance, the mutually reinforcing rights of religion and culture said to sanction corporal punishment in private schools were in conflict with, and ultimately subordinate to, a constellation of rights that included dignity, equality, and freedom and security of the person.[3]

[1] *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC)(Court held that IC s 32*(c)* permitted communities to create schools based upon common culture, language and religion.)

[2] See *Government of the Republic of South Africa & Another v Grootboom & Others* 2001 (1) SA 46 (CC), 2001 (9) BCLR 883 (CC)('*Grootboom*'). By collapsing FC s 26 (1) and FC s 26(2) analysis (and perhaps FC s 36 analysis) into a single test for reasonableness — the *Grootboom* Court effectively turns FC s 26(2) into an odd composite of internal modifier and internal limitation of FC s 26(1). For more on the relationship between FC s 26(1) and (2), see Kirsty McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55.

[3] 2000 (4) SA 757 (CC), 2000 (4) BCLR 1051 (CC)('*Christian Education*'). See also *Prince v President of the Law Society of the Cape of Good Hope* 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC).

There are two things to say about *Christian Education* and the Court's apparent failure to recognize the purpose of FC s 31(2). First, it could just have been a mistake. Second, it is possible that a right to community religious practice could *(a)* be deemed consistent with the other rights in Chapter 2 and *(b)* still be impaired by the law in question. If this second possibility is the correct one, then the analysis would proceed to FC s 36, and the party relying upon the law would have the opportunity to demonstrate that another set of interests or values — not expressly manifest in the rights and freedoms of Chapter 2 — justified the infringement of FC s 31(1).

(ii) *Internal limitations in FC ss 9, 26 and 27*

More interesting, and difficult, questions regarding internal limitations flow from the text of, and the case law surrounding, FC ss 9, 26, and 27. With respect to these provisions, the text and the case law are quite illuminating.

Although the courts have been loath to state categorically that a finding of unfairness under FC s 9(3) ends the court's analysis, in not a single Constitutional Court equality judgment has the Court found that unfair conduct or an unfair law — in terms of FC s 9(3) or FC s 9(4) — can be justified in terms of FC s 36. The Constitutional Court often goes through the motions of FC s 36 analysis, but, as in Kabuki theatre, says nothing. The reason for this artifice is rather clear: the considerations that would be raised to demonstrate fairness under FC s 9(3) would be virtually identical to the considerations raised to demonstrate reasonableness and justifiability under FC s 36.[1] The only judgment on record in which a court has found unfairness in terms of FC s 9(3), but then held the unfair law to be reasonable and justifiable in terms of FC s 36 is *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality*.[2] In *Lotus River*, the High Court found that the differential rates imposed by the municipality upon properties constituted unfair discrimination on the grounds of race. However, Davis J proceeded to find that this unfair discrimination was justified, in terms of FC s 36, by the local government restructuring process. As Iain Currie rightly observes, this justification ought to have formed part of the argument in rebuttal of the presumptive finding of unfair discrimination.[3] Given that the *Harksen* test does permit such an argument, the High Court could easily have avoided the

[1] The Constitutional Court has stated that there is a difference between unfairness under FC s 9 and proportionality under FC s 36. See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)(Kriegler J, dissenting); *Harksen v Lane* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC)(Court holds that FC s 36 'involves a weighing of the purpose and the effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of the infringement of equality.') But as Iain Currie notes, the Court's cursory remarks in this regard do not advance our thinking on the matter. See Currie & De Waal 'Equality' (supra) at 238. Merely stating that there is a difference between the two concepts is not the same as using them in a different manner.

[2] 1999 (2) SA 817 (C), 1999 (4) BCLR 440 (C)('*Lotus River*').

[3] See Currie & De Waal 'Equality' (supra) at 239.

'awkward implication' that 'it is possible for unfair racial discrimination to be reasonable and justifiable in a society based upon equality.'[1]

In its early socio-economic rights jurisprudence the Constitutional Court simply assumed, without any discussion, that a finding that the state failed to take reasonable measures within its available resources to achieve the progressive realization of the rights in question, precluded a finding that the limitation was, nevertheless, reasonable and justifiable in terms of FC s 36. Once it found that the state had failed to meet its obligations in terms of FC s 26(2) or FC s 27(2), the Court proceeded directly to a consideration of appropriate relief, without any inquiry into FC s 36.[2]

The Constitutional Court broke its silence on the relationship between FC ss 26 and 27 and FC s 36 in *Khosa*[3] and *Jaftha*.[4] In *Jaftha*, the Court distinguished between the negative and positive obligations imposed by FC ss 26 and 27. It held that its earlier ruling in *TAC* — that FC s 27(1) 'does not give rise to a self-standing and *independent positive right* enforceable irrespective of the considerations mentioned in section 27(2)' — did not extend to negative breaches of FC ss 26 and 27.[5] Where the state fails to honour its negative obligations under these rights — as in *Jaftha*, where a provision in the Magistrates' Court Act permitted the sale in execution of a person's home for non-payment of debts — there is no reason for the Court to filter its analysis of FC s 26(1) through FC s 26(2). Consequently, the question of the relationship between FC s 26(2) reasonableness and FC s 36 reasonableness does not arise, and the breach of FC s 26(1) may be justified under FC s 36.[6] As it turned out, the *Jaftha* Court found that the breach of FC s 26(1) was *not* reasonable and justifiable in terms of FC s 36, given the importance of access to adequate housing, its link to human dignity, the seriousness of

[1] Currie & De Waal 'Equality' (supra) at 239.

[2] See, eg, *Grootboom* (supra); *Minister of Health & Others v Treatment Action Campaign & Others No 2* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC)('*TAC*'). Similarly, no limitation analysis was undertaken in cases in which it was found that administrative action failed the justifiability test in terms of IC s 24 or the reasonableness test under FC s 33. But see *Bel Porto School Governing Body & Others v Premier of the Province, Western Cape & Another* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) at para 171 (Mokgoro and Sachs JJ note in dissent that justifiability for purposes of limitation analysis generally requires more persuasive evidence than that required for FC s 33.) See also *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board & Others* 2001 (12) BCLR 1239, 1258D-E, 1259A-C (C). Rautenbach argues that the requirements of FC s 33 should, as far as possible, be reconciled with the requirements of FC s 36. In his view, 'section 33 particularises the rules in section 36 in respect of administrative actions that limit rights.' See IM Rautenbach 'The Limitation of Rights and "Reasonableness" in the Right to Just Administrative Action and the Rights to Access to Adequate Housing, Health Services and Social Security' (2005) *TSAR* 627, 641. But for Rautenbach to be correct, the Court must be willing to enforce a stricter standard of review for administrative action.

[3] *Khosa & Others v Minister of Social Development; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC)('*Khosa*').

[4] *Jaftha v Schoeman & Others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC)('*Jaftha*').

[5] *TAC* (supra) at para 39, as quoted in *Jaftha* (supra) at para 32.

[6] *Jaftha* (supra) at paras 32–33. See also Marius Pieterse 'Towards a Useful Role for Section 36 of the Constitution in Social Rights Cases? *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*' (2003) 120 *SALJ* 41.

the infringement, the existence of less restrictive means, and that the sale in execution satisfied a trifling debt.[1]

While *Jaftha* is clear that a breach of the state's negative obligation under FC s 26(1) leaves ample room for a consideration of the justifiability of such a breach in terms of FC s 36, *Khosa* raises doubts as to whether FC s 36 analysis can play a meaningful role in cases concerning a breach of the state's positive obligations under FC s 27(2). In *Khosa*, the Court found that the Social Assistance Act's exclusion of permanent residents from its benefit scheme constituted unfair discrimination in terms of FC s 9 and an unjustifiable limitation of the right of access to social security in terms of FC s 27. In her discussion of the relationship between FC s 9 and FC s 36, Justice Mokgoro first noted that the

> exclusion of permanent residents from the scheme is discriminatory and unfair and I am satisfied that this unfairness would not be justifiable under section 36 of the Constitution. The relevant considerations have been traversed above and need not be repeated. What is of particular importance in my view, however, and can be stressed again, is that the exclusion of permanent residents from the scheme is likely to have a severe impact on the dignity of the persons concerned, who, unable to sustain themselves, have to turn to others to enable them to meet the necessities of life and are thus cast in the role of supplicants.[2]

In short, the very same considerations that informed the finding of unfairness under FC s 9 supported the finding, under FC s 36, that the statutory scheme contemplated by the Social Assistance Act could not be justified. No reasons that might justify the discrimination could be offered in the context of FC s 36 that had not already been offered under FC s 9.

Mokgoro J then moved on to the question of justification, in terms of FC s 36, with respect to the abridgement of FC s 27, and, more particularly, the state's failure to discharge its responsibilities under FC s 27(2). Once again, she concluded that there was no reason for the Court to repeat its assessment, in terms of FC s 36, of the arguments in justification that it had already interrogated in terms of FC s 27(2):

> In my view the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the state relies. For the same reasons, I am satisfied that the denial of access to social grants to permanent residents who, but for their citizenship, would qualify for such assistance does not constitute a reasonable legislative measure as contemplated by [FC s] 27(2). . . . There is a difficulty in applying section 36 of the Constitution to the socio-economic rights entrenched in sections 26 and 27 of the Constitution. Sections 26 and 27 contain internal limitations which qualify the rights. The state's obligation in respect of these rights goes no further than to take 'reasonable legislative and other measures within its available resources to achieve the progressive realisation' of the rights. If a legislative measure taken by the state to meet

[1] *Jaftha* (supra) paras 35–49.
[2] *Khosa* (supra) at para 80.

> this obligation fails to pass the requirement of reasonableness for the purposes of sections 26 and 27, section 36 can only have relevance if what is 'reasonable' for the purposes of that section, is different to what is 'reasonable' for the purposes of sections 26 and 27. This raises an issue which has been the subject of academic debate but which has not as yet been considered by this Court. We heard no argument on the matter and do not have the benefit of a judgment of the High Court. In the circumstances, it is undesirable to express any opinion on the issue unless it is necessary to do so for the purposes of the decision in this case. In my view it is not necessary to decide the issue. Even if it is assumed that a different threshold of reasonableness is called for in sections 26 and 27 than is the case in section 36, I am satisfied for the reasons already given that the exclusion of permanent residents from the scheme for social assistance is neither reasonable nor justifiable within the meaning of section 36.[1]

Mokgoro J does not, as she makes plain, seek to settle the academic debate over whether the proportionality analysis required by FC s 36 could serve any meaningful role once a court has undertaken reasonableness analysis in terms of FC ss 26(2) and 27(2). It is sufficient to note, however, that in so far as the instant matter is concerned, the content of the reasonableness analysis undertaken under FC s 27(2) is understood to be identical to the content of the reasonableness analysis that would be undertaken in terms of FC s 36.[2]

[1] *Khosa* (supra) at paras 82–84.

[2] That this issue — heretofore purely academic — had troubled the Court in its internal deliberations is clear from both Mokgoro J's musings and the response they elicit from Ngcobo J. On the relationship between FC s 27(2) and FC s 36, Ngcobo J writes:

> But if section 27 governs the present constitutional challenge, the problem of a methodological approach arises. The obligations of the state under section 27(2) are limited to taking "reasonable legislative and other measures." The main judgment regards this as an internal limitation on the right of access to social security. I agree. But is it possible to find that a measure is reasonable within the meaning of subsection 2 yet not reasonable and justifiable under section 36(1), the limitation clause? Let us take a non-controversial group, the temporary visitors, which the main judgment also accepts can legitimately be excluded from the social welfare benefits. If their exclusion would be reasonable under section 27(2), is the state required to show also that their exclusion is reasonable and justifiable under section 36(1)? This raises a number of related questions, including, whether the standard for determining reasonableness under section 27(2) is the same as the standard for determining reasonableness and justifiability under section 36(1) and, if not, what is the appropriate standard for determining reasonableness under section 27(2). . . . Faced with these questions, the main judgment adopts the attitude that the outcome would be the same whether the enquiry is to be conducted under section 27(2) or section 36(1). I prefer to approach the matter differently — by looking first to the enquiry required in section 27 and then, if necessary, to section 36. I should add, though, that the outcome would be the same even if the enquiry were to begin and end in section 27(2).

Ibid at paras 105–07. It is hard to understand Ngcobo J's disagreement with the majority. He correctly identifies the problem: namely, is there a difference in the standard of review under FC s 27(2) and FC s 36? But he does not answer the question. He simply says that he would *prefer* to do things differently: that is, he would first undertake analysis under FC s 27 and then, if he so desired, proceed to FC s 36. Why he prefers this approach, Ngcobo J does not say. Moreover, he concludes by noting that 'the outcome would be the same even if the enquiry were to begin and end in section 27(2).' Ngcobo J is either committed to the proposition that his distinction between FC s 27(2) and FC s 36 is a distinction without a difference, or that there is a difference in the standard, which he refuses to describe, that leads, coincidentally, in this case and perhaps all others, to the same outcome. Ngcobo J's analysis takes us nowhere.

The problem the Court acknowledges in *Khosa* — vis-à-vis FC s 26 and FC s 27 and FC s 36 — is, at bottom, a straightforward question of logic. Does the universe of reasons — or kinds of reasons — that the state can offer in justification under FC s 27(2) exhaust the universe of reasons — or kinds of reasons — that could be offered in justification under FC s 36? If the answer to that question is yes, then logically there can be no meaningful basis for a court to undertake limitations analysis under FC s 36 once it has concluded that the state has failed to act reasonably in terms of FC s 27(2). If, however, the answer to that question is no, then there may be some basis, for undertaking a second form of justificatory analysis under FC s 36.

The answer is not grounded solely in logic, however. It turns, in large measure, on the standard*(s)* adopted by our Constitutional Court in socio-economic rights cases, and more specifically, those cases in which the state has failed to take adequate measures to realize progressively the right in question. For example, if the standard for review was that of mere rationality — as suggested by some of the language in *Soobramoney* — it would, logically, be impossible for FC s 36 to play any meaningful role in the Court's analysis. Put differently, if all FC s 27(2) required the state to do was to show that it had applied its mind to the progressive realization of a socio-economic right, and had done so to the satisfaction of the Court, the matter would end there. There could be no reason — in the sense of necessity — for the Court to progress to proportionality analysis under FC s 36.

But as we now know, the standard of review under FC ss 26(2) and 27(2) is not rationality but reasonableness. After *Soobramoney*, *Grootboom*, *TAC* and *Khosa*, the question must be whether there are types of reasons — beyond those currently contemplated in those four judgments — that the state (or some other party) could raise under FC s 36 that it could not raise under FC s 26(2) or FC s 27(2). Given that the state may justify its failure to make good on the promise of a socio-economic right in terms of a whole host of 'reasonable' grounds, it is difficult to conjure up any additional grounds that might justify the failure to make good a promise in terms of FC s 36.[1] Consider the long list of grounds that the Constitutional Court has already identified when undertaking analysis under FC ss 26(2) and 27(2) (and keep in mind that such a list is by no means exhaustive or closed):[2]

[1] See Rautenbach (supra) at 647–653 (Constitutional Court has incorporated, in its analysis of reasonableness under FC s 26(2) and FC s 27(2), FC s 36 criteria such as the importance of the purpose of the restriction, the nature and extent of the deprivation, the relationship between ends and means, the existence of less restrictive means, and cost/benefit analysis.)

[2] See *Khosa* (supra) at para 43 ('In determining reasonableness, context is all-important. There is no closed list of factors involved in the reasonableness enquiry and the relevance of various factors will be determined on a case by case basis depending on the particular facts and circumstances in question.')

- whether there are available resources;[1]
- whether the requested relief is not for an individual entitlement to the immediate provision of a service or resource, but for a comprehensive and coordinated plan to realize the right;[2]
- whether the state has taken steps towards the right's progressive realization;[3]
- whether the relief requested involves access to services, and not to the resources necessary to possess what the right promises;[4]
- whether 'the appropriate … human resources are available';[5]
- whether the state's plan is 'capable of facilitating the realisation of the right';[6]
- whether the plan is reasonable 'both in its conception and its implementation';[7]
- whether the plan is sufficiently flexible;[8]
- whether the plan attends to 'crises';[9]
- whether the state's plan excludes 'a significant segment' of the affected population;[10]
- whether the state's plan balances short, medium and long-term needs;[11] and
- whether the party could form a legitimate expectation of receiving a socio-economic entitlement.[12]

Is there any reason to think that there may be grounds for justification that the state could assert under FC s 36 that are not available to it under FC s 26(2) or FC s 27(2)? In the cases decided to date, ending in *Khosa*, the answer would appear to be 'no'.

But before we shut the door on what is, apparently, no longer an academic debate, consider the textual differences between FC s 27(2), on the one hand, and FC s 36, on the other. FC s 27 reads, in pertinent part, as follows:

> (1) Everyone has the right to have access to —
> *(a)* . . . .
> *(c)* social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. (emphasis added)

[1] See *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1969 (CC)('*Soobramoney*') at paras 10, 20 and 22.
[2] See *Soobramoney* (supra) at para 31; *Grootboom* (supra) at paras 38, 78, 99; *TAC* (supra) at paras 81.
[3] See *Soobramoney* (supra) at paras 13, 19, 21 and 41.
[4] *Van Biljoen v Minister of Correctional Services* 1997(6) BCLR 789 (C), 1997(4) SA 441, 497 (C)('*Van Biljoen*').
[5] *Grootboom* (supra) at paras 39–46.
[6] Ibid at para 52.
[7] Ibid at para 53.
[8] Ibid at paras 63–69.
[9] Ibid at para 74.
[10] Ibid at para 83.
[11] Ibid at paras 39–46, 52, 53, 63–69, 74 and 83.
[12] *Van Biljoen* (supra) at 497.

FC s 36 reads, in pertinent part, as follows:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that *the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom*, taking into account all relevant factors, including —
> *(a)* . . .
> *(b)* the importance of the purpose of the limitation;
> *(c)* the nature and extent of the limitation;
> *(d)* the relation between the limitation and its purpose. (emphasis added)

The language of FC ss 27(2) and 36, on their face, intimate that there are, in fact, *different* kinds or sources of justification. In FC s 27(2), the reasons for failure to make good the promise of a socio-economic right would seem, at first blush, related to the right itself or the resources that would be required to give effect to the right. For example, either the state may not possess sufficient resources to give everyone with terminal renal failure the dialysis treatment that would extend his or her life, or the state may not be required to distribute a requested form of relief because the right, upon reflection, is not meant to embrace a particular form of entitlement. In FC s 36(1), the failure to make good the promise of a given right may have nothing whatsoever to do with the right itself. For example, the grounds for restricting the expressive activity of a person may have nothing at all to do with advancing freedom of expression: we restrict defamatory statements because of the damage we believe is done to the dignity of the persons affected by such conduct.[1] Thus, whereas FC s 27(2) appears to limit our considerations to those justifications related to the means required to realize the purpose of the right (eg, money) or the end of the right itself (eg, social security), FC s 36 tells us that we may cast our justificatory nets as far as the needs of an open and democratic society based on human dignity, equality and freedom will allow. In short, under FC s 36, our reasons for restricting access to social security can take account of a range of goods wholly unrelated to that right: dignity, life, privacy, freedom and security of the person, or any of the other rights found in Chapter 2. Our reasons for restricting rights may not, in fact, have anything to do with the other rights found in Chapter 2. In *Prince*, the grounds for restricting the religious ritual use of cannabis by Rastafarians was the general welfare, and perhaps more specifically, the safety of the commonweal.[2] Thus, although the Court has not as yet made such a distinction grounded in the very text of FC ss 27 and 36, one is on offer.[3]

[1] See *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC).

[2] See *Prince* (supra) at para 130 (The determination as to whether the scope of religious practice protected by FC s 15 embraced the ritual use of cannabis by Rastafarians was wholly unrelated to any subsequent analysis of the societal interests ostensibly threatened by such use.)

[3] Kevin Iles has articulated a very similar, if not absolutely identical, distinction between the objects of the FC s 26(2) and FC s 27(2) reasonableness inquiry and the objects of the FC s 36 reasonableness enquiry. See Kevin Iles 'Limiting Socio-Economic Rights: Beyond Internal Limitations Clauses' (2004) 20 *SAJHR* 448. With respect to the Court's analysis in *Grootboom*, he writes:

But as we have already noted, arguments about the nature or the source of justification are as much empirical — a fact about constitutional adjudication in South Africa — as they are logical and textual. A close reading of the socio-economic rights judgments handed down by the Constitutional Court does not suggest that the Court is likely to place constraints on its FC ss 26(2) and 27(2) 'reasonableness' analysis in the service of creating a meaningful allocation of analytical responsibilities between FC ss 26(2) and 27(2), and FC s 36. Indeed, if the rather circuitous route the Court took to avoid FC s 26 analysis in *Modderklip* offers any indication of the Court's future direction, it is that the Court is unlikely to jettison the freedom that an open-ended reasonableness standard — under FC ss 26(2) and 27(2) — offers in the name of such an 'abstract' good as doctrinal coherence.[1]

(iii) *Internal limitations in FC s 25 and the collapse of stage distinctions*

Unlike FC ss 9, 15, 26, 27, 30 and 31, FC s 25 does not, on its face, appear to possess an internal limitations clause. Indeed, FC s 25 does not contain an internal limitations clause distinct from another clause that determines the ambit of the right.

> With *Grootboom* . . . the object of the reasonableness examination is the plan for the progressive realization of the right. *Grootboom* reasonableness is concerned with such details as the following: how the content of the right is going to be extended and when, the order in which the state plans to cater for those in need, the resources that the state has allocated towards realizing its stated plan including the intergovernmental allocation of tasks and responsibilities, the ultimate comprehensiveness of the plan and those it caters for and the way in which the state seeks to implement the plan. Internal limitations clauses in socio-economic rights cases go to the content and scope of the right they are associated with and define the boundaries as to how much of a particular right can be claimed at a particular point in time. In other words, they are factors that belong at the first stage of the rights interpretation process and not at the second stage.
>
> Section 36 reasonableness is directed not at the plan for realizing rights (as *Grootboom* reasonableness is) but at an examination of the reasonableness of measures that limit rights. Rights are not limited by plans that are designed to give effect to them. . . . *Grootboom* reasonableness does not involve choosing one value from a cluster of incommensurable values as [FC] s 36 reasonableness sometimes does. One is not engaging in a selection between a value furthered by a right and a competing value the state seeks to advance by limiting the right. In fact, *Grootboom* reasonableness does not involve a choice between things at all.

Ibid at 456. While Iles is correct — at a certain level of abstraction — about the distinction between the objects of the two kinds of limitations clauses, it is not so clear that the *Grootboom* internal limitations analysis can be hermetically sealed in the manner he suggests. In the first place, the introduction of 'available resources' and situating policy choices regarding, say, the delivery of housing in the context of a larger government agenda and budget already takes us into the land of competing values and incommensurability. In the second place, it is not clear that Iles needed to make his claim as strong as he does. All he was required to do was demonstrate that the set of reasons that might justify a failure to make good the promise of a right in terms of FC s 26(2) or FC s 27(2) is smaller than the set of reasons that might justify the infringement of a FC s 26 or FC s 27 right in terms of FC s 36.

[1] See *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC). The Constitutional Court could have addressed the claims brought before it in terms of FC ss 25 and 26. But to do so would have raised thorny questions about the content of both FC s 25 and FC s 26, and technically challenging questions about the relationship between FC s 25, FC s 26(2) and FC s 36.

After *FNB*,[1] as Theunis Roux argues in this volume,[2] the Court's inquiry into arbitrariness in its FC s 25(1) determinations — 'no law may permit arbitrary deprivation of property' — bears all the hallmarks of an internal limitations test. Moreover, as Roux notes, the *FNB* Court did not just turn 'arbitrariness' into a kind of internal limitations test. It also collapsed the Court's rights-stage analysis and limitations-stage analysis into a single stage, similar to the approach followed in its socio-economic rights jurisprudence. Our complaint, once again, is that the Court has compromised the analytical rigour of the two-stage approach, and supplanted it with a rather amorphous, if not entirely shapeless, one-stage inquiry into the justifiability of the state's conduct.

34.6 Burden of Justification[3]

During the first stage of analysis under the Bill of Rights, the applicant must establish that a fundamental right has been infringed. That the applicant bears the burden at this first stage of the analysis flows from the generally accepted rule that the person asserting a breach bears the burden of legal justification.[4] It is important to note, however, that the Constitutional Court's objective theory of unconstitutionality[5] and FC s 38's generous standing

[1] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC)('*FNB*').

[2] See Theunis Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) 46-2–46-3.

[3] In the first edition of this work, 'burden of justification' was called 'burden of proof'. This nomenclature was criticized by both the academy and the bar. The general critique was that the author had borrowed the term from another area of law in which its meaning was well-established and quite different. Iain Currie — himself sensitive to such criticism — has described the subject matter as 'showing' or 'burden of justification': as in, who must *show* that the right has been infringed, and who must *show* that a limitation of a right is justified. See Iain Currie & Johan De Waal (eds) *The Bill of Rights Handbook* (5th Edition, 2005) 166. 'Burden of justification' better captures the meaning intended and we follow Professor Currie in employing it for the purposes of our discussion.

[4] See *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)('*Ferreira*') at para 44 ('The task of interpreting . . . fundamental rights rests, of course, with the courts, but it is for the applicants to prove the facts upon which they rely for their claim of infringement of a particular right in question.')

[5] In its most general form, the doctrine holds that a court's finding of invalidity with respect to a given law is not contingent upon the parties before the court. See *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at paras 28–29 ('On the objective theory of unconstitutionality adopted by this Court a litigant who has standing may properly rely on the objective unconstitutionality of a statute for the relief sought, even though the right unconstitutionally infringed is not that of the litigant in question but of some other person'); *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party & Others* 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC) at para 64 (In re-affirming its commitment to the objective theory of unconstitutionality, the Court wrote that 'the practice that has been urged upon this Court carries with it the distinct danger that Courts may restrict their enquiry into the constitutionality of an Act of Parliament and concentrate on the position of a particular litigant'); *Ferreira* (supra) at paras 26–28 ('The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in

provisions[1] do not require that the party before the court alleging that an infringement of a right has occurred be the party who has suffered the infringement.

Assuming that a *prima facie* infringement of a right is established at the conclusion of this first stage of analysis, the next question that arises is which party bears the burden of justification under the limitations clause. (We can bracket vexed questions of whether justification can ever meaningfully occur under FC s 36 with respect to unfair discrimination analysis in terms of FC s 9, deprivation of

a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach.') The generous conditions for standing ensure that the objective theory of unconstitutionality will continue to operate in practice — even if the Court refuses to announce its position on the apparent desuetude of the doctrine. See, especially, *Minister of Home Affairs v Eisenberg & Associates: In re Eisenberg & Associates v Minister of Home Affairs & Others* 2003 (5) SA 281 (CC), 2003 (8) BCLR 838 (CC)(Attorneys' firm which handled mainly immigration matters granted standing — in its own interest and as interested member of the public — to mount constitutional challenge to immigration regulations passed without requisite notice and comment. Although the regulations did not affect the firm's members directly, the Court found that it had an interest in proper notice and comment procedures being followed. Said regulations were found unconstitutional.) See also *Shaik v Minister of Justice and Constitutional Development & Others* 2004 (3) SA 599 (CC), 2004 (4) BCLR 333 (CC)(The analysis of the law in terms of the subjective position of the parties 'is incorrect. It is inconsistent with the principle of objective constitutional invalidity enunciated by this Court. . . . This principle is equally applicable under the 1996 Constitution.')

[1] FC s 38 reads, in relevant part: 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened . . . The persons who may approach a court are — *(a)* anyone acting in their own interest; *(b)* anyone acting on behalf of another person who cannot act in their own name; *(c)* anyone acting as a member of, or in the interest of, a group or class of persons; *(d)* anyone acting in the public interest; and *(e)* an association acting in the interest of its members. See, eg, *Port Elizabeth Municipality v Prut NO & Another* 1996 (4) SA 318 (E), 1996 (9) BCLR 1240 (E)(Interest referred to in FC s 38*(a)* need not relate to a constitutional right of the applicant, but may relate to a constitutional right of some other person); *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council & Others* 2002 (6) SA 66 (T), 2003 (1) BCLR 72 (T) at para 27 (Applicant association instituted proceedings on behalf of the residents of a township, in the public interest and in the interest of its members deemed to have established *locus standi* in terms of FC s 38*(b)*, since it was evident that the people affected by the alleged unlawful action were indigent and therefore unable individually to pursue their claims); *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039 (SCA)(Applicants had standing, in terms of FC s 38*(c)*, to bring an application on behalf of a large class of persons whose social grants had been cancelled by welfare authorities in a manner that violated requirements of procedural fairness); *Van Rooyen & Others v The State & Others* 2001 (4) SA 396, 424H (T), 2001 (9) BCLR 995 (T)(Magistrate and the Association of Regional Magistrates of South Africa had *locus standi* in terms of FC s 38*(d)* to attack the validity of legislation which allegedly undermined independence of the magistrates' courts as guaranteed by the Final Constitution); *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC)(FC s 38*(e)* enabled applicant association to challenge the constitutionality of search and seizure provisions that threatened to infringe the constitutional rights of its members); *Campus Law Clinic (University of KZN Durban) v Standard Bank of SA Ltd & Another* 2006 — SA — (CC), 2006 (6) BCLR 669 (CC)(Law clinic has standing to appeal a decision of the SCA, to which it was not a party, concerning the execution of mortgaged property in the High Court.) The case law suggests a strong correlation between the objective theory of unconstitutionality and standing. See *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & Others* 2002 (6) SA 370 (W), 2002 (12) BCLR 1285 (W)(Applicant who had been charged, and might be convicted, in terms of a statutory provision had a direct interest in challenging the validity of that provision); *National and Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government, & Another* 1999 (1) SA 701 (O)(Unsuccessful tenderer had sufficient interest to apply for the review of decision-making procedure for awarding tender in terms of the right to just administrative action.) See, generally, Cheryl Loots 'Standing, Ripeness and Mootness' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 7.

property analysis in terms of FC s 25(1), or socio-economic rights analysis in terms of FC ss 26(2) and 27(2), having already dealt with them above.[1]) The Constitutional Court in *Makwanyane* held that '[i]t is for the legislature, or the party relying on the legislation, to establish this justification, and not for the party challenging it to show that it was not justified.'[2] One obvious ground for placing the burden of justification on the state where it seeks to uphold a law that limits a right is that the state will often possess unique, if not privileged, access to the information a court requires when attempting to determine whether a limitation is justified.[3]

That said, the Constitutional Court has, on a number of occasions, stated that the failure by the government to offer any support for a limitation does not relieve a court of the duty to inquire into its justifiability.[4] Not surprisingly,

[1] On internal limitations, see § 34.5 supra.

[2] See *Makwanyane* (supra) at para 102. See also *Ferreira* (supra) at para 44. Lower courts were quick to place the burden of justification of a limitation on the party — government or private — seeking to uphold the law limiting the right. See *Nortje v Attorney-General, Cape* 1995 (2) SA 460 (C), 1995 (2) BCLR 236, 248 (C)('[P]arty who seeks a limitation of [the] right bears the onus of establishing the justification for that limitation'); *Zantsi v Chairman, Council of State, Ciskei* 1995 (2) SA 534, 560 (Ck), 1995 (10) BCLR 1424 (Ck)('Thereafter the onus is on the party relying on a limitation to prove that it is a lawful limitation'); *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C), 1995 (2) BCLR 198 (C); *Matinkinca v Council of State, Ciskei* 1994 (4) SA 472 (Ck), 1994 (1) BCLR 17, 34 (Ck)('Once it is established that a statute does interfere with or limit a fundamental right . . . the onus moves to the person attempting to justify the interference.')

[3] See *Moise v Transitional Local Council of Greater Germiston* 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC) at para 19 ('It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under s 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing-up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the Court. It is for this reason that the government functionary responsible for legislation that is being challenged on constitutional grounds must be cited as a party. If the government wishes to defend the particular enactment, it then has the opportunity — indeed an obligation — to do so. The obligation includes not only the submission of legal argument but placing before Court the requisite factual material and policy considerations. Therefore, although the burden of justification under s 36 is no ordinary *onus*, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment.') Cf *Gardener v Whitaker* 1995 (2) SA 672, 691D–E (E), 1994 (5) BCLR 19 (E)('It seems eminently reasonable in practical terms (and because, conceptually, justification in terms of s 33 does not arise in a matter concerning competing fundamental rights) to require that a plaintiff who seeks to rely on the precedence of one fundamental right over another should bear the *onus* of establishing the basis for such precedence. Having done so, it may then still be possible for a defendant to defeat the claim by relying on a defence justified by a rule of law of general application, but the *onus* of showing that it complies with s 33 (the limitation clause) would then, in that regard, rest on the defendant.')

[4] See *Du Toit & Another v Minister for Welfare and Population Development & Others* 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC)('*Du Toit*') at para 31 ('The validity of these provisions is a matter of public importance which is properly before the Court and which must be decided'); *Phillips & Another v Director of Public Prosecutions (Witwatersrand Local Division) & Others* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC) at para 20 ('*Phillips*')('The absence of evidence and argument from the State does not exempt the court from the obligation to conduct the justification analysis'); *J v Director-General, Department of Home Affairs* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC) at para 15; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)('*NCGLE I*') at paras 33–57 (State did not attempt to defend sodomy laws in question, but Court proceeded, at some length, to assess the potential grounds for upholding the laws.)

however, a failure by the state to adduce the requisite evidence will generally result in a rather perfunctory appraisal of the potential grounds for justification[1] and often 'tip the scales against' the state.[2] We know of only one occasion, identified by Hilary Axam, in which the Constitutional Court neither shifted the evidentiary burden to the state nor required any evidentiary showing by the state before going on to find the limitation in question justified.[3]

The Constitutional Court is, not surprisingly, quite reticent about burden shifts within rights that possess internal limitations. With respect to property, as we have seen, the Court's FC s 25 analysis of arbitrary deprivation and expropriation exhausts all plausible justifications.[4] To the extent that burden shifts do occur, they do so in the context of the complicated algorithm the *FNB* Court has devised for deprivation and expropriation.[5]

[1] See, eg, *Minister for Welfare and Population Development v Fitzpatrick & Others* 2000 (3) SA 422 (CC), 2000 (7) BCLR 713 (CC) at para 20; *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering, Gauteng* 2001 (11) BCLR 1175 (CC); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC) at para 26; *S v Steyn* 2001 (1) SA 1146 (CC), 2001 (1) BCLR 52 (CC) at paras 32–36; *S v Niemand* 2002 (1) SA 21 (CC), 2001 (11) BCLR 1181 (CC).

[2] *Moise v Transitional Local Council of Greater Germiston* 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC) at para 19. See also *Phillips* (supra) at para 20.

[3] See *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC)(Court upholds a reverse onus provision that requires persons accused of certain kinds of offences to 'satisfy the court' that they are entitled to bail.) On the Court's curious departure from form in *Dhlamini*, Axam writes:

> In contrast to its past limitations cases requiring the state to bear the onus of justifying with precision 'the particular provisions under attack', the *Dlamini* Court did not require the state to advance any evidence to justify its statutory approach restricting access to bail based on entire categories of offenses, rather than on factors shown to pose heightened risks to the bail system. Contrary to its cases requiring evidence of a convincing correlation between a limitation and the problems it seeks to address, the Court did not demand any evidence demonstrating that the offences subject to more restrictive bail standards were rationally correlated with heightened risks to the interests of justice pending trial . . . Although the Court noted that the risk of penalty may increase the incentive to flee, it did not require the state to present evidence establishing this correlation or suggesting that the nature of the charge is a reasonably reliable indicator of a risk of flight or other harm to the bail system. Nor did the Court require the state to justify the statute's provision that the state's characterization of the charge 'shall be conclusive' and that the onus is triggered merely by a written confirmation that the prosecution 'intends to charge' the accused with one of the offenses subject to the onus. Although the Court acknowledged that the statute makes the prosecution's characterization of the charge 'decisive' in determining whether bail standards will be restricted, it did not scrutinise the potential arbitrariness or irrationality associated with affording police and prosecutors virtually unfettered discretion to trigger the application of standards more restrictive than those established by the Constitution.

Hilary Axam 'If the Interests of Justice Permit: Individual Liberty, the Limitations Clause and the Qualified Right to Bail' (2001) 17 *SAJHR* 320, 330–31.

[4] See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC).

[5] See, generally, Theunis Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46. But see *Nhlabathi & Others v Fick* 2003 (3) SA 620 (W), 2003 (7) BCLR 806 (W) at paras 33–34 ('As Ackermann J stated in the *First National Bank* case, neither the text nor the purpose of section 36 suggests that any rights in the Bill of Rights are excluded from limitation under its provisions. On the contrary, section

With respect to burden shifts within socio-economics rights, the text is silent and analysts are split as to whether such shifts can occur.[1] An applicant who wishes to demonstrate that the state has failed to discharge its duty to provide access to adequate housing under FC 26(1) will have to satisfy the court that the state has failed to meet the 'reasonableness' test developed in terms of FC s 26(2).[2] As yet, the Court has refused to distinguish the reasonableness criteria for justification within FC ss 26(2) and 27(2) from the reasonableness criteria for

25(8) of the Constitution is explicit in making section 36 applicable to land, water and related reform measures. Despite the dictum by Ackermann J, no final decision was taken by the Constitutional Court on the point to what extent an infringement of a right to property which is protected by section 25, can be justified under section 36. Professor Van der Walt, in his book on the property clause, argues convincingly that none of the limitations on the deprivation and expropriation of property contained in section 25, are immune from the provisions of section 36. Most South African authors accept that the general limitation provisions of section 36 and the specific limitation provisions of section 25 apply cumulatively. We share that view.') As a statement of the law, the decision in *Nhlabathi* is simply wrong. The *FNB* Court expressly rejected AJ van der Walt's cumulative approach. In addition to the author of the chapter on property in this work, many other respected commentators have suggested that little space, if any, now exists for meaningful FC s 36 limitations analysis of FC s 25 violations. See Roux (supra) at 46–36.

[1] *Minister of Health & Others v Treatment Action Campaign & Others No 2* 2002 (5) SA 721 (CC), 2002 (5) SA 721 (CC)('*TAC*'); *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2001 (9) BCLR 883 (CC)('*Grootboom*'); *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC)('*Khosa*') at para 83 ('There is a difficulty in applying s 36 of the Constitution to the socio-economic rights entrenched in ss 26 and 27 of the Constitution. Sections 26 and 27 contain internal limitations that qualify the rights. The State's obligation in respect of these rights goes no further than to take "reasonable legislative and other measures within its available resources to achieve the progressive realisation" of the rights. If a legislative measure taken by the State to meet this obligation fails to pass the requirement of reasonableness for the purposes of ss 26 and 27, s 36 can only have relevance if what is "reasonable" for the purposes of that section, is different to what is "reasonable" for the purposes of ss 26 and 27.') See Sandra Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33.

[2] Commentators appear split over whether there is any meaningful burden shift from FC s 26(1) to FC s 26(2), or from FC s 27(1) to FC s 27(2). Kevin Iles states that the Court's refusal to distinguish FC s 26(1) rights content analysis from FC s 26(2) internal limitations analysis means that FC s 26(2) reasonableness analysis is inextricably a part of FC s 26(1) rights analysis. See Kevin Iles 'Limiting Socio-Economic Rights: Beyond Internal Limitations Clauses' (2004) 20 *SAJHR* 448, 464–65 (Iles further notes that '[f]ailure by our courts to allocate the proper tasks to the correct stage of the two-stage rights interpretation process combined with the reluctance to define the content of socio-economic rights has hampered our understanding of the operation of the internal limitations clause.') Sandy Liebenberg offers a somewhat more nuanced account of burden shifts within FC s 26 and FC s 27. See Sandra Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33. She writes that 'the party claiming a constitutional violation would have to establish a *prima facie* case that the measures undertaken are unreasonable because they violate one or more of the criteria laid out in *Grootboom*.' Ibid at 33-53. She goes on to observe that — with respect to the 'within available resources' criterion — '[i]t would be unreasonable to expect ordinary litigants to identify and to quantify the resources available to the State for the realization of particular socio-economic rights. If the state wishes to rely on a lack of available resources in order to rebut an allegation that it has failed to take reasonable measures, it should bear the burden of proving the alleged unavailability of resources. Relevant organs of state are clearly best placed to adduce this type of evidence'. Ibid at 33-53 (citations omitted).

justification within FC s 36.[1] As a result, we have yet to see a genuine burden shift from FC ss 26 and 27 to FC s 36.

As far as equality analysis goes, burden shifts may occur within FC s 9.[2] For example, a demonstration that discrimination occurs on a prohibited ground in FC s 9(3) establishes a rebuttable presumption of unfair discrimination, in terms of FC s 9(5), and forces the respondent to demonstrate that the discrimination was, indeed, fair. If the discrimination is shown to be unfair, and the respondent cannot overcome such a finding or presumption, few if any grounds exist beyond those offered in the context of FC s 9 to justify the repugnant law.[3]

34.7 Law of General Application

(a) The purpose and meaning of 'law of general application'

According to FC s 36(1), only 'law of general application' may legitimately limit the rights entrenched in the Bill of Rights.[4] This statement is beguilingly simple and prone to misinterpretation.

The first distinction of import is that between law and conduct. To say that only 'law of general application' may justify the impairment of a fundamental right

[1] Iain Currie and Johan De Waal concur with this assessment. See Iain Currie & Johan De Waal *The Bill of Rights Handbook* (5th Edition, 2005) 165 ('It is, however, difficult to apply the general limitation clause to rights with internal demarcations or qualifications that repeat the phrasing of s 36 or that make use of similar criteria. For example, s 33(1), which provides, inter alia, a right to lawful and reasonable administrative action will be violated by unlawful or unreasonable administrative action. It is hard to think of a way of justifying such administrative action as a 'reasonable' limitation of the right, or of arguing that it is "in terms of law of general application".')

[2] See *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC); *Bhe & Others v Magistrate, Khayelitsha, & Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole & Others; South African Human Rights Commission & Another v President of the Republic of South Africa & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('*Bhe*'); *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC); *Satchwell v President of the Republic of South Africa* 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC).

[3] See Cathi Albertyn & Beth Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2007) Chapter 35. See also *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality* 1999 (2) SA 817 (C), 1999 (4) BCLR 440 (C)(Only case of which we are aware in which finding of unfair discrimination under FC s 9 was ultimately found justifiable in terms of FC s 36.)

[4] The phrase 'law of general application' appears to have been borrowed from the German Basic Law ('GBL'). GBL, art 19(1), reads: 'In so far as a basic right may under this Basic Law be restricted by or pursuant to a law, such law must apply generally and not to an individual case.' The phrase 'law of general application' serves the same purpose as the phrase 'prescribed by law' does in the Canadian Charter, the European Convention of Human Rights, and the New Zealand Bill of Rights. On the meaning of 'prescribed by law', see *Reference re Manitoba Language Rights* [1985] 1 SCR 721, 748–49, 19 DLR (4th) 1; *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at para 49; Mirielle Delmas-Marty (ed) *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions* (1992) 216–17; Peter Hogg *Constitutional Law of Canada* (4th Edition, 2001).

means that conduct — public or private — that limits a fundamental right but which is not sourced in a law of general application cannot be justified in terms of FC s 36(1).[1]

If, in fact, law (as opposed to conduct) does the limiting of a fundamental right, the next question is whether the law in question qualifies as 'law of general application'. When determining whether a type of law — and any token of such a type — qualifies as law of general application, it is important to remember that this threshold requirement is designed to promote two primary ends: (1) to give effect to the rule of law;[2] (2) to filter out bills of attainder.[3] To give effect to the rule of law, a law of general application must possess four formal attributes. First, the law must ensure *parity* of treatment in two respects: it must treat similarly situated persons alike; and it must impose the same penalties on the governed and the governors, and accord them the same privileges.[4] Second, the rule of law — as opposed to the rule of man — requires that those who enforce the law — the executive or the judiciary — do so in terms of a discernible standard. Our rule of law culture sets its face against the *arbitrary* exercise of state power.[5] Third, the law must be *precise* enough to enable individuals to

[1] See *August v Electoral Commission & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 23 ('In the absence of a disqualifying legislative provision, it was not possible for respondents to seek to justify the threatened infringement of prisoners' rights in terms of s 36 of the Constitution as there was no law of general application upon which they could rely to do so.')

[2] See *Dawood v Minister of Home Affairs; Shalabi & Another v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC)('*Dawood*') at para 47 (On the relationship between the rule of law and a law of general application.)

[3] That the phrase 'law of general application' is meant to serve these two discrete purposes — and, in particular, proscribe bills of attainder — is supported by the drafting history. See Technical Committee on Fundamental Rights 'Sixth Report' (15 July 1993)(Includes phrase 'law of general application'); Technical Committee on Fundamental Rights 'Seventh Report' (29 July 1993)(Phrase broken down into its two component parts and reads 'a law applying generally and not solely to an individual case'); Technical Committee on Fundamental Rights 'Tenth Report' (5 October 1993)(Phrase 'law of general application' supplants 'a law applying generally and not solely to an individual case.' The Technical Committee suggests that its word choice was purely a matter of artifice, an attempt at a more natural and elegant use of language, rather than a change in substance that might diminish the force of an argument that bills of attainder were not the object of this proviso.)

[4] See *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC)('*Pharmaceutical Manufacturers*') at para 40 (footnotes omitted)('We now have a detailed written Constitution. It expressly rejects the doctrine of the supremacy of Parliament, but incorporates other common-law constitutional principles and gives them greater substance than they previously had. The rule of law is specifically declared to be one of the foundational values of the constitutional order, fundamental rights are identified and entrenched, and provision is made for the control of public power, including judicial review of all legislation and conduct inconsistent with the Constitution.')

[5] Ibid at paras 85–86 ('It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. . . . The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.') See also *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 101 (In attempting to determine the meaning of 'law of general

conform their conduct to its dictates.[1] Laws may not grant officials largely unfettered discretion to use their power as they wish, nor may laws be so vaguely worded as to lead reasonable people to differ fundamentally over their extension.[2]

application' Mokgoro J cites with approval McLachlin J's view in *Committee for Commonwealth of Canada v Canada* [1991] 1 SCR 139, 77 DLR (4th) 385: 'She considered that the 'prescribed by law' requirement was to eliminate from limitations clause purview conduct which is purely *arbitrary*.' (Emphasis added).) See, further, *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 25 ('In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an *arbitrary* manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State.' (Emphasis added)); *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 156 (Ackermann J wrote that 'We have moved from a past characterised by much which was *arbitrary* and *unequal* in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order.' (Emphasis added).)

[1] See *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & Others* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC)('*De Reuck*') at para 57 ('The first question is whether s 27(1), read with the definition of child pornography, is a "law of general application" as required by [FC] s 36(1). This Court has held that this requirement derives from an important principle of the rule of law, namely that "rules must be stated in a clear and accessible manner". The applicant's complaint concerned clarity: he submitted that the definition of "child pornography" in s 1 was too vague to satisfy this requirement. Having analysed and considered that definition above, I am satisfied that it is sufficiently clear and does constitute a law of general application.') See also *Irwin Toy Ltd v Quebec* [1989] 1 SCR 927, 58 DLR (4th) 577, 606, 617 ('Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work.')

[2] See *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC), 2002 (5) BCLR 43 (CC) at para 44 ('The next question to be considered is whether the provision is nevertheless justifiable despite its inability to be read in the way that the Board suggests. The prohibition against the broadcasting of any material which is "likely to prejudice relations between sections of the population" is cast in absolute terms; no material that fits the description may be broadcast. The prohibition is so widely phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted. No intelligible standard has been provided to assist in the determination of the scope of the prohibition. It would deny both broadcasters and their audiences the right to hear, form and freely express and disseminate their opinions and views on a wide range of subjects.') See also *Dawood v Minister of Home Affairs; Shalabi & Another v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 47 ('It is an important principle of the rule of law that rules be stated in a clear and accessible manner. . . . It is because of this principle that s 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.') There would appear to be a close relationship between the requirement of clarity or precision for laws of general application and the doctrine of overbreadth. In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & Others* the High Court wrote:

> The applicant has attacked the definition of 'child pornography' as . . . overbroad . . . and . . . so vague that it cannot be regarded as a law of general application. . . . To determine whether a law is overbroad, a Court must consider the means used . . . in relation to its constitutionally legitimate underlying objective. . . .The objective of the Legislature was clear. It was to eradicate child pornography in every form. . . . When one has regard to the objectives of the legislation and the spirit of the Constitution, it can never be said that child pornography has any place in an open and democratic society based on freedom and equality. Section 27(1), which outlaws the possession of child pornography, cannot be said to be disproportionate to the objectives which the Legislature has sought to achieve. In my view the definition of 'child pornography' is not overbroad.

Fourth, a commitment to the non-arbitrary exercise of power entails that the law must be *accessible* to the citizenry.[1] Law must be publicly promulgated and available *ex ante* in order to avoid the appearance that its application and its execution are selective.[2] Finally, as we noted above, the phrase 'law of general application' is meant to prevent any attempt at justification for bills of attainder. Bills of attainder are laws that pick out specific individuals or easily ascertainable members of a group for punishment without judicial trial.[3] Although bills of attainder are a

2003 (3) SA 389 (W) at para 86. Although the court's conclusions about overbreadth and whether the definition in question satisfies the requirements for a law of general application may well be correct, the reasoning does not quite support its conclusions. Overbreadth is concerned, ultimately, with whether a law sweeps up into its proscriptive net both constitutionally protected and constitutionally unprotected activity. It is not clear to us that this overbreadth enquiry has anything to do with an enquiry into the constitutional legitimacy of the law's objective, though this second enquiry is certainly part of limitations analysis. Nor is it clear to us that overbreadth has anything to do with an assessment of proportionality except in the limited sense that in order to know what is and is not constitutionally protected — and thus whether a law is, in fact, overbroad — one may first have to determine what counts as a justifiable limitation on a fundamental right or freedom and what does not. Law of general application analysis is a rather formal affair. The question in all cases of limitations analysis is whether the law in question possesses those features of law required in a polity committed to the rule of law. It is not about the subject matter of the law under scrutiny.

As Lorraine Weinrib notes, by subjecting the exercise of state power to the rule of law through the law of general application test, we reinforce both the constitutional and the democratic nature of our regime of law. First, the law of general application test protects our constitutional regime by requiring that '[a]rbitrary incursions on guaranteed rights must yield in any confrontation with such fundamental values.' Weinrib 'The Supreme Court of Canada and Section 1 of the Charter' (1988) 10 *Supreme Court LR* 469, 477. Secondly, the law of general application test ensures that the potential reprieve which the limitation clause offers the government is available 'if, and only if, the state has utilized its democratic law-making machinery.' Ibid. Professor Weinrib's reasoning is correct in so far as it concerns limitations analysis under the Charter. And her reasoning certainly sheds light on our own Bill of Rights analysis. However, not all law that is subject to Bill of Rights analysis under our Final Constitution will have passed through our democratic law-making machinery. Common law, customary law and regulations are appropriate objects of limitations analysis — and none of them are the direct product of democratic processes.

[1] See *Premier, Mpumalanga, & Another v Executive Committee, Association of State-aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (4) BCLR 382 (CC) at paras 41–42 ('[T]o permit the implementation of retroactive decisions without, for example, affording parties an effective opportunity to make representations would flout another important principle, that of procedural fairness. Citizens are entitled to expect that government policy will ordinarily not be altered in ways which would threaten or harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker. . . [T]he decision by the second applicant to terminate the payment of bursaries to members of the respondent with actual retroactive effect and without affording those members an effective opportunity to be heard was a breach of their right to procedural fairness enshrined in [IC] s 24*(b)* . . . [and] did not constitute "a law of general application".')

[2] See *Dawood* (supra) at para 47 ('[I]f broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.')

[3] The US Constitution prohibits both the federal government and state governments from passing any bill of attainder. Article I, ss 9, 10. See *US v Lovett* 328 US 303 (1946)(Legislation prohibiting payment to three named federal employees on grounds of subversive activity declared invalid as bill of attainder); *US v Brown* 381 US 437 (1965)(Law making it a crime for member of Communist Party to serve as labour union official declared invalid as bill of attainder.)

species of arbitrary exercises of law-making authority, they identify a class of law that, on the surface, sometimes appears to satisfy the requirements of parity, non-arbitrariness, accessibility and precision. Despite such appearances, bills of attainder reflect an obvious perversion of that which animates the rule of law in the first place.[1]

These general considerations lead us to ask two kinds of questions with respect to 'law of general application' analysis. The first is whether there is, in fact, any law that authorizes the challenged conduct. If the challenge is to law, then, secondly, we must ask whether the law in question is 'law of general application'. As both a doctrinal matter and an empirical matter, the four-pronged test for law of general application will be met by most legislation,[2] regulations,[3] subordinate legislation other than regulations,[4] municipal by-laws,[5] common law

[1] The rationale behind this prohibition against extra-judicial sanctions imposed without the possibility of a fair trial does not support the proposition that laws which single out individuals or groups for benefits suffer from a similar disability. With respect to benefits, the question is whether or not the law in question serves the 'naked preferences' of those exercising power — which is another way of saying that the exercise of public power is being used solely for private benefit without any consideration for the needs of the commonweal. See *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute For Democracy in South Africa & Another as Amici Curiae)(No 2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) at para 70 ('The distinction between the first period and all subsequent periods is also rational . . . Whilst other parties would not necessarily have been affected by this event, it cannot be said to be irrational to pass a law of general application to deal with a concrete situation, rather than a law that would apply only to members of the DA, the DP and the NNP. Indeed, to have made provision only for members of those parties might itself have given rise to constitutional objection.')

[2] See *Mkontwana v Nelson Mandela Metropolitan Municipality & Another; Bissett & Others v Buffalo City Municipality & Others; Transfer Rights Action Campaign & Others v MEC, Local Government And Housing, Gauteng, & Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)*('*Mkontwana*') 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC) at para 83 n8 ('Section 118(1) is a provision in an Act of Parliament which governs all municipalities in South Africa. It is clearly a law of general application as contemplated by s 36 of the Constitution.') See also *Deutschmann NO & Others v Commissioner for the South African Revenue Service; Shelton v Commissioner for the South African Revenue Service* 2000 (2) SA 106, 124 (E)('It is no issue that the IT Act and the VAT Act are laws of general application.')

FC s 25's requirement that a deprivation of property must occur in terms of law of general application has given the courts another opportunity to determine the meaning of this phrase. See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC)(Section 114 of Customs and Excise Act 91 of 1964 deemed law of general application for purposes of FC s 25); *Mkontwana* (supra) (Section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 and s 50(1)*(a)* of the Gauteng Local Government Ordinance 17 of 1939 found to be law of general application); *Ex parte Optimal Property Solutions CC* 2003 (2) SA 136 (C) at para 21 ('The Removal of Restrictions Act 84 of 1967 is a law of general application within the meaning of [FC] s 25.')

[3] See *Larbi-Odam & Others v Member of the Executive Council for Education (North-West Province) & Another* 1998 (1) SA 745 (CC), 1997 (12) BCLR 1655 (CC) at para 27 ('A precondition to the applicability of IC s 33(1) is that the limitation of a right occur "by law of general application". I hold that precondition to be met in this case. Regulation 2(2) is subordinate legislation which applies generally to all educators in South Africa.')

[4] See *President of South Africa & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 96.

[5] See *North Central Local Council & South Central Local Council v Roundabout Outdoor (Pty) Ltd & Others* 2002 (2) SA 625 (D), 2001 (11) BCLR 1109 (D)(Municipal by-law placing restrictions on advertising and signs, and thus limiting rights of expression, found to be a law of general application for purposes of FC s 36.) See also *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC), 2005 (11) BCLR 1053 (CC).

rules,[1] customary law rules,[2]

[1] See *S v Thebus & Another* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC) at paras 64–65 ('The Court held that an arrested person had the right to remain silent and that drawing an adverse inference on credibility from silence limited the right. It wrote: 'The rule of evidence that the late disclosure of an alibi affected the weight to be placed on the evidence supporting the alibi was one that was well recognised in the common law. As such, it was a law of general application.') See also *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC), 1996 (5) BCLR 735 (CC)('*Du Plessis v De Klerk*') at para 44 (On the meaning of 'law' in IC 7(2), as well as 'law' in terms of IC 33(1)'s 'law of general application', the Court held that '[t]he term "reg" is used in other parts of chapter 3 as the equivalent of "law", for example in [IC] s 8 ('equality before the law') and [IC] s 33(1) ('law of general application'). Express references to the common law in such sections as [IC] s 33(2) and [IC] s 35(3) reinforce the conclusion that the "law" referred to in [IC] s 7(2) includes the common law and that chapter 3 accordingly affects or may affect the common law. Nor can I find any warrant in the language alone for distinguishing between the common law of delict, contract, or any other branch of private law, on the one hand, and public common law, such as the general principles of administrative law, the law relating to acts of State or to State privilege, on the other.'). See also *Du Plessis v De Klerk* (supra) at para 136 (Kriegler J)('[IC] Section 33(1) . . . draws no distinction between different categories of law of general application . . . [I]t is irrelevant whether it is statutory, regulatory . . . founded on the XII Tables of Roman Law . . . or a tribal custom'); *Shabalala & Others v Attorney-General, Transvaal, & Another* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC) at para 23 ('"Law of general application" within the meaning of [IC] s 33(1) would ordinarily include a rule of the common law'); *S v Mamabolo* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC)('*Mamabolo*') (Common law offence of scandalizing the court is law of general application for purposes of FC s 36); *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 (2) SA 853, 862 (SE), 1997 (10) BCLR 1443 (SE)(Insofar as restraint constitutes limitation on rights entrenched in s 22 of Constitution of the Republic of South Africa Act 108 of 1996, common law complying with requirements of FC s 36(1)); *Nortje & Another v Attorney-General, Cape & Another* 1995 (2) SA 460, 476 (C), 1995 (2) BCLR 236 (C)('There can be no doubt that the common-law [docket] privilege . . . is law of general application'); *Jeeva & Others v Receiver of Revenue, Port Elizabeth, & Others* 1995 (2) SA 433, 445F (SE)('The law relating to privilege unquestionably limits a person's constitutional right of access to State-held information. It is part of the common law of evidence and hence a law of general application'); *Khala v Minister of Safety and Security* 1994 (4) SA 218, 227 (W), 1994 (2) BCLR 89, 97 (W)('The fundamental rights in chap 3 may be limited by "law of general application". The word "law" is not defined in the Constitution. [IC] 33(2) provides that save as provided for in ss (1) or any other provision of the Constitution, "no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this chapter." It follows, therefore, that the word "law" in [IC] s 33(1) includes the common law'); *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) at para 18 ('[B]oth sides accept that, for purposes of [s 25(1) of] the [Final] Constitution, a "law of general application" includes the common law'); *Phato v Attorney-General, Eastern Cape, & Another; Commissioner of the South African Police Services v Attorney-General, Eastern Cape, & Others* 1995 (1) SA 799 (E), 1994 (5) BCLR 99 (E)(The common law of docket privilege was a law of general application within the meaning of s 33(1)); *Bellocchio Trust Trustees v Engelbrecht NO & Another* 2002 (3) SA 519, 524D (C)('Even if I am wrong in coming to the conclusion that the undue delay rule does not limit the right of access to court as envisaged by s 34 of the Constitution, it is my judgment that such limitation is both reasonable and justifiable with reference to the limitations clause contained in s 36(1) of the Constitution.') Foreign courts have reached similar conclusions. See *R v Therens* [1985] 1 SCR 613, 645, 18 DLR (4th) 655; *Ministry of Transport & Noort Police v Curren* [1992] 3 NZLR 260; *Sunday Times v The United Kingdom* (1979) 2 EHRR 245 at para 47.

[2] *Bhe & Others v Magistrate, Khayelitsha, & Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole & Others; South African Human Rights Commission & Another v President of the Republic of South Africa & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at para 96 ('The primogeniture rule, . . [a]s the centrepiece of the customary-law system of succession, . . . violates the equality rights of women and is an affront to their dignity. The result is that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom.') See also *Nwamitwa v Phillia & Others* 2005 (3) SA 536 (T)(Customary law rules, viewed in toto, constitute law of general application that ultimately justify the tribal authorities' refusal to

rules of court,[1] and international conventions.[2] Whether 'mere' norms and standards, directives or guidelines issued by government agencies or statutory bodies qualify as laws of general application remains unclear.[3]

appoint a female chief.) Cf *Taylor v Kurtstag NO & Others* 2005 (1) SA 362, 385 (W), 2005 (7) BCLR 705 (W) ('Whether the internal rules of a religious group are likely to qualify as "law of general application", as referred to in s 36(1), is questionable … What is meant with this expression includes the law in the general sense of the legal system applicable to all which, in this case, allows for contractual freedom to associate and actions flowing from it.')

[1] The authority for this proposition may be described as 'weak' by comparison to the authority that underwrites the recognition of other types of law as law of general application. See *Ingledew v Financial Services Board: In re Financial Services Board v Van der Merwe & Another* 2003 (4) SA 584 (CC), 2003 (8) BCLR 825 (CC) at para 19 (Although not germane to outcome, Constitutional Court and High Court both appeared to accept the proposition that Rule 35(14) of the Uniform Rules of Court 'was a law of general application which reasonably and justifiably limited the constitutional right'); *Sanford v Haley NO* 2004 (3) SA 296 (C)(Suggests that rules of court qualify as law of general application); *S v Nocuse & Others* 1995 (3) SA 240 (Tk)(Rules of court regarding leave to appeal found to be law of general application for purposes of limitations analysis under IC s 33(1)).

[2] See *Chief Family Advocate & Another v G* 2003 (2) SA 599 (W)(Noting that, in *Sonderup v Tondelli & Another* 2001 (1) SA 1171 (CC), 2001 (2) BCLR 152 (CC), the Constitutional Court found that the Hague Convention on Civil Aspects of International Child Abduction Act 72 of 1996, having been incorporated into domestic law, was a law of general application.)

[3] With respect to socio-economic rights, Danie Brand argues, persuasively, that policies and programmes undertaken by the state must often be viewed, along with enabling legislation, as law of general application that governs a particular area of socio-economic life. Brand's argument rests on a distinction between law that imposes a negative duty on the state and law that imposes a positive duty on the state. The test for law of general application in the context of 'negative' rights is characterized by restrictions on how public power may be exercised. However, because the test for compliance in socio-economic rights cases is whether the state has created a comprehensive and coordinated programme to realize progressively a right, and whether it has taken the necessary steps to execute that programme, the test for law of general application in the context of positive rights must be viewed in terms of how the 'law' of that programme — enabling legislation, subordinate legislation and policies — works to effect the desired ends. To be clear, the issue here is whether one can, in fact, separate out, in the domain of socio-economic rights, policies and guidelines from the rest of the state's law-making function. See Danie Brand 'Food' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 56C. But see Jacques de Ville 'The Right to Administrative Justice: An Examination of s 24 of the Interim Constitution' (1995) 11 *SAJHR* 264, 275 (Argues that 'law of general application' covers only laws and not actions pursuant to laws; therefore actions pursuant to laws could not be justified under IC s 33(1).)

South African and Canadian authority is divided on the matter. See *Committee for Commonwealth of Canada v Canada* [1991] 1 SCR 139, 77 DLR (4th) 385 (Court divided as to whether internal airport rules qualified as law for purposes of Charter s 1 review). See, further, Stuart Woolman & Johan de Waal 'Freedom of Assembly: Voting With Your Feet' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 292, 308–14 (Discussion of *Committee for Commonwealth of Canada v Canada* and problems that law of general application analysis can raise for Bill of Rights analysis generally.) To the extent that such rules, directives and guidelines satisfy the four rule-of-law criteria, at least two good reasons exist for treating them as law of general application. First, if such rules, directives and guidelines are deemed not to qualify as law of general application, then the government or party relying upon the policy or guideline will not have the ability to justify them under FC s 36. Pressure may then be placed on the court to do justificatory analysis under the right itself. That is, the court may be inclined to change the content of the right in order to save the legal action in question. The result could be either the development of two different bodies of fundamental rights analysis — one entirely under the right, one more naturally divided between the right and the limitation clause. Mokgoro J adopted such a line in *President of the Republic of South Africa v Hugo*. 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)('*Hugo*'). Mokgoro J wrote:

(b) The relationship between law of general application and the rule of law

As John Finnis somewhat cheekily puts it, 'the Rule of Law' is 'the name commonly given to the state of affairs in which a legal system is legally in good shape'.[1] Here are some of the features of a legal system in good shape:

> (i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with; ... (iii) its rules are promulgated, (iv) clear, and coherent one with another; ... (v) its rules are sufficiently stable to allow people to be guided by their knowledge of the content of rules; ... (vi) the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and ... (vii) those people who have authority to make, administer and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance and (b) do actually administer the law consistently and in accordance with its tenor.[2]

> I consider it undesirable to take a technical approach to the interpretation of 'law of general application' ... [A] technical approach unduly reduces the types of rules and conduct which can justify limitations ... [E]xclusion from section 33(1) may adversely affect the proper interpretation of the scope of rights in Chapter 3.

Ibid at para 104. Second, if the four-part test is actually satisfied, then a refusal to engage in limitations analysis for norms and standards, policies and guidelines, would mean that persons who had acted in reliance upon these state initiatives and aligned their behaviour accordingly, would have no ability to justify any action taken in light of what would have been understood to be state-sanctioned forms of behaviour. The exclusion of such policies and guidelines from FC s 36 justificatory analysis simply sets the bar too high. Kriegler J, also in dissent, agreed with the general framework adumbrated herein, but differed with Mokgoro J on the application of that analytical framework to the 'law' at issue in *Hugo*. Kriegler J argued that that exercise of the presidential pardon provided for in IC s 82(1)*(k)* could not be characterized as law. Kriegler J wrote:

> The exercise of such power is non-recurrent and specific, intended to benefit particular persons or classes of persons, to do so once only, and is given effect by an executive order directed to specific state officials. I respectfully suggest that one cannot by a process of linguistic interpretation fit such an executive/presidential/administrative decision and order into the purview of s 33(1). That savings clause is not there for the preservation of executive acts of government but to allow certain rules of law to be saved.

Ibid at para 76. We are inclined to agree with Kriegler J's characterization of the particular presidential pardons at issue. But the problem is not, as Currie and De Waal suggest, that the pardon picks out particular persons for a benefit. See Iain Currie & Johan De Waal (eds) *The Bill of Rights Handbook* (5th Edition, 2005) 173. Individuation is only a problem where law picks out a readily identifiable set of persons for extra-judicial punishment. It is the star-chamber quality of such an edict that offends the commitment to the rule of law. The problem in *Hugo* is that the 'law' in question does not create an identifiable standard around which an individual may align his or her behaviour. The presidential commutation of a sentence is an ex post facto assessment of what justice requires. However, Kriegler J's gloss on what constitutes 'law' should not be understood to stand for the proposition that administrative policies cannot count as law. That, unfortunately, is exactly how Currie and De Waal characterize Kriegler J's conclusions. Rather such directives may well count as law if they possess the four formal attributes of law we describe below: parity of treatment, non-arbitrariness, precision and accessibility. Moreover, it strikes us as odd that such government edicts — which are prospective in nature and intended to provide standards for the behaviour of state officials and private persons — should not count as law. It is one thing to exclude from consideration decisions that are retrospective in effect and edicts that remain in the drawer of a bureaucrat. It is quite another to elevate form over substance and exclude from consideration those edicts that, by virtue of their prospective effect, shape public and private behaviour.

[1] John Finnis *Natural Law and Natural Rights* (1980) 270.

[2] Ibid at 270–271.

Finnis's description of the rule of law coheres with our own account of the formal features of law of general application. Before further adumbrating the contents of that account, it is worth stopping a moment to interrogate Finnis's first remark a little more closely. The rule of law, he says, describes a legal system 'legally' 'in good shape'. Finnis is being neither funny nor tautological. What he means is that in an age such as ours, where the ideals of

> legality and the Rule of Law . . . enjoys an ideological popularity, . . . conspirators against the common good will regularly seek to gain and hold power through an adherence to constitutional and legal forms which is not the less 'scrupulous' for being tactically motivated, insincere and temporary. Thus, the Rule of Law does not guarantee every aspect of the common good and sometimes it does not even secure the substance of the common good.[1]

In sum, a commitment to the rule of law — and to the formal features of law identified above — is a necessary but insufficient condition for a just or a fair society.

(c) The specific features of law of general application

The threshold test for law of general application excludes, from the more general justificatory framework provided by FC s 36, two classes of cases. The first class of cases embraces those instances in which the party whose conduct has been found to limit a fundamental right cannot rely upon an existing rule of law as a justification for the limitation. In short, FC s 36 only permits the justification of law.[2] It does not

[1] *Finnis* (supra) at 274. As Finnis observes, regimes that are exploitative or ideologically fanatical or some mixture of the two could submit themselves to the constraints imposed by the rule of law if it served the realization of their narrow conception of the good. Indeed, both Stephen Ellmann and David Dyzenhaus argue persuasively that South Africa under apartheid was an exploitative and ideologically fanatical regime committed to the rule of law. Stephen Ellmann *In a Time of Trouble: Law and Security in South Africa's State of Emergency* (1992); David Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991). Why would a fanatic or an ideologue bother? Because by abiding by the rule of law, the ideologue can disguise his malignant intent. That said, while the rule of law did constrain the South African state — and even allowed for a cramped conception of human rights — few would allow that it was fair or just. What was missing was any real commitment to individual dignity and the sense that the purpose of the state was to enable all persons to 'constitute themselves in community'. Finnis (supra) at 274. It should come then as no surprise that the two most important — and somewhat novel — constitutional doctrines developed by the Constitutional Court in its first decade of operation turn on a robust and substantive conception of the rule of law and an account of dignity that makes it the *Grundnorm* for the Final Constitution. See Frank Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11; Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36. Quite unlike the regime of law authorized by apartheid, the new dispensation recognizes that its legitimacy is conditional upon the state's commitment to act for the 'general' welfare and to treat all individuals as worthy of equal concern and respect.

The point of our brief digression into a finer point of legal philosophy is this. Although the obvious concern of the law of general application requirement is that various formal processes be observed — publicity, accessibility, precision, parity — the requirement is, at bottom, concerned with substantive features (the rule of law and individual dignity are but two) of a constitutional state.

[2] *S v Williams & Others* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at para 92 ('I accordingly find that the provisions of s 294 of the Act violate the provisions of ss 10 and 11(2) of the Constitution and that they cannot be saved by the operation of s 33(1) of the Constitution. Although the provision concerned is a law of general application the limitation it imposes on the rights in question is, in the light of all the circumstances, not reasonable, not justifiable and it is furthermore not necessary. The provisions are therefore unconstitutional.')

permit the justification of conduct for which no legal authorization exists.[1] The second class of cases encompasses those instances in which the law which purportedly authorizes the conduct found to limit a fundamental right does not qualify as 'law of general application'. In short, FC s 36 only permits the justification of law that possesses four formal attributes. Parties that have relied upon law that does not possess these four formal attributes cannot make use of FC s 36's general justificatory framework.

(i) *Law and conduct*

Law that fails to meet the 'law' requirement of law of general application falls into roughly two categories. Those categories are: (aa) grant of power to government officials *not* constrained by identifiable legal standards; and (bb) commissions and omissions. Commissions and omissions that fail to meet the desiderata for 'law of general application' fall into two related categories: *(x)* conduct carried out under colour of law but beyond the scope of actual legal authority; *(y)* the failure to discharge constitutional duties.

(aa) Grant to and exercise of power by government officials not constrained by identifiable legal standards

The most obvious instances in which the state may not avail itself of the justificatory framework provided for in FC s 36 are those cases in which it can rely upon no law for authorization of its conduct. In *Pretoria City Council v Walker*, for example, the applicant challenged a decision by the City Council that differentiated between categories of ratepayer in terms of race.[2] The Court noted that the respondent's challenge under the equality clause, IC s 8, was to the conduct of the council, not to law. Since, as the Court correctly reasoned, that conduct 'was clearly not authorised, either expressly or by necessary implication by law of general application', IC s 33(1), the limitation clause, could not be used to justify the Council's unfair discrimination.[3]

In *De Lille & another v Speaker of the National Assembly,* the applicant was found guilty of misconduct and suspended by Parliament for an alleged violation of parliamentary etiquette.[4] The High Court found that the punishment limited the applicant's rights under FC ss 16, 33 and 34 — as well as FC s 58 — *and* that it could not be justified under FC 36. Parliament's actions could not be justified in terms of FC s 36, because, as Hlophe J wrote, they

[1] Whether conduct is, in fact, always authorized by law is a philosophical problem addressed elsewhere in this work. See Stu Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31.

[2] 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)('*Pretoria City Council*').

[3] Ibid at para 82.

[4] 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C)('*De Lille*').

> did not take place in terms of law of general application. There is no law of general application which authorises such a suspension. It is not authorised by the Constitution, the Powers and Privileges of Parliaments Act of 1963 or the Standing Rules of the National Assembly. The law of Parliamentary privilege does not qualify as a law of general application for purposes of s 36. It is not codified or capable of ascertainment. Nor is it based on a clear system of precedent. Therefore there is no guarantee of parity of treatment.[1]

That no law authorized Parliament's conduct should have been sufficient to justify the *De Lille* Court's conclusion. However, as the quotation above reflects, Hlophe J felt it important to emphasize that Parliament's actions — even if dressed up as law — could not satisfy the four criteria by which any law of general application must be measured.

The Constitutional Court, the Supreme Court of Appeal and the High Court have all struggled with the problem of how to characterize — in terms of law of general application — contractual or quasi-contractual relationships that limit the exercise of fundamental rights. In two cases, the Constitutional Court and the Supreme Court of Appeal characterized these relationships as conduct ungoverned by law. In a third case, the High Court held the opposite to be true. For reasons that we hope to make clear, only the High Court's analysis makes sense of the problem.

In *Hoffmann v South African Airways*, South African Airways ('SAA'), a subsidiary of Transnet, and thus an organ of state, was found to have unfairly discriminated against an applicant for employment.[2] SAA's refusal to hire the applicant because he was HIV-positive violated FC s 9. The Constitutional Court held that the state could not, in terms of FC s 36, seek to justify its unfair discrimination, because the discrimination had not been authorized by a law of general application.[3] The Constitutional Court did not even bother to entertain the argument that the extant law of contract, at the time the dispute arose, provided support for SAA's conclusion that it could hire whomever it thought best suited for the position of cabin steward.

The problem of how to understand the nature of state action with respect to contractual arrangements is raised once again in *Transnet Ltd v Goodman Brothers (Pty) Ltd*.[4] After reaching the conclusion that the terms of a tender constituted a limitation of FC s 33, the right to administrative justice, the Supreme Court of Appeal concluded that those contractual terms did not, themselves, constitute law of general application for the purposes of justification under FC s 36. However, if one grants that such waivers exist — which one of the authors of this chapter has argued strenuously we should not do[5] — then one must ask how waivers come to exist. They come to exist in terms of the law of contract. Thus, if one chooses to

[1] *De Lille* (supra) at para 37.
[2] 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC)('*Hoffman*')
[3] Ibid at para 41.
[4] 2001 (1) SA 853 (SCA), 2001 (2) BCLR 176 (SCA)('*Transnet*')
[5] See Woolman 'Application' (supra) at § 31.7.

recognize the existence of constitutional waivers — which we again warn one should not — then one is committed to the proposition that law of general application — the law of contract — authorizes the waiver. Only when one denies the existence of waiver as a conceptually meaningful entity does it make sense to speak of conduct that cannot be justified by reference to law.[1]

The problems that attend the description of contractual relationships in terms of law of general application are thrown into somewhat sharper relief by disputes between private parties governed by common law. In these disputes, no questions about the legitimacy of the exercise of state power arises.[2] That is to say, the court's view of the underlying basis for the dispute is not obscured by such public law principles as the *ultra vires* doctrine. For example, in *Taylor v Kurtstag NO & Others*, the High Court was asked to decide whether the exclusion of the applicant by the respondent from participation in Jewish religious rituals could be justified.[3] The High Court correctly concluded that it could be. The High Court was not, however, entirely clear about the provenance of the law that enabled the exclusion to be justified. Having found that the applicant's FC s 15 and 31 rights had been limited by the respondent, the High Court felt obliged to ask 'whether the internal rules of a religious group … qualify as law of general application'.[4] This, Malan J concludes, is the wrong way to go about solving the problem. Rather, he suggests, the law of general application at issue in the case embraces the body of common law rules that permit individuals and groups to freely associate. It was such law upon which the respondent relied when excluding the applicant from participating in the community's religious rituals, and it was this body of common law that justified the limitations placed upon the applicant's rights of religion and religious practice.[5]

(bb) Commission and omission

(x) Conduct carried out under colour of law but beyond the scope of actual legal authority

Administrative or executive action may be deemed not to satisfy this criterion of 'law' where law enforcement officials act in a manner that infringes fundamental rights without possessing clear legal authority to do so. Such actions might include the failure of the police to inform an arrested person that she has a right to counsel where no statutory provision or rule of common law specifies the

[1] Woolman 'Application' (supra) at § 31.7.

[2] See, eg, *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE), 1997 (10) SACR 1443 (SE)(Insofar as a restraint of trade clause constitutes a limitation on rights entrenched in FC s 22, the common law rules of contract that sanction such clauses constitute law of general application that comply with the proportionality requirements of FC s 36(1).)

[3] 2005 (1) SA 362 (W), 2005 (7) BCLR 705 (W).

[4] Ibid at 385–386.

[5] Ibid at 387.

conditions under which such a failure to inform could legitimately occur.[1] Likewise, if a law enforcement official were to take a confession without informing the accused of his right to remain silent — in the absence of controlling legal authority — then the action would not be justifiable under the limitation clause.[2] Although such administrative or executive action would lack the four formal attributes of a law of general application — parity of treatment, non-arbitrariness, precision and accessibility — and thus fail the second part of the law of general application test, there seems to be no good reason to allow the analysis to go that far.[3]

Minister of Safety & Security & Another v Xaba offers a paradigmatic example of law enforcement officials acting under colour of law without possessing the requisite legal authority to do so.[4] In *Xaba*, police officers compelled a suspect to have surgery to remove a bullet that they believed would provide evidence connecting the suspect to a crime he was alleged to have committed. Neither the Criminal Procedure Act nor any other law authorizes surgery without consent. As a result, the exercise of state power to compel surgery of a suspect, in the absence of legal authority,[5] failed to satisfy the 'law' leg of the test for law of general application and

[1] See *R v Therens* [1985] 1 SCR 613, 18 DLR (4th) 655.

[2] See Frank Snyckers & Jolandi le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 51. See also *R v Hebert* [1990] 2 SCR 151, 57 CCC (3d) 1.

[3] But see *S v Mathebula* 1997 (1) SACR 10 (W), 1997 (1) BCLR 123 (W). In *Mathubela*, Claasens J's reliance on the notion of waiver results in a critical error in reasoning with regard to whether or not law of general application exists that will permit the state to argue in justification of its limitation of the right to remain silent. The state does not claim that a rule of law — in the form of legislation or common law — exists that permits police officers to extract confessions without informing an arrested person of her right to remain silent. Instead, the state claims that the doctrine of waiver constitutes the rule of law — the law of general application — upon which the state relies as a justification for its infringement of various fair trial rights under IC s 25. The honourable judge concurs. As one of the authors has argued at length elsewhere in this work, both the state and the judge must be wrong. No such thing as waiver exists. If no such thing as waiver exists, then there can be no general law of application upon which the state, in this case, can rely. See Woolman 'Application' (supra) at § 31.7 ('Put pithily, what is at issue in all these cases is not the waiver of a right, but the interpretation of a right. . . . Thus whether we are talking about life, dignity, torture, slavery, religion, expression or property, the question is always the same: does the right permit the kind of activity, relationship or status contemplated at some point in time by the parties before the court. If it does not, then . . . the right bars the law or conduct contemplated and no such thing as waiver can occur. If the right in question permits the kind of activity or agreement in question, then the parties may do as they wish and the question of waiver never arises.')

[4] 2003 (2) SA 703 (D), 2004 (10) SACR 149 (D).

[5] An argument could be made that many of these cases could be brought under the Promotion of Administrative Justice Act ('PAJA'). Were that so, only in cases such as *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) and *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC) — where no statutory or common-law remedy exists — would there be a need to develop the law and to create an appropriate remedy — in terms of FC s 8(3) — in direct reliance on a constitutional right.

the state could not justify its prima facie limitation of the suspect's FC s 12 right to freedom and security of the person.[1]

(y) The failure to discharge constitutional duties

The class of cases that form this category could be treated as part of the preceding category. One might argue that it does not matter whether the violation of a right occurs through action or inaction, given that for the purposes of 'law of general application' analysis all that matters is that neither the commission nor the omission are authorized by law. However, we believe that the failure to discharge 'constitutional duties' constitutes a unique enough transgression in our constitutional order to warrant separate discussion.

In *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd,* the Constitutional Court found that the state had failed to take 'reasonable steps' to discharge its responsibilities — under FC s 34 read with FC s 1*(c)* — to provide Modderklip Boerdery with an effective remedy.[2] Moreover, the state failed to offer any 'acceptable reasons' for this failure to act. Given that no law could be invoked to justify this failure to act, the Court noted that FC s 36 'is not applicable … since no law of general application' actually limited Modderklip's rights.[3] The state's omission amounted to conduct unauthorized by law.

The state found itself in a similar position in *August & Another v Electoral Commission & Others.*[4] The state had neither created the necessary mechanism that would enable eligible prisoners to register and to vote, nor had it sought to disqualify them through legislation. As a result, once the applicant had established that the state had not taken any steps to make the exercise of the franchise possible, and had thereby violated FC s 19, the state could not then 'seek to

[1] There would seem to us to be a host of other cases in which state actors, acting under the colour of law, have been found to be acting outside the scope of their legal authority and in violation of constitutional rights. In many of these cases, however, the courts have chosen not to view the violation as a direct infringement of a fundamental right. Instead, they have described the unconstitutional act as a reflection of a lacuna in the common law or a statute, and have developed the common law or construed the statute accordingly. See *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC); *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC); *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC). Because the court refuses, in these cases, to engage in direct application of the Bill of Rights and the concomitant two-stage analysis, the court never has to ask whether the act in question could be justified by reference to some law of general application.

[2] 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) at para 51 ('The obligation resting on the State in terms of s 34 of the Constitution was, in the circumstances, to take reasonable steps to ensure that Modderklip was, in the final analysis, provided with effective relief. The State could have expropriated the property in question or provided other land, a course that would have relieved Modderklip from continuing to bear the burden of providing the occupiers with accommodation. The state *failed to do anything* and accordingly breached Modderklip's constitutional rights to an effective remedy as required by the rule of law, s 1(c), and entrenched in s 34 of the Constitution.')(Emphasis added.)

[3] Ibid at para 52.

[4] 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC)('*August*').

justify the threatened infringement of prisoners' rights in terms of s 36 of the Constitution as there was no law of general application upon which they could rely to do so'.[1]

(ii) *Criteria for law of general application*

Assuming that the limitation of a fundamental right takes place in terms of law, the next question a court must ask is whether the law in question is 'law of general application'. A law of general application, rightly described, possesses the following four features: (1) parity of treatment, (2) non-arbitrariness, (3) accessibility or public availability; and (4) precision or clarity.

The case law on this subject remains surprisingly thin. As a result, we use the extant case law and foreign jurisprudence to support a 'preferred reading': namely that a 'law of general application' — grounded in an underlying commitment to the rule of law — must possess the aforementioned four attributes.

(aa) Parity of treatment

The word 'general' in 'law of general application' is a bit of a misnomer. It does not, as many an uninitiated student of constitutional law has concluded, literally mean that the law must apply to everyone.[2]

First, it means that the state — through the legislature, the executive, and the judiciary — must, broadly speaking, treat similarly situated persons the same. In *Joubert v Van Rensburg*, for example, the court remarked obiter that the state could not justify deprivations of property in terms of the Extension of Security of Tenure Act[3] (ESTA) because ESTA had burdened only agricultural property.[4] For the purposes of satisfying the parity of treatment requirement of the 'law of general application' test, the *Joubert* court suggested that the apposite provisions of ESTA ought to have applied to all property owners.

[1] *August* (supra) at paras 22–23.

[2] *Mhlekwa v Head of the Western Tembuland Regional Authority & Another; Feni v Head of the Western Tembuland Regional Authority & Another* 2001 (1) SA 574, 622B (Tk)('*Mhlekwa*'). The court held that the Regional Authority Courts Act 13 of 1982 (Tk) is law of general application despite the fact that the law does not apply to all residents of South Africa. The court cites in support of this conclusion the reasoning of the Constitutional Court in *Makwanyane*. See *Makwanyane* (supra) at para 32. It quotes, with approval, De Waal and Currie, who write, as follows:

> It would be absurd to suggest that . . . a law of [the] Gauteng legislature cannot qualify as 'law of general application' simply because it does not apply uniformly throughout the Republic. The structure of government established in the Constitution envisages legislation that is limited in its area of application and accordingly provincial legislation will qualify as a law of general application for purposes of s 36.

Johan De Waal, Iain Currie & Gerhard Erasmus *Bill of Rights Handbook* (4th Edition, 2001) 116 (quoted in *Mhlekwa* (supra) at 622C–D).

[3] Act 62 of 1997.

[4] *Joubert & Others v Van Rensburg & Others* 2001 (1) SA 753, 797 (W)('In its content, in the setting of the particular statute, and in the manner in which the Tenure Act handles the situation, the Tenure Act is not 'of general application' in burdening only agricultural property.') The judgment of the High Court in this case was severely criticized by the Constitutional Court in *Mkangeli & Others v Joubert & Others*. 2001 (2) SA 1191 (CC), 2001 (4) BCLR 316 (CC).

Second, parity of treatment in a constitutional state committed to the rule of law means that the governed and the governors are subject to the same penalties and receive the same privileges. In *De Lille,* the High Court and the Supreme Court of Appeal concluded, on different grounds, that Parliament's naked exercise of power with respect to its suspension of MP Patricia de Lille did not satisfy the requirement that Parliament itself must abide by rules that are clearly discernible to all persons in advance of any action that Parliament or that another state actor undertakes.[1] Both courts demanded that Parliament treated the governed — in this case Ms de Lille — as it would treat the governors — itself.

Moreover, both courts seemed to indicate that such laws could not take the form of edicts articulated by relatively transient majorities in the anticipation of the commission of an offence or after the commission of the offence. Language in both judgments suggests that the High Court and the Supreme Court of Appeal would — were the terminology part of South African law — characterize the sanctions imposed by Parliament upon Ms de Lille as a bill of attainder.

(bb) Non-arbitrariness

Laws of general application must enable citizens to conform their behaviour to a discernible standard. In order for them to do so, the state — whether in the form of the executive or the judiciary — must be able to enforce the law according to a discernible standard. In *Case & Curtis*, the Constitutional Court held that the definition of 'obscenity' in the Indecent or Obscene Photographic Matter Act[2] was of 'such indeterminate reach' that it could not but result in arbitrary enforcement.[3] The *Case & Curtis* Court found that the definition of 'obscenity' invariably swept up into the Act's proscriptive net constitutionally protected expression as well as constitutionally unprotected expression. The arbitrariness or standardlessness of the definition led, inexorably, to a finding by the Court that the law was void for overbreadth:

> One need proceed no further to appreciate that the means embodied in s 2(1), read with the definition of *obscene or indecent* material, which includes within its overbroad compass a vast array of incontestably constitutionally protected categories of expression, are entirely disproportionate to whatever constitutionally permissible objectives might underlie the statute. Such a law is *ipso facto* not *reasonable* within the meaning of s 33 (1)(*a*)*(i)*.[4]

[1] The Cape High Court analyzed the problem in terms of the Bill of Rights. See *De Lille v Speaker of the National Assembly* 1998 (3) SA 430, 455 (C), 1998 (7) BCLR 916 (C)(Parliament's conduct impaired the exercise of the right to freedom of expression in terms of FC ss 58 and 16. Because Parliament's treatment of parliamentary privilege amounted to conduct not governed by law of general application, it could not be saved by FC s 36.) The Supreme Court of Appeal preferred to analyze the matter in terms of the common law. But it did not overrule or contradict the High Court's findings in the matter. See *Speaker of the National Assembly v De Lille & Another* 1999 (4) SA 863 (SCA), 1999 (11) BCLR 1339 (SCA)(Court found suspension beyond the scope of Parliament's authority in the absence of legislation or rules that might permit such punishment.)

[2] Act 37 of 1967.

[3] *Case & Another v Minister of Safety and Security & Others*; *Curtis v Minister of Safety and Security & Others* 1996 (3) SA 617 (CC), 1996 (5) BLCR 609 (CC)('*Case & Curtis*') at para 61 n98.

[4] Ibid at para 61.

While the Court was certainly correct in its conclusion that the definition of 'obscenity' in the Indecent or Obscene Photographic Matter Act ('IOPMA') could not satisfy FC s 36, its imprecise use of the term 'proportionality' as a catch-all for all aspects of FC s 36 analysis leads it to confuse substantive questions about the means employed by a law and the objectives of a law with more formal questions about the nature of the law. The definition of obscenity violates the threshold test for a law of general application not because it impairs more than is absolutely necessary our expressive rights, or because it imposes greater costs than benefits. It certainly does both. The definition of obscenity in IOPMA fails the test for law of general application, because it is a standardless standard that vitiates the commitment to the rule of law.[1] That IOPMA's definition of 'obscenity' cannot satisfy the law of general application test means that the *Case & Curtis* Court should never have had to engage in proportionality analysis.[2]

(cc) Precision or clarity

A third, and closely-related, criterion for law of general application is precision. Whereas the criterion of non-arbitrariness tends to emphasize the potential for poorly-constructed law to result in the abuse of state power, the criterion of precision or clarity emphasizes the need, in a society committed to the rule of law, for individuals to be able to regulate themselves. In a society of autonomous moral agents, and in a state that accords such agents equal dignity and respect, the rightness of actions must be said to flow from the choices of the citizens themselves to conform their behaviour to the law, and not from ex post facto assessments of justice as divined by some leviathan.[3]

[1] See, further, *Executive Council, Western Cape Legislature, & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC). The *Executive Council, Western Cape* Court found that the delegation of authority from Parliament to the President failed to set clear limits on what the executive could and could not do. Although this case turned on the doctrine of separation of powers, the failure of the legislature to articulate non-arbitrary guidelines for the exercise of public power is of a piece with the Court's doctrinal concerns in determining the formal contours of law of general application. See also *Janse van Rensburg NO v Minister of Trade and Industry & Another NNO* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC)(Where significant powers of discretion are conferred upon a functionary, the legislature must provide guidance as to the manner in which those powers are to be exercised; the absence of such guidance may render a statutory provision unconstitutional); *Panama Refining Co v Ryan* 293 US 388 (1935)(Delegation of authority to executive declared unconstitutional because Congress had abdicated responsibility for setting clear policy limits on executive action.)

[2] The Constitutional Court's inclination to describe all aspects of limitations analysis as part of its overarching proportionality assessment does not count as an argument in favour of engaging questions of arbitrariness in what the text strongly suggests, and what we contend, is a subsequent stage of limitations analysis.

[3] See *Ferreira v Levin NO* 1996 (1) SA 984 (CC), 1996 (4) BCLR 1 (CC)('*Ferreira*') at para 4 (Ackermann J wrote: 'Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their "humanness" to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.') See also Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

In *Dawood v Minister of Home Affairs*, the Constitutional Court was asked to address the constitutionality of a legislative provision that provided that an immigration permit could be granted to the spouse of a South African citizen, who was in South Africa at the time, only if that spouse was in possession of a valid temporary residence permit.[1] The legislation provided no guidance, however, as to the circumstances in which it would be appropriate to refuse or to issue a temporary residence permit. Although the *Dawood* Court stopped short of finding that the section did not constitute law of general application, it took the opportunity to announce that, 'where broad discretionary powers contain no express constraints', and where 'those who are affected by the exercise of the broad discretionary powers [can] … not know what is relevant to the exercise of those powers', questions about whether the law at issue satisfied the law of general application requirement would inevitably be raised.[2]

Dawood reminds us that legislation that grants law enforcement officials unfettered powers fails the law of general application test on two related grounds.[3] As we have already seen, the unfettered grant of power logically entails arbitrary action: the action is arbitrary in the sense that neither norms nor precedents govern or restrict the state's behaviour. The flip-side of this unfettered grant of authority, and more to the point of our analysis of the third criterion, is that it fails to provide the clarity required for individuals who wish to align their behaviour with an identifiable legal standard. In *Case & Curtis*, the Constitutional Court found that the definition of pornographic material in the Indecent or Obscene Photographic Matter Act was designed to 'hit everything' and made it impossible for persons engaged in expressive conduct to know, in advance, what kind of conduct would be proscribed and what kind of conduct would be permitted.[4]

Similarly, legislation or common law will fail to satisfy this third criterion where the law is impermissibly vague.[5] In *South African National Defence Union v Minister of Defence*, the Constitutional Court held that even a 255-word definition of 'act of

[1] *Dawood & Another v Minister of Home Affairs & Others; Shalabi and Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC)('*Dawood*').

[2] Ibid at para 47. See also *Janse Van Rensburg NO & Another v Minister of Trade and Industry & Another* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC)(Court holds that the public interest dictates that there should be certainty about the constitutionality of all legislation.)

[3] See, eg, *Re Ontario Film and Video Appreciation Society* 45 OR (2d) 80 (CA).

[4] *Case & Curtis* (supra) at para 53 ('[T]he challenged provision includes within its reach material that is constitutionally protected. Ms Fedler, appearing for amici curiae People Opposing Women Abuse et al, conceded that the provision unjustifiably and unreasonably interferes with protected categories of expression. Counsel for the Christian Lawyers Association readily acknowledged that there is no place for a provision that outlaws all depictions of homosexuality and lesbianism. And counsel for the Attorney-General conceded that the Act amounted to a "loaded shotgun" with which the government that promoted the Act intended to "hit everything". Indeed, no one before the Court appeared to be willing to defend the statute in its present form.')

[5] See *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606, 93 DLR (4th) 36 (Discussing doctrine of vagueness in Canadian Charter litigation); *Connally v General Construction Co* 269 US 385 (1926)(Discusses vagueness doctrine in US constitutional law.)

public protest' was impermissibly imprecise because the definition had the potential to sweep up into the Act's proscriptive ambit complaints that could never be accurately described as public protest or partisan political conduct — say, conversations between a member of the military and her husband.[1]

As we have noted above, administrative action will generally fail to satisfy this criterion where law enforcement officials take actions that infringe fundamental rights without possessing clear legal authority to do so. But while it may be true that such conduct fails to satisfy the second leg of the law of general application test — because it lacks the requisite features of parity, non-arbitrariness, precision and accessibility — it is more accurate to say that it lacks the defining features of law *simpliciter*.[2]

(dd) Accessibility or public availability

The final criterion for a law of general application is that the law must be accessible or publicly available. At a minimum, and perhaps only the minimum is necessary, the law must be published.

The European Court of Human Rights, in *Sunday Times v Handyside*, defined 'adequately accessible' law as follows.[3] First, law is adequately accessible if a person is given 'an indication [of the reach of a legal rule] that is adequate in the circumstances of … a given case' and that enables him to 'regulate his conduct' accordingly.[4] Second, law is adequately accessible if it allows a person, 'if need be with appropriate advice, … to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[5] In *President of the Republic of South Africa and Another v Hugo*, Mokgoro J states that most statutes, regulations and common-law rules will be treated as law of general

[1] 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC)('*SANDU*') at para 11. For example, a statute may give the police the power to stop individuals of 'questionable moral character' from moving about South Africa, but fail to identify criteria by which a person might determine who qualifies as an individual of questionable moral character. Such a law, while general and public, is far too imprecise, far too vague to place the public on sufficient notice of what the law expects of them. Such a law would probably violate the overbreadth doctrine in US law on the grounds that no sharp line could be drawn between protected and proscribed activity *and* that constitutionally protected activity would be swept up into its coverage. See *Secretary of State of Maryland v Joseph Munson* 467 US 947 (1984); *Arnett v Kennedy* 416 US 134 (1974).

[2] For a discussion of administrative or executive action undertaken under colour of law but without legal authority, see § 34.7 infra. See also *S v Mathebula* 1997 (1) BCLR 123 (W), 1997 (1) SACR 10 (W).

[3] (1979) 2 EHRR 245 ('*Sunday Times*'). See also *Klass v Federal Republic of Germany* (1979) 2 EHRR 214; *Hashman and Harrup v The United Kingdom* (2000) 30 EHRR 241 at para 43; *Kalac v Turkey* (1999) 27 EHRR 552 at para 41.

[4] *Sunday Times v The United Kingdom* (1992) 14 EHRR 229.

[5] Ibid.

application because these forms of law are, generally speaking, 'adequately accessible'.[1]

Hugo raised, but did not clearly decide, a question about the pedigree of another kind of law: 'whether rules emanating from directives or guidelines, issued by government departments or agencies but falling outside the category of officially published delegated legislation, are laws of general application'.[2] Mokgoro J, after surveying the split in Canadian jurisprudence on this very subject, recognized that a certain lack of publicity or accessibility might attach to such rules.[3] She was, however, persuaded that a failure to accord such directives — published, but perhaps not gazetted — the status of law of general application might have deleterious consequences for the structure of constitutional analysis. First, as one of the authors of this chapter has argued elsewhere, the refusal to accord such instances of executive rule-making the status of law of general application may have the unintended consequence of forcing justificatory arguments back into the rights interpretation stage of analysis in order to save the law in question.[4] Second, Mokgoro J suggests that, even if such executive rule-making is not made public or accessible in quite the same way as legislation or common law, the other criteria for 'law of general application' and the other FC s 36 standards developed by the courts for an assessment of proportionality will ensure that such a rule is unlikely to work the particular mischief that led to the challenge in the first place. Finally, one should note that there is a signal difference between the Canadian jurisprudence that has developed around 'prescribed by law' in s 1 of the Charter, and the Bill of Rights jurisprudence that has developed around 'law of general application' in FC s 36. South African courts have expressly recognized

[1] 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)('*Hugo*'). When surveying the possible desiderata for adequately accessible law, Mokgoro J suggests that publication satisfies the requirement. She notes that:

> Section 2 of the Interpretation Act defines 'law' as 'any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law', and presumptively applies to the interpretation of every such 'law . . . in force' and of 'all by-laws, rules, regulations or orders made under the authority of any such law'. Delegated legislation must be published. . . . When any by-law, regulation, rule or order is authorised by any law to be made by the President or a Minister . . . such by-law, regulation, rule or order shall, subject to the provisions relative to the force and effect thereof in any law, be published in the *Gazette*.

Ibid at para 97.

[2] Ibid at para 100.

[3] See *Committee for Commonwealth of Canada v Canada* [1991] 1 SCR 139, 77 DLR (4th) 385 (Court divided as to whether internal airport rules qualified as law for purposes of s 1 review.) For a relevant discussion of this problem in Canadian jurisprudence, see Stu Woolman & Johan de Waal 'Freedom of Assembly: Voting With Your Feet' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 292, 308–14. See also *Hugo* (supra) at para 104 ('I consider it undesirable to take a technical approach to the interpretation of 'law of general application' . . . [A] technical approach unduly reduces the types of rules and conduct which can justify limitations . . . [E]xclusion from section 33(1) may adversely affect the proper interpretation of the scope of rights in Chapter 3.')

[4] See Stu Woolman 'Freedom of Assembly' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 43.

that all forms of law — legislation, subordinate legislation, regulation, common law and customary law — can be characterized as law of general application. It goes without saying that much of this law has not — as some Canadian jurists would require for s 1 analysis of the Charter — passed through the democratic law-making machinery of the state. In so far as a law in South Africa possesses the four formal hallmarks of the rule of law that we have described — parity of treatment, non-arbitrariness, precision and accessibility — it is law of general application. Although South African courts often tend, in a rather formalistic manner, to emphasize the provenance of a law, this shorthand — when properly unpacked — reveals a commitment to these four formal features of the law.[1]

34.8 'Reasonable and Justifiable in an Open and Democratic Society Based on Human Dignity, Equality and Freedom'

(a) Introduction

FC s 36 seeks to provide a mechanism for the candid consideration of competing values and interests, and for negotiating the tension between democracy and rights. To give courts some direction when undertaking this candid consideration, FC s 36 states that for a fundamental-rights limitation to pass muster, it must be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

While this phrase may well be the touchstone of Bill of Rights analysis, it is also fraught with interpretive difficulties.[2] Not only is it couched in the broadest possible terms, but it replicates all of the tensions it is supposed to resolve: between democracy and rights, between equality and freedom, between equal treatment and the recognition of diversity, between social justice and individual liberty.

One response — one that might be easiest to square with the existing body of jurisprudence — is that such tensions need not concern us too much. On this account, the purpose of FC s 36 is not to resolve conflicts between such basic values in the abstract, but to provide a rubric for reconciliation of conflicting

[1] Mokgoro J reached a similar conclusion in *Hugo*. See *Hugo* (supra) at paras 102–103 ('The need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know the law, and be able to conform his or her conduct to the law. Further, laws should apply generally, rather than targeting specific individuals. In my view, those rule of law concerns are adequately met by the Presidential Act. The remaining question about the Presidential Act concerns its origin as executive rule-making rather than as legislation. . . . The origin of the Presidential Act in executive rule-making rather than in a formal legislative process is not fatal to the application of s 33(1). . . . [T]here are numerous instances of delegated legislation drafted by the executive, which legislation would undoubtedly be accepted as "law". The difference between the Presidential Act and standard instances of executive rule-making, in the form of delegated legislation, is the absence of a parent statute in the former case. In standard cases of executive rule-making, therefore, at least the parent statute has undergone the rigours of the legislative process. That difference cannot in my view justify different treatment for the Presidential Act, which represents an exercise of public power derived directly from the Constitution. The legitimacy which attaches to delegated legislation by reason of the parent statute must attach with equal force to rules representing a direct exercise of power granted by the Constitution. The Constitution, after all, was a vigorously negotiated document.')

[2] See Denise Meyerson *Rights Limited: Freedom of Expression, Religion and the South African Constitution* (1997) xxiii.

interests in specific contexts. Of course, this sort of reply begs the next question: how does FC s 36 enable us to negotiate conflicts within the context of a particular dispute?

The very language of FC s 36 offers at least two pointers in this regard. First, the phrase 'justifiable in an open and democratic society based on human dignity, equality and freedom' suggests that we can find guidance in the laws, practices and judicial doctrines found in other constitutional democracies. Indeed, FC s 39 directs us towards foreign jurisdictions for hints about how to go about reconciling conflicts between rights, values and interests in concrete cases. Second, FC s 36 lists five factors that may assist us in determining the reasonableness and justifiability of a limitation. But the list itself raises additional questions. If these factors do not, as seems clear, represent a closed list of considerations, what other factors might be relevant in any given limitations inquiry? How, if at all, are the listed factors related to one another? Should they be engaged separately and sequentially, or are they simply subsets of a global inquiry into the 'proportionality' of the limitation under scrutiny?

Our discussion of the reasonableness and justifiability inquiry is structured as follows. First, we describe, in somewhat greater detail than above, what the Court understands proportionality analysis to be. Second, we look at the gloss placed by the Court on the five listed factors in FC s 36(1), as well as its take on the relationship between these factors.

Our discussion then moves from the merely descriptive to the critical and the prescriptive. Our moderately critical appraisal of balancing and proportionality rehearses many of the same concerns we expressed about the lack of analytical rigour displayed by the courts with respect to distinguishing fundamental rights interpretation from limitations analysis. After clearing the ground with this critique of balancing, we offer our own preferred reading of FC s 36 — one that coheres with the text and still makes sense of the case law. We begin with the Court's own understanding of its institutional role, and ask whether and to what extent a doctrine of 'shared constitutional interpretation' might better mediate the conflicting doctrinal requirements of constitutional supremacy and separation of powers. While 'shared constitutional interpretation' provides an institutional framework for limitations analysis, it remains incomplete — and of little use — without a normative theory about how the values that underlie the limitations clause cohere. (In short, while the doctrine of shared constitutional interpretation adumbrates a theory of judicial review, a meaningful standard for such review requires additional content.) To fulfil this second end, we explore the Court's understanding of the phrase 'open and democratic society based on human dignity, equality and freedom', and offer an alternative reading of this phrase which we think better coheres with the more general aims of our basic law. Finally, we suggest — consistent with our critique of balancing — that instances of value incommensurability will often arise in the context of limitations analysis. While the Court's conventional morality is sufficient to handle the majority of such conflicts, we believe that in hard cases both analytical rigour and

out-groups will be better served by what we call a 'storytelling' approach to judicial opinion writing. This approach does not conflate novels with judicial narratives. It suggests that storytelling simultaneously challenges deeply ingrained theoretical assumptions about the world in which we live and more firmly grounds such challenges by offering better reasons for choosing one way of being in the world over another.

(b) Proportionality

S v Makwanyane offers the Constitutional Court's clearest statement about the relationship between the five basic values and the five explicit factors:[1]

> The limitation of fundamental rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for an 'open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited, and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of section 33(1), and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators'.[2]

Although *Makwanyane* was decided in terms of IC s 33, the various considerations mentioned in the quote above were largely cut from *Makwanyane*, and pasted, with only minor alterations, into the text of FC s 36.[3] In addition, the insistence that limitation analysis involves the balancing of conflicting values, an assessment based on proportionality, and the rejection of an 'absolute' or rigid set of standards in favour of a flexible, context-sensitive form of analysis, have become the leitmotifs of the Court's limitation jurisprudence. In *S v Manamela & Another (Director-General of Justice Intervening),* the Court wrote that neither it nor

[1] 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC)('*Makwanyane*').

[2] Ibid at para 149.

[3] See *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 33 ('Although section 36(1) of the 1996 Constitution differs in various respects from section 33 of the interim Constitution its application still involves a process, described in *S v Makwanyane* . . . as the "weighing up of competing values, and ultimately an assessment based on proportionality which calls for the balancing of different interests."')

lower courts would 'adhere mechanically to a sequential check-list', but were required, instead, to 'engage in a balancing exercise and arrive at a global judgment on proportionality'.[1] The following statement in *S v Bhulwana* rehearses the same themes:

> [T]he Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.[2]

(c) FC s 36's five factors

(i) *Nature of the right*

It is not immediately apparent why the nature and the scope of the right that has been limited should form part of the limitation inquiry. In two-stage fundamental rights analysis, the inquiry into the content of the right and whether its exercise has been impaired occurs at the first stage of analysis.

One possible explanation for this repetition is that the drafters decided to replace the dual levels of scrutiny found in the limitations clause of the Interim Constitution with a somewhat more nuanced device that would enable a court to tighten or loosen several of the clause's justificatory requirements according to the importance — *the nature* — of the right that has been infringed. For example, with respect to infringements of core rights, such as dignity or expression, 'the nature of the right' proviso might require the party relying upon the impugned law to demonstrate that (1) the objective of the law is *overwhelmingly important*, or (2) the means used to achieve the law's objective are narrowly tailored and trench upon the protected activity no more than is absolutely necessary or (3) the benefits to society realized by the law significantly outweigh the burdens imposed upon the rights-holder. On the other hand, the nature of rights deemed less central to our constitutional project — say trade and occupation — might lighten the justificatory burden on the parties seeking to uphold the limitation.[3]

However, the Constitutional Court has expressly rejected the idea that FC s 36 enjoins the courts to create different levels of scrutiny for different rights. In *Christian Education*, the appellants argued that the state had to show that the

[1] 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC)('*Manamela*') at para 32.

[2] 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC)('*Bhulwana*') at para 18. See also *Petersen v Maintenance Officer, Simon's Town Maintenance Court, & Others* 2004 (2) SA 56 (C), 2004 (2) BCLR 205 (C) at para 22 (Court concludes that 'if the importance and purpose of the common-law rule are weighed against the nature and extent of the gross infringement caused by the said rule, there is no justification for the retention of the common-law rule.')

[3] Where, as in the Interim Constitution, such choices were expressly made in the text, this reading of *Makwanyane*'s first question makes less sense. However, this interpretation does make sense where, as in the Final Constitution, express levels of scrutiny do not exist and the courts are required to reach their own conclusions about the relative importance of each right, and the kind of justification the party defending the infringement must offer.

restriction of their freedom of religion served a compelling state interest.[1] The Court held that American doctrines such as 'strict scrutiny' or 'intermediate scrutiny' — from which the notion of 'compelling state interest' derives — have no purchase in South African constitutional law.

In the Court's view, 'the nature and the importance of the right' forms part of a larger proportionality inquiry. In short, the more important the right is to an open and democratic society based on human dignity, equality and freedom, the more compelling any justification for the limitation of the right needs to be. One may well ask whether this approach is dramatically different from one based on different levels of scrutiny. The Constitutional Court seems to be of the view that its gloss on FC s 36(1)*(a)* is more flexible than IC 33(1)'s bifurcated limitations test and that it relieves the courts of the potentially perilous task of ranking constitutional rights.

In actual practice, the rights to life and human dignity — and closely related rights, such as the right to bodily integrity and the right not to be treated or punished in a cruel, inhuman or degrading way — are deemed central to the society envisaged by the Final Constitution, and only a compelling justification should be advanced for their limitation.[2] Other rights said to be of vital

[1] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC)('*Christian Education*') at paras 29–31. See also *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC)('*Prince*') at para 128.

[2] See *Makwanyane* (supra) at para 144 ('The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these rights above all others.') See also *S v Williams & Others* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at para 76 ('Very stringent requirements would have to be met by the State' before the right to dignity and the protection against punishments that are cruel, inhuman or degrading can be limited'); *Ex parte Minister of Safety and Security & Others: In re: S v Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) at para 28 ('The right to life, to human dignity and to bodily integrity are individually essential and collectively foundational to the value system prescribed by the Constitution. Compromise them and the society to which we aspire becomes illusory. It therefore follows that any significant limitation of these rights, would for its justification demand a very compelling countervailing public interest'); *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC)('*NCGLE II*') at para 58; *Makinana & Others v Minister of Home Affairs & Another; Keelty & Another v Minister of Home Affairs & Another* 2001 (6) BCLR 581 606E-G (C); *Bhe v Magistrate, Khayelitsha & Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole & Others; South African Human Rights Commission & Another v President of the Republic of South Africa & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('*Bhe*') at para 71.

Because the right to equality is considered foundational for our constitutional order, one would expect that a particularly powerful justification would have to be proffered for any limitation of FC s 9. See, eg, *NCGLE II* (supra) at para 58*; Moseneke & Others v The Master & Another* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC) at paras 22–23 (No open and democratic society would tolerate differential treatment based solely on skin colour); *Jordan & Others v S & Others* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC)('*Jordan*') at para 97 (A powerful justification is required for a criminal prohibition which further entrenches patterns of gender inequality); *Bhe* (supra) at para 71. Of course, as we have already noted, the test for unfair discrimination makes it unlikely that a court would find a limitation of this right to be justifiable. See § 34.5 supra.

importance to our constitutional democracy include freedom of religion,[1] freedom of expression,[2] the right to vote,[3] the right to access to adequate housing,[4] the right of access to court,[5] and the right to be presumed innocent.[6]

Not everyone agrees that the 'nature of the right' should be taken to refer to its

[1] See *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC); *Christian Education* (supra) at para 36 ('[R]eligion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake [sic] concepts of self-worth and human dignity which form the cornerstone of human rights.') See also *Prince* (supra) at para 149 (Sachs J, dissenting, wrote that where religious practices are prohibited by law, but do not involve any violation of the Bill of Rights, 'the Constitution obliges the State to walk the extra mile.') Whether the Court's actual decision-making in the area of religious freedom matches its rhetoric is, however, debatable. For critiques of the Court's freedom of religion jurisprudence, see Irma Kroeze 'God's Kingdom in the Law's Republic: Religious Freedom in South African Constitutional Jurisprudence' in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 117; Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36; Paul Farlam 'Freedom of Religion' in S Woolman, T Roux, J Klaaren, A Stein M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 41; Stu Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

[2] See *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469, 1999 (6) BCLR 615 (CC) at para 7 ('Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.') See also *Case & Another v Minister of Safety and Security & Others; Curtis v Minister of Safety and Security & Others* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) at paras 26–27; *Holomisa v Argus Newspapers Limited* 1996 (2) SA 588, 608G–609A (W), 1996 (6) BCLR 836, 854I-855C (W); *S v Mamabolo (E TV & Others Intervening)* 2001 (3) SA 409, 2001 (5) BCLR 449 (CC)('*Mamabolo*') at para 37; *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC)('*Islamic Unity*') at paras 26–28; *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at paras 21–24; *Phillips & Another v Director of Public Prosecutions (Witwatersrand Local Division) & Others* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC) at para 23; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division & Others* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC)('*De Reuck*') at paras 46–50; *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International & Another* 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC) at paras 45–46. However, the Constitutional Court has emphasized on more than one occasion that freedom of expression does not enjoy superior status in our law, and does not automatically trump countervailing interests. See *Mamabolo* (supra) at para 41; *Islamic Unity* (supra) at paras 29–30.

[3] See *Minister of Home Affairs v National Institute for Crime Prevention (NICRO) & Others* 2005 (1) SA 280 (CC), 2004 (5) BCLR 445 (CC) at para 47.

[4] See *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) at para 39 (Emphasizes the link between access to adequate housing and human dignity.)

[5] See *Lesapo v North West Agricultural Bank & Another* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC) at para 22 (Right of access to court is foundational to the stability of an orderly society.)

[6] See *S v Ntsele* 1997 (2) SACR 740 (CC), 1997 (11) BCLR 1543 (CC) at para 4 ('The fundamental rights bound up with and protected by the presumption of innocence are so important, and the consequences of their infringement potentially so grave, that compelling justification would be required to save them from invalidation.') See also *S v Mhatha; S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC) para 19; *S v Mello & Another* 1998 (3) SA 712 (CC), 1998 (7) BCLR 908 (CC) at para 9; *S v Manamela* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC) at para 40.

importance to an open and democratic society based on human dignity, equality and freedom. Cheadle points out that, unlike the formulation in *Makwanyane*, FC s 36(1) says nothing about the importance of the right.[1] He argues — from the ostensibly privileged and incorrigible vantage point of a drafter of the final text — that the 'nature of the right' was meant to serve as a threshold requirement, comparable in function to IC s 33's requirement that a limitation may not negate the essential content of a right.[2] Underlying the inclusion of this factor, Cheadle contends, was the recognition that some rights (eg the right not to be tortured or the right not to be unfairly discriminated against) 'by their very nature and the efficacy of the language embodying them, cannot conceivably be limited'.[3] By contrast, other rights tend to 'overlap with other constitutional rights and values' (eg freedom of expression tends to overlap with human dignity and privacy in the context of defamatory speech).[4] According to Cheadle, this threshold requirement does not entail any commitment to finding some rights to be of greater import than others.

Such a position seems hopelessly muddled. To say that a right cannot, on any ground, be justifiably limited is tantamount to saying that no right, no value, no interest, and no good exists that might trump such a right. More importantly, whatever value Cheadle's faux travaux préparatoires may have, they fail to engage the actual practice of the Court. The Constitutional Court *does*, on occasion, consider whether the nature of a particular right is such that it can meaningfully be limited.[5] Finally, Cheadle flatly contradicts himself.[6] Cheadle states that on his preferred reading of FC s 36, a court 'may accord more weight to a particular right or require greater justification in respect of some aspects of a right as opposed to others'.[7] To accord more weight to one right than another means that it is more important than another right, not that it is fat.

(ii) *Importance of the purpose of limitation*

The second factor identified in FC s 36(1) is 'the importance of the purpose of the limitation'. This factor requires two discrete assessments: an identification of the purpose of the limitation, and an appraisal of its importance.

[1] See Halton Cheadle 'Limitation of Rights' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 693, 706–07.

[2] Ibid at 707–708.

[3] Ibid.

[4] Ibid at 708.

[5] *First National Bank of South Africa Limited v Land and Agricultural Bank of South Africa & Others: Sheard v Land and Agricultural Bank of South Africa & Another* 2000 (3) SA 626 (CC), 2000 (8) BCLR 876 (CC) at para 6 (Only very powerful considerations may justify the limitation of the right to access to court.)

[6] Moreover, it is simply not true, as Cheadle maintains, that 'the main balancing exercise' undertaken by the Court 'is that of balancing the relative importance of the right, on the one hand, and the importance of the purpose of the limiting law, on the other'. Cheadle (supra) at 704. When the Court engages in balancing or a global assessment of proportionality, it actually places the nature of the right and the nature and extent of the limitation on the same 'side' of the scales. The standard of justification required is, in fact, determined by their combined effect. One must wonder then whether it makes sense to speak, as Cheadle sometimes does, about a 'main' balancing exercise and a 'subsidiary' balancing exercise.

[7] Ibid at 709.

With respect to the identification of the objective of the limitation, courts are faced with two difficulties. First, the objective of the limitation is often not apparent or made explicit in the law itself. Courts must then reconstruct the objective from the overall purpose of the Act, the legislative history of the provision and the mischief it was intended to address, or the historical development of the relevant common-law rule.[1] Second, the objective of a limitation can be expressed at different levels of generality. As Peter Hogg explains: 'The higher the level of generality at which a legislative objective is expressed, the more obviously desirable the objective will appear to be.'[2] As it turns out, the formulation of a limitation's objective at a high level of generality often makes it more difficult for the limitation to satisfy the least restrictive means requirement.

When a court is called upon to appraise the purpose of a limitation, it must ensure, at a minimum, that the purpose is not inconsistent with the values of an open and democratic society based on human dignity, equality and freedom.[3] The following objectives have been found to be at odds with basic constitutional values: retribution;[4] re-inscribing historical patterns of prejudice and disadvantage among racial groups;[5] the enforcement of laws animated by bigotry or intolerance dressed up as morality;[6] and the absence of sufficient guidance in a legislative provision as to how an official ought to exercise the discretion granted her.[7]

A government objective designed expressly to reinforce the values which animate our constitutional project will generally satisfy the requirements of this second factor.[8] The courts have recognized that the following objectives further the general aims of our basic law: the promotion of equality, dignity and national

[1] That said, it is generally the purpose of the impugned provision, and not of the Act, that is at issue. See, eg, *Lesapo v North West Agricultural Bank & Another* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC) at para 23.

[2] Peter Hogg 'Section 1 Revisited' (1992) 1 *National Journal of Constitutional Law* 1, 5.

[3] See, in the Canadian context, *R v Big M Drug Mart* [1985] 1 SCR 295, 351 (Compelling the observance of the Christian Sabbath could not justify the limitation of the right to freedom of religion.)

[4] See *Makwanyane* (supra) at paras 129–131; *S v Williams & Others* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at para 86.

[5] See *Bhe* (supra) at para 72.

[6] See *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)('*NCGLE I*') at para 37 ('The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as a legitimate purpose. There is accordingly nothing, in the proportionality enquiry, to weigh against the extent of the limitation and its harmful impact on gays. It would therefore seem that there is no justification for the limitation.')

[7] See *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 934 (CC), 2000 (8) BCLR 837 (CC) at paras 56, 58.

[8] At the most basic level, those values include openness, democracy, human dignity, equality and freedom. At a more specific level, the values which justify restriction — and which flow from the individual rights themselves — may include tolerance, cultural diversity, a commitment to representative and participatory politics, social justice, and privacy.

unity;[1] the protection of children from the degradation and indignity brought about by corporal punishment[2] and child pornography;[3] the fortification of the judicial process;[4] the insistence that members of the defence force do not prejudice or further the interests of a political party; and the requirement that members of the defence force uphold the disciplined character of the defence force.[5]

Of course, any number of objectives are neither inconsistent with the values that animate the Final Constitution nor directly grounded in them. Whether or not such objectives are sufficiently important to justify a limitation would depend on a number of considerations. First, the further one ventures from the values which animate the Bill of Rights, the less likely one is to satisfy this requirement. Administrative convenience or the saving of costs is unlikely to be considered to be closely linked to the values that animate the Bill of Rights. Second, the objective must relate to concerns which are, in the words of Dickson CJ in *R v Oakes*, 'pressing and substantial', and not merely trivial.[6] Third, the objective must be directed to 'the realization of collective goals of fundamental importance'.[7]

Among the objectives not clearly grounded in a specific substantive provision of the Bill of Rights but still deemed of sufficient import to justify a limitation are:

[1] See *Islamic Unity* (supra) at paras 45–46. See also *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at para 41 ('In deciding whether the common law rule complained of by the applicants does indeed constitute an unjustifiable limitation of section 16 of the Constitution, sight must not be lost of other constitutional values and in particular, the value of human dignity.')

[2] See *Christian Education* (supra) at paras 39–50.

[3] See *De Reuck* (supra) at paras 61–67. The Court identified three important objectives served by the prohibition of child pornography, namely 'protecting the dignity of children, stamping out the market for photographs made by abusing children and preventing a reasonable risk that images will be used to harm children'. Ibid at para 67. However, neither of these three justifications were, ultimately, necessary for the finding of invalidity. The impairment of the dignity of all South Africans constituted the sole meaningful justification for the Court's finding.

[4] *Beinash & Another v Young & Others* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC) at para 17 (Right protects bona fide litigants, the processes of the court and the administration of justice against vexatious proceedings); *S v Steyn* 2001 (1) SA 1146 (CC), 2001 (1) BCLR 52 (CC) at para 31 (Right prevents the clogging of appeal rolls and ensuring that hopeless appeals do not waste court time); *LS v AT & Another* 2001 (2) BCLR 152 (CC) at paras 30–31 (Right ensures that custody issues are determined by the court in the best position to do so); *Mamabolo* (supra) at para 48 (Right vouchsafes the integrity of the judiciary); *S v Singo* 2002 (2) SA 858 (CC), 2002 (8) BCLR 793 (CC) at paras 33–35 (Right ensures the effective administration of justice by enabling an accused to be released from custody without bail pending her trial, and by dealing effectively with conduct which strikes at the authority of the courts.)

[5] See *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at paras 11, 28 and 32.

[6] [1986] 1 SCR 103, 138–39

[7] Ibid at 136.

taking effective action against crime;[1] maintaining public peace;[2] preventing the abuse of and trade in harmful drugs;[3] reducing the negative consequences of liquor consumption in public places;[4] protecting the institution of marriage;[5] obtaining full and speedy settlement of tax debts;[6] debt recovery;[7] recovery of the assets of a company under liquidation;[8] and protecting the rights of permanent residents to employment opportunities in the country.[9]

Can a limitation ever be justified in the name of administrative convenience or the saving of costs? Although the Canadian Supreme Court has suggested that fundamental-rights guarantees 'would be illusory if they could be ignored because it was administratively convenient to do so', our Constitutional Court has not taken such a hard-and-fast line.[10]

The Constitutional Court was asked to engage this question in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) & Others*. The case turned on the constitutionality of provisions in

[1] See *S v Manamela & Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC) at paras 41–42, 88; *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at paras 53–54; *S v Dodo* 2001 (3) BCLR 279, 293B–C (E); *Ex parte Minister of Safety and Security & Others: In re: S v Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) at para 44; *National Director of Public Prosecutions & Another v Mohamed NO & Others* 2003 (4) SA 1 (CC), 2003 (5) BCLR 476 (CC) at paras 14–15, 52. See also *S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC)('*Dlamini*') at para 67. The *Dlamini* Court accepted that the 'deplorable level of violent crime', and the 'deeply destructive' effect it has on 'the fabric of our society', is a pressing and substantial concern, and that the purpose of a provision which requires someone charged with a Schedule 6 offence to adduce evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release on bail, is legitimate and important. However, the Court cautioned that: 'Although the level of criminal activity is clearly a relevant and important factor in the limitations exercise undertaken in respect of section 36, it is not the only factor relevant to that exercise. One must be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights.' Ibid. See, further, *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders & Others ('NICRO')* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) at paras 139–140 and 143–145 (Ngcobo J dissenting)(Provision that deprived prisoners of the right to vote served a legitimate purpose in denouncing crime and promoting a culture of the observance of civic duties and obligations.)

[2] See *Dlamini* (supra) at paras 55–56.

[3] See *S v Bhulwana; S v Gwadiso* 1996 (1) SA 288 (CC), 1995 (12) BCLR 1579 (CC) at para 20; *Prince* (supra) at paras 52–53, 114.

[4] See *Phillips & Another v Director of Public Prosecutions (Witwatersrand Local Division) & Others* 2000 (2) SA 1 (CC), 2003 (4) BCLR 357 (CC) at paras 24, 46, 48.

[5] See *NCGLE II* (supra) at para 55.

[6] See *Metcash Trading Ltd v Commissioner for the South African Revenue Service & Another* 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC) at para 60.

[7] See *Jaftha* (supra) at para 40 (Court added that the importance of the purpose was diminished where the debt is of a trifling nature.)

[8] See *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (2) SA 621 (CC), 1996 (1) BCLR 1 (CC) at para 126

[9] See *Makinana & Others v Minister of Home Affairs & Another; Keelty & Another v Minister of Home Affairs & Another* 2001 (6) BCLR 581, 606G–H (C).

[10] See *Singh v Minister of Employment and Immigration* [1985] 1 SCR 177, 218–19 (Wilson J).

the Electoral Act that deprived a particular class of convicted prisoner — those serving sentences without the option of a fine — of the right to vote. The state argued that it would put a strain on the logistical and financial resources of the Electoral Commission to make provision for such prisoners to exercise the franchise. The *NICRO* Court rejected this argument, but stopped short of holding that logistical and cost considerations are entirely or inevitably irrelevant to an inquiry into the limitation of fundamental rights. It rehearsed Ackermann J's contention in *Ferreira v Levin*[1] that 'problems involving resources cannot be resolved in the abstract "but must be confronted in the context of South African conditions and resources — political, social, economic and human",' and that 'what is reasonable in "one country with vast resources, does not necessarily justify placing an identical burden on a country with significantly less resources".'[2] The *NICRO* Court then held that:

> Resources cannot be ignored in assessing whether reasonable arrangements have been made for enabling citizens to vote. There is a difference, however, between a decision by Parliament or the Commission as to what is reasonable in that regard, and legislation that effectively disenfranchises a category of citizens.[3]

The *NICRO* Court's finding that the limitation in question could not be justified by considerations related to logistics and costs rests on three premises. First, the Court stresses that the right to vote is foundational to democracy.[4] Second, while Parliament and the Commission must be given some leeway in deciding how to employ available resources, the disenfranchisement of a category of citizen is the kind of limitation that requires a compelling justification. Third, the state failed to provide any evidence that the exercise of the franchise by this class of prisoner created insuperable logistical problems for the Commission or imposed significant burdens on the fiscus.[5]

Indeed, where such evidence can be adduced, the Court is apt to conclude that the limitation is legitimate. In *Lesapo v North West Agricultural Bank & Another*, the Constitutional Court found that the saving of time and costs in the recovery of the Agricultural Bank's property constituted a legitimate objective.[6] At the same time, it emphasized that the importance of such measures did not 'detract from the importance of the public interest served by the need for justiciable disputes to be settled by a court of law'.[7]

Despite these findings, the principle that administrative convenience and the saving of costs should not, generally, be allowed to override fundamental rights has been confirmed by other Constitutional Court judgments. In *S v Williams & Others*, society's alleged need for 'quick justice' fell 'far short of the justification required to entitle the State to override the prohibition against the infliction of

[1] *NICRO* (supra) at para 133.
[2] Ibid at para 47.
[3] Ibid at para 48.
[4] Ibid at para 47.
[5] Ibid at paras 49-50.
[6] 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC)('*Lesapo*') at paras 23–24.
[7] Ibid at para 24.

cruel, inhuman or degrading punishment'.[1] In *Mohlomi v Minister of Defence*, the logistical difficulties said to beset the state when sued were deemed insufficient justification for a provision that required claims against the defence force to be instituted within a period of six months.[2] Whether or not the state can use administrative convenience or the saving of costs to justify the limitation of a fundamental right in a particular case will depend on the nature of the right in question, the extent of the limitation, and whether or not the state has adduced sufficient evidence in support of its claim.

Another question raised by the 'purpose of the limitation' factor is whether a legislative restriction of fundamental rights whose original purpose is at odds with the values enshrined in the Final Constitution can assume a new, legitimate purpose. In *Jordan & Others v S & Others*, O'Regan and Sachs JJ accepted that the original purpose of the provisions in the Sexual Offences Act dealing with brothels was to enforce a traditional conception of morality, and that this conception of morality was inconsistent with the values underlying a pluralist constitutional democracy.[3] However, the justices also found that the objective of such provisions was not cast in stone. Given the magnitude of South Africa's legal and social transformation, on the one hand, and the need for some measure of legal continuity, on the other, a legislative provision whose original purpose was incompatible with the Final Constitution may be re-interpreted in a manner that makes it consistent with constitutional values. In *Jordan*, the Court found that the purpose of the provisions in question could be recast in terms of the more acceptable societal imperative to control commercial sex.[4]

This approach neither falls into the trap of assuming that the legislative purpose is something fixed and static, nor of conflating the purpose of a law with the subjective intent of those who enacted it. The problem with the 'shifting purpose' doctrine, however, is that it may be used to justify measures that are so tainted by the discriminatory or the authoritarian underpinnings of the original enactment that they may continue to entrench harmful stereotypes. The Constitutional Court is alive to these dangers and has rejected attempts to justify overtly racist or sexist provisions in terms of a less offensive objective.[5] However, it must also remain

[1] 1995 (3) SA 632 (CC), 1995 (7) BCLR (CC)('*Williams*') at para 79.

[2] 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC)('*Mohlomi*') at para 16.

[3] 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC)('*Jordan*') at paras 104–106.

[4] See also *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at para 157 (Sachs J quotes approvingly from *Lynch, Mayor of Pawtucket v Donnelly* 645 US 668 (1984) in which Brennan J wrote: 'While a particular governmental practice may have derived from religious motivations and certain religious connotations, it is nevertheless permissible for the government to pursue the practice when it is continued today solely for secular reasons.')

[5] See *Moseneke & Others v The Master & Another* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC) at paras 20–23 (Holds that the practical advantages flowing from a provision in the Black Administration Act 38 of 1927 which differentiates between the estates of black and white people who die intestate, cannot be delinked from the racially discriminatory purpose and effect of the Act); *Bhe & Others v Magistrate, Khayelitsha & Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole & Others; South African Human Rights Commission & Another v President of the Republic of South Africa & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at paras 61, 72 (Section 23 of the Black Administration Act 'cannot escape the [racist and sexist] context in which it was conceived' in order to be reinterpreted to give 'recognition to customary law' and to acknowledge 'the pluralist nature of our society'.)

on guard that less overt or pernicious forms of discrimination — or state support for particular traditions, religions or worldviews that marginalize smaller, more vulnerable groups — may be countenanced in the name of a new, ostensibly unproblematic purpose.[1]

(iii) *Nature and extent of the limitation*

The next factor, the 'nature and extent of the limitation', lies at the core of the Court's approach to balancing and to proportionality. As O'Regan J wrote in *Manamela*:

> The level of justification required to warrant a limitation upon a right depends on the extent of the limitation. The more invasive the infringement, the more powerful the justification must be.[2]

In appraising the nature and the extent of a limitation, the Court considers a variety of factors.

First, it asks whether the limitation affects the 'core' values underlying a particular right. It has, for example, found that the right to be tried in a hearing presided over by a judicial officer is a core component of the right not to be detained without trial.[3] Similarly, reverse onus provisions are said to strike at the heart of the right to be presumed innocent and therefore require a clear and convincing justification.[4] By contrast, the prohibition of child pornography was found not to implicate the core values of the right to freedom of expression but rather restricted 'expression of little value … found on the periphery of the right'.[5]

Core/periphery analysis has proved to be of particular importance to the Court's privacy jurisprudence. The Constitutional Court conceives of the right to privacy as having an inner core that must be shielded from the corrosive effects of conflicting interests, and a periphery or a penumbra in which the right to privacy may be outweighed by conflicting community interests.[6] At the core of privacy is the right 'to have one's own autonomous identity'.[7] That core

[1] See Henk Botha 'Equality, Dignity, and the Politics of Interpretation' (2004) 19 *SA Public Law* 724.
[2] *Manamela* (supra) at para 53.
[3] *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 89.
[4] *Manamela* (supra) at para 49
[5] *De Reuck* (supra) at para 59. In *De Reuck*, the Court identified the core values that undergird freedom of expression and cited the principles articulated in *South African National Defence Union v Minister of Defence* in support of its finding. See *SANDU* (supra) at para 7 (The 'instrumental function [of freedom of expression] as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally'.)
[6] See *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), 1994 94 BCLR 449 (CC)('*Bernstein*') at para 67 ('[I]t is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. … Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.')
[7] Ibid at para 65.

embraces the capacity to form and to nurture intimate relationships. In *National Coalition v Minister of Justice*, a criminal ban on gay sodomy was held to strike at the heart of privacy:

> The right to privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and to nurture human relationships without undue interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.[1, 2]

However, 'once an individual enters into relationships with persons outside this closest intimate sphere', his or her activities 'acquire a social dimension'[3] and the protection afforded to the right diminishes accordingly. In deciding whether a limitation strikes at the inner core of privacy or affects privacy interests that lie at the periphery of the right, the Court looks at factors such as 'the nature and effect of the invasion' and 'whether the subject of the limitation is a natural person or a juristic person'.[4] Even though juristic persons are entitled to the right to privacy, the Court has made it is clear that because they are 'not the bearers of human dignity', their privacy rights 'can never be as intense as those of human beings'.[5] The Court has also found that, while sexual activity for commercial gain is protected by the right to privacy, it lies at the periphery of the right. Given the commercial character of that activity and a prostitute's invitation to the general public to engage in illicit sexual conduct, the Court in *Jordan* had little difficulty in finding that the prohibition of prostitution was justifiable.[6] By contrast, the *Mistry* Court had no problem finding unconstitutional, as a violation of privacy, a provision that authorized inspections not only of the business premises of health professionals, but of their homes.[7]

Despite its intuitive appeal, the distinction between the ban on gay sodomy and the prohibition of prostitution on the basis of the core/periphery metaphor suffers from a number of difficulties: *(a)* its characterization of all non-commercial sex as an expression of one's sexual identity, or as an instance of the right to form intimate relationships, is pap to be expected from the pulpit and not the bench; *(b)* it presupposes a world in which individuals are equally free to choose their own autonomous identity and to form intimate relationships, and then models personal autonomy and the kind of interpersonal relationships that are worthy of

[1] See *NCGLE I* (supra) at paras 32, 36.
[2] Ibid at para 32.
[3] *Bernstein* (supra) at para 7.
[4] *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC)('*Hyundai*') at para 18.
[5] Ibid.
[6] See *Jordan* (supra) at paras 27–29.
[7] See *Mistry v Interim National Medical and Dental Council of South Africa & Others* 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC) at para 21.

protection on middle-class morality and the institution of (heterosexual) marriage;[1] and *(c)* it fails to recognize that all persons engaged in any form of labour for remuneration — including Constitutional Court justices — necessarily engage in the commodification of some body part.[2]

While the current construction of the right to privacy is open to the above lines of criticism, the Court should be applauded for articulating clearly and publicly the grounds for its decisions. More disturbing, perhaps, is the Court's failure to distinguish between the core and the periphery with respect to most of the other rights in Chapter 2. This silence makes it difficult for other actors, in advance of litigation, to be able to distinguish serious infringements of fundamental rights from less serious ones.

Second, the 'nature and the extent' inquiry requires an assessment of the actual impact of the limitation on those deleteriously affected by it. The following limitations have been found to impair significantly the right at issue: *(a)* the criminalization of gay sodomy constituted a severe limitation of a gay man's rights to equality, privacy, dignity and freedom;[3] *(b)* reverse onus provisions in which possession of a certain quantity of cannabis was deemed tantamount to dealing,[4] or in which possession of arms or ammunition was deemed sufficient proof to establish a prima facie case for indictment for a crime,[5] were found to constitute a serious infringement of the right to be presumed innocent;[6] *(c)* the limitation of a debtor's access to court could not be justified because it led, ineluctably, to the deprivation of the person's livelihood;[7] and *(d)* the sale in execution of people's homes for trifling debts without a judicial hearing was characterized as a severe limitation of the right to access to adequate housing.[8]

Third, the Court sometimes considers the social position of the individuals or group concerned. Whether or not a limitation targets, or has a disproportionate

[1] See Wessel le Roux 'Sex Work, the Right to Occupational Freedom and the Constitutional Politics of Recognition' (2003) 120 *SALJ* 452, 463; Wessel le Roux 'Bridges, Clearings and Labyrinths: the Architectural Framing of Post-Apartheid Constitutionalism' (2004) 19 *SA Public Law* 629, 659–660.

[2] See Stu Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44; Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

[3] See *NCGLE I* (supra) at para 36.

[4] See *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1348 (CC) at paras 19, 21.

[5] See *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC)('*Mbatha*') at para 20.

[6] The majority and minority disagreed over the nature and extent of the limitation in *Manamela*, another case concerning the constitutionality of a reverse onus provision. The majority argued that, '[w]here a presumption of guilt is substituted for the presumption of innocence, the limitation of the right is extensive and "the justification for doing so must be established clearly and convincingly."' *Manamela*, (supra) at para 40. The minority, on the other hand, argued that the statutory offence of the acquisition of stolen goods was not that serious, and that the risk of unfair convictions under the provision was not that high. Ibid at paras 78–81.

[7] See *Lesapo* (supra) at para 25 (Describes the limitation as 'extremely prejudicial' to the debtors' interests.)

[8] See *Jaftha* (supra) at para 39.

impact upon, vulnerable sections of the population, such as religious minorities,[1] the poor,[2] or children born out of wedlock,[3] may determine the level of justification required.

Fourth, the Court sometimes asks whether the limitation is permanent or temporary, and whether it amounts to a complete or a partial denial of the right in question. In *S v Makwanyane*, the Court emphasized the irrevocability of the death penalty, and cautioned that '[t]here is a difference between encroaching upon rights for the purpose of punishment and destroying them altogether'.[4] On the other hand, the *Christian Education* Court found that the prohibition of corporal punishment in schools was not unduly burdensome because it neither deprived parents of the general right to bring up their children in accordance with Christian beliefs nor prevented them from administering corporal punishment at home. In *Metcash,* the Court emphasized the fact that, even though a provision in the Value Added Tax Act limited the right of a vendor to challenge the correctness of an assessment made by the Commissioner, its effect was temporary and the vendor was free to submit any dispute with the Commissioner for judicial resolution once she had paid the disputed amount.[5]

Fifth, in measuring the extent of the limitation, the Court often asks whether the limitation is narrowly tailored to achieve its objective. (This question obviously overlaps significantly with the last factor enumerated in FC s 36(1), namely the existence of less restrictive means.) The Court initially asks whether the limitation applies to a narrow or a broad category of cases.[6] In *S v Mamabolo (E TV & Others Intervening),* the Court found that the crime of scandalizing the

[1] See *Prince* (supra) at para 51 (Ngcobo J, dissenting, describes the stigmatisation suffered by Rastafari as a result of the criminalisation of cannabis) and at paras 157-163 (Sachs J, dissenting, considers the negative impact of the limitation on Rastafari, given that they are a vulnerable and politically powerless group.)

[2] See *Coetzee v Government of the Republic of South Africa; Matiso & Others v Commanding Officer, Port Elizabeth Prison & Others* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC)('*Coetzee*') at paras 8, 66 and 67 (Persons most vulnerable to imprisonment for judgment debts are the poor and unemployed); *Manamela* (supra) at para 44 (Considering the fact that reverse onus provision at issue would leave the poor, unskilled and illiterate most vulnerable to erroneous conviction); *Jaftha* (supra) at paras 39 and 43 (Analyzes the impact of a provision authorising the sale-in-execution of people's homes on the indigent.)

[3] See *Petersen v Maintenance Officer & Others* 2004 (2) SA 56 (C), 2004 (2) BCLR 205 (C) at para 22.

[4] See *Makwanyane* (supra) at para 143. See also *Ex parte Minister of Safety and Security & Others: In re: S v Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) at para 27 (Statutory authorization of the killing of a fleeing suspect amounts to 'a complete denial of the right to life and consequently of all other rights which flow from it.')

[5] See *Metcash Trading Ltd v Commissioner for the South African Revenue Service & Another* 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC)('*Metcash*') at paras 38, 51 and 58. See also *Lesapo* (supra) at para 25 (Court took into account the fact that the limitation of a debtor's right to access to court was not permanent. However, it nevertheless found that the limitation was serious enough — given the extent of the harm — to find it unjustifiable); *Dlamini* (supra) at para 71 (Temporary nature of awaiting-trial detention weighed against the compelling interest in maintaining public peace); *National Director of Public Prosecutions & Another v Mohamed NO & Others* 2003 (4) SA 1 (CC), 2003 (5) BCLR 476 (CC) at para 52 (Temporary preservation order found to be justifiable); *NICRO* (supra) at paras 145–146 (Ngcobo J emphasizes, in dissent, that the justifiability of the limitation of a prisoner's right to vote was contingent upon the length of the sentence to be served in prison.)

[6] See *Dlamini* (supra) at para 74; *NICRO* (supra) at para 67 (Blanket exclusion of prisoners, sentenced to imprisonment without the option of a fine, from the right to vote found to be unjustifiable.)

court, rightly understood, applied to a narrow category of cases, and that the public interest in maintaining the integrity of the judiciary easily trumped the negative effects of the limitation on the public's freedom of expression.[1] Conversely, *Islamic Unity Convention v Independent Broadcasting Authority & Others* held that a clause in a code of conduct which prohibited the broadcasting of material 'likely to prejudice relations between sections of the population' was 'so widely-phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted'.[2] The inroads made into freedom of expression outweighed any possible justification for the locution of the provision.[3]

In determining whether the extent of the limitation is narrowly tailored, the Court also looks at the breadth of discretion granted by the authorizing legislation and the safeguards in place to limit any deleterious effects. The following considerations are relevant to this inquiry: whether adequate guidance is given to administrative officials as to how they should exercise their discretion;[4] whether the limitation of someone's right must be authorized by a judicial officer (eg whether a warrant must first be issued);[5] whether the extent of the limitation is limited by carefully tailored exemptions;[6] and whether the exercise of the discretion is subject to review by the courts.[7]

Where far-reaching powers are conferred on an administrative official, the legislature must provide clear instructions on how such powers are to be exercised. In *Dawood,* the Court found that the discretion given to immigration officials in terms of the Aliens Control Act to refuse to issue or to extend the temporary residence permit of the foreign spouse of a person permanently and

[1] 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC)('*Mamabolo*') at para 48. See also *Metcash* (supra) at para 54 (Limitation of vendor's right to challenge the correctness of an assessment of the tax payable is narrowly focused, and does not apply to any other possible challenges.)

[2] 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC)('*Islamic Unity*') at para 44.

[3] Ibid at paras 43, 44 and 48.

[4] See *Mistry* (supra) at para 22; *De Reuck* (supra) at para 76.

[5] In *Dawood*, O'Regan J noted that there is

> a difference between requiring a court or tribunal in exercising a discretion to interpret legislation in a manner that is consistent with the Constitution and conferring a broad discretion upon an official, who may be quite untrained in law and constitutional interpretation, and expecting that official, in the absence of direct guidance, to exercise the discretion in a manner consistent with the provisions of the Bill of Rights. Officials are often extremely busy and have to respond quickly and efficiently to many requests or applications. The nature of their work does not permit considered reflection on the scope of constitutional rights or the circumstances in which a limitation of such rights is justifiable.

Dawood (supra) at para 46. See also *Mistry* (supra) at paras 21, 22 (Power of medical inspectors to enter any place without having to obtain a warrant, found to be unreasonable); *Dlamini* (supra) at paras 56–57, 74, 76 (Judicial officer's decision to grant or to refuse bail, after considering all relevant circumstances, leads Court to conclude that limitation of the right to bail is narrowly tailored.)

[6] In *Coetzee*, the Court noted that the lack of adequate procedural safeguards to prevent the imprisonment of judgment debtors who are unable to pay undermined the argument in justification. See *Coetzee* (supra) at paras 14, 23, 25. See, further, *De Reuck* (supra) at paras 72–79 (Court concluded, on the basis of an exemption procedure provided for in the Films and Publications Act, that the nature and extent of the limitation is not severe.)

[7] The mere fact that the exercise of discretion may be challenged on administrative grounds does not necessarily support a finding that the limitation is narrowly tailored. See *Dawood* (supra) at para 48.

lawfully resident in South Africa impaired the human dignity of such spouses. The Court noted that the provisions in question contained little guidance as to the circumstances in which a temporary residence permit may be refused. This unfettered grant of power has serious consequences for the rule of law: a person must be able to understand the basis upon which a decision by a government official may lawfully be taken.[1] O'Regan J castigated the government for its failure to provide adequate guidelines and warned that:

> It is for the legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution.[2]

By contrast, the *Hyundai* Court found that a provision permitting a judicial officer to issue a search warrant to further a preparatory investigation initiated by an investigating director in the office of the National Prosecuting Authority was reasonably capable of an interpretation that requires a 'reasonable suspicion' of the commission of an offence.[3] Read thus, the provision contained 'an adequate and objective basis' to protect the 'privacy' of individuals and constituted a justifiable limitation of that right.[4]

(iv) *Relationship between the limitation and its purpose*

Once the legitimacy of a limitation's objective has been established, it makes sense to ask whether the means employed to achieve the objective are rationally related to, or reasonably capable of achieving, that objective. For example, the Constitutional Court found in *S v Bhulwana; S v Gwadiso* that the prohibition on illegal drugs would not be substantially furthered by a legislative presumption that a person found in possession of 115 grams of dagga was a dealer because there

[1] *Dawood* (supra) at para 47.

[2] Ibid at para 54. See also *Janse van Rensburg NO & Another v Minister of Trade and Industry NO & Another* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC) at para 25.

[3] *Hyundai* (supra) at paras 49–52.

[4] Ibid at para 55. See also *LS v AT & Another* (supra) at paras 32–35. In LS *v AT,* the Constitutional Court found that provisions of the Hague Convention on the Civil Aspects of International Child Abduction, as incorporated into South African law, were tailored in a manner designed to limit the deleterious effects that they might have upon a child. The Convention provides for a mandatory procedure whereby a child who has been wrongfully removed or retained, is returned to the state of his/her habitual residence. Even though cases could be envisaged in which these provisions might, contrary to FC s 28(2), run counter to the short-term best interests of a child, the extent of the limitation was substantially mitigated by exemptions provided for in the Convention. In *Metcash*, the Court found that the temporary limitation of a taxpayer's right to challenge the correctness of an assessment made by the Commissioner was ameliorated by the Commissioner's power to suspend the operation of the 'pay now, argue later' principle in appropriate cases. In addition, the exercise of this discretion constituted administrative action subject to review by the courts. See *Metcash* (supra) at paras 42 and 62.

was no logical connection between such possession and the presumption.[1] Similarly, the Court found in *South African National Defence Union v Minister of Defence & Another* that a provision that prohibited members of the defence force from joining a trade union was not rationally related to maintaining the discipline and efficiency of the defence force.[2] And in *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others*, the Court held that no rational connection existed between the legitimate object of promoting and protecting the traditional family and the exclusion of permanent same-sex partners from certain benefits to which married couples were entitled. The realization of this legitimate objective, the Court reasoned, would neither be furthered nor diminished by the extension of the benefits at issue to permanent same-sex partners.[3]

(v) *Less restrictive means*

Assuming that the Court finds both a legitimate objective and a rational connection between the means employed and that objective, it will then consider a fifth factor: whether 'less restrictive means to achieve the purpose' exist. The logic behind this factor is that, if the government or some other party wishes to restrict the exercise of a fundamental right in the service of some other compelling concern, it should attempt to employ means of doing so (laws) which are least restrictive of the right*(s)* being infringed. Other phrases — that a limitation should be narrowly tailored to achieve its purpose, that it should be carefully focused, or that it should not be overbroad — are sometimes used to describe the same inquiry.[4]

[1] 1996 (1) SA 288 (CC), 1995 (12) BCLR 1579 (CC)('*Gwadiso*') at paras 20, 22–23. See also *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC) at paras 21–22 (Court held that presumption that anyone who was present at any premises at which prohibited firearms or ammunition were discovered was in possession of such goods, applied also to instances where there was no logical connection between the presumed fact and the facts proved. Such a presumption was therefore arbitrary.)

[2] 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC).

[3] 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC). A rational relationship between the limitation and its purpose has been found absent in a significant number of cases. See *S v Dodo* 2001 (3) SA 382 (E), 2001 (3) BCLR 279, 293E–G, 293H–294A (E)(Eastern Cape High Court found no rational relationship between a mandatory sentence of life imprisonment and its alleged purpose — deterrence); *Lesapo* (supra) at para 26 (Extent to which the limitation achieved its purpose was, at best, minimal); *Coetzee v Comitis & Others* 2001 (1) SA 1254 (C), 2001 (4) BCLR 323 (C) at para 40 (No rational connection between the restraint of trade in question and the purpose it purported to serve); *S v Walters & Another* 2001 (2) SACR 471 (Tk), 2001 (10) BCLR 1088 (Tk) at para 29 (No rational connection between the authorization of deadly force to prevent the escape of a suspect, and the purpose of the limitation, namely to bring the suspect before a court of law); *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2003 (8) BCLR 891, 902H-I (T)(Neither the arbitrary powers granted immigration officials nor the absence of procedural safeguards in s 34(8) of the Immigration Act alleviated the strain on state resources.)

[4] For judgments in which a limitation of a fundamental right is described as 'overbroad', see *Coetzee* (supra) at paras 13, 14 and 32; *Case & Curtis* (supra) at paras 48–63, 93, 97 and 108–12. But see *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at paras 17–18 (O'Regan J notes different meanings and uses of the term 'overbreadth'.)

The state has failed the 'less restrictive means' requirement in a number of cases in which the Court deemed it obvious that narrower means existed to achieve the legislative objective.[1] In *Coetzee*, provisions that authorized the imprisonment of judgment debtors were held to be overly broad because they swept up into their proscriptive net not only debtors who wilfully refused to pay, but also debtors who were unable to pay.[2] In *Case & Curtis,* a ban on the possession of indecent or obscene photographic matter was held to be unreasonable because the definition of indecent or obscene matter was so broad that it could apply to almost any photograph, film or television programme that contained references to sexual matters.[3] In *Manamela*, the Court found that the objectives of a reverse onus provision — in terms of which someone who had acquired stolen goods was presumed to be guilty of a statutory offence — could also be achieved by a more narrowly tailored reverse onus provision confined to certain categories of expensive stolen goods (motor cars or expensive equipment).[4]

[1] See *Makinana & Others v Minister of Home Affairs & Another; Keelty & Another v Minister of Home Affairs & Another* 2001 (6) BCLR 581, 607A–D (C)(Protection of employment opportunities of South African citizens and permanent residents could be achieved through a provision which did not apply to foreign spouses of South African permanent residents); *Prince v President of the Law Society of the Cape of Good Hope & Others* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) at paras 54–76 and 81 (Ngcobo J, dissenting, wrote that a religious exemption could be granted from the ban on cannabis without undermining the purpose of the provision); *Islamic Unity* (supra) at paras 50 and 51 (The need to protect dignity, equality and national reconciliation could be achieved by a provision which was 'appropriately tailored and more narrowly focussed.')

[2] See *Coetzee* (supra) at paras 13, 14 and 32.

[3] See *Case & Curtis* (supra) at paras 48–63, 91, 93, 97, and 108–112.

[4] *S v Manamela & Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC) at para 43. See also *Phillips & Another v Director of Public Prosecutions (Witwatersrand Local Division) & Others* 2000 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC) at paras 26–28. *Phillips* concerned the constitutionality of a provision which made it an offence for an on-consumption liquor licence holder to allow a person (i) to perform an offensive, indecent or obscene act or (ii) who is not clothed or not properly clothed to perform or to appear on licensed premises where entertainment is presented or to which the public has access. The majority found that the purpose of the limitation — to minimize the harm that may result from the consumption of liquor in public places — could also be achieved by means of a narrowly tailored provision that did not apply to licensed theatres, and which was thus less invasive of freedom of expression.

Less restrictive means were also found to be available where the government had been unable to convince the court that the purpose of a reverse onus provision could not be achieved by means of an evidentiary burden. See *Mbatha* (supra) at para 26; *Manamela* (supra) at para 49; *S v Singo* 2002 (4) SA 888 (CC), 2002 (8) BCLR 793 (CC) at para 39. Less restrictive means were found to be available where the purpose of deterrence could be achieved by means that were less restrictive of the protection against cruel, inhuman or degrading punishment. See *Makwanyane* (supra) at para 128 (State could not carry burden of justification under IC s 33(1) because it could not demonstrate that the death penalty was a more effective deterrent than life imprisonment, and life imprisonment least impaired the constitutional rights at issue); *S v Williams* 1995 (3) SA 625 (CC), 1995 (7) BCLR 861 (CC) at paras 62–63 (State could not carry burden of justification under IC s 33(1) because it could not demonstrate that whipping — though an effective deterrent — was a more effective deterrent than other creative sentencing options which are less invasive of the minor's right to human dignity); *S v Dodo* 2001 (3) BCLR 279, 294B-D (E)(Less restrictive means than prescribed lifelong imprisonment are available: namely the likelihood that offenders will be apprehended, convicted and punished.) Less restrictive means were found to be

The idea that rights should be limited no more than is necessary, and that a limitation will therefore be held to be unjustifiable if it could be achieved by less restrictive means, seems relatively straightforward. Its application presents a number of difficulties. In the first place, whether or not less restrictive means to achieve a given purpose are found to exist will depend, as we have already noted, on the manner in which the purpose of the limitation has been defined. Peter Hogg points out that the purpose can be stated at different levels of generality, and that this may have a significant impact on the less restrictive means inquiry:

> If the objective has been stated at a high level of generality, it will be easy to think of other ways in which the wide objective could be accomplished with less interference with the [fundamental] right. If the objective has been stated at a low level of generality, perhaps simply restating the terms of the challenged law, it will be hard to think of other ways in which the narrow objective could be accomplished with less interference with the . . . right.[1]

This point can be illustrated by reference to the disagreement between the majority and the minority in *Manamela*.[2] Recall that *Manamela* concerned the constitutionality of a reverse onus provision, in terms of which a person who acquired stolen property had to prove that he/she had reasonable cause to believe that the goods were not stolen. The majority defined the purpose of the limitation at a fairly high level of generality, as that of 'put[ting] in place effective means to eradicate the market in stolen property'.[3] The majority recognized that the

available where the objective of the limitation could be achieved by means of a non-discriminatory provision. See *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 49 (Respondent failed to demonstrate that the same purpose could not be achieved by a provision which does not discriminate against married women); *Moseneke & Others v The Master & Another* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC) at paras 22–23 (Practical advantages of racially discriminatory provision can be accomplished equally well by a non-discriminatory provision). Less restrictive means were found to be available by recourse to ordinary or less invasive procedural arrangements. See *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC) at paras 18–19 (Infringement by s 113 of the Defence Act of the right to access to court, in terms of its running time, deemed to be neither reasonable nor justifiable because means less restrictive of the right and capable of achieving the same objective are readily available); *Lesapo* (supra) at para 27 (Less invasive remedies, such as an interdict against the alienation of land, available to realise the purpose); *Mamabolo* (supra) at para 57 (Ordinary mechanisms of criminal justice system could be employed instead of summary procedures.)

[1] Peter Hogg 'Section 1 Revisited' (1992) 1 *National Journal of Constitutional Law* 1, 5.

[2] The point is also illustrated by the disagreement between the majority and the minority in *Prince*. In *Prince*, the minority took the basis for the state's refusal to provide a religious-based exemption from the ban on cannabis to be the prevention of harm to users. They could thus hold that the prohibition went further than necessary, as it targeted both the harmful and non-harmful use of cannabis. By contrast, the majority insisted that the purpose should be defined with greater specificity. In the majority's view,

> The legislation seeks to prohibit the very possession of cannabis, for this is obviously the most effective way of policing the trade in and use of the drug. The question is therefore not whether the non-invasive use of cannabis for religious purposes will cause harm to the users, but whether permission given to Rastafari to possess cannabis will undermine the general prohibition against such possession. We hold that it will.

Prince (supra) at para 141.

[3] *Manamela* (supra) at para 41.

achievement of this objective was a 'pressing social need',[1] but found the sweep of the means employed to be too great. It held that the same objective could be achieved equally well by means of an evidential burden.[2] By contrast, the minority stated the purpose of the limitation with far greater specificity. In their view, the purpose was to impose an obligation upon members of the public to take care not to participate in a market for stolen goods.[3] This purpose could not be achieved fully through less restrictive means. An evidential burden, as opposed to a reverse onus, would 'diminish the obligation upon members of the public to act vigilantly'.[4]

A second problem concerns the separation of powers between the legislature and the judiciary, and the question as to whether a judicial finding that the lawmaker should have used less restrictive means may amount to a judicial usurpation of legislative power. That the Constitutional Court is alive to this danger is evident in *Makwanyane*.[5] Chaskalson P restated 'the fundamental problem of judicial review' in the following terms: 'Can, and should, an unelected court substitute its own opinion of what is reasonable or necessary for that of an elected legislature?'[6] He does not answer this question, nor even set out the standards the courts should employ when placed in such an uncomfortable position. Instead, he sets out the parameters of the problem: that 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators'; that the means chosen must impair the right 'as little as is reasonably possible'; and that the courts should allow the legislature some deference in its choices between 'differing reasonable policy options', but should not 'give them an unrestricted licence to disregard an individual's rights'.[7] In *Manamela*, the Court displays the same awareness of the difficulties associated with determining the availability of less restrictive means, but arrives at a somewhat crisper articulation of the problem: 'The problem for the Court is to give meaning and effect to the factor of less restrictive means without unduly narrowing the range of policy choices available to the Legislature in a specific area.'[8] The *Manamela* Court later elaborates upon the fear that it may unduly narrow the range of policy choices available to the legislature:

> It will often be possible for a court to conceive of less restrictive means, as Blackmun J has tellingly observed: 'And for me, "least drastic means" is a slippery slope . . . A judge would

[1] *Manamela* (supra) at para 42.
[2] Ibid at paras 49–50.
[3] Ibid at para 96.
[4] Ibid at para 97.
[5] *Makwanyane* (supra) at para 107.
[6] Ibid.
[7] Ibid quoting from *Reference re sections 193 and 195(1)(c) of the Criminal Code (Manitoba)* (1990) 48 CRR 1, 62. See also *R v Chaulk* (1991) 1 CRR (2d) 1, 30; *Tetreault-Gadoury v Canada (Employment and Immigration Commission)* (1991) 4 CRR (2d) 12, 26.
[8] *Manamela* (supra) at para 95 (O'Regan J and Cameron AJ dissenting).

> be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation, and thereby enable himself to vote to strike legislation down.'[1]

The concern that judges, in their insistence that the least restrictive means should be adopted, may end up 'annihilat[ing] the range of choices' available to the legislature[2] flows in part from the fact that the question of less restrictive means often raises difficult issues relating to 'cost, practical implementation, the prioritisation of certain social demands and the need to reconcile conflicting interests'.[3] In other words, less restrictive means can often be envisaged, but such means may impose significant administrative burdens on the state, have other substantial cost implications, undermine the state's symbolic objectives or reverse a hierarchy of needs worked out through the political process.

The Court, as we shall see, has contrived an answer of sorts to this challenging problem. That answer appears in its most explicit form in *Mamabolo*, where Kriegler J writes:

> Where section 36(1)*(e)* speaks of less restrictive means it does not postulate an unattainable norm of perfection. The standard is reasonableness. And in any event, in theory less restrictive means can almost invariably be imagined without necessarily precluding a finding of justification under the section. It is but one of the enumerated considerations which have to be weighed in conjunction with one another, and with any others that may be relevant.[4]

How the Court actually engages the challenges posed by the 'less restrictive means' requirement — and sometimes fails to finesse the problems it poses — is illustrated by two cases: *Prince* and *Christian Education*.

In *Prince*, the Constitutional Court considered a challenge to the constitutionality of a statutory prohibition on the use and the possession of cannabis. The applicant claimed that the relevant legislation did not provide an exemption for the use or possession of cannabis by Rastafari for bona fide religious purposes. All of the judges agreed that the prohibition limited the religious freedom of Rastafari. They disagreed, quite sharply, however, on the question as to whether an exemption would constitute a less restrictive means of achieving the state's objectives.

The minority found that the achievement of the limitation's purpose did not require a complete ban on all uses of cannabis. In their view, the limitation was too broad. The statutory provisions in question targeted uses of cannabis that

[1] *Manamela* (supra) at para 94 quoting from *Illinois State Board of Elections v Socialist Workers Party* 440 US 173, 188-189 (1979). The same point is made elsewhere. See *Mamabolo* (supra) at para 49; John Hart Ely 'Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis' (1975) 88 *Harvard LR* 1482, 1485–87; Peter Hogg *Constitutional Law of Canada* (4th Edition, 1997) 877– 78; Henk Botha 'Rights, Limitations, and the (Im)possibility of Self-Government' in H Botha, A van der Walt & J van der Walt *Rights and Democracy in a Transformative Constitution* (2003) 13, 24–25.

[2] *Manamela* (supra) at para 95.

[3] Ibid.

[4] *Mamabolo* (supra) at para 49.

posed no risk of harm and that could be effectively regulated by the state. Such regulation could take the form of an exemption administered by means of a permit system.[1]

The majority, however, concluded that a permit system would be difficult to enforce, would impose significant financial and administrative burdens on the state, and would fail to protect the Rastafari themselves from the harm caused by the use of cannabis. The majority was especially troubled by the prospect of placing law enforcement officials in the uncomfortable position of having to determine whether a person found in possession of cannabis is a bona fide Rastafarian or merely masquerading as such, or of having to distinguish between a person's legitimate use of cannabis for religious ends or a person's illegal use of the drug for recreational purposes. For these, and other, reasons, the majority concluded the creation of an exemption for the use of cannabis for religious purposes would substantially impair the state's ability to enforce legislation designed to restrict the use of controlled substances.[2]

In *Christian Education*, the applicants contended that a ban on corporal punishment in independent religious schools violated their right to religious freedom (FC s 15) and religious community practice (FC s 31). The Court assumed, for the sake of argument, that the law limited the parents' religious rights in terms of FC ss 15 and 31. However, a unanimous Court then found the limitation of these rights to be reasonable and justifiable. It rejected the argument that an exemption would constitute an appropriate 'less restrictive means' on the following grounds:

> The outlawing of physical punishment in the school accordingly represented more than a pragmatic attempt to deal with disciplinary problems in a new way. It had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children. It might in appropriate cases be easier to carve out exemptions from general measures that are purely administrative, regulatory or commercial in character than from those that have principled foundations and are deliberately designed to transform national civic consciousness in a major way. Even a few examples of authorised corporal punishment in an institution functioning in the public sphere would do more than simply inconvenience the State or put it to extra expense. The whole symbolic, moral and pedagogical purpose of the measure would be disturbed, and the State's compliance with its duty to protect people from violence would be undermined.[3]

Both *Prince* and *Christian Education* – two of the Court's more controversial decisions — raise as many questions as they answer about the meaning of 'less restrictive means'. Is a means 'less restrictive' if it is likely to be less effective in

[1] *Prince* (supra) at paras 65–70. Sachs J also suggested the possibility of the decriminalisation of the use of cannabis for sacramental purposes. Ibid at paras 165–169.

[2] Ibid at paras 129–142.

[3] *Christian Education* (supra) at para 50.

achieving the limitation's objective?[1] Should the least restrictive means always be employed, regardless of the additional costs it imposes on the state? Ought a court to insist on less restrictive means in circumstances where it would require the state to reprioritize needs and to allocate more resources to, say, one area of policing at the expense of others? The answer given by a majority of the Court to all of these questions in *Prince* and *Christian Education* is 'no'.

But it would be wrong to conclude from these two cases that the answers will always be so.[2] Aware that a rule that required the state to opt for less restrictive means only if such means would not impose significant additional costs would substantially water down limitations analysis, the Court has sought some middle ground between, on the one hand, dictating the basic law's general normative framework and a detailed script for realizing it ideals, and, on the other, undue deference to the state's objectives and the means it chooses to realize them. The apparent result of this 'balancing' act has been to situate the 'less restrictive means' test within the larger balancing exercise under FC s 36. In terms of this approach, the less restrictive means test is just one of several considerations relevant to limitations analysis. As a result, even where less restrictive means are available, the Court may still find that, on balance, the limitation is reasonable and justifiable.[3] However, although the Court has stated that the 'less restrictive means' requirement 'does not postulate an unattainable norm of perfection' and has located the actual standard for 'less restrictive means' as 'reasonableness' (which together appear to make the factor redundant), it has indicated that there are a number of variables that determine how much weight it attaches to this fifth and final factor.

(aa) Narrowly tailored

In *Case & Curtis*, Mokgoro J emphasized that, while the courts grant a significant 'margin of appreciation' to the legislature in choosing among different means of

[1] In *De Reuck*, the appellant argued that the prohibition of child pornography was overbroad because it applied to persons who possessed child pornography for the purposes of making a documentary film about child pornography. Even though the Act permits the executive committee of the Film and Publication Board to grant an exemption for the possession of banned materials for 'bona fide purposes', the appellant argued that the exemption procedure was not the least restrictive means available, and that a 'legitimate purpose' defence should be recognized. The Court rejected this contention, and held that a 'legitimate purpose' defence would be open to abuse, and was therefore 'unlikely to be an *effective* less restrictive means'. *De Reuck* (supra) at para 81.

[2] See *Prince* (supra) at para 155 ('[L]imitations analysis under section 36 is antithetical to extreme positions which end up setting the irresistible force of democracy and general law enforcement, against the immovable object of constitutionalism and protection of fundamental rights. What it requires is the maximum harmonisation of all the competing considerations.')

[3] The idea that the least restrictive measure need not always be chosen by the legislature was also aired during the constitution-making process. Theme Committee Four wrote that when courts compare the limitation in question with other appropriate alternative restrictions, they are not obliged to pick the least restrictive measure: 'Those restricting rights will be left with a discretion to decide on any particular measure within this [acceptable] range; . . . this need not be the least restrictive measure viewed in isolation.' Theme Committee Four *Advisors Memorandum to Constitutional Assembly* (14 April 1996)(Manuscript on file with authors).

effectuating its goals, this margin does not apply to provisions whose proscriptive sweep is substantially broader than is reasonably required.[1] The *Mamabolo* Court similarly noted that, where the legislature can choose from amongst a range of reasonable options, to qualify as 'reasonable' a measure must be carefully and narrowly tailored.[2]

(bb) Costs imposed

The Court considers the extent to which less restrictive means would impose an additional administrative burden on the state, lead to problems of implementation, divert valuable resources, unduly narrow the range of policy choices available to the legislature, or otherwise impair the state's efforts to achieve its objectives. Here the state or other party seeking to justify the limitation is obliged to demonstrate that less restrictive means would defeat the state's attempt to achieve its legitimate objectives.

(cc) Extent of the limitation

Where a limitation makes severe inroads into an individual's rights, the Court is more likely to require the state to adopt less restrictive measures, even where such measures would impose substantial additional costs upon the state, or give rise to difficulties of implementation. In *Prince*, the minority concluded that the state was obliged to 'walk the extra mile' for the appellant because of the deleterious consequences the statutory limitations have on the religious life of the Rastafari.[3]

(dd) Purpose of the limitation

The last question a court will ask is whether the limitation serves a pressing public interest. If the answer to this question is yes, the Court is more inclined to grant the legislature quite a bit of latitude in its choice of means.[4]

[1] *Case & Curtis* (supra) at para 62.

[2] The Court in *Mamabolo* emphasized that the offence of scandalising the court is to be narrowly construed and to apply only to speech likely to damage the administration of justice. *Mamabolo* (supra) at paras 48–50.

[3] *Prince* (supra) at 149. The minority emphasised the outsider status of the Rastafari, their lack of political influence, and the stigma that flows from the law's treatment of adherents as criminals and drug addicts. Ngcobo J wrote that the prohibition

> degrades and devalues the followers of the Rastafari religion in our society. . . . It strikes at the very core of their human dignity. It says that their religion is not worthy of protection.

Ibid at para 51.

[4] Compare Sachs J's judgment for the Court in *Christian Education* with his dissent in *Prince*. The key to the different conclusions reached by Sachs J in these two cases seems to lie in his statement in *Prince* that 'where there are practices that might fall within a general legal prohibition, but that *do not involve any violation of the Bill of Rights*, the Constitution obliges the State to walk the extra mile.' *Prince* (supra) at para 149 (emphasis added). This statement must be read together with his statement in *Christian Education* that '[i]t might in appropriate cases be easier to carve out exemptions from general measures that are purely administrative, regulatory or commercial in character than from those that have principled foundations

(d) Balancing and proportionality

One of the most noteworthy features of the Constitutional Court's limitations jurisprudence is the way it conceives of the relationship between the different factors that need to be considered. The Court understands these factors to be closely interrelated. Far from representing a 'sequential check-list' that can be adhered to 'mechanically', the factors are to be considered within the broader context of a 'balancing exercise' and a 'global judgment on proportionality'.

This approach has taken many commentators by surprise. Prior to the judgment in *Makwanyane*, it was widely expected that the Court would model its analysis of the reasonableness and justifiability of fundamental-rights limitations on the approach adopted by the Canadian Supreme Court in *R v Oakes*.[1] However, the approach of the *Makwanyane* Court represents, in important respects, a significant departure from the *Oakes* test.[2] The *Oakes* test proceeds in distinct stages: first, it is asked whether the limitation serves a sufficiently important objective; second, whether the limitation is rationally connected to the said objective; third, whether the limitation impairs the right as little as possible; and fourth, whether the actual benefits of the limitation are proportionate to its deleterious consequences for the rights-holder. The need to consider the second question arises only once the first leg of the test has been satisfied; the third question is addressed only once the first and second questions have been answered in the affirmative, and so on. This sequential exercise is substantially different from an approach grounded in balancing and proportionality.[3] Not only is it more structured, but a 'balancing exercise' is undertaken only at the very end of the inquiry, once it has been established that the limitation does serve an important objective, that it is rationally connected to

and are deliberately designed to transform national civic consciousness in a major way.' *Christian Education* (supra) at para 50. For Sachs J, the crucial difference between the two cases lies in their objectives: while important, the objective of the limitation in *Prince* is not directly rooted in a constitutional right — an exemption from the ban on cannabis would not, for instance, result in a violation of human dignity, the ban on unfair discrimination or the right not to be subjected to cruel, inhuman and degrading punishment.

[1] See Stu Woolman 'Riding-the Push-Me-Pull-You: Constructing a Test that Reconciles the Conflicting Interests Which Animate the Limitation Clause' (1994) 10 *SAJHR* 60, 84–90; Gerhard Erasmus 'Limitation and Suspension' in D van Wyk, B de Villers, J Dugard & D Davis *Rights and Constitutionalism: The New South African Legal Order* (1994) 629, 649; Azar Cachalia, Halton Cheadle, Dennis Davis, Nicholas Haysom, Penuell Maduna & Gilbert Marcus *Fundamental Rights in the New Constitution* (1994) 111–115; George Devenish 'An Examination and Critique of the Limitation Provision of the Bill of Rights in the Interim Constitution' (1995) 10 *SA Public Law* 131, 135–36.

[2] Although the *Oakes* test featured prominently in the *Makwanyane* Court's discussion of comparative limitation jurisprudence Chaskalson P was quick to point out that 'there are differences between our Constitution and the Canadian Charter which have a bearing on the way in which section 33 should be dealt with.' *Makwanyane* (supra) at para 110. He gave no indication of what the relevant differences might be, but simply echoed the words of Kentridge AJ in *S v Zuma* that 'I see no reason in this case to fit our analysis into the Canadian pattern.' *Zuma* (supra) at para 35.

[3] Cf Peter Hogg 'Canadian Law in the Constitutional Court of South Africa' (1998) 13 *SA Public Law* 1, 7 (Noting that while the factors identified in *Makwanyane* and subsequently listed in FC s 36 'owe a great deal to the language of *Oakes*, it is clear that a more flexible approach to justification is contemplated'.)

such objective, and that it impairs the right as little as possible. If the limitation fails any of the first three legs, the court need not engage in cost-benefit analysis.

That the *Oakes* test should be seen as worthy of emulation in South Africa after 1994 is hardly surprising.[1] The test represents a bold attempt to come to terms with the sometimes conflicting doctrines of constitutional supremacy and separation of powers. The *Oakes* test subjects fundamental-rights limitations to rigorous scrutiny, refuses to lend legitimacy to the limitation of rights in the name of a crass utilitarian calculus, links conceptually the grounds for finding a rights infringement to the grounds for finding that such a limitation is justified, and offers a sophisticated understanding of the proper degree of deference the courts owe the legislature.[2] Finally, the *Oakes* test promotes analytically rigorous and politically candid judicial reasoning.

(i) *Balancing as a bad metaphor*

The metaphor of balancing is so deeply embedded in our constitutional discourse that we often use it without giving the actual meaning of the metaphor a second thought.[3] Our purpose over the next several sections is to offer *(a)* several definitions of balancing, *(b)* a number of trenchant critiques of the practice; and *(c)* a good faith reconstruction of the Court's doctrines of balancing and proportionality.

[1] It may also have something to do with the accessibility of Canadian constitutional materials. South African lawyers generally experience far fewer barriers in trying to come to terms with Canadian constitutional law than, say, German law.

[2] See Lorraine Weinrib 'The Supreme Court of Canada and Section One of the Charter' (1988) 10 *Supreme Court LR* 469 (For an analysis of the normative vision and the understanding of institutional roles which inform the *Oakes* test.)

[3] See, eg, Johan de Waal 'A Comparative Analysis of the Provisions of German Origin in the Interim Constitution' (1995) 11 *SAJHR* 1, 26 ('[B]alancing is just another way of limiting rights'); Gerhard Erasmus 'Limitation and Suspension' in D van Wyk, B de Villiers, J Dugard & D Davis *Rights and Constitutionalism* (1994) 629, 649–50 ('In order to perform this [limitation] function the judiciary will have to do the necessary balancing throughout'); John Casey *Constitutional Law in Ireland* (1992) 313–14 ('Balancing constitutional rights: On occasion, one person's exercise of his/her constitutional rights will collide heavily with those of others . . . [and] courts will obviously have to weigh . . . the constitutional rights involved . . . to achieve an accommodation'); Paul Sieghart *The International Law of Human Rights* (1991) 94 ('[Limitations analysis] involves a delicate balance between the wishes of the individual and the utilitarian greater good of the majority'); David Currie *The Constitution of the Federal Republic of Germany* (1994) 180 ('If the mystical terminology of reciprocal effect sounds peculiar . . . the bottom line of interest balancing does not'); Laurence Tribe *American Constitutional Law* (1988) 792–93 ('[D]eterminations of the reach of first amendment protections . . . presuppose some form of "balancing" whether or not they appear to do so'). For talk of 'balancing' in our own jurisprudence, see, eg, *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665, 708 (CC)('*Makwanyane*')(Proportionality 'calls for the balancing of interests'); *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631, 656 (CC), 1995 (10) BCLR 1382 (CC)(Sachs J, concurring)('[F]aithfulness to the Constitution is best achieved by locating the two-stage balancing process within a holistic, value-based and case-oriented framework.') Philosophers also employ this terminology. See, eg, John Rawls *Political Liberalism* (1993) 243 (Rawls writes that citizens, like members of the court, must 'be able to explain their vote to one another in terms of a reasonable *balance* of public political values' (emphasis added).) The language of balancing is an inevitable part of any utilitarian theory. For a critique of 'balancing' in utilitarian theory, see Bernard Williams 'A Critique of Utilitarianism' in JCC Smart & B Williams (eds) *Utilitarianism: For and Against* (1973) 75.

(aa) Definitions of balancing

Balancing means the 'head-to-head' comparison of competing rights, values or interests. It takes two basic forms.

Sometimes balancing means that one right (or interest or value) will simply 'outweigh' another right (or interest or value). For example, in *Makwanyane*, the Court held that the applicant's right not to be subject to cruel, inhuman and degrading punishment (informed by the right to life and the right to human dignity) outweighed the state's interest in the death penalty for the sake of retribution and communal catharsis. In purely clinical terms, the death penalty impaired the right not to be subject to cruel, inhuman and degrading punishment and could not be justified in terms of IC s 33.

Sometimes balancing means 'the striking of a balance' between competing rights or interests. No right is asked to pay the ultimate price. In *Minister of Home Affairs v Fourie*, same-sex life partners contended that their rights to equality and to human dignity were impaired by laws that prevented them from entering into civilly-sanctioned marriages.[1] Leaders of religious and traditional communities contended that the state and the Court had no business demanding that they alter their beliefs or practices to accommodate gay and lesbian unions. The Court split the baby and engaged in this second form of balancing. While acknowledging that the rights of same-sex life partners to equality and to dignity were unjustifiably limited by rules of common law and statutory provisions that prevented them from entering civilly-sanctioned marriages, the *Fourie* Court went out of its way to note that religious prohibitions on gay and lesbian marriage did not constitute an unjustifiable infringement and that religious officials could legitimately refuse to consecrate a marriage between members of a same-sex life partnership.[2]

(bb) Critiques of balancing

(w) Pluralism, incommensurability and complexity

Some critiques suggest that the discourse of balancing of constitutional rights, values or interests involves terminological confusion. Other critiques contend that 'balancing', in either of the two forms identified above, is an impossible

[1] *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others, Amici Curiae*); *Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)('*Fourie*').

[2] Ibid at paras 90–98. See also *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA), 2005 (3) BCLR 241 (SCA) at paras 36–37 (Supreme Court of Appeal also holds that no religious denomination would be compelled to marry gay or lesbian couples.)

undertaking. Our critique targets both the terminological and the theoretical confusion associated with balancing talk.[1]

We do not solely value things in quantitative terms: intensity or utility. We value things in qualitatively different ways. Furthermore, human beings generally do not value just one thing in life. Human beings value a vast array of goods. And we value each good in our own and its own particular way.

This first claim about pluralism and the qualitatively different ways in which we value goods suggests a second claim. Human goods are often incommensurable.[2] It is fair to say that the things we value most in life — friends, lovers, work, beauty, nature, and yes, money — cannot be compared with one another. Put differently, while we may be able to compare the virtues of friends with friends, the virtues of lovers with lovers, the virtues of work with work, the virtues of certain objects of beauty with other objects of beauty, and certainly the virtues of more money with less money, there is no single template against which we can measure claims of friendship, love, work, beauty, nature and money. They may compete with one another. But they compete in a way not easily assessed. Indeed, justice may require us to refrain, in so far as it is possible, from attempts to measure these competing goods by a single yardstick. Michael Walzer puts our second complex claim thus:

> There has never been a universal medium of exchange . . . [T]here has never been a single criterion, or a single set of interconnected criteria for all distributions. Desert, qualification, birth and blood, friendship, need, free exchange, political loyalty, democratic decision: each has had its place, along with many others, uneasily coexisting, invoked by competing groups, confused with one another.[3]

[1] See *New Jersey v TLO* (1985) 469 US 325, 369 (Brennan J)(Balancing is 'doctrinally destructive nihilism'); *Murray v Ireland* [1985] IR 532 (Balancing talk is often 'misleading'). See also Cass Sunstein 'Conflicting Values in Law' (1994) 62 *Fordham LR* 1661; Cass Sunstein 'Incommensurability and Valuation in Law' (1994) 92 *Michigan LR* 779; ME Blomquist 'Review of Gaurino-Ghezzi and Loughran's *Balancing Juvenile Justice*' (1997) 7 *Law and Politics Book Review* 24, 25 ('[T]he authors' call for "balance" and the vision of "balance" they offer (punishment coexisting with accountability, treatment and respect for the youth's constitutional rights) are neither new, enlightening nor particularly helpful. The problem facing the juvenile justice system is not so much that the system is single minded, but that with its myriad goals, the system has difficulty translating and accomplishing these goals in some meaningful ways. [J]ust why 'balance' should be pursued and valued as highly as the authors advocate is far from clear. As a goal, 'balance' appears to be one more buzz word like "rehabilitation" and "accountability" that is part of the . . . lexicon but is not particularly useful because . . . it lacks . . . content.')

[2] Other scholars likewise point out the impossibility of measuring conflicting interests against a single metric of value. See, eg, Ted Aleinikoff 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale LJ* 943, 972–76; Mark Tushnet 'An Essay on Rights' (1984) 62 *Texas LR* 1363, 1372–73; Stu Woolman 'Out of Order? Out of Balance? The Limitation Clause of the Final Constitution' (1997) 13 *SAJHR* 102, 114–19.

[3] *Spheres of Justice* (1985) 4. See also John Finnis 'On Reason and Authority in *Law's Empire*' (1987) 6 *Law & Philosophy* 357, 374 ('[Once one] strips away the veil hiding the problem of the incommensurability of the criteria proposed for identifying a best or uniquely right interpretation, theory or answer [w]e are left with the metaphor: "balance". But in the absence of any metric which could commensurate the different criteria, the instruction to balance can legitimately mean no more than bear in mind, conscientiously, all the relevant factors, and *choose*.')

From these observations, Walzer draws the following conclusions. First, goods, like people, have shared meanings in a society, because goods, like people, are a product of social, political, economic, educational, religious and linguistic practices which generate meaning. Second, it is the shared meaning of a good which determines, or should determine, its distribution. Third, and perhaps most importantly for Walzer, when the meanings of social goods are distinct, their distributions must be autonomous. That is, for each good there exists a set of criteria and procedures deemed to be appropriate for its distribution.[1]

Walzer's view may need to be qualified. The demands of justice — even in a world of plural and incommensurable goods — are, in fact, far more complex than Walzer's account allows. First, spheres of human activity do overlap and thereby complicate the criteria for the distribution of any particular social good. Second, to the extent that some spheres of activity are inextricably linked, it is inevitable that the distribution of one good will influence the distribution of another. Third, given the spontaneous, evolutionary manner in which most spheres of activity have come into being — meaning they are never the product of a single agent — the criteria for the distribution of a social good are rarely going to be clear or conflict-free. The criteria for distribution are also rarely going to conform to a simple lexical ordering. Fourth, not only may criteria within spheres conflict, the individual criteria within the same sphere may be so indeterminate as not to yield a clear result in a given instance. Fifth, different goods can sometimes be measured along the same metric. We discover on closer analysis, for example, that friendship and military honour share a common value — loyalty — or we find that two different constitutional norms — equality and expression — undergird a third constitutional commitment — democratic participation.[2] Sixth, spheres may not only overlap with one another, or through

[1] Justice, on this account, consists in making sure that a social good is distributed in accordance with the appropriate criteria for that sphere of human activity. Injustice, on the other hand, consists in the use of either inappropriate criteria for the distribution of goods or, more likely, the use of goods accrued in one sphere of social life to determine the distribution of goods in another sphere. For example, the Pope should be selected on the basis of piety, good judgment and knowledge of Catholic dogma, not because he was the son of the previous Pope or has sufficient wealth to renovate the Vatican. Wealth may be an appropriate criterion for the distribution of some goods, but it is not appropriate for ecclesiastical office.

[2] This general account of incommensurability may strike some readers as just a bit too glib. As the fifth point suggests, there are occasions where if we were to think a little more about the nature of the particular values 'at odds', we might make some progress towards resolving the conflict. Values may have either intrinsic worth or instrumental worth or both. If value P is valuable only in its service to Q, then the conflict between P and Q, when it arises, is only apparent. For example, we may believe that democracy (P) is only valuable in so far as it protects individual liberty (Q). Or if P and Q are valuable only in light of their service to R, then when they conflict we *may* be able to make a clear judgement as to which better serves R. So if we were convinced that democracy (P) and equality (Q) were only valuable in so far as they served the value of community (R), then there might be a way of deciding which of the two goods — P or Q — best served R in a particular instance. In addition, even if our Ps, Qs and Rs are incommensurable, there may be some procedures which are better than others for reconsidering our intuitions about these values. Rawls, for example, uses the original position to generate his two principles *and* to defend the priority of the liberty principle over the difference principle. As we suggest below, there may be still other ways — storytelling — of constructively reflecting upon the way we choose between and order incommensurable values.

domination effect the unjust distribution of some good, but they may also conflict directly with one another. The internal criteria of two spheres of activity may be such that it is impossible in a given situation to do justice to both. For instance, a commitment to a pristine environment may be completely at odds with a commitment to life, equality and economic development.

Although this account of the relationship between spheres of activity and various goods is somewhat more complex than a pure pluralist account, the fact remains that, in innumerable instances, goods are incommensurable. Hard choices as to which good we pursue have to be made. How do we undertake such decisions? There are, it would appear, three basic options.

One could adopt a strict hierarchy of goods. At one time or another — never all the time — we might pursue any of the goods on our list. However, when recognized goods come into conflict with one another, we would choose to pursue those goods in order of their appearance on some hypothetical list. Neither the Court nor any commentators of whom we are aware advocate this option.

One could choose the preferred good on an ad hoc basis. No good would have primacy of place and each decision as regards a conflict between goods would depend on the exigencies or the particular context of the moment. One critique of the Court's limitations analysis is that it often looks as if it takes place in a rather ad hoc manner. But as the previous descriptive account ought to have made clear, such a charge would be unfair.

One could adopt some combination of the two approaches. One might have a theory of goods which told us which goods were most valued, in what circumstances and why. However, in recognizing the heterogeneity and incommensurability of goods, this theory would not demand a strict hierarchy of goods. For example, if in our theory of goods, egalitarian concerns were privileged over autonomy concerns, we might expect that, where constitutional goods such as equality and expression came into conflict, the former would generally take precedence over the latter. However, because such a theory recognizes the plurality and incommensurability of goods, there would be circumstances in which we might recognize the priority of the latter over the former. Most importantly perhaps, given our recognition of the complexity of the decisions to be made about the just distribution of goods, as well as the tendency of goods to conflict, we must acknowledge that we cannot map out all of our choices in advance. In fact, there may be many instances in which multiple goods press their claims upon us in ways which cannot be easily settled. We are stuck, in such instances, with hard choices.[1]

[1] See John Finnis 'On Reason and Authority in *Law's Empire*' (1987) 6 *Law & Philosophy* 357, 375 ('A case is hard, in the sense which interests lawyers, when there is more than one right, ie not wrong, answer.')

How *should* the Court handle hard choices?

First, the Court must be candid and recognize that there will be situations in which constitutional goods will urge independent and irreconcilable claims upon us: in such situations, we will have to choose between incommensurable goods.[1] Second, the Court must acknowledge that it lacks a set of second-order rules which might tell us how to reconcile competing goods with one another.[2] Most importantly, the Court must not view the choice of one good over another good in hard cases as arbitrary. Instead, it must be candid about the reasons for its choices and hope that its candour about the reasons for its choices ultimately reflects the exercise of good judgement.[3]

(x) Subjectivity and arbitrariness

Some critics of balancing point out that the Final Constitution — like most constitutional texts — provides little or no guidance as to how a court should determine the relative weight to be attached to conflicting rights and interests. One possible result is that the weighting and the ranking of interests are not

[1] See Charles Larmore *Patterns of Moral Complexity* (1986). Larmore writes in a very similar vein when articulating the following five-fold thesis with regard to the complexity of moral judgement. First, without some external incontrovertible method by which to measure morality, it is inevitable that rational people will not always agree about what decisions to make in a given situation. Secondly, if we recognize the potential for such rational disagreement about what decision to take in given situations, then 'we must reckon with a fundamental heterogeneity of morality. By this I mean that we have an allegiance to several different moral principles that urge independent claims upon us (we cannot plausibly see the one as a means for promoting the other) and so can draw us in irreconcilable directions.' Ibid at 138. Thirdly, given this fundamental heterogeneity of moral values, any ranking of principles is contingent at best. We can expect situations that undermine the ranking and that force us to sacrifice a 'primary' commitment to a 'subordinate' commitment. Fourth, the sacrifice does not mean we simply reverse our order of principles in a given case. There will be many instances in which, as Larmore writes, 'we find that heeding both sorts of ultimate moral commitments is at odds with the way the world is, when we cannot do what they tell us we ought to do, [and that] we cannot entertain revising their authority or suspending judgment. We have to live with the fact that we have [dual] obligations we cannot [simultaneously] honor. Our possibilities in the world are then too narrow for what we know we ought to do.' Ibid at 150. Finally, the application of moral principles requires the capacity to exercise good judgement. The principles do not tell us when they must be applied. The moral situations to which the principles apply do not come to us with labels that we may simply read off. See Laurent Frantz 'Is the First Amendment Law? A Reply to Professor Mendelson' (1963) 51 *California LR* 729, 748 (The balancer, it is said, attempts to measure the immeasurable and to 'compare the incomparable'.)

[2] Legal rules may be indeterminate in a number of different ways. A first-order rule may be ambiguous or indeterminate. First-order legal rules may conflict with one another. Second-order legal rules, where they exist, may be equally ambiguous and equally apt to conflict with other second-order rules. For a critical take on this view of indeterminacy and legal rules, see Lawrence Solum 'On the Indeterminacy Crisis: Critiquing Critical Dogma' (1987) 54 *U Chicago LR* 462. See also Anton Fagan 'In Defence of the Obvious: Ordinary Meaning and the Identification of Constitutional Rules' (1995) 11 *SAJHR* 545; Alfred Cockrell 'Rainbow Jurisprudence' (1996) 12 *SAJHR* 1, 5. For a brief discussion of indeterminacy in constitutional interpretation, see Stu Woolman 'Review of Du Plessis' and Corder's *Understanding South Africa's Transitional Bill of Rights*' (1995) 112 *SALJ* 711, 714.

[3] For our preferred approach to reason-giving in hard cases, see the discussion of judicial narratives and storytelling at § 34.8*(e)*(iii) infra.

grounded in constitutional interpretation — and extended and reflected engagement with the meaning of the constitutional text — but based, instead, on the subjective preferences of individual judges.[1]

The charge that balancing reinforces non-interpretative tendencies in a bench already loath to make the normative pronouncements that every constitution requires, and creates a mechanism that enables judges to substitute their personal political preferences for the preferences of the democratically-elected branches, inevitably raises important questions about the separation of powers between the legislature and the judiciary. If the mediation of conflicting social interests is understood to be an essentially legislative function, judges ought not to be placed in a position that short-circuits the hurly-burly of the political process.

Realists about the legal process may counter that this argument rests upon a formalist distinction between law and politics (and thus between the legislative function and the judicial function) that never was and never will be an accurate account of what happens in all modern constitutional democracies. What happens, on the realist account, is that politics becomes law, law becomes politics, and politics becomes law in a never-ending cycle of conflict and resolution.

But even realists, among whom we count ourselves, must contend with the spectre of judicial arbitrariness raised by balancing. And, it must be said, we are concerned that this approach to limitations analysis enables judges to skirt the demands that attach to difficult and controversial value-choices by employing the ostensibly neutral, objective or scientific language of balancing.

(y) Incrementalism and conservatism

Balancing is also sometimes associated with a conservative bench. In the United States, balancing got a bad reputation during the McCarthy era, when courts used the language of balancing to validate serious infringements of freedom of expression.[2] Such an account seems to oversimplify the historical record. Balancing has, at various times in history, also been associated with liberal and progressive causes and the extension of constitutional rights and freedoms.[3]

But even if balancing does not necessarily translate into a readiness to sacrifice individual rights and freedoms in the name of collective interests, there may still be something conservative about it. Balancing is, we think, legitimately associated with a cautious, incrementalist approach to constitutionality inspired judicial law-making. The balancer is inclined to restrict her finding to the case at hand, as the next case may, ostensibly, require that a

[1] See Aleinikoff (supra) at 977 ('Balancing — by transforming any interest implicated by a constitutional case into a constitutional interest — is the ultimate non-interpretivism.') See also Loammi Blaauw-Wolf 'The "Balancing of Interests" with Reference to the Principle of Proportionality and the Doctrine of *Güterabwägung*: A Comparative Analysis' (1999) 14 *SA Public Law* 178, 198.

[2] See, eg, *Dennis v United States* 341 US 494 (1951). See also Laurent Frantz 'The First Amendment in the Balance' (1962) 71 *Yale LJ* 1424.

[3] See Kathleen Sullivan 'Post-Liberal Judging: The Roles of Categorization and Balancing' (1992) 63 *Univ Colorado LR* 293 ('Post-Liberal')(Describing the dialectical relationship between categorization and balancing.)

different balance be struck. While there may be advantages to such a judicious approach,[1] which was indeed a hallmark of the Chaskalson Court, there is growing concern within the academy that the case-by-case approach to constitutional analysis, in general, and limitations analysis, in particular, blunts the transformative potential of the Final Constitution.[2]

(z) Science and silence

Balancing, some critics suggest, encourages judges to resort to 'scientific' language — ie, cost-benefit analysis. The fear here is that such talk invites a new type of formalism which, like all formalist doctrines, tends to eschew dialogue about important moral and political issues. As Aleinikoff puts it:[3]

> Scientifically styled opinions, written to answer charges of subjectivity, make us spectators as the Court places the various interests on the scales. The weighing mechanism remains a mystery, and the result is simply read off the machine. Scientific balancing decisions are neither opinions nor arguments that can engage us; they are demonstrations.

A related critique is that balancing rests upon the assumption that the primary aim of constitutional law is to mediate between pre-existing interests. These interests are thought to be exogenous to the legal process. Such an approach to constitutional conflicts presupposes an underlying coherence in the law and in society that in heterogeneous polities — such as our own — simply does not exist. Moreover, an underlying assumption of value homogeneity tends to work against the belief of many an honest citizen — and quite a few academics — that political truths are more likely to arise out of dialogic modulation and not the reinforcement of their own subjective preferences.[4] The judge's role in this account of balancing is akin to that of a grocer, rather than a facilitator of, and a participant in, normative dialogue.[5]

(ii) *Balancing as a benign practice*

Why then would the Constitutional Court — which so clearly commits itself to the cause of constitutional supremacy, which so self-consciously seeks to establish

[1] See Iain Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 138.

[2] See, generally, Robert Nagel 'Liberals and Balancing' (1992) 63 *Univ Colorado LR* 319. An incrementalist approach is said to characterize the development of the common law. It has also been criticized as being at odds with the constitutional injunction to develop the common law in view of the spirit, purport and objects of the Bill of Rights. The critique holds that the incrementalist approach leaves many of the conservative assumptions that inform legal rules unchallenged, and thus fails to realise the transformative potential of the Final Constitution. See, eg, André van der Walt 'Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law' (1995) 11 *SAJHR* 169; André van der Walt 'Dancing with Codes — Protecting, Developing and Deconstructing Property Rights in a Constitutional State' (2000) 118 *SALJ* 258.

[3] Aleinikoff (supra) at 993.

[4] Ibid.

[5] Sullivan 'Post-Liberal' (supra) at 293.

its own institutional legitimacy,[1] which so earnestly attempts to articulate a principled jurisprudence,[2] and which regularly invokes notions of dialogue and shared constitutional interpretation — embrace a judicial method prone to so many real and potential pitfalls? Does this decade-long embrace reflect a lapse of critical reflection and a sociological fact about how deeply ingrained the metaphor of balancing is in legal discourse? Or, rather, is it indicative of the Court's belief that balancing is an indispensable and ineradicable part of limitations analysis, and that, whatever its drawbacks, balancing can somehow be rehabilitated?

Given the Court's natural reticence with respect to discussing such meta-theoretical issues, it is not surprising that the Court's judgments do not provide direct answers to any of these questions. However, after a full decade's worth of limitations jurisprudence, the Court's paper trail is long enough to draw some fairly uncontroversial conclusions about its rationale for choosing balancing and proportionality over other modes of limitations analysis.

First, as we have already noted in the section on drafting history above, the *Oakes* test was already in decline in Canada by the time the Constitutional Court heard its first case in 1995. The Canadian Supreme Court had, in a series of judgments, adopted a significantly more deferential approach to legislative enactments which the state sought to justify in terms of s 1 of the Charter. This softening of the *Oakes* test seems to have gone hand in hand with a growing scepticism within the Court — and within the academy — about the ability of the *Oakes* test to constrain judicial discretion.[3] Various justices had noted that, with respect to the 'minimal impairment' leg of the test, a 'less restrictive means' of achieving the law's objective could almost always be conjured up. The Supreme Court's subsequent modification of the minimal impairment or less restrictive means leg deprived the *Oakes* test of much of its vigour and gave rise to the perception in Canada and elsewhere that a step-by-step approach to limitations analysis was not easy to devise and even harder to maintain.

Second, the Constitutional Court's approach seems to be informed by its belief that the FC s 36 factors are so closely intertwined that one cannot consider them in isolation. The Court, as we have seen, maintains that the inquiry into less restrictive means cannot be meaningfully separated from questions about the nature of the right that is limited, the nature and extent of the limitation and

[1] See Heinz Klug *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000); Stu Woolman 'Metaphors and Mirages: Some Marginalia on Choudhry's *The Lochner Era and Comparative Constitutionalism* and Ready-Made Constitutional Narratives' (2005) 20 *SAPR/PL* 281; Theunis Roux 'Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court' (2003) 10 *Democratization* 92.

[2] See Sujit Choudhry 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana LJ* 819 (Offers an analysis of the way in which the Constitutional Court has sought to ground its jurisprudence in principle.)

[3] See, eg, Christopher Dassios & Clifton Prophet 'Charter Section 1: The Decline of Grand Unified Theory and the Trend towards Deference in the Supreme Court of Canada' (1993) 15 *Advocates' Quarterly* 289.

the importance of the legislative objective. In the Court's view, a global consideration of these factors helps it to contextualize the inquiry into less restrictive means, and assists it in determining the degree of deference appropriate in a particular case.

Third, the softening and the modification of the *Oakes* test and the early Constitutional Court's persistent assertion of the interdependence of the FC s 36 factors makes its ultimate conclusion that FC s 36 requires a 'global' judgment based on proportionality and balancing appear more plausible. It is certainly true that the Court's 'global proportionality' approach makes it easier for the Court to demonstrate the appropriate degree of deference to the political branches of government.

Finally, the Constitutional Court seems confident that it can avoid some of the pitfalls commonly associated with a balancing approach. This confidence flows — on the Court's own account — from the manner in which the factors enumerated in FC s 36 actually do structure and constrain the inquiry into the proportionality of impugned measures. That is, the factors do not need to represent a closed list considered in a strict sequence to provide sufficient focus for the Court's inquiry. The Court contends that FC s 36 and its five factors are designed to facilitate a nuanced engagement with the particular factual and legislative setting and not to resolve value conflicts in the abstract. The balancing exercise to be undertaken under FC s 36 should be an exercise in practical reasoning and good judgement.[1] If practical reasoning and good judgement in the Aristotelian sense is what matters most, then the Constitutional Court's notion of balancing has nothing to do with the 'accuracy' of the weights it attaches to conflicting interests, but rather hinges on the extent to which its judgments engage with particular social contexts and offer persuasive accounts of the basis for the outcome.

Assuming the Constitutional Court is correct about the nature of its preferred approach to limitations analysis, the real question is whether the Court lives up to its ideal. Does balancing, as practised by this Court, lead to a nuanced and context-sensitive limitations jurisprudence that promotes candid consideration of conflicting interests and facilitates shared constitutional interpretation with the coordinate branches of government? The most charitable conclusion we can offer is that the Court's current record is inconclusive. Sometimes the Court's balancing and global assessment of proportionality results in a style of judicial reasoning which masks the actual basis for controversial value choices. On other occasions, the Court's use of balancing as a form of practical reasoning would appear to advance open and candid consideration of conflicting interests. In the

[1] See *Prince* (supra) at para 151 (In the words of Sachs J, the weighing of interests 'does not take place on weightless scales of pure logic pivoted on a friction-free fulcrum of abstract rationality', but has to be done 'in the context of a lived and experienced historical, sociological and imaginative reality.')

end, we remain 'balancing' sceptics because the metaphor's open-texture tends to promote closure rather than candour.[1]

(e) A thick(er) conception of limitations analysis

In this section, we offer a preferred reading of FC s 36 — one which we believe will help courts to think more clearly about the demands that limitations analysis places on various actors in our constitutional democracy. This preferred reading does not proffer a 'grand unified theory'. Our account begins, instead, by addressing serious concerns about institutional comity in a constitutional democracy and by articulating what we, and others, have described as the Final Constitution's call for 'shared constitutional interpretation'. After suggesting the contours of a doctrine that would enable the courts to share 'constitutional competence' with other political actors — and thus mediate the competing doctrinal claims of constitutional supremacy and of separation of powers — we ask whether the Constitutional Court's extant jurisprudence provides sufficient normative content to guide lower courts and other actors interested in participating in this shared interpretive endeavour. What we see is, on the one hand, a rather cursory attempt to reconcile the primary values that underlie fundamental rights analysis and limitations analysis — openness, democracy, human dignity equality and freedom — and a more deeply entrenched privileging of the value of human dignity, on the other. We do not deny the centrality of dignity to our constitutional project — our dignity jurisprudence may even be, with the principle of legality, one of our two most important contributions to the larger world of international or comparative constitutional law. We do take issue with the Court's tendency to reduce the other four values to manifestations of dignity, and its record of having little to say about the meaning of 'democracy' in our basic law — something of a surprise given the success of South Africa's transition from fascism to democracy. Having established that our five basic values may well be incommensurable in some sets of circumstances and that balancing does little to address such incommensurability, we end our discussion

[1] Even if it is true that the exercise in balancing favoured by the Constitutional Court allows for an open and candid consideration of conflicting interests and a nuanced engagement with the social and legislative context, it is still not clear whether this approach is adequately understood by the political branches, or has filtered down to the lower courts. This sociological fact raises the question as to whether the sequential inquiry formulated in *Oakes* would not be more conducive to shared constitutional interpretation. Wouldn't the application of the *Oakes* test signal far more unequivocally to the legislature what exactly needs to be remedied with respect to a legislative provision found to be unconstitutional? Moreover, wouldn't the more structured *Oakes* inquiry make it easier for social actors to anticipate what limitations would or would not pass constitutional muster, and to adapt their actions accordingly? In addition, aren't lower courts less likely to make a hash of the more systematic *Oakes* inquiry? A Constitutional Court that takes some pride in its ability to avoid constitutional issues, and saying no more than is necessary about those issues, is unlikely to produce a corpus of judgments that constrain judicial and non-judicial actors. Roach and Budlender's rather pessimistic analysis suggests that many state actors are either incapable of understanding rules generated by the Constitutional Court (as they are currently constructed) or are wilfully ignoring them. See Kent Roach & Geoff Budlender 'South African Law on Mandatory Relief and Supervisory Jurisdiction' (2005) 122 *SALJ* 325.

by suggesting a methodology for constructing judicial narratives that may be of some use to courts faced with cases that challenge our ability to accommodate marginal groups or that require other forms of hard choices.

(i) *Shared constitutional interpretation*[1]

Our approach to limitations analysis in particular, and to constitutional interpretation in general, suggests that Bill of Rights litigation, rightly conceived, ought to reflect a dialogue about the meaning of fundamental rights and the cogency of justifications offered for their limitation.[2] From this perspective, powers of judicial review are best understood, not as part of a battle for ascendancy between courts and legislatures (though they may turn into that), or a means of frustrating the will of the political majority, but, rather, as a shared project of constitutional

[1] See Stu Woolman 'The Selfless Constitution: Flourishing and Experimentation as the Foundations of the South African State' (2006) 21 *SA Public Law* (forthcoming). As one of the authors has argued elsewhere at length, talk of 'shared constitutional interpretation' is meant to draw our attention to the kinds of institutional arrangements that are most likely to realize the five basic ends of the South African state. First, the radical givenness of the ends of individuals and groups suggests that the South African state is under a constitutional obligation to protect those ways of being in the world that do not vitiate its core commitments to such goods as rough equality, tolerance, dignity and democratic participation. Civil and political rights protect extant ways of being in the world. Second, South Africa's history of radical inequality in resource allocation requires a particular form of redress. The South African state is under a constitutional obligation to ensure that historically marginalized groups have access to the requisite stocks of political and economic capital necessary to sustain preferred sources of the self. Third, consistent with the Final Constitution's core commitments, the South African state must ensure that its citizens are not held hostage by ways of being in the world that diminish individual flourishing. This concern is more about the ability of individuals to exit repressive communities than it is about creating novel conditions for flourishing. But that does not mean that state intervention on behalf of coerced individuals will not have such a knock-on novelty effect. Fourth, state intervention on behalf of such persons may just shake up existing social hierarchies in a manner that creates new ways of being in the world. Similarly, our commitment to experimentalism is predicated upon the notion that existing ways of being will fail both to facilitate the realization of existing ends and to recognize those ends within which happiness truly resides. Fifth, the experimental constitutionalism that gives rise to a doctrine of 'shared constitutional interpretation' is ultimately pragmatic about the means and the ends of life. See Michael Dorf & Charles Sabel 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia LR* 267. It holds no end to be beyond criticism and immune to reform. Consistent with its pragmatic roots, it recognizes the reciprocal relationship between means and ends. That is, experimental constitutionalism understands that a change in the way one goes about pursuing the ends of life may ultimately change the ends that one pursues.

[2] See *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 129 (Constitutional interpretation takes the form of 'a principled judicial dialogue, in the first place between members of this Court, then between our Court and other courts, the legal profession, law schools, Parliament, and, indirectly, with the public at large.') See also David Beatty 'The End of Law: At Least as We Have Known It' in Robert Devlin (ed) *Constitutional Interpretation* (1991) 22; Peter Hogg & Allison Bushell 'The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' (1997) 35 *Osgoode Hall LJ* 75; Henk Botha 'Rights, Limitations, and the (Im)possibility of Self-government' in H Botha, A van der Walt & J van der Walt *Rights and Democracy in a Transformative Constitution* (eds) (2003) 13, 24–25.

interpretation.[1] What is 'shared constitutional interpretation' exactly? In short, shared constitutional interpretation stands for five basic propositions:

> First. It supplants the notion of judicial supremacy with respect to constitutional interpretation. All branches of government have a relatively equal stake in giving our basic law content. Second. It draws attention to a shift in the status of court-driven constitutional doctrine. While courts retain the power to determine the content of any given provision, a commitment to shared constitutional interpretation means that a court's reading of the constitutional text is not meant to exhaust all possible readings. To the extent that a court consciously limits the reach of its holding regarding the meaning of a given provision, the rest of the judgment should read as an invitation to the co-ordinate branches or other organs of state to come up with their own alternative, but ultimately consistent, gloss on the text. Third. Shared constitutional competence married to a rather open-ended or provisional understanding of the content of the basic law is meant to increase the opportunities to see how different doctrines operate in practice and maintain the space necessary to make revision of constitutional doctrines possible in light of new experience and novel demands. In this regard, the Constitutional Court might be understood to engage in norm-setting behaviour that provides guidance to other state actors without foreclosing the possibility of other effective safeguards for rights or other useful methods for their realization. Fourth. A commitment to shared interpretations ratchets down the conflict between co-ordinate branches and levels of government. Instead of an arid commitment to separation of powers — and empty rhetorical flourishes about courts engaging in legal interpretation not politics — courts are freed of the burden of having to provide a theory of everything and can set about articulating a general framework within which different understandings of the basic text can co-exist. The courts and all other actors have more to gain from seeing how variations on a given constitutional norm work in practice. Fifth. This experimentalist framework ought to reveal 'best practices' with respect to the realization of constitutional objectives. These 'best practices' should, in turn, offer the courts, the political branches and the citizenry regular opportunities to re-think the meaning — and the constraints — of our basic law.[2]

Ackermann J, in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, gives expression to just the sort of institutional comity we have in mind when he writes that:

[1] Our account of shared constitutional interpretation does not rest upon some fiction that a perfect distribution of institutional roles between the judiciary, the legislature and the executive exists. On the contrary, we recognize that 'shared constitutional competence' can turn into a political battle between the courts and the political branches. Shared constitutional interpretation is best understood as a means of minimizing the potential for such conflict and remaining alive to the limits of constitutional adjudication with respect to hotly contested political questions. We are grateful to Johan van der Walt for his helpful comments in this regard. Johan van der Walt 'Reply to Woolman and Botha on Limitations' in M Bishop, D Brand & S Woolman (eds) *Constitutional Conversations: Proceedings of the Constitutional Law of South Africa Conference and Public Lecture Series* (2007). The original reply is available at www.chr.up.ac.za/closa.

[2] See Stu Woolman 'The Selfless Constitution: Flourishing and Experimentation as the Foundations of the South African State' (2006) 21 *SA Public Law* (forthcoming). For the original source for this theory of constitutional interpretation, see Michael Dorf & Barry Friedman 'Shared Constitutional Interpretation' (2000) 2000 *Sup Ct Rev* 61. See also *National Education Health and Allied Workers Union v University of Cape Town & Others* 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC) at para 14 (Constitutional Court expressly recognized that the process of interpreting the Labour Relations Act 66 of 1995 in light of the demands of FC ss 39(2) and 23(1) requires an appreciation of the legislature and the courts' shared responsibility for interpreting the Final Constitution.)

> It should also be borne in mind that whether the remedy a Court grants is one striking down, wholly or in part; or reading into or extending the text, its choice is not final. Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, 'fine-tuning' them or abolishing them.[1]

Shared responsibility for interpreting the Final Constitution does have its limits. The legislature must make a good-faith attempt to revisit an issue in a new and constitutionally permissible way. Where, as in *Satchwell I* and *II*, Parliament refuses to take seriously a previous finding of constitutional invalidity, the courts are well within their rights to rebuff subsequent attempts to re-enact, in modified form, the offending statutory and regulatory framework.[2]

How then does shared constitutional interpretation inform our general approach to limitations analysis?[3] As we argued in §§ 34.3, 34.4 and 34.5

[1] 2000 (2) SA 1 (CC), 2000 (1) BCLR 39(CC)('*NCGLE II*') at para 76.

[2] *Satchwell v President of the Republic of South Africa* 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC)('*Satchwell II*'); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC)('*Satchwell I*'). In *Satchwell II*, the Constitutional Court was asked to assess the constitutionality of a statutory and regulatory framework almost identical to one that it had declared unconstitutional only a year earlier in *Satchwell I*. In *Satchwell I*, the Constitutional Court had declared ss 8 and 9 of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 unconstitutional because they discriminated against homosexual judges' same-sex partners. The *Satchwell I* Court ordered that the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' be read into the provisions after the word 'spouse'. Subsequent to the judgment in *Satchwell I*, Parliament promulgated a new Act, the Judges' Remuneration and Conditions of Employment Act 47 of 2001. This Act took no notice of the *Satchwell I* Court's order. In *Satchwell II*, the Constitutional Court refused to accord Parliament any deference, declared the new provisions discriminatory, and read the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' into the new legislation.

[3] Shared constitutional interpretation is Michael Dorf's inestimably valuable contribution to recent constitutional scholarship. As Michael Dorf and Barry Friedman describe it, the 'invitations' by the US Supreme Court to Congress and state legislatures to share responsibility for giving various constitutional provisions content have been going on for some time. As has been noted elsewhere in this text, Dorf and Friedman use the cases of *Miranda* and *Dickerson* to great effect in explaining how shared constitutional interpretation does — and might — work. *Miranda v Arizona* 384 US 436 (1966)('*Miranda*'); *US v Dickerson* 530 US 428 (2000)('*Dickerson*'). As any viewer of US police dramas knows, *Miranda* articulated the warnings to persons arrested by the police custody that must precede any custodial interrogation. What few viewers, and perhaps few academics, appreciate is the extent to which most of those warnings were intended as judicial guidelines and not excavations of constitutional bedrock. The *Miranda* Court, as Dorf and Friedman point out:

> explains that it granted certiorari 'to explore some facets of the problems ... of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.' The Court sets out its 'holding' at the outset, and that holding is only that the prosecution may not use statements made in custodial interrogation 'unless it demonstrates the use of procedural safeguards effective to secure' the privilege. And '[a]s for the procedural safeguards to be employed, unless other fully effective means are devised to inform the accused persons of their right of silence and to assure a continuous opportunity to exercise it' the specific *Miranda* guidelines are required. The Court then devotes an entire paragraph to encouraging governmental bodies to devise their own ways of safeguarding the right. At least twice more, the Court repeats the holding and re-extends the invitation.

Michael Dorf & Barry Friedman 'Shared Constitutional Interpretation' (2000) 2000 *Sup Ct Rev* 61, 81–83 citing *Miranda* (supra) at 441–490. Congress accepted the invitation. But as the judgment in *Dickerson* reflects, it wilfully misconstrued the nature of the invitation. Congress did not, as the Supreme Court

above, the two-part structure of Bill of Rights analysis contains an invitation to non-judicial actors to alter the Constitutional Court's take on the basic law. By explicitly separating out the process of defining the ambit of a right and the process of determining the appropriateness of any limitation, the Bill of Rights avoids creating a world where the outcome of a legal dispute is tied entirely to rights definition. For example, in American constitutional law, once a particular type of conduct is deemed to fall within the protected ambit of a fundamental right, any law limiting the exercise of the conduct concerned is more than likely to be invalidated in terms of a strict scrutiny standard.[1] The two-part structure of Bill of Rights analysis has enabled the Constitutional Court to avoid rigid categories and to acknowledge the role of other state institutions in interpreting the provisions of the Final Constitution.

The two-part structure of Bill of Rights analysis has two further benefits when viewed through the lens of shared constitutional interpretation. First, a relatively precise, if nuanced, approach to limitations analysis creates the space for a fairly fastidious treatment of rights interpretation. Second, the Court is at its best, and its most comfortable, when it speaks to the parameters of the 'constitutional' and is not asked to become an oracle of the 'optimal'.[2]

However, the promise of shared constitutional interpretation will not be fulfilled if the courts continue to rely exclusively on the metaphor of balancing.

suggested, come up with equally effective ways of safeguarding the right to remain silent and not to have statements made in custodial interrogation used by the prosecution unless adequate safeguards have been put in place. Instead, Congress simply enacted as legislation the pre-*Miranda* test that the voluntariness of a confession would be assessed in terms of a totality of the circumstances. The *Miranda*-specific warnings were merely included as factors to be taken into account when determining voluntariness. Not surprisingly, the *Dickerson* Court rejected Congress' 'new' take on the voluntariness of custodial confessions. It did so, as Dorf and Friedman argue, because Congress had failed to take seriously the Court's concern with the 'compulsion inherent in custodial interrogation' and had failed to offer an alternative that could be deemed 'equally effective' in ameliorating this compulsion. Dorf & Friedman (supra) at 71.

While the 34 years between *Miranda* and *Dickerson* might have witnessed confusing dicta from the Court regarding the status and the reach of the holding in *Miranda*, Dorf and Friedman convincingly show that Congress and other government actors did indeed possess significant space to place their own gloss on the Fifth Amendment's protections. What they were not free to do was ignore entirely even the most limited construction of the Court's holding.

[1] For a compelling account of the dilemmas posed by one-stage fundamental rights analysis, see Laurence Tribe & Michael Dorf 'Levels of Generality in the Definition of Rights' (1990) 57 *University of Chicago LR* 1057.

[2] See, especially, *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 27 ('First and foremost it must be emphasised that the Court has a judicial and not a political mandate. Its function is clearly spelt out in IC 71(2): to certify whether all the provisions of the NT comply with the CPs. That is a judicial function, a legal exercise. Admittedly a constitution, by its very nature, deals with the extent, limitations and exercise of political power as also with the relationship between political entities and with the relationship between the state and persons. But this Court has no power, no mandate and no right to express any view on the political choices made by the CA in drafting the NT, save to the extent that such choices may be relevant either to compliance or non-compliance with the CPs. Subject to that qualification, the wisdom or otherwise of any provision of the NT is not this Court's business.')

Constitutional challenges to public or private practices typically pose the following problems for traditional adjudication: (1) epistemic hurdles in adapting the legal language to render faithfully important facts and ideas from particular communities and contexts;[1] (2) evaluative obstacles when courts need to weigh conflicting values against a background of norms grounded in particular contexts;[2] and (3) the complexity of structuring suitable institutional remedies.[3] Balancing blocks meaningful analysis of the facts in difficult cases because it substitutes an empty image for the more difficult task of information-gathering, norm-setting and remedy creation. It thereby risks increased judicial deference to existing practices and, consequently, the systematic under-enforcement of important rights.

[1] Although courts have the institutional advantage of being able to structure the scope of fact-finding through discovery, they nonetheless face the epistemic problem of translating values and concerns from a specific social context into more generalizable legal terms. This problem is particularly acute for cases involving more insular communities. The insularity of such communities at once places their rights most at risk of infringement and also renders it more difficult to communicate their norms and ideas to an outside audience. As noted earlier, our narrative identities are partially constituted by the norms of our communities. Along with those identities, people inherit a vocabulary to express communal norms. Such a vocabulary may or may not correspond to the legal vocabulary. In commenting on the American Mennonites' *amicus curiae* brief in *Bob Jones University v United States*, Robert Cover characterized the Mennonite understanding of the First Amendment as not 'simply the "position" of an advocate.' According to Cover, 'the Mennonites inhabit an ongoing *nomos* that must be marked off by a normative boundary from the realm of civil coercion, just as the wielders of state power must establish their boundary with a religious community's resistance and autonomy.' Robert Cover '1982 Term Foreword: Nomos and Narrative' (1983) 97 *Harvard LR* 4, 28 citing *Bob Jones University v United States* 46 US 574 (1983).

[2] The second challenge for the court is how to evaluate competing norms on complex moral terrain. *Jordan* provides a good illustration of this two-fold challenge: the norms of gender equality, of private autonomy, of public morality, and of resistance to conformity-inspired policies all exert their pull — and often in opposite directions simultaneously.

[3] A related but more problematic scenario is where courts fail to recognize possibilities for rendering the competing values compatible and structuring solutions acceptable to all parties. There is ground to fear that such errors may be quite common in 'hard' cases on account of the courts' lack of familiarity with the norms at stake. Moreover, as Dorf, Sturm and others have argued, the solution may not be apparent, even to the participants, until they engage in a process of deliberation and adjustment. See Michael Dorf 'The Domain of Reflexive Law' (2003) 103 *Columbia LR* 384, 399 (Noting that the dynamic nature of deliberation and implementation may create novel solutions to seemingly intractable conflicts because 'reflexivity goes both up and down, local participation always has ingredient in it the prospect of changing the principal norm.') However, the courts' general inability to distinguish a 'hard' case from a genuine 'clash of absolutes' creates a substantial likelihood of more decisions content to err on the side of caution and to opt against finding existing practices to be unreasonable limitations. The standard conservative approach placates legitimate concerns about the limits of judicial expertise at managing institutional reform and a need to preserve the institutional legitimacy of the judiciary. The upshot is, however, that the government or powerful private institutions will not be required to walk that 'extra mile'. See *Prince* (supra) at para 149 (Sachs J)('I align myself with the position that where there are practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the Constitution obliges the State to walk the extra mile.')

The likelihood of under-enforcement of fundamental rights is further compounded by our courts' typical and justifiable reluctance to wade into the complex regions of institutional reform. Traditionally, courts are confronted with two unpalatable choices when attempting to transform institutions guilty of

To overcome the poverty of the existing approach to limitations analysis, South African courts may be well-served by embracing a more 'experimentalist' approach. Indeed, the open-ended, fact-driven framework of limitations analysis invites litigants — and other stakeholders — to participate more directly in the vetting of possible solutions to the legal problem confronting the court. Such an invitation to the parties to get their hands dirty enables the courts to overcome both their own limited administrative capacity and their often enervating reliance on the good faith of the various parties. More importantly, the invitation to the parties to expand their legal strategies, from competing claims with zero-sum outcomes to more optimal solutions grounded in compromises from which all parties believe they may benefit, enables the courts to reap the problem-solving potential inherent in collective deliberation.

An experimentalist perspective on limitations analysis proceeds from the recognition that the determination of the 'reasonableness' of a limitation and the identification of the best of all possible remedies are interdependent processes. This experimentalist perspective also recognizes how exceedingly difficult it is to discover the 'right' answer — or remedy — from an outsider's perspective.[1] Indeed, the notion of a single 'right' answer in such a complex context — in advance of any attempt to mediate the competing positions — is itself suspect.[2] As Susan Sturm has observed in connection with workplace discrimination, changes in legal doctrine shape people's expectations. The new legal doctrine thereby reconstructs their identities, beliefs and behaviour. Such an evolutionary process — a function

systematic rights violations. Either they become involved in the administration of reform and must scrutinize each detail of proposed changes. Or they abstain from active supervision and intervene only to prevent instances of explicit 'bad faith'. The challenges for courts in administering traditional institutional reforms are substantial, both in time, resources and in administrative oversight. See *Lewis v Casey* 518 US 343, 347 (1996)(The case involved an appeal from a consent degree entered in a piece of prison reform litigation. '[The injunction] specified in minute detail the times that libraries were to be kept open, the number of hours of library use to which each inmate was entitled (10 per week), the minimal educational requirements for prison librarians (a library science degree, law degree, or paralegal degree), the content of a videotaped legal-research course for inmates (to be prepared by persons appointed by the special master but funded by ADOC), and similar matters.') See also Charles Sabel & William Simon 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard LR* 1015, 1021–53 (For other examples of the degree to which federal courts in the United States became involved in the administrative oversight of public institutions like schools, housing, and mental health units.)

[1] See Michael Dorf '1997 Supreme Court Term Foreword: The Limits of Socratic Deliberation' (1998) 112 *Harvard LR* 4.

[2] This recognition is one of the hallmarks of the sociological concepts of complexity and emergence. To observe that social systems are complex is not tantamount to rejecting the possibility of systematic, scientific understanding. Rather, as Lee McIntyre notes, complexity relates to our knowledge of the world at a particular level of description. It does not rebut the possibility of (social) scientific explanations at another level. See Lee McIntyre 'Complexity and Social Scientific Laws' (1993) 97 *Synthese* 209–227.

of the law as an experimental feedback mechanism — can gradually transform the nature of the problem as originally perceived.[1]

Confronted with such complexity, the task for the courts is not to undertake Herculean quests for perfect theoretical answers or to retreat into the quietism of deference to administrative decisions and private ordering. Our preferred experimentalist perspective possesses two important advantages. First, by acknowledging the difficulty of finding the 'right' answer, *ex ante*, courts with a problem-solving perspective must create mechanisms (including legal doctrines) that gather relevant information, generate proposed reforms and relay feedback quickly. Second, given the potential for unintended consequences that flow from adaptive processes triggered by shifting legal principles, a problem-solving perspective implements each set of solutions tentatively and is ready to modify it on the basis of empirical evidence.[2] The experimentalist approach calls for mechanisms that compare the information generated by different proposals and allow for the adoption of successful solutions.[3]

[1] See Dorf 'The Domain of Reflexive Law' (supra) at 399–400 (Observes the dynamic character of social change resulting from new legal protections.) As the partial success of 'rational expectations' theory in macroeconomics demonstrates, some adaptive processes can be modelled very effectively (some of the time). See Steven Sheffrin *Rational Expectations* (1996). However, there are good reasons for doubting whether models of similar precision can be designed for contexts as diverse and unpredictable as personal intimacy (*Jordan*) or religious worship (*Prince*).

[2] See, eg, Michael Dorf, 'Legal Indeterminism and Institutional Design' (2004) 78 *New York University LR* 875, 920–935 and 960–970.

[3] Another solution conducive to easing the strain of rights analysis is for courts to fashion structural interdicts that create forums for participatory deliberation. That is, instead of shouldering the immense burden of creating both the substantive goals and the procedures for institutional reforms, courts can shift the burden to the various stakeholders. The more limited — but no less important — function would be to play the role of a referee who polices the rules for negotiation between the stakeholders. This approach elicits the tacit knowledge and reflective capacities of the stakeholders in a particular controversy. For only these stakeholders possess the ability to overcome the underlying epistemic and evaluative obstacles that confront the courts. See Jonathan Klaaren 'A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socio-economic Rights' — *Human Rights Quarterly* — (forthcoming, manuscript on file with author)(Drawing on experimentalist principles in EU regulatory regimes as the basis for advocating that the SAHRC be responsible for gathering and disbursing information regarding the government's progress in fulfilling the promise of socio-economic rights.)

How might this novel approach to limitations analysis (plus structural injunctions) work? Assume that a court is faced with the prospect of undertaking a limitations analysis in a very complex factual and normative dispute. By issuing a temporary interdict, a court can presume — momentarily — the fact of violation and require the parties to adduce further evidence in support of or in opposition to the limitation of the right. In addition, the temporary interdict may enable the parties — and other interested — stakeholders to search for a mutually agreeable remedy. See Susan Sturm 'The Promise of Participation' (1993) 78 *Iowa LR* 981 (Argues that participation of stakeholders in the negotiation process initiated by a structural injunction offers important benefits.)

The potential benefits of this approach are several-fold. First, the stakeholders are more likely to be familiar with those norms at issue. Their enhanced participation in both the limitations analysis and the construction of remedies eases the strain of translating ideas internal to their way of being in the world into legal parlance. Furthermore, through its injunctive powers, a court can structure the negotiation process in a manner that fosters participation. This court-enforced structure should improve the likelihood of finding solutions to seemingly intractable ethical conflicts. This participatory bubble may

Of course, courts called upon to perform limitations analysis cannot avoid conflicts that are not susceptible to deliberative solutions. Here again experimental constitutionalism offers the additional idea of provisional adjudication. Provisional adjudication puts alternative possible remedies to the test of experience without necessarily elevating such remedies to the level of established doctrine. Provisional adjudication promises two additional benefits. First, it may facilitate compromise. Affected parties may learn from practical experience and adjust their beliefs and conduct accordingly. Second, it gives parties that may have been aggrieved by a final non-provisional outcome the opportunity to experiment with a remedy of their own making.

But suppose that such provisional space fails to yield a desirable — let us say, from the view of the state — outcome. A finding of unconstitutionality generally still leaves the legislature free to pursue the same objectives, but requires it to use means that better fit — in the sense of being more narrowly tailored to — constitutional imperatives. It is, therefore, clear that the courts do not have the final word on the meaning of the constitutional text in two very important respects. First, just as the legislature must pay heed to the Court's reasons for a finding of unconstitutionality when offering a new formulation of a law, so too must the Court demonstrate discernible deference to the legislature's reformulation.[1] The very fact of a limitations clause in our Bill of Rights demands that the courts give the political branches of government ample opportunity to demonstrate that a new and improved law can achieve the desired objectives within the framework established by the Final Constitution.[2] Second, the ability of our

transform some parties' perception of the interests at stake or it may elicit compromises that all sides come to regard as fair. Finally, the process of participatory negotiation will alleviate the strain that institutional reforms place upon judicial resources. As Sabel and Simon have argued, such a use of limitations analysis and structural injunctions generates effective and legitimate solutions and replaces, at least partially, the need for constant judicial oversight. See Charles Sabel & William Simon 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard LR* 1015, 1067–82. However, deliberation and participation are not the elixir to all conflicts between constitutional rights and public policy as manifest in law. As social science has documented in countless experiments, placing people in deliberative groups may lead to the polarization of perspectives instead of the universal adoption of a reflexive stance. See Cass Sunstein *Designing Democracy: What Constitutions Do* (2001)(Discussion of the practical barriers to effective deliberation, especially the phenomenon of group polarization.) Accordingly, institutional mechanisms are required to ensure that the conditions of negotiation are conducive for genuine deliberation. Unless the participatory bubble of a structural injunction ensures the ability of the parties to voice their concerns equally, the court-structured deliberative process may simply become a front for further domination of some parties by others. Shared constitutional interpretation requires structures that encourage those involved in deliberation to adopt flexible attitudes toward the conflicts they confront.

[1] This proposition remains true even where the court remedies the constitutional defect by reading words into the provision. See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at para 84.

[2] Even where the courts refuse to acquiesce, Parliament possesses the power to amend the Final Constitution. In *UDM*, the Court struck down, on relatively technical grounds, floor-crossing legislation for Parliament and the provincial legislatures. *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae) (No 2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC)('*UDM*'). The response by Parliament was to pass an amendment to the Final Constitution that yielded the desired result.

elected representatives to amend the basic law itself — so long as they follow the appropriate procedures and do not violate its basic structure — means that the people always have the final word.

(ii) *Norms: 'an open and democratic society based upon human dignity, equality and freedom'*

(aa) Intersection, convergence and conflict amongst constitutional values

We have described in the preceding pages an approach to limitations analysis that simultaneously answers 'deep' questions about institutional comity in a constitutional democracy and adumbrates an analytical framework that responds to concerns about judicial usurpation of legislative prerogatives and the alleged inability of courts to resolve polycentric social problems. What we have not described, in even the most superficial way, is how the courts go about determining the 'normative' content of limitations analysis.

That normative content for limitations analysis turns on the phrase 'an open and democratic society based on human dignity, equality and freedom'. Determining the meaning of this phrase is fraught with interpretive difficulties as old as political theory itself. There are, for starters, the tensions between democracy and rights, between equality and freedom, and the deeply contested nature of each of these terms.[1]

Before turning to the ways in which our courts have attempted to make sense of this complex phrase, a few observations are in order. First of all, FC s 36 — unlike many international human rights instruments[2] and national constitutions[3] — avoids references to national security, the public interest, public order, decency or morality as criteria for the limitation of fundamental rights. Such silence is not surprising given the myriad ways in which notions of national security, the public interest and public morals were used to suppress opposition to the apartheid state. FC s 36 redefines 'the public interest' (from the constellations of interests that served white, male, straight, and Christian South Africans) in terms of the values underlying an open and democratic society based on human dignity, equality and freedom. No longer can sectarian notions of the public interest be allowed to ride roughshod over fundamental rights. A limitation of a fundamental right that negates plurality or difference in the name of the common good is, generally, unlikely to be deemed reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[1] Consider the meaning of 'openness' in a heterogeneous society. Official recognition of certain customs of traditional or religious communities will be hailed by some as a celebration of openness. It may be derided by others as a form of closure that impedes the life choices of persons who find themselves confined by such communities.

[2] See, eg, art 29(2) of the Universal Declaration of Human Rights; art 31(1) of the European Social Charter; and art 27(2) of the African Charter on Human and People's Rights.

[3] See, eg, Constitution of India ss 19(2)–(6); Constitution of Namibia arts 13(1), 17(2) and 21(2).

Second, FC s 36 requires us to reconsider traditional understandings of the relationship between constitutional rights and the public interest. If the public interest in terms of which fundamental rights may be limited is underpinned by the same values that inform our interpretation of those rights, it makes no sense to view rights and the public interest as being diametrically opposed, the first representing private entitlements and the second state interests. Rather than fitting our two-stage analysis into the traditional, but ultimately facile public/private dichotomy, the Final Constitution requires us to develop a substantive vision of the norms and the values enshrined in the Bill of Rights that, as we argued above, must guide both rights interpretation and limitations analysis. The result is likely to be both a more realistic understanding of the 'private sphere', which recognizes the legitimate role of the state in ordering 'private' relations, and a richer conception of the public interest, which neither equates it with the interests of the governing elite nor reduces it to the sum of private interests.

Third, the Final Constitution does not envisage a neat division of interpretive tasks, in terms of which certain values (say, human dignity, equality and freedom) are considered only or primarily during the first stage of the fundamental rights inquiry, whereas others (say, democracy) feature only during the second stage. Instead, constitutional interpreters must engage with all five values — to the extent that they are relevant — during both fundamental rights interpretation and limitations analysis.[1] Indeed, FC s 39(1), like FC s 36(1), recognizes that a particular right may be underpinned by more than one value. For instance, while freedom of expression certainly serves democracy and freedom, the Constitutional Court jurisprudence also demonstrates how it serves the interests of human dignity and equality.[2] Both FC s 36 and FC s 39 invite us to consider the complex ways in which the values of democracy, openness, human dignity, equality and freedom overlap, converge, intersect, mutually support each other, and clash.

Lastly, the Final Constitution does not view these values as invariably incommensurable. It requires us to attempt first to harmonize them.[3] If this were not

[1] See § 34.3 supra, on the nature of a value-based approached to fundamental rights and limitations analysis, the relationship between the two stages of analysis, and the grounding of both stages of analysis in the interpretation of the phrase 'open and democratic society based upon human dignity, equality and freedom'.

[2] See, eg, *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at para 7 ('Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally.') See also Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36 (On dignity interests served by freedom of expression.)

[3] Konrad Hesse contends that the principle of proportionality is grounded in the insight that a constitutional order values a variety of often incommensurable goods, and that legislators and judges are obliged to make hard choices about where to draw the line between such goods in a manner which respects the 'unity' of the basic law. See Konrad Hesse *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (20th Edition, 1999) 28, 142–43 and 146.

the case, the quintet of values enshrined in FC ss 36 and 39 would generate a cacophony of judgments, rather than a recurring set of themes that hold our Court's jurisprudence together. As Sachs J wrote in his dissenting judgment in *Prince*:

> [L]imitations analysis under section 36 is antithetical to extreme positions which end up setting the irresistible force of democracy and general law enforcement, against the immovable object of constitutionalism and protection of fundamental rights. What it requires is the maximum harmonisation of all the competing interests, on a principled yet nuanced and flexible case-by-case basis, located in South African reality yet guided by international experience, articulated with appropriate candour and accomplished without losing sight of the ultimate values highlighted by our Constitution.[1]

The attempt to harmonize conflicting interests also coheres with our commitment to shared constitutional interpretation. It creates room for an inter-institutional dialogue about the best way of resolving the tension, if not outright conflict, between various constitutional goods.[2]

The Final Constitution does not require us to resolve these conflicts, once and for all, or to measure the Court's fidelity to all five values along a single metric. The tensions inherent in the formulation of FC ss 36 and 39 are constitutive of the South African constitutional order.[3] They reflect the complexity of South African society and the fragility of the political compromise that the Final Constitution represents. Any attempt to eradicate these conflicts and to deny the distinctive meaning of each of these values would do real violence to the constitutional text and deny the commitment to openness and to plurality on which it is premised.[4]

[1] *Prince* (supra) at para 155.

[2] Ibid at para 56 (Sachs J)('The search for an appropriate accommodation imposes a particularly heavy responsibility on the courts to be sensitive to considerations of institutional competence and the separation of powers. Undue judicial adventurism can be as damaging as excessive judicial timidity.')

[3] See Johan van der Walt & Henk Botha 'Democracy and Rights in South Africa: Beyond a Constitutional Culture of Justification' (2000) *Constellations* 341; Henk Botha 'Democracy and Rights: Constitutional Interpretation in a Post-Realist World' (2000) 63 *THRHR* 561, 581.

[4] In her critique of the Dworkinian notion of the rational coherence of a legal order, Drucilla Cornell develops the idea of the synchronization of competing rights and community interests. She writes:

> The goal of a modern legal system is rational synchronization and not rational coherence. Synchronization recognizes that there are competing rights situations and real conflicts between the individual and the community, which may not be able to yield a 'coherent' whole. The conflicts may be mediated and synchronized but not eradicated. In Dworkin, rational coherence depends on the community acting as a single speaker. In reality, a complex, differentiated community can never be reduced to a single voice. Synchronization recognizes the inevitable complexity of the modern state.

Drucilla Cornell 'Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation' (1988) 136 *Univ Pennsylvania LR* 1135, 1211.

(bb) Dignity *and* democracy

(x) Primacy of dignity

As we have already noted,[1] the Constitutional Court regards human dignity as the most important human right and constitutional value. In the view of the Court,

> Human . . . dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. . . . Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected. In many cases however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.[2]

Given that both the text and the Court tell us that dignity plays a 'central' role in limitations analysis, two questions arise. What role does dignity play? And how central is it to our constitutional project?

The Court's recognition of dignity as, perhaps, the master concept in the Bill of Rights has been dealt with at length elsewhere in this work.[3] The reasons for such recognition range from the direct manner in which dignity answers the 'problem' of apartheid,[4] to the centrality of dignity in the post-war constitutional tradition,[5]

[1] For more on the role of dignity in limitations analysis, see § 34.8*(c)*(i).

[2] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 35. For a detailed discussion of how each of the rights in Chapter 2 has been refracted through the prism of human dignity, see Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36. For just a glimpse of the various rights that have been interpreted in the light of human dignity, see, on cruel, inhuman or degrading punishment, *S v Williams* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC); on the right to equality, *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 6 BCLR 708 (CC) at para 41; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 12 BCLR 1517 (CC) at paras 21–26 and 120–29; on freedom of religion, *Christian Education of SA v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) at para 36; on the right to vote, *August v Electoral Commission* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 17, and on the right of access to adequate housing, *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 83; *Van Rooyen v Stoltz* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) at paras 2, 27 and 29.

[3] See Woolman 'Dignity' (supra) at 36-1–36-4 (Noting both the endogenous and exogenous sources of 'one of the world's most developed bodies of dignity jurisprudence.')

[4] See Sandra Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1 (Respect for human dignity requires society to respect the equal worth of the poor by marshalling its resources to redress the conditions that perpetuate their marginalization.)

[5] See Lorraine Weinrib 'Constitutional Conceptions and Constitutional Comparativism' in V Jackson & M Tushnet (eds) *Defining the Field of Comparative Constitutional Law* (2002) 3. The former Chief Justice of the Constitutional Court has acknowledged South Africa's debt to post-World World II constitutional jurisprudence. See Arthur Chaskalson 'Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 193, 196 ('The affirmation of human dignity as a foundational value of the constitutional order places our legal order firmly in line with the development of constitutionalism in the aftermath of the second world war.')

to the ability of dignity to answer, in a coherent manner, the Court's call for a transformative jurisprudence,[1] to the place dignity occupies in Roman-Dutch law,[2] in traditional understandings of ubuntu[3] and in contemporary discourse on the politics of capability,[4] and, finally, to the manner in which dignity assists courts faced with the practical difficulties of reconciling such 'complementary' values as freedom and equality.[5]

The reason of most immediate import for making sense of limitations analysis is, perhaps, the last. Writing in his personal capacity, Justice Laurie Ackermann claims that the Court's dignity-based equality jurisprudence enables it to

[1] The Court attaches five distinct meanings to human dignity, all of which emanate from the same basic Kantian insight that we recognize individuals as ends in themselves capable of self-government. These five 'definitions' or 'dimensions' of dignity are: the individual as end-in-herself, equal concern and equal respect, self-actualization, self-governance, and collective responsibility for the material conditions for agency. See Woolman 'Dignity' (supra) at 36-6–36-19 for an analysis of these five dimensions of dignity.

[2] As a corrective, Justice Ackermann suggests that an historical account of dignity's South African roots must take note of another endogenous source: the Roman-Dutch law of personality. See Laurie WH Ackermann 'The Significance of Human Dignity for Constitutional Jurisprudence' (Lecture, Stellenbosch Law Faculty, 15 August 2005)(Manuscript on file with authors) § 6 (Personality rights include the rights to dignity, life and bodily integrity, physical liberty, autonomy, reputation, feelings, privacy, self-realisation, and identity.) See also J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* (2nd Edition, 2005) 24-38; WA Joubert *Groundslae van die Persoonlikheidsreg* (1953); *Whittaker v Roos and Bateman; Morant v Roos and Bateman* 1912 AD 92, 122; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376, 381 (T); *Jansen van Vuuren & Another NNO v Kruger* 1993 (4) SA 842, 849 (A); *National Media Ltd v Jooste* 1996 (3) SA 262, 272 (A).

[3] Other authors have suggested that the African concept of 'ubuntu' and dignity draw on quite similar moral intuitions. See Yvonne Mokgoro 'Ubuntu and the Law in South Africa' (1998) 4 *Buffalo Human Rights LR* 15; Drucilla Cornell & Karin van Marle 'Interpreting Ubuntu: Possibilities for Freedom in the New South Africa' (2006) 6 *African Human Rights LJ* (forthcoming); Drucilla Cornell 'A Call for a Nuanced Jurisprudence' (2004) 19 *SA Public Law* 661; Marius Pieterse ''Traditional' African Jurisprudence' in Chris Roederer & Darryl Moellendorf (eds) *Jurisprudence* (2004) 441. See also *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC)('*Makwanyane*') at paras 224–25 (Langa J)(Ubuntu captures, conceptually, 'a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, *dignity*, value and acceptance from the members of the community such a person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, *dignity*, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.' (Emphasis added).)

[4] See Amartya Sen *Development as Freedom* (1999); Woolman 'Dignity' (supra) at 36-65.

[5] In her defence of the Constitutional Court's dignity-based equality jurisprudence, Susannah Cowen argues that equality is a 'comparative concept' and that '[t]o value equality without saying more does not explain what outcome it is that we value. In Amartya Sen's language, it does not answer the question, "equality of what?"' Susannah Cowen 'Can "Dignity" Guide South Africa's Equality Jurisprudence?' (2001) 17 *SAJHR* 34. Cowen appears to echo Peter Westen's notion that equality is an 'empty concept' and that the right to equality and nondiscrimination necessarily has to be interpreted in the light of a value other than equality itself. See Peter Westen 'The Empty Idea of Equality' (1982) 95 *Harvard LR* 537.

adjudicate conflicts between equality and freedom in a neutrally-principled manner.[1] Ackermann offers a number of examples of clashes between equality and freedom that, he believes, can be resolved by reference to a neutral conception of dignity. A restrictive covenant in a deed that prevents future sale of the property to a black person constitutes a deep affront to the dignity of prospective black buyers. At the same time, a finding that the provision is constitutionally infirm 'would constitute a mere *abstract* limitation'[2] of the contractual freedom of the contracting parties and of the right of the original owner to dispose of her property as she pleases. The value of dignity helps us to better understand what is so obviously wrong with such restrictive covenants. Ackermann contrasts this first scenario with another: the owner of a residential property, for racist reasons, wishes to have someone trespassing on his property ejected. In this case, Ackermann argues, the owner can rely on constitutional rights such as privacy and freedom of association, while the trespasser only 'suffers a minor limitation and a limited and unpublic indignity'.[3]

Ackermann's analysis of the mediating role of dignity in conflicts between equality and freedom sheds new light on the perceived role of dignity in proportionality analysis.[4] In his view, a dignity-based approach enables judges to make a principled distinction between instances of private discrimination that constitute a violation of somebody's equal worth, on the one hand, and legitimate exercises of personal and associational freedom, on the other. Dignity, he seems to suggest, is ideally suited to playing such a mediating role because it provides a measure of value that is common to the frequently conflicting imperatives of equality and freedom.

The purpose of Ackermann's two intuition pumps is to convince us that the stronger the dignity interest is on one side of the equality/freedom divide, the weaker it is likely to be on the other. In the example of the restrictive covenant, the discrimination strikes at the heart of the dignity interests of a prospective black buyer, while only marginally disturbing the dignity interests of the property owner. But these — on Ackermann's account — are easy cases. One could well imagine cases in which there are strong dignity/equality interests and dignity/freedom interests on both sides. Consider, for example, a clash between the rights of women who wish to participate equally in traditional or religious communities and the 'autonomy' rights of such religious or cultural communities.[5] In such

[1] See Laurie Ackermann 'Equality and the South African Constitution: The Role of Dignity' (2000) 63 *ZaöRV* 537. Justice Ackermann develops this claim in the course of a discussion of the direct horizontal application of the Bill of Rights and argues that, in cases involving a claim of unfair discrimination by one individual against another, a dignity-based approach could enable the court to engage in a type of 'proportionality analysis' and 'balancing' that is neutrally principled. Ibid at 551–552.

[2] Ibid at 552.

[3] Ibid at 553 quoting Louis Henkin '*Shelley v Kraemer*: Notes for a Revised Opinion' (1962) 110 *Univ Pennsylvania LR* 473, 498.

[4] Dignity might play such a mediating role in conflicts between equality and freedom, say where a legislative provision in the Promotion of Equality and Prevention of Unfair Discrimination Act is challenged on the grounds that it violates the right to freedom of association. See Stu Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

[5] See, eg, *Bhe & Others v Magistrate, Khayelitsha, & Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole & Others; South African Human Rights Commission & Another v President of the Republic of South Africa & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 449 (CC).

cases, the discrimination constitutes a serious impairment of the fundamental human dignity of women. At the same time, the religious or cultural practice in question may be so fundamental to the worldview and customs of its adherents that a ruling of unconstitutionality would strike at the very heart of that community's dignity. Dignity does not, in such cases, offer a neutral or a principled way of striking a balance between equality and freedom.

The second problem with dignity as a neutral, mediating principle is that it assumes that a dignity-based reading of the limitations clause adequately captures the various interests served by rights as varied as equality, privacy and association. A number of commentators have argued that something is likely to get lost in the process of translating the right to equality into the language of human dignity.[1] One of their concerns has been that a dignity-based approach to equality focuses primarily on individual moral harm, rather than material disadvantage and structural imbalances of power. While some forms of disadvantage can be expressed quite easily in moral terms, others may not be so readily recognized. This difference may explain why the transformative vision of the Constitutional Court's jurisprudence in the field of sexual orientation has easily outpaced its jurisprudence on discrimination on the grounds of sex and gender. While discrimination against gays and lesbians is usually rooted in moral disapproval and results directly in an affront to their dignity and identity, discrimination on the grounds of sex and gender is often more closely bound up with material disadvantage and systemic discrimination, and is, therefore, more difficult to capture in the language of dignity.[2]

Such a critique may have had real teeth several years ago. However, the Court has, in recent years, embraced an understanding of dignity that recognizes our collective responsibility for creating the material conditions for the actual exercise of agency by all South Africans. Cases such as *Bhe*, *Daniels*,[3] *Grootboom*[4] and *Khosa*[5] demonstrate that dignity can be used to defend the rights of women, the poor and other vulnerable groups that suffer from material disadvantage and systemic discrimination.[6]

[1] Cathi Albertyn & Beth Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248; Dennis Davis 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116 *SALJ* 398; Henk Botha 'Equality, Dignity, and the Politics of Interpretation' (2004) 19 *SA Public Law* 724('*Equality*'). But see Susannah Cowen 'Can "Dignity" Guide South Africa's Equality Jurisprudence?' (2001) 17 *SAJHR* 34.

[2] See Botha 'Equality' (supra) at 748.

[3] *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC).

[4] *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

[5] *Khosa & Others v Minister of Social Development; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (5) BCLR 569 (CC).

[6] On the transfomative potential of human dignity, see Woolman 'Dignity' (supra) at 36-62–36-71; Jonathan Barrett 'Dignatio and the Human Body' (2005) 21 *SAJHR* 525.

These cases buttress our contention that a dignity-based approach to limitations is capable of addressing structural problems associated with poverty and gender. At the same time, however, we must express doubt about the ability of dignity to rescue marginal groups — Rastafarians, prostitutes and unmarried cohabitants — whose ways of being in the world challenge the Court's own assumptions about what is normal and socially acceptable. Indeed, the Court often relies on dignity to justify legal limitations that appear to flow from very traditional, conservative and sectarian concerns.

For example, in *De Reuck*, the Court found that a total ban on child pornography was justified because child pornography impairs the dignity of all children and, thus, of all members of any society that condones it.[1] By appealing to the dignity of society as a whole, rather than focusing on the dignity of those children who were harmed in the making of pornography, the *De Reuck* Court was able to fend off the argument that the limitation — which also extended to depictions of imaginary persons — was overbroad and that less restrictive means were available.[2] Invoking the 'dignity' of an entire society can be dangerous when used to justify the restriction of unpopular views or forms of expression. The 'dignity' of the community can easily become shorthand for the institutionalization of the moral views of the majority and the negation of plurality and difference.[3]

On other occasions, judges underestimate the extent to which a limitation impairs the dignity of members of out-groups. Consider, for example, the insistence in *Jordan* that the stigma associated with prostitution is the result of personal choice and is unrelated to the role of law in apportioning blame and sustaining structural inequality.[4] Or ponder the majority's finding in *Volks* that the exclusion of the surviving partner of a permanent life partnership from the right of surviving spouses to claim maintenance from the estates of their deceased spouses does not constitute unfair discrimination because the law never prevented them from getting married.[5] These findings — grounded both in traditional mores and rather outré metaphysical views about 'individual freedom' — cast something of a pall over the place of dignity in our limitations jurisprudence.

[1] See *De Reuck* (supra) at para 63 ('Children's dignity rights are of special importance. The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth. [T]here is harm to the dignity and perception of all children when a society allows sexualised images of children to be available. The chief purpose of the statutory prohibitions against child pornography is to protect the dignity, humanity and integrity of children.')

[2] Ibid at paras 68–70.

[3] For a critique of *De Reuck*, see Woolman 'Dignity' (supra) 36-45–36-46.

[4] In rejecting the argument that the criminalisation of the conduct of the prostitute, but not of the patron, constitutes unfair discrimination on the grounds of sex and gender, the majority argued: 'If the public sees the [prostitute] as being "more to blame" than the "client", and a conviction carries a greater stigma on the "prostitute" for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attaches to them not by virtue of their gender, but by virtue of the conduct they engage in.' *Jordan* (supra) at para 16.

[5] *Volks NO v Robinson & Others* 2005 (5) BCLR 446 (CC).

Do these cases *really* indicate fundamental problems inherent in a dignity-based approach? Do they suggest that values other than dignity might assist the courts in making better sense of the Final Constitution's commitment to pluralism and the eradication of structural disadvantage?

On the one hand, we are not convinced that a dignity-based approach must of necessity result in the reinforcement of traditional moral views, the continued marginalization of certain out-groups, or the suppression of unpopular views. On the contrary, as Denise Meyerson has persuasively argued, and as the case law largely confirms, dignity can be used to invalidate limitations which seek to impose a particular conception of the good upon autonomous human beings.[1]

On the other hand, we need to ask why, despite its adherence to definitions of dignity that take our capacity for self-actualization and self-governance seriously, the Constitutional Court failed to give adequate effect to dignity in the cases canvassed above. One reason could be that the private-law conception of dignity as *dignitas* still exerts a powerful hold on the legal imagination.[2] This 'conservative' pre-disposition may explain why dignity *qua* self-governance is not always given sufficient weight, and why the discourse of dignity sometimes slips into sermons about dignified behaviour.[3]

(y) Democracy and openness

(aaa) Principle of democracy

Cases such as *Khosa*[4] — which stressed the political community's responsibility to provide non-citizens who find themselves on the margins of that community with the material conditions for agency — and *Fourie*[5] — which recognized that gays and lesbians have an entitlement to public recognition of their intimate relationships — evince the Constitutional Court's transformation of its dignity-based approach to fundamental rights interpretation and limitations analysis from *dignitas* and a narrow conception of the public interest to something far more expansive, if not all-embracing. This far more substantive vision of dignity allows us to make sense of a variety of other constitutional values precisely because this conception of dignity embraces such notions as equal concern and equal respect, self-actualization, self-governance, and the collective responsibility for supplying the material means required for the exercise of individual agency.

[1] See Denise Meyerson *Rights Limited: Freedom of Expression, Religion and the South African Constitution* (1997).

[2] See Barrett 'Dignatio' (supra) at 525.

[3] See Woolman 'Dignity' (supra) at 36-14–36-17.

[4] *Khosa & Others v Minister of Social Development; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (5) BCLR 569 (CC).

[5] *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others, Amici Curiae*); *Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)('*Fourie*').

But what the Court has still not done is to give distinctive content to each of the five values enshrined in FC s 36. For the most part, the Court has viewed the four other values through the lens of human dignity. According to the Court, dignity provides a common measure of value which can help bridge the division between equality and freedom, or between negative and positive rights, or between the individual and collective aspects of our autonomy. However, we have also seen that dignity does not adequately address all conflicts nor does a reliance on dignity appear to do justice to those out-groups whose participation in our social and political life remains marginal at best.

It is particularly surprising that the Constitutional Court has not done more to develop the meaning of 'openness' and 'democracy' — two features of our society that clearly demarcate the boundary between apartheid South Africa and post-apartheid South Africa. In our view, a greater elaboration of the meaning of 'an open and democratic society', and a closer connection of these values to dignity (especially dignity *qua* self-governance), may result in a jurisprudence more inclined to accommodate plurality and difference. Similarly, an engagement with 'democracy' may strengthen our commitment to securing spaces in which 'counter-publics' can challenge dominant ideas. In this section, we consider the possibility of a complementary understanding of the values underlying the Bill of Rights that flows from a greater appreciation for the kind of 'democratic' society to which the Final Constitution commits us.

In *United Democratic Movement v President of the Republic of South Africa*, the Constitutional Court issued a challenge of sorts to the academic community: tell us what 'democracy' means, and more importantly, tell us how it ought to inform, in a principled manner, our understanding of various provisions in the text of the Final Constitution.[1] Some South African academics, and in particular, Theunis Roux, have begun to do just that.[2] In the chapter on 'Democracy' found elsewhere in this work, Roux pulls together the political theories out of which our particular South African conception of democracy arises, the textual provisions of the Final Constitution that shape that conception, and the extant case law of our courts to generate a 'principle of democracy'.[3] We will not rehearse Roux's

[1] *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae)(No 2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC).

[2] See Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 10.

[3] This principle stated in its clearest form holds:

> Government in South Africa must be so arranged that the people, through the medium of political parties and regular elections, in which all adult citizens are entitled to participate, exert sufficient control over their elected representatives to ensure that: (a) representatives are held to account for their actions, (b) government listens and responds to the needs of the people, in appropriate cases directly, (c) collective decisions are taken by majority vote after due consideration of the views of minority parties, and (d) the reasons for all collective decisions are publicly explained. (2) The rights necessary to maintain such a form of government must be enshrined in a supreme-law Bill of Rights, enforced by an independent judiciary, whose task it shall be to ensure that, whenever the will of the

arguments in support of that principle here. We will, however, draw down on several of his arguments, especially those that serve part (2) of his 'principle of democracy'.

The argument that lends the greatest force to our general theory of limitations analysis is Roux's contention that, read together, FC ss 7(1), 36(1), and 39(1) 'structure the way in which the tension between rights and democracy is to be managed in South African constitutional law'.[1] We have argued, over the course of this chapter, that FC ss 36(1) and 39(1) require a value-based approach to fundamental rights analysis and limitations analysis in part because they invoke the same set of values, the same linguistic trope, 'an open and democratic society based upon human dignity, equality and freedom'. However, Roux's connection of the oft-ignored FC s 7(1) to both fundamental rights interpretation (FC s 39) and limitations analysis (FC s 36) enables us to make four new critical points in this chapter.

First, FC s 7(1) reads: 'The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.' Notice that democracy is treated as an independent value. Notice that the values of human dignity, equality and freedom are 'democratic' values. At a minimum, the language of FC s 7(1) should give pause to those interpreters of the basic law who privilege, reflexively, the value of human dignity. One can press this point further and argue that FC s 7(1), in fact, reverses the spin placed by the Constitutional Court on the phrase 'an open and democratic society based upon human dignity, equality and freedom'. It makes a democratic society, and not dignity, foundational.

Second, it is, we think, unnecessary to read the language of FC s 7(1) in a manner that privileges democracy over dignity. Indeed, FC s 7(1) and Roux suggest that we should be just as wary of such overly simplistic reductions (rights service democracy) as we are chary of claims that rights and democracy stand in

majority, expressed in the form of a law of general application, runs counter to a right in the Bill of Rights, the resolution of that tension promotes the values of human dignity, equality and freedom. Roux 'Democracy' (supra) at § 10.5(b)(Author's italics removed.) Although the Court has yet to provide an answer of its own to the question posed in *UDM*, several justices have articulated accounts of 'democracy' that suggest that Roux's principle is nascent in our Court's jurisprudence. Roux notes that in her powerful dissent in *New National Party v Government of the Republic of South Africa*, 'O'Regan J stressed the centrality of the right to vote in the consolidation of South African democracy, remarking that: "The right to vote is foundational to a democratic system. Without it, there can be no democracy at all."' 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 122. O'Regan J's dissent, Roux continues, 'also supports the second element of the principle of democracy . . . . [I]t is integral to the Final Constitution's conception of democracy that rights be capable of trumping the will of the majority where such a result better serves "the democratic values of human dignity, equality and freedom".' Roux (supra) at § 10.5(c). Roux acknowledges that Sachs J's remarks in *Masondo* 'articulate many of the elements of the principle of democracy that [this chapter has] argued [are] immanent in the constitutional text.' Roux (supra) at § 10.5*(c)* citing *Democratic Alliance & Another v Masondo NO & Another* 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC) at paras 42–43.

[1] Roux (supra) at § 10.3(c).

irreconcilable tension with one another (the counter-majoritarian dilemma). We think that it is enough to suggest, as Roux does, that FC s 7(1) delinks the phrase 'an open and democratic society' from 'human dignity, equality and freedom'. That is, whereas the phrase 'open and democratic society based upon human dignity, equality and freedom' suggests a miasma of 'big' ideas that, if read jointly and severally, could exhaust the entire universe of modern political theory, delinking the two phrases forces the reader of FC ss 36(1) and 39(1) to stop and attend — for a moment — to the meaning, as well as the desiderata, of an 'open and democratic society'. Even if it does nothing else, by reading FC s 7(1) together with FC s 36(1), we are forced to concede that the principle of democracy is, at least, of equal weight as the value of dignity when it comes to the justification of a limitation of a fundamental right.

Third, Roux's arguments support our contention that scales and balancing are inapt metaphors for limitations analysis. Such metaphors block one from drawing the conclusion to which FC s 7(1) has already alerted us: namely, that rights stand not in opposition to democracy, but that they are, instead, constitutive of it. That is to say, without the rights to equality, dignity, life, belief, expression, assembly, association, voting, political party membership, citizenship, access to information, access to courts, and just administrative action, we would not have a meaningful democracy. These rights are themselves the preconditions for an 'open and democratic society'.

Fourth, the principle of democracy, when taken seriously, gets read back into these rights. And by that we mean that the virtues of belonging, deliberating and participating, identified first and foremost with democracy, attach not just to the political realm, but to an array of associational forms — religious, traditional, linguistic, commercial, labour, intimate, cultural — that are part of, but not identical to the political. So, although Roux does not make this claim, we do.[1] Indeed, it is an appreciation for these 'democratic' values of membership, deliberation and participation that underwrites our defence of pluralism, marginal social groups and 'oppositional counterpublics'.[2] And we value pluralism, and thus marginal social groups and 'oppositional counterpublics', not simply because they serve as reminders of the emancipatory potential of robust democratic discourse, but because these groups, and others like them, are where democracy takes place everyday for the vast majority of us.[3]

Finally, we agree with Roux that 'no South African political system claiming to be democratic would be worthy of that name unless it respected the democratic

[1] See Woolman 'Freedom of Association' (supra) at § 44.1(b).

[2] Kendall Thomas 'Racial Justice' in A Sarat, G Bryant & R Kagan (eds) *Looking Back at Law's Century* (2002) 78, 87.

[3] The Constitutional Court itself may be slowly coming round to this very position. In its recent judgment in *Fourie*, the Court remarked that '[t]he hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner.' *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others, Amici Curiae)*; *Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at para 95 as cited by Roux (supra) at § 10.3(c).

values which the Bill of Rights affirms.'[1] This view firmly reinforces our own views about the relationship between courts and legislatures in a regime of 'shared constitutional interpretation'. In such a regime, as in the political system contemplated by FC ss 7(1), 36(1) and 39(1), neither the courts nor the political branches of government have a privileged position with regard to the making and the remaking of our basic law.

(bbb) Principle of openness

The dissenting judgment of Sachs J in *Prince* resonates with Roux's understanding of democracy, and sounds themes similar to our own thoughts about the relationship between democracy and the other values that ought to inform limitations analysis. In his dissent in *Prince*, Sachs J stressed the need in an 'open and democratic society' faced with seemingly intractable conflicts — between the state and religious communities — for a 'reasonable accommodation' of interests.[2] This accommodation requires mutual recognition and 'a reasonable measure of give-and-take from all sides'.[3] Sachs J, not surprisingly, finds that the majority's refusal to carve out an exemption for bona fide religious use of cannabis offends this very principle. The majority judgment, he writes, 'puts a thumb on the scales in favour of ease of law-enforcement, and gives insufficient weight to the impact the measure will have, not only on the fundamental rights of the appellant and his religious community, but on the basic notion of tolerance and respect for diversity that our Constitution demands for and from all in our society'.[4] The majority's suppression of cultural and religious differences harms not only the individuals and the communities concerned, but society as a whole. He continues:

> [F]aith and public interest overlap and intertwine in the need to protect tolerance as a constitutional virtue and respect for diversity and openness as a constitutional principle. Religious tolerance is accordingly not only important to those individuals who are saved from having to make excruciating choices between their beliefs and the law. It is deeply meaningful to all of us because religion and belief matter, and because living in an open society matters.[5]

For Sachs J, freedom of belief and the freedom to express such belief are fundamental not only to the freedom and the dignity of the believers concerned, but also to the diversity and the openness that are the lifeblood of a democracy. Democracy, Sachs J seems to be saying, presupposes the capability of marginalized and vulnerable minorities to challenge the normative closure into which political communities tend to lapse. A political community can only remain free if it values plurality and difference, and allows out-groups to disturb and to

[1] Roux (supra) at § 10.3(c).
[2] See *Prince* (supra) at paras 146, 155–156 and 170.
[3] Ibid at para 161.
[4] Ibid at para 147.
[5] Ibid at para 170.

challenge deeply held majoritarian beliefs and practices.[1] For this reason, the critical challenge for our constitutional 'democracy' consists 'not in accepting what is familiar and easily accommodated, but in giving reasonable space to what is "unusual, bizarre or even threatening"'.[2]

Nowhere in his judgment does Sachs J renounce the language of dignity, or question its centrality to the Final Constitution. In fact, his judgment can be read as an endorsement of the constitutional commitment to dignity, and a celebration of dignity's commitment to self-worth, self-actualization and self-governance.[3] What is significant about his judgment, however, is the manner in which the language of dignity is supplemented by a more nuanced account of democracy — a Whitmanian vision of democracy that ties the ability of individuals to re-imagine their own identities to the capacity of the political community for transformation.[4]

Underlying Sachs J's radically democratic vision is an equally egalitarian concern — the demand for equal recognition, as Charles Taylor puts it[5] — for marginal cultures, worldviews and lifestyles.[6] Sachs J emphasizes the political powerlessness of the Rastafari in a manner that recalls the concerns of representation-reinforcing process theory.[7] The continuing disempowerment of the Rastafari unmasks the power relations lurking beneath a veneer of formally equal treatment, and shows how facially neutral laws are conditioned by background assumptions that define 'normality' in terms of conformity to the tenets of mainstream religions. At the same time, it presents the political community with an opportunity to reconsider the ways in which the boundaries of citizenship are being drawn. Of the relationship between the 'romantic-liberal' view of constitutionalism and the struggle of out-groups for recognition, Frank Michelman writes:

> A chief aim of the romantic-liberal constitution must be to free 'the life-chances of the individual from the tyranny of social categories' of 'classes, sexes, and nations'. The benefit accrues not only to the emancipated: it is structural and systemic, and accrues to everyone. Everyone, in the romantic view, has reason to welcome confrontation and challenge of his or her accustomed or habitual ways and values, from all quarters known and unknown. Democracy accordingly becomes not just a procedural but a substantive ideal — a

[1] *Prince* (supra) at para 147 ('[P]ractical inconvenience and disturbance of established majoritarian mind-sets are the price that constitutionalism exacts from government.')

[2] Ibid at para 172.

[3] Ibid at paras 148 and 151. Moreover, the dissenting judgment of Ngcobo J, in which Sachs J concurred, made much of the way the general prohibition stigmatises Rastafari, and thus 'strikes at the very core of their human dignity'. See *Prince* (supra) at paras 48–51.

[4] For a fuller elaboration of this understanding of democracy, see Frank Michelman *Brennan and Democracy* (1999) 68–89; Frank Michelman 'Law's Republic' (1988) 97 *Yale LJ* 1493.

[5] Charles Taylor *The Ethics of Authenticity* (1992).

[6] Sachs insists that the case must be seen against the background of the use of cannabis in Africa in pre-colonial times and in the African diaspora. Ibid at paras 152–53. He also draws parallels between the outlawing of cannabis and the prejudice that all other non-Protestant religions have encountered in South Africa. Ibid at para 159. By contrast, the majority regards this history as irrelevant to the constitutionality of the legislation. Ibid at para 105.

[7] John Hart Ely *Democracy and Distrust* (1981).

> commitment to empower the disempowered and reconnect the alienated. Likewise, freedom of expression figures for the romantic constitutionalist as both an individual right of self-presentation — of efficacious participation or citizenship — and a social-structural provision for imbuing social life with the enrichment, and politics with the knowledge, sparked by frictional contact with human outlooks and sensibilities other than those to which one has grown accustomed.[1]

This constitutional vision is attractive for our account of limitations analysis for a number of reasons. First, it calls for a form of limitations analysis under FC s 36 which does not privilege a single value — say dignity. Our non-reductionist account of the values at play in limitations analysis — and our emphasis on democracy and openness — may counter the tendency to overlook forms of group-based disadvantage not easily captured by the language of dignity.[2] Put slightly differently, FC s 36's commitment to openness ought to underwrite an approach to limitations analysis that challenges any unitary conception of the good. Second, a commitment to openness recognizes that some conflicts may be intractable just as some values are, in given contexts, incommensurable. This commitment, to plurality and to difference, should serve to counter naïve attempts to 'balance' conflicting interests in terms of FC s 36.[3] Third, a commitment to openness helps us to make further sense of FC s 7(1)'s statement that the Bill of Rights 'is a cornerstone of democracy in South Africa'. FC s 7(1)'s vision of democracy presupposes public processes of deliberation and participation that enhance openness, plurality and difference.[4] Although this vision does not resolve the tension between democracy and rights, it enables us to explore the potential of rights litigation to strengthen democracy. Finally, the commitment to a principle of openness in FC s 36 alerts us to the ways in which the lack of access of certain groups to the levers of political power is re-inforced by apparently neutral laws that privilege certain worldviews over others. It reminds us of the emancipatory potential of robust democratic discourse, and the capacity of marginal social groups or 'oppositional counterpublics'[5] to contest dominant notions of normality[6] and to challenge the tendency of the political community to assume its own moral completion.[7]

(iii) *Judicial narratives*

In the previous two sections, we tried to develop limitations analysis in a manner that makes greater sense both from an institutional perspective and from a

[1] Michelman *Brennan and Democracy* (supra) at 70– 71.
[2] See Botha 'Equality' (supra) at 746–51.
[3] Sachs J himself states that '[s]ome problems might by their very nature contain intractable elements' and that 'no amount of formal constitutional analysis can in itself resolve the problem of balancing' conflicting goods. *Jordan* (supra) at para 170.
[4] Ibid at paras 170–171.
[5] Thomas (supra) at 87.
[6] See Botha 'Equality' (supra) 745–746 (Argues that the majority judgment in *Jordan* rested upon a highly conventional understanding of what constitutes normal sexual relations, and prevented oppositional discourses of sexuality from entering mainstream public discourse.)
[7] Michelman *Brennam and Democracy* (supra) at 71.

normative perspective. However, just as shared constitutional interpretation does not provide a simple answer to the inevitable political conflicts that arise out of the dual commitment to the doctrines of constitutional supremacy and separation of powers, even a normative framework that takes adequate account of both democracy and dignity is not going to resolve — in an unproblematic fashion — the kinds of conflicts between incommensurable goods that arise in constitutional disputes.

How then are judges engaged in limitations analysis to arrive at an optimal decision when neither considerations of institutional comity nor normative coherence yield a univocal conclusion? A number of authors have, of late, suggested that storytelling may yield significant benefits for hard cases, in general, and hard cases in terms of limitations analysis, in particular. As we shall see, a slightly different spin on the FC s 36 factor 'the impact of a limitation' may result in a very different approach to such questions as whether less restrictive means should have been used, or whether deference should be paid to the legislature's choice of means.

That said, the following account of judicial narrative-making is not meant to supplant conventional limitations analysis undertaken by the Court in terms of conventional morality. The virtues of this approach are, rather, visible in a handful of hard cases. In these hard cases, conventional morality refracted through the prism of constitutional norms tends to re-inscribe the marginalization of many out-groups. The requirements of storytelling may force decision-makers to consider a range of possibilities that would not have otherwise occurred to them and thus to alter the conclusions they ultimately reach. In addition, the difference between storytelling in hard cases and cryptic justifications for hard choices — in terms of FC s 36 — is the difference between a good explanation and a bad explanation for the decisions that we take: the better the explanation, the more persuasive it will be — for those who need persuading; the more persuasive the decision, the more legitimate it will be deemed to be.[1] Denser judicial narratives thus serve a good that we have argued is essential in fundamental rights interpretation and limitations analysis: analytical rigour.[2]

[1] Part of what makes at least some judgments in hard cases persuasive is their candour about the limits of judicial decision-making. See Paul Gewirtz 'On I Know It When I See It' (1996) 105 *Yale LJ* 1023, 1042–1043. See also Paul Gewirtz 'Narrative and Rhetoric in the Law' in P Brooks & P Gewirtz (eds) *Law's Stories: Narrative and Rhetoric in the Law* (1996) 2, 11 ('[An] opinion usually ends with the words "It is so ordererd", emphasizing the coercive force that judges wield. But the written justification in the body of the judicial opinion is what gives the order its authority.')

[2] The kind of storytelling mode most conducive to legal storytelling and most consistent with our approach to limitation analysis is the novel. The novel lends itself to the requirements of legal storytelling and constitutional politics because it recognises a plurality of different ways of looking at, understanding, and being in the world.

There are at least two views of the purpose of the novel consistent with this description. Both are excellent descriptions of what a great novel can do. One view serves well the ends of law. The other view stays too true to the novel's comic origins, and perhaps to the absurdity of life, to accommodate the more formal requirements of the law. Salman Rushdie, an advocate of the second view, writes that unlike most religious, political and legal doctrines,

> which seek[ ] to privilege one language above all others, one set of values above all others, one text above all others, the novel has always been about the way in which different languages, values and narratives quarrel, and about the shifting relations between them, which are relations of power. The novel does not seek to establish a privileged language, but it insists upon the freedom to portray and analyse the struggle between the different contestants for such privileges.

Salman Rushdie 'Is Nothing Sacred' *Imaginary Homelands* (1991) 415, 421. The limitations of this view of storytelling with respect to law have to do with a certain level of moral abstinence, a reluctance to make judgments, which attaches to the desire to portray the struggle between competing visions of the world.

A somewhat different approach to the purpose of the novel, and one that has consciously sought to connect the narrative conventions of novels and legal judgments, is offered by Martha Nussbaum. Legal knowledge is, Nussbaum argues,

> not simply intellectual grasp of propositions; it is not even simply intellectual grasp of particular facts; it is perception. It is seeing a complex, concrete reality in a highly lucid and richly responsive way: it is taking in what is there, with imagination and feeling.

Martha Nussbaum '"Finely Aware' and Richly Responsible": Literature and Moral Imagination' in *Love's Knowledge* (1990) 152. See also Martha Nussbaum *Poetic Justice: Literary Imagination and Public Life* (1996). The novel likewise demonstrates to us that communication between individuals in difficult personal and ethical circumstances, in circumstances that urge conflicting but equally compelling claims on the agents involved

> is not simply a matter of the uttering and receiving of general propositions. It partakes both of the specificity and of the emotional and imaginative richness of their individual moral effort. We see [the characters] drawing close in understanding by seeing where they come to share the same pictures.

Nussbaum 'Finely Aware' (supra) at 153. And this, at the risk of oversimplification, is the primary difference between Rushdie and Nussbaum. Rushdie emphasizes his characters' vastly divergent ways of seeing the world and the way in which these ways of seeing ultimately, and irreconcilably, clash. Nussbaum, on the other hand, emphasizes how pictures and stories draw us together, and the manner in which detailed pictures and stories give us the opportunity for shared understanding and mutual transcendence.

Nussbaum does not suggest that painting our pictures and telling our stories offers an easy road to the resolution of conflict and the transcendence of difference. Miscommunication is inevitable. Many moral, political and legal conflicts will remain intractable. Furthermore, the overcoming of such conflict, when it does occur, never occurs without cost:

> There will be times when a confrontation with a new situation may lead the perceiver to revise her standing conception of value, deciding that certain prima facie obligations are not really binding here. But this never takes the form of leaping above or sailing around the standing commitments. And if the perceiver, examining these commitments, decides that they do not in fact bind her, then no free departures will be permitted, and the effort of perception will be an effort of fidelity to all elements of the situation, a tense and laboured effort not to let anyone down.

Nussbaum 'Finely Aware' (supra) at 156. In this last sentence, Nussbaum describes an approach to moral reasoning — and for us, an approach to limitations analysis — which she calls perceptive equilibrium: a basic sense of moral principles that enables us to first see that we have an ethical dilemma and then allows us to work back and forth between our perceptions of a concrete and specific set of events and our rules of thumb until we can finally see what ought to be done. See Martha Nussbaum '"Perceptive Equilibrium" Literary Theory and Ethical Theory' *Love's Knowledge* (1990) 168. This model of reasoning, and the specificity and concreteness of moral situations, means that morality depends to a large extent on judgment. See Martha Nussbaum 'Poets as Judges: Judicial Rhetoric and Literary Imagination' (1995) 62 *Univ Chicago LR* 1477. This dependency on judgment means that some individuals will possess better judgment than others. As Wittgenstein has suggested, it is often as important to watch what good people do in particular situations — the way they work through a moral problem — as it is to memorise rules as to what we ought to do generally. Ludwig Wittgenstein *Philosophical Investigations* (1968) 227 ('Corrector prognoses will generally issue from the judgments of those with better knowledge of mankind. Can one learn from this knowledge? Yes, some can. . . . What one acquires here is not a technique; one learns correct judgments. There are also rules, but they do not form a system, and only people can apply them right.') This then is the connection between storytelling and limitations analysis. Great writers provide us with pictures of what good people ought to do in highly specific and complex fictional situations. Great judges provide us with pictures of what good judges — good government officials and good citizens — ought to do in highly specific and complex legal situations. See Woolman 'Out of Order' (supra) at 116–128. See also Narnia Bohler-Muller *Developing a New Jurisprudence of Gender Equality in South Africa* (LLD thesis, University of Pretoria, 2005, on file with authors) 59–104.

The following two case studies do not prove that storytelling invariably works for limitations analysis in hard cases. No approach to limitations analysis could carry such a burden. They serve a rather more mundane purpose: to show that judges doing constitutional law, who might otherwise be sceptical of storytelling, not only have the capacity to tell stories, but to do so to brilliant effect.[1]

(aa) *Prince*

Consider, again, the dissenting judgment of Sachs J in *Prince*. In Sachs J's view, the idea that the religious freedom of Rastafari must simply give way to the state's interest in law enforcement rests on what he calls the 'hydraulic insistence on conformity to majoritarian standards'.[2] Sachs J challenges the supposed neutrality of this dominant mindset by choosing a narrative perspective that differs fundamentally from that of the majority. Instead of emphasizing law-enforcement, Sachs J tells us a bit about the history of the Rastafari, the centrality of cannabis in their religion, the marginality of the Rastafari in South African life, and their inability to exercise any meaningful influence on the political process. By relocating the limitations inquiry in the 'lived and experienced' reality of the Rastafari, Sachs J's story challenges dominant assumptions about the alleged dangers that certain 'controlled' substances pose for the common good.[3]

[1] It would be disingenuous not to acknowledge that calls for storytelling in law often meet with resistance and scepticism. See Woolman 'Out of Order? (supra) at 128–133 (For an extended discussion of the objections to a storytelling approach.) One reason why lawyers are reluctant to embrace storytelling is that a novel can afford multiple perspectives, contradiction and obscurantism. They may even be integral to the success of a story. A legal judgment, on the other hand, must display the kind of clarity that will enable members of a given society to plan their lives with relative certainty. Furthermore, a legal rule will inevitably impose costs on someone who falls afoul of it. It would, so Judge Richard Posner and Judge Pierre Leval argue, make a mockery of the law to have it written in such a way that financial penalties and prison sentences are meted out in contradictory and arbitrary fashion. Indulging in storytelling courts caprice and inconsistency. See Richard Posner *Law and Literature* (1988); Pierre Leval 'Judicial Opinions as Literature' in P Brooks & P Gewirtz (eds) *Law's Stories: Narrative and Rhetoric in the Law* (1996) 206, 207 ('The objectives of the judicial opinion are far different than those of polemics, poetry and narrative forms of literature. The function of the published opinion is to instruct in the meaning of rules of law, indeed in many cases to declare rules of law. Pursuit of literary techniques is more likely to undermine than to reinforce the success of an opinion in meeting its judicial obligations.') A second objection is that the analogy between law and storytelling is misleading: whilst storytelling invites the open play of meaning, legal interpretation is closely linked to the law's quest for certainty, finality and closure. Moreover, law, according to Robert Cover, is inextricably bound up with the authorization of state violence:

> Not only does the violence of judges and officials, the violence of a posited constitutional order, exist. It is generally understood to be implicit in the practice of law and government. Violence is so intrinsic a characteristic of the structure of the activity that it need not be mentioned: Read the constitution. Nowhere does it state the obvious: that the government thereby ordained has the power to practice violence over its people.

Robert Cover 'The Bonds of Constitutional Interpretation: Of the Word, the Deed and the Role' (1986) 20 *Georgia LR* 815, 819. Cover's insights into the violence countenanced by law are important reminders of the limits of legal storytelling.

[2] *Prince* (supra) at 156.

[3] Ibid at para 151.

The minority's stated preference for crafting an exemption for Rastafari ritual use of cannabis also dovetails rather neatly with our description of shared constitutional interpretation. For while the Court would, quite naturally, retain the power to set out very general normative guidelines for the religious use of cannabis by Rastafaris, it would remain up to the legislature, law enforcement officials and representatives of the Rastarfari community to work out the details of an exemption that met the needs of all parties concerned.

(bb) *Jordan and Khosa*

As we have noted elsewhere in this book,[1] the Constitutional Court in *S v Jordan & Others* falls into an 'autonomy trap'. Falling into this trap leads to a failure of legal imagination that actually drives the South African market in sexual slavery. In *Jordan*, the Constitutional Court rejected equality, dignity, privacy and freedom of profession challenges to those sections of the Sexual Offences Act that criminalize prostitution.[2] The majority reasoned as follows:

> If the public sees the recipient of reward as being 'more to blame' than the 'client', and a conviction carries a greater stigma on the 'prostitute' for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attaches to them, not by virtue of their gender, but by virtue of the conduct they engage in. That stigma attaches to female and male prostitutes alike. I am not persuaded by the argument that gender discrimination exists simply because there are more female prostitutes than male prostitutes, just as I would not be persuaded if the same argument were to be advanced by males accused of certain crimes, the great majority of which are committed by men.[3]

The Court's commitment to a very strong form of metaphysical autonomy — a form of autonomy that makes all individuals morally and legally culpable for actions that issue ineluctably from their circumstances — fails dramatically the large number of prostitutes who are victims of sexual trafficking. The *Jordan* Court continues in a very similar vein:

> It was accepted that they have a choice, but it was contended that the choice is limited or 'constrained'. Once it is accepted that [the criminalisation of prostitution] is gender-neutral and that by engaging in commercial sex work prostitutes *knowingly* attract the stigma associated with prostitution, it can hardly be contended that female prostitutes are discriminated against.[4]

First, sexual trafficking is about the sale and the exploitation of women for prostitution. It is about women who have little chance, and no choice, in life's wheel

[1] See Stu Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44; Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

[2] See s 20(1)*(aA)* of the Sexual Offences Act 23 of 1957.

[3] *Jordan* (supra) at paras 16–17.

[4] Ibid at para 16.

of fortune. Second, how 'knowing' that stigma attaches to an event that takes place under conditions of compulsion makes a prostitute culpable remains unclear. The *Jordan* Court's approach may hold in the context of some 'voluntary' forms of prostitution. But the *Jordan* Court's views regarding 'autonomy' makes the manumission of most sexual slaves inconceivable.

A more recent judgment, written by Mokgoro J, hints at a way out of this kind of 'autonomy trap'. In *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*, the Constitutional Court found unconstitutional, as a violation of both FC s 9 and FC s 27(1), the exclusion of permanent residents from the class of persons entitled to a variety of social security grants: old age, disability, veterans, child support and foster care. Mokgoro J writes:

> The exclusion of permanent residents in need of social-security programmes forces them into relationships of dependency upon families, friends and the community in which they live, none of whom may have agreed to sponsor the immigration of such persons to South Africa … Apart from the undue burden that this places on those who take on this responsibility, it is likely to have a serious impact on the dignity of the permanent residents concerned who are cast in the role of supplicants.[1]

Mokgoro J could well have added that permanent residents are, as supplicants, not merely dependent on family members, but quite literally at their mercy.

The same story could well be told of the sexual slaves that *Jordan* necessarily, though never directly, addresses. Many sex slaves would consider themselves fortunate to be supplicants. They are not just excluded from the protection of the law. Many sex slaves do not speak the language, do not know the lay of the land, and do not have the resources to engage corrupt immigration officials or to escape criminal syndicates. Many are enslaved by their own families.[2]

By depicting the permanent residents in *Khosa* as supplicants, Mokgoro J is able to get us to see that FC s 7(2), read with FC ss 9 and 27, places the state under an obligation to protect and to fulfil the rights of all persons in South Africa. By hammering home the point about turning our neighbours into beggars, Mokgoro J shows us that legal regimes that offer incentives to become members of the political community but then punish persons who cannot act on such incentives — by withholding benefits or by threatening incarceration — are perverse. Mokgoro J shows us how the state's denial of various social security grants to permanent residents extinguishes the material conditions for genuine agency. And, in the end, it is this depiction of *Khosa*'s permanent residents as supplicants — as

[1] *Khosa* (supra) at para 76.

[2] Richard Rorty 'Human Rights, Rationality and Sentimentality' in S Shute & S Hurley (eds) *On Human Rights: The Oxford Amnesty Lectures* (1993) 111 (Rorty writes that moral and legal progress is not the result of asking and re-asking the standard philosophical question: 'Why should I be moral?' It is, he argues, a function of asking 'Why should I care about this person, this stranger? And by answering in terms of the sort of long sad story which begins "Because this is what it is like to be in her situation — to be far from home, among strangers" or "Because her mother would grieve for her". Such stories, repeated and varied over centuries, have induced us, the rich, safe, powerful people, to tolerate, and even cherish, powerless people.')

beggars — that convinces a majority of the Court that the children, the aged and the disabled permanently resident in South Africa are entitled to their claim for state support. Had a similar story been told in *Jordan* about the lives of sex slaves, the outcome might well have been different.[1]

34.9 The Purpose of FC s 36(2)

> Except as provided for in subsection (1) or any other provision of this Constitution, no law shall limit any right entrenched in the Bill of Rights.

FC s 36(2) is substantially the same as its predecessor, IC s 33(2).[2] It tells us — for starters — that, in order for a law to limit a right entrenched in Chapter 2, it must satisfy the test set out in FC s 36(1).

However, FC s 36(2) also contains the rather curious proviso that 'any other provision of this Constitution' may provide the grounds for the limitation of a right in the Bill of Rights. The phrase suggests that limitations on fundamental rights may be justified by reference to provisions in the Final Constitution other than FC s 36(1). On one reading, the phrase would appear to permit the override of fundamental rights by other provisions of the Final Constitution without the requirement that they be justified by reference to the test laid out in FC s 36(1).

There is, however, a better reading. Given the primacy of place the Final Constitution accords the Chapter's fundamental rights, and their express purpose of placing clear limits on the exercise of government power, it would be counter-intuitive to subordinate automatically these rights to the exercise of government power. At the very least it should remain an open question as to whether or not the exercise of power expressly provided for by the Final Constitution should be permitted to limit a fundamental right. While we may not want to subject such limitations to the justificatory test set out in FC s 36(1) — because constitutional provisions are not law in the ordinary sense, and probably not the sense contemplated by FC s 36(1) — another kind of justificatory test is warranted. Such a test

[1] Of course, not all prostitutes are sex slaves. Moreover, stories of sexual trafficking are not the only ones worth telling in this context. On the contrary, a storytelling approach accepts that there are multiple stories to be told, and resists the temptation to reduce a class of persons to stereotypical sameness. Drucilla Cornell argues, on the basis of interviews conducted with prostitutes, that for some women, prostitution is 'a representation of [their] sexuate being, a persona that [they have] to live out'. Drucilla Cornell *At the Heart of Freedom: Feminism, Sex, and Equality* (1998) 55. She continues: '[I]n a world of abuse some women will take on the life of a prostitute in order to work though their incestuous and violent pasts.' Ibid at 56. Even though sex workers are subjected to degradation and alienation, Cornell argues that they have not thereby renounced their right to establish their own autonomous identity. She concludes that '[s]tate-enforced moralism hinders what we as feminists should seek: the psychic, political, and ethical space for women to represent themselves.' Ibid at 58.

[2] IC s 33(2) read: 'Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of common law, customary law or legislation, shall limit any right entrenched in this Chapter.' There is one noteworthy difference between FC s 36(2) and its predecessor. FC s 36(2) deletes the modifying clause 'whether a rule of common law, customary law or legislation' that followed the phrase 'no law' in IC s 33(2). The drafters appear to have recognized that the purpose of FC s 36 is primarily to set the parameters for limitations of the substantive provisions of the Bill of Rights and not to establish the application of the Bill.

might legitimately treat the kinds of justification for a constitutional-power-based incursion into a fundamental right differently than FC s 36(1) treats the justifications for statutory, executive, common-law or customary-law infringements of fundamental rights.

The position adumbrated above is consistent with the Canadian jurisprudence on 'internal' constitutional conflicts. No part of the Canadian Constitution is deemed to be superior to any other part. The Charter, therefore, may not be used to invalidate other provisions of the Constitution.[1] The Canadian Supreme Court has crafted a more subtle distinction that permits application of the Charter to *acts* performed in the *exercise* of a constitutional power.[2] The test the Supreme Court employs turns on whether acceding to the Charter argument negates or removes a constitutional power (part of the tree itself). If so, the Charter does not apply. If, however, the attack merely engages the exercise of a constitutional power (the fruit of the tree), then a court may hear the Charter argument.[3]

The High Court in *De Lille v Speaker of the National Assembly* provides some clarity on the South African courts' take on this complex set of issues. In *De Lille* the applicant was found by Parliament to have violated alleged rules of parliamentary privilege.[4] She was duly punished and suspended. The question for the court was whether the constitutional provisions dealing with the powers of Parliament could justifiably limit the constitutional rights of the applicant: especially the rights to administrative justice, political participation and freedom of expression.

Parliament had taken the position that the rules of parliamentary privilege — which generally involve the power of the National Assembly to order its own affairs — were entirely immune from judicial review. The High Court in *De Lille* Court rejected this view.

The *De Lille* court observed that in terms of FC s 2, the Final Constitution is the supreme law of the Republic and that any law or conduct inconsistent with the Final Constitution is invalid. The Court then noted that, according to FC s 8(1), the Bill of Rights applies to all law and binds the legislature, the executive,

[1] See *Reference re Act to Amend Education Act (Ont)* [1987] 1 SCR 1148, (1987) 40 DLR (4th) 18. With regard to the determination of whether a law is constitutional or not, Peter Hogg argues for the logical priority of the constitutional provisions regulating the legislative process over the rights and freedoms found in the Charter: 'It is impossible for a nation to be governed without bodies possessing legislative powers, but it is possible for a nation to be governed without a Charter. Another point in favour of the logical priority of federalism issues over Charter issues is the presence in the Charter of Rights of the power of override.' Peter Hogg 'Judicial Review on Federal Grounds' *Constitutional Law of Canada* (4th Edition 2002) 15-2–15-5.

[2] See *New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 SCR 319, 100 DLR (4th) 212.

[3] Ibid at 373. See Peter Hogg 'Application' *Constitutional Law of Canada* (4th Edition 2002) 34-9–34-12.

[4] *De Lille & Another v Speaker of the National Assembly* 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C)('*De Lille*'). The decision of the Cape High Court was confirmed by the Supreme Court of Appeal, but on non-constitutional grounds. See *Speaker of the National Assembly v De Lille & Another* 1999 (4) SA 863 (SCA), 1999 (11) BCLR 1339 (SCA)(Court found suspension unwarranted — *ultra vires* — in the absence of legislation or rules that might permit such punishment.)

the judiciary and all organs of state.[1] Any rules or legislation regarding privilege inconsistent or incompatible with the Final Constitution — even if drawn from the provisions of the Final Constitution itself — must be found infirm. In *De Lille*, the High Court found that the power of parliamentary privilege was so inextricably bound up with the exercise of the privilege that the two could not be distinguished. The *De Lille* court was therefore obliged to hold that the determination of the extent of this privilege must relate to its exercise, and that both must therefore be subject to judicial review. If the High Court had decided otherwise, Parliament would have had a blank cheque to set the limits of its own powers.[2] Most importantly, this specific exercise of judicial review enabled the court to find that Parliament had exercised its powers in breach of the substantive provisions of Chapter 2. *De Lille* suggests that where another provision of the Final Constitution appears to contemplate a limitation of a fundamental right, no such limit should be permitted without clear and convincing textual evidence.

De Lille also supports the proposition that the exercise of powers sourced from non-Chapter 2 constitutional provisions that impair the exercise of a substantive provision of Chapter 2 cannot — unless authorized by law of general application — be justified by reference to FC s 36. Hlophe J writes:

> The suspension of the first applicant fails the first leg of the limitations test because it did not take place in terms of law of general application. There is no law of general application which authorises such suspension. It is not authorised by the Constitution, the Powers and Privileges of Parliaments Act of 1963 or the Standing Rules of the National Assembly. The law of Parliamentary privilege does not qualify as a law of general application for purposes of s 36. It is not codified or capable of ascertainment. Nor is it based on a clear system of precedent. Therefore there is no guarantee of parity of treatment. It is essentially ad hoc jurisprudence which applies unequally to different parties. . . . Accordingly, the law of privilege fails the 'law of general application' leg of the limitations test.[3]

When can the parliamentary right to free speech afforded by FC s 58, and reinforced by FC s 16, be justified by reference to FC s 36(1)? Beyond its finding that any restrictions on privilege must be justified in terms of law of general application, the *De Lille* court does not say.[4]

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[1] *De Lille* (supra) at 452.

[2] Ibid at 446–447.

[3] Ibid at 455. See also *Speaker of the National Assembly v De Lille & Another* 1999 (4) SA 863 (SCA), 1999 (11) BCLR 1339 (SCA)(Finding that Parliament acted *ultra vires* consistent with High Court finding that Parliament did not act in terms of any cognizable law.)

[4] See, further, *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC)('*UDM*'). The Constitutional Court in *UDM* offers a somewhat different, although ultimately consistent, take on the subject. In June 2002, Parliament passed four Acts that aimed to allow members of national, provincial and local government to change parties without losing their seats. With regard to the constitutional attack on the validity of two constitutional amendments — the First Amendment Act and the Second Amendment Act — the *UDM* Court was quite clear:

> Amendments to the Constitution passed in accordance with the requirements of s 74 of the Constitution become part of the Constitution. Once part of the Constitution, they cannot be challenged on the grounds of inconsistency with other provisions of the Constitution. The

Constitution, as amended, must be read as a whole and its provisions must be interpreted in harmony with one another. It follows that there is little if any scope for challenging the constitutionality of amendments that are passed in accordance with the prescribed procedures and majorities.

Ibid at para 14. The various challenges to the two amendments failed. A normal act of Parliament — even one married to constitutional amendments — is not due such deference. The Membership Act — having failed to comply with the requirements of Item 23A of Annexure A to Schedule 6 to the Final Constitution — suffered the fate of ordinary legislation. It was held to be unconstitutional. But see *Matatiele Municipality & Others v President of the Republic of South Africa & Others* CCT 73/05 (as yet unreported decision of 18 August 2006)(Constitutional amendment altering provincial boundaries declared unconstitutional because Parliament failed to follow appropriate procedures: namely, adequate consultation with, and participation of, the public.)

Read together, *De Lille* and *UDM* provide support for the following propositions: (1) Chapter 2's fundamental rights and freedoms will take precedence over law and conduct authorized by other constitutional provisions; (2) while the primacy of place of fundamental rights in the Final Constitution militates against subordinating fundamental rights to constitutionally articulated government powers, fundamental rights have no automatic claim of priority over constitutionally articulated government powers; (3) accepted canons of constitutional interpretation require that the courts must first attempt to harmonize Chapter 2 and non-Chapter 2 claims; and (4) when harmonizing the rights and freedoms found in Chapter 2 with constitutionally articulated government powers, a court should attempt to cast the constitutionally articulated government powers in a manner that gives greatest effect to the rights and freedoms at stake.

CONSTITUTIONAL LAW OF SOUTH AFRICA

Second Edition

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9 Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.[1]

35.1 Equality in the Final Constitution

(a) Introduction

The founding provisions describe South Africa as 'one sovereign, democratic state founded on the … values [of] … human dignity, the achievement of *equality* and the advancement of human rights and freedoms, non-racialism and non-sexism'.[2] The Bill of Rights includes a detailed and substantive equality right that embraces freedom from unfair discrimination, as well as positive measures to advance equality. In addition, the Bill of Rights as a whole is described as 'a cornerstone of democracy … [that] … affirms the democratic values of human dignity, *equality* and freedom'.[3]

The achievement of equality is thus a constitutional imperative of the first order. As the Constitutional Court has put it: '[The] Constitution *commands* us to strive for a society built on the democratic values of human dignity, the achievement of equality and freedom.'[4] This project is, in turn, part of a broader project aimed at the transformation of South African society:

> Both the Constitutional Court and other courts view the Constitution as transformative. The previous Chief Justice has written that a 'commitment to transform our society lies at the heart of the new constitutional order'. It is clear that the notion of transformation has played and will play a vital role in interpreting the Constitution.[5]

[1] Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)('Final Constitution' or 'FC').

[2] FC s 1*(a)* (emphasis added). See also FC s 36(1) which permits limitations of the rights guaranteed in the Bill of Rights only where such limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom', and FC s 39(1)*(a)* which enjoins courts to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom' when interpreting the Bill of Rights.

[3] FC s 7(1). (emphasis added).

[4] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC) at para 22 (emphasis added).

[5] P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch LR* 351, 351 (footnotes omitted).

The enormity of this challenge in relation to the achievement of equality is reflected in former Chief Justice Arthur Chaskalson's reminder of the deep inequalities of the past:

> In 1996 when the Constitutional Assembly adopted a Constitution for South Africa we were one of the most unequal societies in the world. We had recently emerged, almost miraculously, from a repressive and undemocratic legal order, and had embraced democracy. The past hung over us and profoundly affected the environment in which we were living. The great majority of our people had been the victims of a vicious system of racial discrimination and repression which had affected them deeply in almost all aspects of their lives. This was seen most obviously in the disparities of wealth and skills between those who had benefited from colonial rule and apartheid and those who had not. In the contrast between those with land, and the millions of landless people; between those with homes and the millions without access to adequate housing; between those living in comfort and the millions without access to adequate health facilities, clean water and electricity, between those with secure occupations and the millions who were unemployed or had limited employment opportunities.[1]

Inequalities in South Africa are deep and pervasive, scarring every aspect of society. The scope and complexity of these inequalities complicate the constitutional task of achieving equality, provide many potential answers to the question 'equality of what?',[2] and pose difficult challenges to courts tasked with enforcing the Final Constitution. Another Chief Justice, Beverley McLaughlin of the Canadian Supreme Court, has called equality 'the most difficult right' — a right that often promises more than it can deliver and tends to trouble the boundary between the judiciary, the legislature and the executive.[3]

This chapter explores this 'most difficult of rights' — equality — as both a value and a right. The constitutional value of achieving equality underwrites broad aspirations about the constitution of a future society. Unfettered by institutional constraints, the value enables a democratic dialogue about the nature and the goals of transformation.[4] Together with other constitutional values — such as dignity, freedom, openness and democracy — equality gives meaning to specific substantive constitutional rights. The right to equality, on the other hand, provides an important mechanism for 'achieving equality', and the Constitutional

[1] 'Equality as a Founding Value of the South African Constitution' *Oliver Schreiner Lecture* University of the Witwatersrand (February 2001).

[2] It is, perhaps, trite now to say that the idea of equality always entails this question. See A Sen *Inequality Re-examined* (1992) 23–26.

[3] B McLachlin 'Equality: The Most Difficult Right' (2000) 14 *The Supreme Court Law Review* 17.

[4] Drawing on the work of Henk Botha and Johan van der Walt, Chief Justice Langa refers to the notion that 'transformation is a permanent ideal — a way of looking at the world that creates a space in which the idea of change is constant'. This enables an ongoing dialogue in which 'new ways of being are constantly explored and created, accepted and rejected'. Langa (supra) at 345 citing H Botha 'Metaphoric Reasoning and Transformative Constitutionalism: Part I' (2002) *TSAR* 512; H Botha 'Metaphoric Reasoning and Transformative Constitutionalism: Part I' (2003) *TSAR* 612; and J van der Walt *Law and Sacrifice* (2006).

Court has used this tool to develop a powerful and progressive jurisprudence. However, because rights give rise to rules and enforceable claims,[1] they are limited in ways values are not: namely, they are constrained by the contours of justiciability and by the role of courts in a constitutional democracy.

The next section explores the meaning of the 'value' of equality, with explicit reference to the nature of inequality in South Africa. It endorses a substantive conception of equality and adumbrates the consequences of a theory of 'substantive equality' for the enforcement of the right to equality. To this end, it focuses particularly on the values underlying the equality right, and the manner in which they shape its application. The following section, § 35.2, provides an overview of the right, FC s 9, followed by a detailed discussion of each of its provisions in §§ 35.3–35.5. The chapter concludes with a brief discussion of the Promotion of Equality and Prevention of Unfair Discrimination Act.

(b) The meaning of equality

The meaning of equality in any jurisdiction is influenced by the historical, socio-political and legal conditions of the society concerned. An important starting point for understanding equality in South Africa is the nature of the inequalities that have characterized its past and still haunt its present. For centuries that past was defined by the extensive and systematic exclusion and subordination of black people in all aspects of political, social and economic life.[2] Under colonialism and apartheid, the colour of one's skin determined whether one could vote or access quality education, where one could own land or live, the services and amenities one could enjoy, and the nature and availability of economic opportunities. These systems produced and reinforced racially-based inequalities that became part of the structure of economic and social relations. Deep-seated racial prejudice and racial disparities in education, health status, income and employment, access to land and housing persist to this day.

South Africa is also a deeply patriarchal society in which women have been subordinated in public and private life. All women live in the shadow of gendered stereotypes that act as obstacles to their full participation in society. In general, women have less access to economic opportunities than men, and are more likely

[1] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) at para 21. See also S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) § 36.3*(d)*(Dignity operates as a first order rule, a second order rule, a correlative right and a grundnorm. As a first order rule, the right to dignity disposes of specific disputes. As a second order rule, the right to dignity shapes the Court's application of another right, say equality, to a specific dispute. As a grundnorm, the value of dignity shapes both the interpretation of specific substantive rights and informs the justifications for limitations of specific substantive rights.)

[2] Several cases have addressed this past: *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 40; *Pretoria City Council v Walker* 1998 (2) SA 263 (CC), 1998 (3) BCLR 257 (CC) at para 46; *Moseneke v Master of the High Court* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC); *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC); *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC).

to be poor or dependent upon men to meet their basic needs.[1] At the same time, the gendered division of labour in the household affects the ability of all women to participate fully in the economy.[2] To make matters worse, women are subject to high levels of violence and abuse, especially in the home.[3] Many women live at the confluence of poverty and violence and possess limited access to basic amenities and resources.[4] The majority of these women are black and rural or working class. The strong links between gender, race and class continually reinforce the social and economic subordination of women in South Africa.

Although race, class and gender inequalities are particularly visible, our society is also marked by other inequalities that intersect with race and gender. Thus racial discrimination has often masked, reflected or reinforced inequalities based on religion, language, culture, ethnicity and colour. South Africa is also said to be a deeply xenophobic society.[5] Deep-rooted prejudices against gay and lesbian people,[6] stigmatization of persons on the basis of their actual or perceived HIV status[7] and systemic discrimination against disabled persons[8] remain widespread.

All of these inequalities are captured in the protection against unfair discrimination in FC s 9,[9] and addressing them is an important part of the constitutional project of transformation.[10] To do so requires both a strong concept of equality

[1] While the unemployment rate amongst all Africans is 50,2%, it is 57,8% among African women. This exceeds that of coloured (28,6%), Indian (18,7%) and white (6,6%) women. Of those women who are employed, 84% of African women (1 181 897 out of 1 402 338) are in elementary (unskilled) occupations. Only 0,005% of Indian women and 0,014% of white women are in elementary (unskilled) occupations. See Statistics South Africa *Census 2001: Census in Brief* (2003) 55, 71.

[2] See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 38.

[3] Official research reveals that 2,1% of women report sexual abuse. Statistics South Africa *Quantitative Research Finding on Rape in South Africa* (2000). Women's organizations estimate that as few as one in 20 rapes are reported. These levels of gender violence in South African society exist across race and class. Poor women are more vulnerable not only because of their greater economic dependency, but also because of factors such as lack of secure housing, reliance on often-dangerous forms of public transport, and lack of municipal amenities such as street lighting.

[4] 37% of rural women-headed households fall within the poorest group of households, as compared with 23% of rural male-headed households, 15% of urban women-headed households and 5% of urban male-headed households. D Budlender *Women and Men* (1998) 5 Figure 3. On the problems with the concepts of woman-headed and male-headed households, see D Budlender 'Women and Poverty' (2005) *Agenda* 30-31.

[5] See, eg, *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* CCT 39/09 judgment of 12 December 2006 (as yet unreported)('*Union of Refugee Women*').

[6] For more on sexual orientation and equality, see § 35.5*(g)*(v) infra.

[7] See, eg, *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC).

[8] South African Human Rights Commission *Towards a Barrier-free Society: A Report on Accessibility in Built Environments* (2002).

[9] FC ss 9(3) and (4) list fourteen grounds of impermissible unfair discrimination. See § 35.5*(g)* below.

[10] The notion of transformative constitutionalism has characterized much of the writing on equality. See K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146. See also C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248 ('Facing the Challenge of Transformation'); S Liebenberg & M O'Sullivan 'South Africa's New Equality Legislation. A Tool for Advancing Women's Socio-economic Equality?' in S Jagwanth & E Kalula (eds) *Equality Law*: *Reflections from South Africa and*

and an idea of law as a tool for social change. For many in academia and the Constitutional Court, this combination of concepts is best located in the idea of substantive equality. In a 2006 address at Stellenbosch University, Langa CJ identified substantive equality as one of the key measures of transformation in our society. Here he was referring to the aspirational value of substantive equality: a social and economic revolution in which all enjoy equal access to the resources and amenities of life, and are able to develop to their full human potential.[1] This goal requires the dismantling of systemic inequalities, the eradication of poverty and disadvantage (economic equality) and the affirmation of diverse human identities and capabilities (social equality). It confirms a strong relationship between substantive equality and the achievement of socio-economic rights.[2]

The value of substantive equality does not provide a definitive answer to the question: 'equality of what?' It does, however, suggest that the constitutional answer is, at the very least, a social democratic vision that entails both equality of opportunities and equality of outcomes. Such a vision also embraces the idea of redistribution of power and resources and the elimination of material disadvantage. This is not an uncontested vision, however. Former Constitutional Court Judge Laurie Ackermann has recently argued that the meaning of equality in South Africa is determined solely by the idea of dignity.[3] Several feminist scholars, on the other hand, have criticized the focus on disadvantage within substantive equality: they contend that it ignores the agency and capabilities of human beings.[4]

The aspirational value of achieving equality is capable of an expansive meaning. It is largely unencumbered by more practical considerations manifest in the doctrine of the separation of powers and related concerns regarding institutional competence. However, constitutional rights, as legal entitlements, must be enforced through the courts. How, then, is the idea of substantive equality captured in law, and more particularly, within the equality right?

(c) Substantive equality in law

The best way of understanding the legal idea of substantive equality is to contrast it with the dominant idea of equality in Anglo-American jurisprudence: formal

Elsewhere (2001) 70; P de Vos '*Grootboom,* the Right of Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 *SAJHR* 258; AJ van der Walt 'A South African Reading of Frank Michelman's Theory of Justice' in H Botha, AJ van der Walt & J van der Walt *Rights and Democracy in a Transformative Constitution* (2003); S Jagwanth 'Expanding Equality' in C Murray & M O'Sullivan (eds) *Advancing Women's Rights* (2005) 131; S Jagwanth & C Murray 'No Nation Can Be Free When One Half of It is Enslaved: Constitutional Equality for Women in South Africa' in B Baines & R Rubio-Marin *The Gender of Constitutional Jurisprudence* (2005) 230; Langa (supra) at 352.

[1] Langa (supra) at 352-53 citing Albertyn & Goldblatt 'Facing the Challenge of Transformation' (supra) at 248.

[2] For a discussion on the relationship between equality and socio-economic rights, see B Goldblatt & S Liebenberg 'Achieving Substantive Equality in South Africa: The Relationship between Equality and Socio-Economic Rights' (forthcoming, 2007).

[3] 'Equality and Non-discrimination: Some Analytical Thoughts' (2006) 22 *SAJHR* 606.

[4] See, eg, K van Marle 'Equality: An Ethical Interpretation' (2000) 63 *THRHR* 595; N Bohler-Muller 'The Promise of Equality Courts' (2006) 22 *SAJHR* 380.

equality. Formal equality is based on the idea that inequality is irrational and arbitrary. It presumes that all persons are equal, and that any differential treatment on the basis of arbitrary grounds, such as race or gender, is almost inevitably suspect and irrational. Formal equality also entails a formal approach to law (legal formalism) in which issues are narrowly defined and abstracted from social life. The actual social and economic differences between individuals and groups are not seen to be essential to the legal enquiry. Formal equality is perhaps best described as the abstract prescription of equal treatment for all persons, regardless of their actual circumstances. It perceives inequalities as irrational aberrations in an otherwise just social order. These aberrations can be overcome by extending the same rights and entitlements to all, in accordance with the same 'neutral' standard of measurement.[1]

As a result, a formal equality approach cannot tolerate differences: affirmative action measures are seen as forms of discrimination, rather than as efforts to further a commitment to equality.[2] Its reliance on 'neutrality' tends to mask forms of judicial bias and also ignores the actual social and economic differences between individuals and groups. The application of standards that appear to be neutral, but which often embody the interests and experiences of socially privileged groups, means that a legal commitment to formal equality may exacerbate the inequality of socially or economically disadvantaged groups.[3]

By contrast, a legal understanding of substantive equality proceeds from the recognition that inequality not only emerges from irrational legal distinctions, but is often more deeply rooted in social and economic cleavages between groups in society. Such inequalities are referred to as 'systemic', as they are rooted in the structures and institutions of society. Legal claims (usually of discrimination) that target such inequalities require an understanding of the underlying social and economic conditions that create and reinforce these inequalities, if such claims are to remedy inequality.

A legal commitment to substantive equality entails attention to context,[4] and that context must encompass the influences of the private sphere on disadvantage and subordination. Equality claims are thus assessed in relation to lived

[1] Formal equality, arguably, underlies the jurisprudence of FC s 9(1). See § 35.3 infra.

[2] In both the US and Canada, this reliance on formal equality led to difficulties in arguing that the failure to accord women maternity benefits was a form of sex or gender discrimination. Courts tended to find that pregnancy was the result of a real (biological) difference and thus differentiation on this basis could not amount to discrimination. Because pregnancy is unique to women, employers could exclude pregnancy from insurance coverage (and thus deny maternity pay). See *Geduldig v Aiello* 417 US 484, n 21 (1974); *General Electric Co. v Gilbert* 429 US 125 (1976); *Bliss v A-G Canada* [1979] 1 SCR 183, (1979) 92 DLR (3rd) 417.

[3] See M Minow 'The Supreme Court 1986 Term Foreword: Justice Engendered' (1987) 101 *Harvard LR* 10.

[4] A contextual approach was adopted by the Canadian Supreme Court in *Andrews v Law Society of British Columbia*. [1989] 1 SCR 143. The *Andrews* Court found that 'to approach the ideal of full equality before and under the law, the main consideration must be the impact on the individual or group concerned'. Ibid at 165. This approach has also been endorsed by the South African Constitutional Court. See § 35.5*(b)* infra.

inequalities. Substantive equality recognizes that it is not the fact of difference that is the problem, but rather the harm that may flow from this. The focus of the legal enquiry is therefore on the impact of the act[1] (rather than on difference per se) and on the nature of the harm that the act creates. Equality can thus be advanced through similar or differential treatment, depending on the context. Difference is regarded as a positive value where it is not linked to harm and disadvantage.[2] Difference is also seen as 'relational' rather than hierarchical. There is no necessary valuing of one group over another. Rather, it is the relationship between groups (including the substantive arrangements that produce or prevent a group's social prosperity or political self-determination) that should be examined.[3]

A legal commitment to substantive equality thus requires a retreat from legal formalism. Importantly, the assessment of context and impact should be guided by the purpose of the right and its underlying values.[4] While an analysis of the context in which the alleged violation occurs enhances a court's understanding of the legal claim, a clear exposition of the purpose of the right to equality, and of the constitutional values that underpin it, provide the court with crucial signposts to a decision most faithful to the Final Constitution. These signposts assist the courts in determining when an impugned differentiation (or failure to differentiate) amounts to a violation of the equality right. Moreover, as discussed below, they provide courts with the flexibility required to negotiate the boundaries of institutional competence.

This flexibility is also required in order to address the multiple and varied legal claims for equality implied by the complex picture of inequality discussed above. Some are claims for consistency — for similar treatment across difference. Others are claims for recognition, for inclusion and acceptance of the status of individuals and groups as full and equal members of society. Yet others have been more redistributive claims, seeking access to economic benefits and resources. In practice, many claims involve aspects of both recognition and redistribution, suggesting the two are often inextricably intertwined in the pursuit of equality, and that the dismantling of systemic inequality is always the goal of effective equality claims.[5]

[1] See § 35.5*(h)* infra

[2] Ibid.

[3] Martha Minow argues that difference does not inhere in the individual or group but in the relation between individuals and/or groups. It is not the characteristics of the individual or the group that are the concern, but the social arrangements that make these differences matter. Minow (supra) at 10; M Minow *Making All the Difference: Inclusion, Exclusion and American Law* (1990).

[4] See L du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 32.

[5] The distinction between recognition or status and redistribution was first used by Nancy Fraser in *Justice Interruptus: Critical Reflection on the 'Postsocialist' Condition* (1997). South African writers have used this distinction in relation to socio-economic rights. S Liebenberg 'Needs, Rights and Transformation. Adjudicating Social Rights in South Africa (2006) 17 *Stellenbosch LR* 5. For a general discussion on this distinction, see S Fredman 'Equality as a Social Right' (forthcoming, 2007) and C Albertyn 'Substantive Equality' (forthcoming, 2007).

(d) Values underlying the equality right

The nature, content and application of the principles and values that underlie the equality right are some of the more disputed issues in substantive equality jurisprudence, especially in the two jurisdictions that have taken the lead in this area: South Africa and Canada. In both countries, the courts have given prominence to dignity as the value that largely defines the right. This priority of dignity has generated debate about the content of dignity as well as its role in determining the ambit of protection of the equality right. It has also raised questions about the role of the other foundational values — especially that of the value of equality in determining the content and scope of the right. In this section we explore the role of both these values in relation to the equality right.

In early debates on substantive equality, many critical and feminist legal scholars argued that the application of equality should be guided by the principles of anti-subordination and anti-disadvantage.[1] This approach fitted with the idea of inequality as systemic — deeply embedded within society, and manifest in group disadvantage through social stigma and stereotypes, material inequality or social and economic forms of exclusion. The purpose of the equality right was to remedy and to overcome this disadvantage and exclusion. In the first unfair discrimination case under the Interim Constitution,[2] *Brink v Kitshoff*, O'Regan J wrote that the equality clause was adopted

> in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. ... The need to prohibit such patterns of discrimination and remedy their results are the primary purposes of section 8.[3]

(i) *Dignity*

In *President of the RSA v Hugo*, the Court identified dignity as a core value and purpose of the right, whilst retaining the idea of remedying disadvantage within the overall assessment of unfair discrimination:

> At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal *dignity* and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked. In *Egan v Canada*, Heureux-Dubé J analysed the purpose of (the Canadian right to equality) as follows:

[1] C Pateman 'Equality, Difference, Subordination: The Politics of Motherhood and Women's Citizenship' in G Bock & S James (eds) *Beyond Equality and Difference* (1992) 17-28; D Rhode 'The Politics of Paradigms' in G Bock & S James (supra) at 149. See also R Colker 'Section 1, Contextuality and the Anti-Disadvantage Principle' (1992) 42 *University of Toronto LJ* 77.

[2] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

[3] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC)('*Brink*') at para 42.

> Equality, as that concept is enshrined as a fundamental right . . . means nothing if it does not represent a commitment to recognising each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human *dignity*.[1]

The idea of dignity as meaning equal moral worth — the right to be treated with equal concern and respect — derives from the Kantian notion of the equal moral worth of all human beings.[2] Here dignity is closely related to ideas of equality. Amaryta Sen admits that a common feature of being egalitarian 'in some significant way relates to the need to have equal concern, at some level, for all persons involved'.[3] However, it is not necessarily related to ideas of substantive equality. 'Equal concern and respect' based on 'equal moral worth' is a fairly abstract concept that requires further elucidation to determine exactly what it means when a failure to treat people with equal dignity, or equal concern and respect, contravenes the equality right.[4]

In both South African and Canadian jurisprudence, the use of 'dignity' in equality jurisprudence has been criticized for its indeterminism and for its potential to narrow the right. The narrow definition of dignity in *Harksen v Lane NO*[5] — which turned on the way the applicant felt about the impugned law (did she feel less worthy of respect?)[6] — generated concerns that the use of dignity might reinforce an individualized and abstract conception of equality divorced from actual social and economic disadvantage and the systemic nature of inequality. Some commentators suggested that more content should be given to the value of equality so that the right might better address structural disadvantage and inequalities. Other legal scholars argued that dignity could be interpreted in a way that addressed group-based inequalities and disadvantage.[7]

[1] 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)('*Hugo*') at para 41, quoting *Egan v Canada* [1995] 2 SCR 513 (footnotes omitted). See also *Prinsloo v Van der Linde* 1997 (3) 1012 (CC), 1997 (6) BCLR 708 (CC) at para 41.

[2] For a detailed account of how Kant's variations on the categorical imperative inform both our dignity and our equality jurisprudence, see S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) § 36.2.

[3] A Sen *Inequality Re-examined* (1992).

[4] Dennis Davis has argued that the indeterminate meaning of dignity meant that it was inappropriate as the dominant conceptual tool for interpreting the equality right. 'Equality: The Majesty of Legoland Jurisprudence' (1999) 15 *SALJ* 398 ('Legoland Jurisprudence'). See also D Davis *Democracy and Deliberation* (1999) 69–95. For a critique of Davis's position, see Woolman 'Dignity' (supra) at § 36.5.

[5] 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC)('*Harksen*').

[6] See Albertyn & Goldblatt 'Facing the Challenge of Transformation' (supra) at 24.

[7] S Cowen 'Can Dignity Guide our Equality Jurisprudence?' (2001) 17 *SAJHR* 34; S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1 (in relation to socio-economic rights), S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2003) Chapter 33.

This latter view has been partially borne out by the way the Constitutional Court has developed the meaning of dignity under the Final Constitution. With some notable exceptions,[1] the Court has adopted a contextual rather than an abstract understanding of dignity, and has moved from a narrow focus on individual, personal autonomy and psychological self-worth to a systemic understanding of individual and group-based civil, political and material inequalities.[2] This development has been explicit in relation to socio-economic rights, where the Court has linked dignity (together with freedom and equality) to the achievement of basic needs: 'There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing and shelter.'[3] The Court in *Khosa v Minister of Social Development* not only emphasized the material conditions necessary for the recognition of an individual's dignity,[4] it also suggested that dignity is a group-based concept involving a collective concern for the well-being of others:

> Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their well-being and the well-being of the community as a whole.[5]

In developing the meaning of dignity in relation to equality, the Court has offered a variety of meanings to give content to the more abstract idea of 'equal concern and respect' — the expression of equal dignity or equal 'moral worth'. However, the Court has also missed important opportunities to link this concept to systemic forms of inequality.

At its most formal, equal concern and respect has been applied to the irrational treatment of a group on an arbitrary ground such as race. A constitutional challenge to the unequal, racially-based enforcement of municipal debts in *Pretoria City Council v Walker* offers a good example of this formal approach.[6] In *Walker*, the Court found the enforcement policy to constitute an impairment of dignity and thus amount to unfair discrimination:

[1] See *Jordan & Others v S (Sex Workers Education and Advocacy Task Force & Others as* Amici Curiae*)* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC). See also § 35.5*(g)*(ii)(bb) infra.

[2] This more expansive approach was arguably implicit in cases such as *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 24 and *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para 38. For a discussion of the five different definitions of dignity employed by the Constitutional Court, and an explanation as to how they cohere, as variations on Kant's categorical imperative and his notion of a realm of ends, see Woolman 'Dignity' (supra) at § 36.2.

[3] See *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 23. Later on, the *Grootboom* Court states: 'A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality'. Ibid at para 44. See also A Chaskalson 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order' (2000) 16 *SAJHR* 193.

[4] 2004 (6) 505 (CC), 2004 (6) BCLR 569 (CC).

[5] Ibid at para 74.

[6] See *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)('*Walker*') at paras 69–81. For the facts of this case, see § 35.3*(a)* infra.

> No members of a racial group should be made to feel that they are not deserving of equal 'concern, respect and consideration' and that the law is more likely to be used against them more harshly than others who belong to other racial groups.[1]

A series of claims for equality by gay and lesbian claimants has led to the development of a deeper understanding of 'equal concern and respect'.[2] In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the Court spoke of 'equal concern and respect' in relation to the social consequences of legal exclusion for gay and lesbian couples.[3] This exclusion was said to reinforce harmful stereotypes of gay and lesbian relationships, in particular the message that gay and lesbian people lacked the inherent humanity to constitute families and live within the protection of the law. The Court found such gross invasion of individual self-worth to constitute a violation of dignity and, therefore, of equality.[4] 'Equal concern and respect' thus entails respect across differences and an affirmation of diversity. This theme runs through the entire body of sexual orientation jurisprudence. In *Minister of Home Affairs v Fourie,* the Court wrote:

> Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour.[5]

In cases on gender and citizenship, the Court has found that legal measures that create or reinforce the social and/or economic exclusion of women[6] and non-citizens[7] deny them 'equal concern and respect'. On the other hand, the fact that legal measures do not exacerbate systemic inequalities has led the Court to conclude that certain claimants have *not* been treated *without* 'equal concern and respect'.[8]

At the same time, the Constitutional Court has missed significant opportunities to understand and address the systemic nature of social exclusion in cases relating to gender and to refugees. In *Jordan v The State*, a case concerning the criminalization of sex work, the majority judgment failed to understand how the systemic

[1] *Walker* (supra) at para 81.
[2] See § 35.5*(g)*(v) infra
[3] 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC).
[4] Ibid at paras 45–53.
[5] *Minister of Home Affairs v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at para 60.
[6] *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)(In relation to the customary rule of primogeniture.) See § 35.*(g)*(ii)(aa) infra.
[7] *Larbi-Odam & Others v Member of the Executive Council for Education & Another* 1998 (1) SA 745 (CC), 1997 (12) BCLR 1655 (CC)(On equality of access to economic opportunities (teaching posts).) See § 35.5*(e)* infra.
[8] See *Walker* (supra) at para 68 (The Court found that the applicants were not a disadvantaged group and that the impact of the flat rate, with its concurrent implications of cross-subsidisation in favour of black areas, did not exacerbate any (economic) disadvantage.) See also *Hugo* (supra) at para 40 (The Court found that fathers were not a disadvantaged group — socially or economically.)

social stereotypes underlying sex work might mean that sex workers were not treated 'with equal concern and respect'.[1] In *National Union of Refugee Women v Director: Private Security Industry Regulatory Authority*, the Court similarly failed to see the systemic foundations of the legal exclusion of refugees.[2]

In a small number of cases, the Constitutional Court has connected the value of dignity and the commitment to equal concern and respect to the goal of eliminating group-based material disadvantage. In *Khosa v Minister for Social Development*, the Court found the exclusion of permanent residents from social assistance to be 'intentional, statutorily sanctioned unequal treatment' that affected the material and social well-being of the applicants. [3] The Court found that 'decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society'. The applicants, excluded from such public benefits, were forced into 'relationships of dependency upon families, friends and community', 'relegated to the margins of society' and 'cast in the role of supplicants'.[4] In *Khosa*, the exacerbation of material disadvantage, even destitution, reflected an absence of equal concern and respect. This absence was not merely a concern of the state, but of society as a whole.

The primacy of the value of dignity within the equality right — manifest in the notion of equal moral worth and the requirement that all persons be treated with equal concern and respect — is a malleable concept. It easily embraces ideas of status or recognition, related to social disadvantage, which are implicated in the majority of equality (unfair discrimination) cases. Here the value of dignity evinces a constitutional concern with the equal moral worth of persons and groups, with their inclusion and participation within society as equals, without stereotyping, prejudice and isolation. Although the value of dignity has been tied to material disadvantage, this connection has had limited application in our jurisprudence.[5] In equality cases, this conception of dignity has only been employed where the underlying inequality is supported by a violation of a socio-economic right.[6] That said, these cases demonstrate that dignity *is* capable of supporting a substantive understanding of equality that explores and seeks to remedy systemic

[1] 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC).

[2] *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* CCT Case No. 39/09 (Judgment of 12 December 2006 (as yet unreported)('*Union of Refugee Women*') at para 38 (majority's findings) and para 119 (minority's findings).

[3] 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC).

[4] Ibid at paras 74, 76, 77.

[5] For a sustained argument connecting the right to dignity to the material conditions of existence (and thus material disadvantage), see Woolman 'Dignity' (supra) at § 36.2.

[6] For a discussion of this idea of dignity in relation to socio-economic rights, see S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1. For a discussion of the relationship between equality and socio-economic rights, see S Fredman 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 *SAJHR* 163; B Goldblatt & S Liebenberg 'Achieving Substantive Equality in South Africa: The Relationship between Equality and Socio-Economic Rights' (2007, forthcoming).

inequalities and disadvantage. At the same time, they reveal that a different definition of dignity, often combined with legal formalism, may block a substantive understanding of equality. Trenchant criticisms of dignity in Canadian jurisprudence have revealed that the courts' reliance on dignity may place undue emphasis on whether a particular person or group has been treated with 'equal concern and respect' and fail to assess whether the broader goals of substantive equality have been achieved.[1]

(ii) *Equality*

Despite its dominance, dignity is not the only value that has informed the interpretation of the right to equality. The Constitutional Court has recently developed the value of substantive equality in relation to the equality right, especially in cases concerned with the positive and the restitutionary aspects of the right that flow from FC s 9(2).

The constitutional value of substantive equality is linked to the achievement of social and economic equality and the dismantling of structural inequalities. The Constitutional Court has consistently referred to the achievement of equality in the context of South Africa's apartheid past.[2] In *Minister of Finance v Van Heerden*, Moseneke DCJ spoke of the need for 'a credible and abiding process of reparation for past exclusion, dispossession and indignity within the discipline of our constitutional framework'.[3] This statement was perhaps the first detailed and explicit recognition of the relationship between the value of equality and right to equality. *Van Heerden* was also the first case to engage FC s 9(2): this provision provides constitutional protection for *positive* measures designed to remedy unfair discrimination.

In *Van Heerden*, the Court linked the achievement of equality with the achievement of a society based on 'social justice'. However, such an achievement would only be possible if there was a 'positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege'.[4] This commitment requires remedial or restitutionary

[1] See, eg, C Sheppard 'Inclusive Equality and New Forms of Social Governance' (2004) 24 *Supreme Court LR* (2d) 45; S Moreau 'The Wrongs of Unequal Treatment' (2004) 54 *University of Toronto LJ* 291; J Fudge 'Substantive Equality, The Supreme Court of Canada and the Limits to Redistribution' (2007, forthcoming).

[2] See, eg, *Walker* (supra) at paras 45-48; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at paras 60-62; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 72-77. That the value of equality embraces an idea of material equality and economic redistribution has been endorsed by was also expressed by former Chief Justice, Arthur Chaskalson, and by present Chief Justice, Pius Langa. See A Chaskalson 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order' (2000) 16 *SAJHR* 193; P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351.

[3] 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC)('*Van Heerden*') at para 25. For a discussion of the facts of this case, see § 35.4*(b)* infra. For earlier statements of this idea, see *Walker* (supra) at paras 45-48; *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)('*NCGLE I*') at paras 60-62.

[4] *Van Heerden* (supra) at para 31.

equality.[1] Although the *Van Heerden* Court does not use the term 'redistribution', its interpretation of the value of equality clearly envisages a degree of economic redistribution and the removal of material disparities. Of course, such redistribution would be constitutionally constrained by the criteria for positive measures established under FC s 9(2).

(iii) *Values, substantive equality and institutional boundaries*

In the end, a redistributive function does not always fit comfortably with the institutional role of courts and with the distinction courts seek to draw between issues of social policy and issues of law.[2] The meaning accorded to the value of dignity has become influential in defining the boundaries of the right,[3] and its flexibility and degree of abstraction has been useful for courts as they negotiate the redistributive and institutional difficulties posed by the equality right. The value of equality is far more explicit in its commitment to redistribution, but the Constitutional Court's embrace of the redistributive aspects of equality has been constitutionally and legally constrained — either by the presence of other rights in the Final Constitution (the right to social assistance in *Khosa*[4]) or in legislation (the Maintenance Act in *Bannatyne*[5] and the Political Office Bearers Pension Fund in *Van Heerden*). Fredman suggests that the presence of such express rights is an important indicator of whether a court will act in such a redistributive manner.[6]

Dignity's place in our equality jurisprudence means that it will have to be harnessed in a manner that enables jurists to use the right to equality to achieve transformative ends. However, it is important to remember that the rights and the values of both dignity and equality respond to different kinds of claims, and that each has its place in addressing systemic social and economic inequalities in South Africa.

35.2 Overview of the Right to Equality

The equality right set out in FC s 9 — the successor to IC s 8 — contains five discrete provisions. Each provision reflects a different aspect of the right and a different 'level' of equality protection. This section provides a brief overview of

[1] *Van Heerden* (supra) at para 30 and at paras 73-74 (Mokgoro J).

[2] See *NCGLE I* (supra) at para 123 (Sachs J expresses concern regarding 'over-intrusive judicial intervention in matters of broad social policy'.)

[3] See also S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) § 36.4.

[4] *Khosa & Others v Minister of Social Development & Others; Mahlaule & Another v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) SA 569 (CC).

[5] *Bannatyne v Bannatyne (Commission for Gender Equality, as* Amicus Curiae*)* 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC).

[6] S Fredman 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 *SAJHR* 163.

the right, and the relationship of the provisions to one another. In this respect, the Constitutional Court has argued that '[a] comprehensive understanding of the Constitution's conception of equality requires a harmonious reading of the provisions of section 9'.[1] This reading also requires the right to be approached holistically rather than formulaically, in which the right, as a whole, produces an approach to achieving equality which is 'cumulative, interrelated and indivisible'.[2] Thus, although various tests are formulated for different aspects of the right, it is important to apply these tests in a manner that understands the overall meaning and purpose of the right. Central to this understanding are a theory of substantive equality and an appreciation for the set of values that underpin the right. More than a decade after the onset of constitutional democracy, the Constitutional Court's equality jurisprudence is reasonably well established in relation to all sections of the right, and it is relatively easy to navigate its different pathways.

IC s 8(1) provided that 'every person shall have the right to equality before the law and equal protection of the law', while FC s 9(1) provides that 'everyone is equal before the law and has the right to equal protection *and benefit* of the law'.[3] The Constitutional Court has accorded no meaning to this textual change.[4] Both IC s 8(1) and FC s 9(1) provide constitutional protection against any irrational or arbitrary classifications (on any basis) made by the state. This weak rationality constraint on state action renders irrational or arbitrary classifications unconstitutional. The failure of law to meet FC s 9(1)'s requirements forestalls the need for further assessment under FC s 9(3). Moreover, a violation of FC s 9(1) cannot be saved by the higher justificatory standards of reasonableness and proportionality that ground FC s 36's limitations analysis.

FC s 9(1) also has a secondary and less developed meaning. In a few cases, IC s 8(1) and FC s 9(1) have been interpreted as a guarantee of equal treatment by the courts or 'equality in the legal process'.[5] This interpretation overlaps, but does not fully coincide with, FC s 9(1) as a rationality constraint. It remains unclear as to whether it protects merely against irrational actions, or whether it also reflects a stronger standard of justification. Its relationship to equality of outcome, and not just equality of process, remains an open question.

FC ss 9(3) and (4) and IC s 8(2) prohibit unfair discrimination on a series of listed and unlisted grounds.[6] There is no material difference between the two constitutional texts, except that FC s 9 adds three further prohibited grounds,

[1] *Van Heerden* (supra) at para 28.
[2] Ibid at para 135 (Sachs J).
[3] For a full discussion of this section, see § 35.3 infra.
[4] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at paras 58-59.
[5] See § 35.3*(c)* infra.
[6] The major equality cases decided under IC s 8 were: *Brink v Kitshoff NO* 1996 (1) SA 197 (CC), 1996 (6) BCLR 752 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC); *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC); *Harksen v Lane NO* 1998 (1) 300 (CC), 1997 (11) BCLR 1489 (CC); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC); *Jordan v S* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC).

namely, pregnancy, marital status and birth, as well as a specific protection against unfair discrimination in the private sphere, in FC s 9(4). If the differentiation complained of is on a ground listed in these sections (or a similar ground defined by its potential to impair dignity), then there is no need to apply FC s 9(1) — one can proceed directly to FC s 9(3) or FC s 9(4).

FC ss 9(3) and (4) provide the main substantive protection afforded by FC s 9. Once one is able to show discrimination on a listed or similar ground, the enquiry shifts to determine whether this discrimination is fair or unfair. This essentially moral enquiry focuses on the impact of the discrimination on the complainant and his or her group. The court must consider issues of disadvantage and vulnerability, the purpose of the discrimination, and whether the discrimination is so invasive of the rights and interests of the complainant as to impair his or her dignity or to constitute a similarly serious violation of another right. FC s 9(5) states that discrimination on a listed ground is presumed to be unfair, unless shown to be fair.

If the discrimination complained of relates to a positive measure to achieve equality, then the respondent (usually the state) is able raise a defence to the FC s 9(3) claim under FC s 9(2). FC s 9(2) states that equality includes 'the full and equal enjoyment of all rights and freedoms'. It confirms that the equality right 'includes the adoption of positive measures to achieve equality', in addition to providing protection against unfair discrimination. It differs from IC s 8(3)*(a)* in its positive phrasing, affirming that the meaning of equality includes positive measures. As such, it is an important statement of principle and provides textual support for the remedial and restitutionary aspect of the right. FC s 9(2) also contains a set of criteria that can constitute a complete defence to a claim of unfair discrimination. If a defence of positive measures is raised, then the enquiry proceeds directly to FC s 9(2). Under these circumstances the presumption of unfairness in FC s 9(5) does not apply. If the claim is successfully defended under FC s 9(2), then the positive measure is not unfair. It is only if the impugned measure is not saved under FC s 9(2) that the matter falls to be assessed in terms of FC s 9(3).

FC s 36 provides that a right may be limited if such limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. It is logically impossible for a violation of FC s 9(1) to be saved under this section. It is also unlikely, though not logically impossible, for a violation of FC s 9(3) or FC s (4) to be justified under FC s 36.[1]

[1] For a more detailed explanation of the relationship between unfair discrimination analysis and limitations analysis, and the extent to which FC s 9 analysis exhausts the grounds for justification of discrimination, see S Woolman & H Botha 'Limitations' in in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

35.3 FC s 9(1)

Early academic commentary on IC s 8(1) and FC s 9(1) suggested that the subsection should be given broad, substantive content. It was argued, for example, that the provision should be read as an overarching expression of the equality right to permit affirmative action and redistribution, oppose subordination through the law and provide substantive protection in the legal process.[1] The Constitutional Court did not follow this approach and accorded IC s 8(1) a particular meaning, separate from the rest of the clause. The first cases on IC s 8(1) focused on the idea of equality before the law as at least entitling everyone to equal treatment by courts of law.[2] Although this interpretation has not been superseded, the dominant function accorded to IC s 8(1) in *Prinsloo v Van der Linde,* and subsequent cases under FC s 9(1), has been to protect claimants against inequality qua irrationality.[3] Thus IC s 8(1) and FC s 9(1) are largely limited to protection against arbitrary and irrational distinctions made by the legislature or the administration. This connotation of inequality forms part of a wider constitutional commitment to the legality principle and the rule of law doctrine.[4]

(a) FC s 9(1) as a minimum rationality requirement

A useful starting point for the courts' interpretation of IC s 8(1) and FC s 9(1) as a rationality constraint is the idea that differentiation lies at the heart of both inequality and effective governance. The constitutional question is when such differentiation is permissible, and under what circumstances it is impermissible and unconstitutional as a violation of equality. IC s 8(2) and FC s 9(3) and (4) clearly outlaw differentiation as discrimination. Are there other forms of differentiation that also amount to inequality? In answering this question, the Constitutional Court distinguishes between what it terms 'mere differentiation' and differentiation that amounts to discrimination.[5] While discrimination clearly refers to distinctions made on the basis of prohibited grounds,[6] 'mere differentiation' describes the myriad distinctions that are made by a modern state in the business of effective governance. Examples of these range from income classification for the purposes of taxation or social welfare grants to distinctions made for the

[1] See C Albertyn & J Kentridge 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 *SAJHR* 149, 157-160; D Davis 'Equality' in D Davis *et al Fundamental Rights in the Constitution* (1997) 52–55.

[2] *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC) at para 91.

[3] 1997 (3) SA 1012 (CC), 1997 (6) SA 759 (CC).

[4] See C Albertyn 'Equality' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) Chapter 4. See also *Van der Merwe v The Road Accident Fund* 2007 (1) SA 176 (CC), 2006 (6) BCLR 682 (CC) at n67.

[5] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 23.

[6] See § 35.5*(b)* infra.

distribution of various types of drugs, or the sentencing of offenders for different crimes, or the privileges accorded different categories of prisoners. It is these 'mere differentiations' that are regulated by FC s 9(1).

In *Prinsloo v Van der Linde,* the Constitutional Court established that these distinctions will only contravene the equality right if they are irrational.[1] Ackermann J explained the point as follows:

> [T]he constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest naked preferences that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation.[2]

Described thus, rationality is part of accountability and justification in a democratic state. As apparent in the above extract, however, it is capable of at least two meanings: a weak version in which rationality encompasses the principle of the rule of law that the exercise of public power should not be arbitrary; and a strong version which requires a degree of principled justification of state action ('a defensible vision of the public good'). It is the first and weaker rationality constraint that has become the test for constitutionality under FC s 9(1).[3]

In *Harksen v Lane NO*, decided under IC s 8(1), the Constitutional Court distilled the conclusions of *Prinsloo v Van der Linde* into a simple test:

> Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.[4]

(i) *Has there been a differentiation between individuals or groups?*

Differentiation between individuals or groups triggers FC s 9(1) scrutiny. The Constitutional Court has suggested that this differentiation can be either direct or indirect, although there is no reported case on indirect differentiation.[5] If there

[1] This proposition is widely accepted in other jurisdictions. See, eg, P Hogg *Constitutional Law of Canada* (1996) 1240-1243.

[2] *Prinsloo v Van der Linde* (supra) at para 25 (footnotes omitted).

[3] Although this weak rationality constraint has dominated FC s 9(1) jurisprudence, *Union of Refugee Women* demonstrates a shift to a more principled defence. In *Union of Refugee Women*, the Court did identify a defensible vision of the public good in the important role of the security industry in protecting the human rights, especially the freedom and security, of the public at large. *Union of Refugee Women* (supra) at paras 37-41.

[4] 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 38.

[5] See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)('*NCGLE v Minister of Justice*') at para 63 (The Constitutional Court found that the reference to 'direct and indirect discrimination' in s 9(3) meant that the enquiry under s 9(1) necessarily encompasses both direct and indirect differentiation.)

is no differentiation, then there can be no violation of FC s 9(1).[1] If the differentiation is on a prohibited ground, then it is possible to proceed directly to an enquiry under FC s 9(3) or (4). FC s 9(1) is thus not a necessary step in an equality claim.[2]

Although the fact of differentiation will not usually be in dispute, the Constitutional Court has given some guidance to interpreting contested legislative distinctions. In *Jordan v The State*[3] the state challenged the assumption that the impugned provision criminalized sex workers and not their clients.[4] The minority judgment of O'Regan and Sachs JJ addressed the criteria for the proper interpretation of the section.[5] Overall, they suggested that the Court would 'consider whether there is a constitutionally compatible interpretation of the section' that the provision is 'reasonably capable of bearing'.[6] In doing this, the Court would look at what interpretation had been generally accepted in South African law, the natural reading of the section, and the context of the enactment of the provision.[7] Where the alleged distinction related to a crime, the Court would avoid broadening the definition of the crime, a task that ordinarily fell to the legislature and not the courts. In general, it would be contrary to constitutional values, including the principle of legality, to accept an extended definition of a crime.[8]

(ii) *Does the differentiation have a rational connection to a legitimate government purpose?*

The interrogation of this relationship involves first, the identification of a legitimate purpose, and second, the finding of a rational connection between the differentiation and this purpose. It is not sufficient to identify a generic purpose for the impugned provision or conduct. In *Van der Merwe v Road Accident Fund*[9] the Constitutional Court warned that '[a] court remains obliged to identify and examine the specific government object sought to be achieved'. It might be that the generic purpose is not 'open to constitutional doubt', but that the specific purpose is.[10] In this case, the applicant sought to recover damages from the Road Accident Fund for injuries suffered as a result of her husband's intentionally

[1] Irrational state action that does not arise from a differentiation is prohibited under the the rule of law doctrine. See F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11.

[2] *NCGLE v Minister of Justice* (supra) at para 18.

[3] 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC)('*Jordan*').

[4] Section 20(1)(aA) of the Sexual Offences Act. *Jordan* (supra) at paras 8, 40. Note that this case was decided under IC s 8(1).

[5] Note that this aspect of the judgement does not seem to be contested by the majority, who agree with the finding that there is such a distinction. See *Jordan* (supra) at para 8.

[6] Ibid at para 40.

[7] Ibid at paras 41-44.

[8] Ibid at paras 45-46.

[9] 2007 (1) SA 176 (CC), 2006 (6) BCLR 682 (CC)('*Van der Merwe*').

[10] Ibid at para 33.

knocking her down with his car and then reversing over her.[1] The Fund raised a special plea that it was not liable for patrimonial damages by reason of s 18, read with s 19 of the Matrimonial Property Act 88 of 1984.[2] These provisions prevented a spouse married in community of property from recovering damages for patrimonial loss 'in respect of bodily injuries suffered by him and attributable either wholly or partly to the fault of that spouse'.[3] The applicant consequently challenged these provisions under FC s 9. In defending the claim in relation to FC s 9(1), the Fund argued that s 18 had the legitimate purpose of 'regulat[ing] the patrimonial consequences of marriage'. The Court responded that even if this general purpose was constitutionally valid, one needed to have regard to the specific purpose of the provision to see if that 'specific part of the scheme was constitutionally valid'.[4]

The determination of whether the specified purpose is legitimate or not entails an evaluation of the reasons given for this purpose. To meet the criterion of legitimacy under FC s 9(1), the state merely has to show that its purpose is neither arbitrary nor irrational. In general, legitimacy is equated with a weak form of rationality. The government does not have to justify its purpose against substantive constitutional values or any conception of 'the general good'. In a rare finding of an illegitimate purpose in *Van der Merwe v Road Accident Fund*, the Constitutional Court concluded that that the reasons given for pursuing the specified purpose of avoiding the futility of spousal claims were no longer valid. They had fallen away with changes in the concept of, and legislative framework for, the 'joint estate' in marriage. As such, the purpose was based on a 'relic of the common law of marriage' which was neither useful nor legitimate.[5]

The related question of whether the scheme or measure chosen by Parliament or the government is rationally connected to the identified purpose is also a limited enquiry. The Constitutional Court has cautioned that

> [t]he question is not whether the government may have achieved its purposes more effectively in a different manner, or whether its regulation or conduct could have been more closely connected to its purpose. The test is simply whether there is a reason for the differentiation that is rationally connected to a legitimate government purpose.[6]

In *Van der Merwe*, the Constitutional Court found that the scheme which excluded spouses married in community of property from claiming patrimonial damages from their spouses was not rationally connected to its (already illegitimate) purpose. The Court's analysis reveals that there were no valid reasons for the legislative scheme. On the contrary, it found the reasons proffered to be outdated,

[1] *Van der Merwe* (supra) at para 11.
[2] Ibid at para 14.
[3] Section 18*(b)* of the Act.
[4] *Van der Merwe* (supra) at para 33
[5] Ibid at paras 34 and 50-52.
[6] *East Zulu Motors (Pty) Limited v Empangeni/Ngwelezane Transitional Local Council* 1998 (2) SA 61 (CC), 1998 (1) BCLR 1 (CC) at para 24. See also *Prinsloo v Van der Linde* (supra) at paras 35-38.

arbitrary and absurd. The absurdity of the legislation was reflected in its differential treatment of the negligent driving of a spouse in one class of marriage (out of community of property), which created liability for patrimonial damages, from the negligent driving of another class of spouse (in community of property), which did not create such liability.[1] The legislation also offered no rational explanation for the divide between non-patrimonial damages (which were permitted) and patrimonial damages (which were not). Overall the Court found no rational basis for the scheme or purpose of the Act. The differentiation was thus impermissible as an arbitrary distinction that served no legitimate public end.[2]

In *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)*,[3] the Constitutional Court considered the provisions of the Compensation for Occupational Injuries and Diseases Act.[4] The Act required employees to claim damages for injuries incurred in the course of their employment in terms of that Act and thus precluded such employees from claiming under the common law. The *Jooste* Court found this distinction to be rationally connected to the legitimate government purpose of providing compensation for disability caused by injuries sustained during the course of employment.[5] In doing so, the Court said:

> It is clear that the only purpose of the rationality review is an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference and it is irrelevant to this enquiry whether the scheme chosen by the legislature could be improved in one respect or another. Whether an employee ought to have retained a common law right to claim damages, either over and above or as an alternative to the advantages conferred by the Compensation Act, represents a highly debatable, controversial and complex matter of policy. It involves a policy choice which the legislature and not a court must make.[6]

In summary, FC s 9(1) protects against arbitrary and irrational state action. Although it requires that the purpose and scheme be examined in their proper context, it does not require an analysis of the impact of the impugned action or of the policy choices made.[7] It merely requires the state to have a defensible purpose, together with reasons for its actions that bear some relationship to the stated purpose. This weak rationality constraint is extremely deferential to the legislature[8] and most laws will pass constitutional muster under this

[1] *Van der Merwe* (supra) at para 55.
[2] Ibid at paras 52-58
[3] 1999 (2) SA 1 (CC), 1999 (2) BCLR 139 (CC).
[4] Act 130 of 1993.
[5] Ibid at paras 12-16.
[6] Ibid at para 16. See also *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) at para 45.
[7] *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* CCT 39/09 (as yet unreported judgment of 12 December 2006)('*Union of Refugee Women*') at para 37.
[8] In US constitutional law, a similar strong presumption of constitutionality informs rationality review. See L Tribe *American Constitutional Law* (2nd Edition, 1988) 1439-43.

provision.[1] Thus far, *Van der Merwe v Road Accident Fund* is the only case that has reached the Constitutional Court that has failed the rationality test. *Pretoria City Council v Walker* provides an interesting example of the failure to meet the rationality requirement of FC s 9(1). (It was not, however, decided on such grounds.)[2] The *Walker* Court was confronted with the constitutionality of the City Council's selective enforcement of the debts of defaulting residents. It concluded that this practice was not based on a 'rational and coherent' policy, but was adopted and implemented in a secretive and misleading manner by Council officials, apparently without Council authority and in conflict with a Council resolution.[3] Although the *Walker* Court found this to be unfair, indirect, racial discrimination, the facts also support a claim that the differential treatment was irrational and arbitrary.

(b) Can irrationality be justified under FC s 36?[4]

FC s 36 provides that the rights in the Bill of Rights may be limited by 'law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

[1] Examples of the unsuccessful application of FC s 9(1) include: *Prinsloo v Van der Linde* (supra) at paras 35-42 (A presumption of negligence in the Forest Act 122 of 1984 in respect of causing veld, forest or mountain fires that was imposed on owners of land outside fire control areas, and not on land-owners within such areas, was found to be rationally connected to the legitimate government purpose of preventing veld fires); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)('*Walker*') at para 27 (Geographic differentiation in methods of charging for municipal services for residents of Pretoria townships, where a flat rate was charged, and 'old Pretoria', where metered rates were charged, was found to be rationally connected to the purpose of equalising the provision of such services to residents of areas that were deeply unequal in the past.); *Harksen v Lane NO* 1998 (1) 300 (CC), 1997 (11) BCLR 1489 (CC) at paras 58 (A provision in the Insolvency Act 24 of 1936 that the property of the solvent spouse should vest in the Master and be treated as if part of the insolvent estate was found to be rationally connected to the government's purpose of protecting creditors and facilitating the often complicated process of sequestration); *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 (3) SA 365 (CC), 2002 (9) BCLR 891 (CC) at paras 41-45 (Not irrational to distinguish between departmental and school employees in developing a staffing policy for Western Cape schools that sought to equalise posts across schools within budgetary constraints); *Jordan* (supra) at para 58 (Not irrational to target the criminal conduct of one group (sex workers or purveyors of sex for reward) and not another (clients or purchasers)); *De Reuck v Director of Public Prosecutions, WLD* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) at paras 39-41 (The distinction between defences available to 'mere possessors' and to distributors or broadcasters of publications found to be child pornography under the Films and Publications Act 65 of 1996 is rationally connected to the legitimate government objective of combating harm caused by pornographic and violent materials); *Union of Refugee Women* (supra) at paras 35-42 (Differentiating between citizens and permanent residents on the one hand, and all foreigners on the other, in registration requirements for security officers is rationally connected to the legitimate government purpose of achieving and maintaining a trustworthy and legitimate private security industry.)

[2] *Walker* (supra) at paras 27-28. Although the Court applied IC s 8(1) to the question of whether the imposition of a flat rate for municipal services in certain geographical areas violated the equality guarantee, it did not do so in relation to the question of whether the selective enforcement of debts violated the equality right.

[3] Ibid at paras 73 and 76.

[4] For a discussion of 'irrationality' and the criteria for the law of general application test in FC s 36, see S Woolman & H Botha 'Limitations' in in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

The minimum rationality test means that most claims based on 'mere differentiation' will be filtered out (as rational) by the FC s 9(1) enquiry and will not be subject to any greater standard of justification. If, however, a legislative measure is found to be irrational under FC s 9(1), it is difficult to see how such irrationality could be saved by FC s 36, which sets a higher standard of justification than the rationality standard set by FC s (1). It is more likely that measures that fail FC s 9(1) will be found to be irretrievably unconstitutional.

This point is illustrated by *Van der Merwe v Road Accident Fund*. Here the Court sought to engage in a justification enquiry, but found that the absence of a legitimate purpose for the legislation rendered this enquiry impossible:

> [T]he pursuit of a legitimate government purpose is central to a limitation analysis. The court is required to assess the importance of the purpose of a law, the relationship between a limitation and its purpose and the existence of less restricted means to achieve the purpose. However, in this case there is nothing to assess. The lack of a legitimate purpose renders, at the outset, the limitation unjustifiable.[1]

(c) FC s 9(1) as a guarantee of equality in the legal process

The Constitutional Court has emphasized that its equality jurisprudence is constantly evolving, and that each case requires it to address the particular context of inequality in South Africa. Most IC s 8(1) and FC s 9(1) cases have interpreted these provisions as imposing a weak rationality constraint on the state, especially its legislative, executive and administrative arms. This reading does not constitute the sole meaning of FC s 9(1). On the contrary, a small but significant group of cases have used IC s 8(1) and FC s 9(1) to address questions of equality in the legal process, especially in relation to criminal procedure.

The idea that IC s 8(1) and FC s 9(1) might protect equality in the legal process has also been mooted by some legal scholars. These scholars suggest that it might provide both procedural and substantive protection (and thereby embrace both the substance and the content of the law).[2]

In *S v Ntuli*, Didcott J argued that IC s 8(1) 'surely entitles everybody, at the very least, to equal treatment by our courts of law'.[3] *Ntuli* was decided before the establishment of the rational connection test under IC s 8(1). The case addressed the constitutional validity of provisions in the Criminal Procedure Act that differentiated between categories of criminal appellants.[4] The first category consisted

[1] *Van der Merwe* (supra) at para 63. For an analysis of whether a violation of the right to equality can ever, as a matter of logic in terms of FC s 9(1), or as an empirical matter in terms of FC s 9(3) and FC s 9 (4), be justified under FC s 36, see S Woolman & Botha 'Limitations' (supra).

[2] C Albertyn & J Kentridge 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 *SAJHR* 149, 160 and 178.

[3] 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC) at para 18.

[4] Act 51 of 1977 s 309 read with s 305.

of prisoners, who had been convicted in the lower courts without legal representation, and who required a judge to certify that there were reasonable grounds for an appeal before proceeding with the appeal. The second category — all other criminal appellants — did not require this intervening step of judicial certification before commencing an appeal. The *Ntuli* Court found that the provision violated IC s 25(3)*(h)* — the right to a fair trial, in particular the right 'to have recourse by way of appeal or review to a higher court than the court of first instance' — as well as IC s 8(1). The IC s 25(3) enquiry engaged the standard of substantive fairness in investigating the working and impact of the different appeal procedures. It found a violation of the right to a fair trial.[1] The Court also found that the differentiation between the two categories of criminal appellants, in which one group could appeal as of right and the other required a judge's certificate to do so, amounted to unequal treatment and thus violated the guarantee of 'equality before the law'.[2]

Equal treatment by the courts or equality of legal process does not require identical procedures in different courts, but it does seem to require fair procedures across groups.[3] This suggests that the standard of constitutionality in relation to legal process is not rationality but fairness.[4] At the very least, the substantive content of IC s 8(1) and FC s 9(1) has been enhanced in relation to criminal trials by the fair trial guarantee in IC s 25 and FC s 35. In addition, the idea of 'equality of arms'[5] that has been included within the meaning of 'equality before the law' is linked to the concept of a fair trial. Equality of arms requires that the state and an accused person be placed in an equal position: 'Although inequalities between accused persons are inherent within any criminal justice system, inequalities between opposing litigants in a criminal trial are contrary to the principle of a fair trial.'[6] Two High Court cases have applied this doctrine. The *Lavhengwa* court applied the doctrine during its assessment of a summary procedure relating to contempt of court in the magistrates' courts.[7] The *Qozeleni* court applied the doctrine to the right of a defendant to have full access to the records and other documents in a criminal case.[8]

Thus far, the cases have concerned laws relating to the criminal process. Would the same principles apply in civil trials and procedures, or to the application rather than the content of the law? In *Cary v Cary*, which concerned an application for costs of a pending matrimonial action under Rule 43(1)*(a)*, the High Court found

[1] *S v Ntuli* (supra) at paras 13-16.
[2] Ibid at paras 18-20.
[3] *S v Rens* 1996 (1) SA 1218 (CC), 1996 (2) BCLR 155 (CC) at para 29.
[4] See *S v Lavhengwa* 1996 (2) SACR 453, 479A-B (W).
[5] See *Qozeleni v Minister of Law and Order* 1994 (1) BCLR 75, 88 (E), 1994 (3) SA 625, 642 (E)('*Qozeleni*'); *S v Lavhengwa* (supra) at 477D–478C.
[6] *S v Lavhengwa* (supra) at 478B.
[7] Ibid at 477D–478C.
[8] *Qozeleni* (supra) at 642C-I.

that its discretion was subject to the right to equality before the law, which, in turn, required equality of arms in a divorce action.[1]

In *Van der Walt v Metcash Trading* the Constitutional Court was asked to consider whether FC s 9(1) guaranteed 'equality in outcome in litigation based upon materially identical facts and circumstances'.[2] The Supreme Court of Appeal had been petitioned in two separate, but materially identical, cases for leave to appeal. Two different panels of judges made contrary orders. Writing for the majority, Goldstone J noted that, unlike *S v Ntuli*, a legal right was not denied to one litigant but granted to another. Rather, the exercise of the same right by both litigants resulted in different outcomes.[3] The issue was thus not differential statutory provisions, but a different outcome that flowed from the exercise of judicial discretion. Thus, although FC s 9(1) required 'all persons in a similar position must be afforded the same right to access the courts and to the same fair and just procedures with regard to such access', it did not extend to a guarantee of equality of outcome in matters where judicial discretion is exercised.[4] The Final Constitution does not protect the public from incorrect decisions[5] — although the case suggests that it does protect the public against judges who act in an arbitrary and irrational manner.[6] The *Metcash* Court found that FC s 9(1) offered no substantive protection and that its procedural protection of equality did not require the Supreme Court of Appeal to ensure that identical applications were heard by the same panel of judges (this duty lay with the attorneys, not the judges). Ngcobo J, in dissent, argued that the Supreme Court of Appeal was bound to ensure that similar applications were heard by the same panel, and was thus obliged to structure the process in such a way as to guarantee equal outcomes.[7]

(d) Can inequality in the legal process be justified under FC s 36?

It is logically impossible for a violation of FC s 9(1) as a rationality constraint to be justified under FC s 36. If, however, the interpretation of FC s 9(1) as a guarantee of equality in legal process set a higher standard of justification, such as fairness, then one might still be tempted to ask whether an unfair legal process could be found to be 'reasonable and justifiable in an open and democratic society based upon human dignity, equality and freedom'.[8] We think that a finding of unfairness will probably exhaust all possible justifications that might be offered under FC s 36.

[1] *Cary v Cary* 1999 (8) BCLR 877, 881-82 (C).
[2] 2002 (4) SA 317 (CC), 2002 (5) BCLR 454 (CC) at para 15.
[3] Ibid at paras 16 and 17.
[4] Ibid at para 24.
[5] Ibid at para 19.
[6] Ibid at para 18.
[7] Ibid at paras 41-42.
[8] See *S v Ntuli* (supra) at paras 21-25 (Court found that the unequal treatment of two groups of convicted persons was unreasonable and thus not justified under IC s 33(1).) But see *S v Lavhengwa* (supra) at 478d-482e (Summary procedure in relation to contempt was found to be justified under IC s 33(1).)

(e) The future scope of FC s 9(1)

The dominant meaning of the right to equality before the law and to equal protection and benefit of the law is that it prohibits irrational distinctions or classifications made by the government and Parliament. A second, parallel, meaning is that FC s 9(1) guarantees, at the very least, equal treatment by the courts of law and equality of legal process. Both meanings raise questions of regarding the future development of the right: Is the rationality constraint sufficient to protect those who cannot claim unfair discrimination? Does equality of process include equality in the content and application of the law?

(i) *Beyond rationality?*

The interpretation of FC s 9(1) as a rationality constraint developed in the context of establishing a conceptual separation between legislative distinctions that involve 'unfair discrimination' and those that do not ('mere differentiation').[1] The meaning of FC s 9(1) has thus partly evolved in relation to the centrifugal force of discrimination within the right to equality.[2] The relationship between of FC s 9(1) and FC s 9(3) or (4) means that all legislative and other classifications are only subject to a weak rationality constraint, unless the claimant is able to show that the distinction is based on a ground prohibited under FC ss 9(3) or (4). Distinctions based on a ground prohibited under FC ss 9(3) or (4) trigger the higher level of constitutional scrutiny, namely fairness.

Does FC s 9(1) need to be limited to a rationality test? One argument in favour of a wider interpretation is that the protection against irrational and arbitrary state action exists elsewhere in the Final Constitution. In *New National Party of South Africa v Government of the RSA*, a case dealing with the constitutionality of the Electoral Act, the Constitutional Court found that the legality principle and the rule of law doctrine, constituted a rationality constraint binding all parts of the state.[3] The rule of law doctrine provides a minimum threshold for the exercise of public power that exists 'prior' to the enquiry into the infringement of fundamental rights.[4] The legality principle mirrors the FC s 9(1) test:

[1] This process began in *Prinsloo v Van der Linde*. See *Prinsloo* (supra) at para 23.

[2] This proposition was confirmed in *National Coalition for Gay and Lesbian Equality v Minister of Justice*. 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)('*NCGLE v Minister of Justice*') at para 63 (Ackerman J held that differentiation under FC s 9(1) could be direct or indirect, reasoning that this 'must necessarily flow from the reference in section 9(3) to "direct and indirect discrimination"'.)

[3] 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)('*New National Party*').

[4] Ibid at para 24. See also *Mphahlele v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC), 1999 (3) BCLR 253 (CC)(On the role of the rule of law as a foundational value of the Constitution.)

> The first of the constitutional constraints placed on Parliament is that there must be a rational relationship between the scheme it adopts and a legitimate government purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional.[1]

Although an overlap in sources of constitutional protection is neither impermissible nor exceptional, it does suggest that rationality is not a necessary interpretation of FC s 9 (1) and that further judicial constructions of FC s 9(1) are possible.

Second, it might be argued that FC s 9(1) is conceptually flawed in that it does not conform to the purpose of the right, namely, substantive equality. The idea of equality as rationality refers to a formal notion of equality that sees inequality as a function of laws that irrationally single out groups, rather than as emerging from a social and economic context of inequality.[2] It is also a value-neutral process that tests legislative classifications by the presence of reasons, rather than by the substantive choices made by the law and the values underlying these choices.

On the other hand, one could argue that, viewed holistically, FC s 9 embraces substantive equality.[3] By limiting the meaning of FC s 9(1), the Constitutional Court has made a choice between those legal distinctions that are subject to minimum scrutiny and those that are subject to a more substantive enquiry. It has also determined which policy decisions remain largely in the realm of Parliament and government, and which are tested by the courts, thus paying attention to the separation of powers doctrine.[4] In principle, it is correct that such a choice should be made. It is also appropriate to limit the equality guarantee to certain individuals and groups, to avoid its injudicious use by, for example, corporations,[5] and to apply judicial resources frugally in testing government policy. The critical question here is whether the Court has drawn the line in the correct place. Are there groups who deserve greater protection under the equality right curently excluded from its ambit?

[1] *New National Party* (supra) at para 19. See also *Pharmaceutical Manufacturers Association of SA; In Re: Ex Parte Application of President of the RSA* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) especially at paras 83–85 (Concerned judicial review of executive action, and whether the exercise of public power was rationally related to the purpose for which it was given.)

[2] See H Lessard 'Equality and Access to Justice in the Work of Bertha Wilson' (1992) 15 *Dalhousie Law Journal* 55, 56.

[3] See *NCGLE v Minister of Justice* (supra) at paras 58-64 (This appears to have been the response of the Constitutional Court to the *amicus*.)

[4] See *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 (3) SA 365 (CC), 2002 (9) BCLR 891 (CC)(Chaskalson P) at para 46 ('If we were to apply a "reasonableness" review at the stage of the section 9(1) enquiry, we would be called upon to review all laws for reasonableness, which is not the function of the court.')

[5] The early Canadian experience of the equality right (s 15 of the Canadian Charter of Rights) was that it was abused by juristic persons for largely economic ends. See G Brodsky & Shelagh Day *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back* (1989).

Several legal distinctions not protected by FC s 9(3) can give rise to levels of disadvantage that deserve greater constitutional scrutiny than rationality.[1] Among those classifications that warrant heightened scrutiny are the category of offender, whether one is in prison,[2] and distinctions made on the basis of property ownership or income level.[3] For example, a municipality passes a by-law that imposes a flat rates charge of R100 per plot, regardless of property size or the income of proprietor. This distinction amounts to a wealth classification that may not be tested under FC s 9(3).[4] Any equality challenge based upon FC s 9(1) would only requires 'good' reasons for state action and will not necessarily scrutinize policy choices. However, other options exist. The test under FC s 9(1) could be strengthened. Or one could employ the FC s 9(3) or FC s (4) unfair discrimination test and contend that grounds such as socio-economic status or prisoner-status ought to be recognized as additional (unlisted) grounds.

The question of unlisted grounds is dealt with below. There are several ways of developing FC s 9(1) into a more substantive enquiry.[5] The first would be to strengthen the rationality constraint to require a more substantive interrogation of the relationship between means and ends, or a greater defence of the public good.[6] Although this new test may create some overlap with FC s 36, it would provide a stronger standard of constitutional justification. Alternatively, one could develop a different test by, for example, asking a series of questions that flow from the value of equality and an expanded idea of 'equal protection and benefit of the law'. As suggested elsewhere,[7] these questions could relate to the role of the law in fulfilling the Final Constitution's egalitarian vision of full and equal participation in society. Does the provision facilitate or impede this vision by reinforcing or

[1] It has been suggested that the criterion of fairness should be built into FC s 9(1) so that it applies to those who do not qualify under FC s 9(3) but nevertheless deserve the protection of the Final Constitution. See G Swart 'An Outcomes-based Approach to the Interpretation of the Right to Equality' 1998 (13) *SAPR/PL* 217, 224-233. See also *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC)(Didcott J) at para 57.

[2] As a result, most of the challenges to differentiation that arise in criminal law and procedure have taken place under FC s 9(1). See, eg, *S v Ntuli* (supra); *S v Rens* 1996 (1) SA 1218 (CC), 1996 (2) BCLR 155 (CC).

[3] See L Tribe *American Constitutional Law* (2nd Edition, 1988) 1635-38 (For a discussion of equal protection law and the changing constitutional scrutiny of wealth classifications in the US.)

[4] Given the convergence of poverty and race in South Africa, one could argue that the differential rates amount to indirect racial discrimination. However, such an argument misses those class and wealth dimensions of the problem that are not reducible to race. Alternatively, it could be argued that socio-economic status is a prohibited, but unlisted ground.

[5] This development cannot be achieved through a more substantive enquiry under the rationality test. It would entail an interrogation of means and purpose that would too closely mirror the limitations analysis under FC s 36. Indeed, the rationality test is based on US jurisprudence that does not separate a limitations enquiry from the enquiry into the contravention of the right.

[6] See *Union of Refugee Women* (supra) at paras 37-41

[7] C Albertyn 'Equality' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2nd Edition, 2005) Chapter 4.

removing systemic barriers to advancement in our society? If it can be shown that the flat rate places an intolerable burden on poor people, the constitutional culture of justification[1] demands that such a measure be subject to the kind of justification required by FC s 36, rather than the test of rationality. According to this line of analysis, FC s 9(1) is more than a mere rationality constraint. It is, rather, a substantive provision that ensures the fullest respect for the value of substantive equality and for the constitutional value of accountability for government action.

(ii) *Equality of process as equality of substance and outcome?*

The ambit of FC s 9(1) in protecting equality in the legal process remains a moot point for two reasons. Firstly, it is unclear whether the standard of protection is limited to rationality or extends beyond rationality to questions of, for example, fairness. Second, in *Van der Walt v Metcash Trading*, Goldstone J left open the question whether FC s 9(1) should necessarily be confined to matters of procedure and not substance.[2] Whether, and the extent to which, equality before the law guarantees equal outcomes remains undecided. Both of these areas of equality law will require further clarification by the Constitutional Court.

(f) FC s 9(1) and horizontal application?

None of the jurisprudence on FC s 9(1) suggests that it is horizontally applicable. On the contrary, the interpretation of FC s 9(1) has been entirely located within an understanding of the role and responsibilities of the state in a constitutional democracy. In its present incarnation, therefore, FC s 9(1) cannot apply horizontally either by virtue of the nature of the right, or by virtue of the nature of the duty imposed by the right.[3] To shift the meaning of the right to include private actors would require a jurisprudential development of the human rights obligations of, for example, large national and multinational corporations.

35.4 FC s 9(2): Positive Measures, Substantive Equality and Equality of Rights

FC s 9(2) states that '[e]quality includes the full and equal enjoyment of all rights and freedoms' and that positive measures are permitted to 'promote the achievement of equality' for persons and groups who have been 'disadvantaged by unfair

[1] This 'culture of justification' has been referred to in several cases. See *Shabalala v Attorney-General of the Transvaal* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC) at para 26; *Prinsloo v Van der Linde* (supra) at para 25.

[2] *Van der Walt* (supra) at para 25.

[3] FC s 8(2). For more on the application of the Bill of Rights, and specifically its horizontal application, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 31.2, § 31.4 and the Appendix.

discrimination'. IC s 8(3)*(a)* permitted positive measures 'to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms'. The textual difference means little in so far as the provision was only given a detailed interpretation by the Constitutional Court under the Final Constitution.

The Constitutional Court has consistently referred to IC s 8(3)*(a)* and to FC s 9(2) as important indicators of the commitment to substantive equality. Thus it has acknowledged the remedial and restitutionary aspects of the right and the significance of achieving equality within the overall constitutional vision of transformation. More recently, the Court has confirmed that FC s 9(2) is an important shield of protection for positive measures, providing a complete constitutional defence to a claim of unfair discrimination.

(a) FC s 9(2) as a statement of substantive equality

The Constitutional Court has always recognized that the achievement of equality in South Africa entails the need to overcome a past characterized by deep social and economic inequalities, in which race, gender and other patterns of exclusion and disadvantage structured access to, and enjoyment of, opportunities and benefits.[1] A substantive notion of equality entails the recognition and dismantling of these 'forms of social differentiation and systematic under-privilege'.[2] It also recognizes that the positive, remedial and restitutionary measures referred to in IC s 8(3)*(b)* and FC s 9(2) are fundamental to the achievement of equality and to the creation of conditions for full and equal participation in society.[3] IC s 8(3)*(b)* and FC s 9(2) thus cohere with the transformative purpose of the two constitutions and the idea that the achievement of equality is an ongoing process that is 'remedial and restitutionary'.[4] In the words of Moseneke J, writing for the majority in the leading case on FC s 9(2), *Minister of Finance v Van Heerden*, the equality right is part of 'a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework'.[5]

[1] See *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC)(O'Regan J) at para 42. See also *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC); *NCGLE v Minister of Justice* (supra) at para 62.

[2] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC)('*Van Heerden*') at para 27. See § 35.1 supra.

[3] *Van Heerden* (supra) at paras 22-32.

[4] *NCGLE v Minister of Justice* (supra) at para 61. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at paras 73-77.

[5] *Van Heerden* (supra) at para 25.

FC s 9(2) also states that equality includes the equal enjoyment of the rights and freedoms set out in the Bill of Rights.[1] Writing extra-curially, (then) Chief Justice Arthur Chaskalson has suggested that this statement envisages a society in which all people enjoy a level of psychological, physical and material well-being, enabling them to enjoy all rights and participate fully in that society.[2] In this sense, the assertion of equal rights within the equality clause is an important statement of principle, prefiguring the fundamental transformation of our society. Together with FC s 9(2) as a whole, it confirms that equality does not merely offer protection against past discrimination. It also mandates the achievement of equality in line with a particularly South African (constitutional) vision of social justice.[3]

(b) Positive measures

FC s 9(2) provides for positive measures to advance equality. It reflects a change in wording from IC s 8(3)*(a)* of the Interim Constitution and offers a more positive phrasing of the right's commitment to the promotion of equality. Early concerns that positive measures would be seen as exceptions to equality, rather than as part of substantive equality, were dispelled by this textual change and by the subsequent jurisprudence of the Constitutional Court.[4] However, even with such improvements, many questions remained about the interpretation and the application of FC s 9(2), especially its position in the equality right, its relation to the protection against unfair discrimination in FC s 9(3), the application of the FC s 9(5) presumption to FC s 9(2) and the interpretation of the 'internal criteria' in FC s 9(2).

These questions were largely settled in *Minister of Finance v Van Heerden*. The case concerned an equality challenge to the Political Office Bearers Pension Fund established for members of Parliament after the transition to democracy in 1994. Between 1994 and 1999, the rules of the Fund provided an additional benefit to members of Parliament, who had entered the institution for the first time in 1994, in the form of enhanced employer contributions calculated on a particular scale. Van Heerden, a member who had served in the pre- and post-1994 parliaments, claimed that the scheme amounted to unfair discrimination.[5] The Constitutional Court found the scheme to be constitutionally permissible as a positive measure under FC s 9(2). In doing so, the Court set out the constitutional standards for remedial, positive action by the state.

[1] This provision in FC s 9(2) is textually distinct from FC s 9(2)'s statement on positive measures. In IC s 8(3)*(a)* the provision directly linked positive measures to the equal enjoyment of rights. It thus permitted positive measures 'to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, *in order to enable their full and equal enjoyment of all rights and freedom*' (emphasis added).

[2] See A Chaskalson 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order' (2000) 16 *SAJHR* 193, 203.

[3] See *Van Heerden* (supra) at paras 22-32.

[4] Ibid at paras 30-31. But see *NCGLE v Minister of Justice* (supra) at para 62.

[5] See *Van Heerden* (supra) at paras 4-11 (Summary of the facts.)

(c) The relationship of FC s 9(2) to FC s 9(3) and FC s 9(5)

One of the main questions in academic debate about IC s 8(3)*(b)* and FC s 9(2) has been its conceptual and practical relationship with unfair discrimination and FC s 9(3) and, by necessity, with FC s 9(5). Two related issues arise. First, is FC s 9(2) a complete defence to a claim of unfair discrimination under FC s 9(3),[1] or does it merely provide additional guidelines to the determination of fairness in terms of FC s 9(3)?[2] Secondly, does the FC s 9(5) presumption of unfairness apply to FC s 9(2)? In other words, are positive measures presumptively unfair, thus requiring the state to prove their fairness?

In general, the High Courts had approached FC s 9(2) as if it were a special defence of 'fairness' to a claim of unfair discrimination, but found that special measures were presumptively unfair in so far as they were based on the grounds listed in FC s 9(3).[3] Positive measures thus attracted an onus of establishing on the balance of probabilities that they were taken to promote the achievement of equality. In *Minister of Finance v Van Heerden*, the Constitutional Court agreed that FC s 9(2) constituted a defence to unfair discrimination, but found that it was conceptually wrong to allow special measures to be seen as presumptively unfair.[4]

(i) *Fairness*

The *Van Heerden* Court reiterated the idea that

> [r]emedial measures are not a derogation from, but [are] a substantive and composite part of, the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole. Their primary object is to promote the achievement of equality.[5]

However, implicit in the majority judgment, and made explicit by Sachs J, is the notion that fairness remains an important principle in FC s 9(2) analysis. The enquiry entails an interrogation of many of the factors relevant to the fairness enquiry under FC s 9(3), albeit with an emphasis on the group being advanced, rather than the group being prejudiced. Conceptually therefore, compliance with FC s 9(2) does not make positive measures 'exempt' from attack as unfair discrimination, rather it means that the measures are fair.[6]

[1] See Employment Equity Act 55 of 1998. Under the Act, affirmative action is a complete defence to a claim of unfair discrimination and is not weighed up within the fairness enquiry. See *Eskom v Hiemstra NO* 1999 (11) BCLR 1320 (LC).

[2] See Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Under PEPUDA, a court is required to investigate all the listed criteria of unfairness, even if the defence is one of affirmative action or positive measures. See C Albertyn, B Goldblatt & C Roederer (eds) *An Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 36.

[3] See *Public Servants' Association of South Africa v Minister of Justice* 1997 (5) BCLR 577 (T); *Motala v University of Natal* 1995 (3) BCLR 374 (D); *Minister of Finance v Van Heerden & Another* Cape High Court Case 7067/01 judgment of 12 June 2003 (as yet unreported)('*Van Heerden HC*').

[4] *Van Heerden* (supra) at para 32.

[5] Ibid.

[6] Ibid at para 140.

(ii) *A complete defence*

The *Van Heerden* Court found further that that 'differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted provided the measures are shown to conform to the internal test set by section 9(2)'.[1] In other words, FC s 9(2) provides a complete defence to a claim that positive measures constitute unfair discrimination. All that is required to succeed in this defence is to demonstrate compliance with the internal conditions established in FC s 9(2).

(iii) *The place of FC s 9(3)*

If the measure is found to comply with FC s 9(2), then the enquiry ends. If it does not pass muster under FC s 9(2), and if the measure is based on a listed or unlisted ground prohibited by FC s 9(3), then it will still need to be tested under FC s 9(3) to determine whether it amounts to unfair discrimination.[2] In *Van Heerden*, the minority judgments of Mokgoro and Ngcobo JJ followed this route. Both found the legislative scheme to constitute fair discrimination, mainly because the measure did not impact negatively on, nor impair the dignity of, the claimant.[3]

(d) Proving the defence: the internal criteria in FC s 9(2)

The *Van Heerden* Court identified three criteria that must be satisfied for a defence to succeed under FC s 9(2):

- Does the measure target persons or categories of persons who have been disadvantaged by unfair discrimination?
- Is the measure designed to protect persons or categories of persons who have been disadvantaged by unfair discrimination?
- Does the measure promote the achievement of equality?[4]

Before considering these criteria, it is useful to consider what measures fall under FC s 9(2), and whether the section is limited to measures taken by the state or whether it also applies to positive measures in the private sphere. The broad formulation of the term 'legislative or other measures' seems to suggest that all public or state measures can rely on FC s 9(2) for constitutional protection. The High Court decision in *Motala v University of Natal* took the view that IC s 8(3)*(a)* also applied horizontally.[5] Unless it is decided that the inclusion of the word

[1] *Van Heerden* (supra) at para 32.
[2] Ibid at para 36. All four judgments in *Van Heerden* agree on this approach to FC s 9(2).
[3] *Van Heerden* (supra) at para 97.
[4] Ibid at para 37. Note that all the judges are in accord about the nature of this test. Ibid at paras 82 and 108. Mokgoro J and Ngcobo J, however, each come to different conclusions in applying the test.
[5] 1995 (3) BCLR 374 (D).

'legislative' limits FC s 9(2) to public, rather than private, measures, there is no reason in principle why FC s 9(2) should not apply horizontally. In most instances, the provisions of the Employment Equity Act will regulate positive measures in the workplace.[1] However, the jurisdiction of the Promotion of Equality and Prevention of Unfair Discrimination Act is far less clear, and no precedent exists that currently requires that this Act to be used rather than the Final Constitution.[2]

(i) *Does the measure target persons or categories of persons who have been disadvantaged by unfair discrimination?*

The first criterion focuses on the group that is being promoted by the measure to determine whether it is constituted by 'persons or categories of persons disadvantaged by unfair discrimination' described in FC s 9(2). Two issues are important here: First, to what extent does one have to show actual disadvantage in the group being targeted? Second, can one distinguish between persons within a particular disadvantaged group by targeting a section of a disadvantaged group (the idea of relative disadvantage)?

To answer the first question, one needs to start with the Constitutional Court's recognition that the fundamental cleavages in South African society emerged from group-based attributes such as race or gender. These cleavages permeated the attitudes, practices, institutions and structures of an entire society, and they continue to exist more than a decade after the Final Constitution was enacted. They require extensive remedial and group-based action. To meet this criterion, the 'programme of redress must favour a group or category designated by section 9(2)' and 'the beneficiaries must be shown to be disadvantaged by unfair discrimination'.[3] In practice, this part of the FC s 9(2) test requires that the programme must be shown to benefit a group that is both disadvantaged and defined by a ground that is prohibited under FC s 9(3) (black rather than white, female rather than male etc). Although some evidence to this effect ought to be offered, courts will often be prepared to take judicial notice of such a disadvantaged group. It does not yet matter that the group consists of 'privileged' members of the disadvantaged group, as arguably, Members of Parliament in South Africa are. Nor does it matter if some members of the overall group being advanced by the

[1] Act 55 of 1998.

[2] In *Du Preez v Minister of Justice and Constitutional Development*, the Equality Court did not follow the Constitutional Court in *Van Heerden* in interpreting this Act's provision for positive measures (s 14(1)). 2006 (5) SA 592 (EC). On the contrary, it seemed to suggest that challenges to positive measures under the Act — in this case a challenge to shortlisting criteria for appointment to the position of a regional magistrate — should be tested under the unfair discrimination provisions of the Act (s 13 read with s 14 (2) and (3)) and not in terms of the internal criteria set out in s 14(1), despite the similarity in the wording of s 14(1) and FC s 9(2). This approach does not seem, to us, to be correct. The Act should rather be interpreted in a manner that coheres with, rather than contradicts, *Van Heerden*.

[3] *Van Heerden* (supra) at para 8.

measure belong to a privileged group. A measure will not fail because it includes persons who have not, in fact, been disadvantaged. It is sufficient that 'an overwhelming majority' have been so disadvantaged.[1]

In *Van Heerden*, the group or 'category of persons' who received the beneficial treatment by way of enhanced employer contributions to the Pension Fund comprised all members who entered Parliament for the first time in 1994. This group of 251 people included 53 white people, some of whom were members of the New National Party (the previous governing party). In finding this group to be 'disadvantaged by unfair discrimination', the majority judgment found that the group was largely defined by those 'who were excluded from Parliamentary participation on account of race, political affiliation or belief'.[2] The majority judgment thus accepted that the group was 'disadvantaged' even though up to 20 percent of its members were not historically disadvantaged.[3] In doing so, they did not interrogate the issue of 'membership' closely, but acknowledged that the definition of a class to benefit from a positive measure is a difficult task which would not always be guided by clearly defined boundaries of disadvantage.

It was this loose definition of the group that was found wanting by the minority judgments of Mokgoro and Ngcobo JJ. Both justices found that the group included too many people from an advantaged group, was not defined by race, and could not be seen to be a 'disadvantaged' group.[4] These dissents turned in part over a disagreement over what constitutes an 'overwhelming' majority or a 'tiny minority' within the group (Moseneke J's description of the group). While Mokgoro J agreed that one did not have to show actual disadvantage, she argued that one did have to show that they were all members of a group that was previously disadvantaged.

This difference of judicial opinion goes to a more substantive disagreement about the level of scrutiny that the court will impose on positive measures. The majority judgment signifies a more deferential approach to positive measures, setting the threshold for compliance at a relatively low level and leaving significant space for government and Parliament to address the patterns of subordination and disadvantage in South African society. By contrast, the minority judgments argue that the lines should be drawn differently. In defending the need for greater scrutiny, Mokgoro warns that

> section 9(2), as an instrument of transformation and the creation of a truly equal society, is powerful and unapologetic. It would therefore be improper and unfortunate for section 9(2) to be used in circumstances for which it was not intended. If used in circumstances where a measure does not in fact advance those previously targeted for disadvantage, the effect would be to render constitutionally compliant a measure which has the potential to discriminate unfairly.[5]

[1] *Van Heerden* (supra) at paras 38-40.
[2] Ibid at paras 38-40.
[3] Twenty percent of the group were white, although some of these individuals were members of the African National Congress. Ibid at para 93.
[4] Ibid at paras 88, 105 and 108.
[5] Ibid at para 87.

These questions also go to a wider debate in South African society about the continuing use of positive measures as past inequalities are reduced through greater access to educational and economic opportunities. Although not immediately likely, it is possible that the Constitutional Court's approach to the delineation of a disadvantaged group will change over time. It is interesting to note that the Indian Supreme Court eventually narrowed its approach to the definition of disadvantage after it became apparent that preferential policies, entrenched in the Indian Constitution since the 1950s,[1] had only benefited a small and privileged elite within the defined groups.[2] The Indian Supreme Court now requires both membership in a named group, as well as evidence of low socio-economic status, in order to qualify for preferential treatment.[3]

A related question in South Africa is whether the group may be constituted by a portion of a disadvantaged group, for example, black Africans within the larger black group. The issue of relative disadvantage was not discussed by the majority in *Van Heerden*. Sachs J, in his minority judgment, noted that such relative disadvantage creates 'a more difficult case'.[4] The issue of relative disadvantage did arise in *Motala v University of Natal*.[5] In this case, an Indian student, with five distinctions in matric, challenged the University of Natal's refusal to admit her to medical school. The refusal was based on the decision by the medical school to limit the admission of Indian students to a certain percentage so that more African students could have an opportunity to enter the school. The poor quality of African education under apartheid meant that Africans could not compete equally in a purely merit-based system. The High Court held that, although Indian students were disadvantaged by apartheid, African students had experienced greater disadvantage. As a result, the measure that preferred one black group over another was lawful.[6]

The complex forms of inequality in South Africa, where factors such as race, class, religion and gender intersect in a multitude of ways, means that positive measures may be tailored to particular groups. For example, a particular measure may be targeted at black women, rather than all women, or at Africans rather than

[1] Articles 15(3), 15(4) and 16(4) of the Indian Constitution allow 'special provision' for women and children, Scheduled Castes and Scheduled Tribes and socially and educationally backward classes of citizens. These provisions apply generally (art 15) and to appointments and posts in the state (art 16).

[2] See WF Menski 'The Indian Experience and its Lessons for Britain' in B Hepple & E Szyszczak *Discrimination: The Limits of the Law* (1992) 330; V Nair 'Search for Equality through Constitutional Process: The Indian Experience' in S Jagwanth & E Kalula (eds) *Equality Law: Reflections from South African and Elsewhere* (2001) 255.

[3] See *Indra Sawhney v Union of India* (1993) AIR SC 477; *Indra Sawhney v Union of India* (2000) AIR SC 498.

[4] *Van Heerden* (supra) at para 149. The minority judgement of Mokgoro J suggested that the relative disadvantage experienced by African, coloured and Indian South Africans should have been addressed. Ibid at para 93.

[5] 1995 (3) BCLR 374 (D)('*Motala*').

[6] Ibid at 383B–F.

all black people. In such cases of relative disadvantage, it might be that the scrutiny of the group would need to be higher.[1] Thus, such measures may be constitutional if, in each case, the definition of the group is justified with reference to the actual historic or current unfair discrimination suffered by the majority of that group in a particular context. For example, it is the actual relative privilege of the majority of Indian learners over African learners, as shown in statistics, which allowed the kind of measure contemplated in *Motala* to be found to be constitutional.[2]

(ii) *Is the measure designed to protect persons or categories of persons who have been disadvantaged by unfair discrimination?*

The second condition placed on positive measures by FC s 9(2) is that they should be 'designed to protect or advance' certain persons or groups. Writing about the Interim Constitution, Mureinik argued that the 'culture of justification' brought about by the new Constitution required the courts to test both the purpose and the means of positive measures. Thus, a court should ask what a measure was intended to achieve, and, thereafter, assess whether the design of the measure makes it objectively probable that it will, in fact, achieve the intended ends.[3] Following this general approach, the High Court in *Van Heerden* had required both a causal connection and a necessary connection between the designed measures and the objectives.[4]

This approach was rejected by the Constitutional Court. Moseneke J found that the remedial measure must be 'reasonably capable of attaining the desired outcome'.[5] This phrase meant that the measure should not be 'arbitrary, capricious or display naked preference'.[6] However, the Court did not expect any 'precise prediction of a future outcome', merely a 'reasonable likelihood' that the measure will realize the purpose. This standard does not entail any tests of necessity, precision or proportionality.[7] It is not necessary to establish that the objective *will* be achieved, that it was *necessary* to prejudice one group to advantage another, or that there might be *less onerous* ways to achieve the objective.[8]

An important difference in the standards set by the High Court and the Constitutional Court relates to the question of the onus. The High Court found the onus of fairness to lie with the state and thus required a heavier

[1] Sachs J, in *Van Heerden*, describes an assessment of relative disadvantage as constituting a 'more difficult case'. *Van Heerden* (supra) at para 149.
[2] *Motala* (supra) at 383 B-F.
[3] E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31, 47.
[4] *Van Heerden* (supra) at para 14. See also *Public Servants' Association of South Africa v Minister of Justice* 1997 (5) BCLR 577, 639–641 (T).
[5] *Van Heerden* (supra) at para 41.
[6] Ibid at paras 42 and 149.
[7] Ibid at paras 42 and 43
[8] Ibid at para 42.

burden of proof; the Constitutional Court established that the presumption of unfairness did not apply to FC s 9(2). Relieved of the presumption, the standard applied by the Constitutional Court does not seem to be much more onerous than a rationality test: generally such a standard requires 'a clear and rational consideration' of the relationship between means and purpose.[1] However, the Court has not set the test at this level of scrutiny, but has rather required a level of 'reasonableness' in the design of the programme. Hence it noted that the scheme 'distribute[d] pension benefits on an equitable basis with the purpose of diminishing the inequality between privileged and disadvantaged parliamentarians.[2] The Court also noted that the scheme was transitional, a limited and temporary tool with a five-year life span. It said that the classification of the group related to the need to ameliorate past disadvantage and that there was a 'clear connection' between the differentiation (the definition of the group) and the need.[3] In general, the Court's consideration of the pension scheme demonstrated a fairly detailed scrutiny of the issues, even if it did not apply a very strict standard of assessment. Again, the interpretation and the application of the criterion demonstrate deference to the other branches of government. However, the criterion of reasonableness also provides a degree of flexibility and suggests that the parameters of this requirement will be developed over time.

(iii) *Does the measure promote the achievement of equality?*

The third criterion of constitutionality under FC s 9(2) is that the purpose of the measure must be to achieve equality by protecting or advancing disadvantaged persons or groups. The purpose is tested against the constitutional vision of equality and the creation of a 'non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity'.[4] To achieve this constitutional purpose, remedial actions need to be taken, even though they 'may often come at a price for those who were previously advantaged'.[5]

In assessing a measure, a court will look to at its remedial purpose. It is likely that this remedial purpose must go beyond compensation[6] and should seek to ameliorate past disadvantage.[7] The overall purpose must be to promote equality, rather than to harm or to punish previously advantaged groups.[8]

[1] *Van Heerden* (supra) at para 52.
[2] Ibid.
[3] Ibid at paras 47, 50 and 52.
[4] Ibid at para 44.
[5] Ibid. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 76.
[6] See *Action Travail des Femmes v Canadian National Railway Co* (1988) 40 DLR (4th) 193, 213.
[7] *Van Heerden* (supra) at para 48.
[8] Ibid at para 76.

The application of this criterion requires a weighing up of the beneficial purpose of the measure against the possible harm that it might cause. This weighing up means that the court must consider the impact of the measure on both groups — although the emphasis falls on the group being promoted by the measure. The court must ensure that the measure is not an abuse of power, and does not impose 'substantial and undue harm' on those excluded from the measure. In assessing harm, one must look to the entire class complaining of unfair discrimination. It is a contextual, group-based analysis, not one of individual misfortune. One of the determinative factors in *Van Heerden* was that, apart from a few 'jammergevalle', the majority of those left out of the measure remained better off than those who benefited from the measure.[1] The presence of these 'jammergevalle' or 'unfortunate ones' who are prejudiced by the measure, but are unrepresentative of the class complaining of unfair discrimination, does not negate the measure.[2]

This criterion allows courts to assess the need for, and impact of, positive measures in different contexts as the transformation project begins to shift social and economic relations in South Africa.[3] In undertaking such regular reviews of this project, Sachs J suggests that the courts should have overall regard to the values of dignity and non-racialism,[4] and to the transformative project of achieving substantive equality.

(e) Applying the FC s 9(2) criteria to the case

Van Heerden demonstrates that the application of the FC s 9(2) criteria to a particular case involves a fairly detailed scrutiny of the issues. This assessment requires looking at the scheme or measure as a whole, its historical context, the duration, nature and purpose of the measure, the position of the person complaining of unfair discrimination and the impact of the measure of him or her and his/her class, as well as the position of the group being promoted.[5] In other words, the issues considered in the enquiry are similar to those considered in the enquiry into unfair discrimination. Like that latter enquiry, FC s 9(2) demands a contextual enquiry into impact, but with an emphasis on the group being promoted.[6]

As Sachs J points out, the enquiry is closely linked to FC s 9(3) and its idea of fairness. If fairness is a moral concept that allows an examination of the competing moral claims within the social and historical context of inequality in our society, then the FC s 9(2) enquiry also entails the balancing of the prejudice

[1] *Van Heerden* (supra) at paras 55-56.
[2] Ibid.
[3] Ibid at paras 145 and 149-150 (Sachs J).
[4] Ibid at para 151.
[5] Ibid at para 45.
[6] Ibid at paras 77-80 (Mokgoro J).

caused to individuals by positive measures and the collective benefit of these measures to society in overcoming past discrimination and disadvantage.[1] The overlap between FC s 9(2) and (3) is also illustrated in cases where the courts have dealt with challenges to 'positive measures' in terms of unfair discrimination under FC s 9(3). In *Pretoria City Council v Walker*, for example, the Constitutional Court addressed the constitutionality of a flat rate for municipal charges as a question of unfair discrimination and assessed its validity with reference to the criterion of fairness.[2] Cases such as *Walker* highlight the conceptual relationship between FC s 9(2) and FC s 9(3). The overlap between the principle of remedial equality underlying FC s 9(2) and unfair discrimination in FC s 9(3) has been recognized by the Constitutional Court.[3]

The difference between the two enquiries appears to lie mainly in the manner in which the issues are assessed. An FC s 9(2) enquiry is more deferential to the legislature or government, using a light brush of reasonableness and setting a lower threshold of constitutional validity. It has a forward-looking focus that considers the remedial aspects of equality as applied to a disadvantaged group, rather then an assessment of the past impact of allegedly discriminatory measures. In the overall assessment, more weight is placed on the remedial purpose of the measure, than on its impact on those complaining of unfair discrimination.[4] In a FC s 9(3) enquiry, it is the impact on the complainant which is the key factor. These differences reflect the different aspects of South Africa's broad and substantive equality right.

(f) FC s 9(2) as a sword or a shield?

If FC s 9(2) provides a defence or a shield to positive measures, then does it also provide a sword, or a claim for positive action by the state? Can a court compel the state to act, or does this prerogative lie within the purview of Parliament and the executive? The question of principle is clear — there is a constitutional duty to promote the achievement of equality:

> Our supreme law says more about equality than do comparable constitutions. Like other constitutions, it confers the right to equal protection and benefit of the law and the right to non-discrimination. But it also imposes a positive duty on all organs of state to protect and promote the achievement of equality — a duty which binds the judiciary too.[5]

[1] Most commentators on the right to equality have adopted this position. See, eg, C Albertyn & J Kentridge 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 *SAJHR* 149; D Davis 'Equality' in D Davis, H Cheadle & N Haysom *Fundamental Rights in the Constitution: Commentary and Cases* (1997).

[2] 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC). The low 'flat rate' imposed for municipal services in previously black townships that was challenged in this case was a positive measure in favour of the more economically disadvantage residents of these townships.

[3] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at paras 61-62.

[4] Mokgoro J makes this distinction in *Van Heerden. Van Heerden* (supra) at paras 78-80.

[5] Ibid at para 24.

The permissive language of FC s 9(2) and the deferent approach that the Constitutional Court has adopted in relation to positive measures militate against an interpretation of FC s 9(2) as providing a sword to compel the state to act.[1] In the words of the *Van Heerden* Court: 'presumptive unfairness would unduly require the judiciary to second-guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination'.[2] It is the Court's concern for the proper separation of powers which suggests that FC s 9(2) does not ground a challenge based upon the state's failure to act.

It is more likely that actions to compel the state to enact positive measures to promote equality may be founded on FC s 9(3),[3] or on other substantive rights as defined by the value of equality and/or read with the FC s 9(2) guarantee of the equal enjoyment of rights. The Promotion of Equality and Prevention of Unfair Discrimination Act may also be used to generate remedies that require positive state action or positive private action.[4]

FC s 9(2) states that equality includes the equal enjoyment of the rights and freedoms set out in the Bill of Rights. This clause is textually separated from the statement on positive measures. (In IC s 8(3)*(a)* the provision linked positive measures to the equal enjoyment of rights.) This textual separation strengthens the claim that the statement has an independent meaning under FC s 9. However, it is not clear whether it also forms an independent basis for a claim for equal access to, and enjoyment of, other rights.

This point may be considered in relation to socio-economic rights. Can one ground a challenge to inequalities in the provision of social assistance or housing in FC s 9(2)? The answer is clearly 'no' in relation to inequalities that arise out of a ground prohibited under FC s 9(3). And it is also likely to be 'no' in relation to inequalities arising out of other grounds. Although the principle of the non-discriminatory enjoyment of all rights might be captured in FC s 9(2), it is undoubtedly FC s 9(3) that provides the core operating mechanism for challenging discrimination in the provision of social assistance, housing or education. It is improbable that FC s 9(2) provides an independent mechanism for addressing inequalities that are not caught in the net of FC s 9(3) or FC s 9(4). On the other hand, if a claim is based on a listed socio-economic right such as the right of access to health care under FC s 27 or housing under FC s 26, then it is likely that reliance may be placed on the value of substantive equality (as articulated in part by FC s 9(2)) and the principle of non-discrimination in international law to

[1] *Van Heerden* (supra) at para 33.
[2] Ibid at paras 33 and 152.
[3] See § 35.5 infra.
[4] Act 4 of 2000. For further discussion of PEPUDA, see § 35.8 infra.

demand the consistent application of the right.[1] This approach is apparent in *Khosa v Minister for Social Development*. In *Khosa*, the applicants successfully claimed access to various social benefits, denied to them because of their status as non-citizens, under FC s 9(3) and FC s 27.[2] In discussing their claim of access to social assistance under FC s 27, the Constitutional Court referred to the foundational value of equality which informed the interpretation of the right to mean equal access to socio-economic rights for all persons.[3] The *Khosa* Court also found that the unequal enjoyment of the right could found a claim of unfair discrimination.[4]

(g) FC s 9(2) and FC s 36

FC s 36 provides that a right may be limited, but only to the extent that the limitation is 'reasonable and justifiable in an open and democratic society based of human dignity, equality and freedom'. This limitation provision does not apply directly to FC s 9(2), either conceptually or practically. The primary purpose of FC s 9(2) concerns the promotion of equality not the violation or the limitation of the right. If a measure fails to conform to the guidelines for promotional measures under FC s 9(2), then the next step is to test whether it violates the equality right under FC s 9(3). If it does violate FC s 9(3), then FC s 36 would apply if the limitation on the right to equality arose from a law of general application.[5]

35.5 FC ss 9(3), (4) and (5): Prohibition Against Unfair Discrimination

The subsections dealing with unfair discrimination comprise the functional centre of the equality right. It is here that the court considers whether the state (FC s 9(3)) or a private actor (FC s 9(4)) has unfairly discriminated against another person. The Constitutional Court has considered the meaning of unfair discrimination in a number of cases and has developed a detailed test to be followed in claims of unfair discrimination.

[1] FC s 39(1) requires a court to consider international law. On this matter, see *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at paras 26-33. The principle of equality or non-discrimination in the enjoyment of rights is a central one in international law. Indeed, the principle of non-discrimination has been identified as a core obligation in, for example, the right to the highest attainable standard of health care established in the International Covenant on Economic, Social and Cultural Rights (article 12). See, eg, Committee on Economic, Social and Cultural Rights General Comment 14 'The Right to the Highest Attainable Standard of Health' (Twenty-second session, 2000) UN Doc E/C.12/2000/4 paras 18-19 and 43 (The state has a responsibility to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups.)

[2] *Khosa & Others v Minister of Social Development & Others; Mahlaule & Another v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) SA 569 (CC).

[3] Ibid at para 42.

[4] Ibid at para 44.

[5] See § 35.5*(d)* infra.

(a) Test for unfair discrimination

The test was first set out in *Harksen v Lane NO*. Goldstone J summarized the test as follows:

> 1(i) Does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 9(3).
>
> 2. If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 36).[1]

We can pare this test down to three queries:

1 Does the differentiation amount to discrimination?
2. If so, was it unfair?
3 If so, can it be justified in terms of the limitations clause (FC s 36)?

(b) Step 1: Does the differentiation amount to discrimination?

The equality right has the unusual feature of prohibiting discrimination that is unfair. Fairness is the means of sorting permissible from impermissible forms of discrimination.[2] While discrimination itself contains a negative or pejorative connotation entailing some harm based on difference, unfair discrimination goes further in deepening or worsening existing disadvantage.[3] The Final Constitution requires that disadvantaged groups must be assisted.[4] This requirement does not mean that privileged groups will never be protected by FC s 9(3). It does, however, point to the importance of understanding unfair discrimination contextually,[5] historically and in light of the values underlying the Final Constitution.

[1] 1997 (4) SA 1 (CC), 1997 (11) BCLR 1489 (CC)('*Harksen*') at para 53. Although the test was developed under the Interim Constitution, it has been followed under the Final Constitution. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 15.

[2] See J Kentridge 'Equality' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS3, 1999) Chapter 14, 14-18.

[3] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 31.

[4] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 42.

[5] See Kentridge 'Equality' (supra) at 14-18.

In comparative jurisprudence a distinction is drawn between symmetrical and asymmetrical approaches to discrimination law.[1] A symmetrical approach would regard all differentiation on a prohibited ground to be unacceptable, while an asymmetrical approach would find that measures to benefit disadvantaged groups might be permissible.[2] The existence of positive measures in FC s 9(2) clearly points to an asymmetrical approach to FC s 9 as a whole. The *Harksen* test for unfair discrimination has the curious feature of seeming to offer both a symmetrical and asymmetrical approach in different parts of the test. In step 1 the court says that differentiation on a listed ground is discrimination. There is no suggestion in *Harksen* that the differentiation would need to entail some prejudice to the person complaining of the discrimination. At this stage of the FC s 9(3) enquiry the approach is entirely symmetrical. This approach seems to have been followed in the majority decision in *Walker* and led to the criticism in the minority judgment of Sachs J that 'the measure must at least impose identifiable disabilities, burdens or inconveniences, or threaten to touch on or reinforce patterns of disadvantage, or in some proximate or concrete manner threaten the dignity or equal concern or worth of the persons affected'.[3] Sachs J was, however, commenting only on indirect discrimination on a prohibited ground.[4] Jagwanth has criticized the *Harksen* test as reducing 'the first part of the enquiry into a decontextualised, abstract and mechanical exercise of formal equality'.[5] She explains that an asymmetrical approach that understands difference within social hierarchies of power would result in a more contextual examination that would exclude certain privileged groups from even succeeding at the first stage of the enquiry.

It seems that in applying its own test, the Constitutional Court has sometimes assumed some form of prejudice to be present.[6] While the first step of the FC s 9(3) enquiry may benefit certain privileged groups, they will still have to go through the second step involving the unfairness enquiry. This second step is a more challenging standard to satisfy. Thus, while ideally there should be a better flow in the FC s 9(3) test as a whole between an initial examination of prejudice and later questions of disadvantage (elucidated by looking at impact and context),

[1] See T Loenen 'The Equality Clause in South Africa: Some Remarks from a Comparative Perspective' (1997) 13 *SAJHR* 401; C O'Regan 'Equality at Work and the Limits of the Law: Symmetry and Individualism in Anti-Discrimination Law' (1994) *Acta Juridica* 64.

[2] See C Albertyn 'Equality' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 4-46 — 4-47.

[3] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)('*Walker*') at para 113. Sachs J, while correct to require prejudice, seems to require a demonstration of disadvantage at this stage rather than at the unfairness stage. See C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248, 268-269 ('Facing the Challenge').

[4] For further discussion of direct and indirect discrimination, see § 35.5*(c)* infra.

[5] S Jagwanth 'What is the Difference? Group Categorization in *Pretoria City Council v Walker*' (1999) 15 *SAJHR* 200, 204.

[6] *National Coalition for Gay and Lesbian Equality v Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC)('*NCGLE v Minister of Home Affairs*') at paras 32-40.

the test is capable of resulting in an appropriate substantive equality analysis. Arguably, the broad reach of the first step of the test has the benefit of not excluding people who deserve their 'day in court'. The overall test for unfair discrimination provides a mechanism for courts to examine the complexities of cases that come before them and produce just results.

The other issue that is important at the first stage of the FC s 9(3) enquiry is the proper definition of the group affected by the discrimination. Falling within a listed ground enables a group to get through step one without anything further. It also provides access to the presumption of unfairness in FC s 9(4).[1] In *Hugo*, the male prisoner was unsuccessful because the majority of the Court saw him as part of the group of privileged fathers rather than as a primary care-giver or a disadvantaged father within the broader group of privileged fathers.[2] The need to understand the context of discrimination is therefore important for the purpose of steps 1 and 2 of the FC s 9(3) test. As Jagwanth has pointed out, a proper contextual enquiry at the discrimination stage of the test will allow for a substantive approach to equality where comparisons between groups are understood within the social context of unequal power and hierarchies.[3] It should also be noted that, while equality is a comparative concept, substantive equality enables one to move away from a rigid analytical framework. Thus, in an infamous US decision, pregnancy was equated to disability and, since male workers were not entitled to disability leave, the court denied female workers any entitlement to pregnancy leave. This type of formalism takes the idea of a comparator to an illogical extreme and fails to acknowledge the historical, contextual and even biological factors involved in an evaluation of discrimination.[4]

The Court has said that intention on the part of the alleged discriminator is not relevant to the enquiry as to whether there has been discrimination. It must be determined objectively in light of the facts of each case.[5] Considerations of intention may arise at the fairness stage (step 2 of the test) and in relation to justification (step 3 of the test).

Discrimination can arise where there is an offending act or where there is a failure to act that in itself causes discrimination. The failure to take measures to assist a disadvantaged group such as the lack of sign language interpreters in hospitals can result in a finding of discrimination.[6] There is some debate as to

[1] The choice of ground can also affect remedy. For example, in *NCGLE v Minister of Home Affairs,* the Court decided the issue on the ground of sexual orientation, thus limiting the remedy to same sex couples. Had they decided that there was unfair marital status discrimination against non-spouses, heterosexual domestic partners might also have benefited. See Albertyn 'Equality' (supra) at 4-46. For more on remedies, see M Bishop, M Chaskalson, S Budlender & J Klaaren 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 9.

[2] Albertyn & Goldblatt 'Facing the Challenge' (supra) at 264-65.

[3] Jagwanth (supra) at 205.

[4] See *Law v Canada* [1999] 1 SCR 497 at para 58, cited in Albertyn 'Equality' (supra) at 4-49 — 4-50.

[5] See *Walker* (supra) at para 43; *Harksen* (supra) at para 47.

[6] See *Eldridge v A-G of British Columbia* (1997) 151 DLR (4th) 577 (SCC).

whether our equality right can be used to require the state to provide services where none exist.[1]

In the Constitutional Court's jurisprudence to date, there has been little dispute over the issue of proof of discrimination, both in relation to the question whether there has been discrimination at all, and also whether, if so, such discrimination is based on a prohibited ground. In discrimination law more widely (both labour claims in South Africa and general discrimination claims elsewhere) these issues have been strongly contested. There have, however, been two cases, *NCGLE v Home Affairs* and *Jordan v The State*, in which the Constitutional Court has touched on these issues. These decisions provide some insight as to how disputes about whether there was discrimination and its relationship to the ground might be resolved.

In *Jordan,* the very fact of the legislative distinction was in dispute. Did the provision that criminalized sex work differentiate between sex workers and their clients? It was argued by the state that it did not, since the provision criminalized the conduct of both sex worker and client.[2] The majority accepted that there may be a distinction, but found against the complainant on the relationship of the distinction to the ground, ie that there was no discrimination on the basis of gender. The minority judgment addressed the criteria for the proper interpretation of the provision[3] by looking at issues of statutory interpretation as well as the context in which the provision operated.[4] The minority's approach led to a finding that the provision did differentiate between sex worker and client, and that this differentation amounted to gender discrimination.

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the state sought to argue that the exclusion of gay and lesbian partners from certain benefits was not discrimination based on sexual orientation, but discrimination based on the fact that these partners were 'non-spouses'. The Constitutional Court went to some lengths to show how meanings of 'spouse' were based on harmful exclusions of gay and lesbian people. This more contextual approach stands in contrast to that of the majority in *Jordan*.

It is likely that these issues will be further contested where more complicated claims of intersectional or indirect discrimination are asserted. The courts should adopt a substantive rather than mechanical approach to the issue of whether there has been discrimination.

[1] See S Fredman 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 *SAJHR* 163.

[2] *Jordan & Others v S & Others* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC)('*Jordan*') at paras 8 and 40.

[3] Note that this aspect of the judgement does not seem to be contested by the majority, who agree with the finding that there is such a distinction. Ibid at para 8.

[4] Ibid at paras 41-44.

(c) 'Directly or indirectly'

The prohibition in FC s 9(3) and (4) applies to both 'direct' and 'indirect' unfair discrimination. Direct discrimination occurs where a provision specifically differentiates on the basis of a listed or unlisted ground. For example, the common law definition of marriage specifically referred to 'a man and a woman' and thus discriminated directly against same-sex couples on the ground of sexual orientation. Indirect discrimination occurs where differentiation appears to be neutral and hence benign but has the effect of discriminating on a prohibited ground, whether listed or unlisted. For example, where a measure that treats people in one geographical area differently from people in another area is really based on the fact that white people live in the one area while black people live in the other, indirect discrimination on the basis of race may have occurred. In *Walker*, the Court noted that the reference in the right to direct and indirect discrimination reflected a concern for the 'consequences' rather than the 'form' of the conduct. This approach was consistent with the *Walker* Court's desire to uncover the impact of discrimination.[1]

In *Jordan*, the majority's failure to consider the substantive issues of sex work prevented it from understanding the challenged law as indirect gender discrimination. In particular, the majority failed to see the criminalization of the conduct of the sex worker (usually a woman) but not of the client (usually a man) as indirect gender discrimination. The Court did not go beyond the wording of the gender-neutral legislation to look at the different realities of its impact on men and women. This refusal to look at different realities indicates an inability to understand the social context of sex work and the unequal gender relations in society that shape this occupation. The minority reached the opposite conclusion with a more context-sensitive interpretation of the legislation. O'Regan and Sachs JJ looked beyond the statute, which made no distinction between male and female sex workers or clients, to the actual circumstances of sex work in South Africa. In this way they were able to challenge the stereotyped assumption that female sex workers are to blame for selling themselves rather than the men who 'create the demand for it'.[2] As a general matter, however, we would suggest that the distinction between direct and indirect discrimination is not especially significant since our jurisprudence focuses on the impact of the impugned law on the complainant and enables courts to look beneath any masked prejudice to discover the true face of discrimination.[3]

[1] *Walker* (supra) at paras 31-32.

[2] *Jordan* (supra) at para 65. For another, related, critique of *Jordan,* see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

[3] Albertyn 'Equality' (supra) at 4-34 — 4-35.

(d) 'Anyone'

FC s 9(3) prohibits unfair discrimination against 'anyone'.[1] This raises the question whether the prohibition only applies to natural persons or also to corporations. While the unfairness test generally requires an impairment of dignity, which could not apply to non-humans, it also allows a claim to succeed where an adverse effect of a comparably serious manner is shown. Kentridge suggests that this may allow a corporation to show that it was subject to unfair discrimination on the basis of race if a law precluded black-owned companies from obtaining some benefit.[2] This test seems appropriately flexible and inclusive of possible scenarios where rights violations might occur.

(e) 'Including': unspecified grounds

FC s 9(3) prohibits unfair discrimination on a list of grounds but is careful to say 'including' before listing these grounds. This word clearly indicates that the list of grounds is not closed and that other grounds of unfair discrimination are possible. In respect of IC s 8(2), which stipulated that the listed grounds did not derogate from the generality of the provision, the Constitutional Court held that the list of grounds was not 'exhaustive'. Despite the absence of an express non-derogation provision, FC s 9(3) must be taken to include unspecified (also referred to as unlisted or analogous) grounds of discrimination. The fact that FC s 9(5) presumes discrimination on a listed ground to be unfair also strongly suggests that there can be discrimination on the basis of unspecified grounds (where the presumption would not apply).

The Court in *Harksen* explained how it sees the specified grounds:[3]

> What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted.

In the light of this understanding of specified grounds, the Court explained how the unspecified grounds must be determined:[4]

[1] FC s 9(4) similarly prohibits unfair discrimination by private persons.
[2] Kentridge 'Equality' (supra) at 14-48.
[3] *Harksen* (supra) at para 49.
[4] Ibid at para 46.

> There will be discrimination on an unspecified ground if it based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.

Kentridge has pointed out that there is a similarity between the enquiry into whether differentiation on an unspecified ground amounts to discrimination and the unfairness enquiry since both consider the question of impairment of dignity. This is a somewhat problematic overlap since discrimination entails 'a demonstration of immediate harm that flows from differentiation' while the unfairness enquiry is a deeper exploration of the impact of the discrimination on the individual and her group.[1] The unspecified grounds enquiry looks generally at the group involved while there is more room in the unfairness enquiry to examine the specific complaint. The two enquiries have different objectives: the former distinguishes differentiation from discrimination while the latter has to determine whether a particular act of discrimination was unfair. The two enquiries are, however, related and may overlap somewhat.

The only difference between unspecified and listed grounds is that the former do not benefit from the presumption of unfairness in FC s 9(5).[2] The Court has also said that the enquiry into whether there has been differentiation on a listed or unspecified ground is an objective one.[3]

Under the Interim Constitution, marital status was not a listed ground. In both *Brink* and *Harksen*, O'Regan J found it to be an unspecified ground of discrimination.[4] This view was vindicated by the inclusion of the ground in the list of grounds in FC s 9(3).

The unspecified ground of 'citizenship' illustrates the application of the test. It has now been used in a number of cases where foreign nationals living in South Africa have been the subject of discrimination. Non-citizens are a classic vulnerable group who face xenophobia and even violence. This situation is likely to worsen as the number of immigrants increases and the desperation of those South Africans waiting for services grows. The equality right becomes a critical mechanism for this group to assert its entitlement to the promise of (most rights in) the Final Constitution. Both *Larbi-Odam* and *Khosa* offer positive examples of the courts' support for non-citizens. In *Larbi-Odam*, the Constitutional Court first recognized the ground of citizenship as an additional ground of unfair discrimination. In *Larbi-Odam,* Mokgoro J noted that 'foreign citizens are a minority in all countries, and have little political muscle'. She also said that citizenship is 'a personal attribute that is difficult to change'. The judge compared the experience of foreign citizens to the hardships suffered historically by black South Africans

[1] Albertyn 'Equality' (supra) at 4-49.

[2] For an interesting discussion of discrimination on the unlisted ground of appearance, see M Pieterse 'Discrimination through the Eye of the Beholder' (2000) 17 *SAJHR* 121.

[3] *Harksen* (supra) at para 47.

[4] Ibid at para 92.

living in Bantustan 'homelands' who were effectively denied their citizenship rights. Lastly, she referred to evidence of intimidation and exclusion of foreign teachers that indicated the vulnerability of the non-citizens in this case.[1]

Khosa reiterated the reasons set out in *Larbi-Odam* for treating citizenship as an unlisted ground of discrimination.[2] The judgment was significant in extending access to social grants to permanent residents. Williams notes, however, that courts must take care not to reinforce hierarchies of entitlement within the group of non-citizens, ie permanent residents, legal immigrants, refugees and illegal immigrants, in a way that deepens the vulnerability of the worst off.[3]

In *Hoffman*, the Court found there to be discrimination on the basis of HIV status. It said the following:[4]

> The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They have been stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society's response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason they enjoy special protection in our law. (footnotes omitted)

HIV status was included in the list of additional grounds for possible inclusion in s 34 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) and is obviously of great importance in a country such as South Africa where millions of people are living with HIV/AIDS.

There has been some debate over whether the dignity-based test for additional grounds can be extended to include groups whose vulnerability arises from their material disadvantage.[5] In *Khosa*, while the ground of citizenship was used to

[1] *Larbi-Odam & Others v Member of the Executive Council for Education & Another* 1998 (1) SA 745 (CC), 1997 (12) BCLR 1655 (CC) at paras 19-20.

[2] *Khosa & Others v Minister of Social Development & Others; Mahlaule & Another v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) SA 569 (CC) at para 71.

[3] See L Williams 'Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South Africa Analysis' (2005) 21 *SAJHR* 436, 468. For the Constitutional Court's views on refugees as a group discriminated against in relation to citizens and permanent residents, see *Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* CCT 39/06 Unreported judgment 12 December 2006) at para 45.

[4] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para 28.

[5] See Albertyn 'Equality' (supra) at 4-43 — 4-44.

assist this group, the poverty and related vulnerability of this group were also stressed in the judgment. The test for unlisted grounds, while focusing on dignity impairments, arguably has scope to include other forms of disadvantage. As set out above, the Court uses dignity as a primary criterion but also asks whether an adverse effect 'in a comparably serious manner' should be examined to decide whether a group was discriminated against on an unlisted ground. PEPUDA includes socio-economic status, like HIV status, as an additional ground to be considered for inclusion in the list of prohibited grounds of discrimination. The next ten years may witness cases being brought by people who feel that they have been left behind during South Africa's recent and significant economic expansion. Appropriate claims of discrimination on the grounds of poverty or socio-economic status should be considered by our courts.[1]

(f) 'On one or more grounds'

The phrase 'on one or more grounds' indicates that discrimination can be based on a listed or unlisted ground on its own, or with other listed or unlisted grounds. In *Brink*, O'Regan J made it clear that even where two grounds were implicated in a case, it was enough to make a finding on the basis of only one of the grounds.[2] The Court in *NCGLE v Home Affairs* also pointed to the existence of 'overlapping' and 'intersecting' grounds of discrimination.[3] Sachs J in *NCGLE v Minister of Justice* gave detailed consideration to this issue. His starting point was that

> [R]ights must fit the people, not the people the rights. This requires looking at rights and their violations from a persons-centred rather than a formula-based position, and analysing them contextually rather than abstractly.[4]

He further noted that:

> One consequence of an approach based on context and impact would be the acknowledgment that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is globally and contextually, not separately and abstractly. The objective is to determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring of a sufficiently serious nature as to merit constitutional intervention. Thus, black foreigners in South Africa might be subject to discrimination in a way that foreigners generally, and blacks as a rule, are not; it could in certain circumstances be a fatal combination. The same might possibly apply to unmarried mothers, or homosexual parents, where nuanced rather than categorical approaches would

[1] These grounds will in all likelihood often overlap with other listed grounds such as race, gender and age or other unlisted grounds such as citizenship and landlessness.

[2] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 43.

[3] *National Coalition for Gay and Lesbian Equality v Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at para 40.

[4] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) ('*NCGLE v Minister of Justice*') at para 112.

> be appropriate. Alternatively, a context rather than category-based approach might suggest that overlapping vulnerability is capable of producing overlapping discrimination. A notorious example would be African widows, who historically have suffered discrimination as blacks, as Africans, as women, as African women, as widows and usually, as older people, intensified by the fact that they are frequently amongst the lowest paid workers.[1]

This discussion concerns the issue of what commentators in other jurisdictions have referred to as intersectional grounds of discrimination.[2] An example is where a company employs only black men and white women, with the result that black women fall through the cracks as a separate category of people who fail to benefit from positive measures to advance previously disadvantaged work seekers. An interesting question is whether intersectional grounds of discrimination based on existing grounds result in the creation of a new unlisted ground or are treated as the combination of listed grounds. This is an important distinction since listed grounds benefit from the presumption of unfairness in FC s 9(5) while discrimination on the basis of unlisted grounds does not. It is suggested that the presumption should benefit the new category of discrimination where existing listed grounds are implicated. This expansive interpretation is based on the word 'one or more grounds' in FC s 9(3) and the view that rights should be interpreted in favour of those complaining of violations.

The other possibility contained in anti-discrimination law is the existence of multiple forms of discrimination. Here, a single legislative provision may result in discrimination that affects more than one group.[3] For example, a law prohibiting polygamous unions might discriminate against Muslim people on the ground of religion and against African people on the ground of culture.

A contextual approach requires that different layers of disadvantage be teased out and addressed in their full complexity. Sachs J refers (in a footnote to the above quote) to the view of L'Heureux-Dubé in *Egan v Canada*:

> In reality, it is no longer the 'grounds' that are dispositive of the question of whether discrimination exists, but the *social context* of the distinction that matters. (C)ontext is of primary importance and that abstract 'grounds of distinction' are simply an indirect method to achieve a goal which could be achieved more simply and truthfully by asking the direct question: 'Does this distinction discriminate against this group of people?'.[4]

[1] *NCGLE v Minster of Justice* (supra) at para 113.

[2] K Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139; N Iyer 'Categorical Denials: Equality Rights and the Shaping of Social Identity' (1993) 19 *Queen's Law Journal* 179.

[3] Albertyn 'Equality' (supra) at 4-45 — 4-46.

[4] (1995) 29 CRR (2d) 79, 120.

While the Constitutional Court may not be ready to abandon grounds completely as suggested here, it has thus far taken a relatively expansive and contextual approach to both the listed and unlisted grounds. However, it has been argued that the Court has not always been clear of the difference between multiple and intersectional discrimination, leading to the outcome in *Hugo* that favoured mothers rather than fathers because of an inability to understand the complexities of sex and gender for primary care-giver fathers.[1]

(g) Grounds of discrimination

FC s 9(3) prohibits unfair discrimination on a list of grounds. This list also applies to FC s 9(4) and (5).[2] The grounds were discussed by the Constitutional Court in *Harksen* in a passage quoted earlier. The passage is worth repeating here:

> [T]hey have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted. Section 8(2) seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history.[3]

While there were slight changes to the list between the Interim Constitution and the Final Constitution, the Constitutional Court's conceptual understanding of the grounds has remained consistent. Most of the cases that have come to court have been decided on the basis of a small number of listed grounds: race, gender, marital status and sexual orientation. It is not surprising that in post-apartheid South Africa there would be race discrimination challenges. The challenges based on gender and sexual orientation reflect to some extent the role of two key social movements — the women's movement and the gay and lesbian equality campaign — both of which have used the courts actively in their struggles. As rights awareness becomes more deeply entrenched, challenges on the basis of other grounds are likely to come to court.

[1] See Albertyn 'Equality' (supra) at 4-45 — 4-46.
[2] See § 35.6 - § 35.7 infra.
[3] *Harksen v Lane NO* 1997 (4) SA 1 (CC), 1997 (11) BCLR 1489 (CC) at para 49.

(i) *Race and colour*

South Africa's history of apartheid makes race a central category in understanding discrimination. 'Non-racialism' is included alongside 'non-sexism' as a founding value in FC s 1*(b)*. The Constitutional Court has repeatedly referred to this unjust history and the need to remove discriminatory laws. O'Regan J, in *Harksen*, said the following:

> Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.[1]

Race discrimination occurs where physical attributes associated with a particular race group are used to prejudice the group or its individual members.[2] In South Africa's racist past, racial categories were explicitly defined as including African, coloured, Asian and white and these categories continue to shape people's thinking and people's experiences of disadvantage. Colour discrimination is less familiar to South Africans but is closely tied to discrimination on the basis of race. In the USA, there is some recognition of discrimination on the basis of a person's skin tone within a racial group.[3] Those persons with lighter skins may be given preference over those with darker skins. Discrimination against albinos may fall into this category, and simultaneously intersect with disability discrimination.

The Constitutional Court has decided a number of cases dealing with race discrimination: *Walker*,[4] *Bel Porto School Governing Body v Premier, Western Cape*,[5]

[1] *Harksen* (supra) at para 40.

[2] For a more detailed discussion of 'racialism' see M Pieterse 'It's a Black Thing: Upholding Culture and Customary Law in a Society Founded on Non-racialism' (2001) 17 *SAJHR* 364, 365-67.

[3] See T Jones 'Shades of Brown: The Law of Skin Colour' (2000) 49 *Duke Law Journal* 1487.

[4] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 81 (The case concerned a complaint against alleged differential treatment by the Pretoria City Council. The Council's policy saw residents of a formerly white suburb paying metered rates for municipal services while residents of the adjacent, formerly black township paid a flat rate. The Constitutional Court said that there was race discrimination (albeit indirect) but that it was not unfair as the flat rate was the only practical response to the immediate post-apartheid situation. In the second part of the case, however, the Court held that the Council's differential debt collection policy constituted unfair discrimination. However, Sachs J, in dissent, found that the selective enforcement of debts by the Council was not unfair race discrimination.)

[5] 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC)(The Court in found that the distinction between previously black and white schools did not result in unfair race discrimination.)

Moseneke[1] and *Bhe*.[2] In two cases, the Constitutional Court found there to be unfair discrimination on the basis of unlisted grounds that were closely associated with race.[3]

As the legal remnants of apartheid dwindle, fewer cases of this (formal equality) type are likely to reach the courts: although indirect race discrimination cases may continue for as long as the social and material legacy of past racism remains. Challenges to affirmative action cases dealing with issues of race brought under FC s 9(2) may well increase as previously advantaged groups question the continued existence of positive measures.[4] It is also likely that a number of race discrimination cases will be brought under the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), rather than FC s 9, because it is expressly designed to cover issues of racism and inequality in daily life.

(ii) *Sex, gender and pregnancy*

Many national constitutions refer only to sex as a ground of discrimination. The Final Constitution's expansive list of grounds provides for sex and gender discrimination as well as pregnancy discrimination, a category often subsumed under sex.[5] The Constitutional Court tends to use sex and gender interchangeably in the relatively large number of cases it has considered on these grounds. Sex is generally taken to mean the biological differences between men and women, while gender is the term used to describe the socially and culturally constructed differences between men and women. Pregnancy is one of the most common biological

[1] *Moseneke v Master of the High Court* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC) at para 21 (In this case a section of the Black Administration Act treating the administration of the estates of black people differently from that of others in the country was declared to be unfair race discrimination on the basis of race, colour and ethnic origin.) See also *Ex Parte Western Cape Provincial Government; In Re: DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC)(On the racist history of the Black Administration Act and its predecessors.)

[2] *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at paras 60-68 (The case concerned, among other issues, a challenge to succession provisions under the Black Administration Act and to the customary law of male primogeniture. The offending section of the Act was found to constitute unfair race discrimination.)

[3] See *Mabaso v Law Society of the Northern Provinces & Another* 2005 (2) SA 117 (CC), 2005 (2) BCLR 129 (CC) at para 38 (Concerned a challenge to legislation that prevented attorneys admitted in a former 'homeland' from being allowed to enrol in the same way as other 'non-homeland' attorneys were allowed to do. The Court found there to be unfair discrimination on the basis of the unlisted ground of those covered by former 'homeland' legislation. This difference was clearly informed by past racist measures.) See also *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC) at paras 94-96 (The Court found there to be unfair discrimination on the basis of landlessness as well as race. The High Court had found there to be discrimination on the basis of colour and landownership since franchise, which was racially determined, and land ownership were qualifications in the challenged legislation. The Constitutional Court understood landlessness as having been shaped by racism.)

[4] For further discussion of FC s 9(2), see § 35.4 supra.

[5] See § 35.5*(g)*(iii) infra.

attributes of women used to deny them opportunities. But while some aspects of human reproduction are confined of necessity to women, many other components of child rearing are defined by society as 'women's work' because of underlying patriarchal assumptions.[1] *Fraser* highlighted the fact that men may suffer unfair gender discrimination where sexist cultural assumptions prevent them from participating in child care.[2]

The Constitutional Court has pointed to the deeply entrenched gender inequalities in our society that cause harm to women. Such harm may sometimes be more insidious than race discrimination, and, thus, they are equally unacceptable.[3] In *Brink*, the Court drew attention to the relationship between race and gender discrimination which results in black women in South Africa facing particularly acute barriers to advancement. Many of the gender discrimination cases overlap with marital status discrimination cases since a number of laws have treated — and still treat — married women differently from married men.[4]

(aa) Women's property

Historically, married women have had legal restrictions placed on their contractual capacity and their right to own and control property independently of men. One of the last vestiges of this position — the unfairly discriminatory effect of insurance laws on wives — was considered in *Brink*. The assumption underlying the law was that the defrauding of creditors could be avoided if wives were unable to benefit fully from a policy. However, the law did not cover situations where a husband might similarly attempt to defraud creditors. The Constitutional Court found unfair discrimination based on sex.[5]

Harksen concerned a challenge to insolvency laws that affected the rights of insolvent spouses.[6] The majority found there not to be any unfair discrimination. The minority opinion of O'Regan J, however, found there to be unfair discrimination based on marital status: such unfair discrimination was characterized as a form of sex discrimination encountered by married women.

Bhe found the customary law rule of primogeniture to be unfair discrimination on the basis of gender.[7] The minority decision concluded that there was also

[1] See *President of the RSA & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at paras 37-39.

[2] *Fraser v Children's Court, Pretoria North & Others* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC) at para 25 (While Mohamed DP found the distinction between fathers married in terms of Muslim law and those married in terms of customary law to be the primary basis for a finding of unfair discrimination, he also noted the unfair gender discrimination between unmarried mothers and fathers.)

[3] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC)('*Brink*') at paras 41 and 44 (O'Regan J); *Volks NO v Robinson & Others* 2005 (5) BCLR 446 (CC) at paras 163-64 (Sachs J).

[4] On marital status, see § 35.5*(g)*(iii) infra.

[5] *Brink* (supra) at paras 43-44.

[6] *Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC).

[7] *Bhe & Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SAHRC & Another v President of the RSA &Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('*Bhe*').

discrimination based on age and birth, but found that such discrimination was justifiable. The discrimination based on gender could not be justified.[1]

Volks dealt with the rights of unmarried domestic partners and was decided on the basis of marital status discrimination. However, the majority offered the following gloss on the issue of gender inequality with regard to women's property in intimate partnerships:

> Structural dependence of women in marriage and in relationships of heterosexual unmarried couples is a reality in our country and in other countries. Many women become economically dependent on men and are left destitute and suffer hardships on the death of their male partners … Women remain generally less powerful in these relationships. They often wish to be married, but the nature of the power relations within the relationship makes a translation of that wish into reality difficult. This is because the more powerful participants in the relationship would not agree to be bound by marriage. The consequences are that women are taken advantage of and the essential contributions by women to a joint household through labour and emotional support is not compensated for.[2]

(bb) Women's bodies

Women face domestic violence and rape on a dramatic scale in South Africa. This violence is directly linked to women's unequal position in society and the prevalent social belief that women are required to submit to their fathers, husbands and other men in their lives. Women's control over their bodies relates also to their reproductive rights and their decision to engage in sex work. While other constitutional provisions such as the right to freedom and security of the person in FC s 12 are implicated in some cases concerning women's physical rights, there is a close link to the right to equality and the prohibition of unfair sex and gender discrimination. The Constitutional Court has recognized the prevalence of violence against women in South Africa and has stressed the need to ensure that the law assists women in protecting them from such violence. In *Carmichele*, the Court recognized that violence against women was an obstacle to their enjoyment of all of their fundamental rights and freedoms:[3]

> In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence. As it was put by counsel on behalf of the amicus curiae: 'Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women.'

[1] *Bhe* (supra) at para 179-191.

[2] *Volks* (supra) at paras 63-64. The minority opinion of O'Regan and Mokgoro JJ and the minority opinion of Sachs J link marital status discrimination to gender discrimination.

[3] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) at para 62. See also *S v Baloyi* 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC), 2001 (1) SACR 81 (CC)(Court's response to a challenge to the Prevention of Family Violence Act 133 of 1993); *Omar v Government of the RSA* 2006 (2) SA 289 (CC), 2006 (2) BCLR 253 (CC)(Court entertains a challenge to the Domestic Violence Act 116 of 1998.); *Masiya v Director of Public Prosecutions (Pretoria) & Others (Centre for Applied Legal Studies and Tshwaranang Legal Advocacy Centre as* Amici Curiae) CCT 54/06 judgment of 10 May 2007 (as yet unreported)(Court extended the common-law definition of rape to include anal penetration of females, but refused to extend its reach to males.)

The Court referred, in that context, to the following statement by the Supreme Court of Appeal in *S v Chapman*:

> The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.[1]

In *Van der Merwe*, the Constitutional Court considered the position of people married in community of property to recover delictual patrimonial benefits from damages arising from bodily injury inflicted by a spouse.[2] The complainant had been seriously injured when her husband intentionally rode over her in his car. The Court considered gender discrimination arguments, but made no finding under FC s 9(3) since the case could be disposed of in terms FC s 9(1).[3] The Court did however note the following:

> There is no doubt that in our society domestic violence and economic vulnerability are gendered in nature. Both are a sad sequel to patriarchy. Women are more likely to fall victim to the battery, abuse or negligent driving of their domestic partner than otherwise and are therefore more likely to be non-suited for patrimonial damages than their husbands. Even more demeaning is that victims of domestic and other violence within marriages in community of property would have to solicit their abuser's consent to meet medical and other bills or to make up loss of earnings out of the joint estate. Moreover, in these circumstances third party insurers, if any, are not liable to reimburse the injured spouse or the joint estate. In this way, the burden of abuse and economic dependency becomes mutually reinforcing and most intolerable.[4]

The issue of sex work and its relationship to gender discrimination arose in *Jordan*. The equality challenge was that the law criminalizing sex work treated the sex worker, usually female, more harshly than the customer, usually male. The majority of the Constitutional Court rejected these challenges: holding that there was no unfair sex or gender discrimination as the legislation was 'gender-neutral' in that it applied to male and female sex workers and customers. By contrast, and in a more contextual judgment, the minority found there to be unfair gender discrimination.

The ground of pregnancy discrimination has not been considered by the Constitutional Court. It was considered by the Labour Appeal Court in *Woolworths v Whitehead*. The court upheld the appellant's failure to employ a pregnant applicant.[5] It is also an issue that arises in relation to pregnant learners in the education

[1] 1997 (3) SA 341, 345 C-D (A), quoted in *Carmichele* (supra) at para 62.
[2] *Van der Merwe v Road Accident Fund* 2006 (4) 2 SA 230 (CC), 2006 (6) BCLR 682 (CC)('*Van der Merwe*').
[3] See § 35.3*(a)*(ii) supra.
[4] *Van der Merwe* (supra) at para 67.
[5] *Woolworths (Pty) Ltd v Whitehead* 2000 (12) BCLR 1340 (LAC).

system.[1] While pregnant women elsewhere in the world have sometimes struggled to succeed in equality claims, the existence of this ground within a strong equality right means South African women are more likely to be assisted by the courts.

(cc) Women, men and children

The Constitutional Court has considered the relationship between men and their children in two important FC s 9(3) cases.[2] As discussed above, *Fraser* was brought by an unmarried father who opposed the lack of consent afforded to him in the adoption of his child. The *Fraser* Court recognized that the existence of a marriage might have little to do with whether or not a father involved himself with his children.[3] The Court also stressed the 'deep disadvantage experienced by the single mothers in our society'.[4]

Hugo concerned a challenge to a presidential pardon that favoured women with young children but excluded fathers. The majority found that there was no unfair discrimination against such fathers. The *Hugo* Court said that:[5]

> As many fathers play only a secondary role in child rearing, the release of male prisoners would not have contributed as significantly to the achievement of the President's purpose as the release of mothers.

The various judgments of the *Hugo* Court debated the interesting strategic issue of whether the lack of involvement of fathers in their children's lives should be punished by the law or whether the law should be used to encourage a greater involvment.

(dd) Critical responses to the Court's gender equality jurisprudence

A number of writers have evaluated the first decade of the Constitutional Court's gender equality judgments.[6] The Court has been commended for acknowledging feminist theory as an aid to the proper interpretation of the Final Constitution. The Court has referred to a public/private divide that has the effect of silencing women's claims in the home and other spheres of life considered 'private'.[7] It

[1] See M O'Sullivan 'Reproductive Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 37.4.

[2] The Court has acknowledged the gender inequalities within the judicial maintenance system where mothers depend on the financial assistance of fathers to look after children in their custody. See *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC)('*Bannatyne*') at paras 27-30.

[3] *Fraser v Children's Court, Pretoria North & Others* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC)('*Fraser*') at para 26.

[4] Ibid at para 44.

[5] *President of the RSA & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)('*Hugo*') at para 46.

[6] C Albertyn (2005) 'Defending and Securing Rights through Law: Feminism, Law and the Courts in South Africa' (2005) 32(2) *Politikon* 217 ('Defending and Securing'); E Bonthuys (2007) 'Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court' *Canadian Journal of Women and the Law* (forthcoming); S Jagwanth 'Expanding Equality' in C Murray & M O'Sullivan (eds) *Advancing Women's Rights* (2005) 131; Saras Jagwanth & Christina Murray 'No Nation Can Be Free When One Half of It is Enslaved: Constitutional Equality for Women in South Africa' in B Baines & R Rubio-Marin *The Gender of Constitutional Jurisprudence* (2005) 230.

[7] For more on this point, and the Court's views in *S v Baloyi*, see Albertyn 'Defending and Securing' (supra) at 225-226.

has acknowledged that there is a sexual division of labour that burdens women with child care and household responsibilities.[1] And it has recognized that the feminization of poverty results when families break down and women are usually left with the responsibility for children and consequent greater financial difficulties. In *Bannatyne*, Mokgoro J considered the administrative problems of the judicial maintenance system and said the following:

> Compounding these logistical difficulties is the gendered nature of the maintenance system. The material shows that on the breakdown of a marriage or similar relationship it is almost always mothers who become the custodial parent and have to care for the children. This places an additional financial burden on them and inhibits their ability to obtain remunerative employment. Divorced or separated mothers accordingly face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means. Fathers, on the other hand, remain actively employed and generally become economically enriched. Maintenance payments are therefore essential to relieve this financial burden.
>
> These disparities undermine the achievement of gender equality which is a founding value of the Constitution. The enforcement of maintenance payments therefore not only secures the rights of children, it also upholds the dignity of women and promotes the foundational values of achieving equality and non-sexism. Fatalistic acceptance of the insufficiencies of the maintenance system compounds the denial of rights involved. Effective mechanisms for the enforcement of maintenance obligations are thus essential for the simultaneous achievement of the rights of the child and the promotion of gender equality.[2]

While some of the Court's decisions have taken account of the context of women's lives and the multiple burdens that arise in South Africa's patriarchal society, some commentators point to a disappointing failure by the majority of the Court in *Jordan* and *Volks*. These decisions both resulted in a refusal to assist two categories of disadvantaged women — sex workers and unmarried cohabitants. Ultimately, a deferential approach was followed where the legislature was seen as 'knowing what it was doing' (*Jordan*) or 'needing to improve the situation' (*Volks*). In *Jordan,* the majority failed to heed the Court's own jurisprudence by not looking into the private sphere of sexuality, ignoring context and reinforcing harmful stereotypes.[3] In *Volks*, the majority again resorted to a formal equality approach and moral conservatism.[4] These decisions point to the possibility that a substantive interpretation of FC s 9 with regard to gender equality is not always

[1] See Jagwanth & Murray (supra) at 245 (On *Hugo*.) See also *Volks* (supra) at para 110 (O'Regan and Mokgoro JJ on the gendered division of labour.)

[2] *Bannatyne* (supra) at paras 29-30.

[3] See Albertyn 'Defending and Securing' (supra) at 228-9. See also D Meyerson 'Does the Constitutional Court of South Africa Take Rights Seriously? The Case of *S v Jordan*' (2004) *Acta Juridica* 138-54 (Both majority and minority judgments are criticised for failing to follow a high standard of justification where constitutional rights are at stake.) See also R Kruger 'Sex Work From a Feminist Perspective: A Visit To the *Jordan* Case' (2004) *SAJHR* 20, 138-50.

[4] See Albertyn 'Defending and Securing' (supra) at 229-30. See also Jagwanth 'Expanding Equality' (supra) at 135–36; C Lind 'Domestic Partnerships and Marital Status Discrimination' (2005) *Acta Juridica* 108.

understood or applied adequately by all of the judges on the Court. Gender issues seem to test many ideas around prejudice and stereotyping that seem less complex when seen through the prism of race.

(iii) *Marital status*

The ground of marital status was not included in the Interim Constitution. It is a listed ground in the Final Constitution. In *Brink*, which was brought under the Interim Constitution, the ground of marital status was recognized but not considered since the Court felt the case could be decided with reference only to sex discrimination.[1] In *Harksen*, also decided under the Interim Constitution, O'Regan J, in dissent, wrote that marital status was a ground of discrimination. She said:

> I agree that marital status is a matter of significant importance to all individuals, closely related to human dignity and liberty. For most people, the decision to enter into a permanent personal relationship with another is a momentous and defining one. It requires related decisions concerning the nature of the relationship, its personal and proprietary consequences.[2]

As discussed under the grounds of sex and gender, there is often an overlap between discrimination affecting men and women and marital status discrimination. This overlap occurs because marital systems (civil, customary and religious) have historically contained provisions that give lesser rights and benefits to women.[3] Apartheid thinking also resulted in inequalities between marital systems, with the civil law system generally given preference over customary and religious systems.[4] Here, marital status discrimination overlaps with discrimination on the basis of race, religion and culture. There is also a frequent overlap between marital status and the ground of sexual orientation since same-sex couples have, until recently, been unable to marry.[5] *Fourie* contains a detailed discussion of the nature and benefits of marriage and why same-sex couples' exclusion from marriage is harmful.[6] The exclusion of unmarried partners from the benefits and consequences of marriage has also been raised as a source of marital status discrimination.[7] In *Volks* the exclusion of unmarried cohabitants from the

[1] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 43.

[2] *Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 92.

[3] Ibid at para 94 (O'Regan J). See also *Daniels v Campbell NO* 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC)('*Daniels*').

[4] *Daniels* (supra) at paras 19-20.

[5] For cases dealing with this overlap, see *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at para 40; *Du Toit & Another v Minister for Welfare and Population Development & Others* 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC) at para 26; *J & Another v Director General, Department of Home Affairs & Others* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC) at para 13. For a discussion of the ground of sexual orientation, see § 35.*3(g)(v)* infra.

[6] *Minister of Home Affairs v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at paras 63-74.

[7] *Volks* (supra) at para 49.

provisions of the Maintenance of Surviving Spouses Act was held by the majority to be marital status discrimination but was not found to be unfair.[1] The court pointed to the importance of marriage as an institution and the choice provided to heterosexual couples to enter into marriage or remain outside of it. There is also a detailed discussion of marriage in the minority judgment of O'Regan and Mokgoro JJ that finds that the Act does discriminate unfairly against unmarried partners on the basis of marital status. The minority points to stigma facing such couples as well as a lack of legal protection and finds that cohabiting partners are a vulnerable group.[2]

There is a discussion of the scope of the ground of marital status discrimination in the case of *Van der Merwe v Road Accident Fund*. In *Van der Merwe,* a woman was intentionally injured by her husband. The Road Accident Fund argued that it did not have to pay for her patrimonial damages since she was married in community of property and the Matrimonial Property Act contains a provision that one spouse can not recover such damages from the other.[3] The injured woman challenged this provision on the basis that it unfairly discriminated against people married in community of property, as opposed to those married under other property regimes, on the ground of marital status. The Constitutional Court decided this case in terms of FC s 9(1) and thus found it unnecessary to decide the FC s 9(3) claims. Nevertheless, the Court made certain *obiter* statements about the ground of marital status.[4] The Court said that the existing jurisprudence on marital status related to 'protectable interests or disabilities of being married or not married'[5] and expressed doubt as to whether it could encompass a case where the 'law denies one class of married people a protection that another class enjoys'.[6] The Court seemed to reject the applicant's assertion that it should adopt a generous and expansive interpretation of marital status to encompass people covered by different property regimes within marriage. This position is somewhat at odds with the decision of the Court in *Fraser*. Mohamed DP found there to be unfair discrimination against fathers married in terms of Muslim law as opposed to fathers married in terms of customary law.[7] Thus, in *Fraser*, a distinction is drawn between the benefits afforded to those persons in one form of marriage and the denial of those same benefits to people married under another system. The *Fraser* Court did not expressly describe this distinction as 'marital status' discrimination.

[1] Act 27 of 1990.
[2] *Volks* (supra) at para 135.
[3] Act 88 of 1984.
[4] *Van der Mewe* (supra) at paras 45-47.
[5] Ibid at para 46.
[6] Ibid at para 45.
[7] *Fraser* (supra) at paras 21-23.

(iv) *Ethnic or social origin*

Discrimination on the basis of ethnic or social origin is closely related to race. Ethnic origin is taken to combine 'a biological group that shares a common descent, with a common cultural heritage and, sometimes, a territorial base'.[1] In South Africa, ethnicity was used under apartheid to further divide African people into 'homelands' and for other harmful purposes. Private bodies like the mining houses also segregated ethnic groups within their hostel system. Ethnicity was also used to stigmatize non-indigenous groups such as the Chinese, Malays and Indians. Thus far, the case law has raised 'ethnic origin' as a ground of discrimination in cases dealing with race discrimination.[2]

Social origin relates to ethnic origin where it concerns one's position in a particular clan or group. But it can also refer to one's position in a hierarchy within a family, tribe or other social group. It obviously intersects with age, gender and other categories that affect one's position and status within a particular social group. An international example of social origin discrimination is the caste system in India, which is the subject of efforts to address inequality through Indian anti-discrimination laws. This ground has not yet been considered by our courts.

Social origin discrimination is also used to describe the differential treatment of people on the basis of class. Here, it relates to the additional ground of 'socio-economic status' in s 34 of PEPUDA. Socio-economic status is defined in s 1 of the Act as including 'a social and economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications'. In South Africa, class tends to correspond with race and gender in as much as Africans and women constitute the greatest proportion of the poor.[3]

Although *Khosa*, concerned the rights of non-citizens living in poverty to state support, Mokgoro J links the ground of citizenship to poverty in pointing out the need for the poor to be treated as equal members of society.[4] Social origin may also be linked to the ground of 'birth' since it may involve discriminating against a person because of their position or status in a family.

[1] C Albertyn, B Goldblatt & C Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001) 79-80.

[2] See *Moseneke v Master of the High Court* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC) at paras 21-22, *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; SAHRC & Another v President of the RSA &Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at para 60-61; *Mabaso v Law Society of the Northern Provinces & Another* 2005 (2) SA 117 (CC), 2005 (2) BCLR 129 (CC).

[3] Poverty, race and gender might also be understood as intersecting grounds of discrimination. See S Fredman 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 *SAJHR* 163, 182-5; M Jackman 'Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian Charter and Human Rights Law' (1994) 2 *Review of Constitutional Studies* 76-122; B Goldblatt & S Liebenberg 'Achieving Substantive Equality in South Africa: The Relationship between Equality and Socio-Economic Rights' (2007)(forthcoming).

[4] *Khosa & Others v Minister of Social Development & Others; Mahlaule & Another v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) SA 569 (CC) at para 74. For a discussion of unspecified grounds, see § 35.5*(c)* supra.

(v) *Sexual orientation*

South African laws and social practices reflect a history of exclusion and marginalization of gays and lesbians. The ground of sexual orientation discrimination was included following intense lobbying in the constitution-writing process by gay and lesbian rights activists.[1] A large number of cases have been brought to the courts by organizations representing gay and lesbian interests and by individuals challenging sexual orientation discrimination. The organizations followed a carefully formulated litigation strategy starting with challenges to the criminal law (*NCGLE v Minister of Justice*) and moving to challenges to the status of gay and lesbian relationships (*NCGLE v Home Affairs*).[2] *Satchwell*, *Du Toit* and *J*, although brought by individuals rather than the movement, fit well into the strategy of including same-sex relationships within the benefits afforded to heterosexual spouses.[3] *Fourie*, which requires the state to legislate for same-sex marriage, is the culmination of a careful building-block approach that has placed South African law on the same advanced footing as a handful of other countries in the world with regard to the removal of sexual orientation discrimination.[4]

The sexual orientation judgments were relatively straightforward formal equality decisions since the legislative discrimination was so overtly unfair. One of the authors has argued that this series of cases is inclusive rather than transformatory since it allows gays and lesbians into the protected social institution of marriage without challenging the position of this institution in the wider idea of family in

[1] See C Stychin 'Constituting Sexuality: The Struggle for Sexual Orientation in the South African Bill of Rights' (1996) 23(4) *Journal of Law and Society* 455; S Croucher 'South Africa's Democratisation and the Politics of Gay Liberation' (2002) 28(2) *Journal of Southern African Studies* 315-330; R Louw 'A Decade of Gay and Lesbian Equality Litigation' in M du Plessis & S Pete (eds) *Constitutional Democracy in South Africa 1994-2004* (2004) 65-79.

[2] *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (1) BCLR 1517 (CC)('*NCGLE v Minister of Justice*')(Found the criminalisation of sodomy to be unfair discrimination); *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC)('*NCGLE v Minister of Home Affairs*')(Found the failure to confer immigration benefits provided to spouses on permanent, same sex life partners to be unfairly discriminatory.)

[3] *Satchwell v President of the Republic of South Africa & Another* 2003 (4) SA 266 (CC), 2002 (9) BCLR 986 (CC)('*Satchwell*')(Unfair exclusion of same sex couples from the provisions of the Judges Remuneration and Conditions of Employment Act 88 of 1989); *Du Toit & Another v Minister for Welfare and Population Development & Others* 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC)('*Du Toit*')(Finding provisions of the Child Care Act 74 of 1983 unconstitutional for limiting joint adoption to married people to the exclusion of same sex couples); *J & Another v Director-General, Department of Home Affairs & Others* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC)('*J*').

[4] *Minister of Home Affairs & Another v Fourie & Others; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)('*Fourie*').

South African law.[1] However, she argues that inclusion does not preclude future transformation and may in fact 'assist in setting democratic norms that may eventually shift the social norms'.[2]

The Court has adopted the definition of 'sexual orientation' used by Edwin Cameron as defining people 'by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex'. [3] Ackermann J, in *NCGLE v Minister of Justice*, said that the concept of sexual orientation must be given a generous interpretation. It applied equally to bisexuals and transsexuals and even to the orientation of persons who might, on a single occasion only, be erotically attracted to a member of their own sex.[4] In *NCGLE v Minister of Home Affairs* the Court described the impact of sexual orientation discrimination on gays and lesbians as denying their inherent dignity which 'insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways'.[5]

(aa) Recognition of same-sex relationships: material benefits

Langemaat v Minister of Safety and Security concerned a successful claim by a police woman to have her partner registered on her medical aid.[6] Following the case, a new Medical Schemes Act was introduced which defines a dependant as a 'spouse or partner'.[7] In 2001 a case challenging the Pension Fund Act 41 of 1963, which excluded same-sex life partners from state pension benefits accorded to heterosexual spouses, was settled to allow their inclusion. *Satchwell v Minister of Justice* was brought by a High Court judge to challenge legislation regarding judges' pensions and other benefits of service. While this case did not benefit very many people directly, the judgment was important in recognizing that same-sex couples who depend upon each other are entitled to financial benefits.[8] In *Farr v Mutual and Federal*, an insurance policy holder in a gay relationship wished to have his partner covered by his motor vehicle insurer following an accident.[9] The policy excluded

[1] C Albertyn 'Defending and Securing Rights through Law: Feminism, Law and the Courts in South Africa' (2005) 32 *Politikon* 217, 233. But see S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36 (Woolman contends that the case law on sexual orientation traces a clear arc from mere privacy concerns to full public acknowledgement of the difference of same-sex life partnerships and that the Court's recognition of the rights of same-sex couples to marry constitutes a direct challenge to the conservative mores of the vast majority of South Africans.) See also *Volks NO v Robinson & Others* 2005 (5) BCLR 446 (CC)(Sachs J) at paras 146-242 (On the transformation of family law.)

[2] Albertyn 'Defending and Securing' (supra) at 233.

[3] E Cameron 'Sexual Orientation and the Constitution: A Test Case for Human Rights' (1993) 110 *SALJ* 450, quoted in *NCGLE v Minister of Justice* (supra) at para 20.

[4] *NCGLE v Minister of Justice* (supra) at para 21.

[5] *NCGLE v Minister of Home Affairs* (supra) at para 42 (Ackermann J).

[6] 1998 (3) SA 312 (T), 1998 (4) BCLR 444 (T).

[7] Act 131 of 1998.

[8] *Satchwell* (supra) at paras 23–25.

[9] 2000 (3) SA 684 (C).

'a member of the policy holder's family normally resident with him' from its cover. He argued that his partner was not a family member. The judge found for the insurer on the basis that a permanent same-sex relationship does constitute a family based on the current social context. A number of cases were successfully taken to the pension fund adjudicator by gays and lesbians wishing to include their partners as beneficiaries. The Closed Pension Fund Act thereafter addressed sexual orientation discrimination for pension holders.[1]

In *Du Plessis v RAF*, the Supreme Court of Appeal delivered a highly significant judgment recognizing that there is a common-law duty of support in permanent, same-sex relationships.[2] The unanimous judgment by Cloete JA found that the partner of a man killed in a car accident was entitled to claim damages against the Road Accident Fund for loss of support. The court, relying on *Satchwell*, found that such an action did exist. The *Satchwell* Court had said:

> In a society where the range of family formations has widened, such a duty of support may be inferred as a matter of fact in certain cases of persons involved in permanent, same sex life partnerships. [3]

In *Gory v Kolver,* the Court found the provisions of the Intestate Succession Act[4] that exclude same-sex partners from being treated as 'spouses' to be unconstitutional.[5] The case is significant in that it goes beyond the earlier cases where third parties were required to allow partners in same-sex relationships to benefit where spouses already did. It concerns recognition of the inheritance rights to the entire estate of a partner in a same-sex partnership. Interestingly, the changes to the Act read in by the Court are retrospective and take effect from 27 April 2004.

(bb) Recognition of same-sex relationships — status benefits

NCGLE v Minister of Home Affairs concerned a challenge to the Aliens Control Act 96 of 1991 that gave immigration rights to spouses of permanent residents but not to same-sex partners. The judgment was important in not only finding the laws to be invalid but in reading the wording 'or partner, in a permanent same-sex life partnership' after the word 'spouse' into the offending legislation. The case highlighted the importance of context and impact, vulnerability and patterns of group disadvantage in the discrimination enquiry and advanced the idea that families take many forms, all deserving recognition and protection. Marriage was

[1] Act 41 of 1999.
[2] 2004 (1) SA 359 (SCA), 2003 (11) BCLR 1220 (SCA).
[3] *Satchwell* (supra) at para 25.
[4] Act 81 of 1987.
[5] *Gory v Kolver NO & Others (Starke & Others Intervening)* 2007 (3) BCLR 249 (CC).

only one form of valid life partnership. The language used by the court in its reading-in order has become an important standard for later judgments and even for some legislation.

(cc) Recognition of different types of families

Du Toit v Minister of Welfare was an adoption case also brought by a High Court judge and her partner to challenge the adoption provisions of the Child Care Act.[1] That Act allowed only one partner in a same-sex relationship to be registered as the legally recognized parent of adopted children. Skweyiya AJ made some important remarks about the changing and varied nature of family in society.

J v D-G, Department of Home Affairs amended the Children's Status Act 82 of 1987 to include same-sex partners as parents of children conceived by way of artificial insemination. Here, the one woman carried twins who had been conceived by way of artificial insemination from the ova of the second woman and sperm from an anonymous donor. The birth mother was registered as the parent of the children but the Department of Home Affairs refused to register the other woman as a parent.

These two important cases extended the legal recognition of family to same-sex relationships and their children.

(dd) Marriage[2]

In 2002, a lesbian couple (Fourie and Bonthuys) began their struggle for the right to marry under South African law. After approaching the High Court, then the Supreme Court of Appeal, and finally the Constitutional Court, they were told in December 2005 that they would have to wait another year for the law to be changed by Parliament, or failing this, by the automatic operation of the Court's own order on 2 December 2006, in order to marry.

The couple had asked the Court to address their exclusion from the common-law definition of marriage, which says that marriage is 'a union of one man with one woman, to the exclusion, while it lasts, of all others'. The Court was asked, in a separate (but joined) case brought by the Lesbian and Gay Equality Project, to remedy the problematic marriage formula in the Marriage Act 25 of 1961 that refers to a person taking another person as his or her 'lawful wife (or husband)'. The state opposed both cases. Sachs J gave a judgment on behalf of the majority of the Court which held that the common law and the formula in the Marriage Act were inconsistent with the Final Constitution and invalid to the extent that

[1] Act 74 of 1983.

[2] For an expanded discussion of the *Fourie* decision, see B Goldblatt 'Case Note: Same-Sex Marriage in South Africa — The Constitutional Court's Judgment' (2006) *Feminist Legal Studies* (forthcoming).

they excluded same-sex couples from marriage. The decision was based primarily on the right to equality and the right to dignity.

Sachs J stressed the need for tolerance and 'respect across difference'. He said:

> [W]hat is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.[1]

The majority decided to suspend the declaration of invalidity for one year from the date of judgment to allow the legislature to correct the defects in the common law and Marriage Act. In the event that the defects were not corrected through legislation the offending words in the marriage formula would be read as including the words 'or spouse' after the words 'or husband'. The common law would become invalid to the extent that it did 'not permit same-sex couples to enjoy the status and benefits coupled with responsibilities it accords to heterosexual couples'. Sachs J said any legislation designed to cure the defects in the common law and the Marriage Act must ensure that same-sex couples are 'not subjected to marginalization or exclusion by the law, either directly or indirectly'.[2] The judgment set out the principles that must be applied to ensure that any new law is constitutionally adequate.[3] These are that:

- The objective of the new measure must be to promote dignity, equality and the advancement of human rights and freedoms.
- A new law must not create equal disadvantage for everyone, ie levelling down to get rid of civil marriage.
- Parliament must be sensitive to avoid a remedy that appears equal but actually creates a separation that further marginalizes same-sex couples — segregation that reflects distaste for one group will cause insult to that group. The approach to impact and context taken in our equality jurisprudence would not allow this. Differential treatment may be possible if it enhances dignity and promotes equality.
- The measure chosen must be as 'generous and accepting towards same sex couples as it is to heterosexual couples' in terms of 'tangibles and intangibles'.

Parliament recently passed the Civil Union Act.[4] The Act purports to address *Fourie* by creating the new institution of a 'civil union'. This new institution, available to same-sex and heterosexual couples, provides such couples with the full consequences of marriage. The union can be called a marriage or a civil partnership. The new Act appears to comply with the principles set out in *Fourie*.[5]

[1] *Fourie* (supra) at para 60.
[2] Ibid at para 147.
[3] Ibid at paras 148-53.
[4] Act 17 of 2006.
[5] The Marriage Act continues to remain solely available to opposite-sex couples.

However failure by government to introduce law reforms that would comprehensively address the rights of same-sex couples has resulted in a number of admonishing statements by the Constitutional Court. Goldstone J in *J* said:

> It is unsatisfactory for the courts to grant piecemeal relief to members of the gay and lesbian community as and when aspects of their relationships are found to be prejudiced by unconstitutional legislation. The executive and legislature are therefore obliged to deal comprehensively and timeously with existing unfair discrimination against gays and lesbians.[1]

(Similar remarks were made in *Satchwell* and *Du Toit*.[2]) The passing of the Civil Union Act — at the eleventh hour — seems to indicate that the government is grudgingly heeding the Constitutional Court's call. However, for those same-sex (and heterosexual) couples who do not choose to marry but remain as domestic partners, the law remains inadequate in recognizing their relationships and protecting a surviving partners' interests.

(vi) *Age*

Age discrimination has been defined in s 1 of PEPUDA as including 'the conditions of disadvantage and vulnerability suffered by persons on the basis of their age, especially advanced age'. It also obviously applies to discrimination of the youth, as minors and young adults are sometimes unfairly denied benefits available to older people. The elderly, particularly in modern, western societies, often become vulnerable and disadvantaged.[3] The Constitutional Court has only considered this ground in the minority judgment of Ngcobo J in *Bhe* where he discussed the rights of the eldest male child to succeed to the status of the deceased and found this to be reasonable and justifiable.[4]

The High Court considered age discrimination in *Christian Lawyers Association v Minister of Health*.[5] In this case, a challenge to the provisions of the Choice on Termination of Pregnancy Act, the applicants argued that girls under the age of 18 should not be able to choose to terminate their pregnancies without parental consent because they were not capable of making this decision alone.[6] The court rejected this challenge. It concluded that the Act made informed consent, and not age, the basis for its regulation of access to termination of pregnancy. Mojapelo J said the following:

[1] *J* (supra) at para 23.
[2] *Satchwell* (supra) at para 29; *Du Toit* (supra) at para 41.
[3] See Albertyn, Goldblatt & Roederer (supra) at 73-75.
[4] See § 35.5*(g)*(ix) infra.
[5] 2005 (1) SA 509 (T).
[6] Act 92 of 1996.

> Section 9(1) moreover provides that 'everyone' is equal before the law and has the right to 'equal protection and benefit of the law'. Section 9(3) goes further to prevent unfair discrimination against 'anyone' inter alia on the ground of 'age'. Any distinction between women on the ground of their age, would invade these rights.[1]

The High Court also found there to be unfair age discrimination in *Harris v Minister of Education*: government policy prevented a child from entering Grade 1 in an independent school before the age of 7.[2] The *Harris* Court found that from an educational perspective there was no reason why a 6-year-old should not be ready for school and the government had offered no sound pedagogical reasons for the exclusion. Moreover, since the case related to an independent school rather than a government school, no good administrative reasons existed for preventing 6-year-olds from beginning grade 1 at independent schools.

(vii) *Disability*

Many stereotypes accompany disability. Disabled people are assumed to be incapable, abnormal or ill. Discrimination can also occur where there is a perceived rather than actual disability. Equality for the disabled involves removing barriers to opportunities, eradicating discrimination and providing positive measures to accommodate and include them. PEPUDA addresses these issues in some detail.[3] A number of other countries have disability discrimination laws or constitutional provisions addressing this and their case law may be of assistance.[4] International law, including the recently introduced UN Convention on the Rights of Persons with Disabilities, can be used to inform our approach.[5]

In *Hoffman*, the Constitutional Court found there to be unfair discrimination on the basis of HIV status — a status said to be similar in many respects to disability discrimination.[6] The Court pointed to the denial of employment, prejudice and stigma suffered by HIV-positive people in South Africa.[7]

In *IMATU v City of Cape Town*, the Labour Court found there to be unfair discrimination on the ground of disability in terms of the Employment Equity Act.[8] In this case, a law enforcement officer applied to be transferred to the

[1] *Christian Lawyers* (supra) at 528E.
[2] 2001 (8) BCLR 796 (T).
[3] See Albertyn, Goldblatt & Roederer (supra) at 65-67.
[4] See *Eldridge v Attorney General of British Columbia* (1997) 151 DLR (4th) 577 (SCC); *Auton v British Columbia (Attorney General)* 2004 SCC 78. See also *Autism v France* Complaint No: 13/2002 European Committee of Social Rights (2002).
[5] UN General Assembly (25 August 2006). The UN Convention on the Rights of Persons with Disabilities was signed by South Africa on 30 March 2007, but has not yet been ratified.
[6] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC). However the Court chose not to decide whether discrimination had also occurred on the listed ground of disability. Ibid at para 40.
[7] Ibid at para 28.
[8] [2005] 10 BLLR 1084 (LC).

position of fire fighter. His application was turned down on the basis that he was an insulin-dependent diabetic and might become ill while under pressure.

(viii) *Religion, conscience, belief, culture, language*

Language, culture and religion cases have not often come to court under the equality right but have been considered more fully under their own specific rights in FC ss 30, 31 and 15.[1] While FC s 9 provides protection against unfair discrimination on the basis of these grounds, the specific rights offer broader protections for people to practise their religion, use their language and participate in their culture.

South Africa's history of state-sanctioned racial discrimination overlapped with language discrimination since Afrikaans and English were promoted over other languages. It was the requirement that African children be taught subjects in Afrikaans that was one of the main causes of the Soweto uprising in 1976. Cultural intolerance was intimately linked to racism in the courts' and the lawmaker's approach to customary law. Christianity as understood by the National Party government shaped the apartheid education system. South Africa remains a deeply religious society with Christianity as the major religion. The need for tolerance within and between religions and cultures is an important theme of the Final Constitution.

(aa) Discrimination on the basis of religion, conscience and belief

Protection against discrimination on the basis of religion includes protection of individual and group identification with a particular religion as well as practices and beliefs in terms of that religion. Belief and conscience may extend to moral or other value systems part of, or separate from, faith-based systems of religion. Discrimination on the basis of conscience might result where a person is required by law to do something that contradicts their values or ethics.

In *Christian Education of SA v Minister of Education* concerning the prohibition of corporal punishment, the Constitutional Court addressed the issue of religion and equality in brief. Sachs J said the following:

> The respondent contended that, in line with the above considerations, the State had two powerful interests in the matter. The first was to uphold the principle of equality. It contended that to affirm the existence of a special exemption in favour of religious practices

[1] See P Farlam 'Freedom of Religion, Belief and Opinion' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 41; S Woolman 'Community Rights: Language, Culture and Religion' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 58. These related rights make specific mention of the need for such rights to be exercised in a manner that is consistent with other provisions in the Bill of Rights. See, eg, *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC)(Sunday liquor sales); *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC), 2001 (2) BCLR 133 (CC)(Ban on marijuana and rights of Rastafarians.)

> of certain children only, would be to violate the equality provisions contained in s 9 of the Bill of Rights. More particularly, it would involve treating some children differently from others on grounds of their religion or the type of school they attended. I think this approach misinterprets the equality provisions. It is true that to single out a member of a religious community for disadvantageous treatment would, on the face of it, constitute unfair discrimination against that community. The contrary, however, does not hold. To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views. As the Court said in *Prinsloo v Van der Linde & Another*, the essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and respect. Permission to allow the practice to continue would, in these circumstances, not be inconsistent with the equality provisions of the Bill of Rights.[1]

The Constitutional Court has considered unfair discrimination on the ground of religion in a small number of cases.[2] The High Court has also considered religious discrimination in cases concerning a Sunday horse racing prohibition[3] and the terms of an educational trust.[4]

(bb) Discrimination on the basis of culture

Culture, often difficult to define, refers to the values, practices, rules and behaviour of different social groups.[5] Culture is an important component of human

[1] 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 42. See also *Minister of Home Affairs & Another v Fourie & Others; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)('*Fourie*') at para 159.

[2] *Daniels* involved the question whether a Muslim wife was a spouse in terms of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990. It is worth noting that a finding on gender, marital status or religious discrimination was deemed to be unnecessary, since the Court simply interpreted the word spouse to include a party to a Muslim marriage. Moseneke J however, in a minority judgment, found this to be a strained interpretation. He preferred instead to find the exclusion of Muslim marriages to be unfair discrimination (on the basis of marital status, religion and culture) and the appropriate remedy to be reading in. Interestingly, in *Fraser v Children's Court, Pretoria North*, the Court found that there was unfair discrimination between fathers of children married in terms of Islam (but not recognised as having to consent to the adoption of their child in terms of the Child Care Act 74 of 1983) and fathers married in terms of customary law (who were recognized by that Act). See also *Fourie* (supra) at paras 88-98 (The Court upheld the rights of gays and lesbians to marry and rejected arguments that marriage should remain a heterosexual preserve. However, it also held that no religious denomination and no religious official could be forced to consecrate homosexual unions.)

[3] *Gold Circle (Pty) Ltd & Another v Premier, Kwazulu-Natal* 2005 (4) SA 402 (D)(The Court found the prohibition of horse racing on a Sunday to constitute unfair discrimination on the basis of religion since the prohibition was designed around the Christian Sabbath and yet prevented other religious groups from attending horse racing meetings.)

[4] *Minister of Education v Syfrets Trust Ltd NO* 2006 (4) SA 205 (C)(The court found that the terms of an educational bequest requiring that funds not go to Jews was unfair discrimination on the basis of religion.)

[5] For more on the difficulty of defining 'culture', see S Woolman 'Community Rights' (supra) at § 58.1*(a)–(c)*.

identity and may change over time.[1] The content of a particular culture may be contested by individuals or groups within it and this may result in a court having to weigh up competing rights and grounds of discrimination. These issues arose in *Bhe*, where the applicants challenged the customary law rule of primogeniture (succession along the male line). The Constitutional Court found the rule to be inconsistent with the Final Constitution in that it discriminated against women and extramarital children. The Court noted the evolving nature of customary law and looked at the case within the historical and current context of South Africa. It found that African customs had been distorted by apartheid and violated the dignity and equality rights of women.[2]

(cc) Discrimination on the basis of language

There are a number of strong constitutional protections of language in the Final Constitution in addition to the prohibition against discrimination on this ground. The issue of language discrimination has arisen in relation to the medium of schooling in a number of cases.[3] Language cannot be used as indirect race discrimination to keep black children out of formerly white or coloured schools.[4] In *Ex parte Gauteng Provincial Legislature* Sachs J discussed the position of Afrikaans in schools. He said:

> Thus, if persons were denied access to school because they spoke Afrikaans, or belonged to a cultural group which identified itself as Afrikaner, they could claim a violation of their constitutional rights. Similarly, any person who was denied access to State facilities because they did not speak Afrikaans or did not belong to the self-constituted Afrikaner community could allege that their fundamental rights were being infringed.[5]

[1] C Albertyn 'Equality' (supra) at 4-42.

[2] See *Pillay v KwaZulu-Natal MEC of Education* 2006 (10) BCLR 1237 (N)(An appeal against an Equality Court found that in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, a school's practice of prohibiting a learner from wearing a nose stud prevented her and her community from enjoying their culture and practising their religion.) See also *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill Of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC)('*Ex Parte Gauteng Provincial Legislature*') at paras 69-72 (Discussion by Sachs J of the protection of culture in human rights law, in particular the rights of minorities. He pointed to six interrelated principles of minority protection including: *(i)* the right to existence, (ii) non-discrimination, (iii) equal rights, (iv) the right to develop autonomously within civil society, (v) affirmative action, and (vi) positive support from the State.)

[3] See *Wittman v Deutscher Schulverein, Pretoria* 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T); *Matukane v Laerskool Potgietersrus* 1996 (3) SA 223 (T), [1996] 1 All SA 468 (T); *Ex Parte Gauteng Provincial Legislature* (supra); *Minister of Education, Western Cape, & Others v Governing Body, Mikro Primary School, & Another* 2006 (1) SA 1 (SCA), 2005 (10) BCLR 973 (SCA). For a discussion of the nexus between egalitarian concerns and language policy in public schools and independent schools, see S Woolman 'Community Rights' (supra) at § 58.7.

[4] See I Currie 'Official Languages and Language Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 65.

[5] *Ex Parte Gauteng Provincial Legislature* (supra) at para 71.

He went on to say that this analysis did not necessarily require language exclusivity in schooling:

> Reading these principles together with s 32*(b)* in the manner most favourable to the petitioners, would mean that the practicability of language instruction in existing Afrikaans medium schools could, applying the non-diminution principle, be assumed to exist. At the same time, there is nothing in these principles to guarantee the exclusivity of Afrikaans in any school. On the contrary, the promotion of multi-lingualism, even leaving out the factor of equal access to schools, would encourage the establishment of dual- or multiple-medium schools. Whether or not the Afrikaans language would survive better in isolation rather than, as it were, rubbing shoulders with other languages, would not be a matter of constitutionality but one of policy, on which this Court would not wish to pronounce. Similarly, it would not be for us to say whether denying Afrikaans-speaking children the right to study and play with children of other backgrounds would or would not be to their mutual educational and social detriment or advantage.[1]

(ix) *Birth*

The Constitutional Court defined discrimination on the ground of birth in the case of *Bhe*:

> The prohibition of unfair discrimination on the ground of birth in s 9(3) of our Constitution should be interpreted to include a prohibition of differentiating between children on the basis of whether a child's biological parents were married either at the time the child was conceived or when the child was born. As I have outlined, extra-marital children did, and still do, suffer from social stigma and impairment of dignity. The prohibition of unfair discrimination in our Constitution is aimed at removing such patterns of stigma from our society. Thus, when s 9(3) prohibits unfair discrimination on the ground of 'birth', it should be interpreted to include a prohibition of differentiation between children on the grounds of whether the children's parents were married at the time of conception or birth. Where differentiation is made on such grounds, it will be assumed to be unfair unless it is established that it is not.[2]

In *Petersen v Maintenance Officer, Simon's Town Maintenance Court*, the High Court found there to be unfair discrimination on the basis of birth in a case concerning differentiation between the duty of support of grandparents towards children born in wedlock and extra-marital children.[3] There may be other dimensions to birth discrimination such as a child who is treated unfairly because, for example, he or she is the child of a refugee, adopted or fostered.[4] This ground may intersect or overlap with other grounds such as race, social origin and gender.

[1] *Ex parte Gauteng Provincial Legislative* (supra) at para 74.

[2] *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; SAHRC & Another v President of the RSA & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('*Bhe*') at para 59.

[3] 2004 (2) SA 56 (C).

[4] See Albertyn, Goldblatt & Roederer (supra) at 80-81. See *Khosa & Others v Minister of Social Development & Others; Mahlaule & Another v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) SA 569 (CC)('*Khosa*') at para 78 (The Court notes that the provisions of social security legislation that provides social assistance grants only to nationals discriminates against children on the grounds of their parents' nationality.)

The ground may also be linked to the ground of age discrimination. In *Bhe*, the minority decision of Ngcobo J discussed a challenge to the customary law rule of primogeniture on the basis that it allowed the eldest male to succeed and thus discriminated against younger children. He found that in this case, age and birth discrimination were both reasonable and justifiable.[1]

(h) Step 2: Was the discrimination unfair?

Once discrimination has been established, the FC s 9(3) test looks at whether the discrimination was unfair. If the discrimination is on a listed ground, then it is presumed to be unfair. Here is the point at which the presumption of unfairness in FC s 9(5) kicks in.[2] If discrmination occurs on an unlisted ground, then the presumption does not operate and the complainant must establish that the discrimination was unfair.

The unfairness test set out in *Harksen* looks at the following factors:

(a) the position of the complainants in society, whether they have suffered from past patterns of disadvantage, and whether the discrimination is on a listed ground;
(b) the nature of the provision or power and the purpose sought to be achieved by it. If it is aimed at achieving a worthy social goal and not at impairing the complainants it may be fair;
(c) with due regard to *(a)* and *(b)* and other relevant factors, the extent to which the complainants' rights or interests have been affected, whether this has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

The fundamental question in the fairness test is the impact of the discrimination on the complainant. The approach to establishing unfair discrimination must be contextual. In *Van Heerden*, Moseneke J notes that this contextual approach is informed by a commitment to substantive equality:

> This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but 'situation sensitive' approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.[3]

[1] *Bhe* (supra) at paras 179-183. For a discussion of 'fairness' in the FC s 9(3) test and its relationship to FC s 36, see § 35.5*(i)* infra.
[2] For further discussion of FC s 9(5), see § 35.5*(b)* infra.
[3] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC) at para 27.

The primary right and value upon which unfairness analysis turns is dignity. However, the infringement of other rights and values may butress a finding of unfairness. The Constitutional Court has said that the test is not a closed list of factors to be used in determining fairness and may develop further over time. The factors explored in each case have a cumulative effect and must be assessed objectively.[1] The overall purpose of the fairness enquiry is to use contextual material to establish the impact of the alleged discrimination on the complainant.

The Court refers to the text of the equality right as evidence that the drafters foresaw the possible existence of discrimination that was not unfair. Goldstone J, in *Harksen v Lane NO*, referred to the presumption of unfairness in favour of complainants of discrimination on a listed ground (in FC s 9(5)) as proof that discrimination on a listed ground can be shown to be fair.[2] In *Hugo*, for example, the granting of a presidential pardon to certain categories of prisoners and not others was regarded as fair discrimination.[3]

(i) *The position of the complainant*

In order to understand the complainant's position, a range of considerations have been used by the courts to ensure that a thoroughly contextual enquiry takes account of history, group disadvantage and harm, socio-economic factors and the many forms that inequality takes. This approach allows for a sophisticated impact enquiry.

The Group: The enquiry involves looking at the individual complainant but also his/her group and its position in society. The group may have been subjected to particular laws and practices that caused disadvantage and stigma. Often, the complainant's group will locate the claim within a clear ground of discrimination. Sometimes a person who has been discriminated against may have experienced discrimination across a number of intersecting grounds, resulting in a more specific and complex form of discrimination.[4] This focus on grounds helps to define the group involved so as to better understand its particular position in society.

History: The examination is often backward looking so as to establish the historical factors that led to 'patterns of group disadvantage and harm'.[5] South Africa's history of colonialism and apartheid created a legacy of race discrimination. Gender inequality and sexual orientation discrimination also have historical roots in unjust laws and practices. In fact, all the prohibited grounds are characterized by historical conduct that has marginalized and oppressed people and

[1] *Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC)('*Harksen*') at para 51.
[2] *President of the RSA & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)('*Hugo*') at para 45.
[3] For other decisions in which discrimination was found to be fair, see *Harksen* (supra); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)('*Walker*'); *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 (3) SA 365 (CC), 2002 (9) BCLR 891 (CC); *Jordan & Others v S & Others* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC); *Volks NO v Robinson & Others* 2005 (5) BCLR 446 (CC)('*Volks*').
[4] For a discussion of the meaning 'one or more grounds' see § 35.5*(f)* supra.
[5] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 27.

groups who have (or are associated with) these attributes.[1] Understanding this history enables the Court to appreciate that alleged discrimination is not new but emerges from years of related maltreatment. Note, however, that the Court also needs to be aware of social changes that may not reflect historical practices. Thus, in *Bhe*, the Court recognized that customary law was not static and had evolved over time.[2]

Systemic inequality. The goal of substantive equality is premised on an awareness that inequality is often built into the fabric of our society, not just through laws and rules but through deeply entrenched social practices and attitudes. Children are taught prejudice and fear of 'the other' and are given fixed ideas about the natural order of things (such as fathers heading households). These value systems infuse South African and most other societies around the world and form the foundation for disadvantageous treatment of individuals and groups.[3]

The socio-economic context. The court has to look at the conditions faced by the complainant and his/her group to properly understand the impact of the discrimination. In *Khosa,* the Constitutional Court not only considered the position of the permanent resident group but also looked at the hardship caused to their families, friends and communities who were required to support them in the absence of social assistance from the state.[4]

Different forms of vulnerability. Group vulnerability and disadvantage can effect complainants in a range of ways:[5] stigmatization and marginalization;[6] material disadvantage;[7] social exclusion and stereotyping;[8] political minority status;[9] and failure to accord equal concern and respect.[10] In *Hugo*, O'Regan J held that there are degrees of vulnerability. Thus, 'the more vulnerable the group adversely affected by the discrimination, the more the discrimination will be held to be unfair'.[11] The impact enquiry may require recourse to evidence. The courts have tended to rely on secondary sources such as books and articles recording

[1] *Harksen* (supra) at para 49.
[2] *Bhe* (supra) at para 80.
[3] See § 35.1*(c)* supra.
[4] *Khosa* (supra) at para 76.
[5] See Albertyn 'Equality' (supra) at 4-54 – 4-56.
[6] See *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC)(A person infected with HIV was unfairly discriminated against.)
[7] See *Khosa* (supra)(Poverty was one of the causes of vulnerability for the group of non-citizens.)
[8] Many of the cases concerning sexual orientation discrimination considered by the Court have identified stereotyping and social exclusion as the source of the class's vulnerability. See, eg, *Minister of Home Affairs & Another v Fourie & Others; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)('*Fourie*') at paras 71-72 (The Court said that 'the intangible damage (was) as severe as the material deprivation'.)
[9] See *Khosa* (supra) at para 71 (The Court points to the fact that non-citizens are 'a minority in all countries, and have little political muscle'.)
[10] See *Walker* (supra)(The white residents, although not historically or systemically vulnerable, were nevertheless treated arbitrarily with regard to the selective enforcement by the municipality on the basis of race, and were thus denied equal concern and respect.)
[11] *Hugo* (supra) at para 112.

the position of disadvantaged groups. Sometimes, they have simply taken judicial notice of these issues and have at times even displayed creativity in imagining the possible effects of discrimination. The court can use primary research, briefs submitted by an amicus curiae and other factual evidence to understand properly the social issues involved.[1]

(ii) *Nature and purpose of the provision*

In *Harksen*, the Court said that if the purpose of a provision was to achieve a worthy social goal such as the furthering of equality for all, then this justification might affect the fairness of the discrimination. The Court offered *Hugo* as an example: a presidential pardon extended to certain mothers of young children was found fairly to exclude the claimant father. This factor in the fairness enquiry raises a number of troubling issues that relate to the overall coherence of the Constitutional Court's equality jurisprudence.

First, if the focus of the fairness enquiry is on the impact of the discrimination on the complainant, is it correct to consider the purpose of the provision under challenge, ie will such an enquiry actually assist in determining whether the complainant's dignity was impaired or whether such person or group was truly disadvantaged?[2] It seems that the purpose of an impugned provision may shed light on its impact on the dignity of the complainant. Thus, in *Walker*, the purpose of the flat rate and cross-subsidization was not aimed at prejudicing the residents of the white area, but was used for reasons of practicality as well as for other strategic reasons.[3] On the other hand, the selective enforcement against rates defaulters was not based on a well formulated approach and resulted in treatment of the white residents that failed to accord them equal concern and respect.[4]

Second, the purpose enquiry seems to overlap with the FC s 36 limitations enquiry since both concern the purpose of the challenged provision and the rights concerned. It has been suggested that the enquiry into purpose at the fairness stage is purely a moral or value-based enquiry and that the FC s 36 enquiry allows for issues of a financial and administrative nature to be introduced. Of course, the FC s 36 enquiry also looks at values and the balancing of rights. But the real blurring of the line between the two enquiries arises when the impugned provision is not a law of general application. Since the Constitutional Court has

[1] For more on Rule 31 of the Constitutional Court Rules, see G Budlender 'Amicus' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 8; K Hofmeyr 'Rules and Procedure in Constitutional Matters' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 5. See also *Volks* (supra) at paras 31-35.

[2] But see Woolman 'Dignity' at § 36.4*(a)* and Woolman 'Freedom of Association' at § 44.2*(b)* (Ananalyis of the fairness of discrimination must take account of countervailing interests behind the impugned law or conduct.)

[3] *Walker* (supra) at paras 67-68.

[4] Ibid at paras 79-81. See also *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC) at paras 123-131 (Ngcobo J)(Discussion of the purpose of the differential Parliamentary pensions and its impact on the complainant.)

adopted a relatively restrictive approach to the meaning of 'law of general application', it has resulted in a number of equality cases reaching the courts that cannot be looked at in terms of FC s 36. The result has been that some of the broader considerations such as administrative difficulty have been looked at within the purpose component of the fairness enquiry.[1] It is suggested that this approach is likely to result in the development of two streams of jurisprudence — the one dealing with cases involving laws of general application and the other without.[2] Different tests may lead to different results.

Third, it seems possible that some of the early cases in which the Court's equality jurisprudence was first shaped should not have been FC s 9(3) enquiries into unfair discrimination, but should rather have been examined in terms of FC s 9(2) analysis of positive measures to promote those who have been unfairly discriminated against. Thus, in both *Walker* and *Hugo*, the equivalent provision of FC s 9(2) in the Interim Constitution might have been the more appropriate vehicle to use. Of course, FC s 9(2) and FC s 9 (3) are both part of the equality right and must be understood in relation to each other. Further clarification by the Court of the relationship between the sections will assist in addressing some of the thorny issues around 'purpose' in the fairness and limitations enquiries.[3]

There may also be some overlap with the purpose enquiry and the FC s 9(1) examination of rationality and a legitimate government purpose: the former is, however, a more value-based enquiry than the latter. It has been suggested that the bright lines between the various sections of the equality right unnecessarily limit the reach of FC s 9(1) and treat FC s 9(3) as a gatekeeper of the right. It may be more appropriate to look at purpose according to different standards within each section of the right. Again, the interrelationship between the sections must be borne in mind as the jurisprudence may still develop a more nuanced approach to the right as a whole.

(iii) *Impairment of the rights or interests of the complainant and dignity*

This aspect of the fairness test combines the position of the complainant with the purpose of the provision, as well as any other factors that will assist in evaluating the extent of the effect of the discrimination on the complainant's interests and rights. It is in this cumulative examination that the focus turns to the impairment of dignity or a comparably serious impairment. The court will try here to establish degrees of unfair discrimination since 'the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair'.[4] In *NCGLE v Home Affairs* the

[1] See *Hugo* (supra) at para 46. See also C Albertyn & B Goldblatt (1998) 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248, 269-70 ('Facing the Challenge').

[2] Albertyn 'Equality' (supra) at 4-54 — 4-55.

[3] For further discussion of Step 3 of FC s 9(3) analysis, see § 35.5*(i)* infra. For a discussion of FC s 9(2) and its relationship to FC s 9(3), see § 35.4 supra.

[4] *Hugo* (supra) at para 112 (O'Regan J).

Constitutional Court found that the discrimination against gays and lesbians was 'severe' since 'no concern, let alone anything approaching equal concern' was shown towards this group.[1] In application, this last stage is sometimes merely repetitious of the previous two parts of the fairness test.[2] The *Harksen* test talks about 'interests and rights' of the complainant, both of which must be examined. For example, in *Hoffmann*, the complainant had an interest in being allowed to apply for a job as a cabin attendant with SAA and suffered disadvantage as a result of his application being refused.[3] His rights to not be unfairly discriminated against on the basis of his HIV status and his right to dignity were implicated here. In *Khosa*, the group of permanent residents had an interest in receiving social grants while facing poverty and desperation without these, and had rights to social security, life, equality and dignity.[4]

The emphasis on dignity in the test and as the central underlying value informing the equality right has been explored in academic writing.[5] It is important to recognize that dignity itself is open to interpretation and that such interpretations range from notions of individual affront to more collective and material conceptions of the value.[6] In addition the words 'or of a comparably serious nature' mean that it is not only dignity that is implicated in an evaluation of the impact of unfair discrimination but other values and rights as well. The ongoing engagement with these values and rights in our equality jurisprudence means that we should not view the unfair discrimination test as fixed and immutable but rather as a living and developing vehicle to achieve the goals of the Constitution. Because of its contextual nature and its comparative features, the application of equality is likely to change over time.

(i) Step 3: Can the unfair discrimination be justified?

Having engaged in the fairness enquiry and concluded that there has been unfair discrimination, the court considers whether there are any limitations of the equality right that would justify the unfair law. This stage only applies to discrimination in terms of 'law of general application' since it is only such

[1] *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at para 54. See also *Zondi v MEC for Traditional and Local Goverment Affairs & Others* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC) at para 94 (The impact of discrimination on the landless was also found to be severe.)

[2] See *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (1) BCLR 1517 (CC) at para 26.

[3] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC).

[4] *Khosa & Others v Minister of Social Development & Others; Mahlaule & Another v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) SA 569 (CC)('*Khosa*') para at 44.

[5] See § 35.1*(d)*(i). supra.

[6] For a discussion of the values underlying the equality right, see § 35.1*(d)* supra. See S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36; S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1.

discrimination that may be justified under FC s 36.[1] In *Harksen*, the Constitutional Court said that this final stage will 'involve a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality'.[2]

The relationship between unfairness and justification has been described as a 'paradox' since it seems impossible that something that violates the right to equality would be reasonable and justifiable in a society based on equality. The focus of the unfairness test is the impact on the complainant and is a more 'moral' enquiry concerning the infringement of the person's rights. The limitations enquiry looks more widely at the broader social interests implicated in the case and may involve a balancing of rights. It is here that administrative, financial and other considerations relevant to the pursuit of valuable public policy could be taken into account.[3] There are very few examples of decisions where unfair discrimination was found to be justified. In *Lotus River, Ottery, Grassy Park Association v South Peninsula Municipality* the Cape High Court found that the raising of rates and service charges, while unfair, was justified.[4] In the minority decision of Ngcobo J in *Khosa*, the failure to extend social assistance grants to adult permanent residents was held to be justifiable: the state had legitimate financial constraints and permanent residents were expected to be self sufficient.[5] Although he analyzed the matter as a violation of FC s 27, Ngcobo J said that treating this dispute as an equality challenge would have led to the same result.[6] In contrast, the majority decision of Mokgoro J found that the cost implications of extending grants to permanent residents could not justify the unfair discrimination or the violation of permanent residents' right to social security in FC s 27. The Court scrutinized the state's financial arguments and found that the relatively small costs involved did not justify a limitation of the rights.

There has been some overlap between the unfairness enquiry and this stage of the test.[7] The unfairness test in *(b)* looks at the nature of the provision and its purpose. Thus, while the overall focus of the unfairness test is on the impact on the complainant, it is here that the nature and the purpose of a measure will be examined. The FC s 36 enquiry also looks at the nature and purpose of the limitation.

[1] See S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[2] *Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 52.

[3] Ibid.

[4] 1999 (2) SA 817 (C)(Only case on record in which FC s 36 justified an unfair discrimination finding under FC s 9.).

[5] *Khosa* (supra) at paras 114-34.

[6] Ibid at para 102.

[7] But see Woolman & Botha 'Limitations' (supra) at § 34.5*(b)*(FC s 36 analysis adds nothing, in almost all equality cases, to analysis already undertaken in terms of unfair discrimation analysis under FC s 9(3) or FC s 9(4). The reason, they contend, is that the arguments in justification canvassed in terms of FC s 9 invariably exhaust the arguments that might be offered in terms in FC s 36. As the unfair discrimination test is currently constructed, FC s 36 does not offer meaningful space for the justification of unfair discrimination.)

While we believe that there can be some a conceptual separation between the two enquiries, where there is no law of general application, FC s 36 does not apply, and the *(b)* part of the fairness test sometimes leads to a merging of the 'moral' and policy considerations.[1] In *Hugo*, the Court looked at factors such as cost and administrative burden in deciding that the Presidential pardon (not a law of general application) that excluded men was not unfair. Similarly, in *Hoffmann*, SAA's commercial interests were considered but did not justify overriding the rights of the HIV-positive complainant to be considered for a job. It seems that FC s 9(3) cases fall into two categories — those where a FC s 36 enquiry follows the finding of a rights violation and those where FC s 36 is not implicated. The former will preserve the boundary between fairness and justification while the latter is likely to blur this boundary.[2]

(j) Evaluation of the application of the FC s 9(3) test

The test of unfair discrimination was developed quite early, in *Harksen*, in the Court's existence. Since then it has been followed closely by the Court in a relatively large number of cases. Most cases have resulted in a finding of unfair discrimination in favour of the complainant. The Constitutional Court has repeatedly protected the rights of marginal groups such as gays and lesbians and at times the rights of poverty-stricken non-citizens in a number of thoroughly contextual enquiries. Notable exceptions where (privileged) complainants failed include *Hugo* and *Walker*. The other important cases concerning unsuccessful claims are *Harksen, Jordan*, and *Volks*. Interestingly, all three concerned claims on the ground of indirect gender discrimination. *Harksen* and *Volks* also concerned claims of marital status discrimination. In all three cases, the Constitutional Court was very divided, with the dissents reflecting the views of the same judges (O'Regan J and Sachs J in all three cases and Mokgoro J (who did not sit in *Jordan*) in *Volks* and *Harksen*)). This division in the Court seems to reflect a difference in the contextual application of the FC s 9(3) test: the majority adopts a rather formal approach to equality analysis; the minority adopts a more substantive approach.

In *Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority,* the majority (six judges), while taking care to look at the context of refugees' lives, found that discrimination against them (as opposed to permanent residents and citizens) was not unfair. Again, Mokgoro and O'Regan JJ in a minority judgment (four judges) differed in their finding that refugees had been unfairly discriminated against in relation to permanent residents and as a vulnerable group whose dignity had been impaired. Their reading of the impugned legislation was that it contained an unstated stereotype that refugees are less

[1] Albertyn & Goldblatt 'Facing the Challenge' (supra) at 269-72.
[2] Albertyn 'Equality' (supra) at 4-58 — 4-59.

trustworthy than South Africans. The consideration of impact took account of a wider range of contextual issues than did the majority and seems to have come to a deeper understanding of vulnerability.

In *Jordan,* the majority failed to appreciate the gendered nature of the sex work industry and chose to focus formalistically on the fact that the male customer and the female sex worker, as well as both male and female sex workers, were equally criminalized by the challenged legislation. The minority of five judges found that sex workers faced greater sanctions than did their clients, and that since sex workers were generally women and clients men, indirect discrimination had occurred. The minority was able to see this distinction 'matter[ed]' and explored the position of sex workers in society, ie as social outcasts and temptresses.[1]

Volks concerned a claim by a surviving domestic partner to maintenance in terms of the Maintenance of Surviving Spouses Act. The majority had little sympathy for the middle class complainant: although it did acknowledge the vulnerability of poor women who find themselves in unregulated domestic partnerships. The judgment foundered on its inability to look at the matter historically and systemically. The focus on the special place of marriage led to an unwillingness to examine conservative ideas of the family. This focus on a person's choice to marry or not is at odds with any real understanding of the constraints on women's choices within intimate relationships, particularly when they are already disadvantaged and poor.[2]

35.6 FC s 9(4): Unfair Discrimination by Private Persons

FC s 9(4) extends the prohibition against unfair discrimination in FC s 9(3) to all persons other than the state. Thus private individuals or corporations can commit acts that discriminate unfairly. Since the limitations clause (FC s 36) does not apply to conduct, the full enquiry into whether there has been a violation of the right generally takes place within the fairness test.[3] The purpose element of the fairness test will include justificatory considerations such as cost and administrative burden that might otherwise have formed part of the limitations enquiry. This section has not yet been considered by the Constitutional Court as equality cases have involved challenges to national legislation or other acts of the state. There have however been a small number of High Court cases where FC s 9(4) challenges have been considered.[4] For example, *Minister of Education v Syfrets Trust*

[1] *Jordan* (supra) at para 64.

[2] See C Albertyn 'Defending and Securing Rights through Law: Feminism, Law and the Courts in South Africa' (2005) 32 *Politikon* 217, 229-30; C Lind 'Domestic Partnerships and Marital Status Discrimination' (2005) *Acta Juridica* 108.

[3] But see Woolman & Botha 'Limitations' (supra) at § 34 (Not all private discrimination takes place in terms of unregulated conduct. If the private discrimination is supported by law, then it is not — logically — impossible to have regard to the justificatory framework offered by FC s 36.)

[4] *Radio Pretoria v Chairman, Independent Communications Authority of South Africa, & Another* 2003 (5) SA 451 (T) at para 24.4 (High Court rejected argument that the Independent Broadcasting Authority could not invoke the provisions of FC s 9(4) in assessing the discriminatory actions of a radio station.)

Ltd found that, since the provisions of FC s 9(4) apply horizontally, a charitable trust that covered 'all natural and juristic persons' fell within the ambit of the section.[1]

35.7 FC s 9(5): Presumption of Unfairness

This section creates a rebuttable presumption that discrimination on a ground listed in FC s 9(3) is unfair unless it is established that it is fair.[2] This presumption fits into the FC s 9(3) test at the beginning of step 2 (the enquiry into fairness). Thus, having moved from step 1 where discrimination on a ground has been established, it is necessary to see whether such discrimination is based on a listed ground. If it is, it is presumed to be unfair and the onus shifts to the party against whom the complaint of unfair discrimination has been made, to prove that the discrimination was not unfair. This section encourages applicants to fit their discrimination into listed categories so as to benefit from the presumption. It aims to assist those who are already part of recognized vulnerable groups. A number of vulnerable groups that have not managed to benefit from this presumption because they do not fall within a listed ground have still managed to prove unfairness.[3] The court will look at a range of evidence including statistical and sociological evidence and can also take judicial notice of discrimination as it manifests in society.

35.8 The Promotion of Equality and Prevention of Unfair Discrimination Act

FC s 9(4) requires that national legislation be enacted to prevent or prohibit unfair discrimination. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2001 (PEPUDA) provides measures for the promotion of equality in addition to preventative/prohibitory provisions.

The Act 'is intended to give substance to the constitutional commitment to equality, by providing a legal mechanism with which to confront, address and remedy past and present forms of incidental, as well as institutionalized or structural, unfair discrimination and inequality'.[4] The Act is divided into two main sections dealing, first, with measures to prevent unfair discrimination (Chapters 2 and 3) and second, with measures to promote equality (Chapter 5). It also

[1] 2006 (10) BCLR 1214 (C) at paras 27-32.

[2] *Khosa* (supra) at para 68.

[3] These successful groups include the non-citizens in *Khosa* and the HIV-positive complainant in *Hoffman*. See § 35.5*(f)* supra.

[4] C Albertyn, B Goldblatt & C Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 3. For a critique of PEPUPA's framework for unfair discrimination analysis, and Albertyn, Goldblatt and Roederer's gloss on this test, see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) § 44.2*(b)*.

contains provisions specifically dealing with hate speech, harassment and publication and dissemination of unfairly discriminatory information (ss 10-12). It establishes Equality Courts (Chapter 4) at magistrates' court and High Court level and sets out the procedures to be followed in such courts. The wide range of remedies available to these courts is designed to encourage a creative, informal judicial approach that is sensitive to the circumstances of each case and the needs and interests of the parties.[1]

The promotion measures of the Act have barely been used. No more than a trickle of unfair discrimination cases have reached the courts, and only a small number of these cases have been reported. However, it is likely that a larger body of jurisprudence will develop as public awareness of the courts increases.

The reported Equality Court judgments include: *George v Minister of Environmental Affairs and Tourism*, dealing with the jurisdiction of the equality court;[2] *Du Preez v Minister of Justice and Constitutional Development*, concerning the shortlisting criteria for the post of a regional court magistrate (which were found to constitute unfair race and gender discrimination in terms of PEPUDA);[3] and *Pillay v KwaZulu-Natal MEC of Education & Others*, concerning an appeal from an Equality Court on the subject of a girl's right to wear a nose stud at school in pursuance of her culture and religion.[4]

[1] See N Bohler-Muller 'What the Equality Courts Can Learn from Gilligan's Ethic of Care: A Novel Approach' (2000) 16 *SAJHR* 623. See also A Kok 'Motor Vehicle Insurance, The Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act' (2002) 18 *SAJHR* 59; S Teichner 'The Hate Speech Provisions of the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000: The Good, The Bad and the Ugly' (2003) 19 *SAJHR* 349; N Bohler-Muller 'The *Promise* of Equality Courts' (2006) 22 *SAJHR* 380.

[2] 2005 (6) SA 297 (EqC). The judgment was confirmed on appeal by the Supreme Court of Appeal. See *Minister of Environmental Affairs and Tourism v George* [2006] SCA 57 (RSA). See also *Minister of Justice v Language* Durban and Coast High Court Case No 14181/2005 (Unreported judgment, 20 March 2006).

[3] 2006 (5) SA 592 (EqC).

[4] 2006 (10) BCLR 1237 (N). At the time of writing, this case was awaiting judgment from the Constitutional Court.

36 Dignity

Stuart Woolman

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1. **Founding Provisions**: The Republic of South Africa is one, sovereign, democratic state founded on the following values: *(a)* Human dignity, the achievement of equality and the advancement of human rights and freedoms.

7. **Rights**: (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

10. **Human Dignity**: Everyone has inherent dignity and the right to have their dignity respected and protected.

36. **Limitations**: (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

39. **Interpretation**: (1) When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

165. **Judicial authority**: (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

181. **Establishment and governing principles [of Chapter 9 Institutions]**: (3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

196. **Public Service Commission**: (3) Other organs of state, through legislative and other measures, must assist and protect the commission to ensure the independence, impartiality, dignity and effectiveness of the Commission.[1]

36.1 Introduction

As essentially a court lawyer, with no formal training in philosophy, I dare to take my stand on Kant because his imperatives encapsulate for me, by way of contrast and in the rationally most compelling manner that I have been able to discover, what was so obscene about apartheid. It serves as a constant reminder of our very ugly recent past. As a reforming Constitution, it is right that human dignity should be so highly valued.

Laurie Ackermann[2]

(a) History of dignity

South Africa boasts one of the world's most developed bodies of dignity jurisprudence. Only the Federal Constitutional Court's gloss on the meaning of dignity in Germany's Basic Law can match the richness of our Constitutional Court's account.

* I count myself extremely fortunate to have worked with Drucilla Cornell on this chapter. Professor Cornell not only recognized the Kantian character of our nascent body of jurisprudence, but possessed the imagination to see how a proper understanding of Kant might help us transcend the current limits of the black letter law. Although Professor Cornell disagrees strongly with some of the positions taken in this chapter, anyone familiar with her writing will recognize her handiwork in these pages. I am indebted to Laurie Ackermann for a lengthy, detailed and instructive critique of an early draft of this chapter. I further extend my thanks to Anthony Stein, Michael Bishop and Courtenay Sprague for their expert editorial interventions. All errors in argument and infelicities in style remain my responsibility alone.

[1] Constitution of the Republic of South Africa, 1996 ('FC' or 'Final Constitution').

[2] LWH Ackermann 'The Legal Nature of the South African Constitutional Revolution' (2004) 4 *New Zealand Law Review* 650('Legal Nature').

As the epigram from Justice Ackermann suggests, the richness of this jurisprudence flows, in part, from South African history. The Truth and Reconciliation Commission ('TRC'), for example, recognized that dignity has its roots in the simple idea that justice consists of the refusal to turn away from suffering. The TRC's unflinching commitment to the provision of a historical record of such suffering under apartheid counts as the first step in our moral re-awakening. However, the demands of dignity trace an arc that extends beyond the narrow duty to refuse to turn away from suffering to a broader duty to recognize our fellow citizens as agents capable of governing themselves. The granting of a truly universal franchise, and its exercise in the election of Nelson Mandela in 1994 (and in every other subsequent election), constitutes formal recognition of the capacity of each person to legislate for him or her self. The history of dignity in South Africa does not end there. The formal recognition of our compatriots as autonomous moral agents ratifies an even wider obligation to assist our compatriots in the conversion of their innate talents into capabilities that will, in turn, enable them to realize their preferred way of being in the world. When refracted through the prism of dignity, the Final Constitution extends our obligations, beyond the franchise and those civil liberties that permit us to legislate for ourselves, to socio-economic rights that guarantee the material transformation of the lives of each and every South African.[1] This brief history of our new-found ability to recognize the inherent dignity of our fellow South Africans is meant to suggest how the extension of this right progresses from mere duties of justice to duties of virtue that have as their aim the qualitative perfection of humanity.[2]

[1] See S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1 (Respect for human dignity requires society to respect the equal worth of the poor by marshalling its resources to redress the conditions that perpetuate their marginalisation.)

[2] Dignity dominates our literary, as well as our legal, history. It is, arguably, the chief leitmotif of JM Coetzee's work. From the halting efforts of the magistrate to 'see' his blind concubine in *Waiting for the Barbarians*, to the death march of the protagonist in *Life and Times of Michael K*, to the respect accorded animals in *Disgrace* and *Elizabeth Costello*, to the demand that we bear witness to the pain, as well as the struggle for autonomy, of a fictional character in *Slow Man*, Coetzee asks that we do more than acknowledge the existence of our fellow beings — human, animal, fictive. They may not be entitled to our love. (They may, indeed, be unlovable.) But they are all entitled to their dignity. Moreover, the dignity of which Coetzee speaks follows an arc of widening obligation strikingly similar to the constitutional concerns that animate this chapter. He moves, over time, from dignity as the refusal to turn away, to dignity as the formal recognition of others as ends, to dignity as the capacity to see others as they see themselves — a challenge that is especially great when that other is neither human nor animal, but, as in the case of Paul Rayment, entirely fictional.

As to the phrase, 'qualitative perfection of humanity', I have here, in mind, the constellation of features captured by the terms 'mensch' (Yiddish) or 'menschkeit' (German). These terms represent, at bottom, *a* goal of every human being: to rise above our passions and, in every moral transaction, to attempt to turn ourselves, as Henry James said, into persons 'upon whom nothing is lost'. See H James *The Art of the Novel* (1907) 149.

Despite its deep and profound resonance with South African history, dignity is manifestly not like Auden's valley cheese — 'local, but prized everywhere'. The Constitutional Court quite consciously draws upon two exogenous sources.[1]

First, the Court traces dignity's place in the pantheon of political thought back to Immanuel Kant.[2] The existing corpus of South Africa's dignity jurisprudence tracks, in a surprisingly direct manner, the trajectory of Kant's ethical thought, and, in particular, his various formulations of the categorical imperative.[3] The Court's jurisprudence turns, as we shall see, in ever widening gyres of obligation: moving outward from 'the refusal to turn away' as manifest in the death penalty

[1] Such potted histories necessarily verge on caricature. As a corrective, Laurie Ackermann suggests that an historical account of dignity's South African roots must take note of another endogenous source: the Roman-Dutch law of personality. See LWH Ackermann 'The Significance of Human Dignity for Constitutional Jurisprudence' (Lecture, Stellenbosch Law Faculty, 15 August 2005)(Manuscript on file with author) § 6 (Personality rights include the rights to dignity, life and bodily integrity, physical liberty, autonomy, reputation, feelings, privacy, self-realisation and identity.) See also J Neethling, JM Potgeiter & PJ Visser *Neethling's Law of Personality* (2nd Edition, 2005) 24-38; WA Joubert *Grondslae van die Persoonlikheidsreg* (1953); *Whittaker v Roos and Bateman; Morant v Roos and Bateman* 1912 AD 92, 122; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376, 381 (T); *Jansen van Vuuren & Another NNO v Kruger* 1993 (4) SA 842, 849 (A); *National Media Ltd v Jooste* 1996 (3) SA 262, 272 (A).

Other authors have suggested that the African concept of 'ubuntu' and dignity draw on quite similar moral intuitions. See Y Mokgoro 'Ubuntu and the Law in South Africa' (1998) 4 *Buffalo Human Rights LR* 15; D Cornell & K van Marle 'Interpreting Ubuntu: Possibilities for Freedom in the New South Africa' (2006) 6 *African Human Rights LJ* — (forthcoming); D Cornell 'A Call for a Nuanced Jurisprudence' (2004) 19 *SA Public Law* 661; M Pieterse 'Traditional' African Jurisprudence' in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 441; IG Kroeze 'Doing Things with Values (Part 2): The Case of Ubuntu' (2002) 13 *Stellenbosch LR* 252; R English 'Ubuntu: The Quest for an Indigenous Jurisprudence' (1996) 12 *SAJHR* 641. See also *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC)('*Makwanyane*') at paras 224-225 (Langa J)(Ubuntu captures, conceptually, 'a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, *dignity*, value and acceptance from the members of the community such a person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, *dignity*, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.' (Emphasis added).)

[2] For both the drafters of the Final Constitution and for Kant, the ideal basic law attempts to give adequate effect to three sometimes covalent, sometimes conflicting 'ideas': dignity, equality and freedom. Of this ideal basic law, Kant writes:

> Surely an organisation consisting of the greatest human freedom according to the laws through which the freedom of each can coexist with that of the others (not an organisation consisting of the greatest happiness, for this will no doubt follow on its own) is at least a necessary idea. It is an idea that we must lay at the basis not merely in first drafting a political Constitution, but also in all laws; and in so doing we must initially abstract from the present obstacles, which perhaps may not so much arise inevitably from human nature, as arise, rather, from our neglecting the genuine ideas in making laws.

I Kant *Critique of Pure Reason* (trans W Pluhar, 1996) 364.

[3] Despite the rather conservative cast of many of Kant's actual political positions — his opposition to suicide and his support for the death penalty — and some rather mystical and outré metaphysical commitments — his commitment to a noumenal free will — contemporary philosophers are willing and able 'to transpose Kants' writing, hearing them in a different key . . . from that in which they were

and corporal punishment judgments, to 'the equal respect' accorded non-traditional forms of intimate association in the gay and lesbian rights cases, to 'the collective responsibility for the material conditions required for agency' contemplated in recent socio-economic rights decisions.

Second, the Court recognizes that the history of dignity is a history of the world after World War II.[1] It is no accident that dignity occupies a central place in German constitutional jurisprudence: for 'dignity' is the flip-side of 'never again'. And just as the Germans have promised not to shovel people into stoves, so too have South Africans promised never again to treat people like cattle to be packed off to bantustans or to be slaughtered in the middle of the night. Dignity, like the words 'never again', may now have a new and deeper meaning post-Third Reich and post-apartheid. But 'dignity', like 'never again', writes Alan Ryan, has, in fact, 'been the watchword all along.'[2] Ultimately, that watchword always returns us to first principles: the refusal to turn away.

(b) Structure of the chapter

This chapter engages the constitutional 'watchword' of dignity in a number of discrete, but ultimately related, ways. It sets out comprehensively the black letter law in § 36.2, § 36.3 and § 36.4. Section 36.2 offers a number of working definitions of 'dignity'. While these five definitions reflect different extensions of the term, I shall argue that these different definitions are, in fact, variations on a single theme: Kant's notion of the individual as an autonomous moral agent. Section 36.3 shows how dignity operates — as a first order rule, a second order rule, a correlative right, a value and a grundnorm — in both the text of the Final Constitution and in the judgments of our courts. Section 36.4 catalogues and critiques the courts' use of dignity to work out the extension of various other substantive provisions in the Bill of Rights. In § 36.5, I return to more speculative observations about how dignity operates as rule, value and ideal. Here I answer the 'realist charge' that dignity means anything and everything, and therefore nothing. I offer, in place of the realist critique, an account of dignity that I believe best fits both the remedial purpose and the overall structure of the Final Constitution. This

originally written.' AW Wood 'What is Kantian Ethics' in I Kant *Groundwork of the Metaphysics of Morals* (ed and trans by AW Wood, 2002) 157. In part to disarm critics who might charge me with dilettantism, it must be stressed that the author is not a Kantian scholar and makes no claims, at all, about the best possible reading of Kant. The 'arguments' offered in these pages about Kant serve the much more modest aim of providing an analytical framework through which we might better understand the normative claims that hold our extant dignity jurisprudence together. (Moreover, my engagement with Kant is a function of the Court's own explicit, if sometimes cryptic, references to his conception of dignity.)

[1] The former Chief Justice of the Constitutional Court has acknowledged South Africa's debt to post-World World II constitutional jurisprudence. See A Chaskalson 'Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 193, 196 ('The affirmation of human dignity as a foundational value of the constitutional order places our legal order firmly in line with the development of constitutionalism in the aftermath of the second world war.')

[2] A Ryan 'After the Fall: Judt's *Postwar: A History of Europe Since 1945*' *New York Review of Books* Volume LII, No 17 (3 November 2005) 16, 19.

account explains why dignity must function as both a rule and a regulative ideal and imagines how dignity, properly understood, might serve the ends of a trans-cultural jurisprudence that would give equal weight to — or at least mediate — African and European conceptions of justice.

(c) Methodological concerns

A word or two of explanation about this chapter's method is in order before I set out the black letter law below.

First, neither the emphasis on the actual manner in which the courts have used and defined dignity, nor the effort to distinguish first order rules from second order rules should lead the reader to conclude that I aim to offer a purely positivist account of this body of law.[1]

Second, if the point of a positivist account (shorn of more controversial jurisprudential baggage) is to construct a taxonomy of all the rules that constitute the law of dignity — made up of the primary rules that impose legal obligations and the secondary rules that govern the application and the interpretation of primary rules — then my account does do something like that. But it does so only because all lawyers and academics attempting to understand dignity require a Baedeker of this sort to make their way through a complex body of jurisprudence.

Third, such a Baedeker alone is insufficient to the task of explanation. In the first place, legal rules often perform more than a single function.[2] Not only do different denotations of dignity operate as different kinds of rules, the very same definition of 'dignity' may operate as both a primary rule and a secondary rule. In the second place, while the word 'dignity' may not be so open-textured as to be the basic unit in a jurisprudential 'Lego-land', its multiple uses confound all attempts to reduce the courts' jurisprudence to a finite number of rules.[3]

[1] Not even HLA Hart, with whom the nomenclature of primary rules and secondary rules is most often associated, assumes that such rules exhaust the universe of obligations. See HLA Hart *The Concept of Law* (1961).

[2] See JW Harris *Legal Philosophies* (1980) 105 - 109. In the accepted parlance of legal positivism, primary rules are generally understood to impose duties and obligations, while secondary rules, which are parasitic on the existence of primary rules, determine how primary rules are to be applied or to be altered. See Hart (supra) at 77–96. However, I use 'first order rule' and 'second order rule' in a technical sense not meant to evoke passionate debate about the virtues and vices of legal positivism. First order rules resolve disputes; second order rules assist in the interpretation of — though they do not necessarily determine — the content of first order rules in a manner that permits resolution of disputes. See S Woolman 'Review of Corder and Du Plessis *Understanding South Africa's Transitional Bill of Rights*' (1996) 112 *SALJ* 711, 715. See also T Morawetz 'Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory and Judging' (1992) 141 *University of Pennsylvania LR* 371.

[3] For an example of dignity's simultaneous application as a first order rule, a second order rule, a correlative right and a value, see *Moseneke & Others v The Master* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC) at paras 22–24 (Provision of Black Administration Act providing that Master of High Court had no power to handle intestate estates of black South Africans found to be both a limitation of FC s 9 — equality — because it 'assails the dignity of those concerned' and a 'limitation of the right to dignity in [FC] s 10.' Neither limitation could be justified in a state based upon the values of 'human dignity, equality and freedom.') Different judges have used dignity in different ways to resolve the very same dispute. See *Daniels v Campbell* 2004 (5) SA 331 (CC), 2004 (6) BCLR 735 (CC)(Majority uses dignity as a

Fourth, two distinct dangers attach to a purely positivist account of dignity: *(a)* formally fair rules may mask substantially unjust arrangements;[1] *(b)* once a constitutional norm such as dignity is reduced to rules, obedience to the law tends to supplant considerations of justice as the primary end of our political community.[2] We need to be regularly reminded that the legal rules that the right to dignity produces are only as good as the everyday ethical practices that inform, and regularly transform, those rules.[3]

36.2 Definitions of dignity

This section identifies five primary definitions of dignity in the Court's jurisprudence. One aim of this taxonomy is to demonstrate how these five definitions draw down on the same basic insight: that we recognize all individuals as ends-in-themselves capable of self-governance. (Put pithily, each definition of dignity emphasizes a different dimension of our status as autonomous moral agents.) I suggest how these definitions build upon this common insight and interpenetrate one another to yield a theory of 'dignity.'

value to engage in statutory interpretation that permits Intestate Succession Act to be read in conformity with Final Constitution. Moseneke J, in dissent, found that the right to equality and the right to dignity had been violated, and that any legislative remedy for the violation must conform with such foundational values as dignity. Thus, dignity functions in these two judgments in the very same case as a first order rule, a second order rule, a correlative right, a value and a grundnorm.)

[1] For example, John Finnis somewhat cheekily observes that 'the rule of law' is 'the name commonly given to the state of affairs in which a legal system is legally in good shape.' J Finnis *Natural Law and Natural Rights* (1980) 270. But a commitment to the rule of law alone and to the formal features of law identified with it — is a necessary but not a sufficient condition for a just or a fair society. For more on those formal criteria, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 34. As Finnis notes, regimes that are exploitative or ideologically fanatical (or some mixture of the two) could submit themselves to the constraints imposed by the rule of law if it served the realization of their narrow conception of the good. Indeed, both Stephen Ellmann and David Dyzenhaus argue persuasively that the South African government under apartheid was an exploitative and ideologically fanatical regime committed to the rule of law. See S Ellmann *In a Time of Trouble: Law and Security in South Africa's State of Emergency* (1992); D Dyzenhaus *Hard Cases in Wicked Legal Systems*: *South African Law in the Perspective of Legal Philosophy* (1991). See also J Dugard *Human Rights and the South African Legal Order* (1981). Here then are two additional points about the limits of a positivist account. Although the rule of law did constrain the apartheid state — and even allowed for a cramped conception of human rights — few would allow that it was fair or just. What it was missing was any respect for individual dignity and the attendant sense that the purpose of state was to assist *all* persons to 'constitute themselves in community'. Finnis (supra) at 270–271. In addition, although the two most important constitutional doctrines developed by the Constitutional Court in its first decade of operation turn on a substantive conception of the rule of law and an account of dignity that makes it a *grundnorm* for the Final Constitution, those two doctrines alone are insufficient to guarantee the legitimacy of the new regime. For more on the rule of law, see F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11.

[2] On the relationship between rule-following behaviour, obedience to authority, and justice, see § 36.5*(a)* infra.

[3] For a discussion of dignity as a regulative ideal that enables us to transcend the limits of dignity as a first order rule, see § 36.5*(a)*(i) infra.

At the same time, one must recognize that the Court's definitions yield, at best, a partial theory of dignity.[1] It falls then to commentators such as myself to flesh out the Court's theory, to identify the particular definition(s) or dimension(s) of dignity being deployed in a given case, and to explain, more importantly, *(a)* how the Court responds when one denotation of dignity conflicts with another denotation of dignity and *(b)* how the Court determines when one such denotation must yield to another. It should go without saying that only after one has identified, as fully as possible, the various conceptions of dignity that animate the Court's reasoning does one earn the right to engage them critically.

(a) Individual as an end-in-herself (*Dignity 1*)

Justice Ackermann, the Court's original exponent of dignity, grounds the first definition of dignity in two sources that we have already identified: apartheid and the work of Immanuel Kant:

> [I]t is permissible and indeed necessary to look at the ills of the past which [the Constitution] seeks to rectify and in this way try to establish what equality and dignity mean? What lay at the heart of the apartheid pathology was the extensive and sustained attempt to deny to the majority of the South African population the right of self-identification and self-determination . . . Who you were, where you could live, what schools and universities you could attend, what you could do and aspire to, and with whom you could form intimate personal relationship was determined for you by the state . . . That state did its best to deny to blacks that which is definitional to being human, namely the ability to understand or at least define oneself through ones own powers and to act freely as a moral agent pursuant to such understanding of self-definition. Blacks were treated as means to an end and hardly ever as an end in themselves; an almost complete reversal of the Kantian imperative and concept of priceless inner worth and dignity.[2]

For Kant, as for Ackermann, the recognition of every human being's inherent dignity takes the form of an apparent variation on the golden rule,[3] the categorical imperative: 'Act in such a way that you always treat humanity, whether in your

[1] A Constitutional Court, particularly in its first few years, moves slowly. It might even be true — as a normative matter — that a Constitutional Court, as Laurie Ackermann suggests, 'ought not, even if it could, try to enunciate a total philosophical system based upon dignity.' Correspondence with Laurie Ackermann (26 January 2006)(on file with the author). See also A Honoré *Ulpian: Pioneer of Human Rights* (2002)('[I]t is a mistake to attribute to a lawyer a system of philosophy rather than a set of values.') Academics, however, are not subject to the same constraints as a court of law. The purpose of a book such as this is to offer a good faith reconstruction of the court's various doctrines, and then ask whether, in fact, such doctrines meet minimal criteria of coherence, and if they do, whether they are, ultimately, desirable.

[2] Ackermann 'Legal Nature' (supra) at 650.

[3] As a technical matter, Kant actually rejects the golden rule as a maxim for ethical action. See I Kant *Groundwork of the Metaphysics of Morals* (trans and ed AW Wood, 2002)('*Groundwork*') 46–47. He does so because the golden rule permits our individual inclinations to determine outcomes ('as *you* would have them do onto you') and does not require the attempt at moral perfection (through reason) demanded by the procedures associated with the categorical imperative. See TW Pogge 'The Categorical Imperative' in P Guyer (ed) *Critical Essays on Kant's Groundwork of the Metaphysics of Morals* (1998) 189, 191 (For Kant, 'the categorical imperative is not a version of the Golden Rule.') See also J Rawls *Lectures on the History of Moral Philosophy* (2000)('*Lectures*') 199.

own person or in the person of another, never simply as a means, but always at the same time as an end.'[1]

Stated in Kant's uncompromising terms, such an ethical algorithm might seem impossible to enact.[2] We all know that, even with the best of intentions, many of

[1] Kant *Groundwork* (supra) at 45–46. See also D Meyerson *Rights Limited* (1997) 12 (Refers to this formulation of the categorical imperative as a heuristic device through which we might better understand our own basic law.) That Kant should be identified as a source for constitutional doctrine in South Africa is not as outlandish a proposition as it may initially sound. In his commentary on German constitutional law and its dignity jurisprudence, Donald Kommers identifies three 'politically significant sources of ethical theory': Christian natural law, Kantian thought and social democratic thought. D Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd Edition, 1997) 304.

The above variation of the categorical imperative is, in fact, Kant's second formulation. See Rawls *Lectures* (supra) at 181. Kant's numerous restatements of the second formulation enhance our understanding of his meaning (and that of our first definition). First, he writes: 'A reasonable and rational being in virtue of its nature is an end and consequently an end in itself, and must serve for every maxim as a condition limiting all merely relative and arbitrary ends.' *Groundwork* (supra) at 53. He then places the following gloss on the second formulation: 'So act in relation to every reasonable and rational being (both yourself and others) that that being may at the same time count as an end in itself.' Ibid at 55–56. The second formulation turns our attention to the nature of other moral agents as rational beings, who, like our own selves, are entitled to treatment as ends in themselves. The second formulation also makes, what is for Kant and for us moderns, a crucial distinction: between things which have a price — and are therefore fungible — and things which have no price — and thus have no replacement. Most of us think of ourselves and those we care about as priceless. Kant asks us to extend that recognition to all human beings: for they, like us, view themselves and their significant others as irreplaceable. See AW Wood 'Humanity as an End in Itself' in P Guyer (ed) *Critical Essays on Kant's Groundwork of the Metaphysics of Morals* (1998) 165, 170 (Wood 'Humanity as an End')(Defines the term 'individual as an end-in-itself' as 'an end with absolute worth or (as Kant also says) dignity, something whose value cannot be compared to, traded off against, or compensated for or replaced by any other value.')

[2] Kant did not view this principle as impossible to enact. Indeed, as Rawls notes, Kant found moral pietism offensive and conceived of the categorical imperative as a 'mode of reflection that could order and moderate the scrutiny of our motives in a reasonable way.' Rawls *Lectures* (supra) at 149. Perhaps the best way to characterize Kant's categorical imperative is as a reflective check, albeit a demanding one, on our moral intuitions. A contemporary example of such a reflective check — and one that continues to do a great deal of heavy lifting — is Rawls' own 'veil of ignorance'. See J Rawls *A Theory of Justice* (1972). Like the categorical imperative, the veil of ignorance serves as an intuition pump for claims about distributive justice by forcing us to forsake any knowledge of our current position in society before we begin debate on how various social goods are to be allocated. Both intuition pumps are designed to eliminate illicit information that might otherwise skew (or justify) the criteria for the distribution of important goods in favour of those who already satisfy the requisite desiderata for the distribution of those goods. See, eg, Pogge (supra) at 206 ('The categorical imperative is . . . a general procedure for constructing morally relevant thought experiments. . . [T]he categorical imperative amplifies my conscience by transforming the decision from one of marginal significance into one concerning the world at large, and also isolates my conscience by screening out personal considerations that might affect my choice of maxims but are irrelevant to my decisions about how through legislation to specify a realm of ends.')

John Rawls further claims that the categorical imperative — like the veil of ignorance — is not an 'algorithm intended to yield, more or less mechanically, a correct judgment.' Rawls *Lectures* (supra) at 166. Nor, he continues, is it correct to describe the categorical imperative as a set of rules to catch out liars, cynics and cheats. 'There are' Rawls says, 'no such rules.' Ibid. Kant, however, would seem to believe that his categorical imperative possesses such teeth — and generates such rules — when he argues that if we were to try to universalize a false promise, the universality of such a law 'would make promising, and the very purpose of promising, itself impossible: since no one would believe they were being promised anything, but would laugh at utterances of this kind as empty shams.' Kant *Groundwork* (supra) at 39. First, the procedure produces a universal law — promise-keeping — that secures the status of a law of nature. Second, given that promise-keeping comes to possess, in the adjusted social world associated with

the myriad interactions we have with our fellow human beings will be almost entirely instrumental. We know that whether we are taking decisions for a family, a classroom of students, a neighbourhood, a town, a province or a nation, some form of a utilitarian calculus — the greatest good for the greatest number — will enter into our considerations. And we know that the relational or communitarian quality of ethics is such that we will often privilege the claims of family, kin, neighbourhood or nation over more general or universal claims.[1]

How then to understand Kant in a way that is neither sentimental nor woolly? Consider Oscar Schachter's gloss on the categorical imperative: 'Respect for the intrinsic worth of every person should mean that individuals are not to be perceived or treated *merely* as instruments or objects of the will of others.'[2] Dignity, on this account, sets a floor below which ethical — and legal — behaviour may not fall. Although some relationships will be purely instrumental, no individual person can be treated as a mere instrument over the *entire* domain of her social interactions. This floor supports — as the *Dawood* Court suggests — Chapter 2's express prohibitions on slavery, servitude and forced labour.[3] This definition of dignity also bars punishments that either extinguish the humanity of another entirely — say, the death penalty — or through their disproportionality reduce a human being to a *mere* signal within a large and impersonal system of social control.[4]

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the maxim, the status of a universal law, the burden shifts to the false promiser to offer a maxim that justifies her action while still safeguarding the social practice of promising.

A syllogism may clarify how the categorical imperative operates and the extent to which it determines whether a particular act accords human beings generally the requisite level of dignity.

1. One must always respect humanity as an end in itself in one's own person as well as in the person of another.
2. The act of suicide always fails to respect humanity in one's own person as an end in itself.
3. Therefore, one must never commit suicide.

Wood 'Humanity as an End' (supra) at 181. As Wood notes, however, because step 2 — the 'intermediate premise' or minor premise — is logically independent of step 1 — the second formulation of the categorical imperative or the major premise — one may raise 'legitimate questions about which acts express respect or disrespect for humanity.' Ibid at 181. Thus, although the categorical imperative does effectively screen out many personal considerations in the process of ethical decision-making, it does not distinguish, unequivocally, all acts that respect humanity from all acts that disrespect humanity. (It would be wrong, however, to claim, as some do, that the categorical imperative always begs the question as to whether an act constitutes an act that respects humanity.)

[1] See C Lamore *Patterns of Moral Complexity* (1986)(Argues that deontological, utilitarian and communitarian claims describe different dimensions of moral obligation, and that no one dimension can be made wholly subordinate to another.) For decidedly more deontological, but still quite plastic views on the sources of obligation, see B Williams *Ethics and the Limits of Philosophy* (1985); A Sen *Collective Choice and Social Welfare* (1979).

[2] O Schachter 'Human Dignity as a Normative Concept' (1983) 77 *American J of Int L* 848, 849 (Emphasis added).

[3] For more on the relationship between dignity and the prohibitions of slavery, servitude and forced labour, see § 36.4*(e)* and S Woolman & M Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 64.

[4] For more on the relationship between dignity and sentencing, see § 36.4*(c)*(iii) infra, and D Van Zyl Smit 'Sentencing and Punishment' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 49.

(b) Equal concern and equal respect (*Dignity 2*)

Another version of Kant's moral law — more accurately described as a principle of justice — yields another dimension of dignity: 'Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.'[1] This primarily negative obligation not to treat another merely as a means and to recognize in that other the ability to act as an autonomous moral agent underwrites a conception of dignity as a formal entitlement to equal concern and to equal respect.[2] From this conception of dignity as an entitlement to equal concern and to equal respect, the Constitutional Court has constructed two different, though not entirely distinct, tests in terms of FC s 9 (the right to equality): (1) a right to equal treatment which ensures *(a)* that the law does not irrationally differentiate between classes of persons and *(b)* that the law does not reflect the 'naked preferences' of government; and (2) a right to equal treatment that guarantees that individuals are not subject to unfair discrimination on the basis of largely ascriptive characteristics.[3] Of this demand for equal concern and equal respect, Justice Ackermann writes:

> [A]t the heart of the prohibition of unfair discrimination lies the recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership in particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.[4]

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[1] See I Kant *Metaphysics of Morals* (1797) (trans M Gregor 1991) 56, 231, 395 ('*Metaphysics of Morals*')(Kant reiterates the same principle as: (1) 'Every action is right which by itself or by its maxim enables the freedom of each individual will to co-exist with the freedom of everyone else in accordance with the universal law'; and (2) 'Act according to the maxim of ends which it can be a universal law for everyone to have.')

[2] Kant offers a more accessible, and less rarefied, account of dignity as equal concern and equal respect in the *Metaphysics of Morals*, when he writes:

> [A] human being regarded as a person . . . is exalted above any price; for as a person . . . he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in itself, that is, he possesses a *dignity* (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world. He can measure himself with every other being of this kind and value himself on a footing of *equality* with them.

Ibid at 557 (emphasis added).

[3] See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)('*Hugo*') at para 41 ('[T]he purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded *equal respect* regardless of their membership in particular groups.' (Emphasis added).)

[4] LWH Ackermann 'Equality under the 1996 South African Constitution' in Rüdiger Wolfrem (eds) *Gleichheit und Nichtdiskriminierung im Nationalen und Internationalen Meschenrechtsschutz* (2003) 105. See also *Law v Canada* (*Minister of Employment and Immigration)* (1999) 170 DLR 4th 1 (SCC) at para 51 ('Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.')

(c) Self-actualization (*Dignity 3*)

Another formulation of the categorical imperative shapes a third strand of the Court's dignity jurisprudence. Kant writes: 'Act only on the maxim through which you can at the same time will that it should become a universal law.'[1] Here, the term that warrants the closest scrutiny is 'will'. For Kant, the hallmark of humanity is its ability to 'will' or to shape its ends through 'reason'. But when Kant writes that our humanity consists, at least in part, in our power to rationally set and will an end, he is not speaking solely of an individual's capacity to adopt an end for purely moral reasons. While Kant certainly contends that the defining feature of humanity is our capacity to overcome our instincts and that we are only truly free when we are moral, he maintains that we define ourselves — and our humanity — through the rational choice of *all* of our ends and not just those that are explicitly moral. This broader capacity to create meaning — to 'will' value into the world — gives rise to the modern political pre-occupation with 'self-actualization'.[2] An individual's capacity to create meaning generates an entitlement to respect for the unique set of ends that the individual pursues. In *Ferreira v Levin*, Justice Ackermann writes:

> Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.[3]

Dignity, properly understood, secures the space for self-actualisation.[4] That said,

[1] Kant *Groundwork* (supra) at 37–38 ('Act as if the maxim of your action were to become through your will a universal law of nature.')

[2] See, eg, C Korsgaard *Creating the Kingdom of Ends* (1996) 106–131.

[3] *Ferreira v Levin* 1996 (1) SA 984 (CC), 1996 (4) BCLR 1 (CC)('*Ferreira*') at para 49.

[4] The majority in *Ferreira* rejected Justice Ackermann's view that IC s 11(1) and FC s 12(1) contain a robust, self-standing freedom right. Ibid at paras 170–185 (Chaskalson P). The Constitutional Court accepted, subsequently, Ackermann J's thesis that dignity (FC s 10) is meant to secure the space for self-actualisation (autonomy). However, this characterization of self-actualisation turns not on a commitment to political participation (*Dignity 4*) or to social entitlements (*Dignity 5*) — also known as 'positive liberty' or 'freedom to' — but primarily on a commitment to limiting state power — also known as negative liberty or 'freedom from'. The Court's conception of dignity *qua* freedom (autonomy) is elaborated in a series of early equality cases. See, eg, *Hugo* (supra) at para 41 ('[D]ignity is at the heart of *individual* rights in a *free* and democratic society'); *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC)('*Prinsloo*'); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)('*NCGLE I*'). See also N Haysom 'Dignity' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 131-132.

however, dignity *qua* self-actualisation describes *only* a political, and not a metaphysical, state.[1]

(d) Self-governance (*Dignity 4*)

A third formulation of the categorical imperative helps us to identify a fourth dimension of dignity.[2] An essential feature of the constitutional politics that issues from the categorical imperative is the recognition of the ability of (almost) all human beings — through their capacity to reason — to legislate for themselves. Indeed, as we have just noted, it is our capacity for self-governance, and the fact that we are not simply slaves to our passions, that distinguishes man from beast. (Whether Kant is correct to make reason the sine qua non of humanity is another matter.[3]) Our capacity for self-governance — the capacity of (almost) all human

[1] See S Woolman 'The Selfless Constitution: Flourishing and Experimentation as the Foundations of the South African State' (2006) 21 *SA Public Law* – (forthcoming)(Self-actualization is not contingent upon the ability to will freely one's ends. Such a conception of freedom is a form of folk psychology. Rather, freedom consists primarily of having the capacity to participate in ways of being in the world that already give one's life the better part of its meaning); Wood 'Ethics' (supra) at 176 ('I doubt that Kant's extravagant metaphysics is the best we can do with this problem. The basic point, however, is that Kantian ethics is no more hostage to the free will problem than any other ethical theory would be that regards us as reasonable and self-governing beings'); D Cornell 'A Call for a Nuanced Constitutional Jurisprudence: Ubuntu, Dignity and Reconciliation' (2004) 19 *SA Public Law* 666, 667 ('[I]f we give Kantian dignity its broadest meaning, it is not associated with our actual freedom but with the postulation of ourselves as beings who not only can, but must, confront . . . ethical decisions, and in making those decisions . . . give value to our world.') For Kant — and no doubt some of the justices on the Constitutional Court — freedom does describe a metaphysical state. For Kant, this freedom consists of action in accordance with a maxim that satisfies the requirements of the categorical imperative. See I Kant *Religion within the Limits of Reason Alone* (trans TM Greene & HH Hudson, 1960) 24 ('Freedom of the will is of a wholly unique nature in that the incentive can determine the will only in so far as the individual has incorporated it into his maxim (has made it into the general rule in accordance with which he conducts himself).')

[2] See Rawls *Lectures* (supra) at 183 ('In the third formulation (that of autonomy) we come back again to the agent's point of view, but this time not as someone subject to moral requirements, but as someone who is, as it were, legislating universal law: here the [categorical imperative] procedure is seen as that procedure the adherence to which with a full grasp of its meaning enables us to regard ourselves as making law for a possible realm of ends.')

[3] See B Williams 'The Idea of Equality' in P Laslett & WG Runciman (eds) *Philosophy, Politics and Society* (1962) 111. Williams argues that the entitlement to equal treatment flows not, as in Kant, from the ability to reason, but primarily from the recognition that others have narratives (like our own) that shape their lives, that the pursuit of the ends in such narratives give life its meaning and that equal treatment requires that a person possess the material means necessary to make the pursuit of such ends genuinely possible. Kant was, however, uncompromising in his view that both reason and freedom are pre-conditions for a meaningful existence. On Kant's account:

> [I]n this world of ours there is only one kind of being with a causality that is teleological, that is, directed to purposes, but is yet so constituted that the law in terms of which these beings must determine their purposes is presented as unconditioned and independent of conditions in nature . . . That being is man . . . considered as a noumenon. Man is the only natural being in whom we . . . recognize, as part of his constitution, a supersensible ability (freedom). . . . [The principle of morality — the categorical imperative] is the only possible thing in the order of purposes that is absolutely unconditioned as concerns nature, and hence alone qualifies man, the subject of morality, to be the final purpose of creation.

beings to reason their way to the ends that give their lives meaning — is largely what makes democracy the only acceptable secular form of political organization. For if we are capable of shaping our own ends as individuals, equal political treatment demands that we be able to shape them as citizens in a democracy.[1] At a minimum, it means we must be able to participate in the collective decision-making processes that determine the ends of our community. As Justice Sachs notes in *August v Electoral Commission:*

> The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of *dignity* and of personhood. Quite literally, it says that everybody counts.[2]

This commitment to dignity *qua* self-governance is rather straightforward in the franchise cases.[3] However, dignity *qua* self-governance is, in fact, where the Constitutional Court falters most conspicuously. Dignity *qua* self-governance ought to promote the Court's commitment to representation reinforcing processes — most notably where our democratic processes cannot be profitably exploited by vulnerable minorities and out-groups. But *Prince*, *Jordan*, *Volks* and *De Reuck* sound cautionary notes about the extent to which the Court will extend itself on behalf of non-traditional associations, vocations or professions.[4] In these cases,

See I Kant *The Critique of Judgment* (trans JC Meredith, 1952) § 84. See also Rawls *Lectures* (supra) at 159. In sum, only man has the capacity to determine the laws of nature, to legislate them for himself (and others) and thus to be free in a way (of mere causality and desire) that no other entity (that we know of) is. One could subscribe to this vision of things without endorsing its religious dimensions. One could — indeed ought to — subscribe to this vision without the metaphysical baggage of an unconditioned noumenal self. One ought, however, to keep in mind that, for Kant, only by fashioning 'in ourselves a firm good will, and in shaping our world accordingly' would we qualify as the 'final purpose of creation.' Rawls *Lectures* (supra) at 162. According to Kant, absent such a good will — and a world shaped accordingly — there can be no justice, no dignity, and thus, as we noted at the outset, no reason for humanity to continue to exist.

[1] For what such equal treatment in a democracy requires, see T Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 10.

[2] See *August v Electoral Commission* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 17 (Emphasis added).

[3] See *Minister of Home Affairs v National Institute for Crime Prevention* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC); *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), 1999 (4) BCLR 457 (CC).

[4] See *Prince v Law Society* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC)('*Prince*'); *S v Jordan & Others (Sex Workers Education and Advocacy Task Force & Others as Amici Curiae)* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC)('*Jordan*'); *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC); *Volks v Robinson* 2005 (5) BCLR 466 (CC)('*Volks*'). Sachs J, in dissent in both *Prince* and *Volks*, and as the author of *Fourie*, has begun to adumbrate a jurisprudence that values the meaning of non-dominant associations to their participants, but does not threaten the general principles to which the Final Constitution commits us. See *Prince* (supra) at para 149 ('[W]here there are [religious] practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the Constitution obliges the State to walk the extra mile' and to find adequate means — perhaps a carefully constructed exemption — of accommodating the practice at issue.) See also *Volks* (supra) at paras 154 and 156 (Sachs J rejects the majority's finding that the appellant, 'having chosen cohabitation rather than marriage, . . . must bear the consequences' and thus could not avail herself of the benefits of the Maintenance of Surviving Spouses Act. He contends that: 'Respecting autonomy means giving legal credence not only to a decision to marry but to choices that people make about alternative lifestyles. Such choices may be freely undertaken, either expressly or tacitly. Alternatively, they might be imposed by the unwillingness of one of the parties to marry the other. Yet if the resulting relationships

the Court reinforces a traditional morality supported by a majority of South Africans and effectively undermines the efforts of these out-groups to determine the ends of their own lives.[1]

(e) Collective responsibility for the material conditions for agency (*Dignity 5*)

This failure to accord such out-groups the requisite level of equal respect is thrown into somewhat sharper relief by the fifth and final strand of the Court's dignity jurisprudence. Here the emphasis is not *solely* on the individual ends in our

involve clearly acknowledged commitments to provide mutual support and to promote respect for stable family life, then the law should not . . . penalise or ignore them because they are unconventional. It should certainly not refuse them recognition because of any moral prejudice, whether open or unconscious, against them'); *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project v Minister of Home Affairs* CCT 60/04; CCT 10/04 (unreported decision of 1 December 2005)('*Fourie*').

[1] To be clear, the Constitutional Court never dismisses cavalierly the interests of a vulnerable class of persons. The point is, rather, that traditional mores inform — sometimes more and sometimes less — explicitly the reasoning of the Court. So, for example, the Court in *Jordan* concludes that the criminalization of prostitution could not be said to impair the dignity of the prostitute because 'the diminution arose from the character of prostitution itself.' *Jordan* (supra) at para 74. And since prostitutes choose this ignominious fate, the Court continues, they have no one to blame for the stigma that attaches to their profession but themselves. Ibid at paras 16 –17 ('If the public sees the recipient of reward as being 'more to blame' than the 'client', and a conviction carries a greater stigma on the 'prostitute' for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attaches to them, not by virtue of their gender, but by virtue of the conduct they engage in.') Not only does the Court decline to take responsibility for the manner in which it reinforces such prejudice by upholding the law, it adamantly refuses to acknowledge the conditions of duress under which many sex workers operate. Ibid at para 16. ('It was accepted that they have a choice . . . that is limited or 'constrained'. Once it is accepted that . . . by engaging in commercial sex work prostitutes *knowingly* attract the stigma associated with prostitution, it can hardly be contended that female prostitutes are discriminated against.') Justice Sachs provides the putative grounds for upholding the legal sanctions for traditional taboos in *NCGLE I*:

> There are very few democratic societies, if any, which do not penalize persons for engaging in inter-generational, intra-familial, and cross-species sex, whether in public or in private . . . The privacy interest is overcome because of the perceived harm.

NCGLE I (supra) at para 118. Aside from the fact that most societies, historically, have not only permitted but promoted inter-generational sex, neither the invocation of tradition nor the pressure of the status quo counts as an argument. With respect, it is just this sort of non-argument argument about 'perceived harm', that makes it so difficult to secure judicial solicitude for aberrant practices. Justice Sachs uses 'democratic societies' as a rhetorical strategy to suggest that the Court shares the same set of values as the majority of South Africans. But it is an odd form of justification for a judge and a Court that prides itself on the protection it affords vulnerable groups and non-traditional associations. Indeed, the Court has recently rejected the contention that the trivial 'perceived harms' experienced by transient majorities are adequate grounds for imposing legal sanctions upon non-traditoinal associations. See, eg, *Fourie* (supra) at paras 60–61 (Sachs J)('Equality . . . does not presuppose . . . suppression of difference . . . Equality . . . does not imply . . . homogenisation of behaviour . . . . [T]here are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space has been found for members of communities to depart from a majoritarian norm.')

realm of ends. The Court also contemplates a connotation of dignity that attaches to the realm *as a whole*.[1]

In a series of unfair discrimination and socio-economic rights cases, the Constitutional Court has made it clear that our commitment to dignity does not flow entirely from the inalienable rights of individuals. Whether it has engaged the stigma associated with HIV/AIDS, the urgent need for shelter, the entitlement of all to adequate food and water or the desperation associated with summary evictions, the Constitutional Court has, over the past several years, repeatedly emphasized the fact that

> It is not only the *dignity* of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society *as a whole* is demeaned when state action intensifies rather than mitigates their marginalisation.[2]

Dignity, on this account, is not simply a constellation of duties owed by the state to each subject, or a set of entitlements that can be claimed by each member of the polity. Dignity is that which binds us together as a community, and it occurs only under conditions of mutual recognition. Moreover, such mutual recognition is not merely formal. The Court in *Khosa* notes that the Final Constitution commits us to an understanding of dignity in which

> wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.[3]

The Court's account of dignity, which has heretofore supported various conditions required for the meaningful exercise of individual moral agency, now appears to describe dignity as a collective good. The case law even features a number of disputes in which the dignity interests of the collective are said to trump the dignity interests of an individual.[4]

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[1] See Kant *Groundwork* (supra) at 51:

> I understand by a 'kingdom' a systematic union of different rational beings under common laws. Now since laws determine ends as regards their universal validity, we shall be able — if we abstract from the personal differences between rational beings, and also from the content of their private ends — to conceive of a whole of ends in systematic conjunction.

[2] See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) at para 18 (emphasis added).

[3] *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (5) BCLR 569 (CC)('*Khosa*') at para 74. The Court's language echoes Rawls' description of a Kantian 'realm of ends' in which

> everyone recognizes everyone else as not only honouring their obligation of justice and duties of virtue, but also, as it were, legislating law for their moral commonwealth. For all know of themselves and of the rest that they are reasonable and rational, and that this fact is mutually recognized.

Rawls *Lectures* (supra) at 209. See also S Hoctor 'Dignity, Criminal Law and the Bill of Rights' (2004) 121 *SALJ* 265, 315 ('Dignity has a communitarian aspect: by requiring respect for others' claims to dignity, vindication of the human dignity of all is better assured, and a community of mutual co-operation and solidarity is fostered.')

[4] In two High Court judgments, the general public's right to receive information (*Dignity 5*) trumped the rather attenuated privacy claims of individuals who asserted a right to withhold information (*Dignity 3*). See *S v Dube* 2000 (2) SA 583 (N); *MEC for Health, Mpumalanga v M-Net* 2002 (6) SA 714 (T). See also § 36.4*(g)* infra, for a further discussion of these two expression/privacy/dignity cases.

But with the exception of a few apercu in the socio-economic rights cases, and an aside or two in a handful of other disputes, the Court rarely refers to our collective dignity.[1] The Court's circumspection, in this regard, suggests that it does not have in mind some neo-romantic conception of the political community.[2]

How then to comprehend dignity as a collective concern? What the Court wishes us to understand is that for dignity to be meaningful in South Africa, the political community *as a whole* must provide that basket of goods — including such primary goods as civil and political rights — which each member of the community requires in order to exercise some basic level of agency. This conception of dignity possesses several striking similarities to Amartya Sen's politics of capability.

For Sen, as for our Constitutional Court, the primary concern of the polity is not with wealth maximization. 'Wealth' as Aristotle wrote, 'is evidently not the good we are seeking; for it is merely useful and for the sake of something else.'[3] That something else, as Sen writes, is

> [t]he expansion of the 'capabilities' of persons to lead the kinds of lives they value — and have reason to value. . . . Having freedom to do the things one has reason to value is (1) significant in itself for the person's overall freedom, and (2) important in fostering the person's opportunity to have valuable outcomes.[4]

However, Sen's aims are not limited to fostering the agency of the individual. Individual agents should be understood both as ends-in-themselves and as the 'basic building blocks' of aggregate social development. The 'greater freedom' of

[1] One exception is *S v Makwanyane*, where Justice Langa connects ubuntu with the dignity of individuals and the solidarity of the community:

> [Ubuntu exists in] a culture which places some emphasis on *communality* and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to *unconditional respect*, *dignity*, value and acceptance from the members of the community such a person happens to be part of. It also entails the converse, however. The person has a corresponding *duty* to give the same respect, *dignity*, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and *co-responsibility* and the mutual enjoyment of rights by all.

Makwanyane at paras 224-225 (Emphasis added).

[2] The purpose of the realm of ends has nothing to do with the romantic conception of a volk who would use the institutions of the state to give effect to their preferred way of being in the world. 'For the Kantian', says Wood, 'a community of rational beings must be conceived from the ground up as the rational agreement of a plurality of distinct and equal persons who freely choose to unite their ends on terms that respect each one's autonomy. The crucial thing . . . is *not* to determine a single given collective end.' Wood 'Ethics' (supra) at 162–163 (Emphasis added). According to Wood, 'For Kant the clearest model of a realm of ends in ordinary human life is friendship, in which . . . friends unite their ends in a collective end in which their individual happinesses are swallowed up.' Ibid at 167. This reading does not mean that individuals subordinate their individual goals to the goals of the collective. Individual narratives still matter. Friends are a model for the realm of ends because genuine friends act out of a disinterested desire to see their friends flourish, and for no immediate benefit to themselves. Friends are always ends.

[3] See Aristotle *Nichomachean Ethics* (trans D Ross 1980) Bk I, § 5, 7.

[4] A Sen *Development as Freedom* (1999) 18('*Development*').

individuals not only 'enhances the ability of people to help themselves and … to influence the world,' it is essential to the development of society as a whole.[1] For Sen, the link between individual capabilities and development is part of a virtuous circle. Enhancement of individual freedom — by both political and material means — leads to greater social development, which, in turn, further enhances the possibilities for individual capabilities and the freedom to lead the kinds of lives we have reason to value.[2]

This virtuous circle would appear to be what the Constitutional Court in *Khosa* has in mind when it ties the well-being of the worst off to the well-being of the wealthy. The enhancement of individual capabilities of the poorest members of our political community enhances the development of South Africa as a whole. Or put slightly differently, the greater the 'agency' of the least well-off members of our society, the greater the 'agency' of 'all' the members of our society. This gloss on *Khosa* emphasizes not the subjective sense of well-being that the well-off might experience by tying their well-being to that of the poor. Rather it emphasizes an increase in the objective sense of well-being that flows from the enhancement of the agency of each individual member of our society.

(f) The relationship between the five definitions of dignity and the creation of a realm of ends

We may be able to see, now, how dignity builds upon a simple premise, the refusal to turn away from suffering, and yields, ultimately, a realm of ends. The refusal to turn away marks the very beginning of our moral awareness — the first time we come to understand that others are not mere instruments for the realization of our desires, but beings who are ends in themselves. This moral awakening leads, almost ineluctably, to two further insights: *(a)* that others are entitled to the same degree of concern and respect that we demand for ourselves; and *(b)* that others are entitled to that equal respect and equal concern because they, like us, are possessed of faculties that enable them to pursue ends which give their lives meaning.[3] The ability to give our lives meaning and to determine the course by

[1] See *Development* (supra) at 18.

[2] For a more detailed discussion of the relationship between our dignity jurisprudence and Sen's views, see § 36.5*(a)*(ii), 'Dignity and the politics of capability', infra.

[3] In a recent lecture, Justice Laurie Ackermann offers a working definition of dignity that resonates with least four of the five definitions of dignity adumbrated in these pages:

> I would define Human dignity as follows: It is a concept comprising all those aspects of the human personality that arise from human intellectual and moral capacity; which in turn separate humans from the impersonality of nature, enables them to exercise their own judgment, to have self-awareness and a sense of self-worth, to exercise self-determination, to shape themselves and nature, to develop their personalities and to strive for self-fulfilment in their lives. I have modelled this on the classic German concept propounded by Prof Günter Dürig in the 1950's: 'Jeder Mensch ist Mensch kraft seines Geistes, der ihn abhet von der unpersönlichen Natur und ihn aus eigner Entscheidung dazu befähigt, seiner selbst bewußt zu werden, sich selbst zu bestimmen und sich und die Umwelt zu gestalten.' I have somewhat broadened his exposition by introducing the desire for self-fulfilment, in preference to the word 'happiness' … I have also added the individual's own sense of self-worth as an aspect of

which we give our lives meaning, leads to the recognition that we are able to govern our selves. At a minimum, this mutual recognition of our ability to govern our selves supports the formal political recognition that just as each one of us is entitled to govern our individual self, so too are we entitled to legislate on behalf of the broader community of which we are a part. This mutual recognition of one another as rational beings capable of ordering the ends both of our own lives and of the larger community underwrites the final insight: that we not only live in a realm of ends, but that if such a realm is to have real meaning, we must be willing to order our community in a manner that enables each individual to realize their status as an end. It is simply not enough to *(a)* not turn away from suffering, *(b)* end discrimination and *(c)* grant all citizens the franchise. Once we recognize others as ends we must be committed — at some level — to the provision of those material means necessary to live as ends. To refuse them such means might render meaningless the more formal guarantees found in the Final Constitution. As the Court itself notes in *Grootboom:*

> The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of *human dignity*. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to *human dignity*. In short, I emphasise that human beings are required to be treated as human beings.[1]

Two riders must attach to this account of dignity. First, the notion that the five definitions of dignity can be viewed as building blocks out of which we can construct a realm of ends is *my* speculative exercise. Certainly, the Constitutional Court has never said as much. However, that Kant and Rawls, amongst others, have offered similar philosophical constructs gives this reconstruction of the Court's jurisprudence more than a patina of plausibility. Second, that the five definitions of dignity can be viewed as building blocks out of which we can construct a reasonably coherent theory of dignity does not mean that these five definitions will always cohere with one another. As we shall see, the definitions

human personality; for when a person is dealt with in a demeaning way, . . . the observer can actually experience the impairment of the victim's sense of self-worth. Criticism of another provides a subtle example. No matter how justified, objectively, the content of criticism might be, if it is delivered in an insulting or demeaning way, it unjustly impairs the victim's legitimate *sense* of self-worth as a human being.

See LWH Ackermann 'The Significance of Human Dignity for Constitutional Jurisprudence' (Lecture, Stellenbosch Law Faculty, 15 August 2005)(Manuscript on file with author) § 4 quoting G Dürig 'Der Grundrechtssatz von der Menschenwürde' (1956) 81 *Archiv für öffentliches Recht* 117, 125 ('All humans are human by virtue of their intellectual capacity ("kraft seine Geistes") which serves to separate them from the impersonality of nature and enables them to exercise their own judgment, to have self-awareness, to exercise self-determination and to shape themselves and nature.' (Ackermann's translation).)

[1] *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)('*Grootboom*') at para 83 (Emphasis added).

sometimes pull in opposite directions and thereby generate significant doctrinal tension. I shall, in § 36.4, indicate where such conflicts occur and suggest, where possible, how such conflicts might be resolved.

36.3 USES OF DIGNITY

The word 'dignity' is sprinkled about the text of the Final Constitution. It is a founding value: FC s 1*(a)*. It acts as a cornerstone of both democracy and the Bill of Rights: FC s 7(1). It informs both our interpretation of the ambit of the specific substantive provisions of the Bill of Rights — FC s 39(1) — and our analysis of the justification of any limitation of a right or freedom — FC s 36. It governs the behaviour of our courts, other tribunals and state institutions supporting constitutional democracy: FC ss 165, 181, 196. It is, perhaps most importantly, the second substantive right identified in the Bill of Rights: FC s 10. That dignity operates as a first order rule, a second order rule, a correlative right, a value and a *grundnorm* — and sometimes all in a single case — is confirmed by Justice O'Regan's oft quoted dictum in *Dawood*:

> Human .... dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights.... Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected. In many cases however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.[1]

So, just as dignity denotes at least five different, though often related, kinds of obligation, so too does dignity operate within our legal system in four sundry ways.[2]

(a) Dignity as a first order rule

Dignity is rarely a first order rule. That is, the right to dignity *alone* is rarely dispositive of a constitutional matter. The first rule of South African dignity jurisprudence is that where a court can identify the infringement of a more

[1] *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC)('*Dawood*') at para 35 (Emphasis added).

[2] It is worth noting that even judges comfortable with the common law and quite uncomfortable with constitutional development of that body of law still recognize that the protection afforded individuals under FC s 10 — and elsewhere in the Final Constitution — is substantially broader than the notion of *dignitas* that animates the *actio injuriarum*. See, eg, *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (W)('*Dendy*'). In *Dendy*, the High Court found no need to develop the common law in light of FC s 10 (first order rule) or FC s 39(2) (second order rule or value). The *Dendy* court simply noted, in passing, that in these circumstances dignity functions as a residual right (correlative right). Ibid at para 24.

specific right, FC s 10 will (ostensibly) not add to the enquiry.[1] That said, dignity has operated as a first order rule in a number of intimate association matters because the Constitutional Court could identify no other specific right that would protect the interests of the married couples or life partners in question.[2] High Courts have extended the protection that FC s 10 affords intimate associations beyond the confines of marriage or life partnerships to relationships between grandparents and grandchildren.[3] High Courts have also deployed dignity as an operational rule when no other right would protect the linguistic interests of a party before the court.[4]

(b) Dignity as second order rule

Dignity often operates as a second order rule. That is, dignity determines how a first order rule disposes of a given matter.[5]

Dignity, as a second order rule, features most prominently in equality (FC s 9) cases.[6] It does so in two ways. First, an impairment of human dignity may

[1] *Dawood* (supra) at para 35. What happens, then, when the Court finds that law or conduct has violated both FC s 10 and some other right in Chapter 2? As we note in the section on dignity as a correlative right, when dignity and another right are both violated, the content of that other right — at least in so far as the particular challenge is concerned — would appear to be a particular manifestation of the right to dignity at the same time as it is informed by the value of dignity.

[2] Ibid. See also *Booysen v Minister of Home Affairs & Another* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC)('*Booysen*'); *Daniels v Campbell* 2004 (5) SA 331 (CC), 2004 (6) BCLR 735 (CC)(Moseneke J, in dissent, found that the statutory provisions and common law rules in question constituted an affront to the dignity of all persons married under Muslim law and, consistent with the finding in *Dawood*, undermined their capacity to enjoy the full benefits of their intimate association.)

[3] See *Petersen v Maintenance Officer, Simon's Town* 2004 (2) SA 56 (C), 2004 (2) BCLR 205 (C)(High Court found that the common law's differentiation between children born in wedlock and children born out of wedlock, which only placed duty of support on paternal grandparents for children born in wedlock, violated the right to dignity, the right to equality and the best interests of the child.)

[4] See *S v Pienaar* 2000 (7) BCLR 800 (NC) at para 10 (Failure to acknowledge difference in language, and to ignore the speaker, may violate speaker's right to dignity); *Advance Mining Hydraulics v Botes NO* 2000 (1) SA 815 (T), 2000 (2) BCLR 119, 127 (T)(Right to dignity requires, at the very least, that 'persons be treated as recipients of rights and not as objects subjected to statutory mechanisms without a say in the matter.' The presiding officer's failure to warn an examinee — in a s 415 inquiry — of his right to legal representation before compelling him to answer questions he did not understand constituted a 'blatant affront' to the examinee's dignity.)

[5] In this regard — the disposal of specific disputes — dignity as a second order rule differs from dignity as a value. As we shall see in our discussion of the Court's equality cases, the effect of law or conduct on the dignity of the complainant determines, in part, whether differentiation counts as discrimination and whether discrimination amounts to unfair discrimination. See § 36.4*(a)* infra. The repeated invocation of the *Harksen* test by the Court in equality cases, and the *Harksen* test's appraisal of the impairment of the complainant's dignity as a second step in its calculus of unfair discrimination turns dignity into a second order rule. Similarly, where a punishment is so disproportionate to the crime as to turn a convict into a mere signal in a larger system of social control, the Court will find that the dignity of the convict is impaired. This impairment of the convict's dignity may then support a finding that the sentence imposed on the prisoner constitutes cruel, inhuman or degrading punishment. Again, the rule that disproportional punishment impairs the dignity of a person determines, in part, whether the court will find that a violation of FC s 12 has occurred.

[6] See § 36.4*(a)* infra.

determine whether mere differentiation amounts to actual discrimination. Second, when attempting to determine whether discrimination amounts to unfair discrimination, the Constitutional Court will ask to what extent the law or the conduct in question impairs the dignity of the complainant and whether the law or the conduct in question re-inscribes systemic patterns of disadvantage for — and thus impairs the dignity of — a specific class of persons.[1] Similarly, dignity, as a second order rule, determines: *(a)* whether punishments are disproportionate (FC s 12);[2] *(b)* whether the state has a duty of care with respect to the physical security of its citizens (FC ss 11 and 12);[3] *(c)* the extent of the state's interest in foetal life (FC s 11);[4] *(d)* the parameters of contractual autonomy (FC s 22);[5] *(e)* the circumstances under which an individual may legitimately claim that his or her home is an impregnable castle (FC s 14);[6] *(f)* when the conditions of existence amount to slavery (FC s 13);[7] and *(g)* when expressive conduct constitutes hate speech (FC s 16).[8]

(c) Dignity as a correlative right

The Constitutional Court often deploys rights simultaneously in the service of its arguments. It likes to describe rights as interdependent and symbiotic. This talk of 'interdependence' is especially evident in challenges to law or to conduct grounded in the right to dignity. However, for my immediate purpose — to distinguish dignity as a correlative right from dignity as a first order rule, dignity as a second order rule or dignity as a value — I must show that dignity functions, in some respects, independently of other rights in constitutional challenges that rely upon multiple rights.

S v Jordan provides a paradigmatic example of dignity deployed as a correlative right. Justices O'Regan and Sachs note that although the rights to dignity, privacy, and freedom of the person intersect and overlap, the challenges brought in terms of each of these rights cannot be consolidated into a single challenge grounded in some 'unenumerated' right to autonomy. Each challenge based upon a specific right must, they say, be considered individually.[9]

The Court has adopted this multiple challenge approach in a wide variety of cases. In *Bhe*, customary law rules of primogeniture were found to violate both

[1] See *Moseneke & Others v The Master* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC) at paras 22 and 23 (Provision of Black Administration Act providing that Master of High Court had no power to handle intestate estates of black South Africans held to be both an unjustifiable impairment of FC s 9 — Equality — because it 'assails the dignity of those concerned' and an unjustifiable 'limitation of the right to dignity in [FC] s 10.')

[2] See § 36.4*(c)*(iii) infra.

[3] See § 36.4*(c)*(i) infra.

[4] See § 36.4*(c)*(ii) infra.

[5] See § 36.4*(d)* infra.

[6] See § 36.4*(g)* infra.

[7] See § 36.4*(e)* infra.

[8] See § 36.4*(h)*(ii) infra.

[9] 2002 (6) SA 642 (CC), 2002 (6) BCLR 759 (CC) at paras 52–53.

the right to equality and the right to dignity.[1] The *NCGLEI* Court, in finding that the common law criminalization of sodomy constituted a violation of the right to dignity, as well as a violation of the right to equality and a violation of the right to privacy, wrote '[i]t is clear that the constitutional protection of dignity requires us to acknowledge the value and the worth of all individuals as members of society'[2] and that 'the rights of equality and dignity are closely related, as are the rights of dignity and privacy.'[3]

The language in *NCGLE I* echoes Justice Ackermann's assertion in *Ferreira v Levin* that there exists *a strong correlation* between the right to dignity and individual freedom.[4] Dignity is not, however, just a correlate for negative liberty. It also buttresses the right to equality. As the Court writes in *Prinsloo v Van der Linde*: 'In our view unfair discrimination [the linchpin of equality analysis] … principally means treating people differently in a way which impairs their fundamental *dignity* as human beings, who are inherently equal in *dignity*.'[5] And if the correlation between the right to dignity, the right to equality and various freedoms in Chapter 2 is still not clear, the Court, in *President of the Republic of South Africa v Hugo* states:

> *[D]ignity* is at the heart of *individual rights* in a *free* and democratic society… *[E]quality* … means nothing if it does not represent a commitment to each person's equal worth as a human being, regardless of their differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens.[6]

(d) Dignity as a value or a grundnorm

Although dignity clearly operates as a first order rule, a second order rule and as a correlative right, it is invoked most often as a value. Part of the reason for this preference for deploying dignity as a value flows from the courts' stated preference for 'developing' the law rather than making it.[7] The result of this preference, however, is a certain lack of precision. For example, in *Williams*, the Court writes that:

[1] *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('*Bhe*').

[2] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)('*NCGLE I*') at para 28.

[3] Ibid at para 30.

[4] *Ferreira v Levin* 1996 (1) SA 984 (CC), 1996 (4) BCLR 1 (CC) at para 49.

[5] 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 31 (Emphasis added).

[6] 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)('*Hugo*') at para 41 citing *Egan v Canada* (1995) 29 CRR (2d) 79, 104-5 (Emphasis added). For further analysis of the relationship between equality and dignity, see C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 35.

[7] See, eg, *Advance Mining Hydraulics (Pty) Ltd & Others v Botes & Others* 2000 (1) SA 815 (T), 2000 (2) BCLR 119 (T)(High Court holds that it is unnecessary to decide whether proceedings at issue violated the right to dignity when it could be decided by reference to FC s 39(2)'s injunction to interpret all law in light of the spirit, purport and objects of the Bill of Rights — namely the creation of an open and democratic society based upon human dignity, equality and freedom — as well as the Final Constitution's founding provisions in FC s 1.)

> The Constitution has allocated to the State and its organs a role as the protectors and guarantors of those rights to ensure that they are available to all. In the process, it sets the State up as a model for society as it endeavours to move away from a violent past. It is therefore reasonable to expect that the State must be foremost in upholding those values which are the guiding light of civilised societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society that '. . . even the vilest criminal remains a human being possessed of common human dignity.'[1]

Dignity, in the previous paragraph, appears to operate as a value. In fact, juvenile whipping, in *Williams*, was challenged in terms of the right to equality, the right to dignity and the right to be free from cruel, inhuman and degrading treatment. The *Williams* Court held that juvenile whipping is a violation of the right to dignity (IC s 10) and the right to be free from cruel, inhuman and degrading treatment (IC 11(2)).

Whatever the reason for this particular instance of analytical confusion, as a matter of doctrine, the Constitutional Court is on record as having little time for the putative collapse of the rule/value distinction.[2] *In Minister of Home Affairs v National Institute for Crime Prevention*, Chaskalson CJ writes:

> The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights.[3]

Values are one thing, the *NICRO* Court appears to be saying, rules another. While it is certainly true that the fundamental values articulated in the Final Constitution will shape the rules expressed therein, and that the rules will have a reciprocal effect with respect to our understanding of those fundamental values, there remains a distinction with a difference. Rights give rise to rules and to enforceable claims. Values do not.

And so it is with dignity. FC s 10 — as a first order rule and as a correlative right — gives rise to enforceable claims. Dignity, where it appears as a value, does not.

The first reason that dignity is invoked more often as a value than as a rule is that FC s 39 states that the various substantive provisions in the Bill of Rights, and the Bill of Rights as a whole, must be interpreted so as to 'promote the values that underlie an open and democratic society based on *human dignity*, equality and freedom.' The second reason is that when a law is found to have infringed a

[1] 1995 (3) SA 632 (CC), 1995 (7) SA 861 (CC) at para 77.

[2] But see C Roederer 'Post-matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law' (2003) 19 *SAJHR* 57 (Argues, incorrectly, that the Final Constitution — in particular various operational provisions in Chapter 2 such as FC s 8 and FC s 39 — makes the distinction between rules and values unimportant for the purposes of constitutional interpretation.) For a critique of this position, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) Constitutional Law of South Africa (2nd Edition, OS, March 2005) Chapter 31, Appendix.

[3] *Minister of Home Affairs v National Institute for Crime Prevention* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)('*NICRO*') at para 21.

fundamental right, the question raised, FC s 36 tells us, is whether the limitation in question 'is reasonable and justifiable in an open and democratic society based on *human dignity*, equality and freedom.' The third reason is that the ubiquity of dignity has led the Court to adhere to a relatively restrictive rule regarding the use of dignity as a first order rule: where a court can identify the infringement of a more specific right, FC s 10 should not be added to the enquiry. Because some rights are understood, immediately, to be expressions of the commitment to dignity — say, the prohibitions on torture (FC s 12), slavery, servitude or forced labour (FC s 13) — and many other rights, once refracted through the value of dignity, become expressions of the more basic (non–justiciable) commitment to dignity — say the right to equality and the right not to be subject to cruel, inhuman or degrading punishment — the need for dignity to function as a rule that disposes of cases directly is less pronounced than it might otherwise be.

In the first class of 'dignity as value' cases, dignity guides our interpretation of the right and, in so doing, shapes the ambit of a right. In *Coetzee v Comitis,* the Cape High Court finds that the restraint of trade provision at issue 'strips the player of his human dignity' and therefore constitutes an unjustifiable limitation of his freedom, under FC s 22, of trade, occupation and profession.[1] In *Khosa v Minister of Social Development*, the Constitutional Court's conclusion that 'the exclusion of permanent residents in need … [from] social-security programmes' has 'a serious impact on [their] *dignity*' supports a finding that the Social Assistance Act violates both the right to equality and the right to social security of permanent residents.[2]

In the second class of 'dignity as value' cases, dignity is used to justify a limitation on a right. In *Khumalo v Holomisa*, the Constitutional Court twins the privacy and the dignity rights that ground the interest in a good reputation to turn back a freedom of expression challenge to the constitutionality of the law of defamation.[3] In *De Reuck*, the Constitutional Court finds that the state's interest in protecting the dignity of all children justifies the limitation of the freedom of expression that the Films and Publications Act imposes upon the producers and the possessors of child pornography.[4] In *Christian Education*, the mutually reinforcing rights of religion and culture said to sanction corporal punishment in private schools were deemed subordinate to a constellation of rights that included dignity, equality, and freedom and security of the person.[5]

In the third class of 'dignity as value' cases, those cases in which the Bill of Rights does not apply directly, the Court will often speak of dignity as a value that informs the development of the common law or the interpretation of a statute. In *Carmichele v Minister of Safety and Security,* the Constitutional Court found that the value of dignity, as well as the values that animate freedom and security of the

[1] 2001 (1) SA 1254 (C), 2001 (4) BCLR 323 (C).
[2] 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC)('*Khosa*') at para 76 (Emphasis added).
[3] 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC).
[4] *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC)('*De Reuck*') at paras 62-63.
[5] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) at para 51.

person, required that the duty of care imposed on the state in delictual actions be expanded so as to ensure that the state did not permit known and dangerous felons to imperil the lives of its citizens.[1] Similarly, in *NK v Minister of Safety and Security*, the Constitutional Court found that that these same values required a significant alteration in the common law understanding of vicarious liability and ensured that the state remained responsible for police officers, acting under the colour of law, who abused their authority and violated the physical integrity of the very people they are duty bound to protect.[2] In *Metrorail,* the Constitutional Court interpreted the Legal Succession of the South African Transport Act[3] in light of the values that animate the rights to dignity, life and freedom and security of the person and found that the Act, properly construed, required that the state actors responsible for rail travel take affirmative steps to ensure the safety of their commuters.[4]

36.4 Dignity's relationship to substantive provisions in the Bill of Rights

Dignity's presence — as a first order rule, a second order rule, a correlative right, a value and a grundnorm — in our jurisprudence ensures that dignity determines the extension of many of the substantive rights in Chapter 2. However, dignity's ubiquity guarantees that these same substantive rights will shape our understanding of dignity. The manner and the circumstances in which substantive rights recast our understanding of dignity may vary quite markedly: the relationship between dignity and the freedom of trade, occupation and profession will differ from the relationship between dignity and various socio-economic rights. Despite such differences, the reciprocal effect of dignity and various substantive provisions on one another promises that, however dignity is construed in a given matter, its meaning will never stray far from our core concern with the treatment of individuals as ends-in-themselves.

(a) Equality[5]

Dignity is the linchpin for equality analysis under FC s 9. Indeed, whether unfair discrimination is deemed to have occurred in terms of FC ss 9(3) s 9(4) and 9(5) will often turn on whether, and the extent to which, the complainant's dignity has been impaired. According to the *Harksen* Court, the question as to whether differentiation amounts to unfair discrimination has two parts:

> Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then

[1] 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC)('*Carmichele*').
[2] [2005] JOL 14864 (CC)(CCT 52/04)('*NK*').
[3] Act 9 of 1989.
[4] *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC)('*Metrorail*').
[5] For more on FC s 9, see C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 35. See also I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) Chapter 9.

> whether or not there is discrimination will depend upon whether, objectively, the ground is on attributes and characteristics which have the potential to impair the fundamental *human dignity* of persons as human beings or to affect them adversely in a comparably serious manner. If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of [FC s 9(3)].[1]

Dignity thus informs equality analysis at two stages. First, it enables us to distinguish mere differentiation from discrimination. Differentiation on a ground listed in FC s 9(3) amounts to discrimination because distinctions based upon such ascriptive characteristics are an affront to dignity (*Dignity 2*). Second, and more importantly perhaps, the extent to which a discriminatory measure impairs the complainant's dignity will determine whether discrimination found to be presumptively unfair on a listed ground in FC s 9(3), or merely discriminatory on an analogous ground, will *ultimately* be held to be unfair. As a general matter, the court asks three discrete questions before arriving at a final conclusion as to the unfairness of the discrimination:

- (1) Is the complainant a member of a class of persons subject to past patterns of systemic discrimination? (This question reflects the Court's well-founded belief that differential treatment of persons who are members of historically disadvantaged groups is more likely to impair their dignity (*Dignity 2*), and thus be unfair, than is the differential treatment of persons who are members of groups that have, historically, been relatively well-off.)[2]

[1] *Harksen v Lane* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC)('*Harksen*') at para 53. See also *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC); *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (2) BCLR 257 (CC).

[2] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1516 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC)('*NCGLE II*'); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC), 2001 (12) BCLR 1284 (CC)('*Satchwell I*'); *Satchwell v President of the Republic of South Africa* 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC)('*Satchwell II*'); *J & Another v Director General, Department of Home Affairs & Others* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC); *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC); *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project v Minister of Home Affairs* CCT 60/04; CCT 10/04 (unreported decision of 1 December 2005)('*Fourie*'). See also *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA), 2003 (11) BCLR 1120 (SCA)(Where common law fails to recognize that same sex life partners owe same duty of care as married heterosexual partners it violates both FC s 9 and FC s 10.)

- (2) Does the discriminatory law or conduct in question impair the *dignity*, or some other fundamental right, of the complainant? (This question draws our attention to the actual circumstances of the complainant and requires that the complainant experience some demonstrable harm that prevents self-actualization (*Dignity 3*).)[1]
- (3) Is the discriminatory law or conduct in question designed to achieve an important societal goal and is the discriminatory law or conduct in question narrowly tailored to achieve this legitimate goal? (This question recognizes that our constitutional order serves ends other than equality and that such ends cannot always be reduced to or be squared with egalitarian concerns.[2] However, they can be described in terms of dignity interests in self-actualization and in self-governance (*Dignity 3* and *Dignity 4*).)

While we can characterize all three inquiries in terms of dignity, it is misleading to characterize all three inquiries solely in terms of the dignity interests of the complainant. For while the third question can be framed as an inquiry into the dignity of a class of persons who benefit from the discriminatory measure under scrutiny, it should not be understood as an elaboration of the restitutionary measures provision found in FC s 9(2).[3] The third prong of the test for unfairness is

[1] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC)(Though persons living with HIV/AIDS are not necessarily part of an historically disadvantaged group, the social stigma that attaches to their illness often results in conduct that impairs their dignity. The Court found that the refusal to hire a person on the grounds of his HIV/AIDS status impairs his dignity by preventing him from living life 'to the full extent of its potential'. That impairment of his dignity justifies the ultimate finding of unfair discrimination.)

[2] See *Taylor v Kurtstag* [2004] 4 All SA 317 (W) at para 38 (FC s 18 — freedom of association — 'guarantees an individual the right to choose his or her associates and a group of individuals the right to choose their associates.' The High Court recognizes that the right of the group to choose their associates in the pursuit of such constitutionally recognized objectives as the practice of religion by necessity means the right to require those who wish to join the group to conform their behaviour to certain dictates and the right to exclude — and thus discriminate against — those who refuse to conform.) See also *Wittmann v Deutscher Schulverein, Pretoria & Others* 1998 (4) SA 423, 451 (T), 1999 (1) BCLR 92 (T)('Section 17 of the [I]nterim Constitution and s 18 of the [Final] Constitution recognise the freedom of association. [IC] s 14(1) and [FC] s 15(1) respectively recognise the freedom of religion which includes the right to join others in worship, propagation of the faith etc. Freedom of association entails the right with others to exclude non-conformists. It also includes the right to require those who join the association to conform with its principles and rules.') See, more generally on this point, S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) §§ 44.1*(c)*, 44.3*(c)*(iii), 44.3*(c)*(viii).

[3] See *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC)('*Van Heerden*'). The *Van Heerden* Court establishes FC s 9(2)'s provision for restitutionary measures as a complete defense:

> The pivotal enquiry in this matter is not whether the Minister and the Fund discharged the presumption of unfairness under section 9(5), but whether the measure in issue passes muster under section 9(2). If a measure properly falls within the ambit of section 9(2) it does not constitute unfair discrimination. However, if the measure does not fall within section 9(2), and it constitutes discrimination on a prohibited ground, it will be necessary to resort to the *Harksen* test in order to ascertain whether the measures offend the anti-discrimination prohibition in section 9(3). . . . When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by section 9(2) in that it promotes the achievement of equality and is

primarily concerned with creating the requisite space for other constitutionally mandated goods. Various rights — to religion, to reproductive capacity, to privacy, to expression, to association, to assembly, to education, to property, to language, to form political parties, to form families and to raise children — will and *must* commit us to discriminatory arrangements. To fail to recognize that a constitutional order based upon human dignity, equality and freedom commits us to communitarian, egalitarian and utilitarian ends that pull in different directions is to be soft-headed about hard choices. It is, moreover, to be obtuse about easy choices. If, for example, we wish to have educational institutions that further and deepen our various religious faiths, then we must permit those educational institutions to discriminate, at a bare minimum, in terms of admissions policies that require matriculants to accept a religious curriculum consistent with the belief set of the particular denomination that supports the school.[1] For without such discrimination — which may offer no tangible benefits to historically disadvantaged persons — we will afford religious communities (or other tightly knit associations) no meaningful space within which to pursue their comprehensive vision of the good.[2] A state that rejects such discrimination may possess many virtues,

designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality.

Van Heerden (supra) at paras 36–37. Justice Ackermann himself may be responsible for this misapprehension. He writes:

> In determining whether a discriminatory provision has impacted unfairly on complainants various factors are to be considered, including the position of complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination under consideration is on a specified ground or not, and the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the dignity of the complainants, that is aimed at achieving a worthy and societal goal, such as*, for example, the furthering of equality for all*, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered an impairment to their dignity; the extent or degree to which the rights or interests of the complainants have been affected by the discrimination.

LWH Ackermann 'Equality under the 1996 South African Constitution' in Rüdiger Wolfrem (eds) *Gleichheit und Nichtdiskriminierung im Nationalen und Internationalen Meschenrechtssschutz* (2003) 547. Ackermann's suggestion that a discriminatory measure may have as its end the realization of a substantively more equal society does not mean that all discriminatory measures must have such an objective to warrant sufficient constitutional solicitude to overcome either a presumption (in terms of FC s 9(5)) or an allegation that the measure in question is unfair.

[1] See S Woolman 'Admissions Policies and Discrimination: Rhetoric and Reality in the Equity Requirements for Public Schools and Independent Schools' Presentation before and Submission to the South African Human Rights Commission's Inquiry into Equality and Voluntary Association (12 June 2005)(Manuscript on file with author).

[2] See *Fourie* (supra) at paras 60–61.

but one of them will not be freedom of even the most dessicated sort.[1]

[1] Because our history is one of radical inegalitarianism, equality is, understandably, often treated as *the* pre-eminent constitutional value. See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)('*Hugo*') at para 41 ('[T]he purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal respect regardless of their membership in particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.') The assertion of such pre-eminence has led some courts and some commentators to characterize equality either as the value with which all other values must cohere or as the value before which all other values must fall. Two problems face this reification of equality. As a methodological matter, this emphasis on coherence, while attractive and powerful, locates the problem of legal interpretation in some kind of theory of established meaning which does not specifically address the normative role of law, and the possibility of radical transformation. 'Synchronization', as Drucilla Cornell notes, 'points us to the real problem':

> How do we develop an institutional analysis which allows us not only to synchronize the competing rights of individuals, but also the conflicts between the individual and the community, and between different groups in society. The goal of a modern legal system is synchronization and not coherence. Synchronization recognizes that there are competing rights situations and real conflicts between the individual and the community which may not yield a coherent whole. The conflicts may be mediated and synchronized but not eradicated.

D Cornell 'Pragmatism, Recollective Imagination, and Transformative Legal Interpretation' (1993) *Transformations* 23, 35–36. Or to put the matter slightly differently, those who would make equality the measure of all things, and for whom equality as equal respect and full redress still falls short of some ideological ideal, err because they rely upon a notion of 'rational coherence' which, in turn, depends upon the community acting as a single speaker:

> In reality, a complex, differentiated community can never be reduced to a single voice. Synchronization recognizes the inevitable complexity of the modern state and the imperfection of all our attempted solutions.

Ibid at 36. As a substantive matter, a requirement that certain social formations open themselves up to a wider potential membership because they control access to important social goods could be a compelling justification for interfering with an association's rules regarding entrance, voice and exit. However, it does not follow from such a commitment to equality as redress or equality as substantively equal opportunity that all individuals and all groups are always entitled to substantively equal treatment. The potential conflation of instrumental and ideological grounds for intervention — and the privileging of ideological egalitarianism over dignity-inspired egalitarianism — runs the risk of undermining the very institutions and social practices 'that actually make political pluralism, cultural diversity, individual autonomy and social empowerment possible.' S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) § 44.2. This distinction — between equality as ideology and equality as dignity — has real teeth both in our equality jurisprudence and in the equality jurisprudence of other jurisdictions. See, eg, *Fourie* (supra) at paras 60–61 ('Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour .... [T]here are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space has been found for members of communities to depart from a majoritarian norm.') See also *Hurly v Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 US 557 ('*Hurly*')(The Irish-American Gay, Lesbian and Bisexual Group of Boston ('GLIB') asked to be allowed to march in Boston's annual St Patrick's day parade. The US Supreme Court finessed the difficult issues raised by GLIB's egalitarian claims by analysing the alleged fit of GLIB's expressive conduct with the parade organizer's exclusionary practices. GLIB was the only such group excluded. A rightly decided *Hurley* might have held that where no link could be established between the association's purpose and its discriminatory practice, then the State might

(b) Association

The Constitutional Court has, in two discrete lines of cases, made dignity the primary justification for the protection of intimate association. In the first line of cases, the Court has struck down a variety of laws that invidiously distinguished homosexual acts and relationships from heterosexual acts and relationships (*Dignity 2*). The Court has invalidated laws that criminalize sodomy,[1] that differentiate between heterosexual married couples and gay, lesbian, and transgendered partners in terms of immigration rights,[2] that deny benefits to the surviving same-sex life partner of a judge,[3] that bar same-sex life partners from adopting children,[4] that prevent same-sex life partners from asserting parental rights in instances of artificial insemination,[5] and that prevent same-sex life partners from securing public recognition of their life partnership as a marriage.[6] In the second line of cases, the Court has gone to great lengths to ensure that married couples could continue to cohabit within South Africa while a non-citizen partner seeks permanent residence,[7] that foreign-national spouses seeking work in

exercise a presumption in favour of intervention on the grounds of equal protection. However, were such a link to exist, then the State would bear the burden of demonstrating that its interest was sufficiently compelling to trump the expressive and associational interests of the group whose exclusionary conduct is being challenged.) These observations suggest that the *Dignity 3* and the *Dignity 4* interests of an association may trump the *Dignity 2* interests of an individual where: *(a)* the discriminatory conduct of the association serves legitimate objectives via means narrowly tailored to realize those objectives; and *(b)* the social goods, if any, made available through the association are accessible to the complainant through other institutions. Allan Wood suggests that Kant would reach a similar conclusion with regard to the dignity interests at stake when he writes

> When a social order treats some people better and some worse in ways that they themselves regard as essential to their self-worth, there is a presumption, based upon [the notion of humanity as an end in itself], that this social order fails to respect the humanity of those who receive worse treatment . . . Any such egalitarian presumption might be rebutted, of course, by showing that greater equality in one area could be achieved only at the cost of more fundamental failures to respect humanity in other areas.

See AW Wood 'Humanity as an End in Itself' in P Guyer (ed) *Critical Essays on Kant's Groundwork of the Metaphysics of Morals* (1998) 165, 183.

[1] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1516 (CC)(Sachs J) at para 127 ('It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group.') See also *S v H* 1995 (1) SA 120 (C); *S v Kampher* 1997 (4) SA 460 (C), 1997 (9) BCLR 1283 (C)(Common-law or statutory offences which proscribe private homosexual acts between consenting adult males cannot survive constitutional scrutiny).

[2] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC).

[3] *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC), 2001 (12) BCLR 1284 (CC); *Satchwell v President of the Republic of South Africa* 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC).

[4] *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC), 2002 (10) SA 1006 (CC)('*Du Toit*')(Court held that lesbian partners in a long-standing relationship had their right to dignity and right to equality impaired by various sections of the Child Care Act 74 of 1983 and the Guardianship Act 192 of 1993 that only provided for the joint adoption and guardianship of children by married persons.)

[5] *J & Another v Director General, Department of Home Affiars* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC).

[6] *Minister of Home Affairs v Fourie* CCT 10/04 (1 December 2005).

[7] *Dawood v Minister of Home Affairs* 2000 (1) SA 997 (C), 2000 (3) BCLR 331 (C)('*Dawood*').

South Africa could remain in — country while their applications for work permits were processed[1] and that unwed fathers could secure access to their children.[2]

To the extent that these intimate associations take forms similar to those of traditional unions, the Court has demonstrated a willingness to embrace them.[3] The *Dawood* Court hints at the historical basis for deploying dignity as a first order rule in the second line of 'family' unit cases when it writes: 'The Constitution asserts dignity to contradict [a] past in which human dignity for black South Africans was routinely and cruelly denied.'[4] One of the most repugnant features of apartheid was the use of pass laws, denationalization, migrant labour, and work permits to wreak havoc on black South African families. In both lines of cases, the Court sets its face squarely against those rules of law that might impair one of the most important sources of meaning in our lives: our intimate associations (*Dignity 3*).[5]

(c) Freedom and Security of the Person

Dignity, as refracted through the prism of freedom and security of the person, has revolutionized three bodies of law: *(a)* the common law of delict in the context of state liability for wrongful behaviour; *(b)* the state's regulation of abortion; and *(c)* punishment.

(i) *Development of the common law of delict in the context of state liability*

In both *Carmichele v Minister of Safety and Security*[6] and *NK v Minister of Safety and Security*,[7] the Constitutional Court found that that the right to dignity and the right to freedom and security of the person imposed positive duties on the state to

[1] See *Booysen v Minister of Home Affairs & Another* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC)('*Booysen*')

[2] See *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC)(Court finds that unwed fathers in non-Christian marriages entitled to same rights of access as other fathers); *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC), 2000 (7) BCLR 713 (CC).

[3] But see *S v Jordan & Others (Sex Workers Education & Advocacy Task Force & Others as Amici Curiae)* 2002 (6) SA 642 (CC), 2002 (2) SACR 499 (CC), 2002 (11) BCLR 1117 (CC)('*Jordan*').

[4] *Dawood* (supra) at para 35.

[5] The *Dawood* Court says that it relies upon FC s 10 to protect intimate associations because 'it cannot be said that there is a more specific right that protects individuals who wish to enter into and sustain permanent intimate relationships than the right to dignity in s 10.' *Dawood* (supra) at para 36. That conclusion seems rather odd given that the text expressly provides for freedom of association — FC s 18 — and that intimate associations are, as a matter of foreign law, routinely protected under such a right. The US Supreme Court is inclined to protect intimate family household structures against state intervention, but to permit state intervention where a household does not possess the requisite level of insularity and selectivity. Compare *Moore v City of Cleveland* (1976) 431 US 494 (Striking down zoning laws because they struck too deeply into well-protected sphere of domestic autonomy) with *Village of Belle Terre v Boraas* (1973) 416 US 1 (Upholding zoning laws because they were rationally related to a legitimate state interest and a household of college friends did not constitute an intimate arrangement deemed worthy of constitutional protection.)

[6] 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC)('*Carmichele*').

[7] [2005] JOL 14864 (CC)(CCT 52/04)('*NK*').

prevent, where possible, violations of physical integrity (*Dignity 1*).[1] The violations in these cases were not simply assaults — they were rapes. The seriousness of the crime, and the complicity of the state, led the *Carmichele* Court to write:

> In addressing these obligations in relation to *dignity* and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence. . . . Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women.[2]

The rights implicated, including dignity, did not give rise to a new constitutional action or a new constitutional remedy. The rights did require that a court hearing such a delictual matter must cast 'the net of unlawfulness wider'.[3] Although the Constitutional Court did not itself develop the common law, it directed the High Court and the Supreme Court of Appeal to do so. To ameliorate the defect in the extant law of delict, the Constitutional Court suggested that the courts craft a new test that would impose a duty of care on state actors in 'circumstances where state authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life or physical security of an identified individual or individuals from the criminal acts of a third party' and where, in such circumstances, 'they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.'[4]

In *NK*, the state was more than merely complicit in the rape at issue. The state was deemed vicariously liable for a rape carried out by three police officers acting under the colour of law. In rejecting the Supreme Court of Appeal's conclusion that the principles of vicarious liability did not cover the behaviour of policemen who had used, quite consciously, the trappings of their office to commit this crime, the Constitutional Court wrote:

> [T]he opportunity to commit the crime would not have arisen but for the trust the applicant placed in them because they were policemen, a trust which harmonises with the constitutional mandate of the police and the need to ensure that mandate is successfully fulfilled. When the policemen — on duty and in uniform — raped the applicant, they were simultaneously failing to perform their duties to protect the applicant. In committing the crime,

[1] The interaction between FC s 12 and FC s 10 extends the Final Constitution's commitment to the bodily integrity and the physical security of women to all sexual assaults against women. See *S v Baloyi (Minister of Justice & Another Intervening)* 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC)(State under positive duty in terms of FC 7(2) read with FC 12 (freedom and security of the person) and FC s 10 (dignity) to prevent private threats to personal security, generally, and domestic violence, in particular); *S v Chapman* 1997 (3) SA 341 (SCA), 1997 (2) SACR 3 (SCA)(Rights of dignity, privacy and freedom and security of the person, in the context of endemic sexual violence against women, means that convicted rapists will be shown no mercy.)

[2] *Carmichele* (supra) at para 62.

[3] Ibid at para 57.

[4] Currie & De Waal (supra) at 305. Chastened by the Constitutional Court's reversal, Chetty J subsequently altered the common law in *Carmichele v Minister of Safety and Security.* 2003 (2) SA 656 (C), 2002 (10) BCLR 1100 (C). The Supreme Court of Appeal followed suit in *Minister of Safety and Security v Carmichele.* 2004 (3) SA 305 (SCA), 2004 (2) BCLR 133 (SCA).

> the policemen not only did not protect the applicant, they infringed her rights to *dignity* and security of the person. In so doing, their employer's obligation (and theirs) to prevent crime was not met. There is an intimate connection between the delict committed by the policemen and the purposes of their employer. This close connection renders the respondent liable vicariously to the applicant for the wrongful conduct of the policemen.[1]

What ties both *Carmichele* and *NK* together, and what distinguishes them from other instances in which the state fails to discharge its responsibilities in terms of FC s 12, is the Court's concern with the dignity of women and the systemic violence to which they continue to be subjected. The Court recognizes that so long as the law permits women to be treated as objects, and in particular, allows the state itself to indulge in this kind of abuse, women will never be able to enjoy equal respect in a realm of ends (*Dignity 1*, *Dignity 2*, and *Dignity 5*). Moreover, the state's complicity with respect to this culture of rape demeans us all and is something for which we must accept collective responsibility (*Dignity 5*)(in the form of damages in a delictual action).

The Supreme Court of Appeal deployed both FC s 12 and FC s 10 to develop the law of delict in the context of an omission by state actors to divest of firearms a person known to be a danger to the community. In *Minister of Safety and Security v Van Duivenboden*, the court held that the state had had a duty, under s 11 of the Arms and Ammunition Act,[2] to deprive the person in question of firearms after he had entered into a gun battle with police in 1994.[3] The failure of the police to act on the obvious danger posed by this person led to, or was certainly a sufficiently proximate cause of, his shooting to death, a year later, his wife and his daughter. The negligence of the police — their failure to take the necessary action to avert a reasonably foreseeable set of events and their disregard for the dignity, life and bodily integrity of the people they are sworn to protect — justified the Supreme Court of Appeal's imposition of vicarious liability on the responsible Minister.[4]

(ii) *Reproductive rights*

The Final Constitution's concern for the dignity of women takes a very specific form in FC s 12*(a)*. FC s 12*(a)*, unlike its predecessor in the Interim Constitution, embraces a women's right 'to make decisions concerning reproduction'.

Although the Constitutional Court has yet to expressly vindicate the right to an abortion, two High Courts have heard, and rebuffed, challenges to the statutory

[1] *NK* (supra) at para 57.
[2] Act 75 of 1969.
[3] 2002 (6) SA 431 (SCA).
[4] Ibid at paras 22–24.

expression of this right in the Choice on Termination of Pregnancy Act.[1] In *Christian Lawyers II*, Mojapelo J held that FC s 12(2)*(a)* and *(b)*[2] guarantees the right of every woman to determine the fate of her pregnancy.[3] He noted that while the state does have a legitimate interest in the protection of pre-natal life, such regulation may not amount to a denial of a woman's right to freedom and security of the person. The decision in *Christian Lawyers II* reflects something of an advance on *Christian Lawyers I* with respect to its treatment — or at the very least recognition — of the varying (and conflicting) kinds of dignity interests at stake when reproductive rights are pressed into service in the name of abortion. In *Christian Lawyers I*, McCreath J held that whatever the status of the foetus may have been under the common law, under the Final Constitution the foetus lacks legal personality.[4] As a result, McCreath J could uphold the defendant's exception that the plaintiff's particulars of claim did not disclose a cause of action in that 'a foetus is not a bearer of rights in terms of' FC s 11 and in that FC s 11 does not, therefore, 'preclude the termination of pregnancy in the circumstances and the manner contemplated by the [Termination of Pregnancy Act] and protected under [FC] ss 9, 10, 11, 12, 14, 15(1) and 27(1)*(a)*.'[5] While *Christian Lawyers I* recognizes expressly the dignity rights of women (*Dignity 2* and *Dignity 3*), McCreath J ducks the more difficult question of whether the state possesses an interest in the dignity of life generally (*Dignity 5*), and thus the dignity of pre-natal life, in particular. It remains possible, as both *Christian Lawyers II* and the Termination of Pregnancy Act reflect, to take a state interest in dignity seriously (*Dignity 5*) without concomitantly undermining a women's right to dignity (*Dignity 2* and *Dignity 3*), and her ability to secure an abortion.[6]

(iii) *Punishment*

Dignity and that subsection of freedom and security of the person that prohibits 'cruel, inhuman and degrading treatment or punishment' have worked a minor,

[1] Act 92 of 1996.

[2] FC s 12(2): 'Everyone has the right to bodily and psychological integrity which includes the right-*(a)* to make decisions concerning reproduction.' For more on the relationship between FC s 12, FC s 10 and abortion, see M O'Sullivan 'Reproductive Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 37.

[3] *Christian Lawyers Association v National Minister of Health & Others* 2005 (1) SA 509, 526 (T), 2004 (10) BCLR 1086, 1103 (T)('*Christian Lawyers II*').

[4] *Christian Lawyers Association of South Africa & Others v Minister of Health & Others* 1998 (4) SA 113 (T), 1998 (11) BCLR 1434 (T)('*Christian Lawyers Association I*').

[5] Ibid at 1443, 1437.

[6] For more on how the courts might better characterize the complex relationship between the dignity interests that inform a woman's right to control her reproductive capacity (*Dignity 2* and *Dignity 3*) and her bodily integrity (*Dignity 1*) and the state's dignity interest in pre-natal 'life' (*Dignity 5*), see O'Sullivan (supra) at § 37.2.

and sometimes unpopular, revolution in the criminal law.[1] The revolution began with *S v Williams*.[2] In *Williams*, the Constitutional Court held unconstitutional those provisions of the Criminal Procedure Act that sanctioned the whipping of juveniles. In finding that whipping assailed the dignity of *all* individuals who participate in such a process and thus constituted cruel, inhuman or degrading punishment (*Dignity 1* and *Dignity 5*), the *Williams* Court wrote:

> The Constitution clearly places a very high premium on human dignity and the protection against punishments that are cruel, inhuman or degrading; very stringent requirements would have to be met by the State before these rights can be limited. . . . [T]here is no place for brutal and dehumanising treatment and punishment. The Constitution has allocated to the State and its organs a role as the protectors and guarantors of those rights to ensure that they are available to all. In the process, it sets the State up as a model for society as it endeavours to move away from a violent past. It is therefore reasonable to expect that the State must be foremost in upholding those values which are the guiding light of civilised societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society that . . . 'even the vilest criminal remains a human being possessed of common human dignity.'[3]

Dignity, in *Williams*, constitutes a second order rule that determines the application of a first order rule — the right not to be treated or punished in a cruel, inhuman or degrading way. That a juvenile whipping constitutes a violation of the right to dignity generates the attendent finding of a violation of the right not to be subjected to degrading punishment.

Dignity is deployed once again as a second order rule in the context of punishment in *S v Makwanyane*.[4] In *Makwanyane*, the Constitutional Court held the death penalty to be an unjustifiable abrogation of a panoply of constitutional protections — including the rights to life, dignity, equality, fair trials and humane punishment. While the eleven Justices differed as to the exact basis for this finding, dignity as a second order rule leads Chaskalson P to write:

> The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three [of the Interim Constitution]. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.[5]

The centrality of dignity for the South African constitutional project not only enables the right to be free from cruel, inhuman and degrading punishment to

[1] For more on our jurisprudence of punishment, see D Van Zyl Smit 'Sentencing and Punishment' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 49.

[2] *S v Williams* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC).

[3] Ibid at paras 76–77 quoting *Furman v Georgia* 408 US 238 (1972).

[4] 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC)('*Makwanyane*').

[5] Ibid at para 144.

trump the various justifications for the death penalty offered by the state,[1] it also underwrites a more subtle distinction between punishments. In rejecting the Attorney-General's argument that no meaningful distinction exists between the death sentence and life imprisonment, because 'a prisoner does not lose all his or her rights on entering prison,' Chaskalson P does not rely on a rather arid formalism that equates the termination of life with a denial of dignity.[2] He invokes, instead, the particular meaning of the death penalty in South Africa. It was, for many years, a sword of Damocles hanging over the head of any black South African who might be inclined to challenge the authority and the legitimacy of the apartheid state.

Kant and Hegel, in their rather Manichean universe, could view equal respect as the entitlement of every citizen who recognized that identical status in others, and simultaneously demand that those who failed to accord others such respect, ie, by committing murder, should forfeit (in its entirety) the entitlement to that respect.[3] The *Makwanyane* Court refuses to endorse such a simple calculus: that kind of oversimplification seems more of a piece with the black and white ideology of apartheid than with the post-apartheid struggle to accord each individual equal concern and equal respect (*Dignity 2*). The power of the Court's analysis lies not in refusing to impose a capital sentence. The judgment's force flows from the Court's refusal, at least at the level of rhetoric, to use the law to treat individuals as mere means to achieve some (perceived) greater good (*Dignity 1*).[4]

This leitmotif — of refusing to turn away from suffering, and of not allowing individuals to simply disappear — recurs in a broad array of 'punishment' cases.

In *Coetzee v Government of the Republic of South Africa,* the Constitutional Court held that a provision of the Magistrates Court Act[5] that permitted incarceration without trial of a civil debtor constituted an unjustifiable infringement of the right to freedom and security of the person.[6] The *Coetzee* Court did away with these civil imprisonment provisions largely because incarceration for one's 'status' — and not a crime — is out of step with contemporary mores, and in particular, the

[1] *Makwanyane* (supra) at para 145.
[2] Ibid at para 142.
[3] See, eg, Kant *Metaphysics of Morals* (supra) at 140-143.
[4] In a similar vein, the Constitutional Court refused, in *Mohamed v President of the Republic of South Africa*, to allow the state to ignore the applicant's rights to dignity, life, and freedom and security of the person in the service of some greater political good — say, the war on terror. 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC), 2001 (2) SACR 66 (CC).
[5] Act 32 of 1944.
[6] 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC)('*Coetzee*').

constitutional commitment to human dignity.[1] To treat a human being as a marker for a debt — and to keep them alive as a mere physical reminder to others to beware their financially frivolous ways (*Dignity 1*) — is entirely at odds with a vision of South Africa as a realm of ends (*Dignity 5*). In *Dodo*, the Court struggles mightily with the law's inevitable use of individuals to send messages back to the community about the price of any given crime.[2] Ackermann J writes:

> To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence … the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformative effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.[3]

One might be surprised, after such a strong pronouncement, that the *Dodo* Court would then go on to uphold *any* mandatory life sentence for *any* category of murder.[4] But the *Dodo* Court is not committed to the principle that any hint of a

[1] In *Coetzee*, Sachs J wrote:

> The essence of civil imprisonment, even in its milder forms, has always been that the debtor pays with his or her body. The Afrikaans word gyselaar (hostage) comes from the contract recognised in Roman-Dutch law in terms of which a freeman pledged his person as suretyship for performance. . . . The broad question before us would be whether, in the open and democratic society contemplated by the Constitution, it could ever be appropriate to use imprisonment as a means of ensuring that creditors got paid in full, bearing in mind that the amount to be collected would often fall below the costs of collection, not to speak of the costs to the taxpayer of keeping the debtor in prison. It is evident from the statistical data presented to us that committal to prison is in reality mainly for relatively small amounts and largely for debt in respect of goods purchased, services rendered and money borrowed … The persons most vulnerable to committal orders would be precisely those who were unemployed, and thus could not be subject to emoluments orders, and those who did not have any property which could be attached. To penalise the workless and the poor so as to frighten those a little better-off would be exactly the kind of instrumentalising of human beings which the concept of fundamental rights was designed to rebut.

Coetzee (supra) at paras 66–67.

[2] *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC), 2001 (1) SACR 594 (CC)('*Dodo*').

[3] Ibid at para 38.

[4] Of course, this general statement must be viewed in terms of the actual context of the case before the Court and thus the term 'mandatory' must be read in the context of the section in question. Section 51(1) of the Criminal Law Amendment Act 'made it obligatory for a High Court to sentence an accused, convicted of offences specified in the Act, to imprisonment for life unless, under s 51(3)*(a)*, the Court was satisfied that "substantial and compelling circumstances" existed which justified the imposition of a lesser sentence.' Ibid at para 2 referring to Act 105 of 1997. Moreover, the Court does go on to note that if the legislation had compelled a court to impose life imprisonment and that sentence were deemed

utilitarian calculus in the law is an affront to dignity.[1] Rather, as *Williams*, *Makwanyane* and *Coetzee* make clear, dignity simply demands that we do not allow the consequentialist character of the law to exhaust law's moral content.[2] Dignity forces us to attend constantly to law's ultimate goal: not to control the ends of individuals, but to create a realm of ends (*Dignity* 5).[3]

The Constitutional Court's decision in *Christian Education South Africa v Minister of Education* confirms that this commitment to law *qua* realm of ends is not empty rhetoric. Nothing would have been simpler than acceding to the applicants' contention that the particular tenets of their faith — and the protection afforded by FC s 15 — permitted the use of corporal punishment in private religious schools. Instead, the Court recognizes that the state's interest in banning corporal punishment in schools is justified by reference to the inherent dignity of all children — regardless of their parents' religion — and that this commitment precludes the

grossly disproportionate to the crime, then the Court would be obliged to find the legislation unconstitutional. But that caveat simply supports the proposition in the text above.

Justice Ackermann's position on mandatory life sentences is explored at somewhat greater length in his concurrence in *Makwanyane*. Justice Ackermann writes:

> If the death penalty is to be abolished, as I believe it must, society is entitled to the assurance that the State will protect it from further harm from the convicted unreformed recidivist killer or rapist. If there is an individual right not to be put to death by the criminal justice system, there is a correlative obligation on the State, through the criminal justice system, to protect society from once again being harmed by the unreformed recidivist killer or rapist.

Makwanyane (supra) at para 171. But that obligation, Justice Ackermann notes, still 'demands a humane execution of the sentence.' Ibid at 172. Drawing on the jurisprudence of Germany's Federal Constitutional Court ('FCC'), he states that this means, at a minimum, that 'a law providing for life imprisonment must lay down objective criteria for the release of prisoners serving life sentences.' Ibid. In the words of the FCC:

> Human dignity is not infringed when the execution of the sentence remains necessary due to the continuing danger posed by the prisoner and clemency is for this reason precluded. The state is not prevented from protecting the community from dangerous criminals by keeping them incarcerated.

Ibid (Ackermann J's translation).

[1] In *S v Chapman*, Chief Justice Mohamed made it clear that the courts would use criminal sanctions to send a message to rapists, potential rapists and the general community that sexual violence against women would not be tolerated and that our new constitutional ethos — and the rights of women to dignity, privacy and bodily integrity — dictates that those who engage in sexual violence be shown no mercy. 1997 (3) SA 341 (SCA), 1997 (2) SACR 3 (SCA).

[2] See, eg, *S v Pennington* 1997 (4) SA 1076 (CC), 1999 (10) BCLR 1413 (CC), 1999 (2) SACR 329 (CC)('*Pennington*')(An undue delay in appeals process could constitute an impairment of dignity if it turned out, in a particular case, that the delay visited extreme hardship; but delays are an inevitable part of the criminal justice system and they do not, per se, constitute an impairment of the right to a fair trial or the right to dignity.) But see *Johnson v Minister of Home Affairs* 1997 (2) SA 432 (C)(Failure to process immigration applications expeditiously — with detentions lasting over 14 months — violates IC s 11(1)'s prohibition on detention without trial and IC s 10's right to dignity.)

[3] See *S v Thebus* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC), 2003 (2) SACR 318 (CC) at paras 35–40 (Court rejects argument that the common purpose doctrine violates the right to dignity because it 'de-individualizes . . . [and] dehumanizes people by treating them in a general manner as nameless faceless parts of the group.' It upholds the doctrine on the grounds that 'effective prosecution is a legitimate, pressing social need' and that there is 'need for a strong deterrent to violent crime.' Thus, an individual may be convicted of a crime in terms of the common purpose doctrine even though individual culpability for the act in question cannot be established.)

use of violence to maintain order. Or, in other words, the Court forbade the use of (violence against) children as a means to enforce both discipline within the school and discipline within the broader religious community (*Dignity 1*).[1]

(d) Religion, language and culture

(i) Religion

Despite the obvious centrality of religion for collective identity — and thus for individual dignity (*Dignity 2* and *Dignity 3*) — religion and dignity as mutually reinforcing rights have not fared particularly well in the few cases to reach the Constitutional Court. In *Prince v President, Cape Law Society*, a sharply divided Constitutional Court held that although a Rastafarian's right to freedom of religion in terms of FC s 15(1) of the Final Constitution permitted him to engage in Rastafarian rituals, the state was justified in proscribing the ritual use of cannabis.[2] In reaching its conclusions, the majority relied heavily on the state's evidence that even limited dagga smoking could lead to broader drug use in the country and greater narcotics trafficking through the country. This finding turned, at least in

[1] The High Courts have, as a result of FC s 10's refusal to allow individuals to be treated as mere means, displayed increasingly greater empathy towards prisoners. In *Stanfield* van Zyl insisted that a terminally ill prisoner be given parole because his dignity (in terms of FC s 10) demanded no less:

> Every sentenced prisoner is entitled to respect for and recognition of his equality, human dignity and freedom, in the sense of his right not to be treated or punished in a cruel, inhuman or degrading way. Section 35(2)*(e)* ensures that he has the right 'to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment'. What will be 'consistent with human dignity' in any particular case will, of course, depend on the facts and circumstances of each such case.

Stanfield v Minister of Correctional Services & Others 2004 (4) SA 43 (C), 2003 (12) BCLR 1384 (C) at para 89. See also *S v Dube* 2000 (2) SA 583 (N), 2000 (6) BCLR 685 (N)(Entrapment and the seizing of property of an accused person by the state violates dignity.) The Supreme Court of Appeal has likewise held that the denial of important privileges, that normally attach to citizenship, to prisoners still awaiting trial and sentencing constitute a violation of the Final Constitution's commitment both to the rule of law and to human dignity. See *Minister of Correctional Services v Kwakwa & Another* 2002 (4) SA 455 (SCA).

The Constitutional Court and the Supreme Court of Appeal have also placed significant limits on the use of violence — and in particular, deadly force — with respect to the prevention of crimes that involve no violence themselves. The principle of proportionality, as we have seen in the punishment cases, demands that the state not employ means that are not narrowly tailored to meet a constitutionally legitimate objective. The use of deadly force, as contemplated by the Criminal Procedure Act, to apprehend a pick-pocket is the epitome of disproportionality. These powers, therefore, constitute unjustifiable limitations on the rights to dignity, to life and to freedom and security of the person. See *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA), 2001 (11) BCLR 1197 (SCA), 2001 (2) SACR 197 (SCA); *Ex Parte Minister of Safety and Security: In re S v Walters* 2002 (4) 613 (CC), 2002 (7) BCLR 663 (CC), 2002 (2) SACR 105 (CC).

[2] 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC)(*'Prince'*).

part, on an under-interrogated assumption that no meaningful exemption to existing laws could be carved out for ritual dagga use.[1]

When viewed through the lens of dignity analysis — which valourizes such constitutive attachments as marriage and the family (*Dignity 2* and *Dignity 3*) — the majority's cursory appraisal of the importance of this religious practice for an adherent is rather perplexing. The *Prince* Court's discourse permits a vague sense of danger to the commonweal to overwhelm the dignity interests of a marginal religious minority (*Dignity 2*, *Dignity 3*, and *Dignity 4*).[2]

The Constitutional Court's decision in *Christian Education South Africa v Minister of Education*, on the other hand, contains valuable language about how our dignity jurisprudence tolerates legal asymmetries.[3] The essence of dignity and equality under the South African Constitution, so says the judgment, is that it does not require that we treat everyone the same way, but that we treat everyone with equal concern and equal respect (*Dignity 2*).[4]

Unfortunately, the *Christian Education* Court does not really extend the benefit of this understanding of dignity to religious belief and practice. The judgment assumes, without argument, that s 10 of the South African Schools Act[5] limits

[1] In fairness to the majority in *Prince*, it must be noted that: *(a)* the constitutionality of the proscription of the use of cannabis by criminal sanction was never raised by Prince; *(b)* the religious use of cannabis may appear — to some — indistinguishable from the recreational use of it; and *(c)* had the religious use been more circumscribed, the majority stated its willingness to carve out an exception. Of course, even with these caveats, the majority's judgment still begs the question as to whether the lack of judicial solicitude turns entirely on the state's identification of some intoxicants as criminal — marijuana — and other equally powerful intoxicants — alcohol — as acceptable. The need for an exemption *could* turn on distinctions without meaningful differences.

[2] The minority judgment offers some solace for those inclined to treat religious belief with greater dignity. Justice Ncgobo writes:

> Apart from this, as a general matter, the Court should not be concerned with questions whether, as a matter of religious doctrine, a particular practice is central to the religion. Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet that their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice.

Prince (supra) at 813. Thus, the minority judgment recognizes: (1) how associations are constitutive of the beliefs and practices of individuals; and (2) how the fact of their being constitutive entitles them to constitutional protection. The judgment is remarkable in that it does not rely upon a model of rational moral agency to distinguish those beliefs that are entitled to judicial solicitude from those beliefs that are not. For a further discussion of the Constitutional Court's analysis in *Prince*, *Christian Education* and other religion cases, see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44 and P Farlam 'Freedom of Religion, Conscience, Thought and Belief' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 41.

[3] 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC)('*Christian Eduction*').

[4] Ibid at para 42.

[5] Act 84 of 1996.

FC ss 15 and 31. The Court then explains why the state is justified in barring corporal punishment in all schools and why it need not consider an exemption for such punishment when religious doctrine so dictates.

The problem with the judgment, as I have noted elsewhere, is not its result. It is perfectly reasonable to override religious dictates and to bar corporal punishment that impairs the dignity of children (*Dignity 1* and *Dignity 5*). The problem is with the distinction between the practice of religion in schools and the practice of religion elsewhere, i.e., the home. If children lack the capacity to decide for themselves whether religious practices will prove deleterious to their health — and it therefore becomes incumbent upon the state to intervene on their behalf to protect their dignity — then it would seem reasonable to conclude that barring religion sanctioned corporal punishment at home should be no different than barring religion sanctioned corporal punishment at school. But that is not what the Court concludes. Rather, it contends that the parents 'were not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They could do both simultaneously.'[1] That is, parents could follow their conscience at home — and beat their children — but still obey the law of the land by having their children attend school free from corporal punishment. The Court cannot have it both ways. Either a child's right to dignity (*Dignity 1*) is of such paramount importance that it precludes corporal punishment at home and at school, *or* the dignity interests of a religious community in practicing its faith (*Dignity 3* and *Dignity 4*) justify corporal punishment in school and at home. To say, as the Court does, that the crux of the matter is the use of a teacher as the instrument of religious discipline is pure sophistry. If the teacher was the parent or the school was at home, then the court's basis for enabling the parents' 'to do both simultaneously' would evaporate. The Court refusal to offer any justification for this distinction does its dignity analysis a disservice.[2]

If *Christian Education* and *Prince* represent low water marks with respect to the Court's treatment of conflicts between the dignity interests of religious groups (*Dignity 3* and *Dignity 4*) and the dignity interests of individuals (*Dignity 1*, *Dignity 2* and *Dignity 3*) or the polity as a whole (*Dignity 5*), then the Court's recent ruling in *Fourie* might be judged a marked improvement. In finding that the dignity interests (*Dignity 2*) of same-sex life partners were unjustifiably limited by rules of

[1] *Christian Education* (supra) at para 51.

[2] For a further discussion of *Christian Education,* see Woolman 'Association' (supra) at § 44.3*(c)*(viii). Patrick Lenta has recently offered a similar analysis of *Christian Education*. See P Lenta 'Religious Liberty and Cultural Accommodation' (2005) 122 *SALJ* 352, 370 ('Is Sach's hinting, despite his refusal to rule on the question, that corporal punishment administered in the home should be constitutionally permissible. . . It is hard to see how this could be so. There is no necessary qualitative difference between the two locations.') Both Laurie Ackermann and Patrick Lenta suggest that pragmatic grounds might exist for the distinction: namely that we would not want *trivial* instances of family conflict caught up in the net of the criminal justice system. See Correspondence with Laurie Ackermann (26 January 2006)(On file with author); Lenta (supra) at 371. While the law is often too blunt a cudgel for matters of the heart, the law does not permit non-trivial violence in the home to remain a private matter.

common law and statutory provisions that prevented them from entering civilly-sanctioned marriages, the *Fourie* Court went out of its way to note that religious prohibitions on gay and lesbian marriage did not constitute an unjustifiable infringement and that religious officials could legitimately refuse to consecrate a marriage between members of a same-sex life partnership.[1] In other words, the Court recognized expressly constitutional goods — and, in particular, dignity interests — that had nothing to do with, and which might even be viewed as inimical to, egalitarian concerns.[2]

(ii) *Culture and Language*

Conflicts over cultural practices often pit the dignity interests of the individual (*Dignity 2*) against the dignity interests of communities and associations (*Dignity 3* and *Dignity 4*).[3] Unlike the robust protection afforded religious practices under FC s 15, however, the Final Constitution makes it clear that cultural practices secure constitutional protection only where they do not interfere with the exercise of other fundamental rights.[4]

By granting communities the right to create schools based upon a common culture, language or religion, the Constitutional Court in *Gauteng School Education Bill* expressly recognized the importance of such attachments for individual dignity and group identity.[5] The Supreme Court of Appeal in *Mikro* gave this finding

[1] *Fourie* (supra) at paras 90–98. See also *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA), 2005 (3) BCLR 241 (SCA) at paras 36–37 (No religious denomination would be compelled to marry gay or lesbian couples.)

[2] See Woolman 'Association' (supra) at § 44.3*(c)*(viii); *Taylor v Kurtstag* [2004] 4 All SA 317 (W); *Wittmann v Deutscher Schulverein, Pretoria, & Others* 1998 (4) SA 423, 451 (T), 1999 (1) BCLR 92 (T).

[3] For a more detailed discussion of the relationship between customary law and the dictates of dignity, see § 36.5*(c)* infra. See also *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC); *Mabuza v Mbatha* 2003 (4) SA 218 (C), 2003 (7) BCLR 743 (C) at para 32 ('[These rules] provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as *ubuntu*. These valuable aspects of customary law more than justify its protection by the Constitution. It bears repeating, however, that as with all law, the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights.')

[4] FC s 31 reads as follows: '(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community — *(a)* to enjoy their culture, practice their religion and use their language; and *(b)* to form, join and maintain cultural, religious and linguistic associations and other organs of civil society; (2) The rights in ss (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.' FC s 31(2) could be construed to preclude all exclusionary and discriminatory policies. But that assumes that all such practices are inconsistent with various provisions in the Bill of Rights, in particular, equality and dignity. The Constitutional Court has made it quite clear that not all discrimination is unfair discrimination. See, eg, *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC).

[5] *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC)(Court held that IC s 32*(c)* permitted communities to create schools based upon common culture, language and religion. It further held that IC 32*(c)* provided a defensive right to persons who sought to establish such educational institutions and that it protected that right from invasion by the state. It did not, however, impose upon the state an obligation to establish such educational institutions.)

teeth by holding that FC s 29(2) — the right to receive education in an official language of choice at a public educational institution, where practicable — did not encompass the right to receive such education at each and every public school.[1] The *Mikro* Court further held that the state did not, as a general matter, have the power to substitute its judgment regarding appropriate language policy for that of the school governing body ('SGB'). *Dignity 3* and *Dignity 4* interests will not, therefore, always yield to *Dignity 2* interests. The High Court in *Laerskool Middelburg* correctly added the corollary that the right to single-medium public schools cannot automatically trump the right of all public school students to education in the official language of their choice where the provision of such instruction is 'reasonably practicable'.[2]

(e) Privacy

The privacy jurisprudence of the Constitutional Court draws down on the first and third dimensions of dignity identified at the outset. The notion that dignity entitles the individual to be treated as an end-in-herself (*Dignity 1*) and to pursue some semblance of self-actualization (*Dignity 3*) has driven the Court to conclude that the individual is, consequently, entitled to a space within which to define

[1] *Western Cape Minister of Education v The Governing Body of Mikro Primary School* 2006 (1) SA 1 (SCA), 2005 (10) BCLR 973 (SCA)('*Mikro*').

[2] *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys en Andere* 2003 (4) SA 160 (T). The Court was clearly troubled by the conflict between the right to a single-medium school and the right to be educated in the official language of one's choice. In deciding that the 'minority' students must be accommodated, the Court correctly concluded that the right to a single-medium public educational institution was clearly subordinate to the right of every South African child to education in a language they can comprehend. However, the High Court made two errors — one in law and one in analysis. First, according to the Supreme Court of Appeal in *Mikro*, the High Court in *Laerskool Middelburg* erred when it held that 'minority' students always have a right to an education in their preferred language. That right — said the *Mikro* Court — was constrained by the phrase 'reasonably practicable'. That meant, at a minimum, that learners who had access to another institution that already catered to their linguistic preference were obliged to attend that institution and could not use their linguistic preference to turn a single medium school into a dual medium school. Second, the High Court seems to be on shaky ground when it suggests that it is an open question as to whether facility in a given language was better served where other languages were excluded. Similarly, the High Court wrongly concluded that a claim to a single-medium institution was probably best defined as a mere claim to emotional, cultural, religious and social-psychological security. This trivializes the desire to maintain basic, constitutive attachments. The desire to sustain a given language and culture — especially a minority culture, as Afrikaner culture now is — is best served by single medium institutions that reinforce expressly the importance of sustaining the integrity of that community. As a result, the High Court must also be wrong, if not terribly confused, when it claims that the conversion of a single-medium public institution to a dual-medium school cannot *per se* diminish the force of linguistic (and cultural-linguistic) ties. That is, with respect, exactly what the conversion *per se* does. However, the *Laerskool Middelburg* High Court is correct to note that exclusion on the grounds of language and culture cannot serve as a proxy for exclusion on the grounds of race. See, eg, *Matukane & Others v Laerskool Potgietersrus* 1996 (3) SA 223 (T)(Court found that discriminatory entrance policies ostensibly based upon language and culture, but which were really designed to exclude learners because of their race, violated the right to equality of the complainants and could not be justified on the grounds of cultural, minority or associational rights.)

herself without interference by the state or other members of society.[1] In finding that Section 2(1) of the Indecent or Obscene Photographic Matter Act 37 of 1967 violated the right to privacy by prohibiting the possession of 'indecent' or 'obscene' materials in one's own home, Didcott J, for a majority in *Case & Curtis*, wrote:

> What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the state. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which section 13 of the interim Constitution guarantees that I shall enjoy.[2]

But this understanding of privacy, dignity as self-actualization (*Dignity 3*), secured neither the full endorsement nor the long-term support of the Court. In her concurrence in *Case & Curtis*, Mokgoro J wrote:

> I would, however, respectfully part company from Justice Didcott to the extent that any part of his opinion might be read to suggest that it is not in any circumstances the business of the state to regulate the kinds of expressive material an individual may consume in the privacy of her or his own home. It may be so that, as in England, a 'South African's home is his (or her) castle.' But I would hesitate to endorse the view that its walls are impregnable to the reach of governmental regulation affecting expressive materials.[3]

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[1] For the leading statement on privacy, see *Bernstein & Others v Bester NO & Others* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC)('*Bernstein*') at paras 67, 73, 79 (Ackermann J identifies 'privacy' with the 'inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community.' He quotes, with approval, the Council of Europe's gloss on the right to privacy:

> [The right to privacy] consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially

Ackermann J then concludes that South African and foreign authorities are all inclined to limit 'the "right to privacy" . . . to the most personal aspects of a person's existence, and not to every aspect within his/her personal knowledge and experience.') See also *Pretoria Portland Cement & Another v Competition Commission & Others* 2003 (2) SA 385 (SCA)(Use of warrant to film premises, not approved in the warrant itself, constitutes grave violation of the right to privacy (FC s 14) and the right to dignity (FC s 10) of the applicant, as well as a denial of the applicant's right of access to court (FC s 34).) But see *Director of Public Prosecutions, Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) at paras 70–112 (Search and seizure provisions of Proceeds of Crime Act 76 of 1996 that permitted confiscation of ill-gotten goods in order to prevent their concealment or dissipation did not constitute an unjustifiable limitation of the rights to dignity, property, privacy or a fair trial); *S v Huma* 1996 (1) SA 232 (W), 1995 (2) SACR 411 (W)(Court holds that taking of fingerprints as part of criminal investigation does not constitute an impairment of the accused's dignity in terms of IC s 10 or any other right associated with a fair trial.)

[1] *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC)('*Case & Curtis*') at para 91 citing with approval *Bernstein* (supra) at paras 67–69 (Right to privacy protects 'the inner sanctum of a person' that lies within 'the truly personal realm.') See also *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 18 (Right to privacy protects intimate space because such a space is a prerequisite for human dignity.)

[2] *Case & Curtis* (supra) at para 65. See also *S v Dube* 2000 (2) SA 583 (N)(High Court holds that the right to privacy does not embrace the right not to be secretly photographed while engaging in criminal activity. Such an extravagant notion of privacy — a highly attenuated *Dignity 3* interest — even if constitutionally protected would have to yield before the overwhelmingly more important interests of the polity as a whole (*Dignity 5*)).

The commitment to privacy grounded in individual autonomy would have to yield, as several other justices in *Case & Curtis* likewise noted, when the greater good so required.[1] Thus, while neither Mokgoro J nor Langa J were willing, in *Case & Curtis*, to contest the right of an individual to receive and to read some kinds pornography in the comfort of their own home, they strongly intimated that other kinds of dignity concerns might warrant the limitation of that right.

In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*, Langa J identified at least one class of pornographic materials that no one in South Africa would be permitted to possess: child pornography.[2] Langa J acknowledged that the right to privacy was infringed by Section 27(1) of the Films and Publications Act 65 of 1996.[3] But that limitation was more than justified by the objectives of the Act, and the means required to realize them. What is worth remarking upon in this chapter are the putative grounds for the limitation. Langa J makes a point of trawling through the available evidence that child pornography is *(a)* 'harmful to children who are used in its production'; *(b)* 'potentially harmful because of the attitude to child sex that it fosters'; and *(c)* harmful because of 'the use to which it can be put in grooming children to engage in sexual conduct'.[4] Having been convinced by this body of evidence, Justice Langa makes it part of the justification for the limitation of the right to privacy. However, a close reading of *De Reuck* shows that these grounds are not a necessary condition for the Court's ultimate conclusion. The only real justification that matters is the Court's belief that the mere fact of child pornography impairs the dignity of all children (*Dignity 5*) and any society (*Dignity 5*) that condones it:

> The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth. Society has recognised that childhood is a special stage in life which is to be both treasured and guarded. The state must ensure that the lives of children are not disrupted by adults who objectify and sexualise them through the production and possession of child pornography. There is obvious physical harm suffered by the victims of sexual abuse and by those children forced to yield to the demands of the paedophile and pornographer, but there is also harm to the dignity and perception of *all* children when a society allows sexualised images of children to be available. The chief purpose of the statutory prohibitions against child pornography is to protect the dignity, humanity and integrity of children.[5]

Given that less restrictive means could have been employed — and, indeed, are employed in England and Germany — to realize the three 'empirical' justifications for the prohibition identified above, the only ground that justifies the

[1] See also *MEC for Health, Mpumalanga v M-Net* 2002 (6) SA 714 (T)(The privacy interests of a public hospital and public hospital staff (*Dignity 3*) fall before the freedom of expression interests of the general public ('*Dignity 4* and *Dignity 5*') in viewing clandestinely filmed operations that demonstrate the patently negligent conduct of the hospital staff.)

[2] *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC)('*De Reuck*').

[3] Ibid at para 52.

[4] Ibid at para 62.

[5] Ibid at para 63.

continued validity of the provision of the Films and Publications Act at issue is dignity writ large (*Dignity 5*).[1] One might be inclined to characterize the conflict as one between dignity *qua* self-actualization (*Dignity 3*) and dignity *qua* individual-as-end-in-herself (*Dignity 1*). In *De Reuck*, however, dignity *qua* self-actualization (*Dignity 3*) actually succumbs to dignity *qua* good of the community (*Dignity 5*). For the real offence, according to the Court, is not to the class of actual individual children harmed. Were that the case, we could have expected the Court to require the state to create means narrowly tailored to protect that vulnerable class. Instead, the offence is to the dignity of the entire community (*Dignity 5*). For to say that all children have their dignity impaired by the mere fact of child pornography is to say that we have all had our dignity impaired — as children, as adults, and thus, and as a society as a whole — by the mere fact of (real, imitated or animated) child pornography. There is, quite clearly, a puritanical, and uninterrogated set of assumptions about the meaning of both childhood and sexuality at work here.[2] What is more significant, for my immediate purposes, is the recognition that dignity is used not to protect the individual ends of the realm, but to protect the realm itself.[3]

(f) Freedom of trade, occupation and profession

As we saw in such cases as *NCGLE I, Hugo*, and *Prinsloo*, the South African courts often emphasize the extent to which various dimensions of dignity — say self-actualization (*Dignity 3*) and self-governance (*Dignity 4*) — are necessary conditions for individual freedom. Given this link between dignity and freedom, it is hardly surprising that, as Cameron J explains in *Brisley v Drotsky,* contractual autonomy should now be informed by our constitutional commitment to dignity.[4] Moreover, Cameron argues, contractual freedom, shorn of its excesses, 'enhances rather than diminishes our self-respect and dignity.'[5]

The kind of enhancement contemplated by Cameron J is on full display in *Coetzee v Comitis*.[6] In *Comitis*, the Cape High Court assessed the constitutionality of National Soccer League ('NSL') employment conditions which provided that any person wishing to play professional football (1) had to register with the NSL; (2) had to obtain a clearance certificate from his former club before he could be registered by the NSL as a player of a new club; (3) had to ensure that after

[1] For example, the three 'empirical' reasons for upholding the statute are irrelevant to the Court's apparent conclusion that animated porn may be legitimately proscribed. England and Germany, amongst other jurisdictions, take cognisance of the difference between actual and animated pornography. The laws on their books do not proscribe animated pornography and are, therefore, 'less restrictive means' of achieving the same legitimate state objective.

[2] For a critique of the Court's 'sexuality' jurisprudence, see N Fritz 'Crossing Jordan: Constitutional Space for (Un)Civil Sex?' (2004) 20 *SAJHR* 230.

[3] Here, in *De Reuck*, is one of the few instances where the Court expressly endorses a conservative, neo-romantic notion of a people over a heterogeneous realm of ends.

[4] 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA)('*Brisley*') at paras 94 and 95.

[5] *Brisley* (supra) at para 94 citing, with approval, the dicta of Davis J in *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464, 475 (C), [2002] 2 All SA 515 (C).

[6] 2001 (1) SA 1254 (C), 2001 (4) BCLR 323 (C)('*Comitis*').

conclusion of a contract with a new club, his former club was duly compensated; and (4) remained a registered player of the club with which he was last employed — should the clubs not be able to agree on an appropriate transfer fee — for a period of thirty months (only after this period would the former club no longer be entitled to compensation). Prior IC s 26, challenges to covenants in restraint of trade had foundered on the shoals of *dicta* set out in the pre-constitutional *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*.[1]

After noting that the jurisprudence generated under IC s 26 had 'been uniformly dismissive of a suggestion that the Interim Constitution necessitated a revision of the restraint of trade law',[2] Traverso J states that '[c]onsiderations of public policy cannot be constant [given that] [o]ur society is an ever-changing one' and that '[w]e have moved from a very dark past into a democracy where the Constitution is the supreme law, and public policy should be considered against the background of the Constitution and the Bill of Rights.'[3] Traverso J then holds that because the aforementioned employment conditions 'strip the player of his *human dignity*' by treating him as no more than 'goods and chattel . . . at the mercy of the employer', the NSL Rules cannot be squared with the dictates of FC s 7(1) or FC s 10.[4] The notion that the player is an end-in-himself — and no mere object — requires that the principle of the sanctity of contract yield to more basic considerations of human dignity (*Dignity 1*).[5]

But other courts — including the Constitutional Court and the Supreme Court of Appeal — seem disinclined to follow Traverso J's decision to deploy dignity in a manner that diminishes the deleterious consequences: *(a)* of contracts of adhesion; or *(b)* of criminal sanctions visited upon those who have no choice but to engage in morally reprehensible behaviour if they are to survive.

In *Afrox Healthcare Bpk v Strydom*, an agreement was concluded between the appellant, the owner of a private hospital, and the respondent, a party seeking medical treatment.[6] After an operation at the hospital, negligent conduct by a

[1] 1984 (4) SA 874 (A)('*Magna Alloys*')(Court held that a restraint of trade clause within a contract was *prima facie* valid and that whoever wished to prove the contrary bore the onus of showing that 'the restriction conflicted with the public interest.') See, further, *Waltons Stationery Co. (Pty) Ltd v Fourie & Another* 1994 (4) SA 507 (O), 1994 (1) BCLR 50 (O); *Kotze en Genis (Edms) BPK v Potgieter* 1995 (3) SA 783 (C), 1995 (3) BCLR 349 (C); *AK Entertainment CC v Minister of Safety* 1994 (4) BCLR 31 (E); *Knox D'Arcy (Ltd) & Another v Swar & Another* 1996 (2) SA 651(W), 1995 (12) BCLR 1702 (W).

[2] *Comitis* (supra) at para 30.

[3] Ibid at para 32.

[4] Ibid at paras 34 and 38 (Emphasis added).

[5] For similar analysis, see *Santos Prof Football Club v Igesund* 2002 (5) SA 697, 701 (C)(Court finds that the most basic autonomy interests (*Dignity 1*) of the player militate against the enforcement — by specific performance — of the contract in question.) See also *Fidelity Guards Holdings (Pty) Ltd T/A Fidelity Guards v Pearmain* 2001 (2) SA 853, 862 (SCA)('Insofar as . . . restraint [of trade clauses constitute] . . . a limitation of the rights entrenched in [FC] s 22, the common law as developed by the Courts, in my view, comply with the requirements laid down in [FC] s 36(1). Any party to any agreement where a restraint clause is regarded as material is free to agree to include such a clause in the main agreement and the common law in this regard is therefore of general application'); *Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE), 1997 (10) BCLR 1443 (SE).

[6] 2002 (6) SA 21 (SCA)('*Afrox*').

nurse led to complications that caused further injury to the respondent. The respondent argued that the negligent conduct of the nurse constituted a breach of contract by the appellant and instituted an action holding the appellant responsible for the damages suffered. The Supreme Court of Appeal rejected the respondent's various claims — including a constitutional challenge that relied upon an argument that values such as human dignity required the development of the common law on behalf of those persons who *(a)* do not possess the requisite capacity to understand fully the document they sign or *(b)* occupy substantially weaker bargaining positions. Instead, the SCA concluded that the exemption clause at issue legitimately immunized the appellant from claims for negligence and that the courts are duty bound to enforce such contractual terms unless the Final Constitution or the boni mores of the community clearly dictate otherwise. *Afrox* rests on the classically liberal fiction that the common law constitutes a neutral contractual backdrop for relations between fully autonomous individuals. Unlike the *Comitis* court, the *Afrox* court shows little interest in assessing whether the actual contractual conditions that obtain with respect to most hospital admissions forms 'strip the [patient] of his human dignity' and place him 'at the mercy' of the hospital and its staff. The question as to whether these forms — and the common law that backs them up — can be squared with the dictates of FC s 7(1), FC s 10 or FC s 39(2) never arose.

The Constitutional Court's decision in *Jordan* must, in light of both *Comitis* and *Brisley*, be viewed as doubly disappointing: it neither upholds contractual freedom in the service of dignity *qua* autonomy (*Dignity 3*) nor comes to the aid of those treated as chattel rather than as ends-in-themselves (*Dignity 1*). While one might be excused for thinking, after the decisions in *NCGLE I* and *NCGLE II*, that the Final Constitution's express commitment to dignity and equality would protect the sexual practices of a historically disadvantaged and marginal social group,[1] the *Jordan* Court rejected each and every constitutional challenge to the statutory proscriptions of prostitution.[2] With respect to the argument from dignity, the Court wrote:

> Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body, which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. We do not believe that s 20(1)(aA) can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one's body. … The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.[3]

[1] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs & Others*, 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC)('*NCGLE II*'); *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999 (3) SA 173 (CC), 1998 (12) BCLR 1517 (CC)('*NCGLE I*').

[2] *S v Jordan & Others (Sex Workers Education and Advocacy Task Force & Others as Amici Curiae)* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC)('*Jordan*').

[3] Ibid at para 74.

The Court's assessment that the criminalization of prostitution could not be said to impair the right to dignity of the prostitute because 'the diminution arose from the character of prostitution itself' — the commodification of one's body — is difficult to understand in a liberal, market-based society such as ours.[1] As I have written elsewhere:

> So much of what we do involves the commodification of our bodies. A day-labourer is entitled to some level of constitutional protection of his dignity despite the fact that he has chosen to sell his body for the wages needed to pay for food and shelter. A Constitutional Court judge, while commodifying her body in the natural course of listening to arguments and writing opinions, is likewise entitled to some level of constitutional solicitude. It cannot be that the commodification of one's body *per se* bothers the Court. All of us gainfully employed do just that. It must be a particular form of commodification — or the commodification of a particular body part — that provokes the Court. But when the offending commodification just happens to be a form of behaviour that attracts the censure of many South Africans, then it is hard not to conclude that the Court has confused commodification with moralization.[2]

It is, of course, no reply to argue that the South African constitutional framework not only permits but requires the legislature to enact laws which foster the dignity of all South Africans (*Dignity 5*).[3] The question that goes begging is whether the conception of dignity fostered in *Jordan* can be squared with prior constructions of the right, the value and the ideal of dignity. Given the objectification and the commodification that attend all forms of sexual congress, the Court can articulate no compelling dignity standard that might enable us to distinguish those historically suspect sexual acts, such as homosexual sodomy, that have now secured constitutional protection from those sexual acts, such as prostitution, that have not. Had the Court grounded its dignity analysis either in a *Brisley*-like defence of dignity as contractual freedom (*Dignity 3*) or a *Comitis*-like defence of dignity as emancipation (*Dignity 1*), the result in *Jordan* might well have been different.[4]

(g) Slavery, servitude and forced labour

As I noted at § 36.3 above, 'where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to

[1] *Jordan* (supra) at para 74.
[2] See Woolman 'Association' (supra) at § 44.3*(c)*(x).
[3] *Jordan* (supra) at para 105.
[4] Most of the decisions handed down on FC s 22 read with FC s 10 have been equally deferential. In *Affordable Medicines Trust v Minister of Health*, the High Court held that the state is entitled to restrict the trade, occupation and practice of the complainants — including licenses to dispense medicine — if the restrictions are rational. 2004 (6) SA 387 (T). Moreover, the court found that if anyone's dignity was impaired it was that of the patients. That said, the mere inconvenience caused to the patients did not amount to an impairment of their dignity. Ibid at para 45.

slavery, servitude or forced labour.'[1] The *Dawood* dictum intimates that it is the infringement of FC s 13 (slavery) that establishes an infringement of FC s 10 (dignity) — and not the other way around. As we have already noted, this relationship reflects the first rule of South African dignity jurisprudence: Where a court can identify the infringement of a more specific right, FC s 10 will not add to the enquiry.[2] But this rule does not reflect accurately the reciprocal effect between dignity and many, if not all, of the remaining rights in Chapter 2. Given that dignity demands that each individual be permitted to develop his or her unique talents optimally (*Dignity 3*), then dignity *qua* freedom from slavery underwrites the proscription of those practices where the exercise of 'entitlements of ownership' in one person by another 'impair substantially' the ability of a person to develop optimally her unique talents.[3] Moreover, it requires that those who make law exercise their imagination and retire those edicts that promote such practices.

S v Jordan & Others, as we have just seen, evinces such a failure of legal imagination in the context of freedom of trade, occupation and profession.[4] It does so once again in the context of slavery and, in particular, sexual slavery. The majority's very strong commitment to a form of metaphysical autonomy that makes all individuals morally and legally culpable for actions that issue ineluctably from their circumstances, fails dramatically the increasingly large number of prostitutes who are victims of sexual trafficking. Sexual trafficking is about the sale and exploitation of women and female children. *Jordan* has little if nothing to say about state complicity in a legal regime that condones institutionalised rape. Perhaps this characterization of *Jordan*'s weltanschauung seems unfair. But the majority judgment speaks for itself:

[1] *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC)('*Dawood*') at para 35. See also S Woolman & M Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 64.

[2] *Dawood* (supra) at para 35.

[3] The method of analysis that informs the construction of the constitutional norm of dignity can assist us in discriminating between conditions of slavery and non-slavery. The Constitutional Court's dignity jurisprudence reflects five different perspectives on individual agency. The Court uses its variegated understanding of dignity to identify an ever-expanding list of practices that prevent us from acting as agents. It then augments this list of repugnant practices by identifying analogous practices that deny us our agency. So, for example, in *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* the Constitutional Court held that statutory provisions that did not accord same-sex life partners the same set of entitlements as hetrosexual life partners to permanent residence violate the right to dignity. 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC). In *Satchwell v President of the Republic of South Africa & Another*, the Constitutional Court found that statutory provisions withholding spousal survivor benefits to the survivors of same-sex relationships were deemed analogous to statutory provisions that did not accord same-sex partners the same set of entitlements to permanent residence. 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC). As a result, the refusal to grant spousal survival benefits to the survivors of same-sex relationships constitutes a violation of the right to dignity.

[4] 2002 (6) SA 642 (CC), 1997 (6) BCLR 759 (CC)('*Jordan*').

> It was accepted that they have a choice but it was contended that the choice is limited or 'constrained'. Once it is accepted that [the criminalization of prostitution] is gender-neutral and that by engaging in commercial sex work prostitutes *knowingly* attract the stigma associated with prostitution, it can hardly be contended that female prostitutes are discriminated against.[1]

The Constitutional Court's recent judgment in *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* hints at a way out of this autonomy bind.[2] In *Khosa*, the Constitutional Court found unconstitutional, as a violation of both FC s 9 and FC s 27(1), the exclusion of permanent residents from the class of persons entitled to a variety of social security grants. In *Khosa*, Mokgoro J writes:

> The exclusion of permanent residents in need of social-security programmes forces them into relationships of dependency upon families, friends and the community in which they live, none of whom may have agreed to sponsor the immigration of such persons to South Africa.... Apart from the undue burden that this places on those who take on this responsibility, it is likely to have a serious impact on the dignity of the permanent residents concerned who are cast in the role of supplicants.[3]

Mokgoro J could well have added that permanent residents are, as supplicants, not merely dependent on family members, but quite literally at their mercy. Many sex-slaves, and therefore a large number of prostitutes, would consider themselves fortunate to be supplicants. They are not just excluded from the protection of the law. Many sex-slaves do not speak the language, find themselves in wholly unfamiliar surroundings, and lack the resources to engage effectively corrupt immigration officials or to escape criminal syndicates. Many are enslaved by their own families. The point is not that sex-slaves are excluded from some particular benefit to which another class of persons is entitled. *Khosa* stands for the broader proposition that FC s 7(2) places the state under an obligation to protect and to fulfil the rights of all persons in South Africa. As the *Khosa* Court rightly recognizes, legal regimes that offer incentives to individuals to become members of the political community but then punish persons who cannot act, ultimately, on such incentives — by withholding benefits or by imposing incarceration — are perverse. These disincentives deny the affected person that minimum level of dignity that FC s 7(2) obliges the state to provide (*Dignity 1*). The *Khosa* Court indicates that where the autonomy of our most vulnerable compatriots is largely extinguished (*Dignity 1*), the state bears a much greater burden with respect to demonstrating that it has discharged its duty to provide them with the entitlements necessary to vouchsafe their dignity (*Dignity 3*). The current inability of most sex-slaves/prostitutes to manumit themselves is a problem that can be solved by the state with only the most limited amount of imagination: decriminalisation or regulation.[4]

[1] See *Jordan* (supra) at para 16 (Emphasis added)(Why 'knowing' under conditions of duress and compulsion makes one culpable remains unclear.)

[2] 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC)('*Khosa*').

[3] *Khosa* (supra) at para 76.

[4] See S Woolman and M Bishop 'State as Pimp: Sexual Trafficking and Slavery in South Africa' (2006) 24 *Development SA* — (forthcoming).

(h) Expression

Freedom of expression, the first amongst equals in American constitutional law, can make no similar claim to status with regard to the South African Bill of Rights. Indeed, in head-to-head competition with dignity interests, in all their various manifestations, expressive interests invariably come up short. As Justice Kriegler notes in his analysis of the offence of scandalizing the court in *S v Mamabolo*:

> The balance which our common law strikes between protection of an individual reputation and the right to freedom of expression differs fundamentally from the balance struck in the United States. The difference is even more marked under the two respective constitutional regimes. The United States constitution stands as a monument to the vision and the libertarian aspirations of the Founding Fathers; and the First Amendment in particular to the values endorsed by all who cherish freedom. But they paint eighteenth century revolutionary insights in broad, bold strokes. The language is simple, terse and direct, the injunctions unqualified and the style peremptory. Our Constitution is a wholly different kind of instrument. For present purposes it is sufficient to note that it is infinitely more explicit, more detailed, more balanced, more carefully phrased and counterpoised.[1]

The balance, the careful phrasing, the counterpoised concepts refer to what Justice Kriegler calls the 'three conjoined, reciprocal and covalent values … foundational to the Republic: human dignity, equality and freedom.'[2] One consequence of this conjoinment, reciprocity and covalence is that 'the right to freedom of expression cannot be said automatically to trump the right to human dignity.'[3] Another more immediate consequence is that the crime of scandalizing the court survives the freedom of expression challenge in *S v Mamabolo*. It survives because the administration of justice requires that the 'dignity' of the judiciary as a whole be protected from comments designed to bring the system into disrepute (*Dignity 5*).[4]

(i) *Pornography and child pornography*

We have already noted, in the section on privacy, the Constitutional Court has, in emphasizing the different dimensions of dignity, arrived at different conclusions as to the level of constitutional solicitude that pornographic publications and their readers will be afforded.[5] In *Case & Curtis*, a majority of the Court declined the opportunity to decide whether the publication or the receipt of pornographic

[1] *S v Mamabolo* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC)('*Mamabolo*') at para 40.

[2] Ibid at para 41.

[3] Ibid.

[4] However, the mere assertion by the State that the dignity of the community might be offended by some form of expression or behaviour, without argument or evidence, is insufficient to justify a limitation on expression. See *Phillips v Director of Public Prosecutions, Witwatersrand Local Division* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC), 2003 (1) SACR 425 (CC).

[5] On dignity interests and privacy, see § 36.4*(e)* supra.

material was protected under IC s 15. It preferred instead to ground its finding, that the Indecent or Obscene Photographic Matter Act's criminal sanctions with respect to possession of pornography were constitutionally infirm, in the right to privacy.[1] In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*, the Court found that pornography, as a form of expression, is entitled to the protection afforded by FC s 16.[2] It then proceeded to hold, however, that the state's interest in the dignity of children generally justified the particular limitations that the Films and Publications Act imposed on both the producers and the possessors of pornography that features children. I suggested that whereas the majority in *Case & Curtis* might be inclined to characterize the conflict as one in which dignity *qua* self-actualization (*Dignity 3*) trumps dignity *qua* good of the community (*Dignity 5*), in *De Reuck,* dignity *qua* self-actualization (*Dignity 3*) is justifiably limited — at least in the Court's view — by dignity *qua* good of the community (*Dignity 5*).

(ii) *Hate speech*

Dignity (*Dignity 2*) justifies our jurisprudence's most significant incursion into freedom of expression: hate speech is unprotected. The incursion is built-in to FC s 16 itself. FC s 16(2) reads, in relevant part, that the right to freedom of expression 'contained in subsection (1) does not extend to … *(c)* advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.' In *Islamic Unity Convention v Independent Broadcasting Authority & Others*, Justice Langa explains the purpose of FC s 16(2)'s definitional limits on FC s 16(1) as follows:

> Section 16(2) therefore defines the boundaries beyond which the right to freedom of expression does not extend … Implicit in its provisions is an acknowledgment that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the *dignity* of others and cause harm.[3]

It does not follow, of course, that any proscription placed on hate speech is consistent with FC s 16(2)*(c)*'s dictates and thus automatically justified by reference to an individual interest (*Dignity 2*), a group interest (*Dignity 2*), or a state interest in dignity (*Dignity 5*). Indeed, at issue in *Islamic Unity Convention* was a section of the Code of Conduct for Broadcasting Services that prohibited any broadcast 'likely to prejudice relations between sections of the population'. Given that any number of speech acts could be deemed likely to 'prejudice relations

[1] *Case & Curtis* (supra) at paras 90–95.

[2] *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC).

[3] *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC)('*Islamic Unity Convention*') at para 32 (emphasis added). Justice Langa further notes that: 'There is no doubt that the state has a particular interest in regulating this type of expression because of the harm it may pose to the constitutionally mandated objective of building a non-racial and non-sexist society based on *human dignity* and the achievement of equality.' Ibid at para 33 (Emphasis added).

between sections of the population' without either *(a)* constituting 'advocacy of hatred based on race, ethnicity, gender or religion' or *(b)* constituting 'incitement to cause harm' based upon such advocacy, the code clearly swept into its overly broad ambit speech acts that were protected in terms of FC s 16. The *Islamic Unity Convention* Court concluded that the dignity interests at stake did not justify the Code's limits on expression. After articulating the grounds for its finding of invalidity, the Court, as a remedy, notionally severed the offending text and read the more limited incursion of FC s 16(2)'s hate speech clause into the Code.

Despite the finding in *Islamic Unity Convention*, FC s 16(2)*(c)* retains its teeth. In *Freedom Front v South African Human Rights Commission,* the South African Human Rights Commission found that the slogan 'Kill the farmer, kill the boer' constitutes advocacy of hatred of Afrikaners and incitement to do them harm.[1] The SAHRC was able to reach this finding, as Iain Currie and Johann de Waal note, because it did not restrict 'harm' to the physical, but found the term to embrace both emotional harm and psychological harm.[2] The grounds for such an extension of the term can, Currie and De Waal suggest, be traced directly to the Canadian Supreme Court's decision in *R v Keegstra*.[3] In *Keegstra*, the Canadian Supreme Court wrote:

> A person's sense of *human dignity* and belonging to a community is closely linked to the concern and respect accorded the groups to which he or she belongs. The derision, hostility and abuse encouraged by hate propaganda therefore have a severe impact on the individual's sense of self-worth and acceptance. This impact may cause target-group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with outsiders or adopting attitudes directed towards blending in with the majority. Such consequences bear heavily on a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.[4]

Thus, just as dignity grounds the *Keegstra* Court's finding that anti-semitic statements and holocaust denialism were not entitled to constitutional protection, so too does dignity (*Dignity 2*) ground the SAHRC's conclusion that that the slogan 'Kill the farmer, kill the boer' constitutes hate speech in terms of FC s 16(2)*(c)* and falls beyond the protections afforded speech by FC s 16(1).

The Broadcasting Complaints Commission of South Africa ('BCCSA') reached a similar conclusion in *South African Human Rights Commission v SABC*.[5] The BCCSA was asked to determine whether derogatory remarks about the South African Indian community that formed the primary riff in a well-known Zulu rap song constituted hate speech. The BCCSA concluded that because the song both advocated hatred with respect to members of the Indian community and caused

[1] 2003 (11) BCLR 1283 (SAHRC).
[2] I Currie & J de Waal 'Expression' *The Bill of Rights Handbook* (5th Edition, 2005) 358, 376.
[3] Ibid at 376–377 citing *R v Keegstra* [1990] 3 SCR 697 ('*Keegstra*').
[4] *Keegstra* (supra) at 227–228 (Emphasis added).
[5] 2003 (1) BCLR 92 (BCCSA).

harm that impaired the dignity of members of that community, the song qualified as hate speech for the purposes of FC s 16(2)*(c)*.

In *South African Human Rights Commission v SABC,* as in *Freedom Front v South African Human Rights Commission*, the dignity-inflected demand for equal concern and equal respect (*Dignity 2*) outweighs the dignity interest in expression as a form of self-actualization (*Dignity 3*). The two tribunals have found that the prevention of genuine harm — physical or psychological — trumps the putative benefits of largely valueless forms of self-actualization because justice, in post-apartheid South Africa, first requires that all persons are treated with equal respect. Although this restatement begs any number of questions about harm and value, our constitutional order appears to be committed to the proposition that only once the formal conditions of equal respect (*Dignity 2*) have been secured are individuals free to pursue non-harmful forms of self-actualization (*Dignity 3*).

(iii) *Defamation*

The law of defamation, as the *Khumalo* Court notes, 'lies at the intersection of the freedom of speech and the protection of human dignity.'[1] But at that intersection, the light is generally green for dignity and red for expression.

Currie and De Waal observe that the law of defamation in South Africa, prior to 1994, consistently undervalued freedom of speech, and in particular, 'freedom of the media'.[2] That devaluation was consistent with the suppression of all forms of expression by the state under apartheid.[3]

The ossification of the law of defamation under apartheid was finally addressed by the Supreme Court of Appeal in *National Media Ltd v Bogoshi*.[4] Although it declined to address directly the constitutional challenges to the existing law, the *Bogoshi* Court did decide that the imposition of strict liability on the media with respect to a finding of unlawfulness could no longer be maintained. It replaced the strict liability standard for the media with the ordinary standard of reasonableness.

[1] 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at para 26. See *Kausea v Minister of Home Affairs* 1995 (1) SA 51, 67 (NM)(Utterances by police officer accusing entire command structure of racism constitute hate speech under statute and do not qualify as fair comment for purposes of defence against suit in defamation. 'Freedom of expression,' writes the court, 'cannot . . . be used to violate the dignity of a person.')

[2] Currie & De Waal 'Expression' (supra) at 383.

[3] Compare *Argus Printing & Publishing v Esselen's Estate* 1994 (2) SA 1 (A)(Appellate Division permits judge to sue for defamation in respect of criticism levelled at the judge in his official capacity) with *S v Mamabolo* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC)(Contempt may only be found if there is actual harm done to the administration of justice; otherwise freedom of expression allows for criticism of judges in their individual capacity.)

[4] 1998 (4) SA 1196 (SCA), 1999 (1) BCLR 1 (SCA)('*Bogoshi*'). However, the reluctance of the Appellate Division, the Supreme Court of Appeal and the Constitutional Court to revisit this body of law in light of constitutional imperatives did not stop lower courts from taking up the challenge. In *Mandela v Falati*, the court stated that the new dispensation privileged speech over the reputations of politicians, that expression should be largely unrestrained, and that courts should allow neither prior restraints nor defamation actions to silence critical voices. 1995 (1) SA 251, 259–260 (W).

Advocates of more robust protections for freedom of expression and freedom of the media were not satisfied with this via media. In *Khumalo v Holomisa*, the defendants, on exception, asked the Constitutional Court to revisit *Bogoshi* in the light of the novel requirements of FC s 16(1)*(a)*. Although the Constitutional Court agreed that FC s 16(1)*(a)* applied directly, it declined the invitation to alter the common law of defamation. Justice O'Regan, in support of her conclusion that 'the common law as currently developed' was consistent with the requirements of the Final Constitution, wrote:

> In the context of the actio injuriarum, our common law has separated the causes of action for claims for injuries to reputation (fama) and dignitas. Dignitas concerns the individual's own sense of self-worth, but included in the concept are a variety of personal rights including, for example, privacy. In our new constitutional order, no sharp line can be drawn between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. . . . The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity.[1]

Freedom of expression, described by the majority as a non-paramount value, yields to the dictates of dignity.[2] But should it?[3]

What if the dignity interest that informs freedom of expression had featured in the Court's analysis? Judge van der Westhuizen, in the court a quo, recognizes dignity interests on both sides. Dignity *qua* equal concern and equal respect

[1] *Khumalo* (supra) at paras 27–28. See also *Marais v Groenewald* 2001 (1) SA 634 (T)(Right to good name and reputation, underwritten by FC s 10, requires that defendant be held liable for statements that he could believe 'lawful' only because of his gross negligence and his refusal to take adequate steps to establish the truth.)

[2] In asserting that the justifications for the law of defamation sound the central themes of our constitutional order, the Constitutional Court appears to echo Kant:

> By defamation (*obtrectatio*) or backbiting I do not mean slander (*contumelia*), a false defamation to be taken before the court; I mean only the immediate inclination, with no particular aim in view, to bring into the open something prejudicial to respect for others. This is contrary to the respect owed to humanity as such; for every scandal given weakens that respect, on which the impulse to the morally good rests, and as far as possible makes people sceptical about it.

Kant *Metaphysics of Morals* (supra) at 258. However, Kant differs from the Court in two fundamental respects. First, he was writing of virtues that should not be enforced as a matter of right. Defamation for Kant engages primarily ethical considerations. Second, the Court, unlike Kant, will tolerate false statements so long as they are 'reasonably' made.

[3] Signs of a more generous approach to expressive interests in the context of defamation are on display in *Hardaker v Phillips* 2005 (4) SA 515 (SCA)(Supreme Court of Appeal finds that a jibe, though false and potentially defamatory, constituted fair comment and that any dignity interest that the plaintiff might have had must yield to a more general public interest in free and robust expression.)

buttresses arguments in support of the right to one's reputation (*Dignity 2*), while dignity *qua* self-governance (*Dignity 4*) values 'expression' for the 'central part' its plays in legislating for oneself, and for others, consistent with the dictates of reason.[1] Indeed, in *Sayed*, Judge Davis suggests that had the *Khumalo* Court taken dignity *qua* self-governance seriously, the outcome might have been different.[2] Davis J reasons that even on the most uncontroversial reading of recent South African history, 'democracy' ought to be understood as 'the fundamental objective of the Constitution'. As a result, the entire structure of the Final Constitution 'implies that [the] value of democracy needs to be given primacy of place [when] … we have to … balance[ ] … freedom of expression against [the interests of] those who seek public office or positions of prominence in our public life.'[3] Only a robust media, on Davis' account, is commensurate with the dictates of both democracy and dignity *qua* self-governance (*Dignity 4*).[4]

Two High Courts have recognized that, in a head-to-head contest between expression and privacy, the more important dignity interest might attach to expression. In *MEC for Health, Mpumalanga v M-Net*, the High Court was asked to grant an urgent interdict that would have prevented a broadcaster from airing a piece of investigative journalism that relied on clandestinely obtained footage of negligent medical practices.[5] Bertlesmann J rejected the request for the interdict. He held that the privacy interests of a public hospital and public hospital staff (*Dignity 2*) must fall before the freedom of expression interests (the right to receive information) of the general public (*Dignity 4* and *Dignity 5*). Only by having access to these clandestinely filmed operations that demonstrate the patently negligent conduct of the public hospital staff could: *(a)* the fourth estate discharge its responsibility to ensure government accountability (*Dignity 5*) and; *(b)* the general public meaningfully exercise its rights of self-governance (*Dignity 4*).[6] In *Van Zyl v Jonathan Ball Publishers*, the High Court denied an applicant's request for an interim interdict preventing dissemination, distribution, display or sale of a book that the applicant claimed to be defamatory.[7] It found, on balance, that the expressive

[1] See *Holomisa v Khumalo & Others* 2002 (3) SA 38 (T).
[2] See *Sayed v Editor, Cape Times* 2004 (1) SA 58 (C).
[3] Ibid at 62-63.
[4] Although careful to stay within the limits established by *Bogoshi*, the Supreme Court of Appeal in *Mthembi-Mahanyele v Mail & Guardian* notes that 'some latitude must be allowed in order to allow [for] robust and frank comment in the interest of keeping members of society informed about what government does.' 2004 (6) SA 329 (SCA), 2004 (11) BCLR 1182 (SCA) at para 64. Moreover, in assessing whether a comment is reasonable, the court must take cognizance of the duty of accountability that the Final Constitution places on the state and the role that the media plays in holding the state accountable. Ibid at 66. Without announcing as much, the Supreme Court of Appeal, per Lewis J, appears to offer greater judicial solicitude for political speech. Indeed, the findings in favour of the respondents in both *Sayed* and *Mthembi-Mahanyele* suggest that the reasonableness requirement set out in *Bogoshi* may be sufficiently supple to accommodate a highly critical and confrontational press — so long as the press spends an 'appropriate' amount of time checking its facts.
[5] 2002 (6) SA 714 (T).
[6] Ibid at paras 23–27.
[7] 1999 (4) SA 571 (W)('*Jonathan Ball Publishers*').

interests of the respondent (and the public), as guaranteed by FC s 16 (*Dignity 4* and *Dignity 5*), outweighed the dignity interests of the applicants, as guaranteed by FC s 10 (*Dignity 2*). The *Jonathan Ball Publishers* Court went to some lengths, however, to point out that, although the requirements for an interim interdict were not satisfied, the outcome should not lead the media to conclude that they deserved or would receive 'exceptional treatment' in defamation cases.[1]

(i) Socio-economic rights

In each of the four major socio-economic rights decisions handed down thus far, the Constitutional Court has taken great care to make its readers aware of the manner in which the commitment to human dignity — as rule, value or ideal — has shaped the disposition of the matter before it.[2] Even in *Soobramoney v Minister of Health, Kwa-Zulu-Natal*, where the Court denied Mr Soobramoney's claim that FC s 27(3)'s right to emergency medical treatment entitled him to access to the dialysis that he required for survival, the dismissal was justified in terms of much broader claims to dignity.[3] As Sachs J writes:

> In all the open and democratic societies based upon *dignity*, freedom and equality with which I am familiar, the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care.[4]

[1] *Jonathan Ball Publishers* (supra) at 595–596. Indeed, courts have found that while a publication may, initially, have been reasonable — and not an impairment of dignity — because the author or the publisher was not aware of the harm that the publication might cause, the continued publication of a book after the author and the publisher have been made aware of the injury does constitute an actionable offence. See *NM & Others v Smith & Others* [2005] 3 All SA 457 (W), [2005] JOL 14587 (W)(Court holds that continued publication of a book that identified three women with HIV by name and without their permission constituted a violation of their common-law rights to dignity and privacy and warranted imposition of damages.)

[2] For an excellent restatement and reconceptualiztion of this area of the law upon which my analysis is parasitic, see S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1.

[3] *Soobramoney v Minister of Health, Kwa-Zulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC)('*Soobramoney*').

[4] Ibid at para 52 (emphasis added). Chaskalson P denied Mr Soobramoney's claim on the grounds that the rights enshrined in the Bill of Rights were not always the entitlements their language suggested:

> The Constitution is forward-looking and guarantees to every citizen fundamental rights in such a manner that the ordinary person-in-the-street, who is aware of these guarantees, immediately claims them without further ado and assumes that every right so guaranteed is available to him or her on demand. Some rights in the Constitution are the ideal and something to be strived for. They amount to a promise, in some cases, and an indication of what a democratic society aiming to salvage lost dignity, freedom and equality should embark upon. They are values which the Constitution seeks to provide, nurture and protect for a future South Africa.

Ibid at 52. The dignity long denied the majority of South Africans was something that could not yet be recovered in full: it remained a 'promise'. For a recent critique of this promise, see K van Marle '"No Last Word": Reflections on the Imaginary Domain, Dignity and Intrinsic Worth' (2002) *Stellenbosch LR* 299, 305–307.

Subsequent decisions in *Grootboom*, *TAC* and *Khosa* take progressively more seriously the dignity interests of the parties claiming relief under FC ss 26 or 27. In *Grootboom*, the Court reversed the spin placed on the dignity interests at stake in *Soobramoney*. Yacoob J writes:

> It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent *dignity* of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of *human dignity*. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to *human dignity*. In short, I emphasise that human beings are required to be treated as human beings.[1]

The demands of dignity, far from justifying a failure to deliver on various vague promises, become the measure of the State's efforts to discharge its positive duties to act. As Sandy Liebenberg has astutely observed, the dignity discourse of the Court suddenly shifts, in *Grootboom*, from the language of social exchange as a zero-sum game to the language of a social democratic state committed to 'positive social relationships which both respect autonomy and foster the conditions in which it can flourish'.[2]

Critics of the Court were quick to denigrate this commitment to social democratic principles by pointing to the failure of this more robust, relational notion of dignity to deliver actual houses or shelter to Mrs Grootboom and her fellow litigants.[3] However, in *Treatment Action Campaign*, the Constitutional Court did deliver the relief what it had said that dignity demands.[4] It rejected the government's claim that it could not, at this juncture in time, afford to extend its nevirapine treatment protocol in order to diminish the rates of mother to child transmission ('MTCT') of HIV. While noting that an order directing the government to provide even this relatively inexpensive anti-retroviral could have

[1] *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 83 (Emphasis added)(Court finds that state has failed to discharge its responsibilities in terms of FC s 26. It holds, in addition, that the general entitlements secured through socio-economic rights are essential components of a just political order because they are necessary for self-actualisation (*Dignity 3* and *Dignity 5*)).

[2] Liebenberg (supra) at 11.

[3] But see K Roach & G Budlender 'South African Law on Mandatory Relief and Supervisory Jurisdicton' (2005) 122 *SALJ* 325. Roach and Budlender note that a structural interdict was unnecessary in *Grootboom* because the government had agreed to provide alternative accommodation for the applicants. When the government failed to comply with the terms of this undertaking, the Court was obliged — at the request of the applicants — to issue an order 'putting the government on terms to provide certain rudimentary services'. Ibid at 329 quoting *Grootboom* (supra) at para 5, n 17. Despite such evidence of bad faith, Roach and Budlender counsel caution with respect to the use of supervisory jurisdiction and structural interdicts to ensure that the government follows through on settlements or court orders. Ibid at 345–351. Not only are courts ill-equipped to manage polycentric conflicts over time, the risk of contempt by government officials poses a genuine risk to the long-term credibility and legitimacy of the judiciary.

[4] *Minister of Health v Treatment Action Campaign (2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 ('*TAC*').

relatively significant budgetary implications, the Court found that the needs of the women and children effected were simply too pressing to be ignored. Put in Kantian terms, the Court decided, as Sandy Liebenberg writes, that 'for society to deny poor women and their newborns access to "a simple, cheap and potentially lifesaving medical intervention" would clearly indicate a lack of respect for their dignity as human beings entitled to be treated as worthy of respect and concern.'[1]

In *Khosa v Minister of Social Development*, the Court goes beyond dignity as minimal respect (*Dignity 1*), or dignity as equal concern (*Dignity 2*), and arrives at dignity as a collective concern (*Dignity 5*).[2] In finding that the State's express refusal, under the Social Assistance Act, to provide permanent residents with social welfare benefits constituted a violation of the right to social security under FC s 27, Mokgoro J writes:

> Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society.[3]

The trajectory of the Court's dignity jurisprudence over these four cases is breathtaking. By committing us to the dual proposition that 'we are diminished as a society' to the extent that any of our members are deprived of the opportunities to develop their basic capabilities to function as individual and social beings, and that 'claims on social resources are strongly justified when people lack the basic material necessities of life to enable them to survive',[4] the Court takes seriously

[1] Liebenberg (supra) at 13 citing *TAC* (supra) at para 73.

[2] See *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC)('*Khosa*'). The Constitutional Court has discussed dignity as a collective responsibility in a number of its unfair discrimination decisions. See, eg, *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para 43 ('The interests of the community lie in the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination.') The Constitutional Court has written about dignity *qua* collective responsibility in the context of evictions and claims asserted under FC s 26. (*Dignity 5*). See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) at para 18 ('It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. *Our society as a whole* is demeaned when state action intensifies rather than mitigates their marginalisation.' (Emphasis added).) However, dignity *qua* collective responsibility does not mean that the right to dignity can be successfully invoked against the state whenever the exercise of or entitlement to a socio-economic right is threatened. So, for example, in *Hartzenberg v Nelson Mandela Metropolitan Municipal (Despatch Administrative Unit)* 2003 (3) SA 633 (SE), the High Court held, correctly, that FC s 10 and FC s 12 had nothing to say about the disconnection of electrical services for failure to pay the arrears on water bills. That the state was not entitled to disconnect the electricity was a statutory matter for which the state lacked the requisite authority.

[3] *Khosa* (supra) at para 74.

[4] Liebenberg (supra) at 12.

the sense of urgency rooted in the manifold demands of dignity.[1]

What is truly remarkable about the Court's language in *Khosa* is the manner in which it sweeps up and engages all five primary definitions of dignity. The Court first notes that socio-economic rights, like that of social security in FC s 27, invariably engage the 'founding values of human dignity, equality and freedom'.[2] It then teases out human dignity from these three covalent values, and invokes *Dawood* in support of the proposition that '[h]uman dignity … informs the interpretation of many, possibly all, other rights.'[3] The three rights that dignity informs in the instant matter are life, equality and social security.[4] From this doctrinal foundation, the *Khosa* Court commits itself, in short order, to the following propositions:

- the Final Constitution recognizes 'everyone' as deserving of equal concern and equal respect (*Dignity 2*), whether it be in terms of differentiation by law in terms of FC s 9(1), or the receipt of benefits in terms of FC s 27;[5]
- persons who 'are already settled permanent residents and part of South African society' cannot be abandoned 'to destitution if they fall upon hard times' simply because immigration officials see 'some [pecuniary] advantage to the state in doing so':[6] that is, members of our community cannot be treated as mere means for the advancement of the greater good (*Dignity 1*);
- 'the exclusion of permanent residents from the [social security] scheme' denies them the capacity 'to sustain themselves', and casts them in the role of supplicants:[7] by definition, a supplicant does not govern himself, but remains dependent upon the largesse of those around him; such a state of affairs constitutes the abnegation of dignity (*Dignity 4*);
- '[t]he denial of access to social assistance' relegates many permanent residents to the 'margins of society' and deprives them of those essential goods that are necessary for them 'to enjoy other rights vested in them under the Constitution';[8] the denial of these goods and rights functions as an absolute bar to the development of the 'unique talents' of each individual permanent resident (*Dignity 3*);

[1] On the relevance of urgency to an assessment of reasonableness, see D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance' (2002) 118 *SALJ* 484, 490-1. See also M Nussbaum *Women and Human Development* (1999) 56 ('Programs aimed at raising general or average well-being do not improve the situation of the least well-off, unless they go to work directly to improve the quality of those people's lives. If we combine this observation with the thought . . . that each person is valuable and worthy of respect as an end, we must conclude that we should look not just to the total or the average, but to the functioning of each and every person. We may call this the principle of each person as an end.')

[2] *Khosa* (supra) at para 40.

[3] Ibid at para 41.

[4] Ibid at paras 41–43.

[5] Ibid at para 53.

[6] Ibid at para 65.

[7] Ibid at para 80.

[8] Ibid at para 81.

- this failure to recognize permanent residents as more than means, as persons worthy of equal respect, as individuals capable of self-actualization and self-governance leads the Court to conclude that adequate redress can only occur when we come to understand that our own dignity is linked inextricably to the 'well-being of the poor … and the well-being of the community as a whole.'[1] (*Dignity 5*)

Each of Justice Mokgoro's arguments regarding the constitutionality of the exclusion of permanent residents from the social security scheme at issue turns on one of the five definitions of dignity. These arguments from dignity reinforce one another and build toward a conclusion in which Justice Mokgoro appears to claim that the goal of the Final Constitution is 'a realm of ends', a community in which each of us identifies our own well-being, our own status as ends, with the identification of all other members of our community as ends-in-themselves.

36.5 DIGNITY'S POSSIBILITIES

(a) Dignity and transformation

(i) Dignity as a regulative ideal

In the last section, we saw how the five definitions of dignity — and the rules of law they generate — inform the Constitutional Court's jurisprudence in domains as varied as unfair discrimination, intimate association, pornography, abortion, social assistance, restraint of trade clauses, whipping, hate speech and defamation. In this section, I want to move beyond a discussion of dignity as a set of rules that disposes of specific disputes in a court of law to dignity as a philosophical concern that informs the content of the rules we deploy. To that end, this section endeavours to distinguish dignity as a rule from dignity as a regulative ideal.[2]

For Kant, dignity operates as a regulative ideal when we come to view ourselves and others as rational beings capable — through an appeal to various shared ideals — of arriving at a universalizable moral law.[3] In somewhat more

[1] *Khosa* (supra) at para 81.

[2] But see SJ Cowan 'Can Dignity Guide South Africa's Equality Jurisprudence' (2001) 17 *SAJHR* 34 (Cowan discusses dignity as a value or a rule even where it seems she wishes to defend it as a regulative ideal.)

[3] See I Kant *Critique of Practical Reason* (trans W Pluhar, 2002) 101. On the notion of regulative ideals, Kant writes:

> For rational beings all stand under the law that each of them should treat himself and all others never merely as a means but always at the same time as an end in himself. But by so doing there arises a systematic union of rational beings under common objective laws that is a kingdom. Since these laws are directed precisely to the relation of such beings as one another as ends and means this kingdom can be called a kingdom of ends which is admittedly only an *ideal*. Ibid (Emphasis added).

See, in addition, D Cornell 'A Call for a Nuanced Constitutional Jurisprudence: Ubuntu, Dignity and Reconciliation' (2004) 19 *SAPR/PL* 666–667.

common parlance, what Kant means is that human beings can adopt a position in which we attribute to ourselves and to others the capacity to imagine a political community in which each of us could legislate for himself or herself those maxims by which each and every member of our community could live.[1] As the word 'imagine' suggests, the ideals to which we appeal do not (yet) constitute who we are. They remain aspirations. That is, regulative ideals, such as dignity, inform our judgments. But these ideals do not operate as part of a chain of propositions from which we can simply deduce a rational response to a particular problem the world has set for us.[2]

And what, if anything, do these abstract observations about apodeictic uses of reason have to do with the daily grind of determining the meaning of dignity in a court of law? Only by recognizing dignity as a regulative ideal that operates outside the rather instrumental domain of our black letter law will our political community begin to approximate a realm of ends.[3] This realm of ends will not

[1] See D Cornell *The Imaginary Domain* 4–5, 8; D Cornell *At the Heart of Freedom* (1998) 8, 15, 18–19.

[2] Dignity as a regulative ideal operates, in some respects, *against law*. The concern, as Van Marle notes, is that if law purports to specify all that dignity — or freedom — requires, then the actual space for self-actualization and self-governance will be exhausted by the law. See K van Marle 'No Last Word: Reflections on the Imaginary Domain, Dignity and Intrinsic Worth' (2002) 13 *Stellenbosch LR* 299.

Kant's distinction between the apodeictic use of reason and the hypothetical use of reason may help us to better understand the difference between dignity as a regulative ideal and dignity as a rule. See Kant *Critique of Pure Reason* (supra) at 621 ('If reason is a power to drive the particular from the universal then there are two alternatives. Either, first, the universal is already certain in itself and given. On this alternative, only the power of judgment is required for subsumption. And by this subsumption the particular is determined necessarily. I shall call this the apodeictic use of reason.') With regard to the hypothetical use of reason, the universal can only be assumed. If, in terms of the hypothetical use of reason, it seems that all particular cases follow a rule, then we *infer* from this regularity the rule's universality. Whereas the apodeictic use of reason assumes that the truth is constitutive of the universe, the hypothetical use of reason does not rest on such an assumption. The particular — no matter how many examples we offer — cannot prove the universal. The sceptics challenge to the (hypothetical) rule will always remain. S Kripke *Wittgenstein on Rules and Private Language* (1982). How exactly does the apodeictic use of dignity relate then to what might be called the hypothetical use of dignity? Like this: the apodeictic use of dignity is meant to shake us free from the strictures of rule-following in an attempt to bring us closer to the truth. See Kant *Critique of Pure Reason* (supra) at 621. This abbreviated account warrants the disclaimer that Kant's views on this aspect of moral reasoning cannot be adequately captured in a footnote.

[3] Dignity as a regulative ideal goes beyond dominant notions of legitimacy in modern legal systems because it forces us to attend to the ethical dimensions of action. Roger Berkowitz writes that we often do not notice the extent to which 'justice has fled our world', because 'law has taken its place'. He further writes:

> The CEO of a Fortune 500 company who pays a fine so that his company can dump toxic waste into a reservoir, or moves its corporate address to the Bahamas with the intent of avoiding taxes, does not say: 'I am acting legally if also unjustly.' On the contrary, the very legality of the act is seen as proof of its justness. The divorce of law from justice informs our modern condition. Lawfulness, in other words, has replaced justice as the measure of ethical action.

R Berkowitz *The Gift of Science: Leibniz and the Modern Legal Tradition* (2005) ii. The modern emphasis on law as a set of rules often causes us, as Berkowitz suggests, to lose sight of the ultimate purpose of law: justice. Moreover, he notes, legal positivism turns us into instruments — as opposed to agents — and causes us to lose sight of how human beings find their commonality in ethical interactions. Dignity as a regulative ideal — and not a set of rules that we must simply obey — turns us back into the authors of our actions and forces us to take responsibility for the justice or injustice that we find in the world. Dignity, as expressed in any of Kant's four variations of the categorical imperative, asks us to lay down for ourselves a law that embraces every other individual in a manner that extends beyond the interests of our more parochial selves. Dignity as a regulative ideal thereby reminds us of our highest calling as human beings — doing the right thing. See D Cornell 'A Call for a Nuanced Constitutional Jurisprudence' (supra) at 668.

arise by the mere logical application of an established set of rules. It might, however, happen if we can 'hear the music' of the basic law's variations on the theme of dignity.[1] The preceding analysis of the Constitutional Court's dignity jurisprudence suggests that the Court has already 'heard the music'.

My reconstruction of the Court's dignity jurisprudence — the teasing out of five definitions and four uses — stands then as something of an answer to Dennis Davis' realist critique. Davis suggests that this music is not a symphony, but rather a cacophony of disparate themes, each distinct theme played to suit the particular mood of the Court.[2] I hope to have shown that a dignity jurisprudence that begins with the simple proposition that one may never treat another human being solely as a means, can, along with other variations on the categorical imperative, be used to develop an account of what it means to treat another as an object of equal concern and equal respect. I then suggested how the refusal to turn away and the principle of equal concern and equal respect have been leveraged, by the Court, to generate defensible theses about dignity *qua* self-actualization and dignity *qua* self-governance as constitutive features of a just society. Finally, this cluster of definitions, all rooted in related notions of individual agency, ground the more radical claim that dignity actually requires all citizens to assume responsibility for the manner in which all other citizens live.[3] These definitions of dignity, when married to appeals to the regulative ideal of dignity, provide a reliable guide for understanding what dignity in the Final Constitution is designed to do.[4]

[1] Rawls uses this felicitous phrase when describing how one comes to understand Kant's four formulations of the categorical imperative. See Rawls *Lectures* (supra) at 203. Pogge writes that another reason for the proliferation of formulae is that 'through them the categorical imperative can "be brought closer to intuition and thus to feeling".' TW Pogge 'The Categorical Imperative' in P Guyer (ed) *Critical Essays on Kant's Groundwork of the Metaphysics of Morals* (1998) 189, 208. The same logic holds true for the multiple definitions of dignity. Each definition captures a critical aspect of individual agency. Together, the multiple definitions describe, almost in full, a human being who lives up to her highest calling — doing the right thing — and who, at the same time, flourishes. Indeed, both Kant's project and the Constitutional Court's project is animated by the desire to get us to understand that living up to such a calling is, in fact, a large part of flourishing.

[2] See D Davis 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116 *SALJ* 398. Dennis Davis writes that: 'The court has given dignity both the content and scope that make for a piece of jurisprudential Lego-Land to be used in whatever form and shape is required by the demands of the judicial designer.' Ibid at 413. Even if I disagree with that indictment of our current dignity jurisprudence, Davis had good grounds — at the time of writing — for critiquing the Court's nascent dignity and equality jurisprudence for being grounded in a predominantly 'individualistic framework'. Ibid at 412. See also SJ Cowan 'Can Dignity Guide Our Equality Jurisprudence?' (2001) 17 *SAJHR* 34, 39. For the articulation of similar concerns with respect to German jurisprudence, see D Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd Edition, 1997) 300-301, 312-313 ('*Kommers*') (The anteriority of the right — to dignity — to the state complicates judicial control of the concept); S Wermiel 'Law and Human Dignity: The Judicial Soul of Justice Brennan' (1998) 7 *William and Mary Bill of Rights LJ* 223.

[3] See D Cornell *Defending Ideals* (2004) 75–76.

[4] That the case law does, in fact, reflect a certain level of rigour can be seen in the way the various definitions of dignity track various formulations of the categorical imperative and the manner in which those definitions all sound a similar concern with the treatment of all individuals as ends-in-themselves. But again I wish to stress that this account of how these definitions build upon one another and yield, in a non-linear and cumulative fashion, a commitment to a realm of ends is *my* speculative exercise.

Some readers might be puzzled by my insistence on dignity as a regulative ideal when it has been so clearly enshrined in FC s 10 as a rule and in FC ss 1, 36, 39 as a value. One reason for this insistence is the belief that dignity must still be treated as a touchstone of day-to-day life in South Africa at the same time as it is doubly institutionalised through legislation and judicial interpretation. The appeal to dignity as a regulative ideal in our strictly moral transactions cannot but then inform the manner in which legislatures and courts shape dignity as rule and value. In a heterogeneous society such as ours, where the right and the good are not coextensive, the re-inscription of dignity as a legal rule will have the reciprocal effect of deepening our understanding of dignity as an ethical norm.[1]

How does this reciprocal effect — of ethical ideals and justiciable rules — work in practice? Once again, the evolution of the Court's jurisprudence of dignity provides the most publicly accessible, and compelling, account.

(ii) *Dignity and the politics of capability*

We have, over the Court's first ten years, heard its various members explain the presence of dignity in our Final Constitution by reference to the denial of dignity under apartheid. As Justice O'Regan writes:

> The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings.[2]

The Constitutional Court reacts to the particular ways in which dignity was denied under apartheid (the imposition of the death penalty to blunt political opposition, the implementation of pass laws to control both the intimate and economic lives of black South Africans, the use of corporal punishment as a form of social control) by finding unconstitutional those laws that continue to re-inscribe these affronts to dignity.

But as Justice O'Regan observes above, and Justice Ackermann has written elsewhere, the Final Constitution does not simply ask us to react to, and to reverse, past indignities. It demands that we transform our society into one that will ultimately recognise the intrinsic worth of each individual.[3]

We can trace that process of transformation in the equality jurisprudence on sexual orientation. Our courts begin slowly, dispatching laws proscribing sodomy as a violation of intimate or private space. The courts go on to reject laws that impair the ability of same-sex partners to live — private lives — within South Africa. They then abolish laws that refuse to extend 'public' benefits to the

[1] HLA Hart *The Concept of Law* (1961) 77-96.

[2] *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC)('*Dawood*') at para 35.

[3] See D Cornell 'Laurie Ackermann: Bridging the Span toward Justice: The Ongoing Architectonic of Dignity Jurisprudence' (2008) *Acta Juridica* (Forthcoming).

surviving same-sex life partner of a judicial officer. Ultimately, the dignity of same-sex partners is understood to be as important a public matter as it is private, and the public institution of marriage sanctions heterosexual and homosexual unions alike.[1]

The public recognition of same-sex life partnerships as marriages takes dignity beyond the merely restitutional, and articulates an understanding of dignity that is fundamentally transformative of our politics. That this recent holding is fundamentally transformative, and not merely reactive, is reflected in the state's response to the various challenges mounted against anti-gay and anti-lesbian enactments. The early challenges to sodomy laws and immigration laws met with little resistance. However, as the challenges to the law required public recognition of the equality of gays and lesbians — as opposed to mere sufferance of the homosexuals in our midst — the state's resistance stiffened. In both *Satchwell I* and *II*, Parliament balked at providing spousal benefits to the survivors of same-sex life partnerships. In *Satchwell II*, the Constitutional Court had to take the unusual and uncomfortable step of invalidating a piece of legislation virtually identical to the legislation that it had found unconstitutional in *Satchwell I*. It is hard to read Parliament's response to *Satchwell I* as anything but a refusal to recognize that same-sex partnerships are entitled to equal concern and equal respect. In *Fourie*, the state actively sought to block the recognition of same-sex unions as marriages. Again, it is hard to read the state's response as anything other than a refusal to accord same-sex life partnerships the same public recognition as opposite-sex life partnerships. The Constitutional Court and the Supreme Court of Appeal have reached beyond mere restitutionary forms of justice to a vision of dignity that forces *all* South Africans to reconsider their previous understandings of marriage. This new vision of dignity compels *all* South Africans to acknowledge publicly the variety of legitimate and valuable life partnerships within our society.

It seems reasonable to ask, at this juncture, whether the Court's jurisprudence on equality and sexual orientation reflects a genuine transformation or the mere logical extension of the Court's liberal commitment to state non-intervention and the overt and explicit pressures of the written text. The question arises because some critics of the Court's early dignity jurisprudence have, correctly, suggested that the Constitutional Court permitted a Berlian understanding of negative liberty to slip into the Court's equality jurisprudence through the backdoor of dignity. The *Ferreira* Court rejected Justice Ackermann's view that IC s 11(1) and FC s 12(1) required that 'freedom' and 'security of the person' should be read disjunctively and that IC s 11(1) and FC s 12(1) contained a robust freedom right. However, in a number of cases decided shortly after *Ferreira*, the Court appeared to accept Justice Ackermann's contention that there exists an inextricable link between dignity and the need for individual freedom from state intervention. In

[1] See *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC)('*Fourie*').

Hugo, the Court places 'dignity … at the heart of individual rights in a free and democratic society.'[1] In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Court states that 'it is clear that the constitutional protection of dignity requires us to acknowledge the value and the worth of all individuals as members of society.'[2] Thus, over the course of several cases and the space of a couple of years, individual freedom *qua* negative liberty becomes the foundation for dignity, and dignity, in turn, becomes the basis for equality.

One can accept the truth of the proposition that the Constitutional Court accepted the link between dignity and the need for individual freedom from state intervention without accepting the proposition that dignity is *only* about the need for individual freedom from state intervention. For example, Amartya Sen ties his notion of 'development as freedom' to the provision of a basic basket of goods — both real and figurative — that enable human beings to develop those 'capabilities' necessary for each individual to achieve those ends that each has reason to value.[3] Sen contends that dignity and freedom and equality, rightly understood, are meant neither to achieve definitive outcomes nor to prescribe a univocal understanding of the good.[4] What these covalent values do require is a

[1] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41.

[2] *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 28.

[3] See A Sen *Development as Freedom* (1999)('Sen *Development*'); A Sen *Inequality Re-examined* (1992).

[4] Sen's relationship to classical schools of political philosophy is far too subtle and complicated to be explicated meaningfully here. However, a précis of his position may suggest why Sen, of all contemporary theorists, offers an account of dignity, equality and freedom that provides the best fit with my own take on these 'three conjoined, reciprocal and covalent values'. *S v Mamabolo* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC) at para 41. Sen rejects Rawls' contention in *A Theory of Justice* (1972) — and to a lesser degree in *Political Liberalism* (1993) — that there are certain primary goods — civil liberties such as expression, assembly, the franchise — 'that cannot be compromised in any way.' Sen *Development* (supra) at 64. Sen has even less time for utilitarian frameworks that make the greatest good for the greatest number the sole measure of justice. In addition to offering the standard criticisms of utilitarians — their inability to arrive at an acceptable metric for interpersonal comparisons of happiness, their general indifference to radical inequality in the distribution of happiness, and their neglect of rights, freedoms and other non-utility concerns — Sen inveighs against the general inclination to measure utility or happiness in terms of wealth (eg, GNP) and wealth in terms of income (per capita). Neither wealth nor income provide adequate information about the well-being and the substantive freedom of individuals. Both liberals and utilitarians — as we have just described them — fail to take account of how individual differences — in physical ability or disability, in environment, in social practices, in family structure — create significant asymmetries in the manner in which primary goods and incomes can be exploited. Ibid at 73.

Sen asks us to take account, in his theory of distributive justice, of how the heterogeneity amongst individuals (both within societies and across societies) shapes the meaning of primary goods *and* incomes. For example, the meaning of a primary political good like freedom of assembly will have demonstrably different meanings for a person who is ambulatory and for a person who is not ambulatory, but housebound. Similarly, the utility of an income of R200 000 will have demonstrably different value for a person who is ambulatory and for a person who is not ambulatory, but housebound. At a minimum, says Sen, quoting Adam Smith, our primary concern ought to be providing individuals with those necessities of life that will, in fact, give them '"the ability to appear in public without shame".' Ibid at 73 quoting A Smith *The Wealth of Nations* (1776)(ed RH Campbell and AS Skinner 1976) 469–471 (By "necessities", Smith means 'not only the commodities which are indispensably necessary for the support of life, but

level of material support (eg, food) and immaterial support (eg, civil liberties) that enable individuals to pursue a meaningful and comprehensive vision of the good life — as they understand it.[1]

I have suggested, in this chapter's analysis of the case law, that the Court has moved beyond a minimalist understanding of dignity, and a negative conception of freedom, to something richer and more substantial. In *Grootboom* the Constitutional Court announced: 'A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on dignity, equality, and freedom.'[2] In *Khosa v Minister of Social Development*, the Court commits the state to the provision of actual resources, social assistance, to an identifiable class of persons — permanent residents. In so doing, the Court moves well beyond dignity as negative liberty to a vision of dignity in which 'wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.'[3]

Dignity *qua* collective responsibility for material agency moves us towards a Sen-like capabilities model. Moreover, it does so without being susceptible to the critique of dignity *qua* negative liberty leveled by exponents of substantive equality. The capabilities model defines equal treatment as the provision of differently situated persons with the material and immaterial means that these individuals, in particular, require to pursue some specific vision of the good.[4] So, for example, Sen argues that pregnant women need more nutrition than non-pregnant women and men and that any basic food program is obliged to recognize this difference in a basic nutritional package.[5]

Dignity *qua* collective responsibility based upon a Sen-like capabilities model also appears to answer the charge that a commitment to substantive equality —

whatever the customs of the country renders it indecent for creditable people, even the lowest order, to be without.') That sounds very much like South African dignity discourse.

Sen thus shifts our focus to the actual 'freedom generated by commodities', and away from 'commodities seen on their own'; he attends to the actual freedom generated by civil liberties, and away from formal constitutional rights viewed in the abstract. Ibid at 74. Sen argues that the best measure of equality or freedom or dignity is the ability of individuals to *convert* such primary goods as *income* or *civil liberties* into the capability 'to choose a life one has reason to value' — or in simpler terms, the ability to pursue one's own ends. Ibid at 75. The virtue of Sen's approach is that it recognizes *(a)* the heterogeneity of capacity that people possess by virtue of biology, custom, or class; *(b)* the heterogeneity of critical functions — from nourishment to civic participation — that may be required to live a life one has reason to value; and *(c)* the heterogeneity of capabilities that people possess — different combinations of more basic functions — which, in turn, enable them to pursue different 'lifestyles' or different visions of the good. Because Sen refuses to reduce 'freedom' to a single basic unit — a utile or a liberty — he is, inevitably, quite pluralistic about the kinds of goods which individuals ought to be free to pursue.

[1] Sen *Development* (supra) at 75.

[2] K van Marle 'No Last Word: Reflections on the Imaginary Domain, Dignity and Intrinsic Worth' (2002) 13 *Stellenbosch LR* 299 ('No Last Word') 306.

[3] *Khosa* (supra) at para 74.

[4] See D Cornell *Defending Ideals: War, Democracy, and Political Struggles* (2004).

[5] See Sen *Development* (supra) at 189–203.

or what I have described elsewhere as substantive autonomy[1] — reinscribes the disadvantage of those who find themselves in a 'state of injury'.[2] A capabilities model does not underscore the lack of freedom of our fellow citizens, nor call undue attention to their injury, so much as it demands that we recognize that all of us require a certain basket of goods in order to pursue our preferred way of being in the world.[3]

Dignity *qua* collective responsibility based upon a Sen-like capabilities model also meets the challenge of those theorists such as Steven Feldman who contend that if we give 'dignity' too much content, then we ultimately put 'freedom' itself at risk. Feldman writes:

> [W]e must not assume that the idea of dignity is inextricably linked to a liberal-individualist view of human beings as people whose life-choices deserve respect. If the state takes a particular view on what is required for people to live dignified lives, it may introduce regulations to restrict the freedom which people have to make choices, which, in the state's view, interfere with the dignity of the individual, a social group or the human race as a whole? The quest for human dignity may subvert rather than enhance choice, and in some circumstances may limit rather than extend the scope of the traditional 'first generation' human rights and fundamental freedoms. Once it becomes a tool in the hands of law-makers and judges, the concept of human dignity is a two-edged sword.[4]

Feldman, however, conflates 'dignity' with 'dignified'.[5] 'Dignity', on my account, rests on objective characteristics of a person. Material goods flow to an individual — or a group — because of these objective characteristics. (So, again, pregnant women would receive a better nutritional package because they require better nutrition than non-pregnant women or men.) The term 'dignified', on the other hand, concerns itself with a subjective judgment about the 'value' of the lives

[1] S Woolman & D Davis 'The Last Laugh: Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions' (1996) 12 *SAJHR* 361, 362–363 ('Unlike the notion of formal autonomy which animates classical liberalism, creole liberalism relies upon a notion of *substantive autonomy*. Substantive autonomy recognizes simultaneously the socially constructed, contingent and dependent nature of the individual and the legitimate nature of demands for freedom from social and political coercion. Both creole liberalism and the notion of substantive autonomy rest upon the premise that real individual autonomy can only occur within the many and competing . . . associations into which an individual is born and within which she 'chooses' to remain a part. On this view, the state has an essential role to play in determining the contours of those 'private' relationships which so fundamentally shape individual identity and in making possible a variety of life choices through support for those associations and organizations which make up society writ large. Creole liberalism envisages a state which does not exhaust the possibilities of individual lives, but helps to make real those possibilities. In addition, creole liberalism requires that the state occupy a crucial, if not always central, place in the debate about and construction of values at the same time as it supports a variety of different ways of being in the world. Put slightly differently, such a state bears the dual responsibility of ruling out ways of being which threaten the core values of our polity (tolerance, dignity, rough equality, the real possibility of democratic participation) and of providing a framework within which competing notions of the good life can coexist — if inevitably uncomfortably.') See also Sen *Development* (supra) at 24 (Describes this same set of normative commitments as *substantive freedom*.)

[2] See W Brown *States of Injury: Power and Freedom in Late Modernity* (1995).

[3] See D Cornell *Just Cause: Freedom, Identity and Rights* (2000)('*Just Cause*').

[4] Cowan (supra) at 52–53.

[5] See D Cornell 'A Call for a Nuanced Constitutional Jurisprudence' (supra) at 668 and D Cornell *Defending Ideals* (supra) at 63–83.

being led. So, for example, feminists often conflate 'dignity' and 'dignified' when they attribute false consciousness to women in traditional communities who have chosen lives which seem undignified because these communities embrace practices that appear to deny women their agency. As Drucilla Cornell notes, while we must recognize that material and legal conditions exist that impair the ability of women to shape their preferred way of being in the world, and that such obstacles to agency ought to be removed,[1] we should be quite chary of the argument that to live life within the frame of a traditional community makes a woman's life undignified.[2]

(b) Dignity and the imaginary domain

This last insight into the lived experience of many women in a patriarchal society underwrites a more general claim to protection of what Drucilla Cornell has described as 'the imaginary domain'.[3] It is in this imaginary domain that each of us can explore — or at the very least come to terms with — who we really are.

[1] See S Woolman & M Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 64. See also A Sen 'More Than 100 Million Women Are Missing' *The New York Review of Books* (20 December 1990)(Analysis of obstacles to women's agency — infanticide, denial of property rights, limited education, lack of access to health care, malnutrition — that lead to substantially higher rates of mortality in Asia, Africa and South America.)

[2] For a more detailed discussion of the relationship between women's agency, customary law and the dictates of dignity, see § 36.5*(c)* infra. See also D Cornell *Just Cause* (supra); *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC).

[3] Drucilla Cornell's 'imaginary domain' is an intuition pump that — unlike Kant's categorical imperative or Rawls' original position, does not frame ethical decisions in terms of an abstract, ostensibly universalizable, community of 'rational' individuals. See D Cornell *The Imaginary Domain* (1995); D Cornell *At the Heart of Freedom* (1998). The imaginary domain takes the radical givenness of individuals — and their desires — seriously as the departure point for ethical inquiry. Van Marle offers the following description of the imaginary domain:

> The imaginary domain means that psychic or moral space in which we are sexed creatures who care deeply about matters of the heart, are allowed to evaluate and represent who we are. Cornell argues that the right to the imaginary domain takes us beyond hierarchical definitions of the self. Integral to the imaginary is the notion that the person can never be assumed as a given, but is always part of a project of becoming. A person is understood as a possibility, an aspiration. . . . [S]he argues that the freedom to become a person is dependent upon the minimum conditions of individuation. . . . The freedom that a person must have to become a person demands the space for the renewal of the imagination and concomitant re-imagining of who one is and who one seeks to become.

K van Marle 'No Last Word' (supra) at 301. Cornell identifies three necessary preconditions for the imaginary domain: (1) physical security of the person; (2) the ability to engage in sufficiently complex symbolic analysis to permit individuation of the self; (3) a commitment to the protection of the imaginary domain. Those conditions bear some similarity to the conditions that the Constitutional Court has identified with dignity: from not permitting physical violations of the self that make selfhood impossible (*Dignity 1*), to those material conditions without which no meaningful individuation can occur (*Dignity 5*), to the provision of some of the formal conditions required for self-actualization (*Dignity 3*). The three preconditions for the imaginary domain are, like the five faces of dignity, constitutive features of a realm of ends.

This imaginary domain maps on to the space I have identified with dignity because it requires that we agree to coordinate our actions with others so as to maximize our freedom, and yet do so only in so far as that freedom is consistent with the freedom of others.

Moreoever, this reconceptualization of dignity stands as a rebuttal, of sorts, to Dennis Davis' somewhat disparaging description of the Constitutional Court's equality and dignity jurisprudence as a mere 'Lego-land'. When viewed from the perspective offered by the imaginary domain, *Booysen*, *Dawood*, *National Coalition of Gay and Lesbian Equality*, *Comitis,* and *Khosa* can be understood as attempts by our courts to create the requisite space within which the individual — in a marriage to a South African citizen, in a same-sex life partnership, in a professional football league or living life as a permanent resident — can reflect upon, and, if necessary, alter the fundamental meaning of her being. What the courts, in each of these cases, have done, is require us to take seriously non-dominant ways of being in the world by forcing us to attend to the centrality of a particular kind of relationship, practice or ascriptive characteristic for the self-representation of a given individual (or group). Dignity *qua* imaginary domain also offers an implicit critique of those Constitutional Court judgments which have failed to recognize adequately the practice of a non-dominant group as essential to that group's self-understanding and have, as a consequence, refused to accord the practice at issue the level of respect that it deserves.

(c) Dignity and trans-cultural jurisprudence

Dignity *qua* regulative ideal and dignity *qua* imaginary domain also point up the possibilities for overcoming the divide between European and African conceptions of justice. Just as dignity *qua* regulative ideal asks us to take seriously the material requirements of others and dignity *qua* imaginary domain asks us to take seriously their unchosen conditions of being, I believe that our dignity jurisprudence could offer some assistance in the development of a conception of justice that takes seriously the traditional norms of African culture that ground the lives of many South Africans.

The Constitutional Court's decisions reflect demonstrable sympathy for the many vulnerable minorities that have sought one form of judicial solicitude or another. At the same time, the Court's current body of jurisprudence demonstrates the challenges that adhere to any attempt to accommodate subordinate bodies of law, be they sacred or profane, with that law — the Final Constitution — from which all other law must derive its force.

As we have already noted, the Final Constitution makes it clear that a community's cultural or linguistic practices secure constitutional protection only where they do not interfere with the exercise of other fundamental rights.[1] This formally

[1] FC s 31(2) could be construed to preclude all discriminatory policies. But that assumes that all such practices are inconsistent with various provisions in the Bill of Rights, in particular, equality and dignity. The Constitutional Court has made it quite clear that not all discrimination is unfair discrimination. See, eg, *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC).

correct articulation of the relationship between FC s 31 and the rest of the Bill of Rights is often assumed to imply that the other substantive rights — including dignity — trump collective cultural concerns because dignity and other substantive rights do not protect such concerns. That, however, is untrue. For example, the Constitutional Court in *Gauteng School Education Bill* recognized the importance for individual dignity, and collective claims for equal respect, of granting communities the right to create schools based upon a common culture, language or religion.[1]

Moreover, the courts often mediate conflicts that arise from cultural practices that pit the dignity interests of the individual against the dignity interests of the community. In *Christian Education*, the Constitutional Court had to assess the relative virtues of arguments that *(a)* justified corporal punishment of children in terms of the understanding of dignity refracted through the tenets of a specific religious faith, and that *(b)* called for bans on such punishment because it turned the children of religious parents into mere instruments for the articulation of a community's beliefs. The difficulty in determining where exactly the polity's interest in dignity lies — or which kind of dignity interest deserves primacy of place — ultimately led the *Christian Education* Court to fudge the issue by declaring that the dignity of children was impaired by corporal punishment meted out in religious schools, but that the same child's dignity was not necessarily so impaired by corporal punishment meted out in religious homes.[2]

The courts have had somewhat greater success in mediating the dignity interests at stake in a number of recent challenges to rules of customary law. In *Bhe v Magistrate, Khayelitsha & Others*, the Constitutional Court found that the customary law rule of male primogeniture — and several statutory provisions that reinforced the rule — impaired the dignity of and unfairly discriminated against the deceased's two female children because the rule and the other impugned provisions prevented the children from inheriting the deceased's estate.[3] However, it is the manner in which the *Bhe* Court negotiates two different kinds of claims for equal respect that is most instructive for our current purposes.

The *Bhe* Court begins with the following bromide: while customary law provides a comprehensive vision of the good life for many South African

[1] *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC)(Court held that IC s 32*(c)* permitted communities to create schools based upon common culture, language and religion.)

[2] *Christian Education of South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 51 (CC)('*Christian Education*') at para 25 ('It might well be that in the envisaged pluralistic society members of large groups can more easily rely on the legislative process than can those belonging to smaller ones, so that the latter might be specially reliant on constitutional protection, particularly if they express their beliefs in a way that the majority regard as unusual, bizarre or even threatening. Nevertheless, the interest protected by section 31 is not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity.') For criticism of *Christian Education*, see 36.4*(c)*(iii) supra. See also S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) § 44.3*(c)*(viii); P Lenta 'Religious Liberty and Cultural Accommodation' (2005) 122 *SALJ* 352.

[3] See *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('*Bhe*').

communities and receives some level of constitutional solicitude,[1] this new-found constitutional respect for traditional practices does not immunize them from constitutional review.[2] The *Bhe* Court must locate any justification of extant customary law in the provisions of the Final Constitution.

The *Bhe* Court then characterizes the customary law of succession in terms that validate its spirit without necessitating that the Court be beholden to its letter. The customary law of succession is, according to the Court, a set of rules

> . . . designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community. . . . The heir did not merely succeed to the assets of the deceased; succession was not primarily concerned with the distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit. Property was collectively owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. He inherited the property of the deceased only in the sense that he assumed control and administration of the property subject to his rights and obligations as head of the family unit. The rules of the customary law of succession were consequently mainly concerned with succession to the position and status of the deceased family head rather than the distribution of his personal assets.[3]

By recasting the justification for customary rules of succession in terms of family and community stability, rather than patriarchy and property, the *Bhe* Court is able to soften its critique. It then notes that the conditions of family and community that gave rise to the challenged rules no longer obtain. The *Bhe* Court writes:

> Modern urban communities and families are structured and organised differently and no longer purely along traditional lines. The customary law rules of succession . . . determine succession to the deceased's estate without the accompanying social implications which they traditionally had. Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family which would include the spouse of the deceased as well as other dependants and descendants. He often simply acquires the estate without assuming, or even being in a position to assume, any of the

[1] See, eg, FC s 39(3): 'The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

[2] *Bhe* (supra) at paras 42–46 ('At the level of constitutional validity, the question in this case is not whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are consistent with the Constitution. This status of customary law has been acknowledged and endorsed by this Court.') See also *Alexkor Ltd & Another v Richtersveld Community & Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC)('*Richtersveld*') at para 51 ('While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution'); *Mabuza v Mbatha* 2003 (4) SA 218 (C), 2003 (7) BCLR 743 (C)('*Mabuza*') at para 32 ('It bears repeating, however, that as with all law, the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights.')

[3] *Bhe* (supra) at para 75.

> deceased's responsibilities. In the changed circumstances, therefore, the succession of the heir to the assets of the deceased does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family and dependants of the deceased.[1]

Customary law has not, the *Bhe* Court ruefully observes, evolved to meet the changing needs of the community. It fails African widows because: '*(a)* … social conditions frequently do not make living with the heir a realistic or even a tolerable proposition; *(b)* … the African woman does not have a right of ownership; and *(c)* the prerequisite of a good working relationship with the heir for the effectiveness of the widow's right to maintenance', as a general matter, no longer exists.[2] Again the Court takes care to note that the fault for this arrested development lies outside traditional communities. Ruptures within traditional ways of life — caused by both apartheid, the hegemony of western culture and capitalism — have prevented the law's evolution.[3] This aside sets the stage for the delivery of the *Bhe* Court's coup de grace: that 'the official rules of customary law of succession are no longer universally observed.'[4] The trend within traditional communities is toward new norms that 'sustain the surviving family unit' rather than re-inscribe male primogeniture.

By having shown that the spirit of succession lies in its commitment to family cohesion, that the traditional family no longer coheres as it once did, and that 'distorted' rules of customary law 'emphasise … patriarchal features and minimise its communitarian ones,' the *Bhe* Court closes the gap between constitutional imperative and customary obligation.[5] Had customary law been permitted to develop in an 'active and dynamic manner', it would have already reflected the *Bhe* Court's conclusion that 'the exclusion of women from inheritance on the grounds of gender is a clear violation of … [FC s] 9(3).'[6] Had customary law not been allowed to ossify, traditional communities would have noted how male primogeniture entrenched 'past patterns of disadvantage among a vulnerable group' and endorsed the *Bhe* Court's re-working of customary understandings of the competence 'to own and administer property' in a manner that vindicates a woman's right to dignity under FC s 10.[7] The *Bhe* Court is able, therefore, to assert that traditional communities have conceptions of dignity worth protecting without being obliged to endorse a rule that quite clearly offends the dignity

[1] *Bhe* (supra) at para 80.
[2] See South African Law Reform Commission *The Harmonisation of the Common Law and the Indigenous Law: Succession in Customary La*w Issue Paper 12, Project 90 (April 1998) 6-9. See also TW Bennett *Human Rights and African Customary Law under the South African Constitution* (1997) 126-7.
[3] See, eg, *Richtersveld Community & Others v Alexkor Ltd & Another* 2003 (6) SA 104 (SCA), 2003 (6) BCLR 583 (SCA) at paras 85–105.
[4] *Bhe* (supra) at para 84.
[5] Ibid at para 89.
[6] Ibid at para 83.
[7] Ibid at para 84.

interests of many women and female children within those communities.[1]

Of course, the *Bhe* Court could have taken a different view of the dignity interests at stake — a view that could, arguably, be said to take somewhat more seriously the claim that apartheid had ravaged African societies. Justice Ncgobo, in dissent, suggests that if the *Bhe* Court had been truly serious about rectifying the wrongs done to African communities under apartheid, the Court would not have, as it did, subordinate customary law to more general constitutional dictates and statutory enactments. Had the majority taken seriously its own interim conclusion that customary law under apartheid reflected a system of colonial control rather than an authentic expression of law, then it might have placed greater weight on recent trends in indigenous law which suggested that women were increasingly being allowed to take up positions in the family to which they had, heretofore, been barred. The majority, in Justice Ncgobo's view, failed to acknowledge the multiplex kinship relationships that primogeniture was meant to protect and that traditional communities continued to support. Ncgobo J then articulates a response to the problem of primogeniture that — he believes — would have allowed indigenous law the requisite space in which to generate a remedy that honoured both the dignity of women and the dignity of the communities of which these women remain a part.[2] For Justice Ncgobo, equal concern and equal respect for the dignity of indigenous law requires that it be accorded a status equal to ostensibly more atomized notions of dignity found in European conceptions of justice.[3] The challenge of trans-cultural jurisprudence now facing the Constitutional Court, in particular, and South Africa, in general, is how to contrive an ethic that refuses to privilege reflexively the language of the western legal tradition over the language of indigenous law. If the discourse of dignity is, ultimately, to be privileged over talk of ubuntu, then, Justice Ncgobo suggests, such privileges must be earned and not merely assumed.

[1] Judge Hlophe employs a similar disabling strategy in *Mabuza*. He recognizes the supremacy of the Final Constitution at the same time as he asserts that the protean nature of customary law should enable it to conform, as necessary, to the dictates of the Bill of Rights. His nuanced assessment of the role of *ukumekeza* reconfigures siSwati marriage conventions in a manner that *(a)* refuses to allow *ukumekeza* to be used by the groom's family as a means of control over the bride and *(b)* consciously places the husband and wife on an equal footing with respect to subsequent determinations of whether a valid marriage under siSwati customary law has taken place. See, further, S Woolman & M Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 64.

[2] See *Bhe* (supra) at para 148, where. Justice Ncgobo writes:

> Our Constitution recognises indigenous law as part of our law. Thus section 211(3) enjoins courts to 'apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.' The Constitution accords it the same status that other laws enjoy under it. In addition, courts are required to develop indigenous law so as to bring it in line with the rights in the Bills of Rights. While in the past indigenous law was seen through the common law lens, it must now be seen as part of our law and must be considered on its own terms and 'not through the prism of common law.' Like all laws, indigenous law now derives its force from the Constitution. Its validity must now be determined by reference not to common law but to the Constitution.

[3] See, especially, M Pieterse '"It's a Black Thing": Upholding Culture and Customary Law in a Society Founded on Non-Racialism' (2001) 17 *SAJHR* 364. (Pieterse engages in a thorough analysis — conceptual and practical — of the manner in which the current 'dualism' of western and customary law might be overcome.) See also D Cornell & K van Marle 'Interpreting Ubuntu: Possibilities for Freedom in the New South Africa' (2006) 6 *African Human Rights LJ* (forthcoming); D Cornell 'A Call for a Nuanced Jurisprudence' (2004) 19 *SA Public Law* 661.

37 Reproductive Rights

Michelle O'Sullivan

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37.1 INTRODUCTION

While reproductive rights protect the health and well-being of both men and women, reproductive rights are of fundamental importance to women. Only when armed with such rights can women effectively exercise the rest of the rights enshrined in Chapter 2 of the Final Constitution and become full and equal members of South African society.

Even under the narrowest of constructions, reproductive rights demand respect for women's bodily integrity and an environment for decision making free from fear of abuse, violence and intimidation. Viewed more broadly, reproductive rights require the provision of information about and access to voluntary and adequate reproductive and sexual health services and may even command the provision of such basic necessities as food, shelter, childcare and education. So although this chapter focuses primarily on abortion, reproductive health engages the full panoply of rights guaranteed women in Chaper 2.

Abortion in South Africa is legally regulated by the Choice on Termination of Pregnancy Act.[1] The Choice Act provides that a pregnancy may be terminated upon request of a woman during the first 12 weeks of the gestation period of her pregnancy,[2] and under somewhat more onerous conditions from 12 to 20 weeks.[3] From 20 weeks onwards terminations are available under more limited circumstances.[4]

The Choice Act provides that only the consent of a pregnant woman is required for a termination. It does not require the consent of a partner or, in the case of a minor, parental consent.[5] Non-mandatory and non-directive counselling are to be promoted by the state.[6] Ideally, this service should be available

* I would like to thank Catherine Bailey, who co-authored this chapter with me in the first edition of this work, for allowing me to use some of that chapter's material in this new chapter.

[1] Act 92 of 1996 ('Choice Act').

[2] Choice Act s 2(1)(a). 'Termination of pregnancy' is a broader term than 'abortion'. Choice Act s 1(x) defines termination as 'the separation and expulsion, by medical or surgical means, of the contents of the uterus of a pregnant woman'. The definition includes abortion and induced labour. In this chapter, termination of pregnancy and abortion are used interchangeably.

[3] Choice Act s 2(1)(b) provides that a pregnancy may be terminated where a woman gives informed consent and a medical practitioner, after consultation with the pregnant woman, is of the opinion that:
(i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or
(ii) there exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality; or
(iii) the pregnancy resulted from rape or incest; or
(iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman.

[4] Choice Act s 2(1)(c) provides that a pregnancy may be terminated after the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife who has completed the prescribed training, is of the opinion that the continued pregnancy:
(i) would endanger the woman's life; or
(ii) would result in a severe malformation of the foetus; or
(iii) would pose a risk of injury to the foetus.

[5] Choice Act ss 5(1), (2) and (3). For a discussion of these sections, see §§ 37.3–37.5, and § 37.6 infra.

[6] Choice Act s 4.

before and after the termination of a pregnancy. The Choice Act stipulates that women shall have access to information concerning their rights in relation to the Act.[1] It further provides that all terminations (surgical and medical) must take place in an approved facility and authorizes provinces to approve health facilities that perform terminations.[2]

While the Final Constitution does not deal expressly with the issue of abortion, several of the rights are relevant to the circumstances in which a woman exercises choice over the decision to terminate a pregnancy. This chapter considers the ways in which the rights to life, privacy, religion, freedom and security of the person, dignity, equality, access to information, expression and children's rights effect the right to abortion in South African law.[3]

37.2 LIFE

IC s 9 provided that 'every person shall have the right to life'. FC s 11 provides that 'everyone has the right to life'. The replacement of 'every person' with 'everyone' presumably reflects the apparent linguistic requirement of Constitutional Principle II that '*everyone* shall enjoy all universally accepted fundamental rights, freedoms and civil liberties.'[4] In *Christian Lawyers Association of South Africa & others v Minister of Health & others*[5] McCreath J correctly held that the two terms are interchangeable and that the change across the board from 'every person' to 'everyone' could never

> have been intended to introduce a significant new class of rights-bearer. It is inconceivable that any new category could have been introduced by the legislature in this obscure way.'[6]

As *Christian Lawyers I* suggests, a technical or literal interpretation of the term 'everyone' cannot settle the question of whether a foetus is included within the term 'everyone' for the purposes of the various rights enshrined in Chapter 2.

[1] Choice Act s 6.

[2] Choice Act s 3(1). Medical terminations of pregnancy are carried out by the administration of mifepristone and prostaglandin hormone. The action of these drugs can take several days. Thus, a woman will, in all likelihood, have left the facility prior to the expulsion of the foetus. See *In Re A Case Stated by the Abortion Supervisory Committee* [2003] 3 NZLR 87 (Court held that a doctor did not act illegally under the Contraception, Sterilisation and Abortion Act of 1977 when performing medical abortions if the woman did not remain on licensed premises until the embryo or foetus was expelled.)

[3] See Section 39(1)(b) of the Constitution of the Republic of South Africa Act 108 of 1996 ('FC' or 'Final Constitution'). FC s 39(1)(b) directs courts to consider international law when interpreting fundamental rights. See K Hopkins and H Strydom 'International Law' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, August 2005) Chapter 30. See also L du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, August 2005) Chapter 3. FC s 39(1)(c) provides that courts may consider comparative law when interpreting fundamental rights. See C Botha 'Interpretation of the Bill of Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 32.

[4] Ibid at 1438A (emphasis added).

[5] 1998 (4) SA 113 (T), 1998 (11) BCLR 1434 (T)(*'Christian Lawyers Association I'*).

[6] Ibid at 1438A–B.

At South African common law, legal subjectivity begins at birth. According to the *nasciturus* fiction, however, a foetus, if subsequently born alive, is deemed to have all the rights of a child, where this is to its advantage. This fiction is used to overcome the absence of legal personality of a foetus and to confer upon the foetus particular rights in a limited number of circumstances.[1] The protection provided by the *nasciturus* fiction does not extend to upholding the right to life of the foetus.[2]

The status of the foetus at common law does not determine the issue of legal personality as a constitutional matter. In *Christian Lawyers I,* McCreath J held that whatever the status of the foetus may be under the common law, under the Final Constitution the foetus is not a legal *persona*.[3] McCreath J reasoned as follows. Because the Final Constitution does not include any express provisions affording the foetus (or embryo) legal personality or protection, the drafters of the Constitution could not have intended to make the foetus a beneficiary of any of the rights and freedoms in Chapter 2.[4] Moreover, one would have expected such a clear commitment given that the common law denied the foetus legal personality:

> One of the requirements of the protection afforded by the *nasciturus* rule is that the foetus be born alive. There is no provision in the Constitution to protect the foetus pending the fulfilment of that condition.'[5]

McCreath J then considered how FC s 12(2), which provides everyone with the right to make decisions concerning reproduction and security and control over their body, might influence the construction of FC s 11:

> Nowhere is a woman's right in this respect qualified in terms of the Constitution in order to protect the foetus.[6]

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[1] *Pinchin & another NO v Santam Insurance Co Ltd* 1963 (2) SA 254, 260 (W)(Extended the application of the *nasciturus* rule to delictual as well as property rights.) See J Sinclair 'Family Rights in D Van Wyk, B De Villiers, J Dugard and D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 502, 526 n78.

[2] See *Christian League of South Africa v Rall* 1981 (2) SA 821 (O); *G v Superintendent, Groote Schuur Hospital, & others* 1993 (2) SA 255 (C). In both cases the court refused to appoint a *curator ad litem* to protect the interests of the foetus against its mother, who attempted to procure a legal abortion in terms of the Abortion and Sterilisation Act 2 of 1975. See also *Van Heerden & another v Joubert NO & others* 1994 (4) SA 793 (A)(Held that a still-born baby is not a person for the purposes of the Inquest Act); S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 31.3(a)(On whether a foetus is the beneficiary of constitutional rights.)

[3] *Christian Lawyers Association I* (supra) at 1443B-C, 1437C-D (On this basis McCreath J upheld the defendant's exception that the plaintiffs' particulars of claim did not disclose a cause of action. The notice of exception had alleged that: 'A foetus is not a bearer of rights in terms of' FC s 11. FC s 11 'does not preclude the termination of pregnancy in circumstances and manner contemplated by the act' and 'the right of women to choose to have their pregnancy terminated in the circumstances and manner contemplated by the act, is protected under [FC] ss 9, 10, 11, 12, 14, 15(1) and 27(1)(a).')

[4] *Christian Lawyers Association I* (supra) at 1441H-I.

[5] Ibid at 1441I.

[6] *Christian Lawyers Association I* (supra) at 1441J-1442A (McCreath J emphasized that this does not mean that the state is prohibited from enacting legislation to regulate or to restrict abortion. The state may invoke FC s 36 for that purpose.) For a discussion of FC s 36 in the context of reproductive rights, see § 37.11 infra.

If the drafters had wanted to protect the foetus in the Bill of Rights, McCreath J contends that FC s 28, which specifically protects the rights of the chid, would have been an appropriate vehicle. McCreath J then notes that there are clear indications that the safeguards in FC s 28 do not extend to protect the foetus. A 'child' for the purposes of the section is defined as a person under the age of 18 years.[1] McCreath J writes:

> Age commences at birth. A foetus is not a 'child' of any 'age'. The rights afforded by section 28(1) are in respect of 'every child' — ie all children. Yet certain of the rights could not have been intended to protect a foetus; paragraph (f) relates to work, paragraph (g) to detention and (i) to armed conflict. The protection afforded in other paragraphs of subsection (1) must accordingly also exclude the foetus . . . If FC s 28, specifically designed to protect the rights of the child, does not include the foetus within its ambit of protection, then it can hardly be said that the other provisions of the Bill of Rights, including FC s 11, can be said to do so. [2]

Although, rights are conferred on 'everyone' by the Bill of Rights except where a specific class of person is alone singled out for protection, McCreath believes that the foetus could not be included in the scope of protection of 'everyone'.[3] To acknowledge that the foetus is protected under FC s 11, McCreath reasons, would mean ascribing to 'everyone' a meaning which is different to that which it bears everywhere else in the Bill of Rights. Moreover granting constitutional protection to the life of the foetus would afford the foetus the same protection as that of the mother: Termination of pregnancy would no longer constitute abortion, but murder: '[T]he drafters of the Constitution could not have contemplated such far-reaching results without expressing themselves in no uncertain terms.'[4]

McCreath J then suggests that the Final Constitution ought to be viewed primarily as an egalitarian instrument designed to eradicate systematic forms of domination and disadvantage based on race, gender and class. Once the rights of women enshrined in FC ss 9, 10, 11, 12, 14, 15 and 27 are viewed through the prism of transformation, the argument that the foetus possesses the status of a legal person loses much of its force.

The Constitutional Court is apt to confirm the decision in *Christian Lawyers I*, at least in part, because like McCreath J, it is unlikely to consider the foetus to be a bearer of constitutional rights and accord the foetus a 'right to life'. This conclusion is supported at international law[5] and by the jurisprudence in foreign

[1] FC s 28(3).

[2] *Christian Lawyers Association I* (supra) at 1442D-E.

[3] Ibid at 1442F-I. (McCreath J refers specifically to FC ss 12(1)(a), 12(1)(b), 12(2)(b), 14, 15(1), 16(1), 17, 18, 21, 30 and 35.) For a critique of McGreath J's interpretation of the beneficiaries of these varied rights, see S Woolman 'Application' (supra) at § 31.3(a).

[4] Ibid at 1443B-C.

[5] See L Hernandez 'To Bear or Not to Bear: Reproductive Freedom as an International Right' (1991) *Brooklyn International LJ* 309, 322 (Foetus not a person under the American Convention on Human Rights even though Convention protects the right to have life respected from the moment of conception); Inter-American Commission on Human Rights *Baby Boy* (Unreported, 6 March 1981)(Decided that American Convention's language does not translate into a legally protected right of the foetus.) See also Organisation of African Unity, Protocol on the Rights of Women, Article 14 (11 July 2003)(Significantly broadens the protection of the right of women to terminate a pregnancy. This protocol is not in effect as it requires the ratification of 15 African countries to bring it into effect, and has only been ratified by 12 countries.)

jurisdictions.[1] In *Roe v Wade* Justice Blackmun decided that the use of the word 'person' in the Fourteenth Amendment to the US Constitution — which provides that the states shall not 'deprive any person of life . . . without due process of law' — did not include the unborn.[2] In *Winnipeg Child and Family Services (Northwest Area) v G(DF)*, the Canadian Supreme Court confirmed that Canadian law does not recognize the unborn child as a legal or juridical person whether the case falls under family law, tort law or succession law.[3] The *Winnipeg Child* Court held that the state's interest in preserving fetal life may only be served by legislative solutions that are at once principled and minimally intrusive with respect to the rights of pregnant women.[4] This very position has also been endorsed by the European Court of Human Rights.[5]

In contrast, the German courts have tackled the abortion question in terms of the right to life. Article 2(2) of the Basic Law provides that '[e]veryone shall have the right to life and to the inviolability of his person'.[6] The supreme value accorded to the right to life in the German Constitution should be understood as a direct response to German history and the Nazi's view, during the Third Reich, that certain forms of life and certain kinds of human being were worthless.[7]

[1] See *R v Demers* [2003] BCJ 75, 2003 BCCA 28 (British Columbia Court of Appeal confirmed that a foetus is not captured by the term 'everyone' for the purposes of Canadian Charter s 7. Canadian Supreme Court dismissed Demer's application for leave to appeal.) See also *Kelly v Kelly* 1997 SLT 896, 1997 SCLR 749 (Scottish Second Division Court dismissed an application for an interdict by a husband seeking to prevent his estranged wife from terminating a pregnancy. Confirmed the nasciturus rule that an injury to a foetus was not actionable before birth and observed that recognising a right of the foetus to continue in the womb would inevitably create a conflict between the existing legal rights of the mother and those of the unborn child.)

[2] 410 US 113, 158 (1973).

[3] [1997] 3 SCR 925.

[4] See *R v Morgenthaler* (1988) 44 DLR 385, [1988] 1 SCR 30 (Canadian Supreme Court finds that abortion provisions of Criminal Code that violate a woman's Charter s 7 right to fundamental justice — without ruling on foetus' right to life.)

[5] *VO v France* [2004] 2 FCR 577 (French Court acquitted the doctor of the offence of unintentional homicide of the applicant's child on the basis that the foetus was not a human person for the purposes of the offence. The applicant appealed to the European Court of Human Rights alleging that the French authorities' refusal to classify the taking of life of her unborn child's life as unintentional homicide, and the absence of criminal legislation to prevent and punish such an act, breached Article 2 of the ECHR: 'Everyone's right to life shall be protected by law.' The ECHR Court held that the issue of when the right to life began fell within the margin of appreciation enjoyed by contracting European states and that consensus on such protection has not been resolved within the contracting states. The Court correctly held that in these circumstances, it was neither desirable nor possible to answer in the abstract the question of whether an unborn child was a person for the purposes of Article 2.)

[6] The German courts have also relied on right to dignity provision in GBL, article 1(1). See M Glendon *Abortion and Divorce in Western Law* (1987) 24–39.

[7] See D Van Zyl Smit 'Reconciling the Irreconcilable? Recent Developments in the German Law on Abortion' (1994) 2 *Medical LR* 302, 303–308 (For a discussion of the history of German abortion laws, in particular the *Erbgesundheidsgesetz* of 1933, which provided for mass sterilization and abortion for eugenic purposes and restrictions on abortions for healthy German mothers.) The state has a legitimate interest in upholding the intrinsic value of potential life. However, guaranteeing a foetus the right to life under FC s 11 is not the appropriate mechanism to achieve this end. The Final Constitution, like the German Basic Law, marks a break with a long history of repression. The state's use of repressive criminal sanctions to prevent persons from exercising control over their reproductive lives, especially as they relate to abortion, would be inconsistent with the meaning of that historic break.

In 1993, the German Constitutional Court ('FCC') struck down a federal abortion statute[1] on the grounds that

> the state had a primary duty to protect human life, even before birth. This duty, which began at conception, related to every individual life and included a duty also to protect the unborn child against the mother.[2]

Although the majority conceded that this duty to protect the foetus may clash with the pregnant woman's right to protection of her human dignity, bodily integrity and the development of her personality, they maintained that the Basic Law established minimum standards of protection for the foetus. The minority did not deny that the foetus required constitutionally-based protection. They emphasized, however, that because pregnancy involves the pregnant woman from beginning to end, it was not appropriate to set the rights of a woman against those of a foetus.[3] The majority resolved the conflict between the protection of unborn life and the pregnant woman's rights by drawing a conceptual distinction between illegality, which refers to the 'status of the conduct in the legal system as a whole', and criminality, which refers only to the criminal law.[4] On this view, although an abortion could never be justified constitutionally because of the duty of the state to protect unborn life, the state was not under an 'absolute duty' to criminalize all illegal abortions. The FCC therefore decided that where a woman insisted on having an abortion after she had been subjected to counselling designed to persuade her to carry the foetus to term,[5] and the abortion was performed within a legislatively defined period, such an abortion need not be a criminal offence.[6]

Ronald Dworkin, unlike the FCC, rejects the notion that arguments about abortion turn primarily on whether a foetus is the beneficiary of constitutional rights.[7] Any argument that accords the foetus constitutional rights merely grants the state a derivative interest in prohibiting or regulating abortion. The real issue,

[1] *BVerfGE* A III J2 (1993).

[2] Ibid at 31.

[3] The minority contended that in the early stages of pregnancy the pregnant woman had to be fully involved in all decisions relating to the pregnancy. Only an advanced foetus should be protected by the state by means of the criminal law. See *BVerfGE* A III J2 (supra) at 311–312.

[4] See Van Zyl Smit (supra) at n 97 (This distinction is unique to German criminal law theory.)

[5] The German court recognized that if women were encouraged by the state to continue a pregnancy to term, the state would have a duty to support these women and the children that they bear. FC s 27(1) provides: Everyone has a right of access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The fiscal constraints upon our health and welfare budgets, limited child care grants, high maintenance default rates, and limited mandatory maternity leave and childcare benefits mean that South African women receive limited state assistance for pregnancy and child-rearing. In this context, it is appropriate that the Choice Act provides only for non-directive counselling, allowing women to make reproductive decisions in relation to abortion free of state interference or coercion. In addition, women who have decided to have an abortion are seldom dissuaded from doing so by counsellors. Cf D Hansson and D Russell 'Made to Fail: The Mythical Option of Legal Abortion for Survivors of Rape and Incest' (1993) 9 *SAJHR* 500, 511.

[6] *BVerfGE* A III J2 (supra) at 312–313.

[7] R Dworkin *Life's Dominion: An Argument about Abortion and Euthanasia* (1993).

argues Dworkin, is not whether we object to abortion because we believe that the foetus is a rights bearer whose particular interests must be defended by a third party, but whether we attach some intrinsic value to life and the potential for human life. The interest of the state in potential human life flows from its interest in protecting the sanctity of human life. Abortion is to be regarded as morally repugnant where it offends against this commitment to the sanctity of life. The state may therefore be justified in regulating abortion on grounds that are independent of the rights-bearing capacity of the foetus itself. Hence, argues Dworkin, the state has a 'detached' (as distinct from 'derivative') interest in the regulation of abortion.

The FCC appears to have conflated the detached interest and the derivative interest of the state in regulating abortion. The majority drew no distinction between pre-natal and post-natal life. Because the foetus is a bearer of constitutional rights from conception, the state was found to have a derivative interest in prohibiting abortion.

If our Constitutional Court were to hold that the foetus is a bearer of constitutional rights, it is possible that only abortions performed to save the life of the mother would be a justifiable limitation upon 'the right to life' of the foetus.[1] The Supreme Court of Ireland has taken this very approach. In *Attorney General v X and others*, a 14 year old girl became pregnant as a result of rape and indicated an intention to commit suicide if required to carry the child to term.[2] The Supreme Court held that the proper test to apply when interpreting Article 40, Section 3(3) of the Irish Constitution is that a termination of pregnancy is permissible if it is established, as a matter of probability, that there is a real and substantial risk to the life of the mother that can only be avoided by the termination of pregnancy. The *Attorney General v X* Court held that in view of the likelihood of suicide, such a risk existed.

The experience of South African women under the Abortion and Sterilisation Act provides a compelling argument against the adoption of such a restrictive approach. Thousands of women died each year of pregnancy-related causes, and particularly from unsafe, induced abortion.[3] In contrast, recent research has

[1] See *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC) at para 268 (Capital punishment unanimously held to be unconstitutional. Several justices based their decisions, in whole or in part, upon the fact that the death penalty violates the right to life. Although an analysis of abortion was not germane to the issues considered, Mahomed DP did refer to it.) See also S Woolman and H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, September 2005) Chapter 34.

[2] See *Attorney General v X and others* (1992) 15 *BMLR* 104. This section provides that 'The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, gaurantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right'.

[3] H Rees, J Katzenellenbogen et al 'The Epidemiology of Incomplete Abortion in South Africa' (1997) 4 *SAMJ* 432 (Estimates from data collected in September 1994 at fifty six public hospitals in nine provinces in South Africa that there were at least 425 deaths in South African hospitals annually as a result of unsafe abortion, and an estimated 44 686 women were admitted with incomplete abortions.) Unsafe abortion was, prior to the Choice Act, one of the chief causes of South Africa's high rate of maternal morbidity. See Parliamentary Select Committee on Abortion 'Presentation on Behalf of the Medical Research Council's Incomplete Abortion Research Group' (1995) available at www.geocites.-com/terjeskjerdal/abort_1.htm.

demonstrated that the Choice Act, combined with accessible, affordable reproductive health care services, will prevent the majority of these deaths.[1] The reduction of morbidity associated with safe terminations protects a woman's right to life and enhances a woman's quality of life.[2]

Even if the foetus itself does not have a right to life, the state nevertheless has a 'detached' interest in fostering the sanctity of human life by protecting potential life and by regulating abortion in the late stages of pregnancy.[3] The ECHR supports this line of argument when it writes:

> At best, it may be regarded as common ground between states that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person enjoying protection under the civil law, moreover, in many states, such as France, in the context of inheritance and gifts, and also in the United Kingdom, requires protection in the name of human dignity, without making it a 'person' with the 'right to life' for purposes of Article 2.'[4]

The state's detached dignity interest in fetal life is relevant to the question of the validity of the Choice Act. At the very least, it seems safe to conclude that the constitutional enquiry does not end with a finding that the foetus does not have a right to life.

37.3 PRIVACY[5]

FC s 14, the right to privacy, is said to be primarily about a 'right to be let alone'.[6] At the very least it ensures that certain areas of an individual's life remain free from state interference. In *Eisenstadt v Baird,* the US Supreme Court wrote:

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[1] See R Jewkes and H Rees 'The Impact of Age on the Epidemiology of Incomplete Abortions in South Africa after Legislative Change' (2005) 112 *BJOG: International Journal of Obstetrics and Gynaecology* 355 (Demonstrates convincingly that the introduction of the Choice Act has had a positive impact on maternal morbidity from incomplete abortions, and has resulted in an extremely significant reduction in abortion associated mortality. By comparison with the 1994 research cited above, the 1998–2001 mortality data indicates that there has been a 91.06% reduction in deaths from unsafe abortions.)

[2] See R Cook 'Advancing Reproductive Rights Beyond Cairo and Beijing' (1996) 3 *International Family Planning Perspectives* 22 (Considers the international-law obligations of governments to reduce maternal mortality and morbidity.)

[3] See D Myerson 'Abortion: The Constitutional Issues' (1999) 116 *SALJ* 50.

[4] *VO v France* [2004] 2 FCR 577 at para 84.

[5] FC s 14 provides:

Everyone has the right to privacy, which includes the right not to have —

(a) their person or home searched;
(b) their property searched;
(c) their possessions seized;
(d) the privacy of their communications infringed.

Section 13 of the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC') provided:

> 'Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.'

See D McQuoid-Mason 'Privacy' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 38.

[6] Glendon (supra) at 36.

> [I]f the right of privacy means anything it is the right of an individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[1]

In *Roe v Wade*, the US Supreme Court struck down a Texas law criminalizing abortion on the grounds that the right to privacy embraced the right to terminate a pregnancy.[2] The court acknowledged the need to strike a balance between the woman's right to privacy and the state's interest in potential human life.[3] The *Roe* Court established a framework, known as the trimester approach, in terms of which the state's interest in protecting potential life did not become compelling until after the point of viability of the foetus.[4] Only at the point of viability, or in the third trimester of pregnancy, would the interest of the state in protecting potential life be sufficiently compelling to justify the restriction of a woman's right to choose to have an abortion. Even then, said the *Roe* Court, the compelling interest of the state in protecting potential life remained subordinate to the woman's life and health. A state could impose restrictions on abortion prior to viability only if the measures were necessary to protect a woman's health and were the least restrictive means of doing so.

There are good reasons to allow a state to prohibit abortion after viability. At about that point, foetal brain development is sufficient to feel pain, which indicates that the foetus has protectable interests of its own. By then a woman has had sufficient opportunity to decide whether she believes that it is best to terminate the pregnancy. Hence she is not then denied the right to choose abortion.[5]

[1] 405 US 438, 453 (1972)(Decision provided unmarried couples with the right to choose to use contraceptives. Although the right to privacy is not specifically mentioned in the US Constitution, it is implicitly guaranteed in various of its provisions.) See L du Plessis 'Personal Rights: Life, Freedom, and Security of the Person, Privacy and Freedom of Movement' in Van Wyk et al (eds) *Rights and Constitutionalism* (supra) 212, 242 (Summary of American privacy jurisprudence); R Dworkin 'Unenumerated Rights: Whether and How *Roe* Should be Overruled' (1992) 59 *University of Chicago LR* 381, 417 ('Unenumerated Rights').

[2] 410 US 113 (1973).

[3] Ibid at 158.

[4] 'Viability' is the point at which a foetus can exist independently outside the uterus. Courts have recently considered whether this includes living with artificial aid. See *Kassama v Magat* 767 A 2d 348 (Md Spec App 2001)(Held that 'viability' means potentially able to live outside mother's womb, albeit with artificial aid); *Carhart v Stenberg* 972 F Supp 507 (D Neb 1997)(Held that in the abortion context 'viability' of foetus occurs when there is reasonable likelihood of foetus' sustained survival outside womb, with or without artificial support, and that even as medical technology advances, the point of viability is determined not in relation to technology but in relation to when the foetus can survive without artificial support.)

[5] The Choice Act utilizes a three-stage framework. After 20 weeks gestation, which is just prior to the point of viability, terminations are available only in limited circumstances. In addition, the Choice Act requires that two health workers be involved in a decision to terminate a pregnancy in the late stages of pregnancy, indicating the increased importance and difficulty of the decision. The limited circumstances under which terminations are available in the Act after 20 weeks protect women's health, as the risks involved in a termination increase as the pregnancy develops. The interests of health workers are also protected, as most prefer to perform an early, rather than a late, termination. Women are encouraged to exercise their choice to terminate a pregnancy in the early stages of a pregnancy, by making abortion available on request through the first 12 weeks.

The viability demarcation also acknowledges that abortion becomes 'morally more problematic as the foetus develops towards the shape of infanthood, as the difference between pregnancy and infancy becomes more a matter of location than development.'[1] The reasons advanced for the limitation of a right to abortion at viability appear to be sufficiently compelling to satisfy the limitations test set out in FC s 36.

In the two decades following *Roe*, a number of US Supreme Court decisions curtailed the right to choose an abortion.[2] In *Planned Parenthood of Southeastern Pennsylvania v Casey,* the US Supreme Court reaffirmed that women have the constitutional right to choose to have an abortion, but abandoned the trimester framework of *Roe* and held that the state had a legitimate interest in foetal life throughout pregnancy.[3] A state could promote this interest by enacting restrictive measures designed to encourage childbirth over abortion, provided that the measures did not unduly burden a woman's right to choose an abortion. According to *Casey*, a restriction imposes an undue burden on a woman if it has 'the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.'[4] A woman challenging such restrictive measures bears the initial burden of demonstrating 'undue' harm.[5]

Inconvenience, even severe inconvenience, is not an 'undue burden' on a woman's right to an abortion. Instead, a court's proper focus must be on the practical impact of the challenged regulation and whether it will have the likely effect of preventing a significant number of women for whom the regulation is relevant from obtaining abortions. To constitute an undue burden, a challenged

[1] See R Dworkin 'Unenumerated Rights' (supra) at 429–430.

[2] See, eg, *Harris v McRae* 448 US 297 (1980) (Upheld a ban on federal Medicaid reimbursements for abortions except in the case of life endangerment); *Hodgson v Minnesota* 497 US 417 (1990)(Upheld a requirement that a young woman seeking an abortion notify both parents); *Ohio v Akron Center for Reproductive Health* 497 US 502 (1990)(Upheld a requirement that a young woman obtain the consent of one parent or a judicial waiver); *Webster v Reproductive Health Services* 492 US 490 (1989)(Upheld a statute that created a presumption of 'viability' at 20 weeks'; the preamble to the statute asserted that '[t]he life of each human being begins at conception' and that 'unborn children have protectable interests in life, health and well being'; the legislation also prohibited state public employees from counselling women about abortion and banned the performance of abortions at public facilities.)

[3] 505 US 833 (1992).

[4] Ibid.

[5] J Benshoof '*Planned Parenthood v Casey* — The Impact of the New Undue Burden Standard on Reproductive Health Care' (1993) 269 *JAMA* 2249. Prior to *Casey,* the court had consistently invoked the principle of government neutrality. For example, in *Harris v McRae*, this principle was found to justify a state not providing any financial assistance to women who choose to have abortions. *Casey* was the first case that did not involve government funding in which the court abandoned the principle that the government must act with neutrality in regard to a woman's decision to terminate her pregnancy. But see *Carhart v Smith* 178 F Supp 2d 1068 (D Neb 2001)(Held that to afford no protection to the effectuation of a woman's decision to obtain an abortion would render her fundamental right meaningless); *Eubanks v Schmidt* 126 F Supp 2d 451 (WD Ky 2000)(Women have the right to choose to have an abortion before viability and to obtain it without state's imposition of any undue burden. A law will impose a prohibited 'undue burden' on the right to choose abortion if it has the purpose or effect of placing a substantial obstacle in path of women seeking abortion of a nonviable fetus. A State may pass a law aimed at decreasing number of abortions so long as law strives to reach this goal by influencing woman's choice, rather than by creating substantial obstacles.)

state regulation must have a strong likelihood of preventing women from obtaining abortions rather than merely making abortions more difficult to obtain.[1] American courts have also held that the states do not violate the US Constitution by expressing a preference for normal childbirth over abortion.[2] The government has no constitutional obligation whatsoever to facilitate abortions, and can further restrict that right short of placing an undue burden on a woman's right to choose.[3] Despite the erosion of reproductive rights in these decisions, American courts have consistently held that a state may not place its interest in foetal life above its interest in the life or health of a woman at any time during the course of a pregnancy.[4]

As the US jurisprudence suggests, locating a right to choose an abortion within the right to privacy has numerous drawbacks. Justice Ruth Bader Ginsberg notes that analysing the right to terminate in terms of privacy — an autonomy right — has made it easier for the court to justify limiting women's access to abortion. She suggests that analysing the issue in terms of the right of women to the equal protection of the law — a solidarity right — would have made it more difficult for the court to rule, for example, that neither the US Constitution nor federal statute requires state health insurance reimbursements for elective abortions.[5]

Research in America suggests that the negative consequences of restrictions on abortion and the lack of access to publicly funded abortion facilities are visited primarily on poor, young, rural, and battered women in dysfunctional families.[6] Locating the right to choose an abortion exclusively in the right to privacy could well have a similar effect in South Africa and leave the current position of the most vulnerable women in our society unchanged. As June Sinclair has argued:

> In the US the Supreme Court in *Roe v Wade* held that a woman's constitutional right to privacy prevented a state from forbidding abortion. This recognition of women's autonomy in the 'private' sphere of reproduction, however, is what has been used to justify failures on the part of the federal government to provide funding necessary to make the abortion choice meaningful to those women who cannot afford medically acceptable procedures. The duty of the state not to prohibit abortion in this sphere of privacy has come to mean

[1] *Karlin v Foust* 188 F 3d 446 (7th Cir 1999).

[2] *Women's Emergency Network v Bush* 323 F 3d 937 (11th Cir 2003); *Taylor v Kurapati* 600 NW2d 670 (Mich App 1999).

[3] *Victoria W v Larpenter* 205 F Supp 2d 508 (EDLa. May 21, 2002).

[4] See *Women's Medical Professional Corp v George Volnovich* 130 F 3d 187 (6th Cir 1997)(Held that even though state has right to ban post-viability abortions, and therefore applications of this ban are constitutional if woman's health and life are not at risk, post-viability abortion regulation which threatens life or health of even a few pregnant women should be deemed unconstitutional.) See also *Planned Parenthood of Rocky Mountains Services, Corp. v Owens* 2002 WL 571784 (10th Cir 2002); *Rhode Island Medical Soc v Whitehouse* 66 F Supp 2d 288 (Dis RI 1999); *McMillan v City of Jackson* 701 So 2d 1105 (Miss 1997).

[5] R Ginsburg 'Sex Equality and the Constitution: The State of the Art' (1992) 14 *Women's Rights Law Reporter* 361, 362.

[6] J Benshoof 'The Impact of the New Undue Burden Standard' (supra) at 2254. Under the Final Constitution, the right of access to reproductive health care services, (see § 37.8 infra), freedom and security of the person (see § 37.5 infra), and a substantive interpretation of equality (see § 37.4 infra), should make it unnecessary to rely entirely on privacy to found a right to abortion in South Africa.

that it also has no duty to intervene to protect this choice that its non-intervention guarantees. The negative right does not translate into a positive claim to safe, subsidized abortion facilities.'[1]

Despite these limitations, Ronald Dworkin cautions against dismissing the privacy argument altogether. He suggests that it should be used in conjunction with, rather than in contra-distinction to, an equal protection analysis.[2] This approach makes sense in a country such as ours with its long history of state regulation of reproduction.[3]

37.4 EQUALITY[4]

Equality has a special place in the Final Constitution.[5] As we try to expiate the sins of a past 'in which inequality was systematically entrenched,'[6] the Final Constitution sets its face against laws and practices which reinforce the subordination of disadvantaged groups and undermine their dignity.[7]

The Final Constitution is concerned with both substantive and formal equality. Substantive equality looks beyond abstract legal rights to the actual social, political and economic conditions of disadvantaged groups. From this perspective it is clear that, in order to secure the equal access of persons to constitutional rights and freedoms, more may be required from the state than abstention from interference in the lives of its citizens. The state may be required to intervene positively to provide the minimum resources necessary for the enjoyment of certain rights.

Because reproductive autonomy is a precondition for the sexual and social equality of women,[8] women ought to be entitled to claim state resources in

[1] See J Sinclair (supra) at 525. Similar criticism of these decisions has been levelled by numerous commentators. See DE Roberts 'The Future of Reproductive Choice for Poor Women and Women of Colour (1992) 14 *Women's Rights Law Reporter* 309 ('A choice — at least where fundamental rights are concerned — means more than the abstract ability to reach a decision in one's mind. A true choice means an uncoerced selection of one course of action over another and the ability to follow one's chosen course. An indigent woman may have the legal option to decide that she wants to terminate her pregnancy. She may even feel that an abortion is essential to her economic, physical and emotional survival. But if the government will pay for her childbirth expenses and not for an abortion, and she has no money for either option, she does not have a choice.')

[2] R Dworkin *Life's Dominion: An Argument about Abortion and Euthanasia* (1993) 54.

[3] On the principle of procreative autonomy underlying decisions upholding the right to contraception and abortion see R Dworkin 'Unenumerated Rights' (supra) at 417.

[4] See J Kentridge 'Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 35.

[5] See C A MacKinnon *Toward a Feminist Theory of the State* (1989) 246.

[6] See *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 33.

[7] See *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC) at paras 218, 262 and 322.

[8] See *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC), *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41; *Harksen v Lane* 1998(1) SA 300 (CC), 1997 (11) BCLR 1489 (CC); *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC); *Nonkululeko Letta Bhe and others v The Magistrate Khayelitsha and others* 2005 1 SA 580 (CC), 2005 (1) BCLR 1 (CC).

that choice safely and securely.[1] By looking at abortion as an equality issue we can also assess reproductive choice in the whole context in which women fall pregnant and decide to terminate a pregnancy or to raise children.[2] The social and sexual equality of women will only be achieved when women are free to choose whether or not to have sex, and when women are free to decide on the number and spacing of their children, if any.[3] A legal right to early and safe abortion is an issue of individual conscience, social justice and sexual equality.

The biological facts of life determine that it is women who become pregnant. However, it is also a social reality of South African life that, in addition to the burden of childbirth, the costs and responsibility of bringing up children are disproportionately borne by women. Goldstone J emphasised in *President of the Republic of South Africa and Another v Hugo* the acute challenges involved in child rearing for South African women:

> For all that it is a privilege and the source of enormous human satisfaction and pleasure, there can be no doubt that the task of rearing children is a burdensome one. It requires time, money and emotional energy. For women without skills or financial resources, its challenges are particularly acute. For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources, are immense. The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship. The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment.[4]

The social and economic consequences of pregnancy may include: losing a job or promotion, low-paid or no maternity leave, lack of adequate childcare, interrupted careers or education.[5] This double burden of birth has a profound impact on women's ability to participate as equal citizens.[6]

[1] See R Dworkin 'Why Liberals Should Care About Equality' *A Matter of Principle* (1985) 205.
[2] Ibid.
[3] Ibid.
[4] *Hugo* (supra) at para 38.
[5] In South Africa 330–400 of every 1 000 births are to young women and girls under 19. See *Youth Speak Out . . . A Study on Youth Sexuality* (NPPHCN/UNICEF (1996). Without the option of abortion some of these women drop out of the education system and thereby forgo the benefits of education. The result is a cycle of poverty for women already trapped by their disadvantaged social circumstances. See *Mfolo and Others v Minister of Education, Bophuthatswana* 1992 (3) SA 181 (B), 1994 (1) BCLR 136 (B) (Held that a regulation prohibiting pregnant women from pursuing their studies to be inconsistent with section 9 of the Bophuthatswana Constitution.) See also *Student Representative Council of Molepolole College of Education v Attorney General* [1995] (3) LRC 447 (Botswana Court of Appeal)(Found regulations obliging pregnant students to leave Teachers Training College or miss the following semester to contravene section 15(3) of the Botswana Constitution. Section 15(3) prohibits sex-based discrimination); *Lloyd Chaduka and Morgenster College v Enita Mandizvidza*, Judgment No SC 114/2001, Civil Appeal No 298/2000)(Zimbabwe Supreme Court)(Held that a contractual provision that required women to withdraw from college if they become pregnant is contrary to public policy and the Zimbabwean Constitution.)
[6] The repealed Abortion and Sterilization Act operated unfairly to discriminate against women generally by denying them control over their own fertility, but also discriminated indirectly against black, poor, and rural women. Under the Abortion and Sterilization Act, 61.3% of the legal abortions performed in South Africa during 1995 were on white women. See answer to Question in National Assembly on 14 March 1996 by Dr Zuma, Minister for Health, Interpellations, questions and Replies of the National Assembly Third Session — First Parliament 1–14 March 1996.

The equality clause in the Final Constitution provides expressly that everyone has the right to equal protection and benefit of the law. FC s 9(2) provides that 'equality includes the full and equal enjoyment of all rights and freedoms' and supports a substantive rather than purely formal approach to equality. If we accept that the primary purpose of the equality clause is to assist disadvantaged groups to overcome the inequality of their condition, we must then separate substantive equality claims from other equality claims. This may be important if, in claiming equal protection, men or partners of pregnant women attempt to prevent women from asserting their reproductive rights. The demand for substantive equality in the domain of reproductive rights makes the connection between systemic discrimination against women and women's unique reproductive role.[1] With respect to disputes over reproductive rights, a man's formal right to equality must yield before a woman's substantive right to equality.[2] Indeed, the text of FC s 9(3) embraces pregnancy,[3] in addition to sex and gender, as a prohibited ground of discrimination and thereby acknowledges that pregnant women are members of a systematically disadvantaged group whose historical and current condition require enhanced judicial solicitude.

Because the social consequences of pregnancy may profoundly impair a woman's ability to participate as citizens,[4] FC s 9(3), recognizes that women deserve to be treated with equal concern and respect in relation to their biological difference, not punished for it.[5] Although the Bill of Rights addresses discrimination on the basis of pregnancy, it is likely to be many years before women are free and equal to men in their sexual relationships. The Choice Act recognizes that to achieve sex and gender equality, women of all ages must be able to decide

[1] K Mahoney 'Canadian Approaches to Equality Rights and Gender Equity in the Courts' in R Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 439.

[2] See G Brodsky & S Day 'Canadian Charter: Equality Rights for Women' *Canadian Advisory Council on the Status of Women* (September 1989) 192. See also *Coe v County of Cook* 162 F 3d 491 (7th Cir 1998)(Upheld principle that the constitutional right of a woman to have an abortion without interference from the man who impregnated her precludes recognition of any constitutional right of the man to interfere); *Paton v British Pregnancy Advisory* [1979] QB 276 (In the absence of the right to be consulted under the Abortion Act, a husband had no rights enforceable in law or in equity to prevent his wife from having an abortion or to stop the doctors carrying out the abortion which was lawful under the 1967 Act); *Paton v United Kingdom* (1981) 3 EHRR 408 (European Commission found that the husband's and potential father's right to respect for his private life and family life cannot be interpreted so widely as to embrace such procedural rights as claimed by the applicant, i.e. a right to be consulted, or a right to make applications about an abortion which his wife intends to have performed on her.)

[3] See *Brink v Kitshoff* NO 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 42. But see *Geduldig v Aiello* 417 US 484 (1974)(Disingenuous comparison made between pregnant and non-pregnant persons); *Bliss v AG of Canada* [1979] 1 SCR 183 (Held that discrimination on the ground of pregnancy did not amount to discrimination on the basis of sex.)

[4] For example, abortions in England and Wales rose by over 14 % to a six-year high in 1996 following a government public health warning that certain contraceptive pills carried an increased risk of blood clots. See 'Blood Clots Fears Only Covering Explanation: Abortions Up 14%' *The Guardian* (21 February 1997).

[5] See *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 (Canadian Supreme Court adopted a new test, abandoning the similarly situated or male comparator test, which focuses on the impact of laws on the context of the person affected. This test analyses discrimination in terms of disadvantage, which requires judges to look at the real experience of women or other claimants and to confront systematic discrimination.)

whether to terminate a pregnancy. Parliament has acknowledged that women are best placed to make this choice, and has provided for abortion on request within the first 12 weeks of pregnancy.[1] If women present early for terminations, both doctors and properly trained midwives can perform the termination procedure.[2] Abortion on request, combined with access to medical terminations, heralds a new age in women's reproductive health: I say heralds, because such unencumbered access to abortion is not yet the reality for many women in South Africa.[3]

The right to access health care services, including reproductive health care, is guaranteed in FC s 27.[4] A failure by any state-controlled clinic or hospital to provide termination of pregnancy on the same scale as any other medical or surgical procedure unfairly discriminates against pregnant women under FC s 9 and violates FC s 27. Similarly, given that FC s 9 is enforceable between private persons[5] — as is the Promotion of Equality and Prevention of Unfair Discrimination Act[6] — medical aid schemes may not be able to refuse funding for terminations of unwanted pregnancies without infringing a woman's constitutional and statutory rights.

37.5 Freedom and Security of the Person

The right to freedom and security of the person has been extended in the Final Constitution to include the right of everyone to bodily and psychological integrity. This subsection encompasses the right to make decisions concerning reproduction and to security in and control over one's body.[7] The decision to terminate a pregnancy falls clearly within the ambit of this right.

In *Christian Lawyers II,* Mojapelo J held that FC ss 12(2)(a) and (b) guarantee the right of every woman to determine the fate of her pregnancy — whether to terminate it or not — and that this freedom of choice is reinforced by the rights to equality, dignity, life, privacy and to access to reproductive health care.[8] He confirmed that while the state has a legitimate interest in the protection of prenatal life, such regulation may not amount to a denial of the right to freedom and security of the person.

[1] Choice Act s 2(1)(a).

[2] Choice Act s 10(1)(a).

[3] The Choice Act came into effect on 1 February 1997. See K Dickson, R Jewkes, H Brown, H Rees and L Mavuya 'Abortion Service Provision in South Africa Three Years After Liberalization of the Law' 34 (3) *Studies in Family Planning* (2003) 277 (Reveals that three years after enactment of the Choice Act, only 32% of the 292 designated abortion facilities were functioning; 27% of functioning facilities were in the private sector. Substantial parts of South Africa were without abortion services — resulting in gross inequalities in service availability.)

[4] FC s 27(1)(a).

[5] See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31.

[6] Act 4 of 2000.

[7] FC s 12(2): Everyone has the right to bodily and psychological integrity which includes the right-(a) to make decisions concerning reproduction; (b) to security in and over their body.

[8] *Christian Lawyers Association v National Minister of Health and Others* 2005 (1) SA 509, 526 (T), 2004 (10) BLLR 1086, 1103 (T)('*Christian Lawyers II').*

The Constitutional Court's purposive approach to the interpretation of FC s 12 — which looks at the right in its broader constitutional context and situates it within our particular historical condition — is especially important in the context of reproductive rights: for the 'right to choose means little when women are powerless.'[1]

The Constitutional Court first considered the scope of freedom and security of the person under the IC in *Ferreira v Levin NO & others*.[2] The *Ferreira* Court construed the right quite narrowly[3] and limited its reach to maintaining physical integrity within the context of unlawful detention and proscribing cruel, inhuman and degrading treatment.[4]

In his minority judgment, Ackermann J interpreted the ambit of freedom and security of the person, and freedom in particular, to be the right of individuals 'not to have obstacles to possible choices and activities' put in their path by the state.[5] However, this reliance on a classically liberal notion of freedom from state intervention suffers from limitations for women similar to those created by the right to privacy. It does not, for one, ground a positive claim against the state to provide women with access to safe and affordable abortion facilities. The explicit and detailed provisions of FC s 12 recognize that the struggle of women for personal autonomy has, historically, been a struggle for inclusion in society, rather than exclusion by the state.[6]

FC s 12 confronts directly the fact that many women do not enjoy security in and control over their bodies.[7] The extremely high rate of rape, sexual abuse, forced sex, sexual intimidation, domestic violence and femicide in South

[1] See C Smart *Feminism and the Power of Law* 151 (A generous interpretation of freedom does not imply absolute freedom or no state regulation.)

[2] 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)(*'Ferreira'*). IC s 11(1) provided that 'every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial. IC s 11(2) prohibited all forms of physical, mental and emotional torture as well as cruel inhuman and degrading treatment.

[3] *Ferreira* (supra) at para 158 (Chaskalson P took the view that the constitutional challenge to s 417(2)(b) of the Companies Act 1973 should be based on the right to a fair criminal trial.)

[4] See *S v Coetzee & others* 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC)(On the narrow construction of right to freedom in IC s 11(1)).

[5] *Ferreira* (supra) at para 54.

[6] See H Lessard 'Relationship, Particularity and Change: Reflections *R v Morgenthaler* and Feminist Approaches to Liberty' (1991) 36 *McGill LJ* 263, 292.

[7] FC s 12(1)(c) extends the protection of freedom and security of the person to be free from all forms of violence from either public or private sources and may be used to develop the common law of delict. See *Rail Commuter Action Group and Others v Transnet Ltd t/a Metrorail and Others (No 2)* 2003 (5) SA 593 (C), 2003 (3) BCLR 288 (C); *Rail Commuter Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC); R Jewkes and L Penn Kekana *'He Must Give Me Money, He Musn't Beat Me: Violence Against Women in Three South African Provinces.*' (Women's Health Medical Research Council 1999) 11 (Surveyed 1306 women in 3 provinces and revealed that 26.8% of women from the Eastern Cape, 28.4% of Women from Mpumalanga and 19.1% of Women in the Northern Province had been physically abused by a current or ex-partner.) See S Matthews, N Abrahams et al (2004) 'Every Six Hours a Woman is Killed by Her Intimate Partner: A National Study of Female Homicide in South Africa' (2004) (5) *MRC Policy Brief* 2 (Reported that, in 1999, 8.8 per 100 000 of women aged 14 years and older were killed by their partners, the equivalent of one women being killed every six hours.)

Africa has forced the Constitutional Court to acknowledge that that 'spousal abuse and domestic violence 'is a pervasive and frequently hidden problem that challenges society at every level' and that 'domestic violence is 'systematic, pervasive and overwhelmingly gender-specific.'[1] The circumstances in which women become pregnant are often beyond their control: their partners refuse to use condoms or to let them practise contraception,[2] or have intercourse with them against their will.[3]

HIV infection is another consequence of our coercive sexual environment. South African women in violent relationships have an increased risk of being infected with HIV than women in non-violent relationships.[4]

The history of reproductive rights in South Africa is a history of pervasive, highly invasive regulation. Women were subject to the marital power of their husbands and relegated to the status of perpetual minors.[5] As mothers, they were accorded equal status as guardians of their children as recently as 1993.[6] In addition the racist population control policies of the apartheid government sought to control black women's fertility by the use of injectable contraceptives — another egregious assault on the bodily integrity, dignity and equality of women.[7] Until recently abortion was criminalized.[8] Women either carried unwanted foetuses to term or sought abortions on the backstreets.[9]

Our constitution's express recognition of the experience of repression and degradation by South Africa's women is a departure from international freedom and security of the person provisions.[10] In the course of rejecting its racist and

[1] *S v Baloyi* 2002 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC) at para 11. See also *Sonderup v Tondelli* 2001 (1) SA 1171 (CC), 2001 (12) BCLR 152 (CC) at para 34.

[2] See B Klugman and R Weiner 'Occasional Paper No 28' Women's Health Project, Centre for Health Policy, University of Witwatersrand (1992) 27 as quoted in J Birnbaum 'Contextualising Choice: Abortion, Equality and the Right to Make Decisions Concerning Reproduction' (1996) 12 *SAJHR* 485, 500 n 47.

[3] Beijing Conference Report '1994 Country Report on the Status of Women' (1994) 44 (Places the number of reported rapes in 1993 at 23 318.) The South African Police Service acknowledges that rapes are radically underreported. They estimate that only 1 in 35 rapes is reported.

[4] K Dunkle and R Jewkes *Gender-based Violence and HIV Infection Among Pregnant Women in Soweto* (Gender and Health Group, Medical Research Council 2003).

[5] Marital power was finally abolished for all races retrospectively by s 29 of the General Law Fourth Amendment Act 132 of 1993. See F Kaganas & C Murray 'Law and Women's Rights in South Africa: An Overview' in *Gender and the New South African Legal Order* (1994) 13.

[6] Guardianship Act 192 of 1993.

[7] During apartheid, the government's population policy was designed to control black South African population growth. Many black women were injected with a contraceptive known as Depo Provera. As a result contraception is a highly politicized issue.

[8] Abortion and Sterilization Act 2 of 1975 (Repealed by the Choice Act).

[9] An estimated 42 000 to 300 000 backstreet abortions were performed annually under the Abortion and Sterilization Act. The women involved face a high risk of permanent infertility, disability and mortality from septic abortions. See ARAG Submission to Ad Hoc Select Committee on Abortion and Sterilization (1995)(text on file with author).

[10] Article 3 of the Universal Declaration of Human Rights (1948) provides that 'everyone has the right to life, liberty and security of the person'. Articles 9 and 10 of the International Covenant on Civil and Political Rights (1966) provide for liberty and security of the person in the context of freedom from unlawful arrest and detention, as does Article 6 of the African Charter on Human and People's Rights (1981).

sexist past, South Africa now leads, and no longer follows, in the field of human rights.[1]

The Choice Act promotes a woman's right to freedom and security of her person by affording every woman the right to choose to have an early, safe and legal abortion. The language is not gender-neutral. It applies to women. The Choice Act recognizes that each woman is best placed to make the decision to terminate in accordance with her individual beliefs.[2]

Whether the choice Act's various infringements of FC s 12 are reasonable and justifiable limitations of women's reproductive choice in South Africa is considered below.[3] The nature of the liberty afforded to women under FC s 12 will be important in determining whether the state has taken the requisite steps to ensure full enjoyment of this right. However, as Ackermann J suggests in his dissent in *Ferreira*, rights to freedom and security are bound up with the conditions for their exercise.[4] They are, in particular, contingent upon having access to the reproductive health care services expressly provided for in FC s 27.[5] Without wide access to health facilities and health workers prepared to perform early and safe abortions, these FC s 12 right's will be largely meaningless.[6] By giving women control of their own fertility under statute and through the Final Constitution, we create a framework within which women will truly be able to enjoy the fundamental freedom to choose the number and the spacing of their children.

37.6 CHILDREN'S RIGHTS

Christian Lawyers II concerned a constitutional challenge to those provisions of the Choice Act that required only the consent of a minor in order for her to obtain a termination of pregnancy.[7] The Act does not require parental consent. The Christian Lawyers Association alleged that women or girls below the age of 18 are not capable, without parental consent or control, of making an informed decision as

[1] Article 16(1)(e) of the Convention on the Elimination of All Forms of Discrimination Against Women ('Women's Convention') (1979) provides that: 'State parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.')

[2] In the first 12 weeks it is the woman's decision alone.

[3] See § 37.11 infra.

[4] Ackermann J draws on the wisdom of Isaiah Berlin in order to warn us against the danger of conflating freedom with the condition of its exercise. *Ferreira* (supra) at para 52. Freedom is never lost, they both argue, and the state is under a certain obligation to promote education, health, justice, to raise standards of living, which is 'not directed at the promotion of liberty itself, but to the conditions in which alone its possession is of value. Useless freedoms should be made usable but they are not identical with the conditions indispensable for their utility.' I Berlin 'Introduction' in *Four Essays on Liberty* (1969) at liii–lv, as quoted by Ackermann J in *Ferreira* (supra) at para 52, n 55.

[5] FC s 27(1)(a). See also Article 14(2)(b) of the Women's Convention, which obliges state parties to take all appropriate measures to eliminate discrimination in rural areas, which include the rights 'to have access to adequate health care facilities, including information, counselling and services in family planning.'

[6] R *v Morgenthaler* (1988) 44 DLR (4th) 385, [1988] 1 SCR 30 ('*Morgenthaler*').

[7] Ibid.

to whether or not to have a termination of pregnancy. Since a girl is, on this view, never capable of giving informed consent, they contended that sections 5(1),(2) and (3) of the Choice Act — which do not require parental consent — are unconstitutional. In the case of a minor requesting a termination, the Act advises that she consult with her parents, guardian, family or friends before the termination. But if she chooses not to do so, she is not, under the Act, to be denied a termination. The Christian Lawyers Association sought a declaration that section 5*(a)* was inconsistent with the rights of children to family or parental care and to be protected from maltreatment, degradation or abuse, and *(b)* violated a child's best interests and the right to equal protection of the law.[1]

Mojapelo J considered the entire scheme of the Choice Act. The Act requires informed consent. It provides that a termination can only be performed by a medical practitioner or registered midwife at a designated facility. It obliges the state to promote the provision of counselling before and after a termination. It encourages a young woman to consult family or friends prior to obtaining a termination of pregnancy. It requires that women be informed of their rights under the Act.[2] Mojapelo J concluded that the legislature had not, in fact, left termination of pregnancy unregulated and that the cornerstone of the Choice Act is that a pregnant woman of any age is required to give informed consent in order to obtain a termination.[3]

He considered what 'informed consent' means in this context: namely knowledge, appreciation and consent.[4] 'Knowledge' means that a woman who consents to a TOP must have full knowledge 'of the nature and extent of the harm or risk'. The requirement of 'appreciation' implies more than mere knowledge. The woman concerned 'must also comprehend and understand the nature and extent of the harm or risk.'[5] 'Consent' means that a woman must consent to the harm or risk associated with the termination of her pregnancy. Her consent 'must be comprehensive.' That is, 'it must extend to the entire procedure inclusive of any consequences.'[6] In sum, Mojapelo J writes, 'valid consent can only be given by someone with the intellectual and emotional capacity for the required knowledge, appreciation and consent.'[7] The Act thereby recognises that where the capacity for informed consent exists, in spite of the youthfulness or age of the person, such a person can obtain a termination of pregnancy. Age is no bar to informed consent.

[1] FC s 28(1)(b) provides: Every child has the right to family care or parental care. FC s 28(1)(d) provides: Everyone has the right to be protected from maltreatment, neglect, abuse or degradation. FC s 28(2) provides: A child's best interests are of paramount importance in every matter concerning the child.

[2] *Christian Lawyers Association II* (supra) at 514–515.

[3] Ibid at 515.

[4] See *Waring and Gillow v Sherborne* 1904 (TS) 340, 344 cited in *Christian Lawyers Association 2* (supra) at 515 ('It must be clearly shown that the risk was known, that it was realised, that it was voluntarily undertaken. Knowledge, appreciation, consent — these are the essential elements; but knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent.')

[5] See *Castell v De Greeff* 1994 (4) SA 408, 425 (C); J Neethling, J M Potgieter and P J Visser *Law of Delict* (3rd Edition, 1999) 100–101 as cited in *Christian Lawyers Association II* (supra) at 516.

[6] *Castell* (supra) at 425 as cited in *Christian Lawyers Association II* (supra) at 516.

[7] See *Castell* (supra) at 425 and J Neethling, J M Potgieter and P J Visser (supra) at 120 as cited in *Christian Lawyers Association II* (supra) at 516.

Mojapelo J went on to hold that the approach of the Choice Act in relation to minors was, in light of the requirements of informed consent, constitutional. He reasoned as follows. First, the Final Constitution affords everyone the right to make decisions concerning reproduction and security over their bodies, including girls under eighteen. Second, the right to equality makes everyone equal before the law and prevents unfair discrimination on the basis of age. Any distinction drawn on the basis of age would violate the right to equality and the party engaging in age discrimination would have the burden of proving the discrimination fair.[1] Third, the argument that the provisions of the Choice Act under attack do not cater for the best interests of the girl child is unwarranted. Mojapelo J writes:

> The legislative choice opted for in the Act serves the best interest of the pregnant girl child . . . because it is flexible enough to recognise and accommodate the individual position of a girl child, based on her intellectual, psychological and emotional make up and actual majority.[2]

The judge concluded that provided a girl under 18 is capable of giving informed consent, she can obtain a termination of pregnancy.[3]

The approach adopted by Mojapelo J is consistent with the approach of courts in other jurisdictions.[4] In *American Academy of Paediatrics v Lungren* the Supreme Court of California declared a statute unconstitutional which required a minor to obtain parental or judicial consent for an abortion.[5] The *Lungren* court emphasised that the legislation under scrutiny allowed a minor to make decisions about child-care and whether to give a child up for adoption — decisions that had potentially deleterious consequences for the minor's long term mental and physical health. The *Lungren* court held that:

> It is particularly difficult to reconcile the defendant's contention — that parental or judicial involvement in the abortion decision is necessary to protect a minor's emotional and

[1] *Christian Lawyers Association II* (supra) at 528.

[2] Ibid.

[3] As the case was decided on exception, the Christian Lawyers Association may amend their defective claim and proceed with a constitutional challenge. They are unlikely to proceed with the claim as it is presently conceived. As presently conceived, the Christian Lawyers Association's constitutional complaint is underpinned by the notion that a parent has a right to veto a minor's termination of pregnancy, for any reason at all and irrespective of the circumstances giving rise to the pregnancy. No exceptions are contemplated. No suggestion is made that this discretion must be exercised wisely nor of the circumstances under which the veto may be exercised. This violates a minor's right to procreative autonomy. To require parental consent in circumstances of parental rape or incest could never be in the best interests of a child. The order sought by the Christian Lawyers Association, which they suggest is necessary to cure the constitutional omission, would in fact render the legislation unconstitutional. The Christian Lawyers Association proposes parental consultation as an alternative requirement. This requirement would be at odds with the basis for the primary cause of action, namely that a minor is never capable of giving informed consent for an abortion. The suggested requirement of parental consultation is underpinned by the notion that a child is capable of giving informed consent whereas a requirement of parental consent is not.

[4] 2 See *Gillick v West Norfolk and Wisbech Area Health Authority and Another* [1988] All ER 402, 409 (HL)(Supports approach that is consistent with procreative autonomy and evolving capacity of minors in respect of access to reproductive health services.)

[5] 940 P2d 797 (Cal Sup Ct 1997).

> psychological health — with these statutory provisions authorizing a minor who has given birth to consent, on her own, to the adoption of her child. The decision to relinquish motherhood after giving birth would seem to have at least as great a potential to cause long-lasting sadness and regret as the decision not to bear a child in the first place.[1]

Mojapelo J's approach in *Christian Lawyers II* likewise recognises that Parliament has made a rational legislative choice in enacting the provisions of the Choice Act relating to minors and that this choice respects the autonomy of minors to make important reproductive decisions.

37.7 RELIGION

FC s 15 protects everyone's right to freedom of conscience, religion, thought, belief and opinion. Taken together, and read with FC s 31, these rights protect the moral autonomy of both groups and individuals. When a state prohibits abortion, it invariably imposes a particular conception of morality that encroaches upon the moral autonomy of women protected by FC s 15.[2] However the converse is not true. The Choice Act does not coerce anyone into having an abortion, and therefore does not infringe the right to religious freedom.

Rights of conscience do, however, protect health workers who refuse to perform abortions because of their beliefs or opinions about abortion. This right is subject to certain limitations. For example, a health worker cannot refuse to perform an abortion where it is necessary to save the life of the woman concerned or to alleviate her pain. This proviso does not violate the right to freedom of conscience or religion of providers because it is grounded in the 'double effect' doctrine. This doctrine provides that any medical intervention which has a good objective, such as preserving a patient's life, may be performed despite the fact that it can only be done at the expense of what is believed to be an unavoidable harmful effect. Similarly, rights of conscience do not permit health workers to misinform or to fail to inform women of their rights in relation to the Act.[3] In other jurisdictions the right to conscientious objection has been narrowly interpreted. It protects the conscience of health workers who perform the actual procedure, not the conscience of every person involved.[4]

The right not to be unfairly discriminated against on the basis of religion, conscience and belief is also entrenched in the Employment Equity Act (EEA)[5] and the Promotion of Equality and Prevention of Unfair Discrimination (PEPUDA).[6] These Acts provide a basis for health workers to challenge unfair discrimination by an employer in respect of conscientious objection, or an

[1] Child Care Act 74 of 1983 s 18(4)(d)(Permits a minor to consent to the adoption of her child.)
[2] P Farlam 'Freedom of Religion' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 43.
[3] See § 37.9 infra.
[4] *Janaway v Salford Health Authority* [1988] 3 All ER 1079 (HL).
[5] Act 55 of 1998.
[6] Act 4 of 2000.

employer's failure to prevent such unfair discrimination.[1] PEPUDA also protects health workers from unfair discrimination from co-workers and other private persons. A health worker who assists in the performance of terminations and suffers victimisation or discrimination from colleagues who object to terminations may institute a complaint in terms of PEPUDA.

Contraceptive coverage laws have been challenged in the United States on the basis that they violate the religious beliefs of Catholic charitable entities. In *Catholic Charities of Sacramento, Inc v The Superior Court of of Sacramento County*,[2] a Catholic Church affiliated employer challenged the Women's Contraception Equity Act (WCEA).[3] The WCEA was enacted by the legislature in 1999 to eliminate gender discrimination in health care benefits and to improve access to prescription contraceptives. The WCEA requires employers that offer coverage for prescription drugs to cover prescription contraceptives. However, it includes an exception for religious employers that enables them to exclude coverage for 'contraceptive methods that are contrary to the religious employer's religious tenets.' Catholic Charities did not qualify as a 'religious employer' under the WCEA because it did not meet the four criteria of the definition of 'religious employer'.[4] The *Catholic Charities* Court upheld the constitutionality of the WCEA on the grounds that the WCEA was designed to remedy gender discrimination and did not interfere with the free exercise of religion. In *Catholic Charities of the Diocese of Albany v Serio,* a New York Supreme Court heard a constitutional challenge to similar provisions in New York's Women's Health and Wellness Act (WHWA).[5] The New York Supreme Court upheld the WHWA on the grounds that it was narrowly tailored to effect the purpose of improving healthcare for women and ending discrimination against women in healthcare coverage. The *Serio* Court also held that the Act's 'narrow exception serves to protect the rights and health of large numbers of employees who do not share their employer's religious views.'[6] In our secular society, the religious views of employers and health workers should not be imposed upon women in a manner that impinges upon constitutional rights to reproductive autonomy.

[1] See EEA s 60(3)(Provides that if an employer failed to take necessary steps to deal with unfair discrimination, and it is proved that the employee has contravened the relevant provisions, the employer must be deemed also to have contravened that provision.) See also *Ntsabo v Real Security CC* (2003) 24 ILJ 2341, 2377F, 2378A (LC).

[2] 85 P 3d 67(Cal 2004)..

[3] California Health & Safety Code 1367.25 and California Insurance Code 0123.196.

[4] A 'religious employer' includes an entity for which each of the following is true: '(a) The inculcation of religious values is the purpose of the entity; (b) The entity primarily employs persons who share the religious tenets of the entity; (c) The entity serves primarily persons who share the religious tenets of the entity; (d) The entity is a non-profit organization.'

[5] RJI No. 01-03-072905 (NY Sup Ct 2003)(New York Supreme Courts are the lowest courts in the State, not, as the name suggests, the highest.)

[6] Ibid at 17.

37.8 DIGNITY[1]

FC s 10 provides that everyone 'has inherent dignity and the right to have their dignity respected and protected'.[2] The denial of the right to choose an abortion infringes the right of a woman to human dignity. In *Morgenthaler*, Wilson J asserted that:

> The right to reproduce or not to reproduce which is the issue in this case is one such right and is properly perceived as an integral part of modern women's struggle to assert her dignity and worth as a human being.[3]

Denying a woman the freedom to make and to act upon decisions concerning reproduction treats her as a means to an end and strips her of her dignity. The right to dignity twinned with the right to life raises vexed issues with regard to the quality of life of a woman who must bring an unplanned pregnancy to term. The consequences of an unwanted pregnancy forced to term impacts not only upon a woman's quality of life but often that of her existing family and children, the newborn, and society as a whole. Access to reproductive health care services, including abortion services, enhances the quality of life of all these individuals.

Denise Myerson argues that because the concepts of human dignity, equality and freedom function differently in limitations analysis and rights analysis, even if the foetus is not a rights bearer, consideration still needs to be given as to whether the values of human dignity, equality and freedom operate as a constitutional constraint on legislation governing access to abortion. She suggests that the value of human dignity is most obviously under threat when abortion is permitted, because the destruction of foetal life, which has intrinsic value, threatens human dignity. The value of human dignity in the context of foetal life suggests permitting abortion up until the point of viability. Meyerson concludes that the Choice Act probably strikes just the right balance between these competing considerations.[4]

37.9 ACCESS TO HEALTHCARE

FC s 27(1)(a) provides that everyone has the 'right to have access to health care services, including reproductive health care services'. FC s 27(2) provides that the 'state must take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of these rights'. The Final Constitution does not guarantee a right to health, only the qualified right of access to health care services. However, the right of access to health care services and the related right to health in international law must be considered when interpreting this section.[5] Articles 10 and 12 of the Women's Convention explicitly protect

[1] See D Cornell 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, August 2005) Chapter 36.

[2] *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC).

[3] *R v Morgenthaler* (1988) 44 DLR (4th) 385, 491.

[4] D Myerson (1999) 116 *SALJ* 50, 56–57. See § 37.2 infra.

[5] D Bilchitz 'Health' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, August 2005) Chapter 56A.

equal access of women to reproductive health care services. Other health provisions in international law implicitly protect reproductive health by protecting both women and the children they bear.

Reproductive health is the condition in which the reproductive process is accomplished in a state of complete mental, physical and social well-being. It is not merely the absence of disease or disorders of the reproductive process. Reproductive health therefore implies that people have the ability to practice and to enjoy 'safe' sexual relations. It further implies that women can go safely through pregnancy and childbirth and should be assured that the conditions necessary for infant survival, growth and healthy development exist.[1] Access to safe abortion services contributes to reproductive health through the reduction of maternal morbidity and mortality.

37.10 Access to Information

FC s 32 provides everyone with a right of access to information held by the state and required for the exercise or protection of his or her rights. Moreover, it extends the application of the right to other persons and provides for the enactment of national legislation to give effect to the right.[2]

Article 10(h) of the Women's Convention states that the right to access to information means that women have the right 'to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.' Lack of access to information about reproductive health will prevent women from exercising their right to reproductive decision-making, which includes making informed choices, and this will consequently limit the control that they have over their bodies.

The state's failure to provide information about reproductive health could be an actionable offence. In *Brownfield v Daniel Freeman Marina Hospital*, the Court of Appeal of California held that a rape survivor who was denied access to information concerning emergency contraception by a Catholic hospital could sue for medical malpractice.[3] The hospital asserted that providing the morning-after pill constituted performing an abortion. The *Brownfield* Court concluded that this treatment constituted prevention (ie. birth control) rather than a termination of pregnancy[4] and that 'a women's right to control her treatment must prevail over [the hospital's] moral and religious convictions.'[5] The *Brownfield* Court reasoned that the duty to disclose information about reproductive health arises from the fact that an adult of sound mind has

> the right, in the exercise of control over [her] own body, to determine whether to submit to lawful medical treatment. Meaningful exercise of this right is possible only to the extent that

[1] See R Cook 'Human Rights and Reproductive Self-Determination' (1995) 44 *American University LR* 975, 1002.

[2] See J Klaaren and G Penfold 'Access to Information' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) Chapter 61.

[3] 208 Cal App 3d 405, 412–414 (1989) ('*Brownfield*')

[4] See also *Margaret S v Edwards* 488 F Supp 181 (EDLa 1980)('[A]bortion as it is commonly understood, does not include the IUD, the 'morning-after' pill, or, for example, birth control pills.')

[5] *Brownfield* (supra) at 6.

> patients are provided with adequate information upon which to base an intelligent decision with regard to the option available.[1]

The Choice Act demands that medical practitioners and midwives provide women with information concerning their rights in relation to the Act. In other jurisdictions, medical practitioners who refuse to perform a termination are advised to provide woman with information about facilities where they can obtain a termination. Our courts will have to decide whether this clause is a reasonable and justifiable limitation upon the freedom of conscience of health workers.[2]

37.11 Freedom of Expression

Abortion implicates the right to freedom of expression in so far as the dissemination of information assists or dissuades women from terminating a pregnancy. In *Africa Christian Action v Marie Stopes South Africa*, the Advertising Standards Authority heard argument that the advertising of 'safe' and 'pain free' abortions is misleading and offensive and that there was no evidence to substantiate such claims.[3] The Advertising Standards Authority Appeal Committee dismissed the complaint. The Committee concluded that there was sufficient evidence to substantiate Marie Stopes' advertising of abortions as 'safe' and 'pain free'.[4]

In relation to whether the advertisement was misleading and offensive, the Committee ruled that having regard to the constitutional right of reproductive autonomy and a woman's statutory rights under the Choice Act, it cannot be said that this advertisement caused widespread offence. Although the advertising may

[1] *Brownfield* (supra) at 8.

[2] See § 37.12 infra.

[3] *Africa Christian Action v Marie Stopes South Africa* (Advertising Standards Authority Final Appeal Committee, 22 April 2004) available at www.wlce.co.za/litigation/Heads%20ArgumentMarieStopes.pdf (accessed on 7 June 2005)('*African Christian Action*').

[4] Ibid at paras 10.2–10.5. The Committee relied on the strict requirements in the Choice Act for the approval of designated abortion facilities, similar World Health Organisation standards and evidence from the World Health Organisation that abortion when performed by trained healthcare providers with proper equipment, correct technique and sanitary standards is one of the safest medical procedures. The Committee also considered the constitutional protection afforded to reproductive decision-making and the preamble to the Choice Act which provides for access to safe, effective, affordable and acceptable methods of fertility regulation. Marie Stopes produced evidence to demonstrate that conscious sedation is a technique to reduce the pain and anxiety associated with a TOP. The Committee concluded that the average reasonable person knows that the phrases 'safe and unsafe abortions' are used in the context of terminating a pregnancy by persons with the necessary skills in an acceptable medical environment compared with termination by persons without the necessary skills in an environment that fails to meet acceptable medical standards. A reasonable person would know that every medical or surgical procedure by its nature connotes risk, and that errors of judgment in carrying out the procedure, or post-operative complications may render the procedure itself unsafe. The record included the Department of Health's view that 'any restriction on advertising abortion may prevent women from obtaining much needed information about the availability of safe and high quality abortion services in their vicinity, thus denying them the opportunity to make informed choices.' The Committee concluded that in weighing up these interests, the balance must favour the respondent's interest in informing society that they do provide a 'safe' abortion service.

be offensive to certain segments of our society, such offence does not meet the stringent requirements of the relevant test.[1] The Committee held that:

> Even if it were found that the advertisement is offensive one would have to balance the right of freedom of expression against the offensiveness to public values in the context of an open and democratic society based on human dignity, equality and freedom.'[2]

In *Open Door and Dublin Well Women and others v Ireland*, the applicants complained that an injunction issued by the Irish Supreme Court ordering that the applicants, 'their servants or agents be perpetually restrained from assisting pregnant women within the jurisdiction to travel abroad to obtain abortions by referral to a clinic, by making for them any travel arrangements, or by informing them of the identity and location of and the method of communication with a specified clinic or clinics or otherwise' impaired their freedom of expression.[3] The European Court of Human Rights ruled that the issuing of the injunction constituted an infringement of Article 10's right to freedom of expression.[4] Although the restriction pursued the legitimate aim of the protection of morals — of which the protection of the right to life of the unborn in Ireland is but one aspect — the injunction preventing applicants from receiving or imparting information about abortion facilities outside Ireland was disproportionate to the aim pursued.[5] The counselling of pregnant women neither advocated nor encouraged abortion, the Court observed, but was confined to an explanation of the available options. Furthermore, the injunction was found to be ineffective in protecting the right to life of the unborn since it did not prevent large numbers of Irish women from continuing to obtain abortions in Great Britain.[6] In fact, the Court found that the injunction created a risk to the health of those women seeking abortions at a later stage in their pregnancy due to a lack of proper counselling and appropriate medical supervision.[7]

37.12 LIMITATIONS

The purpose of the Choice Act is to provide for early, safe and legal abortion. It provides a legal framework for women to exercise their reproductive rights in a

[1] *African Christian Action* (supra) at para 12.
[2] Ibid at para 13.1.
[3] 14234/88 [1992] ECHR 68 (*'Open Door'*).
[4] Article 10 of the European Convention of Human Rights provides:
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'
[5] *Open Door* (supra) at para 73.
[6] Ibid at para 76.
[7] Ibid at para 77.

responsible manner. In so doing it also limits the right to terminate a pregnancy in certain important respects. For example, abortion on request is available only in the first 12 weeks of gestation, and on limited grounds up until 20 weeks.[1] Some pro-choice activists argued that 14 and 24 weeks were more appropriate time limits.[2] However, as registered midwives will also be able to perform the termination in the first 12 weeks, a compromise around an earlier date is not unreasonable.

After 12 weeks the decision is no longer the woman's alone. The decision is then shared by the woman and a medical practitioner. The latter must be of the opinion that the pregnant woman falls within one of the specified grounds.[3] This balances the need for later abortions, particularly for young women or rape survivors who may not realize they are pregnant until an advanced stage of pregnancy, and the need to encourage women who present early to act in the interests of their own health and well-being.

The availability of abortion after 20 weeks of pregnancy is severely curtailed.[4] In other jurisdictions late terminations are rare.[5] The restrictions contained in the Choice Act are an attempt to balance the increasingly compelling interests of the foetus at and after viability.[6]

Abortion is often treated as a litmus test when individuals are assessed as to their suitability for the bench. But a litmus test of what? I'd like to suggest that a democracy — and the individuals citizens therein — can have its moral maturity measured by the reproductive rights its secures for women. Democracy is, after all, grounded in a belief that individuals can and, indeed, ought to become autonomous, self-governing moral agents. Only a regime that accords women meaningful reproductive rights can claim to treat the better half of its population seriously as citizens and decision-makers.[7] In *Morgenthaler*, Wilson J roundly condemned the criminalization of abortion in Canada for this very reason: it failed to treat women as autonomous human beings worthy of the equal concern and respect demanded by the Charter. By so linking liberty and equality rights, Wilson's judgment in *Morgenthaler* provides persuasive authority for the proposition that the South African state cannot simply subordinate the physical integrity and moral autonomy of women to other state interests without doing violence to the

[1] Because it is difficult to predict with accuracy the actual date of conception, the date is counted from the 'gestation of pregnancy', which means from the first day of the last menstrual period ('LMP'). Many women will only conceive in the 14-day period after the LMP. Accordingly, many women will only be 10 and 18 weeks pregnant respectively, at 12 and 20 weeks' gestation.

[2] See ARAG Freedom of Choice (Abortion) Bill.

[3] See § 37.1 supra (Discusses specified grounds).

[4] Choice Act s 2(1)(c).

[5] In 1992, only 53 out of approximately 160 000 terminations in the UK occurred after 24 weeks, 50 because of severe foetal handicap and 3 to prevent grave permanent injury to the physical or mental health of the pregnant woman. See Office of the Population Census & Survey (UK). Research indicates that foetuses do not have a conscious appreciation of pain before 26 weeks of gestation. See also 'For Debate: Do Foetuses Feel Pain?' 313 *British Medical Journal* (28 September 1996) 795.

[6] See § 37.3 infra (Reproductive technology is constantly changing and the law must be sufficiently flexible to be able to respond to these changes.)

[7] See R Copelon 'Sexual and Reproductive Rights?' in *The Constitution of South Africa from a Gender Perspective* (1995) 233.

very conception of citizenship to which the Final Constitution and the Bill of Rights seeks to give birth.[1]

The Choice Act could have been more permissive. It is certainly not the least restrictive means for providing early, safe and legal abortion.[2] That said, Parliament and the Ministry of Health consulted widely and debated the proposed Bill at length prior to its promulgation. The regulatory framework of the Choice Act reflects a rational and a democratic choice consistent with the 'objective normative value system' manifest in our Bill of Rights.[3]

[1] *Morgenthaler* (supra) at 25.

[2] See FC s 36(1)(e).

[3] During 1995, written and oral submissions were made to a multi-party Ad Hoc Select Committee on Abortion and Sterilization. The National Assembly Portfolio Committee on Health also invited written comments and heard oral submissions over three days on the Termination of Pregnancy Bill. The Bill was tabled in Parliament on 17 September 1996. See *ARAG Newsletter* (November 1996).

38 Privacy

David McQuoid-Mason

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38.1 Introduction: The Meaning of Privacy

Section 14 of the Final Constitution provides:

> 'Everyone has the right to privacy, which includes the right not to have —
> *(a)* their person or home searched;
> *(b)* their property searched;
> *(c)* their possessions seized; or
> *(d)* the privacy of their communications infringed.'[1]

Privacy has a variety of connotations,[2] has been described as 'an amorphous and elusive' concept,[3] and has been closely identified with the concept of identity.[4] Whatever its actual extension is, at the very least, the right to privacy embraces the right to be free from intrusions and interference by the state and others in one's personal life. Such freedom from interference may require that a citizen be free from unauthorized disclosures of information about his or her personal life.[5] This second connotation of privacy implies that individuals have control not only over who communicates with them but also who has access to the flow of information about them.[6]

Privacy, like other rights, is not absolute.[7] The 'inner sanctum' of a person (eg, family life, sexual preference and home environment) may be shielded from invasion by conflicting rights of the community. However, as a person moves into

[1] The Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC'). The wording in s 13 of the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC') is substantially the same: 'Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.'

[2] See AF Westin *Privacy and Freedom* (1967) 7 ('the voluntary and temporary withdrawal of a person from the general society through physical and psychological means, either in a state of solitude or small group intimacy or, when among larger groups, in a condition of anonymity or reserve'). Cf *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376, 348-5 (T). See also *International Commission of Jurists Conclusions of the Nordic Conference on the Right to Privacy* (1967) (Nordic Conference defined privacy as 'the right to be let alone to live one's own life with the minimum degree of interference'); *Olmstead v United States* 277 US 438, 478, 48 SCt 564 (1928) (Brandeis J dissenting) ('the right to be let alone–the most comprehensive of rights and the right most valued by civilized men'); J Neethling *Die Reg op Privaatheid* (1976) 287 ('n individuele lewens-toestand van afsondering van openbaarheid'). Cf *National Media Ltd & another v Jooste* 1996 (3) SA 262, 271 (A). See also J Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 365 ('Burchell *Personality Rights*').

[3] *Bernstein v Bester* NO 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 65 ('*Bernstein*').

[4] Ibid.

[5] *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) at para 91.

[6] D J McQuoid-Mason *The Law of Privacy in South Africa* (1977) 99 ('McQuoid-Mason *Privacy*'). Cf J Neethling J M, Potgieter & P J Visser *Neethling's Law of Personality* (4th edition 1996) 243 ('Neethling et al *Law of Personality*'): ('privacy can be infringed only by acquaintance with personal facts by outsiders contrary to the determination and will of the person whose right is infringed, and such acquaintance can take place in two ways only, namely through intrusion (or acquaintance with private facts) and disclosure (or revelation of private facts)').

[7] Cf *Case v Minister of Safety and Security* (supra) at para 106.

communal relations and activities such as business[1] and social interaction, the scope of personal space shrinks accordingly.[2] This diminished personal space does not entail that people involved in business or social interactions no longer have a right to privacy:[3] As Neethling, Potgieter and Visser have argued:

> Privacy is an individual condition of life characterized by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this state.[4]

Thus a right to privacy encompasses the competence to determine 'the destiny of private facts'. This determination of destiny, in turn, embraces the right to decide 'when and under what conditions private facts may be made public'.

38.2 Common-Law Right to Privacy

Section 14[5] creates a constitutional right to privacy. The supremacy of the Constitution does not mean that all previous notions of privacy will be forgotten and fall into disuse. The courts will inevitably retain those existing common-law actions which are in harmony with the values of the Constitution.[6] For instance, it is unlikely that in the immediate future the courts will develop an independent 'constitutional delict' of invasion of privacy, unless circumstances arise where such invasion cannot be accommodated by the common law and the courts are required to fashion some other 'appropriate remedy'.[7]

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[1] In appropriate circumstances the right to privacy also extends to business relationships. See *Haynes v Commissioner for Inland Revenue* 2000 (6) BCLR 596, 613 (Tk). Despite the suggestion to the contrary. See *Shelton v Commissioner for South African Revenue Services* 2000 (2) SA 106, 123 (E). See also *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 17 (Langa DP assumed that businesses could sue for invasion of privacy when he said: 'The right to privacy may be claimed by any person. The present matter is concerned with the right to privacy of . . . a natural person, and nine business entities which are juristic persons'. He then went on to observe that 'what is clear is that the right to privacy is applicable, where appropriate, to a juristic person'.) See § 38.5.

[2] *Bernstein* (supra) at para 67.

[3] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* (supra) at para 16 infra: ('The right, however, does not relate solely to the individual within his or her intimate space . . . Thus, when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the State unless certain conditions are satisfied.')

[4] J Neethling, JM Potgieter & PJ Visser (eds) *Law of Delict* (2001) 355 ('Neethling et al, *Law of Delict*'). Cf *Bernstein* (supra) at para 68.

[5] Section 13 of the Interim Constitution.

[6] Cf *Gardener v Whitaker* 1995 (2) SA 672, 684 (E), 1994 (5) BCLR 19 (E). It has been pointed out, however, that caution must be exercised when attempting to project common-law principles onto the interpretation of fundamental rights and their limitation: At common law the determination of whether an invasion of privacy has taken place constitutes a single inquiry, including an assessment of its unlawfulness, whereas in constitutional adjudication under the Constitution a two-stage approach must be used in deciding the constitutionality of a statute. See *Bernstein* (supra) at para 71 (Ackermann J). See S Woolman 'Limitations' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, S Woolman (eds) *Constitutional Law of South Africa* (1st edition, RS5, 1999) Chapter 12.

[7] D McQuoid-Mason 'Invasion of Privacy: Common Law v Constitutional Delict — Does It make a Difference?' (2000) *Acta Juridica* 227, 259-261('McQuoid-Mason 'Common Law v Constitutional Delict'). See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) ('*Fose*').

South African courts have had little difficulty in recognizing a common-law action for invasion of privacy under the broad principles of the *actio injuriarum*.[1] A traditional definition for this delict would be 'an intentional and wrongful interference with another's right to seclusion in his [or her] private life'.[2] There is, however, no requirement of intention in cases involving the mass media.[3]

(a) Essentials for liability

For a common-law action for invasion of privacy based on the *actio injuriarum* to succeed, the plaintiff must prove the following essential elements: (i) wrongfulness, (ii) fault in the form of intention — or in the case of the mass media, negligence, and (iii) infringement of the plaintiff's privacy.[4]

(i) *Wrongfulness*

The wrongfulness of a factual infringement of privacy is judged in the light of contemporary *boni mores* and the general sense of justice of the community as perceived by the court.[5] In *National Media Ltd & another v Jooste*, Harms JA wrote:

> The boundary of a right or its infringement remains an objective question. As a general proposition, the general sense of justice does not require the protection of a fact that the interested party has no wish to keep private.[6]

It has been pointed out, however, that 'legal protection of private facts is extended to ordinary or reasonable sensibilities and not to hypersensitiveness'.[7] The courts will not protect facts 'whose disclosure will not 'cause mental distress and injury to anyone possessed of ordinary feelings and intelligence'.'[8] Put slightly differently, even if a person feels subjectively that his or her rights have been impaired under the *actio injuriarum*, such impairment will not be unlawful unless a person of ordinary sensibilities would have regarded the conduct as offensive.

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[1] *O'Keeffe v Argus Printing and Publishing Co Ltd & Another* 1954 (3) SA 244, 248 (C) ('*O'Keeffe*'); Cf McQuoid-Mason *Privacy* (supra) at 86. See *S v A & another* 1971 (2) SA 293, 297 (T)('*S v A*'): '[T]here can be no doubt that a person's right to privacy is one of . . . 'those real rights, those rights *in rem* related to personality, which every free man is entitled to enjoy' '. See also *Bernstein* (supra) at para 68.

[2] McQuoid-Mason *Privacy* (supra) at 100. The courts have found reference to the American courts useful when considering this the contours and the requirements of this action. *O'Keeffe* (supra) at 249; cf *Rhodesian Printing and Publishing Co Ltd v Duggan & another* 1975 (1) SA 590, 593-4 (RA)('*Rhodesian Printing*'). See generally McQuoid-Mason *Privacy* (supra) at 35 for relevant United States developments. See also *Bernstein* (supra) at para 75.

[3] See infra § 38.2 *(a)*(ii)(bb).

[4] Cf McQuoid-Mason *Privacy* (supra) at 33, 100.

[5] *Financial Mail (Pty) Ltd & others v Sage Holdings Ltd & another* 1993 (2) SA 451,462 (A) ('*Financial Mail*'); *Bernstein* (supra) at para 68. See also *O'Keeffe* (supra) at 249; *S v A* (supra) at 299; *Rhodesian Printing* (supra) at 595; McQuoid-Mason *Privacy* (supra) at 118-22.

[6] See *National Media Ltd & another v Jooste* 1996 (2) SA 262, 271 (A) (Harms JA).

[7] Ibid.

[8] *Financial Mail* (supra) at 462; *National Media Ltd & another v Jooste* (supra) at 270.

The test for injury in these cases is objective.[1] This subjective-objective distinction tracks the analysis of the Constitutional Court[2]. The Court has held that a person's subjective expectation of privacy will only have been wrongfully violated if the court is satisfied that such expectation was objectively reasonable.[3]

In determining the current modes of thought and values of any community, the courts may be influenced by its statute law.[4] It is also clear that the Constitution — 'and its spirit, purport and objects' — will play a major role in determining the 'new' *boni mores* of South African society.[5] In a sense, the Bill of Rights 'crystallizes' the *boni mores* of society by providing that an infringement of the right to privacy in the Constitution is *prima facie* unlawful.[6]

(ii) *Fault*

The defendant must have acted intentionally or with *animus injuriandi*.[7] In a case involving the media, negligence may be sufficient. [8]

(aa) Intention or *animus injuriandi*

Animus injuriandi in defamation and related wrongs requires the intention to injure and consciousness of wrongfulness.[9] The intention to injure refers to the direction of the wrongdoer's will towards the conduct. Consciousness of wrongfulness means that the defendant must know that his or her conduct is wrong.[10] The principles governing intention in delict are similar to those in criminal law: intention may be categorized as *dolus directus*, *dolus indirectus*, and *dolus eventualis*.[11] Once the other elements of an invasion of privacy have been proved, *animus injuriandi* will be presumed.[12]

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[1] Cf *De Lange v Costa* 1989 (2) SA 857, 860 (A); Burchell *Personality Rights* (supra) at 329.

[2] McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 232.

[3] *Bernstein* (supra) at para 75. See below § 38.3*(a)*(i).

[4] *Rhodesian Printing* (supra) at 595.

[5] *Gardener v Whitaker* 1995 (2) SA 672, 684 (E), 1994 (5) BCLR 19 (E) (Froneman J). For a discussion of the direct and indirect application of the Chapter on Fundamental Rights to the common law, see S Woolman 'Application' in M Chaskalson et al *Constitutional Law of South Africa* (1st edition, RS5, 1999) §§ 10.3*(a)(v)* and 10.8

[6] Burchell *Personality Rights* (supra) at 117. Cf Neethling et al *Law of Personality* (supra) at 239, n 7.

[7] *O'Keeffe* (supra) at 247; *Kidson v SA Associated Newspapers Ltd* 1957 (3) SA 461, 468 (W); *Mhlongo v Bailey & another* 1958 (1) SA 370, 372 (W); *C v Minister of Correctional Services* 1996 (4) SA 292,306 (T). Cf McQuoid-Mason *Privacy* (supra) at 113-5.

[8] Cf *National Media Ltd v Bogoshi* 1998 (4) SA 1196, 1213 (SCA), 1999 (1) BCLR 1 (SCA), [1998] 4 All SA 347 (A) ('*Bogoshi*'). See below § 38.2*(a)*(ii)(bb).

[9] Cf *Minister of Justice v Hofmeyr* 1993 (3) SA 131, 154 (A).

[10] Neethling et al *Law of Delict* (supra) at 125.

[11] Neethling et al *Law of Delict* (supra) at 123-125. *Dolus eventualis* has been applied to electronic surveillance by private detectives. *S v A* (supra) at 299.

[12] *Kidson v SA Associated Newspapers* Ltd (supra) at 468. It has been suggested that where the plaintiff can prove patrimonial loss he or she should be entitled to sue for a negligent invasion of privacy under the *lex aquilia*. See McQuoid-Mason *Privacy* (supra) at 253. See also H D Krause 'The Right to Privacy in Germany — Pointers for American Legislation?' (1965) *Duke LJ* 481, 516 (In Germany liability for negligent invasions of privacy should be 'limited to situations in which the plaintiff can show tangible damage').

For policy reasons the courts have not required the element of consciousness of wrongfulness as an element of *animus injuriandi* in wrongs affecting the liberty of the individual: wrongful arrest and detention or detention without a warrant or a wrongful attachment of goods.[1] In such cases, it is not open to the defendants to argue that they were ignorant of the wrongfulness of their acts. [2] Strict liability is imposed.[3] It has been suggested that a possible effect of the Constitution on the concept of *animus injuriandi* might be to regard certain of the rights mentioned in s 14 (such as unlawful searches and seizures) as so fundamental and important that strict liability should be imposed in the same manner as the common law imposition of strict liability for unlawful arrest, detention and attachment.[4]

(bb) Negligence by the mass media

The Supreme Court of Appeal has suggested that in defamation cases 'the media should not be treated on the same footing as ordinary members of the public by permitting them to rely on the absence of *animus injuriandi*'.[5] The court went on to say that 'given the credibility which the media enjoys amongst large sections of the community,' it would be 'entirely reasonable' to hold that 'the media are liable unless they were not negligent'.[6] Similar considerations apply to publications resulting in invasions of privacy by the media.[7] The adoption of the 'reasonableness' test regarding the conduct of the media may not, it has been opined, necessarily mean that the court endorsed negligence as a requirement for liability by the media.[8] However, the requirement of negligent conduct by the media to determine liability seems to accord with the constitutional imperative of freedom of the press.[9] The controversy has arisen because the courts tend to blur the questions of wrongfulness and fault and because the criterion of 'reasonableness' can be used in two senses: (1) during the policy-based inquiry into whether the defendant's conduct was unlawful; and (2) during the defence stage to determine whether the defendant's conduct was justifiable.[10] The Constitutional Court has since confirmed that the latter applies and that 'reasonable publication' is another one of the crystallized defences available to the media.[11] It did not, however,

[1] *Minister of Justice v Hofmeyr* (supra) at 154-5; *Todt v Ipser* 1993 (3) SA 577, 588 (A); *C v Minister of Correctional Services* (supra) at 306. Cf McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 233.

[2] *Todt v Ipser* (supra) at 588.

[3] Neethling et al *Law of Personality* (supra) at 129.

[4] McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 233-234. Cf Burchell *Personality Rights* (supra) at 117-118.

[5] *Bogoshi* (supra) at 1213. See also *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) ('*Khumalo*').

[6] Ibid. Cf McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 234.

[7] Cf *Jansen van Rensburg v Kruger* 1993 (4) SA 842, 849-850 (A).

[8] See JR Midgley 'Media Liability for Defamation' (1999) 116 *SALJ* 211, 215.

[9] Section 16(1). See Burchell *Personality Rights* (supra) at 226-227.

[10] Cf Burchell *Personality Rights* (supra) at 388.

[11] *Khumalo* (supra) at paras 18-19. See infra § 38.2*(c)*(i), for the other crystallized defences of truth and for the public benefit, fair comment and qualified privilege.

comment on the fact that a High Court has suggested that the reasonable publication defence should be extended to other situations not only publications by the media.[1]

The suggestion that the mass media may only use those defences that negate wrongfulness,[2] will have to be revisited in the light of s 16[3] — freedom of expression — of the Constitution. The courts must now weigh up competing constitutional imperatives of the right to privacy against the freedom of the press.[4] In media cases, the Constitutional Court has held that the 'reasonable publication' defence strikes an equitable balance between freedom of expression and the duty of editors and journalists to act with due care and respect for the individual's dignity.[5]

(iii) *Invasion of privacy*

In South Africa, the courts have regarded invasion of privacy as an impairment of *dignitas*[6] under the *actio injuriarum*. Privacy thus includes 'those rights relating to . . . dignity'.[7] Although the Constitution mentions 'dignity' and 'privacy' separately,[8] the Constitutional Court has stated that they are linked.[9] Invasions of privacy may be broadly divided into intrusions or interferences with private life, and disclosures and acquisition of information.[10] The latter are sometimes called substantive and informational privacy rights.[11]

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[1] *Marais v Groenewald* 2001 (1) SA 634, 646 (T), [2001] 2 All SA 578 (T). Cf JR Midgley 'Intention Remains the Fault Criterion under the Actio Injuriarum' (2001) 118 *SALJ* 433, 440; JR Midgley 'Media Liability for Defamation' (supra) at 223.

[2] See below § 38.2*(c)*(i).

[3] Section 15 of the Interim Constitution.

[4] *Khumalo (supra) at para 25: 'In particular, the values of human dignity, freedom and equality'.*

[5] *Khumalo* (supra) at para 43.

[6] *O'Keeffe* (supra); *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376, 383-4 (T), *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441, 455 (A); *Nell v Nell* 1990 (3) SA 889, 896 (T); *Sage Holdings & another v Financial Mail (Pty) Ltd & others* 1991 (2) SA 117, 129-31 (W), *Sage Holdings & another v Financial Mail (Pty) Ltd & others* 1993 (2) SA 451, 462-3 (A); McQuoid-Mason *Privacy* (supra) at 124. See, however, J Neethling *Persoonlikheidsreg* (3rd Edition 1991) 223-6, where he describes privacy as an independent right.

[7] *O'Keeffe* (supra) at 246. Cf McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 229.

[8] Sections 10 and 14 respectively. Cf Neethling et al *Law of Personality* (supra) at 242 n 40: 'the express constitutional recognition of the right to privacy . . . independent of the right to dignity . . . finally lays to rest the possible equation of, and thus confusion between, these two personality rights'. See, however, O'Regan J's judgment in *Khumalo* (supra) at para 26: 'No sharp lines . . . can be drawn between reputation, *dignitas* and privacy in giving effect to the value of human dignity in our Constitution'.

[9] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); 1998 (6) BCLR 726 (CC) at para 30.

[10] In the United States invasions of privacy tend to be divided into: *(a)* intrusions, *(b)* public disclosures of private facts, *(c)* placing a person in a false light, and *(d)* appropriation. See generally W Page Keeton, DB Dobbs, RE Keeton and DG Owen *Prosser and Keeton on The Law of Torts* (5th edition 1984) 851-66; McQuoid-Mason *Privacy* (supra) at 37-43.

[11] Cf L du Plessis & J de Ville 'Personal Rights' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 242.

(aa) Intrusions and interferences with private life

The courts have held the following intrusions into a person's private life or affairs or 'inner sanctum'[1] to be criminally or civilly actionable: illegally entering a private residence,[2] persistently shadowing a person,[3] secretly watching a person undress[4] or bath,[5] improperly interrogating a detainee,[6] electronically 'bugging' a person's home,[7] reading a person's private documents,[8] or correspondence,[9] taking unauthorized blood tests[10] and illegal telephone tapping.[11] The Constitution makes all of these forms of intrusions unlawful.[12] Most of these intrusions involve individuals becoming acquainted with private information about others without their consent. If such information is communicated to third parties without lawful justification, it would give rise to an action for invasion of privacy based on wrongful disclosure of private facts.[13] The list of intrusions that fall under the general rubric of invasion of privacy is not closed.[14]

(bb) Publication of private facts

Traditionally, publication of private facts may involve placing a person in a false light[15] and appropriating their image or likeness for monetary purposes.[16] These acts are dealt with as separate forms of invasion of privacy.[17] Some commentators have suggested that false light and appropriation cases should be treated as infringements of the right to identity rather than the right to privacy.[18]

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[1] *Bernstein* (supra) at para 71.

[2] *De Fourd v Council of Cape Town* (1898) 15 SC 399, 402, police entering a brothel without a warrant; *S v Boshoff & others* 1981 (1) SA 393, 396 (T). Cf *S v I & another* 1976 (1) SA 781 (RA).

[3] *Epstein v Epstein* 1906 TH 87. Cf McQuoid-Mason *Privacy* (supra) at 154.

[4] *R v Holliday* 1927 CPD 395,401; *R v Daniels* 1938 TPD 312, 313; R v R 1954 (2) SA 134, 135 (N).

[5] *R v Schoonberg* 1926 OPD 247.

[6] *Gosschalk v Rossouw* 1966 (2) SA 476, 492 (C); *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A).

[7] *S v A* (supra); cf McQuoid-Mason *Privacy* (supra) at 148-9.

[8] *Reid-Daly v Hickman & others* 1981 (2) SA 315, 323 (ZA).

[9] *S v Hammer & others* 1994 (2) SACR 496, 498 (C).

[10] *Seetal v Pravitha & another NO* 1983 (3) SA 827, 861-862 (D); *M v R* 1989 (1) SA 416, 426-7 (O); *Nell v Nell* 1990 (3) SA 889, 895-896 (T)*; C v Minister of Correctional Services* 1996 (4) SA 292, 300 (T). See also *D v K* 1997 (2) BCLR 209 (N) (Natal Provincial Division held that the constitutional protection of privacy precluded it from invoking its inherent jurisdiction to order the respondent in a paternity dispute to undergo a blood test against his will. The court held that the presumptions contained in ss 1 and 2 of the Children's Status Act 82 of 1987 adequately protected the interests of the minor child in a paternity dispute without invading the constitutionally protected privacy of the respondent.)

[11] *Financial Mail* (supra) at 463.

[12] FC Section 14 recognizes a general right to privacy.

[13] See below § 38.2*(a)*(iii)(bb).

[14] See McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 230.

[15] See below § 38.2*(a)*(iii)(cc).

[16] See below § 38.2*(a)*(iii)(dd).

[17] Cf Page Keeton et al *The Law of Torts* (supra) at 863. Cf McQuoid-Mason *Privacy* (supra) Chapters 5-8.

[18] Neethling et al *Law of Delict* (supra) at 357.

A list of actionable disclosures involving publications of private facts would incorporate: disclosures concerning the contents of stolen documents,[1] unauthorized publication of a photograph of a retired schoolteacher portraying him as a young man in the company of a well-known singer,[2] publication of a story about young children abducted from the custody of their parents,[3] attempted photographing of security policemen mentioned by counsel at a trial as having been responsible for the death of a detainee,[4] the disclosure of private facts obtained by illegal telephone tapping,[5] the unauthorized publication of a photograph and story about an unmarried mother who conceived a child by a well-known rugby player,[6] unauthorised disclosure by a doctor to colleagues that his patient was suffering from AIDS, [7] and disclosing the identity of a police informer.[8] All such cases would be captured by the right to privacy in the Constitution.[9]

(cc) False light

Publishing non-defamatory but false statements about a person — eg a false newspaper story that certain married and engaged nurses 'want boyfriends', will also constitute placing a person in false light.[10] This definition of false light is a variation of a definition of publication of private facts. In both actions the facts published are not true. Such statements are not actionable under the law of defamation because there is no lowering of the plaintiff's reputation. Should the publication be deemed to fall under the right to privacy, however, it ought to be protected by the Constitution. That said, if such false light publication is regarded as an infringement of identity[11] it may not be covered as a constitutional wrong unless it is further regarded as part of dignity.[12] The preferred view is that false light cases should be regarded as invasions of privacy because such publicity has unjustifiably exposed the plaintiff to unwanted publicity.[13]

[1] *Goodman v Von Moltke* 1938 CPD 153. Cf Neethling *Die Reg op Privaatheid* (1976) 390.
[2] *Mhlongo v Bailey & another* 1958 (1) SA 370 (W) ('*Mhlongo*').
[3] *Rhodesian Printing and Publishing Co Ltd v Duggan* 1975 (1) SA 590 (RA).
[4] *La Grange v Schoeman & others* 1980 (1) SA 885 (E).
[5] *Financial Mail* (supra) at 463.
[6] *National Media Ltd & another v Jooste* 1996 (3) SA 262, 271 (A).
[7] *Jansen van Vuuren & another NNO v Kruger* 1993 (4) SA 842 (A).
[8] *Swanepoel v Minister van Veiligheid en Sekuriteit* 1999 (4) SA 549, 553 (T), [1999] 3 All SA 285 (T).
[9] FC s 14.
[10] *Kidson v SA Associated Newspapers Ltd* 1957 (3) SA 461 (W).
[11] See Neethling et al *Law of Delict* (supra) at 356-357.
[12] See FC s 10. It has been suggested that dignity should be given a broad definition to include privacy. See Burchell *Personality Rights* (supra) at 334. The Constitutional Court has acknowledged that dignity includes identity. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (6) BCLR 726 (CC) at para 120 (Sachs J): ('The violation of dignity under section 10 . . . offers protection to persons in their multiple identities and capacities'.)
[13] McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 231.

(dd) Appropriation

Appropriation means that a person's image or likeness is used without their consent: for example, the unauthorized use of a photograph for an advertisement.[1] Appropriation is also a variation of publication of private facts. As such, it has been suggested that appropriation is better dealt with under the right to identity.[2] Indeed, the Constitutional Court has pointed out that 'the scope of privacy has been closely related to the concept of identity'.[3] Appropriation is clearly a violation of a person's right to decide for herself who should have access to her image and likeness — something that goes to the root of individual autonomy or privacy.[4] The control of one's image should be protected under the right to privacy. However, if an appropriation is regarded as an infringement of the right to identity, then it should be protected under the right to dignity broadly construed.[5]

The Namibian High Court has held that an applicant's claim to adopt his wife's surname was not protected by the right to privacy.[6] An appropriation must be linked to a reasonable expectation of privacy.[7]

(b) Remedies

The main remedies for invasion of privacy at common law are: (i) damages and (ii) interdicts. The old common law remedy of the right to retraction, apology and reply appears to have been abrogated by disuse.[8] It could, however, be revived as 'appropriate relief' under the Constitution.[9]

(i) *Damages*

A plaintiff wishing to recover sentimental damages for invasion of privacy under the *actio injuriarum* sues for a *solatium* or satisfaction. She does not sue for pecuniary loss that can be accurately calculated in monetary terms.[10] Where

[1] *O'Keeffe* (supra).
[2] Neethling et al *Law of Delict* (supra) at 357.
[3] *Bernstein* (supra) at para 65.
[4] But see Neethling et al *Law of Delict* (supra) at 357 n 282, who suggest that it is a right independent of privacy. See also Burchell *Personality Rights* (supra) at 334, who would prefer to see the exercise of individual autonomy under the rubric of dignity rather than privacy.
[5] Cf Burchell *Personality Rights* (supra) at 334. See, generally, McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 231.
[6] *Muller v President of the Republic of Namibia* 2000 (6) BCLR 655, 668 (NmS) (held that her name was also not protected by the right to protection of family life).
[7] For instance, the High Court has held that the use of an accused person's photograph for a photographic identification parade without his consent is not a violation of his right to privacy. See *S v Zwayi* 1998 (2) BCLR 242 (Ck), [1998] 1 All SA 569 (Ck), 1997 (2) SACR 772 (Ck). Cf Johan de Waal, Iain Currie and Gerhard Erasmus *The Bill of Rights Handbook* (3rd edition 2000) 276.
[8] See below § 38.3*(a)*(i).
[9] FC s 38. See below § 38.3*(b)*(iv).
[10] McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 231.

patrimonial loss can also be proved the plaintiff may bring a 'rolled up' action for both sentimental damages and actual pecuniary loss.[1]

When calculating damages for invasion of privacy the courts will take into account the contents, nature and extent of the publication,[2] the standing of the plaintiff,[3] and the conduct of the defendant.[4] The courts have regarded the fact that the defendant deliberately rode roughshod over the plaintiff's feelings as an aggravating factor[5] and the tendering of an apology as a mitigating factor.[6] The court may take into account further factors: the nature of the imputations, the probable consequences of the defendant's conduct, and comparable awards in other cases.[7]

The Namibian court has regarded flagrant invasions of fundamental rights and freedoms in the Namibian Constitution as an aggravating factor and have suggested that 'a liberal approach to *quantum*' should be adopted in such cases.[8] The South African Constitutional Court has held that additional constitutional punitive damages should not be awarded for infringements of fundamental rights and freedoms.[9] One of the main reasons advanced for rejecting punitive damages was that they blur the distinction civil and criminal law.[10] However, as I have argued elsewhere, not all egregious impairments of personality rights could result in criminal prosecutions.[11] The problem can be overcome by treating such cases as justifying aggravating compensatory damages.[12]

(ii) *Interdicts*

In the past, under the common law, a plaintiff has been able to obtain an interdict to restrain a proposed or continued invasion of privacy.[13] In order to obtain a *final interdict* the plaintiff must prove that he or she has: (i) a clear right, (ii) suffered actual injury or has a well-grounded apprehension of irreparable injury,

[1] *Mathews v Young* 1922 AD 492, 505.
[2] *O'Keeffe* (supra) at 248; cf *SAAN v Yutar* 1969 (2) SA 442, 458 (A).
[3] *Mhlongo* (supra) at 372. Cf *Buthulezi v Poorter & others* 1975 (4) SA 608, 613-614 (W); *Smith v Die Republikein (Edms) Bpk en 'n ander* 1989 (3) SA 872, 878 (SWA); *Afrika v Metzler* 1997 (4) SA 531, 535 (NmH).
[4] *Afrika v Metzler* (supra) at 535.
[5] *Mhlongo* (supra) at 372.
[6] *Kidson v SA Associated Newpapers Ltd* 1957 (3) SA 461, 468 (W).
[7] Cf *Smith v Die Republikein (Edms) Bpk* (supra) at 877-8.
[8] *Afrika v Metzler* (supra) at 539; cf McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 235.
[9] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at paras 69-73 (Ackermann J).
[10] Ibid at para 70. See below § 38.3*(b)*(i).
[11] McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 235: (the unauthorized publication of the photograph in *Mhlongo* (supra) and the defamation in *Afrika v Metzler* (supra) could not have given rise to criminal actions).
[12] Burchell *Personality Rights* (supra) at 474; cf McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 235.
[13] *Epstein v Epstein* 1906 TH 87, 88; *Rhodesian Printing and Publishing Co Ltd v Duggan* 1975 (1) SA 590, 595 (RA); *Financial Mail* (supra).

and (iii) that no other satisfactory remedy is available.[1] For an *interim interdict* the applicant must show (i) a prima facie right;[2] (ii) a well-grounded apprehension of irreparable harm if the interim relief is not granted; (iii) the balance of convenience favours the granting of the interim interdict; and (iv) the applicant has no other satisfactory remedy.[3] When granting such interdicts, fault by the defendant is irrelevant.[4]

The Constitution has now made the courts more circumspect in granting interdicts that impose prior restraints on freedom of expression. These prior restraints are regarded as presumptively invalid.[5] Otherwise, the imposition of such interdicts do not require a different approach from the previous common law position. The infringement of the freedom of expression can be dealt with during the 'balance of convenience' stage of the enquiry.[6]

(iii) *Retraction and apology*

The Roman-Dutch law remedy of *amende honorable* was thought to have fallen into disuse under South African common law.[7] It has recently been held that although the remedy may have fallen into disuse, it had not been abrogated.[8] In *Mineworkers Investment Co (Pty) Ltd v Modibane*, the court wrote that even if the *amende honorable* had never existed 'the imperatives of our times would have required its invention … [as] it is entirely consonant with the 'spirit, purports and objects' of the Bill of Rights in our Constitution'.[9] It can therefore be used in circumstances where it would provide 'appropriate relief'.[10]

The fact that a defendant has retracted the statement or apologized has been used as a mitigating factor when assessing damages.[11] However, courts have also noted that in defamation cases it is 'virtually impossible for one to restore another's good name and reputation to its former glory by a mere, at times

[1] *Setlogelo v Setlogelo* 1914 AD 221, 227. See McQuoid-Mason *Privacy* (supra) at 132.

[2] See *La Grange v Schoeman & others* 1980 (1) SA 885 (E)(an application for an interdict failed where a newspaper photographer unsuccessfully tried to establish that he had a prima facie right to take photographs of a policeman accused in a trial of having killed a political detainee).

[3] *Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 (1) SA 391, 398 (A), [1996] 4 All SA 675 (A).

[4] *Setlogelo v Setlogelo* (supra) at 227; cf McQuoid-Mason *Privacy* (supra) 132; Burchell *Personality Rights* (supra) at 490-491.

[5] *Mandela v Falati* 1995 (1) SA 251, 259-260 (W), 1994 (4) BCLR 1 (W).

[6] *Hix Networking Technologies v System Publishers (Pty) Ltd* (supra) at 400.

[7] *Ward-Jackson v Cape Times Ltd* 1910 WLD 257, 263; cf *Kritinger v Perskorporasie van Suid-Afrika (Edms)Bpk* 1981 (2) SA 373, 389 (O).

[8] *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 212 (W) at para 24.

[9] Ibid at para 28.

[10] McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 236. See below § 38.3*(b)*(iv).

[11] Cf *Norton v Ginsberg* 1953 (4) SA 537, 540 (A).

invariably predestinated, retraction and/or apology'. [1] That said, Jonathan Burchell has suggested that a prompt and unreserved apology may also be a factor affecting the reasonableness of a publication.[2]

(c) Defences

Defences that rebut wrongfulness or *animus injuriandi* in the law of defamation generally also apply to invasions of privacy.[3] The same is likely true for the defences that rebut negligence in cases of defamation by mass media.

(i) *Defences excluding wrongfulness*

Defences rebutting unlawfulness that apply to defamation — and that might also apply to invasions of privacy — include: *(a)* truth for the public benefit, *(b)* fair comment and *(c)* qualified privilege.[4] This list is not closed. Because the traditional defences of truth for the public benefit, fair comment and qualified privilege do not necessarily provide adequate protection for the press,[5] the broad criterion of 'reasonable publication' by the defendant can also be used to negate unlawfulness.[6] This defence could be raised at either the policy-based initial inquiry into the lawfulness of the privacy infringement or subsequently as a special defence dealing with absence of negligence.[7] This broad policy-based approach has been adopted where a spouse invaded her adulterous husband's privacy in order to get evidence for a divorce.[8]

(aa) Truth for the public benefit

A defendant may offer a defence that the defamatory statement in question was true and for the public benefit.[9] The onus of proving truth and public benefit rests on the defendant.[10] There is no onus on the plaintiff to prove the falsity of

[1] *Afrika v Metzler* (supra) at 539.
[2] Burchell *Personality Rights* (supra) at 496.
[3] *Jansen van Vuuren v Kruger* 1993 (4) SA 842, 849-50 (A).
[4] Ibid at 850.
[5] *National Media Limited v Bogoshi* 1998 (4) SA 1196,1207 (SCA), [1998] 4 All SA 347 (A), 1999 (1) BCLR 1 (SCA) ('*Bogoshi*').
[6] Ibid at 1211.
[7] See generally, McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 239.
[8] *S v I* 1976 (1) SA 781, 784 (RAD), where Beadle CJ observed: 'The sole issue in this case . . . is whether, in the circumstances, the appellants were justified in peeping through the window. Again put another way, were they justified in invading the complainant's privacy in the manner they did? If they were so justified, the fact that as a necessary consequence of this invasion of privacy the complainant's *dignitas* was injured is an irrelevant consideration'.
[9] *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 23 ('*Khumalo*').
[10] *Bogoshi* (supra) at 1215.

the published statement.[1] Similar principles apply to invasions of privacy.[2] Some commentators have suggested that the defence does not apply to invasions of privacy because privacy can only be violated if the communication concerns true facts.[3] However, that assessment does not hold for false light invasions of privacy[4] where the true facts have been falsified in a non-defamatory manner. In cases involving invasions of privacy the fact that a person is a public figure or has been catapulted into the public eye[5] may be an important consideration in determining whether the publication is for the public benefit.[6] The Constitution provides that freedom of expression includes the 'freedom to receive or impart information or ideas.'[7] This proviso will become an important factor in deciding whether the publication is for the public benefit.[8]

(bb) Fair comment

The defamation defence of fair comment may be relevant as a defence in privacy cases where the plaintiff has been portrayed in a false light because of a

[1] *Khumalo* (supra) at para 43; cf *Selemela and others v Independent Newspaper Group Ltd and others* 2002 (2) BCLR 197, 208 (NC). The court in *Khumalo's* case (supra) at para 43 explained the reason as follows: '[T]he defence of reasonableness developed in [*Bogoshi's*]case … strikes a balance between the constitutional interests of the plaintiffs and defendants. It permits a publisher who can establish truth and the public benefit to do so and avoid liability. But if a publisher cannot establish the truth or finds it disproportionately expensive or difficult to do so, the publisher may show that in all the circumstances the publication was reasonable' (O'Regan J).

[2] Cf McQuoid-Mason *Privacy* (supra) at 218-224. The statement need not be true in all respects, provided it is substantially true (ie the material allegations are true). See *Johnson v Rand Daily Mails* 1928 AD 190, 204. Truth alone is not a defence, but may be used in mitigation of damages. See *Geyser v Pont* 1968 (4) SA 67,68 (W). It has been held that 'the publication of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way at the particular time'. See *Bogoshi* (supra) at 1211. The publication of the truth must be for the public benefit. 'Public benefit' means the same thing as 'public interest' and has been described as: 'Material in which the public has an interest' — not 'what the public finds interesting'. Ibid. Cf *Financial Mail* (supra) at 464 (Corbett CJ) ('In my view there is a public interest in preserving confidentially in regard to private affairs and in discouraging the leaking of private and confidential information, unlawfully obtained, to the media'). The court will look at the time manner and place of publication to determine if it is for the public benefit as people should be allowed to live down their past. See *Lyon v Steyn* 1931 TPD 247, 251. Traditionally if it is proved that the defendant was actuated by spite or malice the defence of truth for the public benefit will fail. See *Coetzee v Nel* 1972 (1) SA 353, 374 (A). Although this view has been doubted on the basis that the 'truth is the truth no matter what the motives of the publisher are and the publication of truth for the public benefit does not cease to be for the public benefit simply because the publisher is prompted by some improper or ulterior motive', Burchell *Personality Rights* (supra) at 276.

[3] Neethling et al *Law of Personality* (supra) at 276.

[4] Neethling et al *Law of Personality* (supra) at 285: (they regard such cases as falling under 'identity' not privacy. It is probably for this reason that they say that the defence of truth for the public benefit cannot apply to invasions of privacy.)

[5] Cf *La Grange v Schoeman* 1980 (1) SA 885, 892 (E).

[6] Cf McQuoid-Mason *Privacy* (supra) at 219-24; Neethling et al *Law of Personality* (supra) at 268.

[7] Section 16(1)*(b)*.

[8] Cf Burchell *Personality Rights* (supra) at 415.

non-defamatory comment by the defendant.[1] The constitutional imperative of freedom of expression[2] may result in the courts taking a more liberal approach concerning the interpretation of the 'fairness' requirement.

(cc) Qualified privilege

A defendant will not be liable for a defamatory statement made: (i) on a privileged occasion, where the statement is made in discharge of a duty; (ii) the statement was published during judicial or quasi-judicial proceedings; (iii) or the statement was published in a report of proceedings of courts, parliament or public bodies.[3] The same principles apply to invasions of privacy.[4]

The position of the mass media has been strengthened by the freedom of expression provisions in the Constitution.[5] It is likely that the press will be able to rely more frequently on the defence of qualified privilege than in the past. Burchell has suggested that the media have a duty to inform the public of news-worthy events, characters and conduct and that the public have a corresponding interest to be so informed.[6] However, the courts have been careful to point out that there is no special defence of qualified privilege for the media.[7]

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[1] Cf McQuoid-Mason *Privacy* (supra) at 230. For the defence of fair comment to succeed the defendant must prove *(a)* the statement must be a comment (opinion) not a statement of fact; *(b)* the comment must be 'fair' (relevant, honest and free from malice); *(c)* the facts commented on must be true; and *(d)* the comment must be on a matter of public interest. See *Crawford v Albu* 1917 AD 102, 113-114; *Marais v Richard* 1981 (1) SA 1157 (A). A comment is an opinion not a statement of fact and the test is whether a reasonable person would regard the statement as a comment or a statement of fact. See *Crawford v Albu* (supra) at 127. A comment is fair if it is relevant, honest and made free from malice. See *Crawford v Albu* (supra) at 115. The fact that a comment is extravagant, exaggerated or prejudiced does not make it 'unfair'. See *Johnson v Beckett* 1992 (1) SA 762, 780–783 (A). If malice is shown the comment will no longer be fair. See *Johnson v Beckett* (supra) at 780, 783. The facts commented upon must be true: As in the case of truth for public benefit the facts commented upon need not be true in every minute detail. See *Buthelezi v Poorter* 1974 (2) SA 831, 833 (W).

[2] Section 16(1)*(b)*.

[3] Discharge of a duty: The occasion will give rise to a qualified privileged where the person making the statement is discharging a moral, social or legal duty by communicating it to a person with a legitimate interest or duty to receive it. See *de Waal v Ziervogel* 1938 AD 112; *O v O* 1995 (4) SA 482, 492 (W). For example where a doctor may be legally obliged to make certain disclosures. Cf *Jansen van Vuuren NO v Kruger* 1993 (4) SA 842, 851 (A). The test is whether an ordinary, reasonable person, having regard to the relationship of the parties and surrounding circumstances would have made the disclosure. See *Borgin v de Villiers* 1980 (3) SA 556, 577 (A). Judicial & quasi-judicial proceedings: Judges and magistrates are presumed to have acted lawfully within the limits of their authority. See *May v Udwin* 1981 (1) SA 1, 19 (A). Witnesses, litigants, advocates and attorneys are accorded a qualified privilege as long as the statement is relevant to the case and is founded on some reasonable cause. See *Pogrund v Yutar* 1967 (2) SA 564, 570 (A); *Joubert v Venter* 1985 (1) SA 654, 697 (A). Reports of court proceedings, parliament and public bodies: The defence of qualified privilege applies to fair and substantially accurate reports of judicial or parliamentary proceedings. See *Benson v Robinson & Co* 1967 (1) SA 420, 428 (A). The defence of qualified privilege can be defeated by proof of malice. See *Benson v Robinson and Co* (supra) at 432.

[4] *Jansen van Vuuren NO v Kruger* (supra) at 849.

[5] Section 16(1)*(b)*.

[6] Burchell *Personality Rights* (supra) at 295. Cf *Bogoshi* (supra) at 1200.

[7] *Neethling v du Preez, Neethling v The Weekly Mail* 1994 (1) SA 708, 777 (A); *Holomisa v Post Newspapers Ltd* 1996 (2) SA 588, 610 (W).

In order to succeed with the defences of truth for the public benefit, qualified privilege and fair comment, the defendant is required to show on a balance of probabilities that all elements of the defence have been proved.[1] However, this requirement may inhibit freedom of expression. As a result, some authors have argued that the defendant should merely carry an evidential burden as in the case of *animus injuriandi.*[2] In *Gardener v Whitaker,*[3] the High Court held that the Constitution had brought about a fundamental change and that the plaintiff 'now bears the onus of showing that the defendant's speech or statement is, for example, false; not in the public interest; not protected by privilege; unfair comment, and the like'.[4] Such an approach was rejected in *Buthelezi v SABC.*[5] In *Buthelezi,* the court observed that there is no evidence 'that the Constitution sets greater store by freedom of speech than the essential worth of the character of the individual.' The court held that the onus should shift to the defendant to prove the defence because the latter has knowledge of the information necessary to establish the defence.[6] This latter view was supported by the Supreme Court of Appeal in *National Media Ltd v Bogoshi.*[7] As the law currently stands, the abolition of strict liability on the press has created a predisposition in favour of freedom of expression. The law now allows the press to escape liability by showing reasonableness or absence of negligence.

(dd) No closed list of defences

The list of defences is not closed. Other defences which rebut unlawfulness that could apply to privacy are: consent, absolute privilege, statutory authority, necessity and private defence. Consent will be a good defence provided that the invasion of privacy takes the form to which the plaintiff consented.[8] Absolute privilege will be a good defence in situations of parliamentary privilege provided for by the Constitution.[9] Statutory authority may justify certain invasions of

[1] *Neethling v du Preez, Neethling v The Weekly Mail* (supra) at 770, 777; *Bogoshi* (supra) at 1216.
[2] Burchell *Personality Rights* (supra) at 227.
[3] *Bogoshi* (supra).
[4] *Gardener v Whittaker* 1995 (2) SA 672, 691 (E), 1994 (5) BCLR 19 (E).
[5] *Buthelezi v SABC* 1997 (12) BCLR 1733 (D) .
[6] Ibid at 1744.
[7] *Bogoshi* (supra) at 1216. See infra § 38.2 *(c)*(i)(ee).
[8] *National Media Ltd v Jooste* 1996 (3) SA 262, 272 (A). The defence failed, for instance, where the consent was given to use a photograph in a news story and it was used in an advertisement. See *O'Keeffe v Argus Printing and Publishing Co Ltd & Another* 1954 (3) SA 244, 257 (C). It also failed where a person consented to a photograph being used in a nursing journal article, but not for an appeal in a Sunday newspaper. See *Kidson v SA Associated Newspapers Ltd* 1957 (3) SA 416, 464 (W).
[9] In respect of parliamentary proceedings, see FC s 58(1), provincial parliamentary proceedings, see FC s 117(1), and municipal councils with delegated powers from the province, see FC s 161. The privilege is absolute because it cannot be defeated by malice.

privacy[1] that would otherwise be unlawful, (such as the duty to report child abuse,[2] mentally ill persons who are dangerous,[3] or notifiable diseases[4]), provided the statutes concerned satisfy the limitation requirements of the Constitution.[5] Necessity could be raised as defence where the defendant has acted reasonably to prevent a threat of greater harm to another person arising from force of nature or conduct unconnected with the plaintiff.[6] Private defence applies where the defendant invades the plaintiff's privacy to prevent his or her interests being harmed by the plaintiff.[7]

(ee) 'Reasonable publication' as a defence

'Reasonableness' is the criterion used for determining the lawfulness of publications by the mass media in defamation cases.[8] It could also be used to rebut unlawfulness in similar cases of invasion of privacy. In one sense, reasonableness can be used during the policy-based *ex post facto* enquiry into wrongfulness.[9] In another, it can also be used as a defence to rebut fault in the form of lack of negligence.[10] This dual application of the reasonableness criterion leads to an overlap between the unlawfulness enquiry and the fault criterion of negligence.[11]

[1] In the past it was used to justify excessive intrusions by the apartheid authorities such as state interferences with a person's choice as to: marriage, see Prohibition of Mixed Marriages Act 55 of 1949 s 1; sexual partners, see Immorality Act 23 of 1957 s 16; education for whites, was controlled by the provinces, see Republic of South Africa Constitution Act 32 of 1961 s 84(1)*(c)*; education for blacks, see the Bantu Education Act 47 of 1953; coloureds, see the Coloured Persons Education Act 47 of 1963; education for Indians, see the Indian Education Act of 1965; university, see Extension of University Education Act 45 of 1959 ss 17 and 31; residence, see Group Areas Act 36 of 1966 s 13; Bantu Land Act 27 of 1913; Bantu Trust and Land Act 18 of 1936; Coloured Persons Settlement Act 7 of 1946; Rural Coloured Areas Act 24 of 1963; entertainment, see Publications Act 42 of 1974 s 8(1)*(d)*; political party, see Prohibition of Political Interference Act 51 of 1968 s 2. The police were also given wide powers of search, see Criminal Procedure Act 51 of 1977 s 22, detention without trial, see Criminal Procedure Act 51 of 1977 s 185; Internal Security Act 74 of 1982 s 50(1); and the right to intercept postal communications, see Post Office Act 44 of 1958 s 118A, and telephone conversations, see Post Office Act 44 of 1958 s 118A(2)*(b)*. See generally McQuoid-Mason *Privacy* (supra) at 235. See also *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) at para 100.

[2] See, eg Child Care Act 74 of 1983 s 42.

[3] See, eg Mental Health Act 18 of 1973 s 13.

[4] See, eg Health Act 63 of 1977 s 45.

[5] Section 36(1); Burchell *Personality Rights* (supra) 425-7. See below § 38.5.

[6] Neethling et al *Law of Personality* (supra) at 263; McQuoid-Mason *Privacy* (supra) at 233. For instance, a shopkeeper with a closed circuit television camera to monitor shoppers. See Burchell *Personality Rights* (supra) at 424-5.

[7] McQuoid-Mason *Privacy* (supra) at 234; cf *Rhodes University College v Field* 1947 (3) SA 437, 463 (A): '[A] man whose character, reputation or conduct has been assailed can say what is reasonably necessary to defend it.'. Cf *S v I* 1976 (1) SA 781 (RA); Neethling et al *Law of Personality* (supra) at 264-6.

[8] See *Bogoshi* (supra) at 1211. Cf *Khumalo* (supra) at 424.

[9] Burchell *Personality Rights* (supra) at 227.

[10] Ibid at 226.

[11] Ibid.

(ii) *Defences excluding intention*

Once the other elements of an action for invasion of privacy have been proved *animus injuriandi* will be presumed.[1] The evidential burden then shifts to the defendant to show absence of *animus injuriandi.*[2] Presumably this is because the defendant has unique if not incorrigable knowledge of his or her mental state at the time. The question remains, however, why only an evidential burden rests on defendants to rebut *animus injuriandi* while a full onus rests on the defendant to rebut unlawfulness.[3] Burchell has been pointed out that the requirement of 'subjectively assessed, intention-based liability' for individuals under the *actio injuriarum* 'furthers freedom of speech'.[4] Defences that rebut *animus injuriandi* include *(a)* mistake, *(b)* jest, *(c)* rixa, and any other defence that can rebut intention or consciousness of wrongfulness (eg intoxication,[5] insanity,[6] no intention to injure etc).

(aa) Mistake

If the defendant did not intend to invade the plaintiff's privacy or was *bona fide* unaware of the wrongfulness of his or her act, then the presumption of *animus injuriandi* would be rebutted.[7] However, if the constitutional right to privacy is regarded as so fundamental that defendants may not argue that they were ignorant of the unlawfulness of their acts, it will no longer be open to them to simply show that they made a *bona fide* mistake of law. They be obliged to show that the mistake was reasonable.[8]

(bb) Jest

Neethling, Potgieter and Visser have argued that when a person publishes such

[1] *Kidson v SA Associated Newspapers Ltd* 1957 (3) SA 416, 468 (W).

[2] *SAUK v O'Malley* 1977 (3) SA 394, 403 (A); *Neethling v du Preez, Neethling v The Weekly Mail* 1994 (1) SA 708, 768 (A).

[3] Burchell *Personality Rights* (supra) at 305: 'The courts will have to explain why a defence excluding unlawfulness must be proved on a preponderance of probabilities but, in regard to a defence excluding *animus injuriandi*, only an evidential burden rests on the defendant'.

[4] Burchell *Personality Rights* (supra) at 305.

[5] Cf *Geyser en 'n ander v Pont* 1968 (4) SA 67, 72-3 (W); *Muller v SA Associated Newspapers Ltd* 1972 (2) SA 589, 592 (C).

[6] Cf *Wilhelm v Beamish* (1894) 11 SC 13, 15; *Muller v SA Associated Newspapers Ltd & others* (supra) at 592. But if the defendants' mental afflictions are such that they appreciate the nature and effect of their acts they will still be liable. See *Vaughan & another v Ford* 1953 (4) SA 486, 488-9 (R).

[7] *Maisel v van Naeren* 1960 (4) SA 836, 840, 850 (C). It has been suggested that for a bona fide mistake the defendant must show subjectively both a mistake of fact and a mistake of law. See Neethling et al *Law of Personality* (supra) at 179.

[8] On the possibility of strict liability being imposed, see infra § 38.3*(a)*(iii).

defamatory words as a joke, his or her will is not directed to injuring the plaintiff's reputation.[1] A similar stance could well be taken with respect to invasions of privacy.[2] However, I believe that certain fundamental constitutional rights to privacy are so important that the defence of *bona fide* unconsciousness of wrongfulness should not be available to the defendant unless it is also reasonable.[3]

(cc) Rixa

A defendant is not liable for defamation if he or she spoke the words without premeditation, in sudden anger on provocation by the plaintiff, and did not persist in uttering them.[4] Technically, if the defendant was 'unconscious of any intention to defame' at the time of the utterance, he or she would not possess *animus injuriandi*.[5] A similar approach could be adopted in respect of invasions of privacy.[6] However, in cases of egregious invasions of certain constitutional rights to privacy, it could again be argued that *bona fide* unconsciousness of the wrongfulness of the act should not be available as a defence unless it is reasonable.[7]

(dd) No closed list of defences

The list of defences rebutting intention or *animus injuriandi* is not closed.[8]

(ee) Rebuttal of negligence by mass media

As has been pointed out,[9] the court in *National Media Ltd v Bogoshi* blurred the distinction between wrongfulness and fault. At the same time, the SCA stated that the onus was on the defendant to prove that the publication was reasonable and not negligent and that 'proof of reasonableness would probably be proof of lack of negligence'.[10] The court rejected the principles underlying strict liability and

[1] Neethling et al *Law of Personality* (supra) at 180. The courts have, however, introduced an objective element by holding that the defence applies if the words could not reasonably be understood in a defamatory sense. See *Peck v Katz* 1957 (2) SA 567, 572-3 (T). Cf J Burchell *The Law of Defamation in South Africa* (1985) 285-6. This could be explained on the basis that if the joke is misunderstood by reasonable bystanders an inference of *dolus eventualis* could be drawn. See NJ van der Merwe and PJ Olivier *Die Onregmaatige Daad in die Suid-Afrikaanse Reg* (4th edition 1980) 444. The better view seems to be that jest is a defence that rests upon the subjective absence of *animus injuriandi*. cf *Geyser v Pont* 1968 (4) SA 67, 72 et seq (W).

[2] Cf McQuoid-Mason *Privacy* (supra) at 241.

[3] See below § 38.3*(a)*(iii).

[4] *Kirkpatrick v Bezuidenhout* 1934 TPD 155, 158. Cf *Peck v Katz* 1957 (2) SA 567, 573 (T); *Jeftha v Williams* 1981 (3) SA 678 (C); *Bester v Calitz* 1982 (3) SA 864 (O).

[5] Cf McQuoid-Mason *Privacy* (supra) at 240 n53.

[6] Cf McQuoid-Mason *Privacy* (supra) at 240-1: For example, 'where after provocation during a quarrel somebody bursts into another's room or makes embarrassing disclosures concerning his argumentative opponent's private life'.

[7] See below § 38.3*(a)*(iii).

[8] *Muller v SAAN* 1972 (2) SA 589 (C); Burchell *The Law of Defamation in South Africa* (supra) at 284-6.

[9] See above § 38.2*(a)*(i).

[10] Ibid at 1215.

dolus eventualis and accepted that the media could escape liability by proving that they were not negligent.[1] Although it has been suggested that the SCA did not go so far as to recognize that negligence was a specified ground of defence for the mass media,[2] the High Court seems to have placed such a gloss on *Bogoshi*.[3] Midgley has opined that *animus injuriandi* still remains a criterion for liability by the press, but that 'if the media were not negligent in publishing the material they may raise a lack of knowledge of unlawfulness as a defence'.[4] I can see no reason in principle why a reasonable lack of such knowledge by the media does not constitute a defence to an allegation of negligence.[5] After all, negligence is measured objectively and deals with conduct. Intention is measured subjectively. Therefore, a requirement of reasonable conduct by the defendant does not mean that media defendants have to rebut *animus injuriandi*. It merely means that they have to show that they were not negligent.[6]

38.3 The Constitutional Right to Privacy

Section 14 of the Final Constitution refers to a general right to privacy as well as the right of individuals not to have their persons or their homes or property searched or their communications infringed. The right to privacy is recognized in a number of international human rights instruments.[7] The right is also recognized in the constitutions of many foreign jurisdictions.[8]

Section 14 will not only have an impact on the development of the common law action for invasion of privacy.[9] It may also give rise to new actions for invasion of privacy which reflect not only the interests protected by the common law but also a number of important personal interests as against the state. In countries such as the United States the result of constitutionalizing these interests is that 'what once were victimless crimes are now lawful pursuits, the invasion of

[1] Ibid at 1214-1215.
[2] Midgley 'Intention Remains the Fault Criterion under the Actio Injuriarum' (2001) 118 *SALJ* 433.
[3] *Marais v Groenewald en ander* 2001 (1) SA 634, 645 (T), [2002] 2 All SA 578.
[4] Midgley 'Intention' (supra) at 433.
[5] Cf Burchell *Personality Rights* (supra) at 227.
[6] Cf *Bogoshi* (supra) at 1215.
[7] For example, the Universal Declaration of Human Rights (art12); the International Covenant on Civil and Political Rights (art 17); the European Convention of Human Rights and Fundamental Freedoms (art 8); the American Convention on Human Rights (art 11); the Convention on the Rights of the Child (art 16); and the American Declaration on the Rights and Duties of Man (arts 5, 9 and 10). Cf *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) at para 104.
[8] For example, in the Constitutions of Angola (art 24), Argentina (art 29), Mauritius (art 3*(c)*), Mexico (art 16), Mocambique (art 64), and Namibia (art 13). The right is also recognized in the French Civil Code (art 9) and Penal Code (arts 368–72). The German Basic Law does not mention a general right to privacy, but protects individual aspects of privacy such as protection of postal articles (art10) and inviolability of the home (art13). Likewise the right to privacy is not enshrined in the Constitution of the United States but has been held to be implicit in the First, Third, Fourth, Ninth and Fourteenth amendments which create 'zones of privacy'. See *Grisworld v Connecticut* 381 US 479 (1965); *Roe v Wade* 410 US 113 (1973). See, generally, *Bernstein* (supra) at paras 72-4, 77.
[9] See supra § 38.2*(a)*(i).

which creates a constitutional tort'.[1] Section 14 may well yield a similar transformation in South Africa. However, it would seem that at present the Constitutional Court is more inclined to develop the common law than to create a separate constitutional delict. Of course, this predisposition does not mean that such a delict may not be developed in the future.[2]

(a) Elements for a constitutional invasion of privacy

A breach of s 14 of the Constitution will prima facie be regarded as an unlawful invasion of privacy. The onus will then be on the person or body breaching the right to establish that such breach was justified in terms of s 36. Fault is not a requirement[3] and any defences must be consistent with s 36.[4] The courts have a discretion to award a wide variety of remedies.[5]

The Constitutional Court has pointed out that whereas at common law the test for whether there has been an unlawful infringement of privacy is a single inquiry, under the Constitution a two-fold inquiry is required.[6] In the case of a constitutional invasion of privacy the following questions need to be answered: *(a)* has the invasive law or conduct infringed the right to privacy in the Constitution? *(b)* if so, is such an infringement justifiable in terms of the requirements of the limitation clause[7] of the Constitution?[8] For this reason the Constitutional Court has cautioned against simply using common law principles to interpret fundamental rights and their limitations.[9]

As has been previously mentioned, the first constitutional enquiry is analogous to the policy-based enquiry into the unlawfulness stage of the common law — in both instances the subjective expectation of privacy must be reasonable.[10] The second enquiry deals with the justification of the infringement of the right to privacy in terms of s 36 of the Constitution and must be discharged on a balance of probabilities.[11] One must consider each of these stages of the enquiry before considering whether in a constitutional action for invasion of privacy it is necessary to prove fault.

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[1] Dooley *Modern Tort Law* (1997) Vol 3 § 35.05.
[2] See, generally, McQuoid-Mason 'Common Law v Constitutional Delict' (supra) at 243-246.
[3] See infra § 38.3*(a)*(iii).
[4] See infra § 38.3*(a)*(ii).
[5] See infra § 38.3*(b)*.
[6] *Bernstein* (supra) at para 71.
[7] Section 36(1).
[8] *Bernstein* (supra) at para 71.
[9] Ibid.
[10] See supra § 38.3.*(a)*(i).
[11] It has been pointed out that once an infringement of the constitutional right has been established the question of whether the right may be limited 'involves a far more factual enquiry than the question of interpretation'. See J De Waal, I Currie and G Erasmus *The Bill of Rights Handbook* (supra) at 134. This inquiry may involve sociological or statistical evidence on the impact that the restriction of the right has on society. Ibid at 134-5.

(i) *Was there an infringement of the constitutional right to privacy?*

The concept of privacy applies to both common law and constitutional infringements of the right.[1] In order to establish an infringement of the constitutional right to privacy the plaintiff will have to show that he or she had a subjective expectation of privacy which was objectively reasonable.[2] Except in the case of privacy rights going to the 'inner sanctum' of a person, an individual's expectation of privacy must be weighed against 'the conflicting rights of the community'.[3] Such expectations may also be tempered by countervailing fundamental rights such as freedom of expression[4] or the right of access to information.[5] However, freedom of expression — unlike the rights to life and dignity[6] — has been afforded no higher status than any other right in the Constitution,[7] including the right to privacy. Accordingly, the courts have to strike a balance between the individual's right to privacy and the public's right to information within the norms of the Constitution.[8]

The Constitution provides a right of access to any information held by the State or by any other person that is required for the exercise or protection of any rights.[9] These provisions have now been given effect by the Promotion of Access to Information Act.[10] The Act contains detailed provisions concerning the manner in which access to information held by public and private bodies should be made available.[11] It also provides special safeguards to protect the privacy of third parties, who are natural persons,[12] from publishing information which if released

[1] See supra § 38.1.

[2] *Bernstein* (supra) at para 75; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) at para 16. The Constitutional Court has suggested that, like the American courts, the Canadian courts require a subjective expectation of privacy by the injured person and that the expectation is recognized as reasonable by society, and that the German courts use an approach similar to that of a 'reasonable expectation of privacy.' *Bernstein* (supra) at paras 76, 78.

[3] *Bernstein* (supra) at para 69: a person's 'inner sanctum' was described by Ackermann J as their 'family life, sexual preference and home environment'.

[4] Section 16. However, it has been pointed out that in the case of the mass media it does not follow that 'journalists enjoy special constitutional immunity beyond that accorded to ordinary citizens'. See *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588, 610 (W), [1996] 1 All SA 478 (W), 1996 (6) BCLR 836 (Cameron J).

[5] Section 32, now given effect to by the Promotion of Access to Information Act 2 of 2000.

[6] The Constitutional Court has said that the 'rights to life and dignity are the most important of all human rights, and the source of all other rights.' See *S v Makwanyane* 1995 (3) SA 391, 451 (CC), 1995 (6) BCLR 65 (CC).

[7] *Buthulezi v SABC* 1997 (12) BCLR 1733, 1739 (D), [1998] 1 All SA 147 (D).

[8] Cf *Holomisa v Argus Newspapers Ltd* (supra) at 606, where the court sought to balance freedom of speech against reputation. Section 16(1)*(b)* of the Constitution provides that freedom of expression includes 'freedom to receive or impart information or ideas'.

[9] Section 32(1).

[10] Act 2 of 2000. See J Klaaren and G Penfold, 'Access to Information' in Chaskalson et al *Constitutional Law of South Africa* (2nd Edition, Original Service 2002) Chapter 62. See also I Currie and J Klaaren, *The Promotion of Access to Information Act* (2001).

[11] Sections 17-32 (public bodies) and 53-61 (private bodies).

[12] Sections 34 and 63.

would constitute an action for breach of confidence,[1] and, a variety of other forms of information held by public[2] and private bodies.[3] A public or private body that is sued for releasing information in terms of the Act will have to show that such disclosures were made in terms of the Act and were reasonable and justifiable in terms of FC s 36.

The constitutional right to privacy in s 14 can be broadly divided into (i) personal autonomy cases and (ii) informational privacy cases. Variations of these categories have been recognized in the common law for many years.[4] The common law can therefore provide some useful guidelines when giving the right content.

(aa) Privacy rights protecting personal autonomy

Personal autonomy privacy rights protect individuals against intrusions in and interference with their private lives. They are sometimes called substantive privacy rights.[5] Many personal autonomy rights were flagrantly invaded under the apartheid state in South Africa.[6] Under the new constitutional dispensation these rights may be infringed only if the state or party seeking to uphold an infringement can satisfy the test set out in the limitation clause.[7] The recognition of a constitutional right to privacy may also give rise to new actions for invasions of privacy by the state.

Personal autonomy privacy rights permit individuals to make important decisions about their lives without interference by the state.[8] These rights are generally

[1] Sections 37 and 65.

[2] Such as certain records of the South African Revenue Services (s 35); commercial information belonging a third party (s 36); information which might jeopardise the safety of individuals or property (s 38); information in certain police dockets in bail proceedings or used in law enforcement and legal proceedings (s 39); privileged records in legal proceedings (s 40); and research information belonging to third parties and public bodies (s 41).

[3] Such as certain commercial information belonging to a third party (s 64); information which might jeopardise the safety of individuals or property (s 66); privileged records in legal proceedings (s 67); commercial information belonging to a private body (s 68); and research information belonging to third parties and private bodies (s 69).

[4] Cf *Financial Mail (Pty) Ltd & others v Sage Holdings Ltd & another* 1993 (2) SA 451, 462 (A). See above § 38.2*(a)*(iii).

[5] L Du Plessis and J De Ville 'Personal Rights' in D Van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 242.

[6] See above § 38.2*(c)*(iii)(dd).

[7] S Woolman 'Limitations' in M Chaskalson et al (eds) *Constitutional Law of South Africa* (1st edition RS5 1999) Chapter 12. See also H Botha and S Woolman 'Limitations' in M Chaskalson et al (eds) *Constitutional Law of South Africa* (2nd Edition, *forthcoming* 2004) Chapter 36.

[8] Page Keeton et al *The Law of Torts* (supra) at 866. However, it has been suggested that 'the mere compulsion to be physically present at a particular place at a particular time in response to a subpoena cannot in itself be regarded as an intrusion on a person's privacy'. *Bernstein* (supra) at para 58. Ackermann J went on to say: 'A distinction must be drawn between the compulsion to respond to a subpoena and the compulsion to answer particular questions . . . in consequence of responding to the subpoena.' Ibid.

understood to give the individual — or a small intimate group — control over such matters as marriage, procreation, contraception, family relationships, child-rearing, and education.[1] This set of privacy rights cover personal decisions about one's home life, (possession of pornography[2]) and one's sexual life (the practice of sodomy[3]). Personal autonomy privacy enables individuals to decide who should enter their home and protects individuals from unauthorized intrusions into their homes by officers of the state[4] and other uninvited persons. However, these rights are not unlimited. Certain pornographic material may not be protected by the right to privacy.[5] Nor may certain sexual behaviour.[6] This lack of protection is particularly apt particularly where harm is caused to others — even if it takes place in the privacy of the home.

(A) *Pornography*

Section 2(1) of the repealed[7] Indecent or Obscene Photographic Matter Act,[8] subject to certain exceptions,[9] prohibited the possession of any 'indecent or obscene photographic matter'.[10] The latter was defined as including 'photographic matter or any part thereof depicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature'.[11] In *Case & another v Minister of Safety and Security & others*[12] the Constitutional Court struck down s 2(1) as an unconstitutional violation of the right to privacy. Didcott J wrote:

> 'What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the State. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which section 13 of the Interim Constitution (Act 200 of 1993) guarantees that I shall enjoy.'[13]

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[1] Page Keeton et al *The Law of Torts* (supra) at 866-7.

[2] *Case v Minister of Safety & Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) at para 91.

[3] Cf *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6, 30 (CC), 1998 (12) BCLR 1517 (CC) at 30 ('*NCGLE*').

[4] Cf *State v Madiba* 1998 (1) BCLR 38, 43 (D); *State v Gumede* 1998 (5) BCLR 530, 538 (D).

[5] *Case v Minister of Safety and Security* (supra) at para 99 (Langa J) (for example, pornography involving children or animals).

[6] *NCGLE* (supra) at para 118 (Sachs J): 'There are very few democratic societies, if any, which do not penalize persons for engaging in inter-generational, intra-familial, and cross-species sex, whether in public or in private . . . The privacy interest is overcome because of the perceived harm'.For a critique of Sach J's argument, see S Woolman 'Association' in M Chaskalson et al *Constitutional Law of South Africa* (2nd Edition OS 12-03) § 44.1(b)

[7] Repealed by the Films and Publications Act 65 of 1996 s 33.

[8] Act 37 of 1967.

[9] These were set out in s 2(2), which relates to situations where special permission has been granted, or the photographic matter has not been declared undesirable.

[10] 'Photographic matter' is defined in s 1 to include 'any photograph, photogravure and cinematograph film, and any pictorial representation intended for exhibition through the medium of a mechanical device'.

[11] Section 1.

[12] 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC).

[13] Ibid at para 91.

However, the right to personal autonomy privacy is not absolute. Didcott J's statement was qualified by some of the other judges[1] who expressed concern about issues such as child pornography.[2]

(B) *Sexual relationships*

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*[3] the Constitutional Court considered the constitutionality of the common law crime of sodomy and s 20A of the Sexual Offences Act. [4] Although the court found that the crime of sodomy violated the right of homosexuals not to be discriminated against on the basis of sexual orientation, it also made the following observations concerning privacy:

> Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.[5]

The court went on to say that 'the law may continue to proscribe what is acceptable and what is unacceptable even in relation to sexual expression and even in the sanctum of the home, and may, within justifiable limits, penalize what is harmful and regulate what is offensive'.[6] The court rejected the notion that 'the privacy argument may subtly reinforce the idea that homosexual intimacy is shameful or improper'.[7] The court observed that 'privacy protects persons not places' and is 'not simply a negative right to occupy a private space free from government intrusion, but a right to get on with your life and to express your personality'.[8]

(C) *Prostitution*

In *S v Jordan and others*[9] the Constitutional Court had to decide whether ss 2, 3*(b)* and *(c)* and s 20(1) (aA) of the Sexual Offences Act[10] — that made it an offence to keep a brothel and to have unlawful carnal intercourse or commit an act of indecency for reward — were unconstitutional in terms of the interim Constitution. Although most of the judgment dealt with whether the provisions were

[1] See *Case* (supra) at para 99. Langa J observes that the right to personal privacy even in this context is not necessarily exempt from limitation. Didcott J accepts this qualification. Ibid at para 95.
[2] Ibid at para 107 (Madala J). Cf *Osborne v Ohio* 495 US 103, 110 SCt 1691 (1990).
[3] *NCGLE* (supra).
[4] Sexual Offences Act 23 of 1957 s 20A
[5] *NCGLE* (supra) at para 23.
[6] Ibid at para 118.
[7] E Cameron 'Sexual Orientation and the Constitution: A Test Case for Human Rights' (1993) 110 *SALJ* 450, 464.
[8] *NCGLE* (supra) at para 116 (Sachs J).
[9] 2002 (6) SA 642 (CC) ('*Jordan*').
[10] Act 23 of 1957.

discriminatory, violated the rights to freedom and security and economic activity, and whether the state was entitled to outlaw commercial sex, the court also briefly dealt with the question of privacy.[1] The court held that none of the considerations regarding the establishment and nurturing of 'human relationships without interference from the outside community' mentioned in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[2] were present in the case of prostitution.[3] The court went on to say that by 'making her sexual services available for hire to strangers in the market place, the sex worker empties the sex act of much of its private and intimate character … [and] places her far away from the inner sanctum of protected privacy rights'.[4] The court, however, concluded that 's 20(1)(aA) does amount to an infringement of privacy and we cannot agree with the proposition that prostitutes surrender all their rights to privacy in relation to the use of their bodies simply because they receive money for their sexual services'.[5] The question, then, was whether the invasion of privacy occasioned by s 20(1)(aA) was justified in terms of s 33, the limitation clause, of the Interim Constitution. The court found that it was.[6]

The American experience regarding privacy rights which protect personal autonomy is instructive. The US Supreme Court has declared unconstitutional state laws which prohibited abortion except in order to save the mother's life;[7] city by-laws that have attempted to restrict the number of related individuals living in one house,[8] and by-laws that defined a 'family' narrowly as including only a few categories of related individuals.[9]

(bb) Privacy rights protecting information

Privacy rights limit the ability of people to gain, publish, disclose or use information about others without their consent. Some of these privacy rights have been

[1] *Jordan* (supra) at para 82 (Ngcobo J) (that privacy 'lies at the periphery [of the case] and not at its inner core').

[2] *NCGLE* (supra) at para 23.

[3] *Jordan* (supra) at paras 29 (Ncgobo J) and 82 (Sachs and O'Regan JJ). Interestingly enough, more than a hundred years ago, De Villiers CJ, in a case involving a raid on a brothel by the police without a proper warrant observed as follows: 'Even these abandoned women have their rights, and without their permission or a legal warrant no policeman is justified in interfering with their privacy.' *De Fourd v Cape Town Council* (1898) 15 SC 399, 402.

[4] *Jordan* (supra) at para 82. The court subsequently observed: 'although s 20(1)(aA) breaches the right to privacy, it does not reach into the core of privacy, but only touches its penumbra'. Ibid at para 86.

[5] *Jordan* (supra) at para 83: (Sachs and O'Regan JJ) 'However, we conclude that the invasion of privacy thus caused is not extensive'.

[6] *Jordan* (supra) at para 94. See infra, § 38.5.

[7] *Roe v Wade* 410 US 113, 93 SCt 705 (1973). For a discussion of privacy issues in the context of abortion, see M O'Sullivan & C Bailey 'Reproductive Rights' in M Chaskalson et al (eds) *Constitutional Law of South Africa* (1st edition RS5 1999) § 16.3.

[8] *Belle Terre v Boraas* 416 US 1, 94 SCt 1536 (1974).

[9] *Moore v City of East Cleveland* 431 US 494, 97 SCt 1932 (1977). See also L du Plessis & J de Ville 'Personal Rights' in Van Wyk et al *Rights and Constitutionalism* (supra) at 248; S Woolman and J De Waal 'Freeedom of Association' in Van Wyk et al *Rights and Constitutionalism* (supra) at 338 and S Woolman 'Association' in M Chaskalson et al *Constitutional Law of South Africa* (2nd Edition OS 12-03) § 44.3*(c)*(ii).

mentioned earlier in the discussion of common-law actions.[1] During the apartheid era in South Africa, the state engaged in widespread abuse of rights protecting information. Most of the offensive legislation upon which the abuse was predicated has been repealed.[2] Examples of invasions of informational privacy rights that are protected under the Final Constitution include: taking a prisoner's blood with consent, but not for HIV testing without consent;[3] taking a person's blood for testing with consent, but not for DNA testing; [4] and restoring erased computer information.[5]

Attempts by examinees to prevent the extraction of information at meetings of creditors in company liquidation and insolvency hearings by relying on the constitutional right to privacy have also been considered by the courts. In *Bernstein v Bester NO*[6] the Constitutional Court held that ss 417 and 418 of the Companies Act[7] were not inconsistent with the privacy and search and seizure provisions of s 13 of the interim Constitution. However, the Court held that if the answer to any question would infringe or threaten the examinee's interim Constitution rights, it would constitute 'sufficient cause' for the purposes of s 418(5)*(b)*(iii)(aa) of the Companies Act for refusing to answer the question, because such a question would not have been 'lawfully put'.[8] The Constitutional Court has held that the same principle applies to questions asked in terms of ss 64 and 65 of the Insolvency Act.[9] A similar approach was adopted by the Constitutional Court in respect of s 205 of the Criminal Procedure Act.[10] This Act also requires examinees to answer certain questions or face criminal penalties.[11]

It seems that if information is conveyed in circumstances analogous to a privileged occasion under the common law,[12] such disclosure may not necessarily be a breach of constitutional privacy provided the information itself was not originally obtained as a result of such a breach. In *Mistry v Interim National Medical and Dental Council of South Africa & others*,[13] information was communicated by one medicines control inspector to another for the purposes of planning and implementing a search of premises in order to carry out a regulatory inspection. It was argued that this was an invasion of constitutional privacy provided for in

[1] See supra § 38.2*(a)*(iii).
[2] See supra § 38.2*(c)*(iii)(dd).
[3] Cf *C v Minister of Correctional Services* 1996 (4) SA 292 (T).
[4] *S v R* 2000 (1) SACR 33, 39 (W).
[5] *Klein v Attorney-General, WLD* 1995 (3) SA 848, 865 (W).
[6] *Bernstein* (supra).
[7] Act 61 of 1973.
[8] *Bernstein* (supra) at para 61.
[9] Act 24 of 1936. See *Harksen v Lane NO & others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 77.
[10] Act 51 of 1977.
[11] *Nel v Le Roux NO & others* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC) at para 18.
[12] See supra § 38.2*(c)*(i)(cc).
[13] 1998 (7) BCLR 880 (CC), 1998 (4) SA 1127 (CC) ('*Mistry*').

Interim Constitution s 13 and contrary to the secrecy provisions of the Medicines and Related Substances Control Act[1] and the Medical, Dental and Supplementary Health Service Professions Act.[2] In finding that the applicant's right to constitutional privacy had not been breached, the Constitutional Court took into account the following factors: the substance of the communication was merely that a complaint had been made and that an inspection was planned; the information had not been obtained in an intrusive manner but had been volunteered by a member of the public; it was not about intimate aspects of the applicant's personal life but about how he conducted his medical practice; it did not involve data provided by the applicant himself for one purpose and used for another; it was information which led to a search, not information derived from a search; and it was not disseminated to the press or the general public or persons from whom the applicant could reasonably expect such private information would be withheld, but was communicated only to a person who had statutory responsibilities for carrying out regulatory inspections for the purpose of protecting the public health, and who was himself subject to the requirements of confidentiality.[3]

State demands for information that is reasonably required for official statistical,[4] census[5] and income tax[6] purposes are likely to be regarded as reasonable and justifiable.[7] Likewise, statutory reporting requirements concerning information about child abuse[8] and mental patients who are dangerous to others[9] are likely to be declared constitutional.[10]

The United States' experience concerning access to information is useful, but should not be followed blindly. It has been held not to be unconstitutional for a statute to require doctors to disclose information to the state about prescriptions for certain drugs with a high potential for abuse,[11] and for certain census questions to elicit information concerning personal and family characteristics.[12] It has also been held that a telephone subscriber can have no 'reasonable expectation of privacy' regarding telephone calls which are electronically monitored by a telephone company,[13] and that a bank client has no expectation of privacy in respect

[1] Act 101 of 1965, s 34.
[2] Act 56 of 1974, s 41A(9)*(a)*.
[3] *Mistry* (supra) at para 44 (Sachs J).
[4] Statistics Act 66 of 1976.
[5] Ibid.
[6] Income Tax Act 58 of 1962.
[7] See generally McQuoid-Mason *Privacy* (supra) at 99, 158. It could perhaps be argued that the Identification Act 72 of 1986 s 6 goes too far, particularly with regard to the need for fingerprints (s 11). However, the secrecy provisions (s 17) and the need to guard against fraud may justify the requirement.
[8] Child Care Act 74 of 1983 s 42; Prevention of Family Violence Act 133 of 1993, s 4.
[9] Mental Health Act 18 of 1973, s 13.
[10] See Woolman 'Limitation' (supra).
[11] *Whalen v Roe* 429 US 589, 97 SCt 869 (1977) (information was stored in a central computer).
[12] *United States v Little* 321 F Supp 38 D Del (1971). See generally Du Plessis and De Ville 'Personal Rights' in Van Wyk et al *Rights and Constitutionalism* (supra) at 244-5.
[13] *Smith v Maryland* 442 US 735, 99 SCt 2577 (1979).

of information contained in cheques and deposit slips handed in to the bank.[1] These latter decisions are wrong. They assume that the subscribers and clients have forfeited their right to privacy simply by agreeing to comply with the statutory or other requirements of the service providers.

Section 14 of the Final Constitution specifically provides protection against the following methods of unlawfully obtaining information: *(a)* searches of people's persons or homes;[2] *(b)* searches of people's property;[3] *(c)* seizures of possessions;[4] and *(d)* infringements of communications.[5] The list is not exhaustive. The first three categories can be broadly subsumed under a single category of unlawful searches and seizures.

(ii) *Unlawful searches and seizures*

Unlawful searches and seizures include searches of individual's persons or homes, searches of individual's property and seizure of possessions. Such searches and seizures are generally regarded as invasions of privacy.[6] A number of laws authorizing searches and seizures have been declared unconstitutional. De Waal, Currie and Erasmus have suggested[7] that to be constitutionally valid such laws must (i) properly define the power to search and seize;[8] (ii) provide for prior authorization by an independent authority;[9] and, (iii) must require the independent authority to be provided with evidence on oath that there are reasonable grounds for conducting the search.[10]

Section 13 of the Interim Constitution was aimed at protecting personal privacy and not private property.[11] The same proposition applies to s 14 of the Final Constitution.[12] A person may be searched in terms of the Criminal Procedure

[1] *United States v Miller* 425 US 435, 96 SCt 1619 (1976).

[2] *S v Madiba* 1998 (1) BCLR 38, 43 (D)(search and seizure in terms of Arms and Ammunition Act 75 of 1969 – evidence allowed).

[3] Cf *Mistry* (supra)(search of doctor's surgery).

[4] *Mistry* (supra)(seizure of pharmaceutical goods).

[5] *S v Naidoo* 1998 (1) SACR 479 (N), 1998 (1) BCLR 46 (D)(intercepting a telephone call); *Protea Technology v Wainer and others* 1997 (9) BCLR 1225 (W)(recording a telephone conversation). Where such information is used only by the person obtaining it and is not disclosed to others the unlawful conduct may amount to an intrusion.

[6] See *Fedics Group (Pty) Ltd & another v Matus & another* 1997 (9) BCLR 1199 (C), 1998 (2) SA 617 (C) at para 97.

[7] See De Waal et al *Bill of Rights* (supra) at 278.

[8] *Mistry* (supra) at para 29.

[9] *Park-Ross v Director, Office for Serious Economic Offences* 1995 (2) BCLR 198, 218-9 (C), 1995 (2) SA 148.

[10] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2000 (10) BCLR 1079 (CC), 2001 (1) SA 545 (CC) at para 28. See also *South African Association of Personal Injury Lawyers v Heath* 2001(1) SA 883 (CC), 2000 (10) BCLR 1131, 1165 (CC). Cf De Waal et al *Bill of Rights* (supra) at 278.

[11] *Mistry* (supra) at para 28.

[12] *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 116.

Act[1] if he or she has been arrested,[2] or the person conducting the search has a search warrant.[3] A search without a warrant will usually result in a constitutional violation.[4] Quite a number of extant statutory provisions regarding searches and seizures should be regarded as unconstitutional invasions of privacy.[5]

The Constitutional Court declared that s 28(1) of the Medicines and Related Substances Control Act[6] — which empowered inspectors to enter and search premises without a warrant and to seize and remove medicines from those premises — is inconsistent with the privacy right contained in IC s 13.[7] It held that to the extent that a statute authorizes warrantless entry into private homes and rifling through intimate possessions, such a statute would breach the right to personal privacy.[8] The court held that the invasion authorized by s 28(1) was substantially disproportionate to its public purpose, was clearly overbroad in its reach, and failed to pass the proportionality test.[9] Furthermore, the provisions were so wide that they could not be 'read down' to bring them within the limits of the Constitution.[10]

A lower court has held that s 6 of the Investigation of Serious Economic Offences Act,[11] which empowers the Director of the Office for Serious Economic Offences in pursuit of an enquiry under s 5 to enter and search premises

[1] Act 51 of 1977.
[2] Section 23.
[3] Section 21(2).
[4] *S v Motloutsi* 1996 (1) SA 584, 592-3 (C), 1996 (2) BCLR 220 (C)(the fact that the accused's lessee had allowed the police to search the premises without a warrant did not make the police conduct lawful).
[5] See eg ss 19-36 in Chapter 2 of the Criminal Procedure Act, which confer extensive powers of search and seizure and provide for entry of premises and the forfeiture and disposal of property; s 11(1)*(g)* of the Drugs and Drug Trafficking Act, which allows a police official to 'seize anything which, in his opinion, is connected with, or may provide proof of a contravention of a provision' of the Act; s 41(1)*(a)* of the Arms and Ammunition Act, which allows a police official 'who has reason to believe that an offence has been committed, by means of or in respect of any article which he has reason to believe to be in or on any place, including any premises, building, dwelling, flat, room, office, shop, structure, vessel, aircraft or vehicle, or any part thereof or to be in possession of any person' to 'without warrant, enter and search such a place or search such a person and seize any article, arm or ammunition'; s 4 of the Customs and Excise Act, which gives customs officers wide powers of entry search and seizure and to question people; s 8(6) of the Prevention of Public Violence and Intimidation Act, which allows the Chairman, or any member of staff, of a Commission of Inquiry Regarding the Prevention of Public Violence, for the purposes of an inquiry, at all reasonable times to enter upon and inspect any premises and demand and seize any document on or kept on such premises; s 37(2)*(b)* of the Criminal Procedure Act, which allows a registered medical practitioner attached to any hospital to take a blood sample from a person if such medical officer has reasonable grounds to believe that the contents of the person's blood may be relevant at any later criminal proceedings. The taking of fingerprints of an arrested person in terms of s 37 of the Criminal Procedure Act was found not to be contrary to ss 10 and 11(2) of the Interim Constitution, but the question of privacy was not raised. See *S v Huma & another* 1996 (1) SA 232, 233, 237 (W).
[6] Act 101 of 1965.
[7] *Mistry* (supra).
[8] Ibid at para 16.
[9] Ibid at para 23.
[10] Ibid at para 27.
[11] Act 117 of 1991.

and to seize and remove property therefrom without authority, violates the constitutional right to privacy in terms of the Interim Constitution.[1] However, s 7 of the Act, which prohibits disclosure without the permission of the Director of any information obtained as a result of an enquiry, search and seizure conducted in terms of the Act, was held by the same court not to be unconstitutional because the Director is required to act *intra vires* s 7.[2]

It has also been held that the provisions of s 7(3) of the Harmful Business Practices Act,[3] — which gave investigating officers arbitrary powers of entry, inspection, search and seizure without a warrant — are an infringement of s 14 of the Constitution.[4] Section 7(3) was not saved by the limitation clause of the Constitution[5] because there was no reason why such powers could not be subject to the same sort of prerequisites and controls that are laid down by the search and seizure provisions of s 21 of the Criminal Procedure Act.[6] The argument that the exercise of the powers in s 7(3) of the Harmful Business Practices Act would not be unconstitutional if the provisions were used with due regard to the Constitution was held not to be feasible in practice.[7]

In the United States the word 'search' has been held to mean 'a governmental invasion of a person's privacy'.[8] Persons claiming that their privacy has been invaded have to establish that they had a subjective expectation of privacy, and that society has recognized that expectation as objectively reasonable.[9] The American courts have decided that whether or not an individual has lost his or her legitimate expectation of privacy is determined by considering such factors as whether the item was abandoned[10] or obtained by consent.[11] The courts have also interpreted 'seizure' of a person's property as occurring when the government 'meaningfully interferes with an individual's interests in possession'.[12] As

[1] *Park-Ross v Director, Office for Serious Economic Offences* 1995 (2) SA 148 (C), 1995 (2) BCLR 198 (C).
[2] Ibid.
[3] Act 71 of 1988.
[4] *Janse van Rensburg NO v Minister van Handel en Nywerheid en 'n ander* 1999 (2) BCLR 204, 220 (T). ('*Janse van Rensburg*')
[5] Section 36(1).
[6] Act 51 of 1977. See *Janse van Rensburg* (supra) at 220. (The court said that by way of comparison notice could also be taken of s 10(2) of the Consumer Affairs (Unfair Business Practices) Act 7 of 1996 of Gauteng.)
[7] *Janse van Rensburg* (supra) at 220.
[8] *Rakas v Illinois* 439 US 128 at 143, 99 SCt 421 (1978).
[9] Ibid. Cf *Bernstein* (supra) at para 75: (Ackermann J) '[I]t seems a sensible approach to say that the scope of a person's privacy extends a fortiori only to those aspects in regard to which a legitimate expectation of privacy can be harboured.'
[10] *Katz v United States* 389 US 347, 361, 88 SCt 507 (1967); *Abel v United States* 362 US 217, 241, 80 SCt 683 (1960). No expectation of privacy where items were left in a hotel waste basket after a guest had checked out of the hotel.
[11] See *United States v Matlock* 415 US 164, 177, 94 SCt 988 (1974)(Consent given by a fellow occupant of a bedroom). But see *S v Motloutsi* 1996 (1) SA 584, 592-3 (C), 1996 (7) BCLR 220 (C)(the court held that the fact the accused's lessee had given consent for the police to search the premises without a warrant did not make their conduct lawful).
[12] *United States v Jacobsen* 466 US 109, 120, 104 SCt 1652 (1984).

the South African Constitution operates horizontally as well as vertically, the terms 'searches' and 'seizures' may have a wider meaning than in the United States and may apply to private security firms and any one else who engages in unlawful searches and seizures. However, it has been held that Bills[1] designed to prohibit traditional leaders from accepting any remuneration or allowances other than that provided for by law or custom of the Province of KwaZulu-Natal do not violate the right not to have private possessions seized in terms of s 13 of the Interim Constitution.[2]

The Constitutional Court has no jurisdiction to investigate the legality of searches and seizures which occurred prior to the Interim Constitution coming into operation.[3]

(iii) *Infringements of private communications*

Infringements of private communications have long been recognized as invasions of privacy in South African law.[4] For instance, the courts have held that eavesdropping and electronic surveillance by private detectives during matrimonial disputes may result in a criminal invasion of privacy if the methods used are unreasonable.[5] The stealing of tape recordings of confidential business meetings and offering them to a third party has been held to be an unlawful invasion of privacy.[6] During the Apartheid era, however, widespread violation of private communications was sanctioned by statute. For example, a person designated by the Minister of Posts and Telegraphs, or a Minister who was a member of the State Security Council, could authorize the interception of mail 'in the interests of state security'[7] and listen in to telephone conversations.[8] Such practices would today certainly be an infringement of s 14.[9]

[1] See K*waZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill, 1995 and Payment of Salaries, Allowances and other Privileges to the Ingonyama Amendment Bill, 1995* 1996 (4) SA 653 (CC), 1996 (7) BCLR 903 (CC).

[2] *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and other Privileges to the Ingonyama Amendment Bill of 1995* 1996 (4) SA 653 (CC), 1996 (7) BCLR 903 (CC).

[3] *Key v Attorney-General, Cape Provincial Division, & another* 1996 (4) SA 187 (CC), 1996 (6) BCLR 788 (CC), 1996 (2) SACR 113 (CC); *Rudolph & another v Commissioner for Inland Revenue & others* 1996 (4) SA 552 (CC), 1996 (7) BCLR 889 (CC).

[4] McQuoid-Mason *Privacy* (supra) at 141-142. See above § 38.2.

[5] *S v A* 1971 (2) SA 293, 297 (T)(where private detectives were convicted on a charge of *crimen injuria* for installing a 'transmitter wireless microphone' under the dressing table of the complainant during an investigation into the latter's private life at the request of an estranged spouse).

[6] *Janit v Motor Industry Fund Administrators (Pty) Ltd* 1995 (4) SA 293 (A).

[7] Post Office Act 44 of 1958 s 118A. Cf McQuoid-Mason *Privacy* (supra) at 141-142.

[8] Act 44 of 1958 s 118(2)*(b)*. Cf McQuoid-Mason *Privacy* (supra) at 145-146.

[9] Section 13 of the Interim Constitution. See, for example, *Fedics Group (Pty) Ltd & another v Matus & another* 1997 (9) BCLR 1199 (C), 1998 (2) SA 617 (C); *Protea Technology Ltd & another v Wainer & others* 1997 (9) BCLR 1225 (W).

The Interception and Monitoring Prohibition Act[1] now prohibits the intentional interception of telecommunications or monitoring of conversations by monitoring devices[2] unless such interception is authorized by a judge.[3] The same applies to postal articles.[4] The courts have held that the primary purpose of the Act is to protect confidential information from illicit eavesdropping.[5] Such authorization, however, may only be given by a judge, on written application, if he or she is satisfied that: (i) the offence that has been or is being or will probably be committed is a serious offence that cannot be properly investigated in any other manner and of which the investigation in terms of the Act is necessary; or (ii) the security of the Republic is threatened or (iii) that the gathering of information concerning a threat to the security of the Republic is necessary.[6] The above provisions may well be open to scrutiny by the Constitutional Court to determine whether they violate FC s 14. Even if these provisions are found constitutionally sound, where the provisions of the Act have not been followed, the injured party may have an action for an invasion of his or her constitutional right to privacy[7] and secure an order declaring that the evidence obtained is inadmissible.[8]

Some courts have held that in the case of intercepting a telephone call from a kidnapper demanding a ransom, or the interception of persistent indecent telephone calls made by a perverted caller, such interceptions may escape the prohibition in s 2(1)*(b)* of the Interception and Monitoring Prohibition Act. They escape on the grounds of the consent of one of the parties to the telephone call or on the basis of an argument that such a call would not constitute 'a conversation'.[9] However, in cases where police informers or traps are used, the mere consent of one of the parties to the surreptitious electronic recording of a

[1] Act 127 of 1992.
[2] Section 2(1).
[3] Section 2(2).
[4] Section 2(2)*(b)*.
[5] *Lenco v Holdings Ltd & others v Eckstein & others* 1996 (2) SA 693, 700 (N); *S v Kidson* 1999 (1) SACR 338, 344 (W) ('*Kidson*').
[6] Section 3(1)*(b)*.
[7] See, for example, *S v Naidoo & another* 1998 (1) BCLR 46, 72 (N), 1998 (1) SACR 479 (N) (McCall J) ('If the monitoring of a conversation is not authorized by a direction properly and lawfully issued by a Judge in terms of section 3, then not only would such monitoring constitute a criminal offence in terms of the Monitoring Act, it would also, in my judgment, constitute an infringement of the right to privacy, which includes the right not to be subject to the violation of private communications'.)
[8] *S v Naidoo* (supra) at 72: a judge granted a direction in terms of the Monitoring Act, based on false and misleading information, to tap a telephone. See also *S v Nkabinde* 1998 (8) BCLR 996 (N): the police monitored conversations between the accused and his legal representatives in terms of an order wrongly granted under the Monitoring Act, and continued to do so for a period beyond the date provided for by the tainted authority. See M Chaskalson & W Trengove 'Evidence' in M Chaskalson et al *Constitutional Law of South Africa* (1st edition RS5 1999) § 26.4*(c)*.
[9] *S v Naidoo* (supra). See *Kidson* (supra) at 343 (Cameron J agreed with McCall J that consent by one of the parties to a two-party conversation may render that monitoring exempt, but went on to qualify his agreement).

conversation is not sufficient, and proper prior authorization must be obtained.[1] A reasonable expectation of privacy is violated when a telephone conversation is intercepted by a third party without the knowledge or consent of the participants.[2] However, the mere fact that the parties on a telephone are aware that they must be careful when talking on the telephone cannot be construed as consent to the violation, or a waiver of the person's expectation of a right to privacy.[3]

The case of 'participant monitoring' has been dealt with differently by the High Court.[4] Where a suspect who was assisting the police in their investigations into a murder had offered to visit an accused at her home carrying a concealed voice-activated tape recorder and had later handed over the recording to the police, the information imparted was held not to be 'confidential information' for the purposes of the Interception and Monitoring Prohibition Act.[5] The court held that the legislature could not have intended to impose an unqualified prohibition on participant monitoring. Its primary aim is to protect confidential information from such illicit eavesdropping as third-party surveillance.[6] While the Act prohibits intentional monitoring to gather confidential information, information voluntarily imparted in a two-party conversation covering the criminal conduct of the communicator is not for the purposes of the Act 'confidential information' in relation to the other party to the conversation.[7] Therefore, 'no constitutionally cognisable breach of privacy occurred' when the police procured the monitoring by the suspect of his conversation with the accused.[8] Even assuming that the Act had been breached, the court found that these facts did not support a claim of entrapment. Although the police might have played a trick on the accused, the police violation was 'minimal' and there had not been 'any police impropriety or invasion of privacy' or 'serious failure' by them.[9] More recently the 'participant

[1] Compare the Canadian approach in *R v Duarte* [1990] 1 SCR 30; *R v Wiggins* [1990] 1 SCR 62; *R v Wong* [1990] 3 SCR 36. See also P W Hogg *Constitutional Law of Canada vol II* (3 ed 1992) 45-7.

[2] *R v Thompson* [1990] 2 SCR 1111. Cf Hogg *Constitutional Law of Canada* (supra) at 45-7.

[3] *S v Naidoo*(supra) at 89.

[4] *Kidson* (supra).

[5] *Kidson* (supra) at 348. Cameron J took the view that the formulation by Heher J, in *Protea Technology Limited & another v Wainer & others* 1997 (3) SA 594, 603 (W) ('*Protea Technology*'), that the question of whether or not the information enjoys the protection of the Act depends largely upon the intention of the communicator was 'over-broad'. *Kidson* (supra) at 347. He suggested that the following additional requirement should be added: 'the information the communicator intended to restrict as confidential must be information upon which the law attributes the confidentiality'. Ibid.

[6] Ibid at 344.

[7] Ibid at 348.

[8] Ibid at 350.

[9] Ibid at 352. Cameron J therefore used his discretion to admit the tape recording and transcript. Ibid at 353. See Chaskalson and Trengove 'Evidence' (supra) at § 26.4(c). The court had previously cautioned that: 'The police and other agencies should not be encouraged to circumvent statutory prohibitions with flimsy re-arrangements of personnel and operators' *Kidson* (supra) at 346.

monitoring' exemption from constitutional invalidity has been extended to entrapment in both civil[1] and criminal[2] cases.[3]

In *Protea Technology v Wainer,* the court held that employees have a legitimate expectation of privacy concerning telephone calls made and received by them in matters unconnected with their employer's business.[4] Where conversations involve their employer's affairs the latter is entitled to demand and obtain as full an account as the employee is capable of furnishing.[5] Such conversations are not protected by the Constitution because as soon as employees abandon their private sphere for the affairs of their employers they lose the benefit of the right to privacy. The employers then have the right to know both the substance and the manner in which employees conduct themselves and it matters not how the information is obtained.[6] However, such an approach goes too far and could make working conditions untenable. Unreasonable monitoring of employees' communications when dealing with the employer's business should be regarded as *prima facie* evidence of a breach of their constitutional right to privacy. Employers who wish to monitor continually the substance and manner in which their employees communicate with others about the affairs of the business should be required to justify their conduct within the provisions of s 36 of the Constitution.[7]

In the United States, electronic eavesdropping on private conversations has been held to be an invasion of privacy[8] except where such calls are electronically monitored by a telephone company.[9] In Germany, the privacy of correspondence, post and telecommunications is protected by the Basic Law.[10]

(iv) *Fault not required*

Fault is not a requirement for an infringement of a constitutional right to privacy. Thus strict liability may be imposed upon a defendant who breaches the constitutional right to privacy. Actions brought under the general common law right to privacy, as developed under the Final Constitution, require the usual fault

[1] See *Tap Wine Trading CC v Cape Classic Wines (Western Cape) CC* 1999 (4) SA 194, 197 (C), [1998] 4 All SA 86 (C).

[2] See *S v Dube* 2000 (1) SACR 53, 75-6 (N), 2000 (6) BCLR 685 (N), 2000 (2) SA 583 (N).

[3] See De Waal et al *Bill of Rights* (supra) at 287: 'In our view these cases were correctly decided since a person can hardly be said to have a subjective expectation of privacy *vis-a-vis* a party to a conversation. The Monitoring Act and Constitution is [sic] aimed at preventing third party monitoring in the sense of eavesdropping'. That said, if the conversation was meant to be confidential (and was not unlawful) and a disclosure is subsequently made to third parties, the protection of the general right to privacy in s 14 of the Final Constitution would apply.

[4] *Protea Technology* (supra).

[5] Ibid at 1240.

[6] Ibid at 1241.

[7] Woolman 'Limitations' (supra).

[8] See *Katz v United States* 389 US 347, 88 SCt 507 (1967).

[9] See *Smith v Maryland* 442 US 735, 99 SCt 2577 (1979). See also Du Plessis and De Ville 'Personal Rights' in Van Wyk et al *Rights and Constitutionalism* (supra) at 244-5.

[10] Article 10. See Du Plessis and De Ville 'Personal Rights' in Van Wyk et al *Rights and Constitutionalism* (supra) at 248-9.

elements to be proved.[1] However, the position regarding actions based on the listed categories in s 14 may be different. The imposition of strict liability for unlawful searches and seizures and interferences with communications specifically listed in the Constitution is similar to that adopted by the common law in respect of unlawful arrest or imprisonment.[2] Such wrongs are technically regarded as *injuriae* under the *actio injuriarum*. But the courts tend to impose strict liability on the arresting or imprisoning authorities.[3] The plaintiff must prove the fact of the arrest or imprisonment and that it was unlawful. It is not necessary to allege or prove *dolus* or culpa.[4] Thereafter, it is for the defendant to show that the arrest or imprisonment was justified.[5] The policy behind the approach is that the courts regard unlawful arrest as a serious encroachment upon the freedom of an individual.[6] The infringement of a constitutional right to privacy can be regarded as equally egregious, particularly the specific categories mentioned in s 14. The US courts adopt this approach with respect to constitutional torts involving invasions of privacy.[7]

The defendant can justify such infringements at the rights analysis stage by showing that the plaintiff had no reasonable expectation of privacy[8] or subsequently, in terms of s 36, showing that the legally sanctioned limitation was reasonable and justifiable.[9]

(b) Remedies

There is a wide range of remedies available for breaches of fundamental rights in the Constitution.[10] Apart from the specific remedy of declaring any law or conduct inconsistent with the Constitution invalid to the extent of the inconsistency,[11] the court may grant 'appropriate relief' including a declaration of rights, to any person who alleges and proves that a right in the bill of rights has been infringed or threatened.[12]

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[1] See supra § 38.2*(a)*(ii).

[2] *Whittaker v Roos and Bateman* 1912 AD 92, 129; *Ramsay v Minister van Polisie* 1981 (4) SA 802, 806-7 (A); *Minister of Justice v Hofmeyr* 1993 (3) SA 131, 156 (A).

[3] Ibid. See also Neethling et al *Law of Personality* (supra) at 130.

[4] *Donono v Minister of Prisons* 1973 (4) SA 259, 262 (C); *Shoba v Minister van Justisie* 1982 (2) SA 554, 559 (C).

[5] *May v Union Government* 1954 (3) SA 120, 124 (N); *Ingram v Minister of Justice* 1962 (3) SA 225, 227 (W); *Bhika v Minister of Justice* 1965 (4) SA 399, 400 (W); *Divisional Commissioner of SA Police Witwatersrand v SA Associated Newspapers Ltd* 1966 (2) SA 503, 511-2 (A); cf *Groenewald v Minister van Justisie* 1973 (3) SA 877, 883-4 (A); *Prinsloo v Newman* 1975 (1) SA 481, 500 (A); *Minister of Law and Order v Hurley* 1986 (3) SA 568, 589 (A).

[6] *Areff v Minister van Polisie* 1977 (2) SA 900, 914 (A).

[7] Cf *Monroe v Pape* 365 US 167 (1961), wrongful search, seizure and arrest. See also *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics* 403 US 388 (1971).

[8] See supra § 38.3*(a)*(ii).

[9] See infra § 38.3*(c)*.

[10] See, generally, De Waal et al *Bill of Rights* (supra) ch. 8.

[11] Section 172 (1).

[12] Section 38.

In respect of infringements of privacy four broad categories of constitutional remedies will be considered: *(a)* constitutional damages; *(b)* interdicts; *(c)* declarations of invalidity; and *(e)* exclusion of evidence.[1] The first two are always relevant for a delictual action for invasion of privacy, while the latter may sometimes be relevant. However, these categories are not closed. The courts have the power to adopt a flexible approach by granting any other 'appropriate relief'.[2]

(i) *Constitutional damages*

In *Fose v Minister of Safety and Security*,[3] the Constitutional Court expressed the view that in most cases the ordinary common law remedies for delictual damages for infringements of personality rights will be an adequate remedy for a breach of a fundamental right. However, it has been pointed out that there is no reason 'to imagine that any remedy is excluded' provided it 'serves to vindicate the Constitution and deter its further infringement'.[4] In *Fose,* the Court expressed strong reservations about the concept of punitive damages for constitutional wrongs and refused to grant them on the facts of the case. It appears, however, that the court rejected the concept of constitutional punitive damages *in addition to* the damages that were claimed by the plaintiff as a *solatium* for the torture and assault allegedly suffered by him at the hands of the police. The fact that his constitutional rights had been egregiously violated would be provided for in the calculation of the common law damages that would be awarded to vindicate his rights.[5]

Justice Ackermann, writing for the majority, stated that as the claim for punitive constitutional damages was in addition to the claim for patrimonial loss, pain and suffering, loss of amenities, *contumelia* and other general damages, it would perpetuate 'an historical anomaly' which 'fails to observe the distinctive functions of the civil and criminal law and which sanctions the imposition of a penalty without any of the safeguards afforded in a criminal prosecution'.[6] A more cautious approach was taken by Didcott J and Kriegler J. Didcott J thought that punitive damages should not be awarded against the state and that the matter was better dealt with by the legislatore.[7] Kriegler J argued that although punitive damages should not be awarded in the case before the court, he believed that the court should not go as far as 'rejecting for all time the possibility that a case may arise where punitive or exemplary damages are 'appropriate' redress for infringement of constitutionally protected rights'.[8]

[1] De Waal et al *Bill of Rights* (supra) at 159.
[2] Section 38. See De Waal et al *Bill of Rights* (supra) at 172-173.
[3] 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 at paras 58, 98 ('*Fose*'). See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC).
[4] Ibid at para 100 (Kriegler J).
[5] Ibid at para 67.
[6] Ibid at para 70.
[7] Ibid at para 87.
[8] Ibid at para 91. Kriegler J pointed out that Ackermann J had been 'uncharacteristically ambivalent' in that he appeared to reject the concept in paras 69–73 of his judgment, but at para 70 'seeks to found the current rejection on the particular facts of this case.' Ibid.

However, after *Carmichele* the position regarding damages for delicts resulting from breaches of constitutional fundamental rights has changed.[1] Now all courts will be required to develop the common law so that it complies with constitutional imperatives. That said, courts are still unlikely to award additional constitutional damages unless these can be regarded as 'an appropriate remedy'.[2] In such cases it would have to be shown that such damages would vindicate the Constitution and serve to deter further violations of fundamental rights.[3]

The same common law principles concerning the presumption that the plaintiff has suffered sentimental damages will apply.[4] The quantum of damages for a *solatium* cannot be accurately calculated and the court will take into account the same factors as under the common law. It is submitted however that when calculating the quantum of damages the fact that the defendant has breached a constitutional right should be regarded as an aggravating factor, in the sense that it is *prima facie* evidence of egregious conduct by the defendant.[5]

(ii) *Interdicts*

The Constitutional Court has used the remedy of interdict[6] and *mandamus*[7] to protect fundamental rights. The elements required for the granting of an interdict to prevent a constitutional infringement are the same as those that apply at common law.[8] Where there is an application for a prior restraint against the publication of an alleged defamatory statement, the courts have been cautious about infringing the right to freedom of expression.[9] In such cases, the courts seem to take the view that such restraints bear a heavy presumption against constitutional validity.[10] Similar principles would apply to publications involving informational privacy. De Waal, Currie and Erasmus point out that the Constitutional Court has on occasion used 'the so-called 'structural interdict' which directs violators to rectify the breach of fundamental rights under court supervision'.[11]

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[1] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC).

[2] Ackermann J observed, in *Fose* (supra) at para 69, that 'an appropriate remedy must mean an effective remedy'.

[3] *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 at para 38.

[4] See, generally, Neethling et al *Law of Personality* (supra) at 277.

[5] Cf *Afrika v Metzler* 1997 (4) SA 531, 539 (NmH) (court said that the fact that the defendant had breached a fundamental right in the Namibian Constitution should be regarded as an aggravating factor).

[6] See, eg, *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 96 (an interdict was an appropriate remedy to prevent the selective institution of legal proceedings by the city council for the recovery of rates which amounted to unfair discrimination in breach of the Constitution).

[7] See, eg, *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 46: a mandamus was considered an appropriate remedy to compel the Electoral Commission to comply with Constitution.

[8] See above § 38.2*(b)*(ii).

[9] *Mandela v Falati* 1997 (3) SA 789 (CC).

[10] *Mandela v Falati* (supra) at 259-60.

[11] De Waal et al *Bill of Rights* (supra) at 193, citing *August v Electoral Commission* 1999 (3) SA 191 (CC), 1999 (4) BCLR 363 (CC)(The Electoral Commission was directed to make the necessary arrangements to enable prisoners to vote). On remedies, generally, see J Klaaren 'Remedies' in M Chaskalson et al *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Chapter 9.

(iii) *Declarations of invalidity*

If the court finds that a law or a provision of a law is inconsistent with the Constitution it may declare the law or the provision invalid to the extent of the inconsistency.[1] This applies equally to the conduct of a person or an institution.[2] There have been several instances where certain provisions of laws[3] or conduct of certain persons[4] have been declared inconsistent with the constitutional right to privacy. In such cases, the declaration of invalidity could also lay the basis of an award for delictual damages. The plaintiff's claim could include a prayer for a declaration of invalidity together with a prayer for an award of damages if the first prayer is upheld. The remedy of a declaration of the invalidity of a statute does not exist at common law.

(iv) *Exclusion of improperly obtained evidence*

In searches and seizures or infringements of private communications which result in a person's privacy being unlawfully infringed and evidence improperly obtained, the evidence must be excluded if it would render the trial unfair or be detrimental to the administration of justice.[5] This topic is discussed elsewhere in this volume.[6]

(v) *Any other 'appropriate relief'*

The Constitution empowers the courts to provide 'appropriate relief' where the applicant's statutory or common law remedies are insufficient.[7] In delictual actions, any other 'appropriate relief' could be any remedy that vindicates the Constitution, deters future violations of fundamental rights and is relevant to the plaintiff's claim for relief. In some instances it could be a prerequisite for, or in addition to, a claim for damages. Such remedies may include exclusion of

[1] Section 172(1)*(a)*.

[2] Section 2 read with s 172(1); cf De Waal et al *Bill of Rights* (supra) at 176.

[3] Cf *Park-Ross v Director, Office for Serious Economic Offences* 1995 (2) 148, 218-21 (C), 1995 (2) BCLR 198 (C)(declaring invalid s 6 of the Investigation of Serious Economic Offences Act 117 of 1991); *Mistry* (supra) at para 27(declaring invalid s 28(1) of the Medicines and Related Substances Control Act 101 of 1965); *Janse van Rensburg NO v Minister van Handel en Nywerheid* 1999 (2) BCLR 204, 220 (T)(declaring invalid s 7(3) of the Harmful Business Practices Act 71 of 1988).

[4] *S v Naidoo* 1998 (1) BCLR 46, 72 (N), 1998 (1) SACR 479 (N)(where the police monitored telephone communications in violation of the Interception and Monitoring Act 127 of 1992 and the Constitution).

[5] Section 35 (5) of the Constitution; *S v Naidoo* (supra). The principle seems to apply to both criminal and civil cases. See *Fedics Group (Pty) Ltd & another v Matus & another* 1997 (9) BCLR 1199 (C), 1998 (2) SA 617 (C) at para 92.

[6] See M Chaskalson and W Trengove 'Evidence' (supra) at § 26.4*(c)*; T Roux and A Stein 'Evidence' (2nd Edition Original Service forthcoming 2004) Chapter 52.

[7] FC s 38. For instance, where a provincial department of welfare had failed to process an applicant's claim for a social grant within a reasonable period of time, the court ordered the authorities to pay her grant from the date when it should have accrued to her if her application had been dealt with reasonably and not from the later date when it accrued in terms of the regulations. See *Mahambehlala v Member of the Executive Council for Welfare, Eastern Cape and another* 2001 (9) BCLR 899, 911 (SE), 2002 (1) SA 342, 356 (SE); *Mbanga v MEC for Welfare, Eastern Cape and another* 2002 (1) SA 359, 370 (SE).

evidence,[1] administrative law remedies,[2] a declaration of rights[3] or some other appropriate remedy.

De Waal, Currie and Erasmus have suggested that before finding a constitutional remedy for the private violation of a right in the bill of rights, the court must 'first look at legislation, then turn to existing common law and finally, if all else fails, develop a new common law remedy'.[4] This principle could be applied, for example, to a false light invasion of privacy where the plaintiff wishes to demand a retraction, an apology or a right of reply. There is no statute that provides for this. The common law remedy of *amende honorable* was thought to have fallen into disuse. [5] However, in holding that the remedy is still part of South African law, a High Court has recently stated that if the remedy had not existed the constitutional 'imperatives of our times would have had required its invention' as 'appropriate relief'.[6] Thus, before creating a new remedy — the court did, in fact, rely on the existing common law and resuscitate an existing remedy.[7]

(c) Defences

The traditional defences rebutting wrongfulness in respect of a common law invasion of privacy[8] may also be applied to an invasion of the constitutional right to privacy provided they satisfy the requirements of the limitation clause.[9] Strictly speaking, as fault is not required for an invasion of the constitutional right to privacy,[10] it is not open to a defendant to use the common law defences that rebut fault in respect of the invasion of a constitutional right to privacy. However, it is probably unlikely that the courts are presently ready to develop the common law to impose strict liability for all forms of invasions of the constitutional right to

[1] Ibid.

[2] Where, for example, there is a violation of just administrative action in terms of the Final Constitution. Cf *Claude Neon v City Council of Germiston* 1995 (3) SA 710 (W), 1995 (5) BCLR 556 (W); De Waal et al *Bill of Rights* (supra) at 177.

[3] See FC s 38. Cf *In re: The National Education Policy Bill No 83 of 1995* 1996 (3) SA 289 (CC) at para 40; *JT Publishing v Minister of Safety and Security* 1997 (3) SA 514 (CC), 1996 (12) BCLR 1599 (CC).

[4] See De Waal et al *Bill of Rights* (supra) at 195. The authors contend a person who is prevented from voting must first lay a charge under the Electoral Act 73 of 1998 (ss 87-94 read with ss 97-99) and then bring an action under the *actio injuriarum* at common law. If these mechanisms do not provide the person with a remedy the court should assist him or her by developing the common law. If this cannot be done and the citizen is still unable to vote, he or she can then approach the court which 'must revisit the statutes, the common law and if necessary develop a new remedy that is appropriate to give effect to the constitutional right.' Ibid.

[5] Cf *Kritzinger v Poskorporasie van Suid-Afrika (Edms) Bpk* 1981 (2) SA 373, 389 (O).

[6] *Mineworkers Investment Co (Pty) Ltd v Modilane* 2002 (6) SA 512 (W) at para 28. See above § 38.2*(b)*(iv).

[7] *Carmichele* makes it clear that the courts must develop the common law actions and remedies to ensure that the spirit, purport and objects of the Constitution are vindicated.

[8] See supra § 38.2*(c)*(i).

[9] *National Media Limited v Bogoshi* 1998 (4) SA 1196 (SCA), 1999 (1) BCLR 1 (SCA). See below § 38.5.

[10] See supra § 38.3*(a)*(iii).

privacy (other than those express categories in s 14).[1] To impose strict liability for all forms of invasions of the constitutional right to privacy would involve negating the traditional requirement of fault (more particularly, *animus injuriandi*)[2] for claims under the *actio injuriarum*.[3]

If strict liability is imposed for an invasion of the constitutional right to privacy the only defence open to the defendant would be to show that the statutory provision could be justified by reference to the limitation clause in the Constitution.[4] The analysis would proceed as follows. At the first stage — the rights stage — the defendant merely has to give an explanation of why the plaintiff does not have a reasonable expectation of privacy (eg, where a 'participant' monitors a conversation with a colleague suspected of committing a crime).[5] If the defendant succeeds that is the end of the matter. If the defendant fails, then the question arises as to whether his or her conduct is protected by the limitation clause. The justification in terms of the limitation clause could be regarded as a special defence to a claim for a breach of a constitutional fundamental right which must be proved on a balance of probabilities.[6]

38.4 Privacy and Juristic Persons

At common law it was previously thought that as privacy is primarily a human trait, an action for invasion of privacy would not be open to artificial or juristic persons.[7] Artificial or juristic persons could not sue for invasion of privacy because they did not have a body or *dignitas* or feelings or self-respect. They could, on the other hand, sue for defamation.[8] The Appellate Division did, however, hold that an artificial person may have a right to privacy.[9]

[1] In terms of s14 people have the right not to have their *(a)* person or home searched; *(b)* property searched; *(c)* possessions seized; or *(d)* the privacy of their communications infringed.

[2] See above § 38.2*(a)*(ii)(aa).

[3] See D McQuoid-Mason 'Invasion of Privacy: Common Law v Constitutional Delict — Does It make a Difference?' (2000) *Acta Juridica* 227, 260.

[4] Conduct alone, without a statutory basis, could not be justified because it would not constitute a law of general application. See Woolman 'Limitations' (supra) at § 12.5.

[5] Cf *S v Dube* 2000 (1) SACR 53, 75-6 (N), 2000 (6) BCLR 685 (N), 2000 (2) SA 583 (N). See above §38.3*(a)*(i)(bb).

[6] The defences for invasion of privacy are similar to the defences for defamation. See *Janse van Vuuren v Kruger* 1993 (4) SA 842, 849-50 (A). In defamation if a defendant cannot prove on a balance of probabilities that defence of truth for the public benefit he or she can fall back on the defence of reasonable publication. See *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at para 43. Either defence may indicate that the defendant's conduct was reasonable and justifiable in terms of the limitation clause in s 36.

[7] Cf *Universiteit van Pretoria v Tommie Meyer Films* 1977 (4) SA 376 (T) and *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441, 453-4 (A); McQuiod-Mason *Privacy* (supra) at 191.

[8] *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441, 453-4 (A).

[9] *Financial Mail (Pty) Ltd & others v Sage Holdings Ltd & another* 1993 (2) SA 451 (A) (a corporation had the right to sue for invasion of privacy where a newspaper had obtained information from a private memorandum and unlawful tape recordings).

Because privacy rights are generally justified by reference to personal autonomy,[1] their protection should generally be limited to natural persons.[2] That said, it seems consistent with the nature of the right that juristic persons should be able to claim certain informational privacy rights,[3] unless no reasonable expectation of privacy exists.[4] This view accords with the informational rights protected under the common law in *Financial Mail (Pty) Ltd & others v Sage Holdings Ltd & another*.[5] It also conforms to the position on the privacy rights of juristic persons set out in *AK Entertainment CC v Minister of Safety and Security*.[6] The Constitutional Court has also held that juristic persons enjoy the right to privacy in terms of the Constitution. However, because they are not bearers of human dignity, their privacy is less deserving of protection.[7] Nonetheless 'what is clear is that the right to privacy is applicable, where appropriate, to a juristic person'.[8]

38.5 Privacy and Limitations Analysis

(a) Limitations of personal autonomy privacy

The right to privacy is not absolute.[9] In personal autonomy privacy cases involving the possession of pornography or conducting of sexual relationships — even though they may involve the 'inner sanctum' of the privacy continuum — certain conduct may be justifiably limited. For instance, it may be reasonable and justifiable to outlaw the possession of child pornography[10] or sexual relationships involving children or animals.[11]

In *S v Jordan and others*[12] the Constitutional Court had to decide whether ss 2, 3*(b)* and *(c)* and 20(1)(aA) of the Sexual Offences Act[13] were unconstitutional and invalid. In the course of the judgments the court considered whether in the context of the right to privacy the provisions could be justified in terms of the limitations clause of the Interim Constitution. Ngcobo J wrote:

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[1] See supra §§ 38.2.*(a)*(iii)(aa) and 38.3*(a)*(i)(aa).

[2] Cf *Bernstein* (supra) at para 79.

[3] In the US juristic persons have been able to claim for certain informational privacy rights, particularly in respect of the so-called 'appropriation' cases. 'Constitutional Law' *American Jurisprudence* (2nd Edition 1972) 606 at para 16(A). Cf McQuoid-Mason *Privacy* (supra) at 192; Neethling *Die Reg op Privaatheid* (supra) at 295.

[4] *Bernstein* (supra) at para 90. Section 8(4) of the Constitution provides that: 'Juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons.'

[5] 1993 (2) SA 451 (A), (the corporation was suing to prevent the publication of unlawfully obtained information).

[6] 1995 (1) SA 783 (E), 1994 (4) BCLR 31 (E).

[7] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2000 (10) BCLR 1079 (CC), 2001 (1) SA 545 (CC) at para 16.

[8] Ibid at para 17.

[9] See, generally, Woolman 'Limitations' (supra).

[10] *Case v Minister of Safety and Security* 1996 (3) SA 165 (CC), at para 107 (Madala J). See above § 38.3*(a)*(i)(aa).

[11] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 118 (Sachs J). See supra § 38.3*(a)*(i)(aa).

[12] 2002 (6) SA 642 (CC) ('*Jordan*').

[13] Act 23 of 1957.

> Having regard to the legitimate State interest in proscribing prostitution and brothel-keeping, viewed against the scope of the limitation on the right of the prostitute and brothel-keeper to earn a living, I conclude that if there be a limitation of the right to privacy, the limitation is justified.[1]

Likewise, Sachs J and O'Regan J agreed with the submission of Counsel for the State:

> Parliament could choose between prohibiting prostitution, regulating it or abstaining from addressing it at all. The Act opted for prohibition and, while this might carry with it certain problems, it is a constitutionally permissible legislative choice.[2]

The court found that it was a justifiable limitation of the right to privacy to criminalize prostitution in terms of s 20(1)(aA).[3]

(b) Limitations of informational privacy

The Constitutional Court has held that the provisions of ss 417(3) and 418(2) of the Companies Act[4] — which compel production of private possessions or private communications during the winding-up of a company — are justifiable.[5] The Court in *Bernstein* wrote:

> The public's interest in ascertaining the truth surrounding the collapse of the company, the liquidator's interest in a speedy and effective liquidation of the company and the creditors' and contributor's financial interests in the recovery of company assets must be weighed against this peripheral infringement of the right not to be subjected to seizure of private possessions.[6]

The court also found that the information sought at such hearings pertained to 'participation in a public sphere' and could not rightly be held to be 'inhering in the person'. There was no reasonable expectation of privacy.[7]

[1] *Jordan* (supra) at para 29.
[2] Ibid at para 92.
[3] Ibid at para 94.
[4] Act 61 of 1973.
[5] *Bernstein* (supra) at para 90 (Ackermann J).
[6] Ibid. The court also reaffirmed its decision in *Ferreira v Levin NO & others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 127. There it held that s 417(2)*(b)* of the Companies Act, which requires persons examined under that section to answer questions which might incriminate them, and provides that any answers given may be used in evidence against them, was not a justifiable limitation in terms of s 33 under the Interim Constitution. The Court found that there was not an acceptable degree of proportionality between the legitimate objective sought to be achieved in s 417(2)*(b)* and the means chosen.
[7] *Bernstein* (supra) at para 85.

The lower courts have also held that although the interrogation requirements under ss 65 and 152 of the Insolvency Act[1] infringed a debtor's right to privacy, such infringements are justified. The courts concluded that the rights of a creditor should enjoy preference over the insolvent's right to privacy in pre-sequestration matters.[2] Likewise, it has been held that the power of the Director of the Office for Serious Economic Offences, in terms of s 7 of the Investigation of Serious Economic Offences Act,[3] to decide whether or not to permit disclosures concerning information obtained as a result of an enquiry, search and seizure conducted in terms of the Act, is reasonable and justifiable. It was deemed so because the Act required the Director to act *intra vires* section 7.[4]

It has been held that the arbitrary powers of search and seizure given to inspectors under s 7(3) of the Business Practices Act[5] are not reasonable and justifiable.[6] They failed the limitations test because there was no reason why they could not be subject to the same well-articulated controls laid down in s 21 of the Criminal Procedure Act.[7]

There have been conflicting High Court decisions concerning the validity of the provisions governing the seizure of property in terms of the Proceeds of Crime Act[8] and the National Prosecuting Authority Act.[9] In *Bathgate*, the powers of seizure justified in terms of s 36. In *Hyundai* the powers of seizure were failed the limitations test.[10]

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[1] Act 24 of 1936.

[2] *Podlas v Cohen and Bryden NO & others* 1994 (4) SA 662 (T), 1994 (3) BCLR 137 (T).

[3] Act 117 of 1991.

[4] *Park-Ross v Director, Office for Serious Economic Offences* 1995 (2) SA 148 (C), 1995 (2) BCLR 198 (C).

[5] Act 71 of 1988.

[6] *Janse van Rensburg NO v Minister van Handel en Nywerheid en 'n ander* 1999 (2) BCLR 204 (T).

[7] Act 51 of 1977.

[8] Act 76 of 1996, s 36; *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (1) SACR 105, 135 (C), 2000 (2) SA 535 (C), 2000 (2) BCLR 151 (C) (powers of seizure justified in terms of s 36.)

[9] Act 32 of 1998; *Hyundai Motor Distributors (Pty) Ltd v Smith NO* 2000 (1) SACR 503 (T), 2000 (2) SA 934 (T), [2000] 1 All SA 259 (T)(powers of seizure not justified in terms of s 36).

[10] *Gardener v Whitaker* 1995 (2) SA 672, 686 (E), 1994 (5) BCLR 19 (E); *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 65 (CC) at para 102; *Park-Ross v Director, Office for Serious Economic Offences* 1995 (2) SA 148, 162 (C), 1995 (2) BCLR 198 (C); *Director of Public Prosecutions: Cape of Good Hope v Bathgate* (supra) at 126-127.

39 Life

Marius Pieterse

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Life
11. Everyone has the right to life.[1]

39.1 INTRODUCTION

> The right to life is the most basic, the most fundamental, the most primordial and supreme right which human beings are entitled to have and without which the protection of all other human rights becomes either meaningless or less effective. If there is no life, then there is nothing left of human dignity. Only when life exists can we be concerned with how to make it worth living and to prevent it from being undermined by various acts and omissions that endanger it. The protection of life is therefore an essential pre-requisite to the full enjoyment of all other human rights.[2]

The right to life is recognized in most legal and constitutional systems (to the extent that it is regarded as a norm of customary international law). It is often termed the 'most basic' human right, since its enjoyment is an essential pre-requisite for the meaningful exercise of all other rights. Given the near universal acceptance of its importance, it is perhaps surprising that there is little consensus on the normative content of the right to life. International human rights instruments and foreign constitutions or human rights legislation tend to emphasize different aspects of, or limits to, its enjoyment.[3]

In South Africa, a similar lack of consensus among the constitutional drafters resulted in the deliberately broad and unqualified formulation of the right in the Interim Constitution.[4] The open texture of the provision meant that controversies related to the normative content of the right, and its application to controversial social issues such as the death penalty and abortion, were deferred, and left largely, though not exclusively, to judicial resolution.[5] The Final Constitution retained this open-ended formulation.

[1] Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)('Final Constitution' or 'FC').

[2] F Menghistu 'The Satisfaction of Survival Requirements' in BG Ramcharan (ed) *The Right to Life in International Law* (1985) 63.

[3] T Desch 'The Concept and Dimensions of the Right to Life as Defined in International Standards and in International and Comparative Jurisprudence' (1985) 36 *Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht* 77, 79-87 (Engages entrenchment of the right in various foreign constitutions). As to international law, compare for instance the following formulations in treaties that South Africa has ratified. Article 6(1) of the International Covenant on Civil and Political Rights (1966)('ICCPR') reads: '1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'. Article 6 of the UN Convention on the Rights of the Child (1989) reads: '1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child'. Article 4 of the African Charter on Human and Peoples' Rights (1986) reads: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'.

[4] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

[5] See LM du Plessis 'Whither Capital Punishment and Abortion under South Africa's Transitional Constitution?' (1994) 7 *SACJ* 145, 146-48 and 161.

Commentators appear to accept that this open-ended formulation, read with the directive in FC s 7(2) that 'the state must respect, protect, promote and fulfil the rights in the Bill of Rights', allows for a broad and permissive interpretation of the right to life in South Africa.[1] Constraints on its ambit are said to be permitted only in so far as FC s 36 allows. Of course, this general proposition sheds no light on the right's content, its outer limits, its enforceability and its impact on various forms of state and private action.

39.2 The Object of Protection: 'Life'

At common law, legal personality (and thus 'life' in a legal sense) begins when birth is complete and ends when a doctor certifies that a person is dead.[2] However, while the common-law understanding of the end of life largely corresponds with the scientific/biological understanding of death, life in a biological sense may well begin significantly before the granting of legal personality. The value society places on biological life creates significant tension within a variety of legal doctrines: (1) our courts are unwilling to hold that no life is preferable over severely disabled life in relation to so-called 'wrongful life' actions;[3] (2) our legislation on termination reflects unease with late-term abortions;[4] and (3) the cessation of life-support for patients lacking cognitive or intellectual life remains hotly contested.[5]

However, life as a constitutional norm has as its aim more than the mere protection of biological or legal life against extinction. It appears to demand respect for and protection of something altogether more encompassing. In *S v Makwanyane*, O'Regan J wrote:

> The right to life is, in one sense, antecedent to all other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader

[1] See *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC)('*Makwanyane*')(Chaskalson P) at para 85 (Regarding the right to life in the Interim Constitution); Du Plessis (supra) at 151; I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 281.

[2] See R Keightly 'The Beginning and End of Legal Personality: Birth and Death' in B van Heerden, A Cockrell, R Keightley, J Heaton, B Clarke, JD Sinclair & T Mosikatsana (eds) *Boberg's Law of Persons and the Family* (2nd Edition, 1999) 28-29, 50-54 (Discussing the common-law definition of birth and related complexities and the problems occasioned by the lack of a more precise legal definition of death.)

[3] See *Friedman v Glicksman* 1996 (1) SA 1134, 1142H-I (W)(Court expresses this unwillingness and indicates that actions for wrongful life are not recognized in South African law); M Blackbeard 'Die Aksie vir "Wrongful Life": "To Be or not to Be"?' (1991) 54 *THRHR* 57, 66-67 (Argues that this reluctance to recognize such an action is indicative of the value South African society places on 'life' in a biological sense.) The recognition of 'wrongful life' claims thus appears to be inimical to the values associated with the right to life. Otherwise, the debate surrounding these claims seems unaffected by the right to life. See J Fedler 'Life' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS 2, 1998) 15-9–15-10.

[4] See D Meyerson 'Abortion: The Constitutional Issues' (1999) 116 *SALJ* 50, 56-57.

[5] See *Clarke v Hurst* 1992 (4) SA 630, 649G-H, 653A-C (D).

> community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognized and treasured. The right to life is central to such a society.[1]

This understanding of life — which embraces the cognitive and intellectual experience of humanity — begins to illuminate the extension of FC s 11. It also begins to explain our society's hesitation with respect to the termination of biological life after conception but before birth (being more hesitant to allow for such termination later in pregnancy when the potential of cognitive human life in the sense understood here is at its greatest) and the termination of life (euthanasia) under conditions of terminal illness or debilitating pain (allowing for cessation of life support only where there is no or preciously little potential of ongoing cognitive or intellectual existence).[2]

39.3 The Subjects of Protection: 'Everyone'

The right to life attaches to every human being. And the Constitutional Court has indicated that there are no exceptions. Criminals, for instance, do not forfeit their right to life through their actions.[3] But the interaction and tensions between biological, legal and constitutional notions of 'life' mean that the term 'everyone' is controversial when it comes to the interests of an unborn foetus (a biological, but not legal, entity) in being born alive. The threshold question to be decided in debates about the permissibility of abortion is whether such a foetus can claim the right to life. If not, the right to life (at least as an enforceable subjective right[4]) is a

[1] *Makwanyane* (supra) at para 326. See also Fedler (supra) at 3.

[2] From this understanding of life, the Court affirms the connection between the rights of life and dignity. As O'Regan J has remarked:

> The right to life, thus understood, incorporates the right to dignity. So the rights of human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.

Makwanyane (supra) at para 327. See also *Makwanyane* (supra) at paras 84, 111, 144, 218, 222, 311. See also Currie & De Waal (supra) at 281 ('Entrenchment of the right to life requires the state to take a leading role in re-establishing respect for human life and dignity in South Africa'); S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

[3] See *Makwanyane* (supra) at paras 137 and 331. See also *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC), 2001 (7) 685 (CC)('*Mohamed*') at paras 47 and 52; Currie & De Waal (supra) at 282.

[4] Some commentators argue that even if a foetus does not have a right to life, the values of life and dignity still inform the regulation of abortions in an open and democratic society. See M O'Sullivan 'Reproductive Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 37; Meyerson (supra) at 56-58; T Naude 'The Value of Life: A Note on *Christian Lawyers Association of SA v Minister of Health*' (1999) 15 *SAJHR* 541, 551-59.

non-starter. If a foetus does, however, have a right to life, then the permissibility of abortion will pit the foetus' right against the autonomy and the bodily integrity rights of the woman who wishes to terminate her pregnancy.[1]

International human rights documents are largely ambivalent on the question of whether a foetus has a right to life, while foreign constitutional systems take a variety of positions on the issue.[2] Even at South African common law, where a foetus was not regarded as a person and did not therefore enjoy any subjective rights, divisions of the Supreme Court expressed some disagreement as to whether the *nasciturus*-fiction could be used in abortion cases to protect a foetus' interests in being born alive.[3] In *Christian League of Southern Africa v Rall*, the OPD held that the fiction does not provide protection against abortion and that any 'rights' of an unborn foetus die with it when it is aborted.[4] The CPD disagreed in *G v Superintendent, Groote Schuur Hospital*.[5] It held that 'there is much to be said for recognising that an unborn child has a legal right to representation, or an interest capable of protection, in circumstances where its very existence is threatened.'[6]

The question of whether a foetus can rely on the constitutional protection of the right to life was thus bound to be controversial. Indeed, some traction might be gained by differences in wording between FC s 11 — which grants the right to life to 'everyone' — and the arguably more restrictive formulation of IC s 9 — which granted the right to 'every person'.[7] The question on the meaning of 'everyone' in this context came before the TPD in *Christian Lawyers Association of SA v Minister of Health*. The applicants challenged various provisions of the Choice on Termination of Pregnancy Act on the basis that they violated the

[1] See Du Plessis (supra) at 158, 163. Commentators are divided as to whether, if a foetus indeed has a right to life, it could ever be outweighed by the autonomy interests of a pregnant woman. For instance, Meyerson argues that, in light of the value that our society places on the rights to life and dignity, a woman's rights in this respect would generally not outweigh the foetus' right to life. Meyerson (supra) at 53. PJ Visser regards the limitation of a foetus' right to life in this respect as uncontroversial. PJ Visser 'Enkele Gedagtes oor die Moontlike Invloed van die Reg op Lewe in die Deliktereg' (1997) 30 *De Jure* 135, 140. Michelle O'Sullivan recognizes that the state's general interest in human dignity underwrites the legal proscription of late-term abortion. However, she does not attribute personhood to the foetus and thus does not set up a direct conflict between women's reproductive rights and foetal rights.

[2] See M Slabbert 'The Position of the Human Embryo and Foetus in International Law and its Relevance for the South African Context' (1999) 32 *CILSA* 336; Desch (supra) at 87-96.

[3] According to this doctrine, a foetus that ultimately comes to term is regarded as having been born at conception in instances where the fiction works to the foetus' advantage. On the invocation of this legal fiction at common law, see Keightly (supra) at 31-41.

[4] *Christian League of Southern Africa v Rall* 1981 (2) SA 821, 827G, 830A-B (O).

[5] *G v Superintendent, Groote Schuur Hospital* 1993 (2) SA 255 (C).

[6] Ibid at 259D-E (C).

[7] But see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 31.3*(a)*(Woolman discusses the beneficiaries of constitutional rights, in general, and the rights, if any, of a foetus, in particular. Woolman notes that the change in language was not meant to reflect a change in content but was intended by the drafters to serve the ends of linguistic naturalness and transparency.) See, however, Fedler (supra) at 15-6 (Argues that the shift from 'every person' to 'everyone' may be significant for the abortion debate.)

constitutional right to life of unborn children.[1] McCreath J upheld an exception against the challenge, finding that, whatever the position may be at common law, the constitutional drafters did not intend for the concept 'everyone' to include unborn children.[2] Had this been the drafters' intention, McCreath J continued, the Final Constitution would either have contained an explicit provision to this effect, or unborn children would have been explicitly included in the definition of 'child' under FC s 28(3).[3] McCreath J also considered significant the drafters' refusal to limit the right to reproductive freedom in FC s 12(2)*(a)* to make allowance for the right to life of the foetus.[4] McCreath drew further support for his arguments from the absence of textual support for extending the protection of any other fundamental rights to unborn children. McCreath J concluded that '[t]o include the foetus in the meaning of that term ['everyone'] in s 11 would ascribe to it a meaning different from that which it bears everywhere else in the Bill of Rights'.[5] In the end, none of the challenged provisions of the Choice on Termination of Pregnancy Act were deemed to infringe the right to life.[6] Given the sweeping nature of the *Christian Lawyers I* Court's judgment, a reader might be forgiven for assuming that pregnant women's rights to bodily integrity, equality, dignity, freedom of belief and access to reproductive health care services would trump foetal rights to life.[7]

However, the *Christian Lawyers I* Court's interpretation of the word 'everyone' in FC s 11 did not entirely settle the question as to whether the right to life or the right to dignity might, if properly construed, afford some protection to foetal life in South Africa. In *Christian Lawyers II*, Mojapelo J held that, while FC ss 12(2)*(a)* and *(b)* guarantee the right of every woman to determine the fate of her pregnancy, the state retains a legitimate dignity interest in the protection of life, generally, and of pre-natal life, in particular.[8] Although any regulation grounded in this dignity interest may not amount to a denial of a woman's right to reproductive autonomy, it appears that the rights to dignity and to life may well have a meaningful role to play in the regulation of abortion.[9]

[1] Act 92 of 1996.

[2] *Christian Lawyers Association of SA v Minister of Health* 1998 (4) SA 1113, 1117I-J, 1120H-1121H, 1123C (T), 1998 (11) BCLR 1434 (T)('*Christian Lawyers Association I*').

[3] Ibid at 1121G-H, 1122B-E.

[4] Ibid at 1121I-J.

[5] Ibid at 1122H-I.

[6] For criticism of the *Christian Lawyers Association I* Court's reasoning, see Naude (supra) at 541-48; Woolman 'Application' (supra) at § 31.3*(a)*.

[7] See *Christian Lawyers Association I* (supra) at 1123E-G.

[8] See *Christian Lawyers Association v National Minister of Health & Others* 2005 (1) SA 509, 526 (T), 2004 (10) BLLR 1086, 1103 (T)('*Christian Lawyers II*').

[9] For more on how dignity interests play out in the context of reproductive rights and the 'life' of a foetus, see S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36; O'Sullivan (supra) at § 37.8; Woolman 'Application' (supra) at § 31.3*(a)*.

39.4 End-of-life Decision-making

Despite its fundamental nature, it would seem that there are circumstances in which subjects may exercise their rights to life and to autonomy in a manner that extinguishes the object of the right to life. Legal systems around the world typically tolerate suicide.[1] They also generally accept the legal principle that every person is free to refuse life-saving or life-prolonging medical treatment, even when such refusal would cause or accelerate their death.[2]

In the case of life-saving treatment, the right to life appears to prohibit the refusal of treatment on behalf of someone else who lacks the capacity to do so himself. In *Hay v B*, the WLD authorized a blood transfusion to an infant despite the refusal of the treatment by the infant's parents. The *Hay* Court overruled the parents' refusal of consent, in its capacity as upper guardian of all minors, because the infant would die if the transfusion were not performed. The *Hay* Court was not prepared to 'negate the essential content' of the child's 'inviolable' right to 'live as a human being, be part of a broader community and share in the experience of humanity' merely because administering the transfusion was against the wishes and the sincere beliefs of his parents.[3]

Refusing life-prolonging treatment on behalf of another adult is a more vexed question. Whereas there is no legal duty artificially to keep someone alive who is clinically dead, it is less certain whether life-prolonging treatment may be discontinued where a patient lacks the capacity for cognitive or intellectual life but remains clinically alive.[4] In *Clarke v Hurst*, which pre-dated the Interim Constitution and thus did not explicitly involve the right to life, the Durban Supreme Court authorized the discontinuance of artificial life support on a patient who, despite his biological life-functions being described as 'stable', completely lacked cognitive or intellectual awareness due to severe brain-stem injury from which there was no chance of recovery.[5] The patient's wife had applied for an order to be appointed his curatrix personae and sought, in that capacity, to authorize the acceleration of her husband's death through the cessation of his gastric feeding and hydration treatment regimes. The *Clarke* Court held that the wrongfulness or otherwise of such an authorization depended on whether, according to the legal convictions of the community, the discontinuation of the treatment would be reasonable in light of the quality of life remaining to the patient and of his physical and mental status.[6] Given the patient's complete lack of cognitive or intellectual

[1] See Desch (supra) at 99. Committing or attempting suicide is not a crime in South Africa. See *S v Gordon* 1962 (4) SA 727 (N); *Ex parte Minister van Justisie: In re S v Grotjohn* 1970 (2) SA 355 (A).

[2] See Desch (supra) at 99; Fedler (supra) at 8. See also *Castell v De Greeff* 1994 (4) SA 408, 420J-421D (C).

[3] *Hay v B* 2003 (3) SA 492, 486B-E (W).

[4] See *S v Williams* 1986 (4) SA 1188 (A); Currie & De Waal (supra) at 289.

[5] *Clarke v Hurst* 1992 (4) SA 630, 649G-H, 653A-C (D)('*Clarke*').

[6] Ibid at 653A-C.

life and the irreversibility of his condition, the order was granted.[1] The 'qualitative conception of life' accepted in *Clarke* corresponds with the broader understanding of the object of the right to life advanced by O'Regan J in *S v Makwanyane*.[2] Read together, the cases suggest that extinguishing the object of the right to life of another through the refusal of life-prolonging treatment may be permissible in circumstances where the object of that other person's right has irreversibly been reduced to nothing more than biological existence.

Clarke is also authority for the proposition that South African law tolerates refusal of life-sustaining treatment by means of a so-called 'living will'.[3] A living will is a document in terms of which an able-bodied person commits to writing her refusal of life-sustaining medical treatment to apply in future circumstances where it is impossible to obtain her express consent to such treatment and where there is little or no hope that she would recover from a severely debilitating injury or condition.[4]

Clarke does not, however, answer the more controversial question of whether a person may request the termination of his life in circumstances where he remains cognitively and intellectually alive, but where his quality of life has so deteriorated that he considers life no longer to be worth living. Requesting active euthanasia is more controversial than refusal of life-sustaining treatment by means of a living will, since what is extinguished in cases of active euthanasia is not merely biological life, but also cognitive and intellectual life.[5] Even more controversial still are situations of active euthanasia where a patient does not himself expressly request the acceleration of death. The question of the permissibility of active euthanasia is often depicted as conflict between the right to life and various rights that secure individual autonomy.[6] However, given, first, the close connection between the rights to life and to dignity and, second, the fact that death is an inextricable part of life, one can argue that the right to life includes a right to die with dignity and that the right to die with dignity supports requests for active euthanasia.[7]

Whereas instances of active euthanasia in South Africa have historically resulted in criminal prosecution, courts have typically treated persons found guilty

[1] *Clarke* (supra) at 649A-H.

[2] See Fedler (supra) at 15-8.

[3] Ibid. See also Currie & De Waal (supra) at 289. The patient in *Clarke* was a member of the South African Voluntary Euthanasia Society and had signed a living will in terms of which he was not to receive life-sustaining medical treatment in circumstances where there were no reasonable prospects of his recovery from extreme physical or mental disability. See *Clarke* (supra) at 633E-634A.

[4] On the interpretation of the right to life in the context of living wills or powers of attorney generally, see C Wellman 'The Inalienable Right to Life and the Durable Power of Attorney' (1995) 14 *Law & Philosophy* 245.

[5] On euthanasia as a waiver of the right to life, see Desch (supra) at 97-100.

[6] See Fedler (supra) at 15-8; Currie & De Waal (supra) at 288.

[7] See L M du Plessis & J R de Ville 'Personal Rights: Life, Freedom and Security of the Person, Privacy, and Freedom of Movement' in D van Wyk, B de Villiers, J Dugard & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 212, 232.

of murder under such circumstances with 'conspicuous leniency' in sentencing.[1] In its Report on *Euthanasia and the Artificial Preservation of Life*, the South African Law Commission (SALC) declined to take a final position on the question of active euthanasia.[2] Instead, it suggested three alternative models of regulating the practice to the legislature. The first is to leave the current legal position intact (and hence to allow courts to decide on whether a conviction is warranted and, if it so finds, to craft appropriate sentences for 'mercy killers'.) Under the second model, medical practitioners would be allowed to give effect to the explicit request of a terminally ill but mentally competent patient for the acceleration of her death, provided that they adhere to strict procedural guidelines. Under the third model, a multi-disciplinary panel or committee would be constituted to decide on requests for active euthanasia.[3] Under all three models, instances of active euthanasia in the absence of an express request by the patient would remain open for prosecution. None of these models has, as yet, been adopted by the legislature.

Should the right to life be interpreted as encompassing a right to die with dignity, a legislative scheme along the lines proposed by the SALC would probably not amount to an infringement of the right to life. But, even if such legislation were held to infringe a (more narrowly interpreted) right to life, commentators have suggested that such infringement would constitute a reasonable and justifiable limitation thereof, given the value that society attaches to the right to dignity, in particular, and to autonomy, in general.[4]

39.5 The Obligation to Respect the Right to Life

(a) The core of the right to life: A prohibition on killing

At its core, the right to life protects human life from extinction. To kill or to condone the killing of a person thus amounts to an infringement of the right to life. And yet, there are 'exceptionally compelling' circumstances in which open and democratic societies regard such an infringement as justifiable.[5]

The most widely debated example of such killing is the death penalty, which, perhaps surprisingly, is not altogether impermissible at international law. Article 6 of the International Covenant on Civil and Political Rights contains an express

[1] Compare, for instance, the sentences passed in *S v Hartmann* 1975 (3) SA 532 (C); *S v De Bellocq* 1975 (3) SA 538 (T); *S v Smorenburg* 1992 (2) SACR 389 (C).

[2] South African Law Commission Report *Euthanasia and the Artificial Preservation of Life* Project 86 (November 1998)('SALC *Euthanasia Report*').

[3] See SALC *Euthanasia Report* (supra) at 228-232. The SALC's proposal allows for instances of 'passive euthanasia' such as that authorised in *Clarke*.

[4] See Fedler (supra) at 8-9; Currie & De Waal (supra) at 289.

[5] Accordingly, it is often said that the core of the right to life consists only of a guarantee against 'arbitrary' or 'unjust' killing. See Desch (supra) at 102-106; Du Plessis & De Ville (supra) at 222; Meghistu (supra) at 64; H Rudolph 'The 1993 Constitution — Some Thoughts on its Effect on Certain Aspects of Our System of Criminal Procedure' (1994) 111 *SALJ* 497, 500; Currie & De Waal (supra) at 282-283.

limitation on the right to life that allows for the death penalty to be imposed 'for the most serious crimes', subject to adherence to rigorous procedural safeguards.[1] In commenting on this provision, however, the UN Human Rights Committee (UNHRC) has indicated that the death penalty should only be tolerated in highly exceptional circumstances, and that its abolition is 'desirable' and is 'considered as progress in the enjoyment of the right to life'.[2]

The Constitutional Court declared the death penalty unconstitutional in *S v Makwanyane*. Chaskalson P viewed the penalty primarily as an unjustifiable violation of the guarantee against cruel and inhuman punishment (in terms of IC s 11(2)), but stated that his reading of IC s 11(2) was informed by the right to life in IC s 9.[3] He also held that the state had to demonstrate respect for the rights to life and dignity in everything it does, including the manner in which it punishes criminals. The fact that the death penalty failed to demonstrate such respect contributed to the Court's finding it unconstitutional.[4]

Most of the other opinions in *Makwanyane* regard the death penalty as a violation of the right to life. This right, a number of justices held, at the very least entitled citizens not to be deliberately and systematically put to death by the state in a manner that disregarded their human dignity.[5] Several justices also noted that the death penalty did not merely limit, but totally extinguished, the right to life (and, hence, the enjoyment of all other constitutional rights).[6]

Another form of state-sanctioned killing enjoying limited recognition in international law is killing during warfare and armed conflict. Whereas international law typically regards such killing as permissible, provided it takes place in accordance with the rules of humanitarian law,[7] the UNHRC has emphasized that war

[1] Article 6(2)-(6) states: '2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court. 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases. 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. 6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant'. For discussion of similar restrictions on the right to life in other international instruments, see Desch (supra) at 108-111.

[2] UN Human Rights Committee General Comment 6 'The Right to Life' (Article 6 of the Convention)(16th Session, 1982)('GC 6') at para 6. See also GC 6 (supra) at para 7.

[3] *Makwanyane* (supra) at para 80. See also *Makwanyane* (supra) at para 95.

[4] Ibid at para 144.

[5] Ibid at paras 166 (Ackermann J), 174-76 (Didcott J), 193 (Kentridge AJ), 208 (Kriegler J), 217, 234 (Langa J), 269, 282 (Mahomed DP), 313, 317 (Mokgoro J), 333-34 (O'Regan J), 353-54 (Sachs J).

[6] See, for instance, *Makwanyane* (supra) at paras 270 (Mahomed DP) and 350-51, 353 (Sachs J). The Court has since reiterated its stance on the death penalty in *Mohamed*. *Mohamed* (supra) at para 39. See also *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC)('*Kaunda*') at paras 98 (Chaskalson CJ) and 206 (Ngcobo J).

[7] See Desch (supra) at 114-115.

and related violence pose major threats to the right to life and that states accordingly have a duty to prevent warfare at all costs.[1] In *Makwanyane*, Chaskalson P recognized that it may be permissible to limit the right to life in warfare and armed conflict (provided that the state adheres to relevant international standards.)[2] Furthermore, Kentridge AJ remarked, in a separate judgment, that the right to life must not be understood to prohibit the state from defending itself against insurrection.[3] One would, however, expect that such killing would only be justifiable in circumstances where no other options were reasonably available to the state.

A further particularly controversial example of killing in furthering state interests is the use of lethal force in arrest, which certain international human rights instruments regard as amounting, in narrowly defined circumstances, to a justifiable limitation of the right to life.[4] In South Africa, such killing has for years been authorized by s 49 of the Criminal Procedure Act.[5] The Act provided for the use of such force as is reasonably necessary in the circumstances to effect an arrest, and determined that killing a person suspected of having committed an offence listed in Schedule 1 of the Act (which included a list of crimes ranging from serious violent crimes to significantly more mundane offences) would amount to justifiable homicide where there were no other means of affecting the arrest. Several commentators speculated that s 49(2), in conferring such wide indemnity on police officers and others who kill in the course of an arrest, probably amounted to an unjustifiable violation of the right to life.[6]

In *Makwanyane*, Chaskalson P deliberately refrained from pronouncing on the constitutionality of s 49(2), but stated that '[g]reater restriction on the use of lethal force may be one of the consequences of the establishment of a constitutional state which respects every person's right to life'.[7] Subsequently, the Northern Cape High Court held in *Raloso v Wilson* that while s 49(2) was probably unconstitutional, it ought to refrain from making a declaration to that effect because the legislature had indicated that it was revising the subsection at issue.[8] In *Govender v Minister of Safety and Security*, the Supreme Court of Appeal held, in relation to s 49(1) of the Criminal Procedure Act, that the state's duty to protect the rights

[1] UNHRC General Comment 6 (supra) at para 2.
[2] *Makwanyane* (supra) at para 139.
[3] Ibid at para 193.
[4] See GC 6 (supra) at para 3; art 2(2) of the European Convention of Human Rights; Desch (supra) at 111-14.
[5] Act 51 of 1977.
[6] See, for example, Du Plessis & De Ville (supra) at 215; Rudolph (supra) at 501-02; Visser (supra) at 144. For a useful comparison of the interests served and affected by killing in the course of arrest and the death penalty, which illustrates the likely unconstitutionality of such a broad indemnity for killing in the course of arrest, see D Bruce 'Killing and the Constitution — Arrest and the Use of Lethal Force' (2003) 19 *SAJHR* 430, 439-42.
[7] *Makwanyane* (supra) at para 140.
[8] *Raloso v Wilson* 1998 (4) SA 369, 377E-G, 378G-H (NC).

(including the right to life) of citizens extended to fleeing subjects and that the legitimacy of the use of force in arrest would depend on the outcome of a proportionality inquiry. In such an inquiry, the interests served by such force would be weighed against the interests infringed thereby. The *Govender* Court further indicated that the protection of property would, in all likelihood, not outweigh the rights of fleeing suspects to life and physical integrity.[1]

The Constitutional Court finally held that s 49(2) was unconstitutional in *Ex Parte Minister of Safety and Security: In re S v Walters*.[2] In a unanimous judgment, the Court reiterated its stance in *Makwanyane* on the value of the right to life and reaffirmed the state's duty to promote respect for the right in everything that it does.[3] Kriegler J stated that the rights to life, dignity and bodily integrity were 'individually essential and collectively foundational to the value system prescribed by the Constitution'[4] and regarded it as obvious that s 49(2) significantly limited these rights.[5] The *Walters* Court held that s 49(2) was unconstitutional because the interests it protected did not provide the 'weighty consideration' that would be necessary to justify the taking of a life.[6] The *Walters* Court stated that the question of how much force was permissible in an attempt to affect an arrest, had to be answered in light of 'the value our Constitution places on human life'.[7] It reiterated that the use of force in arrest would only be justified if deemed reasonably necessary in the circumstances, taking into account the seriousness of the offence allegedly committed by the suspect and the threat of violence posed by the suspect to the arresting officer or others.[8]

Subsequent to *Walters*, s 49(2) was amended to allow for the use of deadly force in circumstances where such force is immediately necessary to protect the arrestor or a third party, where delaying the arrest holds substantial risk of death or bodily harm to members of the public, and where the suspected offence is a serious one of a violent nature. To the extent that it provides for the use of force beyond the parameters laid down in *Walters*, the new s 49(2) reintroduces uncertainty over the constitutionality of statutory limitations placed upon the right to life in these circumstances.[9]

The horizontal application of the prohibition against killing is effected primarily through the criminalization of murder and culpable homicide. A pertinent limitation on the right to life in this context, recognized in the great majority of legal

[1] *Govender der v Minister of Safety and Security* 2001 (4) SA 273 (SCA), 2001 (11) BCLR 1197 (SCA)('*Govender*') at paras 8, 13, 19-22.
[2] 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC)('*Walters*').
[3] Ibid at paras 5-6.
[4] Ibid at para 28.
[5] Ibid at paras 29-30.
[6] Ibid at paras 40-41, 44. On the weighing of interests in this context, see Bruce (supra) at 446-49.
[7] *Walters* (supra) at para 53.
[8] Ibid at para 54.
[9] The terms and effects of the amendment are critically discussed by Bruce. See Bruce (supra) at 436-37, 449-451. Bruce prefers the more precise *Walters* formulation of circumstances in which lethal force is permissible.

systems, including South African common law, is the permissibility of killing in self-defence or in defence of another person.[1] In both *Makwanyane* and *Walters*, the Constitutional Court indicated that such killing in principle remains tolerable in a society committed to respect for the right to life. In *Makwanyane*, Chaskalson P stated that it was consistent with the general limitations clause, and indeed required by the right to life, to give preference to the lives of 'innocent' civilians over the lives of 'aggressors' in circumstances of private defence.[2] Unlike the death penalty, he continued, such private defence 'takes place at the time of the threat to the victim's life, at the moment of the emergency which gave rise to the necessity and, traditionally, under circumstances in which no less-severe alternative is readily available to the potential victim'.[3] In *Walters*, Kriegler J was at pains to point out that the unconstitutionality of s 49(2) of the Criminal Procedure Act in no way diminished the ability of police officers, or civilians, to defend life or physical safety by any means necessary.[4]

However, both judgments accept that our basic law severely constrains the entitlement to kill in private defence. As Chaskalson P stated in *Makwanyane:* 'There are strict limits to the taking of life, even in the circumstances that have been described, and the law insists upon these limits being adhered to.'[5] The permissibility of a limitation on the right to life through killing in private defence, as with killing in the cause of arrest, is determined through weighing the interests protected by the killing against those infringed.[6] While such a proportionality exercise is consistent with the common-law approach to determining the permissibility of killing in private defence, the value that the constitutional order places on the right to life likely means that the common law boundaries of permissibility have significantly contracted.

Whereas the common law allows for killing in defence of life, physical integrity and even, in extreme cases, property, Chaskalson P's judgment in *Makwanyane* appears to regard life as the only interest that may justify extinguishing the right to life of another.[7] In *Ntamo v Minister of Safety and Security*, the Transkei High Court stated that the boni mores in private defence cases are impacted by 'the sanctity of life, a fundamental right enshrined in s 11 of the Constitution' and endorsed the views of Chaskalson P in *Makwanyane*.[8] In *S v Dougherty*, the WLD similarly held that the impact of the right to life on an inquiry into the permissibility of private defence was to raise the common-law standard. It rejected, as a result, the

[1] On the common law definition of 'private defense' and the circumstances in which it is allowed, and the authority for these defenses, see Bruce (supra) at 233 .

[2] *Makwanyane* (supra) at para 138.

[3] Ibid. See also *Makwanyane* (supra) at paras 193 (Kentridge AJ), 270 (Mahomed DP), and 355-56 (Sachs J).

[4] *Walters* (supra) at paras 33, 51, 54.

[5] *Makwanyane* (supra) at para 138.

[6] Ibid. See also *Walters* (supra) at para 33; Bruce (supra) at 233.

[7] See *Ex Parte die Minister van Justisie: In re S v Van Wyk* 1967 (1) SA 488 (A).

[8] *Ntamo v Minister of Safety and Security* 2001 (1) SA 830 (Tk) at para 35.

appellant's reliance on private defence since the appellant could not show that lethal force was necessary to protect his own life.[1] In *Walters*, however, Kriegler J appeared to accept that killing in defence of physical safety would, at least in circumstances where such safety is seriously threatened, amount to a justifiable limitation of the right to life.[2] This latter view seems more realistic, and appears to be consistent with the values of a society that values bodily and psychological integrity as well as life. What seems clear, however, is that killing in defence of property is not constitutionally permissible,[3] and that killing in defence of physical safety would only be so in circumstances where such safety is genuinely and seriously threatened.

The right to life may, ultimately, compel a shift with respect to both criminal and civil liability for the negligent causation of death. As for civil liability, the Supreme Court of Appeal remarked, obiter, in *Johannesburg Country Club v Stott* that it may be against public policy contractually to exclude such liability because of the high value placed by the Final Constitution on the sanctity of life.[4] This 'high value' may, in addition, influence the calculation of damages in delictual cases concerning the negative causation of death in dependants' actions.

(b) Beyond the core

The Final Constitution's broad conception of 'life' ensures that FC s 11 protects South Africans against injuries that result in a significant diminution of their cognitive and intellectual capacity. The right to life therefore features in the calculation of delictual damages to compensate for the wrongful causation of loss of amenities of life and/or reduced life expectancy.[5]

In the realm of criminal law, a broad conception of the right to life raises the question of whether the right is unjustifiably limited by a sentence of life imprisonment. In an unreported judgment of the Namibian High Court in *S v Tijo*, it was held that, because life imprisonment significantly diminishes the experience of human life for a convicted person's entire lifespan, such a sentence was akin to 'a sentence of death' and accordingly amounted to an unconstitutional infringement of the right to life in the Namibian Constitution.[6] This view was subsequently rejected by the Namibian Supreme Court in *S v Tcoeib*. While seemingly accepting that life imprisonment significantly restricts enjoyment of life, the Court

[1] *S v Dougherty* 2003 (2) SACR 36 (W) at paras 38-39. For criticism of this aspect of the judgment, see CR Snyman 'Private Defence in Criminal Law — an Unwarranted Raising of the Test of Reasonableness' (2004) 67 *THRHR* 325, 330-31.

[2] See *Walters* (supra) at para 51.

[3] See *Govender* (supra) at para 22. See also Visser (supra) at 143.

[4] *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) at para 12.

[5] See Visser (supra) at 137-38, 141-42.

[6] *S v Nehemia Tijo* High Court of Namibia 4/9/91 (unreported), quoted and discussed in *S v Tcoeib* 1996 (1) SACR 390, 396A-H (NmS).

regarded it as significant that such a sentence, unlike the death penalty, did not involve the extinction of the right to life. Rather, Mahomed CJ viewed a sentence of life imprisonment as justifiably infringing the right to liberty of an imprisoned person.[1] Similarly, at least two judges in *Makwanyane* distinguished the death penalty from long-term imprisonment. They did so on the grounds that the latter did not involve the complete extinction of the rights to life and to dignity associated with the former.[2]

While certainly not comparable to the death penalty, a sentence of life-imprisonment does appear to be at odds with the broad understanding of the right to life endorsed elsewhere in *Makwanyane*. Life imprisonment is not solely concerned with the limitation of liberty interests. Because it involves a significant diminution of the right to 'human life' and 'to share in the experience of humanity', life imprisonment would constitute a justifiable limitation of the right to life only when imposed as punishment for the most heinous of offences.[3]

39.6 The Obligation to Protect the Right to Life

When read with FC s 7(2), it is clear that the right to life, in addition to providing a safeguard against killing or significant diminution of quality of life, imposes positive obligations on the state. Among these obligations is the duty to protect the right to life against unlawful outside threats. At a minimum, the state is required to punish the unlawful deprivation or diminution of life through the effective implementation of criminal law. However, the duty imposed by FC s 11 read with FC s 7(2) extends beyond punishment and encompasses an obligation to protect citizens from unlawful threats to their life and physical integrity.[4]

In *Carmichele v Minister of Safety and Security*, the Constitutional Court found that the common law of delict was in need of development in order to comport with the constitutional entrenchment of rights to life, to dignity and to freedom and security of the person.[5] The Court further endorsed a dictum by the European Court of Human Rights, according to which the right to life 'may also imply in certain well-defined circumstances a positive obligation on the authorities to take

[1] *Tcoeib* (supra) at 396H-397C.

[2] See *Makwanyane* (supra) at paras 142 (Chaskalson P), and 196 (Kentridge AJ).

[3] On relationship between rights to life and right to dignity and the Court's jurisprudence on life imprisonment, see S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36; D van zyl Smit 'Sentencing and Punishment' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 49. See also *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC).

[4] See GC 6 (supra) at para 3; *Makwanyane* (supra) at para 193 (Kentridge AJ); BG Ramcharan 'The Concepts and Dimensions of the Right to Life' in BG Ramcharan (ed) *The Right to Life in International Law* (1985) 1, 7; Currie & De Waal (supra) at 285-86.

[5] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (1) BCLR 995 (CC)('*Carmichele*') at para 44.

preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual.'[1] While it did not speak directly to the existence of a positive obligation in terms of the right to life, the *Carmichele* Court signalled that the right imposed more than a negative duty of non-interference.

In *Rail Commuters Action Group v Transnet t/a Metrorail*, the Cape High Court recognized that the state actors in question 'have a legal duty to protect the lives and property of members of the public who commute by rail',[2] a finding informed by a purposive interpretation of the rights to life and to freedom from violence.[3] In upholding an appeal against the partial overturning of this judgment by the Supreme Court of Appeal, the Constitutional Court reiterated that the rights to life, to dignity and to freedom and security of the person sometimes imposed positive obligations on the State.[4] The *Rail Commuters Action Group* Court confirmed the respondents' duty to take reasonable measures to provide for the security of rail commuters, but found it unnecessary to locate such an obligation in the relevant constitutional rights. Instead, it found the duty implicit in the provisions of the Legal Succession to the South African Transport Services Act[5] read in light of FC ss 10, 11 and 12.[6]

Whereas the existence of an obligation to protect the lives of citizens, inherent in the right to life, thus appears to be beyond question, the extent of this obligation remains uncertain. In giving effect to the Constitutional Court's implied directive to develop the common law in *Carmichele*, the Supreme Court of Appeal stated that an obligation to protect the lives of citizens is not absolute and that liability for non-compliance with such an obligation would result only in circumstances where security officers were aware, or should reasonably have been aware, of a 'real and immediate risk to life' and where they failed to take such action within their powers as might reasonably 'have been expected to avoid that risk'.[7] The Supreme Court of Appeal has also suggested, in passing, that such an obligation does not operate horizontally, notwithstanding the constitutional entrenchment of the right to life.[8]

An interesting and related question is whether the obligation to protect the right to life extends to the protection of foetal life, even if it is accepted that a foetus cannot be a subjective beneficiary of the right to life. Given the high regard

[1] *Osman v United Kingdom* 29 EHHR 245 (ECHR) at para 115, quoted and endorsed in *Carmichele* (supra) at para 45.

[2] *Rail Commuters Action Group v Transnet t/a Metrorail* 2003 (3) BCLR 288, 352C-D (C).

[3] Ibid at 335H-I.

[4] *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC)('*Rail Commuters*') at paras 66 and 70

[5] Act 9 of 1989

[6] *Rail Commuters* (supra) at paras 72, 84, 111(3).

[7] *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA), 2004 (2) BCLR 133 (SCA) at para 33, quoting from *Osman* (supra) at para 116. See also *NK v Minister of Safety and Security* 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC).

[8] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para 33.

that the Final Constitution has for the values of life and human dignity, the state may have an obligation to protect foetal life in a manner that might justify limitations on women's reproductive rights.[1] This interest might require a court to look harder at the justifications for late-term abortions endorsed by the Choice on Termination of Pregnancy Act.[2]

39.7 The Obligation to Promote the Right to Life

In *Makwanyane*, Chaskalson P concluded that the state had to demonstrate respect for the right to life in 'everything that it does'.[3] That an obligation to promote respect for the right to life in this manner was more than a mere rhetorical flourish became apparent in *Mohamed v President of the RSA*. In *Mohamed,* the Constitutional Court held that immigration authorities 'failed to give any value to Mohamed's right to life' when allowing for his extradition to the United States in order to stand trial for an offence that could result in the imposition of the death penalty.[4] Given that the death penalty is inimical to the right to life in the Final Constitution, the state was held to have breached a constitutional obligation by allowing for the deportation or extradition of a person without first securing the assurance that he would not be sentenced to death.[5]

Whereas the *Mohamed* order included a directive to bring the judgment to the attention of the trial court in the United States, the majority of the Constitutional Court subsequently held in *Kaunda v President of the RSA* that the obligation to promote respect for the right to life did not extend to ensuring that the provisions of the Final Constitution are adhered to by foreign governments. As has been noted elsewhere, the two decisions are difficult to square with one another.[6] While the government ordinarily required assurance from foreign states that the death penalty would not be imposed on South African citizens, the majority in *Kaunda* was not prepared to direct the state to insist on such assurance in relation to crimes committed by South African nationals in countries where the death penalty was allowed in accordance with international law.[7] O'Regan J dissented

[1] I have in mind late-pregnancy abortions and deliberate foetal 'harvesting' for commercial, research or other reasons. See Meyerson (supra) at 56-58 (Argues that such an obligation may be derived from the constitutional value of human dignity.) But see Naude (supra) at 551-559 (Views the obligation as flowing from the value of life underlying FC s 11.)

[2] See Meyerson (supra) at 56-58 (Meyerson regards the current provisions of the Choice on Termination of Pregnancy Act as striking an adequate balance between women's autonomy and equality rights on the one hand and the State's obligation to protect foetal life on the other.)

[3] *Makwanyane* (supra) at para 144.

[4] *Mohamed* (supra) at para 48.

[5] Ibid at paras 47-48, 52, 58, 73.

[6] S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 31.5 (On the extraterritorial effect of the Final Constitution.)

[7] *Kaunda* (supra) at paras 32, 37, 44-45, 56, 70, 98-102, 144. The matter was accordingly distinguished from *Mohamed* on the basis that Mohamed was present in South Africa, and could thus avail himself of the protection of the Final Constitution. Ibid at paras 49-50, 56. It would appear that Chaskalson CJ did contemplate the operation of a duty to promote respect for rights as forming a part of customary international law in such circumstances.

on the grounds that the obligation to promote respect for the rights in the Bill of Rights also bound the South African government when conducting diplomatic affairs or otherwise acting extra-territorially. On her reading of *Mohamed*, the government was ordinarily under an obligation to ensure that South African citizens would not be sentenced to death elsewhere in the world.[1] Similarly, Sachs J reasoned that the government was obliged to do what was reasonably within its power to ensure that South Africans are not subjected to the death penalty elsewhere.[2] While O'Regan J's judgment gives better effect to the obligation to promote the right to life, a joint reading of *Mohamed* and *Kaunda* suggests that, at a minimum, state actions which do not themselves violate the right to life but which render the right vulnerable to infringement by others (in South Africa or elsewhere) fall foul of the obligation to promote respect for the right insofar as such actions fall within the territorial reach of the Final Constitution.

39.8 The Obligation to Fulfil the Right to Life

The existence of an obligation to fulfil the right to life was first acknowledged in South African constitutional jurisprudence by Sachs J in *S v Makwanyane*. Sachs J wrote that an 'objective approach in relation to the enjoyment of the right to life' entailed that 'the State is under a duty to create conditions to enable all persons to enjoy the right'.[3] This objective approach entails more than protecting the existence of citizens' lives from unlawful infringement by their peers. Enjoyment of the right to 'human life' and to 'share in the experience of humanity' depends not only on biological existence and cognitive and intellectual ability, but also on material means and access to social goods. As Joanne Fedler observes:

> Both materially and philosophically, life depends upon resources essential for the preservation and quality of existence. Inherent in a broader notion of life is a value judgment about what constitutes an acceptable quality of life. So whilst life may be a value in and of itself, without water, food, livelihood, friendship, and recreation it may not be worth living.[4]

The obligation to fulfil the right to life, therefore, involves satisfaction of the socio-economic dimensions of the right[5] and thus intersects with various positive obligations that the state must heed in terms of FC ss 26, 27, 28 and 35.

[1] *Kaunda* (supra) at paras 229, 231, 249, 253.
[2] Ibid at para 275.
[3] *Makwanyane* (supra) at para 353.
[4] Fedler (supra) at 15-2.
[5] That the right to life encompasses such socio-economic dimensions has also been affirmed in international law, with the UNHRC remarking that '[t]he expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.' GC 6 (supra) at para 5. In international human rights law scholarship, the right to life is accordingly regarded as a prime example of the interdependence and indivisibility of civil and political rights and socio-economic rights. See C Scott 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27 *Osgoode Hall LJ* 769, 781, 875, 878; Menghistu (supra) at 78.

Two 'categories' of socio-economic interests may be regarded as relevant to the enjoyment of the right to life. The first, which may be termed 'survival requirements', are 'the type of elementary, basic, and essential inputs necessary to keep [biological] life going'[1] and include access to basic nutrition, water, shelter and (arguably) basic health care services. Beyond these minimum requirements, the satisfaction of several 'secondary' socio-economic rights aimed at ensuring an adequate standard of living — housing, more advanced health care services and education — affirm the Final Constitution's commitment to human dignity and life.[2] However, even if 'life' is confined to biological existence, it may be argued that the obligation to fulfil the right to life at least requires the satisfaction of survival requirements:

> If deprivation of the lives of millions of people through lack of access to survival requirements is not a right to life issue, we can only say that the whole concept and notion of the right to life in its restricted and narrow sense does not apply to more than a billion people around the globe.[3]

Although the obligation to fulfil the right to life in South Africa appears to require the realization of most socio-economic rights, the Final Constitution's general commitment to the progressive realization of socio-economic rights suggests that the courts are unlikely to recognize a free-standing right to life that would secure the claimant some immediate set of entitlements.[4] But this does not mean that such positive obligations — in terms of the right to life — should be viewed as perpetually unenforceable. Indian Courts, for instance, have found that the right to life embraces a wide range of survival and quality of life concerns and have enforced several socio-economic claims (contained in the Indian Constitution as non-enforceable Directive Principles of State Policy) against the state in terms of the right to life.[5] While it is certainly significant that, unlike its Indian counterpart,, the South African Constitution provides for the judicial enforcement

[1] Menghistu (supra) at 67.

[2] Ibid.

[3] Ibid at 65. See also Menghistu (supra) at 63, 67-69, 79-80; Ramcharan (supra) at 6-10; Du Plessis & De Ville (supra) at 215; M Pieterse 'A Different Shade of Red: Socio-economic Dimensions of the Right to Life in South Africa' (1999) 15 *SAJHR* 372, 373 (Pieterse 'A Different Shade of Red').

[4] It may therefore be expected that the general limitations clause will more readily be invoked in relation to the obligation to fulfil the right to life than in relation to the obligations to respect and to protect the right. See Du Plessis & De Ville (supra) at 224; Pieterse 'A Different Shade of Red' (supra) at 378, 384.

[5] See, for example, the following judgments of the Indian Supreme Court: *Bandhua Mutki Morcha v Union of India* AIR 1984 SC 802 (Right to life includes protection of health); *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180 (Right to life includes right to livelihood); *MC Metha v Union of India* AIR 1987 SC 965 (Right to life includes protection against harmful environmental factors); *Parmanand Katara v Union of India* AIR 1989 SC 2039 (State must take all possible measures to preserve life; right to life violated where emergency medical treatment is refused); *P Rathinam v Union of India* AIR 1994 SC 1844 (Right to life entails more than 'mere animal existence'); *Consumer Education and Research Centre v Union of India* AIR 1995 SC 636 (Right to health forms integral part of the right to life); *Consumer Education and Research Centre v Union of India* AIR 1995 SC 922 (Right to life includes right to livelihood); *UP Avas Evam Vikas Patishad v Friends Co-op Housing Society* AIR 1996 SC114 (Right to life includes right to shelter);

of several socio-economic rights in their own right and, while there is accordingly a strong argument that enforcement of such rights should not be confused with enforcement of the right to life, the Indian experience shows that enforcing the obligation to fulfil the right to life is not impossible. In South Africa, it may be argued that the obligation to fulfil the right to life at least entails that the state, in its effort progressively to realize socio-economic rights, should award immediate priority to the satisfaction of survival requirements.

In *Soobramoney v Minister of Health, KwaZulu-Natal*, the Constitutional Court acknowledged that access to socio-economic amenities was essential to enjoyment of the right to life. In detailing the many socio-economic demands that the Constitution places on the state, Chaskalson P stated that satisfaction of needs for access to medical care, food, water, housing and employment formed part of the right to 'human life'.[1] In a separate concurring judgment, Sachs J added that: '[a] healthy life depends upon social interdependence: the quality of air, water, and sanitation which the State maintains for the public good; the quality of one's caring relationships as well as the quality of health care and support furnished officially by medical institutions and provided informally by family, friends, and the community.'[2] Madala J observed, in another concurring judgment, that '[t]he State undoubtedly has a strong interest in protecting and preserving the life and health of its citizens and to that end must do all in its power to protect and preserve life.'[3]

However, the *Soobramoney* Court did not ground a positive obligation to provide such goods in the right to life. The appellant, who required renal dialysis in order to remain alive, argued that a decision not to provide him with such treatment at state expense infringed his right to life, read with his right not to be refused emergency medical treatment.[4] He relied, for this part of his argument, on the judgment of the Indian Supreme Court in *Paschim Banga Khet Mazdoor Samity v State of West Bengal*.[5] In dismissing the claim, the Court regarded it as significant

Paschim Banga Khet Mazdoor Samity v State of West Bengal AIR 1996 SC 2426 (Right to life violated by non-provision of emergency medical care)*; State of Punjab v Mohinder Singh Chawla* AIR 1997 SC 1225 (Right to life includes access to health care services); *Samatha v State of Andhra Pradesh* AIR 1997 SC 3297 (Right to life requires the social and economic empowerment of tribal peoples); *State of Himachal Pradesh v Raja Mahendra Pal* AIR 1999 SC 1786 (Right to life includes right to livelihood); *Akhtari B v State of Madhya Pradesh* AIR 2001 SC 1528 (Right to life includes right to parental care); *Murli S Deora v Union of India* AIR 2002 SC 40 (Right to life includes right not to be victim of air pollution and requires ban of smoking in public places); *Secretary, Minor Irrigation and Rural Engineering Services UP v Sahngoo Ram Arya and Another* AIR 2002 SC 2225 (Right to life includes right not to be hounded and constantly harassed by police); *MC Metha v Union of India* AIR 2004 SCW 4033 (B)(Right to life includes rights to enjoyment of pollution-free water and air); *Kapila Hingorani v State of Bihrar* AIR 2005 SC 980 (Right to life includes right of workers to earn a salary).

[1] *Soobramoney v Minister of Health, KwaZulu Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC)('*Soobramoney*') at para 31.

[2] Ibid at para 54.

[3] Ibid at para 39.

[4] Ibid at para 14.

[5] *Paschim Banga Khet Mazdoor Samity v State of West Bengal* AIR 1996 SC 2426.

that, unlike its Indian counterpart, the Final Constitution contained a right not to be refused emergency medical treatment in FC s 27(3), which would logically apply to situations similar to that in *Samity* (where the claimant was in urgent need of immediate care).[1] The *Soobramoney* Court thus thought it unnecessary to engage the more general right to life in this matter. Further, since Mr Soobramoney's condition did not constitute a medical emergency, FC s 27(3) was held to be inapplicable.[2] Instead, the *Soobramoney* Court proceeded to evaluate the claim in light of the right to have access to adequate health care services in FC s 27(1) and (2) and found that the non-provision of dialysis to Mr Soobramoney, in terms of a rationally conceived and bona fide resource rationing policy, was not in breach of the state's FC s 27 obligations.[3]

While clearly ruling out the application of the right to life in circumstances covered by FC s 27(3), *Soobramoney* does not directly address whether the right to life may be used in conjunction with FC s 27(1) in circumstances where death may result from a refusal of medical treatment in non-emergency situations.[4] So while it seems clear from Sachs J's observation that 'the right to life may [not] . . . be extended to encompass the right indefinitely to evade death',[5] it is not clear whether the judgment similarly precludes claims for life-*saving* treatment in terms of the right to life.

The Constitutional Court seemed to acknowledge that the effect of the obligation to fulfil the right to life may mandate special consideration for claims for life-saving treatment in *Minister of Health v Treatment Action Campaign (No 2)*.[6] In *TAC*, the Court remarked that 'regard must be had to the fact that this case is concerned with newborn babies whose lives might be saved by the administration of Nevirapine to mother and child at the time of birth'.[7] However, it nowhere explicitly depicted the restrictive policy as potentially falling foul of the obligation to fulfil the right to life. To date, the only explicit acknowledgement that the right to life has a role to play in securing access to life-saving medical treatment is the WLD's finding in *Hay v B* that a child's inviolable right to life justified an order that he receive life-saving medical treatment against the wishes of his parents.[8]

[1] *Soobramoney* (supra) at paras 15-18.
[2] Ibid at paras 20-21.
[3] Ibid at paras 29, 36-37.
[4] I have criticized the manner in which the judgment sidesteps this question and thereby reads down the ambit of the right to life elsewhere. See Pieterse 'A Different Shade of Red' (supra) at 382; M Pieterse 'Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience' (2004) 26 *Human Rights Quarterly* 882, 900. See C Scott & P Alston 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*'s Legacy and *Grootboom*'s Promise' (2000) 16 *SAJHR* 206, 236-237.
[5] *Soobramoney* (supra) at para 57. See also D Moellendorf 'Reasoning about Resources: *Soobramoney* and the Future of Socio-economic Rights Claims' (1998) 14 *SAJHR* 327, 327-328.
[6] See Pieterse 'A Different Shade of Red' (supra) at 385; Scott & Alston (supra) at 255.
[7] *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC)('*TAC*') at para 72. See also *TAC* (supra) at para 131.
[8] See *Hay v B* (supra) at 486B-E.

Apart from decisions concerning access to health care services, an acknowledgement of the socio-economic dimensions of the right to life motivated an obiter remark in the CPD that a prohibition on begging on privately owned public retail premises would be unlikely to withstand constitutional scrutiny. In *Victoria & Alfred Waterfront v Police Commissioner, Western Cape*, Desai J expressed 'grave reservations' on the constitutionality of such a prohibition. He continued:

> The issue of begging frequently raises a direct tension between the right to life and property rights. In that event, the property rights must give way to some extent. The rights to life and dignity are the most important of all human rights. By committing ourselves to a society founded on the recognition of human rights, we are required to value those rights above all others. Furthermore, the right to life encompasses more than "mere animal existence". It includes the right to livelihood.[1]

Finally, the Constitutional Court acknowledged that the 'intertwined' rights to life and to dignity were implicated in a matter concerning the denial of social security benefits.[2] In *Khosa*, the Court declared legislative provisions that limited social security benefits to South African citizens unconstitutional, since these provisions infringed the rights of non-citizens to equality and to have access to social security. In accepting social security as necessary for enjoyment of the right to life, Mokgoro J held that '[w]hen the rights to life, dignity and equality are implicated in cases dealing with socio-economic rights, they have to be taken into account along with the availability of human and financial resources in determining whether the State has complied with the constitutional standard of reasonableness.'[3]

It therefore seems that, while South African courts are prepared to acknowledge that the right to life encompasses access to such socio-economic amenities as are necessary for human survival and flourishing, they are unwilling to simultaneously acknowledge that this understanding of the right entails obligations beyond those imposed upon the State in terms of Chapter 2's enumerated socio-economic rights. At the moment, it, the right to life plays an indirect role in decisions concerning urgent access to vital socio-economic goods and services. While one may lament the inability to deploy the right to life in a manner that might enable one to secure access to those goods necessary for surviving and flourishing, it is encouraging that the socio-economic dimensions of the obligation to fulfil the right to life are not denied.

[1] *Victoria & Alfred Waterfront v Police Commissioner, Western Cape* 2004 (4) SA 444, 446D-G (C).
[2] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) at para 41.
[3] Ibid at paras 44 and 81.

40 Freedom and Security of the Person

Michael Bishop and Stu Woolman

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Freedom and Security of the Person

12. (1) Everyone has the right to freedom and security of the person, which includes the right

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent.[1]

40.1 INTRODUCTION

(a) Drafting history

(i) *Evolution of IC s 11*

Section 11 of the Interim Constitution[2] had its origins in two distinct rights found in the early drafts of the Interim Constitution: a right to personal liberty, and a right to freedom from torture and inhumane punishment.[3] The initial separation of the two rights tracked the structure of international human rights instruments and the provisions of a number of foreign constitutions.[4] After briefly forging a

[1] Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)('FC' or 'Final Constitution').

[2] Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution').

[3] See Technical Committee on Fundamental Rights *Fourth Report* (3 June 1993). The personal liberty right read: 'Every person shall have the right to his or her personal liberty.' The freedom from torture and inhumane punishment right read: 'No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.'

[4] See Universal Declaration of Human Rights, arts 3 and 5, International Covenant on Civil and Political Rights, arts 7 and 9(1), African Charter on Human and Peoples' Rights, arts 5 and 6, and European Convention on Human Rights, arts 3 and 5(1). The Canadian Charter, the German Basic Law and US Constitution also bifurcate the two sets of rights.

Section 7 of the Canadian Charter of Rights and Freedoms states that: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.' Three different dimensions of the Canadian Supreme Court's interpretation of s 7 of the Charter inform our analysis of FC s 12: (1) the restrictive definition of 'liberty'; (2) the relatively restrictive definition of 'security of the person'; (3) the residuary definition of 'fundamental justice' — a definition that invites the court to entertain a wide and unenumerated variety of substantive challenges to the law. 'Liberty' — the functional equivalent of 'freedom' in FC s 12(1) — has been construed to mean freedom from physical restraint. Such restraint occurs primarily in the context of the criminal justice system and has been understood to encompass imprisonment, mandatory fingerprinting, document production, and oral testimony. 'Liberty' under s 7 of the Charter does not embrace political liberty (expressive rights and the franchise are protected elsewhere in the Charter) nor was it intended to offer any protection for property or economic interests. However, despite the drafters' relatively clear desire to limit s 7's ambit to purely procedural challenges, the Supreme Court has imputed a substantive dimension to the provision, and, in particular, the phrase 'fundamental justice'. See S Choudhry 'The *Lochner* Era and Comparative Constitutionalism' (2004) 2 *Journal of International Constitutional Law* 1. The Charter, s 12, contains a prohibition on 'cruel or unusual treatment or

punishment'. However, the Canadian Supreme Court has had little occasion to define the phrase. The Supreme Court has said that one test for cruel and unusual punishment would be 'whether the punishment prescribed is so excessive as to outrage standards of decency'. See *R v Miller and Cockerill* [1977] 2 SCR 680, 688. The Supreme Court has, in terms of s 12, struck down a law that required a minimum sentence of seven years' imprisonment for importing narcotics as grossly disproportionate to the offense. See *R v Smith* [1987] 1 SCR 1045.

Article 1(1) of the German Basic Law states that 'human dignity is inviolable'. The right to human dignity has been interpreted by the Federal Constitutional Court to prevent the infliction of cruel or degrading punishment. 45 *BVerfGE* 187, 228 (1977) citing 1 *BVerfGE* 332 (1952) and 25 *BVerfGE* 269 (1969). The FCC has also held that life imprisonment may violate the right to human dignity if the possibility of parole was not built into the sentence. See 45 *BVerfGE* 187, 245 (1977) as quoted in D Currie *The Constitution of the Federal Republic of Germany* (1994) 305. Article 2(2) of the GBL contains a general guarantee of life, bodily integrity, and personal liberty comparable to the guarantee of security of the person found in FC s 12(2): 'Everyone has the right to life and to inviolability of the person. Personal liberty shall be inviolable. These rights may be impinged upon only pursuant to statute.' Article 2(2)'s commitment to personal liberty has been interpreted narrowly as protecting individuals from physical restraint and bodily invasion. See 22 *BVerfGE* 180, 218–20 (1967) as cited in Currie (supra) at 307. In addition, the FCC held that art 2(2)'s commitment to personal liberty limits pretrial imprisonment to that time necessary to investigate the case, to a reasonably short period of time, to cases where there is a significant chance for recurrence and to determine an accused's mental competence. The FCC has also held that while art 2(2)'s guarantee of bodily integrity may not preclude the use of electroencephalograms, it does bar the state from subjecting individuals to non-consensual spinal taps or placing accused persons on trial when they are extremely ill. Articles 1(1) and 2(2) seem to place fairly clear limits on what might count as a violation of freedom and security of the person under the GBL. However, German constitutional jurisprudence has not entirely escaped the conceptual difficulties posed by the notion of substantive due process. Article 2(1) of the GBL states that: 'Everyone has the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code.' The FCC found that personality could not be meaningfully limited to some incorporeal set of mental events. It was therefore obliged to define the right broadly as a general right of freedom of action: the right of '[e]very person . . . to do or not to do what he wishes'. 16 *BVerfGE* 32, 36–37 (1957). Despite this broad construal of the language of the right, the Federal Constitutional Court appears to have been quite circumspect in using the right to strike down government restrictions on individual freedom. Striking down laws that prohibit intermediaries from seeking to match willing drivers with people looking for rides (17 *BVerfGE* 306 (1964)), that deny parents unlimited power to bind minor children by contract (72 *BVerfGE* 155 (1986)), or that require falconers to demonstrate the capacity to use firearms in order to procure a license to hunt with a falcon (55 *BVerfGE* 159 (1980)) hardly reflects a robust or uncontrollable understanding of 'freedom' or 'substantive due process'.

A substantial body of American jurisprudence exists on what counts as 'cruel and unusual punishment' under the Eighth Amendment. The Eight Amendment (1791) reads: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Banishment, terms of imprisonment radically disproportionate to the offence for which they are imposed, and quaint forms of execution such as disembowelment, having a person drawn and quartered, or burning someone alive have all been declared unconstitutional. The most contentious issue in American criminal jurisprudence turns on whether 'cruel and unusual punishment' encompasses the death penalty. As the law currently stands, the Eighth Amendment does not bar the death penalty. Given the permissive approach of US courts to capital punishment and the striking down of the death penalty in South Africa, it might be thought that US capital punishment jurisprudence has entirely lost its relevance for South African constitutional law. However, because US death penalty jurisprudence is driven by the due process, the fair trial and the proportionality of punishment guarantees afforded by the Eighth, Fifth and Fourteenth Amendments, the case law still has some resonance for similar doctrines being developed by our courts. The Fifth Amendment reads, in relevant part: 'No person . . . shall be deprived of life, liberty or property without due process of law.' The Fourteenth Amendment reads, in relevant part: 'No State shall . . . deprive any person of life, liberty or property without due process of law.'

What counts as 'liberty' or 'freedom' for the purposes of constitutional analysis and protection is a question which has vexed American jurists for well over two centuries. Most US Supreme Court judges over the past two centuries have defended the proposition that the drafters of both the federal Constitution and the state constitutions intended to create governments with limited powers (and thus

new right to 'Security of the Person' (which included the right to be free from torture or inhuman punishment),[1] the Technical Committee on Fundamental Rights combined this new right with the right to personal liberty and called the amalgamation 'Freedom and Security of the Person'.[2] The enacted version, IC s 11, read as follows:

> Freedom and Security of the Person
>
> (1) Every person shall have the right to freedom and security of the person which shall include the right not to be detained without trial.
>
> (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

Neither the Technical Committee notes nor the Ad Hoc Committee notes offer an explanation for these changes.[3] One inference that might be drawn is that the drafters believed the rights to personal liberty and to security of the person were

maximum individual liberty). A second proposition, defended by a handful of Supreme Court judges, is that, in addition to the enumerated provisions of the various constitutions that restricted the exercise of governmental powers, natural law vests the people with unenumerated rights that cannot be violated constitutionally. While the first proposition is uncontroversial, the second is not. In *Calder v Bull* Judge Chase wrote that the Supreme Court was entitled to declare legislation unconstitutional if it infringed upon the sphere of natural liberty which vested in all citizens. 3 US 386 (1799). However, a majority of the *Calder* Court, in holding that the Connecticut legislature's invalidation of a probate decree did not violate the US Constitution, reasoned that the US Supreme Court could invalidate acts of the federal government and state governments only where a specific constitutional provision had been violated. In the first decade of the 20th century, the Supreme Court began to give the 'due process' guarantees in the Fifth and Fourteenth Amendments substantive, as well as formal, content. 'Substantive due process' enables courts to find law unconstitutional if 'it exceed[s] all bounds of the social compact'. R Rotunda & J Novak *Treatise on Constitutional Law: Volume I* (1992) 380. Of course, the problem with the doctrine of substantive due process is that views on what counts as behaviour being beyond the bounds of the social compact may vary dramatically. The substantive due process doctrine reached its apogee in 1905 in *Lochner v New York*, 198 US 45 (1905). In *Lochner*, the Supreme Court struck down a New York statute that limited bakers to a 60-hour work week (for health-related reasons) on the grounds that that it was an arbitrary infringement of the freedom of contract protected by the due process clause of the Fourteenth Amendment. The *Lochner* Court's majority opinion elicited Justice Oliver Wendell Holmes' barbed reply that 'the Fourteenth Amendment does not enact Herbert Spencer's *Social Statics*'. Ibid at 75. The phrase, nearly a century later, is generally employed only as a term of opprobrium. Indeed, conservative American lawyers today note that the substantive due process doctrine gave birth to the 'right to privacy' and the controversial constitutional protection afforded to contraception and to abortion. S Woolman 'Metaphors and Mirages: Some Marginalia on Choudhry's *The Lochner Era and Comparative Constitutionalism* and Ready-Made Constitutional Narratives' (2005) 20 *SAPR/PL* 281. See also *Griswold v Connecticut* 381 US 479 (1965)(Contraception); *Roe v Wade* 410 US 113 (1973)(Abortion).

[1] See Technical Committee on Fundamental Rights *Fifth Report* (11 June 1993). The *Fifth Report* retained the right to personal liberty as it appeared in the *Fourth Report*. The freedom from torture and cruel punishment became the right to security of the person, with the addition of a new clause conferring the right to security of the person: '(1) Every person shall have the right to the security of his or her person. (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.'

[2] Technical Committee on Fundamental Rights *Sixth Report* (15 July 1993). The Committee added the rather laconic Explanatory Note: 'Clauses 5 and 6 of the previous version of the draft have been combined.'

[3] Contemporaneous academic commentary on the subject is equally ambiguous. See H Corder & L du Plessis *Understanding South Africa's Transitional Bill of Rights* (1994) 153.

sufficiently related to place them under the same heading. Another inference, drawn by Ackermann J in *Ferreira v Levin*, is that the amalgamation of the separate rights supported a disjunctive reading of IC s 11(1) and (2) and thus a construction of IC s 11 that results in a stand-alone right to 'freedom' writ large.

(ii) *Evolution of FC s 12*

The enacted version of s 12 of the Final Constitution varies substantially from both IC s 11 and earlier, draft formulations of FC s 12. The Constitutional Assembly had, in a relatively late draft, created a neat tripartite structure for the right that divided (and thereby emphasized) its three major components: freedom of the person, security of the person, and freedom from torture, cruel and degrading treatment and non-consensual medical experimentation.[1] The final

[1] The recorded drafting history of FC s 12 begins in October 1995. The first draft of the clause reflects an attempt to clarify the meaning of freedom of the person and security of the person. See Section 5 (Freedom and Security of the Person) of the Draft Bill of Rights (9 0ctober 1995), which reads, in relevant part: '(1) Everyone has the right to physical and psychological integrity and to freedom of the person; (2) no one may be– *(a)* deprived of liberty arbitrarily or without just cause; or *(b)* detained without trial; (3) No one may be– *(a)* tortured in any way; *(b)* treated or punished in a cruel, inhuman or degrading way; or *(c)* subjected to medical or scientific experiments without their consent.' The first part of the draft clause separated freedom of the person from security of the person, and implicitly defined security of the person in terms of the right to physical and psychological integrity. The second part of the draft clause added a freedom from arbitrary deprivation of liberty to the freedom from detention without trial. The third part of the draft clause retained IC s 11's provisions regarding torture and cruel treatment and punishment. It added a restriction on subjecting individuals to medical or scientific experiments without their consent.

The February draft clause featured several advances. First, it divided the right into three major components: freedom of the person, security of the person, and freedom from torture, cruel and degrading treatment, and medical experimentation. Secondly, the right to freedom of the person was understood to include the right not to be deprived of liberty arbitrarily or without just cause and the right not to be detained without trial. These subsections were probably intended to emphasize that freedom of the person was designed to be primarily procedural in nature and that it was not intended as a full-blown (or even residual) right to negative freedom. Thirdly, the phrasing of the right to security of the person begins to get to grips with two rights of fundamental importance for gender equality: the right of persons to be free from all forms of violence, and to be secure in, and to control, their own bodies. While the potential ambit of these two subsections may be relatively broad, it is hard not to read them as being principally concerned with domestic violence and reproductive rights. Finally, the third subsection — freedom from torture, cruel and degrading treatment, and medical experimentation — dealt with freedom from *direct* physical abuse in three of its most fundamental senses. See *Memorandum from Panel of Constitutional Experts to Chairpersons and Executive Director of the Constitutional Assembly* (5 February 1996), s 11, which reads, in relevant part: 'Freedom and Security of the Person: (1) Everyone has the right to freedom of the person, including the right not to be– *(a)* deprived of liberty arbitrarily or without just cause; or *(b)* detained without trial; (2) Everyone has the right to security of the person [bodily and psychological integrity], including the rights– *(a)* to be free from all forms of violence; and [*(b)* to be secure in, and control their own body;] (3) No one may be– *(a)* tortured in any way; *(b)* treated or punished in a cruel, inhuman or degrading way; or *(c)* subjected to medical experiments without that person's consent.'

The March draft maintained the structural and the linguistic clarity of the February draft and clarified the meaning of several of the subsections. See *Discussion by Constitutional Committee Sub-Committee in Preparation for Report-Back to Constitutional Committee* (12 March 1996): 'Freedom and security of the person: 11(1) Everyone has the right to freedom of the person, including the right not to be– *(a)* deprived of liberty arbitrarily or without just cause; or *(b)* detained without trial; (2) Everyone has the right to security of the person, including the right– *(a)* to be free from all forms of violence; *(b)* to [bodily/physical] and

iteration of FC s 12 deviates, in some important respects, from this analytically sound rubric. The right to freedom of the person and the right to security of the person — separated in the drafts — are placed in the same subsection: FC s 12(1). FC s 12(1) now embraces three different kinds of freedom which had formerly been placed in three different subsections: freedom of the person and its largely procedural subsections; freedom from all forms of violence; and freedom from torture and cruel and degrading treatment and punishment. FC s 12(2) underwent a change in name and in substance. It is no longer the right to security of the person. Instead it is the right to bodily and psychological integrity. The grouping of paragraphs under FC s 12(2) makes somewhat more sense than the concatenation of rights found in FC s 12(1). When viewed through the lens of women's rights, the re-organization is far less compelling. In previous drafts, the freedom from all forms of violence cohered with rights to reproductive choice and to bodily integrity. All three subsections engage matters of great urgency for the women of South Africa. Under FC s 12(2)'s new grouping, reproductive rights are combined with the right to be free from medical experimentation without informed consent. While bodily control is clearly integral to both rights, women's concerns are no longer the focus of the section.

Although one might be inclined to read this final re-organization of FC s 12 as a failure to take women's concerns seriously, the actual jurisprudence emanating from FC s 12 suggests that these structural alterations have not, in fact, diminished women's rights. As we shall see, whereas IC s 11 primarily offered guarantees against state impairment of human dignity by the criminal justice system, FC s 12 extends the right's ambit to largely 'private' relationships. Real revolutions in the law have already been wrought from FC s 12's protection of individuals against various sources of physical violence and psychological harm.[1]

(b) Philosophical background

(i) *IC s 11:* Ferriera v Levin*, classical liberalism and substantive due process*

The drafters of the Interim Constitution could hardly have contemplated the heated philosophical exchanges that their construction of IC s 11 would occasion. The pace of negotiations, and the pressures placed upon technical committees charged with crafting provisions that would accommodate the concerns of a

psychological integrity; and *(c)* to make decisions concerning [reproduction/their body] free from coercion, discrimination and violence; (3) No one may be– *(a)* tortured in any way; *(b)* treated or punished in a cruel, inhuman or degrading way; or *(c)* subjected to medical *or scientific* experiments without that person's consent' (changes emphasized). Notice that the March draft expressly granted everyone freedom over reproductive choices. Of all the proposed drafts, the March 1996 iteration makes the most sense.

[1] See § 40.5 infra.

variety of parties, did not permit the luxury of rarefied academic debates. That said, the choices made by the Technical Committee responsible for IC s 11 — in particular, the conjunction of a right to personal liberty with a right to physical security — led, almost inexorably, to one of the more memorable set of exchanges amongst the original members of the Constitutional Court.

In *Coetzee v Government of the Republic of South Africa & Others*, Sachs J anticipated the gathering storm:

> My principal focus is on the rights subsumed in the expression 'freedom and security of the person'. The issue of determining the precise limits and content of these words will no doubt exercise this court for a long time to come. Other jurisdictions have battled with the problem of whether the phrase should be construed as referring to one right with two facets, or two distinct, if conjoined, rights. Another jurisprudentially controversial matter has been whether the words should be considered as applying only or mainly to the absence of physical constraint or whether it should be regarded as having the widest amplitude and extend to all the rights and privileges long recognized as central to the orderly pursuit of happiness by free men and women. Even more fundamental (and even more difficult) are questions relating to the nature of citizenship and civic responsibility in a modern industrial-administrative state, the degree of regulation that is appropriate in contemporary economic and social life and the extent to which freedom and personal security are achieved by protecting human autonomy on the one hand and recognizing human interdependence on the other.[1]

In the quotation above, Sachs J captures the heart of the incipient debate: (1) whether 'freedom' and 'security of the person' constitute two distinct rights housed under a single roof; (2) whether 'freedom' refers to freedom from the specific incursions into personal autonomy expressly identified in IC s 11, or whether it corresponds to the liberal political tradition's more general concern with the imposition of *any* unjustifiable restriction on individual autonomy.[2] *Ferreira v Levin NO & Others* witnessed the very tempest Sachs J had predicted.[3]

In *Ferreira*, Ackermann J both proposed a disjunctive reading of IC s 11 — separating the right to 'freedom' from the right to 'security of the person' — and

[1] *Coetzee v Government of the Republic of South Africa & Others; Matiso v Commanding Officer, Port Elizabeth Prison, & Others* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC) at para 44.

[2] See J Rawls *Political Liberalism* (1993) 292 (Liberal theory prefers to confine state interference with individual conduct to those restrictions necessary to achieve mutual security and the maximum possible degree of individual autonomy); J Raz *The Morality of Freedom* (1986) 6–14 (While talk of a presumption of liberty — as with Rawls' first principle of justice — may be confusing, liberals are on more solid ground when they make the stronger claim that *(a)* freedom is intrinsically valuable and *(b)* every political act restricting any individual's freedom requires justification.)

[3] *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)('*Ferreira*'). For a fuller account of this case, see I Currie & S Woolman 'Freedom and Security of the Person' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS 5, 1999) Chapter 39; I Currie '*Ferreira v Levin*' (1996) 12 *SAJHR* 179.

defended a rather Berlinian conception of 'freedom' as negative liberty.[1] In addition to — or perhaps because of — the general protection of individual liberty afforded on this account, Ackermann J's reading of IC s 11(1) protected an unspecified number of 'residual' freedom rights. That is, it guaranteed protection of rights not specifically protected elsewhere in Chapter 3 of the Interim Constitution, including immunity against self-incrimination in contexts where the IC s 25(3) fair trial rights of accused persons did not apply.

To understand exactly how Ackermann J arrived at these conclusions requires an abbreviated account of the underlying facts and law at issue. Ackermann J's robust reading of IC s 11(1) was necessitated by a legal technicality. The applicants had attacked s 417(2)*(b)* of the Companies Act[2] as a violation of their IC s 25(3) fair trial rights.[3] In particular, they objected to the fact that s 417(2)*(b)* compelled an examinee at a s 417 inquiry into the winding up of a company to answer potentially incriminating questions, and allowed the answers given to those questions to be used in evidence in subsequent criminal proceedings against the examinee. The applicants contended that such compulsion was inconsistent with the fair trial rights of accused persons.

The applicants had a problem, however. They were not, as yet, accused persons. They had merely been summoned for examination by the Master. The *Ferreira* Court divided on whether the applicants could challenge the validity of s 417(2)*(b)* as a violation of their IC s 25(3) rights if they had neither been charged with a criminal offence nor, in a criminal trial, been confronted by evidence given by them at a s 417 inquiry.

Ackermann J found that although there was, as yet, no threat to the fair trial rights expressly protected by IC s 25(3), the applicants could find relief in IC s 11(1). IC s 11(1), according to Ackermann J, must be read disjunctively: the

[1] In fairness to Ackermann J, *Ferreira* represents the Justice's first attempt to work through a Kantian conception of human dignity in terms of the provisions of the South African Constitution. See C Taylor 'Kant's Theory of Freedom' in *Philosophy and the Human Sciences: Philosophical Papers II* (1985)(Human freedom is prior to legitimate order, in that legitimate authority can only arise as the creation of human agents through consent.) For a rather unsympathetic assessment of the Kantian strain in contemporary liberal political philosophy, see M Sandel 'Introduction' in M Sandel (ed) *Liberalism and its Critics* (1984) 1. Although unsuccessful in *Ferriera*, Ackermann J's approach was, ultimately, vindicated in the Court's dignity and equality jurisprudence. For a fuller, and rather appreciative, account of Ackermann J's project and its Kantian roots, see S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

[2] Act 61 of 1973.

[3] Section 417 of the Companies Act permits examination of the officers of a company being wound up because it is unable to pay its debts, and the examination of its debtors, and of persons with information about the affairs of the company or who are in possession of property of the company. Examinees may be summoned by the Master of the High Court or by the court itself to attend an examination. Section 417(2)*(b)* provides for the compulsion of an examinee: 'Any such person may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may thereafter be used in evidence against him.' An examinee who fails, without sufficient cause, to answer questions is guilty of an offence (s 418(5)*(b)*(iii)) and liable on conviction to a fine not exceeding R2 000 or six months' imprisonment, or both such fine and imprisonment (s 441(1)*(f)*).

right 'to freedom' is a separate and independent right, related to the right to 'security of the person'. Part of the justification for this disjunctive reading lay in a rather Rawlsian or Kantian contention that 'freedom' was prior to other fundamental rights because the liberty to pursue one's own personal development and conception of the good life lies at the core of what it means to be human.[1] Another part of the justification for this disjunctive reading lay in the contention that 'freedom' was the ground for a broad array of other enumerated fundamental rights.[2]

Ackermann J's conception of 'freedom' in IC s 11(1) consciously corresponds with the standard philosophical account of negative liberty. Negative liberty, according to Ackermann J — and Isaiah Berlin — consists of 'the area within which . . . a person . . . is or should be left to do or be what he is able to do or be, without interference by other persons'.[3] While the right to freedom does not 'deny or preclude the constitutionally valid, and indeed essential, role of state intervention in the economic as well as the civil and political spheres', such interventions must, to the extent that they are limitations of freedom, be justified on the grounds set out in IC s 33(1).[4] This reading suggested, for Ackermann J, the following definition of the right to freedom: 'I would, at this stage, define the right to freedom negatively as the right of individuals not to have "obstacles to possible choices and activities" placed in their way by . . . the state.'[5]

For the most part, this sphere of negative liberty would be captured by many of the rights specifically enumerated in the Interim Constitution's Bill of Rights. As a result, 'the freedom rights protected by [IC] s 11(1) should more properly be designated "residual freedom rights".'[6] What, exactly, would the relationship between the enumerated rights and the residual freedom rights be? One would first determine whether an infringement of a specifically enumerated right had

[1] See J Rawls *A Theory of Justice* (1973); I Berlin 'Two Concepts of Liberty' in *Four Essays on Liberty* (1969); I Kant *Groundwork of the Metaphysics of Morals* (trans and ed AW Wood, 2002).

[2] See *Ferreira* (supra) at para 49 (According to Ackermann J, freedom provides the grounds for the entrenchment of the following rights: IC ss 12, 14-21, 25(2)*(c)* and *(d)*, 25(3)*(c)* and *(d)*, 27, 28, 30(1)*(e)*, 30(2) and 31.)

[3] Ibid at para 52.

[4] Ibid.

[5] Ibid at para 54. John Stuart Mill adumbrates a similar conception of 'freedom' in his Introduction to *On Liberty* (1859)('It comprises first, the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects . . . The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them. . . . Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived. No society in which these liberties are not, on the whole, respected is *free*, whatever may be its form of government.' (Emphasis added.))

[6] *Ferreira* (supra) at para 57.

occurred. If not, then one would determine whether a residual freedom right protected by IC s 11(1) existed. In the instant matter, no enumerated freedom right had been infringed by s 417(2)*(b)* of the Companies Act. Ackermann J then considered whether s 417(2)*(b)* impaired any of the residual freedom rights protected by IC s 11(1):

> What is it about the nature and operation of the provisions of s 417(2)*(b)* of the Act, and their impact upon the examinee, which can be said to be inconsistent with [s 11(1)] . . .? In the first place, the examinees . . . appear at the examination under compulsion, for if they are duly summoned and fail to attend voluntarily, the Master or the court may . . . cause them to be apprehended and brought before the Master or court for examination. The examinee has no choice but to attend. The examinee is, in terms of subsec (2), obliged to submit to examination. . . . Section 417 obliges the examinee to answer all questions, even though the answer given to any such question may tend to incriminate him or her. Examinees thus have a very restricted choice if they have in the past acted in a way which might make them liable to criminal prosecution in connection with the trade, dealings, affairs or property of the company and they are examined in connection with such acts. If they refuse to answer, they face conviction and sentence to a fine or imprisonment (or both). If they answer, they run the risk of prosecution and conviction under circumstances where they might not have been prosecuted or convicted but for their answers at the examination, because s 417(2)*(b)* explicitly provides that even an answer which tends to incriminate the examinee may thereafter be used in evidence against him or her.[1]

In addition to finding that s 417(2)*(b)*'s creation of 'obstacles to possible choices and activities' constituted an impairment of IC s 11(1) in its most general sense, Ackermann J concluded that it infringed a residual freedom right in IC s 11(1) — the right against self-incrimination — left unprotected by IC s 25(3). Moreover, the failure to provide examinees with immunity for their testimony could not be justified by reference to the objective sought to be achieved by the section (the protection of shareholders and creditors of a company) and thus constituted an unjustifiable limitation of the residual right to self-incrimination in terms IC s 33(1).

The majority in *Ferreira* reached a similar conclusion via a fundamentally different route. The majority found that the IC s 25(3) challenge to the Companies Act was justiciable and that s 417(2)*(b)* impaired the exercise of IC s 25(3). As a result, even in terms of Ackermann J's preferred mode of analysis, the majority had no need to consider whether a residual freedom right in IC s 11(1) had been infringed. However, the majority did believe it necessary to distance itself from what it considered some of the more immoderate aspects of Ackermann J's reading of IC s 11.

According to Chaskalson P, the primary, though not necessarily the only, purpose of IC s 11(1) was to ensure the protection of the physical integrity of the individual. Read in this more restrictive manner, IC s 11(1) protects a right to physical liberty and a right to physical security.[2] 'This does not mean', Chaskalson

[1] *Ferreira* (supra) at para 70.
[2] Ibid at paras 158–59 (Chaskalson P).

P conceded, 'that we must construe [IC] s 11(1) as dealing only with physical integrity.' 'Freedom' may well entail more than that. But whatever 'freedom' does mean, Chaskalson P continued, it does not amount to a presumption of individual liberty.

Textual peculiarities and institutional comity were the two primary drivers for the majority's reasoning.

The bifurcated structure of the limitations clause under the Interim Constitution — IC s 33(1) — meant that limitations of residual freedom rights would be subject to the more onerous 'necessity' requirement, while many of the enumerated freedom rights would only have to satisfy the more deferential 'reasonable' requirement. It would be odd, indeed, reasoned Chaskalson P, if the drafters of the Interim Constitution had intended the enumerated rights found in IC Chapter 3 to be more easily impaired than unenumerated residual freedom rights ostensibly protected by IC s 11(1). Moreover, the higher threshold for justification of an impairment of IC s 11(1) would create the perverse incentive amongst litigants to pursue more aggressively residual freedom right challenges than many enumerated right challenges. Again, the majority reasoned, the drafters could not have intended such an outcome.

The potential anomalies that the limitations clause might — under an Ackermannian reading of IC s 11(1) — have a bearing on critical considerations of institutional comity. For unless the Constitutional Court was willing to compromise on its understanding of the meaning of 'necessary' in IC s 33(1), then all government action would be subject to an extraordinarily high level of justification. An unduly intrusive and exacting Constitutional Court — in the early days of a constitutional democracy — would run the risk of straining its relations with the political branches of government. The Constitutional Court was obliged, according to Chaskalson P, 'to avoid the pitfall of *Lochner v New York*.'[1] The interventionism of the *Lochner* Supreme Court, whose willingness to frustrate remedial government action in the name of an expansive and anachronistic understanding of liberty, undermined both the authority of the court and the institution of judicial review, led Chaskalson P to conclude: 'We should not . . . construe s 11 so broadly that we overshoot the mark and trespass upon terrain that is not rightly ours.'[2]

What then does 'freedom' in the context of IC s 11 — and thus FC s 12 — mean? The holding of the majority in *Ferreira* can be summarized as follows. First, the right to freedom and security of the person in s 11 — and FC s 12 — is confined, primarily, to the protection of the physical liberty and physical security of the individual. Second, while freedom writ large obviously involves more than the protection of physical integrity, the protection for this more expansive understanding of freedom can generally be found in the other specific and enumerated provisions of the Bill of Rights. Third, if one cannot secure adequate protection for some basic component of individual freedom under any of the enumerated

[1] *Ferreira* (supra) at para 182, citing *Lochner v New York* 198 US 45 (1905).
[2] Ibid.

provisions of the Bill of Rights, then it may be appropriate to look to the right to freedom in IC s 11(1) — now FC s 12(1) — for such protection. Fourth, given that the right to a fair trial is dealt with specifically and in detail under IC s 25(3) — now FC s 35(3) — neither IC s 11 nor FC s 12 embraces a residual fair trial right. Fifth, whatever else it might encompass, the residual freedom rights to be found in IC s 11 or FC s 12 do not embrace 'a right not to have obstacles to future choices and activities placed in one's path by the state.'

The majority in *Ferreira* may have effectively blunted Ackermann J's efforts to enshrine a broad, self-standing, freedom right in the Bill of Rights of both the Interim Constitution and the Final Constitution. Its holding did not, however, end the legal community's ongoing conversation about the extent to which the Bill of Rights protects the negative conception of liberty that animates Ackermann J's opinion or, as importantly, the latitude possessed by the judiciary to flesh out the meaning of the basic law.

(aa) Negative liberty

The fate of negative liberty as grundnorm in our basic law is fairly easy to predict. Ackermann J's initial desire to ground the Bill of Rights in a fundamentally negative conception of liberty — as reflected in his judgments in *Ferreira* and *Du Plessis v De Klerk*[1] — was, for good reason, largely rebuffed by the rest of the Constitutional Court. As Chaskalson P's remarks above suggest, the Court was loath — especially in its early days — to make grand philosophical pronouncements about the political underpinnings of our new order. It may also be that a majority of the Court disagreed with Ackermann J about the nature of these first principles. It is fair to say that they held the winning hand in this argument as well.

Although Ackermann J did South African jurisprudence an immense service by attempting to state clearly the principles upon which his reasoning lay — a characteristic that marked his entire tenure on the Court — it is not at all clear that his argument from first principles was correct.[2] Although this chapter is hardly the

[1] 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC). For a critique of Ackermann J's jurisprudence of negative liberty, see S Woolman & D Davis 'The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and Final Constitutions' (1996) 12 *SAJHR* 361; S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31. For the most sustained and well-developed defence of modern classical liberalism, see the works of Friedrich A Hayek: FA Hayek *Law, Legislation and Liberty* (1979); FA Hayek *New Studies in Philosophy, Politics, Economics and the History of Ideas* (1978); FA Hayek *The Constitution of Liberty* (1960); FA Hayek *The Road to Serfdom* (1948).

[2] See A Cockrell 'Rainbow Jurisprudence' (1996) 12 *SAJHR* 1, 12 (Ackermann's J exploration of the meaning of freedom in *Ferreira* stands out from the bulk of Constitutional Court jurisprudence as a rigorous consideration of the substantive reasons motivating constitutional adjudication.) But see H Klug 'Striking Down Death' (1996) 12 *SAJHR* 61, 66–67 (Klug justifies the cramped definition of rights offered by the Court as a political necessity. Broad declaratory definitions of rights might require the Court, when later faced with different facts and concerns, to modify or to create exceptions from its previous articulation of a rule. More importantly, broad definitions of rights at this early stage of South African constitutional democratic history — namely, the early years of genuine majoritarian rule — could put the Court's long term political viability at risk by setting up too many conflicts with the new 'representative' government.)

place to engage at length in complex philosophical debates, the terms of that debate — and our preferred understanding — are easy enough to state.

While Ackermann J recognizes that certain material and social preconditions must exist for negative liberty to operate as a genuinely meaningful ideal, he defends the thesis that a clear distinction between 'freedom' and its conditions must be maintained if anyone is to have any meaningful experience of freedom itself. This commitment to the 'priority' of negative liberty, along with an entirely accurate view of the dangers of a state committed to one right way of being in the world and final solutions (read Holocaust and Apartheid), leads Ackermann J to conclude that negative liberty, and not positive liberty, is the 'truer and more humane ideal'.[1]

This more humane ideal rests on at least two basic propositions. First, the individual determines, for herself, the sources of meaning in her life, and constructs out of these different sources a particular vision of the good life. Second, in order for an individual to pursue her preferred way of being in the world, the state must limit its intervention into the affairs of its citizens to those rules of law that are necessary for the security of the commonweal and that create the requisite space for each member of society to pursue her preferred way of being in the world in a manner consistent or compatible with the pursuit of the preferred ways of being in the world of her fellow citizens. Ackermann J states this second proposition as follows:

> I wish to emphasize quite explicitly that a broad and generous interpretation of freedom does not deny or preclude the . . . essential role of state intervention in the economic as well as the civil and political spheres. On the contrary, state intervention is essential to resolve the paradox of unlimited freedom (where freedom ultimately destroys itself) in all these spheres.[2]

The critiques of classical liberalism are well known and have, by and large, been incorporated into contemporary liberal theory. The first critique is that, as a metaphysical matter, classical liberalism has relied upon an atomistic model of the self which stresses the capacity of separate, independent selves to choose the aims and attachments by which they will define themselves. As a chooser, 'the self', as John Rawls has written, 'is prior to the ends which are affirmed by it; even a dominant end must be chosen from among numerous possibilities.'[3] Rawls himself later recanted this particular metaphysical commitment and recognized that all individuals have their identities or selves determined or conditioned by a vast network of social, historical, political, religious, educational, and linguistic practices over which they have no control whatsoever.[4] Liberals can still defend

[1] I Berlin 'Two Concepts of Liberty' in *Four Essays on Liberty* (1969) 171.
[2] *Ferreira* (supra) at para 52.
[3] J Rawls *A Theory of Justice* (1973) 3–4.
[4] See J Rawls *Political Liberalism* (1993). See also C Lamore *Patterns of Moral Complexity* (1986). The original critique to which Rawls was obliged to answer was levelled by Michael Sandel. See M Sandel *Liberalism and the Limits of Justice* (1981).

robust forms of associational freedom — or zones of autonomy — while recognizing that our identities are largely defined by and dependent upon the communities we inhabit.[1]

The second critique is that classical liberals often assume that individuals have privileged access to the 'correct' understanding of the good life and that neither the state nor other social actors are in a position to supplant that vision of the good with some other vision of the good. As Charles Taylor and others have forcefully argued, there are any number of instances in which others do possess greater insight into our needs than we do ourselves. And if 'we cannot maintain the incorrigibility of the subject's judgments about his freedom, or rule out second-guessing', then we must admit that others — including the state — may possess the capacity, on occasion, to set us free.[2]

Third, classical liberal theory generally takes the view that the state must refrain from taking decisions or making laws that determine beliefs or objectives that are deemed central to individual and group identity formation. The pithy way of putting this proposition is that liberals wish to remain 'neutral' between competing comprehensive conceptions of the good life. The more nuanced, but still liberal, response to this aspiration to neutrality is twofold: *(a)* although liberals are correct that the recognition of each individual as the author of her actions is a necessary condition for a free society, it does not follow that every individual choice is morally, politically or constitutionally justifiable; *(b)* individual selves are not merely socially constructed, but all of their actions are, in some way, addressed towards the other individuals and groups that make up their political community.[3] What this means for our constitutional politics is that one's belief in the correctness of a way of life does not end public debate about one's choices. While one's choices may ultimately be universally accepted — or simply acceptable in a society committed to zones of autonomy — those choices must, at the very least, be justifiable in a manner that other members of society can understand, if not live by themselves.

At a minimum, the previous analysis supports the following four propositions. First, individual autonomy and group autonomy — and the pluralist society which inevitably follows — remain valid ideals that are not contingent upon the acceptance of various axioms of classical liberal theory. Second, given our shared horizons of meaning, members of a given polity can have rational arguments about ways of being in the world and the extent to which particular practices conform to the ideals to which a polity has committed itself in public documents such as the Final Constitution. Third, such arguments can make a

[1] S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44 (Recognizing that the various associations into which we are born and of which we remain a part are constitutive of the self, and that a liberal conception of freedom — or any meaningful conception of freedom — rests upon the recognition of that fact.)

[2] C Taylor 'What's Wrong with Negative Liberty' *Philosophy and the Human Sciences: Philosophical Papers II* (1985) 211, 228.

[3] See C Taylor *The Ethics of Authenticity* (1992).

difference in the way others see us, and the way we see others. Thus, contrary to the positions taken by many classical liberals, the commitment to pluralism does not preclude rational discourse about values and the good life, nor does it necessarily preclude the reconciliation of differences over the ends of life — even where the goods at issue initially appear incommensurable. Furthermore, on this conception of politics, the state does not disappear. Quite the opposite. This more sophisticated form of liberalism sees the state as playing an essential role in the debate about, and the construction of, values. Fourth, the Final Constitution's commitment to transformation and to rough equality combined with the recognition that all meaningful action takes place within some form, indeed many forms, of association, results in a liberalism committed to some kind of state support for a variety of different ways of being in the world. Such support is especially important for those groups with visions of the good life which are not politically, socially or economically dominant: the state is obliged, on this account, to take more seriously the views of the good life held by aboriginal communities stripped of the wealth necessary to sustain traditional practices, or the views of the good life held by single mothers who run up against the burdens of single parenting, sexism in the workplace, and restrictions on reproductive choice.

We have shown why we have good reason to refrain — at a theoretical level — from endorsing Ackermann J's views on the meaning of 'freedom' without withdrawing our support for a liberal reading of our basic law. Having underscored our differences, we think it important to emphasize the extent to which we agree with Ackermann J that 'freedom' cannot mean that the liberal state must tolerate all ways of being in the world and concur that those ways of being which threaten the core values of this constitutional order — dignity, rough equality and the real possibility of democratic participation — must be ruled out of bounds.

We also think it important to note that our thick conception of liberalism — our commitment to more than the nightwatchman state — is more than just a theory. It is, as things stand, our Constitutional Court's practice. As Theunis Roux writes, a host of Constitutional Court decisions and dissents, as well as the text of the basic law itself, underwrites a principle of democracy that demands more than the occasional exercise of the franchise.[1] As Frank Michelman notes, the rule of law doctrine — as currently constructed — potentially subjects every exercise of state power to judicial review.[2] (Could Ackermann J have wanted more than that?) In Sandra Liebenberg's estimation, our Court has shaped its socio-economic rights jurisprudence around conceptions of interdependence in which meaningful exercise of civil and political rights is contingent upon the progressive realization of rights to housing, water, food, health and social security.[3] According to one of the

[1] See T Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 10.

[2] See F Michelman 'Rule of Law, Legality and Constitutional Supremacy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11.

[3] See S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33.

authors of this chapter, the Court's dignity jurisprudence traces an arc from the recognition that dignity begins with the refusal to turn away from suffering to the recognition that dignity requires the material transformation of the life of each South African in a manner that enables her to exercise meaningfully her agency and her capacity for self-actualization.[1] These discrete doctrines — especially the dignity jurisprudence explicated by Ackermann J — support the proposition that Ackermann J and the rest of the Court have generated a body of law that at once exhausts the debate about 'freedom' in *Ferreira* and, at the same time, leaves us with something far more substantial: the normative framework for a social democracy.

(bb) Substantive due process

If Ackermann J lost the battle over 'freedom', then in the end, it seems, he won the war over the value at the core of our current jurisprudence: dignity.[2] Could the same be said for the battle, in *Ferreira*, over whether too expansive a view of freedom would inevitably enmesh the Court in political conflicts it would do best to eschew? Recall that Chaskalson P admonished Ackermann J for falling, potentially, into the jurisprudential trap of substantive due process associated with *Lochner v New York*.[3] Chaskalson P's remarks in this regard are worth quoting in full:

> Implicit in the social welfare state is the acceptance of regulation and redistribution in the public interest. If in the context of our Constitution freedom is given the wide meaning that Ackermann J suggests it should have, the result might be to impede such policies. Whether or not there should be regulation and redistribution is essentially a political question which falls within the domain of the Legislature and not the Court. It is not for the Courts to approve or disapprove of such policies. What the Courts must ensure is that the implementation of any political decision to undertake such policies conforms with the Constitution. It should not, however, require the Legislature to show that they are necessary if the Constitution does not specifically require that this be done.
>
> In terms of our Constitution we are enjoined to protect the freedom guaranteed by s 11(1) against all governmental action that cannot be justified as being necessary. If we define freedom in the context of s 11(1) in sweeping terms we will be called upon to scrutinise every infringement of freedom in this broad sense as being 'necessary'. We cannot regulate this power by mechanisms of different levels of scrutiny as the Courts of the United States do, nor can we control it through the application of the principle that freedom is subject to laws that are consistent with the principles of 'fundamental justice', as the Canadian Courts do.

[1] See S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

[2] Ibid (Offers a detailed account of Ackermann J's contribution to this domain, as well as the evolution of his thought.)

[3] *Ferreira* (supra) at para 182, citing *Lochner v New York* 198 US 45 (1905).

> We should be careful to avoid the pitfall of *Lochner v New York* which has been described by Professor *Tribe* in his seminal work on *American Constitutional Law*, as being 'not in judicial intervention to protect "liberty' but in a misguided understanding of what liberty actually required in the industrial age'. The *Lochner* era gave rise to serious questions about judicial review and the relationship between the Court and the Legislature, and as Professor *Tribe* points out, the collapse of *Lochner* gave
>
> > 'credence to the notion that the legislative process should be completely wilful and self-controlled, with absolutely no judicial interference except where constitutional provisions much more explicit than due process were in jeopardy'.
>
> The protection of fundamental freedoms is pre-eminently a function of the Court. We should not, however, construe s 11 so broadly that we overshoot the mark and trespass upon terrain that is not rightly ours.[1]

Though we disagree with Ackermann J's take on 'freedom', his dismissal of Chaskalson P's *Lochner* gambit in the above passage is spot on:

> There may also be the anxiety that, unless freedom is given a more restricted meaning, this Court will inevitably be drawn into matters which are the concern of the Legislature rather than the Courts and could stand accused of what *Tribe* has described as being the error in decisions such as *Lochner v New York* which was 'a misguided understanding of what liberty actually required in the industrial age'. I believe this fear to be unfounded. *Lochner* . . . was decided in 1905 at a time and in a socio-economic context completely different from ours in 1995. I do not believe that we ought to allow ourselves to be haunted by the *Lochner* ghost. It is to me inconceivable that the broad sweep of labour legislation in this country could be struck down because of an argument that it infringed rights of contractual freedom protected by the Constitution. This is so for a number of reasons.
>
> First, the interventionist role of the State is no longer seen, in broad terms, as being limited to protecting its citizens against brute physical force and intimidation from others only, but is seen as extending to the economic and social realm as well. Secondly, there are specific provisions in the Constitution itself which will ensure that appropriate labour and other social legislation will not be invalidated because of a 'misguided understanding' of what liberty requires. Thirdly, statutory limitations on contractual freedom will . . . be justified under s 33(1) [the limitation clause], assuming the other requirements for limitation to have been fulfilled. . . . As a general proposition it is difficult to see how labour and other social legislation would be struck down where such legislation easily passes constitutional scrutiny in countries such as the United States of America, Canada and Germany.[2]

Beyond the obvious persuasiveness of Ackermann J's rejoinder, four aspects of this exchange will deepen our understanding of 'substantive due process' in South African constitutional law.

First, a decade later, all three branches of government continue to contend with basic issues of legitimacy and are, therefore, quite anxious about their exercise of

[1] See *Ferreira* (supra) at paras 180–83 (footnotes omitted).
[2] Ibid at paras 65–66 (footnotes omitted).

power in relation to the other branches.[1] To the extent that *Lochner* means anything at all in South Africa, it must be understood as a warning articulated by *one* Justice, on one official occasion, about how far the courts should go in a fragile society where the trust necessary for testing the good will of one's political partners does not yet possess the kind of foundation born of time and respect found in other jurisdictions. Ironically, that *Lochner* gets mentioned less frequently in a country closer to crisis may well reflect the fact that an institution attempting to establish its own legitimacy and the legitimacy of the entire democratic constitutional project might be less inclined to use a metaphor synonymous with failure.

Second, for the purposes of this chapter, the most remarkable quality of the Court's jurisprudence is not its minimalism (its well-known desire to avoid making unnecessary pronouncements about the content of our basic law).[2] It is the Court's maximalism. For example, the development of the Court' rule-of-law doctrines has now outstripped the capacity of the Court to control its reach. The result is a doctrine that contains elements of *Lochnerism* — that is, characteristics of substantive due process — that the Chaskalson Court should, if operating in terms of its own logic, have worked more assiduously to control.

While the consequences of the Court's rule-of-law judgments for constitutional jurisdiction are radical, and clearly not contemplated by the drafters of the Final Constitution, it is certainly possible to view the legality principle as an inevitable consequence of a founding document committed to constitutional supremacy. What was certainly not inevitable, nor even foreseen, was the transmogrification of a doctrine designed to ensure that state actors exercise their powers within the formal bounds of the law into a doctrine in which *the actual manner* in which the

[1] The most recent exchange over the now moribund Constitution Fouteenth Amendment Bill — with its efforts to revamp the judiciary and bring it under the direct administrative control of the executive — is just one such example of the anxiety-ridden encounters that continue to occur between the three branches of government. For more on that exchange, see C Albertyn 'Judicial Independence and the Constitution Fourteenth Amendment Bill' (2006) 22 *SAJHR* 126. A better example may be the various pronouncements made by government officials surrounding the provision of nevirapine in order to prevent mother-to-child transmission of HIV. See *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC), 2002 (10) BCLR 1033 (CC)(*'TAC'*). In *TAC*, the Constitutional Court went to great lengths to point out that it was simply ensuring that the government followed its own well-articulated policy regarding the provision of anti-retrovirals — proved safe and efficacious — to a particular class of persons. At the same time, several members of the Cabinet were not quite sure how to respond to the judgment. The Health Minister, Dr Manto Tshabalala-Msimang suggested that the government was free to contravene the Court's instructions. Shortly thereafter, the Minister of Justice, Penuell Maduna, publicly disavowed the Health Minister's intimations of contempt and assured the public that the government would abide by the Court's decision. The need for quite self-conscious recognition of the powers of a co-ordinate branch of government — and the need to build trust between the branches — was on display from the very beginning of the new constitutional dispensation. Hours after President Mandela lost a legal battle in *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* he went on national television to declare not only that the Constitutional Court's judgment must be obeyed but that the simple fact of the Court's disagreement with the government was a sign of South Africa's political good health. 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC).

[2] For the locus classicus on the Constitutional Court's aversion to saying more than is absolutely necessary to resolve a dispute, see I Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 138

state actor behaves — within such formal bounds — could be assessed in terms of *substantive* outcomes. That may not sound revolutionary. After all, various rights, as well as the limitations clause, subject state action to a test for reasonableness. What is revolutionary about *Fedsure*, *Pharmaceutical Manufacturers* and *Modderklip* is that prior to these judgments, the constitutionality of the conduct of state actors was always measured against a specific substantive provision in the Interim Constitution or the Final Constitution.[1] Indeed, one would have thought that self-same proposition lay at the very core of the Court's holding in *Ferreira*.

With *Fedsure*, constitutional review is no longer moored to the text. The legality principle draws its force, the Court tells us, from no specific provision, but from the text as a whole: something more basic than the text of the basic law. With *Fedsure*, the Court enters the well-established, if controversial, domain of modern substantive due process doctrine: the territory ploughed and cultivated by the

[1] The principle of legality and the rule of law doctrine articulated in *Fedsure* and *Pharmaceutical Manufacturers* respectively stand for the deceptively simple proposition that every exercise of public power must comply with the law. See *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC), 2000 (3) BLCR 241 (CC)('*Pharmaceutical Manufacturers*'); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC), 1998 (12) BCLR 1458(CC)('*Fedsure*') at paras 58–59 ('It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.') The most recent expression of this principle is to be found in the dissenting opinion of Langa CJ in *AAA Investments v Micro Finance Regulatory Council & Another* CCT 51/05 (unreported decision of 28 July 2006)('Public power can only be validly exercised if it is clearly sourced in law.') But this apparently uncontroversial thesis packs two additional punches. First, it requires that any exercise of public power be 'affirmatively authorized by positive law'. See F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) 11-11. See also *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) at para 35. Second, because all law derives its force from the constitution, all positive law must comport with constitutional dictates, and therefore, any exercise of public power itself — as authorized by positive law — must be consistent with the explicit and implicit demands of the basic law.

While these two additional theses may appear, on their face, to be relatively tame, their consequences are revolutionary. The legality principle, and its doppelganger, the rule of law doctrine, makes every exercise of public power subject to constitutional review without any express provision of the Constitution requiring such an exacting standard. For a Constitutional Court committed to not saying anything more than necessary about the meaning of the constitutional text, the elevation of such a tacit (but perhaps penumbral) commitment to the status of a first principle makes the *Lochner* Court's gloss on the 14th Amendment's due process clause seem relatively tame. A second consequence of this doctrine that the Constitutional Court must have anticipated, but has as yet refused to address directly, is the radical expansion of its own jurisdiction. See Michelman (supra)(From the premise that every law draws its force from the basic law and that the validity of every exercise of power must be assessed in terms of the basic law, 'it apparently must follow that every possible appeal in a case at law presents a constitutional question.') By making every exercise of public power and every judicial construction of both law and conduct a 'constitutional matter', the Constitutional Court retains the capacity to review each and every judicial decision. That means, in short, that once a dispute reaches a tribunal, it becomes, potentially, a constitutional matter. (Whether the underlying dispute engages conduct by a state actor is immaterial.) Any judicial construction of law that is not authorized by law — and that includes the basic law — is meat for constitutional review. As a result, the Constitutional Court, a court of specialized and limited jurisdiction, has transformed itself into a court that could effectively be a court of plenary jurisdiction. See C Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' (2005) 21 *SAJHR* 509.

US Supreme Court in reproductive rights cases stretching from *Griswold*[1] and *Eisenstadt*,[2] through *Roe*[3] to *Carey*,[4] and which ultimately gave birth by judicial writ to an unenumerated, but now largely accepted, right to privacy. *Pharmaceutical Manufacturers* is noteworthy, in this regard, not merely because it extends the reasoning of *Fedsure*. *Pharmaceutical Manufacturers* also holds that, despite the addition of a textual hook in the Final Constitution — FC s 1*(c)* — that commits us 'in principle' to the rule of law, the rule of law doctrine is not grounded in a specific textual provision.

Enter *Modderklip*. In *Modderklip* the Supreme Court of Appeal had found that the state's failure to act on the occupation of private land by an informal settlement amounted to an expropriation under FC s 25(1) read with FC s 7(2), and ordered the state to compensate Modderklip Boerdery for the violation.[5] The Constitutional Court declined to decide the case on the same basis.[6] The *Modderklip* Court relies instead, for reasons that cannot be interrogated here, on FC s 1*(c)* and FC s 34. No longer simply a stand-alone principle, FC s 1*(c)*, when read with the right of access to courts, FC s 34, generates the proposition that the rule of law, properly conceived, imposes an 'obligation [on] . . . the state to provide the necessary mechanisms for citizens to resolve disputes that arise between them.'[7] But the sting in this judgment is not that FC s 34 secures for the citizenry the legal institutions required to mediate conflict. Now read in concert with FC s 1*(c)*, FC s 34 requires more than 'the mere provision of the mechanisms' for dispute resolution.[8] It demands that the state take 'reasonable steps . . . to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law.'[9]

[1] 381 US 479 (1965).
[2] 405 US 438 (1972).
[3] 410 US 113 (1973).
[4] 431 US 678 (1977).
[5] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre,* amici curiae*); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre,* amici curiae*)* 2004 (6) SA 40 (SCA), 2004 (8) BCLR 821 (SCA). See also *Modderklip Boerdery (Pty) Ltd v Modder East Squatters & Another* 2001 (4) SA 385 (W).
[6] *President of the Republic of South Africa & Others v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC)('*Modderklip*').
[7] See *Chief Lesapo v North West Agricultural Bank & Another* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC)('*Chief Lesapo*') at para 22 (*Chief Lesapo* hints at some of the concerns raised in *Modderklip*. Mokgoro J writes that FC s 34 and the rule of law doctrine are 'foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against *vigilantism*, and the *chaos* and *anarchy* which it causes. Construed in this context of the *rule of law* and the principle against self-help in particular, access to court is indeed of cardinal importance.' (our emphasis) However, it is one thing to enveigh against individualized acts of self-help, and quite another to find the State culpable for the social disintegration that flows from a generalized failure of the state's legal dispute mechanisms to resolve conflict effectively.)
[8] *Modderklip* (supra) at para 42.
[9] Ibid.

Third, if such language alone is not striking enough — the spectre of a Zimbabwe-like constitutional crisis looms large — then three subtle shifts in language are.

- The right of access to courts is no longer primarily concerned with the existence of formal legal structures. It is now concerned, it appears, with 'effective remedies'.[1] It is concerned with *substantive* outcomes — substantive due process — and thus outcomes the constitutionality of which are to be measured by the courts for compliance with some rather murky, but no less meaningful, sense of what 'reasonable steps' are required to turn back the forces of entropy.
- It also seems clear that this new reasonableness test is not derived from FC s 34. It flows from FC s 1*(c)* and our commitment to the rule of law. As Langa DCJ writes: 'The precise nature of the state's obligation in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature of the right or interest that is at risk as well as on the circumstances of each case.'[2] FC s 1*(c)* will tell us, in the context of various rights, what reasonable, *substantive* steps the state — and the courts — must take to maintain order.
- The challenges of meeting such a reasonableness requirement in similar kinds of cases are not to be underestimated. For, although the Court describes these circumstances as extraordinary, they are, indeed, the circumstances in which many South Africans find themselves now.[3]

In the space of several paragraphs, the *Modderklip* Court has moved from an apparently procedural gloss on the rule of law — consistent with the legality principle annunciated in *Fedsure* and *Pharmaceutical Manufacturers* — to something far more robust. The state — in order to comply with the dictates of the rule of law doctrine — must create and maintain courts that provide 'effective remedies'. Again, the rule of law requires not just any remedy, but an effective remedy. What is an effective remedy? An effective remedy must reflect a serious attempt to prevent 'large-scale disruptions in the social fabric' and their attendant 'chaos and misery'. Failure of the state to plan adequately for such contingencies risks censure by the courts. Moreover, such censure is no longer limited to a terse

[1] *Modderklip* (supra) at para 42.

[2] Ibid at para 43.

[3] Ibid at paras 46–49 ('[C]ourt orders must be executed in a manner that prevents social upheaval. Otherwise the purpose of the rule of law would be subverted by the very execution process that ought to uphold it. . . . The circumstances of this case are extraordinary in that it is not possible to rely on mechanisms normally employed to execute eviction orders. This should have been obvious to the state. It was not a case of one or two or even ten evictions where a routine eviction order would have sufficed. To execute this particular court order and evict tens of thousands of people with nowhere to go would cause unimaginable social chaos and misery and untold disruption. In the circumstances of this case, it would also not be consistent with the rule of law. The question that needs to be answered is whether the state was, in the circumstances, obliged to do more than it has done to satisfy the requirements of the rule of law and fulfil the [FC s] . . . 34 rights of Modderklip. I find that it was unreasonable of the state to stand by and do nothing in circumstances where it was impossible for Modderklip to evict the occupiers because of the sheer magnitude of the invasion and the particular circumstances of the occupiers.')

statement at the end of a judgment castigating the responsible Minister for a failure to discharge constitutional responsibilities. A failure to take those reasonable steps necessary to safeguard the rule of law may result in an award of constitutional damages against the state. Like the *Lochner* Court and its expansive reading of the 14th Amendment, the *Modderklip* Court also states that it will find unconstitutional that state action — or that state inaction — which falls outside that permitted by our social compact. In South Africa, we are concerned, not with the violation of freedom of contract, but with state action that risks 'large-scale disruptions in the social fabric'. The Constitutional Court has retained for itself the right to intervene when it believes such disruptions pose a danger to the commonweal.

If *Modderklip* is *Lochnerism*, then it is *Lochnerism* of a certain kind. *Modderklip* announces that the Final Constitution — and the rule of law doctrine — does not simply oblige the state to act within the law. *Modderklip* warns the state that although the Final Constitution says nothing about violations of the rule of law — to say nothing about the imposition of constitutional damages for such violations — the courts will readily identify violations and impose appropriate sanctions when the state has not taken what the courts deem to be reasonable steps to maintain the rule of law. This maximalist account of what the rule of law requires is a species of *Lochnerism* because the highest constitutional tribunal in South Africa has gone far beyond the text of the Final Constitution and finds that the basic law now subjects the state to a set of due process dictates that are undeniably substantive.

Fourth, we have just argued that *Modderklip* reflects a very particular species of *Lochnerism*. If *Modderklip* is a form of *Lochnerism*, then so too must Ackermann J's opinion in *Ferreira* be. And if both *Ferreira* and *Modderklip* are species of *Lochnerism*, then Chaskalson P's charge against Ackermann J loses much, if not all, of its force. Both *Ferreira* and *Modderklip* stand for the proposition that judicial overreach is generally not 'a problem' with which most Constitutional Courts must contend. What the tag *Lochneresque* does is draw attention to the Constitutional Court's general desire to avoid offering a sustained political argument about (1) policy-decisions taken by a political branch of government; (2) the meaning of a constitutional provision; and (3) the use of a constitutional provision to uphold or strike down a law. That the exigencies of particular cases may demand such 'overreach' is an inescapable condition of doing justice in a constitutional jurisdiction. Ackermann J, in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, identifies the proper response to our courts judicial flight from substance when he writes that:

> It should be borne in mind that whether the remedy a Court grants is one striking down, wholly or in part; or reading into or extending the text, its choice is not final and that legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, fine-tuning them or abolishing them. Thus, they can exercise final control over the nature and extent of the benefits.[1]

[1] 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at para 76.

There is, as Ackermann J indicates, no real profit to be had in describing *Modderklip* and *Ferreira* in such odious terms as 'substantive due process'. He seems, in his opinions, to suggest instead that in the years to come, the myths of *Modderklip* and *Ferreira* will tell of a society that, having thrown off the shackles of a despotic state, still manages, under the quiet but insistent tutelage of the Constitutional Court, to enjoy the fruits of 'liberty'.

(ii) *FC s 12: Enumerated rights, dignity and the dialectic of enlightenment*

The result of the Court's post-*Ferreira* jurisprudence and the recasting of the actual language of the right is a provision that, while more modest in reach, is more influential in practice. The right to freedom and security of the person, as one of the authors has written elsewhere, has worked major and minor revolutions in the law of sentencing and punishment, delict, reproductive rights, remedies for public and private violence and detention.[1]

FC s 12 — for all its permutations in draft form — still retains the bifurcated structure of IC s 11: FC s 12(1)'s right to freedom and security of the person; and FC s 12(2)'s right to bodily and psychological integrity. As Iain Currie and Johan de Waal rightly observe, FC s 12 has retained its prominence in our nascent body of jurisprudence not because of its expansive understanding of freedom, but because 'it affords comprehensive protection' in the areas to which it does apply.[2]

FC s 12(1) provides both substantive protection and procedural protection for any deprivation of physical liberty. The substantive component requires that the state possess good reasons for the deprivation. The procedural component requires that the state employ fair proceedings or even trials when any such deprivation of freedom is contemplated.[3] Because the drafters offered a far stricter and a more specific formulation of FC s 12(1), we are unlikely to witness again the kind of debate about the meaning of 'freedom' that arose under IC s 11: all five dimensions of the right, as listed in FC s 12(1)*(a)* through FC s 12(1)*(e)*, speak directly to 'unwarranted' invasions of the body by the state.[4] FC s 12(2) extends the domain of freedom secured by the right to specific forms of bodily integrity. It safeguards the reproductive rights of women and ensures that all persons subject to medical experimentation are, in so far as our limited capacity allows, aware of the potential consequences of novel medical or scientific experiments performed upon them. If a gap exists in the formulation of FC s 12 that might allow greater latitude for judicial law-making, then FC s 12(2) closes down that gap by containing provisions that further extend individual control over bodily integrity. Thus far, neither FC s 12(1) nor FC s 12(2) have elicited the kind of controversy to which IC s 11(1) gave rise.

[1] S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.
[2] I Currie & J De Waal *The Bill of Rights Handbook* (5th Edition, 2005) 292.
[3] For a discussion of the dual nature of FC s 12 protection see § 40.2*(a)* infra.
[4] Ibid.

But the 'comprehensive protection' afforded by FC s 12 is only part of the story. FC s 12 has come to play a revolutionary role in the development of our law not because it serves as a vehicle for the preferred political philosophy of a majority of the justices on the Constitutional Court. It is at the centre of significant changes in our law because of the manner in which the Court has connected FC s 12 to the constitutional grundnorm of dignity.

Dignity represents our recognition of others as ends-in themselves, as the objects of our mutual concern and mutual respect, as capable of self-actualization and of self-governance, and, as members of our political community, entitled to the material conditions required for the meaningful exercise of individual agency.[1] Its ultimate aim, however, is the emancipation of all of the individual members of the polity.

Such a characterization of the core tenets of our dignity jurisprudence — and its relationship to FC s 12 — places far too positive a spin on the concerns that sit at the core of the right to freedom and security of the person. As one of the authors of this chapter has noted elsewhere, the right, the value and the ideal of dignity is, originally, animated by a refusal to turn away from suffering.[2] That original, animating feature of our dignity jurisprudence — the recognition of our capacity for brutality — is what ties FC s 10's right to dignity to FC s 12's right to freedom and security of the person.

FC s 12 recognizes that the history of emancipation associated with the modern nation-state is often, if not inevitably, accompanied by domination. Robespierre and The Terror, in 1793, followed hot on the heels of the French Revolution and The Declaration of the Rights of Man and of the Citizen, in 1789.[3] After the Holocaust, Stalin's purges and the dropping of atomic bombs on Hiroshima and Nagasaki, and after the victory of Allied forces and the creation of the various international institutions founded at Bretton Woods, members of the Frankfurt School articulated a trenchant critique of modernity that remains difficult to admit in full, but equally impossible to reject out of hand: that liberation and domination in the modern democratic constitutional state are flip-sides

[1] See Woolman 'Dignity' (supra) at § 36.4*(c)*(Freedom and security of the person as refracted through the prism of dignity, has revolutionized three bodies of law: *(a)* the common law of delict in the context of state liability for wrongful behaviour; *(b)* the state's regulation of abortion; and *(c)* punishment.)

[2] Ibid.

[3] The Declaration sounds the triumph of political emancipation from the despotism of monarchy. See art I — Men are born and remain free and equal in rights. Social distinctions can be founded only on the common utility; art III — The principle of any sovereignty resides essentially in the Nation. No body, no individual can exert authority which does not emanate expressly from it; art VI — All the citizens, being equal in [the eyes of the law], are equally admissible to all public dignities, places, and employments, according to their capacity and without distinction other than that of their virtues and of their talent. Only four years later France hears the indefatigable hooftaps of Robespierre, who justified mass executions in the name of progress by stating that: 'Terror is nothing other than prompt, severe, inflexible justice.'

of the same coin. That is, the liberation from one form of political economy, that of monarchy and mercantilism, invites new forms of domination that flow from another, that of the bureaucratic, democratic capitalist state. Adorno puts this basic thesis as follows:

> The dual nature of progress, which always developed the potential of freedom simultaneously with the reality of oppression, gave rise to a situation in which peoples were more and more inducted into the control of nature and social organization, but grew at the same time, owing to the compulsion which culture placed upon them, incapable of understanding in what way culture went beyond such integration. . . . They make common cause with the world against themselves, and the most alienated condition of all, the omnipresence of commodities, their own conversion into appendages of machinery, is for them a mirage of closeness. . . .
>
> The concept of dynamism . . . is raised to an absolute, whereas it ought, as an anthropological reflex of the laws of production, to be itself critically confronted, in an emancipated society, with need. The conception of unfettered activity, of uninterrupted procreation, of chubby insatiability, of freedom of frantic bustle, feeds on the bourgeois concept of nature that has always served solely to proclaim social violence as unchangeable. . . . It was in this, and not in their alleged leveling down, that the positive blue-prints of socialism . . . were rooted in barbarism. It is not man's lapse into luxurious indolence that is to be feared, but the savage spread of the social under the mask of universal nature, the collective as a blind fury of activity. The naïve supposition of an unambiguous development towards increased production is itself of a piece of that bourgeois outlook which permits development in only one direction because, integrated into a totality, dominated by quantification, it is hostile to qualitative difference. If we imagine emancipated society as emancipation from precisely such totality, then vanishing lines come into view that have little in common with increased production and its human reflections.[1]

We do not think it surprising that those persons who helped to bring about the end of apartheid — almost half a century after the world had declared itself rid of Nazi Germany — would imbue their founding document with a bit of grim realism about the emancipatory powers of the post-apartheid state. We find in FC s 12 a preoccupation with the worst forms of abuse that the state — and

[1] T Adorno *Minima Moralia: Reflections from Damaged Life* (trans EFN Jephcott, 1951) 146–56. Horkheimer describes the French Revolution as a 'condensed version of later history' and in words even more prescient for the common era writes:

> More and more, economic questions are becoming technical ones. The privileged position of administrative officers and technical and planning engineers will lose its rational basis in the future; naked power is becoming its only justification. The awareness that the rationality of domination is already in decline when the authoritarian state takes over society is *the real basis for its identity with terrorism*. (emphasis added)

M Horkheimer 'The Authoritarian State' in A Arato & E Gebhardt (eds) *The Essential Frankfurt School Reader* (1982) 95, 105. Perhaps no better explanation exists for the current existential and political crisis in the West and in the Middle East. However, as pessimistic as both Adorno and Horkheimer are about the human condition, they were by no means fatalists. Both imagined that neo-Marxist dialectic — as opposed to liberal enlightenment conceptions of development and progress — might strengthen 'freedom' and bring about the end of exploitation. See T Adorno & M Horkheimer *Dialectic of Enlightenment* (1972).

modern society — can visit upon the individual.[1] FC s 12 reminds us that the post-apartheid state retains the power to put people in prison without reason and without end, and that ours remains a society in which bodies are raped, tortured and otherwise exploited. Take FC s 12(1)*(b)* — the right not to be detained without trial. All of the original interpreters of our basic law understood that FC s 12(1)*(b)* was designed to remind us of apartheid's many depredations. As Ackermann J writes in *De Lange*:

> When viewed against its historical background, the first and most egregious form of deprivation of physical liberty which springs to mind when considering the construction of the expression 'detained without trial' in s 12(1)*(b)* is the notorious administrative detention without trial for purposes of political control. This took place during the previous constitutional dispensation under various statutory provisions which were effectively insulated against meaningful judicial control. Effective judicial control was excluded prior to the commencement of the detention and throughout its duration. During such detention, and facilitated by this exclusion of judicial control, the grossest violations of the life and the bodily, mental and spiritual integrity of detainees occurred. This manifestation of detention without trial was a virtual negation of the rule of law and had serious negative consequences for the credibility and status of the judiciary in this country.[2]

Moreover, many, but by no means all, of our Constitutional Court Justices understood that various commonplace acts of barbarism under apartheid would find renewed expression in our post-apartheid state, and that genuine emancipation would require constant vigilance against new forms of domination. We would suggest that a majority of the *De Lange* Court recognized that permitting presiding officers (who were neither magistrates nor judges) to imprison, indefinitely and repeatedly, recalcitrant witnesses in insolvency proceedings was of a piece with the apartheid practice of detention without trial, and that this identification of a 'new' form of exploitation underwrites the Court's finding that this particular statutory grant of power to punish is unconstitutional.

Ackermann J's words may seem rather tepid compared to Adorno's largely nihilistic critique of modernity. And that is not just because judges are not

[1] Although much ink has been spilled over the meaning of 'freedom' in IC s 11 and FC s 12, it seems fair to say that FC s 12's primary focus is on security of the person. FC s 12(1)*(c)*, FC s 12(1)*(d)*, FC s 12(1)*(e)*, FC s 12(2)*(a)*, FC s 12(2)*(b)* and FC s 12(2)*(c)* all reflect the drafters' concern with very concrete forms of harm that can be worked upon the individual body rather than concerns with more abstract notions of 'freedom'.

[2] *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC)('*De Lange*') at para 26. Sachs J sounds similar concerns when he writes that in terms of the

> [I]nterim Constitution . . . the words 'detention without trial' stood alone as an express bar to physical restraint by the State and accordingly had to function as the sole textual basis for analysing the constitutionality of all forms of coercive State power involving physical restraint. Now it is just one item in an extensive and nuanced catalogue, and therefore needs to be given a specific significance which both justifies its place in the list and separates it from the other items. It accordingly reclaims its commonly accepted identity in South Africa as relating to a specific and unmistakable prohibition of the special and intense form of deprivation of liberty that scarred our recent history.

Ibid at para 173.

philosophers. The Frankfurt School's post-Marxist dismissal of the Enlightenment's commitment to truth is not, as yet, a philosophical fashion that has taken root here. South Africa remains the last great modernist project. Our Final Constitution is certainly written as if it is such. It commits us to great ideals and the material transformation of the lives of those who cannot yet enter the public square without still experiencing shame. There is simply too much truth yet to be told. FC s 12 will not, therefore, be read as a double-edged sword by our courts. It will be read instead as a reminder that domination and exploitation are features of our society — as they are of every society — and that it falls to our politicians, judges, lawyers and various organs of civil society to ensure that the great emancipatory ends of our modernist project are not undermined by new forms of domination.

40.2 Relationship Between FC ss 12(1), 12(1)*(a)*, and 12(1)*(b)*

Despite FC s 12(1)'s disaggregation and re-formulation of the various rights found in IC s 11(1), the Constitutional Court has largely failed to give distinct content to, and delineate satisfactorily between, FC s 12(1), FC s 12(1)*(a)* and FC s 12(1)*(b)*. In this section, we attempt to reconstruct the Court's FC s 12(1), FC s 12(1)*(a)* and FC s 12(1)*(b)* jurisprudence. This reconstruction apportions discrete tasks to each of the three sections and avoids offending the constitutional canon of surplusage.

(a) Dual function of FC s 12(1)

FC s 12(1) provides both substantive and procedural protection. That much is settled law. What remains unclear is the actual textual source for this dual protection.

The (residual) dual protection now afforded by FC s 12(1) was first articulated by O'Regan J, in dissent, in *Bernstein v Bester*.[1] She argued that both the procedural dimension and substantive dimension of IC s 11(1) flowed from the very notion of 'freedom' itself:

> [F]reedom has two interrelated constitutional aspects: the first is a procedural aspect which requires that no one be deprived of physical freedom unless fair and lawful procedures have been followed. Requiring deprivation of freedom to be in accordance with procedural fairness is a substantive commitment in the Constitution. The other constitutional aspect of freedom lies in a recognition that, in certain circumstances, even when fair and lawful

[1] *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC)('*Bernstein*').

> procedures have been followed, the deprivation of freedom will not be constitutional, because the grounds upon which freedom has been curtailed are unacceptable.[1]

What is important about this approach is that both safeguards are enshrined in FC s 12(1)'s general right to 'freedom and security of the person' rather than any specific subsection.

Ackermann J, while professing to follow O'Regan J's dualist approach, located the procedural aspect of the right not in 'freedom' but in the word 'trial'. Indeed, under the Interim Constitution, a unanimous Court in *Nel v Le Roux* made it clear that the procedural protection of IC s 11 was to be found in the 'trial component' of the right.[2]

Ackermann J was provided with another opportunity to address the same question under the Final Constitution in *De Lange v Smuts*. In *De Lange*, Ackermann J begins by stating that 'the procedural aspect of the protection of *freedom* is implicit in [FC] s 12(1) as it was in s 11(1) of the interim Constitution'.[3] However, he later shifts the textual justification for his analysis and writes: 'Although para *(b)* of s 12(1) only refers to the right 'not to be detained without trial' and no specific reference is made to the other procedural components of such trial it is implicit that the trial must be a "fair" trial.'[4] Indeed, he concludes that s 66 of the Insolvency Act's lack of procedural protection limits FC s 12(1)*(b)*, not FC s 12(1). This finding confirms his holding in *Nel* that FC s 12(1)*(b)* — and not FC s 12(1)'s general commitment to 'freedom' — provides the desired procedural protection. In addition, Ackermann J specifically sources the substantive protection afforded by FC s 12(1) in FC s 12(1)*(a)*'s prohibition on deprivations of liberty 'arbitrarily or without just cause'.[5]

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[1] *Bernstein* (supra) at para 145. O'Regan J went on to note that both the procedural and the substantive protection afforded by IC s 11 received adequate protection elsewhere in the Bill of Rights. (Procedural protection is secured largely through the right to a fair trial. Substantive protection is achieved through such rights as expression, association, assembly and religion). As a result, O'Regan J conceived of IC s 11 as a residual right. Ibid at paras 146–47.

O'Regan J repeated this formulation in another separate judgment in *S v Coetzee* 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC) at para 159 ('They raise two different aspects of freedom: the first is concerned particularly with the reasons for which the State may deprive someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom. As I stated in *Bernstein and Others v Bester and Others NNO*, our Constitution recognises that both aspects are important in a democracy: the State may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair. The two issues are related, but a constitutional finding that the reason for which the State wishes to deprive a person of his or her freedom is acceptable, does not dispense with the question of whether the procedure followed to deprive a person of liberty is fair.')

[2] *Nel v Le Roux NO & Others* 1996 (3) SA 532 (CC), 1996 (4) BCLR 592 (CC)('*Nel*') at para 12 ('It was contended that the [challenged procedure] did not constitute a 'trial' for purposes of s 11(1) and in any event infringed the requirement of 'fairness' or 'due process' or 'natural justice' which is implicit in the 'trial' component of this right. I have no doubt that this latter requirement, however one wishes to label it, is implicit in this right.') See also *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC)('*De Lange*') at para 20.

[3] *De Lange* (supra) at para 22.

[4] Ibid at para 24.

[5] Ibid at para 22.

Mokgoro J's judgment in *De Lange* locates both the substantive and the procedural protection of freedom in FC s 12(1)*(a)*. As far as she was concerned, substantive protection flowed from the requirement of 'just cause' and procedural protection from the prohibition on 'arbitrary' deprivations.[1]

The unanimous decision in *S v Thebus* creates additional confusion about the proper construction of FC s 12(1), FC s 12(1)*(a)*, and FC s 12(1)*(b)*.[2] The *Thebus* Court — in rejecting a FC s 12(1)*(a)* challenge to the common-law doctrine of common purpose — held that '[t]he "just cause" [in FC s 12(1)*(a)*] points to substantive protection against being deprived of freedom arbitrarily or without an adequate or acceptable reason *and to the procedural right to a fair trial*.'[3]

In sum, the Court, and its various members, offer four possible variations on the relationship between and the meaning of FC s 12(1), FC s 12(1)*(a)*, and FC s 12(1)*(b)*:

- Substantive protection and procedural protection both flow from the general FC s 12(1) right to 'freedom' (O'Regan J).
- Substantive protection is enshrined in FC s 12(1)*(a)*, and procedural protection in FC s 12(1)*(b)* (Ackermann J).
- The term 'just cause' in FC s 12(1)*(a)* houses the substantive dimension of the right, while the term 'arbitrary' in FC s 12(1)*(a)* provides for procedural protection (Mokgoro J).
- Substantive protection and procedural protection are both sourced in FC s 12(1)*(a)* (*Thebus*).

This confusion with regard to the actual textual source of the substantive protection and procedural protection of FC ss 12(1), 12(1)*(a)* and 12(1)*(b)* may seem rather academic. However, the ambiguity surrounding the proper construction of FC ss 12(1), 12(1)*(a)* and 12(1)*(b)* has demonstrably practical consequences for constitutional doctrine.

In *De Lange v Smuts*, for example, when asked to consider whether the detention of witnesses for failure to answer questions violated FC s 12(1)*(a)*, FC s 12(1)*(b)* or both, Ackermann J found that only FC s 12(1)*(b)* had been impaired. O'Regan J, on the other hand, found a general breach of FC s 12(1). Mokgoro J located the limitation in FC s 12(1)*(a)*.

The variety of positions taken in *De Lange* are just a singular manifestion of a larger problem. In *Geuking*, the Court, as a whole, relied entirely on the general

[1] *De Lange* (supra) at para 130. See also J de Waal 'Revitalising the Freedom Right? *De Lange v Smuts No* (1999) 15 *SAJHR* 217, 225–26 (Agrees that part of the procedural aspect should be located in the prohibition on arbitrariness, but limits this role to requiring that the deprivation accord with the principle of legality. Whether the principle of legality truly reflects procedural protection rather than substantive protection is questionable.)

[2] *S v Thebus & Another* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC)(The Court split on issues relating to the right to silence, but was unanimous on the construction of FC s 12.)

[3] Ibid at para 39 (our emphasis). See also *Omar v Government of the Republic of South Africa & Others (Commission for Gender Equality, Amicus Curiae)* 2006 (2) SA 289 (CC), 2006 (2) BCLR 253 (CC)('*Omar*')(Court considers procedural issues in relation to a FC s 12(1)*(a)* challenge.)

'freedom' guarantee of FC s 12(1) to engage issues surrounding the constitutionality of a pending extradition.[1] In *Lawyers for Human Rights*, the following year, the Court addressed similar questions of detention (of illegal immigrants) in terms of 'distinct' rights afforded by FC s 12(1)*(a)* and FC s 12(1)*(b)*.[2] And the year after that, in *Omar*, the Court chose to consider the constitutionality of detention for violation of domestic protection orders solely in terms of FC s 12(1)*(a)*.[3] While some of these discrepancies may be a result of the manner in which the cases were presented, the variation in the form of analysis clearly illustrates confusion, or at least ambivalence, about how to allocate distinct analytical tasks to each of the three sections.[4]

[1] *Geuking v President of the Republic of South Africa & Others* 2003 (3) SA 34 (CC), 2004 (9) BCLR 895 (CC)('*Geuking*') at para 48 (The Court was asked to consider the constitutionality of certain provisions of the Extradition Act 67 of 1962. These provisions permitted extradition to countries without an extradition agreement. A successful extradition under these circumstances requires that a magistrate be satisfied, among other things, that the requesting country has sufficient evidence for a successful prosecution. Section 10(2) of the Act provides that a certificate from the prosecuting authority of the requesting state will serve as conclusive proof of this question. The applicant alleged that this provision violated both the substantive and procedural aspects of the FC s 12(1) framework. Goldstone J rejected this argument on the grounds that '[t]he role of the s 10(2) certificate in reaching such conclusions is a narrow one, related only to the question of whether the alleged conduct is sufficient to give rise to an offence in the foreign jurisdiction. As such its conclusive character does not detract from the fact that the magistrate's enquiry and conclusion is sufficient, in the context of the purpose of the enquiry, which is to facilitate extradition, to meet the constitutional requirement of just cause.')

[2] *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC)('*Lawyers for Human Rights*') at para 32 (The Immigration Act 13 of 2002 allows the detention of foreigners who arrive at ports of entry and who are suspected of being illegally in the country. The Court rejected the High Court's interpretation that a person could be detained on the mere 'say-so' of the immigration officer. Yacoob J instead interpreted the section to permit detention only if the officer had a 'reasonable suspicion' that the person was illegally in the country. Interpreted in this way, the provision did not violate FC s 12(1)*(a)*:'It is not arbitrary to cause the detention of a person who has just arrived at a port of entry in South Africa, and who is reasonably suspected by an immigration officer on duty at the port of entry to be an illegal foreigner. Indeed, reasonable suspicion by an immigration officer constitutes just cause for the detention.' However, because it allowed detention without trial the act limited FC s 12(1)*(b)*. That violation was unjustifiable only to the extent that it permitted detention for longer than 30 days without the option of having the detention confirmed by a court.)

[3] See *Omar* (supra)(The applicant questioned the constitutional validity of parts of the Domestic Violence Act 116 of 1998. The Act permitted the execution of suspended warrants of arrest following the issuance of a protection order. The challenges based on FC s 12 asserted that the possibility that a person could be arrested without notice of the protection order and that a police officer was compelled to arrest a potential offender based on the affidavit by the complainant. In rejecting both these challenges, Van der Westhuizen J failed to consider separately the twin pillars of FC s 12(1) protection and relied exclusively on FC s 12(1)*(a)*, to address largely procedural complaints. Ibid at paras 44 and 48.)

[4] While there is no doubt that the right to freedom in its various forms has two dimensions, there is a limit to the utility of the division between procedure and substance. The two dimensions of freedom, as Mokgoro J notes, are intimately related:

> Where an interest of paramount importance is at issue, then stringent procedures are called for: indeed, we expect them to be more precise than when a lesser interest is implicated, and our contemplation of the substance of the matter will influence our attitude toward the procedure required. It may, however, be stated that while there are often clear examples of substantive and procedural issues that might be contrasted, sometimes the line is too fine to be drawn.

(b) Reconstructing 'freedom': Discrete roles of FC ss 12(1), 12(1)*(a)* and 12(1)*(b)*

We are not, it should be clear, claiming that the different definitions attached by different judges, and different courts, to FC ss 12(1), 12(1)*(a)* and 12(1)*(b)* are, in fact, outcome determinative. Our task — in this section — is to provide a gloss on the three sections that makes sense of the Court's extant jurisprudence and to construct a rubric for the analysis of future cases that gives each of the three sections a distinct, and yet coherent, meaning.

We begin with FC s 12(1)*(a)* because this is the only component part of FC s 12(1) to have attracted the unanimous agreement of the Court — in *Thebus* — on its content. *Thebus* tells us that FC s 12(1)*(a)* has a substantive dimension and a procedural dimension rooted in the phrase 'just cause'.

While we may, as the *Thebus* Court does, ignore FC s 12(1) generally, it is more difficult to disregard the word 'arbitrary' in FC s 12(1)*(a)*. As Mokgoro J suggested in *De Lange*, the term 'arbitrary' in FC s 12(1)*(a)* must offer, at a minimum, a form of procedural protection for some deprivations of liberty.

Nor can FC s 12(1)*(b)* be ignored in its entirety. In the first place, it refers solely to those instances in which a person has been 'detained' — a patently higher threshold than FC s 12(1)*(a)*'s 'deprivation'. In addition, FC s 12(1)*(b)*'s 'trial' requirements clearly warrant more stringent procedural protections than those procedural protections demanded by FC s 12(1)*(a)*. While the procedural requirements of FC s 12(1)*(a)* and FC s 12(1)*(b)* may overlap — where a 'deprivation' in terms of FC s 12(1)*(a)* requires a 'trial' in terms of FC s 12(1)*(b)* — there exists a distinction with a difference between the procedural protections afforded by FC s 12(1)*(a)* and FC s 12(1)*(b)*. FC s 12(1)*(b)* ought to afford persons 'detained without trial' significantly greater procedural protection.

Given this apportionment of responsibilities between FC s 12(1)*(a)* and FC s 12(1)*(b)*, what role, if any, remains for the general right to 'freedom' in FC s 12(1)? While it is difficult to imagine physical deprivations of freedom that will not be protected by FC s 12(1)*(a)*, FC s 12(1) — unlike FC s 12(1)*(a)* — is

De Lange (supra) at para 128. O'Regan J concurred with Mokgoro J in this assessment. Ibid at para 143 ('[T]here is no rigid rule as to what procedural safeguards are appropriate in the context of s 12(1). The procedural safeguards required will depend on the nature of the deprivation and its purpose.') See also J de Waal 'Revitalising the Freedom Right? *De Lange v Smuts NO*' (1999) 15 *SAJHR* 217, 226. But not only has the court used substance in determining procedure, it has also used procedure to determine substance. In *De Lange* (supra) at para 41 Ackermann J held, while considering the substantive fairness of the provision, that '[a] further significant safeguard to the examinee's rights is [the possibility of] an unrestricted reconsideration of the grounds for the examinee's committal and continued detention [by a court].' In two more recent decisions the Court has relied almost entirely on the manner in which a decision is reached as providing the substantive justification for the deprivation of freedom in the context of extraditions (*Geuking*) and illegal aliens (*Lawyers for Human Rights*). This jurisprudence seems to point towards the adoption of a broad single test of the 'fairness' or acceptability of a deprivation rather than two discreet enquiries. In its most recent consideration of FC s 12 the *Omar* Court failed to even mention the dual nature of this section. However, it is clear that, in theory at least, the Court maintains its two-prong approach.

not limited to deprivations that are arbitrary or without just cause. FC s 12(1) should therefore play, as O'Regan J suggests in *De Lange*, a residual role. It will, on our account, engage those violations of physical freedom that might fall through the doctrinal cracks of FC ss 12(1)*(a)* and 12(1)*(b)*.[1]

In sum, we offer the following construction of the relationship between FC s 12(1), FC ss 12(1)*(a)* and 12(1)*(b)*:

- FC s 12(1)*(a)* affords substantive protection and procedural protection for deprivations of freedom that are 'arbitrary' or that occur without 'just cause'.
- FC s 12(1)*(b)* affords more stringent procedural protection to persons 'detained without trial' than the procedural protection demanded by mere deprivations of freedom in terms of FC s 12(1)*(a)*.
- FC s 12(1) operates as a residual right and affords both substantive protection and procedural protection for deprivations of freedom not captured by FC s 12(1)*(a)*.

(c) The 'due process wall': FC ss 12 and 35

Although it is comprehensively dealt with elsewhere in this work,[2] we should briefly mention the relationship between FC ss 12 and 35. The general rule established by our Constitutional Court is that there is a 'due process wall' between the two.[3] This wall defends the following propositions: *(a)* the specific guarantees in FC s 35 should be confined to arrested, accused and detained persons and should not be extended to cover other situations; *(b)* the general right to fair procedure in FC s 12 should not influence the determination of FC s 35 rights; *(c)* the 'trial' under FC s 12(1)*(b)* is very different from, and less rigorous than, the trial anticipated in FC s 35.[4]

Despite the clear erection of this theoretical wall between FC ss 12 and 35, Snyckers and Le Roux note that there has nonetheless been a fair degree of seepage from both sides of the barrier.[5] So while FC s 12 clearly covers very distinct terrain from FC s 35, they may not be as far apart as the Constitutional Court would like.

40.3 FC s 12(1)*(a)*: Arbitrary Deprivation of Freedom

The threshold inquiry to establish a violation of FC s 12(1)*(a)* must always be whether there has been a 'deprivation of freedom'. This inquiry itself has two

[1] This residual character of FC s 12(1) was recognized by the majority in *Ferreira*. Chaskalson P held that deprivations of freedom not enumerated elsewhere else in the Bill of Rights may deserve protection in terms of FC s 12 (then IC s 11).

[2] See F Snyckers & J le Roux 'Criminal Procedure: Rights of Detained, Arrested, and Accused Persons' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, August 2006) § 51.1*(a)*.

[3] This rule flows from the Court's decisions in, among others, *Ferreira*, *Nel* and *De Lange*.

[4] Snyckers & le Roux (supra) at § 51(1)*(a)*(iv).

[5] Ibid at § 51(1)*(a)*.

component parts: *(a)* a determination of the extension of 'freedom'; *(b)* a determination of the extension of 'deprivation'.

(a) Meaning of 'freedom'

We have already covered the complex terrain of the Court's understanding of freedom.[1] The Court's jurisprudence strongly supports, and our gloss on the purpose of FC s 12 re-inforces, the contention that 'freedom' conduces principally to a concern about physical liberty.

(b) Meaning of 'deprivation'

Unfortunately our courts have not always been clear with respect to the question whether law or conduct amounts to a 'deprivation'.[2] What we can say with some certainty is that imprisonment always constitutes a 'deprivation' for the purpose of FC s 12(1)*(a)*.

However, it seems equally clear — given the rejection of Ackermann J's take on IC s 11 in *Ferreira* — that not all constraints on physical freedom amount to 'deprivations'. The difficulty in constructing a predictable and a principled judicial doctrine on deprivation was squarely addressed by the European Court of Human Rights in *Guzzardi v Italy*:

> In order to determine whether someone has been 'deprived of his liberty' . . . the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is nonetheless one of degree of intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection.[3]

The European Court and the European Commission have applied these guidelines to such diverse circumstances as asylum-seeking,[4] confinement of

[1] See § 40.1*(b)* supra.

[2] In *Bernstein,* for example, Ackermann J held that '[t]he obligation to respond to a subpoena and to be present at the appointed time and place would not, on the majority view, compromise the physical integrity of the subpoenaed witness.' *Bernstein* (supra) at para 51. It is unclear whether this amounts to a finding that there was no 'deprivation' at all, or that there was a deprivation but that it was not 'arbitrary'. Currie and De Waal describe the finding as relating to 'deprivation'. I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 295. We are less certain. In the remainder of the paragraph, Ackermann J considers the necessity of subpoena proceedings in a democratic society and seems to be describing the 'just cause' or the justification for a subpoena rather than the extent of the 'deprivation'.

[3] (1981) 3 EHRR 333 at paras 92–93.

[4] See *Amuur v France* (1996) 22 EHRR 533 (Four Somali asylum-seekers were kept in the international zone of a Paris airport for 20 days. The Court held that they had been deprived of their liberty in terms of art 5(1). The fact that they could depart France for other countries was deemed immaterial. The applicants were entitled to seek asylum in France and it was by no means certain that another country would grant them such status.)

soldiers,[1] the hospitalization of children,[2] and the drying out of drunkards[3] — amongst others.[4] But while the ECHR jurisprudence should provide valuable assistance to our courts in the future, it currently provides neither bright-line rules nor anything that begins to approximate a clear definition. The Canadian Supreme Court has also applied its mind to this problem. While it has concluded that statutory requirements to submit to fingerprinting,[5] produce documents,[6] give oral testimony[7] and not to loiter near schools[8] all constitute 'deprivations of liberty',[9] the Supreme Court has been reluctant to offer a precise definition of 'deprivation'.

Contriving a precise definition of 'deprivation' is especially important when one considers the large number of temporary restrictions on physical liberty employed by law enforcement officials: road-blocks, body searches, and requests for the production of identification. The danger here, as Currie and de Waal note, is twofold: the threshold can be set too high and hamper law enforcement, or the threshold can be set too low and fail to offer meaningful safeguards against the

[1] See *Engel & Others v The Netherlands* (1976) 1 EHRR 647 (The ECHR considered various degrees of 'arrest' of military personnel. The ECHR first noted that the appropriate standard for 'deprivation' turned on the applicant's military status and that the standard differed from that of ordinary civilians. Ibid at para 59. The ECHR held that 'light arrest' — confinement to military premises while off-duty — and 'aggravated arrest' — confinement while off-duty to a specific room — did not constitute 'deprivations'. Ibid at paras 61–62. However, 'strict arrest' — confinement on and off-duty to a cell — and 'committal to a disciplinary unit' — confinement to military premises for up to six months — amounted to 'deprivations of liberty'. Ibid at paras 63–64.)

[2] See *Nielsen v Denmark* (1988) 11 EHRR 175 (A 12-year-old boy was placed in a psychiatric ward by his mother against his will. He was allowed to visit his mother's home and eventually to go to school. The Commission held that the mother's consent could not be decisive of the matter and that, in the circumstances, there had been a deprivation of liberty. Application No 10929/84. The ECHR reversed this finding. While agreeng that the mother's consent was not dispositive, it held that the restrictions were no more than those that would ordinarily be required in the hospitalization of a young child.)

[3] See *Litwa v Poland* (2000) 33 EHRR 1267 (Court held that detaining a drunk man in a 'sobering-up' facility for six hours, despite the short duration, amounted to a deprivation of liberty.)

[4] See *Guzzardi v Italy* (1981) 3 EHRR 333 at paras 92–93 (In a 10-8 split decision, Court held that the enforced stay on a small island, combined with police supervision, limits on the areas of the island that could be visited and the lack of social contact, constituted a deprivation of liberty); *Raimondo v Italy* (1994) 18 EHRR 237 (ECHR held that placing applicant under police supervision and house confinement from 9pm — 7am was only a 'restriction' and not a 'deprivation of liberty'); *Blume v Spain* (2000) 30 EHRR 632 (A court released the applicants from state custody and ordered that they be remanded to the custody of their families. It also made provision for psychiatric treatment on a voluntary basis. Upon release, the applicants were kept locked in a hotel for 10 days and subjected to 'de-programming' by a psychologist. ECHR held that this de-programming amounted to a deprivation of liberty and could be characterized as 'false imprisonment'.) See, generally, P van Dijk & GJH van Hoof *Theory and Practice of the European Convention on Human Rights* (3rd Edition, 1998) 345–48.

[5] See *R v Beare* [1988] 2 SCR 387. But see *S v Huma & Another* 1996 (1) SA 232 (W), 1995 (2) SACR 411 (W)(Taking of fingerprints is not an invasion of 'physical integrity' and does not amount to 'cruel, inhuman or degrading treatment'. The court did not consider the question of arbitrary deprivation of freedom.)

[6] See *Thomson Newspapers v Canada* [1990] 1 SCR 425.

[7] See *Stelco v Canada* [1990] 1 SCR 617.

[8] See *R v Heywood* [1994] 3 SCR 761.

[9] See, generally, P Hogg *Constitutional Law of Canada* (3rd Edition, Loose-Leaf, RS 1, 2004) § 44.7*(a)*.

abuse of police power.[1] Some judicial line-drawing must occur at this stage of the analysis.[2] For, while the Court has preferred to concentrate on the extension of the internal modifiers of 'deprivation' — 'arbitrary' or 'without just cause' — it is hard to know when one ought to proceed to the procedural phase or the substantive phases of a FC s 12(1)*(a)* inquiry without first knowing whether a deprivation worthy of constitutional solicitude has occurred.[3] As noted in *Guzzardi*, it is difficult, if not impossible, to build a meaningful test for deprivation. It therefore seems more likely that the courts will develop its content through application to specific facts. That said, we believe that the courts would do well to err on the side of an expansive application at this first stage of the inquiry.

(c) Substantive dimension of FC s 12(1)*(a)*

(i) *Arbitrariness*

In *De Lange*, Ackermann J separated the inquiry into substantive protection into two distinct stages:

> In the first place it may not occur 'arbitrarily'; there must, in other words, be a rational connection between the deprivation and some objectively determinable purpose. If such rational connection does not exist the substantive aspect of the protection of freedom has by that fact alone been denied. But even if such rational connection exists, it is by itself insufficient; the purpose, reason or 'cause' for the deprivation must be a 'just' one.[4]

[1] See Currie & De Waal (supra) at 295.

[2] See *Magagane v The Chairperson, North West Gambling Board* CCT 49/05 (Unreported decision, 8 June 2006) n73 ('[S]ome rights in the Constitution [including s 12(1)*(a)*] expressly provide for line drawing at the threshold inquiry.')

[3] The Court's current approach to arbitrariness and deprivation in FC s 12 appears to accord with the gloss placed by the Constitutional Court on 'arbitrariness' and 'deprivation' when it comes to the assessment of the prohibition on arbitrary deprivation of property in FC s 25(1). See *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC)('*FNB*'). The Court held that '[i]n a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned.' Ibid at para 57. According to Theunis Roux, '[a]fter *FNB*, it is clear that the term 'deprivation' will be given a wide meaning, and that this stage of the inquiry will consequently play very little role (if any) in future cases.' T Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) 46-18. The collapsing of the analysis of the modifier into the analysis of the term modified also occurs in the context of FC s 14 analysis. In *Magagane*, the Court held that a regulatory search or inspection amounted to a 'search' in terms of FC s 14. The Court refused, however, to define the term 'search'. Writing for the Court, Van der Westhuizen J stated:

> It would be undesirable to impose at the threshold inquiry an arbitrary demarcation line between degrees of intrusion that would invoke the constitutional right to privacy. Such line drawing would have the negative effect of placing certain administrative inspections beyond the reach of judicial review.

Magagane (supra) at para 59. Interestingly enough, the *Magagane* Court did note that its position might be different with respect to FC s 12 analysis.

[4] *De Lange* (supra) at para 23.

Some commentators criticize this bifurcated inquiry as overly elaborate.[1] They prefer, instead, O'Regan J's single-step approach. O'Regan J's test turns on whether the grounds for the deprivation are 'acceptable'.[2]

The Court has, as yet, to fully endorse either position — Ackermann's opinion attracted only a plurality of the *De Lange* Court. However, two good reasons exist for rejecting O'Regan J's single-step inquiry. First, it was enunciated under the Interim Constitution. IC s 11 lacked FC s 12(1)*(a)*'s clear language that a deprivation of freedom may be *neither* 'arbitrary' *nor* 'without just cause'. Second, as the language in FC s 12(1)*(a)* suggests, a distinction with a real difference exists between the two legs of Ackermann J's inquiry: a deprivation may be arbitrary but still have a just cause. This distinction exists in relation to both the substantive dimension and the procedural dimension of arbitrariness.

(aa) Substantive arbitrariness

An inquiry into substantive arbitrariness raises two primary questions.

First: Does the deprivation have a source in law? For, even if a curtailment of freedom serves the most compelling governmental purpose imaginable, a curtailment unauthorized by law remains arbitrary.[3]

Second: Is the deprivation related to a legitimate government purpose?[4] For, even if a curtailment of freedom is authorized by law, if the law does not serve a legitimate government purpose, it remains arbitrary.

While the Constitutional Court has rejected expressly a number of FC s 12(1)*(a)* arbitrariness challenges on the grounds that the deprivations did serve a legitimate government purpose,[5] in *S v Z & 23 Similar Cases*, a full bench of the Eastern Cape Provincial Division condemned the keeping of children sentenced

[1] See Currie & De Waal (supra) at 296.

[2] *Bernstein* (supra) at para 145. According to Currie and De Waal, it makes no sense 'to require a reason for the deprivation of freedom in the first part of the enquiry and then to require a good reason for the deprivation in the second part of the same enquiry'. Currie & De Waal (supra) at 296 n14.

[3] I Currie & S Woolman 'Freedom and Security of the Person' in M Chaskalson, J Klaaren, J Kentridge, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) 39-36 — 39-37; De Waal (supra) at 226 (Arbitrary 'simply means that any deprivation of freedom must be authorised by law and in accordance with the law'.) This requirement is based on the principle of legality, which necessitates that all exercises of public power have a source in law. A deprivation in these circumstances will have to be, and will often be able to be, justified under FC s 36.

[4] A similar test of arbitrariness is used in two other contexts in South African constitutional law: where the legislation is arbitrary and violates the legality principle — see *Pharmaceutical Manufacturers* — and FC s 9(1)'s guarantee of equal protection before the law will be violated if the differentiation is arbitrary — see *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 789 (CC). For a recent consideration of arbitrariness in the context of FC s 9(1), see *Road Accident Fund v Van der Merwe* CCT 48/05 (Unreported Decision, 30 March 2006)(Legislation prohibiting spouses from claiming non-patrimonial damages from each other serves no legitimate government purpose.)

[5] See, for example, *De Lange* (supra) at para 29 (Committal of witness to prison during insolvency investigation serves legitimate government purpose); *Thebus* (supra) at para 40 (The doctrine of common purpose is rationally related to the legitimate government purpose of 'controlling joint criminal enterprise'); *Lawyers for Human Rights* (supra) at para 32 (It is not arbitrary to detain at a port of entry a person reasonably suspected of being an illegal immigrant).

to reform schools in custody for inordinately long periods of time because there were no schools to which they could be sent.[1] The High Court held that the deprivation was arbitrary because 'it is purposeless and inflicts hardships on the juveniles that may be disproportionate to their crimes . . . and does not serve the purpose of the punishment imposed on them by the court.'[2] *S v Z & 23 Similar Cases* demonstrates that the content of substantive arbitrariness is not exhausted by the norm of 'just cause'. Indeed, *S v Z & 23 Similar Cases* illustrates that a deprivation may be animated by a just cause, but constitute substantively arbitrary action because it fails to achieve the deprivation's objective. Again, the cause may be just, but the deprivation may remain arbitrary.

(bb) Procedural arbitrariness

In Canada, a deprivation will be deemed arbitrary *(a)* if inadequate criteria exist to govern the exercise of state power,[3] or *(b)* if the exercise of official discretion is not based upon an actual grant of authority in the empowering legislation.[4] This 'procedural arbitrariness' speaks to the absence of legal authority for the deprivation rather than to its purpose.

This doctrine of 'procedural arbitrariness', as defined above, has not been expressly endorsed in our law. However, in *Lawyers for Human Rights v Minister of Home Affairs*, the Constitutional Court had to consider the constitutionality of a legislative provision granting an immigration officer the discretion to order the detention of a person illegally in South Africa.[5] The Court held that if

[1] 2004 (1) All SA 436 (E), 2004 (4) BCLR 410 (E) at para 21.

[2] Ibid at para 21, n17.

[3] See, eg, *R v Hufsky* [1988] 1 SCR 621, 632 followed in *R v Ladouceur* [1990] 1 SCR 1257 (Random stopping of motorists for spot checks was arbitrary detention because there were no criteria for the selection of motorists to be stopped); *R v Swain* [1991] SCR 933 (Law permitting commitment to psychiatric facility of person acquitted of criminal charge on the basis of insanity arbitrary as it provided no standards on which the judge could base his decision); *R v Lyons* [1987] SCR 309 (Declaration as a dangerous offender not arbitrary as decision had to be based on defined critetria); *Thwaites v Health Sciences Centre* (1988) 51 Man R (2d) 196, 201 (CA)(Legislation allowing for the compulsory detention by a magistrate on a showing that 'a person should be confined as a patient at a psychiatric facility' was declared a violation of the right against arbitrary detention or imprisonment because the legislation failed adequately to specify relevant guiding criteria 'sufficiently defining the persons who may be subject to the legislation, and the circumstances under which they may be compulsorily detained'.)

[4] See *R v Duguay* (1985) 1 SCR 93 (Arrest not on proper grounds nor with an honest belief that proper grounds were present a violation of the arbitrary detention right.) This principle is already part of our administrative law. See Promotion of Administrative Justice Act 3 of 2000, s 6(2)*(e)*, *(f)* and *(h)*.

[5] *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC)('*Lawyers for Human Rights*'). The legislative provision at issue was s 34 of the new Immigration Act 13 of 2002. Yacoob J held that the provision should be interpreted in a constitutionally compatible manner and that when this was done it permitted detention only if the officer had a reasonable suspicion that the person was an illegal immigrant. Detention under these circumstances was not arbitrary and the 'reasonable suspicion of the officer' was a 'just cause'. Ibid at paras 31–32. See also *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2003 (8) BCLR 891 (T).

detention could be ordered on the mere say-so of the immigration officer, the section at issue would be arbitrary and unconstitutional.[1]

(ii) *Just cause*

(aa) Constitutional values

The somewhat elusive quality of 'just cause' is captured by this observation in *De Lange v Smuts*:

> It is not possible to attempt, in advance, a comprehensive definition of what would constitute a 'just cause' for the deprivation of freedom in all imaginable circumstances. . . . Suffice it to say that the concept of 'just cause' must be grounded upon and consonant with the values expressed in s 1 of the 1996 Constitution[2] and gathered from the provisions of the Constitution as a whole.[3]

In *De Lange v Smuts NO,* the Constitutional Court was asked to consider whether s 66(3) of the Insolvency Act[4] allowed for the imprisonment of witnesses who refused to answer questions regarding an insolvent estate. The Court held that the provision serves the compelling public purpose of enforcing civil claims against debtors,[5] that the penalties exacted induced necessary testimony and the production of documents about the estate by the insolvent and others, that imprisonment in terms of s 66(3) is not a criminal sanction,[6] and that similar provisions are common in many other democratic societies.[7] These rationales for s 66(3) — and the fact that the penalties did not go any further than was necessary —

[1] *Lawyers for Human Rights* (supra) at para 29. See also *Omar v Government of the Republic of South Africa & Others (Commission for Gender Equality, Amicus Curiae)* 2006 (2) SA 289 (CC), 2006 (2) BCLR 253 (CC)(The applicant challenged various provisions of the Domestic Violence Act 116 of 1998 that permit arrest for violating a protection order. The applicant's complaint was that the arrest was mandatory if a complainant produced an affidavit alleging an infringement of the protection order and the policeman had a reasonable suspicion that the complainant could suffer imminent harm. The Court dismissed the claim on the grounds that the production of an affidavit was at least as good protection as requiring 'reasonable suspicion'. However, the Court's decision emphasized the section was saved because of the police officer retained the discretion to effect an arrest only if there was a possibility of harm.)

[2] Section 1 provides:

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

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the Constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

For more on FC s 1, see C Roederer 'Founding Values' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 13.

[3] *De Lange* (supra) at para 30 (Ackermann J).

[4] Act 24 of 1936.

[5] *De Lange* (supra) at paras 31–32.

[6] Ibid at paras 37–38.

[7] Ibid at para 39.

collectively constituted a 'just cause' for the deprivation of freedom.[1]

The Constitutional Court has, however, handed down judgments that offer some guidance as to the kinds of deprivations that might be deemed without 'just cause'. In *Coetzee v Government of the Republic of South Africa*, the Court invalidated provisions of the Magistrates' Courts Act that permitted the detention of civil debtors.[2] The Court found that the contested provisions would sweep up into their proscriptive net both debtors who could pay but wilfully refused and those impecunious members of society who were too poor to pay.[3] The *Coetzee* Court held that a 'debtors' prison' was inconsistent with new constitutionally-mandated mores and thus an unjustifiable limitation of IC s 11. Were the case to have been heard in terms of FC s 12(1)*(a)*, the Court would have held that deprivations of freedom in these circumstances lacked a 'just cause'.

(bb) Basic tenets of the legal system

The concept of 'just cause' takes on somewhat greater solidity when informed by the following term of art: 'the basic tenets of the legal system'. The 'basic tenets' dimension of 'just cause' requires that courts 'abstract[ ] from the record of the South African legal system a sense of its fundamental principles'.[4] Members of the Constitutional Court have, on two occasions, deployed the 'basic tenets' test for 'just cause' when considering the constitutionality of statutory provisions that excluded a standard element of a criminal offence.

In *S v Coetzee*,[5] the Court was asked to determine the constitutionality of a provision that made directors and servants of a corporation liable for any acts

[1] *De Lange* (supra) at paras 36 and 40. The witness effectively 'carried the key to their prison in their own pocket' as they would be released as soon as they divulged the requested information or documents. Ibid at para 36. A fine would not be an appropriate sanction because it would often have to be very large to be effective. Ibid at para 40. The Court reached similar conclusions in other insolvency cases. See *Bernstein* (supra) at para 60 (Sections 417 and 418 of the Companies Act 61 of 1973 permitted witnesses to be called to testify or produce documents at the liquidation of a company. The Court upheld the provisions on the grounds that the law neither permits the enquiry to be employed in a vexatious or unfair manner nor allows imprisonment for failing to answer questions that, if answered, would threaten the witness' constitutional rights); *Nel v Le Roux* (supra) at paras 20–21 (Judges and magistrates were given the power under s 205 of the Criminal Procedure Act to summon witnesses to answer questions put by the prosecutor about a suspected offence. The Court held that the potentially unconstitutional effect of CPA s 205 was saved by CPA s 189. CPA s 190 allows a reticent witness to refuse to answer such questions if she has a 'just excuse'. When 'just excuse' is read in light of the Bill of Rights — as required by FC s 39(2) — CPA s 205 is no longer constitutionally objectionable); *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 36 (Imprisonment for failing to answer questions at a meeting of creditors could, in terms of ss 64 and 65 of the Insolvency Act, only follow if the question was 'lawfully put' and the witness did not have a 'reasonable cause' for failing or refusing to answer. Under those circumstances there was nothing objectionable about the legislation.)

[2] *Coetzee v Government of the Republic of South Africa; Matiso & Others v Commanding Officer, Port Elizabeth Prison, & Others* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC).

[3] Ibid at paras 8 and 15.

[4] Currie & De Waal (supra) at 297. In *S v Lubaxa* the Supreme Court of Appeal held that the refusal to discharge an accused after the State's case when there was not sufficient evidence to convict threatened to violate FC s 12 because it would contradict the basic common-law principle that there must be a 'reasonable and probable cause to believe that the accused is guilty of an offence' before a prosecution is initiated 2001 (2) SACR 703 (SCA) at para 19.

[5] 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC).

for which the corporation could be held liable '*unless* it is proved that he did not take part in the commission of the offence and that he could not have prevented it'.[1] A majority of the Court regarded the provision as a simple reverse onus that violated the right to be presumed innocent.

Kentridge AJ, in his dissent, took the view that s 332(5) of the Criminal Procedure Act imposed vicarious liability on directors and servants of a company for a criminal offence committed by a company.[2] On Kentridge AJ's reading, the 'unless' did not reverse the onus, but rather created an additional defence for the accused. The provision could not, on this reading, be challenged under IC s 25's right to presumed innocent. However, the imputation of liability and the absence of personal criminal intent were, according to Kentridge AJ, grounds for a challenge based on IC s 11. Kentridge AJ then concluded that the vicarious liability provision imposed on servants by s 332(5) unjustifiably limited IC s 11 because the imposition of absolute liability on servants (as opposed to directors) for the crimes of the body corporate is inconsistent with the basic tenets of our legal system.[3] One could neither impute to servants as a class the choice of engaging in a regulated activity nor impute to servants the element of control of the affairs of the corporate body. No law that punishes a person who exercises no control over the actions or the affairs that lead to criminal activity can be squared with IC s 11(1)'s commitment to 'freedom'.[4]

O'Regan J, in her dissent, largely agreed with the conclusions reached by Kentridge AJ.[5] However, she departed from Kentridge AJ with respect to her analysis of the problem. For O'Regan J, two distinct questions had to be answered. The first question was whether it was constitutionally legitimate to impose criminal liability on directors and servants of corporate bodies in the circumstances contemplated by s 332(5) of the Criminal Procedure Act. The second question was whether it was legitimate to impose upon an accused the burden of proving that he or she could not have prevented the commission of the offence. The two questions engaged two different aspects of constitutionally protected freedom. The first question engaged the *reasons* for which the state may deprive someone of freedom in terms of IC s 11(1). The second engaged the *manner* whereby a person is deprived of freedom in terms of IC s 25.[6]

According to the common law, criminal liability generally arises only where unlawful conduct and fault can be established. Deprivation of liberty, without culpability for the unlawful conduct, constitutes a breach of this established rule.[7] According to O'Regan J, s 332(5) did not require directors to show that they exercised due diligence, but merely that they could not have prevented the criminal conduct at issue. On this reading, directors could be sufficiently culpable

[1] Criminal Procedure Act 51 of 1977, s 332(5)(emphasis added).
[2] *S v Coetzee* (supra) at para 85.
[3] Ibid at para 100.
[4] Ibid at para 101.
[5] Sachs J appears to concur with O'Regan J. Ibid at paras 225 and 227. Ackermann J also concurs with O'Regan J. Ibid at para 66.
[6] See also *Bernstein* (supra) at paras 145–47.
[7] *S v Coetzee* (supra) at 176.

to warrant the imposition of criminal liability — thus any consequent deprivation of freedom of directors would not fall foul of IC s 11*(a)*. However, since no servant could ever engage in conduct — or undertake due diligence — that would make them criminally culpable for the purposes of s 332(5), s 332(5) infringed IC s 11*(a)* with respect to this class of person.[1]

The Court has had another occasion to consider the removal of causation as an element of a criminal offence. The common-law doctrine of common purpose allows for the conviction of a group of people for the same offence even when only one person is truly — causally — responsible for the criminal act. The applicants in *S v Thebus* challenged this doctrine as an infringement of the substantive protection afforded by FC s 12(1)*(a)*.[2] Moseneke J, writing for the Court, rejected the challenge on the grounds that many offences at common law — rape, incest or perjury — do not treat causation as an element of the crime and that a requirement of causation for criminal offences is not a 'basic tenet of the law'.[3]

FC s 12(1)*(a)* may also be used to challenge a criminal prohibition itself.[4] For example, the legislature could not make it a crime (punishable by imprisonment) to wear a red hat. The concept of 'just cause' extends FC s 12(1)*(a)*'s reach to any criminal sanction that fails to serve a legitimate social goal. Just cause may also embrace a certain degree of proportionality. In *S v Boesak*, Langa DP held that imprisonment for 'theft of a sufficiently serious nature' constitutes a just cause for imprisonment.[5] Implicit in Langa DP's finding is the proposition that imprisonment for a trivial amount might not constitute 'just cause' for imprisonment. However, this propostion has not yet been recognized and ratified by the Court: challenges on this basis to the oft-questioned criminalization of prostitution[6] and bestiality[7] have both failed.[8]

[1] To the extent that we can draw any conclusions from the minority judgments, *S v Coetzee* suggests that vicarious liability offences will be justifiable deprivations of freedom in terms of FC s 12(1)*(a)* if the offence can be categorized as merely 'regulatory', or, as we have just seen, the imposition of vicarious liability is modified by a defence of due diligence. Ibid at paras 97 (Kentridge AJ), 160 (O'Regan J), 77 (Didcott J), and 57 (Mahomed DP).

[2] 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC).

[3] Ibid at para 37 n60.

[4] *De Lange* (supra) at para 25 ('[A]ccused persons are entitled to challenge the constitutional validity of a criminal offence with which they are charged on the substantive freedom right [on the] ground that such offence does not, for purposes of s 12(1)*(a)*, constitute 'just cause' for the deprivation of their freedom.')

[5] *S v Boesak* 2001 (1) 912 SA (CC), 2001 (1) BCLR 36 (CC), 2001 (1) SACR 1 (CC) at para 39.

[6] See *S v Jordan* 2002 (6) SA 642 (CC), 2002 (11) BCLR 117 (CC)('*Jordan*') at para 75 (While the majority refused to consider the FC s 12 challenge to laws proscribing prostitution, it was firmly rejected by O'Regan and Sachs JJ.)

[7] See *S v M* 2004 (3) SA 680 (O) at para 22 (Court held that despite the lack of any material impact on the community, the criminalisation of bestiality was still justified as an abrogation of well-entrenched mores.)

[8] Indeed, in *S v Jordan*, the minority suggested that such a challenge was not even possible:

> [a] prostitute makes herself liable for arrest and imprisonment by violating the law. Provided that the law passes the test of constitutionality, any invasion of her freedom and personal security follows from her breach of the law, and not from any intrusion on her right by the State. In the light of the approach taken by the majority of this Court to s 11(1) of the interim Constitution, *there can be no complaint in terms of that section by a person who has been convicted and sentenced in terms of a duly enacted criminal prohibition.*

Jordan (supra) at para 75 (our emphasis). To the extent that this is what the minority were saying, they are wrong. FC s 12(1)*(a)* certainly does allow challenges to substantive criminal prohibitions, even if the scope is very limited.

(cc) Proportionality

Although the Constitutional Court has never explicitly endorsed proportionality as an element of 'just cause', it has regularly applied notions of proportionality in its IC s 11(1) and FC s 12(1)*(a)* decisions. In *Nel*,[1] and *De Lange*,[2] the release of a witness subsequent to an inquiry meant that the coercive measures went no further than was necessary to achieve their aim and were not, therefore, substantively arbitrary. In *De Lange*[3] and *Bernstein*,[4] Ackermann J specifically held that imprisonment was appropriate because it was the only effective means to achieve the objectives of the inquiry. The *Lawyers for Human Rights* Court held that the detention of illegal immigrants without confirmation by a court was unconstitutional only when the detention period exceeded 30 days. The findings in all four cases strongly suggest that proportionality is an important element of 'just cause'.[5]

[1] *Nel* (supra) at para 11.

[2] *De Lange* (supra) at para 36.

[3] Ibid at para 40.

[4] *Bernstein* (supra) at para 55 ('[I]t is not a sanction which is disproportionate to the offence, therefore s 11(1) and (2) are not impaired. The sanctions are necessary to enforce the legislation.')

[5] However, the Court would do well to be cautious about extending the proportionality component of 'just cause' too far. The Canadian Supreme Court began with a definition of 'fundamental justice' (their equivalent of 'just cause') as those principles found in 'the basic tenets of the legal system'. *Re BC Motor Vehicle Reference* [1985] 2 SCR 486, 503. However, 'fundamental justice' soon became the equivalent of principles that 'would have general acceptance among reasonable people' — *Rodriguez v British Columbia* [1993] 3 SCR 519, 607) — or that would be 'simply unacceptable to reasonable Canadians' — *Canada v Schmidt* [1987] 1 SCR 500, 522). The lack of precision manifest in *Schmidt* is reflected in two cases concerning extradition from Canada to another jurisdiction for a 'capital' offence. In 1991, the Supreme Court held that such extradition did not 'shock the conscience'. See *Kindler v Canada* [1991] 2 SCR 779. It reversed itself 10 years later. See *United States v Burns* [2001] 1 SCR 283. See, generally, Hogg (supra) at 44.10*(b)*.

In US constitutional law, substantive due process entails a two-part analysis of a legislative measure affecting life, liberty or property: a reasonableness enquiry and a proportionality enquiry. The measure may not be unreasonable or arbitrary, and the means selected to achieve the purpose of the measure must be in proportion to that purpose. See *Nebbia v New York* 291 US 502, 525 (1933)('The Fifth Amendment and the Fourteenth do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.') The first part of this test is expressly authorized by FC s 12(1)*(a)*. The second part — requiring proportionality between means and ends — may be authorized by the requirement that a deprivation of liberty must be for 'just cause'. German courts have adopted a similar approach. A deprivation of personal liberty must comply with the 'principle of proportionality, which is rooted in the rule of law'. 22 *BVerfGE* 180, 220 (1967)(Institutionalization as a mental patient of a person who posed no danger to himself or others offends principle of proportionality.) See D Currie *The Constitution of the Federal Republic of Germany* (1994) 307. In German jurisprudence, proportionality means both proportionality between means and ends, and proportionality between costs and benefits. The state is justified in depriving a person of liberty only to the extent necessary for liberty and security of themselves or others. In addition, the harm prevented by the deprivation must outweigh the harm that it causes to individual liberty. Similar principles are said to underlie the European Court of Human Right's article 5 jurisprudence. See *X v United Kingdom* 4 EHRR 188 (Validity of detention of mental patients requires an assessment as to whether the interests of the protection of the public prevail over the individual right to liberty to an extent sufficient to justify detention.)

(d) Procedural dimension of FC s 12(1)*(a)*

FC s 12(1)*(a)* does not require a 'trial' as contemplated in either FC s 35 or FC s 12(1)*(b)*. As a result the level and the kind of procedural fairness required by FC s 12(1)*(a)* will often turn on the nature of the deprivation of freedom. As Mokgoro J notes:

> Where an interest of paramount importance is at issue, then stringent procedures are called for: indeed, we expect them to be more precise than when a lesser interest is implicated, and our contemplation of the substance of the matter will influence our attitude toward the procedure required.[1]

Deprivation of freedom in a mental hospital differs — in meaning and in substance — from the deprivation of freedom that follows from a refusal to give evidence on pain of imprisonment.[2] Deprivation of freedom in a mental hospital will require different processes and different justifications than deprivations of freedom to prevent the spread of a contagious disease. The Court can, in advance, offer no more content to the required procedure for a particular deprivation than to say that the deprivation must be fair under the circumstances. Deprivations of freedom in terms of FC s 12(1)*(a)* will require well-articulated procedures that fall somewhere between a full criminal trial and appropriate responses by law enforcement officials[3] who stop individuals in order to ascertain their identity.[4]

In *Sibiya*, the High Court was asked to consider the constitutionality of procedures established to re-assess the prison terms of persons sentenced to death

[1] *De Lange* (supra) at para 128. See also *Nel* (supra) at para 14.

[2] For an examination of commitment to mental hospitals, see E Bonthuys 'Involuntary Civil Commitment and the New Mental Health Bill' (2001) 118 *SALJ* 667.

[3] *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2003 (8) BCLR 891, 902B (T)(Du Plessis J found that immigration legislation that allowed a foreigner to be detained on the mere declaration that the person was an illegal by an immigration official violated both the rule of law and FC s 12(1)*(a)*'s procedural component.)

[4] Perhaps the best manner to gauge what is and is not acceptable is to look at the procedures the Court has already found fair or unfair. It must be emphasized that not all of these decisions were taken in terms of FC s 12(1)*(a)*. Some rely upon IC s 11(1) or FC s 12*(b)*. However, as discussed above, we believe this part of FC s 12's protection best fits FC s 12(1)*(a)*. In *Nel*, s 205 of the Criminal Procedure Act 51 of 1977 allowed witnesses to be summoned to appear in court to give evidence on a suspected offence. The witness could be imprisoned if he failed to answer the questions or produce the required documents. The Act, however, contained a number of safeguards: the presiding officer had to be a judge or magistrate; the subpoena had to be approved by the public prosecutor; imprisonment would only follow if it was necessary to maintain law and order; and the person would not be imprisoned if he had a just excuse. In the circumstances, and considering the importance of s 205 as an evidence gathering mechanism, the Court upheld the section. In *Geuking*, the applicant challenged the procedure for extradition which was close but not identical to an ordinary criminal trial. The proceedings were held in public before a magistrate or judge, the person liable for extradition was entitled to challenge and adduce evidence and to appeal the decision. The Court noted that extradition did not result in criminal conviction or punishment, it simply decided whether the person could be sent for trial in another country. The procedure, although falling slightly short of a full criminal trial, was fair in the circumstances. In *De Lange*, provisions allowing imprisonment for failing to answer questions or produce documents at insolvency proceedings were found invalid only to the extent that it permitted a non-judicial officer to preside.

before the abolition of the death penalty by the Constitutional Court in *S v Makwanyane*. The High Court described the challenged procedures as follows:

> Proceedings do not take place in public, there is Chamber consideration of documents and perhaps argument but no trial, the administrative action is performed by a judicial officer who does not purport to constitute a court of law, no evidence may be adduced at all, not even an application in terms of s 316 will be entertained, there is no right to access the reasons or advice formulated as a result of this process and no judgment as resulting (sic) from a court of law emerges from this process, there is no appeal against any of these proceedings or advice, sentence is imposed by the President not a court of law.[1]

The High Court held that, as the death sentences had been set aside, all those who had been sentenced to death were entitled to a new sentencing procedure akin to a trial.

A unanimous Constitutional Court reversed the High Court decision.[2] The Constitutional Court noted that the death sentences had not been set aside — all that *Makwanyane* had said was that the death sentence could not be imposed or carried out after the date of the judgment. While a new sentence had to be imposed, this consequence of the Court's finding in *Makwanyane* did not entitle the affected persons to a new trial.[3] It would have been perfectly consistent with the procedural requirements of FC s 12(1)*(a)* for the legislature to have replaced all of the death sentences with sentences of life imprisonment.[4] But the legislature had, in fact, done more. The legislative remedy for the holding and the order in *Makwanyane* was to give each prisoner an opportunity to have his sentence reconsidered by a judge. Under these circumstances, the inability to lead evidence, the holding of the proceedings in chambers and the lack of appeal did not infringe the procedural protections afforded by FC s 12(1)*(a)*.[5]

As *Sibiya* suggests, a litigant relying on FC s 12(1)*(a)* — as opposed to FC s 35 — cannot challenge a specific procedural failure — say, the failure to be notified of the proceedings or to hold the proceedings in public.[6] A challenge grounded in FC s 12(1)*(a)* requires the court to review the entire domain of procedural safeguards afforded the applicant. If, on the whole, the proceedings are fair, then the requirements of FC s 12(1)*(a)* will be satisfied.[7]

The Constitutional Court confirmed this rule in *Omar v Government of the Republic of South Africa*. The applicant had challenged provisions of the Domestic Violence Act that had resulted in his arrest for violating a protection order. One of the

[1] *Sibiya & Others v Director of Public Prosecutions & Others* [2005] 1 All SA 105 (W) at para 188.

[2] *Sibiya & Others v Director of Public Prosecution Johannesburg & Others* 2005 (5) SA 315 (CC), 2005 (8) BCLR 812 (CC)('*Sibiya*').

[3] Ibid at paras 10–13 and 35.

[4] Ibid at para 35.

[5] Ibid at paras 36–37.

[6] See *Nel* (supra) at para 19 (Failure to hold the proceedings in public not unfair because it may be to the benefit of both the witness and society not to disclose the evidence at this stage.)

[7] Ibid at para 20 ('The summary procedure for imprisoning a recalcitrant witness must be adjudged in the context of the s 205 proceedings as a whole.')

complaints raised by the applicant was that the protection order did not have to be hand-delivered but could be sent by registered mail. It was therefore possible for him to be arrested for contravening an order of which he had no knowledge.[1] This argument relied heavily on the fact that lack of notice was one of the seven factors that led the *Coetzee* Court to declare unconstitutional various provisions of the Magistrates' Court Act that had permitted imprisonment of civil debtors.[2]

The *Omar* Court rejected this argument. It noted that if Omar were arrested for domestic violence, he would be entitled to all the benefits of FC s 35 — including a hearing within 48 hours of his arrest. Coetzee, on the other hand, was imprisoned indefinitely for a civil debt and received none of FC s 35's benefits.[3] The *Omar* Court concluded that, on the whole, the Domestic Violence Act's procedures were fair.

FC s 12(1)*(a)* can, in addition, only be invoked when a challenged provision either compels the adjudicator to act in a procedurally unfair manner or prevents her from acting in a procedurally fair manner. If the section in question is silent as to the fairness of the procedures, no constitutional complaint can be lodged against the section itself.[4] In *Nel v Le Roux*, this principle prompted the Court to find that even though s 205 of the Criminal Procedure Act did not require that the consequences of non-compliance be explained to the examinee, the presiding officer was constitutionally compelled to do so. The section was therefore valid.[5] The *Bernstein* Court held that the challenged provisions should, in addition, be construed in light of the considerable body of case law that fleshed out their application.[6] Given that the empowering legislation and the case law's gloss on that legislation were fair, the *Bernstein* Court held that the correct procedure would have been to approach the High Court for a review of the proceedings and the behaviour of the officer in question.[7]

40.4 FC s 12(1)*(b)*: Detention Without Trial

FC s 12(1)*(b)* recognizes that 'detention without trial was a powerful instrument designed to suppress resistance to the programmes and policies of the former

[1] *Omar* (supra) at para 41.
[2] *Coetzee v Government* (supra) at para 14.
[3] *Omar* (supra) at para 44.
[4] *Nel* (supra) at para 18; *De Lange* (supra) at para 85.
[5] *Nel* (supra) at para 21. See also *Bernstein* (supra) at para 52 (The Court considered the validity of provisions compelling witnesses to appear and produce evidence at hearings regarding insolvent companies. When dealing with the contention that the section was open to abuse, Ackermann J held that '[t]he fact that the power of subpoena may possibly be abused in a particular case to the prejudice of the person subjected to such abuse does not mean that the power should, for this reason, be characterised as infringing s 11(1) of the Constitution. The law does not sanction such abuse; it merely recognises that it is difficult to control it and that a clear case of abuse must be established in order to secure a discharge from a subpoena.')
[6] *Bernstein* (supra) at para 46.
[7] Ibid at para 47.

government.'[1] Indeed, several members of the Constitutional Court have expressed the opinion that FC s 12(1)*(b)* should be read primarily as a reminder that this particular tool of the apartheid state cannot be used to repress political opposition and that the extension of the right should be largely determined (and curtailed) by its historical meaning. While FC s 12(1)*(b)* currently plays a limited role in our jurisprudence — a role largely determined by its historical resonance — the abuse of state power with which FC s 12(1)*(b)* is concerned could just as easily be visited upon immigrants, mental patients and common criminals. No good reason exists for limiting the protection afforded by FC s 12(1)*(b)* to political revolutionaries.

Moreover, FC s 12(1)*(b)* cannot be reduced to a purely symbolic function. Neither FC s 35(2) nor FC s 12(1)*(a)* can be read to require that a person detained by the state must have that detention preceded or confirmed by a 'trial'.[2] FC s 12(1)*(b)* imposes duties upon the state that differ markedly from the obligations found in FC s 35(2) and, by requiring a 'trial', goes well beyond the demands of procedural fairness manifest in FC s 12(1)*(a)*.

(a) Detention

The 'trial' requirement only arises if a person is detained. But what is 'detention'?

The term 'detention' in FC s 12(1)*(b)* is best understood as the placing of a person under lock and key. 'Deprivation of liberty', in terms of FC s 12(1)*(a)*, sets a far lower threshold: trials are not required for temporary restrictions of liberty (ie, requests for identification or even arrest[3]) incidental to police investigation of a crime. Nor should they be. While Ackermann J, in *De* Lange, concluded that that 'detention' encompasses imprisonment, he also suggested that it embraced significant 'restriction of physical movement'.[4] However, the 'restriction of physical movement' contemplated by FC s 12(1)*(b)* must be comparable to incarceration for there to be a meaningful distinction between 'detention' and 'deprivation'.

That said, *Sibiya* suggests that 'detention' must be read as 'detention without trial'. *Sibiya* turned on the failure of the state to alter the sanction imposed on those persons sentenced to death prior to the Interim Constitution coming into effect. The *Sibiya* Court considered the matter in terms of FC s 12(1)*(a)* rather than FC s 12(1)*(b)* because the continued 'deprivation of liberty' did not constitute 'detention without trial'.[5] The 'trial' required by FC s 12(1)*(b)* had already taken place.

[1] *De Lange* (supra) at para 115 (Didcott J). See also *Lawyers for Human Rights* (supra) at para 36.

[2] FC 35(2)*(d)* allows a detainee to challenge the lawfulness of his detention. However, FC s 12(1)*(b)* compels the state to provide a trial without any request or any challenge by the detainee.

[3] *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2003 (8) BCLR 891, 898E-F (T)(Arrest is not included in detention for the purposes of FC s 12(1)*(b)*.)

[4] *De Lange* (supra) at para 28.

[5] *Sibiya* (supra) at para 32.

(b) Trial

As the *Nel* Court notes, a FC s 12(1)*(b)* 'trial' requires somewhat more than a mere administrative inquiry, but somewhat less than what FC s 35 demands:

> The 'trial' envisaged by this right does not, in my view, in all circumstances require a procedure which duplicates all the requirements and safeguards embodied in s 25(3) of the [Interim] Constitution. *In most cases it will require the interposition of an impartial entity, independent of the Executive and the Legislature to act as arbiter between the individual and the State.*[1]

Although the precise nature of this 'impartial entity' was left open, the *Nel* Court appeared to commit itself to the proposition that the official in question would always be a 'judicial officer who ordinarily functions as such in the ordinary courts'.[2]

In *De Lange*, the Court was asked to consider whether non-judicial officers could participate in the 'impartial entity' described by *Nel*. The question elicited significant disagreement.[3] *De Lange* concerned the constitutionality of s 66(3) of the Insolvency Act. That provision permitted the imprisonment of a witness summoned to give testimony about an insolvent estate. More importantly, the incarceration could be ordered by an official of the Master's office.

A plurality of the *De Lange* Court found that FC s 12(1)*(b)* demands 'a hearing presided over or conducted by a judicial officer in the court structure established by the [Final] Constitution and in which [FC] s 165(1) has vested the judicial authority of the Republic'.[4] The doctrine of separation of powers — as manifest in Chapter 8 of the Final Constitution — requires that laws be enforced by the executive and adjudicated by bodies independent of the executive. Officials of the Master's office, despite having the requisite skill and experience, remained members of the executive branch of government.[5] Although they may be impartial, executive officers could never be independent. The section was, therefore, found to be invalid to the extent that it allowed a person other than a judge or magistrate to commit another to prison.[6]

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[1] *Nel* (supra) at para 14 (our emphasis).

[2] Ibid at para 15.

[3] The plurality judgment is contained in the judgment of Ackermann J (Chaskalson P, Langa DP and Madala J). Sachs and O'Regan JJ concurred with the judgment.

[4] *De Lange* (supra) at para 57.

[5] Ibid at para 59.

[6] Ibid at paras 48–56 and 87–101. Didcott and Kriegler JJ disagreed with the majority. For Didcott and Kriegler JJ, Ackermann J's judgment 'concentrate[d] on form at the expense of substance'. Officers of the Master's office were, on this account, just as impartial as magistrates, and any irregularity would in any event be reviewable by an independent court. Ibid at para 125. Didcott and Kriegler JJ found s 66(3) wholly unobjectionable. Mokgoro J argued that the case was about process, not office: 'The mere fact without more that a person committing the recalcitrant witness to prison is in name a judicial officer, in my view, is, in itself, not an adequate safeguard that the committal is acceptable in an open and democratic society that has such high regard for individual liberty.' Ibid at para 137. As s 66(3) lacked any procedural safeguards, it constituted an unjustifiable limitation of FC s 12(1)*(a)*. O'Regan J concluded that 'no person may be imprisoned indefinitely for coercive purposes except by a court of law, or an independent and impartial institution of a character similar to a court of law.' Ibid at 165. As the meeting of creditors envisaged in the s 66(3) procedure did not function as a court of law — even when presided over by a magistrate — it constituted a limitation of FC s 12(1). O'Regan J did not rely on FC s 12(1)*(b)*, but on the general guarantee of procedural fairness in FC s 12(1).

The nature of the 'entity' that could conduct a trial in terms of FC s 12(1)*(b)* was considered again in *Freedom of Expression Institute v President, Ordinary Court Martial, Lt Col Mardon NO & Others*.[1] Provisions of the Defence Act and the Military Discipline Code in the First Schedule to the Act were challenged on the basis that the Code permitted army officers to adjudicate court martials.[2] None of the three army officers were required to have any legal training or qualification. A court martial could result in a sentence of up to two years imprisonment.[3] The Court found that, although a court martial could 'be presided over by a layman notwithstanding that such court has the power to deprive a convicted accused of his liberty',[4] the absence of meaningful independence amongst the convening authority, the prosecutor and the court martial personnel meant that the court martial failed to qualify as a 'trial' for the purposes of FC s 12(1)*(b)*.[5]

Although the foregoing analysis suggests that the form of a FC s 12(1)*(b)* 'trial' has yet to be finally determined, *De Lange* and *Freedom of Expression* stand for the proposition that an independent and impartial entity similar, if not identical to a court of law, is required. In addition, two forms of 'detention without trial' do not violate FC s 12(1)*(b)*: an accused person awaiting his or her first court appearance may be detained for a period of 48 hours,[6] and an accused person awaiting trial may be detained pending trial where bail has not been granted.[7]

(c) Limitation

Detention with anything less than a 'trial' constitutes a limitation of FC s 12(1)*(b)*. In *Lawyers for Human Rights*, the Constitutional Court had an opportunity to assess the constitutionality of a range of limitations on the right.

Section 34 of the new Immigration Act permitted people to be detained pending deportation if an immigration officer reasonably suspected that they were an

[1] 1999 (2) SA 471 (C), 1999 (3) BCLR 261 (C).

[2] Act 44 of 1957.

[3] *Freedom of Expression* (supra) at para 21. The Full Bench of the Cape High Court had previously adopted the finding of the High Court in *De Lange v Smuts* (supra) that 'only a court of law may deprive a person of liberty.' Such a 'court of law' must 'be an ordinary court which conforms with the spirit of the Constitution and which affords an accused person a fair trial'. The court martial clearly fell far short of this ideal.

[4] Ibid.

[5] Ibid at paras 19–20. Hlophe ADJP sets out the test for independence as 'whether the tribunal from the objective standpoint of a reasonable and informed person will be perceived as enjoying the essential conditions of independence.' Ibid at para 25.

[6] FC s 35(1)*(d)*.

[7] FC s 35(1)*(f)*. See *Dlamini* (supra) at para 36. As Kriegler J noted, '[t]he Constitution itself . . . places a limitation on the liberty nterest protected by s 12' in terms of FC s 7(3). FC s 7(3) reads: 'The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.'

illegal foreigner. Yacoob J, writing for the *Lawyers for Human Rights* Court, held that detention based upon mere suspicion violated FC s 12(1)*(b)*.[1]

The difficulties with the Act flowed from its differential treatment of various classes of person. Immigrants who arrived by air would be kept in a state facility for a maximum of 30 days before they had to be released or before an order of court had to be issued to extend the detention. Any such detainee could also demand the confirmation of his detention by a warrant issued by a court. If the warrant was not issued within 48 hours, the detainee had to be released. The *Lawyers for Human Rights* Court found that, if due regard was had to these procedural safeguards, the provisions of the Act governing detainees who arrived by air were justifiable under FC s 36.[2]

For those who arrived by ship, the Act's position was somewhat more complicated. They could, at the discretion of the officer, be detained, as described above, with the same procedural safeguards. However, they could also be detained on the ship until that ship left port. In ship detention cases, detainees could be held, on the ship, for periods substantially longer than 30 days. Moreover, these detainees could not challenge their detention in court. The *Lawyers for Human Rights* Court held that unlimited ship detention and the inability to challenge such detention constituted unjustifiable limitations of FC s 12(1)*(b)*. It read various provisions into the legislation to cure these defects.[3]

40.5 FC s 12(1)*(c)*: Public and Private Violence

The right in FC s 12(1)*(c)* 'to be free from all forms of violence from either public or private sources', though seldom mentioned, can be accredited with some of the most meaningful recent developments of the common law. While only recognized expressly under the Final Constitution, this right had already been recognized by the courts under the Interim Constitution.[4]

FC s 12(1)*(c)* draws its inspiration from art 5 of the Convention on the Elimination of All Forms of Racial Discrimination ('CERD'). Article 5 imposes duties on States Party to protect people from 'violence or bodily harm whether inflicted by government officials or by any individual, group or institution'.[5] In addition to these traditional negative duties, the Convention contains affirmative obligations to prohibit, to punish and to discourage violence.[6] While the apposite articles of

[1] *Lawyers for Human Rights* (supra) at para 33.
[2] Ibid at para 44.
[3] Ibid at para 43.
[4] See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) at para 44 the Constitutional Court found that IC s 11 imposed a duty on the state to prevent criminals in custody from committing violent acts against members of the public. This finding was followed by the High Court and the Supreme Court of Appeal. See *Carmichele v Minister of Safety & Security & Another* 2003 (2) SA 656 (C); *Minister of Safety and Security & Another v Carmichele* 2004 (3) SA 305 (SCA), 2004 (2) BCLR 133 (SCA)('*Carmichele SCA*').
[5] Convention on the Elimination of All Forms of Racial Discrimination, art 5*(b)*.
[6] Ibid art 2. These positive obligations contemplate both legislation and executive action to combat violence.

the CERD are directed exclusively towards racially-motivated carnage, FC s 12(1)*(c)* aims to thwart all forms of violence.[1]

(a) Violence

The term 'violence' has been defined by some commentators as a 'grave invasion of personal security'.[2] This denotation of the term suffers from several limitations.

First, we see little reason to distinguish, ab initio, 'grave invasions' from 'ordinary invasions' of personal security. The critical distinction is not the extent of the invasion, but its nature. For example, a person arbitrarily detained for three years would have experienced a 'grave invasion' of personal security, but it would hardly seem right to characterize that experience as 'violent'. Violence generally involves some immediate threat to life or physical security. (The source of this threat is immaterial.) Second, we think that the curtailment of FC s 12(1)*(c)*'s protection to 'grave' violations would fail many of those the right is meant to protect. Women (or men) trapped in abusive relationships may suffer from psychological, as well as physical violence that could probably not be successfully characterized as 'grave'. That such threats and acts of intimidation are often the hallmark of such relationships supports our contention that the violence contemplated by FC s 12(1)*(c)* ought not to be narrowly construed (even when FC s 12(2)'s right to psychological integrity may also be invoked.)

(b) Positive obligations

(i) *Vertical application*

The Constitutional Court first recognized the positive dimensions of FC s 12(1)*(c)* when considering a challenge to the Domestic Violence Act in *S v Baloyi*:

> The specific inclusion of private sources emphasises that serious threats to security of the person arise from private sources. Read with s 7(2), s 12(1) has to be understood as *obliging the State directly* to protect the right of everyone to be free from private or domestic violence.[3]

The Court subsequently confirmed the positive duty imposed on the state by FC s 12(1)*(c)* in *Carmichele v Minister of Safety and Security*.[4]

[1] See Currie & De Waal (supra) at 303 n51.

[2] Ibid at 304.

[3] *S v Baloyi (Minister of Justice & Another Intervening)* 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC) at para 11 (Emphasis added. Footnote omitted)(Domestic Violence Act 116 of 1998 read not to impose a reverse onus provision on accused.)

[4] 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC)('*Carmichele*').

In *Carmichele*, a woman had been attacked by a man — accused of rape and murder — who had recently been released from jail on bail. The gravamen of Carmichele's complaint was that the attack was a direct consequence of the failure of the state — in the form of the investigating officer and the prosecutor — to oppose bail for her attacker in a previous matter. Both the High Court and the Supreme Court of Appeal refused her claim. They held that the state had no legal duty to prevent the harm in question. Although Carmichele had failed to raise constitutional issues in either the High Court or the Supreme Court of Appeal, the Constitutional Court found that all courts have an obligation to develop the common law in light of the spirit purport and objects of the Bill of Rights.[1] The Constitutional Court then found, without specifically relying on FC s 12(1)*(c)*,[2] that

> there is a duty imposed on the State and all of its organs not to perform any act that infringes these rights [including s 12(1)*(c)*]. In some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.[3]

This holding has spawned a revolution in the law of delict.[4] This new duty — grounded in FC ss 39(2) and 12(1)*(c)* — extends the state's general duty to protect

[1] *Carmichele* (supra) at para 39.

[2] According to Marius Pieterse, two obvious reasons exist for the Court's silence in this regard. First, since the case had initially been brought in terms of the Interim Constitution, the Court did not want to address the thorny issue of retrospective effect. Second, the subsequent constitutional challenge was brought in terms of FC s 39(2). FC s 39(2)'s general obligation to develop the common law in light of the spirit, purport and objects of the Bill of Rights. See M Pieterse 'The Right to be Free from Public and Private Violence after *Carmichele*' (2002) 119 *SALJ* 27, 32. FC s 39(2), as one of the authors notes elsewhere, does not permit reliance on a specific substantive section of the Bill of Rights. S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 31.4*(e)*.

[3] *Carmichele* (supra) at para 44. In coming to this conclusion, the *Carmichele* Court rejected the position taken by the US Supreme Court in *De Shaney v Winnebago County Department of Social Services*. 489 US 189 (1988)(US Supreme Court declines to hold state liable for failure to prevent child abuse although state was on notice that such abuse had occurred.) The *Carmichele* Court preferred the reasoning of the European Court of Human Rights in *Osman v United Kingdom*. See *Carmichele* (supra) at para 45 quoting *Osman v United Kingdom* 29 EHHR 245 at para 115 ('It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that article 2 of the European Convention on Human Rights may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.') See also *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) at para 40 ('The State is further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse or degradation.')

[4] The Minister of Safety and Security has since been held liable for a failure to take positive steps in the following Supreme Court of Appeal cases: *Minister of Safety and Security & Another v Hamilton* 2004 (2) SA 416 (SCA)(State responsible for damage caused by a mentally unstable woman issued a gun licence); *Van Eeden v Minister of Safety and Security (Women's Legal Centre as Amicus Curiae)* 2003 (1) SA 389 (SCA), 2002 (4) All SA 346 (Police failure to close a gate allowed a dangerous prisoner to escape and to rape and assault a young woman); *Minister of Safety and Security v Van Duivenboden* 2003 (1) SA 389 (SCA)(The failure

its citizens by imposing liability in the event of egregious failures.[1] It is worth noting that a significant proportion of these successful delictual actions have vindicated the rights of women to be free from violence.

It is also worth noting that the courts have linked the right to freedom from violence to the constitutional value of accountability. In *Van Duivenboden*, the Supreme Court of Appeal wrote:

> Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights, in my view, the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case.[2]

The *Van Duivenboden* Court emphasized that delictual liability did not follow, automatically, from the state's failure to discharge its duties of accountability. Other kinds of remedies or extra-judicial mechanisms might well ensure the government's accountability.[3] However, the *Van Duivenboden* Court held that 'where the State's failure occurs in circumstances that offer no effective remedy other than an action for damages, the norm of accountability will . . . ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm.'[4]

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of the police failed to remove a gun from a man they knew to be dangerous led, almost ineluctably, to the shooting deaths of the man's wife and daughter.) The High Court has also acknowledged *Carmichele*'s revolution in the common law of delict. See *Seema v Lid van die Uitvoerende Raad vir Gesondheid, Gauteng* 2002 (1) SA 771 (T)(Authorities of state mental hospital have a duty to the public to ensure that patients do not escape and cause harm); *Moses v Minister of Safety and Security* 2000 (3) SA 106 (C)(Plaintiff's husband had been assaulted and killed by other inmates while in police custody); *Geldenhuys v Minister of Safety and Security* 2002 (4) SA 719 (C)(Police held liable for failure to provide speedy medical assistance.) In *Geldenhuys* Davis J wrote:

> 'The facts of this case recall a sad part of the apartheid past, of individuals left to die in cells, of a systematic destruction of human dignity of people who were in the custody of the police. That was our past and it can no longer be our future, for if it is, then the wonderful aspirations and magnificent dreams contained in the Constitution will turn to post-apartheid nightmares. The transformation of our legal concepts must, at least in part, be shaped by memory of that which lay at the very heart of our apartheid past. When considering police action, the past is of great importance in assisting to shape legal concepts which are congruent with our constitutional future.'

This decision was subsequently overruled by the Supreme Court of Appeal on the grounds that negligence had not been proven. See *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA). See also *Mpongwana v Minister of Safety and Security* 1999 (2) SA 794 (C)(The plaintiff was paralysed by a stray bullet while in a taxi. The shot was fired by a rival taxi organisation. She claimed against the minister as the police had known about the volatile relationship between the rival organisations and had failed to prevent it erupting in violence. The court recognised the validity of the claim in principle by dismissing an exception to the claim); *Botha v Minister van Veiligheid en Sekuriteit* 2003 (6) SA 568 (T)(While effecting an arrest a policeman accidentally shot the plaintiff who successfully claimed for damages against the Minister); *Van der Spuy v Minister of Correctional Services* 2004 (2) SA 463 (SE)(The court upheld a claim by an innocent bystander who was shot by an escaping prisoner.) For a general discussion of FC s 12(1)*(c)*'s impact on the law of delict see J Neethling 'Delictual Protection of the Right to Bodily Intergrity and Security of the Person against Omissions by the State' (2005) 122 *SALJ* 572.

[1] *Van Eeden* (supra) at para 23.

[2] *Van Duivenboden* (supra) at para 21. See also *Carmichele (SCA)* (supra) at para 37; *Van Eeden* (supra) at para 17.

[3] Ibid.

[4] Ibid at para 21.

The Constitutional Court in *Rail Commuters* extended the logic of *Van Duivenboden* to the failure of any organ of state to discharge its constitutionally-mandated delictual duties.[1] At the same time, the *Rail Commuters* Court agreed with the *Van Duivenboden* Court that, although there is a strong link between the right to freedom from violence and accountability, the constitutional requirement of accountability would not always result in a finding of delictual liability. O'Regan J outlined the *Rail Commuters* Court's approach as follows:

> In determining whether a legal duty exists whether in private or public law, careful analysis of the relevant constitutional provisions, any relevant statutory duties and the relevant context will be required. It will be necessary too to take account of other constitutional norms, important and relevant ones being the principle of effectiveness and the need to be responsive to people's needs.[2]

As the above quotation suggests, the Constitutional Court has not merely confined FC s 12(1)*(c)*'s reach to instances that require it to redefine delictual liability. The *Rail Commuters* Court overruled an earlier decision of the Supreme Court of Appeal[3] and concluded that the Final Constitution required that the statutory provisions governing Metrorail's responsibilities imposed a positive duty — that is, a prospective duty, on Metrorail 'to ensure that reasonable measures are in place to provide for the security of rail commuters.'[4] *Rail Commuters* reads the statutory provisions at issue through the lens of FC s 12(1)*(c)* and suggests that we would all be better served if the law were read to compel the state to prevent the violence in the first place and not simply to justify the award of damages after the fact.

[1] *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC)('*Rail Commuters*') at para 76 ('The principle that Government, and organs of State, are accountable for their conduct is an important principle that bears on the construction of constitutional and statutory obligations, as well as on the question of the development of delictual liability.')

[2] Ibid at para 78 (footnotes omitted). The reasons for this reliance on accountability are not entirely clear. Surely, the text of FC s 12(1)*(c)* provides sufficient basis for increasing the State's liability. The deployment of the value of 'accountability' serves two functions. Firstly, although a large number of 'accountability' cases have involved an element of violence, by relying on state accountability rather than the right to be free from violence, the courts have given themselves the opportunity to extend state liability to cases in which violence is absent. Indeed, a number of such 'accountability' cases have already occurred. Applicants seeking compensation for unfair administrative action have relied upon the extension of state liability recognized in the FC s 12(1)*(c)* 'accountability' cases. See, eg, *Olitzki Property Holdings v State Tender Board & Another* 2001 (3) SA 1247 (SCA), *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA). Secondly, the FC 12(1)*(c)* 'accountability' challenges have all been brought as statutory interpretation or development of the common law cases in terms of FC s 39(2). Thus, any support that can be found in the constitutional text to alter the current state of the law is of great rhetorical value. However, the reliance on accountability does detract from the State's specific duty, in terms of FC s 12(1)*(c)*, to protect especially vulnerable members of our community from violence.

[3] *Transnet Ltd t/a Metrorail & Others v Rail Commuters Action Group & Others* 2003 (6) SA 349 (SCA), 2003 (12) BCLR 1363 (SCA). The Supreme Court of Appeal decision had overruled the previous judgment of Davis J in the Cape High Court. See *Rail Commuter Action Group & Others v Transnet Ltd t/a Metrorail & Others (No 1)* 2003 (5) SA 518 (C), 2003 (3) BCLR 288 (C).

[4] *Rail Commuters* (supra) at para 84.

FC s 12(1)*(c)*, read with the requirement of accountability, has also broadened the common-law doctrine of vicarious liability.[1] In *K v Minister of Safety and Security*, the applicant had been raped by three on-duty policemen who had offered her a lift home. Both the High Court and the Supreme Court of Appeal rejected her delictual claim on the grounds that the policemen had been acting contrary to the purpose of their employment and that the Minister could accordingly not be held liable for their actions. O'Regan J found that the Supreme Court of Appeal had misunderstood the facts of the case and had therefore misapplied the common-law test. According to the Constitutional Court, the policemen who raped K had committed a crime while operating under the colour of law. Or to put the matter in slightly different terms, the officers simultaneously committed a crime that fell outside their duties and omitted to protect K from a crime that fell well within their duties. The omission created the basis for the finding of vicarious liability. The link drawn by the *K* Court between the commission of a crime and the failure to fulfil a constitutional duty echoes FC s 12(1)*(c)*'s link between the duty not to cause violence (negative) and the duty to prevent violence (positive).[2]

[1] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC)('*K*'). See also the Supreme Court of Appeal's judgment in *Minister of Safety and Security v Luiters* Case Number 213/05 (as yet unreported decision of 17 March 2006)(The Minister was held liable for the actions of an off-duty policeman who fired on nine innocent people while allegedly looking for robbers. At the time of writing, the case was on appeal to the Constitutional Court.)

[2] The state's obligation to prevent violence in terms of FC s 12(1)*(c)*, read with FC s 39(2), was further extended in *Omar v Government of the Republic of South Africa & Others (Commission for Gender Equality, Amicus Curiae* 2006 (2) SA 289 (CC), 2006 (2) BCLR 253 (CC)('*Omar*'). The applicant had challenged various provisions of the Domestic Violence Act 116 of 1998 that facilitated the issuance of protection orders and warrants for arrest on the grounds that they violated his rights to freedom and security of the person, access to courts and fair trial. The *Omar* Court rejected the applicant's challenges and justified the legislation on the grounds that FC s 12(1)*(c)* requires the state to take active steps to prevent domestic violence and to encourage victims to report all instances of it:

> Whereas the privacy of the home and the centrality attributed to intimate relations are valued, privacy and intimacy often provide the opportunity for violence and the justification for non-interference. Victims are ambivalent about their fate and reluctant to go through with criminal prosecution. It is understandable for the legislature to enact measures that differ from those generally applicable to criminal arrests and prosecutions. It is clear that the Act serves a very important social and legal purpose.

Ibid at para 18. FC s 12(1)*(c)* could potentially have played a similar interpretative role in *Road Accident Fund v Van der Merwe* CCT 48/05 (Unreported, 30 March 2006). The complainant's husband had intentionally run her over with his car and reversed over her again. The Road Accident Fund rejected her claim on the grounds that it was barred by the Matrimonial Property Act. The *Van der Merwe* Court held that the challenged provision of the Matrimonial Property Act violated FC s 9(1) because it often impaired a woman's ability to claim adequate compensation. Although the *Van der Merwe* Court did not rely upon FC s 12(1)*(c)* in reaching its conclusions, the Court did have this to say in response to the amicus' invocation of the right to be free from violence: 'Spouse batterers and wrongdoers in delict are in effect immunised from making good patrimonial damages of their marriage partners. This ouster provision seems to be at odds with the constitutional protection extended to a person's bodily integrity.' Ibid at para 69.

(ii) *Horizontal application*

Although a number of the aforementioned matters engage domestic violence, they do so in terms of existing legislation designed to protect women. The courts have not, as yet, been required to use FC s 12(1)*(c)* to develop the common law of delict in purely private disputes.[1]

(c) Negative obligations

FC s 12(1)*(c)* imposes both positive obligations and negative obligations.[2] These two duties often overlap. Whenever the police arrest a suspected criminal or

[1] The existence of a duty to act that can give rise to a delictual liability is a well-ventilated topic. At common law, the presence of a number of factors can establish liability for an omission:

(1) Whether there was prior conduct which created a danger; the existence of prior conduct was once considered an absolute requirement for liability; see, eg, *Silva's Fishing Corporation (Pty) Ltd v Mazewa* 1957 (2) SA 256 (A)(Owner of fishing fleet liable for failing to rescue drifting boat);

(2) The control of a dangerous object; see, eg, *Minister of Forestry v Quathambla (Pty) Ltd* 1973 (3) SA 69 (A)(Owner liable for fire on property under his control); *Oosthuizen v Homegas (Pty) Ltd* 1992 (3) SA 463 (O)(Liability for explosion caused by failure to properly warn or instruct about dangers); *Cape Town Municipality v Butters* 1996 (1) SA 473 (C)(Municipality liable for failure to properly warn of dangerous slope next to parking area); see also Neethling, Potgieter & Visser (supra) at 63–66;

(3) The existence of a rule of law; see *Minister van Polisie v Ewels* 1975 (3) SA 590 (A)('*Ewels*')(Existence of a duty to prevent crime was a factor in the holding that a the Minister was liable for the failure of a policeman to prevent an assault); see also *Carmichelle* (supra); Neethling, Potgieter & Visser (supra) at 66–68;

(4) The existence of a special relationship between the parties; see *Mtati v Minister of Justice* 1958 (1) SA 221 (A)(Relationship between police officer and detained person); *Ewels* (supra)(Relationship between policeman and citizens); *De Beer v Sergeant* 1976 (1) SA 246 (T)(Duty on parent to prevent child committing a delict); see, generally, Neethling, Potgieter & Visser (supra) at 69–70;

(5) The holding of a particular office; see *Macadamia Finance Ltd v De Wet* 1991 (4) SA 273 (T)(Liquidators liable for failure to insure assets);

(6) Contractual undertaking to protect a third party; see *SAR & H v Estate Saunders* 1931 AD 276 (Liability for failure to move a trailer in terms of a contract); *Blore v Standard General Insurance Co Ltd* 1972 (2) SA 89 (O)(Garage accepted responsibility for safety of car's steering mechanism and therefore liable for loss suffered as a result); see also Neethling, Potgieter & Visser (supra) at 70–71;

(7) The creation of an impression that a third party's interests will be protected; See *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W)(Security firm protecting premises owes duty to third parties lawfully on the premises to protect their property). See also Neethling, Potgieter & Visser (supra) at 71–72.

None of these factors constitute necessary or sufficient conditions for the imposition of a duty. Courts often require the presence of a number of such factors before finding that an omission to act violated a duty of care. See Neethling, Potgieter & Visser (supra) at 72.

The courts are, in this domain, developing a fairly progressive doctrine even where they do not invoke FC s 12(1)*(c)*. For example, the Supreme Court of Appeal in *Media 24 v Grobler* found that employers have a positive duty to protect their employees not only from physical violence, but also from such forms of psychological violence as sexual harassment. *National Media 24 & Another v Grobler* 2005 (6) SA 328 (SCA) at para 65 ('This duty cannot in my view be confined to an obligation to take reasonable steps to protect them from *physical* harm caused by what may be called *physical* hazards. It must also in appropriate circumstances include a duty to protect them from *psychological* harm caused, for example, by sexual harassment by co-employees.' (Our emphasis))

[2] Although FC s 12 requires no further justification, part of the rationale behind the prohibition on public violence is to promote greater respect for life and dignity. Langa J explains this commitment as follows:

break up a riot, they must simultaneously act *positively* to prevent further violence from private sources and at the same time act *negatively* to minimise the violence they necessarily employ, as agents of the state, to achieve their aims.

The Constitutional Court considered the relationship between these two obligations in *Walters*. At issue in this case was the constitutionality of provisions allowing the police to use force, including lethal force, when affecting an arrest.[1] Kriegler J reasoned that an arrest was never an end in itself, but merely one means of getting a suspect into court. As a result, force could only be justified when an arrest was necessary to achieve that goal. If an arrest is necessary, the force employed must be the minimum necessary to effect the arrest,[2] and must be proportionate with respect to the offence committed or the continued threat of violence.[3]

Implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion. In this new context, then, the role of the State becomes clear. For good or for worse, the State is a role model for our society. A culture of respect for human life and dignity, based on the values reflected in the Constitution, has to be engendered, and the State must take the lead. In acting out this role, the State not only preaches respect for the law and that the killing must stop, but it demonstrates in the best way possible, by example, society's own regard for human life and dignity by refusing to destroy that of the criminal. Those who are inclined to kill need to be told why it is wrong. The reason surely must be the principle that the value of human life is inestimable, and it is a value which the State must uphold by example as well.

S v Makwanyane 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 222.

[1] *Ex Parte Minister of Safety and Security & Others: In re Ex Parte Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC). The constitutional challenges to the Criminal Procedure Act were not limited to FC s 12(1)*(c)*. The applicants raised challenges grounded in the right to life (FC s 11), the right to human dignity (FC s 10) and other rights to freedom and security of the person (specifically, FC ss 12(1)*(e)* and 12(2)*(b)*). Although the majority of the references in the judgment are to the right to bodily integrity — FC s 12(2) — the Court's observations remain relevant to our understanding of FC s 12(1)*(c)*. See Currie & De Waal (supra) at 309. For a more detailed account of the constitutional dimensions of arrest, see F Snyckers & J le Roux 'Criminal Procedure' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 51.

[2] *Walters* (supra) at para 54 ('Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.')

[3] Ibid ('In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrester or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances.') See also *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA), 2001 (11) BCLR 1197 (SCA) at paras 19–20 (Court interprets statute to only allow use of force when there are reasonable grounds to believe that the suspected offence involved the infliction or threat of serious bodily harm or where the suspect poses an immediate threat of serious bodily harm to him or her, or a threat of harm to members of the public.)

The requirement of proportionality echoes the sentiments of Justice White in *Tennessee v Garner* 471 US 1 (1985) 11–12 ('It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorises the use of deadly force against such fleeing suspects. It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or

40.6 FC s 12(1)*(d)*: TORTURE

(a) Definition

Before offering a definition of 'torture', it may help to consider the purposes for which torture has, traditionally, been used: (1) as part of the victor's pleasure after military victory; (2) to promote terror in the general population; (3) as a form of punishment; (4) as a means of extracting confessions; and (5) as a method of gathering intelligence.[1] Luban notes that the last purpose is both the most recent to develop and the only one that citizens of liberal democracies accept as a legitimate justification.[2] As a result, our discussion of the definition of and the justification for torture will be limited to the relationship, if any, between torture and the need to gather information deemed necessary to protect the general safety of the commonweal.[3]

South African courts have not, as yet, been called upon to determine the scope

to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.')

The High Court has twice held that allowing the police to order the surgical removal of a bullet from a suspect's leg amounted to a violation of FC s 12(1)*(c)*. The removal of the bullet constituted violence beyond that necessary to effect an arrest. See *S v Xaba* 2003 (2) SA 703, 708H (N); *S v Gaqa* 2002 (1) SACR 654, 658H (C).

The dual duties of the police become particularly complicated when two opposing protesting groups resort to violence. The European Court of Human Rights held that the police have a duty to interfere, with force if necessary, to prevent the two private groups from causing further violence. See *Platform Ärtzte fur dasLeben v Austria* 13 EHRR 204 (1988); S Woolman 'Freedom of Assembly' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 43.

[1] See D Luban 'Liberalism, Torture, and the Ticking Bomb' (2005) 91 *Virginia Law Review* 1425, 1429–37.

[2] Ibid at 1437. According to Luban, the utilitarian moral philosophy that informs political liberalism enables some liberals to conceive of torture, in the worst case scenario, as consistent with liberalism. Luban writes:

> To speak in a somewhat perverse and paradoxical way, liberalism's insistence on limited governments that exercise their power only for instrumental and pragmatic purposes creates the possibility of seeing torture as a civilized, not an atavistic, practice, provided that its sole purpose is preventing future harms. Now, for the first time, it becomes possible to think of torture as a last resort of men and women who are profoundly reluctant to torture. And in that way, liberals can for the first time think of torture dissociated from cruelty — torture authorized and administered by decent human beings who abhor what circumstances force them to do. Torture to gather intelligence and save lives seems almost heroic. For the first time, we can think of kindly torturers rather than tyrants.

Ibid.

[3] Sachs J offers a brief look at the history of torture in Southern Africa from the outset of Dutch settlement in his concurring judgment in *Makwanyane. S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC) at paras 384–87. For a brief exposition of torture's evolution into an acceptable form of law enforcement, see S Williams 'Your Honor, I Am Here Today Requesting The Court's Permission to Torture Mr. Doe': The Legality of Torture as a Means to an End versus The Illegality of Torture as a Violation of Jus Cogens Norms Under Customary International Law' (2004) 12 *University of Miami International and Comparative Law Review* 301, 307–11.

of the term 'torture'.[1] However, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'), which has been ratified by South Africa, offers the following authoritative international definition:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[2]

Four essential features of torture emerge from this definition:[3] *(a) severe* mental or physical pain or suffering; *(b) intentionally* inflicted; *(c)* for a listed *purpose*;[4] and *(d)* by, or with the consent of, an *official* actor. While intention and official sanction are undoubtedly important elements for a finding of torture, it is the notion of 'severity' that attracts the greatest amount of jurisprudential debate.[5]

[1] See *Fose v Minister of Safety Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC)('*Fose*'). The Constitutional Court was asked to consider whether a man was entitled to constitutional damages in addition to delictual damages for the severe assaults he had suffered while in police custody. The *Fose* Court casually referred to the assaults as 'torture'. Ibid at paras 81, 89, 101 and 103. Indeed, the Court accepted allegations that 'torture' was a 'widespread and persistent phenomenon at South African police stations.' Ibid at para 103. However, it made no attempt to define the term.

The Constitutional Court has been presented with other opportunities in which it could have analyzed law or conduct in terms of the prohibition of torture. It has preferred, however, to view the challenged law or conduct in terms of the prohibition on 'cruel, inhuman and degrading treatment or punishment'. See *Makwanyane* (supra) at para 78 (Death penalty constitutes cruel, inhuman and degrading punishment.) However, Chaskalson P suggests, without making a specific finding, that the death penalty would not amount to torture. *Makwanyane* (supra) at para 97. Similarly, in *Williams,* while the Court was willing to engage some foreign jurisprudence on torture, it ultimately found that the whipping or the caning of juveniles constituted cruel, inhuman and degrading punishment. *S v Williams* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at para 63.

[2] (1984) UN Doc A/39/51 (ratified by South Africa on 10 December 1998) art 1.

[3] See LM Keller 'Is Truth Serum Torture?' (2005) 20 *American University International Law Review* 521, 569.

[4] There is some disagreement over the content of this element. See N Jayawickrama *The Judicial Application of Human Rights Law* (2002) 307. As a general matter, the listed purposes involve the domination of the victim to achieve a predetermined end.

[5] The United Nations General Assembly has declared that 'torture constitutes an *aggravated and deliberate* form of cruel, inhuman or degrading treatment or punishment.' Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975) GA res 3452, UN Doc A/10034 ('Torture Declaration') art 1(2)(Our emphasis). Intention and severity also form the backbone of the European Court's and European Commission's understanding of torture. In *Denmark v Greece*, the European Commission wrote: 'The word 'torture' is often used to describe inhuman treatment which has a purpose such as the obtaining of information or confessions, or the infliction of punishment, and is generally an aggravated form of inhuman and degrading treatment.' Application Numbers 3321–3/67 and 3344/67 (1969) 12 *European Commission for Human Rights Yearbook* 186. The European Court expressed a very similar statement in *Ireland v The United Kingdom* (1978) 2 EHRR 25 ('*Ireland v UK*'). The *Ireland v UK* Court found that 'it was the intention that the Convention, with its distinction between 'torture' and 'inhuman or degrading treatment' should by the first of these terms attach a special stigma to *deliberate* inhuman treatment causing *very serious* and cruel suffering.' Ibid at para 167 (our emphasis).

The practical difficulties associated with determining whether pain or suffering is sufficiently severe to constitute torture are well documented in *Ireland v The United Kingdom*. In response to increased 'terrorist' activity by the IRA and other armed Irish activists, the United Kingdom began using various 'techniques' to extract information. The 'techniques' involved protracted standing against the wall on tip-toes, the covering of the suspect's head throughout most of the detention, the exposure of the suspect to loud noise for a prolonged period of time, and deprivation of sleep, food and drink. The European Commission on Human Rights found that these practices, employed collectively, amounted to torture.[1] The European Court on Human Rights, in a divided judgment, reversed the Commission's decision. It wrote:

> Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the peculiar intensity and cruelty implied by the word torture.[2]

A majority of the *Ireland v The United Kingdom* Court recognized that an undeniable benefit attaches to limiting the kinds of practices we identify as torture. If every undesirable interrogation technique amounts to torture, then the term 'torture' may lose its capacity to elicit the desired levels of public repugnance.

The conflicting conclusions the European Commission and the European Court reached regarding the 'levels of suffering' required to support a finding of torture reflect but one of the unsettled dimensions of this unsettling practice. Other courts and commentators have noted, however, that to focus on the severity of pain as the primary criterion for a finding of torture is to misconceive the essence of torture itself. As these writers often point out, the victims of war, disease and starvation often experience greater degrees of pain. What distinguishes torture from these other horrific experiences is that the pain is associated with a particularly malignant set of motives: the domination and the destruction of the personality of individual.[3] It is not pain, but cruelty bordering on barbarism

[1] *Ireland v United Kingdom* Commission Report (25 January 1976).

[2] *Ireland v UK* (supra) at para 167. The Israeli Supreme Court has held that similar practices — prolonged standing or uncomfortable sitting positions, tight hand or ankle cuffing, loud noise, sleep deprivation, hooding, cold rooms, and violent shaking — do not amount to torture. See *Public Committee Against Torture in Israel v The State of Israel* (1999) 53(4) PD 817 reprinted as *Supreme Court of Israel: Judgment Concerning the Legality of the General Security Services Interrogation Method* (1999) 38 ILM 1471.

[3] While arguing that the threat of escalating pain can constitute torture, Parry contends that torture 'can include not just the most intensely painful practices but also all the practices that use pain to punish or gather information, upend the victim's worldview, and express the domination of the state and the torturer'. J Parry 'What is Torture, Are We Doing it, and What if We Are?' (2003) 64 *University of Pittsburgh Law Review* 237, 248. Copelon argues that

> to treat physical brutality as the sine qua non of torture obscures the essential goals of modern official torture: the breaking of the will and the spread of terror. It obfuscates the relationships between acts of violence and the larger context of torture, between physical pain and mental stress, and between mental integrity and human dignity. It ignores the facts that abuse of the body is humiliating as well as searing, and that the body is abused and controlled not only for obscene sadistic reasons but ultimately as a pathway to the mind and spirit.

R Copelon 'Recognizing the Egregious in the Everyday: Domestic Violence as Torture' (1994) 25 *Columbia Human Rights Law Review* 291, 309–10.

that distinguishes torture from other forms of physical violence or psychological abuse. So, for example, in *Estrella v Uruguay* the Human Rights Commission held that threats of violence to friends or relatives, the threat of deportation and the mock amputation of an arm with an electric saw — despite the infliction of minimal amounts of physical pain — amount to torture.[1]

Making 'severity' the linchpin of torture analysis also enables proponents of novel interrogation techniques to distinguish their more 'humane' forms of information extraction from such medieval forms of persecution as the rack.[2] Modern interrogation practices — often described as 'torture-lite' — may seem benign by comparison.[3]

The third requirement — the official sanction for such abuse — is often taken for granted in the international literature because the cases themselves turn on allegations of brutality by state actors.[4] That said, official sanction for this form of physical abuse and psychological violence seems to us to lie at the heart of contemporary debates about the nature of, and the justification for, torture. For example, our disgust at the treatment of prisoners at Guantanamo Bay stems, in large part, from the fact that such treatment was officially sanctioned by the US government.[5]

[1] Communication No 74/1980 *HRC 1983 Report* (1983) Annex XII. See also *Cariboni v Uruguay* Communication No 159/1983 *HRC 1988 Report* (1988) Annex VII.A (A university professor was kept hooded and sitting straight for seven days. When he had a meal he had to kneel and use the chair as a table. He was only taken to the toilet twice a day. He could often hear loud shrieks, possibly from a nearby torture in progress. The shrieks were accompanied by very loud music and noise. He was often threatened with torture and abruptly moved to a new location.) See also *E Quinteros and MC Almeida de Quinteros v Uruguay* Doc A/38/40 (1981)(Mother of daughter who was tortured also a 'victim of the violations suffered by her daughter.')

[2] As Parry has noted, '[t]he difference between wall-standing and the rack is a matter of degree, not of kind.' Parry (supra) at 249. See also *Ireland v UK* (supra) at 116 (O'Donoghue J, dissenting)('One is not bound to regard torture as only present in a medieval dungeon where the appliances of rack or thumb screw or similar devices were employed. Indeed, in the present day world there can be little doubt that torture may be inflicted in the mental sphere.')

[3] See RB Schechter 'Intentional Starvation as Torture: Exploring the Gray Area Between Ill-treatment and Torture' (2003) 18 *American University International Law Review* 1233.

[4] As a general matter, torture is understood to be a form of public, state-sanctioned violence. Private violence — no matter how gruesome — does not qualify as torture. But see Copelon (supra) at 342 (Argues that domestic violence should be regarded as torture. According to Copelon there is no real difference between the dominant position of the state and the position of a domestic abuser. Both are in a position of complete and often unquestionable control over their victim.)

[5] See *Tyrer v United Kingdom* (1979-80) EHRR 1 at para 33, cited with approval in *Williams* (supra) at para 33 ('Furthermore, [corporal punishment] is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment — whereby he was treated as an object in the power of the authorities — constituted an assault on precisely that which is the main purpose of art 3 to protect, namely a person's dignity and physical integrity. The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender.') In *Aydin v Turkey*, the European Commission for Human Rights held that one of the factors that raised the treatment of the complainant to the level of torture was that it was 'committed by a person in authority over the victim'. *Commission Report* (7 March 1996) at para 189.

(b) Justification

In *S v Makwanyane* Chaskalson P (as he then was) wrote that '[i]t is difficult to conceive of any circumstances in which torture, which is specifically prohibited under IC s 11(2), could ever be justified.'[1] Even in times of war or public emergency torture is, under international law, absolutely prohibited.[2] But while the Final Constitution does not allow derogation from FC s 12(1)*(d)* or *(e)* during a state of emergency,[3] it does not exclude the possibility that legislation permitting torture in specific circumstances could be justified under FC s 36. The crisp question, in this section, is whether 'conditions exist in which torture might be justifiably used to prevent the destruction of the constitutional order itself, the death of millions of this country's inhabitants or, perhaps, just one other life'.[4]

Recent allegations of torture of suspected terrorists and prisoners of war by US forces in Iraq and other parts of the world have rekindled serious academic

[1] *Makwanyane* (supra) at para 97. In his concurring judgment, Sachs J also suggests that the prohibition of torture may be non-justifiable. He writes:

> In the case of other constitutional rights, proportionate balances can be struck between the exercise of the right and permissible derogations from it. In matters such as torture, where no derogations are allowed, thresholds of permissible and impermissible conduct can be established.

Ibid at para 352. The implication of this statement is that once an act is classified as torture, then it can no longer be justified.

[2] CAT art 2(2) states that: 'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.' These words are echoed in art 3 of the Torture Declaration and art 5 of the American Torture Convention. Article 5 of the American Torture Convention precludes the use of such factors as 'the dangerous character of the detainee or prisoner' or 'the lack of security of the prison establishment' to justify torture. Article 9 of the OAU Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa also specifically ban the use of any type of necessity, threat of war or national emergency as a justification for torture. The extensive ratification of CAT (138 state parties) and the proliferation of similar treaties and guidelines that prohibit the justification of torture could be used to argue that the prohibition is in fact part of international customary law, if not a jus cogens norm. International customary law forms part of South African law (FC s 232), legislation must be interpreted to accord with international law if possible (FC 233) and the Constitution itself must be interpreted in light of international law (FC s 39(1)*(b)*). See, generally, H Strydom & K Hopkins 'International Law' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 31. All these factors suggest that torture would not be justifiable under the Final Constitution. However, international customary law is only binding only if it is not inconsistent with the Final Constitution or an Act of Parliament. The Final Constitution would require an independent inquiry to determine whether torture could ever be justified. It seems safe to say that torture under any circumstances violates South Africa's international obligations under CAT, a reasonable reading of international customary law and the general trend amongst constitutional democracies.

[3] FC s 35(5) lists torture and cruel, inhuman and degrading punishment as non-derogable rights. See, generally, N Fritz 'States of Emergency' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 60.

[4] I Currie & S Woolman 'Freedom and Security of the Person' in M Chaskalson, J Klaaren, J Kentridge, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) 39.3*(b)*.

debate about when, if ever, torture can be justified.[1] For those who advocate the judicious use of torture, the preferred intuition pump is the 'ticking-bomb' scenario: a bomb has been planted in a densely populated area and the police have a man who knows where the bomb is and how to disarm it. For torture abolitionists, this scenario is what Wittgenstein would call 'the picture that bewitches us'.[2] It serves as an effective (but misleading) metaphor because it is loaded in favour of the judicious, but highly selective, use of torture: because the 'terrorist' possesses the relevant information for disarming the threat to our safety, torture will succeed in extracting accurate information. But this scenario, abolitionists contend, relies on a set of assumptions that do not in fact obtain:[3] knowledge of the bomb's existence and its location, and the ability of the suspect to defuse the bomb or somehow halt the countdown to detonation.[4] Because these assumptions are built in to the 'ticking-bomb' scenario, it commits us to accepting the use of torture when it is not, in fact, certain that torturing the suspected terrorist will save lives. Moreover, once we accept that torture may be a legitimate interrogation technique for significant threats to life where an explosion is imminent, the

[1] For a vigorous defence of state-sanctioned torture, see A Dershowitz *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (2002)(Dershowitz advocates a system of judicial warrants for torture.) For a critique of 'torture warrants', see M Strauss 'Torture' (2004) 48 *New York Law School Law Review* 201, 271–73. For other justifications of torture, see M Bagaric & J Clarke 'Not Enough Official Torture in the World: The Circumstances in Which Torture is Morally Justifiable' (2005) 39 *University of San Francisco Law Review* 581, 611 ('The only situation where torture is justifiable is where it is used as an information gathering technique to avert a grave risk. In such circumstances, there are five variables relevant in determining whether torture is permissible and the degree of torture that is appropriate. The variables are (1) the number of lives at risk; (2) the immediacy of the harm; (3) the availability of other means to acquire the information; (4) the level of wrongdoing of the agent; and (5) the likelihood that the agent actually does possess the relevant information. Where (1), (2), (4) and (5) rate highly and (3) is low, all forms of harm may be inflicted on the agent — even if this results in death.') See further, Parry (supra) at 258 ('There is no way to escape the fact that torture is an awful practice. People's lives are ruined, often beyond repair. The drafters of the Convention [Against Torture] were right: no one should torture; no one should suffer from torture; torture is always wrong' but 'Government agents should use torture only when it provides the last remaining chance to save lives that are in imminent peril.') See also J Parry & W White 'Interrogating Suspected Terrorists: Should Torture Be an Option?' (2002) 63 *University of Pittsburgh Law Review* 743, 760; A Moher 'The Lesser of Two Evils: An Argument for Judicially Sanctioned Torture in a Post-9/11 World' (2004) 24 *Thomas Jefferson Law Review* 469 (Argues that the Dershowitzian model is preferable to the current climate of secrecy in which torture occurs unregulated.)

[2] This criticism of the 'ticking-bomb' scenario is largely parasitic on Luban's insights and the criticism offered by Marcy Strauss. See Strauss (supra) at 265–68.

[3] For arguments against torture under any circumstances, see Luban (supra)(Examines torture's place in liberal theory and argues that the 'ticking-bomb' scenario is a fantasy used to justify the unjustifiable); S Williams 'Your Honor, I Am Here Today Requesting The Court's Permission to Torture Mr. Doe': The Legality of Torture as a Means to an End v. The Illegality of Torture as a Violation of Jus Cogens Norms under Customary International Law' (2004) 12 *University of Miami International and Comparative Law Review* 301, 360 ('If we, as human beings, wish to continue to characterize ourselves as 'civilized,' torture should never be legalized because it is the ultimate act of incivility and the epitome of inhumanity.'); Strauss (supra) at 274 ('Only an absolute ban on torture without exception will enable this nation to resist the impulse to ignore critical core values in favor of an elusive security.')

[4] See Luban (supra) at 1442–44.

other danger is that we will then feel that other potentially life-threatening situations warrant the same interrogation techniques.[1] Our bewitchment may lead us to endorse the use of torture to ensure, for example, the speedy return of a kidnapped child.[2]

Of course, the slippery-slope argument of the abolitionist is itself an intuition pump. It is designed to sow sufficient doubt about the efficacy of torture in the collective consciousness that we, the political community, will ultimately no longer be inclined to view the benefits that might flow from torture as ever sufficient to outweigh the costs.

Because neither the advocates nor the abolitionists can rely on 'facts' with respect to the 'ticking-bomb scenario', the arguments for and against torture cannot rely on the conclusions each side draws from this particular intuition pump. And for that reason we too wish to remain agnostic as to the justifiability of torture under the kinds of circumstances described above.

A more compelling and nuanced argument against torture — one that does not rely upon cost-benefit analysis — has recently been offered by Michael Ignatieff. First, Ignatieff contends that:

> [P]hysical torture . . . inflicts damage on those who perpetrate it as well as those who are forced to endure it. Any liberal democratic citizen who supports the torture of terrorist suspects in ticking-bomb cases must accept responsibility for the psychological damage done to victim and interrogator. Torture exposes agents of a democratic state to the ultimate moral hazard. The most plausible case for an absolute ban on physical torture relates precisely to this issue of moral hazard. No one should have to decide when torture is or is not justified, and no one should be ordered to carry it out. An absolute prohibition is legitimate because in practice it relieves public servants from the burden of making intolerable choices.[3]

Second, the damage done by torture extends beyond the immediate participants. Ultimately, torture implicates each and every citizen:

> For torture, when committed by a state, expresses the state's ultimate view that human beings are expendable. This view is antithetical to the spirit of any constitutional society whose raison d'être is the control of violence and coercion in the name of human dignity and freedom.[4]

[1] The scenario is normally presented as a simple utilitarian 'ends-justify-the-means' argument. It is also sometimes characterized as a form of self-defence. See Strauss (supra) at 260–61.

[2] Luban describes the slippery slope argument as follows:

> The real debate is not between one guilty man's pain and hundreds of innocent lives. It is the debate between the certainty of anguish and the mere possibility of learning something vital and saving lives. And, above all, it is the question about whether a responsible citizen must unblinkingly think the unthinkable and accept that the morality of torture should be decided purely by totaling up costs and benefits. Once you accept that only the numbers count, then anything, no matter how gruesome, becomes possible. 'Consequentialist rationality,' as Bernard Williams notes sardonically, 'will have something to say even on the difference between massacring seven million, and massacring seven million and one.

Luban (supra) at 1444, citing B Williams 'A Critique of Utilitarianism' in JJC Smart & B Williams *Utilitarianism: For and Against* (1973) 75, 93.

[3] M Ignatieff 'Evil under Interrogation: Is Torture ever Permissible?' *Financial Times* (May 15, 2004)('Evil under Interrogation'). See also M Ignatieff *The Lesser Evil: Political Ethics in an Age of Terror* (2004).

[4] Ignatieff 'Evil under Interrogation' (supra).

In sum, what makes torture anathema for Ignatieff is not so much the pain or the indignity experienced by the person tortured, but the extent to which the practice of torture undermines the 'dignity' of the persons charged with the responsibility of extracting information by such means, and the collective 'dignity' of a society that tolerates such practices. In this respect, Ignatieff sounds a set of cautionary notes consistent with the dignity jurisprudence of our own Constitutional Court. In *Port Elizabeth Municipality*, the Court writes:

> It is not only the *dignity* of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society *as a whole* is demeaned when state action intensifies rather than mitigates their marginalisation.[1]

Dignity, as one of the authors of this chapter has written elsewhere, is not simply a constellation of negative duties owed by the state to each human subject, or a set of positive entitlements that can be claimed by each member of the polity. Dignity is that which binds us together as a community, and it occurs only under conditions of mutual recognition and mutual respect.[2]

40.7 FC s 12(1)*(e)*: Cruel, Inhuman or Degrading Treatment or Punishment

(a) Components of FC s 12(1)*(e)*

FC s 12(1)*(e)* prohibits six distinct forms of mischief: cruel treatment; inhuman treatment; degrading treatment; cruel punishment; inhuman punishment; and degrading punishment.[3]

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[1] See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) at para 18 (emphasis added).

[2] See S Woolman 'Dignity' (supra) at 36-15. The kind of community that both Ignatieff and the Constitutional Court have in mind is captured by Langa J's apercu on ubuntu in *Makwanyane*. Langa J explains how ubuntu illuminates the right not to be tortured or to be subject to cruel, inhuman or degrading treatment as follows:

> [Ubuntu exists in] a culture which places some emphasis on *communality* and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to *unconditional respect*, *dignity*, value and acceptance from the members of the community such a person happens to be part of. It also entails the converse, however. The person has a corresponding *duty* to give the same respect, *dignity*, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and *co-responsibility* and the mutual enjoyment of rights by all.

Makwanyane (supra) at paras 224–25 (emphasis added). Langa J, like Ignatieff, connects the dignity of discrete individuals to the solidarity necessary to maintain the kind of community contemplated by the Final Constitution. See also *Khosa* (supra) at para 74 (Court writes that the Final Constitution commits us to an understanding of dignity in which 'wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole'); S Hoctor 'Dignity, Criminal Law and the Bill of Rights' (2004) 121 *SALJ* 265, 315 ('Dignity has a communitarian aspect: by requiring respect for others' claims to dignity, vindication of the human dignity of all is better assured, and a community of mutual co-operation and solidarity is fostered.')

[3] *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at paras 93 and 276; *S v Williams* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC)('*Williams*') at para 20; *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC)('*Dodo*') at para 35; *S v Niemand* 2002 (1) SA 21 (CC), 2001 (11) BCLR 1181

(i) *Treatment and punishment*

The first important terms to understand are 'treatment' and 'punishment'. Plainly, if the challenged practice cannot be characterized as either 'punishment' or 'treatment', then FC s 12 cannot be successfully invoked.[1]

'Punishment' embraces most criminal sanctions. The death penalty (*Makwanyane*), corporal punishment (*Williams*) and imprisonment (*Dodo*) have all been found, without any difficulty, to constitute 'punishment' for the purposes of FC s 12(1)*(e)*. It remains unclear, however, whether fines, or the confiscation of a licence, fall within this term. The horizontal application of 'punishment' could also extend beyond purely criminal sanctions to disciplinary procedures in the workplace, schools or universities.[2] 'Punishment' is, in reality, a subset of 'treatment'. Generally, punishment should be understood as a form of treatment by an authority — public or private — occasioned by the transgression of a rule.

But what, then, is 'treatment'? In *S v Ncube* the Zimbabwean Supreme Court remarked that

> [t]reatment has a different connotation from punishment. It seems to me that what is envisaged is treatment which accompanies the sentence. In other words, the conditions associated with the service of sentences of imprisonment are now subject to the proscription. The frequency and conditions of searches of convicts and remand prisoners, the denial of contact with family and friends outside the prison, crowded and unsanitary prison cells and the deliberate refusal of necessary medical care, might afford examples.[3]

'Treatment' would also encompass the circumstances in which a person is kept in custody prior to punishment. For example, in *S v Huma* the High Court held that the taking of fingerprints was not punishment, but did amount to treatment.[4] In *Dilworth v Reichards*, Claassen J held that knowingly subjecting an innocent man to arrest and several appearances in court was a '*prima facie*' violation of FC s 12(1)*(e)*.[5]

(CC) at para 21; *S v Huma* 1996 (1) SA 232, 236A (W)('*Huma*'). Similar provisions in the Namibian and Zimbabwean constitutions have also been interpreted disjunctively. See *Ex parte Attorney General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76, 86 (NmS); *S v Ncube; S v Tshuma; S v Ndhlovu* 1988 (2) SA 702, 715 (ZS)('*Ncube*').

[1] See P Hogg *Constitutional Law of Canada* (3rd Edition, Loose-Leaf, RS 1, 2004) 50.2.

[2] See *Tyrer v United Kingdom* (1979–80) 2 EHRR 1 (Corporal punishment in school specifically held to be 'punishment', not treatment.)

[3] *Ncube* (supra) at 715E–F. At international law, the following forms of treatment — during punishment — have been found to amount to cruel inhuman or degrading treatment: *Massiotti v Uruguay* Communication No 25/1978 (1982) HRC Report Annex XVIII and *Bazzano v Uruguay* Communication No 5/1977 (1979) HRC Report Annex VII (Overcrowding in prisons); *Cyprus v Turkey* (1976) 4 EHRR 482 at para 405 and *Whyte v Jamaica* Communication No 732/1997 (1998) HRC Report Annex XI.V (Withholding of food, water or adequate medical treatment); *Young v Jamaica* Communication No 615/1995 (1998) HRC Report Annex XI.J (Repeated soaking of bedding); *Ireland v The United Kingdom* (1978) 2 EHRR 25 ('*Ireland v UK*')(Combination of practices including prolonged standing, sleep deprivation and exposure to loud noise while in custody are 'treatment' not 'punishment').

[4] *Huma* (supra) at 235H.

[5] *Dilworth v Reichard* 2003 (4) BCLR 388, 402F (W)(The plaintiff and defendant were both in the vicinity of a shooting. The plaintiff was arrested and charged. The defendant knew that the plaintiff had been charged and that the plaintiff was innocent. The plaintiff was subsequently released. The defendant was then arrested and eventually convicted. The plaintiff sued the defendant for failing to report his involvement to the police. The High Court upheld the claim.)

Neither FC s 12 nor the Constitutional Court, however, confines the extension of 'treatment' to events that occur during custody or imprisonment. Such a narrow reading would make 'treatment' a mere adjunct of 'punishment'. In *Mohamed v President of the Republic of South Africa*, a unanimous Constitutional Court held that the deportation or extradition of a person within the custody of South African law enforcement officials to the receiving state without first obtaining the assurance from the receiving state that the death penalty will not be imposed impairs FC s 12(1)*(e)*.[1] The deportation or the extradition itself, in *Mohamed*, constitutes unconstitutional 'treatment'.[2] Even further outside the realm of criminal sanction, the European Commission of Human Rights has found that the invidious differentiation of racial groups by immigration law or policy amounts to degrading 'treatment'.[3]

The unfair operation of a criminal sanction will probably not amount to 'treatment' that may be challenged in terms of FC s 12(1)*(e)*.[4] According to the Canadian Supreme Court

> [t]here must be some more active state process in operation, involving an exercise of state control over the individual, in order for the state action in question, whether it be positive action, inaction or prohibition, to constitute 'treatment' which is absent in the case of a 'mere prohibition'.[5]

The requirement of control, if generously interpreted, provides a sound basis for determining the outer limits of FC s 12(1)*(e)*'s application.

The potential horizontal application of FC s 12 might mean that 'the control' in question could be exercised by a party other than the state.[6] Given the

[1] *Mohamed & Another v President of the Republic of South Africa & Others (Society for the Abolition of the Death Penalty in South Africa & Another Intervening)* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC) at para 60 (A suspected terrorist was deported to the USA from South Africa without any assurance from US authorities that that the suspect would not be subject to the death penalty. The Court declared that the government had failed to give effect to the Final Constitution and ordered that a copy of its judgment be sent to the federal district trial court in New York. Mohamed was not, in the end, sentenced to death.)

[2] See *Chalal v United Kingdom* (1996) 23 EHRR 413 (European Court holds that deportation constitutes 'treatment'.) In Canada, deportation is not regarded as punishment, but whether it falls within the ambit of 'treatment' has been left open. *Canada v Chiarelli* [1992] 1 SCR 711.

[3] *East African Asians v United Kingdom* (1973) 3 EHRR 76 (Immigration laws that discriminated on the basis of race constitute degrading treatment.) In South Africa such conduct will more likely be attacked as unfair discrimination under FC s 9. There is little, if anything, that s 12(1)*(e)* can add to the protection already afforded against discrimination.

[4] *Rodriguez v British Columbia* [1993] 3 SCR 519 ('*Rodriguez*')(The applicant was a terminally-ill patient who wanted to commit suicide but would soon be unable to do so without assistance. She argued that legislation prohibiting her assisted suicide was cruel and unusual punishment or treatment. The Supreme Court of Canada found that the prohibition was clearly not 'punishment' and also did not amount to 'treatment'.)

[5] Ibid at para 67.

[6] See *Canadian Foundation for Children v Canada* [2004] 1 SCR 76 at para 48 (The court dismissed a claim that a law permitting reasonable force to be used against children by parents sanctioned 'cruel and unusual punishment'. In addition, the Suprem Court held that force by parents could never amount to 'treatment' as they were not part of the state — and the Charter only applies to state action – and that force exercised by teachers could only qualify as 'treatment' if they were employed by the state.)

extension of the law of delict to state action and to state omission with respect to various forms of violence, one could well imagine a court applying FC s 12(1)*(e)* to the law governing — or to instances of — domestic violence or child abuse. However, given our thesis that the primary purpose of FC s 12 is to ensure that the emancipatory powers of the state that may be used to enhance human freedom are not simultaneously used to dominate or exploit citizens, we would hesitate to extend FC s 12's reach too readily to private violence where the text does not expressly invite such a reading.

(ii) *Cruel, inhuman and degrading*

Differentiating between the three qualifying adjectives in FC s 12(1)*(e)* — cruel, inhuman and degrading — is no easy task. And it is made no easier by the preference of our courts to find that the treatment complained of satisfies all three definitions. In *S v Williams*, Langa J articulated this preference as follows:

> Whether it is necessary to split the words of the phrase and interpret the concepts individually is a matter which would largely depend on the nature of the conduct sought to be impugned. It may well be that, in a given case, conduct that is degrading may not be inhuman or cruel. On the other hand, other conduct may be all three.[1]

The *Williams* Court, while grudgingly acknowledging the distinct meaning of the three terms, then notes that each generation will refract the terms 'cruel, inhuman and degrading' treatment through the lens of the social mores of the time. FC s 12(1)*(e)* analysis, the Court held, requires that the standards for cruel, inhuman and degrading treatment be 'objectively . . . articulated and identified, [with] regard being had to the contemporary norms, aspirations, expectations and sensitivities of the . . . people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised international community'.[2] This objective standard does not, however, mean that public opinion serves as the benchmark for determining when punishment or treatment is 'cruel, inhuman and degrading'. As Chaskalson P made abundantly clear in *Makwanyane*:

> Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication.[3]

(aa) Dignity

Before we turn to the differences in the meaning of the three words, it is

[1] *Williams* (supra) at para 25.
[2] Ibid at para 22 quoting *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76, 86I (NmS).
[3] *Makwanyane* (supra) at para 88.

important to emphasize what they have in common: the denial of dignity.[1] As Ackermann J wrote in *Dodo*: '[w]hile it is not easy to distinguish between the three concepts 'cruel', 'inhuman' and 'degrading', the impairment of human dignity, in some form and to some degree, must be involved in all three.'[2] Dignity, as a right, a value and an ideal, reminds us that '[h]uman beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end.'[3] FC s 12(1)*(e)*'s dignity concerns are not, however, limited to purely instrumental, and often brutal, uses of state power. FC s 12(1)*(e)*, like FC s 12(1)*(d)*, recognizes that certain forms of treatment and punishment diminish not only the humanity of the person subjected to the cruel, inhuman or degrading treatment or punishment, but also offend the dignity, that is, 'the humanity of those who carry it out'.[4] And, as with FC s 12(1)*(d)*, FC s 12(1)*(e)* engages the dignity of society as a whole. Here, the state must not simply ensure that the bar is not set too low; it has a duty to raise the bar:[5]

> The Constitution has allocated to the State and its organs a role as the protectors and guarantors of those rights to ensure that they are available to all. In the process, it sets the State up as a model for society as it endeavours to move away from a violent past. It is therefore reasonable to expect that the State must be foremost in upholding those values which are the guiding light of civilised societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society that '. . . even the vilest criminal remains a human being possessed of common human dignity'.[6]

The state must model what it means to treat others with dignity.[7]

[1] For a full discussion of how dignity has influenced the Court's construction of FC s 12(1)*(e)*, see Woolman 'Dignity' (supra) at § 36.4*(c)*(iii). In utilizing dignity as a tool to determine violations of FC s 12(1)*(e)*, we must of course be mindful of the general rule that it is a violation of a more specific right that indicates a violation of dignity, not the other way round. See *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 35. However, FC s 12(1)*(e)* is not subsumed by dignity and the specific circumstances to which it draws our intention do indeed give independent content to our understanding of dignity.

[2] *Dodo* (supra) at para 35. See also *Furman v Georgia* 408 US 238, 272–73 (1972)('The true significance of [cruel and unusual] punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded.' (Brennan J)).

[3] *Dodo* (supra) at para 38 (footnote omitted). For a more comprehensive account of the Court's dignity jurisprudence, and, in particular, the notion that individuals must be treated as ends-in-themselves, see Woolman 'Dignity' (supra).

[4] *Makwanyane* (supra) at para 314 (Mokgoro J).

[5] See *Makwanyane* (supra) at para 222 (Langa J) quoting Brandeis J in dissent in *Olmstead v United States* 277 US 438, 485 (1928) ('Our Government is the potent, the omni-present teacher. For good or for ill, it teaches the whole of our people by its example.')

[6] *Williams* (supra) at para 77 quoting *Furman v Georgia* (supra) at 273 (Brennan J). See also *Makwanyane* (supra) at paras 57, 88 (Chaskalson P), 229 (Langa J) 311, 314 (Mokgoro J) and 328 (O'Regan J).

[7] In *S v Makwanyane* a number of the judges linked the concept of protection of dignity in the realm of punishment to *ubuntu*. See *Makwanyane* (supra) at paras 130–31 (Chaskalson P), 223–27 (Langa J), 237–45 (Madala J), 263 (Mahomed J) and 307–09 (Mokgoro J). The 'dominant theme' of *ubuntu* is 'that the life of another person is at least as valuable as one's own thus, heinous crimes are the antithesis of *ubuntu*. Treatment that is cruel, inhuman or degrading is bereft of *ubuntu*. *Makwanyane* (supra) at para 225 (Langa J). For more on *ubuntu* and its application in South Africa, see D Cornell & K van Marle 'Interpreting Ubuntu: Possibilities for Freedom in the New South Africa' (2006) 6 *African Human Rights LJ* (forthcoming); D Cornell 'A Call for a Nuanced Jurisprudence (2004) 19 *SA Public Law* 661.

(bb) Cruel

'Cruelty' implies some form of intentional or wilful conduct by the perpetrator — a specific and callous disregard for the suffering — physical or psychological — of the victim.[1] Neither 'inhuman' nor 'degrading' conduct require this intention. So, while the state's negligent failure to provide adequate prison facilities due to a lack of resources may constitute inhuman or degrading treatment, it cannot be deemed cruel.[2]

(cc) Inhuman

While the absence of intention distinguishes 'cruel' from 'inhuman', cruel treatment will generally be found to be inhuman. A similar hierarchy exists between inhuman and degrading.

In *Tyrer v United* Kingdom, the European Court of Human Rights had to decide whether the caning of a boy three times by a police officer as punishment for an assault was 'inhuman' or 'degrading'. Relying on an earlier decision in *Ireland v United Kingdom*, the ECHR found that 'the suffering occasioned must attain a particular level before a punishment can be classified as "inhuman".'[3] It found that that threshold had not been crossed, but that the caning was still 'degrading'.[4] Mahomed J's judgment in *Makwanyane* supports the proposition — implicit in *Tyrer* — that 'inhuman' treatment refers to 'treatment' of others as if they were 'not' human — a thing, a tool or an animal. 'Degrading' treatment refers to the very human, if subjective, experience of humiliation.[5]

(dd) Degrading

Punishment or treatment is 'degrading' if it causes 'feelings of fear, anguish and inferiority capable of humiliating and debasing [the victims] and possibly breaking their physical or moral resistance.'[6] However, these feelings must go beyond those ordinarily caused by a criminal conviction or punishment. Were the subjective

[1] See *Williams* (supra) at para 24 (Langa J quoted, without comment, the following definitions of 'cruel' or 'cruel treatment': 'causing or inflicting pain without pity' (*The Oxford English Dictionary*); 'wilfully caus(ing) pain without justification . . . intention of causing . . . unnecessary suffering' (*R v Mountain* 1928 TPD 86, 88); 'deliberate act causing substantial pain and not reasonably necessary in all the circumstances' (*Hellberg v R* 1933 NPD 507, 510).)

[2] 'Intention' here is meant in the broad sense to include *dolus directus*, *dolus indirectus* and *dolus eventualis*.

[3] *Tyrer* (supra) at para 29. The suffering required for a practice to qualify as 'inhuman' need not cause physical injury. See *Ireland v UK* (supra) at para 167 ('The five techniques . . . caused, if not actual bodily injury, at least intense physical and mental suffering . . . and also led to acute psychiatric disturbances . . . [and] therefore fell into the category of inhuman treatment'.)

[4] *Tyrer* (supra) at para 35.

[5] Mohamed J was the only judge in *Makwanyane* to specifically find that the death penalty was *inhuman* punishment. *Makwanyane* (supra) at para 281 ('In my view, it also constitutes *inhuman* punishment. It invades irreversibly the humanity of the offender by annihilating the minimum content of the right to life protected by s 9; by degrading impermissibly the humanity inherent in his right to dignity; by the inevitable arbitrariness with which its objective is implemented; by the continuing and corrosive denigration of his humanity in the long periods preceding his formal execution; by the inescapable denial of his humanity inherently involved in a sentence which directs his elimination from society.')

[6] *Ireland v UK* (supra) at para 167.

responses of shame associated with every conviction or with every punishment to qualify as 'degrading', all convictions and all punishments would be prima facie unconstitutional. That could hardly have been the intent of the drafters.[1]

The European Court has suggested that a finding of degradation will turn on such objective factors as 'the nature and context of the punishment, the manner and method of its execution, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim'.[2] But such factors offer little insight into why the Court found the 'birching' of a 15-year-old boy on his bare buttocks by a policeman at a police station to be degrading, while it concluded that the 'slippering' of a 7-year-old pupil with a rubber-soled gym shoe by his headmaster in his office was not.[3]

(c) Judicial doctrines

(i) *Inherently impermissible*

(aa) Physical punishment

Some practices are inherently 'cruel, inhuman or degrading'. In *S v Williams,* Langa J characterized corporal punishment as follows:

> The severity of the pain inflicted is arbitrary, depending as it does almost entirely on the person administering the whipping. Although the juvenile is not trussed, he is as helpless. He has to submit to the beating, his terror and sensitivity to pain notwithstanding. Nor is there any solace to be derived from the fact that there is a prior examination by the district surgeon. The fact that the adult is stripped naked merely accentuates the degradation and humiliation. The whipping of both is, *in itself*, a severe affront to their dignity as human beings.[4]

[1] See *Williams* (supra) at paras 40–41 referring to *Tyrer* (supra) at para 30. The *Dilworth* High Court found that being arrested and forced to appear in court violated FC s 12(1)*(e)*. Ordinarily, arrest and a court appearance do not amount to degrading treatment. However, where the police, the prosecutor or another party knew of the person's innocence and still acted in a manner that led to his arrest, then such action, it seems, may constitute a violation of FC s 12(1)*(e)*.

[2] *Costello-Roberts* (1985) 19 EHRR 112 at para 30; *Tyrer* (supra) at para 30.

[3] Compare *Tyrer* (supra) at para 30 (Birching violates ECHR) with *Costello-Roberts* (1985) 19 EHRR 112. The *Costello-Roberts* majority, without much explanation, held that 'slippering did not reach the requisite 'level of severity'. Ibid at paras 31–32. The *Costello-Roberts* minority focused on the 'ritualised' 'official' and 'formalised' character of the punishment, the lack of adequate parental consent and that corporal punishment was being progressively outlawed throughout Europe. Ibid at 137–38. See also *Campbell & Cosans v United Kingdom* (1980) 3 EHRR 531 (European Commission holds that attending a school that permits corporal punishment does not amount to degrading treatment.) See also *Williams* (supra) at para 90 and *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 1998 (12) BCLR 1449 (CC) at paras 44–47 (Sachs J considers the degrading impact of corporal punishment in schools as part of the s 36 analysis to determine the justifiability of a religious groups claim for exemption from a state ban on corporal punishment. Interestingly, Sachs J held that there was a difference between corporal punishment administered in the 'detached and institutional environment' of a school and that meted out in the 'intimate and spontaneous atmosphere of the home'. Ibid at para 49.)

[4] *Williams* (supra) at para 45 (our emphasis). See also *S v Petrus & Another* [1985] LRC (Const) 699; *S v Ncube; S v Tshuma; S v Nchlovu* 1988 (2) SA 702 (ZS); *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmS). For a discussion of *Williams* and other corporal punishment cases, see D van Zyl Smit 'Sentencing and Punishment' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitional Law of South Africa* (2nd Edition, OS, December 2003) § 49.2*(d)*(ii).

Corporal punishment would therefore violate FC s 12(1)*(e)* irrespective of the crime or the person upon whom it was imposed.[1]

(bb) Imprisonment

Whether life imprisonment constitutes cruel, inhuman and degrading treatment has not yet been addressed directly by the Constitutional Court. However, implicit in the Court's finding in *Dodo* is the conclusion that mandatory life sentences are not necessarily incompatible with FC s 12(1)*(e)*.[2]

On the other hand, there is good reason to believe that the Constitutional Court would confirm — if given the opportunity — the Supreme Court of Appeal's conclusion in *S v Bull* that a life sentence without the possibility of parole would always violate FC s 12(1)*(e)*.[3] The *Bull* Court found, in a manner consistent with the position in other jurisdictions, that the possibility of release offered by parole enabled a prisoner to retain his dignity.[4] However, the mere possibility of parole alone does not immunize a life sentence from constitutional challenge. The sentence, in addition, had to take in to account whether the body that grants parole would exercise its discretion 'fairly, justly and responsibly' and whether the parole board's failure to do so would be reviewable by a court.[5]

In *Nkosi*, similar logic drove the Supreme Court of Appeal to conclude that a 'Methuselah sentence' — a sentence of such duration that the accused has no hope of release before death — was cruel, inhuman and degrading.[6] Again, the absence of any possibility of parole reduced the prisoner to a mere signal in a larger system of social control and thereby failed to recognize that the prisoner still retained some measure of dignity.

The Constitutional Court too has suggested that the imprisonment of an habitual offender for an indeterminate period of time — a span that could potentially exceed the length of the prisoner's life — is cruel, inhuman and degrading.[7] Although the Court ground its holding primarily on the gross disproportionality reflected in the imposition of such a sentence on a non-violent offender, it noted that

[1] Similarly, although slightly less emphatically, the *Makwanyane* Court held that the death penalty is innately cruel, inhuman and degrading. The Court identified five main reasons for this finding: the inherent arbitrariness of imposing the death penalty; the failure to respect the victim's dignity; the finality of death; the unequal effect on the poor and other marginalised or unpopular members of society; and the suffering during the long wait for execution. Didcott J's denunciation of the death penalty was more emphatic: 'every sentence of death must be stamped, for the purposes of [IC] s 11(2), as an intrinsically cruel, inhuman and degrading punishment.' *Makwanyane* (supra) at para 179.

[2] *Dodo* (supra)(The Court upheld legislation requiring mandatory minimum life sentences for certain crimes.)

[3] See *S v Bull & Another; S v Chavulla & Others* 2002 (1) SA 535 (SCA) at para 23; *S v Nkosi & Others* 2003 (1) SACR 91 (SCA) at para 9.

[4] See *S v Tcoeib* 1993 (1) SACR 274 (Nm); 45 *BVerfGE* 187 (1977). See also Van Zyl Smit (supra) at § 49.2*(d)*(iv).

[5] See van Zyl Smit (supra) at § 49.2*(d)*(iv) citing *S v De Kock* 1997 (2) SACR 171, 211*h* (T).

[6] *Nkosi* (supra) at para 9.

[7] *S v Niemand* 2002 (1) SA 21 (CC), 2002 (3) BCLR 219 (CC) at para 26.

> [t]he indeterminacy of the sentence also exacerbates the cruel, inhuman or degrading nature of the punishment on the grounds that the maximum period of incarceration remains at all times unknown to the prisoner and the period of his/her incarceration is dependent on the Executive. This is, no doubt, the cause of considerable torment. I therefore conclude that to sentence a person to what may potentially constitute a life-long imprisonment, infringes the right of such person not to be subjected to cruel, inhuman or degrading treatment or punishment.[1]

(cc) Other forms of punishment

Other forms of punishment may well offend FC s 12(1)*(e)*. For example, Chief Justice Warren, writing for a plurality of the US Supreme Court in *Trop v Dulles*, found that expatriation as a punishment was 'cruel and unusual' despite the absence of physical harm:

> There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. In short, the expatriate has lost the right to have rights.[2]

Expatriation, banishment or other severe forms of shunning might fall foul of FC s 12(1)*(e)* because such actions also constitute 'statements' that deny the inherent dignity or humanity of the offender.[3] Similarly, forms of punishment designed to humiliate publicly an offender may be found degrading in terms of FC s 12(1)*(e)*.

(ii) *Proportionality*[4]

(aa) Gross disproportionality and mandatory minimum sentences

The most developed body of FC 12(1)*(e)* jurisprudence holds that a punishment 'grossly disproportionate' to the crime is cruel, inhuman and degrading. In *S v Dodo*, the Constitutional Court was asked to consider the constitutionality of new

[1] *Niemand* (supra) at para 26.

[2] 356 US 86, 101–102 (1958)(footnotes omitted). But see *Perez v Brownell* 356 US 44 (1958)(Court holds that expatriation for voting in foreign elections is not unconstitutional. However, the Supreme Court's finding was not based upon the Eighth Amendments limits on cruel and unusual punishment, but on the legitimate exercise of the legislature's powers.)

[3] See *August & Another v Electoral Commission & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 17 (While considering the statutory disenfranchisement of particular class of prisoners, Sachs J observed that membership in, and continued participation in, the political community is an essential dimension of human dignity: 'The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity.')

[4] For a comprehensive discussion on proportionality in sentencing, see van Zyl Smit (supra) at § 49.2*(c)*.

mandatory minimum sentence legislation[1] that required the imposition of life sentences for certain forms of rape and murder. The sentences were not, however, truly mandatory. A judge could depart from the mandatory minimum if 'substantial and compelling circumstances' justified a lesser sentence. The *Dodo* Court began its consideration of FC s 12(1)*(e)* by emphasizing the centrality of human dignity to any determination of sentence:

> To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformative effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.[2]

While 'mere disproportionality' would partially deny an offender's humanity, it would not meet the threshold for a finding of unconstitutionality. Only a sentence 'grossly disproportionate' to the offence[3] infringes FC s 12(1)*(e)*.[4] The question in *Dodo* was whether the mandatory minimum sentencing scheme reflected in the legislation compelled courts to impose grossly disproportionate sentences.

In *S v Malgas*, the Supreme Court of Appeal had interpreted the phrase 'substantial and compelling circumstances' — the linchpin for escaping the imposition of the mandatory minimum — to mean that

> [i]f the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.[5]

[1] Criminal Law Amendment Act 105 of 1997 ('CLAA').

[2] *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC)('*Dodo*') at para 35.

[3] See *Dodo* (supra) at para 37 (Offence in this context 'consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.')

[4] Ibid at para 39. Ackermann J emphasized that although the standard of gross disproportionality was essentially the same as that applied in Canadian and American courts, South African courts need not agree with the application of that standard in other jurisdictions.

[5] 2001 (2) SA 1222 (SCA) at para 25. The Supreme Court of Appeal placed the following gloss on the challenged CLAA provisions:

A Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2). Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

Ackermann J, writing for the *Dodo* Court, agreed that the *Malgas* court's gloss on the CLAA granted courts sufficient discretion to fashion a sentence that did not cross the threshold of 'gross disproportionality'. As a result, the challenged sentencing provisions in the CLAA were deemed constitutional.[1]

But what about mandatory minimum sentencing requirements that grant the courts no discretion to impose a lesser sentence? The sentence would then have to be evaluated against the nature of the offence prescribed. But, as both the *Dodo* Court and the *Malgas* Court note, the appropriateness of the sentence turns on both the nature of the offender and the circumstances of the offence.

In Canada, the Supreme Court originally adopted the 'most innocent possible offender' test when asked to consider the constitutionality of mandatory minimum sentencing requirements that deny courts the discretion to impose lesser sentences. If the minimum sentence would be grossly disproportionate for this hypothetical 'most innocent possible offender', the entire section would be deemed unconstitutional. For example, in *R v Smith* a minimum sentence of seven years for importing narcotics would have to be tested against a young person returning to Canada with her 'first joint of grass'.[2] The Supreme Court found this sentence to be grossly disproportionate. The Supreme Court of

B Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

C The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

D The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

E In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole

F If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

G In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided.

Ibid.

[1] See *Dodo* (supra) at para 40.

[2] [1987] 1 SCR 1045, 1053.

Canada's position meant that almost all legislation containing minimum mandatory sentences that eliminated judicial discretion would be found to be grossly disproportionate.[1]

The Supreme Court of Canada has twice retreated from this position. It first supplanted the 'most innocent possible offender' test with the 'reasonable' hypothetical offender most likely to 'arise in day-to-day life'.[2] More recently, it dispensed with its 'reasonable' hypothetical offender test entirely. In *R v Morrisey*[3] and *R v Latimer*,[4] the Court overturned departures from mandatory minimum sentences by the trial court. In both cases the offender fitted the description of the 'most innocent offender'. And yet, the Supreme Court upheld the mandatory minimum sentences on the grounds that they reflected the State's commitment to the right to life and to the denunciation of all forms of killing. As Peter Hogg notes, *Morrisey* and *Latimer* cannot be reconciled with *Smith*.[5] Hogg suggests that the Court simplify matters by creating a constitutional doctrine that asks only whether the sentence is grossly disproportionate for the specific offender a court finds before it.[6]

What approach is the South African Constitutional Court likely to adopt? The Court has regularly affirmed the doctrine of objective unconstitutionality. This doctrine states that 'the validity or the invalidity of any given law is not contingent upon the circumstances (say, the timing) of the case, or, more specifically, the parties to the case.'[7] While the doctrine of objective unconstitutionality is

[1] See Hogg (supra) at 50-4–50-6. See also *R v Goltz* [1991] 3 SCR 485, 531 ('*Goltz*')(McLachlin J dissenting).

[2] *Goltz* (supra) at 516 (In upholding a law imposing a mandatory seven-day jail term for driving a car, the majority rejected the trial court's and the minority's reliance on a hypothetical 'Good Samaritan', and held that a genuine good samaritan could rely on a defence of necessity.)

[3] [2000] 2 SCR 90 at para 46 (The accused had been drinking with a friend in a cabin. He tried to jump onto a bunk bed while holding a loaded gun. He fell. The gun went off and killed his friend. The trial court refused to apply the 4-year statutory minimum sentence for culpable homicide. The Supreme Court upheld the minimum sentence on the grounds that it served 'principles of general deterrence, denunciation and retributive justice'.)

[4] [2001] 1 SCR 3 at para 86 (The applicant's daughter suffered from a severe form of cerebral palsy. When the applicant heard that many operations would be required to prevent his daughter's condition from deteriorating, the applicant decided to end her life. He was convicted of second degree murder. The trial court exempted the applicant from the mandatory sentence — life without parole for 10 years. A unanimous Supreme Court overturned the trial court and upheld the mandatory sentence on the grounds the sentence 'represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values.')

[5] Hogg (supra) at 50-10.

[6] Hogg (supra) at 50-10. Hogg bases his approach on McIntyreJ 's dissent in *Smith* – a court should only consider the offender before it – and Arbour J's concurrence in *Morrisey* – a four-year minimum sentence was not disproportionate for this offender although it might be disproportionate for some future offender.

[7] S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) 31-50. See, eg, *De Reuck v Director of Public Prosecutions, WLD* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC); *Ingledew v Financial Services Board: In re Financial Services Board v Van der Merwe & Another* 2003 (4) SA 584 (CC), 2003 (8) BCLR 825 (CC) at para 20.

outcome neutral, or at least not outcome determinative, it ought to tilt the Court toward the acceptance of some variation on the 'most innocent offender' test.

(bb) Gross disproportionality and indefinite incarceration

In *S v Niemand*, the Constitutional Court applied the 'grossly disproportionate' test to the indefinite incarceration of habitual criminals. Mr Niemand had been declared a habitual criminal but had only committed crimes of dishonesty, not violence.[1] A rule of 'practice' limited the term for such offenders to 15 years. But no statutory limit existed on the length of imprisonment. In addition, although the habitual offender would come up for parole after seven years, the courts possessed no oversight powers with respect to the parole board's decisions. Given that this arrangement left the prisoner 'at the mercy of the executive',[2] the *Niemand* Court was asked to consider whether the punishment was grossly disproportionate. Madala J, writing for the Court, held that while

> [l]ife imprisonment for crimes such as murder and rape may be proportional to the heinous nature of the crimes the imposition of life imprisonment, in the guise of an indeterminate sentence, for an habitual criminal who is neither violent nor a danger to society . . . is a different matter. That sentence is grossly disproportionate to the length of the imprisonment merited by such offences and as such constitutes a violation of s 12(1)*(e)* of the Constitution.[3]

The *Niemand* Court cured the constitutional defect by reading in words to set the maximum period of incarceration at 15 years.[4]

(c) Extra-territorial application[5]

The prohibition on cruel, inhuman and degrading punishment has, and, considering current trends in international terrorism and international criminal law, will likely in future, raise the issue of the application of the Bill of Rights outside South Africa's borders. In *Mohamed*, the Constitutional Court held that the South African government could not extradite or deport a person to a country where he was likely to face the death penalty. This decision should also extend to include any practice that South African courts determine violates s 12(1)*(e)*. Although not strictly concerned with extra-territorial application, the decision in *Mohamed* should be welcomed as recognizing and enforcing South Africa's obligation of non-refoulement under the Convention Against Torture.[6]

[1] *Niemand* (supra) at para 5.
[2] Ibid at para 13.
[3] Ibid at para 25.
[4] Ibid at para 33.
[5] For a detailed account of the extra-territorial application of the Bill of Rights, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 31.6.
[6] Article 3 of the Convention reads: 'No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'

Much less encouraging is the Court's holding in *Kaunda*.[1] *Kaunda* concerned a claim by a group of South African citizens held in Zimbabwe that the South African government had a constitutional duty to intervene on their behalf to try to secure their extradition back to South Africa, or at the very least to secure an assurance that they would be well treated and not sentenced to death. In refusing all the claimed relief, the majority of the Court held that the Bill of Rights does not apply outside of South Africa.[2] If taken to its logical conclusion, the majority would permit the state to run a torture camp as long as it was located outside South African borders and its inmates never set foot in South Africa.

In contrast, the minority recognized that

> [a]s a general principle . . . our Bill of Rights binds the government even when it acts outside South Africa, subject to the consideration that such application must not constitute an infringement of the sovereignty of another state.[3]

This view gives appropriate weight to both the interests of the individual and the need for international comity,[4] and will hopefully persuade a future majority of the Constitutional Court to reconsider its position.

40.8 FC s 12(2): Bodily and Psychological Integrity

The structure of FC s 12(2) is, as we noted in the introduction, somewhat confusing. It guarantees a general right to 'bodily and psychological integrity'. It then elaborates upon that general guarantee by providing for the right to make decisions concerning reproduction (FC s 12(2)*(a)*), the right to security in and control over the body (FC s 12(2)*(b)*), and the right to be free from coercive medical and scientific experiments (FC s 12(2)*(c)*). While FC ss 12(2)*(a)* and *(c)* look like specific instances of FC s 12(2)'s general guarantee, FC s 12(2)*(b)* tests our ability to give distinct meaning to 'bodily and psychological integrity', on the one hand, and 'security in and control over the body', on the other. In order to avoid violating the constitutional canon of surplusage, we must interpret 'bodily and psychological integrity' to mean something over and above 'security in and control over' the body.

(a) Bodily integrity

When asked to consider, in *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others*, whether a law criminalizing sodomy unfairly

[1] *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC)('*Kaunda*').

[2] Ibid at para 37 ('The bearers of the rights are people in South Africa. Nothing suggests that it is to have general application beyond our borders.')

[3] Ibid at para 229.

[4] The rationale for the majority's decision can probably be traced back to the confusion of two separate issues: *(a)* the application of the Bill of Rights to state conduct and persons beyond our borders; and *(b)* the influence of the Bill of Rights on foreign legal systems. The majority seems to believe that the two are inextricably linked, while the minority correctly recognizes that the two issues are logically distinct. See Woolman 'Application' (supra) at § 31.6.

discriminated against homosexuals, the Constitutional Court stated that all of its efforts to explicate our basic law are informed by the recognition that '[t]o understand "the other' one must try, as far as is humanly possible, to place oneself in the position of "the other".'[1] 'It is easy to say' the *NCGLE I* Court continued

> that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are 'different' from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.[2]

FC s 12(2) recognizes — at a minimum — that each *physical body* is of equal worth and is entitled to equal respect.[3] This reading of FC s 12(2) means that bodily integrity affords the individual somewhat more protection than the entitlement — found in FC s 9(3) — not to be discriminated against on the grounds of disability.[4] Moreover, FC s 12(2)'s commitment to bodily integrity requires more than mere tolerance of a myriad of diverse bodies. We would suggest that FC s 12(2) can be read to impose a duty on the state to ensure that every 'body' is able to participate fully in society.[5] This conception of bodily integrity also goes further than the largely negative protection afforded by FC s 12(2)*(b)*.

Hoffmann v South Afican Airways gives us some indication of how FC s 12(2) might shape such a duty to ensure that every 'body' is able to participate fully in society. Hoffmann applied to the South African Airways (SAA) for employment as a cabin attendant. Despite SAA's own finding that he was professionally and physically capable of discharging the duties of cabin attendant, Hoffmann was denied employment because of his HIV-positive status.

[1] *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)('*NCGLE I*') at para 22.

[2] *NCGLE I* (supra) at para 22 quoting with approval Cory J in *Vriend v Alberta* [1998] 1 SCR 493 at para 69.

[3] See S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) § 36.2*(b)* (Identifies 'equal concern and equal respect' as one of the five 'definitions' of dignity that the Constitutional Court employs.)

[4] FC s 12(2) creates the basis for an independent challenge that will be informed by, but not entirely determined by, the rights to dignity and to equality. More importantly, perhaps, a FC s 12(2) enables litigants to challenge the stigma that attaches to the cultural construction of their bodies (and some illness or disfigurement) without having to argue that they are 'disabled'. See *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para 28 (Court holds that refusal to employ a person because of their HIV status constitutes unfair discrimination. Ngcobo J avoided addressing the question of whether HIV-positive status amounted to a disability for the purposes of FC s 9(3). Indeed, the applicant had pressed the point that that his FC s 9 challenge was grounded not in a claim regarding disability but from the affront to his dignity that flowed from the social marginalization associated with his HIV status.)

[5] As one of the authors has noted elsewhere, dignity requires the commitment of political community to the provision of that level of material goods necessary for all persons — irrespective of their talents or limitations — to 'pursue a meaningful and comprehensive vision of the good life as they understand it.' Woolman 'Dignity' (supra) at 36-68 citing A Sen *Development as Freedom* (1999) 75.

Hoffmann contended that that SAA's refusal to employ him violated FC s 9(3)'s prohibition on unfair discrimination.[1] The Constitutional Court agreed. It held that SAA's behaviour was constitutionally repugnant because it excluded Hoffmann from participation in society on account of the condition of his body.[2] SAA's conduct amounted not only to unfair discrimination: it also constituted, at least implicity, an assault on Hoffmann's body integrity.[3] It is this type of recognition of the inherent worth of all bodies lies at the care of FC in s 12(2)'s guarantee of bodily integrity.

(b) Psychological integrity

While the three subsections of FC s 12(2) give 'bodily integrity' concrete content, the same cannot be said for 'psychological integrity'. Given the paucity of case-law on the meaning of the term, the following ruminations remain speculative at best. In short, 'psychological integrity' as a self-standing right necessarily goes beyond the protection afforded by 'bodily integrity' and provides fortification from undue stress or shock.[4]

Psychological integrity already receives comprehensive protection in our common law in the form of delictual damages for 'emotional shock'.[5] Courts award such damages for a broad array of psychological trauma: the pain associated with a mother learning of her son's death;[6] the deleterious emotional effects of parents

[1] For a general discussion on the FC s 9 see B Goldblatt & C Albertyn 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 35.

[2] Hoffman (supra) at para 38 ('The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason they enjoy special protection in our law. People who are living with HIV must be treated with compassion and understanding. We must show ubuntu towards them. They must not be condemned to 'economic death' by the denial of equal opportunity in employment.')

[3] The Court's finding on this score is somewhat undermined by its conclusion that the position would probably have been different if Hoffmann's CD4 count was so low that he would be unable to perform his duties.

[4] The FC s 12(2)'s right to psychology integrity will often overlap with the rights to dignity and privacy. See, generally, S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36; D McQuoid-Mason 'Privacy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 38.

[5] See, generally, J Neethling, JM Potgieter & PJ Visser *Law of Delict* (4th Edition, 2001) 290–95.

[6] *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA)(The plaintiff's son had been killed in an accident caused by the negligent driving of the insured. She successfully claimed damages for the distress and grief she suffered when she was informed of his death.) See also *Majiet v Santam Ltd* [1997] 4 All SA 555 (C)(Mother discovered son's body in the street after he had been negligently knocked down by another driver); *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A)(The plaintiff suffered severe psychological trauma after witnessing his brother being involved in an accident.) Even the threat of harm to a loved one could be actionable. See *Els E v Bruce; Els J v Bruce* 1922 EDL 295 (Defendant threatened to harm plaintiff's husband); *Boswell v Minister of Police* 1978 (3) SA 268 (E)(Defendant untruthfully told the plaintiff that he had shot and killed the plaintiff's cousin.) In Canada, an application to place a child under state protection is considered an affront to the parents' psychological integrity. Their psychological integrity is protected by the Canadian Charter's s 7 guarantee of 'security of the person'. See *New Brunswick v G.(J.)* [1999] 3 SCR 46 (Court ordered that the parents be represented by state-funded counsel to ensure that the procedure was compatible with the principles of fundamental justice); *Winnipeg Child and Family Services v KLW* [2000] 2 SCR 519 (Apprehension of a child in need of

discovering that their babies had been swapped at birth;[1] or the suffering of a person disfigured by acid during a medical examination.[2]

FC s 12(2)'s guarantee of psychological integrity also reinforces aspects of the *actio iniuriarum*'s protection against insults and invasion of privacy. For example, in *NM v Smith*, the plaintiffs' HIV status had been revealed in the biography of a well-known politician.[3] The plaintiffs argued that this non-consensual revelation undermined their psychological integrity and caused them emotional harm. The High Court agreed. It wrote:

> [B]ecause of the ignorance and prejudices of large sections of our population, an unauthorised disclosure [of a person's HIV status] can result in social and economic ostracism. It can even lead to mental and physical assault.[4]

FC s 12(2) does meaningful and independent work here because the damage done is not to the plaintiff's FC s 10 right to dignity or her FC s 14 right to privacy: they sustain damage from the emotional and psychological stress caused by the disclosure of their status to their family, friends and community.

In *Media 24 v Grobler*, the Supreme Court of Appeal was seized with a claim that employers are liable for failing negligently to protect their workers from sexual harassment.[5] The Court specifically mentioned the effect of harassment on the psychological integrity of the victim in upholding the direct liability of the company for failing to protect its employees from harassment by co-workers.[6]

Constitutional protection of psychological integrity must, however, have limits. In Canada, the Supreme Court held that the stress induced by the unreasonable delay of a government entity in addressing a complaint could breach a person's right to psychological integrity.[7] However, that same delay, in the South African context, is unlikely to occasion a breach of FC s 12(2).

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protection — but without a warrant — constitutes a prima facie breach of the parents' security of the person, but did not, ultimately, infringe the principles of fundamental justice because the parents were entitled to a post-apprehension hearing.)

[1] *Clinton-Parker & Dawkins v Administrator, Transvaal* 1996 (2) SA 37 (W)(Both couples claimed emotional damages from the hospital after discovering after two years that their babies had been swapped at birth.)

[2] *Gibson v Berkowitz* 1996 (4) SA 1029 (W)(Defendant had negligently used undiluted acid to take cancer swabs of the plaintiff's vagina. The plaintiff received damages for emotional and psychological suffering as well as physical harm.)

[3] [2005] 3 All SA 457 (W).

[4] Ibid at para 46.2.

[5] *Media 24 v Grobler* 2005 (6) SA 328 (SCA)(The SCA quoted with approval a finding of the Industrial Court that 'The victims of harassment find it embarrassing and humiliating. . . . The psychological effect on sensitive and immature employees, both male and female, can be severe, substantially affecting the emotional and psychological well-being of the person involved.')

[6] Ibid at para 67 citing with approval *J v M Ltd* (1989) 10 ILJ 755, 758A–D (IC)(The Court recognized that prolonged sexual harassment could severely affect the 'emotional and psychological well-being of the person involved'.)

[7] *Blencoe v British Columbia* [2000] 2 SCR 307 (Several complaints of sexual harassment had been lodged against the applicant, a former cabinet minister, at the Human Rights Commission. The Commission had taken almost three years to finalize the complaint. The majority found that state-induced psychological stress could impair the right to security of the person, but that the impairment in this case was not severe enough to warrant such a finding. In addition, the stress experienced by the applicant was not primarily caused by the delay. The Court also noted that Canada possessed sufficient administrative law remedies to address the matter.)

40.9 FC s 12(2)*(a)*: Decisions Concerning Reproduction[1]

The right to bodily integrity or control over the body would seem broad enough to embrace the protection of reproductive decisions. Why then does the Final Constitution explicitly mention the right to 'make decisions concerning reproduction'?

One reason might be to avoid the well-known doctrinal difficulties that American courts have experienced as a result of the *Roe* Court's location of a judicially-created right to abortion in another judicially-created right to privacy.[2] The specific recognition of reproductive freedom may have been intended to leave the courts very little room to outlaw abortion, while still permitting the drafters to avoid responsibility for expressly reaching that conclusion in the constitutional text. That said, the primary motivation is probably symbolic. It recognizes that some of the most devastating and socially entrenched forms of physical (and psychological) oppression and exploitation relate to reproduction and sexuality. FC s 12(2)*(a)* serves to draw South African courts' attention to that specific form of denial of bodily integrity.

(a) Abortion

In *Christian Lawyers Association v National Minister of Health,* Mojapelo J recognised that FC s 12(2)*(a)* read with FC s 12(2)*(b)* creates a 'constitutional right to termination of pregnancy'.[3] The *Christian Lawyers II* Court held both that the challenged

[1] For a general discussion of reproductive rights in the Final Constitution, see M O'Sullivan 'Reproductive Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 37.5 (O'Sullivan deals specifically with the relationship between freedom and security of the person and reproductive rights.)

[2] This drafting decision by the Constitutional Assembly possesses the added benefit of meeting a host of feminist critiques levelled against viewing reproductive freedom in terms of privacy rights. See, eg, C Neff 'Woman, Womb, and Bodily Integrity' (1991) 3 *Yale Journal of Law and Feminism* 327, 327–28 (Argues that a right-to-privacy-based balancing test has led to an alarming trend in American constitutional law toward permitting the state to intercede on behalf of its interest in a foetal life. Neff contends that the right to privacy is not a meaningful concept for a woman if it allows the state to sever, conceptually, the woman from her womb and to 'represent its contents as a separate and identifiable interest'. Neff anticipates the South African solution to this problem and argues such a problem does not arise if reproductive rights are grounded in a right to bodily integrity.) Indeed, the Supreme Court of Canada deployed the more general but related right to 'security of the person' in s 7 of the Charter to strike down restrictions on abortion in *R v Morgentaler (No 2). R v Morgentaler (No 2)* [1088] 1 SCR 30.

[3] *Christian Lawyers Association v National Minister of Health & Another* 2005 (1) SA 509, 518 (T), 2004 (10) BCLR 1086 (T)('*Christian Lawyers II*')(The applicant challenged the constitutionality of statutory provisions that permitted women under the age of 18 to have abortions without the consent of and without consultation with their parent or guardian. The court upheld the legislation.) *Christian Lawyers II* affirms the position of McCreath J in *Christian Lawyers I* that a foetus does not have a right to life and that FC s 12 is in no way limited by any interests the foetus might have. *Christian Lawyers Association & Others v Minister of Health & Others* 1998 (4) SA 1113 (T), 1998 (11) BCLR 1434 (CC)('*Christian Lawyers I*'). Pace *Roe*, the 'right to an abortion' belongs to the pregnant woman, and not to the doctor performing the abortion. See *Nourse v Van Heerden* 1999 (2) SACR 198 (W)('No constitutional rights of the applicant were identified which were violated by his having been restricted as to the circumstances and conditions in and on which he could procure abortions.' Since doctors are not the beneficiaries of such rights, the *Nourse* court rejected the doctor's claim that illegal abortions performed prior to the promulgation of the Interim Constitution were, post-1994, now legal.)

provisions of the Choice on Termination of Pregnancy Act ('Choice Act')[1] are constitutional and that any attempt by the legislature to enact law making abortion *per se* a crime would be deemed constitutionally infirm.[2]

The argument around abortion is therefore more likely to turn on the extent to which the state can limit a woman's right to abortion.[3] The Choice Act currently places a number of limitations on the 'right to an abortion'. Abortions are permitted 'on request' until 12 weeks into the pregnancy. After 12 weeks of gestation, the foetus may still be terminated — but only in limited circumstances up to 20 weeks.[4] After 20 weeks, termination is permitted only if there is a risk of injury or death.[5] An abortion thus becomes steadily more difficult to procure as a pregnancy progresses.[6]

These limitations on FC s 12(2)*(a)* and *(b)* rely on two forms of justification. The first form of justification emphasizes the escalating risk of abortion to the mother over the course of the pregnancy.[7] In a society that permits a broad array of risky and unnecessary activities every day — from sky-diving and bungee-jumping to body-piercing and plastic surgery — the argument from 'risk' smacks of a particularly pernicious form of paternalism. For the legislature to decide in advance that pregnant women may not 'risk' second and third trimester abortions denies them the agency we easily grant the rest of the population over a broad domain of more dangerous and less socially relevant conduct, including many

[1] Act 92 of 1996.

[2] *Christian Lawyers II* (supra) at 518 ('In a sense therefore the Constitution not only permits the Choice on Termination of Pregnancy Act to make a pregnant woman's informed consent the cornerstone of its regulation of the termination of her pregnancy, but indeed requires the Choice Act to do so. To provide otherwise would be unconstitutional.')

[3] See O'Sullivan (supra) at § 37.12.

[4] An abortion between 12 and 20 weeks is permitted if:

(i) the continued pregnancy would pose a risk of injury to the mother's physical or mental health; or
(ii) there exists a substantial risk that the unborn child would suffer from severe physical or mental abnormality; or
(iii) the pregnancy resulted from rape or incest; or
(iv) the continued pregnancy would significantly affect the social or economic circumstances of the mother.

Choice Act s 2(1)*(b)*.

[5] The exact circumstances are:

(i) would endanger the mother's life; or
(ii) would result in a severe malformation of the unborn child; or
(iii) would pose a risk of injury to the unborn child.

Choice Act s 2(1)*(c)*.

[6] On limitations generally, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constituional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[7] See *Roe v Wade* 410 US 113 (1973). A majority of the US Supreme Court held that the state had an interest in the life and health of both the woman and the foetus. In the first trimester, neither interest was sufficiently compelling to justify regulation or prohibition. By the second trimester, the interest in the woman's health was sufficiently compelling to justify regulation. The interest in the foetus' well-being only became compelling in the third trimester. In the third trimester, the state could justify regulation or even prohibition of abortion as long as it did not threaten the life of the woman.

other kinds of medical procedures.[1] In so doing, it risks turning women into 'foetal incubators'.[2] The second form of justification emphasizes the dignity interest of the political community in the life of the foetus. The High Court in *Christian Lawyers I* firmly rejected the proposition that a foetus possesses any rights — let alone the right to dignity — under the Final Constitution.[3] However, the *Christian Lawyers II* Court,[4] and authors elsewhere in this work, recognize that the state, and the broader political community, may have a 'detached', as opposed to a derivative, dignity interest in the regulation of abortion.[5]

(b) Sterilization

The Sterilisation Act[6] defines sterilization as 'a surgical procedure performed for the purpose of making the person on whom it is performed incapable of procreation, but does not include the removal of any gonad'.[7] Any person over the age of 18 may be sterilized with their consent.[8] Those persons below the age of 18 may only be

[1] For similar arguments against the prohibition of late term abortions, see T Kushnir 'It's My Body, It's My Choice: The Partial-Birth Abortion Ban Act of 2003' (2004) 35 *Loyola University Chicago Law Journal* 1117; R Oliveri 'Crossing the Line: The Political and Moral Battle over Late-term Abortion' (1998) 10 *Yale Journal of Law and Feminism* 397. See also *Stenberg v Carhart* 530 US 914 (2000)(Five member majority invalidates statute prohibiting partial-birth abortion because it did not provide a health exception for the woman and constituted an 'undue burden' on a woman's right to choose a particular procedure. The Choice Act does possess a health exception.)

[2] Neff (supra) at 350 ('From the moment a pregnant woman decides that she does not want to carry the pregnancy to term, from the moment she ceases voluntarily to participate in the pregnancy, it becomes a pregnancy against her will and a significant bodily intrusion. This bodily intrusion is, in effect, state action to commission the womb for use as a fetal incubator. The state has entered the woman's body, seized control, and established an adversarial relationship between the woman and her womb.') See also JJ Thomson 'A Defense of Abortion' (1971) 1 *Philosophy & Public Affairs* 47. Thomson employs the hypothetical situation of a famous violinist being permitted to use the reader's kidneys for dialysis as an intuition pump to designed to force the reader to reconceive the relationship between a woman and the foetus inside her. We discuss this intuition pump at length in the context of FC s 13's prohibition of forced labour. See S Woolman & M Bishop 'Slavery Servitude and Forced Labour' in S Woolmna, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2005) 64-3.

[3] *Christian Lawyers I* (supra) at 1123. While one of the authors has roundly criticized McCreath J's reasoning in *Christian Lawyers I*, the outcome remains sound. See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 31.3*(a)*(iii).

[4] *Christian Lawyers II* (supra) at 527E.

[5] See M O'Sullivan 'Reproductive Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 37.2 citing R Dworkin *Life's Dominion: An Argument about Abortion and Euthanasia* (1993); S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) § 36.4*(c)*(ii)(Woolman contends that it remains possible to take the state's interest in pre-natal life seriously without concomitantly undermining a woman's right to dignity and her ability to secure an abortion.)

[6] Act 44 of 1998.

[7] Sterilisation Act s 1.

[8] Sterilisation Act s 2(2).

sterilized if a failure to do so would put their life or health at risk.[1] Persons with diminished mental capacity may be sterilized without their consent under certain limited circumstances.[2]

Despite recent amendments to the Sterilisation Act intended to increase the protection afforded to persons with diminished mental capacity,[3] the provisions permitting their sterilization remain controversial.[4] Indeed, recent decisions in other jurisdictions suggest that even our new and improved Sterilisation Act may be the subject of future constitutional challenges.

In *Re Eve*, the Canadian Supreme Court rejected an application by a mother to have her disabled twenty-four-year-old daughter sterilized.[5] The Court emphasized both the permanent negative psychological impact sterilization would have on the daughter and the manner in which non-consensual sterilization re-inforced the marginalization of disabled persons.[6] The Court also rejected the argument that Eve would be unsuitable for parenthood. It found instead that

> mentally incompetent parents show as much fondness and concern for their children as other people. Many, it is true, may have difficulty coping with the financial burdens involved. But this issue is a social problem, and one, moreover, that is not limited to incompetents.[7]

By contrast, the House of Lords permitted a similar application in *Re B*.[8] The Law Lords were at pains to emphasize that

[1] Sterilisation Act s 2(3)*(a)*.

[2] Sterilisation Act s 3. The statutory requirements include: consent by a parent, guardian spouse or curator (s 3(1)*(a)*); the recommendation of a panel of a psychiatrist or medical practitioner, a psychologist or social worker and a nurse after considering various prescribed criteria (s 3(1)*(b)* read with s 3(2)); and that the person be incapable of making, now or in the future, their own informed decision about contraception or sterilisation or of fulfilling the parental responsibility associated with giving birth (s 3(1)*(c)*).

[3] Sterilisation Amendment Act 3 of 2005.

[4] For an excellent exposé on the sterilisation of mentally incapable people, see K Savell 'Sex and the Sacred: Sterilization and Bodily Integrity in English and Canadian Law' (2004) 49 *McGill LJ* 1093. Savell argues that how one views non-consensual sterilization depends largely on the narrative one employs and the conception of the body one adopts. She relates the story of AR, a twenty-five-year-old mentally disabled man who had been castrated without his consent at the request of his mother. A local official took exception to the castration and instituted action against the mother. In describing how the perception of the mother's actions depends on how one narrates the story, Savell writes:

> When a commentator agreed that AR was a subject in need of control in his own and others' interests, the legal action taken against his mother seemed unjust and unfair. Conversely, when a commentator was concerned about the implications for society of allowing castration to control individual members, the legal action taken against AR's mother seemed just.

Ibid at 1123. The determination may also turn on how society constructs AR's body:

> Where AR's body was constructed as threatening precisely because it could not be contained sexually, castration was viewed as a means of achieving integrity and, therefore, order at the level of the individual and the social body. Conversely, where AR's body was constructed as emasculated and lacking integrity as a result of having been castrated, castration was viewed as a violation of the individual body and a threat to social cohesion.

Ibid at 1095.

[5] *E (Mrs) v Eve* [1986] 2 SCR 388, 31 DLR (4th) 1 ('*Eve*').

[6] *Eve* (supra) at para 80.

[7] Ibid at para 84.

[8] *Re B (a Minor) (Wardship: Sterilisation)(1987)* [1988] 1 AC 199, [1987] 2 All ER 206 (HL)('*Re B*').

> [T]his case is not about sterilisation for social purposes; it is not about eugenics; it is not about the convenience of those whose task it is to care for the ward or the anxieties of her family; and it involves no general principle of public policy. It is about what is in the best interests of this unfortunate young woman and how best she can be given the protection which is essential to her future wellbeing so that she may lead as full a life as her intellectual capacity allows.[1]

The House rejected the applicant's distinction between therapeutic sterilization and non-therapeutic sterilization.[2] It grounded its conclusion, instead, in what it believed to be in the best interests of the person whose sterilization was at issue.[3]

The virtue of the Canadian approach is that it recognizes that persons with diminished mental capacity retain their right to 'bodily integrity'.[4] The vice of the House of Lords' approach is that it reinforces the cultural construction of the disabled person as outside the body politic.[5]

As things now stand, the Sterilisation Act grants a properly composed panel significant latitude when determining whether sterilization is appropriate. However, to the extent that the Act permits the panel to authorize sterilisation when it is not medically necessary, it clearly infringes FC s 12(2)*(a)* and faces, to our minds, the rather difficult task of justifying this grant of authority without palpable evidence that forced sterilization is a medical or a public health necessity.

(c) Contraception

Any law that impaired the ability to secure contraception would limit FC s 12(2)*(a)* and would have to be justified in terms of FC s 36.[6] Such a legislative restriction seems unlikely in our current political climate.

However, many private, mainly religious, institutions prohibit the use or the sale of contraceptives amongst their members or on their premises. In the United States, the use of contraceptives in Catholic hospitals and their distribution at

[1] *Re B* (supra) at 212.

[2] Ibid at 204 and 205.

[3] According to Savell, the finding in *B* and subsequent cases in the United Kingdom were underwritten by three primary justifications: 'the risk of pregnancy, the trauma of pregnancy and childbirth, and the unfitness of the woman to parent. In each of these [three] categories, norms of sexual behaviour and reproductive responsibility function to produce the learning disabled woman as marginal and, therefore, in need of sterilization for her own protection.' Savell (supra) at 1129. Savell also notes that, thus far, the English courts have only allowed sterilisation of women. Ibid.

[4] See § 40.8*(a)* supra.

[5] See M Nussbaum *Frontiers of Justice: Disability, Nationality and Species Membership* (2006).

[6] American jurisprudence is particularly useful in this regard. See *Griswold v Conneticut* 381 US 479 (1965)(Law prohibiting any use of contraceptives unconstitutional); *Eisenstadt v Baird* 405 US 438, 442 (1972)(Prohibition on use by unmarried couples only unconstitutional); *Carey v Population Services International Inc* 431 US 678 (1977)(Law prohibiting distribution of contraceptives unconstitutional). For an excellent evaluation of American 'sexual freedom' cases, see D Cruz 'The Sexual Freedom Cases'? Contraception, Abortion, Abstinence and the Constitution' (2000) 35 *Harvard Civil Rights-Civil Liberties Law Review* 299. See also R Wyser-Pratte 'Protection of RU-486 as Contraception, Emergency Contraception and as an Abortifacient under the Law of Contraception' (2000) 79 *Oregon Law Review* 1121.

schools has led to litigation.[1] As one of the authors argues elsewhere in this work, the ability of private religious groups to control the use of contraception — such as the day after pill — will turn both on the extent to which the institution controls the distribution of public goods (ie, a public hospital) and the extent to which members of the particular religious community have agreed to be bound by the tenets of that faith.[2]

40.10 FC s 12(2)*(b)*: Security in and Control over One's Body

FC s 12(2)*(b)* creates a sphere of individual inviolability with two components. 'Security in' and 'control over' one's body are not synonymous. The former denotes the protection of bodily integrity against physical invasions by the state and others. The latter guarantees the freedom to exercise autonomy or the right to self-determination with respect to the use of one's body.

(a) 'Security in'

In the two most direct applications of FC s 12(2)*(b)*, two High Courts found that the surgical removal of a bullet from a suspect for the purposes of a police investigation was a limitation of the the suspect's right to bodily integrity.[3] The two courts differed, however, as to whether the invasion constituted a justifiable limitation in terms of FC s 36.[4]

The High Court in *Gaqa* found that the Criminal Procedure Act[5] did contemplate the removal of a bullet.[6] In light of this law of general application, Desai J concluded that, since the proposed operation presented a minimal risk to the suspect and the

[1] Many Catholic hospitals refuse to provide the 'morning-after pill' to rape victims. As the history of RU486 in the US suggests, while the pill is generally considered a contraceptive, some do view this form of it as an abortificent. See H Skeeles 'Patient Autonomy versus Religious Freedom: Should State Legislatures Require Catholic Hospitals to Provide Emergency Contraception to Rape Victims?' (2003) 60 *Washington and Lee Law Review* 1007; T Fujikawa Lee 'Emergency Contraception in Religous Hospitals: The Struggle between Religious Freedom and Personal Autonomy (2004) 27 *University of Hawaii Law Review* 65.

[2] S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44. See also S Woolman & I Currie 'Community Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 58.

[3] See *S v Xaba* 2003 (2) SA 703, 708H (D)('*Xaba*'); *S v Gaqa* 2002 (1) SACR 654, 658H (C)('*Gaqa*').

[4] On limitations, see, generally, S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[5] Act 51 of 1977 ('CPA').

[6] *Gaqa* (supra) at 657H–658C (Both the power to 'search' in CPA s 27 and the power to ascertain distinguishing features in CPA s 37 were held, on a purposive interpretation, to allow the police to carry out the operation.)

suspect was accused of murder, society's interest in the suspect's trial, and potential conviction, outweighed the suspect's interest in bodily integrity.[1]

The High Court in *Xaba* managed to avoid the manifold errors in *Gaqa*'s limitations analysis by rejecting this decision's reading of the CPA. Southwood AJ instead interpreted the CPA in a manner that did not grant the police the power to authorize a surgical intervention.[2] Given the absence of 'law of general application', the *Xaba* Court held, the suspect's FC s 12(2)*(b)* right could not be justifiably limited in terms of FC s 36.

The conflicting decisions in *Gaqa* and *Xaba* reflect judicial uncertainty with regard to the exercise of police power in such cases. As Southwood AJ noted in *Xaba*,[3] the legislature would be well advised to draft an amendment to the CPA that brings greater clarity to the matter.[4]

Where the 'invasion' is more subtle than the extraction of a bullet, an equally subtle approach to FC s 12(2)*(b)* analysis is warranted. As Lawrence Tribe notes:

> it is important to have a way of talking about these matters in which the intrusion caused by the police officer who gently shoves a person back to clear the way for an ambulance, for example, does not amount, even potentially, as an invasion of privacy or personhood.[5]

In short, not every action by the state or another party that involves touching another person's body warrants constitutional scrutiny. In *S v Huma*, the High Court had the following to say about the mandatory taking of fingerprints:

> The process of taking one's fingerprints does not, in my view, constitute an intrusion into a person's physical integrity. No physical pain of any kind accompanies this process. By comparison, the taking of a blood sample constitutes more of an intrusion into a person's physical integrity than the mere taking of one's fingerprints. When a blood sample is taken the skin is ruptured and it is accompanied by a small element of pain. Pain and violation of a

[1] *Gaqa* (supra) at 659. The High Court quoted with approval the following dictum from *Winston v Lee*. 470 US 753 (1985)(Brennan J):

> The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. In a given case the question whether the community's needs for evidence outweighs the substantial privacy interests at stake is a delicate one, admitting of few categorical answers.

On the meaning of 'law of general application', see Woolman & Botha 'Limitations' (supra) at § 34.7.

[2] In *Xaba*, Southwood AJ first considered CPA s 27. The section only entitled a 'police official' to conduct a search. This power could not be delegated. In fact, the CPA prohibited a police official from taking a blood sample and could therefore hardly be interpreted to allow the much more invasive procedure at issue here. In addition, the ordinary meaning of 'search' did not include surgery. *Xaba* (supra) at 712G–713D. Southwood then considered CPA s 37(1)*(c)*. CPA s 37(1)*(c)* gives the power to take 'necessary steps' to determine distinguishing 'marks, features or characteristics'. Section 37 allocates responsibility to medical practitioners to aid police officials with an array of procedures, including the taking of blood samples. CPA s 37(2)*(a)*. According to Southwood AJ, this allocation of responsibilities did not embrace more invasive procedures as the surgical removal of a bullet. Ibid at 713G–714E.

[3] Ibid at 714F–G.

[4] Such an amendment, whatever its form, would not, however, answer the question of when police intrusion into a suspect's bodily integrity is justified under FC s 36.

[5] *American Constitutional Law* (2nd Edition, 1988) 1330.

person's physical integrity are also associated with corporal punishment and other forms of punishment. By comparison, in my judgment, the taking of fingerprints is on par with the mere taking of a photograph, which does not, in my view, violate the *physical integrity of a person.*[1]

Non-trivial invasions of bodily integrity that attract constitutional scrutiny occur most frequently in the context of law enforcement investigations. For example, a suspected drug courier may be subjected to a cavity search. A suspected drunk driver may be required to undergo a breathalyzer test or provide a blood sample for analysis. Unsolicited bodily invasions that cross the threshold for constitutional scrutiny have occurred in several other contexts and jurisdictions.[2]

Given that non-trivial invasions of bodily integrity will still occur rather frequently in the context of law enforcement, our courts will be obliged to develop criteria for distinguishing justifiable invasions from unjustifiable invasions. US case law offers the following set of rough and ready guidelines:

(1) A decision to invade bodily integrity must follow established procedures and not be arbitrary. For example, body searches require at least reasonable suspicion.
(2) Where possible, a deliberate invasion of bodily integrity must be preceded by a hearing — even if the hearing is only informal.[3]
(3) The principles of necessity and proportionality should be observed.[4] An intrusion must avoid inflicting unnecessary physical pain or anxiety. It must not run the risk of disfigurement or injury to health.

(b) 'Control over'

FC s 12(2)*(b)*'s right to exercise 'control over' one's body flows from the general liberal principle that freedom consists, in part, in the ability to 'fram[e] the plan of our life to suit our own character'.[5] However, such freedom may conflict with both well-grounded and ill-founded beliefs of a majority of the population — and its representatives — about ways of being in the world deemed deleterious to the health and the well-being of all of its citizens.

[1] *S v Huma* 1996 (1) SA 232, 236I–237B (W).
[2] In the US, for example, challenges to compulsory vaccination programmes and to the fluoridation of water have received the courts' attention. See *Jacobsen v Massachusetts* 197 US 11 (1905); *Dowell v City of Tulsa* 348 US 912 (1955).
[3] Tribe (supra) at 1332.
[4] *Winston v Lee* 470 US 753 (1985)(Surgical removal of a bullet from a suspect to determine its origin violates due process where the state has substantial evidence of the origins of the bullet from another source.)
[5] JS Mill *On Liberty* (1859) Introduction.

FC s 12(2)*(b)* assumes that individuals are capable of taking decisions that are in their own interests and of acting as responsible moral agents. Any political decision that limits such autonomy constitutes a prima facie affront to FC s 12(2)*(b)*.

It is worth noting that both FC s 12(2)*(b)* and legitimate limitations on its exercise are protected by the same underlying principle: mutual concern and mutual respect for others. If we are genuinely concerned with and respectful of the lives of our fellow citizens, then we must respect the life choices they make at the same time as we express concern about whether such choices are good for them. Should their preferred way of being in the world entail putting coke up their nose (rather than drinking it from a glass), refusing life-saving blood transfusions for their children on religious grounds, or continuing to smoke in the face of incontrovertible evidence of its dangers, then the commonweal may be justified in passing laws that interfere with the 'bodily control' of citizens who wish to smoke, do coke or allow their children to die. However the recognition of a constitutional right to bodily autonomy in an open society means that we must minimize paternalistic forms of intervention in others' lives.[1]

Our case law is, however, replete with examples of court's upholding paternalistic limitations on bodily self-determination. For example, while declaring unconstitutional a law that prohibited sodomy, Heher J offered the following observation:

> There are undoubtedly some acts which are so repugnant to and in conflict with human dignity as to amount to perversion of the natural order. Bestiality seems to me to be an obvious example of an independent unnatural offence which justifies this categorisation.[2]

The High Court in *S v M* followed Heher J's lead and rejected equality, freedom and privacy-based constitutional challenges to laws prohibiting bestiality.[3] As a matter of legal strategy, the accused erred by relying upon the prohibition on arbitrary deprivation of freedom in FC s 12(1)*(a)* rather than the right to control over the body in FC s 12(2)*(b)*.[4] However, the *S v M* court's findings in relation to both FC s 12(1)*(a)* and FC s 9(3) make it clear that it would have reached a similar conclusion with respect to a challenge brought under FC s 12(2)*(b)*.[5]

[1] See Tribe (supra) at 1371–72:

> In a society unwilling to abandon bleeding bodies on the highway, the motorist or driver who endangers himself [by not wearing a helmet or seatbelt] plainly imposes costs on others. His choice to risk a range of possible injuries, instead of certain death, in one respect strengthens society's case for regulating him; the social and economic cost of caring for the motorist who suffers an accident is likely to be considerably greater than the cost of burying the terminally ill patient who refuses extraordinary measures to prolong his life.

[2] *National Coalition for Gay and Lesbian Equality & Others v Minister of Justice & Others* 1998 (2) SACR 102, 127d-f (W), 1998 (6) BCLR 726 (W).

[3] *S v M* 2004 (3) SA 680 (O).

[4] Ibid at paras 20–22.

[5] Ibid at paras 17–19 and 22.

The Constitutional Court has not yet been asked to consider the meaning of FC s 12(2)*(b)*. However, its decision in *S v Jordan* suggests that the Court may not be especially sympathetic to uses of the body that it, and the majority of South Africans, find morally repugnant.[1] *Jordan* concerned the constitutionality of legislative provisions outlawing prostitution and brothel-keeping. The applicants' challenge was based on the rights to equality, privacy, dignity, freedom and security of the person and freedom of trade. The majority found, without much difficulty, that '[t]he Act pursues an important and legitimate constitutional purpose, namely to outlaw commercial sex.'[2] Sachs and O'Regan JJ's dissenting judgment is, somewhat ironically, more troubled by how we construct the idea of control over the body. The body is not, so they tell us,

> something to be commodified. Our Constitution requires that it be respected. We do not believe that s 20(1)*(a*A*)* can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one's body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by s 20(1)*(a*A*)* but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.[3]

As one of the authors has noted elsewhere, all of us, Constitutional Court judges included, commodify our bodies by receiving money for our labour.[4] To invidiously distinguish prostitutes from Constitutional Court justices in terms of the stigma that attaches to their profession is to confuse commodifying with moralizing. And, it would seem to us, the Court is guilty of the latter.[5]

Jordan — when viewed through the lens of FC s 12(2)*(b)* — reminds us that the right to bodily autonomy is concerned — not with the welfare of the individual — but with the preservation of individual integrity. 'The value of autonomy', according to Ronald Dworkin,

[1] 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC)('*Jordan*').

[2] Ibid at para 15. The *Jordan* Court offers (in a footnote) four justifications for this assertion: (1) prostitution breeds crime; (2) prostitution exploits women; (3) prostitution leads to child trafficking; (4) prostitution promotes the spread of disease. Both the applicant and the amicus had argued that these ills would be better solved by decriminalisation. According to the majority, the legislature's justification for the criminalization of prostitution ought not to be second-guessed by the Court. Ibid at n11. Of course, the interrogation of the legislature's purpose in passing a law that impairs the exercise of a fundamental right is an essential feature of limitations analysis. See S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 34.8.

[3] *Jordan* (supra) at para 74.

[4] See S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) § 43.3*(c)(x)*.

[5] See N Fritz 'Crossing Jordan: Constitutional Space for (Un)Civil Sex' (2004) 20 *SAJHR* 230.

> derives from the capacity it protects: the capacity to express one's own character — values, commitments, convictions and critical as well as experiential interests — in the life one leads. Recognizing an individual right of autonomy makes self-creation possible. It allows each of us to be responsible for shaping our lives according to our own coherent or incoherent — but in any case, distinctive — personality. It allows us to lead our own lives rather than be led along them, so that each of us can be, to the extent a scheme of rights can make this possible, what we have made of ourselves. We allow someone to choose death over radical amputation or a blood transfusion, if that is his informed wish, because we acknowledge his right to a life structured by his own values.[1]

However, as we all know, illness, age or mental incompetence may result in the wholesale absence of individual autonomy. In such instances, where the decision would have been a matter of autonomous choice, courts and other parties may be asked to intervene on the afflicted person's behalf. A court may be approached for an order that a mentally incompetent person undergo surgery to remove a kidney in order to save the life of a sibling.[2] A court may be approached for an order declaring that a hospital may legally terminate life support for a patient in a persistent vegetative state.[3] Where the court substitutes its own judgment for that of the 'afflicted' person, it must remain mindful that FC s 12(2)*(b)*'s right to bodily self-determination requires such substitution to emphasize the importance of the 'afflicted' person's bodily integrity:

> On the one hand, Anthony Bland is alive and the principle of the sanctity of life says that we should not deliberately allow him to die. On the other hand, Anthony Bland is an individual human being and the principle of self-determination says he should be allowed to choose for himself and that, if he is unable to express his choice, we should try our honest best to do what we think he would have chosen. We cannot disclaim this choice because to go on is as much a choice as to stop. Normally we would unquestioningly assume that anyone would wish to live rather than to die. But in the extraordinary case of Anthony Bland, we think it more likely that he would choose to put an end to the humiliation of his being and the distress of his family. Finally, Anthony Bland, is a person to whom respect is owed and we think that it would show greater respect to allow him to die and be mourned by his family than to keep him grotesquely alive.[4]

Even prior to the enactment of the Final Constitution, South African law already gave partial recognition to the right to control over the body in the context of

[1] R Dworkin *Life's Dominion* (1993) 225.
[2] *Strunk v Strunk* 445 SW 2d 145 (1969).
[3] *Airedale NHS Trust v Bland* [1993] 1 All ER 821.
[4] *Airedale NHS Trust v Bland* [1993] 1 All ER 821, 854*d-g* (Hoffmann LJ). See also The South African Law Commission *Discussion Paper 71: Euthanasia and the Artificial Preservation of Life* (1997). The Commission concluded that an individual's clear expression of a wish not to have her life prolonged by medical means should be respected. The expression of such a wish could take the form of a direction (sometimes called a 'living will') that should one ever suffer from a terminal illness and as a result be unable to make or to communicate decisions concerning one's medical treatment or its cessation, any medical treatment that one receives should be discontinued and that only palliative care should be administered. Where a patient is in a vegetative state and unable to express this wish a court should possess the power to authorize the termination of life-prolonging procedures.

euthanasia. The court in *Clarke v Hurst* granted an application for an order allowing the discontinuance of artificial feeding of a plaintiff who was in a persistent vegetative state and who had signed a document expressing his wish that he not be kept alive by artificial means.[1] While this holding constitutes an important recognition of bodily autonomy, it is unclear how much further our courts would be willing to go with respect to the right to die.

The ability of a court to substitute its own judgment for that of an 'afflicted' person will often be controversial. In *Hay v B*, a doctor made an urgent application to the High Court for permission to give an infant a life-saving blood transfusion.[2] The parents had refused to allow the transfusion because, as Jehovah's Witnesses, their faith prohibited it. Despite FC s 15's guarantee of freedom of religion and the law's general acknowledgement of the parental right to act on behalf of a child, the *Hay* court held that the interests of the child were always paramount,[3] and that its right to life should be protected.[4] It granted the application.[5]

40.11 FC s 12(2)*(c)*: Subjection to Medical and Scientific Experiments

FC s 12(2)*(c)* requires a litigant to prove two distinct elements.[6] First, she must demonstrate that the conduct complained of constitutes a medical or scientific experiment. Secondly, if it does, she must show that there was an absence of informed consent.

(a) Medical or scientific experiment

Although both the National Health Act and FC s 12(2) afford a high degree of protection to any act that infringes a person's bodily integrity, FC s 12(2)*(c)* still requires that one demonstrate that a given procedure falls within the definition of an 'experiment'. Such a showing is of particular importance given that FC s 12(2)*(c)* is the only non-derogable FC s 12(2) right — as determined by FC s 37 — and that its non-derogability may be taken into account when a court considers the 'nature of right' in terms of FC s 36.

[1] 1992 (4) SA 630 (D).

[2] 2003 (3) SA 492 (W).

[3] Ibid at 494I–495A relying on FC s 28(2). See, generally, A Friedman & A Pantazis 'Children's Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) § 47.10.

[4] *Hay v B* (supra) at 495C-D ('His right to life is an inviolable one. This is a right that is capable of protection. It is in the best interests of baby R that this right be protected. He will live as a human being, be part of a broader community and share in the experience of humanity. I am alive to the fundamental beliefs espoused by the first and second respondents. I respect their private religious beliefs. However, in the present matter, the evidence establishes that their beliefs negate the essential content of the right in question.') See also M Pieterse 'Life' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 39.4.

[5] In the pre-constitutional decision of *Phillips v De Klerk* a Jehovah's Witness himself refused a blood transfusion for injuries sustained in a car accident. Unreported decision of the TPD (March 1983) discussed in SA Strauss *Doctor, Patient and the Law: A Solution of Practical Issues* (3rd Edition, 1991) 29-36. The responsible doctor successfully obtained an urgent order permitting him to give the transfusion against the patient's wishes. After he had recovered, the patient approached the High Court for an order overturning the earlier decision. Esselen J granted the order, holding that a competent adult was entitled to refuse treatment that went against his religious convictions.

[6] Currie & Woolman (supra) at 39–47; Currie & De Waal (supra) at 310.

When then does an activity qualify as a medical or scientific experiment? Although we are easily outraged by the notorious experiments performed by Nazi doctors during WWII[1] and the equally repugnant investigations carried out by US army doctors on US soldiers during the Cold War — the Tuskegee syphilis experiment[2] and the testing of the effects of radiation[3] and hallucinogens[4] — such conduct amount to acts of barbarism dressed up in medical gowns. They also tend to deflect our attention way from the fact that, as the World Medical Association notes in its Declaration of Helsinki, '[m]edical progress is based on research which ultimately must rest in part on experimentation involving human subjects.'[5] FC s 12(2)*(c)* alerts us to threats to personal integrity that flow from everyday medical research and treatment.

[1] See G Annas & M Grodin (eds) *The Nazi Doctors and the Nuremburg Code: Human Rights in Experimentation* (1992) 97–99 ('*Nazi Doctors*'). The one positive result to come out of those experiments is the Nuremburg Code. The Code was created by the Nuremburg tribunal as part of the judgment convicting the Nazi doctors. The code stands as the first, and still the principle, international document condemning medical experimentation and enshrining informed consent.

[2] From 1932 to 1972, four hundred black men suffering from syphilis were deliberately left untreated so as to better understand the effects of the disease. The men did not know about the project, and many did not know that they had syphilis. They thought they were receiving standard medical care. See, generally, JH Jones *Bad Blood: The Tuskegee Syphilis Experiment* (2nd Edition, 1993); J Katz 'The Consent Principle of the Nuremburg Code: Its Significance Then and Now' in Annas & Grodin *Nazi Doctors* (supra) at 230.

[3] See *Jaffee v United States* 663 F2d 1226 (3rd Cir 1981)(The plaintiff and some of his fellow soldiers were forced to stand in the Nevada desert without any protection while a nuclear device was exploded nearby. The plaintiff was ultimately unsuccessful. A majority of the court held that soldiers could not sue the government for injuries suffered 'in the course of activity incident to service'. The dissenting judges characterized the incident as a serious violation of internationally established human rights and that no law should allow the government to evade liability for such violations.) See also G Annas 'The Nuremburg Code in US Courts: Ethics versus Expediency' in Annas & Grodin *Nazi Doctors* (supra) at 209. An even more disturbing experiment occurred in Cincinnati between 1960 and 1971. Eighty-eight cancer patients were subjected to radiation treatment as part of research for the military. The patients were not told that they were part of an experiment or of the deleterious effects of the procedure. The treatment shortened all of their lives. When the experiment eventually came to light, the families of the victims instituted a class action suit against the hospital. See *In re Cincinnati Radiation Litigation* 874 F. Supp. 796 (SD Ohio 1995)(District Court accepted the plaintiffs contention that they had a right to bodily integrity and that the experiments potentially violated that right.) See also M Hawk 'The Kingdom of Ends': *In Re Cincinatti Radiation Litigation* and the Right to Bodily Integrity' (1995) 45 *Case Western Law Review* 977.

[4] The infamous MKULTRA project began in 1953. It involved 200 researchers at 80 institutions. The researchers would administer drugs, including LSD, to members of the armed forces to try to counter the 'brainwashing techniques' used against America soldiers in the Korean War. At least two people died during these experiments and many suffered from severe mental and physical illness as a result. When this project came to light, a freedom of information suit was filed to discover the names of the participating institutions. See *Central Intelligence Agency v Sims* 471 US 159 (1984). See also *United States v Stanley* 107 SCt 3054 (1987)(Stanley had volunteered to test protective clothing for chemical warfare. During the tests he was secretly given LSD. The hallucinations caused by the LSD led to his divorce and eventual discharge from the army. Stanley sued the army for compensation. In what Annas has described as an 'extraordinarily technical and abstract decision', Justice Scalia held that to allow Stanley to sue would be an unjustifiable intrusion into 'military discipline and decision-making'. See also Annas (supra) at 212–15. Justice O'Connor, in a strongly worded dissent, argued that the project was so deplorable and so far outside the bounds of the 'military mission' that the US Constitution, read with the Nuremburg Code, necessitated compensation. Ibid.

[5] Preamble to the Declaration of Helsinki (2000) WMA 52nd Assembly, available at www.wma.net/e/policy/17-c_e.html (accessed on 15 March 2006).

Most ethical guidelines for medical research draw a distinction between 'therapeutic' or 'clinical' research where the main aim is treating or diagnosing a patient, and 'non-therapeutic' research where the goal is 'purely scientific'. The Declaration of Helsinki only requires full informed consent for 'non-therapeutic' research. In the context of clinical research, physicians are given almost complete discretion to decide when consent is necessary.[1] This grant of discretion is justified on the grounds that doctors know best what is in the patient's interest. (As we shall see, the South African Medical Research Council takes a somewhat stricter line.)

In *X v Denmark*, medical professionals tested the fine line between experimentation and treatment.[2] The European Commission for Human Rights had to decide whether a doctor's use of a new model of pincers in an accepted procedure for sterilization amounted to an experiment. The dispute arose because subsequent to the sterilization operation the woman operated upon fell pregnant. The Commission found that a standard sterilization procedure could not be classified as experimentation and that the use of the new pincers did not alter this conclusion.[3]

In this instance, South African law may be ahead of international scientific conventions. Our law does away with the sometimes illusory distinction[4] between

[1] The following provisos apply to clinical research: 'In the treatment of the sick person, the physician must be free to use a new diagnostic and therapeutic measure, if in his or her judgment it offers hope of saving life, re-establishing health or alleviating suffering.' Part II, art 1. 'The potential benefits, hazards and discomfort of a new method should be weighed against the advantages of the best current diagnostic and therapeutic methods.' Part II, art 2.

[2] *X v Denmark* Application Number 9974/82 (1983) 32 *Decisions and Reports* 282. See N Jawayickrama *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (2002) 351-352 (For a discussion of *X v Denmark*.)

[3] The Medical Research Council offers the following 'rule of thumb' for distinguishing between clinical practice and research: 'consider the 'intent' of the clinician — if the intent is to apply information to others, or to present it at a scientific meeting, or submit it for publication or for a higher qualification — in other words, to contribute to generalisable knowledge — this is research.' Medical Research Council *Guidelines on Ethics for Medical Research: General Principles* (4th Edition, 2002) available at http://www.sahealthinfo.org/ethics/ethicsbook1.pdf (accessed on 14 August 2006)('*MRC Guidelines*') 2.4.1.3.

[4] Mason Meier criticizes this distinction specifically with reference to HIV experiments in developing countries conducted by multinational pharmaceutical companies: 'investigators see these trials as research, whose purpose is to provide generalizable knowledge that may help others. On the other hand, most individuals suffering with AIDS see these trials as therapy, whose primary purpose is to benefit them.' B Mason Meier 'International Protection of Persons Undergoing Medical Experimentation: Protecting the Right to Informed Consent' (2002) 20 *Berkeley Journal of International Law* 513, 537. This difference in perspective allows physicians to

> artificially create less stringent informed consent requirements simply by labelling an activity 'therapeutic.' This 'therapeutic illusion' permits physicians to use non-consensual subjects under the superficial guise that the research would, in some undefined sense, benefit the subject or those with similar characteristics.

Ibid at 537–38 (footnotes omitted). A related problem is that researchers often select under-developed communities to conduct their research specifically because of the lower level of knowledge and the lack of treatment alternatives. The Medical Research Council requires researchers to prove the necessity of conducting the research in the vulnerable community and to prove some benefit to the community from the study. See MRC *Guidelines* (supra) at 7.1.3.8.

therapeutic conduct and non-therapeutic conduct by requiring all medical interventions to be subject to the same degree of informed consent. FC s 12(2)'s implicit distinction between 'normal' therapeutic medical interventions and medical experiments continues to possess meaningful content because the basic law ultimately determines the validity of ordinary law. It may well be the case that the standard of informed consent for 'all' medical interventions — experimental or not — is far too low. If that is so, then FC s 12(2)*(c)* can be used to raise the bar with respect to experiments. Or the standard may only be too low with regard to experimentation. In all such instances, FC s 12(2)*(c)* retains its purchase.[1] We would therefore agree with Van Wyk that 'experiment' in FC s 12(2)*(c)* should be read to include all forms of research,[2] therapeutic and non-therapeutic,[3] that in some way invade the bodily integrity of the subject.[4]

FC s 12(2)*(c)* also refers to 'scientific' experiments. Tests that may be covered by this term include placing people under extremely stressful conditions in order to measure their response.[5] As a result, some academics argue that FC s 12(2)*(c)*

[1] Van Wyk contends that 'experiment' in FC s 12(2)*(c)* should be read to include all forms of research, therapeutic and non-therapeutic, that invade the bodily integrity of the subject. Were that so, MRC *Guidelines* (supra) at 2.1.2 and 2.1.3 would fail van Wyk's test: 'Research is a systematic investigation, including research development, testing and evaluation designed to develop or contribute to generalisable knowledge. Any activity aimed at obtaining knowledge affecting a person in any way, and which is additional to ordinary clinical practice, is to be regarded as research.' Van Wyk (supra) at 17–18. However, Van Oosten argues that 'experiment' should include only non-therapeutic treatment that includes some risk. P van Oosten 'The Law and Ethics of Information and Consent in Medical Research' (2000) 63 *THRHR* 5. See also S Strauss 'Clinical Trials Involving Mental Patients: Some Legal and Ethical Issues' (1998) 1 *South African Practice Management* 20 (FC s 12(2)*(c)* only proscribes 'purely experimental' or non-therapeutic procedures.) The authors differ on this point. Stu Woolman acknowledges that his disability sometimes requires his physicians to employ non-standard modes of treatment. He is alive because of such treatment, but would be loath to describe his doctor's ministrations as experiments. Michael Bishop prefers to cast the net of experimentation as wide as possible to ensure maximum patient protection against medical abuse and neglect.

[2] A decent definition of research is offered in the MRC *Guidelines* (supra) at 2.1.2 and 2.1.3: 'Research is a systematic investigation, including research development, testing and evaluation designed to develop or contribute to generalisable knowledge. Any activity aimed at obtaining knowledge affecting a person in any way, and which is additional to ordinary clinical practice, is to be regarded as research.'

[3] Van Wyk (supra) at 17–18 (Argues that there are three possible interpretations of 'experiment': a) any research; b) only non-therapeutic research; and c) only research that amounts to cruel, inhuman or degrading treatment. She argues that both a literal reading and a value based interpretation of FC s 12(2)*(c)* point to the first possibility.) But see Van Oosten (supra)(Argues that 'experiment' should include only non-therapeutic treatment that includes some risk); S Strauss 'Clinical Trials Involving Mental Patients: Some Legal and Ethical Issues' (1998) 1 *South African Practice Management* 20 (FC s 12(2)*(c)* only proscribes 'purely experimental' or non-therapeutic procedures.)

[4] There are some forms of research, for example testing samples that were taken in the course of ordinary medical practice or compiling data from existing records, that involve no separate interference with the subject and therefore no invasion of their integrity. These would not be prohibited by FC s 12(2)*(c)*. See Van Oosten (supra) at 16.

[5] The two best-known examples of such social experimentation are the Milgram Experiment and the Stanford Prison Experiment. The Milgram Experiment tested how individual participants reacted to commands to inflict what the individual participant believed to be increasingly powerful electrical shocks on another. However, the other participant in the experiment was an actor and no shocks were inflicted. The majority of participants obeyed commands to inflict the maximum possible shock. See S Milgram

requires the state to impose the same degree of care and the same degree of consent as is demanded for medical experiments. For example, welfare activists in the United States challenged a state rule that denied additional assistance to parents who conceived children while on welfare.[1] They contended that the rule constituted a form of experimentation designed to determine whether welfare recipients would alter their behaviour in response to particular kinds of incentives. Such a reading is not only strained — it is unworkable. All laws — from tax regulations to traffic violations — constitute forms of social control designed to constrain behaviour. If the state alters its policy — and the law — in response to the behaviour of the citizenry, then all law becomes an ongoing experiment. That would make all law subject to FC s 12(2)*(c)*. The drafters of the Final Constitution could not have possibly imagined that all South African law would be so subject and that the implementation of each law would require the informed consent of each member of our polity.

(b) Informed consent

Informed consent provides both substantive and procedural protection to subjects of experimentation.[2] It ensures that subjects are treated with dignity[3] and that they retain the capacity to make decisions that may be contrary to the desire or the interests of the persons offering them a form of therapeutic treatment.[4]

Obedience to Authority; An Experimental View (1974). The Stanford Prison Experiment tested the reaction of a group of volunteers placed in a mock 'prison' and then separated into 'guards' and 'prisoners'. The guards became increasingly violent and the prisoners progressively more emotionally disturbed. The experiment, initially planned for two weeks, ended after six days because of the terrible state of the 'mock' prison conditions and its inhabitants. See C Haney, WC Banks & PG Zimbardo 'Interpersonal Dynamics in a Simulated Prison' (1973) 1 *International Journal of Criminology and Penology* 69. Both experiments press the envelope of what we might consider constitutionally-protected experiments in terms of FC s 12(2)*(c)*. However, it is not the participants lack of knowledge about the experiment that could result in the constitutional impairment. The gold standard of double-blind, placebo-controlled experimentation relies upon participant and doctor ignorance. An argument could be made in which such experiments counted as impairments of FC s 12(2)*(c)*, but were deemed justifiable — in terms of the MRC Guidelines — under FC s 36.

[1] *CK v Shalala* 883 F Supp 991 (DNJ 1995)(Claim failed on the basis that the law — even if characterized as an experiment — did not pose a danger to the plaintiffs' well-being.)

[2] Mason Meier (supra) at 515.

[3] According to Jonas 'only genuine authenticity of volunteering can possibly redeem the condition of thinghood to which the subject submits.' H Jonas 'Philosophical Reflections on Experimenting with Human Subjects' (1969) 98 *Daedalus* 219, 240 as cited in Mason Meier (supra) at 515. Recent MRC *Guidelines* (supra) amplify these two basic principles: (1) 'autonomy (respect for the person — a notion of human dignity); (2) beneficence (benefit to the research participant); (3) non-maleficence (absence of harm to the research participant); (4) justice (notably distributive justice — equal distribution of risks and benefits between communities)'. No one of these four principles has priority over another. Application of the MRC guidelines requires researchers and ethics to exercise good judgment. Guideline 1.3.1. FC s 12(2)*(c)* can embrace these four principles but will ultimately privilege autonomy as the basis of informed consent as the most central principle.

[4] See R Delgado & H Leskovac 'Informed Consent in Human Experimentation: Bridging the Gap Between Ethical Thought and Current Practice' (1986) 34 *UCLA L Rev* 67, 91; E Gordon 'Multiculturalism in Medical Decision-making: The Notion of Informed Waiver' (1996) 23 *Fordham Urban LJ* 1321, 1328 as cited in Mason Meier (supra) at 515.

As we have already noted, a substantial body of law already outlines the content of informed consent. The most recent contribution to this body of law is the National Health Act ('NHA').[1] According to the NHA, consent is only 'informed' if the health care user, at the time of consent, possesses the following forms of knowledge:

(a) her own health status, except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to her best interests;
(b) the range of diagnostic procedures and treatment options generally available;
(c) the benefits, risks, costs and consequences generally associated with each option; and
(d) her right to refuse health services and the implications, risks, obligations of such refusal.[2]

Informed consent does not merely require that the patient be informed of the salient risks and options but that he 'appreciates and understands what the . . . purpose of the [experiment] is'.[3] Furthermore, information alone is not sufficient if the person is unable to act meaningfully and freely on that information.[4] In *C v Minister of Correctional Services*, a prisoner's privacy suit succeeded because the state had permitted an HIV test to be taken without his informed consent.[5] The

[1] Act 61 of 2003.

[2] NHA s 7(1)(3) read with NHA s 6(1). This knowledge should be given to the user in a language that she understands and in a manner appropriate for her level of literacy. NHA s 6(2). For more detail on exactly what information a practitioner or an experimenter must be provide, see van Oosten (supra) at 27–28.

[3] *C v Minister of Correctional Services* 1996 (4) SA 292 (C). See also *Christian Lawyers Association v Minster of Health & Others* 2005 (1) SA 509, 516F–517B (T), 2004 (10) BCLR 1086 (T)('*Christian Lawyers II*')(The Court cited with approval the dictum of Innes CJ in *Waring & Gillow Ltd v Sherborne* 1904 TS 340, 344 that informed consent requires 'that the risk was known, that it was realised, and that it was voluntarily undertaken. Knowledge, appreciation, consent — these are the essential elements; but knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent.' Mojapelo J went on to outline the meaning of each of these requirements:

> The requirement of 'knowledge' means that the woman who consents to the termination of a pregnancy must have full knowledge 'of the nature and extent of the harm or risk'.
>
> The requirement of 'appreciation' implies more than mere knowledge. The woman who gives consent to the termination of her pregnancy 'must also comprehend and understand the nature and extent of the harm or risk'. The last requirement of 'consent' means that the woman must 'in fact subjectively consent' to the harm or risk associated with the termination of her pregnancy and her consent 'must be comprehensive 'in that it must 'extend to the entire transaction, inclusive of its consequences'.' (citations omitted).)

Ibid at 515F-516B.

[4] See Van Oosten (supra) at 29 (Consent must not only be informed but also free and voluntary, clear and unequivocal, comprehensive and revocable.) The right to revoke consent at any time is central to any construction of informed consent. Unfortunately, financial inducements to participate in experiments tend to attract disproportionately larger percentage of poorer subjects. Poverty acts a powerful incentive to consent to activities for many participants. See MRC *Guidelines* (supra) at 9.13 (Specifically limits the payment of research participants.)

[5] The court considered the Department's compliance with pre-determined departmental regulations defining informed consent. However, the principles articulated by the High Court reflect generally accepted practice regarding HIV testing. *C v Minister of Correctional Services* (supra) at 301D.

prisoner had twice been informed that the test was for HIV and other sexually transmitted diseases and that he had the right to refuse. Despite these efforts, the court found that the prisoner had still not been given *informed* consent because *(a)* the information had not been divulged in private or individually and *(b)* the prisoner had not been given sufficient time to consider whether to refuse the test.[1] Similarly, if a person is given the opportunity to participate in a trial for an HIV treatment, but is not offered alternative means of treatment, then the duress that attends such a decision makes it difficult to say that she has given informed consent. That said, we do not, as yet, possess adequate medical responses to many illnesses. In such instances, the duress that attends consent may be preferred to the absence of experimental protocols that offer some possibility of a cure.

Similarly vexed questions of duress and consent attend the question of whether a doctor can withhold information from a patient regarding a potential risk if the doctor knows that the patient is likely to refuse what the doctor considers the best course of treatment?[2] Ackermann J, writing for a full bench of the Cape High Court in *Castell v De Greef*, held that the doctor, no matter how well-motivated, was not entitled to do so:

> It is clearly for the patient to decide whether he or she wishes to undergo the operation, in the exercise of the patient's fundamental right to self-determination. A woman may be informed by her physician that the only way of avoiding death by cancer is to undergo a radical mastectomy. This advice may reflect universal medical opinion and may be, in addition, factually correct. Yet, to the knowledge of her physician, the patient is, and has consistently been, implacably opposed to the mutilation of her body and would choose death before the mastectomy. I cannot conceive how the 'best interests of the patient' (as seen through the eyes of her physician or the entire medical profession, for that matter) could justify a mastectomy or any other life-saving procedure which entailed a high risk of the patient losing a breast. Even if the risk of breast-loss were insignificant, a life-saving operation which entailed such risk would be wrongful if the surgeon refrains from drawing the risk to his patient's attention, well knowing that she would refuse consent if informed of the risk. It is, in principle, wholly irrelevant that her attitude is, in the eyes of the entire medical profession, grossly unreasonable, because her rights of bodily integrity and autonomous moral agency entitle her to refuse medical treatment. It would, in my view, be equally irrelevant that the medical profession was of the unanimous view that, under these circumstances, it was the duty of the surgeon to refrain from bringing the risk to his patient's attention.[3]

[1] *C v Minister of Correctional Services* (supra) at 304C–E.

[2] See I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 310; Van Oosten (supra) at 24; I Currie & S Woolman 'Freedom & Security of the Person' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) 39.6*(d)*(ii).

[3] 1994 (4) SA 408 (C)('*Castell*'). It is worth comparing this pronouncement by Ackermann J with his equally expansive construction of liberty in *Ferreira*. The correctness of *Castell* was questioned by the Supreme Court of Appeal in *Broude v McIntosh* 1998 (3) SA 60 (SCA). Although it did not overrule *Castell*, the *Broude* court worried that a 'surgical intervention of a medical practitioner whose sole object is to alleviate the pain or discomfort of the patient, and who has explained to the patient what is intended to

The *Castell* Court determined that for informed consent to exist a patient must be informed of all 'material' risks. A risk is material if:

(a) a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it; or
(b) the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it.[1]

This decision represents a welcome shift from medical paternalism to patient autonomy.[2] This new standard for informed consent — based upon the notion of the reasonable patient and not the reasonable doctor — seems to us to be consistent with FC s 12(2)'s commitment to bodily integrity.

(c) Persons unable to consent

But what of those who are unable to consent? Can one ever perform experiments on them?[3] Both Van Oosten and Strauss have argued that FC s 12(2)*(c)* specifically refers to the subject's own consent. Assume then that children and the mentally handicapped cannot be experimented upon without limiting FC s 12(2)*(c)*.[4] The question then would be whether any law that permits such experimentation can be justified in terms of FC s 36. The limitations analysis will turn largely upon whether the experiment is therapeutic or non-therapeutic. It will be much easier to justify research that has immediate potential benefit for the patient than research that has no or only remote possible benefits in the future.

However, the banning of all non-therapeutic research on a class of people will inevitably turn them into 'research orphans'.[5] Moreover, such a bright-line rule would preclude meaningful research into specific childhood diseases or mental disorders. Thus, experimentation that may be beneficial to the class to which the subject belongs — if not the subject herself — could be a justifiable limitation under FC s 36. The therapeutic value of the research and the level of risk

be done and obtained the patient's consent to it being done, should be pejoratively described and juristically characterized as an assault simply because the practitioner omitted to mention the existence of a risk considered to be material enough to have warranted disclosure and which, if disclosed, might have resulted in the patient withholding consent.' Ibid at 67J-68A.

[1] *Castell* (supra) at 428 F–G.

[2] See Van Oosten (supra) at 24 ('[T]he undeniable inherent potential of abuse of research subjects renders a stricter adherence to the informed consent requirement necessary in medical research than standard practice.')

[3] For a summary of classes of person who may not be able to consent, and a brief exposition of the law regulating consent on their behalf, see Van Oosten (supra) at 15–21.

[4] In the context of children, it will likely only be those children who are in fact unable to provide informed consent, rather than those who fall under a set age, that will not be permitted to engage in experimentation. See *Christian Lawyers II* (supra)(Court upheld legislation permitting girls under the age of 18 to receive abortions. The court accepted that it was the subjective capacity of the child to provide informed consent, not her age, that was necessary to allow an abortion.)

[5] J Burchell 'Non-Therapeutic Medical Research on Children' (1978) 95 *SALJ* 193, 196.

involved will be important, but not decisive factors in determining the justifiability of any such experimentation. Legislation already permits proxy consent for therapeutic interventions on children[1] and the mentally ill.[2] National ethical guidelines exist for conducting non-therapeutic research on those unable to consent.[3] It should be borne in mind that ultimately, it is the courts, not medical research boards, that have the final say on the constitutionality of any medical research.

The apparent justifiability of experiments on persons who cannot consent is still subject to one important proviso. The specific refusal of the incompetent — no matter what the grounds — must always be honoured.[4]

[1] Section 39(4) of the Child Care Act distinguishes between various classes of children. Act 74 of 1983. Children under 14 cannot consent to any form of medical treatment and they can be treated only with proxy consent from their legal guardian. Children aged between 14 and 18 may consent to treatment but not to operations. Only 18-year-olds may consent to any form of medical intervention. The treatment can include experimentation.

[2] The new Mental Health Act allows interventions if consent is granted by a spouse, next of kin, partner, associate, parent or guardian. Act 17 2002 ('MHA'). It does not, however, seem to allow any non-therapeutic experimentation on mentally ill patients. People may be submitted to 'involuntary care, treatment and rehabilitation' which 'means the provision of health interventions to people incapable of making informed decisions due to their mental health status and who refuse health intervention but require such services for their own protection or for the protection of others'. MHA s 1. No provision of the Act allows experimentation.

[3] South African Medical Research Council *Guidelines on Ethics for Medical Research* (1993). The guidelines allow therapeutic research if there exists only 'minimal risk'. 'Minimal risk' is defined as a small chance of a trivial reaction or an extremely remote possibility of serious harm or death. Non-therapeutic research (and therapeutic research on incompetent subjects) may be conducted only if there is a 'negligible risk'. Negligible risk is defined as risk 'equal to the probability and magnitude of physical or psychological harm that is normally encountered in the daily lives of people in a stable society or in the routine performance of physical or psychological examination or test'. Both Van Wyk and Van Oosten claim that the *Guideline*'s definition of minimal risk is not in line with international practice. See Van Wyk (supra) at 11 and 22; Van Oosten at 12.

[4] MRC *Guidelines* (supra) at 5.1 (Research can only be conducted on an incompetent with their assent. 'Assent implies a willingness that does not necessarily carry the greater understanding and legal implications that are generally understood by "consent".')

41 Freedom of Religion, Belief and Opinion

Paul Farlam

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41.1 Introduction

(a) Religion and the state before 1994

Prior to 1994, Christianity was South Africa's unofficial state religion. The pre-1994 Constitutions[1] and a host of legal rules expressly endorsed the tenets of the Christian faith.[2]

The promotion of Christianity by the state was accompanied by, and contributed to, the marginalisation of other religious communities. The Christian bias of the legal system caused adherents of other faiths, significant prejudice in respect of maintenance and other spousal benefits,[3] divorce,[4] succession,[5] and the law of evidence.[6]

However, even the articulation of Christian belief was not unfettered under Apartheid. The brand of Christianity favoured by the state reflected a theology that advocated obedience to the government of the day. As a result, Christian groups and leaders that regarded their faith as requiring opposition to tyrannical

[1] Section 2 of the Republic of South Africa Constitution Act 110 of 1983 ('Tricameral Constitution') and s 2 of the Republic of South Africa Constitution Act 32 of 1961 both stated that 'The people of the Republic of South Africa acknowledge the sovereignty and guidance of Almighty God'. The Preamble to the Tricameral Constitution contained a pledge to 'uphold Christian values and civilized norms' and, like the 1961 Constitution, included a statement to the effect that the South African people 'are conscious of our responsibility towards God and man'. At some periods prior to Union in 1910, there were even established churches (the Nederduitsch Hervormde Kerk or the Nederduitse Gereformeerde Kerk) in the Zuid-Afrikaansche Republiek and the Free State.

[2] These legal rules included: (1) non-recognition of Muslim and Hindu marriages on the basis that, being potentially polygamous, they were 'contrary to public policy'; *Ismail v Ismail* 1983 (1) SA 1006, 1025F-G (A); see also *Esop v Union Government (Minister of Interior)* 1913 CPD 133 and F Cachalia 'Citizenship, Muslim Family Law and a Future South African Constitution: A Preliminary Enquiry' (1993) 56 *THRHR* 392, 398-9; (2) rules relating to 'Christian national education' for white students in public schools; see *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at para 149 (Sachs J) ('*Solberg*'); (3) censorship provisions; see the Publications and Entertainment Act 26 of 1963 and the Publications Act 42 of 1974; see too *Publication Control Board v Gallo (Africa) Ltd* 1975 (3) SA 665 (A) ('*Publication Control Board*'); *Human & Rousseau Uitgewers (Edms) Bpk v Snyman NO* 1978 (3) SA 836, 849 (T); (4) the crime of blasphemy (an offence based only on the Christian concept of God); *R v Webb* 1934 AD 493, 496; *Publication Control Board* (supra) at 671H; (5) laws restricting shopping, sporting and entertainment events on Sundays; J D van der Vyver 'Religion' in W A Joubert (founding ed) *The Law of South Africa* (Vol 23, First Reissue) at para 239; (6) the public holidays 'with a religious base' (Ascension Day and the Day of the Vow, as well as Good Friday and Christmas Day); and (7) penalties exacted on gays and lesbians. For a judicial survey of State bias in the pre-constitutional period, see *Solberg* (supra) at paras 149-153 (Sachs J). For earlier discussions of the relationship between church and State in South Africa (with specific reference to the position under the 1961 Constitution), see J G Wulfsohn 'Separation of Church and State in South African Law' (1964) 81 *SALJ* 90 and 226, and B v D van Niekerk ' "Render unto Caesar . . .": A study of the Sunday Observance Laws in South Africa' (1969) 86 *SALJ* 27.

[3] *Ismail v Ismail* (supra).

[4] *Cf Ryland v Edros* 1997 (2) SA 690 (C), 1997 (10) BCLR 77 (C).

[5] *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Kalla and Another v The Master and Others* 1995 (1) SA 261 (T), 1994 (4) BCLR 79 (T).

[6] *S v Johardien* 1990 (1) SA 1026 (C).

and unjust rulers often suffered government reprisals.[1]

Believers of other faiths who felt compelled to voice their opposition to government policies naturally found the state less than sympathetic[2]. Those who subscribed to secular ideologies such as communism were actively sought out and penalised.[3] In pre-1994 South Africa, religious freedom was certainly less severely impaired than in countries with regimes hostile to religion. But the post-1994 constitutional entrenchment of freedom of religion, conscience, thought and belief marks a clear break with the repressive and the biased policies of the past.

[1] The Christian Institute, headed by Dr. Beyers Naude, was banned in 1977 under s 4 of the Internal Security Act, Act 44 of 1950, after earlier having been declared an 'affected organisation' in 1975 under s 2 of the Affected Organisations Act, Act 31 of 1974. See the report of the mission sent to South Africa in 1987 by the International Commission of Jurists; G Bindman (ed) *South Africa: Human Rights and the Rule of Law* (1988) 55-7; A S Mathews *Freedom, State Security and the Rule of Law* (1986); J Van der Vyver (supra) at para 232. A prominent church leader like Beyers Naude (a former moderator of NGK in the Transvaal and later Secretary-General of the South African Council of Churches) was himself banned. Archbishop Desmond Tutu had his passport revoked in 1981 (when he was a Bishop in the Anglican Church); *Tutu v Minister of Internal Affairs* 1982 (4) SA 571 (T). Allan Boesak had his passport withdrawn in 1985 (when he was a minister in the NG Sendingkerk, as well as President of the World Alliance of Reformed Churches); *Boesak v Minister of Home Affairs* 1987 (3) SA 665 (C). Frank Chikane (Beyers Naude's successor as Secretary-General of the SACC, as well as general secretary of the Institute of Contextual Theology) was denied entry to South West Africa when invited in his clerical capacity by the Council of Churches in Namibia; *Cabinet for the Territory of South West Africa v Chikane* 1989 (1) SA 349 (A). Another example of an infringement of freedom of Christian belief under Nationalist rule was the infamous 'church clause' in the Blacks (Urban Areas) Consolidation Act, Section 9(7) of Act 25 of 1945. The clause empowered the relevant government minister, with the consent of the local urban authority, to prohibit the attendance of black people at church services in areas that had not been zoned for occupation by black people under the Group Areas Act, Act 36 of 1966. See D V Cowen *The Foundations of Freedom* (1961) 56, 63; J D van der Vyver (supra) at para 232. The passing of this Act, which was openly disobeyed by a number of denominations, had a tragic postlude. The Anglican Archbishop of Cape Town, Geoffrey Clayton, died of a heart attack after signing a letter to the Prime Minister, advising that he could not instruct his church to obey it. See A Paton *Apartheid and the Archbishop: The life and times of Geoffrey Clayton, Archbishop of Cape Town* (1973).

Many Christian and other religious organisations in South Africa and elsewhere (including the World Alliance of Reformed Churches) declared apartheid to be a heresy. A particularly strong statement to this effect was *The Kairos Document*, signed largely by left-wing Christians and Muslims. Another notable denunciation of apartheid was 'The Koinonia Declaration', produced by a group of Afrikaner clergy. See, generally, J W De Gruchy *The Church Struggle in South Africa*, and J W De Gruchy & C Villa-Vicencio (eds) *Apartheid is a Heresy*. The World Council of Churches also denounced racial discrimination as being contrary to Christian teachings in 1960. See *Cape Times* 15 December 1960; Cowen (supra) at 63. The South African Council of Churches condemned apartheid as being inconsistent with Christian principles in 1968. See L Thompson *A History of South Africa* (1990) 204-5.

[2] The teachings of Mahatma Gandhi on *Satyagraha* — which drew inspiration from Hinduism — were developed in the context of opposition to the apartheid-style laws imposed on Indians in the Transvaal in the first decade of this century. For Gandhi's description of the origin of *Satyagraha*, see Shriman Narayan (ed) *The Selected Works of Mahatma Gandhi* (Vol 3, 1928) Chapters XII and XIII. See also Fatima Meer (ed) 'The South African Gandhi' in *An Abstract of the Speeches and Writings of M K Gandhi 1893-1914* (2nd Edition, 1996).

[3] See, for example, the Suppression of Communism Act 44 of 1950; *Kahn v Louw NO and Another* 1951 (2) SA 194 (C); *R v Sachs* 1953 (1) SA 392 (A).

(b) Provisions in the Final Constitution protecting religion

The right to freedom of religion, belief and opinion — s 15 of the Final Constitution[1] — reads as follows:

> 15(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
>
> (2) Religious observances may be conducted at state or state-aided institutions, provided that —
>
> (a) those observances follow rules made by the appropriate public authorities;
> (b) they are conducted on an equitable basis; and
> (c) attendance at them is free and voluntary.
>
> (3) (a) this section does not prevent legislation recognising-
>
> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
> (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
>
> (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

A number of other provisions in the Bill of Rights also affect religious belief. The most important is s 31's right to practise religion in a communal setting.[2] That provision reads as follows:

> 31(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
>
> (a) to enjoy their culture, practise their religion and use their language; and
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
>
> (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights. [3]

There was no equivalent to s 31 in the Interim Constitution. Nor was there a community right in any proposed text of the Final Constitution prior to the second Constitution Bill. The insertion of s 31 was apparently a last-minute concession to the Freedom Front and was conceivably motivated by a desire to ensure compliance with Constitutional Principle XII.

The relationship between the rights in s 15 and s 31 is not entirely clear. In particular, it is not evident whether, in the absence of any reference to manifestation of religious practice in s 15(1), religious practice should be regarded as being

[1] Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC')

[2] See I Currie 'Minority Rights: Education, Culture and Language' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Chapter 35.

[3] In the first certification decision, the Constitutional Court referred to s 31 as the provision which ensured the recognition and protection of the collective rights of self-determination mentioned in CP XII. See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 220.

protected in the group right rather than the individual freedom. The Constitutional Court has now clarified the nature of the relationship between the two rights. Section 15(1) protects the practices of religious sects, groups, associations, communities and institutions. As Ngcobo J wrote in *Prince v President, Cape Law Society* (*'Prince II'*) [1]:

> ... [ss] 15(1) and 31(1)(a) complement one another. Section 31(1)(a) emphasises and protects the associational nature of cultural, religious and language rights. In the context of religion, it emphasises the protection to be given to members of communities united by religion to practise their religion.

Section 31, read with s 18, strengthens, rather than undermines, the force of the right to religious freedom enshrined in s 15(1).[2]

Another important provision in the Bill of Rights for the purposes of freedom of religion analysis is s 9, the right to equality. Subsection 9(3) provides that the state may not unfairly discriminate directly or indirectly against anyone *inter alia* on the grounds of religion, conscience or belief. Subsection 9(4) expands the protection against unfair discrimination to the private sphere by stipulating that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection 3. It further requires that national legislation must be enacted to prevent or to prohibit unfair discrimination.[3] How s 9 both reinforces religious liberty and limits religious autonomy are subjects canvassed below.[4]

[1] 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) at para 39.

[2] See S Woolman 'Association' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Sptiz & S Woolman (eds) *Constitutional Law of South Africa* (2nd Edition, 2003) Chapter 44. The Supreme Court of Appeal in *Nkosi v Bührmann* provision suggested that the internal limitation of the s 31 (found in s 31(2)) should be regarded as implicit in s 15(1), with the result that the s 15's right to practise religion must also be regarded as subordinate to the other rights in the Bill of Rights. 2002 (1) SA 372 (SCA) at para 43. That interpretation would not, however, appear to be warranted textually or be consistent with the Constitutional Court's decisions.

[3] This legislation has been enacted as the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Religion, conscience and belief are among the 'prohibited grounds' listed in s 1(1) thereof. In terms of s 6, 'discrimination', as defined in s 1(1), is forbidden on any of the prohibited grounds, if it is 'unfair'. The burden of proof in cases in which unfair discrimination has been alleged and the factors to be taken into account in determining unfair discrimination, are dealt with in ss 13 and 14 of the Act. See C Albertyn *et al* (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000)* 75-77.

[4] Other constitutional provisions which mention religion, but which are of little importance for the present chapter, are: s 6(5)(b)(ii) (which provides that a Pan South African Language Board established by national legislation, must promote and ensure respect for Arabic, Hebrew Sanskrit and other languages used for religious purposes in South Africa); s 35(2)(f)(iii) (which confers on all detained persons, including every sentenced prisoner, the right to communicate with and be visited by, that person's chosen religious counsellor); and Schedule 2, which provides for oaths or solemn affirmations by office bearers in the national and provincial spheres of government, with the oath concluding with the words 'So help me God', and s 29(4) (a clause in the section dealing with the right to 'Education', which allows state subsidies for private — and thus religious — educational institutions, and thus means that state subsidies for church schools or other educational institutions with a religious dimension or focus are constitutional).

As case law in foreign jurisdictions demonstrates, the manifestation of religion, conscience or belief can also implicate other rights that do not expressly refer to religion, such as the right to freedom of expression (s 16), the right to freedom of assembly (s 17) and the 'associational' or institutional nature of religion protected by the right to freedom of association (s 18).[1]

(c) The origins and development of the religion clause

(i) *The drafting of s 15 of the Constitution*

The wording of s 15 of the Constitution owes much to its predecessor. Section 14 of the Interim Constitution[2] reads:

> 14 (1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.
>
> (2) Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary.
>
> (3) Nothing in this Chapter shall preclude legislation recognising-
>
> (a) a system of personal and family law adhered to by persons professing a particular religion; and
>
> (b) the validity of marriages concluded under a system of religious law subject to specified procedures.'

The main differences between the freedom of religion, belief and opinion clauses in the Interim and Final Constitutions are: (1) the absence of a reference to academic freedom in subsection (1) of FC 15 (academic freedom is now protected under the right to freedom of expression); (2) the absence of the clause 'Without derogating from the generality of subsection (1)' at the beginning of subsection (2) of FC 15; (3) the fact that subsection (3) of FC 15 authorises legislation recognizing marriages concluded under any system of personal or family law, and not just religious law; and (4) and that FC 15(3) makes any legislation enacted in terms of that subsection susceptible to challenge under other provisions of the Constitution.

The changes to subsection (3) are potentially of substance. However, at least one commentator suggests that, even under IC s 14(3), legislation recognizing a system of personal or family law was required to be consistent with the other

[1] See *Solberg* (supra) at para 149 (Sachs J); L du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* 156. As regards s 18, the right to association, see S Woolman 'Association' (supra) at Chapter 44.

[2] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

rights in the Bill of Rights.[1] The aforementioned amendments to subsections (1) and (2) are seemingly less significant. Academic freedom, for example, is more appropriately protected elsewhere in the Bill of Rights.[2]

Other differences between the Interim and Final Constitutions as far as religion is concerned are the inclusion in the Final Constitution of a right to religious community (s 31) and a change in the wording of the preamble.[3] As I have already noted, the inclusion of the group religious right in s 31 should only amplify the freedom protected in s 15. Substituting the invocation at the start of the Interim Constitution with the peroration in the Final Constitution should,

[1] D Basson *South Africa's Interim Constitution: Text and Notes* (1994) 27. The majority of writers, however, came to the opposite conclusion. See, for example, E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31, 45n44; F Cachalia et al *Fundamental Rights in the New Constitution* (1994) 52, 53; D Davis et al *Fundamental Rights in the Constitution* (1997) 107; J Sinclair *The Law of Marriage* (Vol I) 34.6.

[2] Academic freedom was presumably included in s 14(1) of the Interim Constitution because of a desire to protect freedom of thought, belief and opinion in institutions of higher learning, and to protect such institutions from being subjected to closures, direct interference or economic harassment on account of the beliefs and ideologies espoused there. The more natural home for academic freedom would, however, have been the right to freedom of expression (where it is now located), which even under the Interim Constitution protected the freedom of artistic creativity and scientific research.

It is nevertheless of interest to note that there has traditionally been a connection between freedom of religion and certain South African universities. A feature of the Acts establishing and regulating the English-medium universities and some of the Afrikaans-medium universities prior to November 2001 was the presence of a 'conscience clause'. See s 21 of the University of the Witwatersrand, Johannesburg (Private) Act 15 of 1959; s 17 of the University of Cape Town Act 38 of 1959; s 21 of the University of Natal (Private) Act 7 of 1960; s 21 of the University of Port Elizabeth Act 1 of 1964. This clause prohibited a test of religious belief being imposed on any person as a condition of his/her becoming or continuing to be a student, graduate, or member of the academic staff of the University, or of that person's holding any office or emolument or exercising any privilege. It also forbade any preference being given to, or advantage being withheld from, a person on the ground of his/her religious belief. Thus, even in the pre-1994 era, freedom from religious coercion and discrimination was a foundational tenet of a number of South African universities and an integral part of their character and composition.

The statutes containing the conscience clauses were repealed by the Higher Education Amendment Act 23 of 2001. The objects and strictures of the 'conscience clauses' are, however, still protected, by virtue of the right to freedom of religion, and the right to freedom from discrimination on the basis of religion, conscience and belief. The opening words to s 14(2) were unnecessary and, arguably, inappropriate.

The words '[w]ithout derogating from the generality of subsection (1)', which prefaced s 14(2), were probably intended to indicate that s14(2) was not to be used to build restrictions into the general s 14(1) right, but rather to be viewed as regulating a particular situation covered by that right. But that interpretation should in any event have been apparent from the context; so nothing is lost by its exclusion from s 15(2). In any event, s 14(2) was arguably a qualification of the s 14(1) rights (just as s 15(2) qualifies the s 15(1) right), rather than an example of the sort of religious freedom enshrined in subsection (1), as suggested by the prefatory clause.

[3] The Final Constitution, unlike the Interim Constitution, does not commence with the words 'In humble submission to Almighty God'. It does, in contrast with the Interim Constitution, conclude with the words '*May God protect our people. Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso. God seën Suid-Afrika. God bless South Africa. Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika*'.

likewise, not have any substantive effect. The Constitutional Court's comments in relation to the meaning of the phrase 'In humble submission to Almighty God' in the Western Cape Constitution buttress this conclusion.[1]

The drafts of the text of s 15 of the Final Constitution reveal that there was seemingly little controversy among the members of the Constitutional Assembly or the panel of experts about the precise wording of subsections (1) and (2) of the right. The only change between the final approved text and the 'Working Draft of the New Constitution' distributed by the Constitutional Assembly on 22 November 1995 is the substitution of the words 'an appropriate authority' at the end of s 15(2)*(a)* with the phrase 'the appropriate public authorities'. The changes make it clear that rules for religious observances at state or state-aided institutions should conform to the principle of subsidiarity. That is, ideally such rules would be articulated and enforced by the body in closest proximity to the institution being regulated.[2]

The formulation of s 15(3) was apparently more contentious. The final wording of the clause showed every sign of having been drafted by committee. The Working Draft of 22 November 1995 included a subsection (3) that read as follows:

> The Constitution does not prevent legislation recognising the validity of marriages concluded under a system of religious law [or other recognised traditions], or a system of personal and family law adhered to by persons professing a particular religion to the extent that the system is consistent with the Bill of Rights.

By the fourth edition of the Working Draft of the New Constitution, disseminated on 25 March 1996, this provision was changed to read:

> 3 *(a)* This section does not prevent legislation recognising —
>
> (i) marriages concluded under any tradition or a system of religious, personal or family law; and
>
> (ii) systems of personal and family law under any tradition or adhered to by persons professing a particular religion.
>
> (b) The legislation referred to in paragraph *(a)* must be consistent with the provisions of the Constitution.

[1] *Ex parte Speaker of the Western Cape Provincial Legislature: In re Certification of the Constitution of the Western Cape* 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC) at para 28.

[2] The Fifth Edition of the Working Draft for the New Constitution, released on 15 April 1996, placed an asterisk next to the words 'state or state-aided', noting that these words should be 'revisited and consistency with the wording in the ['Education' clause] (once it is settled) considered'. There was, however, no change to that phrase.

The fifth edition of the Working Draft, dated 15 April 1996, reflected a further change to subsection (3)*(b)*.[1] The wording of s 15(3)*(b)* was then changed a final time prior to the second version of the Constitutional Bill adopted by the Constitutional Assembly on 8 May 1996. The amendments were largely cosmetic. However, the new text did insert a requirement that the legislation contemplated by subsection 15(3)*(a)* be consistent not only with the Constitution but also 'this section' (ie, s 15). It is unclear what the drafters intended by stipulating that s 15 does not prevent legislation consistent with section as a whole. That would seem self-evident.[2]

(ii) *The drafting of s 14 of the Interim Constitution*

The Bill of Rights in the Interim Constitution was drafted by a Technical Committee appointed by the Negotiating Council (one tier of the Multi-Party Negotiating Process) between May and November 1993. This committee had a number of South African proposals for bills of rights to work from and also relied heavily on international human rights documents and Bills of Rights in

[1] It read: 'Marriages, or systems of personal and family law, recognised by legislation referred to in paragraph *(a)* must be consistent with the provisions of the Constitution.'

[2] The end-notes to the Fourth Working Draft of the New Constitution (of 25 March 1996), which reflected submissions from the public on the Working Draft published on 22 November 1995, indicate that a variety of submissions on the right to freedom of religion, belief and opinion were considered and rejected by the members of the Constitutional Assembly. For example —

(i) as regards subsection (1): individual members of the public requested that satanism be expressly excluded from freedom of religion; submissions were received for and against the legalisation of dagga for religious purposes (with over a thousand petitions being received from the Burning Spear Movement calling for the recognition of the rights of Rastafarians); an academic requested that the clause explicitly state that freedom of religion also includes the right to change religious allegiance, and the right to profess, practise and propagate the religion of one's choice (a clause along these lines appears in the Constitution of Botswana, section 11(1) whereof provides: 'Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance'. See also, s 13(1) of the Constitution of Lesotho of 1993. The Conscientious Objector Support Group proposed adding the words 'including the right to conscientious objection to military service' (by way of comparison, Article 4(3) of the German Basic Law reads: 'No one may be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by federal statute';

(ii) concern was expressed, *inter alia* by the National Professional Teachers Association of South Africa, that subsection (2) was both too vague and too restrictive; and

(iii) various Muslim organizations objected to the requirement that legislation enacted in terms of subsection (3) be consistent with the Bill of Rights, on the basis that Muslims regard their personal law as divine, binding and absolute and this law cannot be altered or subjected to any national law. A clause along the lines of IC s 14(3) was proposed.

other countries.[1] The Technical Committee that drafted the Bill of Rights was also assisted in drafting the freedom of religion clause by a proposed clause submitted by the South African Chapter of the World Conference on Religion and Peace (WCRP-SA).[2]

According to two members of that Technical Committee, Professors Corder and Du Plessis, IC s 14(1) was understood to be in conformity with the first sub-clause of the WCRP-SA proposal.[3] The second sub-clause of the WCRP-SA proposal was addressed in IC s 14(3). That clause did not go as far as recognising religious communities' systems of family law. It merely authorises the legislature to do so.

Professors Du Plessis and Corder also note that '[d]uring the negotiations, it soon became clear that the negotiators had no intention whatsoever of using the Constitution and the Bill of Rights to erect walls to separate church and state'.[4] IC s 14(2) reflects this intention.

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[1] Du Plessis & Corder (supra) at 25-33 and 46-48.

Among the indigenous human rights documents that provided the backdrop to individual rights provisions, such as the freedom of religion clause, in the Interim Constitution were the South African Law Commission's Interim Report on Group and Human Rights (1991), the ANC Bill of Rights in South Africa (1992), the Constitution for the State of KwaZulu-Natal (approved by the Legislative Assembly of KwaZulu in 1992) and the Charter for Social Justice (produced by a group of Western Cape human rights experts in 1992).

The Bill proposed by the Law Commission in its Interim Report included the following clause, as article 18 (headed 'Religious, linguistic and cultural rights'):

Everyone has the right, individually or in community with others, freely to practise the religion and culture and freely to use the language of his or her choice, so that there shall be no prejudice to or favouring of anyone on account of his or her religion, culture or language.

The Law Commission's proposal in its Final Report on Group and Human Rights of October 1994, was briefer, and more in line with formulations of the right in international human rights documents: 'Every person shall have the right to freedom of thought, conscience, religion and belief, and to manifest his or her religion or belief.'

The first two clauses of article 7 of the Charter for Social Justice (which was modelled in large part on s 2 of the Canadian Charter of Rights and Freedoms) provided that:

Everyone has the following freedoms:

freedom of conscience and religion;

freedom of thought, belief, opinion and expression including freedom of the press and other media of communication.

[2] Du Plessis & Corder (supra) at 155-157. The WCRP-SA's proposed clause read as follows:

1. All persons are entitled:
1.1 to freedom of conscience,
1.2 to profess, practise, and propagate any religion or no religion,
1.3 to change their religious allegiance;
2. Every religious community and/or member thereof shall enjoy the right:
2.1 to establish, maintain and manage religious institutions;
2.2 to have their particular system of family law recognized by the state;
2.3 to criticise and challenge all social and political structures and policies in terms of the teachings of their religion.

For a discussion of the WCRP-SA's proposed clause, see G Abraham 'Declaration on religious rights and responsibilities: A Catholic response' (1994) 111 *SALJ* 344.

[3] Du Plessis & Corder (supra) at 156.

[4] Ibid at 155, 157.

(iii) *Relevant clauses in international and foreign law*

FC s 15(1) and IC s 14(1) of the Interim Constitution betray the influence of international, regional and domestic human rights documents.[1] The concatenation of thought, conscience, religion and belief in the same clause would appear to have been influenced by Art 18 of the Universal Declaration of Human Rights (1948) ('UDHR'),[2] Art 18(1) of the International Covenant on Civil and Political Rights (1966) ('ICCPR')[3] and Art 9(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ('ECHR').[4]

The brevity with which the right to freedom of religion is expressed in Chapter 2 of the Constitution does, however, stand in stark contrast to the wording of that right in international, regional and domestic human rights documents.[5]

The minimalism of s 15(1) may well be attributable to s 2*(a)* of the Canadian Charter of Rights and Freedoms.[6] Section 15(1) of the Constitution has also been shaped by Art 21(1)*(b)* of the Chapter on Fundamental Human Rights and Freedoms in the Constitution of the Republic of Namibia. That clause provides that:

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[1] Ibid at 47.

[2] Article 17 of the UDHR provides that: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

[3] Article 18 of the ICCPR states:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

[4] Article 9 of the ECHR provides: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

[5] An example of a more expansive right in a foreign constitution, which influenced the drafting of the South African Constitution is to be found in Article 4 of the German Basic Law ('Freedom of faith, of conscience, and of creed'), which has been translated as follows:

(1) Freedom of faith and of conscience, and freedom to profess a religion or a particular philosophy [Weltanschauung], are inviolable.

(2) The undisturbed practice of religion is guaranteed.

(3) No one may be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by federal statute.

See D Currie *The Constitution of the Federal Republic of Germany* (1994) 344.

[6] Section 2*(a)* declares succinctly that the first of the freedoms to which everyone is entitled is 'freedom of conscience and religion'.

> All persons shall have the right to … freedom of thought, conscience, and belief, which shall include academic freedom in institutions of higher learning.[1]

The texts of both s 14 of the Interim Constitution and s 15 of the Final Constitution are conspicuously different from that of the First Amendment to the United States Constitution. The US Constitution forbids laws 'respecting the establishment of religion or prohibiting the free exercise thereof'. Nevertheless, case law and academic commentary on the First Amendment has been heavily utilised by the Constitutional Court.[2] It has also been referred to extensively by South African writers.[3] While guidance and inspiration can profitably be sought from the decisions and analysis emanating from the United States,[4] the Constitutional Court has sounded its usual cautionary note that the South African Constitution 'deals with issues of religion differently to the US Constitution'.[5]

41.2 Freedom of Religion, Belief and Opinion: Section 15(1)

(a) The importance of the right

Freedom of conscience and religion is said to be one of the oldest of the internationally recognised human freedoms.[6] Indeed some political philosophers have

[1] In contrast to s 15 of the Final Constitution (and s 14 of the Interim Constitution), Art 21 of the Namibian Constitution does, however, refer to religion alone in a further clause. Article 21(1)*(c)*, which confers on all persons the right to 'freedom to practise any religion and to manifest such practice'.

[2] See, in particular, the judgments of O'Regan and Sachs JJ in *Solberg* (supra) at paras 118-123, 137-138 and 153-163, and *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) at paras 29-41 (Sachs J)('*Christian Education South Africa')*.

[3] See, for example, D Davis 'Religion, Belief and Opinion' in H Cheadle *et al South African Constitutional Law: The Bill of Rights* 204, 204-208; and G Devenish *A Commentary on the South African Bill of Rights* Chapter 10.

[4] See *Solberg* (supra) at para 141(Sachs J) ('If I draw on statements by certain United States Supreme Court Justices, I do so not because I treat their decisions as precedents to be applied in our Courts, but because their *dicta* articulate in an elegant and helpful manner problems which face any modern court dealing with what has been loosely called church / State relations. Thus, though drawn from another legal culture, they express values and dilemmas in a way which I find most helpful in elucidating the meaning of our own constitutional text.')

[5] See *Solberg* (supra) at para 99-100 (Chaskalson P) ('we should be careful not to blur [the] distinction' between the establishment and free exercise clauses, which have different concerns. Not only should one take care not to import establishment concerns into the South African freedom of religion clause, but one should also be alert to the fact that 'free exercise' doctrine in the United States has developed in a context in which there is an establishment clause, and may potentially have to be augmented or revised in the absence of such a clause.')

A further factor to bear in mind is that the South African Constitution, unlike the United States Bill of Rights, has a general limitation clause. Thus, when seeking to make use of the American free exercise test, one must determine which legs of the test belong in the religion clause enquiry and which legs should form part of the limitation clause evaluation.

[6] See P Lillich 'Civil Rights' in T Meron (ed) *Human Rights in International Law* (1984) 158, and J Humphrey 'Political and Related Rights' in Meron (op cit) 176.

recently argued that it is the pre-eminent negative right in the liberal pantheon.[1] The right has lost none of its currency or centrality in recent constitutional documents.[2] The Constitutional Court appears to have accorded it singular status in *Prince v President, Cape Law Society & other:*

> The constitutional right to practise one's religion is of fundamental importance in an open and democratic society. It is one of the hallmarks of a free society.[3]

One of the reasons why the right remains so important is that the freedom is deemed to be integral to our dignity, growth and self-worth.[4]

(b) Notable features of the clause

(i) *The protection of non-religious thoughts and beliefs*

The first significant feature about s 15(1) is that the clause does not merely protect *religious* freedom.[5] To secure protection under the ambit of s 15, one does not have to prove that one is an adherent of a 'religion' — something that in the past was not infrequently (although wrongly) equated with belief in

[1] P Macklem 'Freedom of Conscience and Religion in Canada' (1982) 40 *U of Toronto LR* 50. John Rawls asserts that the right to freedom of conscience and religion would be the first to be consented to in his hypothetical social contract. *A Theory of Justice* (1976) 206.

[2] Close to two centuries after the protection of religious freedom was accorded precedence in the United States of America's Bill of Rights (1791), it was placed at the head of the list of protected rights and freedoms in s 2(a) in the Canadian Charter of Rights and Freedoms (1982).

[3] 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC) at para 24.

[4] As regards the connection between religion and dignity, see *Christian Education South Africa (CC)* (supra) at para 35:

> The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has that capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights.'

See also *Prince (CC 1)* (supra) at paras 48-50 (Ngcobo J).

[5] In this respect, it is much like s 2 of the Canadian Charter of Rights and Freedoms, Art 4 of the German Basic Law, Art 18 of the ICCPR and Art 9 of the European Convention. FC s 9, which will no doubt play an important role in litigation on religious matters, also echoes the expansive nature of the s 15(1) right when it prohibits unfair discrimination on the grounds of 'religion, conscience, belief'.

a supreme being[1] — nor that one is affiliated with religious institutions in any conventional sense.[2]

The South African clause goes further than a number of other freedom of religion clauses in foreign constitutions in that it not only includes 'conscience' and 'religion', but also 'thought, belief and opinion'. It imports a decidedly overt secular element into the clause.[3] Thus s 15 encompasses a freedom not to believe in any religion, or, to phrase it more positively, the freedom to be a sceptic, agnostic or atheist.[4] It should embrace comprehensive views of the good life that are derived from political, sociological or philosophical ideologies[5] as well as purely personal moral codes. It may even cover opinions formed as a result of 'considerations of policy, pragmatism, or expediency'.[6] Views on abortion and euthanasia could therefore potentially be protected under s 15 even if they stem from 'personal morality that is not founded in religion' or from 'conscientious beliefs that are not religiously motivated'.[7]

[1] See *Publications Control Board v Gallo (Africa) Ltd*. 1975 (3) SA 665, 672 (A) as cited in J D van der Vyver in 'Suspension, derogation and *de facto* deprivation of fundamental rights in Bophuthatswana' (1994) 57 *THRHR* 257, 267. See also *Adelaide Company of Jehovah's Witnesses v The Commonwealth* (1943) 67 CLR 116 (HC) ('Probably most Europeans would regard religion as necessarily involving some idea or doctrine effecting the relation of man to a Supreme Being'). Note that the United States' 'Universal Military Training and Service Act once defined the term 'religious training and belief' as 'an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation'. See *US v Seeger* 380 US 163, 85 SCt 850 (1965) ('*Seeger*'). This definition is not dissimilar to that adopted by the South African Board for Religious Objection when interpreting the Defence Act 44 of 1957. See *Hartman v Chairman, Board of Religious Objection* 1987 (1) SA 922 (O). In *Hartman*, however, a full bench decision of the Orange Free State Provincial Division ruled that Theravada Buddhism, a non-theistic tradition of Buddhism, did in fact qualify as a 'religious conviction' in terms of the Act. The US Supreme Court did not read the phrase 'religious training and belief' as having a theistic requirement when applied to conscientious objectors — *Seeger* (supra) and *Welsh v United States* 398 US 333, 90 SCt 1792 (1970) — despite the seemingly clear language of the statute to the contrary. These last three decisions are more in accord with contemporary norms.

[2] In this regard, s 14(1) is similar to s 19(1) of the Zimbabwe Constitution. See *In re Chikweche* 1995 (4) SA 284, 290H-I (ZS), 1995 (4) BCLR 533 (ZS) (Gubbay CJ)('In any event, I am of the view that the reference in s 19(1) to freedom of conscience is intended to encompass and protect systems of belief which are not centred on a deity or religiously motivated, but are founded on personal morality.') McNally JA, who had 'reservations about the classification of Rastafarianism as a religion', in fact would have held for the applicant on this basis: 'But I have no doubt that it is a genuine philosophical and cultural belief, and as such falls under the protection of s 19(1) of the Constitution.' Ibid at 292F.

[3] The equivalent provision in the Interim Constitution, s 14, introduced an even more secular tone by including within the right in s 14(1), 'academic freedom in institutions of higher learning'.

[4] See J Humphrey 'Political and Related Rights' in T Meron (ed) *Human Rights in International Law: Legal and Policy Issues* (1984) 178.

[5] See P Lillich 'Civil Rights' in T Meron (ed) *Human Rights in International Law: Legal and Policy Issues* (1984) 159 n243.

[6] See *Seeger* (supra).

[7] *R v Morgentaler* [1988] 1 SCR 30, 176-8 ('*Morgentaler*'); P Hogg *Constitutional Law of Canada* (4th Edition, 1992) § 39.2, 979 n12. In *Morgentaler*, Wilson J asserted that regulation of abortion is a denial of freedom of conscience and thus a violation of s 2(a) of the Canadian Charter. See also M O'Sullivan & C Bailey 'Reproductive Rights' in Chaskalson et al *Constitutional Law of South Africa* (1st Edition, RS 5, 1999) § 16.6.

There may well, however, be a difference between the extent of the protection conferred by s 15(1) on religious and other conscientiously held beliefs,[1] on the one hand, and other beliefs, thoughts, opinions, on the other hand. As the Constitutional Court has made clear, s 15(1), in line with international human rights norms, protects an adherent's right to *manifest* his or her religion in worship, observance, practice and teaching.[2] The Constitutional Court has not yet pronounced on the extent to which the s 15(1) right to thought, belief and opinion also includes an external dimension — or in other words, encompasses not only the right to *hold* a belief or opinion or adhere to a system of thought, but also to *act* thereon. However while the expressions, or external manifestations of 'thought, belief and opinion' may have been more appropriately protected under other provisions in the Bill of Rights,[3] and may be regarded as already enjoying some measure of protection there, one probably cannot read the protection of conduct associated with 'thought, belief and opinion' out of the section without doing undue violence to the text.[4]

(ii) *The protection of 'opinion'*

An unusual feature of the right enshrined in s 15(1) is the inclusion of 'opinion' along with religion, conscience, thought and belief. In fact, the reference to 'opinion' in a clause protecting freedom of religion and belief is seemingly without precedent in international or foreign jurisprudence.

One might argue that protecting opinion is out of place in a clause that is concerned with honouring and protecting a person's *convictions*. But that need not necessarily be so. Section 15 is aimed at ensuring that everyone is free to adhere to deeply held beliefs and values, whether they are derived from religion, a system of personal morality, or a secular world view. A set of deeply held opinions — or convictions — can form a comprehensive view of the good life comparable to any and all conventional religious faiths. Viewed in this light, the protection of 'opinions' is not inconsistent with the protection of thought or belief.[5] Nor is it necessarily incongruous in a clause concerned with recognising the individuality, freedom and dignity of every person and the diversity of ideas.

[1] See *Morgentaler* (supra)(Wilson J)(referring not only to a right to hold or articulate beliefs in relation to abortion but also a right to act thereon in accordance with one's conscience).

[2] See §§ 41.2(b)(iii) and 41.2*(c) infra*.

[3] See, eg, the right to freedom of expression (s 16), the right to assembly, demonstration, picket and petition (s 17), the right to freedom of association (s 18) or the right to make political choices (s 19), the right to freedom of movement and residence (s 21).

[4] A reading that excludes protection for the manifestation of non-religious thoughts and beliefs would also unduly emasculate those rights. The right to hold a belief — and not be forced to renounce or forswear it — is a fundamental right. However, it has limited application in modern diverse societies, where it generally difficult, if not impossible, to discern the nature and content of a person's beliefs or ideologies without some external manifestation thereof. Furthermore, a prohibition on the manifestation of particular thoughts or beliefs would significantly prejudice persons who held such beliefs and thus, at least indirectly, significantly undermine their right to adhere to the beliefs in question.

[5] *The New Shorter Oxford English Dictionary* (Vol 2) 2007 defines 'opinion' as 'belief'.

As has been pointed out in the previous section,[1] the s 15(1) right is normally associated with a right to manifest religious beliefs in practice. Consequently, some doubt could be expressed about whether the right to 'freedom of opinion' amounts to anything more than the right to 'hold' an opinion. The airing of an opinion is after all protected elsewhere — most notably in the 'freedom of expression' clause (s 16).[2] But to suggest that there is no protection of the external manifestations of an opinion under s 15(1) is seemingly not justified, either textually or conceptually.[3] The articulation or external manifestation of opinion — like religion — should therefore probably be regarded as being protected under s 15(1), notwithstanding the overlap with rights such as s 16.

(iii) *The absence of any express mention of religious practice*

There can be no dispute that s 15(1) entrenches the right to *hold* or *entertain* any religious or non-religious thoughts, beliefs and opinions.[4] It is, however, one thing to protect the holding of opinions, beliefs or thoughts, as we have already noted. It is another to protect the manifestation of those beliefs. The text of s 15(1) does not explicitly protect practice motivated by religion (or, for that matter, conscience).[5]

The lack of any direct reference to religious practice, while unusual,[6] has correctly been regarded by the Constitutional Court as being of little significance. The Court has adopted the interpretation of the right in Canadian law.[7] In particular,

[1] § 41.2(b)(i) *supra*.

[2] See *Solberg* (supra) at para 145 (Sachs J): 'Freedom of opinion and freedom of expression go hand in hand'.) See art 19 of the UDHR, art 19 of the ICCPR and art 10 of the ECHR, where 'opinion' is linked with 'expression', rather than the 'thought, conscience and religion' which is located in the previous article. Compare art 5 (Freedom of Expression) of the German Basic Law and art 4 thereof, with s 2*(b)* of the Canadian Charter of Rights and Freedoms (which protects 'freedom of thought, belief, opinion and expression').

[3] See the discussion in relation to the protection of manifestations of thought and belief in § 41.2(b)(i) *supra*.

[4] A number of commentators have suggested that the right to hold or entertain thoughts and beliefs (whether religious or not) should be considered inviolable. See in this regard K Partsch 'Freedom of Conscience and Expression, and Political Freedoms' in L Henkin (ed) *The International Bill of Rights of Rights* (1981); M Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993); and L du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 158.

[5] Cf the German Basic Law (art 4(2) and (3)), art 18(1) of the ICCPR, art 9(1) of the European Convention, and, seemingly, the First Amendment to the American Constitution (which is concerned, in part, with the free *exercise* of religion) — which explicitly protect religious practice. With the exception of the First Amendment to the US Constitution, these provisions have been quoted above under § 41.1*(c)*(iii). The First Amendment to the US Constitution commences thus: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'.

[6] In addition to the examples already mentioned, the following clauses also protect religious practice: art 18 of the UDR, art 3 of the American Declaration of the Rights and Duties of Man, art 12 of the American Convention on Human Rights, art 8 of the African [Banjul] Charter on Human and Peoples' Rights ('African Charter'), art 21(1)(c) of the Namibian Constitution, arts 25 & 26 of the Indian Constitution and art 19(1) of the Constitution of Zimbabwe.

[7] See § 41.2*(c)* below.

the Court has followed Dickson J's remarks in *R v Big M Drug Mart Ltd*[1] as to the scope of the Canadian freedom:

> [t]he essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination.[2]

The Court's interpretation is consistent with the rest of s 15. Section 15(2) makes provision for 'religious observances'. Section 15(3) deals with marriages and other details of family life governed *inter alia* by religious law. The marked distinction between protected religious belief and unprotected religiously dictated or motivated conduct that was drawn in 19th century American case law,[3] and in pre-Charter Canadian cases[4] has not been followed. The international consensus on the protection of religious practice requires that s 15(1) be interpreted as protecting the manifestation and practice of religious belief.[5].

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[1] [1985] 1 SCR 295, (1985) 18 DLR (4th) 321, 353 (SCC). (*Big M Drug Mart Ltd*).

[2] Ibid. The last clause of this excerpt from Dickson J's judgment is virtually identical to art 18(1) of the ICCPR and art 9(1) of the European Convention.

This interpretation accords with the views of two of the members of the Technical Committee that drafted the Bill of Rights. See Du Plessis & Corder (supra) at 155-6. (The authors assert that IC s 14(1) accorded, in this respect, with the submission from the South African Chapter of the World Conference on Religion and Peace. That submission contained a provision claiming that all persons are entitled 'to profess, practise, and propagate any religion or no religion'.)

[3] *Reynolds v United States* 98 US 145, 25 LEd 244 (1878) (After an examination of whether the First Amendment exempted from criminal prosecution for polygamy, people who practised bigamy on account of their Mormon religious beliefs, the Court held: 'Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.')

[4] *Walter et al v Attorney-General of Alberta* [1969] SCR 83, (1969) 3 DLR (3d) 1 (SCC) ('The Act is not directed at Hutterite religious belief or worship, or at the profession of such belief. It is directed at the practice of holding large areas of Alberta land as communal property, whether such practice stems from religious belief or not.') See also D Gibson *The Law of the Charter: Equality Rights* (1990) 191-195.

[5] South Africa ratified the ICCPR in 1998 and the African Charter in 1996. It thereby became obliged to ensure compliance with these documents in its domestic law. See J Dugard *International Law: A South African Perspective* (2nd Edition) 242-244. It would also be difficult to justify divergence from the UDHR. Although the UDHR was envisaged as merely a 'standard-setting' document, its status and prestige are such that it is not only regarded as the yardstick by which to measure compliance with human rights standards, but it has also come to be viewed as a legally binding instrument. See Dugard (supra) at 240-242; W Amien and P Farlam (eds) *Basic human rights documents for South Africans* 6. It should be borne in mind that in terms of Constitutional Principle II, the Final Constitution had to ensure that everyone enjoys 'all universally accepted fundamental rights, freedoms and civil liberties' by means of 'entrenched and justifiable provisions in the Constitution'. The Principle is enumerated in Schedule 4 to the Interim Constitution.

(iv) *The lack of an 'establishment clause'*

The fourth notable feature of s 15(1) is the absence of an establishment clause. That is, the Final Constitution contains no clause mandating the separation of church and state.[1] This structured silence should not occasion much surprise. Establishment clauses are not very common in national constitutions or international covenants.[2] Nor are the two clauses necessarily as compatible in the same document as might at first be thought. The American establishment clause, for example, was originally conceived as complementary to the free exercise clause. However, the two clauses do pull in different directions.[3] As Louis Lusky notes:

> In our society . . . there is continuing tension between the two Clauses. Sometimes, indeed, it has almost seemed that anything not forbidden by one is required by the other, and that — but for the Court's divine mediation — the same act or omission might be forbidden by one *and* required by the other.[4]

The drafters of South Africa's Constitutions were quite self-conscious about the traditional commitment of the state to religion writ large.[5] It is therefore not surprising that it soon became clear to the members of the Technical Committee responsible for the Interim Constitution's Bill of Rights that 'the negotiators had no intention whatsoever of using the Constitution and the Bill of Rights to erect walls to separate church and state'.[6] In its first decision dealing with IC s 14(1), the Constitutional Court expressly acknowledged that a strict separation of church and state was not required by the Constitution.[7]

The textual silence does not, however, mean that establishment clause concerns will enjoy no protection in South Africa. As discussed below,[8] the right to freedom of religion, belief and opinion requires at least some degree of separation

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[1] The 'establishment clause' consists of the injunction, at the start of the First Amendment, that 'Congress shall make no law respecting an establishment of religion'. According to the US Supreme Court in *Lemon v Kurtzman*, a statute will only comply with the establishment clause if: (i) it has a secular purpose; (ii) its primary effect is one that neither advances nor inhibits religion; and (iii) it does not foster excessive government entanglement with religion. 403 US 602, 91 SCt 2105 (1984).

[2] Apart from the US Constitution, the Australian Constitution (s 116) and the Constitution of the Russian Federation (art 14) are seemingly the only constitutions with such clauses which provide for the separation of religion and the state, although see also, art 20.3 of the Japanese Constitution. Article 137(1) of the German Basic Law (part of the Weimar Constitution of 1919, which was incorporated by art 140 into the Basic Law) declares 'There shall be no state church', but it is clear from other provisions of the Basic Law (such as art 7) that the German Constitution imposes no strict divide between church and state. The German Constitutional Court has also not interpreted the clause as equivalent to the American establishment clause. See Currie *The Constitution of the Federal Republic of Germany* (supra) at 245ff.

[3] See E S Corwin and J W Peltason's *Understanding the Constitution* (13th Edition, 1994) 194-5.

[4] L Lusky *By What Right?* (1975) 167 (emphasis in original).

[5] There were, for example, public holidays for Christmas, Good Friday, Easter and Ascension Day, as well as a day of thanksgiving and commemoration, previously called The Day of the Vow. There were also tax exemptions, state chaplains etc., as well as a well-developed Afrikaner 'civil religion'. See T D Moodie *Power, Apartheid and the Rise of Afrikanerdom* (1980); and C Villa-Vicencio *Trapped in Apartheid* (1988).

[6] See § 41.1*(c)*(ii) above. See also L Du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 155.

[7] *Solberg* (supra) at paras 99-102 (Chaskalson P), 116, 118-119 (O'Regan J).

[8] See § 41.2*(d)* below.

between church and state. Moreover, s 9 specifically prohibits unfair discrimination, whether direct or indirect, on the grounds of religion, conscience or belief. The equality clause, in conjunction with s 15, could therefore also serve to outlaw some of the state practices that have been captured by the establishment clause in the United States.[1]

(c) The core of the right to religious freedom

In *Prince*, the Constitutional Court confirmed that the right to freedom of religion in s 15(1) of the Constitution protects religious belief and the practice or manifestation of belief and prohibits coercion or restraint of religious belief or practice. Ngcobo J wrote:[2]

> This Court has on two occasions [in *Solberg* and *Christian Education South Africa*] considered the contents of the right to freedom or religion. On each occasion, it has accepted that the right to freedom of religion at least comprehends: *(a)* the right to entertain the religious beliefs that one chooses to entertain; *(b)* the right to announce one's religious beliefs publicly and without fear of reprisal; and *(c)* the right to manifest such beliefs by worship and practice, teaching and dissemination. Implicit in the right to freedom of religion is the 'absence of coercion or restraint'. Thus 'freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs.[3]

Another way of itemising what lies at the heart of the right to freedom of

[1] See *Solberg* (supra) at para 102 (Chaskalson P). That a concern for equality was one of values underlying the Establishment Clause is suggested by comments in James Madison's *Memorial and Remonstrance*, a tract that has been regarded by generations of Supreme Court justices as illustrative of the intention of the framers of the Establishment Clause. See, for example, *Everson v Board of Education* 330 US 1, 67 SCt 504 (1947); *Engel v Vitale* 370 US 421, 82 SCt 1261 (1962) *('Engel')*. In *Memorial and Remonstrance,* one of Madison's criticisms of a contemporary bill was that it was violative of the principle of equality.

[2] *Prince (CC I)* at para 38. (Ngcobo J was writing for the minority, but the majority did not disagree with him on this point, nor was it open for them to do so in the light of the unanimous judgment in *Christian Education South Africa*.)

[3] In interpreting the right to freedom of religion in this way, the Constitutional Court has adopted the definition of freedom of religion by Dickson J in *R v Big M Drug Mart Ltd,* in relation to s 2*(a)* of the Canadian Charter of Rights and Freedoms. See § 41.2*(b)*(iii) above. The Constitutional Court has also ensured that the main attributes of the right to freedom of religion and belief in the South African Constitution are the same as those of the rights to thought, conscience and religion enshrined in international documents like the Universal Declaration of Human Rights (1948) (Article 18), and the International Covenant on Civil and Political Rights (1966) (Article 18(1) and (2)). See also regional documents like the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 9(1) and (2)) and the African [Banjul] Charter on Human and Peoples' Rights (art 8 whereof reads: 'Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.')

religion in s 15(1) is to distinguish the following four freedoms:[1] *(a)* freedom of religious choice; *(b)* freedom of religious observance; *(c)* freedom of religious teaching; and *(d)* freedom to propagate a religion.[2] A more comprehensive list of the kinds of religious practices or manifestations of religious belief that would be protected under s 15(1) can be discerned from art 6 of the United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, passed by the United Nations General Assembly in November 1991. That article provides a number of concrete examples of the freedoms contained in the 'right of freedom of thought, conscience, religion or belief', and thus the type of conduct that should be protected under s 15(1) of the Constitution.[3] These include the freedom: *(a)* to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes; *(b)* to establish and maintain appropriate charitable or humanitarian institutions; *(c)* to make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief; *(d)* to write, issue and disseminate relevant publications in these areas; *(e)* to teach a religious or belief in places suitable for these purposes; *(f)* to solicit and receive voluntary financial and other contributions from individuals and institutions; *(g)* to train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief; *(h)* to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's own religion or belief; and *(i)* to establish and maintain communication with individuals and communities in matters of religion and belief at the national and international levels.

The Constitutional Court has pointed out that the coercion prohibited by s 15(1) may be direct or indirect[4] and that constraints on religion may be imposed in subtle ways.[5] In order to determine whether there is an infringement of the right to freedom of religion, it is necessary not only to look at the purpose of the legislation (or conduct), but also its 'overall purpose and effect'.[6]

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[1] See Y Dinstein 'Freedom of Religion and Religious Minorities' in Y Dinstein & M Tabory (eds) *The Protection of Minorities and Human Rights* 145, 147; I Currie 'Minority Rights: Education, Culture and Language' *Constitutional Law of South Africa* (1st Edition)(supra) at § 35.4*(d)*(iii).

[2] As Iain Currie notes, the last three freedoms may receive additional protection under s 31, but only insofar as the observance, dissemination and teaching of religious beliefs relates to the practice of a religion in community with other practitioners. Furthermore, atheism or agnosticism would not be covered by s 31, since such beliefs are merely held and not communally practised. Currie (supra) at §35.4*(d)*(iii).

[3] The relevance of these examples to art 9 of the ECHR is noted by M Shaw 'Freedom of Thought, Conscience and Religion' in R St Macdonald, F Matshcher & H Petzold (eds) *The European System for the Protection of Human Rights* 451-452. See also G Weigel 'A Preliminary Examination of Religious Freedom' in R Gastil (ed) *Freedom in the World: Political Rights and Civil Liberties* (1982) 136-40, who uses these eleven points as the basis for his Index for Religious Freedoms.

[4] *Solberg* (supra) at para 104 (Chaskalson P).

[5] Ibid at paras 93 (Chaskalson P), and 114 (O'Regan J). 'Subtle' coercion is dealt with below under § 41.2*(d)*.

[6] Ibid at paras 127 (O'Regan J), and 161 (Sachs J).

One of the most flagrant ways in which the State could breach the right to freedom of religion would be by law or action that intentionally, and directly, targeted particular religious organisations or believers (or religious organisations or adherents in general). An example of such a law would be one that banned a particular church[1] or religious group or order (such as Jehovah's Witnesses or Jesuits[2]) or prohibited a particular religious practice (either at all, or by a particular religion or sect).[3] The United States Supreme Court, in *Church of Lukumi Babalu Aye, Inc v City of Hialeah*,[4] struck down just such a statute. The municipal ordinance in question was construed as a thinly veiled prohibition of the animal sacrifice rituals of the Santeria religion.[5] Similarly, a law or decision that precluded adherents of a particular religious faith from being eligible for state jobs or being admitted into state-funded institutions would violate s 15.[6]

Another obvious violation of the right to freedom of religion would occur were the State to compel persons to profess allegiance to a particular faith, or partake in, or be connected with, activities of a particular religion.[7] The state cannot compel a person to take a religious oath as a condition of public employment or eligibility for an elected position.[8] Nor can one be forced to pay taxes to a

[1] An example of a flagrant violation of this nature was the Transkei Minister of Justice's banning of the Methodist Church of Southern Africa in 1978 (under the Undesirable Organisations Act 98 of 1975 (Tk)) and the Transkei legislature's subsequent passing of the Methodist Church of Transkei (Private) Act 41 of 1978 (Tk), in terms of which the Methodist Church of Southern Africa was divested of its assets. See *United Methodist Church of Southern Africa & others v Methodist Church of Southern Africa & others* 1991 (2) SA 138 (TkAD).

[2] Norway, at one period of time, excluded Jesuits from the country and thus, had to make a reservation with respect thereto when it first ratified the ECHR. See D J Harris, C Warbrick & M O'Boyle *Law of the European Convention on Human Rights* (1995) 362.

[3] See *Kokkinakis v Greece* (1994) 17 EHRR 397 (The European Court of Human Rights held that Greece had violated art 9 of the ECHR, the right to freedom of thought, conscience and religion, when its courts had convicted, and ordered the imprisonment of a Jehovah's Witness for proselytism — i.e., the evangelical activity of calling at houses to persuade occupiers to become Jehovah's Witnesses).

[4] 508 US 520, 113 SCt 2217 (1993).

[5] Earlier judgments of the US Supreme Court declared unconstitutional laws forbidding or imposing restrictions on the teaching of religious beliefs or the dissemination of religious tracts. See *Cantwell v Connecticut* 310 US 296, 60 SCt 900 (1940); *Murdock v Commonwealth of Pennsylvania* 319 US 105, 63 SCt 870 (1943).

[6] *McDaniel v Paty* 435 US 618, 98 SCt 1322 (1978) (a state provision prohibiting members of clergy from serving in various state offices held to be unconstitutional). See also *Fowler v Rhode Island* 345 US 67, 73 SCt 526 (1953) (the State cannot penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities). A more contemporaneous example of a practice that would appear to violate the right to freedom of religion is the Bavarian government's prohibition on members of the Church of Scientology being employed by the state.

[7] A provision outlawing such conduct expressly is in fact included in the German Basic Law. Article 136(4) of the Weimar Constitution, incorporated by art 140 of the Basic Law, declares that no-one can be compelled to perform any religious act or ceremony, to participate in religious exercises, or to take a religious form of oath.

[8] *Torcaso v Watkins* 367 US 488 (1961) (person appointed as a notary public was required to take an oath declaring belief in God).

church, of which one is not a member, in support of its religious activities.[1] Nor can the state pass legislation designed to compel all residents (including non-believers) to observe the holy day of one particular religion.[2]

Laws or conduct of the nature described in the previous two paragraphs — i.e., laws or conduct with a religious motivation or purpose — are still on the books. However, a more common form of state intervention in religious affairs is by means of facially neutral government actions. Facially neutral laws — laws that do not engage expressly with or refer to religious practice (or belief) — apply to religious organisations and adherents because such laws apply to everyone. While such 'neutral' interference would apparently be more benign (and ostensibly much less likely to be motivated by religious preferences or bigotry), it could have a severe impact on religious organisations or communities. A religious group's way of life or its rites of worship could effectively be prohibited. Believers could be coerced into acting in ways inimical to their faith.[3]

[1] See Shaw (supra) at 453-454 (As the European Commission of Human Rights held as much in *Darby v Sweden* A 187 (1991) Comm. Rep.).

[2] Thus, a Canadian federal statute, the Lord's Day Act RSC 1970 — which *inter alia* prohibited any work or commercial activity on the 'Lord's Day' (the Christian sabbath) — was found by the Canadian Supreme Court to have a religious purpose, as well as a religious effect, and consequently to infringe the right to freedom of conscience and religion impermissibly. See *Big M Drug Mart Ltd* (supra) at 321. In contrast, various Sunday observance laws in the US were held to no longer have a religious purpose and consequently to be constitutionally unobjectionable. See *McGowan v Maryland* 366 US 420 (1961)81 SCt 1101; *Braunfeld v Brown* 366 US 599, 81 SCt 1144 (1961); *Gallagher v Crown Kosher Super Markets of Massachusetts, Inc.* 366 US 617, 81 SCt 1122 (1961); and *Two Guys from Harrison-Allentown, Inc. v McGinley* 366 US 582, 81 SCt 1135 (1961).

[3] Examples of neutral statutes or requirements that have been challenged in the United States on the basis of violating a particular religious group's or adherent's right to the free exercise of their religion include: a Wisconsin law requiring compulsory school attendance until the age of 16, which was successfully challenged by the Amish (who argued that this requirement severely jeopardised the survival of their religion) in *Wisconsin v Yoder* 406 US 205, 92 SCt 1526 (1972); a law prescribing payment of social security taxes, which was unsuccessfully challenged by a member of the Old Order Amish (on the basis that payment of taxes and receipt of benefits violated the taxpayer's Amish faith) in *United States v Lee* 455 US 252 (1982) (for another case in which the US Supreme Court dismissed a challenge to a generally applicable tax which did not provide an exemption for a religious organisation, see *Jimmy Swaggart Ministries v Board of Equalization of California* 493 US 378, 110 SCt 688 (1990)); a government requirement that welfare applicants submit their social security numbers in order to receive benefits which was unsuccessfully attacked in *Bowen v Roy* 476 US 693, 106 SCt 2147 (1986) (*'Bowen'*); statutory provisions

The Constitutional Court has thus far considered two cases in which religious adherents or organisations requested exemptions from facially neutral statutes.[2] In both cases, the Court did not deny that the statutes violated the right to freedom of religion, notwithstanding the secular nature and purpose of the laws. The Court also accepted that the legislation could potentially be held to be unconstitutional by virtue of failing to include an exemption for religious adherents.[3] But in neither case was the religious challenge successful.

In *Christian Education, South Africa* (the first of the challenges to an overtly neutral law) the Court unanimously assumed that a statute prohibiting corporal punishment of juveniles in schools infringed the claimant's right to freedom of religion. It found, however, that any such infringement would be justified under

denying state unemployment benefits to Seventh Day Adventists who refused to work on Saturdays (their sabbath), which were successfully challenged in *Sherbert v Verner* 374 US 398 (1963), 83 SCt 1790 and *Hobbie v Unemployment Appeals Commission of Florida* 480 US 136 (1987), 107 SCt 1046 (see also *Thomas v Review Board of the Indiana Employment Security Division* 450 US 707 (1981), 101 SCt 1425 ('*Thomas*') — US Supreme Court found that Indiana's denial of unemployment benefits to a Jehovah's Witness who had left his job producing armaments because of sincerely held religious beliefs violated the free exercise clause). See too *Employment Division Oregon Department of Human Resources v Smith* 494 US 872 (1990), 110 SCt 1595 ('*Smith*') (a challenge to the criminal prohibition on the use of the drug peyote (a hallucinogen derived from a plant), which outlawed all ingestion of peyote, whether for sacramental purposes or not. A majority of the US Supreme Court rejected the free exercise challenge (although this decision was overturned by a national statute, which was then itself found to be unconstitutional by the US Supreme Court). By contrast, the California Supreme Court held unconstitutional the application of state criminal statutes to Native American Indians using peyote in a bona fide religious ceremony. See *People v Woody* 61 Cal 2d 716, 394 P2d 813 (1964). Jehovah's Witnesses also successfully challenged the failure to exempt them from a law which required saluting the national flag, on the basis that this violated the injunction in the Scriptures against worshipping graven images. See *West Virginia State Board of Education v Barnette* 319 US 624, 87 LEd 1628 (1943), 63 SCt 1178.

[2] See *Christian Education South Africa* (supra) and *Prince* (supra). See also *N Smith 'Freedom of Religion: The Right to Manifest our Beliefs' (2002) 119 SALJ* 690. The third freedom of religion case considered by the Constitutional Court thus far –*Solberg* (supra) — could potentially have been framed as a claim for exemption by adherents of religions (such as Judaism) whose day of rest or worship was a day other than Sundays, and who were thus faced with financial disadvantage if they honoured their religion. See, for example, the challenge mounted in *Edwards Books and Art Ltd. v The Queen* [1986] 2 SCR 713, 35 DLR (4th) 1 (*'Edwards Books and Art Ltd'*), where a majority of the Canadian Supreme Court found that there was a violation of the right to freedom of conscience and religion, but that this infringement was justified under s 1 of the Canadian Charter of Rights and Freedoms. The attack on the Liquor Act in *Solberg* (supra) was not, however, along these lines. Instead, it was alleged that the relevant statutory provisions fell to be struck down in their entirety by virtue of having an impermissible religious purpose.

[3] The Supreme Court of Appeal stated in *Prince v President, Cape Law Society & others* 2000 (3) SA 845 (SCA), 2000 (7) BCLR 823 (SCA) at para 11 ('*Prince (SCA)*') that it may well be impermissible for a court to declare otherwise unobjectionable statutes unconstitutional by virtue of their failing to contain an exemption for *bona fide* religious users, because this would involve a court legislating. The Constitutional Court has, however, correctly pointed out that this is not so; it is perfectly competent for a Court to hold that a statute violates the right to freedom of religion insofar as its impact on a particular religious group is concerned. See *Prince (CC)* (supra) at paras 31-33.

the limitation clause. In *Prince v President, Cape Law Society & others*, (*'Prince (CC 2)'*),[1] the Court found that there was a violation of s 15 (as well as s 31) of the Constitution vis-à-vis adherents of the Rastafari religion as a result of the prohibition on the use or possession of cannabis in two statutes.[2] A majority of the Court hearing that case found, however, that the infringement is justified under s 36 of the Constitution[3]

(d) The penumbra of the right: the protection against subtle non-quantifiable coercion

Although the Final Constitution contains no 'establishment clause' and does not mandate a 'wall of separation' between church and state, the state is not necessarily free to identify with or promote a particular religion. The extent to which the state remains able to do so depends on the dictates of the freedom of religion clause (s 15(1)), as well as the right to freedom from discrimination on the basis of religion, conscience and belief (s 9(1)). Although non-entanglement of church and state is not the direct focus of s 15(1) — unless there is coercion of adherents of other faiths to act (or refrain from acting) contrary to their beliefs[4] — it may be caught and constrained by the very logic of the right.

The question of whether it would be consistent with s 14(1) of the Interim Constitution (the equivalent of s 15(1) of the Final Constitution) for the state to gives its *imprimatur* of approval to a particular religion arose for consideration by the Constitutional Court in *S v Lawrence; S v Negal; S v Solberg*. In *Solberg*, the appellants alleged that the Liquor Act 27 of 1989 (as amended), evinced a religious purpose (allegedly 'to induce submission to a sectarian Christian conception of the proper observance of the Christian sabbath and Christian holidays or, perhaps, to compel the observance of the Christian sabbath and Christian holidays') and that such a sectarian aim constituted an infringement of the right to freedom of religion. A majority of the Constitutional Court found that the right to freedom of religion in s 14(1) of the Interim Constitution prohibited the 'endorsement' of religion by the State. O'Regan J wrote that 'explicit endorsement of one religion over others would not be permitted in our new constitutional order'.[5] Sachs J similarly opined that the State's endorsement would violate the freedom of religion clause if a 'reasonable South African (of any faith or none) who is neither hyper-sensitive nor overly insensitive to the belief in question, but highly

[1] 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC). See also *Prince (CC 1)* (supra).

[2] The Drugs and Drug Trafficking Act 140 of 1992 (s 4(b)) and the Medicines and Related Substances Control Act 101 of 1965 (s 22*(a)*(10)).

[3] The decision in *Prince* turned in large part on whether or not it would have been practical or in the public interest for an exemption to be granted so as to permit Rastafarians to smoke cannabis or marijuana for religious purposes.

[4] See the discussion in § 41.2*(c)* above.

[5] See *Solberg* (supra) at para 123 (O'Regan J).

attuned to the requirements of the Constitution' would deem there to be such.[1] However, Sachs J concluded that the infringement could be justified in terms of the limitation clause. In the result, a majority[2] held that s 90(1) of the Liquor Act was consistent with the Interim Constitution.

What is significant about the *Solberg* decision is not so much the result but the fact that a majority of justices found that the right to freedom of religion in the Interim Constitution — which to all intents and purposes is the same as the right to religious freedom in the Final Constitution — precluded the state from showing a special affinity with Christianity.[3] Despite a lack of unanimity in reasoning,[4] the Court clearly supported the proposition that those endorsements of the kind effected by s 90(1) of the Liquor Act — which precluded the sale of wine under a grocer's licence on Sundays, Christmas Day and Good Friday — infringed the rights to religious freedom.

The question at this point is whether a prohibition on state involvement with religion (and particularly the endorsement of one particular religion) is required in order for there to be adequate protection from religious *coercion* (and thus full protection of religious *liberty*). A prohibition on certain forms of state identification with religion, such as endorsement of a 'favoured' religion, is necessary to protect against *subtle non-quantifiable coercion*. State endorsement of a particular religion results in indirect coercion of adherents of other faiths, agnostics and atheists. The presence of coercion of this nature may be particularly pronounced in a school environment.[5] A proscription on state endorsement of a favoured

[1] Ibid at para 162 (Sachs J). O'Regan J declared that s 90 of the Liquor Act 27 of 1989 had both a sectarian purpose and a sectarian effect and therefore impermissibly infringed the freedom of religion clause of the Interim Constitution. Sachs J wrote that 'the inescapable message sent out by the particular choice of these closed days [of the Liquor Act] is that despite the enactment of s 14, the state still shows special solicitude to Christian opinion or, to put it more accurately, to the views of certain Christians, and thereby infringes s 14'. Ibid at para 163.

[2] Chaskalson P (with three Justices concurring) found that there was no violation of IC s 14(1). The opinion of Sachs J, upholding the provision of the statute under the limitation clause, was concurred in by Mokgoro J. Thus, five of the nine Justices who heard the case agreed that the constitutional challenge should be dismissed.

[3] Restricting sale of alcohol on Sundays and other 'closed days' (as defined in the Liquor Act) did not further a religious purpose or impinge on anyone's faith, except in a legally irrelevant way. See, eg, the decisions of the US Supreme Court upholding Sunday observance laws: *McGowan v Maryland* (supra); *Braunfeld v Brown* (supra); *Gallagher v Crown Kosher Super Markets of Massachusetts, Inc.* (supra); and *Two Guys from Harrison-Allentown, Inc. v McGinley* (supra). There was moreover no evidence in *Solberg* (supra) that anyone's freedom of religion had in fact been infringed. There was consequently an 'air of artificiality' about the challenge and the attack on the consistency of the Liquor Act with s 14(1) of the Interim Constitution should arguably have been dismissed on this ground alone. Ibid at paras 140 and 154, (Sachs J). See also the Canadian Supreme Court decision in *Hy & Zel's Inc v Ontario (Attorney-General)* [1993] 3 SCR 675 (a challenge to Sunday trading restrictions was rejected on the basis that the appellants, who had adduced no evidence and did not allege that their rights had been violated, lacked standing.); *Edwards Books and Art Ltd* (supra) at 40-41, 65 (freedom of religion challenge of Hindus and Muslims was dismissed because of insufficient evidence to support a constitutional attack.)

[4] O'Regan emphasised the importance equality or 'equitableness' of state support for religiously-based norms. See *Solberg* (supra) at paras 120-123 (O'Regan J) and para 148 (Sachs J).

[5] See *Lee v Weisman* 505 US 577, 112 SCt 2649 (1992) *('Weisman')* (US Supreme Court declared a purportedly non-denominational prayer at a high school graduation ceremony impermissible under the free exercise clause on the basis that, though voluntary, it resulted in indirect coercion).

religion is therefore appropriately located under the freedom of religion clause. While this coercion analysis can claim empirical evidence in its favour, the coercion becomes more subtle once one moves away from religious observances in captive environments such as schools or prisons (i.e., to activities not covered by s 15(2) of the Constitution).[1]

Support for the view that endorsement results indirectly in coercion, and thus must be prohibited to properly protect freedom of religion, is to be found in the judgment of O'Regan J in *Solberg*[2]. The same argument has been surfaced in the writings of South African academics such as Denise Meyerson[3] and Charles Villa-Vicencio[4] and the opinions of the US Supreme Court.[5] What is not directly addressed by the *Solberg* decision is the *extent* of state involvement with Christianity or any other religion that would be precluded by the constitutional right to freedom of religion by virtue of being indirectly coercive to adherents of minority faiths. Would any government actions with a religious purpose necessarily be precluded on the basis of being 'subtly coercive'? And would such a strict separation between the state and religion actually advance religious freedom?

The answer to both of these two questions is no. There is no reason why state involvement with religion, or government actions that have a religious purpose or effect, would necessarily be coercive (even indirectly or subtly) and thus be inconsistent with the penumbra of the right to religious freedom. There is furthermore no simple correlation between separation of church and state and total religious freedom. While complete identification of church and state clearly undermines religious freedom, a rigorous policy of state non-identification with religion would likely be violative of freedom of religion. The apex of religious freedom therefore

[1] A majority of the Supreme Court in *Weisman* endorsed the 'psychological coercion' analysis of Justice Kennedy. The majority's position prompted the quintessential Scalia riposte: 'interior decorating is a rock-hard science compared to psychology practiced by amateurs … [a] few citations of [r]esearch in psychology that have no particular bearing upon the precise issues here, cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing'. Ibid at 636.

[2] *Solberg* (supra) at paras 122-123.

[3] See D Meyerson *Rights Limited* (1997) 32-33 ('[a]nother, perhaps less obvious, way in which the state may limit the right to religious freedom is by giving a preferred status either to religion as such or to one or more specific religions. Such a policy would obviously raise equality concerns, but it also raises concerns about religious freedom, because the preferral puts indirect pressure on citizens to adopt the religion favoured by the state.')

[4] See C Villa-Vicencio *A Theology of Reconstruction* (1992) 264-268. Professor Villa-Vicencio discusses the importance of the separation of religion and state for freedom of religion. See J Klaaren 'Review of Stephen Carter's *The Culture of Disbelief* ' (1994) 10 *SAJHR* 287, 289.

[5] *Larson v Valente* 456 US 228, 245, 102 SCt 1673 (1982) (Brennan J). See also *McCollum v Board of Education* 333 US 203, 227 (1948) (Frankfurter J); *Zorach v Clauson* 343 US 306, 325 (1952) (Jackson J); *School District of Abington Township, Pennsylvania v Schempp* 374 US 203, 287-294, 298-299, 305 (1963) (Brennan and Goldberg JJ); and *Engel* (supra) (Black J, admittedly in an establishment clause setting, discussed the indirect coercive pressure that could be exerted on religious minorities.)

lies somewhere between positive identification and negative identification.[1]

In establishing exactly where on the continuum of church-state identification maximum freedom of religion is attained it is useful to outline more nuanced models of church-state interaction. At one extreme lie *absolute theocracies*[2]. Next are countries with an *established church*: an established church is compatible either with a system in which there is a virtual monopoly in religious affairs, or one in which there is a substantial toleration of other beliefs. Thirdly, there are countries with an *endorsed church*: an endorsed church, while not formally affirmed as the official church of a nation, is accorded special acknowledgment and perhaps treatment (although freedom of religion and freedom from religious discrimination are protected). Fourthly, there are *co-cooperationist regimes* where no special status is granted to dominant churches although the state co-operates closely with churches in a number of ways. (It may arrange religious education, maintain churches or even collect taxes for churches). Fifthly, there are *accommodationist regimes*. Such states 'might be thought of as co-operationism without the provision of any direct financial subsidies to religion or religious education'.[3] Under these latter regimes the state is able to accommodate religion and the religious wishes of citizens by, for example acknowledging the importance of religion as part of national or local culture, allowing religious symbols in public settings, and permitting tax, dietary holiday, Sabbath and other kinds of exemptions. Sixthly, there are *separationist regimes*. Such regimes can vary dramatically. At the very least they differ from accommodationist regimes by being less accepting of state involvement with religious activities (even on an equitable basis). In separationist regimes religious teaching in schools would be prohibited, while any suggestion of public support for religion would be considered inappropriate. Seventhly, there are political arrangements marked by *inadvertent insensitivity* to religion. Finally, there are legal orders characterised by *hostility and overt persecution* of religious orders and adherents.

There may be disagreement about which of the middle four systems outlined above would be most likely to maximise religious liberty in any particular context. (The first two and last two involve some restrictions on religious practices and adherents.) Perhaps the most persuasive case can be made for an *accommodationist*

[1] A useful discussion of religious freedom in this context is to be found in W Cole Durham, Jr. 'Perspectives on Religious Liberty: A Comparative Framework', in J D Van der Vyver and J Witte Jr. (eds) *Religious Human Rights in Global Perspective: Legal Perspectives* (1996) 1-44. I have previously employed Cole Durham Jr's framework when analysing the Constitutional Court decision in *Solberg*. See P Farlam 'The Ambit of the Right to Freedom of Religion: A Comment on *S v Solberg*' (1998) 14 *SAJHR* 298, 320-323.

[2] Durham (supra) at 19.

[3] Ibid at 21.

regime.[1] Accommodationism certainly results in greater freedom than a system that allows endorsement.[2]

An accommodationist approach would also appear to be preferable to a separationist stance because it would permit a government, in certain circumstances, to enact laws that have the primary or incidental purpose of benefiting a particular religion (but do not constitute endorsement). Such measures may well be required for the full protection of religious liberty.[3] Worship or expressions of faith can have a public, as well as a private, dimension. Refusing to permit religious observances or other expressions or manifestations of faith in public *fora* can therefore constitute an infringement of the religious faith of certain adherents.[4] Stated differently, a policy banning all worship or religious instruction from state institutions is not neutral vis-à-vis different religions (or even all adherents of one religion[5]), or between religious adherents, atheists and agnostics. This proposition has been acknowledged and affirmed by the German Constitutional Court:[6]

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[1] This model is favoured by a number of American academics who are dissatisfied with the restrictions on religious freedom that they feel are concomitant on a policy of rigid church-state separation as well as some South African writers. As regards American writers, see, in addition to Durham (supra), M W McConnell 'Accommodation to Religion' 1985 *Supreme Court Review* 1 and 'Accommodation of Religion: An Update and a Response to Critics' (1992) 60 *George Washington LR* 685. For South African support for an accommodationist position, see D Davis 'Religion, Belief and Opinion' in H Cheadle, D Davis & N Haysom *South African Constitutional Law: The Bill of Rights* (2002) 209-210; W Freedman 'The Right to Religious Liberty, The Right to Religious Equality, and S 15(1) of the South African Constitution' (2000) 11 *Stell LR* 99, 113-114. See also Farlam (supra) at 320-323.

[2] As regards 'endorsement', Durham says the following: 'Of course, substantial religious liberty can also exist in co-operationist or endorsed church regimes, at least where genuine religious equality is present. However, there is always a sense in such regimes that smaller religious communities have a kind of second-class status, and to the extent that public funds are directly supporting programs of majority churches, there is a sense that members of religious minorities are being coerced to support religious programs with which they do not agree.' See Durham (supra) at 24.

[3] See *Solberg* (supra) at para 122 (O'Regan J).

[4] This was recognised by the framers of the Interim and Final Constitutions — hence the inclusion of ss 14(2) and 15(2).

[5] For example, the view — seemingly influential among the drafters of the First Amendment of the US Constitution — that the ideal model for the church is the small, non-hierarchical institution of the first few centuries (i.e. before Constantine made Christianity the official religion of the Roman Empire), and the attitude that the essence of religion is a personal relationship between the believer and his/her God, were all Puritan beliefs that stemmed in part from disaffection with the religious practice in Europe in the 17th and 18th centuries. Thus, not only were these not impartial religious truths then, (or, for that matter, now) they had never even been the most widely accepted Christian views. A more optimistic view about the Church and its ability to preserve its integrity in the face of worldly temptations, a more generous view of who should appropriately be accepted as church members, and a less intensely private view about the nature and content of religious practices would probably be more reflective of mainstream Christian belief. Thus, a policy whereby churches are denied any co-operation or assistance from government authorities, and are consequently small and perhaps less hierarchical and bureaucratic, is a policy that favours beliefs that churches should conform to this model, while equally clearly disadvantaging those who believe that more worldly structures (like the Catholic Church) reflect an appropriate ecclesiastical structure.

[6] See D Currie *The Constitution of the Federal Republic of Germany* (supra) at 253. See also *Mozert v Hawkins County Public Schools* 647 FSupp 1194 (E Tenn 1986) and *Mozert v Hawkins County Public Schools* 827 F2d 1058 (6th Cir 1987) (concerning whether schools should be required to exempt students from readings and discussions that offended their religious beliefs).

The Court wrote:

> Similarly, in the later decisions respecting school prayers and interdenominational public schools the claims of dissenting children to be free from state-sponsored exposure to religion were subordinated to the rights of religious children and their parents, based upon Article 4, to the free exercise of their religion.[1]

In its first decision on school prayers in interdenominational public schools, the German Constitutional Court noted that the complaining parents' desire to keep their children's education free from religious influence conflicted with the wishes of other parents to provide their children with a Christian upbringing. The Court then advanced a number of propositions. First, to eliminate all traces of religious thinking from the schoolroom would not be neutral with respect to religion. Second, it would disadvantage those parents who preferred a religious education[2]. Third, resolution of competing claims to religious liberty was basically entrusted to the democratic process. Finally, so long as public schools did not become 'missionary schools' or attempt to breach the infallibility of Christian beliefs, a curricular affirmation of Christianity more cultural than confessional infringed no one's religious freedom.[3]

In *Solberg*, there was no unanimity over whether the impugned provisions of the Liquor Act violated the right to freedom of religion. There was, however, a clear majority (if not consensus) in support of the proposition that subtle and potentially non-quantifiable coercion (such as state support for a particular religion) could infringe the right to religious freedom. This proposition was explicitly articulated by O'Regan J and the two justices who concurred with her. The same proposition was unequivocally endorsed by the four Justices who found that there was no violation of the right to freedom of religion in *Solberg*:

> I am not unmindful of the fact that constraints on the exercise of freedom of religion can be imposed in subtle ways and that the choice of Christian holy days for particular legislative purposes may be perceived to elevate Christian beliefs above others; and that as a result adherents of other religions may be made to feel that the State accords less value to their beliefs than it does to Christianity.[4]

At the same time, the Court, in *Solberg*, made it clear that government measures favouring or benefiting a religion in a particular context would not necessarily amount to endorsement of that religion. Thus, such measures would not inevitably be prohibited under the freedom of religion clause because they were indirectly or subtly coercive.[5]

It is not clear from the various judgments in *Solberg* precisely what the attitude of the Court would be as regards 'accommodationism'. However, the analyses of O'Regan and Sachs JJ display an awareness of the need to tolerate state involvement with religion, while at the same time restricting displays of state favouritism.

[1] 41 BVerfGE 29 (1975); 52 BVerfGE 223 (1979).
[2] 41 BVerfGE 29 (1976) 49-50.
[3] 41 BVerfGE 29 (1975) 50-52, 64.
[4] *Solberg* (supra) at para 93 (Chaskalson P).
[5] Ibid at para 122.

The approach of Chaskalson P acknowledges the reality of coercion and warns against an establishment-clause style 'wall of separation'. Thus all three opinions in *Solberg* would seem consistent with such an accommodationist approach.

(e) The penumbra of the right: religious equality

A more contentious issue than whether s 15(1) protects 'subtle coercion' as part of the guarantee of religious liberty, is whether the right also contains a guarantee of equality. This issue was the primary source of disagreement between the majority and minority opinions in *Solberg*.[1] O'Regan and Sachs JJ argued that it was apparent from both the text and the broader context that equality (or equity) considerations were an integral part of the right to freedom of religion in IC s 14(1). Chaskalson P, on the other hand, felt that neither textual nor policy considerations warranted the inclusion of equality considerations in IC s 14(1).[2]

The Constitution undeniably manifests a concern for equality and a respect for diversity. Nevertheless, it would not seem to be textually required, or conceptually coherent, for the right to freedom of religion, belief and opinion in s 15(1) to be read to require equal treatment.[3] As Chaskalson P stated in *Solberg*:

> The Constitution deals with unequal treatment and discrimination under s 8. Unequal treatment of religions may well give rise to issues under s 8(2), but that section was not relied upon by the appellant in the present case. To read 'equitable considerations' relating to State action into s 14(1) would give rise to any number of problems not only in relation to freedom of religion but also in relation to freedom of conscience, thought, belief and opinion, which would go far beyond the difficulties raised by the 'establishment clause' of the US Constitution[4].

The freedom of religion jurisprudence of Canada reflects similar concerns.[5] As Katherine Swinton has noted,[6] early decisions of the Supreme Court of Canada, such as *Big M Drug Mart Ltd* and *Edwards Books and Art Ltd* suggested that the right to freedom of conscience and religion enshrined in s 2*(a)* of the Canadian Charter of Rights and Freedoms contained an equality (or 'equal liberty') component.[7] However, this dimension was not the 'essence of the concept' of freedom of religion as described in *Big M Drug Mart*. The reference to equality in these early cases may well have been influenced by the fact that the right to equality in s 15 of the Canadian Charter only came into effect on 17 April 1985, three years

[1] See Davis (supra); Farlam (supra) at 310.

[2] For a discussion of the debate over equality in the *Solberg* judgment, see Farlam (supra) at 310-318; J De Waal I Currie & G Erasmus *The Bill of Rights Handbook* (4th Edition) 297-301; Freedman (supra) at 108 -114.

[3] See De Waal et al (supra) at 301.

[4] *Solberg* (supra) at para 102.

[5] The Canadian freedom of religion and conscience clause bears some similarity to s 15(1) of the Constitution, as discussed above. See §§ 41.1*(c)*(iii), 41.2*(b)*(iii) & (c) supra.

[6] K Swinton 'Freedom of Religion' in G A Beaudoin & E Mendes (eds) *The Canadian Charter of Rights and Freedoms* (3rd Edition, 1996) 4-5.

[7] *Big M Drug Mart Ltd* (supra) at 353.

after the rest of the Charter, and after both *Big M Drug Mart Ltd* and *Edwards Books* had been argued before the Supreme Court. The question of whether the challenge should have been brought under s 15 of the Charter could not arise in *Big M Drug Mart Ltd*, and was considered by the Supreme Court in *Edwards Books* to be inappropriate to consider.[1] By contrast, in the main decision on Sunday trading after April 1985 — the Ontario Court of Appeal's judgment in *Peel (Regional Municipality) v Great Atlantic*[2] — there was greater concern with *coercion* than equality.[3] The same emphasis on coercion is to be found in the leading Canadian judgments on religious education handed down between *Edwards Books* and *A & P*.[4] The case law of Canada therefore suggests that the references to equality considerations in early cases (for quite understandable textual reasons) have become somewhat less relevant as the jurisprudence has matured.[5]

41.3 The Stages of the Freedom of Religion Enquiry

As indicated in § 41.2 above, the Constitutional Court has, on a few occasions, commented on the ambit of the right to freedom of religion. There is, however, less clarity as yet as to the test to be employed in determining whether or not the right to freedom of religion has been infringed. Would legislation or conduct that impeded the exercise of religion to any degree or in any respect violate the right? If not, what kinds of impediments would fall afoul of the freedom of religion guarantee? And to what extent should the courts engage in an analysis of whether the claimant has correctly described or characterised the prejudice that the state actions would allegedly inflict upon his or her religious faith or practice? These are some of the issues that will have to be confronted, and answered, prior to the crystallisation of the test for determining contraventions of the right to religious freedom.

It is not necessary to examine the stages of the freedom of religion enquiry in the context of government measures (be they laws or conduct) with the clear intent of impairing religious freedom. The first stage of the analysis would be satisfied by such clear intent. All that would then be required would be a determination of whether the limitation on religion was justified under s 36 of the Constitution. Determining contraventions of s 15(1) by ostensibly neutral laws that may have a disparate effect on various religions and from which some affected believers consequently request an exemption is a more complex

[1] *Edwards Books and Art Ltd* (supra) at 54–55 (Dickson CJC), and 59 (Beetz J) and 75 (La Forest J).

[2] (1991) 78 DLR (4th) 333 (Ont CA). Leave to appeal to the Supreme Court of Canada was granted: (1991) 85 DLR (4th) viii (note). The appeal was withdrawn: 11CRR (2d) 383.

[3] See Swinton 'Freedom of Religion' (supra) at 4-14 to 4-15.

[4] Ibid at 4-14 n68. See, for example, *Zylberberg v Sudburg (Board of Education)* (1988) 52 DLR (4th) 577 (Ont CA); *Canadian Civil Liberties Association v Ontario (Min. of Education)* (1990) 65 DLR (4th) 1 (Ont. CA).

[5] See Hogg (supra) at Chapter 39 (no mention of an 'equal liberty' dimension). See also R Sharpe & K Swinton 'Freedom of Conscience and Religion' in *The Charter of Rights and Freedoms* (1998)(no mention of equality as regards freedom of belief, conscience or religion).

matter. In those cases it would be necessary for a court to determine whether (a) there is a *sincerely held belief* (whether held by the complainant or other persons in relation to whom the challenge is brought), (b) that has been *sufficiently burdened*. In making these enquiries, the court should avoid becoming entangled in doctrinal disputes or imposing its own views as to the validity or worth of the religious beliefs in question.

(a) Sincerity of belief

The first issue to be considered by a court when faced with an allegation that a secular and otherwise unimpeachable law impinges upon the s 15(1) right is the believer's sincerity.[1] The court cannot simply accept without any enquiry that a religious belief has been affected by legislation or state conduct. At the same time, the court should be sensitive to the varieties of beliefs and the constitutional commitment to diversity. Religious beliefs do not have to be objectively reasonable or sophisticated to be worthy of protection for the adherence thereto to be regarded as sincere.[2] The fact that a doctrine might not be regarded as particularly reasonable or coherent does not mean that is not genuinely believed. Nor is the sincerity of a complainant's beliefs necessarily called into question by the fact that other members of a religion disagree with his or her interpretation or views as to what actions are prohibited by the religion,[3] or the fact that the beliefs are apparently not held by any organised religious group.[4] It is not for the court, or the state, to prescribe what is orthodox or heretical.

Only in exceptional cases will the court conclude that a religious belief is not sincerely held. This might occur where, for example, there is little or no evidence of true devotion to a religion, or where the evidence suggests that claims of adherence to a belief have been trumped up in an attempt to obtain an exemption to cater for personal predilections. Thus far in South Africa, no court has held that a belief has not been sincerely held and thus falls outside the protective ambit of the freedom of religion clause.[5] In *Prince,*[6] the genuineness (or sincerity) of the appellant's religious beliefs were put in issue by the Director-General of Health. This contention was swiftly dispatched by the Court.

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[1] *Prince (CC2)* (supra) at paras 40, 41 and 43; *In re Chikweche* (supra) at 289I-J; *Christian Education South Africa v Minister of Education* 1999 (4) SA 1092, 1100B-D (SE), 1999 (9) BCLR 951 (*'Christian Education South Africa (SE)'*); L Tribe *American Constitutional Law* (2nd Edition) §14-12. See also *Christian Education South Africa (CC)* (supra) at paras 6, 14 and 16.

[2] See Tribe (supra) at § 14-6 and § 14-12; *Thomas (*supra*)*; *United States v Ballard* 322 US 78, 86-87 (1944).

[3] *Thomas* (supra) (Jehovah's Witness resigned from a munitions factory because of a sincere belief that such work violated his religion, even though other members of his religion disagreed with his views as to what actions the beliefs forbade).

[4] *Bowen (*supra*)* (The claimants therein sought to bar the government from using their daughter's social security number, on the basis that this would 'rob the spirit of their daughter and prevent her from obtaining greater spiritual power').

[5] On the other hand, a finding of sincerity was made in *Christian Education South Africa (SE)* (supra) at 1100I-1101J. The Court's findings in relation to whether it had been shown that a religious belief was implicated will be dealt with under § 41.3*(b)*.

[6] *Prince (CC2)* (supra) at paras 43, 97 and 111.

Another issue that arises at this stage of the freedom of religion enquiry is whether the beliefs in issue in a particular case should properly be characterised as 'religious'. The right in s 15(1) does not merely cover religious beliefs. It also extends to views derived from political, sociological or philosophical ideologies (and includes the right *not* to be religious). To the extent that organisations and adherents are committed to comprehensive visions of the good life, there may well be no difference between the extent of the protection afforded under s 15(1) to religious practices, on the one hand, and secular ideologies or systems of thought, belief, conscience or opinion, on the other.[1] However, freedom of religion, thought and belief clauses in international human rights documents do not appear to accord the same degree of protection to practices motivated by non-religious beliefs as to ones dictated by religious faith. Nor has the question of the protection to be afforded to non-religiously motivated practices yet been addressed by the Constitutional Court. Consequently, there may still be some significance attached (albeit limited) to whether a belief can be classified as 'religious' or not.[2]

The definition given to the term 'religion' in various contexts (and in different countries) has been canvassed above.[3] The concept was often equated in the past with belief in a supreme being. Such a definition is undoubtedly too limited. It would fail, for example, to include a faith like Theravada Buddhism.[4] The term 'religion' requires a much broader extension.[5]

It is, however, impossible to define religion in advance or in the abstract.[6] The question of whether a system of beliefs qualifies as a religion would therefore have to be evaluated in every case, with regard to precedent,[7] comparative case

[1] Talking about a belief will probably be regarded as being protected in the first instance under the right of freedom of expression, rather than the freedom of conscience, religion, thought, belief and opinion. However it should still enjoy protection under the latter right.

[2] In Prince (CC2), the Constitutional Court dealt with the question of whether Rastafarianism was a religion. *Prince (CC2)* (supra) at paras 15-18 and 97.

[3] See § 41.2*(b)*(i) (supra)

[4] See *Hartman v Chairman, Board of Religious Objection* 1987 (1) SA 922 (O) (*'Hartman'*) (Faith qualifies as a 'religious conviction' in terms of the Defence Act 44 of 1957).

[5] See *Christian Education South Africa (CC)* (supra).

[6] See G van der Schyff 'The Legal Definition of Religion and its Application' (2002) 119 *SALJ* 288-294; E Peñalver 'The Concept of Religion' (1997) 107 *Yale LJ* 791; The Hon Mr Justice D Malcolm 'Religion, Tolerance and the Law' (1996) 70 *Aust LJ* 976, 978-980. For a list of *indicia* as to what constitutes a religion, see also *Malnak v Yogi* 592 F2d 197 (3d Cir 1979) and *Church of the New Faith v Commissioner for Payroll Tax (Vic)* (1983) 154 CLR 120, 132, 173, 174.

[7] South African Courts have held the following belief systems to be religions: Theravada Buddhism, (see *Hartman* (supra)); Rastafarianism, (see *Prince (CC2)* (supra) at paras 40, 97)) and Scientology, (see *Church of Scientology in SA Incorporated Association Not for Gain v Readers' Digest Association SA (Pty) Limited* 1980 (4) SA 313, 314G-H (C)). As regards Jehovah's Witnesses, see *Simonlanga & Other v Masinga & Other* 1976 (4) SA 373 (W).

law,[1] and religious and academic writings.[2] It would also require sensitivity to the fact that it would not be appropriate or desirable for a court to stand in judgment of the verity or acceptability of beliefs.[3]

(b) Sufficient burden

The second leg of the freedom of religion enquiry in cases in which the invalidity of or religious exemptions from ostensibly neutral statutes are at issue concerns the nature of the burden that has to be imposed on a religion in order for there to be a violation of the right to freedom of religion and belief. The right is clearly infringed where government measures impinge upon practices such as worship, teaching and observance,[4] or where they relate to other actions concerning the viability or existence of religious organisations or precepts of a faith. In other words, religious practices *central* to a faith are protected. What is less clear is whether practices that are not prescribed or proscribed by the organisation to which the individual belongs, but are simply motivated by, derived from, or related to the organisation's creed and commands, or the individual's faith, can be protected as part of the right to religious freedom. An ancillary issue is the extent to which it is competent or appropriate for a court to make such determinations.

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[1] For a case in which a practice was not held to be 'religious' for the purpose of art 18 of the ICCPR, see *MAB, WAT and J-AYT v Canada* (Communication No 570/1993, Inadmissibility decision of April, 1994) 1994 HRC Rep, Vol II. In that matter, the Human Rights Committee dismissed a claim for protection under the right to freedom of thought, conscience and religion by three Canadian citizens, who said they were leading members and 'plenipotentiaries' of an organisation named 'Assembly of the Church of the Universe', the beliefs and practices of which, according to the authors of the complaint, necessarily involved the care, cultivation, possession, distribution, maintenance, integrity, and worship of the 'Sacrament' of the church (which they referred to as 'God's tree of life', and which is generally known as cannabis or marijuana). The Human Rights Committee held that there was no violation of the right as the expression 'religion or belief' did not encompass 'a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug'. See also B G Tahzib *Freedom of Religion or Belief* (1996) 278-279; *United States v Meyers* 95 F3d 1475, 1479 (10th Cir. 1996) (defendant tried to avoid conviction for drug violations by arguing that he was the 'founder and Reverend of the Church of Marijuana' and that it was 'his sincere belief that his religion commands him to use, possess, grow and distribute marijuana for the good of mankind and the planet Earth).

[2] See Tribe (supra) at 1181-1182:

> The most common approach to defining religion is to draw analogies to generally accepted religions. When such analogies focus on the externalities of a belief system or organization, they unduly constrain the concept of religion. As the theologian Harvey Cox has written: '[A] man-in-the-street approach would surely have ruled out early Christianity, which seemed both subversive and atheistic to the religious Romans of the day. The truth is that one man's 'bizarre cult' is another's true path to salvation . . .'. Externalities upon which courts cannot properly rely include the belief system's age, its apparent social value, its political elements, the number of its adherents, the sorts of demands it places on those adherents, the consistency of practice among different adherents, and the system's outward trappings- e.g., prayers, holy writings and hierarchical organizational structures. To be sure, courts should be wary of sudden births of religions that entitle practitioners to special rights or exemptions. But the proper place for that inquiry is in the assessment of the believer's sincerity, not in any evaluation of the belief's externalities.

[3] See Woolman 'Association' (supra) at §§ 44.1*(b),* 44.1*(c)* and 44.3*(c)*(viii).

[4] These practices are specifically mentioned as corollaries of the right to freedom of conscience, thought, belief and religion in art 18(1) of the ICCPR and art 9(1) of the ECHR.

Lower courts in South Africa have demonstrated little reluctance in engaging in debates as to what practices are truly dictated by religion, or whether a restriction on such practices constitutes a substantial burden on a claimant's faith. They have also shown no hesitation in finding that where impeded practices are not central to a faith, or when the burden on the faith is not substantial, a freedom of religion challenge should be rejected. In *Christian Education South Africa (SE),* the High Court held that the claimants had not shown that it was part of their *religious* beliefs that teachers and schools be empowered to administer corporal punishment to learners.[1] Liebenberg J stated that he had come to the conclusion that, on the applicant's own showing, the impugned section of the statute[2] 'does not constitute a *substantial* burden on the freedom of religion as practised in the applicant's constituent schools'.[3]

The Constitutional Court by contrast has shown a greater sensitivity to the claims of religious adherents.[4] In *Christian Education South Africa (CC)*, Sachs J accepted that the appellant's members sincerely believed that parents are obliged by scriptural injunction to use corporal correction as an integral part of the upbringing of their children and also accepted that the impact of the relevant provision of the South African Schools Act was 'far from trivial'.[5] The case was therefore decided under the limitation clause, rather than on the basis of a failure to prove a violation of the right to freedom of religion. In a later case, *Prince* (*CCII*),[6] the Constitutional Court had no difficulty in concluding that the use of cannabis was central to the Rastafari religion and thus covered by s 15(1). Ngcobo J warned against courts enquiring too readily into the centrality of religious practices:[7]

> . . . as a general matter, the Court should not be concerned with questions whether, as a matter of religious doctrine, a particular practice is central to the religion. Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may

[1] See *Christian Education South Africa (SE)* (supra) at 1101G-1102A.

[2] South African Schools Act 84 of 1996.

[3] *Christian Education South Africa (SE)* (supra) at 1102E-1103H. See M du Plessis 'Doing Damage to Freedom of Religion' (2000) 11 *Stell LR* 295-305 (criticising the decision in *Christian Education South Africa (SE)* (supra) on the basis that the court inappropriately disputed the contents of the applicant members' religious beliefs).

See also *Garden Cities Incorporated Association Not For Gain v Northpine Islamic Society* 1999 (2) SA 257, 272D-H (C)(Conradie J found that the respondent had not made out a case on the papers for a finding that electronic amplification of the call to prayer was a fundamental tenet of Islamic religion: 'there is evidence on the affidavits that it has become a widespread practice for calls to prayer to be electronically amplified but there is nothing to suggest that such amplification has become a precept of the Islamic religion after centuries of call to prayer without sound equipment.')

[4] However, for criticism of the Constitutional Court's approach in *Christian Education South Africa* (supra), see M Pieterse 'Religious Confusion' (2001) 64 *THRHR* 672; S Woolman 'Association' (supra) at § 44.3*(c)*(viii). As far as the approach of the Supreme Court of Appeal is concerned, see *N|kosi v Bürhmann* 2002 (1) SA 372 (SCA) at paras 45 and 46 (Court considered the contents of a particular adherent's religious beliefs relating to funerals and graveside rites and rituals).

[5] *Christian Education South Africa (CC)* (supra) at para 37.

[6] *Prince (CCII)* (supra) at paras 42 and 97.

[7] Ibid at para 42.

> freely believe in what they cannot prove. Yet that their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice.

The comments of the Constitutional Court in *Prince (CCII)* echo those of the Supreme Court of the United States. In *Lyng v Northwest Indian Cemetery ('Lyng)*, O'Connor J wrote:

> The dissent thus offers us the prospect of this court holding that some sincerely held religious beliefs and practices are not 'central' to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit. In other words, the dissent's approach would require us to rule that some religious adherents misunderstand their own religious beliefs. We think that such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the judiciary in a role that we were never intended to play.[1]

The US Supreme Court has, however, applied a 'substantial burden' test to determine whether there was an infringement of the free exercise of religion in cases such as *Sherbert v Verner*[2] and *Wisconsin v Yoder*.[3] The judgment of the US Supreme Court in *Employment Division, Oregon v Smith* prompted the United States Congress to enact a statute — The Religious Freedom Restoration Act of 1993 — restoring the ('substantial burden') free exercise of religion test.[4]

Like the United States Supreme Court and the South African Constitutional Court, the German Constitutional Court has been reluctant to second-guess the religious claims of applicants or to reinterpret their own beliefs for them. In *Rumpelkammer*,[5] the Court overturned a lower court's decision, which, on the

[1] 485 US 439, 108 SCt 1319, 1329-30 (1988). Ironically, the U.S. Supreme Court's reluctance in *Lyng* to engage in an evaluation of what is 'central' or 'indispensable', rather than peripheral or insignificant, to religious beliefs and practices, may have had the consequence of upholding conduct that would 'virtually destroy the Indians' ability to practice their religion' and thus have 'devastating effects on traditional Indian religious practices'. *Lyng* (supra) at 133 (Brennan J dissenting).

See also *Smith* (supra) where Scalia J stated 'nor is it possible to limit the impact of respondents' proposal by requiring a 'compelling state interest' only when the conduct prohibited is 'central' to the individual's religion. It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in a free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims'. [Repeatedly] and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.'

[2] 374 US 398 (1963).

[3] 406 US 205 (1972).

[4] The Religious Freedom Restoration Act was held to be unconstitutional. See *City of Boerne v Flores, Archbishop of St. Antonio* 521 US 507, 117 SCt 2157, 138 LEd 2d 624 (1997).

[5] 24 BVerfGE 236 (1968).

grounds of unfair competition with commercial rag dealers, had forbidden a Catholic youth organisation (not incorporated into the Catholic church but institutionally connected with it) from encouraging practitioners to contribute rags and other old clothes to raise money for hunger relief.[1] In holding that charitable collection was an exercise of religion the Court reasoned as follows:

> In determining what is to be regarded as the free exercise of religion, we must consider the self-image of the religious or ideological community. The state would violate the independence of ideological associations and their internal freedom to organize accorded by the Constitution if it did not consider the way these associations see themselves when interpreting religious activity resulting form a specific confession or creed.
>
> The Catholic and Evangelical churches view the exercise of religion as encompassing not only the freedom of worship and believe but also the freedom to act on those beliefs in the real world. The active love of neighbour is understood by both Catholic and Evangelical churches as a fundamental religious duty. It follows from the nature of religious freedom outlined here that a charitable collection has a religious character and may claim the protection of Article 4(2) of the Constitution only if it meets certain conditions.[2]

The German Constitutional Court did not attempt to establish for itself whether the activities in question were truly central to, or core tenets of, the Catholic faith. At the same time, it did not abdicate all responsibility and simply accept the *ipse dixit* of the applicants.

The judgment in *Religious Oath*[3] further illustrates the deferential approach of the German Constitutional Court. An evangelical pastor was fined because he refused to be sworn in as a witness in criminal proceedings. His justification — that, according to Christ's word from the Sermon on the Mount, it was impermissible for him to take any oaths, even non-religious ones — was accepted by the Constitutional Court. His conviction was overturned.

Religious Oath is notable both for the majority and dissenting judgments. The majority judgment evinces an admirable tolerance for divergent religious positions. By contrast, the dissent, which rejected the pastor's claim on the grounds that he had misread the Sermon on the Mount, embodies an approach which could have disastrous consequences for religious freedom and, in particular, minority viewpoints.[4]

The majority impliedly criticises the dissent when it says that the pastor's view 'finds some support from the Bible', and that, in any event, '[t]he state may not evaluate its citizens' religious convictions or characterize these beliefs as 'right' or

[1] See Currie *The Constitution of the Federal Republic of Germany* (supra) at 258-259.

[2] Ibid at 261-2 n94. See also D Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd Edition, 1997) 447.

[3] 33 BVerfGE (1972) 23.

[4] According to Justice von Schlabrendorff, in dissent, the Sermon on the Mount 'does not apply to the state', 'is not a law and, above all, is not a law for the earthly millennium. As a consequence, one may only read and understand the Sermon on the Mount from the standpoint of eschatology'. See Kommers (supra) at 456-457. Currie terms this dissent 'astounding' and suggests that it is surely 'up to the individual, within the limits of sincerity, to say what his own religion required'. Currie (supra) at 261-262 n 94.

'wrong'.[1] The majority's judgment is replete with a number of statements to the effect that 'the numerical strength of a particular faith or its relevance in society cannot be determinative', that Article 4(1) 'protects those infrequently occurring convictions which diverge from the teachings of the churches and religious communities' and that the state 'permits even outsiders and sects to develop their personalities in keeping with their subjective convictions, free of harassment'.[2]

In contrast to the approach of the South African Constitutional Court, the US Supreme Court and the German Constitutional Court, the Canadian courts have shown a far greater readiness to dip into the murky waters of religious doctrine. In *Jones v The Queen ('Jones')*[3] a pastor of a fundamentalist church in Alberta, who ran his own schooling programme, refused to apply for approval for his academy from the Department of Education as he was required to do by statute. He claimed that to do so would violate his religious convictions. In particular, he claimed that he could not make such an application, because to do so would acknowledge that the school board, a secular institution, was the source of his right and obligation to educate his children rather than God. He was, however, prepared to accept that the board could, of its own initiative, send an official to vet his academy. Furthermore, he was prepared to abide by the board's decision. His only concern was that he not be compelled to ask the state to permit him to perform God's will.

The approach of the majority of the *Jones* Court was to hold that even though the pastor claimed that he was being compelled to act contrary to his conscience, the statute was actually not contrary to his religious beliefs. Wilson J concluded that being required to recognise a secular role for the school did not entail that Jones 'replace God with the school board as the source of his right and his duty to educate his children'.[4] Wilson J was also of the view that, even if the legislation did compel action contrary to Jones' religious beliefs, 'any impact at all on [his] freedom of conscience and religion … is an extremely formalistic and technical one'. It would not give rise to a violation of s 2*(a)* of the Charter.[5]

This sort of judicial intervention is inappropriate. Courts should not assert that believers (and particularly ministers of religion) have incorrectly interpreted what their religion requires them to do. Indeed, the minority in *Jones* stated that 'a court is in no position to question the *validity* of a religious belief, notwithstanding that few share that belief'.[6]

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[1] It is not objectionable for a Court to assert that religious convictions do *not* automatically trump the demands of citizenship. But what the State cannot do is assess whether, in its opinion, a believer has misunderstood the religious beliefs to which she adheres.

[2] Kommers (supra) at 454-456.

[3] [1986] 2 SCR 284, 31 DLR (4th) 569.

[4] Ibid at 575-8, 577-8.

[5] Ibid at 578. (Wilson J claimed that the effect of the statutory machinery for Jones' religion was 'trivial or insubstantial'.)

[6] Ibid at 591 (emphasis in the original). Even the approach of the minority is not, however, beyond criticism. La Forest J seemed to consider as relevant to a determination of the *sincerity* of Jones's religious convictions whether or not his beliefs on this score are typical or unusual. This again portrays a bias towards orthodox and mainstream beliefs that is inappropriate for a freedom of conscience and religion enquiry.

Lower courts in Canada have also shown a willingness to involve themselves in such doctrinal enquiries regarding burdens, centrality and sincerity. In *Salvation Army, Canada East v Ontario (A-G)*,[1] the Ontario General Division ruled that the Pension Benefits Act (requiring that payment of pension benefits be guaranteed to members of the Salvation Army) did not violate the Salvation Army's freedom of religion because the principle and practice of 'voluntarism' is not a fundamental tenet or essential of the faith and therefore does not fall within the freedom covered by s 2*(a)*. Even if the freedom was impaired, the court reasoned, the burden imposed by the requirement of compliance with the relevant statute was trivial or insubstantial. The Court found that the practices in question were really only an administrative or pastoral in nature and did not derive from one of the deeply held convictions of the faith.[2]

The same approach has been employed by the European Commission of Human Rights. According to Shaw, the Commission has 'posited a distinction between actions expressing a belief, which may be protected under Article 9 if 'they are intimately linked' to the sphere of personal beliefs and religious creeds, and actions merely motivated or influenced by such beliefs or creeds, which will not be so protected'.[3]

As the cases above suggest, there is no uniformity in approach in open and democratic societies when it comes to determining which practices fall to be protected under the right of freedom of religion and belief. The preferred approach would, however, seem to be the one adopted by the South African Constitutional Court, the United States Supreme Court and the German Constitutional Court. According to this approach courts are not required to accept every claim of faith as the basis for a *prima facie* infringement of the right and then move immediately to a limitation clause analysis. However if freedom of religion is to be truly respected, even the most unorthodox beliefs and convictions should be

[1] (1992) 88 DLR (4th) 238.

[2] For further examples of a seemingly inappropriate determination as to the precepts of a faith, see *Ontario (Attorney-General) v Dieleman* (1994) 117 DLR (4th) 449, 748b-c *('Dieleman')*. In that matter, Adams J, when (apparently correctly) dismissing a freedom of religion challenge, and granting an interlocutory injunction to restrict picketing protesting abortion, stated: 'If Umbertino's belief that her protest activity is required by her religion is not shared by the vast majority of the members of her religion, which is the case, it is difficult to conclude that her conduct constitutes the exercise, practice or manifestation of her religion.' The reasoning of Adams J is open to criticism on the basis that it could result in prejudicing of unusual views and the stifling of religious diversity and privileges religious conformity over individual conscience. In this regard, it is notably different from the judgment of the US Supreme Court in *Thomas*.

[3] Shaw (supra) at 458-9.

given some credence. All the court need require is credible explanation for the religious practice under scrutiny.[1]

Nevertheless, in certain cases, a court will quite rightly examine how closely linked the practices for which protection is claimed are to the actual religious *beliefs* of the claimant.[2] Two cases, *Arrowsmith v UK ('Arrowsmith')*[3] and *Grandmaison and Fritz v Federal Republic of Germany ('Grandmaison')*.[4] — both adjudicated in terms of art 9(1) of the ECHR[5] — provide germaine examples of situations in which conduct has not been held to fall within the ambit of the right to freedom of religion, conscience, thought and belief because it could not be linked closely to belief.

In *Arrowsmith*, the Commission held that although pacifism comes within the ambit of freedom of thought or conscience, distribution of leaflets which did not 'actually express the belief concerned' was not protected under Article 9(1). The fact that the distribution was motivated or influenced by pacifist convictions was

[1] Owing to the difficulty, in part, in evaluating the claims of religious adherents under the free exercise clause for this reason, it is important that cases be decided under other rights, when they are implicated. See Tribe (supra) at §14-12, 1249-1. Challenges brought *inter alia* under the free exercise clause may be upheld on the basis of freedom of expression. See *West Virginia State Board of Education v Barnette* 319 US 624 (1943) (Jehovah's Witnesses challenged school regulations requiring students to salute the American flag — something which they regarded as equivalent to worshipping a 'graven image'); *Wooley v Maynard* 430 US 705 (1977) (the refusal of Jehovah's Witnesses to be coerced into displaying New Hampshire's state motto, 'Live Free or Die', on their car licence plates.) See also *Heffron v International Society for Krishna Consciousness (ISKCON)* 452 US 640 (1981) (decided (and rejected) on the basis of the right to freedom of expression, notwithstanding the allegation that the regulations in question suppressed religious rituals. Challenge was by a religious society espousing the views of the Krishna religion to rules prohibiting the sale or distribution at a state fair of printed or written material, except from booths, on the basis that it was a religious ritual for members of the Krishna religion to go into public places to distribute or sell religious literature.)

[2] See Woolman 'Association' (supra) at §§ 44.1*(c)* and 44.2*(b)*. See also *American Life League v Reno* 855 FSupp 137, 144 (ED Va 1994). (That case concerns picketing and physical obstruction of abortion clinics by anti-abortion activitists, contrary to the Freedom of Access to Clinic Entrances Act of 1994, which was sought to be justified on the basis of the free exercise of religion clause. This kind of activity would appear to fall under s 17 (the right to assembly, demonstration, picket and petition) or even s 16 (the right to freedom of expression). Consequently, unless claimants in a comparable case in South Africa could show that a prohibition on picketing abortion clinics was integrally linked to their faith, their claims should not be able to succeed under s 15(1). The District Court may however have gone too far in its centrality enquiry, as evidenced by the following comments in the judgment: 'It suffices here to note that the plaintiffs have not alleged in any of their three complaints and do not contend in their memoranda that physical obstruction of abortion clinics is a sacrament or important ritual necessary to their observance of their faith'. Nevertheless, the court was seemingly correct to enquire whether picketing was sufficiently closely linked to Catholicism to warrant protection under the guarantee of freedom of religion. See also *Dieleman* (supra) at 748b-c (a freedom of religion justification for picketing in protest against an abortion clinic.)

[3] No 7050/75, 19 DR 5 (1980).

[4] 53 DR 150 (1987).

[5] As already mentioned, art 9(1) grants everyone the freedom, 'either alone, or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance'.

held to be too attenuated a link. In *Grandmaison*, the distribution of leaflets to soldiers was viewed as undermining military discipline. The distribution of the leaflets was not regarded as capable of being the manifestation or expression of a belief. Once again the conduct was not held to be a protected 'practice'.[1]

Arrowsmith and *Grandmaison* are, however, cases that concern expressions of conscience rather than religious belief. Though there may be no good reason to favour religious belief over conscience,[2] courts may be inclined to grant more scope for making centrality enquiries in respect of matters of conscience.

(c) The problem of doctrinal entanglement

A constant refrain in the United States Supreme Court decisions referred to above is the need for a court to avoid becoming enmeshed in debates about the validity, merits or truths of religious beliefs, or their importance to believers. In short, the Courts need to avoid doctrinal entanglement.

The United States Supreme Court's desire to avoid making judgments that call for investigation into religions and of individual beliefs is no doubt partly motivated by a desire to avoid any state entanglement with religion. US Courts would foreground Establishment Clause concerns.[3] But, as the Court explained in *United States v Ballard*,[4] the desire to avoid doctrinal entanglement also rests on separate free exercise grounds.[5]

[1] Compare *X v Federal Republic of Germany* 24 DR 137 (the wish of a man to be buried on his own land), with the decision of the Supreme Court of Appeal in *Nkosi v Bührmann* 2002 (1) SA 372 (SCA) (the refusal of an orthodox Jew to hand over the letter of repudiation (guett or 'get') to his ex-wife after their divorce). (As regards Jewish divorces and 'gets' in South African law, see s 5A of the Divorce Act, 70 of 1979 (inserted by the Divorce Amendment Act, 95 of 1996); the Hon Mr Justice M W Friedman 'Jewish divorces — a purposeful and pragmatic solution by the South African Law Commission' (1994) 111 SALJ 97; and *Raik v Raik* 1993 (2) SA 617 (W).)

[2] It might perhaps be contended that, inasmuch as religious beliefs could involve matters of divine revelation or precepts of faith, they are less readily susceptible to rational, objective analysis than matters of conscience. There may be some truth in this, but people can conscientiously hold beliefs that are worthy of protection even if they cannot articulate coherently the justifications therefor.

[3] See *Lemon v Kurtzman* 403 US 602 (1971)(the third requirement of the establishment clause is stated to be that a statute 'not foster 'an excessive government entanglement with religion').

[4] 322 US 78 (1944).

[5] For other cases (involving internal church disputes) in which it has been held that courts should refrain from deciding matters of religious doctrine in order not to impinge upon religious autonomy, see *Jones v Wolf* 443 US 595 (1979); *Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church* 393 US 440 (1969); *Kedroff v St Nicholas Cathedral* 344 US 94 (1952); *Serbian Orthodox Diocese v Milivojevich* 426 US 696 (1976).

The dangers of doctrinal entanglement have been recognised by South African courts, most notably in *Ryland v Edros,*[1] *Worcester Muslim Jamaa v Valley & others,*[2] and *Mankatshu v Old Apostolic Church of Africa & others.*[3] Doctrinal entanglement is the guiding principle for enquiries into both the sincerity of beliefs and the burden of government measures on religious faiths. This principle could well result in courts becoming more reluctant to interfere in internal disputes of religious organisations.[4]

41.4 Limitations on the Right to Freedom of Religion

After the infringement of the right to freedom of religion is established, it is necessary to examine whether the contravention of the right is justifiable in terms of the limitation clause.[5] The limitation clause enquiry is apt to be of

[1] 1997 (2) SA 690, 702F-703D (CC), 1997 (10) BCLR 1348 (CC). Farlam J (as he then was) stated: 'I myself raised the doctrinal entanglement point after reading the instructive article by F Cachalia 'Citizenship, Muslim family law and a future South African Constitution: A preliminary enquiry' (1993) 56 *THRHR* 392, 400 in which the following statement appears: 'Thus Islam is a 'revelational culture', which does not differentiate between law and religion, positive legal rules and moral prescripts, the religious and the profane, and the public and the private. . . .' Mr Cachalia also states, as did the witnesses who testified at the trial, that the

> Holy Quran is the fundamental source of Islamic law, and in the Muslim belief system, it constituted the *ipsissima verba* of Almighty God. The Holy Quran, together with compilations of the practices and traditions of the Prophet Mohammed form a body of commandments (sharia) which govern all aspects of a Muslim's life, including marriage, divorce and devolution of property on death.

That being so, it seemed to me that there was a distinct danger that by making rulings on the issues before the Court I might unwittingly become entangled in doctrinal matters which it is inappropriate and indeed undesirable, for the reasons given in the American decisions such as *Jones v Wolf* (supra), for a Judge in a secular Court to do in a country which has a constitution which entrenches every person's 'right to freedom of conscience, religion, thought, belief and opinion . . .' (as ours does in s 14(1)). It is true that our Constitution, unlike the Constitution of the United States, does not have an establishment clause but it seems clear that, although the American rule against doctrinal entanglement is to some extent prompted by establishment concerns, the rule also rests on independent free exercise clause grounds as was explained in *United States v Ballard* (supra): *cf* also the approach of the majority in the German Constitutional Court in the *Religious Oath Case* (supra), a decision on art 4 of the Basic Law, which deals with freedom of faith, conscience and creed.

[2] 2002 (6) BCLR 591 (C).

[3] 1994 (2) SA 458 (TkA).

[4] For example, disputes as to ownership of property or whether there was proper adherence to ecclesiastical rules in elections or disciplinary proceedings. See Woolman 'Association' (supra) at §§ 44.1*(b)* and *(c),* and § 44.3*(c)*(viii). For US Supreme Court cases on these questions, see *Jones v Wolf* (supra), *Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church* (supra), *Kedroff v St Nicholas Cathedral* (supra), *Serbian Orthodox Diocese v Milivojevich* (supra).

[5] *Prince (CCII)* at para 45.

greater import in freedom of religion cases given the deference that is likely to be accorded claims of religious adherents.[1] While the nature of this exercise is addressed in some detail elsewhere in this work[2], it is appropriate to make some observations at this juncture of the specific relevance of s 36 analysis in the freedom of religion cases.

(a) Reasonable and justifiable limitations on religious practice

An important distinction in relation to the limitation of religious freedom is traditionally regarded as being between the *holding* of religious or non-religious beliefs, on the one hand, and the *practice* of religion, on the other. Many commentators write that the right to hold a religious belief, or any other belief or world-view is inviolable.[3] This would seem to be correct. Thus persons could not constitutionally be required to forswear allegiance to any religion; nor could persons be obliged to pledge allegiance to, or be forced to join, a particular religion in order to qualify for state benefits or admission to state institutions. However, apart from these limited examples, it is difficult to see how — in the absence of telepathy and mind control — the freedom to hold a belief can be meaningfully restricted.

The right to *manifest* religious or other conscientiously held beliefs in practice is, however, clearly capable of being limited. International and regional human rights instruments expressly recognize this potentiality.[4]

Bans or restrictions on suicide cults or religious sects whose activities could

[1] For a discussion of s 36(1) in freedom of religion cases, see *Christian Education South Africa (CC)* (supra) at paras 29-31; *Prince (CCII)* (supra) at paras 45-47 (Ngcobo J); 128 (the Majority); 151, 155 (Sachs J). In *Christian Education South Africa (CC)*, the Constitutional Court confirmed, to the extent that this may have been necessary, that there is no requirement on the state to show a 'compelling interest' in order to justify an infringement of the right to freedom of religion — even where the burden on religion is demonstrably substantial. The extent of the burden imposed on religion would, however, be a factor that would go into the balancing or proportionality enquiry, which *inter alia* involves a consideration of the 'nature and extent of the limitation' (s 36(1)*(c)* of the Constitution).

[2] See S Woolman 'Limitation' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS 5, 1999) Chapter 12.

[3] See De Waal et al (supra) at 296; D Meyerson *Rights Limited* (1997) 2; L du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 158. No limitation of that right is, for example, permitted under art 18 of the ICCPR or art 9 of the ECHR. See K Partsch in L Henkin (ed) *The International Bill of Rights* (1981); M Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993); D J Harris et al *Law of the European Convention on Human Rights* (1995) 365-366.

[4] For example, Art 1(3) of the United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1991) (this clause qualifies the religious practices listed in art 6 of the Declaration), Art 18(3) of the ICCPR, Art 9(2) of the ECHR, and Art 12(3) of the American Convention on Human Rights (1978) all use roughly the same words to describe permissible limitations (that the freedom to manifest one's religion and/or beliefs 'shall be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others').

potentially cause physical harm to the general public would likely pass constitutional muster. To the extent that the existence and activities of such religious groupings were not prohibited by existing legislation, more specific statutes could potentially outlaw them.[1]

The jurisprudence of the U.S. Supreme Court reveals a readiness to uphold restrictions on religious freedom when confronted with religious demands made within prison or within the military. The Court has upheld regulations forbidding a religious observance like the wearing of a yarmulke by a devout Jew while in Air Force uniform,[2] and regulations that restricted the freedom of a prisoner to observe religious practices.[3] A number of rulings of the European Commission confirm this trend.[4] The Commission has, for example, upheld a ban on a Buddhist prisoner growing a beard,[5] and refused to accept an argument that religious precepts should be taken into account when providing prison food.[6] The grounds, in such cases, for differentiating prison and military populations from other classes of citizens is suspect at best. On the other hand, the basis for other restrictions seem obvious. The European Commission was quite correct in giving short shrift to a Sikh who argued that high-caste Sikhs are not allowed by their religion to clean floors[7] and in denying a prisoner access to a religious book which contained an illustrated chapter on martial arts techniques.[8]

Laws or regulations that endorse or display a clear preference for one religion would violate the right to freedom of religion of adherents of other faiths.[9] The constitutional concern with diversity, as well as the constitutional values of freedom and equality, would seemingly prevent the sectarian motivation underlying such laws from being accepted as a legitimate government objective, and thus preclude any such laws being upheld under the limitation clause.[10] To survive s 36 analysis government laws that directly or indirectly benefit a particular religion (without endorsing it), or that, conversely, restrict or prejudice the practices of a

[1] See *Ross v New Brunswick School District No 15* [1996] 1 SCR 825 (a schoolteacher publicly disseminated the opinion that Christian civilization was being destroyed by an international Jewish conspiracy. The bulk of the punishment meted out to Ross was held to be a justifiable limitation of his right to freedom of religion and conscience.)

[2] *Goldman v Weinberger* 475 US 503, 106 SCt 1310 (1986).

[3] *O'Lone v Estate of Shabazz* 482 US 342 (1987).

[4] See also *Arrowsmith* (supra) and *Grandmaison* (supra).

[5] *X v Austria 1753/63* Yearbook VIII (1965) 174 (184).

[6] See P Van Dijk & G J H van Hoof *Theory and Practice of the European Convention on Human Rights* (2nd Edition) 404 , 404n1062).

[7] *X v UK* 28 DR 5, 27, 38 (1982). See also Van Dijk & Van Hoof (supra) at 404; Shaw (supra) at 459-460.

[8] *X v UK No. 6886/75* 5 DR 100 (1976).

[9] See § 41.2*(d)* above.

[10] See *Ryland v Edros* 1997 (2) SA 690, 707G (C): 'It is quite inimical to all the values of the new South Africa for one group to impose its values on another'. This passage is quoted with approval in *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319, 1329C-D (SCA) and *Solberg* (supra) at 1228A-B. See S Wooman 'Limitations' (supra) at § 12.6.

particular faith, must therefore be supported by an objectively reasonable purpose, or what Denise Meyerson has called 'neutral reasons'[1].

An ancillary question is whether sectarian religious reasons can be considered by the legislature when engaging issues such as corporal punishment, abortion, or school curricula. This issue has generated considerable debate amongst political and legal philosophers. According to John Rawls and Kent Greenawalt, faith-based reasons *simpliciter* are insufficient justification for political action.[2] Rawls argues that choices of political representatives should be justifiable on the basis of 'public reasons'. Greenawalt asserts that 'explicit reliance [by legislators] on any controversial religious or other comprehensive view would be inappropriate',[3] because when legislators speak on political issues, they represent all their constituents. However, neither philosopher denies that religious dictates can be the basis or motivation for the legislator's position. Thus, while the kinds of crassly sectarian religious motivations that were so prevalent prior to April 1994 may be prohibited in the new constitutional era, banishing religion entirely from political fora, and precluding adherents from attempting to influence public debates, would itself violate the right to religious freedom.[4]

(b) Infringements by neutral, generally applicable, measures

The most common form of state interference with religious liberty is by means of facially neutral government measures that are not intended to prejudice any particular religion but which have the effect of doing so. The extent to which it is

[1] See Meyerson *Rights Limited* (supra) at 21. Professor Mayerson also wrote that:

> the reference in the limitation clause to an open and democratic society based on human dignity, equality and freedom implies that no limit on the right to religious freedom is permissible unless justified in terms of reasons which would carry at least some weight with all reasonable people who relate to each other as possessors of equal moral status' and that 'such reasons will be public reasons, or reasons which are independent of particular intractably disputed religious views and those views' own internal standards of justification.

Ibid at 19. For example, a legislature may prohibit the followers of a particular religion from making human sacrifices at their ceremonies on the basis of preventing physical harm — the involuntary loss of innocent life. As Meyerson points out, the status of such measures 'can be defended in terms of which any reasonable person, regardless of their religious beliefs, would accord at least some weight'. Ibid. See also D Meyerson 'Reading the Constitution through the Lens of Legal Philosophy', Inaugural Lecture, University of Cape Town, 8 October 1997 at ss II and III.

[2] See K Greenawalt *Religious Convictions of Political Choice* (1988); K Greenawalt *Private Consciences and Public Reasons* (1995); J Rawls *Political Liberalism* (1992); J Rawls 'The Idea of Public Reason Revisited' (1997) 64 *University of Chicago LR* 765; Michael J Perry *Religion in Politics*: *Constitutional and Moral Perspectives* (1997).

[3] Greenawalt *Private Consciences and Public Reasons* (supra) at 157.

[4] See *Chamberlain v Surrey School District No. 36* [2002] 4 SCR 710 (Case concerning whether a school board had exceeded its authority under the School Act by making a decision to exclude books depicting same-sex parented families from Kindergarten-Grade One in order to accommodate the moral and religious beliefs of some parents that homosexuality was wrong. The majority of the Canadian Supreme Court in that case, although overturning the decision of the British Columbia Court of Appeal and setting aside the school board's decision, held that s 76 of the School Act — which required school boards to conduct schools on 'strictly secular and non-sectarian principles' and to inculcate 'the highest morality' while avoiding the teaching of any 'religious dogma or creed' — did not preclude decisions motivated in whole or in part by religious considerations, provided they were otherwise within the Board's powers.)

appropriate to limit religious freedom in this manner (by not providing for an exemption for adherents of affected religions) is therefore of critical importance to freedom of religion analysis.

Courts are often reluctant to grant such exemptions: especially when a religious institution seeks an exemption from a criminal prohibition.[1] The Australian High Court, in *Church of the New Faith v Commissioner for Payroll Tax (Vic)*[2], refused to extend legal immunity to conduct contravening a criminal law of general application. The Court wrote:

> The freedom to act in accordance with one's religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them. Religious conviction is not a solvent of legal obligation.

The United States Supreme Court adopted a similar approach in *Employment Division, Department of Human Resources of Oregon v Smith.*[3] The majority held that an Oregon law prohibiting the knowing or intentional possession of a 'controlled substance', including the hallucinogenic drug peyote, was not unconstitutional by virtue of failing to make an exception for the ingestion of peyote for sacramental purposes at ceremonies of the Native American Church.[4]

The South African Constitutional Court has not expressed the same reservations as regards the granting of religious exemptions from generally applicable statutes. However, it has refused to grant exemptions in both cases in which one has been sought.[5] The recognition of the need for exemptions and the refusal to grant them automatically is captured by the following passage from *Christian Education South Africa (CC)*[6] (and reiterated by the majority in *Prince (CCII)*):

> The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should,

[1] See John Locke *A Letter Concerning Toleration* (1689) (reprinted in J Locke *A Letter Concerning Toleration in Focus* (1991) 36-37). Locke argues that neither a religion nor its adherents should not be exempted from a neutral criminal prohibition enacted for the good of society.

[2] (1983) 154 CLR 120, 135-136 (Mason ACJ and Brennan J). See also the Hon Mr Justice D Malcolm 'Religion, Tolerance and the Law' (1996) 70 *Aust LJ* 976, 980.

[3] 494 US 872 (1990).

[4] The US Supreme Court had previously mandated an exemption in a criminal law in *Wisconsin v Yoder* (supra). It had also been predisposed to require that personal choices arising out of religious motivations be exempted from formally neutral state requirements. See Tribe (supra) at §14-7, 1193. As regards the approach of Canadian courts to exemptions, see W Freedman 'Up in Smoke: Judicially Mandated Constitutional Exemptions for Religiously Motivated Conduct' (2002) 13 *Stell LR* 135, 140-144.

[5] See § 41.2*(c)* above.

[6] *Christian Education South Africa (CC)* (supra) at para 35.

wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.[1]

(c) Conflicts with other constitutional rights

Rights to religious freedom can potentially be outweighed by other constitutionally protected rights. Religious freedom will conflict with and sometimes give way to rights such as the rights of the child (s 28),[2] the right to freedom of expression (s 16),[3] the right to dignity (s 10),[4] the right to freedom and security of the person (s 12),[5] and the right to equality (s 9).

Religious freedom is apt to run up most often against demands for equality.[6] These demands will be most compelling with regard to discrimination on the basis of race, sex or sexual orientation.[7] The extent to which religious institutions

[1] *Prince (CCII)* (supra) at para 115.

[2] See *Kotze v Kotze* 2003 (3) SA 628 (T) (A provision in a settlement agreement in an unopposed divorce requiring that '[b]oth parties undertake to educate the minor child in the Apostolic Church and to educate the minor child in the religious activities of that church' not made an order of court as not in the child's best interests); *Dunscombe v Willies* 1982 (3) SA 311 (D) (an application for variation of a custody order to deny the non-custodian father, a Jehovah's Witness, who refused to refrain from attempting to inculcate in his children the tenets of his faith, access to the divorced parties' minor children); *Allsop v McCann* [2000] 3 All SA 475 (C) (an application by a custodian parent to prevent a child from attending the non-custodian parent's church). For commentary on the case, see E Bonthuys & M Pieterse 'Divorced parents and the religious instruction of their children: *Allsop v McCann* (2001) 118 *SALJ* 216. See also *P v S* (1993) 108 DLR (4th) 287 (SC) (a case concerning whether the imposition of restrictions on the right of access of a divorced father (a Jehovah's Witness) to his child contravened his right to freedom of religion under the Canadian Charter); and *Young v Young* [1993] 4 SCR 3 (relating to a restriction in a custody order precluding the father from discussing the Jehovah's Witness religion with his children when he had access to them). For cases involving the refusal of a Jehovah's Witness parents to consent to a blood transfusion for their child; *B (R) v Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315, (1995) 122 DLR (4th) 1 (SC).

[3] See *Otto-Preminger-Institut v Austria* (1995) 19 EHRR 34 (upholding the seizure and forfeiture of a film found likely to offend the religious feelings of Catholics, despite the infringement on the right to freedom of expression).

[4] See *Tobacco Atheist* 12 BVerfGE 1 (1960) (Case concerns a convict whose parole application had been denied on the ground that he had attempted to bribe fellow inmates by offering them tobacco to forswear their religion. The German Constitutional Court held that the denial of parole did not infringe his religious freedom, as the right to proselytise did not permit proselytisation inconsistent with the dignity of others). See also Currie *The Constitution of the Federal Republic of Germany* (supra) at 253; Kommers (supra) at 452-453.

[5] See *Christian Education South Africa (CC)* (supra) at paras 39-47 (prohibition on corporal punishment of learners challenged on the basis of a violation of the right to freedom of religion); *X, Y & Z v Sweden* 5 EHRR 47 (1983) (a complaint that the Swedish criminal law which prohibited parents from physically chastising their children was a violation of freedom of religion).

[6] Two statutes likely to elicit equality challenges to religious practices are the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and the Labour Relations Act 66 of 1995.

[7] Religious institutions must be allowed to differentiate on the basis of religion or belief. See De Waal et al (supra) at 292; C Albertyn, B Goldblatt & C Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000* (2001) 76; S Woolman 'Association' (supra) at §§ 44.1*(b)* and *(c)* and 44.2*(b)*.

are permitted to (continue to) differentiate on these grounds is captured by the following three scenarios.[1]

The first scenario involves discrimination against a person with *spiritual responsibilities* (such as priest or a candidate for ordination). Few exercises are more central to religious freedom than the right of a church to choose its own spiritual leaders. If a court were to hold that churches could not deem sexual orientation, or any of the other enumerated grounds in the equality clause, a disqualifying factor for the priesthood, the effect on many churches could be devastating. Consequently, although the value of equality is foundational to the new constitutional dispensation, it is unlikely that equality considerations could outweigh the enormous impact of failing to give churches an exemption in relation to their spiritual leaders.[2] Where the appointment, dismissal and employment conditions of religious leaders (such as priests, imams, rabbis, and so forth) are concerned, religious bodies are likely to be exempted from compliance with legislation prohibiting unfair discrimination.[3] One way in which this could be achieved would be by exempting the church-minister relationship from labour relations legislation on the grounds that 'ministry' is a 'calling' involving duties to God, and thus does not involve an employment relationship.[4] Indeed, in *Church of the Province of Southern Africa, Diocese of Cape Town v Commission for Conciliation, Mediation and Arbitration*[5], the Labour Court held that an ordained priest was not an 'employee' for the purposes of the 1995 Labour Relations Act.[6]

The second scenario relates to discrimination against *employees of a seminary or Christian school*. Factors militating against legal intervention might include the job

[1] See P Farlam 'Liberation Through the Law? The Constitution and the Church' in P Germond & S de Gruchy (eds) *Aliens in the Household of God* (1997) 136-141.

[2] In the light of the history of South Africa, the principle of racial equality is particularly fundamental. If a church sought to justify this racial discrimination in the choice of clergy on biblical or theological grounds, it might therefore not escape legal sanction. A Court would no doubt examine closely the basis for the discrimination and scrutinise the justification therefor (while still hopefully being mindful of the danger of doctrinal entanglement).

[3] See *McClure v Salvation Army* 460 F2d 553 (5th Cir 1972). The Salvation Army was deemed not to be in violation of the prohibition on sex discrimination when it fired McClure, a female officer of the Salvation Army.

[4] See *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705 (HL). See also, *Diocese of Southwark v Coker* [1998] ICR 140 (CA); *Mabon v Conference of the Methodist Church of New Zealand* [1998] 3 NZLR 513 and *Knowles v The Anglican Church Property Trust, Diocese of Bathurst* (1999) 89 IR 47. The possibility of this sort of approach being adopted in New Zealand to safeguard the right of religious freedom under the Human Rights Act 1993 was discussed by P Rishworth 'Coming Conflicts over Freedom of Religion' in G Huscroft and P Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (1995) 247.

[5] 2002 (3) SA 385 (LC), [2001] 11 BLLR 1213.

[6] The 'church minister' exemption might also be available for a person such as a church organist or a director of music at a church, whose ecclesiastical functions involve sufficient pastoral or liturgical leadership for them to be considered to occupy analogous posts to ministers. For US cases in which the 'church-minister' exemption has been extended to such musical figures, see *Walker v First Presbyterian Church* 22 Fair Empl Prac Cases (BNA) 762 (Cal Superior Ct 1980) (a church that dismissed a gay organist was granted immunity from action under a city ordinance forbidding discrimination on the basis of sexual preference), and *Assemany v Archdiocese of Detroit* 434 NW 2d 233 (Mich App 1988) (a church that dismissed a musical director was similarly immunised on the basis of the 'church-minister' exemption).

description of the person suffering the discrimination and the impact on religious freedom of not granting the religious institution an exemption. If, for example, the seminary or theological faculty could show that a teaching post involved substantial religious responsibilities, the seminary might be able to succeed in obtaining an exemption from anti-discrimination legislation using the analogy of the 'church-minister' exemption. In the United States, the Catholic University of America succeeded in defeating a job discrimination suit by a nun who claimed she was denied tenure in the university's canon law department on the basis of her sex.[1] Furthermore, if a Christian school could show that leading an 'exemplary Christian life' was an important part of every teacher's job description — 'exemplary', of course, being interpreted by the church in accordance with its own tenets — then it is conceivable that the church would be given some latitude to flout the legal prohibition on employment discrimination.[2]

Apart from these sorts of special circumstances, however, religious institutions — like schools, seminaries or universities — would probably not be deemed exempt from an anti-discrimination law. In general, one's gender, marital status, ethnic or social origin, pregnancy or language (to list just a few of the s 9(3) prohibited grounds) could not be legitimately considered a negative factor by a Christian educational body when evaluating a person for a teaching post. It is that much more true of applicants for non-teaching positions. Consequently, if a Christian college dismissed a laboratory co-ordinator or a computer systems analyst or a secretary, on finding out that the person was homosexual, it would not avail the educational institution to say that 'it holds strong religious views against homosexuality or homosexual practices'.[3] The same reasoning would seemingly be applicable where a church dismissed an employee engaged in a non-spiritual task — for example, a receptionist or typist[4] on the basis of one of the prohibited grounds. A different outcome might, however be required if employment as a secretary was made conditional on church membership, and the person so employed was subsequently excommunicated from the church because of his or her involvement in a gay or lesbian relationship.[5] The logic of the distinction is that the secretary understood the membership criteria of the church when she joined the church and bound herself to them.

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[1] *EEOC & McDonough v Catholic University of America* (CA DC, No 94-5263, 14/5/96). See also *EEOC v Southwestern Baptist Theological Seminary* 651 F2d 277 (5th Cir. 1981) (the court held that all academics in the theological seminary qualified as ministers, and that the 'church-minister' exemption therefore applied to all of them. It has not, however, been held that teachers and administrators in a religious school are 'ministers' for the purpose of this exemption); *EEOC v Tree of Life Christian School* 751 FSupp 700 (SD Ohio 1990).

[2] In Canada, religious schools have escaped legal sanction after dismissing teachers for indulging in practices (such as having an extra-marital relationship or remarrying after a divorce) which the religious institutions deemed inconsistent with their teachings. See *Caldwell v Stuart* (1984) 56 NR 83; *Garrod v Rhema Christian School* (1991) 18 CHRR 47; *Kearley v Pentecostal Assemblies Board of Education* (1993) 19 CHRR 473.

[3] King's College in Edmonton, Alberta, Canada fired an employee who performed a secular task: see *Vriend v Alberta* [1998] 1 SCR 493. See also *Vriend v Alberta* 132 DLR (4th) 595, 599a-b (Alb CA) (1996).

[4] *Whitney v Grater NY Corp of Seventh-Day Adventists* 401 FSupp 1363 SDNY (1975) in which the free exercise claim of the religious employer was rejected.

[5] See *Geraci v Eckankar* 526 NW 2d 39 (Minn Ct App 1995).

In a third set of scenarios, a religiously affiliated publisher, bookshop, hospital or other business may attempt to dismiss an employee, or refuse to hire an applicant on the basis of that person's gender, sexual orientation, or marital status. It is extremely unlikely that the church-minister analogy or the role model exemption, which could be used to justify discrimination under the previous scenarios, would be available to an employer in this context.[1] Nor would religious freedom be likely to be undermined in any substantial way by a ruling prohibiting discrimination on any of the grounds listed in s 9(3) (other than religion or belief). Some may even query whether there is any infringement of religious freedom in this context. It may be argued that it is a secular, and not a religious, activity that is being regulated, and thus the right to freedom of religion is not implicated. A court should, however, exercise caution before making such a ruling, due to the problem of doctrinal entanglement and the danger of ignoring, or stifling, the diversity of religious and secular beliefs.

(d) Waiver of the right to religious freedom

The question of whether a person is capable of waiving the right to religious freedom has thus far arisen in a number of High Court cases.

In *Wittmann v Deutscher Schulverein, Pretoria, & others*,[2] the High Court was required to consider whether a private school infringed the right of freedom of religion protected by IC s 14 when it compelled a pupil to attend religious instruction classes and morning assemblies that included prayers. The religious instruction sessions were not devotional in nature, but the prayers at assembly were. The plaintiff wanted compelled attendance at both to be declared unconstitutional. The school had previously allowed children to opt out of the religious instruction classes. But it changed its policy and had, since the introduction of a more academic form of religious instruction, made it virtually impossible to opt out of the classes. The plaintiff's child was admitted to the school after it had made more restrictive its policy on religious instruction.

Van Dijkhorst J characterized the issue in terms of religious freedom. As a result, he had to decide as whether, if the religious instruction was of a confessional nature, the German School acted unconstitutionally in enforcing attendance at these classes.[3] Van Dijkhorst J found that this private school was not a 'state-aided school' in terms of IC s 14(2) and was also not an organ of state. IC s 14(2) therefore did not apply. Van Dijkhorst J then went on to hold that even if the

[1] There are numerous American cases holding the 'church-minister' exception inapplicable to employees holding jobs in secular, albeit religiously affiliated, businesses. See, for example, *EEOC v Pacific Press Publishing Association* 676 F2d 1272 (CA 9th Cir 1982), where an editorial secretary of a publishing house was held not to be a 'minister'; and *Lukaszewski v Nazareth Hospital* 764 FSupp 57 (ED Pa 1991), in which a director of a physical plant at a hospital was not considered a 'minister'.

[2] 1998 (4) SA 423 (T), 1999 (1) BLCR 92 (T).

[3] Ibid at 438F-G.

school had been a state-aided one, the compulsion would have been constitutional because the parent had voluntarily agreed to abide by the school rules and had thus waived any right of non-attendance in terms of IC s 14(2).[1]

In *Garden Cities Incorporated Association Not For Gain v North Pine Islamic Society*,[2] the High Court was faced with the question of whether the right to freedom of religion (or, for that matter, any other right protected by the Constitution) could be waived in a written contract. The applicant was in the business of developing townships. The respondent had been formed to establish a mosque in an area under development. The respondent had agreed, in a contract for the purchase of property in the township, not to conduct any activities on the property that would, in the opinion of the applicant, cause a nuisance or in some other way disturb the other owners in the township. In particular, the respondent had undertaken not to use any sound amplification on or in the buildings or structures to be erected on the land and not to issue any audible 'calls to prayer'. Instead, a light would be switched on at the appointed hour of prayer. By its own admission, the respondent never intended to honour clause 20 of the agreement of sale that set out these restrictions. Instead, it claimed that the clause infringed its right to freedom of religion protected by s 15(1) of the final Constitution.

Conradie J held that the applicant's freedom of religion had not been infringed.[3] The contract did not more than 'consensually regulate a particular ritual practised at a particular place'.[4] He also concluded that the respondent could waive any religious rights in the contract and that the sanctity of the contract should be upheld. In support of his conclusion Conradie J cited the words of Van Schalkwyk J in *Knox D'Arcy Ltd & another v Shaw & another*[5]:

> It must be understood that there is a moral dimension to a promise which is seriously given and accepted. It is generally regarded as immoral and dishonourable for a promissory to breach his trust and, even if he does so to escape the consequences of a poorly considered bargain, there is no principle that inheres in an open and democratic society, based upon freedom and equality, which would justify his repudiation of his obligations. On the other hand, the enforcement of a bargain (even one which was ill-considered) gives recognition to the important constitutional principle of the autonomy of the individual.

The result in both cases is correct.[6] However, the waiver of fundamental rights and freedoms is best avoided if at all possible. Simply put, allowing rights and freedoms to be bartered or sold diminishes their value.

[1] Ibid at 455E.
[2] 1999 (2) SA 268 (C).
[3] See *Garden Cities* (supra) at 271H-I. Ibid at 271B.
[4] Whether it is correct, or at least advisable, for a Court to grapple with what constitutes a tenet of the Islamic faith is an issue dealt with under § 41.3(b) supra.
[5] 1996 (2) SA 651 (W), 1995 (12) BCLR 1702 (W) (Constitutionality of a restraint of trade clause).
[6] See *Kotze v Kotze* (supra) at 631C (as regards a waiver of the right to freedom of religion).

41.5 Religious Observances in State or State-aided Institutions: Section 15(2)

In an attempt to avoid a debate — such as that which has taken place in the United States of America,[1] and to a lesser extent in Canada[2] — as to whether prayers, Bible-readings and other devotional activities are allowed in schools or other state institutions at all (and, if so, to what extent), the drafters of s 14 of the Interim Constitution inserted a clause (s 14(2)) regulating such observances.[3] It has essentially been retained intact in FC s 15(2). In terms thereof, religious observances at state or state-aided institutions are allowed subject to two provisos: (i) that 'such religious observances are conducted on an equitable basis'; and (ii) that 'attendance at them is free and voluntary'.[4] Both provisos are deliberately open-ended. Both provisos allow the 'appropriate public authorities', who ideally would be in direct or at least fairly immediate contact with the institutions under scrutiny, the discretion to regulate observances in the manner best suited to the particular context. It will be difficult to lay down any fixed principles as to what s 15(2) should mean in practice. That said, a few comments are required on the meaning of the terminology used in s 15(2).

What is the meaning of the requirement that observances be conducted on an *equitable basis*? The word 'equity', according to Etienne Mureinik, means something less than equal.[5] It is more akin to 'fair' and 'just'.[6] 'Equitable basis' does not require the equal treatment and parity of observance for all religious faiths. Further guidance can be gleaned from *Solberg:*

> In the context of a school community and the pervasive peer pressure that is often present in such communities, voluntary school prayer could also amount to the coercion of pupils to participate in the prayers of the favoured religion. To guard against this, and at the same time to permit school prayers, s 14(2) makes clear that there should be no such coercion. It is in this context that it requires the regulation of school prayers to be carried out on an equitable basis. I doubt whether this means that a school must make provision for prayers for as many denominations as there may be within the pupil body; rather it seems to me to require education authorities to allow schools to offer the prayers that may be most

[1] See *Engel* (supra) (purportedly non-denominational prayer composed by Regents appointed by the school board in New York declared unconstitutional); *Abington School District v Schempp* 374 US 203 (1963) (reciting of Lord's Prayer and reading of the Bible as start of each school day deemed unconstitutional); *Wallace v Jaffree* 472 US 38 (1985) (period of silence for 'meditation or voluntary prayer' unconstitutional); *Lee v Weisman* 112 SCt 2649 (1992) ('non-sectarian' invocation and benediction by rabbi at school graduation ceremony unconstitutional). See also *Stone v Graham* 449 US 39 (1980) (posting of Ten Commandments in schools was unconstitutional).

[2] See *Zylberberg v Sudbury Board of Education* (1988) 65 OR (2d) 641 (CA), (1988) 52 DLR (4th) 577; *Russow v BC (AG)* (1989) 35 BCLR (2d) 29 (SC); *Canadian Civil Liberties Association v Ontario* (1990) 71 OR (2d) 341 (CA). See also B Sokhansanj 'Our Father who art in the classroom' (1992) 56 *Sask LR* 47.

[3] See Du Plessis & Corder (supra) at 157 (IC s 14(2) is a 'prime example of a provision attesting to the negotiators' unwillingness to erect walls of separation between church and state'.)

[4] See De Waal et al (supra) at 302-305.

[5] E Mureinik 'Let's Privatise God' *Mail and Guardian* 10-11 November 1995; W Freedman 'Understanding the Freedom of Religion Clause in the South African Constitution Bill, 1996' (1996) 1 *Human Rights and Constitutional LJ of Southern Africa* 35, 36.

[6] See *Solberg* (supra) at paras 121-123 (O'Regan J) (The Justice brackets fairness with equity, and states that 'at the least, the requirement of equity demands the State act even-handedly in relation to different religions').

> appropriate for a particular school, to have that decision taken in an equitable manner applicable to all schools, and to oblige them to do so in a way which does not give rise to indirect coercion of the 'non-believers'.[1]

What constitutes *religious observances*? In *Wittmann v Deutscher Schulverein, Pretoria, & others (Wittman)*, the Court concluded that a religious observance was in the nature of an act of worship, and should be distinguished from religious education:

> 'Religious observance' is an act of a religious character, a rite. The daily opening of a school by prayer, reading of the scripture (and possibly a sermon or religious message, and benediction) is such an observance. Religious education is not.[2]

What is the meaning of the words *state-aided*? Does this include any school, university or hospital that receives any state funding, no matter how small? In *Wittmann*,[3] the Court concluded, in the light of an analysis of the applicable statutory context[4] that 'private schools' as defined in the latter Act were not 'state-aided institutions', despite being eligible to apply annually for the prescribed subsidy.

What is meant by the requirement that religious observances be *free and voluntary*? In terms of this proviso, is it sufficient that the attendance at such observances, or participation therein, not be compulsory? The Canadian courts have held that religious observances can have coercive effects despite not being compulsory. This observation is undoubtably correct. As a result, regulations permitting prayers and other religious observances have been struck down in Canada, even though pupils who did not want to participate could apply for an exemption.[5] However if a similar approach were adopted in South Africa, s 15(2) could be rendered nugatory.[6] Surely the framers of the Interim or Final Constitutions were concerned with compulsion and not simple coercion. And that is a distinction with a difference. The purpose of s 15(2) is to allow religious observances in such institutions, provided that cognisance is taken of the need not to violate the religious beliefs of persons of other faiths.[7]

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[1] *Solberg* (supra) at para 103.

[2] *Wittman* (supra) at 449E.

[3] *Wittman* (supra) at 450H-453B.

[4] The Education and Training Act 90 of 1979 (which dealt with black education) and the Private Schools Act (House of Assembly) 104 of 1986.

[5] See Hogg (supra) at § 39.7, 985-986; D Gibson *The Law of the Charter: Equality Rights* (1990) 199, 200; P Macklem et al *Canadian Constitutional Law* (Vol II, 1994) 310-4.

[6] See E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31, 45-46.

[7] The jurisprudence of Germany may be of assistance in this regard. See Currie *The Constitution of the Federal Republic of Germany* (supra) at 244-269. Arts 7(2) and (3) of the Basic Law permit and regulate the holding of religious classes in pubic schools. Article 7(2) provides that: 'The person entitled to bring up a child have the right to decide whether the child shall attend religious classes'. Article 7(3) states that: 'Religion classes shall form part of the ordinary curriculum in public schools, except in secular schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious communities. No teacher may be obliged against his will to give religious instruction.' For a comparison of school prayer in Germany, the USA and Canada, see J Waltman 'Communities in Conflict: The School Prayer in West Germany, the United States and Canada' (1991) 6 *CJLS/RCDS* 27.

41.6 Statutory Recognition of Religious Family Law

FC s 15(3) states that s 15 does not preclude legislation recognising *(a)* marriages concluded under any tradition or a system of religious, personal or family law, or *(b)* systems of personal or family law adhered to by any tradition or religion. However, s 15(3) contains the rider that any such legislation must be consistent both with s 15 and with the Constitution.

The last-minute insertion[1] into s 15(3)*(b)* of the requirement of consistency with s 15 is difficult to fathom. Subsections 15(1) and (2) could hardly preclude legislation that was not inconsistent with them. Conversely they could not permit legislation that was in conflict with them. The reference to 'this section' in s 15(3)*(b)* should therefore be disregarded. It does no work.

The requirement of consistency with the other provisions of the Constitution is significant. It avoids a debate — such as that which ensued in relation to IC s 14(3) — over whether legislation recognising a system of personal and family law could be immune from challenge under other clauses of the Bill of Rights.[2] It is now clear that any legislation that recognises religious or customary law marriages or systems of family law *must* comply with the equality clause and thus cannot, for example, discriminate on the basis of sex or gender. As a result, if Parliament chooses to enact legislation contemplated by s 15(3), it faces the unenviable task of trying to be true to the religion or custom in question while avoiding all unfair discrimination.

Only one statute of the kind envisaged in s 15(3) has been enacted: the Recognition of Customary Marriages Act 120 of 1998.[3] That statute allows polygamy, provided that the husband has a written contract approved by a court that will regulate the matrimonial property system of his marriages.[4]

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[1] See § 41.1*(c)*(i) above.

[2] The majority of academics who commented on s 14 of the Interim Constitution concluded that it precluded any judicial scrutiny of legislation that fell within the purview of s 14(3)*(a)* and *(b),* whether on account of a violation of the right to equality or any other basis. See Mureinik 'A Bridge to Where? (supra) at 45 n44; Cachalia et al (supra) at 52–53; D Davis, H Cheadle & N Haysom '*Fundamental Rights in the Constitution*' (1997) 107; J D Sinclair *The Law of Marriage*, Vol I (supra) at §34.6.

[3] See *Thembisile v Thembisile* 2002 (2) SA 209 (T) at 214A *('Thembisile')*, where it is stated that the Recognition of Customary Marriages Act is part of the legislation referred to in s 15(3).

[4] As to whether the statute involves any discriminatory provisions, see J Pienaar 'African Customary Wives in South Africa: is there Spousal Equality after the Commencement of the Recognition of Customary Marriages Act?' (2003) 14 *Stell LR* 256. Also note that one of the provisions in that Act was challenged as being in conflict with s 9 of the Constitution, but the issue was ultimately held over for adjudication at a separate hearing. See *Mabuza v Mbatha* 2003 (7) BCLR 743 (C) *('Mabuza')*.

The South African Law Commission has recently produced a report on 'Islamic Marriages and Related Matters'. South African Law Commission Discussion Paper 101 '*Islamic Marriages and Related Matters'* Project 59 (December 2001). The Department of Justice has begun drafting legislation on the recognition of Muslim marriages. As regards gender equality in Muslim law, see N Goolam 'Gender equality in Islamic Family Law: Dispelling Common Misconceptions and Misunderstandings' (2001) 12 *Stell LR* 199.

Section 15(3)*(a)* is, in the final analysis, a weak provision. It merely *permits* the state to pass legislation. It does not require it to do so[1]. It then stipulates that such legislation is subject to (and thus subordinate to) all the provisions of the Constitution.[2] One might therefore question whether s 15(3)*(a)* serves any purpose at all, and whether the concerns that it was designed to address were not adequately catered for in other clauses.

That said, s 15(3) does indeed have value.

First, s 15(3)*(a)* emphasises the fact that, contrary to pre-1994 judgments like *Ismail v Ismail*,[3] there is nothing objectionable or *contra bonos mores* about recognising the validity of marriages, or other elements of the family laws, of non-Christian faiths or traditions.[4] Such marriages or systems of family law can be recognised by the legislature, and by the courts. The significance of this shift cannot be overestimated. Prior to 1994, family law conformed strictly to Western and Christian norms. A particularly pernicious result of this ethnocentrism was that marriages concluded according to a number of non-Christian religious rites were not recognised as valid civil marriages. This refusal had deleterious consequences for spouses in relation to succession, evidence and determination of marriages.[5] Section 15(3) makes it clear that this deficiency of the pre-constitutional era is now a thing of the past and can be set right.[6] The courts and the legislature have begun this task.[7]

The second benefit that flows from the inclusion of s 15(3)*(a)* in the Constitution is that it removes any argument that legislation which recognised, say,

[1] See ss 9(4), 32(2) and 33(3) of the Constitution, which *require* Parliament to enact legislation of the kind envisaged in those sections.

[2] Interestingly, two of the members of the technical committee that drafted the Bill of Rights in the Interim Constitution, Professors Du Plessis and Corder, commented that IC s 14(3), by merely authorising the legislature to pass legislation recognising a system of family law rather than requiring it to do so, was of a 'provisional nature'. They attributed this provisional nature to the fact that the recognition religious family law rites was raised at a very late stage in the negotiating process and in conjunction with the highly controversial issue of customary law. See Du Plessis & Corder (supra) at 157. Nevertheless, the 'provisional nature' of the subsection dealing with religious family law has been retained in the Final Constitution.

[3] 1983 (1) SA 1006 (A).

[4] See *Mabuza* (supra) at para 129; *Thembisile* (supra) at paras 23-25. See also L du Plessis 'Legal and Constitutional Means Designed to Facilitate the Integration of Diverse Cultures in South Africa: A Provisional Assessment' (2002) 13 *Stell LR* 367, 377-378.

[5] See *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Kalla v The Master* 1995 (1) SA 261 (T), 1994 (4) BCLR 79 (T); and *S v Johardien* 1990 (1) SA 1026 (C).

[6] See, as regards the courts' protection of the rights of women under African Customary Law, *Bhe & others v The Magistrate, Khayelitsha* (Unreported judgment of the Cape High Court delivered 25 September 1993) (Ngwenya J). See also *Chawanda v Zimnat Insurance Co Ltd* 1990 (1) SA 1019 (ZHC), *Katekwe v Mushabaiwa* 1984 (2) ZLR 112 (SC) ('the Courts by their judgments should seek to heal the pangs inflicted on African women by their legal disabilities').

[7] See *Ryland v Edros* (supra), *Amod v Multilateral Motor Vehicle Accidents Fund* (supra) and *Daniels v Campbell NO* [2003] 3 All SA 139, 154c-155i (C), 2003 (9) BCLR 969 (C). See also the amendments to legislation such as the Civil Proceedings Evidence Act 35 of 1965, the Criminal Procedure Act 51 of 1977, the Government Employees Pension Law 1996 (Proclamation 21 of 1996), the Transfer Duty Act 40 of 1949, and the Child Care Act 74 of 1983.

Muslim family law could be vulnerable to attack on the basis that it was *prima facie* discriminatory because it afforded official recognition to Muslims that was not available to Hindus, Jainists, or Buddhists. Absent a provision such as s 15(3), there may have been a danger that, irrespective of its content, a statute that recognised a system of personal or family law adhered to by a particular religious community could have been challenged by religious groups whose own systems of family law had not yet been accorded similar treatment.[1]

[1] That is, a constitutional challenge might have been possible under s 15(1), given that the government cannot favour one religion over another, or religion over non-religion.

42 Freedom of Expression

Dario Milo, Glenn Penfold & Anthony Stein

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16. Freedom of Expression

(1) Everyone has the right to freedom of expression, which includes —

(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity;

(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to —

(a) propaganda for war;

(b) incitement of imminent violence;

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.[1]

42.1 INTRODUCTION

This chapter deals with the fundamental right to freedom of expression. This is a right that has attracted a great deal of judicial attention since its entrenchment in FC s 16 and its predecessor, IC s 15.

We start with a discussion of the drafting history of FC s 16 and the major issues that arose during the drafting process. This is followed by an introduction to the structure of analysis under FC s 16's two parts: the protection in FC s 16(1) and the exclusions in FC s 16(2). We then consider the general approach of our courts to the FC s 16 right, including the dominant approach of balancing the right against countervailing considerations, and the rationales for protecting free speech (including the traditional justifications of the pursuit of truth, the functioning of democracy and self-fulfilment). Next, we focus on the application of FC s 16(1) in more detail; we consider, amongst others, the meaning and import of the express inclusion of freedom of the media, freedom to receive or impart information and ideas, freedom of artistic creativity and academic and scientific freedom in FC s 16(1). Some of the issues canvassed in this context are the meaning of 'expression', the notion of 'press exceptionalism', the protection of journalists' sources, the concept of artistic expression and the protection of the means of expression.

Having largely focussed on the protection of freedom of expression up to then, we move to restrictions on freedom of expression that shed light on the nature of the protection given to freedom of expression. First, we look at the categories of expression excluded from constitutional protection in FC s 16(2): propaganda for war, incitement of imminent violence and, most significantly, hate speech (which, in the constitutional context, consists of 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'). In this section we also consider legislative restrictions on hate speech. Second, we examine, at some length, various common law and statutory restrictions on freedom of speech, which each raise fundamental issues as to the proper balance between freedom of expression and countervailing rights and values. In this

* The authors would like to thank Michael Bishop and Stu Woolman for their editorial assistance.

[1] Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC').

section, we first consider defamation, an area in which free speech clashes with the right to reputation and in which the law has developed dramatically since the advent of constitutional democracy. This is followed by a discussion of privacy, restrictions in the name of protecting the administration of justice (that is, the open justice principle and its implications as well as the criminal offences of scandalising the court and the so-called *sub judice* rule), intellectual property restrictions, sexually explicit expression (including pornography, child pornography and nude dancing), restrictions on commercial expression (notably, advertising restrictions), restrictions in the interests of national security, defence and intelligence, and prior restraints on publication. Our main focus in the discussion of these restrictions is assessing the proper constitutional approach that ought to be taken to these restrictions or, put differently, where the balance should be struck in these areas of expression.

Finally, we consider the special protection of speech in the legislature, including the rule that members of the legislature are not liable for what they say in these institutions that are so central to our democracy.

42.2 THE DRAFTING HISTORY OF FC S 16

In addition to their historical interest, *travaux préparatoires* may under certain circumstances play a role in the interpretation of a fundamental right.[1] The text of the right to freedom of expression under the Final Constitution differs in notable respects from that of the Interim Constitution.[2] Moreover, the clause went

[1] See *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at paras 16-19 ('In countries in which the constitution is similarly the supreme law, it is not unusual for the courts to have regard to the circumstances existing at the time the constitution was adopted, including the debates and writings which formed part of the process. . . .

Our Constitution was the product of negotiations conducted at the Multi-Party Negotiating Process. The final draft adopted by the forum of the Multi-Party Negotiating Process was, with few changes, adopted by Parliament. The Multi-Party Negotiating Process was advised by technical committees, and the reports of these committees on the drafts are the equivalent of the travaux préparatoires relied upon by the international tribunals. Such background material can provide a context for the interpretation of the Constitution and, where it serves that purpose, I can see no reason why such evidence should be excluded. The precise nature of the evidence, and the purpose for which it may be tendered, will determine the weight to be given to it. . . .

Background evidence may, however, be useful to show why particular provisions were or were not included in the Constitution. . . . [W]here the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution'.)

[2] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC'). IC s 15 read:

(1) Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.

(2) All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion.

through a number of incarnations[1] in the relevant Theme Committee of the Constitutional Assembly[2] before it settled on FC s 16 in its present form.[3] The Explanatory Memorandum expressly recognises the influence of foreign jurisdictions' constitutional protection of expression in the drafting of the clause, and in particular the constitutions of Canada, the United States, Germany, Namibia and India.[4] The Theme Committee identified three 'key issues' that 'troubled South African constitutional drafters' in respect of freedom of expression: first, horizontality versus verticality; secondly 'the bearer of the right issue'; and thirdly what was termed 'the two-tier approach to restrictions'.[5] We shall discuss the last of these issues first, and then consider the first and second issues.

The two-tier approach, which was reflected in the limitations clause of the Interim Constitution, afforded greater protection to 'political expression' over other forms of expression by requiring that limitations on political expression meet the higher criterion of 'necessity' in order to be justifiable.[6] As the

[1] At least three variations of the clause were considered: the 'Provisional Text', the 'Redrafted Provisional Text: Option 1' and the 'Redrafted Provisional Text: Option 2'. See Constitutional Assembly, Constitutional Committee, Sub-Committee: Draft Bill of Rights *Explanatory Memorandum of Theme Committee 4 of the Constitutional Assembly responsible for fundamental rights: Explanatory Memorandum* Vol. 1 (9/10/1995)('*Explanatory Memorandum*').

The Provisional Text provided:

(1) Every person, including the press and other media, shall have the right to freedom of speech and expression.

(2) This right shall include the freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers.

(3) Any propaganda for war shall be prohibited.

(4) Any advocacy of racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited.

(5) All media financed by or under the control of the state shall be regulated in a manner that ensures independence, impartiality and diversity of opinion.

The Redrafted Provisional Text: Option 1 provided:

(1) Everyone has the right to freedom of speech and expression, including —

(a) freedom of the press and other media; and

(b) freedom to receive or impart information and ideas.

(2) The speech and expression protected in subsection (1) does not include either

(i) propaganda for war; or

(ii) advocacy of hatred that constituted incitement to discrimination, hostility or violence, and that is based on race, ethnicity, gender, or religion.

(3) The state must regulate any media that it finances or controls to ensure that it is impartial and presents a diversity of opinion.

Redrafted Provisional Text: Option 2 was the same as Redrafted Provisional Text: Option 1, but with clause (2) removed.

[2] A general background to the drafting process and passing of the Final Constitution is provided on the Constitutional Court's website: see http://www.constitutionalcourt.org.za/site/theconstitution/history.htm (accessed on 20 July 2008).

[3] In general, for this overview of the background we draw upon the *Explanatory Memorandum* (supra) at para 4.1.1.

[4] Ibid at para 3.1.

[5] Ibid at para 3.2.2.

[6] See S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

Explanatory Memorandum notes, the final text rejects this two-tier approach and hence 'political expression' does not as a matter of form enjoy greater protection in the text of the Constitution than, for example, artistic expression or commercial expression.[1]

Returning to the application issue, in response to the case law that had developed under the Interim Constitution, the Explanatory Memorandum reflects a conscious decision to allow the right to freedom of expression to apply 'horizontally' as well as vertically. Referring expressly to the lower court decision in *De Klerk v Du Plessis*,[2] which had then only recently been decided, the Theme Committee noted that if the right to freedom of expression is only vertical in its operation, as the *De Klerk* Court had held in respect of the Interim Constitution, it 'will have a major impact on the common law offences of criminal defamation, blasphemy and contempt of court' but not on other important areas of the common law. To allow it to operate horizontally would facilitate, for example, the reassessment of the law of defamation which 'in recent years has been hostile to claims of press freedom'.[3] Moreover, the Explanatory Memorandum notes that there are strong jurisprudential arguments against confining the right to freedom of expression to vertical application since this would result in the paradox that aspects of the common law, which have less democratic legitimacy, will be subject to less searching scrutiny than legislation, which is subject to direct constitutional review.[4] As discussed further below, the 'horizontal' application of the right to freedom of expression in the Final Constitution has since been affirmed by the Constitutional Court, although the precise extent of this horizontal application requires refinement.[5]

In respect of the third contentious issue identified by the Theme Committee, namely who should qualify as 'bearers of the right', both the Interim Constitution and the drafts of the final text preferred the use of the term 'every person'. The Explanatory Memorandum, referring again to decided cases,[6] makes it plain that this is intended to cast the net of the bearers of the right to freedom of expression

[1] *Explanatory Memorandum* (supra) at para 4.1.1. This is not to say that political expression does not in any event enjoy greater protection than other forms of speech under FC s 16 as a matter of principle. See, for example, 'Defamation' § 42.9*(a)* infra.

[2] 1995 (2) SA 40 (T), 1994 (6) BCLR 124 (T). The vertical application of the Interim Constitution was upheld on appeal in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC).

[3] *Explanatory Memorandum* (supra) at para 4.1.4, referring to *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 (1) SA 708 (A); *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A); *Pakendorf & Andere v De Flamingh* 1982 (3) SA 146 (A). Indeed, the application of the right to freedom of expression has resulted in substantial reform of the common law of defamation and, to a lesser extent, privacy. See 'Defamation' § 42.9*(a)* and 'Privacy' § 42.9*(b)* infra.

[4] *Explanatory Memorandum* (supra) at para 4.1.4, referring to academic writing on the subject.

[5] See § 42.6 infra. See also S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31; S Woolman 'The Amazing Vanishing Bill of Rights' (2007) 124 *SALJ* 762.

[6] The cases referred to were those decided both prior to and under the Interim Constitution. See eg, *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 (B). Under the Zimbabwean Constitution, see *Woods v Minister of Justice & Others* 1995 (1) SA 703 (ZSC).

widely, including all natural persons, whether citizens or aliens and prisoners.[1] The final text adopts the term 'everyone' instead of 'every person'. As discussed below,[2] this reinforces the breadth of the potential bearers of the right to freedom of expression.

A further obvious difference between the expression clauses of the Interim and Final Constitutions is the introduction into the final text of categorical exclusions. The Explanatory Memorandum reflects the debate between the express exclusion of certain categories of speech, and leaving it to the courts to develop exclusionary categories under the limitations clause.[3] The debate was resolved in favour of the categorical exclusions.[4] The drafting notes to the Provisional Text and the Revised Provisional Text reflect that the categorical exclusions of propaganda for war and hate speech were taken, almost word for word, from the expression clause of the International Covenant on Civil and Political Rights.[5]

From the outset, IC s 15(2), pertaining to funding of state media, had been contentious. The Explanatory Memorandum comments that it is absent from the expression clauses of the source instruments and that it 'does not really belong in a Bill of Rights', and had been included in the Interim Constitution at the last minute as a political compromise.[6] The argument for its omission was that

[1] *Explanatory Memorandum* (supra) at para 4.1.1.

[2] See § 42.6 infra.

[3] See *Explanatory Memorandum* (supra) at para 5 fn 3-4.

[4] See § 42.3 infra. We argue that there are good reasons for preferring the limitations approach over categorical exclusions, including allowing for a more nuanced and flexible analysis in the hands of the courts when confronted with expression challenges and avoiding the interpretive difficulties involved in defining the precise ambit of the categorical exclusions. See also L Johannessen 'A Critical View of the Constitutional Hate Speech Provision: Section 16' (1997) 13 *SAJHR* 135.

[5] International Covenant on Civil and Political Rights, 1966 ('ICCPR') arts 20(1) and 20(2) provide:

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The wording of the ICCPR was slightly altered in the final text of the Constitution. Advocacy of hatred based on 'ethnicity' and 'gender' were expressly added (while the reference to 'national' hatred was removed) and the simpler general qualification, 'that constitutes incitement to cause harm', was preferred over the ICCPR phrase, 'that constitutes incitement to discrimination, hostility or violence'. Notably, the separate categorical exclusion of expression that constitutes 'incitement of imminent violence' does not appear in the earlier drafts. This category is absent from the ICCPR but is derived from foreign expression jurisprudence, and was added later to the final text. See 'Excluded Expression: Analysis of FC s 16(2)' § 42.8 infra.

[6] *Explanatory Memorandum* (supra) at para 4.1.2 ('Section 15(2) does not enunciate an individual right but a constitutional principle designed to ensure an independent and impartial media which gives expression to a diversity of opinion. This provision does not really belong in a Bill of Rights, as it is not concerned with a right and is not a 'universally accepted fundamental right' within the meaning of Constitutional Principle II. It was inserted at a late stage in the Kempton Park drafting at the insistence of groups that wished to ensure that the principle of an independent media had constitutional endorsement and was not simply left to recognition in an ordinary statute'. Referring to L Du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* (1994)).

pursuant to the then recently enacted Independent Broadcasting Authority Act[1] regulation of all media, including the state media, fell under an independent regulatory body and therefore the clause was unnecessary. The requirement of an independent body to regulate broadcasting in the public interest is entrenched elsewhere in the Final Constitution.[2] A similar clause to IC s 15(2) was included in the Provisional Text as well as the Revised Provisional Text but the argument for its omission prevailed and it did not emerge in FC s 16. In view of this history, the omission of the provision cannot be interpreted as a constitutional endorsement of partiality in the state media.

42.3 The structure of Free Speech Analysis: FC s 16(1) and FC s 16(2)

The consequence of the explicit exclusion of certain categories of expression from the ambit of constitutional protection, as noted by the Constitutional Court in *Islamic Unity Convention v Independent Broadcasting Authority & Others*, is that FC s 16 is a section in two parts:

> Subsection (1) is concerned with expression that is protected under the Constitution. It is clear that any limitation of this category of expression must satisfy the requirements of the limitations clause to be constitutionally valid. Subsection (2) deals with expression that is specifically excluded from the protection of the right.[3]

How is FC s 16(2) to be interpreted? The words '[t]he right in subsection (1) does not extend to' imply that the categories of expression enumerated in FC s 16(2) are not to be regarded as constitutionally protected speech. FC s 16(2) therefore defines the boundaries beyond which the right to freedom of expression does not extend. In that sense, the subsection is definitional: certain expression does not deserve constitutional protection because, among other things, the expression has the potential to impinge adversely on the dignity of others and cause grave harm.[4]

In *Islamic Unity* the Court emphasised that any expression that is not specifically excluded under FC s 16(2) enjoys the protection of the right.[5] Even expression such as child pornography, considered by the Court in *De Reuck v Director of Public Prosecutions*, that has dubious extrinsic worth in serving any of the values underlying the protection of expression is, as a point of departure, constitutionally

[1] Act 153 of 1993.
[2] FC s 192.
[3] 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC)('*Islamic Unity*').
[4] Ibid at paras 31-32.
[5] Ibid at para 33. This passage was endorsed in *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC)('*De Reuck*') at para 47.

protected.[1] Having encapsulated the well-established underlying rationales for the constitutional protection of expression, the *De Reuck* Court explained the role of the limitations enquiry as follows:

> Seen from this perspective, the [ban on the possession of child pornography] does not implicate the core values of the right. Expression that is restricted is, for the most part, expression of little value which is found on the periphery of the right and is a form of expression that is not protected as part of freedom of expression in many democratic societies.[2]

It is curious that child pornography, which the Court noted is 'universally condemned' in 'all democratic societies',[3] could be described as rising even to the level of 'little value', rather than as having no value whatsoever. This is, however, the necessary consequence of the structure of analysis imposed by the text of the Final Constitution and the approach adopted by the Court to the interpretation of FC s 16; namely, that all and any expression save for that explicitly excluded under section 16(2) is protected, and that any restriction must then be justified under the limitations enquiry.[4] The Court has rightly regarded the explicit categorical exclusions in the constitutional text as comprising a closed list. The implication of this approach to the interpretation of FC s 16 is that the Court will never take it upon itself to carve out further types of expression for categorical exclusion. Instead, FC s 36 will carry an ever-increasing (but desirable) burden in defining the contours of our expression jurisprudence.

This is borne out by the approach in *Phillips v DPP, Witwatersrand Local Division* — which concerned nude dancing — where in a nuanced passage the Constitutional Court digressed to correct the emphasis of the Court below in characterising the analysis imposed by FC s 16:

[1] In the case of child pornography, we submit that the only conceivable justification for protection is one which appeals to the value of expression in itself. Only the most austere anti-consequentialist meta-ethical theory (a theory that does not assign value by ends or consequences) would allow any such intrinsic value (if indeed such value exists) to outweigh the intolerable consequences of child pornography, which were summarized by the Court in *De Reuck* as striking at the dignity of children, harming the children who are used in its production, and harming any society in which it is tolerated. *De Reuck* (supra) at para 61. In any event, all respectable anti-consequentialist theories have heuristics or higher-order rules that resolve conflicts between intrinsic values. For example, in the case of child pornography, the inherent assault on the dignity of the child and therefore the value of the child in itself. Ibid. See further 'Sexually explicit expression' § 42.9*(e)* infra.

[2] *De Reuck* (supra) at para 59.

[3] Ibid at para 61.

[4] Ibid at para 48 ('Relying on the approach of the United States Supreme Court where certain categories of expression are unprotected forms of speech, the respondents argued such materials do not serve any of the values traditionally considered as underlying freedom of expression, namely, truth-seeking, free political activity and self-fulfilment. This argument must fail. In this respect, our Constitution is different from that of the United States of America. Limitations of rights are dealt with under s 36 of the Constitution and not at the threshold level. Section 16(1) expressly protects the freedom of expression in a manner that does not warrant a narrow reading. Any restriction upon artistic creativity must satisfy the rigours of the limitation analysis' (footnotes omitted).)

> [I]t is necessary to address an aspect of the High Court judgment that has relevance for the way in which constitutional protection of freedom of expression is understood and perceived. Referring no doubt to s 16 of the Constitution, the Judge in the High Court concluded that:
>
> > 'It is clear, however, that under the new constitutional dispensation in this country, expressive activity is prima facie protected no matter how repulsive, degrading, offensive or unacceptable society, or the majority of society, might consider it to be.'
>
> The trial Court's conclusion might convey an incorrect understanding of the extent of the protection afforded by the constitutional scheme. The right to freedom of expression (as is the case with all rights in the Bill of Rights) is not and cannot be regarded as absolute. The FC s 16(1) right may be limited by a law of general application that complies with FC s 36. In other words, the Constitution expressly allows the limitation of expression that is 'repulsive, degrading, offensive or unacceptable' to the extent that the limitation is justifiable in 'an open and democratic society based on human dignity, equality and freedom'.[1]

In *Phillips* the threshold infringement — a limitation of FC s 16 — was easily established. The Court below had halted the enquiry at that stage in the absence of state submissions on justification, holding that the state bore an onus in this regard that could not be discharged in the absence of submissions.[2] The Constitutional Court, however, held that the burden of limitations was not an onus in the true sense[3] and, despite the absence of argument or evidence from the state, proceeded to undertake a thorough and careful limitations analysis in respect of the impugned provisions which occupied by far the bulk of the Court's reasoning.[4]

42.4 THE GENERAL APPROACH OF OUR COURTS TO THE CONSTITUTIONAL RIGHT TO FREEDOM OF EXPRESSION

As the length of this chapter demonstrates, our courts have, since the advent of the Interim Constitution, decided a large number of cases dealing with the right to freedom of expression. After a thorough analysis, it would no doubt be possible to extract a wealth of themes, principles and subtle contradictions from the case law. Our aim in this portion of the chapter is the less ambitious one of identifying the major features and some of the sub-themes of our courts' approach to the constitutional right to freedom of expression. We do so in a largely uncritical way, saving our criticism for the discussion that follows on the various restrictions on freedom of expression.

[1] 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC)('*Phillips*') at para 17 (footnotes omitted).
[2] Ibid at para 28.
[3] Ibid at para 20.
[4] The state agencies were severely criticised in the judgment for the failure to assist the courts. Ibid at paras 9-12. For further analysis of *Phillips*, see 'Sexually explicit expression' § 42.9*(e)* infra. For a discussion on the obligation of the state to supply evidence, see M Chaskalson, G Marcus & M Bishop 'Constitutional Litigation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2007) § 3.7.

The single most significant aspect of the growing South African jurisprudence on freedom of expression is a rejection of the dominant approach in the United States that freedom of expression is a pre-eminent right or value, in favour of an approach of balancing. In the words of O'Regan J on behalf of a unanimous Constitutional Court, 'although freedom of expression is fundamental to our democratic society, it is not a paramount value'.[1] The overwhelming approach of our courts in dealing with issues that engage freedom of expression is to balance freedom of expression against other countervailing rights or interests, such as the rights to reputation, privacy, equality or the values of the administration of justice or national security. As Kriegler J has remarked:

> With us the right to freedom of expression cannot be said to automatically trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law.[2]

Balancing is not conducted within FC s 16. Instead, expression jurisprudence follows the basic structure of the Bill of Rights which sets out a wide array of fundamental rights but specifically states that they are all subject to the self-standing limitations clause in FC s 36(1). In terms of this clause, all rights may be limited, provided that the limitation is in terms of 'law of general application' and is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This involves a proportionality enquiry or, put differently, a balancing exercise.[3] A court is required to weigh up the infringement of the right against the purpose that the infringement seeks to achieve. The effect of the limitations clause is that the same document that entrenches freedom of expression as a fundamental right itself acknowledges

[1] *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)('*Khumalo*') at para 25. This view of free speech can be contrasted with the best interests of the child, enshrined in FC s 28(2), which *is* a paramount value. See A Pantazis & A Friedman 'Children's Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition OS, 2004) Chapter 48.

[2] *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC)('*Mamabolo*') at para 41. Professor Karthy Govender, on behalf of the appeal committee in *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283, 1288 (SAHRC)('*Freedom Front*') describes this as 'a much more nuanced and balanced approach' to freedom of expression than that of the US courts. See also *Khumalo* (supra) at paras 28 and 41-3; *Independent Newspapers (Pty) Ltd v Minister for Intelligence* [2008] ZACC 6 at para 44 (Confirming that the principle of open justice, which flows inter alia from the right to freedom of expression, is not absolute and can be overridden by countervailing rights.)

[3] *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 104; *S v Bhulwana* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 18. For a critique of balancing as a metaphor for limitations analysis see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 33.

that this right is neither absolute nor pre-eminent. Fitting this pattern, the courts have interpreted FC s 16(1) broadly to include any material that communicates or attempts to communicate meaning, including speech that may be considered of low value, such as pornography[1] (including, even, child pornography),[2] nude dancing[3] and commercial speech.[4] Even this low value speech overcomes the first hurdle of proving an infringement of the right, and thus engages the limitations clause.[5] Confining balancing to FC s 36(1) in this way should be supported because the limitations clause is particularly well suited to this weighing-up exercise.[6]

The approach of balancing is best reflected in the courts' unwillingness to adopt an all-or-nothing standard that would allow freedom of expression to always override harm in certain types of situations, even in situations in which freedom of expression will invariably outweigh the countervailing considerations. The Constitutional Court's refusal to strike down the crime of scandalising the court and the SCA's refusal to bar Cabinet ministers from suing for defamation in relation to criticism of their official conduct illustrate this reluctance. The Constitutional Court preferred to leave open the possibility that, in an appropriate case, a conviction for scandalising may be justified, while making it clear that this could only occur in exceptional circumstances.[7] In a similar vein, the SCA, in

[1] *Case & Another v Minister of Safety and Security & Others; Curtis v Minister of Safety and Security & Others* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC), 1996 (1) SACR 587 (CC)(Mokgoro J).

[2] *De Reuck* (supra) at para 48. See further 'Sexually Explicit Expresson' § 42.9*(e)* infra.

[3] *Phillips* (supra) at para 15. See 'Sexually Explicit Expression' § 42.9*(e)* infra.

[4] *City of Cape Town v Ad Outpost (Pty) Ltd* 2000 (2) SA 733, 748 (C); and *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd & Others* 2002 (2) SA 625 (D). See also 'Commerical Speech' §42.9*(f)* infra.

[5] The only difficulty with this approach is that FC s 36(1) can only be employed to justify 'laws of general application'. If the law arises from executive or private conduct that does not qualify as a 'law of general application', FC s 36(1) cannot be used to depart from the very broad construction of FC s 16.

[6] See *R v Keegstra* [1990] 3 SCR 697, (1990) 3 CRR (2d) 193, 218('*Keegstra*')(Dickson CJC notes that the self-standing limitations clause (s 1) of the Canadian Charter of Rights and Freedoms is better suited to the balancing exercise than attempting to carve out certain areas from the free expression protection in s 2*(b)* of the Charter. Dickson CJC thus favours a 'large and liberal interpretation' of freedom of expression coupled with weighing the 'various contextual values and factors' at the limitations stage.) This approach is different to that in the United States, where the courts, in the absence of a limitations clause in the US Constitution, carve out certain forms of speech from constitutional protection. As the US Supreme Court stated in *Chaplinsky v New Hampshire* 315 US 568 (1942)('*Chaplinsky*'): 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and the obscene, the profane, the libelous, and the insulting or 'fighting' words — those that by their very utterance inflict injury or tend to incite an imminent breach of the peace'. *Chaplinsky* has, however, been watered-down in a number of subsequent decisions of the US Supreme Court.

[7] *Mamabolo* (supra). See § 42.9*(c)*(iv)(aa) infra.

principle, allowed Cabinet ministers to sue for defamation but simultaneously favoured a strict approach in assessing whether a political plaintiff should succeed in a defamation action.[1]

There are only two clear areas of South African free speech law where balancing is rejected. Tellingly, both are a product not of the courts, but of the constitutional drafters. The first is the exclusion from constitutional protection of certain forms of expression — propaganda for war, incitement of imminent violence and egregious hate speech — in FC s 16(2).[2] If expression falls within these specified categories, there is no room for balancing; free speech always loses. The other, diametrically opposed, area in which balancing does not apply is the privilege for speech in Parliament and the other legislatures. Here, the Final Constitution states that a member of the legislature cannot be criminally or civilly liable for anything said in the legislature.[3] In this instance, because of the overwhelming value to our democratic enterprise of free speech in the legislature, speech always wins, trumping considerations such as reputation and even national security.[4]

This approach of balancing is inconsistent with complete faith in the 'marketplace of ideas' that is sometimes evident in the approach of the courts in the United States.[5] It recognises that expression can cause harm and that it is sometimes necessary to prevent or minimise that harm through the mechanism of law, rather than simply through more speech.[6] This is nowhere more apparent than in our law's treatment of hate speech, where the Constitutional Court has recognised that the harm that such speech does to dignity, equality and the goal of national unity, justifies its restriction.[7] As Professor Govender has stated, on behalf of the appeal committee of the South African Human Rights Commission, the approach in our law of balancing freedom of expression against other rights and interests

[1] *Mthembi-Mahanyele v Mail & Guardian Limited & Another* 2004 (6) SA 329 (SCA)('*Mthembi-Mahanyele*'). See § 42.9*(a)* infra.

[2] Though the approach of balancing has been restored somewhat by the legislature in s 29 of the Films and Publications Act 65 of 1996, which provides for a number of defences to the criminal prohibition against these forms of expression. The courts and other tribunals have, in interpreting the hate speech exclusion in s 16(2)*(c)*, adopted somewhat of a balancing approach by stating that this exclusion should be interpreted in a manner which balances the right to freedom of expression with dignity, equality and national unity. See § 42.8(2) infra.

[3] See 'The protection of expression in legislatures' § 42.10 infra.

[4] Another area in which one might say that our courts do not adopt a clear balancing approach is the defence of qualified privilege to a civil claim (e.g. defamation or breach of privacy). The approach is that the value of free speech is so high in certain circumstances (e.g. statements made during the course of court proceedings) that the statement is not unlawful unless it is irrelevant to the occasion for which privilege is granted, or if it is actuated by malice.

[5] For more, see § 42.5*(a)* infra.

[6] Our courts thus do not rigidly apply the famous statement of Brandeis J in *Whitney v California* 274 US 357, 377 (1927)('*Whitney v California*') that, if there is time for discussion to expose the falsehood and fallacies, 'the remedy to be applied is more speech, not enforced silence'.

[7] *Islamic Unity* (supra) at para 33. See § 42.8*(c)* infra.

involves a rejection of 'the absolutist stance of allowing ideas to compete totally uninhibited in the market place of ideas'.[1]

Part of what balancing means is that, while our courts acknowledge that expression can cause harm, the fundamental value of freedom of expression means that it can only be restricted where harm is actually caused or is likely to occur. Mere speculation of harm is insufficient to warrant overriding this fundamental right. This is particularly apparent in the approach of our courts to those aspects of contempt of court that implicate freedom of expression.[2] In the context of, first, scandalising the court and, then, *sub judice*, the Constitutional Court and the SCA (respectively) have emphasised that these crimes only arise where there is a real likelihood of the publication undermining the administration of justice.[3] This stands in sharp contrast to the position under the pre-constitutional common law, where a statement was unlawful where it *tended* to undermine the administration of justice.[4] This emphasis on real harm is also apparent in the constitutional treatment of trade mark law, where the Constitutional Court has emphasised that an action for dilution under the Trade Marks Act[5] only arises where the trade mark owner demonstrates a likelihood of substantial harm or detriment of such a degree that permitting the diluting speech would be unfair.[6]

Nevertheless, the Constitutional Court appears to be willing to relax this stringent approach to the likelihood of harm when the stakes are too high for it to risk being wrong[7] and the speech at issue is of relatively little value. This is apparent in the Court's decision to uphold a broad, criminal prohibition of all forms of child pornography despite accepting, in relation to simulated child pornography,[8] that no child would have been physically harmed in its production.

Another consequence of the balancing approach is that, unlike the United States' courts,[9] our courts have not followed a 'levels of scrutiny' approach to

[1] *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283, 1296 (SAHRC)('*Freedom Front*').

[2] Contempt *ex facie curiae*. See § 42.9*(c)*(iv) infra.

[3] *Mamabolo* (supra); *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA)('*Midi Television*').

[4] *S v Van Niekerk* 1972 (3) SA 711 (A); *S v Harber & Another* 1988 (3) SA 396 (A).

[5] Act 194 of 1993.

[6] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a SABMark International* 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC)('*Laugh It Off*') at paras 49-50. See 'Intellectual Property Restrictions' § 42.9*(d)* infra.

[7] This approach is consistent with that advocated by RA Posner. See RA Posner 'The Speech Market and the Legacy of *Schenk*' in L Bollinger & G Stone (eds) *Eternally Vigilant: Free Speech in the Modern Era* (2002) 121, 124 ('If [the harm that may be caused by speech] is grave enough, it should be regulable even though unlikely; and if likely enough, it should be regulable even though not particularly grave'.) There is thus, in Posner's words, a need for a trade-off between the gravity and the likelihood of the harm.

[8] Pornography that apparently portrays children but where the persons depicted are in fact adults or where the images are computer generated without the involvement of actual children.

[9] Although the US courts have to some extent moved towards an approach of balancing in recent years, a 'levels of scrutiny' approach continues to apply. For example, high value speech, including political speech, can only be restricted where there is a 'clear and present danger'. See *Schenck v United States* 249 US 47, 52, 39 SCt 247 (1919)('*Schenck v US*') and *Abrams v United States* 250 US 616, 628, 40 SCt 17 (1919)('*Abrams v US*'). Commercial speech, as comparatively low value speech, may be limited where the government interest in restricting the speech is substantial, the regulation directly advances the government interest and that the manner in which it does so is no more extensive than is necessary. See *Central Hudson Gas v Public Services Commission* 447 US 557, 100 SCt 2343 (1980)('*Central Hudson*').

freedom of expression which adopts different tests depending on the nature of the expression. They have, however, tended to scrutinise the type of expression in issue in order to assess the value of that expression, and therefore how heavily it weighs in the limitation scales.[1] In doing so, our courts, in effect, distinguish between high value and low value speech, based in part on the underlying rationales for freedom of speech.[2] For example, our courts have generally emphasised that political expression lies at the core of the freedom of expression protection,[3] while the Constitutional Court has made the point that child pornography does not implicate the core values of freedom of expression and therefore receives less protection.[4] This attitude was also apparent when the Constitutional Court struck down a restriction on nude (or improperly clothed) performances at premises with a liquor licence in part because the prohibition hit not just striptease clubs and the like, but also serious theatre.[5] Certain judges seemed to regard the latter type of expression as more deserving of constitutional protection than the former.[6] In sum, while aspects of the US approach may be characterised as a ladder, with discrete rungs of value and levels of justification, the South African approach is more like a slide with a gradual decreasing burden of justification as the value of speech decreases.

South Africa's courts have, to date, not faced a number of tricky issues that bring into focus the manner in which freedom of expression may be limited or regulated in the name of the promotion of better — read fuller, or more diverse — expression; areas such as campaign finance restrictions, content and common carrier regulation of broadcasting and public funding of certain forms of speech. These issues, which dominate much of the recent literature on free speech in the United States, raise important questions as to the manner in which the state, in the words of Owen Fiss, 'might become the friend, rather than the enemy, of

[1] A similar approach is adopted in Canada (which, like South Africa, has a self-standing limitations clause — s 1 of the Canadian Charter). See, for example, *Keegstra* (supra) at 242.

[2] These rationales are discussed in § 42.5 infra.

[3] See, for example, *Holomisa v Argus Newspapers Limited* 1996 (2) SA 588 (W) ('*Holomisa*'); *Mthembi-Mahanyele* (supra). See 'The Law of Defamation' § 42.9*(a)* infra. See also *MEC for Education: KwaZulu-Natal & Others v Pillay* 2008 (2) BCLR 99 (CC) at para 94 (cultural and religious expression is 'central to the right of freedom of expression').

[4] *De Reuck* (supra) at para 59. See § 42.9*(e)* infra.

[5] *Phillips* (supra) at paras 27-28.

[6] For further discussion of this case, see § 42.9*(e)* infra. Two areas which squarely raise the question as to the value of speech in furthering the rationales of freedom of expression that have not yet been fully ventilated before our highest courts, are hate speech and commercial expression. As discussed below, the value of these categories of speech, and the level of protection that should be accorded to them, is a matter of some controversy. See § 42.8*(c)* and § 42.9*(f)* infra. Hate speech was to some extent considered in *Islamic Unity* which considered the manner in which the hate speech exclusion in FC s 16(2)*(c)* operates and struck down a clearly overbroad hate speech prohibition.

freedom'.[1] They require courts to engage with the most appropriate way in which to regulate the 'marketplace of ideas'. Given the approach of our courts in other areas, it is likely that they will reject arguments to allow for an uninhibited, free market and will look favourably upon laws that rationally improve access to the speech market in the interests of greater participation.[2]

42.5 THE RATIONALES FOR FREEDOM OF EXPRESSION

Freedom of expression has been described in the United States as 'the matrix, the indispensable condition on which nearly every other freedom depends'[3] and, closer to home, by our Constitutional Court as 'the lifeblood of an open and democratic society cherished by our Constitution'.[4] Despite these emphatic affirmations of the value of freedom of expression, it seems that, while almost everyone agrees that freedom of expression should be protected, almost no one agrees on why it should be protected.

A possible response to this dilemma is to say that freedom of expression should be protected because FC 16(1) says so. While this may be true, it is a facile and unsatisfactory response. The reasons that we protect freedom of expression matter. Without an understanding of the rationales underpinning this freedom, we cannot properly explain the degree of protection that is given to it in various contexts nor draw its limits, both in the sense of defining the ambit of the right to freedom of expression and in assessing the permissibility of limitations on the right. It is therefore necessary to consider some of the rationales advanced for freedom of expression.[5]

[1] O Fiss *The Irony of Free Speech* (1996) 2. Fiss also lists hate speech and pornography in this category because this speech, according to Fiss, can undermine the sense of self-worth of the target group (in the case of hate speech) and women (in the case of pornography) and thus reduce their contribution to debate on public issues. Ibid at 5-26. This harm of withdrawal of the target group (an aspect of what Fiss refers to as 'the silencing effect of speech') is acknowledged by the majority of the Canadian Supreme Court in *Keegstra* (supra) 227-8. See § 42.8*(c)* infra.

[2] See, for example, *New National Party of South Africa v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 13 ('The Constitution recognises that it is necessary to regulate the exercise of the right to vote so as to give substantive content to the right.')

[3] *Palko v State of Connecticut* 302 US 319, 327 (1937).

[4] *Dikoko* v *Mokhatla* 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC) ('*Dikoko*') at para 92. See also *Mandela v Falati* 1995 (1) SA 251, 259 (W)('*Mandela*')('In a free society all freedoms are important, but they are not equally important. Political philosophers are agreed about the primacy of the freedom of speech. It is the freedom upon which all the other freedoms depend; it is the freedom without which the others would not long endure'.)

[5] In the space available, we cannot do justice to the large amount of literature on this topic. For more detailed considerations of the philosophical underpinnings of freedom of expression, see F Schauer *Free Speech: A Philosophical Enquiry* (1982)('*Free Speech*')(Schauer expresses misgivings with a number of the justifications advanced for freedom of speech); E Barendt *Freedom of Speech* (2nd Edition, 2005) ('*Freedom of Speech*'); T Emerson *The System of Freedom of Expression* (1970); L Bollinger & G Stone (eds) *Eternally Vigilant: Free Speech in the Modern Era* (2002); I Loveland (ed) *Importing the First Amendment: Freedom of Speech and Expression in Britain, Europe and the USA* (1998); and L Alexander *Is There a Right of Freedom of Expression?* (2005)(Alexander expresses the view that there is no independent right to freedom of expression). In a South African context, see J Van der Westhuizen 'Freedom of Expression' in Van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism* (1994) 264; D Meyerson ' "No

One of the justifications that is sometimes given for freedom of expression is the principle of autonomy or liberty: if one is free to do as one pleases, one should be free to say as one pleases. In other words, freedom of expression is simply an instance of the more general principle of autonomy, or a way of giving effect to autonomy.[1] This is based on the idea that if we are all equal, rational beings we should not be told that our views are less worthy, and therefore cannot be expressed, while the views of others are allowed. We should thus all enjoy liberty of expression unless good reasons are advanced for limiting that liberty.

The difficulty with the principle of autonomy as a justification for freedom of expression, is that it does not explain why expression is different to other conduct. In the words of Frederick Schauer, it does not give rise to a Free Speech Principle, i.e. a principle which explains why expression is given greater protection from interference than other forms of conduct.[2] The principle of autonomy also fails to explain why the Constitution protects certain, specific fundamental freedoms (such as freedom of expression, religion, association, assembly and movement), rather than containing a general right to freedom.[3] We therefore need to look elsewhere for the justification for why we protect the right to freedom of expression.

Platform for Racists": What Should the View of Those on the Left Be?' (1990) 6 *SAJHR* 394; R Suttner 'Freedom of Speech' (1990) 6 *SAJHR* 372; A Sachs 'Towards a Bill of Rights in a Democratic South Africa' (1990) 6 *SAJHR* 13; and J Burchell *Personality Rights and Freedom of Expression* (1998) 1-23.

[1] F Schauer 'First Amendment Opportunism' in Bollinger & Stone (supra) at 174, 175 (Argues that a number of United States Supreme Court decisions relying on freedom of speech, in fact appeal to more general notions of liberty. He posits, for example, that the advertising decision of *Virginia Citizens Consumer Council v Virginia Board of Pharmacy* 425 US 748 (1976), which on the face of it relies on the protection of freedom of speech in the First Amendment, has little to do with freedom of expression and more to do with the general notion of economic liberty.) See § 42.9*(f)*.

[2] Schauer *Free Speech* (supra) at 5-7.

[3] See *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC). Ackermann J interpreted the right to freedom and security of the person in IC s 11(1) in a 'broad and generous' way, as entrenching a general 'right to freedom' (or liberty). Ibid at paras 45-69. The majority of the Constitutional Court, however, rejected this broad approach, holding that the right to freedom embodied the protection of physical integrity and other freedoms (which are likely to arise only rarely) of a fundamental nature. Ibid at para 184. See further M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) 40-5–40-11. This does not mean, however, that the principle of autonomy is irrelevant to the protection of freedom of expression and the weight to be accorded to that freedom. As O'Regan J states in *Khumalo* (supra) at para 21*:* '[f]reedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings'. The Constitutional Court recently adopted part of Ackermann J's view in the context of freedom of expression, holding that: 'Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.' *MEC for Education: KwaZulu-Natal & Others v Pillay* 2008 (2) BCLR 99 (CC) at para 63 quoting *Ferreira* (supra) at para 49. See § 42.5*(c)* infra.

Three more solid justifications are traditionally advanced for the protection of freedom of expression: the search for truth, the functioning of a democracy and self-fulfilment (or audience autonomy).[1] These justifications were captured by the Constitutional Court in *South African National Defence Union* in the following terms:

> [Freedom of expression] lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.[2]

We discuss each of these traditional rationales, in turn. This is followed by a brief discussion of some other free speech rationales.

(a) The search for truth

The oldest justification advanced for the protection of free expression, is the pursuit of truth.[3] This rationale was probably first articulated in 1644 by John Milton, arguing against the licensing of the printing press: 'Let [Truth] and falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?'.[4] A number of Milton's arguments were taken up two centuries later by John Stuart Mill, who adopted the premise that many of the opinions that we suppress may be true, or may contain a portion of truth, and the elimination of suppression of speech would increase the likelihood of establishing truth.[5] Mill expressed the view that it was not only the publication of true information that facilitates the search for truth. He reasoned that wholly false information can also advance that search, because it provides an opportunity for the truth to be made more

[1] See *Irwin Toy Limited v Quebec (Attorney-General)* (1989) 58 DLR (4th) 577, 612 (SCC)(The Canadian Supreme Court described the rationales for freedom of expression in the following terms: '(1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated'.)

[2] *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at para 7. See also *Phillips & Another v Director of Public Prosecutions, Witwatersrand Local Division, & Others* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC)('*Phillips*') at para 23 ('[t]he right to freedom of expression is integral to democracy, to human development and to human life itself'); *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC)('*De Reuck*') at para 59.

[3] It is not only the oldest but also probably the most influential. In the words of Schauer, it is the 'predominant and most persevering' justification for free speech. *Free Speech* (supra) at 15. See also *Case & Another v Minister of Safety and Security & Others; Curtis v Minister of Safety and Security & Others* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC), 1996 (1) SACR 587 (CC)('*Case*') at para 26 (Mokgoro J describes the truth justification as the most commonly cited rationale for freedom of expression.)

[4] *Areopagitica* (1644). See also J Milton *A Speech for the Liberty of Unlicensed Printing* (1644).

[5] *On Liberty* (1859), republished in *On Liberty and Other Essays* (1991).

meaningful in exposing the false idea. Further, if those who hold a true idea are not forced to defend it, it will become a 'dead dogma' rather than a 'living truth'.[1]

These ideas on the importance of freedom of speech to the pursuit of truth have been taken up enthusiastically by the United States Supreme Court, to justify the protection of free speech under the First Amendment to the United States Constitution.[2] The Supreme Court has, in some respects, adopted a market theory of free speech, holding that the best means of attaining truth is through free competition in the 'marketplace of ideas'. The market is preferable to government determination as a means for attaining truth because government cannot be relied on to distinguish truth from falsity, especially where government has an interest in the matter. The 'marketplace of ideas' theory of free speech was famously expressed by Justice Oliver Wendell Holmes in his dissenting judgment in *Abrams v US*:

> But when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that the truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[3]

The marketplace of ideas theory has also found some purchase in the judgments of our courts. As Kriegler J stated on behalf of the Constitutional Court in *S v Mamabolo*:

> Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country

[1] JS Mill *On Liberty* (supra) at 40. As Brennan J, with reference to Mill, states in the famous decision of the United States Supreme Court in *New York Times v Sullivan*: '[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about "the clearer perception and livelier perception of truth, produced by its collision with error".' 376 US 254, 279 n 19 (1964)('*Sullivan*').

[2] The First Amendment states, in emphatic language, that 'Congress shall make no law . . . abridging the freedom of speech, or of the press'.

[3] *Abrams v US* (supra). This approach, which Holmes J conceded was an experiment, led him to disagree with the view of the majority of the Supreme Court that the First Amendment was not infringed by the Espionage Act, which criminalized the criticism of the United States government's policies while the country was at war. Similarly, in *Gitlow v New York*, Holmes J dissented from the majority in relation to a conviction for criminal anarchy arising from the publication of a Communist Party manifesto. 268 US 652 (1925)('*Gitlow*'). He stated: 'If, in the long run, the beliefs expressed in proletarian dictatorships are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given that chance'. Ibid at 673.

> because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.[1]

It seems fair to accept that the attainment of truth is a beneficial value and that expression is capable of advancing this value in a way that other conduct is not. In this respect, the pursuit of truth is a compelling rationale for freedom of expression,[2] expecially where a statement of fact (which is capable of objective ascertainment) is made and some public good (other than the mere attainment of truth for its own sake) is achieved through the establishment of truth. This would include, for example, the disclosure of scientific results reflecting drugs which ease suffering or cure illness or the disclosure of criminal acts or malfeasance of public officials.[3]

The truth rationale is regarded by some as less compelling in relation to expressions of opinions (as opposed to facts) because an opinion does not directly advance the truth as, unlike a fact, it cannot be either true or false. This argument is, in our view, mistaken. It seems to us that the pursuit of truth may be advanced through the expression of opinion where one opinion is more correct than another and the expression of that opinion persuades others to accept it.[4] As Schauer points out, the fact that objective truth may not be ascertainable is not fatal to the utility of this justification for free speech, as the purpose is not necessarily the attainment of objective truth, but epistemic advancement (i.e. information or ideas in which we can be more confident).[5]

There are, however, several problems with the truth theory. As a starting point, it is of little assistance in explaining the protection of speech which conveys neither a statement of fact nor an opinion. A fictional novel, for example, does not necessarily advance the truth. The same can be said of most forms of pornography, numerous forms of artistic expression, including music or sculpture, and false statements of fact published by the media, albeit in good faith.

[1] *Mamabolo* (supra) at para 37. See also *Mandela* (supra) at 259 ('The history of liberty shows that the currency of every free society is to be found in the market-place of ideas where, without restraint, individuals exchange the most sacred of all their commodities. If the market is sometimes corrupt or abused or appears to serve the interests of the wicked and unscrupulous, that is reason enough to accept that it operates in accordance with the rules of human nature'.)

[2] See *Gardener v Whitaker* 1995 (2) SA 672, 687 (E)('the advancement of knowledge and truth' is a fundamental value underlying freedom of expression.)

[3] The argument from truth is thus a particularly compelling rationale for the specific protection of scientific and academic research in FC s 16(1)*(d)*.

[4] We note that the judgments in the United States Supreme Court which established the 'marketplace of ideas' theory of free speech dealt with the expression of opinions rather than facts. See *Abrams v US* (supra); *Gitlow* (supra); and *Whitney v Califonia* (supra).

[5] Schauer *Free Speech* (supra) at 18. Unrestricted expression of *opinions* may well be more important than free expression of *facts* because the nature of opinions or ideas is that we can be less confident in the truth of a particular proposition (i.e. the proposition may be more open to debate). Ibid at 31-33.

The primary criticism of the truth rationale is that, in its strong form, it assumes that truth is likely to emerge from unrestricted discussion. In short, the 'marketplace of ideas' theory puts too much faith in the power of truth to emerge from open discussion.[1] There are two main reasons why the theory's detractors argue that this is not necessarily the case. First, men and women's rationality is flawed. The marketplace of ideas theory assumes that, faced with a choice, people will tend to choose truth because they are endowed with reason or the power of rational decision-making. The problem is that there is little empirical support for this proposition and history is replete with instances of false (or bad) ideas gaining general acceptance. A number of authors cite the rise of Nazism in Germany prior to World War II as an instance of false ideas generally prevailing in society. Commenting that the argument from truth is idealistic and naive, Stanley Ingber points out that people may be more persuaded by packaging than by the content of a particular idea.[2] Schauer remarks that the ability to reason has largely been discredited by history and the insights of psychology, and concludes that without empirical support for the likelihood of truth emerging from a free market in ideas, 'the argument from truth evaporates'.[3]

We submit that this overstates the position. If one accepts that truth is valuable, the real question is not whether truth will always emerge from unrestricted discussion, but rather whether truth is more likely to result from free discussion or from a system in terms of which government (or another body) regulates what can and cannot be said. While we are conscious that there is no empirical support for this view, history would seem to support the argument that the greater the freedom to express a diversity of opinions, the more likely it is that the truth will be established. At the very least, it seems that an increase in the pool of ideas improves the chances of establishing truth.

Second, the probability of truth emerging from open discussion may be hampered if the marketplace is skewed, which it invariably is. Ingber correctly points out that real world conditions may interfere with, and distort, the operation of the marketplace of ideas.[4] The 'marketplace of ideas' model is therefore open to the same criticisms as the *laissez-faire* economic theory on which it is based. Ingber points to, for example, sophisticated and expensive communication technology, monopoly control of the media, and access limitations for disfavoured and impoverished groups, as leading to a situation where ideas which support the entrenched power structure or ideology are most likely to gain acceptance in

[1] See D Feldman 'Content Neutrality' in I Loveland (ed) *Importing the First Amendment: Freedom of Speech and Expression in Britain, Europe and the USA* (1998) 139 ('Content Neutrality'), 142 ('we would do well to maintain a healthy scepticism in the face of exhortations to subscribe to a blind faith in the capacity of an heroic citizenry and the market-place of ideas to weed out the bad ideas and allow only the good to flourish'.)

[2] S Ingber 'The Marketplace of Ideas: A Legitimizing Myth' (1984) *Duke LJ* 1, 35-36.

[3] Schauer *Free Speech* (supra) at 26. For further formidable critiques of the argument from truth in this context, see generally R Abel *Speech and Respect* (1994); Barendt *Freedom of Speech* (supra) at 8-13.

[4] Ingber (supra) at 5. See also C Sustein *Democracy and the Problem of Free Speech* (1993).

the free market.[1] In Ingber's words, the market has 'a status quo bias'.[2] This criticism must be taken particularly seriously in post-apartheid South Africa, which is characterised by great political, social and economic inequalities, a fairly narrow group of media owners and in which access to the mass media is virtually unattainable for a great deal of the population.[3]

This criticism does not, however, necessarily give rise to an absolute rejection of the pursuit of truth as a justification for protecting freedom of expression. It can rather take the form of a call for some measure of regulation in order to create conditions in which true freedom of expression is advanced. In other words, we need not completely abandon the value of the speech marketplace, but should rather attempt to make access to that marketplace more equitable so that a greater diversity of views is available in the market. Owen Fiss makes the point that government should, in appropriate cases, intervene as a 'parliamentarian' in creating pro-speech conditions:

> In some instances, instrumentalities of the state will try to stifle free and open debate, and the First Amendment is the tried-and-true mechanism that stops or prevents such abuses of state power. In other instances, however, the state may have to act to further the robustness of public debate in circumstances where powers outside the state are stifling speech. It may have to allocate public resources — hand out megaphones — to those whose voices would not otherwise be heard in the public square.[4]

In our view, it is important to distinguish between the marketplace of ideas theory and the more general truth rationale. Although these two concepts are related — and intertwined in the jurisprudence of the United States Supreme Court — they are not the same. It is possible to accept the argument from truth, while rejecting the idea that the marketplace that acts as the mechanism of establishing truth must be free of all restrictions. In a South African context, the huge social and economic inequalities and the need to balance freedom of expression against a variety of other rights and interests, offer compelling reasons to regulate expression in certain circumstances in order to alleviate the threat of the marketplace being skewed. This is, to some extent, reflected in the approach taken in FC s 192, which stipulates that legislation must establish an independent broadcasting

[1] See also CE Baker *Human Liberty and Freedom of Speech* (1989).

[2] Ingber (supra) at 17.

[3] The lack of access to the mass media is not a uniquely South African phenomenon. Eric Barendt has had the following to say about the position in the United States: 'the modern mass media are controlled by a handful of groups and networks. Few cities in the United States offer readers a choice of newspapers, while three or four national networks dominate television. The United States, like Europe, has witnessed the growth in multi-media corporations, with interests in films, broadcasting, newspapers and magazines, or some combination of them'. Barendt 'The First Amendment and the Media' in Loveland (ed) (supra) at 44.

[4] O Fiss *The Irony of Free Speech* (1996) 3-4. See also Feldman (supra) at 148 ('A free market-place of ideas needs careful management to prevent abuse of power by those who can apply money or physical force to demean or drive out others'.)

authority in the public interest 'to ensure fairness and diversity of views broadly representing South African society'.[1]

The area of government regulation of expression is, however, one in which decision-makers should tread carefully. While there may, in appropriate circumstances, be good reasons to regulate certain aspects of the speech market in the interests of increasing the quality and diversity of speech, we should not lose sight of the fact that government is often poorly placed to make decisions on the regulation of expression because it will almost inevitably have an interest in maintaining the status quo — or changing it in a manner that suits the government of the day. As Frederick Schauer says: 'The reason for preferring the marketplace of ideas to the selection of truth by government may be less the proven ability of the former than it is the often evidenced inability of the latter.'[2]

Another criticism levelled at the truth rationale is that it assumes that truth is a pre-eminent value in society. These critics argue that there are many other values that society may regard as equally or more important, such as the right to a fair trial, intellectual property or the right to reputation.[3] They also point out that, in certain circumstances, the truth of the statement is the very reason for prohibiting it. This is true of, for example, the prohibition on the disclosure of information that undermines national security, the protection of commercially confidential information and the protection of individual privacy.

The response to this criticism is that the fact that speech may be limited in certain circumstances does not remove the value of the argument from truth. It merely serves to emphasise that the interests in freedom of expression — which may include the advancement of truth — may, in appropriate cases, be outweighed by other rights or interests, and that freedom of expression is not absolute. Put differently, that other rights or interests might outweigh freedom of expression in particular cases does not mean that the reason that free speech weighs heavily on the other side of the scale is not its capacity to advance the pursuit of truth.

(b) The proper functioning of democracy

The next rationale for freedom of expression is its value in facilitating the proper functioning of the democratic process. This justification, which certain authors

[1] The body contemplated in FC s 192 is the Independent Communications Authority of South Africa, established in terms of s 3 of the Independent Communications Authority of South Africa Act 13 of 2000. See J White 'The Independent Communications Authority of South Africa' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) 24E-3. See also Chapter 9 of the Electronic Communications Act 25 of 2002 (Regulates, amongst other things, broadcasting content and ownership).

[2] Schauer *Free Speech* (supra) at 34. For a critical discussion of the argument for free speech based on the 'suspicion of government rationale', see Barendt *Freedom of Speech* (supra) at 21-23.

[3] See Schauer *Free Speech* (supra) at 23 and 33 (Argues that any strong version of the argument from truth must elevate truth to a position of absolute priority over other values, and that such absolute priority is unworkable.)

regard as the dominant rationale for freedom of expression,[1] occupies a prominent position in American free speech theory. The main proponent of this rationale, Alexander Meikeljohn, argued that the American people, as a matter of historical fact, created a form of self-government where sovereignty rested in the people and not the government,[2] and in terms of which the people only granted some powers to the government and reserved other powers for themselves.[3] The power to criticise government and to engage in political speech was one of the powers specifically reserved by the people in the emphatic wording of the First Amendment of the United States Constitution.[4] In the words of James Madison, 'the censorial power is in the people over the Government, and not in the Government over the people'.[5] Meikeljohn therefore drew a sharp distinction between public and private speech and argued that freedom of speech in areas of public affairs is absolute.[6] He criticised the United States Supreme Court for extending the protection of the First Amendment to non-political speech because, he said, it diluted the protection of core political speech (if one accepts that private speech is protected, one must assume that other interests will occasionally trump it and its protection is thus not absolute).

Meikeljohn's views were instrumental in shaping the decision of the United States Supreme Court in the landmark defamation case of *New York Times v Sullivan*.[7] During the course of his judgment, which put in place a highly speech-protective standard for libel involving public officials, Justice Brennan emphasised the fundamental importance of political speech in the context of a national commitment that 'debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials'.[8]

Following the lead of the United States, courts in most democracies agree that political expression is at the core of the protection of freedom of expression.[9] As the English courts have stated:

[1] See, for example, L Bollinger & G Stone 'Dialogue' in L Bollinger & G Stone (eds) *Eternally Vigilant: Free Speech in the Modern Era* (2002) 1, 23.

[2] Hence, the opening words of the United States Constitution: 'We the people. . .'

[3] A Meikeljohn *Political Freedom – The Constitutional Powers of the People* (1960)('*Political Freedom*') and 'The First Amendment is an Absolute' [1961] *Supreme Court Review* 245.

[4] 'Congress shall make *no* law . . .' (emphasis added).

[5] 4 Annals of Congress 934 (1794), quoted in R Post 'Reconciling Theory and Doctrine in First Amendment Jurisprudence' in Bollinger & Stone (eds) (supra) at 152, 157.

[6] Meiklejohn *Political Freedom* (supra) at 79.

[7] 376 US 254 (1964)('*Sullivan*'). See also W Brennan 'The Supreme Court and the Meikeljohn Interpretation of the First Amendment' (1965) 79 *Harvard Law Review* 1. *Sullivan* is discussed in detail at § 42.9*(a)* infra.

[8] *Sullivan* (supra) at 270. See also H Kalven 'The *New York Times* Case: A Note on "the Central Meaning of the First Amendment"' [1964] *Sup Ct Rev* 191; D Milo *Defamation and Freedom of Speech* (2008) 66-7 ('*Defamation*').

[9] See, for example, *Lingens v Austria* (1986) 8 EHRR 407 (European Court of Human Rights)('*Lingens v Austria*'); *Theophanous v Herald and Weekly Times Ltd* (1993-4) 182 CLR 104 (Australia). See D Spitz 'Eschewing Silence Coerced by Law: The Political Core and the Protected Periphery of Freedom of Expression' (1994) 10 *SAJHR* 301; Barendt *Freedom of Speech* (supra) at 155-162.

> In a free and democratic society it is almost too obvious to need stating that those who hold public office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind.[1]

The argument from democracy asserts that freedom of expression is a precondition to a properly functioning democracy because it promotes, in particular, the twin democratic values of *accountability and participation*.

The protection of freedom of expression enhances democratic *accountability* — as well as the other core constitutional values of responsiveness and openness[2] — by imposing a valuable check on governmental and other public power. For example, it facilitates the exposure of maladministration, corruption and nepotism.[3] As Cameron J stated in *Holomisa v Argus Newspapers Ltd*:

> In a system of democracy dedicated to openness and accountability, as ours is, the especially important role of the media, both publicly and privately owned, must in my view be recognised. The success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens. But strong and independent newspapers, journals and broadcast media are needed also, if those criticisms are to be effectively voiced, and if they are to be informed with the factual content and critical perspectives that investigative journalism may provide.[4]

Freedom of expression is thus fundamental in a representative democracy like ours, in which the people elect the government, are represented by that government and in which the government should be accountable to the electorate.[5]

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[1] *Derbyshire County Council v Times Newspaper* [1992] 3 All ER 65, 80 (CA), quoting *Hector v Attorney General of Antigua and Barbuda* [1990] 2 All ER 103, 106.

[2] FC s 1*(d)*. See also, for example, FC s 195. The fundamental nature of public accountability is emphasised in the judgment of the Constitutional Court in *Rail Commuters Action Group & Others v Transnet Limited t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at para 74. The Supreme Court of Appeal has also endorsed the importance of the principle in, for example, *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at paras 20-22.

[3] See *Government of the Republic of South Africa v 'Sunday Times' Newspapers & Another* 1995 (2) SA 221, 227 (T)('*Sunday Times*')(Joffe J)('It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest, mal- and inept administration.')

[4] 1996 (2) SA 588, 608-9 (W)('*Holomisa*'). *Holomisa* was decided under the Interim Constitution, which expressly recognised the special importance of political expression, by stating that a limitation on the right to freedom of expression 'insofar as it relates to free and fair political activity' must, in addition to being reasonable and justifiable, also be necessary' (IC s 33). Although the limitations clause in the Final Constitution (FC s 36) is different in approach, and applies the same limitations test to all infringements of fundamental rights, our courts will probably continue to apply an increased level of protection to political speech. See J Burchell *Personality Rights and Freedom of Expression* (1998) 22-23. See also *Mthembi-Mahanyele* (supra).

[5] See R Dworkin *Sovereign Virtue: The Theory and Practice of Equality* (2000) 363-365; R Post 'Equality and Autonomy in First Amendment Jurisprudence' (1997) 95 *Michigan LR* 1517. The democratic participation value is particularly useful in the context of the Internet, which has dramatically enhanced the ability of citizens to engage in public discussion of important issues. See JM Balkin 'How Rights Change: Freedom of Speech in the Digital Era' (2004) 26 *Sydney LR* 13. For a discussion of the concept of representative democracy, see T Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 42.10.2*(b)*.

Freedom of expression also enhances democratic *participation* in several ways. It enables citizens, and particularly the media, to communicate information and ideas to the community and thus contributes to the creation and maintenance of an informed electorate, so that they can better participate in the democratic process.[1] As O'Regan J stated in *Khumalo*: 'without [freedom of expression], the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled'.[2] Freedom of expression also advances democratic participation by enabling people to communicate the wishes of the population to the government. In the words of Joffe J in *Sunday Times*, freedom of expression enables communication between 'the governed and those who govern'.[3]

A number of criticisms have historically been aimed at the argument from democracy. We briefly discuss two of the most common criticisms. First, it is argued that the argument from democracy is only useful in democracies, and it assumes that democracy is the most preferable form of government.[4] While there may be some merit in this criticism in the abstract, this is immaterial in a South African context, in which the Constitution emphatically endorses a commitment to democratic governance.[5] Leaving aside the merits and demerits of democracy as a political system, the point about the argument from democracy is that if a country adopts a democratic form of government, such a government functions most effectively amidst a culture of accountability and participation; a culture that is served by freedom of expression.

Second, certain authors have pointed to the 'democratic paradox' that they see as implicit in the argument from democracy.[6] This so-called paradox is that, if one accepts that freedom of expression flows from democracy (or the sovereignty of the people), how does one explain that, in a constitutional state, the right to freedom of expression can be used to override the democratically-expressed will of the majority expressed through, for example, an Act of Parliament? This criticism misses the point. The point is not that the protection of freedom of expression is the natural outcome of the democratic process, but rather that this freedom is a precondition to the proper functioning of the democratic system — particularly a system of representative democracy. Without the protection of this fundamental right, one cannot be confident in the outcome of the democratic

[1] The Constitutional Court recently confirmed the importance of participatory democracy in a case dealing with the right to comment on draft legislation, *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 145. For more on public participation, see *Matatiele Municipality & Others v President of the RSA & Others* 2007 (1) BCLR 47 (CC); *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* [2008] ZACC 10.

[2] *Khumalo* (supra) at para 21.

[3] *Sunday Times* (supra) at 228.

[4] Thomas Scanlon therefore regards the argument from democracy as 'artificial'. T Scanlon 'A Theory of Freedom of Expression' (1972) 1 *Philosophy & Public Affairs* 204, 205-206.

[5] On the relevant provisions of the Final Constitution, see Roux 'Democracy' (supra) at § 10.3.

[6] See, for example, Schauer *Free Speech* (supra) at 40-41.

process.[1] Seen in this context, the criticism becomes simply a manifestation of the 'counter-majoritarian dilemma'[2] — the idea that fundamental rights can trump the will of the majority — which is canvassed in other chapters of this work.[3] The answer to this dilemma is, as Theunis Roux explains, that the South African Constitution adopts a conception of democracy that is broader and more sophisticated than simple majoritarianism. The Final Constitution safeguards fundamental rights against unjustifiable infringement by the majority as constitutive of, rather than contrary to, democracy.[4]

A potential weakness with the argument from democracy is that it only explains why we protect a fairly narrow range of expression: political speech. It does not explain why we protect other speech that does not further the democratic enterprise — such as, arguably, painting, music, scientific research, commercial speech, defamation that does not engage political speech, and hard core pornography. An additional difficulty is the absence of a bright line between political and non-political expression.[5] By way of example, much of pornography is not necessarily political, yet the emphasis by feminist writers on the power relations underlying pornography suggests that there may be a political element to this expression.[6]

(c) Self-fulfilment and audience autonomy

The third traditional justification for freedom of expression is that it promotes individual self-fulfilment. This rationale values freedom of expression for its intrinsic worth in enabling individuals to communicate with others and, in so doing, to develop towards self-fulfilment. In the words of Froneman J in *Gardener v Whitaker*, one of the underlying values of freedom of expression is 'the free development of an individual's intellect, interests, tastes and personality'.[7]

[1] Schauer acknowledges that this argument is still a powerful one in support of a 'broad freedom to communicate ideas and information relevant to the processes of government', but points out that this is not a strong argument based on sovereignty of the people, but rather one based on equal participation. Ibid at 41.

[2] Ibid at 40 ('Any distinct restraint on majority power, such as a principle of freedom of speech, is by its nature anti-democratic, anti-majoritarian').

[3] See S Seedorf & S Sibanda 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12. See also S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[4] 'Democracy' (supra) at §§ 10.2*(d)* and 10.5. For example, FC s 7(1) proclaims that the Bill of Rights is 'a cornerstone of democracy in South Africa'. Ibid at § 10.3*(c)*.

[5] For an attempt to explicate the parameters of public interest speech in the context of defamation law, see D Milo *Defamation and Freedom of Speech* (2008) at 138-154.

[6] See § 42.9*(e)* infra.

[7] 1995 (2) SA 672, 687 (E). See also *Case* (supra) at para 26 (Mokgoro J)(freedom of expression is 'foundational to each individual's empowerment to autonomous self-development'); *NM & Others v Smith* (*Freedom of Expression Institute as Amicus Curiae*) 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC)('*NM v Smith*') at para 145 (O'Regan J). The leading academic exponent of the self-fulfillment rationale for free speech is Emerson. T Emerson *The System of Freedom of Expression* (1970) 6.

This rationale draws heavily on the idea that we are all equal moral agents, endowed with human dignity, and that we should thus be able, insofar as possible, to strive for individual self-fulfilment. As van der Westhuizen J states in *Holomisa v Khumalo*:

> The different theoretical and philosophical explanations offered as reasons why freedom of expression should be protected [include] that expression is an essential part of one's awareness of oneself, one's very being, and one's human dignity. There is thus an element of the protection of dignity involved in the protection of expression. Therefore not only true or meaningful statements, which could contribute to a debate, are protected, but also other forms of expression, simply because it is human to communicate.[1]

The strength of this rationale is that it is not limited to political speech or speech which is capable of advancing the truth, but extends to all forms of communication. It includes, for example, music, painting, fictional writing and nude dancing — any form of communication through which one may pursue fulfilment.

Freedom of expression can advance self-fulfilment of *the speaker*. In this sense, we pursue fulfilment by communicating with others, and testing and modifying our ideas in open discussion. As Schauer says, '[c]ommunication is an integral part of the self-development of the speaker, because it enables him to clarify and better understand his own thoughts'.[2] But freedom of expression can, in addition, advance the fulfilment of *the listener*. In this sense, free communication promotes individual fulfilment by facilitating exposure to a wide variety of information and ideas, allowing us to take a broader range of issues on board and encouraging intellectual development.

The argument from self-fulfilment is similar to another rationale that is sometimes offered for freedom of expression — 'audience autonomy'.[3] The concept of audience autonomy is most often associated with the writing of Thomas Scanlon, who adopts the liberal stance that the powers of the state are limited to those that citizens would recognise 'while still regarding themselves as equal, autonomous and rational agents'[4] and that '[a]n autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do'.[5] Ultimate choice (or sovereignty) thus rests with the individual, even when a particular course of conduct is prohibited by law because the individual can choose whether to obey the law, or to breach it and suffer the consequences. If the ultimate choice rests with the individual, then the individual's decision ought to be as informed as possible; hence the need for a

[1] 2002 (3) SA 38, 61 (T)('*Khumalo HC*').
[2] Schauer *Free Speech* (supra) at 55.
[3] This is different to the idea of autonomy discussed above because, unlike other conduct, expression has an audience. There are thus two autonomy interests at play in relation to expression — that of the speaker and that of the listener.
[4] Scanlon (supra) at 214.
[5] Ibid at 216.

free flow of communication. According to Schauer, 'Scanlon's theory, therefore, is best characterised not as a right to speech, but rather as a right to receive information and, more importantly, a right to be free from governmental intrusion into the ultimate process of individual choice'.[1]

This rationale is also reflected in the writing of Ronald Dworkin:

> [M]orally responsible people insist on making up their own minds about what is good or bad in life or in politics, or what is true or false in matters of justice and faith. Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions. We retain our dignity, as individuals, only by insisting that no one — no official and no majority — has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it.[2]

One difficulty with the rationale of audience autonomy is that the so-called 'right' to disobey the law is a contested principle.[3] In addition, it is, at times, difficult to justify the protection of harmful expression on the basis that it is necessary for the individualistic self-fulfilment or autonomy of the speaker or listener. For example, in the context of hate speech, it is difficult to explain why the personal growth of an individual that may come with speech should justify the infliction of serious harm on others.[4]

Nevertheless, the free speech rationales of individual self-fulfilment and audience autonomy are, we submit, helpful. The fact that free speech may justifiably be limited (or outweighed) by significant countervailing values does not detract from the premise on which these rationales are based: we value free speech because it advances self-fulfilment and personal growth. Moreover, even if one rejects the 'right' to civil disobedience, there is a wide range of expression that does not bring about unlawful results and which can be justified on the basis of the need for facilitating individual choice. It is rare that we make decisions as to whether or not to obey the law. It is far more common for us to make the myriad of decisions as to which course of conduct to adopt within the bounds of the law — what religion, if any, one chooses to follow, what one's view is on the death penalty or what type of music one prefers.

[1] Scanlon (supra) at 69.

[2] *Freedom's Law: The Moral Reading of the America Constitution* (1996) 200. See also Burchell (supra) at 13-16. Dworkin's emphasis on moral agency as underlying the right to freedom of expression is cited with approval in *Holomisa v Argus Newspapers* (supra) at 608. See also D Richards *Free Speech and the Politics of Identity* (1999).

[3] See Schauer *Free Speech* (supra) at 70-71.

[4] See § 42.8*(c)* infra. Another criticism that is sometimes advanced of the self-fulfilment rationale is that it fails to explain what is so special about expression in advancing self-fulfilment, where fulfilment can be advanced through non-speech activities such as international travel. See Schauer *Free Speech* (supra) at 57.

(d) Some other rationales for freedom of expression

In addition to the traditional theories discussed above, a number of other rationales have been advanced for protecting freedom of expression. We discuss some of them here. The first is that a society which values freedom of expression is more likely to encourage tolerance, as the community (and government) is more likely to accept the co-existence of a variety of opinions, ideas and ways of life.[1] As the Constitutional Court has stated:

> The corollary of freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.[2]

The leading proponent of this rationale, Lee Bollinger, explains that the protection of freedom of expression is a means of grappling with the 'the impulse to censor' that can lead to intolerance in a wide variety of settings.[3] He argues that the protection of freedom of expression restrains this impulse and thus generally promotes tolerance:

> [T]here is a *bias toward* intolerance that must be continually curbed and mediated for any democratic society to work. Under this picture of human society, it makes sense to take a single area of human behaviour — we take speech — and to declare it more or less off-limits for regulation. It serves a similar function to a wilderness area in an urban society, a place where sides of our personality are singled out, developed, tested and highlighted because they are relevant to life in general. In this way, the extremes of speech take on their own meaning. The whole point of the exercise is to stretch the limits of our capacities, of our self-restraint and capacity for the appropriate level of social tolerance.[4]

This rationale has a particular appeal in post-apartheid South Africa, given the heterogeneous nature of our society and our past of racial, religious, cultural and other intolerance. As the Constitutional Court emphasised in the same-sex marriage case, South Africa is a pluralist society in which diversity and tolerance of that diversity is important. As with the articulation of many other values in the jurisprudence of the Constitutional Court, this sentiment is clearly captured in the judgment of Sachs J, writing on behalf of a unanimous Court:

> Equality means equal concern and respect across difference. It does not presuppose the diminution or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply the levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. . . . The Constitution thus acknowledges the variability of human beings . . . affirms the right to be different, and celebrates the

[1] L Bollinger *The Tolerant Society* (1986).
[2] *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at para 8.
[3] L Bollinger 'Dialogue' in Bollinger & Stone (eds) (supra) at 27.
[4] Ibid at 27-28.

> diversity of the nation. . . . At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test for tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomforting.[1]

Vincent Blasi takes the tolerance argument further, identifying a number of beneficial character traits — including inquisitiveness, independence of judgment, distrust of authority and initiative[2] — that a system of freedom of expression promotes by, for example, forcing persons to confront differences of understanding and to defend their view.[3] According to Blasi, these character traits are beneficial to society because they enable the populace to act as an effective, independent check on authority and facilitate compromise.[4]

A final rationale for freedom of expression is the 'safety valve' theory. According to this rationale, the suppression of expression is not effective in curbing the promotion of undesirable views. On the contrary, suppression is likely to encourage ideas to fester until they erupt through the outlet of violent conduct. Expression, in contrast, provides an avenue — a 'valve' — which channels undesirable views through the medium of expression rather than actions.[5] If, for example, the Ku Klux Klan is free to express racist views, they are less likely, so the argument goes, to engage in lynchings or other forms of racial unrest.

The primary difficulty with the 'safety valve' argument is that there is no firm, empirical evidence to support it. While it may be true that, in certain instances, freedom of expression operates in this positive way, there are no doubt other

[1] *Minister of Home Affairs v Fourie (Doctors for Life International & Others, Amici Curiae); Lesbian and Gay Equality Project & Others v Minister of Home Affairs* 2006 (1) SA S24 (CC), 2006 (3) BCLR 355 (CC) at para 60. See also *MEC for Education: KwaZulu-Natal & Others v Pillay* 2008 (2) BCLR 99 (CC) at para 107 (In rejecting an argument by a school that permitting a Hindu student to wear a nose-stud to school would result in many more students deviating from the school's code of conduct, Langa CJ held: 'if there are other learners who hitherto were afraid to express their religions or cultures and who will now be encouraged to do so, that is something to be celebrated, not feared. As a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution. The display of religion and culture in public is not a "parade of horribles" but a pageant of diversity which will enrich our schools and in turn our country.')

[2] 'Free Speech and Good Character: From Milton to Brandeis to the Present' in Bollinger & Stone (eds)(supra) at 84 (Other traits identified by Blasi are: perseverance, courage to confront evil, aversion to simplistic accounts and solutions, self-awareness, imagination, empathy, receptivity to change and a tendency to view problems and events in a broad perspective.)

[3] Ibid at 85-86 (Freedom of expression also promotes Blasi's beneficial traits by emboldening persons who do not subscribe to the orthodox view to retain their dissident views and express them, and encouraging those who wish to combat what they perceive as bad views to do so through engagement (i.e. communication) rather than censorship.)

[4] Ibid at 87-90 (These traits also help people and institutions adapt to a changing world and encourage engagement and civic participation.)

[5] Emerson (supra), and in *Whitney v California* (supra) at 375-6 (1927)(Brandeis J). See also D Meyerson ' "No Platform for Racists": What Should the View of Those on the Left Be?' (1990) 6 *SAJHR* 394 ('*No Platform*') at 397 (An example of the use of the 'safety value' argument in the context of hate speech.)

instances where expression fuels the fire of noxious views and promotes violent conduct. It is by no means clear that allowing the Ku Klux Klan to engage in racist invective results in a decrease in racial violence rather than the opposite.

42.6 THE APPLICATION OF FC S 16(1)

(a) 'Everyone' has the right to freedom of expression

The use of the term 'everyone' in FC s 16(1) entails that the widest possible range of subjects is able to assert the right. The Constitutional Court has adopted a purposive interpretation of the word that includes both natural and juristic persons in order to fully and meaningfully protect the right.[1] In addition, it has been held that in the absence of an indication that a particular right is to be restricted only to citizens,[2] the term 'everyone' extends the benefits of the right to both citizens and non-citizens.[3] The values underlying expressive freedom demand that those who may be least empowered, including those who do not enjoy citizenship rights, are able to invoke the protection of the right.

(b) Direct horizontality of FC s 16(1): *Khumalo* v *Holomisa*

The right to freedom of expression under the Final Constitution may be directly relied upon in certain disputes involving only private parties. This is the effect of the Constitutional Court's decision in *Khumalo & Others v Holomisa & Others*.[4] In this respect, the Final Constitution differs fundamentally from the Interim Constitution.[5] However, it would be a mistake to read this part of *Khumalo* too broadly:

> In this case, the applicants are members of the media who are expressly identified as bearers of constitutional rights to freedom of expression. There can be no doubt that the law of defamation does affect the right to freedom of expression. Given the intensity of the constitutional right in question, coupled with the potential invasion of that right which

[1] *Ex parte Chairperson of Constitutional Assembly: In re Certification of Constitution of the RSA 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('*First Certification Judgment*') at para 57. The drafters of the final text abandoned the formulation of 'every person' which had been preferred in the IC s 15(1), in favour of the broader 'everyone'.

[2] See, for example, FC s 19 (the right to vote) and FC s 23 (the right to freedom of trade, occupation and profession).

[3] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) at para 47. See also *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 (B)(Significantly, this decision was referred to by the Theme Committee responsible for the Draft Constitutional Assembly, Constitutional Committee, Sub-Committee: Draft Bill of Rights *Explanatory Memorandum of Theme Committee 4 of the Constitutional Assembly Responsible for Fundamental Rights: Explanatory Memorandum* Vol. 1 (9/10/1995) at para 4.1.1.).

[4] 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)('*Khumalo*').

[5] Under the Interim Constitution it had been held categorically that freedom of expression could have no direct horizontal application. *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC).

> could be occasioned by persons other than the State or organs of State, it is clear that the right to freedom of expression is of direct horizontal application in this case *as contemplated by s 8(2) of the Constitution*.[1]

The italicised words are the crucial part of the dictum for the purposes of the present discussion. The Court based its decision on the wording of FC s 8(2) as opposed to FC s 8(1). The Court rejected an interpretation, based on the express inclusion of 'the judiciary' under FC s 8(1) that would have entailed categorical horizontal application of FC s 16. The absence of the term 'the judiciary' in IC s 7(1) had been central to the finding, under the Interim Constitution, that freedom of expression had no direct 'horizontal' application.[2]

The particular reading of FC s 8 adopted by the Court in *Khumalo* is carefully examined elsewhere in this work,[3] and is not without difficulties.[4] However, the clear effect of the dictum is that the competence of direct reliance on the right to freedom of expression in disputes that do not involve the impugning of legislative provisions and where the state is not a party, will be determined on a case-by-case basis applying the open-ended criteria set out in FC s 8(2), namely: 'if, and to the extent that, [the right to freedom of expression] is applicable taking into account the nature of the right and the nature of any duty imposed by the right.'

42.7 Protected expression: analysis of FC s 16(1)

(a) Freedom of speech and expression

While the Interim Constitution used both the terms 'speech' and 'expression',[5] the text of the Final Constitution opts for the term 'expression' alone. This is undoubtedly a result of the recognition that 'expression', while including the act

[1] *Khumalo* (supra) at para 33 (Emphasis added.)

[2] The basis for the finding was not the text of the respective expression clauses but rather the difference in the text of the application provisions: IC s 7 and FC s 8. In essence, the Court (Kentridge AJ) based its finding on the absence of the term 'judiciary' in IC s 7(1). In this manner the Court avoided the force of the United States application jurisprudence arising from *Shelley v Kraemer* 334 US 1 (1948). *Du Plessis v De Klerk* (supra) at paras 45-50:

> Nor do I believe that the absence of reference to the Judiciary in s 7(1) is an oversight. One of its effects is to exclude the equation of a judgment of a Court with State action and thus prevent the importation of the American doctrine developed in *Shelley v Kraemer*. This Court, like the Provincial and Local Divisions of the Supreme Court, is bound to apply the law, which in a proper case includes chapter 3, but that does not permit the Courts to ignore the limitation contained in s 7(1). . . . [A]ny litigant contesting the constitutionality of a statute is applying chapter 3 to the relationship between himself and the Legislature, not to his relationship to the opposing (private) litigant.

[3] See generally S Woolman 'Application' in S Woolman, T Roux, J Klaaren , A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition , OS, December 2005) § 31.1*(c)*.

[4] Some of them derived from the very failure to impart meaning to the term 'the judiciary' in s 8(1). S Woolman 'Application' (supra) at § 31.1*(c)*.

[5] IC s 15(1) read in relevant part: 'Every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.'

of speaking, encompasses a broader range of activities than 'speech'. Protection of 'expression' alone also avoids the interpretive difficulties that might otherwise arise from attempting to imbue 'speech' with a meaning that is not already captured under 'expression'.[1]

In *De Reuck*[2] it was argued that child pornography, as defined in the relevant legislation,[3] was not a form of constitutionally protected expression. In advancing this argument, the respondents sought to develop a categorical exclusion of child pornography in line with the United States approach. The Court[4] rejected this argument, emphasising, as it had previously done,[5] that the Constitution's protection of freedom of expression differed from that of the First Amendment to the United States' Constitution; except for the explicitly excluded categories of expression set out in FC s 16(2), all other expressive acts, even child pornography, are protected at the threshold level. Infringements then fall to be justified under the FC s 36 limitations inquiry.

(b) Freedom to receive or impart

While it remained an open question under the Interim Constitution,[6] in *De Reuck* the Court noted that freedom of expression under the Final Constitution extends not only to those who seek to impart information or ideas but also to those who may be the recipients of expression.[7] In *Case*, Mokgoro J emphasised the importance of the right to receive information in the following terms:

> But my freedom of expression is impoverished indeed if it does not embrace also my right to receive, hold and consume expressions transmitted by others. Firstly, my right to express myself is severely impaired if others' rights to hear my speech are not protected. And secondly, my own right to freedom of expression includes as a necessary corollary the right to be exposed to inputs from others that will inform, condition and ultimately shape my own expression. Thus, a law which deprives willing persons of the right to be exposed to the expression of others gravely offends constitutionally protected freedoms both of the speaker and of the would-be recipients.[8]

[1] For a general discussion on forms of conduct that nevertheless qualify as expression, such as flag desecration, see E Barendt *Freedom of Speech* (supra) at 78-86. For a discussion of nude dancing as protected expression in South Africa, see 'Sexually Explict Expression' § 42.9*(e)* infra.

[2] *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC)('*De Reuck*').

[3] Films and Publications Act 65 of 1996 s 1. Read with s 27(1) and sch 1 of the Act, various activities associated with possessing, distributing and publishing child pornography are criminalized.

[4] *De Reuck* (supra) at para 48.

[5] *Mamabolo* (supra) at para 41. See also *Midi Television* (supra) at para 14.

[6] *Case* (supra) at para 92. But see the separate judgement of Mokgoro J. Ibid at para 25.

[7] *De Reuck* (supra) at 49.

[8] *Case* (supra) at para 25. The right to receive information does not necessarily provide a constitutional claim to *access* the information that one wishes to receive. Such a right is, of course, protected specifically in FC s 32, and by the Promotion of Access to Information Act 2 of 2000, but this does not mean that the (largely negative) right to freedom of expression itself creates a right of access to information that a holder of the information does not wish to part with. See Barendt *Freedom of Speech* (supra) at 110-111.

Thus, in *Islamic Unity* the Court was unimpressed with the argument that the impugned provision, clause 2*(a)* of the Code of Conduct for Broadcasting Services,[1] only limited the expression of broadcasters. The respondents sought to advance this argument under the limitations enquiry as a ground of justification for the breadth of the provision. The Court found that this argument ignored the fact that the broadcaster concerned had a potentially wide audience that would be deprived of the expression that it would receive in the event that the clause was allowed to stand.[2]

The right to receive information is, like the right to express it, not absolute. In *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions & Others* the public broadcaster sought leave to broadcast criminal proceedings which were of high public interest.[3] The Court recognised the importance of the right to receive information as part of the expressive right and assumed without deciding that expression includes the positive aspect of access to courts.[4] This however did not entitle the broadcaster to broadcast proceedings as the ultimate issue was the preservation of the right to a fair trial and the Court's power to regulate its own process to achieve this end.[5]

(c) Information or ideas

The significance of the inclusion of both information and ideas in FC s 16(1) is that not only the imparting or receiving of the factual, empirical content of expression is protected but also the elements of expression which may be novel, controversial or involve creativity.[6] 'Ideas' are often central to political and social expression and accordingly expression cannot be restricted purely on the basis that it has no demonstrable factual content or is not susceptible to proof.[7] Against the particular South African history of suppression of ideas, the express protection of the right to receive and impart ideas emphasises that expression may not be restricted on the basis that it is deemed to be politically or socially 'subversive'.[8] Moreover, in articulating the scope of the right the courts

[1] Independent Broadcasting Authority Act 153 of 1993 sch 1, read with s 56(1).
[2] *Islamic Unity* (supra) at para 47.
[3] 2007 (1) SA 523 (CC), 2007 (1) SACR 408 (CC), 2007 (2) BCLR 167 (CC)('*SABC v NDPP*').
[4] Ibid at paras 24-25.
[5] See § 42.9*(c)(i)* and (iii) infra.
[6] The distinction between 'information' and 'ideas' is generally that 'information' comprises facts and may be the constituent of knowledge whereas ideas involve some creative content and need not be underpinned by facts.
[7] Again, this tests the limits of common-law restrictions on communication of ideas. For instance, opinions are treated more favourably in defamation law as compared with false facts. See § 42.9*(a)* infra.
[8] The same is true of information; for example, the publication of factual material that some may consider to be subversive.

on more than one occasion have endorsed the dictum of the European Court of Human Rights in *Handyside v United Kingdom* that the right to 'receive or impart information or ideas' applies 'not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also that offend, shock or disturb'.[1]

Though the effect of the distinction between information and ideas in the context of a constitutional right has received no particular judicial consideration, the common law has long recognised the distinction between information and ideas on the one hand, and their expression on the other. It has been repeatedly affirmed, for example, that there can be no copyright in information or ideas but only in the precise form of their communication.[2] At a minimum, constitutionalising the freedom to receive or impart information and ideas requires that those limitations imposed at common law or by statute on communication of information and ideas be re-examined in light of the Constitution to ensure that they are justifiable. In certain instances, restrictions imposed by trade mark or copyright law, for example, will be required to yield to the imperatives of freedom of expression.[3]

(d) Freedom of the press and other media

(i) *Press exceptionalism*

Our Courts have on a number of occasions[4] rejected a strict doctrine of so-called 'press exceptionalism'. In its strongest form, this doctrine demands that special or greater protection be extended to the press under the right to freedom of expression.[5] Courts have, however, also repeatedly endorsed one of the premises which

[1] *Handyside v United Kingdom* (1976) 1 EHRR 737, 754 ('*Handyside v UK*') quoted with approval in *Islamic Unity* (supra) at para 28 and *De Reuck* (supra) at para 49. See also *Sunday Times* (supra) at 227E; *In re Chinamasa* 2001 (2) SA 902 (ZS), 2001 (1) SACR 78 (ZS), 2000 (12) BCLR 1294 (Z), 2000 (2) ZLR 322 (Gubbay CJ). The Courts have in this respect self consciously opted for the broad approach of the European Court of Human Rights.

[2] See *Galago Publishers (Pty) Ltd v Erasmus* 1989 (1) SA 276, 283J-284D (A); *Kalamazoo Division (Pty) Ltd v Gay* 1978 (2) SA 184, 191C-D (C).

[3] This is the case in other jurisdictions where, for example, parody in expressive acts with a legitimate social objective is allowed to trump intellectual property rights in certain circumstances. See, for example, *Mattel Inc v Walking Mountain Productions* 353 F 3d 792 (9th Cir 2003), 2004 US Dist LEXIS 12469; *Dr Suess Enterprises v Penguin Books USA Inc* 109 F 3d 1394, 1400 (9th Cir); *Campbell v Acuff-Rose Music Inc* 510 US 569, 114 S Ct 1164, 127 L Ed 2d 500 (1994). The principle received recognition, albeit *obiter dictum* in *Laugh It Off* (supra) at paras 64-66. The effect of freedom of expression on intellectual property rights is discussed separately below. See 'Intellectual property restrictions' § 42.9*(d)* infra.

[4] *Holomisa v Argus Newspapers* 1996 (2) SA 588 (W)('*Holomisa*'), cited with approval in *Midi Television* (supra) at para 6.

[5] 'Press exceptionalism' has also been described as 'the idea that journalism has a different and superior status in the Constitution'. A Lewis *Make No Law — the Sullivan Case and the First Amendment* (1991) 210, quoted by Cameron J in *Holomisa v Argus Newspapers* (supra) at 610D, approved in *Midi Television* (supra) at para 6. For a classic exposition of press exceptionalism, see Justice Potter Stewart 'Or of the Press' (1975) 26 *Hastings LJ* 631.

usually underpins press exceptionalism; namely that the press occupies a position of singular importance in protecting the expressive right on the community's behalf. In *Islamic Unity* the Court observed:

> [T]he fact that s 16(1)*(a)* makes specific mention of 'freedom of the . . . media' is a clear indication of the recognition by the Constitution of the powerful role that the media plays in shaping public opinion and providing the public with information about current events. There can be no doubt that radio and television are extremely influential media. The extent and impact of the infringement is therefore not rendered less significant by reason of the fact that the prohibition applies only to broadcasters.[1]

This recognition of the importance of the media in the protection of expressive freedom in a democratic society may be regarded as an endorsement by our Courts of a weak form of press exceptionalism. The press, by virtue of its position, is a bearer not only of rights but of constitutional obligations in relation to freedom of expression. The necessary implication is that in relation to freedom of expression, the press is not identically situated to the ordinary citizen. This also emerges in an important passage from the decision of the Constitutional Court in *Khumalo* which it is worth quoting at length:

> The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate. As Deane J stated in the High Court of Australia,
>
> '. . . the freedom of the citizen to engage in significant political communication and discussion is largely dependent upon the freedom of the media'.
>
> The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression.
>
> Furthermore, the media are important agents in ensuring that government is open, responsive and accountable to the people as the founding values of our Constitution require. . . . In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our

[1] *Islamic Unity* (supra) at para 47. See also *SABC v NDPP* (supra) at para 24 ('The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate. The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression.')

> democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16.[1]

In *Holomisa v Argus Newspapers* Cameron J reconciled the apparent tension between the rejection of press exceptionalism on the one hand, and acknowledgement of the singular role of the press in a democratic society on the other, as follows:

> It does not follow, however, from the special constitutional recognition of the importance of media freedom, or from the extraordinary responsibilities the media consequently carry, that journalists enjoy special constitutional immunity beyond that accorded ordinary citizens. . . . Ronald Dworkin *A Matter of Principle* (1985) at 386-7 puts the matter thus:
>
> > 'But if free speech is justified on principle, then it would be outrageous to suppose that journalists should have special protection not available to others, because that would claim that they are, as individuals, more important or worthier of more concern than others.'
>
> It is thus consistent to reject 'press exceptionalism' while at the same time emphasising that, because of the critical role that the media play in modern democratic societies, the law of defamation must leave them free to speak on matters of public importance — though no more free than other citizens — as fully and openly as justice can possibly allow.[2]

(ii) *Protection of sources of information*

Since relevant evidence of a competent witness is under ordinary circumstances compellable in both criminal and civil proceedings without 'just excuse',[3]

[1] *Khumalo* (supra) at paras 22-24, citing with approval the dictum of the High Court of Australia in *Theophanous v Herald & Weekly Times Ltd & Another* (1994) 124 ALR 1 ('*Theophanous*') 61. See *Sunday Times* (supra) at 227I-228A:

> It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. . . . It must advance communication between the governed and those who govern.

[2] *Holomisa* (supra) at 610D, citing *Neethling v Du Preez & Others, Neethling v The Weekly Mail & Others* 1994 (1) SA 708 (A)('*Neethling v Du Preez*'). This dictum has been approved by the Supreme Court of Appeal in *Midi Television* (supra) at para 6. For discussion of press exceptionalism in the context of defamation law, see D Milo *Defamation* (supra) at 81-94. Press exceptionalism can readily be rejected if one grounds the protection of freedom of expression in the principle of autonomy (a rationale that we, in any event, reject above) or self-fulfilment. See § 42.5 supra. It seems to us, however, that if one understands freedom of expression as furthering the search for truth and the proper functioning of democracy (and, to a lesser extent, audience autonomy), a degree of press exceptionalism may well be justified, given the institutional role that the media play in communicating information and ideas on a wide range of issues to the public.

[3] See D Zeffertt, A Paizes & A St Q Skeen *The South African Law of Evidence* (2003) 665. See also C Tapper *Cross & Tapper on Evidence* (10th Edition, 2004) at 241-242.

recognition of a journalistic privilege[1] not to divulge the identity of sources, may be viewed conceptually as a weaker manifestation of 'press exceptionalism'. In many open and democratic societies protection of journalistic sources is considered to be an essential component of media freedom,[2] but in South Africa the existence of that journalistic privilege remains uncertain. It is best to distinguish two issues; first, whether a journalist enjoys a legally enforceable privilege in respect of the identity of her source, and secondly, if so, the proper scope or limitations of such privilege.

In civil proceedings, a witness who refuses to answer relevant and admissible questions without proper cause, such as a valid assertion of privilege, may be sentenced to prison for contempt. In criminal proceedings, the statutory peg for this inquiry is s 189 of the Criminal Procedure Act ('CPA')[3] which provides that a witness is compellable and must answer any question put to him and produce any document required to be produced by him, unless he has a 'just excuse' for his refusal or failure to do so.[4] Where no 'just excuse' is demonstrated, the same section empowers a court to sentence the recalcitrant witness to incarceration for considerable periods.[5] In the event that the witness persists in refusing to answer relevant and admissible questions without just excuse, the court may repeatedly renew the prison sentence.[6]

[1] See Zeffertt, Paizes & Skeen (supra) at 665 (The authors observe that the issue of compellability must be distinguished conceptually from the recognition of a privilege. If a witness is not compellable then that witness cannot be required to enter the witness box. On the contrary, if a privilege may be claimed, the witness may still be compellable but may refuse to answer questions within the legitimate scope of the privilege claimed.)

[2] See § 42.7*(d)*(ii)(aa) infra.

[3] Act 51 of 1977.

[4] A number of other statutory provisions incorporate s 189 by reference. See, for example, CPA s 205. Section 189 provides, in relevant part:

> (1) If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to be produced by him, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a just excuse for his refusal or failure, sentence him to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in Part III of Schedule 2, to imprisonment for a period not exceeding five years.
>
> (2) After the expiration of any sentence imposed under subsection (1), the person concerned may from time to time again be dealt with under that subsection with regard to any further refusal or failure.
>
> (3) A court may at any time on good cause shown remit any punishment or part thereof imposed by it under subsection (1).
>
> (4) Any sentence imposed by any court under subsection (1) shall be executed and be subject to appeal in the same manner as a sentence imposed in any criminal case by such court, and shall be served before any other sentence of imprisonment imposed on the person concerned.

[5] Two years in respect of criminal proceedings for certain offences and five years for criminal proceedings involving more serious offences.

[6] CPA s 189(2).

Prior to the Interim Constitution, there was conflicting authority on the existence of a journalistic privilege. In *S v Pogrund* the accused was a journalist who asserted that principles of professional ethics prevented the disclosure of a source.[1] The court, interpreting the equivalent statutory provisions to CPA s 189, held that such principles 'confer no privilege in law on any journalist'[2] and accordingly that protection of a journalistic source did not constitute a 'just excuse'.

In *S v Cornelissen*,[3] however, the court held that a journalist whom the police sought to compel to give a statement was justified in refusing to do so. The journalist had reported on a meeting at the University of the Witwatersrand where a political activist had allegedly sung 'kill the boer, kill the farmer'. The journalist was prepared to swear the truth of his article but not to give a statement under CPA s 205, which provides for the compulsion of statements but expressly incorporates the 'just excuse' provisions of CPA s 189.[4] In addition, CPA s 205(4) requires a Court to be of the opinion, before imposing the prison sentence, that the information is 'necessary for the administration of justice or the maintenance of law and order'.[5] In the circumstances where the police made no attempt first to obtain evidence from other potential witnesses, the Court held that it was not necessary for the administration of justice to obtain the evidence from the journalist concerned. The reasoning of Stegmann J,[6] however, makes it clear that this is not on account of the witness's position as a journalist but would apply wherever there were other potential sources of the information which had not been exhausted. *Cornelissen* is therefore of doubtful authority for the recognition of a journalistic privilege and it has subsequently been held not to support the proposition that a journalist may only be called as a witness as a matter of last resort.[7]

Whatever the situation prior to the Constitution, CPA s 189, as well as those other provisions that incorporate it by reference, must now be interpreted in light of the Bill

[1] *S v Pogrund* 1961 (3) SA 868 (T)(Pogrund had received secret documents issued by one 'Thunder Cracker', the leader of an organization that aimed to disrupt and make a farce of all Republican celebrations planned for 31 May 1961, under the code name operation 'damp squib'. Information concerning celebratory events would be passed to cell leaders, referred to as 'rockets' who would be assisted in their anti-republican disruptions by members of their cells, called 'crackers'. Disruption was to be achieved, inter alia, by cutting off electricity, disrupting toilet facilities, cutting off the speaker system or 'causing a farce at the "moment critique"'. Ibid at 868-869.)

[2] Ibid at 871A. See also *S v Woods* 1978 (1) SA 713 (A), referring to *S v Pogrund* but upholding a refusal to answer questions on grounds of just excuse.

[3] *S v Cornelissen: Cornelissen v Zeelie NO & Andere* 1994 (2) SACR 41 (W)('*Cornelissen*').

[4] CPA s 205(2).

[5] CPA s 205(4).

[6] *Cornelissen* (supra) at 62.

[7] See *Munusamy v Hefer NO & Others* 2004 (5) SA 112 (O)('*Munasamy*') at 120 (Court held that *Cornelissen* did not establish the principle that 'a journalist *qua* journalist has the right to be called as a witness only as a last resort.')

of Rights.[1] The backdrop to any approach to the issue is the principle recognised in *Nel v Le Roux NO*[2] that a witness may never be required to answer a question or produce a document which would unjustifiably infringe a constitutional right.[3] Refusal to answer in such circumstances would always and necessarily constitute a 'just excuse' within the meaning of the legislative provisions. The relevant question, therefore, is whether — and to what extent — FC s 16, and in particular the freedom of the press and other media, demands the recognition of a journalistic privilege.

The issue has arisen squarely only once in proceedings under the Constitution and the Court, correctly in the circumstances, avoided it. In *Munusamy v Hefer NO & Others* a journalist was summoned to testify before a commission of enquiry. The Commission had been established to enquire into allegations that the then National Director of Public Prosecutions had been an apartheid spy. The allegations first arose in articles written by the journalist in question.[4] The journalist sought to be excused entirely from giving evidence before the Commission on account of her desire to protect her sources or, alternatively, to be excused until all other evidence had been led before the Commission. The Chairman of the Commission declined to excuse her temporarily or at all, but ruled that she and her legal representatives would be afforded a proper opportunity to object to particular questions if and when they were put to her. Relying in part on the authority of *Cornelissen*, the journalist applied to the High Court for this ruling to be set aside and for an order that the Commission permanently excuse her or, alternatively, summon her only after all other evidence had been gathered. The Court, in effect, found that the journalist's challenge was premature. There were undoubtedly many legitimate questions relevant to the terms of reference of the Commission that could be put to the journalist which would not require her to identify the sources of her information.[5] She was accordingly a compellable witness, though this did not prevent her from asserting a privilege in respect of particular questions if and when the need arose.

In the absence of any definitive judgment on the protection of journalists' sources from our courts, it is useful to look to foreign courts for assistance.

[1] See L Du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32.

[2] *Nel v Le Roux NO* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC)('*Nel v Le Roux*')(The case concerned an inquiry in terms of CPA s 205 (read with s 189), which permitted witnesses to be called to give evidence on a suspected offence and to be imprisoned if they refused to do so.) The principle has been affirmed in, for example, *Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at paras 75-76; *De Lange v Smuts NO* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC).

[3] *Nel v Le Roux* (supra) at para 7.

[4] The journalist, Munusamy, had made the information available to City Press newspaper when her own newspaper, the Sunday Times, declined to publish it.

[5] *Munusamy* (supra) at 118D.

(aa) Comparative jurisprudence

The journalistic privilege not to disclose a source is recognised as a necessary incident of freedom of the press in many open and democratic societies. Accordingly, the jurisprudence in those countries is concerned not with the existence of the privilege, but with its proper scope or limitation. In the United Kingdom, the legislature has provided that no person responsible for a publication may be required to disclose a source unless it is demonstrated that to do so is necessary in the interests of justice, national security or the prevention of crime. These exceptions have been characterised metaphorically by the Court of Appeal as the 'doorways' to disclosure of sources.[1] The focus of the jurisprudence of the United Kingdom has inevitably turned on the proper interpretation and application of these 'doorways'.[2] The line of cases leading up to the decision of the European Court of Human Rights in *Goodwin v United Kingdom*[3] provides the greatest insight into the approach of the UK courts and the European jurisdiction generally.

The facts are significant. Goodwin, a journalist for a leading trade magazine, received from an established source unsolicited information by telephone concerning the troubled financial position of a private company; one Tetra Ltd. The information was derived from a draft of Tetra's confidential corporate plan which had been removed, unlawfully, while in the custody of Tetra's accountants, either by the source himself or by some other party who had passed it on to the source. Relying on the 'interests of justice' doorway Tetra Ltd sought an order preventing the publication or dissemination of the information and disclosing the identity of the source. The disclosure order was granted by the Chancery Division and upheld both by the Court of Appeal[4] and the House of Lords.[5] The judgment of the House of Lords set a cornerstone for the approach of the United Kingdom courts to the interpretation of the criterion of necessity in the interests

[1] United Kingdom Contempt of Court Act s 10 provides: 'No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.'

[2] See *X Ltd & Another v Morgan-Grampian (Publishers) Ltd & Others* [1991] 1 AC 1, [1990] 1 All ER 616, 1990 2 WLR 421 ('*X v Morgan-Grampian CA*'). The use of the 'doorways' metaphor is significant because it reflects the manner in which the United Kingdom courts have approached the journalistic privilege. The privilege is presumptive with the onus upon those seeking the disclosure of sources. The statutory exceptions are the 'doorways' to disclosure of the source, which are not presumptively open but rather presumptively closed.

[3] *Goodwin v The United Kingdom* [1996] 22 ECHR 123 ('*Goodwin*').

[4] *X Ltd & Another v Morgan-Grampian (Publishers) Ltd & Others* [1991] 1 AC 1, [1990] 1 All ER 616, 1990 2 WLR 421 ('*X v Morgan-Grampian CA*').

[5] *X Ltd & Another v Morgan-Grampian (Publishers) Ltd & Others* [1991] 1 AC 1, [1990] 2 All ER 1, 1990 2 WLR 1000 ('*X v Morgan-Grampian HoL*').

of justice and accordingly for the journalistic privilege more generally.[1] The relevant part of the speech of Lord Bridge of Harwich in this regard is often referred to and bears quoting:

> Construing the phrase 'in the interests of justice' in this sense immediately emphasises the importance of the balancing exercise. It will not be sufficient, per se, for a party seeking disclosure of a source protected by s 10 to show merely that he will be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he bases his claim in order to establish the necessity of disclosure. The judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached.[2]

On referral to the European Court of Human Rights at the instance of the journalist, the European Court found that the disclosure order imposed by the

[1] The additional 'doorways' in the UK legislation — namely, national security and the prevention of crime — were not considered to pose the same interpretive difficulties. See *X v Morgan-Grampian HoL* (supra) at 7 ('I cannot help wondering whether these dicta do not concentrate attention too much on only one side of the picture. They suggest that in determining whether the criterion of necessity is established one need only look at, in the one case, the interests of national security and, in the other case, the prevention of crime. In the context of cases dealing with those two grounds of exception to the protection of sources, it is perfectly understandable that they should do so. For if non-disclosure of a source of information will imperil national security or enable a crime to be committed which might otherwise be prevented, it is difficult to imagine that any judge would hesitate to order disclosure. These two public interests are of such overriding importance that once it is shown that disclosure will serve one of those interests, the necessity of disclosure follows almost automatically though even here if a judge were asked to order disclosure of a source of information in the interests of the prevention of crime, he 'might properly refuse to do so if, for instance, the crime was of a trivial nature'. . .. But the question whether disclosure is necessary in the interests of justice gives rise to a more difficult problem of weighing one public interest against another.')

[2] *X v Morgan-Grampian HoL* (supra) at 7 (Lord Bridge continued: 'It would be foolish to attempt to give comprehensive guidance as to how the balancing exercise should be carried out. But it may not be out of place to indicate the kind of factors which will require consideration. In estimating the importance to be given to the case in favour of disclosure there will be a wide spectrum within which the particular case must be located. If the party seeking disclosure shows, for example, that his very livelihood depends on it, this will put the case near one end of the spectrum. If he shows no more than that what he seeks to protect is a minor interest in property, this will put the case at or near the other end. On the other side the importance of protecting a source from disclosure in pursuance of the policy underlying the statute will also vary within a wide spectrum. One important factor will be the nature of the information obtained from the source. The greater the legitimate public interest in the information which the source has given to the publisher or intended publisher, the greater will be the importance of protecting the source. But another and perhaps more significant factor which will very much affect the importance of protecting the source will be the manner in which the information was itself obtained by the source. If it appears to the court that the information was obtained legitimately this will enhance the importance of protecting the source. Conversely, if it appears that the information was obtained illegally, this will diminish the importance of protecting the source unless, of course, this factor is counterbalanced by a clear public interest in publication of the information, as in the classic case where the source has acted for the purpose of exposing iniquity. I draw attention to these considerations by way of illustration only and I emphasise once again that they are in no way intended to be read as a code.')

domestic courts of the United Kingdom unjustifiably interfered with Goodwin's right to freedom of expression under art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In weighing the importance of the journalistic privilege, the European Court noted that:

> Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of contracting states and is affirmed in several international instruments on journalistic freedoms.
>
> . . .
>
> Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with art 10 of the convention unless it is justified by an overriding requirement in the public interest.[1]

In addition to the 'overriding requirement', the Court held that art 10(2) requires a reasonable relationship of proportionality between the legitimate aim which the disclosure order is intended to achieve and the means deployed to achieve this aim.[2] On the facts of *Goodwin* the Court found that such proportionality was absent. It held that the publication ban was sufficient to protect Tetra Ltd against further publication and dissemination of the material. The disclosure order was unnecessary to achieve this purpose. Beyond this, a company's interest in rooting-out the disloyal employee was not, in the Court's view, a sufficient reason for overriding the central values underlying the journalistic privilege.[3]

Never enamoured with a reversal in Strasbourg, the response of the United Kingdom courts to *Goodwin* has been revealing. The Court of Appeal in *Camelot Group v Centaur Ltd* held that the tests applied by the European Court and the House of Lords were substantially the same.[4] The two Courts, it was held, applying the same principles, simply reached different conclusions on the same facts;

[1] *Goodwin* (supra) at para 39. The majority of the Court referred with approval to the 'Resolution on Journalistic Freedoms and Human Rights' adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) and the European Parliament's 'Resolution on the Confidentiality of Journalists' Sources' OJ 1994 C44 (18 January 1994) 34.

[2] *Goodwin* (supra) at para 46.

[3] Ibid at paras 42-46 (In reaching this conclusion, the European Court held that it is not sufficient for a party seeking disclosure of a journalist's source to show merely that he or she requires disclosure in order to exercise a legal right or avert a threatened legal wrong. Ibid at para 45. Moreover, it is significant that the Court overturned the decisions of the domestic courts notwithstanding its express recognition of the margin of appreciation doctrine in terms of which domestic courts enjoy a broad discretion in respect of the application and interpretation of domestic law under the Convention. As the European Court noted, the assessment by the domestic courts as to whether there was a 'pressing social need' which overrides the journalistic privilege was subject to this margin of appreciation. Ibid at para 40.)

[4] [1999] QB 124 (CA)('*Camelot*').

a conclusion as unsurprising as two courts reaching different conclusions on whether the same course of conduct is negligent.[1] Although this attempt to reconcile the two approaches is unconvincing,[2] it explains the emphasis the United Kingdom courts have placed on the facts of each case. This approach has allowed the courts to lean in favour of overriding the privilege notwithstanding the stringency of the test in principle and the incidence of the onus, often with disturbing and counter-intuitive results.[3]

[1] Ibid at 131 (This, the Court of Appeal held 'is no more surprising legal phenomenon than this court concluding that a particular course of conduct amounted to negligence when the court of first instance concluded that the very same course of conduct did not amount to negligence.')

[2] The House of Lords adopted a test more akin to a direct utilitarian calculus emphasised by the 'weighing' or 'balancing' analogy; the benefits of protecting the source from disclosure are to be weighed against the prejudice to the complaining party. By contrast, the European Court places a heavy onus on the party seeking to upset the journalistic privilege to demonstrate that there is an overriding requirement in the public interest in favour of the disclosure of the source and that the means of achieving this benefit is proportionate to the aim. If one is to utilize the 'weighing' analogy of the House of Lords, the scales, on the approach of the European Court, begin heavily weighted in favour of the journalistic privilege. The courts of the United Kingdom begin with the scales evenly balanced. In our view, the judgment of the Court of Appeal in *Camelot* is best read as an implicit rebuke of the European Court for failing to accord the English courts a sufficient margin of appreciation, in accordance with established Convention law.

[3] See, for example, *Camelot* (supra)(Camelot was a company — whose controlling stake was owned by public companies — which had secured the monopoly to run the national lottery in the United Kingdom. Draft financial statements were stolen by an employee and leaked to the press. The purpose of the leak was to disclose unusually high payments to Camelot's directors at the expense of the charities which the lottery was established to support. The leak gave rise to a series of press articles which resulted in a public storm. The directors were called to account to government and this led ultimately to a reduction in the payments to the directors concerned. Camelot secured urgent interdicts to prevent further dissemination or publication of the draft statements, but also sought delivery of the draft statements that would, by their nature, reveal the source of the leak. The High Court obliged, and the order was confirmed by the Court of Appeal. Distinguishing the facts from those in the *Goodwin* case, the Court of Appeal held that of fundamental importance was the fact that Camelot had two purposes in seeking the order which would reveal the source. The first was to prevent further disclosure of those documents. The second was to identify the disloyal employee and thereby to prevent further leaks. Both purposes were legitimate, and the second would only be served by discolsure of the source. Moreover, the Court held that there was no substantial public interest in the leaking of the draft statements as the final statements were due for release in due course and would have contained substantially similar information. On the facts, the Court held that there were therefore sufficiently strong reasons to outweigh the important public interest in protection of press sources. But the facts could easily have led the Court to the opposite conclusion. Camelot was, in effect, a public company overseeing public funds. The United Kingdom Courts in *X v Morgan-Grampian CA* (supra) and *X v Morgan-Grampian HoL* (supra) repeatedly observed that the public status of a company would add significant weight to the benefit of protecting the source of a leak. In addition, in *Goodwin* the European Court held that uncovering disloyalty was not a competent basis for disclosure. On these grounds alone the facts of *Camelot* more strongly support upholding the journalistic privilege than did those in *X v Morgan-Grampian*. Moreover, the fact that the final statements would soon be disclosed could, for two reasons, have weighed in favour of protecting disclosure of the source. First, since the excesses of the directors would have been revealed in any event, there is a diminished basis for compromising the fundamental press freedom in requiring the disclosure of the source. Second, the final statements might have afforded diminished emphasis to the directors' remuneration or allowed Camelot to 'spin' the statements so as to distract from the remuneration issue.). See also *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29; [2002] 4 All ER 193, [2002] UKHL 29, [2002] 1 WLR 2033, 67 BMLR 175 (HL)('*Ashworth*')(The Court ordered disclosure where the source, in all likelihood an

A serious deficiency of the UK courts' approach is that it decreases the level of foreseeability. This has related consequences for the rule of law and freedom of expression. One of the requirements of the rule of law is that laws must be sufficiently precise to allow reasonable individuals to plan their actions.[1] If the law is too vague, or the test of transgression too open-textured, this not only undermines the rule of law, it will also have a chilling effect on expression since it will leave journalists and their sources unable to determine in advance whether their actions will be afforded the protection of the privilege. In *Goodwin* the European Court found that the discretion in relation to that Court's version of the journalistic privilege did meet this forseeability requirement.[2] This was of course before the dictum in *Camelot* which attempts to reconcile, we suggest by fiat, the approaches of the European and United Kingdom courts. The inevitable consequence of this has been a line of cases which seeks to distinguish *Goodwin* on the facts rather than by recourse to principle leading, at times, to counter-intuitive results.

Despite its drawbacks, the case law in the wake of the *Goodwin* line of decisions has considerably distilled the UK courts' approach to the privilege. The following principles are discernable: The formal test to be applied in determining whether overriding the privilege against disclosure is warranted is whether the disclosure is necessary and proportionate.[3] There is a formal onus on the party seeking to override the privilege in meeting this test.[4] While the test applied by the European Court and the United Kingdom courts is the same, in applying the test, the UK court enjoys a wide discretion.

employee, was privy to confidential medical records at a secure state mental health hospital and had divulged details of a patient's medical record. Disclosure was ordered notwithstanding that much of the information was already in the public domain and had been placed there by the patient himself in the course of prior court proceedings, and despite the articulation by Lord Woolf CJ that the protection of journalists' sources 'makes a significant contribution to the ability of the press to perform their role in society'. Ibid at para 66. The Court emphasised the paramount value of medical confidentiality to the institutional integrity of medical institutions. The institution therefore had an interest in discovering the source of the leak so as to prevent further leaks. Ibid at para 63. The fact that the information is paid for was also held to diminish the claim to privilege.)

[1] See generally L Fuller *The Morality of Law* (Revised Edition, 1969); L Fuller 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 *Harvard LR* 630. Of Fuller's eight principles of legality, this principle is perhaps the least contentious. Along with the publicity requirement, this principle is generally regarded as an uncontroversial requirement for something to be a valid law.

[2] *Goodwin* (supra) at para 31 referring with approval to *Tolstoy Miloslavsky v United Kingdom* (13 July 1995) Series A 316-B at para 37 ('The Court reiterates that, according to its case-law, the relevant national law must be formulated with sufficient precision to enable the persons concerned — if need be with appropriate legal advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. A law that confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference.')

[3] *Ashworth* (supra) at para 61.

[4] *Goodwin* (supra).

Moving to the United States, the First Amendment extends no privilege to a journalist against being compelled to reveal the identity of a source in respect of a federal crime. This was the proposition established, by a narrow majority of the Supreme Court, in the leading case *Branzburg v Hayes*.[1] It does not matter whether the source herself was involved in the commission of the crime or merely provided information as to others' criminal conduct.[2] Any doubt which may have existed as to the categorical nature of this dictum has recently been settled in *Judith Miller*.[3]

The circumstances of *Miller* are notorious. Senior members of the George W Bush Administration leaked the identity of a CIA agent, Valerie Plame, in order

[1] 408 US 665, 92 S Ct 2646, 33 L Ed 2d 626 (1972)('*Branzburg*'). The majority was 5-4. The separate concurrence of Justice Powell, which established the majority, was notoriously opaque and spawned a generation of scholarly and judicial First Amendment analysis and debate as to the proper scope of the dictum in *Branzburg*. For a representative sample, see *NY Times Co v Gonzales* 459 F 3d 160, 172-73 (2nd Cir, 2006)(Recognised qualified privilege); *Zerilli v Smith* 656 F 2d 705, 711 (DC Cir, 1981)('*Zerilli*')(Affirmed qualified privilege); *Riley v City of Chester* 612 F 2d 708, 715-16 (3d Cir, 1979)(Affirmed qualified privilege emphasising that where testimony of journalist is relatively insignificant in context of overall evidence this weighs heavily against erosion of privilege); *McKevitt v Pallasch* 339 F 3d 530, 532 (7th Cir, 2003) (scathingly critical of the line of cases which seeks to discern the recognition of a privilege in *Branzburg*); see also A Lewis 'Panel Discussion and Collected Essays: Are Journalists Privileged?' (2008) 29 *Cardozo L Rev* 1431. Of Powell J's concurrence one of the dissenting judges, Justice Stewart, later wrote extra-judicially that the Supreme Court had rejected claims to a journalist's First Amendment privilege to protect their sources 'by a vote of five to four, or, considering Mr. Justice Powell's concurring opinion, perhaps by a vote of four and a half to four and a half'. P Stewart 'Or of the Press' (1975) 26 *Hastings LJ* 631, 635. The controversy is apparent in almost every First Amendment case that revisits the issue. See, eg, *In re: Grand Jury Subpoena, Judith Miller* 297 F 3d 964 (2005)('*Miller*'). In *Miller* it was argued that since Powell J's concurrence secured the majority, the scope of the *Branzburg* dictum is confined to the scope of Powell J's judgment, as the 'least common denominator', and cannot be derived from the judgment of the plurality of the Court. *Miller* (supra) at 969 referring to *McKoy v North Carolina* 494 US 433, 462, 108 LEd 2d 369 (1990). This interpretation of *Branzburg* was rejected in the unanimous judgement of the Court in *Miller* which held that while Powell J had written a separate concurrence he had also endorsed the reasons for the decision of the plurality of the Court and that accordingly the plurality judgment was binding in respect of the absence of a First Amendment privilege. *Miller* (supra) at 969-970. It is of historical interest that Powell J's judicial conference notes pertaining to the deliberations in *Branzburg* have recently been discovered and published. They indicate unequivocally that Powell recognised a privilege, though not a constitutional privilege, and was concerned rather with the limitations on such privilege:

> A few days after the argument in Branzburg, Justice Powell prepared notes of the court's private conference on a form that looks a little like a miniature-golf scorecard. In contrast to his meandering concurrence, the few crisp sentences of notes were relatively clear. 'We should not establish a constitutional privilege,' Justice Powell said, referring to one based on the First Amendment. Such a privilege would create problems 'difficult to foresee,' among them 'who are "newsmen" — how to define?' But, he added, 'there is a privilege analogous to an evidentiary one' — like those protecting communications with lawyers, doctors, priests and spouses — 'which courts should recognize and apply' case by case 'to protect confidential information'.

A Liptak 'A Justice's Scribbles on Journalists' Rights' *New York Times* (7 October 2007).

[2] *Branzburg* (supra) at 692 and 695.

[3] *In re: Grand Jury Subpoena, Judith Miller* 297 F 3d 964 (2005)('*Miller*').

to politically damage her husband, a former ambassador, Joseph Wilson.[1] Leaking the identity of an intelligence agent is a federal crime and the journalists involved refused to comply with a Grand Jury subpoena which would have required them to reveal the source of the leak even though they had not published the name of the intelligence agent. The Court of Appeals unanimously held that there was no doubt as to the authority of the dictum in *Branzburg*[2] and the Supreme Court declined to hear any further appeal.[3]

The failure to recognise a privilege flowing directly from the US Constitution does not, however, close the door on the privilege in the United States. In *Miller*, while unanimous in their finding, on the authority of *Branzburg*, as to the absence of a First Amendment privilege, the Court was heavily divided as to the whether the *Branzburg* Court had left room for the recognition of a privilege at common law, and, if so, the proper scope of such privilege.[4] Tatel J, the only judge to find that there was a common-law privilege noted that the Court in *Branzburg* had expressly invited the legislature to define such a privilege[5] and, subsequent to *Branzburg*, the legislature had authorised the courts to develop evidentiary privileges in federal cases in light of 'reason and experience'.[6] As to the scope of the privilege, Tatel J favoured the so-called 'balancing approach' which emphasises the facts of each case.[7] He also identified guidelines to be followed when

[1] Wilson had revealed that he had been sent to Niger in 2002 in order to investigate whether Iraq had sought to purchase uranium and that he had reported that there was no credible evidence to support this claim. The claim that Iraq had sought to purchase uranium from Africa was central to the Bush Administration's contention that Iraq sought to develop nuclear weapons. This claim became the central basis for the subsequent US invasion of Iraq.

[2] *Miller* (supra) at 970 ('Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source. The Highest Court has spoken and never revisited the question. Without doubt, that is the end of the matter.')

[3] Writ of certiorari denied: *Miller v United States* 125 S Ct 2977, 162 LEd 2d 906 (2005).

[4] Each of the three members of the Appeal Court wrote separate judgments on this issue; Sentelle J found, on the authority of *Branzburg*, that there was categorically no common law privilege, Tatel J held there to be a qualified privilege (though he found on the facts that the appellants did not meet the requirements of the privilege) and Henderson J held it unnecessary to decide the question.

[5] *Branzburg* (supra) at 706.

[6] Federal Rules of Evidence, Pub L No 930595 88 Stat 1926 (1975) Rule 501. The Supreme Court had previously found, albeit in the context of a different privilege, that this legislative authorisation evidenced 'an affirmative intention not to freeze the law of privilege' but to 'leave the door open to change'. *Miller* (supra) at 989 citing with approval *Trammel v United States* 442 US 939, 99 S Ct 2879, 61 LEd 2d 309 (1980)(justifying privilege against adverse spousal testimony in terms of the sanctity of the relationship).

[7] *Miller* (supra) at 991, quoting the Justice Department *Subpoena Guidelines* 28 CFR § 50.10(2)('[T]he approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice. . .. [C]ourts applying the privilege must consider not only the government's need for the information and exhaustion of alternative sources, but also the two competing public interests lying at the heart of the balancing test. Specifically, the court must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value. That framework allows authorities seeking to punish a leak to access

conducting the balancing exercise including that the claim on privilege will always be greater in the civil as opposed to criminal cases[1] and that while exhaustion of other avenues of determining the identity of the source is a necessary condition for overriding the privilege, it is not sufficient.[2]

In respect of the foreseeability problem in applying the balancing test, Tatel J stressed that the decision whether to disclose the information to the journalist is always ultimately the source's decision:

> Indeed, the point of the qualified privilege is to create disincentives for the source — disincentives that not only promote the public interest, but may also protect journalists from exploitation by government officials seeking publication of damaging secrets for partisan advantage. Like other recipients of potentially privileged communications — say, attorneys or psychotherapists — the reporter can at most alert the source to the limits of confidentiality, leaving the judgment of what to say to the source. While the resulting deterrent effect may cost the press some leads, little harm will result, for if the disincentives work as they should, the information sources refrain from revealing will lack significant news value in the first place.[3]

Canadian law distinguishes between two fundamental categories of privilege, so-called class or blanket privilege and case-by-case privilege.[4] Under class privilege, of which attorney-client and police-informer privilege are the standard examples, the subject matter is presumptively privileged and the onus is on those seeking to

key evidence when the leaked information does more harm than good. . . while preventing discovery when no public interest supports it'. Tatel J adopted this approach despite its rejection in the context of other forms of privilege. He noted that *Jaffee* (extending the psychotherapists privilege to social workers) rejected the balancing test not because other jurisdictions had done so but because 'making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.' *Miller* (supra) at F 2d 991 referring to *Jaffee* (supra) at 1923. See also *Upjohn Co v United States* 449 US 383, 393 (1981); C Clark 'The Recognition of a Qualified Privilege for Non-Confidential Journalistic Materials: Good Intentions, Bad Law' (1999) 65 *Brooklyn LR* 369.

[1] *Miller* (supra) at 970 citing *Zerilli* (supra)(Even prior to *Miller*, as both Sentelle J, in the judgment of the Court, and Tatel J in his separate judgment noted, it had been settled that *Branzburg* is not controlling authority in the context of civil cases 'where the public interest in effective law enforcement is absent'.)

[2] Some of the other guidelines were: *(a)* the fact that it is difficult to determine the definitional limits of a 'journalist', particularly in view of rapidly developing unconventional forms of journalism, such as bloggers, is not an obstacle to recognising the privilege in standard cases, leaving the further extension of the privilege to future cases. See, for example, Note 'Developments in the Law of Media: II Protecting the New Media: Application of The Journalist's Privilege to Bloggers' (2007) 120 *Harvard LR* 996. *(b)* It is important to emphasise that the privilege is not analogous to the medical or legal privilege in so far as it is the journalist's privilege and not that of the source. This entails that only the journalist, not the source, may waive the privilege. As Tatel J notes in *Miller*, if it were the source's privilege then this might easily be undermined by government or employees demanding waivers as a condition of employment or in advance of any leak. *Miller* (supra) at 994. *(c)* The manner in which the reporter treats or uses the received information makes no difference in determining whether the privilege should be upheld. Tatel J held, on the facts of *Miller*, that it did not matter that the journalists themselves had not disclosed that Valerie Plame was a CIA agent in their publications.

[3] *Miller* (supra) at 1001.

[4] For a discussion on the origin of the distinction, see *R v McClure* [2001] 1 SCR 445, 2001 SCC 14 (*'McClure'*) at paras 27-29.

displace the privilege to demonstrate that no privilege should apply.[1] Journalist-source privilege (like that involving priest-congregant and doctor-patient)[2] is not extended this presumptive protection. Instead, the applicability of the privilege is determined by the Court on a case-by-case basis applying the so-called Wigmore test:[3]

(i) The communications must originate in a confidence that they will not be disclosed;
(ii) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
(iii) The relationship must be one which in the opinion of the community ought to be 'sedulously fostered'; and
(iv) The injury to the relationship from the disclosure of the communications must be greater than the benefit gained from the correct disposal of the litigation.[4]

In a recent decision, the Ontario Court of Appeal expressly referred with approval to that part of the United States jurisprudence which emphasised the high value to be assigned to combating crime when balancing the competing interests.[5] The Court paraphrased the statement of White J in *Branzburg* as '. . .it is not necessarily better to write about crime than to do something about it.'[6]

Even in cases where the journalist is ordered to reveal a source, the Canadian courts have held that the contempt power as a means of coercing compliance must be used cautiously and only as a last resort. Courts must apply the principle of least intrusive means of securing compliance.[7] The Courts have embraced the

[1] For a description of 'class privilege', see *R v Gruenke* [1991] 3 SCR 263 at 286 (Lamer CJ).

[2] *St Elizabeth Home Society v Hamilton* [2008] OJ No 983, 2008 ONC LEXIS 1179, 2008 ONCA 182 ('*St Elizabeth Home Society*') at para 24.

[3] JH Wigmore *Evidence in Trials at Common Law* (McNaughton Revised Edition, 1961) Vol 8, 527.

[4] See also *McClure* (supra) at para 29; *A M v Ryan* [1997] 1 SCR 157 at para 30; *R v National Post* [2008] OJ No 744, 2008 ONCA 139 ('*National Post*') at para 79, *St Elizabeth Home Society* (supra) at paras 25-26. Notably, in the most recent considerations of the issue, *National Post* (supra) and *St Elizabeth Home Society* (supra), the Ontario Court of Appeal has emphasised that the approach to journalistic privilege is the same whether it is founded in the common law or s 2*(b)* of the Canadian Charter, except that the application of the Wigmore criteria at common law must be influenced by the relevant provisions of the Charter. *National Post* (supra) at para 74. At the time of writing the Supreme Court of Canada had granted an application for leave to appeal, but had not yet delivered judgment.

[5] On the facts of *National Post* — the journalist had received documents implying that the Prime Minister had a conflict of interest in obtaining a loan — the Appeal Court was particularly keen to order the journalist to deliver up an envelope containing documents supplied by the source for two reasons. First, there was an allegation that the documents (which might disclose the source) were forged. Second, it was not contended by the law enforcement agencies that the documents concerned simply contained evidence of the crime, but that the documents were themselves real evidence and therefore part of the commission of the crime. It was alleged that the sending of the documents to the journalist was part of a criminal conspiracy to implicate the Prime Minister of Canada in wrongdoing and therefore to force him out of office. The physical documents could be subjected to forensic analysis which might aid in the identification of the source. The severity of the alleged crime was added to the scales when the Court balanced the competing interests. *National Post* (supra) at paras 115-120.

[6] *National Post* (supra) at para 116.

[7] *St Elizabeth Home Society* (supra) at paras 40-41.

so-called *Dagenais/Mentuck* test.[1] The test, which has been applied in a wide range of contexts involving the discretionary application of competing Charter rights, directs courts, rather than approaching matters as a direct clash or conflict between two or more Charter rights or values, to explore alternative measures and to minimise the impact upon the rights and values implicated by incorporating the proportionality and minimal impairment principles enshrined in s 1 of the Charter.[2]

(bb) The preferred approach to the privilege under the Final Constitution

It is possible to discern, at the highest level of generality, certain common principles in the foreign jurisprudence which may inform an approach under FC s 16. The courts assume, in one form or another, a wide discretion as to whether to apply the privilege; a discretion which is extremely sensitive to the facts of each particular case. Moreover, most courts reach for the metaphor of 'balancing' to structure the exercise of this discretion. However, part of the difficulty with this approach is to articulate what precisely is to be added to the scales on each side in a manner that does not pre-select the outcome.[3] It is difficult to avoid the conclusion that 'balancing' barely advances the analysis.

Beyond the poverty of the balancing metaphor however, there is a fundamental difference in the types of 'balancing', even at this ephemeral level. On the one hand there are those courts[4] that appear to approach the issue as a consequentialist balancing of equal interests on either side. On the other hand are those courts[5] that apply a modified consequentialist analysis, holding that there is a powerful presumption in favour of the protection of the journalistic source arising out of the particular importance of the privilege to media freedom and the importance of media freedom to the democratic project.[6] The party seeking

[1] Ibid at paras 46-49. The test is named after the Supreme Court decisions in which the approach was developed. See *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835 ('*Dagenais*'). See also *R v Mentuck* [2001] 3 SCR 442.

[2] *St Elizabeth Home Society* (supra) at paras 47-49.

[3] For example the balancing expressed by the US Court in *Miller* is 'between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice.' *Miller* (supra) at 991. This formulation merely begs the question as to what is in the public interest on each side of the equation and how this is to be 'balanced'. Under such an analysis, the Court's conclusion is likely to determine its reasons rather than the converse.

[4] Such as the United States courts that recognise the privilege in any form. Cf *Miller* (supra) and the fourth Wigmore criterion applied by the Canadian courts, such as *National Post* (supra).

[5] The United Kingdom and European courts applying the *X v Morgan-Grampian/Goodwin v United Kingdom* approach. However, this attempt to distil common principle must be qualified by the analysis, undertaken above, of the substantive differences between the UK and European approaches despite the professed formal similarity of the approach adopted.

[6] In consequentialist terms, under this analysis the source protection is always assigned a very high starting value or alternatively, the values underlying source protection are held to have some *intrinsic* value within the consequentialist calculus — they are pockets of intrinsic value. Bernard Williams' critique of the structure of consequentialism runs as follows: 'No one can hold that everything, of whatever category, that has value, has it in virtue of its consequences. If that were so, one would just go on for ever, and there would be an obviously hopeless regress. That regress would be hopeless even if one takes the view, which is not an absurd view, that although men set themselves ends and work towards them, it

disclosure of the source bears a heavy onus of persuading these courts that the privilege should not be extended in the particular case.[1] The onus can be discharged only if the party seeking disclosure of the source demonstrates that there is, to use the language of *Goodwin*, 'an overriding requirement in the public interest' in favour of disclosure and that the means of achieving this benefit is proportionate to the aim.[2] To put it differently, lifting of the privilege must be both proportionate — in the sense that it is the least invasive means of achieving an objective of sufficient importance — and necessary — there must be no other means of achieving the objective.

Of these two approaches to 'balancing' we submit that only the latter approach gives proper effect to the status of the privilege as an incidence of the fundamental right to press freedom as opposed to a right or interest of lesser status. However, even under a modified 'balancing' approach there will be a high level of uncertainty in the manner in which a particular court will exercise its discretion in a particular case. This has real consequences for the rule of law, as discussed above, and may have a 'chilling' effect as journalists and their sources struggle to foresee whether the source's anonymity will be respected. It is therefore desirable that our courts craft lower-order principles with as great a degree of specificity as possible. We suggest that the more detailed considerations set out below provide a starting point for developing those principles.

First, it is important to recognise that the privilege is that of the journalist and not the source, and accordingly it cannot be waived by the source. In many cases, pressure, internal and external, implicit and explicit, is brought to bear on the source to waive privilege in order to 'let the journalist off the hook'. The recognition that the source cannot waive the privilege is intended to remove the inevitable corrosion that this pressure inflicts on the privilege. Second, it is not necessary that the 'chilling effect' which will result from disclosure of journalistic sources be proved by empirical evidence in each case.[3] Third, the United

is very often not really the supposed end, but the effort towards it on which they set value — that they travel, not really in order to arrive (for as soon as they have arrived they set out for somewhere else), but rather they choose somewhere to arrive, in order to travel. Even on that view, not everything would have consequential value; what would have non-consequential value would in fact be travelling, even though people had to think of travelling as having the consequential value, and something else — the destination — the non-consequential value'. B Williams 'A Critique of Utilitarianism' in JJC Smart & B Williams *Utilitarianism For & Against* (1973).

[1] Cf § 42.42.9*(h)*(iii) infra.

[2] For more on *Goodwin* see § 42.7*(d)*(ii)(aa) supra.

[3] See *St Elizabeth Home Society* (supra) at paras 31-33 ('I am also unable to accept the submission of the Attorney General for Ontario that we should exclude consideration of the *Charter* on the ground that there is insufficient evidence to support the claim that disclosing the identity of the source would have a "chilling effect" on journalists' sources and the gathering of news. As I have noted, there was some evidence to this effect provided at the show cause hearing by the appellant's editor and the expert witness. For the following reasons, it is my view that no more was required. Courts routinely craft legal rules without the need for elaborate empirical evidence. They instead employ their judgment as to the likely impact rules will have on human behaviour, particularly where the issue is encouraging the free flow of information.')

Kingdom courts have placed significant emphasis on the value of discovering the identity of a disloyal employee as a basis for ordering disclosure.[1] This cannot be consistent with the recognition of the privilege as central to the fundamental right of press freedom.[2]

Fourth, it should not be sufficient for a party seeking disclosure to show merely that without disclosure it will be unable to exercise a legal right or avoid a threatened legal wrong. To do so would be to ignore the pedigree of the privilege by placing a fundamental right on the same footing as an ordinary right. The fifth guideline, which is related to the fourth, is that civil disputes should seldom provide an occasion for compromising the privilege. This is particularly so where the party seeking disclosure is a listed company or where the information disclosed was relevant to wrongdoing which has public significance, such as corrupt activities in a national lottery company or a large bank or accounting firm. Sixth, notwithstanding the approach of the House of Lords in *Ashworth*,[3] whether the information was purchased from the source should be relevant to disclosure only where the party seeking disclosure has a purely private interest. Where, for example, the source has disclosed information of wrongdoing that is of public significance, the fact that the information was purchased should be regarded as insignificant when considered against the public benefit of the information emanating from the source reaching the public domain.

Seventh, it is correct that the privilege will be more easily overridden in contexts where the source has disclosed information of criminal offences, which may require identification of the source for effective investigation and prosecution of the crime. There is, inescapably, an important public interest in law enforcement. However, the nature of the criminal act is also relevant; a source that discloses information regarding the criminal conduct of a public official should be deserving of greater protection than one who discloses general criminal conduct. To remove that protection in the case of wrongdoing of significant public interest may discourage the information from reaching the public domain at all. Eighth, the fact that alternative avenues of determining the identity of the source have been exhausted should constitute a necessary but not sufficient condition for overriding the privilege. Ninth, the manner in which the journalist utilises the information of the source should be relevant to determining whether the privilege is upheld. A journalist who uses the privilege responsibly, particularly in a matter of grave public importance, should enjoy greater confidence that her source will be protected.[4]

[1] For more on *Camelot* see § 42.7*(d)*(ii)(aa) supra.

[2] In this respect, the approach of the European Court in *Goodwin* is to be preferred; a private company's interest in rooting out disloyalty should not feature as a good enough reason to override the privilege. *Goodwin* (supra) at paras 42-46.

[3] *Ashworth* (supra) at para 66.

[4] See *Miller* (supra)(The journalists concerned did not disclose the identity of the CIA agent even though the source had informed them of her identity. Notwithstanding this the court did not consider this relevant to the question of whether disclosure should be ordered.)

Tenth, and finally, it is not a challenge to the recognition of the privilege that the legitimate bounds of what constitutes 'journalism' are difficult to identify. It is true that there will be difficult cases, such as whether a lone blogger with a laptop is a journalist and therefore deserving of the privilege. However, this does not detract from the uncontroversial instances of journalism which are 'easy cases' and deserving of the full protection of the privilege.[1]

(e) Freedom of artistic creativity

Many of the fundamental values underlying freedom of expression, discussed above,[2] are emphasised in artistic expression. Artists frequently address themes and issues which are painful or difficult for society, or which are ignored through social prejudice or routine. Moreover, artistic expression is integral to human culture; it is part of individual and social self-definition.

Two textual features of the protection of artistic expression under FC s 16 stand out and must structure the approach to the interpretation of this right. Firstly, unlike many other jurisdictions and instruments,[3] the text of FC s 16 expressly includes artistic expression. Secondly, FC s 16 refers to 'artistic *creativity*' not merely 'artistic expression'.[4] The protection of creativity rather than expression expands the range of artistic endeavours that are protected to include the process of creation.[5] It is not merely the outcome or end product of the artistic process that is protected, but the process of creation itself.[6]

The express inclusion of artistic creativity in the text warrants further examination. Although not expressly included in any of the instruments from which the wording of our Constitution's expression clause is derived, it is now trite in those jurisdictions that artistic expression is protected, and in many cases, that it is considered to lie at the core of protected activity.[7] Why, then, did the drafters

[1] *National Post* (supra) at para 99 ('Case-by-Case approach does not require establishing in advance the legitimate bounds of journalism.')

[2] See § 42.5 supra.

[3] Notably, neither the First Amendment, s 2*(b)* of the Canadian Charter, art 19 of the International Covenant on Civil and Political Rights, art 10 of the European Convention on Human Rights, art 19 of the Indian Bill of Rights (Part III of the Indian Constitution), s 14 of the New Zealand Bill of Rights Act of 1990 nor s 20 of the Constitution of Zimbabwe expressly protect artistic expression.

[4] FC s 16(1)*(c)*.

[5] The *Oxford Dictionary* (10th Edition) defines 'creativity' as follows: 'creative adj. relating to or involving the use of imagination or original ideas in order to create something. n creativity'.

[6] A restrictive interpretation of FC s 16(1)*(c)* would emphasise the elements of originality in 'creativity', suggesting that those wishing to claim the protection of the right must demonstrate this element. This interpretation, it is submitted, would be subversive of the expressive right as a whole which the Constitutional Court has emphasised must be interpreted generously and subject only to the express categorical exceptions listed in FC s 16(2). See § 42.3 supra.

[7] See, for example, *National Endowment for the Arts v Finley* ('*Finley*') 524 US 569, 602, 118 SCt 2168, 141 LEd 2d 500 (1998)(Souter J dissenting — though not on this issue)('It goes without saying that artistic expression lies within this First Amendment protection', citing *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston Inc* 515 US 557, 569, 115 SCt 2338 (1995).)

consider it necessary to specifically mention artistic creativity in FC s 16(1)? There are a number of possible reasons. The first is for historical emphasis. The Court noted in *Islamic Unity* that artistic[1] expression had been particularly suppressed under apartheid and that the Interim and Final Constitutions signalled a fundamental departure from this regime.[2]

Secondly, the drafters sought to place beyond any doubt that artistic expression — like the other specifically enumerated forms of expression in FC s 16(1) — is deserving of protection in its own right and that it therefore lies at the core of the expressive right, not merely in the penumbra.[3] This addresses the highly developed American First Amendment jurisprudence where initially only political expression was considered to lie at the core. It required gradual development at the hands of the courts before even standard forms of artistic expression moved closer to the core of expressive freedom alongside political expression, warranting protection for their own sake and not on account of any political content which they may convey. Even now it is not clear that artistic and political expression occupy the same space in the United States expression jurisprudence.[4] The listing of artistic creativity in FC s 16 provides a short cut in this regard, avoiding some expression khakibos.

The khakibos, however, cannot be altogether evaded, and this suggests a third reason for the overt protection of artistic expression. Two fundamental conceptual dimensions govern the analysis of the scope and application of the artistic right in all jurisdictions: *(a)* the range of activities, acts and endeavours which are, or ought to be, included within the scope of 'artistic expression' (or in our case 'artistic creativity'); and *(b)* the role of context. These two dimensions are related. Expressive activities that may not be justified in certain contexts will not only be tolerated but may lie at the heart of the protection of expressive freedom when

[1] The Court also identified political expression as having been particularly suppressed.

[2] *Islamic Unity* (supra) at para 27, quoted with approval in *Phillips* (supra) at para 27.

[3] The use of the terms 'core' and 'penumbra' in this discussion is not intended to show allegiance to positivist jurisprudence. Rather it is the language employed in many of the cases and is a useful shorthand for articulating broadly those forms of expressive activity, along a continuum, that enjoy greater protection (the corollary of which is that infringements are difficult to justify) versus those that may enjoy lesser protection.

[4] *Finley* (supra) LEd 2d at 568 ('The *constitutional* protection of artistic works turns not on the political significance that may be attributable to such productions, though they may indeed comment on the political, but simply on their expressive character, which falls within a spectrum of protected "speech" extending outward from the core of overtly political declarations. Put differently, art is entitled to full protection because our 'cultural life', just like our native politics, "rests upon [the] ideal" of governmental viewpoint neutrality.' Quoting from *Turner Broadcasting System, Inc v FCC* 512 US 622, 641, 114 SCt 2445, 129 LEd 2d 497 (1994)('*Turner Broadcasting*') and *Joseph Burstyn Inc. v Wilson* 343 US 495, 501, 72 SCt 777, 96 LEd 1098 (1952)(Art 'may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.'))

undertaken in social space that is specifically reserved for artistic expression. The express protection of 'artistic creativity' is therefore significant because once an expressive activity is identified as falling within this constitutional category, limitations on that activity may be more difficult to justify.

(i) *The centrality of context*

As discussed above, the structure of the free speech analysis under FC s 16 entails that the greatest burden of reasoning is borne under the limitations inquiry.[1] The inquiry, as has now been repeatedly affirmed, is essentially one of proportionality.[2] Legislative provisions that are expressly aimed at restricting artistic endeavours or that do so inadvertently by overbreadth — legislative clumsiness — will face particular difficulty in the proportionality inquiry, owing to the special protection afforded to artistic space. This was the unarticulated premise in the Court's reasoning in *Phillips* where liquor licensing laws which might have had the effect of restricting portrayals of nudity in ordinary theatres where alcohol was offered were struck down.[3] While the Court acknowledged that the State has a legitimate interest in regulating the sale of liquor, the licensing laws were too broad to survive the limitations inquiry. The majority held:[4]

> That the section applies to theatres is of particular concern. A theatre liquor licence holder is obliged to maintain a bona fide theatre at which dramatic performances, concerts or plays are presented. The core business of a theatre is to realise protected freedom of expression by presenting artistic creations that communicate thoughts and ideas. There seems to be no basis to distinguish, as the Act purports to do, between theatres that sell liquor for consumption and those that do not. This is particularly so if it is borne in mind that theatres are in effect restricted to selling liquor only to those to whom access has been granted to attend a particular presentation and then only for a period that starts half an hour before the show begins and cannot go beyond half an hour after it ends. Indeed, the provision controls the kind of entertainment that may be provided at licensed theatres instead of controlling behaviour or conduct at these establishments. The provision is far too wide and also misdirected.[5]

The implication of this reasoning is that the same expression (nude dancing) in a different context — such as an ordinary bar — would fall further towards the penumbra of the right and restriction would therefore be easier to justify.

[1] See § 42.3 supra.

[2] See S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[3] *Phillips* (supra) at paras 28-29 (The appellant, who had been charged under the provisions of the Liquor Act 27 of 1989, was the owner of a strip club, not what would commonly be understood to be a theatre. Nonetheless, the Court was conscientious in extrapolating to ordinary theatrical spaces. For further discussion on *Phillips*, see 'Sexually explicit expression' § 42.9*(e)* infra.)

[4] Yacoob J (Langa DCJ Goldstone J, Kriegler J, Mokgoro J, Ngcobo J, O' Regan J and Sachs J concurring.) In addition to signing on to the majority judgment, Ngcobo J and Sachs J wrote separate concurring opinions. Madala J dissented.

[5] *Phillips* (supra) at para 28 (emphasis added).

The centrality of context to the breadth of protection afforded by the free speech right, as distinct from the content of the expressive act, has been repeatedly affirmed in the United States First Amendment jurisprudence.[1] In *Pacifica* a complaint was laid by a listener to a radio station that broadcast a recording of the profane, and now famous, *Filthy Words* monologue first performed for a live audience in a theatre in California by the then ground-breaking stand-up comedian George Carlin.[2] Noting that the routine was 'vulgar, offensive and shocking' the Court held that the context of the broadcast was critical in determining whether the sanction imposed by the regulatory body was constitutionally permissible. The recording was broadcast at about 2 pm on a weekday and the listener laid a complaint with the relevant regulatory body on the basis that it had been heard over the car radio by his child who was accompanying him. Upholding the sanction, the Supreme Court was willing to assume that the expression would be protected in the context of a stand-up comedy theatre[3] but held that it was deserving of diminished protection in an unrestricted broadcast setting at that particular time of day.[4]

The process of expressly delineating in our expression jurisprudence the contextual havens for artistic creativity, both physical and conceptual, has only just

[1] The classic exposition of the relevance of context is that of Justice Holmes in *Schenk v US* (supra) at 52 ('We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.') See further *Cohen v California* 403 US 15, 25 (1971)('*Cohen*')(In *Cohen*, which was not an artistic expression case, the appellant was convicted of disturbing the peace after he entered a court room wearing a jacket which said 'Fuck the Draft', which he then folded and removed. The Court quashed the conviction.); *FCC v Pacifica Foundation* 438 US 726, 98 SCt 3026, 57 LEd 2d 1073 (1978)('*Pacifica*')(*Pacifica* referred with approval to *Cohen*, paraphrasing, 'one occasion's lyric is another's vulgarity').

[2] Carlin was considered the doyen of United States stand-up comedy. He used routines such as this as social satire to take aim at 'what he thought of as the palliating and obfuscating agents of American life – politicians, advertisements, religion, the media and conventional thinking of all stripes'. M Watkins & B Weber 'George Carlin, Comic Who Chafed at Society and Its Constraints, Dies at 71' *New York Times* (24 June 2008).

[3] *Pacifica* (supra) LEd 2d at 1088 ('[W]e may assume, arguendo, that this monologue would be protected in other contexts. Nonetheless, the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context.')

[4] *Pacifica* (supra) at 746-747 (Referring to *Joseph Burstyn Inc v Wilson* 343 US 495, 502-503 (1952) and *Red Lion Broadcasting Co*mpany *v Federal Communications Commission et al (No 2)* 395 US 367 (1969)('*Red Lion Broadcasting*') the Court noted that '[w]e have long recognised that each medium of expression presents special First Amendment problems' and that the broadcast medium received more limited protection because of its 'uniquely pervasive presence'.)

begun.[1] Our Courts will be called upon increasingly to stipulate the context restrictions on expressive acts that are characterised as 'art' and which test expressive boundaries. This is, as discussed above, apparent in the reasoning of the Court in *Phillips* where a standard artistic context — a theatre — was implicated. It is also apparent, though only implicitly, in *De Reuck* where the Court found no basis for a constitutional complaint against a statutory offence of knowing possession of child pornography where the legislative scheme[2] permits possession of such material only on specific application for an exemption in each case to the executive committee of the Film and Publications Board.[3] In doing so, the Court rejected the contention that a defence akin to possession with 'legitimate purpose' was required to save the legislative scheme from overbreadth and hence unconstitutionality.[4] Though it was not directly in issue in *De Reuck*, a feature of the legislative scheme that is particularly noteworthy is that it expressly denies child pornography an 'artistic use'[5] exemption from the highest level of restrictive classification.[6] Accordingly, though in principle on the structure of analysis imposed by FC s 16, all expression, save that expressly excluded, passes the threshold of protected expression, there is only a single basis of justification for expressive acts associated with child pornography, and that is where a *formal criterion* has been satisfied; namely authorisation from the Film and Publications Board.

This is understandable under the Constitution. It is correct that even social space reserved for artistic expression which tests the limits of expressive freedom should not be made available for activities involving child pornography.[7] To extend these spaces to expressive acts involving abuse of children, or to afford them a context in which they are protected, would do violence to the entire constitutional project. From a jurisprudential point of view it is interesting to note that the effect of the legislative scheme which has received constitutional sanction in *De Reuck* — on the limited basis at issue in that case — is that child pornography takes up a position on the continuum of constitutionally protected expressive acts that in effect approaches the categorical exclusions expressly listed in FC 16(2).

[1] See *De Reuck* (supra) at para 33 (The Court recognised that context was important in characterising the true content of an expressive act; in this case in determining whether the material concerned met the definition of 'child pornography'. However it is essential to distinguish conceptually between the role of context in determining meaning (which was what the Court was considering in this passage of *De Reuck*) and the role of context in justifying expressive acts, where the meaning/content of those acts is clear or has been determined. We are concerned in this discussion with the latter.)

[2] The Films and Publications Act 65 of 1996 ('FPA').

[3] See *De Reuck* (supra) at para 13 (The Court observed that this was the effect of the amendments to FPA s 27(1) read with FPA s 22.)

[4] *De Reuck* (supra) at paras 80-83 (The Court held that, notwithstanding that this was a feature of similar legislation in other jurisdictions, it was open to abuse.)

[5] The term employed in the statute is 'artistic publications'.

[6] FPA sched 5 read with sched 9.

[7] In this context, we use to term 'child pornography' in the sense of the depiction of sexual activity involving actual children (i.e. real and not simulated child pornography). For a discussion of the ambit of child pornography under the FPA, see § 42.9*(e)* infra.

(ii) *What is art?*

We suggest above that one reason for the express protection of 'artistic creativity' under FC s 16(1) is that expressive acts that have an artistic purpose, are part of the artistic process or are in-and-of themselves 'art', will be deserving of increased protection by making any infringement more difficult to justify under the limitations clause. The question of what activities qualify as acts of artistic creativity will therefore be central to developing South African expression jurisprudence.[1]

Standard categories of artistic expression that are recognised as such in all comparable jurisdictions include: music and poetry;[2] films, programmes broadcast by radio and television;[3] live entertainment such as live music and dramatic works;[4] and paintings, drawings, engravings and sculpture.[5] Though it is not always explicit, an analysis of the cases in other jurisdictions reveals that the type of medium itself is not a sufficient condition for expression to be considered as 'art'; context, as discussed above, is fundamentally important. In addition, some courts have examined intentionality or purpose in order to determine whether an act qualifies as a form of artistic expression.[6]

As innovative artistic forms challenge the limits of the concept of art, the temptation on the part of courts (and legislators) elsewhere to breach the 'forbidden line' of viewpoint neutrality by examining the content of the expressive act has grown proportionately stronger.[7] The temptation appears to be strongest where the artistic expression involves graphic sexual content, violence or subversive political or social comment. In these cases obscenity and indecency laws are

[1] If the assumption is wrong, as indicated above, then there is really little remaining reason to distinguish 'artistic creativity' from other forms of expression. Another way of putting this is that the express protection of artistic creativity entails at least a weak form of 'artistic exceptionalism'.

[2] See *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* 515 US 557, 569, 115 S Ct 2338, 132 LEd 2d 487 (1995)('*Hurley*').

[3] See *Schad v Mount Ephraim* 452 US 61, 65, 101 SCt 2176, 68 LEd 2d 671 (1981); *Kaplan v California* 413 US 115, 119-120, 93 SCt 2680, 37 LEd 2d 492 (1973)('*Kaplan*').

[4] See *Ward v Rock Against Racism* 491 US 781, 790, 109 SCt 2746, 105 LEd 2d 661 (1989)('*Ward*'); *Hurley* (supra) at 569.

[5] See *Kaplan* (supra) at 119-120; *Hurley* (supra) at 569.

[6] See, for example, *Ward* (supra) at 790 (Music as a form of '*expression and communication*' is protected (emphasis added)); *Finley* (supra)('art is entitled to full protection because our *cultural life*. . . rests upon the ideal' citing with approval *Turner Broadcasting* (supra) at 641 (emphasis added, internal quotations omitted)).

[7] *Police Dept of Chicago v Mosley* 408 US 92, 95, 92 SCt 2286, 33 LEd 2d 212 (1972)('If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable'); *Texas v Johnson* 491 US 397, 414, 109 SCt 2533, 105 LEd 2d 342 (1989)('Above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas' which is to say that 'the principle of viewpoint neutrality . . . underlies the First Amendment'.)

often invoked in order to restrict the activity.[1] Perhaps the most probing challenge, at least in the United States, has come from so-called 'performance art',[2] though traditional media such as photography and sculpture have also evoked restrictive or punitive measures from the state particularly where they have included homoeroticism and religious criticism.

In the United States, the issue is inextricably entwined with state funding of the arts and its intersection with the expression jurisprudence, the cornerstone of which is the principle of so-called 'viewpoint neutrality'. For example, in 1989 the National Endowment for the Arts ('NEA') funded a Robert Mappelthorpe exhibition which included homoerotic photographs and a work by Andre Serrano entitled 'Piss Christ'.[3] Certain members of congress condemned the NEA's funding as state sponsorship of pornography, and Congress reacted with a reduction of the NEA grant and legislative amendments to prevent future incidents. This

[1] The Supreme Court has held that obscenity is not constitutionally protected 'speech' under the First Amendment. Expression is not obscene, and therefore does qualify for protection, if it has 'serious artistic value'. *Miller v California* 413 US 15, 24, 93 SCt 2607, 37 LEd 2d 419 (1973)('*Miller v California*')(The Court in *Miller v California* laid down a three part test to determine whether speech is obscene and therefore unprotected: *(a)* whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; *(b)* whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and *(c)* whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. This of course begs the question as to what constitutes '*serious artistic* value'. To this end, the Court in *Pope* elucidated the third part of the *Miller* test as whether a 'reasonable person would find such value in the material, taken as a whole.' *Pope v Illinois* 481 US 497, 500-501, 107 SCt 1918, 95 LEd 2d 439 (1987)('*Pope*'). However, as noted by Justice Scalia in his separate concurrence in *Pope*, this test remains fundamentally flawed: 'I must note, however, that in my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can. Since ratiocination has little to do with esthetics, the fabled "reasonable man" is of little help in the inquiry, and would have to be replaced with, perhaps, the "man of tolerably good taste" — a description that betrays the lack of an ascertainable standard. If evenhanded and accurate decisionmaking is not always impossible under such a regime, it is at least impossible in the cases that matter. I think we would be better advised to adopt as a legal maxim what has long been the wisdom of mankind: *De gustibus non est disputandum*. Just as there is no use arguing about taste, there is no use litigating about it. For the law courts to decide "What is Beauty" is a novelty even by today's standards.' *Pope* (supra) at 505.) For further discussion of *Miller v California*, see § 42.9*(e)* infra.

[2] By virtue of its very nature, it is not coincidental that the performance art genre is difficult to define. It is easier to furnish examples. Amongst the most well known is 'Smut Fest' by the performance artist Annie Sprinkle, formally a career actress in pornographic films. During her performance art routine, Sprinkle, with her legs spread, invited audiences to view her cervix through a speculum. Undoubtedly part of the purpose was commentary on the objectification of pornography intended to shock. A further example is that of Ron Athey's 'Four Scenes in a Harsh Life' which involved making cuts in the back of his co-performer Divinity Fudge, an HIV-positive drag queen. Strips of absorbent paper were placed on the cuts and the blood stained paper was then hoisted into the air. See www.ronathey.com (accessed on 20 October 2008). In general, performance art is characterised by actions of the artists themselves constituting the work of art. For a history and account of performance art, see A Kurzweg 'Live Art and the Audience: Toward a Speaker-Focused Freedom of Expression' (1999) 34 *Harvard Civil Rights and Civil Liberties LR* 437 (Using the case of performance art, the author argues for what she terms a more 'speaker-focused approach' to freedom of expression protection under the First Amendment, as opposed to an 'audience based' approach which she argues characterises present First Amendment jurisprudence.)

[3] The work featured a photograph of a crucifix immersed in urine.

spawned a series of conflicts in the courts between the legislative branch and artists as the legislature tried to find a restrictive formulation governing allocations of state funding to the arts which did not violate the First Amendment.[1] A legislative formula which allows for a diverse representative body applying a level of subjective content-based criteria was finally upheld in *NEA v Finley*.[2] In doing so the Supreme Court distinguished between Government action as patron (in NEA cases) and government action as sovereign; Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of expression at stake.[3] In light of *Finley*, the jurisprudential approach of the US Supreme Court to the problem of subjectivity (or absence of viewpoint neutrality) in criteria employed in state funding decisions is a combination of a weaker standard in the funding context[4] together with an institutional/process solution — the body making the decisions concerned must be representative of diverse artistic and cultural points of view.[5]

Since provocative and subversive social commentary is often at the very heart of the artistic endeavour, it is of fundamental importance that our jurisprudence

[1] See *Bella Lewitzky Dance Foundation v Frohnmayer* 754 F Supp 774 (CD Cal, 1991)(The Federal District Court struck down as unconstitutionally vague an amendment providing that no NEA funds 'may be used to promote, disseminate, or produce materials which in the judgment of [the NEA] may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.')

[2] *National Endowment for the Arts v Finley* 524 US 569, 118 SCt 2168, 141 LEd 2d 500 (1998)('*Finley*')(Upheld an amendment that required 'the Chairperson of the National Endowment for the Arts (NEA) to ensure that artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.' The legislative scheme also provided for an institutional framework whereby recommendations for funding were made by advisory panels which are required to reflect '*diverse artistic and cultural points of view*.')

[3] *Finley* (supra) at 513.

[4] *Advocates for the Arts v Thomson* 532 F2d 792, 795-796 (CA1)(cert. denied, 429 U.S. 894, 97 SCt 254, 50 LEd 2d 177 (1976)) cited with approval in *Finley* (supra) at 551 ('[T]he very assumption' of the NEA is that grants will be awarded according to the 'artistic worth of competing applications' and absolute neutrality is simply 'inconceivable.' However, even on the approach of the majority, viewpoint neutrality is still maintained in a weaker form: Government may not 'aim at the suppression of dangerous ideas'. *Finley* (supra) at 561. The 'dangerous ideas' doctrine is derived from the earliest First Amendment jurisprudence. See *American Communications Assn v Douds* 339 US 382, 402 (1950)('*Douds*'); *Cammarano v United States* 358 US 498 (1959); *Regan v Taxation with Representation* 461 US 540 (1983).

[5] But see *Finley* (supra) at 564 (Justice Scalia's held as follows in his separate concurrence: 'The method of compliance proposed by the National Endowment for the Arts (NEA) — selecting diverse review panels of artists and nonartists that reflect a wide range of geographic and cultural perspectives — is so obviously inadequate that it insults the intelligence. A diverse panel membership increases the odds that, *if and when* the panel takes the factors into account, it will reach an accurate assessment of what they demand. But it in no way increases the odds that the panel *will* take the factors into consideration — much less ensures that the panel will do so, which is the Chairperson's duty under the statute.' (emphasis in original). Justice Scalia would have preferred an approach that relied purely on the relaxation of the requirement of viewpoint neutrality when government makes funding decisions.)

develops conceptual tools that are able to avoid explicit or implicit reliance on subjective content-based criteria for restriction of art. In almost all cases, including the most challenging acts of artistic expression, restrictions based on context rather than content will be sufficient to achieve any legitimate aims of the state in protecting society from a perceived harm. The feature of context restriction that is critical in an open and democratic society where the perceived harm of the artistic act is at its highest is that any restriction must effectively allow for informed choice. This entails first, that those whom an open and democratic society affords full legal capacity, namely adults, must be entitled to choose to view the activity. Secondly, viewing must be voluntary; the context must sufficiently guard against accidental or unintentional viewing. In an open and democratic society, where these criteria are satisfied, few artistic activities will justify further restrictions particularly if such proposed restrictions rely on the content, or supposed merit or value, of the activity.[1]

(f) Academic freedom and freedom of scientific research

The protection of academic freedom and freedom of scientific research is intended to guard against repeating the history of significant state interference in the independence and autonomy of educational institutions, academics and students prior to democracy.[2] Notably, under the Final Constitution the freedom is specifically incorporated under the expressive right and is no longer confined, as it was under the Interim Constitution, to 'institutions of higher learning'.[3] Academic freedom is therefore protected at all educational institutions including schools and colleges.

Most jurisdictions have recognised that the right to freedom of expression includes the right to academic freedom even when it is not expressly protected.[4]

[1] As is apparent from *De Reuck*, an artistic activity depicting child pornography is an exception which warrants near-categorical restriction based on content. 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC). As noted above, the peculiar consequence of the structure of free speech analysis under the Final Constitution is that even artistic acts that involve child pornography receive constitutional protection though the near categorical restriction imposed by the legislature is easily justifiable. See § 42.3 supra. See further § 42.9*(e)* infra.

[2] Section 25 of the Universities Act 61 of 1995 provides a notorious example. It empowered the Minister to impose conditions on the granting of university subsidies. Regulations published in 1987 pursuant to s 25 required universities to take steps directed towards the prevention and punishment of certain detailed student activities, aimed mainly at suppression of student political activity and what the responsible Minister had termed the suppression of 'the revolutionary onslaught'. The universities succeeded in having a number of these regulations set aside as being void for vagueness. See, for example, *University of Cape Town v Ministers of Education and Culture (House of Assembly and House of Representatives)* 1988 (3) SA 203 (C).

[3] IC s 14(1) provided: '(1) Every person shall have the right to freedom of conscience, religion, thought, belief, and opinion, which shall include academic freedom in institutions of higher learning.'

[4] See, for example, *Sweezy v New Hampshire* 354 US 234, 262-263 (1957)('*Sweezy*')(The concurring opinion of Justice Frankfurter is repeatedly quoted as delieneating the scope of the right to academic freedom in the United States as a university's right to 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study'.) See also *McKinney v The University of Guelph* [1990] 3 SCR 229 (SCC).

However, the application and scope of this aspect of the right remain poorly defined.[1] In the United States, for example, it has been held that the right to academic freedom is the institution's right and not that of the teacher/academic.[2] This principle, which is based upon an interpretation of the Supreme Court decision in *Sweezy*,[3] has been widely deployed by Federal Courts to restrict an individual academic's rights in respect of student grading and curriculum content.[4] While the constitutional protection of academic freedom may come down in favour of the institution in conflicts with academics concerning certain curriculum and grading issues, we submit that a general principle that academic freedom is exclusively that of institutions and not of individual academics cannot hold under our Constitution. As considered above, the class of bearers of the expressive right is broadly defined under the Final Constitution and the right requires generous interpretation.[5] There is nothing in the text that suggests that the right should be limited to institutions and not individuals. Nor is there a basis for a weaker version of the principle, namely, that in the case of conflict, the

[1] *Stronach v Virginia State University* Civil Action 3:07-CV-646-HEH (ED Va, January 15 2008)('*Stronach*').

[2] See *Urofsky v Gilmore* 216 F 3d 401, 414 (4th Cir, 2000)('*Urofsky*')('Cases that have referred to a First Amendment right of academic freedom have done so generally in terms of the institution, not the individual'); *Wozniak v Conry* 236 F 3d 888, 891 (7th Cir, 2001); *Edwards v Cal Univ of Pa* 156 F 3d 488, 491 (3d Cir, 1998)('*Edwards*'); *Brown v Amenti* 247 F 3d 69 (3d Cir, 2001)('*Brown*'); *Lovelace v SE Mass Univ* 793 F 2d 419, 425 (1st Cir, 1986)('*Lovelace*'); *Sweezy* (supra). But see *Parate v Isibor* 868 F 2d 821, 827-28 (6th Cir, 1989)('*Parate*').

[3] The Supreme Court did not directly address the issue in *Sweezy* (supra), but the decision was premised on the right being that of the institution.

[4] See *Urofsky* (supra) at 415 ('Significantly, the [Supreme] Court has never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so'); *Wozniak* (supra) at 891 (Characterising as 'frivolous' a University of Illinois professor's claim that he had a right to autonomy in grading his students despite conflicts with the university's grading procedures and stating '[n]o person has a fundamental right to teach undergraduate engineering classes without following the university's grading rules'); *Edwards* (supra) at 491 ('[The] First Amendment does not allow a university professor to decide what is taught in the classroom but rather protects the university's right to select the curriculum'); *Brown* (supra) at 75 ('a public university professor does not have a First Amendment right to expression via the school's grade assignment procedures); *Lovelace* (supra) at 425 ('To accept plaintiffs contention that an untenured teacher's grading policy is constitutionally protected . . . would be to constrict the university in defining and performing its educational mission') and *Stronach* (supra)('No constitutional right to academic freedom exists that would prohibit senior VSU [Virginia State University] officials from changing a grade given by Stronach to one of his physics students against his will.') The only deviation appears to be in the Sixth Circuit, *Parate* (supra) at 827 ('A university professor may claim that his assignment of an examination grade or a final grade is communication protected by the First Amendment. . . [t]hus, the individual professor may not be compelled, by university officials, to change a grade that the professor previously assigned to her student.') *Stronach* distinguishes *Parate* on the basis that in that case the university authorities did not seek to alter the grade themselves but to force the academic himself to alter the grade.

[5] See § 42.3 supra.

academic freedom of the institution should always trump that of its individual members. The interests of the individual and the institution should rather be carefully balanced in appropriate cases.

(g) Protecting the means of expression

Meaningful protection of the right to freedom of expression, particularly in a context of material inequality, requires that there must be access to the necessary resources for effective expression. When applied to broadcasting, FC s 16 must be read in the light of FC s 192 which requires the establishment of an independent authority to regulate broadcasting in the public interest and thereby to ensure fairness and diversity of views broadly representing South African society. The expressive right accordingly recognizes the legacy of inequalities in South African society in which 'not all have equal access to and control of resources, including the electronic media'.[1] This implies a positive right, discussed further below,[2] to support from the state so that voices that would otherwise not be heard can find a meaningful space in the marketplace of ideas.

Protecting the means of expression also has a negative dimension: Any restriction upon or interference with the means of expression constitutes an infringement of the right to freedom of expression that must be justified under the limitations clause. This principle has been recognised in a number of jurisdictions[3] and is a necessary incident of the right to freedom of expression under our Constitution.

(i) *Monopolies*

Monopolies are one of the most common limitations on the means of expression. Competition law, in so far as it applies to sectors of the economy that are necessary to foster the means of expression, is therefore an important instrument of freedom of expression.[4] In *City of Los Angeles v Preferred Communications*, for example, the United States Supreme Court held that 'cable television partakes of some

[1] *Islamic Unity* (supra) at para 45.

[2] See § 42.7*(g)*(iii) infra.

[3] See *City of Los Angeles and Department of Water and Power v Preferred Communications Inc* 476 US 488 (1986)('*Preferred Communication*'); *Red Lion Broadcasting Co Inc & Others v Federal Communication Commission et al (No 2)* 395 US 367 (1969); *Autronic AG v Switzerland* (1990) 12 EHRR 485 at para 47 (Protection of freedom of expression 'applies not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information'); *Retrofit (Pvt) Ltd v Posts & Telecommunications Corp (Attorney-General of Zimbabwe Intervening)* 1996 (1) SA 847 (ZS), 1995 (9) BCLR 1262 (Z), 1995 (2) ZLR 199 ('*Retrofit*').

[4] See *Unites States in Associated Press v United States* 326 US 1 (1945) at para 20 (Recognised this principle which is undoubtedly applicable in respect of competition legislation under our Constitution.)

of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers'.[1] Consequently the City's refusal, without good cause, to allow a cable television company to lease space on utility poles because the company had refused to participate in an auction to award a monopoly franchise for provisions of such services in the area was an infringement of the First Amendment.

In the decision of the Zimbabwean Supreme Court in *Retrofit*[2] it was held that the State Telephone Corporation's monopoly over both fixed line and wireless telephone services violated the constitutional right of every person to receive and impart ideas and information.[3] The evidence showed that the Corporation was incapable of maintaining the fixed line service let alone establishing a viable cell phone network. This was frustrating the access of Zimbabweans cellular phone technology which was rapidly developing elsewhere. After carefully examining the purported objects of the monopoly, the Court found that these could not justify the limitation of the right to freedom of expression.[4] While the decision in *Retrofit* must obviously be interpreted in light of the particular circumstances[5] and statutory setting in Zimabwe, it is a landmark ruling that will be highly instructive to our own courts when confronted with restrictions on the means of expression.[6]

(ii) *Testing the means of expression: the availability of alternative means*

Meaningful protection of the right to freedom of expression might, in certain times, have required little more than access, quite literally, to physical space necessary to express oneself; a public place and a speaker's stand to project one's voice.[7] However, changes in technology and the media through which information and ideas are communicated have had a fundamental impact on the protection of expression. Today, meaningful expression often requires access

[1] *Preferred Communications* (supra) at 494.
[2] *Retrofit* (supra) at 861H-862A.
[3] Ibid at 861H-862A.
[4] Ibid at 862E-866A.
[5] See *SA Post Office Ltd v Van Rensburg* 1998 (1) SA 796, 809B-811E (E)(Distinguishes *Retrofit* but does not articulate clearly the basis for the distinction.)
[6] *TS Masiyiwa Holdings (Pvt) Limited & Another v Minister of Information Posts and Telecommunications* 1997 (2) BCLR 275 (ZS).
[7] Perhaps the most celebrated defined physical space is the north-east corner of Hyde Park in London which was given over by the Royal Parks and Gardens Act of 1872 as a place for public speaking, now known colloquially as 'Speakers' Corner'. See generally JM Roberts 'The Enigma of Free Speech: Speakers' Corner, The Geography of Governance and a Crisis of Rationality' (2000) 9(2) *Social & Legal Studies* 271; JM Roberts *Tyburn Hanging Tree and the Origins of Speakers' Corner* available at http://www.speakerscorner.net/docs/origins.html (accessed on 18 October 2008); and JM Roberts 'Spatial Governance and Working Class Public Spheres: The Case of a Chartist Demonstration at Hyde Park' (2001) 14(3) *The Journal of Historical Sociology* 308. As Roberts explains, the 1872 legislation was, ironically, intended to curtail the practice of robust protest which had developed in that area of Hyde Park over the preceding 150 years. Many other cities have analogous areas of public spaces dedicated to free speech, for example the Domain, Sydney Australia and Speakers' Corner in Regina, Saskatchewan, Canada.

to extensive financial and advanced technological resources.[1] The mere preservation of physical space in which to project one's message with the human voice may indirectly suppress expression; the soap box in a public park is no match for the nightly news.

This fact appears to have been lost on the Supreme Court of Appeal in *Laugh It Off*,[2] where the appellant had used the relatively cheap medium of a T-shirt to parody the marketing of a well-known and popular beer brand by slightly altering the beer's trademarked label. The Supreme Court of Appeal, for the first time in our law, tentatively[3] applied an 'alternative means/avenues of expression test' derived from the Canadian and United States[4] jurisprudence:

> The appellant may declaim the message about black labour and white guilt from rooftops, pulpits and political platforms; and it may place the same words (without appropriating the registered mark's repute) on T-shirts, and sell them. In other words, its freedom of expression is hardly affected.[5]

The availability of these alternative means of expression was expressly relied upon by the Supreme Court of Appeal in finding that any infringement of the appellant's right to freedom of expression was justifiable. The test, however, begs the essential question of what constitutes 'adequate alternative means' of expression on the facts of the case. In a crowded market place dominated by the well-resourced and their commercial or ideological interests, it is frequently necessary to compete commercially or unconventionally in order to convey a message effectively. While the opportunity to declaim one's message from 'rooftops, pulpits or political platforms' may once have been sufficient to guarantee protection of expressive rights, that is no longer the case; Laugh It Off would not have reached the same audience, nor done so as effectively as it did, through the sale of its T-shirts. Moreover, the sale of the T-shirts afforded modest resources to continue to convey the critical message.

On appeal, the Constitutional Court recognised the submissions regarding the ambiguity of the 'alternative means' test[6] and expressly refrained from either

[1] Interestingly, there are those who advocate for the establishment of a broadcast centre at Speakers' Corner in Hyde Park which would be open to all to broadcast their views over the electronic media. See http://www.speakerscorner.net/charter.html.

[2] *Laugh It Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International* 2005 (2) SA 46 (SCA), [2004] 4 All SA 151 ('*Laugh It Off SCA*'). For further discussion of this case, see 'Intellectual property restrictions' § 42.9*(d)* infra.

[3] See *Laugh It Off SCA* (supra) at para 30 (The SCA declined to embrace the test in absolute terms but preferred to treat it as a 'relevant factor'.)

[4] Ibid at paras 30 and 36 (Court referred, inter alia, to *Compagnie Générale des Etablissements Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (TD); Mutual of Omaha Insurance Co v Novak* 836 F 2d 397 (1987); *Dallas Cowboys Cheerleaders Inc v Pussycat Cinema Ltd* 604 F2d 200, 206 (1987)).

[5] *Laugh It Off SCA* (supra) at para 30.

[6] *Laugh It Off* (supra) at para 63.

endorsing the test as forming part of our expression jurisprudence or deciding the appeal on that basis.[1] While it is likely that our courts will ultimately adopt a version of the 'alternative means' test as relevant to the justification of infringements of the right to freedom of expression, it is critical that the concept of 'adequacy' is a sufficiently rich one that properly takes into account the changing contexts and technologies of expression.

(iii) *State support for the means of expression and state broadcasters*

The issue, however, can be taken a step further: To what extent should the state be required to provide or supplement existing means of expression where effective expression is denied to disempowered individuals or groups for want of resources or systemic inequality?

The Supreme Court in the United States has interpreted the First Amendment not to require such state assistance, asserting that 'although government may not place obstacles in the path of a [person's] exercise of … freedom of [speech], it need not remove those not of its own creation.'[2] The legislature's decision not to subsidise the exercise of a fundamental right therefore does not infringe the right, and is not subject to strict scrutiny on review.[3] Furthermore, the legislature's decision not to grant a benefit, such as a tax exemption, to a particular organization or endeavour, is, save in exceptional circumstances, not susceptible to judicial review.[4]

In South Africa, a central medium of expression, and a major recipient of state resources, is the state broadcaster: the South African Broadcasting Corporation (SABC). It is vital for effective protection of the right to freedom of expression that the SABC adopts true viewpoint neutrality and that it provides a medium for marginalised, disempowered, unpopular, critical and diverse expression. Such expression is otherwise likely to be suppressed by more powerful commercial and political interests. As was noted above,[5] the final text of FC s 16 removed the clause that was incorporated in the Interim Constitution and earlier drafts

[1] *Laugh It Off* (supra) at para 66.

[2] *Harris v McRae* 448 US 297, 316 (1980)('*Harris*'). See also *Regan v Taxation With Representation* 461 US 540 (1983)('*Regan*').

[3] *Regan* (supra) at 549 citing *Buckley v Valeo* 424 US 1 (1976); *Maher v Roe* 432 US 464 (1977).

[4] *Regan* (supra) at 549 citing with approval *Cincinnati Soap Co v United States* 301 US 308, 317 (1937); *Alabama v Texas* 347 US 272 (1954); *Commissioner v Sullivan* 356 US 27, 28 (1958)('For the purposes of these cases appropriations are comparable to tax exemptions and deductions, which are also "a matter of grace [that] Congress can, of course, disallow … as it chooses"'). See also *Douds* (supra) at 402 (withdrawal of the opportunity to invoke the facilities of the National Labor Relations Board as a result of expressive activities) and *Wieman v Updegraff* 344 US 183 (1952)(denial of the opportunity for public employment as a result of engagement in certain speech). In general, denial of support is not reviewable where it is 'aimed at suppression of dangerous ideas'. *Douds* (supra) at 402; *Speiser v Randall* 357 US 513 (1958).

[5] See § 42.2 supra.

which required that state broadcasting resources be employed to this end. However the Constitution itself[1] and national legislation[2] incorporating the Charter[3] of the SABC give effect to this obligation.[4] The obligation is also necessarily entailed by the right to freedom of expression.

FC s 192 requires national legislation to 'establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and diversity of views broadly representing South African society'.[5] One of the purposes of public broadcasting is to promote views of those who are marginalised and to resist political co-option or the disproportionate influence of commercial interests and the well-resourced. The independent regulator, ICASA, is explicitly empowered, and obliged, under FC s 192 and national legislation,[6] to monitor and enforce compliance by the SABC with its public service mandate.

To this end, a strong independent regulator is critical to securing meaningful protection of the expressive right. Where the independent regulator is weak, under-resourced or falls under the influence of particular political or commercial interests, the very foundation of freedom of expression is compromised. Since its inception, ICASA has at times been criticised, including recently by the courts,[7] for failing properly to carry out its constitutional mandate. This is cause for constitutional concern. Moreover, recent events within the SABC, including express 'blacklisting' of certain political commentators on the basis of their

[1] FC s 192.

[2] Broadcasting Act 4 of 1999 ('Broadcasting Act').

[3] Broadcasting Act, Chapter IV ss 8-28.

[4] Section 10(1) of the Broadcasting Act provides, in relevant part:

Public service:

(1) The public service provided by the Corporation must—

(a) make services available to South Africans in all the official languages;

(b) reflect both the unity and diverse cultural and multilingual nature of South Africa and all of its cultures and regions to audiences;

. . .

(d) provide significant news and public affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance and independence from government, commercial and other interests;

. . .

(f) enrich the cultural heritage of South Africa by providing support for traditional and contemporary artistic expression;

(g) strive to offer a broad range of services targeting, particularly, children, women, the youth and the disabled;

(b) include programmes made by the Corporation as well as those commissioned from the independent production sector.

[5] The Independent Communications Authority of South Africa Act 13 of 2000 ('ICASA Act') gives effect to this constitutional obligation.

[6] Broadcasting Act s 6.

[7] See *Islamic Unity* (supra) at paras 14-18.

viewpoints,[1] internecine conflict between the Board and senior management which has resulted in repeated litigation between the Chief Executive and the Board,[2] as well as amongst senior management themselves,[3] suggest that the SABC itself is an institution that has been unable effectively to transcend political contestation, to fulfil its public service mandate and to secure independence. The compromising of this central institution of open democracy has potentially dire consequences for the effective protection of freedom of expression.

(iv) *The Internet*

The Internet is a global medium of expression. It has revolutionised the communication of information and ideas. As the United States Supreme Court noted in *Reno v ACLU*:[4] 'It is no exaggeration to conclude that the content on the Internet is as diverse as human thought.'[5] The Internet's effectiveness however, is limited by its accessibility. Access has two parts: access to the minimal infrastructure necessary to utilise the Internet and quality or speed of access. Since all aspects of the technology that are necessary to make the Internet possible are privatised in South Africa, both of these components manifest in the cost of access. The

[1] See 'Commission of Enquiry into Blacklisting and Related Matters' reprinted in *Mail & Guardian Online* (14 October 2006) available at ,http://www.mg. co.za/ContentImages/286848/SABCBLACKLISTREPORT.pdf (accessed on 18 October). The Report found that there was an arbitrary blacklist of outside commentators and that there was a 'climate of fear' in SABC newsrooms. See F Haffajee 'Inside the SABC blacklist report' *Mail & Guardian Online* (13 October 2006) available at http://www.mg.co.za/article/2006-10-13-inside-the-sabc-blacklist-report (accessed on 18 October 2008).

[2] L Flanagan 'Mpofu had no Power to Axe Snuki' *The Star* (16 May 2008) available at www.iol.co.za/index.php?click_id=13&set_id=1&art_id=vn20080516055516714C294082; 'SABC Board Slams Mpofu's "Management"' *The Star* (17 June 2008) available at http://www.iol.co.za/index.php?set_id=1&click_id=3015&art_id=vn20080617124034170C119538 (accessed on 18 October 20008); 'SABC to Appeal Mpofu Court Ruling' *Mail & Guardian Online* (20 May 2008) available at http://www.mg.co.za/article/2008-05-20-sabc-to-appeal-mpofu-court-ruling (accessed on 18 October 2008); 'SABC Suspends Mpofu again' *Mail & Guardian Online* (13 June 2008) available at ww2.mg.co.za/article/2008-06-13-sabc-suspends-mpofu-again (accessed on 18 October 2008); F Grobler 'Mpofu, SABC Urged to Resolve Dispute Outside of Court' *Mail & Guardian Online* (24 June 2008) http://ww2.mg.co.za/article/2008-06-24-mpofu-sabc-urged-to-resolve-dispute-outside-of-court (accessed on 18 October 2008); 'Mpofu Suspended a Third Time' *Biz-Community* (13 June 2008) available at http://www.biz-community.com/Article/196/15/25473.html (accessed on 18 October 2008); 'Court Awaits Argument in Mpofu Case' *Mail & Guardian Online* (8 July 2008) available at http://www.mg.co.za/article/2008-07-08-court-awaits-argument-in-mpofu-case (accessed on October 18 2008).

[3] 'Zikalala takes SABC suspension to CCMA' *Mail & Guardian Online* (11 April 2008) available at http://www.mg.co.za/article/2008-04-11-zikalala-takes-sabc-suspension-to-ccma (accessed on 20 October 2008); J Newmarch 'Zikalala returns as Mpofu fights on' *Business Day* (8 July 2008) http://www.businessday.co.za/articles/topstories.aspx?ID=BD4A797873 (accessed on 20 October 2008).

[4] *Reno v American Civil Liberties Union* 521 US 844 (1997)(Court struck down for overbreadth and inconsistency with the First Amendment various statutory provisions enacted to protect minors from indecent and 'patently offensive' communications on the internet)('*Reno v ACLU*').

[5] Ibid at 849 (Quotes the decision of the District Court in the same proceedings. The judgment contains a useful and detailed summary of the history, growth and operation on the Internet.)

regulatory environment that has secured Telkom Ltd, until recently, a fixed-line infrastructural monopoly has severely curtailed both of these components of accessibility.[1] Relatively few people[2] have access to the Internet and 'high speed' access is disproportionately expensive in comparison with most other countries. Meaningful protection of the Internet as a means of expression requires deregulation of cost sensitive infrastructure components, particularly fixed-line infrastructure as well as, arguably, state expenditure on key infrastructure to improve access. Failure to take these steps will inevitably result in the entrenchment of existing inequalities of access.

Apart from access, the extent to which the Internet facilitates expressive freedom will be determined by the extent to which it remains independent. Although not expressly included under FC s 16, the right to freedom of expression clearly includes freedom from unjustifiable state interference with the content[3] and regulation of the Internet. The South African domain name space, .za, is now regulated by the Electronic Communications and Transactions Act ('ECTA').[4] Prior to ECTA it was unregulated and managed on a goodwill basis by private individuals and entities. This was unsatisfactory as there was no institutional safeguard against conflicts of interest between private interests and the public interest, which the .za domain ultimately serves. ECTA rectifies this problem through the establishment of an independent regulatory body, the .za Domain Name Authority, to regulate the domain.[5] The Authority assumed responsibility as of May 2007[6] and has taken few steps to exercise its authority in terms of ECTA. This is a cause for some concern as the future effective functioning of the .za domain in the public interest depends, as in the case of broadcasting, on effective functioning by an independent regulator.

[1] For a full discussion on the regulatory environment see J White 'Independent Communications Authority of South Africa (ICASA)' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24E.

[2] As of March 2008, approximately 5.1 million South Africans or 11.1% of the population has Internet access (including dial-up access). Increasingly, however, access is measured in terms of broadband access in respect of which only 215 000 households/businesses have access representing approximately 1% of the population. This compares with broadband access in Japan (68.7%), Malaysia (60%), United Kingdom (66.4%), Germany (64.6%), Sweden (77.3%), Turkey (22.5%), United States (71.4%), Canada (65.9%) and Brazil (22.4%). See 'Internet Usage Stats for Africa' available at http://www.internetworldstats.com/stats1.htm and R Wray 'China Overtaking US for Fast Internet Access as Africa gets Left Behind' *Guardian Online* available at http://www.guardian.co.uk/money/2007/jun/14/internetphonesbroadband.digitalmedia (accessed on 20 October 2008).

[3] Content restrictions that are justifiable in respect of other media, such as those pertaining to child pornography (discussed above) will obviously be similarly justifiable in respect of Internet content.

[4] Act 25 of 2002.

[5] ECTA s 59. The section provides that it would assume responsibility from a date to be determined by the Minister.

[6] GN 458 *Government Gazette* 29903 (18 May 2007).

42.8 EXCLUDED EXPRESSION: ANALYSIS OF FC S 16(2)

As discussed above, FC s 16(2) carves out certain expression from the protection of the right to freedom of expression contained in FC s 16(1). The categories of expression listed in FC s 16(2) are beyond the boundaries of the right to freedom of expression.[1] These categories are: *(a)* propaganda for war; *(b)* incitement of imminent violence; and *(c)* the advocacy of hatred based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.

In assessing the meaning of each of the section 16(2) exclusions, it is important to bear in mind the cautionary words of Professor Govender in the context of hate speech:

> [T]he finding that any particular expression amounts to hate speech would in most instances be determinative of the constitutional enquiry. Any test used to assess whether expression amounts to hate speech must acknowledge the seriousness of such a classification.[2]

Accordingly, it is appropriate to adopt a restrictive approach in interpreting the ambit of these exclusions. This approach is particularly apposite in light of the fact that FC s 16(2) applies to the enumerated categories of expression in an unqualified manner. There are, for example, no exclusions (or defences) for speech uttered in private conversation or for statements that the speaker reasonably believes to be true.[3]

(a) FC s 16(2)*(a)*: Propaganda for war

The first exclusion in FC s 16(2) is propaganda for war. This exclusion is taken directly from art 20(1) of the International Covenant on Civil and Political Rights ('ICCPR'), which stipulates that '[a]ny propaganda for war shall be prohibited by

[1] *Islamic Unity* (supra) at para 32 (Langa DCJ). In the first edition of this chapter, the authors suggested that one possible interpretation of FC s 16(2) is that it simply identifies three categories of expression that may be limited by legislation, but that such limitation must still pass the limitations test. G Marcus & D Spitz 'Expression' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS1, 1999) 20-61. They, somewhat tentatively, stated that this interpretation 'would be desirable and may be available'. Ibid. It seems to us that such an interpretation, while having the benefit of limiting the ambit of the FC s 16(2) exclusions, does not give sufficient weight to the language of FC s 16 as compared to the other fundamental rights set out in Chapter 2 of the Final Constitution (that are not limited in this express manner). We agree with the approach in *Islamic Unity* (supra) that FC s 16(2) limits the ambit of what is meant by 'expression' for purposes of FC s 16(1). We note, however, that such an approach means that it is even more important to interpret FC s 16(2) in a restrictive manner.

[2] *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283, 1289 (SAHRC)('*Freedom Front*'). Perhaps the strongest advocates of a restrictive interpretation of the s 16(2) carve-outs are the authors of the first edition of this chapter. Marcus & Spitz (supra) at 20-58 — 20-63. They correctly describe FC s 16(2) as 'an ouster clause and a remnant of parliamentary sovereignty. It deprives the courts of jurisdiction to measure government action in this area against constitutional standards'. Ibid at 20-60.

[3] These exceptions are, for example, contained in the hate speech prohibition that was upheld by the Canadian Supreme Court. See *R v Keegstra* [1990] 3 SCR 697, (1990) 3 CRR (2d) 193('*Keegstra*').

law'. Not surprisingly, this provision of the ICCPR (coupled with the hate speech provision in art 20(2)) is controversial; its opponents argue, correctly, that it is detrimental to freedom of expression, vague, subjective and ineffective.[1] It is thus important that our courts interpret 'propaganda for war' in a restrictive manner so as not to include contributions to legitimate debates as to whether South Africa, or other states, should engage in international armed conflict. If this were not the case, it would mean that the debate that took place in Parliament and elsewhere in 1939 as to whether South Africa should enter World War II would not merit constitutional protection if it were to take place today.[2] This would be absurd.

The first manner in which FC s 16(2) should be limited is through the meaning given to the term 'war'. This term usually refers to an international armed conflict. Nevertheless, not all armed conflicts are unlawful as a matter of international law, and the meaning of 'war' in FC s 16(2)*(c)* should thus be confined to armed conflicts that are contrary to international law. This is consistent with the approach of the Human Rights Committee, which states, in its General Comment on art 20(1) of the ICCPR, that the prohibition 'extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations' but does not prohibit 'advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations'.[3] This raises the interesting, and difficult, prospect of South African courts adjudicating on the legality of certain forms of armed conflict. In international law, this is a notoriously difficult and contentious issue, with governments and academics very seldom agreeing on the lawfulness of a particular armed conflict.

The other important term in FC s 16(2)*(a)* is 'propaganda'. In the context of the ICCPR, it has been described as a word that 'is capable of a very expansive meaning'.[4] Nevertheless, the 'expansive meaning' — the communication of ideas and information for the purpose of achieving a particular purpose — is only one possibility in a range of meanings.[5] 'Propaganda' can also be defined in a more specific manner, as referring to an organised, systematic enterprise of circulating information and ideas to serve a purpose.[6] Given the fact that speech amounting

[1] See D McGoldrick *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1994) 480-491 (Finland, for example, explained that one reason for its reservation in respect of art 20(1) was that it was too vague to be enforced through the criminal law. Ibid at 481-482.)

[2] Marcus & Spitz (supra) at 20-61.

[3] 'General Comment No. 11: Prohibition of Propaganda for War and Inciting National, Racial and Religious Hatred (art 20)' (Nineteenth session, 1983).

[4] McGoldrick (supra) at 481.

[5] One of the meanings of 'propaganda' in *Webster's Third New International Dictionary* is: 'dissemination of ideas, information, or rumor for the purpose of helping or injuring an institution, a cause, or a person'.

[6] The *Shorter Oxford English Dictionary* defines 'propaganda' as: '[a]ny association, systematic scheme, or concerted movement for the propagation of a particular doctrine or practice'. *Chambers 21st Century Dictionary* defines it as: 'the organized circulation by a political group, etc. of doctrine, information, misinformation, rumor or opinion, intended to influence public feeling, raise public awareness, bring about reform'.

to propaganda for war is excluded from constitutional protection, we submit that the latter, more restrictive, meaning should apply.

As with the other categories of expression excluded by FC s 16(2), s 29 of the Films and Publications Act ('FPA') makes it a criminal offence to broadcast, publish, distribute or present propaganda for war.[1] This legislative prohibition is, however, subject to a range of fairly broad exceptions[2] which, coupled with the limited meaning of 'propaganda for war', render the ambit of the criminal prohibition in s 29 extremely narrow. Ironically, the express exclusion of propaganda for war from constitutional protection results in the criminal prohibition in the FPA being given a particularly narrow interpretation. The meaning given to the phrases in FC s 16(2) — which must be interpreted narrowly — must be the same as the identical phrases used in FPA s 29; the constitutional interpretative exercise of restricting the ambit of constitutionally excluded expression thus also limits the ambit of the legislative prohibition. This is true of not only 'propaganda for war' but also 'incitement of imminent violence' and hate speech.

(b) FC s 16(2)*(b)*: Incitement of imminent violence

FC s 16(2)*(b)* is the least controversial of the s 16(2) exclusions; few would dispute that it is justifiable to prohibit speech that incites others to imminent violence. Even the United States courts — extremely protective of freedom of expression — acknowledge that the advocacy of the use of force or of a violation of law (which is wider than incitement of violence) may be prohibited where the 'advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action'.[3]

The must important question in relation to FC s 16(2)*(b)* is what is meant by 'incitement'. Gilbert Marcus and Derek Spitz point out that the 'clear and present danger' test in the United States distinguishes between *advocacy* and *incitement* of lawless action; providing constitutional protection to the former but not the latter.[4] They note, however, that the South African common law does not

[1] Act 65 of 1996. Specifically, s 29 prohibits the following acts: knowingly broadcasting or distributing a publication; broadcasting, exhibiting in public or distributing a film; or presenting an entertainment or play in public which, judged within context, 'amounts to propaganda for war'.

[2] FPA s 29(4) provides the follwing exceptions: *(a)* a *bona fide* scientific, documentary, dramatic, artistic, literary or religious publication, film, entertainment or play; *(b)* a *bona fide* discussion, argument or opinion on a matter pertaining to religion, belief or conscience; and *(c)* a *bona fide* discussion, argument or opinion on a matter of public interest.

[3] *Brandenburg v Ohio* 395 US 444 (1969)('*Brandenburg v Ohio*'). The US courts apply the 'clear and present danger' test under which limitation of free speech will be justified if the danger of the harm materialising is imminent and there is no time for good speech to counter evil speech. *Whitney v California* 274 US 357, 378 (1927)(Brandeis J).

[4] Marcus & Spitz (supra) at 20-29.

distinguish between advocacy and incitement.[1] In this regard, the Appellate Division defined the crime of incitement as follows:

> [A]n inciter is one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other's mind may take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading, or the arousal of cupidity. The list is not exhaustive. The means employed are of secondary importance; the decisive question in each case is whether the accused reached and sought to influence the mind of the other person towards the commission of a crime.[2]

However, we submit that, for purposes of FC s 16(2)*(b)*, 'incitement' involves actively encouraging, calling for or pressuring others to engage in acts of violence where the threat of the violence occurring is imminent.[3] It would not necessarily extend to, for example, expression which advocates the overthrow of the state, even by violent means.[4] In addition, we agree with Marcus and Spitz that FC s 16(2)*(b)* should be interpreted as requiring both a subjective and an objective element, i.e. the speaker subjectively intends to incite imminent violence; and it is objectively likely that such violence will result from the expression.[5] The context of the publication and the surrounding circumstances will, of course, be crucial considerations to take into account in determining whether these requirements are met.[6] As with propaganda for

[1] Marcus & Spitz (supra) at 20-29.

[2] *S v Nkosiyana & Another* 1966 (4) SA 655 (A). See also *Dunlop South Africa Ltd v Metal and Allied Workers Union & Another* 1985 (1) SA 177, 188 (D) and *National Union of Metal Workers of South Africa & Others v Gearmax (Pty) Ltd* 1991 (3) SA 20, 25 (A). Marcus and Spitz point out that the Appellate Division's approach to incitement in *Nkonsiyana* is very wide. Marcus & Spitz (supra) at 20-29.

[3] C van Wyk 'The Constitutional Treatment of Hate Speech in South Africa' (2003) 18 *SAPR/PL* 185, 194 ('incitement' means 'to call for, urge or persuade'); Y Burns 'Hate Speech and Constitutional Values: The Limits of Freedom of Expression' in G Carpenter (ed) *Suprema Lex: Essays on the Constitution presented to Marinus Wiechers* (1998) 35 ('Hate Speech'), 51 (Remarks, with reference to *Webster's Dictionary*, that it means 'to put in motion', 'to move to action', 'to spur or urge on'.)

[4] Particularly in light of the fact that the term 'incitement' (and the requirement of immediacy) are employed in FC s 16(2)*(b)*, whereas FC s 16(2)*(c)* refers to 'advocacy'.

[5] Marcus & Spitz (supra) at 20-62 (It is unclear whether Marcus and Spitz would require the violence to in fact eventuate or whether the likelihood of the violence materialising is sufficient to trigger FC s 16(2)*(b)* (the latter being our view). They state as follows: 'only expression . . . which objectively and in the prevailing circumstances does indeed incite imminent violence may be denied constitutional protection on the basis of FC s 16(2)*(b)*'.) For a different view, see K Govender 'The Freedom of Speech' (1997) 1(6) *The Human Rights and Constitutional Law Journal of Southern Africa* 22 (Objective likelihood of imminent violence is not required.)

[6] Cf *Spies v SABC 1* Case 2008/05 available at http://www.bccsa.co.za/templates/judgement_template_433.asp (accessed on 20 October)(The Broadcasting Complaints Tribunal held that an audio-visual clip of a hip-hop song 'Get Out' by the artist Zubz constituted incitement to cause imminent harm: 'had this song been part of a larger dramatic work, the dramatic or documentary merit of the whole might have placed the militant lyrics into perspective. On its own, however, the overwhelming effect of the song is neither purely aesthetic nor documentary'. Ibid at para 14.)

war, incitement to violence is also criminalised under FPA s 29.[1]

(c) FC s 16(2)*(b)*: Hate speech[2]

The clash between freedom of expression and other constitutional values is arguably most apparent on the terrain of hate speech, in which freedom of speech — often political speech — is pitted against the fundamental values of dignity and equality.[3] Contrary to the adage 'sticks and stones can break my bones but words can never hurt me', hateful speech can cause significant harm both to the victims of such speech and society as a whole. In a country like South Africa that has recently emerged from legally sanctioned racism, division and repression, the risk of hate speech inculcating or perpetuating racist and other bigoted views is particularly pressing.

On the other hand, the area of hate speech is a particularly emotive area that is susceptible to overly restrictive measures against freedom of expression. Nowhere is the challenge of the European Court of Human Rights in *Handyside v UK* more real:

> [Freedom of expression is] applicable not only to 'information' and 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. . .. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[4]

Prior to assessing the manner in which South African law deals with the thorny issue of hate speech, we briefly examine the reasons for prohibiting hate speech as well as the arguments against such a prohibition.

(i) *The arguments for and against hate speech prohibitions*

Should the law prohibit hate speech and, if so, how far should it go in doing so? This is one of the most contested issues of freedom of expression currently confronting legislatures, courts and academics. Despite a number of international instruments calling for a ban on hate speech[5] and the enactment of hate speech

[1] FPA s 29 states that a person commits an offence if he or she knowingly broadcasts of distributes a publication; broadcasts, exhibits in public or distributes a film; or presents an entertainment or play in public which, judged within context, 'incites to imminent violence'. This offence is subject to the same exceptions that apply to propaganda for war. See § 42.8*(a)* supra. For other legislative prohibitions on inciting violence, see Rioutous Assemblies Act 17 of 1956 s 17, discussed in I Currie and J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 374; and Regulation of Gatherings Act 205 of 1993 s 8(6).

[2] The authors wish to thank Pooja Dela and Laeeqa Soobedaar for research assistance on this section of the chapter.

[3] This should not be taken to suggest that dignity (and, for that matter, equality) is not one of the values underlying freedom of expression.

[4] *Handyside v United Kingdom* (1976) 1 EHRR 737, 754 ('*Handyside v UK*') quoted with approval in *Islamic Unity* (supra) at para 28 (Langa DCJ).

[5] United Nations Declaration on the Elimination of All Forms of Racial Discrimination (1963) art 9; International Convention on the Elimination of All Forms of Racial Discrimination (1966) art 4; and ICCPR art 20(2).

prohibitions in a number of jurisdictions, there remains much disagreement as to whether such bans are a justifiable infringement on freedom of expression.[1] It is an issue that has sharply divided the Canadian Supreme Court, with only a slim majority of the Court upholding a criminal prohibition on hate speech.[2] The United States Supreme Court reached the opposite conclusion, striking down a hate speech law as an impermissible infringement of freedom of speech.[3] It is also an issue that has divided progressive South African authors; some argue that hate speech should be tolerated,[4] while others argue that it should not.[5] The difficult issues that hate speech gives rise to become apparent when one considers the arguments both for and against hate speech bans.

The argument in favour of prohibitions on hate speech is that the particularly serious harm, both to the group targeted by the speech as well as to society as a whole, caused by hate speech outweighs the concurrent infringement of freedom of expression. The harms associated with hate speech are usefully discussed by the Canadian Supreme Court in its seminal judgment in *Keegstra*.[6] The Supreme Court upheld a conviction of a teacher for anti-semetic teachings under a law which prohibited the promotion of hatred on grounds of, amongst others, religion.[7] During the course of his judgment on behalf of the majority, Dickson CJC identified two broad categories of harm occasioned by hate speech. The first category of harm is the impact of hate speech on the members of the group that is the target of the speech. Dickson CJC captures this impact in the following terms:

[1] For an overview of the laws regulating hate speech in various jurisdictions, see S Colliver (ed) *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (1992).

[2] *R v Keegstra* [1990] 3 SCR 697, (1990) 3 CRR (2d) 193('*Keegstra*') (The Court was divided four to three). This case is discussed below.

[3] See *RAV v City of St Paul, Minnesota* 505 US 377 (1992)('*RAV*')(Striking down a law that prohibited the placing of a symbol or object, including a burning cross, which one knows 'arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender'). See also *Beauharnais v Illinois* 343 US 250 (1952)(In the years following World War II, the United States Supreme Court upheld a statute criminalising group defamation based on race or religion, on the basis that libel fell beyond First Amendment protection. The Court upheld a conviction of a white supremacist for accusing blacks of, amongst other things, rape, robbery and other violent crimes. Although this decision has never been explicitly overruled, it is at odds with subsequent decisions of the Court. See *New York Times v Sullivan* 376 US 254 (1964), *Brandenburg v Ohio* 395 US 444 (1969) and *RAV* (supra).) For a particularly pro-speech approach to hate speech bans in the United States jurisprudence, see *Collin v Smith* 578 F2d 1197 (1978)(Striking down a municipal ordinance that would have prevented a march by Neo-Nazis through a predominantly Jewish area of Chicago.) But see *Virginia v Black* 538 US 343 (2003)('*Virginia v Black*')(Upholding a prohibition on cross burning with intent to intimidate). For a useful, recent discussion of the position in the United States, see M Rosenfeld 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002-2003) *Cardozo LR* 1523, 1529-1541.

[4] Meyerson 'No Platform' (supra).

[5] A Cockrell ' "No Platform for Racists": Some Dogmatism Regarding the Limits of Tolerance' (1991) 7 *SAJHR* 339.

[6] Supra.

[7] Canadian Criminal Code s 319(2). See also *R v Andrews* [1990] 3 SCR 870.

> It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence. . .. [W]ords and writings that wilfully promote hatred can constitute a serious attack on persons belonging to a racial or religious group, and in this regard the [Special Committee on Hate Propaganda in Canada] noted that these persons are humiliated and degraded. . . . A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs. . . . The derision, hostility and abuse encouraged by hate propaganda therefore have a severe impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, amongst other things, respect for the many racial, religious and cultural groups in our society.[1]

The harm of hate speech is greater than other forms of insult. Neisser offers several explanations for this, including that one's race, gender or religion is fundamental to one's sense of identity and the very real fear, based on historical experience, of physical violence or discrimination that is implicit in much of hate speech.[2] The special nature of the harm caused by hate speech seems to have been recognised by the United States Supreme Court in *Virginia v Black*.[3] In concluding that it is constitutional for a statute to criminalise the burning of a cross with intent to intimidate, the Court examined the history of cross burning in the United States, its close association with the Ku Klux Klan and violent attacks against blacks, and the fear of impending violence inspired by cross burning.[4]

The second broad category of harm associated with hate speech is the impact of such speech on society as a whole. Hate speech can increase social tensions, and the risk of violence, discrimination and other anti-social behaviour both because the hateful message may persuade (or incite) people to hateful views and actions[5] and because the targeted persons may react violently to the speech.

[1] *Keegstra* (supra) at 227-8, quoted, in part, in *Freedom Front* (supra) at 1293.

[2] E Neisser 'Hate Speech in the New South Africa: Constitutional Considerations for a Land Recovering from Decades of Racial Repression and Violence' (1994) 10 *SAJHR* 336, 339-40. See also Burns 'Hate Speech' (supra) at 48-49. As Justice Stevens stated in his dissenting judgment in the United States Supreme Court decision of *RAV*, the legislative judgment that 'harms caused by racial, religious, and gender-based invective are qualitatively different from that caused by other fighting words — seems to me eminently reasonable and realistic'. *RAV* (supra) at 424. See also D Feldman 'Content Neutrality' (supra) 170-171.

[3] 538 US 343 (2003).

[4] Ibid at 363 (The reasoning of the majority of the Court is reflected in the following statement of O'Connor J: 'The First Amendment permits Virginia to outlaw cross burning done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence.')

[5] See *Keegstra* (supra) at 228 (Dickson CJC remarked: 'hate propaganda can attract individuals to its cause', with the possibility that the 'prejudiced messages may gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society'.)

Hate speech also undermines the values of pluralism and diversity, by communicating a message that some members of the community are less worthy than others merely by virtue of their membership of a particular group. In the South African context, hate speech thus undermines the pressing goals of overcoming our divisive past and pursuing the tasks of reconciliation and the building of a democratic society. As Neisser says, hate speech may weaken 'the community-building necessary for democracy to be sustained'.[1]

The two harms discussed above have been recognised in the only hate speech case that has thus far come before the Constitutional Court — *Islamic Unity*.[2] During the course of his judgment on behalf of a unanimous Court, Langa DCJ emphasised our divided past and the need for promoting dignity, equality and national unity:

> There is no doubt that the state has a particular interest in regulating [hate speech as contemplated in FC s 16*(2)(c)*] because of the harm it may pose to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and the achievement of equality.
>
> . . .
>
> It is indeed true that the appropriate regulation of broadcasting by the government and its organs, in the public interest, serves an important and legitimate purpose in a democratic society. . . . This is because of the critical need, for the South African community, to promote and protect human dignity, equality, freedom, the healing of the divisions of the past and the building of a united society. South African society is diverse and has for many centuries been sorely divided, not least through laws and practices which encouraged hatred and fear. Expression that advocates hatred and stereotyping of people on the basis of immutable characteristics is particularly harmful to the achievement of these values as it reinforces and perpetuates patterns of discrimination and inequality. Left unregulated, such expression has the potential to perpetuate the negative aspects of our past and further divide our society.[3]

Set against these significant harms of hate speech are the arguments against the prohibition of such speech. These arguments can again be divided into two: the argument that hate speech bans are such a serious infringement of freedom of expression so as to outweigh any harm that the speech may cause; and the argument that hate speech bans are ineffective or, worse, counter-productive.

The first argument is that freedom of expression is an important, perhaps pre-eminent, fundamental right, and that a hate speech ban amounts to a significant infringement of that right because it prohibits speech based on the point of view

[1] Neisser (supra) at 343. See also *Freedom Front* (supra) at 1293 ('Our Constitutional order proceeds from the premise of inclusivity and nation building and seeks actively to prevent the marginalization of any community. This is expressed in the sentiment in the Preamble to the Constitution that South Africa belongs to all who live in it, united in our diversity'.)

[2] *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC)('*Islamic Unity*').

[3] Ibid at paras 33 and 45.

that is expressed. In the language of the United States Supreme Court, it amounts to 'viewpoint discrimination'.[1] Viewpoint discrimination is particularly problematic in this context given the fact that a great deal of hate speech amounts to political expression, and thus goes to the core of protected expression. Strong proponents of this view argue that hate speech advances all the key rationales for why we protect freedom of expression. As McLachlin J stated on behalf of the minority in *Keegstra*:

> In short, the limitation on freedom of expression created by [the hate speech prohibition] invokes all the values upon which s 2*(b)* of the *Charter* [the right to freedom of expression] rests — the value of fostering a vibrant and creative society through the marketplace of ideas; the value of the vigorous and open debate essential to democratic government and preservation of our rights and freedoms; and the value of a society which fosters self-actualization and freedom of its members.[2]

It seems to us that this is an overstatement in relation to most hate speech, which is of questionable value in furthering the goals of freedom of expression.[3] Racial abuse is unlikely to advance the goals of pursuing the truth or promoting an effective democracy. While it may promote the self-fulfilment of the hate monger, it is difficult to understand why this rationale is sufficient to justify the harm inflicted on the target group.[4]

The other argument against prohibitions on hate speech — that they are ineffective or counter-productive in combating the spread of hatred — has several related strands. The first strand is the absence of any empirical evidence that hate speech bans reduce racism, sexism or other forms of bigotry. Critics of hate speech laws regularly point to instances in history where racism and religious hatred has grown despite the presence (and enforcement) of hate speech laws. The most prominent example is Germany in the period leading up to World War II.[5] The second strand of the argument is that the suppression of hate speech

[1] *RAV* (supra) at 391. The Supreme Court's concern over viewpoint discrimination is shared by a number of authors. See, for example, RA Posner 'The Speech Market and the Legacy of *Schenck*' in L Bollinger & G Stone (eds) *Eternally Vigilant: Free Speech in the Modern Era* (2002) 145.

[2] *Keegstra* (supra) at 311. See also Niesser (supra) at 346-347 (notes that certain forms of hate speech could further the free speech rationale of self-fulfilment as well as the aims of the search for the truth and democratic government).

[3] See *Keegstra* (supra) at 239 (Dickson CJC, on behalf of the majority, states that expression intended to promote hatred against certain groups 'is of limited importance when measured against free expression values.') See also Burns 'Hate Speech' (supra) at 54 (hate speech 'does not advance any of the recognized goals of freedom of expression.')

[4] See J Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 35 ('[s]ome may say that the catharsis of expressing one's view is a vital aspect of autonomy, but why should one person's catharsis be allowed to become another person's indignity?'). For a useful discussion of the link between hate speech and the rationales for freedom of expression, see Rosenfeld (supra) at 1532-6.

[5] See *Keegstra* (supra) at 304-5 (McLachlin J). A number of hate speech prohibitions also existed in apartheid South Africa. See, for example, Black Administration Act 38 of 1927 s 29; the Publications Act 42 of 1974; and Internal Security Act 74 of 1982 s 63.

does not permit the open airing and debate of hateful invective, and makes it more likely that racism and other forms of bigotry will surface in violent action.[1] In other words, the 'safety valve' of free speech is not allowed to operate.[2] A third argument is that prosecutions for contraventions of hate speech bans only serve to attract more attention (and media publicity) to the bigoted views, make the accused appear as a martyr for his or her views, and provide a platform for the accused to spread his or her hateful message.[3] According to the final strand, history indicates that hate speech bans are often used in an attempt to silence minorities who are opposed to the status quo — the very groups that hate speech laws are meant to protect. The prosecution of black power advocates in the United Kingdom is often cited as an example of this,[4] as is the experience under apartheid in which hate speech laws were used to silence critics of the government.[5]

A comparative analysis of hate speech laws in various jurisdictions reveals a sharp divide between the approach in the United States — in which courts generally strike down hate speech prohibitions as violating the First Amendment — and the approach taken in international conventions and in other jurisdictions, such as Germany, France, Denmark, the Netherlands, the United Kingdom, Northern Ireland, Israel, India, Australia and Canada — which are sympathetic to, and supportive of, hate speech bans.[6] This can, to some extent, be explained by the individualistic approach to freedom of speech that prevails in American jurisprudence compared with the more communitarian approach adopted in other jurisdictions which seeks to balance freedom of expression with other values such as multi-culturalism, equality and dignity.[7] It is not surprising, given South

[1] Meyerson 'No Platform' (supra) at 397 ('To the extent that racial animosities will continue to plague us, it is better to let them be played out at the level of words rather than to bottle them up, thereby not only increasing their virulence, but also making more likely a more dangerous kind of discharge'.)

[2] See § 42.5 supra.

[3] *Keegstra* (supra) at 304 (McLachlin J)(The Justice also made the related argument that the prohibition may fuel conspiracy theories to the effect that there is truth in the hateful expression, i.e. listeners may believe 'that there must be some truth in the racist expression because the government is trying to suppress it'. Ibid at 304. Dickson CJC, on behalf of the majority in *Keegstra*, disputed McLachlin J's views, saying that the prohibition on hate speech 'serves to illustrate to the public the severe reprobation with which society holds messages of hate directed towards racial and religious groups. The existence of a particular criminal law, and the process of holding a trial when that law is used, is thus itself a form of expression, and the message sent out is that hate propaganda is harmful to target group members and threatening to harmonious society'. Ibid at 244.)

[4] See Niesser (supra) at 348-349.

[5] G Marcus 'Racial Hostility: The South African Experience' in Colliver (ed) (supra) at Chapter 24; L Johannessen 'A Critical View of the Constitutional Hate Speech Provision' (1997) 13 *SAJHR* 135, 136-7.

[6] See Rosenfeld (supra) at 1523 (In the realm of hate speech, there is 'a big divide between the United States and other Western democracies'.) The European Court on Human Rights has also indicated that egregious hate speech does not enjoy protection under the right to freedom of expression in art 10 of the European Convention on Human Rights and Fundamental Freedoms (1950). See, for example, *Jersild v Denmark* 19 EHRR 1, 28 (1994)('*Jersild*').

[7] Rosenfeld (supra) at 1529 and 1541.

Africa's past and the egalitarian nature of our Constitution, that our law has rejected the United States approach and is generally supportive of hate speech laws. It seems to us that this is both because of a desire to avoid the harms associated with hate speech as well as the symbolic effect of hate speech prohibitions. Such prohibitions send a clear message that hateful speech which disrupts the goals of dignity, equality and the building of a united society will not be tolerated.[1]

(ii) *The constitutional treatment of hate speech*

(aa) The express exclusion in FC s 16(2)*(c)*

As noted in the previous section, many jurisdictions have grappled with the appropriate constitutional balance in cases involving hate speech. The drafters of South Africa's Constitution have, to some extent at least, settled the debate in this country by stipulating, in FC s 16(2)*(c)*, that freedom of expression does not extend to 'advocacy of hatred based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'.[2] The effect of this provision is that particularly egregious hate speech is excluded from constitutional protection, notwithstanding the fact that such speech undoubtedly falls within the ordinary meaning of 'expression'.[3] As Langa DCJ stated in *Islamic Unity*: '[s]ection 16(2) defines the boundaries beyond which the right to freedom of expression does not extend'.[4]

Not surprisingly, this constitutional carve-out of hate speech was controversial. Lene Johannessen, for example, argues that it is jurisprudentially unsound to exclude a portion of expression from the protection of the Constitution. He adds that there was in fact no need for the drafters to exclude hate speech from FC s 16, since the courts would, in any event, have found that a prohibition on egregious hate speech would be saved by the self-standing limitations clause in FC s 36(1).[5]

However, it bears emphasising that FC s 16(2)*(c)* sets a high threshold for hate speech; it only applies where the expression amounts to advocacy of hatred *and* constitutes incitement to cause harm. The advocacy of hatred is not, in itself, sufficient to trigger this provision.[6] It follows that, while FC s 16(2)*(c)* removes

[1] Niesser (supra) at 350; Burns 'Hate Speech' (supra) at 54.

[2] The wording of FC s 16(2)*(c)* is based on art 20(2) of the ICCPR, which reads as follows: 'Any advocacy of national, racial and religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. See § 42.2 supra.

[3] See § 42.3 supra.

[4] *Islamic Unity* (supra) at para 32.

[5] Johannessen (supra) at 138-142.

[6] The Canadian legislative provision that was at issue in *Keegstra* does not set such a high threshold. It simply prohibits the promotion of hatred (without the additional requirement of incitement). Compare also s 8(5) of the Regulation of Gatherings Act 205 of 1993.

the debate, at the level of constitutional principle, as to whether hate speech laws are permissible, it opens up some significant interpretive difficulties. The most pressing are what amounts to 'advocacy of hatred' and 'incitement to cause harm'.

(bb) 'Advocacy of hatred based on race, ethnicity, gender or religion'

The first requirement in FC s 16(2)*(c)* — 'advocacy of hatred' — suggests that the speaker must actively 'advocate' hatred. In other words, the speaker must promote hatred or attempt to instill hatred in others. As Iain Currie and Johan de Waal state: '[t]o advocate hatred is to propose or call for it, to make a case for it'.[1]

The next question is what is meant by 'hatred'. The following statement of Cory JA in the Canadian decision of *R v Andrews* has been cited on numerous occasions on this issue:

> Hatred is not a word of casual connotation. To promote hatred is to instill detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies.[2]

This requirement was found to be satisfied in the decision of the appeal committee of the South African Human Rights Commission ('the SAHRC') in *Freedom Front*.[3] The appeal committee held that the chanting of 'kill the Farmer, kill the Boer' at an ANC Youth League rally and at an ANC leader's funeral, amounted to hate speech. Professor Govender, who penned the decision on behalf of the SAHRC committee, remarked that '[c]alling for the killing of people because they belong to a particular community or race must amount to the advocacy of hatred, unless the context clearly indicates otherwise'.[4]

FC s 16(2)*(c)* is limited to the advocacy of hatred *based on* the listed grounds of race, ethnicity, gender or religion. There are two important points here. First, hate speech does not extend to speech which simply advocates hatred of a particular person (which more ordinarily falls within the domain of defamation) but rather

[1] *The Bill of Rights Handbook* (5th Edition, 2005) 375. See also C van Wyk 'The Constitutional Treatment of Hate Speech in South Africa' (2003) 18 *SAPR/PL* 185, 182 (Advocacy includes 'an element of exhortation, pleading for, supporting or coercion'); *Keegstra* (supra) at para 120 (Considering the similar phrase 'promotes hatred' in the Canadian hate speech statute, Dickson CJC, on behalf of the majority, stated that 'promotes' indicates active support or instigation. . . [it] indicates more than simple encouragement or advancement. The hate-monger must intend or foresee as substantially certain a direct and active stimulation of hatred against an identifiable group'.)

[2] 43 CCC (3rd) 193, 211, quoted with approval in *Freedom Front* (supra) at 1290. See also *Keegstra* (supra) at 250 (Dickson CJC added as follows: 'Hatred is predicated on destruction, and hatred against identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and the values of society. Hatred in this sense is a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation'.)

[3] *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC)('*Freedom Front*').

[4] Ibid at 1290.

consists of advocating hatred based on *group* characteristics. Hate speech is thus sometimes referred to as 'group defamation'. Second, FC s 16(2)*(c)* does not cover all forms of hate speech, but only those that are based on the specified grounds of race, ethnicity, gender or religion.[1] FC s 16(2)*(c)* does not, therefore, include hate speech based on analogous grounds such as homophobic speech.[2]

(cc) 'Incitement to cause harm'

Perhaps the even more difficult question is what is meant by 'incitement to cause harm' in FC s 16(2)*(c)*. It is clear that 'harm' includes physical violence. The important question is whether it extends beyond violence. The authors of the first edition of this chapter emphasised the fact that FC s 16(2)*(c)* is an exclusion from constitutional protection and should thus be narrowly interpreted; they expressed the view that harm should be limited to physical harm.[3] Other writers disagree, saying that 'harm' should include psychological and emotional harm.[4]

The nature of the harm contemplated in FC s 16(2)*(c)* arose squarely in *Freedom Front*, because the SAHRC did not find a causal link between farm attacks and the chanting of the 'kill the Farmer, kill the Boer' slogan. Whereas the SAHRC had initially held that FC s 16(2)*(c)* was limited to physical harm, the appeal committee disagreed, holding that it extended to psychological and emotional harm for

[1] These grounds are a sub-set of the listed grounds for unfair discrimination enumerated in FC ss 9(3) and (4). For a discussion of the grounds of unfair discrimination, including the meaning of the terms race, ethnicity, gender and religion, see C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 35.

[2] This view is shared by Currie and De Waal. Hate speech based on 'gender' refers to speech that advocates hatred based on the social constructs of maleness and femaleness, and is probably wide enough to include hate speech against transgendered persons. Nevertheless, it does not, in our view, include hatred based on homosexuality (or other forms of sexual orientation) — despite the fact that the need to prohibit homophobic hate speech is just as pressing as the need to prohibit hate speech based on the grounds listed in FC s 16(2)*(c)*. While there is no reason in principle to distinguish between hate speech aimed at gays and lesbians and hate speech aimed at men or women, it would, in our view, be an overly forced interpretation of FC s 16(2)*(c)* to read it as extending to homophobic speech (particularly where FC s 9(3) lists sexual orientation as a separate ground of discrimination to that of gender (and sex)). Currie & De Waal (supra) at 375 n 88. See also van Wyk (supra) at 193-4. Yvonne Burns expresses a contrary view. While accepting that a textual interpretation of FC s 16(2)*(c)* points to the exclusion of speech based on sexual orientation, Burns argues that a generous, purposive interpretation of this provision (i.e. taking into account the values of the Constitution) favours the extension of hate speech to that aimed at gays and lesbians. Burns 'Hate Speech' (supra) at 48-49.

[3] Marcus & Spitz (supra) at 20-63 (Marcus and Spitz add that '[t]his is not to say that social and psychological harms caused by hate speech are not real harms which can and should be combated. However, they may be combated by legislation capable of satisfying the requirements of [the limitations clause]'.)

[4] Currie & De Waal (supra) at 376-377 and Burns 'Hate Speech' (supra) at 51-52. See also *Human Rights Commission of South Africa v SABC* 2003 (1) BCLR 92 (BCCSA) at para 39. These are the types of harms identified by the Canadian Supreme Court in *Keegstra* (supra) in the different context of interpreting a statutory prohibition (rather than interpreting a constitutional exclusion).

three reasons:[1] *(a)* the textual consideration that limiting FC s 16(2)*(c)* to physical violence would render FC s 16(2)*(b)* — which prohibits incitement of 'imminent violence' — redundant;[2] *(b)* it makes no sense to limit incitement to violence only to speech that advocates hatred on the limited grounds set out in FC s 16(2)*(c)*; and *(c)* a broader meaning of 'harm' better serves the constitutional objectives of building a non-racial and non-sexist society and protecting dignity.[3] The SAHRC appeal committee, however, emphasised that the harm must be 'serious and significant' and it is not enough that the speech is merely offensive.[4] It added that it must be shown that the expression itself causes the harm or is likely to cause the harm.[5] Turning to the facts, the committee found that the slogan 'kill the Farmer, kill the Boer', in the context in which it was chanted, fell foul of FC s 16(2)*(c)* as:

> [it] would harm the sense of well being, contribute directly to a feeling of marginalisation, and adversely affect the dignity of Afrikaners. The slogan says to them that they are still the enemy of the majority of the people of this country. It contributes to the alienation of the target community and conveys a particularly divisive message to the majority community that the target community is less deserving of respect and dignity.[6]

While there is much to commend the reasoning of the appeal committee in *Freedom Front*, the difficulty is that it focuses primarily on the harm caused to the target group *by the speech*. It does not specifically deal with the meaning of the phrase 'incitement to cause harm' in FC s 16(2)*(c)*. This phrase suggests that one should not look to the harm caused by the speech itself but rather to the impact of the speech on third parties, i.e. does the speech encourage, stimulate or call for others to cause harm? This is the ordinary meaning of 'incitement'.[7] Despite this ordinary meaning, Currie and De Waal argue that 'incite' in the context of

[1] *Freedom Front* (supra) at 1292.

[2] This is not, strictly speaking, correct. This interpretation would not render FC s 16(2)*(b)* redundant any more than any other sensible interpretation of FC s 16(2)*(c)*. One must accept that 'harm' includes, at a minimum, physical violence. Whatever interpretation is given, FC s 16(2)*(b)* covers the incitement of violence (whatever the basis for that incitement), provided that the violence is imminent, while FC s 16(2)*(c)* covers incitement of violence only on the grounds of race, ethnicity, gender or religion, although the violence need not be imminent. In relation to physical violence, FC s 16(2)*(c)* is therefore in one respect wider and in another narrower than FC s 16(2)*(b)*. Nevertheless, what is important is that the use of the word 'violence' in FC s 16(2)*(b)* indicates that the 'harm' in FC s 16(2)*(c)* is not limited to physical violence, as the drafters chose to use a different term to that used in FC s 16(2)*(b)*.

[3] *Freedom Front* (supra) at 1292-1295.

[4] Ibid at 1295. See also *Van Loggerenberg v 94.7 Highveld Stereo* 2004 (5) BCLR 561 (BCCSA) at para 6. But see V Bronstein 'What You Can and Can't Say in South Africa' (Unpublished paper, 2007)(on file with the authors) 32 and 37-42 (Criticises a number of decisions of the BCCSA for apparently equating offensiveness with hate speech.)

[5] *Freedom Front* (supra) at 1295 (Professor Govender goes on to state that the question 'is whether a reasonable person assessing the advocacy of hatred on the stipulated grounds within its context and having regard to its impact and consequences would objectively conclude that there is a real likelihood that the expression causes harm'. Ibid at 1298.)

[6] Ibid at 1299.

[7] See § 42.8*(b)* supra.

FC s 16(2)*(c)* means 'directed at' or 'intended'.[1] If this interpretation is correct, speech may fall within FC s 16(2)*(c)* if the speech itself causes harm to the targeted group by, for example, inflicting serious psychological harm.

While we acknowledge that an overly textual interpretation is not always appropriate to the task of giving meaning to the Bill of Rights, it seems to us that equating 'incitement' with 'intention' is an unduly strained reading of FC s 16(2)*(c)*. If the constitutional drafters had intended to hit speech that causes harm directly, they could easily have drafted FC s 16(2)*(c)* to do so. The use of the word 'incitement' indicates that the speech must instigate or actively persuade others to cause harm. This interpretation is supported by two further textual factors: 'incitement' is coupled with 'to cause' harm in FC s 16(2)*(c)*; and the use of the word 'incitement' in FC s 16(2)*(b)*, which refers to 'incitement of imminent violence'.

If 'incitement' bears its ordinary meaning, as we suggest it does, the harms contemplated in FC s 16(2)*(c)* must be concrete. This does not mean, on the one hand, that 'harm' is confined to physical harm or, on the other hand, that 'harm' extends to expression which merely stirs up feelings of hatred in the audience.[2] The harm contemplated in FC s 16(2)*(c)* includes various forms of serious harm that are capable of incitement in an audience, including incitement of violence (whether against persons or property), discrimination, harassment and verbal abuse.[3] It covers, for example, not only hateful statements at a neighbourhood meeting that call for the lynching of blacks, but extends to the instigation of harassing phone calls to black neighbours or encouraging the conclusion of agreements not to sell houses in the neighbourhood to black persons. If this interpretation is correct, the harm ultimately caused to the target group extends to serious psychological or emotional harm, but it must be harm that is *incited* by speech.

The requirement of incitement, particularly when coupled with the word 'advocacy' in FC s 16(2)*(c)*, indicates that expression only falls foul of this provision if the speaker intends to engage in hate speech. It is difficult to envisage how one can advocate hatred and incite to cause harm without intending to do so.[4]

Finally, whatever interpretation is given to FC s 16(2)*(c)*, it is important that it is not given too wide a meaning. Not only is a broad approach to this provision

[1] Currie & De Waal (supra) at 377 (In most instances of hate speech, '[i]t is the speech itself, and not the audience who may or may not be sufficiently fired up to translate the message into violent action, that causes the social and psychological harm'.)

[2] The latter approach would undermine the separate requirement in FC s 16(2)*(c)* of advocating hatred.

[3] This position is similar to ICCPR art 20(2). ICCPR art 20(2) proscribes the advocacy of hatred that incites discrimination, hostility or violence.

[4] But see *Freedom Front* (supra) at 1297 (Suggests that this is not the case, stating that the focus should be on whether the expression causes the harm or is likely to cause the harm, rather than on the subjective intention of the speaker.)

unsound as a matter of constitutional interpretation but it creates the danger, as Professor Govender puts it, 'that speech that is vitally important to the advancement of our constitutional democracy may be classified as hate speech, because our society is still, in respect of significant social issues, divided on racial lines'.[1]

(iv) *Legislative prohibitions on hate speech*

Since the advent of the Constitution, Parliament has passed two statutes containing prohibitions on hate speech.[2] We discuss these statutes after first setting out some brief comments on the general approach to the assessment of hate speech legislation.

(aa) The general approach to assessing the constitutionality of hate speech legislation

The starting point in assessing the constitutionality of hate speech legislation is to establish whether or not the prohibited expression falls within the meaning of FC s 16(2)*(c)*. If the prohibition is synonymous with, or more limited than, the type of hate speech contemplated in FC s 16(2)*(c)*, the legislation will pass constitutional muster. If, however, the legislative prohibition is wider than FC s 16(2)*(c)*, it limits the general right to freedom of expression in FC s 16(1) and must be justified under the limitations clause. In conducting the limitations analysis, it is important to bear in mind that there is a need to balance the right to freedom of expression against the rights to dignity and equality.[3]

Some guidance on this issue can be found in the decision of the Canadian Supreme Court in *Keegstra*, in which the majority of the Court upheld a criminal prohibition on hate speech. In summarising the majority's conclusion, Dickson CJC emphasised that the legislation created a narrowly confined offence

[1] *Freedom Front* (supra) at 1297.

[2] See also Regulation of Gatherings Act 205 of 1993 s 8(5), assented to on 14 January 1994 (Shortly before the Interim Constitution came into effect). It came into force on 15 November 1996. It reads: 'No person present at or participating in a gathering or demonstration shall by way of a banner, placard, speech or singing, or in any other manner incite hatred of other persons or any group of other persons on account of differences in culture, race, sex, language or religion.'

[3] The assessment of the constitutionality of hate speech legislation in other jurisdictions does not necessarily involve a clash between constitutional rights. This is because most constitutions only confer rights against the state, so that the hate speech legislation enacted by the legislature infringes the constitutional right to freedom of expression, while the hate speech does not itself infringe the constitutional right to equality. As McLachlin J emphasised in her dissenting judgment in *Keegstra*, the Canadian hate speech prohibition at issue in that case did not infringe the constitutional right to equality. McLachlin J thus pointed out that the conflict was 'not between rights, but rather between philosophies'. *Keegstra* (supra) at 290. The position is markedly different in South Africa, in light of the so-called horizontal application of the Bill of Rights and, in particular, the fact that FC s 9(4) expressly extends the unfair discrimination prohibition to non-state actors. See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) § 31.4.

which was neither overbroad nor vague. He pointed out, further, that the prohibition 'possesses a stringent *mens rea* requirement, necessitating either an intent to promote hatred or knowledge of the substantial certainty of such', as well as the fact that the meaning of 'hatred' is restricted to 'the most severe and deeply-felt form of opprobrium'.[1] This conclusion was supported by the following: private conversation was excluded from the statutory prohibition; the promotion of hatred had to be focussed on an identifiable group; and the prohibition contained various exceptions.[2]

While *Keegstra* is an example of a sufficiently narrow hate speech prohibition, in *Islamic Unity* the Constitutional Court was confronted with a provision that was overly broad. The unanimous Court struck down a provision of the broadcasting code[3] that prohibited the broadcasting of material that was 'likely to prejudice … relations between sections of the population'. Deputy Chief Justice Langa pointed out that the prohibition was cast in absolute terms, that it was 'so widely-phrased and so far-reaching that it would be difficult to know beforehand what it really prohibited or permitted', and that it 'would deny broadcasters and their audiences, the right to hear, form and freely express and disseminate their opinions and views on a wide range of subjects'.[4]

(bb) Section 29 of the Films and Publications Act

Following the lead of FC s 16(2)*(c)*, s 29 of the FPA[5] stipulates that a person commits an offence if he or she knowingly broadcasts or distributes a publication; broadcasts, exhibits in public or distributes a film; or presents an entertainment or play in public, which, judged within context, 'advocates hatred that its based on race, ethnicity, gender or religion, and which constitutes incitement to cause harm'. Although this prohibition replicates the phrase used in FC s 16(2)*(c)*, s 29 prohibits a narrower range of expression than that contemplated in FC s 16(2)*(c)*. This is because s 29(4) contains three important exceptions to the prohibition: *(a)* a *bona fide* scientific, documentary, dramatic, artistic, literary or religious publication, film, entertainment or play; *(b)* a *bona fide* discussion, argument or opinion on a matter pertaining to religion, belief or conscience; and *(c)* a *bona fide* discussion, argument or opinion on a matter of public interest.[6] These broad exceptions would appear to remove a large amount of hateful speech from the ambit of the criminal prohibition. It is likely, for example, that much of hate

[1] *Keegstra* (supra) at 256.
[2] Ibid.
[3] The Code of Conduct for Broadcasting Services, contained in Independent Broadcasting Authority Act 153 of 1993 sched 1.
[4] *Islamic Unity* (supra) at para 44.
[5] Act 65 of 1996.
[6] FPA s 29(4).

speech against a religious group would form part of a *bona fide* religious publication or a good faith discussion, argument or opinion on 'a matter pertaining to religion'. Section 29 should therefore survive constitutional challenge.

(cc) Section 10 of the Equality Act

A further, and apparently wider, prohibition on hate speech is contained in s 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act ('the Equality Act').[1] This legislation, unlike the FPA, does not impose a criminal prohibition on hate speech, but rather treats hate speech as a type of civil wrong for which a victim can claim relief. This is, in principle, to be welcomed. As the Canadian Court stated in *Canada (Human Rights Commission) v Taylor*:

> The chill placed upon expression in [the context of a human rights statute] will ordinarily be less severe than that occasioned where criminal legislation is involved, for attached to a criminal conviction is a significant degree of stigma and punishment, whereas the extent of opprobrium connected with a finding of discrimination is much diminished and the aim of remedial measures is more upon compensation and protection of the victim.[2]

Section 10(1) of the Equality Act provides as follows:

> [N]o person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to —
> *(a)* be hurtful;
> *(b)* be harmful or incite harm;
> *(c)* promote or propagate hatred.

The 'prohibited grounds' are defined in the Equality Act as the listed grounds for unfair discrimination set out in FC ss 9(3) and (4), including, for example, sexual orientation, age, disability and language[3] as well as any other ground where discrimination based on that ground 'causes or perpetuates systemic disadvantage'; 'undermines human dignity' or 'adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on [a listed ground]'. This considerably broadens the grounds of hate speech from those enumerated in FC s 16(2)*(c)*.

The broad prohibition in s 10(1) of the Equality Act must be read subject to the proviso in s 12, which states that this provision does not preclude:

[1] The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
[2] [1990] 3 SCR 892.
[3] The complete list is: 'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.

> the *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution.

A first noticeable characteristic of s 10(1) is that it does not envisage that the hate speech must incite or persuade others. It prohibits speech that itself gives rise to the harms envisaged in the section. Although this aspect of the s 10(1) prohibition goes wider that FC s 16(1)*(c)*, which requires 'incitement' of harm, we are of the view that this extension would, in itself, be reasonable and justifiable and would thus survive constitutional scrutiny.

There are, however, several difficulties with the prohibition in s 10(1). First, it does not require intention on the part of the speaker. A statement will fall foul of this prohibition if it meets the vague test that it 'could reasonably be construed to demonstrate a clear intention to…'. This test is overly broad and vague. The second, and perhaps more important, difficulty is that the harms contemplated in this section are, on their face, very wide. Speech is prohibited if it appears to be intended to promote or propagate hatred, to be harmful or to incite harm or to be hurtful. The phrases 'hatred', 'harmful' and 'harm' are, if given the meaning accorded to these phrases in the context of FC s 16(2)*(c)*,[1] not problematic. The difficulty is the use of the phrase 'hurtful'. If interpreted literally, this phrase (particularly when used together with 'harmful') would prohibit a wide range of expression such as robust opinions on racial issues or gender-insensitive jokes. Such an approach would run counter to the constitutional commitment to freedom of expression, and should be avoided.

One way of minimising the impact of s 10(1) on freedom of expression would be to interpret the phrases 'be harmful' or 'incite harm' as referring to physical violence and, perhaps, other concrete forms of harm such as discrimination, and to interpret the phrase 'be hurtful' as capturing serious and significant psychological and emotional harm.[2] While this may not be the ordinary meaning of 'hurtful', any other interpretation would probably mean that s 10(1) is unconstitutional.

The other way in which s 10(1) may survive constitutional scrutiny is through the s 12 proviso. The problem is that this proviso is, like s 10(1) itself, vague. While the exclusion of 'fair and accurate reporting in the public interest' is to be welcomed,[3] phrases such as '*bona fide* engagement in artistic creativity' are

[1] See § 42.8*(c)*(iii) supra.

[2] See A Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act: Why the Controversy?' 2001 *TSAR* 294, 299-300.

[3] Such a defence avoids the situation that arose in *Jersild*. In *Jersild*, a television journalist was convicted for the broadcast of a documentary containing extracts of interviews with racist youths expressing strong racist and xenophobic views. The purpose of the programme was to demonstrate the pressing problems of racism and xenophobia and did not endorse the views of the youths. The journalist's conviction was eventually set aside by the European Court of Human Rights.

uncertain, particularly as notions of art are subjective and changeable over time. Even more unclear is what is meant by the exclusion of 'any information, advertisement or notice in accordance with section 16 of the Constitution'. This phrase suggests that any speech that falls within the constitutional right to freedom of expression (i.e. speech which does not amount to propaganda for war, incitement of imminent violence or hate speech contemplated in FC s 16(2)*(c)*) does not fall foul of the hate speech prohibition in s 10(1) — provided that the speech takes the form of 'any information, advertisement or notice'. This would collapse the enquiry under the Equality Act into an enquiry as to whether the hate speech falls within FC s 16(2)*(c)*, which would be bizarre given that the wording of s 10(1) is very different to that of FC s 16(2)*(c)*. Another way of interpreting this phrase is to read it as excluding constitutionally protected speech but only to the extent that the infringement of that speech would not amount to a reasonable and justifiable infringement of the right to freedom of expression under FC s 36(1). This too would be a most unsatisfactory result, as it would lead to great uncertainty and would mean that the legislature would effectively have put in place an overbroad prohibition on expression and then require the courts to draw the boundaries of the prohibition.

The drafting of the hate speech prohibition in s 10(1) read with s 12 of the Equality Act therefore leaves a great deal to be desired. In the critical area of hate speech in which the tension between the fundamental rights of freedom of expression, dignity and equality is at stake, it is imperative that the legislature intervene to remedy the matter by producing a more coherent hate speech prohibition. In its current form, the Equality Act is vulnerable to a range of constitutional challenges.

42.9 Major restrictions on freedom of expression

The following section does not purport to examine in detail the plethora of laws that restrict free speech. Rather, the approach taken is to examine a number of major restrictions on freedom of expression, with a focus on those restrictions that have engaged the attention of the courts following the enactment of the Interim Constitution. The restrictions that are considered here are defamation; privacy; restrictions designed to protect the administration of justice; restrictions to protect intellectual property rights; sexually explicit speech; commercial speech; national security restrictions; and prior restraints.

(a) The law of defamation[1]

The law of defamation greatly curtails what a publisher may write or say about individuals or juristic persons, and thus represents a major restriction on freedom

[1] For a detailed analysis of how the values underpinning the conflicting rights of reputation and freedom of expression ought to affect aspects of the law of defamation, see D Milo *Defamation and Freedom of Speech* (2008)('*Defamation*').

of expression. In principle it is of course desirable for a democratic society to protect persons' reputations through laws such as the law of defamation.[1] Indeed, the right to reputation has always been jealously protected at common law,[2] and has also been recognised by our courts as forming an aspect of the constitutionally protected right to dignity, entrenched in FC s 10:[3]

> The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual.[4]

The law of defamation thus has to balance two constitutional rights, neither of which can be regarded as being of greater *a priori* significance in South Africa: the right to reputation, protected under the right to dignity, and the right to freedom of expression.[5] In our view, the common law of defamation sought to balance these rights in a manner that unjustly favoured the right to reputation.[6] This is particularly true of two main pillars of the South African law of defamation: the onus rule, which requires defendants to prove a defence to an action for defamation on a balance of probabilities;[7] and the strict liability rule, in terms of which media defendants could not rely on absence of fault to escape liability.[8] As will be discussed in greater detail below, the strict liability rule has now been revisited by the Supreme Court of Appeal, and a new defence of reasonable publication has been introduced.[9]

[1] For the classic analysis of the value of reputation, see RC Post 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *California LR* 691. See generally L McNamara *Defamation and Reputation* (2007)(Provides a compelling modern justification of the values underpinning reputation.)

[2] The leading text on the common law of defamation remains JM Burchell *The Law of Defamation in South Africa* (1985)('*Defamation*').

[3] *Khumalo & Others v Holomisa* 2002 (1) SA 401 (CC), 2002 (8) BCLR 771 (CC)('*Khumalo*') at para 28. Cf *National Media Ltd & Others v Bogoshi* 1998 (4) SA 1195, 1216 (SCA)('*Bogoshi*').

[4] *Khumalo* (supra) at para 27. For further discussion of this point, see S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) 36-55 — 36-58.

[5] Of course, the conflict between these two rights characterised the common law of defamation even before the advent of the Interim and then the Final Constitution. But this conflict must now be resolved through the prism of the proper balancing of two constitutional rights. Cf *Bogoshi* (supra) at 1216-1217 (the Supreme Court of Appeal revisited and reformulated the common law of defamation, and declared that this formulation was consistent with the Interim Constitution).

[6] See *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588, 611 (W)('*Holomisa*'). For a detailed discussion of the pre-constitutional law of defamation, see Burchell *Defamation* (supra).

[7] *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 (1) SA 708 (A)('*Neethling*').

[8] *Pakendorf v De Flamingh* 1982 (3) SA 146 (A)('*Pakendorf*').

[9] See § 42.9*(a)*(iv) infra.

The remainder of this section is structured as follows. The question of standing to sue for defamation is addressed first, followed by a discussion of developments in the law of defamation in regard to determining when a statement is defamatory. The challenges to the onus rule and the strict liability rule are dealt with thereafter. This is followed by a consideration of aspects of defences that have been considered in recent cases, and finally a few issues relating to remedies.[1] While a number of important developments must be welcomed, it is arguable that the law of defamation remains an unreasonable limitation on freedom of expression in certain significant respects. In addition, room remains for the development of defamation law in light of the values of the Bill of Rights.

(i) *Standing to sue for defamation*

One way in which to ensure that freedom of expression receives maximum protection is to regard a particular class of plaintiff as simply having no standing to sue for defamation. Thus, in *Die Spoorbond & Another v South African Railways*, the South African Railways and Harbours, as a governmental body, was not entitled to sue for defamation in regard to allegations that it had endangered the lives of members of the public.[2] Schreiner JA held that 'it would involve a serious interference with the free expression of opinion … if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects actions for defamation'.[3] Allowing the state to sue for defamation would effectively be sanctioning a seditious libel regime, the absence of which lies at the heart of freedom of political speech.[4]

The exact ambit of the rule that the government may not sue for defamation must be appreciated. Firstly, it does not follow from *Die Spoorbond* that government officials such as Cabinet ministers should not be allowed to sue for

[1] The issues discussed here are those that most profoundly implicate the balancing between freedom of speech and reputation. See generally Milo *Defamation* (supra) especially chs V, VI and VII (argues that the presumptions of falsity, fault and harm to reputation should not survive constitutional scrutiny). For a useful analysis of the constitutionality of the crime of defamation, see C Walker 'Reforming the Crime of Libel' (2005-6) 50 *New York L School LR* 169. The Supreme Court of Appeal has recently held that the crime of defamtion is consistent with the Constitution. *Hoho v The State* [2008] ZASCA 98.

[2] *Die Spoorbond & Another v South African Railways; Van Heerden & Others v South African Railways* 1945 AD 999, 1009 ('*Die Spoorbond*') (The Appellate Division left open the possibility of the plaintiff suing for malicious falsehood, which is a far more onerous cause of action as compared to defamation.)

[3] Ibid at 1013. The same disabling rule applies in a number of other jurisdictions. See, for example, *Posts and Telecommunications Corporation v Modus Publications (Pty) Ltd* 1998 (3) SA 1114, 1123 (ZS)(McNally JA set out useful criteria to determine whether an artificial person is part of the governance of the country)(Zimbabwe); *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 (HL)('*Derbyshire*')(England); *City of Chicago v Tribune Co* 307 Ill 595 (1923) (US); *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 (New South Wales).

[4] H Kalven Jr 'The *New York Times* Case: A Note on the "Central Meaning" of the First Amendment' [1964] *Supreme Court Rev* 191.

defamation.[1] This is clearly correct: To non-suit public officials from suing for defamation would not only pay scant regard to the right to reputation, and undermine the quality of public discourse, but may also deter individuals from entering public office.[2]

Secondly, the High Court has held that the state is entitled to provide financial assistance to public officials who sue for defamation. This holding is questionable. To the extent that the defamatory allegations are truly aimed at the government rather than a particular individual, the action should, of course, not be entertained as it would breach the rule in *Die Spoorbond*.[3] The facts of *Ritchie* are illustrative of such a scenario. Various defamation actions had been brought around the same time by a range of public officials against the same newspaper, editor and journalist; these actions had been funded by the Northern Cape Provincial Government. The Court erred, in our view, in not recognising that the specific factual context gave rise to an inference that the provincial government was seeking to silence criticism through the mechanism of the defamation actions. The decision to fund the various plaintiffs should have been set aside. Where, however, it cannot be contended that the true plaintiff in a defamation case is the government as opposed to an individual public official, the fact that the action is funded by the government is not necessarily objectionable.

Finally, it is competent for political parties, including the ruling party, to sue for defamation.[4]

(ii) *Defamatory statements*

A number of courts have examined the question of whether a publication is defamatory in light of constitutional values. The basic test is the objective one of

[1] *Mthembi-Mahanyele v Mail & Guardian Ltd & Another* 2004 (6) SA 329 (SCA)('*Mthembi-Mahanyele*'). See also *Argus Printing and Publishing Co Ltd & Others v Esselen's Estate* 1994 (2) SA 1 (A)('*Argus Printing*')(judges may sue for defamation).

[2] See D Milo 'Cabinet Ministers Cannot Sue for Defamation' (2003) 120 *SALJ* 282; *Ritchie & Another v Government of the Northern Cape Province & Others* 2004 (2) SA 524 (NC)('*Ritchie*') at para 16.2; *Mthembi-Mahanyele* (supra) at para 40; J Neethling 'Die *Locus Standi* van 'n Kabinetminister om vir Laster te Eis, en die Verweer van Redelike Publikasie van Onwaarheid op Politieke Terrein: *Mthembi-Mahanyele v Mail & Guardian Ltd* 2004 6 SA 329 (HHA)' (2005) 68 *THRHR* 321, 323.

[3] For criticisms of *South African Associated Newspapers Ltd & Another v Estate Pelser* 1975 (4) SA 797 (A) see *Mthembi-Mahanyele* (supra) at para 39. See also *New York Times v Sullivan* 376 US 254, 291-292 (1964)('*Sullivan*'); *The Queen on the Application of Comninos v Bedford Borough Council & Others* [2003] EWHC 121 Admin at para 39 (The Bedford Borough Council had agreed to provide financial support to libel claims brought by three council officers. In an application for judicial review of this decision by the Council, Sullivan J agreed that the important public policy expressed by the House of Lords in *Derbyshire* (supra) should not be circumvented. 'If a local authority's true purpose is to sue for damage to its own reputation . . . then it will have acted for an improper purpose and/or taken irrelevant considerations into account and its decision will be liable to be quashed on normal public law principles'.)

[4] *Argus Printing* (supra); *African National Congress v Inkatha Freedom Party* [1999] 3 All SA 47 (W)(government different from ruling political party). The position is different in England. See *Goldsmith v Bhoyrul* [1998] QB 459 (in our view, this decision articulates the correct approach.)

whether a reasonable person of ordinary intelligence might reasonably understand the words to convey a meaning that tends to lower the plaintiff in the estimation of members of the community.[1] Even before the advent of the Interim Constitution, the common law exhibited a hesitancy to regard statements in regard to political matters as being defamatory. In *Argus Printing & Publishing Co Ltd v Inkatha Freedom Party*,[2] the Appellate Division held that 'the law's reluctance to regard political utterances as defamatory no doubt stems in part from the recognition that right-thinking people are not likely to be greatly influenced in their esteem of a politician by derogatory statements made about him.'[3]

This generous approach has been extended to speech in regard to other matters of public interest, as is evidenced in a few recent High Court decisions. In *Rivett-Carnac v Wiggins*, Davis AJ stated that the principles of the Constitution 'must be seen as essential to the determination of the values and views held by reasonable members of the community' and this community 'must be construed as one which is interested and concerned with transparency and deliberation. . .. The reasonable reader is prepared to draw a distinction between a robust exchange of views and material which goes further and damages a person's reputation and dignity'.[4] Similarly, in *Sokhulu v New Africa Publications Ltd & Others*, Goldstein J held that the right-thinking person for the purposes of determining whether a statement is defamatory is one who subscribes to the norms and values of the Constitution.[5] Such a person would not regard an allegation that the plaintiff had cohabited with a person for two years as being defamatory.[6]

But taking account of constitutional values in this context cuts both ways and so will not always result in greater protection for free speech. Where a publication by the defendant clearly imputes conduct at odds with the values of our Constitution, the publication will be defamatory. Thus an article that attributed to the plaintiff gratuitous use of racially derogative language ('white trash') and racial vilification would be regarded by right-minded members of South African society as reprehensible and conduct that must be eradicated; the allegations were therefore defamatory.[7]

[1] See *Mthembi-Mahanyele* (supra) at para 25. Cf *Mahomed & Another v Jassiem* 1996 (1) SA 673, 707 (A)(Test refers not to the general community but to the particular community of which the plaintiff was a member.)

[2] 1992 (3) SA 579, 588 (A).

[3] See also *Mangope v Asmal & Another* 1997 (4) SA 277, 287 (T). Cf *Lingens v Austria* (1986) 8 EHRR 57 at para 42.

[4] 1997 (3) SA 80, 89-90 (C)(And later the court wrote: 'The danger with equating robust criticism and defamatory material is that the onus then rests on [the] defendant to [escape liability]. If this is done too easily, the Court becomes a particularly accessible forum for potential litigants with the consequence that debate and deliberation can be stifled'. Ibid at 91.)

[5] 2001 (4) SA 1357 (W).

[6] Ibid at 1359. See also *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W) at para 13; *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (W) at para 65.

[7] *Sindani v van der Merwe & Others* 2002 (2) SA 32 (SCA). Cf *Botha & Another v Mthiyane & Another* 2002 (1) SA 289 (W), 2002 (4) BCLR 389 (W) at para 49.

(iii) *The challenges to the onus rule and the strict liability rule*

Following the enactment of the Interim Constitution, a number of defendants argued that aspects of the common law position were unjustifiable restrictions on inter alia freedom of expression. Their primary targets were the onus rule (which means that the plaintiff need not establish falsity) and the strict liability rule (that holds a faultless defendant liable). These arguments had varying levels of success, and left the law in a considerable state of uncertainty.[1] Many of the challenges sought to introduce into South African law the speech protective principles that have been developed by the US Supreme Court in its rich though complex defamation jurisprudence. The US Supreme Court has afforded greater protection to speech where the plaintiff is a public official or figure, or where the speech is on a matter of public interest.[2] Thus the First Amendment requires that a public official or figure must prove with convincing clarity that the defendant acted with 'actual malice', i.e. with knowledge of, or reckless disregard for, the falsity of the publication; this also implies that the plaintiff must establish falsity.[3] And because 'debate on public issues should be uninhibited, robust, and wide-open',[4] even where a private figure sues for defamation in relation to a matter of public concern, the plaintiff must establish falsity,[5] as well as some form of fault (at least negligence).[6] Moreover, actual damage must be proved by the plaintiff.[7] Thus the presumptions of falsity and damage have not survived constitutional scrutiny in the US, and defamation liability, at least in cases involving public interest speech, must be based on fault. The US position thus provides an obvious foundation for arguments by media defendants that the South African position unjustifiably infringes freedom of expression.[8]

[1] See Marcus & Spitz (supra) at § 20-32, 20-38 (Consider these developments in detail.)

[2] For a useful summary of the US position, see RL Weaver, AT Kenyon, DP Partlett & CP Walker *The Right to Speak Ill: Defamation, Reputation and Free Speech* (2006) 39-75.

[3] See *Sullivan* (Actual malice rule first established by the Supreme Court where a public official had sued for defamation.) See also *Curtis Publishing Co v Butts; Associated Press v Walker* 388 US 130 (1967)(Extends *Sullivan* to public figures); A Lewis *Make No Law: The Sullivan Case and the First Amendment* (1992)(The best description of these developments, especially the social and political background to *Sullivan*.)

[4] *Sullivan* (supra) at 270.

[5] *Philadelphia Newspapers Inc v Hepps* 475 US 767 (1986)('*Hepps*').

[6] *Gertz v Robert Welch Inc* 418 US 323 (1974).

[7] Presumed and punitive damages may only be awarded if actual malice is proved by the plaintiff. Ibid at 349.

[8] See, for example, *Holomisa* (supra) at 613-614.

To understand these challenges it is useful to contrast two South African cases from this period. Cameron J's ground-breaking judgment in *Holomisa* remains a model of clarity for judges and lawyers considering how to balance competing constitutional rights. Cameron J held that the Interim Constitution required 'the fundamental reconsideration of any common-law rule that trenches on a fundamental rights guarantee'.[1] In regard to defamation law, a proper balance between free speech and reputation requires that, in cases involving political activity,[2] the plaintiff bears the onus of proving that a defamatory statement is not entitled to constitutional protection.[3] The plaintiff will discharge this onus by showing that, in all the circumstances of the case, the statement was unreasonably made.[4]

A decision that is in sharp contrast to *Holomisa* is that of Eloff JP in *Bogoshi v National Media Ltd & Others*.[5] The judge gave short shrift to the argument that freedom of expression compelled a change to any features of the common law of defamation. He held that the right to reputation takes precedence over the right to free speech, and that the latter right was in any event given adequate protection by the common-law rules of defamation.[6]

The Supreme Court of Appeal finally resolved the inconsistent approaches of the lower courts to whether the Interim Constitution compelled changes to media defamation law in *Bogoshi*,[7] the appeal from Eloff JP's decision. The Court adopted a controversial methodology; rather than testing common-law rules against the Interim Constitution, the Court preferred to assess whether previous decisions of the Appellate Division stated the common law correctly.[8] The Court held that the strict liability principle that had previously been upheld by the

[1] *Holomisa* (supra) at 603.

[2] This restriction on the ambit of the decision was warranted because the Interim Constitution explicitly gave greater protection to speech relating to free and fair political activity. See Marcus & Spitz (supra) at 20-10. Cameron J stated *obiter* in *Holomisa* that the reversal of the onus rule should as a matter of principle apply in all defamation cases. *Holomisa* (supra) at 611.

[3] *Holomisa* (supra) at 613.

[4] Ibid at 618. See also *Gardener v Whitaker* 1995 (2) SA 672 (E), 1994 (5) BCLR 19 (E)(Plaintiff bears onus of proving that the statement was false and not in the public interest, or was unfair comment or not protected by privilege). Cf *Hall v Weltz & others* 1996 (4) SA 1070 (C)(*Holomisa* not applicable where ordinary citizens sue for defamation); *Buthelezi v South African Broadcasting Corporation* 1997 (12) BCLR 1733 (D)(Concept of public interest should be broadened but the defendant should have to prove the reasonableness of the publication).

[5] 1996 (3) SA 78 (W).

[6] Ibid at 83-4. See also *Potgieter & 'n Ander v Kilian* 1996 (2) SA 276 (N), 1995 (11) BCLR 1498 (N)(Interim Constitution does not apply horizontally); *McNally v M & G Media Limited & Others* 1997 (4) SA 267 (W), 1997 (6) BCLR 818 (W)(Rejected contentions that plaintiff should bear the onus of disproving a defence, and should have to prove actual malice or negligence).

[7] 1998 (4) SA 1196 (SCA)('*Bogoshi*'). For detailed discussion, see J Burchell 'Media Freedom of Expression Scores as Strict Liability Receives the Red Card: *National Media Ltd v Bogoshi*' (1999) 116 *SALJ* 1 ('Media Freedom'); JR Midgley 'Media Liability for Defamation' (1999) 116 *SALJ* 211.

[8] This approach can be criticised. See J van der Walt 'Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-operative Relation between the Common Law and Constitutional Jurisprudence' (2001) 17 *SAJHR* 341.

Appellate Division in *Pakendorf*[1] had incorrectly stated the common law. That decision did not, Hefer JA held, properly reflect freedom of expression and of the press, rights which always existed at common law, 'although [their] full import … might not always have been acknowledged'.[2] The Court continued: 'If we recognise, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in that process, it must be clear that strict liability cannot be defended'.[3] Hefer JA then, confusingly, turned to consider the question of unlawfulness, where he believed similar policy considerations applied,[4] concluding that 'the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time'.[5] Adding to the confusion, Hefer JA then reverted to the issue of fault for media defamation. He held that the media should not be treated on the same footing as individual defendants, for whom the absence of *animus injuriandi* (the intention to defame) means that they escape liability. It would thus be appropriate to hold the media liable unless they were not negligent, though the burden of proving lack of negligence or reasonableness of conduct lies with the defendant.[6]

(iv) *The defence of reasonable publication*

The decision of Hefer JA in *Bogoshi* is far from a model of clarity. Courts and commentators have especially struggled to understand how the judgment preserves the traditional distinction between fault and unlawfulness.[7] There has also been some debate as to whether the standard of fault postulated by *Bogoshi* is that of negligence or a form of *animus injuriandi*.[8] Two further issues may be identified: the ambit of speech to which the defence applies, and whether the decision has altered the law with respect to non-media defendants.

[1] *Pakendorf & Andere v De Flamingh* 1982 (3) SA 146 (A).
[2] *Bogoshi* (supra) at 1210.
[3] Ibid.
[4] Ibid at 1211.
[5] Ibid at 1212. The Court then mentioned a number of factors that would be relevant in regard to determining reasonableness, such as the nature, extent and tone of the allegations, the reliability of sources and the opportunity given to the victim to respond. Ibid at 1213.
[6] Ibid at 1214-1216. The Court therefore rejected the approach adopted by Cameron J in *Holomisa* (supra) in regard to the onus of proof. This approach, the Court reasoned, attached excessive importance to freedom of expression. Ibid at 1217.
[7] See especially *Mthembi-Mahanyele* (supra) at paras 45-47 (Lewis JA attempts to elucidate the distinction); *Sayed v Editor, Cape Times, & another* 2004 (1) SA 58, 63 (C)('*Sayed*')(Overlap between requirements.)
[8] See JM Burchell *Personality Rights and Freedom of Expression: The Modern* Actio Injuriarum (1998)('*Personality Rights*') 226 (supports a negligence test). Cf Midgley (supra)(supports an attenuated test based on intention). See also JR Midgley 'Intention Remains the Fault Criterion Under the *Actio Injuriarum*' (2001) 118 *SALJ* 433.

In regard to the first two issues, it is submitted that much of this debate is misplaced. There is merit in distinguishing lack of fault in the form of reasonable mistake as to the truth of the statement,[1] from general considerations of unreasonableness for purposes of the wrongfulness enquiry. But at bedrock *Bogoshi* should be recognised as articulating a defence based on reasonable publication in regard to speech on matters of public interest.[2] Attempts to clinically distinguish between fault and unlawfulness in this context have not, it is submitted, been persuasive. The most extensive attempt at reconciling *Bogoshi* in this regard is the judgment of Lewis JA in *Mthembi-Mahanyele v Mail & Guardian Ltd*:

> *Bogoshi* indicates that the reasonableness of the publication might also justify it. In appropriate cases, a defendant should not be held liable where the publication is justifiable in the circumstances — where the publisher reasonably believes that the information published is true. The publication in such circumstances is not unlawful. Political speech might, depending upon the context, be lawful even when false provided that its publication is reasonable. (See in this regard the test for reasonableness in *Bogoshi* . . . .) This is not a test for negligence: it determines whether, on grounds of policy, a defamatory statement should not be actionable because it is justifiably made in the circumstances.[3]

The objection to Lewis JA's analysis is that the test for lack of unlawfulness — which Lewis JA essentially states to be whether the publisher held a reasonable belief in the truth of the publication — on the one hand, and the negligence enquiry envisaged at the stage of fault, on the other, overlap to such a great degree. This is especially evident where Lewis JA applies the law to the facts. Thus, after discussing the unlawfulness stage of the enquiry, Lewis JA moves on to the fault stage, and states that 'much of what has been said above is relevant here too'.[4] This confusion is unhelpful to the development of our law of defamation. The key policy test to be applied is that of reasonableness: in all the circumstances, can it be said that the publication was reasonable?[5]

[1] The same applies to other mistakes that relate to elements of the plaintiff's cause of action, such as whether the defendant thought the statement was defamatory, or the availability of other defences, such as qualified privilege or fair comment.

[2] D Milo 'The Cabinet Minister, the *Mail & Guardian*, and the Report Card: The Supreme Court of Appeal's Decision in the *Mthembi-Mahanyele* Case' (2005) 122 *SALJ* 28 ('The Cabinet Minister') at 38-9.

[3] *Mthembi-Mahanyele* (supra) at para 47. See also *NM & Others v Smith & Others* 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC)('*NM v Smith*') at paras 96-7 (Langa CJ attempts to explicate the distinction in the context of privacy).

[4] *Mthembi-Mahanyele* (supra) at para 72.

[5] The authors differ on this point. One response, expressed by Dario Milo, is that our courts should resist drawing nice distinctions between fault and unlawfulness for purposes of media defamation law, and that the defences of reasonableness at the level of unlawfulness, and absence of negligence at the level of fault, in practice conflate into the same enquiry, namely, whether the defendant has acted reasonably. See Milo 'The Cabinet Minister' (supra) at 38-39 and Milo *Defamation* (supra) at 196. Another perspective, favoured by Glenn Penfold, is that it is important for our courts separately to recognise the defences of reasonableness and absence of negligence. According to this view, the reasonableness defence (as part of wrongfulness) is an open-ended policy enquiry that depends on all relevant considerations, and a defence of absence of negligence is qualitatively different; most importantly, it adds the defence of reasonable mistake, which means that the defendant is not liable if he or she reasonably believed that the material was true at the time of publication, without any further enquiry into the broad policy considerations on which a wrongfulness enquiry may depend, such as the tone of the article. G Penfold 'Aspects of Freedom of Expression in South

As to the second issue flagged above, the form of fault that now applies in media defamation law is clearly negligence. This has been acknowledged by the Constitutional Court in *Khumalo*[1] as well as the Supreme Court of Appeal in *Mthembi-Mahanyele*.[2] A jurisprudence is already developing in regard to the ingredients of reasonable conduct.[3] We support this move as a negligence standard accords with recent foreign jurisprudence in a number of jurisdictions,[4] adopts a flexible standard with which our courts are familiar, and, unlike the actual malice rule in *Sullivan*,[5] represents a reasonable balance between the right to free speech and reputation.[6] When applying the standard, courts should be careful to not demand too much of the defendant: the reasonable publication defence rightly protects the publication of defamatory statements even though they cannot be proved to be true, provided the publisher has acted reasonably. And, as has been recognized recently by the House of Lords, in assessing whether a publisher has acted responsibly on the facts, considerable weight should be accorded to the editorial judgment of the publisher.[7]

Africa's Democratic Transition' in C Jenkins, M du Plesssis & K Govender (eds) *Law, Nationbuilding and Transformation in South Africa* (2009, forthcoming)('Aspects'). See also J Burchell 'Media Freedom of Expression Scores as Strict Liability Receives the Red Card: *National Media Limited v Bogoshi*' (1999) 116(1) *SALJ* 1, 5-7; and J Neethling 'The Protection of False Defamatory Publications by the Mass Media: Recent Developments in South Africa against the Background of Australian, New Zealand and English Law' (2007) 40 *CILSA* 103 ('Recent Developments') at 123-124.

[1] *Khumalo* (supra) at para 20.

[2] *Mthembi-Mahanyele* (supra) at para 46.

[3] In a few cases, the courts have held that the reasonable publication defence availed the publisher. See, for example, *Sayed* (supra); *McKay v Editor City Press & Another* [2002] 1 All SA 538 (SE); *Mthembi-Mahanyele* (supra)(Lewis JA, Howie P); *Roberts v Johncom Media Investments Ltd* [2007] JOL 19012 (C); *Burchell v Johncom Media Investments Ltd* unreported decision of the Eastern Cape High Court, Case No 1092/2004. In other cases, the reasonable publication defence has failed. See, for example, *Lady Agasim-Pereira v Johnnic Publishing Eastern Cape (Pty) Ltd & Others* [2003] 2 All SA 416 (SE); *Mthembi-Mahanyele* (supra)(Mthiyane JA, Mpati DP); *Mothlasedi v New Africa Investments Ltd* unreported decision of the Witwatersrand Local Division (29 March 2007).

[4] For example, the developments in Australia. See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (Australian High Court held that the common law defence of qualified privilege could in principle be invoked to political communications to the public where the publisher had established the reasonableness of its conduct.) Cf *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 (HC). A test of responsible publication also informs the extended defence of qualified privilege that is now recognised in England. See *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 202 (HL). See also *Loutchansky v Times Newspapers Ltd (No 2)* [2002] QB 783 (CA) at para 36. A Canadian court has recently introduced a similar defence in Ontario. *Cusson v Quan* 2007 ONCA 771.

[5] The *Sullivan* test has been trenchantly criticized by academics and judges. The most eloquent rejection of the *Sullivan* test in South Africa is Cameron J's decision in *Holomisa* (supra) at 613-6. For an excellent academic critique, see RA Epstein 'Was *New York Times v Sullivan* Wrong?' (1986) 53 *U Chicago LR* 782.

[6] On the desirability of a negligence test as a means of balancing reputation and freedom of speech, see Milo *Defamation* (supra) at 206-211.

[7] *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359 (HL) at paras 51, 111 and 142.

The final two issues that require brief analysis are whether the reasonable publication defence applies to all types of speech, and whether it affects non-media defendants as well as media defendants. *Bogoshi* clearly postulates that the defence applies to speech on all matters of public interest.[1] However, an interesting development in this regard is the decision of Lewis JA (with whom Howie P concurred) in *Mthembi-Mahanyele*. Lewis JA, building on *Bogoshi*, upheld a special political speech defence — which she termed 'justifiable political speech' — the effect of which is to negative the presumption of unlawfulness.[2] Lewis JA appeared to regard such speech as information, opinion and arguments concerning government and political matters that affect the public.[3] The learned judge grounded her decision on the reach of this defence, on the principle that members of government must be accountable to the public. There can be no issue taken with Lewis JA on the need for political speech to be strongly protected in a democratic society. But to restrict this protection to the category of explicit political speech in modern circumstances, where there is no clear distinction between private and public power, poses a threat to freedom of expression.[4] *Bogoshi* already protects public interest speech that goes beyond purely political speech, as Mthiyane JA in his dissenting judgment recognises.[5] It may be that Lewis JA simply views political speech as a crystallisation of the general principle in *Bogoshi*, but if this is the case, it was superfluous for Lewis JA to introduce the political speech defence.[6] In our view, Lewis JA's judgment should be interpreted as correctly emphasizing the significance in our democracy of political speech, but it is confusing and unnecessary for this significance to result in a special defence being created for political speech to the exclusion of speech on other matters of public interest.[7]

In regard to the later issue, there are strong arguments of principle that support the view that the media should not be placed in a stronger position than ordinary members of the public.[8] Less clear is whether the media, because of their

[1] *Bogoshi* (supra) at 1208. The contours of 'public interest' are broad. Cf *London Artists v Littler* [1969] 2 QB 375 (CA)(Lord Denning). For an attempt to distinguish between speech on matters of public interest and private speech, see Milo *Defamation* (supra) at 138-154.

[2] *Mthembi-Mahanyele* (supra) at para 69.

[3] Ibid at para 57.

[4] In Australia and New Zealand, extended protection to false defamatory statements is limited to explicit political speech. This approach has been trenchantly criticised. See M Chesterman *Freedom of Speech in Australian Law: A Delicate Plant* (2000).

[5] *Mthembi-Mahanyele* (supra) at para 117 (Mthiyane JA saw no need for the introduction of a special political speech defence. This conclusion is correct.)

[6] Lewis JA's reliance on decisions of the European Court of Human Rights in carving out an enclave of protection for political speech is, we submit, misplaced. See *Thorgeirson v Iceland* (1992) 14 EHRR 843 at para 64 (Court stated that 'there is no warrant in case law for distinguishing … between political discussion and discussion on other matters of public concern').

[7] See further Milo 'The Cabinet Minister' (supra) at 37; Neethling 'Recent Developments' (supra) at 119.

[8] See, for example, *Holomisa* (supra) at 610 (Cameron J); *Midi Television* (supra) at para 6 (Nugent JA).

potential to inflict greater damage to reputation as a result of widespread dissemination, should as a matter of constitutional law be placed in a less advantageous position than other defendants.[1] We point out that, while in principle defensible (and in our view preferable), it is in practice difficult to make distinctions based on the identity of the defendant (as opposed to, for example, how widespread the dissemination is): there are formidable difficulties in defining who qualifies as a member of the media, and this is exacerbated by the convergence of technologies and digital publication. Further, if the motivating factor for the distinction is the capacity of the media to inflict greater harm because of widespread publication, anomalies would arise where individual defendants publish statements widely.[2]

A related issue is the standard that should be applied to non-media defendants. The *Bogoshi* defence has been developed by the High Court to require that the appropriate standard of fault for non-media defendants is gross negligence.[3] This is a significant development of the common law because it restricts the erstwhile free speech rights of non-media defendants and is not necessarily appropriate.[4]

(v) *Falsity as an ingredient of the plaintiff's cause of action*

The traditional position as regards falsity in the South African law of defamation is that the defendant bears the burden of proving the truth of a statement for the public benefit.[5] This principle was attacked by defendants in a series of exceptions brought in terms of the Final Constitution. In these varied cases, it was urged —

[1] This was, of course, historically the position at common law in South Africa, where the strict liability rule applied.

[2] See *NM v Smith* (supra) at para 177 (O'Regan J)(given the scale of damage to an individual that can be caused by widespread publication, appropriate to confer special obligations upon media). The Privy Council has recently held that the *Reynolds* defence is not limited to media defendants. See *Seaga v Harper* [2008] UKPC 9 at para 11.

[3] See *Bogoshi* (supra) at 1214-1245 (The Court left the point open.) See also *Marais v Groenewalt* 2001 (1) SA 634, 646 (T)(*Marais*)(There is nothing in principle to distinguish media publications from non-media publications. Thus *animus injuriandi* should now be interpreted as being satisfied with evidence of gross negligence on the part of the defendant.) Cf *Heyns v Venter* 2004 (3) SA 200 (T). See generally J Neethling 'Nalatigheid as aanspreeklikheidsvereiste vir die *actio injuriarum* by laster' (2002) 65 *THRHR* 260; JC Knobel 'Nalatigheid persoonlikheidskrenking' (2002) 65 *THRHR* 24. The majority of the Constitutional Court did not need to reach the issue of whether the reasonable publication test applies to non-media defendants in the context of the disclosure of private medical facts in *NM v Smith* (supra) at para 99 (Langa CJ) and para 182 (O'Regan J)(These judges appear to apply the traditional intention test to a non-media defendant.) For further analysis of this case, see 'Privacy' § 42.9*(b)* infra.

[4] In terms of the traditional position, non-media defendants escape liability if they lack intention to defame. Applying a gross negligence standard requires more of non-media defendants than a standard based on intention.

[5] The 'public benefit' aspect of the defence is not a requirement of the law in many other jurisdictions, such as England and Australia. See P Milmo & WVH Rogers *Gatley on Libel and Slander* (10th Edition, 2004) 267 (Considers the position in England, and the uniform legislation that was passed in the Australian states and territories in 2005, such as 25 of the New South Wales' Defamation Act, 2005.)

unsuccessfully — that freedom of expression required that public officials,[1] or corporations,[2] or individuals suing in relation to a matter of public concern,[3] should bear the burden of proving falsity. One difficulty for the defendants in these cases was that the Supreme Court of Appeal had already commented in *Bogoshi* — albeit obiter and in a case decided under the Interim Constitution — that falsity is not an element of the delict of defamation.[4] For instance, in *Khumalo HC*, van der Westhuizen J held that although the onus rule could be regarded as a limitation on the right to free speech and that he was tempted to rule that it 'may well not always pass the test of a reasonable and justifiable limitation in all situations', the court was bound by *Bogoshi*.[5] But the judge added that he was 'not necessarily convinced that the existing common law position on the burden of proof regarding … falsity … as a general rule would be in accordance with the Constitution in all cases, and a fresh look may be warranted'.[6]

The fresh look desired by van der Westhuizen J was provided by the Constitutional Court in the appeal: *Khumalo v Holomisa*. O'Regan J, for a unanimous Court, rejected the argument that the plaintiff should have to show falsity. The Court acknowledged the inequities of the present position where the defendant must establish truth:

> [The common law] does not directly protect a powerful constitutional freedom of expression interest for there is no powerful interest in falsehood. Nor does it provide necessary protection for the constitutional value of human dignity. For, in the main, a person's interest in their reputation can only further constitutional values if that reputation is a true reflection of their character.[7]

The Court also recognised that the rule that the plaintiff need not establish falsity is invasive of free speech:

> The difficulty of proving the truth or otherwise of defamatory statements, and the common-law rule which lets the risk of the failure to establish truth lie on defendants, in the absence of a defence of reasonable publication, does cause a 'chilling effect' on the publication of information. A publisher will think twice before publishing a defamatory statement where it may be difficult or impossible to prove the truth of that statement and where no other defence to defamation would be available.[8]

[1] *Holomisa v Khumalo & Others* 2002 (3) SA 38 (T)('*Khumalo HC*'); *Selemela & Others v Independent Newspaper Group Ltd & Others* 2001 (4) SA 987 (N).

[2] *Times Media Ltd v Franki Africa (Pty) Ltd* Unreported, Witwatersrand Local Division (2 August 2000).

[3] *Isaacs v Independent Newspaper Group (Pty) Ltd* Unreported, Witwatersrand Local Division (3 November 2000).

[4] *Bogoshi* (supra) at 1218.

[5] *Khumalo HC* (supra) at 66 (The Court found that the clear differences in application between the Interim and Final Constitutions were not sufficient to warrant a different approach to the law of defamation.)

[6] Ibid at 69.

[7] *Khumalo* (supra) at para 36.

[8] Ibid at para 39.

But, the Court held, this 'chilling effect' is reduced considerably by the *Bogoshi* defence of reasonable publication, so much so that '[w]ere the Supreme Court of Appeal not to have developed the defence of reasonable publication … a proper application of constitutional principle would have indeed required the development of our common law to avoid this result'.[1] Therefore, because the *Bogoshi* defence struck the appropriate constitutional balance between freedom of expression and reputation, there was no need for the law to be further developed in this regard.[2]

The Constitutional Court's judgment is disappointing not least for its failure to engage meaningfully with the subtleties of the newspaper's contentions. The case presented an opportunity for the Court to forge a greater protective regime for speech on matters of public interest by endorsing a rule that, for this type of speech, the plaintiff bears the burden of establishing falsity. This is the position adopted by the Supreme Court of the US in *Philadelphia Newspapers Inc v Hepps*, where the Court found that the rule was necessary to ensure that true speech on matters of public concern is not deterred.[3] And there is a substantial body of empirical evidence from England that suggests that the chilling effect caused by the burden of proof is not exaggerated.[4] A good argument can therefore be made that a rule based on *Hepps* more properly balances the importance of freedom of speech on matters of public interest with the right to reputation.[5]

(vi) *Truth for the public benefit*

It is well-known that a number of defences to a defamation action exist under common law.[6] One of the crystallized defences is truth for the public benefit or interest.[7] The notion of public benefit has always been interpreted widely; thus in

[1] *Khumalo* (supra) at para 43.

[2] Ibid.

[3] 475 US 767, 776 (1986). Cf *McVicar v UK* (2002) 35 EHRR 22 at para 86 (General rule that publisher establish truth not an unjustifiable infringement of art 10 of the European Convention of Human Rights.)

[4] See, for example, E Barendt, L Lustgarten, K Norrie & H Stephenson *Libel and the Media: The Chilling Effect* (1997) 191 and 196; RL Weaver & G Bennett 'Is the *New York Times* "Actual Malice" Standard Really Necessary? A Comparative Perspective' (1993) 53 *Louisiana LR* 1153, 1172.

[5] See further Milo *Defamation* (supra) at 162-83. Cf J van der Vyver 'Constitutional Free Speech and the Law of Defamation' (1995) 112 *SALJ* 572, 599 (Pre-eminence of dignity means that the onus should be on the publisher to justify his conduct.) One of the authors of this chapter adopts a slightly different view, supporting the approach of the Constitutional Court in *Khumalo* as striking an appropriate balance between freedom of expression and the right to reputation. It allows the reasonableness defence effectively to operate as a tie-breaker between these interests where the truth or falsity of allegations cannot be proved. Penfold, however, points out that there may be scope for placing the onus in respect of both negligence and unreasonableness on the plaintiff, at least in relation to political speech — contrary to the position of the SCA in *Bogoshi*. See Penfold 'Aspects' (supra).

[6] See generally Burchell *Personality Rights* (supra) at 207-300.

[7] These terms are used interchangeably, as is the modern practice.

Graham v Ker,[1] De Villiers CJ stated that '[a]s a general principle, I take it to be for the public benefit that the truth as to the character or conduct of individuals should be known'.[2]

The decision of the Supreme Court of Appeal in *Independent Newspapers Holdings Ltd & Others v Suliman* represents a sharp contrast to the broad approach to 'public benefit' that is frequently adopted in the common law.[3] The case concerned the notorious Planet Hollywood bombing in Cape Town in 1998. The *Cape Times* published articles accompanied by photographs a few days after the bombing, which gave rise to a defamation claim by the plaintiff. The defamatory meaning of the articles was that the plaintiff was suspected by the police of being implicated in the bombing and had been arrested at the airport while attempting to leave South Africa.[4] Marais JA (with whom Scott JA and Mthiyane JA concurred) stated that he had 'no hesitation in finding that the defamatory aspects of the articles were true'.[5] The 'troublesome aspect of the case' was the issue of public benefit or interest, which the judge thought was 'wholly unhelpful in failing to provide any indication of what is meant by public benefit or interest'.[6] In Marais JA's opinion the clash between free speech and the rights to dignity and privacy means that even if there is a legitimate public interest in a particular topic, it would not follow that any information of relevance to that topic may be published. Instead, what is required is an ad hoc assessment of what weight should be assigned to the respective interests in the particular circumstances of the case.[7] The consequences of the premature disclosure of the identity of a suspect are, Marais JA held, so traumatic to the person concerned that greater weight in this context should be given to the rights of dignity and privacy; all the press are at liberty to do until the suspect appears in court is to inform the public that an unnamed suspect has been arrested and questioned by the police. In addition, it

[1] (1892) 9 SC 185, 187 ('*Graham*').

[2] Ibid (The Court in *Graham* qualified this point in its pronouncement that it is not in the public interest to rake up past transgressions after a long lapse of time.) See also *McBride v The Citizen 1978 (Pty) Ltd* unreported decision of the Witwatersrand Local Division, Case No 03/15780 (6 February 2008) at para 13 (The Court, incorrectly, applied this qualification to editorials in a newspaper that commented on the suitability of a public official, Robert McBride, for the office of Chief of Police for the Ekurhuleni Metropolitan Municipality, by referring to his role in the Magoo bombing in 1986. The Court also held that the defence of fair comment did not avail the defendant inter alia on the basis that it had omitted to mention in the impugned articles that McBride was awarded amnesty by the Truth & Reconciliation Commission for his role in the Magoo bombing; the factual substratum for the newspaper's strident opinions about McBride was therefore absent. In our view the Court erred in not according sufficient breathing space to editorial opinions published about a public official. The newspaper had not fabricated any facts upon which it based its bona fide comments. Further, McBride's amnesty was common knowledge and in our view did not have to be specifically mentioned in each editorial piece in order to claim the benefit of the fair comment defence.)

[3] [2004] 3 All SA 137 (SCA)('*Suliman*').

[4] Ibid at para 30.

[5] Ibid at para 38 (Thus reliance on the *Bogoshi* defence was unnecessary. Ibid at para 41.)

[6] Ibid at para 42.

[7] Ibid at para 44.

would not generally be in the public interest for the identity of a suspect to be known prematurely.[1] In so far as the photograph of the suspect is concerned, the fact that legislation restricts at a criminal law level the publication of the photograph 'leaves little, if any, room for the conclusion that it is in the public interest to publish such a picture'.[2] Nugent JA (with whom Ponnan AJA concurred) disagreed with the majority in regard to the 'public benefit' aspect of the decision.[3] His view was that the arrest of a person on a serious charge is always a matter of public concern, and this applies no less to the identity of that person.[4]

The restrictive interpretation of the 'public benefit' aspect of the truth defence adopted by Marais JA constitutes a restriction on freedom of speech that, we submit, is difficult to justify. Marais JA's approach is effectively to segment the defamatory information into specific items that are each then separately tested against the 'public benefit' requirement. Thus general information on the prevention of crime is in the public interest, but disclosing a suspect's identity (including his photograph) is not.[5] This results in the undesirable position that a true statement (the suspicion of involvement of the plaintiff) conveyed in regard to a matter of general public interest (the Planet Hollywood bombings) may not be published without being mulcted in damages, because that statement includes details that are regarded as not being in the public interest (the details of the identity of the plaintiff). Marais JA's consolation to the press — that the identity of the suspect can be revealed once he appears in court — does not adequately value freedom of the press.

A better conception of press freedom is proffered by Nugent JA, who stated that 'the protection that is afforded to press freedom must mean that it will generally be in the public interest for truthful matter to be published'.[6] A similar

[1] *Suliman* (supra) at para 47 (This will especially be the case where the plaintiff is not a public figure. Ibid at para 49. Marais JA was prepared to accept that exceptions could arise where the publication of the identity of a suspect might be for the public benefit. One instance is where the crime is such that the public may be entitled to be informed of the suspect's identity 'so that they can steer clear immediately of the person'. Another exception might be where a person's discharge of a high profile public office requires him to be above suspicion. Ibid at paras 45 and 46.)

[2] *Suliman* (supra) at para 50. The provision in question was South African Police Services Act 68 of 1995 s 69.

[3] The judge agreed, however, with the result. He held that the information that had been published had not been proved to be true.

[4] *Suliman* (supra) at para 72.

[5] Ibid at para 59 (Somewhat paradoxically, Marais JA did not segment the information in this restrictive sense when it comes to the *privacy* aspect of the case. The judge stated that the facts and circumstances of the arrest of the plaintiff were not private matters; he also wrote (*obiter*) that the disclosures of his name and photograph were 'not, in my opinion, private information of a kind which the law should regard as worthy of protection'.)

[6] Ibid at para 70. The difficulties presented by the case emanate to a significant degree from the principle that truth is not on its own sufficient to justify a defamatory publication in South African law. There is merit in the courts revisiting whether a 'public benefit' requirement should constrain the defence at all.

approach was adopted in the leading decision of the House of Lords: *Jameel*.[1] An article identified the claimant as a corporation whose account was being monitored to prevent it from being used for terrorist funding. As Lord Hoffmann ruled, the issue of public interest had to be determined by looking at the article as a whole, rather than by isolating the defamatory statement.[2] The thrust of the article was clearly in the public interest.

In our opinion, a similar approach should be applied in South African law. If the broad approach sanctioned in the *Jameel* case was adopted, it would follow that *Suliman* was wrongly decided; the thrust of the article — about the arrest of a suspect in the Planet Hollywood bombing in Cape Town — was clearly in the public interest.[3]

(vii) *Remedies: Interdicts, damages and the amende honorable*

The final issue to highlight in regard to the impact of the Constitution on the law of defamation relates to the remedies that the plaintiff may obtain.[4] These remedies also need to balance the importance of the competing interests of freedom of expression and reputation. We discuss, in turn, prior restraints on speech, damages, and apologies and retractions.

The commitment to freedom of expression means that prior restraints on expression should be sparingly granted in defamation cases, particularly where the statements concern matters of public interest.[5] It was for this reason that in *Mandela v Falati*, Winnie Mandela failed in her application to restrain the respondent from making defamatory statements about her.[6] Van Schalkwyk J held that 'in general no politician should be permitted to silence his or her critics. It is a matter of the most fundamental importance that such criticism should be free,

[1] *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359 (HL)(The case concerned the responsible publication defence, but its approach to the issue of public interest should inform our courts' approach to the truth and public benefit defence.)

[2] Ibid at para 48 and at para 34 (Lord Bingham); para 111 (Lord Hope); para 143 (Lord Scott); para 148 (Baroness Hale).

[3] See *Thint (Pty) Ltd v National Director of Public Prosecutions & Others; Zuma & Another v National Director of Public Prosecutions & Others* [2008] ZACC 13 at paras 50-51 (This recent decision provides some support for the proposition that the majority in *Suliman* (supra) adopted the wrong approach. In the context of a discussion of whether a letter of request to authorities in Mauritius for information required in the pending prosecution of Jacob Zuma for corruption invaded Zuma's dignity, the Court stated that '[t]he right to dignity . . . does not necessarily extend to the right not to be named as a suspect, once there is a reasonable suspicion that a crime has been committed' and 'there is no right not to be named as a suspect in a criminal matter'. It is difficult to square these comments — which the Constitutional Court made without qualification — with the proposition adopted by the majority in *Suliman* that it is not in the public interest to name a suspect to a crime before they appear in court.)

[4] On constitutional remedies generally, see M Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 8.

[5] The general position in regard to prior restraints is dealt with at § 42.9*(h)* infra.

[6] 1995 (1) SA 251 (W).

open, robust and even unrestrained.'[1] One of the most compelling factors that should weigh heavily against the granting of interim interdicts in the context of defamation was identified by the court in *Lieberthal*:

> The Court must also take into account that even though the applicant seeks only temporary relief at this stage the effect of granting the remedy will be to stop 702 [a radio station] from broadcasting on this matter until the defamation action is completed. This could conservatively take more than two years. Granting temporary relief at this stage is therefore tantamount to granting final relief. The balance of convenience therefore favours 702.[2]

The rule in defamation cases has traditionally been that publication will not be restrained if the defendant has a sustainable case.[3] However, as a result of a significant *obiter dictum* of the Supreme Court of Appeal in a non-defamation case, *Midi Television (Pty) Ltd t/a e-TV v Director of Public Prosecutions (Western Cape)*, courts faced with applications for interim interdicts in defamation cases should now enquire whether:

> the prejudice that the publication might cause . . . is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. . . . [E]ven then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage.[4]

The result of the proper application of the *Midi Television* test is that interim interdicts against defamatory publications should now only be granted in the most exceptional of cases, where the merits clearly favour the applicant, and

[1] Ibid at 260. See also *Manyatshe v Mail & Guardian Ltd* unreported decision of the Witwatersrand Local Division (21 September 2006).

[2] *Lieberthal v Primedia Broadcasting (Pty) Ltd* 2003 (5) SA 39, 48 (W)('*Lieberthal*'). See also *Hix Networking Technologies v System Publishers (Pty) Ltd & Another* 1997 (1) SA 391, 402 (A). In contrast, final interdicts that forbid the repetition of defamatory material that has been held by a court to have been published unlawfully do not unjustifiably infringe freedom of expression. But in a case where the applicant sought final relief in respect of future, unknown statements on an Internet website that the applicant alleged would be defamatory (as a result of the background circumstances), the High Court rightly regarded the relief sought as constituting a major restriction on the right to freedom of expression. *Tsichlas & Another v Touch Line Media (Pty) Ltd* 2004 (2) SA 112 (W). See also *Petro Props (Pty) Ltd v Barlow & Another* 2006 (5) SA 160 (W) at para 57 (rejecting application for final interdict that would have had the effect that the respondents 'may no longer speak out, may no longer champion their cause, may no longer seek to persuade.')

[3] *Lieberthal* (supra) at 43; *Van Zyl & Another v Jonathan Ball Publishers & Others* 1999 (4) 5 SA 571 (W). In England, however, a defendant who asserts that he will defend the allegations to be published will only on very rare occasions be injuncted; to allow injunctions in this context would offend one of the most basic aspects of free speech, the freedom to 'publish and be damned'. See *Bonnard v Perryman* [1891] 2 Ch 269, CA; *Greene v Associated Newspapers Ltd* [2005] QB 972, CA. For a recent articulation of the speech-protective Australian approach, see *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46.

[4] 2007 (5) SA 540 (SCA)('*Midi Television*') at paras 19-20. For a full analysis of this decision, see § 42.9*(c)*(iv)(bb) infra.

where an award of damages or a right of reply[1] will not adequately remedy the harm caused to the applicant's reputation.[2]

The major remedy sought in defamation cases is an award of damages. In quantifying these damages, courts need to calibrate the impact the award will have on freedom of expression, not just in relation to the particular defendant, but also in regard to other publishers. The Supreme Court of Appeal has recognised the restrictive effect of a substantial damages award: 'too high an award of damages may act as an unjustifiable deterrent to exercise the freedom of expression and may inappropriately inhibit the exercise of that right'.[3] The Supreme Court of Appeal has also effectively jettisoned the notion that punitive damages may be awarded in defamation cases.[4] Courts should accordingly exercise great care to ensure that damages awards are not set at a level that would inhibit the future exercise of freedom of expression.[5]

Finally, we should mention the remedy known in Roman-Dutch law as the *amende honorable*. Under this remedy, the plaintiff could claim an apology and retraction from the defendant instead of damages. The leading modern case that adopts this remedy is *Mineworkers Investment Co (Pty) Ltd v Modibane*.[6] The plaintiff sought an interdict and damages in regard to allegations made by the defendant and published in various newspapers that the plaintiff was incompetent and dishonest. At trial, counsel for the plaintiff argued that the defendant should be ordered to pay damages unless he published an advertisement containing an apology in *The Business Day*. This raised the crisp issue of whether relief such as that sought by the plaintiff was competent. Willis J held that the *amende honorable*,

[1] See *Lieberthal* (supra) at 48.

[2] Courts have nevertheless been prepared, despite the threshold set in *Midi Television,* to grant interdicts in defamation cases. See, for example, *Els v Media 24 (Pty) Ltd* [2008] ZAGPHC 39 (Sutherland AJ granted an interdict against *You* and *Huisgenoot* magazines in respect of an article alleging that the applicant was a child molester. The judge ruled that the alternative remedy of a damages claim offered cold comfort to the incalculable damage to the applicant's reputation that the publication would cause. Ibid at para 13.)

[3] *Mogale & Others v Seima* [2005] JOL 16040 (SCA)('*Mogale*') at para 9. See also *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd & Others* 2001 (2) SA 242 (SCA) at para 48; *Dikoko* (supra) at paras 54, 92. But see *Dikoko* (supra) at para 141 (Skweyiya J).

[4] *Mogale* (supra) at para 12 (The Court quoted with approval Didcott J's decision in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 80 (Damages claims that have as their object some punitive or exemplary result have not been authoritatively recognised.) He also cited Hattingh J's express repudiation of punitive damages in *Esselen v Argus Printing and Publishing Co Ltd & Others* 1992 (3) SA 764, 771 (T)(Punishment aim of criminal law not the law of delict). This disapproval of punitive damages in defamation cases also broadly accords with the jurisprudence of the US Supreme Court. See *Gertz v Robert Welch Inc* 418 US 323, 350 (1974); *Dun & Bradstreet Inc v Greenmoss Builders Inc* 472 US 749 (1985)(Punitive damages in relation to speech on matters of public concern may only be granted if the plaintiff proves actual malice.) For a different (and most undesirable) approach, see *Afrika v Meltzer* 1997 (4) SA 531, 539 (NmH)(Publishers will be more mindful to exercise restraint if 'substantive (sic) exemplary/punitive damages could be visited upon them if they defame another.')

[5] The European Court has recognised that excessively high damages awards constitute an infringement of art 10 of the ECHR. *Tolstoy Miloslavsky v UK* (1995) 20 EHRR 442. See also *Independent News and Media v Ireland* (2006) 42 EHRR 46.

[6] 2002 (6) SA 512 (W)('*Modibane*').

though it had fallen into desuetude, had not been abrogated by disuse;[1] it was merely forgotten: 'a little treasure lost in a nook of our legal attic'.[2] According to the judge, even to the extent that the remedy was no longer part of South African law, the Constitution allowed such a remedy to be developed. [3] Damages awards often fail to achieve an appropriate balance between free speech and reputation; not only may damages ruin defendants financially, but they will often not operate to vindicate the reputation of the plaintiff effectively.[4] Willis J thus granted relief in the form of damages but made that relief effective only in the event that the defendant did not publish an apology (the wording of which was suggested by the plaintiff) in a national newspaper.

This creative decision by Willis J represents a salutary reminder that in defamation cases the relief needs to achieve a harmonious balance between vindicating the reputation of the plaintiff, and only restricting free speech to the extent necessary.[5] Damages awards are often blunt instruments to achieve this balance.[6] Alternative remedies such as rights of reply,[7] apologies and retractions, and declarations of falsity,[8] should in principle be considered as discretionary alternatives to damages awards, depending on the facts of the case.[9] The potential development of an apology remedy has recently received renewed impetus in the judgments of Mokgoro J and Sachs J in *Dikoko*. As Mokgoro J stated:

> A remedy based on the idea of *ubuntu* or *botho* could go much further in restoring human dignity than an imposed monetary award in which the size of the victory is measured by the *quantum* ordered and the parties are further estranged rather than brought together by the legal process.[10]

(b) The law of privacy

Like defamation, the protection of individual and corporate privacy often comes

[1] *Modibane* (supra) at para 23.
[2] Ibid at para 24.
[3] Ibid at para 28.
[4] Ibid at paras 25 and 28.
[5] See also *University of Pretoria v South Africans for the Abolition of Vivisection* 2007 (3) SA 395 (O) at para 17 (The court went even further than Willis J had done in the *Modibane* case. The court granted a declaration of falsity, and ordered the publication of a retraction and apology.) Cf *Young v Shaik* 2004 (3) SA 46, 57 (C)(declaration of apology as remedy disapproved of.)
[6] See generally JG Fleming 'Retraction and Reply: Alternative Remedies for Defamation' (1987) 12 *U British Columbia LR* 15; New South Wales Law Reform Commission *Defamation* (Report 75, 1995).
[7] See generally JA Barron 'Access to the Press — A New First Amendment Right' (1967) 80 *Harvard LR* 1641.
[8] On the potential for declaratory relief to effect an appropriate balance between free speech and reputation, see, for example, MA Franklin 'A Declaratory Judgment Alternative to Current Libel Law' (1986) 74 *California LR* 809.
[9] See generally Milo *Defamation* (supra) at Chapter VIII.
[10] *Dikoko* (supra) at para 68. Ibid at paras 113-116 (Sachs J).

into conflict with the right to freedom of expression.[1] Many of the constitutional issues echo the problems encountered in defamation law where a reconciliation of reputation and free speech must be effected, and will not be repeated here.[2] However, two issues that have recently engaged our courts require further attention as a matter of free speech law. The first is whether the action for invasion of privacy should be developed to hold the media to a negligence standard.[3] The second is how the defence of 'public interest' has been interpreted to justify either an intrusion into private life or the publication of private facts.

(i) *Lack of negligence in media privacy cases*

At common law, liability for invasion of privacy is based on *animus injuriandi*, the intention to invade the plaintiff's privacy.[4] Some commentators have opined that the liability of media defendants for invasion of privacy should parallel the position that applies in defamation; negligence on the part of such defendants would be sufficient for the imposition of liability.[5] The Constitutional Court had occasion to consider this issue in *NM v Smith*.[6] The plaintiffs had been involved in controversial clinical HIV trials at the University of Pretoria which Patricia de Lille, a prominent opposition politician, had investigated. Several years later the plaintiffs were identified as being HIV-positive in de Lille's biography where the trials were discussed. They sued de Lille, the author of the biography and the publisher in the High Court, arguing that the disclosure of their identities and HIV status had been made without their consent and was therefore unlawful. They also argued that the defendants had acted intentionally or alternatively they had been negligent and that the common law should be developed to recognise liability for negligent disclosures of private medical facts. The defendants argued that they did not act with fault because they believed that the plaintiffs had consented to the disclosure. The basis for this argument was that the plaintiffs had consented to the disclosure of their HIV status for purposes of an external report commissioned by the University of Pretoria following complaints about the clinical trials. The High Court held that the principles in *Bogoshi*

[1] For a detailed discussion of the constitutional right to privacy, see D McQuoid-Mason 'Privacy' in S Woolman, T Roux, J Klaaren, A Stein, M, Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2003)('Privacy'). The classic monograph in South African law on the common law of privacy remains DJ McQuoid-Mason *The Law of Privacy in South Africa* (1977)('*Law of Privacy*'). See also J Burchell *Personality Rights and Freedom of Expression: The Modern* Actio Injuriarum (1998)('*Personality Rights*').

[2] See 'Defamation' § 42.9*(a)* supra. Thus the defences to a defamation action (such as truth for the public benefit, qualified privilege and consent) and the remedies available are for the most part of equal application in privacy cases. See McQuoid-Mason 'Privacy' (supra) at 38-13 and 38-17.

[3] See 'Defamation' § 42.9*(a)* supra.

[4] J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* (2nd Edition, 2005) 252.

[5] Burchell *Personality Rights* (supra) at 429; McQuoid-Mason 'Privacy' (supra) at 38-16.

[6] 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC)('*NM v Smith*').

applied.[1] Schwartzman J held that the defendants had not acted intentionally and were not negligent before they were notified about the error because there was nothing in the University of Pretoria report that indicated that the names of the plaintiffs were confidential.

The Constitutional Court's decision revealed a sharp division amongst certain members of the Court.[2] The judges were unanimous that confidential medical information lies at the core of a person's right to privacy, and the majority accepted that one's HIV status in the South African context deserves heightened protection against disclosure, especially given the potential intolerance and discrimination that may result.[3]

The disagreement in the Court concerned the issue of whether the defendants were liable for the initial publication of the book. The majority judges, led by Madala J, held that the defendants were liable for breaching the privacy and dignity of the plaintiffs on the basis of intention. The defendants were, according to the majority, 'aware that they had not obtained the express informed consent of the [plaintiffs] to publish their HIV status',[4] or at least 'foresaw the possibility that consent had not been given'.[5] Madala J therefore did not need to consider whether defendants in privacy cases should be liable for the negligent disclosure of private facts.[6]

Langa CJ concurred with the result reached by the majority but for different reasons. According to him, the evidence fell short of establishing that the defendants had acted with intention.[7] However, the common law had to be developed under the Constitution so that negligence becomes the basis for liability for media defendants in privacy cases: a media defendant would have to show that it acted without negligence to escape liability, whereas the traditional approach of intention continues to apply to non-media defendants. In Langa CJ's words: 'It is … constitutionally appropriate that the media should be held to a higher standard than the average person'. Langa CJ regarded the author and publisher as media defendants because they were 'professionals involved in the distribution of information for commercial gain'.[8] In his view, it was not sufficient for the defendants

[1] [2005] 3 All SA 457 (W) at para 36 (Thus a defence of reasonable publication is available, and the appropriate fault standard is negligence. Schwartzman J did not distinguish for purposes of the application of the *Bogoshi* test between media and non-media defendants. Ibid at para 41.)

[2] For critique of the Court's failure to analyse with any rigour whether the case raised a constitutional matter at the outset, see S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *SALJ* 762; G Penfold & D Milo 'Media Freedom and the Law of Privacy: *NM and Others v Smith and Others (Freedom of Expression Institute Intervening as* Amicus Curiae*)*' (2007) 1 *Constitutional Court Review* (forthcoming)('Media Freedom').

[3] For criticism of this aspect of the case, see J Steinberg 'Generous Judgment Instills Stigma' in *Notes from a Fractured Country* (2007) Cf *Jansen van Vuuren & Another NNO v Kruger* 1993 (4) SA 842 (A).

[4] *NM v Smith* (supra) at para 59 (Madala J).

[5] Ibid at para 64. (The Court awarded the plaintiffs damages in the amount of R35 000 each.)

[6] Ibid at para 67.

[7] Ibid at para 93.

[8] Ibid at para 98 (On the facts, Langa CJ held that both the author and the publisher had acted negligently in failing to take steps to determine the exact terms of the consents given by the plaintiffs for purpose of the University of Pretoria report.)

to rely simply on the University report; they had an additional duty to ensure that the plaintiffs had consented to disclosure outside the report.

Like Langa CJ, O'Regan J — the lone dissenter in the case — also held that the defendants lacked intention.[1] At least 'for purposes of this case', it was also necessary to develop the law of privacy to include a test of negligence for media defendants; the media are immensely powerful and it is appropriate to confer special obligations on the media.[2] But, unlike Langa CJ, O'Regan J did not find that the facts disclosed negligence on the part of the author and publisher; the author's reliance on the University of Pretoria report was defensible on free speech grounds.[3]

What to make of *NM v Smith*? The majority's puzzling and, with respect, incorrect approach to the factual question of intention[4] had the disappointing result that the judges did not engage with the central free speech issue at the heart of the case — whether in privacy cases the media should be burdened with liability for negligence, in contrast to the more generous standard of intention that traditionally applies to non-media defendants. We contend that Langa CJ and O'Regan J in this regard are in principle correct: as Sachs J stated in his concurring judgment, 'the principles developed in [*Bogoshi*] are eminently transportable to the law of privacy'.[5] There are sound justifications for the view that the negligence standard of liability is appropriate in balancing the demands of freedom of expression with the rights to dignity, privacy and reputation.[6] There is also a formidable argument to support the view that persons who publish to the world at large in a professional capacity should bear special obligations to check their facts;[7] an approach that allows such publishers to rely on lack of

[1] *NM v Smith* (supra) at paras 156-168.

[2] Ibid at para 177.

[3] Ibid at para 187,

[4] The majority's finding that intention on the part of the defendants could be inferred not only undermines the principle that appeal courts — *a fortiori* the Constitutional Court — should only interfere in findings of fact in the rarest of cases. *NM v Smith* (supra) at para 169 (O'Regan J)(dissenting). It is also in our view based on unconvincing reasoning. The majority bases its conclusion that the defendants knew that no consent had been given by the plaintiffs on factors such as that the author went ahead and published even though she had made unsuccessful earlier attempts to find the consents; that de Lille failed to take sufficient steps to ascertain whether consent had been given; and that both the author and de Lille assumed that the report was confidential. Ibid at paras 59-60. These are, we submit, hardly factors that lead to the inevitable conclusion that the defendants subjectively foresaw that the plaintiffs did not give consent, more especially in light of the contrary evidence given by the author and de Lille, and their proven track records in matters concerning HIV/Aids. Ibid at para 58. See also Penfold & Milo 'Media Freedom' (supra); S Seedorf 'Jurisdiction' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 4.

[5] *NM v Smith* (supra) at para 203. See also Penfold & Milo (supra). For a different view, see H Scott 'Liability for the Mass Publication of Private Information in South African Law: *NM v Smith (Freedom of Expression Institute as Amicus Curiae)*' (2007) 18 *Stellenbosch LR* 387, 398-399.

[6] See generally Milo *Defamation* (supra) at 206-211.

[7] A sharp distinction can no longer be easily made between media and non-media defendants. See generally DA Anderson 'Freedom of the Press' (2002) 80 *Texas LR* 429. Cf *Marais* (supra) at 646.

intention to escape sanction would undermine the right to human dignity of the plaintiff.[1]

(ii) *The public interest defence*

A crucial consideration in reconciling the conflict between the right to privacy and the right to freedom of expression is whether the publication complained of is in the public interest.[2] The leading pre-constitutional case that articulated this defence was *Financial Mail (Pty) Ltd v Sage Holdings Ltd & Another*, where the Appellate Division held as follows:

> [I]n a case of the publication in the press of private facts about a person, the person's interest in preventing the public disclosure of such facts must be weighed against the interest of the public, if any, to be informed about such facts.[3]

There is a paucity of authority on the limits of the public interest defence after the enactment of the Interim Constitution. Three decisions set the ground rules. In the first decision, *MEC for Health, Mpumalanga v M-Net & Another*,[4] the applicant launched an eleventh hour application to prevent the broadcast of an exposé by *Carte Blanche*, an investigative journalism programme, concerning alleged malpractices in the treatment of women who underwent voluntary abortions at a hospital in Groblersdal that fell under the jurisdiction of the applicant. The Court held that even on the assumption that the *Carte Blanche* team used questionable methods to obtain the information,[5] this should not prevent it from carrying out its constitutional obligation to inform the public of information of clear public concern, especially given that no patient's right to privacy had been infringed.[6] The right of privacy of the hospital staff had to be outweighed by the right of the public to be informed of alleged malpractices at the public hospital.[7] Bertelsmann J continued:

[1] This is, after all, the *raison d'etre* of the *Bogoshi* defence. *Bogoshi* (supra) at 1214.

[2] The public interest limitation on the right to privacy was accepted in the classic discussion of the right by SD Warren and LD Brandeis. SD Warren and LD Brandeis 'The Right to Privacy' (1890) 4 *Harvard LR* 193, 214. See also WL Prosser 'Privacy' (1960) 48 *California LR* 383; TI Emerson 'The Right to Privacy and Freedom of the Press' (1979) 14 *Harvard Civil Rights-Civil Liberties LR* 329. For a modern discussion, see H Fenwick & G Phillipson *Media Freedom under the Human Rights Act* (2006) 778-805; Barendt *Freedom of Speech* (supra) at 230-246.

[3] 1993 (2) SA 451, 462-3 (A)(On the facts of *Financial Mail*, the Court granted an interdict restraining the publication of confidential and sensitive commercial information about the applicant. There was no overriding public interest to justify the publication. Ibid at 466.)

[4] 2002 (6) SA 714 (T)('*MEC for Health*').

[5] The Court, however, made no finding in this regard. It was not in a position to do so, given the urgency with which the application had been brought.

[6] Ibid at paras 24 and 27.

[7] Ibid at para 28.

> The enshrinement of the freedom of expression in s 16 of the [Final] Constitution now places a much greater emphasis upon the public's right to know and will consequently weigh the scale more firmly in favour of the right to disseminate news and the media's obligation to inform. The information at issue here is of the kind which is essential to enable the public to judge the performance of public officials and the politicians responsible for them.[1]

The Court also articulated a powerful argument against even temporary bans on publication: 'It is of the very essence of news that, as the word implies, current events should be brought to the attention of the public as soon as possible.'[2]

The second major decision on public interest gestured at the significance of the status of the plaintiff in balancing privacy and freedom of expression. An entertaining set of facts confronted the court in *Prinsloo v RCP Media Ltd t/a* Rapport.[3] The applicant and his partner were advocates based in Pretoria. They had achieved some notoriety, not least because of stories that had been published concerning the applicant's partner's breast implants and her aspirations to be a singer, actor and model.[4] The applicant sought an order directing the *Rapport* newspaper to return to the applicant an index print containing photographs of the applicant, his partner and a third person allegedly engaged in various sexual adventures.[5] Van der Westhuizen J correctly accepted that the information at issue was private: 'a photographic image of people involved in conduct of an intimate sexual nature … represents a view, or a peep … of a split second into the most intimate privacy of the persons involved.'[6] In balancing this interest against the right to freedom of expression, van der Westhuizen J accepted that the right protected publication of even mundane issues and gossip but that, in intimate sexual cases, the rights to dignity and privacy 'would weigh much heavier in the competition with free expression'.[7] On the facts, claims by *Rapport* that it could invoke the public interest defence were rightly rejected by the Court; it mattered not, for example, that the applicant and his partner were advocates, or were to some extent in the public eye.[8] 'It is not clear to me', held van der Westhuizen J, 'whether it is the public interest which is at stake here, or rather the

[1] *MEC for Health* (supra) at para 28.

[2] Ibid at para 29. See also *Observer and Guardian v UK* (1992) 14 EHRR 153 (imposition of a delay may deprive a story of its value and interest); see also 'Prior restraints' § 42.9*(h)* infra. For criticism of the *MEC for Health* decision, see J Neethling 'Indringing in Privaatheid en die Openbare Inligtingsbelang' 2003 *TSA*R 572.

[3] 2003 (4) SA 456 (T)('*Prinsloo*').

[4] The applicant's partner had been nicknamed 'Advocate Barbie'.

[5] The index print had apparently been handed to *Rapport* after the applicant had taken the film on which the images were recorded to a photography shop for development.

[6] *Prinsloo* (supra) at 468.

[7] Ibid at 469.

[8] Ibid at 472-474.

curiosity of a bored and frustrated public, and perhaps specifically of the readers of Afrikaans newspapers and magazines'.[1]

The final noteworthy case is perhaps the leading post-constitutional discussion of the concept of public interest: *Tshabala-Msimang v Makhanya*.[2] The *Sunday Times* published an article entitled 'Manto's Hospital Booze Binge' in which it claimed that the Health Minister's medical records of two hospital stays revealed the (large) amounts of alcohol she had consumed both before and after her shoulder surgery. The Health Minister (and the hospital) sued the newspaper principally for the return of the copies of the records, and also urged the court to interdict it from further commenting on the records. On the first issue, Jajbhay J concluded that the National Health Act,[3] which in general prohibits access to, and disclosure of, medical records,[4] buttressed by the constitutional rights to privacy and dignity, meant that the Minister's medical records had to be returned to the hospital.[5]

The real significance of the decision for media freedom, however, lies in Jajbhay J's approach to the Minister's claim for an interdict to prevent the newspaper from further commenting on the medical records. Although, in the view of the Court, public interest 'is a mysterious concept' that can be likened to 'a battered piece of string charged with elasticity',[6] the public has a right to be informed about public figures and the facts showed that the 'revelations made are relevant to the [Minister's] performance of her constitutional and ministerial duties'.[7] Even though the information was unlawfully obtained, 'there was in fact a pressing need for the public to be informed about the information contained in the medical records'. Jajbhay J held, further, and echoing the democracy rationale for freedom of speech,[8] that 'the publication … was capable of contributing to a debate in our democratic society relating to a politician in the exercise of her functions.'[9] He therefore refused to grant an interdict.

[1] Ibid at 473. Curiously, despite this line of reasoning, van der Westhuizen J ultimately permitted *Rapport* to retain possession of the index print on pragmatic grounds; a number of legal proceedings between the parties in relation to the index print were pending and *Rapport* may have needed to refer to the index print in the course of these proceedings. Ibid at 476.

[2] [2007] ZAGPHC 161 ('*Tshabalala-Msimang*').

[3] Act 61 of 2003 ('Health Act').

[4] Health Act ss 14 and 17.

[5] *Tshabalala-Msimang* (supra) at para 33. One could argue that the Health Act is unconstitutional to the extent that it does not provide for a defence of public interest with respect to the disclosure of medical records. See, for example, P de Vos 'Advertisements, Acts and a Right to Know the Truth' *Business Day* (26 September 2007).

[6] *Tshabalala-Msimang* (supra) at para 37.

[7] Ibid at para 44.

[8] See § 42.5(b) supra.

[9] *Tshabalala-Msimang* (supra) at para 46 (However, the judge later states obiter, in a section headed 'General comments on the conduct of journalists', that the newspaper 'should have thought long and carefully about suitable alternatives before they chose to release this information'. Ibid at para 54. This observation not only contradicts Jajbhay J's earlier findings on public interest, but, derives from a narrow understanding of media freedom. To suggest that the media must elect not to publish matters of public interest and must rather, for example, report the allegation to the police, is to undermine the role of the media in our democracy.)

Some concluding remarks that flow from this troika of post-Constitution privacy cases are appropriate. First, both *Tshabalala-Msimang* and *MEC for Health* endorse the proposition that even where the media has unlawfully obtained or accessed information of public concern, this factor is not necessarily of sufficient weight to restrain publication. This is surely right, though the media should take note that journalists and editors can still be held criminally liable and, in the criminal context, the public interest value of the information is likely to mitigate sentence, rather than to negate liability.[1]

Second, as illustrated most strikingly by the *Prinsloo* case, even public figures are entitled to object to the disclosure of intimate information, such as the graphic details and photographs depicting their sex lives. The intensity of the invasion of privacy has always played a role in balancing privacy and public interest.[2] To provide one example, a politician who packages himself to the public as happily married cannot complain if the media expose his extra-marital affairs, though he would be entitled to object to the publication of intimate photographs evincing the affair.[3]

Third, it is desirable that issues such as alleged hypocrisy on the part of public officials be properly ventilated and debated. Thus in *Tshabalala-Msimang*, the broader context of the article concerning the Health Minister's medical records was reportage by the *Sunday Times* that alleged that the Health Minister was an alcoholic coupled with her numerous public statements about the dangers of alcohol abuse.[4] Exposure of hypocrisy on the part of public officials or figures is quintessentially in the public interest; such publication serves the democracy and truth rationales for freedom of expression.[5]

[1] However, there is some merit in the proposition that as a matter of constitutional law, a public interest defence should operate in regard to criminal offences such as trespass that are committed by members of the media in the bona fide exercise of their right to inform the public on matters of public concern.

[2] See Neethling *Law of Personality* (supra) at 248.

[3] See, for example, *Greeff v Protection 4 You (Pty) Ltd*, Unreported, Transvaal Provincial Division (9 March 2007)(DVD containing footage of Springbok rugby players in the nude restrained); *Campbell v MGN Ltd* [2004] 2 AC 457 (HL)('*Campbell*')(publication of photograph and details of drug addiction treatment not justifiable); *Theakston v MGN Ltd* [2002] EMLR 22 (Publication of article about role model's visit to brothel in the public interest, but photograph not justifiable); *Von Hannover v Germany* (2005) 40 EHRR 1 (Photographs of Princess Caroline depicting aspects of her daily life violated her privacy). Cf *A v B plc* [2003] QB 195 (CA)(Article concerning details of footballer's extra-marital affairs in the public interest).

[4] *Tshabalala-Msimang* (supra) at para 12.

[5] The recognition of the hypocrisy principle is well-rehearsed in English law. See, for example, *Campbell* (supra)(publication of allegation of drug addiction of model, where she had previously stated that she had no drug problem, in the public interest). Cf *McKennitt v Ash* [2007] EMLR 113 (CA) (alleged inconsistency with broad statements of aspirations of celebrity on her website not sufficient to permit book publisher to rely on public interest defence). See generally Milo *Defamation* (supra) at 144-54 (Arguing that one guiding principle when dealing with the private lives of public figures is the notion of trustworthiness in public life.)

Finally, as many of these observations illustrate, the status of the plaintiff is of crucial significance in reconciling the tensions between free speech and privacy.[1] In cases involving private figures, for instance, a publisher will need to ensure that it can point to the public interest value of the story to mount an argument that it was justifiable to identify the plaintiff, even though he or she is a private figure.[2] That task will be much easier in the case of people who are already public figures, particularly if they are government officials.

(c) Restrictions designed to serve the administration of justice

Speech concerning the judicial process is subjected to significant restrictions in our law. These restrictions hamper the ability of members of the public and the media to comment on the judiciary and its decisions or on forthcoming or on-going criminal or civil trials, and, in some instances, exclude the media and the public entirely from judicial proceedings. Restrictions such as these clearly impact upon the right to freedom of expression, but the assessment of whether the restrictions are justifiable is particularly fraught because, as with many other areas of free speech law, a number of competing values are implicated. For example, in the case of the *sub judice* rule, the right of an individual to a fair trial and to privacy may be undermined by adverse publicity, and, in the case of the offence of scandalising the court, the broader value of the maintenance of the administration of justice is at play.

The first major area of law of relevance we discuss here is the open justice principle — including broadcasting the courts and tribunals — and the exceptions to that principle. Thereafter, two areas within contempt of court law are analysed: the crime commonly known as 'scandalising the court' and the *sub judice* rule.

(i) *The principle of open justice*

'Every Court of justice is open to every subject of the King'.[3] So held Lord Halsbury in the locus classicus in English law that expostulated the principle of open justice.[4] In general, this principle has been followed in South African law; court proceedings are usually open to the public,[5] though numerous exceptions

[1] See, for example, M Tugendhat & I Christie *The Law of Privacy and the Media* (2002) 361-363; Neethling *Law of Personality* (supra) at 246-247; Burchell *Personality Rights* (supra) at 416. However, the US approach, which justifies privacy invasion based on the 'newsworthiness' test, is over-broad and should be rejected. For a summary of US law in this regard, see P Siegel *Communication Law in America* (2002) 90-95.

[2] See, for example, *NM v Smith* (supra) at para 154 (The publisher could not justify the identification of three private figures who were HIV-positive as being in the public interest.) See also *Peck v UK* (2003) 36 EHRR 41 (CCTV footage of private figure who cut his wrists on a public street unjustifiable invasion of his privacy.)

[3] *Scott v Scott* [1913] AC 417, 440.

[4] For a detailed discussion of the English position, see J Jaconelli *Open Justice: A Critique of the Public* Trial (2002). See also Barendt *Freedom of Speech* (supra) 338-351.

[5] See, for example, Supreme Court Act 59 of 1959 s 16; Criminal Procedure Act 51 of 1977 s 152; FC ss 34 and 35(3)*(c)*; R *v Maharaj* 1960 (4) SA 256 (N); *Financial Mail (Pty) Ltd v Registrar of Insurance* 1966 (2) SA 219, 221 (W); *Prinsloo* (supra) at 462.

exist.[1] The leading case that articulates the principle of open justice in South African law is the decision of the Constitutional Court in *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions & Others*.[2] The case is discussed in greater detail below when we consider the broadcasting of court hearings.[3] Suffice to say for present purposes that the Court accepted that open justice is a constitutional principle that emerges from the co-incidence of a number of rights and values that are entrenched in the Constitution: the right to freedom of expression, especially the right of the public to receive information and ideas;[4] the rights to a fair criminal trial and public hearing;[5] and the foundational values of accountability, responsiveness and openness.[6] The Constitutional Court has also accepted the following laudatory rationales for the open justice principle:

> Closed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based .... Seeing justice done in court enhances public confidence in the criminal-justice process and assists victims, the accused and the broader community to accept the legitimacy of that process. Open courtrooms foster judicial excellence, thus rendering courts accountable and legitimate.[7]

Open justice thus serves a number of the rationales that reflect the traditional justifications for freedom of expression:[8] it enhances the pursuit of truth; promotes democracy; allows the public to understand how courts work; facilitates the extension of courtroom debates to other areas of society;[9] and provides an outlet

[1] For some of the more important exceptions, see § 42.9*(c)*(ii) infra.

[2] 2007 (1) SA 523 (CC), 2007 (2) BCLR 167 (CC)('*SABC v NDPP*').

[3] See 'Broadcasting of enquiries and judicial proceedings' § 42.9*(c)*(iii) infra.

[4] *SABC v NDPP* (supra) at para 24.

[5] Ibid at para 30. For discussion of the open justice principle in the context of the rights to a fair civil hearing and criminal trial, see J Brickhill & A Friedman 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) 59-83 – 59-85; F Snyckers & J le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) 51-120 – 51-123.

[6] *SABC v NDPP* (supra) at para 32. See also ibid at paras 97-8 (Moseneke DCJ). The Court's recognition of the right to open justice as an independent right that is based upon other rights and values in the Constitution is regarded as a 'judicial innovation' by Robert Danay and Jake Foster, 'The Sins of the Media: The *SABC* Decision and the Erosion of Free Press Rights' (2006) 22 *SAJHR* 263, 572. Much international jurisprudence houses the principle within the right to freedom of expression. See, for example, H Fenwick & G Phillipson *Media Freedom under the Human Rights Act* (2006) 168.

[7] *Shinga v The State & Another* 2007 (4) SA 611 (CC), 2007 (5) BCLR 474 (CC), 2007 (2) SACR 28 (CC) at paras 25-6 (Although these comments were made in the context of criminal proceedings, they apply with equal force in civil cases.) See also *SABC v NDPP* (supra) at paras 29-32 (Open courtrooms ensure accountability, limit high-handed behaviour by judicial officers, and prevent railroaded justice); ibid at para 139 (Sachs J)(there should be greatest degree of public involvement); *S v Mamabolo (e-TV intervening)* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC) at para 29 (Openness ensures that citizenry know what is happening in courts so that they can discuss the conduct of courts). See, generally, Jaconelli (supra) at 34-48. For more on the principle of openness, see S Woolman & H Botha 'Limitations' (supra) at § 31.7.

[8] See § 42.5 supra.

[9] See *Named Person v Vancouver Sun* 2007 SCC 43 ('*Named Person*') at para 81.

for the public to vindicate its sense of justice in regard to criminal and civil matters.[1]

To the extent that open discussion enhances the right to a fair criminal or civil trial, the right of the media to report on court proceedings and the litigant's rights go hand in hand. But the issue of open justice from the perspective of freedom of expression becomes most acute where these interests conflict, for example, when a litigant wishes the details of the proceedings to remain private, or where interests such as national security are invoked by the state. Where the state or parties to litigation do not wish the proceedings to be transparent, do the public and the media have a freedom of expression right — in its crystallized open justice form — to attend and report fully on the court proceedings?[2]

As the Constitutional Court has recently acknowledged,[3] the presumption should be in favour of open proceedings and full reportage.[4] That presumption should be rebutted only if cogent reasons exist that show why the desire of the state or the parties to keep information from the public should prevail.[5] Two High Court examples that emphasise this point of departure are worthy of mention; the first concerned privacy interests, and the second, nuclear secrets. In *Prinsloo v RCP Media t/a Rapport*, the applicants argued that the hearing of their application should take place *in camera* because of the salacious facts of the case.[6] Van der Westhuizen J held:

> Intimate personal details are often disclosed in courtrooms in front of members of the public and the media. This is unfortunate for the individuals involved, but their privacy is in such cases outweighed by values such that courts in a democratic country function with transparency, so that any member of the public can see that justice is being done. It is not

[1] *Press-Enterprise Co v Superior Court of California* 464 US 501, 509 (1984). For a useful analysis of how open justice celebrates these values, see I Cram *A Virtue Less Cloistered: Courts, Speech and Constitutions* (2002) Chapter 1.

[2] This raises the difficult theoretical point of whether the right to free speech envisages a positive obligation to provide access in this context. For some discussion on this point, see Barendt *Freedom of Speech* (supra) at 339-340.

[3] *Independent Newspapers (Pty) Ltd v Minister for Intelligence (Freedom of Expression Institute Intervening as* Amicus Curiae*)* 2008 (5) SA 31 (CC) at para 54 ('*Independent Newspapers*')('Ordinarily, the starting point is that court proceedings and so too court records must be open to the public'). This case is discussed in detail in § 42.9*(c)*(iii) infra.

[4] The principle of open justice has been extolled in numerous jurisdictions. For US law, see the US Supreme Court's decisions in *Richmond Newspapers v Virginia* 448 US 555 (1980) and *Globe Newspaper Co v Superior Court* 457 US 596 (1982). The Canadian Supreme Court has pronounced upon the importance of open justice on numerous occasions. See, for example, *Canadian Broadcasting Corp v New Brunswick (Attorney General)* [1996] 3 SCR 480 at para 22; *Re Vancouver Sun* [2004] 2 SCR 332 at para 23; *Named Person* (supra) at para 81.

[5] See *Independent Newspapers* (supra) at paras 44-5 (Limitations on the open justice principle could occur by way of a law of general application (such as s 56 of the Childrens' Act 38 of 2005 which provides that proceedings of a childrens' court are closed), or may be attenuated by a court exercising its inherent power under FC s 173 to regulate its own process, in the interests of justice.)

[6] *Prinsloo v RCP Media Ltd t/a Rapport* 2003 (4) SA 456 (T). See § 42.9*(b)* supra, where this case is discussed in greater detail.

> uncommon for a nervous, embarrassed and emotionally fragile plaintiff in a divorce court to have to explain under oath in a courtroom filled with a large number of onlookers, how a spouse committed adultery or how alcoholism, drug abuse, family violence, or even incest wrecked a marriage, and for the victims of violent crime to have to explain in front of the public and the media how the death, rape or mutilation of oneself or a loved one, such as a child, was experienced and how it may have ruined people's lives.[1]

In the nuclear secrets case, *S v Geiges*,[2] the state sought an order under, inter alia, s 52(1) of the Nuclear Energy Act[3] that the trial of persons accused of smuggling nuclear technology be heard *in camera*. The effect of such an order would have been to exclude all members of the public (including the media) from the trial, prohibit the disclosure of the evidentiary record adduced at the trial, and to prevent the disclosure of the identities or identifying information of expert witnesses. The Court rejected the state's application. Labuschagne J affirmed that the public has a legitimate interest 'in all criminal trials and are entitled to be kept informed in that regard'. The Final Constitution requires courts to observe the principle of open justice in the conduct of proceedings, recognizes the central role of the media in ensuring open justice and permits 'only the narrowest demonstrably justifiable infringement of the right of access to open court proceedings'.[4] Significantly, the 'starting-point should … be that trial proceedings should be held in open court unless there are compelling reasons to close the doors of the court to the media and/or the public'.[5] Further, the blanket orders sought in regard to the names of witnesses and nuclear experts who would be testifying were clearly overbroad; all the State had done was to articulate a 'general apprehension of recruitment of the witnesses by elicit nuclear proliferation networks', without alleging or proving any causal link between the act of testifying and harm to the witnesses.[6] The state had also failed to distinguish between witnesses whose identity was already in the public domain and those that were not.[7]

The cases that we have discussed thus far concern the classic illustration of the open justice principle: that courts must be open to the public. One specific application of open justice that requires special mention is access to court documents. In the leading case, *Independent Newspapers (Pty) Ltd v Minister for Intelligence*, the Constitutional Court confirmed, for the first time in South African law, that '[f]rom the right to open justice flows … the right to have access to papers and

[1] *Prinsloo* (supra) at 462.
[2] [2007] ZAGPHC 46 ('*Geiges*').
[3] Act 131 of 1999.
[4] *Geiges* (supra) at para 61.
[5] Ibid at para 80. The Court also stated that it was 'probably obliged' to release non-sensitive documentation and evidence under the open justice principle. Ibid at para 71.
[6] Ibid at paras 74, 77.
[7] Ibid at para 79.

written arguments which are an integral part of court proceedings'.[1] The case concerned an application by a newspaper group to compel disclosure to the public of certain documents that formed part of the record of proceedings before the Constitutional Court, brought by the former Director-General of the National Intelligence Agency, Billy Masetlha, against the President of South Africa.[2] A day before the hearing of the *Masetlha* application, the Registrar of the Court was directed by the judges to remove the entire record, including the parties' written argument, from the Court's website and not to make them available to the public because certain of the documents in the record appeared to be classified on national security grounds. Independent Newspapers then moved an urgent application to access the written argument of the parties as well as the record of proceedings. The Court ruled that the record and written arguments be made available, but that any party who wished to object to the disclosure of any part of the record could do so within a certain time period. The Minister for Intelligence then objected to the disclosure of certain documents contained in the record, citing national security interests. The ultimate decision before the Court was whether the documents ought to be released in accordance with the principle of open justice, or whether they should remain secret on the grounds of national security.[3]

[1] *Independent Newspapers* (supra) at para 39. For foreign law recognising the same principle, see *Edmonton Journal v Alberta (Attorney General)* [1989] 2 SCR 1326 at para 86 ('*Edmonton Journal*'); *Named Person* (supra) at para 81. See also *Nixon v Warner Communications Inc* 435 US 589, 597 (1978)(general right to inspect and copy public records and documents including judicial records and documents); *Press-Enterprise Co v Superior Court* 478 US 1 (1986)(access to transcripts of preliminary hearing in criminal proceedings). Cf *Chan U Seek v Alvis Vehicles* [2004] EWHC 3092 (Ch) at para 30 (general tenor of cases is in favour of disclosure to the public of materials which through proceedings in open court have entered the public domain). In our view, rule 62(7) of the Uniform Rules of Court falls foul of the open justice principle in this context. It provides that 'any party to a cause, and any person having a personal interest therein, with leave of the registrar on good cause shown, may at his office, examine and make copies of all documents in such case'. This has been interpreted as precluding a stranger to the case (such as the media) from having access to the documents prior to the judgment. See, for example, *Abt v Registrar of the Supreme Court* (1899) 16 SC 476, 479 ('[C]ases which may never come into Court in no ways concern the public'); *Transvaal Chronicle & Another v Roberts* 1915 TPD 188, 192. There can be no justification for such a ban on access. The better approach is that adopted in the Rules of the Constitutional Court that permit any person to obtain such access on payment of the required fee. Rule 4(6).

[2] See *Masetlha v The President of South Africa & Another* 2008 (1) SA 566 (CC)(the former Director-General unsuccessfully challenged the suspension and termination of his employment contract.)

[3] The majority of the Court dismissed an interlocutory application by the newspaper group in which the group argued that its lawyers and senior editors should obtain access to the documents sought to be kept secret, on strict conditions of confidentiality, in order to prepare its case on the merits of the continued secrecy. The Court reasoned, inter alia, that 'the release of the restricted materials at the interlocutory stage would have created the untenable rule that when a member of the public questions the confidentiality of information kept by the state, she or he would in effect gain the right to receive the information in order to decide whether to prepare a court challenge'. *Independent Newspapers* (supra) at para 30. But see *Independent Newspapers* (supra) at paras 137-49 (Yacoob J).

Moseneke DCJ's first significant ruling for the majority of the Court[1] was his rejection of the argument of the Minister for Intelligence that once documents have been properly classified under operative legislation as being harmful to national security, courts have no discretion to order the disclosure of such documents:

> The mere fact that documents in a court record carry a classification does not oust the jurisdiction of a court to decide whether they should be protected from disclosure to the media and public . . .. It follows that where a government official objects to disclosure of a part of the record before a court on grounds of national security, the court is properly seized with the matter and is obliged to consider all relevant circumstances and to decide whether it is in the interests of justice for the documents to be kept secret and away from any other parties, the media or the public.[2]

Moseneke DCJ also enunciated relevant factors that a court should take into account, which, we submit, should apply to any claim that court documents should be kept secret:

> [A] court will have regard to all germane factors which include the nature of the proceedings; the extent and character of the materials sought to be kept confidential; the connection of the information to national security; the grounds advanced for claiming disclosure or for refusing it; whether the information is already in the public domain and if so, in what circumstances it reached the public domain; for how long and to what extent it has been in the public domain; and, finally, the impact of the disclosure or non-disclosure on the ultimate fairness of the proceedings before a court. These factors are neither comprehensive nor dispositive of the enquiry.[3]

We submit that the factors set out by Moseneke DCJ in *Independent Newspapers* for assessing whether a court record should remain secret represent a reasonable

[1] Sachs J agreed with Moseneke DCJ's approach to the legal issues involved. Ibid at para 152. Yacoob J suggested that the majority's test for whether a court could limit the right of open justice — whether such a limitation was in the interests of justice — might not give appropriate protection to constitutional rights. Ibid at para 83. Van der Westhuizen J preferred a limitations test employing, by way of analogy, the factors set out in FC s 36. Yacoob, Sachs and Van der Westhuizen JJ dissented from the majority's conclusion on the facts that all but one of the documents objected to should remain secret. See further § 42.9*(g)* infra.

[2] *Independent Newspapers* (supra) at paras 51 and 55. The Court also rejected a procedural solution, suggested by the Freedom of Expression Institute, including a requirement that courts hear submissions from interested parties before making a non-disclosure order. Although the Court agreed with the principles behind the procedure, it felt that it was better to leave the issue to the discretion of courts. Ibid at paras 57-58. While the benefit of the Freedom of Expression Institute's approach is that public participation in decisions to close proceedings or restrict access to documents is guaranteed, it is difficult to fault the logic of the Court that these salutary guidelines should not be elevated to inflexible rules of procedure. Courts should, however, as a default principle, strive to accommodate public participation in these contexts, to the extent possible. It is always competent, of course, for interested parties to intervene in court proceedings where the right to open justice is threatened, as in *Independent Newspapers*. Procedural safeguards in this context exist in Canadian and US jurisprudence. See *In re Washington Post* 807 F 2d 383, 391-392 (1986) (CA Fourth Cir); *Named Person* (supra) at para 51.

[3] *Independent Newspapers* (supra) at para 55.

attempt to balance the competing interests at stake, against the background of a general principle of openness.[1]

We differ, however, with the judgment of the majority in its articulation of the relevant test for assessing whether courts may limit rights based on FC s 173 — the courts' inherent power to regulate their own process. We agree with Yacoob J that it is incongruous for Parliament to be held to a different (presumably higher) standard of justification — the limitations clause — and yet permit courts to 'limit rights more easily'.[2] There is in our view merit in Van der Westhuizen J's proposal that an exercise analogous to the limitations enquiry is required in this context.[3] The majority's approach to the facts of the case, especially in view of the detailed factual analysis of the documents concerned by Yacoob J,[4] is also open to criticism.

(ii) *Restrictions on the open justice principle*

There are many exceptional cases[5] — usually in the criminal law context — where the principle of open justice must give way: either by excluding the public (and the media) from court proceedings, or limiting reportage and access to documents in some way.[6] While many of these restrictions will withstand scrutiny — most obviously those that protect children who are either accused or

[1] See *Independent Newspapers* (supra) at para 153 (SachsJ)(openness 'is an integral part of the constitutional vision of an open and democratic society'.)

[2] Ibid at para 84.

[3] Ibid at paras 172-173 ('[T]he balancing of competing interests that has to be done is not unrelated to a consideration of the reasonableness and justifiability of the limitation of the right, as required by section 36'.)

[4] Ibid at paras 90-136.

[5] Even before the advent of the Interim Constitution, courts regarded restrictions on access or reportage as only justifiable in exceptional circumstances. See, for example, *Botha v Minister van Wet en Orde & Andere* 1990 (3) SA 937 (W)(Desirable for public to see how court dealt with order of detention in terms of Internal Security Act 74 of 1982; application for *in camera* hearing refused). See, generally, *Geiges* (supra) at paras 54-56.

[6] The courts' power to impose restrictions on access to proceedings is contained in various statutory and common law rules. For instance, in terms of Criminal Procedure Act 51 of 1977 ('CPA') s 153(1), a judge or magistrate has a discretion to exclude the public or any portion of the public from attending proceedings in the interests of state security, law and order, public morals or the administration of justice. Courts also have discretion to restrict access in order to protect witnesses (CPA s 153(2)) and the complainant (CPA s 153(3)). These restrictions generally serve legitimate societal objectives (though some of the concepts are ambiguous and questionable (for example, 'public morals')) and, provided they are applied correctly, are in our view not generally unconstitutional. Less easy to defend are those provisions that regulate what may be reported in open proceedings. See especially CPA s 154(2)*(b)*(prohibition on the publication of information related to offence of extortion or indecency before accused has pleaded); South African Police Services Act 68 of 1995 s 69 (offence to publish a photograph of person who is in custody pending (i) the decision to institute proceedings against him or (ii) the commencement of criminal proceedings in which he is the accused, until he pleads to the charge.)

witnesses in criminal proceedings[1] or a party or witness in civil cases,[2] as well as genuine concerns regarding national security[3] — each restriction will need to be tested on a case by case basis in regard to whether the restriction justifiably restricts freedom of expression.[4]

An example of a reporting restriction that has not survived constitutional scrutiny is the overbroad restriction on reporting information disclosed in divorce proceedings contained in s 12 of the Divorce Act.[5] In terms of this provision, all that may be reported in regard to a divorce hearing is the names of the parties, the fact that a divorce is sought and the court's order at the conclusion of the proceedings. In *Edmonton Journal*, the Canadian Supreme Court was concerned with a similar though in some respects less restrictive statutory provision — the provision in question allowed the publication of the names and addresses of parties and witnesses, a brief statement of the charges and defences, the legal submissions and the court's summing-up or judgment in divorce and related proceedings.[6] Cory J held that the provision had a 'sweeping effect':

> The dangers of this type of restriction are obvious. Members of the public are prevented from learning what evidence is likely to be called in a matrimonial case, what might be expected by way of division of property and how that evidence is to be put forward. Neither would they be aware of what questioning may be expected. . . .
>
> As well the comments of counsel and the presiding judge are excluded from publication. How then is the community to know if judges conduct themselves properly?[7]

The impugned provision in *Edmonton Journal* significantly reduced the openness of courts because it went further than was necessary to protect the privacy of persons involved in proceedings when less restrictive measures — such as granting a

[1] See CPA s 153(4) which provides that where an accused is under 18, the only people allowed at the trial are the accused, his legal representative, his parent or guardian, and any other person who is necessary or allowed by the court. See also *Re Southam and the Queen (No 2)* (1986) 53 OR (2d) 663 (CA)(a statutory provision that granted to a judge a discretion to exclude the press from attendance at trials of young offenders was upheld as a reasonable limitation upon free speech. The court stated *obiter* that an absolute ban would not have constituted a justifiable limitation.); *SABC v NDPP* (supra) at para 141 (Sachs J). Cf *In re S (FC) (a child)* [2005] 1 AC 593 (HL)(press could identify the (adult) defendant in a criminal trial even though this would also identify her child.)

[2] See General Law Amendment Act 68 of 1957 s 5(1).

[3] For extensive discussion on the English position, see Jaconelli (supra) at 130-55.

[4] Restrictions that will also pass the limitations analysis include rules that the identities of rape victims and other victims of sexual violence may not be divulged without the prior consent of the victim concerned. Cf *Canadian Newspapers Co v Canada (A-G)* [1988] 2 SCR 122, 52 DLR (4th) 690 (mandatory ban on publication of the names of complainants in sexual assault cases constitutes a reasonable limitation on freedom of expression; it furthers the legitimate interest in having complaints reported by protecting the identities of complainants); *SABC v NDPP* (supra) at para 141 (Sachs J).

[5] Act 70 of 1979.

[6] The impugned provision was section 30 of the Alberta Judicature Act, RSA 1980.

[7] *Edmonton Journal* (supra) at paras 88-89.

trial judge a discretion to prohibit publication or to hold *in camera* hearings where appropriate — existed.[1]

The South African High Court took a similar line when it declared s 12 of the Divorce Act unconstitutional in *Mandel v Johncom Media Ltd.*[2] Acting Judge Cassim held that s 12 contained what amounted to an absolute prohibition on court reporting that undermined 'the general rule that the courts are open to the public.... [Publication of matters] of public interest which are raised in a divorce action [even] where there are legitimate reasons for such issues to be raised in public are prohibited'.[3] The Court further held that its finding that s 12 is unconstitutional would not cause injustice, as judges retain a discretion to order the non-publication of 'material which unduly and unfairly infringes the private life of a litigant … Similarly, the rights of children are protected'.[4]

(iii) *Broadcasting of enquiries and judicial proceedings*

The principle of open justice postulates that members of the public or the media should in general be able to have access to court proceedings. How should courts assess a claim by a member of the broadcast media that it has a freedom of speech right to broadcast proceedings to the public via television or radio — and also, in this age of convergence, over the Internet?[5] A few variants on this controversial issue have been considered by South African courts. The first case, *Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v King NO & Others*,[6]

[1] *Edmonton Journal* (supra) at para 102.

[2] [2008] ZAGPHC 36.

[3] Ibid at para 9.

[4] Ibid at para 12. The Constitutional Court has reserved judgment on proceedings for confirmation of the High Court's order of constitutional invalidity. See also, South African Law Commission *Publication of Divorce Proceedings: Section 12 of the Divorce Act (Act 70 of 1979)* Project 114 (August 2002) para 3.84 (Concludes that s 12 of the Divorce Act is overbroad). Cf *Kerzner v Jonathan Ball Publishers (Pty) Ltd* unreported decision of the Witwatersrand Local Division (10 December 1997) 25 (S 12 not contrary to the Interim Constitution.)

[5] The argument that court proceedings should be televised has not been well-received internationally and, as a matter of principle, it constitutes a weak free speech claim. See Barendt *Freedom of Speech* (supra) at 347. For a masterful survey of the position in comparative jurisdictions, see *South African Broadcasting Corporation v Thatcher* [2005] 4 All SA 353 (C) at paras 51-109 (Van Zyl J). In many jurisdictions, appeals to the right to televise as a matter of constitutional right have been rejected. See, for example, *Petition No 2 of the BBC* [2000] HRLR 423 (In Scotland, an application by the BBC to televise the Lockerbie bombing trial was rejected by the Scottish High Court of Judiciary); *R v Squires* (1992) 78 (3d) CCC 97 (A majority of the Ontario Court of Appeal ruled that prohibiting the media from filming parties as they enter and leave court constitutes a justifiable infringement of free speech. Cf *Phillips & Another v National Director of Public Prosecutions & Others* 2001 (4) SA 849 (W)); *BVerfGE* 44 (2002)(The German Constitutional Court has also rejected arguments that a law prohibiting the filming of court proceedings is unconstitutional.) Even in the US, where cameras are routinely allowed into courts as a matter of state law, the First Amendment case for their presence has yet to be made.

[6] 2000 (4) SA 973 (C)('*Dotcom*'). For commentary on the case, see C Plasket 'Unconstitutional Administrative Action: The Case of the King Commission and the Media' (2001) 118 *SALJ* 659; DM Pretorius 'Freedom of Expression and the Broadcasting of Public Enquiries and Judicial Proceedings' (2006) 123 *SALJ* 40.

concerned arguments for live radio broadcasts of a topical commission of inquiry into match-fixing by the former South African cricket captain, Hansie Cronjé.[1] The full bench of the Cape High Court held that the prohibition by the chairperson of the direct radio transmission of proceedings constituted a limitation 'on what is essential to the activities of that medium of communication'. The judges were alive to the important differences between various media of communication: Unlike print media, radio permits not only the words spoken, but the emphasis, the tone of voice, the hesitations, etcetera to be recorded and communicated. Although the chairman's desire to ensure that witnesses would not be inhibited from testifying was laudable, he had nevertheless underestimated the importance of freedom of expression and had not exercised his discretion in accordance with the proportionality demanded by the Constitution's limitations analysis. In addition, the Court noted that the enquiry was dealing with an important matter of public interest and that radio constitutes the only access to information for many South Africans.[2] Moreover, the chairman had painted television and radio with the same brush where it would have been possible for him to impose restrictions that would render the presence of radio broadcasting and recording equipment less obtrusive.[3]

In our view, *Dotcom* was correctly decided on its facts. But the decision does not necessarily make the argument for *televising* courts and other proceedings stronger. Indeed, judges in a number of subsequent cases rejected applications that enquiries or criminal trials be televised. In *South African Broadcasting Corporation v Public Protector*, the national broadcaster, SABC, and a commercial broadcaster, e-TV, failed in their application to review the decision of a panel to disallow radio and television broadcasts of its public hearing into the acquisition by the government of arms and connected allegations of misconduct.[4] According to the Court, the panel had properly weighed the free speech concerns of the media against its obligation to protect the integrity of information and the interests of witnesses. Its resulting cautious approach could not be set aside on review.[5] An application by

[1] The enquiry was set up in terms of the Commissions Act 8 of 1947. Section 4 of this Act provides that commissions of enquiry are heard in public, though the chairman has a discretion to depart from this in whole or part.

[2] *Dotcom* (supra) at paras 57-60.

[3] Ibid at para 61.

[4] 2002 (4) BCLR 340 (T).

[5] Ibid at 353 (Bertelsmann J opined that he might have taken a different view had the matter been an appeal rather than a review. The court should have interrogated the reasoning of the panel more closely in relation to radio broadcasts; although much of the panel's reasoning might preclude television broadcasts, it is not clear why radio broadcasts should also have been banned, especially, as pointed out by the applicants, in circumstances where many South Africans cannot read. Ibid at 352. It is appropriate, as in *Dotcom*, for courts to be especially robust when scrutinising administrative action where fundamental rights are impinged. For further discussion, see JR de Ville *Judicial Review of Administrative Action in South Africa* (Revised 1st Edition, 2005) 192-193. See also, generally, J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 62.)

e-TV to televise the high-profile criminal trial of businessman Shabir Shaik, former Deputy President Jacob Zuma's financial advisor, for corruption also failed, principally on the basis of the privacy interests of witnesses, who may have been intimidated or inhibited in giving evidence:

> Contrast [print publications] with a permanently-captured moment of inadvertent folly, embarrassment or humiliation that will appear time after time, if thought desirable, in the living rooms of the country's television watchers when every pause, every frown, every hesitation, every unguarded response or unavoidable disclosure of some private fact is preserved on tape or film for as long as thought desirable.[1]

The SABC achieved greater success in *South African Broadcasting Corporation v Thatcher*, which concerned the broadcasting of aspects of a court proceeding related to the alleged involvement of Mark Thatcher, the son of the former British Prime Minister, in an attempted coup in Equatorial Guinea.[2] The application was narrow in its scope: the SABC sought permission to broadcast an edited daily highlights package for purposes of delayed television news and current affairs programmes. Van Zyl J granted the application. The Court held that any limitation on the right of privacy of the litigants 'is reasonable and justifiable'. It was significant in this regard that the traditional arguments that applied against broadcasting court proceedings — that witnesses could be negatively influenced — did not apply on the facts, as the issue was to be decided as an opposed application on the papers.[3] Thus only an edited package of counsels' arguments and the delivery of judgment would be broadcast. 'On a case-by-case basis', van Zyl J concluded, a court should feel free, 'within its inherent power to arrange its own procedures, to allow, wholly or partially, the recording and televising of its proceedings'.[4]

As *Thatcher* indicates, while flexibility is the touchstone, the argument for televising courts is far stronger where what is sought to be broadcast is counsels' arguments and the ruling of the court rather than the testimony of witnesses; indeed, in that narrow context, it is difficult to conceptualise countervailing considerations that would rebut the right to televise. It is therefore disappointing that, even in this narrow context, both the Supreme Court of Appeal and the Constitutional Court provided little analysis of the substantive issues when they were finally called upon to decide the scope of a right to televise court proceedings.[5]

In *South African Broadcasting Corporation Ltd v The National Director of Public Prosecutions*,[6] the Supreme Court of Appeal held that the SABC could not broadcast,

[1] *Midi Television (Pty) Ltd t/a e-TV v Downer* Unreported, Durban Local Division (12 October 2004) at 11. Squires J subsequently rejected a further application by e-TV for permission to make mechanical sound recordings of the trial for broadcasts. *Midi Television (Pty) Ltd t/a e-TV v Downer* unreported decision of the Durban Local Division (16 November 2004).

[2] [2005] 4 All SA 353 (C)('*Thatcher*').

[3] Ibid at paras 111-112.

[4] Ibid at para 115.

[5] We accept that the analysis of the Courts in this case was no doubt affected by the very short time periods within which both Courts prepared their judgments.

[6] [2006] ZASCA 90, [2006] SCA 89 (RSA)('*SABC v NDPP SCA*').

live and as edited highlight packages, on radio and television, the argument in Shabir Shaik's appeal before that Court.[1] The Supreme Court of Appeal engaged in a balancing of rights analysis facilitated by the existence of s 173 of the Constitution which declares this court's inherent power to regulate its 'own process'.[2] Although there was no general rule when it came to a contest between the right to freedom of expression of the broadcaster, and the appellate litigants' fair trial rights, Howie P adopted the test that 'live or recorded sound broadcasting should not be allowed unless the court is satisfied that justice will not be inhibited'.[3] Given the 'long and demanding appeal … [and the fact that] there is a great deal at stake', to permit live television would add an 'inhibiting dimension' and create the 'material risk that justice will be impaired'.[4] The SABC appealed the decision to the Constitutional Court.

A majority of the Court, in a judgment handed down in an admirably short time,[5] elected not to interfere with the Supreme Court of Appeal's decision. It assumed, without deciding, that the right to freedom of expression includes a right to record and broadcast court proceedings.[6] The narrow issue, according to the majority of the Court, was whether the Supreme Court of Appeal's discretion as to how to discharge its responsibility of ensuring that proceedings before it were fair should be interfered with.[7] In the circumstances of an appeal from another court's decision not to allow broadcasting, the majority held that an appeal court should only interfere with the discretion in narrow circumstances, in part because the case required a value judgment from the original court.[8] The test was whether the Supreme Court of Appeal had committed a demonstrable blunder or reached an unjustifiable conclusion.[9] In the majority's view the test adopted by the Supreme Court of Appeal, far from being a demonstrable blunder, established an 'appropriate relationship of proportionality' between freedom of expression and the court's obligation to ensure that its proceedings are

[1] The trial judgment in *Shaik* is reported as *S v Shaik* [2005] 3 All SA 211 (C). Shaik ultimately failed in his appeal against his conviction before both the Supreme Court of Appeal and the Constitutional Court. *S v Shaik* 2007 (1) SA 240 (SCA); *S v Shaik* 2008 (2) SA 208 (CC), 2007 (12) BCLR 1360 (CC).

[2] *SABC v NDPP SCA* (supra) at para 15.

[3] Ibid at para 20. As a matter of previous practice, the Supreme Court of Appeal had granted the broadcaster the right to make visual recordings without sound.

[4] Ibid at para 25. It also mattered to the Supreme Court of Appeal that, in Jacob Zuma's possible criminal trial, most of the witnesses whose testimony was led in the Shaik trial would need to give evidence; 'exposure of such witnesses … might cause them to refuse to testify in the Zuma trial'. Ibid at para 27.

[5] The Constitutional Court handed down judgment eight days after argument in order to ensure that the Shaik appeal before the SCA was not delayed.

[6] *SABC v NDPP* (supra) at para 25.

[7] Ibid at para 34.

[8] Ibid at para 40.

[9] Ibid at para 41.

fair.[1] The decision had been reached judicially and, therefore, could not be interfered with.[2]

The conservative approach adopted by the majority of the Constitutional Court, perhaps partly because of the time constraints under which it was operating, should be contrasted with the dissenting judgment of Moseneke DCJ.[3] The Deputy Chief Justice correctly identified the issue: the case was about a publication ban that 'silences speech. Images may flourish but the spoken word may not'.[4] In examining whether the Supreme Court of Appeal exercised its discretion properly, it was important to adopt the point of departure that the right to free speech would serve little purpose 'if the media, though entitled to convey information and broadcast footage and recordings, were not entitled to gather information, footage and recordings.'[5] Moseneke DCJ stressed that the vast majority of citizens prefer to rely on the media rather than personal attendance at court proceedings and receive news by means of radio and television.[6] The test adopted by the Supreme Court of Appeal privileged the right to a fair trial over open justice and free speech, 'which from the outset prejudices the rights of broadcasters'.[7] He dismissed the concern that fair trial rights would be in jeopardy because it had not been 'shore[d] up with facts'. In addition, less restrictive means existed to prevent any mischief at which the prohibition was directed.[8]

The judgment of Moseneke DCJ is to be preferred to that of the majority. With respect, the substantial deference accorded by the majority to the decision of the Supreme Court of Appeal — which effectively foreclosed the Court's analysis of the substantive issues — resulted in an impoverished approach to the open justice and free speech issues that lay at the heart of the case.[9] It is precisely in the context of appeals and applications — where there is generally no oral testimony

[1] *SABC v NDPP* (supra) at para 46.

[2] Ibid at para 67. Langa CJ et al for the majority also commented in passing that the judiciary and the media should co-operate in regard to broadcasting court proceedings in the future, and suggested that coverage on a trial basis might be a starting point. Ibid at paras 71-72. 'It is . . . not in the interests of . . . the viewing public in general for the process to be impelled by a last-minute application followed by hastily improvised procedures'. Ibid at para 72.

[3] Mokgoro J concurred with the decision of Moseneke DCJ, and Sachs J essentially concurred in his reasoning, but agreed with the majority's order on account of the SABC's tardiness in bringing the application. For strident and persuasive criticism of the majority's decision, see Danay & Foster (supra) at 576-585.

[4] *SABC v NDPP* (supra) at para 83 (the SCA allowed visuals of the proceedings, unaccompanied by audio, to be recorderd for television).

[5] Ibid at para 96.

[6] Ibid at para 101. Ibid at para 133 (Mokgoro J)(Broadcast would 'bring the courtroom into their houses'); Ibid at para 140 (Sachs J).

[7] Ibid at para 103. Ibid at para 128 (Mokgoro J).

[8] Ibid at paras 106 and 110 ('There is no evidence that the [Supreme] Court [of Appeal] considered whether it could allow sound broadcast to some extent or under particular circumstances.')

[9] See Danay & Foster (supra) at 576 (Regard the majority's approach as 'a profound abdication of the responsibility to ensure that the rights enshrined in the Constitution are upheld'.)

— that the justifiable concerns about rights to fair trials hold little sway. As Sachs J put it: 'As a general rule . . . appeal courts are under a constitutional obligation to facilitate public understanding of how they work, and this ordinarily would require granting of full access to electronic media.'[1] Moseneke DCJ correctly recognised that when balancing open justice and freedom of expression with fair trial rights it is simply not enough to speculate as to what prejudice might result if appeals are televised.[2] As is consonant with a number of areas of our free speech jurisprudence, the Constitutional Court should rather have demanded cogent evidence as to the harm that televising proceedings would cause.[3]

(iv) *Balancing freedom of speech against the administration of justice*

There are a number of criminal offences that are variously described as contempt of court. Many of these, such as the disobeyance of orders of court, do not engage the right to freedom of expression, or, if they do impinge on free speech, are defensible.[4] There are, however, two variants of contempt of court that are clear restrictions on freedom of speech. These are the crimes of scandalising the court, and unfairly prejudicing legal proceedings (*sub judice*). Each of these will be considered in turn.[5]

(aa) Scandalising the court

In many other jurisdictions, the crime of scandalising exists in much the same form as it does in South Africa. The question of whether the crime is compatible with freedom of speech has been considered in a number of these jurisdictions.[6] The most speech-protective response to these challenges is unsurprisingly epitomised by the stance of the US Supreme Court. That Court requires that, in

[1] *SABC v NDPP CC* (supra) at para 148.

[2] Ibid at para 106 (Moseneke DCJ).

[3] Cf the markedly different and interventionist approach of the Supreme Court of Appeal in *Midi Television (Pty) Ltd t/a e-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA)('*Midi Television*') discussed in § 42.9*(c)*(vi)(bb) infra. See also *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC) at § 42.9*(d)* infra.

[4] Examples of contempt restrictions on freedom of speech that are generally justifiable are the offences known as contempt in the face of the court, such as where a person in court threatens, insults or interferes with the judge. For a recent example of a case where the court overturned a contempt conviction, see *Lewis v The State* [2007] SCA 3 (RSA).

[5] At the outset, it is significant that, while there may be an overlap between the two crimes in some instances, the typical scandalising case concerns publications that do not comment upon specific pending court proceedings, but about litigation that has been completed or about the judiciary or individual judges in general. The right to comment about pending or current cases — limited by the *sub judice* rule — raises issues that are in many ways qualitatively different to those involved in the scandalising sanction, and hence will be treated separately.

[6] For a review of the legal position in England and Wales, Ireland, Germany, Austria, Belgium, France, Denmark, Iceland, the Netherlands, Italy, Greece, Russia and Hungary, see MK Addo (ed) *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards* (2000).

scandalising cases concerning pending or current proceedings, an exceedingly high threshold must be satisfied in order for the offence to be triggered. In *Pennekamp v Florida*,[1] Reed J adopted the clear and present danger test, namely that the evil consequences of the comment must be 'extremely serious and the degree of imminence extremely high before utterances can be punished'.[2] In relation to concluded proceedings, even unrestrained criticism will be protected.[3] The result is that a scandalising-type offence is effectively a dead letter in the United States.[4]

A similar approach to the US articulation of the clear and present danger test appears from the decision of the Ontario Court of Appeal in *R v Kopyto*.[5] The five-judge panel unanimously overturned a conviction for scandalising in circumstances where the accused, a solicitor for the failed litigant, said after the case, 'This decision is a mockery of justice. It stinks to high hell'. Two judges — Cory JA and Goodman JA — thought the offence could pass constitutional muster, provided that the threat to the administration of justice was real and substantial and constituted a present or immediate danger to the administration of justice.[6] One judge would have eradicated the offence in its entirety on constitutional grounds.[7] Dubin JA (Brooke JA concurring) articulated the offence as requiring a serious risk that the administration of justice would be interfered with. This test does not demand as much as the clear and present danger formulation, but nevertheless sets the threshold relatively high.[8]

The Supreme Court of Zimbabwe has conducted a thorough examination of whether the crime of scandalising infringes the right to freedom of expression entrenched in s 20(1) of the Zimbabwean Constitution.[9] In a well-reasoned judgment, the Court held that the 'serious risk' test that Dubin JA adopted in *Kopyto* reflected Zimbabwean law, and that this test had the result that the limitation on freedom of expression posed by the offence was reasonably justifiable in a democratic society.[10]

The Privy Council has also had occasion to assess the limits of scandalising-type offences in a number of cases; the lesson from these decisions appears to be

[1] 328 US 331 (1946).

[2] For the first articulation of the clear and present danger test see *Schenk v US* (supra) at 52. See further § 42.9*(g)* infra.

[3] *Bridges v California* 314 US 252, 273 and 291 (1941)('*Bridges v California*').

[4] B van Niekerk *The Cloistered Virtue: Freedom of Speech and the Administration of Justice in the Western World* (1987) 57. It is also significant that in the US, judges are generally elected, which enhances the argument that speech should in this context be given maximum protection. See I Cram *A Virtue Less Cloistered: Courts, Speech and Constitutions* (2002) 169.

[5] (1987) 47 DLR (4th) 213 ('*Kopyto*').

[6] Ibid at 241 (Cory JA), 263 (Goodman JA). Cf ibid at 282 (Dubin JA).

[7] Ibid at 255 (Houlden JA).

[8] Ibid at 285. Dubin JA and Brooke JA nevertheless did not consider that contempt of court in general constituted an infringement of freedom of expression.

[9] *In re Chinamasa* 2001 (2) SA 902 (ZSC)('*Chinamasa*').

[10] Ibid at 920-921.

that imputing improper motives to judges is particularly objectionable.[1] For example, in *Badry v Director of Public Prosecutions of Mauritius*, the Privy Council upheld a contempt conviction on the basis that the comments imputed improper motives to a judge who had dismissed a worker's compensation claim.[2] Finally, the European Court of Human Rights, in a few criminal libel cases, has upheld convictions of publishers for statements imputing incompetence or corruption on the part of judges, on the basis that the state has a legitimate interest in the protection of the reputation of its judges.[3] However, in general, this attitude 'sits uneasily alongside the Court's rhetoric about the importance of tolerating a broad range of political speech in a democracy'.[4]

In South Africa, the Constitutional Court has analysed the constitutionality of the crime of scandalising the court in one of its seminal free speech decisions, *S v Mamabolo (E TV & Others Intervening)*.[5] Mamabolo, an official in the Department of Correctional Services, was convicted of contempt of court in the Pretoria High Court for making statements about an order of that court. The order concerned Eugene Terre Blanche, the notorious leader of the AWB (a right-wing political party), who had earlier been sentenced for attempted murder and assault with intent to do grievous bodily harm. Terre Blanche had been serving his gaol sentence for the assault offence while appealing to have the attempted murder conviction reduced to one of assault with intent to do grievous bodily harm. Because of Terre Blanche's belief that his release on parole in relation to the assault charge was imminent, he had applied for and been granted bail by Els J, pending the outcome of the attempted murder appeal. Mamabolo was quoted in a newspaper report as stating that Els J had acted erroneously by granting bail to Terre Blanche, because, according to the Department, Terre Blanche was not yet eligible for parole. Els J thereafter summarily tried and convicted Mamabolo, stating in his oral judgment: 'I have no doubt that this was a scandalous comment and it impugned on the integrity of this court'.

The Constitutional Court's judgment was authored by Kriegler J. The first major issue was the nature and purpose of the offence of scandalising the court. Kriegler J held that the judiciary is different from the other branches of government; it is an independent pillar of state, on an equal footing with the executive and legislative pillars of state in theory, but in terms of 'political, financial or military power it cannot hope to compete'.[6] It must rely instead on moral

[1] See, for example, *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322. See also *Ahnee v DPP* [1999] 2 AC 294.

[2] [1983] 2 AC 297.

[3] See, for example, *Barfod v Denmark* (1989) 13 EHRR 493; *Prager and Oberschlick v Austria* (1995) 21 EHRR. But see *De Haes v Belgium* (1998) 25 EHRR 1 (Allegations of political bias on the part of judges political opinion entitled to strong protection unless no factual basis.) In England, while the offence remains in existence, there has been no conviction for contempt on this basis since 1930. See, for example, *R v Commissioner of Police, ex parte Blackburn (No 2)* [1968] 2 QB 150 (Failed prosecution of Quintin Hogg QC for his article in *Punch*).

[4] Cram (supra) at 175.

[5] 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC)('*Mamabolo*').

[6] Ibid at para 16.

authority. Hence, the confidence of the public is crucial for the proper functioning of the judiciary and, in turn, the preservation of rule of law.[1] The crime of scandalising is one of the devices that are necessary to 'protect the authority of the courts'.[2]

The Court emphasised that the offence had to be viewed as one that exists to protect the moral authority of the judicial process, rather than the dignity of the individual judicial officer.[3] More importantly for our purposes, the offence has to be viewed against the importance of freedom of expression in relation to the functioning of the courts. Free and frank debate about judicial proceedings is important for a number of reasons: for citizens to debate the conduct of their courts; to promote impartiality, accessibility and effectiveness of the judiciary; to act as a democratic check on the judiciary's power; and to promote peace and stability in society by convincing its members that the legal process is effective.[4]

It did not follow, however, that the crime of scandalising had no place in South Africa's constitutional democracy. The main issue is one of determining how a line between permissible comment on judicial affairs and comment that exceeds the bounds of permissibility should be drawn.[5] The recognition by the Constitution itself of the need to protect the dignity of the courts[6] meant that any argument that the crime of scandalising should either be jettisoned entirely or materially attenuated had to fail.[7] The clear and present danger test that had been adopted in the United States and also, in essence, by certain judges of the Ontario Court of Appeal, was therefore unacceptable in South African jurisprudence.

The Court further held that the focus should be on the consequences of the statement; the test is now 'whether the offending conduct, viewed contextually, really was likely to damage the administration of justice.'[8] This creative interpretation of the limits of the crime[9] allowed Kriegler J to conclude, in the part of his judgment that is of most practical importance, that the test for scandalising will not now lightly result in a conviction:

[1] *Mamabolo* (supra) at para 19.
[2] Ibid at para 20.
[3] Ibid at para 25. A judge is in the same position as anyone else in regard to the law of defamation; hence a judge may sue to protect his or her reputation in relation to any unlawful, defamatory publication. See, for example, *Argus Printing* (supra) at 29-30 (possible overlap with scandalising discussed by Corbett JA.)
[4] *Mamabolo* (supra) at paras 29-31.
[5] Ibid at para 38. Kriegler J concedes that drawing a clear line in this respect is impossible. Ibid at para 32.
[6] FC 165(4).
[7] *Mamabolo* (supra) at paras 38-39.
[8] Ibid at para 45.
[9] I Currie & J De Waal *The Bill of Rights Handbook* (5th Edition, 2005) 394 (Regard this interpretation as a reading-down of the common law offence.)

> the scope for a conviction . . . must be narrow indeed if the right to freedom of expression is afforded its appropriate protection. The threshold for a conviction . . . is now even higher than before the superimposition of constitutional values on common law principles; and prosecutions are likely to be instituted only in clear cases of impeachment of judicial integrity.[1]

Although there would still exist a narrow category of 'egregious cases' where the crime could be committed, and this would limit the right to freedom of expression, the Court regarded this limitation as eminently justifiable. The narrowness of the category of cases to which the crime still applied, the fact that the language that would fall foul of the offence would need to be 'serious', and, finally, the importance of maintaining the integrity of the judiciary, meant that retaining the 'tightly circumscribed' crime of scandalising was appropriate.[2]

Sachs J authored a concurring judgment that is significant for its wide-ranging statements on free speech. The first important point that Sachs J made is that bruising criticism of the judiciary may lead to an improvement in the administration of justice, rather than undermining it. Sachs J then relied on an important argument that is often invoked in free speech jurisprudence, namely that the 'chilling effect' of a fear of being prosecuted for criticising the courts may increase the deterioration of the administration of justice.[3] The judge essentially agreed that the North American position should apply, namely that the expression must be likely to have an impact of 'a sufficiently serious and substantial nature as to pose a real and direct threat to the administration of justice'.[4] On the facts of the case, all the judges agreed that Mamabolo's conviction had to be quashed as the statements attributable to him did not impair the dignity of the judiciary.[5]

A number of points can be made about the *Mamabolo* decision. Kriegler J and Sachs J's decisions must be welcomed for their recognition that citizens have the right to engage in robust criticism of the judiciary, and for striking a more appropriate balance between freedom of expression and the administration of justice than had previously been the case under the common law. But in our opinion both judgments should have taken matters further. The crime of scandalising constitutes a severe restriction on free speech, precisely because speech concerning the judiciary is a quintessential illustration of political speech.[6] As has been argued above, political speech rightly receives extensive protection in our democracy.[7] The crime of scandalising is in principle analogous to the crime of sedition;

[1] *Mamabolo* (supra) at para 45.

[2] Ibid at para 48-9 (The Court also held that the summary procedure for the conviction of the accused was an unconstitutional infringement of the right to a fair trial set out in FC s 35(3).) Cf *Lewis v The State* [2007] SCA 3 (RSA).

[3] *Mamabolo* (supra) at para 70.

[4] Ibid at para 75.

[5] Ibid at para 61.

[6] Van Niekerk (supra) at 52 (Criticism of an office of public administration should never entail penal consequences in a functioning democracy.)

[7] See § 42.5 supra.

just as this crime is wholly incompatible with a commitment to freedom of expression, so too is the very existence of a crime of scandalising.[1] Although Kriegler J's reinterpretation of the crime, and his repeated observations that it is now to be narrowly construed, provide solace, the crime nevertheless remains in force, and the vagaries of its *actus reus* will inevitably portend an undesirable chilling effect on freedom of expression.[2] Thus, even the strict threshold test set out in the North American jurisprudence and effectively adopted by Sachs J, does not go far enough in protecting freedom of speech in this context. South Africa's history is replete with examples of how the sanction of contempt was employed by the apartheid state to stifle academic and media criticism.[3] The very existence of the crime of scandalising played a role in maintaining the hegemony of apartheid. This history should give pause to the proposition endorsed in *Mamabolo* that the sanction is necessary, even if only in egregious cases.[4] In any event, the fear that the administration of justice will be threatened by overly robust and ill-considered criticism is probably exaggerated. In the words of Cory JA of the Ontario Court of Appeal, 'the courts are bound to be the subject of comment and criticism. Not all will be sweetly reasoned. … But the courts are not fragile flowers that will wither in the heat of controversy.'[5]

Critics of the absolutist position advocated here — that there should be no crime of scandalising — might emphasise that Kriegler J's repeated articulation that the sanction for contempt should only apply in the most egregious of cases inevitably means that the crime will begin to gather dust. This response does not withstand scrutiny. Either the crime is justifiable in principle or it should be discarded. It is also significant that there have been at least two reported convictions for scandalising after *Mamabolo*. In one of these cases, *S v Bresler & Another*, the accused had mounted a racist attack on the (coloured) magistrate who had convicted his daughter of a traffic offence, writing, inter alia, that the magistrate was unqualified, insane and incompetent, and had applied 'bush law'.[6] While the accused's comments were clearly reprehensible, and would have provided solid grounds for a defamation action by the magistrate as well as a complaint before the Equality Court, the conviction for contempt of court was not, in our view, a

[1] See further Barendt *Freedom of Speech* (supra) at 319 (Argues that it is hard to distinguish attacks on the judiciary from political speech, which lies at the core of a freedom of speech guarantee.)

[2] This remains the case even though a number of defences, such as truth for the public benefit and fair comment may apply. *Mamabolo* did not address these issues. *Mamabolo* (supra) at para 23. Just as the defence of truth does not save the constitutionality of a sedition offence, so the same can be argued of the offence of scandalising. See *Sullivan* (supra); Barendt *Freedom of Speech* (supra) at 319 (Crime may be necessary in jurisdictions where judges are career civil servants or do not enjoy security of tenure).

[3] See, for example, Van Niekerk (supra) at 59-60.

[4] *Mamabolo* (supra) at paras 76-77 (Point is eloquently expressed by Sachs J.)

[5] *Kopyto* (supra) at 227.

[6] 2002 (4) SA 524 (T).

justifiable restriction of free speech. As Satchwell J herself remarked, '[y]ou may hold that belief, no matter how farcical it is, no matter how grotesque it is, no matter how offensive it may be to this Court or to anyone else. This is a democracy and you are entitled to your views and your opinions. You are as entitled to be a racist as the next person is entitled to be a communist or another a liberal.'[1]

In the second post-*Mamabolo* case, *S v Moila*, the accused had alleged that two judges of the High Court were, inter alia, biased, racially intolerant, and guilty of clandestine collusion and dishonesty.[2] The Court held that accusations that a judge is guilty of personal favouritism and is corrupt have a tendency to bring the administration of justice into disrepute; the allegations 'amounted to unbridled vituperative attacks on the Judges … in which they are vilified and held up to public obloquy for making findings that did not suit the accused'.[3] The facts of the case demonstrated to the Court 'the need for the retention of this form of contempt of court'.[4] While it is easy (and correct) to condemn the behaviour of the accused in this case, it is submitted that it is constitutionally suspect to employ the heavy hand of the criminal law to punish such speech.

The fact that at least two successful reported prosecutions for scandalising have occurred after *Mamabolo* should give pause to the view that the crime will only be invoked infrequently. We submit that to support the existence of the crime in any incantation is to countenance a regime where a form of seditious libel is acceptable. If we are correct in this regard, the importance of free speech for democracy impels us to reject such a proposition.

(bb) The *sub judice* rule

Rules that prevent the prejudicing of pending proceedings traditionally require the courts to balance the right of freedom of expression with the right of the litigant to a fair criminal or civil trial or hearing. These latter rights also receive protection under the Constitution.[5] One rationale[6] for the *sub judice* rule is that prejudicial

[1] *S v Bresler and Another* (supra) at 534. But Satchwell J's later comments undermine this proposition: 'But, when you express those views in public, when you act upon them and when your behaviour and actions impact upon other persons, then this Court is entitled to and will examine your actions to determine whether any offence has been committed'. Ibid.

[2] 2006 (1) SA 330 (T).

[3] Ibid at 346-347.

[4] Ibid at 348.

[5] FC ss 34 an 35. See generally J Brickhill & A Friedman 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 59; F Snyckers & J le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 51.

[6] Another common rationale for the *sub judice* rule is the general objection to trial by the media. See generally Barendt *Freedom of Speech* (supra) at 323-328. This consideration certainly weighed with the House of Lords in one of the leading cases. *Attorney-General v Times Newspapers Ltd* [1974] AC 273. But this rationale lacks a principled basis. See also Barendt *Freedom of Speech* (supra) at 326 ('the view that the press is usurping the functions of the courts will rarely be sustainable'.) To the extent that the rationale dissolves into the proposition that the integrity and reputation of the courts need protection from adverse publications, similar objections can be made as apply to the offence of scandalising. See § 42.9*(c)*(iv)(aa) supra.

publicity may impact on the litigants' case, principally by influencing the judges or the jury deciding the case,[1] though also, more generally, by prejudicing the administration of justice.[2] The rationale that argues that prejudicial publicity will influence decision-makers is stronger where juries as opposed to judges decide cases. In so far as judges are concerned, the argument that prejudicial publicity might influence judges cannot be sustained on policy grounds without conceding that it would then be 'impossible to find an impartial judge for a high profile case'.[3] Hence the argument based on prejudicial impact on the decision-maker cannot justify *sub judice* restrictions in South Africa, where there is no jury system.[4] On the other hand, it is conceivable that publicity concerning, say, the identity of the accused where identity is in issue, or details concerning witnesses, who might then be intimidated, may undermine the administration of justice.[5] We submit that the many circumstances in which the administration of justice could be interfered with in regard to a pending or current case, justify the retention of the rule, provided that the appropriate constitutional test is crafted. We revert to the appropriate test below.

The balance between the right to free speech and the litigant's right to a fair trial is resolved differently across various jurisdictions. The leading case in England is *Attorney-General v Times Newspapers Ltd* where the plaintiffs in pending civil litigation (before a judge and not a jury) alleged that they had been born with deformities as a result of their mothers' consumption of a drug called Thalidomide.[6] They alleged that the drug had been manufactured negligently by the defendants. The *Sunday Times*, which had previously published an article on the case, wished to run another article that effectively imputed negligence to the defendants. The Attorney General obtained an injunction preventing this article from being published on the grounds that it would constitute a contempt of court. The case eventually reached the House of Lords which agreed with the

[1] G Robertson QC & A Nicol *Media Law* (4th Edition, 2002) 346.

[2] H Fenwick & G Phillipson *Media Freedom under the Human Rights Act* (2006) 247.

[3] *Banana v Attorney-General* 1999 (1) BCLR 27, 36 (ZS)(only remote possibility of judge being influenced by extraneous matter; assessors in a similar position). On the other hand, the recent controversy over the prosecution's phrase 'generally corrupt relationship', which the media repeated extensively and which the SCA wrongly attributed to the trial court in describing the relationship between Shabir Shaik and Jacob Zuma, arguably illustrates that even appeal judges may be subconsciously influenced by publicity. See *Shaik v The State (2)* [2006] SCA 134 (RSA) at para 8.

[4] See *Chinamasa* (supra) at 923 (only remotest possibility exists of judge being consciously or subconsciously influenced by extraneous matter). Even in the context of juries, this justification for the *sub judice* rule may be challengeable. Recent studies in New Zealand and Australia suggest that the impact of prejudicial media coverage on jury decisions is minimal. See Fenwick & Phillipson (supra) at 272-273. On the empirical research in the US, see Fenwick & Phillipson (supra) at 275.

[5] See, for example, C Cleaver 'Ruling Without Reasons: Contempt of Court and the *Sub Judice* Rule' (1993) 110 *SALJ* 530, 534.

[6] [1974] AC 273.

Attorney General on the basis that the article prejudged the issues in pending litigation, even though there was little likelihood of the article influencing the judges that would hear the action.

The *Sunday Times* appealed to the European Court of Human Rights.[1] That Court held that the conviction for contempt violated the right to freedom of expression in art 10 of the ECHR and that the blanket prejudgment test applied by some of the judges in the House of Lords was not necessary in a democratic society for maintaining the authority of the judiciary. The Court noted that the debate about Thalidomide was a matter of undisputed public concern, the publications had been balanced and couched in moderate terms, and there was little possibility of the judges being influenced by the publications.[2] Following this defeat in Strasbourg, the British government enacted the Contempt of Court Act 1981, which sought to address the deficiencies of contempt law. Section 2(2) of this Act states that contempt is committed where a publication creates a substantial risk that the course of justice will be seriously impeded or prejudiced.[3]

The Canadian Supreme Court's jurisprudence in regard to the *sub judice* form of contempt is strikingly similar to the test set out in the UK's Contempt of Court Act. In *Dagenais*, the Court held that a proper balancing between the Canadian Charter rights to a fair trial and to freedom of expression requires that a publication ban on media publicity is only permissible where the ban is necessary to prevent a real and substantial risk to the fairness of the trial and where reasonably available alternative measures will not prevent the risk.[4]

The US Supreme Court has adopted the clear and present danger test: is there such a danger that the administration of justice will be seriously prejudiced?[5] In the leading case of *Bridges v California*, the Supreme Court held that a newspaper editorial that urged that a sentence of imprisonment should be meted out to union members who had assaulted non-union employees, could not be punished.[6] The position with respect to publication bans is even more onerous. In *Nebraska Press Association v Stuart*, the Supreme Court ruled that a trial court's

[1] (1979) 2 EHRR 245.

[2] Cf *Worm v Austria* (1998) 25 EHRR 454 at para 50 (the Court upheld a conviction of a journalist for suggesting that a politician facing tax evasion charges was guilty; the article was unbalanced and there was a probability that it would influence the lay judges that would hear the matter.)

[3] For a full discussion of the Contempt of Court Act, 1981, and how it attempts to address the European Court of Human Rights' concerns in *Times Newspapers*, see Fenwick and Phillipson (supra) at chapter 6.

[4] (1995) 120 DLR (4th) 12 (SCC), [1994] 3 SCR 835, 881. These alternative measures include changing venue, postponing the trial until the impact of pre-trial publicity has eroded, and sequestering the jury during the trial. A similar test applies in Australian law. See *Hinch v Attorney-General (Victoria)* (1987) 164 CLR 15. See also S Walker 'Freedom of Speech and Contempt: The English and Australian Approaches Compared' (1991) 40 *ICLQ* 583.

[5] See generally DR Pember & C Calvert *Mass Media Law* (2007) Chapter 11.

[6] *Bridges v California* 314 US 252 (1941).

decision to prohibit the publication of confessions or admissions given by the accused and other prejudicial evidence in a high profile murder trial infringed the First Amendment.[1] Although the Court accepted that prior restraints in this context might be competent in some circumstances, a trial court is under a very heavy burden to show that the order was necessary to avoid the harm to the administration of justice.[2]

Closer to home, the Lesotho High Court considered the *sub judice* rule against the importance of free speech in *Moafrika Newspaper re: rule nisi (*R *v Mokhantso & Others)*.[3] A criminal trial was in progress concerning the murder of the Deputy Prime Minister a number of years before. The *Moafrika* newspaper published a caption alleging that the murderers of the Deputy Prime Minister had not been arrested or charged. This suggested that the present accused had not committed the murder. Peete J called on the newspaper to show cause why the newspaper should not be punished as having breached the *sub judice* rule. On analysis, Peete J decided that the caption, even though 'seemingly outrageous, offensive or intemperately worded', was expressed on a matter of public interest and came within the protection of the constitutional right of free speech.[4] On the facts, there was no real possibility of the judge being consciously or subconsciously influenced by the caption[5] and neither did it impugn the authority or dignity of the court.[6] The court opined that courts should be disinclined to be seen to gag or muzzle the media and, while the *sub judice* rule was necessary, it only protected against publications that constituted a substantial risk of prejudice or interference with court proceedings.

Now to the position in South Africa. Historically, the *sub judice* rule proscribed publications where, in the words of the Appellate Division in *S v Van Niekerk*, 'the statement or document in issue tends to prejudice or interfere with the administration of justice in a pending proceeding'.[7] In the other leading case, *S v Harber*, Van Heerden JA confirmed that the question of whether the tribunal was in fact likely to be influenced by the publication was irrelevant.[8] The question

[1] 427 US 359 (1976).

[2] One point that remains unclear in the US, however, is whether this protective regime is limited to media publications. The Supreme Court has, for instance, upheld the conviction of a litigant's lawyer who made statements outside court that were substantially likely to materially prejudice the proceedings. *Gentile v State Bar of Nevada* 501 US 1030 (1991). In this context, the First Amendment's demands are less exacting.

[3] 2003 (5) BCLR 534 (LesH)('*Moafrika*').

[4] Ibid at para 23. This right is protected under s 14 of the Lesotho Constitution 1993.

[5] Ibid at para 21 (The judge conceded that this was 'despite multitudinous misgivings which formerly crossed my mind when I first read the caption after this trial had begun.')

[6] Ibid at para 25. This appears to be a consideration of the 'scandalising' form of contempt. See § 42.9*(c)*(iv)(aa) supra.

[7] *S v Van Niekerk* 1972 (3) SA 711, 724 (A)('*Van Niekerk*'). This test was also adopted in *S v Harber & Another* 1988 (3) SA 396, 419 (A)('*Harber*').

[8] *Harber* (supra) at 419.

is whether if the facts set out in the publication 'were to be accepted by the tribunal they could influence the proceedings before it'.[1] Applying this test, the Appellate Division in that case confirmed the conviction of the editor of *The Weekly Mail* for contempt in regard to an article published during the course of the Delmas treason trial in 1986; the article in question, amongst other things, listed '[n]ew evidence which could shake the State's case'.

The *sub judice* rule as formulated in the *Van Niekerk* and *Harber* cases constituted a clear and unjustifiable restriction on freedom of expression;[2] any controversial speech on current and pending civil and criminal cases — including appeals — was effectively banned. It is therefore of great moment that in a recent decision the Supreme Court of Appeal effectively jettisoned the *Van Niekerk* and *Harber* tests and brought our law into line with the position in other jurisdictions such as England, Canada and Zimbabwe. Although dealing with an application for a prior restraint, the ruling in *Midi Television (Pty) Ltd t/a e-TV* v *Director of Public Prosecutions (Western Cape)* is of clear application to both pre- and post-publication contempt of court proceedings.[3] e-TV, a commercial broadcaster, wished to broadcast a documentary relating to a pending criminal case that had attracted wide publicity: the 'Baby Jordan' murder.[4] The documentary included interviews with persons who were likely to be state witnesses in the prosecution. The DPP sought an interdict permitting it to view the documentary in order to determine whether the programme would prejudice the forthcoming criminal trial, and if necessary, thereafter to bring further legal proceedings to interdict the broadcast. The Cape High Court granted the interdict.[5] On appeal, Nugent JA, for a unanimous bench, quashed the interdict.[6] The right of e-TV to broadcast the documentary had to be weighed against the common-law contempt rule that the proper administration of justice may not be prejudiced or interfered with, as buttressed by the constitutional rights to fair civil hearings and criminal trials.[7] 'What is … relevant', Nugent JA continued, 'is to determine when the risk of

[1] *Harber* (supra) at 420. Moreover, although the media are not strictly liable for contempt, negligence on the part of an editor suffices. Ibid at 418.

[2] The approach historically taken by the South African courts was rejected as encroaching too deeply into freedom of expression by the Supreme Court of Zimbabwe. *S v Hartmann & Another* 1984 (1) SA 305, 311 (ZS)(proper test for contempt of court whether real risk that publication likely to prejudice fair trial; approach in *Van Niekerk* too restrictive of free speech). See also *Moafrika* (supra) at para 11. For further criticism, see G Marcus 'Freedom of Expression under the Constitution' (1994) 10 *SAJHR* 140; G Hill '*Sub judice* in South Africa: Time for a Change' (2001) 17 *SAJHR* 563.

[3] 2007 (5) SA 540 (SCA)('*Midi Television*').

[4] One reason for the significant public interest in the trial was the factual matrix. One of the accused was the former girlfriend of Baby Jordan's father; she was ultimately found guilty of murder, having engaged assassins to murder Baby Jordan.

[5] *Director of Public Prosecutions (Western Cape) v Midi Television (Pty) Ltd t/a e-TV* [2006] 2 All SA 286 (C).

[6] The case had been overtaken by events (the accused had all been convicted and e-TV had broadcast the documentary), but the Court nevertheless thought that the case raised 'important questions of law on which there is little authority'. *Midi Television* (supra) at para 4.

[7] Ibid at para 12.

prejudice will be sufficient to constitute an interference with the administration of justice that justifies a corresponding limitation being placed on press freedom.'[1] The Court articulated the new rule in terms that are solicitous to free speech:

> In summary, a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information. . . . [I]f a risk of that kind is clearly established, and if it cannot be prevented from occurring by other means, a ban on publication that is confined in scope and in content and in duration to what is necessary to avoid the risk might be considered. [2]

On the facts, the Court concluded that there were no grounds for apprehending that the broadcast would be unlawful; the arguments that there might be discrepancies between what state witnesses said in their interviews with e-TV and what they told the police, and that their safety might be endangered, were 'no more than conjecture that falls altogether short of justifying an outright ban on publication'.[3] In any event, no law obliged e-TV to furnish the proposed broadcast to the DPP prior to it being broadcast: '[t]he law generally allows freedom to publish and freedom is not subject to permission.'[4]

This momentous decision of the Supreme Court of Appeal has radically altered our contempt of court law. Its significant impact can be illustrated with reference to the facts of the *Midi Television* case. Prior to *Midi Television* publishing interviews with witnesses before their testimony in court constituted a classic instance of a breach of the *sub judice* rule.[5] In *Midi Television*, the Court insisted that conjecture as to whether this would result in prejudice to the trial would not be accepted; proof of a real risk of demonstrable and substantial prejudice will be demanded as a threshold test. The Court went further than simply adopting the real risk test: even if the threshold real risk test is established, 'the disadvantage of curtailing the free flow of information must outweigh its advantage', which in turn requires attention to be focused on the right of the public to receive the information. Nugent JA's decision gives necessary and long-overdue breathing space to the media in reporting on pending proceedings.[6]

[1] *Midi Television* (supra) at para 13.
[2] Ibid at para 19.
[3] Ibid at para 22.
[4] Ibid at para 25.
[5] See, for example, Y Burns *Communications Law* (2001) 229.
[6] Apart from the recasting of the *actus reus* of the crime, there are other areas of contempt law that could be used to ensure that freedom of expression is not unjustifiably restricted. For instance, the *mens rea* requirement should be intention, and courts should in this regard reject the negligence standard applied to editors in *Harber*. Moreover, there is merit in the development of a public interest defence; where a story that would otherwise constitute contempt is overwhelmingly in the public interest, the publisher should escape liability. Cf *Attorney-General v Times Newspapers* [1973] QB 710, 739-740 (Lord Denning). See also Walker (supra) at 598-599.

(d) Intellectual property restrictions

One area of law that has traditionally enjoyed something of an immunity — even to a degree in the US — from the impact of freedom of speech principles is the law of trademarks and copyright, and related rights. This is surprising; as we have seen, even fundamental human rights such as reputation, privacy and the right to a fair trial have to be balanced against free speech considerations. This 'immunity' for intellectual property law is now breaking down as aspects of this law are being subjected to restrictions to cater for freedom of expression. This has happened in South Africa in what is now one of the leading cases on the relationship between freedom of speech and trademark law in the English-speaking world, the Constitutional Court's decision in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a SABMark International*.[1] This case is analysed next. Thereafter, the focus shifts to copyright law and especially a few UK cases where the defences to copyright infringement have been revisited from the perspective of freedom of speech.

(i) *Parodying famous trademarks*[2]

In *Laugh It Off*, the business of the applicant ('Laugh It Off') consisted of altering the images and words on trade marks and printing them onto T-shirts which were then sold for profit. The respondent in the case ('SAB') was the holder of the trademark for Carling Black Label beer, one of the leading beer products in South Africa. The applicant had adapted the respondent's trade mark on one of its T-shirts by changing the wording 'Black Label' to 'Black Labour', 'Carling Beer' to 'White Guilt', 'America's lusty lively beer' to 'Africa's lusty lively exploitation since 1652', and 'Enjoyed by men around the world' to 'No regard given worldwide'.

SAB sought an interdict against the applicant on the basis that it had infringed the respondent's trade mark by violating s 34(1)*(c)* of the Trade Marks Act.[3] This section provides that a trade mark may be infringed by the unauthorized use in the course of trade of a identical or similar mark, provided the trade mark is well known and the use of the mark would be likely to 'take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark'. Laugh It Off's argument that s 34(1)*(c)* did not oust its constitutional right to

[1] 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC)('*Laugh It Off*'). For commentary on the decision, see T Illsley 'How to Tell a Take-Off from a Rip Off: Trade Mark Parody and Freedom of Expression in South Africa' (2006) 22 *SAJHR* 119; BR Rutherford 'Trade-mark Protection and Freedom of Expression' (2006) 18 *SA Merc LJ* 355; W Alberts 'The Future of Trade Mark Dilution in South Africa' (2006) *TSAR* 212; G Devenish 'We Are Amused: *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International*' (2005) 122 *SALJ* 792; J Brickhill 'Breaking Down the Boardroom Doors with a Snigger and a Smirk — Laugh It Off Laughs Last' (2006) 21 *SAPL* 214.

[2] Apart from parodies and satires in respect of trademarks, another area of trademark law that may give rise to free speech concerns is where a trader employs the trademark of his competitor for purposes of comparative advertising. See, for example, *Boehringer Ingelheim Ltd & Others v Vetplus Ltd* [2007] FSR 29 (CA)(No doubt that freedom of expression is engaged in a comparative advertising case.)

[3] Act 194 of 1993.

comment on or make fun of trade marks and brands did not find favour with either the High Court[1] or the Supreme Court of Appeal,[2] both of which granted SAB relief.

Harms JA in the Supreme Court of Appeal accepted that the statutory provision in issue had to be 'interpreted in the light of the Constitution and its application must be such that it does not unduly restrict a party's freedom of expression', and that this required 'the weighing-up of the freedom of expression and the trademark owner's rights of property and freedom of trade, occupation or profession'.[3] It was particularly at the stage where the trade mark owner must show unfair detriment that concerns relating to free speech may be taken into account.[4] The key issue was whether the use by Laugh It Off would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the Black Label mark, and this depended mainly on its message. The Court accepted that the message created the impression in the mind of the public that SAB has always been and still is guilty of exploiting its black labour.[5] This message is materially detrimental to the repute of the trademarks concerned.[6] Harms JA then considered what he termed 'the freedom of expression justification'.[7] Although T-shirts 'provide a powerful medium for making socio-political comments',[8] Laugh It Off's right to free speech was not unjustifiably curtailed by the statutory provisions as it 'may declaim the message about black labour and white guilt from rooftops, pulpits and political platforms; and it may place the same words (without appropriating the registered mark's repute) on T-shirts, and sell them'.[9] Even if Laugh It Off's T-shirt could be regarded as a parody, that on its own could not be regarded as a defence to trademark infringement but merely a relevant factor to be put in the balance.[10] On the facts, Laugh It Off had not exercised but abused its right to freedom of expression.[11]

Happily, however, the last laugh in the case belonged to Laugh It Off. The Constitutional Court unanimously rejected Harms JA's approach and refused SAB the interdict it had sought. The Court explained that s 34(1)*(c)* of the

[1] *SAB International t/a Sabmark International v Laugh It Off Promotions* [2003] 2 All SA 454 (C).

[2] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2005 (2) SA 46 (SCA)('*Laugh It Off SCA*').

[3] Ibid at paras 20-21.

[4] Ibid at para 23. Paradoxically, Harms JA does not take this point to its logical conclusion in his decision, but treats freedom of expression as an independent issue.

[5] Ibid at para 26.

[6] It follows that Harms JA restricted his analysis to the 'likely to be detrimental to the repute of a registered trade mark' aspect of s 34(1)*(c)*. His decision (and that of the Constitutional Court on appeal) thus did not concern the alternative bases for infringement under the section, namely 'likely to take unfair advantage of' and the 'distinctive character' aspects to the section.

[7] *Laugh It Off SCA* (supra) at para 28.

[8] Ibid at para 29.

[9] Ibid at para 30.

[10] Ibid at para 37.

[11] Ibid at para 41.

Trade Marks Act introduced the principle of dilution and serves a vital purpose of protecting the unique identity and reputation of the mark, which clearly underpins the economic value that inheres in the selling power of the mark.[1] The form of dilution in casu was the alleged tarnishment of the trade mark by Laugh It Off creating unfavourable associations with the trade mark.[2]

The approach taken by Harms JA was rejected on a number of grounds. First, as a matter of methodology, Harms JA had wrongly followed a two-stage approach, enquiring first whether an infringement of the s 34(1)*(c)* had taken place, and only thereafter whether freedom of expression justified the infringement. This approach is flawed because a finding of unfair use or likelihood of detriment to the repute of the trade mark is intimately connected with whether the expression is protected by FC s 16(1) and therefore effectively prevented a proper interpretation of s 34(1)*(c)* in light of the Constitution.[3] Although the Court held that s 34(1)*(c)* limits the right to free expression by ousting certain expressive conduct, the terms of the dispute before it — Laugh It Off had not challenged the constitutionality of the section — required the Court to assume that the limitation was reasonable and justifiable and compelled a construction of the section that was most compatible with freedom of expression.[4] In doing so '[c]ourts must', Moseneke J noted, 'be astute not to convert the anti-dilution safeguard of renowned trade marks usually controlled by powerful financial interests into a monopoly adverse to other claims of expressive conduct of at least equal cogency and worth in our broader society'.[5]

Moseneke J for the Court further held that 'unfair detriment' will need to be assessed on a case by case basis, but the general principle is that the trademark owner bears the burden to demonstrate likelihood of *substantial harm or detriment* which amounts to unfairness.[6] Harms JA's decision inferred detriment solely on the basis of the meaning that the judge had attributed to the message on the T-shirts. As evidence, however, this meaning was 'at best scant and unconvincing as an indicator of substantial economic harm'.[7] Indeed, even if the message is unsavoury, unwholesome or degrading, Moseneke J held that, in general, the message should be protected by the free speech clause.[8] Thus a claim under s 34(1)*(c)* must go further than showing some notional or assumed harm to the

[1] *Laugh It Off* (supra) at para 40.
[2] Ibid at para 41 (Moseneke J observes that this differs from another form of trade mark dilution, that of blurring, which occurs where the distinctive character of the trademark is weakened; with tarnishment, on the other hand, the object of protection is the repute of the mark.)
[3] Ibid at para 44. Harms JA had suggested the same approach earlier in his judgment, but seems to have ultimately opted for the two-stage approach. *Laugh It Off SCA* (supra) at para 23.
[4] *Laugh It Off* (supra) at para 48.
[5] Ibid.
[6] Ibid at paras 49-50 (our emphasis).
[7] Ibid at para 55.
[8] Ibid.

general reputation of the trademark owner;[1] what has to be proved is the substantial likelihood of economic and trade harm.[2] There was no evidence that the message on Laugh It Off's T-shirts was likely to tarnish the selling power of SAB's trademark.[3] Because this threshold had not been met by SAB, Moseneke J considered that it was unnecessary to assess whether the message conveyed by the T-shirt amounted to parody,[4] although he noted that the fact that a work is parody will be a relevant though not decisive factor in determining whether the use of the senior work is fair for purposes of s 34(1)*(c)*.[5]

Sachs J felt 'that something more needs to be said'.[6] The judge thought that the appeal should be upheld not just on the 'clip-board evidence' basis sanctioned by Moseneke J — although he concurred in Moseneke J's judgment. Rather, the issue that lay at the heart of the case was that of the constitutional value of parody. Sachs J agreed with Moseneke J that classifying a message as a parody will be a factor in the overall analysis of whether, in the specific context, an independent observer 'would say that the harm done … to the property interests of the trademark owner outweighs the free speech interests involved'.[7] Apart from the nature of the message as parody, other factors that are relevant (though not decisive) will be whether the activity is primarily communicative or primarily commercial; whether the message could have been conveyed by means other than parody, bearing in mind that the medium could well be the message; the actual medium used and its context; and whether the parody is deemed unsavoury.[8] On the facts, Sachs J held that the only possible complaint SAB could have from a trademark law perspective was that the T-shirts negatively impacted on the image of Black Label beer. But 'it is difficult to imagine that black working class drinkers would raise an eyebrow at the suggestion that together with virtually every other enterprise of the time, SAB benefited from the use of cheap black labour'.[9] SAB would in any event have other remedies at its disposal even if Laugh It Off's use had harmed the repute of the beer, such as injurious falsehood and defamation.[10] On the facts, the scales came down clearly in favour of Laugh It Off; no harm

[1] Under the law of defamation, defamatory statements — statements that, objectively viewed tend to lower the estimation of the plaintiff — are rebuttably presumed to cause harm to the reputation of the plaintiff.

[2] *Laugh It Off* (supra) at para 56.

[3] Ibid at para 58 (No evidence had been led to establish this likelihood of harm; there was not even the slightest suggestion that the market dominance enjoyed by SAB had been reduced.)

[4] Ibid at para 66.

[5] Ibid at para 64.

[6] Ibid at para 73.

[7] Ibid at para 82.

[8] Ibid at paras 85-88 (These are non-exhaustive factors that need to be evaluated in a fact-sensitive and contextual manner against the backdrop of the values of an open and democratic society. Ibid at para 89.)

[9] Ibid at para 98.

[10] Ibid at para 101 (The defence of fair comment would probably have been available to *Laugh It Off* had it been sued for defamation (assuming the words could be regarded as defamatory at the outset).)

was caused to the marketability of Black Label beer, and the T-shirt parody was necessary because the message was precisely the dislocated use of the trademark.

Sachs J concluded with two significant points in relation, first, to trademark law and freedom of speech generally and, secondly, to the role of laughter in society. Firstly, even the threat of litigation can stifle legitimate debate:

> Large businesses have special access to wealth, the media and government. Like politicians and public figures, their trademarks represent highly visible and immediately recognizable symbols of societal norms and values. The companies that own famous trademarks exert substantial influence over public and political issues . . .
>
> [T]he tarnishment theory of trademark dilution may in protecting the reputation of a mark's owner, effectively act as a defamation statute. As such, it could serve as an over-deterrent. It could chill public discourse because trademark law could be used to encourage prospective speakers to engage in undue self-censorship to avoid the consequences of speaking.[1]

Secondly, in the present case 'subversive humour' was used 'as a means of challenging economic power, resisting ideological hegemony and advancing human dignity', a goal that the law should protect:

> A society that takes itself too seriously risks bottling up its tensions and treating every example of irreverence as a threat to its existence. Humour is one of the great solvents of democracy. It permits the ambiguities and contradictions of public life to be articulated in non-violent forms. It promotes diversity. It enables a multitude of discontents to be expressed in a myriad of spontaneous ways. It is an elixir of constitutional health.[2]

Laugh It Off deserves to be celebrated as a great freedom of expression case, a powerful articulation by the Constitutional Court of the right to freedom of speech. This is especially true of the judgment of Sachs J, though even the more cautious decision of Moseneke J must be welcomed for its emphasis of the importance of properly taking free speech considerations into account in interpreting otherwise restrictive statutory provisions.[3] In the particular context of trademark dilution, Moseneke J has effectively read into the relevant statutory provision of the Trade Marks Act a requirement that the trademark owner must show that actual damage to the selling power of the trademark owner is almost inevitable.[4] Although this arguably conflicts with the literal interpretation of the provision, it is a far better balance between free speech interests and the protection of a trademark than the literal approach adopted by Harms JA in the Supreme Court of Appeal.

[1] *Laugh It Off* (supra) at paras 105-106.
[2] Ibid at para 109.
[3] See Devenish (supra) at 801; Illsey (supra) at 125.
[4] Cf the legislative scheme in the UK, where the dilution provision stipulates that infringement occurs where the use of the sign *takes* unfair advantage of or is detrimental to the distinctive character or repute of the mark. Trade Marks Act 1994 s 10(2). The South African provision stipulates that infringement embraces the *likelihood* of unfair advantage or detriment.

Although much of Sachs J's decision is strictly unnecessary, given his agreement with the narrow ground of decision of the rest of the Court, his sophisticated reading of the core issues implicated by parody and laughter will greatly assist in the further development of the balancing between intellectual property law and freedom of speech. Of particular significance is Sachs J's recognition of the potential chilling effect of trademark dilution law on free speech, and the analogies he drew with the law of defamation.[1] There is a rich jurisprudence on the use of law (especially libel law) in England and the US to silence critics of corporate power.[2] In the US, the term 'Strategic Lawsuits Against Public Participation' or SLAPPS has been coined to describe these types of actions.[3] Sachs J is right to identify the need to enhance the protective regime for these critics regardless of the cause of action chosen by the corporate plaintiff.[4] It is also important to afford greater breathing space to genuine parodies or satires, especially those that implicate matters of public importance.[5] This clearly applied to the use of SAB's trademark by Laugh It Off; as Sachs J was quick to appreciate, Laugh It Off's T-shirts were poking fun at the trademark-saturated nature of our consumerist society.[6]

(ii) *Copyright: Defences to infringement*

The copyright cases that threaten freedom of expression are, like *Laugh It Off*, not the typical commercial piracy actions where copyright protection is defensible and necessary. Most of the copyright cases that engage the attention of a freedom of expression guarantee are those involving defendants, typically the media, seeking to inform the public as to matters of public importance, in circumstances where

[1] For arguments in relation to the chilling effect of the law of defamation see § 42.9*(a)* supra. Cf the conservative approach of the English High Court to trademark rights and free speech. *Levi Strauss v Tesco Stores* [2002] EWHC 1556.

[2] A high-profile example is the famous 'McLibel' case in England. See generally on this litigation, J Vidal *McLibel: Burger Culture on Trial* (1997). For more on other libel cases involving corporate (and other) claimants, see D Hooper *Reputations Under Fire: Winners and Losers in the Libel Business* (2000).

[3] The leading study of this phenomenon is FJL Donson *Legal Intimidation: A SLAPP in the Face of Democracy* (2000).

[4] Cf *Steel & Morris v UK* (2005) 41 EHRR 22 (Failure to provide legal aid to the impecunious defendants sued by McDonald's Corporation for defamation was a breach of the art 10 right to freedom of expression.) It is not suggested that trademark law should always yield to free speech considerations; much of trademark is defensible, especially the classical instances of infringement such as using in the course of trade an identical or similar mark in relation to identical or similar goods or services. See Trade Marks Act s 34(1)*(a)* and *(b)*. To argue that the free speech right always precludes the right of the trademark owner to legitimately protect his or her business interests would be tantamount to undermining the existence of trademark law in its entirety.

[5] For a useful discussion of the US position in regard to the protection accorded to parodies of trademarks, see K Levy 'Trademark Parody: A Conflict between Constitutional and Intellectual Property Interests' (2001) 69 *George Washington LR* 425; JST Kotler 'Trade-mark Parody, Judicial Confusion and the Unlikelihood of Fair Use' (1999-2000) 14 *Intellectual Property J* 219.

[6] For a powerful perspective on this phenomenon, see N Klein *No Logo: Taking Aim at the Brand Bullies* (2000).

the impact of the story is argued to require the reproduction of a substantial part of the copyright-protected work of the plaintiff.[1] Existing defences may do some of the work required by freedom of expression in this context, especially the constructs of 'fair use', as many of the defences are termed in the US,[2] or 'fair dealing' as they are termed in the UK and South Africa,[3] which can be given content in accordance with the values of freedom of speech. A few cases from England and the US are illustrative.

In *Pro Sieben Media AG v Carlton UK Television Ltd*, the plaintiff had conducted an exclusive TV interview with a person who had chosen to persist with her pregnancy after it had been revealed that she was carrying eight live embryos.[4] The interviewee, as is common for stories of this kind, had been paid a large sum of money by the plaintiff. The defendants had included a 30-second extract from this interview in its own programme, 'The Big Story: Selling Babies', which criticised the phenomenon of 'cheque-book journalism'. The interview was used to exemplify this form of journalism. The Court of Appeal upheld a defence of fair dealing for purposes of criticism or review, which it accepted should be interpreted liberally.[5] The defence was not limited to criticism of the interview represented by the copyright work as such; rather, it included criticism of the ideas found in the work and its social or moral implications.[6]

Another leading case involving a related fair dealing defence is *Ashdown v Telegraph Group Limited*, where the *Daily Telegraph* published unauthorized extracts from a confidential diary minute that related to a secret meeting between Paddy Ashdown, the former leader of the Liberal Democrats, and Tony Blair, the Labour Prime Minister.[7] The minutes suggested that Mr Blair had seriously intended to form a coalition government with the Liberal Democrats, despite his public denials. About two years after the meeting, when Mr Ashdown intended to publish his diaries, the minute was leaked to the *Daily Telegraph*. The Court of

[1] For a general discussion of the impact of a freedom of expression right on copyright law, see Barendt *Freedom of Speech* (supra) at 247-63; G Robertson QC & A Nicol QC *Media Law* (5th Edition, 2008) chapter 6; H Fenwick & G Phillipson *Media Freedom under the Human Rights Act* (2006) Chapter 18. See also C Visser 'The Location of the Parody Defence in Copyright Law: Some Comparative Perspectives' (2005) 38 *CILSA* 321.

[2] Copyright Act 1976 s 107.

[3] In regard to the UK, see Copyright, Designs and Patents Act 1988 s 30. For South African defences, see Copyright Act 98 of 1978 s 12(1). The UK and SA defences recognize a defence of fair dealing for the purposes of criticism or review or for reporting current events.

[4] [1999] 1 WLR 605.

[5] Ibid at 614.

[6] Ibid at 614. See also *Hubbard v Vosper* [1972] 2 QB 84 (substantial reproduction of books and letters written by plaintiff, the founder of the Church of Scientology, could be used by the defendant, an ex-member of the Church in his critical book). See also *Fraser-Woodward Ltd v BBC & Another* [2005] FSR 36 (Ch)(fair dealing where photographs of David and Victoria Beckham used in a television programme criticising tabloid journalism).

[7] [2002] Ch 149 ('*Ashdown*'). For a full account of copyright and defences seeking to protect freedom of speech, where other jurisdictions are also examined, see G Davies *Copyright and the Public Interest* (2nd Edition, 2002).

Appeal considered that the defence of fair dealing for purposes of reporting current events normally provides courts with the necessary scope to reflect the public interest in freedom of expression.[1] The Court confirmed that 'current events' should be liberally interpreted to include events of 'current interest', even though they may have occurred some time in the past.[2] The Court then considered the residual defence of public interest that the legislation had preserved. Lord Phillips MR recognised that in most cases the fair dealing defences will be adequate to balance the interests of infringers and creators of works. The Court held that, in principle, the use of the exact words is not justifiable by reference to the right to freedom of speech, but that circumstances can arise where freedom of expression will only be effective if it is permissible to reproduce the very words used.[3] This was generally the case on the facts: reference to Ashdown's exact words was necessary for the newspaper to give an authentic account of the meeting. But Lord Phillips MR held that the newspaper had gone too far. Only shorter quotations from the Ashdown minute were necessary and therefore justifiable. In addition, 'the minute was deliberately filleted in order to extract colourful passages that were most likely to add flavour to the article'.[4]

It is submitted that the defence of 'public interest' should be given far more prominence in copyright law than is evidenced by the approach of the Court in *Ashdown*.[5] We submit that the correct approach is reflected in what appears to be the only statement on the issue in South African law, the obiter remark in the High Court decision in *Prinsloo v RCP Media t/a Rapport*: 'The public interest and the related freedom, duty and responsibility of the media can of course outweigh considerations regarding copyright'.[6]

In the US, uncharacteristically, the First Amendment has seldom provided shelter for copyright infringers. In the leading case of *Harper & Row v The Nation*, *The Nation* published extracts from former President Gerald Ford's unpublished

[1] *Ashdown* (supra) at para 33.

[2] Ibid at para 39.

[3] Ibid at para 39. For a conservative and, with respect, incorrect approach, see *Hyde Park Residence Ltd v Yelland* [2001] Ch 143, [2000] 3 WLR 215 (CA)(The *Sun* published stills of photographs from a security video that depicted the late Princess Diana and Dodi Fayed paying a brief visit to a French villa. The newspaper sought to make the point that Dodi's father, Mohamed al Fayed, had been lying in regard to his comments about how long the couple had spent at the villa. The Court held that this point could be made without reference to the copyright-protected photographs, and there were no circumstances that justified invoking the public interest argument to protect the publication. Ibid at 168. In *Ashdown*, Lord Phillips MR commented that the Court of Appeal in *Hyde Park* had defined the 'public interest' too narrowly by confining its application to instances of serious wrongdoing by the claimant.)

[4] *Ashdown* (supra) at para 82.

[5] For a persuasive critique of *Ashdown*, see Fenwick & Phillipson (supra) at 910-915.

[6] *Prinsloo v RCP Media Ltd t/a* Rapport 2003 (4) SA 456, 465 (T). See also *Lion Laboratories Ltd v Evans & Others* [1985] QB 526, 536 and 550 (CA). Cf *Verlagsgruppe News Gmbh v Austria (No 2)* [2007] EMLR 413 (Little scope for absolute prohibition to publish a person's photograph where article on a matter of public concern.)

memoirs discussing why he had pardoned his predecessor, Richard Nixon.[1] The majority of the Supreme Court denied the fair use defence to the publisher, albeit primarily on the basis that the memoris were unpublished.[2] Brennan J authored a spirited, and in our view correct, dissent in favour of the right to publish, arguing that the majority's restrictive interpretation of the fair use doctrine ill-served the 'progress of arts and sciences and the robust public debate essential to an enlightened citizenry'.[3]

In the context of parody, however, the US Supreme Court has denied copyright owners complete hegemony.[4] The classic case is *Campbell v Acuff-Rose Music Inc* which involved the rap group 2 Live Crew's spoof of Roy Orbison's song, 'Oh, Pretty Woman'.[5] The Supreme Court unanimously upheld the right of 2 Live Crew to parody the rock song, though it confirmed that the nature of the song as parody could not be elevated to an independent defence — it had, instead, to house itself within the general fair use defence.[6] On the facts of the case, the 2 Live Crew song was a transformative work that furthered the goal of copyright law (this would often be satisfied by parodies) and deserved protection even though it copied the heart of the original song (the opening lyrics and bass riff of the song). Parodies often necessarily aim at the most important parts of the original work, and copying, the Court held, 'does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart'.[7] Moreover, the market for the parody differed from the market for the original song, and in any event, parodies may legitimately aim at undermining demand for the original through social criticism thereof.

It is submitted that South African courts dealing with similar issues as those confronting the courts in cases such as these should be alive to the impact copyright protection will have on freedom of expression. As the US and English

[1] 471 US 539 (1985)('*Harper & Row*').
[2] Ibid at 551.
[3] Ibid at 579 (Brennan J was joined by White and Marshall JJ).
[4] See, for example, *Hoffman v Capital Cities / ABC Inc* 255 F 3d 1180 (9th Cir, 2001)(Computer artists had modified shots of Dustin Hoffman, amongst other well-known actors and actresses, in order to depict these actors and actresses as wearing the spring fashions of famous designers. The Court upheld the speech because, although it was aimed at commerical gain, it was inextricably entwined with humour and visual and verbal editorial comment); *Mattel Inc v MCA Records* 296 F3d 894 (9th Cir, 2002)(The then little-known Danish band Aqua, had produced a song entitled 'Barbie Girl' which lampooned and parodied the Barbie doll and its image, the intellectual property rights to which are owned by Mattel. Mattel attacked this use on a number of grounds including trademark dilution in the form of tarnishment and blurring. The Court held that while MCA Records used the Barbie Girl name to sell records, it also lampooned the Barbie Girl image and commented humourously on American cultural values. It was therefore not purely commercial speech and was entitled to full First Amendment protection); *Mattel Inc v Walking Mountain Productions* 353 F 3d 792 (9th Cir, 2003)(An artist, Forsythe, took photos portraying nude Barbie dolls in sexualised positions being attacked by vintage household appliances. Mattel argued that this constituted a violation of its trademark and copyright. The Court rejected Mattel's claim, holding that the photopraphs constituted 'fair use' through parody.)
[5] 510 US 569 (1994)('*Campbell v Acuff-Rose*').
[6] Ibid at 582.
[7] Ibid at 588.

jurisprudence indicates, freedom of expression considerations can usually be taken into account within the umbrella of existing copyright defences, provided that these defences are interpreted generously and in a manner that gives meaningful protection to the publication of significant copyright-protected material on matters of public concern, or parodies or satires that constitute social commentary. *Campbell v Acuff-Rose* offers an instructive precedent for South African law in regard to the importance of protecting parody.[1] However, our courts should be more solicitous to free speech interests than the courts in *Ashdown* and *Harper & Row*, both cases where the speech was clearly political in nature and the publishers were performing their vital constitutionally-sanctioned roles of informing members of the public of such speech.[2]

(e) Sexually explicit expression

Sexual expression is one of the traditional battlegrounds for freedom of expression. This section first summarises the primary legislation regulating sexual expression. It then discusses the protection of pornographic expression and the limits on that protection, particularly the value of pornography and the harms that criminalising it is meant to avoid. Finally, we discuss nude dancing as protected expression.

(i) *The statutory framework*

The main statute that regulates sexually explicit expression is the Films and Publications Act ('FPA').[3] This statute replaced two notoriously repressive censorship laws, the Indecent or Obscene Photographic Matter Act ('IOPMA'),[4] and the Publications Act,[5] both of which were subject to challenges under the Interim Constitution.

The scheme of the FPA is broadly as follows. Three levels of classification are most relevant for freedom of expression purposes: complete prohibition, XX and X18. Complete prohibition applies only to the possession, creation, production,

[1] Of course, a more potent argument in favour of greater parody protection in trademark or copyright law is made by Sachs J in *Laugh It Off*. See § 42.9*(d)(i)* supra.

[2] But see *Fressoz and Roire v France* (2001) 31 EHRR 2 (Journalist entitled to publish confidential documents relating to tax assessments of head of Peugeot to give credence to article about his salary.)

[3] Act 65 of 1996.

[4] Act 37 of 1967.

[5] Act 42 of 1974. For a discussion of this Act and cases decided in terms of it, see JCW van Rooyen *Censorship in South Africa* (1987). For a general discussion on the history of media regulation in South Africa, see PL Rivers 'A Genealogy of Media Regulation in South Africa Since 1892' (2007) 124 *SALJ* 491.

importation, exportation, distribution or broadcast of a film or publication that contains child pornography.[1] Films will be classified as XX if they contain a scene or scenes (simulated or real) of bestiality, incest or rape; explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person or which degrades a person or constitutes incitement to cause harm; or the explicit infliction of extreme violence or effects of extreme violence which constitutes incitement to cause harm.[2] A film will be classified as X18 if it contains a scene or scenes (simulated or real) of explicit sexual conduct which, in the case of sexual intercourse, includes an explicit visual presentation of genitals.[3] Substantially similar provisions apply to the classification of publications.[4] It is an offence to distribute films and publications that have been classified as XX or X18[5], or publications that contain visual presentations or descriptions that would result in the XX or X18 classifications were they to be classified.[6] A number of exemptions are articulated under the FPA. Licensees of adult premises are exempt from the prohibitions relating to X18 films and publications.[7] There is also an exemption application procedure for publications classified or classifiable as XX or X18, or from the child pornography provisions, where 'bona fide purposes will be served by such an exemption'.[8] Holders of broadcasting licences are exempt from the duty to apply for classification of films.[9] Further, in a necessary concession to freedom of expression, the XX or X18 classifications will not be applied in respect of a '*bona fide* scientific, documentary, literary or … artistic' publication or film.[10]

(ii) *Pornographic films and publications as protected expression*

The Constitutional Court has had two occasions to consider the constitutionality of pornography. In *Case & Another v Minister of Safety and Security & Others*,[11] the

[1] FPA s 27(1).
[2] FPA sched 6.
[3] FPA sched 7. In turn, 'sexual conduct' is broadly defined as including male genitals in a state of arousal or stimulation, the undue display of genitals or of the anal region, masturbation, bestiality, sexual intercourse (real or simulated), sexual contact involving the direct or indirect fondling or touching of the intimate parts of a body, the penetration of the vagina or anus with any object, oral genital contact or oral anal contact. FPA s 1.
[4] See FPA scheds 1 and 2.
[5] FPA ss 25-26.
[6] FPA s 28. While films must be classified before they are distributed, in general publications may be classified only after their publication. See § 42.9*(b)* infra.
[7] FPA s 24.
[8] FPA s 22.
[9] FPA s 23(3).
[10] FPA scheds 5 and 9. The Films and Publications Amendment Bill B27B-2006 proposes significant amendments to the legislation. For instance, if enacted in its present form, publications other than certain newspapers which contain, inter alia, descriptions of sexual conduct, will be subjected to pre-publication classification. Such a classification regime will not be constitutionally justifiable.
[11] 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC)('*Case*').

applicants, who had been charged with the contravention of s 2(1) of IOPMA — they were allegedly in the possession of sexually explicit videos — challenged this provision against a number of rights in the Interim Constitution. The prohibition in s 2(1) was limited to the *possession* of indecent or obscene material. This material was defined in IOPMA to include photographic matter 'depicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature'.

The majority judgment was authored by Didcott J who struck down s 2(1) on the basis that it unjustifiably violated the privacy guarantee in IC s 13:

> What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the State. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy.[1]

Although s 2(1) was also challenged on the basis that it infringed the right to freedom of expression contained in IC s 15(1), the majority preferred to leave that question open.[2] However, Mokgoro J, in an insightful analysis, was prepared to rule that the ban contemplated by s 2(1) of IOPMA also violated the right to freedom of expression. The first enquiry in this regard was whether sexually explicit expression fell within the right articulated in IC s 15(1). Mokgoro J rightly accepted that the correct approach was to interpret the right generously to include sexually-explicit material and to postpone consideration of any possible ground for excluding ultimate protection of the expression to the limitations stage of analysis.[3] Mokgoro J accepted that the act of possessing protected material is itself constitutionally protected by a freedom of expression guarantee: 'my freedom of expression is impoverished indeed if it does not embrace also my right to receive, hold and consume expressions transmitted by others'.[4] This aspect of

[1] *Case* (supra) at para 91 (Didcott J emphasized that the 'preposterous definition' of indecent and obscene material aggravated the violation of IC s 13; it was so wide as to cover famous works of art that are readily displayed in major galleries around the world. Furthermore, the provision was not saved by the limitations clause (IC s 33); although criminalising the production and even the possession of truly obscene material could be justifiable, s 2(1) also hit less obnoxious material. Ibid at para 93.) See further D McQuoid-Mason 'Privacy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) at 38-23. For commentary on the decision, see N Smith 'Policing Pornography' (1997) 13 *SAJHR* 292.

[2] *Case* (supra) at para 92. Ibid at para 98 (Langa J) and para 102 (Madala J).

[3] Mokgoro J contrasted this approach to that adopted in the US. In that jurisdiction (where, of course, the US Constitution does not contain a limitations clause), courts' interpretative energy resides at the stage of determining whether material is obscene; if so, it is simply not covered by the First Amendment. On the structure of free speech analysis, see § 42.3 supra.

[4] *Case* (supra) at para 25. This argument is clearer under the Final Constitution. Whereas IC s 15(1) did not specifically protect the right to receive and impart information and ideas, this protection is now explicit in FC s 16(1).

free speech was necessary at least on the basis of the rationale that the right to receive others' expression is 'foundational to each individual's empowerment to autonomous self-development'.[1] There was, however, no need to demarcate protected from unprotected sexually-explicit speech, because s 2(1) of IOPMA was clearly overbroad; the 'indecent or obscene' definition covered 'a virtually limitless range of expressions, from ubiquitous and mundane manifestations like commercial advertising to the most exalted artistic expressions'.[2]

One category of pornography that clearly and rightly troubled members of the Court in *Case* was child pornography. Thus Madala J stated in his concurring judgment that 'children should not be exposed to or participate in the production of pornography, and … possession by them and exposure to pornographic material should be prohibited'.[3] Madala J was clearly of the opinion that limiting even the possession of such pornography was constitutionally legitimate.[4] The Court dealt with just such a category of pornography a few years later under the Final Constitution, in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)*.[5]

In *De Reuck*, a film producer had been charged with contravening s 27(1) of the FPA, which prohibits the knowing creation, production, distribution, importation and possession of a film that contains a scene of child pornography.[6] Langa DCJ for a unanimous Court summarized the proper interpretation of the offence contemplated in s 27(1) thus:

[1] *Case* (supra) at para 26. Cf *Stanley v Georgia* 394 US 557, 565 (1969) (Prohibition on possession of pornography infringes the First Amendment; state 'has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch').

[2] *Case* (supra) at para 59. Mokgoro J's approach to the case — engaging the free speech issue directly — is commendable. As she put it, 'I do not believe it would be appropriate to dispose of a matter so prominently implicating crucial freedom of expression issues without attending to the arguments in that regard'. Ibid at para 66. See also ibid at para 112 (Sachs J)('The infringement of privacy becomes harder to countenance when it targets communicative matter'.)

[3] Ibid at para 105.

[4] Ibid at para 107, (Madala J, with the majority, confined his discussion to the right to privacy rather than the right to freedom of expression.)

[5] 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC)('*De Reuck*').

[6] At the time of *De Reuck*, child pornography was defined in FPA s 1 as 'any image, real or simulated, however created, depicting a person who is or who is shown as being under the age of 18 years, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participating in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children'. The Court confirmed that on a proper interpretation, this definition contained an exhaustive list of what constitutes child pornography. Ibid at para 21. The current definition of child pornography extends the net wider: it includes any image, however created, or any description of a person (real or simulated) who is or is depicted as being under 18 and who is engaged in, participating in or assisting another to participate in sexual conduct, or showing or describing the body or parts of the body of such a person in a manner or circumstances which amount to sexual exploitation, or where it is capable of being used for these purposes. For a discussion of the current regime, see M Watney 'Regulation of Internet Pornography in South Africa Part 1' (2006) 69 *THRHR* 227 and M Watney 'Regulation of Internet Pornography in South Africa Part 2' (2006) 69 *THRHR* 381.

> The overarching enquiry, objectively viewed, is whether the purpose of the image is to stimulate sexual arousal in the target audience. This entails considering the context of the publication or film in which the image occurs as a visual presentation or scene. The court conducts the enquiry from the perspective of the reasonable viewer.[1]

In regard to whether FC s 16(1) had been infringed, Langa DCJ confirmed that expression that was not excluded under FC s 16(2) fell to be protected under FC s 16(1).[2] Child pornography clearly constitutes expression; indeed, the Court appears to accept that such expression qualifies as artistic expression.[3] Furthermore, FC s 16(1) is not limited only to rights of speakers, it also covers the right of recipients to receive child pornography.[4] Section 27(1) of the FPA thus clearly limited freedom of expression. The question that remained was whether such a limitation was justifiable; an issue that this discussion will postpone until later.[5] First, we examine in some detail the claim that pornography should be treated as protected expression.[6]

The generous approach adopted by the Court to the ambit of the right to freedom of expression is consistent with its approach to rights analysis in general and is also in accordance with the approach adopted in similar jurisdictions where rights are subject to a conceptually distinct limitations analysis.[7] In Canada, for instance, in *R v Butler*, the Supreme Court held that a prohibition on the sale and possession of obscene material clearly infringed s 2*(b)* of the Canadian Charter as a content-based restriction on expression.[8] The Canadian Supreme Court has taken a similar approach to prohibitions on child pornography.[9] The European Court of Human Rights, in its seminal obscenity decision of *Handyside v UK*, confirmed that freedom of expression is applicable 'not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb'.[10]

[1] *De Reuck* (supra) at para 38.
[2] Ibid at para 47. See generally § 42.3 supra.
[3] *De Reuck* (supra) at para 48.
[4] Ibid at para 49, quoting FC s 16(1)*(b)*. See also IC s 15(1) and Mokgoro J's decision in *Case* (supra).
[5] See § 42.9*(e)*(iii) infra.
[6] It should be noted that Langa DCJ also held that FPA s 27 limited the right to privacy in FC s 14. *De Reuck* (supra) at para 52, relying on the reasoning in *Case* (supra). This dual free speech/privacy approach has also been endorsed by the Supreme Court of Canada. *R v Sharpe* 2001 SCC 2, (2001) 194 DLR (4th) 1 ('*Sharpe*')(Criminal Code penalizing possession of child pornography engaged privacy as well as free speech protection).
[7] See generally S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.
[8] [1992] 1 SCR 452, (1992) 89 DLR (4th) 449 (SCC)('*Butler*')(Meaning sought to be expressed through pornography).
[9] *Sharpe* (supra) at para 27 (Guarantee of free expression extends even to offensive speech).
[10] Supra at paras 48-49 (The case concerned *The Little Red School Book*, a reference book for 12-18 year olds that contained chapters on sex, drugs and pornography in quite graphic detail.)

The major jurisdiction that provides a contrasting approach is, again, the United States, where courts, in the absence of a limitations clause, have been compelled to exclude certain speech from the protective coverage of the First Amendment.[1] Speech that is properly classified as 'obscene' receives no constitutional protection and is regarded as 'utterly without redeeming social importance'.[2] In the leading case of *Miller v California*, the Supreme Court articulated a strict threshold test for determining obscene speech: a work is obscene where: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and (3) the work lacks serious literary, artistic, political or scientific value.[3] Where the US Supreme Court rules that a particular form of pornography is obscene (as it appears to have done in the case of child pornography)[4] its decision that the speech should not be protected is tantamount to what, for example, South African and Canadian courts do when they assess limitations on protected speech as justifiable. We turn to consider how courts have assessed limitations on sexually explicit speech next.

(iii) *Assessing limitations on sexually explicit material: pornography as low-value speech*

As in the case of other low-value speech such as commercial speech, the approach of South African and other courts engaging restrictions on sexually explicit expression is to consider the value of the speech at issue within the limitations analysis.[5] That pornography lies at the periphery of the right to freedom of expression is widely accepted in various jurisdictions, which has the result that limitations upon such expression are more easily countenanced.[6] In a recent House of Lords decision, for example, Lord Hoffmann made the point that '[t]he

[1] The results achieved under the US approach and those that follow from an explicit limitations analysis often coincide. It is only the methodology of the analysis that differs.

[2] *Roth v United States; Alberts v California* 354 US 476, 484 (1957)(Brennan J, emphasising, however, that the standards for judging obscenity safeguard freedom of speech and the press. Ibid at 488.)

[3] 413 US 14, 24 (1973)('*Miller v California*'). The most famous judicial pronouncement on obscenity is Stewart J's comment in an earlier case, *Jacobellis v Ohio.* 378 US 184, 197 (1964)(Conceding that he may never be able to describe the forms of hard-core pornography that could be banned but 'I know it when I see it'.) For a discussion of how the Supreme Court has provided further guidelines in regard to each leg of the obscenity test, see DR Pember & C Calvert *Mass Media Law* (2007) 532-38. But see the test under the UK's Obscene Publications Act, 1964 s 1(1) (The publication for gain of an article which tends, taken as a whole, to deprave and corrupt a significant portion of those likely to see or hear it). For a comprehensive account of UK obscenity law from a free speech perspective, see H Fenwick & G Phillipson *Media Freedom under the Human Rights Act* (2006) 422-47; R Stone *Textbook on Civil Liberties and Human Rights* (5th Edition, 2004) 302-317.

[4] *New York v Ferber* 458 US 747, 764 (1982)('*Ferber*').

[5] For the position in regard to commercial speech, see § 42.9*(f)* infra.

[6] One argument that should be rejected is that pornographic speech qualifies as hate speech and hence does not attract any constitutional protection. See D Meyerson *Rights Limited: Freedom of Expression, Freedom of Religion and the South African Constitution* (1999) 129-31 ('*Rights Limited*')(pornography does not qualify under any of the requirements for hate speech.) See further § 42.8*(c)* supra.

right to vend pornography is not the most important right of free expression in a democratic society',[1] or, as Baroness Hale put it, '[p]ornography comes well below celebrity gossip in the hierarchy of speech which deserves the protection of the law'.[2] This low-value speech approach is also reflected in the jurisprudence of the European Court of Human Rights, which affords a wide margin of appreciation to domestic courts in considering the constitutionality of restrictions on sexually explicit speech.[3]

Our Constitutional Court has also addressed this issue, in the context of child pornography. In *De Reuck*, the Constitutional Court considered whether the child pornography prohibition contained in the FPA survived the limitations analysis. The first point made by Langa DCJ was that child pornography did not implicate the core values of freedom of expression, namely 'its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally'.[4] This is a significant point; the claim that hard-core pornographic images, especially child pornography, serves the democracy rationale for free speech, or that wide dissemination of child and other hard-core pornography aids in the discovery of truth, is simply implausible.[5] As Barendt puts it, '[m]ost pornography is non-cognitive; it does not make claims which might be true'.[6] In *Miller v California*, Burger CJ stated that 'to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene materials demeans the grand conception of the First Amendment'.[7] Or, even more to the point, '[n]o one is denied an equal voice in the political process … when he is forbidden to circulate photographs of genitals to the public'.[8]

It is nevertheless the case, as Ronald Dworkin argues, that government censorship of pornographic speech engages fundamental concerns of moral independence that lie at the heart of a free speech clause:

[1] *Miss Behavin' Ltd v Belfast City Council* [2007] 3 All ER 1007 (HL) at para 16 (Judicial review refused of decision not to grant sex establishment licence in particular area).

[2] Ibid at para 38. See also supra at para 83 (Lord Neuberger)(This may, however, be an overstatement of the relative value of celebrity gossip and pornography to the free speech enterprise.)

[3] *Handyside* (supra) at para 48. See also *Müller v Switzerland* (1991) 13 EHRR 212 at para 35 (Criminal conviction of artist for exhibition of explicit paintings, including depicting sexual relations between men and animals, upheld).

[4] *De Reuck* (supra) at para 59, summarizing the Court's decision in *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC). See also *Sharpe* (supra) at para 24 (Child pornography does not contribute to search for truth or to social and political discourse; may not even engage the value of self-fulfilment).

[5] See § 42.5 supra. For an excellent summary and discussion of the rationales for freedom of expression in the context of pornography, see Fenwick & Phillipson (supra) at 392-408.

[6] Barendt *Freedom of Speech* (supra) at 356.

[7] *Miller* (supra) at 34. See also *Butler* (supra) at para 102 (Pornography does not stand on equal footing with other kinds of expression that directly engage the core of freedom of expression).

[8] R Dworkin *A Matter of Principle* (1985) 336.

> Liberals defend pornography, though most of them despise it, in order to defend a conception of the First Amendment that includes, as at least one of its purposes, protecting equality in the processes through which the moral as well as the political environment is formed.[1]

If it is accepted that pornographic speech engages the right to freedom of expression, albeit at its periphery, the query that must next be interrogated is what the harm is that is sought to be avoided by censoring pornography.

(iv) *Assessing limitations on pornography: harms sought to be avoided through criminalizing pornography*

Langa DCJ in *De Reuck* considered that the objective of the prohibition on child pornography in the FPA was sound:

> The purpose of the legislation is to curb child pornography, which is seen as an evil in all democratic societies. Child pornography is universally condemned for good reason. It strikes at the dignity of children, it is harmful to children who are used in its production, and it is potentially harmful because of the attitude to child sex that it fosters and the use to which it can be put in grooming children to engage in sexual conduct.[2]

Furthermore, the Act's prohibition on child pornography was not overbroad; although there were no specific defences — for example, for researchers who possess child pornography — there were other safeguards in the Act such as an exemption application which would cater for deserving cases.[3] Similar restrictions

[1] R Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (1996) 238. For a recent discussion of the rationales for protecting pornography, see J Weinstein 'Democracy, Sex and the First Amendment' (2007) 31 *New York University Rev of Law and Social Change* 865, 878-96 (Argues that the democracy rationale presents the most promising justification for obscenity; it is used to attempt to change people's attitudes about sexual mores.) See also A Koppelman 'Free Speech and Pornography: A Response to James Weinstein' (2007) 31 *New York University Rev of Law and Social Change* 899, 906-7 (Restrictions on pornography aim precisely at preventing citizens from thinking certain thoughts).

[2] Ibid at para 61. Cf *Sharpe* (supra) at paras 87-94 (Accepting that the evidence showed a reasonable apprehension of at least four forms of harm caused by child pornography: the changing of attitudes of possessors in ways that makes them more likely to sexually abuse children; the fuelling of fantasies and making paedophiles more likely to offend; the use of child pornography to groom or seduce victims; and the abuse of children who are used in the production of pornography.)

[3] FPA s 22. Indeed, a more specific 'legitimate purposes'-type defence was not an effective less restrictive means to achieve the purpose; such a defence would in any event be open to abuse. *De Reuck* (supra) at para 82. The Court left open the issue of whether lawyers, judicial officers and police officers were hit by the prohibition when possessing child pornography for purposes of their occupations. Ibid at para 87. An argument can be made that the FPA is unconstitutional to the extent that it does not permit of exceptions in relation to, for instance, the possession of child pornography for legitimate and necessary journalistic purposes. Thus there is no similar exemption as applies to material that would otherwise be classified as XX or X18, if they are bona fide scientific, documentary, literary or artistic publications or films. FPA scheds 5 and 9. So a broadcaster or newspaper whose confidential source provided it with examples of child pornography used by a public official could not possess the pornography without arguably violating the FPA. Cf *US v Mathews* 209 F 3d 338, 345 (4th Cir, 2000)(journalist may not possess child pornography for purpose of doing research for future story; argument to the contrary misses fundamental distinction between child pornography and other pornography.) Such a position may be

on the possession and production of child pornography have been upheld on constitutional grounds in other jurisdictions.[1]

Although limitations on child pornography are fairly easy to justify,[2] it is less clear on what basis restrictions on other forms of pornography may be sanctioned. It is in this context that courts will have to engage the difficult question of the harms sought to be prevented through the restriction of pornography. There is a substantial body of literature that seeks to locate this harm in the context of violence against women. The main arguments here are that there is a link between pornography and sexual harm and that pornography is a form of gender discrimination: it 'presents women purely as objects for men's sexual needs and so demeans and disparages them'.[3] The jurisprudential high-point of this argument was the implementation of an ordinance drafted by Catherine MacKinnon and Andrea Dworkin in Indianapolis that sought to create a civil remedy for harms caused to women by pornography, defined inter alia as 'the graphic sexually explicit subordination of women, whether in pictures or in words'. The victory was short-lived; the Court of Appeals for the Seventh Circuit considered that this definition violated the First Amendment. Easterbrook J held that the ordinance was an unconstitutional instance of 'thought control'. Further,

susceptible to constitutional challenge on free speech grounds (although the decision in *De Reuck* indicates that such a challenge would not succeed). There is a defence to the publication of hate speech for a film, publication, entertainment or play that amounts to a bona fide discussion, argument or opinion on a matter of public interest. FPA s 29(4). See also *Sharpe* (supra) at paras 70-71 (Describing the legislated 'public good' defence to a charge of possession of child pornography). For a critique of *De Reuck* see Woolman 'Dignity' (supra) at Chapter 36.

[1] For the US position, see *Ferber* (supra)(conviction under state statute for sale of films depicting boys masturbating constitutional; states have greater leeway on the regulation of pornographic depictions of children and obscenity test of *Miller v California* not applicable); *Osborne v Ohio* 495 US 103 (1990)(even possession of child pornography may be criminalised; reasonable for state to conclude that it will decrease production of child pornography if it criminalizes possession). Cf *Ashcroft v Free Speech Coalition* 535 US 234 (2002)(Child Pornography Prevention Act, 1996 extended prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using real children; unconstitutional because virtual child pornography not intrinsically related to sexual abuse of children and no artistic work exemption). For discussion on this case, see DR Dallas 'Starting with the Scales Tilted: The Supreme Court's Assessment of Congressional Findings and Scientific Evidence in *Ashcroft v Free Speech Coalition*' (2007) 44 *Willamette LR* 33.

[2] That is not to say that the ambit of child pornography is uncontroversial. For a discussion of childhood sexuality within motion pictures that may trigger US child pornography law, see JE Bristol 'Free Expression in Motion Pictures: Childhood Sexuality and a Satisfied Society' (2007) 25 *Cardozo Arts and Entertainment* LJ 333, 358 (arguing that not all child nudity should be treated the same for purposes of child pornography law). Nor is it necessarily the case that simulated child pornography causes the same harms as real child pornography.

[3] Barendt *Freedom of Speech* (supra) at 379. The literature on this topic is enormous. A useful collection is contained in D Cornell *Feminism and Pornography* (2000). Classic works that should be consulted include A Dworkin *Pornography: Men Possessing Women* (1981); C MacKinnon *Feminism Unmodified: Discourse on Life and the Law* (1987); C MacKinnon *Only Words* (1993); N Strossen *Defending Pornography; Free Speech, Sex, and the Fight for Women's Rights* (2000); N Strossen 'Is "Minnesota a Progressive?" A Focus on Sexually Oriented Expression' (2006) 33 *William Mitchell LR* 51; C MacKinnon & R Dworkin 'Pornography: An Exchange — Comment/Reply' *New York Review of Books* 3 March 1994; R Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (1996) chapters 9 and 10; and C Itzin (ed) *Pornography: Woman, Violence and Civil Liberties* (1994).

the ordinance did not exempt works of literary, artistic, political or scientific value.[1] Indeed, US First Amendment law remains tolerant of much pornography, provided it cannot be classed as obscene under *Miller v California*. Thus, even legislation that is designed to prevent the dissemination to children of indecent — though not 'obscene' — material via the Internet could not be upheld where such legislation would inevitably infringe the freedom of adults to access indecent material because '[t]hat burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.'[2]

The objective of preventing harm to women through pornography has had a better reception in Canada. In *Butler*,[3] Sopinka J for the Supreme Court held that 'degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings'.[4] A substantial body of opinion existed to the effect that the portrayal of persons in such positions 'results in harm, particularly to women and therefore to society as a whole'.[5] While a direct link to such harm could not be shown, the Court accepted that 'it would be reasonable to conclude that there is an appreciable risk of harm to society in the portrayal of such materials'.[6] The Court stated:

> [I]f true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading materials. Materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on 'the individual's sense of self-worth and acceptance'.[7]

[1] *American Booksellers Assoc, Inc v Hudnut* 771 F2d 323, 328 (7th Cir 1985). The Supreme Court affirmed the decision without hearing oral argument. 475 US 1001 (1986).

[2] *Reno v American Civil Liberties Union* 521 US 844, 874 (1997)(provision in Communications Decency Act 1996 unconstitutional because less restrictive means such as software was available by which parents could prevent children accessing certain material). See also *Ashcroft v American Civil Liberties Union* 542 US 656, 669 (2004)(Child Online Protection Act declared unconstitutional; use of blocking and filtering software less restrictive means than employing criminal sanctions for purpose). Cf *US v Williams* 553 US (2008)(statute that prohibited offers to provide and requests to obtain child pornography not infringing the First Amendment).

[3] [1992] 1 SCR 452, (1992) 89 DLR (4th) 449 (SCC)('*Butler*')(The facts of the case were that: the owner of a video shop that sold and rented hard-core pornography was charged under the Criminal Code with the sale, and possession for purpose of sale, of obscene material. 'Obscenity' was defined as 'any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence'. The Court upheld the provision, in part, because it only minimally impaired freedom of speech — the test for obscenity set a high threshold, and works with scientific, artistic or literary merit were not caught. Ibid at paras 117-118.)

[4] Ibid at para 51.

[5] Ibid at para 52.

[6] Ibid.

[7] Ibid at para 90 (The objective of avoiding harm associated with the dissemination of pornography was, according to the Court, sufficiently pressing and substantial to warrant some restriction on freedom of expression. Ibid at para 94.)

In order to determine if a rational connection exists between the objective of preventing harm and the impugned measures, the Court held that it is sufficient if Parliament has a reasonable basis for believing that there is a link between pornography and harm to society.[1]

The *Butler* Court's acceptance of a link between pornography and harm to women and society has been criticised.[2] Nadine Strassen has argued, for instance, that the Court's approach is a 'dangerous intuitive' one, and that, even if it is assumed, contrary to the available evidence, that *seeing* pornography leads to sexist and violent actions, 'it still would have to [be proved] that pornography has a corner on the sexism and violence market, and that pornography is in fact entirely suppressible'.[3] *Butler* should therefore not be regarded as a persuasive precedent. Where the state seeks to restrict even low-value speech such as pornography on the basis of harm to society, it is surely right to require that this harm be demonstrated in a reasonably compelling manner. While defences that protect speech that constitutes, for example, valuable artistic or literary works,[4] or publications made on matters of public concern, are desirable, the *a priori* question that must be answered in these cases is whether it is at all justifiable in principle to restrict pornography. In the absence of evidence of specific and non-speculative harm, such restrictions should be carefully scrutinised, and may well not survive a constitutional challenge.

(v) *Nude dancing as protected expression*

One specific category of sexually explicit expression that has received the attention of our Constitutional Court is nude dancing. The proposition that nude dancing is a form of protected expression was accepted in *Phillips & Another v Director of Public Prosecutions, Witwatersrand Local Division & Others*,[5] which concerned the constitutionality of s 160*(d)* of the Liquor Act.[6] This provision made

[1] Ibid at para 112. *Butler*'s rationale has been extended to books and magazines, and harm to the dignity of gays and lesbians, through degrading hard-core pornography. See *Little Sisters and Art Emporium v Minister of Justice and Attorney-General of Canada* [2000] 2 SCR 1120.

[2] For compelling criticism, see, for example, Fenwick & Phillipson (supra) at 450-462.

[3] Strossen (supra) at 249. The question as to the link between pornography and harm is a complex one which, to be properly assessed, would require an analysis of all available evidence. It is not a link which, in our view, exists simply as a matter of 'reason or logic' (to use the phrase adopted by the Canadian Supreme Court for assessing the rationality of limitations on fundamental rights where the rationality of the limitation has not been proved on the basis of empirical evidence. *RJR-MacDonald v Attorney-General of Canada* [1995] 3 SCR 199.) See § 42.9*(f)* infra.

[4] Cf FPA scheds 5 and 8. Cf also the UK's Obscene Publications Act 1959 s 4(1) (defence if publication for public good in interests of science, literature, art or learning). This provision was, for example, probably responsible for the eventual unbanning in England of DH Lawrence's *Lady Chatterley's Lover*. For accounts of this and other famous obscenity trials where s 4(1) was employed, see A Travis *Bound and Gagged: A Secret History of Obscenity in Britain* (2000).

[5] 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC)('*Phillips*').

[6] Act 27 of 1989.

it an offence for a holder of an on-consumption liquor licence to allow a person 'who is not clothed or not properly clothed to perform or to appear' or any person 'to perform an offensive, indecent or obscene act . . . on licensed premises where entertainment is presented or to which the public has access'.[1] The applicant, the owner of a club known as *The Titty Twister*, was charged for allowing striptease dancing on the premises. Yacoob J for the majority held that the provision limited freedom of expression:

> The prohibition applies to all entertainment of every description, provided only that the conduct covered by the subsection is part of it. It . . . therefore limits the freedom of artistic creativity and the freedom to receive and impart information and ideas protected by s 16(1)*(b)* and *(c)* of the Constitution. Even though the performers and audiences themselves are not guilty of any offence in terms of the subsection, the inevitable consequence of its enforcement is to restrict the performance of all entertainment within this broad category and to impact negatively on performers and potential audiences alike.[2]

Sachs J, in a separate concurring judgment, reminds us that '[t]he problem of whether it is constitutionally permissible to prohibit the combination of tipples and nipples has divided judicial minds in many open and democratic societies'.[3] The majority of the US Supreme Court in *Barnes v Glen Theatre, Inc* held that nude dancing was protected by the First Amendment, though only at its outer perimeter, and 'marginally so'.[4] Because the value of the expression in issue is far removed from the core of freedom of expression, there is greater scope for the government to justify limitations on nude dancing. Hence in *Barnes*, for instance, an Indiana public indecency statute that was enacted to address the perceived evil of public nudity was upheld; nudity was not proscribed 'because of the erotic message conveyed by the dancers and the dancers remained free to communicate erotic expression, albeit that they had to wear pasties and G-strings in doing so'.[5]

Even in *Phillips*, although the Constitutional Court ultimately ruled that s 160*(d)* of the Liquor Act was unconstitutional, it did so on a very narrow

[1] See also Sexual Offences Act 23 1957 s 19*(b)* (Offence for person who willfully and openly exhibits himself or herself in an indecent dress or manner at any door or window or within view of any public street or place to which public have access). The common law offence of public indecency — unlawfully, intentionally and publicly performing an act which tends to deprave or corrupt the morals of others or which outrages the public sense of decency — is also relevant. For discussion of this offence, see J Burchell *Principles of Criminal Law* (3rd Edition, 2005) 874-9.

[2] *Phillips* (supra) at para 15. Ibid at paras 54-55 (Ngcobo J in dissent: 'I have grave doubts whether there is any connection between the striptease dancing involved in this case and the constitutional right to freedom of expression. . . . Whether freedom of artistic creativity guaranteed by our Constitution includes nude dancing for the primary purpose of stimulating liquor sales is not free from doubt'.)

[3] Ibid at para 64.

[4] 501 US 560, 566 (1991)('*Barnes*'). See also *City of Erie et al v Pap's AM* 529 US 277, 292-294 (2000)('*City of Erie*')(although being in a state of nudity not inherently expressive conduct, nude dancing is expressive conduct that falls within outer ambit of First Amendment).

[5] *Barnes* (supra) at 571. See also *City of Erie* (supra) at 279(A similar result was reached. The ban on nudity in that case was also a general ban that did not have the purpose of suppressing the erotic message of the dance, and dancers were free to perform wearing pasties and G-strings.)

basis: the provision was overbroad; its coverage extended beyond bars and places at which the sale of liquor is the primary activity to, for example, performances at theatres as well as clubs.[1] Had the prohibition been narrowly tailored to, for instance, only prohibit nude dancing at places where the primary business is to sell liquor, the position, according to the majority, 'might well have been different'.[2]

(f) Commercial expression

The United States Supreme Court has defined commercial expression as 'expression related solely to the economic interests of the speaker and its audience'.[3] This definition has been quoted with apparent approval by Davis J in one of the two reported commercial speech cases decided thus far by South African courts.[4]

The most common type of commercial speech is advertising.[5] It must, however, be interrogated in each case whether the advertisement is related *solely* to the economic interests of the parties. Speech on matters of public concern should not be regarded as commercial speech simply by virtue of its being couched in the form of a traditional advertisement. The best illustration of this point is the speech at issue in one of the US Supreme Court's seminal free speech cases, *New York Times v Sullivan*.[6] In this case, the plaintiff sued for libel in respect of allegations contained in a paid advertisement published in the *New York Times*. The advertisement called for contributions to pay the legal expenses of a number of black student protesters who had been arrested for allegedly falling foul of the opprobrious racial laws then in place in Montgomery, Alabama. This was clearly

[1] *Phillips* (supra) at para 28.

[2] *Phillips* (supra) at para 27 (Madala J would have held the limitation on freedom of expression justifiable even given the breadth of the provision: 'Given the potential dangers that arise when drunkenness and nudity are combined, it is both reasonable and justifiable for the Legislature to require theatres to refrain from selling liquor on the days when such performances are being held'. Ibid at para 46.)

[3] *Central Hudson Gas & Electric v Public Services Commission* 447 US 557, 561 (1980)('*Central Hudson*'). Cf the narrower definition previously proffered in *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* 425 US 748, 761 (1976)('*Virginia State Board of Pharmacy*')(Speech that proposes a commercial transaction.)

[4] *City of Cape Town v Ad Outpost (Pty) Ltd* 2000 (2) SA 733, 748 (C)('*Ad Outpost*'). The only other reported commercial speech case is *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd & Others* 2002 (2) SA 625 (D)('*Roundabout Outdoor*'). These cases are discussed below.

[5] Other forms of speech such as expression in the context of unlawful competition (for instance, disparagement of a competitor's products) and expression inducing another to breach a contract, would appear also to qualify as commercial speech. With regard to restrictions on unlawful competition, it is submitted that the common law, and especially the elasticity of the 'wrongfulness' requirement of the delict, should give sufficient protection for the genuine exercise of free speech.

[6] 376 US 254 (1964)('*Sullivan*'). The best analysis of this case, together with its socio-political backdrop and reproducing the advert, is in A Lewis *Make No Law: The* Sullivan *Case and the First Amendment* (1992). See also SD Ross & RK Bird 'The Ad that Changed Libel Law: Judicial Realism and Social Activism in *New York Times Co v Sullivan*' (2004) 9 *Communication L & Policy* 489. See further § 42.9*(a)* supra.

speech on a matter of public interest that was entitled to robust protection ('it communicated information, expressed opinions and recited grievances'), rather than commercial speech that did not enjoy such protection.[1]

Similarly, speech is not 'commercial' simply because money is spent in producing it or merely because it is sold for a profit.[2] If this were the case, all material published by the press or traditional media would only be entitled to protection as commercial speech, irrespective of the content of the speech. This would be absurd. Speech is also not 'commercial' simply because it covers a commercial issue. Much speech on commercial issues concerns matters of compelling public interest and is not only related to advancing the commercial interests of the speaker and its audience, such as the exposure of corporate governance failures or product defects.

Although, as will be seen, courts in various jurisdictions regard commercial speech as covered by a freedom of speech guarantee and valuable in society, courts also invariably adopt the position that restrictions on this form of speech are easier to justify than is the case with many other forms of speech, most obviously, political speech. These two points are dealt with in turn.

(i) *Commercial speech as protected expression*

The first enquiry is whether (and why) commercial speech receives protection under a free speech guarantee. Our courts have held that judges should interpret the scope of the right to freedom of expression generously so as to cover freedom of commercial speech. Thus in *Ad Outpost*, Davis J concluded that 'it is clear that advertising falls within the nature of expression and hence stands to be protected in terms of s 16(1) of the Constitution'.[3] The court reached a similar conclusion in *Roundabout Outdoor*, emphasising that the advertising restrictions in that case impeded the freedom to impart and receive information and ideas entrenched by FC s 16(1)*(b)*.[4]

The same approach has been adopted in other jurisdictions. The first unequivocal extension of free speech protection to commercial speech by the US

[1] The line between commercial speech and speech that should be treated as predominantly public concern speech is difficult. This is illustrated by the recent controversy in the US in relation to whether Nike's press releases responding to allegations that the company mistreated workers outside the US, constituted commercial speech. The Californian Supreme Court held that this was commercial speech. *Nike Inc v Kasky* 123 SCt 2554 (2003). For commentary, see RL Kerr 'From *Sullivan* to *Nike*: Will the Noble Purpose of the Landmark Free Speech Case be Subverted to Immunize False Advertising?' (2004) 9 *Communication L & Policy* 525. Cf *Barthold v Germany* (1992) 15 EHRR 244 (veterinary surgeon's advertisement that pointed out lack of proper night service a matter of importance to the community).

[2] *Virginia State Board of Pharmacy* (supra) at 761.

[3] *Ad Outpost* (supra) at 749.

[4] *Roundabout Outdoor* (supra) at 633.

Supreme Court occurred in the *Virginia State Board of Pharmacy* case.[1] Commercial speech has also been regarded as falling within the scope of freedom of speech by, for example, the Supreme Court of Canada[2] and the European Court of Human Rights.[3]

Despite the approach of most jurisdictions in extending the protection of freedom of expression to commercial speech, the theoretical basis for this protection is uncertain and contested. One critic of the notion of freedom of commercial expression puts it in the following strong terms:

> Freedom of commercial expression is a constitutional fraud. It does not have sound grounding in legal precedent. The normative arguments adduced in its favour are without exception invalid and unsound.[4]

This criticism is, we submit, an overstatement. While we accept that certain of the arguments for free speech (such as the argument from democracy, the self-fulfilment of the speaker,[5] the 'safety valve' theory and the development of a culture of toleration) are generally inapposite to commercial speech, this is not true of all the rationales. It seems to us that the protection of commercial speech can be justified by focusing on the importance of commercial information to consumers. Promoting freedom of commercial speech empowers consumers to make informed choices as to products and services.[6] As the Canadian Supreme Court remarked in *Ford*:[7]

[1] *Virginia State Board of Pharmacy* (supra)(Striking down a statute that stipulated that it was unprofessional conduct for a pharmacist to advertise the price of prescription medicines). See also, for example, *Carey v Population Services international* 4331 US 768 (1977). Previous decisions of the US Supreme Court excluded commercial speech from the protection of the First Amendment. See, for example, *Valentine v Christensen* 316 US 52 (1942) and *Pittsburgh Press v Human Relations Commission* 413 US 376 (1973).

[2] *Ford v Attorney General of Quebec* [1988] 2 SCR 712 ('*Ford*'); *Irwin Toy v Attorney-General of Quebec* [1989] 1 SCR 927('*Irwin Toy*').

[3] *Market Intern & Beerman v Germany* (1990) 12 EHRR 161 ('*Market Intern*').

[4] RA Shiner *Freedom of Commercial Expression* (2003) 328 (Shiner engages in a detailed and thought-provoking examination of the merits of protecting freedom of commercial expression and concludes that none of the rationales for the protection of freedom of expression apply to commercial speech.) See also CE Baker 'Commercial Speech: A Problem in the Theory of Freedom' (1976) 62 *Iowa Law Rev* 1.

[5] It is, generally speaking, difficult to argue that commercial expression advances the self-fulfillment of the speaker as it is mostly corporate entities that engage in commercial speech (such as advertising). See Barendt *Freedom of Speech* (supra) at 15. For a criticism of the application of this rationale to commercial expression, see Shiner (supra) at 163-191.

[6] D Meyerson *Rights Limited* (supra) at 93 ('Advertising clearly raises freedom of expression concerns, because it imparts information about goods and services that people have an interest in receiving'). Cf *Virginia State Board of Pharmacy* (supra) at 763 (Blackmun J)(the consumer's 'interest in the free flow of commercial information. . . may be as keen as, if not keener by far, than his interest in the day's most urgent political debate'.)

[7] *Ford* (supra) at 767.

> Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of self-fulfilment and personal autonomy.[1]

The free flow of commercial information enables us to know more about commercial subjects, products and services, and thus serves individual choice and the proper functioning of a free market economy. The 'market place of ideas' thus promotes the efficiency of the economic market (by, amongst other things, assisting in the search for commercial truth).[2] This is, in particular, the case in relation to commercial speech that conveys information (such as so-called informational advertising) but is less apposite, if at all, to more emotive commercial speech like 'lifestyle' advertising (advertising that associates the product with an attractive lifestyle).[3] An additional argument in support of the protection of freedom of commercial expression is that a failure to protect it would inevitably 'chill' other forms of speech in circumstances where courts may incorrectly categorise speech.

Although it is difficult to argue that commercial expression should enjoy the same level of constitutional protection as other forms of speech — such as political expression, journalistic endeavour and artistic creativity[4] — we submit that it is correct that restrictions on freedom of commercial speech engage the reasons that we value freedom of expression and thus fall within FC s 16(1).[5]

(ii) *Assessing limitations on commercial expression*

The second important question with regard to commercial expression is how limitations on such expression are to be assessed. The broad point here — again, one accepted in various jurisdictions — is that commercial speech receives weaker protection than other forms of speech. In the words of Kondile J in *Roundabout Outdoor*, commercial speech 'occupies a subordinate position in the

[1] See *Central Hudson* (supra) at 563 (1980)('the First Amendment's concern for commercial speech is based on the informational function of advertising'); Shiner (supra) at 308 and 328 (criticises this rationale on the basis that much of advertising does not provide information, but rather appeals to emotions and conjures up associations. While this is true of much lifestyle advertising, it is not necessarily true of much advertising that is informational in nature.)

[2] For a criticism of this argument, see Shiner (supra) at 299-301. See also RC Post 'The Constitutional Status of Commercial Speech' (2000) 48 *U California LR* 1, 8 (courts should not protect the values of market economy through free speech).

[3] See Barendt *Freedom of Speech* (supra) at 399 ('Very little commercial advertising is intended to assert anything which could be regarded as truth, rather than persuade consumers to do something'.)

[4] We would note that certain commercial speech would amount to artistic expression.

[5] The Constitutional Court adopts a wide approach to 'expression' for purposes of FC s 16(1). See § 42.4 supra.

scale of constitutional rights values'.[1] Davis J in *Ad Outpost*, however, sounds the following cautionary note:

> The tendency to conclude uncritically that commercial expression bears less constitutional recognition than political or artistic speech needs to be evaluated carefully. So much speech is by its very nature directed towards persuading the listener to act in a particular manner that artificially created divisions between the value of different forms of speech requires critical scrutiny.[2]

Certain in-built limitations on the protection for commercial expression flow from a proper consideration of the major rationale for its protection — that it empowers consumers by providing them with a free flow of information of relevance in a market economy. This rationale cannot countenance the dissemination of, for instance, false and misleading advertisements, for which there can thus be no constitutional protection.[3] To the extent that numerous restrictions on advertising goods prohibit false and misleading advertisements, these will qualify as justifiable limitations of free speech.[4] But restrictions on truthful claims, say, comparative advertising or restrictions on professional advertising,[5] will be more difficult to defend.

How have South African courts assessed limitations on commercial speech? The two reported cases that are discussed next both deal with restrictions on

[1] *Roundabout Outdoor* (supra) at 635 (Kondile J endorses the view expressed by Gilbert Marcus and Derek Spitz that most commercial speech is of peripheral constitutional value. Ibid at 634 citing Marcus & Spitz 'Expression' (supra) at 20-50—20-51.) See also *Central Hudson* (supra) at 562 (Constitution accords lesser protection to commercial speech than other speech protected by the First Amendment); *Markt Intern* (supra) at para 33 (states enjoy greater discretion in regulation of commercial speech). But see *Ad Outpost* (supra) at 749. It is not universally accepted that commercial expression should enjoy lesser protection than other forms of expression. See *44 Liquormart v Rhode Island* 517 US 484, 518 (1996)('*44 Liquormart*')(Thomas J stated: 'I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'non-commercial' speech'.)

[2] *Ad Outpost* (supra) at 749.

[3] Cf A Nicol QC, G Millar QC & A Sharland *Media Law and Human Rights* (2001) 167. In contrast, with regard to defamatory speech implicating matters of public concern, publishers escape liability in South Africa and elsewhere even for publishing false statements of fact, provided the publication is reasonable. See § 42.9*(a)* supra.

[4] Cf Code of Advertising Practice of the Advertising Standards Authority para 4.2. Electronic Commincations Act 36 of 2005 s 55 requires that all broadcasting licensees adhere to this Code. Some statutory examples of (it is submitted, justifiable) restrictions on false and misleading advertising are: Merchandise Marks Act 17 of 1941 ss 6 and 7 (prohibiting false and forged trade marks, and false trade descriptions); Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 s 5; Trade Metrology Act 77 of 1973 s 37; Plant Improvement Act 53 of 1976 s 33; Trade Practices Act 76 of 1976 s 9(1) (prohibition on display of advert that is false or misleading in material respects); and Animal Improvement Act 62 of 1998 s 18.

[5] Restrictions on professional advertising have attracted judicial attention in a number of jurisdictions. See, for example, *Ohralik v State Bar Association* 436 US 447 (1978); *In re Primus* 436 US 412 (1978); *Rocket v Royal College of Dental Surgeons of Ontario* (1990) 71 DLR (4th) 68 (SCC); *Casado Coca v Spain* (1994) 18 EHRR 1.

billboard advertising. Thereafter, the approach to restrictions on commercial speech adopted in other jurisdictions is briefly considered.[1]

In *Ad Outpost*, the first respondent had been interdicted from erecting an advertising sign on property of the second respondent that was adjacent to the N1 highway. A by-law provided that any person who intended to display an advertising sign had first to seek permission from the City of Cape Town and that the sign itself could only contain stipulated details, such as the name and contact details of the occupier of the property. This effectively disallowed third parties such as the first respondent from advertising on premises occupied by others. Davis J held that the by-law breached the respondents' right to freedom of expression 'by prohibiting any form of a particular mode of advertising which it is seeking to communicate to a segment of the public'.[2] The crucial enquiry then became whether the limitation was justifiable in terms of FC s 36(1). Although restrictions on outdoor advertising to protect the environment were in principle defensible, it was significant that on the City's own evidence, the existing by-law was inadequate, especially in regard to advertising on others' premises. Davis J concluded that the blanket nature of the prohibition 'is contrary to the constitutional requirement that a desired result should be achieved by means which are least damaging to the constitutional right in question'.[3]

Ad Outpost should be contrasted with *Roundabout Outdoor*. This case also dealt with the erection of an advertising billboard in breach of by-laws. The Court distinguished this case from *Ad Outpost* on the ground that, while that case dealt with an absolute prohibition on a certain form of commercial speech, the by-law in *Roundabout Outdoor* only involved restrictions on the location of billboards. 'It is therefore sufficient' Kondile J held, 'if the restriction broadly advances the applicant's interest'.[4] The Court accepted that the measures adopted by the applicant were designed to achieve the twin objectives of ensuring traffic safety and preserving the appearance of the locality. These were substantial interests and the measures taken in the by-laws were 'rationally connected to a legitimate, substantial and pressing purpose of promoting public safety and welfare. They directly advance that purpose. They are the least restrictive measures that could have been employed by applicant to accomplish its purpose'.[5]

[1] Other significant areas within advertising law that may impact on free speech are political advertising restrictions and requirements that adverts should be decent. For discussion, see G Robertson QC & A Nicol QC *Media Law* (4th Edition, 2002) 712-714.

[2] *Ad Outpost* (supra) at 749. Cf *Ramsden v Corporation of the City of Peterborough* (1992) 7 CRR 288 (Ontario Court of Appeal)('*Ramsden*')(Third party advertising a form of communication protected by free speech).

[3] *Ad Outpost* (supra) at 750-1 (The applicant had conceded in a policy document that a new, balanced policy was required that would allow certain types of third party advertising.)

[4] *Roundabout Outdoor* (supra) at 635.

[5] Ibid at 635-6 (The Court referred with approval to the similar conclusions accepted in *Ramsden* (supra)(concern for traffic safety and aestheticism of city are pressing objectives), and by the Californian Supreme Court in *Metromedia Inc v San Diego* 453 US 490 (1981)(traffic safety and appearance of city substantial government goals).)

The United States position on the compatibility of restrictions on commercial speech with the First Amendment is set out in *Central Hudson*. The issue in this case was whether a ban on promotional advertising for gas and electricity services that sought to reduce the demand for electricity in the context of the 1970s energy crisis was constitutional. The Supreme Court laid down the following test for the constitutionality of commercial speech restrictions: commercial speech that concerns lawful activity and that is not misleading may only be restricted where the government interest in its regulation is substantial, the regulation directly advances the government interest, and the regulation is not more extensive than is necessary to serve that interest.[1] Although the ban in question served the substantial government interest in energy conservation, and advanced that interest, it covered *all* promotional advertising and hence was more extensive than was necessary.

In another leading US case on advertising restrictions, *44 Liquormart*, the Supreme Court used its *Central Hudson* test to strike down statutes that prohibited advertisements publishing information concerning the price of alcoholic drinks.[2] The legitimate objective of moderating alcohol consumption was not significantly advanced by the total ban as no clear evidence had been led to show that the restriction reduced consumption.[3] Furthermore, according to the Court, steps less invasive of freedom of expression could have been taken to achieve the objective, such as an increased taxation on alcoholic products.[4]

The approach of the Supreme Court of Canada to advertising restrictions is reflected in *Irwin Toy*.[5] The starting point for the Court is that 'expression' is given a broad meaning for purposes of s 2*(b)* of the Canadian Charter so that virtually any material that conveys or attempts to convey a meaning is protected. Advertising aimed at children attempts to convey meaning and therefore amounts to protected expression. The next step is whether the purpose *or* effect of the legislation is to control, or attempt to control, the conveyance of meaning. If so, the legislation infringes the right to freedom of expression, and one must then assess whether the limitation is justified (or reasonable). On the facts of *Irwin Toy*, the

[1] *Central Hudson* (supra) at 566. The last leg of the *Central Hudson* test suggests that one applies a least restrictive means test to limitations of commercial expression (i.e. similar to the limitations test adopted under the Canadian Charter). This test was, however, qualified in a subsequent decision of the US Supreme Court. *Board of Trustees of the State University of New York et al v Todd Fox* 492 US 469, 109 SCt 3028, 3035 (1989)(Test requires simply a reasonable fit between the legislature's ends and the means adopted to accomplish those ends, which 'employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.')

[2] Supra.

[3] Ibid at 505.

[4] Ibid at 531 (Stevens J, with three other justices, correctly rejected the approach taken by the Court in *Posadas de Puerto Rico Associates v Tourism Co of Puerto Rico* 478 US 328 (1986)(Court accepted the argument that if a state is permitted to ban a particular product, it could legitimately ban advertising for that product, even though the product remained legal.))

[5] Supra.

Court held that a statutory prohibition on all advertising directed at children under 13 was a reasonable limitation on the right to free speech as such advertising was inherently manipulative and advertisers could still target parents and other adults.[1]

The jurisprudence of the European Court of Human Rights is also instructive in regard to the discretion afforded restrictions on commercial speech. In *Markt Intern*, a sharply-divided Court concluded that art 10 of the European Convention on Human Rights had not been violated.[2] The applicants had published a bulletin including an article about the dissatisfaction of a customer who had not received the promised reimbursement of a beauty product ordered from a mail-order company that fell foul of a German statute prohibiting unfair competition. The Court held that states have a wide margin of appreciation in regard to regulating matters such as unfair competition and that the restriction on competition was proportionate.[3]

One specific topic that excites much controversy in this area is restrictions on tobacco advertising. In South Africa, s 3(1) of the Tobacco Products Control Act[4] prohibits the advertising of tobacco products in broad terms.[5] In assessing the constitutionality of this provision, guidance will no doubt be sought from the Canadian Supreme Court, particularly the decision in *RJR-McDonald Inc v Attorney-General of Canada*.[6] In this case, the Court narrowly rejected a blanket ban on all forms of tobacco advertising, except at the point of sale.[7] The majority of the Court (per McLachlin J) held that the prohibition's objective — the reduction of

[1] It should be noted that the test adopted by the Canadian Supreme Court is the same as that adopted in cases not involving commercial expression. See, for example, *Keegstra* (supra) at 215-6 (Involving hate speech).

[2] *Markt Intern* (The Court was split 9-9, with the President exercising his casting vote in favour of the German government. The dissent was particularly concerned with the effect a deferential approach may have on the openness of business activities. Ibid at 177.) Other cases on unfair competition also indicate a deferential approach. See *Jacubowski v Poland* (1994) 19 EHRR 64 (Restraint from sending critical articles concerning former employer to journalists justifiable on the basis of unfair competition laws); *Krone Verlag GmbH & Co KG (No 3) v Austria* 2003 (Restraint on newspaper publishing comparison of its selling price relative to competitor a disproportionate interference with art 10).

[3] *Markt Intern* (supra) at para 32.

[4] Act 83 of 1993.

[5] Section 3(3), however, provides that a retailer of tobacco products may (in accordance with regulations) post signs at the point of sale that 'indicate the availability of tobacco products and their price'. A similar prohibition is contained in the United Kingdom Tobacco Advertising and Promotions Act 2002. See also *R (On the application of British American Tobacco & Others) v Secretary of State for Health* [2004] EWHC 2493 (Admin). Advertising bans on tobacco are called for in the International Framework Convention on Tobacco Control (2003).

[6] [1995] 3 SCR 199, (1995) 127 DLR (4th) 1 (SCC), 31 CRR (2d) 189 ('*RJR-McDonald*'). The issue has not been expressly considered by the US Supreme Court, though its rulings in *Rubin v Coors Brewing Co* 514 US 476 (1995) (restrictions on advertising alcohol content on beer compatible with First Amendment) and *44 Liquormart* (supra) suggest that at least a total ban on the truthful advertising of a lawful product would not survive a First Amendment challenge. Cf also *Lorillard Tobacco Co v Reilly, Attorney-General of Massachusetts* 533 US 525 (2001).

[7] See Canadian Tobacco Products Control Act, 1988.

consumption and thus the reduction of smoking-related risks to health — was legitimate, but that the ban was wider than necessary. According to the majority of the Court, although tobacco advertisements that associated smoking with an attractive lifestyle (so-called lifestyle advertising) could be linked to increased consumption of tobacco, this connection had not been proved, and did not follow as a matter of 'reason or logic', in relation to other forms of advertising such as brand-preference advertising (which generally consists of the depiction of a product pack or trade marks) and informational advertising (which provides factual information about the product).[1] McLachlin J emphasised that the blanket ban deprived those who lawfully chose to smoke of information on 'price, quality and even health risks associated with the different brands'.[2]

Following the decision in *RJR-McDonald*, the Canadian Parliament enacted the Tobacco Act, 1997. This Act prohibits the advertising and promotion of tobacco products other than by means of 'information advertising' or 'brand-preference advertising' in adult publications or adult places.[3] The Act expressly carves out 'lifestyle advertising' and advertising that could reasonably be construed as appealing to young persons, from the provision allowing for information and brand-preference advertising.[4] In the sequel to *RJR-McDonald*, a challenge to this legislation again went all the way to the Canadian Supreme Court.[5] This time, in *JTI-MacDonald* the Court upheld the revised advertising and promotion ban, emphasising the deference that should be paid to the legislature in this area as well as the significant harms associated with tobacco consumption. McLachlin CJC explained the Court's attitude as follows: '[w]hen commercial expression is used, as alleged here, for the purposes of inducing people to engage in harmful and addictive behaviour, its value becomes tenuous'.[6]

The advertising ban in s 3(1) of the South African Tobacco Products Control Act goes further than the legislation which formed the subject of *JTI-MacDonald* and is more akin to that contained in the predecessor legislation that was considered in *RJR-McDonald*. The South African legislation includes within its ambit so-called brand-preference and informational advertising and, on the authority of *RJR-McDonald*, in our view goes too far in limiting freedom of expression. If challenged, s 3(1) may well not survive constitutional scrutiny.

[1] *RJR-McDonald* (supra) at para 164.
[2] Ibid at para 170. *RJR-McDonald* also dealt with whether manufacturers could be compelled to insert heath warnings on cigarette packets. The majority of the Court held that this also offended freedom of expression. This view accepts the proposition that a right to freedom of expression also includes a right *not* to speak. In the US, a requirement that lawyers had to disclose certain fee information was held not to infringe the First Amendment. *Zauderer v Office of Disciplinary Counsel of Ohio* 471 US 626 (1985).
[3] Sections 22(1) and (2).
[4] Section 22(3).
[5] *Canada (Attorney General) v JTI-MacDonald Corp* 2007 SCC 30.
[6] Ibid at para 47.

(g) Restrictions in the interest of national security, defence and intelligence

The intersection between legitimate state restriction of information in the interests of national security and freedom of expression in a democratic society is a fault line that yields inevitable conflict. The legitimacy of unsupervised state national security restriction rests on a premise that owes allegiance to a particular conception of democracy: the executive elected by and accountable to a democratic Parliament may be entrusted with restricting information in the best interests of society. However, this conception must compete with the libertarian conception that such power may be abused and must therefore be carefully regulated. The very nature of information restriction makes it difficult to regulate; without access to information it is difficult to challenge the basis or legitimacy of any particular restriction. Moreover, in the context of national security there is a risk, perhaps more so than in any other context, that the government will restrict the flow of information in its own, as opposed to the national, interest. As will appear from the discussion that follows, courts and legislatures alike struggle to articulate principles to delineate the legitimate restriction of information on national security grounds in a democratic society. In this section, we first critically examine the various sources of restrictions and then consider the approach of courts to conflicts between national security claims and freedom of expression, particularly media freedom.

(i) *General national security restrictions*

The sources of South African national security restrictions are to be found not in a single coherent statutory setting but under cover of a variety of statutes, regulations, directives, policy instruments and other materials. Some of them, as described below, are quite secretive and obscure.

(aa) The Constitution

As the Constitutional Court has recently affirmed,[1] the Constitution itself imposes upon legislative and executive organs of state the powers and duties to preserve the peace of the Republic and secure the well-being of its people,[2] to defend and protect the Republic,[3] to maintain national security,[4] to establish and maintain intelligence services[5] and to combat crime.[6] Chapter 11 of the Constitution, in particular, sets out the framework for the establishment and conduct of the

[1] *Independent Newspapers (Pty) Ltd v Minister for Intelligence (Freedom of Expression Institute Intervening as* Amicus Curiae*)* 2008 (5) SA 31 (CC) at para 49 ('*Independent Newspapers*').
[2] FC s 41(1)*(a)* and *(b)*.
[3] FC s 200(2).
[4] FC ss 44(2)*(a)*, 146(2)*(c)(i)* and 198.
[5] FC s 209(1).
[6] FC s 205(3).

security services and, notably, articulates specific principles which govern national security.[1] Effect is given to these obligations 'through legislation, the establishment of institutions as permitted by law and by the exercise of executive authority vested in the President and the Cabinet.'[2]

(bb) Minimum Information Security Standards

In the exercise of this executive authority, the Cabinet, in 1996,[3] approved the Minimum Information Security Standards ('MISS') as the national security policy. MISS was adopted to replace the Guidelines for the Protection of Classified Information[4] which were a product of the apartheid cabinet. MISS has not been published in any official document nor is it generally publicised[5] though it is applicable to all departments and organs of state.

The preface and introduction to MISS, which sets the context for the guidelines, indicate some awareness of the need for openness in an open and democratic society,[6] but the same cannot, as we explain below, be said of the restrictive classification regime that it sanctions. The MISS guidelines themselves are extensive and detailed, dealing with wide-ranging aspects of national security policy.

[1] FC s 198 provides:

Governing principles

The following principles govern national security in the Republic:

(a) National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.

(b) The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.

(c) National security must be pursued in compliance with the law, including international law.

(d) National security is subject to the authority of Parliament and the national executive.

[2] *Independent Newspapers* (supra) at para 49.

[3] Curiously there is some discrepancy about when precisely MISS was adopted by Cabinet. The face of the MISS document itself reflects that it was adopted on 4 December 1996. The Minister, however, in his answering affidavit before the Constitutional Court in *Independent Newspapers* (supra) indicated that it was adopted on 4 December 1998 and this is the date recorded in the judgment. See *Independent Newspapers* (supra) para 49.

[4] SP 2/8/1 (March 1988).

[5] Conspicuously, MISS does not appear amongst the official documents and legislation published on the National Intelligence Agency or the Ministry of Intelligence websites. See www.nia.org.za or www.intelligence.gov.za (accessed on 14 September 2008).

[6] The Preface records:

> The world and especially South Africa has changed dramatically during the last few years, with profound implications for our society, our government, the South African Police Service, the Defence and Intelligence Communities. Our understanding of the range of issues that impact on national security is evolving.

While the Introduction states:

> The need for secrecy and therefore security measures in a democratic and open society, with transparency in its governmental administration, is currently the subject of much debate, and will continue to be for a long time.
>
> However, the issue need not be controversial, since the intended Open Democracy Act (not yet promulgated at the time of going to press) itself will acknowledge the need for protection of sensitive information, and therefore, will provide justified exemption from disclosure of such information.

These include provision and application of security measures,[1] document security (including all aspects of classification),[2] personnel security (including vetting and security screening),[3] communication security,[4] computer security,[5] physical security,[6] breaches of security[7] and division of responsibilities with respect to the practice of security.[8] It is remarkable in itself that, in a constitutional democracy founded in part on openness, a document so broad in scope and setting out the detailed constraints upon the exercise of power to withhold information from the public domain, which has the form of regulations or legislation, and which potentially results in the imposition of severe criminal sanctions[9] should not be published through the standard mechanisms for government publication and, at the very least, gazetted.

The heart of MISS is the document classification regime.[10] Four levels of classification are introduced and defined.[11] The definitions of each level of classification are obscure, employing extremely vague concepts and requiring the official applying her mind to classification to draw distinctions. For example, 'confidential' is defined as information which may be used 'by malicious/opposing/hostile elements to harm the objectives and functions of an individual and/or institution',[12] as opposed to 'secret' information which may be used by the same elements to 'disrupt' the same individuals or institutions.[13] The thresholds for classification are also set at impermissibly low levels; classification is permissible if harm or disruption 'may' result. This has the constitutionally impermissible result that speculative harm to national security may be used as a cloak for secrecy.[14]

[1] MISS chapter 3.
[2] MISS chapter 4.
[3] MISS chapter 5.
[4] MISS chapter 6.
[5] MISS chapter 7.
[6] MISS chapter 8.
[7] MISS chapter 9.
[8] MISS Appendix A
[9] While no criminal sanctions are set out in MISS it is arguable that the legislation that we discuss below, and that criminalises the disclosure of classified information, applies to the disclosure of documents that are classified under MISS. See §§ 42.9*(g)(i)*(cc) and 42.9*(g)*(ii). This contention was advanced by the Minister for Intelligence in *Independent Newspapers* (supra), but the Constitutional Court did not need to deal with its correctness.
[10] MISS chapter 4, ss 1-17.
[11] MISS chapter 2 defines these categories as 'restricted', 'confidential', 'secret' and 'top secret'.
[12] MISS chapter 2 s 3.4.2.
[13] MISS chapter 2 s 3.4.3.
[14] Our highest courts have eschewed the ability of government to restrict free speech based on speculative harm in numerous contexts. See, for example, *S v Mamabolo (e-TV & Another intervening)* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC) at para 45 ('*Mamabolo*'); *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC) at para 50 ('*Laugh It Off*'); *Midi Television (Pty) Ltd t/a e-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) at para 19. See also *Independent Newspapers* (supra) at para 165 (Sachs J). See also § 42.4 supra. Many foreign jurisdictions also require more than a possibility of harm to national security before classification can occur. See, for example, USA Executive Order 13292 (25 March 2003) s 1.2; UK's Official Secrets Act, 1989 s 1(4); and New Zealand's government policy entitled 'Security in the Government Sector' available at http://www.security. govt.nz/sigs/html/index.html (accessed on 18 June 2008).

Moreover, in terms of MISS, responsibility for classification rests with the author or head of the state institution concerned, or his delegate.[1] This casts the net of those authorised to impose classification, and therefore remove information from the public domain, widely. In our opinion, not only does MISS not contain adequate safeguards against intentional abuse but its lack of clarity means that there is also little chance of consistent application of these classification concepts by decision-makers acting with the best of intentions.

MISS itself does not create offences, but a range of offences, with severe penalties, for unlawful disclosure of classified information are created under a number of different pieces of legislation, including the Protection of Information Act.

(cc) Protection of Information Act

It is striking that the central legislative pillar of information restriction in South Africa, the Protection of Information Act ('PIA'), was enacted and applied in the apartheid era.[2] It is equally striking that this Act is notable for its paucity. It is almost exclusively dedicated to the creation of a myriad of complex and serious offences connected with the unlawful disclosure of restricted and classified information,[3] as well as legal mechanisms, such as evidentiary presumptions, for facilitating easier conviction.[4] This is, in and of itself, unsurprising in an Act intended to be used under an undemocratic, oppressive dispensation which perceived threats to its existence everywhere and which was intended to shore-up the tyranny of the executive. The less said by Parliament under those circumstances, the easier it would be for the executive to act without constraint.

However, that this legislation has been allowed to remain for so long on the statute books is, at the very least, neglectful. Parliament has now signalled its intention to repeal the Act and to replace it with new legislation by the same name. This is to be welcomed, at least in principle, as is the much more detailed and extensive nature of the Protection of Information Bill presently under consideration.[5] This new Bill aims to formalise in legislation and subsequent regulations much of what has up to now been unarticulated or left to executive discretion, policy and directives. The Bill also intends to consolidate in a single legislative instrument some of what is presently to be found across a disparate body of sources. This too is to be welcomed, although we submit that the Bill in its current form falls short of this objective.[6]

[1] MISS chapter 4 s 1.2.
[2] Act 84 of 1982.
[3] PIA ss 2-7.
[4] PIA ss 8-10.
[5] B28-2008, published in *GG* 30885 (18 March 2008).
[6] The Bill, in its current form, would, for instance, not disturb the classification regime created by the Defence Act 42 of 2002, or that set out in the Intelligence Services Act 65 of 2002. These regimes are discussed in § 42.9*(g)*(ii)(aa) and (cc) respectively.

In too many respects, the content of the Bill shares too much in common with its apartheid namesake and, in certain respects, including aspects of its most fundamental conceptual apparatus, it surrenders even more ground to vaguely defined executive power. Viewed from the perspective of democratic theory, the Bill places increased strain on the legitimising premise: 'trust your democratically elected government to act in the national interest'.

We submit that any legislation that is ultimately passed should embody at least three core characteristics. First, classification (and any restriction of information more generally) should be predicated only on 'national security' threats and not upon broader concepts such as 'the national interest'. Moreover, 'national security' should be clearly and narrowly defined. Secondly, the threshold tests for harm that may arise from the disclosure of the information concerned must be similarly clearly defined in respect of each level of classification that may be imposed, and the harm that may result must be of a significant nature.[1] In particular, mere speculative harm — which, as we observed above, is sufficient under the current MISS guidelines — should not be a sufficient basis for classification.[2] Thirdly, in order to strike the correct balance between the legitimate interests of national security and the constitutional value of openness (including guarding against abuse of classification), it is crucial that the legislation should provide for a 'public interest defence' to permit disclosure of classified information where it is demonstrated that there was a legitimate public interest for such disclosure.[3]

(ii) *Other legislative entrenchment of national security restrictions*

(aa) The Defence Act

The Constitution provides for a separate intelligence division of the Defence Force[4] which, along with the other intelligence agencies, is to be regulated by

[1] In its present form, we would submit that the harm upon which classification is predicated in the Bill is too vaguely defined and speculative. A classification of (1) 'confidential' is required where the information concerned is 'sensitive information' the disclosure of which *may* 'be harmful to the security or *national interest* of the Republic or could prejudice the Republic in its international relations.' (2) 'secret', where it is also 'sensitive information' which *may* 'endanger' rather than 'harm' the 'national interest' or 'jeopardise' rather than 'prejudice' international relations and (3) 'top secret' where it is 'sensitive information' which *may* cause 'serious or irreparable harm' to the 'national interest' or cause states to sever their relations with the Republic. Protection of Information Bill ss 20(1), (2) and (3). In this form we would submit that there is a real danger that the legislation is constitutionally overbroad.

[2] It is noteworthy that even the equivalent United States security laws, enacted by the Bush Administration after September 11 2001 and in an atmosphere of fear and repression, as well as a state of war, sets a higher standard for restrictions requiring, for example, that a classification of 'top secret' requires that unauthorised disclosure of the information concerned could *reasonably be expected* to 'cause exceptionally grave damage to the national security' which the classifying authority is 'able to identify and describe'. Executive Order 12958 (March 25 2003) s 1.2. Each of the three levels of classification is predicated on 'national security' only and the classifying authority is required to articulate the nature of the threat. Moreover, the authority to classify as 'top secret' and 'secret' are restricted to a select group of senior members of the executive (in the case of 'top secret' only the President, the Vice President or an agency head or their delegate). US Executive Order s 1.3.

[3] In its present form there is no such provision in the Bill.

[4] FC s 209.

national legislation. Chapter 6 of the Defence Act[1] preserves the Intelligence Division that was previously in existence[2] and requires it to 'gather, correlate, evaluate and use strategic intelligence', inter alia, for the purpose of ensuring national security. [3] The Defence Act furthermore provides in considerable detail for levels of security clearance for personnel and the review of such levels of security clearance.[4] It also provides for civilian monitoring of the Intelligence Division through an inspector as required by the Constitution.[5] The Defence Act criminalises the disclosure of information[6] classified in terms of the Act and a wide range of activities associated with 'classified facilities,'[7] and provides severe penalties for contraventions.[8] Curiously however, the Defence Act does not expressly provide for the manner of classification of information, levels of classification, the standards or criteria for classification nor identify those with the power to classify. These fundamental constraints on the abuse of this power are left unregulated and subject to a vague implied power which is presupposed by the above provisions.

(bb) The National Key Points Act

The National Key Points Act[9] is apartheid era legislation that empowers the Minister in a broad array of specified circumstances, including when it is considered to be in the 'public interest', to declare a place or area a 'national key point'. The consequence of this classification is that a range of special security measures may be attached to the area concerned. The Act creates a number of offences in relation to certain activities associated with a 'key point' including, for example, the disclosure of any information concerning security measures at a key point.[10] There is, furthermore, no requirement that key points be publicly identified and there is no publicly available list of places that have been declared key points.[11] Moreover, the Act criminalises conduct by reference to repealed apartheid legislation,[12] notably the notorious Official Secrets Act.[13] While such offences may be argued to be defunct, the continued reference to them is testimony to the dubious

[1] Defence Act 42 of 2002 ('Defence Act').
[2] Defence Act s 33.
[3] Defence Act s 34.
[4] Defence Act ss 37-41.
[5] FC s 210*(b)*; Defence Act s 42.
[6] Defence Act s 104(7) even if such disclosure is by way of 'gesture'.
[7] Defence Act s 104(19).
[8] 5 years imprisonment under s 104(7) and 25 years under s 104(19).
[9] National Key Points Act 102 of 1980 ('Key Points Act').
[10] Key Points Act s 10(2)*(b)*.
[11] This lacuna in the law has obvious implications for the publicity requirement of the rule of law.
[12] Key Points Act s 10(1).
[13] Act 16 of 1956.

pedigree of the Act. Parliament has indicated its intention to repeal the Key Points Act under the revised PIA, referred to above. However, the intention is that the operative features of the Key Points Act will be preserved in the new legislation.

(cc) The Intelligence Services Act

Disclosure of classified information is also an offence under the Intelligence Services Act.[1] There are a number of concerning aspects to the regulation regime under the Act. For example, the Minister of Intelligence has promulgated extensive regulations governing various aspects of the intelligence services[2] but which, conspicuously, do not deal with classification. In addition, in terms of this Act the Director General of any of the intelligence services may, subject to the approval of the Minister of Intelligence, issue 'functional directives' applicable to the protection of classified information.[3] However, it is unclear whether any of the Directors General has issued functional directives as contemplated. There is no record of this in any government notice, nor is it apparently recorded in a Government Gazette. On the assumption that such functional directives have been issued, it would, it is submitted, be contrary to the rule of law and unconstitutional on this basis alone, for the fact of such directives not to be publicised. An essential element of law is that it must be publicised and readily ascertainable.[4] Moreover, secret directives would be contrary to the requirements of an open and democratic society.

(dd) Other legislation

A range of other legislation gives effect to national security restrictions. The Promotion of Access to Information Act provides for refusal of a request for information on grounds of national security.[5] Moreover, where the disclosure of the existence of information may itself endanger national security, the relevant official may refuse to confirm or deny its existence.[6] While the exercise of these powers is undoubtedly reviewable under the Constitution for legality, there are considerable practical obstacles to any such review. It is difficult to review the restriction of information the content of which one is ignorant, let alone where one is ignorant of its very existence. Although not in the context of PAIA, the Constitutional Court has refused an interlocutory application[7] for limited access

[1] Intelligences Services Act 65 of 2002 s26.
[2] Intelligence Services Regulations GN R1505 *GG* 25592 (16 October 2003)
[3] Intelligences Services Act s 10(3)*(d)*
[4] See F Michelman 'The Rule of Law, Legality and Supremacy of the Constituiton' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS March 2005) Chapter 11.
[5] Promotion of Access to Information Act 2 of 2000 ('PAIA') s 41.
[6] PAIA s 41(4).
[7] *Independent Newspapers* (supra) at para 21.

to documents by a party and its legal representatives in order to challenge restrictions on the disclosure of the document, even though the restricted material concerned had been in the public domain for several weeks and had already received wide circulation to the clerks and administrators of the court,[1] the lower court as well as the attorneys and counsel for the State. Undoubtedly, the courts themselves may require sight of such information even where it is denied to those who seek to challenge its restriction.[2] Notably, PAIA also provides for a general public interest override under which the relevant information officer is required to disclose information which would otherwise be justifiably withheld when such disclosure meets a high public interest threshold.[3]

Various provisions in legislation governing nuclear power[4] provide for national security restrictions, create serious offences for transgression and provide for a judicial discretion in proceedings under these statutes to restrict public access to the court and to the record. This however was found in *Geiges*[5] not to entitle the prosecution to a blanket restriction on public access to proceedings. Moreover, any claims to state restriction of nuclear secrets would, for the same reasons articulated above, be susceptible, at least in principle, to scrutiny by the courts.

Finally, various other pieces of apartheid legislation that contain restrictions on information and are arguably arbitrary and overbroad, remain on the statute books. These provisions are of doubtful constitutional validity.[6]

(iii) *Case law*

The conception of separation of powers which the Constitution embodies does not preserve for the legislature or executive the ultimate determination as to whether a matter is necessary for national security.[7] This reflects one of the fundamental changes between the pre- and post-constitutional dispensations: Today, the courts are the final arbiters of the exercise of state power even, or perhaps more particularly, where such power is exercised in the name of national security. This is the necessary effect of constitutional supremacy[8] and the role of the courts as the institution ultimately responsible for the interpretation and application of the Constitution.[9]

[1] *Independent Newspapers* (supra) at paras 143 and 149.

[2] *Independent Newspapers*, discussed in greater detail below, stating that the state's claims to restriction on grounds of national security are not decisive and do not oust the Court's jurisdiction.

[3] PAIA s 46.

[4] Nuclear Energy Act 46 of 1999 ('the NEA') in particular s 21(2)*(b)*; Non-Proliferation of Weapons of Mass Destruction Act 87 of 1993 ('the NPWMDA') in particular s 52(1).

[5] *S v Geiges & Others (M & G Media Ltd & Others Intervening)* 2007 (2) SACR 507 (T)('*Geiges*'), discussed further above. See § 42.9*(c)*(i) supra.

[6] See, for example, The National Supplies Procurement Act 89 of 1970 in particular s 8B.

[7] For more on separation of powers generally, see S Seedorf & S Sibanda 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12.

[8] FC s 2.

[9] FC s 165.

Although these doctrines are easy enough to assert at the level of high principle, it is the manner in which the courts interpret and apply them in particular cases at particular historical moments that defines the true contours of this fundamental judicial power in a constitutional democracy. For example, the courts in the United States, which enjoy similar constitutional powers of interpretation and review,[1] have at certain times strongly and dramatically asserted this power in blocking government action premised on uninterrogated claims of national security or the national interest, but at other times they have extended broad deference to such actions.[2] In the influential *Pentagon Papers* case, the Court declined to grant a prior restraint on publication of material that the government contended would be damaging to the national security if disclosed.[3] In a string of separate concurring judgments the majority judges laid down or reaffirmed principles that emphasised the readiness of the courts to interrogate government claims of national security or national interest over the right to freedom of expression.

Although these judgments are examined in more detail elsewhere in this chapter,[4] there are a few noteworthy points at this stage. The first is the refusal of the Court to recognise any residual or inherent power to obtain a prior restraint on the basis of a general assertion of national security. The state was required to point to specific powers extended to it. This it could not do.[5] There was no doubt of the President's power, for example, to classify information.[6] However, that power was not relied upon in *Pentagon Papers*. Secondly, the court emphasised the heavy presumption in favour of the First Amendment and press freedom over national security.[7] The presumption arose, inter alia, from the paramount responsibility of the free press to prevent government from deceiving the people.[8] Thirdly, surmise and conjecture was not acceptable. The government could not approach the court with mere statements of conclusions[9] that a particular act would damage national security. Only governmental allegation supported by proof that publication must 'inevitably, directly and immediately'[10] cause the perceived harm to national security would be sufficient to support even an interim restraining order restricting the media's freedom to publish.

[1] Though implied rather than express, and exercised on the authority of the seminal judicial precedent of *Marbury v Madison*. 5 US (1 Cranch) 137 (1803).

[2] Focusing more pertinently on fair trial rights and national security rather than freedom of expression, see *Hamdan v Rumsfeld* 548 US 557 (2006)(Made limited inroads into the military commissions established in terms of the United States Military Commissions Act of 2006 and particularly the ability of Guantanamo Bay prisoners to challenge their classification as 'enemy combatants'). But see, more recently, *Boumediene v Bush* 553 US — (2008)(United States Supreme Court, by 5-4 majority, ruled that Guantanamo Bay prisoners do enjoy the protection of the United States Constitution.)

[3] *New York Times v US* 403 US 713 (1971), 91 W Ct 2140, 29 LEd 2d 822 ('*New York Times v US*', also referred to as '*Pentagon Papers*').

[4] For more on *Pentagon Papers*, see § 42.9*(h)* infra.

[5] *New York Times v US* (supra) at 720-724.

[6] Ibid at 741 (Marshall J concurring).

[7] Ibid at 723 (Douglas J concurring).

[8] Ibid at 717 (Black J concurring).

[9] Ibid at 727 (Brennan J concurring).

[10] Ibid at 726-727 (Brennan J concurring).

Our own jurisprudence dealing with the clash between the state's national security claims and fundamental rights, particularly freedom of expression and open justice, is in its infancy. In the few cases that have arisen, our courts have laid down some promising foundational principles, though in the application of these principles there is evidence of a deference to the executive's national security assertions.

An important preliminary principle flows from the Constitutional Court's decision that whether legislation is necessary for national security purposes is objectively justiciable in the context of separation of powers between national and provincial legislatures.[1] If the question is objectively justiciable in that context then it is difficult to see how it would not be held to be justiciable also in other contexts where the issue may arise.

The most important case in this area is *Independent Newspapers*[2] where the Constitutional Court for the first time asserted a number of important foundational principles. The case is considered in detail earlier in this chapter,[3] but it is useful to summarise these principles again here. One, and most significantly, the Court (both the minority and majority)[4] rejected the state's contention that the classification of a document ousts the courts' jurisdiction to consider the justification for such classification and, if necessary, to lift it: The 'mere ipse dixit of the minister concerned does not place such documents beyond the reach of the courts'.[5] Two, while the Court accepted that openness of court proceedings — and the necessary corollary of freedom to publish — is the 'default position',[6] the Court rejected the principle that restrictions on public access to court proceedings, and accordingly media freedom to report, is permissible only in exceptional circumstances.[7] Three, the Court refused to mandate a formal application procedure whenever the state seeks a restriction on this ground or to find that the state bears a true onus of demonstrating that the restriction is justifiable. The Court preferred to adopt a weaker and, in our opinion, more ephemeral test of 'balancing' or 'weighing' the competing rights or interests in favour of restriction versus the right to report, under the rubric of an ultimate determination of the interests of justice in the circumstances of each case.[8] While the Court was prepared to set

[1] *Chairperson of the Constitutional Assembly, Ex p: In re Certification of the Amended Text of the Constitution of the RSA* 1996 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at para 155 (The statement was made in the context of applying the 'tie-breaker' provisions under FC s146. FC s 146(2)*(c)* provides in effect that national legislation prevails over provincial legislation when 'the national legislation is necessary for. . . the maintenance of national security'.)

[2] *Independent Newspapers (Pty) Ltd v Minister for Intelligence (Freedom of Expression Institute Intervening as* Amicus Curiae*)* 2008 (5) SA 31 (CC) para 49 ('*Independent Newspapers*').

[3] See § 42.9*(c)(i)* supra.

[4] In his dissenting judgment Yacoob J agreed with this finding. *Independent Newspapers* (supra) at para 89.

[5] Ibid at paras 53-54.

[6] Ibid at para 43.

[7] Ibid.

[8] Ibid at paras 55-56.

out some actors[1] that may be relevant to the determination of the 'interests of justice' test, it was reluctant to articulate firm principles.[2]

Elsewhere in this chapter,[3] we have expressed a preference for the approach of the minority in *Independent Newspapers*, namely, to apply a test akin to the limitations analysis to determine whether rights to open justice and freedom of expression should be curtailed in the interests of national security. Despite the majority's finding to the contrary,[4] we are of the view that an approach that permits limitation only to the extent demonstrably 'reasonable and justifiable in an open and democratic society' is more in keeping with the constitutional entrenchment of open justice and media freedom.

The correctness of this approach, even where the case involves potential disclosure of nuclear secrets, is supported by *Geiges*. In this case, decided before *Independent Newspapers*, the prosecuting authority sought to conduct an entire criminal trial, concerning serious charges of unlawful disclosure of nuclear secrets and sale of associated technology, in camera. Referring extensively to the Constitutional Court's jurisprudence in respect of open justice and media freedom, the Court held that such a blanket secrecy order was hopelessly overbroad and that restrictions on disclosure should be evaluated and ordered in the course of the criminal proceedings themselves.

Morevoer, at the jurisprudential level, as we have argued earlier,[5] the *Independent Newspapers* majority's repeated resort to a vague balancing of interests and rights under the umbrella of the interests of justice introduces much uncertainty and has ultimate consequences for the rule of law. This is illustrated by the difference between the minority and majority judgments in *Independent Newspapers*. While the minority preferred an approach akin to the limitations enquiry, it was prepared

[1] *Independent Newspapers* (supra) at para 55 (The court will have regard to 'all germane factors' which include 'the nature of the proceedings; the extent and character of the materials sought to be kept confidential; the connection of the information to national security; the grounds advanced for claiming disclosure or for refusing it; whether the information is already in the public domain and if so, in what circumstances it reached the public domain; for how long and to what extent it has been in the public domain; and, finally, the impact of the disclosure or non-disclosure on the ultimate fairness of the proceedings before a court.' The Court emphasised that these factors are neither comprehensive nor dispositive of the enquiry.)

[2] Ibid at paras 56-57.

[3] See § 42.9*(c)(i)* supra.

[4] *Independent Newspapers* (supra) at para 44. This finding flows from what we would submit to be a fundamentally flawed premise which grounded the Court's reasoning; namely, that the Court was confronted by equal and competing constitutional claims, on the one hand the rights to press freedom and open justice and on the other hand 'government's obligation to pursue national security'. Ibid at para 56. The government's obligation to ensure national security is regulated by legislation under the Constitution. It is not of comparable status to the fundamental rights with which it is 'balanced' by the Court. Implicitly, the Court found that the executive enjoys an inherent and residual right to assert national security at any time. This type of 'right' has been rejected by the courts in the United States. See *New York Times v US*.

[5] See § 42.7*(d)*(ii)(bb) supra.

to apply, for the sake of argument,[1] the 'interests of justice' approach preferred by the majority. Applying the majority's test, Yacoob J came to a starkly different conclusion on the facts. Yacoob J undertook a careful analysis of the documents which the Minister persisted in objecting to forming part of the public record.[2] Yacoob J rigorously demonstrated that in many instances the contents of the remaining restricted materials were already in the public domain, having been widely reported on previously. This tipped the balance decisively against restriction.[3] Moreover, Yacoob J demonstrated that in the case of some of the restricted material, a primary motivation for the state's objection appeared to be avoiding embarrassment.[4] This too was not a legitimate factor to weigh in the balance.[5] Notably, while both the minority and majority recognised that much of the material which the Minister sought to restrict was not classified[6] — and peculiarly in the case of one of the documents, was classified in the course of the proceedings themselves — this fact did not feature in the majority's evaluation. This is in stark contrast to the approach adopted by the United States Supreme Court, where the failure to point to a specific power — rather than an 'inherent' or 'residual' power — under which documents were restricted would be a decisive factor against allowing them to be withheld from publication.[7]

Compared to the majority's interests of justice 'balancing' approach, limitations analysis requires a far more careful analysis. The requirements of a limitations analysis are considered in considerable detail elsewhere in this work,[8] but, in essence, the limitations analysis involves an investigation into the proportionality between the object sought to be achieved (which must be legitimate) and the constitutionally invasive means of achieving that object.[9] As indicated above, Yacoob J did not in fact apply the limitations analysis test for which he advocated, but a limitations-type approach would presumably have excluded issues of embarrassment and the fact that material was already in the public domain as bases for

[1] *Independent Newspapers* (supra) at paras 82 and 85.

[2] Ibid at paras 90-136.

[3] This principle has been applied in the United Kingdom where restraints on publication have been sought based on national security claims. See *Attorney-General v Guardian Newspapers (Ltd) & Others (No 2)* [1988] 3 All ER 638 ('*Spycatcher Case*').

[4] The National Intelligence Agency operatives, on instructions from their seniors, had engaged in an unlawful surveillance operation of Sakumzi Macozoma. They had been exposed early in the operation when they were observed by a private security company in their own vehicles, rather than unmarked NIA vehicles, who summoned the police.

[5] *Independent Newspapers* (supra) at para 118.

[6] Ibid at para 51.

[7] *New York Times v US* (supra) at 720-724.

[8] S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[9] See, for example, *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at para 33; *S v Manamela (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC), 2000 (1) SACR 414 (CC) at para 33.

allowing restriction because there would be no rational connection between the restriction and the legitimate object of national security. Moreover, as the minority demonstrated, in many instances the restrictions were overbroad and capable of being more narrowly-tailored, such as by redaction of the names of sensitive individuals, in order to achieve the legitimate national security objects. The search for less restrictive means is an explicit part of the limitations analysis that makes it more likely that courts using this approach will consider alternative options that do not tread as heavily on freedom of expression.

Perhaps the most critical distinction between the judgments of the minority and majority in *Independent Newspapers* was in the approach to the background circumstances of the proceedings themselves. Yacoob J was at pains to emphasise as a foundation of his reasoning that the newspaper had not approached the Court on self-interested grounds but in fulfilment of its constitutional obligation to keep the public informed.[1] It had come to court urgently, in circumstances where an appeal record and heads of argument had been removed from the public domain, when none of the parties to the proceedings in the courts below had sought to restrict the materials from the public record[2] and where the appeal in which the record was restricted concerned matters which were of the highest public interest. The underlying proceedings involved the suspension and dismissal of the Director General of Intelligence by the President following abuse of the state intelligence structures including the unlawful surveillance of a private citizen.[3] There were, furthermore, suggestions that these activities had been carried out in furtherance of political objectives. Yacoob J's careful analysis of the material reveals that a discrepancy between one particular document over which the Minister asserted secrecy[4] and the version of the document released to the public was deliberately calculated to conceal the unlawful activities of the National Intelligence Agency and was an exercise in public deceit.[5] This background was critical to the interests of justice enquiry for Yacoob J, though it received little express consideration in the balancing of the majority. As Yacoob J articulated it:

> [T]he circumstances in which an intelligence agency came to improperly and unlawfully infringe upon the privacy of an innocent citizen are not merely matters of public curiosity. They would be issues of immense public interest. The degree of public interest is an important factor to be put into the balance and would, in my view, not be of insignificant weight if the interest is one that must be fulfilled.[6]

[1] *Independent Newspapers* (supra) at para 142.

[2] These facts (public importance and the removal of an otherwise unrestricted record only on appeal) were recognised by the majority. *Independent Newspapers* (supra) at paras 3-7 and 42.

[3] Ibid at para 103.

[4] The report of the Inspector General of Intelligence into the unlawful activities undertaken by the NIA operatives. The IGI's report was restricted while a 'sanitised' version was released to the public. As Yacoob J's analysis demonstrates, the sanitised version did not simply remove security sensitive information, but had distorted certain elements of the report. *Independent Newspapers* (supra) at para 127.

[5] *Independent Newspapers* (supra) at paras 127-136.

[6] Ibid at para 88.

(h) Prior restraints on publication

Prior restraints impose restrictions on speech before the speech is ventilated in the public domain; they seek to ensure that the affected speech never sees the light of day. We have already considered prior restraints in the context of defamation, privacy and contempt of court law.[1] In this section we briefly consider a number of other areas of free speech law in which prior restraints may be used to silence speech. The most common are film and video censorship regimes, and judicial interdicts prohibiting publication.[2]

(i) *The presumption against prior restraints*

In principle, a commitment to freedom of expression requires that courts view prior restraints as unconstitutional unless exceptional factors are present. Historically, freedom of expression and especially the right to a free press have been regarded as encompassing, at their very basic level, the freedom to publish first and suffer the consequences, if any, thereafter.[3] This basic point of departure has been eloquently articulated by Blackstone:

> Every free man has an undoubted right to lay what sentiments he pleases before the public … but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.[4]

The contrast is therefore between restraints on publication at the outset, and subsequent criminal or civil sanctions that may be visited upon the speech once it has been published. It is submitted that prior restraints are clearly more invasive of free speech than subsequent sanction; while the latter may be said to 'chill' free speech, the former can legitimately be regarded as freezing speech.[5] There are a number of reasons for the hostility towards prior restraints:[6] they replace speech

[1] See §§ 42.9*(a)*, 42.9*(b)* and 42.9*(c)*(iv)(aa) supra.

[2] Other forms of prior restraint are discernable. For example, permit requirements that regulate public meetings could be regarded as prior restraints on free speech. See, for example, *Re Munhumeso & Others* 1995 (1) SA 551 (ZS)(regulations requiring consent to public processions not reasonably justifiable in interests of public safety); *Mulundika v The People* (1996) 1 BHRC 199 (SC Zambia)(requirement to obtain prior permission for public gatherings infringes the freedom of speech and assembly). See generally V Blasi 'Prior Restraints and Demonstrations' (1970) 68 *Michigan LR* 1481. See also S Woolman 'Freedom of Assembly' in S Woolman, T Roux, J Klaaren, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 43.

[3] F Abrams 'The Press *Is* Different: Reflections on Justice Stewart and the Autonomous Press' (1979) 7 *Hofstra LR* 563, 576.

[4] W Blackstone *Commentaries on the Laws of England Book IV* (1765) 151-152. See also *Greene v Associated Newspapers Ltd* [2005] QB 972 (CA)('*Greene*') at paras 42-43.

[5] A Bickel *The Morality of Consent* (1975) 61; H Fenwick & G Phillipson *Media Freedom under the Human Rights Act* (2006) 153. For a provocative contrasting view, see Barendt *Freedom of Speech* (supra) at 119-121.

[6] See generally Marcus & Spitz 'Expression' (supra) at 20-25–20-26.

with state-sanctioned silence; they are issued in circumstances where courts are, at least to a degree, engaged in speculative adjudication based on hypothetical harms that may or may not occur;[1] and, as with other forms of censorship, they result in self-censorship as citizen-critics check their behaviour to avoid having such restraints visited upon them.[2]

(ii) *Legislative prior restraint*

The Films and Publications Act[3] regulates films by means of a classification system; all films must be submitted for classification before they may be screened or distributed.[4] Films classified as XX or X18 may not be screened in public or distributed.[5] The classification committee may also compel the excision of certain parts of the film.[6] Comparative jurisprudence indicates that such administrative controls on speech are acceptable provided that these controls contemplate procedural safeguards against adverse rulings, such as a right to a prompt judicial determination on the merits.[7] The South African legislation appears to be compliant with this jurisprudence; for instance, there are provisions that afford affected persons rights of appearance and representation before the committee, and provision is made for rights of appeal to a Review Board and then to the High Court.[8] This is not to say that the substantive provisions of the FPA that regulate when films may be banned or scenes excised necessarily escape unscathed; these will have to be tested independently, as has happened, for instance, to the prohibition of child pornography.[9] While *films* are subjected to

[1] See *Greene* (supra) at para 57.

[2] See generally the discussion in G Robertson & A Nicol *Media Law* (4th Edition, 2002) 19-27.

[3] Act 65 of 1996 ('FPA').

[4] FPA s 18(1).

[5] FPA ss 25*(a)* and *(b)*. A film classified as X18 may, however, be exhibited by a holder of a licence to conduct the business of adult premises. FPA s 24(1). For discussion of the various classifications of films and publications, see § 42.9*(e)* supra.

[6] FPA s 18(4)*(b)*.

[7] *Freedman v Maryland* 380 US 51, 58 (1965)(Censors bear the burden of proving that the film is unprotected expression, and banning a film ultimately requires a prompt judicial determination); *Little Sisters Book & Art Emporium v Canada (Minister of Justice)* [2000] 2 SCR 1120 at paras 70-107 (While customs legislation responded to a pressing objective to prohibit the import of obscene material into Canada, importers of obscene material entitled to fair customs procedure prior to classification and banning). Ibid at paras 230-39 (In a powerful dissent, Iacobucci J argues that the customs legislation displays all the hallmarks of unjustifiable prior restraints). See also *R v Glad Day Bookshops Inc* (2004) 239 DLR (4th)(An Ontario judge ruled that the overbroad film censorship system in that province was not a justifiable restriction of the constitutional right to freedom of speech. The legislation applied to all films and in respect of all viewers; further, other expressive media in Ontario do not have to be approved prior to publication. Ibid at paras 144, 155.)

[8] FPA ss 19, 20 and 21.

[9] *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & Others* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC)('*De Reuck*'). See also § 42.9*(e)* supra. For an argument that prior restraints may be objectionable even in the context of film classifications, see Barendt *Freedom of Speech* (supra) at 131-133.

a prior restraint regime, the same does not apply generally to *publications*.[1] Members of the public may complain about certain publications, which are then referred to a classification committee for classification.[2]

(iii) *Judicial prior restraints*

The jurisprudence of the US Supreme Court endorses the salutary principle that judicial prior restraints constitute severe restrictions on free speech that are only exceptionally justifiable.[3] In the leading case *Near v Minnesota*,[4] state legislation permitted a court to enjoin as a public nuisance any malicious, scandalous, obscene or defamatory publication. The statute was held to constitute an unconstitutional prior restraint. The Supreme Court, however, left open the possibility that such restraints could be issued in exceptional cases, such as the location of troops.[5] In the most resounding expression of the principle against prior restraints — the *Pentagon Papers* case[6] — the majority of the Supreme Court overturned temporary orders that had been granted against newspapers preventing them from publishing classified state documents relating to the government's involvement in the Vietnam War because as Brennan J held, 'I cannot say that disclosure of any of [the documents] will surely result in direct, immediate, and irreparable damage to our Nation or its people'.[7]

[1] Except where a publisher intends to distribute a publication that is likely to contain material which would be classified as XX or X18. FPA s 17(4).

[2] FPA s 16. Clause 16(1) of the controversial Films and Publications Amendment Bill 27B-2006 proposes to require that publishers ('other than a newspaper that is published by the Newspaper Association of South Africa') must submit a publication for classification if the publication contains 'visual presentations, descriptions or representations' amounting to, inter alia 'sexual conduct'. This provision would introduce a general prior restraint regime for publications (with the exception of certain newspapers), and, if enacted, would be vulnerable to constitutional attack. See generally I Jamie SC *Opinion furnished to Parliament in respect of the Constitutionality of Certain Provisions in the Films and Publications Amendment Bill (B27B-2006)* (5 December 2007, on file with the authors) 17-24.

[3] *Bantam Books Inc v Sullivan* 72 US 58, 70 (1963)('Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity'.)

[4] 283 US 697 (1931)('*Near*'). See also *Lovell v Griffin* US 444, 58 SCt 666 (1938)(city ordinance prohibiting the distribution of literature of any kind, at any place, and in any manner, without a permit from the City Manager, strikes at the very foundation of freedom of the press by subjecting it to licence and censorship); *Nebraska Press Association v Stuart* 427 US 539, 96 SCt 2791 (1976)(court order prohibiting the reporting of the existence or nature of any confessions or other information implicating a person accused of murder is an unconstitutional prior restraint on reporting news about crime).

[5] *Near* (supra) at 716.

[6] *New York Times v US* 403 US 713 (1971)('*New York Times v US*'). See also *Organization for a Better Austin v Keefe* 402 US 415 (1971).

[7] *New York Times v US* (supra) at 730. Ibid at 714-24 (Concurring judgments of Black and Douglas JJ). For an example of a justifiable prior restraint in US law, see *US v The Progressive Inc* 467 F Supp 990 (1979)(Article describing method of manufacturing and assembling hydrogen bomb could be restrained.) The presumption against prior restraints also applies in English law. See Human Rights Act, 2000 s 12(3)(No relief must be granted to restrain publication before trial unless applicant likely to establish that publication should not be allowed); *Cream Holdings Ltd & Others v Banerjee & Others* [2004] WLR 918 (HL)(Applicant's prospects of success at trial must be sufficiently favourable to justify prior restraint.)

There have been a number of decisions in South Africa that, it is submitted, support the presumption against the constitutional validity of prior restraints.[1] An important decision in this regard is Joffe J's ruling in *Government of the Republic of South Africa v 'Sunday Times' Newspaper & Another*.[2] The government sought an interdict preventing the publication by the *Sunday Times* of the findings of a commission of inquiry into whether any irregularities had occurred during the allotment and cancellation of a state tender for soya-based products. It based its argument on a governmental regulation made under the Commissions Act[3] that prohibited publication of the findings of a commission of inquiry until the State President had released the commission's report for publication or it had been laid before Parliament. The *Sunday Times* challenged the constitutional validity of this regulation on the basis of the right to freedom of expression.[4] Joffe J held that the Commission was investigating a matter 'pre-eminently of public concern and interest and of which the public is entitled to be fully informed'.[5] The regulation, in Joffe J's opinion, constituted a prior restraint because it was 'cast in such a manner that the report may never see the light of day. If the President does not release it for publication or lay it upon the table of Parliament, a matter of public interest could well be kept from the public forever'.[6] Quoting with approval from the US Supreme Court's decision in *Near v Minnesota*, the Court ruled that, though prior restraints may be acceptable in some circumstances, the allegations of irreparable harm that had been made by the government were speculative and offered no compelling basis for suggesting that the right to free speech should be limited.[7]

A further High Court case that is intuitively supportive of the general principle against prior restraints is *Romero v Gauteng Newspapers Ltd & Others*.[8] The Business Practices Committee had published a report under the auspices of the Ministry of Trade and Industry declaring that a harmful business practice involving the applicant was unlawful. The applicant launched proceedings challenging the findings of

[1] Some of these decisions were made in the specific context of defamation or privacy law and have been addressed at §§ 42.9*(a)* and 42.9*(b)* supra.

[2] 1995 (2) SA 221 (T), 1995 (2) BCLR 182 (T)('*Sunday Times*').

[3] Act 8 of 1947.

[4] The case was brought under the Interim Constitution (IC s 15(1) protected free speech), though the case is equally authoritative under the Final Constitution. See *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at para 23.

[5] *Sunday Times* (supra) at 228.

[6] Ibid at 229.

[7] Ibid. Cf *Mandela v Falati* 1995 (1) SA 251, 259 (W)('*Mandela*')(Prior restraints should not survive constitutional scrutiny save in exceptional circumstances). For examples of a case raising exceptional circumstances, see *Santam Ltd v Smith* 1999 (6) BCLR 714 (D)(The court restrained the respondent from continuing with a blackmail campaign against Santam Ltd); *Treatment Action Campaign v Rath & Others* 2007 (4) SA 563 (C)(Interim interdict granted to prohibit the publication by respondents of allegation that the applicant a front for pharmaceutical companies.)

[8] 2002 (2) SA 431 (W)('*Romero*'). The date of the report is deceptive; judgment in the case was handed down in 1997.

the Committee. Meanwhile the respondents planned to publish an article referring to the pending review proceedings. The applicant tried to prevent publication primarily on the basis that it was wrongful for the respondents to publish papers that had been filed at court before the matter was called in court. Wunsh J rejected this argument. To allow the argument would lead to 'a most peculiar and remarkable result. A newspaper can freely publish a report that a judgment … has been given against a person … but the newspaper cannot publish an article saying that the aggrieved party has appealed against the judgment … and the reasons why he or she says it is wrong'.[1] There was no suggestion that the publication would impede the administration of justice if it were published, nor could it be argued that the proposed report was defamatory.[2]

A significant contrast with the decisions that stress general antipathy for prior restraints is the Prophet Mohammed cartoons case: *Jamiat-Ul-Ulama of Transvaal v Johnnic Media Investments Ltd & Others*.[3] The context of the case was the world-wide controversy over the publication of Danish cartoons depicting the Prophet Mohammed, such as a cartoon depicting the Prophet Mohammed as a suicide bomber. The applicant, a voluntary religious association, sought to interdict the respondents from publishing any cartoons depicting the Prophet Mohammed. Jajbhay J granted the interdict on the grounds that the cartoons were 'demeaning' and 'undignified'. Depicting the Prophet Mohammed as a terrorist, he held, 'shows a lack of human sensibility and … advocate[s] hatred and stereotyping of Muslims on the basis of immutable characteristics'.[4] Finally, the publication would 'demean the dignity of an individual whom the Muslim community hold in highest regard'.[5]

It is our view that *Jamiat-Ul-Ulama* was wrongly decided. Jajbhay J's decision to grant the applicant a prior restraint severely impacts upon the right to freedom of expression. For instance, even the publication of one or two of the cartoons in the context of a serious discussion describing the controversy over the cartoons would be hit by the interdict.[6] Even where the content of speech could be classified as hate speech, the jurisprudence of the Broadcasting Complaints Commission of South Africa correctly recognises the right of the media to broadcast the

[1] *Romero* (supra) at 437-8.

[2] Ibid at 443-4. Although the judge reached the correct result, the decision is surprising for its lack of any reference to the right to freedom of speech and to cases such as *Mandela* (supra) and *Sunday Times*, both of which had been decided before *Romero*.

[3] [2006] ZAGPHC 12.

[4] Ibid at 8.

[5] Ibid at 9. For discussion of the decision, see NMI Goolam 'The Cartoon Controversy: A Note on Freedom of Expression, Hate Speech and Blasphemy' (2006) 39 *CILSA* 333; G Carpenter 'Freedom of Speech and Cartoons Depicting the Prophet Mohammed' (2006) 69 *THRHR* 684 ('Cartoons'); R Malherbe 'The Mohammed Cartoons, Freedom of Expression and the Infringement of the Right to Religious Dignity' (2007) *TSAR* 332.

[6] For example, the publication of one of the cartoons in the *Mail & Guardian* of 3 February 2006 would have been hit.

speech in the context of a discussion about the controversy.[1] In any event, we submit that Jajbhay J offers no proper basis for restraining the publication. First, it cannot be correct that the dignity of the Prophet Mohammed or, for example, Jesus Christ can be vindicated in our courts.[2] Secondly, to the extent that Jajbhay J regarded the cartoons as constituting hate speech, the judgment is devoid of any analysis as to why such a categorisation is appropriate. No evidence existed, for example, to show that the publication of the cartoons would constitute an incitement to cause harm to Muslims. Thirdly, although Jajbhay J is on stronger ground where he regards dignity as encompassing the values of a religious group,[3] this factor must be regarded as in general insufficient to outweigh the right of a newspaper to inform its readers of a topical controversy on a matter of public interest. On the facts, a report on the cartoon controversy without the ability to publish some of the cartoons impoverishes the debate. Precluding a newspaper from publishing material to give colour to a story is an infringement of editorial integrity.[4] There is in any event a world of difference between, for instance, the publication of the cartoons in a magazine dedicated to arguing that all Muslims are terrorists, and a balanced report on the cartoon controversy in a respected newspaper. Moreover, the Court in *Jamiat-Ul-Ulama* was concerned with a prior restraint; this form of censorship is qualitatively different as a matter of free speech law from a prosecution after the fact for the publication of hate speech or even blasphemy.

Cases such as *Jamiat-Ul-Ulama* should now be regarded as aberrations. The Supreme Court of Appeal's decision in *Midi Television (Pty) Ltd t/a e-TV v Director of Public Prosecutions*[5] has been discussed earlier.[6] In an obiter comment,[7] the Court proffered an approach to prior restraints in free speech cases that, if applied, will have the result that these orders should not be granted, unless , first, the prejudice

[1] See, for example, *Human Rights Commission of SA v SABC* 2003 (1) BCLR 92 (BCCSA) at para 40 (In public interest that listeners were informed of content of objectionable song by Mbongeni Ngema so that there could be an informed discussion). It is not without significance that at the time of the Danish cartoon controversy, many of those outraged by the cartoons distributed chain emails attaching the cartoons, to illustrate the extent of the insult. This act ironically illustrates the potency of allowing debate to flourish, rather than banning the cartoons. See P Stein & D Milo 'Media Rights Forged in Battle' *Sunday Times* (10 December 2006).

[2] See Carpenter 'Cartoons' (supra) at 689 ('Only living human beings can have rights; it is therefore impossible to infringe the Prophet Mohammed's right to dignity'.)

[3] Cf S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) at 36-10, 36-14, 36-15 (explaining one meaning of dignity as equal concern and respect and dignity to the realm as a whole). See also Malherbe (supra) at 333 (argues that the right to religious freedom includes the right to religious dignity, and that this right was violated by the cartoons).

[4] See, for example, *Fressoz and Roire v France* (2001) 31 EHRR 2 (publication of photocopies of tax assessments of high profile businessman necessary to give credibility to story highlighting disparity in pay increases between management and other employees).

[5] 2007 (5) SA 540 (SCA)('*Midi Television*').

[6] See §§ 42.9*(a)* and 42.9*(c)*(iv)(bb) supra.

[7] *Midi Television* (supra) at paras 19-20.

'that the publication might cause … is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place'[1]. The court must, second, be satisfied that 'the disadvantage of curtailing the free flow of information outweighs its advantage.'[2] Attempts to obtain interdicts on public interest speech should, after *Midi Television*, be subjected to very strict scrutiny.[3]

The presumption against prior restraints will be easier to rebut in cases where the speech interest is weak when compared with competing considerations. For instance, in cases where the media seeks to publish private information about an individual that clearly does not implicate a matter of public concern, and where the individual has proved that substantial harm to his or her dignity or privacy will otherwise result, it would be appropriate for courts to interdict publication.[4] Thus, in the English case involving the wedding of the celebrities Michael Douglas and Catherine Zeta-Jones, the Court of Appeal indicated that a differently constituted Court of Appeal was wrong in its earlier conclusion that unauthorized photographs of the wedding in *Hello!* magazine could not be restrained. The Court's conclusion rested on the absence of any public interest in the photographs and the infringement of the privacy rights of the celebrities.[5] While we concur in principle with the decision, it must be emphasised that in the absence of clear evidence of the damage that will be suffered, courts should as a matter of principle be loathe to grant interdicts that will stifle speech, especially where the speech implicates matters of public concern.

42.10 Special protection of speech in the legislature

As discussed above, a number of the rationales for protecting freedom of expression are contentious.[6] The one rationale that is, we submit, beyond dispute in a democracy such as ours, is the idea that freedom of expression promotes — and is, in fact, a prerequisite for — the proper functioning of a system of representative democracy. Nowhere is this more apparent than in the protection that democracies grant to freedom of speech in the legislature.[7] This protection has

[1] *Midi Television* (supra) at para 19.
[2] Ibid.
[3] Despite the *Midi Television* case, Eugene de Kock, the former apartheid police assassin, obtained an urgent ex parte interim interdict against the publisher and author of a book that he alleged defamed him. *De Kock v Struik Publishing (Pty) Ltd* unreported decision of the Transvaal Provincial Division Case No 54066/2007 (9 January 2008). The interdict was later discharged by Seriti J, who ruled that De Kock had not acted in the utmost good faith in failing to disclose the detail of his criminal history to the Court and that the allegations complained of were true and in the public interest. Ibid at 15 and 18.
[4] See *Prinsloo v RCP Media t/a Rapport* 2003 (4) SA 456, 476 (T)(*obiter* that publication of details of the sex lives of private individuals may be prevented by courts). See § 42.9*(b)* supra.
[5] *Douglas v Hello! Ltd (No 2)* [2003] EMLR 28 (CA). See also *Douglas v Hello! Ltd* [2001] QB 967 (CA).
[6] See § 42.5 supra.
[7] See *Matatiele Municipality and& Others v President of the Republic of South Africa & Others* 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC) at para 109 (Sachs J described Parliament as 'the engine-house of our democracy'.)

a very long pedigree, with the English Bill of Rights of 1688 proclaiming that 'the freedome of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'.[1] Parliamentary privilege also has a long history in South Africa, with the Parliament of the Cape of Good Hope enacting a statute safeguarding this privilege in its first session in 1854.[2]

The special protection of speech in legislatures is now expressly entrenched in the Final Constitution. The Final Constitution records that members of the national and provincial legislatures (as well as Cabinet members and members of the provincial executive committees) have freedom of speech in the relevant legislative body (the National Assembly, the National Council of Provinces and the provincial legislatures) and its committees, subject to the rules and orders of the relevant body.[3] It goes on to provide that such persons 'are not liable to civil or criminal proceedings, arrest, imprisonment or damages' for anything 'said in, produced before or submitted to' the legislative body or its committees as well as anything revealed as a result of anything that they have said in, produced before or submitted to that body or its committees.[4]

In relation to local government, FC s 161 states that provincial legislation, within the framework of national legislation, may provide for privileges and immunities of municipal councils and their members. The national framework legislation in respect of municipal councils is s 28 of the Local Government: Municipal Structures Act,[5] which essentially repeats the language of the sections of the Final Constitution on the privilege of the national and provincial legislatures. This national legislation is then given effect to by identical legislative provisions in each of the provinces.

Two justifications are traditionally advanced for the principle of Parliamentary privilege. First, Parliament should have complete control over its own proceedings and its members and therefore that 'matters arising in this sphere should be examined, discussed and adjudged in Parliament and not elsewhere'.[6] This is

[1] The Bill of Rights of 1688 describes this as an 'ancient' right and declares the position that had, by that time, already existed for many years. See *Poovalingham v Rajbansi* 1992 (1) SA 283, 286 (A) ('*Poovalingham*')(Corbett CJ); E Wade & A Bradley *Constitutional and Administrative Law* (10th Edition, 1985) 212.

[2] Act 1 of 1854. For a useful discussion of the chronological history of laws of Parliamentary privilege, see *Poovalingham* (supra) at 286-291.

[3] See FC s 58(1)*(a)*(Applies to Cabinet members and members of the National Assembly in the Assembly and its committees — this would not include Cabinet meetings); FC s 71(1)*(a)* (applies in the National Council of Provinces ('NCOP') and its committees and covers delegates to the NCOP, Cabinet members and Deputy Ministers who attend and speak in the NCOP or an official in the national executive or provincial executive who the NCOP requires to attend a meeting of the NCOP or a committee of the NCOP in terms of FC s 66(2), and part-time representatives of local government who participate in the proceedings of the NCOP in terms of FC s 67); and FC s 117(1)*(a)* (applies to members of the provincial legislature and the province's permanent delegates to the NCOP in the legislature and its committees.)

[4] FC ss 58(1)*(b)*(National Assembly), 71(1)*(b)*(NCOP) and 117(1)*(b)*(provincial legislatures).

[5] Act 117 of 1998.

[6] *Poovalingham* (supra) at 286 (Discussing the rationale for the rule of absolute Parliamentary privilege in England.)

essentially a separation of powers concern. Second, complete freedom of speech in the legislature promotes a proper functioning democracy.[1] As Mokgoro J stated on behalf of the Constitutional Court in *Dikoko*:

> Immunising the conduct of members from criminal and civil liability during council deliberations is a bulwark of democracy. It promotes freedom of speech. It encourages democracy and full and effective deliberation. It removes the fear of repercussion for what is said. This advances effective democratic government.[2]

Implicit in the blanket immunity contained in these provisions is an acceptance that legislatures cannot function effectively if those who participate in their proceedings do so under the threat of litigation (particularly for defamation) if they criticise or debate in an overly robust manner. The Final Constitution thus recognises that, in these institutions that are most vital to the democratic process, the remedy for bad speech is more speech, not legally enforced silence.[3]

While this carved-out sanctuary of free expression is fundamentally important to democracy, it is necessary to bear in mind that the potentially negative effects of this carve-out are also significant. The exclusion of the application of civil and criminal law means that, apart from the sanctions contemplated in the rules of the legislature, a member of the legislature cannot be held liable for anything he or she communicates in the legislature and its committees. This includes not only liability for defamation and breach of privacy but also criminal offences such as breaches of national security, incitement of violence and hate speech. Moreover, the effect of these provisions is effectively to oust the courts from adjudicating on what is said (or otherwise communicated) in the legislatures.[4] Accordingly, care should be taken in assessing whether Parliamentary privilege applies in a particular situation.

In the context of a defamation claim against an executive mayor, the Constitutional Court in *Dikoko* emphasised that, although the legislative immunity is 'an important bulwark of constitutional democracy', it prevents those who have been defamed from seeking recourse through the courts and thus 'raises important and difficult questions of constitutional principle'.[5] In this case, the Court assessed whether the chief executive officer of a municipality could sue the mayor

[1] *Dikoko* (supra) ('a Member must have a complete right of free speech in Parliament without any fear that his motives or intentions or reasoning will be questioned or held against him thereafter').

[2] 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC) at para 39.

[3] See *Whitney v California* (supra) at 377.

[4] This consideration seemed to weigh heavily with the Appellate Division in the pre-constitutional case of *Poovalingham*(The Court held that the communication to Parliamentarians of allegations relating to a private dispute between two members of the House of Delegates did not amount to the business of Parliament and thus fell outside Parliamentary privilege. As Corbett CJ stated: 'in determining the ambit of Parliamentary privilege the Court should, while giving full attention to the need for comity between the Courts and Parliament, not be astute to find reason for the ousting of the jurisdiction of the Court and for the limitation or defeat of the litigant's legitimate claims'. Ibid at 294.)

[5] *Dikoko* (supra) at para 1.

(a member of the municipal council) for defamatory allegations made before the North West Provincial Public Accounts Standing Committee (a committee of the provincial legislature). The mayor made the defamatory allegations in relation to a dispute regarding the mayor's outstanding cellular telephone account (he alleged that the CEO had deliberately allowed the mayor's account to accumulate so that the outstanding amount could be used by political opponents to attack the mayor's integrity). The difficulty for the mayor was that the statements were not made in a meeting of the municipal council (of which he was a member) but rather in a meeting of the provincial legislature (of which he was not). He therefore argued, first, that the immunity of municipal councillors extends to statements made outside the council in the course of the business of the council[1] and, second, that the immunity in the provincial legislature extended to non-members of the legislature that made statements in the committees of that legislature.[2]

The Court's decision on the first argument turned on the fact that the mayor's statements related to a personal dispute with the CEO and not to the real and legitimate business of the council.[3] It was therefore unnecessary for the Court to decide whether the privilege extends to the business of the council outside of the council and its subcommittees, and the Court left this question open.[4] Nevertheless, during the course of her judgment, Mokgoro J referred to a number of decisions of the Canadian courts which reason that Parliamentary privilege can extend beyond the walls of Parliament, provided that the conduct is an extension of the Member of Parliament's real or essential Parliamentary functions.[5] Although this approach may, in principle, be salutary, such an approach would appear to result in an unduly strained reading of the privileges provided for in the Final Constitution and the relevant legislation. It is difficult to see how a statement made outside the council (and its committees) is 'said in, produced before or submitted to the council or any of its committees'.[6]

[1] This argument was based on Local Government: Municipal Structures Act 117 of 1998 s 28 and North West Municipal Structures Act 3 of 2000 s 3.

[2] This argument sought to rely on s 117 of the Constitution (see above) as well as sections of the North West Provincial Legislature's Powers, Privileges and Immunities Act 5 of 1994.

[3] *Dikoko* (supra) at para 40.

[4] Ibid. The Court also left open whether or not the privilege extends to the executive (as distinct from the legislative) functions of a municipal council. Ibid at para 41. Although we accept that it may be difficult to delineate the legislative and executive functions of a municipal council, the extension of the privilege to executive functions would mean that municipal councilors would enjoy greater protection in relation to executive functions than the equivalent bodies at a national and provincial level. For example, although Cabinet members are protected by the privilege when they speak in the National Assembly (FC s 58), this provision does not extend to meetings of the Cabinet itself.

[5] Ibid at para 36. See, for example, *Roman Corp Ltd v Hudson Bay Oil Co Ltd* (1971) 18 DLR (3d) 134, 138; *Stopforth v Goyer* (1978) 87 DLR (3d) 373, 381; and *Re Clark v Attorney General of Canada* (1977) 81 DLR (3d) 33, 55.

[6] To use the wording of Local Government: Municipal Structures Act 117 of 1998 s 28.

In dealing with the second argument, the Constitutional Court took a stricter — and, we submit, correct — approach to the wording of the relevant privilege. Mokgoro J rejected the argument that a purposive approach required the Court to interpret the privilege for provincial legislatures as extending to persons who are not members of the provincial legislature but who participate in its proceedings, such as witnesses before the legislature or its committees. As Mokgoro J pointed out, the text specifically only extends the protection to members of the provincial legislature and cannot reasonably accommodate a broader construction that extends to non-members.[1]

The one constraint on expression in the legislature is that it must accord with the rules and orders of the relevant legislature. This qualification raises the threat of the legislature sanctioning speech through the use of its rules. This issue arose in *De Lille & Another v Speaker of the National Assembly*, in which the Cape High Court (Hlophe J) held that the suspension from Parliament of Patricia de Lille (then a PAC Member of Parliament) for a period of 14 days for asserting that various ANC MPs had spied for the apartheid government — statements for which she subsequently apologised — amounted to an unjustifiable infringement of freedom of expression.[2] Hlophe J therefore set aside her suspension.[3]

[1] *Dikoko* (supra) at para 45 (Mokgoro J points out that this is not an entirely satisfactory state of affairs and may lead to unfairness: '[A] situation is created where others who participate in the same deliberations as witnesses, promoting the same role and functions of the legislature and advancing the same business of the legislature are not protected. That leaves them exposed to criminal and civil proceedings on the basis that they are not members of the legislature. It might be argued that this does not seem to accord with the basic principle of fairness.' Mokgoro J thus seems to suggest that privilege should be extended to non-members of legislature who participate in their proceedings. She adds that this could be done on the basis of a qualified privilege (which was not raised by the defendant in *Dikoko*). While it may be appropriate to extend absolute privilege for civil liability to persons that are not members of the legislature, it seems to us that it would not be appropriate to extend criminal immunity to such persons. This would, for example, allow a person who is not a Member of Parliament to make statements jeopardising national security, provided he or she does so in a Parliamentary committee.)

[2] 1998 (3) SA 430 (C) at para 38. Hlophe J also held that the suspension failed the limitations test because it was not in terms of a law of general application. The suspension was not authorised by either the Powers and Privileges of Parliament Act, 1963 or the Standing Rules of the National Assembly. The so-called Parliamentary privilege does not qualify as a law of general application. Ibid at para 37.

[3] The Supreme Court of Appeal upheld the decision of the High Court. *Speaker of the National Assembly v De Lille & Another* 1999 (4) SA 863 (SCA). The SCA, however, confined itself to holding that Parliament lacked the power to suspend one of its members. The SCA therefore decided the case on the ground of legality and did not directly consider the freedom of expression challenge (although freedom of expression played a role in guiding the legality enquiry).

43 Freedom of Assembly

Stuart Woolman

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43.1 INTRODUCTION

Protests, assemblies and mass demonstrations played a central role in South African liberation politics. Now that the battle for liberation has been won, and all possess the franchise, there might be a sense that demonstrations have diminished in pitch and frequency. They have.

Still, mass protests continue to be an important form of political engagement. Organized labour, landless people, anti-privatisation movements, students, squatters, and even the police, have used demonstrations to press their demands. The continued vitality of assembly in the newish South Africa bespeaks its essential role in any liberal democracy.[1]

Freedom of assembly creates the space both to speak and to be heard. A single voice is likely to be drowned out in our polity. A choir is far more likely to get its message across.[2] Moreover, power in modern nation states invariably concentrates in and around large social formations: meaningful dialogue between these large social formations often requires the collective efforts of demonstrators, picketers and protestors.[3]

Consider, for a moment, the nature of this particular species of communicative action: dialogue. The genus speech — and by that I mean all forms of symbolic representation — makes us human. Dialogue raises us above the primitive. For it is only in dialogue with competent speakers that we are able to assert truth claims about the physical, and moral claims about the social. Only dialogue enables us to wring out of our shared endowment of working assumptions and half-truths the agreements that define the ends of our polity. This is a windy way of saying that dialogue, not the franchise, is the sine qua non of democracy. Some confuse this indispensability with instrumentality. That gets things back to front. Without

* I would like to thank Simon Deloneg for helping me to better understand how assembly law in South Africa works — and doesn't — in practice.

[1] *S v Mamabolo (E TV and others Intervening)* 2001 (3) SA 409 (CC), 2001 (1) SACR 686 (CC), 2001 (5) BCLR 449 (CC) at para 50 ('That freedom to speak one's mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, *assembly*, association and political participation protected by ss 15 - 19 of the Bill of Rights.' (Emphasis added).) See also *Handyside v United Kingdom* (1976) 1 EHRR 737 (European Court describes assembly as an ineradicable feature of democratic politics); *Johnson v Cincinnati* 310 F 3d 484 (6th Cir 2002) citing *Shapiro v Thompson* 394 US 618, 643 (1969)(Court recognizes that the constitution's commitment to liberty — freedom *simpliciter* — must protect rights to travel through public spaces and on roadways and rights to protest in those same spaces. Such rights are 'virtually unconditional.')

[2] See *S v Turrell and Others* 1973 (1) SA 248, 256 (C)('Free assembly is a most important right for it is generally only organized opinion that carries weight and it is extremely difficult to organize it if there is no right of public assembly.')

[3] See *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC)('*SANDU*') at para 8 ('[F]reedom of expression [FC s 16]. . . freedom of religion, belief and opinion [FC s 15], the right to dignity [FC s 10], as well as the right to freedom of association [FC s 18], the right to vote and to stand for public office [FC s 19] and *the right to assembly* [FC 17] . . . taken together protect the right of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where these views are controversial.' (Emphasis added).) See also *South African National Defence Union v Minister of Defence* 2004 (4) SA 10 (T); *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC); *NUMSA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC).

dialogue, there are no human subjects, no citizens. The relationship between democracy and dialogue is thus best understood in terms of reciprocal effect: dialogue is a necessary, but not sufficient, condition of democracy; democracy deepens our capacity for dialogue.

By foregrounding dialogue, I want to shift our attention, albeit briefly, away from the standard account, and that chestnut of democratic theory which tells us that although 45 million South Africans can get it wrong, the more we discuss the ideas we seek to put into practice, the better our decisions are likely to be.[1] Assemblies and demonstrations, on the standard account, generate debate and thereby improve our deliberative processes. That they *may* do. But they only do so because dialogue, and a commitment to reasoned discourse about the ends of life, has already made agreement and disagreement possible. What assemblies and demonstrations really force us to do is attend to situations where power — inequality in power, or abuse of power — has distorted our capacity to engage in reasoned discourse, and has valourized the interests of one segment of the polity over another.

This last observation suggests why freedom of assembly provides an effective means of communication for those who feel that their demands are not being given serious consideration by the state. Discrete and insular minorities – or so-called 'out-groups' — find it difficult to present their concerns within the confines of representative politics.[2] As we have already seen, size matters. For these 'out-groups', the freedom to assemble makes democracy visible and counters feelings of helplessness and isolation.[3] One of the primary consequences of minorities'

[1] See *SANDU* (supra) at para 7 (Freedom of expression — and related guarantees of assembly, association, belief, and the franchise — lie 'at the heart of a democracy.' Freedom of expression 'is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.') See also *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588, 608 (W) citing R Dworkin 'The Coming Battles over Free Speech' *New York Review of Books* (11 June 1992) 55, 56 ('A second kind of justification for [expressive conduct] . . . supposes that [such] freedom is valuable, not just in virtue of the consequences it has, but because it is an essential and 'constitutive' feature of a just political society that government treat all its adult members, except those who are incompetent, as responsible moral agents.')

[2] Put another way, marginal viewpoints, beliefs and practices may not command the attention they deserve because their proponents lack adequate political representation in Parliament. Freedom of assembly thereby provides a corrective to simple majoritarian rule. See, for example, *Seeiso v Minister of Home Affairs & Others* 1998 (6) BCLR 765 (LesCA). While the formal features of freedom of assembly analysis differ somewhat under the Lesotho Constitution, the substantive considerations remain the same. The Lesotho Court of Appeal in *Seeiso* found that the State's assertion that the 'security of the state', the 'protection of the public interest' and 'the maintenance of law and order' required the curtailment of a such a core constitutional right as freedom of assembly could not be vindicated without clear and convincing evidence. The *Seeiso* Court held that such overwhelming proof was presented neither to the High Court nor to the Court of Appeal. In granting the applicant the desired relief — permission to hold the assembly — the Court of Appeal held that the freedom of assembly was far too essential for the formation of public opinion in a free, open and democratic society to permit the courts to simply accept the State's contention that speech alone constitutes a serious threat to the commonweal.

[3] *Brokdorf* 69 Bverf GE 315, 345 (1985)('The unrestricted exercise of this freedom . . . has the effect of preventing a feeling of impotence and dangerous tendencies of general dissatisfaction with the state.')

subjective experience of empowerment is that majority rule is stabilized. By allowing minorities to express their disenchantment with the majority's decisions, the state's general exercise of power becomes more legitimate.[1]

In addition to providing an alternative mode of democracy for marginal groups, freedom of assembly also ensures the continuation of communication between voters and representatives. Assemblies enable the government to identify pressing problems that arise in the time between elections. Freedom of assembly thereby furthers accountability and responsiveness.

These rather arid, academic arguments miss much of that which makes assemblies, demonstrates, pickets, processions and marches truly dynamic and powerful. And that is the nature of the crowd. The crowd draws its power, as Cannetti notes, from its erasure of borders between individuals, the gravitational pull that an expanding, living, moving group has on those around it, and the incipient threat of violence that causes all around to sit up and take notice.[2]

Cannetti's observations about crowds suggest why, in South Africa, assemblies remain a potent tool. In the advanced western democracies, most communication is electronically disseminated. Citizens withdraw into private spaces and watch. Assembly has, consequently, a greatly diminished role to play with respect to political mobilization. In South Africa, many citizens lack meaningful access to such goods as computers, televisions and newspapers. Connections stay corporeal; television is no synecdoche for community. Assembly, the poor person's media, remains the best means for making the needs and the will of the majority heard. Pickets, marches, demonstrations and processions are fires that cannot be so easily put out — or turned off.

[1] The claim is descriptive, not normative. See JN Pandey *Constitutional Law of India* (29th Edition, 1996) 118 (Expressive rights enable a political system to negotiate social change and forestall revolution.) Habermas calls this 'grant' of political space for protest 'compensatory legitimation', because by abdicating power over 'mere' expression, the state enhances its own stability. J Habermas *Legitimation Crisis* (1975).

[2] E Cannetti *Crowds and Power* (1962) 22:

> [E]ruption . . . the sudden transition from a closed into an open crowd . . . is a frequent occurrence. . . . A crowd quite often seems to overflow from some well-guarded space into the squares and streets of a town where it can move about freely, exposed to everything and attracting everyone. But more important than this external event is the corresponding inner movement: the dissatisfaction with the limitation of the number of participants, the sudden will to attract, the passionate determination to reach all men.

See *In Re Munhumeso and Others* 1995 (1) SA 551, 557 (ZS), 1995 (2) BCLR 130 (ZS), 1994 (1) ZLR 49 (SC)('*Munhumeso*')(The *Munhumeso* Court dryly observes that: 'A procession, which is but an assembly in motion, is by its very nature a highly effective means of communication, and one not provided by other media. It stimulates public attention and discussion of the opinion expressed. The public is brought into direct contact with those expressing the opinion'); *Ezelin v France* [1991] EHRR 362 at para 32 (Right of assembly often exercised through public procession); *H v Austria* [1989] EHRR 70. But see *Fourways Mall (Pty) Ltd v South African Commercial Catering* 1999 (3) SA 752, 759 (W)(Neither LRA nor FC s 17 provides protection for pickets that violate conditions of court order and proceed in a manner that interferes with the rights of the public and other tenants of a shopping mall. Assault and intimidation are not acceptable forms of expressive conduct.)

Crowd action — loud, noisy, disruptive, and sometimes dangerous — ought to be viewed, as Kraemer persuasively argues, as a direct expression of popular sovereignty.[1] By creating space for crowd action, FC s 17 vouchsafes a commitment to a form of democracy in which the will of the people is not always mediated by political parties and the elites that run them.

So much for the arguments from democracy. The philosophical justifications for freedom of assembly are not, however, exhausted by the freedom's political utility. All individuals develop their personality and unique talents in the context of groups.[2] Goods such as companionship and recreation are as important as any other[3] and are worthy of constitutional protection.[4]

43.2 The History and the Regulation of Assembly

(a) Apartheid and the old statutory framework

While assemblies may have played a central role in anti-apartheid politics, they played that role almost entirely without legal sanction. From the 1920s onward, the government enacted repressive law after repressive law in a largely successful

[1] See L Kraemer *The People Themselves: Popular Constitutionalism and Judicial Review* (2005). Michael Dorf & Barry Friedman have argued that the co-ordinate branches of government — the legislature, the executive and the judiciary — actually share the responsibility for constitutional interpretation. See M Dorf & B Friedman 'Shared Constitutional Interpretation' (2000) 2000 *Sup Ct R* 61. See also S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 31.3*(b)*(vi); S Woolman & L Yu 'The Selfless Constitution: Flourishing & Experimentation as the Foundations of the South African State' (2006) 21 *SA Public Law* — Kraemer's view is that such ecstatic expressions of the will of the people transform constitutional interpretation into an enterprise shared with the people themselves. See also B Ackermann *We the People* (1991).

[2] The notion that associations — of which assemblies are a subset — are constitutive of the self is developed at length elsewhere in this work. See S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) §§ 44.1*(b)*(i)-(ii).

[3] See, eg, *Coates v Cincinnati* (1961) 402 US 611, 615 (US Supreme Court notes that the freedom to assemble protects the 'right to gather' for purely social aims. Moreover, that such aims may serve no meaningful political end and may annoy non-participants is not a legitimate basis for restricting a gathering.) See also *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* [2001] ECHR 563 at para 86 ('Freedom of assembly as enshrined in Article 11 of the Convention protects a demonstration that may annoy or give offence to persons'); *Plattform 'Ärzte für das Leben' v Austria* [1988] ECHR 15; AE Schilder *Het recht tot vergadering en betoging* (1989) 120 (On the relationship between assembly and personality development); T Mauntz & G Durig *Grundgesetz Kommentar* 8 (1991) 88. As always, I am indebted to Johan De Waal for his patient explanation of German jurisprudence.

[4] It is, of course, another question as to whether assemblies that promote individual flourishing ought to trigger the protection afforded by FC s 17. There are good reasons to hesitate before we extend the ambit of FC s 17 to cover assemblies that lack even the most attenuated connection to the political process. As I note below, § 43.3*(a)* infra, extending the protection of FC s 17 to gatherings without any political dimension means that FC s 17 might, at least notionally, protect any meeting of 2 or more persons. We can rely on other constitutional guarantees as well as non-constitutional bodies of law to protect such recreational, religious, cultural or commercial gatherings. See, eg, FC ss 15, 18, 30, 31. Too broadly construed a right to assemble has the potential to weaken our commitment to assembly as a form of political participation.

effort to stifle dissent.[1] The promulgation of anti-assembly legislation accelerated dramatically after the National Party took power in 1948.

The National Party launched its campaign to eviscerate the freedom to assemble with the Suppression of Communism Act ('SCA').[2] SCA s 9 allowed the Minister of Justice to prohibit a gathering or an assembly whenever there was, in his opinion, reason to believe that the objects of communism would be furthered at such a gathering.[3] A few years later the government — in response to the ANC's 1952 defiance campaign — passed the Criminal Law Amendment Act ('CLAA').[4] The CLAA increased penalties for crimes committed in the context of political protest.[5] More serious limitations followed the enactment of a new

[1] Before 1950 assembly was, to some extent, permissively regulated by common law. At common law, the individual was entitled to all rights not expressly prohibited or limited by statute or by the common law itself. The crime of public violence served as the primary limitation on the freedom to assemble. See L Ackermann *Die Reg insake Openbare en Staatsveiligheid* (1984) 153 (Section 52 of the Internal Security Act 74 of 1982 repealed the common law with regard to open-air assemblies.) The law of assembly, even prior to 1950, was not so permissive with respect to black South Africans. See Black Administration Act 38 of 1927, ss 25 and 27 (Allowed the President to promulgate regulations with reference to 'the prohibition, control or regulation of gatherings or assemblies of Blacks' and 'the observance by Blacks of decency'); Black (Urban Areas) Consolidation Act 25 of 1945, s 38(3)*(r)*(Conferred power to the Bantu administration boards, under the supervision of magistrates, to control and restrict the meetings of 'Bantus'); Development Trust and Land Act 18 of 1936. See also A Mathews *Law, Order and Liberty in South Africa* (1971) 240–2, 249–50; J Dugard *Human Rights and the South African Legal Order* (1978) 186–91. Incidentally, the first regulatory framework for assembly after the Union was formed — the provisions of the original Riotous Assemblies Act 27 of 1914 — was adopted to enable the government to deal with white labour unrest.

[2] Act 44 of 1950. The Act was later incorporated into the Internal Security Act 74 of 1982.

[3] The Minister could, in terms of SCA ss 9 and 5, (which applied to listed persons), give notice to a person prohibiting him from attending any gathering. The provisions gave rise to a number of court cases that turned on the definition of the word 'gathering'. See, eg, *S v Meer En 'N Ander* 1981 (4) SA 604, 606 (A)(Court accepts premise of the statute — namely that the threat of communism, breakdowns in the security of the State, and the maintenance of public order were real enough to justify radical restrictions on gatherings. Having accepted the premise, the court then articulates a taxonomy of gatherings in which prohibited 'social gatherings' does not 'include the family … activities of the restricted person.') See also C Forsyth *In Danger for Their Talents* (1985) 148–67; Dugard (supra) at 162–3. The bench's blinkered world-view and its efforts to compartmentalize law and politics meant apartheid-era judges could, with a straight face, state that:

> freedom of speech and freedom of assembly are part of the democratic right of every citizen of the Republic, and Parliament guards these rights jealously for they are part of the very foundation upon which Parliament rests. Free assembly is a most important right for it is generally only organized public opinion that carries weight and it is extremely difficult to organize it if there is no right of public assembly.

S v Turrel 1973 (1) SA 248, 256 (C)(Magistrate's prohibition of a meeting in terms of Riotous Assemblies Acts s 2(1) reversed on grounds that the order did not identify the meeting at issue with sufficient clarity.) See also *S v Budlender & Another* 1973 (1) SA 264 (C); E Kahn 'Freedom of Assembly' (1973) 90 *SALJ* 18. Not until the late seventies did academic lawyers begin to criticize, ever so tentatively, both assembly legislation and the manner in which such legislation was construed by the courts. See, eg, J Van der Vyver *Die Beskerming van Menseregte in Suid-Afrika* (1975); J Van der Vyver *Seven Lectures on Human Rights* (1976).

[4] Act 8 of 1953.

[5] The Internal Security Act was designed to achieve a similar result. Act 74 of 1982, ss 58 and 59. See Ackermann (supra) at 164–8. The judiciary, on occasion, saw a political motive as an aggravating factor in sentencing. See E Cameron 'Civil Disobedience and Passive Resistance' in H Corder (ed) *Essays on Law and Social Practice in South Africa* (1988) 219, 231.

Riotous Assemblies Act in 1956.[1]

Open opposition to the government met with further restrictions in the 1960s and 1970s.[2] By the late 1970s it became almost impossible to obtain permission to assemble.[3] Attempts at reform in the early 1980s failed.[4] In the mid-1980s, as South Africa's political crisis deepened and it appeared that assembly law could get no worse, the government responded by issuing extremely restrictive 'emergency' regulations under the Public Safety Act.[5]

Real change began only in February of 1990, with the agreement of most political parties to the National Peace Accord ('NPA'). The NPA marked South Africa's first successful attempt to reconcile the rights of assemblers with the state's interest in public order.

(b) Democracy and the new statutory framework

(i) *Provenance of the Regulation of Gatherings Act*

The next two attempts to bring South African assembly jurisprudence into the twentieth century took place under the auspices of the Commission of Inquiry

[1] Act 17 of 1956. Initially, the Act allowed the Minister of Justice to prohibit any public gathering in order to maintain public peace or to prevent the engendering of racial hostility. However, the 1974 amendments to the Act extended the Minister's prohibitory powers to private gatherings. See Riotous Assemblies Amendment Act 30 of 1974, s 2(1). The Riotous Assemblies Act, s 17, states that a person commits the crime of incitement to public violence if the natural and probable consequences of his act, conduct, speech or publication would be the commission of public violence by others. At the time of writing, the Act was still in force. Demonstrations near Parliament were outlawed by the Gatherings and Demonstrations Act 52 of 1973.

[2] The General Law Further Amendment Act required that assemblies receive both the local authority's consent and the approval of a magistrate in the district in which the assembly was to take place. Act 92 of 1970, s 15. See Dugard (supra) at 187. Under the Internal Security Acts of 1976 and 1982, the Minister issued annually a notice that declared outdoor gatherings illegal — save for *bona fide* sporting and religious purposes — unless permission was obtained from a magistrate. Demonstrators often ignored the permission requirement, despite the fact that the requirement featured quite prominently in the state's strategy to suppress political protest.

[3] See H Corder & D Davis 'A Long March — Administrative Law in the Appellate Division' (1988) 4 *SAJHR* 281, 289.

[4] Not only did the Rabie Commission fail to deliver the hoped for reform, it could be argued that it led to an even more repressive regime of laws. See, eg, Internal Security Act 74 of 1982; Demonstrations in or near Court Buildings Act 71 of 1982. For a comprehensive analysis of the statutes, see Mathews (supra) 52–6, 139–47; Ackermann (supra) at 149–68.

[5] Act 3 of 1953. Regulation 7(1), Proclamation 109 of 1986 issued in terms of the Public Safety Act, held that '[t]he . . . Commissioner may for the purpose of the safety of the public . . . issue orders . . . (*b*A) whereby any particular gathering, or any gathering of a particular nature, class or kind, is prohibited at any place or in any area specified in the order.' A few challenges to the assembly regulations were successful. See, eg, *Natal Newspapers (Pty) Ltd v State President of the Republic of South Africa* 1986 (4) SA 1109 (N)(Court struck down Regulation 7(1)*(d)*). The majority were not. See, eg, *Van der Westhuizen NO v United Democratic Front* 1989 (2) SA 242 (A)(Court upheld regulation 7(1)*(b*A).) See E Mureinik 'Pursuing Principle: the Appellate Division and Review under the State of Emergency' (1989) 5 *SAJHR* 60; D Basson 'Judicial Activism in a State of Emergency: An Examination of Recent Decisions of the South African Courts' (1987) 3 *SAJHR* 28; M Kidd 'Meetings and the Emergency Regulations' (1989) 5 *SAJHR* 471. See also J Dugard, N Haysom & G Marcus *The Last Years of Apartheid: Civil Liberties in South Africa* (1992).

Regarding the Prevention of Public Violence and Intimidation ('Goldstone Commission'). The Goldstone Commission's first endeavour was to convene a multinational panel of experts to thrash out a new approach to assembly.[1] The Commission and its multinational panel then drafted new legislation intended to give effect to the principles enunciated in the panel's testimony. The result was the Goldstone Commission's greatest achievement: the Regulation of Gatherings Act ('RGA').[2]

(ii) *Analysis of the Regulation of Gatherings Act*

To Parliament's credit, the legislation retains the most interesting aspect of the panel's report: namely, the notion of 'demonstration as of right'. Demonstration as of right means that the ability to hold a public gathering, assembly or demonstration is not contingent upon approval by the state. Unfortunately, the RGA qualifies this 'right' in a manner that largely vitiates its significance.[3] Several other

[1] See P Heymann (ed) *Towards Peaceful Protest in South Africa: Testimony of a Multinational Panel Regarding the Lawful Control of Demonstrations in the Republic of South Africa before The Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation* (1993)('Heymann Report'). The panel's conclusions flowed from a single basic axiom: the right to assemble, demonstrate, protest and petition is a necessary condition for making good a democratic society's commitment to universal political participation. The Heymann Report should be viewed as part of the drafting history of the Regulation of Gatherings Act and as a corrective to errant readings of the Act by a variety of state actors.

[2] Act 205 of 1993. The RGA repeals the following statutes and sections of statutes dealing with assembly: Gatherings and Demonstrations in the Vicinity of Parliament Act 52 of 1973 (as amended in 1992); Demonstrations in or near Court Buildings Prohibition Act 71 of 1982; ss 46(1) and (2), 47, 48, 49, 51, 53, 57, 62 Internal Security Act 74 of 1982; Gatherings and Demonstrations in or near the Union Buildings Act 103 of 1992. Despite the manifest need for the repeal of these laws in order for the right to assemble to be meaningfully exercised in the run-up to the 1994 elections, the RGA was not enacted until 1996. See J Rauch & D Storey 'The Policing of Public Gatherings and Demonstrations in South Africa 1960–1994' *Truth Commission Research Unit* (May 1998) available at www.csvr.org.za/pubslist/pubspd.htm and www.csvr.org.za/papers/papjrds.htm, (accessed on 25 December 2004). The RGA states that it should not be understood to repeal any part of the following statutes: Arms and Ammunition Act 75 of 1969 (Section 38A sets out the requirements for carrying a gun in public); Dangerous Weapons Act 71 of 1968 (Section 2 permits the Minister to prohibit a person or class of persons from bearing arms in public); Control of Access to Public Premises and Vehicles Act 53 of 1985 (Allows the state to control — and completely restrict — access to public property); Civil Protection Act 67 of 1977; Public Safety Act 3 of 1953; Intimidation Act 72 of 1982; and Prevention of Public Violence and Intimidation Act 139 of 1991.

[3] Under the RGA, demonstrations require no notification at all. But do not be misled. Demonstrations consist of 15 people or less. See RGA s 1 ('[D]emonstration' includes any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action; . . . 'gathering' means any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989 [Act 29 of 1989], or any other public place or premises wholly or partly open to the air.') Gatherings, however, are subject to more onerous conditions. RGA s 4(3) reads, in relevant part: 'If a convener has been notified in terms of subsection (2) *(a)* or has not, within 24 hours after giving notice in terms of section 3(2), been called to a meeting in terms of subsection (2)*(b)* of this section, the gathering may take place in accordance with the contents of the notice and in accordance with the provisions of section 8, but subject to the provisions of sections 5 and 6.' The notice of gathering must be given either seven days in advance or 48 hours in advance. If the latter, the authorities have the right to prohibit the gathering. The ability of the drafters to assert that the legislation protects 'demonstration as of right' has as much to do with a definitional exercise that limits the scope of demonstrations as it does with any principled commitments.

provisions blunt, in a similar fashion, the potentially revolutionary vision of mass action envisaged by the RGA, and reflect the difficulty that present political actors have had in making a complete break with the past.[1]

The RGA requires that notice for gatherings be provided to local authorities and police seven days in advance.[2] This notice period creates doctrinal problems and practical difficulties.

Assembly doctrine must take account of the fact that assemblies are often an immediate response to actions — by the state or by private parties — that touch a raw nerve in some segment of the body politic.[3] Recall that we protect assemblies because of their capacity to communicate (some part of) the public will to the state, and in so doing, prevent the government from undertaking or continuing a particular course of action which lacks either public support or some other form

See § 43.3*(a)*(iii) infra (On the constitutionality, under FC s 17, of the RGA's construction of the term 'demonstration'). Put more bluntly, the intention of the legislature was to limit the *number* of people who could assemble freely, without requiring prior notice to the authorities.

The motivation for the distinction is laid bare in the penalties that attach to non-compliance with the notification requirements. Ask yourself, for example, whether 150 protesters, with the same grievance, assembled in groups of 15, say, 50 metres apart, constitute a *demonstration* or a *gathering*. Assume not one person in any of the 10 groups of 15 attempted to give notice. After all, a group of 15 is not required to provide notice. Should, however, this scenario be deemed a *gathering*, then each protester, if convicted, could receive a fine of up to R20 000 and/or a sentence of up to one year in prison. (The fines and sentences actually imposed under the act are not insignificant. Ten persons accused of failing to provide proper notice for a protest of over 100 persons were each — after a plea bargain — fined R3000 or sentenced to 3 months, suspended wholly for 5 years. Correspondence with S Delaney, Staff Attorney, Freedom of Expression Institute ('FXI')(25 February 2005)(On file with author).) The law thereby creates an incentive for 'guerilla'-type protests, consisting of small units of mobile, vociferous protestors. But perhaps the state is willing to take its chances with groups of 15, even if such groups are actually more difficult to control by law and by the exercise of police power.

[1] J Duncan 'Where is the Debate on Civil and Political Rights? The State of Censorship in South Africa' (Paper Presented on World Press Freedom Day, University of the Witwatersrand)(May 3, 2003) available at www.fxi.org.za, (accessed on 31 January 2005)(Even though the Landless Peoples Movement had scrupulously complied with the requirements of the RGA, the police used the RGA to censor expression rather than enable it. Having given notice of a peaceful demonstration in Ermelo, and having not received a reply from the police within 24 hours, the convener exercised his right to proceed with the march. On the day of the march, the police arrested half of the marchers for 'failing to disperse'. The arrests occurred after the demonstration had ended.) See also *Freedom of Expression Institute Newsletter* 'Landless Peoples Movement's ('LPM') Leaders Arrested' (2004)(Overzealous enforcement of the RGA is often exacerbated by police abuse subsequent to arrest.) It is difficult not to conclude that the security forces are intent on scaring the protest out of the LPM. The police have also used s 18*(b)* of the Electoral Act to prevent any gatherings of any kind on election-day.

[2] RGA s 3(2) reads, in relevant part: 'The convener shall not later than seven days before the date on which the gathering is to be held, give notice of the gathering to the responsible officer concerned: Provided that if it is not reasonably possible for the convener to give such notice earlier than seven days before such date, he shall give such notice at the earliest opportunity: Provided further that if such notice is given less than 48 hours before the commencement of the gathering, the responsible officer may by notice to the convener prohibit the gathering.'

[3] According to Article 8(1) of Germany's Basic Law, no permission from the state is necessary for using public streets for protests. See T Feldmeier *Politische Meinungsäusserung auf Offentlichen Strassen* (1982) 164. More importantly for the purposes of our analysis of the RGA's notice requirements, the German Constitutional Court has held that the administrative procedures surrounding the right to assemble must be assembly-friendly. See *Brokdorf* 69 *BVerfGE* 315, 355 (1985). The German Constitutional Court has even derived duties to co-operate and to facilitate from statutory notification requirements.

of legitimacy. The seven day notice period not only works to suppress dissent, it grants the government a grace period within which the government can turn intention into action before the public can register its collective ire.[1] The manner in which the RGA seven-day notice period frames our nascent assembly jurisprudence is difficult to square with how our courts have, heretofore, construed the Final Constitution's commitment to expression, in particular, and an open and democratic society, in general.[2]

In terms of practice, the RGA thwarts many a convener who, in fact, complies with the 7-day notice period. Take the recent experiences of the Thembelihle Crisis Committee ('TCC'). The TCC has adopted the practice of filing a notice — on a Friday — 10 days in advance of an assembly scheduled for two Mondays hence. On Monday, the local authorities set up a meeting for Tuesday. On Thursday, the TCC conveners receive notice that their assembly has been prohibited. On Friday, the TCC files an urgent application in Magistrate's Court to have the prohibition set aside. The Magistrate summarily dismisses the application, and rules as follows: *(a)* Rule 55(1) of the Magistrate's Court Rules requires that an application shall be delivered on 10 day's notice; *(b)* Rule 9 (14) states that this 10-day notice period may be reduced if an application shows 'good cause' and thereby satisfies the requirements for urgency; *(c)* since the applicants could not demonstrate the requisite risk to life or liberty, the application does meet the conditions for reduced notice; *(d)* no other remedy is contemplated in the rules; *(e)* the date of the proposed gathering possesses no particular significance;[3] and

[1] But see RGA s 12(2): 'It shall be a defence to a charge of convening a gathering in contravention of subsection (1)*(a)* that the gathering concerned took place spontaneously.' While the defence of spontaneity creates some breathing room, it is a decidedly narrow exception to the notice provisions and the penalties for non-compliance.

[2] Our courts have recognized the need to create rules that simultaneously encourage expression and protect those who interests might otherwise be prejudiced. See, eg, *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W) at para 25 citing *National Media Ltd v Bogoshi* 1998 (4) SA 1196, 1210 (SCA); 1999 (1) BCLR 1 (SCA)(Court finds that damages in defamation cases do not always strike the proper balance between expression and reputation, that 'nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error' and that a public apology provides a remedy that will 'set the record straight, restore the reputation of the victim, give the victim the necessary satisfaction, avoid serious financial harm to the culprit and encourage rather than inhibit freedom of expression.') For a somewhat more sanguine view of the legal framework created by the RGA, although uninformed by the actual practice of local authorities, see 'Politics in Public: Freedom of Assembly and the Right to Protest in South Africa' Democratic Dialogue Working Paper (1998) available at www.democraticdialogue.org, (accessed on 25 December 2004)('[P]erhaps the most interesting facet is the recognition of the inherent political nature of such public gatherings. This is acknowledged through the interlocking structure of the decision-making process which links the organisers, the police and the civil authorities as mutually responsible participants in the democratic process. In so doing it demands that each party recognise their role in maintaining the balance between human rights and social responsibilities.')

[3] It may be trivially true that the march date selected has no historic significance. But that does not mean that the local authorities are entitled to prohibit a protest, a picket, or a procession as it suits them. The default position ought to be that the time selected by conveners is meaningful — from the perspective of both effective communication and logistics. Only overridingly important government interests — an imminent threat to life and public order — ought to trump the right to demonstrate in public forums. Anything short of such a demonstrably significant interest requires that the state make every effort to vindicate both the expressive interests of the demonstrators and the interests of third parties in going about their normal, everyday business. See § 43.3*(b)*(iv) infra (Discussion of the appropriate conditions for time, place and manner restrictions.)

(f) future applications must observe the Magistrate's Court Rules with respect to proper notice periods.

The local authorities have, as the above account suggests, found themselves the unintended beneficiaries of a number of provisions in the RGA, the Magistrate's Court Rules and the Uniform Rules of Court. RGA s 4(3) requires local authorities to set up a meeting with the conveners and other interested parties within 24 hours of receipt of notification. Once the meeting takes place, the local authorities are, under RGA s 5(2), given a significant degree of discretion in deciding whether or not to prohibit the gathering.[1] Although the authorities are required, under RGA s 5(3), to give reasons for the prohibition, local authorities tend to generate form letter refusals; the RGA's provisions for judicial review conspire, along with the Magistrate's Court Rules, to prevent proper ventilation of the assembly issues raised by these form letter refusals. How do these procedures prevent proper review? RGA s 6(3)*(c)* bars magistrates from awarding costs when a convener seeks to have an order prohibiting a gathering set aside. The High Court can, under the RGA, still award such costs. So although the High Courts may be better suited to assess competing expressive and public order interests, the RGA channels the impecunious conveners toward the Magistrates Court.[2] The Magistrate, unfamiliar with the RGA, and taking the Magistrate's Court Rules on 'urgent' applications at their word, turns down the convener's application to have the prohibition set aside.[3] All the parties — from convener, to local authority, to magistrate — have complied with the required procedures and yet no

[1] See RGA s 2*(d)*: 'The responsible officer shall endeavour to ensure that such discussions take place in good faith.'

[2] In some respects, the RGA's attempt to channel cases into the Magistrate's Court may be less of a barrier to litigation in the High Court than the drafters of the RGA anticipated. Costs are generally not awarded in cases in which the litigant seeks to vindicate a constitutional right. To the extent that an applicant has a bona fide constitutional claim, and has not engaged in an abuse of the legal process, she should not have costs awarded against her. As a result, the RGA does not create a meaningful set of disincentives with respect to the launching of *constitutional* challenges in the High Court. See *Motsepe v Commissioner For Inland Revenue* 1997 (2) SA 898 (CC), 1997 (6) BCLR 692 (CC) at para 30 (Holds that general rule is that caution must be exercised 'in awarding costs against litigants who seek to enforce their constitutional right against the State, particularly where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or 'chilling' effect on other potential litigants in this category.') See also *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) at paras 43–44 (No order as to costs should have been made against applicant in the High Court even though 'resort to the Constitution had failed.' Therefore, 'the appellant is entitled to a reversal of that part of the order in the High Court condemning him to pay . . . costs and [he] should not have to bear the costs in this Court.') But see *Ingledew v Financial Services Board: In Re Financial Services Board v Van Der Merwe & Another* 2003 (4) SA 584 (CC)(Submission of record that failed to comply with Rules would warrant an order of costs.) However, it is not clear that an applicant who seeks to have a prohibition order made in terms of the RGA set aside in terms of the RGA itself, and not in terms of some provision of the Final Constitution, is similarly entitled to be immunized from an order of costs in the High Court.

[3] I am indebted to Simon Delaney — of the Freedom of Expression Institute ('FXI') — for his patient explanation of the procedural problems created by the interaction of the RGA, Magistrate's Court Rules and the Uniform Rules of Court when conveners attempt to secure prompt and adequate judicial review of a responsible officer's prohibition of a gathering. See *Juta's Supreme Court Act and the Magistrates' Courts Act and Rules* (3rd Edition, 2003).

gathering, and no meaningful assessment of the grounds for prohibition, takes place.

I have, in the above account, assumed 'good faith' efforts by all parties in order to illustrate the procedural problems created by the interaction between the RGA and the rules of court. However, the recent record of local authorities with respect to their statutory and constitutional obligations to facilitate assemblies suggests an attitude malign.

Local authorities often take more than a week to reply to a properly filed notice. This practice violates the 24-hour response requirements of RGA s 4 (3). Similarly, meetings with responsible officers and members of the South African Police Services (SAPS) — as required by RGA s 4(2)*(b)* — do not appear to be designed 'to discuss any amendment of the contents of the notice and such conditions regarding the conduct of the gathering as he may deem necessary.' In more than one instance, TCC conveners have proffered a variety of conditions, pursuant to RGA s 4(4)*(b)*, that would allow for a peaceful demonstration that does not compromise the interests of third parties.[1] Responsible officers have demonstrated little inclination to meet their statutory obligation to facilitate these events and have refused to negotiate conditions with TCC conveners. Instead, requests to demonstrate peaceably are met with blanket prohibitions. The TCC received the following letter from a responsible officer:

> You are hereby advised that your notice for a gathering on Monday, 29 November 2004 is prohibited because of the following reasons: . . . 1. The proposed times for the gathering from 06:00 until 09:00 will result in serious vehicular traffic because it is peak hour period. 2. There is also reasonable suspicion that your gathering will result in lawlessness and damage to property. Your gathering on Monday November 29, 2004 is thus prohibited.[2]

This prohibition is noteworthy in several respects. First, RGA s 4(4)*(b)* actually acknowledges that gatherings will, inevitably, disrupt traffic and contemplates an agreement between the responsible officer, the convener and the police that will ensure that 'vehicular or pedestrian traffic, especially during traffic rush hours, is

[1] The TCC volunteered to submit itself to the following constraints: Restricting the picket to a designated area; limiting the number of picketers to 60 persons, the majority of whom are over 50; cordoning off the picket; requiring picketers to stand in a straight line behind the cordon; designating 20 marshals, by name, and by identifiable marks such as armbands, to ensure that the picket complies with all stipulated conditions and statutory requirements. See Founding Affidavit, *Segodi, Miya and Thembelihle Crisis Committee v City Of Johannesburg & Minister of Safety and Security* (High Court, Witwatersrand Local Division, 26 November 2005)(Document on file with author.) The responsible officers neither agreed to nor engaged with these proposals — as RGA s 4(2)*(b)* would appear to require — during the meeting to discuss the proposed march.

[2] An application by the Anti-Privatization Forum to demonstrate on a weekend elicited a similarly spurious set of reasons for prohibition. The Chief of Police of the Johannesburg Metropolitan Police Department, Chris Ngcobo, justified the ban on the following grounds:

1. Your proposed gathering will result in serious disruption of vehicular traffice because of . . . the *tendency* of your participants, who deliberately stop while marching, to obstruct traffic.

. . .

3. The making of fire in a public place with the intention of burning . . . account statements.

Reply to Application for a Gathering, Sunday, March 21 2004, at the Constitutional Court in Johannesburg (18 March 2004)(On file with author).

least impeded.' Second, reasonable suspicion 'of lawlessness and damage to property' is not the standard set out in the RGA for the prohibition of a gathering. RGA s 5(1) demands 'credible information on oath … brought to the attention of a responsible officer.'[1] Third, the timing of the picket is, in fact, one of its essential features. Only by timing the picket for the morning rush hour are the picketers in any position to communicate to their fellow citizens — through banners with various slogans printed thereon — their concern about the lack of delivery of basic services in Thembelihle. A picket or demonstration at another time has no audience and serves no purpose.[2]

The RGA imposes more onerous provisions on gatherings scheduled with less

[1] US assembly jurisprudence sets a similarly high threshold for the state. US courts recognize the state's substantial interest in safeguarding its citizens against violence. See *Hill v Colorado* 530 US 703, 715 (2000)('It is a traditional exercise of the States' 'police powers to protect the health and safety of their citizens') quoting *Medtronic, Inc v Lohr* 518 US 470, 475 (1996). This substantial interest in public safety does not end the inquiry. The state must provide 'tangible evidence' that speech-restrictive regulations are 'necessary' to advance the proffered interest in public safety. See *Bay Area Peace Navy v United States* 914 F 2d 1224, 1227 (9th Cir 1990). Generalizations about groups or kinds of groups are insufficient. See *City of Chicago v Mosley* 408 US 92, 100–1 (1972)(Court rejects state's 'argument that . . . it may prohibit all non-labour picketing because, as a class, non-labour picketing is more prone to produce violence than labor picketing. Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications.') See also *Project 80's Inc v City of Pocatello* 942 F 2d 635, 638 (9th Cir 1991)(Court rejects city's public safety argument after finding 'little evidence' in the record that the ordinances banning door- to-door solicitation actually protected citizens from crime); *Hodgkins v Goldsmith* 2000 WL 892964 (SD Indiana 2000)(Court finds unconstitutional a curfew restricting minors' constitutional rights to assemble in public streets, parks and other traditional public fora. The mere 'common sense' justifications of the city council — married to its apparent lack of interest in providing the court with evidence linking security concerns and the behaviour of minors — elicited a withering critique.) But see *Grider v Abramson* 180 F 3d 739 (6th Cir 1999)(Court states that interests of security — and the high probability of violence — warrants upholding the following limits on two cotemporaneous demonstrations: (1) mandatory magnetometer searches as prerequisite to admission either to KKK rally or counter-demonstration, (2) physical segregation of KKK rally and counter-demonstration (which prevented attendees' simultaneous discourse with other attendees at both events), (3) exclusion of all private citizens from restricted police-occupied buffer zone, and (4) prohibition of all unscheduled oration within restricted area.)

[2] This account is based upon a founding affidavit drafted by the Freedom of Expression Institute on behalf of the TCC. See Founding Affidavit, *Segodi, Miya and Thembelihle Crisis Committee v City Of Johannesburg & Minister of Safety and Security* (High Court, Witwatersrand Local Division, 26 November 2005)(Document on file with author.) The TCC — with assistance from the Freedom of Expression Institute — is revising its litigation strategy in order to demonstrate how responsible officers, metropolitan police and local authorities abuse the discretion afforded them by the RGA. If convenors initiate the notice procedures well in advance of the scheduled date for the assembly, the state cannot so easily exploit the manner in which the RGA, the Magistrate's Court Rules and the Uniform Rules prevent the Magistrates Courts' — or High Courts — from reviewing the merits of the prohibition order. Either the local authority renders its decision within several days of a timeously called meeting or it delays issuance of the order for several weeks. If the local authority acts reasonably expeditiously and still prohibits the gathering, the Magistrates Court will have sufficient time to hear the merits of the application to have the prohibition set aside. If the local authority delays issuance of the prohibition until the very last minute, then it will be difficult to hide its facile reasons for the prohibition behind the RGA's procedures or the Magistrates' Court Rules. At a minimum, an established pattern of delay and dissembling will become part of the record of any application to a Magistrate's Court or a High Court.

than 48 hours notice.[1] Failure to meet the 48-hours-in-advance deadline for notice gives the local authorities almost unfettered discretion to issue prohibitions.[2] This extraordinary power to silence opposition places an unnecessarily blunt cudgel in the hands of individuals unlikely to place expressive interests on par with public order concerns.[3]

The 48-hour notice provisions bode ill for freedom of assembly.[4] Even expedited judicial review — which, as we have seen, is almost impossible to secure —

[1] RGA s 3(2).

[2] Ibid.

[3] Prior to the enactment of the RGA in 1996, several courts found unconstitutional the exercise by authorities of relatively unfettered powers to prohibit public assemblies. See, eg, *ANC (Border Branch) v Chairman, Council of State, Ciskei* 1992 (4) SA 434 (Ck), 1994 (1) BCLR 145, 165 (Ck)(Unfettered powers of prohibition of public assemblies given to magistrates and police found to be unjustifiable restriction of freedom of assembly) quoting *Dillon v Municipal Court for Monterey-Carmel* 49 P 2d 945 (1971) ('Any procedure which allows licensing officials wide or unbounded discretion in granting or denying permits is constitutionally infirm because it permits them to base their determination on the content of the ideas sought to be expressed.') See also *In re Munhumeso & Others* 1995 (2) BCLR 125 (ZS)(Impugned legislation clearly at variance with freedom of assembly; regulating authority had uncontrolled power to impose conditions which may amount to an absolute ban, irrespective of traffic flow or likelihood of a breach of the peace or public disorder); § 43.3*(b)*(iv) infra (On the constitutionality of statutory provisions that grant state officials untrammelled discretion with respect to time, place and manner restrictions.)

[4] The RGA does, however, have gaps with respect to adherence to the notice requirements that can be exploited by savvy protestors. According to RGA s 12(2): 'It shall be a defence to a charge of convening a gathering in contravention of subsection (1) *(a)* that the gathering concerned took place *spontaneously*.' See Affidavit of Na'eem Jeenah, Palestinian Solidarity Committee (3 November 2004)(On file with author)('On Wednesday, 20th October 2004 I was present at a protest outside the Sandton Convention Centre in Sandton. The protest was against the imminent arrival at the Convention Centre of Israeli Deputy Prime Minister Ehud Olmert and his signing of a protection of investment treaty with South Africa's Minister of Trade and Industry, Mandisi Mpahlwa. The protest was organised *spontaneously* in the morning of the 20th October 2004, when we confirmed that we would exercise our constitutional right to hold a peaceful protest.' (Emphasis added).) It seems clear — therefore — that a failure to notify the authorities in advance of a (planned) gathering can serve as a 'get out of jail free' card. A savvy protest organizer will leave no paper-trail. She will neither advertise the event with posters nor circulate e-mails that might ultimately contradict the defence of spontaneity. Of course, too many 'spontaneous' gatherings may lead both prosecutors and the courts to view the defence of 'spontaneity' with a healthy degree of scepticism. See *US v Masel* 54 F Supp 2d 903 (WD Wisconsin 1999)(US Courts will not allow demonstrators to escape time, place and manner restrictions on the grounds that the protestors are not, ostensibly, part of a formal association. Just as the absence of formal structures does not deny assemblers the protection of the First Amendment, the absence of formal structures does not absolve the demonstrators of the responsibility for complying with notice requirements and other facially neutral regulations. The *Masel* Court refused to allow demonstrators to hide behind the 'fiction' of non-association when they were, on the facts, clearly engaged in collective action.)

Or consider another way of complying with the notice requirements that avoids the possibility of both prohibition and conviction. Assume a group of 20 persons plan a march at 06h00 on Monday. At 15h30 on the preceding Friday, the convener faxes an RGA s 3 notice to the responsible officer. These offices have already closed at the appointed hour of 15h00. The offices only re-open at 07h00 the following Monday. By the time the responsible officer reads the timeously filed fax, the gathering is in full swing. The convener has complied fully with RGA s 8. The police proceed to arrest the marchers under RGA s 12(1)*(a)*. But since RGA s 12(1) has not, in fact, been breached, the accused must be acquitted. Correspondence with S Delaney, Staff Attorney, FXI, (25 February 2005)(On file with author.)

is no match for local authorities bent on stamping out the spread of dissent through the use of blanket prohibitions.[1]

Another powerful set of mechanisms for chilling assembly are the provisions made in Chapter 4 of the RGA for the imposition of civil liability.[2] If riot damage occurs as a result of a demonstration, each member of the demonstration is jointly and severally liable for the damage caused. Joint and several liability for riot damage creates the potential for significant personal liability. How many members of the public are willing to risk personal bankruptcy to challenge some undesirable state of affairs? Only those, I suppose, who have little or nothing left to lose. However, the freedoms guaranteed in the Final Constitution

[1] The Constitutional Court has recognized that the use of expedited procedures poses a unique threat to the exercise of fundamental rights. See, eg, *S v Mamabolo (E TV and others Intervening)* 2001 (3) SA 409 (CC), 2001 (1) SACR 686 (CC), 2001 (5) BCLR 449 (CC)(Court holds that while the protection of reputation justifies placing limits on speech that scandalises a court, the protection of reputation does not justify expedited procedures that fail to take account of the expressive interests at stake.) As I have noted above, several Magistrates Courts have refused to hear the statutorily guaranteed expedited appeal of a prohibition because the urgent applications made by conveners failed to satisfy the criteria for urgent applications established by the rules of court. Interview with J Duncan, Director, FXI, (3 February 2005). Interview with S Delaney, Staff Attorney, FXI, (10 February 2005). The absence, practically speaking, of a meaningful avenue of appeal, both where that gathering has and has not met the 7-day notice requirement, creates a regulatory framework inimical to the right to assemble.

[2] RGA ss 11(1) and (2) read, in relevant part: '(1) If any riot damage occurs as a result of *(a)* a gathering, every organization on behalf of or under the auspices of which that gathering was held, or, if not so held, the convener; *(b)* a demonstration, every person participating in such demonstration, shall, subject to subsection (2), be jointly and severally liable for that riot damage as a joint wrongdoer contemplated in Chapter II of the Apportionment of Damages Act, 1956 (Act 34 of 1956), together with any other person who unlawfully caused or contributed to such riot damage and any other organization or person who is liable therefor in terms of this subsection. (2) It shall be a defence to a claim against a person or organization contemplated in subsection (1) if such a person or organization proves- *(a)* that he or it did not permit or connive at the act or omission which caused the damage in question; and *(b)* that the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable; and *(c)* that he or it took all reasonable steps within his or its power to prevent the act or omission in question: Provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question.' See Freedom of Expression Institute 'Annual Report for 2004' (2004) available at www.fxi.org.za, (accessed on 28 January 2005)(Suggests, without argument, that RGA s 11(1) and (2) are constitutionally suspect); R La Grange 'Opinion for the Freedom of Expression Institute on the Regulation of Gathering Act (12 July 2004) at para 117 ('[T]he provisions of section 11(1) and (2) extend ordinary civil liability on grounds that would not normally be recognised in a delictual action and also place the onus on the defendant to disprove liability. . . [T]his latter effect reverses the traditional onus for civil liability and constitutes a serious infringement of the common law rights of a defendant in an action for damages.')

The US Supreme Court has rejected the imposition of joint and several liability on participants in an otherwise lawful boycott simply because some participants engaged in acts of violence. See *NAACP v Claiborne Hardware Co* 458 US 886, 915–920 (1982)(*Claiborne* Court wrote that '[c]ivil liability may not be imposed merely because an individual belonged to a group,' a gathering, an assembly or an association. *Claiborne* Court held that 'only those individuals who participated in violent or unlawful activities that proximately caused the damages could be held liable.') See also *US v Masel* 54 F Supp 2d 903 (WD Wisconsin 1999) N Jarman & D Bryan 'General Principles Governing Freedom of Assembly and Public Events Institute for Conflict Research: Comparative Assessment of Assembly Law in England, Scotland, Republic of Ireland, France, Italy, Israel, Palestine, USA, Canada and South Africa' *Institute for Conflict Research Working Paper* (2000) available at www.conflictresearch.org.uk, (accessed on 25 January 2005).

are intended to protect the expressive interests of all, not just those on the margin. The official response to this concern that civil liability requirements chill assembly is that demonstration organizers can take out demonstration damage insurance prior to a march. That line of argument appears reasonable until one asks whether controversial groups will be able to secure insurance, or whether even a mainstream political group can convince their insurers that they will not attract a violent response for which they may ultimately be held liable. In many instances both controversial and mainstream groups will find insurance either unavailable or too costly.[1] These groups may decide to take their chances.[2] If they do, however, they run the risk that the police will incite a violent response and that any subsequent damage will both discredit and bankrupt the organization and its membership. Civil liability makes assembly a high-stakes game that most assemblers either are bound to lose or not permitted to play.[3]

At first glance, the RGA gives every indication that Parliament had solved problems associated with of the use of deadly force to disperse demonstrators. RGA s 9(2)*(e)* provides that the force necessary to prevent the killing or serious injury of persons or the destruction or serious damage to immovable property or valuable movable property must be 'necessary', 'moderated' and 'proportionate to the circumstances'.[4] It thereby places some philosophical limits on deadly force. However, RGA s 9(2)*(d)* expressly allows the use of 'firearms and other weapons' for crowd control and permits the use of force where there are apparently 'manifest intentions' to kill or to seriously injure persons, or to destroy or seriously damage property.[5] RGA ss 9(3) and 13(1)*(b)* insulate the common-law defences

[1] See V Blasi 'Prior Restraints on Demonstrations' (1970) 68 *Mich LR* 1481 (Blasi argues that a municipality's use of large fees for policing and sanitation constitute unconstitutional prior restraints on public assemblies. Civil liability provisions function in a comparable manner.)

[2] So taken is Parliament with the potential efficacy of civil liability as a form of social control with respect to assemblies and demonstrations that the Security and Constitutional Affairs Select Committee, has recommended that the South African Law Reform Commission investigate the possibility of a specific civil action in respect of consequential damages arising from 'terrorist' hoaxes. See Protection of Constitutional Democracy Against Terrorist and Related Activities Bill [B 12B–2003].

[3] B Rutinwa 'Freedom of Association and Assembly: Unions, NGOs and Political Freedom in Sub-Saharan Africa' *Article 19 Working Paper* (March 2001) available at www.article19.org/docimages/986.htm, (accessed on 25 December 2005). Rutinwa accepts the thrust of my criticism but suggests that the appropriate response is to reform the RGA along the lines of Ghanaian Law. Under Ghanaian law, he says 'responsibility for any damage occurring in the course of demonstrations is borne not by all demonstrators jointly and severally, but by those individuals proved to have caused it.' See Public Order Act 491 of 1994. I may be mistaken, but on my reading of the Ghanaian Public Order Act**,** ss 3(1) and 3(2) hold both organizers *and* any other person responsible for the property damage liable for that damage.

[4] See, eg, *Barney v Eugene* 20 Fed Appx 683, 2001 WL 1153441 (9th Cir 2001)(Court holds that use of tear-gas constituted a permissable use of force after violence erupted and that the use of tear-gas on non-violent demonstrators — after several hours of peaceful protest — did not violate the rights to free speech and assembly of the non-violent demonstrators.)

[5] RGA s 9(2)*(d)* reads: 'If any person who participates in a gathering or demonstration or any person who hinders, obstructs or interferes with persons who participate in a gathering or demonstration- (i) kills or seriously injures, or attempts to kill or seriously injure, or shows a manifest intention of killing or seriously injuring, any person; or (ii) destroys or does serious damage to, or attempts to destroy or to do serious damage to, or shows a manifest intention of destroying or doing serious damage to, any

of self-defence, necessity and protection of property from the effect of RGA s 9(2)*(e)*.[1] Read together, these provisions create innumerable opportunities for the police to use deadly force to curb 'potentially violent' or 'potentially destructive' demonstrations.[2] After the Constitutional Court's judgment in *Ex Parte Minister of Safety and Security and Others: In Re S v Walters & Another*[3] and the Supreme Court of Appeal's decision in *Govender v Minister of Safety and Security*,[4] it is hard to imagine that our appellate courts would not find these RGA provisions constitutionally infirm. The *Walters* Court held that s 49(2) of Criminal Procedure Act[5] was unconstitutional to the extent that it authorized the use of deadly force where there was no threat of serious bodily harm.[6] In light of *Walters*, RGA s 9(2)*(d)*'s authorization to use firearms where there is merely an intention to 'destroy … or damage property' must be viewed as constitutionally suspect. RGA s 9(3)'s insulation of common law doctrines that sanction the use of deadly force in order to protect private property should likewise fail the *Walters* test. As for the other provisions in the RGA that permit the use of deadly force for the purposes of crowd control, both *Govender* and *Walters* suggest that, at a minimum, such provisions must be read down so as to 'exclude the use of firearm or similar weapon' unless a law enforcement officer has 'reasonable grounds for believing *(a)* that the

immovable property or movable property considered to be valuable, such a member of the Police of or above the rank of warrant officer may order the members of the Police under his command to take the necessary steps to prevent the action contemplated in subparagraphs (i) and (ii) and may for that purpose, if he finds other methods to be ineffective or inappropriate, order the use of force, including the use of firearms and other weapons. *(e)* The degree of force which may be so used shall not be greater than is necessary for the prevention of the actions contemplated in subparagraphs *(d)*(i) and (ii), and the force shall be moderated and be proportionate to the circumstances of the case and the object to be attained. The power to use such deadly force has the potential to create a duty to use to it.' See *Mpongwana v Minister of Safety and Security* 1999 (2) SA 794, 805 (C)(High Court found that a duty imposed on the police by RGA s 9(1)*(f)* to take all reasonable steps to protect persons and property might well be a factor in deciding whether police had duty of care, for the purpose of proving a cause of action in delict, where use of deadly force results in harm.) See also *Rail Commuter Action Group v Transnet Ltd T/A Metrorail* (No 1) 2003 (5) SA 518, 573 (C)(Court imposed legal duty on state-owned railway, in terms of FC ss 11 and 12(1), to minimise the extent of violent crime and lack of safety on a public commuter rail service.)

[1] RGA s 9(3) reads, in relevant part: 'No common law principles regarding self-defence, necessity and protection of property shall be affected by the provisions of this Act.'

[2] The Independent Complaints Directorate ('ICD') has recommended that police officers who fired into a crowd of demonstrators and killed one person be charged with murder. The ICD report states that the use of birdshot and buckshot is unlawful. Correspondence with J Duncan, Director, FXI (15 May 2005).

[3] 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC)('*Walters*').

[4] 2001 (4) SA 273 (SCA), 2001 (2) SACR 197 (SCA), 2001 (11) BCLR 1197 (SCA)('*Govender*').

[5] Act 51 of 1977.

[6] *Walters* (supra) at paras 40, 41, 45, 46. The conditions for exercise of this license also stand in direct conflict with international instruments on the subject. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, s 9, reads, in relevant part: 'Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury or to prevent the perpetration of a particularly serious crime involving grave threat to life … In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.' Proceedings of the United Nations 8th Congress on the Prevention of Crime and the Treatment of Offenders (1990) available at www.uncjin.org/Documents/8comm/index.html, or www.asc41.com/8th%20UN%20Congress%20on%20the%20Prevention%20of%20Crime/8th_congress.htm (accessed on 28 February 2005).

suspect poses an immediate threat of serious bodily harm to him or her, or a threat of harm to members of the public; or *(b)* that the suspect has committed a crime involving infliction or threatened infliction of serious bodily harm.'[1] To the extent that they cannot be read down, these provisions violate the right to dignity, FC s 10, the right to life, FC s 11, and the right to freedom and security of the person, FC s 12.[2]

The RGA provides for summary intervention by a judicial officer.[3] While summary judicial interventions *per se* are not constitutionally infirm, the Constitutional Court in *Mamabelo* found 'broadly similar procedures' — in the context of expressive conduct and contempt of court — unconstitutional.[4]

43.3 Assembly Analysis

> Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.[5]

(a) The content of the right

The approach to assembly analysis adumbrated in this chapter tracks the Constitutional Court's preferred approach.[6] This two-stage process requires that we first establish the categories of assembly, demonstration, picket and petition that

[1] *Govender* (supra) at paras 21 and 24. See also *Walters* (supra) at paras 38–39.

[2] *Walters* (supra) at paras 3–7, 40–41, 45–46.

[3] See RGA ss 4(4) and 6 (1). RGA s 4(4) reads, in relevant part: 'If a local authority does not exist or is not functioning in the area where a gathering is to be held, the convener shall give notice as contemplated in this section to the magistrate of the district within which that gathering is to be held or to commence, and such magistrate shall thereafter fulfil the functions, exercise the powers and discharge the duties conferred or imposed by this Act on a responsible officer in respect of such gathering.' RGA, s 6(1)*(b)* reads, in relevant part: 'Whenever an authorized member in terms of section 4(4)*(b)* requests that a particular condition be imposed and the request is refused, or whenever information contemplated in section 5(1) is brought to the attention of a responsible officer and the gathering in question is not prohibited, an authorized member may, if instructed thereto by the Commissioner or the district commissioner of the South African Police for the area where the gathering is to be held, apply to an appropriate magistrate to set aside such refusal or to prohibit such gathering, as the case may be, and the magistrate may refuse or grant the application.'

[4] *S v Mamabolo (E TV and others Intervening)* 2001 (3) SA 409 (CC), 2001 (1) SACR 686 (CC), 2001 (5) BCLR 449 (CC) at paras 53–58 (Court finds summary procedures for contempt of court committed *in facie curiae* inquisitorial, inherently punitive, unfair, and not reconcilable with the basic standards of fairness called for by FC s 35(3)).

[5] Section 17 of the Constitution of the Republic of South Africa Act 108 of 1996 ('FC' or 'Final Constitution'). Section 16 of the Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution') read: 'Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions.'

[6] That approach is a value-based or purposive approach. A value-based approach to rights interpretation is profitably compared to a notional approach to rights interpretation. A notional approach to rights interpretation holds that any activity or status falling 'notionally' within the ambit of a right is protected. The applicant would then merely have to demonstrate a restriction of the protected activity before the analysis moved on to the limitation clause. See, eg, *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC)(Court assumes violation of FC ss 15 and 31); *Benaish v Ernst & Young* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC)(FC s 34, access to court, means 'access to court'); *Ferreira v Levin NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)(Ackermann J assumes that 'freedom' in IC s 11 means freedom in its broadest possible sense). For more on the conceptual confusion associated with a notional approach, see S Woolman 'The Right

serve the values which animate the freedom and those categories of assembly, demonstration, picket and petition that fall without the freedom's protective ambit. The second step, if necessary, requires a demonstration that a protected FC s 17 activity has been impaired. Only then may we assess the merit of arguments in support of laws that limit the exercise of this right.[1] A good example of the consequences of failing to distinguish between the distinct requirement of rights analysis and limitations analysis in the context of the right to assemble is *Acting Superintendent-General of Education of KwaZulu-Natal v Ngubo*.[2] In deciding that the freedom of assembly — IC s 16 — 'implicitly extends no further than is necessary "to convey the [demonstrator's] message",' the *Ngubo* court collapses the determination of the scope of the right with what ought to be the subsequent analysis of the conditions under which that right may be justifiably restricted.[3]

Consistency: *Benaish v Ernst & Young* (1999) 15 *SAJHR* 166; S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 34. On the other hand, a value-based approach: *(a)* takes seriously FC s 39(2)'s admonition that the provisions of Chapter 2 be interpreted in light of the 'values which underlie an open and democratic society based upon human dignity, freedom and equality'; *(b)* permits us to screen out those forms of behaviour that clearly do not merit constitutional protection; *(c)* ensures that only genuine and serious violations of a constitutional right make it through to limitation clause analysis; *(d)* possesses the virtue of having both rights analysis and limitations analysis driven by service to the same five fundamental values; and *(e)* demands that courts provide an adequate explanation for rules it derives from the rights enshrined in the Final Constitution. See also L Weinrib 'The Supreme Court of Canada and Section One of the Charter' (1988) 10 *Sup Ct LR* 469, 477; E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31, 32–33.

[1] Indeed, it is now trite law that one must first establish the scope of the right and its contravention, before one proceeds to the justificatory stage of the analysis. See *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (1) SACR 568 (CC), 1995 (4) BCLR 401, 414 (CC)(Fundamental rights analysis under IC Chapter 3 'calls for a two-stage approach. First, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?') See also *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665, 707 (CC).

[2] 1996 (3) BCLR 369 (N).

[3] Ibid at 375. Canadian expressive conduct jurisprudence sounds a similar cautionary note with respect to the proper allocation of tasks in a Bill of Rights that bifurcates fundamental rights analysis. See *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139, 77 DLR (4th) 385 ('*CCC*') (For an extended discussion and critique of *Committee for the Commonwealth of Canada*, see S Woolman & J De Waal (supra) at 292.) At issue in *CCC* was the plaintiffs' freedom to distribute handbills and carry placards promoting their political positions in a public airport terminal concourse. An airport regulation prohibited all expressive activity and made no distinction between commercial solicitation and political advocacy. Lamer CJ's opinion ignores the structural imperatives of the Charter and analyses both the expressive interests and governmental interests within the freedom alone. Part of the reason, if not the entire reason, that Lamer locates his test for expressive conduct in public spaces solely within Charter s 2*(b)* is that he decides that the regulation in question is not a 'law' within the meaning of s 1, the limitation clause. He is, therefore, unable to do the necessary assessment of the government's justification in the context of s 1. Our jurisprudence on the meaning of law of general application, though under-developed, would appear to contemplate treating published government regulations as laws of general application. L'Heureux-Dubé J's opinion — and her notional approach to rights analysis — contradicts her stated belief that *not* all public property is appropriate for expressive activity and results in the use of two overlapping balancing tests in the context of her s 1 analysis. L'Heureux-Dubé's judgment suffers not so much from incoherence as a lack of elegance. Her 'balancing' tests do, ultimately, address the central question of the case: whether the expressive activity in question is compatible with the property's purpose and whether other 'public arenas' in the vicinity are available and adequate for the expressive activities.

(i) *Internal modifiers*

Much is made of the violence implicit in every act of state and every rule of law.[1] It would be churlish, however, to deny that crowds of demonstrators, protestors and picketers are not moved by violence, do not communicate through violence or do not use violence to seduce. The internal modifiers in FC s 17 recognize 'violence' as an intrinsic element of assembly and seek not to suppress it, but to channel it, to make it a part of the cut and thrust of democratic politics.

(aa) Peacefully

One readily identifiable class of assemblies, demonstrations and pickets excluded from the protection of the right are those that are not peaceful. So, for example, the High Court in *Fourways Mall (Pty) Ltd v South African Commercial Catering* found that neither the LRA nor FC s 17 countenance assault and that picketers may not employ tactics that intimidate the general public and thereby interfere with the rights of other tenants of a shopping mall.[2]

German assembly jurisprudence offers additional guidance. In Germany, an assembly is deemed non-peaceful only if acts of physical violence against person or property are committed or threatened.[3] Consistent with concerns regarding out-groups and intra-election voter-representative communication, Hoffmann-Riem argues that it should be kept in mind that assembly is primarily used by those who are dissatisfied with the status quo.[4] A generous interpretation of the 'peaceful' proviso is therefore necessary to prevent the state from exploiting this

[1] See, eg, R Cover 'The Bonds of Constitutional Interpretation: Of the Word, the Deed and the Role' (1986) 20 *Georgia LR* 815, 818 ('Violence is so intrinsic a characteristic of the structure of [law] that it need not be mentioned: Read the Constitution. Nowhere does it state the obvious: that the government thereby ordained has the power to practice violence over its people.')

[2] 1999 (3) SA 752, 759 (W).

[3] In German assembly jurisprudence, not every unlawful disturbance of law and order or infringement of the rights of others is understood to be 'violent'. An assembly is deemed non-peaceful only if acts of physical violence against person or property are committed or threatened. See *Brokdorf* 69 *BVerfGE* 315, 360 (1985); *Mutlangen* 73 *BVerfGE* 206, 248 (1986). ECHR jurisprudence is somewhat more restrictive — if only because the margin of appreciation requires the ECHR Court to defer, where appropriate, to the understanding of a domestic court. See *Stankov* (supra) at para 90 ('Where there has been incitement to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.') See also *Incal v Turkey* [1998] ECHR 48 at para 48; *Sürek v Turkey (No 1)* [1999] ECHR 51 at para 61. However, recent ECHR decisions have found that authorities may restrict or prohibit assemblies only where the state can demonstrate violent intent. The mere assertion that a dissident group may destroy property, disturb the peace, or propagate separatist ideas are insufficient grounds for limiting the right. See *Stankov* (supra) at paras 77–112 ('Article 11 of the Convention only protects the right to 'peaceful assembly'. That notion — according to the Commission's case-law — does not cover a demonstration where the organisers and participants have violent intentions.' However the Commission found no evidence of such intent in the instant case and rejected alleged past incidents as grounds for prohibition.) See also *Christians against Racism and Fascism v The United Kingdom* (1980) 21 DR 138; *G v Germany* (1989) 60 DR 256.

[4] See W Hoffmann-Riem *Reihe Alternativkommentare Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* (1984) 753.

requirement in order to suppress unpopular positions.[1] This generous interpretation ensures that if some members of an assembly resort to violence, while the majority of the participants remain peaceful, the assembly remains protected. This result is necessary to prevent a peaceful assembly from being hijacked by violent supporters, opponents or agents provocateurs. When such a hijacking does occur, the police must attempt to act solely against the violent minority and to avoid depriving the rest of the assembly of FC s 17's protection.[2]

(bb) Unarmed

Another readily identifiable class of assemblies, demonstrations and pickets excluded from the protection of the right are those in which the participants are armed. Once again, German assembly jurisprudence enhances our understanding of this internal modifier.[3]

In Germany, the use of protective devices by demonstrators (such as shields) has been prohibited by the Assembly Act on the grounds that they stimulate aggression among participants and onlookers by showing a readiness to engage in violence.[4] The carrying of defensive devices by demonstrators, however, may be grounds for police action against the whole assembly — as opposed to acting solely against the individuals carrying the defensive devices — only when it can be shown that the majority of demonstrators intend to provoke a response and are gearing themselves up for a reaction from counter-demonstrators or the police.[5] So understood, the modifier 'unarmed' might even be read to prohibit the use of masks. Certainly anyone familiar with the history of the Ku Klux Klan in the United States would understand that the wearing of masks can be read as an explicit threat.[6]

[1] The use of sit-ins to blockade entrances, roads, and railway lines — initially characterized as 'violent' by ordinary German courts — are now constitutionally protected. See S Woolman and J de Waal 'Voting with Your Feet' in D van Wyk, B de Villiers, J Dugard & D Davis (eds) *Rights and Constitutionalism* (1994) 292 citing *BGH* (1969) *NJW* 1770, 1773 (In upholding convictions of students who disrupted lectures, a German administrative court found that while pressure to listen was constitutionally protected, outright coercion is not.)

[2] See *Brokdorf* (supra) at 361.

[3] See Article 2.3 *VersammlG* (Prohibits the transportion, provision, or distribution of weapons to assemblies.) The definition of 'arms' obviously embraces guns and knives. But bottles and sticks may — depending on the intention of the carrier — also qualify as arms. Rotten eggs, tomatoes, or paint — when used to embarrass opponents — ought to fall outside the definition. See Schilder (supra) at 150.

[4] Article 17a *VersammlG*.

[5] See Maunz and Dürig (supra) at 26.

[6] Not all masks are veiled threats. Any law that treats all masks as such ought to be viewed as void for overbreadth. See *South African Defence Union v Minister of Defence and Another* 1999 (2) SA 735, 746 (T)(A 255 word definition of 'act of public protest' covered conduct ranging from 'holding or attendance of a meeting which is calculated to support or oppose any policy or conduct of the government or of a foreign government' to any indication of 'private or public support or opposition regarding any policy, conduct or principle' or any event of national or public concern.' The long but still non-exhaustive definition of public protest could capture complaints made by a defense force member to her husband in relation to absolutely any 'an event of national or public concern.' Such a complaint could never be accurately described as a public protest. Section 126B(4) of Defence Act 44 of 1957 was therefore deemed void for overbreadth. Although the court did not make this point expressly, the breadth of the definition of public protest would extinguish the entire range of expressive and political rights of each

(ii) *Assembly*

Courts accord different kinds of expressive activity different levels of protection. Comparative constitutional analysis suggests that of all the expressive rights — speech, voting, political participation, religion, association — assembly may receive the least amount of judicial solicitude. Part of the explanation for this diminished protection is that assembly — like other forms of *conduct* — is often viewed merely as a condition for freedom of speech, and that it is the *content* of the speech itself that is thought to be of paramount importance. Stated another way, the courts have tended to view a political or social gathering as important for what is said at the gathering rather than for the fact of the gathering itself.[1] This tendency in rights discourse towards (artificially) separating the speech act from the surrounding conduct reflects a widespread and deeply embedded bias against extending constitutional protections to groups.[2]

History is, of course, no argument. The introduction to this chapter sets out various independent grounds for a right to assemble: *(a)* to create space for large, vocal social formations that service representative democracies; *(b)* to act as a catalyst for debate; *(c)* to supplement representative democracy through a form of direct democracy; *(d)* to empower out-groups; *(e)* to enhance the stability and the legitimacy of the political processes by allowing for the articulation of minority

and every member of the military.) See also *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631, 643 (CC), 1995 (10) BCLR 1382 (CC)(Court held a statutory provision providing for imprisonment for non-payment of civil debts to be unconstitutional because it was overbroad); *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (1) SACR 587 (CC), 1996 (5) BCLR 609 (CC) at para 49 ('Overbreadth analysis is properly conducted in the course of application of the limitations clause. To determine whether a law is overbroad, a court must consider the means used in relation to its constitutionally legitimate underlying objectives. If the impact of the law is not proportionate with such objectives, that law may be deemed overbroad'); *Reitzer Pharmaceuticals (Pty) Ltd v Registrar of Medicines &d Another* 1998 (4) SA 660, 669 (T)(On the nature of overbreadth for the purposes of constitutional analysis.) See, further, 'FXI Supports the Right of Gay and Lesbian People to March in Their Outfits' *FXI Newsletter* (17 September 2004). The FXI report noted that the Johannesburg Metropolitan Police Department threatened to arrest drag queens wearing any form of disguise that obscures their facial features. The police asserted that their authority to make such arrests flowed from the RGA. RGA s 8(7) reads: 'No person shall at any gathering or demonstration wear a disguise or mask or any other apparel or item which obscures his facial features and prevents his identification.' The construction of this section by the police suggests that RGA s 8(7) may be void for overbreadth. The section does not appear to lend itself to reading down.

[1] Cf *De Jonge v Oregon* 299 US 353 (1937)(Court recognizes the right of free assembly as separate and distinct from those of free speech and free press, and 'equally fundamental'); *Thomas v Collins* 323 US 516 (1945)(Court not only recognizes the right of free assembly as a separate and distinct right but also extends its protection to any peaceable assembly, be it public, private, political, economic, or social.) See also CE Baker 'Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place and Manner Regulations' (1983) 78 *Northwestern U LR* 937 (Argues that there are strong and independent grounds for protecting assembly and that it should not be treated as an adjunct of speech.)

[2] For a set of arguments designed as a corrective for such methodological individualism, see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) §§ 44.1*(b)*(i)-(ii). See also *Irwin Toy Ltd v Quebec (Attorney General)* (1989) 39 CRR 193, 229 (SCC)('[I]f the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee.')

views; *(f)* to improve government accountability and responsiveness between elections; *(g)* to channel the violence inherent in mass action into a less dangerous form; and *(h)* to facilitate self-actualisation. None of these grounds is, I think, entirely reducible to or exhausted by their service to expressive ends. All of these grounds, read together, establish the protective ambit of the freedom of assembly.

A freedom to assemble defined in terms of the aforementioned goods — and one that includes ground *(h)* — is open to the critique that there is very little by way of collective activity that FC s 17 does not notionally protect. As a result, I am inclined towards a view of FC s 17 that emphasizes its broadly political dimensions.[1] Ground *(h)* may well warrant the extension of the protection of FC s 17 to gatherings that serve purely recreational, developmental, spiritual, cultural, commercial or academic ends. But a court should do so advisedly.[2]

(iii) *Demonstrations*

What is the difference between an assembly and a demonstration? Resort to dictionary definitions has always struck me as rather jejune. However, in the absence of any textual indication, or discussion in the *travaux preparatoires*, as to the meaning of each word, common sense understandings supplemented by their use as legal terms of art are as good a place as any to start.

Demonstrations are associated with some form of support or opposition for a moral or political position. Assemblies are gatherings that may or may not have political content. South African case law offers no gloss or variation on this distinction.

The only definition of 'demonstration' in South African law appears in the Regulation of Gatherings Act ('RGA'). RGA s 1 defines 'demonstration' as 'any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action.' RGA s 1 defines 'gathering' as 'any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act . . . , or any other public place or premises wholly or partly open to the air.' The RGA distinguishes demonstrations from gatherings solely in terms of size. As a purely abstract matter, there is no reason to limit the extension of the term 'demonstration' to groups of 15 or less. The purpose of the RGA's construction of 'demonstration' is to differentiate the conditions under which a group must subject itself to the advance notification requirements of the Act from the conditions under which groups are not so subject. Demonstrations — 15 people or less — are not

[1] Even if the right is limited to assemblies with political dimensions, it will still protect an array of practices in public and in private. See, eg, *Djavit An v Turkey* [2003] ECHR 91 at para 56 ('Freedom of assembly . . . should not be interpreted restrictively. As such this right covers both private meetings and meetings in public thoroughfares as well as static meetings and public processions; in addition, it can be exercised by individuals and those organising the assembly.')

[2] The contraction of assembly's ambit to serve political ends suggests that a whole host of activities do not fall under the aegis of FC s 17. The point is not that these activities do not deserve protection, but rather that they are best protected by other rights or well-established non-constitutional bodies of law.

perceived to be threats to public order. Convenors are therefore not required to provide advance notification. Gatherings of any greater size, whatever their purpose, are.

Contrary to the Goldstone Commission's recommendations, this numerical definition of demonstration does not protect 'demonstration as of right'.[1] The apparent intention of the legislature was to limit the number of people who could assemble freely without providing prior notice. The RGA offers no insight into this distinction between demonstrations and gatherings. The RGA does not engage the different *types* of assembly nor does it attempt to craft regulatory regimes that actually fit the varying aims of such assemblies. Given the absence of any explanation in the RGA for the distinction made between demonstrations and gatherings, the 15-person threshold for demonstrations must be viewed as arbitrary. The consequences of the distinction between demonstrations and gatherings under the RGA, however, are quite real. Persons convicted of participating in a gathering without giving proper notification may receive a fine of up to R20 000 and/or a term of imprisonment of up to one year.[2]

Given the history of this country, and, in particular, the prominence of demonstrations as a mode of mass political action, the drafters of the Final Constitution would have been unlikely to invest 'demonstration' with a narrow numerical extension. Even if we accept the proposition that the state may legitimately restrict demonstrations as of right, the definitions of 'demonstration' and 'gathering' under the RGA not only inhibit the exercise of assembly but criminalize gatherings that pose no absolutely threat at all to order, property or other public goods. So while the definition of demonstration is constitutionally suspect because it is radically under-inclusive, the definition of gatherings may well be found void for vagueness and overbreadth.[3]

[1] See § 43.2*(b)*(ii) supra.

[2] See RGA s 12(1).

[3] The definition of 'gathering' under the RGA subjects to notice requirements every public congregation larger than 15 persons intended 'to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution.' Did Parliament mean to require every convenor of a church convocation in a public park — during which issues of moment may be debated and the considered opinion of the community canvassed — to apprise local authorities of the meeting in advance or risk the imposition of a banning order or the dispersal of the persons assembled? The RGA, as I noted above, makes no attempt to distinguish between that different kinds of social gatherings in which beliefs and practices — social, economic, spiritual or political — are engaged (and sometimes contested.) The RGA's potential threat of criminal sanctions in the context of a church convocation ought to be sufficient for a court to find the applicable provisions of the RGA void for overbreadth. Similar considerations support invalidating the applicable provisions of the RGA on the grounds of vagueness. The definition of 'gathering' in the RGA would seem to be 'so vague, wide and subject to subjective or arbitrary interpretation that it is impossible to read the wording down to a constitutionally acceptable definition.' *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 (3) SA 389 (W), 2002 (12) BCLR 1285 (W) at para 72 (On vagueness.) See also *Dawood & Another v Minister of Home Affairs & Others, Shalabi & Another v Minister of Home Affairs & Others, Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 47 ('It is an important principle of the rule of law that rules be stated in a clear and accessible manner.') No reasonable person could determine — on the basis of the RGA's definition alone — whether the RGA's requirements applied solely to party political protests or to such events as a church convocation.

(iv) *Picketing*

The right to picket is a noteworthy addition to our assembly jurisprudence.[1] Primary and secondary picketing are often used by organized labour to bring management to heel.[2] One might have expected, therefore, that the right to picket

[1] Canada recognizes picketing as one of many expressive and political rights that serve a range of political, social and economic ends. See *Retail Wholesale & Department Store Union, Local 580 v Dolphin Delivery Ltd* (1986) 33 DLR 174, 183, [1986] 2 SCR 573 (Explains the Canadian Charter's commitment to picketing as follows: 'It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy as we know it today . . . depends upon its maintenance and protection.')

[2] The Labour Relations Act ('LRA') affords trade unions and their members significant statutory protection with respect to the right to picket in and about the private property of an employer. Act 66 of 1995. LRA s 69 reads, in relevant part: (1) A registered *trade union* may authorise a picket by its members and supporters for the purposes of peacefully demonstrating- *(a)* in support of any protected *strike*; or *(b)* in opposition to any *lock-out*. (2) Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1), may be held- *(a)* in any place to which the public has access but outside the premises of an employer; or *(b)* with the permission of the employer, inside the employer's premises. [Sub-s. (2) amended by s. 20 of Act 42 of 1996.] (3) The permission referred to in subsection (2) *(b)* may not be unreasonably withheld.'

However, the LRA does not permit pickets that employ physical intimidation unrelated to a given labour dispute. See *Minister Of Correctional Services v Ngubo* 2000 (2) SA 668, 673 (N)(LRA protection of strikes and picketing does not extend to forms of physical intimidation intended not to communicate opposition to a labour practice but to coerce others into action — say the resignation of a member of management — that does not fall within 'the purview of the LRA'); *Modise v Steve's Spar, Blackheath* 2001 (2) SA 406 (LAC) at paras 118–119. (Although 'strikers' conduct is mitigated by the fact that 'they abided by the terms of the interdict prohibiting picketing within a defined distance of the trading premises, but they did not, despite the interdict, stop striking. . . . Obedience to a court order is foundational to a State based on the rule of law'); *Jacot-Guillarmod v Provincial Government, Gauteng, & Another* 1999 (3) SA 594, 599 (T) quoting from *Mondi Paper v Paper Printing Wood & Allied Workers Union & Others* (1997) 18 ILJ 84, 90 (D)(LRA permits 'a registered trade union to authorise a picket by its members and supporters for the purposes of peacefully demonstrating in support of any protected strike.' However, 'the incidents relating to the intimidation of non-striking employees at home are . . . examples of improper demonstrating in support of a strike.')

Distinguishing those conditions of assembly which compel others to reconsider their positions from those conditions of assembly that employ coercion to effect the actual desired outcome is difficult to do. It is also difficult, ex post facto, for courts to assess competing accounts of strike actions. In *South African Commercial Catering And Allied Workers Union & Others v Irvin & Johnson Ltd*, the Labour Appeals Court concluded that conduct of the demonstrators was intimidatory and 'carried out with a disregard for the economic rights of the employer and the right to security and tranquility of its employees.' 2002 (3) SA 250 (LAC) at paras 25, 27–28. The court reached this conclusion based on testimony that suggested that 'the demonstrators had . . . breached just about every condition of the 'picketing' agreement with the Cape Town City Council. They did not picket in the street in which they had permission to do so; they were many more than the 46 demonstrators for whom permission had been requested; they did not remain on the pedestrian walkways; they did not stand five metres apart (in fact, they did not stand still at all, but surged from one gate of the factory to another).' Ibid at para 21. It is impossible to gainsay the court's conclusions on the merits. But a reasonable scepticism — born of experience — must attach to measuring the 'lawfulness' of a demonstration in terms of its compliance with conditions established by a responsible local authority. The primary interest of the local authority will always be order. The facilitation of a potentially destructive demonstration courts entropy — and no officer of the peace has an interest in that.

would have been placed within FC s 23. However, for reasons that remain unclear, the right to picket wound up in FC s 17.[1]

One obvious explanation for the placement is that the drafters wanted the right to picket extended beyond the sphere of employer-employee relations. FC s 17 invites us to move from the particular — picketing in labour disputes — to the general — picketing as a form of social protest directed by one private party against another.[2] The private character of this form of social protect also suggests why both the state and the courts will tolerate primary picketing but not sanction secondary picketing.[3]

(v) *Petitions*

FC s 17 protects the right to petition.[4] As Du Plessis and Corder note:

> While some might regard the right to petition as somewhat archaic, its importance historically as a means of registering grievances seems to have diminished little in present circumstances.[5]

Many of our fellow citizens lack access to the capital necessary to exploit electronic forms of communication, to employ lobbyists or to make campaign contributions that will secure an audience with the right government official. Petitions remain the most cost-effective means for tabling their concerns.

Of course, neither Parliament nor a provincial legislature nor a municipal council can be expected to respond in detail to each and every petition. The administrative burden would be too great. However, for the right to retain any purchase, government ought to acknowledge receipt of the petition and offer a

[1] In their motivation for including the right to picket in FC s 17, Theme Committee Four wrote: 'Picketing in labour disputes is not dealt with in s 27 of the Interim Constitution. If it were not included in a new section dealing with labour relations, it would be covered by the horizontal application of the proposed right which is a non-contentious issue.' Theme Committee Four 'Schematic Report on Freedom of Assembly, Demonstration and Petition' (9 October 1995). What the Theme Committee probably meant to say was that if the right to picket were not included in the labour rights provision of the Final Constitution, FC s 17's right to picket would afford constitutional protection to workers in private disputes with their employers. FC s 17 would provide such protection because — according to the theme committee members — the right to picket will be understood to apply horizontally.

[2] Unlike the Interim Constitution, the Final Constitution does apply to some private disputes governed by common law. See *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC); S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31. However, the Bill of Rights' provisions are not infinitely elastic and the Bill will not apply directly to all private disputes that might notionally fall within the ambit of a right. For some general background on the subject of pickets, see JR Midgley 'Boycotts and Similar Action: A Comparison of German and South African Law' (2002) 119 *SALJ* 352; AA Landman 'The New Right to Picket' (1999) 6 *Contemporary Labour Law* 41.

[3] See *Retail, Wholesale and Department Store Union v Dolphin Delivery Limited* (1986) 33 DLR (4th) 174, [1986] 2 SCR 573 (Since Charter found not to engage private conduct governed by common law, secondary picketing not protected by Charter.)

[4] FC ss 56 and 105 oblige the National Assembly and each provincial legislature, respectively, 'to receive petitions, representations or submissions from any interested persons or institutions.'

[5] H Corder & L Du Plessis *Understanding South Africa's Transitional Bill of Rights* (1994) 160. See D Davis 'Assembly' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law* (2002) 239, 242 (Identifies petitions as a distinctly South African form of political participation.)

considered, if abbreviated, response.[1]

(b) Limitations on the right

Once the applicant can demonstrate that a gathering is entitled to the protection of FC s 17 and that some rule of law impairs the exercise of the right, the analysis shifts to FC s 36. This section breaks the justificatory analysis down into categories that engage particular constellations of public order, private property and expressive interests.

(i) *Private property*

Assemblies on private property ought to be the easiest for the government to regulate. In such circumstances, privacy and property interests compete on a rather equal constitutional footing with assembly and other expressive rights. For example, a local ordinance may legitimately require a private homeowner's consent before commercial solicitation is permitted.[2]

Shopping centres — or malls — with their open spaces, mock boulevards and strolling crowds challenge this public-private divide. In *Amalgamated Food Employers v Logan Valley*, the US Supreme Court held that given the 'public' nature and function of shopping malls, such malls were subject to the same First Amendment standards as any downtown business block.[3] As a result, the *Logan Valley*

[1] The restrictive approach to 'petition' in the KwaZulu-Natal Legislature Rules — 141 and 148(2)(f) — permits submission of a petition only when all other legal avenues for relief have been exhausted by a petitioner and thus looks to be constitutionally infirm. The Gauteng Petitions Act is substantially more generous. Act 14 of 1998. It defines 'petitioner' as a natural or juristic person acting: *(a)* on his or her or its interests; or *(b)* in the interest of another person who is not in position to seek relief in his or her or its own name; or *(c)* as a member of or in the interest of a group or class of persons; or *(d)* acting in the public interests. The Act also provides for a Public Participation and Petitions Committee to deal with petitions and a Public Participation Office to enable under-resourced communities to participate in the legislative proces. Gauteng Petitions Act s 8. Tthe German Federal Constitutional Court has held that 'the right to petition . . . implies a corresponding obligation of the state to accept the petition, to consider it, and to inform the petitioner of its decision — but (in order to avoid undue burdens) not to give reasons.' D Currie *The Constitution of the Federal Republic of Germany* (1994) 174 citing 2 *BVerfGE* 225, 230 (1953).

[2] See *Breard v City of Alexandria* 341 US 622 (1951); *Wisconsin Action Coalition v City of Kenosha* 767 F 2d 1248, 1258 (7th Cir 1985)(Court holds that municipality may lawfully act to protect the peaceful enjoyment of local homes by its citizens.) However, while the US Supreme Court has let stand ordinances which bar picketing or demonstration in front of private residences, it has taken a very different tact with respect to prohibitions on non-commercial forms of communication by groups who lack other, adequate means of expression. See, eg, *Watchtower Bible and Tract Society of New York, Inc v Village of Stratton* 536 US 150 (2002)(After noting that for over 50 years unduly burdensome restrictions on door-to-door canvassing and pamphleteering have been deemed unconstitutional, Supreme Court concludes that with respect to groups such as Jehovah's Witnesses, who lack significant financial resources, the ability to communicate effectively and meaningfully requires the kind of personal contact at issue and that such contact is protected by the freedom of assembly. No other form of communication would be adequate to the task); *Heffron International Society for Krishna Consciousness* 452 US 640 (1981)(Solicitation is protected form of expressive conduct.) See also *Ohio Citizen Action v City of Seven Hills* 35 F Supp 2d 575 (ND Ohio 1999)(Court invalidated local ordinance imposing a 5:00 pm curfew on canvassing); *National People's Action v Village of Wilmette* 914 F 2d 1008, 1012 (7th Cir 1990)(Court holds time restrictions on canvassing — limiting them to particular hours — are constitutionally infirm because '[e]ven a temporary deprivation of a First Amendment [freedom] is generally sufficient to prove irreparable harm.')

[3] 391 US 308 (1968). The *Logan Valley* Court was effectively applying and extending the 'public function' doctrine developed in *Marsh v Alabama*. 326 US 501 (1946). The *Marsh* court, however, was concerned with expanding the judiciary's understanding of the state action doctrine in order to protect speech, not assembly.

Court found that picketing, within a mall, of a store charged with unfair labour practices fell within the protection of the First Amendment. Four years later the US Supreme Court severely curbed the application of the 'public function' doctrine to commercial property. In *Lloyd v Tanner*, the Court found that the handing out of anti-war leaflets in a shopping mall did not warrant constitutional protection.[1] Whereas the *Logan Valley* labour protest had targeted a specific store, the *Lloyd* Court felt that the aims of a more general protest could just as easily have been accomplished in an alternative public location such as the street in front of the mall.[2]

In South Africa, the privatisation of public space — and our shopping malls are good examples of such privatisation — suggests that our courts ought not to allow property rights to trump automatically assembly rights.[3] Malls offer only the illusion of privacy. Where a protest is directed at a particular vendor, and not a state actor, the protest must take place within reasonable proximity of the place of business in order for the protest to have any purchase. The Labour Relations Act ('LRA'), for example, recognizes the right of trade unions and their members — in support of a strike — to picket in and about the private property of an employer. LRA s 69 reads, in relevant part:

> (2) Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1), may be held- *(a)* in any place to which the public has access but outside the premises of an employer; or *(b)* with the permission of the employer, inside the employer's premises … (3) The permission referred to in subsection (2) *(b)* may not be unreasonably withheld.[4]

Note that the LRA does not limit such pickets to public property. Members of trade unions may picket 'in any place to which the public has access.' This

[1] 407 US 551 (1972).

[2] See also *Hudgens v NLRB* 424 US 507 (1976)(Striking labourers do not have First Amendment right to picket in front of store in mall.) But see *Pruneyard Shopping Center v Robins* 447 US 74 (1979)(US state constitutions may grant more expansive protections to speech and assembly than the US Constitution, and thus permit and protect political solicitation in a private shopping centre, as long as the restrictions on the use of the private property do not amount to a taking of property without compensation or contravene some other federal constitutional provision); JC Harrington 'Free Speech, Press and Assembly Liberties under the Texas Bill of Rights' (1990) 68 *Texas LR* 1435.

[3] The Constitutional Court has expanded the notion of what constitutes a 'public purpose' with respect to it analysis of deprivations and expropriations of property under FC s 25. See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC)('*FNB*') at para 50 (Constitutional Court holds that overriding purpose of the constitutional property clause is to strike 'a proportionate balance' between existing property rights and the promotion of the public interest.) See also T Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46. Extending the definition of 'public purpose' under FC s 25 to matters that fall within the purview of FC s 17 is, admittedly, a stretch.

[4] Labour Relations Act 66 of 1995. LRA s 69 reads: '(1) A registered *trade union* may authorise a picket by its members and supporters for the purposes of peacefully demonstrating- *(a)* in support of any protected *strike*; or *(b)* in opposition to any *lock-out*. (2) Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1), may be held- *(a)* in any place to which the public has access but outside the premises of an employer; or *(b)* with the permission of the employer, inside the employer's premises. [Sub-s. (2) amended by s. 20 of Act 42 of 1996.] (3) The permission referred to in subsection (2) *(b)* may not be unreasonably withheld.'

language clearly embraces such 'private' venues as shopping malls. The right to picket on private property is further reinforced by the language of the next two subsections: namely, that employers may not unreasonably withhold permission to picket *within* their business premises. To the extent that provision for non-labour related protests is not made manifest in other pieces of legislation, our courts are well placed to craft rules that permit such protests to take place at the same time as they secure the rights of a business to carry out its commercial activity with limited interference. Businesses are not entitled to monopolize the use of places that function as 'public' spaces.[1] The LRA provides initial, if not ample, support for this thesis.

(ii) *Security and order*

Where assemblies and demonstrations pose an imminent and a direct threat to public security, the government is well within its rights to ban them.[2] The catch, of course, is not to allow the mere assertion that such a threat exists to censor unpopular or unconventional views.[3] The relative ease with which government's claim to be under siege explains why courts — from Zimbabwe to the US to Germany — take a dim view of banning.[4] They generally require the state to demonstrate that no other means of dealing with a threat to public order — say, relocation to another venue — is available.[5]

[1] The horizontal application of the right to picket reinforces the conclusion that FC s 17 does engage private disputes on private property. See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31. The doctrines of 'public purpose' and 'public function' also appear in FC s 238 'organ of state' analysis.

[2] See RGA s 5(1). See also Article 15.1 *VersammlG*.

[3] See *Cisse v France* [2002] ECHR 400 at para 52 (ECHR recognizes that public order concerns alone do not justify state intervention with respect to a peaceful sit-in by undocumented persons who sought and received sanctuary within a church. However, the Court concluded that after two-months the applicants had made their point — literally and symbolically — and that the deterioration of sanitary conditions gave the state sufficient reason to bring the demonstration to a halt.)

[4] See *In Re Munhumeso & Others* 1995 (1) SA 551 (ZS), 1995 (2) BCLR 130 (ZS), 1994 (1) ZLR 49 (SC)('*Munhumeso*'). Section 6(2) of Law and Order (Maintenance) Act makes official conduct the measure of the constitutional right, and not the constitutional right the measure of official conduct — thus reversing the accepted hierarchy of legal authority in a constitutional order: 'Its effect is to deny such rights unless a certain condition is satisfied, namely that the public procession it is sought to form is unlikely to cause or lead to a breach of the peace or public disorder. If there is the slightest possibility of it doing so, permission is refused.' The default position for assembly analysis under the Law and Order Act was banning. Only proof that a march would, in fact, be peaceable could overcome that presumption. Such a showing is logically impossible to make. The Zimbabwe Supreme Court held s 6(2) to be an unjustifiable infringement of the right to assemble.

[5] US courts recognize the state's substantial interest in safeguarding its citizens against violence. See *Hill v Colorado* 530 US 703, 715 (2000). The substantial interest in public safety does not end the inquiry. The state must provide 'tangible evidence' that speech-restrictive regulations are 'necessary' to advance the proffered interest in public safety. See *Bay Area Peace Navy v United States* 914 F 2d 1224, 1227 (9th Cir 1990). Generalizations about groups or kinds of groups are insufficient. See *City of Chicago v Mosley* 408 US 92, 100–1 (1972)('Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications.') See also *Project 80's Inc. v City of Pocatello* 942 F2d 635, 638 (9th Cir 1991)(Court rejects city's proffered interest in public safety after finding 'little evidence' in the record that the ordinances banning door- to-door solicitation actually protected citizens from crime); *Hodgkins v Goldsmith* 2000 WL 892964 (SD Indiana 2000)(Court finds

(iii) *Content neutrality*

At various points in this discussion, I have alluded to the fact that assembly jurisprudence is primarily concerned with conduct. This emphasis on form, however, should not be understood to mean that assembly concerns do not engage matters of substance.

Where government restrictions on assembly go to the point of view, or the political ends, of the participants, courts ought to be loath to accept any restrictions, let alone prohibitions.[1] For starters, the only acceptable content-specific restrictions on assemblies held in public streets and parks ought to be on forms of expression left unprotected by FC s 16(2).[2] However, content-based restrictions on assembly may also pass constitutional muster *(a)* where the purpose of the public space is inconsistent with the subject matter of the speech[3] or

unconstitutional a curfew restricting minors' rights to assemble in public streets, parks and other traditional public fora because the state produced no evidence demonstrating link between security concerns (read crime) and the behaviour of minors.)

German courts take a very similar line. See *Brokdorf* (supra) at 352. See also Woolman & De Waal (supra) at 329 citing *BVerw* (1982) *NJW* 1008, 1009 (Federal Administrative Court held that banning is not permitted where resort may be had to measures that will avert the alleged danger. Where participants carried banners with inscriptions that insulted members of the Chilean government, and in so doing committed a criminal offence, the court held that the confiscation of banners was the appropriate and proportional response. The court also noted, as a general matter, that where the objective of the assemblers is to obstruct the flow of traffic the assembly is not protected. Where, however, the hindrance of traffic is an unavoidable and an incidental effect of the exercise of the freedom to assemble, then it must be tolerated.)

[1] See *Ward v Rock Against Racism* 491 US 781, 791 (1989)('The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys'); *Clark v Community for Creative Non-Violence,* 468 US 288, 293 (1984)(An ordinance is content-neutral if it can be 'justified without reference to the content of the regulated speech'); *Deboer v Village of Oak Park* 267 F 3d 558 (7th Cir 2001)(Court declared village ordinance unconstitutional because it created the conditions for viewpoint discrimination by vesting in village clerk unbridled discretion to decide whether an assembly in village hall would benefit the public as a whole or some sectarian (read religious), interest.) See also *Stankov* (supra) at para 86 (Article 11 of the ECHR does not permit state prohibit or restrict 'an assembly or an association . . . [solely because of] the views held or statements made by participants or members.') So while the RGA, for example, is content-neutral with respect to the kinds of political demonstrations and gatherings it governs, the State's application of the RGA suggests that it engages in view-point based discrimination. Marches and protests organized by COSATU are generally permitted and even facilitated. The official response to groups on the margin, such as the APF or the LPM, is often desultory compliance with notice requirements and a pro forma letter of prohibition.

[2] See *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC)(Court explains relationship between protected speech under FC s 16(1) and unprotected speech under FC s 16(2) in order to demonstrate how legislation — Clause 2*(a)* of the Code of Conduct for Broadcasting Services (Schedule 1 to Independent Broadcasting Authority Act 153 of 1993) — that presumes to restrict unprotected speech, in fact, trenches on protected speech.) For more on content neutrality and content-based restrictions on speech, see D Milo & A Stein 'Expression' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2nd Edition, OS, August 2005) Chapter 42; G Marcus & D Spitz 'Expression' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Chapter 20.

[3] *McCook v Springer School District* 44 Fed Appx 896, 168 Ed Law Rep 710, 2002 WL 1788529 (10th Cir 2002)(Right to assemble and to associate does not entitle parent to have access to school property without limitation.)

(b) where the subject matter of the speech — or the mere fact of political speech — is inconsistent with employment in the public service.[1]

The Constitutional Court in *South African National Defence Union v Minister of Defence* provides a coherent account of the relationship between the general commitment to content-neutrality and the appropriate conditions under which the content of speech by public servants may be restricted.[2] The *SANDU* Court states that the purpose of the mutually supporting expressive rights found in Chapter 2 — FC ss 15, 16, 17, 18, 19 — is to enable:

> groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.[3]

Public servants, especially those in the security services, have obligations and duties that may legitimately restrict their expressive conduct. FC s 199(7) states that:

> Neither the security services, nor any of their members, may, in the performance of their functions — *(a)* prejudice a political party interest that is legitimate in terms of the Constitution; or *(b)* further, in a partisan manner, any interest of a political party.[4]

[1] See *Bethel School District v Fraser* 478 US 675 (1986)(Since public-schools are not public forums, schools can control the content of assemblies or gatherings for legitimate pedagogical reasons.)

[2] See *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC)('*SANDU*').

[3] Ibid at para 8.

[4] For a recent case that engages directly the limits of expressive conduct by members of the security services, see *Van Dyk v Minister van Veiligheid en Sekuritait* Case No 4268/2002 (TPD 29 April 2003, Du Plessis J)('*Van Dyk*'). The High Court held that a police officer was legitimately terminated from his employment because he stood for election as a member of the Democratic Alliance. For a more detailed discussion of this case and limits of political expression by members of the security services, see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) § 44.3*(c)*(vii). The officer argued that because his position in the police force — that of a budget analyst — did not require him to engage the public directly, the officer's candidacy could not prejudice the administration of justice or give the appearance of impropriety. The High Court found that the purpose of the South African Police Service Act was to eliminate any perception on the part of the public that the administration and the enforcement of the law advanced the fortunes of any given political party. Act 68 of 1995, s 46. The elimination of the perception of bias in the police force in order to instil greater public confidence in government justified the limitation of the rights of the particular officer in question. *Van Dyk* (supra) at 10 ('The need for a police force that is seen to be impartial speaks for itself.') See *Ahmed v United Kingdom* [1998] ECHR 76 at paras 52–53 (ECHR concludes that state is entitled to restrict the partisan political activities of local government officers — including the right to assemble — in order to strengthen the tradition of bureaucratic neutrality, to enhance the appearance of impartiality and to diminish potential for abuse of political power); *Civil Service* 39 *BVerfGE* 334, 349, 359 (German Constitutional Court holds that loyalty requirements for civil servants found in the Basic Law, Articles 33(4) and 33(5), permit state to exclude from public service persons 'who reject and oppose the free democratic order, the rule of law and the social state. Moreover, the rights of expression, association and assembly do not, necessarily, entitle a civil servant to be a 'member of a political party pursuing goals inimical to the Constitution.') See also D Currie (supra) at 221–224.

The *SANDU* Court concludes that 'members of the Defence Force may not, in the performance of their functions, act in a partisan political fashion.'[1] However, the 255 word definition of 'act of public protest' found in Defence Act, s 126B(2) read with Defence Act, s 126B(4) covered conduct ranging from 'holding or attendance of a meeting which is calculated to support or oppose any policy or conduct of the government or of a foreign government' to any indication of 'private or public support or opposition regarding any policy, conduct or principle' or any event of national or public concern.'[2] The long but still non-exhaustive definition of public protest could capture complaints made by a defence force member to her husband in relation to absolutely any 'event of national or public concern.' Such a complaint could never be accurately described as public protest or partisan political conduct. As a result, the Constitutional Court held that the Defence Act's gloss on the term 'public protest' in s 126B(2) and the extension of its definition of 'act of public protest' in s 126B(4) were unconstitutional. It then severed both subsections from the Defence Act.[3]

(iv) *Time, place and manner restrictions*

For the most part government restrictions on assembly will appear neutral with respect to the content of the expression. Facially content-neutral regulations may still impair the right to assemble in a variety of ways.

Foreign and international assembly jurisprudence make it clear that citizens ought to have 'guaranteed access' to public streets and parks.[4] A universal or

[1] *SANDU* (supra) at para 11.

[2] Act 44 of 1957.

[3] See *South African National Defence Union v Minister of Defence* 2004 (4) SA 10, 29 (T)(High Court finds that Regulation 8*(b)* in Chapter 20 of the General Regulations of the South African National Defence Force and Reserve — which provided that the right of members to assemble, to demonstrate, to picket and to petition was subject to the limitation that such right could not be exercised 'in respect of any matter concerning either the employment relationship with the Department of Defence or any matter related to the Department of Defence' — failed to satisfy the test for expressive conduct by members of the security services set out by the Constitutional Court in *SANDU*. The regulation was, therefore, an unjustifiable 'limitation of the right of assembly.')

[4] South African legislation on the subject seems rather outré. The Control of Access to Public Premises and Vehicles Act does not guarantee such access. Act 53 of 1985. Indeed, it would seem to give the state untrammeled authority to control ingress and egress. Section 2 reads, in relevant part:

> Notwithstanding any rights or obligations to the contrary and irrespective of how those rights or obligations arose or were granted or imposed, the owner of any public premises or any public vehicle may- *(a)* take such steps as he may consider necessary for the safeguarding of those premises or that vehicle and the contents thereof, as well as for the protection of the people therein or thereon; *(b)* direct that those premises or that vehicle may only be entered or entered upon in accordance with the provisions of subsection (2). (2) No person shall without the permission of an authorized officer enter or enter upon any public premises or any public vehicle in respect of which a direction has been issued under subsection (1) *(b)*, and for the purpose of the granting of that permission an authorized officer may require of the person concerned that he — *(a)* furnish his name, address and any other relevant information required by the authorized officer; *(b)* produce proof of his identity to the satisfaction of the authorized officer; *(c)* declare whether he has any dangerous object in his possession or custody or under his control; *(d)* declare what the contents are of any vehicle, suitcase, attaché case, bag, handbag, folder, envelope, parcel or container of any nature which he has in his possession or custody or under

blanket prohibition on such access — though facially neutral — would constitute an unjustifiable infringement of FC s 17.[1]

That said, the government is entitled to place time, place, and manner restrictions on assemblies in an attempt to mediate conflicting interests in safety, privacy, property and expression. US courts employ a three-part test for restrictions on assemblies in a public forum:[2] (1) the restriction must be content-neutral;[3] (2) the restriction must not burden the expressive conduct more than is absolutely necessary to further a 'significant government interest';[4] (3) any restriction must provide for 'alternative channels for communication' — that is, they must permit the assembly to take place elsewhere, or at another time, or allow the

his control, and show those contents to him; *(e)* subject himself and anything which he has in his possession or custody or under his control to an examination by an electronic or other apparatus in order to determine the presence of any dangerous object; *(f)* hand to an authorized officer anything which he has in his possession or custody or under his control for examination or custody until he leaves the premises or vehicle; *(g)* in the case of premises or a vehicle or a class of premises or vehicles determined by the Minister by notice in the *Gazette*, be searched by an authorized officer.

Despite the apparant desuetude of the Act, s 2 remains constitutionally infirm.

[1] See *Hague v CIO,* 307 US 496, 515–16 (1939)('Wherever the title of streets and parks may rest they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such a use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege to use the streets and parks for communication on national questions may be regulated in the interest of all: it must not, in the guise of regulation, be abridged or denied.')

[2] *Frisby v Schultz* 487 US 474, 481 (1988)(Court holds that while reasonable time, place and manner restrictions may be necessary to further significant governmental interests, an ordinance that fails to satisfy any leg of the three-part test will be declared unconstitutional.)

[3] See *Chicago Police Department v Mosely* 408 US 92 (1972)(Ordinance allowing labour picketing near schools, but barring other grounds for picketing, is declared invalid as a content-based restriction); *Boos v Barry* 485 US 312 (1988)(Law forbidding display of banners or signs critical of a foreign government within 500 feet of said government's embassy is constitutionally invalid as a content-based restriction.) See also *Collin v Smith* 578 F 2d 1197, 1206 (7th Cir 1978) quoting *Street v New York* 394 US 576, 592 (1969)(Court finds ordinances designed to prevent demonstrations by neo-Nazis unconstitutional, despite the potential 'infliction of psychic trauma on the resident Holocaust survivors', because 'public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers'); *Terminiello v Chicago* 337 US 1 (1949)(Words that simply make the listeners angry insufficient ground to bar speech; words must be sufficient to incite violence.)

[4] See *Ward v Rock Against Racism* 491 US 781 (1989)(Ordinance requiring performers appearing at city theatre to use city-owned sound equipment is a regulation narrowly tailored to effect the city's significant interest in preventing excessive noise); *Clark v Community for Creative Non-Violence* 468 US 288 (1984)(Significant government interests include traffic safety, sanitation, public peace and order, noise control, and personal privacy.) But see *Edwards v South Carolina* 372 US 229 (1963)(Supreme Court reverses convictions because protest took place in an historically recognized public forum — in front of the state legislature — and that there had been no threat of violence by the demonstrators nor evidence of the use of 'fighting words'); *Brown v Louisiana* 383 US 131 (1966)(Court overturns breach of peace convictions of African-American students who had peaceably assembled in a public library to protest silently against whites-only policy); *National People's Action v Village of Wilmette* 914 F 2d 1008, 1012 (7th Cir 1990)(Court holds time restrictions on canvassing — limiting them to particular hours — are constitutionally infirm because '[e]ven a temporary deprivation of a First Amendment [right] is generally sufficient to prove irreparable harm.')

message to be conveyed in a comparable form.[1] All laws purporting to regulate the time, place and manner of assemblies are subject to two further provisos: (1) they must provide clear guidelines for the conduct being regulated;[2] (2) they cannot give a public official unfettered discretion to decide what kinds of expressive conduct are and are not permissible.[3]

The Zimbabwe Supreme Court, in *In Re Munhumeso & Others*, was confronted with a piece of legislation that contravened each of these five accepted standards for the regulation of assemblies and demonstrations.[4] Section 6 of the Law and Order (Maintenance) Act read, in relevant part, as follows:

> (1) A regulating authority may issue directions for the purpose of controlling the conduct of public processions within his area and the route by which and the times at which a public procession may pass.
>
> (2) Any person who wishes to form a procession shall first make application in that behalf to the regulating authority of the area in which such procession is to be formed and if such authority is satisfied that such procession is unlikely to cause or lead to a breach of the peace or public disorder, he shall, subject to the provisions of s 10, issue a permit in writing authorizing such procession and specifying the name of the person to whom it is issued and

[1] See *Edwards v City of Coeur d'Alene* (9th Cir 2001) 262 F 3d 856, 867 (Court declared unconstitutional an ordinance banning the attachment of 'any wooden, plastic or other type of support' to signs carried during parades and public assemblies on city streets because they could, according to the ordinance, be used as weapons. Court rejected the city's contention that the ability to 'hand out, leaflets, carry signs (without supports and made of non-rigid materials), sing, shout, chant, perform dramatic presentations, solicit signatures for petitions and appeal to passersby' constituted adequate alternatives); *Metromedia, Inc v San Diego* 453 US 490 (1981)(Ban on all billboards eliminated a well-established means of communication used to convey a broad range of different kinds of messages, and a means of communication for which there was no surrogate.)

[2] See *Lakewood v Plain Dealer Publishing Co* 486 US 750, 758–59 (1988)(Court finds that standardless discretion on the part of government officials is dangerous for two reasons: (1) affected parties will censor their own speech to avoid potential, if uncertain, punishment; (2) absence of criteria for exercise of official discretion makes it impossible for the court to review meaningfully the official's decision. Moreover, standardless discretion increases the likelihood that a government official will be able to discriminate against demonstrators 'by suppressing disfavored speech or disliked speakers.')

[3] See *Cox v Louisiana* 379 US 536, 554, 557 (1965)(US Supreme Court holds that 'the rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy . . . [However,] it is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by the use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.') See also *Gregory v Chicago* 394 US 111 (1969)(Convictions for disorderly conduct of a group of peaceful demonstrators pressing for school desegregation overturned because statute gave the police almost unlimited discretion to decide what constituted a 'diversion tending to a breach of the peace'); *Shuttlesworth v Birmingham* 394 US 147, 149 (1969)(US Supreme Court invalidates ordinance for lack of specificity — permits could be refused on such vague grounds as 'public welfare, safety, health, decency and public morals' — and for granting city commission unbridled power to prohibit assemblies); *Khademi v South Orange County Community College District* 194 F Supp 2d 1011 (CD California 1999)(Court held that requiring prior approval of president to hold of meetings in specified areas unconstitutional due to absolute discretion given to president to allow or disallow meetings.)

[4] 1995 (1) SA 551 (ZS), 1995 (2) BCLR 130 (ZS), 1994 (1) ZLR 49 (SC).

such conditions attaching to the holding of such procession as the regulating authority may deem necessary to impose for the preservation of public order.

(3) Without prejudice to the generality of the provisions of sub-s (2), the conditions which may be imposed under the provisions of that subsection may relate to — *(a)* the date upon which and the place and time at which the procession is authorised to take place; *(b)* the maximum duration of the procession; and to any other matter designed to preserve public order.

The Supreme Court distils from this language three elemental infirmities. First, the Act does not assume that the public may, as a matter right, demonstrate or assemble in public streets and parks. The Act instead 'imposes a prohibition on the right to take part in a public procession *unless* permission is first applied for and obtained from a regulating authority.'[1] In short, the Act makes an absolute ban on 'public processions' in 'public places' the departure point for assembly analysis.[2] Second, the regulating authority may issue a banning order on just about any grounds whatsoever: 'the discretionary power of [the] regulating authority is uncontrolled.'[3] The absence of any criteria to be used by the regulating authorities in the exercise of their discretion turns the Act into an 'instrument for the arbitrary suppression of the free expression of views.'[4] Third, the Act makes no effort to burden the expressive conduct only as much as is absolutely necessary to further a significant government interest: 'the regulating authority is not obliged to take into account whether the likelihood of a breach of the peace or public disorder could be averted by attaching conditions upon the conduct of the procession in the issuance of a permit relating, for instance, to time, duration and route … rather than an outright ban.'[5] The *Munhumeso* Court concludes that while 'the power to control … a public procession [in a public place may be] necessary in the interests of public safety or public order', such power had to be exercised in a manner far 'less restrictive and authoritarian' than provided for in the Act.[6]

Government may legitimately claim greater latitude with respect to the restrictions imposed on public or state-owned venues not normally associated with, or conducive to, assemblies or demonstrations.[7] However, South African courts

[1] See *Munhumeso* (supra) at 561 (Emphasis added).

[2] Ibid at 563 ('Although the rights to freedom of expression and assembly are primary and the limitations thereon secondary, s 6(2) of Chap 65 reverses the order.')

[3] Ibid at 562.

[4] Ibid at 562.

[5] Ibid.

[6] Ibid at 563. See *Maestri v Italy* [2004] ECHR 76 (Unfettered discretion granted authorities to prohibit Freemasons from associating or assembling violates Article 11); *Djavit An v Turkey* (supra) at paras 64–69 (Exercise of administrative authority — without reference to any law or regulation — that prevents Turkish Cypriot from meeting with Greek Cypriots violates Article 11 because it is not an exercise of power prescribed by law.)

[7] For example, while the Constitutional Court accepts the proposition that many forms of political protest by members of the security services are constitutionally protected, it is likely to view partisan political protests by members of the security services on a military base as justifiably restricted by the provisions of the Defence Act. See *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC). See also *Adderly v Florida* 385 US 39, 41 (1966)(US Supreme Court held that demonstrators,

should take care not to base assembly doctrines primarily on place. Too great an emphasis on the nature of the forum — public, non-public, private — tends to result in 'tests' that are both over-inclusive and under-inclusive with respect to the vindication of assembly interests.[1]

How then might a court best approach time, place and manner restrictions on assemblies so as to avoid definitional traps? It might begin by asking whether the

however peaceful, did not have the right to gather on jail grounds: 'Traditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not.' The Court noted, however, that had the sheriff ordered the crowd's dispersal based upon the content of the speech, the order would not have been content-neutral and would have been a violation of the right to free speech); *Greer v Spock* 424 US 828, 838 (1976)(Court upheld two regulations barring political activities on a military base. The Court wrote that the purpose of a military base is 'to train soldiers, not to provide a public forum . . . The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is historically and constitutionally false.') But see *United States v Grace* 461 US 171 (1983)(Petitioners challenged a statutory provision that barred display of organizational banners on Supreme Court grounds and sidewalks. The Court did not address the constitutionality of the actual statutory provision, but only its effect on the right of the petitioners and public to use the surrounding sidewalk to carry out their expressive activities. The Court held that public property that abuts government property does not lose its character as 'public forum property.')

The preoccupation with place in US assembly jurisprudence distorts the courts' treatment of content based restrictions. Speech in non-public forums need only be 'viewpoint-neutral'. See *Widmar v Vincent* 454 US 263 (1981)(Court holds that since state college allows various student groups to use classrooms for meetings, it cannot restrict use based on the view-point of a group's speech, and therefore cannot prohibit religious groups from using the classroom.) The doctrine of view-point neutrality operates as a surrogate for the two-fold proposition that not all state-owned spaces are equally appropriate for assemblies, and that the primary purpose of a state-owned property may justify a significant narrowing of both the conditions under which an assembly may take place and subject matter engaged at an assembly. See *Bethel School District v Fraser* 478 US 675 (1986)(Since public-schools are not public forums, schools can control the content of assemblies or gatherings for legitimate pedagogical reasons); *Courtemanche v General Services Administration* 172 F Supp 2d 251(DMass 2001)(Court upholds denial of organization's permit application because demonstration would both interfere with primary purpose of the federal building and compromise the security of other members of the public.)

[1] The 'geographical' analysis reflected in public forum and non-public forum doctrines diverts attention from the real interests at stake: the value of the expressive activity and the countervailing interests in privacy, property or public order. Two cases reflect this subordination of substance to form. In *Brown v Louisiana*, the court employed the public forum test in finding unconstitutional the breach of peace convictions of African-American students who had engaged in peaceful silent protest within a public (whites-only) library. 383 US 131 (1966). In *Adderly v Florida*, on the other hand, the court employed the non-public forum doctrine and held that protesting African-American students did not have the right to gather on a jail driveway. 385 US 39 (1966). It is hard to understand why the inside of a library — a place for quiet contemplation — is declared a public forum and thus a potentially appropriate venue for public protest, while a government driveway fronting a jail is a non-public forum and a more easily restricted venue. Given the nature of the two locations, one might be forgiven for thinking that the assignations 'public' and 'non-public' should have been reversed. These two cases suggest that '[c]lassifying a medium of communication as a public forum' will weight the analysis heavily in favour of the speaker and 'may cause legitimate governmental interests to be thoughtlessly brushed aside.' See DA Farber & JE Nowak 'The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Analysis' (1984) 70 *Virginia LR* 1219, 1224. Conversely, identification of a venue as a non-public forum may tilt the analysis too heavily in favour of the government's interest in the protection of property and public order and often leads 'courts to ignore the incompatibility of challenged regulations' with' constitutional commitments to an open and democratic society. Ibid.

public is ordinarily admitted to the property in question as a matter of right. A negative response tilts the analysis in favour of the governmental or private interest asserted. An affirmative answer prompts a further enquiry as to whether the property in question is traditionally open to expressive activity. If this follow-up question is answered in the affirmative, then the assembly interests are to be privileged. It may be, however, that the place in question is open to the public, but is not normally associated with expressive activity. Since not all publicly accessible places are easily transformed into assembly or demonstration grounds, the next question might assess the compatibility of the property's purpose with such expressive activity. If the property is government-owned, the court might ask to what extent the restriction on gatherings simply ensures that the property can be effectively used by the government and other members of the public for its intended purpose, and to what extent the restriction effectively suppresses expression.[1] This functional approach suggests that FC s 17 ought to afford protection to demonstrations on privately owned property. Not only does the Final Constitution contemplate the extension of the guarantees in the Bill of Rights to relationships between private parties, the privatisation of public space in South Africa demands that courts interrogate both the extent to which a piece of private property serves a public function and the extent to which the expressive conduct in question actually impairs the property rights and the privacy rights of the owner.[2]

Authorities often attempt to relocate assemblies and demonstrations to 'more suitable' venues, at 'more suitable' times. With respect to restrictions on place, a court might first ask whether, in fact, other forums in the vicinity are available for expressive activities. If such alternative forums are not available, then one might ask more generally whether adequate alternative media, forms or manner of expression can be meaningfully exploited by the demonstrators.[3] Of course, it must be remembered that sites for demonstrations are often selected because of the nexus between the place and the issue. Alternative sites or forms of expression may diminish significantly the impact of the protest.[4] The court must, therefore, inquire into the symbolic significance of the property for the message being

[1] For further discussion of time, place and manner restrictions on assembly in the United States, see WE Lee 'Lonely Pamphleteers, Little People and the Supreme Court: Time, Place and Manner Regulations of Expression' (1986) 54 *Geo Wash LR* 757.

[2] See *Marsh v Alabama* 326 US 501 (1946)(Company town — though privately owned — possesses all the *indicia* of municipality and thus is subject to constitutional norms.) See § 43.3*(b)*(i) supra (Discussion of the relationship between private property and its public function.)

[3] It is all well and good to speak of alternative media, but that media must be a real alternative. Most alternative forms of mass communication are prohibitively expensive. See, eg, *Metromedia, Inc v San Diego* 453 US 490 (1981)(Ban on all billboards eliminated a cost-effective formal communication for which there was no meaningful alternative.)

[4] US Courts have made it quite clear that not all alternatives are equal and that the alternative must be capable of reaching the same audience as the prohibited medium. See *Edwards v City of Coeur d'Alene* (supra) at 867. In *Edwards*, the Seventh Circuit declared unconstitutional an ordinance banning certain kinds of signs carried during parades and public assemblies and rejected the city's contention that the ability to 'hand out, leaflets, carry signs (without supports and made of non-rigid materials), sing, shout, chant, perform dramatic presentations, solicit signatures for petitions and appeal to passersby' constituted adequate alternatives. It wrote:

conveyed as well as the medium being used to convey that message.[1] The more closely related the property is to the message, the greater the weight to be given to the expressive interests sought to be exercised there. It must also be remembered that many South Africans will not, in fact, have access to other 'adequate' forms of communication. The means of the demonstrators are just as important as the means of demonstration.

Similar considerations attach to time. The inconvenience a demonstration may cause to others during rush hour traffic is a legitimate concern. Assemblies cannot be used to coerce others into listening by obstructing their passage. However, assemblies are, at bottom, meant to convey the political position of one set of citizens to their fellow citizens and to those who govern. This conversation requires the presence of believer and non-believer alike. The selection of time is, therefore, a relevant consideration in the planning of an assembly or a demonstration. The right of the public to use the streets — married to the functional significance of time — demands that authorities compromise with conveners on the place and the time at which a demonstration takes place.

Various provisions of the Regulation of Gatherings Act ('RGA') have already had their constitutionality appraised in this chapter.[2] However, the questions set out in the previous two paragraphs throw into somewhat sharper relief several of the RGA's many fault-lines. Neither the 7-day notice provision nor the 48-hour notice provision privilege assembly rights in public streets. Like Zimbabwe's Law and Order (Maintenance) Act, the RGA generally allows regulating authorities to prohibit a gathering *unless* permission is first applied for and obtained. While regulating authorities may be required to act in 'good faith' and to limit banning orders to a relatively identifiable set of circumstances under the 7-day notice period, the forty-eight hour notice provision grants the authorities almost unfettered discretion to ban an assembly:

> if . . . notice is given less than 48 hours before the commencement of the gathering, the responsible officer may by notice to the convener prohibit the gathering.[3]

As a general rule, parades and public assemblies involve large crowds and significant noise. While some of these mass gatherings are less populated and more orderly than others, it is often difficult to see more than a few feet in any direction, or to hear anyone who isn't standing nearby. These circumstances make it difficult for individual protestors or participants to convey their messages to the broad audience they seek to attract. . . .[Only] signs attached to supports such as poles or sticks are effective tools by which to overcome the communication problems endemic to these types of situations. A sign that can be hoisted high in the air projects a message above the heads of the crowd to reach spectators, passersby, and television cameras stationed a good distance away.

[1] See *Adderly v Florida* 385 US 39, 49 (1966)("The jailhouse . . . is one of the seats of government, whether it be the Tower of London, the Bastille or a small county jail. And when it houses political prisoners or those who many think are unjustly held, it is an obvious centre for protest.")

[2] For a section by section analysis of the Regulation of Gatherings Act 205 of 1993, see § 43.2*(b)* supra.

[3] RGA s 3(2). Prior to the enactment of the RGA in 1996, several courts found unconstitutional the exercise by the authorities of relatively unfettered powers to prohibit public assemblies. See, eg, *ANC (Border Branch) v Chairman, Council of State, Ciskei* 1992 (4) SA 434 (Ck), 1994 (1) BCLR 145, 165 (Ck)(Unfettered powers of prohibition of public assemblies given to magistrates and police found to be unjustifiable restriction of freedom of assembly.)

Local authorities have also discovered that the RGA can be manipulated in such a manner as to thwart the best intentions of a convener who, in fact, complies with the 7-day notice period.[1] Because conveners rarely have the opportunity to plan a demonstration more than a week in advance, and because the notice period for urgent applications that do not meet the requirements for expedited review is 10 days, local authorities have been able to issue banning orders without having to concern themselves with the possibility that a court of law might reverse their decisions. More importantly, the reflexive use of banning orders by local authorities hardly comports with the dictates of FC s 17. FC s 17 demands that local authorities be willing to engage in nuanced assessments of the symbolic significance of the property for the message being conveyed, the relationship of the time of a gathering to the ability to convey a political position, and the extent to which the expressive conduct in question impairs the property rights and the privacy rights of others.[2]

[1] See § 43.2*(b)* supra (For an account of how local authorities have learned to exploit the judicial review provisions of the RGA and the manner in which these provisions interact with the Magistrates' Court Rules and the Uniform Rules of Court. In short, the local authorities understand that neither Magistrates Courts nor the High Courts are apt to act on urgent applications prior to the date of the planned assembly.)

[2] See § 43.2*(b)* supra (Explanation of how local authorities violate, with impunity, the 24-hour response requirements of RGA s 4(3), the good faith requirements of RGA s 4(2)*(b)*, the objective conditions for prohibition requirement of RGA, s 4(4)*(b)* and RGA s 5(1)'s insistence that a prohibition be based upon 'credible information on oath . . . brought to the attention of a responsible officer.') The authorities are keenly aware of the significance of time. Only a picket at rush hour allows demonstrators to communicate with their fellow citizens. Because a picket or a demonstration at another time often has no audience and serves no purpose, local authorities regularly ban peaceful protests during rush hour. See Founding Affidavit, *Segodi, Miya and Thembelihle Crisis Committee v City Of Johannesburg & Minister of Safety and Security* (High Court, Witwatersrand Local Division, 26 November 2005)(Document on file with author).

44 Freedom of Association

Stuart Woolman

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44.1 Introduction To Association*

Some 170 years ago Alexis de Toqueville wrote that no one and especially 'no legislator can attack [the freedom of association] without impairing the very foundations of society'.[2] If Michael Walzer is to be believed, de Toqueville's fears of impaired foundations have been realized. Walzer asserts that 'associational life in the advanced capitalist and social democratic countries seems increasingly at risk. Publicists and preachers warn us of a steady attenuation of everyday cooperation and civic friendship . . . The Hobbesian account of society is more persuasive than it once was.'[3] If we continue to ignore the foundational nature of associations, Walzer concludes, we do so at our own peril.[4]

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* I would like to thank Gavin Andersson, Danie Brand, Anton Kok, Anthony Stein and David Zefferttt for comments on earlier drafts of this chapter.

[2] *Democracy in America* (1835) 222.

[3] 'The Civil Society Argument' in Chantall Mouffe (ed) *Dimensions of Radical Democracy* (1992) 89, 90.

[4] Concerns about the fragility of associational life are not unique to advanced Western democracies. South Africa is fortunate to have a reasonably rich array of trade unions, civics, media, political parties, universities, legal structures, traditional communities, financial facilities and religious institutions. There is, however, a *thinness* about South African civil society.

This palpable thinness may be a function of a number of different historical antecedents. First, Apartheid was enormously successful in disrupting traditional ways of life, in flattening out, if not eliminating, the public space necessary for the spontaneous creation of a variety of secondary and tertiary associations and in re-inscribing invidiously exclusive communities. Second, much of the foreign money and energy that sustained the fight against Apartheid has disappeared. Third, as those once outside government have become part of government, the institutions from whence they came have lost some of their robustness. Fourth, the dominance of unbridled global market capitalism over the last decade may be responsible for the ongoing debasement of associational life.

That said, recent studies of South African civil society suggest a richness that is not readily apparent. See Mark Swilling and Bev Russell 'The Size and the Scope of the Non-Profit Sector in South Africa' in *Johns Hopkins Comparative Nonprofit Sector Study* (2002). In their contribution to the *Johns Hopkins Study*, Swilling and Russell broadened the definition of Non-Profit Organization (NPOs) to fit South Africa's transition from exclusive authoritarianism to constitutional democracy. Co-operatives, burial societies and stokvels all provide kinds of community that standard analytical markers would not have captured. The study shows that the NPO sector has a full-time equivalent (FTE) workforce of 645,316, as compared with 534,000 in mining or 436,187 in national government departments. That number places South Africa well above the average of the 28 countries surveyed. South Africa's NPO FTE workforce percentage (7.9%) compares favourably with the US (11.9%), Norway (9.1%), Germany (8.0%) and more than favourably with Japan (4.6%), Italy (3.2%), Brazil (2.5%) and Mexico (0.7%). These South African NPOs have been in existence for an average of 19 years, with religious NPOs (38 years) and health NPOs (31 years) showing remarkable staying power. Moreover, NPO management is predominantly black (73%) and female (59%).

But as Swilling, Russell and others are quick to admit, those numbers don't tell the whole story. More than 53% of South Africa's NPOs must be classified as informal, voluntary community-based organizations (CBOs). The size and capacity of such CBOs will vary. As a general rule, however, their limited size and institutional capacity place significant limits on their ability to source funding and partnerships — whether public or private — that would enable them to survive, let alone flourish. See Gavin Andersson, 'Partnerships between CBOs, NGOs and Government in South Africa' (1999) USAID Policy Paper (Manuscript on file with author). Gerhard Kraak 'The South African Voluntary Sector in 2001' (2001) 3 *Development Update* 44.

At least one working assumption in this chapter is that a successful social democracy must be willing to provide various kinds of support for the creation and the maintenance of primary, secondary and tertiary associations. It may have to support associations that compete with one another in both the public and the private realm. Mr Justice Dennis Davis and I have argued that state support for various associations is a necessary pre-condition in South Africa both for rational public discourse and individual

In the first edition of this book, I argued that associations were essential components of a well-ordered society because they made good the promise of a variety of other rights and freedoms. I still believe that proposition to be true. However, the general framework for my defense of associational rights has shifted markedly.

I now claim that casting associational freedom as a *correlative* — or even a derivative — of other constitutional rights seriously underestimates the importance for individual and group identity of the *constitutive* attachments rooted in our associations. Given the centrality of associations for both the creation and the maintenance of identity — and the heterogeneaity and *arationality* of choice in the domain of identity formation[1] — we should tread very carefully when we decide which associations merit constitutional solicitude.[2] This second set of justifications is not a function of arid, philosophical considerations. It flows from some immediate concerns raised by the jurisprudence of our courts.

This revised and enhanced appreciation for the freedom of association has led to the identification of a third strand of justifications for associational freedom: *capture*. Capture, unlike the correlative or the constitutive justifications for association, is unique to freedom of association. It is a function of — one might even say a necessary and logical consequence of — the very structure of associational life. In short, capture justifies the ability of associations to control their association through both exclusionary membership policies and the manner in which they order their internal affairs. Without the capacity to police their membership and their internal affairs, many associations would face such threats as hostile transformation or even extermination. Individuals, groups or even states opposed to the values of a given association could use ease of entrance, flexibility of voice or difficulty in discharge to change fundamentally the nature of an association. In a

and group flourishing, see Stu Woolman and Dennis Davis 'The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and Final Constitutions' (1996) 12 *SAJHR* 361. See also Stu Woolman and Li Yu, 'The Selfless Constitution: Arationality and Agency in Identity Formation, Social Change and Constitutional Theory' (Forthcoming 2004). South Africa has developed a remarkably sophisticated legal framework for engaging civil society organizations in the development of public policy. See, eg, the Nonprofit Organizations Act 71 of 1997, the Lotteries Act 57 of 1997, the National Development Agency Act 108 of 1998, the Taxation Laws Amendment Act 30 of 2000, the National Economic Development and Labour Council Act 35 of 1994 and the Local Government Municipal Systems Act 32 of 2000. While these Acts favour established and institutionalized NPOs, they still create the basis for a broader participatory democracy. The challenge for South Africa is to create mechanisms that tap the 53% of NPOs that lack the institutional capacity to engage both the state and other actors in civil society.

A second working assumption of this chapter is the modern Toquevillian inclination to valorize private, formalized associations is unwarranted. There is no reason that public entities — statutory bodies or organs of state – cannot serve as meaningful settings for associational activity. Cf *Law Society of the Transvaal v Tloubatla* 1999 (11) BCLR 1275, [1999] 4 All SA 59 (T).

[1] The extension of the term 'arationality' is discussed below in § 44.1*(b)*.

[2] As I note below in §44.1*(b)*, constitutive attachments are not just of instrumental import and are not just important for the preservation of individual identity. The various associations that are the loci for such attachments provide the setting for all meaningful action and are a necessary pre-condition for any society, let alone a well-ordered one.

world without high transaction and switching costs for the creation of associations, this risk of penetration and alteration would be a tolerable state of affairs. We could form and unform associations as we liked.[1] However, we do not live in such a world. In our world, because the costs of creating and maintaining associations are quite high, the fragility of associations means that most associations have an intrinsic interest in controlling entrance, voice and exit.[2]

Dissociation or the right not to associate is often viewed as an inevitable component of and thus fourth justification for the right to associate. Concerns about capture reveal, in part, why this is so. However, the domain of cases engaging the issues of compelled or forced association does not fall neatly or entirely within the domain of cases engaged by capture. Dissociation therefore demands a distinct line of analysis.[3]

The foregoing grounds for protecting associations ought to suggest the fairly high degree of imprecision with which we often use the term 'association'. Associations may be formal or informal. They may be ascriptive in character or

[1] With regard to our constitutive attachments, most of the associations that give our life meaning are not chosen by us nor created by us nor structured by us. See § 44*(b)* infra.

[2] For more precise definitions of entrance, voice and exit see § 44.1*(c)* infra. See also Albert Hirschman *Exit, Voice and Loyalty* (1970); Evelyn Brody 'Entrance, Voice and Exit: The Constitutional Bounds of Freedom of Association' (2002) 35 *UC Davis LR* 821.

[3] Freedom *simpliciter* is a fifth justification often offered for associational rights. Many people have a gut sense that they must be free to choose those persons with whom they wish to associate. To some extent, it *is* just plain obvious that a liberal democratic society must be committed to some level of associational choice. However, as I have already intimated above and as I will argue further below, there are significant descriptive and prescriptive constraints on associational freedom. That is, we are not as free as we would like to think with regard to the associations to which we belong, nor are we as free to structure associations however we might like, nor, finally, should we be able to simply associate with whomever we please, however we please, whenever we please. The extent of and the limits of the 'freedom' in freedom of association shall become clear as we discuss the other grounds for protecting and sometimes limiting associational rights.

A sixth, and related, justification is the public/private distinction. The notion is that freedom of association is intended to protect a sphere of individual, and often private, autonomy. This justification is so under-inclusive and over-inclusive as to lack meaningful content. Though we want our intimate associations protected, we clearly also want to safeguard associations which are quite public — political parties, universities, trade unions, civics, professional regulatory bodies, park boards. Some of our intimate associations, the family, for example, control a range of social (read public) goods that may demand state intervention (read children). Most importantly, a public/private distinction fails to explain how many associations host mechanisms that distribute a broad array of goods. For example, a university can supply cultural goods, economic goods, intellectual goods, recreational goods, intimate goods, empowerment goods and so on. A university is not unique in this regard — a museum or an internet site might well do the same. The point then is a simple one. Associations often provide a range of goods beyond those with which they are identified. Those secondary goods may be as important to the members as the primary goods.

voluntary. They may be incorporated or unincorporated.[1] They may be public or private or some mix of the two. Consider the following list:

> Nuclear families, extended families, friends, acquaintances, burial societies, fellow workers, neighbours, citizens, civics, lovers, sexual partners, religions, sects, book clubs, dinner guests, bowling clubs, fraternities, political parties, political action groups, stokvels, political lobbies, trade unions, corporations, non-governmental organizations, charities, guilds, professional regulatory bodies, schools, universities, committees, museums, park boards, economic trade associations, parent-teacher associations, school boards, tenant associations, co-op boards, landless peoples movements, co-operatives, internet forums, foundations, trusts.

The manifestly manifold nature of associations reflected in this list reveals, in turn, the brute fact that all human activity, well *almost* all human activity, involves some form of associational behaviour.

The plethora of associational forms makes it difficult to fit all associations into a single analytical framework.[2] One can try. One might be inclined to break down the above list into three distinct categories. We can identify primary associations — such as families — where the contact is relatively intimate and our choice relatively limited. We can identify secondary associations — a parent-teacher association — where the engagement is focused, somewhat less intimate and somewhat more voluntary. We can identify tertiary associations — the Reproductive Rights Alliance – where our involvement is intermittent and our connection as transitory as we might like. As we shall see, however, even this thin schematic has limited heuristic value. Each member of the broad church of associations identified above possesses dimensions of involuntariness, choice, intimacy, recreation, politics, inclusion, participation and exclusion. No tripartite division addresses such core concerns in advance.

On the other hand, one can identify a golden thread running through all four primary justifications for associational freedom. This leitmotif might best be

[1] Some commentators have asserted, without argument, that 'associations must have some sort of constitution, or at least a structure of decision-making before they will be protected.' Johan De Waal, Iain Currie and Gerhard Erasmus 'Association' in *The Bill of Rights Handbook* (2001) 341, 343. With respect, neither the grounds for protecting associational freedom nor the variety of South African associations that deserve protection warrant such a cramped understanding. (Likewise the author's unjustified asymmetrical treatment of the freedom to associate and the freedom to dissociate — the former must satisfy some set of formal requirements, the latter need not — underscores the need for analysis and not mere assertion.)

Of course, associations may need a constitution in order to satisfy statutory requirements for tax benefits or public funding. See, eg, the Nonprofit Organizations Act 71 of 1997, the Lotteries Act 57 of 1997, the National Development Agency Act 108 of 1998 and the Taxation Laws Amendment Act 30 of 2000. But that descriptive fact about statutory recognition has no bearing on the prescriptive character of constitutional protection.

[2] David Cole notes that because 'virtually all conduct is at least potentially associational', we are presented with 'serious challenges to crafting a coherent jurisprudence.' 'Hanging with the Wrong Crowd: Of Gangs, Terrorists and Freedom of Association' (1999) *Sup Ct Rev* 203, 204. This difficulty does not prevent one from identifying an array of justifications for the freedom. To give up on a unified theory of everything associational does not require one to give up on theory.

described as social capital.[1] Social capital *is* – and *is a function of* – our collective effort to build and to fortify the things that matter. It is our collective grit and elbow grease, our relationships and their constantly re-affirmed vows. Social capital emphasises the extent to which our capacity to do anything is contingent upon the creation and maintenance of forms of association which provide both the tools and the setting for meaningful action.[2] Social capital is often treated as ephemera. That makes sense. It is so hard to see. In fact, it is this elusive quality that makes social capital so fragile. It is made up, after all, not of bricks and mortar, but of relationships and commitments and the trust, respect and loyalty upon which they are dependent.[3] Social capital links up the four primary justifications for the protection of associational life in the following manner. Social capital cuts across the various forms of associational life buttressed by other rights — the correlative. Social capital is what keeps our intimate, economic, political, cultural, traditional, reformist and religious associations going. Without it, nothing works. Social capital explains at least part of what is at stake for both individual identity and social cohesion — the constitutive. Social capital recognizes that we store the better part of our meaning in fundamentally involuntary associations. Squander that social capital, nothing that matters is. Social capital recognizes the dominant rationale for ceding control over membership and purpose to the association — capture. Social capital recognizes both the real and the figurative sense of ownership that animates associational life. If anyone and everyone can claim ownership of and in an association, then no one owns it. Social capital takes seriously the threat of various kinds of compelled association. Trust, respect and loyalty have no meaning where the association is coerced. These several

[1] In the course of writing this chapter, I contrived 'social capital' as an apt neologism for what is ultimately at stake in most associational conflicts. But it is no neologism at all. Upon completion of this chapter, Gavin Anderson and Brahm Fleisch kindly directed me to the growing body of literature in sociology, political science and development studies on the definition, the value and the history of 'social capital'. See, eg, Robert Putnam *Bowling Alone: The Collapse and Revival of American Community* (2000) and *Making Democracy Work: Civic Traditions in Modern Italy* (1993); James Coleman *Foundations of Social Theory* (1990); Pierre Bourdieu 'Forms of Capital' in JC Richards (ed) *Handbook of Theory and Research for the Sociology of Education* (1986) 241. In *Bowling Alone*, Putnam defines social capital as follows:

> Whereas physical capital refers to physical objects and human capital to the properties of individuals, social capital refers to social networks and the norms of reciprocity and trustworthiness that arise from them. In that sense, social capital is closely related to what some have called 'civic virtue'. The difference is that social capital calls attention to the fact that civic virtue is most powerful when embedded in a sense network of social relations. A society of many virtuous but isolated individuals is not necessarily rich in social capital.

Bowling Alone (supra) at 19. There is a signal difference between Putnam's account of social capital and the one developed in these pages. First, in this chapter, social capital is not assumed to be desirable primarily because of its instrumental link to civic virtue and the well-ordered society. Social capital is simply a cause and an effect of all stable associational frameworks. It is a predicate good for most other social goods. Second, because associational life is the necessary setting for most meaningful action, it makes little sense to speak, as Putnam does, of virtuous individuals in isolation. Virtue is a feature of human life that can exist only in the context of a densely woven fabric of social practices that define the good life.

[2] Our deployment of our social capital is how things get done. In the absence of significant stores of social capital, the only tool for collective action is coercion.

[3] See Anette Baier 'Trust and Antitrust' in *Moral Prejudices* (1995) 95, 96, 98, 128–129.

virtues can be earned, but never commanded. No trust, respect or loyalty: no social capital. No social capital: none but the most debased association.[1]

The obvious importance of social capital aside, I am not going to force some grand theory about the necessary conditions for a social democracy into the limited confines of a chapter on freedom of association. Rather, in the pages that follow, I hope to show how each of the four aforementioned grounds for protecting associational life support both social capital *and* different indicia for determining the level of support a particular kind of association should receive. The notions of the 'constitutive', the 'correlative', 'capture' and 'dissociation' should also enable us to unpack some of the reasoning behind existing South African case law on association.

(a) Associations as Correlative

Associational freedom makes participatory politics meaningful and genuinely representative politics possible. An individual is unlikely to have either the ability or the resources necessary to mount an effective campaign to convince large numbers of his peers that his position on a particular subject is correct. However, a like-minded group of individuals — with their collective insight, effort and resources — is far more likely to make itself heard. Once heard, they have the opportunity to influence fellow members of society. If they are able to influence a sufficiently large number of their fellow citizens, they can, perhaps, translate their influence into the election of representatives. These representatives, who wield the real power, may then effect the desired political change. Associations thereby provide the bridge from individual efforts to collective political action.[2]

[1] The rhetoric should not be mistaken for the following logically transitive proposition: (1) if a = b; (2) if b = c; (3) then a = c. Trust, respect and loyalty may be pre-condition for social capital, but social capital is not reducible to those virtues.

[2] The argument for constitutionally protecting political association might also be stated in the negative. That is, associational freedom acts as a brake on majoritarian tyranny by making it possible for individuals and minorities to challenge existing political majorities. The first challenge consists simply of a demonstration of numerical strength. The second challenge consists of developing arguments designed to persuade members of the existing majority to switch their allegiance and ultimately turn the present minority into the majority. Associations, on this account, make majorities fluid. And the more fluid the majority, so the argument goes, the less likely it will be to squash a minority: members of a fluid majority may well recognize that they could be on the receiving end should allegiances shift once again. See de Toqueville (supra) at 223. See also Dennis Davis 'South Africa and Transition: From Autocracy to What?' (1992) 18 *Centre for Applied Legal Studies Working Papers* 23 (only local and intermediate political associations can apply the sort of pressure necessary to spur the party elites into action and thereby ensure that the benefits of political liberation result in economic and social liberation); Robert Dahl *Polyarchy: Participation and Opposition* (1971).

Associational freedom also secures so-called private goods. Most of us believe that our intimate associations are crucial to our self-understanding.[1] The freedom of association prevents the state from exercising too substantial an influence over our decisions about whom to love and how to love them.[2]

Associational freedom protects cultural goods. Cultural practices and affiliations — like intimate relationships — often form an integral part of our self-understanding.[3] Cultural associations sustain these practices and affiliations. If, therefore, we wish to safeguard these basic or primordial attachments from undue state interference, then we must be willing to place cultural associations securely within the freedom's protective sphere. We might also wish to protect cultural associations for more instrumental reasons. For one thing, cultural associations often act as effective buffers between the individual and state power. For another, the greater the number of and more varied our cultural associations, the more enriched our national culture and our individual lives tend to be. For a third, cultural associations, like other associations, tend to fill the breach left by the decline of familial hierarchies and the concomitant increase in market-driven individualism. They mediate the anomie of modern society, often perform welfare functions the state is unable or unwilling to undertake, and generally function as the glue preventing social disintegration.

Associational freedom realizes economic goods. Business associations, for example, may realize certain efficiencies or advances through the sharing of price, product and technical information. Optimally, and ultimately, the benefits of such shared knowledge should flow to the consumer in the form of lower prices and better products.

Associational freedom advances social goods. The freedom enables individuals and communities to organize around particular issues of concern. It thereby permits these groups to contest and ameliorate the structure of social power in ways that are not directly political. It also allows them to organize in pursuit of activities that they just happen to enjoy.

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[1] But that self-understanding does not mean that we, as individuals, do have or should have relatively unfettered control over decisions about intimate relationships. See § 44.1*(b)* infra. See also Jed Rubenfeld 'The Right of Privacy' (1989) 102 *Harvard LR* 737 (The general effect of anti-contraception, anti-abortion, anti-homosexuality or anti-miscegenation laws is to force one's life into extremely limited patterns—patterns which inform, if not dictate, the totality of one's life. Seen this way, a right to intimate association is not about 'the freedom to do certain, particular acts' but rather the 'freedom not to have one's life too totally determined by a progressively more normalizing state'.)

[2] See *Roberts v United States Jaycees* 468 US 609, 615, 104 SCt 3244 (1984)(that intimate 'personal relationships [enjoy] a substantial measure of sanctuary from unjustified interference by the State . . . reflects the realization that individuals draw much of their emotional enrichment from close ties with others'). See also *Lawrence v Texas* –US — , 123 SCt 2472, 156 LEd 2d 508 (2003)(Homosexual sodomy protected by right to privacy); *National Coalition for Gay and Lesbian Equality v Minister of Justice and others* 1999 (1) SA 6 (CC), 1998 912) BCLR 1517 (CC) (Homosexual sodomy protected by rights to equality, dignity and privacy).

[3] See Kenneth Karst 'Paths to Belonging: The Constitution and Cultural Identity' (1986) 64 *North Carolina LR* 303. Karst notes that cultural groups establish many of our 'primordial affinities'. These affinities 'not only provide a tie to other people, but also offer us our very selves'.

Associational freedom realizes social-uplift or substantive-equality goods. It frees labour to bargain collectively so that it may compete with capital on a more equal footing.[1] It frees women to form educational institutions suited to their particular needs. If we believe that the economic empowerment of subordinated groups is a sufficiently pressing social goal, then we may want to insulate such associations from significant state interference so that these groups can advance their historically subordinated interests.[2]

The foregoing list of goods should suggest that the sphere of liberty secured by the freedom of association is important for three very basic reasons. First, individuals (and groups) are freed to pursue or maintain those attachments which they believe are constitutive of their being. Such attachments might be intimate, cultural, religious or social. Secondly, individuals (and groups) are further freed to realize — spontaneously, if not consciously — a most important instrumental goal: a rich and varied civil society. This rich and varied civil society in turn serves many ends: facilitating social debate and participatory politics, providing a buffer between the individual and the state, sustaining a vibrant culture, and ensuring economic progress and advancement. Thirdly, the foregoing list of goods should also imply that if we withdraw constitutional protection from these various forms of association, our ability to protect individuals from the abuses of state power, as well as unchecked social and economic power, will be significantly diminished.[3]

[1] This chapter's treatment of association reflects several notable lacunae: it does not discuss closed-shop agreements, management bargaining units, or codetermination statutes mandating employee participation in corporate policy-making structures. These specialized areas of labour association law are at a distance from traditional associational concerns, are largely subsumed by the provisions governing labour relations entrenched in s 23 of the Final Constitution and the Labour Relations Act 66 of 1995, and are therefore best dealt with in the chapter on Labour Relations. See Carole Cooper 'Labour Rights' in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz and Stuart Woolman (eds) *Constitutional Law of South Africa* (2nd Edition March 2004) ('*Constitutional Law of South Africa* (2nd Edition)') Chapter 53. The chapter will engage trade unions in so far as their practices shed light on associational issues generally. See also Report on Freedom of Association, Theme Committee Four, Fundamental Rights, Constitutional Assembly (1995)('The freedom in so far as it affects trade unions and employer associations should be dealt with separately under the rights and freedoms concerning labour relations.')

[2] See Deborah Rhode 'Association and Assimilation' (1986) 81 *Northwestern University LR* 106 (associations of individuals from historically disadvantaged groups may engage in exclusionary practices, that would be deemed unjustifiable in associations made up of individuals from advantaged groups, where the social meaning of the association and exclusion is not invidious). See also Cathi Albertyn, Beth Goldblatt and Chris Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001) 123 for an allusion to the Act's potential for asymmetrical treatment of exclusionary practices in historically disadvantaged and non-disadvantaged associations. Thus, discrimination is not, ipso facto, an evil. What Professors Albertyn, Goldblatt and Roederer do not engage – and in fairness, cannot do so adequately given the limits of space – is the necessity of discrimination for life generally and for meaningful association in particular. However, when they do engage association-based discrimination, it seems to be given unduly short shrift. Too egalitarian an orientation so flattens and distorts associational life as to make it unintelligible. See § 44.2*(b)* infra.

[3] For a general discussion of freedom of association under the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC') as well as a detailed analysis of US, Canadian and German jurisprudence up through 1994, see Stu Woolman and Johan de Waal 'Freedom of Association: The Right to Be We' in David van Wyk, John Dugard, Bertus de Villiers & Dennis Davis (eds) *Rights and Constitutionalism* (1994) 338-86.

(b) Associations as Constitutive

(i) *Associations as Constitutive of the Self*

Associational freedom is often justified on the ground that it enables individuals to exercise relatively unfettered control over the various relationships and practices deemed critical to their self-understanding. But autonomy as the basis for associational freedom overemphasizes dramatically the actual space for self-defining choices. In truth, our experience of personhood, of self-consciousness, is a function of a complex set of narratives over which we exercise little in the way of (self) control.

Our notion of 'selfness' is a function, a very useful by-product, of a complex array of semi-independent neural networks that control the body's journey through life. This complex set of dispositional states are a function of both the deep grammar of our brains and the social endowments that have evolved over time to determine various patterns of behaviour. It should be apparent from this brief account that the self or the mind is a valuable abstraction and *not* an entity — or an internal observer or a boss — that stands back from experience and then dictates to the body what it does in response to various stimuli.[1]

Each self then is *just* a centre of narrative gravity. Each centre of narrative gravity — each self — is a set of different, but overlapping narratives. Each narrative, or storyline, reflects a complex set of experiences and dispositional states organized around a particular form of behaviour. 'I' consist of narratives around my roles as a male, as an academic, as an English speaker, as a son, as a sexual being, as an American, as a tennis player, as a sleeper, as a cook, as a Jew, as a disabled person, as a friend of Anthony, as a listener, as a teacher, as a New Yorker, as bald, as the Managing Editor of *Constitutional Law of South Africa*. The list of narratives is not infinite — but it is almost as long and as varied as my life. The self then is that centre of narrative gravity, that self-representation, which holds together and organizes information, various storylines and dispositional states that make up my sense of 'me'. It is unique. The variety of narratives that make up 'me' is different in a sufficiently large number of respects to allow me to differentiate my 'self' from any other 'self'. It is relatively stable. Though my narratives and dispositional states are always changing, my self-representations enable me to see my 'self' as remaining relatively consistent over time.[2]

[1] This understanding of the self draws heavily upon contemporary analytic theories in the philosophy of mind. These accounts often rely, in turn, upon current studies in empirical psychology and neurophysiology. See, in particular, the works of Daniel Dennett *Elbow Room* (1984), *Consciousness Explained* (1991) and *Freedom Evolves* (2003). See also Andrew Pessin and Sandy Goldberg (eds) The Twin Earch Chronicles (1996); Derek Parfit *Reasons and Persons* (1984). (This account elides the extensive debate around consciousness and identity. A literature review of that debate clearly does not belong here.) This 'de-centered' characterization of the self also features in many contemporary psychoanalytic, post-structuralist and post-modern theories of personhood. However, this functionalist account of the self does not share many of the epistemic commitments — and the anxieties of doubt – of much of what counts as post-modern.

[2] Individuals who have suffered through accidents or illnesses often experience a radical break in terms of the self. A sense of self 'before' and a sense of self 'after'. Such is the difference between these different self-representations that an individual will often say 'I am not the same person'. Of course, they are correct. The different set of dispositions makes them a different person. (Many of us will have a similar sense of otherness when we think back upon our childhood.)

It is socially and physically determined. The self, and its various narratives, is thoroughly a function of physical capacities and social practices over which we have little control or choice.[1]

The conclusions we draw from this account of the self for our understanding of associational life are fairly straightforward. This account of the self should dispel the notion that individuals are best understood as 'rational choosers' of the ends they seek. The self should be seen as the inheritor and the executor of a rather heterogenous set of practices — of ways of responding to or acting in the world. The centrality of inherited practices or social endowments for both the creation and the maintenance of identity introduces an ineradicable element of *arationality* into the domain of individual decision-making. That is, despite the dominance of the enlightenment vision of the self as a rational agent, the truth of the matter is that the majority of our responses to the world are *arational*. They are not reflective. They are not critical. They are not chosen. They just are.[2] It is this heterogeneous variety of associations and practices into which we are born and in which we continue to reside that determine substantially our responses to various events or phenomena. If this is so, then as a constitutional matter, the model of a rational individual moral agent which undergirds much of our current jurisprudence ought to be supplanted with a vision of the self that is more appropriately located in the associations to which we all belong.

Take for example the way in which our courts have dealt with Rastafarians in *Prince*[3], homosexuals in *National Coalition for Gay and Lesbian Equality I* and

[1] See Richard Dawkins *The Selfish Gene* (1976) and *The Extended Phenotype* (1982) for a useful account of how patterns of learned behaviour — memes — replicate themselves over time through individuals, groups and societies. Like genetic replication, we need not be aware of the process of memetic replication for it to occur. Of course, human beings differ meaningfully from other species in their capacity to exercise some control over both genetic and memetic replication.

[2] This use of the term *arational* may strike some as deeply counterintuitive. It may seem to sweep into the ambit of the arational, various processes most people are apt to describe as falling within the domain of the rational. The point is not to argue about terms. I would be happy to concede various natural and social processes as counting as amongst the many kinds of rational operations in which we engage. The point is the authorship of the processes themselves. We employ many natural and social processes in a fashion clearly intended to secure various ends. The fit between our means and ends, as well as the choice of the ends themselves, is often just what we mean by rational. We did not, as individuals, and often as groups, consciously create many of these processes. They are not the product of any one person's capacity to reason (though various individuals will have contributed to this vast array of processes). In this respect, they are *arational*. So when I say these responses 'just are', I am not denying that there might not be good reasons for them being so. I only deny that the ultimate source of the reasons, evolutionary adaptation or social adaptation, does not lie within the individual alone. Cf Edmund Burke 'Speech on Conciliation with America' (22 March 1775) (Burke wrote that 'it is a great mistake to imagine that mankind follows up practically any speculative principle, either of government or freedom, as far as it will go in argument or logical illation.') Like me, Burke is sceptical of reasoning from the bottom up. Unlike me, Burke is deeply cynical about our collective capacity for rational discourse.

[3] *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) ('*Prince*') (Rastafarian use of cannabis in religious ritual justifiably impaired by criminal sanctions because the legislature has power and duty to enact legislation prohibiting conduct considered by it to be anti-social — whether court agrees with this assessment or not).

II[1] and sex workers in *Jordan*.[2] What links all of the judgments — majority and minority alike — is the model of the self as a rational moral agent.[3] The result of this dominant mode of analysis is that it overestimates the capacity of the individual to choose his or her own ends. Conversely, it underestimates the centrality of associations, endowments and practices for the formation of individual identity. If we were to shift our constitutional analysis to one in which we see associations as constitutive of the self, then we might be willing to treat individuals who participate in non-dominant forms of behaviour with greater respect. Eliminate the notion that individual Rastafarians 'choose' to smoke an elicit substance and supplant it with the assessment that Rastafarians simply engage in a marginal, but not especially dangerous, form of life. The result should be that we are willing to take more seriously the need to create a space for what many in our society view as aberrant practices.[4] Exemptions for other ways of being in the world supplant the desire to sanction non-conformist or non-dominant forms of behaviour. Judicial solicitude for rational individual choice — a stance that often inclines toward the belief in a single justifiable form of behaviour — is displaced by judicial solicitude for the arational, constituitive attachments that form the better part of our identity.

The recognition of the self as a function of arational, constitutive attachments does not mean that we must give each of these attachments our imprimatur of constitutional approval.[5] Within the constraints of these social endowments, we

[1] *National Coalition for Gay and Lesbian Equality v Minister of Justice and others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) ('*NCGLE I*'); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) ('*NCGLE II*').

[2] See *S v Jordan (Sex Workers Education and Advocacy Task Force and others as Amici Curiae)* 2002 (6) SA 642 (CC) ('*Jordan*') (Women's right to engage in commercial transactions involving sex, though private and often involving economically marginalized classes, insufficient to outweigh state's interest in proscription through criminal sanction).

[3] See *NCGLE I* (supra) and *NCGLE II* (supra).

[4] See *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) ('*Case*') at para 99. In *Case,* Justice Langa distinguishes permissible from impermissible pornography. Criminal sanctions for child pornography make sense on the grounds of coercion and an inability to provide consent. Criminal sanctions on pornography featuring bestiality are not be justified on the same grounds. But what if they were? Animals, or those persons with their interests at heart, would, at best, be indifferent to any distinction between our use for them as food and as sexual objects. Justice Sachs provides the putative grounds for such distinctions in *NCGLE I* (supra) at para 118: 'There are very few democratic societies, if any, which do not penalize persons for engaging in inter-generational, intra-familial, and cross-species sex, whether in public or in private ... The privacy interest is overcome because of the perceived harm.' Aside from the fact that most societies, historically, have not only permitted but promoted inter-generational sex, neither tradition nor the status quo is an argument. With respect, it is just this sort of non-argument argument about 'perceived harm', that makes it so difficult for minority/aberrant practices to be taken seriously. Justice Sachs uses 'democratic societies' — and thus majority rule — as a screen. But as the honorable justice knows, it is accepted wisdom that a primary justification for judicial intervention in a constitutional democracy is to protect discrete and insular minorities against laws animated by the trivial 'harms' experienced by the majority.

[5] We might begin with a predisposition in favour of creating a space for non-conformist behavior: let us say the disposition to smoke cannabis as a part of Rastafarian religious ritual. However, if this disposition were linked to a disposition to sell cannabis and other drugs to individuals outside the Rastafarian community, and this disposition led to behaviour that endangered the general welfare of society, then we would be well within our rights to ask that the sale of cannabis outside the Rastafarian community be legally proscribed.

still possess the capacity to make critical assessments. Within the constraints of these social endowments, we still possess the capacity to make reasoned judgments about right and wrong, good and evil.[1] Indeed, it is the varied forms of attachments and dispositions that make up the self which provide each of us, and our society collectively, with the critical leverage necessary for discriminating between more and less valuable forms of behaviour.

Thus, the recognition of associations as constitutive of the self does not mean that we eschew hard constitutional choices. It means, rather, that we ought to think twice before we differentiate individiously between our preferred way of being in the world and that way of being preferred by others. Freedom of association rightly understood forces us to attend to the *arationality* of our most basic attachments and to think twice before we accord our arational attachments preferred status to the arational attachments of others.

(ii) *Associations as Constitutive of Social Life*

The constitutive nature of our attachments forces us to attend to another often overlooked feature of associations. We often speak of the associations that make up our lives as if we were largely free to choose them or make them up as we go along. I have suggested why such a notion of choice is not true of us as individual selves. It is also largely not true of associational life generally. As Michael Walzer has convincingly argued, there is also a 'radical givenness to our associational life.'[2] What he means, in short, is that most of the associations that make up our associational life are *involuntary* associations. We don't choose our family. We

[1] The emphasis in this section on the arational sources of the self should *not* be understood as diminishing the place of reason in ethical, political and legal thought (or most fields of human inquiry for that matter). First, the place of instrumental reason and the ability of human beings to recognize regularities in the world means, at the very least, that we are able to discriminate between better and worse ways of realizing our preferred ends. Second, the more de-centered the self, the more varied forms of life the self draws upon, the more tools the self will have when deciding upon the preferred vision of the good life. Third, this account is not averse or opposed to the existence of some deep grammar of human reason — married to long-standing social conventions – that commits us to such varied ends as the family, the collective and the individual. Some may think it convenient that such a species of naturalism results in a commitment to such imperfectly reconcilable goods as freedom, equality, dignity and democracy. However, putting aside the current dominance of liberal and social democracy, these values or ends have competed with one another for primacy of place for several millennia. How one settles, *in a rational manner*, the differences between these ultimate ends is the very meat of ethical and political thought. Fourth, though there may be plenty of instances in which the evidence for our beliefs about the world leaves room for a certain amount of theoretical indeterminacy, I take it as given that most of our beliefs about the world are true *and* that we, humans, share most of those beliefs. Only under such general conditions of shared understanding does it even begin to make sense to talk about disagreement. Thus, though Ptolemy and I may not share certain theories about the solar system, we certainly would share most other beliefs about things in this world. This identity of belief sets between Ptolemy and myself would be obvious if you were able to watch — and to interrogate – both what we do and say. Moreover the near identity of belief sets would enable us to settle many an 'apparent' dispute. See, for example, Donald Davidson *Inquiries into Truth and Interpretation* (1985), 'On the Very Idea of a Conceptual Scheme' (1974) 47 *Proceedings and Addresses of the American Philosophical Association* 1; Wilfred VO Quine *Word and Object* (1960); Daniel Dennett *The Intentional Stance* (1987).

[2] Michael Walzer 'On Involuntary Association' in Amy Gutmann (ed) *Freedom of Association* (1998) 64, 67.

generally don't choose our race or religion or ethnicity or nationality or class or citizenship. Moreover, even when we appear to have the space to exercise choice, we rarely create the associations available to us. The vast majority of our associations are already there, culturally determined entities that pre-date our existence or, at the very least, our recognition of the need for them. Finally, even when we overcome inertia and do create some new association (and let me not be understood to underestimate the value of such overcoming), the very structure and style of the association is almost invariably based upon an existing rubric. Corporations, marriages, co-edited and co-authored publications are modelled upon existing associational forms. So gay marriages may be a relatively new legal construct — but marriage itself is a publicly recognized and sanctioned institution for carrying on intimate or familial relationships. Even in times of transformation and revolution, reiteration and mimicry of existing associational forms are the norm.[1]

Perhaps Walzer's most interesting challenge flows from his invitation to think about what it might mean for individuals to lack involuntary associational ties, to be 'unbound, utterly free?'[2] One image, he suggests, might be that of wild horses. But this very image is the antithesis of what makes us human. We are human, and not merely feral, because of the involuntary associations into which we are born and which have been sustained and developed over time. Even schools designed to enable us to make the most of our freedom do not let us do whatever we so wish. We have to learn to be free. And even then, our freedom is predicated upon associations which were and continue to be involuntary in important respects.

As with the above account of the self, this account of the involuntariness of associational life is not meant to undermine the importance of associational *freedom* for a truly democratic society. Issues of access, of coercion, of choice, of voice, of exit must be constantly negotiated in order to ensure both fairness and flourishing for all members of a society. The emphasis on *involuntariness* in associational life is meant to bracket that conception of freedom which suggests that any impediment to free association is a denial of that which is most fundamentally human. Those impediments are, in many respects, the precondition for such freedom. A reasonably equal and democratic society must, it would seem, mediate the givenness of our associational life and the aspirations of all of us to discriminate (and sometimes choose) between those associational forms which still fit and those which do not. It is often the case that not choosing to leave an association, but to stay, is what we truly cherish as freedom.[3] Indeed, as Walzer suggests, we ought to call such decisions to reaffirm our commitments 'freedom simply,

[1] The French Revolution returns to direct democracy. The Cambodian revolution looks to traditional forms of communal or agricultural organization. Less radical revolutions, like the American and the South African, harken back to the republicanism of the Greek polis or iterate the modern idiom of a constitutional democracy committed to universal human rights.

[2] Walzer 'On Involuntary Association' (supra) at 70.

[3] We commit and recommit to marriages, friendships, religions, countries, employers. We stay with people or institutions out of loyalty, and because this is just who we are. Sometimes we fight for our country. At other times, we carry on the fight, generally peaceably, within our country. Both fights reflect our loyalty and commitment to our country.

without qualification.'[1] It is, for the most part, he concludes, 'the only freedom that free men and women can ever have.'[2]

The constitutional insights to be drawn from this account of involuntary association are much the same as the naturalized account of the self above. To understand what 'freedom' actually means requires us to pay particular attention to the unchosen conditions of such freedom: to the real space in which choice obtains. This understanding in no way diminishes our responsibility to engage in a casuistic, case-by-case analysis of associational claims. It does, however, sound a cautionary note both for those who trumpet freedom as the ultimate trump and for those who would treat all associations as suspect and therefore as instruments to advance the egalitarian ends of the state.[3]

(c) Associations and Capture

There is something about the very structure of associations that makes them worth protecting: capture.[4] Capture is a function of — one might even say a necessary and logical consequence of — the very structure of associational life. In short, capture justifies the ability of associations to control their association through selective membership policies, the manner in which they order their internal affairs and the discharge of members or users. Without the capacity to police their membership and dismissal policies, as well as their internal affairs, associations would face two related threats. First, an association would be at risk of having its aims substantially altered. To the extent the original or the current raison d'être of the association matters to the extant members of the association, the association must possess the ability to regulate the entrance, voice and exit of members. Without built-in limitations on the process of determining the ends of the association, new members, existing members and even outside parties could easily distort the purpose, the character and the function of the association. Second, and for similar reasons, an association's very existence could be at risk. Individuals, other groups or a state inimical to the values of a given association

[1] Walzer, 'On Involuntary Association' (supra) at 73.

[2] Walzer, 'On Involuntary Association' (supra) at 73.

[3] On how one chooses between due recognition for the various associational sources of the self and the need for the state to intervene in order to ensure that its citizens have adequate access to those associations deemed preconditions for liberal democracy as well as individual and group flourishing, see § 44.2 infra.

[4] An association's control over selective membership policies (entrance), its internal affairs (voice), exclusionary or discharge procedures (exit) would seem to explain much, though not all, of the content of the right to disassociate. But the converse is not the case: the grounds for dissociation do not explain the notion of capture. Cf Johan De Waal, Iain Currie and Gerhard Erasmus 'Association' in *The Bill of Rights Handbook* (2001) 341. The authors describe the right to dissociate as including 'the rights not to establish an association, to stay out of existing associations, to dissolve an association and to resign from an association.' Ibid at 343. For a more precise account of dissociation or *forced* association, see § 44.1*(d)* infra. See also Nicholas Haysom 'Association' in Halton Cheadle, Dennis Davis and Nicholas Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 247, 251; Halton Cheadle 'Labour Relations' in Cheadle et al (supra) at 363.

could use ease of entrance into and the exercise of voice in an association to put that same association out of business.

In a world without high transaction and switching costs for the creation of associations, the risk of such penetration and alteration might be a tolerable state of affairs. (Then again, in a world of pre-dominantly involuntary association, we might rather fight than switch.[1]) But, it almost goes without saying, in the real world the costs of creating and maintaining associations is quite high. Just starting an association — be it religious, cultural, economic, political or intimate — takes enormous effort. To fail to take such efforts seriously, by failing to give individuals 'ownership' over the fruits of their continued labour is to risk creating significant disincentives to form, to build and to maintain their relationships. Thus, whether we are talking about a marriage, a corporation, a church, a political party, a cricket board, a dinner party, a trade union, a golf club, or a law society, we will want to give them a certain amount of room to govern their affairs and to operate without interference by outside parties. And this *is* what we do. Marriages are subject to a contract — a contract that, vis-a-vis monogamous relationships anyway, excludes other parties from the family. Private corporations are structured — through articles of incorporation and by-laws – to exclude non-members from participation in the operation of the corporation without the appropriate approval. Such participation may occur, amongst other ways, through the legally sanctioned purchase of shares of ownership or ownership outright or through being hired by an existing member or empowered employee of the corporation. A church may have a covenant or articles of faith to which a member must swear in order to gain entrance and to which they must adhere to retain membership. A golf club membership may require nomination and fees. A law society might require a test or a period of training to secure admittance. It might require community service, dues and fairly strict law-abiding behaviour in order remain a practitioner in good standing. To fail to permit a marriage, a corporation, a church, a golf club or a law society to govern its boundaries and its members in appropriate ways would make these arrangements impossible to maintain. It would, in some respects, be equivalent to saying that anyone and everyone owns these associations — which is, of course, tantamount to saying that no one owns them.

I use the notion of property in both a literal and a figurative sense. In a quite literal sense, most associations have tangible property that makes the pursuit of its ends possible. Thus, for example, if a Congregationalist Church is to pursue its

[1] Moreover, as I have already argued, many, if not most, of the associations to which we belong are involuntary associations. They are involuntary in the sense that they preexist us and constitute who we are as individuals and communities. They are involuntary in the sense that we have a limited range of associations to which we can belong. They are involuntary in the sense in that even when we are as free as can be we are generally not free to disown all of the associations of which we are a part. Some may choose to be Thoreau, others forced to be Crusoe. But even the Thoreaus and Crusoes amongst us are not unencumbered.

mission of imparting the received wisdom of the Church and enabling its members to engage in shared devotion, then it will often require buildings, a parsonage, books, musical instruments and furniture. The Church may also run schools and host events designed to promote the church's teachings amongst the young and the masses. How it disposes of such property — and who owns that property — can be said to be governed by the constitution that governs the Church's financial affairs as well as the legal regime that governs property generally. In a quite literal sense, we might want to prevent capture of the Church's property by, let us say, a group of persons who wish to create a similar appreciation for the Korean language and culture. The normal regime of property in a liberal democratic state would be one means of preventing the use of unsavoury means for the realization of such ends.

There is also a figurative sense of ownership and property bound up with, but not identical to, the literal sense. This figurative sense involves the capacity of like-minded individuals to work together to realize shared ends and to share in the gratification of such ends. In the case of a marriage or a religious entity or a cultural formation, the goods are often identical to the means of attaining them. Thus, the coming together to pray in a Congregationalist Church is both a means of making manifest individual faith and an end in itself. These means and ends are governed by articles of faith. The manner of prayer, the content of belief and the binding rituals are set out in rules. Adherence to this set of rules, and the capacity to generate new rules, should matter as much as the rules which govern more tangible forms of property. For if there is no set of rules said to express the beliefs of the members — even if this set of rules is unwritten — then there is a real sense in which anything goes and anyone belongs. The figurative property regime of associational membership in a liberal democracy should ensure that a Congregationalist Church is able to define and maintain itself as such, and that it need not worry about a sudden transformation into some other denomination.

Both senses of property and ownership matter. It is the purpose of freedom of association to ensure that both are protected from *capture* by those who would use them for ends at a variance with the existing and rightful members of the association.[1]

[1] As least part of what animates those concerned with 'freedom' in freedom of association is what we describe here in terms of capture: the notion that like minded individuals ought to be free to do what they like with whom they like and to set up associations to that end without fear of undue interference or penetration. Capture, and its dual metaphors of property and ownership, captures this first meaning of 'freedom'. The power to exclude from one's associational property and to prevent its capture by others reflects a second notion of 'freedom' — the right not to be forced to associate with others. This ground for 'freedom' of association is exhausted by notions of capture and disassociation. A third justification for 'freedom' is autonomy and self-realization. It would seem that our account of association in terms of the correlative, the constitutive and the dual senses of ownership intrinsic to capture provide ample room for a self to fashion itself to the extent it can and the extent it will.

(i) *Entrance*

As we have seen, associations pursue a variety of different ends. In the pursuit of these ends, associations may require the control of a substantial amount of property or may be charged with the distribution of a wide variety of goods. In any case, the kind of association under scrutiny will often dictate the kind of control we wish to give it over entrance.

Marriages will generally be exclusive affairs — entrance to which may be determined by the individuals involved or, in some cases, the families of those individuals. Trade unions may likewise limit entrance to those who are employed in the given trade and are willing to use collective bargaining to determine the terms of their employment. Religious institutions may be entitled to restrict entrance to individuals who have sworn to uphold the tenets of the faith and agree to demonstrate continued adherence through the performance of required ritual. Likewise, only by keeping out persons who might not have the commitments of the Reproductive Rights Alliance or the Alliance Francaise at heart — only by controlling entrance — would each Alliance be assured of maintaining some control over the means necessary to pursue their respective ends.[1] The literal and figurative sense of property and ownership does real work because only this dual understanding of property enables the various associations to carry out their various ends.

How much control do we cede to the existing members of an association to determine who is entitled to entrance? Again, it depends. We tend to cede a great deal of control over entrance to marriages to the parties concerned. We can easily

[1] If the Alliance Francaise is to pursue its mission of teaching the French language and creating a greater appreciation for French culture, then it will require buildings, books, musical instruments, cinemas, computers and furniture. The Alliance Francaise may also give away scholarships or host events designed to promote the language and culture. Let us assume that a group of persons wished to create a similar appreciation for the Korean language and culture. One possible step towards the realization of such a goal would be to gain control of the Alliance Francaise. While French dictionaries might not prove useful, the buildings and other goods under the current control of the Alliance Francaise certainly would.

One obvious objection to this example is that associations such as the Alliance Francaise often do not have members in the deliberative and quasi-political sense that we have been using the notion. Many tertiary associations are not run by their members. They may be established by trusts and run by trustees. In such cases (and such cases may represent a large percentage of associations), the concerns about permeability, contestability and capture may have limited purchase. The example is, however, designed to highlight what is at stake for those associations which have *not* put their basic principles beyond the reach of the shifting viewpoints of the individuals who pay dues, participate in the management of the association or simply make use of the association's goods and services.

Another objection, it must follow, is that such associations rarely undergo the kind of hostile takeover we tend to attribute to Wall Street kingpins. Perhaps so. Perhaps not. Struggles for control, I would argue, are a salient feature of all associational settings. Sometimes the strife is limited to the control of a law faculty and the aims it pursues. Sometimes it is takes place between various parties to a marriage and individuals outside a marriage. Sometimes insiders and outsiders collude to take control of a country. Control over entrance is one way we control the manner in which associations may, over time, come to view their mission differently and how we account for — or indeed control — such change.

imagine intervention where a party is being coerced into such an arrangement.[1] We tend to cede a great deal of control over membership in religious institutions. A liberal democratic state is on very shaky ground when it starts to decide on matters we tend to believe belong to some transcendental domain — even where such rules run counter to liberal democratic principles. However, when we move on to more public institutions such as trade unions or universities or law societies, then we may want such institutions to bear some sort of burden of demonstrating that the grounds for exclusion are reasonably or even inextricably linked with the purposes of the institution. The state should accept my exclusion of a potential mate from the bonds of matrimony on the grounds that she snores, or even from a religious denomination on the alleged grounds that snoring is the devil's work. But because snoring seems wholly unrelated to the aims of a trade union, a university or a law society (unless, of course, it happens on the job, in the class, or during trial), the state should be willing to interfere with the entrance requirements of any such institution that uses snoring as a bar.[2] The basis for the distinction between the two groups of associations should be obvious. It is not clear what, if anything, a state would gain through interference in snoring-based entrance criteria for marriages and religions. It is, however, clear that issues of power, participation and opportunity in a liberal democratic society may require that institutions designed to deliver such goods — trade unions, political parties, universities and so – must do so in a fair manner — a manner that is in some sense is congruent with the values of a liberal democratic society.[3]

[1] Westerners tend to be more uneasy about polygamous unions than monogamous ones. But we seem ready to create conventions to cover those kinds of marriages — and cede the requisite control over them — to the extent we are convinced that coercion is less of an issue.

[2] See Martin Redish and Christopher McFadden 'HUAC, the Hollywood Ten and the First Amendment Right of Non-Association' (2001) 85 *Minn LR* 1669. The members of the Hollywood studios that shunned or boycotted persons with previous connections to the Communist Party did not have an associational purpose bound up with such anti-Communist precepts prior to the exclusion of the Hollywood Ten. On my account, therefore, the studios would be hard pressed to show any connection between their exclusionary practice and their associational purpose. The only question, hypothetically, would be the grounds for the state's intervention on the Hollywood Ten's behalf.

[3] Nancy Rosenblum 'Compelled Association, Public Standing, Self-Respect and the Dynamic of Exclusion' in Amy Gutmann (ed) *Freedom of Association* (1998) 75-108. While Rosenblum recognizes the logic of congruence, she is absolutely adamant that state intervention take note of two other associational dynamics. First, liberal democracies by their very nature must make provision for exclusion, and for exclusion that does not necessarily require rational defence. Second, a primary problem for liberal democracies is not exclusion *per se* but social anomie, a failure to connect that is not a necessary outgrowth of exclusionary practices. Histories of exclusion and histories of dislocation may overlap with one another in South Africa. But one must take care not to mistake the one for the other and assume that the appropriate corrective is simply to eliminate all vestiges of exclusion. The proper response may be for the state to develop institutions that create opportunities for greater participation and that serve the associational needs of historically disadvantaged communities. That the drafters of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 have conflated exclusion and dislocation seems relatively self-evident. See § 44.2*(b)* infra.

(ii) *Voice*

Part of the purpose of the Reproductive Rights Alliance is to give voice or expression to the virtues of reproductive choice. Suppose, however, that reproductive choice is anathema to a large number of individuals. Assume that these individuals join the Alliance in order to shift its message — to change its voice. Only by giving the Alliance — and its existing leadership or trustees — the power to control its message, and if need be expel members whose views conflict with its stated mission, can the Alliance be certain that it can continue to voice its support for reproductive rights. Similarly, freedom of association, and related freedoms of expression, thought, conscience, assembly or petition, would be relatively hollow if the state could simply intervene in order to alter the Alliance's message in a manner that suited the majority of citizens and their representatives.[1] Thus, capture analysis is tied to the belief that many associations exist both to give *expression* to various ways of being in the world and to provide a setting in which such ways of being may continue to flourish.

But 'voice' throws up at least five difficult questions. First, what is the voice of an association? Second, how is that voice established? Third, how does one account for shifts in the positions of the members of an association that would require a shift in voice? Fourth, on what grounds would a state be entitled to interfere in the internal affairs of an association to change the message or alter the manner in which the message is formed? Fifth, how much expression or clear articulation must an association give to its values in order to be understood to actually possess an expressive component — or is the generally accepted conduct of its members sufficient?

What is the voice of an association? The voice of an association must have as least two dimensions: (1) what the association says it is about; (2) what the association does in the world. The two should be relatively co-extensive. That is, there should be a relatively tight fit between word and deed. In this respect, the voice of an association may be judged in much the same way as a person. If a person says they believe in reproductive choice, but thwarts the ability of others to secure such services – either by bombing clinics or funding pro-life campaigns – then we might have cause to wonder whether they mean what they say.[2]

[1] It is critical to note that exclusionary practices often protect unpopular minority views. See Katherine Moerke and David Selden 'Associations Are People Too' (2001) 85 *Minn LR* 1495.

[2] Of course, it goes without saying that word or deed alone will not necessarily establish what an individual believes. Self-deception, weakness of the will, cognitive dissonance can all create disjunctions between word and deed, word and word and deed and deed. Nor is there any simple way to determine a person's or an entity's beliefs or propositional attitudes. Perhaps the best approach is to adopt an intentional stance: a strategy of interpretation that presupposes the rationality and the relative transparency of the people that we hope to understand.

How is an association's voice established? Of course, saying that the voice of an association is established through both word and deed oversimplifies the exercise. Associations are often made up of members who do not share exactly the same set of beliefs and who do not believe in the same course of action. Moreover, there may be no clear annuciation of belief nor a clear mechanism for such articulation. Or, as if often the case, persons in a position to articulate the association's beliefs to the public may not, in fact, reflect the beliefs of the members. Many associations are *not* set up like little democracies. They may not have structures for debate. The members may not possess equal status in determining the message. When we think about how hierarchical families, churches, fraternities and corporations often are, we should take care before we attempt to introduce democratic principles into the mix. Indeed, part of living in a liberal democratic society means a certain level of acceptance for associations that do not conform to the basic, organizing principles of a liberal democratic state.

This apparent difficulty in determining the message of an association suggests two somewhat compatible strategies to deal with questions three, four and five above. First, we should be reluctant to attribute a clear set of beliefs or values unless we have clear evidence of such beliefs or values. Second, we should be reluctant to interfere in the spontaneous construction of such a set of beliefs or values by the members of an association. That is, we should be chary about imposing a state-sanctioned value on an association unless we have clear evidence that the association in question has no apparent belief regarding the subject under scrutiny.

How does one account for and respond to shifts in the positions of the members of an association that would require a shift in voice? The two prophylactic rules in the paragraph above offer a start. Moreover, unless a good reason exists to interfere in the internal affairs of the association in question in order to determine the message, we should be reluctant to push the analysis any further.

On what grounds would a state be entitled to interfere in the internal affairs of an association to change the message or alter the manner in which the message is formed? With certain kinds of association the threshold for interference in determining the voice ought to be quite high. With families, religious groups and traditional communities, the first inclination of a liberal state ought to be to allow the members to work out their voice on their own. Only in circumstances of obvious coercion, and where parties concerned have little opportunity to articulate their voice through exit, should the state show a willingness to intercede.[1] Such an approach adheres to the logic of associational life: associations are both constitutive and involuntary in important respects, but we can never allow them to use their involuntariness as a mechanism for abuse. So a liberal state should be willing to intervene where children's well-being is at stake because they do not control either the voice of the family or their own exit. A liberal state

[1] See the discussion of coercion as a ground for state interference at § 44.2*(d)* infra.

should be willing to intervene where women in traditional communities likewise lack a voice or a meaningful opportunity to exit — and where a desire to be heard or to exit is made express.[1] With other kinds of association, the threshold for interference in determining the message should be quite low. For example, because political parties are essential for the effective operation of most liberal democracies, we would want a relatively unfettered accounting of just what the members of a party advocate. That means we can reasonably require a party to be open to all those who wish to belong and who can satisfy some basic conditions of membership.[2]

The articulation and the control of voice becomes can become an issue even for those associations which do not have — as with a particular party — a particularly expressive function. Take the Boy Scouts, for example. They have a very elaborate set of structures, codes and activities designed to raise virtuous and publicly-spirited young men. But what if a homosexual scoutmaster — who heretofore has not made his sexually orientation known — is 'outed' by a newspaper? Can the central leadership of the Boy Scouts — who heretofore have not made sexually orientation an explicit part of their code — now argue that all their previous actions and statements have demonstrated that homosexuality has always been anathema to the Scouts and that the mere sexual orientation of the homosexual scoutmaster makes such a person an inappropriate leader of young men? As I discuss below, such a scenario does not lend itself to a simple resolution.[3] Competing interests within the organization, the lack of clarity of institutional purpose (which could be said to bind members in advance) and the quasi-public, quasi-private nature of the organization all make both the construction and the attribution of voice a difficult exercise.

(iii) *Exit*

Controlling entrance and voice is only possible if an association controls exit. The Reproductive Rights Alliance, or any such association, must be able to determine whether a person has complied with the basic dictates of the association. If not, it must also be able to expel her from the association. That is not to say that every association ought to be able to discipline and punish members however it sees

[1] How express such intent should be will be a matter for debate. But paternalism in the guise of correcting 'false consciousness' is always a danger when intervening on behalf of adults.

[2] The problem of multiple voting and membership — that is, persons belonging to all parties in an effort to skew all results towards their singular preferences — is at least partially controlled by only permitting registration with a single party. Thus, if I am really an ANC stalwart masquerading as a DA supporter, then a registration restriction locks me into a particular organizational setting. I lose, at least publicly, my ability to influence the construction of an ANC voice. Some broad commitment, in advance, to the positions of the party coheres with arguments from capture and democracy. But no advance set of commitments can control wilful deception nor wilful deception en mass.

[3] See § 44.1*(c)*(vi) infra.

fit. For classically voluntary, secondary associations in which members have a legitimate expectation of ongoing participation, the association's expulsion procedures may have to satisfy two basic requirements: *(a)* the grounds for the expulsion ought to be tied directly to the purpose of or the management of the association; *(b)* a member of the association should receive some form of fair hearing should she wish to contest the expulsion.[1]

As our discussion of involuntary associations should have made clear, exit is also critical for the members of an association. No association can be truly said to be free if its members are coerced into remaining. It goes without saying that some associations are easier to walk away from than others. Families, religions, ethnic groups, races and states are notorious difficult to shrug off.[2] Thus, as we have already noted, sometimes the walking away is notional — one never 'really' leaves. Constitutional law in a liberal democracy must take such notional departures seriously. And it must make real breaks possible. Just as a liberal democratic state must be willing to intervene where the coercive conduct of association threatens the physical well-being of a member, it must also be willing to create some measure of opportunity for its citizens to leave associations. That cannot possibly mean an obligation to find everyone the job, the family, the religion, the community that best fits him or her. But it may mean creating institutions — say the Human Rights Commission or the Commission for Gender Equality — that help to foster awareness of situations in which involuntary associations become intolerable. It may also mean that we give all citizens the resources — primarily through education — needed to make meaningfully 'free' decisions about where they want to be, what they want to do and who they want to do it with: even if such decisions often simply re-affirm the associations that such persons have already entered.

[1] See, eg, *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T) ('*Cronje*'); *Ward v Cape Peninsula Ice Skating Club* 1998 (2) SA 487 (C) ('*Ward*') and *Wittmann v Deutscher Schulverein, Pretoria, and Others* 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T) ('*Wittmann*') and discussion of these cases at § 44.3*(c)*(ix) infra. Again, the complex nature of associational life requires a caveat. With respect to membership in many tertiary associations — where, say, a R50 annual fee to belong to the World Wildlife Fund is the sum total of the relationship — membership would seem sufficiently attenuated that fair hearings are generally unwarranted and undesirable. (The issue again is less the kind of association and more the ability of members to participate in its affairs.) With respect to membership in religious and traditional forms of association, the imposition of fair hearings — unless part of the accepted practice — would be a rather gratuitous imposition. To the extent that an expulsion would be about a matter of faith — and not access to property — a member should be expected to understand and to have accepted the conditions for remaining within the fold as well as the conditions for being asked to leave.

[2] It should go without saying that not all ascriptive associations — race and ethnicity — are themselves constitutionally protected association. Such a definition would most certainly be overly broad. Rather the point is to draw attention to the circumstances in which the state intervention in 'involuntary associations' is justified. See § 44.1*(d)* — Association and Dissociation – and § 44.2*(d)* — Coercion – infra.

(iv) *Social Capital, Fragility, Switching Costs and Transaction Costs*

The foregoing discussion should make clear why we care about forestalling the capture of associations — and the concomitant ability of associations to retain their autonomy through control of entrance, voice and exit. In a world of insignificant transaction and switching costs, one might be inclined to answer that we would not. Individuals and groups would be literally free to leave, join, dissolve and reform associations without any of the time, effort, and money that the creation and maintenance of associations require. But we do not live in such a world. Nor is it really possible to understand what it is to be human in a world of completely 'free association'. Human beings are only human, only become human, through a complex engagement of physically and socially constructed dispositions. (This treatment ignores, it goes without saying, the manner in which the physical and the social influence one another over time). And each set of such dispositions is significantly, if not entirely, a function of processes of replication over which we have only a modicum of control.

But what if we were to start acting as if we were creatures capable of 'free association'? What would an approach that failed to take the protection of existing associations seriously be likely to yield? My sense is that even with enormous sums of economic capital, the fragility of associations would make large scale intervention a failure. Most associations are built on trust and respect. Conditions that undermine the tenuous bonds of trust and respect between individuals and groups are likely to make many forms of association quite difficult to maintain.[1]

[1] The jurisprudential argument developed herein is simple. A robust associational life is a necessary pre-condition for a well-ordered and just society. Trust is both a necessary pre-condition for a robust associational life and a product of that associational life. A well-ordered society is one that does not allow trust to attrite. See, eg, Sisela Bok, 'Truthfulness, Deceit and Trust' in *Lying* (1978) 31 ('Whatever matters to human beings, trust is the atmosphere in which it thrives.') This chapter can be read as an extended meditation — grounded in constitutional theory — on the primacy of this virtue and the political conditions necessary to sustain it. Put another way, trust's ubiquity and necessity only become apparent to us upon its destruction, much as we 'notice air only when it becomes scarce or polluted.' Annette Baier 'Trust and Antitrust' in *Moral Prejudices* (1995) 95, 129. This chapter sounds a cautionary note on taking trust and associational life — much as we take air — for granted.

Likewise, the pre-conditions for trust are such that they do not lend themselves to demands for clearly articulated rules of distributive justice (or clearly articulated rules period) that a well-ordered society is often said to require. The reasons for this are three-fold.

First, unlike rules of distributive justice, which require fairly rigorous institutions designed to facilitate the transparency, accountability and openness of social interactions (eg, courts, legislatures, newspapers, universities), trust is 'a fragile plant, which may not endure inspection of its roots, even when they were, before the inspection, quite healthy.' Baier (supra) at 130. For example, a marriage is not likely to survive for long, if, at the nightly repast, the first question is 'so were you faithful today dear?'

Second, and for reasons already assayed, trust cannot be commanded. A system of distributive justice — say that portion of Rawls' second principle that requires that all economic arrangements must provide some benefit to the least well-off — generates a fairly abstract set rules to be followed by the governors and the governed. The instantiation of these rules is parasitic upon existing forms of inarticulate and indeterminate social coordination such as trust.

When I say inarticulate, think of what it means when someone says 'Trust me'. While it may be superfluous where you are already likely to heed the advice or guidance of a friend, it is, in fact, more often a danger signal, a thinly veiled threat or, even when sincere, a potential overestimation of the trustee's capacity to make good. Think of what the words 'Trust me' would add to a provision of a contract. Nothing. On the one hand, the clause would be meaningless because there could be no

One can view the market, which places a premium on efficiency, fungibility and mobility, as a kind of large-scale intervention that can, without adequate brakes, eviscerate bonds of trust and respect. This view of markets holds equally for intervention by the state. No one with even a passing familiarity with the abuses of Apartheid can fail to appreciate the destruction wrecked on the better part of South African society. Moreover, the constant presence of the state in many areas of social life made the continuation of all but the most non-threatening forms of associational life difficult if not impossible.

The fragility of associational life and the difficulty of deploying social capital to new ends under conditions of constant change or interference underscores a

expectation of performance: it is based upon trust and it just goes with the territory that the truster may be let down by the trustee. On the other hand, the prefatory imperative — 'Trust me' – must be read out of the provision in order for the remainder of the clause to be understood by both parties to be binding.

When I say indeterminate, the nature is of trust is such that the trustee must grant wide 'discretionary powers to the trusted, to let the trusted decide how, in a given manner, one's welfare is best advanced, to delay the accounting for a while, to be willing to wait and see how the trusted has advanced one's welfare.' Annette Baier, 'Trust and Its Vulnerabilities' in *Moral Prejudices* (1995) 131, 136. While rule-governed systems may rely, in part, upon discretion, discretion is at the very heart of trust.

When I say a system of rules is parasitic on trust, the formation of rules — or a system of rules – is based upon the ability to exercise good judgment. This good judgment, in turn, is contingent upon the capacity to make determinations about the kinds of situations in which trust is to be extended or withheld. (This capacity to make such determinations is predicated upon such 'primitive' practices as noting that shifty eyes elicit suspicion or that a shoulder shrug reflects acquiescence.)

The conclusion to be drawn from this brief meditation has two-parts.

First, where there is 'little or no mutual trust . . . it is hard to see how trust could get started without the help of some third party. Only if trust is there in some form can we increase it by using what is there to contrive conditions in which it can spread to new areas.' Annette Baier, 'Sustaining Trust' in *Moral Prejudices* (1995) 152, 176. (Parents employ this model with their children all the time. It goes without saying that they can likewise build up large reservoirs of distrust that make coordination impossible.) Moreover, it is impossible to simply supplant the enormous reservoirs of trust created and reinforced by associational life with rules designed to rupture and reorganize social life along radically different lines without incurring substantial costs in social capital and cohesion. (How one strikes the proper balance between conservation and transformation is at least part of what this chapter aims to answer).

Second, Jurgen Habermas has noted that securing agreement in modern societies subject to both perpetual pluralization and disenchantment with the world puts enormous strain on collective democratic deliberation. See *Theory of Communicative Action* (1984) and *Between Facts and Norms: Contributions towards a Discourse Theory of Law and Democracy* (1996). As William Rehg writes:

> reaching agreement communicatively [and constructively] requires a large background consensus on matters that are unproblematic for group members. The implicit agreement represented by such a lifeworld background stabilizes a communicatively integrated group insofar as it removes a large body of assumptions from challenge — as it were fusing validity with facticity of a given cultural background. This is because the background not only provides its members with shared resources for managing conflict; as a source of shared identities it lessens the number of issues that are likely to be contested at any given time, so that large numbers of social action rest on a stable basis of unquestioned consensus.

'Introduction' *Between Facts and Norms: Contributions towards a Discourse Theory of Law and Democracy* (1996) xvi. Given the limits of 'unquestioned consensus' in the South African polity, and the need for consensus to transform society, reinforcing and extending the implicit understandings that perpetuate trust and associational life is an absolutely necessary, if not sufficient, condition for the success of the South African political project.

conservative tack towards associational life and intervention therein.[1] That does not mean intervention is never justified. The examples of legitimate intervention offered thus far suggest otherwise. But if we place make efficiency or equality the basis for all of our social planning, then it seems relatively obvious that we place certain aspects of and kinds of associational life at risk. How we come up with a method of analysis that helps us to decide what kinds of state intervention in associational life are justified — and may actually improve associational life — is a project begun in the following two subsections.

(v) *Permeability, Flexibility, Contestability and the Problem of Shifting Boundaries*

The choice of the Reproductive Rights Alliance as one of our primary examples for capture analysis is apt to occlude some very important characteristics of associations. First, entrance criteria may expand or contract. The Alliance itself only appears to have a relatively static voice. What counts as paradigmatic conditions for reproductive choice are bound to change over time. What the Alliance members or the board of trustees valued in 1993 may not be what they value now in 2003. Second, associations possess varying degrees of flexibility. The Alliance has a certain amount of flexibility: within the parameters of promoting reproductive rights quite a number of different messages may be conveyed. The African National Congress, on the other hand, would appear to have the potential for an even more varied content. As it stands, the ANC is home to various strains of nationalism, neo-liberal politics and the invidiously characterized 'ultra-left'. In addition to the varied ends of its eclectic membership, the ANC as a political party has as a raison d'etre the continued control of the levers of power. The combination of differing optimal visions and the need to secure the support of the electorate means that the ANC's entrance criteria and its voice criteria are going to be *flexible* and *contestable*. Third, associations will vary in terms of their *permeability*. A housing association may be as permeable as the geographical location, and the resultant housing units, it intends to cover. A water access movement in Alexandra must have a narrow brief, but be open to as many residents of Alexandra as are interested in access. A marriage seems relatively impermeable. It is a quite classically a union of two — one women and one man — and two only. Or is it? We now know marriages can move form the monogamous to the polygamous; from heterosexual to homosexual; from common law to customary to religious to secular. Likewise, some religious institutions have been historically averse to homosexual leaders. However, as the recent elevation of a homosexual clergyman in the Anglican Church points up, even the most hide-bound associations can change, can shift their boundaries.

[1] The argument is hardly inimical to transformation. It simply sounds a cautionary note as to the kinds of intervention in associational life that are likely to be successful. For example, various attempts at Black Economic Empowerment ('BEE') are entirely consistent with this account. BEE recognizes existing stocks of social capital and creates incentives for new relationships of trust and respect that extend the access to those stocks to persons heretofore excluded from them. Whether BEE is the best possible engine for transformation is not something upon which this chapter need take a view.

How then is a court to decide when it should intervene on behalf of an association seeking to enforce some pre-determined vision of what the association means and represents? One answer would be the kind of functional response I have begun to outline in this introductory section. One could attempt to identify a correlative right that supports the particular kind of association in question. One could attempt to determine the relative weight an association might have in the lives of its members (taking care that such weights will vary from person to person). One could attempt to determine whether the attempts at controlling the entrance to and voice of the association are consistent with the express or objective meanings of the association (attentive to the fact that such ascriptions of value are as flexible and contestable as the boundaries of the association are permeable and shifting). Against such valuations of the existing membership of the association in question one would then have to assess how compelling the justification would be for overriding the association's exclusionary criteria. As we shall see, one overriding interest, though by no means the only one, is the state's interest in ending discriminatory practices. It is trite that all efforts at exclusion are discriminatory. The real questions for us in South Africa are two-fold: (1) Does the discrimination in question impair the dignity of the person or persons being excluded? (2) Even if the dignity of the person is so impaired, does the impairment warrant compelling the members of the association to alter its criteria for entrance and thereby changing, if the intervention would in fact do so, its voice.

(vi) *Problems with Capture Analysis*

As the discussion in subsections (i)–(v) above suggests, controlling entrance, voice and exit is not without its difficulties. The Boy Scouts, as we have already begun to suggest, offers a suitably complex setting to test some of our interim conclusions about association analysis. It pursues particular goals – the pursuit of certain virtues by young men. It distributes various goods — opportunities to learn skills, to participate in organized events and to secure a certain status within the broader community. Given these goals and goods, should the Boy Scouts of America be free to include and exclude whomever they like? As our 'functional' analysis suggests, the Scouts' freedom to exclude individuals raises three-related concerns. First, such rules may discriminate against individuals and groups in ways wholly unrelated to the ends of the association. Second, such rules may discriminate against individuals and groups in ways that offend the rules to which a society is committed. Third, a rigid adherence to existing articles or by-laws of an association may preclude the association from a natural or spontaneous evolution into an organization that pursued a somewhat modified or a dramatically different set of ends.

In recent litigation, the Boy Scouts have had their desire to exclude homosexuals vindicated by the United States Supreme Court.[1] The US Supreme Court believed there to be a relatively clear nexus between the right of the Boy Scouts of America to represent themselves as a standing for a particular set of values

[1] *Boy Scouts of America v Dale* 530 US 640, 120 SCt 2446 (2000) ('*Dale*').

(whether they actually expressed them or not) and the right to exclude individuals whose behaviour apparently subverts those stated values. Although not employed by the Court, the three-part analysis suggested in the paragraph above does some work in explaining what was at stake in *Boy Scouts of America v Dale*.[1] The first concern links the Gay scoutmaster's exclusion to the association's ends. The second concern engages the issue of privileging the constitutive nature (and meaning) of the Scouts to (a majority of) its members over egalitarian concerns of the society in general. The third concern determines the extent to which the Scouts' governing authority may declare — albeit through fiat — what all affiliates of the Scouts may declare to be both the exclusionary criteria and the ends of the association.[2]

While the US Supreme Court has been forced to grasp the nettle of membership practices, it is relatively clear from the outcome in *Dale* that it has not been willing to press down particularly hard on the Boy Scout's stated justifications for exclusion. It is not clear how, if at all, the sexual orientation of a Scoutmaster (and former Eagle Scout) runs counter to the general ethos of the Scouts. Likewise, it is not clear that the vast majority of members believe that the virtues promoted

[1] The US Supreme Court, however, employs a set of doctrines that rests upon distinctions between 'expressive associations', 'intimate associations' and those associations which are neither expressive nor intimate. These doctrines are articulated in a quartet of public accommodation cases beginning with *Roberts v United States Jaycees* 468 US 609, 615, 104 SCt 3244 (1984) ('*Roberts*') and extending through *Board of Directors of Rotary International v Rotary Club of Duarte* 481 US 537, 107 SCt 1940 (1987) ('*Rotary Club*'), *New York State Club Association v City of New York* 487 US 1, 108 SCt 2225 (1988) ('*City of New York*') and *Dale* (supra).

[2] Four points need to be made about the *Dale* litigation. First, the stakes were deemed to be so high for associational rights generally that sixty-three associations and 18 states filed amicus briefs with the court. Second, the amicus briefs filed by various Boy Scout affiliates and sponsors could be found on both sides of the case. For example, some Methodist church sponsors saw no conflict between the presence of a Gay assistant Scoutmaster and the basic values the Boy Scouts are said to espouse. Some Methodist Church sponsors did. Third, in terms of US jurisprudence, the Boy Scouts had to rely on the 'expressive' content of their association in order to find protection under the First Amendment. That the Boy Scouts had not expressed clear views on homosexuality as part of their broader social message did not detain the Court. Expression was deemed to be an ineluctable consequence of the association. The need to force association into the parameters of existing constitutional doctrine around expression points up the limits of US associational jurisprudence. Moreover, it should put South African courts on notice that what is truly at stake is not expression but 'capture': the ability of associations to control both their membership (entrance and exit) and their member's behaviour (voice). Fourth, as a matter of New Jersey constitutional law, the New Jersey Supreme Court found that Mr. Dale could rely upon New Jersey's Anti-Discrimination laws and that the State's constitutional commitment to equality took precedence over the expressive (if any) interests of the Boy Scouts and their (purely associative) interests in having the ability to exclude Mr. Dale from participation. Since it could not supplant its own assessment of what the New Jersey Constitution requires, the US Supreme Court was thus forced to hold that the US Constitution's 1st Amendment protection of expressive association trumped the State's interest in public accommodation anti-discrimination laws. South African Courts, on the other hand, will have to decide solely on the fit between membership practices, the Promotion of Equality and Prevention of Unfair Discrimination Act, and ss 9 and 18 of the Constitution.

by the Boy Scouts are in any manner undermined by the sexual orientation of a Scout or a Scoutmaster.[1]

Perhaps a better example of fit between exclusionary practices and associational ends is on display in *Royal Society for the Prevention of Cruelty to Animals* ['RSPCA'] *v Attorney-General*.[2] The RSPCA sought vindication of (1) a membership policy designed to remove and exclude members who wished to change the association's policy on hunting; and (2) a convenient administrative scheme for enforcing this policy. The Court held that the policy was not inconsistent with the Human Rights Act of 1998. In short, the charity retained the freedom under Article 11 of the European Convention on Human Rights to exclude from the association those persons who it believed might ultimately damage its interests. The court's decision is consistent with the three-part test adumbrated above. First, the humane treatment of animals — the clear and unequivocal purpose of the RSPCA — is squarely at odds with the adoption of a policy designed to support blood sport. To prevent the 'capture' of the RSPCA by individuals — and even members — inimical to the associations' core concerns, the RSPCA had little choice but to adopt its chosen exclusionary mechanisms. Second, it seems relatively clear that individuals who wished to press for changes in hunting laws were not prevented from doing so simply because they were not permitted to use the RSPCA as a vehicle for such change. Thus, the exclusion policies are not an affront to any basic principles of justice. Third, it would render the freedom to associate absolutely meaningless if an association founded to ensure the humane treatment of animals was compelled to adopt a policy most often associated with the inhumane treatment of animals.[3]

To the extent that a South African court has engaged the substance of control over membership policies, it has failed to employ a similarly complex set of

[1] It is difficult to understand why homosexual status *simpliciter* should be understood to constitute expression or advocacy. To suggest that it does possess such expressive content, and then to find the status/expression to be of secondary constitutional import, is to suggest that the label 'homosexual' 'is tantamount to a constitutionally prescribed symbol of inferiority.' See Donald Hermann 'Homosexuality and the High Court' 51 *De Paul LR* 1215, 1223. See also *Dale* (supra) at 696 (Stevens J dissenting). The US Supreme Court has, in *Lawrence v Texas* – US — , 123 SCt 2472, 156 LEd 2d 508 (2003)('*Lawrence*'), found that the right to privacy now protects intimate homosexual relationships. Though there is no necessary consequence of this new-found right to privacy for associational rights, it may mark a shift in the Court's willingness to interrogate more vigorously the rationales behind public and private rules that result in the exclusion of gays and lesbians. Moreover, despite assurances from the *Lawrence* majority that its decision would not have any necessary consequences for its treatment of other claims by gays and lesbians for equal treatment, at the very least it must go some distance towards eradicating the constitutionally mandated badge of inferiority re-inforced by *Dale*.

[2] [2002] 1 WLR 448. See also 'Current Survey — Freedom of Speech' [2002] *Public Law* 355-6.

[3] That said, shifts in policy that identified the culling of herds for the benefit of the wildlife concerned with the putting down of animals in order to spare them pain might fall within the domain of contestable policies consistent with the over-arching purpose of the RSPCA.

criteria. In *Cronje v United Cricket Board of South Africa* ['UCB'] [1], the court concluded, simply, that an association 'has the same right as anybody else to resolve not to associate with a third party.' The court was not at all vexed by such questions as whether the grounds for exclusion served a basic policy of the association or whether the membership policy of the association offended basic principles of justice to which our society is now committed. Instead, the court relied upon rather tried, tired and true commitments of the common law to 'freedom of contract'. Harking back to the turn of the last century, the court quoted with approval the holding of the Witwatersrand Local Division in *Johnson v Jockey Club of South Africa*:

> '(N)o member of the public has any claim against the Jockey Club for damages merely because the club refuses to admit him to any of its privileges or refuses to have anything to do with him. That is also the reason why such an association is entitled, when it receives an application from a non-member, with whom it has no contractual relationship, for membership or permission to use facilities, simply to refuse the application.'[2]

Of course, the South African court could have employed, without fear, a more nuanced approach to the analysis of membership policies on display in *Cronje*. First, the exclusion policies were connected directly to the goals of the association. The UCB has a direct interest in making certain that its members abide by the rules of the game: throwing games is just not cricket. Second, these exclusion policies are not an affront to any basic principles of justice and certainly not to any reasonably new commitment to equality. Third, the exclusion policies with regard to corruption are not contested aspects of what it means to be a member of the UCB.[3]

South African courts are not likely to be able to simply fall back on the common law in the near future. The Promotion of Equality and Prevention of Unfair

[1] *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T)('*Cronje*').

[2] 1910 WLD 136, 140. See also *Ricardo v Jockey Club of South Africa* 1953 (3) SA 351, 357 (W); *Marlin v Jockey Club of South Africa* 1951 (4) SA 638, 649 (T); *Carr v Jockey Club of South Africa* 1976 (2) SA 717, 721 (W).

[3] But see *Ward* (supra) and *Wittmann* (supra). Though neither case raises constitutional freedom of association issues directly, both cases uphold the rights of members of an association to challenge their expulsion from a voluntary association. However, in both cases the grounds for reversing the expulsion have more to do with the procedural failure to grant the member a fair hearing, than with some substantive measure of whether the expulsion occurred for some politically or morally reprehensible reason. Indeed to the extent that *Wittmann* weighs in on the power of an association to terminate membership when the member acts in a manner contrary to the decisions of the association's board and engages in expressive conduct that leads to criticism of the association, it decides that the association does possess such power. While both cases appear to move away from the anachronistic stance of *Cronje*, one might simply read these two cases as standing for the proposition that a member has vested interests in the club that, at a minimum, require a fair termination hearing. A non-member, on the other hand, possesses no such rights. Read this way, *Wittmann*, *Ward* and *Cronje* seem of a piece. See § 44.3*(c)*(ix) infra.

Discrimination Act ('PEPUDA')[1] has as its stated aim 'the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people.'[2] No one escapes the grand sweep of the Act. It binds state actor and private actor alike. All associations — from political to business to social to religious to recreational — fall expressly within its purview. Moreover, should a complainant be able to make a *prima facie* showing that an association has discriminated on any one of the prohibited grounds stated in the Constitution and the Act, then that association will have the burden of demonstrating that the discrimination is justifiable.[3] The Act goes even further. It presumes that any discrimination on grounds analogous to those found in section 9 of the Constitution is unfair. Associations are now on notice. The time when a right to exclude was presumed to be legal is over.

(d) Association and Dissociation

For reasons already assayed under the headings of 'the correlative', 'the constitutive' and 'capture', the right to associate must include the right not to associate with third parties.[4] The right to dissociate — as a specific feature of the more general right to associate — tends to be asserted in three primary settings.

In the first setting, an association with a clear raison d'etre — i.e., collective bargaining or professional oversight[5] — also takes up a more controversial agenda — political mobilization around issues unrelated to the association's organizing principle. A union may decide that its members not only have an interest in legislation related directly to workers' rights but also to a whole host of other social issues. Some courts may recognize a right to dissociate with respect to

[1] Act 4 of 2000 (Act 52 of 2002 as amended).

[2] Ibid at Preamble.

[3] For more on the content of the Act and its interplay with s9, Equality, and s10, Dignity, of the Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC') see Cathi Albertyn, Beth Goldblatt and Chris Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001); Gretchen Carpenter 'Equality and Non-Discrimination in the New South African Order' (2002) 65 *THRHR* 177,183-185; Anton Kok 'Motor Vehicle Insurance, The Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act' (2002) 18 *SAJHR* 59; Anton Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act: Why the Controversy?' (2001) *TSAR* 294; Grete Vogt 'Non-Discrimination on the Grounds of Race in South Africa — With Special Reference to the Promotion of Equality and Prevention of Unfair Discrimination Act' (2001) 45 *J of African Law* 196; Marius Pieterse 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Final Nail in the Customary Law Coffin?' (2000) 117 *SALJ* 627. See also § 44.2*(b)* infra.

[4] See *Law Society of the Transvaal v Tloubatla* 1999 (11) BCLR 1275, 1280-1281, [1999] 4 All SA 59, 66-67 (T)

[5] See *Society of Advocates of Natal v De Freitas and Another* 1997 (4) SA 1134 (N); *De Freitas and Another v Society of Advocates of Natal 2001* (3) SA 750 (SCA), 2001 (6) BCLR 531 (SCA); *De Freitas and Another v Society of Advocates of Natal* 1998 (11) BCLR 1345 (CC); *General Bar Council of South Africa v Van der Spuy* 1999 (1) SA 577 (T). These cases reflect, by my lights, uncontroversial examples of compelled association of members of regulatory bodies. See discussion at § 44.3*(c)*(iv) infra.

'ideological union expenditures not directly related to collective bargaining.'[1] Other courts might find ideological union expenditures unrelated to collective bargaining to be justified on the grounds that it promotes internal union democracy as well as a fostering of union participation in broader political debates.[2] Similarly, a professional regulatory body — a law society or a medical association — may elect to conduct political activities not directly related to its regulatory function. Again, a court could take the view that fees for activities unrelated to the associations primary purpose may not be mandatory. Or a court might just as well conclude that as long as the compulsory membership in a regulatory association does not restrict the membership from disagreeing with the association's views, then neither the right to associate (or to dissociate) nor the right to expression is being infringed.[3]

In a second setting, an association, as a creature of statute, may force individuals to engage in activities in which they would prefer not to participate. In *Chassagnou v France*, farmers with relatively small holdings were forced by law to become members of municipal hunting associations and to transfer hunting rights over their land to these hunting associations and their members.[4] The European Court of Human Rights held that the forced association contemplated by French law violated the right not to belong to an association and the right not to be compelled to join an association fundamentally at odds with a person's convictions.

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[1] See, eg, *Abood v Detroit Board of Education* (1977) 431 US 209, 97 SCt 1782. This 'fair share' doctrine is articulated in a long line of cases beginning with *International Associational Machinists v Street (*1961) 367 US 740, 81 SCt 1784; *Ellis v Brotherhood of Railway, Airline and Steamship Clerks* 466 US 435,104 SCt 1883 (1984); *Chicago Teachers Union v Hudson* (1986) 475 US 292, 106 SCt 1066; *Communications Workers of America v Beck* (1986) 487 US 735, 108 SCt 364; *Lehnert v Ferris Faculty Association* 500 US 507, 111 SCt 1950 (1991). Cf *Brotherhood of Railroad Trainmen v Virginia* (1963) 377 US 1, 84 SCt 1113; *United Mine Workers v Illinois Bar Association* 389 US 217, 88 SCt 353 (1967); *United Transportation Union v State Bar of Michigan* 401 US 576, 91 SCt 1076(1971). These three cases stand for the principle that associations have the right to litigate in the interests of itself and individual members even where the primary aims of the association are not at stake.

For a current overview of US federal and state case law engaging forced association, as well as federal and state anti-discrimination statutes, see Kevin Francart 'No Dogs Allowed: Freedom of Association v Forced Inclusion: Anti-Discrimination Statutes and Their Applicability to Private Organizations' (2000) 17 *Thomas Cooley LR* 273. For a nuanced account of dissociation, see William Marshall 'Discrimination and the Right of Association' (1986) 81 *Northwestern University LR* 68. Few commentators argue that the freedom of association embraces an absolute right to dissociate. But see Thomas McGee 'The Right to Not Associate: The Case for an Absolute Freedom of Negative Association' (1992) 23 *University of Western Los Angeles LR* 123.

[2] See, eg, *Lavigne v OPSEU* (1986) 33 DLR (4th) 174. Three judges in *Lavigne* held that the right to associate does not include the right to dissociate. Another judge held that non-collective bargaining political positions do not implicate the right to dissociate because there is too attenuated a relationship between the union dues paid by the member and political positions ultimately adopted by the unions. The dues could not, on this reading, be accurately characterized as coerced association. See also *Association of Professional Engineers of Saskatchewan v SGEU* (1992) 91 DLR (4th) 694 (Compulsory dues not compelled association, merely condition of employment, and employment not coerced). For more on the Canadian rejection of the fair share doctrine, see Steven Thorncroft 'Compulsory Payment of Union Dues — Use for Collective Bargaining and Non-Bargaining Purposes' (1992) 71 *Canadian Bar Rev* 153.

[3] *Morrow v State Bar of California* (1999) 188 F3d 1174.

[4] *Chassagnou v France* (2000) 29 EHRR 615 (*Application Nos 25088/94*).

In a third setting, political entities may attempt to coerce participation or agreement. Indeed, political entities may attempt to use the language of voluntary association in order to mask repressive politics. In *Communist Party of India (Marxist) v Bharat Khumar*, the Indian Supreme Court held that the calling of a bundh inevitably violated the constitutional rights of community members who did not wish to participate in a political event, while the calling of a hartal – peaceful mass action based on the principles of passive resistance – did not.[1] The predictable result was that instead of calling for a bundh, political organizations began calling for a hartal. In *Kerala Vyapari Vavasayi Ekopana Samithi v State of Kerela*, the Court found that the Communist Party's call for a hartal was simply a call for a bundh by another name and thus an unconstitutional infringement of the associational rights (including the right not to participate in political activities) of the citizens of Kerela.[2] Closer to home, *Commercial Farmers Union v Minister of Lands, Agriculture And Resettlement, Zimbabwe and Others* supports the recognition of a constitutional right to disassociate in the context of coerced political participation.[3] The Zimbabwe Supreme Court held that the forced attendance of farmers and farm-workers at meetings organised by the local ZANU (PF) branch violated the right of freedom of association guaranteed by s 21 of Zimbabwe's Constitution.

44.2 Grounds For and Models of Infringement

As some of the aforementioned cases suggest, associational freedom is not an unalloyed good. Associations have their dark sides. They may pursue ends that threaten the well-being of society or some of the individuals therein. They may gain a monopoly of power over an area of social life that enables them to dictate the distribution of goods associated with that sphere of social life and preclude others from the pursuit and receipt of such goods. They may be sufficiently insular and exclusive that their mere existence reinforces prevailing prejudices. The state may wish, in such circumstances, to interfere with the freedom to associate in order (a) to secure the safety of society, (b) to realize substantive equality, (c) to promote tolerance, and (d) to facilitate greater political participation.[4]

State intervention in the service of these three ends is likely to take one of four forms: (1) an outright banning of the association on the grounds that its professed aims and current practice threaten a well-ordered society, or more profoundly, the continued existence of the free, democratic and constitutional order itself; (2) a requirement that the association open up its membership to include all interested members of society on the grounds that membership exclusivity is inconsistent with the overridingly important goal of equality; (3) a requirement that the internal organization of certain associations must conform to basic democratic principles; and (4) a requirement that an association refrain from coercion.

[1] 1998 AIR 184 (SC).
[2] 2000 AIR 389 (SC) ('*Kerela*').
[3] 2001 (2) SA 925 (ZS), 2001 (3) BCLR 197 (ZS).
[4] As it happens, these four ends are largely of a piece with the civic equality principle recently articulated by Amy Gutmann in *Identity in Democracy* (2003).

(a) Banning

The banning of certain criminal associations *per se* is unlikely to generate controversy.[1] Controversy is only likely to be aroused when the government seeks to ban political or expressive associations.[2] Certain democratic states — fighting democracies such as Germany — believe that banning is a legitimate response to associations that aim to undermine or destroy the state's free and democratic constitutional order.[3] However, even these fighting democracies are highly circumspect in employing such a drastic measure. They generally require very clear evidence of a concerted effort to destroy the constitutional order before they will impose a ban.[4] Such an evidentiary requirement is rarely satisfied in well-ordered and stable democracies.

(b) Equality and the Promotion of Equality and Prevention of Unfair Discrimination Act ('PEPUDA') [5]

A more likely form of state interference is the requirement that certain associations open themselves up to a wider potential membership because they control

[1] But see below, § 44.3*(b)*, for a lengthier account of the argument that most criminal associations are *per se* unconstitutional, Professor Haysom's critique of my position and my reply.

[2] I am not suggesting that bannings of non-political associations should not engage the court. Given this country's history, all laws criminalizing association should be carefully scrutinized. Apartheid legislation clearly infringed everyone's general freedom to associate. See, eg, the Group Areas Act 41 of 1950 (compelling black, white, Indian and coloured South Africans to live separately); Separate Amenities Act 49 of 1953 (required aforementioned groups to use separate public facilities); Prohibition of Mixed Marriages Act 55 of 1949 (denying individuals the freedom to choose a sexual partner or spouse). The abuse of law to proscribe political association was particularly profound in the Apartheid era. In 1950 the National Party Parliament passed its first major piece of anti-political association legislation—the Suppression of Communism Act 44 of 1950. This Act was successfully employed for more than twenty-five years to suppress almost all opposition to Apartheid. Over the next thirty years Parliament passed numerous pieces of legislation delegating to the executive relatively unfettered powers to silence any association deemed a threat to the State. See, eg, Unlawful Organisations Act 34 of 1960 (ANC and PAC were banned on the grounds that 'they seriously endangered the safety of the public [and] the maintenance of the public order'); Prohibition of Foreign Financing of Political Parties Act 51 of 1968 (Act prevented new opposition from forming by cutting off foreign funding); Internal Security Act 74 of 1982 (in terms of the emergency regulations passed under the Act, the Minister could, without giving notice or hearing to anyone, prohibit all the activities of an association). In light of this repressive history, great caution should be exercised before resort is had to the banning of any political entity.

[3] Article 9(2) of the Basic Law (Grundgesetz) reads: 'Associations, the purposes of which conflict with criminal laws or which are directed against the constitutional order . . . are prohibited.' See *BVerwG* 1954 *NJW* 1947 (prohibition of FDJ—communist youth movement—declared constitutional). Cf *Brandenburg v Ohio* 395 US 444, 89 SCt 1827 (1969) (First Amendment values—and by implication association—permit Ku Klux Klan to articulate virulently racist and anti-semitic beliefs and do not allow the state to proscribe advocacy of force to effect political, social or economic change save where advocacy will produce imminent lawless action.)

[4] For a discussion of this question in relation to the status of subversive advocacy, see Gilbert Marcus & Derek Spitz 'Expression' in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz and Stu Woolman (eds) *Constitutional Law of South Africa* (1st Edition RS5 1999) Chapter 20 ('*Constitutional Law of South Africa* (1st Edition)').

[5] Act 4 of 2000 ('PEPUDA').

access to important social goods. As we noted above, PEPUDA does just that. But the Act goes further. The Act makes equality *per se* an overridingly important goal. A requirement of equality because an association provides access to a particular set of social goods and a requirement of equality because a society believes all individuals and groups are entitled to substantively equal treatment will likely generate different outcomes.[1] PEPUDA makes equality a trump and the distribution of social goods a subsidiary concern.

This conflation of instrumental and ideological grounds for egalitarian intervention is only one reason that PEPUDA is likely to meet resistance and inspire a host of challenges based upon associational freedom. It will meet such resistance because, as I have argued above, control over membership policies and internal affairs goes directly to the heart of associational freedom.[2] Membership policies

[1] For example, a group of Xhosa gay and lesbian activists might wish to participate in a Xhosa Heritage Day Parade. The organizers may balk — on the alleged ground that homosexuality is not part of Xhosa heritage. It may be hard to identify a clear set of social goods to be secured through participation in a parade. If so, then equality *per se* is the only grounds for state intervention to ensure Xhosa gay and lesbian participation as gays and lesbians. Should it be sufficient? It is a close call. After all, it is likely that the only thing motivating the exclusion of these activists is prejudice. If there is no clear connection between the purpose of the parade and the basis for the exclusion, then the exclusion seems harder to sustain. What if it were an Easter Sunday parade? The connection of religious belief to the parade would place religious belief — as it currently stands – squarely at odds with a basic political commitment to equality. The Act does not seem to recognize (1) the distinction between wanting equality for instrumental reasons — the access to social goods — and (2) wanting equality for purely ideological reasons — wanting equality for equality's sake. In the US, anti-discrimination laws reach deep into the private realm but not in so all-encompassing, so totalizing a manner as PEPUDA. Thus, when the US Supreme Court heard *Hurly v Irish-American Gay, Lesbian and Bisexual Group of Boston* ['GLIB'] (1995) 515 US 557, 115 SCt 2338 ('*Hurly*') and had to adjudicate the claim by GLIB to allow them to be included in Boston's annual St. Patrick's day parade, it faced a bit of a quandary. The Court had to decide whether a largely recreational associational activity with largely recreational benefits could justifiably exclude any group it so desired. Instead of facing squarely the legitimate ends of recreational activity for associational life or the value of GLIB's egalitarian claims, the US Supreme Court hid behind the alleged expressive content of the parade and the alleged fit of that expressive conduct with the parade organizer's exclusionary practices. GLIB was the only such group excluded. A rightly decided *Hurley* might have held that where no link could be established between the association's purpose and its practice, then the State might exercise a presumption in favour of intervention on the grounds of equal treatment and respect.

[2] To the extent that membership policies are about exclusion, the freedom of association must be understood include a correlative freedom not to associate. The US Supreme Court has recognized the freedom not to associate or to dissociate. See *Abood v Detroit Board of Education* 431 US 209, 97 SCt 1782 (1977) (dissenting employees possess a right to refuse to associate with respect to ideological expenditures not directly related to collective bargaining). A more difficult question is when, if ever, the freedom to dissociate implies a right to discriminate. See *Norwood v Harrison* 413 US 455, 93 SCt 2804 (1973) ('Invidious discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . [but] it has never been accorded affirmative constitutional protection'). The US case law seems to suggest that two general classes of association may discriminate: expressive associations and intimate associations. See *NAACP v Alabama* 357 US 449, 78 SCt 1163 (1958) (expressive associations protected); *Griswold v Connecticut* 381 US 479, 85 SCt 1678 (1965) (right to privacy and intimate associations protected). However, where association is neither expressive nor intimate, the right to dissociate and discriminate may fall before some important state interest. See *Roberts* (supra) at 615; *Rotary Club* (supra); *City of New York* (supra). The Canadian Supreme Court appears split on whether the freedom to associate includes a freedom to not to associate. *Lavigne v OPSEU* [1991] 2 SCR 211, 81 DLR (4th) 545. It has, however, never endorsed a right to discriminate. European Convention of Human Rights jurisprudence appears equally divided on the subject. See *Young, James & Webster v UK* (1982) 4 EHRR 38.

and internal affairs are, after all, about how the association chooses to constitute itself.

Because the membership policies and the organization of internal affairs are often critical — though not necessarily essential — to an association's identity, one must be aware that laws which force a change in these policies may alter the essential character of that association. If one believes that political pluralism, cultural diversity, individual autonomy and social upliftment may be threatened by forced changes in associations' membership criteria, then one might want to give some associations the power to police their boundaries and thereby prevent the capture of the association by individuals or groups who might wish to change the association's aims. That is, one may wish to give the individuals and groups whose lives are substantially shaped by the associations of which they are a part, or who invest significant resources and effort in the maintenance and creation of particular kinds of enterprises, the power to police the membership of the organization in order to ensure that it remains true to its founding tenets. The question then is: When, or under what conditions, is an association entitled to exercise its right to determine its membership criteria free from external intervention? Or conversely: When might society's commitment to equality trump an association's control over its membership criteria?

PEPUDA would appear not to engage directly the complicated cluster of issues raised by conflicts between equality and association. Associations are mentioned briefly in the schedule to s 29: an illustrative list of unfair practices in certain sectors.[1] They would also seem to be engaged in s 27. This section requires that companies, partnerships and clubs develop 'equality plans'.[2]

[1] See the schedule for s 29 of PEPUDA, especially Item 10. It reads, in pertinent part, as follows: Clubs, Sport and Associations:

(a) Unfairly refusing to consider a person's application for membership of the association or club on any of the prohibited grounds.

(b) Unfairly denying a member access to or limiting a member's access to nay benefit provided by the association or club . . .

It doesn't take an especially discerning eye to see how little intrinsic merit associations are believed to possess by the drafters of PEPUDA when they are lumped together with — and indeed follow — clubs and sport. Of course, the mention of both clubs and associations may have been intended to ensure that PEPUDA is understood to cover all associations — and, in particular, such notoriously discriminatory entities such as business clubs or golf clubs. See also Item 9 of the Schedule: Provision of Goods, Services and Facilities.

[2] See s 27(2) of PEPUDA. These 'equality plans' must be fleshed out in the regulations to the Act. Section 25(4)*(b)* reads, in relevant part, that 'preparing equality plans [must take place] in the prescribed manner.' These regulations remain to be promulgated. Section 26 does not contain this qualifier. Courts could step in and decide what an 'appropriate' (section 26*(a)*) equality plan would be.

Despite the paucity of express references, PEPUDA poses an imminent threat to associational freedom.[1] That it does so is especially evident from Sections 13, 14(2) and 14(3). Section 13 reverses the evidentiary burden. Once the complainant makes out a *prima facie* case, the evidentiary burden shifts to the respondent to show that its discriminatory actions are fair.[2] Section 14(2) and (3) set out the conditions that must be met by the respondent in order to show that the discrimination is fair. Section 14(2) states the test a respondent must meet to discharge his, her, their or its burden. It reads:

> In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:
> a. The context;
> b. The factors referred to in subsection (3);
> c. Whether the discrimination reasonably and justifiably discriminates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

Section 14(3) lists a host of factors to be considered by the Court when making its determination. They are:

a. Whether the discrimination impairs or is likely to impair human dignity;
b. The impact or likely impact of the discrimination on the complainant;
c. The position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns;
d. The nature and the extent of the discrimination;
e. Whether the discrimination is systemic in nature;
f. Whether the discrimination has a legitimate purpose;
g. Whether, and to what extent, the discrimination achieves its purpose;
h. Whether there are less restrictive means and less disadvantageous means to achieve the purpose;
i. Whether or to what extent the respondent has taken such steps as being reasonable in the circumstances to —
   (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds or
   (ii) accommodates diversity.

[1] PEPUDA will be dealt with at length in Janet Kentridge 'Equality' in Chaskalson et al *Constitutional Law of South Africa* (2nd Edition) (supra). See Albertyn, Goldblatt and Roederer (supra) for an extensive commentary on the Act and Cathi Albertyn, 'Equality' in Cheadle et al (supra) ('Equality') §4, 118 - 121 for a brief discussion of the Act.

[2] I am grateful to David Zeffertt for his patient explanation of PEPUDA's evidentiary burdens. Any remaining errors in analysis are mine alone. It must be said that the burden reversal is largely of a piece with our constitutional equality jurisprudence.

For those who might wish away all traces of discrimination violently re-inscribed by Apartheid *and* subtly re-inforced by traditional ways of life[1], nothing could appear more reasonable than the tests laid out in ss 14(2) and (3). But some of the most obvious constructions of the tests are not reasonable. Section 14(2) may appear to provide the kind of ill-defined and gymnast-like flexibility of a standard South African constitutional balancing test — context, factors, reasonableness and justifiability. Section 14(2)*(b)*, however, takes us to s 14(3). Subsections 14(3) *a–e* and *h–i* are read by some commentators to load the dice in favour of the complainant. The alleged discrimination can simply detrimentally affect the complainant personally — *b* — and need not impair the complainant's dignity. The actual position of the complainant may actually be of less importance than some set of ascriptive features of the complainant — *c*. The inquiries in *h* and *i* place the burden squarely on all associations to find less restrictive and disadvantageous means of realizing their ends and further require all associations to address historical disadvantage and to accommodate diversity. Failure by an association to take factors *a–e* or *h–i* seriously, in advance of litigation, could lead to changes in an association's structure that go well beyond the kinds of actions that might have justified the discrimination in question.

Although, on this construction of the Act, the analysis in ss 14(2)*(b)* and 14(3) may tilt sharply in favour of the complainant, some solace would appear to be on offer from s 14(2)*(c)*. Section 14(2)*(c)* looks a bit like a limitations test. It relies upon the respondent's capacity to explain the discrimination in terms of objectively identifiable criteria linked clearly to the association's purpose. Reasonable enough. But that is not how Professors Albertyn, Goldblatt, Roederer and their collaborators read s 14(3).[2] 'Objectively identifiable criteria' is another way of saying that the differentiation may not be on 'prohibited grounds' of discrimination under the Act. 'Intrinsic to the activity concerned' means that the respondent 'must demonstrate an *indispensable causal link* between the 'objectively identifiable criteria' and the activity.'[3] Consider the authors' example:

[1] Apartheid is the rightful punching bag for much of South Africas current ills. Apartheid is the unabated source of untold suffering. Apartheid squandered the enormous wealth of this country. But to ascribe to Apartheid all patterns of disadvantage must be false. What it certainly did do – and still does do – is arrest South Africa's development. Of course, one could argue that from the perspective of the pursuit of an egalitarian society, it does not matter what the starting point is, only that we get there. That may be true. But that level of abstraction is not the primary departure point for most justifications of egalitarian measures. It is the history of radical inequality that justifies the current pursuit of equality.

[2] Albertyn, Goldblatt and Roederer (supra) at 46 — 48. This subsection was added to the Act in order to meet some of the concerns of the insurance and the banking industry. These industries were concerned that 'commercial differentiation' would fall foul of the Act. Earlier drafts of the Bill attempted to distinguish between discrimination and differentiation. Insurance companies wanted a complete defence. Human rights groups did not want any defence at all. The subsection is perhaps best read as an inelegant attempt to ensure that 'commercial discrimination' is more likely to be found fair than unfair.

[3] Ibid at 47 (emphasis added).

> Assume that a black waiter, with twenty years experience, is turned down in favour of a waiter of Chinese origin (with two years experience) for a job at a Chinese restaurant.[1]

Given the relatively equal experience and the potentially pertinent difference in origin (and one is led to assume language), one could be forgiven for reaching the conclusion that is just the kind of situation in which discrimination may be fair.[2] Not so. Or not so fast. First, the mere fact that race plays a role – and objectively identifiable criteria means no prohibited grounds such as race may 'feature' in the differentiation — makes it look like unfair discrimination. Second, since 'intrinsic to the activity concerned' means 'must demonstrate an indispensable causal link between the "objectively identifiable criteria" and the activity',[3] the respondent is placed in the position of having to demonstrate that choosing the Chinese waiter is a necessary pre-condition for the restaurant's continued existence. That is simply impossible. Thus, what looks at first blush like a mechanism for taking into account the interests of the association turns out to be anything but.

In fairness to the authors, they make an effort to drag s 14(2)*(c)* back from the brink by holding that this subsection's requirement of reasonableness and justifiability means that all the factors in s 14(3) — they say s 14(2)*(b)* which is just to say s 14(3) — come back into play. That is to say that we can count the factors twice if we so choose.[4] This double counting is supposed to save the Chinese waiter. Somehow, the alleged need to maintain the illusion of authenticity — in the face of *de jure* discrimination and a very dispensable causal link — may be a factor that tips the analysis back in favour of 'fair discrimination'. But as I have argued above, it hard to see how an authenticity predicated upon the prejudices of the non-Chinese world can be used to save bias that is not an absolutely necessary

[1] Albertyn, Goldblatt and Roedever (supra) at 46.

[2] The authors employ a very faulty set of intuition pumps. Ostensibly, 20 years of experience invariably trumps 2 years of experience. With respect to waiters everywhere, and as a former member of the fraternity/sorority, I am not convinced that the learning curve remains all that steep after two years. Secondly, the choice of a Chinese waiter for a Chinese restaurant draws on an odd sociological/psychological phenomenon. It is designed to get us to buy some 'Sandton Square is really a Tuscan piazza' sort of authenticity. (Which, perversely, is exactly how the authors find their way to justifying the discrimination.) One would think that the only legitimate grounds for choosing the Chinese waiter would be actual use of a common language in the restaurant – knowledge of the language being an integral part of communicating with the kitchen and/or other staff – or that the waiter comes from the community — here or elsewhere - of which the owners and the other employees are a part — links to the community being one of the ways in which the restaurant sustains itself. Otherwise, the grounds for justification are our pre-existing prejudices based upon race.

[3] Ibid at 47.

[4] Though this approach may lack analytical precision, it does echo the Constitutional Court's equality jurisprudence. See *President of the Republic of South Africa and another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41; *Harksen v Lane NO and others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC).

pre-condition for the restaurant's survival. The only real arguments ought to be the need of the restaurant to draw on Chinese staff in order to run the restaurant effectively. Unfortunately, the authors have so narrowly construed the meaning of s 14(3)'s other components that this argument becomes impossible to make.[1]

The difficulties with the construction of s 14 proffered by Professors Albertyn, Goldblatt and Roederer only reinforce more general concerns about the consequences of PEPUDA for associational life.[2] But suppose we bracket the discussion of the conflict between equality and association as it plays itself out in PEPUDA. That does not mean we give associations, and any attendant discriminatory policies, a free ride.

At a minimum, any association wishing to justify exclusion on grounds expressly recognized as discriminatory, or grounds analogous to those expressly recognized as such, will have to engage the tests of discrimination already built up by the Constitutional Court.[3] An association is likely to have to discharge the burden of showing: (1) a rational connection between its discriminatory policy and the association's ends and (2) that where such a rational connection exists, that the ends of the association are worth maintaining despite the discrimination inherent in its membership policies.

(c) Democracy

A third form of government interference will involve attempts to require political associations — and perhaps other associations — to structure their internal

[1] More desirable constructions of s14 are available. As the Constitutional Court has recently pointed out in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and others*, an apparent statutory imperative that a Court *must* consider the factors laid out in a statute does not mean that they must do so in a mechanical fashion or that they may not take other considerations into account. CCT5/03 (15 October 2003). This canon of statutory construction could result in a PEPUDA test for discrimination that achieves a nuanced assessment of associational and egalitarian concerns. For example, s14(2)*(c)* could accord great weight to an association's ability to demonstrate how a discriminatory practice serves the association's purpose. Even the inevitable double counting of factors has a potentially benign explication. The Constitutional Court determines the impairment of the complainant's fundamental human dignity and whether it ultimately amounts to an impairment of a sufficiently serious nature in much the same manner. See *President of the Republic of South Africa and another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41. See also Arthur Chaskalson 'Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 193.

[2] These concerns about PEPUDA are bolstered by the Act's treatment of hate speech. The Act goes far beyond the Final Constitution's prohibition on the advocacy of hate speech to proscribe any speech act 'that could reasonably be construed to demonstrate a clear intention — *(a)* to be hurtful; *(b)* to be harmful' on any one of the seventeen prohibited grounds or analogous grounds. PEPUDA, s10.

[3] For the test for discrimination generally see, eg, *Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC). For excellent general discussions of the requirements of equality analysis see Cathi Albertyn, 'Equality' in Cheadle et al *SA Constitutional Law: The Bill of Rights* (supra) § 4; Johan De Waal, Iain Currie and Gerhard Erasmus, 'Equality' in *The Bill of Rights Handbook* (2001) § 9; Janet Kentridge, 'Equality' in Chaskalson et al *Constitutional Law of South Africa* (1st Edition) (supra) § 17.

affairs in a more democratic and egalitarian fashion.[1] Here the basic question is to what extent the state's interest in the integrity of a democratic process and a democratic society justifies the infringement of a political party's associational right to order its affairs as it wishes. If you start from the premise that political parties and associations are largely 'private orderings' created to pursue private ends, then the state will have to go some distance to demonstrate its need to meddle.[2] If, on the other hand, your departure point is that political parties and associations are essential for a functioning representative democracy, then you would argue that party structures must be democratic in order to serve democracy and that any deviation from democratic principles in the party's internal affairs must themselves be justified.[3]

A party must likewise refrain from commandeering the apparatus of the state in order to discipline members of the party. It seems especially critical that where, as in South Africa, a single party controls the most important levers of power, that the same party must not be able to use that power in order to further the interests of a faction within the party. What justifies the state's intervention within party politics to ensure democratic processes also justifies the prevention of the state's interference with party politics in order to undermine democratic processes.

[1] Efforts at democratization of associational structures need not be limited to political parties. One can equally imagine legislative attempts to democratize shop floors and corporate boardrooms. See Martin Brassey and Carole Cooper 'Labour Rights' in Chaskalson et al *Constitutional Law of South Africa* (1st Edition) (supra) § 30. See also Catherine O'Regan 'Possibilities for Worker Participation in Corporate Decision Making' 1990 *Acta Juridica* 113. However, as noted at § 44.1*(c)*(iv) supra, the entrance to and voice of an association may not be democratic simply because democracy may be inconsistent with the very goals and values of the association. Should religious associations be democratised? To what end? On the other hand, a national chess federation that distributes public goods in a game of skill might be susceptible to intervention that requires both non-discrimination and some form of democratic rule by those who possess a sufficient familiarity and proficiency in the game.

[2] US case law tends to support a 'liberal' view of political parties. *Tashjian v Republican Party of Connecticut* 479 US 208, 107 SCt 544 (1986) (statute barring independent voters from participating in Republican Party primaries violated the Party's 'First Amendment right to enter into political associations with individuals of its own choosing'); *Democratic Party of the United States v Wisconsin* 450 US 107, 101 SCt 1010 (1981) (Wisconsin law requiring delegates to vote in compliance with results of the state's open primary violates the Party's associational right to choose its delegates as it sees fit). See also *Eu v San Francisco County Democratic Central Committee* 489 US 214, 109 SCt 1013 (1989); *Cousins v Wigoda* 419 US 477, 95 SCt 541 (1975). But see *Marchioro v Chaney* 442 US 191, 196, 99 SCt 2243 (1979) (upholding Washington law requiring that the major parties have a state committee with two representatives from each county on grounds that a state's interests in conducting elections in a 'fair and orderly fashion is unquestionably legitimate').

[3] The German Basic Law expressly recognizes that the integrity of political parties and the integrity of the democracy of which they are a part are inextricably linked. Article 21(1) states, in relevant part: 'The political parties shall participate in the forming of the will of the people. They may be freely established. Their internal organization must conform to democratic principles.' The rules which govern the internal order must meet the democracy requirement in the following ways: (1) rules must specify that party issues are reserved for resolution at membership meetings; (2) members must be able to participate actively and on an equal basis in the decision-making process; (3) free expression of opinion must be possible at membership meetings; (4) the will of the majority must prevail; (5) the party rules must provide for the formation of the party structures from the bottom up; (6) the executive must answer to the general membership at general meetings; (7) exclusions from the party may not be arbitrary.

Finally, the state's interest in opening up political associations flows from considerations of involuntariness. If our citizenship or membership in a given state is largely involuntary and exit is difficult if not impossible, then our capacity to leave a given set of political institutions is by necessity limited. The involuntariness of our political associations makes its incumbent upon the state to create meaningful avenues for political participation. Without such avenues — and the franchise is insufficient — the citizenry are no better than hostages (however benign their caretakers).

The state's interest in the democratic process may also take the form of exclusionary rules. The state may prevent members of the police force, the security forces, the civil service and other government employees from direct participation in the affairs of political parties and electoral politics.[1] The reason for such exclusion is two-fold. First, in countries such as South Africa, the police and security forces have, historically, been actively involved in the suppression of political activity at the behest of the state. A newly formed democratic state may, therefore, have a substantial interest in demonstrating that the police and security forces are no longer tools of repression nor vehicles for the realization of state policy by untoward means. Exclusion of police and security force members from politics demonstrates the commitment of the state to the impartial enforcement of the law, the willingness of politicians to bow to the electorate's desire for democratic change and the recognition that the de-politicization of the security forces fosters a culture in which the military does not see itself as having an interest in particular political outcomes. Second, the exclusion of civil servants and other government employees from direct political activity — running for office and canvassing for votes — serves the state's interest in not having the electorate view the government as serving the narrow interests of a given political party.[2] Moreover, it prevents individuals and groups from using the apparatus of the state — say the postal system — to serve the ends of a particular political party.

(d) Coercion

It would seem relatively uncontroversial to argue that the State will be entitled to interfere in associational life where members of an association are clearly coerced into participation. The difficulty with coercion as a justification for the infringement of associational freedom lies not with those actions that constitute physical abuse. It is rather with those situations in which even the most limited choice

[1] See FC s199(7); South African Police Force Act 68 of 1995, s 46. The Act's and the Constitution's limitations on political association by members of the police force are assayed in § 44.3*(c)*(vii) infra in the context of *Van Dyk v Minister van Veiligheid en Sekuriteit*, Case No. 4268/2002 (TPD 29 April 2003, Du Plessis J).

[2] But see, eg, *Vogt v Germany* (1996) 21 EHRR 205 (ECHR held that the State had a legitimate interest in ensuring an unbiased civil service. However, the dismissal of a civil servant — in this case a secondary school teacher — for her refusal to resign from the German Communist Party (DKP) constituted a violation of her right to association and a sanction disproportionate to the aim pursued).

appears impossible, but necessary, to exercise. With children, one difficulty with such intervention is that we generally give parents a great deal of autonomy with respect to the manner in which they raise their children.[1] With adults, one difficulty is the paternalistic presumption that government can substitute its judgment of what is best for that of its citizenry. Inquiries into non-physical coercion of children and adults are united by considerations of exit.[2] One must take great care, however, when we interfere in associational life that we are not too quick to allow attributions of 'false consciousness' to masquerade as concerns about the inability of children or adults to vote with their feet.

44.3 Association Analysis

(a) Determining the content of the right[3]

(i) *Within the Ambit*

This chapter has identified four basic grounds for associational freedom: the correlative, the constitutive, capture and dissociation.[4] It has also identified a unifying theme: social capital. The question at this stage is: how does each of these underlying justifications enable us to determine the content of the right and those associations that might thereby claim its protection?

By the correlative, we mean that that though there exist independent justifications for the freedom, associational freedom is often most powerfully justified by

[1] See *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) ('*Christian Education*'). The Constitutional Court said that parents had no constitutional right to raise their children however they might like. However, the judgment, while denying the right of teachers to dole out corporal punishment in schools, assures parents that they still possess that same privilege within the home. Another example, as suggested to me by Danie Brand, makes the problem — and the resolution — of non-physical coercion of children a bit clearer. Imagine a summer camp established for white children only. Racist beliefs are inculcated by their adult counsellors as a matter of course. Imagine also that all South African children have access to summer camps so that no child is denied access to this particular good. The reason that the state would be justified in interfering in the voice, if not the entrance, of this camp is that the state has an interest in the creation of citizens who treat other citizens with equal concern and respect. This problem raises invariably a related problem of inculcating exclusive religious beliefs in children. A potentially acceptable justification for a difference in outcome is that the Constitution clearly contemplates religious freedom and religious education. A failure to treat discriminatory religious doctrines differently from racial supremacist doctrines would have the inevitable consequence that the state could interfere with the construction of the most basic tenets of many religions. It might mean that the state would be free to police public and private schools, as well as religious institutions, to ensure that children were not exposed to doctrines that gave clear preference to one set of religious practices because one deity is to be preferred over another. However, while the grounds for interfering with the non-physical doctrinal coercion of children are the same for both religion and race, the centrality of religious life in South Africa makes any significant state interference in the inculcation of religious supremacy unlikely. See the discussion of religious associations at § 44.3*(c)*(viii) infra.

[2] See *S v Jordan (Sex Workers Education and Advocacy Task Force and others as Amici Curiae)* 2002 (6) SA 642 (CC)('Jordan').

[3] FC s 18 reads: Everyone has the right to freedom of association.

[4] See § 44.1 supra.

reference to other constitutional guarantees.[1] With respect to some kinds of association — newspapers, parties and black empowerment entities — the correlative rights — expression, political rights and equality — may be deemed so foundational for our constitutional politics that no recourse need be had to the right of association itself. However, other associations — churches, corporations, traditional communities — may be sufficiently peripheral to our constitutional politics that the correlative rights — religion, trade, property and cultural rights — might be strengthened or reinforced by reference to association.[2] Of course, this second correlative position assumes that associations actually provide goods in

[2] See the discussion at § 44.1*(a)* supra. That associational rights are often buttressed by reference to other rights is evident in *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC). The Constitutional Court was asked to determine the constitutionality of a provision of the Defence Act 44 of 1957 which prohibits members of the armed forces from participating in public protest action and from joining trade unions. The court held that prohibiting participation in acts of public protest infringed the right to freedom of expression of SA National Defence Force members and that prohibiting SANDF members from joining a trade union infringed the constitutional right of 'every worker' 'to form and join a trade union'. As Justice Sachs noted in his concurring judgment, implicit in the court's decision was the conviction that freedom of association entitled SANDU members to form a body that could publicly articulate their collective concerns and that would look after their collective economic interests. See also Mohamed Chicktay 'Mission Impossible: Trade Union and Protest Action Rights in the Military: *South African National Defence Union v Minister of Defence*' (2000) 16 *SAJHR* 324.

[2] The Constitutional Court often deploys rights simultaneously in the service of its arguments — and it often describes rights as interdependent and symbiotic. In *Khumalo v Holomisa*, the Court twinned privacy and dignity in support of personality rights in a suit for defamation. 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC). In *Christian Education* (supra), the mutually reinforcing rights of religion and culture were deemed to be in conflict with, and ultimately subordinate to a constellation of equality, dignity, freedom and security of the person and children's rights considerations. In *National Coalition for Gay and Lesbian Equality v Minister of Justice* the Court, in finding the common law criminalization of sodomy a violation of the right to dignity, wrote: '[I]t is clear that the constitutional protection of dignity requires us to acknowledge the value and the worth of all individuals as members of society.' Moreover, the court argued, 'the rights of equality and dignity are closely related, as are the rights of dignity and privacy'. 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) ('*NCGLE I*') at paras 28-30. The language echoes Justice Ackermann's emphasis in *Ferreira v Levin*, on the inextricable link between *dignity* and the need for individual *freedom* from state intervention: 'Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.' 1996 (1) SA 984, 1013-1014 (CC), 1996 (1) BCLR 1 (CC). Individual freedom — negative liberty — thus becomes the foundation for dignity. Dignity, in turn, becomes the basis for equality. As the Court writes in *Prinsloo v Van der Linde*: 'In our view unfair discrimination [the linchpin of equality analysis] principally means treating people differently in a way which impairs their fundamental *dignity* as human beings, who are inherently equal in *dignity*'. 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC). And if the interdependence of and reinforcement between individual freedom and dignity and then equality is still not clear, the Court, in *President of the Republic of South Africa v Hugo* writes: '[D]ignity is at the heart of individual rights in a free and democratic society. . . [E]quality means nothing if it does not represent a commitment to each person's equal worth as a human being, regardless of their differences. Equality means that our society cannot tolerate legislative

some sense independent of their dominant feature. As I have argued, they clearly do. Social capital. If the associations in question do not provide social capital, or do not serve constitutive attachments, or do not create either real or figurative senses of ownership, then they probably are not worth protecting. But then again if they are not worth protecting, the likelihood is that no one will be fighting for them.

By the *constitutive*, we mean that: (1) associations are integral to self-understanding, and there can be no self without the host of associations that give the self content; (2) associations are necessary for social cohesion, and are the indispensable settings for meaningful action. This two-fold recognition is meant to give us pause before we decline to grant *any* association some minimal level of constitutional protection.[3] For the purposes of associational rights analysis, the two dimensions of the constitutive prompt two obvious questions: Is the association in question important for individual and group identity? Is the association the setting for meaningful action? Most associations — certainly any worth trying to get into or remaining a part of — must be so. The deep background considerations that a court should keep in mind when considering challenges to associational freedom are two-fold. First, the court should be quite wary of supplanting an association's preferred vision of the good life with one of its own or that of a democratically-elected majority. Second, and perhaps more importantly, a court must be take great care before it opens up, interferes with or dismantles existing associations. Such interventions must be carefully calibrated to preserve existing social capital at the same time that the imperative of transformation grants access to that capital and its concomitant opportunities.[4]

By *capture*, we mean that in order for most associations to function as associations, they must possess some degree of control over who belongs to the association and some degree of control over the ends the association pursues.[5] So long as the association as currently constituted possesses a figurative and/or real sense of ownership, so long as there is real social capital at stake, a court must cede to the association some significant level of control over entrance, voice and exit.[6]

By *dissociation*, we mean that individuals must also be free to not to associate with others: whether it be through forced acceptance, forced membership, or

distinctions that treat certain people as second class citizens' 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) For further analysis of the relationship between equality and dignity see C Albertyn 'Equality' (supra); Susannah Cowan 'Can Dignity Guide Our Equality Jurisprudence?' (2001) 17 *SAJHR* 34; David Liebowitz and Derek Spitz 'Dignity' in Chaskalson et al *Constitutional Law of South Africa* (1st Edition) (supra) § 17; Susannah Cowan and Stu Woolman 'Dignity' in Chaskalson et al *Constitutional Law of South Africa* (2nd Edition) (supra) § 36.

[3] See the discussion at § 44.1*(b)* supra. Some exceptions to that rule are discussed at § 44.3*(a)*(ii) infra.

[4] This defence of associational freedom might strike some as a conservative brake on transformation. It is not. This chapter is, rather, a simple attempt to point out what is at stake in association cases.

[5] See the discussion at § 44.1*(c)* supra.

[6] Again, this is not a license to discriminate. While the demonstration by an association of some link between its exclusionary policies and its varied purposes may be sufficient for prima facie constitutional protection, the state may still have compelling reasons to alter those policies and thus justify intervention in the association's internal affairs.

forced financial and ideological support.[1] Courts may be less inclined to find that negative associational freedom mirrors positive associational freedom. Compelled political association is clearly out of bounds. No one may be forced to participate in a political activity or a cause in which they do not believe. However, a court may find that obligatory membership in a union or law society does not mean that political or social action taken by such an entity — against the wishes of a member – constitutes the kind of coercion that merits constitutional intervention. How much coercion a court may be willing to tolerate will likely vary according to a court's assessment of the association's contribution to the vibrancy of our democracy or the necessity of the forced association for some compelling public interest.

(ii) *Without the ambit*

The eclectic grounds for associational freedom should strongly suggest that there are few kinds of association which enjoy no constitutional protection.[2] Given the freedom's wide protective ambit, it is perhaps more appropriate to ask what kinds of associations clearly do not serve the values which animate the freedom and should not, therefore, enjoy any constitutional protection. Two candidates suggest themselves: criminal associations and associations which directly threaten the constitutional order.

Criminal associations arguably fall outside the clause's protective ambit because they do not help to realize a rich and varied civil society or any of the macro-social ends which flow from such a society. While one should not wish to underestimate the positive contributions of some subversion for social growth and social capital, or even for personal identity, we would be on safer ground arguing that criminal associations actively undermine the open and democratic society to which the Constitution aspires.[3] Similarly, while criminal associations may aid certain subversive forms of self-realization, these forms of self-realization cannot be safeguarded without threatening the rule of law and a democratic constitutional order. Thus, the failure to realize either positive social ends or acceptable forms of self-realization justify the categorical exclusion of criminal associations from the freedom's protective ambit.

This approach is open to the criticism that by excluding criminal associations from the protection of the freedom we suppress artificially the very sort of question the Constitution requires the court to ask, namely: is the criminal statute in

[1] See the discussion at § 44.1*(b)* supra.

[2] Of course, it goes without saying that every action, including my writing alone in a room in anticipation of you reading this text, involves a form of association. It would however be absurd to conclude that every such association warrants some level of constitutional protection.

[3] It is one thing to admit that a certain type of crime is desirable or necessary, because the costs of any attempt at perfect enforcement are both too high and highly likely to be over-inclusive. It is quite another, and quite wrong, to argue that criminal associations are therefore entitled to any constitutional protection.

question unconstitutional on the grounds that it violates the freedom to associate? There are four possible responses to the problem.

The first is the most compelling. One obvious distinction is between those associations that advocate a change in the criminal law and those associations whose aim is the pursuit of criminal ends. It should be uncontroversial to claim that associations that simply seek to alter the law through the political process in order to de-criminalize a certain form of behaviour are entitled to constitutional protection. It should be equally uncontroversial to claim that associations whose aim is the pursuit of criminal ends are not — as a general matter — entitled to such protection.

Our analysis of *per se* excluded criminal associations could stop there. And nothing much would be lost. That said, the threshold test for criminal associations need not always entail a mechanistic application of the existing criminal law to the association in question. What counts as a criminal association excluded from the protection of the freedom may be the subject of a more subtle discrimination by the court as to which criminal associations definitely do not and cannot serve the values underlying the freedom and which criminal associations might just serve those values.

Even if the criminal association which we wish to see protected did not survive under a more subtle threshold test, it is more than likely that the association in question could find solace elsewhere. The associations which warrant constitutional protection are almost invariably protected by some other constitutional right.

Finally, we could, quite mistakenly, reject a wholesale categorical exclusion for criminal associations. Under this last and least desirable option, we would then be faced with the choice of excluding criminal associations from the ambit of the freedom on an ad hoc basis or affording all criminal associations *prima facie* protection and then deciding whether restrictions on the association's freedom are justified under the limitation clause.[1]

[1] In his otherwise very generous account of my previously articulated position on associational freedom, Nicholas Haysom accuses me of adopting a loose definition of criminality that forecloses 'any examination of the type of criminality or the reasons why the type of limitation or violation of the right is justified' (presumably by some law). Nicholas Haysom, 'Association' in Cheadle et al *South African Bill of Rights* (supra) at 255. Professor Haysom's objections are just those recognized in the second and third responses to excluding criminal associations from the protected ambit of the right. As I argue in this text, as well as the text to which Professor Haysom has referred, where it is difficult to identify in advance those criminal associations which should not receive *prima facie* judicial solicitude, then the state may rely on the limitation clause to vindicate its claims. However, for reasons that have to do with maintaining a meaningful distinction between rights analysis and limitations analysis, we should be wary about collapsing all 'ambit of the right' examinations into the justificatory framework of the limitation clause. Professor Haysom also worries that I have somehow collapsed the distinction between the criminal association and the individuals engaged in the criminal association. With respect, I fail to see the sting — or the fruit – in this line of criticism. For example, Professor Haysom wonders about the ability of members of a banned organization to meet — and therefore to associate — in order to contest the banning of their association. Without splitting too many logical hairs, the purpose of the two associations

Failure to effect acceptable forms of self-realization, the furtherance of group identity or the accretion of social capital also justifies the categorical exclusion of associations that directly threaten the constitutional order. Our judicious approach to exclusions suggests that only those organizations which possess the military capacity to subvert that order and which have demonstrated clearly their intent to use that capacity ought not to enjoy constitutional protection.[1] This rule draws a distinction between associations that merely advocate the government's overthrow — which deserve at least *prima facie* protection — and associations that demonstrate through military preparation and action that they are bent on non-peaceable governmental change. The former deserve at least *prima facie* protection under both freedom of expression and freedom of association. If these associations are going to be restricted, then the government must be able to justify the restriction under the limitation clause.

(b) Limitations on the right

(i) *The Complex Character of the Analysis*

If many associational rights are buttressed by other constitutional rights, then the nature of the limitations review they receive will, in substantial part, be contingent upon the level of constitutional importance accorded the buttressing right. As a result, varying degrees of protection will exist for different kinds of associations. Political associations will receive a high level of judicial solicitude. But intimate associations, if buttressed by dignity, or cultural associations, if buttressed by religion, might also receive equally significant constitutional protection. Economic associations may not receive the highest level of protection, buttressed as they are by property rights or economic activity rights. However, the mere fact that other constitutional imperatives support economic associations suggests that they will receive greater judicial solicitude than associations that lack such correlative support.

Even this rendering of the scrutiny afforded associational rights does not capture the truly complex character of the analysis. On closer inspection we see that

is different. The first set of members of the banned associations are pursuing the ends of the banned association. The second set of members of the banned association are simply pursuing a legal case or a political strategy regarding the status of the association. Though the members of the two sets might well be identical, the ends of the two associations are not. Thus, the latter 'association' is protected while the 'former' is not. Indeed, Professor Haysom's point about the common law and its control of criminal conspiracies makes this very point. Ibid at 255.

[1] Article 9(2) of the German Basis Law provides that an association may be dissolved if it threatens the democratic constitutional order of the state. However, as Gerrit Pienaar has suggested: 'This does not mean that organizations may not criticize the government or constitutional order, but that violent aggressive negation of and attempts to destroy the democratic, constitutional order are factors which may lead to the prohibition of the organization.' 'Freedom of Political Association in South Africa, Germany and USA' 1993 *TSAR* 233, 238.

the success of the state in providing justifications for its interference may not necessarily correlate with the level of protection afforded the association by reference to some other provision in the Bill of Rights. Some highly protected associations may be very susceptible to state intervention. On the other hand, some associations that receive little express judicial solicitude may be less likely to be interfered with justifiably.

At first blush this result seems counter-intuitive, if not contradictory. However, the result begins to make sense when one recalls that the proportionality of a limitation does not depend solely upon the value of the associational interest asserted, but also depends upon the importance, intensity or weight of the interest offered as justification for the limitation. Thus, the public nature of the functions fulfilled by political associations not only legitimises the higher level of protection offered to them but also serves as the justification for significant state interference with such associations. Conversely, although associations which serve few if any public or quasi-public functions may not be deserving of any special degree of constitutional protection, they are less apt to be the object of state interference because the state possesses fewer compelling reasons to interfere in their affairs. The more public goods distributed by an association or the more public its function, the more likely it is to be subject to legitimate state intervention.[1]

(ii) *Grounds for Limitation*

Many of the grounds for limiting the right to associate have been covered in § 44.2. None is without controversy. Banning a political association in a state committed to openness and democracy must be reserved for only the clearest and most imminent threats. Altering the internal affairs of an association in order to make them more democratic can be justified most readily when the association serves quite directly the ends of our democratic state. Intervention in an association's affairs to prevent coercion is warranted when the coercion of a member is physical. It is less clearly so when the coercion straddles the line between false consciousness and a sense that the person in question may have nowhere else to go. Egalitarian concerns raise the most complex and contentious set of issues. At a minimum, a court should show limited tolerance for membership criteria that both discriminate against individuals and groups in ways *wholly* unrelated to the ends of the association and offend the basic rules to which a society is committed.

[1] But as I suggested above in § 44.1, a crude public/private distinction fails to account for the array of goods any given association might distribute. Though one might associate political parties or universities with public goods, we would be missing a large part of the picture if we failed to account for the many different kinds of good such an association provides. Likewise, classically intimate associations — such as the family — may be the setting for a similar range of goods. Children, for example, as future citizens are a public good and the state has an interest in their preservation and their education.

Where appropriate, a court might likewise be on solid ground in rejecting claims of associational autonomy where existing by-laws of an association both discriminate unfairly against individuals and groups and preclude the association from a natural or spontaneous evolution into an organization that pursued a somewhat modified set of ends.[1] It would be one thing — and potentially a good thing – for the courts (or the state) to use such egalitarian concerns to intervene in the affairs of an entity that controls the distribution of important public goods — a business, a university or a political party. It would be quite another thing — often a bad thing — for the courts to intrude on those associations where such goods are not the primary goods at stake — a religious institution, a small social club or a family gathering.

The pertinent grounds for enforcing the right and limiting the right will vary from associational context to associational context. The discussion below looks at how the competing justifications play out in different settings and in the constitutional case law already on the books.

(c) Analysis in context

(i) *Political associations*

There are at least two likely situations in which the interest behind the restriction a political organization's associational freedom.

The first situation is one in which the state wishes to alter the internal affairs of political parties. Generally, the state will attempt to justify its interference by arguing that the close nexus between political parties and the state requires intervention in the party's internal affairs to ensure that the party serves its representative function in a representative democracy. For example, in some jurisdictions representative democratic politics demands that the members of political parties elect the candidates of their political party to represent them in elections.[2]

[1] This three-fold analysis works in the opposite direction as well. Associations with a tight fit between purpose and exclusion, which do not offend our basic political commitments and which create space for dissent and change go some distance towards the potential burden of state intervention.

[2] In Germany, for example, Article 21 of the Federal Electoral Act requires that candidates for federal elections be elected by a meeting of the members, or a representative group of such a meeting, or the permanent representation of such meeting.

The Constitutional Court has yet to be drawn into a discussion of what democracy actually requires. In *United Democratic Movement v President of the RSA and Others* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) ('*UDM*'), the Court held that while floor-crossing legislation must comply with constitutional requirements, it was not unconstitutional *per se*. Cf *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C)(High Court held that a suspension of a member of Parliament for contempt constituted a denial of democratic rights to participation). To the extent that the floor-crossing legislation did not clearly violate rights of participation and association, the Court was quite right not to interfere with minor changes to the political edifice. However, as I have argued above, given the involuntariness of our basic political associations, it is quite fair to hold the state to a much higher standard in ensuring that the capacity for political association is real and the capacity of such associations to be heard is meaningful.

The second situation is one in which the state attempts to open up restrictive party membership policies. The state might argue that democracy requires that political demands are made by representative groups of interested individuals. On this account, political parties or associations which excluded individuals on the basis of race, creed, colour, sex, sexual orientation or some other invidious characteristic would not be representative.[1] The compelling counter-argument is that in cases where the discrimination and exclusion actually serves the expressive ends of the association — and where state intervention would alter those expressive ends — then we may wish to permit expression to trump the state's interest in representivity and equality.[2] Though perhaps unpalatable, this position is entirely consistent with the notion that associational freedom demands that we give associations the power to police their membership in order to ensure that the association remains true to its founding tenets.

The Promotion of Equality and Prevention of Unfair Discrimination Act might be understood to require a commitment, by all those exercising state or public power, to realize the ends of substantive equality and articulate policies designed to redress discrimination.[3] Such a statutory imperative could be used to ensure that persons who have historically been denied access to the levers of political power be able to belong to the political party of their choice and to participate meaningfully in that party's deliberations.[4]

The crisp question is: does the Constitution permit racially exclusive parties? The answer this analysis suggests is a qualified yes: to the extent that all citizens can still participate meaningfully in the affairs of state. However, where racially exclusive political practices actually impair democratic deliberation and participation, the answer should be no.

[1] See *Smith v Allwright* 321 US 649, 64 SCt 757 (1944) (Democratic Party rule barring blacks from participating in primaries declared unconstitutional on grounds that election of Democratic candidate would legitimate the racially discriminatory and unrepresentative practices of the party); *Terry v Adams* 345 US 461, 73 SCt 809 (1953) (political association which determined Democratic Party nominations and discriminated against blacks violates right to vote).

[2] See William Marshall 'Discrimination and the Right of Association' (1986) 81 *Northwestern University LR* 68.

[3] See ss 25, 26 and 27 of PEPUDA.

[4] How far the Constitutional Court will go in this area is unclear. The decision in *UDM* can be read as a demonstration of a reasonable reluctance by the Court to interfere in the co-ordinate branches considered judgment about what counts as multi-party politics and representative, participatory democracy. Or it can be read as a very technical judgment that abjured any unnecessary judgments about matters not squarely before the Court. However, the US Supreme Court, in an opinion that could reflect meaningfully on the extent to which the courts should intervene in party politics, held that state laws that prohibited 'fusion candidates' (candidates running under the banner of more than one party) could not be said to unduly burden third party candidates. *Timmons v Twin Cities Areas New Party* (1997) 520 US 351, 117 SCt 1364. The effectiveness of fusion candidates is an empirical matter — and it is not clear if or how they help third parties — but the Court's decision demonstrated a marked deference to the state's choice to limit how parties are organized, who they choose to represent them and, effectively, to stack the electoral odds in favour of the two major parties.

(ii) *Intimate associations*

With associations that are supported by some other constitutional right or imperative, distinctions are rarely made between state regulation of the association's goals and state regulation of the association's a means of achieving those goals. Consequently, the degree of protection afforded the association is often derived from the constitutional protection for the association's objective. This conflation of goal and means is hardly problematic with respect to intimate associations. The intimate associational goal and its means are inextricably linked. As a result, intimate associations normally receive the strong constitutional protections that flow from rights to privacy, human dignity and equality.

If we take sexual congress or traditional partnerships as the paradigmatic examples of intimate association, there appear to exist few good reasons for state regulation or interference.[1] Few public goods seem to be at stake. Moreover, considerations of identity, constitutive attachment, capture and social capital strongly militate against interference. Where equality is an issue, it usually cuts against, and not in favour of, traditional forms of state intervention. As *NCGLE I* and *NCGLE II* illustrate, the Constitution is committed to sexual orientation equality.[2] In *NCGLE II*, the Constitutional Court found that failure of the Aliens Control Act to include permanent same sex life partners in its definition of married person violated s 9(3) of the Constitution.[3] In *NCGLE I*, the Constitutional Court found that the common law offenses of sodomy and statutory provisions criminalizing homosexual acts violated both the right to equality and the right to privacy.[4] These express commitments to equality and to privacy

[1] US case law on state interference with intimate association has been inconsistent, if not incoherant. Compare *Griswold v Connecticut* 381 US 479, 85 SCt 1678 (1965) (striking down law impairing private heterosexual relations) with *Bowers v Hardwick* 478 US 186, 106 SCt 2841 (1986) (upholding law impairing private homosexual relations). However, in the recent case of *Lawrence v Texas* — US –, 123 SCt 2472, 156 LEd 2d 508 (2003) ('*Lawrence*'), the US Supreme Court has now found that homosexuals possess the same rights to privacy as heterosexuals. In addition, the US Supreme Court has, in *Roberts v United States Jaycees* 468 US 609, 104 SCt 3244 (1984) ('*Roberts*'), and its progeny, identifed four relatively useful criteria for determining whether an association qualifies as an intimate association: (1) small size, (2) private purpose, (3) selectivity of membership, and (4) insularity of the group. Read together *Lawrence* and *Roberts* should buttress the claim that homosexuals and heterosexuals possess the same kind of intimate associational rights. But see *Shahar v Bowers* (1997) 114 F3rd 1097 (11th Cir. 1997)(Allowing state attorney to withdraw offer of employment upon learning that offeree intended to enter into a homosexual union.) For a general discussion of this case see Shane Wetmore '*Shahar v Bowers*: The Eleventh Circuit's One Step Forward, Two Steps Back' 30 *U Toledo LR* 159. The express protection for sexual orientation under s 9 of the South African Constitution should trump any arguments from state-enforced morality that homosexuals are not entitled to make use of the same legal institutions as non-homosexuals.

[2] *NCGLE I* (supra) (Common law offence of sodomy and statute criminalizes homosexual acts found unconstitutional). *National Coalition for Gay And Lesbian Equality And Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), 2000(1) BCLR 39 (CC) ('*NCGLE II*') (Failure of definition of married person in terms of s 25 of Aliens Control Act 96 of 1991 to include same sex life partners found unconstitutional); For more on the incoherence of the Court's jurisprudence on sexual associations, see § 44.3*(c)(x)*. See, expecially, *S v Jordan and Others (Sex Workers Education And Advocacy Task Force And Others As Amici Curiae)* 2002 (6) SA 642 (CC) ('*Jordan*').

[3] *NCGLE II* (supra).

[4] *NCGLE I* (supra).

undermines directly the state's attempt to restrict intimate homosexual relationships.[1] Moreover, they suggest that little, if any, room exists for denying homosexuals use of the same legal institutions and arrangements on offer to non-homosexuals.

However, not all intimate associations are partnerships based upon sexual union. Many intimate associations are nuclear and extended family structures.[2] Despite the constitutive nature of intimate familial attachments and such buttressing rights as privacy, religion or language and culture, plenty of potentially good reasons exist for state intervention.[3] First, children are usually not in any position to protect their interests or even determine those interests. Second, the state has an interest in making certain that its future citizens are in a position to discharge their responsibilities to the state and to others. At a minimum, the state has a clear interest in making certain that the protection of the intimate association of the family is not a cover for abuse or neglect.

[1] See *S v H* 1995 (1) SA 120 (C) and *S v Kampher* 1997 (4) SA 460 (C), 1997 (9) BCLR 1283 (C) (Common-law or statutory offences which proscribe private homosexual acts between consenting adult males cannot survive constitutional scrutiny). Although the court's view in *Kampher* was grounded on the prohibition against discrimination on the basis of sexual orientation contained in the equality provision of the Interim Constitution, the protection of intimate association entrenched in the right to privacy also applied. The application of these other provisions of the Bill of Rights to an intimate association underscores the argument that associational rights are frequently buttressed by other constitutional rights.

[2] The US Supreme Court is inclined to protect intimate family household structures against state intervention, but permit state intervention where a household does not possess the requisite level of insularity and selectivity. Compare *Moore v City of Cleveland* (1976) 431 US 494 (Striking down zoning laws because they struck too deeply into well-protected sphere of domestic autonomy) with *Village of Belle Terre v Boraas* (1973) 416 US 1 (Upholding zoning laws because rationally related to legitimate state interest and household of college friends did not constitute an intimate arrangement deemed worthy of constitutional protection).

[3] The Constitutional Court has demonstrated a willingness to extend the definition of the family in order to protect basic constitutive attachments. See *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC)('*Du Toit*')(Court held that lesbian partners in a long-standing relationship had successfully challenged the constitutional validity of various sections of the Child Care Act 74 of 1983 and the Guardianship Act 192 of 1993 on the ground that the Acts only provided for the joint adoption and guardianship of children by married persons only); *Booysen and others v Minister of Home Affairs and another* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC)('*Booysen*')(Foreign national spouses seeking to work in South Africa successfully challenged statutory provision requiring that they apply for a work permit while outside the country and barring them from re-entry until permit issued); *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000(3) SA 936 (CC), 2000 (8) BCLR 837 (CC) ('*Dawood*') (Constitutional Court found constitutionally infirm provisions of the Aliens Control Act that regulated the circumstances in which foreign spouses — especially the poor – of South African residents were allowed to reside temporarily in South Africa pending the outcome of their applications for immigration permits.) All three cases turned on a finding that the dignity of the family unit was impaired. As O'Regan J writes in *Dawood*: 'It cannot be said that there is a more specific right that protects individuals who wish to enter into and sustain permanent intimate relationship than the right to dignity in s 10. There is no specific provision protecting family life as there is in other constitutions and in many international human rights instruments.' Ibid at paras 35 – 37. The learned judge is wrong in two respects. First, association must, in fact, be that more specific provision of the two provisions. It possesses a much more circumscribed ambit than dignity. Second, many other jurisdictions do rely upon freedom of association to protect intimate associations.

The knottier question is whether the state is entitled to ensure that children receive the best possible outcome.[1] Both the minimalist and maximalist approach recognize that children are not the sole property of their parents. The minimalist approach seems to recognize actual harm, perhaps only actual physical harm, as grounds for intervention. The 'best interest of the child' test, as manifest in the Constitution and the case law, would seem to demand more. But how much more? The maximalist approach, while taking children very seriously, runs the risk of not being able to find a suitable environment for children outside a family structure. The Constitutional Court has recognized both the importance of the family structure and its limits. It has intervened to support parental relationships with children born out of wedlock and the adoption of children by non-citizens.[2] On the other hand, it has suggested that corporal punishment within the home is constitutionally permissible and that families with children are not entitled to any special treatment vis-a-vis emergency housing.[3] Its decisions have thus far steered a path between minimalism and maximalism.[4]

(iii) *Cultural associations*

To the extent that cultural associations confine themselves to bona fide cultural activities, they should be relatively immune to state intervention.[5] By permitting

[1] See *Troxel v Granville* (2000) 530 US 57, 120 SCt 2054; *In re Custody of Smith*, 969 P2d 21 (Wash. 1998). The US Supreme Court affirmed the Washington Supreme Court declaration that the statute that enabled non-custodial relatives to secure visitation rights was unconstitutional as a violation of the custodial parents right to be free from state intrusion so long as the children were not subject to actual harm. See also David Herring, '*Troxel* and the Rhetoric of Associational Respect' (2001) 62 *U. Pitt. LR* 649.

[2] See *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC)(Court finds that unwed fathers in non-Christian marriages entitled to same rights of access as other fathers); *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC), 2000 (7) BCLR 713 (CC).

[3] Compare *Christian Education* (supra) (Children may not be subject to corporal punishment in private schools; but Court finds that same such punishment may occur within the sanctity of the home) with *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) reversing in part *Grootboom v Oostenberg Municipality and Others 2000* (3) BCLR 277 (C)(High Court held that vulnerability of children supports — in terms of s 28(1)*(c)* — decision to put municipality on terms to produce shelter for those families in desperate need; Constitutional Court reverses, in part, and finds no independent claim under s 28(1)*(c)*, only a general claim to housing under s 26.) See also Angelo Pantazis and Adrian Freeman 'Children's Rights' in Chaskalson et al *Constitutional Law of South Africa* (2nd Edition) (supra) Chapter 47.

[4] As I have already discussed at § 44.2(d) supra, coercion in the context of intimate familial associations is not the sole province of children. It seems trite, but still worth noting, that when faced with physical coercion, the rights of women to freedom and security of the person, to freedom from servitude, to equality and to dignity all trump any and all benefits that might accrue from sustaining traditional ways of life that re-inscribe such abuse. Female genital mutilation and forced labour are obvious candidates for the trash-heap of history. But polygamy and lobolo? It is easy — and in most cases quite right — to identify such practices with the continued subordination of women. Women are chattel. The more difficult question is whether such practices can be reconfigured so as to sustain legitimately both intimate familial associations and cultural practices.

[5] *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill Of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC). The Court held that s 32*(c)* of the Interim Constitution permitted communities to create schools based upon common culture, language and religion. It further held that IC 32*(c)* provided a defensive right to persons who sought to establish such educational institutions and that it protected that right from invasion by the State. It did not, however, confer on the State an obligation to establish such educational institutions. Ibid at para 7.

communities to create schools based upon a common culture, language or religion, the Constitutional Court in *Gauteng School Education Bill e*xpressly recognized the importance of such constitutive attachments and associations for both individual and group identity (and implicitly endorsed their importance for maintaining social cohesion and conserving social capital). However, the High Court in *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* has quite correctly added the corollary that the right to single-medium public schools does not and cannot automatically trump the right of all public school students to education in the official language of their choice.[1]

If a cultural association can demonstrate that its discriminatory membership policies legitimately help to preserve a community's cultural life, then the associational right to determine membership should trump most other interests.[2] As the High Court in *Wittmann v Deutscher Shulverein, Pretoria and Others* reasoned, the right

[1] But see *Laerskool Middelburg en 'n ander v Departementshoof, Mpumalanga Departement van Onderwys, en andere* 2003 (4) SA 160 (T). The Court was clearly troubled by the conflict between the right to a single-medium school and the right to be educated in the official language of one's choice. In deciding that the 'minority' students must be accommodated, the Court correctly concluded that the right to a single-medium public educational institution is clearly subordinate to the right which every South African has to education in a similar institution and to a clearly proven need to share education facilities with other cultural societies. The Court seems to be on far shakier grounds when it suggests that it is an open question as to whether the exercise of one's own language and culture was better furthered where provision was made in a school for the exclusion of other cultural societies or not. Moreover, it quite wrongly argued that a claim to a single-medium institution was probably best defined as a claim to emotional, cultural, religious and social-psychological security. This trivializes the desire to maintain basic, constitutive attachments. It seems clear that the desire to sustain a given culture — especially a minority culture, as Afrikaaner culture now is – is best served by single medium institutions that reinforces implicitly and expressly the importance of sustaining the integrity of that community. As a result, the Court must also be wrong, if not terribly confused, when it claims that the conversion of a single-medium public institution to a dual-medium school cannot *per se* diminish the force of each ethnic, cultural and linguistic communities claim to a school organized around its language and culture. Ibid at 173A/B - F/G. That is, with respect, exactly what the conversion to a single medium *per se* does.

[2] Three of the *Roberts* (supra) intimate association criteria could help to identify protected cultural groups: (1) cultural purpose, (2) selectivity of membership, and (3) insularity of the group. The last criterion is, however, somewhat problematic. The US Supreme Court's thinking seems to have been driven by successful litigation undertaken by Amish and Native American groups. The peripheral contact of mainstream society with these groups leads the Court to the conclusion that group insularity itself is what warrants protection. But it is hard to see why withdrawal ought to animate our thinking about which cultural groups are entitled to protection. Cultural groups are entitled to protection whether they participate actively in the affairs of the commonweal or not. First, the South African polity takes great pride in its diversity. It would be perverse to penalize direct contributions to South Africa's rich cultural tapestry. Second, most cultural groups are sufficiently small that their control over their own cultural destiny is relatively limited. Thus, whether the group is insular or not is unlikely to affect their control over the levers of political power.

At least part of what underwrites cultural autonomy claims is the belief that cultures themselves have a right to survive. See, eg, Charles Taylor 'The Politics of Recognition' in Gutmann (ed) *Multiculturalism and the Politics of Recognition* (1996) 57, 61. ('More societies today are turning out to be multicultural, in the sense of including more than one culture that wants to survive'). With regard to the force of such claims in South Africa, the injustices of Apartheid and colonial rule are so legion as to make them impossible to ignore. However, righting the wrongs of a long legacy of violence, theft, forced removal and the often all too real cutting out of the mother tongue does not give cultural autonomy claims an automatic trump over other claims in a democratic society.

Two points need be made here. First, cultures are not entities that remain static over time. (They evolve both spontaneously and self-consciously.) A defense of cultural autonomy then is a call to support key features of a culture — say language — that makes the culture's survival *in some form* possible.

to maintain a private German school educational institutions based upon culture, language or religion is predicated upon the capacity to exclude non-speakers, non-believers or non-participants.[1] This rationale is entirely consistent with justifications for associational freedom based upon constitutive attachments and capture. One cannot maintain either group identity or the institutions that support that identity if everyone has access to, a claim upon and some control over the property and workings of an association. Moreover, the state's interest — and anyone else's interest – in equality here is rather weak. The goods provided by such associations are far less public than those provided by political and economic associations and that are legitimately subject to far greater state control.[2]

Occasionally, however, the Constitution's compelling interest in equality may justifiably outweigh the values served by particular intimate and cultural associations. The status of polygamous unions raises such a conflict.[3]

That said, the link between culture, social capital and hard capital throws up a most complex set of problems. Communities often support financially other members of their community. Quite often the access to capital comes with terms extraordinarily favourable to the borrower. How should we treat such standing cultural compacts? Such culturally-based economic arrangements are easily subject to charges of bias. That goes without saying. The question is: what can we do about it? Neither outlawing such funds nor opening them up is likely to have the desired outcome. In either case, the fund goes underground or out-of-existence. Unlike banks, whose aim is the bottom line and who profess to serve the broader public, these rotating capital funds are designed, most often, to support members of the community in need or in need of backing to start a business. The aim is the strengthening of community life. To the extent that the

Second, the spontaneous growth of culture suggests that what we, in democratic societies, wish to protect is not culture *per se*, but the rights of individuals qua members of a community to participate in various cultural practices. Only if individuals wish to continue to participate in cultural practices — with the requisite state support — does it even begin to make sense to talk of cultural survival. If no one wants to continue to speak Sepedi, it would certainly count as a loss. But it could hardly be said to amount to an injustice.

[1] 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T). But see *Matukane and others v Laerskool Potgietersrus* 1996 (3) SA 223 (T)(Court found that discriminatory entrance policies based upon language and culture (read race) violated the right to equality of the complainants and could not be justified on the grounds of cultural, minority or associational rights).

[2] See *Wisconsin v Yoder* 406 US 205, 92 SCt 1526 (1972) (Amish parents permitted to educate their children at home); *Pierce v Society of Sisters* 268 US 510, 45 SCt 571 (1925) (Catholics allowed to educate their children in private school); *Santa Clara Pueblo v Martinez* 436 US 49, 98 SCt 1670 (1978) (prohibiting undue state interference with Native American tribal autonomy). *Santa Clara Pueblo* is a perfect example of the double-edged sword of cultural autonomy. Pueblo women contested the traditional and quite discriminatory manner of treatment they endured under the governing Pueblo political council. The Court upheld the autonomy of the council against the equality claims of the female petitioners on the grounds of Pueblo political sovereignty.

[3] See, eg, *Kalla & another v The Master & others* 1995 (1) SA 261 (T), 1994 (4) BCLR 79 (T). In *Kalla* the issue raised, but not decided, was whether the freedom of religion guaranteed by s 14(1) of the Interim Constitution afforded recognition to potentially polygamous unions according to Muslim rites. The issues raised by the case pertain, however, not only to religious freedom but also to freedom of association. In the absence of PEPUDA, one might have argued that such unions ought to enjoy *prima facie* constitutional protection. Whether PEPUDA reverses the 'burden' and grants *prima facie* protection to the party alleging discrimination, the substantive constitutional analysis of such unions, and any potential justification for them, should remain the same.

fund continues to serve such an aim — one that ultimately promotes cultural life and social capital — the grounds for overriding its discriminatory and exclusionary policies and aims are limited.[1]

(iv) *Economic associations*

Quite a different set of considerations apply to business associations. In most constitutional jurisdictions the state is entitled to place substantial burdens upon economic association.[2] The primary reason is that business associations control the distribution of important social (public) goods and must be subject to rules of

[1] But see s 31 of the Final Constitution, Cultural, religious and linguistic communities. It reads as follows: (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community — *(a)* to enjoy their culture, practise their religion and use their language; and *(b)* to form, join and maintain cultural, religious and linguistic associations and other organs of civil society; (2) The rights in ss (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.' Section 31(2) could be construed to preclude all exclusionary and discriminatory policies. But that assumes that all such practices are inconsistent with various provisions in the Bill of Rights, in particular, equality and dignity. The Constitutional Court has made it quite clear that not all discrimination is unfair discrimination. See, eg, *Pretoria City Council v Walker*1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC).

Several possible approaches exist to test the constitutionality of the accretion and distribution of economic capital in cultural collectives.

First, one could permit the accumulation and re-distribution of such capital within the particular community subject to the proviso that such capital could not be used by community members to achieve either dominance or monopoly power with respect to the distribution of social goods — say political power — in non-economic domains. See, eg, Michael Walzer *Spheres of Justice* (1981). Of course, the policing of the mechanisms for distribution of goods across different spheres is difficult when, in fact, it is possible to identify different criteria for the distribution of such goods and when the spheres themselves overlap.

Second, according to Amy Gutmann's civic equality principle, the acid test for such cultural community-based funds would be whether they still permitted the state to discharge its obligation to provide for: (1) equal citizenship or political participation; (2) equal liberty and (3) equal, basic opportunity to live a preferred vision of the good life. Amy Gutmann *Identity in Democracy* (2003) 26-27.

Third, one could talk about the entitlements of such cultural collectives in terms of protection or parity, rather than privilege. See Laurence Sanger 'The Free Exercise of Culture: Some Doubts and Distinctions' *Daedalus* (Fall 2000) 193. Sanger offers a number of justifications for this approach. First, protection rests on the settled judgments of the modern political community. (Sanger's analysis here seems of a piece with Rawls' thesis that an overlapping consensus must underwrite any given liberal democratic society. John Rawls *Political Liberalism* (1993)). Second, protection or parity avoids the 'normal objection that cultural impulses are being indefensibly privileged over other human concerns.' Ibid at 203. Though Sanger is not particularly clear as to the nature of the indefensible advantage, he appears to be suggesting that cultural formations and practices are often not rationally defensible. That claim cannot be gainsaid. The real question is to what extent cultural practices — and the funds here under scrutiny — can be both immune form rational scrunity and benefit from constitutional protection. At a minimum, we might agree that moral practices that are morally repugnant independent of the cultural predilections of the majority and which cannot offer independent grounds for the continuation — other than 'this is just what we do' — are not entitled to constitutional solicitude. This is quite a minimalist position. The cultural practices that a community under attack is apt to defend is likely to be morally repugnant to the majority, but still capable of justification by reference to widely shared values such as freedom, equality, social cohesion, community, order, virtue, spirituality and tradition.

[2] See, for example, *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds en 'n ander* 1997 (8) BCLR 1066, 1077G–H (T), where Cameron J rejected an associational challenge under IC s 17 to compulsory membership of a pension fund: '[Ek is van mening] dat die applikant geen aanspraak uiteengesit het wat gekoppel kan word aan 'n krenking van enige reg wat deur artikel 17 omvat word nie. Dit blyk inteendeel uit die stukke dat die assosiasie- kwessie in die huidige geval suiwer 'n finansiële kwessie is, sonder enige verdere dimensie.'

fair play. In addition, where existing regulations strike far into the heart of an association's membership policies or limit the associational choices of an individual, a constitutional attack is more likely to be based upon infringements of the rights to trade, profession or occupation or the right to property.[1]

Two kinds of power exercised by economic associations — practice requirements by legal regulatory bodies and restraints of trade by private businesses — have attracted recent judicial scrutiny. The courts have largely resisted direct constitutional engagement.[2]

Attempts by advocates to gain direct access to the market for legal services have occupied the courts on a number of occasions.[3] In all three *De Freitas* decisions — in the High Court[4], the Supreme Court of Appeal[5] and the Constitutional Court[6] — the courts gave constitutional challenges to rules barring direct access 'short shrift'.[7] The High Court relies heavily on the traditional rationales for the distinction between the bar and side-bar and holds that the distinction between attorneys and advocates remains manifestly rationale because clients were indemnified with regard to loss of trust money by attorneys but not by advocates. Neither the economic acitivity rights in s 26 of the Interim Constitution nor some notion of the right to associate with clients of one's own choosing on terms of one's own choosing (or not to associate with the Law Society) features in the High Court judgment. The Supreme Court of Appeal judgment likewise does not engage in any serious analysis of either the economic rights or the associational rights raised in *De Freitas*. Judge Cameron, in a concurring judgment, merely points out that the rules of such regulatory bodies must comply with the constitutional requirements of rationality and non-arbitrariness.[8]

Despite the limited constitutional value of the *De Freitas* judgments, two High Court cases have recognized at least some of the implications of legal regulatory bodies for freedom of association. In *General Council of the Bar of South Africa v Van der Spuy*,[9] the High Court contrived a three-part test to measure the compatibility of practice rules with constitutional dictates.[10] The last leg of the test — that

[1] See Dennis Davis 'Freedom of Trade, Occupation and Profession in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz and S Woolman (eds) Constitutional Law of South Africa (2nd Edition December 2003) Chapter 54.

[2] For an excellent as well as comprehensive discussion of both constitutional challenges to professional regulatory bodies and to restraints of trade, see Robert LaGrange 'Economic Activity Rights' in H Cheadle et al *South African Bill of Rights* (supra) at 337, 344-359.

[3] Ibid at 345.

[4] *Society of Advocates of Natal v De Freitas and Another* 1997 (4) SA 1134 (N)('*De Freitas I*')..

[5] *De Freitas and Another v Society of Advocates of Natal 2001* (3) SA 750 (SCA), 2001 (6) BCLR 531 (SCA) ('*De Freitas III*').

[6] *De Freitas and Another v Society of Advocates of Natal* 1998 (11) BCLR 1345 (CC) ('*De Freitas II*').

[7] LaGrange (supra) at 345.

[8] *De Freitas III* (supra) at 762-763, citing, with approval *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at paras 34-35.

[9] 1999 (1) SA 577 (T) ('*Van der Spuy*')

[10] The three part test holds that: (1) minimum standards of integrity will be presumed rational; (2) qualification standards must serve the public interest and must be fairly enforced; (3) qualification regulations may not in reality be barriers to entry which prevent a person from practicing in the desired profession.

regulations may not really be barriers to entry masquerading as qualifications — engages the substance of commercial association. In *Law Society of the Transvaal v Tloubatla*,[1] the High Court concluded the freedom of association includes the right to dissociate. However, because the High Court chose to read the internal limitation of FC s 22(2) into FC s 18, the requirement that a member of the Law Society must possess a fidelity fund certificate to practice did not even amount to a *prima facie* infringement of the right to associate.[2] The limited scope of the courts' rulings in *Van der Spuy* and *Tloubatla* signal that regulations of commercial association, in particular professional association, need only satisfy some minimal level of rationality to pass constitutional muster.

The majority of cases in the area of restraint of trade have largely followed the same form. That is, they have failed to engage directly the Constitution. Where they have done so, they have primarily held that the common law tradition of 'sanctity of contract' reflected in restraint of trade clauses trumps any countervailing economic activity rights or associational rights.[3] Only in *Coetzee v Comitis* has a court proved bold enough to suggest that a restraint of trade clause must give adequate content to the public policy requirements made manifest in the Constitution.[4] *Coetzee* echoes *Van der Spuy* by holding that contractual provisions that act as barriers to entry will be treated as rebuttably unconstitutional. In general, however, for economic associations to engage constitutional imperatives, the economic regulation in question will have to make the desired economic association all but impossible.

(v) *Empowering associations*

Associations that aim to empower historically disadvantaged groups support the Constitution's commitment to affirmative action and substantive equality. These associations may need to have discriminatory membership policies if they are to be able to police their resources and be in a position to achieve their constitutionally protected objective. When faced with such an association, the state may be hard pressed to show that it has an interest in regulating the membership policies and internal affairs of such an association on racial or gender equality grounds. After all, it is the constitutionally protected goal of realizing real racial

[1] 1999 (11) BCLR 1275, [1999] 4 All SA 59 (T) ('*Tloubatla*').

[2] I say 'would appear' because it is not clear whether the Court believes that there has been an infringement of the right and because the Court writes that 'one need not consider whether under s 36(1) of the Constitution a limitation of s 18 to provide for the matters in the Attorneys Act is warranted.' Ibid at 66. All the Court does say is that a fidelity fund certificate, like rules regarding admission, conduct, contribution and the like, is deemed to be a normal and acceptable limitation of the right to dissociate in the foreign jurisdictions surveyed by the Court.

[3] See, eg, *Waltons Stationary v Fourie* 1994 (4) SA 507 (O), 1994 (1) BCLR 50 (O); *Kotze v Potgeiter* 1995 (3) SA 783 (C), 1995 (3) BCLR 349 (C); *Knox D'Arcy v Shaw* 1996 (2) SA 651 (W), 1995 (12) BCLR 1702 (W); *Gero v Linder* 1995 (2) SA 132 (O); *Reeves v Marfield Insurance Brokers* 1996 (3) SA 766 (A).

[4] 2001 (1) SA 1254 (C), 2001 (4) BCLR 323 (C) ('*Coetzee*').

and gender equality through affirmative action that justifies the exclusion in the first place.[1]

However, to pass constitutional muster, the exclusive empowering association should have to demonstrate two things.[2] First, it should have to show that its membership is historically disadvantaged and continues to be disadvantaged. Secondly, it should have to show that the exclusive membership policy promotes the goal of substantive equality.

Neither inquiry is simple. The first question may beg questions of both ongoing disadvantage as well as relative historical disadvantage. Excluded parties could well wind up competing with an exclusive empowering association in an attempt to demonstrate in whose favor the weight of historical disadvantage actually falls. The second question throws up the problem of what counts as an association of historically disadvantaged persons designed to redress various forms of inequality. Is any association of such historically disadvantaged persons insulated from attempts by excluded parties to secure access? Would a black South African only club committed to black nationalism, but not to any clear remedial efforts to eliminate vestiges of apartheid, be entitled to exclude non-black applicants?[3] It might be.[4] But the only acceptable grounds for its exclusionary practices would be those related to expression and not to the constitutionally or statutorily mandated goal of equality. The reason for reliance on expression — and not equality — is clear. The club in question has a primarily expressive purpose. It is not engaged, directly, in empowerment.

(vi) *Small social associations*

Small social associations, despite the absence of additional direct constitutional support, are unlikely targets for state interference. Empirically, they are unlikely to attract state attention because the state has limited resources and will generally have much larger fish to fry. Secondly, even if the state, or applicants using a civil rights act[5], did wish to challenge such an association, there are few good substantive reasons for the interference. In most instances the small social club will not control the *distribution* of any important shared, social good. It will simply be

[1] See Cathi Albertyn, Beth Goldblatt and Chris Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001) 132 (Alluding to the possibility that a similar justification of discriminatory practices by historically disadvantaged groups will place such associations beyond the reach of the Act.)

[2] See Deborah Rhode 'Association and Assimilation' (1986) 81 *Northwestern University LR* 106, 108 (exclusionary practices justified only where association actually challenges existing disadvantage.)

[3] See Shawn M. Larsen 'For Blacks Only: The Freedom of Association of Private Minority Clubs' (1999) 49 *Case Western L Rev.* 359.

[4] See *New York City Commission on Human Rights v United African Movement*, No. MPA95-0851/PA95-0031 (NYCCHR June 30, 1997) (The Commission held that the exclusion and the harassment of a white woman at a public event sponsored by the UAM amounted to discrimination, warranted compensation, and required that all future UAM events either meet the definition of 'private event' or announce clearly in the media that such events are limited to UAM members. This case stands for the principle that historically disadvantaged groups are not, ipso facto, entitled to discriminate.)

[5] For example, The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

the setting for friendly human relations. Where the small association serves the 'purely' local and social ends of its members, the state's interest in opening up the membership is 'purely' ideological. Unless we wish to grant the state the power to enforce its ideology at every turn — thus truly raising the spectre of totalitarianism — such purely ideological grounds for interfering in an association's affairs should be rejected.[1]

That a small social club or an informal gathering may not *control* the distribution of any important shared social good does not mean that it is not the setting for the creation and perpetuation of important social goods. A small neighbourhood chess club informally created by a group of eight year old girls most certainly does enable these girls to build friendships and hone their chess skills. Even if such a club is of limited duration, it is a crucible in which the girls learn about the loyalty such kinship creates and the trust sustained bonds require.[2] Much the same might be said of the 'dinner party' that features so often in discussions about association and exclusion. It must be the case that such arrangements between friends (and acquaintances) allow us to develop the kinds of qualities critical to more general, and more public, social relationships. And lest we think that all associations must either work to achieve justice or provide the setting for the development and refinement of character, sometimes girls just want to have fun. It is an impoverished jurisprudence (of association) that forgets that.

(vii) *Security forces*

In *South African National Defence Union v Minister of Defence* ('*SANDU I*')[3] the Constitutional Court held that a provision of the Defence Act[4] prohibiting members of the armed forces from participating in public protest action and from joining trade unions violated the members' right to freedom of expression and their right 'to form and join a trade union'. Implicit in the majority's decision — and explicit in Justice Sachs' concurrence — was the notion that SANDU members' freedom of association had been infringed. The question for the court was whether these infringements were justifiable. With respect to the soldier's right to freedom of expression, the court found the provisions' limitations a grave incursion on the soldiers' expressive rights and patently unjustifiable. With respect to

[1] See *West Virginia State Board of Education v Barnette* 319 US 624 at 642, 63 SCt 1178 (1943) ('If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein'). See also Note 'State Power and Discrimination by Private Clubs: First Amendment Protection for Non-expressive Associations' (1991) 104 *Harvard LR* 1835.

[2] As I have argued above, this kind of loyalty and trust are the pre-conditions for more sophisticated relationships of loyalty and trust as well as the formation and conservation of social capital. Such clubs also provide the constitutive attachments critical for identity formation and social cohesion.

Of course, if this small girls only chess club grew into a large provincial federation — still supported privately — that ran nationally sanctioned tournaments that enabled participants to secure internationally recognized grandmaster points, then some good grounds for state intervention — to ensure equal opportunity — would exist.

[3] 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC).

[4] Act 44 of 1957, s 126.

the soldiers' 'right to form and join a trade union', the court rejected the Minister's contention that an infringement of the right was justified by the constitutional imperative to structure and manage the South African National Defence Force ['SANDF'] as a 'disciplined military force'.[1] As the current provision of the Act stood, it was a constitutionally unjustifiable limitation. However, while deciding that the requirement of strict discipline would not necessarily be undermined by permitting SANDF members to join a trade union, the court did note that the structure of a trade union might well differ in a military environment and that appropriate legislation might justifiably limit the scope of a soldier's trade union rights.[2]

In *South African National Defence Union v Minister of Defence* ('*SANDU II*')[3], the High Court was asked to assess the constitutionality of a subsequent set of regulations.[4] The *SANDU II* Court found that the regulations that specified conditions for peaceful demonstration, prohibited union affiliation or closed shop agreements, barred members from securing union-sponsored legal representation and allowed for withdrawal of union recognition without notice violated SANDU's and SANDF members' rights to collective bargaining (s 23), assembly (FC s 17) and association (FC s 18).[5]

In *Van Dyk v Minister van Veiligheid en Sekuritait*, the High Court held that a police officer was legitimately terminated from his employment because he stood for election as a member of the Democratic Alliance.[6] The officer argued that because his position in the police force — that of a budget analyst – did not require him to engage the public directly, the officer's candidacy could not prejudice the administration of justice or give the appearance of such impropriety.[7] The Court found that the purpose of the South African Police Force Act 68 of

[1] See FC s 199 (7). It reads, in pertinent part: 'Neither the security forces, nor any of its members, may, in the performance of their functions — *(a)* prejudice a political party interest that is legitimate in terms of the Constitution; *(b)* further, in a partisan manner, any interest of a political party.'

[2] With that difference clearly in mind, the order of invalidity was suspended for 3 months in order to give the Minister of Defence the opportunity to devise an appropriate regulatory framework for military trade unions.

[3] 2003 (9) BCLR 1055 (T).

[4] Government Gazette Number 998 (20 August 1999).

[5] At the time of writing, the *SANDU II* High Court's orders of invalidity awaited confirmation by the Constitutional Court.

[6] Case No. 4268/2002 (TPD 29 April 2003, Du Plessis J). While on the police force from 1995 to 1999, Van Dyk had represented the Freedom Front on the Greater Pretoria Metropolitan Council (GPMC). In 2000, Van Dyk switched to the Democratic Alliance and openly ran for a seat on the GPMC as a DA candidate.

[7] Van Dyk also argued that while the South African Police Force Act 68 of 1995, s 46, and the Final Constitution, s 199(7), set identifiable limits on party political activity, those limits should be read, and if necessary modified, by the political rights found in the Final Constitution, s 19. The Court found that even if section 46(1) was deemed to have infringed FC s 19, the infringement was patently reasonable and justifiable under s 36.

1995 was to eliminate any perception on the part of the public that the administration and enforcement of the law advanced the fortunes of any political party or undermined the claims of members of other parties to justice.[1] The Court found that the elimination of any taint of political party bias in the police force in order to instil greater public confidence in government justified the limitation of the political and associational rights of the particular officer in question.[2] Such a finding is consistent with the needs of a nascent democracy committed to the principle that all are equal before the law and that all can be expected to be treated without favour or prejudice.[3]

(viii) *Religious associations*

Despite the correlative right to freedom of religion and the profoundly constitutive nature of religious attachments, religious associations have not fared particularly well in the few cases to reach the Constitutional Court.

In *Prince v President, Cape Law Society*, a sharply divided Constitutional Court held that although a Rastafarian's right to freedom of religion in terms of s 15(1) of the Final Constitution of the permitted him to engage in Rastafarian rituals, the state was justified in proscribing the ritual use of cannabis.[4] In reaching its conclusions about the requirements of general welfare and international obligation, the majority relied heavily on the state's evidence that even limited dagga smoking could lead to broader drug use and greater narcotics trafficking. In large part, this assessment relied upon an under-interrogated assumption that no meaningful exemption to existing laws could be carved out for ritual dagga use.

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[1] Section 46 of the South African Police Force Act reads as follows:

(1) No member must not

(a) exhibit support or swear allegiance openly or associate himself or herself with a political party, organization, movement or body,

(b) hold any position or office in a political party, organization, movement or body,

(c) carry any symbol or any means of identification in respect of any party, organization, movement or body,

(d) promote or denigrate party political interests,

(2) Subsection (1) does not mean that a member is prohibited from

(a) joining a party, organization, movement or body or his or her choice,

(b) attending a meeting of a political party, organization, movement or body: on the understanding that no member may attend such a meeting in uniform; or

(c) exercising his or her right to vote.

(My translation). Section 46(1)*(a)* replaced section 35(1)*(a)* of the Police Act 7 of 1958. The Police Act stated that no member of the Police Force, while still a member of the Police Force, may engage in political activity, stand for election or participate in a municipal council.

[2] See *Van Dyk* (supra) at 10 ('The need for a police force that is seen to be impartial speaks for itself.')

[3] See § 44.2*(c)* supra for various democratic rationales for the limitation of associational rights. A number of eastern European nations have placed similar laws on the books in order to diminish the public's understandable resultance to trust a security apparatus that had all too recently used all manner of surveillance and violation of bodily integrity to enforce the repressive policies of the state. Of course, as South Africa's history of overt politicization of the security services recedes into the past, the rationale for barring party political activity will lose at least some of its force.

[4] 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) ('*Prince*').

When viewed through the lens of association analysis, the rationale for the majority judgment seems rather opaque. On the basis of little more than assertion by the state, the majority is willing to bar a member of a religious association from engaging in practices that the association's members deems central to their way of being in the world. There is no issue of an exclusionary practice. There is no issue of discrimination. There is little question about the import of the ritual for the association in question. At best, the Court's discourse pits a vague sense of danger to the commonweal against the very real commitments of a discrete and insular religious minority. Given that the state's interest is an abstraction in the very worst sense of the term, it is difficult to escape the conclusion that had a more mainstream entity sought protection for an 'illegal' ritual, a creative solution might have been found.

The minority judgment offers some solace. As Justice Ncgobo writes:

> Apart from this, as a general matter, the Court should not be concerned with questions whether, as a matter of religious doctrine, a particular practice is central to the religion. Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet that their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice.[1]

For the purposes of association analysis the above paragraph is important in several respects. While Justice Ncgobo uses the term 'irrational' to describe how outsiders may perceive a religious belief or practice, he may just as well have used the word arational. He goes on to note that however irrational — or arational — a religious belief or practice might be, the centrality of that belief in the life ofits holder is what secures the religious belief, practice or association, constitutional protection. Thus, the minority judgment recognizes: (1) how associations are constitutive of the beliefs and practices of individuals; and (2) how the fact of their being constitutive entitles them to constitutional protection. The minority judgment is remarkable in that it does not rely upon a model of rational moral agency to describe the beliefs entitled to judicial solicitude.[2]

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[1] *Prince* (supra) at 813.

[2] Of course, one might argue that religious associations are unique for reasons that even the minority judgment suggests: namely that religion is the realm of faith and not reason. As such, it goes without saying that for both the majority and the minority that the beliefs or practices will be arational. However, the ascription of arationality to constitutive beliefs that merit constitutional protection is important: because it is the centrality of the belief — and its concomitant association — to the adherents' lives that warrants its protection and not some basic assumption of rationality (or reasonableness).

That said, one must take care not to give adherents to any religious faith a free pass (an exemption) simply because a deity allegedly stands behind their deeply held convictions. Either a deeply held conviction that fits into a community's comprehensive vision of the good life warrants an exemption or it does not. The presence of a deity itself adds nothing to the analysis. For a similar view vis-à-vis cultural association exemptions see Sanger (supra) at 193, 204-6.

The Constitutional Court's decision in *Christian Education South Africa v Minister of Education* would appear to be of greater use vis-a-vis the vindication of associational rights.[1] The judgment contains valuable language about how equality jurisprudence tolerates legal asymmetries. The essence of equality under the South African Constitution, so says the judgment, is that it does not require that we treat everyone the same way, but that we treat everyone with equal concern and respect.[2] And that's just a fancy way of saying that we need not all act the same way in order to enjoy the benefits — including the associational benefits — of a liberal constitution.

Unfortunately, the Court does not extend the benefit of this understanding of equality to religious or cultural associations. It refuses to give ss 15 or 31 of the Final Constitution any meaningful content. The judgment assumes that for the purposes of analysing the constitutionality of s 10 of the South African Schools Act[3] — which bars the use of corporal punishment by teachers — ss 15 and 31 of the Constitution have been infringed. Upon moving to the limitations analysis under s 36, the Court explains why the state is justified in barring corporal punishment in schools and why the court is justified in not crafting an order creating an exemption for such punishment.

The problem with the judgment is not its result. It is perfectly reasonable to override religious dictates and to bar the corporal punishment of children in schools. Children are in no position to determine the desirability of a set of religious practices that may result in harm to themselves. The problem is with the distinction between the practice of religion in schools and the practice of religion elsewhere, i.e., the home. If children lack the capacity to decide for themselves whether religious practices will prove deleterious to their health — and it therefore becomes incumbent upon the state to intervene on their behalf — then it would seem reasonable to conclude that barring religion sanctioned corporal punishment at home should be no different than barring religion sanctioned corporal punishment at school. But that is not what the Court concludes. Instead, it rather sanctimoniously argues that the parents 'were not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They could do both simultaneously.'[4] That is, parents could follow their conscience at home — and beat their children — but still obey the law of the land by having their children attend school free from corporal punishment. Moreover, save for the imposition of corporal punishment, says the Court, the religious schools were not prevented from maintaining their

[1] *Christian Education* (supra).
[2] Ibid at para 42.
[3] Act 84 of 1996.
[4] *Christian Education* (supra) at para 51.

specific Christian ethos. The Court cannot have it both ways. Either the scope for religious autonomy and the religious community's constitutive attachments is sufficient to justify corporal punishment in school and at home or a child's right to dignity is of such paramount importance for the state to bar it when deployed at school or at home. To say that the crux of the matter is the use of a teacher as the instrument of religious discipline is pure sophistry. If the teacher was the parent or the school was at home, then the court's basis for enabling the parents' 'to do both simultaneously' would evaporate. Thus, whereas the minority judgment in *Prince* leaves a reader with a sense that just less than half the court takes religious associations seriously, the *Christian Education* judgment leaves one with a sense that both the parents and the children in question and the public at large are not being taken seriously.

These two decisions also seem to drive one to the conclusion that the courts have not made a meaningful distinction between largely ascriptive associations such as a religious association and voluntary associations such as a cricket board. The notion, underlying both *Prince* and *Christian Education*, is that these religious associations could, if they wanted to, jettison a doctrine or two in order to comply with broader social and political norms. Certainly we might expect the United Cricket Board to align itself with these broader social and political norms (though not without difficulty), because the team it sends out represents the nation. But we cannot have such expectations of a religious denomination in a liberal society. Quite often to belong to such an ascriptive association is to have one's identity and life shaped in a manner that does not readily permit the alteration of either belief or act.[1] To be a member of a liberal society is to live in a state committed to not so readily dictating the ends of its citizens. That is not to say that the state cannot intervene in the affairs of a church. Only that it must have regard for the unique character of such associations as well as for the fairly high threshold for such intervention.

(ix) *Voluntary Associations and Fair Hearings*

South African Courts have engaged associational rights and fair hearings in three relatively recent cases. In all three cases — *Cronje v United Cricket Board of South*

[1] It goes without saying that not all religions will provide nor will all believers adhere to a comprehensive view of the good life that warrants political or legal deference. First, religions are so varied in their doctrine — and their comprehensiveness and adherents so varied in their level of commitment — that one cannot presume that religious participation *simpliciter* justifies violation of laws that bind every citizen. Second, while many religions are ennobling, religious doctrine underwrites quite a lot of bigotry and hatred. See Sanger (supra) at 194, 205-206 ('Religiously motivated conduct is far too vast and far too varied a category to be a plausible candidate for a presumptive exemption from the laws that bind the rest of us.') Cf Paul Farlam 'Freedom of Religion' in Chaskalson et al *Constitutional Law of South Africa* (2nd Edition December 2003) Chapter 41 (Advocate Farlam is inclined to give sincere believers a presumptive right to an exemption. Although he does not say as much, perhaps Advocate Farlam's inclination in this regard is buttressed by the notion that a Court can always find that the state's prima facie infringement of s 16's freedom of religion is reasonable and justifiable under s 36.)

Africa[1], *Ward v Cape Peninsula Ice Skating Club*[2], and *Wittmann v Deutscher Schulverein, Pretoria, and Others*[3] — the courts have upheld the rights of associations to control the grounds for expulsion so long as they met basic standards of procedural fairness. In *Cronje*, the court deferred to the United Cricket Board when it came to deciding how and whether to deal with Hansie Cronje once he had been expelled from the association. In *Ward* and *Wittmann*, the courts reversed the expulsion. They did not do so on the ground that the expulsion occurred for some politically or morally reprehensible reason. The associations were simply found to have failed to comply with the dictates of procedural fairness. To the extent that *Wittmann* weighs in on the power of an association to terminate membership when the member acts in a manner contrary to the decisions of the association's board and engages in expressive conduct that leads to criticism of the association, it decides that the association does possess such power. All three cases can be read as standing for the proposition that a member has vested interests in the association that, at a minimum, require a fair termination hearing. A non-member, on the other hand, possesses no such rights. Read this way, *Wittmann*, *Ward* and *Cronje* seem of a piece. Indeed, what ties them together at a theoretical level is the notion that once a person has been granted entry into an association, he or she accepts the basic principles upon which the association operates and thus the principles that may lead to his or her exclusion. The potential for exclusion is part of the consideration the member offers in return for admittance.[4]

(x) *Sexual Associations*

All sexual associations involve an exchange of some sort. Love, pleasure, rage, humiliation, and, yes, even wealth, all form part of the currency of sexual association.

In *NCGLE I* and *NCGLE II*,[5] the Constitutional Court held that the Constitution's express commitment to equality with regard to sexual orientation meant that the statutory and common law rules that invidiously distinguished homosexuals from heterosexuals were constitutionally infirm. In short, the two judgments place these sexual associations — and the correlative rights to equality, dignity and privacy as well as the constitutive attachment of homosexual intercourse — at the centre of protected associational activity.

But in another recent judgment, *S v Jordan*,[6] the Court withheld constitutional

[1] 2001 (4) SA 1361 (T).
[2] 1998 (2) SA 487 (C)
[3] 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T).
[4] The ability of these kinds of voluntary associations to exclude members whose behaviour is at odds with the basic tenets of the association is consistent with my belief that concerns about 'capture' stand at the heart of associational freedom.
[5] *NCGLE II* (supra); *NCGLE I* (supra).
[6] *S v Jordan and Others (Sex Workers Education And Advocacy Task Force And Others As Amici Curiae)* 2002 (6) SA 642 (CC) ('*Jordan*').

protection for consensual sexual associations. The apparently critical difference between *NCGLE I* and *II* and *Jordan* is that the latter turns on the presence of a monetary exchange and the traditionally despised occupation of prostitution. Upon closer analysis, none of the Court's distinctions between the various kinds of sexual association hold up. At least part of the rationale for the rejection of the equality arguments raised in *Jordan* rests on both the prostitute and the john being subject to criminal sanction — albeit very different sanctions in kind and degree.[1] But were different legal sanctions for the same kind of sexual act visited upon homosexuals and heterosexuals, it would be hard to imagine the post-*NCGLE I* and *II* Court sustaining this 'separate but equal' treatment. Similarly, the Court holds that sexual association of a prostitute and a john — or between any two persons involving some pecuniary exchange — lies at the periphery of the right to privacy and not at its core. But this distinction between core and periphery is illusory. Aside from its invidious characterization of prostitution, the Court makes no effort to describe those kinds of heterosexual and homosexual sexual association that belong at the core and those kinds that fall at the periphery.[2] The Court neither weighs in on the various kinds of indiscriminate sexual behaviour that heterosexuals and homosexuals engage in for the sheer fun of it nor does it take a view about the many kinds of intimate sexual intercourse where some other kind of bargain has clearly been reached.[3] But it is hard to imagine the Court describing such 'private' relationships as lying at the periphery of the right to privacy. Likewise, the Court's judgment that the criminalization of prostitution could not be said to impair the dignity of the prostitute because 'the diminution arose from the character of prostitution itself' – the commodification of one's body — is difficult to understand in a liberal, market-based society such as ours.[4] So much of what we do involves the commodification of our bodies. A day-labourer is entitled to some level of constitutional protection of his dignity despite the fact that he has chosen to sell his body for the wages needed to pay for food and shelter. A Constitutional Court judge, while commodifying her body in the natural course of listening to arguments and writing opinions, is likewise entitled to some level of constitutional solicitude. It cannot be that the commodification of one's body *per se* bothers the Court. All of us gainfully employed do just that.

[1] *Jordan* (supra) at paras 15 and 18.

[2] The majority simply asserts, without argument, this distinction. Ibid at para 29. The minority does not contest the assertion. Ibid at para 117.

[3] See Narnia Bohler-Muller 'Drucilla Cornell's 'Imaginary Domain': Equality, Freedom and the Ethic of Alterity in South Africa' (2002) 65 *THRHR* 166. See also Max Du Plessis 'Between Apology and Utopia' (2002) 18 *SAJHR* 1, 19–21.

[4] *Jordan* (supra) at para 74.

It must be a particular form of commodification — or the commodification of a particular body part — that provokes the Court. But when the offending commodification just happens to be a form of behaviour that attracts the censor of many South Africans, then it is hard not to conclude that the Court has confused commodification with moralization.[1]

[0] Ibid at para 105.

[0] From the general perspective of associational freedom, the Court fails to give the correlative rights of an association to equality, dignity and privacy equal weight in these three cases. It also fails to take seriously the variety of sexual association necessary for identity formation and, dare I say, social cohesion. See, eg, Kate Weston, Families We Choose: Lesbians, Gays and Kinship (1991) 103 — 136. Only those traditional models of biological union — or those made easily analogous to them — secure the Court's approval.

45 Political Rights

Jason Brickhill & Ryan Babiuch

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FC s 19 provides:

(1) Every citizen is free to make political choices, which includes the right —
   (a) to form a political party;
   (b) to participate in the activities of, or recruit members for, a political party; and
   (c) to campaign for a political party or cause.
(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of this Constitution.
(3) Every adult citizen has the right —
   (a) to vote in elections for any legislative body established in terms of this Constitution, and to do so in secret, and
   (b) to stand for public office and, if elected, to hold office.

45.1 INTRODUCTION*

As with all rights in the Final Constitution, the political rights enshrined in FC s 19 must be read in context. South Africa's history of denying political rights to certain racial groups, discussed in Chapter 2 of this work[1] and briefly in § 45.2(a) below, is well known and provides one important context in which FC s 19 must be understood. FC s 19 must also be read alongside the other provisions of the Final Constitution relating to democracy.[2] Finally, to fully understand the workings of FC s 19 — specifically FC s 19(2) and FC s 19(3) — one must understand South Africa's electoral system, and, in particular, its system of proportional representation.[3]

This chapter begins by placing the FC s 19 guarantees within their proper interpretive context. § 45.2 discusses South Africa's unique historical background regarding political rights and voting, surveys the other constitutional provisions which influence the interpretation of FC s 19, and briefly analyzes the impact that both foreign and international law may have on the courts' understanding of political rights. Given the sparse case law adjudicating FC s 19 directly, and the fact that the constitutionally-enshrined political rights are couched in broad terms, these various contexts provide important lenses through which to understand FC s 19's guarantees.

§§ 45.3-45.5 explore the application of FC s 19: the people or groups to whom it applies and who have standing to rely on this section, and the general approach that the Constitutional Court has adopted in FC s 19 disputes within the context

* We would like to thank Johan de Waal, the author of the chapter on Political Rights in the 1st Edition of this work, for allowing us to draw significantly on the contents of that chapter. We would also like to thank Theunis Roux for his guidance, helping to light the way.

[1] See S Woolman, H Klug & R Babiuch 'Constitutional History' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 2.

[2] See the preamble, and FC ss 1, 7, 36, 39, 57, 59, 61, 70, 72, 116, 118, 152, 160, 195, 234, and 236, and the whole of Chapter 9. For a full exploration and discussion of the principle of democracy in South African constitutional law, see T Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10.

[3] For a detailed discussion of election law, see G Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 29.

of the separation of powers doctrine. These sections give essential perspective on the right, showing that the guarantees are broadly applicable (§ 45.3) and can be relied on by an expansive array of parties — even if they are not directly affected by an alleged violation (§ 45.4). § 45.5 documents the deferential standard adopted by the Constitutional Court in FC s 19 cases and then shows how the difficulty of devising a proper remedy constrains the Court's ability to protect FC s 19 rights.

§ 45.6 considers the implied right to political participation, and the relationship it bears to the narrower right contained in FC s 19. The implied right to political participation maps much of the territory covered by Chapter 10 of this work. (Chapter 10 — 'Democracy' — considers the principle of democracy in South African constitutional law.) This right is nevertheless worthy of separate consideration in light of the important decisions in *Doctors for Life International v Speaker of the National Assembly & Others*[1] and *Matatiele Municipality & Others v President of the Republic of South Africa & Others*.[2]

While FC s 19 protects several specific rights, when a question or controversy does not fit neatly into the ambit of one of these rights, the Constitutional Court has shown a willingness to refer to FC s 19 political rights in a more general sense. In particular, the Court has read FC s 19 along with FC s 1*(d)* to stand for the proposition that ambiguous electoral laws must be interpreted in favour of enfranchisement rather than disenfranchisement. § 45.7 analyzes the Court's treatment of the specific rights in FC s 19, and then discusses the general meaning given to FC s 19. Finally, §§ 45.8-45.10 break down the constituent parts of FC s 19, explaining each of them in turn and analyzing the case law in each area.

45.2 Interpretation of Political Rights

As stated above, FC s 19 rights must be read in their proper context. Since the case law regarding FC s 19 remains fairly thin, the historical background of the right to vote and the related provisions of the Final Constitution are particularly important to unlocking the meaning of FC s 19.

(a) Historical background

The Constitutional Court's understanding of FC s 19 is deeply intertwined with South Africa's history of denying political rights to black people. Initially, each of the territories that were to form the Union of South Africa had different voting restrictions. For instance, the Cape allowed men of all races to vote, provided that they met certain economic qualifications, while the Transvaal discriminated along racial lines, not allowing non-white citizens to vote — and sometimes placed limitations on the voting privileges of white men. Many Africans expected the non-racial voting standards of the Cape to be extended as a 'reward' for supporting the British in the Anglo-Boer South African War of 1899-1902. However, the

[1] 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC)('*Doctors for Life*').
[2] 2007 (1) BCLR 47 (CC)('*Matatiele (II)*').

Treaty of Vereeniging explicitly stated that non-whites could only be granted the franchise through the consent of the white population.[1]

Over the next several decades, blacks were stripped completely of their right to vote. The union between the Afrikaner governing party and the white Labour Party in 1924 precipitated the slide towards black disenfranchisement.[2] In 1936, the Representation of Natives Act[3] took blacks completely off of the voters roll, effectively taking away their right to vote in those territories where it once existed. By contrast, the franchise was extended to white women in 1930. By 1931, the economic qualifications limiting the right to vote for poorer white citizens were dropped. These changes effectively enfranchised all white citizens regardless of sex, economic status or social standing.

The enfranchisement situation of Indians and coloureds was a bit more complicated. Although an Act was introduced to Parliament in 1946 that would have provided Indians three representatives to Parliament,[4] the Indian community viewed the law as a slap in the face and undertook a boycott. Soon afterwards, the boycott was no longer necessary. Apartheid policies stripped Indians of even this minimal political representation.

Apartheid efforts at disenfranchisement of black people were met, in addition to political protest, with legal challenges. Some of the most well-known judgments to emerge from apartheid South Africa were delivered during this period, all tellingly related to political rights. In *Ndlwana v Hofmeyr*, a challenge to the Representation of Natives Act failed, the Appellate Division basing its decision on the notion of parliamentary supremacy.[5] However, in the famous pair of *Harris* cases, the Appellate Division twice struck down legislative attempts to disenfranchise blacks. In *Harris I*,[6] the Appellate Division struck down the Separate Representation of Voters Act,[7] which provided for 'the separate representation of European and non-European voters in the Province of the Cape of Good Hope'.[8] Outraged, the government sought to circumvent the judgment by passing the High Court of Parliament Act. The Act purported to turn Parliament itself into the highest court in constitutional matters, with the power to review and set aside, by simple majority vote, any Appellate Division decision declaring an Act of

[1] Article 8 of the Treaty of Vereeniging.

[2] This pact was precipitated by the economic crisis between 1919 and 1921. The lowered price of gold initially led many mining employers to lay off skilled white labour in favour of cheaper, black labour. Seeing their fortunes rapidly declining, the working class Labour Party entered into a coalition with the governing party in order to consolidate political power and improve the lots of the newly-expendable workers.

[3] Act 12 of 1936.

[4] Asiatic Land Tenure and Indian Representation Act 28 of 1946.

[5] 1937 AD 229.

[6] *Harris v Minister of the Interior* 1952 (2) SA 428 (A).

[7] Act 46 of 1951.

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

Parliament invalid. The 'High Court of Parliament' proceeded to declare *Harris I* wrongly decided. Thus followed *Harris II*,[1] in which a unanimous Appellate Division struck down the High Court of Parliament Act.

The government, going back to the drawing board, used a two-step legislative strategy, passing two Acts by ordinary majority, in order, first, to restructure Parliament to give it the majority necessary to amend the Constitution;[2] and, secondly, to amend the Constitution by removing the constitutional protection of black voting rights.[3] These steps allowed it to re-enact the Separate Representation of Voters Act. At the same time, the government passed legislation to increase the quorum of the Appellate Division bench for cases concerning the validity of legislation. The majority of the enlarged bench of the Appellate Division then dismissed the challenge to these new statutes in *Collins*.[4] The sole dissenting judge was Schreiner JA.[5]

The 1983 Constitution created a tricameral legislature that included Indians and coloureds. The 1983 Constitution allotted voting power to whites, Indians and coloureds in a ratio of 4:2:1, respectively, but gave no representation to Africans. This Constitution lasted a mere ten years before being repealed by the Interim Constitution, which affirmed, for the first time in South Africa's history, the principle of universal adult suffrage.[6]

(b) Drafting history

In addition to embodying new political rights, the Final Constitution was itself the product of a multi-staged process of participatory political decision-making. It is therefore useful to consider briefly the drafting history leading up to the enactment of FC s 19.

Before the multi-party negotiations commenced, there were confidential discussions, referred to as 'talks about talks', to test the waters between the African National Congress (ANC) and the ruling National Party (NP).[7] These talks

[1] *Minister of the Interior v Harris* 1952 (4) SA 769 (A).

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

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

[4] *Collins v Minister of the Interior* 1957 (1) SA 552 (A).

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

[6] For a more complete history, see S Woolman, H Klug & R Babiuch 'Constitutional History' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 2.

[7] Z Motala & C Ramaphosa *Constitutional Law: Analysis and Cases* (2002) 4. Cyril Ramaphosa chaired the Constitutional Assembly, the democratically elected legislative body which drafted and adopted the Final Constitution.

established the ground rules for the negotiations that followed. In particular, the initial meetings between the ANC and the NP led to the adoption of the Groote Schuur Minute.[1] This Minute was the first agreement between the two organisations: in the Minute, the NP agreed to meet the ANC's demands contained in the Harare Declaration,[2] and the ANC agreed, in turn, to help to reduce the levels of violence in the country. The next formal agreement was the Pretoria Minute. In this second Minute, the government agreed to release political prisoners and the ANC agreed to suspend the armed struggle.

These two agreements paved the way for the CODESA talks[3] and, thereafter, the Multi-Party Negotiating Forum 'MPNF') held at the World Trade Centre, Kempton Park. The MPNF ultimately culminated in the adoption of the Interim Constitution on 18 November 1993. The Interim Constitution was enacted by the tricameral parliament, signed into law by the State President, FW de Klerk, and came into force on 27 April 1994. Ironically, therefore, the principle of universal franchise was introduced by the act of an undemocratic legislature.

Section 21 of the Interim Constitution, the predecessor to FC s 19, provided:

(1) Every citizen shall have the right —
   (a) to form, to participate in the activities of and to recruit members for a political party;
   (b) to campaign for a political party or cause; and
   (c) freely to make political choices.
(2) Every citizen shall have the right to vote, to do so in secret and to stand for election to public office.

At the second plenary session of CODESA, the major parties had agreed that a democratically elected Constitutional Assembly (CA) should draft the new constitution. However, as noted by the Constitutional Court:

> [i]nstead of an outright transmission of power from the old order to the new, there would be a programmed two-stage transition. An interim government, established and functioning under an interim constitution agreed to by the negotiating parties, would govern the country on a coalition basis while a final constitution was being drafted. A national legislature, elected (directly and indirectly) by universal adult suffrage, would double as the constitution-making body and would draft the new constitution within a given time. But — and herein lies the key to the resolution of the deadlock — that text would have to comply with certain guidelines agreed upon in advance by the negotiating parties. What is more, an independent arbiter would have to ascertain and declare whether the new constitution indeed complied with the guidelines before it could come into force.[4]

[1] The Groote Schuur Minute was signed on 2 May 1990. See Motala & Ramaphosa (supra) at 4.

[2] The Harare Declaration, a document adopted by the Organization of African Unity in 1989, contained the ANC's understanding of the process towards a negotiated settlement.

[3] Convention for a Democratic South Africa.

[4] *Ex parte Chairperson of the Constitutional Assembly, In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 13 (*First Certification Judgment*).

The 'guidelines' referred to were the Constitutional Principles (CPs) contained in the Interim Constitution, and the 'independent arbiter' was to be the Constitutional Court. A number of the CPs referred to political rights and democracy, in particular CP VIII, CP XIV and CP XVII. It is appropriate to remember them, as the CPs still find an echo in FC s 19 and the principle of democracy underlying the Final Constitution:

VIII There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation.

XIV Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.

XVII At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.

When FC s 19 was drafted, a number of changes, some of significance, were made to IC s 21. FC s 19 nevertheless received no objections during the certification process and was certified by the Constitutional Court as complying with the CPs set out above.[1] Where a provision of the Final Constitution was drafted so as to differ from its Interim Constitution predecessor, courts interpreting the Final Constitution should regard such textual changes as deliberate and intended to have some effect. There are two significant differences between IC s 21 and FC s 19. First, the structure of rights in sub-sec (1) is conceptually altered: FC s 19(1) provides that an overarching right to make political choices *includes* the rights to form a political party; to participate in the activities of, or recruit members for, a political party; and to campaign for a political party or cause. IC s 21(1) treated the right to make political choices as a discrete right and treated the other three rights as separate, rather than subordinate, rights. Secondly, the insertion of the right to free and fair elections in FC s 19(2) was wholly new.

The upgrading of the right to make political choices broadens the right extensively. When interpreted as part of IC s 21(1), this right would *not* have included the rights in IC s 21(1)*(a)* and *(b)* to form, to participate in the activities of and to recruit members for a political party; and to campaign for a political party or cause. Under the Final Constitution, these rights form part, but not the whole, of the right to make political choices. Forming and participating in the activities of and recruiting members for political parties, and campaigning for a political party or cause are now instances of the making of political choices. These activities also help us to understand what else amounts to a protected political choice, as other instances of political choices should have characteristics in common with these examples. One such characteristic is that all of the rights in FC s 19(1), which constitute instances of the right to make political choices, involve the relationship between citizens and political parties or causes. Arguably, therefore, the right to make political choices is limited to choices implicating political parties or causes: rights fitting within a representative model of democracy in which political rights of citizens

[1] See *First Certification Judgment* (supra) at Annexure 3: Summary of Objections and Submissions; *Ex parte Chairperson of the Constitutional Assembly, In re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC).

against the state are mediated by political parties. This construction of FC s 19 may mean that, if our constitutional conception of democracy has both participatory and representative dimensions, the participatory dimension must be found in provisions outside FC s 19(1) (and possibly outside FC s 19 as a whole). This conception of a broader right to participate in political processes, which is found in provisions outside FC s 19, and a narrower right embodying the classical protections necessary in a representative democracy, in particular the right to vote, is discussed in more detail in § 45.6 below.

(c) Constitutional context

(i) *Relationship between FC s 1(d) and FC s 19*

Several provisions of the Final Constitution are particularly helpful in placing FC s 19 in its proper context. FC s 1*(d)* states that 'universal adult suffrage, a national common voters [sic] roll, regular elections, and a multi-party system of democratic government' are foundational values of the new South African constitutional order. As a result, democratic values must be promoted when a court interprets the provisions of FC s 19.[1] If the court finds that the FC s 19 rights are infringed, these values must also be used to determine whether that limitation is reasonable and justifiable.[2]

(ii) *Other relevant constitutional provisions*

As will be discussed in § 45.6 below, FC s 19 entrenches a set of political rights that constitute a subset of a broader right to political participation that runs through the Constitution. Part of that right to political participation is the right of public involvement in legislative processes, contained in FC s 59(1)*(a)* in respect of the National Assembly, FC s 72(1)*(a)* in respect of the National Council of Provinces, and FC s 118(1)*(a)* in respect of provincial legislatures. These provisions, and the broader right of political participation of which they form part, are discussed in § 45.6 below.

FC s 19 must also be considered within the constitutional framework regulating elections. FC ss 46(1) and 105(1) set forth the broad constitutional requirements governing the national and provincial legislatures, respectively, and give the national legislature regulatory power over the non-fixed details of the two systems. FC s 157 provides for the election of members of Municipal Councils. While these provisions give the national legislature the responsibility of creating a working regulatory framework for elections, it is the Court's responsibility to ensure that the laws and regulations passed by the legislature are consistent with the Constitution's guarantees.

[1] C Roederer 'Founding Provisions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 13.
[2] See FC ss 39 and 36.

Also, the constitutional provisions dealing with the rights of freedom of expression,[1] assembly, demonstration, picket and petition, [2] association,[3] the provisions regarding the electoral system, the electoral commission,[4] the mandate of representatives and traditional leaders,[5] and the provision for referendums[6] are integrally linked with FC s 19.

(d) International law

In terms of FC s 39(1)*(c)*, when interpreting the Bill of Rights, a court must consider international law. It is incumbent on courts, therefore, to have regard to the protection afforded to political rights in international law when interpreting FC s 19 and the other provisions of the Final Constitution that protect political rights.

The International Covenant on Civil and Political Rights (ICCPR) entrenches political rights in art 25, which provides:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
> *(a)* To take part in the conduct of public affairs, directly or through freely chosen representatives;
> *(b)* To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
> *(c)* To have access, on general terms of equality, to public service in his country.[7]

[1] FC s 16. For more on freedom of expression, see D Milo, A Stein & G Penfold 'Freedom of Expression' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 42.

[2] FC s 17. For more on freedom of assemnly' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 43.

[3] FC s 18. For more on freedom of association, see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

[4] FC ss 190 and 191.

[5] See *ANC v Minister of Local Government and Housing* 1997 (3) BCLR 295 (N). The High Court refused to invalidate a proclamation, issued in terms of the Local Government Transition Act 209 of 1993, which entitled traditional leaders to become *ex officio* members of regional councils. The applicants' argument that IC s 182 only allowed traditional leaders to be nominated to 'elected local government' was rejected. Since local governments in rural areas are not wholly elected, the argument meant that traditional leaders could only participate in the cities and towns, where almost none of them lived. FC schedule 6, item 26(1) makes it clear that traditional leaders are *ex officio* entitled to be members of the local government structures, wherever they reside, until 1999 or until an Act of Parliament provides otherwise.

[6] FC s 84(2)*(g)* grants the President the power to call for a referendum in terms of an Act of Parliament. That Act now seems to be the Electoral Commission Act 51 of 1996 and no longer the Referendums Act 108 of 1983. The former does not explicitly repeal the latter, but s 2(2) provides that the President may, notwithstanding anything to the contrary contained in any other law, declare that a referendum shall be held to ascertain the views of voters on a matter, determine who shall be entitled to vote, and determine the questions to appear on the ballot paper.

[7] United Nations Human Rights Committee, General Comment 25 'The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service' (Article 25 of the Covenant)(57th session, 1996) CCPR/C/21/Rev.1/Add.7 ('GC 25').

In General Comment 25, the United Nations Human Rights Committee commented on art 25, noting that 'whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.'[1] As is appropriate in international instruments, the ICCPR provides flexibility to nation states as to how they must respect this right. For example, the reference to participation in public affairs *directly or through elected representatives*, reflects the range of democratic models between the participatory and representative polar extremes.[2] However, it is clear that art 25 contemplates a form of *democracy*, and General Comment 25 states further that '[a]rticle 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.'[3] Significantly, art 25 adopts a standard of reasonableness as the internal measure for testing restrictions of the rights that it contains.[4] In *NNP*, as is discussed in § 45.5(b) below, the Constitutional Court adopted the much more deferential standard of rationality.

In *Doctors for Life*, the Court emphasized the entitlement of citizens in terms of art 25 to participate in public affairs, and held that art 25 must be understood in the light of art 19 of the ICCPR, the right to freedom of expression, which includes the 'freedom to seek, receive and impart information and ideas'.[5] The Court held that arts 19 and 25 guarantee not only the positive right to political participation, but simultaneously impose a duty on states to facilitate public participation in the conduct of public affairs.[6]

The African Charter on Human and Peoples' Rights ('the African Charter') protects political rights in art 13 and, like the ICCPR, refers to 'participation' in political processes:

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.

[1] GC 25 (supra) at para 1.

[2] See GC 25 (supra) at para 3: people have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government.

[3] Ibid.

[4] GC 25 (supra) at para 25: 'Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen. The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office.' GC 25 (supra) at para 10 states: 'The right to vote at elections and referenda must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote. It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements. Party membership should not be a condition of eligibility to vote, nor a ground of disqualification.'

[5] *Doctors for Life* (supra) at para 91.

[6] Ibid at para 92.

3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.[1]

The inclusion of rights of access to the public service and to public property and services in the same provision as the right to participate in the government of one's country perhaps reflects a concern of many young African democracies regarding the abuse of political power, especially in respect of employment, public resources and state services. In *Doctors for Life*, the Constitutional Court read art 13 (the right to participate in government) together with art 25, which provides that '[s]tates parties … shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.' By implication, the Court was suggesting that states parties to the African Charter must take steps, through teaching, education and publication, to ensure that citizens are able to exercise their right to participate in the government of their country.

The *Doctors for Life* Court concluded that the international law position in respect of political rights is as follows:

> The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.[2]

The Court held that, while the right to political participation in international law can be realized in multiple ways, it 'does not require less of a government than provision for *meaningful exercise of choice in some form of electoral process* and public participation in the law-making process by permitting public debate and dialogue with elected representatives'.[3]

The Court noted that the international law right to political participation, being an open-textured 'programmatic' right (one which must be realized through the programmes and policies of individual states) will undoubtedly evolve, gathering its meaning and content from historical and cultural experience.[4] As will be seen in § 45.6 below, the international law position heavily influenced the *Doctors for Life* Court. The evolving international law on political rights, particularly the emerging right to democratic governance in international law,[5] will therefore continue to be particularly

[1] African (Banjul) Charter on Human and Peoples' Rights, adopted on 27 June 1981 (Acceded to by South Africa on 9 July 1996).

[2] *Doctors for Life* (supra) at para 105.

[3] Ibid at para 106 (emphasis added).

[4] Ibid at paras 96-97.

[5] See, in general, G Fox 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law* 539; T Franck 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46; H Klug 'Guaranteeing Free and Fair Elections' (1992) 8 *SAJHR* 263.

relevant as our domestic law in this area develops. Insofar as these norms become part of customary international law, they also become the law of South Africa.[1]

(e) Foreign law

In terms of FC s 39(1)*(c)*, when interpreting the Bill of Rights, a court may consider foreign law. It is appropriate, therefore, to have regard to the constitutional protection afforded to political rights in other constitutional regimes.

The Canadian Charter of Rights and Freedoms contains a cluster of 'democratic rights' in ss 3 to 5. Section 3 provides: 'Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.' This provision is similar to FC s 19(3), which also couples the right to vote with the right to stand for election to legislative bodies, and Canadian jurisprudence on the interpretation of s 3 is accordingly useful to South African courts. The Canadian Supreme Court, like the South African Constitutional Court, has been criticized for adopting a highly deferential approach to limitations of the right to vote.[2] The Canadian Supreme Court's deference flows from its notion that the purpose of the right is to confer on each citizen 'effective representation' in the legislature.[3] Sections 4 and 5 of the Canadian Charter are concerned respectively with the duration of the terms of the House of Commons and Parliament, and the sitting of Parliament and the legislatures.

The German Basic Law (*Grundgesetz*) does not contain a provision equivalent to FC s 19 in its Fundamental Rights chapter, although it does entrench the rights to freedom of expression,[4] association,[5] assembly[6] and petition.[7] However, Chapter III, dealing with the Bundestag (legislature), provides for elections and specifically entrenches the right to vote and be elected in art 38:

> (1) Members of the German Bundestag shall be elected in general, direct, free, equal, and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience.
> (2) Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected.
> (3) Details shall be regulated by a federal law.

In addition, Chapter II of the Basic Law, dealing with the Federation and the Länder (provinces) contains the following articles, which carry more than an echo of Germany's own painful history of abuse of political rights:

[1] For a discussion of FC s 39(1)*(b)* and FC s 232, see H Strydom & K Hopkins 'International Law and International Agreements' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 30.
[2] PW Hogg *Constitutional Law of Canada* (3rd Edition, 1992) 1001.
[3] *Re Prov Electoral Boundaries (Sask)* [1991] 2 SCR 158.
[4] Article 5.
[5] Article 8.
[6] Article 9.
[7] Article 17.

Article 20 [Basic institutional principles; defence of the constitutional order]

(1) The Federal Republic of Germany is a democratic and social federal state.
(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.
(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.

Article 21 [Political parties]

(1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.
(2) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.
(3) Details shall be regulated by federal laws.

In providing for public participation in political processes in constitutional provisions falling *outside of a Bill of Rights*, the German Basic Law is structurally similar to the Final Constitution, as will be seen when the right to political participation is considered in § 45.6 below.

The *Doctors for Life* Court noted that a growing number of national constitutions, in particular those adopted after the ICCPR entered into force, endorse the principle of participatory democracy. The Court referred to a number of constitutions 'which, like our Constitution, include provisions that promote public participation in law-making'. In the context of a consideration of the right to participate, specifically, in the law-making process, the Court referred to the law of England, the United States of America, Germany, Tanzania, Portugal, Colombia and Belarus. It also noted the growing trend among states to embrace the principle of participatory democracy.[1]

(f) Statutes embodying political rights

Finally, the interpretation of FC s 19 should also take place within the context of relevant domestic legislation. Domestic legislative efforts to realize political rights include the Referendums Act,[2] the Electoral Act,[3] the Electoral Commission Act,[4] the Abolition of Restrictions on Free Political Activity Act,[5] the Independent Communications Authority of South Africa Act,[6] the Independent Media

[1] *Doctors for Life* (supra) at paras 102-104.
[2] Act 108 of 1983.
[3] Act 73 of 1998.
[4] Act 51 of 1996.
[5] Act 206 of 1993.
[6] Act 13 of 2000.

Commission Act,[1] the Labour Relations Act,[2] the Protected Disclosures Act,[3] the Promotion of Access to Information Act,[4] the Promotion of Administrative Justice Act,[5] and the Promotion of Equality and Prevention of Unfair Discrimination Act.[6] While, of course, none of these Acts can limit the rights in FC s 19 unless that limitation is saved by FC s 36, they are relevant to the extent that, if a right is embodied in legislation, it is not necessary to rely directly on FC s 19.[7] In addition, in interpreting these statutes, FC s 39(2) requires courts to 'promote the spirit, purport and objects of the Bill or Rights', an interpretive process in which FC s 19 will play a significant role. Accordingly, the relationship between these Acts and FC s 19 cuts both ways.

45.3 Horizontal Application of Political Rights

According to FC s 8(2), a constitutional provision applies horizontally to a natural or juristic person to the extent that it is applicable, taking into account the nature of the right and the duty imposed by the right.[8] Although the Constitutional Court has not had to answer this question explicitly, FC s 19(1) and (3) should have horizontal applicability. As far as an infringement on these rights is concerned, it matters little whether it is a state or a private person that is denying a person the right to vote in secret, to stand for public office, to participate in the activities of a political party, or to campaign for a political cause. Horizontal applicability may prove to be very important since many potential infringements may come from political rivals, or even private employers, rather than the government.

Currie and De Waal contend that FC s 19(2), which effectively gives content to the right to vote, is not applicable horizontally because the duty to create free, fair, and regular elections falls only on the government.[9] We disagree. It may be that the duty to ensure *regular* elections falls only on the state. Intuitively, however, the fairness of any game or contest depends both on the role of the referee or umpire and on the conduct of the competing players. The players are obliged to 'play fair', even if the role of enforcing the rules of the game rests solely on the arbiter. FC s 19(2) should similarly be regarded as imposing duties on the political parties contesting an election. It may be that FC s 19(2) imposes only *negative horizontal* duties on private persons to respect the right: for example, by not engaging in acts of political violence, intimidation or electoral fraud. By contrast, the state will bear

[1] Act 148 of 1993.
[2] Act 66 of 1995.
[3] Act 26 of 2000.
[4] Act 2 of 2000.
[5] Act 3 of 2000.
[6] Act 4 of 2000.
[7] See *S v Mhlungu & Others* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 59; *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC), 1995 (10) BCLR 1424 (CC) at para 7; *Ferreira v Levin NO, Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 199.
[8] See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) § 10.8*(a)*(ii).
[9] See I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 447.

positive obligations to take steps to protect, promote and fulfil the right to free and fair elections, discharged primarily through the Independent Electoral Commission, which is obliged in terms of FC s 190 to ensure that elections are free and fair. The horizontal application of FC s 19(2) may also become vital where the Independent Electoral Commission fails, refuses or lacks the institutional capacity to intervene to prevent violations by political parties or other private persons.

In *Institute for Democracy in South Africa & Others v African National Congress & Others* ('*IDASA*'), the applicants were IDASA, a non-governmental organization, and two private citizens. The applicants launched a High Court application against a number of political parties, seeking to compel them to disclose the sources of the substantial donations they receive.[1] The respondents were the African National Congress (ANC), the Democratic Alliance (DA), the Inkatha Freedom Party (IFP) and the New National Party (NNP), all political parties registered in terms of s 15 of the Electoral Commission Act.[2] The High Court held that political parties, for the purposes of the request for access to their donations records, are 'private bodies', rather than 'public bodies', as defined in the Promotion of Access to Information Act.[3] The *IDASA* court held that some of the provisions of the Final Constitution relied upon by the applicants, which fell outside the Bill of Rights, were not enforceable as against private parties, including political parties.[4] However, the High Court proceeded to consider and apply FC s 19. It ultimately concluded that the applicants did not require access to the requested records for the purpose of protecting their FC s 19 rights. Nevertheless, the *IDASA* Court's approach strongly suggests that it regarded FC s 19 as binding not only the state, but also political parties. Thus, FC s 19 applies, for the time being, horizontally.

45.4 Standing to Sue in Political Rights Cases

At a textual level, FC s 19 excludes non-citizens from its application, and is one of the few rights in the Final Constitution to do so.[5] But what about political parties? Most of the cases decided to date have been brought by political parties, and yet on its face the right is extended to citizens only. How then do political parties have standing to sue under FC s 19? The answer lies in the distinction between the holder of a right (in this case, citizens) and the persons who have standing in terms of FC s 38 to enforce the right.[6] FC s 38 provides:

[1] 2005 (10) BCLR 995 (C)(*IDASA*). *IDASA* is discussed further at § 45.7 infra.
[2] Act 51 of 1996.
[3] *IDASA* (supra) at para 32.
[4] Ibid at para 40.
[5] For a full discussion of the beneficiaries of the various rights found in the Bill of Rights, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31.
[6] For a full discussion of standing, see C Loots 'Standing, Ripeness and Mootness' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 7. The broad approach to both standing and application rests, to a significant degree, on the Court's doctrine of objective unconstitutionality. For more on this doctrine, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31.

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are —
> *(a)* anyone acting in their own interest;
> *(b)* anyone acting on behalf of another person who cannot act in their own name;
> *(c)* anyone acting as a member of, or in the interest of, a group or class of persons;
> *(d)* anyone acting in the public interest; and
> *(e)* an association acting in the interest of its members.

The Constitutional Court has also granted political parties standing to sue under FC s 19. For example, it has heard cases over the disparate impact that a voter identification requirement[1] and floor-crossing legislation[2] have had on political parties, over the interpretation of election statutes,[3] and over the amount of discretion possessed by the Electoral Commission.[4] In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO),* the Court granted standing to a national non-profit organization to bring an application on behalf of two convicted prisoners who were unable to register or vote in an upcoming election.[5] As noted above, in *IDASA*, a High Court application was brought by a non-governmental organization and two private citizens. The three applicants brought the proceedings in terms of FC s 38 'on their own behalf, in the interests of all South African citizens, and in the public interest.'[6] The High Court did not question their standing.

In appropriate cases, litigants will have standing to seek relief under FC s 19 on any of the bases provided for in FC s 38. Persons would thus have standing in their own interest, as citizens and as voters. They could also institute proceedings on behalf of other persons who cannot act in their own name (for example, on behalf of soldiers on active duty outside the country during an election or mentally handicapped persons or unrehabilitated insolvents who lack the legal capacity to institute proceedings). One could sue as a member of, or in the interest of, a group or class of persons, such as prisoners. Arguably, whenever the right to a free and fair election is threatened, public interest standing would arise. One can also imagine that a political association — not a political party — could claim standing as an association acting on behalf of its members.

[1] See *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)(*'New National Party'*); *Democratic Party v Minister of Home Affairs & Another* 1999 (3) SA 254 (CC), 1999 (6) BCLR 607 (CC).

[2] *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as* Amici Curiae*) (No 2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC)(*'UDM'*).

[3] See *African Christian Democratic Party v Electoral Commission & Others* 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC)(*'African Christian Democratic Party'*).

[4] See *Liberal Party v Electoral Commission & Others* 2004 (8) BCLR 810 (CC)(*'Liberal Party'*).

[5] 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)(*'NICRO'*).

[6] Ibid at para 3.

In *Doctors for Life*, Ngcobo J stated that there are two extraordinary standing requirements for an application to strike down legislation due to a failure to facilitate public involvement in its enactment: first, the applicant must have sought and been denied an opportunity to be heard on the relevant Bills; and, secondly, the applicant must have launched the application as soon as practicable after the Bills were promulgated.[1] However, *Doctors for Life* was not decided on the basis of FC s 19, and these standing requirements would, therefore, appear only to apply to cases under FC ss 59(1)*(a)*, 72(1)*(a)* and 118(1)*(a)*: the duty of legislatures to facilitate public involvement in the law-making process.

Section 96 of the Electoral Act provides, under the heading 'Jurisdiction and Powers of Electoral Court', that '[t]he Electoral Court has final jurisdiction in respect of all electoral disputes and complaints about infringements of the Code, and no decision or order of the Electoral Court is subject to appeal or review.' In *Liberal Party v the Electoral Commission & Others*, the Constitutional Court left open the question whether this provision ousts the Court's jurisdiction to hear electoral matters.[2] Noting that FC s 167 confers jurisdiction on the Court in all constitutional matters, and noting the rights guaranteed in FC s 19, the *Liberal Party* Court assumed in favour of the (ultimately unsuccessful) applicant that the matter was constitutional and that the Court had jurisdiction.[3] In *African Christian Democratic Party*, the Court was able to avoid the question again, holding that the Electoral Act does not govern municipal elections, which are regulated instead by the Municipal Electoral Act, and therefore that s 96 of the Electoral Act did not apply.[4] It may be that the Court will seek to avoid what appears to have been intended as an ouster provision in s 96 by holding that s 96 only confers exclusive and final jurisdiction on the Electoral Court in matters based directly on the Electoral Code. Where a complaint of infringement of constitutional rights arises, the Constitutional Court will retain jurisdiction.

45.5 Justiciability of Political Rights

(a) Separation of powers concerns

In *United Democratic Movement v President of the Republic of South Africa & Others* ('*UDM*'), the Constitutional Court adopted a strongly deferential approach in considering a constitutional challenge to floor-crossing legislation. The Court set the tone for its consideration of the merits of the challenge by noting that '[t]his case is not about the merits or demerits of the disputed legislation, [which] is a political question and is of no concern to this Court.'[5] The Court held that if defection is permissible, the details must be left to Parliament.[6] The Court further held that the frustration of the will of the electorate (by allowing floor-crossing)

[1] *NICRO* (supra) at para 216.
[2] *Liberal Party* (supra) at para 15.
[3] Ibid at paras 12-15.
[4] *African Christian Democratic Party* (supra) at para 15.
[5] *UDM* (supra) at para 11.
[6] Ibid at para 47.

does not infringe FC s 19 because all the rights in this section 'are directed to elections, to voting and to participation in political activities. Between elections, however, voters have no control over the conduct of their representatives.'[1] In addition, the *UDM* Court held, multi-party democracy is not undermined by floor-crossing because FC s 1*(d)* does not prescribe a particular form of electoral system, and the commitment to multi-party democracy is not incompatible with a system of proportional representation that allows floor-crossing between elections.[2] When it reached the question of remedy, the Court emphasized that '[o]ne of the considerations that must be kept in mind by a Court in making orders in constitutional matters is the principle of the separation of powers and, flowing from it, the deference it owes to this Legislature in devising a remedy.'[3] Separation of powers and deference are, in this sense, the central themes of *UDM*.

The reasoning in *UDM* reflects a shallow, pluralist conception of the principle of democracy under the Final Constitution. It is also at odds with the Court's other dicta on the nature of South African democracy. As contended in Chapter 10 of this volume,[4] the ratio of *UDM* does not affect the content of the principle of democracy in South African constitutional law, but rather stands for a meta-principle that the judiciary should defer to the legislature in politically sensitive cases concerning the design of the electoral system. If this is so, then *UDM* also does not qualify the standard or level of review in political rights cases. Instead, it provides for a strong principle of deference in a narrow set of cases implicating political rights: those involving the electoral system. Although the *UDM* Court did proceed to apply a rationality test to the floor-crossing provisions, it did so to determine whether they were consistent with the rule of law. It did not apply to the provisions a test for an infringement of FC s 19 or any other right.[5] It ultimately concluded that the impugned provisions were rational.[6]

In relation to the right to vote, a particular version of the counter-majoritarian argument has been advanced by some judges of the Constitutional Court. The argument is that, by interfering in the legislative process or invalidating legislation adopted by democratically elected legislative bodies (even if doing so in order to enforce the right to vote), the Court is undermining the right to vote itself.[7] The answer to this concern lies in the supremacy of the Final Constitution. In *Doctors for Life*, Ngcobo J explained:

> This Court has emphasised on more than one occasion that although there are no bright lines that separate its role from those of the other branches of government,

[1] *UDM* (supra) at para 49.
[2] Ibid at para 35.
[3] Ibid at para 115.
[4] See T Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10, 10-64 — 10-65.
[5] *UDM* (supra) at para 55.
[6] Ibid at para 70.
[7] *Doctors for Life* (supra) at para 339 (Yacoob J) and at para 239 (Sachs J).

> 'there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation.'
>
> But at the same time, it has made clear that this does not mean that courts cannot or should not make orders that have an impact on the domain of the other branches of government. When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may — and if need be must — use their powers to make orders that affect the legislative process.[1]

In the area of election law, the courts play a special role as the 'referees' of the democratic process.[2] Rather than having the usual counter-majoritarian function of ensuring that the popular will of the people as expressed through legislative enactments is in accord with the Final Constitution, the duty of the 'referee court' (including the Independent Electoral Commission and Electoral Court) during elections is to ensure that the popular will of the people is fairly represented in the outcome.[3] As such, the courts can be seen as the guardians of democracy and their supervision helps to extend the legitimacy of the democratic process.

(b) Standard of review in political rights cases

The Constitutional Court, at least rhetorically, has recognized the profound importance of political rights. In *New National Party*, for example, the Court remarked: 'The importance of the right to vote is self-evident and can never be overstated … without it there can be no democracy.'[4] In *August*, Sachs J held:

> Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.[5]

[1] *Doctors for Life* (supra) at para 199 citing *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 721 (CC) at para 98.

[2] I Ebsen *Das Bundesverfassungsgericht als Element gesellschaftlicher Selbstregulierung: eine pluralistische Theorie der Verfassungsgerichtbarkeit im demokratischer Verfassungsstaat* (1985) 340; J Ely *Democracy and Distrust* (1980) 73. The last author refers to the famous footnote of Justice Stone in *United States v Carolene Products* 304 US 144, 152-53 (1938) n 4: 'It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.'

[3] The framers of the Canadian Charter recognized the different function fulfilled by the courts in this area by not subjecting the right to vote (s 3) to the override power afforded Parliament in s 33.1 of the Charter.

[4] *New National Party* (supra) at para 11.

[5] *August & Another v Electoral Commission & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC)('*August*') at para 17.

And in *African Christian Democratic Party v Electoral Commission & Others*, the Court held that it will interpret legislation 'to promote enfranchisement rather than disenfranchisement and participation rather than exclusion'.[1]

The Court's rhetorical statements about the importance of political rights have not, however, been translated into a strict standard of review. Quite the opposite. In *New National Party*, the Court adopted a highly deferential standard of review in relation to a constitutional challenge to certain provisions of the Electoral Act. The provisions in question required a particular kind of bar-coded identity document as a precondition for registration as a voter in national and provincial elections, as well as for the exercise of the right to vote itself. Yacoob J for the majority tested the impugned legislation by asking, first, whether the regulatory scheme was rationally related to a legitimate government purpose, holding that reasonableness only became relevant during limitations analysis.[2] Yacoob J then went further, holding that to succeed in establishing that the Act infringed the right to vote, a litigant would have to show that, 'as at the date of the adoption of the measure, its probable consequence would be that those who want to vote would not have been able to do so, even though they acted reasonably in pursuit of the right.'[3] On this test, citizens must prove the reasonableness of their conduct in pursuing their rights, but legislation need only be rational to pass constitutional muster. On the facts, Yacoob J found that the requirement of the bar-coded identity document as the principal method of identification was, on the face of it, rationally connected to the legitimate governmental purpose of enabling the effective exercise of the vote.[4] This degree of deference to the legislature does not sufficiently protect the right to vote and is discordant with the rhetorical importance that the Court places on the right to vote in other cases.

O'Regan J issued a compelling dissent in *New National Party*, holding that mere rules and regulations, some of which may restrict certain people's ability to exercise their right to vote, do not limit the right to vote. They constitute a necessary form of regulation.[5] According to O'Regan J, the primary obligation imposed by FC s 19(2) and (3) is not negative but positive. It requires government to take positive steps to ensure that the right is fulfilled.[6] Matters such as the location of the polling booths, the hours of voting and the requirements of proof of identity must be regulated by law. When creating this regulatory framework, Parliament should seek to enhance democracy, not to limit it.[7] Citizens must comply with reasonable regulation: unreasonable regulation will infringe the right to vote.[8] The following passage lies at the heart of her reasoning:

[1] *African Christian Democratic Party* (supra) at para 23.
[2] See *New National Party* (supra) at paras 23-24. For further discussion of the relationship between the rights analysis and the limitations analysis in *New National Party*, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.
[3] *New National Party* (supra) at para 23.
[4] Ibid at paras 26 and 31.
[5] Ibid at para 123.
[6] Ibid at para 118.
[7] Ibid at para 122.
[8] Ibid at para 124.

> Given the constitutional obligations imposed upon Parliament to enhance democracy by providing for free and fair elections, it seems incongruous and inappropriate that this Court should be able to determine whether citizens have acted reasonably, but not Parliament. Citizens, of course, have an obligation to comply with reasonable regulations made by Parliament and the Commission in order to exercise their right to vote. This Court must, however, determine whether Parliament (and the Commission) has acted reasonably in making such regulations. If citizens do not comply with reasonable regulations, they cannot complain that their right to vote has been infringed. The test proposed by Yacoob J may also be difficult to apply. South Africa is a diverse society. Some of its citizens are fully literate and live in wealth and comfort, many, however, are disadvantaged both educationally and materially. What is reasonable for one group of citizens may be quite unreasonable for another. It is not clear to me how the test established by the majority can accommodate sensitively the realities of South African society. Related to this difficulty with the test is the problem that the test may be evasive of application in relation to those citizens who are unaware of legislative provisions which qualify the right to vote. In this case, evidence was produced which showed that in July 1998, almost 60% of South Africans were unaware of the fact that they would need a bar-coded ID to vote. Many of them may still be unaware of that fact. Ignorance will lead to non-compliance. Is such non-compliance always to be considered unreasonable conduct? It seems to me therefore that the test adopted by the majority may be difficult to apply.
>
> In my view, the proper approach is to require legislative regulation of the right to vote to be reasonable. As a test, it is less difficult to implement than the test adopted by the majority. It will enable appropriate scrutiny of legislative measures regulating elections before they are held and it emphasises not only the importance of the right to vote but also the importance of the obligation imposed upon Parliament to enact measures in a manner which will enhance, not inhibit, the growth of democracy in South Africa.[1]

The simple rationality test adopted by the majority in *New National Party* is far too deferential a standard to apply to such a profoundly important right. It also rests on two incorrect assumptions. The first is that the principle of separation of powers prohibits courts from determining whether the legislature acted reasonably. This is not the case, as the Court's later decisions in *Doctors for Life* and *Matatiele II* illustrate. Indeed, in *Doctors for Life*, Ngcobo J emphasized the appropriateness of reasonableness as a review standard and its frequent use as such throughout the Final Constitution.[2]

The second incorrect assumption in *New National Party* is that the validity of a statute is ordinarily determined with reference to the circumstances that existed at the time of its enactment.[3] Although the majority of the Court conceded that the circumstances prevailing at the time when the validity of the provision is considered by a court are not irrelevant, the majority clearly favoured 'putting itself in the position of the legislature at the time when the legislation was passed'. The Court develops this approach from the doctrine of objective unconstitutionality,

[1] *New National Party* (supra) at paras 126-127.
[2] *Doctors for Life* (supra) at para 126.
[3] *New National Party* (supra) at para 22.

ie the principle that a pre-existing law becomes invalid the moment the Constitution comes into force.[1] This doctrine of objective unconstitutionality in turn follows from the principle of constitutional supremacy. It is normally used to explain one of the consequences of constitutional invalidity, which is that, in theory, a court merely 'confirms' that a statute is invalid and that its order of invalidity therefore operates retrospectively. While it may be the correct approach in theory, it should never be rigidly adhered to in practice. The Court's jurisprudence on the retrospectivity of orders of invalidity makes manifest this inherent flexibility. In any event, the doctrine is of doubtful assistance in the interpretation stage of analysis. If strictly applied it would mean that the court must not only put itself in the shoes of the legislature at the time when the law was passed but also ask itself what the Final Constitution meant when the law was passed. In so far as an applicant alleges that the effect of a law is unconstitutional, it seems strange to decide the matter by trying to predict the effects of the legislation when the law was passed, rather than simply looking at what they really are.

The Court's decision to approach the matter from the time when the law was passed leads it to make artificial distinctions between the constitutional validity of the statutory provisions and the constitutional validity of their implementation. When the effect of a law is considered, this distinction seldom makes sense. The way in which a law is implemented may provide insight into its eventual effects. Thus, requiring proof of identity with the bar-coded ID undoubtedly had the effect of making it more difficult for people to exercise their right to vote. As O'Regan J concluded in her dissenting judgment,[2] this requirement was unreasonable. In *New National Party*, the Court should have balanced the extent of the infringement against the importance of the purpose of the legislation under the limitations clause.

In *August & Another v Electoral Commission & Others*,[3] which was decided before *New National Party*, the Court had appeared to upgrade the level of review in respect of the right to vote from rationality to reasonableness. The question before the *August* Court was whether the Electoral Commission had an obligation to take affirmative steps to ensure that prisoners awaiting trial and sentenced prisoners could register and then vote in an upcoming general election. The Court held that the right to vote 'by its very nature imposes positive obligations on the legislature and the executive',[4] that the Electoral Commission had an 'obligation to take *reasonable* steps to create the opportunity to enable eligible prisoners to register and vote',[5] and that any limitation on the right to vote must pass scrutiny under the limitation clause. The *August* Court found the inaction of the legislature and the Commission unconstitutional. It ordered the Electoral Commission to make 'all *reasonable* arrangements' to ensure that people who were imprisoned during the registration period could register, and that all

[1] See *Ferreira v Levin NO & Others; Vryenhoek v Powell* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at paras 25-30.
[2] *New National Party* (supra) at para 158.
[3] *August* (supra) at para 3.
[4] *NICRO* (supra) at para 16.
[5] Ibid at para 22.

registered prisoners could vote in the upcoming election. However, the references to 'reasonableness' appear to be obiter dicta, as the case was decided on the basis that the right to vote in FC s 19 was obviously limited, and that such limitation could only be justified under FC s 36 if effected by means of a law of general application.[1] Accordingly, the level of review to which a statute limiting the right to vote would be subjected did not really arise.

In *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others*, the standard for testing infringements of the right to vote again did not need to be addressed. The Minister of Home Affairs had, correctly in the view of the *NICRO* Court, conceded that legislation that precluded prisoners sentenced to imprisonment without the option of a fine from voting in upcoming elections limited the right to vote, but sought to justify the limitation under FC s 36. Due to this concession, the Court said nothing about the level of review under FC s 19. The Minister bore the onus to justify the conceded limitation of the right, and the Court held that this onus had not been discharged by the two lines of justificatory argument advanced. First, the *NICRO* Court held that the main thrust of the government's justification of the provisions in question was directed to logistical and cost arguments which, on the evidence before the Court, could not be sustained.[2] Secondly, as to the policy issues raised as justification (that at the level of policy it was important for the government to denounce crime, particularly crimes involving violence and even theft, and to communicate to the public that citizens' rights are related to their duties and obligations as citizens), the *NICRO* Court held that the legislation was not narrowly tailored to such crimes, and that in any event insufficient evidence had been placed before it by the Minister.[3] Due to the Minister's concession, the Court did not have to consider these justifications as against FC s 19. Arguably, given a proper evidentiary foundation, these bases might justify depriving certain prisoners of the vote in terms of a rationality testing. But they would appear to remain unreasonable.

In *UDM*, although it ultimately adopted a very deferential approach, the Court nevertheless referred to reasonableness as the applicable level of review in considering whether floor-crossing was inimical to the multi-party system of government established by FC s 1*(d)*. The Court held:

> A multi-party democracy contemplates a political order in which it is permissible for different political groups to organise, promote their views through public debate and participate in free and fair elections. These activities may be subjected to *reasonable* regulation compatible with an open and democratic society. Laws which go beyond that, and which undermine multi-party democracy, will be invalid. What has to be decided, therefore, is whether this is the effect of the disputed legislation.[4]

[1] *NICRO* (supra) at paras 3 and 31.
[2] Ibid at para 66.
[3] Ibid at para 67.
[4] *UDM* (supra) at para 26.

In *Doctors for Life* and *Matatiele II*, the Court applied a standard of reasonableness to the state's duty to facilitate public involvement in the law-making process.[1] The right to such public involvement in the law-making process forms part of the broader 'right to political participation', as does FC s 19.[2] It remains to be seen whether reasonableness will be the yardstick for all obligations arising out of the broad right to political participation (outside of the right to vote), or even what the content of this right will be. A further question is what the standard of review will be where a litigant relies on both FC s 19 and the right to participate in the law-making process (for example, where legislation impacting on the right to vote is passed without sufficient public involvement). In such a case, the challenge as to the substantive complaint and the procedural complaint would be closely related. It seems paradoxical that such legislation could be tested for reasonableness as to process requirements, but merely for rationality as to its substance.

The dissenting approach of O'Regan J in *New National Party* fits much more comfortably with the dicta of the Court in *August* and *UDM* regarding reasonableness and with the majority's conception of the nature of South African democracy in *Doctors for Life* and *Matatiele II*. Unfortunately, however, absent a departure from precedent, the majority decision in *New National Party* will remain valid in respect of challenges to electoral statutes allegedly infringing the right to vote.

(c) Remedies in political rights cases

The difficulty of issuing effective remedies exerts a strong influence over the Constitutional Court's FC s 19 jurisprudence. If a complaint is lodged timeously, an interdict or some other effective remedy can often be fashioned prior to an election, even if it requires the Court to push back electoral deadlines for a political party to register for an election.[3] The Court has shown a pragmatic willingness to quickly consider time-sensitive electoral issues.[4] Once an election has taken place, however, the possibilities for remedy shrink considerably. Absent a severe infringement that could clearly have changed the outcome of an election, it is difficult to conceive of a post-election remedy for the prevention of a qualified voter from voting — whether or not FC s 38 requires that an effective remedy must be found.

Setting aside an election is a drastic remedy. It is particularly so in a system of proportional representation, where it is not possible to limit the order to the

[1] *Doctors for Life* (supra) at para 146; *Matatiele (II)* (supra) at para 50.

[2] *Doctors for Life* (supra) at paras 105-08.

[3] In *African Christian Democratic Party*, the Court ordered the Electoral Commission to ignore its deposit deadline to allow the ACDP to register to contest the Cape Metro elections.

[4] In *New National Party*, *NICRO*, *African Christian Democratic Party* and *Liberal Party*, the Court expedited its procedures in order to deal with a time-sensitive electoral matter.

constituencies affected.[1] Accordingly, save in the most extreme circumstances, where the effect of the unconstitutional law or conduct outweighs the cumulative effect of the mechanisms meant to ensure that the election is free and fair, the Court is unlikely to set aside an election. Where a substantial period of time has elapsed since the election, the public interest in the finality of the result will outweigh the interests of the litigants.[2] A mere declarator may at least serve the purpose of condemning the breach. The Court could also consider awarding constitutional damages, in place of an order setting aside election results.[3]

Several statutes, such as the Electoral Act and the Labour Relations Act, provide remedies when political rights are violated by private persons. The statutes afford the individual, in some respects, broader rights than FC s 19. Whether the courts will develop remedies beyond those conferred by these statutes depends on the approach to the scope and limitation of political rights and the interpretation of FC s 8(3). For example, the Labour Relations Act does not oblige an employer to grant a worker leave for the purpose of standing for public office.[4] If the request for leave is refused, a court is likely to hold that FC s 19 is not infringed because the right to stand for public office does not entitle a worker to leave. Similarly, it does not entitle a candidate to financial support for his or her campaign. This interpretation of FC s 19 makes it unnecessary to consider a common-law remedy to give effect to the right. The Electoral Act, to use another example, creates several criminal offences to prevent horizontal infringements of the right to vote. However, the Act provides no civil remedies.[5] A court is unlikely to hold that the existence of these criminal prohibitions disposes of the need to develop a civil remedy. Even if one considers them to be 'remedies', they hardly offer 'appropriate relief' to the complainant. In such cases (for example, where one private person unlawfully prevents another from voting on election day), a declarator coupled with an award of damages seems to be the only remedy appropriate to vindicate the right to vote and deter infringements in future.

[1] See *Dongo v Mwashita & Others* 1995 (2) ZLR 228 (HC). The Zimbabwean High Court held that trivial deviations from laws governing the conduct of elections would not lead to the setting aside of an election. However, the court found that the irregularities in the present case were substantial and had affected the result of the election, and that the election therefore had to be set aside. However, the court was only considering a single constituency within a general election.

[2] Zimbabwean cases support this proposition. See, eg, *Mandava v Chigudu & Others* 2000 (1) ZLR 679 (HC); *Makamure v Mutongwiza* 1998 (2) ZLR 154 (H); *Kutama v Town Clerk, Kwekwe* 1993 (2) ZLR 137 (S). In these cases, delay weighed heavily against granting the relief sought. See also *DTA of Namibia v Prime Minister of the Republic of Namibia* 1996 (3) BCLR 310 (NmH).

[3] See *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others,* Amici Curiae*)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC). See also M Bishop, J Klaaren, M Chaskalson & S Budlender 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 9.

[4] The Labour Relations Act 66 of 1995 merely affords employees who are office bearers of representative trade unions the right to take reasonable paid leave during working hours to perform their functions. See LRS s 15.

[5] See Electoral Act 73 of 1998 ss 87-94 read with ss 97-99.

45.6 THE BROAD AND NARROW RIGHTS TO PARTICIPATE IN PUBLIC AFFAIRS: *DOCTORS FOR LIFE* AND *MATATIELE II*

In *Doctors for Life* and *Matatiele II*, the Constitutional Court discovered in the Final Constitution a broad, general principle of public participation in the political process. At lease some aspects of the principle are justiciable. One component of the right to political participation is the right to public involvement in the law-making process. Another component of the right is FC s 19 read with FC ss 16 to 18. In *Doctors for Life*, the Court held that the international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected to public office.[1] The Court went on to find a domestic equivalent of this international law position in the Constitution, holding:

> In our country, the right to political participation is given effect not only through the political rights guaranteed in section 19 of the Bill of Rights, as supported by the right to freedom of expression but also by imposing a constitutional obligation on legislatures to facilitate public participation in the law-making process.

As discussed in § 45.2(d) above, in international law the broad and narrow rights are both located in the text of art 25 of the ICCPR. In the Final Constitution, however, only the narrower right is contained in FC s 19. To find the broader right to political participation, therefore, the *Doctors for Life* Court had to go further afield, both to international law itself and to the right to public involvement in the legislative process in FC s 59(1)*(a)* (in respect of the National Assembly), FC s 72(1)*(a)* (in respect of the National Council of Provinces), and FC s 118(1)*(a)* (in respect of provincial legislatures).[2]

The applicant in *Doctors for Life* impugned a cluster of health-related statutes — the Choice on Termination of Pregnancy Amendment Act,[3] the Sterilisation Amendment Act,[4] the Traditional Health Practitioners Act[5] and the Dental Technicians Amendment Act[6] — on the grounds that, during the legislative process leading to their enactment, the National Council of Provinces (NCOP) and provincial legislatures had not complied with their constitutional obligations under FC ss 72(1)*(a)* and 118(1)*(a)*. In terms of FC s 72(1)*(a)*, the NCOP 'must … facilitate public involvement in [its] legislative and other processes… and [those of] its committees'. FC s 118(1)*(a)* imposes a similar obligation on the provincial legislatures.[7]

[1] *Doctors for Life* (supra) at para 105.
[2] *Doctors for Life* (supra) and *Matatiele II* (supra).
[3] Act 38 of 2004
[4] Act 3 of 2005.
[5] Act 35 of 2004.
[6] Act 24 of 2004.
[7] Ngcobo J delivered the judgment of the majority. Sachs J filed a separate concurring judgment, and Yacoob J (with the concurrence of Skweyiya J) and Van der Westhuizen J filed dissenting judgments.

At the outset, Ngcobo J, writing for the majority, addressed the issue of separation of powers, noting that this principle is one of the essential features of South African democracy.[1] While the courts must observe the constitutional limits of their authority, and not interfere in the processes of other branches of government unless so mandated by the Final Constitution,[2] the Final Constitution is the supreme law and binds all branches of government, including Parliament.[3] Accordingly, the Court has the power and responsibility to ensure that Parliament fulfils its constitutional obligations: it would require clear language in the Final Constitution to deprive the Court of this power.[4]

Ngcobo J considered the right to political participation under international law and foreign law. He concluded that, under international law,[5] while the right can be achieved in many ways, it 'does not require less of a government than provision for meaningful exercise of choice in some form of electoral process and public participation in the law-making process by permitting public debate and dialogue with elected representatives'.[6] Ngcobo J held that the duty to facilitate public involvement in the legislative process under the Final Constitution must be understood as a manifestation of the international law right to political participation. Under the Final Constitution, he explained, the right to political participation is given effect to not only through FC s 19, as supported by the right to freedom of expression, 'but also by imposing a constitutional obligation on legislatures to facilitate public participation in the law-making process'.[7] This public involvement in the legislative process, noted Ngcobo J, is a more specific form of political participation than that provided for by art 25 of the ICCPR, which provides for participation in the conduct of 'public affairs' more generally.[8]

As a backdrop to his consideration of the content of the right to public involvement in the law-making process, Ngcobo J for the majority espoused the Court's own principle of democracy:

> The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process.[9]

Ngcobo J went on to consider by what standard to test the state's obligations to facilitate public involvement in the law-making process. He emphasized that Parliament will have considerable discretion in determining how best to fulfil its duty

[1] *Doctors for Life* (supra) at para 36.
[2] Ibid at para 37.
[3] Ibid at para 38.
[4] Ibid.
[5] Ibid at paras 90-106. See § 45.2(d) and (e) infra for a more detailed consideration of international law and foreign law.
[6] Ibid at para 106.
[7] Ibid at para 106.
[8] Ibid at para 107.
[9] Ibid at para 121.

to facilitate public involvement.[1] He concluded, however, that a legislature must act *reasonably* in discharging its duty to facilitate public involvement in the law-making process.[2] In determining whether a legislature has acted reasonably, relevant factors will include: the nature and importance of the legislation and the intensity of its impact on the public; practicalities such as time and expense, which relate to the efficiency of the law-making process; [3] and rules, if any, adopted by the legislature to facilitate public involvement.[4] However, practicalities alone will not justify failure to involve the public.[5] In evaluating the reasonableness of the conduct of a legislature, the Court will nevertheless pay particular attention to what the particular legislature considers reasonable.[6]

Ngcobo J held that there are two aspects to the constitutional duty of legislatures to take reasonable steps to facilitate public involvement: first, 'the duty to provide meaningful opportunities for public participation in the law-making process'; and, secondly, 'the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided'.[7] This second, broader requirement has at its core public education and other such measures.[8] The purpose of such measures is to 'create conditions … conducive to the effective exercise of the right to participate in the law-making process.'[9] Ngcobo J discussed the various practical means of providing opportunities for public participation: he observed that the conventional methods are the submission of written or oral representations,[10] and held that public participation can be achieved through either method.[11] Again, the ultimate question is whether what the legislature has done is reasonable in the circumstances.[12]

On the facts, Ngcobo J found that the NCOP had failed to discharge its constitutional duty to facilitate public involvement in respect of the Choice on Termination of Pregnancy Amendment Bill[13] and the Traditional Health Practitioners Bill,[14] but that it had discharged its obligations in respect of the Dental Technicians Amendment Bill.[15] The basis for the finding of breach concerning two of the Bills was that the NCOP had decided that public hearings should be held in relation to the two Bills, and that they should be held in the provinces, but that neither the NCOP nor a majority of the provinces had in fact held the promised hearings.[16]

[1] *Doctors for Life* (supra) at paras 122-24.
[2] Ibid at paras 125-26.
[3] Ibid at para 128 and para 146.
[4] Ibid at para 146.
[5] Ibid
[6] Ibid
[7] Ibid at para 129.
[8] Ibid at paras 130-34.
[9] Ibid at para 132.
[10] Ibid at para 142.
[11] Ibid at para 144.
[12] Ibid at para 146.
[13] Ibid at para 189.
[14] Ibid at para 181.
[15] Ibid at para 192.
[16] Ibid at para 193.

In considering the remedy, Ngcobo J held that the obligation to facilitate public involvement is a manner and form requirement of the law-making process. Non-compliance renders the resulting legislation invalid.[1] However, he suspended the Court's order of invalidity for eighteen months to enable Parliament to re-enact the impugned legislation by following the correct procedure.[2] Ngcobo J further adopted a restrictive approach to standing. He held that there are two extraordinary standing requirements for such an application to be heard: first, the applicant must have sought and been denied an opportunity to be heard on the relevant Bills; and, secondly, the applicant must have launched the application as soon as practicable after the Bills had been promulgated.[3]

Yacoob J dissented.[4] He held, for largely textual reasons, that 'public involvement' does not mean 'public participation'.[5] Moreover, he reasoned that the Final Constitution does not require public involvement as a requirement for valid enactment of legislation;[6] that to infer such a requirement when it is not expressly provided for would impermissibly undermine the legislature and the right to vote;[7] and that, in the circumstances, the failure to hold public hearings 'though regrettable [was] of no constitutional moment'.[8] Van der Westhuizen J's dissenting judgment held that public involvement is not a constitutional requirement for passing legislation. His judgment tracked the logic of Yacoob J's dissent.[9] Separation of powers concerns feature strongly in both dissenting judgments.[10]

In the judgment of Sachs J, who concurred in the majority judgment, the separation of powers doctrine sounds a central theme. Despite his concurrence, Sachs J called for caution:

> New jurisprudential ground is being tilled. Both the separation (and intertwining) of powers in our Constitution, and the notions underlying our participatory democracy, alert one to the need for a measured and appropriate judicial response. I would prefer to leave the way open for incremental evolution on a case by case [basis] in future. . . .I fear the virtues of participatory democracy risk being undermined if the result of automatic invalidation is that relatively minor breaches of the duty to facilitate public involvement produce a manifestly disproportionate impact on the legislative process.[11]

In *Matatiele II*, which was delivered the day after *Doctors for Life*, Ngcobo J again delivered the majority judgment. The majority essentially applyied the principles established in *Doctors for Life* to the facts of *Matatiele II*. *Matatiele II* concerned a constitutional challenge to the Constitution Twelfth Amendment Act[12] and the

[1] *Doctors for Life* (supra) at para 209.
[2] Ibid at para 214.
[3] Ibid at para 216.
[4] Skweyiya J concurred in the judgment of Yacoob J.
[5] Ibid at para 308.
[6] Ibid at paras 317-20.
[7] Ibid at paras 338-39.
[8] Ibid.
[9] Ibid at paras 241-245.
[10] Ibid at para 244(7) (Van der Westhuizen J) and at para 338 (Yacoob J).
[11] Ibid at para 239.
[12] Constitution Twelfth Amendment Act of 2005.

Cross-boundary Municipalities Laws Repeal and Related Matters Act.[1] The constitutional amendment and the related act had the effect of re-demarcating the boundary of the municipality of Matatiele so as to transfer it from KwaZulu-Natal to the Eastern Cape. Ngcobo J affirmed the ratio of *Doctors for Life*: legislatures must take reasonable steps to facilitate public involvement in the law-making process.[2] Ngcobo J found on the facts that, although the Eastern Cape legislature had discharged its obligations by holding public consultations, the KwaZulu-Natal legislature had failed to do so.[3] He declared invalid the offending legislation, but suspended the order of invalidity for eighteen months.[4] Skweyiya, van der Westhuizen and Yacoob JJ filed separate dissenting judgments that reaffirmed the dissenting position they had adopted in *Doctors for Life*.

It is clear from these two cases, therefore, that South African democracy has a participatory dimension. Out of this broad right to political participation some justiciable rights arise. One segment of this broad right consists of the political rights in FC s 19. Another is the duty of legislatures to take reasonable steps to facilitate public involvement in the law-making process.

45.7 Structure of FC s 19

FC s 19, whilst forming part of the broad right to political participation, is itself divided into three subsections, each of which deals with a separate category of political rights: the freedom to make independent political choices, the right to free and fair elections, and the right to vote and run for elective office. It is significant that the first two rights are granted to 'every citizen', while the third is granted to 'every adult citizen'. Not only does this mean that only adult citizens may vote, but it makes explicit that the freedom to make independent political choices and the guarantee of free and fair elections are a constitutional right of every South African citizen, regardless of age.[5] As such, the text of FC s 19 makes political freedom and the entitlement to live in the particular type of constitutional democracy created by the Final Constitution core components of South African citizenship.

In addition, where a case does not neatly fit into any one of these categories, the Constitutional Court has shown a willingness to resort to FC s 19 as a whole, bolstering its interpretation by reference to the founding values in FC s 1*(d)* and the principle of democracy. In *African Christian Democratic Party*, for example, the Court held that FC s 1*(d)* and FC s 19 mean that electoral statutes, where ambiguous, should be interpreted in favour of enfranchisement and against disenfranchisement.[6] In *Doctors for Life* and *Matatiele II*, the Court, having considered

[1] Act 23 of 2005.
[2] *Matatiele II* (supra) at para 50.
[3] Ibid at paras 83-84.
[4] Ibid at para 114.
[5] *New National Party* (supra) at para 12.
[6] *African Christian Democratic Party* (supra) at para 23.

various provisions, including FC s 19 and FC s 1*(d)*, concluded that South African democracy has both representative and participatory dimensions. Against this background, the Court relied on the provisions of the Final Constitution that require legislatures to facilitate public involvement in the law-making process and held that the legislatures have a duty to take reasonable steps to do so.[1]

One possible challenge that might not fit neatly under any one of the subsections of FC s 19 is a challenge to the requirement that a deposit be paid by parties wishing to contest an election. Requiring the payment of a deposit for electoral participation constitutes a baseline property or wealth qualification and thereby infringes FC s 19 as a whole, especially when read together with the principle of democracy established in *Doctors for Life* and *Matatiele II*. However, in *African Christian Democratic Party*, the Court delivered an *obiter dictum* that appears to endorse the requirement of a deposit, noting that it ensures that the participation of political parties in elections is not frivolous, and that the payment of a deposit complements the duty to inform the electoral authorities of the party's intention to participate and of the details of its candidates.[2] Nevertheless, if a political party were able to show that its participation in an election was not frivolous and that it had complied with the other procedural requirements, such as furnishing the prescribed notifications and information, it might have some prospects of success in a challenge to the deposit requirement. While the currently prescribed deposit for local government elections is not unreasonably high, the total amount escalates according to the number of municipalities contested. This escalation of fees may be prohibitive for new or emerging parties.

45.8 FC s 19(1): The Freedom to Make Political Choices[3]

The purpose of FC s 19(1) is to ensure that citizens are able freely to align themselves with the political cause or party of their choice without fear of adverse consequences. As such, FC s 19(1) is essentially a freedom right and a special political species of the rights to equality, freedom of expression, belief, opinion, assembly and association.

Anticipating that the freedom to make independent political choices may be infringed in the workplace, FC s 197(3) stipulates that no employee of the public service 'may be favoured or prejudiced only because that person supports a particular political party or cause.' The Labour Relations Act also aims to protect employees from being forced to toe a certain political line. In terms of s 186 of the Act, a dismissal is automatically unfair if the employer unfairly discriminated against an employee on the basis of political opinion. Section 26(3) of the LRA provides that a closed shop agreement is only binding if no amount of the

[1] *Doctors for Life* (supra) at paras 125-126; *Matatiele II* (supra) at para 50.
[2] *African Christian Democratic Party* (supra) at para 31.
[3] The freedom to make political choices was protected by IC s 21(1).

worker's salary is deducted to benefit a political party or contributed to the campaigning costs of a candidate standing for political office.[1]

In *IDASA*, the applicants sought to establish the principle that political parties, or at least those holding seats in the national, provincial or local government legislatures, are obliged in terms of FC s 32(1) (the right of access to information) and ss 11 and 50 of the Promotion of Access to Information Act (PAIA),[2] to disclose details of the substantial donations that they receive, on due and proper request to do so by any South African citizen. In support of the application, the applicants relied on FC s 19(1) and (2). FC s 19(1) and (2) guarantee the rights 'to make political choices' and to 'fair and regular elections' respectively. The High Court held that the respondent political parties were private, and not public, bodies for the purpose of a PAIA request for access to information.[3] Accordingly, the applicants had to show that they reasonably required the respondents' donation records in order to exercise or protect those particular rights.[4]

The applicants contended that the right 'to make political choices' entailed 'the right, in the first place, to choose between political parties'.[5] They argued further that, in order to exercise this choice, citizens require relevant information about a party, its policies and its finances. It was further contended on behalf of the applicants that an election is only 'fair' if the electorate can make informed choices. Implicit in these submissions is a deep conception of democracy, one in which citizens actively participate in and through the medium of political parties.

The High Court held that the applicants had failed to explain how the respondents' donation records would assist them to exercise or protect their rights in terms of FC s 19(1) and (2). It held that donor secrecy did not impugn any of the rights contained in either of these subsections. In doing so, the High Court adopted a narrow, literal interpretation of FC s 19(1) that holds that the provision was 'intended to prevent any restrictions being imposed on a citizen's right to make political choices, such as forming a political party, participating in the activities of and recruiting members for a party, and campaigning for a political cause.' This interpretation limits FC s 19(1) to the formal aspects of political activity by citizens. The High Court held further that 'the emphasis in section 19(2) lies upon the elections and the nature of the electoral process and not so much upon the persons or parties participating in those elections.'[6] This reasoning echoes the Constitutional Court's dictum in *UDM* that all the rights in FC s 19 'are directed

[1] See S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44; C Cooper 'Labour Relations in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 53.

[2] Act 2 of 2000.

[3] *Institute for Democracy in South Africa & Others v African National Congress & Others* 2005 (10) BCLR 995 (c)(*IDASA*) at para 32.

[4] Ibid at para 33.

[5] Ibid at para 42.

[6] Ibid at para 47.

to elections, to voting and to participation in political activities [and that]… [b]etween elections … voters have no control over the conduct of their representatives.'[1]

The *IDASA* Court accordingly declined to interpret the right to make political choices, and FC s 19 as a whole, in accordance with a deliberative conception of democracy in which informed citizens actively engage in a genuine dialogue with their elected representatives and with the political parties campaigning for their votes.[2] Instead, the High Court adopted a check-box conception of the right to make political choices, limited to the formal, external choices in respect of forming a political party, participating in the (formal) activities of and recruiting members for a party, and campaigning for a political cause. There is much to be said for the contention that these acts are worth less (perhaps even worthless) if performed by an uninformed, disengaged citizenry. In *Doctors for Life*, Ngcobo J emphasized that '[p]ublic involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens.'[3]

(a) The right to form a political party

FC s 19(1) protects the right to form a political party and the freedom to determine the purpose and objectives of that party. The Electoral Commission Act makes provision for political parties to register.[4] In order to take part in an election, a political party must give the Electoral Commission notice of its intention to contest the election, provide the Commission with a party list, and pay a deposit via a bank guaranteed cheque.[5] The requirements for registration therefore pose no substantive barriers to a person wishing to form a political party. They are merely procedural. It is not even clear whether a political party has to be registered in terms of this Act. The objective of the provisions may simply be to enable the Electoral Commission to maintain a register of parties.

Access to the ballot is controlled in terms of the provisions of the Electoral Act. These provisions require parties wishing to participate in elections to register in terms of that Act.[6] The biggest restriction on access to the ballot remains the payment of a deposit, the amount of which is determined by the Electoral Commission. The deposit is forfeited if the party fails to secure at least one seat in the elections it is contesting. As discussed in § 45.7, a deposit, which has the effect of substantially limiting access to the ballot, may be regarded as a property qualification and therefore unconstitutional.

[1] *UDM* (supra) quoted in *IDASA* (supra) at para 49.
[2] See S Bosch 'IDASA v ANC — An Opportunity Lost for Truly Promoting Access to Information' (2006) 123 *SALJ* 615 (Offers a useful criticism of the decision.)
[3] *Doctors for Life* (supra) at para 131.
[4] See ss 15-17 of the Electoral Commission Act 41 of 1993.
[5] See s 17 of the Local Government: Municipal Electoral Act 27 of 2000.
[6] See ss 26-31 of the Electoral Act.

The requirement to pay a 'deposit' to contest elections was considered in *African Christian Democratic Party*. The applicant ('ACDP') sought leave to appeal against a decision of the Electoral Court refusing to interfere with a decision by the Electoral Commission to exclude it from contesting the local government elections in the Cape Town Metropolitan area. The Electoral Commission held that the ACDP had not complied with ss 14 and 17 of the Local Government: Municipal Electoral Act,[1] because it had failed to pay the prescribed deposit. The ACDP had made a bulk payment to the National Office of the Electoral Commission, as was permitted by the Electoral Commission, in respect of a list of municipalities which accompanied the payment. In error, the ACDP failed to include the Cape Town Metropolitan area on the list. After paying the bulk deposit, the ACDP decided not to contest seats in certain municipalities that appeared on the list. As a result, the Commission had surplus funds of R10 000 that were not specifically allocated as a deposit to any particular municipality. However, the ACDP failed to request that the Electoral Commission allocate a portion of the surplus to the Cape Town Metropolitan area. The Commission took the view that it had not received a deposit in respect of the Cape Town Metropolitan area and refused to allocate a portion of the surplus funds to that area. The Electoral Court upheld the Commission's view and dismissed the ACDP's complaint. The ACDP appealed to the Constitutional Court on the basis that it had paid the necessary deposit. The Electoral Commission opposed the appeal and contended that the ACDP had not.

O'Regan J, for the majority, held that, when interpreting electoral statutes, courts should seek to promote enfranchisement rather than disenfranchisement, within the limits of the interpretive exercise.[2] Adopting this approach, O'Regan J held that ss 14 and 17 did not prevent the Electoral Commission from establishing a central or 'bulk' payment facility.[3] O'Regan J concluded that the surplus paid by the ACDP constituted compliance with these provisions and that the ACDP had, therefore, already paid the requisite deposit. No condonation of non-compliance was in issue.[4] After determining that an order for the applicant would not disrupt the upcoming election,[5] O'Regan J made an order declaring that the ACDP was entitled to participate in the elections and directing the Commission to facilitate its participation.[6]

The decision is to be welcomed. Procedural requirements for participation in elections, such as the payment of a deposit, though important both for practical

[1] Act 27 of 2000.
[2] *African Christian Democratic Party* (supra) at para 23.
[3] Ibid at para 28.
[4] Ibid at paras 33-34.
[5] The Court stated that it must balance the disruption caused by the order and the fundamental importance of political rights. The closer the dispute to the date of the election, the more disruption such an order would cause.
[6] Ibid at para 37. Skweyiya J dissented, holding that the ACDP had failed to comply with the mandatory requirement of paying the deposit, and that conferring a discretion on the Electoral Commission would threaten the integrity of the elections and the democratic process.

purposes and to ensure that elections are, in fact, free and fair, should not overshadow the real purpose of elections: to provide citizens with an opportunity to participate directly, albeit periodically, in governance.

A further question is whether the Electoral Commission would be entitled to refuse to register a political party on the basis that its values, proposed policies or internal governance are unconstitutional. As noted above, the German Basic Law requires parties to be internally democratic and denies any protection to those that seek to undermine the constitutional state.[1] Section 16(1)*(c)* of the Electoral Act provides that the chief electoral officer may not register a party if the proposed name, symbols or the constitution or deed of foundation of the party contains anything propagating or inciting violence or hatred, or which causes serious offence to any section of the population on the grounds of race, gender, sex, or other listed grounds, or which indicates that persons will not be admitted to membership or welcomed as supporters on the grounds of their race, ethnic origin or colour. This statutory restriction is self-evidently a reasonable and justifiable limitation of the right to form a political party.

(b) The right to participate in the activities of a political party

The right to participate in the activities of a political party forms part of the freedom to make political choices and must be interpreted in this context. Just as the right to freedom of expression does not necessarily entitle a person to have his views published in the newspaper of his choice, FC s 19(1) does not entitle a person to participate in any particular activity of the party of her choice. In so far as the constitutions of the various political parties constrain members of political parties or other individuals from participating, FC s 19(1) will be of limited assistance. It will not enable applicants to challenge admission criteria or members to dispute intra-party decision-making mechanisms or disciplinary procedures. FC s 18, the freedom of association, is likely to form a more fertile constitutional basis for the review of admissions policies and expulsion proceedings.[2] Administrative law remedies, in particular judicial review, in terms of the Promotion of Administrative Justice Act,[3] read with the constitutional rights to equality and to

[1] Article 21 [Political parties] of the Basic Law provides:
(1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds. (2) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality. (3) Details shall be regulated by federal laws.

[2] See S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44 (Contends that control over entrance, voice and exit are essential for the protection of associational rights, and that the case law supports the proposition that fair hearings are a necessary feature of most public associations.)

[3] Act 3 of 2000.

just administrative action,[1] may also provide a more fruitful basis to challenge such party procedures.

Section 9(2) of the Electoral Code prohibits the use of threats or rewards to prevail upon persons to participate in political activity. Section 108 of the Electoral Act criminalizes holding or taking part in political meetings, marches or demonstrations on voting day. It also provides that no political activity other than voting is allowed at a voting station on voting day. These limitations are clearly constitutional. By limiting political activities during and shortly before the voting period, the statutory provisions seek to protect the right freely to make a political choice.

(c) The right to campaign for a political party

(i) *General*

The citizen's right to campaign for a political party aims to prevent intimidation and other forms of interference with free political canvassing and campaigning. Section 87 of the Electoral Act makes it an offence to prevent reasonable access to voters and unlawfully to prevent the holding of political meetings, marches, demonstrations and other political events. In so far as political rights are violated by rival political parties, the Code of Conduct addresses the situation.[2] Every party and every candidate participating in an election must subscribe to the Code.[3] The Act confers extensive powers on courts to deal with political parties and candidates acting in breach of the Act, including the Code of Conduct.[4] Vicarious liability of political parties is not regulated by statute and parties are therefore liable for acts committed by their members only when facts are proved which give rise to such liability at common law.[5]

It is unclear whether the right to campaign extends to the workplace. When trade unions engage in political activities it has to be kept in mind that, in terms of the Labour Relations Act, members of a trade union have the right to take part in

[1] The right to form a political party was protected by IC s 21(1)*(a)*.

[2] See Schedule 2 of the 1998 Electoral Act. In terms of item 3*(c)* political parties are enjoined to take reasonable steps to prevent their members from contravening the Code or any other law. See *African National Congress v National Party (Independent Electoral Commission Intervening)* 1994 (4) SA 190, 202 (ENC). Kriek JP held, in respect of a similar provision of the 1993 Code, that this does not make the party responsible for all forms of illegal conduct perpetrated by party officials. In this case officials of the National Party unlawfully issued temporary voters' cards to 146 individuals in the Victoria West region. The court held that, as the National Party could not foresee the situation arising, its failure to warn its officials not to issue the cards was not unreasonable and no penalty was therefore imposed. Some of the provisions of the Electoral Act have an indirect bearing on the right to campaign for a political party by placing limitations on other fundamental rights. The right of political parties to freedom of expression is limited by s 9(1) of the Electoral Code. According to this section, false or defamatory remarks and the use of language which may lead to violence and intimidation are prohibited.

[3] See Electoral Act s 99.

[4] The penalties range from a warning to R200 000 fines to disqualification of candidates or even to the cancellation of the registration of a political party. See Electoral Act s 96.

[5] *National Party v Jamie NO & Another* 1994 (3) SA 483, 494 (EWC); *Inkatha Freedom Party v African National Congress* 1994 (3) SA 578, 588 (EN). For a discussion of the liability of political parties at common law, see *Hamman v South West African People's Organisation* 1991 (1) SA 127 (SWA).

the legal activities of the union and the representatives of the union have the right of access to the employer's premises.[1] Employee protest actions to promote or to defend socio-economic interests of workers are also protected.[2]

(ii) *State funding of political parties*[3]

FC s 19(1) clearly implies that there may be no restrictions on citizens' rights to make financial or other contributions to political parties, unless such restrictions meet the requirements of the limitations clause. Since it forms part of a freedom right, the right to campaign does not entitle a political party to claim support from the state. However, FC s 236 provides that, 'to enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis'.

The Public Funding of Represented Political Parties Act gives effect to FC s 236.[4] The Act establishes a special fund, managed by the Electoral Commission, from which money is allocated from time to time to the political parties represented in the National Assembly and the provincial legislatures. The amount parties receive depends on two considerations: the party's proportional number of seats and the principle of equity. The latter principle dictates that each represented party must receive a fixed minimum amount of money. The funds must be used for purposes compatible with the functioning of a political party in a modern democracy.

Unrepresented parties do not qualify for state funding. Since there is no constitutional entitlement to state funding, the exclusion of unrepresented parties does not violate FC s 19. However, the FC s 9(1) right to equal benefit of the law may form the basis for such a challenge.[5] FC s 9(1) requires that the differentiation between represented and unrepresented parties bear a rational connection to a legitimate government objective. The purpose of the Public Funding of

[1] See LRA ss 4 and 12.

[2] See LRA s 77.

[3] See G Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) 29-21.

[4] See Act 103 of 1997.

[5] The constitutional guarantee of equal opportunity for political parties is merely a special application of the FC s 9 general equality clause. Some constitutions have special clauses which protect equal opportunity for political participation. Article 33(1) of the German Basic Law guarantees equal political rights and duties to every German in every federal state. See S Woolman & J de Waal 'Freedom of Association: The Right to be We' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism* (1994) 374. For the position in the United Kingdom, see A Birch 'The Theory and Practice of Modern British Democracy' in J Jowell & D Oliver *The Changing Constitution* (2nd Edition, 1989) 98.

In a decision of the Zimbabwean Supreme Court — *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Others* 1998 (2) BCLR 224 (ZS) — a patently unfair system of funding political parties was held to violate the applicant party's right to freedom of speech. The statute provided that parties with less than fifteen elected members of Parliament were not entitled to any state funding at all. This threshold resulted in only one party, the majority party, qualifying for funding. In striking down the statute the court remarked that 'in poorer societies, where private funding is either not available or offers inadequate assistance, the inability to obtain state funding, because the qualification is set too high, causes a reduction of the effective freedom of expression of political parties'. Ibid at 237.

Represented Political Parties Act, and FC s 236, is to promote multi-party democracy. It is not clear why the achievement of this objective demands a differentiation between represented and unrepresented parties. An equality challenge is nevertheless unlikely to succeed for two reasons. First, the Public Funding of Represented Political Parties Act satisfies the requirement in FC s 236 that national legislation be enacted to regulate public funding of political parties. The legislation contemplated by FC s 236 is expressly required to provide for the funding of parties 'participating in national and provincial legislatures': that is, the parties actually represented in those bodies. Secondly, it could be argued that the differentiation between represented parties and unrepresented parties is not arbitrary since it is difficult to ascertain the support for unrepresented parties, and therefore the amount of state support that should be given to them.[1]

(iii) *Political parties and the media*

The right to campaign for a political party does not entitle the political party or an individual to access state-controlled media or privately owned media.[2] When a party is treated unfairly by the media, a challenge based on FC s 9, in conjunction with FC s 19, may be more sensible. During the 1994 elections the relationship between the media and the political parties was regulated by the Independent Media Commission. This body was dissolved and the Independent Broadcasting Authority (IBA) took over its function to determine the duration of, and other issues pertaining to, party political broadcasts during the election period.[3] The IBA has since been replaced by the Independent Communications Authority of South Africa (ICASA).[4] The underlying principle remains that political parties must be treated equitably when the election is covered. For example, no broadcaster may be compelled to broadcast a political advertisement, but in making time available the broadcaster may not discriminate against a political party.

There are also statutory restrictions on publication during the period from the date on which an election is called to the date the result of the election is determined and declared. Section 107 of the Electoral Commission Act 51 of 1996 provides requirements in respect of any printed matter intending to affect the

[1] Section 74 of the Electoral Act 202 of 1993 provided that parties qualified for 50 per cent of an initial grant if they submitted a list of 10 000 signatures (of National Assembly voters) or 3 000 signatures (of provincial legislature voters). The full initial grant was given to parties that could show, with a poll based on scientific methods and evaluation, potential support of at least two per cent of voters. The latter provision led to disputes about the representativity and scientific nature of a poll. See *Workers International to Rebuild the Fourth International v IEC* 1994 (3) SA 277 (SPE).

[2] See, eg, Woolman & De Waal 'Freedom of Association' (supra) at 372 n152 for the position in Germany. Small parties receive less television time than the larger parties in Germany

[3] The Independent Media Commission was established in terms of Act 148 of 1993. This Act, and therefore the Commission, ceased to exist when the Independent Electoral Commission was dissolved.

[4] ICASA was established in terms of the Independent Communications Authority of South Africa Act 13 of 2000. Section 2 provides that one of the objects of the Act is to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by FC s 192. See J White 'Independent Communications Authority of South Africa (ICASA)' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskaslon & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24E.

outcome of an election.[1] No person may print, publish or distribute any printed matter or publication that does not comply with these requirements. This provision limits the right to freedom of expression, but this limitation is probably reasonable and justifiable in terms of FC s 36. The right of political parties to freedom of expression is also limited by s 9(1) of the Electoral Code, which prohibits false or defamatory remarks and the use of language which may lead to violence and intimidation. At common law, political bodies fall within the class of non-trading corporations that can sue for defamation.[2]

45.9 FC s 19(2): The Right to Free, Fair and Regular Elections

The right to free, fair and regular elections in FC s 19(2) gives content and meaning to the right to vote.[3] As the Constitutional Court has held, 'the right to vote is indispensable to, and empty without, the right to free and fair elections'.[4] Whereas FC s 19(3) guarantees the existence of the right to vote, FC s 19(2) obliges the government to make proper arrangements for its effective exercise. Read together, these subsections entitle every South African citizen to vote in a free and fair election.[5]

One essential ingredient for a free and fair election is the creation of an independent commission to manage the elections.[6] Such a commission has been established by the Electoral Commission Act.[7] The two main functions of the Electoral Commission are to manage elections of national, provincial and municipal legislative bodies and to ensure that those elections are free and fair.[8] As far as the management of the elections is concerned, the role of the Commission is not merely supervisory.[9] Rather, its functions 'relate to an active, involved and detailed management obligation over a wide terrain'.[10] Moreover, the Commission is solely responsible for organizing elections. It must of course do so in terms of legislation and the Final Constitution,[11] but the Electoral Commission is not

[1] Section 107 provides that any printed matter intending to affect the outcome of an election must state clearly the full name and address of the printer and publisher. The provision also requires the publisher of certain publications originating from political parties and related persons to head an article in that publication with the word "advertisement" if inserted in the publication on the promise of payment to the publication.

[2] *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 600.

[3] See N Steytler, J Murphy, P de Vos & M Rwelamira *Free and Fair Elections* (1993).

[4] *New National Party* (supra) at para 12.

[5] As the Constitutional Court observed in *New National Party*, the right to free, fair and regular elections is guaranteed to all South African citizens irrespective of their age. *New National Party* (supra) at para 12.

[6] Ibid at para 16.

[7] Act 51 of 1996.

[8] It goes without saying that if the independence of the Commission — and therefore FC s 19(2) — is undermined, then any individual has standing to approach a court for appropriate relief, including a declaration of rights, even if the Commission itself does not seek or even oppose such an application. See § 45.4 supra, on standing.

[9] *New National Party* (supra) at para 76.

[10] Ibid.

[11] The fact that it is responsible for running the elections does not entitle it to write the electoral laws. That is the function of Parliament and not the Commission. If legislation infringes the independence of the Commission, it may of course be challenged.

part of any government department. As with other Chapter 9 Institutions — state institutions supporting constitutional democracy — its independence is entrenched under FC s 181(2).[1] Although accountable to the National Assembly,[2] the Final Constitution requires the Electoral Commission to perform its functions impartially.

The existing legislative framework within which the Electoral Commission operates may not fully protect the independent functioning of the Commission. First, there appears to be a lack of 'financial independence'.[3] The Commission must be afforded an adequate opportunity to defend its budgetary requirements before Parliament and must then have the ability to access funds allocated to it in order to discharge its functions.[4] No member of the executive should have the power to stop transfers of money to an independent institution such as the Electoral Commission without the existence of appropriate safeguards for the independence of the institution. Secondly, there may be problems with the 'administrative independence' of the Commission. The Commission must retain operational control over the functions it is required to perform. No state department may tell the Commission how to perform functions such as the registration of voters. However, if the Commission asks the government for assistance, then it must be provided.[5]

If the management of the election by an independent commission is an essential ingredient of a free and fair election, it follows that legislation and government conduct which undermine the independence of the Commission violate the FC s 19(2) right to free and fair elections. But not every failure of the government to assist the Commission undermines its independence. In many cases the Commission will be able to resist interference with its independence. For example, in *New National Party*, the NNP sought declaratory relief in consequence of actions by the government which allegedly interfered with the independence of the Commission. Despite holding that the government failed to appreciate the true import of FC ss 181 and 190, which provide for the independence of the Commission and require that all organs of state must assist and protect the Commission to ensure its independence and effectiveness,[6] the Constitutional Court refused to grant relief on the basis that the applicant lacked standing to rely on these sections of the Final Constitution.[7] Implicit in the Court's finding was the view that FC s 19(2) was not violated since the Commission managed to assert its independence

[1] See Electoral Commission Act s 3.
[2] See FC s 181.
[3] For more on the absence of financial independence of Chapter 9 Institutions generally, and the ability of government to undercut their respective mandates, see S Woolman & J Soweto-Aullo 'Commission for the Promotion and the Protection of the Rights of Religious, Linguistic and Cultural Communities' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24F.
[4] *New National Party* (supra) at para 98.
[5] Ibid at para 99.
[6] Ibid at para 100.
[7] Ibid at paras 106-107.

without resort to the courts.[1] Individuals, even political parties, will seldom persuade the courts to interfere in disputes between organs of state in the absence of an allegation that a fundamental right is infringed or threatened, since the principles of cooperative government — and, in particular, FC s 41(3) — envisage that intergovernmental disputes must be resolved through other means.

While it is a necessary ingredient, the existence of an independent Electoral Commission is, in itself, not sufficient to secure free and fair elections. According to the Constitutional Court, the requirement of 'fairness' has at least two further implications. The first is that each citizen must not be allowed to vote more than once in the elections, and the second is that any person not entitled to vote must not be permitted to do so. Regulation of the exercise of the right to vote is therefore necessary to ensure a free and fair election.[2] The Final Constitution recognizes the necessity of such regulation by requiring a properly functioning voters' roll.[3] Registration on the voters' roll must be viewed in this context. According to the Court, it is a constitutional requirement to vote and not a limitation of the right to vote.[4] The same applies to the provisions of the Electoral Act that govern proof of identity. Some form of easy and reliable identification is necessary to facilitate the process of registration and voting. The legislature is obliged to make provision for such a form of identification in order to ensure the fairness of the elections. As was discussed above, the majority of the *New National Party* Court held that legislative regulation of the exercise of the right to vote will not be unconstitutional as long as the provision is rationally related to a legitimate government purpose. In our view, the standard of reasonableness advocated by O'Regan J in her dissenting judgment is more appropriate. FC s 19 is of signal importance to South Africa's constitutional democracy and abridgements of its requirements ought to be subject to more searching analysis on the part of our courts.

While individuals may of course challenge legislation and state conduct which undermines their right to free and fair elections, it may sometimes prove difficult to find an appropriate remedy for a violation of FC s 19(2). The most intrusive remedy, setting aside the results of an election, seems to be available only when the effect of the unconstitutional law or conduct outweighs the effect of the mechanisms meant to ensure that the election is free and fair.[5] Individuals and political parties wishing to enforce the right to free and fair elections should therefore act timeously, ensuring that violations can be remedied through

[1] See *Sithole & Others v Minister of Justice & Others* 2000 (1) ZLR 246 (HC). The applicants sought to set aside the appointment of the Registrar-General on the grounds of previously demonstrated bias, partiality and lack of transparency and because he had an interest in the outcome of the referendum, since the draft constitution would abolish his office. The application ultimately failed on the basis that the President ought to have been cited in the application, as it was the exercise of the President's power to appoint the Registrar-General that was in issue.

[2] *New National Party II* (supra) at para 12.

[3] See FC ss 1*(d)*, 46(1), 105(1) and 157(5).

[4] *New National Party II* (supra) at para 15.

[5] See *DTA of Namibia v Prime Minister of the Republic of Namibia* 1996 (3) BCLR 310 (NmH). See § 45.5(c) supra.

interdicts or other appropriate forms of relief.[1] As far as the regularity of elections is concerned, the Final Constitution determines the duration of the National Assembly, provincial legislatures and municipal councils in FC ss 49, 108 and 159 respectively.[2]

45.10 FC s 19(3): The Active and Passive Right to Vote

(a) The right to vote, the electoral system and the mandate of representatives

(i) *General*

Many of the constitutional provisions applicable to elections since the first democratic elections in 1994 have expired and been replaced by other provisions and by way of a detailed matrix of saving and suspending provisions in the Interim Constitution and Final Constitution.[3] The constitutional and statutory framework for elections is now far less complex.

FC s 46(1) provides that the electoral system is prescribed by national legislation, is based on a common voters' roll, with a minimum voting age of 18 years, and results, in general, in proportional representation. FC s 105(1) provides the same in respect of provincial elections.[4]

In this electoral system, the electorate has no choice between candidates, only between parties. Each party creates a candidate list from which representatives are installed into office in accordance with the proportion of the vote which that party received in the election. The electorate is not given a formal role in the selection of names on the candidate list or the determination of the order in which the names appear. This selection process is left solely to the discretion

[1] See § 45.5(c) supra, on remedies.

[2] The Assembly and the provincial legislatures may be dissolved before their expiry date in the circumstances envisaged in FC ss 50 and 109. If the Final Constitution is amended to extend the life of a legislative body, the right to regular elections may be impaired. The requirements for amending FC s 19 will then have to be met. It is slightly more difficult to amend the Bill of Rights than the other provisions of the Constitution. See FC s 74.

[3] In respect of the first election of the National Assembly under the Final Constitution (held in 1999), the Final Constitution saved the provisions of the Interim Constitution, which therefore applied to that election despite the repeal of the Interim Constitution. At the same time, FC s 50(1) was suspended until the second election of the National Assembly under the Final Constitution. In addition, Schedule 2 of the Interim Constitution applied to the filling of vacancies in the legislatures until the second election of the National Assembly under the Final Constitution. As amended, Schedule 2 provides that the next available person on the list of the party which nominated the vacating member shall fill the vacant seat. FC s 47(4), which foresees national legislation to deal with this issue, was explicitly suspended by FC Schedule 6, item 6(4), until after the second election under the Final Constitution. Those saving and suspending provisions are no longer applicable.

[4] However, FC Schedule 6, item 6 provided that the first election of the National Assembly and the provincial legislatures would take place in accordance with IC Schedule 2, as amended by Annexure A to Schedule 6 of the Final Constitution. Schedule 2, as amended, essentially provides for a list system of proportional representation for the election of both the National Assembly and the provincial legislatures. For example, in respect of the National Assembly, items 1 and 3 of the Schedule provide that the parties shall nominate candidates and must do so by submitting regional and national lists or only regional lists.

of the party. And parties have used very different methods to create and to order their party lists.[1]

The election of members to municipal councils must be in accordance with national legislation. This system — now provided for in the Local Government: Municipal Structures Act[2] — must provide for the list system of proportional representation or a combination of lists and ward representation.[3]

(ii) *The mandate of representatives and loss of membership*

As far as the mandate of representatives is concerned, FC s 47(3) provides that a person loses membership in the National Assembly if at any time that person fails to meet the eligibility requirements in FC s 47(1) or is absent from the Assembly without permission in contravention of the established rules of the legislature. Similar provisions regulate the loss of membership and the filling of vacancies in the provincial legislatures.[4] Schedule 6, item 6 provides that Schedule 2 of the Interim Constitution[5] applied to the loss of membership and the filling of vacancies in the National Assembly until the second election of the Assembly under the Final Constitution. Schedule 2 of the Interim Constitution was then amended by the insertion of item 23A, which introduced an additional ground for the loss of membership of a legislature in circumstances other than those provided for in FC ss 47(3) and 106(3). As item 6(3) of Schedule 6 provides that Annexure A applied only until the second election of the National Assembly under the Final Constitution, the anti-defection provision in item 23A and the power to amend that provision within a reasonable period had a maxim lifespan ending in September 2004, the latest date by which the second election under the Final Constitution had to be held.

The additional ground for loss of membership introduced by item 23A was that a representative loses membership of a legislature to which the Schedule applies if that person ceases to be a member of the party which nominated him or her as a member of the legislature.[6] However, Schedule 2, as amended by item 23A(3), provided that an Act of Parliament could be passed, within a reasonable period after the Final Constitution took effect, to provide for a manner in which it would be possible for a member who ceased to be a member of the party which nominated him or her to retain membership of a legislature.

[1] See P de Vos 'South Africa's Experience with Proportional Representation' in J de Ville & N Steytler *Voting in 1999: Choosing an Electoral System* (1996) 29.

[2] Act 117 of 1998. See s 22 and Schedule 1 of the Act.

[3] See FC s 157.

[4] See FC s 106(3) and (4).

[5] As amended by Annexure A to Schedule 6 of the Final Constitution.

[6] Legally speaking, the constitutional provisions do not preclude a Member of Parliament or a member of a provincial legislature from criticizing his or her party or even from voting across party lines. Cf H Steinberger 'Political Representation in Germany' in P Kirchhof & D Kommers (eds) *Germany and its Basic Law* (1993) 126. In practice, however, the extent to which an MP or MPL will be able to differ from the 'party line' will depend on whether parties can expel such members and the extent of control courts will exercise over disciplinary procedures in terms of FC s 33 (the right to just administrative action).

Parliament passed such a law in 2002, entitled the Loss or Retention of Membership of National or Provincial Legislatures Act 22 of 2002 ('the Membership Act'), which provided for a limited system of floor-crossing in the national and provincial legislatures. In *UDM*, the Constitutional Court declared the Membership Act invalid because it was not passed within a reasonable time after the adoption of amendment 23A(3) to Schedule 2.

Parliament was nevertheless able to introduce the amendments originally contained in the Membership Act by way of a constitutional amendment. Republic of South Africa Amendment Act 2 of 2003 repealed the Membership Act and introduced a new Schedule 6A of the Final Constitution. The new Schedule introduces the amendments attempted by the Membership Act and provides for floor-crossing in national and provincial legislatures. In most instances, floor-crossing is subject to a window-period and 10 per cent threshold requirements.

In *UDM*, the Court also considered the First Amendment Act[1] which allowed floor-crossing in local governments during two fifteen-day periods in the second and fourth year after an election and the accompanying Local Government Amendment Act,[2] which reconciled the Amendment with already existing legislation. Under the First Amendment Act, 10 per cent of the representatives of a party must disaffect from that party in order for the floor-crossing to be legitimate. The legislature waived this requirement for the first fifteen-day period in order to accommodate the break-up of the Democratic Alliance. The *UDM* Court heard a multi-pronged challenge from the applicant. It rejected every argument put forth. Perhaps, the most important of these rejections were the Court's conclusions that floor-crossing did not interfere with the founding values or basic structure of the Final Constitution[3] and was not inconsistent with the provisions of FC s 19(3).[4] The *UDM* Court held that FC s 19(3) is agnostic with regard to the constitutionality of floor-crossing:

> [T]he rights entrenched under section 19 are directed to elections, to voting and to participation in political activities. Between elections, however, voters have no control over the conduct of their representatives.[5]

Lastly, the Court applied a rationality test to ensure that the floor-crossing provisions were consistent with the rule of law.[6] It found that having two fifteen-day periods in between election cycles and a 10 per cent minimum to allow a cross-over permitted some cross-over flexibility while still promoting stability,[7] and that the provision excluding application of the 10 per cent minimum from the first cross-over period was a rational response to the dissolution of the Democratic Alliance.[8]

[1] Constitution of the Republic of South Africa Amendment Act 18 of 2002 ('Constitution First Amendment Act').
[2] The Local Government: Municipal Structures Amendment Act 20 of 2002 ('Local Government Amendment Act').
[3] *UDM* (supra) at paras 15-17.
[4] Ibid at para 49.
[5] Ibid.
[6] Ibid at para 55.
[7] Ibid at para 69.
[8] Ibid at para 70.

(iii) *Proportional representation*

The only remaining constitutional requirements of significance as far as the electoral system is concerned are the provisions which require, in general, proportional representation.[1] The entrenchment of proportional representation is difficult to reconcile with the traditional approach to the interpretation of political rights. It is normally accepted that political rights may be realized within a variety of electoral systems. All electoral systems have advantages and disadvantages.[2] Judiciaries around the world have therefore seldom interfered with a legislative preference for a particular electoral system.[3] The entrenchment of proportional representation, however, places limits on the ability of South African legislatures to experiment with different types of electoral system. It therefore becomes necessary to delineate the boundaries of legislative discretion in this area. The central feature of proportional representation, which may not be abrogated, lies in the notion that votes should count substantively the same. In other words, in contrast to majoritarian or pluralistic systems, proportional representation means that all votes are equal and no votes are wasted.[4] There are many alternatives to

[1] See FC s 46(1)*(d)* (National Assembly); FC s 106(1)*(d)* (provincial legislatures). A somewhat stricter requirement of proportionality, it seems, applies to municipal councils in FC s 157(3).

[2] See, eg, K Asmal & J de Ville 'An Electoral System for South Africa' in N Steytler, J Murphy, P de Vos & M Rwelamira (ed) *Free and Fair Elections* (1993); D Horowitz *A Democratic South Africa? Constitutional Engineering in a Divided Society* (1991); A Reynolds *Voting for a New South Africa* (1993). Commentators often do not mention one of the central shortcomings of the list system of proportional representation: since party bureaucrats acquire decisive powers, the system makes it possible for party elites to 'fix' results. Thus, whether or not such 'deals' were made in the first South African election, the list system lends itself to this sort of abuse more than the other systems of political representation.

[3] The European Commission has rejected an argument that electoral rights necessarily translate into a system of proportional representation. See Application 7140/75, 7 Eur Comm'n HR 95, 97 (1977).

[4] See *Louw v Matjila & Others* 1995 (11) BCLR 1476 (W). The High Court considered the meaning of proportional representation. The court held that the real question was whether an election yielded a result which was broadly proportional to the interests of those who participated therein in the sense that it could be demonstrated that the results were representative of the society whose interests were intended to be served by the election. The underlying purpose of a system of proportional representation, the court said, is to ensure the equitable representation of minorities in the organs of government. Ibid at 1482. The Local Government Transition Act 209 of 1993 displayed a commitment to accommodate as effectively as possible the diversity of South African society. The intention was that organs of government would be as inclusive and representative as possible at all levels. Turning to the facts of the case, the court held that the procedure adopted for the election of members to the executive council of the Transitional Metropolitan Council of Johannesburg was plainly defective. The respondents not only failed to comply with any recognized system of proportional representation but in fact failed to demonstrate the nature of the system which they sought to rely upon. But, as the invalidation of the election would cause great inconvenience, the court merely made a declaratory order for the guidance of future elections. The plaintiff was awarded costs.

In *Democratic Party v Miller*, the High Court invalidated reg 74(5) of the Local Government Election Regulations 28 of 1996 in Kwazulu-Natal. 1997 (1) SA 758 (D), 1997 (2) BCLR 223 (D). The regulation provided that if a party list contained fewer candidates than the proportional share the party was entitled to, the party would forfeit its entitlement to representation. The court held that 'once a vote is cast it is to be counted for purposes of determining the proportional representation quota . . . that is consistent with the fundamental right to vote accorded to every citizen in terms of s 21(2) of the [interim] Constitution. Any legislation which detracts from this or results in a distortion of the voting falls to be struck down as inconsistent with both the fundamental right to vote and the principle that the election is to be conducted democratically.' Ibid at 226.

the present electoral system which will meet this criterion. The list system of proportional representation is therefore not immune from constitutional reform.

Nonetheless, the Constitutional Court has made it clear that it will police closely the bounds of any reform of the electoral system, at least in the context of provincial constitution-making. In a proposed provincial constitution, the Western Cape legislature provided for an electoral system that expressed a form of proportional representation: however, its proposed proportional representation system divided the province into a number of geographic multi-member constituencies. In *Ex parte Speaker of the Western Cape Provincial Legislature: In re Certification of the Constitution of the Province of the Province of the Western Cape*, the Constitutional Court found this system to be inconsistent with the Final Constitution.[1] The Court reasoned that such a form of proportional representation was inconsistent with the single list system provided for in Schedule 6 of the Final Constitution read with Schedule 2 of the Interim Constitution.[2] Further, the electoral system did not qualify as a legislative structure and thus could not fall within the scope of the permissible deviation allowed by FC s 143(1)*(a)*.[3]

The courts have also considered the extent and applicability of the requirement of proportionality in two further cases. In *Democratic Alliance v ANC & Others*,[4] the Cape High Court was asked to decide whether FC s 160(8) requires the party-political composition of a municipal council's committees, including the executive

In *Crowther & Andere v Plaaslike Oorgangsraad v Bethlehem & Andere,* the High Court was less forgiving and the election of the executive committee of a transitional local council was set aside. 1997 (8) BCLR 1011 (O). The court held that s 16(6) of the Local Government Transition Act, as amended, dictated that if a transitional local council chose to elect an executive committee, it had to do so in accordance with a system of proportional representation. In other words, the provision was peremptory. The court found the respondent's method of election, which amounted to a majority vote, to be inconsistent with the statutory requirement of proportional representation. The fact that the transitional local council described the system as one of proportional representation was irrelevant, as was the fact that the result of the election might have brought about a measure of proportional representation.

A disproportionate result was, however, the crucial consideration in the invalidation by the High Court of the election of an executive committee in *Nasionale Party in die Oos-Kaap & 'n Ander v Port Elizabeth Oorgangsraad & Andere*. 1998 (2) BCLR 141 (SE). The court disagreed with the approach in *Louw v Matjila* to the extent that it permitted a result which was merely 'broadly proportional to the interests of those who participated' in the election. According to the court, a stricter approach was necessary. In any event, a distortion that allowed a political party to obtain a two-thirds majority on the executive committee, the majority needed for decisions of the committee, in circumstances where the same party did not have a two-thirds majority on the transitional council, was unacceptable.

[1] 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC)('*Western Cape, First Certification Judgment*'). For more on this judgment, and on provincial constitutions generally, see S Woolman 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 20.

[2] Ibid at paras 43 and 46. The Court apparently saw the inconsistency deriving solely from the operation of the transitional provisions of Schedule 6. Ibid at para 43 n69. It thus remains possible that geographic multi-member constituencies are consistent with the Final Constitution's command for in general proportional representation. Ibid at paras 45 and 47-49.

[3] *Western Cape, First Certification Judgment* (supra) at paras 45 and 47-49. For more on this aspect of the judgment, see S Woolman 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 20.

[4] 2003 (1) BCLR 25 (C).

committee, to be proportional to the parties' support in the council. FC s 160(8) requires that members of a municipal council are entitled to participate in the proceedings of the council and its committees in a manner that must be 'consistent with democracy'. FC s 160(8) makes no explicit requirement of proportional representation. The High Court, seemingly heavily influenced by the decision in *UDM* delivered shortly before, remarked that, due to the political sensitivity of the case, a high degree of judicial deference was necessary.[1] The court ultimately held that the requirement that municipal councillors' participatory rights be consistent with democracy imposes an imprecise standard that would be satisfied by any number of arrangements, including a winner-takes-all system.

A similar issue arose in *Democratic Alliance & Another v Masondo NO & Another*.[2] *Masondo* concerned the question as to whether FC s 160(8) applied to mayoral committees. The majority of the *Masondo* Court held that these bodies are executive in nature, not legislative, and therefore that the requirement of participation 'consistent with democracy' was not applicable. However, Sachs and O'Regan JJ issued separate dissenting judgments. They wrote that mayoral committees are mixed executive and legislative bodies that *do* implicate the democracy requirement in FC s 160(8). By deciding that FC s 160(8) did not apply, Sachs and O'Regan JJ contended, the majority had failed to indicate what sort of minority party participation will be 'consistent with democracy'.

(b) The active right to vote

The active right to vote is protected by FC s 19(3).[3] The right may not be transferred. No duty to vote may be derived from FC s 19, but the introduction of such a duty by statute will not necessarily be unconstitutional.[4] Section 87 of the Electoral Act prohibits undue influence in respect of other persons registering to vote, voting, voting for particular candidates, and associated conduct.

(i) *Equal voting rights*

As the Constitutional Court has stated, most electoral laws have the potential directly or indirectly to affect different categories of people in different ways: by reason of where they live, their standard of literacy or political beliefs.[5] In South Africa, the anti-discrimination provision does not require applicants to show that such laws intentionally discriminate against them, but merely that the law affects a listed or analogous group negatively and results in unfair discrimination against them.[6] A violation of FC s 9(3) may nevertheless be difficult to show

[1] *Democratic Alliance v ANC* (supra) at 41B-F.
[2] 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC).
[3] The right to vote was protected by IC s 21(2). The franchise is also protected in FC s 1. When it comes to amendment of the Final Constitution, FC s 1 may be of significance. In terms of FC s 74, FC s 1 requires a higher majority of the National Assembly to amend than FC s 19, and, to the extent that the two provisions correspond, the higher degree of entrenchment also extends to FC s 19.
[4] See Maunz-Dürig-Herzog's *Grundgesetz Kommentar* (1991)(Commentary on art 38 of the Basic Law.)
[5] See *Democratic Party v Minister of Home Affairs & Others* 1999 (3) SA 254 (CC), 1999 (6) BCLR 607 (CC)('*Democratic Party*') at para 12.
[6] See *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) para 43.

since the Constitutional Court appears to require proof that the law in itself resulted in fewer people of the affected group exercising the right to vote and not merely that the law made it more difficult for them to exercise the right to vote.[1] In other words, an applicant is required to show a factual causal connection between the law and the diminished number of people exercising the franchise. In our view, this approach fails to focus on the impact of the discriminatory law or conduct on the litigants and instead focuses, inappropriately, on the indirect consequences of that impact. But that is not generally how our equality jurisprudence works. Once a law affects a listed or analogous group negatively, it discriminates. Moreover, a facially discriminatory law that affects a group identified in FC s 9(3) is presumed to be unfair. The burden then shifts to the state or other party defending the discriminatory provision to prove that the provision is unfair. In considering the issue of unfairness, the number of affected groups who did not vote may be a factor to take into account, but it cannot be decisive precisely because people fail to vote for various reasons. The appropriate question is whether the impact on the group is unreasonable in the light of the purpose of the legislation. For example, a property qualification will unfairly discriminate. It is not necessary to show that such a law actually resulted in fewer poor people voting and that, in the absence of the qualification, more poor people would have voted.[2]

The constitutional entrenchment of proportional representation makes it unlikely that South African courts will be confronted with the apportionment[3] and

[1] In *Democratic Party,* the Court held that it was not enough to show that the requirement of a green bar-coded identity document affected a greater proportion of white potential voters, rural voters and young voters. *Democratic Party* (supra) at para 12. It was necessary to show that the requirement resulted in smaller numbers of the affected groups registering than those outside the categories.

[2] Cf *Harper v Virginia Board of Elections* 383 US 663, 86 SCt 1079 (1966). The case concerns the constitutionality of a $1.50 poll tax. The court described the tax as capricious and found that it violates the equal protection clause. Lines drawn on the basis of wealth or property are, as those on the basis of race, traditionally disfavoured. In overturning the statute, the Supreme Court described wealth as a 'suspect classification' and stated that the vote was a 'fundamental interest'. Both strands of equal protection jurisprudence in the US were therefore applied in this case. See also *Hill v Stone* 421 US 289 (1975)(Use of the franchise to achieve unrelated state, objectives — such as the enforcement of the tax laws — declared unconstitutional); *Cipriano v City of Houma* 395 US 701 (1969); *City of Phoenix v Kolodziejski* 399 US 204 (1970)(Difference between the interests of property owners and non-property owners found insufficiently substantial to justify the exclusion of the latter from the franchise); *Dunn v Blumstein* 405 US 330 (1972)(Durational residence requirements found unconstitutional.)

[3] The term 'apportionment' is used to describe deviations from the 'one person, one vote' principle. The courts in the US have increasingly been confronted with such disputes ever since the Supreme Court decided in *Baker v Carr* that apportionment disputes are justiciable and are not covered by the 'political question' doctrine. 369 US 186, 82 SCt 691 (1962). The courts seem to tolerate significant deviations at state and local level. See *White v Regester* 412 US 755, 93 SCt 2332 (1973); *Abate v Mundt* 403 US 182, 91 SCt 1904 (1971); *Mahan v Howell* 410 US 315, 93 SCt 979 (1973); *Brown v Thomson* 462 US 835, 103 SCt 2332 (1983); *Board of Estimate of City of New York v Morris* 489 US 688, 109 SCt 1433 (1989)). In elections for Congress, on the other hand, the Supreme Court requires almost mathematical equality. See *Reynolds v Sims* 377 US 533, 84 SCt 1362 (1964); *Kirkpatrick v Preisler* 394 US 526, 89 SCt 1225 (1969); *Wesberry v Sanders* 376 US 1, 84 SCt 526 (1964); *Karcher v Daggett* 462 US 725, 103 SCt 2653 (1983). The Canadian courts have adopted a more flexible approach. Apportionment legislation is upheld as long as it guarantees 'effective representation' to the electorate. As a result, courts have tolerated considerable

gerrymandering disputes[1] which led to so much litigation in Canada and the United States. The major advantage of a system of proportional representation is that, in theory at least, it guarantees almost exact equality of the vote.[2]

(ii) *Secrecy of the ballot*

FC s 19 provides that every citizen has the right to vote in secret.[3] Several provisions in the 1998 Electoral Act deal with the secrecy of the vote.[4] Section 90(1) provides that no person may interfere with a voter's right to secrecy. Section 98 makes such interference an offence. These provisions give effect to the constitutional imperatives and the international human rights law norms relating to secrecy.[5]

(iii) *Exclusion of classes of citizens from the right to vote*

Under the Electoral Act, only South African citizens who are 18 years old or older are eligible to vote.[6] In order to exercise this right, each citizen must register with the Electoral Commission to ensure that their name is placed on the voters' roll.[7] Permanent residents are no longer entitled to vote. These provisions, which merely confirm similar restrictions appearing in the text of the Final Constitution,

deviations from the equality principle. Rural voters have most often been the beneficiaries of court-sanctioned deviations. See *Attorney-General for Saskatchewan v Carter* (1991) 81 DLR (4th) 16; *Reference Re: Electoral Boundaries Commission Act* (Alberta) 86 DLR (4th) 447, [1991] 2 SCR 158. But see *Dixon v British Columbia* (1989) 59 DLR (4th) 247. (The deviations were found to be unconstitutional.) In the United Kingdom the judiciary has been reluctant to interfere with the proposals of the Boundary Commissioners. See D Butler 'Electoral Reform' in J Jowell & D Oliver (eds) *The Changing Constitution* (2nd Edition, 1989) 373.

[1] 'Gerrymandering' describes the drawing of constituency lines in a manner so as to dilute the support for particular political parties, cultural or racial groups. The US Supreme Court has been more sympathetic to claims from racial minorities than to claims from political parties. See *Davis v Bandemer* 478 US 109, 106 SCt 2797 (1986); *Gaffney v Cummings* 412 US 735, 93 SCt 2321 (1973). In order to support a claim of racial gerrymandering, the Court merely requires a showing of discriminatory effect and not discriminatory intent. See *Thornburgh v Gingles* 478 US 30, 106 SCt 2752 (1976). Recently, however, the Court has also set limits on legislatures' ability to secure representation of minority groups. In *Shaw v Reno* the US Supreme Court struck down a voting district that had an extremely irregular shape (substantial parts of the district consisted solely of a highway). 509 US 630, 113 SCt 2816 (1993). The Court said that the district plan resembled 'political Apartheid'.

[2] The German Constitutional Court, in dealing with equality of the vote within the list system of proportional representation, has said that every ballot must have the same potential value and that every voter must have an equal opportunity to influence the outcome of the election. See 1 *BVerfGE* 208, 242; 34 *BVerfGE* 81, 98.

[3] The right to vote in secret was protected by IC s 21(2).

[4] Legal provisions dealing with the secrecy of the vote include ss 38, 39, 70 and 90 of the 1998 Electoral Act. Section 90(2) provides that no person may, except as permitted under the Act, disclose any information about voting or the counting of votes, or open any ballot box or container sealed in terms of the Act, or break its seal. See also ss 5 and 15 of the Referendums Act 108 of 1983.

[5] For the position in international law, see art 25 of the International Covenant of Civil and Political Rights, art 21 of the Universal Declaration of Human Rights, and art 3 of the European Convention on Human Rights. See also s 17 of the Namibian Constitution and art 38(1) of the German Basic Law.

[6] See Electoral Act s 1.

[7] See Electoral Act s 8(1).

are relatively uncontroversial.[1] The Act also prevents persons subject to a court order declaring them to be of unsound mind, mentally disordered, or detained under the Mental Health Act,[2] from registering to vote.[3] Excluding these classes of mentally-handicapped citizens is a clear limitation of the right to vote and arguably constitutes unfair discrimination on a listed ground.[4] As such, the provisions must be justified under FC s 36. Since the Act provides no provision for a mentally-handicapped person to challenge their ineligibility to vote, a court could find the law to be overbroad by excluding mentally-capable citizens from voting.

Although the 1993 Electoral Act excluded certain classes of prisoners from voting in the 1994 elections,[5] when the 1998 Electoral Act was enacted it made no mention of the voting rights of prisoners.[6] The Electoral Commission therefore made no arrangements to register South African citizens who were in prison and created no special voting procedures to allow incarcerated citizens to vote. This omission could have resulted in the effective disenfranchisement of all

[1] FC s 46 read with FC s 19(3), which guarantees every 'adult citizen' the right to vote. Elsewhere legislatures have extended the vote to foreigners at, for example, the local level. In *BverfGe EuGRZ* 1990, 438, the German Constitutional Court invalidated such legislation on the basis that constitutional amendment was the only permissible means to extend the vote to foreigners. Considerable problems were caused with the deprivation and restoration of South African citizenship to Africans who became 'citizens' of the Bantustans: Transkei, Bophuthatswana, Venda and Ciskei. See P Ncholo 'The Right to Vote' in N Steytler, J Murphy, P de Vos & M Rwelamira *Free and Fair Elections* (1993) 60.

[2] Act 18 of 1973.

[3] See 1998 Electoral Act s 8.

[4] See FC s 9(3): 'disability' is a ground for unfair discrimination.

[5] One of the most contentious issues during the negotiations process concerned the right of prisoners to vote. The final compromise, brought about after several uprisings and considerable loss of life in the prisons, was written into law only on the day before the first democratic election took place. On 25 April 1994, Mr F W de Klerk, then State President, amended s 16*(d)* of the 1993 Electoral Act by Proclamation 85 of 1994 in order to limit the category of prisoners not entitled to vote to those convicted for murder, robbery with aggravating circumstances, and rape, and attempts to commit those offences. Initially s 16*(d)* excluded those in prison for murder, culpable homicide, rape, indecent assault, childstealing, assault with intent to do grievous bodily harm, robbery, malicious injury to property, breaking and entering any premises with intent to commit an offence, fraud, corruption, and bribery, and any attempt to commit the offences referred to. The Transitional Electoral Council then apparently agreed to extend the vote to all prisoners. But President De Klerk refused to sign the Proclamation containing this far-reaching amendment of the Electoral Act. Instead, the more limited version of the amendment was signed into law. The implementation of this last-minute deal was by no means uniform. It is therefore not possible to say how many and which classes of prisoners voted in the first democratic election.

Lawyers for Human Rights sponsored two prisoners to take the relevant organs of state to court. In *Masuku & Mbonani v State President & Others,* the two prisoners contended that s 16 of the 1993 Electoral Act was inconsistent with the Interim Constitution's political rights and right to equality. 1994 (4) SA 374 (T). The prisoners, who were both convicted of murder, were disqualified from voting in the April 1994 general elections. The Transvaal Provincial Division of the Supreme Court held that it had no jurisdiction to consider the validity of the Electoral Act. Since convicts had to vote by special vote on 26 April 1994 and the Interim Constitution only came into operation on the 27th, the court held, that, even before the coming into effect of the Interim Constitution, the time for convicted persons to vote would have expired, and to give an order in favour of the applicants would be a *brutem fulmen*. The last part of the reasoning cannot be accepted. If there was a violation, a court could have considered other forms of appropriate relief, including an award of damages.

[6] For further discussion of the voting rights of prisoners, see G Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) 29-3.

prisoners. Prior to the election, the omission was challenged by two prisoners in *August & Another v Electoral Commission & Others.*[1]

The question before the *August* Court was whether the Electoral Commission had an obligation to take affirmative steps to ensure that prisoners awaiting trial and sentenced prisoners could register and then vote in an upcoming general election. The Constitutional Court reasoned that the right to vote 'by its very nature imposes positive obligations on the legislature and the executive',[2] that the Electoral Commission had an 'obligation to take reasonable steps to create the opportunity to enable eligible prisoners to register and vote',[3] and that any limitation on the right to vote must pass scrutiny under the limitation clause. Since this infringement on the prisoners' right to vote was not brought about by a law of general application, but was rather the result of the legislature's silence and the subsequent omission of the Electoral Commission, the Court found the resulting restriction unconstitutional.[4] It then ordered the Electoral Commission to make 'all reasonable arrangements' to ensure that people who were imprisoned during the registration period could register, and that all registered prisoners could vote in the upcoming election.

The two main counter-arguments rejected by the *August* Court were that prisoners forfeited their right to vote by denying themselves the opportunity to register and/or vote by becoming incarcerated and that making special provision for prisoners to vote on election-day presented the Electoral Commission with excessive logistical difficulties. With respect to the first argument, the Court stated that the common law establishes that, while certain restrictions on a prisoner's freedom must necessarily follow from imprisonment, a 'substantial residue of basic rights' — in this case, the right to vote — cannot be denied prisoners.[5] The Court answered the second argument by stating that since prisoners are a 'determinate class of persons, subject to relatively easy and inexpensive administrative control', they should pose no excessive administrative difficulties when compared with other groups for whom special voting procedures are made.

The Court explicitly stated that its judgment in *August* should not be read as suggesting that Parliament was prevented from disenfranchising certain categories of prisoners.[6] In 2004, this notion was tested in *NICRO*. Parliament amended the 1998 Electoral Act[7] to prohibit prisoners serving a sentence without the option of a fine from voting.[8] The Court struck down this part of the amendment. It found

[1] *1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC)* ('*August*') at para 3.
[2] Ibid at para 16.
[3] Ibid at para 22.
[4] For a discussion of the meaning of 'law of general application' in FC s 36 and its consequences in *August*, see S Woolman and H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.
[5] *August* (supra) at para 18.
[6] Ibid at para 31.
[7] The Electoral Laws Amendment Act 34 of 2003.
[8] The effect of s 24B of the Act was that imprisoned citizens awaiting trial enjoyed the presumption of innocence and were thus permitted to vote, citizens imprisoned with the option of a fine were allowed to vote so as to not discriminate against poorer citizens who are only in prison due to their lack of ability to pay the requisite fine.

that the government's justifications were insufficient to uphold a limitation on the right to vote. In particular, the *NICRO* Court found the that provision was overbroad,[1] that providing registration and voting accessibility to this group of prisoners would not create excessive financial or logistical strain,[2] that making special arrangements for prisoner registration and voting does not disfavour other groups who have some logistical difficulty registering and voting,[3] and that the government could not provide an adequate policy explanation for this limitation.[4] As a result, the Court ordered the voters' roll to be temporarily opened for all prisoners serving sentences without the option of a fine and for these prisoners to be afforded the opportunity to vote.

August and *NICRO* make it explicitly clear that at least some prisoners must be afforded the right to vote. Given this imperative, it seems clear that no limitation can be placed on prisoners' right to vote based on logistical or financial constraints: that is, the additional administration necessary to allow the remainder of the prisoner population to vote is not sufficiently burdensome to justify such a limitation. It remains an open question, however, whether a more narrowly-tailored ban on prisoner voting rights — such as disenfranchising only those prisoners found guilty of a certain category of more serious crimes — may be constitutionally permissible. By a vote of 5-4, The Canadian Supreme Court in *Sauvé* struck down a law disenfranchising prisoners serving prison terms of at least two years.[5] The outcome of any further such legislative attempt to limit the voting rights of prisoners in South Africa will depend to a large extent on the vexed question of the standard of review applicable to FC s 19 cases. Rationality review may not present a sufficiently strong shield to protect the voting rights of prisoners from future legislative curtailment.

(c) The right to stand for election to public office

FC ss 47 and 106 provide that every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly or a provincial legislature. Unrehabilitated insolvents, persons declared to be of unsound mind, and anyone convicted of an offence and sentenced to more than twelve months' imprisonment, without the option of a fine, are disqualified. More controversially, 'anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service' may not become a member. This provision does not apply to the President, Deputy President, Ministers, Deputy Ministers and other office bearers whose functions have been declared compatible with membership by national legislation.

[1] See *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)('*NICRO*') at para 67.
[2] Ibid at para 49.
[3] Ibid at paras 52-53.
[4] Ibid at para 65-66.
[5] *Sauvé v Canada (Chief Electoral Officer)* 2002 SCC 68.

FC ss 47 and 106 technically do not limit the right to stand for election to public office. Instead, these provisions prevent a person from being a *member* of a legislature while working for the state. They prevent a person from holding two jobs paid for by the government. Civil servants' rights to stand for election to public office are limited in many countries. In South Africa, s 36 of the Public Service Act forbids employees of the state to 'draw up or publish any writing or deliver a public speech to promote or prejudice the interests of any political party'.[1] Section 20*(g)* of the same Act provides that members of the public service who make use of their position to promote or to prejudice the interest of any political party shall be guilty of misconduct. These provisions make it impossible for civil servants to run for public office. The justification most often advanced for such limitation is that the state has a legitimate interest in preserving a neutral and professional civil service. However, it is difficult to see why such a limitation should be upheld in an open and democratic society based on human dignity, freedom and equality. The courts, the Public Service Commission and the Office of the Public Protector should provide the citizen with sufficient protection against unreasonable and politically biased decision-making. It is, in any event, doubtful whether the limitation of civil servants' right to stand for public office furthers the attainment of a career-orientated and non-partisan public service.[2]

In *O'Meara NO v Padayachi*, the High Court referred the issue of whether a provision of the Local Government Transition Act[3] was constitutional to the Constitutional Court.[4] The provision disqualified persons indebted to local government — in respect of assessment rates, rent, service charges or any other moneys for a period of longer than three months — from standing for election. In addressing the question of reasonable prospects of success, the Court stated that the provision was necessary to prevent unsuitable persons from standing who, through their past and present conduct, had shown themselves disruptive of the organs of local government or wilfully to have failed to discharge obligations to local government. However, the disqualification went beyond what was necessary since it embraced all failures to pay, irrespective of their nature or magnitude or the state of mind of the debtor. This Act was, as its name indicates, only applicable to a transitional period, and accordingly the disqualifying provision challenged in *O'Meara* fell away.[5]

Given that the right to stand for public office is in many ways the twin of the right to vote, the question of the appropriate level of review to test for infringements arises here, too. In our view, mere rationality does not sufficiently protect the right, and reasonableness is the least that should be required of law or conduct limiting the right to stand for election and hold public office.

[1] Act 103 of 1994.

[2] See 44 *BVerfGE* 125, 138. The German Constitutional Court tried to distinguish between permissible campaign efforts of government officials and the improper use of public means for party political purposes.

[3] Act 209 of 1993.

[4] 1997 (2) BCLR 258 (D). See also *Waters v Khayalami Metropolitan Council* 1997 (3) SA 476 (W).

[5] In terms of s 94 of the Local Government: Municipal Electoral Act 27 of 2000, the Local Government Transition Act 209 of 1993 does not apply to a municipal election held after the expiry of the term of municipal councils referred to in s 93(3) of the Local Government: Municipal Structures Act 117 of 1998.

46 Property

Theunis Roux

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THE PROPERTY CLAUSE

The property clause of the Interim Constitution, s 28 of Act 200 of 1993 ('IC'), reads as follows:

(1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.

(2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.

(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

The property clause of the Final Constitution of the Republic of South Africa, s 25 of Act 108 of 1996 ('FC'), reads as follows:

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application—

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section —

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6).

46.1 The Function and Structure of the Property Clause Inquiry

The decision of the Constitutional Court in *First National Bank*[1] resolved much of the initial uncertainty surrounding the interpretation of s 25 of the Constitution.[2] The overriding purpose of the constitutional property clause, the Court held, is to strike 'a proportionate balance'[3] between the protection of existing property rights and the promotion of the public interest.

On its own, this holding was nothing new: the balancing of private and public interests in property is the traditional function of property clauses in comparative constitutional law. What the decision in *FNB* added, however, was greater clarity on how the South African property clause should be interpreted to suit this end. Before *FNB*, it was theoretically possible that the private/public balance might have been struck at any one or more of six stages in the property clause inquiry — (1) in determining whether the right or interest allegedly protected by s 25 was indeed constitutionally protected property; (2) if so, in deciding whether the law at issue provided for the deprivation of property; (3) if so, in determining whether such deprivation was arbitrary; (4) in deciding whether the law at issue provided for the expropriation of property; (5) if so, in determining the amount, timing and manner of any compensation that might be due, and (6) in determining whether any deviation from the property clause standard could be justified under the general limitations clause. After *FNB*, it is apparent that the property clause inquiry will focus on stage (3) — the test for arbitrariness. As more fully explained below, the Constitutional Court's analysis in this case telescoped

[1] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) ('*FNB*').

[2] See AJ van der Walt *The Constitutional Property Clause* (1997); Geoff Budlender 'The Constitutional Protection of Property Rights: Overview and Commentary' in Geoff Budlender, Johan Latsky & Theunis Roux *Juta's New Land Law* (Original Service, 1998) Ch 1; Matthew Chaskalson & Carole Lewis 'Property' in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz & Stu Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Ch 31; Johan de Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* (4th Edition, 2001) Ch 25; and Theunis Roux 'Property' in Halton Cheadle, Dennis Davis & Nicholas Haysom *South African Constitutional Law: The Bill of Rights* (2002) 429. Whilst resolving many of the interpretative debates in these commentaries, the decision in *FNB* has not necessarily rendered the outcome of future cases more predictable. As explained in § 46.5*(b)* infra, in substituting for the wording of s 25 a foundational test for arbitrariness, the Court has developed a new set of rules that will defy formulaic (as opposed to formalistic) application.

[3] *FNB* (supra) at para 50.

many of the issues that might have been addressed (and in comparative constitutional law are addressed) at other stages of the property clause inquiry into this stage. This is not to say that the other stages are unimportant, or that they will not determine the outcome of some cases.[1] But the breadth of the Court's arbitrariness test in *FNB* is such that it will tend to dominate the inquiry.[2]

Viewed in this way, the direction taken by the Constitutional Court in *FNB* is very similar to that taken in its socio-economic rights jurisprudence.[3] The trend in this area, too, has been to elevate what amounts to an internal limitations test to a position of pre-eminence. This recent trend has had two consequences. The traditional two-stage inquiry into whether a constitutional right has been violated and, if so, whether such violation is justified under the general limitations clause, has largely become a single inquiry: whether the law at issue is justified against a review standard varying in intensity between reasonableness (in the case of socio-economic rights) and arbitrariness (in the case of the property clause).[4] As a result, the general limitations clause has receded into the background.

At a formal level, of course, the classification of the property clause inquiry into distinct stages survives. According to the Court in *FNB*, these stages may be expressed in the form of the following questions:

(a) Does that which is taken away from [the property holder] by the operation of [the law in question] amount to property for purpose of s 25?
(b) Has there been a deprivation of such property by the [organ of state concerned]?
(c) If there has, is such deprivation consistent with the provisions of s 25(1)?
(d) If not, is such deprivation justified under s 36 of the Constitution?
(e) If it is, does it amount to expropriation for purpose of s 25(2)?
(f) If so, does the [expropriation][5] comply with the requirements of s 25(2)*(a)* and *(b)*?
(g) If not, is the expropriation justified under s 36?[6]

[1] Some additional balancing may, for example, occur at stages (4) and (5).

[2] See *Nhlabathi v Fick* [2003] 2 All SA 323 (LCC) at paras 30-31 (applying the arbitrariness test in the context of land reform) and *Geyser v Msunduzi Municipality* 2003 (3) BCLR 235, 250B-251H (N) (applying the arbitrariness test to assess the constitutionality of s 118 of the Local Government: Municipal Systems Act 32 of 2000).

[3] See S Liebenberg 'Socio-economic Rights' in Chaskalson et al *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Ch 41; S Liebenberg, 'Interpretation of Socio-economic Rights' in Chaskalson et al *Constitutional Law of South Africa* (2nd Edition, Original Service Dec 03) Ch 33.

[4] The arbitrariness standard mandated by the property clause is itself variable in intensity. See § 46.5*(b)* infra.

[5] The Court in *FNB* here uses the word 'deprivation'. As explained in § 46.4 infra, all expropriations are also deprivations, and therefore this formulation is not entirely incorrect. Nevertheless, at this stage of the property clause inquiry, the focus has been narrowed to expropriations as a sub-set of deprivations. The word 'expropriation' is accordingly preferable.

[6] *FNB* (supra) at para 46.

This structure has been described as a 'true algorithm'.[1] That is, it requires the court to assess the law under challenge stage by stage until it is found to be either constitutional or unconstitutional. A close examination of the Court's decision-making tree[2] reveals that this is mostly true. A finding of constitutionality will occur (and terminate the inquiry) if one of the following answers is given: a negative answer to the question in *(a)* (meaning that the law does not interfere with constitutionally protected property); a negative answer to *(b)* (the law does not provide for the deprivation of property); a negative answer to *(e)* (the law does not provide for the expropriation of property); a positive answer to *(f)* (the law provides for the expropriation of property but is consistent with s 25(2)), and a positive answer to *(g)* (the law provides for the expropriation of property contrary to s 25(2) but is justified under s 36). Similarly, a finding of unconstitutionality will occur (and terminate the inquiry) if a negative answer is given to *(d)* (meaning that the law unjustifiably deprives a person of property contrary to s 25(1)), or a negative answer is given to *(g)* (unjustifiable expropriation of property contrary to s 25(2)).

There is, however, one situation in which the court will have to skip one of the stages. That is where a positive answer is given to *(c)*: meaning that the law provides for the deprivation of property consistent with s 25(1). A law of this type need not pass through the *(d)* stage of the inquiry since there is no constitutional violation that requires justification. Such a law might, however, provide for the expropriation of property, and therefore it is necessary to pose the question in *(e)* and continue with the inquiry. The question in *(e)* is itself ambiguous as to whether it refers back to the answer to the question in *(c)* or *(d)*.[3] Does the 'it' in *(e)*, in other words, refer back to the deprivation described in *(d)* (a justified deprivation contrary to s 25(1)), or does it refer back to the deprivation in *(c)* (a deprivation consistent with s 25(1))? As we shall see below, both types of deprivation could also amount to expropriations, and it is hence necessary to pose the question in *(e)* in both instances. It follows that the structure of analysis in *FNB* is not a true algorithm, but one in which it is possible to skip a stage, depending on the answer to the question in *(c)*.

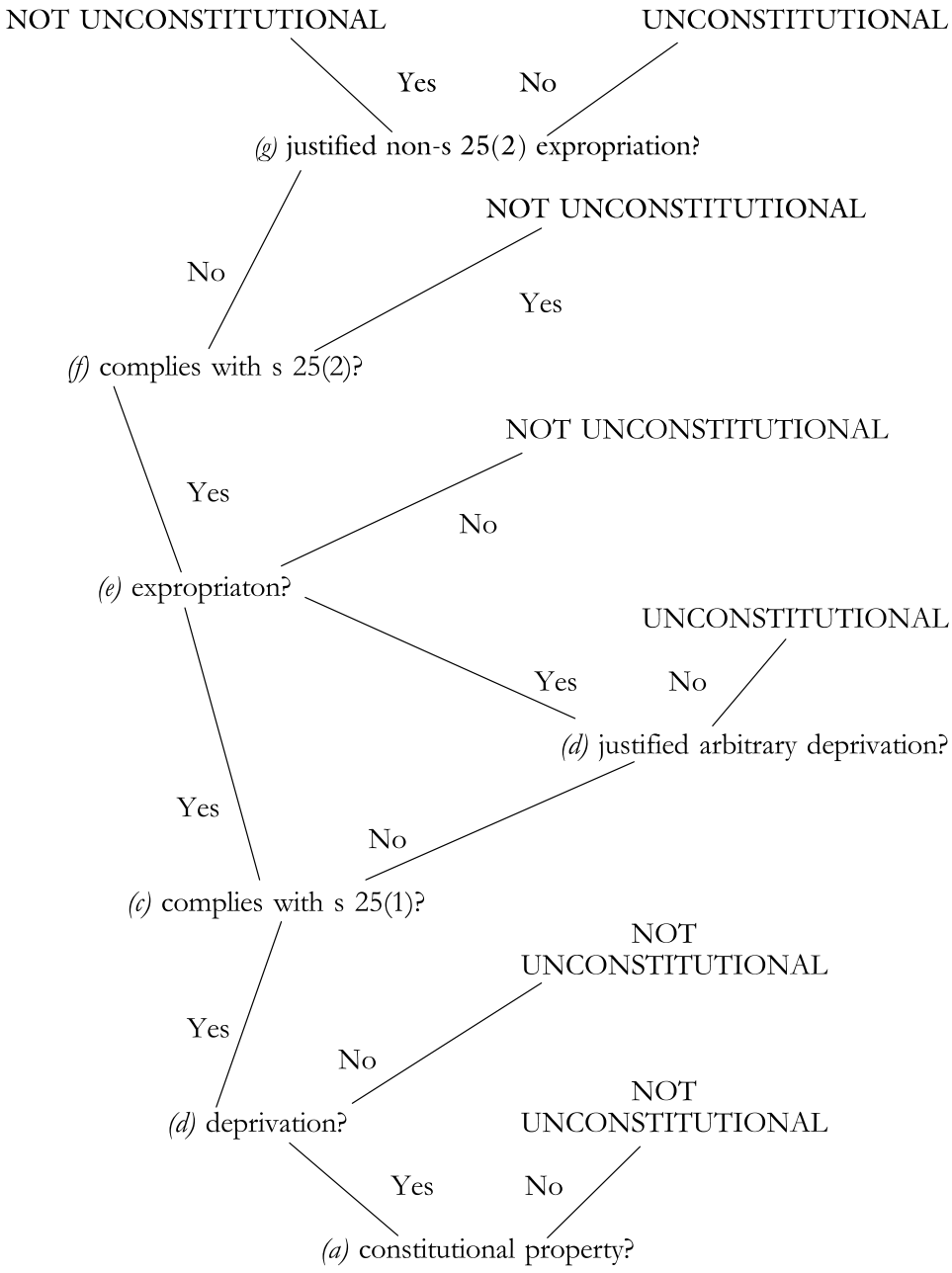
Subject to this qualification, this chapter follows the formal structure of the *FNB* Court's analysis of the constitutional property clause. The purpose throughout, however, will be to demonstrate in respect of each stage why it is that the focus of the property clause inquiry will tend to fall on the question in *(c)*, or rather on a subset of this question, namely whether the law at issue permits the arbitrary deprivation of property.

[1] Johan de Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* (5th Edition, forthcoming, 2004).

[2] See *Nhlabathi v Fick* (supra) at paras 30-1 and *Geyser v Msunduzi Municipality* (supra) at 250B-251H.

[3] I am indebted to Stu Woolman for drawing this ambiguity to my attention, and for suggesting the idea of representing it by means of a decision-making tree.

THE *FNB* DECISION-MAKING TREE



46.2 APPLICATION

(a) Application of the property clause to private actors

The constitutional property clause undoubtedly provides protection against the deprivation of property by state actors and by private actors when exercising statutory rights.[1] But does it provide protection against deprivation by private actors activing in terms of the common law? The test for deciding this type of question was laid down in *Khumalo v Holomisa*.[2] According to this case, the common law does not 'in all circumstances … fall within the direct application of the Constitution',[3] and therefore the Bill of Rights does not apply directly to litigation between private actors in every instance. Rather, ss 8(2) and (3) of the Constitution require a two-stage analysis. First, the court must inquire whether 'the nature of the right and the nature of any duty imposed by the right' are such that the right can be said to bind a natural or juristic person.[4] If this question is answered in the affirmative, 'a court must apply, or if necessary develop, the common law to the extent that legislation does not give effect to the right'.[5]

The Constitutional Court has not as yet been required to apply this test to s 25. However, its decision in *Phoebus Apollo Aviation CC v Minister of Safety and Security*[6] sheds some light on how the Court might decide this issue. In *Phoebus*, the Constitutional Court was asked to overturn a decision of the Supreme Court of Appeal on the grounds that it had failed to develop the common law indirectly, as required by s 39(2) of the Constitution. Three police officers had stolen money that had earlier been stolen from the appellant by an armed gang. The appellant argued that s 25(1) of the Constitution applied because the thefts had deprived it of its property and that, in promoting the 'spirit, purport and objects' of the property clause in accordance with s 39(2), the Supreme Court of Appeal should have extended the State's vicarious liability in delict to this situation.[7] The Constitutional Court rejected this argument. It held that the provisions of the property clause 'are aimed at protecting private property rights against governmental action and are quite irrelevant here where the appellant was originally deprived of its property by robbers and recovery of part of it was later frustrated by three thieves'.[8] This somewhat ambiguous dictum is authority for the proposition that the property clause does not apply to private conduct that is not authorised

[1] See *Nhlabathi v Fick* (supra) at paras 27-35 (property clause applied in constitutinal challenge to land reform law conferring on tenants a statutory right to bury their relatives on the land on which they are residing, where an established practice to this effect exists).
[2] 2002 (5) SA 401 (CC), 2002 (8) BCLR 772 (CC).
[3] Ibid at para 32.
[4] Ibid at para 31 (quoting s 8(2) of the Constitution).
[5] Ibid.
[6] 2003 (2) SA 34 (CC), 2003 (1) BCLR 14 (CC) ('*Phoebus*') at para 4.
[7] Ibid at para 3.
[8] Ibid at para 4.

by law[1] or to conduct on the part of government employees when acting outside the course and scope of their employment. The first part of the dictum is also wide enough to suggest that the property clause does not provide protection against deprivation by private actors acting in terms of the common law. Since the direct horizontal application of the property clause was not at issue in *Phoebus*, however, the correctness of this proposition should not be assumed without further analysis.

In the academic literature written before *Phoebus*, the only author who came close to saying that the property clause might be binding on private actors when acting in terms of the common law was AJ van der Walt. In his extended commentary on the clause, Van der Walt wrote that 'the fact that section 25(1) refers to "law of general application", as opposed to "a law" … subjects common-law and customary-law authorised deprivations of property to the requirements of section 25(1), namely that they should not be arbitrary'.[2] He then gave two examples that seemed to imply that deprivations of property by private actors acting in terms of the common law or customary law should be subject to s 25(1), namely 'deprivations in the context of customary-law land rights and common-law rules relating to the original acquisition of ownership'.[3] On such an approach, a person who was 'deprived' of property through, say, the attachment of a movable thing to immovable property owned by a private actor, could theoretically challenge the common-law rule in question as providing for the arbitrary deprivation of property contrary to s 25(1).

Quite apart from the fact that it is difficult to conceive of a convincing example where the common law provides for deprivation of property by private actors contrary to s 25(1), it would not be necessary for the court directly to apply s 25 in such cases. According to s 173 of the Constitution, 'the Constitutional Court, the Supreme Court of Appeal and High Courts have the inherent power … to develop the common law, taking into account the interests of justice'. Faced with an arbitrary deprivation of property sanctioned by the common law, any of these courts would be empowered to develop the common law so as to achieve a just result. In so doing, they would be obliged by s 39(2) of the Constitution to 'promote the spirit, purport and objects of the Bill of Rights'. Since one of the objects of the Bill of Rights is to protect people against arbitrary deprivation of property, it would seldom be necessary to consider whether s 25 was directly applicable to the case.

[1] Cf *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* [2003] 1 All SA 465 (T) at paras 42, 44 and 45 ('*Modderklip*') (holding that a squatter community's refusal to comply with an eviction order amounted to a *de facto* expropriation of the applicant's land in conflict with s 25 of the Constitution). *Modderklip* was handed down eight days before the decision in *Phoebus*. Insofar as it provides authority for the proposition that the property clause applies to private conduct that is not authorised by law, it appears to have been tacitly overruled.

[2] Van der Walt *The Constitutional Property Clause* (supra) at 106.

[3] Ibid at 107.

De Waal, Currie & Erasmus have pointed out (and as *Phoebus* appears to confirm), the words 'deprivation' and 'expropriation' in s 25 have a 'specialised' meaning that limits the obligations imposed by ss 25(1), (2) and (3) to state actors.[1] If the question of the direct application of the property clause to private actors were ever to be decided on the basis of the test laid down in *Khumalo*, the court would be enjoined to consider both the 'intensity' of the right and 'the potential invasion of that right which could be occasioned by persons other than the state or organs of state'.[2] Arguably, both the right not to be arbitrarily deprived of property and the right not to have one's property expropriated without compensation would pass the first part of this test. However, the potential for invasion by a private actor of these rights is limited. First, there can be no direct challenge to a common law rule providing for the *expropriation* of property by a private actor, because such a rule simply does not exist. Second, although the term 'deprivation' could conceivably be stretched to cover the examples Van der Walt mentions, in its technical sense this term refers to the regulation of private property by the state, and therefore has no meaning in the context of private law relations.

For the aforementioned reasons, the remainder of this Chapter assumes that s 25 has no direct horizontal application. It also assumes that s 25 is not indirectly applicable between private actors. These two situations must be distinguished from the indirect application of the property clause to state actors. In *South Peninsula Municipality v Malherbe NO*,[3] for example, s 25 was applied in the interpretation of a town-planning ordinance. Where legislation that provides for the expropriation of property is unclear, the Court held, s 25 requires that it be interpreted in favour of the payment of compensation. And in another, concurring judgment in *Premier, Eastern Cape v Cekeshe*,[4] the rule in *Pretoria City Council v Modimola*[5] relating to the non-application of the *audi alteram partem* principle in certain circumstances was held to be incompatible with s 25. The indirect vertical application of the property clause in this way is an important side effect of the constitutionalisation of property rights in South Africa, and should not be ignored.[6]

[1] De Waal et al *The Bill of Rights Handbook* (4th Edition) (supra) at 412.

[2] *Khumalo v Holomisa* (supra) at para 33. On the 'intensity' of fundamental rights, see further *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 18 (describing privacy as 'a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves way from that core').

[3] 1999 (2) SA 966, 983E-I (C).

[4] 1999 (3) SA 56, 103E-F (Tk).

[5] 1966 (3) SA 250 (A).

[6] See also *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) at paras 14-29 (interpreting the proviso to s 12(1) of the Expropriation Act 63 of 1975 in conformity with s 25 of the Constitution).

(b) Who is entitled to the rights protected by section 25?

Section 8(4) of the Constitution provides that '[a] juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.' In *FNB*, the Court offered two independent rationales for extending the protection of s 25 to juristic persons. First, the Court held that 'the property rights of natural persons can only be fully and properly realized if such rights are afforded to companies as well as natural persons.'[1] Second, 'denying companies entitlement to property rights would "… lead to grave disruptions and would undermine the very fabric of our democratic State" '.[2] The first reason is a logical extension of the express protection given to natural persons by s 25. The second amounts to a rule-utilitarian argument in favour of the right to private property.[3] The significance of the Court's use of this argument lies not in the result it defends (which is fairly uncontroversial as a matter of constitutional interpretation), but in what it reveals about the Court's underlying sense of the link between democracy, property rights and economic growth.[4]

Several countries in the developing world, in an attempt to overcome the legacy of colonialism, have limited the protection afforded by their constitutional property clauses to citizens. Although such policies are unlikely to be pursued in the foreseeable future in South Africa, it is worth noting that the plain meaning of s 25 is that anyone who is affected by a deprivation of property is entitled to protection, whether or not they are a citizen, and whether or not they are residing in South Africa at the time of the alleged violation.[5] Similarly, it should not make any difference whether a company's head office is in South Africa or elsewhere. Provided it has interests that are affected by a law of general application in South Africa, and provided further that such interests are recognised as constitutional property,[6] the company will be entitled to the rights protected by s 25.

46.3 Is The Interest at Stake Constitutional Property?

(a) Introduction

Section 25(1) of the Constitution prohibits the deprivation of property 'except in terms of law of general application' and specifies that 'no law may permit arbitrary deprivation of property'. Section 25(2) prohibits the expropriation of property

[1] *FNB* (supra) at para 45.

[2] Ibid citing *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* (supra) at para 18.

[3] See Jeremy Waldron *The Right to Private Property* (1988) 5-12.

[4] Although the finding in *FNB* was limited to juristic persons in the form of companies, both of the lines of reasoning just described are equally applicable to other business entities such as close corporations, trusts, partnerships and the like. All of these forms of business entity should enjoy protection under the property clause.

[5] Generally speaking, when the Constitution intends to distinguish between citizens' and non-citizens' rights it does so expressly. See, for example, s 19(1) (freedom to make political choices).

[6] See § 46.3 infra.

except in terms of law of general application and specifies that property may only be expropriated 'for a public purpose or in the public interest' and 'subject to compensation'. The threshold question in any constitutional property inquiry, therefore, is whether the interest at stake constitutes property as contemplated in s 25(1) and (2). No matter how oppressive or unfair the law at issue is, if it does not interfere with property in this sense, the protection afforded by s 25 is not triggered.

In *FNB*, the Court declined to furnish 'a comprehensive definition of property for purposes of s 25', on the basis that such an exercise would be 'practically impossible'.[1] Instead, the Court restricted its decision to the narrow holding that ownership of a corporeal movable, together with land ownership, was 'at the heart of our constitutional concept of property'.[2] The first part of this holding was dictated by the facts of *FNB*: the detention (for the purpose of establishing a lien in terms of s 114 of the Customs and Excise Act 91 of 1964) of three motor vehicles belonging to the appellant. The second part, that relating to the ownership of land, merely confirmed the significance of the stipulation in s 25(4)*(b)* that 'property is not limited to land'.

Notwithstanding the narrowness of this holding, the decision in *FNB* does give an indication of how the Court might approach the threshold property question in future cases. In stating that ownership of corporeal movables and land constituted property for the purposes of s 25, the Court held that this was the case 'both as regards *the nature of the right* involved as well as *the object of the right*'.[3] This choice of words suggests that the Court's determination of more complex claims will hinge on a composite assessment of these two issues.[4]

In private law, the object of a property right is typically a corporeal thing.[5] This might explain why the Court in *FNB* was at pains to say that its judgment was 'not concerned at all with incorporeal property'.[6] Then again, there is nothing in the judgment to suggest that, when presented with the appropriate case, the Court will not extend the protection of the property clause to encompass incorporeal property. On the contrary, in outlining its general approach to the meaning of property, the Court quoted with approval AJ van der Walt's argument that it was necessary to break the shackles of private law conceptualism in favour of a

[1] *FNB* (supra) at para 51.
[2] Ibid.
[3] Ibid (emphasis added).
[4] Section 12(1) of the Expropriation Act makes a distinction between 'property other than a right' (para *(a)*) and 'a right to use property' (para *(b)*) and provides for different standards of compensation in respect of each. This distinction is not necessarily incompatible with the Court's approach to constitutional property in *FNB*, since that approach is broad enough to accommodate both aspects of the property concept, and s 25(3) allows for differential compensation depending on the nature of the property.
[5] See Van der Walt *The Constitutional Property Clause* (supra) at 32ff.
[6] *FNB* (supra) at para 100. See also *FNB* (supra) at para 54.

more 'dynamic', transformation-oriented, public law conception of property.[1] The Court's endorsement of Van der Walt's pioneering work in this area suggests that it will probably adopt a fairly wide conception of property, one that includes incorporeal property, and that it will seek to strike the private/public balance at other points in the constitutional property clause inquiry.[2]

For analytic purposes, this Chapter follows the Constitutional Court's lead in compartmentalising the question whether a constitutional property right is at stake into a discussion of the nature (or legal form) of the right and the object of the right. This way of proceeding is somewhat artificial since in most cases only one of these two issues will be problematic.[3] Thus, in relation to (rights in) incorporeal property, the question is what categories of incorporeal property (if any) should enjoy constitutional protection. The various legal forms that incorporeal property takes are all very familiar and consequently do not pose any difficulty once this question has been answered. Conversely, there are a range of rights in corporeal property, some of which may be deserving of constitutional protection and others not. Here the key issue is the legal form of the right, since it is settled law after *FNB* that both movable and immovable corporeal property enjoy constitutional protection. In order to avoid duplication, the section on 'the nature of the right' that follows focuses on the nature of property rights in *corporeal* property, and the section on 'the object of the right' focuses on the various types of *incorporeal* property and their claim to constitutional protection.

(b) The nature of the right

Counsel for the respondents in *FNB* argued that the legal form of the appellant's right — ownership of a corporeal movable — was merely 'a contractual device . . . designed to protect the [appellant]',[4] and that it should therefore not enjoy protection under s 25. The Court rejected this argument, holding that '[t]he fact that an owner of a corporeal movable makes no or limited use of the object in question, is irrelevant to the categorisation of the object as constitutional property.'[5] In particular, the right of ownership reserved by financial institutions when leasing motor vehicles should not be conflated with their 'commercial interest' in the vehicles themselves.[6]

[1] *FNB* (supra) at para 52, citing Van der Walt *The Constitutional Property Clause* (supra) at 11.

[2] Further reasons in support of the extension of the constitutional conception of property to include incorporeal property are given in § 46.3*(c)* infra.

[3] Disputes, such as that in *Du Toit v Minister of Transport* (supra), over whether what was expropriated constituted a right to use property or the physical thing itself may of course arise, but they will generally not affect the outcome of the threshold property question, ie the question whether a constitutional property interest is at stake.

[4] *FNB* (supra) at para 53.

[5] Ibid.

[6] Ibid at para 55.

The Court was careful to restrict this holding to cases involving ownership of corporeal movables.[1] The Court's reasoning, however, is likely to be extended to other types of rights and other types of things, ie whether the right at issue is ownership, a limited real right, or a personal right to movable or immovable property, the inquiry into the legal form of the right will be objective. According to this approach, the Court will not concern itself with 'the subjective interest' of the claimant in the object of the right, nor with the 'economic value of the right',[2] but with the legal form of the right at the time of the alleged infringement.

The Court's refusal to deal with the subjective interest of the claimant at the threshold stage in *FNB* does not, of course, mean that this question is irrelevant. It simply means that the Court will deal with it at a later stage of the inquiry.[3] For example, assume that the Department of Housing, as part of its low-income housing strategy, were to target land held for speculative purposes on the periphery of cities and large towns. Before *FNB*, it might have been possible for the state to have argued that, given the urgent need for suitable land to accommodate the urban poor, land speculation in such areas was socially harmful, and therefore that rights in land held for these reasons should not be protected under s 25. After *FNB*, this argument will not be possible. Instead, any attempt by the state to target land held for speculative purposes would have to be defended at a later stage of the property clause inquiry.

If the subjective interest of the right-holder is irrelevant at the first stage of the inquiry, what can the legal form of the right tell us about the likelihood that a particular right will be recognised as constitutional property? When referring to this issue in *FNB*, the Court implied that some rights and interests in property, by their very nature, should not enjoy protection under s 25. Although the Court itself wisely refrained from saying what those rights and interests were, one of the purposes of a commentary such as this is to consider the arguments for and against the recognition of particular rights and interests.

The starting point has to be the distinction drawn in private law between real rights, which are binding on the world at large, and personal rights, which are binding only on the immediate parties to the legal relationship. The law of property as a subject in private law is concerned with the former category of rights, as well as possession (although possession is sometimes regarded as a limited real right).[4] Personal rights, on the other hand, take a number of different forms, and traverse a number of different areas of law. For the reasons given earlier, this section will focus on real and personal rights in corporeal things. The question of which forms of incorporeal property should enjoy constitutional protection will be examined in the next section.

[1] *FNB* (supra) at para 54.
[2] Ibid at paras 54 and 56.
[3] Ibid at para 54 (remarking that the use to which the property is being put 'may be relevant in deciding whether a deprivation thereof is arbitrary and, if it is, whether such deprivation is justified under s 36').
[4] See DG Kleyn & A Boraine *Silberberg and Schoeman's The Law of Property* (3rd Edition, 1993) 111-13.

Although the decision in *FNB* was silent on this issue, there can be little doubt that, in addition to ownership, all of the limited real rights recognised at common law (lease, mortgage, pledge, servitude and lien) should enjoy protection under the property clause, together with limited real rights recognised by statute, such as mineral rights.[1] The fact that a property right has been recognised at common law or by statute means that that the courts or the legislature have already deemed it to be important. The legislature may, of course, wish to adjust the importance accorded to certain classes of property rights, particularly if the recognition of that class is seen as an impediment to social transformation. However, to exclude a particular class of property rights from constitutional protection at the threshold stage would be tantamount to adopting a principle that, in every situation in which rights belonging to that class conflict with the public interest, the latter should prevail. The courts might want to do this in respect of certain interests in property, but not in respect of interests that have already been recognised at common law or by statute. In respect of such interests, the rule of law requires a more subtle form of balancing, one that can be achieved only at other points in the property clause inquiry.

For the same reason, the traditional incidents of ownership (the right to use and enjoy (the fruits of) the thing owned, the right to possess, consume, alienate, and vindicate the thing, and the right to exclude others from it) should enjoy separate protection under the property clause.[2] For example, a zoning law that interferes with the way the owner of a building intends to use that building should in principle be subject to scrutiny under s 25, even though the zoning law does not affect the entire bundle of rights that the owner has in the building.

Further support for this argument may be found in the *FNB* Court's tacit approval of the 'conceptual severance'[3] approach to property when elaborating its test for arbitrariness under s 25(1). One of the components of that test, as we shall see,[4] is to determine whether the impugned deprivation 'embraces all the incidents of ownership' or 'only some incidents of ownership and those incidents only partially'.[5] Since this determination is made only after the threshold stage

[1] See, for example, s 5(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 (recognising prospecting, mining exploration and production rights granted in terms of the Act as limited real rights). The finding in *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 (1) BCLR 23, 28E-G (T) that, '[i]f the drafters of the Constitution [had] intended to protect mineral rights, they would have done so expressly', is based on a clear misunderstanding of the decision in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1997 (1) BCLR 1 (CC) ('*First Certification*') at para 74. It should not be followed.

[2] See *Geyser v Msunduzi Municipality* (supra) at 249I-J (holding that '[t]he property that is protected by section 25 of the Constitution includes property rights such as ownershp and the bundle of rights that make up ownership such as the right to use property or to exclude other people from using it or to derive income from it or to transfer it to others').

[3] The term was coined by Margaret Radin 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings' (1988) 88 *Columbia LR* 1667.

[4] See § 46.5*(b)* infra.

[5] *FNB* (supra) at para 100.

has been passed, the constitutional conception of property must, by implication, include all the recognised incidents of ownership. The clear inference to be drawn from the *FNB* decision is that the Court will not bar property clause challenges merely because the state has interfered with a few incidents of ownership only. Rather, the Court will entertain the challenge and assess the constitutionality of the law concerned according to the nature and severity of its impact and the number and importance of the incidents the law affects.

Laws that interfere with the traditional incidents of ownership or limited real rights should be distinguished from laws that merely cause patrimonial loss. For example, a law regulating the way in which mineral rights may be held, once assented to by the President, may have an adverse economic impact on the holders of such rights. Until the law is put into operation, however, the impact will affect the holders' subsidiary interest in the market value of their rights, rather than the rights themselves.[1] Such a law will give rise to a claim under the property clause only if the court were prepared to recognise this type of subsidiary interest as property for the purposes of s 25.[2]

The reference in *FNB* to the possibility that some incidents of ownership may be 'partially' affected by a law suggests that the Court may indeed be prepared to countenance claims of this kind.[3] The reason for extending the constitutional conception of property in this way, however, would not be to erect an artificial hurdle in the way of social transformation, but to postpone the necessary interest-balancing exercise to a later, more flexible stage. The *FNB* Court thus held that a law that (partially) deprived the claimant of some of the incidents of ownership would be subject to review for arbitrariness, but that a lower standard of review would apply to such a law when compared to a law that deprived the claimant of all of the incidents of ownership.[4] In most cases this would mean that a law (partially) depriving the claimant of one or two incidents of ownership would easily pass constitutional muster. Likewise, the extension of the constitutional conception of property to the traditional incidents of ownership and to subsidiary interests would not necessarily mean that the state would have to pay just and equitable compensation in every case. The duty to pay just and equitable compensation, as explained below,[5] depends on whether the law provides for the expropriation of property. Even if every conceivable strand in the property rights bundle were recognised as property for purposes of s 25, expropriation could be

[1] See the Mineral and Petroleum Resources Development Act 28 of 2002, which at the time of writing had been assented to by the President but not yet put into operation. Item 12 of Schedule II to this Act provides for the payment of compensation for expropriation in certain circumstances.

[2] Such interests have been recognised as property at common law. See *Diepsloot Residents' and Landowners' Association v Administrator, Transvaal* 1994 (3) SA 336 (A).

[3] *FNB* (supra) at para 100*(f)*.

[4] Ibid.

[5] See § 46.7 infra.

defined in such a way as to preclude the payment of compensation in cases where this would tilt the private/public balance too far in favour of the claimant.[1]

Outside the private law of property, the most important forms of property are personal rights to performances regulated by the law of contract, including some important commercial rights, intellectual property rights (copyright, trademarks and patents), and certain public-law entitlements (the so-called 'new property'), including welfare rights (pensions and medical aid benefits) and other forms of state 'largesse' (such as licences, permits and quotas).[2] The question whether the constitutional conception of property should be extended to these forms of property depends on whether incorporeal property as such should be protected under s 25 and, if so, whether any distinction should be made between the various forms of incorporeal property. The extension of s 25 to incorporeal property is dealt with in the next section.

(c) The object of the right

As we have seen,[3] the Constitutional Court in *FNB* was at pains to restrict its holding to corporeal property. In so doing, however, the Court was simply being cautious. Neither this decision nor that in the *First Certification* case[4] should be taken as an indication that the Court, when confronted with an appropriate case, will not extend the constitutional conception of property to encompass incorporeal property. In addition to the general arguments raised by Van der Walt about the need for a 'dynamic', transformation-oriented, public-law conception of property,[5] there are three specific reasons for extending the protection of the property clause to incorporeal property. First, the blanket exclusion of incorporeal property from the protection of s 25 would be a very crude way of balancing competing public and private interests in property. As with the definitional exclusion of

[1] Alternatively, it might be possible for the state to justify the non-payment of compensation where the right expropriated constitutes a very minor strand in the owner's property rights bundle. See *Nhlabathi v Fick* (supra) at paras 32-5 (assuming, without deciding, that the granting of permission to establish a grave by statute might constitute a '*de facto* expropriation', but holding that the non-payment of compensation was justified under s 36).

[2] The term 'largesse' to describe these forms of state benefit, and the term 'new property', were coined by Charles Reich 'The New Property' (1964) 73 *Yale LJ* 733.

[3] See § 46.3*(b)* supra.

[4] In *First Certification* (supra), the Court held that the fact that the 1996 Constitution does not extend express protection to incorporeal property rights was not contrary to the Constitutional Principles in Schedule 4 of the interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993) because such rights are not 'universally accepted fundamental rights'. This ruling should not be misunderstood as a ruling that s 25 does not protect incorporeal property. The purpose of the certification exercise was to test the 1996 Constitution against the Constitutional Principles, including the principle that all 'universally accepted fundamental rights' should enjoy constitutional protection. A decision that a particular kind of right in property is not universally accepted and therefore need not have been *expressly* recognised in the Constitution is not tantamount to a finding that it is not recognised at all. See further the remarks made in § 46.3*(b)* supra in relation to mineral rights, and the finding in *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 (1) BCLR 23, 28E-G (T).

[5] See § 46.3*(a)* supra.

rights and subsidiary interests in corporeal property, such an approach would amount to declaring for all future cases that, where private and public interests in incorporeal property conflict, the latter should prevail. A much more nuanced approach than this is required, one that can only be achieved at a later stage of the property clause inquiry. Second, the overwhelming preponderance of foreign law authority favours the constitutional protection of incorporeal property.[1] And, finally, the second of the two reasons given by the Court in *FNB* for extending the protection of s 25 to juristic persons — the role that these forms of property have to play in economic growth and the consolidation of democracy[2] — applies equally well to the extension of that protection to incorporeal property.

The main category of incorporeal property, personal rights to performances, including a range of commercial rights, has been widely recognised in foreign law as being in principle capable of constitutional property clause protection. It is impossible to list all of the possible sub-categories here, but some examples are shares in a company,[3] goodwill,[4] rights in a partnership,[5] and the right of management of a company.[6]

Another important category of incorporeal property concerns public law entitlements in the form of welfare rights (including pensions and medical aid benefits) and other kinds of government 'largesse' (including licences, permits and quotas). Such entitlements — collectively referred to as 'the new property'[7] — enjoy constitutional protection in many countries. However, such protection is typically afforded against procedurally unfair deprivation, and not against expropriation.[8] Since these entitlements are by their very nature contingent on mutable government policies or programmes, it would in most cases be nonsensical to impose on the state a duty to compensate individuals in the event of these entitlements being withdrawn. Such an approach would effectively lock the state into an existing set of welfare policies and programmes, thereby unfairly tilting the balance in favour of the current class of beneficiaries at the expense of the state's obligation to promote the public interest by pursuing the best set of policies and programmes for changing circumstances.

[1] See Van der Walt *The Constitutional Property Clause* (supra) at 30-71.

[2] See § 46.2*(b)* supra.

[3] *Government of Mauritius v Union Flacq Sugar Estates Co Ltd; Government of Mauritius v Medine Shares Holding Co Ltd* [1992] WLR 903 (PC).

[4] *Manitoba Fisheries Ltd v The Queen* (1978) 88 DLR (3d) 462 (distinguishing *Government of Malaysia v Selangor Pilot Association* [1977] 2 WLR 901 (PC)).

[5] *Societe United Docks v Government of Mauritius; Marine Workers Union v Mauritius Marine Authority* [1985] LRC (Const) 801 (PC).

[6] *Attorney-General v Lawrence* [1985] LRC (Const) 921 (St Christopher and Nevis CA).

[7] See Charles Reich 'The New Property' (1964) 73 *Yale LJ* 733.

[8] On the position in the United States and the Commonwealth in this regard, see Matthew Chaskalson 'The Problem with Property: Thoughts on the Constitutional Protection of Property in the United States and the Commonwealth' (1993) 9 *SAJHR* 388, 404-7.

The question whether the new property should enjoy protection under the property clause in the interim Constitution was considered in *Transkei Public Servants Association v Government of the Republic of South Africa*.[1] In this case, the Transkei High Court observed that 'the meaning of 'property' in section 28 of the [interim] Constitution may well be sufficiently wide to encompass a State housing subsidy'.[2] This *obiter dictum* is no more than persuasive authority, of course, but is nevertheless likely to be followed in cases decided under the 1996 Constitution. After all, it is not the recognition of the new property as such that constitutes the real difficulty, but the degree and nature of the protection afforded to such property. For this reason, it is once again likely that the answer will lie not at the threshold stage of the inquiry, but in the application of the Constitutional Court's test for arbitrariness. As we shall see,[3] a court has tremendous scope in terms of that test to vary the level of scrutiny applied according to the nature of the impugned law and the form of property at stake. Where that law is a welfare law, and the form of property at issue a public law entitlement, a court is likely to give the state a fairly wide margin to adjust the structure, and method of enjoyment, of the entitlement, subject only to the requirement that any adjustments it does make should be effected in a procedurally fair manner. Precisely so as to allow for the enforcement of rights to procedural fairness at the s 25(1) stage, most public law entitlements should be recognised as property. The only real reason for excluding claims based on such entitlements at the threshold stage would be to eliminate cases where the interest has not as yet taken the form of a vested right. This consideration would mainly apply where the remedy sought was compensation rather than the enforcement of the claimant's right to procedural fairness.[4]

Finally, intellectual property rights in the form of patents, trademarks and copyright should, and are likely to be, recognised as constitutional property, for all the aforementioned reasons: the need to subject any interference with such rights to the Court's more flexible balancing test for arbitrariness, their importance to the economic development of South Africa, and the weight of foreign law authority.[5]

46.4 Has There Been a Deprivation of Property?

If the court decides that the right or interest at stake amounts to constitutionally protected property, the next stage of the inquiry requires it to determine whether there has been a deprivation of property. After *FNB*, it is clear that the term

[1] 1995 (9) BCLR 1235 (Tk).
[2] Ibid at 1246-7.
[3] See § 46.5*(b)* infra.
[4] See *Chairman of the Public Service Commission v Zimbabwe Teachers Association* 1996 (9) BCLR 1189 (ZS) (holding that a public servant's right to an annual bonus is not expropriated where it is withheld before having vested).
[5] For an overview of these foreign cases see Van der Walt *The Constitutional Property Clause* (supra) at 64 n114.

'deprivation' will be given a very wide meaning, and that this stage of the inquiry will consequently play very little role (if any) in future cases. Noting that the term was 'somewhat misleading or confusing',[1] the Court in *FNB* remarked that '[i]n a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned'.[2] Without offering a comprehensive definition, the Court held that 'dispossessing an owner of all rights, use and benefit to and of corporeal movable goods, is a prime example of deprivation in both its grammatical and contextual sense'.[3]

The actual holding in *FNB* with regard to the meaning of 'deprivation' is therefore quite narrow. Nevertheless, there is enough in the Court's *obiter dicta* to suggest that very little will turn on whether the law at issue deprives the claimant of property as opposed to interfering in some other way with that property short of an actual deprivation. The more likely scenario is that a court hearing a constitutional property clause challenge will construe almost any interference with the use or enjoyment of property as a deprivation, and will deal with the level of intrusiveness of the deprivation when considering whether the requirements of s 25(1) have been met. For example, a law that interferes with only one or two 'sticks' in the property rights bundle will not for that reason alone be treated as providing for something less than a deprivation.[4] Rather, the fact that the deprivation of property is less than total will be a factor relevant to the court's determination, at the next stage of the inquiry, whether there is 'sufficient reason' for the deprivation.[5]

Although it failed to give a comprehensive definition of the term 'deprivation', the Constitutional Court's judgment in *FNB* did endorse the view expressed in an earlier version of this chapter that expropriations should be construed as a form of deprivation.[6] Whatever else the term 'deprivation' may mean, therefore, it is certain that a law that provides for the expropriation of property will also constitute a deprivation of property. The significance of this rule is that a law providing for the expropriation of property, in addition to the requirements of s 25(2), will have to satisfy the requirements of s 25(1). Indeed, on the evidence of *FNB*, it would seem that the Constitutional Court, when confronted with such a law, will *first* test it for compliance with s 25(1), before moving on, if necessary, to s 25(2).[7]

[1] *FNB* (supra) at para 57, citing Van der Walt *The Constitutional Property Clause* (supra) at 101ff.
[2] Ibid.
[3] Ibid at para 61.
[4] See *Geyser v Msunduzi Municipality* (supra) at 250B (interference with right to transfer property constitutes deprivation for purposes of s 25(1)); *Nhlabathi v Fick* (supra) at para 29 (appropriation of grave by farmworker tenant constitutes deprivation).
[5] See, in particular, para *(f)* of the test for arbitrariness laid down in para 100 of *FNB* (discussed in § 46.5*(b)* infra).
[6] See Matthew Chaskalson & Carole Lewis 'Property' in Chaskalson et al *Constitutional Law of South Africa* (supra) at 31-14, cited with approval in *FNB* (supra) at para 57.
[7] See the set of questions posed by the Court in *FNB* (supra) at para 46.

Once again, this approach will tend to de-emphasize the potential balancing function performed by other stages of the constitutional property inquiry — in this case the distinction between expropriations and deprivations — in favour of the Court's test for arbitrariness. Whilst in most instances, the privileging of the test for arbitrariness has the effect (and virtue) of introducing greater flexibility into the property clause inquiry, the Court's insistence that a law that provides for the expropriation of property should first be tested against s 25(1) may have the opposite effect. One of the principal means by which an individual's interest in the use and enjoyment of property, and the state's interest in acquiring it, may be balanced is through the payment of compensation. This idea is recognised in the US Supreme Court's takings jurisprudence, which regards compensation as the mechanism through which society shares the burden imposed on property holders by the forced enlistment of their property in service to the public good.[1] An otherwise arbitrary law may be perfectly rational, and indeed proportional, if it provides for the payment of just and equitable compensation. This being so, it would make no sense to assess the arbitrariness of a law that provides for the expropriation of property without also considering what that law says about the amount, time and manner of compensation. In this way, the inquiry mandated by the state's duty to pay compensation in s 25(2)*(b)* will tend to become sucked into, or at least rendered redundant by, the test for arbitrariness in s 25(1). As explained below,[2] there are several points in that test at which the 'means employed' by the legislature and the 'extent of the deprivation' occasioned by the law need to be assessed.[3] In respect of deprivations that take the form of expropriations, the means employed to effect the deprivation may be a scheme of expropriation that includes the payment of just and equitable compensation. If so, this would make all the difference in the world to the question whether the law permits the arbitrary deprivation of property.

The same conclusion may be reached by means of the following *reductio ad absurdum* argument. Conceptually, the most severe form of deprivation is an expropriation, which is defined as the forced transfer of a right in property from the individual to the state.[4] If just and equitable compensation is provided, however, the impact of an expropriation may not be so severe. It would therefore be somewhat odd for a court to delay its consideration of this aspect of the law to a later stage. To do so, a court would have to counter-factually assess the law as though no compensation had been offered, and then either find the regulatory

[1] See, in particular, *Armstrong v United States* 364 US 40, 49 (1960) ('[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'). The principle laid down in *Armstrong* was used to explain the US Supreme Court's *ad hoc* balancing test for regulatory takings in two more recent cases. See *Yee v City of Escondido* 118 L Ed 2d 153, 162 (1992) and *Concrete Pipe and Products of California Inc v Construction Laborers Pension Trust for Southern California* 124 L Ed 2d 539, 580 (1994).

[2] See § 46.5 infra.

[3] *FNB* (supra) at paras 100*(a)*, *(d)* and *(g)*, discussed in § 46.5*(b)* infra.

[4] See § 46.7 infra.

scheme to be non-arbitrary, or arbitrary but justified under s 36, or arbitrary and not justified. Where just and equitable compensation was indeed provided, a finding that the law provided for the arbitrary deprivation of property based on such a counterfactual inquiry would be absurd. To avoid this result, the Court would have to take into account the fact that the scheme of expropriation provided for the payment of compensation in the course of applying the test for arbitrariness. This approach would have the effect of sucking the inquiry into the amount, time and manner of payment of compensation into the arbitrariness test.

'Sucking in' will also occur, as in *FNB*, where a law permits the expropriation of property but does not provide for compensation. Confronted with a law that provided for civil forfeiture (in effect, an uncompensated expropriation) the Court in *FNB* did not move directly, as it might have done, to consider the question whether the state's failure to pay compensation to the appellant was justified under s 36. Rather, it construed s 114 of the Customs and Excise Act[1] as providing for a 'total deprivation' of property,[2] and then proceeded to measure it against the standard set by s 25(1). The fact that the deprivation was total was central to the Court's conclusion that s 114 permitted the arbitrary deprivation of property. Substantially the same result, however, might have been achieved by construing s 114 as permitting the expropriation of property without compensation, in violation of s 25(2)*(b)*.

Where, as in *FNB*, the remedy sought is the striking down of the law, it matters little whether the law is found to be unconstitutional because it provides for the arbitrary deprivation of property or because it permits the expropriation of property without compensation. Where, on the other hand, the proper outcome is for the Court to uphold the law, subject to reading in a requirement that the state pay just and equitable compensation, the Court would have to find that the law provided for the expropriation of property, since the duty to pay compensation only arises where property is expropriated. On the approach laid down in *FNB*, however, such a finding would be unlikely, because the prior finding that the law unjustifiably violated s 25(1) would terminate the constitutional inquiry.

46.5 Is The Law That Provides For The Deprivation Consistent With Section 25(1)?

After the decision in *FNB*, it is clear that every law that deprives a person of property, including by way of expropriation, must satisfy the requirements of s 25(1). These requirements that the deprivation must occur in terms of law of general application, and that the law in terms of which the deprivation occurs must not be arbitrary.

[1] Act 91 of 1964.
[2] *FNB* (supra) at para 108.

(a) Law of general application

The term 'law of general application' as used in s 36 of the Constitution is discussed in the chapter on 'Limitation'.[1] As it occurs in s 25(1), the requirement that any deprivation of property must occur 'in terms of law of general application' is intended to protect individuals from being deprived of property by bills of attainder or other laws that single them out for 'discriminatory treatment', or which 'capriciously interfere with [their] property rights'.[2]

The important consequence of this requirement is that the focus of the s 25(1) inquiry, and indeed the entire property clause inquiry, will invariably fall on a law rather than any other type of state action. Administrative action that deprives a person of property without being authorized by law of general application will be reviewable in the first instance under the Promotion of Administrative Justice Act,[3] and possibly also under s 33 of the Constitution (the right to just administrative action).[4] Similarly, *executive* action that deprives a person of property without being authorized by law of general application will be reviewable in the first instance as a violation of the principle of legality.[5]

(b) Arbitrary deprivation of property

The specification in s 25(1) that 'no law may permit the arbitrary deprivation of property' received by far the greatest attention in the *FNB* decision,[6] and will clearly be central to the balancing of public and private interests in property in future cases. Before the decision in *FNB*, the consensus of academic opinion, relying on the Constitutional Court's decision in *S v Lawrence; S v Negal: S v Solberg*,[7] had been that the requirement of non-arbitrariness in s 25(1) was equivalent to the rationality requirement imposed by s 9(1) of the Constitution.[8] This view was conclusively rejected in *FNB*. The Court, after an exhaustive survey of foreign law, held that the validity of a deprivation depends on 'an appropriate

[1] See Stuart Woolman 'Limitation' in Chaskalson et al *Constitutional Law of South Africa* (supra) at § 12.5.

[2] *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* (supra) at 29H (endorsing the position taken in an earlier version of this Chapter).

[3] Act 3 of 2000.

[4] See Jonathan Klaaren & Glenn Penfold 'Administrative Action' in Chaskalson et al *Constitutional Law of South Africa* (2nd Edition, Original Service, 2002).

[5] See further § 46.5*(c)* infra.

[6] See *FNB* (supra) at paras 61-109.

[7] 1997 (4) SA 1176 (CC).

[8] See Geoff Budlender 'The Constitutional Protection of Property Rights: Overview and Commentary' in Budlender et al *Juta's New Land Law* (Original Service, 1998) 1-34–6, Matthew Chaskalson & Carole Lewis 'Property' in Chaskalson et al *Constitutional Law of South Africa* (1st Edition, RS5, 1999) 31–13-4, and Theunis Roux 'Property' in Cheadle et al *South African Constitutional Law: The Bill of Rights* (2002) 429, 461. But see De Waal et al *The Bill of Rights Handbook* (supra) at 422 (arguing that a deprivation is arbitrary 'if it follows unfair procedures, if it is irrational, or is for no good reason').

relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve'.[1] In so doing, the Court made it clear that the test for arbitrariness 'is not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination'.[2] The precise test to be applied is worth quoting in full:

> [D]eprivation of property is 'arbitrary' as meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:
>
> *(a)* It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.
>
> *(b)* A complexity of relationships has to be considered.
>
> *(c)* In evaluating the deprivation in question, regard must be had to the relationship between the purpose of the deprivation and the person whose property is affected.
>
> *(d)* In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
>
> *(e)* Generally speaking, when the property in question is ownership of land or a corporeal movable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.
>
> *(f)* Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
>
> *(g)* Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.
>
> *(h)* Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25.[3]

On first reading, this passage appears to be a godsend to practitioners long perplexed by the labyrinthine commentaries on the property clause that predated *FNB*. Unfortunately, appearances can be deceptive, and never more so than

[1] *FNB* (supra) at para 98. Note the similarity between this formulation of the test and the burden-sharing principle articulated in *Armstrong* (supra).

[2] Ibid. See also *FNB* (supra) at para 65: 'In its context "arbitrary", as used in s 25, is not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends. It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality. At the same time it is a narrower and less intrusive concept than that of the proportionality evaluation required by the limitation provisions of s 36.'

[3] *FNB* (supra) at para 100.

when a court appears to be making the outcome of future cases more predictable. What seems at first blush to be a step-by-step guide to the resolution of virtually any s 25 challenge, on closer examination turns out to be a deliberate retention by the Court of an almost absolute discretion to decide future cases in the manner it deems fit.

To make matters worse, after a lengthy display of comparative law scholarship in the thirty paragraphs leading up to the formulation of this test, the Court in *FNB* scarcely applied it. Instead, it decided the constitutionality of s 114 of the Customs and Excise Act[1] mainly by distinguishing the facts in *FNB* from the facts in several Australian cases.[2] The actual application of the test for arbitrariness is contained in two short paragraphs.[3] The precise holding is that, where the state seeks to deprive a third party of property to exact payment of a debt (in this case a customs debt) owed by another party (the debtor) to the state, there must be a close nexus between: (1) the third party and the transaction giving rise to the debt, (2) the property taken and the debt, and (3) the third party and the debtor.[4] So much is admirably clear. The reasoning leading up to this holding, however, hardly amounts to a systematic application of the factors listed in paras *(a)* to *(h)* of the passage quoted above. Rather, the Court simply asserts the legitimacy and importance of the state's general need to exact payment of customs debts, and then reduces the means adopted in the Customs and Excise Act to three brief propositions, concentrating on the lack of connection between means and ends.[5] 'In the absence of any such relevant nexus,' the Court concludes, 'no sufficient reason exists for s 114 to deprive persons other than the customs debtor of their goods.'[6]

On this evidence, there are two keys to understanding the Court's test for arbitrariness. First, because it applies to all deprivations, including expropriations, the test will be the focus of almost any property clause inquiry. It will be in the application of this test that courts will seek to strike the required balance between the individual right to property and the public purpose sought to be pursued in, or the public interest underlying, the law in question. Of the remaining stages of the constitutional property clause inquiry, the threshold question concerning the meaning of property may serve to eliminate claims based purely on the impact of the law on the claimant's wealth, rather than on any particular right in property or legally recognised incident of ownership. The only other stages of the inquiry

[1] Act 91 of 1964.
[2] *FNB* (supra) at paras 101-7.
[3] Ibid at paras 108-9.
[4] Ibid at para 108.
[5] These propositions are: the lack of any connection between the third party and the 'transaction giving rise to the customs debt', the lack of any connection between the property taken and the customs debt, and the lack of any representation on the part of the third party inducing the state to act to its detriment in incurring the customs debt (implying that the claimant might have been estopped from challenging the validity of the law had it indeed made such a representation). Ibid.
[6] *FNB* (supra) at para 109.

that may be meaningfully applied are the distinction between deprivation and expropriation (to determine whether the additional duty to pay just and equitable compensation arises, where it serves the claimant's interests to raise such an argument) and the inquiry into the adequacy of compensation (where this stage provides a more nuanced method for balancing private and public interests in property).

The second key to unlocking the arbitrariness test in *FNB* is to accept that it is a test that leaves much scope for judicial discretion. Both the factors that the court must take into account and the level of scrutiny will vary according to the circumstances. No mere formulaic application of the test will be possible, at least not until many more cases have been decided. Even the stipulation in para *(e)* of the test that, 'where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case where the property is something different and the property right something less extensive', is preceded by the qualification 'generally speaking'. One of the main exceptions to this rule may be the most contentious, namely the deprivation of ownership rights in land in pursuit of land reform. In this case, as more fully argued in § 46.8 below, the normative force of the declaration in s 25(4)*(a)* that the 'public interest includes the nation's commitment to land reform', together with the attempted immunisation of land reform from constitutional impediment in s 25(8), may have the effect of lowering the level of scrutiny, even though 'the property in question is ownership of land'.

All that can be said with any certainty is that the level of scrutiny will vacillate between two fixed poles: rationality review at the lower end of the scale, and something just short of a review for proportionality at the other.[1] Where the deprivation totally deprives the claimant of all his or her rights in land or a corporeal movable (and is not effected in pursuit of land reform or other reforms aimed at broadening access to South Africa's natural resources), the law at issue is unlikely to pass constitutional muster unless it provides for something approximating the prompt payment of market value compensation. Where, on the other hand, only some rights in the property are affected, and the impact of the law does not impose a disproportionate burden on those affected when compared to the purpose sought to be achieved, especially where the purpose of the law is land

[1] The level of scrutiny applied may, of course, be crucial to the outcome of the case. At the time of writing s 118(1) of the Local Government: Municipal Systems Act 32 of 2000 had been the subject of two contradictory High Court decisions, and was awaiting consideration by the Constitutional Court. See *Geyser v Msunduzi Municipality* (supra) and *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bisset v Buffalo City Municipality* ('*Mkontwana*') unreported SECLD Cases 1238/02 and 903/02 (judgment of Kroon and Leach JJ). The difference between these two decisions is attributable to the fact that a rational basis test was applied in *Geyser*, whereas in *Mkontwana* the Court applied something approximating a proportionality test.

reform or another kind of reform aimed at broadening access to South Africa's natural resources, then the law is unlikely to be found unconstitutional.

Although s 114 of the Customs and Excise Act was not challenged in *FNB* on the basis of procedural fairness, the Constitutional Court held in passing that a deprivation of property is also arbitrary where the law in terms of which the deprivation is effected is procedurally unfair.[1] The inquiry into the procedural fairness of a law for the purposes of s 25(1) must be distinguished from the procedural fairness of particular administrative action. Where the deprivation of property occurs in terms of procedurally unfair administrative action, but the law authorizing such action is not on the face of it procedurally unfair, the proper course is to have the administrative action set aside under the Promotion of Administrative Justice Act.[2] The interaction between the right to procedural fairness and the right not to be arbitrarily deprived of property is discussed in the next section.

(c) Deprivation of property and the right to just administrative action

Since the right to just administrative action, including procedurally fair administrative action, in FC s 33 deals with administrative action rather than 'law', there will generally be no overlap between the property clause and the administrative justice clause with regard to allegations of procedural unfairness. A law that provides for the deprivation of property in a procedurally unfair manner will be challengeable under s 25(1) of the Constitution, and administrative action that deprives a person of property in a procedurally unfair manner will be challengeable under the Promotion of Administrative Justice Act. There are, however, two possible areas of overlap between the property clause and other parts of the Constitution that need to be clarified.

First, in the opinion of some commentators,[3] delegated rule-making falls within the definition of administrative action in the AJA and also within the concept of administrative action for purposes of s 33. Since delegated rules (such as regulations made under an Act of Parliament) undoubtedly constitute 'law of general application', they will in theory be susceptible to review for procedural fairness both under s 25(1) and the AJA.

The second possible area of overlap between s 25(1) and other parts of the Constitution concerns executive action that effects a deprivation of property with-

[1] *FNB* (supra) at para 100. See further *Janse van Rensburg NO v Minister van Handel en Nywerheid* 1999 (2) BCLR 204, 221E (T) and *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) at para 82.

[2] Act 3 of 2000 ('the AJA').

[3] See Iain Currie & Jonathan Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) § 2.38.

out being authorized by a law of general application.[1] Executive action is by definition not reviewable under s 33 or the AJA. However, the Constitutional Court has held that all executive action is subject to the principle of legality, and must be authorised by law.[2] Executive action that effected a deprivation of property without being authorised by a law of general application would therefore be reviewable both under s 25(1) and in terms of the principle of legality.

In respect of both of these potential areas of overlap, the property clause should be applied only as a last resort. Thus, were it indeed held that delegated rule-making is a form of administrative action, the procedural fairness of a delegated rule that effected a deprivation of property should first be tested against the AJA.[3] Similarly, executive action that effected an arbitrary deprivation of property and which was not authorised by law should be reviewed in the first instance as a violation of the principle of legality.

46.6 Is The Deprivation Justified Under Section 36?

Should the court find that s 25(1) has been infringed, either because the deprivation did not take place 'in terms of law of general application', or because the law authorizing the deprivation was arbitrary, the state could theoretically seek to justify such infringement under s 36 of the Constitution, the general limitations clause.[4] On closer analysis, however, the application of s 36 to infringements of s 25(1) is beset by conceptual difficulties.[5] Deprivations that limit s 25(1) because they do not occur 'in terms of law of general application' cannot be saved by s 36 because the precondition for the application of this section is that the limitation should have occurred 'in terms of law of general application'. And a law that permits the arbitrary deprivation of property, either because it is procedurally unfair or because it provides insufficient reason for the deprivation, is hardly likely to be 'reasonable and justifiable in an open and democratic society', as required by s 36(1).

[1] Administrative action that effects a deprivation of property without being authorised by a law of general application will generally be reviewable under s 6(2)*(f)*(i) of the AJA (because it is not authorised by the empowering provision on which it ostensibly relies). There may be some instances, however, where action undertaken by a member of the administration does not constitute administrative action because it does not amount to the exercise of a public power or the performance of a public function in terms of any legislation. (See the definition of administrative action in s 1 of the AJA.) Such action will therefore not be reviewable under the AJA, but will be reviewable in terms of the principle of legality, therefore precluding the need to resort to the property clause.

[2] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 59.

[3] Of course, if delegated rule-making were found *not* to constitute administrative action, such action would generally not be reviewable for procedural fairness, except if the law concerned effected a deprivation of property, in which case it would be reviewable for procedural fairness under s 25(1), following the holding in *FNB*.

[4] See Woolman 'Limitation' in Chaskalson et al *Constitutional Law of South Africa* (1st Edition, RS5, 1999) § 12.5.

[5] See De Waal et al *The Bill of Rights Handbook* (supra) at 426-8.

In dealing with the issue of justification in *FNB*, the Court acknowledged these difficulties, but assumed in favour of the state that s 36 *was* applicable to infringements of s 25(1).[1] The Court then proceeded to apply a pared down version of its s 36(1) justification analysis to the facts as follows:

> FNB's ownership in the vehicles concerned is ultimately completely extinguished by the operation of s 114 of the Act. As against this the Commissioner gains an execution object for someone else's debt. But, as already indicated, there is no connection between FNB or its vehicles and the customs debt in question. Under these circumstances the object achieved by s 114 is grossly disproportional to the infringement of FNB's property rights.

This passage tends to confirm the view that s 36 has 'no meaningful application' to infringements of s 25(1).[2] The issues addressed by the Court in this passage are precisely the same as those addressed in its test for arbitrariness. Thus, the complete extinguishment of First National Bank's ownership of the vehicles is addressed in paras *(d)* and *(f)* of the arbitrariness test, which requires the Court to examine 'the extent of the deprivation' and whether it 'embraces all the incidents of ownership'. Likewise, the absence of a 'connection between FNB or its vehicles and the customs debt' was, as indicated above, central to the Court's finding that 'no sufficient reason' existed for the deprivation.[3]

In cases where the test for arbitrariness approximates rational basis review rather than proportionality, the conceptual case for the non-application of s 36 is strongest: a law that infringes s 25(1) for lack of means-end rationality will never be capable of justification under the general limitations clause. At the other end of the scale, where the test for arbitrariness approaches a test for proportionality, the application of s 36 can at best confirm a conclusion already reached under s 25(1), as illustrated by *FNB*.[4]

For similar reasons, the reference to s 36(1) in s 25(8) of the Constitution is probably redundant. Section 25(8) provides:

> No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

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[1] *FNB* (supra) at para 110.

[2] De Waal et al *The Bill of Rights Handbook* (supra) at 427.

[3] See *FNB* (supra) at para 109. See also *Mkontwana* (supra) at paras 60-67 (holding that the limitation imposed by s 118(1) of the Local Government: Municipal Systems Act 32 of 2000 was not reasonable and justifiable for reasons similar to those given by the Court in finding that this section provided for the arbitrary deprivation of property).

[4] See also *Janse van Rensburg NO v Minister van Handel en Nywerheid* 1999 (2) BCLR 204, 222E (T). The contrary finding, in *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C), that an infringement of s 25(1) was justified under s 36, is explicable on the basis that the limitations clause was applied to justify the infringement of other rights as well, meaning that the finding in this case that the law was justified was not specific to the finding that the law infringed s 25(1). In addition, *Bathgate* predated *FNB*, and accordingly did not apply the arbitrariness test as laid down in that case.

The intention behind this provision was to insulate land reform measures from constitutional impugnment under s 25. Unfortunately, subsection (8) has been formulated in a way that tends to defeat this purpose. The addition of the proviso indicates that the Constitutional Assembly contemplated that certain land reform measures might 'depart' from the provisions of the property clause. The word 'departure' in s 25(8), however, has no meaning other than a limitation of the rights in s 25. Thus, s 25(8) in effect provides that a land reform measure that limits a right entrenched in s 25 must comply with s 36(1). But s 36(2) in any event states that: 'Except as provided in [s 36(1)] … no law may limit any right entrenched in the Bill of Rights.' The proviso to s 25(8) was therefore unnecessary. At most it supports the inference to be drawn from s 36(2).[1]

The only other interpretative weight that can be given to s 25(8) is that the court should apply a lower level of scrutiny when testing land reform measures against s 25 than it does in respect of other measures. After *FNB*, however, it is clear that the appropriate point in the analysis for this type of 'measure-based' distinction is not the general limitations stage, but the test for arbitrariness. In respect of a land reform measure, for example, the court might decide to depart from the general rule laid down in *FNB* that 'where the property in question is ownership of land … a more compelling purpose will have to be established'.[2] The normative force of s 25(8) would justify weakening the standard of review in such a situation, even where the measure deprived the complainant of ownership of land. This type of adjustment to the level of scrutiny must, however, be made when applying the test for arbitrariness. Once that test has been applied, the same conceptual difficulties that beset the application of s 36 to infringements of s 25(1) will render the application of s 25(8) redundant.

46.7 Does The Deprivation Amount to an Expropriation of Property?

According to s 25(2) of the Final Constitution, the state may only expropriate property on three conditions. First, it must do so in terms of law of general application. Second, the law authorising the expropriation must be enacted in pursuit of 'a public purpose' or must otherwise be 'in the public interest'. Third, the law must provide for the payment of compensation, either by agreement or as determined by a court of law. Section 25(3) of the Constitution adds more detail to the third condition by specifying the standard that the compensation scheme must meet if it is to pass constitutional muster.

After *FNB*, it is clear that these requirements must be met *in addition to* the requirements laid down in s 25(1). Since the requirement that the law should be a law of general application appears in both s 25(1) and (2), a law that provides for the expropriation of property must, in addition to meeting the requirements in

[1] See *Nhlabathi v Fick* (supra) at para 33.
[2] See para *(e)* of the test for arbitrariness as set out in *FNB* (supra) at para 100.

s 25(2), provide 'sufficient reason' for depriving the claimant of property by way of expropriation and be procedurally fair. Put differently, the *consequence* of classifying a law as providing for the expropriation of property is to add two requirements to the list of requirements that the state must meet if the law is to pass constitutional muster. First, the law must have been enacted in pursuit of 'a public purpose' or be otherwise 'in the public interest'. Second, compensation must be paid.

In comparative constitutional law, the categorization of a law as providing for the expropriation (or 'compulsory acquisition' or 'taking') of property as opposed to the mere deprivation (or 'regulation') of property is often the main point of contestation between the constitutional complainant and the state. Much of the US Supreme Court's takings jurisprudence, for example, concerns whether a law that purports to be a mere regulation of property 'goes too far',[1] and in so doing amounts to an expropriation of property (or 'regulatory taking'). Similarly, in the Commonwealth, a great deal of energy is put into determining the boundary between the deprivation and compulsory acquisition of property.[2]

In South Africa, by contrast, the distinction between deprivation and expropriation has lost much of its significance. The *FNB* Court treated expropriations as a form of deprivation[3] and insisted that an impugned law, even where it clearly provided for the expropriation of property, first be tested for compliance with s 25(1). As *FNB* itself illustrates, a law that totally deprives the claimant of its property, without providing for compensation, is unlikely to survive the Court's test for arbitrariness.[4] From the point of view of the constitutionality of such a law, it matters little whether it is classified as providing for a deprivation of property that does not amount to expropriation, or as a law that provides for the expropriation of property. Similarly, a law that expressly provides for the expropriation of property subject to compensation, but which is not aimed at achieving 'a public purpose or in the public interest', is unlikely to provide sufficient reason for depriving the claimant of property, and therefore unlikely to survive constitutional scrutiny beyond the s 25(1) stage. The only situation in which a claimant might have an interest in persuading the court that the law being challenged provides for the expropriation of property rather than the arbitrary deprivation of that property is where it wishes the court to uphold the law, and to read in a requirement that the state pay at least some compensation (where

[1] *Pennsylvania Coal Co v Mahon* 260 US 393, 415-16 (1922).

[2] See Thomas Allen 'Commonwealth Constitutions and the Right Not to be Deprived of Property' (1993) 42 *ICLQ* 523. But see Tom Allen 'The Human Rights Act (UK) and Property Law' in Janet McLean (ed) *Property and the Constitution* (1999) 147, 151 (arguing that the distinction between expropriation and deprivation in Article 1 to the First Protocol on the European Convention on Human Rights is 'less important than it is in the USA' because compensation is not guaranteed in every case).

[3] *FNB* (supra) at para 57.

[4] Cf *Nhlabati v Fick* (supra) at paras 27-31 (law providing for the appropriaton of a grave without compensation found not to amount to an arbitrary deprivation of property). The case illustrates that where the property right affected forms a small part only of the claimant's overall estate, the non-payment of compensation may survive the test for arbitrariness.

none is provided) or more compensation or better structured compensation (where the essence of the complaint is that the amount, time and manner of the compensation is not just and equitable). Where, as in *FNB*, the purpose of the challenge is to have the law struck down, a finding that the law provides for the arbitrary deprivation of property is as good as (from the claimant's perspective) a finding that the law provides for expropriation and fails to meet the two additional requirements set by s 25(2).

The two leading South African decisions on the distinction between expropriation and other forms of deprivation of property are those in *Harksen v Lane NO*[1] and *Steinberg v South Peninsula Municipality*.[2] In *Harksen*, the Constitutional Court was asked to declare s 21(1) of the Insolvency Act[3] unconstitutional in terms of s 28(3) of the Interim Constitution, which guaranteed the payment of compensation for any expropriation of property. Section 21(1) of the Insolvency Act provides that:

> The additional effect of the sequestration of the separate estate of one or two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property ... of the spouse whose estate has not been sequestrated ... as if it were the property of the sequestrated estate, and to empower the Master or trustee to deal with such property accordingly. ...

Writing for the majority, Goldstone J assumed in favour of the appellant, without deciding, that the effect of this provision is that, on sequestration of an insolvent spouse's estate, 'full ownership in the solvent spouse's property did in fact pass to the trustee of the insolvent estate'.[4] Even if this assumption were correct, Goldstone J held, the appellant's property had not been expropriated. In South Africa, expropriation was generally understood to be 'the process whereby a public authority takes property (usually immovable) for a public purpose and usually against payment of compensation.'[5] Before a law could be said to provide for expropriation, it must be clear that the legislature intended that the public authority should *permanently* acquire the affected party's property for a public purpose.[6] Section 21(1) of the Insolvency Act did not provide for expropriation in this sense. Rather, it provided for the *temporary* divestment of the appellant's property, subject to proof of ownership.[7]

[1] 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 CC.
[2] 2001 (4) SA 1243 (SCA).
[3] Act 24 of 1936.
[4] *Harksen v Lane NO* (supra) at para 31.
[5] Ibid at para 32.
[6] Ibid at para 37.
[7] Ibid.

This decision has been criticised for laying down an inflexible rule that the temporary compulsory acquisition of property by the state can never amount to expropriation.[1] In the US Supreme Court's takings jurisprudence, by contrast, greater emphasis is placed on the economic impact of a law, and whether it is fair to expect the complainant to bear the burden of such impact without compensation.[2] On such an approach, the duration of the expropriation is not necessarily decisive.

Nevertheless, the general approach to the distinction between expropriations and other forms of deprivation in *Harksen* is likely to be followed in future cases. In short, a law may be said to provide for expropriation where, in addition to whatever other impact the law may have on the claimant's property, an organ of state acquires the property. To this must be added the important qualification that the effect of an expropriation may also be to transfer the property from the claimant to a third party, other than an organ of state, where the benefit thereby extended serves a 'public purpose' or is otherwise 'in the public interest'.[3]

In *Steinberg v South Peninsula Municipality* — a Supreme Court of Appeal decision handed down after *Harksen* — the appellant sought an order 'directing the respondent to take all steps necessary "to complete the expropriation process implemented in respect of", or, alternatively, to expropriate, certain immovable property of which she [was] the owner'.[4] The appellant had purchased a residential house that was affected by a road scheme. The scheme had been declared some twenty-five years prior to the purchase. But it had never been implemented. The appellant knew about the scheme when purchasing the house, but claimed that the respondent's continuing failure to implement it amounted to the 'constructive expropriation' of her property.[5] In the course of argument, direct reliance was placed on various decisions of the US Supreme Court in which that Court has elaborated its 'inverse condemnation' or 'regulatory takings' doctrine. In terms of this doctrine, a regulation that goes 'too far'[6] may in certain circumstances be regarded as an expropriation of property.[7]

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[1] See AJ van der Walt & Henk Botha 'Coming to Grips with the New Constitutional Order: Critical Comments on *Harksen v Lane NO*' (1998) 13 *SAPL* 17 and Theunis Roux 'Constitutional Protection of Property and Land Reform' *Annual Survey of South African Law 1997* 332, 333-4.

[2] See, for example, *Armstrong v United States* 364 US 40 (1960); *Penn Central Transportation Co v City of New York* 438 US 104 (1978); and Frank I Michelman 'Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) 80 *Harvard LR* 1165.

[3] See *Nhlabati v Fick* (supra) at para 32 (law authorising appropriation of grave on landlord's property by farmworker tenant assumed to be a '*de facto* expropriation of a servitude over the land concerned').

[4] *Steinberg* (supra) at para 1.

[5] Ibid.

[6] See *Pennsylvania Coal Co v Mahon* 260 US 392 415-16 (1922); *Penn Central Transportation Co v City of New York* (supra).

[7] See further *Mugler v Kansas* 123 US 623 (1887); *Pumpelly v Green Bay and Mississippi Canal Co* 80 US (13 Wall) 166 (1871); *Goldblatt v Town of Hempstead* 369 US 590 (1962); *Penn Central Transportation Co v City of New York* 438 US 104 (1978); *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982); *Keystone Bituminous Coal Association v De Benedictis* 480 US 470 (1987); *Nollan v California Coastal Commission* 483 US 825 (1987).

The significance of the Supreme Court of Appeal's decision in response to this argument is not so much the rule laid down — that 'advance notification of a possible intention' on the part of the state to expropriate the complainant's property does not in itself amount to expropriation[1] — but the Court's *obiter* remark that

> there may be room for the development of a doctrine akin to constructive expropriation in South Africa — particularly where a public body utilizes a regulatory power in a manner which, taken in isolation, can be categorized as a deprivation of property rights and not an expropriation, but which has the effect, albeit indirectly, of transferring those rights to the public body.

Although the Court went on to hold that it was not necessary to decide whether 'a doctrine of constructive expropriation can or should be developed in South Africa',[2] this remark is interesting for what it reveals about the Supreme Court of Appeal's preparedness, even after the Constitutional Court's decision in *Harksen*, to countenance a more complex conception of the distinction between expropriations and other forms of deprivation. *Steinberg* also raises the pertinent question of whether, after the decision in *FNB*, South African constitutional property law can be said to have moved closer towards, or further away from, what is sometimes ominously referred to as the 'spectre' of the US Supreme Court's regulatory takings jurisprudence.

For the reasons given in the introduction to this section, *FNB* has minimised rather than increased the likelihood that something akin to the US Supreme Court's regulatory takings doctrine will be adopted in South Africa.[3] The essential function performed by this doctrine in US takings law is to ensure that a law that has an adverse economic impact on the constitutional claimant should be treated as providing for expropriation where to do otherwise would be to impose a disproportionate burden on the claimant. After *FNB*, however, such a law is likely to be found to provide for the arbitrary deprivation of property, and would therefore be struck down as a violation of s 25(1), rendering the question whether it also provides for the constructive expropriation of property redundant.

[1] *Steinberg* (supra) at para 12.

[2] Ibid at para 9.

[3] For a (conceptually confused) contrary view, see Kevin Hopkins & Kate Hofmeyr 'New Perspectives on Property' (2003) 120 *SALJ* 48, 57-8. The flaw underlying the authors' argument in these pages is the assertion that the test for arbitrariness may produce a finding that the law under challenge provides for the expropriation of property. This is incorrect. The test for arbitrariness may produce at most a finding that the law provides for the arbitrary deprivation of property. Such a finding will terminate the constitutional inquiry, subject to the notional application of s 36. The question whether the law effects a regulatory taking or constructive expropriation of property is a separate question, which is less likely to arise after *FNB* because laws that are amenable to this type of interpretation will tend to be struck down as arbitrary deprivations of property rather than uncompensated expropriations.

46.8 Does The Expropriation Comply With Sections 25(2) and (3)?

A law that is found to provide for the expropriation of property must, in addition to the three requirements set by s 25(1), satisfy two further requirements. First, it must have been enacted 'for a public purpose or in the public interest'.[1] Second, it must provide for the payment of compensation: the amount, time and manner of payment of which must have been agreed or 'decided or approved by a court'.[2]

(a) 'For a public purpose or in the public interest'

Since all expropriations are to be treated as deprivations, and subjected first to the standard set by s 25(1), it is highly unlikely that a law that provides for the expropriation of property contrary to s 25(2)*(a)* will in fact be tested against this requirement. Logically, a law that does not serve a public purpose and is not in the public interest is unlikely to provide 'sufficient reason' for any deprivation of property it may authorise, and is therefore unlikely to pass the *FNB* test for arbitrariness. Conversely, laws that *do* pass that test are unlikely to be set aside under s 25(2)*(a)* because of the very broad power given to the state by this paragraph to expropriate property for a public purpose or in the public interest. It is difficult to conceive of a court finding that a law that did *not* permit the arbitrary deprivation of property was *not* enacted for a public purpose or in the public interest. The typical example of a law that would fall foul of s 25(2)*(a)* is a law enacted in pursuit of the interests of a single individual. But such a law would invariably be found to permit the arbitrary deprivation of property, and would thus be struck down before s 25(2)*(a)* was applied.

The fact that a law permits the expropriation of property for the purposes of transferring it to a third party (rather than the state) would not give rise to a finding of unconstitutionality under s 25(2)*(a)*, provided that the overall purpose of the law was to promote the public interest. For example, Chapter III of the Land Reform (Labour Tenants) Act[3] provides for the judicial expropriation and transfer of property from one private individual to another. The state at no point acquires the property thus expropriated. The entire scheme of expropriation provided for in the Act, however, is clearly in the public interest, and therefore not unconstitutional. In case there were any doubt about this, s 25(4)*(a)* of the Constitution expressly provides that 'the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources'.

[1] Section 25(2)*(a)*.
[2] Section 25(2)*(b)*.
[3] Act 3 of 1996.

(b) Just and equitable compensation

The second requirement imposed by s 25(2) is that a law that authorises the expropriation of property must provide for the payment of compensation. Barring an agreement between the state and the party affected, the amount and the time and manner of payment of compensation must be determined by a court of law. Section 25(3) provides that all three aspects of the compensation scheme must be 'just and equitable, reflecting an equitable balance between the public interest and the interests of those affected'. In assessing this requirement, the court is enjoined by s 25(3) to have 'regard to all relevant circumstances'. A non-exhaustive list of circumstances is thereafter provided as follows:

(a) the current use of the property;
(b) the history of the acquisition and use of the property;
(c) the market value of the property;
(d) the extent of direct state investment and subsidy in the acquisition and beneficial improvement of the property; and
(e) the purpose of the expropriation.

(i) *A just and equitable amount of compensation*

Ordinarily, a reference to just and equitable compensation in a constitution means market value compensation.[1] However, by identifying as issues relevant to the amount of compensation the extent of state investment and subsidy in the acquisition and improvement of the property,[2] the use to which the property is being put, and the history of its acquisition, the Constitutional Assembly clearly contemplated that compensation at less than market value could be awarded in appropriate cases under s 25(3). The Constitutional Court has not as yet been asked to consider this question. In *Khumalo v Potgieter*,[3] however, the Land Claims Court had occasion to interpret the constitutional compensation standard as incorporated in s 23(1) of the Land Reform (Labour Tenants) Act.[4] The Court held that just and equitable compensation should be assessed in two stages. First, the court must determine the market value of the property by using accepted valuation methods and principles, including the comparable sales method (where appropriate) and the so-called *Pointe Gourde* principle, which requires the court to disregard the effect of the scheme of expropriation on the value of the property.[5] After arriving at the market value, the court must next 'consider to what

[1] See A Eisenberg 'Different Formulations of Compensation Clauses' (1993) 9 *SAJHR* 412; G Erasmus (ed) *Compensation for Expropriation: A Comparative Study* Vol 2 (1990).
[2] Section 25(3)*(d)*.
[3] [2000] 2 All SA 456 (LCC) ('*Khumalo II*'). For the background to this case, see the Court's earlier judgment in *Khumalo v Potgieter* [2000] 1 All SA 24 (LCC).
[4] Supra. Section 23(1) provides that '[t]he owner of affected land or any other person whose rights are affected shall be entitled to just and equitable compensation as prescribed by the Constitution for the acquisition by the applicant of land or a right in land'.
[5] *Khumalo II* (supra) at paras 23-6.

extent the market value . . . must be adjusted according to the dictates of the other factors referred to in paragraphs *(a)*, *(b)*, *(d)* and *(e)* of section 25(3).'[1]

Given the range of factors in s 25(3), some of which are quantitative and others qualitative, it is hard to think how else the task of determining just and equitable compensation could have been approached. By definition, disputes about the quantum of compensation are disputes about rands and cents. Some method therefore has to be found of translating the rather vague criteria in s 25(3) into terms that are readily quantifiable. The method suggested by the Land Claims Court, of first determining the market value of the property according to accepted methods, and thereafter adjusting this value upwards or downwards according to the Court's sense of the equities of the matter, is a commonsense approach that should ultimately be endorsed by the Constitutional Court.

(ii) *Payment of compensation in a just and equitable manner*

Section 25(2) and (3) require that the manner of payment of compensation must also be just and equitable, reflecting 'an equitable balance between the public interest and the interests of those affected'. It is possible that a law could pass constitutional muster even though it provided for compensation in a form other than cash (for example, government bonds). The test would be whether the private interest in cash compensation was outweighed by the public interest in paying compensation in that other form. Even if that were the case, the overall manner of payment of compensation would have to be 'just and equitable' on the basis of the factors listed in s 25(3).

(iii) *Payment of compensation within a just and equitable time*

Like the amount and manner of payment of compensation, the time within which compensation is paid must be just and equitable. Ordinarily, prompt payment of compensation would have to follow an expropriation.[2] Sections 25(2) and (3) do, however, leave open the possibility of delayed compensation in circumstances where this is just and equitable. The presence or absence of such circumstances would have to be assessed by the court, taking into account the same factors that are relevant to the quantification of just and equitable compensation. For example, the use to which property was being put could be relevant to the time within

[1] *Khumalo II* (supra) at para 93. See also *Ex parte Former Highland Residents; In re: Ash v Department of Land Affairs* [2000] 2 All SA 26 (LCC) at paras 25-38 (applying the same method in assessing just and equitable compensation for the purposes of s 2(2) of the Restitution Act). This decision was cited with approval in *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) at para 23.

[2] Erasmus (ed) *Compensation for Expropriation: A Comparative Study* (supra).

which it was just and equitable that compensation be paid. If an owner were not using a particular property and did not intend to derive any material benefit from it in the immediate future, it might be just and equitable to delay the payment of compensation.

46.9 Is The Expropriation Justified Under Section 36?

Given the algorithmic[1] structure of the constitutional property clause inquiry as set out in *FNB*, the final stage of the inquiry will be reached in exceptional cases only.[2] A law that provides for the expropriation of property will first be tested against s 25(1), in which case s 36 will be applied in the first instance to justify an infringement of this provision. Only laws that are found *not* to violate s 25(1), or which are saved by s 36, are in principle subject to the discipline of s 25(2) and (3), and only then if they are found to provide for expropriation. This means that the final stage of the constitutional property clause inquiry applies in theory to laws of general application that do not provide for the (unjustifiable) arbitrary deprivation of property, but which are found to authorise the expropriation of property other than for a public purpose or in the public interest, and/or which fail to provide for the payment of just and equitable compensation. Very few such laws will survive constitutional scrutiny until the final stage. For the aforementioned reasons,[3] a law providing for the expropriation of property that is not aimed at achieving a public purpose or is not in the public interest will in all likelihood fail the arbitrariness test mandated by s 25(1). In the unlikely event that it survives constitutional scrutiny to the penultimate stage, it will be struck down for violating s 25(2)*(a)*. Thereafter, the state would be faced with the conceptually impossible task of having to justify, as being reasonable and justifiable in an open and democratic society, a law that, *ex hypothesi*, was enacted in pursuit of a non-public, private interest.[4] Similarly, a law that fails to provide for just and

[1] See De Waal et al *The Bill of Rights Handbook* (5th Edition, forthcoming, 2004) (supra) and the discussion at § 46.1 supra.

[2] *Nhlabathi v Fick* (supra) (s 36 applied to justify appropriation of grave without compensation in terms of s 6(2)(*d*A) of the Extension of Security of Tenure Act 62 of 1997).

[3] See § 46.7 supra.

[4] Cf Hopkins & Hofmeyr 'New Perspectives on Property' (supra) at 61-2. In support of their argument that s 36 may have meaningful application, the authors of this article posit the example of a law providing for compulsory community service for plastic surgeons in order to provide medical assistance to motor vehicle accident victims. Such a law would impose a disproportionate burden on plastic surgeons and would consequently be struck down at the s 25(1) stage. The question whether it served a public purpose or was in the public interest as required by s 25(2) would never arise. If the court made a mistake, and found that the law did not violate s 25(1), it would have to make two further mistakes before s 36 could have meaningful application. First, it would have to find that that such a law was not in the public interest, and, second, it would have to find that a law that was not in the public interest was reasonable and justifiable in an open and democratic society. To say, as these authors do, that, '[f]or as long as there are arguments available to both sides, there is a possibility that the court may find for the applicants' is equivalent to saying that a wrong argument may be right because courts sometimes make mistakes. Ibid at 61.

equitable compensation will only be reasonable and justifiable under s 36 where the adverse impact of the law is minimal in relation to the object sought to be achieved.[1]

46.10 LAND RIGHTS

Subsections (5), (6), (7) and (9) of s 25 confer certain rights to land. These rights are discussed in a separate chapter.[2]

[1] See *Nhlabathi v Fick* (supra) at para 35. In this case the Land Claims Court, applying s 36 after a finding that s 25(2) had been violated, upheld a law that granted a farmworker tenant the right to bury a relative on land belonging to someone else. The impugned provision was found to be justified, *inter alia*, because 'the right [expropriated did] not constitute a major intrusion into the property rights of the landowner.' Ibid.

[2] See Andra Eisenberg 'Land' in Chaskalson et al *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Ch 40; Dennis Davis & Julia Kupka 'Land' in Chaskalson et al *Constitutional Law of South Africa* (2nd Edition, forthcoming, 2004) Ch 46.

47 Children's Rights

Adrian Friedman, Angelo Pantazis & Ann Skelton

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47.1 INTRODUCTION[1]

Three observations are worth making at the outset because they drive so much of the analysis that follows. First, the provisions of FC s 28 — the primary source of children's rights — are derived from a number of international instruments. The foundational text is the Convention on the Rights of the Child ('CRC'). The CRC was ratified by South Africa in June 1995. The African Charter on the Rights and Welfare of the Child ('ACRWC'), a regional instrument that was ratified by South Africa in January 2000, also informs the interpretation of FC s 28.[2]

Second, although it is the primary focus of this chapter, FC s 28 is not the only section that confers constitutional rights on children.[3] Several cases illustrate this point.[4] In *Petersen v Maintenance Officer & Others*[5] the High Court considered the common-law rule that did not allow an extra-marital child to claim maintenance from the paternal grandparents (but did allow claims from the maternal grandparents) whilst children born within a marriage could claim from either set of grandparents. The court found discrimination on the ground of birth (in contravention of FC s 9(3)) a violation of the child's dignity (protected by FC s 10), as well as an infringement of the child's best interests in terms of FC s 28(2). The High

[1] For general discussions of FC s 28 or its predecessor, s 30 of the Constitution of the Republic of South Africa, Act 200 of 1993 ('Interim Constitution' or 'IC'), see A Cockrell 'The Law of Persons and the Bill of Rights' in *Bill of Rights Compendium* (Service Issue 13, October 2003) paras 3E9-12; J Sloth-Nielsen 'Children' in D Davis & H Cheadle (eds) *The South African Constitution: The Bill of Rights* (2nd Edition, 2006) 421; A Skelton & P Proudlock 'Interpretation, Objects, Application and Implementation of the Children's Act' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (OS, 2007) 1-8 — 1-10.

[2] Although the ACRWC bears striking similarity to the CRC, it contains small but important differences. See, for example, *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC), 2007 (2) SACR 539 (CC), 2007 (12) BCLR 1312 (CC)('*S v M*') at para 31 (the Court identifies a specific provision relating to the importance of avoiding imprisonment of mothers, which appears in article 30(1) of the ACRWC, but does not have a counterpart in the CRC). See, further, B Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A Zero-Sum Game?' (2008) *SAPR/PL* 1.

[3] See B Bekink & D Brand 'Constitutional Protection of Children' in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 177-181; J M Kruger 'The Protection of Children's Rights in the South African Constitution: Reflections on the First Decade' (2007) 70 *THRHR* 239, 241-245.

[4] See, for example, *Bhe & Others v Magistrate Khayelitsha & Others (Commission for Gender Equality as Amicus Curiae); Shibi & Sithole and Others; South African Human Rights Commission & Another v President of the Republic of South Africa & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('*Bhe*') at paras 95 and 53 (The Court found that the principle of male primogeniture discriminated unfairly against children on the grounds of sex and of birth by preventing them from inheriting the deceased estate of their father. The law also infringed the children's right to dignity. The case also demonstrates the importance of the international instruments: Langa DCJ remarked that the importance of not discriminating against children on the grounds of sex is acknowledged in the African Charter on the Rights and Welfare of the Child. Actually this recognition is included in the preambles of both the African Charter and the UN Convention; *Khosa v Minister of Social Development; Mahaule v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC)('*Khosa*') at para 78 (The applicants were permanent residents who sought grants provided for under the Social Assistance Act for their children who had been born in South Africa. The Court found the impugned provisions to be unconstitutional, as refusing the child support grant or care dependency grant would amount to discrimination against the children on the basis of their parents nationality.) For a detailed discussion, see L Janse van Rensburg 'The *Khosa* Case — Opening the Door for the Inclusion of all Children in the Child Support Grant?' (2005) 20 *SAPR/PL* 102.)

[5] 2004 (2) SA 56 (C), 2004 (2) BCLR 205 (C), [2004] All SA 117 (C)('*Petersen*').

Court accordingly developed the common law to allow the extra-marital child's claim against the paternal grandparents. Similarly, in *Christian Lawyers South Africa v Minister of Health & Others (Reproductive Health Alliance as Amicus Curiae)* the court was concerned with the constitutionality of a law that permitted girls below the age of 18 years to choose whether to terminate their pregnancies — provided that they possessed the intellectual and emotional capacity to grant informed consent.[1] The court rejected the challenge on the grounds that FC ss 12(2)(a) and (b),[2] 27(1)(a),[3] 10[4] and 14[5] apply to 'everyone', including girls under the age of 18 years, and that FC s 9(3) prohibits discrimination on the basis of age. Although this chapter focuses on the rights that are unique to children, it should always be kept in mind that children are protected by most of the rights in FC Chapter 2.

Third, children's rights can be broadly categorised as rights of protection and rights of autonomy. Childhood is a process of development. This gradual process of increasing capacity married to a balanced theory of children's rights should witness the courts' use of a combination of rights to protect their self-determination.[6] FC s 28(1) encompasses rights that are predominantly protective in nature,[7] whilst FC s 28(2) is flexible enough to include rights to autonomy. *MEC for Education, KwaZulu Natal v Pillay* indicates the willingness of courts to accept children's rights to autonomy, particularly for adolescent children.[8] The *Pillay* Court found that the wearing of a nose stud by a 16 year old girl, Sunali, was an expression of

[1] 2005 (1) SA 509 (T), 2004 (10) BCLR 1086 (T)('*Christian Lawyers (2004)*').

[2] FC s 12(2)*(a)* and *(b)* read: 'Everybody has the right to bodily and psychological integrity, which includes the right — *(a)* to make decisions concerning reproduction; *(b)* to security in and control over their body.'

[3] FC s 27(1)*(a)* reads: 'Everyone has the right to have access to — *(a)* health care services, including reproductive health care'.

[4] FC s 10 reads: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

[5] FC s 14 reads in relevant part: 'Everyone has the right to privacy'.

[6] S Human 'The Theory of Children's Rights' in CJ Davel (ed) *Introduction to Child Law* (2000) 164. See further JM Kruger 'The Philosophical Underpinnings of Children's Rights Theory' (2006) 69 *THRHR* 436 (The author makes the point that childhood is a process of continuous change which takes place as the child matures. Ibid at 450-451. Children have rights that need to be protected long before they have the capacity to exercise their rights to autonomy. In the author's view a 'Gillick-competency test' — as devised in the English House of Lords case of *Gillick v West Norfolk & Wisbech Area Health Authority & the DHSS* [1985] 3 All ER 403 — is the most appropriate answer to what the acceptable limits of self-determination are.)

[7] FC s 28(1)*(h)* provides a right for children to be legally represented in civil matters is something of an exception, because although it has been used by the courts as a protective measure in the appointment of curators *ad litem* (*Du Toit & Another v Minister of Welfare & Population Development & Others (Lesbian & Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC); *S v M* (supra); *AD & Another v DW & Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC), 2008 (4) BCLR 359 (CC)('*AD v DW*') it has also been interpreted as giving children rights to autonomy (*Soller NO v G & Another* 2003 (5) SA 430 (W)('*Soller NO*'); *Ex Parte Van Niekerk & Another : In re Van Niekerk v Van Niekerk* (Unreported, Transvaal High Court Case Number 34054/03, 20880/02, 13 July 2004) ('*Ex Parte Van Niekerk*'). This issue will be discussed later in the chapter.

[8] 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC)('*Pillay*'). See also *Antonie v Governing Body, Settlers High School & Others* 2002 (4) SA 738 (C)('*Antonie*')(A Rastafarian 15 year old girl brought an application in her own name to challenge the school governing body's decision to find her guilty of serious misconduct for wearing her hair in dreadlocks which she covered with a cap. The Cape High Court set aside the decision of the school governing body, finding that it had not given adequate recognition to the principles of the Constitution, including the child's rights to freedom of expression.)

her Hindu culture and religion, that the girl sincerely identified with the practice and that the practice could be reasonably accommodated by the school granting an exemption to its code of conduct. The Constitutional Court further remarked that children of Sunali's age should increasingly be taking responsibility for their own actions and beliefs.[1] This conception of autonomy animated *Christian Lawyers (2004)*. In *Christian Lawyers (2004)* the High Court found that the Termination of Pregnancy Act,[2] which was based on capacity for informed consent rather than on a specific age, promoted the best interests of the child because it was flexible and was able to accommodate the individual position of a girl based on her intellectual, psychological and emotional maturity.[3]

47.2 Name and Nationality

(a) The right to a name

The right to a name is primarily enforceable against the state. It imposes a duty on the state to recognise and to register the child's name at birth.[4] Theoretically, the right could be enforced against parents who either fail to name their children or to take the necessary steps to facilitate recognition and registration. In *Hadebe v Minister of Home Affairs*, the mother of a child applied to court for an order directing the respondent to amend the details of her child's birth certificate after repeated attempts over 18 months had failed to get the department's officials to make the amendment.[5] The High Court agreed:

> [i]t is clear that if a child has, as is provided for in section 28 (1)(a) of the Constitution 'the right to a name from birth', the official of the state who is charged with doing those things that enable his or her name to be recorded must have a correlative duty to facilitate the registration of that name in the records of the state: certainly it is no part of the function of that official to place technical difficulties in the way of such registration.[6]

(b) The right to a nationality

In order to understand the right of a child to a nationality, it is important to distinguish between nationality and citizenship. The concept of 'citizenship' concerns the rights and the obligations of citizens and the state. Its effect is internal.[7]

[1] *Pillay* (supra) at para 56.
[2] Act 92 of 1996.
[3] *Christian Lawyers* (2004) (supra) at 528 H. See also H Kruger 'Traces of *Gillick* in South African Jurisprudence: Two Variations on a Theme' (2005) 46(1) *Codicillus* 1.
[4] See *Marckx v Belgium* 2 EHRR 330 (1980) (Sets out the position in the European Union.)
[5] (Unreported Durban and Coast Local Division Case Number 15715/05, 14 December 2006).
[6] Ibid.
[7] See R Keightley 'The Child's Right to a Nationality and the Acquisition of Citizenship in South African Law' (1998) 14 *SAJHR* 411, 412-3; J Dugard *International Law: A South African Perspective* (2nd Edition, 2000) 209. See also *Kuanda v President of the RSA* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at para 240 (O'Reagan J, dissenting).

'Nationality' concerns the connection between the state and the individual in the international arena.[1] The effect of such 'diplomatic protection' is external.[2]

There is no existing South African authority on the correct reading of FC s 28(1)*(a)*. There are two possible interpretations of the section.

First, the concepts of 'nationality' and 'citizenship' could be indistinguishable. The provisions of the South African Citizenship Act 88 of 1995 would then help illuminate the meaning of this subsection. If nationality means citizenship, then the Citizenship Act would be one useful source for determining the scope of the right. This is so because the Final Constitution provides that an Act of Parliament must provide for the acquisition, loss and restoration of citizenship.[3] The Final Constitution therefore anticipates that the details of the right to citizenship may be provided in legislation. If citizenship and nationality is the same thing, the details provided by the Citizenship Act would apply equally to the right to nationality.

This reading is strained at best. The distinction between nationality and citizenship is such an integral part of — and has such a clear meaning in — international law that South African jurisprudence would be ill-served if the two concepts were collapsed. Moreover, FC s 39(1)*(b)* enjoins the courts to consider international law when interpreting the Bill of Rights.

The better reading is one in which the concept of nationality is kept distinct from the concept of citizenship. On such a reading, FC s 28(1)*(a)* grants a right to nationality only. Because FC s 28 applies to all children inside South Africa, regardless of where they were born, the section simply guarantees that children resident in South Africa cannot be rendered stateless.[4]

One caveat is in order with regard to this preferred reading. A decision of a South African court on the question of foreign nationality is a legal fiction.[5] No foreign court is bound by the pronouncement of our courts on the question of the nationality of foreigners. Therefore, there seems little that the South African courts or the state could do to promote this right in respect of nationals of other countries. This problem is compounded by the fact that, for the purpose of diplomatic protection, nationality is an objective concept. Each state must determine which people are its nationals.[6] A national is considered an extension of the state itself. As such, a person is either objectively a national or not for the purpose of diplomatic protection.[7] So while any state can declare a person to be its national, such a declaration would have no practical effect if the person did not satisfy the objective test for nationality. The status of being a national in international law has no relevance other than in the context of diplomatic protection.

It would therefore not be entirely useless for the section to be interpreted in such a way as to compel the South African state to grant nationality to stateless

[1] See Dugard (supra) at 208.

[2] An injury to a national of a state is considered an indirect injury to the state itself, incurring state responsibility by the injuring state to the injured state. See Dugard (supra) at 298.

[3] FC s 3(3).

[4] See Keightley (supra) at 424.

[5] Ibid at 421.

[6] Article 1 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930.

[7] *Nottebohm (Liechtenstein v Guatemala) 2nd Phase* 22 ILR 349, 359 (1955)('*Nottebohm*').

children within its borders. However, such children should satisfy the international law standard to qualify as South African nationals.[1]

47.3 Family Care or Parental Care, or Appropriate Alternative Care[2]

(a) The meaning of 'family or parent'

Section 30(1)*(b)* of the Interim Constitution guaranteed the right of every child 'to parental care' simpliciter. FC s 28(1)*(b)* is expressly more extensive. Parental care has been interpreted in the case law to refer not only to natural parents, but also to adoptive parents, foster parents and step-parents.[3]

The court in *SW v F* held that the right to parental care was not a bar to adoption 'where the care of the natural parents was lacking or inadequate'.[4] In *Heystek v Heystek* the court ordered a husband to pay maintenance *pendente lite* to his wife that would include the maintenance of her children — his stepchildren — even though he did not have a duty under the common law or statute to support the children.[5] The court did not need to rely on the Final Constitution as it did to reach its decision. The parties were married in community of property and so the wife's debts were also the husband's debts. The court's second, constitutional, basis for its decision was that the constitutionalisation of the best interests of the child standard in FC s 28(2) required a broad reading of parental care. The exact rationale for this conclusion is unclear. The court does not say whether the section imposes a direct duty on step-parents to support stepchildren because they are parents of a particular 'Kind' or because this 'legal' relationship would be in children's best interests.

Though such a gloss on the court's holding may be a matter for debate, we should be inclined to interpret parental and family care in the light of the functions that parents and family perform and to recognise the many types of family that actually exist in South Africa. The courts have generally followed this line of argument. In *Jooste v Botha,* 'family' in FC s 28(1)*(b)* was said to include the extended family.[6] In *J & Another v Director General, Department of Home Affairs, & Others*,[7] the court a quo interpreted the children's right to family and parental care (jointly) as demanding that the first applicant, as their genetic mother, be recognised by the law as their parent where the children had been born to her lesbian partner,

[1] International law requires a 'real and effective link' between the national and the state invoking diplomatic protection. *Nottebohm* (supra) at 360.

[2] The most useful foreign jurisprudence here is the interpretation of art 8 of the European Convention on Human Rights (1950). Article 8 protects the right of everyone to respect for their family life.

[3] See *SW v F* 1997 (1) SA 796 (O), 802F-H; *Heystek v Heystek* 2002 (2) SA 754 (T), 757C-D, [2002] 2 All SA 401 (T) ('*Heystek*'); *Du Toit & Another v Minister of Welfare and Population Development & Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC) at para 18.

[4] *SW v F* (supra) at 799B-C.

[5] *Heystek* (supra) at 757C-D.

[6] 2000 (2) SA 199 (T), 208D-E, 2000 (2) BCLR 187 (T) *('Jooste*').

[7] 2003 (5) SA 605 (D) at para 22 ('*J & Another*').

the second applicant, as result of artificial insemination, using the oocytes of the first applicant and the sperm of an anonymous male donor. In terms of s 5 of the Children's Status Act,[1] the second applicant alone was the legal parent. The court proceeded to read in to s 5 those terms that would afford the first applicant appropriate recognition and relied on various grounds of discrimination in terms of the equality provision in granting this relief.[2] In *V v V,* the court rejected an argument that a mother's lesbianism should exclude her from securing the custody of her children by, in part, relying on FC s 28(1)*(b)*.[3] The court refused to see her sexual orientation as something that would interfere with her status as parent or a part of a family.

In *Jooste v Botha,* the three kinds of care in FC s 28(1)*(b)* were defined rigidly: *(a)* family care is where the child is part of a family, whether nuclear or extended; *(b)* parental care is where there is no family and only a single parent; *(c)* alternative care is where the child is removed from the family environment.[4] The court must be incorrect in claiming that a single-parent household is not a family or that two parents provide family care and not parental care. Of greater moment is that the *Jooste* court found the common denominator for the three types of care to be the child's right to be in the care of a custodian. This interpretation construes FC s 28(1)*(b)* far too narrowly. A grandparent is a member of the extended family who may not have custody and yet still have the duty to support the child.[5] A non-custodial parent, such as a parent who loses custody upon divorce, remains a parent with parental duties. The *Allsop v McCann* court extended the definition of parental and family care a step further when it found that the constitutional duty of a non-custodial parent to provide parental care to his legitimate child under FC s 28(1)*(b)* was said to include the provision of religious instruction.[6]

The facts of *Jooste* make the flaws in the definitions it proffers that much more obvious. In *Jooste,* an 11-year-old boy born out of wedlock sued his father for delictual damages for *injuria* and emotional distress based on his father's failure to acknowledge him and to love him. (No claim for maintenance or support was made in the instant case.) One of the legal foundations for the claim was the right to parental care in the Final Constitution. The court held that since a parent must be a custodian, the child's non-custodian parent fell outside the ambit of the

[1] Act 82 of 1987.

[2] The Constitutional Court also amended s 5 to make it constitutionally compliant, but did not rely on s 28(1)*(b)* of the Constitution to reach its conclusion. See *J & Another v Director General, Department of Home Affairs, & Others* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC).

[3] 1998 (4) SA 169 (C), 190B-C.

[4] *Jooste* (supra) at 208D-G.

[5] But note that in *Petersen* the court did not use the right to family care to found a duty on paternal grandparents to support their extra-marital grandchild (the court did not consider the applicability of this right). The High Court relied on the rights to equality, dignity and consideration of the child's best interests.

[6] 2001 (2) SA 706, 713F-H (C).

provision.[1] But surely the child's right to maintenance by his father is a right to parental care? The object lesson of *Jooste* is that the best way to define family or parental care is not in terms of a narrow set of criteria, but in terms of generous and flexible standards. Different parents or family members may owe different degrees of care to a child. The child has the right to the care of, and to contact with, *both* parents. This general norm can create serious difficulties where the parents do not live together, particularly where they have re-married and new families have been formed. Such difficulties are on display in *B v M*.[2] The appellant, the custodian mother of two children from her first marriage, had been prevented by the High Court from relocating from Johannesburg to Cape Town with her second husband because the court had found that it would not be in the interests of the children to be separated from their father: the respondent. The appellant was therefore required to live apart from her new husband, and their baby was consequently separated from his own father. The court found that it was not in the interests of any of the children to be forced into this kind of separation, ordered that the 'nucleur family' be permitted to relocate as a unit, and granted ancillary orders to ensure ongoing contact between the respondent and his children. Satchwell J expressly mentioned that the Final Constitution recognises a right to family or to parental care, and that our courts should be alert to preserve and to protect family units and not to initiate or allow actions or policies which could cause permanent dislocation.[3]

With regard to children and the extended family, the High Court held in *Kleingeld v Heunis & Another*[4] that a grandparent has locus standi to apply for contact with grandchildren, but has no inherent right to contact. A court may grant such contact where there are grounds indicating that it is in the best interests of the child. The court, citing *B v S*,[5] reiterated that it is the child who has an inherent right to contact with family members. As there was no evidence to show that such contact

[1] *Jooste* is authority for the proposition that the extra-marital child does not have a constitutional right to parental care by its father. The leading constitutional case on the issue of the relationship between the extra-marital child and its father is *Fraser v Children's Court, Pretoria North, & Others* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC). The Court found that s 18(4)*(d)* of the Child Care Act 74 of 1983 to be unconstitutional because it required the mother's consent alone, and not the father's, to the adoption of the extra-marital child. The basis for this finding was the equality provision. The Court did not directly consider the children's rights section: but the best interests of the child clearly informed its thinking. In *Jooste*, the second reason that the Court held that the Final Constitution did not create the obligation claimed against the father was that the law will not attempt to enforce the impossible — love. *Jooste* (supra) at 209G-H.

[2] [2006] 3 All SA 172 (T); 2006 (9) BCLR 1034 (W).

[3] Ibid at para 170. See also *F v F* 2006 (3) SA 42 (SCA) [2006] 1 All SA 571 (SCA)('*F v F*')(The SCA dismissed an appeal by a custodian mother against a refusal of permission to relocate to England with her daughter. The Court stated that caution must be exercised that custodian parents should not be prevented from pursuing their lives and careers, especially as differential treatment between custodial and non-custodial parents may often result in gender discrimination. Nevertheless, on the facts of the case the court found that the relocation was not in the best interests of the child as it would separate her from her non-custodian father with whom she had a close relationship.)

[4] 2007 (5) SA 559 (T).

[5] 1995 (3) SSA 571 (A). See also *Townsend-Turner & Another v Morrow* 2004 (2) SA 32 (C), [2004] 1 All SA 235.

(which was objected to by the child's parents) would be in the best interests of the children, the court dismissed the application.

The Children's Act has codified the common law regarding parental authority. It has reconceptualised them as 'parental responsibilities and rights': (a) to care for the child; (b) to maintain contact with the child; (c) to act as guardian of the child; and (d) to contribute to the maintenance of the child.[1] These responsibilities and rights are acquired automatically and are shared by biological mothers and married fathers, whilst unmarried fathers only acquire such responsibilities automatically in certain specified circumstances.[2] Once such responsibilities and rights are acquired, they must be exercised in accordance with the best interests of the child.

(b) The purposes of FC s 28(1)*(b)*

FC 28(1)*(b)* has three purposes.

FC s 28(1)*(b)* is aimed at the preservation of a healthy parent-child relationship, and guards against intrusions of the family environment by unwarranted executive, administrative and legislative acts. To some extent it fulfils the purpose of a 'right to family life' which was excluded from the Final Constitution.[3] But it does so from a child-centred rather than a parent-centred perspective.[4] For example, the provision operated to protect the family from the state in *Patel & Another v Minister of Home Affairs & Another*.[5] The *Patel* court held that in deciding whether to deport the second applicant from South Africa in terms of the Aliens Control Act,[6] the right of his children to family or parental care had to be taken into account.

In *S v M*, the Constitutional Court found that FC s 28(1)*(b)* read with FC s 28(2) requires the law to make the best possible efforts to avoid, where possible, any breakdown of family life or parental care that may put children at risk.[7] The Court

[1] Act 38 of 2005 s 18(2). This section came into operation on 1 July 2007.

[2] Children's Act s 21. The section came into operation on 1 July 2007. The Children's Act also allows for parental responsibilities and rights to be shared with other persons by way of an agreement in terms of s 22.

[3] J Sloth-Nielsen asserts that the SA Constitution deliberately did not embrace a 'right to family life'. 'Children' in D Davis & H Cheadle (eds) *The South African Constitution: The Bill of Rights* (2nd Edition, 2006) 511. This failure was raised in *Ex Parte Chairperson of the Constitutional Assembly In Re Certification of the Constitution of the Republic of South Africa Act, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC). The Court found that the absence of this right did not preclude certification because it allowed for flexibility in the recognition of different family forms in a diverse society. Despite the non-inclusion of the right to family life, such a right has been recognised in *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC); *Booysen & Others v Minister of Home Affairs & Another* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC).

[4] The courts have had a tendency to interpret the child's right to family or parental care in a parent-centred manner. See M Pieterse 'Reconstructing the Private/Public Dichotomy? The Enforcement of Children's Constitutional Social Rights and Care Entitlements' (2003) *TSAR* 1, 14-16; E Bonthuys & T Mosikatsana 'Law of Persons and Family Law' (2000) *Annual Survey of SA Law* 128, 152-153. See also *B v S* 1995 (3) SA 571 (A); *T v M* 1997 (1) SA 54 (A) and *Jooste*. However, a child-centred jurisprudence is evident in a number of cases. See *Heystek v Heystek* (supra); *F v F* (supra); and *S v M* (supra).

[5] 2000 (2) SA 343, 350E-F (D).

[6] Act 96 of 1991.

[7] *S v M* (supra) at para 20.

concluded that, when sentencing a primary-care giver, a sentencing court has a responsibility to consider the effect that imprisonment will have on the children's right to family and parental care. Justice Sachs wrote that the impact imprisonment would have on any dependent children's right to care required a sentencing court to give specific and well-informed attention to ensuring that, given the legitimate range of choices in the circumstances, it imposed the punishment least damaging to the interests of the children.[1]

Second, it requires that care of a certain quality be given to all children.

Third, it identifies the parties who must furnish such care. In the first place, the duty falls on parents and other family members. The state's responsibility in this regard is to ensure that there are legal obligations to compel parents (and family) to fulfil their responsibilities in relation to their children. Hence, legislation and the common law impose obligations upon parents to care for their children.[2]

In the absence of such care, such as where the child has been removed from the family, the state has a duty to provide appropriate care. What is the position where the child lives with its parents or family but they are too poor to provide the child with adequate care? A literal reading of FC s 28(1)*(b)* indicates that the child would not be entitled to state support in terms of its provisions. The Constitutional Court gave the section such an impoverished reading in *Government of the Republic of South Africa v Grootboom*.[3] The Final Constitution cannot possibly contemplate that a child is entitled to adequate care when its family can provide it or when it is in the state's care, but not when the child is still with its family and the family is unable to provide proper care.[4]

47.4 Basic Nutrition, Shelter, Basic Health Care and Social Services

(a) Shelter defined

The Constitutional Court has been criticised for its failure to define the minimum core content of those socio-economic rights that have seized the court.[5] Instead of assessing the content of the right in question, the Court has simply asked whether the state had penned a 'reasonable' plan to realise a particular right.[6] A partial exception appears in that part of *Government of the Republic of South Africa v Grootboom* that deals with children's rights. This aspect of the judgment turns on

[1] Ibid at para 33. See also *S v Kika* 1998 (2) SACR 428 (W); *Howells v S* [1999] 2 All SA 233 (C).

[2] *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 75 ('*Grootboom II*'). See also *Bannatyne v Bannatyne (Commission for Gender Equality, as amicus curiae)* 2003 (2) SA 363 (CC), 2003 (2) BCLR 11 (CC) at para 24.

[3] *Grootboom II* (supra) at paras 76-7. See § 47.4 infra.

[4] For a similar criticism of *Grootboom II*, see M Pieterse 'Reconstructing the Private/Public Dichotomy? The Enforcement of Children's Constitutional Social Rights and Care Entitlements' (2003) *TSAR* 1. In any case, the state is committed to providing all needy children with child care grants.

[5] See D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence' (2003) 19 *SAJHR* 1.

[6] Ibid at 9-10.

the definition of shelter in s 28(1)*(c)*. As a result, the Court could not avoid an analysis of the content of that part of the right.

The structure of FC s 28(1)*(c)* makes the act of defining 'shelter' less than straightforward. In terms of FC s 28(1)*(c)*, every child has a right 'to basic nutrition, shelter, basic health care services and social services'. The insertion of the word 'basic' before 'nutrition' and 'health care', but not before 'shelter', led to a significant difference of opinion between the court a quo[1] and the Constitutional Court on the meaning of the section.

Unlike FC s 26, which entrenches the right to housing, and FC s 27, which entrenches the rights to health care, food, water and social security, FC s 28(1)*(c)* does not give any indication in its text that the rights are limited by the resources available to the state. As a result, the prevailing view prior to *Grootboom* was that FC s 28(1)*(c)* could be used to raise the standard of living in many communities with greater alacrity than FC s 26 or s 27.[2] Indeed, the applicants in *Grootboom* made this very argument. In the Cape High Court, the applicants argued that the children in their community were entitled to basic shelter — something, concrete, even if less substantial than the right to housing in FC s 26. Moreover, since it was not in their interests to be separated from their parents, their parents should be accommodated as well.

The state argued that the ordinary definition of the word 'shelter' means a 'place of temporary lodging for the homeless poor'.[3] The 1996 amendment to the Child Care Act defines shelter as 'any building or premises maintained to used for the reception, protection and temporary care of more than six children in especially difficult circumstances'.[4] According to the state, FCs 28(1)*(c)* refers only to a 'place of safety' used to house children without parents or removed from their parents. It follows that no child has a right to be housed with her parents.[5]

Davis J, however, considered the reasoning of the state to apply more appropriately to FC s 28(1)*(b)*. FC s 28(1)*(b)* contains the right to family care 'or to appropriate alternative care when removed from the family environment'. The definition of 'shelter' in the Child Care Act would seem therefore to apply to what is envisaged in FC s 28(1)*(b)*. Concerning the ambit of FC s 28(1)*(c)*, Davis J wrote:

> If a child's right to shelter in terms of s 28(1)*(c)* implies that the right exists only in terms of being housed in a state institution, then it would not necessarily offer a significantly different right to that provided for in terms of s 28(1)*(b)*. Accordingly s 28(1)*(c)* appears to provide for a right to be protected from the elements in circumstances where there is no need to remove such children from their parents.[6]

The court reasoned that, notwithstanding the omission of the word 'basic' before 'shelter', the ordinary meaning of the word suggests that it offers something short

[1] *Grootboom v Oostenburg Municipality* 2000 (3) BCLR 277 (C) ('*Grootboom I*').

[2] P de Vos 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution' (1997) 12 *SAJHR* 67, 87-8, 93; De Waal et al (supra) at 412; Cockrell (supra) at para 3E-13; E de Wet *Constitutional Enforceability of Socio-Economic Rights* (1996) 105-6.

[3] *Grootboom I* (supra) at 287E.

[4] Act 74 of 1983 (amended by Act 96 of 1996).

[5] *Grootboom I* (supra) at 287F.

[6] Ibid at 287H-288A.

of the adequate housing contemplated in FC s 26. In the event that parents are unable to provide 'shelter' for their children, FC s 28(1)*(c)* imposes an obligation on the state to do so.[1]

Without this understanding of the meaning of shelter, the court a quo could not have found as it did. If the omission of the word 'basic' implied that the child's right to shelter meant a right to adequate housing, then the state would be subject to immense budgetary pressure. No court could impose an unqualified obligation on the state to provide housing to children on demand. As a result, Davis J adopted the view that the 'shelter' contemplated by FC s 28(1)*(c)* must be rudimentary. In this respect, the reasoning of the court a quo in relation to shelter is consistent with the view that FC s 28(1)*(c)* is not subject to progressive realisation.

Yacoob J, writing for the Constitutional Court, adopted the opposite view on the meaning of shelter:

> I cannot accept that the Constitution draws any real distinction between housing on the one hand and shelter on the other, and that shelter is a rudimentary form of housing. Housing and shelter are related concepts and one of the aims of housing is to provide physical shelter. But shelter is not a commodity separate from housing. There is no doubt that all shelter represents protection from the elements and possibly even from danger. There are a range of ways in which shelter may be constituted: shelter may be ineffective or rudimentary at the one extreme and very effective and even ideal at the other. The concept of shelter in section 28(1)*(c)* is not qualified by any requirement that it should be 'basic' shelter. It follows that the Constitution does not limit the concept of shelter to basic shelter alone. The concept of shelter in section 28 (1)*(c)* embraces shelter in all its manifestations. However, it does not follow that the Constitution obliges the state to provide shelter at the most effective or the most rudimentary level to children in the company of their parents.[2]

This conclusion is subject to two criticisms. First, it ignores the use of the term 'adequate housing' in FC s 26 and 'shelter' in FC s 28(1)*(c)*. The drafters' choice of varying terminology suggests that the two concepts have different extensions. Second, it ignores the ordinary understanding of the word 'shelter' as reflected in most dictionaries.[3] Of course, a court is not bound by dictionary definitions. However, in this case they provide compelling evidence of the common understanding of the difference between the two terms.

Prior to *Grootboom*, there were essentially three viable interpretations of the section: (1) the section provides children with a directly enforceable claim to shelter, which is the same as housing, with or without their parents; (2) the section provides children with a directly enforceable claim to shelter, something less that housing, with or without their parents; (3) The section provides children with a

[1] *Grootboom I* (supra) at 288B.

[2] *Grootboom II* (supra) at para 73.

[3] In the court a quo, the respondent pointed to the *Shorter Oxford Dictionary*: shelter is defined as a 'structure affording protection from rain, wind or sun; any screen or place of refuge from the weather. A place of temporary lodging for the homeless poor.' *Grootboom I* (supra) at 287E. *Chambers Twentieth Century Dictionary* defines shelter as: a 'shielding or screening structure, esp against weather: a place of refuge, retreat or temporary lodging in distress.'

claim to shelter, which is the same as housing, to be supplied progressively by the state.[1]

Some academics had hoped for the adoption of the first definition.[2] The third definition was, perhaps, the least expected, but the one ultimately chosen by the Constitutional Court.

(b) Progressive realisation

It is obvious from the three options delineated above that while (1) would impose less of a burden on the state than (2), there would be a burden nevertheless. Indeed, the order of Davis J in the court a quo required that the children of the applicants be provided with shelter, along with their parents, until such time as the parents could provide shelter themselves.[3] The basis for this order was the court's view that:

> [t]he wording of section 28 differs from that of section 26 in that there is no similar qualification [that the right is subject to the resources of the state] as appears, for example, in section 26(2). Section 28(1)*(c)* is drafted as an unqualified constitutional right. Accordingly the question of budgetary limitations is not applicable to the determination of rights in section 28(1)*(c)*.[4]

By contrast, the Constitutional Court held:

> The obligation created by section 28(1)*(c)* can properly be ascertained only in the context of the rights and, in particular, the obligations created by sections 25(5), 26 and 27 of the Constitution. Each of these sections expressly obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the rights with which they are concerned. Section 28(1)*(c)* creates the right of children to basic nutrition, shelter, basic health care services and social services. There is an evident overlap between the rights created by sections 26 and 27 and those conferred on children by section 28. Apart from this overlap, the section 26 and 27 rights are conferred on everyone including children while section 28, on its face, accords rights to children alone. This overlap is not consistent with the notion that section 28(1)*(c)* creates separate and independent rights for children *and their parents* (emphasis added).[5]

It is clear that the Constituional Court, rightly or wrongly, was determined to avoid the political implications, the attendant cost and future interpretive difficulties of Davis J's order.[6] However, if the sections are read literally, the grounds for rejecting the lower court's order are shaky at best.

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[1] There is, of course, a fourth possibility: that the right is to something less than housing and that right would then be subject to progressive realisation. Since the Constitutional Court found that the right of children is to adequate housing, this interpretation adds nothing. *Grootboom II* (supra) at para 73.

[2] See for example De Vos (supra) at 87-8, De Waal et al (supra) at 412, Cockrell (supra) at para 3E-13, de Wet (supra) at 105-6.

[3] *Grootboom I* (supra) at 293I-J.

[4] Ibid at 290G-291B.

[5] Ibid.

[6] This conclusion was reached on the basis that although the parents are not bearers of these rights, it would not be in the best interests of the children to be removed from their parents. *Grootboom I* (supra) at 289C-D.

If the rights entrenched in FC ss 26 and 28(1)*(c)* are the same why repeat them? It might be argued that this was done merely to reinforce these rights explicitly for children. This does not explain, however, the plain textual difference between the two sections. Section 26 makes the right to housing subject to available resources. FC s 28(1)*(c)* does not.

The emphasised part of the last quote lays bare the motive of the Constitutional Court. In the court a quo, Davis J was at pains to point out that the child is the bearer of the rights in FC s 28, and that FC s 28 must be read as a whole: most importantly its provision related to the best interests of the child in FC s 28(2). It would be contrary to the interests of children for them to be removed from their parents and, therefore, their parents must accompany them.[1] The Constitutional Court, however, was not prepared to accept the real implication of the judgment of the court a quo: that FC s 28(1)*(c)* creates a right for parents. The court makes clear its resistance to this notion in the following passage:

> This reasoning [of the court a quo] produces an anomalous result. People who have children have a direct and enforceable right to housing under section 28(1)*(c)*, while others who have none or whose children are adult are not entitled to housing under that section, no matter how old, disabled or otherwise deserving they may be. The carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand. Moreover, there is an obvious danger. Children could become stepping stones to housing for their parents instead of being valued for who they are.[2]

The court's reasoning is hard to gainsay. The 'carefully constructed scheme for progressive realisation would make little sense if it could be trumped' in the way described. What then to make of the literal interpretation of the two sections, an interpretation that undermines the scheme for progressive realisation? Rather than claiming that the overlap of the rights is inconsistent with the notion that separate rights are created,[3] the court should have made it clear that a purposive, rather than a literal, interpretation of the section made it compatible with a scheme for progressive realisation of housing.

An interesting question is whether all the rights in s 28(1)*(c)* are subject to progressive realisation. *Minister of Health v Treatment Action Campaign* did not deal directly with that question.[4] However, the judgment clearly assumes that the right to basic health care in FC s 28(1)*(c)* is subject to progressive realisation. The Constitutional Court writes:

> The provision of a single dose of nevirapine to mother and child for the purpose of protecting the child against the transmission of HIV is, as far as the children are concerned, essential. Their needs are *most urgent* and their inability to have access to nevirapine profoundly affects their ability to enjoy all rights to which they are entitled. Their rights are most in peril

[1] *Grootboom I* (supra) at 288G-H and 289C-G.
[2] *Grootboom II* (supra) at para 71.
[3] For an analysis of this aspect of the judgment, see Pieterse (supra) at 10-11.
[4] *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) ('*TAC*').

> as a result of the policy that has been adopted and are most affected by a *rigid* and *inflexible* policy that excludes them from having access to nevirapine. (Emphasis added).[1]

The emphasised words are consistent with the approach of the court to other questions of progressive realisation. The court consider whole classes of applicants and holds that a reasonable plan to realise progressively the rights in question must accommodate the most needy applicants.[2] Furthermore, the plan must be balanced, flexible and targeted.[3] The wording of this part of *TAC* suggests that the Court considered the right to be subject to progressive realisation and that the plan to realise the right was not reasonable.

Khosa too failed to provide any guidance as to the progressive realisation of s 28(1)*(c)*. The case concerned the constitutional invalidity of provisions of the Social Assistance Act[4] that reserved pensions, child support grants and care dependency grants for South African citizens — excluding permanent residents. The impugned sections[5] of the Act were said to be unfairly discriminatory, to breach FC s 27(1)*(c)*[6] and, in respect of the child-related grants, FC s 28.[7] The Court clearly stated that the denial of support for children in need 'trenches upon their rights under s 28(1)*(c)*'.[8] Mokgoro J noted that FC ss 26 and 27 contain an internal limitation, and that state action must pass internal limitations requirement of reasonableness. The test of 'reasonableness' in regard to FC ss 26 and 27 is, however, different from the reasonableness requirement in the FC s 36 limitations test. The Court made no mention of the fact that FC s 28(1)*(c)* does not contain any internal limitation. It chose not to make any findings on the relationship between the two tests as there was no argument before the Court on it, and it was not necessary to decide the case. It appears that whilst FC s 28(1)*(c)* was thrown into the mix, the Court based its decision on its preferred reading of FC s 27.

(c) The interaction between FC s 28(1)*(b)* and FC s 28(1)*(c)*

The interpretation of the interaction between FC s 28(1)*(b)* and FC s 28(1)*(c)* was critical to the outcomes in *Grootboom* and *TAC*. The United Nation's Committee on the Rights of the Child ('UNCRC') has interpreted the Convention on the Rights of the Child as placing the state under an obligation to provide for children whose parents are unable to do so. The Constitutional Court in *Grootboom* had a different view:

> The extent of the state obligation must also be interpreted in the light of the international obligations binding upon South Africa. The United Nations Convention on the Rights of

[1] *TAC* (supra) at para 77.
[2] See *Grootboom II* (supra) at para 44.
[3] See *Grootboom II* (supra) at para 43; *TAC* (supra) at para 68.
[4] Act 59 of 1992.
[5] Technically, the sections had not yet come into operation, but for the sake of convenience the Court refers to them as 'impugned sections'.
[6] FC s 27(1)*(c)* reads, in relevant part: 'Everyone has the right to have access to — social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.'
[7] *Khosa* (supra) at para 39.
[8] Ibid at para 78.

> the Child, ratified by South Africa in 1995, seeks to impose obligations upon state parties to ensure that the rights of children in their countries are properly protected. Section 28 is one of the mechanisms designed to meet these obligations. It requires the state to take steps to ensure that children's rights are observed. In the first instance, the state does so by ensuring that there are legal obligations to compel parents to fulfil their responsibilities in relation to their children. Hence, legislation and the common law impose obligations upon parents to care for their children. The state reinforces the observance of these obligations by the use of civil and criminal law as well as social welfare programmes.[1]

FC section 28(1) must be read in this context. The sections encapsulate the conception of the scope of care that children should receive in our society. Subsections *(b)* and *(c)* must be read together. Subsection *(b)* ensures that children are properly cared for by their parents or families, and that they receive appropriate alternative care in the absence of parental or family care. Subsection (1)*(b)*, therefore, defines those responsible for giving care. Subsection (1)*(c)* lists various aspects of the care entitlement.

Despite the reference to social-welfare programmes, the *Grootboom* Court appears to conclude that parents must provide for their children and that the state's job is to make sure that they do so. So long as children are cared for by their parents, the state, according to the Constitutional Court, is not obliged to provide for them. This palpable difference between the Court's and the CRC's conception of the obligations of the state is made clear from the following extract from *Grootboom*:

> It follows from ss 1*(b)* that the Constitution contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking. Through legislation and the common law, the obligation to provide shelter in ss (1)*(c)* is imposed primarily on the parents or family and only alternatively on the state. The state thus incurs the obligation to provide shelter *to those children, for example, who are removed from their families*. It follows that section 28(1)*(c)* does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families. (Emphasis added).[2]

It could be that the highlighted words show that the Court was merely giving an example of when the state's responsibility would arise. The Court might not have ruled out an obligation on the state where a child is still in the care of her parents but cannot provide for her. However the tone of the judgment and the fact that the applicants' claim based on FC s 28 failed suggest that a child will never have a right enforceable against the state while she is in the care of her parents.[3] The position post-*Grootboom* but before *TAC* was as follows: If a child is with her parents, then the parent is responsible for providing all those rights contained in ss *(c)*. The role of the state, in such cases, is to provide the legislative framework for children to enforce their rights against their parents when necessary and to realise progressively the socio-economic rights to which everyone is entitled.[4] If a

[1] *Grootboom II* (supra) at paras 75-6.
[2] *Grootboom II* (supra) at para 77.
[3] See Pieterse (supra) at 10.
[4] *Grootboom II* (supra) at para 78.

child is without her parents, then ss *(b)* provides that the child is entitled to 'appropriate alternative care'. Once this proviso occurs, the provider of the alternative care becomes duty-bound to provide the rights contained in ss *(c)*. If the provider is the state, which will presumably always be the case, if only temporarily, then the rights in ss *(c)* are enforceable against it. As soon as appropriate alternative care is found that caregiver becomes the provider of the rights.[1]

While the Court in *Grootboom* was concerned only with the right to shelter, it did not confine its remarks about the interaction between the two subsections to shelter. This approach does not confront the obvious differences between the various rights contained in ss *(c)*. The implication is that, assuming a child is still in the care of her parents, she could not turn to the state for the provision of social services.[2] If the court was, in fact, concerned only with rights to shelter, its judgment should have been made that clear.[3]

In *TAC*, counsel for the state, in reliance on *Grootboom*, argued that the duty is on parents to provide health care for their children so long as the children remain in their care.[4] In rejecting this argument, the *TAC* Court wrote:

> The state is obliged to ensure that children are accorded the protection contemplated by section 28 that arises when the implementation of the right to parental or family care is lacking. Here we are concerned with children born in public hospitals and clinics to mothers who *are for the most part indigent and unable to gain access to private medical treatment which is beyond their means*. They and their children are in the main dependent upon the state to make health care services available to them. (Emphasis added).[5]

TAC stands for the proposition that in the case of health care, the child's parent need not be absent but simply be unable to discharge the obligations imposed by the right. If a parent can afford medicine and the other components of health care, then it is his or her duty to provide them.[6] If the parent cannot, then the child can turn to the state for support, assuming the state has sufficient available resources.[7]

In reaching this conclusion the *TAC* Court referred to *Grootboom* and reproduced its finding that '[i]t follows from ss 1*(b)* that the Constitution contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking'.[8] The Court then quoted further from *Grootboom* and said that '[t]his does not mean . . . that the State incurs no obligation in relation to children who are being cared for by their parents or

[1] The state provides support to foster parents through a cash grant and school fee exemption.

[2] See FC s 28. The child would, like everyone else, have a right to social services in terms of FC s 27, subject to the resources of the state.

[3] See J Sloth-Nielsen 'The Child's Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*' (2001) 17 *SAJHR* 210, 225 (Sloth-Nielsen argues that although parents often provide amenities to their children, it is artificial to describe these as components of social services. By failing to confine its remarks to shelter and perhaps nutrition, the court invited such artificial reasoning.)

[4] *TAC* (supra) at para 75.

[5] *TAC* (supra) at para 78.

[6] Ibid at para 76.

[7] The potential problem of, or the solution to the problem of progressive realisation was not made explicit.

[8] *TAC* (supra) at para 74.

families.'[1] Unlike *Grootboom*, however, the *TAC* Court did not see this obligation as being limited to legal mechanisms to force parents to comply with their duties. It was able, therefore, to reach the conclusion that the state must provide the health care that was requested.

(d) The state of the law

The law regarding the provision of socio-economic rights under FC s 28 is as follows. First, all the socio-economic rights contained in FC s 28 should be read in the light of other socio-economic rights and are thus subject to progressive realisation. Second, the parent is the primary provider of shelter and the child is only entitled to shelter by the state when she is not in the care of her parents but in the care of the state. Third, although the parent is also the primary provider of health care, the state must step in, subject to all the requirements of progressive realisation, when the parent is unable to provide fully for the needs of a child.

At first blush, it seems plausible to separate basic nutrition and shelter from health and social services. The latter two objects seem to lend themselves more to state provision and the former more to parental provision. However, there seems no logical reason to conclude that the state should only step in when there are no parents in the case of shelter, but must step in when there are indigent parents in the case of health care. The approach of the Court does not really amount to a dichotomy between (i) services to be provided primarily by the parent and (ii) services to be provided primarily by the state. On the Court's own approach, even health care must first be provided by the parent, if she can afford it. The real dichotomy is between cases where the state must provide to children who are still in the care of their parents and cases where the state must provide only when children are not in the care of their parents. It is ultimately a distinction without a meaningfully different justification.

(e) Socio-economic rights of children living separately from their parents

Post-*Grootboom II* and *TAC*, the jurisprudence confirms the direct enforceability of the socio-economic rights of children who are living separately from their parents. *Centre for Child Law & Another v Minister of Home Affairs & Others* arose from an urgent application brought on behalf of a group of unaccompanied foreign children who were ear-marked for deportation, and who were, in the meantime, being detained together with adults at a repatriation centre.[2] De Vos J discussed the implications of *Grootboom II*, namely that the primary duty to fulfil a child's socio-economic rights rests on the child's parents or family. However, she continued thus:

[1] Ibid at para 75.
[2] 2005 (6) SA 50 (T)('*Centre for Child Law 2005*').

> I agree with the view held by Liebenberg[1] that this suggests that the State is under a duty to ensure basic socio-economic provision for children who lack family care, as do unaccompanied foreign children. There is thus an active duty on the State to provide those children with rights and protection as set out in s 28.[2]

She found the government's behaviour with regard to the children to be a serious infringement of s 28(1)*(c)*.[3]

In a different matter brought by the Centre for Child Law, the socio-economic rights of children living separately from their parents again came under scrutiny. *Centre for Child Law & Others v MEC for Education, Gauteng, & Others*[4] dealt with the rights of children who had been removed from their parents via care and protection proceedings and had been placed in a school of industries. The application revealed that the children were living in parlous conditions and with no access to psychological support or therapeutic services.[5] The respondents did not deny that the children were suffering the effects of the weather as a result of the poor quality of the building and inadequate clothing and bedding. They nevertheless opposed the applicants' plea that the children be immediately provided with sleeping bags as an interim measure until more long term remedies could be effected. Murphy J noted that the socio-economic rights provisions in FC s 28 do not contain any internal limitation subjecting them to the availability of resources. The respondent's suggestion that the Red Cross or non-governmental organisations might be approached to provide sleeping bags was given short shrift by Murphy J. He noted that the State's response reflected a fundamental misunderstanding of the State's constitutional duty: 'The duty to provide care and social services to children removed from the family environment rests upon the State.'[6] The High Court put in place a structural interdict which dealt with both the short term and longer term aspects of the remedy sought.[7]

47.5 Protection From Maltreatment, Neglect, Abuse or Degradation

(a) Corporal punishment

Section 294 of the Criminal Procedure Act 51 of 1977 formerly allowed the whipping of juveniles as a possible sentence to be imposed by a court. The section did not provide an age limit below which the punishment could not be inflicted. However, judicial practice was not to impose the sentence on children below nine years

[1] S Liebenberg 'Taking Stock — The Jurisprudence on Children's Socio-Economic Rights and its Implications for Government Policy' (2004) 5(4) *ESR Review*.

[2] *Centre for Child Law 2005* (supra) at para 17.

[3] The children had been in detention from February to September 2004, waiting for responses to set of Children's Courts inquiries.

[4] 2008 (1) SA 223 (T)('*Centre for Child Law 2008*').

[5] Ibid at 226G-227A (The conditions included lack of adequate clothing or bedding, concrete floors, broken windows, no heating, and the court mentioned that at that time of year the night time temperatures dropped to below zero.)

[6] Ibid at 228G.

[7] For more on structural interdicts, see M Bishop 'Remedies' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) § 9.5.

of age.[1] In *S v Williams,* the applicants challenged this provision on a number of grounds These grounds covered an alleged violation of s 30(1)*(d)* of the Interim Constitution — the equivalent of s 28(1)*(d)* of the Final Constitution. The Court did not consider this argument because it declared the statutory provision an unconstitutional violation of the prohibition against cruel and degrading punishment.[2] However, the reasoning of the Court suggests that the section would have been found to have violated Interim Constitution s 30 had the court been required to consider it.

Both parties agreed that whipping was unconstitutional when it was a sentence imposed upon adults. The state attempted, however, to distinguish between juvenile and adult whipping. The *Williams* Court rejected the basis for such a distinction:

> Differences between adult and juvenile whipping have, in my view, little or no relevance to the enquiry. They are in any event differences of degree rather than kind. To the extent that comment is needed on the argument which has been raised, however, I am of the view that the differences are far outweighed by the similarities. There is a small difference in the dimensions of the instrument used; the adult is stripped naked and trussed, the strokes being delivered on bare flesh while the juvenile's strokes are inflicted on normal attire, without him being tied; there is no limit to the number of times a juvenile may be sentenced to receive strokes while the adult may only be so sentenced twice, and never within a period of three years of the previous sentence of strokes. Both occur in a state institution; the maximum number of strokes that may be imposed is seven in respect of both. Both involve a physical beating with a cane wielded by a State employee, a virtual stranger to the person being punished.[3]

The state attempted to argue that the character of a juvenile is still in the process of development and that whipping might assist in correcting bad behaviour. The *Williams* Court likewise rejected this line:

> I do not agree. One would have thought that it is precisely because a juvenile is of a more impressionable and sensitive nature that he should be protected from experiences which may cause him to be coarsened and hardened. If the State, as role model *par excellence,* treats the weakest and the most vulnerable among us in a manner which diminishes rather than enhances their self-esteem and human dignity, the danger increases that their regard for a culture of decency and respect for the rights of others will be diminished.[4]

Having found a constitutional violation, the Court turned to the question of limitation. The state argued that whipping acts as a deterrent and is preferable to jail because of the limited resources of the state.[5] Furthermore, it claimed that whipping is appropriate to 'grey-area crimes,' which are not serious enough for prison but too serious for softer options.[6] The Court rejected these arguments for two reasons.

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[1] *S v Williams & Others* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at para 15 ('*Williams*') relying on *S v Du Preez* 1975 (4) SA 606 (C).

[2] IC s 11(2).

[3] *Williams* (supra) at para 44.

[4] *Williams* (supra) at para 47.

[5] Ibid at para 61.

[6] Ibid at para 62.

First, there has been a shift away from punishment as a means of correction and prevention.[1] The development of this process must not be seen as a weakness, as the justice system having 'gone soft.' What it entails is the application of appropriate and effective sentences. An enlightened society will punish offenders, but will do so without sacrificing decency and human dignity.[2]

Second, the Court's position was at least partly a result of the move to create a new juvenile justice system. The presupposition is that viable alternatives to prison exist. The Court thereby answers the problem of grey-area crimes.[3] The Court pointed to alternatives already on offer in the Criminal Procedure Act:[4]

> In addition to the provisions of section 290 (*supra*), a juvenile may also be dealt with in terms of other sections of the Act, such as, section 287 [fine]; section 297(1)(a- c) [postponing sentence conditionally or unconditionally, suspended sentence subject to conditions; caution and discharge]; sections 276(1)*(h)* and 276A [correctional supervision]; and converting the trial to an enquiry in terms of the Child Care Act No. 74 of 1983. The latter course has 4 options, namely: (i) placing the child in the custody of a suitable foster parent; (ii) sending the child to a designated children's home; (iii) sending the child to a designated school of industries; (iv) returning the child to the parent or guardian, under supervision of a social worker.[5]

The judgment in *Williams* was delivered in 1995. It indicated that a complete overhaul of the law relating to child offenders was required. Now, 13 years later, the Child Justice Act seeks to provide a comprehensive plan to deal with child offenders.[6] The Child Justice Act is assessed below.[7] It should be noted that the *Williams* Court refrained from deciding on the constitutionality of corporal punishment administered by schools. The Court simply referred to two contrasting views about its acceptability abroad.[8] The matter was resolved the following year by the passing of the South African Schools Act. The Act banned the use of corporal punishment in schools, and provided that anyone who administers it commits an offence.[9]

(b) Christian Education and corporal punishment in schools

In *Christian Education South Africa v Minister of Education of the Government of the*

[1] Ibid at para 65.
[2] *Williams* (supra) at para 68.
[3] Ibid at para 72.
[4] Act 51 of 1977.
[5] *Williams* (supra) at para 74.
[6] Act 75 of 2008 was gazetted on 11 May 2009. The Act is expected to come into operation on or before 1 April 2010.
[7] See §47.7(b) infra.
[8] *Williams* (supra) at para 48 citing *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112 and *Ingraham v Wright* 430 US 651, 692 (1977)(White dissenting).
[9] Act 84 of 1996 s 10(1) and (2). Following *Williams*, the Abolition of Corporal Punishment Act 33 of 1997 eliminated corporal punishment as a sentence in a number of statutes and outlawed its use as punishment in customary law tribunals. Corporal punishment was also expressly outlawed in places of alternative care (eg places of safety, children's homes and schools of industry) by an amendment (inserting regulation 31A) to the Regulations to the Child Care Act published under GN R 637 in *GG* 20076 of 21 May 1999.

Republic of South Africa, the constitutionality of the ban on corporal punishment in schools, imposed by the Schools Act, was challenged by a voluntary association called Christian Education South Africa.[1] By the time of trial, it had limited its challenge to the fact that the definition section of the Act includes independent schools. It limited the challenge still further 'by making it applicable to the applicant's constituent schools only.'[2]

The applicants claimed that their rights under ss 15 and 31 of the Final Constitution, the rights to freedom of belief and practice of religion, were impaired by the ban. In support of this claim, the applicant stated that various passages of the Bible instruct parents to administer corporal punishment to their children. Since teachers act *in loco parentis* during the school day, the applicants reasoned that schools ought to be allowed to administer corporal punishment on behalf of the parents.[3]

In a clear and well-reasoned judgment, Liebenberg J in the court a quo enunciated the following, and now prevailing, approach to violations of the two religion clauses:

> In cases of this nature a court will in the first place consider whether the belief relied upon in fact forms part of the religious doctrine of the religion practised by the person concerned. Once it has found that the belief does form part of that doctrine, the court will not embark upon an evaluation of the acceptability, logic, consistency or comprehensibility of the belief. But, the court will then enquire into the sincerity of the person's claim that a conflict exists between the legislation and the belief which is indeed burdensome to that person.[4]

The application thus failed at the very first stage of analysis. The High Court found that while it was indeed a part of Christian doctrine for parents to be allowed to chastise their children, teachers were not so allowed.[5] Therefore, the right of schools to administer corporal punishment was not predicated on religious belief. The 'approach adopted by the applicant [was] merely to clothe rules of the common law in religious attire.'[6]

In *S v Williams,* the Constitutional Court left open the question of corporal punishment in schools. In *Christian Education,* Liebenberg J compared court-imposed beatings to school-imposed beatings.[7] The court found that the only differences between the two punishments were that the authority administering the punishment was different and that, in the case of the school, the person administering the punishment would not be unknown to the pupil. Since these differences

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[1] 1999 (4) SA 1092 (SE), 1999 (9) BCLR 951 (SE)('*CESA I*').

[2] *CESA II* (supra) at 954D.

[3] Ibid at 956A-G.

[4] Ibid at 958E-F. The court referred to various foreign judgments in support of its judgment. See *Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church* 393 US 440, 451 (1969); *Thomas v The Review Board* 450 US 707 (1981); *In re Chikweche* 1995 (4) SA 284 (ZS), 1995 (4) BCLR 533, 538F (ZS). See *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231(CC); *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC), ('*CESA II*').

[5] *CESA I* (supra) at 959C.

[6] Ibid at 959E.

[7] Ibid at 964G-J.

were not deemed material, the court concluded that school administered corporal punishment was likewise unconstitutional.[1] The legislature, by passing the South African Schools Act, was simply giving effect to FC s 28(1)*(d)*.[2]

Liebenberg J need not have made this last remark. Having found that the statute did not violate the rights of the applicant, no more need have been said. However, Liebenberg J wanted to make it clear that FC s 31(2) acts as an internal modifier to the right to practise religion: it thereby prohibits a person or a group from practising their religion in a manner inconsistent with other provisions of the Final Constitution.[3] Thus, even if the prohibition on corporal punishment was a *prima facie* violation of the right to practise religion, because corporal punishment administered by schools was a violation of another provision, FC s 31 itself was not violated.[4]

In the Constitutional Court, Sachs J assumed, in favour of the applicant, that a ban on school-administered corporal punishment in independent religious schools violates FC ss 15 and 31.[5] He then proceeded to FC s 36. The apparent rationale for skipping the rights analysis was that if the limitation were shown to be reasonable and justifiable, it would be unnecessary to take a harder line on the applicant's FC s 15 and FC s 31 claims.[6] While this approach is permitted by the text, the standard two-step approach of Liebenberg J is to be preferred.[7]

In the course of examining the purpose of the limitation, Sachs J pointed to the obligation of the state to 'protect all people and especially children from maltreatment, abuse or degradation'.[8] He pointed to the constitutional requirement that in all matters concerning a child, the child's best interests are paramount.[9] In addition, he stated that FC s 12 — freedom and security of the person — means that all people have the right 'to be violence-free'.[10] The court then said the following:[11]

> As part of its pedagogical mission, the Department sought to introduce new principles of learning in terms of which problems were solved through reason rather than force. In order to put the child at the centre of the school and to protect the learner from physical and emotional abuse, the legislature prescribed a blanket ban on corporal punishment. In its judgement, which was directly influenced by its constitutional obligations, general prohibition rather than supervised regulation of the practice was required. The ban was

[1] Ibid at 965A.
[2] Ibid at 965B.
[3] *CESA I* (supra) at 965C.
[4] For more on the relationship between the FC s 31(2), FC s 31 and other provisions in the Bill of Rights, see S Woolman 'Community Rights: Language, Culture and Religion' S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) in *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 58.
[5] *CESA II* (supra) at para 27.
[6] Ibid at para 28.
[7] For a critique of Sach's notional approach to rights analysis, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.
[8] *CESA II* (supra) at para 40.
[9] Ibid at para 41.
[10] Ibid at para 47.
[11] Ibid at para 50.

> part of a comprehensive process of eliminating state-sanctioned use of physical force as a method of punishment. The outlawing of physical punishment in the school accordingly represented more than a pragmatic attempt to deal with disciplinary problems in a new way. It had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children.

While the approach of the court was meant to favour the applicant and in the end did no harm, it muddied the waters by confusing the order of its analysis. It ought to have confronted these issues of maltreatment, best interest and dignity as part of its assessment of FC s 31. Had it done so, it would have been clear that Liebenberg J was correct in finding that FC s 28(1)*(d)* was violated and thus FC s 31 could not be. Even if the FC s 15 claim remained, doctrinal coherence would have been better served by pressing down on the faith-based attack and proceeding, if necessary, to the limitations enquiry.

The Court explicitly left the question open of the constitutionality of corporal punishment administered by parents.[1] The South African Law Reform Commission, in its final report on the Review of the Child Care Act,[2] recommended that the Children's Bill should include a clause that would remove the common-law defence of reasonable chastisement. The Children's Amendment Bill,[3] as first introduced in Parliament, included a stronger provision that would actually provide for an outright ban on corporal punishment in the home. This clause became mired in controversy, and was eventually dropped at the eleventh hour.[4]

The possibility remains that a constitutional challenge will be brought against corporal punishment in the home, most likely aimed at the common-law defence of reasonable chastisement. International experience with this problem may be helpful. In *A v United Kingdom*[5] a unanimous court ruled that repeated corporal punishment of a nine year old boy by his stepfather amounted to inhuman or degrading treatment, and that the UK government should have taken measures to provide protection by disallowing the common-law defence of moderate and justified chastisement in such cases.[6] In *Canadian Foundation for Children, Youth and the Law v Attorney General, Canada*,[7] the majority found that a law that allowed correction by parents and persons *in loco parentis* provided that the force used was

[1] *CESA II* (supra) at para 48. For a critique of this piece of legal sophistry, see S Woolman 'Freedom of Association' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

[2] Project 110 (December 2002) 115-116.

[3] B 19-B of 2006, clause 139.

[4] P Proudlock & L Jamieson 'Guide to the Children's Act 38 of 2005', unpublished paper, Children's Institute (2008) 8.

[5] [1998] 2 FLR 959 ('*A*').

[6] See *A v United Kingdom* (2000) *De Jure* 146 (Argues that South Africa's common law relating to the defence of reasonable chastisement may be in need of reform). See further J Burchell & J Milton *Principles of Criminal Law* 3ed (2005) 296; B Bekink 'When do Parents go too Far? Are South African Parents Still Allowed to Chastise their Children through Corporal Punishment in the Home?' (2006) 2 *SACJ* 173, 188-191 (Raises questions about the constitutionality of corporal punishment and the defence of reasonable chastisement.)

[7] *Canadian Foundation for Children, Youth and the Law v Attorney General, Canada* [2004] 1 SCR 76 ('*Canadian Foundation*').

reasonable in the circumstances and was not 'unconstitutionally vague'.[1] In the majority's view, the child's best interests was not an overriding principle but only one factor to be considered: the family should not be exposed to intrusion by law enforcement for every trivial spanking. In contrast, the *Canadian Foundation* minority found that the law was vague and controversial. It also concluded that the common-law defences of necessity and *de minimis non curat lex* would be sufficient to prevent parents from being prosecuted or convicted for excusable or trivial conduct. Sloth-Nielsen has expressed the view that the minority position in *Canadian Foundation* is more consistent with a children's rights approach under the Final Constitution.[2]

(c) Legislative development

FC s 28(1)*(d)* provides that the child has the right '*to be protected* from maltreatment, neglect, abuse or degradation'.[3] This subsection clearly imposes a positive obligation on the state to prevent harm to children. Since 1994, it has been the view of many lawyers that the Child Care Act[4] is inadequate and fails to vindicate the standards set by the Final Constitution.[5] Changes were made to the Act in the Child Care Amendment Acts of 1996[6] and 1999.[7] However, these alterations were temporary: The new Children's Act,[8] passed in 2005, has been partially brought into operation. When the Act is fully implemented it will repeal the Child Care Act as well as various other statutes.[9]

The Children's Act contains numerous clauses that are relevant to our understanding FC s 28(1)*(d)*. The word 'abuse' is defined in s 1 as —

[1] The court split 6 to 3. The minority judgments were penned by Arbour, Binnie and Deschamps JJ.

[2] J Sloth-Nielsen 'Children' in H Cheadle, D Davis & N Haysom (eds) *The South African Constitution: The Bill of Rights* (2nd Edition, 2006) 528.

[3] Emphasis added.

[4] Act 74 of 1983.

[5] See J Sloth-Nielsen & B van Heerden 'Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa' (1996) 12 *SAJHR* 247; J Sloth-Nielsen & B van Heerden 'The Child Care Amendment Act 1996: Does it Improve Children's Rights in South Africa?' (1996) 12 *SAJHR* 649.

[6] Act 96 of 1996.

[7] Act 13 of 1999.

[8] Act 38 of 2005. For technical reasons related to the processing of Bills provided for in FC s 75 and FC s 76 the Children's Bill was divided into two separate Bills. The first one was signed into law in 2006 as the Children's Act 38 of 2005. The second one was signed into law in March 2008, as the Children's Amendment Act 41 of 2007. The Amendment Act adds missing sections. The full Act, thus formed, is called the Children's Act 38 of 2005. On 30 June 2007 the President issued a signed proclamation (proclamation 13, 2007, *GG* no 30030, 29 June 2007) bringing certain sections of the Act into operation with effect from 1 July 2007.

[9] Children's Act s 313 read with schedule 4 repealed (in entirety) The Age of Majority Act 57 of 1972, the Children's Status Act 82 of 1987, the Guardianship Act 192 of 1993, and the Natural Fathers of Children Born out of Wedlock Act 86 of 1997. When the Act is fully implemented it will also repeal the whole of the Child Care Act 74 of 1983; the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, the few remaining sections of the Children's Act 33 of 1960, s 1 of the General Laws Further Amendment Act 93 of 1962, and s 4 of the Prevention of Family Violence Act 133 of 1993.

> any form of harm or ill-treatment deliberately inflicted on a child, and includes (a), assaulting a child or inflicting any other form of deliberate injury to a child; (b) sexually abusing a child or allowing a child to be sexually abused;[1] (c) bullying by another child; (d) a labour practice that exploits a child; or (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.

Neglect of a child is defined as 'a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs'. The Children's Act provides that a parent, guardian or other person caring for a child is guilty of an offence if that parent or care-giver (a) abuses or deliberately neglects the child; or (b) abandons the child.[2] A person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance.[3]

The offences carry heavy penalties, with a fine or imprisonment not exceeding 20 years.[4] Neglect must now be 'deliberate', thus adding a *mens rea* requirement. Under s 50(1) of the Child Care Act negligence had been sufficient to establish the offence of 'ill-treatment'. This shift is no doubt aimed at protecting parents who neglect their children due to circumstances that are beyond their control, eg, illness or poverty.

When it is suspected that children are abused or neglected, a Children's Court[5] hearing will be held to decide, on the basis of a report from a social worker and any other relevant evidence, whether the child is in need of care and protection. If it is necessary to do so, then the presiding officer of the Children's Court may order the removal of the child to temporary safe care pending finalisation of the matter.[6] The court may, upon deciding that a child is in need of care and protection, select a solution from a very wide range of options. Some options are aimed at keeping children in families and providing services to ensure their care and safety.[7]

The Children's Act contains a variety of innovative strategies aimed at upholding children's s 28(1)*(d)* rights. The Act makes it compulsory for a wide range of professionals to report child abuse.[8] Controversially, the Act also establishes a

[1] In addition to the provisions of the Children's Act, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 has amended aspects of the Sexual Offences Act 23 of 1957, and aspects of the Criminal Procedure Act 51 of 1997. Often referred to colloquially as the 'new Sexual Offences Act', the new legal framework provides a range of redefined sexual offences and penalties, including sexual offences against children. The Act alters the position taken in *Masiya v Director of Public Prosecutions, Pretoria & Another (Centre for Applied Legal Studies & Another as Amici Curiae). Masiya* had disappointingly extended the common-law definition of rape to include anal rape of girls but not of boys. 2007 (5) SA 30 (CC), 2007 (3) SACR 435 (CC). The new Sexual Offences Act contains a broader, gender neutral definition of rape.

[2] Children's Act s 305(3).

[3] Children's Act s 305(4).

[4] Children's Act s 305(7).

[5] The Children's Court has greatly increased powers. These powers are described, together with the procedural rules, in Children's Act Chapter 4.

[6] Children's Act s 151. Removals may only occur without a court order on grounds that are specified in s 152.

[7] See, generally, Children's Act ss 156-159. The court may also, in suitable cases, make an order that the child be placed in alternative case: eg, foster care or placement in a child and youth care centre.

[8] Children's Act s 110.

register of persons unsuitable to work with children. Any court or any legally constituted disciplinary forum may find a person unsuitable to work with children.[1]

Section 12 of the Act provides that 'every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.' The Act also specifically prohibits, to various degrees: marriage or engagement below a minimum age; marriage without consent; genital mutilation or circumcision of female children;[2] virginity testing;[3] circumcision of male children.[4]

(d) Child pornography

In *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & Others*[5] the Constitutional Court upheld the ban on the possession and distribution of child pornography contained in the Film and Publications Act.[6] The Court found there to be an impairment of the rights to freedom of expression[7] and privacy,[8] but considered these limitations reasonable and justifiable.[9]

In reaching its conclusions, the Court relied, in part, on the duty of the state to promote FC s 28(1)*(d)*. It highlighted the various harms that child pornography causes to children:

> The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth. Society has recognised that childhood is a special stage in life which is to be both treasured and guarded. The state must ensure that the lives of children are not disrupted by adults who objectify and sexualise them through the production and possession of child pornography. There is obvious physical harm suffered by the victims of sexual abuse and by those children forced to yield to the demands of the paedophile and pornographer, but there is also harm to the dignity and perception of all children when a society allows sexualised images of children to be available.[10]

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[1] Children's Act s 121. Any institution that employs people to work (even in a voluntary capacity) with children such as schools or child and youth care centres, have to check (via the department of Social Development) whether the prospective employee's name is on the register prior to employing anybody. Section 121 provides procedures for dealing with disputes concerning the findings.

[2] Children's Act s 12(3).

[3] Children's Act s 12(4) prohibits any testing of children below 16. However, s 12(5) permits children over 16 to consent to virginity testing after proper counselling. The test results may not be disclosed without the consent of the child, and the child may not be marked to show the result. For more on virginity testing, see E George 'Virginity Testing and South Africa's HIV/Aids Crisis: Beyond Rights Universalism and Cultural Relativism, Toward Health Capabilities' (2008) 96 *California LR* 1447.

[4] Children's Act s 12(8) prohibits circumcision of children below 16 except if performed for religious purposes or medical reasons. The fact that tradition does not form the basis of an exception leaves this clause open to possible constitutional challenge. Circumcision of children over 16 is permissible with the child's consent and after proper counselling. Children's Act s 12(9).

[5] 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC)('*De Reuck II*').

[6] Act 65 of 1996.

[7] *De Reuck II* (supra) at para 50.

[8] Ibid at paras 52-3.

[9] Ibid at paras 56-91 (Limitation analysis of the court.) For a critique of the *De Reuck* Court's limitation analysis, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, M Bishop, J Klaaren & S Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[10] *De Reuck II* (supra) at para 63.

The state argued that child pornography causes harm to children in three ways:[1] *(a)* it is used to groom children for sexual abuse when the potential offender shows the child images of other children performing sexual acts to make the abuse seem acceptable; *(b)* it reinforces the belief that sex with children is acceptable; and *(c)* it is used by paedophiles to fuel their fantasies before committing acts of sexual abuse. The Court accepted evidence from the police of *(a)* and concluded that although empirical evidence did not support *(b)* or *(c)*, it was common sense that either *(b)* or *(c)* might occur in some cases.[2]

The new Sexual Offences Amendment Act (SOAA)[3] criminalises intentional exhibition of child pornography to either an adult or to a child.[4] The term '*child pornography*' is defined[5] widely so as to ensure that all methods that may be used to create child pornography are covered under the definition. The essence of the definition captures everything of a sexual nature related to children (or people being presented as children or even animated depictions of children) whether it is intended to stimulate erotic or aesthetic feelings or not. In addition, the display of any pornography to a child is an offence.[6] The Act targets both those who use children in pornography and those who benefit in any manner from the pornography.[7]

The Act also established a new offence of sexual grooming.[8] Persons may be charged for actively grooming or assisting others to groom children for the purpose of committing sexual offences with them are criminalised. Sexual grooming has already been addressed by the courts. In his minority judgment in *S v M*, Cameron JA used the term 'domestic sexual predation' to describe the situation in which a vulnerable and dependent 15 year old baby-sitter was gradually entrapped into a sexual relationship by an adult friend of the family.[9] Satchwell J has described grooming as 'an ongoing process aimed at the child accepting sexual activities.'[10] She explained that grooming is wrong and punishable because one of the parties can coerce the child into engaging in sexually related activities.

The constitutionality of a number of sections of the Criminal Procedure Act (as amended by the SOAA) was challenged in *Director of Public Prosecutions, Transvaal v*

[1] *De Reuck II* (supra) at para 65.
[2] Ibid.
[3] Act 32 of 2007.
[4] Ibid s 10.
[5] Ibid s 1.
[6] Ibid s 19.
[7] SOAA s 20(1) criminalises use. SOAA s 20(2) applies to pecuniary benefits from pornography. The Films and Publication Amendment Act 3 of 2009 was promulgated in the Government Gazette in August 2009. The Department of Home Affairs views the Amendment Act as part of its bid to end child pornography. Critics say that it paves the way for pre-publication censorship and that the exemptions provided do not go far enough to promote freedom of expression. This Act is likely to give rise to constitutional litigation.
[8] SOAA s 18.
[9] 2006 (1) SACR 135 (SCA) at paras 203-205, 260-263. Cameron JA apparently failed to recognize similar signs of grooming in a subsequent matter. See *Geldenhuys v The State* 2009 (1) SACR 1 (SCA). In *Geldenhuys,* the different ages of consent to sexual intercourse for males and females was found to be unconstitutional, with only retrospective effect. Act 32 of 2007 had already provided a prospective legislative solution to the problem of unequal treatment.
[10] *S v M* 2007 (2) SACR 60 (W) at para 36.

Minister for Justice and Constitutional Development & Others.[1] The provisions dealt with the procedures for the oath or admonition of child victims and witnesses, as well as their testimony being heard via an intermediary using equipment and privacy of the proceedings. The Constitutional Court employed a section 39(2) reading of the provisions, and found that although the impugned sections were not in themselves unconstitutional, they had to be read in a constitutionally compliant manner in order to fully protect children. The Court's structural interdict requires the Minister to provide information and plans regarding resources relating to the system such as the number of trained intermediaries and the requisite equipment being available at courts around the country.

47.6 Child Labour[2]

The most important existing laws are s 52A of the Child Care Act (as amended) and s 43 of the Basic Conditions of Employment Act.[3] Subject to ministerial exemption, no child under the age of 15 years may be employed. The latter provision repeats s 28(1)*(f)* of the Final Constitution. Both statutory provisions exist on pain of criminal sanction.

There are a number of problems with the current situation in South Africa. First, the above statutory provisions are widely ignored: many children are illegally employed and exemption from the statutory prohibition is seldom sought.[4] Second, the legislative and policy framework is unsophisticated: especially when they are measured against the International Labour Organisation's Minimum Age Convention and Recommendation (1973),[5] and the ILO's Worst Forms of Child Labour Convention (1999).[6] The international documents distinguish between various age-groups and kinds of work,[7] set out criteria for proper enforcement of the law, and require that the conditions under which child labour can be deemed satisfactory. Third, children work largely because of poverty. Child labour will only end when measures are effected to alleviate their poverty. In the meantime, adequate social security must be provided to children. Education for poor children must be improved to protect them from abusive work. School must become a viable and attractive alternative to work and a place from which authorities can monitor the involvement of children in work.[8]

[1] 2009 (4) SA 222 (CC).

[2] See South African Law Commission Discussion Paper 103 *Review of the Child Care Act* (December 2001) 13.5 ('SALC *Review of the Child Care Act*').

[3] Act 75 of 1997.

[4] SALC *Review of the Child Care Act* (supra) at § 13.5.5.

[5] Convention no 138 and Recommendation no 146, ratified by South Africa, available at www.ilo.org/ilolex/english/index.htm.

[6] Convention no 182, ratified by South Africa, available at www.ilo.org/ilolex/english/index.htm

[7] For example, art 3 of the Minimum Age Convention specifies that the minimum age for dangerous work should be 18 years.

[8] SALC *Review of the Child Care Act* (supra) at §13.5.2.

The Children's Act makes it an offence to use, procure or offer a child for slavery, bondage or servitude or compulsory labour for provision of services,[1] or to use, procure, offer or employ a child for purposes of commercial sexual exploitation, trafficking, or to in any other way involve a child in child labour.[2] A social service professional who becomes aware of any of these activities has a duty to report it.[3] Using children to commit crimes is considered one of the 'worst forms of child labour'.[4] In a high profile case in which a woman had hired others to murder her boyfriend's baby, the High Court recognised that the youngest accused (16 years at the time of the commission of the offence) could be seen to be a child used by an adult to commit a crime.[5] They were all convicted of murder. However, the two youngest (both below 18 years at the time of offence) escaped the minimum sentence of life imprisonment: both received 15 year sentences.

47.7 Children and the Justice System

(a) Imprisonment as a last resort

The requirement in FC s 28(1)*(g)* that children be imprisoned only as a measure of last resort and, if necessary, for the shortest appropriate period of time is also found in art 37*(b)* of the Convention on the Rights of the Child ('CRC'). The Committee on the Rights of the Child has stated that the CRC must be interpreted in conjunction with other international instruments.[6] The UN Standard Minimum Rules for the Administration of Juvenile Justice (1985), known as the Beijing Rules, is one such instrument. In terms of rule 13.1, 'detention pending trial shall be used only as a measure of last resort'. In 1994 the Correctional Services Act 8 of 1959 was amended[7] to conform to international standards. In terms of s 29(1) of the Act, prior to amendment, an accused below the age of 18 could only be detained before his conviction if it was necessary and no suitable place of

[1] Section 141(1)(a). For more on slavery, servitude and forced labour, see S Woolman & M Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 64; S Woolman & M Bishop 'Down on the Farm and Barefoot in the Kitchen: Farm Labour and Domestic Labour as Forms of Servitude' (2007) 24 *Development Southern Africa* 595.

[2] Sections 141(1)(b)-(e). See S Woolman & M Bishop 'State as Pimp: Sexual Slavery in South Africa' (2006) 23 *Development Southern Africa* 385.

[3] Section 141(2).

[4] See, generally, J Gallinetti *An Assessment of the Significance of the International Labour Organisation's Convention 182 in South Africa with Specific Reference to the Instrumental Use of Children in the Commission of Offences as a Worst Form of Child Labour* (unpublished LLD thesis, University of the Western Cape, 2007). FC s 35*(h)* read with s 92 of the Child Justice Act 75 of 2008 requires that the court undertake an assessment of the child well being whether the child has been used by an adult to commit a crime, and if so, whether the adult should be referred for prosecution in terms of s 141(1)*(d)* read with s 305(1)*(e)*. The Children's Act, and the information elicited must be taken into account in determining the treatment of the child in the child justice system.

[5] *S v Mfazwe & Others* Unreported decision of the Cape Provincial Division, Case Number 07/06 (28 June 2007) (Waglay J)('When sentencing children and juveniles, especially where payment was offered to them to commit an offence, courts should see these children and juveniles not only as perpetrators of the offence but also victims of a serious form of exploitation.')

[6] See *S v Kwalase* 2000 (2) SACR 135, 139b (C), [2001] 3 All SA 588 (C)('*Kwalase*'); *S v Nkosi* 2002 (1) SA 494 (W), 2002 (1) SACR 125, 145e (W), [2002] 4 All SA 745 (W)('*Nkosi*').

[7] Correctional Services Amendment Act 17 of 1994.

safety was available. The amended section provides that an accused child below 14 cannot be detained in prison, but may be detained in a police lock-up or cell for a period not exceeding 24 hours if the detention is necessary and in the interests of justice and the child cannot be placed in the care of his parents, an institution or a place of safety. A similar rule applies to children between the ages of 14 and 18, except that the maximum period of detention is 48 hours. However, ss (5A) provides for the imprisonment of a child between the ages of 14 and 18 in certain circumstances and lists factors to consider in determining whether imprisonment is in the interests of justice. FC s 28(1)*(g)* has also had an impact on sentencing. In the first constitutional case to rule on the sentencing of children, *S v Williams*, the Court found that the provisions allowing for judicially ordered whipping as a sentence for children violated IC ss 10 and 11(2), but did not consider whether corporal punishment also infringed IC s 30 (the IC's children's rights section).[1]

The first case to set out general guidelines for the sentencing of child offenders in the new Constitution era was *S v Z en Vier Ander Sake*.[2] Five matters came before the High Court on review in the ordinary course: suspended sentences had been imposed upon young offenders. Erasmus J took a very energetic approach: he personally visited the juvenile section of the prison and requested a report from the Director of Public Prosecutions (Eastern Cape). As a result of its investigations, the High Court laid down certain guidelines:

(i) diversion[3] should be considered prior to trial in appropriate cases;
(ii) age must be properly determined prior to sentencing;
(iii) a court must act dynamically to obtain full particulars about the accused's personality and personal circumstances;
(iv) a court must exercise its wide sentencing discretion sympathetically and imaginatively;
(v) a court must adopt, as its point of departure, the principle that, where possible, a sentence of imprisonment should be avoided, and should bear in mind especially that: the younger the accused is, the less appropriate imprisonment will be; imprisonment is rarely appropriate in the case of a first offender; and short-term imprisonment is rarely appropriate;
(vi) a court must not impose suspended imprisonment where imprisonment is inappropriate for a particular accused.[4]

The approach set out in *S v Z* was followed the following year in *S v Kwalase*.[5] This judgment is notable for the lengths to which the High Court went to set out

[1] IC s 30 did not include the provision that detention should be a measure of last resort, only that every child in detention should be detained under conditions and treated in a manner that takes account of his or her age.

[2] 1999 (1) SACR 427 (E)('*S v Z*').

[3] Diversion allows for a conditional withdrawal of charges at the pre-trial stage. If the child completes the diversion programme successfully the charges are withdrawn and the child does not obtain a criminal record. Diversion is premised on there being a *prima facie* case and an admission of responsibility for the commission of the offence. Diversion has been practised in South Africa since the 1990s but has now been given legal recognition by the Child Justice Act.

[4] See also *S v S* 2001 (2) SACR 321 (T)(A similar approach appears to have underpinned the Court's decision to set aside a suspended prison term for a 15 year old girl who had falsely accused a 17 year old boy of rape because she was afraid of her father and replace it with a postponed sentence.)

[5] 2000 (2) SACR 135 (C).

a clear legal and philosophical framework for the sentencing of offenders below the age of 18 years at the time of the commission of their offences. Van Heerden J spelt out the centrality of the FC s 28(1)*(g)* right of a child not to be detained except as a measure of last resort and for the shortest appropriate period of time in sentencing procedures. This right must be interpreted in light of South Africa's international obligations, particularly the UNCRC and the Beijing Rules.[1] The judicial approach towards the sentencing of child offenders, Judge Van Heerden argued, had to be reappraised and developed in order to promote an individualized response that was not only in proportion to the nature and gravity of the offence, but also the offender.

In 2005, the SCA again considered sentencing of child offenders in *Director of Public Prosecutions, Kwa-Zulu Natal v P*.[2] The state appealed against a non-custodial sentence that had been handed down by the High Court in a case of murder committed by a girl who was only twelve years old at the time of the commission of the offence. The SCA replaced the original non-custodial sentence with a prison term of seven years suspended for five years. The judgment is disappointing. It restates the sentencing principles that were set out in *S v B*. But instead of taking the opportunity to give clear meaning to the term 'imprisonment as a measure of last resort, and for the shortest appropriate period of time' the judgment simply reiterates the principles and delivers a harsher punishment than that of the court a quo. In addition, it appears to have weakened the principle laid down in *S v Z* that suspended prison terms should not be used in cases where imprisonment is adjudged to be inappropriate.[3]

The long term impact of *P* cannot as yet be determined. However, there are signs that it will be interpreted positively. In *Mocumi v S*,[4] *P* was referred to in support of a finding that a prison term for a child offender was found to be shockingly inappropriate. In *S v M*, Sachs J stated that '*P* confirmed the need for a re-appraisal of the juvenile justice system in the light of the Constitution'.[5] Sachs J further summarised *P* as follows:

> [It] pointed out that the overarching thesis of the international instruments and the Constitution was that child offenders should not be deprived of their freedom except as a measure of last resort and then only for the shortest possible period of time [and that] even then the sentence must be individualised so as to prepare the child offender for reintegration into society…. [T]he principles guiding the sentencing of a child are proportionality and the best interests of the child.[6]

The principles for sentencing child offenders were repeated and amplified by the

[1] The UN Standard Minimum Rules for the Administration of Juvenile Justice (1986).

[2] 2006 (1) SACR 243 (SCA)('*P*').

[3] For further criticism of the judgment, see S Terblanche 'Sentencing a Child Who Murders — *DPP KwaZulu Natal v P* 2006 (1) SACR 243 (SCA)' (2007) 20 *SACJ* 243.

[4] (Unreported Northern Cape Division Case Number CASR 2/05, 30 May 2006).

[5] *S v M* (supra) at para 11.

[6] Ibid at para 16 n 20.

Supreme Court of Appeal in *S v N*.[1] Cameron JA, writing for the majority, referred directly to the 'last resort' principle and provided this elucidation:

> [It] bears not only on whether we choose prison as a sentencing option, but on the sort of prison sentence we impose, if we must. So if there is a legitimate option other than prison, we must choose it; but if prison is unavoidable its form and duration should also be tempered. Every day he spends in prison should be because there is no alternative.[2]

In addition, the courts have continued to stress the importance of a probation officer's pre-sentence report wherever it is possible that a sentence may include detention.[3] While not a novel legal approach,[4] judgments in the new constitutional era have linked the requirement to the constitutional protection of children.

Detention refers not only to prison or police cells but also to other secure places of detention such as reform schools.[5] In *S v Z & 23 Similar Cases*,[6] the court reviewed 24 cases, which were referred to by a concerned magistrate in terms of s 304(2)*(a)* of the Criminal Procedure Act (CPA).[7] In all of these cases, child offenders had been sentenced to a reform school in terms of CPA s 290, but had been in prison for long periods of time waiting to be transferred to a reform school. The court directed the department to report on a range of matters, and ordered the immediate release of 24 child offenders whose two year orders had either lapsed or would soon lapse. Other arrangements were made for those who had not spent a very long duration in prison. The matter was postponed for six months. The subsequent hearing gave rise to a further written judgment.[8] At the High Court's request, the Department of Education had presented a plan for structural alteration of an existing school of industries to create a reform school that could receive sentenced children. The court order included a structural interdict overseeing the Department's fulfilment of their plans. The same scenario that

[1] *S v N* 2008 (2) SACR 135 (SCA). The case concerned a 17 year old who had been sentenced for rape by the magistrates court to a period of 10 years imprisonment, four years of which were suspended. The majority of the court, after anxious deliberation, set aside the sentence and replaced it with a sentence of correctional supervision in terms of section 276(1)*(i)*. The new sentence required the offender to spend one sixth of his sentence in prison before becoming eligible for release on correctional supervision. Maya JA's minority judgment upholds the constitutional principles relevant to sentencing of child offender. However, the judge concludes that an effective six year sentence, while 'undoubtedly robust', was an appropriate punishment under the circumstances. Moreover, it did not deny the child a chance of rehabilitation.

[2] Ibid at para 39.

[3] *S v Z* (supra); *Kwalase* (supra); *S v J & Others* 2000 (2) SACR 310 (C); *S v Petersen & 'n Ander* 2001 (1) SACR 16 (SCA); *S v N & Another* 2005 (1) SACR 201 (CkH); *S v M & Another* 2005 (1) SACR 481 (E).

[4] For the importance of a pre-sentence report, see *S v H & Another* 1978 (4) SA 385 (EC); *S v Ramadzanga* 1988 (2) SA 837 (V); and *S v Quandu* 1989 (1) SA 517 (A).

[5] When the Children's Act 38 of 2005 comes into operation, the term 'reform school' will fall away. The institutions will instead be called 'child and youth care centres'. They will be specifically registered to receive sentenced children. Initially they will remain under the control of the Department of Education. But within 2 years of the Act's implementation they must be transferred to the Department of Social Development. See ss 191 and 196 of the Children's Amendment Act 41 of 2007.

[6] 2004 (4) BCLR 410 (E).

[7] Act 51 of 1977.

[8] 2004 (1) SACR 400 (E)

led to the *S v Z* judgments has subsequently played itself out twice again in other provinces.[1]

These judgments, taken in toto, have created a progressive constitutional jurisprudence on the sentencing of children. During the same period, however, the actual sentencing of child offenders moved in a contrary direction by the courts' interpretation of the minimum sentencing legislation: the Criminal Law Amendment Act (CLAA).[2] When the CLAA was promulgated, it did not apply to children below the age of sixteen. Sixteen and seventeen year olds were included in the ambit of the Act,[3] although the sentencing procedure for them was different from the procedure for adults.[4]

In a string of cases, the courts debated the interpretation of the provisions related to sixteen and seventeen year olds.[5] *Nkosi*, for example, considered the international law and constitutional provisions, and enunciated the following principles for sentencing a child offender:[6]

(i) Wherever possible a sentence of imprisonment should be avoided, especially in the case of a first offender;
(ii) imprisonment should be considered as a measure of last resort, where no other sentence can be considered appropriate.

[1] See *S v M* and *S v S* (Unreported decision of the Northern Cape High Court, Case Nos. 435/04 and 237/04)(11 November 2005) available at www.childlawsa.com (The judgment arose from an urgent special review of the situation of two children who had been sentenced to reform school. By the date of review, the children had been in prison for 15 and 19 months respectively. Lacock J found that although the sentences were appropriate they could not be carried out. He set them aside and replaced them with prison terms matching the periods already served, and the children were consequently released forthwith.) See also *N & Another v the State* (Unreported decision of the Natal High Court, Case No AR 359/2006)(14 September 2006), available at www.childlawsa.com (In this matter, two teenage boys had been awaiting designation to reform school in Westville prison for eighteen months. Levinsohn J pointed out that the sentence was a competent one, and he therefore did not set the sentence aside. However, he released the two boys on the grounds that it was in the interests of justice to do so. Lamenting the shortage of reform schools, the judge urged magistrates who sentence young people to reform school to diarise the matter for one month, and to send the matters on special review if the children are not moved timeously. This practice was subsequently included in the Child Justice Act, s 76(4).)

[2] CLAA ss 51 to 53, which came into operation on 1 May 1998. The amendment was initially intended to be a short-term measure, but has recently been further amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, which provided magistrates sentencing jurisdiction of up to 30 years imprisonment.

[3] See J Kriegler 'Criminal Procedure: Legislation' (2003) *Annual Survey of South African Law* 786 (The author points out that there is no clear rational for treating 16 and 17 year olds differently from 14 and 15 year olds. He makes this comment in relation to the rules related to automatic appeal as introduced by the Criminal Procedure Amendment Act 42 of 2003. In our view, the point he makes is equally applicable to the law on minimum sentences.)

[4] CLAA s 51(3)*(b)* provided: 'If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.'

[5] *S v N* 2000 (1) SACR 209 (W); *S v S* 2001 (1) SACR 79 (W); *S v Blaauw* [2001] 3 All SA 588 (C); *S v Malgas* [2001] 3 All SA 220 (SCA); *S v Nkosi* (supra); *Direkteur van Openbare Vervolgings, Transvaal v Makwetsja* [2003] 2 All SA 249 (T).

[6] *Nkosi* (supra) at 147f-i.

(iii) where imprisonment is considered, it should be for the shortest possible period given the nature and gravity of the offence and the needs of society as well as the particular needs and interests of the child offender;
(iv) if possible the judicial officer must structure the sentence in such a way as to promote rehabilitation and reintegration; and
(v) the sentence of life imprisonment may only be considered under exceptional circumstances.

The applicability of minimum sentences appeared to be resolved by the Supreme Court of Appeal in *S v B*.[1] The case involved a 17-year-old boy who had been convicted of murder. The court *a quo* had applied the minimum sentence of life imprisonment. The appellant argued that the Final Constitution only permits children to be detained as a last resort, and that a minimum sentence implies a first resort of imprisonment. The *S v B* Court agreed and held that minimum sentences do not apply to sixteen- and seventeen-year-olds. According to *S v B*, the traditional aims of punishment for child offenders have to be re-appraised in the light of international instruments. Any sentencing court must have discretion when sentencing a child, in order to give effect to the requirement of individualisation and the need for proportionality. The SCA added, however, that when dealing with sixteen- and seventeen-year-olds, the fact that the legislature has ordained minimum sentences for specific offences should be taken into account as a weighting factor when a court exercises its sentencing discretion.[2]

After this case, the Criminal Law (Sentencing) Amendment Act[3] reinstated minimum sentences for sixteen- and seventeen-year-olds. In the *Centre for Child Law v Minister of Justice and Constitutional Development and Others*[4] the Constitutional Court ruled that the Final Constitution prohibits minimum sentencing legislation from being applied to children aged 16 and 17 years old. The Court confirmed the order of constitutional invalidity declaring sections of the CLAA[5] invalid. The majority of the Constitutional Court found that he minimum sentencing regime constrains the discretion of the sentencing officer by orienting them away from non-custodial options, by de-individuating sentences, and by conducing to longer prison sentences. This breaches their rights in terms of section 28(1)*(g)*, and the *Centre for Child Law* Court found that no adequate justification had been provided for the limitation.

(b) Law reform

The Child Justice Act provides various alternatives to imprisonment, both prior to and during trial, and at sentencing.[6] It is worth discussing these innovations in some detail. The Act reiterates the rule that children must be detained separately from adults. It also adds additional protections; for example boys must be

[1] 2006 (1) SACR 311 (SCA), [2005] 2 All SA 1 (SCA).
[2] Ibid at para 11.
[3] Act 38 of 2007.
[4] 98/08 [2009] ZACC 18.
[5] As amended by Act 38 of 2007.
[6] Act 75 of 2008, due to come into operation on 1 April 2010.

confined separately from girls.[1] There are special provisions for the protection of children detained in police custody, including the requirement that they be detained in conditions that reduce the risk of harm, that they be permitted visitors and that they be cared for in a manner consistent with the special needs of children.[2]

The Act clearly reinforces the constitutional standard that detention, including pre-trial detention, is a measure of last resort. It provides written notice and summons as alternatives to arrest,[3] and places a variety of restrictions on the circumstances in which children can be arrested.[4] The Act articulates that a unique clause demands that 'when considering the placement of a child' preference must be given to the least restrictive option possible in the circumstances.[5] The detention of children younger than 14 is subject to even more stringent conditions.[6]

All children must be assessed by a probation officer before they appear at a preliminary inquiry.[7] The purpose of the assessment is to provide quality information to make decisions about how the child is to be dealt with, including the possibility of the child's case being 'diverted'. Diversion is a process of channelling cases away from the formal court system to specially devised plans or programmes.[8] Diversion is not treated as a conviction, and the child does not obtain a criminal record. A child can only be diverted if he or she acknowledges responsibility for the offence, and if there is a prima facie case against him or her. The procedure for diversion depends on the seriousness of the offence. A minor offence may be diverted by a prosecutor. If the case is not diverted by the prosecutor, or if the matter is more serious, then the child must appear before a preliminary inquiry. This hearing takes the place of a hearing of first appearance. The palpable difference is that all efforts are made to ensure that appropriate decisions are made about the child. A child may be diverted at this stage, failing which the matter proceeds to trial in the child justice court.[9] If the child does not comply with the

[1] Section 28(1)*(a)*.

[2] Section 28(1)*(b)-(d)*. The section also includes a compulsory reporting procedure if any injury or trauma is complained of or observed.

[3] Sections 17 and 18.

[4] Section 22. Children charged with minor offences are not to be arrested and detained, unless their parents cannot be located or they are deemed to be risk to themselves or others. If such a child is detained, he or she can be released into the care of the parent or an appropriate adult by a police official if the offence is a minor one, or by a police official with the agreement of the public prosecutor if the case is more serious. The offences are arranged according to schedules, with schedule 1 containing relatively minor offences, schedule 2 more serious ones, and schedule 3 the most serious, such as murder, rape and aggravated robbery. Police may not release a child charged with a schedule 3 offence, even with the authorisation of the prosecutor.

[5] Section 26.

[6] If a child is below 14 years of age or if 14 years or older but charged with a schedule 1 or 2 offence, and such child has not been released into the care of a parent or appropriate adult, then the police official must give consideration to the child being accommodated in a suitable child and youth care centre instead of being held in police cells. Chapter 5 of the Bill deals with assessment, and chapter 7 with preliminary inquiry.

[7] Section 34.

[8] Chapter 8 of the Child Justice Bill provides detailed provisions on diversion.

[9] The Child Justice Court is any court before which a child is appearing, bound by the rules set out in the Act, and is held in camera.

diversion order, and has no satisfactory explanation when brought before court, then he or she may then be tried for the offence.[1]

During the preliminary inquiry and trial stages, the Act retains its vigilance regarding detention. Preference is given to the release of children: but if they are to be detained they should preferably be held in a suitable child and youth care centre.[2] Children may only be detained in a prison to await trial if they are over the age of 14 years and charged with serious offences.[3] The Act stipulates that trials of children are to be concluded as speedily as possible and that postponements are to be limited in number and duration.[4] Children in prison are to be brought back to court every 14 days.[5]

The sentencing chapter[6] gets off to a positive start with a list of sentencing objectives: to encourage the child to understand the implications of and be accountable for the harm caused; to promote an individualised and proportionate response; and to promote reintegration of the child into the family and the community.[7] The chapter also embraces a range of sentencing options that can be served in the community and places great emphasis on restorative justice.[8] Another option is for the child to be sentenced to a child and youth care centre for 5 years.[9] To this end, the chapter provides for increased tariffs for residential sentences to these centres.[10] Section 77(1)*(a)* prohibits the imprisonment of children below 14 years at the time of sentence.[11] Children who are 14 years or older may be sentenced for up to 25 years.

47.8 Legal Representation in Civil Proceedings

According to FC s 28(1)*(h)*:

> Every child has the right to have a legal practitioner assigned by the state and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.

The Constitutional Court has referred to this section on two occasions, both in

[1] Section 55.

[2] These are secure centres that are managed by the Department of Social Development.

[3] Section 30.

[4] Section 66(1).

[5] Section 66(2) Children in child and youth care centres are to appear every 30 days, and for those in the care of parents, postponements are not to exceed 60 days.

[6] Chapter 10 of the Child Justice Act.

[7] Section 69.

[8] The restorative justice options offered in the Act are family group conferences and victim offender mediation. See A Skelton and M Batley 'Restorative Justice: A Contemporary South African Review' 21(3) 2008 *Acta Criminologica* 37.

[9] Section 76(3). The section also provides for a child to be sentenced to a child and youth care centre and a prison sentence at the same time. The child is then brought back to court after the 5 years to consider release or transfer to an adult prison.

[10] In terms of CPA s 290, a sentence to a reform school (now included in the term 'child and youth care centre)', could be ordered for a maximum period of two years.

[11] The Child Justice Bill had proposed that the relevant age for this prohibition should be under 14 years at the time of the commission of the offence. This was changed to 'at the time of sentence' by the Parliamentary Justice Portfolio Committee.

relation to the appointment of a curator *ad litem* for very young children.[1] These cases illustrate one manner in which FC s 28(1)*(h)* may be utilised: it is a measure to protect children caught up in litigation by ensuring that the curator *ad litem* looks after their interests.

However, of much more interest is FC s 28(1)*(h)*'s potential to promote the recognition of a child's developing autonomy. As they mature, children's views become more central to the resolution of conflicts concerning them. FC s 28(1)(h) provides a platform for children to be directly involved in civil litigation and for their legal representatives to place the views of the children before the court. The Children's Act confirms this new approach very directly.[2] Every child of sufficient age, maturity and stage of development, must be given the opportunity to participate in matters that concern him or her. Moreover, the child's views must be given due consideration.[3] The Act also grants every child the right to bring, or be assisted in bringing, a matter to court.[4]

The Constitutional Court has on two occasions noted that they would like to hear directly from children (presumably those who are of sufficient age and maturity) in matters where their rights were affected. In *Christian Education*, the Court commented that it would have been useful to hear the voices of children on the issue of corporal punishment in schools.[5] And while their actual experiences and opinions would not necessarily have been decisive, their voices and presence would have enriched the dialogue between the parties and the Court.

In *Pillay*, the Court referred to this passage and commented that legal matters involving children often exclude children. Langa CJ remarked: 'The need for the child's voice to be heard is perhaps even more acute when it concerns children of [about 16 years] who should be increasingly taking responsibilities for their own actions and beliefs.'[6]

In *Soller NO*, the meaning and scope of FC s 28(1)*(h)* was explored in some detail.[7] The applicant was a fifteen year old boy, referred to as K, who sought a variation of his custody order so that he could be placed in the custody of his

[1] See *Du Toit & Another v Minister of Welfare & Population Development & Others* 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC) at para 3 (Skweyiya AJ held that where there is a risk of substantial injustice to children a court is obliged to appoint a *curator ad litem* to represent the interests of children, and that this obligation flows from the provisions of FC s 28(1)*(h)*.) See also *AD v DW* (supra) at para 11 n 5 (Court relied heavily on the report of the curatrix.)

[2] See C Davel 'General Principles' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (2007)(Note, in particular, the authors' comments on ss 10 and 14 of the Act.)

[3] Children's Act s 10. The section came into operation on 1 July 2007. The provision is based on art 12(1) of the CRC and art 4(2) of the ACRWC. For further information on the voice of the child, see A Barratt 'The Best Interest of the Child: Where is the Child's Voice?' in S Burman (ed) *The Fate of the Child* (2003) 145; D Kassan 'The Voice of the Child in Family Proceedings' (2003) 36 *De Jure* 164; JA Robinson 'The Right of the Child to be Heard at the Divorce of their Parents: Reflections on the Legal Position in South Africa' (2007) 70 *THRHR* 263.

[4] Children's Act s 14. A child may approach a court directly, as can anyone acting in the interest of the child, anyone acting as a member of or in the interests of a group or class, or in the public interest. These rights appear in s 15 of the Children's Act, and echo directly the standing provisions in FC s 38.

[5] *Christian Education* (supra) at para 53.

[6] *Pillay* (supra) at para 56.

[7] *Soller NO v G & Another* 2003 (5) SA 430 (W).

father. The application was originally brought in terms of FC s 28(1)*(h)* on behalf of K by an attorney who turned out to have been struck from the roll for what was described as 'piratical recklessness in his approach to important litigation'. Satchwell J decided that although the attorney was unsuitable to represent K, the matter did require the assignment of a legal representative under FC s 28(1)*(h)*. The judge went on to observe the significance of the fact that the legislature inserted FC s 28(1)*(h)* into the Final Constitution with the full knowledge that the Office of the Family Advocate[1] already existed. She further reasoned that the legal practitioner assigned in terms of FC s 28(1)*(h)* was surely not intended to appropriate the role and usurp the function of the Family Advocate. The judgment draws a clear distinction between the role of the Family Advocate and the role of a legal representative:

> The family advocate provides a professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer. The legal practitioner stands squarely in the corner of the child and has the task of presenting and arguing the wishes and desires of that child.[2]

In *Ex Parte Van Niekerk*, two girls aged 13 and 11 were granted leave to intervene as parties in an application brought by their father to gain access to them. The court held that to give proper effect to the provisions of FC s 28(1)*(h)*: 'A court is entitled to join minors as parties to proceedings affecting their best interests. Unless the children are joined as parties they will not be able to appeal against an adverse order.'[3] In *R v H & Another*[4] the court asked whether a child caught up in litigation between divorcing parents should have separate legal representation. A representative was appointed by the High Court in terms of FC s 28(1)*(h)* after consultation with all the parties. The lawyer later successfully applied to be joined as a second defendant.[5] The approach in *Ex Parte Van Niekerk* is to be preferred. It joins the children themselves as parties, not the legal representative. Such recognition gives the children better opportunities for participation.

FC s 28(1)(h) requires legal representation where a 'substantial injustice' would otherwise result. The *Soller* Court's gloss on this term is of particular significance where 'the civil proceedings concerned are of crucial importance to [the child's] current life and future developments.'[6]

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[1] The Family Advocate was created by the Mediation in Certain Divorce Matters 24 of 1987. Regarding the role of the family advocate, see S Burman & McClennan 'Providing for Children? The Family Advocate and the Legal Profession' (1996) *Acta Juridica* 69; N Glasser 'Can the Family Advocate Adequately Safeguard Our Children's Best Interests?' (2002) 65 *THRHR* 74; 'Taking Children's Rights Seriously' (2002) 35 *De Jure* 223; 'Custody on Divorce: Assessing the Role of the Family Advocate' in S Burman (ed) *The Fate of the Child* (2003) 108.

[2] *Soller NO* (supra) at 438 d-e. See further *Centre for Child Law (2005)* (supra)(confirmed the right of legal representation at state expense in civil cases for foreign unaccompanied minors, and separated out the role of a curator *ad litem* from that of a legal representative.)

[3] *Ex Parte Van Niekerk* (supra) at para 8. The Court relied on the Canadian case of *Re Children's Aid Society of Winnipeg & AM & LC Re RAM*, 7 CRR.

[4] 2005 (6) SA 535 (C), [2006] 4 All SA 199 (C).

[5] The lawyer asked to be joined a *nomine officio* capacity.

[6] *Soller NO* (supra) at 435d.

Whilst a fledgling jurisprudence on FC s 28(1)*(h)* appears to be developing, several questions are left for debate. How is the child to obtain a legal representative? In *Legal Aid Board v R*, the High Court decided that the Legal Aid Board can appoint a legal representative for a child, and that it is not necessary to approach the High Court in every case.[1] If the matter is an application, then should children file affidavits? If children do not give evidence in court, is it appropriate for a judge to hear them in chambers?[2] How does a legal representative assist a child who is too young or immature to give instructions? We currently possess no clear answers to these questions. However, given the rapid pace of development in child law we can expect them to be addressed in the not to distant future.

47.9 Children and Armed Conflict

The Final Constitution includes both the right of children not to be used directly in armed conflict, and the right to be protected in times of war. The word 'directly' might be open to the interpretation that children could be employed by the South African National Defence Force to do work that would not involve them directly in armed conflict (with due regard to FC s 28(1)*(f)* which protects children from work that is inappropriate to their age).[3] Domestic legislation accords with the Final Constitution: The Defence Act provides that the minimum age of recruitment into the South African National Defence force is 18 years,[4] this provision may not be derogated from even in times of armed conflict.[5]

FC s 28(1)*(i)* is above the minimum standard set by art 38 of the CRC. The CRC only prohibits children under 15 years from being directly involved in armed conflict. Much stronger protection can be found in the wording of the ACRWC. The ACRWC provides that 'no child shall take a direct part in hostilities' and obliges the state to 'refrain, in particular, from recruiting the child'.[6] The wording of the Final Constitution is thus more closely aligned to the wording of the ACRWC. The Optional Protocol to the CRC on the involvement of children in armed conflict[7] (which has been signed but not ratified by South

[1] *Legal Aid Board v R & Another* 2009 (2) SA 263 (D).

[2] This debate is not new. And judges have differing views on the matter. See *Martens v Martens* 1991 (4) SA 287 (T); *McCall v McCall* 1994 (3) SA 201 (C). The judges found it most instructive to speak to the children in chambers. However, in *F v F*, the only SCA judgment to have dealt with this question, the court declined to hear the child in chambers. The reasons were that she had already expressed discomfort with seeing many experts in relation to the case, as well as the prospect of a child having to face five judges in chambers, and the fact that this request occurred in the context of an appeal. Furthermore, Maya AJA raised procedural concerns about whether the children's views would constitute evidence, and, if so, should there be opportunity to lead rebuttal evidence? However, the Court did acknowledge that courts must take into account the child's preferences (where she is old enough to articulate them) and the Court had ample information before them regarding such preferences.

[3] See J Sloth-Nielsen 'Children' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law* (2nd Edition 2006) 541.

[4] Act 42 of 2002 s 52(1).

[5] Defence Act s 91(2)*(a)*.

[6] Art 22(2). The ACRWC defines a child as a person below the age of 18. Art 3.

[7] GA/RES 54/263 (signed by South Africa on 8 February 2002).

Africa) establishes a minimum recruitment age of 18 years and also broadens the ambit of the prohibition on the involvement of children through recruitment by armed groups that do not fall under the control of the state. The Optional Protocol opens the door to possible horizontal application against the non-State armed groups.[1] FC s 28(2)*(i)* can also potentially apply horizontally.[2]

47.10 The Best Interests of the Child

(a) Introduction

FC s 28(2) re-iterates the common-law standard of the best interests of the child. But it is no mere repetition. The common-law standard is applied by the High Court in its position as the upper guardian of minor children. The constitutional standard applies in 'every matter concerning the child'. Furthermore, the wording of the text indicates that the best interests of the child in FC s 28(2) is not limited to the matters in FC s 28(1). This conclusion is born out by a comparison with s 30(3) of the Interim Constitution. Interim Constitution s 30(3) said that the best interests of the child were paramount for the purposes of IC s 30 alone.[3]

The problems with the best interests standard are legion and legendary:

> (i) it is 'indeterminate'; (ii) members of the various professions dealing with matters concerning children . . . have quite different perspectives on the concept . . .; and (iii) the way in which the 'best interests' criterion is interpreted and applied by different countries (and indeed, by different courts and other decision-makers within the same country) is influenced to a large extent by the historical background to and the cultural, social, political and economic conditions of the country concerned, as also by the value system of the relevant decision-maker.[4]

Even if we admit the above, it is hard to see how it could be otherwise. Values with respect to and ideas about children vary over time and place. One would not want to block the flexibility and growth of the law by a need for certainty and neatness.[5] The 'best' one can do is list some basic criteria and flesh out their meaning through application to specific types of situations.

(b) The operation of FC s 28(2)

From the existing case law, it is clear that FC s 28(2) operates in at least three ways.

First, the concept of the child's best interests is used to interpret the protections in FC s 28(1) or vice versa; subsecs (1) and (2) are read together. For example,

[1] For more on children in armed conflict, see B Mezmur 'Children at Both Ends of the Gun: Child Soldiers in Africa' in J Sloth Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 199-218.

[2] For more on the direct horizontal application of the Bill of Rights, see S Woolman 'Application' in S Woolman, T Roux, M Bishop, J Klaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) 31-62 to 31-74.

[3] A Cockrell 'The Law of Persons and the Bill of Rights' in *Bill of Rights Compendium* (Service Issue 13, October 2003) at para 3E19.

[4] B van Heerden et al *Boberg's Law of Persons and the Family* (2nd Edition, 1999) 502-503 (footnotes omitted).

[5] See *Minister of Welfare and Population Development v Fitzpatrick & Others* 2000 (3) SA 422 (CC), 2000 (3) BCLR 713 (C)(*'Fitzpatrick'*) at para 18.

in *Bannatyne v Bannatyne*, the Constitutional Court referred to the child's right to proper parental care (FC s 28(1)*(b)*): it places an obligation on the state to create the necessary environment for parents to provide proper parental care.[1] One of the state's duties was to enforce the effective payment of maintenance. The Constitutional Court reversed a Supreme Court of Appeal decision that had failed to take the best interests of a child into account in rendering a decision concerning maintenance.[2]

Second, the best interests criteria may be employed to determine the ambit of another right in the Bill of Rights. Alternatively, the best interests criteria are relevant at the limitation stage of application analysis of this other right. For example, the Witwatersrand High Court in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & Others*[3] held that the ban on child pornography did not contravene the applicant's rights to privacy and freedom of expression. These rights are not absolute and must be interpreted in the light of the paramountcy of children's best interests. Alternatively, if the applicant's rights *were* violated, the court a quo was of the view that the ban on child pornography was a constitutionally acceptable *limitation* because of what is in children's best interests. The Constitutional Court[4] did not allow children's interests to decide the ambit of the rights to expression and privacy. These rights were violated by the statutory prohibition. Children's interests, however, justified the limitation of the rights.[5] The judgment of the Constitutional Court may indicate that where children's best interests enter the analysis of a non-s 28 right, they do so only at the limitation stage. However, if a non-s 28 right is a right of a child, then the best interests criteria are inseparable from the determination of whether the challenged law or action violates the non-s 28 right. For instance, in *Hay v B & Others* the High Court read the child's right to life together with the right to have the child's best interests considered as paramount. As a result, the Court rejected the FC s 15 claim of the parents, who were Jehovah's[6] Witnesses and believed that their religion forbade a blood transfusion which might save the child's life.[7]

Third, FC s 28(2) creates a self-standing right:

> Section 28(1) is not exhaustive of children's rights. Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights

[1] 2003 (2) SA 363 (CC) at paras 24-5.

[2] See *Du Toit & Another v Minister of Welfare and Population Development & Others (Lesbian and Gay Equality Project as amicus curiae)* 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC)('Du Toit'). The court found to be unconstitutional statutory provisions that did not allow for joint adoption by same-sex partners in a long-term relationship. One of the grounds for this outcome was that it was in children's best interests to be adopted jointly by suitable parents. Children would be otherwise deprived of the possibility of a family life as required by FC s 28(1)(b). Ibid at para 22.

[3] 2003 (3) SA 389 (W), 2002 (12) BCLR 1285 (W), [2003] 1 All SA 449 (W) ('*De Reuck I*').

[4] *De Reuck II* (supra) at para 55.

[5] See *Khosa* (supra) at para 136.

[6] 2003 (3) SA 492 (W).

[7] See *Kotze v Kotze* 2003 (3) SA 628 (T)(High Court combined the child's right to religious freedom with its right to its best interests, and refused to make a certain clause part of a divorce order. The parties had sought to educate their child in the Apostolic Church: the offending clause was found infirm because it predetermined and constrained the child's future.)

> enumerated in s 28(1) and s 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in s 28(1).[1]

In *Fitzpatrick*, the court decided that s 18(4)*(f)* of the Child Care Act violated FC s 28(2). The section proscribed the adoption of a child born of a South African citizen by persons who are not South African citizens or are persons who qualify for naturalisation but have not yet applied. The court held that the best interests of a child could lie in its adoption by non-South Africans.[2] Another notable illustration of FC s 28(2) as an independent right is to be found in *Sonderup v Tondelli & Another*.[3] In *Sonderup,* the Hague Convention on the Civil Aspects of International Child Abduction Act[4] was found not to violate FC s 28(2):

> In normal circumstances it is in the best interests of children that parents or others shall not abduct them from one jurisdiction to another, but that any decision relating to the custody of the children is best decided in the jurisdiction in which they have hitherto been habitually resident.[5]

In *AD v DW*, an American couple wanted to adopt a South African child. Instead of making an application to the Children's Court, they brought an application to the High Court for sole custody and guardianship with a view to removing the child from South Africa and concluding an adoption in the USA. The case began in the High Court.[6] That court refused to grant the order, and referred the couple to the Children's Court, the forum where domestic adoptions are concluded.[7] The couple appealed both the refusal and the referral in the Supreme Court of Appeal.[8]

The SCA divided three to two, with four written judgments. The majority held that to grant the order sought by the applicants would result in sanctioning an alternative route to inter-country adoption under the guise of a sole custody and sole guardianship application. The majority found this approach to be an unsavoury form of by-passing the Children's Court adoption system and jumping the queue. The court held further that the appeal should in any event fail because

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[1] *Fitzpatrick* (supra) at para 17.

[2] Ibid at para 19.

[3] 2001 (1) SA 1171 (CC), 2001 (2) BCLR 152 (CC) ('*Sonderup*'). See also *Petersen v Maintenance Officer, Simon's Town Maintenance Court, & Others* 2004 (2) SA 56 (C), [2004] 1 All SA 117 (C) at para 20.

[4] Act 72 of 1996.

[5] *Re F (Minor: Abduction: Jurisdiction)* [1990] 3 All ER 97, 99j (CA), quoted in *Sonderup* (supra) at para 28.

[6] *De Gree & Another v Webb & Others (Centre for Child Law, University of Pretoria, Amicus Curiae)* (2006) (6) SA 51 (W).

[7] See *Minister of Welfare & Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) (Constitutional Court declared section 18(4)*(f)* of the Child Care Act 74 of 1983 unconstitutional. It thus opened the door to inter-country adoptions that the Court envisaged would be concluded via the Children's Court, using the Child Care Act and international law as the legal framework.) For a discussion of some of the problems experienced in the practice of inter-country adoption following *Fitzpatrick*, see A Louw 'Inter-country Adoption in South Africa: Have the Fears become Fact' (2006) 39(3) *De Jure* 503.

[8] *De Gree & Another v Webb & Others (Centre for Child Law as Amicus Curiae)* 2007 (5) SA 184 (SCA).

of the principle of subsidiarity:[1] insufficient efforts had been made to find suitable care for the child in South Africa and thus inter-country adoption could not proceed. The minority took a different view, holding that that as upper guardian of minors, the High Court had jurisdiction to hear the application. In their view the papers showed that it was overwhelmingly in her best interests for the order of sole custody and sole guardianship to be granted.[2]

The case finally found its way to the Constitutional Court. The child remained in alternative care. The Court had to find a way to ensure that a correct procedure for children was followed (to prevent unlawful adoptions or trafficking in children) whilst upholding the best interests of the individual child concerned. Justice Sachs recognised the importance of the 'subsidiarity' principle, but ultimately found that the principle must yield to the paramountcy principle. The best interests of each child must therefore be examined on an individual basis and not in the abstract:

> Child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case.[3]

The Court ruled that unduly rigid adherence to technical matters should play a relatively diminished role, because 'the courts are essentially guarding the best interests of a child, not simply settling a dispute between litigants.'[4]

(c) Paramountcy v limitation

The use of the word 'paramount' in FC s 28(2) has led some courts to pronounce that children's interests can never be trumped by the rights of others.[5] The Constitutional Court in *De Reuck* decided otherwise:

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[1] The principle of subsidiarity is based on the notion that inter-country adoption should be subsidiary to domestic solutions for the care of a child. The principle is reflected in numerous international instruments. Art 21 of the CRC describes inter-country adoption as 'an alternative means of child-care, if the child cannot be placed in foster care or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin'. Art 24 of the African Charter on the Rights and Welfare of the Child uses similar terminology in its description of inter-country adoption, but is somewhat more extreme: it describes inter-country adoption as being 'a last resort'. The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (1993), includes the following language in its preamble: 'Recognizing that inter-country adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.'

[2] For a discussion of the judgment by the Supreme Court of Appeal, see P Moodley 'Unravelling the Legal Knots around Inter-country Adoptions in *De Gree v Webb*' (2007) 3 *Potchefstroom Electronic Law Journal*.

[3] *AD v DW* (supra) at para 55.

[4] Ibid.

[5] *De Reuck I* (supra) at para 45; *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys en Andere* 2003 (4) SA 160 (T), 178B-C, 2002 (4) All SA 745 (T)(although educational officials' conduct declaring a school dual-medium was not administratively fair, the decision was not set aside because the best interests of the English learners already admitted to the school under the decision were paramount). For more on this judgement, see S Woolman & B Fleisch *The Constitution in the Classroom: Law and Education in South Africa* (2009). See also S Woolman & M Bishop 'Education' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) in *Constitution Law of South Africa* (2nd Edition, OS, November 2007) Chapter 57.

> [T]he approach adopted by this Court [is] that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. This Court has held that section 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with section 36.[1]

Moreover, many of the children's rights in FC s 28, including FC s 28(2), are derogable in a state of emergency.[2]

Various courts have considered limitations on children's constitutional best interests.[3] Sometimes the reasons for such limitations are other aspects of the children's best interests. So, odd as it may sound, a child's best interests may also limit her best interests. For example, in *Sonderup*, the Hague Convention on the Civil Aspects of International Child Abduction was found to satisfy the long-term interests of children, but the Court discussed the question whether, assuming children's short-term interests were not satisfied by the Convention, such limitation could be justified under FC s 36. It was. The Court reiterated the important purpose of the Convention — that custody issues should be determined by the court which is in the best position to do so by reason of the relationship between its jurisdiction and the child. It wrote:

> The Convention also aims to prevent the wrongful circumvention of that forum by the unilateral action of one parent. In addition, the Convention is intended to encourage comity between States parties to facilitate co-operation in cases of child abduction across international borders.[4]

Sometimes the reasons for limitations on children's best interests are the interests of other children, or children generally, or of other parties, such as parents or the state. For instance, the court in *Harris v Minister of Education* found that a ministerial notice stating that only a child who is to turn seven years' old before the 31st of December of any particular year might be admitted to grade one in that school year violated FC s 28(2). The court held that it was educationally unsound to hold back a child who was ready for school. One of the justifications for the limitation on the right to which the court applied its mind was that '[s]cholars below the age of seven years tend to clog the educational system as a result of high failure and repetition rates and that this carries financial implications for the government'.[5] The court held this concern not to be relevant for the independent schools which the ministerial notice covered. Had the case been brought in respect of a government school, the limitation might well have been justified.

Sometimes the justifications for the limitations on children's rights may be a mix of the above considerations.

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[1] *De Reuck II* (supra) at para 55 citing *Sonderup* (supra) at paras 27-30.

[2] Section 37.

[3] *Sonderup* (supra) at paras 29-36; *Harris v Minister of Education* 2001 (8) BCLR 796, 805-6 (T), [2001] JOL 8310 (T)('*Harris*'); *Du Toit* (supra) at paras 31-7.

[4] *Sonderup* (supra) at para 31. The approach of *Sonderup* has been followed in two subsequent Supreme Court of Appeal judgments: *Pennello v Pennello (Chief Family Advocate as Amicus Curiae* 2004 (3) SA 117 (SCA) and *Central Authority v H* 2008 (1) SA 49 (SCA). See further C Woodrow & C du Toit 'Child Abduction' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (2007) Chapter 17.

[5] *Harris* (supra) at 805C.

Since children's best interests may validly be limited, what is the meaning of the phrase 'paramount importance'? Indeed, if a child's best interests are not always supreme, what is the point of FC s 28(2)? How would it be different from a hypothetical right which protected adults' best interests? FC s 28(2) is a highly unusual provision in the Bill of Rights because it applies to a group of people across the entire domain of their existence. Most of the other rights relate to particular spheres of activity. One purpose of the provision is to create a right for children *as children* — because they are especially vulnerable and because we think they are precious and because their interests have all too often given way to the interests of others. If these considerations lie at the heart of FC s 28(2), then the section must be read to reflect the following three concerns.

First, in every matter where a child's interests are (substantially) involved, those interests must be taken into account. This requirement turns all children's matters into potentially constitutional matters.[1] In *J v Director General, Home Affairs,*[2] the Constitutional Court declared unconstitutional a statutory provision which recognised the husband of a woman who had been artificially inseminated with his consent as the child's father, but did not recognise the long-term lesbian partner of a woman who had been inseminated with the partner's consent as the parent of the child. The basis of for the finding of unconstitutionality was that the law discriminated unfairly on the basis of sexual orientation.[3] The Court said that since the statute was unconstitutional on this ground, it was unnecessary to consider the other grounds raised by the applicant.[4] With respect, the children's interests must be considered in every relevant case. Indeed, the Court, in crafting a remedy, said that its order met best interests of the child requirements.[5]

Second, under FC s 28(2), children's interests alone are made a constitutional right. The subsection does not create a right for others.[6] It does not create a right of parental responsibilities and entitlements.[7] The interests of persons other than children are not captured by the subsection.

Third, FC s 28(2) involves a weighing-up process of the various interests of children in order to decide what is best for them. In addition, a child's interests have a leg up *vis-à-vis* other rights and values. That said, it is important to remember that the Final Constitution does not say that a children's interests are 'paramount'. They are of 'paramount importance'.[8] Indeed, the case law recognizes that they can be validly limited.

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[1] Many reported cases suggest that FC s 28(2) serves as reinforcement for the common-law standard of the best interests of the child.

[2] 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC) ('*J v Director General*').

[3] See FC s 9(3).

[4] *J v Director General* (supra) at para 15.

[5] Ibid at para 16.

[6] None of the other subsections of FC s 28 provide protection for non-minors.

[7] Cockrell (supra) at para 3E21. But we do not agree with Cockrell that a right of parental responsibilities and duties cannot be located elsewhere in the Bill of Rights (consider, for example, the rights to privacy and dignity.) Some parental responsibilities and obligations must be recognised because we do not want the state to possess sole control over the standards set for our children and families. See also S Woolman '*Freedom of Association*' (supra) at Chapter (Woolman contends that association — and intimate associations such as the family — are best protected by FC s 18.)

[8] But see *Reno v Flores* 507 US 292, 303-5 (1993)(Scalia J).

In *S v M* the court provides its clearest articulation to date on the meaning of the paramountcy principle. Sachs J comments that the very expansiveness of the paramountcy principle appears to promise everything but delivers little.[1] Nevertheless, the *S v M* Court recognised that it is precisely the contextual nature and inherent flexibility Constitutional s 28(2) that constitutes the source of its strength. The Court then attempted to 'establish an operational thrust for the paramountcy principle'.[2] The principle cannot, the Court reasoned, be interpreted 'to mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations. … [T]he fact that the best interests of the child are paramount does not mean that they are absolute.'[3] *S v M* dealt with the question of what the duties of a sentencing court are, in light of FC s 28(2), when the person being sentenced is the primary caregiver of minor children. Recognising the negative effects of imprisonment on the children, the judgment pronounced that sentencing officers should pay appropriate attention to the children of a primary caregiver and take reasonable steps to minimise damage:

> The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely the interests of children who may be concerned.[4]

47.11 The Age of a 'Child'

(a) The beginning of a 'child'

What effect does the 'age' of a child have for the bestowal of the protections in FC s 28 (and in other sections of the Bill of Rights) before birth? The applicants in *Christian Lawyers Association of South Africa & Others v Minister of Health & Others*[5] argued that the legalisation of abortion in the Choice on Termination of Pregnancy Act[6] violated the right to life of the foetus.[7] The court held that the right to life did not include the unborn child because FC s 28(3), in part, defines a child as a person under the age of 18 years. As a result, reasoned the court:

> [a]ge commences at birth. A foetus is not a 'child' of any 'age'. Had the drafters of the Constitution wished to protect the foetus in the bill of rights at all, one would have expected this to have been done in section 28, which specifically protects the rights of the child.[8]

[1] *S v M* (supra) at para 23.
[2] Ibid at para 25.
[3] Ibid at paras 25-26.
[4] Ibid at para 42.
[5] 1998 (4) SA 1113 (T), 1998 (11) BCLR 1434 (T)('*Christian Lawyers*').
[6] Act 72 of 1996.
[7] FC s 11.
[8] *Christian Lawyers* (supra) at 1442D.

The literal reading of FC s 28(3) does not, however, necessarily exclude its application to the foetus. The courts would be better served by an evaluation of the real values and interests at stake in abortion cases.[1]

In *S v Mshumpa* the victim was an unborn baby, who was shot (in the 38th week of pregnancy) through her mother's abdomen, resulting in a still birth.[2] The state argued that the common law should be developed so the definition of murder included the killing of an unborn child, as this conclusion would reflect the medical reality and the convictions of the community. The court noted that the common-law principle of being 'born alive' has never been discarded or developed either nationally or in foreign jurisdictions. It therefore came to the conclusion that no rights are conferred on an unborn child and, therefore, that a person only becomes a legal subject after birth.

(b) The end of a 'child'

The Children's Act[3] has changed the age of majority from 21 years to 18 years. This alteration brings the concepts of 'childhood' and 'minority' in South African law into alignment. Moreover, it resolves earlier debates about whether the Age of Majority Act was unconstitutional.[4] The change in the law reflects a growing recognition of the autonomy of young people, and allows them, for example, to choose their life partners without parental consent once they have turned 18 years of age. Inevitably, they will also lose certain protections. For example, an agreement entered into by a young person over 18 years will be enforceable against her, and the common-law action of *restitutio in integrum* will no longer be available to a person between the ages of 18 and 21.[5]

[1] For more on this case, see M O'Sullivan 'Reproductive Rights' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition OS, February 2005) Chapter 37.

[2] 2008 (1) SACR 126 (E).

[3] Act 38 of 2005. Section 17 reads: 'A child, whether male or female, becomes a major upon reaching the age of 18 years'. The section came into operation on 1 July 2007. The Age of Majority Act 57 of 1972 was repealed in full.

[4] South African Law Reform Commission *Review of the Child Care Act Report* Project 110 (December 2002) 23-25; J van der Vyver 'Constitutionality of the Age of Majority Act' (1997)114 *SALJ* 750, 754.

[5] For a more complete explanation of this change in the law and other issues relating to minority, see T Boezaart 'Some Comments on the Interpretation and Analysis of S 17 of the Children's Act 38 of 2005' (2008) 41(2) *De Jure* 245.

48 Land

Juanita Pienaar & Jason Brickhill

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25. Property. —

. . .

(4) For the purposes of this section —

(*a*) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(*b*) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).

(9) Parliament must enact the legislation referred to in subsection (6).[1]

48.1 Introduction

The land reservation and segregation that formed the core of apartheid and colonial rule in South Africa led Sol Plaatje, the first General Secretary of the African National Congress, famously to exclaim: 'Awaking on Friday morning, June 20, 1913, the South African Native found himself, not actually a slave, but a pariah in the land of his birth'.[2] That date marked the passage of the Black Land Act 27 of 1913. Ever since, the legal regulation of land rights has had a special social, economic and cultural significance in South Africa. Indeed, much of the struggle to end apartheid can be understood as a struggle to regain land rights that were lost through colonial conquest and apartheid forced removals.

The history of apartheid land law[3] and the negotiations over the inclusion of a

[1] Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)('Final Constitution' or 'FC').

[2] ST Plaatje *Native Life in South Africa* (1916). On Plaatje's response to the Black Land Act, see B Willan *Sol Plaatje: A Biography* (1984) 143-73.

[3] See, for example, C Cross & R Haines *Towards Freehold* (1988); G Budlender & J Latsky 'Unravelling Rights to Land and to Agricultural Activity in Rural Race Zones' (1990) 6 *SAJHR* 155-77; THR Davenport & KS Hunt *Right to Land* (1987); TW Bennett 'African Land — A History of Dispossession' in R Zimmermann & D Visser (eds) *Southern Cross: Civil and Common Law in South Africa* (1996) 65; CG van der Merwe & JM Pienaar 'Land Reform in South Africa' in P Jackson & DC Wilde (eds) *The Reform of Property Law* (1997) 334.

property clause in the Interim Constitution[1] have been exhaustively described elsewhere. The purpose of this chapter is to analyse the constitutional framework for land reform adopted by the Constitutional Assembly in the latter part of the constitutional property clause, FC ss 25(4)-(9). The three central provisions in this framework — FC ss 25(5), (6) and (7) — must be understood as part of the cluster of socio-economic rights in the Final Constitution.[2] Each subsection provides the constitutional basis for a different sub-component of the land reform programme: FC s 25(5) offers the basis for land redistribution;[3] FC s 25(6) provides for tenure reform;[4] and FC s 25(7) engages land restitution.[5] FC s 25(8) provides for the reform of law related to natural resources.[6] This degree of constitutional protection for land and related rights is rather unusual,[7] but nevertheless understandable given the symbolic importance of land in South Africa.

Before proceeding to the main discussion, we proffer a brief history of the drafting of the property clauses. As a further preliminary matter, we also discuss

[1] See Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC'). The Interim Constitution contained only a limited number of socio-economic rights, whilst IC s 28, the property clause, provided for the protection of rights in property, subject to IC ss 121-123, the framework for land restitution. See G Budlender 'The Constitutional Protection of Property Rights' in G Budlender, J Latsky & T Roux *Juta's New Land Law* (1998) 1-3; E Lahiff & S Rugege 'A Critical Assessment of the Land Redistribution Policy in the Light of the *Grootboom* Judgement' (2002) 6(2) *Law, Democracy and Development* 279-84; AJ van der Walt *The Constitutional Property Clause* (1997) 7-8; AJ van der Walt *Constitutional Property Law* (2005) 1-3. For more on the interpretation of IC s 28, see PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's Law of Property* (4th Edition, 2003) 486-487; H Mostert 'South African Constitutional Property Between Libertarianism and Liberationism: Challenges for the Judiciary' (2000) 60(2) *ZaöRV* 295-330; AJ van der Walt 'Notes on the Interpretation of the Property Clause in the Constitution' (1994) 57 *THRHR* 193.

[2] See further, S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) 33-1–33-2. For purposes of this chapter, FC s 26 is particularly relevant, especially in relation to access to land for housing and eviction. Since these matters are, however, canvassed in detail in the chapter in this treatise on housing, the discussion of housing and eviction in this chapter is limited. See K McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55.

[3] Broadening access to land is the main focus of this programme.

[4] Providing security of title is the main focus of this programme.

[5] Restoring land or rights in land or compensating claimants in certain circumstances is the main focus of this programme.

[6] In this regard, reform has occurred and is still taking place in relation to minerals and water. See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's Law of Property* (5th Edition, 2006) Chapters 23 and 24; H Thompson *Water Law: A Practical Approach to Resource Management and the Provision of Services* (2006).

[7] Even Latin American countries, which have been in the forefront of land reform and constitutional mechanisms for providing land reform and agrarian protective measures, have nothing as comprehensive as the South African Bill of Rights. For example, art 171 of the Bolivian Constitution protects the social, economic and cultural rights of indigenous people, especially with regard to communal lands of origin, and guarantees the sustainable utilization of their natural resources, their identity, values, languages, customs and institutions. Article 5 XXVI of the Brazilian Constitution provides merely that small rural properties, when worked by families, cannot be attached in cases of debt.

the proper approach to interpreting legislation enacted to give effect to the constitutional land provisions, and the relationship between land, culture and customary law.

48.2 Drafting History

The Interim Constitution contained positive rights to restitution of land rights in IC ss 121 to 123, but did not provide for rights in respect of redistribution and tenure reform. Indeed, the property clause in IC s 28 did not refer to land or land reform at all. This left land reform measures, especially those falling outside the restitution sub-component of the programme, vulnerable to constitutional challenge under IC s 28. The first draft of the Bill of Rights[1] in the Final Constitution[2] proposed two alternative solutions to this problem: a property clause that included land reform provisions; or no property clause at all.[3] Some submissions thus argued that a separate land clause should be included to provide for all the sub-components of the land reform programmes, and not only for restitution.[4] Other submissions recommended that the property clause provide for positive rights to land, including restitution,[5] redistribution and tenure security.[6] The intention behind these latter submissions was that the property clause should strike a balance between the protection of existing property rights and the promotion of socio-economic rights to land and tenure security.[7] Ultimately, it was this view that prevailed.

In addition to the positive provisions on land reform, an affirmative action or restitutionary justice clause was inserted in FC s 25(8). The intention behind this clause appears have been to place beyond doubt the notion that 'land, water and related reform in order to redress the results of past racial discrimination' constitute a protected constitutional purpose.[8]

[1] Theme Committee 4 was responsible for drafting the fundamental rights provisions of the Final Constitution and Theme Committee 6 was responsible for drafting the provisions concerning the specialized structures of government.

[2] For the historical background to the property clause in the Interim Constitution, see A Eisenberg 'Land' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS3, 1998) 40-1–40-5.

[3] Theme Committee 4 Draft Bill of Rights (9 October 1995). The right to property was not entrenched in the Constitutional Principles in IC Schedule 4, meaning that the exclusion of the property clause from the Final Constitution was notionally possible.

[4] Submission by the Land and Agricultural Policy Centre to the Constitutional Assembly Theme Committee 6 Workshop on Issues Associated with Land Rights (DATE).

[5] IC ss 121-123, which provided for restitution, did not form part of the chapter on fundamental rights.

[6] In addition to these positive measures it was proposed that land be excluded from the property clause, ie that the property clause be qualified by the provision that it would not apply to land. See Constitutional Assembly Theme Committee 6 *Specialized Structures of Government: Draft Report by Theme Committee 6* (11 September 1995) 22.

[7] These rights could be used to balance other rights in the Constitution, to test the validity of legislation, as a guide in the interpretation of legislation, and as a criterion to test the justifiability of administrative action. *Memorandum to Theme Committee 6.3 Draft Formulation on Land Rights* (11 September 1995) See also Van der Walt *Constitutional Property Law* (supra) 1-4.

[8] Budlender 'The Constitutional Protection of Property Rights' (supra) at 1-73.

48.3 Land Rights in the Final Constitution

The White Paper on South African Land Policy sets out the fourfold purpose of land reform: *(a)* to redress the injustices of apartheid; *(b)* to foster national reconciliation and stability; *(c)* to underpin economic growth; and *(d)* to improve household welfare and alleviate poverty.[1] These policy objectives are inevitably interconnected with FC s 25. In one of the first cases that dealt with property rights, *First National Bank of SA Limited t/a Wesbank v Commissioner for the SA Revenue Services; First National Bank of SA t/a Wesbank v Minister of Finance*, the Constitutional Court held that:

> The purpose of section 25 has to be seen as protecting existing property rights as well as serving the public interest, mainly in the sphere of land reform, but not limited thereto, and also as striking a proportionate balance between these two functions.[2]

Accordingly, the property clause can be divided into two distinct parts: the first consists of FC s 25(1)-(3), which aims to protect existing property rights and delimit the scope of that protection.[3] The second, FC s 25(4)-(9), deals with land reform and related matters. Whereas the Interim Constitution granted positive rights to restitution only, the Final Constitution grants constitutional protection to land redistribution and tenure reform as well.[4] Although these land rights place legal obligations on the legislator, the exact nature and extent of these obligations are still uncertain. The rights go further than the imposition of negative obligations,[5] and place a positive obligation on the state to enact legislation providing for land redistribution, tenure security and restitution.[6]

In *Government of the RSA v Grootboom*, the Constitutional Court held that the land rights in FC s 25 form part of the cluster of socio-economic rights in the Final Constitution.[7] This idea was further developed in *Minister of Health v Treatment Action Campaign*.[8]

[1] Department of Land Affairs *White Paper on South African Land Policy* (1997) v. The publication of the White Paper was preceded by the publication of the Green Paper on Land Reform in February 1997.

[2] 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 50.

[3] For a discussion of the remainder of FC s 25, see T Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's Law of Property* (4th Edition, 2003) 489; Van der Walt *Constitutional Property Law* (supra) at 12-13.

[4] But see *Joubert v Van Rensburg* 2001 (1) SA 753 (W)('*Joubert*') at paras 43-44. This decision was later overturned on appeal. See *Mkangeli v Joubert* 2001 (2) SA 1191 (CC), 2001 (4) BCLR 316 (CC). For further discussion, see § 48.7*(b)*(iv) infra.

[5] A negative obligation entails that the legislator may not enact legislation which would make people landless or threaten their tenure security, except under very limited circumstances. See G Budlender 'Towards a Right to Housing' in AJ van der Walt *Land Reform and the Future of Land Ownership in South Africa* (1991) 45-47.

[6] P de Vos 'Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 67.

[7] 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)('*Grootboom*') at para 19. For more detail, see Liebenberg (supra) at 33-7–33-8 and 33-22–33-23.

[8] 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) 94. See also Liebenberg (supra) at 33-24–33-32.

Even though there is no explicit provision providing for a 'right to land', the second part of FC s 25 provides for inter-connected sub-programmes in which this distinct form of socio-economic right may be realized.[1]

48.4 Interpreting Land Legislation

A plethora of legislation has been enacted to give effect to the constitutional rights underpinning each sub-programme of land reform. We refer to this legislation collectively as 'land legislation' and in this section of the chapter make some brief comments on how the interpretation of this cluster of legislation should be approached.

The first factor that influences the interpretation of land legislation is the historical injustice the legislation seeks to address. These injustices were well captured by Sachs J in *Port Elizabeth Municipality v Various Occupiers*:

> [A] cluster of statutes . . . gave a legal/administrative *imprimatur* to the usurpation and forced removal of black people from land and compelled them to live in racially designated locations. For all black people, dispossession was nine-tenths of the law. Residential segregation was the cornerstone of the apartheid policy. This policy was aimed at creating separate 'countries' for Africans within South Africa. Africans were precluded from owning and occupying land outside the areas reserved for them by these statutes. . . . Differentiation on the basis of race was, accordingly, not only a source of grave assaults on the dignity of black people. It resulted in the creation of large, well-established and affluent white urban areas co-existing, side-by-side, with crammed pockets of impoverished and insecure black ones. The principles of ownership of Roman-Dutch law then gave legitimation in an apparently neutral and impartial way to the consequences of manifestly racist and partial laws and policies.[2]

The next major theme relevant to interpreting land legislation is the constitutional context. In terms of FC s 39(2), courts interpreting legislation must promote the spirit, purport and objects of the Bill of Rights. What, then, is the 'constitutional matrix' into which the constitutional land provisions fit? Two types of constitutional provision are relevant: the founding values of the Final Constitution; and the (other) rights in the Bill of Rights.

The Court in *PE Municipality*, interpreting the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act,[3] noted that the 'starting and end point of the analysis must be to affirm the values of human dignity, equality and freedom'.[4] We agree with Budlender that these values are likely to have a 'tilt' effect when interpreting land legislation in favour of an interpretation that gives greater weight to the rights and interests of the vulnerable and landless.[5]

[1] Liebenberg (supra) at 33-1–33-2.
[2] 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC)('*PE Municipality*') at paras 9-10.
[3] Act 19 of 1998 ('the PIE Act').
[4] *PE Municipality* (supra) at para 15.
[5] Budlender 'The Constitutional Protection of Property Rights' (supra) at 1-69.

Relevant founding values also include the rule of law, which the Constitutional Court has stated is crucially important in the land reform process.[1] The Court has emphasized that the Final Constitution is strongly committed to *orderly* land reform, and does not sanction arbitrary seizures of land, whether by the state or by landless people.[2] In *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (AgriSA & Others,* Amici Curiae*)* ('*Modderklip*'), the Constitutional Court held that the state is 'required to take reasonable steps … to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders [concerning illegal land occupation], thus undermining the rule of law'.[3]

Another constitutional value relevant to the interpretation of land legislation is *ubuntu*. *Ubuntu* reflects a commitment to communality and the interdependence of the members of a community, a respect for life and human dignity, humanness, social justice and fairness, and an emphasis on reconciliation rather than confrontation.[4] *Ubuntu* and its underlying values are certainly relevant when considering customary law notions of communal ownership of land. Although not expressly referred to in the Final Constitution, the Constitutional Court has on a number of occasions stated that *ubuntu* has a place among the founding values.[5] In *PE Municipality*, the Constitutional Court specifically emphasized the role of *ubuntu* in the land reform process.[6] Although *ubuntu* is a multi-faceted value and courts have emphasized different aspects of *ubuntu* in different cases,[7] in our view it is relevant to land reform in at least two of its dimensions: communality (of land ownership) and a preference for mediation and reconciliation over adversarial confrontation.

The right to dignity in FC s 10 must play a role in the interpretation of land legislation, since FC s 25 seeks to repair the 'grave assaults on the dignity of black people' inflicted by apartheid dispossession.[8] One means of giving effect to the right to dignity when interpreting land legislation is to prefer an interpretation that promotes the autonomy and choice of the landless, whom the legislation seeks to benefit, over an interpretation in terms of which they are to be silent, grateful recipients of whatever benefit the state decides to confer.

[1] *PE Municipality* (supra) at para 20.
[2] Ibid. See also *Grootboom* (supra) at para 92.
[3] 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) at para 43.
[4] C Himonga & C Bosch 'The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?' (2000) 117 *SALJ* 306, 311-12. See also M Pieterse '"Traditional" African Jurisprudence' in C Roederer & D Moellendorf (eds) *Jurisprudence* (2006) 442.
[5] See *Bhe & Others v Magistrate, Khayelitsha, & Others (Commission for Gender Equality as* Amicus Curiae*)* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at para 45; *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at paras 130, 224-225, 263 and 308; Az*anian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC), 1996 (8) BCLR 1015 (CC) at para 19; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para 38.
[6] *PE Municipality* (supra) at para 37.
[7] See Pieterse (supra) at 445-47.
[8] *PE Municipality* (supra) at para 10.

The Court in *PE Municipality* noted the broad overlap between FC s 25 and FC s 26, and remarked that 'the stronger the right to land, the greater the prospect of a secure home'.[1] In *Grootboom*, dealing with the right of 'access to adequate housing' in FC s 26, Yacoob J held that '[f]or a person to have access to adequate housing all of these conditions must be met: *there must be land*, there must be services, there must be a dwelling' (emphasis added).[2] Therefore, land reform is a necessary precondition for the realization of the right of access to adequate housing. In practice, the two programmes complement each other and must be implemented contemporaneously.

Finally, the administrative justice right in FC s 33 (as embodied in PAJA[3]) and the right of access to information in FC s 32 (as embodied in PAIA[4]) will be relevant to the interpretation of the process provisions of land legislation. Decisions taken by organs of state in terms of land legislation may constitute 'administrative action' which may be reviewable in terms of s 6 of PAJA.

FC s 25(5), (6) and (7) (read with FC s 25(9)) provide a constitutional mandate for the enactment of legislation to give effect to the rights contained in these provisions, although each of these subsections does so in different terms. For present purposes, it is sufficient to note that the requirement of super-ordinate legislation has a number of implications. First, the express constitutional mandate for legislation in an area may give that legislation an extra layer of insulation against constitutional attack. Where land legislation implicates conflicting, but constitutionally protected, interests, and the specific Act prioritizes, for example, tenure reform over other property rights, the express constitutional requirement for such legislation may, to some extent, 'tilt' the balance in defence of such a statute, even if not rendering land legislation immune to constitutional challenge.[5] Secondly, the legislation enacted to give effect to constitutional land rights must be interpreted as doing just this. This principle has been established in respect of similar legislation required to give effect to other constitutional rights: the Labour Relations Act 66 of 1995 ('the LRA'), which gives effect to the labour rights in FC s 23; PAJA, which gives effect to the right to lawful, reasonable and procedurally fair administrative action in FC s 33; PAIA, which gives effect to the right of access to information in FC s 32; and the Promotion of Equality and Prevention of Unfair Discrimination Act 2 of 2000 ('PEPUDA'), which gives effect to the right to equality in FC s 9. In relation to these statutes, the Constitutional Court has held that litigants must rely on the relevant Act and may not go behind it and rely directly on the

[1] *PE Municipality* (supra) at para 19.

[2] *Grootboom* (supra) at para 35. See also K McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) at 55-34–55-35.

[3] Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

[4] Promotion of Access to Information Act 2 of 2000 ('PAIA').

[5] See Budlender 'The Constitutional Protection of Property Rights' (supra) at 1-69.

constitutional provision.[1] However, litigants may rely on the constitutional provisions to challenge the relevant statute on the basis that it fails adequately to give effect to the constitutional right, and if found wanting the Court may make a declaration of invalidity coupled with any of the usual remedies.[2] Thirdly, the interpretation and application of legislation enacted to give effect to a constitutional right is always a constitutional matter falling within the jurisdiction of the Constitutional Court.[3] This is so even in cases in which the parties do not contend that the relevant land legislation is constitutionally deficient.

48.5 Land, Culture and Customary Law

The relationship between land, culture (cultural rights) and customary law is crucial to understanding the constitutional commitment to land reform in FC s 25 and the land legislation. It goes beyond mere interpretive relevance: as we shall see in *Richtersveld*, customary law rights have a substantive affect on the application of FC s 25 and the land legislation.[4]

In 1903, the South African Native Affairs Commission (Langden Commission), which was appointed to determine a 'common understanding' on 'native policy' in the four colonies,[5] recommended the territorial segregation of black and white. It suggested the creation of 'native reserves': distinct territories of exclusively African occupation. The Commission contended that the reserves had a historical and legal basis: natives had 'distinct rights' to the reserved lands as 'ancestral lands held by their forefathers'. These distinct rights of tenure were regarded as a form of communal or group ownership under which the 'Tribal Chief' administered the land in trust for the community. The chiefs, however, had (according to the Report) voluntarily transferred their sovereign rights of administration to the Crown by 'peaceful annexation'.

This account indicates how the colonial authorities set about building a (purported) legal and historical bridge between the existing customary law rights that their occupation had usurped, and a future system based on legislated racial segregation. The Report sought to legitimize this transition and process of dispossession by asserting two main claims: first, that the 'native reserves' to be created were, in fact, the true traditional tribal lands of the black communities;

[1] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC)('*Bato Star*') at para 25; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 (CC)('*New Clicks*') at para 96; *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC)('*NEHAWU*') at paras 14-16.

[2] *New Clicks* (supra) at para 96.

[3] *PE Municipality* (supra) at para 7; *Alexkor Ltd v Richtersveld Community & Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC)('*Richtersveld (CC)*') at para 23. In the context of the LRA and the right to fair labour practices in FC s 23, see *NEHAWU* (supra) at paras 14-15; *National Union of Metalworkers of South Africa & Others v Bader Bop (Pty) Ltd & Another* 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC) at para 15. In the context of the interpretation and application of PAJA, see *Bato Star* (supra) at para 25.

[4] See § 48.8*(c)*(iii) below.

[5] For a discussion of the Langden Report, see I Currie & J de Waal *The New Constitutional & Administrative Law* (2001) 51-52.

and, secondly, that their chiefs had voluntarily surrendered authority and control over those lands to the Crown. Therefore, to the extent that customary law rights in land were not simply ignored, they were subordinated to the common law and to the authority of the colonial state.

In *Bhe & Others v Magistrate, Khayelitsha, & Others (Commission for Gender Equality as* Amicus Curiae*)* ('*Bhe*'), the Court described the place of customary law in the new constitutional dispensation:

> Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution. Sections 30 and 31 of the Constitution entrench respect for cultural diversity. Further, s 39(2) specifically requires a court interpreting customary law to promote the spirit, purport and objects of the Bill of Rights. In similar vein, s 39(3) states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law as long as they are consistent with the Bill of Rights. Finally, s 211 protects those institutions that are unique to customary law. It follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right.[1]

Therefore, customary law rights in land are recognized in the same way as common-law or statutory rights in land, provided that they are consistent with the Final Constitution. The pre-constitutional disdain for customary law rights was condemned in *Richtersveld*:

> While in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution.[2]

The Final Constitution therefore seeks to revive customary law in respect of land, which had until 1994, been variously distorted, misinterpreted, ignored and made subordinate to both statute and common law. In addition, customary law, which is a 'living' body of law,[3] has developed in its own right.

In *Bhe*, in the context of the customary law of succession, the Constitutional Court described the customary law of 'ownership' of property as follows:

> Property was collectively owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. The members of the family under the guardianship of the deceased fell under the guardianship of his heir. The latter, in turn, acquired the duty to

[1] 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at para 41 (footnotes omitted).
[2] *Richtersveld (CC)* at para 51.
[3] *Bhe* (supra) at paras 86-87.

> maintain and support all the members of the family who were assured of his protection and enjoyed the benefit of the heir's maintenance and support. He inherited the property of the deceased only in the sense that he assumed control and administration of the property subject to his rights and obligations as head of the family unit.[1]

Property is therefore generally owned collectively, although some property is regarded as 'individual property'. Depending on the nature of communal property, collective 'ownership' vests in different units of the community. 'Family' property is managed by the head of the family for the benefit of all members of the extended family; 'house' property is exploited for the sustenance of members of a particular 'house'.[2] Land, too, is common property, allocated to particular community members or family units by chiefs, but remaining the 'property' of the community as a whole.[3] As leaders of their nations, chiefs enjoyed a range of powers over land, including the right to demand a tribute from the harvest or hunt, and to reserve the best land for themselves.[4] Traditionally, they had the power to establish new realms, make out royal homesteads or 'zone' the land for grazing or farming.[5] Today, however, their most important power is to allot plots of land to subjects on which to farm and live, a decision now most often made in practice by local wardheads.[6] The constitutional rights to culture in FC ss 30 and 31, read with FC s 39(3) and FC s 211, which recognize customary law, require the legislature (through land legislation) and the courts to give effect to customary law principles relating to land rights and the roles of traditional leaders and communities in administering communal land.

48.6 FC s 25(5): Redistribution

(a) Introduction

Under FC s 25(5), '[t]he state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.' This subsection has both a positive dimension and a negative dimension.[7] Although it does not specifically provide that everyone has *a right to land*, the requirement that the state 'foster conditions which enable citizens to gain access to land' imposes a positive obligation on the state to

[1] *Bhe* (supra) at para 76.
[2] Pieterse (supra) at 454; CRM Dlamini 'The Role of Customary Law in Meeting Social Needs' (1991) *Acta Juridica* 71, 82.
[3] Pieterse (supra) at 454.
[4] T Bennett & C Murray 'Traditional Leaders' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) 26-56–26-57.
[5] Ibid at 26-57.
[6] Ibid.
[7] E Lahiff & S Rugege 'A Critical Assessment of the Land Redistribution Policy in the Light of the *Grootboom* Judgement' (2002) 6(2) *Law, Democracy and Development* 279, 285.

provide adequate and appropriate assistance to people who do not have access to land. Following *Grootboom*, this obligation may be used to compel the state to act reasonably, especially in relation to meeting the needs of the most vulnerable members of society.[1] At the same time, the duty to 'foster conditions' places the state under a negative obligation to ensure that there are no impediments to the provision of access to land.[2]

The phrase 'legislative and other means' has been interpreted to mean that the state is under an obligation to take immediate steps towards the realization of the right in question.[3] In international law this formulation is understood to mean that legislation is not mandatory, but that it may nevertheless be highly desirable and in some cases even indispensable.[4] Furthermore, legislation on its own is not sufficient.[5] Other measures include 'administrative, financial, educational and social measures',[6] and 'the establishment of social programmes, the creation of appropriate bodies, and the establishment of other procedures as well as the adoption and implementation of appropriate bodies and detailed plans by the government'.[7]

'[R]easonable legislative and other measures' suggests that measures adopted by the state can be reviewed both for their reasonableness and for the extent to which they make progress in the implementation of the right.[8] In *Grootboom*, the Constitutional Court found that the state has discretion in determining the *nature* of the policies to be adopted, the specific *legislative measures* to be drafted and their

[1] See *Grootboom* (supra) at 93. In *Minister of Health v Treatment Action Campaign & Others (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC)('*TAC*')(both declaratory and mandatory orders were given). Lahiff & Rugege contend that poor people with no access to land or whose access is inadequate or precarious may demand that the state implement a programme which makes secure access to land possible. Lahiff & Rugege (supra) at 285.

[2] Flemming DJP in *Joubert v Van Rensburg* 2001 (1) SA 753 (W) at para 43.2 interpreted this phrase to mean 'circumstances which make it easier to acquire, for example, subsidised interest rates or purchase prices, or enriched prices for products. It does not mean that a statute may protect an occupier who insists on taking — gratis.'

[3] Such steps should be 'deliberate, concrete and targeted as clearly as possible towards meeting the obligations'. UN Committee on Economic, Social and Cultural Rights, General Comment No 3 'The Nature of State Parties' Obligations' (Fifth Session, 1990) UN doc E/1991/23 ('GC 3'). The requirement of immediate steps is reflected in the fact that the drafters omitted to include the qualifying phrase 'towards the progressive realization of the right', which would have given the state the option of achieving the right progressively rather than immediately.

[4] Ibid.

[5] P de Vos 'Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 67, 67.

[6] Constitutional Committee Supplementary Memorandum on the Bill of Rights and party submissions.

[7] GC 3 (supra).

[8] This obligation is similar to the obligation which will in any event be incumbent on South Africa when it ratifies the International Covenant on Economic, Social and Cultural Rights of 1966. In terms of this covenant, legislative measures are needed to establish the framework and to regulate judicial supervision of these rights (art 2(1)). See also A Pillay 'Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction?' (2005) 122 *SALJ* 419, 430.

implementation.[1] The Court, however, found that it was imperative that the programme chosen should be capable of facilitating the realization of the right:[2]

> The precise contours and content of the measures to be adopted are a matter for the Legislature and the Executive. They must, however, ensure that the measures they adopt are reasonable... A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.[3]

The Court made it clear that the reasonableness requirement does not only relate to the way the programme is conceived. The programme must also be reasonable in the way it is implemented: 'The formulation of a program is only the first stage in meeting the State's obligations ... An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State's obligations.'[4] Thus, in order to determine whether 'reasonable legislative and other measures' have been taken, the conception and design of a programme as well as the manner, pace and extent of its implementation must be considered. The state's capacity to implement its programmes is also a factor. In this regard, the *Grootboom* Court emphasized the need for co-ordinated action between the different levels of government and the responsibilities of each: a 'reasonable program therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.'[5] Although land matters fall within the functional area of national government, this requirement is equally applicable to FC s 25 in so far as the co-operation of different levels of government is necessary for the effective implementation of land reform.

An internal limitation, similar to the one found in the other socio-economic rights, appears in the form of the phrase 'available resources' in FC s 25(5). This phrase qualifies the state's duty to realize the right.[6] In the words of the *Grootboom* Court:

> The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the State to do more than its available resources permit. This

[1] *Grootboom* (supra) at para 41.
[2] See S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) 33-33–33-35.
[3] *Grootboom* (supra) at para 41.
[4] Ibid at para 42.
[5] Ibid at para 39.
[6] Liebenberg (supra) at 33-44, 33-55–33-57.

> means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.[1]

This proviso does not mean, however, that the state has complete discretion to determine the resources available for the realization of the right in question.[2] The term 'available resources' must be understood as referring to the total available resources of a country, including resources available from the international community through co-operation and assistance.[3]

The phrase 'access to land on an equitable basis' is clearly not restricted to measures aimed at delivering ownership, but may encompass other rights to land as well.[4] The formulation 'on an equitable basis' implies that redistribution programmes are especially aimed at redressing historical imbalances in land ownership. Accordingly, the poor are not the sole focus. Everyone who has been marginalized and excluded from land ownership as a result of past racially discriminatory legislation and practices may benefit from the programme. Portions of the community who are not necessarily poor still stand to benefit, for example, from farmer settlement programmes.

The state's sub-programme of land redistribution is embodied both in legislation and in policy measures dealing with grants, subsidies and other forms of financial assistance. According to the White Paper on South African Land Policy[5] the main aim of the redistribution programme is to provide access to land for the landless for both residential and productive purposes.[6] When the redistribution programme was first embarked on, the intention was to assist particularly the urban and rural poor, farm workers, labour tenants and emerging farmers.[7] The legislation enabling redistribution was directed at a very specific category of beneficiaries.[8] Although access to land may also be linked to the creation of new tenure forms, it is not the main aim of the redistribution programme.[9]

The following section deals with an overview of the enabling legislation and policy measures that have been adopted under the redistribution programme. It

[1] *Grootboom* (supra) at para 46.

[2] De Vos (supra) at 69.

[3] Ibid at 72. This is very important because there are extensive foreign funding resources available for land reform.

[4] See in this regard the concept of 'new order' rights as provided for in the Communal Land Rights Act 11 of 2004. Although there is no content given to 'new order rights' in this Act, it is clear that not only ownership is intended since some of the use rights that may be acquired can be upgraded to ownership at a later stage. The point of departure seems to be that new order rights have to be secure tenure rights. See § 48.7*(b)*(v) infra.

[5] Department of Land Affairs *White Paper on South African Land Policy* (1997)('*White Paper on Land Policy*').

[6] FC s 25(5) should be read with FC s 26(1) and (2).

[7] *White Paper on Land Policy* (supra) at ix.

[8] *Ngcobo v Van Rensburg* 1999 (2) SA 525 (LCC), [1997] 4 All SA 537 (LCC)('*Ngcobo*')(Labour tenants); *Venter v Claasen* 2001 (1) SA 720 (LCC)(Occupiers: a' specific class of persons that had been exploited in the past and who are still extremely vulnerable in relation to their tenure'.)

[9] See § 48.7 infra.

focuses on the Land Reform (Labour Tenants) Act 3 of 1996 ('the Labour Tenants Act') and the Extension of Security of Tenure Act 62 of 1997 ('the ESTA').[1] Reference will also be made to the Provision of Land and Assistance Act 126 of 1993, as amended by Act 26 of 1998, as well as to the Transformation of Certain Rural Areas Act 94 of 1998 ('the TCRA'). The Communal Land Rights Act 11 of 2004 ('the CLRA'), which is an attempt to give effect both to FC s 25(5) (provision of access to land) and FC s 25(6) (tenure reform) will be dealt with in the tenure reform section below.

(b) Enabling legislation

(i) *Land Reform (Labour Tenants) Act 3 of 1996*

The main aims of the Act are to *(a)* provide adequate protection against exploitation and eviction of labour tenants;[2] and *(b)* to provide access to land by enabling acquisition of land or rights in land by labour tenants in particular circumstances.

(aa) Beneficiaries

The Act was drafted to benefit a particular category of land user only:[3] a person who presently has, or had in the past, the right to reside on a farm; has or had the right to use cropping or grazing land on the farm or another farm of the owner, and in consideration of such right provides or has provided labour[4] to the owner or lessee; and whose parent or grandparent resided or resides on a farm or had the use of cropping or grazing land on such farm or another farm of the owner; and in consideration of such right provided or provides labour to the owner or lessee. This category would embrace a successor of a labour tenant,[5] but exclude a farm worker.[6]

[1] Although the ESTA fits equally comfortably in the redistribution and the tenure reform programmes, it will be discussed in more detail as part of the tenure reform programme. See § 48.7*(b)*(iv) infra. Only the sections dealing with access to land will be mentioned in this section.

[2] Sections dealing with the regulation of eviction also provide for tenure security in that the insecure labour tenancy relationship that existed prior to the new land dispensation has been amended by providing secure rights to labour tenants.

[3] Labour Tenants Act s 1. *Moshela v Sancor* 1999 (1) SA 614 (T)(Confirmed that labour tenancy is not a dictionary term, but a technical one and that the facts have to be specified in order to support the allegation of labour tenancy.) See also JM Pienaar 'Labour Tenancy: Recent Developments in Case Law' (1998) *Stellenbosch LR* 311; W Freedman 'Labour Tenants Act: Whom Does it Protect?' (2000) 117 *SALJ* 449.

[4] See *Deo Volento Rusoord BK v Shongwe* 2006 (2) SA 5 (LCC)(None of the respondents or their families provided labour to the land owner. However, when they were children they did work for the farm owner during the school holidays or over weekends for which they (and not their parents) were paid daily. The labour they provided did not replace that of their parents. The court found that it was a way of earning pocket money only and that it was not in 'exchange for' the right to reside on the property (at 7F).)

[5] Labour Tenants Act s 1.

[6] Ibid. These occupiers are specifically provided for in the ESTA. See § 48.7*(b)*(iv) below.

If all of these elements are present,[1] then it is presumed that such a person is a labour tenant.[2] The benefits of labour tenancy may also be utilized by associates[3] or successors of labour tenants. Since it can be very difficult in practice to establish whether a person is a farm worker or a labour tenant, the combined effect of all agreements entered into is taken into account.[4] Why is it so important to distinguish between farm workers and labour tenants if both these categories of tenants fall within the overall redistribution programme, and recent legislative amendments have sought to remove some of the distinctions and instead to bring these forms of tenancy closer together?[5]

Various reasons for still adhering to this category distinction may be offered. First, the historical context of these two tenancy forms differs: labour tenancy is clearly a tenancy that involves second- or third-generation tenants, whereas farm workers qualify for benefits under the ESTA even if they are only first-generation occupiers.[6] In fact, it is possible that new occupiers will continue to settle on land and that the ESTA will apply to them.[7] Secondly, although the broad aims of the two pieces of legislation are very similar, they do not provide identical protection and benefits. For example, only farm workers (or other occupiers under the ESTA) have burial rights.[8] Labour tenants who have applied for land rights do not need similar protection, since they are land owners in their own right.[9] Thirdly, the underlying idea of the labour tenancy legislation is that labour tenancy is to be

[1] Initially there were split decisions concerning whether all of the requirements in paras *(a)*, *(b)* and *(c)* had to be met or whether it was sufficient if only two of the three requirements were met. Since the decision in *Ngcobo*, it is clear that only beneficiaries that meet *all* of the above requirements fall within the ambit of the Act.

[2] See *Woerman NO & Another v Masondo & Others* 2002 (1) SA 811 (SCA), [2002] 2 All SA 53 (SCA). See also M Euijen & C Plasket 'Constitutional Protection of Property and Land Reform' *Annual Survey of South African Law* (2002) 545.

[3] An 'associate' is a family member of a labour tenant or any other person who has been nominated in terms of s 3(4) as the successor of such labour tenant. This becomes relevant when a labour tenant has died or has become mentally ill or is unable to manage his or her affairs due to another disability or when such a labour tenant leaves the farm voluntarily without appointing a successor. An associate is also a family member that has been nominated to provide labour in the labour tenant's stead, eg as provided for in s 4(1).

[4] Labour Tenants Act s 2(6).

[5] The Land Affairs General Amendment Act 51 of 2001.

[6] Special circumstances can, however, lead to a person being proclaimed to be a 'long-term occupier' under s 8(4) of the ESTA which generally enables that person to retire on the farm and remain there until death. In these circumstances the length of occupation is indeed relevant (10 years or more), but it is not linked to generations of occupiers as such. The other requirement for being identified as a long-term occupier is that the person must be 60 years of age (or older).

[7] Although possible in theory, it is not the existing practice. Fewer occupiers are being housed on farms today than ever before — especially as farm workers. The question can rightly be asked whether ESTA is succeeding, given that evictions from farms are exacerbating the already backlogged provision of housing in urban and peri-urban areas. See M Wegerif, B Russel & I Grundling *Still Searching for Security: The Reality of Farm Dweller Evictions in South Africa* (2005)(Deals with evictions for the period 1984-2004); W du Plessis, NJJ Olivier & JM Pienaar 'Land Matters' 2005 (2) *SAPR/PL* 435.

[8] For more detail, see § 48.7*(b)*(iv)(ee)(3) infra..

[9] This proposition holds only if former labour tenants have applied successfully and acquired ownership or other rights in land. In that case, as owners, they are free to utilize their land according to their own needs, within lawful limits.

phased out as a form of land control. The redistributive objectives of the Act are accomplished by enabling labour tenants to apply for land or rights in land and to become land owners themselves.[1] The underlying idea of the ESTA, on the other hand, is not to eradicate the institution of farm workers as such, but to prevent the exploitation of this form of tenancy and to provide protection against eviction. One way of doing so, of course, is through the acquisition of land or land rights. Chapter II of the ESTA provides for this form of redistribution.[2]

In our view, the continued distinctions between various (rural) tenants are not ideal. The different eviction proceedings applicable to each category places an additional burden on applicants to categorize occupiers before instituting eviction proceedings.[3] The lack of progressive development under chapter II of the ESTA (which provides for long-term security), in comparison to chapter III of the Labour Tenants Act, further highlights unjustified discrepancies between the different forms of redistribution contemplated by the two Acts.

Because it may be difficult in practice to determine whether one is dealing with a labour tenant or a farm worker, various guidelines have been developed in the case law. The main difference between a labour tenant and a farm worker is that the latter is paid predominantly in cash or in another form of remuneration, but not predominantly by making use of the property (cropping and grazing rights as well as occupation of land).

Landman & Another v Ndlozi; Landman v Gama & Another held that the evaluation need not necessarily be made from the employee's perspective.[4] Gildenhuys J wrote that in some instances the value (of using the land) would have to be determined from the perspective of the employer, in other instances from that of the employee and in yet other instances by objective standards. The court also found that the whole period of employment had to be considered. In other words, the value of each component for the whole period the person (occupier or labour tenant) ostensibly met the requirements of the relevant Act has to be determined.[5]

[1] Chapter III of the Labour Tenants Act. See § 48.2*(a)*(iii) infra.

[2] Due to the complexity of this procedure and to the fact that numerous role players have to be involved in a successful venture, this method of land redistribution has not been very successful. It would, for example, require a good working relationship and partnership between the land owner, the occupier and invariably also the local authority. Other factors like limited funding, non-availability of land and no or limited capacity on local government level impede its success further.

[3] Yet other unlawful occupiers (squatters or persons holding-over) in relation to residential property or constructions being used for purposes of a home are dealt with in accordance with the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act'). Thus, three different pieces of legislation become relevant when eviction is intended. Unlawful occupation from business premises is still regulated by common law. See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's Law of Property* (5th Edition, 2006) Chapters 11 and 22.

[4] 2005 (4) SA 89 (LCC)('*Landman*').

[5] Factors in this determination — as set out in *Landman* – include the value of maize that they received per month, the value of being allowed to keep cattle and other animals on the land, the use of structures on the land for housing and other purposes; and the value of having a small vegetable garden on the land. In *Landman*, the value of making use of the property by far outweighed the monetary remuneration that the tenants received per month — thereby establishing labour tenancy. With regard to cropping rights, see *Msiza v Uy*s 2005 (2) SA 456 (LCC)(Moloto J held that it was not the value of the *input costs* that were relevant, but the *value of the benefit derived* from the cropping activity that had to be taken into account.)

(bb) Labour tenants' rights

A labour tenant has the right to use and occupy a specific portion of land with his or her family.[1] Labour tenants' security of tenure is promoted in that these rights may only be terminated in accordance with the Act. In practice, a labour tenant's use and occupational rights are usually terminated by a waiver of rights, the death of the tenant, the eviction of the tenant once certain substantive and procedural requirements have been met, or when the labour tenant obtains vested rights in land in his or her own capacity, replacing the relationship between labour tenant and owner/employer.[2] Special provision is made for the appointment of successors to labour tenants in certain circumstances.[3] On the other hand, the landowner has the right to demand labour by the labour tenant, in exchange for these occupational and use rights.[4]

The use and occupational rights may only be terminated in accordance with the Act. Eviction obviously results in permanent deprivation. On the other hand, relocation orders result only in temporary deprivation of rights and only apply to a specific parcel of land.[5] Relocation orders are appropriate where the owner needs the specific parcel of land for agricultural purposes or if the land is needed for development which is, according to the court, of public benefit. Nevertheless, relocation orders will not be granted arbitrarily, but only if the court is satisfied that greater hardship will be done to the owner or lessee if the labour tenant is not relocated.[6] A relocation order may also coincide with an order to pay compensation to the labour tenant, in which case the relocation order will not be executed before the compensation has been paid. If the owner has not used the land for the purposes intended one year after the relocation order was granted, an application may be lodged for the reinstatement of the labour tenant to the original parcel of land.[7]

The labour tenant relationship must be terminated before eviction proceedings can take place. Provision is made for normal and urgent eviction proceedings. In normal eviction proceedings, an eviction order will be granted if it is fair and equitable in the relevant circumstances[8] and *(a)* if the labour tenant (or associate)

[1] Labour Tenants Act s 3(1). The relevant date for this purpose is 2 June 1995 when the Bill was first published for comment. Since the publication date coincided with large-scale evictions from land it is that date that is relevant and not the date the Act commenced, namely 22 March 1996.

[2] See Labour Tenants Act s 3. See also Badenhorst, Pienaar & Mostert *Silberberg* (supra) at Chapter 22.

[3] Labour Tenants Act s 3(4). If a labour tenant dies, becomes mentally ill or is unable to manage his or her affairs due to another disability or leaves the farm voluntarily without appointing a successor, then his or her family may appoint a person as his or her successor and shall, within 90 days after being called upon in writing to do so by the owner, inform the owner of the person so appointed. A family member, if acceptable by the owner, may also be appointed as successor. Such an appointment may not be denied unreasonably by the land owner.

[4] Labour Tenants Act s 4.

[5] Labour Tenants Act s 8.

[6] Labour Tenants Act s 8(4).

[7] Labour Tenants Act s 8(5).

[8] Labour Tenants Act s 7.

committed a material breach of any obligation to provide labour and has failed to remedy such a breach after one month's written notice; or *(b)* the labour tenant (or associate) has committed some other act which amounts to a fundamental breach of the relationship that cannot be remedied.

It is not only the landowner who may initiate eviction proceedings. However, the landowner needs to support eviction proceedings instituted by another person.[1] At least two months' written notice must be given to the labour tenant and the Director-General of Land Affairs[2] and the notice must contain the grounds for eviction.[3]

If the court is satisfied that the following requirements have been met, an urgent eviction order may be granted, pending the outcome of a final order:[4] *(a)* if there is real and imminent danger of substantial damage to the owner or lessee; *(b)* if there is no other effective remedy available; *(c)* if the likely harm to the owner, if the order is not issued, exceeds the likely harm to the person against whom the order is sought; and *(d)* if adequate arrangements have been made for the reinstatement of a person who has been removed, but the final order was not granted. Requirements for urgent eviction orders under labour tenancy legislation and the ESTA are now identical.[5]

Despite the provision for urgent and normal eviction proceedings, evictions are limited in two important respects: the first concerning the circumstances of the labour tenant and the other dealing with the process of land redistribution and how far along in this process the labour tenant has already progressed. In the first instance, a landowner is precluded from initiating eviction proceedings against a labour tenant merely because he or she has become too old (defined as 60 years or older), too frail or ill to provide labour, or is disabled.[6] If the aged labour tenant dies, the exception is also applicable to his or her associates or family members for a period of 12 months after his death, thus enabling them to find suitable accommodation without needing to be worried about eviction proceedings for at least a year. If the landowner is prejudiced by these provisions, he or she may apply for equitable relief.[7] The other limitation on eviction has to do with applications by labour tenants to acquire land or rights in land under Chapter III of the Act. If such an application is pending, the labour tenant generally may not be evicted.[8] Unfortunately, this provision has been exploited in the past, leading to the rule that the court may, despite the prohibition on eviction, order eviction

[1] Labour Tenants Act s 6(1).
[2] Labour Tenants Act s 11(1).
[3] Labour Tenants Act s 11(2).
[4] Labour Tenants Act s 15.
[5] See § 48.7*(b)*(iv)(hh) infra.
[6] Labour Tenants Act s 9(1)*(a)*-*(b)*.
[7] Labour Tenants Act s 9(3). No specific provisions are given regarding this form of relief other than that it has to be just and equitable in the circumstances.
[8] *Van der Walt v Lang* 1999 (1) SA 189 (LCC).

if it is satisfied that special circumstances exist which make it fair, just and equitable to do so, taking into account all relevant considerations.[1]

The right to legal representation for persons whose tenure has been threatened or infringed was confirmed in *Nkuzi Development Association v Government of the RSA*.[2] Although the labour tenancy legislation and the ESTA were drafted in order to give effect to FC s 25, the court found, the reality was that:

> a very large number of the people for whose benefit the Labour Tenants Act and ESTA were enacted, do not enjoy that entitlement when their right are infringed or threatened with infringement. This is so because they are overwhelmingly poor and vulnerable people with little or no formal education. When their tenure security is threatened or infringed, they so not understand the documents initiating action or the processes to follow in order to defend their rights. On the one hand they cannot afford the fees for a lawyer to represent them because of their poverty. As a result they are quite often unable to defend or enforce their rights and their entitlement under the Constitution, the Labour Tenants Act and ESTA.[3]

Consequently many litigants appeared in court unrepresented. The *Nkuzi* court accordingly ordered that indigent persons whose tenure security is threatened or infringed under these statutory measures have a right to legal representation or legal aid at state expense if substantial injustice would otherwise result. The state or its agents are entitled to adopt a screening process to establish whether the person concerned is entitled to legal aid or legal representation.

(cc) Redistribution of land — acquisition of land rights under chapter III of the Act

Labour tenants may lodge an application for an award of land or land rights or for financial assistance.[4] Applicants can apply for ownership of the portion of land they are using and occupying, or another portion of land elsewhere that they or their predecessors used and occupied for a period of at least five years prior to 22 March 1996,[5] and of which they had been illegally deprived.[6] It is also possible for labour tenants to apply for another parcel of land elsewhere on the land on which they are staying, as identified by the landowner. In order to utilize the land effectively, the application may be brought together with an application for other limited real rights, such as servitudes of water or right of way. These additional rights will be granted if they are reasonably necessary or reasonably consistent with the rights previously enjoyed by the labour tenant.[7]

The owner of the land subject to such an application must be informed. If he or she does not dispute the status of the applicant, it is presumed that such a

[1] *Mwelase v Hiltonian Society* 2001 (4) SA 100 (LCC).
[2] 2002 (2) SA 733 (LCC)(Moloto J).
[3] Ibid at para 4.
[4] See Chapter III. See also s 16. Financial arrangements are provided for in s 26 of the Act.
[5] 22 March 1996 was the commencement date of the Act.
[6] Labour Tenants Act s 16(1)*(a)-(b)*.
[7] Labour Tenants Act s 16(1)*(c)-(d)*.

person is a labour tenant, until the contrary is proven.[1] If the status is questioned by the landowner, either party is free to approach the Land Claims Court for a ruling on this issue. Once the applicant's status has been clarified, the landowner may approach the Director-General of Land Affairs with other options for an equitable solution to the application, other than granting ownership to the applicant of the land identified.[2] If such a proposal is rejected by the applicant, which he or she is entitled to do, the original claim is continued. In cases where the matter cannot be resolved by the parties, the court may be approached for an order or other appropriate relief.[3]

The Labour Tenants Act therefore seeks in the first place to achieve a negotiated solution to competing land claims in a way that promotes the dignity of all participants. However, if the owner refrains from initiating settlement proposals, or if the offered proposal is rejected by the applicant, or if any agreements reached by the parties are deemed to be unreasonable or inequitable, applications for ownership and other rights in land will be referred to court or arbitration.[4]

The following factors are taken into account when an application for land rights is considered:[5] the achievement of the goals of the Act, the desirability to assist labour tenants to establish themselves on farms on a viable and sustainable basis, and considerations of equity and justice. The willingness of the owner of the affected land and the applicant to make contributions to the settlement of the application is also considered. Lodging an application, as mentioned before, means that applicants may generally not be evicted.

In line with the constitutional considerations set out in the property clause, particularly FC s 25(3), the land owner is entitled to just and equitable compensation to be determined by court or, if necessary, by an arbitrator.[6]

A successful application for land rights results in the applicant's becoming a landowner in his or her own right — achieving the underlying goal of redistribution. Although the Labour Tenants Act has national application, most of the labour tenancy applications to date have been received from Mpumalanga and KwaZulu-Natal.

(ii) *Provision of Land and Assistance Act 126 of 1993*

In its original form,[7] the Provision of Land and Assistance Act ('PLAA') was a remnant of the pre-constitutional era aimed at designating and subdividing land and settling persons. It was subsequently redrafted,[8] and is currently used as the main mechanism to realize the aims of the redistribution programme.

[1] Labour Tenants Act s 17(5).
[2] Labour Tenants Act s 18.
[3] Labour Tenants Act s 17(4).
[4] Labour Tenants Act s 17(7).
[5] Labour Tenants Act s 22(5).
[6] Labour Tenants Act s 23.
[7] The Provision of Certain Land for Settlement Act 126 of 1993.
[8] The Provision of Certain Land for Settlement Amendment Act 26 of 1998.

Under this Act land is designated by the Minister of Land Affairs for the purposes of redistribution. Both state and privately-owned land may be designated — the latter only after it has been made available by the owner.[1]

Development of privately-owned land may be undertaken by the state or private parties (the land owner or contractor). Afterwards, subdivision of the land takes place. The normal township establishment or subdivision of agricultural land provisions[2] are specifically excluded,[3] resulting in subdivision in accordance with a partition plan providing for small-scale farming and residential, public, community or business purposes.[4] Formal requirements include a survey of the area, approval of the plans and diagrams and filing documents at the deeds registry for registration.[5] Once a deed of transfer has been lodged at the deeds registry, registration of ownership takes place in favour of the beneficiary.[6] Settlement on the land may also be conditional.[7]

The following persons may apply for relief:[8] persons who have no land or who have limited access to land and who wish to gain access to land or to additional land, persons wishing to upgrade their land tenure or persons who have been dispossessed of their right in land but do not have a right to restitution under the Restitution of Land Rights Act.[9] Financial assistance may be used for many purposes. Grants and subsidies may also be used to acquire capital assets, to acquire a share in an existing agricultural enterprise or to facilitate planning and development.[10] Funds may be transferred to provincial governments, municipal councils or other organs of state responsible for planning or development.[11] Subsidies or grants may also be used to acquire land to be used as commonage or to extend existing commonages.[12]

The powers of the Minister to acquire land for redistribution purposes are extensive and also include the possibility of expropriation.[13] If expropriation is

[1] PLLA s 2(1).
[2] See, eg, the Prohibition of Subdivision of Agricultural Land Act 70 of 1970.
[3] PLLA s 2(4).
[4] PLLA ss 5-6.
[5] PLLA s 7.
[6] PLLA s 9.
[7] Over the years, however, the practice has been that the subdivision and utilization of land and the consequential settlement thereon are linked to the requirements of the Conservation of Agricultural Resources Act 43 of 1983 and the National Water Act 38 of 1998. It is also quite common that the densification number (of beneficiaries and settlements) and number of livestock are also regulated.
[8] The 1998 amendments to the Act have had an impact on the category of beneficiaries. The original Act allowed for the granting of an advance or subsidy 'to any person'.
[9] Act 22 of 1994. For more detail concerning the restitution programme, see § 48.8 infra.
[10] See PLLA s 10(1)*(a)-(b)*.
[11] PLLA s 10(1)*(e)*.
[12] PLLA s 10(1)*(c)*.
[13] PLLA s 12(1).

deemed to be an effective tool to acquire a specific portion of land, the landowner has a right to a hearing[1] and compensation must be paid.[2]

(iii) *Transformation of Certain Rural Areas Act 94 of 1998*

The Transformation of Certain Rural Areas Act ('the Transformation Act' or 'TCRA') is aimed at persons occupying land located only in the former Coloured rural areas. These areas were established under the Rural Areas Act (House of Representatives) 9 of 1987,[3] and originally comprised 23 pieces of land dispersed within the provincial jurisdictions of the present-day Western Cape, Northern Cape, Eastern Cape and Free State provinces. The Rural Areas Act provided for the separation of residential and agricultural zones — all for the exclusive occupation of persons belonging to the Coloured community.

The underlying idea of the Transformation Act is that the different communities should determine *when* and *how* the new dispensation in land-holding should occur.[4] It was envisaged that change would be effected independently in the different areas,[5] and should, if effective, result in 'negotiated legal reform'.[6] This commitment to the autonomy and choice of communities promotes the constitutional value of (and right to) dignity.

When implemented correctly, the Act should dismantle the existing rural land tenure regime and replace it with measures in line with the overall land reform programme, while also meeting the needs and aspirations of the community concerned. In this sense, the Act is both a redistributive measure[7] and a tenure reform tool.[8]

Two broad categories of land are relevant: *(a)* land in a township and *(b)* land in the remainder. The moment the Transformation Act came into operation, trust land situated in a township immediately vested in the relevant municipality.[9] This automatic transfer of rights did not affect existing registered or registrable rights in relation to the property concerned.[10] Township areas continued to vest in the relevant municipality.

[1] PLLA s 12(2). This position is consistent with FC s 25(1) and (2). See T Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Costitutional Law of South Africa* (2nd Edition, OS, December 2003) 46-33–46-35.

[2] FC s 25(3).

[3] For more detail, see D Carey-Miller & A Pope *Land Title in South Africa* (2000) 449-55; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's Law of Property* (5th Edition, 2006) Chapter 22. Forerunners to this Act included the Rural Coloured Areas Act 24 of 1963 and the Rural Coloured Areas Amendment Act 31 of 1978.

[4] Twenty-three former coloured rural areas are identified.

[5] TCRA s 10(2)*(b)*.

[6] See also P Wisbourg & R Rohde 'TRANCAA and Communal Land Rights: Lessons from Namaqualand' PLAAS Policy Brief (April 2003).

[7] Access to land is thereby broadened.

[8] It provides more secure tenure.

[9] TCRA s 2.

[10] Ibid.

The Act is open-ended in the sense that it does not prescribe the specific method to be used for the community to express its preferences. A consultation process resulted in the communities being able to vote in advisory referenda on the following three ownership alternatives: *(a)* communal property association; *(b)* transfer to the municipality; and *(c)* option of own choice — including trust ownership and individual title.

The Minister must decide to which entity or (or entities) the land must be transferred, taking into account the community's stated preference. The Minister has the power to assist the municipality or committee in making a decision.[1] This power introduces the possibility of an *extended procedure* since it can entail appointing a person with the specific brief to investigate and assist in writing a report indicating which entity should receive the land.[2] If the Minister is satisfied, after the extended process, then the land is transferred accordingly. If the Minister is still not satisfied, the decision lies with the Minister to which entity the property should be transferred and to take steps accordingly.[3]

Referenda in four of five areas showed a clear preference for communal property associations.[4] The low interest in individualized tenure is interesting, reflecting as it does a cultural preference for community ownership. The municipality was the choice of transfer beneficiary in only one instance.

Once the transitional period lapses, all land not transferred vests in the Minister, who holds the land and is empowered to dispose of it.[5] The transformation process has not yet been completed. In all of the relevant areas an extended procedure had to be embarked on. Although the open-endedness of the Act leaves ample room to address the needs of specific communities, it has also led to the process being drawn out.

(c) Policy documents

The policy of the first Minister of Land Affairs and Agriculture, Derek Hanekom, focused on the promotion of subsistence farmers through the provision of

[1] Subject to the exclusion of the power to make regulations, the Act also provides for the general or particular delegation of powers by the Minister to either the Premier of the province or to any officer in the service of the national government. See also TCRA s 8(1).

[2] Such a designated person has a wide range of powers; inter alia, settling any disagreements in relation to land or boundaries between the parties.

[3] TCRA s 3(12)*(b)*.

[4] Due to internal conflict the other area, Kommagas, never held a referendum.

[5] TCRA s 3(13).

Settlement/Land Allocation Grants (SLAGs).[1] The second Minister, Thoko Didiza,[2] shifted the emphasis to the promotion of black commercial farmers, through an Integrated Programme of Land Redistribution and Agricultural Development (IPLRAD). Despite the emphasis on commercial farming, there was still room in the IPLRAD for subsistence farmers, albeit at the lower end of the subsidy scale. IPLRAD, which is still in force, aims to redistribute 30 per cent of agricultural land to black owners by 2014. Whereas the initial SLAGs were once-off grants of R15 000 per family, the IPLRAD consists of a sliding scale of state grants which must be matched by a proportionate 'own contribution' by the beneficiary. Depending on the circumstances, this contribution may consist of cash, assets or labour. The main problem with the SLAG was the cost of good agricultural land. Households had to pool their resources to buy land. This need to pool resources often led to rushed attempts to form groups that lacked cohesion. The lack of cohesion led, in turn, to problems of co-ordination and overcrowded settlements.[3]

Although the size of grants has been increased in the IPLRAD, other problems persist. For example, grants are mainly accessed by persons who are literate, and have money, transport or political contacts. The Department of Land Affairs' stance in the White Paper that priority would be given to the 'marginalized and the needs of women in particular' has not been realized in practice.[4]

(d) Redistribution programme: brief evaluation

The period 1995-2005 has seen the redistribution of an estimated 2.9 per cent of agricultural land from white to black ownership.[5] Various reasons have been suggested for the slow pace of delivery. First, projects have not necessarily been designed in line with the needs and skills of the community they are expected to benefit. Secondly, the Communal Property Association has proven to be a problematic legal vehicle. Thirdly, suitable land for redistribution has been

[1] See E Lahiff & S Rugege 'A Critical Assessment of the Land Redistribution Policy in the Light of the *Grootboom* Judgement' (2002) 6(2) *Law, Democracy and Development* 279, 291-97; AJ Van der Walt *Constitutional Property Law* (2005) 354.

[2] Minister Didiza served until 23 May 2006. She was replaced by Minister Lulu Xingwana.

[3] Other problems with SLAG included the fact that the initiative had to come from the land reform beneficiary, which made the grant highly dependent on adequate information dissemination. In addition, the grant application procedure did not take regional planning and land reform needs into account. For more detail, see Lahiff & Rugege (supra) at 291-97; JM Pienaar 'Land Reform and Development: A Marriage of Necessity' (2004) 25(2) *Obiter* 269.

[4] Lahiff and Rugege argue that the transition from SLAG to IPLRAD has changed the situation dramatically and constitutes a direct reversal of previous policy because an upper limit has now been replaced by a lower limit: '[I]t sends out a strong message to would-be applicants and officials alike that the programme is not aimed at the very poorest, potentially discouraging any applicants and making it unlikely that applications from the very poor will be prioritized.' Lahiff & Rugege (supra) at 313.

[5] It is very difficult to establish exactly how much land has in fact been redistributed. Apart from the absence of a reliable tracking and monitoring system, all indications of race on the title deeds have been removed since 1996.

hard to find. Fourthly, poor co-ordination between various sectors within the Department of Land Affairs has hindered projects. Fifthly, in many instances the co-operation of traditional leaders has been lacking. Sixthly, the budget for redistribution and tenure reform has decreased in real terms over the past six years. Finally, although government funds have been used to acquire shares in farm enterprises, especially in the Western Cape, the mere transfer of shares to land reform beneficiaries has not contributed significantly to changing historically entrenched power relations in the agricultural sector.

Irrespective of the reasons for the lack of redistribution, there is a real risk that the target of redistributing 30 per cent of agricultural land by 2014 will not be reached. The slow pace of land reform was one of the main themes of a national Land Summit that took place in July 2005. The consensus of opinion was that markets by themselves would not redistribute land at the scale, quality, location and price required. The present situation does not correspond to an ideal 'willing-buyer, willing-seller' market since the state is often the only prospective buyer. This market failure has led to suggestions that the state should intervene more purposefully in the market, using expropriation if necessary.[1]

48.7 FC s 25(6): Security of Tenure

(a) Introduction

FC 25(6) provides that a 'person or community whose tenure of land is legally insecure as a result of past discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress'. FC s 25(9) in turn provides that 'Parliament must enact the legislation referred to in subsection (6)'.

The formulation of both FC s 25(6) (tenure reform) and FC s 25(7) (restitution) is unusual in that the two provisions, on the face of it, give the legislature complete discretion to define the scope and content of the rights. FC s 25(9) leaves the legislature with no option: it *must* enact legislation to give effect to the tenure reform and restitution rights. Once enacted, however, such legislation cannot be challenged unless it clearly departs from the spirit and purport of the Bill of Rights.[2]

The need for a tenure reform programme has to be placed in perspective. The South African land control system was not only intrinsically linked to race. It was also inherently fragmented and diverse, resulting in land control forms varying from race group to race group and region to region, often consisting only of

[1] See AJ van der Walt 'Reconciling the State's Duties to Promote Land Reform and to Pay "Just and Equitable" Compensation for Expropriation' (2006) 123 *SALJ* 23. Van der Walt emphasizes the constitutional necessity of and justification for expropriation for land reform purposes. Concerning compensation, he shows convincingly that, depending on the relevant factors and circumstances, just and equitable compensation may be below market value.

[2] See § 48.4 supra.

insecure permit-based rights.[1] This approach resulted in a complex, diverse land tenure system, with the security of individual tenure depending on the specific form of control. The phrase 'past discriminatory laws or practices' refers to this complex system of primary and sub-ordinate legislation setting out land control forms, as well as the practices followed in implementing it. 'Tenure reform' therefore entails replacing existing land control forms with other, more secure tenure forms. In this process the ideal is to move away from a permit-based to a rights-based system, to leave scope for persons to choose, as far as possible, their tenure form according to their needs and to recognize de facto land rights.[2]

Various statutes have been promulgated to meet the state's obligation to provide tenure security or comparable redress, most recently the Communal Land Rights Act 11 of 2004 ('CLRA'). The Upgrading of Land Tenure Rights 112 of 1991, promulgated during the pre-constitutional era, is still a valuable tool in addressing tenure reform. Other noteworthy measures include the ESTA, the Communal Properties Association Act 28 of 1996 and the Interim Protection of Informal Land Rights Act 31 of 1996.

(b) Enabling legislation

(i) *The Upgrading of Land Tenure Rights Act 112 of 1991('the Upgrading Act')*

The Upgrading Act was initially promulgated to provide for the upgrading and conversion of certain rights into ownership and the transfer of tribal land in full ownership to tribes. The Act has been amended a few times to keep up with new developments in the tenure reform programme.

Rights emanating from leasehold, deeds of grant or quitrent[3] in a formalized township were automatically converted into ownership. Ownership is registered in the name of the person who had the specified right to land immediately before the Upgrading Act commenced.[4] Schedule II rights, consisting of various occupational rights derived from legislative measures[5] and tribal occupational rights in

[1] See CG van der Merwe & J Pienaar 'Land Reform in South Africa' in P Jackson & DC Wilde *The Reform of Property Law* (1997) 334, 348-50; C Cross & R Haines *Towards Freehold* (1988); G Budlender & J Latsky 'Unravelling Rights to Land and to Agricultural Activity in Rural Race Zones' (1990) 6 *SAJHR* 155; TW Bennett 'African Land — A History of Dispossession' in R Zimmermann & D Visser (eds) *Southern Cross: Civil and Common Law in South Africa* (1996) 65; Carey-Miller & Pope (supra) at 19-21.

[2] Department of Land Affairs *White Paper on South African Land Policy* (1997) vi.

[3] These rights are also know as Schedule I rights. See Van der Merwe & Pienaar (supra) at 348-52; H Mostert & J Pienaar *Modern Studies in Property Law III* (2005) 323-25.

[4] The Upgrading Act also provides in s 2(2) for the necessary entries and endorsements to reflect the conversion to ownership.

[5] The following is provided for: *(a)* any permission granted in terms of reg 5(1) of the Irrigation Schemes Control Regulations 1963 (Proc 5 of 1963) to occupy any irrigation or residential allotment; *(b)* any permission to occupy any allotment within the meaning of the Black Areas Land Regulations 1969 (Proc R188 of 1969); *(c)* any right of occupation granted to any registered occupier as defined in s 1 of the Rural Areas Act (House of Representatives) 9 of 1987 (repealed by the Transformation of Certain Rural Areas Act 94 of 1998 (see § 48.6*(b)*(iii) above); and *(d)* any right to the occupation of tribal land granted under the indigenous law or customs of the tribe in question.

accordance with indigenous customs and traditions, are not upgraded automatically, but have to go though the procedure set out in s 3 of the Act. This procedure has two requirements. First, where the land is state-owned, conversion will only take place once the Minister is satisfied that the rights and interests of putative holders will be protected. Secondly, where the land is owned by a tribe or has been allocated to a particular tribe for use and occupation, conversion may only take place once a tribal resolution has been reached.

The recently drafted CLRA is therefore not the first Act to provide for the acquisition of tribal (or communal) land by communities or individuals. As long ago as 1991, the Upgrading Act provided that any tribe could obtain ownership in land.[1] The tribe is then able to sell, exchange, donate, let, hypothecate and otherwise dispose of its land.[2] However, the initial commencement of the Act coincided with a general moratorium[3] on disposal to persons other than members of the tribe.[4]

(ii) *The Interim Protection of Informal Rights Act 31 of 1996 ('the Interim Protection Act')*

Although initially intended to be an interim measure, the slow pace of tenure reform has led to the Interim Protection Act being extended on an annual basis. Although the Act has national application, it is employed mainly in areas that previously formed part of the four national states and six self-governing territories.

Four categories of rights are protected. First, the use or occupation of, or access to land in terms of *(i)* any tribal, customary or indigenous law or practice of a tribe; or (ii) the custom, usage or administrative practice in a particular area or community where the land at any time vested in the SA Development Trust, the government of any self-governing territory or the former governments of the four national states enjoy protection. The Interim Protection Act also protects the rights or interests in land of trust beneficiaries under arrangements in terms of which the trustee holds a public office, or is a body/functionary established under an Act of Parliament. Beneficial occupation is also protected,[5] provided that it has

[1] Upgrading Act s 19(1).

[2] Upgrading Act s 19(1).

[3] The court could consent to the selling or exchanging of tribal land in certain instances only. See Upgrading Act s 19(3).

[4] This moratorium period expired in 2001.

[5] Defined in s 1 of the Interim Protection Act as being occupation by a person, as if he or she is the owner, without force, openly and without the permission of the registered owner. The two definitions of beneficial occupation in the Interim Protection Act and the CLRA are thus identical. This phrase is also similar to the provisions provided for in the Prescription Act 68 of 1969 in relation to acquisitive prescription. Some of the submissions prior to the passing of the Communal Land Rights Bill voiced concerns that this definition would disqualify women in that their conduct in relation to land was not 'open as if they were the owners thereof' and that this definition would be detrimental to their cause.

endured for a continuous period of not less than five years prior to 31 December 1997. Finally, permission-based 'rights' pertaining to particular units of statutory black land enjoy protection.[1]

(iii) *The Communal Property Association Act 28 of 1996 ('the CPA Act')*

The legal structures available for common ownership before the commencement of the CPA Act generally entailed complex legal and administrative provisions and ignored the social and economic role communal property plays in traditional communities. Therefore, the use of common or joint ownership, by way of a trust or through a juristic person, was not effectively exploited by certain communities. The CPA Act provides an institutional framework for the registration and functioning of a new juristic structure, namely that of the communal property association.

The CPA Act has been criticized for its complexity and lack of functionality. The process to establish a communal property association is difficult and time-consuming.[2] Registration is dealt with in two phases: the provisional association is registered and then the communal property association is finally registered.[3]

Before the association can be finally registered, the constitution has to be drafted.[4] The constitution must be consistent with the following principles:[5] fair and inclusive decision-making processes; equality of membership; democratic processes; fair access to property of the association and accountability and transparency. The underlying idea is, however, that although certain basic requirements have to be met, the constitution has to reflect the unique needs, values and conditions of the community involved.[6]

(iv) *The Extension of Security of Tenure Act 62 of 1997 ('the ESTA')*

(aa) Introduction

The state's constitutional obligation to promulgate legislation dealing with the promotion of secure tenure was in part fulfilled with the enactment of the ESTA in 1997. The aims of the Act are threefold: to promote long-term security

[1] These are set out in Schedule 1 or 2 of the Upgrading Act. This protective category relates to rights listed in the schedules of which the holder is not formally or officially recorded as the rightful holder.

[2] See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's Law of Property* (5th Editon, 2006) Chapter 22; D Carey-Miller & A Pope *Land Title in South Africa* (2000) 461-67.

[3] See Cary-Miller & Pope (supra) at 473-85; T Scheepers *A Practical Guide to Law and Development* (2000) 76-79.

[4] CPA Act s 6.

[5] CPA Act s 9.

[6] The final registration takes place by the registration officer once all the formalities have been met. A registration certificate is finally issued that bears the seal of the communal property association after which the association acquires juristic competency. See CPA Act s 8(6)*(a)*.

of tenure; to regulate eviction; and to introduce a set of rights and duties in relation to both occupiers and land owners.[1]

Although the Act has national application, it is limited to rural and peri-urban areas.[2] It is thus clear that the underlying aim is to protect a certain category of rural dwellers: occupiers on farms or farm workers.[3]

(bb) Beneficiaries

Not everyone qualifies as an occupier for purposes of the ESTA. The Act applies to any person residing on land which belongs to another and who has or on 4 February 1997 or thereafter had consent or another right in law to do so; as well as a person who resides on land belonging to another who works for herself and does not employ an outside person.[4] Labour tenants,[5] persons using or intending to use land mainly for industrial, mining, commercial or commercial farming purposes and persons who have a monthly income exceeding R5000 are explicitly excluded from the protection of the ESTA.[6] These exclusions are in line with the main purpose of the Act: to protect vulnerable occupiers.

In some instances persons are presumed to be occupiers: a person who has continuously and openly resided on land for a period of at least one year is presumed to have the consent of the land owner. With regard to persons who occupied the land before 4 February 1997, 'consent' also includes that of the previous land owner. In *Landbounavorsingsraad v Klaasen*, the court held that consent is more than a mere indication of the inclination of the grantor: it creates legally enforceable rights and obligations.[7] Thus the person claiming rights as an occupier must be or must have been a party to the consent agreement.[8] All

[1] *Prize Trade 44 (Pty) Ltd v Isaac Tefo Memane* LCC Case 35/01 (Unreported judgment, 21 August 2003)(Confirmed that one of the main functions of the Act is to ensure that evictions are conducted equitably in the interests of both parties.)

[2] ESTA s 2.

[3] See *Venter v Claasen* 2001 (1) SA 720 (LCC). Limiting the application of the Act to rural areas in general has increasingly led to farm workers being settled in urban areas, thereby avoiding the impact of the Act. This unintended and untoward consequence has been curbed, to some extent, by making the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act') applicable to all forms of residential occupation — irrespective of location. Although the full force of the ESTA may thus be avoided, the substantive and procedural requirements related to evictions in general, still need to be complied with. See *Joubert v Van Rensburg* 2001 (1) SA 753 (W) at paras 35-38 (Flemming DJP considered the fact that the Act does not affect all landowners equally, but only owners of farm land as one of the aspects that contributed to the Act being declared unconstitutional. Since the constitutionality of the Act was not in issue in *Joubert*, the Supreme Court of Appeal and the Constitutional Court concluded that Flemming DJP's finding regarding the unconstitutionality of the ESTA was to be disregarded. See *Mkangeli v Joubert* 2001 (2) SA 1191 (CC), 2001 (4) BCLR 316 (CC).)

[4] ESTA s 1.

[5] Their tenure position had already been dealt with under the Land Reform (Labour Tenants) Act 3 of 1996.

[6] ESTA s 1(1)*(x)(c)*.

[7] 2005 (3) SA 410 (LCC)('*Landbounavorsingsraad*').

[8] Ibid at paras 21-23.

persons residing on land would therefore not necessarily qualify as occupiers for purposes of the ESTA — there has to be a legal nexus between that person and the owner or person in charge of the property. Family members residing in the house with occupiers therefore do not automatically qualify as occupiers — they only qualify if there is a legal connection.

Apart from 'ordinary occupiers', s 8(4) of the ESTA also recognizes 'long term occupiers'. Long-term occupiers are persons who have occupied land for a period exceeding ten years and who are 60 years of age or older,[1] or are employees or former employees of the owner or person in charge and are unable to provide labour as a result of ill-health, injury or disability.

(cc) The promotion of long-term tenure security

The ESTA's record in promoting long-term security has thus far been disappointing. Chapter II, which deals with this issue, is phrased in general terms and lacks detail concerning the tenure options available. Given that the ESTA is constitutionally mandated legislation, which is required to provide a framework for tenure reform, one would have expected more substantive provisions.[2] The ESTA nevertheless creates two mechanisms for promoting long-term tenure security: on-site development and off-site development.[3] Off-site development entails occupiers acquiring independent tenure rights on land belonging to someone other than the owner of the land on which they are residing. In cases of off-site development, reasons must be given why the development cannot be undertaken on the farm where the occupiers are residing, especially if the occupiers indicate a preference for on-site development.[4] This in-built preference for on-site development has not, however, led to large-scale developments on farms. In fact, quite the contrary: land owners are very hesitant to make land available for housing on farms.[5] Off-site development has not been that successful either. This form of long-term tenure security requires a good working relationship between land owners and local government, as well as commitment and funding, which are often lacking. In short, the ESTA has proven more effective at protecting against arbitrary eviction and

[1] The courts have interpreted the age requirements strictly. See *Rashava v Van Rensburg* 2004 (4) SA 421 (SCA)(The court had to determine whether, when interpreted 'correctly', ages of 58 or 59 would also be included under the 60 years of age provision, especially if the long period of employment (in this instance 20 years) was also kept in mind. The court found that the wording was quite clear and that no interpretation — generous, purposive or otherwise — could change the meaning (at para 14).) Other case law has also found that the use of an identity document was not the only method to determine age that would be acceptable in court. Other methods also included testimony to the date of birth, as long as the evidence is reliable. See in this regard *Mpedi v Swanevelder* 2004 (4) SA 344 (LCC).

[2] See FC s 25(5); § 48.6 supra. It is also problematic if compared to the regulation of redistribution measures in the Labour Tenants Act and the relative success that Act has had in practice.

[3] ESTA s 4(1).

[4] ESTA s 4(2)*(c)*.

[5] M Wegerif, B Russel & I Grundling *Still Searching for Security: The Reality of Farm Dweller Evictions in South Africa* (2005).

regulating the day-to-day relationship between land owners and occupiers than in promoting long-term security.[1]

In order to promote long-term security, the Minister of Land Affairs and Agriculture has equivalent powers to those exercised under the Expropriation Act 63 of 1975. As soon as the expropriation of land or rights is initiated, a hearing must be held and compensation paid.[2]

(dd) Occupiers' rights

1. General

The fundamental rights listed in s 5 of the ESTA apply to occupiers. Apart from these rights, additional rights and duties are also listed in s 6. These rights must be balanced with the rights of owners or persons in charge. Apart from the rights that emanate from the Act itself, parties are free to include particular rights in the agreement that forms the foundation of the occupier's status.

2. The right to family life

The right to family life was a somewhat controversial omission from the Bill of Rights, but is included in the ESTA. Not many of the rights provided for in ss 5 and 6 have been adjudicated on. The right to family life was, however, one of the focal points in *Conradie v Hanekom*.[3] In terms of the agreement with the land owner, both the husband and wife stood to lose their residential rights when either spouse's employment contract was cancelled. In contravention of his employment contract, the husband threatened and injured persons on the land and caused damage to property. He was dismissed after a disciplinary hearing. This dismissal also led to the termination of the wife's employment. On review under s 19(3) of the ESTA, the wife was reinstated on the basis that the provision linking the termination of her employment to the conduct of her husband was unreasonable. She could therefore not be evicted for this reason. In addition, on the basis of her right to family life, her husband was allowed to join her on the premises. The court accordingly set both eviction orders aside and ordered that other remedies be sought in respect of the conduct of the husband. The court did not give any indication as to what these remedies might be.

The right to family life in accordance with the cultural background of the family was raised in *Wichman v Langa*.[4] Applications for the eviction of the long-term occupier's sons and grandson were contested on the basis that leaving

[1] See FC s 25(5) and FC s 26(3). See also S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003).

[2] ESTA s 26(2).

[3] 1999 (4) SA 491 (LCC), [1999] 2 All SA 525 (LCC).

[4] 2006 (1) SA 102 (LCC)('*Wichman*').

the grandmother would be unacceptable in terms of Zulu culture and tradition. The extended family set-up entailed that the different generations should live together.[1] The court responded that no expert evidence supported the claims made in relation to Zulu customs and culture and that, even if it were true, the respondents had all fallen foul of s 10 (dealing with irreconcilable breach) of the ESTA. On the facts, the conduct of the respondents displayed a blatant disregard for the lives and property of the other employees and owners. The right to family life was thus trumped by the safety and other interests of the rest of the occupiers and owner. In both this decision and *Conradie*, the courts failed appropriately to balance competing rights. In *Conradie*, the right to family life was upheld, ruling out the possibility of an eviction order, without seeking to give effect to the rights of the land owner and other occupiers. On the facts the only real difference between the two cases is that *Conradie* dealt with a husband and wife and the link to family life in that regard, whereas *Wichman* dealt with parent-child and grandparent-grandchild relationships and an alleged custom that could not be proven. Unfortunately, neither case provides useful guidelines on how to balance the right to family life, on the one hand, and the interests of land owners, on the other. In seeking to balance the right to family life and the (property) rights of land owners, it may be appropriate for courts to seek creative remedies, such as interdicts precluding certain conduct on the part of occupiers, without an order for eviction; alternatively, granting eviction but awarding compensation or other redress to occupiers.[2]

3. The right to freedom of religion and burial rights

As originally drafted, the ESTA did not provide for burial rights but for the right to visit graves. In *Serole v Pienaar* the applicants argued that the right to visit graves included the right to bury deceased family members, given that the custom of indigenous black people requires the dead to be buried close to the living.[3] The court held that permission to establish a grave would amount to a servitude over the property, which would be different in nature to the kind of right which the legislature intended to grant occupiers.[4] The court accordingly dismissed the application.

Nkosi v Bührman focused on the right to freedom of religion as protected by ss 5 and 6 of the ESTA, before their amendment in 2001.[5] The applicants argued that they were entitled to bury a deceased family member on the land without the

[1] *Wichman* (supra) at para 24.

[2] See *President of RSA & Another v Modderklip Boerdery (Pty) Ltd & Others (Agri SA and Others,* Amici Curiae) 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC)(Court awarded constitutional damages to the landowner because it was unable to order eviction.)

[3] 2000 (1) SA 328 (LCC), [1999] 1 All SA 562 (LCC)('*Serole*').

[4] Ibid at para 16.

[5] 2002 (1) SA 372 (SCA), 2002 (6) BCLR 574 (SCA)('*Nkosi*').

landowner's consent, on the basis of their religious freedom, which was not an independent right, but an element of the occupier's security of tenure. The court held that the right to freedom of religion had internal limits and did not confer unfettered ability to choose a gravesite or to take a gravesite without the consent of the owner.[1] The court also emphasized that the kind of rights bestowed on occupiers, namely residential and use rights, did not detract *permanently* from the substance of the land, whereas a gravesite would do exactly that. Consequently, 'use' was use in association with the right of residence which did not confer any right to, or in, the land itself.[2] This reliance on 'permanence', in our view, was misplaced. The impact of indefinite rights of occupiers to occupy land on a land owner's rights may amount to an equally significant deprivation as the establishment of a gravesite.

In 2001 the ESTA was amended to provide for burial rights in certain instances. In terms of a new s 6(2)(dA), an occupier now 'has the right to bury a family member who resided on the land at the time of his or her death, in accordance with their religion or cultural belief, if an established practice in respect of the land exists'. And, according to s 6(5), 'family members of a long-term occupier have the right to bury the occupier on the land on which he or she was resident at the time of death'.

An 'established practice' in relation to the land is defined in s 1(1) as meaning a practice in terms of which the owners or persons in charge (or their predecessors in title) *routinely* gave permission to people residing on the land to bury deceased family members, in accordance with their religious and cultural beliefs. The practice furthermore relates to the land in question and not the specific family.[3] This provision accordingly recognizes the establishment of custom through practice: that is, living customary law.

Nhlabathi v Fick was the first case to be decided under the amended version of the ESTA.[4] The court considered whether s 6(2) was unconstitutional due to its impact on landowners' rights.[5] Two arguments were advanced in attacking the provision: first, that s 6(2)*(dA)* fell foul of the protection given to property under FC s 25; and, secondly, that it intruded into the functional area of exclusive local government legislative competence, contravening FC s 44(1)*(a)*(iii). In view of the focus of this chapter, we consider only the first line of attack.[6]

The respondent argued that the appropriation of a grave deprives the landowner of property. The court thus had to determine if a deprivation or an

[1] *Nkosi* (supra) at para 49.
[2] Ibid at paras 5 and 51.
[3] See *Dlamini v Joosten* 2006 (3) SA 342 (SCA)(The concept that the practice relates to the land as such and not the particular family, was again confirmed.)
[4] [2003] 2 All SA 323 (LCC)('*Nhlabati*').
[5] For an in-depth discussion of this case, see J Pienaar & H Mostert 'The Balance Between Burial Rights and Landownership in South Africa: Issues of Content, Nature and Constitutionality' (2005) 122 *SALJ* 633 ('The Balance').
[6] Ibid at 644-659.

expropriation had taken place. Deprivations will pass constitutional muster if they result from a law of general application which does not permit arbitrary limitation. Impositions amounting to expropriation must additionally be for a public purpose or in the public interest. Also, expropriation requires the payment of just and equitable compensation, the amount of which must be agreed on or determined by court. Impositions on property generally have to adhere to the requirement of proportionality.[1]

After *First National Bank t/a Westbank v Commissioner for the SA Revenue Services*,[2] it is generally accepted that an imposition on property rights will be 'arbitrary' for purposes of FC s 25 when the legislative measure employed does not give *sufficient reason* for the particular deprivation in question or is procedurally unfair.[3] The existence of sufficient reason for the deprivation or imposition can be assessed by a 'means-ends' analysis and a consideration of a complexity of relationships. The connection between the purpose of the deprivation and the affected property-holder and the nature of the property, are also included in this exercise. The proportionality review, as foreseen by FC s 36(1), refers to an assessment of the justifiability and rationality of a particular imposition on property. The separate concepts of non-arbitrariness and proportionality do overlap, however, even if their functions within the constitutional property enquiry vary considerably. In *Nhlabathi*, the court listed four grounds upon which it had to base its finding relating to arbitrariness:

- The right to appropriate a grave has to be balanced with the rights and interests of the land owner or person in charge;[4]
- The burial is only permitted where there is an established practice in this regard;[5]
- The establishment of the grave and visiting and maintaining it will in most cases only constitute a minor intrusion into the landowner's property rights;[6] and
- The right to burial was introduced by legislation as part of the constitutional mandate to ensure legally secure tenure.[7]

[1] FC s 36(1). See also PJ Badenhorst, J Pienaar & H Mostert *Silberberg and Schoeman's Law of Property* (5th Edition, 2006) Chapter 21; H Mostert & PJ Badenhorst 'Property and the Bill of Rights' in Y Mokgoro & P Tlakula (eds) *Bill of Rights Compendium* (Issue 18, June 2006) concerning deprivations: 3FB40-70 and expropriations: 3FB71-93.

[2] 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC).

[3] *Nhlabathi* (supra) at para 100. See T Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46.

[4] *Nhlabathi* (supra) at para 26*(a)*.

[5] Ibid at para 26*(b)*.

[6] Ibid at para 26*(c)*. This holding constitutes a major departure from the stances taken in previous case law.

[7] ESTA s 25(6), *Nhlabathi* (supra) at para 26*(d)*.

With regard to an established practice, the facts in *Nhlabathi* are especially noteworthy. Two members of the Nhlabathi family had already been buried on the farm previously. The respondent argued that those burials resulted from his 'indulgence'; and that no burial plot as such had been allocated to the family. Despite this averment, the family clearly regarded those plots as their burial grounds and several other burial plots for other families also existed on the land. The court found that the established practice was not in relation to a particular family, but to the land in question.[1] The potential arbitrariness of the provision was therefore tempered by limiting the burial right to certain instances only.

Concerning the extent to which the appropriation of a grave site diminishes the rights of the land owner, *Nhlabathi* differs radically from previous case law. In contrast to initial declarations in *Serole v Pienaar* that granting a grave site would result in a *permanent* diminution of ownership, in *Nhlabati*, the court referred to 'minor intrusions' only. This finding has a definite impact on whether FC s 25(1) or (2) comes into play and whether compensation needs to be paid. The court in *Nhlabathi* ultimately held that, although the establishment of a grave amounts to a servitude without the permission of the land owner, compensation is not payable.[2] In our view, the court reached the correct decision on the facts. However, there may be cases in which compensation ought to be payable.

With regard to the arbitrariness enquiry, the court indicated that the constitutional mandate to ensure legally secure tenure is a decisive factor.[3] It furthermore held that burial enables occupiers to live in accordance with their cultural and religious beliefs, which, connected with the underlying purpose of the ESTA, provides sufficient reason to justify an inroad into the landowner's rights. The obligation placed on the landowner is thus reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[4] During the balancing act however, the court envisages that the right of the landowner may outweigh that of the occupier in some instances.

Finding that the right to burial amounts to a servitude[5] required the court to deal with the argument that establishing such a servitude without consent amounted to expropriation contrary to FC ss 25(2) and (3). *Nhlabathi* supports the view that expropriations, being a subspecies of deprivation, need to comply with all the requirements for deprivations set out in FC s 25(1) as well as the additional requirements in FC ss 25(2) and (3).[6] Impositions on property are

[1] Also confirmed in *Dlamini v Jo*osten 2006 (3) SA 342 (SCA).
[2] *Nhlabathi* (supra) at paras 27-30.
[3] Ibid at para 26*(d)*.
[4] This conclusion is reminiscent of the minority judgement of Ngoepe J in *Nkosi*. *Nkosi* (supra) at 1161C.
[5] In 'The Balance', Pienaar and Mostert argue that the right to burial is a statutorily defined right and not a servitude since none of the traditional property law requirements dealing with servitudes are met in this instance. If the court had found that these rights are indeed statutory burial rights as determined and set out in ESTA itself, there would have been no need to explain the lack of provision for compensation. Pienaar & Mostert 'The Balance' (supra).
[6] *Nhlabathi* (supra) at para 29.

regarded as unconstitutional deprivations when they are achieved by way of a law that is not of general application, are arbitrary or cannot pass the proportionality test under FC s 36. A constitutional expropriation would have to meet additional requirements: it must be in the public interest or for public purposes and compensation must be paid. In *Nhlabathi*, the court tested the provision for proportionality. Given that the court had already confirmed that the provision was not arbitrary, proportionality review was perhaps superfluous. Nevertheless, the court found that there might be instances where the absence of the right to compensation on expropriation is reasonable and justifiable and in the public interest. In the light of the nation's commitment to land reform, granting a burial right need not lead to compensation being paid to the land owner.[1]

4. The right to legal representation

The right to legal representation and legal aid, as developed in *Nkuzi Development Association v Government of RSA*,[2] applies to occupiers whose tenure is threatened or infringed.[3]

(ee) Termination of rights

Occupiers may be evicted only when certain substantive and procedural requirements have been met. This protection is strengthened by an automatic review procedure in terms of which all eviction orders granted by lower courts are reviewed by the Land Claims Court before the eviction is carried out.[4] The eviction of a person, other than in terms of the Act,[5] constitutes an offence.[6]

The ESTA establishes two groups of occupiers: those who already occupied the land when the Bill was published for comment, that is, on 4 February 1997, and those who became occupiers after this date. The latter group is in a slightly better position, especially in relation to the landowner's responsibility to provide suitable alternative accommodation. Apart from these normal eviction proceedings, the ESTA also provides for urgent eviction proceedings.

[1] See M Euijen & C Plasket 'Constitutional Protection of Property and Land Reform' (2003) *Annual Survey of South African Law* 437-38.

[2] 2002 (2) SA 733 (LCC).

[3] See § 48.6*(b)*(i)(bb) supra.

[4] ESTA s 19(3).

[5] Keep in mind that, at this stage, a relocation order does not constitute eviction for purposes of the Act. Although it might be argued that a relocation order affects vested rights of long-term occupiers, the Act does not specifically require that such relocation 'arrangements' be reviewed by the Land Claims Court under s 19(3). See *Nomthandazo Chagi v Singisi Forest Products* (LCC13/05); *Pharo's Properties v Kuilders* 2001 (2) SA 1180 (LCC), [2001] 2 All SA 309 (LCC); *Pretorius v Beginsel* 2002 JOL 9238 (LCC). *Drumearn v Wager* confirmed that a relocation order does not constitute an eviction for purposes of ESTA. 2002 (6) SA 500 (LCC). It has, however, also confirmed that the relocation should be to 'suitable alternative accommodation' as contemplated in the Act.

[6] ESTA s 23(1).

Generally, irrespective of the date of occupation, evictions may take place on any legal ground,[1] including intentional threats against, intimidation of or harm or damage to other occupiers on the land; assisting persons unlawfully to erect dwellings on the land; breach of a material and fair term of any agreement reached by the parties where the owner or person in control of the land did not breach the agreement; and a fundamental breach of the relationship between the occupier and the owner which is impossible to remedy.[2]

A further ground for eviction concerns the situation where the occupier was an employee whose right of residence arose solely from her employment and she voluntarily resigned in circumstances that did not amount to a constructive dismissal in terms of the Labour Relations Act 66 of 1965.[3]

(ff) Evictions

1. General

The majority of reported cases under the ESTA have dealt with eviction proceedings. The ESTA is a good example of 'social legislation'. It takes a far less formalistic and adversarial approach to, for example, costs orders[4] and condonation of procedural irregularities.[5]

Depending on the date of occupation, an application for eviction may be lodged under s 10 (if the person was an occupier on 4 February 1997) or s 11 (when the occupier became an occupier after that date). Urgent applications are dealt with under s 15. The right to legal representation when being faced with an eviction application has been clearly established.[6] Under s 19(3) of the ESTA, all eviction orders are automatically referred to the Land Claims Court for review before an eviction order is finally confirmed and executed.[7]

[1] ESTA s 8(1).

[2] ESTA s 6(3).

[3] ESTA s 19(1)*(d)*. In such circumstances, both the employment and the occupational agreement have to be terminated before an eviction order will be considered. See *Landbou Navorsingsraad v Klaasen* [2001] JOL 9046 (LCC), *Jaco Hough Boerdery Trust v Smith* LCC Case 15R/04 (Unreported judgment, 3 March 2004).

[4] *De Wit v May* [2003] JOL 11195 (LCC); *SA Baard Boerdery v Grietjie Pofadder* LCC Case 97R/04 (Unreported judgment, 26 October 2004).

[5] The question whether a late notice of appeal should be condoned was decided with reference to *(a)* the possibility of a successful appeal, as well as *(b)* the particular circumstances of the client in *Rashava v Van Rensburg*. 2004 (2) SA 421 (SCA). With regard to the latter, the court found that the appellant was an illiterate, impecunious and uneducated woman with no knowledge of the workings of the legal system and that she could not be refused condonation solely on the ground that her legal advisers had been negligent in the performance of their work (at para 9).

[6] *Nkuzi Development Association v Government of the Republic of South Africa* 2002 (2) SA 733 (LCC); *Maas Transport BK v Beukes* [2002] JOL 9804 (LCC).

[7] Review proceedings in the Land Claims Court are decided by a single judge. He or she can confirm the order in whole or in part, set it aside, substitute it or remit it to the magistrate. Appeal against a confirmation of a review lies to the Land Claims Court (two judges) and thereafter to the Supreme Court of Appeal. See *Magodi v Van Rensburg* [2001] 4 All SA 485 (LCC), [2001] JOL 8502 (LCC).

2. Procedural requirements

The owner[1] or person in charge of the property has to give the occupier, the municipality in whose area of jurisdiction the land is situated and the head of the relevant provincial office of the Department of Land Affairs not less than two calendar months' written notice of her intention to obtain an eviction order.[2] The notice must contain the grounds for eviction and must be detailed enough so that no recipient should have any doubt concerning their rights and the consequences of a failure to protect those rights.[3] The notice has to be in a language that is understood by the occupiers.[4]

3. Requirements for eviction

Two sets of considerations are relevant to the question whether to grant an eviction order: first, specific legal requirements and, secondly, the general requirement of fairness. The specific legal requirements include whether the occupation has been terminated in accordance with the Act;[5] whether procedural requirements have been complied with and whether a probation report has been submitted. The purpose of a probation report is to enable the court to determine whether the conditions for eviction have been met.[6] The report should be submitted within a reasonable time,[7] and should provide information relevant to the requested eviction, including the availability of suitable alternative accommodation; the possible impact the eviction might have on affected persons (including children and their education); and the possible hardship it may cause the occupier. On the basis that alternative accommodation and hardship caused were issues to be addressed in each eviction application, Moloto J held in *Valley Packers Co-operative Ltd v Dietloff*[8] that a probation report is a requirement whether the application for eviction is under s 10[9] or s 11 of the ESTA. However, the impact of

[1] It has to be clear from the documents that the applicant is indeed the owner of the land. See *Henri du Plessis Trust v Kammies* LCC Case 77R/01 (Unreported judgment, 3 September 2001)(If the owner is a trust, the necessary information concerning the trustees has to be set out clearly in the documents); *Remhoogte Boerdery Edms (Bpk) v Mentoor* [2001] JOL 9018 (LCC)(Where the owner is a legal person, the person acting on behalf of the owner has to prove his or her authorization to do so); *Sparrow v Morementsi* LCC Case 116R/03 (Unreported judgment, 25 February 2004)(The Court confirmed that a farm manager cannot institute proceedings under his own name, but would have to set out his authority to do so, or that he is acting on behalf of the owner.)

[2] ESTA s 9(2)*(d)*.

[3] *African Charcoal (Pty) v Ndlovu* [2002] 2 All SA 19 (LCC), [2000] JOL 6271 (LCC).

[4] *Denleigh Farms v Mhlanzi* 2000 (1) SA 225 (LCC).

[5] See the whole of ESTA s 9.

[6] ESTA ss 10 and 11.

[7] 'Reasonable time' would depend on the particular circumstances of each case. See *Western Investments Company (Ltd) v Van Reenen* LCC Case 05R/02 (Unreported judgment, 12 February 2002)(Gildenhuys J found that waiting six months for a probation report would be 'unreasonably long'.)

[8] [2001] 2 All SA 30 (LCC), [2001] JOL 7828 (LCC)('*Vallet Packers*') at para 8.

[9] ESTA s 10(1) provides for voluntary termination of employment, in which case a probation report would not be necessary. *Westminister Produce (Pty) Ltd t/a Elgin Orchards v Simons* [2000] 3 All SA 279 (LCC). This decision was later overturned in *Valley Packers*.

the *Valley Packer* decision has been tempered somewhat by *Theewaterskloof Holdings (Pty) Ltd, Glaser Division v Jacobs*. The *Jacobs* court held that a mere request for a probation report would meet that requirement.[1] However a mere request for the report would not enable the court to reach conclusions regarding alternative accommodation or the hardship to be faced by the parties. It would, in fact, defeat the purpose of the submission of the report.

In our view, although an urgent eviction order may, in limited circumstances, be granted without the court studying the probation report, a final order should not be granted in such circumstances.[2] Although the ESTA specifically refers to the position of the occupier when the report is drafted, case law has indicated that the report should reflect the position of *both* the occupier and the land owner.[3] The report should thus, in principle, be a balanced report and interviews have to be held with both the landowner (or person in charge) and the occupier. With regard to the landowner's interests, the report could, for example, include facts such as having to lease other accommodation and the cost of transporting workers when occupiers refuse to vacate the land.

In considering the general requirement of fairness, relevant factors include the period the occupier resided on the land; the fairness of any agreement or provision of any law on which the owner or person in charge relies,[4] the conduct of the parties giving rise to the termination, the interests of the parties and the fairness of the procedure followed by the owner or person in charge. For persons who were occupiers on 4 February 1997, the court will also consider the efforts of the owner or person in charge to secure alternative accommodation for the occupier, as well as the interests of the parties, including the comparative hardship to the owner and/or person in charge and occupier(s) if an order for eviction is not granted. With regard to persons who became occupiers after that date, s 11(3) provides a list of factors to be taken into account concerning whether eviction would be just and equitable. These factors include whether suitable alternative accommodation is available and the reason for the eviction. Suitable alternative accommodation must be safe and generally not less favourable than the previous situation. The mere fact that accommodation is available is therefore not sufficient.[5]

[1] 2002 (3) SA 401 (LCC).

[2] See *Gili Greenworld Holdings (Pty) Ltd v Shisonge* [2002] JOL 9930 (LCC)(The court found that it would not have to wait for an unreasonable length of time for the report to submitted in urgent eviction proceedings.)

[3] *Terblanche v Flippies* LCC Case 36R/01 (Unreported judgment, 25 May 2001).

[4] The provisions of the relevant agreements may also be considered in this regard. See *De Wit v May* [2003] JOL 11195 (LCC)(One of the provisions entailed that the occupier would be responsible for any costs involved should the occupier be evicted. Apart from the fact that the ESTA is social legislation, meaning that costs orders are generally not made, the provision of the agreement was also found to be unfair in the circumstances.)

[5] See, eg, *Botha v Morobane* LCC Case 35R/04 (Unreported judgment, 30 April 2004)(The eviction order granted was set aside on review on the basis that the alternative accommodation offered was not acceptable. In this case the occupier ostensibly had a house that was not occupied by her, but was being let. On that basis the eviction order was granted in the magistrate's court. However, on review, it became clear that the house was a mere shack, was already occupied, and was located far from the evictee's workplace. The eviction order was consequently set aside.)

In *PE Municipality*, the Constitutional Court considered the analogous provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, and the factors to be taken into account when considering an eviction application. The Court emphasized that the set of statutory factors is not a closed list, and that the Court has a broad discretion concerning what factors to take into account and what weight to attach to each.[1] The Court stated that technical questions, such as onus of proof, should not play an unduly significant role.[2] Sachs J characterized the nature of the enquiry in this passage:

> The court is not resolving a civil dispute as to who has rights under land law; the existence of unlawfulness is the foundation of the enquiry, not its subject-matter. What the court is called upon to do is to decide whether, bearing in mind the values of the Constitution, in upholding and enforcing land rights, it is appropriate to issue an order which has the effect of depriving people of their homes.[3]

This passage tends to suggest that the enquiry is not a legal question at all, but a moral question based on the Final Constitution's value system, a question located somehow outside (constitutional) land law.[4] However, in our view, the passage is best read, not as suggesting that the eviction enquiry is an extra-legal question, but instead as authority for three propositions. First, proof of unlawful occupation alone is not a sufficient basis on which to grant eviction, though it is a prerequisite. Secondly, the statutory factors relevant to granting eviction orders must be interpreted and applied bearing in mind underlying constitutional values, and are not a closed list. Finally, the court has a broad discretion, both as to procedure and substance, when considering eviction cases.

4. Granting an eviction order

Once the court is satisfied that all the procedural requirements have been met and that it is indeed fair in the circumstances, an eviction order will be granted. The order has to contain two distinct dates: the date on which the house or dwelling has to be evacuated; and the date on which the eviction order will be carried out if the occupiers have not left the land of their own accord.[5] Both dates have to be fair. The Land Claims Court has indicated its dissatisfaction with lower courts granting eviction orders without providing for the two relevant dates.[6] The date has to be determined so that it leaves sufficient time for the automatic review

[1] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC)('*PE Municipality*') at paras 30-31.

[2] Ibid at para 32.

[3] Ibid.

[4] The passage suggests a 'natural law' theory of land law in which law is not law unless it is just. See WB le Roux 'Natural Law Theories' in C Roederer & D Moellendorf *Jurisprudence* (2006) 25ff.

[5] ESTA s 12(1).

[6] See also *McKenzie NO & Another v Lukas & Others* LCC Case 11R/04 (Unreported judgment, 22 April 2004).

proceedings to be completed.[1] Depending on the circumstances, the eviction order may also include an order granting compensation for structures and buildings erected by the occupier or for improvements or crops planted by the occupier.[2] If there are outstanding wages to be paid, these wages may also be reflected in an eviction order.

Sometimes, eviction applications are overtaken by events. In *Modderklip*, the Constitutional Court showed its willingness to fashion creative remedies to solve apparently intractable conflicts over land.[3] In this case, the three key players, the land owner, the 40 000 unlawful occupiers and the state, were all in impossible positions: the land owner could neither evict the occupiers nor use its land; the occupiers had no alternative land; and the state could not (as a practical reality) enforce the eviction order or provide alternative land for the occupiers. The Court awarded constitutional damages to the land owner, noting that this remedy resolved the impasse: 'It compensates Modderklip for the unlawful occupation of its property in violation of its rights; it ensures the unlawful occupiers will continue to have accommodation until suitable alternatives are found and it relieves the State of the urgent task of having to find such alternatives.'[4]

5. Urgent eviction proceedings

Section 15 of the ESTA provides for urgent eviction proceedings. Such an order may be granted in identical circumstances to those provided for under the Labour Tenants Act considered above.[5] Although urgent, reasonable notice still needs to be given to the municipality in the jurisdictional area and the relevant office of the Department of Land Affairs.[6] 'Real and imminent danger', as contemplated in s 15(1)*(a)*, relates to both the occupier and the land owner.[7] Although never a final order, urgent orders will only be granted if the court is satisfied that all of the requirements have been met. Applicants should thus have clear evidence of threatening conduct,[8] and applications based on mere assumptions and speculation will not be granted.[9]

[1] *Eggersgluz & Another v Trayishile Kethese & Others* LCC Case 13R/99 (Unreported judgment, 6 April 1999); *Spies v Mahlangu* LCC Case 19R/00 (Unreported judgment, 22 March 2000); *Vooraus Beleggings (Edms) Bpk v Molefe* LCC Case 9R/00 (Unreported judgment, 7 March 2000).

[2] ESTA s 13(1)*(a)*.

[3] *President of RSA & Another v Modderklip Boerdery (Pty) Ltd & Others (Agri SA and Others,* Amici Curiae*)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC).

[4] Ibid at para 59.

[5] See § 48.6*(b)*(i) supra.

[6] ESTA s 15(2).

[7] *Grand Valley (Edms) Bpk v Nkosi* LCC Case 73/99 (Unreported judgment, 25 June 1999).

[8] *Inhoek Varkboerdery (Edms) Bpk v Kok & Others* LCC Case 03R/05 (Unreported judgment, 4 February 2005).

[9] *Gili Greenworld Holdings (Pty) Ltd v Shisonge* [2002] JOL 9930 (LCC).

(gg) Mediation and Arbitration

As we noted above, the constitutional value of *ubuntu* provides support for an interpretation of land legislation that prefers mediated solutions to adversarial confrontation.[1] Section 21 of the ESTA provides for mediation proceedings in certain circumstances. Although the decision of Sachs J in *PE Municipality* dealt with eviction proceedings under PIE, it is clearly relevant to evictions in general. The *PE Municipality* Court made it clear that whether mediation had occurred or not would be one factor when considering whether the eviction would be fair in the circumstances.[2] If there has been no attempt at mediation, negative inferences may be drawn as regards the fairness of the eviction. A mediator may be appointed by either of the parties[3] or the Director-General of Land Affairs.[4] Disputes may also be referred to arbitration under s 22 of the ESTA, in which case the general provisions of the Arbitration Act 42 of 1965 will apply.

(hh) Review proceedings

Although the initial idea was that automatic review proceedings would only be an interim measure while all the relevant parties and the court functionaries were still unfamiliar with the workings of the ESTA, s 19(3) has not been repealed.

The purpose of automatic review proceedings is to ensure that only evictions that have met all of the substantive and procedural requirements are carried out. Recent case law has confirmed that new evidence, facts or correspondence may not be introduced in these proceedings.[5] In cases where new evidence comes to the fore on review, the case is usually remitted to the magistrate.

(v) *The Communal Land Rights Act 11 of 2004 ('the CLRA')*

(aa) General

Although the CLRA is the embodiment of government's commitment to tenure reform, as set out in FC s 25(6) and (9), various sections also fit within the redistribution programme.[6] The mechanism used to achieve the objectives of redistribution, and tenure security in particular, is to enable 'new order rights' to replace 'old order rights' in communal areas. These rights may be held individually or communally.

[1] See § 48.4 supra.
[2] *PE Municipality* (supra) at para 43.
[3] ESTA s 21(1).
[4] ESTA s 21(2).
[5] *Eikenbosch Farm (Pty) Ltd v Matthews* 2003 (4) SA 283 (LCC).
[6] For the aims and functioning of the redistribution programme, see § 48.6 supra. See also H Mostert & J Pienaar *Modern Studies in Property Law III* (2005) 317-22.

(bb) Application

The CLRA is principally applicable to communal land, namely land occupied or used by a community or its members subject to rules of that community.[1] If land falls within the ambit of s 2, the Act applies and communities have no choice but to participate.[2]

The broad categories of land set out in s 2 all relate to some extent to the pre-1991 land control system.[3] State land that is beneficially occupied[4] and that has vested at any time in the governments of the former self-governing territories[5] or national states[6] form one such broad category. This category also includes non-disposed[7] state land that vested in the SA Development Trust and certain other trusts.[8]

The categories of land to which the CLRA applies reflect its primary application to traditional communal areas. However, the CLRA also goes beyond the pre-1991 land regime by providing that it applies to 'beneficiaries of communal land or land tenure rights in terms of other land reform laws' and by catering for a number of 'new' categories of communal land.[9] Significantly, it also applies to 'any other land, including land which provides equitable access to land to a community as contemplated in section 25(5) of the Constitution'.[10] Under the

[1] See CLRA s 2. 'Community' is defined in the CLRA and the Restitution of Land Rights Act 22 of 1994 as a group of persons whose rights to land are derived from shared rules determining access to land held in common by the group. See also *Richtersveld Community v Alexkor Ltd* 2001 (3) SA 193 (LCC) at 1330A-B; GJ Pienaar 'The Land Titling Debate in South Africa' (2006) *TSAR* 435, 441-45; GJ Pienaar 'The Meaning of the Concept Community in South African Land Tenure Legislation' (2005) 16 *Stellenbosch LR* 60.

[2] The default provisions come into effect when the community refrains from constituting a juristic person as determined in ss 3 and 9 of the CLRA.

[3] The list of repealed legislation refers to the land legislation promulgated in the former Bophuthatswana, Venda, Ciskei, QwaQwa, KwaNdebele and Transkei, and amends various sections of the KwaZulu Ingonyama Trust Act of 1994.

[4] Beneficial occupation entails occupation by a person or community for a continuous period of not less than five years prior to 31 December 1997 as if that person was the owner, without force, openly and without the permission of the owner.

[5] QwaQwa, KwaNdebele, Gazankulu, KwaZulu, Lebowa and KaNgwane.

[6] Transkei, Ciskei, Venda and Bophuthatswana.

[7] Under the State Land Disposal Act 48 of 1961. Land that was listed in the Schedule to the Black Land Act before it was repealed and land listed as 'released areas' under the Development Trust and Land Act are also included. Finally, it also relates to land subject to the KwaZulu-Natal Ingonyama Trust.

[8] Development and Trust Land Act 18 of 1936. The SA Development Trust (SADT) was disestablished in March 1992 and land held by the Trust was transferred to the (then) Administrators of the former Transvaal and Orange Free State provinces, to the Minister of Regional and Land Affairs and the governments of the former self-governing territories (Proc R28 in *GG* 13906 of 31 March 1992). The dismantling of the SADT was a necessary consequence of the White Paper on Land Reform of 1991 and of the impending unification of South Africa's borders under the new constitutional dispensation.

[9] CLRA ss 39 and 2(1)*(c)* and *(d)*. For example, it incorporates 'land acquired by or for a community whether registered or not'.

[10] Ibid s 2(1)*(d)*.

redistribution programme (and tenure reform programme) it has become possible for communities to become land owners via a communal property association.[1]

(cc) 'Old order' and 'new order' rights

Section 4 of the CLRA gives effect to FC s 25(6) by confronting the issue of rights that are legally insecure as a result of past racially discriminatory laws or practices. In addressing this issue, the rights and relations of the 'old South Africa' come into play — hence the reference to 'old order rights'. To move from 'old order' rights to 'new order' rights, the CLRA provides for the transfer, confirmation or cancellation of these rights.

'Old order rights' include 'any tenure rights *in communal land* or any other rights *over communal land* whether formal or informal, registered or unregistered, derived from or recognized by law (including customary law, practice and usage)'.[2] This definition excludes rights of occupancy,[3] labour tenancy,[4] sharecropping,[5] or rights in terms of an employment contract.[6]

'New order rights', although not clearly defined, generally involve a tenure right in communal or other land which has been confirmed, converted, conferred or validated by the Minister under s 18 of the Act.[7]

Communal land is generally held by the state.[8] The tribal head or 'chief' (or traditional leader) manages the land in trust for the community and allocates land to individual families via the family head. Accordingly, community members occupy the land on a communal basis under the overall authority of traditional leaders. Land allocated to community members usually consists of two parcels of land: one to be utilized for residential and the other for agricultural purposes.[9]

[1] See § 48.7*(b)*(iii) supra. Although s 2(2) of the CLRA states that the Minister will determine the extent of the land affected by this provision by way of notice in the *Government Gazette*, s 2(2) confuses the scope of the CLRA and CPA Act since the provisions may impact on the same land. The implications of s 2(1)*(c)* and *(d)* read with s 39 are much more far-reaching than initially meets the eye.

[2] CLRA s 1 — interpretation clause (emphasis added).

[3] This understanding of occupancy would include instances where occupancy is purely on a contractual basis, with the assumption that the occupancy can be terminated in accordance with the agreement.

[4] These rights have already been dealt with in the context of the Labour Tenants Act. See § 48.6*(b)*(i) supra.

[5] Sharecropping was a form of labour tenancy and has thus also been dealt with under the labour tenancy legislation. See JM Pienaar 'Farm Workers: Extending Security of Tenure in Terms of Recent Legislation' (1998) 2 *SAPR/PL* 423.

[6] Occupancy may also coincide with employment. The ESTA will deal with these instances. See the discussion above in § 48.7*(b)*(iv). Occupiers whose rights may be terminated at any stage are also included in this category.

[7] CLRA s 18 constitutes an executive act of the Minister. See § 48.7*(b)*(v)(dd)2. infra.

[8] IC s 229 provided that all land that previously vested in the governments of the national states or self-governing territories would, after 26 April 1994, vest in the Republic of South Africa.

[9] See IP Maithufi 'Law of Property' in JC Bekker, JMT Labuschage & LP Voster (eds) *Introduction to Legal Pluralism in South Africa: Customary Law* (2002) 56-59; TW Bennett *Human Rights and African Customary Law* (1995) 37-139.

Other 'informal rights' also prevail in relation to the commons and include water and grazing rights. *All of these rights* fall within the ambit of 'old order rights' since they are derived from customary law, practice and usage.[1]

The legislature has, however, in the past also intervened in the recognition and regulation of rights in relation to communal land.[2] Proclamation R188 of 1969 provides for two forms of tenure, namely quitrent and permission to occupy.[3] *Quitrent* refers to the registered occupation of surveyed land for which an annual fee is payable. These portions of land are classified as agricultural, commercial or residential. The *permission to occupy* is a statutory form of land control which involves the occupation of unsurveyed communal land. Use of the land is guaranteed with the payment of rental. As mentioned above,[4] the Upgrading Act provides for the conversion of quitrent and deeds of grant to full ownership. Since these rights relate to surveyed land, the conversion is automatic. Permission to occupy, being over unsurveyed land, falls under Schedule II of the Upgrading Act and may only be upgraded by means of a registration process, and therefore usually takes much longer to achieve. Tenure security has, to some extent, already been provided for in the Upgrading Act in relation to quitrent and permission to occupy. Despite this provision, these rights also fall within the ambit of 'old order rights' for purposes of the CLRA.[5] Moreover, it appears that the CLRA will generally prevail in respect of such rights.

'Old order rights' also include informal land rights. In the former national states and self-governing territories with abundant communal land, land rights were invariably granted outside the prescribed procedures. This resulted in families occupying and using land for generations without a legal basis for such

[1] See § 48.5 supra.

[2] See CG van der Merwe & J Pienaar 'Land Reform in South Africa' in P Jackson & DC Wilde *The Reform of Property Law* (1997) 348-52.

[3] Ibid.

[4] See § 48.7*(b)*(i) supra.

[5] None of the provisions providing for the upgrading of tenure rights have been repealed or amended by the CLRA. In fact, the whole of s 3, which provides for the conversion of land tenure rights mentioned in Schedule 2 of the Upgrading Act, is also still intact. Because of certain conditions, these rights are not automatically converted into ownership. The fact that these rights usually relate to unsurveyed land or that additional requirements are needed, such as tribal resolutions, mean that these rights are probably still in the process of being transformed. Apart from permission to occupy, Schedule 2 rights also include 'any right to the occupation of tribal land granted under the indigenous law or customs of the tribe in question'. Section 3 of the Upgrading Act provides for the conversion of Schedule 2 rights into ownership by the Registrar of Deeds through registration of such an erf or piece of land in the name of the applicant. It then proceeds by setting out the required procedure. Significantly, s 3(1)*(a)*(ii) and *(b)* refer to conversions being conditional on the obtaining of a tribal or community resolution. These rights are exactly the kind of rights that are being dealt with in the CLRA. The tribal areas and related rights affected by both the Upgrading and the CLRA are identical. Under s 39 of the CLRA, it seems as if the latter will prevail. If this is the case, the continued function of those portions of the Upgrading Act that currently also provide for the conversion of tribal land rights to ownership is unclear. Why would there be two different procedures in place? Perhaps, due to the promulgation of the CLRA, the relevance of the Upgrading Act has now been restricted to Schedule I rights?

allocation. The breakdown of the land administration in these areas has also resulted in many grants not being recorded at all or records being lost or destroyed. Since 1996 these rights have, however, been protected by the Interim Protection Act, as discussed above.[1] Because these rights have been recognized by law they also fall within the ambit of 'old order rights' for purposes of the CLRA.[2]

(dd) Procedure for tenure reform

1. First steps: establishing the community and conducting a land rights enquiry

Before the process of formalizing or securing tenure rights can begin, the community has to be established as a juristic person.[3] The actual registration of land in the name of the community only takes place once community rules have been adopted and registered. Should the community fail to adopt rules, which would stall the transformation process, the Minister responsible for Land Affairs is empowered to draft standard rules for the community.[4] Once it is clear that a particular portion of land is affected by the CLRA and the community rules have been finalized, the Minister announces a land rights enquiry.[5] The land rights enquirer, an official of the Department of Land Affairs or another suitable person,[6] has to conduct an investigation into the situation of a particular community or piece of land, in order to recommend to the Minister whether any existing old order rights need to be transferred, validated, cancelled or recognized.[7] The enquiry must deal with 'all old order and other land rights, including conflicting rights.' The broad powers of the enquirer probably extend to investigations into limited real rights vested in the property. The enquirer will have to deal with conflicting rights: conflicts between family members, conflicting tribal affiliations and boundary conflicts. 'Conflicting rights' may also refer to the effect of possible restitution claims on the land and existing rights and interests.[8]

In selecting from among the 'options available for securing rights',[9] it is necessary to consider the rights at stake as well as all available options. As the tenure reform programme has as one of its basic points of departure that beneficiaries

[1] See § 48.7*(b)*(ii) supra.
[2] Ibid, for the four categories of rights that are protected under this Act.
[3] CLRA s 3, read with s 9.
[4] CLRA s 19(5).
[5] CLRA s 14(1). A notice to that effect is published in the *Government Gazette*.
[6] CLRA s 15(1).
[7] In order to do that successfully, the person (including persons who assist him or her) may, having regard to constitutional rights, compel the provision of written and verbal evidence; enter and search premises and take possession of documents and articles and convene and attend meetings. See, in general, CLRA s 17.
[8] CLRA s 14(2)*(a)*.
[9] CLRA s 14(2)*(c)*.

should be able to choose their particular form of tenure, the preferences of the particular person or community must be taken into account. The enquiry must also look into the provision of land on an equitable basis,[1] and gender equity.[2] The CLRA has been criticized for allowing traditional structures to perform the functions of land administration committees.[3] The role of women in these structures is limited, and there is a real risk that female interests will not be considered.

Spatial planning, land use management and land development[4] make up other essential aspects of the enquiry. The enquirer must obtain the co-operation of local government structures, including traditional leadership structures in conducting the inquiry.

Once the enquiry has been completed a notice is published containing the results of the enquiry.[5] The publication of the results ostensibly introduces a phase of community participation.[6] However, the CLRA does not envisage any appeal procedure against the findings of the enquirer once the final results have been published. Therefore the only option open to affected communities is to participate *during* the enquiry phase. The community's ability to participate in negotiating their own future will probably depend on the extent to which the land rights enquirer involves them in the enquiry process.

2. The determination phase

Once the land rights enquirer has lodged his report with the Minister, the Minister exercises her discretion to make a determination in terms of the pivotal s 18 of the CLRA. The process of determination is aimed at identifying the best possible solution for every holder of an 'old order' right. If the Minister is satisfied that all the requirements have been met, she may make the determination taking into account the relevant report, all relevant laws (relating to spatial planning, local government and agriculture),[7] the 'old order rights of all affected holders',[8] and the need for the promotion of gender equity.[9]

When making the determination, the Minister also has to take into account the Integrated Development Plan of each municipality.[10] After consultation with the

[1] CLRA s 14(2)*(d)*.
[2] CLRA s 14(2)*(g)*.
[3] See A Claassens 'Women, Customary Law and Discrimination: The Impact of the Communal Land Rights Act' (2005) *Acta Juridica* 42ff.
[4] CLRA s 14(2)*(e)*.
[5] CLRA s 16*(b)*.
[6] CLRA s 17(1).
[7] This places an almost impossible burden on the Minister. It is inconceivable that she would be able to make such a determination in light of the plethora of existing legislation dealing with the matters listed. It is envisaged that this function would probably be delegated to other functionaries.
[8] Many of these old order rights have not been captured in records, databases or other official documents. Use rights bestowed on women would be especially difficult to 'track down' if holders do not come forward and participate in the enquiry.
[9] CLRA s 18(1).
[10] CLRA s 18(4).

Minister of Local Government, municipalities or other land use regulators, the Minister may also decide to reserve a right for the state (or municipality) and stipulate any land use or other conditions which are necessary for public purposes or which are in the public interest; or to protect the affected land, rights in land, an owner of such land or the holder of such rights; or to give effect to the CLRA.[1]

Where applicable, the location and extent of the land to be transferred to a community or person has to be determined.[2] Boundary conflicts must be settled by the Minister. Nothing in the CLRA compels the Minister in such an event to consult or gain the co-operation of the affected communities. However, it is likely that any such decision by the Minister will constitute administrative action in terms of PAJA. If so, affected persons will be entitled to a fair process (including a hearing) leading up to the decision,[3] to request reasons for the decision,[4] and, where applicable, to apply to court for the review and setting aside of the decision.[5]

Section 18(3) of the CLRA determines that in confirming, converting or cancelling 'old order' rights, the Minister may determine that communal land has to be surveyed and subdivided into sections which are then registered either in the name of the community, individuals or the state.[6] The CLRA does not deal with restrictions on the subdivision of land prescribed by the Prohibition on the Subdivision of Agricultural Land Act ('the Prohibition Act').[7] This legislative silence may simply reflect the anticipation of the repeal of the latter Act. But it may also have been envisaged that the Minister could consent to grant an exemption from the Prohibition Act, as provided for in that Act, while making the determination in terms of s 18 of the CLRA. This simultaneous application of the CLRA and the Prohibition Act is by no means textually self-evident.

The constitutional call for tenure reform is especially relevant with respect to s 18(3)*(d)*. Section 18(3)*(d)* deals with the fate of 'old order' rights. The determination may *confirm* the right,[8] *convert* it into ownership or another new order right, or *cancel* the right, whereupon the land to which such right relates will be incorporated into the land held by a community and the holder awarded comparable redress. The CLRA does not give any indication of the *type* of rights that may be *confirmed*. Confirmation could for instance entail that a right in the form of permission to occupy land will be surveyed and registered, or that 'informal' use rights will be formalized and registered. Confirmation could also, however,

[1] CLRA s 18(4).
[2] CLRA s 18(2).
[3] PAJA s 3.
[4] PAJA s 5.
[5] PAJA s 6.
[6] Probably reserved to the municipality that will be providing services.
[7] Act 70 of 1970. If the land in question is not classified as 'agricultural', the Act is in any event not relevant in this context.
[8] CLRA s 18(3)*(d)*(i).

refer to rights which are already secure, but which nevertheless must go through the determination process because of s 18(3)*(a)*. It is also unclear whether confirmation will result in an 'old order' right being embodied in a new form, or whether such rights continue to exist unaltered. 'New order rights' must, however, be sufficiently secure to give effect to the constitutional imperative of FC s 25(6).

Because section 18(3)*(d)*(ii) provides for conversion into either ownership and/or new order rights, it implies that not all 'new order' rights will necessarily be ownership. The Act here anticipates diversification of secure rights to land control and holding.[1] However, different signals are sent by other sections of the Act.[2]

The relationship between ss 12 and 13 with regard to a cancellation of rights under s 18(3)*(d)*(iii) is also unclear. In the case of s 18 cancellations following a ministerial determination, the land will be incorporated into existing communal land and the holder of the cancelled right will then be awarded comparable redress.[3] On the other hand, s 12 refers to cancellation subsequent to an *application by the holder of a right* contemplated in FC s 25(6) to the Minister. Section 12(2) further indicates the kind of redress that may be considered: *(a)* land other than land to which the old order rights relate; *(b)* compensation in money or in any other form; or *(c)* a combination of *(a)* and *(b)*. The Act gives no indication of the factors determining when security will be considered 'impossible', how comparable redress will be determined and at what stage it will be paid, or whether it is payable to communities or to individuals only.

Section 18(4)*(b)* aims to promote gender equality by providing that a 'new order' right can be conferred on a woman who is a spouse of a male holder of an old order right so that the new order right can be held jointly;[4] or on a woman who is a widow of a male holder of an old order right or succeeded to that right,[5] or that such right can be granted to a woman in her own right.[6] This section attempts to recognize and to develop the customary law rule under which a woman could not hold rights in property so as to bring it into line with the Final Constitution — and in particular, the right to equality in FC s 9.

Finally, during the determination phase, the Minister may validate an old order right that was acquired in good faith or invalidate an old order right that was acquired *mala fides*. Once the old order right has been validated, it presumably has

[1] For example, a permission to occupy can be converted into ownership or a new order right that is something less than ownership, but is still formalized, registered and secure — perhaps an occupational right?

[2] See, eg, CLRA s 9.

[3] CLRA s 18(3)*(d)*(iii).

[4] CLRA s 18(4)*(b)*(i).

[5] CLRA s 18(4)*(b)*(ii).

[6] CLRA s 18(4)*(b)*(iii). The sentence structure of this clause is nonsensical. It is further evidence of the apparent haste with which the text of the CLRA was drafted.

to be converted into a new order right. It is presumed that this section is aimed at addressing those categories of 'informal' rights, which were granted *de facto* in the absence of any legal basis, and which currently already enjoy protection under the Interim Protection Act.[1]

(ee) Formalization of tenure rights

Security of tenure is one of the main aims of the Act, and is achieved by way of registration.[2] Once the Minister has made the determination under s 18, registration is the next step. This process results in the community's becoming the lawful holder of rights and obligations in respect of land and can be reflected in the deeds registry. As set out above, the community acquires juristic personality in order to gain legal capacity to deal with the land once the necessary community rules have been registered.[3] It is the Minister's task to ensure that the transfer and registration requirements have been met and it is the task of the land administration committee to ensure that new order rights are then allocated to community members and registered.[4]

(c) Tenure reform: brief evaluation

Since embarking on the tenure reform programme, only one Act, the ESTA, has been constitutionally challenged. In view of the interests of both land owners and occupiers and the concomitant balancing of these rights and interests, as well as the fact that burial rights may only be exercised in prescribed circumstances and once various conditions have been met, the court held, in *Nhlabathi v Fick*, that the Act was constitutionally sound.[5] Before this decision, in *Joubert v Van Rensburg*,[6] Flemming DJP remarked obiter on the constitutionality of the ESTA, stating that the Act was not generally applicable,[7] and that it allowed arbitrary deprivation of property,[8] which could not be justified in terms of FC s 36(1).[9] Flemming DJP's decision has been criticized in the academic literature for showing a lack of understanding of the effects of apartheid land law,[10] and for failing to consider the impact of tenure security statutes on the development of the common law.[11] On appeal, neither the SCA,[12] nor the Constitutional Court,[13]

[1] See § 48.7*(b)*(ii) supra.
[2] CLRA s 5(2). See H Mostert & J Pienaar *Modern Studies in Property Law III* (2005) 332-334, 336.
[3] See § 48.7*(b)*(v)(dd)61 supra.
[4] The land administration committee represents the community that owns the communal land and is empowered to allocate new order rights, once determined by the Minister, to community members. It also has to ensure that the communal land is registered. See CLRA s 25.
[5] *Nhlabathi v Fick* [2003] 2 All SA 323 (LCC).
[6] 2001 (1) SA 753 (W).
[7] Ibid at para 41 (It only applied in rural areas.)
[8] Ibid at paras 26-44.
[9] Ibid. See AJ van der Walt *Constitutional Property Law* (2005) 340-42.
[10] M Euijen & C Plasket 'Constitutional Protection of Property and Land Reform' (2001) *Annual Survey of South African Law* 439ff.
[11] Van der Walt *Constitutional Property Law* (supra) at 342.
[12] *Mkangeli v Joubert* 2002 (4) SA 36 (SCA)('*Mkangeli (SCA)*').
[13] *Mkangeli v Joubert* 2001 (2) SA 1191 (CC), 2001 (4) BCLR 316 (CC)('*Mkangeli (CC)*').

considered the constitutionality of the ESTA. Both courts expressed their displeasure at the way in which this issue had been dealt with in the court a quo.[1]

The constitutional principles of equality and democracy lie at the heart of the CLRA. These principles inform the constitutions of the respective communities to be transformed into juristic persons. The principle of equality requires that one-third of the boards and committes must be women.[2] Furthermore, one member of the committee must represent the interests of vulnerable community members, including women, children and the youth, as well as the elderly and the disabled. Although the committee is generally appointed in accordance with community rules, a recognized traditional council may also fulfil these functions if the relevant community has such a council.[3] When recognized traditional councils perform the functions of land administration committees, one member has to safeguard the interests of women, children, the elderly and the youth. In this situation, despite sweeping provisions in the CLRA providing for gender equity, there is a real risk that land-related issues that affect the vulnerable — especially unmarried women — may be overlooked.[4]

Finally, although the CLRA, when it commences, will play an important role in the formalization of insecure land tenure rights, securing title to communal land by means of registration is by no means uncontroversial. Some authors have argued that the land titling paradigm that informs the legislation is inappropriate and is likely to undermine rather than secure land rights for residents.[5] The poor fit between the CLRA and the core features of African land tenure means that it

[1] See *Mkangeli (SCA)* at para 27. Brand AJA states that 'statements made by the learned Judge in the Court a quo such as those that I have referred to may give the impression that he failed to approach the question regarding the applicability of ESTA in an intellectually disciplined way and with an open mind. These statements should therefore have been avoided.' In the Constitutional Court Chaskalson P wrote: 'Appeals are brought against orders made by a court and not against comments made in the course of a judgement'. *Mkangeli (CC)* at para 12. The *Mkangeli* Court continued:

> The finding made by Flemming DJP that the Tenure Act is inconsistent with the Constitution was not the basis for the orders made by him. The finding is moreover of no force and effect. That is clear from the Constitution and there is no need for this Court to make a declaration to that effect or to hear the appeal for purpose of saying so. Should the constitutionality of the Act become a relevant issue in these or other proceedings it can be brought before this Court in accordance with the proper procedures.

Ibid at para 14.

[2] CLRA s 22(3).

[3] CLRA s 21(3).

[4] See B Cousins '"Embeddedness" Versus Titling: African Land Tenure Systems and the Potential Impact of the Communal Land Rights Act 11 of 2004' (2005) 16 *Stellenbosch LR* 488 ('Embeddedness') 507-08. For an exposition of recent developments dealing generally with access to land by African women, see JM Pienaar 'Broadening Access to Land: The Case of African Rural Women in South Africa' (2002) *TSAR* 177; JC Bekker & LN van Schalkwyk 'All African Women May at Last Own Property' (2005) 38 *De Jure* 395; AM Janse van Rensburg 'The True Capacity of Women under Customary Rule to Acquire Land: An Exposé on the Law, Land and Rules of Succession' (2003) 14 *Stellenbosch LR* 282.

[5] Cousins 'Embeddedness' (supra) at 488-513 (Makes reference to tenure reform examples in Mozambique (1997) and Tanzania (1999) which recognize and protect existing occupation and use of communal land and give them the status of property rights, but without requiring their conversion to Western notions of private ownership.).

does not provide adequately for the recognition and protection of existing rights of occupation and use; is likely to undermine the rights of female members of households who are not spouses; reinforces distortions of traditional authority bequeathed by colonial and apartheid policies; is likely to generate boundary disputes; and does not adequately address the range of situations, needs and problems in relation to communal land that currently exists.

48.8 FC s 25(7): Restitution

(a) Introduction

FC s 25(7) provides that a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

The date 19 June 1913 is crucial to the restitution programme. The notorious Black Land Act, which commenced at that time, divided the country into scheduled areas (reserved for the exclusive occupation of black persons) and other land available to the white, coloured and Indian populations respectively. Twenty-three years later, the area available for black occupation was extended by the South African Development Trust and Land Act 18 of 1936.[1] In order to effect the division between black and 'other' land, communities were uprooted and moved all over the country — invariably by force. The various Group Areas Acts further entrenched the racially-based land control system.[2]

In terms of IC s 121 and FC s 25(7), the restitution process must be regulated by an Act of Parliament. The Restitution of Land Rights Act 22 of 1994 ('the Restitution Act') was enacted shortly after the transition to democracy, and has remained in force, although subject to several amendments, under the Final Constitution.[3] The preamble to the Restitution Act refers to the constitutional right to restitution and states the aim of the Act as being to promote the advancement of persons, groups or categories of persons disadvantaged by unfair discrimination, in order to promote their full and equal enjoyment of rights in land. The two main role players in the restitution process are the Commission on Restitution of Land Rights[4] and the Land Claims Court.[5]

[1] For background to the Act, see JM Pienaar 'Farm Workers: Extending Security of Tenure in Terms of Recent Legislation' (1998) 2 *SAPR/PL* 423, 423-428; R Haines & CR Cross 'An Historical Overview of Land Policy and Tenure in South Africa's Black Areas' in CR Cross & RJ Haines (eds) *Towards Freehold? Options for Land and Development in South Africa's Black Rural Areas* (1988) 73-92.

[2] The Group Areas Act 41 of 1950; the Group Areas Act 36 of 1966.

[3] See T Roux 'The Restitution of Land Rights Act' in G Budlender, J Latsky & T Roux *Juta's New Land Law* (Original Service, 1998) Chapter 3; V Jaichand *Restitution of Land: A Workbook* (1997) 53-76; D Carey-Miller & A Pope *Land Title in South Africa* (2000) 313-97.

[4] See Restitution Act Chapter II.

[5] See Restitution Act Chapter III.

(b) Role players

(i) *The Commission on Restitution of Land Rights*

The Commission on Restitution of Land Rights consists of the Chief Land Claims Commissioner (appointed by the Minister of Land Affairs), a Deputy Land Claims Commissioner and a number of regional land claims commissioners.[1] The general functions of the Commission are to receive claims lodged under the Restitution Act; to assist claimants in the preparation and submission of claims and to advise claimants of the progress of their claims.[2]

The role of the Commission is investigative,[3] facilitative and mediatory.[4] It is further authorized to monitor and to make recommendations regarding the implementation of orders made by the Land Claims Court, to make recommendations to the Minister with regard to claimants who do not qualify for relief under the Restitution Act, to apply to court for a declaratory order regarding a question of law, and to ensure that priority is given to claims which affect a substantial number of persons.[5] The Commission also has the power to conduct investigations and to demand particulars or documents relevant to restitution claims.

(ii) *The Land Claims Court*

The Land Claims Court has national jurisdiction, similar to that of a provincial division of the High Court in civil proceedings, as well as all the ancillary powers necessary or reasonably incidental to the performance of its functions.[6] Although some cases can be referred to the Court by the Commission, claimants are also able to approach the Land Claims Court directly.[7] Generally the Land Claims Court has the following powers:[8] to determine the restitution of any right in

[1] Restitution Act s 4(3).

[2] Restitution Act s 6(1).

[3] See *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* 2005 (4) SA 212 (SCA), [2005] JOL 14177 (SCA)('*Transvaal Agricultural Union*') at para 71 (The nature of the investigation undertaken by the Commission prior to the publication of the s 11 notice was investigated. It was found that the phase before publication of the said notice was investigative and not adjudicative and that none of the procedural steps which might culminate in a hearing before the Land Claims Court was clothed with absolute finality.)

[4] *Farjas v Regional Land Claims Commissioner, KwaZulu Natal* 1998 (2) SA 100 (LCC), 1998 (5) BCLR 579 (LCC), [1998] 1 All SA 490 (LCC).

[5] See PJ Badenhorst, J Pienaar & H Mostert *Silberberg and Schoeman's Law of Property* (5th Edition, 2006)('*Silberberg 5th Edition*') Chapter 22, Carey-Miller & Pope (supra) at 334-39.

[6] Restitution Act ss 22-38. See Badenhorst, Pienaar & Mostert *Silberberg 5th Edition* (supra) at Chapter 22, Carey-Miller & Pope (supra) at 367-88. Provision was made for the establishment of the court in s 123 of the Interim Constitution and the operation of the court is currently regulated by Chapter III of the Restitution Act.

[7] Restitution Act s 38A. See Carey-Miller & Pope (supra) at 388; *Department of Land Affairs v Witz: In re Various Portions of Grassy Park* 2006 (1) SA 86 (LCC). When the court is approached directly, it is not necessary to lodge a claim with the Commission as well.

[8] Restitution Act s 22(1).

land in accordance with the Act; to determine compensation; to determine the person entitled to ownership; to grant a declaratory order with regard to a question of law relating to any matter in respect of which the court has jurisdiction; and to determine all matters that need to be determined under IC ss 121-123.

In order to accommodate as many (*bona fide*) claims as possible and to expedite matters, it was decided that any evidence, including oral evidence, would be admissible.[1] The test is whether the evidence is relevant and cogent to the matter being heard, irrespective of whether the specific evidence would ordinarily be admissible in other courts. In some instances, a pre-trial conference may be convened to expedite matters.

When considering claims, the court will have regard to many factors,[2] including the desirability of providing for the restitution of rights; the desirability of remedying past violations of human rights; the requirements of justice and equity; the feasibility of specific restoration; the desirability of avoiding (another) major social disruption; the amount of compensation or other consideration paid when the dispossession occurred; the history of the dispossession, the hardship caused and the current use of the land; and any other factor that the court considers relevant and consistent with the spirit of the Final Constitution.

The court may order restoration of the claimed land or alternative land or rights in land, award compensation or order that a claimant be declared a beneficiary of a state support programme, or any combination of these orders.[3] Court orders can also be granted conditionally.[4]

(c) Restitution procedure

All restitution claims are first screened by the Land Claims Commission. Disqualified claims are ignored and validated claims processed. This screening process entails the issuance of a compliance certificate and drafting a case report that sets out the basis of acceptance. Aggrieved claimants can at this stage approach the Land Claims Court for review of the Commission's conduct. The aim, however, is to attempt to solve as many claims as possible by way of administrative and mediation procedures. As we noted above, this non-confrontational approach promotes the constitutional value of *ubuntu*.[5] As a result, the majority of claims are handled by the Commission. Only the complicated claims or those claims that cannot be finalized by way of mediation are referred to the Land Claims Court for adjudication.[6]

[1] Restitution Act s 30.
[2] Restitution Act s 33. See Badenhorst, Pienaar & Mostert *Silberberg 5th Edition* (supra) at Chapter 22, Carey-Miller & Pope (supra) at 373-74.
[3] Restitution Act s 35(1)*(a)-(e)*.
[4] Restitution Act s 25(2)*(a)*. See eg *In re*: *Kranspoort Community* 2000 (2) SA 124 (LCC).
[5] See § 48.4 supra.
[6] Restitution Act s 14(2).

(i) *Formal requirements*

A person's claim will be disqualified if:[1] the claim was not lodged between 1 May 1995 and 31 December 1998;[2] the applicant received just and equitable compensation when the dispossession occurred;[3] or any other form of just and equitable consideration.[4] Once the *formal* requirements have been considered, the second phase of the process, in which the *substantive* requirements are considered,[5] commences. Once all the requirements have been met, the claim is accepted and processed.

(ii) *Substantive requirements*

In *Richtersveld (CC)*, the Court set out the requirements to found a restitution claim as follows:

(a) that the Richtersveld Community is a 'community' or 'part of a community' as envisaged by the subsection;
(b) that the Community had a 'right in land' as envisaged;
(c) that such a right in land continued to exist after 19 June 1913;
(d) that the Community was, after 19 June 1913, 'dispossessed' of such 'right in land';
(e) that such dispossession was the 'result of past racially discriminatory laws or practices'; and
(f) that the Community's claim for 'restitution' was lodged not later than 31 December 1998.

Before *Richtersveld (CC)*, the lower courts had placed a fairly restrictive gloss on these requirements. The Constitutional Court reversed many aspects of this parsimonious approach.

[1] Restitution Act s 2(1)*(a)*.

[2] At the end of 2003 it became clear that about 1000 land claims, lodged with the Eastern Cape Land Claims Commissioner, were erroneously rejected. The Minister of Land Affairs confirmed that no further extension of the period for lodgement of claims would be possible. The Minister is currently considering other forms of relief for these persons, *inter alia* as beneficiaries of the land redistribution programme.

[3] 'Just and equitable' refers to the term as set out in FC s 25(3). In most instances compensation was paid, but it was hardly 'just and equitable'. See Roux 'The Restitution of Land Rights Act' (supra) at 3A20–3A22.

[4] Expropriations under the Expropriation Act 63 of 1975 are also excluded. These expropriations were for public purposes and included the expropriation of land for the building of roads, schools and hospitals. See *Ndebele-Ndzundza Community v The Farm Kafferskraal* 2003 (5) SA 375 (LCC), [2003] 1 All SA 608 (LCC)('*Ndebele-Ndzundza*') at para 29 (It was argued that the farm to which the claimants were removed constituted compensation for purposes of the Restitution Act, thereby disqualifying the claim since it did not meet the threshold requirement. The court found that it did not constitute compensation since no compensation was computed at the 'time of dispossession'. Furthermore, the farm had been provided as part of an envisaged homeland consolidation plan (into the subsequent Lebowa homeland) which constituted a discriminatory act in itself: 'to accept as compensation, land given in furtherance of such policies would be tantamount to buttressing the very acts the Constitution and [Restitution] Act are intended to undo.')

[5] These requirements are also set out in Restitution Act s 2.

(aa) Standing

The following persons qualify as applicants: persons, communities or part of communities that had been dispossessed of land or rights in land on or after 19 June 1913.[1] A community is any group of persons whose rights in land are derived from shared rules determining access to land held in common by members of the group,[2] and includes part of a group. These persons' descendants would also qualify as applicants. A spouse or partner in a customary marriage qualifies as a descendant for this purpose.[3] Any person, irrespective of race, may institute a claim as long as all of the requirements in s 2 are met. In principle, no category of citizens is excluded from the Restitution Act.[4]

(bb) Dispossession

The Restitution Act contains no definition of 'dispossession'. It has thus been up to the courts to interpret the concept. Recent case law has indicated that dispossession must be broadly interpreted.[5] It is not a requirement that the claimant have lost actual physical occupation of the property.[6] Nor is a forced removal required.[7] In *Ndebele-Ndzundza Community v The Farms Kafferskraal no 181 JS*, the court found that the *cumulative effect* of various laws and practices eroded the rights of the claimants and that this directly or indirectly induced them to vacate the farm.[8] A specific date of dispossession is also not required,[9] since dispossession may occur over a period of time.[10]

[1] See Badenhorst, Pienaar & Mostert *Silberberg 5th Edition* (supra) Chapter 22; Carey-Miller & Pope (supra) at 327-30; Roux 'The Restitution of Land Rights Act' (supra) at 3A9–3A13.

[2] This definition is identical to the definition of 'community' for purposes of the CLRA.

[3] Customary marriages were thus recognized for this purpose even before their official recognition in the Recognition of Customary Marriages Act 120 of 1998. .

[4] *Department of Land Affairs v Witz, In Re Various Portions of Grassy Park* 2006 (1) SA 86, 101A-D (LCC); *Randall v Minister of Land Affairs, Knott v Minister of Land Affairs* 2006 (3) SA 216 (LCC), [2002] JOL 9682 (LCC)('*Randall*'). Both these cases involved restitution claims instituted by white persons.

[5] *Prinsloo & Another v The Ndebele-Ndzundza & Others* 2005 (6) SA 144 (SCA)('*Prinsloo*') at para 46.

[6] See *Dulabh v Department of Land Affairs* 1997 (4) SA 1108 (LCC), [1997] 3 All SA 635 (LCC)('*Dulabh*')(Decided under IC s 121, the question was whether the claimants would qualify as applicants under the Act when they had never lost physical possession of the property concerned. In this instance, the court found that the claimants never indicated their willingness to let go of the property — leasing the property for over 20 years was a clear indication of the family's determination to remain in physical control. It was found that the prohibition on the transfer of property to an heiress and the subsequent sale thereof to the Development Board constituted a dispossession of her right in land, more specifically her right to inherit and take transfer of the property.)

[7] See *Ex parte Pillay* LCC Case 1/99 (Unreported judgment, 13 September 2004) at para 9; *Abrams v Allie & Others* 2004 (4) SA 534 (SCA), 2004 (9) BLLR 914 (SCA), [2004] 2 All SA 99 (SCA)('*Abrams*') at para 11. See also *Botha Family Trust* (supra) at para 48 (Court found that the loss of control over the area over which for many decades the community had unrestricted access and control amounted to dispossession.)

[8] 2003 (5) SA 375 (LCC) at para 21.

[9] *Richtersveld (CC)* eliminated the specific date requirement. But see *Jacobs v Department of Land Affairs* LCC Case 3/98 (Unreported judgment, 28 February 2000)(Court held that there must be a particular moment in time from when the dispossessed person (or community) did not have a particular right anymore.)

[10] *Mpehla* contradicts the finding in *Kranspoort Community concerning the Farm Kranspoort 48 JS* 2000 (2) SA 124 (LCC)(Court decided that dispossession could not take place over a period of time.)

Depending on the circumstances, it can be difficult to ascertain whether dispossession took place. For example, what if owners sold their properties, after a particular area had been proclaimed a group area, for fear of its being expropriated? Would that constitute dispossession? In *Ex parte Pillay*,[1] the property was sold to a private individual (and not an organ of state) two years prior to the declaration as a group area. Here it was clear that the area had been earmarked to be declared a group area. The court found that a sale of property could still constitute a dispossession if 'some outside agency' or some 'element of compulsion' was involved.[2] The emphasis should not be on the party *to whom* the property was sold, but rather *what* prompted the sale. The court found that the loss of possession was a result of outside pressure from a racially discriminatory law or practice, which constituted dispossession for purposes of the Act.[3]

Department of Land Affairs v Witz, In Re Various Portions of Grassy Park[4] and *Randall v Minister of Land Affairs, Knott v Minister of Land Affairs*[5] relate to (white) owners selling properties in terms of the Group Areas Act and legislation regulating the consolidation of national states respectively. In the first case, various properties were affected by a Group Areas Act declaration transferring the properties from a white group area to a coloured group area. A permit allowed the owner to subdivide the properties and to sell them within a period of one year. However, the family concerned managed to sell off the properties piecemeal over a period of 11 years, with the help of an estate agent. Here the court emphasized that the initial owner *elected* to acquire the properties to sell them under a permit he *voluntarily applied* for, keeping in mind that, as a disqualified person, he was in principle prevented from handling the properties at all.[6] In these circumstances the court found that there had been no dispossession.

In *Randall* and *Knott*, owners were forced to sell off properties under homeland consolidation provisions. In these cases both the *manner* in which properties were acquired[7] and the *structure of purchase prices* were problematic. A portion of the purchase price was paid in the form of a registered stock certificate and the balance was paid in cash. Not only did the owners not have a choice in how the funds were to be paid, but the government stock did not bear interest at a

[1] *Ex parte Pillay* (supra).

[2] Ibid at para 9. See also *Abrams* (supra) at para 12 (The threat of expropriation if the property was not sold to the Development Board induced transactions in the areas involved, making the land transactions not voluntary.)

[3] *Ex parte Pillay* (supra) at para 11.

[4] 2006 (1) SA 86 (LCC).

[5] 2006 (3) SA 216 (LCC).

[6] *Department of Land Affairs v Witz, In Re Various Portions of Grassy Park* 2006 (1) SA 86, 98E-F 99A-C (LCC)('*Department of Land Affairs*')('Put another way, his election resulted not in his dispossession, but on the contrary in his (taking) *possession* of the properties and being accorded the opportunity to sell with the possibility of realizing their investment potential, the purpose for which the properties were in any event purchased. The subsequent failure of the purchase price to meet the expected investment potential, if indeed that is what occurred, cannot in my view constitute a dispossession as contemplated by the Act.')

[7] *Randall* (supra) at 22E-226D.

competitive rate.[1] The court found that these circumstances hardly qualified as a 'willing-buyer-willing-seller' offer,[2] and thus constituted dispossession for purposes of the Restitution Act. Although these cases seem very similar, the *Witz* family had far more freedom in alienating their properties, managed to do it over a period of time and were able to get the best prices possible.

(cc) A right in land

The dispossession of any of the following rights, registered or not, will qualify for purposes of the Act:[3] any right in land, including the interest of a labour tenant, a customary interest, the interests of a beneficiary owner or a trust arrangement, including beneficial occupation of a continuous period of no less than ten years prior to the dispossession in question.[4]

The definition of 'right in land' is thus very broad.[5] It bears emphasizing that ownership is not the only right or interest that qualifies, and that customary law rights in land must be recognized.

(dd) After 19 June 1913

In a Constitution that seeks to right historical wrongs, it is inevitable that cut-off dates must be plucked from among the many past injustices and these will therefore be, to some extent, arbitrary lines that decide how far back the Constitution will cast its gaze. Although many dispossessions and deprivations had occurred under colonial rule before this date, the 1913 date was the one agreed on during negotiations preceding the promulgation of the Interim Constitution. This date was consequently confirmed in the Final Constitution and the Restitution Act.[6]

[1] *Randall* (supra) at 224E-G. In *Knott*'s case the balance was paid in cash over a period of 12 months without any interest.

[2] Ibid at 226I-J.

[3] See P Badenhorst, J Pienaar & H Mostert *Silberberg and Schoeman's Law of Property* (4th Edition, 2003) Chapter 22, Carey-Miller & Pope (supra) at 330-31; Roux 'The Restitution of Land Rights Act' (supra) at 3A13-3A16.

[4] Restitution Act s 1. In order to succeed with a claim based on beneficial occupation, the claimants must prove *(a)* that they derived some benefit from occupation; and *(b)* that they had the intention to derive benefit (in other words, it is insufficient if the benefit was coincidental or by accident). See *Kranspoort Community In Re: The Farm Kranspoort* 2000 (2) SA 124 (LCC)(Court found that the community's use and enjoyment rights constituted beneficial occupation and that they had been dispossessed thereof.)

[5] See TW Bennett & CH Powell 'Restoring the Land: The Claims of Aboriginal Title, Customary Law and the Right to Culture' (2005) 16 *Stellenbosch LR* 431-45 (The authors investigate and ultimately reject the right to culture as a basis for the institution of land claims. They argue that the right to culture as a basis for claiming rights in land would be too restricted and if based on the aboriginal land rights approach, would effectively only benefit cultures that are currently under threat. In the South African set-up it would effectively only benefit Khoisan communities since African culture is thriving.)

[6] Restitution Act s 2. The case sequence of the Richtersveld community has also indicated that the court is not willing to reject that date as the relevant date for restitution purposes.

However, as we shall see, the Constitutional Court in *Richtersveld (CC)* used fairly creative legal reasoning to prevent this cut-off date from depriving the community of a claim.[1]

(ee) Discriminatory law or practice

The dispossession has to be both the *factual* and *legal* result of a racially discriminatory law or practice.[2] From 1999 the three-step approach set out in *Minister of Land Affairs v Slamdien*[3] was followed in order to determine whether dispossession falls within the ambit of the Restitution Act.[4] This approach required asking:

1. Was the relevant legal measure that enabled the dispossession a 'racially discriminatory law' as referred to in s 2(1)*(a)* and defined in s 1 of the Restitution Act? [5]
2. Was the conduct a 'racially discriminatory practice'? and
3. Was the dispossession of the property 'as a result of' the law referred to in *(a)* or the practice referred to in *(b)*?[6]

Apart from these questions, two further requirements had to be met: namely that the measure or practice had to relate to the exercise of land rights and that it had to be linked with creating spatial racial segregation.[7] In this respect, the court in *Slamdien* adopted a purposive approach. This approach entailed examining the *historical context* of the statutory measure as well as the *underlying purpose* of the Restitution Act. The court concluded:

> The history of the Restitution Act and section 2(1)*(a)*, as set out above, strongly points to its underlying purpose being *to address dispossessions of land rights which were the result of a particular class of racially discriminatory laws and practices, namely those that sought specifically to achieve the (then) ideal of spatial apartheid*, with each racial and ethnic group being confined to its particular racial zone. These would then be those laws and practices which discriminated against persons on the basis of race in the exercise of rights in land in order to bring about that racial zoning. It does not, in my view, include any racially discriminatory law or practice whatsoever, regardless of the particular area of human activity where the discrimination had its impact.[8] [emphasis added]

This rather rigid approach required claimants to satisfy at least five criteria in order to show that a measure or practice was in fact racially discriminatory. In

[1] § 48.8*(c)*(iii) infra.

[2] *Boltman v Kotze Community Trust* [1999] JOL 5230. See Badenhorst, Pienaar & Mostert *Silberberg 5th Edition* (supra) Chapter 22, Carey-Miller & Pope (supra) at 331-32; Roux 'The Restitution of Land Rights Act' (supra) at 3A17 — 3A20.

[3] 1999 (4) SA BCLR 413 (LCC), [1999] JOL 4491 (LCC)('*Slamdien*').

[4] See JM Pienaar 'Racially Discriminatory Law or Practice' for Purposes of the Restitution of Land Rights Act 22 of 1994: Recent Developments in Case Law' (2005) 38 *De Jure* 195.

[5] In this instance it was the Group Areas Act 36 of 1966.

[6] *Slamdien* (supra) at para 11.

[7] This requirement was articulated in the first decision of *Richtersveld Community v Alexkor Ltd.* 2001 (3) SA 1293, 1338D-H (LCC), 2004 (8) BCLR 871 (LCC)('*Richtersveld (LCC)*'). It was rejected in the Supreme Court of Appeal and Constitutional Court decisions.

[8] *Slamdien* (supra) at para 26.

addition, *Slamdien* construed the purpose of the Restitution Act narrowly (as concerned only with laws and practices that sought to achieve spatial apartheid). One of the considerations when formulating this 'test' was that a less strict test might open the floodgates[1] and allow many claimants a second 'bite at the cherry'.[2] After being followed in several subsequent cases, the *Slamdien* approach was largely abandoned by the Supreme Court of Appeal in *Richtersveld Community v Alexkor Ltd*.[3]

(iii) *The requirements in practice: the Richtersveld scenario*

The legal battle for the Richtersveld community began in 2001 when the community instituted a claim against the registered land owners, Alexkor Ltd and the state. The land at the heart of the dispute was a narrow strip of land in the Northern Cape along the west coast from the Gariep River (formerly the Orange River) in the north to Port Nolloth in the south. This area formed part of tribal land that had historically been occupied for centuries by the Richtersveld community and its ancestors.

In its first decision in this case,[4] the Land Claims Court confirmed that the community's ancestors had a form of control over the land in question which constituted beneficial occupation,[5] but found that they had lost that control in 1847 when the land was annexed and proclaimed Crown land.[6] Actual dispossession, according to the Land Claims Court, thus took place long before the 1913 Act commenced, resulting in the claim falling outside the ambit of the Restitution Act. The court also concluded that the community had failed to show that dispossession had occurred as a result of discriminatory laws or practices, and rejected the claim.[7]

[1] *Slamdien* (supra) at para 10.

[2] Pienaar 'Racially Discriminatory Law' (supra) at 195 ff.

[3] 2003 (6) SA 104 (SCA), 2003 (6) BCLR 583 (SCA)('*Richtersveld (SCA)*') at para 97 (The Court found that the *Slamdien* approach was 'too restrictive'.)

[4] For more detail, see H Mostert 'The Case of the Richtersveld Community: Promoting Reconciliation or Effecting Division?' (2002) *TSAR* 160.

[5] In that the community derived benefit from their occupation (hunting there and gathering materials in order to survive) and that the occupation occurred at least ten years before the dispossession of the land.

[6] Here the court confirmed that the doctrine of aboriginal title did not form part of South African law. For a detailed discussion concerning the benefits and drawbacks of the doctrine and whether it applies in the South African situation, see K Lehman 'Aboriginal Title, Indigenous Rights and the Right to Culture' (2004) 20 *SAJHR* 86. In this article, Lehman specifically analyses the different approaches to the concept of 'indigenous' and the possible consequences for the spirit of national unity and reconciliation that the Final Constitution seeks to achieve.

[7] The court found that the removal of the community resulted from the area being declared a security area. No one, irrespective of race, was allowed access. This conclusion was reached with reference to the *Slamdien* approach. *Slamdien* required that three questions be answered in the affirmative and that there be a clear-cut indication that the measures or practice impacted on the exercise of land rights in furtherance of the purpose of achieving spatial racial segregation. When these requirements were applied to the facts in the first *Richtersveld* case, none of them were satisfied. Accordingly the court found that the measure isolating the Richtersveld community to one portion of the original land was not racially discriminatory. The fact that the community was deemed no to be 'civilised enough' to acquire and hold land rights in the area was not discussed in the initial case. Cf Pienaar 'Racially Discriminatory Law' (supra).

The Richtersveld community appealed successfully to the Supreme Court of Appeal.[1] The court found that the annexation in 1847 in no way meant the end of the community's control over or occupation of the land. Instead, the community remained on the land, used it for pasture, resided on it, had control over water rights and even granted mineral rights to outsiders. This control over the land continued until diamonds were discovered in the 1920s, after which the area was declared to be a security area and the community was relocated.[2] The land was finally registered in the name of the respondent in 1994.[3] The court concluded that the community's rights to land (including minerals and precious stones) were akin to those held under common-law ownership and constituted a 'customary law interest'.[4] This interest satisfied the requirement that the community be the holder of 'rights in land'. When diamonds were discovered, the state conveniently ignored these rights and instead granted full ownership in the land to Alexkor. Thus, dispossession after 1913 had also been established. Finally, the court found that the manner in which the community had been dispossessed of their customary law interest amounted to a racially discriminatory practice in as much as the state had taken the view that the community was not 'civilized' enough to have rights in land.[5]

The SCA considered the three-step approach that was first developed in *Slamdien* to determine whether the dispossession in question had occurred under a racially discriminatory act or practice.[6] When these requirements were applied to the Precious Stones Act,[7] a seemingly racially neutral act, no dispossession could be shown. However, the SCA in *Richtersveld* held that there was no indication in the Final Constitution or the Restitution Act that claims should be limited to 'spatial segregation' cases.[8] Accordingly, the SCA overruled *Slamdien* and, on an expanded understanding of dispossession, held that all the requirements of s 2 had been met.

Following the Richtersveld community's success in the SCA, Alexkor Ltd appealed to the Constitutional Court. Alexkor argued that the SCA had erred

[1] See H Mostert & P Fitzpatrick 'Living in the Margins of History on the Edge of the Country — Legal Foundation and the Richtersveld Community's Title to Land' (2004) *TSAR* 309-23 for an in-depth discussion of the SCA and Constitutional Court decision. See also AJ van der Walt *Constitutional Property Law* (2005) 293-96.

[2] *Richtersveld (SCA)* (supra) at para 61.

[3] Alexkor is a public company established in terms of the Alexkor Limited Act 116 of 1992. It is owned by the second respondent, the South African government and conducts business in the diamond mining sector.

[4] *Richtersveld (SCA)* (supra) at paras 28-29. See also Bennett & Powell (supra) at 438-41; Lehman (supra) at 86.

[5] Discriminatory practices also include indirect discrimination. In this case it refers to the fact that this community's rights were treated differently to the rights of the white community. *Intention* or a *motive* to discriminate on a racial basis is not required.

[6] *Richtersveld (SCA)* (supra) at paras 96-110.

[7] Act 44 of 1927.

[8] *Richtersveld (SCA)* (supra) at para 101.

when finding that the community's rights in land had survived the 1847 annexation; and in holding that dispossession resulted from a racially discriminatory law or practice.[1] Consequently, the Constitutional Court had to determine the nature of the rights in land which the community held before the annexation; and whether these rights survived annexation.

The Court approached the problem with reference to indigenous or customary law,[2] and emphasized that the content of these rights could not be determined by reference to common law. The Court re-emphasized the importance of customary law as a legal source: 'In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.'[3]

The Court stressed that customary law was unwritten, practised and passed on from generation to generation,[4] and that it had its own norms and values.[5] Since the focus in this instance was on the Richtersveld community, the *nature* of its rights had to be determined with reference to the *history* and *usages* of this specific community. Undisputed evidence showed that the community always had a communal approach to land holding and that the prospecting of minerals had always been part and parcel of the land rights package.[6] In light of this, the Court concluded that the real character of the title of the community was a

> right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld Community had a right of ownership in the subject land under indigenous law.[7]

The Court held that it was 'satisfied that under the indigenous law of the Richtersveld Community communal ownership of land included communal ownership of the minerals and precious stones'.[8]

It was thus quite clear that the community had a 'right in land' as required by s 2. The next questions to be answered were whether any rights in land survived the annexation, and if so what the nature of these surviving rights was. In this regard the Court found that there was nothing that suggested that annexation extinguished existing land rights.[9] On the contrary, there were clear indications

[1] *Richtersveld (CC)* (supra) at para 10.
[2] Ibid at paras 49,55
[3] Ibid at para 51.
[4] Ibid at para 53.
[5] The Court here correctly held that the customary law recognized by the Final Constitution is the 'living' customary law, not the 'official' customary law found in case law and textbooks. See the discussion of customary law in § 48.5 supra.
[6] *Richtersveld (CC)* (supra) at para 61 (Outsiders were not entitled to prospect or extract minerals in the area concerned.)
[7] Ibid at para 62.
[8] Ibid at para 64.
[9] Ibid at paras 68-69.

that the community continued to grant grazing and mineral leases to outsiders after the annexation.[1] The community furthermore continued to occupy the land, and to claim and exercise rights of ownership over the whole of the Richersveld area. The Court concluded that 'the indigenous law ownership … remained intact as at 19 June 1913.'[2]

The promulgation of the Precious Stones Act 44 of 1927 was a direct consequence of the discovery of diamonds in the subject land. This Act did not recognize rights of owners of land under indigenous law. Only registered rights were recognized. Holders of unregistered rights immediately lost their right to occupy and exploit the land when the Act commenced. The process of dispossession thus began in 1927, although the community was finally dispossessed at the end of 1993 when Alexkor became the registered owner of the land. The 'dispossession' as required by the Restitution Act consequently occurred *after* 19 June 1913.

But was it a result of racially discriminatory laws or practices? As mentioned above, when the Precious Stones Act commenced, only registered, common law rights were recognized and protected, while customary law rights were ignored. Inevitably, the impact of this approach was racially discriminatory since only black persons were holders of indigenous rights and such rights were not recognized:

> Although it is correct that the Precious Stones Act did not form part of the panoply of legislation giving effect to 'spatial apartheid', its inevitable impact was to deprive the Richtersveld Community of its indigenous law rights in land while recognizing, to a significant extent, the rights of registered owners. In our view, this is racially discriminatory and falls within the scope of the Act.[3]

The three-step approach as applied in *Slamdien* has thus been abandoned. Instead, the focus has shifted to the *impact* of the particular measure. A seemingly racially neutral legislative measure may still have a racially discriminatory impact.[4] This new approach accords with the Constitutional Court's approach to unfair discrimination in FC s 9, where the focus is also on the impact of discrimination.[5]

This decision represents the first occasion on which the Constitutional Court

[1] *Richtersveld (CC)* (supra) at para 77.

[2] Ibid at para 81.

[3] Ibid at para 99.

[4] Since the *Richtersveld (CC)* decision, this approach has also been followed in *Khumalo v Minister of Land Affairs* 2005 (2) SA 618 (LCC). Here, a provision in the Black Administration Act 38 of 1927 led to the claimant's family losing property when a certificate was issued by the Commissioner after an investigation and a payment of R2.00. The argument was that the Black Administration Act was a general regulatory measure and that it did not provide for racial zoning or the exercise of land rights as such. The court confirmed that the *Slamdien* approach was too narrow and focused on the impact of the measure instead. Section 8 of the Black Administration Act had the effect of depriving registered owners of ownership, 'but only if the registered owner was a Native' (at para 19). Because the same result would never have occurred had the owner been a white person, the Act was found to be a racially discriminatory law or practice, thereby meeting the requirement of s 2 of the Restitution Act.

[5] See, generally, C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, M Chaskalson, A Stein & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007).

has placed such a high degree of emphasis on indigenous (or customary) law — not only as a general source of law, but as the origin of ownership or real rights. In so doing, the Court has shown its determination to move away from the narrow, common-law or 'Western' approach to land rights. This shift in emphasis is likely to be significant in cases where the determination of whether there was a 'right in land' is crucial to the success of the claim.

(d) Brief analysis of the restitution programme

(i) *Tempo of land restitution*

Initially the process of land restitution was slow and the implementation of the Restitution Act problematic. The establishment of regional commissions was hindered by budgetary constraints, capacity problems and staff issues. Government initially adopted a judicial approach to processing land claims, and all claims were referred to the Land Claims Court for adjudication. It soon became clear that a court-driven process was painstakingly slow and antagonistic.[1] Since the commencement of the Restitution Act, it has been amended seven times. Each amendment has been aimed at streamlining the process and ironing out problem areas.[2] South Africa has been on a steep learning curve.[3]

(ii) *Number of claims and progress*

Approximately 79 000 restitution claims were lodged before the close of the claims submission process.[4] At the end of March 2006 71 645 of these claims had been settled,[5] and 1 067 152 hectares transferred to 1 003 551 beneficiaries comprising 196 667 households. The largest percentage of settled claims is in the Eastern Cape, with Mpumalanga and the Free State sharing the lowest number of settled claims. Urban claims have mainly been settled by way of financial compensation and comprise 93 per cent of the settled claims. It is projected that all outstanding urban claims (1076) will be settled by the end of 2007 and that 3103 rural claims will be settled by the end of 2007 and a further 2251 by the end of 2008.[6] There are a further 1621 'residual' outstanding claims that have to be settled. These claims have been referred to the Land Claims Court as a result of legal issues, links with community or family disputes, where the claimants are untraceable, or where there are still delays in submitting required information or documentation.

[1] See E Stoddard & H Osodo 'Hunger for Land Grows' *This Day* (14 January 2004) 11-12.
[2] See § 48.8*(d)*(iii) infra, for discussion of the latest amendment to the Act.
[3] Other jurisdictions dealing with land claims have faced similar problems. In Namibia, the goal was to finalize 40 000 claims by the end of 2001. Only 2000 claims have been finalized to date. In Australia 45 out of 540 claims were finalized over a period of 10 years.
[4] T Milazi 'Quick Change and a Two-Sided Coin' *Financial Mail* (16 January 2004) 21.
[5] *Commission on the Restitution of Land Rights Annual Report* (2006) 56.
[6] Ibid.

Urban claims are usually individual claims linked to separate title deeds.[1] Rural claims are fewer in number, but are more complicated since they affect vast tracts of land of which large portions have been extensively cultivated or have well-developed infrastructure. Conflicting land claims, in which documentary evidence is vague or non-existent, are also quite common in rural areas.

It is very difficult to ascertain whether, if at all, racial imbalances in the ownership of land have been addressed since the start of the land reform programme.[2] After 1996, title deeds in South Africa have not recorded the race of the rights-holder.[3] Although the Department of Land Affairs can give some indication of the tracts of land that have been restored, the overall picture is incomplete since land may also have been acquired by black persons through the market. Although some sources say that three per cent of land has been transferred since 1994,[4] others claim that this amount only relates to farm land[5] and that these statistics do not accurately reflect reality.

(iii) *Innovation to expedite the process*

The target date for the finalization of land claims has been extended to the end of 2008. The most recent development in attempting to meet that deadline is the promulgation of the Restitution of Land Rights Amendment Act 48 of 2003. Before this amendment, claims that could not be solved via mediation or the administrative procedure provided for in the Restitution Act were referred to the Land Claims Court for adjudication. The Land Claims Court would then, if necessary, grant an order that the land or right in land be expropriated and compensation determined. The need to go to court caused delays in the restitution process.[6]

The publication of the Amendment Bill in 2003 was met with fierce criticism from agricultural unions claiming that it was opening the door to the 'Zimbabwe scenario' and that constitutional principles were being sacrificed.[7] The new s 42E provides for the purchase, acquisition in any manner or expropriation of land or a right in land by the Minister of Land and Agriculture — without a court order. These options are available to the Minister in two instances: first, when a valid restitution claim has been lodged and the expropriation is linked to the restoration

[1] There are some well-known community claims, like the District Six claims in Cape Town and the Cato Manor claims in Durban.

[2] Before the land reform programme began, it was generally agreed that 87 per cent of the land was held by the white minority population, whereas the black majority possessed only 13 per cent of the land.

[3] G Coetzee 'Grondsake Wil Rasaanduiding op Aktes Sien' *Die Burger* (5 February 2004) 2.

[4] R Hall & P Jacobs 'Another Look at Land Reform' *This Day* (24 October 2003) 13-14.

[5] Stoddard and Osodo mention 2.3 per cent. It is widely acknowledged that less than 5 per cent of the land has been transferred.

[6] See ss 35(5) and (5A) of the Restitution Act, now repealed.

[7] M Louw 'Besware Stuit Nie Wet Oor Grond se Onteiening' *Die Burger* (3 February 2004) 10; J Joubert 'Staat Kan Grond Vat Al sê Boer Nee' *Die Burger* (18 September 2003) 4.

or awarding of such land, portion of land or right in land; and, secondly, where no such claim has been lodged, but the acquisition is *directly related* to or *affected* by such claim, and the acquisition promotes the purpose of restitution.

Apart from the outcry from landowners that the provision was unconstitutional, concerns were raised that the implementation of s 42E would damage investor confidence and economic and agricultural development. The Department of Land Affairs, however, emphasized that the expropriation powers would be used as a last resort and that the amendments to the Act would expedite the process of restitution.[1]

In terms of the new s 42E, expropriation can take place without the court having granted an order to that effect. If a valid land claim has been instituted, the expropriation has as its purpose restoring or awarding such land, portion of land or right in land to the claimant.[2] These 'acquisition powers' are not, however, limited to valid restitution claims only. Land may also be acquired even if there is no valid restitution claim, but the acquisition of the land is directly related to or affected by a restitution claim.[3] Bearing in mind that the rule of law is a key value to be promoted in interpreting FC s 25(7) and land legislation (and in testing land legislation against FC s 25), permitting expropriation without a court order must raise constitutional eyebrows.

To curb the effect of these provisions, the Amendment Act provides that the *amount* of compensation, as well as the *time* and *manner* of payment, have to be determined by agreement or by the Court in accordance with FC s 25(3). FC s 25(3), which provides that compensation must be just and equitable. The procedure in the determination process is also governed by rules issued under s 32 of the Restitution Act. Although the power to expropriate land now lies with the Minister, aggrieved parties remain free to approach a court in relation to the amount of compensation and to the manner and time of payment.[4] These acquisitions must also serve the aims of the restitution programme, which should

[1] See T McLachlan 'Landmark Expropriation Deal' *Daily Dispatch* (26 April 2006) 10 and T McLachlan 'Land Reform Landmark' *Sowetan* (26 April 2006) 27 (With regard to the first case where a farmer received an expropriation notice relating to his farm in the North West province. The notice was published after years of unsuccessful negotiations. However, before the land could be expropriated, the land owner accepted an offer of R2 million. According to the Department of Land Affairs this case is a clear indication that expropriation will only be employed as a last resort). The second expropriation notice issued was in June 2006 in the Mpumalanga province after three years of unsuccessful negotiations. See S Yende 'Expropriation Talk Put on Hold' *City Press* (11 June 2006) 4.

[2] ESTA s 42(1)*(a)*(i).

[3] ESTA s 42(1)*(b)*.

[4] N Wilson 'Lawyer Allays Fear of Land Grabs' *Business Day* (28 January 2004) 8. Academic authority suggests that market value is not an overriding factor, but only *one* of the many factors to be taken into account in determining the amount of compensation. See AJ van der Walt 'Reconciling the State's Duties to Promote Land Reform and to Pay "Just and Equitable" Compensation for Expropriation' (2006) 123 *SALJ* 23, 23-40. It is thus quite possible that the final amount to be paid could be below market value — depending on the particular circumstances. It has also been suggested that it would be quite legitimate for the legislature to set down a general land reform discount for compensation — provided that the legislature leaves room for adjustments based on individual circumstances.

ensure that acquisitions and expropriations will not occur in a haphazard manner. As administrative action, the whole process is also subject to review by a court in terms of PAJA. In addition, the Minister only needs to fall back on these 'last-resort' powers if the usual mediation procedures fail. For these reasons, s 42E in our view passes constitutional muster under FC s 25, or is saved by the restitutionary justice provision in FC s 25(8) read with the general limitations clause in FC s 36.

(iv) *Budget*

The funds allocated for land reform have increased from R770 million in the 2000/2001 fiscal year to R1.7 billion in 2003/2004. Expectations are that funding for the restitution programme alone will increase to R1.4 billion by 2006/2007.[1] In the 2004 budget, R933 million was allocated to restitution alone. That increase can probably be ascribed to the fact that 2005 was the initial target date for the completion of restitution claims and that government was hoping that the deadline would be met by allocating more money at that stage.

Despite these increases, critics have commented that the budget is still a 'Cinderella budget'.[2] They point out that national increases do not correlate with the increased operational costs of the Department of Land Affairs and the Land Claims Commission. In the past, the combined budgets for redistribution and restitution have added up to 0.4 per cent of the total national budget. Though the allocation to land reform has increased, it still remains less than 1 per cent of the total budget.

Land restitution for the period 1995-2005 has cost the government approximately R2.8 billion. In comparison to other departments, the Department of Land Affairs is doing very well at spending its funds, with an average of 98 per cent of the budget having been spent, of which about 80 per cent has been spent on land reform.

As set out above, the claims that still have to be settled are sizeable. The cost of settling these claims is conservatively estimated at between R2-billion and R10-billion. It is clear that the current and envisaged budgets fall far short of what is required.

(v) *Sustainable development and agriculture*

It is estimated that 30-35 per cent of all farm land in South Africa is subject to land claims.[3] This accounts for 20 per cent of land nationally, with two provinces (Mpumalanga and Limpopo) facing land claims that affect about 50 per cent of

[1] An additional R750 million over the next three years was also allocated towards supporting newcomers to the agricultural sector forming part of the redistribution and agricultural development initiatives of government.

[2] *Mail & Guardian* (20 February 2004).

[3] See, eg, W Hartley 'Land Claims 'No Risk to Food Security' *Business Day* (8 January 2004) 3.

agricultural land. Concern has been voiced over the decline in agricultural production levels after resettlement, and that food production may be compromised. In order to address this issue, government introduced the Agricultural Strategic Plan in 2001 and, in February 2004, announced a new comprehensive agricultural support programme.[1] It is imperative that the redistribution and restitution of land coincide with the redistribution and transfer of capacity and skills.[2] It is abundantly clear that allocating land alone is no longer a guarantee for successful farming in the 21st century.[3]

(vi) *Community-related problems*

Six years after the Elandskloof restitution claim was settled, hardly any development has taken place on the land. This failure has mainly been due to in-fighting in the community and a lack of skills. The community, consisting of 300 persons, is unable to decide on the priorities to be included in its development plan. Because the community is the owner of the land, the municipality is not part of the initial development process and cannot (or will not) get involved. Recent infighting in Ndabeni, Cape Town, has also resulted in no benefits being provided to persons to whom land was allocated in 2001.[4] These examples highlight a few shortcomings in the process: communities need assistance in drafting development plans and getting the development process up and running. In order to achieve that, the Department of Land Affairs has to remain involved in the communities and should consider implementing monitoring procedures. Merely settling communities on the land after finalization of claims cannot be the end of the process or of the Department's involvement.

(e) Outstanding claims

The outstanding restitution claims to be settled self-evidently include some of the most difficult claims. It remains to be seen whether s 42E of the Restitution Amendment Act will expedite the process so that unnecessary delays in the determination of compensation can be avoided.

The outstanding claims are not only legally complex, but are bound to be costly as well. The implementation of the CLRA will also have an impact on available funding. It has been estimated that the implementation of that Act will cost government about R68.3 million. The real cost however, seems closer to R500 million. Competition for adequate funding within the Department of Land Affairs among the three individual reform programmes is thus envisaged.

[1] The programme centres on the Comprehensive Farmer Support Programme (CASP) and is aimed at the following beneficiaries: LRAD beneficiaries, emerging entrepreneurs, those whose services have collapsed (food production) and beneficiaries of the household food production programme.

[2] For more detail regarding the relationship between land reform and sustainable development, see JM Pienaar 'Land Reform and Sustainable Development: A Marriage of Necessity' (2004) *Obiter* 269.

[3] The overall picture is more disconcerting when one considers that the funding for agricultural and related research has declined from R338 million in 1997/98 to R262 million in 2002/2003.

[4] W Roelf 'Infighting, Bogus Claims, Buck-Passing, Bureaucracy Snarl Ndabeni Land Restitution' *Cape Times* (12 July 2006) 4.

49 Sentencing and Punishment

Dirk van Zyl Smit

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49.1 INTRODUCTION

The Constitution[1] assumes that the State may punish criminal offenders. Section 12(1)*(e)*, for example, sets a relatively high threshold. It allows all punishment, save that which results in individuals being 'treated or punished in a cruel, inhuman and degrading way'.[2] While s 12(1)*(e)* creates a relatively permissive framework for punishment, a wide of array of other constitutional constraints exist. So even where s 12(1)*(e)* is not engaged, the State may punish individuals only by means of sentences imposed by the courts following criminal trials that are subject to rigorous constitutional requirements.[3] This chapter will explore how sentencing and punishment are shaped by the fundamental rights recognised by Chapter 2 of the Constitution.

Often, lost among the welter of inquiries into the limits of the State's penal powers is whether the State has a positive constitutional duty to criminalise certain forms of conduct and to ensure that they are punished by appropriately severe penalties. The traditional view is that the State has a wide discretion to decide how to defend the constitutional rights of its citizens. Punishing offenders through the criminal justice system is but one of the options available to it.[4] However, this flexible view of criminal sanctions is increasingly being challenged by the victims' movement. The movement goes to great lengths to point out that the protection of a range of individual rights is normally achieved through the criminal justice system and that, for this modality to be effective, it must be backed by adequate criminal sanctions.[5] South African courts have signalled their acceptance of, though perhaps not fully embraced, the proposition that positive, constitutionally derived duties with respect to criminal sanctions may be placed on the State.[6]

The courts have also indicated that such duties may extend to sentencing and punishment. *Azanian People's Organisation (AZAPO) & others v President of the Republic of South Africa & others*[7] can be read as authority for the proposition that, other than in the exceptional circumstances of the South African transition to democracy, the family of a deceased person would have a right to seek to

[1] The Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC').

[2] See also the reference to sentenced prisoners in FC s 35(2). The provisions of the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC') corresponding to FC ss 12(1)*(e)* and 35(1) were IC ss 11(2) and 25(1) respectively.

[3] See F Snyckers 'Criminal Procedure' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS 5, 1999) Chapter 27.

[4] For a useful general discussion of the question, 'Kann der Gesetzgeber verpflichtet sein rechtgüterverletzungen zu bestrafen?' see C Roxin *Strafrecht Allgemeiner Teil* (Vol I 1994) 22–23.

[5] For a discussion of the human rights of victims of crime in the context of sentencing generally, see B Emmerson & A Ashworth *Human Rights and Criminal Justice* (2001) Chapter 18.

[6] *Carmichele v Minister of Safety and Security & another* 2001(4) SA 938 (CC), 2001 (10) BCLR 995 (CC).

[7] 1996 (4) SA 671 (CC), 1996 (8) BCLR 1015 (CC). See also *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) ('*Makwanyane*'). Chaskalson P recognised that the State is obliged to take action to protect human life and held that 'those who commit violent crime should be met with the full rigor of the law'. Ibid at para 117. This passage provides support for the proposition that failure to sanction such action by adequate punishment would be a dereliction of duty on the part of the State.

ensure that the wrongdoers are properly prosecuted and punished. In other jurisdictions such a right has been recognised. In *Osman v United Kingdom* the European Court of Human Rights commented that the State is enjoined by Article 2(1) of the European Convention on Human Rights 'not only to refrain from the intentional and unlawful taking of life, but also to take appropriate action to safeguard the lives of those within its jurisdiction'.[1] The Court noted the *'primary duty* [of the State] to secure the right to life by putting in place *effective criminal law provisions* to deter the commission of offences against the persons backed up by law enforcement machinery for the prevention, suppression and *sanctioning of breaches* of such provisions'.[2]

It is not only the right to life that the State has a duty to protect through the use of criminal sanctions. The Constitutional Court has recognised that the rights of the child should be protected by forceful application of maintenance laws. Such laws may be enforced by contempt of court provisions resulting in the imprisonment of defaulters on maintenance payments.[3] Similarly, the European Court of Human Rights has ruled that children need to be protected by a reformulation of the criminal law to outlaw more effectively assaults in the guise of parental chastisement.[4] Most of these developments deal with an obligation to criminalise behaviour rather than with appropriate sanctions. As a result, the impact such changes will have on constitutional requirements for sentencing law is not yet clear.

A more common question is the extent to which the imposition and the implementation of punishment is restricted by the individual rights entrenched in the Bill of Rights.[5] The analysis of this question forms the bulk of this chapter.

49.2 The Imposition of Punishment

In order to engage questions about the constitutional constraints on the power of the State to punish, one must consider briefly the existing legal framework for sentencing decisions. Historically, exceptionally wide discretion has been granted to courts imposing sentence. Even today no general legislation prescribes the approach to sentencing that courts must adopt.

The restrictions on the exercise of judicial sentencing discretion that do exist are imposed by different means. For many crimes there are statutorily prescribed maximum sentences. More controversially, there are also prescribed minima. For many common-law offences, however, there are no direct statutory limits. The overall range of discretion for such offences is substantial.

[1] See *Osman v United Kingdom* (2000) 29 EHRR 245 at para 115.
[2] Ibid (emphasis added).
[3] See *Bannatyne v Bannatyne & another* 2003 (2) SA 363 (CC), 2003 (2) BCLR 777 (CC).
[4] See *A v United Kingdom* (1999) 27 EHRR 611.
[5] The protection of these rights is constrained by s 36, the limitation clause. For further discussion, see S Woolman 'Limitations' in Chaskalson et al *Constitutional Law of South Africa* (supra) Chapter 12.

Indirect statutory restriction is achieved by limitations on the punishment jurisdiction of specific courts. The High Court, which has no general restrictions on its punishment jurisdiction, can impose any sentence that it regards as appropriate. Lower courts have sentencing jurisdictions prescribed and limited by statute. While our jurisprudence has attempted to develop sentencing principles within this broad discretionary framework, it is relatively unformed and has only a limited impact on the actual exercise of sentencing discretion.[1] Nevertheless, sentencing decisions are subject to appeal. Appellate courts not only pronounce on the principles of sentencing and whether they have been observed but also consider and sometimes overturn individual sentences. In the process appellate courts have developed some admittedly vague rules that allow them to intervene when sentencing courts are found to have misdirected themselves or imposed sentences that the appellate courts regard as unreasonable.[2]

Constitutional norms add a new dimension to debates about punishment.[3] They address themselves in the first instance to the question of whether the legislative framework of the sentencing system is constitutionally valid. They can also be applied directly to sentencing decisions in individual cases. While constitutional norms apply both to the sentencing process and to substantive sentencing law, most attention has been focussed on the latter. However, in *S v Dzukuda & others; S v Tshilo,*[4] the Constitutional Court stressed the constitutional importance of fair trial rights. It held that, in relation to sentencing, the right to a fair trial requires, amongst other things, 'a procedure which does not prevent any factor which is relevant to the sentencing process and which could have a mitigating effect on the punishment to be imposed from being considered by the sentencing court'.[5] Both procedural and substantive sentencing practices need to be measured against such general constitutional standards such as legality, equality, proportionality and the protection of human dignity.

[1] See E du Toit *Straf in Suid-Afrika* (1981) 446–8. See also M A Rabie, S A Strauss & M C Mare *Punishment: An Introduction to Principles* (5th Edition, 1994) 285–300; D P van der Merwe *Sentencing* (1991); S S Terblanche *The Guide to Sentencing in South Africa* (1999) 153-202.

[2] Formulations of the latter grounds of intervention are often couched in particularly vague terms, such as 'inducing a sense of shock' or 'being startlingly inappropriate': See Terblanche (supra) at 495 (and the case and sources cited there.)

[3] See N Steytler *Constitutional Criminal Procedure* (1998) 403–438.

[4] See *S v Dzukuda* 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC) ('*Dzukuda*').

[5] *Dzukuda* (supra) at para 12. *In casu* the Court held that the procedure created by s 52 of the Criminal Law Amendment Act 105 of 1997, in terms of which an offender who had been tried and convicted by a regional court was referred for sentence in the High Court, was not unconstitutional. The procedure did not create conditions in which the offender's right to a fair trial in the imposition of sentence could not be met. The constitutional right to a fair trial also plays a role in deciding whether an accused person should be informed in the charge sheet of any enhancement of sentencing jurisdiction that the court may use in the event of a conviction. See *S v Legoa* 2003 (1) SACR 13 (SCA) at para 20; *S v Ndlovu* 2003 (1) SACR 331 (SCA) at para 11.

(a) Legality

In order for there to be even the possibility of the equal protection of the law guaranteed by s 9 of the Constitution, the law has to be reasonably clear. In criminal law this requirement is captured by the trite common-law proposition, *nulla poena sine lege*.[1] The Constitution itself now entrenches a general principle of legality.[2] This principle demands that legal powers only be exercised under the law and according to constitutionally appropriate procedures. The Constitution also recognises explicitly the right of accused persons not be convicted, or by extension punished, for acts or omissions that were not offences at the time of their commission.[3] Furthermore, it guarantees specifically the right of accused persons 'to the benefit of the least severe of the prescribed punishments if the prescribed punishment of the offence has been changed since the time that the offence was committed and the time of sentencing'.[4]

In respect of punishment, the legality principle has at least two implications. First, penalties themselves should be reasonably precisely defined. Secondly, the imposition of such penalties should be governed by clear legal rules, which themselves should meet the requirements of the principle of legality.

(i) *Defining penalties*

The definition of specific forms of punishment may at first glance appear not to be a problem in South Africa. Whatever the constitutional shortcomings of the sentence of death or of corporal punishment, their ambit was clear. Fines, too, are unambiguous in their penal content. At a conceptual level the same applies to sentences of imprisonment. Since the abolition of imprisonment with hard labour,[5] the length of time to be served has been the only factor that distinguishes one sentence of imprisonment from another.

Correctional supervision is far more problematic in this regard.[6] Although correctional supervision is formally defined by s 1 of the Criminal Procedure Act, that section refers only to a community-based punishment in accordance with the 1959 Correctional Services Act.[7] More importantly, s 84 of the Correctional Services Act, provides that:

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[1] See E M Burchell, P M A Hunt & J M Burchell *South African Criminal Law and Procedure* Vol I (3rd Edition, 1997) 28ff.

[2] See *Pharmaceutical Manuacturers Association of SA & another: In re Ex parte President of the Republic of South Africa & others* ('*Pharmaceutical Manufacturers*') 2000 (2) SA 674, 698D-E (CC), 2000 (3) BCLR 241 (CC) at para 50. See also FC s 1(c).

[3] FC s 35(3)*(l)*.

[4] FC s 35(3)*(n)*. See Steytler (supra) at 376-9.

[5] A punishment of hard labour, under the Criminal Law Amendment Act 16 of 1959, would be subject to direct constitutional challenge in terms of FC s 13, which prohibits forced labour.

[6] For a discussion of this issue in an international context, see D van Zyl Smit 'Legal Standards and the Limits of Community Sanctions' (1993) 1 *European Journal of Crime, Criminal Law and Criminal Justice* 309, 321.

[7] Act 8 of 1959. This Act was still in force in October 2003, as the corresponding provisions of the new Correctional Services Act 111 of 1998 had not yet been brought into force.

> every probationer shall be subject to such monitoring, community service, house arrest, placement in employment, performance of service, payment of compensation to the victim and rehabilitation or other programmes as may be determined by the court or the Commissioner [of Correctional Services] or prescribed by or under this Act, and to any such other form of treatment, control or supervision, including supervision by a probation officer, as the Commissioner may determine after consultation with the social welfare authority concerned in order to realize the objects of correctional supervision.

The implication is that when someone is sentenced to correctional supervision any of the varying forms of community-based punishment mentioned may be imposed by a court. A court may also impose 'other programmes'. Moreover, the Commissioner of Correctional Services may add 'any other form of treatment, control or supervision' that will realise the objects of correctional supervision. Because the content of some of these forms of correctional supervision is so unclear, a large number of punishments will not be defined precisely enough to meet the standards of legality.

There are various ways to ensure that standards of legality are met. One solution was suggested by Kriegler AJA in *S v R*.[1] In that case the judge recognised the perilous position of the person subject to correctional supervision:

> Tydens die *uitdiening* van sy straf is die toesiggeval in groot mate uitgelewer aan die amptenare van die Departement van Korrektiewe Dienste; om die *bepaling* daarvan ook aan hulle oor te laat, sou pligsversaking wees.[2]

The solution was for the sentencing court to determine the content of the sentence of correctional supervision and for the correctional authorities to adhere to the sentence.[3] This solution meets the objections to leaving an unstructured and overboard discretion to the correctional authorities. However, it does not constrain the courts themselves. The question of whether the requirements of legality are met where courts have so very wide a sentencing discretion is usually posed in respect of the length of sentence, for example, a term of imprisonment. However, it has equal force in instances where the sentencing court is asked to determine the content of the sentence itself: what, for example, correctional supervision should entail in a particular case.[4]

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[1] See *S v R* 1993 (1) SA 476 (A), 1993 (1) SACR 209 (A).

[2] Ibid at 492G: 'While *serving* his punishment the person under supervision is to a large extent subject to the Department of Correctional Services; also to leave the *determination* of it to them would be dereliction of duty' (my translation).

[3] Ibid at 492A. See also *S v Tsanshana* 1996 (2) SACR 157, 160*g–h* (E). In *S v Sekoboane* 1997 (2) SACR 32 (T), the court stressed the necessity of precisely formulated conditions, but at the same time it was noted that, by analogy with parole, there could be no objection to allowing the Commissioner to mitigate the conditions of sentence, as this could only be to the advantage of the offender and better serve his or her rehabilitation.

[4] It is an established rule of South African law that courts cannot directly create new forms of punishment. See Du Toit *Straf in Suid-Afrika* (supra) at Chapter 15.

One way in which this latter difficulty can be overcome is for the legislature to provide for a limited number of community-based sentences and to define their content relatively closely. In practice this may be done by a combination of primary and secondary legislation.[1] For example, an Act of Parliament may specify community service as a sentence that may be imposed and regulations may lay down what form it should take in order to ensure that it is not unduly punitive or unduly lenient.[2] Alternatively, the primary legislation could stipulate a closed list of community sentences and describe their content.[3] It therefore does not follow automatically that all community sentences are open to constitutional challenge.

There may be serious doubts, however, whether current legislation defines community sentences precisely enough to meet the constitutional requirement of legality. This concern applies particularly to 'programmes determined by the court'. However, it may also apply to other forms of community sentence mentioned in s 84 of the Correctional Services Act.

Courts also have a very wide discretion to suspend sentences on condition that certain requirements are met. The question that the courts face is: what may be regarded as an 'acceptable penal content' for such sentences or conditions of suspension? The answer is again related to human dignity and the prohibition of degrading punishment. The sanction should be 'of the kind which can be endured with self-possession by a person of reasonable fortitude'.[4] Offenders should not be publicly humiliated[5] or compelled to do or not do things that undermine their dignity as human beings.[6]

(ii) *Sentencing guidelines*

In most legal systems the sentence to be imposed for a specific offence is determined by a court within a range set by the legislature. The wider the range, the greater scope there is for the sentencing court to exercise discretion and the less certainty the individual offender has about the sentence to expect for a particular offence. Very wide ranges may be justified by the argument that the narrower the

[1] It is noteworthy that s 36(1) of the Final Constitution allows rights to be limited by 'law of general application' rather than and not only by 'a law of general application', ie an Act of Parliament, as is the case in article 19 of German Basic Law.

[2] See A Ashworth *Sentencing and Criminal Justice* (3rd Edition, 2000) 262–99 for a discussion of developments in England in this regard.

[3] Chapter VI of the Correctional Services Act 111 of 1998 provides much more detail, although it also needs to be complemented by regulations. This chapter of the Act was not in force by October 2003.

[4] A von Hirsch 'The Ethics of Community-Based Sanctions' (1990) 36 *Crime and Delinquency* 162, 167.

[5] For example, be compelled to drive a car with a notice declaring that the driver was convicted of drunken driving or to confess publicly to having remorse for a crime.

[6] For example, some suspensive conditions would require that women not fall pregnant as a condition of probation; see S L Arthur 'The Norplant Prescription; Birth Control, Woman Control or Crime Control?' (1992) 40 *UCLA LR* 1, 101.

range, the greater the risk that a sentence which is disproportionate to the gravity of the offence and the guilt of the individual offender may have to be imposed. The question arises, however, whether the absence of explicit sentencing standards meets the requirements of the principle of legality.

As we have seen, South African sentencing law has traditionally allowed courts a wide discretion in selecting appropriate sentences. A direct challenge to a sentence on the basis that the punishment was not specified in advance is unlikely to succeed on the grounds of lack of legality alone. In the future, however, when consideration is given to the need for sentencing guidelines, or for another sentencing framework that reduces discretion and therefore the risk of arbitrariness, the requirements of legality may well influence legislation.[1]

(b) Equality

Legislative guidelines for sentencing are subject not only to the requirement of legality but also to the related requirements of equality before the law and equal protection of the law.[2] One of the primary motivations in the campaign for legislation to reduce or even eliminate the discretion of sentencing courts in the United States of America was a desire to ensure that factors irrelevant to the sentence were not taken into account and thus to ensure equality in the imposition of sentence.[3]

In the context of the death penalty, the US Supreme Court has wrestled with the question of what legislative framework the Constitution requires in order to ensure equal protection of the law. As the US Supreme Court has never found the sentence of death to be inherently unconstitutional, particular attention has been paid to the question of equal protection. The jurisprudence that has emerged in this context is of wider significance, as it can be applied to sentences other than the death penalty. It is particularly salient in South Africa because of the similarity of the constitutional provisions ensuring equal protection of the law.[4]

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[1] For such a proposal, see South African Law Commission Report (Project 82) Sentencing (A New Sentencing Framework) (2000); S S Terblanche 'Sentencing guidelines for South Africa: Lessons from elsewhere' (2003) *SALJ*. It is a moot point whether the legislature must necessarily grant wide sentencing discretion, or indeed any sentencing discretion at all, to the courts. See *Mistretta v US* 488 US 361, 109 SCt 647 (1989) (US Supreme Court held that the branches of government have an overlapping responsibility for sentencing and that therefore the determination of sentencing guidelines by a commission which included judges, rather than by the courts directly, was not an unconstitutional division of powers.)

[2] Among other things, the right to equal protection of the law requires that 'in the administration of criminal justice no different or higher punishment should be imposed upon one than such is prescribed to all for like offences'. See *Barbier v Connolly* 113 US 27, 31, 5 SCt 357 (1884); *Truax v Corrigan* 257 US 312, 334–5, 42 SCt 124 (1921).

[3] A von Hirsch, K A Knapp & M H Tonry *The Sentencing Commission and its Guidelines* (1987).

[4] The phrase 'equal protection and benefit of the law' is used in s 9(1) of the South African Constitution and 'equal protection of the laws' in the Fourteenth Amendment to the Constitution of the United States of America. See J Kentridge 'Equality' in M Chaskalson et al *Constitutional Law of South Africa* (supra) at § 14.4*(a)*.

In *Furman v Georgia*,[1] the US Supreme Court set aside a death sentence on the basis that it was cruel and unusual only in the narrow sense in that it had been imposed according to a procedure that allowed too much discretion to the sentencers. In short, the procedure seemed subject to an element of arbitrariness. Equal protection of the law could not be ensured without clear standards for imposition of the death penalty.[2]

Equal protection of the law could not be ensured by the opposite extreme either: by legislation providing for mandatory death sentences when certain specified 'objective' criteria were present. In 1978, therefore, the same Supreme Court ruled in *Lockett v Ohio* that a procedure that prevented a sentencer from considering every possible mitigating factor would be unconstitutional.[3] Since then the hunt has been on for a legislative framework for the imposition of capital punishment that would ensure equality by avoiding the arbitrariness of a totally unstructured discretion, whilst at the same time allowing sufficient flexibility to ensure that all the appropriate information is placed before the court.[4]

More difficult questions are raised by the claim that inequalities in sentencing are a function of systemic or structural bias. Such structural biases complicate legislative interventions. Prominent examples are American cases in which it has been suggested that the criminal justice system in a particular state is racially biased as a whole, and therefore statistically more likely to produce the death penalty for blacks than for whites, or more subtly, for the killers of whites than the killers of blacks. In *McCleskey v Kemp*,[5] this argument was rejected by the US Supreme Court on the basis that bias would have to be shown in a particular case and that evidence of systematic bias was insufficient. The view adopted by the minority, that systematic bias meant that a particular trial could not be fair, could well be resurrected in South Africa, where the limited evidence available suggests a similar bias, at least where the race of victims is concerned.[6]

[1] See *Furman v Georgia* 408 US 238, 92 SCt 2726 (1972).

[2] See *Makwanyane* (supra) endorsing the reasoning of *Furman* (supra) at paras 41–56 (Chaskalson P), at paras 153–66 (Ackermann J) and at paras 273–4 (Mahomed J). See also *S v Williams & others* 1995 (3) SA 332 (CC), 1995 (7) BCLR 861 (CC) at paras 45 and 89 (Langa J stressed the arbitrary element in the severity of the pain inflicted by the execution of a sentence of whipping); *R v Offen; R v McGilliard; R v McKeowen; R v Okwuegbunam; R v S* [2001] 1 WLR 253 (the Criminal Division of the Court of Appeal for England and Wales recognised the prohibition on arbitrariness, in addition to the requirement of proportionality. Both had constitutional status, as they were derived from the European Convention on Human Rights as incorporated into English law by the Human Rights Act of 1998.)

[3] See *Lockett v Ohio* 438 US 586, 98 SCt 2954 (1978).

[4] See L S Sheleff 'The Arbitrary "Arbitrary" Rule' in *Ultimate Penalties* (1987) 83–116.

[5] See *McCleskey v Kemp* 481 US 279, 107 SCt 1756 (1987).

[6] See *Makwanyane* (supra) at para 48, n 78 (Chaskalson P commented on the way in which race and class affect the operation of the criminal justice system.) See also M C J Olmesdahl in Olmesdahl & N C Steytler (eds) *Criminal Justice in South Africa: Selected Aspects of Discretion* (1983) 142–8, 201–4.

(c) Proportionality

It is often said that the power of the State to create punishments is limited by the constitutional principle of proportionality. The principle that 'the punishment must fit the crime' is well established in South African sentencing law. However, the Constitution itself does not refer to this principle explicitly. Nevertheless, proportionality in sentencing is clearly required by the Constitution. In *S v Makwanyane* Chaskalson P identified proportionality as a factor to be considered when deciding whether a particular punishment was cruel, inhuman or degrading.[1]

In his analysis of proportionality or sentencing in the German Constitution, Stree has explained:

> The legislator has to determine penalties which stand in a just relationship to the gravity of the offence and to the blameworthiness of the offender. This principle is derived from the general principles of the Constitution, particularly the *Rechtsstaatsprinzip*. It is, however, quite justifiably also deduced from art 1.I of the Basic Law (inviolability of human dignity). For an excessively heavy or gruesome punishment or minimum punishment amounts to a disregard of the human personality and therefore infringes against art 1.I of the Basic Law. To some extent further support for the proposition that punishment must be oriented to the degree of blameworthiness can be derived from the equality principle contained in art 3.I of the Basic Law and the related requirement of material justice. However, it is questionable whether such a far-reaching general proposition which binds the legislator can be derived from art 3.I of the Basic Law.[2]

There is also international support for the principle of proportionality in sentencing.[3] The Recommendation by the Council of Europe on Consistency in Sentencing has stipulated:

[1] See *Makwanyane* (supra) at para 94. The provision in the Canadian Constitution outlawing cruel and unusual punishment or treatment has been interpreted as outlawing both punishments that are inherently contrary to human dignity and punishments that are grossly disproportionate to the gravity of the offence. There is of course a link between the two, as a disproportionately heavy punishment may be seen as denying the human dignity of an offender. P W Hogg states that 'it is clear that the phrase [cruel and unusual] includes two classes of punishment: (1) those that are barbaric in themselves, and (2) those that are grossly disproportionate to the offence'. *Constitutional Law of Canada* (3rd Edition, 1992) 1130. See also *Weems v United States* 217 US 349, 371 30 SCt 544 (1910) (the court referred to *O'Neil v Vermont* 144 US 323, 12 SCt 693 (1892) and held that the prohibition against cruel and unusual punishments operated also 'against all punishments which, by their excessive length or severity, are greatly disproportionate to the offences charged). The prohibition against legislative disproportionality is undisputed in death penalty cases in the United States of America. It is also recognised by the US Supreme Court in cases involving imprisonment, although it has been interpreted very narrowly in recent Supreme Court decisions. See *Ewing v California* 123 SCt 1179 (2003), *Lockyer v Andrade* 123 SCt 1166 (2003), *Harmelin v Michigan* 111 SCt 2680 (1991). For a more generous formulation of the test, see *Solem v Helm* (1983) 463 US 277.

[2] W Stree *Deliktsfolgen und Grundgesetz* (1960) 8 (my translation). See also the decision of the German Federal Constitutional Court of 9 March 1994 in (1994) 24 *Neue Juristische Wochenschrift* 1577.

[3] See in general D van Zyl Smit 'Constitutional Jurisprudence and Proportionality in Sentencing' (1995) 3 *European Journal of Crime, Criminal Law and Criminal Justice* 369–80.

> Whatever rationales for sentencing are declared, disproportionality between the seriousness of the offence and the sentence should be avoided.[1]

A constitutional principle of proportionality in sentencing can be deduced from the South African Constitution by a similar process of analysis to that adopted in German law. The principle of the *Rechtsstaat* is also part of South African constitutional law, while human dignity is explicitly protected by s 10 of the South African Constitution. However, the South African Constitutional Court has used the prohibition on cruel, inhuman and degrading punishment and treatment in s 12(1)*(e)* of the Constitution as the key to a classic statement of the rationale for recognising the principle of constitutional proportionality in sentencing. In *S v Dodo* Ackermann J wrote:

> The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue . . . Section 12(1)(*a*) [of the Constitution of the Republic of South Africa] guarantees, amongst others, the right 'not to be deprived of freedom . . . without just cause'. The 'cause' justifying penal incarceration and thus the deprivation of the offender's freedom is the offence committed. 'Offence', as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender's freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence.
>
> To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in para [37] above), the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformative effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.[2]

[1] Recommendation No R (92) 17 of the Committee of Ministers of the Council of Europe, which was adopted on 19 October 1992. The recommendation explicitly takes into account arts 3, 5 and 6 of the European Convention on Human Rights and Fundamental Freedoms.

[2] See *S v Dodo* 2001 (3) SA 382, 403–4 (CC), 2001 (5) BCLR 423 (CC), 2001 (1) SACR 594 (CC) ('*Dodo*') at paras 37, 38.

Ackermann J goes on to qualify these general propositions by emphasising that 'it would not be *mere* disproportionality between the sentence legislated and the sentence merited by the offence which would lead to a limitation of the s 12(1)(*e*) right, but only *gross* disproportionality'.[1]

(i) *Mandatory minimum sentences*

The recognition of a doctrine of proportionality derived from the Constitution raises several practical questions regarding South African sentencing legislation. One of these is whether legislation may prescribe mandatory minimum sentences for certain offences. A wide-ranging survey of judicial decisions on this question in the Commonwealth and the United States suggests that courts in these jurisdictions are reluctant to declare that all mandatory minimum sentences are inherently unconstitutional.[2]

Of particular relevance to South Africa in this regard are the decisions of the Supreme Court of Canada.[3] In Canada, as in South Africa, courts have been allowed an exceptionally wide discretion in deciding on sentence. In *Smith v The Queen*,[4] the Court was asked to consider the constitutionality of a mandatory minimum seven-year sentence for importing narcotics into Canada. The majority held that if a hypothetical case could be imagined for which the minimum sentence would be grossly disproportionate, the legislation that created the minimum would be unconstitutional. In this instance such a hypothetical case was easily imaginable. The mandatory minimum seven-year sentence was therefore unconstitutional. The Court came to this conclusion even though on the facts before it a sentence of seven years or more might not have been inappropriate.

On the basis of *Smith,* it seemed as if all minimum sentences might be open to challenge, as it would always be possible to imagine some hypothetical set of facts on which the mandatory minimum sentence would inhibit the discretion of the judge to impose an appropriate sentence. However, in 1991, in *R v Goltz*,[5] the Supreme Court of Canada adopted a more nuanced stance. Before it was the question of the constitutionality of a mandatory sentence of seven days' imprisonment for driving a motor vehicle when prohibited from doing so. The prohibition, which could give rise to the mandatory sentence, could be imposed only on an offender who had committed several traffic offences. In *Goltz*, the Canadian Supreme Court upheld the mandatory sentence. *Smith* was qualified by holding that the hypothetical facts on which the legislation could lead to an unjust

[1] *Dodo* (supra) at para 39. The meaning of the distinction between 'mere' and 'gross' disproportionality is difficult to discern and Ackermann J does not give any clear indication of how it should be understood.

[2] D Hubbard 'Should a Minimum Sentence for Rape be Imposed in Namibia?' 1994 *Acta Juridica* 228.

[3] See *Dodo* (supra) at para 39 (Ackermann J discusses the importance of Canadian and US jurisprudence in this regard.)

[4] See *Smith v The Queen* 34 CCC (3d) 97 (1987).

[5] See *R v Goltz* 67 CCC (3d) 481 (1992).

result had to be 'reasonable' and not 'far-fetched'.[1] The result in Canada is that while not all mandatory minimum sentences are unconstitutional, legislative minima that might result in gross disproportionality will not pass constitutional muster.

The Namibian High Court drew on Canadian case law in *S v Vries*.[2] Section 14(1)*(b)* of the Stock Theft Act[3] provided for a mandatory three-year sentence of imprisonment for a second or subsequent conviction of stock theft. The accused, Vries, was convicted of stock theft in May 1995. His case was covered by s 14(1)*(b)* because he had been convicted of stock theft more than 25 years previously in 1969. The High Court found that the effect of s 14(1)*(b)* in the circumstances of the existing case was shocking in that it was grossly disproportionate to the offence committed by the accused. It accordingly struck down s 14(1)*(b)* as unconstitutional. In his opinion, Frank J sets out a general approach to the constitutionality of minimum sentences that mirrors that of the Canadian courts:[4]

1. A statutory minimum sentence is not *per se* unconstitutional.
2. It will be unconstitutional if it provides for a punishment which will be shocking in the circumstances of the specific case before court.
3. Where a statutory minimum sentence results in a shocking sentence there are four options available to the court, namely:
   (a) to declare the provision of no force or effect for all purposes,
   (b) to declare the provision to be of no force and effect only in a particular class of cases i.e. to down-read it,[5]
   (c) to declare the provision to be of no force or effect in respect to the particular case before court i.e. apply a constitutional exemption,
   (d) to allow the legislature to cure the defects in the impugned legislation pursuant to the provisions of Article 25(1)*(a)* of the Constitution.[6]
4. Where the statutory minimum sentence is found to be shocking in the case before the Court the Court must then enquire whether it will be shocking 'with respect to hypothetical cases which . . . can be foreseen as likely to arise commonly'. If the answer to the second enquiry is in the affirmative then the Court must act in one of the respects set out in 3*(a)*, *(b)* or *(d)* above. If the answer to the second enquiry is in the negative the court must act as set out in 3*(c)* above.

[1] *R v Goltz* (supra) at 503. See also *R v Morrissey* [2000] 191 DLR (4th) 87.
[2] See *S v Vries* 1996 (12) BCLR 1666 (Nm), 1996 (2) SACR 638 (Nm) ('*Vries*').
[3] Act 12 of 1990 (Nm).
[4] See *Vries* (supra) at 1676G–1677A.
[5] Note that this option would not fall within 'reading down' as it is understood in South African law. The Constitutional Court has emphasized that a statute can be read down only so far as the reading down is consistent with a reasonable interpretation of the language of the statute. See for example *S v Bhulwana* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 28. However, the option contemplated by Frank J would be one within the power of the Constitutional Court to define a class of situations to which a law cannot be applied consistently with the Constitution. See for example the order made in *Ferreira v Levin NO & others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC). The Constitutional Court describes this remedial power as notional severance. See J Klaaren 'Judicial Remedies' in Chaskalson et al *Constitutional Law of South Africa* (supra) at § 9.3*(c)*.
[6] The corresponding provision of the South African Constitution is FC s 172(1)*(b)*(ii).

Another Namibian case, *S v Likuwa*,[1] tracks closely the approach adopted by Frank J in *S v Vries*. In *Likuwa*, the Court found that a minimum sentence of ten years' imprisonment for contravention of s 29(1)*(a)* of the 1996 Arms and Ammunitions Act was unconstitutional 'because it was grossly disproportionate when seen in the light of the very wide net cast by s 29(1)*(a)* of the Act'.[2] This section prohibited, amongst other things, the possession of 'machine rifles'. The court found that many rural people possessed such rifles merely in order to protect themselves and their livestock. Infringement of the section in such circumstances was 'likely to be quite common'[3] and ten years' imprisonment an unacceptably harsh sentence for it. The court accordingly applied the general approach suggested by Frank J and struck out the words 'of not less than ten years' that qualified the sentence of imprisonment prescribed by the section. This solution meant that not only the accused before the court but also all future offenders of this section would not be subject to a minimum sentence of imprisonment.

The South African Constitutional Court has declared itself opposed to the notion of a constitutional exemption in individual cases. In *S v Bhulwana*,[4] O'Regan J emphasised that 'the litigants before the court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants'. Paragraph 3*(c)* of the *Vries* formulation is therefore unlikely to be adopted in South Africa. However, subject to that proviso, South African law is likely to follow an approach to minimum sentences broadly similar to that of Namibian and Canadian law. Legislative minima were used in the past, in terrorism[5] and drug legislation[6] for example, deliberately to limit the discretion of the courts. Given the opposition of South African courts to restrictions on their sentencing discretion,[7] they may be expected to examine the constitution-

[1] See *S v Likuwa* 1999 (5) BCLR 599 (Nm), 1999 (2) SACR 44 (Nm) ('*Likuwa*').

[2] Ibid at 604H.

[3] Ibid at 604D–I.

[4] See *S v Bhulwana* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC), 1996 (2) SACR 748 (CC) at para 32.

[5] Section 2(1) and s 3 of the Terrorism Act 83 of 1967 provided for a compulsory sentence of five years, but was repealed by s 73 of the Internal Security Act 74 of 1982, which made no provision for compulsory minimum sentences.

[6] Section 2(1) of the Abuse of Dependence-producing Substances Act 41 of 1971 laid down a compulsory five-year sentence for the offence of dealing in drugs, and a similar provision existed in s 2(iii) and (iv) for the offence of possession of drugs. In addition to these measures, s 8 of the Act provided for compulsory forfeiture. However, this Act was repealed by s 52 of the Prevention and Treatment of Drug Dependency Act 20 of 1992, which did not re-enact the compulsory minimum sentence provisions or the provision relating to compulsory forfeiture.

[7] See *S v Gibson* 1974 (4) SA 478, 482 (A) (Homes JA) (the imposition of a mandatory sentence 'cuts across traditional considerations of mitigating and reformative factors in a particular case ... [and] unduly puts all the emphasis on the punitive and deterrent factors of sentence, and precludes the traditional consideration of subjective factors relating to the convicted person'.) See also *S v Khumbisa & others* 1984 (2) SA 670, 684 (N). Because of their belief that minimum sentence requirements are fundamentally unsound, South African courts have shown considerable ingenuity in interpreting them narrowly. See, for example, *S v Nel* 1987 (4) SA 950 (W); *S v Toms; S v Bruce* 1990 (2) SA 802 (A).

ality of legislation that might result in disproportionate sentences even more critically than their Canadian counterparts. Relatively few truly mandatory minimum sentences remain on the statute book in South Africa.[1] However, compulsory confiscation orders or compulsory suspension of driving licences, which are not formally regarded as punishments,[2] may have the same disproportionate effect on the offender. Their constitutionality will also have to be examined critically.

In late 1997 the Criminal Law Amendment Act[3] created a range of minimum sentences for a long list of 'serious offences'.[4] The minimum sentences range from life imprisonment for specified aggravated forms of murder and rape[5] to set numbers of years for first offenders and recidivists for offences listed in the schedules to the Act.[6] The sentences have to be imposed on adult offenders unless 'substantial and compelling circumstances exist which justify the imposition of lesser sentences',[7] and are therefore not fully mandatory.

There can be no constitutional objection to the legislature indicating to the courts that it requires severe punishments for serious offences. However, in this instance, the legislature went further and restricted severely the ability of sentencing courts to deviate from specified minimum sentences. Much therefore depended on how the courts interpreted the words, 'substantial and compelling circumstances'. The Supreme Court of Appeal, in *S v Malgas,*[8] removed any doubts about whether the provision was compatible with the principle of constitutional proportionality.[9] This result was achieved by ruling that when a court is convinced that an 'injustice' would be done by imposing the mandatory sentence, that injustice constituted 'substantial and compelling' circumstances that would allow the court to depart from the prescribed minimum. The tautology of holding

[1] Section 283(2) of the Criminal Procedure Act 51 of 1977 explicitly excludes the discretion of the sentencing court where legislation prescribes a minimum penalty of a term of imprisonment or a fine. Examples of legislation providing minimum sentences are s 27 of the Explosives Act 26 of 1956 and s 39 (2)*(a*A)(i)*(aa)* of the Arms and Ammunition Act 75 of 1969, substituted by s 1 of the Arms and Ammunition Amendment Act 65 of 1993.

[2] See Du Toit (supra) at 345.

[3] Act 105 of 1997. Section 54 provides that the Act is to come into operation on a date fixed by the President by proclamation in the *Gazette*.

[4] The heading to s 51 refers to 'Minimum sentences for certain serious offences'. The provision is not designed to be a permanent feature of South African law. Section 53 provides that ss 51 and 52 shall cease to have effect two years after the commencement of the Act. However, the President may extend this period with the concurrence of Parliament, by proclamation in the *Gazette*, for two years at a time.

[5] Section 51(1) read with Part I of Schedule 2.

[6] Section 51(2) read with Parts II, III and IV of Schedule 2.

[7] Section 51(3)*(a)*.

[8] *S v Malgas* 2001 (2) SA 1222 (SCA), 2001 (1) SACR 469 (SCA) ('*Malgas*').

[9] One question remains open. In its interpretation the Court gave 'due weight to the fact that these provisions were not intended to be permanent features of the legislative scene and were to lapse after two years unless extended annually'. *Malgas* at para 7. However, the legislation was amended by s 36 of Act 62 of 2000 to allow extensions of two years at a time. On 1 May 2003 the legislation was extended until 30 April 2005: *Government Gazette* 24804 Government Notice R 40, 30 April 2003. This means that by the time it is next considered the legislation would have been in force for seven years. One may doubt whether it can still be justified as a 'relatively short-term response' to 'an alarming burgeoning in the commission of crimes'.

that 'injustice' means 'substantial and compelling' is compounded by further equating 'injustice' with 'disproportionality'.[1]

This reference to proportionality allowed the Supreme Court of Appeal to meet the desideratum stated earlier in the judgment. That is, that the provisions must be 'read in the light of the values enshrined in the Constitution and, unless it does not prove possible to do so, interpreted in a manner which respects those values'.[2] In formulating its conclusions, the Supreme Court of Appeal did not build directly on the many previous decisions of the High Court on the possible interpretation of these provisions.[3] Instead, it summarised its findings on the appropriate approach in a passage that defies further précis:

A. Section 51 [of the Criminal Law Amendment Act 105 of 1997] has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).
B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.
D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.
E. The Legislature has, however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.
F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

[1] See *Malgas* (supra) at para 22. Marais JA seeks to explain that 'something more' than a mere discrepancy between what the sentence that law prescribes and the sentence that the sentencer would otherwise be minded to impose is required to justify a departure from the minima:

> 'What that something more must be it is not possible to express in precise, accurate and all-embracing language. The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and as such to justify the imposition of a lesser sentence.'

[2] Ibid at para 7.

[3] The SCA relegates the High Court decisions to a footnote. See *Malgas* (supra) at para 6, fn 3.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantive and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.
H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.
I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided.[1]

The constitutionality of this approach was confirmed in *S v Dodo*. The Constitutional Court noted that the judgment in *Malgas* was 'undoubtedly correct'.[2] The Constitutional Court commented that the interpretation that Supreme Court of Appeal had given to s 51(1) of the Criminal Law Amendment Act made it plain that 'the power of the court to impose a lesser sentence than that prescribed can be exercised well before the disproportionality between the mandated sentence and the nature of the offence becomes so great that it can be typified as gross'.[3] It followed, the Constitutional Court explained, that the offender's rights in terms of s 12(1)(*e*) of Constitution were not infringed, as all that that section, with its prohibition on cruel, inhuman and degrading punishments, required was that there should not be a gross disproportionality between the punishment and the crime.

The formulation adopted in *Malgas* and confirmed in *Dodo* has been followed in other cases, but these have added little of constitutional significance. They have emphasised, however, that life imprisonment, the ultimate penalty in South Africa, which proportionality requires, may be imposed only for the worst category of crimes. Therefore, the ultimate penalty will not be imposed merely because the rape falls into a category where the prescribed minimum sentence is life imprisonment.[4] As Terblanche points out this means that since only a small proportion of rapes are in or near the 'worst category', 'the prescribed sentence will ordinarily be departed from'.[5] Expressed differently, traditional proportionality requirements will succeed routinely in justifying departures from the minima

[1] *Malgas* (supra) at para 25.
[2] *Dodo* (supra) at para 40.
[3] Ibid.
[4] See *S v Abrahams* 2002 (1) SACR 116 (SCA); *S v Mahomotsa* 2002 (2) SACR 435 (SCA), [2002] 3 All SA 534 (A); *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA), [2001] 4 All SA 731 (SCA).
[5] S S Terblanche 'Mandatory and minimum sentences: Considering s 51 of the Criminal Law Amendment Act 1997' 2003 *Acta Juridica* 194, 215.

where the minimum sentences are substantially higher for a particular form of crime than what would be imposed without the presence of significant aggravating circumstances.

In a similar vein, s 51 of the Criminal Law Amendment Act provides that where a court decides to impose a prescribed sentence on a young offender between the age of 16 and 18 years it must record its' reasons for the decision.[1] Section 51 further stipulates that the prescribed minimum sentences do not apply to children under 16 years of age.[2] Thus, the loosening of sentencing requirements in relation to children between 16 and 18 could have been interpreted as only a procedural requirement demanding that special attention be paid to the cases involving older children. However, the provincial and local divisions of the High Court that have interpreted this provision have read it as a licence to depart freely from the minima[3] and effectively treated this category in the same way that they treat children under the age of 16.[4] The basis for this interpretation has been the extensive recognition granted to the rights of children under 18 in s 28 of the Constitution. Section 28 provides that a child should only be detained as a measure of last resort: one consistent with the best interests of the child.[5] These provisions have allowed courts to develop constitutional limits on the sentencing of children that go beyond those contained in the requirement that sentences should not be grossly disproportionate to the offence committed.[6]

(ii) *Preventive sentences*

Legislative provision for preventive sentences may provide a framework that encourages the courts to impose sentences that are disproportionate to the offence committed and to the blameworthiness of the offender. A 1993 amendment to the Criminal Procedure Act provides that where a court exercises its discretion to declare a convicted offender a 'dangerous criminal' it must 'sentence such person to undergo imprisonment for an indefinite period'.[7] The danger of disproportionality here is particularly great. On the face of the section an offender may be declared 'dangerous' after being convicted of any offence.

[1] Section 51(3)(*a*).

[2] Section 51(3)(*b*).

[3] See *S v Blaauw* 2001 (2) SACR 255 (C), [2001] 3 All SA 588 (C); *S v Nkosi* 2002 (1) SA 494 (W), 2002 (1) SACR 135 (W) ('*Nkosi I*').

[4] Terblanche (supra) at 216.

[5] These rights have been bolstered by the United Nations Convention on the Rights of the Child to which South Africa is signatory, a fact that must be recognised by sentencing courts: see *S v Kwalase* 2000 (2) SACR 135 (C). Reference has also been made to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules') as containing further standards that must be considered in conjunction with the Convention on the Rights of the Child. See also *Nkosi I* (supra) at 503E–F.

[6] General sentencing law has long emphasised the importance of concerns for the rehabilitation of children when imposing sentence. What is new is the constitutional emphasis that is now given to this aspect of sentencing them. See *Nkosi I* (supra) at 502C–505J.

[7] Section 286B of the Criminal Procedure Act 51 of 1977 introduced by s 22 of the Criminal Matters Amendment Act 116 of 1993.

How to strike the right balance between punishment necessary for the protection of society and detention that does not offend a person's dignity cannot be answered simply. Protecting society by preventing crime is the primary purpose of punishment. Detaining dangerous individuals and thus removing them from society might achieve such protection. However, it is clear from a constitutional perspective that the individual may not simply be sacrificed for the greater good. Indefinite detention of someone who has not been convicted of an offence, merely because there was evidence that he was 'dangerous', would be unconstitutional. Similarly, if someone were to be convicted of a minor offence and were then to be sentenced to indefinite detention because there was evidence of his dangerousness, the constitutionality of the sentence would be suspect because of the gross disproportionality of the sentence.

Sentences may still be legitimately influenced by considerations of prevention. A violent offender with previous convictions for violence will invariably be given a longer sentence than a first offender. The reasoning may be that because of his previous convictions his personal blameworthiness is increased and that he is therefore liable for a heavier punishment. However, a court may use the scope that this finding gives it to impose a sentence that prevents, for a time at least, the individual from committing further crimes of violence. The preventive sentence would still bear some relationship to present and previous offences of the offender.[1]

A provision allowing for the potentially indefinite detention of dangerous offenders has been upheld in Canada. The Canadian legislation provides that when someone is convicted of a 'serious personal injury offence' and the offender is a threat to the life, safety, physical or mental well being of other persons then, subject to procedural protections, the culprit may be declared a dangerous offender and detained indefinitely.[2] In *Lyons v The Queen,* the Supreme Court of Canada held that a sentence that was based 'in part' upon preventive considerations was not unconstitutional.[3] However, the Court did not reject the test of proportionality to the crime entirely. It emphasised that the offender had to be convicted of a serious violent offence for him to be considered for an indefinite sentence and that there were other safeguards to protect offenders from being falsely declared to be dangerous or from being detained when they had ceased to be dangerous. Moreover, the Court found that there was a degree of flexibility in the constitutional notion itself. A sentence would be unconstitutional only if it were grossly disproportionate. 'The word "grossly"', La Forest J explained, 'reflects this court's concern not to hold Parliament to a standard so exacting . . . as to require punishments to be perfectly suited to accommodate to moral nuances of every crime and every offender.'[4]

[1] See the argument developed from first principles in this regard by Stree (supra) at 57. See also *Makwanyane* (supra) at para 128 (Constitutional Court recognised prevention as a legitimate object of punishment, but found that it was an object which could be achieved without capital punishment).

[2] Section 688*(a)* of Part XXI of the Canadian Criminal Code.

[3] *Lyons v The Queen* (1988) 37 CCC (3d) 1.

[4] Ibid at 33.

In spite of this rather weak formulation, the court in *Lyons* should not be seen as having effectively abandoned all protection against gross disproportionality of sentence in cases where public protection is required. *Lyons* was followed by the Supreme Court of Appeal in South Africa in *S v Bull & another; S v Chavulla & others,*[1] where the constitutionality of the South African provision authorising the indefinite detention of dangerous offenders was challenged. The South African provisions, ss 286A and 286B of the Criminal Procedure Act,[2] are similar to the Canadian provisions. However, they do not limit the inquiry into whether the offender is dangerous to cases where the offender has been convicted of a 'serious personal injury' offence. As mentioned above a South African court could conduct an inquiry into dangerousness and, if it found that an offender were a danger to society, impose an indefinite sentence following a conviction of a minor offence. However, the Supreme Court of Appeal ruled that the constitutional principle against gross disproportionality of sentence had to be respected and the offence for which the offender was convicted 'must clearly be of such a nature as to justify a present determination of continued dangerousness in the future which requires a pattern of persistent or repetitively aggressive and violent behaviour'.[3] In this way the South African Court retained an element of offence proportionality in its decision about dangerousness. These detailed procedures for determining dangerousness, plus the requirement of psychiatric evidence on dangerousness, go some way towards meeting the too-wide-a-net critique. They are designed to ensure that the status of 'dangerous criminal' is not lightly attributed.

Furthermore, the South African legislation provides that the trial court must specify the initial period that the accused must serve before being brought back to court to be considered for release if he has ceased to be dangerous.[4] The Supreme Court of Appeal, in *Bull*, introduced a further element of proportionality into the interpretation of these provisions by holding that this period should be fixed with regard to the nominal determinate sentence that the court would have imposed had it not found the accused to be a dangerous criminal.[5] The actual period should be the time that the offender would have had to serve before being considered for parole.[6]

[1] *S v Bull & another*; *S v Chavulla & others* 2002 (1) SA 535 (SCA), 2002 (6) BCLR 551 (SCA), 2001 (2) SACR 681 (SCA) ('*Bull*').

[2] Act 51 of 1977.

[3] See *Bull* (supra) at para 19.

[4] Section 286B of the Criminal Procedure Act.

[5] See *Bull* (supra) at para 28.

[6] That is, in practice, half the nominal determinate sentence. There is strong parallel between this approach and that adopted by English courts in setting a minimum period or 'tariff' that an offender sentenced to life imprisonment has to serve before being considered for release. See D van Zyl Smit *Taking Life Imprisonment Seriously* (2002) Chapter 3.

The same question of proportionality arises in a less drastic form when a court exercises its discretionary power to declare someone an habitual criminal,[1] which has the effect of imposing a sentence of between seven and 15 years' imprisonment.[2] The maximum period is essential, for, as the Constitutional Court noted in *S v Niemand,*[3] otherwise the declaration would be akin to a life sentence. That would be grossly disproportionate for an offender who is neither violent nor a danger to society in terms of s 286A of the Criminal Procedure Act.[4]

A declaration that an offender is an habitual criminal may be made if the court 'is satisfied that the said person habitually commits offences and that the community should be protected against him'.[5] From this formulation it is clear that the offender is not being punished primarily for his current offence. However, the necessity of finding that the offender 'habitually' commits offences means that close attention is paid to his previous record. In this way the general blameworthiness of the offender is taken into consideration, making this special provision to protect the community less open to constitutional objection.

(iii) *Exemplary sentences*

The imposition of exemplary sentences by the courts raises problems similar to those discussed above in relation to the principle of proportionality. Hitherto the courts have cautioned that exemplary sentences are to be imposed with circumspection. It is acknowledged that inherent in the notion of an exemplary sentence is an element of injustice to the individual accused.[6] The imposition of an exemplary sentence by definition privileges the interests of society in deterrence over the principle of proportionality in relation to the individual offender. The courts have countenanced exemplary sentences in the past. But they have also said that such

[1] In terms of s 286 of the Criminal Procedure Act 51 of 1977.

[2] The minimum is specified by s 38 of the Correctional Services Act 8 of 1959. Historically, the maximum was deduced from s 286(2) of the Criminal Procedure Act, which specifies that a court should not declare someone an habitual criminal if it would otherwise have imposed a sentence of more than fifteen years. The Constitutional Court found that the inference that the maximum period was 15 years could not be drawn in this way and held that the maximum period of 15 years should be read into section 65(4)(*b*)(iv) of the Correctional Services Act 8 of 1959. The maximum period will be regulated directly when the Correctional Services Act 111 of 1998 comes into force as s 73(6)(*c*) of that Act specifies a maximum period of 15 years.

[3] See *S v Niemand* 2002 (1) SA 21 (CC), 2001 (11) BCCR 1181 (CC), 2001 (2) SACR 654 (CC) at para 25.

[4] An interesting parallel is to be found in para 62 of the German Penal Code, which provides that preventive detention (*eine Massregel der Besserung und Sicherung*) may not be imposed when it is disproportionate to the offences which he has committed, and is likely to commit, as well as to the degree of danger which he poses. Commentators have suggested that this provision incorporates the principle of proportionality to a satisfactory degree, as long as it is interpreted with the further principle of minimum intervention in mind. See, for example, K Lackner *Strafgesetzbuch mit Erläuterungen* (23rd Edition, 1993) 466–7.

[5] Section 286(1).

[6] See *S v Khulu* 1975 (2) SA 518, 521B–H (N).

sentences are justified only in a limited range of circumstances and only to the extent that the injustice to the individual does not outweigh the broad interest of society.[1] In the light of the constitutional principles of equality and proportionality, the test for whether and when an exemplary sentence is justified could well become stricter.

(iv) *Punishment for specific crimes*

Legislation that permits the imposition of a specific punishment for a crime for which such punishment is inappropriate under all circumstances is another form of disproportionality between crime and punishment that is unacceptable under the Constitution. In South Africa the use of capital and corporal punishment historically was restricted to specific offences. If these punishments had not been declared to be unconstitutional, the question might have arisen whether their imposition was not grossly disproportionate to the gravity of some of the specific offences for which they might have been imposed. Such an argument has been accepted by the United States Supreme Court in respect of the death sentence for rape, which, in the view of that court, would always be disproportionate to the gravity of the offence.[2] Similarly, South African courts (which of course did not have the power to declare legislation unconstitutional) held that corporal punishment, because of its drastic nature, was inappropriate for crimes not involving elements of violence.[3]

(d) Dignity: human dignity and cruel, inhuman or degrading punishment

The most direct challenges to legislation on punishment are likely to be directed against specific forms of punishment that may be fundamentally incompatible with a Constitution that guarantees human dignity. As many, if not all, forms of punishment undermine human dignity to some degree, it may be difficult to argue that all such punishments are so fundamentally repugnant that they cannot be considered even for the most heinous crimes.

The South African Constitution contains a number of fundamental rights that are of significance in this regard: s 10's right to human dignity, s 12(1)*(d)*'s prohibition of torture, and s 12(1)*(e)*'s prohibition of cruel, inhuman or degrading treatment or punishment. The wording of s 12(1)*(e)* is especially important: in

[1] See *Khulu* (supra) at 521B–H; *S v Matoma* 1981 (3) SA 838, 842H–843A (A); *S v Collett* 1990 (1) SACR 465, 470A–H (A); *S v Masekeo* 1982 (1) SA 99, 102F (A); *S v Reay* 1987 (1) SA 873, 877C (A); *S v Sobandla* 1992 (2) SACR 613, 617F–H (A); *S v Potgieter* 1994 (1) SACR 61 (A).

[2] *Coker v Georgia* 433 US 584, 97 SCt 2861 (1977). It is noteworthy that even the dissenting judges, who regarded rape as an offence which was so serious that the court could not intervene if the legislature chose to make it punishable by the sentence of death, accepted in principle that the 'concept of disproportionality bars the death penalty for minor crimes' (Burger CJ, with whom Rehnquist J concurred, dissenting at 604).

[3] See *S v P* 1985 (4) SA 105 (N).

particular, the use of 'or' in linking the adjectives describing the types of punishment that are prohibited. Thus, a form of punishment (or a form of treatment) is unconstitutional when it is 'cruel', or when it is 'inhuman', or when it is 'degrading'.[1] The wording of s 12(1)*(e)* is similar to that in other Constitutions[2] and international instruments.[3]

Value judgments are unavoidable in deciding whether particular forms of punishment are fundamentally repugnant to the rights guaranteed in the Constitution. In a number of jurisdictions judges have agreed that these value judgments cannot merely reflect the predilections of the judges concerned, but that the reasoning and the information on which they are based should be clearly articulated. The issue has been complicated further by the recognition that such decisions cannot be made once and for all, but that they are based on evolving standards of decency.[4] One source of evolving standards of decency is international practice. The specific provision in the South African Constitution[5] that requires the courts to have regard to public international law, where applicable, and which permits them to look to comparable foreign case law means that South African courts, like those in Namibia and Zimbabwe, will pay considerable attention to comparative jurisprudence.[6]

The Namibian courts have suggested that when deciding whether a form of punishment is fundamentally unconstitutional, primary attention must be paid not only to the text of the Constitution and to comparative material in interpreting it but also to the 'social conditions, experiences and perceptions of the people' of the country concerned. In *S v Tcoeib* O'Linn J analysed earlier *dicta* and pointed out that these latter factors required the presentation of wide-ranging evidence.[7] There is still some uncertainty as to what evidence, if any, would be presented

[1] See *Makwanyane* (supra) at paras 93 and 276 and *S v Williams & Others* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861(CC) at para 20 ('*Williams*'). See also the interpretation given by Mahomed AJA to the similar provision in the Namibian Constitution in *Ex parte Attorney General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76, 86 (NmS), and by Gubbay JA to the similar provision in the Zimbabwean Constitution in *S v Ncube; S v Tshuma; S v Ndhlovu* 1988 (2) SA 702, 715 (ZS). In South African law, therefore, the debate which has dogged American and Canadian jurisprudence, about whether punishment has to be both 'cruel' and 'unusual' in order to be unconstitutional, will not arise: see W Hogg *Constitutional Law of Canada* (3rd Edition, 1992) at 1130.

[2] See, in particular, art 8 of the Constitution of Namibia and s 15 of the Constitution of Zimbabwe.

[3] Article 7 of the International Covenant of Civil and Political Rights; art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The latter refers only to 'inhuman or degrading treatment or punishment', but the absence of the word 'cruel' does not mean that its scope is significantly different.

[4] *Makwanyane* (supra) at para 199 (Kentridge J). In *Williams* (supra) at paras 36-37, Langa J suggested that the relationship between public opinion and 'contemporary standards of decency' was not clear and questioned whether it was necessary to adopt the American concept of 'contemporary standards of decency'. However, he also stated in the judgment that 'the Constitution ensures that the sentencing of offenders must conform to the standards of decency recognised throughout the civilised world'. Ibid at para 77.

[5] Section 39(1).

[6] See, eg, *Makwanyane* (supra) and *Williams* (supra).

[7] See *S v Tcoeib* 1993 (1) SACR 274 (Nm)('*Tcoeib*').

about objective factors of this kind and how they would be related to the fundamental value judgment.[1]

(i) *The sentence of death*

Much has been written about the constitutionality of various aspects of the sentence of death in many jurisdictions. As has been seen above, the death penalty has inspired close analysis of the importance of equality and proportionality in sentencing.[2] On the direct question of whether the death penalty is inherently unconstitutional, international law is equivocal. There is, however, a strong bias towards abolition.[3]

When the constitutionality of the death penalty was raised in *S v Makwanyane*[4] Chaskalson P surveyed much of the international law and the comparative jurisprudence, but observed that there was little of it which could be applied directly to the question of whether death is an acceptable form of punishment in South African constitutional law.[5] He emphasised that the court had to pay due regard to the South African legal system, to South African history and circumstances, and to the language of the South African Constitution.[6] The latter point was particularly important because of differences in the wording of Constitutions.[7] Many Constitutions either outlaw capital punishment[8] or, conversely, guarantee its existence,[9] thus removing the issue from direct constitutional debate.

In *Makwanyane*, the Constitutional Court held that capital punishment infringed the rights to life and dignity and constituted cruel, inhuman or degrading punish-

[1] In *S v Williams and Five Similar Cases* 1994 (4) SA 126 (C) the court gave counsel for the state time to consider whether he wished to lead evidence, in terms of s 102(1) of the Constitution. This may be evidence of the kind referred to in *Tcoeib* (supra). On the difficulties of providing relevant evidence on these questions, see *S v A Juvenile* 1990 (4) SA 151, 171B (ZS). On the limited relevance of 'public opinion', see *Makwanyane* (supra) at paras 87–9.

[2] See § 49.2*(b)* supra on equality and § 49.2*(c)* supra on proportionality.

[3] For an overview, see W A Schabas *The Abolition of the Death Penalty in International Law* (3rd Edition, 2002). An example of the balance which is being struck is art 6 of the International Covenant on Civil and Political Rights, which lays down detailed requirements which the death penalty has to meet, but adds, in art 6(6), that nothing in art 6 'shall be invoked to delay or prevent the abolition of capital punishment'. There is also an optional protocol to the International Covenant, which aims at the abolition of capital punishment.

[4] *Makwanyane* (supra).

[5] Ibid at paras 37–9 (Chaskalson P).

[6] Ibid at para 39 (Chaskalson P).

[7] In particular, the substantive protection given to the right to life by s 9 was stressed by Chaskalson P in *Makwanyane* (supra) at paras 38, 78, 80 and 85. See also *Makwanyane* (supra) at para 154 (Ackermann J) and at para 324 (O'Regan).

[8] For example, art 102 of the German Basic Law or art 6 of the Constitution of Namibia.

[9] Article 5(1) of the Constitution of Malaysia or art 9(1) of the Constitution of Singapore.

ment.[1] The crucial question was whether s 277(1)*(a)* of the Criminal Procedure Act,[2] which made it a competent sentence for murder, created a legitimate limitation of these rights. The state's principal argument in this regard was that capital punishment was justified by its deterrent effect. The court rejected this argument on the grounds that there was no clear proof that capital punishment served effectively to deter murder.[3] It was pointed out that the deterrence argument tends to ignore the existence of alternative sentences to capital punishment[4] and that it ignored the State's duty to act as a role model in the development of a culture of rights.[5] The court also rejected arguments of the Attorney-General, who sought to justify capital punishment for its retributive function or as a measure necessary to prevent criminals from killing again.[6] In particular, the court emphasised that the retributive element of punishment had to be given less weight under a human rights regime that placed a particular emphasis on the value of *ubuntu*.[7] Taken cumulatively, retribution, prevention, and a marginal deterrent effect on potential murderers were held to be insufficient to justify the factors 'which taken together make capital punishment cruel, inhuman and degrading: the destruction of life, the annihilation of dignity, the elements of arbitrariness, inequality and the possibility of error in the enforcement of the penalty'.[8]

(ii) *Corporal punishment*

In *S v Williams & others,* the provisions of s 294 of the Criminal Procedure Act,[9] were challenged on the grounds that whippings were contrary to human dignity and were cruel, inhuman or degrading. The South African courts had long expressed reservations about corporal punishment and its compatibility with

[1] See *Makwanyane* (supra) at para 95 (Chaskalson P). See also *Mohamed & another v President of the Republic of South Africa & others (Society for the Abolition of the Death Penalty in South Africa intervening)* 2001(3) SA 893 (CC), 2001 (7) BCLR 685 (CC) at para 39 (Constitutional Court in an *en banc* decision confirmed that death penalty was also inconsistent with the values and provisions of the Final Constitution).

[2] Act 51 of 1977.

[3] *Makwanyane* (supra): Chaskalson P at paras 116–25, Didcott J at paras 181–3, Kentridge J at para 202, Kriegler J at paras 212–13, Mahomed J at paras 286–94, Mokgoro J at para 317, and O'Regan J at para 340.

[4] Ibid at para 123 (Chaskalson P), at para 181 (Didcott J), and at para 287 (Mahomed J).

[5] Ibid at para 124 (Chaskalson P), at 222 (Langa J), and at para 316 (Mokgoro J).

[6] Ibid at para 128 (Chaskalson P).

[7] Ibid at paras 129–31 (Chaskalson P), at para 203 (Kentridge J), at paras 222–7 (Langa J), at paras 237–43 (Madala J), at para 296 (Mahomed J), at paras 307–13 (Mokgoro J), and at para 341 (O'Regan J).

[8] Ibid at para 135 (Chaskalson P).

[9] Act 51 of 1977. Section 294 was subsequently repealed by s 2 of Act 33 of 1997.

human dignity,[1] but had not previously been able to strike down the primary legislation that allowed it to be imposed. In *Williams* the Constitutional Court noted the rejection of corporal punishment at international law[2] and in the jurisprudence of many national states[3] and declared juvenile whippings to be unconstitutional. The court emphasised the dehumanising nature of whippings:

> The severity of the pain inflicted is arbitrary, depending as it does almost entirely on the person administering the whipping. Although the juvenile is not trussed, he is as helpless. He has to submit to the beating, his terror and sensitivity to pain notwithstanding . . . The fact that the adult is stripped naked merely accentuates the degradation and humiliation. The whipping of both is, in itself, a severe affront to their dignity as human beings.[4]

Langa J proceeded to reject 'any culture of authority which legitimates the use of violence . . . [as] inconsistent with the values of the Constitution'.[5] In so doing he rejected the argument of the State that the dignity of juveniles is not necessarily infringed by the infliction of corporal punishment.[6] The State argued that juvenile whippings were a justifiable limitation of the rights protected by ss 10 and 11 of the 1993 Constitution[7] because of their deterrent value and because they provided a convenient and beneficial alternative to other socially more undesirable forms of punishment.[8] Langa Jrejected these arguments and pointed to the need to utilise

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[1] See, for example, *S v Kumalo & others* 1965 (4) SA 565, 574F–H (N); *S v Motsoetsoana* 1986 (3) SA 350 (N); *S v Ndaba & others* 1987 (1) SA 237, 245A–C (T).

[2] See *Williams* (supra) at para 39. International law usually contains only a general prohibition of cruel, inhuman or degrading punishment. This prohibition is subject to interpretation and development: see N Rodley *The Treatment of Prisoners under International Law* (2nd Edition, 1999) 309–324. Secondary instruments do outlaw corporal punishment explicitly. Examples are the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), which outlaw corporal punishment of juveniles (Rule 17.3), and the United Nations Standard Minimum Rules for the Treatment of Prisoners, which outlaw corporal punishment of prisoners (Rule 31). In 1993 South African practice was brought into the line with the latter rule, when corporal punishment ceased to be a punishment that could be imposed on prisoners. (See s 17 of the Correctional Services Amendment Act 68 of 1993, which amended s 54 of the Correctional Services Act 8 of 1959.)

[3] See *Williams* (supra) at para 40. For pronouncements of the constitutionality of corporal punishment for adults in Southern African countries, see *S v Petrus & another* [1985] LRC (Const) 699 (Botswana CA); *S v Ncube; S v Tshuma; S v Ndhlovu* (supra); *Ex parte Attorney-General, Namibia: In re Corporal Punishment* 1991 (3) SA 76 (NmS).

[4] *Williams* (supra) at para 45.

[5] Ibid at para 52.

[6] Ibid at paras 41–7. See McNally JA (dissenting) in *S v A Juvenile* 1990 (4) SA 151, 171E–H (ZS).

[7] That is, the rights to human dignity and freedom from cruel, inhuman, or degrading punishment (cf ss 10 and 12(1)*(e)* of the 1996 Constitution). The court found it unnecessary to consider the appellants' argument that these rights were incapable of limitation. See *Williams* (supra) at paras 55–6. In *Smith v The Queen* (1987) 34 CCC (3d) 97 Lamer J notes that there are some punishments which will always 'outrage our standards of decency'. *Smith* (supra) at 140. He includes in this *obiter* pronouncement 'corporal punishment, such as the lash, irrespective of the number of strokes'. An even wider version of this proposition is developed by Stuart, who argues that no punishment which in the Canadian context is cruel and unusual, either because of its nature or because it is grossly disproportionate in a particular case, should ever be regarded as being justifiable in terms of the Canadian limitations clause; D Stuart *Charter Justice in Canadian Law* (1991) 308–9.

[8] See *S v Vakalisa* 1990 (2) SACR 88, 94G–J (Tk); in *S v A Juvenile* (supra) at 171I–172A (McNally JA, (dissenting)).

new sentencing options which did not require the sacrifice of decency and human dignity.[1]

S v Williams addressed only juvenile whippings in the context of s 294 of the Criminal Procedure Act. The judgment has had obvious implications for all forms of corporal punishment. Following *Williams* it is clear that the corporal punishment of adults in execution of criminal sentences will be unconstitutional.[2] It seems likely that corporal punishment at schools will be similarly struck down. Although the Constitutional Court was at pains to stress that the issue of corporal punishment of scholars was not before it,[3] *dicta* in *Williams* suggest that the Constitution will not countenance the caning of school children.[4] In any event, legislation subsequent to the decision in *Williams* outlawed corporal punishment in all schools, including private schools run by non-government bodies.[5] The constitutionality of this provision was challenged by parents of children in religious schools. In *Christian Education South Africa v Minister of Education,*[6] the Constitutional Court held that, even if it were assumed that the prohibition infringed the religious rights of parents, it was saved by the limitations clause, as religious freedom could be limited in this way in order to protect the rights of the child and reduce violence in society generally.

(iii) *Imprisonment*

Imprisonment, even for a short period, is a harsh form of punishment. The circumstances of imprisonment may mean not only that the offender loses his liberty but also that his human dignity is infringed. However, this is a criticism of the manner in which imprisonment is often implemented rather than of legislation allowing its imposition. In theory at least, imprisonment, properly organised,[7] offers the offender the possibility of retaining his dignity, of reflecting on his conduct, and of returning to society as a full participant. A 'Methuselah sentence' – a term that is so long that a prisoner would have absolutely no chance of being released at the expiry of the sentence or on parole after serving half the sentence – will amount to cruel, inhuman and degrading punishment.[8] The absence of a possibility of parole makes it unconstitutional.[9]

[1] See *Williams* (supra) at paras 64–75.

[2] This proposition was common cause between the parties. Ibid at para 10.

[3] Ibid at para 49.

[4] Ibid at paras 47 and 52. Corporal punishment in Namibian schools was prohibited in *Ex parte Attorney-General, Namibia: In re Corporal Punishment* (supra).

[5] Section 10(1) of the South African Schools Act 84 of 1996 provides simply: 'No person may administer corporal punishment at a school to a learner.'

[6] See *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC). For criticism of the Court's inconsistent protection of children's rights in Christian education, see S Woolman 'Association' in Chaskalson et al *Constitutional Law of South Africa* (2nd Edition) (supra) at § 44.3(c)(viii).

[7] However, the imprisonment of a person who is not able to cope physically without being humiliated may well be contrary to human dignity. See *Price v United Kingdom* (2002) 34 EHRR 53 in which the imprisonment of a quadriplegic with out inquiring whether adequate resources were available to deal with her needs, was held to violate the prohibition on degrading punishment in art 3 of the European Convention on Human Rights.

[8] Such punishment is prescribed by s 12(1)(*e*) of the Constitution.

[9] See *S v Nkosi & another* 2003 (1) SACR 91 (SCA) ('*Nkosi II*') at para 9.

(iv) *Life imprisonment*

Life imprisonment, if given its literal meaning, denies the offender the possibility of returning to society. As Levy J explained in the Namibian case of *S v Nehemia Tjijo*,[1] the effects may be disastrous:

> Life imprisonment robs the prisoner of . . . hope. Take away his hope and you take away his dignity and all desire he may have to continue living . . . The concept of life imprisonment destroys human dignity by reducing a prisoner to a number behind the walls of a gaol waiting only for death to set him free.

For Levy J the logic of these propositions was inescapable. Life imprisonment was unconstitutional because it infringed the human dignity of the offender. Nor was he impressed by the fact that offenders might be released on parole or unconditionally before completing their sentences. It was not sufficient to rely on the wide discretion of the executive to ensure that the human dignity of the offender was safeguarded.[2]

The argument that life imprisonment is a cruel, inhuman or degrading punishment is often rejected outright. It is argued that it does not infringe human dignity significantly more than other long prison sentences and that it is justifiable as a maximum penalty, particularly where the death sentence has been abolished.[3] A much more subtle approach to the question of life imprisonment was developed by the German Federal Constitutional Court in 1977.[4] The Court recognised that the State was entitled to legislate for harsh punishments for serious offences. It said, however, that a punishment that placed the individual permanently in prison and made his release subject to the exercise of executive power was an unconstitutional violation of the human dignity of the offender.[5] What was required, said the court, was a mechanism that gave the offender the assurance that his release would be considered by a judicial body after a set period. This procedure would allow the person serving the sentence to retain some prospect of release and thus to preserve his dignity. Judicial review of all life sentences after the prisoner had served a maximum of 15 years was subsequently introduced by legislation.[6] The constitutionality of that legislation has been upheld in principle

[1] Unreported decision of 4 September 1991 as quoted in *Tcoeib* (supra) at 275*i*.

[2] Ibid at 275*j*–276*d*.

[3] See the judgment of Ackermann J in *Makwanyane* (supra) at paras 170–2. See also *Tcoeib* (supra) and the review of international practice conducted there. It should be noted, however, that life imprisonment is outlawed in a number of countries and that there is a small but active movement that is pressing for its total abolition. For an overview of the international position, see United Nations Crime Prevention and Criminal Justice Branch *Life Imprisonment* (1994).

[4] 45 *BVerfGE* 187.

[5] It would also fail to meet the requirements of legality.

[6] A new section, art 57a, was added to the German Penal Code in 1982. In its decision of 3 June 1992 the Federal Constitutional Court held that it was acceptable to take into account whether the offender had been particularly blameworthy in respect of the offence for which he had been sentenced when subsequently considering his release in terms of art 57a. 86 *BVerfGE* 288. However, the trial court should make a finding in this regard in order to guide the tribunal that would eventually decide on his release.

by a later decision of the German Federal Constitutional Court.[1]

In *S v Tcoeib*[2] the Supreme Court of Namibia held that life imprisonment could not be equated with the sentence of death.[3] Chief Justice Mahomed, who gave the judgment of the Court, adopted the same approach to life imprisonment as had the German Federal Constitutional Court in 1977.[4] Life imprisonment could be justified only if the prisoner retained some hope of eventually being released from prison. Mahomed CJ explained that life imprisonment

> 'cannot be justified if it effectively amounts to a sentence which locks the gates of the prison irreversibly on the offender without any prospect whatever of lawful escape from that condition for the rest of his or her natural life and regardless of circumstances which might subsequently arise'.[5]

Like the German Federal Constitutional Court, the Supreme Court of Namibia emphasised that the constitutionality of life imprisonment depended on the recognition of the human dignity of the prisoner. Such dignity would be undermined unless the prisoner had a 'concrete and fundamentally realizable expectation'[6] of release. The difficult question was whether the existing release mechanisms were sufficient to meet that requirement. Mahomed CJ conceded that

> if the release of the prisoner depends entirely on the capricious exercise of the discretion of the prison or executive authorities, leaving them free to consider such a possibility at a time which they please or not at all and to decide what they please when they do, the hope which might yet flicker in the mind and heart of the prisoner is much too faint and much too unpredictable to retain for the prisoner a sufficient residue of dignity which is left uninvaded.[7]

Mahomed CJ ruled that the procedures for the consideration of the release of life prisoners created by the Namibian Prisons Act were sufficient, notwithstanding the fact that (a) they gave wide discretionary powers to officials of the Namibian prison administration and (b) empowered the President to make the final decision to release a prisoner serving a life sentence when a Release Board had made a positive recommendation. In this respect the Namibian court did not

[1] 86 *BVerfGE* 288.

[2] See *Tcoeib* (supra).

[3] Ibid at 397*b*. The Court found that Levy J in *S v Nehemia Tjijo* (Unreported decision of 4 September 1991) had been wrong to equate the two.

[4] The 1977 decision of the German Federal Constitutional Court (45 *BVerfGE* 187) is referred to with approval by Mahomed CJ in *Tcoeib* (supra) at 398*g*–399*a* and 400*a*.

[5] Ibid at 398*b*.

[6] Ibid at 399*b*, quoting D van Zyl Smit 'Is Life Imprisonment Constitutional? The German Experience' 1992 *Public Law* 263, 271.

[7] See *Tcoeib* (supra) at 399*b*–400*a*.

follow the strict standards as set out by the German court. Decisions regarding the release of prisoners serving life sentences could be made by a judicial body. Mahomed CJ did emphasise, however, that:

> The relevant authorities entrusted with these functions have not only to act in good faith but they must properly apply their minds to each individual case, the relevant circumstances impacting on the exercise of a proper discretion, the objects of the relevant legislation creating such mechanisms and the values and protections of the Constitution.[1]

The decision of the Supreme Court of Namibia in *Tcoeib* may be regarded as strong persuasive authority in South Africa. The relevant provisions of the Namibian Constitution are mirrored by similar provisions in the South African Constitution.[2] One may predict with some confidence that a life sentence without the prospect of parole or other form of release will be found unconstitutional in South Africa.[3] The repeated statements of the South African Appellate Division that, as far as the courts are concerned, life means life,[4] do not therefore reflect the full, constitutionally required reality.

Life imprisonment has not yet been considered fully by the South African Constitutional Court.[5] However, in *S v De Kock*,[6] Van der Merwe J subjected the Southern African jurisprudence on life imprisonment to a comprehensive review.[7] He cited the decision of Mahomed CJ in *S v Tcoeib*[8] with approval and concluded that a decision on whether to impose life imprisonment should be taken on the basis that it was not a sentence that left the offender without a prospect of release. Van der Merwe J found that an expectation of release was inherent in the provisions of the Correctional Services Act.[9] He explained that the responsible authorities had to act fairly, justly and responsibly in the light of all the factors that existed at the time of sentence and that might come to the fore in the future.[10] If this did not happen, the courts could be asked to intervene.[11]

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[1] *Tcoeib* (supra) at 400*c*.

[2] Article 8 (human dignity) of the Constitution of Namibia may be compared to s 10 in the Constitution of South Africa. Also relevant are the similar provisions relating to personal liberty (art 7 and s 12 in Namibia and South Africa respectively) and to administrative justice (art 18 and s 33 in Namibia and South Africa respectively).

[3] See *Bull* (supra) at para 23; *Nkosi II* (supra) at 95*d*. South African prison law does create a mechanism for the consideration of the release on parole of prisoners serving sentences of life imprisonment. Section 65(5) of the Correctional Services Act 8 of 1959.

[4] See *S v Mdau* 1991 (1) SA 169, 177B (A); *S v Oosthuizen* 1991 (2) SACR 298, 302A (A); *S v W* 1993 (2) SACR 74 (A); *S v Mehlape en andere* 1993 (2) SACR 180, 183H (T).

[5] See *Makwanyane* (supra) at paras 170–2.

[6] *S v De Kock* 1997 (2) SACR 171 (T) (*'De Kock'*).

[7] See *De Kock* (supra) at 204*d*–211*i*.

[8] See *Tcoeib (*supra*)*.

[9] See *De Kock* (supra) at 211*b*. See also *S v Smith* 1996 (1) SACR 250, 225*b*–256*a* (E).

[10] See *De Kock* (supra) at 211*b*.

[11] Ibid.

One could not proceed from the position that the responsible authorities would act irresponsibly and in a manner contrary to the Constitution and the Correctional Services Act.[1]

The Supreme Court of Appeal has made clear on a number of occasions that life imprisonment is the ultimate penalty. It should only be imposed on offenders who commit the most serious crimes. Courts should not attempt to ensure that such offenders are detained for longer than the minimum period before prisoners serving life sentences are considered for release, either by declaring offenders dangerous criminals[2] or by imposing exorbitantly long fixed-term sentences.[3]

49.3 The Implementation of Punishment

A sentence that is otherwise constitutionally acceptable may be implemented in a manner that is unconstitutional. In the case of death sentences, the Supreme Court of Zimbabwe[4] and the European Court of Human Rights[5] both declared that the manner in which the death penalty was implemented could amount to inhuman or degrading treatment. Where this has been the case the courts intervened to ensure that the sentence of death was not carried out, even if the Constitution or international instrument that they were interpreting allowed the death sentence to be imposed.[6] If the constitutionality of the sentence of death were ever to be upheld in South Africa, the constitutionality of the way in which it is implemented might be challenged along the same lines.

Constitutional challenges relating to the implementation of sentences are more likely to be directed against those forms of punishment in which the State plays an active part in the supervision and control of the offender over a long period of time, and which require decisions to be made about the termination of the sentence. Imprisonment and, to a lesser extent, correctional supervision, are such forms of punishment. This relationship between the State and the offender lends itself to a wide range of specific constitutional challenges. Most challenges are likely grounded in commitments to human dignity and the principle of legality.

[1] *De Kock* (supra) at 211*b*. See also the argument for legality in the implementation of sentences infra, § 49.3(*b*), and D van Zyl Smit 'Taking Life Imprisonment Seriously' in E Kahn (Ed) *The Quest for Justice: Essays in Honour of Michael MacGregor Corbett, Chief Justice of the Supreme Court of South Africa* (1995) 309–27.

[2] See *Bull* (supra).

[3] See *Nkosi II* (supra); *S v Silvale* 1999 (2) SACR 102 (SCA).

[4] *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe & others* 1993 (4) SA 239 (ZS), 1993 (2) SACR 432 (ZS).

[5] *Soering v United Kingdom* (1989) 11 EHRR 439.

[6] In *Soering* (supra) the intervention took the indirect form of preventing extradition to the United States, where the European Court feared that the accused would be subject to treatment that would infringe the European Convention.

(a) Dignity

Most rights-based legal systems of prison law recognise that, as a general rule, imprisonment ought not to deny prisoners any other rights, except those of which the negation is the necessary consequence of incarceration. Historically, the recognition granted to prisoners' rights in South Africa has been patchy. Initially their rights were widely recognised. In 1912 in *Whittaker v Roos and Bateman; Morant v Roos and Bateman*[1] the newly constituted Appellate Division of the Union of South Africa held that prisoners of all kinds were entitled to 'all the personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed.'[2] This dictum was restricted in a series of cases dealing with the rights of political detainees and eventually sentenced political prisoners.[3] In *Goldberg & others v Minister of Prisons & others*[4], the Court held that sentenced prisoners were limited to a few basic rights. However, in *Minister of Justice v Hofmeyr*,[5] the Appellate Division finally recognised that all the fundamental rights of prisoners survived incarceration and effectively reinstated the 1911 decision in *Whittaker*.

The decision in *Hofmeyr* continues to form the basis of South African jurisprudence on prisoners' rights and 'has been given fresh impetus by a number of our constitutional values such as dignity, equality and humanity'.[6] Moreover, the same principles underlie the prisoners' rights articulated in s 35(2) of the Constitution. Amongst these rights is detention in conditions of human dignity. These conditions include 'at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment'.[7] The danger

[1] See *Whittaker v Roos and Bateman; Morant v Roos and Bateman* 1912 AD 92 *('Whittaker')*.

[2] *Whittaker* (supra) at 123.

[3] See D van Zyl Smit ' "Normal" prisons in an "abnormal" society? A comparative perspective on South African prison law and practice' (1987) 6 *Criminal Justice Ethics* 37–51.

[4] See *Goldberg & others v Minister of Prisons* 1979 (1) SA 14 (A). The judgment is notable also for the dissent of Corbett JA, who adopted a much more liberal approach to the rights of sentenced prisoners in conformity with the general principles articulated in *Whittaker* (supra).

[5] See *Minister of Justice v Hofmeyer* 1993 (3) SA 131 (A). See also *Van Biljon & others v Minister of Correctional Services & others* 1997 (4) SA 441 (C), 1997 (6) BCLR 789 (C) at para 42 ('*Van Biljon*').

[6] See *Minister of Correctional Services & others v Kwakwa & another* 2002 (4) SA 455 (SCA) at 469I, [2002] 3 All SA 242 (A), 2002 (1) SACR 705 (SCA).

[7] For a thoughtful discussion of a prisoner's right to adequate medical treatment, see *Van Biljon* (supra), where Brand J ordered the prison authorities to provide HIV-positive applicant prisoners with the anti-retroviral medication that had been prescribed for them.

is that this list, together with the other rights mentioned in s 35(2),[1] may be considered to be the sum of prisoners' rights.

Some guidance on how prisoners' rights generally may be protected by focusing on the essential human dignity of prisoners may be gleaned from the extensive jurisprudence on prisoners' rights in other jurisdictions.[2] In *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs & others*[3] the Zimbabwean Supreme Court held that the lawfulness of the actions of the authorities in drastically limiting the exercise period allowed to a condemned prisoner should be judged against '[the] broad and idealistic notion of dignity, humanity and decency'. It derived this principle directly from the provision in the Zimbabwean Constitution that outlaws torture and inhuman or degrading treatment or punishment.[4] As a general matter, the Court emphasised that it was ill equipped to make decisions regarding the administration of prisons. However, Gubbay CJ, stated that::

> But a policy of judicial restraint cannot encompass any failure to take cognisance of a valid claim that a prison regulation or practice offends a fundamental constitutional protection.[5]

As is the case with imposition of punishment, the question of whether implementation of a sentence of imprisonment, or any other sentence, is contrary to human dignity can be answered by analysing closely whether the sentence

[1] Section 35(2) provides:
Everyone who is detained, including every sentenced prisoner, has the right—
(a) to be informed promptly of the reason for being detained;
(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
(f) to communicate with, and be visited by, that person's—
(i) spouse or partner;
(ii) next of kin;
(iii) chosen religious counsellor; and
(iv) chosen medical practitioner.

[2] See, generally, D van Zyl Smit *South African Prison Law and Practice* (1992) 59ff; S Krantz *Cases and Materials on the Law of Corrections and Prisoners' Rights* (3rd Edition, 1986); D van Zyl Smit & F Dünkel (eds) *Imprisonment Today and Tomorrow—International Perspectives on Prisoners' Rights and Prison Conditions* (2nd Edition, 2001); A J Fowles *Prisoners' Rights in England and the United States* (1989). For examples of judicial pronouncements on the retention of civil rights by prisoners, see *Raymond v Honey* [1983] 1 AC 1 [1981] 2 AIIER 1084 at 10, 14; *R v Board of Visitors of Hull Prisoners, Ex parte St Germain* [1979] QB 425, 455; *Solosky v The Queen* (1979) 105 DLR (3d) 745, 760; *Meachum v Fano* 427 US 215, 225, 96 SCt 2532 (1976); *Connecticut Board of Pardons v Dumschat* 452 US 458, 468, 101 SCt 2460 (1981); *Namunjepo & others v Commanding Officer Windhoek Prison & another* 2000 (6) BCLR 671 (NmS).

[3] See *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs & others* 1992 (2) SA 56 (ZS) ('*Conjwayo*').

[4] Ibid at 63D–E.

[5] Ibid at 60I.

amounts to torture or a form of cruel inhuman or degrading treatment or punishment.[1] The prohibition of certain forms of punishment and treatment has also been used as the basis for the protection of prisoners' rights in international human rights law.[2] In this regard the European Court of Human Rights has been particularly active and has emphasised that torture or degrading treatment of punishment are prohibited in absolute terms in democratic societies, irrespective of the circumstances and the victims' behaviour.[3] The Court held that conditions of imprisonment may amount to degrading treatment, and thus infringe art 3 of the European Convention on Human Rights,[4] even where the authorities to not intend to degrade the prisoner.[5] Prison overcrowding may be degrading to prisoners in this sense.[6]

It is clear that for any limitations of prisoners' rights to be accepted in South Africa, they have to be imposed by legislation and meet the requirements of the limitations section of the Constitution.[7] This necessary condition does not address the questions of what the full range of prisoners' rights is or of what limitations may legitimately be imposed on prisoners' rights. The answers are difficult to determine in the abstract and will often depend on the circumstances of the case[8] or on whether more specific rights of individual prisoners are involved as well.[9]

One particularly controversial question is the right of prisoners to vote.[10] In *August & another v Electoral Commission & others*[11] the Constitutional Court recognised the fundamental constitutional importance of the right to vote[12] and declared unconstitutional administrative action that would have deprived prisoners of the right to exercise it. However, the Court carefully left open the question

[1] See s 12(1)(*e*) of the Constitution as discussed by I Currie & S Woolman 'Freedom and Security of the Person' in Chaskalson et al *Constitutional Law of South Africa* (1st Edition) (supra) Chapter 39.

[2] See N S Rodley *The Treatment of Prisoners Under International Law* (2nd Edition, 1999); S Livingstone, T Owen and A MacDonald *Prison Law,* (3rd Edition, 2003) 109-140. For an overview of international and regional instruments applicable to prisoners' rights in Africa, see S H Bukurura *Protecting Prisoners' Rights in Southern Africa: An Emerging Pattern* (2002).

[3] See *Kalashnikov v Russia* (2003) 36 EHRR 34 at para 95.

[4] Article 3 of the European Convention on Human Rights provides: 'No one shall be subjected to torture or to inhuman treatment or punishment.'

[5] See *Peers v Greece* (2001) 33 EHRR 51; *Kalashnikov v Russia* (supra); *Poltoratskiy v Ukraine* (application no 38812/97; unreported judgment of 29 April 2003).

[6] See *Kalashnikov v Russia* (supra).

[7] 'Imprisonment is a severe punishment; but prisoners retain all the rights to which every person is entitled under Ch 3, subject only to limitations imposed by the prison regime that are justifiable under s 33.' *Makwanyane* (supra) at para 143 (Chaskalson P) (The reference to s 33 in the passage quoted is to the Interim Constitution. In the Final Constitution the same function is performed by s 36.)

[8] See, for example, *Strydom v Minister of Correctional Services and others* 1999 (3) BCLR 342 (W) (long-term maximum security prisoners had a right of access to electricity where the Department of Correctional Services had allowed the privilege of having electrical appliances in their cells).

[9] See *C v Minister of Correctional Services* 1996 (4) SA 292 (T) (prisoner's rights to privacy and dignity infringed when tested to determine whether he was HIV-positive without his fully informed consent.)

[10] See ss 1(*d*) and 19 of the Constitution.

[11] See *August & another v Electoral Commission & others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) ('*August*').

[12] Ibid at para 17.

of whether legislation disqualifying prisoners or categories of prisoners from voting could be justified in terms of the limitations clause.[1] Given the emphasis on the importance of the right to vote, it is unlikely that a future court will uphold a total denial of the vote to all prisoners. A more limited, prospective restriction, for example, on the voting rights of offenders who are convicted of crimes against the democratic order may pass constitutional muster.[2] However, the logic of recognising the fundamental nature of the right to vote in a democracy makes it more likely that a South African Court will follow the majority of the Supreme Court of Canada in finding that the denial of right to vote of any category of prisoners runs counter to the constitutional commitment to the inherent worth and dignity of every individual and therefore cannot be saved by the limitations clause.[3]

It is important to note that the recognition of the right of prisoners to constitutionally acceptable treatment means that prisoners may claim positive performance from the authorities. Prisoners are dependent on the authorities in ways that ordinary citizens are not. The prison authorities have to provide directly for them. For example, the courts in upholding prisoners' explicit constitutional right to be given adequate medical treatment have explained that 'unlike persons who are free, prisoners have no access to other resources to assist them in gaining access to medical treatment' and must therefore be provided with medical treatment even if such treatment would not be available to indigent persons outside prison.[4]

Prisoners' positive rights may be applied even more broadly. The German Federal Constitutional Court has held that the constitutionally protected human dignity of sentenced prisoners gives them an interest in ensuring that prisons are administered in a way that provides them with an opportunity to be resocialized and to lead a crime-free life.[5] Such an approach will have far-reaching implications for the way in which sentences of imprisonment are implemented in South Africa.

With the recognition in South African prison law that the implementation of a prison sentence has as its objective the enabling of prisoners to lead a socially responsible and crime free life, comes also the possibility that certain duties may

[1] *August* (supra) at para 31.

[2] See N V Demleitner 'Continuing Payment of One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative' (2000) 84 *Minnesota LR* 753. There is considerable evidence of partial restrictions being recognised in various jurisdictions. See *August* (supra) at para 31 n 30. Detailed examples are collected in the minority judgment of Gonthier J in *Sauvé v Canada (Chief Electoral Officer)* 2002 SCC 68 at paras 122–134. Gonthier J also points out that the international and regional human rights tribunals have recognised such exceptions to the right to vote.

[3] *Sauvé v Canada (Chief Electoral Officer)*(supra).

[4] See *Van Biljon* (supra) at para 53.

[5] 35 *BVerfGE* 203 at 235–6. For further comparative material, see E Rotman 'Do Criminal Offenders have a Constitutional Right to Rehabilitation?' (1986) 77 *Journal of Criminal Law and Criminology* 1023. Note also that art 10(3) of the International Covenant on Civil and Political Rights provides: 'The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.'

be placed on sentenced prisoners. As such duties restrict rights of sentenced prisoners, it must meet the requirements of the limitation section of the Constitution.[1] An example of legislative provision for such duties is s 37 of the 1998 Correctional Services Act. Section 37 provides that sentenced prisoners must participate in an assessment process and 'perform any labour which is related to any development programme or which generally is designed to foster habits of industry'.[2] However, the Act strictly limits these duties by providing, for example, that prisoners who are ill cannot be compelled to work[3] and that the work may not be a form of punishment or disciplinary measure.[4] Moreover, if prison authorities compel prisoners to work in terms of these provisions, they are obliged, in order to recognise their human dignity, to reward them adequately for their labour.[5]

(b) Legality

(i) *During imprisonment*

An important component of the principle of legality[6] is that even those rights of prisoners that are restricted as a necessary consequence of incarceration may only be limited if this is done by law, either expressly or by necessary implication. Both the Constitution and the legislation regulating prisons in South Africa must therefore be scrutinized to see whether they provide the necessary authority for the restriction of prisoners' rights.[7] In addition, the restrictions must be formulated sufficiently narrowly to ensure that prisoners are not subject to overbroad discretionary powers.[8]

A further requirement is that in all dealings with prisoners the requirements of administrative justice must be met.[9] The courts have held that these requirements encompass the legitimate expectations that prisoners may form as a result of

[1] See Woolman 'Limitations' in Chaskalson et al *Constitutional Law of South Africa* (1st Edition) (supra) at Chapter 12.

[2] This provision limits s 13 of the Constitution, which protects human dignity by stipulating that '[n]o one may be subjected to slavery, servitude or forced labour'. Note that by October 2003 the provisions relating to labour in the 1998 Correctional Services Act had not been brought into effect. Their compatibility with the Constitution (and that of the equivalent, less carefully drafted, provisions of the 1959 Correctional Services Act) has not been tested.

[3] Section 37(1)(*b*)**.**

[4] Section 40(5).

[5] D van Zyl Smit 'Anchoring the Treatment of Sentenced Prisoners in a Rights Discourse: the Example of Prison Labour in German Prison Law' (1999) 116 *SALJ* 613.

[6] See *Pharmaceutical Manufacturers* (supra).

[7] See *Minister of Correctional Services & others v Kwakwa & another* (supra) at 473 (court emphasised that the Commissioner had to meet the requirements of legality in determining a system of privileges).

[8] See the seminal decision of the German Federal Constitutional Court of 14 March 1972 (33 *BVerfGE* 1), which declared the necessity of a statutory framework of sufficient precision to be a constitutional requirement for all restrictions of prisoners' rights. This decision led directly to the enactment of the German Prison Act of 1976.

[9] FC s 33.

the manner in which the prison authorities manage the privileges that they grant.[1] Legitimate expectations should also embrace the requirement of procedurally fair hearings before prisoners are transferred to institutions such as 'C-Max' high security prisons that may affect their privileges and concessions.[2]

(ii) *On release*

The requirements of legality in respect of the implementation of sentences relate also to the rules determining the release of offenders from the restrictions of their sentence. Difficulties in this regard rarely arise with respect to the final unconditional release of prisoners or those offenders subject to correctional supervision. Much more problematic are the decisions relating to conditional release on parole or correctional supervision. These decisions clearly affect the liberty of offenders. Even though it may be argued that no one has a right to parole, prisoners have a very strong interest in liberty and may often have legitimate expectations with respect to parole.[3]

The problem of expectations is particularly acute where a court has determined, formally or informally, that a person should be considered for release after a set period. In *Thynne, Wilson and Gunnell v United Kingdom,*[4] the ECHR held that detaining prisoners serving discretionary life sentences[5] beyond the minimum period indicated by the trial judge as necessary to meet the punitive aims of the sentence, without having their release considered by a 'court', would be a contravention of art 5(4) of the European Convention on Human Rights. An administrative inquiry by a parole board, which left the final decision to a government minister, was held to be inadequate to meet this requirement. Article 5(4) of the European Convention is analogous to s 12(1)*(b)* of the South African Constitution. Section 12(1)*(b)* outlaws detention without trial. If this section is interpreted in a similar way to art 5(4), the constitutionality of current South African procedure in terms of s 65(5) of the 1959 Correctional Services Act for the release of prisoners serving life sentences is open to serious question.[6] The issue will arise

[1] See *Strydom v Minister of Correctional Services & others* (supra) at 354C-F.

[2] See *Nortje en 'n ander v Minister van Korrektiewe Dienste* 2001 (1) SACR 514 (HHA), 2001 (3) SA 472 (SCA), [2001] 2 All SA 623 (A).

[3] D van Zyl Smit *South African Prison Law and Practice* (supra) at 359–69. Whether prisoners have legitimate expectations to be granted parole is disputed. See *Greenholtz v Inmates of Nebraska Penal and Correctional Complex* 442 US 1, 11, 99 SCt 2100 (1979) (the majority of the US Supreme Court ruled that a parole system 'provides no more than a mere hope that the benefit will be obtained'.) The liberty interest of parolees was recognised by Marshal J in his dissent in *Greenholtz*. Ibid at 23. This latter approach may prove persuasive in terms of the new South African Constitution.

[4] See *Thynne, Wilson and Gunnell v United Kingdom* (1991) 13 EHRR 666.

[5] The same analysis has now also been extended to mandatory life sentences for murder: See *Stafford v United Kingdom* (2002) 35 EHRR 32 and *Regina (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003]1 AC 837, and *Regina v Lichniak, Regina v Pyrah* [2002] UKHL 47, [2003]1 AC 903.

[6] This question will not arise when Chapter VII of the Correctional Services Act 111 of 1998 comes into force as the release on parole of all prisoners serving life sentences will be considered by the court that imposed them after the prisoners have served 25 years of their sentences.

with particular force where the sentencing court has given an indication of what may properly be regarded as the punitive part of a life sentence and the prisoner subsequently completes that part of the sentence.[1]

Procedures for release on parole have to comply with the standards of administrative justice.[2] South African courts are divided on the question of whether the Commissioner of Correctional Services is allowed to issue a general directive that parole boards should only consider offenders who have committed certain offences after they have served two-thirds, three-quarters or even four-fifths of their sentences.[3] The Act, however, allows all prisoners to be considered for release on parole after they have served half their sentences, minus any 'credits' they might be awarded for their behaviour in prison.[4] No authority exists in the 1959 Correctional Services Act for the Commissioner to issue such a directive to parole boards. Moreover, systematic offence-based intervention by the Commissioner is not related to any of the purposes of parole. It amounts to a *de facto* resentencing by the Commissioner and thus disturbs the relative, ordinal proportionality of the sentences imposed by the courts.[5] Although prisoners do not have a right to be paroled, such additional penalisation infringes the right to procedurally fair and reasonable administrative action. It undermines the prisoners' legitimate expectations, created by the Act, that they will be considered for release after they have served half their sentences, reduced further by the number of the credits they receive.[6]

Where a prisoner who has already been released on parole is alleged to have infringed his parole conditions the liberty interest is even stronger. It may even be argued that he cannot be returned to prison without a full trial-like procedure being followed to determine whether he has in fact infringed his conditions of parole.[7]

The same applies to prisoners serving sentences of correctional supervision. The current position is that prisoners who were sentenced initially to correctional supervision cannot have their sentences converted to imprisonment without the matter being heard by a court.[8] Such are the requirements of due process.

[1] The question was raised but not decided in Namibia, where the release procedures are similar to those currently in force in South Africa. See *S v Tcoeib* (supra) at 402*e–h*.

[2] See *Steele v Warden Mountain Institution* (1991) 60 CCC (3d) 1.

[3] Compare *Winckler & others v Minister of Correctional Services & others* 2001 (2) SA 747 (C), [2001] 2 All SA 12 (C) (which finds that the Commissioner has this power) with *Combrink & another v Minister of Correctional Services & One Other* 2001 (3) SA 338 (D), 2000 JDR 0607 (D), [2000] JOL 7349 (D).

[4] Section 65(4)(*a*) of the Correctional Services Act 8 of 1959.

[5] The courts will be able to play a much more active role in determining parole outcomes once s 276B of the Criminal Procedure Act 51 of 1977 and Chapter VII of the Correctional Services Act 111 of 1998 have come into force, *inter alia*, because they will be able to specify a non-parole period as part of the sentence. See *S v Leholoane* 2001 (2) SACR 297 (T).

[6] See *Combrink & another v Minister of Correctional Services & another* (supra); *contra Winckler & others v Minister of Correctional Services & others* (supra).

[7] The constitutional requirement for such a procedure has been widely recognised. See *Morrissey v Brewer* 408 US 471, 92 SCt 2593 (1972).

[8] Sections 276(1)*(h)*, 286B(4)*(b)*(ii) or 297(1)*(a)*(i)*(cc*A), (1)*(b)* or (4) of the Criminal Procedure Act 51 of 1977 read with s 84B(2) of the Correctional Services Act 8 of 1959.

However, prisoners who are initially sentenced to imprisonment, and then have part of their sentences converted to correctional supervision, may subsequently be sent back to prison without the safeguard of a determination of the facts by a court.[1] The constitutionality of this latter procedure is dubious.[2] While the increased flexibility of sentences allows offenders to be subject to different forms of control, it will require the development of new procedural mechanisms to afford prisoners protection against constitutionally proscribed arbitrary exercises of power.[3]

The constitutional powers of the President to pardon or reprieve offenders exists outside of, and in addition to, the parole system.[4] Although this power is traditionally used sparingly, its constitutional status is such that its application will not easily be subject to judicial supervision.[5] However, in *Hugo v President of the Republic of South Africa & another*[6] the Court held that the President was bound to act in accordance with the Constitution when granting special remission of sentence. He could not discriminate unfairly. Such discrimination would contravene s 8(2) of the Interim Constitution.[7] Accordingly, it was held that the President could not grant remission only to mothers of children under the age of 12 years and thus discriminate against fathers. On appeal the Constitutional Court confirmed that the President could not exercise his power of pardon in violation of the Bill of Rights, but held, on the facts, that there had been no unfair discrimination against fathers.[8]

[1] Sections 276(1)*(i)* or 287(4)*(a)* of the Criminal Procedure Act 51 of 1977, and s 84B(1) of the Correctional Services Act 8 of 1959.

[2] See D van Zyl Smit 'Degrees of Freedom' (Summer 1994) 13 *Criminal Justice Ethics* 31–7; P C Vegter 'Stellen de Grondrechten Eisen Aan De Vrijheidsbeperkende Straf' in T H van Veen & G van Essen (eds) *Sanktietoepassing Een Nieuwe Ordening* (1991) 35. In *De Lange v Commissioner of Correctional Services, Eastern Cape* 2002 (3) SA 683 (SE), 2002 (2) SACR 185 (SE) it was emphasised that a prisoner has no right enforceable against the prison authorities to compel them to approach the court to ask for a variation of the sanction.

[3] At the very least the decision to send a person back to prison must be subject to some form of substantive review under s 33*(d)* of the Constitution, the right to administrative justice, to ensure that it satisfies the requirements of proportionality. See in this regard *Roman v Williams NO* 1997 (9) BCLR 1267 (C), 1998 (1) SA 270 (C), [1997] 4 All SA 210 (C). Van Deventer J confirmed the decision of the Commissioner under s 84B(1) of the Correctional Services Act 8 of 1959 to re-imprison the applicant, but only because the decision was substantively justifiable in relation to the reasons given for it. The Correctional Services Act 111 of 1998 contains much more elaborate procedures in this regard, but by October 2003 they had not been brought into effect.

[4] See s 84(1)*(j)* of the Constitution, read with s 327 of the Criminal Procedure Act and ss 66 and 70 of the Correctional Services Act 8 of 1959.

[5] *Gerhardt v State President* 1989 (2) SA 499 (T); *Kruger v The Minister of Correctional Services & others* 1995 (2) SA 803 (T), 1995 (1) SACR 375 (T); *Kommissaris van Korrektiewe Dienste v Malaza* 1996 (1) SA 1143 (W).

[6] *Hugo v President of the Republic of South Africa & another* 1996 (2) SA 1012 (D), [1996] 1 All SA 454 (D), 1996 BCLR 876 (D).

[7] Act 200 of 1993. Section 9(3) of the Final Constitution contains the comparable provision.

[8] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC).

50 Environment*

Morne van der Linde and Ernst Basson

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Everyone has the right:
(a) to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.[1]

50.1 INTRODUCTION

Our natural environment is finite.[2] This finitude is brought into sharp relief by a host of harmful human activities:[3] 'unsustainable development, irresponsible use of natural resources, neglect, abuse, greed, ignorance or a lack of respect' for nature's delicate ecosystems.[4] Our systemic disregard for our environment has led to a loss of genetic diversity, de-vegetation, desertification, pollution, degradation of fresh water sources, overpopulation, deterioration and erosion of topsoil, climate and atmospheric quality change, ozone layer depletion and acid rain, reduction of non-renewable energy sources, disruption of biochemical cycles and a loss of cultural heritage.[5] Some have gone so far as to characterise the ineluctable course of environmental destruction as a 'global security threat'.[6]

A full blown response to such a global security threat lies beyond the scope of this chapter. What follows is what two South African environmental lawyers can offer: an examination of a person's right to a healthy environment and the right to protection of the environment as made manifest in the Final Constitution. With those more limited goals in mind, we will also briefly consider the origins and recognition of this right in international human rights discourse and its protection at both a global and a regional level. The better part of this chapter goes on to explore the ambit of the constitutional right to a healthy environment against the backdrop of extant environmental legislation in South Africa.[7]

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[1] Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC') s 24.
[2] PM Pevato (ed) *International Environmental Law* (Volume 1, 2003) xiv.
[3] Ibid.
[4] Ibid.
[5] Ibid citing LK Caldwell *International Environmental Policy* (2nd Edition, 1990) 17-8.
[6] G Handl 'Environmental Security and Global Change: The Challenge to International Law' (1990) (1) *Yearbook of International Environmental Law* 3.
[7] The need for capacity building in the field of environmental law at a national level was identified in 2002. The Johannesburg Principles on the Role of Law and Sustainable Development stated that 'we [judges] are strongly of the view that there is an urgent need to strengthen the capacity of judges, prosecutors, legislators and all persons who play a critical role at national level in the process of implementation, development and enforcement of environmental law, including multilateral environmental agreements (MEAs), especially through the judicial process.' The Chief Justices of Southern Africa once again reaffirmed this position in 2003 at the Regional Needs Assessment Meeting for Southern Africa. To further these goals, a national symposium on environmental law for judges was held in Pretoria during January 2004. See also *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province* 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC), [2007] ZACC 13 at paras 102-104 (The Constitutional Court emphasised the obligation on South African Courts, in terms of the Johannesburg Principles, to protect the environmental rights in the Constitution for the benefit of present and future generations, regardless of the identity of the party seeking such protection.)

50.2 International Perspectives on the Right to a Healthy Environment

Norm setting and protection of the environment takes place on four different levels: the global (United Nations), the regional (African Union), the sub-regional (Southern African Development Community) and the national (South Africa). Many governments commit themselves to implementing — at a national level — norms set at a global, regional or sub-regional level. A common critique of international human rights norms is that if these norms were adequately enforced at the national level, the international norms would be superfluous.[1] This insight rings true, and points to the need to distinguish between international norm setting and domestic enforcement. Thus, the environmental rights found in various international instruments rely for their *enforcement* on the Final Constitution.[2] That said, the international norms are not without purpose in our polity: the broad and long-standing norms of international law play an essential part in determining the meaning of the constitutional right to a healthy environment.

(a) Importance of international perspectives — nature of the right

Why do we want to protect a right to a healthy environment? Two schools of thought answer this question: anthropocentric and deontological. On the anthropocentric approach a healthy sustainable environment is of purely instrumental value: the environment serves the important ends of man. It promotes health, happiness and social cohesion.[3] The deontological approach, on the other hand, views a healthy, sustainable natural environment as an end in itself. Such broad philosophical debates again fall outside the ambit of this chapter; but they inform — if only at an intuitive level — the explication of our constitutionally entrenched right.

In contemporary rights discourse, environmental rights have been categorised as 'third-generation rights.' First-generation rights are the traditional civil and political rights — the rights to vote, to a fair trial, freedom of expression and so on. Socio-economic rights — rights to food, housing, healthcare, education — are labelled 'second-generation' rights. The third generation of rights emerged only after the adoption of the 1966 human rights covenants[4] and they are often referred to as 'solidarity rights'. In addition to the right to a healthy environment, the category also embraces the right to peace and the right to development.[5]

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[1] C Heyns & F Viljoen 'An Overview of International Human Rights Protection in Africa' (1999) 15 *SAJHR* 421.

[2] See FC s 24. See also 1981 African Charter on Human and Peoples' Rights ('the African Charter') art 24.

[3] For a discussion on the issue of anthropocentrism, see M Anderson 'Human Rights Approaches to Environmental Protection: An Overview' in A Boyle & M Anderson (eds) *Human Rights Approaches to Environmental Protection* (1996) 15. See also C Stone 'Should Trees Have Standing? - Towards Legal Rights for Natural Objects' (1972) 45 *USC L Rev* 450.

[4] International Covenant on Civil and Political Rights ('ICCPR') adopted 16 December 1966 (G.A. Res. 2200A (XXI) UN Doc A/6316 (1966) 999 UNTS 171), and the International Covenant on Socio and Economic Rights ('ICESR') adopted 16 December 1966 (G.A. Res. 2200A (XXI) UN Doc A/6316 (1966) 993 UNTS 3).

[5] A Rosas 'So-called Rights of the Third Generation' in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights* (1995) 243.

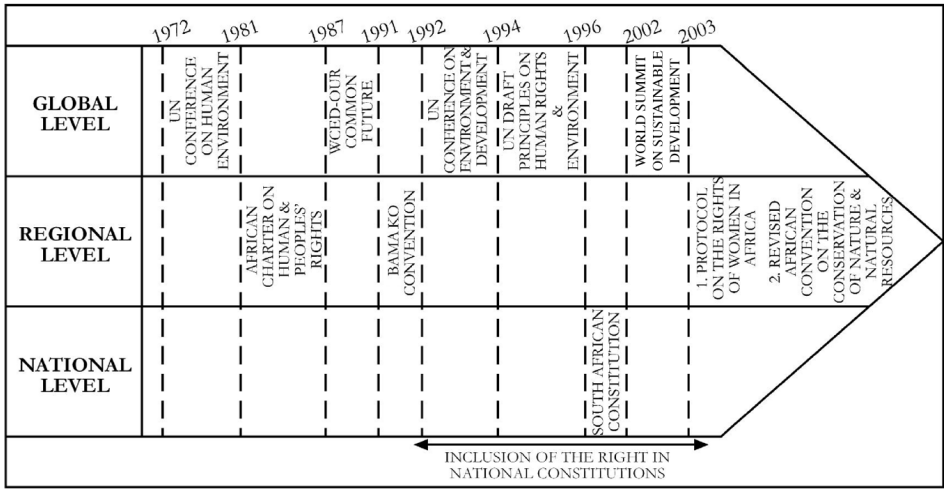
At international law, the content of the broad right to a healthy environment consists of two linked but distinct parts: substantive rights and procedural rights. Substantive rights generally take the form of positive state obligations. They encompass the government's duty to prevent pollution and ecological degradation as well as its obligation to promote conservation and sustainable development. Ultimately, determining the substance of these duties depends upon value judgements made by courts or other decision-makers.

Procedural rights address *how* decisions about the environment should be made, rather than what decisions are ultimately taken. The most common procedural rights are: (1) the right to information concerning the environment; (2) the right to receive and disseminate ideas and information; (3) the right to participation in environmental planning and decision-making, including any prior Environmental Impact Assessment ('EIA'); (4) the right to freedom of association in relation to environmental protection; and (5) the right to effective remedies and redress for environmental harm in administrative or judicial proceedings.[1] While the procedural rights have been widely acknowledged and accepted, the recognition of the substantive dimension of the right has not, as yet, secured the same level of international consensus.

(b) Global level of protection

The necessity of organized efforts to protect the environment only rose to public awareness in the early 1970s. At that time, people began to appreciate that the environment was being placed under ever increasing pressure and was unlikely to sustain itself without coordinated participation, management practices and regulatory frameworks both globally and locally.

KEY EVENTS IN THE RECOGNITION OF THE RIGHT TO AN ENVIRONMENT



[1] See M Anderson 'An Overview' in A Boyle & M Anderson (eds) *Human Rights Approaches to Environmental Protection* (1996) 8.

Increased appreciation for the need for systemic intervention led to a shift from a traditional commitment to conservation, to a co-ordinated approach to 'environmental management'. This shift was formalised when, in 1972, the United Nations General Assembly ('UNGA') convened the United Nations Conference on Human Environment in Stockholm.[1] The Stockholm Declaration[2] provided that 'man has a fundamental right to freedom, equality and adequate conditions of life, in an environment where quality permits a life of dignity and well-being'.[3]

The Stockholm Conference also led to the creation of the United Nations Environmental Programme ('UNEP'), as the primary UN agency responsible for the environment.[4] The leading global environmental authority has as its mission 'to provide leadership and encourage partnership in caring for the environment by inspiring, informing and enabling nations and peoples to improve their quality of life without compromising that of the future generations.'[5] In 1987, the World Commission on Environment and Development developed a new right: 'All human beings have the fundamental right to an environment adequate for their health and well-being'.[6]

Support for the new right continued to grow. In 1990, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities stressed the 'need to identify new trends in international law relating to human rights dimensions of environmental protection.'[7] Then, in 1991, the Commission on Human Rights held that 'all individuals are entitled to live in an environment adequate for their health and well-being.'[8] In the same year, the UN Special Rapporteur on Human Rights and the Environment stressed the need for research into 'the permissible limits to the exercise of certain guaranteed human rights in order to ensure full enjoyment of the right to the environment.'[9] Twenty years after the Stockholm Declaration another important international soft law instrument was created — Agenda 21.

[1] This Conference was held in June 1972 in Stockholm, Sweden ('Stockholm Conference').

[2] Declaration of the United Nations Conference on the Human Environment available at http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503 (accessed on 16 October 2009).

[3] UN doc A/Conf.48/14.rev, Chapter 1 (New York 1972).

[4] The three core 'soft law' instruments that emerged from the Stockholm Conference were presented to the 27th Session of the UN General Assembly ('UNGA') in 1972. These instruments were: (1) the Stockholm Declaration, consisting of 26 guiding principles on current environmental challenges; (2) an Action Plan, consisting of 109 recommendations of international action for environmental management; and (3) a framework for the creation of an organization to implement the Action Plan. See UNGA Res 2997 (XXVII)) and Res 3004 (XXVII).

[5] UNEP (DPDL)/GJS/1/3: *UNEP`s Environmental Law Activities: a 30-year Review (From Stockholm to Johannesburg)* (2002) 2.

[6] World Commission on Environment and Development *Our Common Future* (1987) 348.

[7] Preamble, Human Rights and the Environment - Resolution 1990/7 of the Sub-Commission adopted on 30 August 1990.

[8] Rsolution 1991/44 (5 March 1991).

[9] UN doc.E/CN.4/Sub.2/1991/8 of 2 August 1991.

Agenda 21 emerged from the United Nations Conference on Environment and Development ('UNCED').[1] It serves as a comprehensive plan of action for the implementation of sustainable development. However, the right to a healthy environment played a limited role in the plan. Boyle contends that Agenda 21's failure to give greater recognition to the right to environment is indicative of the continuing uncertainty of the role of human rights law in international environmental law.[2] Nevertheless, the right gained greater traction in the final report of the Special Rapporteur of the UN Commission on Human Rights. The 'Sub-Commission on the Prevention of Discrimination of Minorities, Human Rights and the Environment' contained 27 principles on human rights and the environment'.[3] A more recent development came at the 2002 World Summit on Sustainable Development. The Summit evaluated progress in environmental protection over the previous 10 years and offered a map of the way forward.

(c) Regional level of protection[4]

The African Charter on Human and Peoples' Rights provides for a right to a satisfactory environment and creates an internationally binding human rights instrument for African states.[5] However, prior to the adoption of the Charter, environmental concerns in Africa were primarily limited to natural disasters.[6] As a result, it is not surprising that the negotiators did not foresee the importance of the inclusion of the environmental right, nor its potential to address contemporary environmental concerns that can be ascribed to globalisation, industrialisation, unrestricted development, wars, civil conflicts and other humanitarian crises. Article 24 of the African Charter stipulates that 'all people shall have the right to a satisfactory environment favourable to their development'.[7] While its broad outline is promising, the right contains no clear indication as to what the terms 'satisfactory' and 'environment' entail. This ambiguity allows for both broad and restrictive readings.

The African Charter provides for a supervisory body — the African Commission on Human and Peoples' Rights — to ensure that the rights contained in the Charter are promoted and protected by state parties to the African Charter. The Commission has had two opportunities to consider the meaning of article 24. In

[1] The Conference — also known as the Rio Conference — was held in June 1992 in Rio de Janeiro, Brazil.

[2] A Boyle 'The Role of International Human Rights Law in the Protection of the Environment' in A Boyle & M Anderson *Human Rights Approaches to Environmental Protection* (1996) 43.

[3] UN Doc.E/CN.4./Sub.2/1994/9. These draft principles are reprinted in C Miller *Environmental Rights: Critical Perspectives* (1998) 3.

[4] For a more comprehensive discussion see M Van der Linde 'Regional Environmental Law under the Auspices of the African Union' in HA Strydom & ND King *Fuggle and Rabie's Environmental Management in South Africa* (2nd Edition, 2009) 165-189.

[5] The African Charter was adopted on 27 June 1981 in Nairobi, Kenya and entered into force on 21 October 1986. All 53 countries in Africa are members of the African Union.

[6] The natural disasters that elicited the most concern were drought, deforestation, deterioration of water resources, land concentration and desertification.

[7] African Charter art 24.

Free Legal Assistance Group v Zaire,[1] the Commission might have linked article 24 with article 16 (health) in their consideration of the Zairian government's duty to provide such basic services as clean drinking water. However, the Commission preferred to base its decision solely on article 16.

The Commission could not avoid the problem when, in March 1996, it received a communication from the Social and Economic Rights Action Centre ('SERAC') regarding Nigeria's failure to comply with article 24.[2] In particular, it had to determine the extent to which the degradation of the environment through oil pollution violated the citizens' rights to clean air, water and soil. In October 2001, the Commission concluded that Nigeria had violated this contentious right and offered remedial recommendations pertaining to the position prevalent in the Niger Delta.[3] According to the African Commission, the Nigerian government had failed to fulfil its minimum obligations under the African Charter by participating directly in the contamination of the environment (air, water and soil pollution) which, in turn, adversely affected the health of the Ogoni people. Furthermore, the government had failed to protect the local community against the harm caused by an oil consortium and had failed to conduct the requisite impact and risk assessment studies on the environment and local communities.[4] In making these findings, the Commission gave substantial content to article 24. The right to a satisfactory environment, the Commission held, requires a government to:

1 take reasonable measures to prevent pollution and ecological degradation;[5]
2 promote conservation and ensure ecological sustainable development and the use of natural resources;[6]
3 permit independent scientific monitoring of threatened environments;[7]
4 undertake environmental and social impact assessments prior to industrial development;[8]
5 provide access to information to communities involved;[9] and
6 grant those affected an opportunity to be heard and participate in the development process.[10]

SERAC gives content to both the procedural and substantive dimensions of the right. Procedurally, it establishes two rights: (a) the right to access information about the environment or potential threats to the environment; and (b) the right to have one's case heard in the event that one's environmental rights are impaired or threatened. The judgment also delineates the substantive duties borne by the

[1] *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v Zaire* Communications 25/98, 47/90, 56/91 and 100/93.

[2] *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 ('*SERAC*').

[3] For a detailed discussion on the *SERAC* decision, see M van der Linde & L Louw 'Considering the Interpretation and Application of Article 24 of the African Commission on Human and Peoples' Rights in Light of the *SERAC* Communication' (2003) 3 *AHRLJ* 167.

[4] *SERAC* (supra) at para 50.

[5] *SERAC* (supra) at para 52.

[6] Ibid.

[7] Ibid at para 53.

[8] Ibid.

[9] Ibid.

[10] Ibid.

government: to (a) prevent pollution, (b) limit ecological degradation and (c) promote conservation and sustainable development. These obligations reflect two central international environmental principles: the *preventative principle* and the *duty of care principle*.[1] The *SERAC* obligations emphasise the socio-economic nature of these rights and are thus contingent upon the financial resources of the Nigerian — or any other African — government.

A number of smaller instruments also provide recognition of the environmental right at the regional level.[2] The most interesting is the Protocol to the African Charter on the Rights of Women. This protocol places an interesting spin on the protection of environmental rights.[3] The Protocol takes cognisance of the intimate relationship between women and the environment; it contains no fewer than five articles that deal specifically with environmental issues and women's rights.[4] The Protocol provides for a woman's general right to live in a healthy and sustainable environment,[5] but then goes on to oblige state parties to involve women in environmental management at all levels, to promote research into new and renewable energy sources and to facilitate women's access to these resources.[6] A number of other provisions give greater content to these obligations.[7]

A particularly intriguing dimension of the protections afforded by the Protocol is its recognition of the value of indigenous knowledge. The role of women in traditional agrarian societies often grants them a deep, if tacit, understanding of ecosystems. Traditional medicines constitute a significant and particularly valuable account of this tacit knowledge. In order to safeguard real, if unregistered, intel-

[1] M Kidd *Environmental Law: A South African Perspective* (1997) 8.

[2] See, for example, the Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Waste within Africa ('Bamako Convention') available at www.chr.up.ac.za/hr_docs/african/docs/oau/oau8.doc (accessed on 16 October 2009). The Bamako Convention was adopted in 1991 and entered into force in 1998. For discussions of this Convention see D Tladi 'The Quest to Ban Hazardous Waste Import into Africa: First Bamako and Now Basel' (2000) 33 *CILSA* 210 and M van der Linde 'African Responses to Environmental Protection' (2002) 35 *CILSA* 99.

[3] The Protocol places States under an obligation to regulate the management, processing and storage of domestic waste. States must also ensure that proper standards are followed with respect to the storage, transportation and destruction of toxic waste. Art 19*(a)*. Unfortunately, the Protocol fails to engage the transnational movement of hazardous waste.

[4] Preamble (para 6), arts 15, 16, 18 & 19.

[5] Art 18(1).

[6] Art 18(2) *(a)* & *(b)*. In this regard, the Protocol reaffirms commitment to women and sustainable development provided for in the Preamble to the United Nations Plan of Action on the Environment and Development.

[7] The Protocol demands that state parties ensure that women enjoy full participation in the development process (art 19*(a)*) and in the implementation and evaluation of development policies (art 19*(b)*). It guarantees women's access to land and their right to property. Art 19*(c)*. Flexible banking and lending systems must be put in place to ensure women's access to credit. Art 19*(c)* and *(d)*). Similarly, the Protocol emphasises the traditional exclusion of women from income-generating activities that relate to the use of natural resources. Women must be in a position to provide sustenance to their families and to participate in economies, micro or macro. Art 19(5). Of perhaps greater moment are obligations on member states to ensure access to clean drinking water, land, sources of domestic fuel and the means of producing nutritious food and a duty to establish adequate storage systems. Art 15.

lectual property rights in such medicines, states are placed under an obligation to ensure indigenous knowledge systems are protected and developed.[1]

A final important, and more recent, African initiative is the Revised African Convention on the Conservation of Nature and Natural Resources.[2] This regulatory environmental treaty recognises numerous 'soft' law instruments and treaties. In particular, it vouchsafes the right of all people to a satisfactory environment favourable to their development.[3] It also places procedural obligations on states to disseminate environmental information, to ensure public access to environmental information, grants access to justice, and requires public participation in environmental decision-making.[4]

(d) National Level of Protection

Numerous African countries have constitutionally entrenched some variation on the right to a healthy and a sustainable environment.[5] The protection generally comes in three forms. First, some constitutions require the state to protect the environment. Others grant individual rights to a healthy environment. The third form imposes duties on individuals to protect the environment. Some constitutions require some or all of the above.[6]

A constitutionally entrenched environmental right possesses numerous benefits. First, it can provide a 'safety net' when existing laws or policies fail to address a given environmental problem. Second, an environmental right can place a brake on economic programmes that harm the environment. Third, the provision of procedural environmental rights should promote greater public participation in the process of interpreting and enforcing substantive environmental rights.[7]

50.3 South African constitution

Section 24 of the Final Constitution is the ultimate source of all environmental rights in South Africa. However, FC s 24 must be understood in conjunction

[1] Art 18(2)*(c)*.

[2] For a detailed discussion on the 1968 Convention, the revision process and the Revised 2003 Convention see M van der Linde 'A Review of the African Convention on Nature and Natural Resources' (2002) 1 *AHRLJ* 33.

[3] Art III.

[4] Art XVI.

[5] These countries include: Angola (art 24), Benin (arts 27–29), Burkina Faso (art 29), Cameroon (preamble), Cape Verde (art 72), Chad (arts 47–48), Comoros (preamble), Congo (arts 35–6), Cote d'Ivoire (art 19), Ethiopia (art 44), Gabon (art 1(8)), The Gambia (art 215), Ghana (art 36*(g)*), Guinea (art 19), Lesotho (art 36), Madagascar (arts 35; 39), Malawi (art 13), Mali (art 15), Mozambique (arts 37;72), Niger (art 27), Nigeria (art 20), Sao Tome & Principe (art 48), Senegal (art 8), Seychelles (art 38), South Africa (art 24), Sudan (art 13), Togo (art 41), and Uganda (art 39).

[6] I Koppen & K Ladeur 'Environmental Rights' in A Casesse, A Clapham & J Weiler (eds) 'Human Rights and the European Community: Substantive Law' (1991) 21; JB Ojwang 'Environment Law and the Constitutional Order' (1993) 18; and BT Mekete & JB Ojwang 'The Right to a Healthy Environment: Possible Juridical Bases' (1996) 3 *SAJELP* 169.

[7] For a discussion on the constitutional entrenchment of the environment see C Bruch, W Coker & C van Arsdale 'Breathing Life into Fundamental principles, Implementing Constitutional Environmental Protections in Africa' (2000) 7 *SAJELP* 20.

with the primary piece of environmental legislation: the National Environmental Management Act ('NEMA').[1] NEMA creates the enabling environment (pun intended) for environmental protection.

(a) Historical context and Interim Constitution

Prior to 1990, the government made but one attempt to create an environmental right or entitlement. A draft bill that ultimately became the Environmental Conservation Act ('ECA') contained a provision that entitled every citizen to a clean and healthy environment. [2] This provision was regrettably deleted from the final version of the Act.[3]

The next move to create an environmental right came during the negotiation of the Interim Constitution.[4] During the Multiparty Negotiating Forum,[5] the various stakeholders offered a broad array of proposals for an environmental right.[6] The ultimate product — the concise right in IC s 29 — accordingly reflects a number of political trade-offs. In its final form, s 29 granted every person an entitlement to an environment 'which is not detrimental to his or her health or well-being.' The wording of IC s 29 was criticized on the grounds that it was anthropocentric: it protected the environment solely in terms of the needs of human beings. It ignored the inherent value of the environment itself.

The environmental right was engaged, but briefly mentioned, by the Constitutional Assembly. Although the Constitutional Assembly received numerous submissions pertaining to an environmental right, language from the Environmental Portfolio Committee that should have been incorporated into the draft Final Constitution was ignored. At the certification hearings, the Constitutional Court heard that the procedure regarding the adoption of the environmental right did not comply with the Constitutional Principles laid down by the Interim Constitution. Although the Constitutional Court acknowledged receipt of these representations, strangely it made no reference to them in its judgment.[7]

[1] Act 73 of 1998.

[2] Act 73 of 1989.

[3] R Lyster 'The Protection of Environmental Rights' (1992) 109 *SALJ* 518.

[4] Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution').

[5] For more on the negotiating process, see S Woolman & J Swanepoel 'Constitutional History' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) §2.4.

[6] The South African Law Commission had a short environmental right highlighting an entitlement to well-being, conservation, and environmental protection. The Constitutional Committee of the African National Congress proposed an elaborate right consisting of 5 subsections. It articulated entitlements and duties related to environmental management, protection control, conservation, pollution, co-operative governance and penalties relating the environmental degradation. The Inkatha Freedom Party and the Pan Africanist Congress offered further alternatives to the NP and ANC proposals.

[7] T Winstanley 'The Final Constitution and the Environment' (1997) *4 SAJELP* 135. See also *Ex Parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), [1996] ZACC 26.

(b) The Final Constitution

The Constitutional Assembly revisited the Interim Constitution's environmental right and eventually accepted a compromise formulation. Section 24 consists of two main parts: the right to a healthy environment and the right to protection of the environment. The Final Constitution notably enhances the content of the environmental right as compared to the Interim Constitution. That said, some have expressed concern about the basic law's ability to achieve the full integration of divergent national and provincial environmental laws.[1] While legitimate concerns, the principles of cooperative government contained in FC chapter 3[2] and chapter 3 of NEMA should go some distance in allaying such fears.

To return to the constitutional text, FC s 24 reads:

> Everyone has the right:
> *(a)* to an environment that is not harmful to their health or well-being; and
> *(b)* to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
> (1) prevent pollution and ecological degradation;
> (2) promote conservation; and
> (3) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

(i) *Constructing the right*

Through the word 'everyone', s 24 acknowledges that the right is to be enjoyed by all people in South Africa, citizens and non-citizens alike. Likewise, its emphasis on preventing future harm to the environment encourages a relaxed approach to the already loose rules for standing.[3]

Section 24 possesses characteristics of both civil rights and socio-economic rights. As a civil right, subsection (a) places a negative obligation on government (and other actors): they must refrain from actions that create an environment harmful to an individual's health or well-being. As a socio-economic right, the government must, under subsection (b), take positive action to promote, protect and fulfil the right. Subsection (b) of s 24 envisages sound management strategies, conservation, environmental education and an integrated approach to resource utilization.

At the core of FC s 24 is the concept of sustainable development. Sustainable development drives the remaining elements of the right. Several recent cases have interpreted and explored the content and application of sustainable develop-

[1] PGW Henderson *Environmental Laws of South Africa* (Vol 1, 1996) 1-3.

[2] For more on co-operative government, see S Woolman & T Roux 'Co-operative Government & Intergovernmental Relations' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 1, September 2009) Chapter 14.

[3] For more on standing, see C Loots 'Standing, Ripeness & Mootness' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 7. For more on benefits, see S Woolman 'Application' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

ment.[1] In *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province*[2] — which instantly became the *locus classicus* on sustainable development in contemporary South African law — the Constitutional Court identified and emphasised the inherent inter-relationship between s 24's rights to the environment, on the one hand, and s 24's rights to economic and social development, on the other:

> What is immediately apparent from section 24 is the explicit recognition of the obligation to promote justifiable 'economic and social development'. Economic and social development is essential to the well-being of human beings …. But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked. … Economy is not just about the production of wealth, and ecology is not just about the protection of nature; they are both equally relevant for improving the lot of humankind.[3]

Earlier, in *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs,* Judge Claassen had held that the constitutional right to an environment is on par with the rights to freedom of trade, occupation, profession and property.[4] As such, when a court engages — often contemporaneously — rights to property, land and freedom of trade and s 24's environmental rights, it must enter into a normative and often empirical assessment of how the rights can best be harmonized. And if the rights cannot be harmonized, then the courts must offer a compelling account of why one right must be given precedence over any other right given the facts in play.[5] Such an ineradicable tension between s 24 and other rights is inevitable: 'By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration *inter alia* socio-economic concerns and principles.'[6]

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[1] This was not always the case. See *Ex parte Mercer & Another* 2003 (1) SA 203 (CC)(The applicants, convicted in the magistrate's Court for harbouring wild animals without the required permit provided for in Nature and Environmental Conservation Ordinance 19 of 1974 (C), challenged the constitutionality of the ordinance in terms of FC s 9 and FC s 24. The application was dismissed by the Court on the grounds that the matter was still pending before the High Court.); *Johan de Kock v Minister of Water Affairs & Others* 2005 (12) BCLR 1183 (CC), [2005] ZACC 12 (In 2005, the Constitutional Court had the opportunity to consider the positive obligation placed on government in terms of s 24(b), but declined to do so. The applicant approached the Constitutional Court directly under Rule 18 and FC s 167(6)*(a)*. The applicant's substantive claim was the government's failure to implement legislation aimed at containing the pollution or to prosecute the Iron and Steel Company ('ISCOR') for significant environmental pollution. Despite the potential for interpreting this obligation, the Court refused the application for direct access. It did, however, direct the Registrar to bring the judgment to the attention of the Law Society of the Northern Provinces so that they might consider aiding Mr de Kock with a challenge in the High Court.)

[2] 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC), [2007] ZACC 13.

[3] Ibid at paras 44-45.

[4] 2004 (5) SA 124 (W)('*BP Southern Africa*').

[5] Ibid at 143.

[6] Ibid at 144.

Socio-economic concerns and principles — including the protection of the environment — will, ultimately, 'test' the limits of the Constitution's commitment to more traditional rights to property and land.

(aa) Meaning of 'environment'

What exactly constitutes the environment? Neither international law, nor academic writing, nor legislation provides a uniform answer to this question. Academic interventions reveal an expansive and a restrictive definition. The restrictive approach limits the extension of the term to nature and natural resources. The expansive — and more widely accepted — definition recognizes that the environment encompasses a variety of physical and social elements.[1] A broad denotation of environment was offered in *BP Southern Africa.* The *BP Southern Africa* court defined the environment as 'all conditions and influences affecting the life and habits of man'.[2] That broad definition fits with the Constitutional Court's move in *Fuel Retailers* to integrate environmental protection with economic development and social cohesion.[3]

As for legislation, NEMA provides a similarly wide understanding. It defines 'environment' as:

> The surroundings within which humans exist and that are made up of:
> (i) the land, water and atmosphere of the earth;
> (ii) micro-organisms, plant and animal life;
> (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
> (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.[4]

The wording of NEMA and our FC s 24 jurisprudence make clear that 'environment' encompasses our natural surroundings and those economic entities and social structures that determine — to a large degree — both our being and our well-being in the world. When determining the extension of the term environment under FC s 24, consideration must be given to the needs, interests and values of both traditional communities as well as the more urbanized South African public.

The decision in *Mapochsgronde Action Group v Eagles Quarries (Pty) Ltd & Others* provides an indication of what it means to extend 'environment' from the natural

[1] See Environment Conservation Act 73 of 1989 ('ECA') s 1 (Defines the environment as inclusive of 'the aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms.') For discussion of this approach, see P Sands *Principles of International Law* (2003) 15; P Birnie & A Boyle *International Law and the Environment* (2001) 5; RF Fuggle & MA Rabie (eds) *Environmental Management in South Africa* (1999) 83-92.

[2] *BP Southern Africa* (supra) at 145.

[3] *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province* 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC), [2007] ZACC 13.

[4] NEMA s 1.

to the cultural.[1] The High Court awarded an interim interdict to halt the commencement of excavations for an open cast granite mine because the mine would not only cause extensive ecological damage to scarce bio-diversity, but also destroy archaeological sites of the Ndundza-Ndebele late Iron Age and 30 Boer forts from the 1882-83 ZAR-Mapoch War. Both sites possess significant educational and historical value.

(bb) Meaning of 'health' and 'well-being'

Subsection (a) grants everyone an entitlement to an environment that satisfies *two* criteria. First, the environment must not be harmful to a person's health. Second, the environment must not be deleterious to their well-being.

(x) Health

(1) General

'Health' in subsection (a) signifies human health. The term extends beyond the mere physical state to include both social and mental components; to use the World Health Organisation's definition, 'health' is 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.'[2] The right to health implies the highest attainable standard of health including both access to health services and healthy living conditions. The Bill of Rights addresses these twin elements of human health through different but related provisions: FC s 27(1) guarantees the rights to access to health services, sufficient food and water and social security; FC s 24*(a)* establishes the right to a healthy environment.

The protection of human health imposes a duty on private parties — as well as organs of state — to prevent and address despoliation of our physical environment. This duty could take the form of the provision of clean uncontaminated water, control of atmospheric emissions, environmental clean-up operations, environmental rehabilitation or integrated waste management. The common law maxim of *sic utere tuo ut alienum non laedas* (literally: 'so use your own as not to injure another's property') expresses the obligation of reasonable use of land and obliges the user of land to extend a certain duty of care towards neighbours — including the prevention of pollution emanating from the land. This rather limited principle — and its close ties to the right to a healthy environment — was confirmed in *Minister of Health and Welfare v Woodcarb (Pty) Ltd*.[3] The *Woodcarb* court allowed an application for an interdict by the Minister of Health and Welfare under the Atmospheric Pollution Prevention Act[4] against a company that had been operating a scheduled incineration process without the required registration certificate. Neighbouring tenants complained to the Minister about the smoke

[1] *Mapochsgronde Action Group v Eagles Quarries (Pty) Ltd & Others* 2002 (TPD)(Unreported decision on file with the authors).

[2] Constitution of the World Health Organization, Preamble, available at www.who.int/governance/eb/who_constitution_en.pdf (accessed on 16 October 2009).

[3] 1996 (3) SA 155 (N)('*Woodcarb*').

[4] Act 45 of 1965.

emissions from the sawmill plant. The court held that smoke emissions without the necessary certificate were a violation of the neighbours' right to 'an environment that is not detrimental to their health or well-being' contained in the Interim Constitution.[1] Although the *Woodcarb* court found a violation of the right to an environment that is not detrimental to health or well-being, it did not offer a meaningful interpretation of these concepts.

FC s 24 extends the common law duty of care towards neighbours to excessive 'noise pollution'. In *Lasky & Another v Showzone CC & Others,* the owner of an existing theatre-restaurant was instructed to reduce the noise from their premise's club which interfered with the applicant's right to undisturbed use and possession of the next door property.[2] The court held that even though the applicant had purchased the property knowing it was next to a theatre-restaurant in a central business district, that did not mean the entertainment facility could not be restrained from causing unreasonable, disturbing noise.[3] Similarly, in *Lone Creek River Lodge & Others v Global Forest Products & Others*, the High Court handed down an interdict that prevented a sawmill and plywood plant from driving heavy logging trucks that created an unreasonable level of noise past a neighbouring luxury guesthouse at night, over weekends and on public holidays.[4] The court confirmed that the applicants had a 'clear right to use and enjoy their property and to do their business as a guest house free from unlawful interference by others': in this case, that meant to be free from unreasonable noise.[5] For our purposes, it is equally important that the court confirmed that FC s 24 and s 28 of NEMA embraced this 'trite principle of our common law'.[6]

(2) Pollution: Duty of care

Section 28 of NEMA gives content to the right to a healthy environment by codifying the common-law duty of care against the background of two international environmental soft law principles — introduced into South African law through s 2 of NEMA — 'the polluter pays' and 'life cycle management'. Section 28(1) places an extensive general duty of care on polluters to take reasonable measures to prevent significant pollution or environmental degradation and to take remedial steps to minimise and to rectify unavoidable pollution or environmental degradation.[7] NEMA does not expressly define the meaning of 'significant pollution' for purposes of determining when a duty of care would be triggered. However, while a *de minimis* change in the biological composition of a particular environment would probably not qualify as significant pollution, s 3 of NEMA does expressly cover a wide category of activities that determine whether the duty of care has been discharged:

[1] *Woodcarb* (supra) at 164 F.
[2] 2007 (2) SA 48 (C).
[3] Ibid at paras 26-28.
[4] [2007] ZAGPHC 307 ('*Lone Creek*')
[5] Ibid at 8.
[6] Ibid.
[7] See National Water Act 36 of 1998 s 19 for a similar duty of care to prevent pollution of water sources.

(i) Conduct an environmental impact assessment by investigating, assessing, and evaluating the impacts of the pollution or environmental degradation;[1]
(ii) Educate employees of the environmental risks involved in such activities;
(iii) Cease, modify, control the causes of the pollution;
(iv) Contain, prevent movement of pollutants;
(v) Eliminate the source of pollution; and
(vi) Remedy the effects of the pollution or degradation.[2]

In the case of environmental emergencies, s 30 of NEMA sets out a similar duty of care, coupled with an obligation to take specific remedial action, to avoid or minimise the effects of the emergency.[3]

(3) Environmental strict liability[4]

The gamut of legal subjects who are subject to the duty of care is extremely wide. Section 28(2) of NEMA places parties such as the owners, controllers (e.g. lessees) and users (e.g. contractors) of the land or premises under a duty to prevent future or address historical pollution or environmental degradation. The extent of the obligation to remedy past environmental wrongs was the subject of dispute in *Bareki NO v Gencor Ltd & Others*.[5] The High Court had to decide whether the defendants' environmental duty of care in terms of ss 28(1) and (2) of NEMA rendered them liable for historic asbestos fibre pollution and environmental degradation caused by their mining operations from 1976 to 1981. The court analysed the difference between retrospective and retroactive legal effect of statutory provisions in light of the rebuttable common-law presumption against retrospective statutes and the constitutional endorsement of the rule of law. It concluded that the principle of fairness required that s 28 of NEMA should not have retrospective legal effect before the date of its enactment in 1999. In order to address this limitation on liability for the rehabilitation of historic pollution, the legislature passed s 35 of the National Environmental Management: Waste Act.[6] Section 35 expressly extends the obligation to remediate historically contaminated land to contamination that arose before commencement of the Act.

Section 28 of NEMA also allows the government to intervene if a responsible party fails to adequately remedy environmental degradation and to recover all the costs of the operation. The categories of parties that may be liable under s 28 are:

[1] See *Hichange Investments (Pty) Ltd v Cape Produce (Pty) Ltd t/a Pelt Products & Others* (EC)(Unreported Case No 1050/2001)(copy on file with the authors) 31. (Leach J held that this duty is discharged only when an EIA occurs after an identified activity has taken place, i.e. as part of reasonable steps to address significant pollution.) See also JHE Basson 'Retrospective Authorisation of Identified Activities for the Purposes of Environmental Impact Assessment' (2003) 10 *SAJELP* 133.

[2] NEMA s 28(3).

[3] NEMA s 30. See National Water Act s 20 for the duty of care during emergency incidents that may affect water quality.

[4] Although the provisions of NEMA pertaining to strict environmental liability are considered, thought should be given to similar provisions contained in other environmental legislation.

[5] 2006 (1) SA 432, 436E-445C (T)(De Villiers J).

[6] Act 59 of 2008.

(a) Parties directly or indirectly responsible for the pollution. The latter category may include financial institutions or investors that finance projects that cause significant pollution or degradation (e.g. a mine, road, a dam, a pipeline, an industrial plant or a housing development). These institutions may be liable for environmental rehabilitation costs if they failed to ensure that adequate mechanisms for environmental protection were put in place and strictly adhered to by the borrower who caused the pollution;

(b) The land-owner at the time of the pollution or degradation or his or her successor in title. New property owners of industrial property are at risk and should, as a standard practice, conduct an environmental due diligence investigation and set off their risk for future environmental rehabilitation liability through indemnification, environmental insurance policies, or reduced purchase consideration for the transaction; or

(c) The person in control or using the property at the time when the pollution or degradation occurred; or

(d) Anyone that had negligently failed to prevent the pollution or degradation.

(y) Well-being

The second constitutional criterion, 'well-being', proves to be much more elusive. While well-being does not exclude health (mental or physical), the term captures economic, social, aesthetic and emotional considerations. The desire to protect the 'fynbos' unique to the Western Cape from a hazardous building project might, for example, be captured under an expansive understanding of well-being.[1]

Wildlife Society of Southern Africa & Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa offers a good example of a situation in which 'well-being' rather than 'health' is at issue.[2] The applicants had challenged the decision of traditional leaders to grant occupation rights to private individuals in a conservation area on the Wild Coast. The new occupants had caused extensive ecological degradation. Since their health was not ill-affected, the applicants contended that the government had a duty to enforce the protected status of the area in terms of the 'well-being' all South Africans experience in having protected and sustainable ecosystems. Unfortunately, the court did not venture an interpretation of 'well-being' and decided the case on other grounds.

So what then is the source of such an argument from well-being? One answer is that the Constitution and NEMA both recognize the 'aesthetic' dimension inherent in the right to an environment that protects one's well-being.

The courts' response to this proposition has been mixed. In *Eagles Landing Body Corporate v Molewa NO & Others*,[3] the High Court declined to waive a cost order against a losing party — as provided for by s 32(2) of NEMA — who had brought an application in the interest of environmental protection. Kroon J found that while the applicants had acted in the interest of the environment, it had used that interest 'to achieve another purpose in the interests of its members,

[1] J De Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (1999) 394.
[2] 1996 (3) SA 1095 (Tk).
[3] 2003 (1) SA 412 (T).

viz the protection of the view from the sectional title land.'[1] In a similar vein, the *Paola v Jeeva NO & Others* court explicitly rejected the applicant's argument that the magnificent view that he enjoyed from his property — which would be obscured by the proposed alterations to his neighbour's property — enjoyed legal protection.[2] The court held that: (a) it would be irrational to bar his neighbours from building a similar house to that of the applicant; (b) it 'would result in chaos and great confusion in the development world'; and (c) it would lead to a 'multiplicity of actions [which] might harm the effective administration of justice by tying the Courts up in the adjudication of a new category of claims' relating to the right of one property to insist that another property must refrain from obstructing its view.'[3]

The reasoning of the two High Court cases fails to take account of that portion of the definition of 'environment' in NEMA that is designed to protect those 'aesthetic properties and conditions' of the physical environment that positively 'influence human well-being.' A room with a view would seem to clearly fall within that definition.[4] This criticism of the High Court decisions was — by implication — endorsed in the appeal of *Paola v Jeeva No & Others*.[5] The Supreme Court of Appeal reversed the decision of the court *a quo* by protecting the appellant's exceptional view of the Durban coast that would have been severely obscured by the respondent's approval of plans for extensions to the neighbouring property. Although the case was decided on the basis of the unlawfulness of the approval of the extension plans, the Court held that it was clear from the facts that the proposed execution of the plans will 'significantly diminish the value of the applicant's adjoining property' and was therefore contrary to the applicable legislation.[6] The reduction in the value of the property that would result from the applicant's inability to enjoy the magnificent views from his property forms part of the field of protection of the applicant's right to an environment that is not detrimental to his well-being. The Court's reasoning clearly recognizes that the aesthetic value (of a magnificent view or some other feature of the environment) falls within the protective ambit of FC s 24*(a)*.

That such a split in understanding the meaning of 'well-being' should exist — and may continue to exist — was expressly recognized by the High Court in *HTF Developers (Pty) Ltd v the Minister & Others*. The High Court noted that the term 'well-being' is 'open-ended and … manifestly … incapable of a precise definition'.[7] That said, the *HTF Developers* Court confirmed that FC s 24*(a)*'s

[1] *Eagles Landing Body Corporate v Molewa NO & Others* (supra) at para 106.
[2] 2002 (2) SA 391 (D).
[3] Ibid at 406.
[4] NEMA s 1(1).
[5] 2004 (1) SA 396 (SCA)(Farlam AJ).
[6] Ibid at paras 11-16, 23.
[7] 2006 (5) SA 512 (T)('*HTF Developers (HC)*') at para 18. The High Court decision was overturned on appeal in *HTF Developers (Pty) Ltd v the Minister of Environmental Affairs* 2007 (5) SA 438 (SCA), which was in turn overturned by the Constitutional Court in *MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Limited* 2008 (2) SA 319 (CC), 2008 (4) BCLR 417 (CC), [2007] ZACC 25. However, nothing in the later decisions contradicts the High Court's wide construction of 'well-being'.

(and NEMA s 24's) recognition of an entitlement to 'well-being' must, at a minimum, be construed as encompassing 'a sense of environmental integrity; a sense that we ought to utilise the environment in a morally responsible and ethical manner.'[1] Thus, however elusive the definition of 'well-being' may be, the Supreme Court of Appeal and one High Court have recognized its aesthetic and moral dimensions.

(cc) Meaning of 'present and future generations'

The concepts of inter-generational equity and intra-generational equity are reflected in FC s 24*(b)*'s reference to 'present and future generations'. Inter-generational equity places present generations under an obligation to ensure that the environment and extant natural resources are equitably preserved and protected for the full enjoyment of future generations.[2] This principle has also been incorporated in a number of treaties and soft law instruments.[3]

In *The Director, Mineral Development, Gauteng Region & Sasol Mining (Pty) Ltd v Save the Vaal Environment & Others*,[4] the Supreme Court of Appeal heard the objections of the Respondent who opposed, on environmental grounds, an application by SASOL Mining (the mineral rights holder) for a mining license in terms of s 9 of the Minerals Act.[5] The Appellant argued that the respondent would at a later stage have an opportunity to state their objections, i.e. during the approval of the environmental management program ('EMPR') in terms of s 39 of the Act. SASOL Mining intended to start with open-cast, strip mining in an environmentally sensitive area close to the Vaal River. The court accepted evidence that described the irreversible environmental damage that the open cast mine would cause: the destruction of the Rietspruit Wetland, the threat to fauna and flora, constant noise, light, dust and water pollution that would affect the spiritual and aesthetic quality of the area, loss of water quality that would destroy important recreational activities and small businesses and the subsequent devaluation of property in that area.[6]

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[1] *HTF Developers (HC)* (supra) at para 18 quoting J Glazewski *Environmental Law in South Africa* (2000) 86.

[2] See E Weiss 'In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity' in P Hayden (ed) *The Philosophy of Human Rights* (1989); E Weiss 'The Planetary Trust: Conservation and Intergenerational Equity' (1984) 11 *Ecology Law Quarterly* 495; E Weiss 'Our Rights and Obligations to Future Generations for the Environment' (1990) 84 *AJIL* 199; L Gundling 'Our Responsibility to Future Generations' (1990) 84 *AJIL* 207.

[3] See, for example, the United Nations Convention on Climate Change (1992), text available at http://unfccc.int/resource/docs/convkp/conveng.pdf (accessed on 17 October 2009); the Convention on Biodiversity (1992), text available at http://www.cbd.int/doc/legal/cbd-un-en.pdf (accessed on 17 October 2009); the African Convention on the Conservation of Nature and Natural Resources (1968), available at http://www.africa-union.org/root/au/Documents/Treaties/Text/Convention_ Nature%20&%20Natural_ Resources.pdf (accessed on 17 October 2009); Stockholm Declaration (1972), text available at www.unep.org; and the Rio Declaration (1992), text available at www.unep.org. See further, *Minors Oposa v Secretary of Department of Environmental and Natural Resources* reprinted in *International Legal Materials* (1994) 173 (Philippine Supreme Court's elucidation of the principle of intergenerational equity).

[4] 1999 (2) SA 709, 719C-D (SCA), 1999 (8) BCLR 845 (SCA)('*Save the Vaal*').

[5] Act 50 of 1991.

[6] *Save the Vaal* (supra) at 714-715.

With respect to the principle of inter-generational equity, the court relied solely upon the Brundtland Commission Report.[1] The court's decision to shape its decision in terms of international 'soft' law comes as something of a surprise given that the principle of inter-generational equity is expressly recognized in FC s 24(b) and s 2 of NEMA. But let's leave that oddity of the judgment aside. Let us ask instead what its benefits might be.

Although inter-generational equity is not a principle of international law that is directly enforceable between the legal subjects of international law, it is generally regarded as a principle of international 'soft' law that forms the context for interpretation of international law rules and principles. The reliance on international law creates a precedent whereby, through analogy, the remaining principles of international environmental soft law may have legal effect in South African law as directly enforceable legal principles. Pace s 2 of NEMA, international environmental soft law might have somewhat greater purchase than mere 'interpretational guidelines'. Secondly, although this principle applies directly to the conduct of an organ of state — the decision of the Director to issue the mining licence in terms of s 9 — it also applies, in result, to the conduct of a private party — the mining rights holder who intended to conduct open cast mining in an environmentally sensitive area. Not only does FC s 24 — read with FC s 8(2)[2] — create directly enforceable legal rights between private parties, but the principles of international environmental soft law can now be said to have direct binding legal effect between private parties. In essence, the principle of intergenerational equity underwrites a set of legal duties to conduct construction or manufacturing or mining activities in an ecologically sustainable manner; to manage waste streams effectively in terms of the 'polluter pays' and 'cradle to grave' principles; and to take adequate steps in terms of the precautionary principle to prevent greenhouse gas emissions and their contribution to global warming.

(dd) Meaning of 'ecologically sustainable development'

(x) Sustainable development

(1) International Law

UNEP's mission statement articulates the basic principles of sustainable development.[3] It describes a co-ordinated set of policies relating to environmental protection and management that enable 'nations and peoples to improve their quality of life without compromising that of future generations.'[4] This proposition captures both the notions of intra-generational equity and inter-generational equity. It echoes the World Commission on Environment and Development's tra-

[1] *Save the Vaal* (supra) at 719.

[2] For more on direct application of the Bill of Rights, see S Woolman 'Application' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

[3] 2 See generally D Tladi *Sustainable Development in International Law: An Analysis of Key International Instruments* (2007)(discussion of the international dimensions from a South African perspective).

[4] UNEP *Capacity Building for Sustainable Development: An Overview of UNEP Environmental Capacity Development Activities* (2002) 11.

ditional approach. In short, sustainable development is 'development that meets the needs of present generations without compromising the ability of future generations to meet their own needs.'[1]

Sands teases out the content of sustainable development in international law in terms of four basic principles:

(i) the principle of intergenerational equity — preservation of natural resources for the benefit of future generations;
(ii) the principle of sustainable use — the aim of exploiting natural resources in a 'sustainable', 'prudent', 'rational', 'wise' or 'appropriate' manner;
(iii) the principle of equitable use or intra-generational equity — exploitation of natural resources in an equitable manner where exploiting states take into consideration the needs of other states; and
(iv) the integration principle — ensure the integration of environmental considerations into economic and other developmental plans, programmes and projects as well as that development needs are taken into consideration when environmental objectives are applied.[2]

In *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* the International Court of Justice dealt with the rights and obligations of the respective parties under a bilateral treaty between Hungary and Slovakia concerning the construction and subsequent operation of the Gabcikovo-Nagymaros Barrage System.[3] The Court attempted to reconcile economic development with a commitment to sustainable development:

> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — … new norms and standards have been developed… . Such new norms have to be taken into consideration, and such new norms standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with the protection of the environment is aptly expressed in the concept of sustainable development.[4]

In a separate opinion, Weeramantry J argued that the principle of sustainable development was sufficiently well-accepted to be considered a part of customary international law:

> The principle of sustainable development, in my view, is an integral feature of modern international law. … The principle of sustainable development is thus part of modern

[1] Brundtland (Commission) Report *Our Common Future* (1987) 43.

[2] P Sands *Principles of International Law* (2003) 253. Cited in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province* 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC), [2007] ZACC 13 ('*Fuel Retailers*') at para 51 n 57 and *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs* 2004 (5) SA 124, 143-144 (W)('*BP Southern Africa*').

[3] 37 ILM 162, available at http://www.icj-cij.org/docket/files/92/7375.pdf (accessed on 17 October 2009).

[4] Ibid at para 140.

international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community.[1]

(2) Application in South African law

South African case-law has considered both inter-generational equity and sustainable development.[2] In *Minister of Public Works & Others v Kyalami Ridge Environmental Association*, the Constitutional Court had an opportunity to consider FC s 24.[3] Heavy rains had destroyed the homes of approximately 300 people living in Alexandria township. A transit camp was to be established on state land, adjacent to Leeuwkop Prison until permanent housing could be provided. A High Court application by existing residents of the area and other stakeholders sought an interdict restraining the respondents from proceeding with the establishment of the camp. The applicants claimed that government's decision was in contravention of the relevant town-planning scheme and applicable environmental legislation. The government contended that it was under a constitutional obligation to assist the flood victims, that this decision by the state as owner of the land was not an administrative decision and that it consequently did not require authorisation or permission. The High Court granted an interim interdict and ordered the Department to consider environmental impact studies and any relevant laws. The Minister appealed directly to the Constitutional Court claiming that the matter raised important constitutional issues.

In a unanimous judgment, the Constitutional Court upheld the appeal. It first found that the government, as owner of the Leeuwkop land, has the same rights and many of the same obligations as other land owners. If the Government complies with binding legislation and works within the framework of the Constitution, then it is entitled to enjoy those rights. Given that government's decision to establish the camp did not violate the rights of residents under environmental, land and township legislation nor infringe s 24 of the Constitution, the government could proceed as it did. Moreover, in considering the correct course of action to be taken, the committee appointed by the government had acted in a procedurally fair manner: it had taken into account the nature of the decision, the rights affected by the decision, the circumstances in which the decision was made, and the consequences of the decision. The constitutional dispute that truly seized the Court was whether the residents' s 26 right to housing had been unconstitutionally limited. Here too the Court found that under the dire and desperate circumstances under which the residents found themselves subsequent to the flood, the government's immediate response to the crisis could not be said to violate the residents' right to adequate housing.

Some commentators have argued that *Kyalami Ridge* would have been an ideal opportunity for the Court to discuss the principle of sustainable development and to tackle an alleged conflict between economic development and envi-

[1] Although formally recognised in 1972, Weeramantry J effectively traces and discusses the elements of sustainable development to around 223 B.C.

[2] See § 50.3(cc) supra for a discussion of intergenerational equity and sustainable development in *Save the Vaal* (supra).

[3] 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC), [2001] ZACC 19 ('*Kyalami Ridge*').

ronmental protection.[1] Although the Court could have considered sustainable development, this argument does not properly appreciate the scope and application of sustainable development. The case only raised competing commitments to adequate housing and environmental protection: economic development did not feature.[2] Contemporary definitions of sustainable development recognize three distinct, but necessarily overlapping, domains. Sustainable development must be (1) environmentally appropriate, (2) socially beneficial and (3) economically viable.[3] By framing sustainable development as mediating a tension solely between environmental and economic interests, many commentators fail to engage the second component of sustainable development: the attendant benefit or harm to the community in which the development takes place.

The Court had the opportunity to properly address the issue of sustainable development in *Fuel Retailers*.[4] The case concerned the environmental authorisation for a new petrol filling station in the town of White River. The Court was of the view that the environmental authorities' consideration of the environmental impact study failed to evaluate adequately and consider the socio-economic impact of the new filling station. The Department contended that the need, desirability and sustainability of the new filling station had already been adequately considered by the local authority when it approved the rezoning application for the filling station. This decision ostensibly freed the Department from any obligation to reassess those factors as part of the environmental impact assessment process. Not so, held Justice Ngcobo. The kind of 'triple bottom line' approach that forms an essential part of an environmental impact assessment requires far more of a decision-maker than a mere assessment of need and desirability undertaken by town planners. The environmental impact assessment process used by the environmental authorities is a separate and distinct process from the rezoning processes of local authorities.[5] The environmental authorities should, under s 22 of ECA, have ensured that all of the significant and cumulative environmental, social and economic consequences of the planned development had been investigated. This investigation had to be undertaken, in turn, in terms of the environmental principles in ss 2, 23 and 24 of NEMA in order to achieve the desired goal of sustainable integrated environmental management.

[1] L Ferris & D Tladi 'Environmental Rights' in D Brand & C Heyns *Socio-Economic Rights in South Africa* (2004).

[2] FC ss 24 and 26.

[3] See M van der Linde & E Basson 'Sustainability Auditing' in I Sampson (ed) *The Guide to Environmental Auditing in South Africa* (2004); M van der Linde 'Forestry Stewardship, Sustainable Forest Management and Auditing' in I Sampson (ed) *The Guide to Environmental Auditing in South Africa* (2004).

[4] *Fuel Retailers (supra).*

[5] *Fuel Retailers* (supra) at para 85.

The Court's analysis of the constitutional guarantee of sustainable development in FC s 24*(b)* is a *tour de force*.[1] Firstly, the Court accepted the contemporary meaning of the principle of sustainable development in international law,[2] as part of South African law.[3] Secondly, the Court confirmed the interrelationship and interdependence of environmental, economic and social interests. The *Fuel Retailers* Court writes:

> The Constitution recognizes the interrelationship between the environment and development; indeed it recognizes the need for the protection of the environment while at the same time it recognizes the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. … Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment… . Sustainable development does not require the cessation of socio-economic development but seeks to regulate the manner in which it takes place. It recognizes that socio-economic development invariably brings risk of environmental damage as it puts pressure on environmental resources. It envisages that decision-makers guided by this concept of sustainable development will ensure that socio-economic developments remain firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support future socio-economic developments… .
>
> NEMA, which was enacted to give effect to section 24 of the Constitution, embraces the concept of sustainable development. Sustainable development is defined to mean 'the integration of social, economic and environmental factors into planning, implementation and decision-making for the benefit of present and future generations. This broad definition of sustainable development incorporates two of the internationally recognized elements of the concept of sustainable development, namely, the principle of integration of environmental protection and socio-economic development, and the principle of inter-generational and intra-generational equity. In addition NEMA sets out some of the factors that are relevant to decisions on sustainable development. These factors largely reflect international experience. But… these factors are not exhaustive… . [NEMA] requires that the interests of the environment be balanced with socio-economic interest. Thus, whenever a development which may have a significant impact on the environment is planned, it envisaged that there will always be a need to weigh considerations of development, as underpinned by the right to socio-economic development, against environmental considerations, as underpinned by the right to environmental protection. …
>
> [NEMA] contemplates that environmental decisions will achieve a balance between environmental and socio-economic developmental considerations through the concept of

[1] The Court's approach, however, is not without its critics. See, for example, T Murombo 'From Crude Environmentalism to Sustainable Development: *Fuel Retailers*' (2008) 3 *SALJ* 486; L Ferris 'Sustainable Development in Practice: *Fuel Retailers Association of South Africa v Director-General Environmental Development, Department of Agriculture, Conservation and Environment, Mpumalanga Province*' (2008) 1 *Constitutional Court Review* 235; D Tladi '*Fuel Retailers,* Sustainable Development & Integrration : A Response to Ferris' (2008) 1 *Constitutional Court Review* 255 (Tladi specifically criticizes the Court's un-nuanced equation of social rights with economic rights as a single coherent socio-economic right which the author argues is based on an incorrect analysis of the principle of sustainable development).

[2] See §50.3*(c)*(i)(dd)*(x)*(1) supra.

[3] *Fuel Retailers* (supra) at paras 46-57.

> sustainable development … NEMA requires that the cumulative impact of a proposed development, together with the existing developments on the environment, socio-economic conditions and cultural heritage must be assessed. The cumulative effect of the proposed development must naturally be assessed in the light of existing developments. A consideration of socio-economic conditions … includes the consideration of the impact of the proposed development not only in combination with the existing developments, but also its impact on existing ones… .
>
> Unsustainable developments are in themselves detrimental to the environment. … It is … not enough to focus on the needs of the developer while the needs of the society are neglected. One of the purposes of the public participation provision of NEMA is to afford people the opportunity to express their views on the desirability of a [development] that will impact on socio-economic conditions affecting [a local population] … . [S]ocio-economic development must be justifiable in the light of the need to protect the environment. The Constitution and environmental legislation introduce a new criterion for considering future developments. Pure economic factors are no longer decisive. The need for development must now be determined by its impact on the environment, sustainable development and social and economic interests. The duty of the environmental authorities is to integrate these factors into decision-making and make decisions that are informed by these considerations. This process requires a decision-maker to consider the impact of the proposed development on the environment and socio-economic conditions. … [Similarly, the developer must] identify and predict the actual or potential impact on socio-economic conditions and consider ways of minimizing negative impact while maximizing benefit. Were it to be otherwise, the earth would become a graveyard for commercially failed developments. And this in itself poses a potential threat to the environment.[1]

(y) Ecologically

FC s 24*(b)*(iii) provides that legislative or other measures must 'secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. The meaning of the term 'ecologically' has not been adequately considered in our jurisprudence. The danger exists that without placing special emphasis on ecological interests, as the Final Constitution requires, a mere mechanical evaluation of environmental rights, economic rights and social developmental rights will result in environmental interests being 'balanced away' during the environmental assessment process of s 24 of NEMA. Sachs J's minority decision in *Fuel Retailers* provides a potential alternative. His approach places greater emphasis on ecological interests during the evaluation of the environmental effect of economic and social interests:[2]

> Running right through the preamble and guiding principles of NEMA is the overarching theme of environmental protection and its relation to social and economic development. This theme is repeated again and again. Economic sustainability is not treated as an independent factor to be evaluated as a discrete element in its own terms. Its significance for NEMA lies in the extent to which it is inter-related with environmental protection. Sustainable development presupposes accommodation, reconciliation and (in some instances) integration between economic development, social development and environ-

[1] *Fuel Retailers* (supra) at paras 44-45, 58-59, 61, 72, 74, 76 and 79-80.
[2] See also Ferris (supra) at 252.

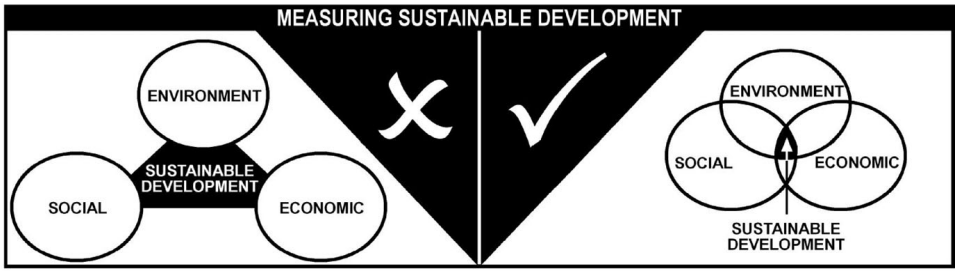
> mental protection. It does not envisage social, economic and environmental sustainability as proceeding along three separate tracks, each of which has to be weighed separately and then somehow all brought together in a global analysis. The essence of sustainable development is [a] balanced integration of socio-economic development and environmental priorities and norms. Economic sustainability is thus not part of a check-list that has to be ticked off as a separate item in the sustainable development enquiry. Rather, it is an element that takes on significance to the extent that it implicates the environment. When economic development potentially threatens the environment it becomes relevant to NEMA. Only then does it become a material ingredient to be put in the scales of a NEMA evaluation.[1]

Similarly, Judge Claassen held in *BP Southern Africa* that sustainable development is

> [t]he fundamental building block around which environmental legal norms have been fashioned, both internationally and in South Africa, and is reflected in s 24(b)(iii) of the Constitution. Pure economic principles will no longer determine in an unbridled fashion whether development is acceptable. Development, which may be regarded as economically and financially sound, will in future be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns.[2]

According to Sachs J and Claassen J decision-makers (and courts) cannot ignore or undervalue the adjective 'ecologically'. They must ensure a result that allocates ecological benefits their proper weight.

Sustainable development — or 'triple bottom line analysis' — usually lies at the heart of environmental impact assessments ('EIAs'). During this process, decision-makers must strike a delicate balance between the three pillars of sustainable development. The diagram below illustrates how these three concepts must be understood holistically and not hierarchically.



Of course, it may not always be possible to satisfy the differing demands of this tri-partite alliance. Given the inherent tension between economic development and environmental protection, decision-makers may often be forced to choose one dimension of sustainable development over another. That 'hard choice' does

[1] *Fuel Retailers* (supra) at para 113.

[2] *BP Southern Africa* (supra) at 144. This approach was confirmed by the Supreme Court of Appeal in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd & Another* 2006 (5) SA 483 (SCA) at para 15.

not necessarily mean that environmental protection must yield to economic development. As *Save the Vaal*[1] suggests, decision-makers who take FC s 24 seriously might find that environmental protection trumps economic development in a given set of circumstances. In short, FC s 24 provides a constitutional basis to refuse an application for a proposed development that will negatively impact on the environment.[2]

This approach to sustainable development applies both to government and private industry. Over the last two decades, South African businesses have been experiencing growing pressure from stakeholders to maintain acceptable standards of internal corporate governance.[3] The third instalment of the King Report ('King III'), released in 2009, makes sustainable development an integral part of good corporate governance. Sustainable development in this context refers to the 3-pillared approach to environmental management and protection.

(ee) Meaning of 'reasonable legislative and other measures'

FC s 24*(b)* requires reasonable legislative and other measures to prevent pollution and ecological degradation, promote conservation and to secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. This provision means that the existing regulatory regime relating to the environment and natural resources in South Africa should be complimented by a process of: (1) amending or replacing existing environmental legislation; (2) adopting new legislation that gives effect to the objectives of this subsection; and (3) interpreting existing legislation as well as the common law and customary law in a manner that promotes the spirit, purpose and objects of the Bill of Rights, including FC s 24.[4]

(w) Reasonable measures

Section 24*(b)* of the Final Constitution places an obligation on the state to protect the environment through 'reasonable' measures, legislative or otherwise. Reasonableness can, it should be noted, operate as an internal qualification in that it restrict a party's obligation under FC s 24(b). The Constitutional Court, in *Government of the Republic of South Africa & Others v Grootboom & Others*, defined reasonableness, in the context of FC s 26, in the following manner:

> The State is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The State is obliged to act to achieve the intended result and the legislative measures will invariably have to be supported by appropriate, well-directed policies and

[1] *The Director, Mineral Development, Gauteng Region & Sasol Mining (Pty) Ltd v Save the Vaal Environment & Others* 1999 (2) SA 709 (SCA), 1999 (8) BCLR 845 (SCA).

[2] The legal definition of sustainable development in NEMA s 2 is contrary to FC s 24*(b)* and thus unconstitutional, because it omits the adjective 'ecologically'. NEMA s 2 creates the impression that economic, developmental and environmental interests are of equal value in the Final Constitution. That is clearly not the case.

[3] See, for example, 'Institute of Directors in Southern Africa' *King Report III on Corporate Governance for South Africa* (2009).

[4] FC s 39(2).

> programs implemented by the Executive. These policies and programs must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the State's obligations. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligations.[1]

Grootboom suggests that FC s 24*(b)* requires flexible but coherent measures to give effect to environmental protection.[2] However, in *BP Southern Africa,* Claassen J noted that while 'it is the Court's duty to subject the reasonableness of these [environmental protection] measures to evaluation', the courts should constantly keep in mind that they are generally 'ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community'.[3]

In terms of FC s 24*(b)*, measures and legislation adopted by the state must be acceptable, rational and based on equitable standards and criteria. The legal standard for reasonable (or justifiable) administrative conduct of organs of state was succinctly described in *Roman v Williams NO.*[4] Firstly this objective test requires the evaluation of the suitability of the conduct. Secondly, the test asks whether the conduct in question was necessary. Finally, the test subjects the conduct to proportionality analysis.[5] Although this statement of the law originates in the very different context of a review of an administrative decision relating to imprisonment, its principles offer our courts useful guidance when they are asked to address FC s 24*(b)* challenges.

(x) Financial constraints

The Constitutional Court's first socio-economic rights case — *Soobramoney v Minister of Health (KwaZulu-Natal)*[6] — has been used to support the contention that where the state fails to prevent pollution or ecological degradation, the lack of financial resources on the part of government can serve as a justification for such non-compliance.[7] In *Soobramoney* the Court held that a state hospital could legitimately refuse to provide expensive treatment to a man with a terminal illness. Some commentators might argue that this line of analysis fails to distinguish between rights that grant an individual entitlement, from rights that cannot be reduced to an individual deliverable object. In point of fact, the Court's approach to reasonableness under FC ss 24, 26 or 27 goes to the government's ability to construct and to execute a plan that delivers, over time and within recognizable constraints, these goods to all the members of our polity. Neither FC s 24, nor

[1] 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), [2000] ZACC 19 at para 42 (Yacoob J).

[2] *BP Southern Africa* (supra) at 142.

[3] Ibid at 143. See also *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC), [2002] ZACC 15.

[4] 1998 (1) SA 270 (C), 1997 (9) BCLR 1267 (C).

[5] Ibid at 1276.

[6] 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC), [1997] ZACC 17.

[7] L Ferris & D Tladi 'Environmental Rights' in D Brand & C Heyns *Socio-Economics Rights in South Africa* (2004). For more on the meaning of the 'within available resources' qualification in other socio-economic rights, see S Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) §33.5*(b)*.

FC s 26, nor FC s 27 is generally understood to guarantee individual remedies. Reasonableness with regard to the environmental right relies rather heavily on regulation through legislation. The nature of the legal object (*Natur der Sache*) of FC s 24 can only be achieved through a variety of measures — integrated environmental management systems, the appointment of qualified officials, environmental education, and conservation programs such as work for water, clean up campaigns, public-private partnership programmes — for which organs of state are mostly, but not solely, responsible.

In addition, the environmental right and the request for reasonableness contained in FC s 24*(b)* does not contain the same internal qualifiers — 'within its available resources' and 'to achieve the progressive realisation of each of these rights' — as the rights of access to housing and health. In the (likely) event that financial resources are nonetheless raised by the state as a defence in the practical application of the environmental right, the state would, regardless of the limitation of available resources, have an inescapable minimum core obligation under the environmental right to fulfil. Leach J in *Hichange Investments (Pty) Ltd v Cape Produce (Pty) Ltd t/a Pelt Products & Others* rejected an MEC's contention that its failure to take steps against an unregistered tannery that caused severe air pollution was justified on the grounds of a lack of technical expertise (read: lack of finances).[1] Leach J described this argument as 'a groundless plea *ad misercordiam*'. He explained:

> To now come to Court and plead that he lacks the necessary expertise to carry out the functions which the legislature has specifically entrusted to him is really no answer. It is not for the applicant to question the advisability of appointing the [MEC] as the functionary entrusted with certain obligations. That decision was taken by the legislature and, like it or not, the [MEC] is called upon to discharge those functions. … The legislature has entrusted certain obligations upon the [MEC] under s 28, obligations which are not met by 'co-operative governance' [requesting National Government to fulfil the obligations]. What the [MEC] was obliged to do was to carry out the obligations imposed under s 28(4).[2]

(y) Legislative measures

FC s 24 requires enabling legislation. NEMA is South Africa's primary piece of environmental framework legislation.[3] NEMA's environmental framework[4] has been supplemented by a range of specialised environmental statutes that give practical effect to FC s 24. The table of legislation below captures, alphabetically,

[1] Unreported decision, (EC) Case No. 1050/2001 (copy on file with the authors) 36.

[2] Ibid at 36-7.

[3] See long title of NEMA.

[4] For a detailed discussion of NEMA and the characteristics of framework legislation see J Nel & W Du Plessis 'An Evaluation of NEMA Based on a Generic Framework for Environmental Framework Legislation' (2001) 8 *SAJELP* 1.

some of the most important pieces of legislation (as well as their objects) that directly or indirectly give life to the basic aims of FC s 24.

SELECTED NATIONAL LEGISLATION ADOPTED IN ACCORDANCE WITH SECTION 24*(b)* OF THE CONSTITUTION[1]		
No	**Act**	**Scope**
1	Basic Conditions of Employment Act 3 of 1997	Provides for control measures pertaining to employment, particularly ensuring healthy conditions.
4	Cultural Institutions Act 119 of 1998	Provides a supporting system for institutions such as the zoological gardens.
5	Marine Living Resources Act 18 of 1998	Regulates conservation of the marine ecosystem and the long-term sustainable utilisation of marine living resources.
6	Minerals and Petroleum Resources Development Act 28 of 2002	Provides for equitable access to and sustainable development of mineral and petroleum resources.
7	National Development Agency Act 108 of 1998	Promotes public private partnerships.
8	National Environmental Management Act 107 of 1998	Provides for co-operative environmental governance.
10	National Forests Act 84 of 1998	Reforms the law on forests.
11	National Heritage Resources Act 25 of 1999	Provides for the protection of heritage resources.
12	National Nuclear Regulator Act 47 of 1999	Establishes the National Nuclear Regulator.
13	National Water Act 36 of 1998	Regulates all matter relating to water.
14	National Veld and Forest Fire Act 101 of 1998[2]	Regulates veld and forest fires.
15	Occupational Diseases in Mines and Works Act 78 of 1973	Provides compensation for persons working in mines or works who are injured due to the dangerous nature of their environment.
16	Nuclear Energy Act 46 of 1999	Establishes the South African Nuclear Energy Corporation Limited.
17	Promotion of Administrative Justice Act 3 of 2000	Provides for the promotion of administrative justice, including actions impacting on the environment.
18	Promotion of Access to Information Act 2 of 2000	Promotes access to information, including information pertaining to the environment.
20	Water Services Act 108 of 1997	Regulates the right of access to basic water supply and basic sanitation as well as other related matters.
21	Protected Disclosures Act 26 of 2000	Protects whistleblowers, including those exposing environmental abuse.
22	World Heritage Convention Act 49 of 1999	Incorporates the World Heritage Convention into South African law.

[1] This table is based on the (now somewhat dated) table of South African Environmental Legislation printed in M van der Linde Compendiu*m of South African Environmental Legislation* (2004).

[2] See also Gouda Boedery v *Transnet Limited* [2004] ZASCA 85.

23	Wreck and Salvage Act 94 of 1996	Regulates the salvage of certain vessels and the application of the International Convention of Salvage (1989) in South Africa.
24	National Environmental Management Act: Protected Areas Act 57 of 2003	Provides for the protection and conservation of ecologically viable areas, representative of the country's biological diversity, its natural landscapes and seascapes.
25	National Environmental Management Act: Biodiversity Act 10 of 2004	Provides for the management and protection of the country's biodiversity within the framework established by NEMA.
26.	National Environmental Management Act: Air Quality Act 39 of 2004.	Provides for an integrated approach to the management and protection of the country's air quality.
27.	National Environmental Management Act: Waste Management Act 59 of 2008	Provides for establishment of a national waste management system, protects health and the environment, prevents pollution and ensures remediation of contaminated land.
28.	National Environmental Management Act: Integrated Coastal Management Act 24 of 2008.	Provides for establishment of a system of integrated coastal and estuarine management.

In the following sections, we discuss a selection of these statutes that most directly affect the implementation of FC s 24.

(1) National Environmental Management Act (NEMA)[1]

NEMA creates the basic legal framework for the environmental rights guaranteed in FC s 24.[2] The Act repeals the greater part of the Environmental Conservation Act ('ECA').[3] NEMA's principles for environmental decision making are drawn from international environmental law and the Final Constitution:[4]

(a) NEMA is a detailed statute. As this chapter focuses on the constitutional environmental right, it is not the appropriate forum to provide a detailed analysis of its contents. However, to give some idea of its scope, we provide a list of its core features.
(b) It promotes ecological sustainable development.
(c) It reconfirms the State's trusteeship of the environment on behalf of the country's inhabitants.[5]

[1] Act 107 of 1998.
[2] *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs* 2004 (5) SA 124, 145-149 (W).
[3] Act 73 of 1989.
[4] NEMA s 2.
[5] NEMA s 2(4)*(o)*.

(d) It introduces co-operative governance of environmental matters by establishing the necessary governmental institutions to ensure proper enforcement of environmental protection laws.[1]
(e) It makes provision for fair environmental decision-making and for conciliation and arbitration of conflicts.[2]
(f) As part of the process of integrated environmental governance, NEMA introduces a new framework for environmental impact assessments.
(g) Based on the doctrine of strict liability, NEMA introduces a far-reaching general duty of care to prevent, control and rehabilitate the effect of significant pollution and environmental degradation.[3]
(h) Similarly, it dictates the duty of care to address emergency incidents of pollution.[4]
(i) It permits criminal prosecution of individuals. But more interestingly, it holds managers and directors of companies accountable for 'environmental crimes': that is, for environmental damage caused by juristic persons.[5] NEMA's penalties can also require incarceration for managers and directors.
(j) NEMA permits employees to refuse to perform environmentally hazardous work and protects whistle-blowers.[6]
(k) Finally, NEMA reconfirms the wide standing rules that the Constitution provides in FC s 38[7] and ensures broad access to environmental information.[8]

(2) National Forest Act (NFA)[9]

The NFA reforms and codifies the laws on forests. It repeals previous laws relating to forests and forestry such as the Management of State Forests Act[10] and provides principles to guide decisions affecting forests,[11] the promotion and enforcement of sustainable forest management[12] and the development and implementation of policy pertaining to forests and forestry.[13]

(3) National Water Act (NWA)[14]

The Water Services Act[15] was enacted in 1997 to deal with the rights of access to basic water supply, basic sanitation, and the setting of national standards and norms for tariffs. NWA is, however, the primary legislation pertaining to the

[1] NEMA Chapters 2 and 3. Environmental crimes are contained in the schedules to the Act.
[2] NEMA Chapter 4.
[3] NEMA s 28.
[4] NEMA s 30.
[5] NEMA s 34.
[6] Chapter 7 of NEMA.
[7] For more on standing, see C Loots 'Standing, Ripeness and Mootness' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) §7.2.
[8] NEMA s 31.
[9] Act 84 of 1998.
[10] Act of 128 of 1992.
[11] NFA s 3.
[12] NFA s 4.
[13] NFA s 46.
[14] Act 36 of 1998.
[15] Act 108 of 1997.

regulation and conservation of water within South Africa.[1] In sum, the purposes of NWA are to: ensure the management of water resources;[2] protect water resources;[3] regulate water usage;[4] create catchment management agencies;[5] and regulate access to, and rights over, land.[6] Section 19 of NWA places a duty of care on polluters, landowners and land users to prevent pollution of water sources similar to that found in s 28 of NEMA.

In *Harmony Gold Mining Co Ltd v Regional Director: Free State Department of Water Affairs and Forestry* the Supreme Court of Appeal held that Harmony — a gold-mining company — had a legal duty to prevent the pristine aquifers in its mining area from being contaminated by heavy metals through acid drainage from old mines.[7] Section 19 of NWA, the SCA found, imposed an obligation on Harmony to ensure not only that its own operations did not pollute clean water, but also to take expensive measures to prevent polluted water upstream from more shallow and now defunct mines from contaminating its own deeper clean ground water sources. To arrive at this conclusion, Howie P read the common-law duty of landowners in light of the provisions of s 19 of NWA. *Harmony* establishes the principle that owners or users of property must take reasonable steps to prevent pollution from other sources from polluting the water on their own property.

(4) Marine Living Resources Act (MLRA)[8]

The Marine Living Resources Act regulates the conservation of the marine eco-system, the long-term sustainable utilisation of marine living resources and the exploitation, utilisation and protection of certain marine living resources.[9] It demands that the control over marine living resources be exercised in a fair and equitable manner to the benefit of all citizens.[10]

(5) Mineral and Petroleum Resources Development Act (MPRDA)[11]

In 1998 the government released a white paper: 'A Minerals and Mining Policy for South Africa.'[12] This position paper reaffirmed the government's commitment to sustainable development in the mining sector. The most important step towards the sustainable development of mineral and mining resources was the promulgation

[1] For a comprehensive discussion of the NWA, see H Thompson *Water Law: A Practical Approach to Resource Management and the Provision of Services* (2006); and HA Strydom & ND King *Fuggle and Rabie's Environmental Management in South Africa* (2nd Edition, 2009) 425-454.

[2] NWA Chapter 2.

[3] NWA Chapter 3.

[4] NWA Chapter 4.

[5] NWA Chapter 7.

[6] NWA Chapter 13.

[7] [2006] ZASCA 66 (SCA).

[8] Act 18 of 1998.

[9] With respect to the protection of the South Africa marine environment, see generally, Strydom & King (supra) at 455-512.

[10] Long title of the MLRA.

[11] Act 28 of 2002.

[12] Department for Minerals and Energy *A Minerals and Mining Policy for South Africa* (1998) available at http://www.dme.gov.za/minerals/min_whitepaper.stm (accessed on 17 October 2009).

of MPRDA.[1] It guarantees equitable access to and sustainable development of the nation's mineral and petroleum resources in order to eradicate all forms of discriminatory practices in the mineral and petroleum industries. The Act further emphasises the need to create an internationally competitive and efficient administrative and regulatory regime. MPRDA was recently subjected to comprehensive amendment when the environmental provisions relating to prospecting and mining activities (ie, environmental management programs, environmental assessment authorisation, environmental management, rehabilitation and mine closure, financial provision for mine closure) were repealed from the Act and incorporated into NEMA.[2] The amendment also alters the lines of decision-making and review authority.[3]

(6) National Environmental Management: Protected Areas Act (NEM: PAA)[4]

The Protected Areas Act provides for the protection and conservation of ecologically viable areas representative of the country's biological diversity, its natural landscapes and its seascapes. It further provides for the establishment of a national register of protected areas,[5] the management of these areas,[6] cooperative governance, public participation[7] and matters related to protected areas.

(7) National Environmental Management: Biodiversity Act (NEM: BA)[8]

The Biodiversity Act provides for the management and protection of the country's biodiversity within the framework established by NEMA.[9] It covers the protection of species and ecosystems,[10] sustainable use of indigenous biological resources, equity in bio-prospecting,[11] and the establishment of a regulatory body on biodiversity — the South African Biodiversity Institute.[12]

(8) National Environmental Management: Air Quality Act (the Air Quality Act)[13]

The Air Quality Act, as the name suggests, regulates air quality in order to protect the environment. The Air Quality Act, once fully in force, will repeal[14] the

[1] For a background discussion of the management of the environmental impacts of mining activities see Strydom & King (supra) at 513-576.

[2] National Environmental Management Amendment Act 62 of 2008 and Mineral and Petroleum Resources Development Amendment Act 49 of 2008.

[3] Environmental management on mines will for a period of 18 months fall within the exclusive jurisdiction of the Minister of Minerals (except for deciding appeals which falls within the authority of the Minister of Water and Environmental Affairs). Thereafter authority will revert to national or provincial environmental agencies.

[4] Act 57 of 2003.

[5] NEM: PAA Chapter 2.

[6] NEM: PAA Chapter 4.

[7] NEM: PAA Chapter 3.

[8] Act 10 of 2004. Regarding the protection of biological diversity in South Africa, see generally, Strydom & King (supra) at 97-125, 382-393, 394-424.

[9] NEM: BA Chapter 2.

[10] NEM: BA Chapter 4.

[11] NEM: BA Chapter 6.

[12] NEM: BA Chapter 2.

[13] Act 39 of 2004. See generally Strydom & King (supra) at 579-629.

[14] Air Quality Act s 60.

Atmospheric Pollution Prevention Act ('APPA').[1] However, for the time being, APPA applies simultaneously with parts of the Air Quality Act.[2] The Air Quality Act creates reasonable measures for the prevention of air pollution whilst having due regard to the concept of sustainable development. The Act introduces a new dimension to improving air quality in South Africa: regulation of ambient air quality.[3] The Act envisages national norms and national, provincial and local standards to regulate ambient air quality and emission standards[4] and establishes specific air quality measures and objectives.[5] Until the national, provincial and local ambient air quality standards have been established, s 63 of the Act makes provision for temporary ambient air quality standards that cover the most common pollutants.[6] Furthermore, s 18(1) empowers the Minister or MEC to declare an area a 'priority area' if ambient air quality standards are being exceeded or if a significant negative impact on the air quality occurs and specific air management action is required to rectify the situation.[7] The Act requires national and provincial executives to specify what activities result in atmospheric emissions so they can be properly regulated.[8]

For the time being, negative point source emissions are regulated by s 9(1) of APPA. This section prohibits an operator from performing any of the scheduled processes unless it holds a current registration certificate from the Chief Air Pollution Control Officer ('CAPCO'). The courts have had a number of opportunities to consider the consequences — especially the effects of illegal air pollution on third parties — of operating outside the certification system. In *Minister of Health*

[1] Act 45 of 1965.

[2] The Air Quality Act partially commenced on 11 September 2005 except for ss 21, 23, 36, 49, 51(1) *(e)* & *(f)* & (3), 60 and 61. However, it runs concurrently with APPA and secondary legislation published in terms thereof.

[3] Air Quality Act s 2*(b)*.

[4] Air Quality Act ss 9, 10 and 11.

[5] Air Quality Act s 12.

[6] See Air Quality Act schedule 2. See also SANS 69:2004 and SANS 1929:2004 published in *GG* 27179 (28 January 2005)(the latter adds Benzene (C6H6) as a common ambient pollutant that should be regulated.)

[7] For example, the Vaal Triangle Air-shed Priority Area was declared in *GG* 28732 (21 April 2006) amended by *GG* 30164 (17 August 2007) and the HighVeld Priority Area in *GG* 30518 (23 November 2007).

[8] Air Quality Act s 21 requires the Minister, and authorizes the MEC, to publish lists of activities which result in atmospheric emissions that may be significantly detrimental to the environment. These lists must establish the minimum emission standards resulting from a listed activity (including permissible amount, volume, emission rate or concentration etc.). The Act also introduces a new licensing system where the emitter of a listed activity must obtain an Atmospheric Emissions License from the Licensing Authority in the area where is or will be carried out. Air Quality Act ss 22 and 37. The Minister has undertaken an extensive public consultative process and is presently finalizing the national list. Air Quality Act s 21(4)*(a)*. Until the promulgation of the new lists, the 72 noxious and offensive emission processes contained in the Second Schedule to APPA become Listed Emissions in terms of the Air Quality Act. Air Quality Act s 62. Air Quality Act s 23 makes provision for the Minister or MEC to declare any appliance or activity that may result in atmospheric emissions which may be detrimental to health or the environment as a Controlled Emitter. Similarly the Minister or MEC may, in terms of s 26, declare as Controlled Fuels any substance or mixture thereof which when used as fuel in a combustion process, result in atmospheric emissions that are a threat to the environment or health. The Minister or MEC may in terms of Part 6 of Chapter 4 of the Act adopt measures to control pollution by dust, noise and offensive odours that create public nuisance.

& Welfare v Woodcarb (Pty) Ltd the High Court prohibited the further operation of a scheduled process by a sawmill in the absence of a Registration Certificate.[1] The Court held that the resultant air pollution from the illegal burning of sawdust, chips and wood infringed the neighbours' constitutionally protected environmental rights.

Similarly, in *Hichange Investments (Pty) Ltd v Cape Produce (Pty) Ltd t/a Pelt Products & Others* the first respondent illegally operated a tannery by failing to comply with CAPCO's technical requirements. The tannery generated a severe stench, and seriously corroded metal structures and equipment on the applicant's neighbouring premises.[2] To prevent further violations, Leach J ordered the provincial environmental authority to ensure proper compliance with the conditions of the Registration Certificate.

Recently, in *Tergniet,*[3] the High Court found that the first respondent, a manufacturer of creosole-treated wooden poles, operated a tar process without a valid Registration Certificate. In addition, it found that the tar process caused significant atmospheric vapour pollution through the uncontrolled release of volatile organic compounds. The Court concluded that, despite holding a Registration Certificate for another (wrongly) scheduled process of wood burning and wood drying and having already submitted an internal appeal against CAPCO's refusal to operate a tar process, the creosote business was operating illegally. To protect the applicant's constitutional environmental rights, the Court issued an interdict that barred the first respondent from continuing with its unlawful operations.[4]

As these decisions illustrate, the Air Quality Act will often be invoked to address particularly noxious forms of pollution that cause conflict between neighbours, or between communities and polluters.

(9) National Environmental Management: Waste Act (Waste Act)[5]

The Waste Act consolidated more than 36 laws as well as various policies, guidelines and other reference materials currently used in relation to waste management in the country. In addition, it introduces the more integrated 'cradle-to-grave'[6] approach and secure life cycle management of products, to replace the outdated 'end-of-the-pipe'[7] approach to waste management. Some of the other important topics covered by the Waste Act include: a reduction in natural resource consumption; waste generation; recycling; waste disposal; prevention of pollution; promotion of waste services; remedying land degradation; and achieving integrated waste-management reporting and planning.

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[1] 1996 (3) SA 155 (N).

[2] 2004 (2) SA 393 (EC).

[3] *Tergniet and Toekoms Action Group & Thirty Four Others v Outeniqua Kreosootpale (Pty) Ltd & Others* [2009] ZAWCHC 6.

[4] Ibid at par 50.

[5] Act 59 of 2008.

[6] According to Wikipedia, 'cradle to grave' means 'the full Life Cycle Assessment from manufacture ("cradle") to use phase and disposal phase ("grave").' Available at http://en.wikipedia.org/wiki/Cradle-to-grave_analysis (accessed on 13 September 2010).

[7] This approach simply tries to solve the problem at the end of the process. The best example is literally putting something on the end of a waste-emitting pipe to limit its polluting effects.

(10) National Environmental Management: Integrated Coastal Management Act (ICMA)[1]

ICMA provides for the establishment of a system of integrated coastal and estuarine management in order to promote conservation of the coastal environment, and to maintain the natural attributes of coastal landscapes and seascapes. The Act also regulates the development and use of coastal areas, and ensures that it is economically and socially justifiable as well as ecologically sustainable. Lastly, ICMA prohibits incineration and dumping at sea, and pollution or inappropriate development of the coastal zone.[2]

(z) Other measures: integrated environmental management systems and environmental impact assessments[3]

In *BP Southern Africa,* the Court found that the integrated environmental management system ('IEMS') that was administered by the provincial environmental authority — in terms of Chapter 5 of NEMA[4] read with the appropriate environmental impact assessments ('EIAs') provided for in ECA[5] — is an example of the 'other measures' provided for by FC s 24*(b)*.[6] No all-embracing definition of Integrated Environmental Management ('IEM') currently exists. However, s 23(2) of NEMA describes the purpose of IEM as the integration of the fundamental principles of environmental management in s 2 of NEMA into all decisions that may deleteriously effect the environment.[7] IEM systems or activities must, therefore, identify and evaluate the actual and the potential effects of pollutants on the environment, socio-economic development and the preservation of communities and their cultural heritage. They must assess risks, consequences and alternatives in order to mitigate any negative impacts and to maximise potential benefits.[8] IEMs also create structures designed to facilitate meaningful public participation in the environmental decision making process.[9]

As part of the process of integrated environmental governance, NEMA introduces a new framework for EIAs.[10] Those entities that seek to conduct listed activities must consider, investigate and assess the potential impact that their activities will have on the environment and then report their findings to EIA Administrators.[11] The Minister or MEC are empowered to make regulations identifying activities and geographical areas, setting procedures for applying for EIAs, or any other matter, necessary to ensure the effectiveness of the environmental

[1] Act 24 of 2008.
[2] ICMA long title.
[3] See generally Strydom & King (supra) at 971-1045.
[4] NEMA ss 23 and 24.
[5] ECA ss 21 and 22.
[6] *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs* 2004 (5) SA 124, 145-149 (W)('*BP Southern Africa*').
[7] NEMA s 2 gives further effect to FC s24.
[8] NEMA s 23(2)*(b)*.
[9] NEMA s 23(2)*(d)* & *(f)*.
[10] NEMA s 24(A)-(I).
[11] NEMA s 24(1) as amended by National Environmental Management Amendment Act 62 of 2008 s 2.

authorisation process.[1] The Minister or an MEC may also, in terms of s 24(2)*(a)* of NEMA, identify prescribed activities that may not commence without their prior authorisation.[2] It is a criminal offence to proceed without authorisation.[3]

Notwithstanding these limitations, authorities are often confronted with cases where prescribed activities commenced or were finalised without prior authorization.[4] In *Silvermine Valley Coalition v Sybrand Van der Spuy Boerdery & Others*, the court made clear that s 24(1) of NEMA (and s 21 of the ECA) does not make provision for retrospective authorisation: Parties who continue without prior permission not only act unlawfully but also illegally.[5] *Hichange Investments (Pty) Ltd v Cape Produce (Pty) Ltd t/a Pelt Products & Others* establishes that South African environmental law makes provision for EIAs in two instances.[6] First, as in *Silvermine Valley Coalition,* s 24 of NEMA, read with s 21 of ECA, requires an EIA for identified activities to be conducted as part of the authorisation process prior to the commencement of the activity in question. Second, s 28(4)*(a)* of NEMA requires an EIA to be conducted in the event of significant pollution where the responsible party's duty of care requires it to take reasonable steps to address the pollution. However, conducting such an *ex post facto* EIA in terms of s 28(4)*(a)* of NEMA does *not* constitute retrospective authorization of the identified activities.

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[1] NEMA s 24 (2), (3), (5) and (6).

[2] The Minister subsequently published, in terms of NEMA s 24(5) and 44, the EIA Regulations. GN R385, R386 and R387 published in *Government Gazette* No 28753 (21 April 2006). They came into effect on 3 July 2006. Regulation 385 sets out the detailed requirements and procedures that applicants should follow to obtain approval of listed activities prior to their commencement. The first critical step is to determine whether a basic assessment or scoping ('full assessment') is to be applied to the application. A basic assessment must be applied if the authorisation for the planned activity falls into any of the following categories: *(a)* the planned activity is listed in EIA Regulation 386; or *(b)* the planned activity is listed in a notice issued by the Minister or the MEC in terms of NEMA s 24D of the Act pertaining to those listed matters referred to in NEMA s 24(2) (e.g. in specific geographical areas that may or may not require an EA). EIA Regulation 385 regs 21(1)*(a)* and *(b)*. EIA Regulation 385 regs 21(2)*(a)*(i) and (ii) require that scoping and EIA must be applied to an application if:

(a) the planned activity is listed in EIA Regulation 387;
(b) the planned activity is listed in a notice issued by the Minister or the MEC in terms of NEMA s 24D pertaining to those listed matters referred to in NEMA s 24(2) of (e.g. in specific geographical areas that may or may not require an EA);
(c) the Administrator accepts an application by the applicant that the EAP recommends that scoping instead of a basic assessment should be done due to the nature of information that the Administrator would require to make a decision (EIA Regulation 385 reg 21(2)*(b)*); and
(d) if there are several activities under the same development, but only one of them qualifies for scoping as set out above, scoping should be applied to all the activities (EIA Regulation 385 reg 21(2)*(c)*).

[3] NEMA s 24F(1)*(a)*. It is also criminal not to comply with an applicable norm or standard or contravene conditions in an EA. NEMA s 24F(2) as amended by National Environmental Management Amendment Act 62 of 2008 s 5. All these crimes are punishable with a fine of up to R5 million or 10 years' imprisonment or both. NEMA s 24F(4).

[4] These cases were decided prior to the Amendment introducing s 24F into NEMA. Sections 24(A)-24(I) were incorporated into NEMA in terms of the National Environment Amendment Act 8 of 2004. This act, including the amendments, became operational on 7 January 2005.

[5] 2002 (1) SA 478, 448-489 (C)('*Silvermine Valley Coalition*').

[6] *Hichange Investments (Pty) Ltd v Cape Produce (Pty) Ltd t/a Pelt Products & Others* unreported decision (EC) Case No 1050/2001 (copy on file with the authors) 30-31, 33 and 39.

However, in *Eagles Landing Body Corporate v Molewa NO & Others*, Kroon J reached a seemingly opposite conclusion to *Silvermine Valley Coalition* and *Hichange Investments*.[1] The court permitted retrospective authorisation because it concluded that the legislature could not have intended such a partially constructed structure to be demolished, authorised and then rebuilt.[2] To remedy these divergent interpretations — and in light of the hefty volume of EIA applications before administrators — the legislature passed an amending Act. The new s 24G permits parties to rectify the unlawful commencement or continuation of activities — subject to the payment of a substantial penalty.[3]

Despite allowing for rectification of unauthorised activities, this provision has proven controversial. Applicants and decision-makers alike have been frustrated by its scope, its application and operation. The primary problems relate to transitional provisions, time periods, the entitlement to retrospective authorisation, and general difficulties relating to interpretation. For example, some administrators have taken the position that the administrative fine should be interpreted as an 'administrative fee' that still allows for potential prosecution. This interpretation clearly contradicts the terms of s 24G(2) read together with s 24(3) which indicate that the legislature intended to supplant prosecution with an administrative fine. This payment should effectively halt the operation of s 24F of NEMA.

In addition to the difficulties with applying and interpreting the rectification procedure, s 24(G) of NEMA may be unconstitutional on several grounds. First, the principle of the rule of law (in FC s 1[4]), read with the principle of administra-

[1] 2003 (1) SA 412 (T).

[2] Ibid at paras 101-2.

[3] As amended by s 6 of the National Environmental Management Amendment Act 62 of 2008. NEMA s 24G(1) states that any person who has committed an offence in terms of section 24F(2)*(a)*, which includes commencing with a listed or specified activity without prior authorisation, can apply for environmental authorisation from the Minister, the Minister of Mining or MEC. Those authorities may require the applicant to compile a report and submit the following information for his/her consideration:

1. an assessment of the nature, extent, duration and significance of the environmental consequences or impacts, including the cumulative effects, of such illegal activities;
2. a description of mitigation measures that have been or will be undertaken in regard to the environmental consequences or impacts;
3. a description of the public participation process that was followed, including all comments that were received and an explanation how these issues have been addressed;
4. an Environmental Management Program (EMPr); and
5. any other information that may be required.

NEMA s 24G(2) requires the Minister or MEC to consider any reports or information submitted by the applicant and may then either issue a Directive that orders the activity to cease, wholly or in part, and to rehabilitate the affected environment. Otherwise the Minister or MEC may issue an EA subject to specific conditions. NEMA s 24G(2A), however, requires the applicant first to pay an administration fine of up to R1 million before the Minister or MEC may act as above. NEMA s 24(G)(3) makes it an offence not to comply with the Directive of the Minister or MEC or to contravene any condition of the authorization and such a person is liable on conviction of a penalty as contemplated in s 24F.

[4] For more on the rule of law, see F Michelman 'Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11. For more on founding provisions of the Final Constitution generally, see C Roederer 'Founding Provisions' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 13.

tive legality found in FC s 33,[1] makes it impossible for a lawful activity to follow from unlawful administrative conduct. The wording of s 24(2) of NEMA — the empowering provision — requires authorisation prior to the commencement of an identified activity. No exception can undo the unlawfulness of a breach. Permitting rectification would not only appear to be inconsistent with the principles of administrative justice, but also with the Supreme Court of Appeal's holding in *Oudekraal Estates (Pty) v the City of Cape Town* relating to validity of successive administrative decisions.[2]

Secondly, prior authorisation and conducting an EIA before the commencement of activities that may negatively affect the environment form the very essence of the EIA process in s 24 of NEMA and the IEM in s 23 of NEMA. Section 24G of NEMA undermines the very purpose of environmental assessment, integrated environmental management, sustainable development and, ultimately, the fundamental right to environmental protection. Davis J's words in *Silvermine Valley Coalition v Sybrand Van der Spuy Boerdery & Others* support this proposition with respect to the ECA: '[t]he ECA and the regulations do not envisage that an EIA can be wrenched from its particular purpose as conceived in the legislative structure and be employed as an independent remedy'.[3] A belated EIA would have no effect on the continuation of the existing but illegal identified activity; it might be of a moral value but 'would hold no legal significance in terms of the legislative structure in which the EIA is located.'[4]

Thirdly, it is contrary to South Africa's obligations under international law to conduct an EIA after the fact. Section 2(4)(b) and (i) of NEMA codified the international soft law principle of integrated management and environmental assessment as underlying principles for the interpretation of environmental law in South African law. An environmental assessment prior to the commencement of an activity that may detrimentally affect the environment is an established legal element of the principle of sustainable development. Given that FC s 24*(b)* read with s 2(4)*(a)* of NEMA makes sustainable development the foundation of South African environmental law, prior authorisation and conducting an EIA must form an essential part of the right to environmental protection. Any illegal conduct that undermines the very essence of the fundamental right to environmental protection violates FC s 24.

Fourthly, the provision would appear to conflict with well-established criminal law principles. One, while the legislature intended the administrative fine to have a penal character, the applicant can still be criminally prosecuted for the same offence in terms of s 24F(2)*(a)* of NEMA. This outcome conflicts with FC s 35(3)*(m)*. FC s 35(3)*(m)* prohibits anybody from being convicted twice for

[1] For more on FC s 33, see J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 63.

[2] 2004 (6) SA 222 (SCA).

[3] *Silvermine Valley Coalition* (supra) at 488.

[4] Ibid.

the same crime.[1] Two, it may be contrary to the presumption of innocence[2] and the right against self incrimination.[3] Section 24F(1) states that a person who 'has committed an offence' may apply for a rectification authorisation. By implication, through the mere process of submitting an application, the applicant is presumed by law to have contravened s 24(2)*(b)* of NEMA. Indeed, officials often use this 'presumption' to justify the imposition of severe administrative fines. Lastly, while the applicant may have a valid defence against a criminal conviction in terms of s 24F(2)*(a)* of NEMA, the applicant cannot raise that same defence against an administrative fine. The Minister or MEC does not have discretionary powers to waive the fine. For example, an applicant may have acted on the wrong instruction from an official and not have applied for prior authorisation for the listed activity. The applicant could successfully raise the defence of putative authorisation — excluding the required *mens rea* — to avoid criminal conviction. Yet, on the same facts, the applicant would still be strictly liable to pay the administrative fine.

Fifthly, although s 24G(2A) of NEMA requires the Minister or MEC to be paid an administrative fine before consideration of the application, the mathematical formula according to which the fine is calculated may not have been promulgated by regulation. It may merely be captured in an internal departmental directive. An internal departmental directive is not a 'rule of law'. As a result, any fines imposed would violate any number of provisions in FC s 35 and could not be justified in terms of FC s 36. In any event, punishment without prior publication of the criminal offence would seem to be the quintessential example of a violation of the rule of law to which the Constitution is committed.[4]

In the IEM process, both applicants and administrators/decision-makers must take full cognisance of FC s 24 as well as various important provisions of NEMA[5] in evaluating their impact or proposed impact on the environment. *Fuel Retailers Association* specifically considered these provisions in relation to the evaluation process.[6] The *Fuel Retailers* Court wrote:

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[1] FC s 35(3)*(m)* reads: 'Every accused person has a right to a fair trial, which includes the right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted'. For more on FC s 35(3)*(m)*, see F Snyckers & J Le Roux 'Criminal Procedure: The Rights of Detained, Arrested & Accused Persons' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) §51.5*(m)*.

[2] FC s 35(3)*(h)*. For more on the presumption of innocence, see Snyckers & Le Roux (supra) at §51.5*(i)*.

[3] FC s 35(3)*(j)*. For more on the right against self incrimination, see Snyckers & Le Roux (supra) at §51.5(j)(i).

[4] FC s 35(3)*(l)* read with FC s 35(3)*(n)*. FC s 35(3)*(l)* reads: 'Every accused person has a right to a fair trial, which includes the right- not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted'. FC s 35(3)*(n)* reads: 'Every accused person has a right to a fair trial, which includes the right- to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing'. For more on both rights, see Snyckers and Le Roux (supra) at § 51.5*(l)* and *(n)*.

[5] See NEMA ss 2, 23, 24 (in particular 24(4)) and 28.

[6] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & Others* 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC), [2007] ZACC 13 ('*Fuel Retailers*').

> [T]he applicant [correctly] contended that the environmental authorities themselves were obliged to consider the socio-economic impact of constructing the proposed filling station. The applicant also [correctly] submitted that this obligation is wider than the requirement to assess the need and desirability of the proposed filling station under the Ordinance. This obligation requires the environmental authorities to assess, among other things, the cumulative impact on the environment brought about by the proposed filling station and all existing filling stations that are in close proximity to the proposed one. This [obligation] in turn required the environmental authorities to assess the demand or necessity and desirability, not feasibility, of the proposed filling station with a view to fulfilling the needs of the targeted community, and its impact on the sustainability of existing filling stations. The applicant relied upon the provisions of section 24*(b)*(iii) of the Constitution, as well as sections 2(4)*(a)*, 2(3), 2(4)*(g)*, 2(4)*(i)*, 23 of NEMA.[1]

Administrators consider policies, guidelines and specialist reports during the evaluation process in order to ascertain whether the requirements of NEMA and FC s 24 have been met. In *MEC for Agriculture, Conservation, Environment & Land Affairs v Sasol Oil Pty Ltd & Bright Suns Development CC*, the Supreme Court of Appeal reiterated the value to be attached to such policies:

> The adoption of policy guidelines by state organs to assist decision-makers in the exercise of their discretionary powers has long been accepted as legally permissible and eminently sensible. This is particularly so where the decision is a complex one requiring the balancing of a range of competing interests or considerations, as well as specific expertise on the part of a decision-maker. As explained in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,[2] a Court should in these circumstances give due weight to the policy decisions and findings of fact of such a decision-maker. Once it is established that the policy is compatible with the enabling legislation, as here, the only limitation to its application in a particular case is that it must not be applied rigidly and inflexibly, and that those affected by it should be aware of it. An affected party would then have to demonstrate that there is something exceptional in his or her case that warrants a departure from the policy.[3]

Ultimately, administrators (and applicants) must be satisfied that an 'environmentally responsible' decision has been made.

It must be stressed that once a decision has been approved, an applicant is still under an obligation to obtain additional related environmental authorisations which may fall outside the ambit of Chapter 5 of NEMA. In *Earthlife Africa (Cape Town) v Director-General: Environmental Affairs and Tourism & Eskom Holdings Limited* the Court reaffirmed this point. It held that Eskom could not commence construction of its new Pebble Bed Modular Reactor 'unless and until it obtains the necessary authorisations in terms of the [National Nuclear Regulator] Act and [the Nuclear Energy] Act.'[4]

(ii) *Related Rights and Constitutional provisions*

This section briefly considers rights other than FC s 24 that regularly feature in environmental disputes.

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[1] *Fuel Retailers* (supra) at para 30.
[2] 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC), [2004] ZACC 15; at para 48.
[3] [2005] ZASCA 76 at para 19.
[4] 2005 (3) SA 156 (C).

(aa) Substantive Rights

(u) Equality[1]

FC s 9 can affect environmental protection in a variety of ways. A local municipality may employ different waste management, environmental management, service delivery, or water use strategies and policies for diverse stakeholders — residential zones; heavy and medium industrial zones; and light commercial zones. Whatever the benefits of this differential treatment might be, it could lead to the perpetuation of existing social inequities.[2]

In a case where the right to equality was specifically engaged in an environmental context — *Paola v Jeeva NO & Others* — the applicant challenged a decision permitting his neighbour to build a two-storey house that would obscure his view.[3] In dismissing the application, the Court inelegantly applied FC s 9. The applicant argued that any building that detracted from the view of an adjoining property should be prohibited by the relevant local authority. Kondile J held that this approach would endorse 'unequal treatment of neighbouring property owners with regard to the development of their properties, on the basis of the order of the occurrence of the developments. That is arbitrary and clearly inconsistent with the Constitution, which demands the promotion of equality and rationality.'[4] The court would have accomplished its task with greater elan had it employed FC s 33 read with FC s 24.

However, when FC s 9 is properly raised in relation to FC s 24, the dispute must be settled within the terms of the 'equality enquiry' laid down in *Harksen v Lane NO*[5] and the applicable provisions of the Promotion of Equality and Prevention

[1] FC s 9 reads:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

For more on FC s 9, see C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 35.

[2] For an indication of how a court might approach such a case, see *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC), [1998] ZACC 1 (the City Council applied different rules for the provision of electricity in black townships and white suburbs).

[3] 2002 (2) SA 406 (D)('*Paola*'). See also §50.3(c)(i)(bb)(y) 'Well-being' above, for a more detailed discussion of this case. See also, *Ex parte Mercer & Another* 2003 (1) SA 203 (CC), [2002] ZACC 23 (the applicants, convicted in the Magistrates' Court for harbouring wild animals without the required permit, challenged the constitutionality of the law in terms a number of constitutional issues including FC ss 9 and 24. The Court avoided deciding the issue, as the parties were still awaiting the outcome of the High Court.)

[4] *Paola* (supra) at 404H.

[5] 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC), [1997] ZACC 12.

of Unfair Discrimination Act ('Equality Act').[1] Indeed, ordinarily litigants must rely first on the Equality Act, if it is applicable, before reverting to FC s 9.[2] FC s 9 will, generally, only apply when the court is asked to consider the constitutionality of the legislation governing the conflict between the parties.

(v) The right to life

The Final Constitution grants the right to life to every individual.[3] The right is directly related to the right to a healthy environment where, for example, a person uses contaminated water, or breathes polluted air. Short and long-term health risks due to environmental degradation could be interpreted as an infringement of a person's right to life. The right to life has, rather interestingly, been deployed in other jurisdictions to protect environmental interests in the absence of an enforceable environmental right.[4] In *Gabcikovo — Nagymaros Project (Hungary v Slovakia)*, Weeramantry J held: '[t]he protection of the environment is likewise a vital part of contemporary human rights doctrine for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself.'[5]

The Constitutional Court has endorsed the connection between the right to a healthy environment and the right to life. The *Fuel Retailers* Court emphasised the importance of effective protection of the environmental rights in the Constitution as a pre-requisite for the enjoyment of the other rights in the Bill of Rights:

> The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed it is vital to *life* itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment.[6]

(w) Human dignity[7]

The right to dignity can dovetail with the right to a healthy environment in two discrete ways: (1) the infringement of the right as a result of environmental degradation; or (2) environmental protection at the cost of human dignity. The first

[1] Act 4 of 2000.

[2] *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC), [2007] ZACC 21 at para 40.

[3] Section 11 of the Final Constitution. For a detailed discussion on s 11, see M Pieterse 'Life' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 39.

[4] For a detailed discussion, see M Anderson 'Individual Rights to Environmental Protection in India' in A Boyle & M Anderson *Human Rights Approaches to Environmental Protection* (1996).

[5] ICJ (September 1997) General list no.92 Reprinted in UNEP *Compendium of Judicial Decisions on Matters Related to Environment: International Decisions* (Vol. 1, 1998) 255, 298

[6] *Fuel Retailers* (supra) at para 102 (emphasis added).

[7] FC s 10 reads: 'Everyone has inherent dignity and the right to have their dignity respected and protected.' For a detailed discussion of s 10, see S Woolman 'Dignity' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

category of denial of dignity would occur, for example, where industries pollute a river that a community uses for water, washing, recreation or worship. The second could occur where there is opposition to providing emergency housing to a desperate community because of the potential impact on an ecologically sensitive area. The courts have yet to consider, interpret and apply the right to dignity in relation to the environmental right in an environmental dispute. When they do, they should recall the Constitutional Court's dictum in *Dawood & Another v Minister of Home Affairs & Others*:

> [Dignity] is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.[1]

(x) Access to housing

The Final Constitution grants every person the right of access to adequate housing and requires the state to take reasonable legislative and other measures within its available resources to attain the progressive realisation of this right.[2] The right to adequate housing or access thereto can come into conflict with FC s 24 where residents of a community have been rendered homeless through a natural disaster such as flooding. Government, under such circumstances, is under a constitutional obligation to provide adequate housing to flood victims. A relocation or housing project that gives effect to constitutional obligations under FC s 26 can have adverse affects on the natural environment.[3]

(y) Access to food and water

Section 27 of the Final Constitution provides rights of access to healthcare

[1] 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC), [2000] ZACC 8 at para 35.

[2] FC s 26 reads:

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

For a detailed discussion of s 26, see K McLean 'Housing' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55.

[3] See *Minister of Public Works & Others v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC), [2001] ZACC 19.

services,[1] sufficient food and water,[2] and social security.[3] Two rights contained in FC s 27 stand in some tension with the environmental rights in FC s 24: the rights to food and water. Subsistence fishing and hunting often have a negative impact on the conservation of sensitive ecosystems. Agricultural practices — say the use of natural aquifers to increase production — may have an adverse effect on sound environmental management. Moreover, the state's dual obligations to manage the natural environment and to provide the conditions for adequate production of food products can come into conflict.[4] At the same time, the right to access to water may work, hand in glove, with the right to a healthy environment. Access to water implies drinking water free from toxic contaminants, which will require keeping watercourses and the surrounding environment free of pollution.[5]

(z) Property Clause

The Final Constitution grants individuals a limited right to property.[6] If the government wants to restrict the use of a person's property for conservational purposes, then it may, in terms of FC s 25(2), only do so in terms of a law of general application and provided that such a deprivation is not done 'arbitrarily'.[7] However, the term 'arbitrary' in FC s 25(1) has been interpreted by the Constitutional Court to describe a decision-making process that falls somewhere between

[1] FC s 27(1)(a) reads: 'Everyone has the right to have access to health care services, including reproductive health care'. For a detailed discussion on the right to healthcare, see D Bilchitz 'Health' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 56A.

[2] FC s 27(1)(b) reads: 'Everyone has the right to have access to sufficient food and water'. For a discussion on the right to food, see D Brand 'Food' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 56C. For a discussion on the right to water, see A Kok & M Langford 'Water' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 56B. For the most recent authority on the right to water, see *Mazibuko & Others v City of Johannesburg & Others* (CCT 39/09) [2009] ZACC 28 (Constitutional Court rejected Soweto residents' objections to the City's water policy).

[3] FC s 27(1)*(c)* reads: 'Everyone has the right to have access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.' For a discussion on the right to social security, see M Swart 'Social Security' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 56D.

[4] For further discussion of the rights to food and nutrition, see G Bekker 'Introduction to the Rights to Food and Nutrition' in Centre for Human Rights *Economic and Social Rights Series — A Compilation of Essential Documents on the Rights to Food and Nutrition* (Volume 3, 2000) 1.

[5] See United Nations Committee on Economic, Social and Cultural Rights' General Comment No. 15 on the Right to Water. E/C.12/2002/11 (12 Nov. 2002)(The comment states that everyone is entitled to safe and acceptable water for personal and domestic use.)

[6] FC s 25. For more on the right to property, see T Roux 'Property' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46.

[7] See AJ van der Walt 'Property Rights, Land Rights, and Environmental Rights' in D van Wyk, B De Villiers, J Dugard & D Davis *Rights and Constitutionalism: The New South African Legal Order* (1994) 496.

actual arbitrariness and proportionality.[1] If the state wishes to expropriate property, it must do so for a public purpose or in the public interest and must provide the owner with fair compensation. It is yet to be determined when protecting the environment is a sufficient purpose to expropriate property.

(bb) Procedural Rights

The procedural rights — the rights to access to information and administrative justice — contained in the Bill of Rights are often indispensable in the application, implementation and enforcement of FC s 24. Procedural rights provide a mechanism for gathering information that might affect those concerned with a potential environmental dispute and in adopting reaction strategies to check the reasonableness of government decisions. As Oliver JA wrote in *Director: Mineral Development, Gauteng Region, & Another v Save the Vaal Environment & Others*: 'Our Constitution, by including environmental rights as fundamental human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect [in terms of the] administrative process in our country.'[2]

(x) Access to Information[3]

The right of access to information provides the public with a mechanism to obtain relevant information on existing or potential threats to the environment.[4] For example, in *Van Huysteen v Minister of Environmental Affairs and Tourism*, the Cape High Court held that the applicants should have access to state-held documents regarding the development of a proposed steel mill and its potential adverse environmental impact.[5]

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[1] *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC), [2002] ZACC 5. For further discussion, see T Roux 'The "Arbitrary Deprivation" Vortex: Constitutional Property Law after *FNB*' in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 265 and F Michelman 'Against Regulatory Taking: In Defence of the Two-stage Inquiry' in Woolman & Bishop (supra) at 283.

[2] 1999 (2) SA 709, 719 (SCA).

[3] FC s 32 reads:

(1) Everyone has the right of access to-

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

For a discussion of FC s 32, see J Klaaren & G Penfold 'Access to Information' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) Chapter 62. For a discussion of the right's application to environmental law, see W Du Plessis 'Access to Information' in A Paterson & LJ Kotze *Environmental Compliance and Enforcement in South Africa* (2009) 197-221.

[4] See C Bruch, W Coker & C van Arsdale 'Breathing Life into Fundamental Principles: Implementing Constitutional Environmental Protections in Africa' (2000) 7 *SAJELP* 21,66.

[5] 1996 (1) SA 283 (C), 1995 (9) BCLR 1191 (C). See also *Aquafund (Pty) Ltd v Premier of the Western Cape* 1997 (7) BCLR 907 (C); *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W), 1998 (8) BCLR 1024 (W); *Van Niekerk v City Council of Pretoria* 1997 (3) SA 839 (T); and *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (4) SA 174 (T), 1997(8) BCLR 1048 (T).

The constitutional right to access information has — as required by FC s 32(b) — been given effect by the Promotion of Access to Information Act ('PAIA').[1] In addition to the general procedure for accessing information, PAIA places a mandatory obligation on both public[2] and private[3] bodies to disclose information if the record would reveal evidence of 'imminent and serious public safety or environmental risk.' In *Trustees for the Time Being of the Biowatch Trust v the Registrar: Genetic Resources & Others,*[4] the High Court dealt with an application for access to information about genetically modified organisms. The application relied on both FC s 32 and PAIA (because the application was lodged between promulgation and entry into force of PAIA.) The respondents were of the view that the request was premature. Internal remedies, in their view, had not yet been exhausted in terms of s 78 of PAIA. Dunn AJ concluded, however, that s 78 was not applicable because the section did not apply to the bodies from which Biowatch was seeking information. One of the complex array of issues raised in *Biowatch* was whether the state could refuse to disclose information on the grounds of s 18 of the Genetically Modified Organisms Act.[5] Section 18 prohibited the Registrar from disclosing information gained in his duties, except if ordered to do so by a court or 'insofar as it is necessary for the proper application of the provisions of [the GMO] Act'. Dunn AJ held that the second exception applied:

> the right of access to information is intended to serve a wider purpose, namely to ensure that there is open and accountable administration at all levels of government - a vital ingredient in our new constitutional culture and in an open and democratic society. The disclosure of information, or the granting of access to information, should therefore, in my view, be necessary for the proper application of the provisions of the GMO Act. In other words, the Registrar is not prohibited from disclosing any information acquired by him through the exercise of his powers or the performance of his duties under the GMO Act, if such disclosure is aimed at giving effect to the right to access of information enshrined in s 32(1)*(a)* of the Constitution.[6]

Dunn AJ, therefore, correctly concluded that Biowatch was entitled to most of the information it had sought under FC s 32(1).

A number of pieces of environmental legislation complement FC s 33 and PAIA.[7] For example, the national environmental management principles of NEMA provide that 'decisions must be taken in an open and transparent manner, and access to information must be provided for in accordance with the law."[8] NEMA further provides for access to environmental information and the protection of whistle-blowers.[9]

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[1] Act 2 of 2000.
[2] PAIA s 46*(a)*(ii).
[3] PAIA s 70*(a)*(ii).
[4] 2005 (4) SA 111 (T)('*Biowatch (HC)*').
[5] Act 15 of 1997.
[6] *Biowatch (HC)* (supra) at para 37.
[7] See National Water Act 36 of 1998 ss 110, 140 –142; National Environmental Management: Biodiversity Act 10 of 2004 ss 7, 61, 82, 89, 99 and 100; Protected Areas Act 57 of 2003 ss 5, 10 and Part 5; and Mineral and Petroleum Resources Development Act 28 of 2002 ss 30, 61 and 88.
[8] NEMA s 2(4)*(k)*.
[9] NEMA s 31.

The right to access information is closely supported by the rights to freedom of expression[1] and freedom of assembly.[2] The freedom to express what may be controversial or unpopular views is particularly relevant when environmental action (or inaction) elicits vociferous protests from environmental activists — often in ways that impinge on private property. The question is, then, how to harmonize, if possible, the rights to property and economic activity of developers and the rights of the public to obtain information about the negative environmental impacts of the planned activity and to voice their displeasure with the development through protests, assemblies or demonstrations on the property at issue. The Court in *Petro Props (Pty) Ltd v Barlow and the Libradene Wetland Association* faced this very question.[3] A persistent public campaign organised by a community association had halted the development of a Sasol petrol filling station that encroached on a wetland. The campaign was so effective that Sasol withdrew from the development and construction stopped. The developer failed in its application to interdict the respondents from harassing and interfering with its property rights to develop the property into a filling station. Tip AJ rejected the argument that the right to development of the property outranks the right to freedom of expression. Referring to various leading judgments on the importance of freedom of speech in an open and democratic society, he held that as the protest was 'not vexatious, *contra bonos mores* or actionable', there was no justification in prohibiting a successful public campaign.[4] South African courts 'have on many occasions warned of the perils of curtailing free speech and free association'.[5] This was such a case: Permitting an interdict in these circumstances 'would have a chilling effect on the readiness of persons … and associations … to step forward as active citizens.'[6]

(y) Administrative Justice[7]

FC s 33 and the subsequent promulgation of the Promotion of Administrative Justice Act ('PAJA')[8] provide powerful rights to just administrative action. Administrative justice plays a central role in most environmental disputes: the subject of a challenge almost always turns on the legitimacy of the administrative decision

[1] For a detailed discussion of the expression protection found in FC s 16(1), see D Milo, G Penfold & A Stein 'Freedom of Expression' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 42.

[2] For a detailed discussion of the assembly protection found in FC s 17, see S Woolman 'Freedom of Assembly' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 43.

[3] 2006 (5) SA 160 (W)('*Petros Props*').

[4] *Petro Props* (supra) at para 65.

[5] Ibid at para 60.

[6] Ibid.

[7] For a detailed discussion of administrative justice, FC s 33, see J Klaaren & G Penfold 'Kust Administrative Action' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 63. For a discussion of FC s 33's application to environmental law, see Y Burns & M Kidd 'Administrative Law & Implementation of Environmental Law' in HA Strydom & ND King *Fuggle and Rabie's Environmental Management in South Africa* (2nd Edition, 2009) 222-268; and E Bray 'Administrative Justice' in A Paterson & LJ Kotze *Environmental Compliance and Enforcement in South Africa* (2009) 152-196.

[8] Act 3 of 2000.

procedures (an EIA, for example) for issuing a licence or permit.[1] PAJA and FC s 33 offer the following three-fold protection: all administrative action must be 'lawful, *reasonable* and *procedurally* fair.'[2]

First: reasonableness. The assurance of reasonable administrative action allows courts to consider, within certain parameters, the issue of substantive fairness in the administrative decision-making process. In *South African Shore Angling Association & Another v Minister of Environmental Affairs*, the parties challenged the validity and constitutionality of regulations that impose a general prohibition on recreational use of vehicles in the coastal zone as unreasonable.[3] Erasmus J rejected the challenge. As the regulations did not constitute an absolute ban — they allowed for exemptions and permitting — they were reasonable. In *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs*, the applicant challenged a decision not to grant permission to build a new filling station. It argued that the MEC had relied on socio-economic concerns, not environmental ones and had exceeded his mandate by relying on sources outside the ECA. The court rejected both arguments. The *BP Southern Africa* court held that the constitutional and statutory framework — which expanded beyond ECA to include NEMA and other relevant legislation — made it 'abundantly clear that the department's mandate includes the consideration of socio-economic factors as an integral part of its environmental responsibility.'[4] Claassen J emphasised that the discretionary powers exercised by the MEC during the EIA were reasonable because they enabled the MEC to fulfil her constitutional obligation under FC s 24.[5] In addition, the MEC's discretionary powers were not exhausted by strict adherence to EIA guidelines. Ample room exists for deviation from the guidelines -- provided the applicant has proffered comprehensive supporting evidence. In the instant case it failed to provide such evidence.

The most important decision on reasonableness in the context of environmental decision-making is the Constitutional Court's discussion on the allocation of fishing quotas in *Bato Star Fishing (Pty) Ltd v the Minister of Environmental Affairs and Tourism*.[6] In essence, O'Regan J held that the reasonableness of administrative action depends on the facts of the case. The Court extracted the following (somewhat unhelpful) test from s 6 of PAJA: a decision will be unreasonable if a reasonable decision-maker could not have reached it. The Court reiterated that reasonableness in any particular instance will depend on factors such as the nature of the decision; the identity of the decision-maker; the range of factors relevant to the decision; the nature of the competing interests involved; and the impact of the decision on the lives and well-being of those affected. The Court further 'warned' that judges may not take over the task of the executive branch

[1] See also LJ Kotze & AJ Van der Walt 'Just Administrative Action and the Issue of Unreasonable Delay in Environmental Impact Process: A South African Perspective' (2003) 10 *SAJELP* 39.

[2] FC s 33(1).

[3] 2002 (5) SA 511 (SE).

[4] Ibid at 151D-E.

[5] 2004 (5) SA 124 (W).

[6] 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC), [2004] ZACC 15. See also *Compass Waste Services (Pty) Ltd v The Head of Department, Department Agriculture and Environmental Affairs of the Province Kwa-Zulu Natal & Others* unreported case (N) Case No: 2280/2003 (on file with authors).

of government by arrogating 'to [themselves] superior wisdom'. Rather, the sole task of the courts is to establish if a decision was reasonable in terms of the Constitution.[1]

Second: Procedural fairness. Procedural fairness in the decision-making process of environmental matters embraces the *audi alteram partem* ('hear the other side') rule. In *Director, Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment & Others*,[2] the Supreme Court of Appeal rejected the government's refusal to apply the *audi alteram partem* rule in a mining licence application. The SCA described the government's position as an overly legalistic interpretation of the relevant legislation and as 'emasculat[ing] the principles of natural justice'.[3] The state's formalistic approach to statutory interpretation was clearly in conflict with the constitutional duty on all bearers of state authority (and even, in some instances, private parties)[4] to concretise FC s 33 and FC s 24. Through contextual-teleological-value based interpretation, the Court found that the issuance of a mining licence in terms of s 9 of the Minerals Act[5] set into motion a series of events that might have serious consequences for the environment because it enabled the licence holder to take preparatory steps to commence actual mining upon the later approval of the environmental management program ('EMPR').[6] Furthermore, the Court found that s 39 of the Minerals Act enabled a license holder to be exempted from the responsibility to conduct an EMPR, or to obtain temporary permission to commence mining pending the approval of the EMPR.[7] If the demand to 'hear the other side' was postponed until the end of the EMPR process, then environmental concerns might never be heard. By applying the *audi* rule at the s 9 stage, the extensive damage that mining operations might cause to the environment and ecology can be identified and, if necessary, prevented. This approach will ensure that sustainable development will take place in a fashion that ensures intergenerational equity.

The issue of procedural fairness was again considered in *Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs and Tourism & Eskom Holdings*.[8] Earthlife argued that the procedure that led to the grant of an Environmental Authorisation ('EA') to construct a pebble bed modular reactor ('PBMR') was unfair. Earthlife had only been permitted to comment on the draft environmental impact report. Moreover Earthlife could only engage the Director-General's consultants: they were barred from approaching the DG himself. The Court took time to stress the great importance of procedural aspects and that EA administrators must give proper consideration to interested and affected parties'

[1] Ibid at 44-46.
[2] 1999 (2) SA 709 (SCA)('*Save the Vaal*').
[3] Ibid at 717.
[4] See FC ss 8(1) and (2).
[5] Act 50 of 1951.
[6] *Save the Vaal* (supra) at 718.
[7] Ibid at 718 F-H.
[8] 2005 (3) SA 156 (C)('*Earthlife*'). See also *Evans & Other v Llandudo/Houtbay Transitional Metroplolitan Substructure & Another* 2001 (2) SA 342 (C)(the Court dealt with the issue of procedural fairness in the decision-making process where the respondent issued an ECA s 31A directive in order to protect the environment).

participation in the authorisation process. After reviewing the evidence, Griesel J accepted both of Earthlife's arguments: (1) the DG made his decision 'without having heard [Earthlife]' and (2) 'without making himself aware of the nature and substance of [its] submissions.'[1] He set aside the decision and ordered the DG to reconsider the matter after hearing Earthlife's submissions.

Two last, minor points are worth making. One, a license applicant is entitled to written reasons from an environmental authority for the refusal of the license.[2] Two, PAJA provides not only for judicial review of administrative action, but specifies the remedies that can be granted if the decision is deficient. These remedies include: prohibition, setting aside the administrative action, a declaration of rights, granting an interdict, and, in extreme cases, damages.[3]

(iii) *Other Constitutional provisions relevant to the environment*

Several central structural mechanisms of the Final Constitution that determine the respective competences of the national legislature and provincial legislatures have an important bearing on environmental matters.[4] In short, certain subject areas are assigned exclusively to the provincial legislatures,[5] while others are areas of concurrent competence for both national and provincial lawmakers.[6] A detailed regime exists for resolving conflicts between the two spheres of legislative authority. Environmental issues fall into both the exclusive and shared categories. The Final Constitution grants concurrent control over the most important environmental subjects, including 'Environment', 'Nature conservation … and marine resources', 'Pollution control' and 'Soil conservation'.[7] Only a few subjects, with limited environmental relevance, are assigned solely to the provinces.[8] Finally, some environmental issues — including 'Air pollution', 'Municipal parks', 'Noise pollution' and 'Refuse removal and waste disposal'[9] — are reserved for local gov-

[1] *Earthlife* (supra) at para 78.

[2] PAJA s 5.

[3] PAJA ss 6 and 8.

[4] For a full discussion of the separation between national and provincial governments, see V Bronstein 'Legislative Competence' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15 and V Bronstein 'Conflicts' in S Woolman, T Roux &, M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 16.

[5] These powers are listed in Schedule 5.

[6] These powers are listed in Schedule 4.

[7] Other potentially relevant areas included in Schedule 4 are: (1) Administration on indigenous forest; (2) Agriculture; (3) Animal control and diseases; (4) Cultural matters; (5) Disaster management; (6) Health services; (7) Industrial promotion; (8) Public transport; (9) Regional planning and development; (10) Tourism; (11) Trade; and (12) Urban and rural development.

[8] Potentially relevant areas included in Schedule 5 are: (1) Abattoirs; (2) Museums other than national museums; (3) Provincial planning; (4) Provincial cultural matters; and (5) Provincial roads.

[9] Other potentially relevant areas included in Schedule 4(b) and 5(b) are: (1) Beaches; (2) Cleansing; (3) Control of public nuisances; (4) Electricity and gas reticulation; (5) Fences and Fencing; (6) Fire fighting services; (7) Municipal abattoirs; (8) Municipal planning; (9) Municipal health services; (10) Municipal public transport; (11) Stormwater management systems; and (12) Water and sanitation services.

ernment.[1] If one sphere of government, intentionally or not, intrudes into the realm of another sphere, its actions will be invalid.[2]

Chapter 9 of the Final Constitution establishes several organizations designed to support constitutional democracy. The South African Human Rights Commission ('SAHRC'),[3] the Public Protector and other bodies ensure that relatively impartial institutions monitor, promote, protect and fulfil the rights contained in Chapter 2.[4] For example, the SAHRC must request from relevant organs of state information on measures undertaken by these organs in the realisation of the rights contained in chapter 2, including the right to a healthy environment.[5]

50.4 Application of the Right to a Healthy Environment: Practical Considerations

Although the right to a healthy environment is entrenched in our Bill of Rights, the case-law remains under-developed. What follows are some practical considerations to be taken into account when applying FC s 24 in environmental dispute settlement procedures.

(a) Considering the appropriate forum for environmental dispute settlement

Litigation is but one dispute resolution mechanism; there are many other — sometimes more appropriate — dispute resolution processes. If we think of the possibilities as falling on a continuum with litigation on one end, other options towards the less formal end would encompass negotiation, mediation, conciliation, arbitration, mini-trial, mediation-arbitration, fact-finding and enquiry. Non-litigation procedures are referred to collectively as Alternative Dispute Resolution ('ADR'). Whatever the procedure parties use, the application and the interpretation of FC s 24 remain an integral part of resolving an environmental dispute.

[1] FC ss 155(6)*(a)* and 155(7) read with Schedules 4*(b)* and 5*(b)*.

[2] See *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & Others* [2010] ZACC 11 (a national law that interfered with the provincial power to determine municipal planning was declared invalid).

[3] For more on the Chapter 9 institutions, see M Bishop & S Woolman 'Public Protector' in S Woolman, T Roux &M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24A; S Woolman & Y Schutte 'Auditor General' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B; J Klaaren 'SA Human Rights Commission' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24C; C Albertyn 'Commission for Gender Equality' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D, J White 'Independent Communication Authority of South Africa (ICASA)' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24E, S Woolman & J Soweto-Aullo 'Commission for the Promotion & the Protection of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24F.

[4] FC s 184.

[5] FC s 184(3).

ADR will generally be more appropriate if the maintenance of the relationship between the parties is important.[1] The primary advantages of ADR are: more cost effective; less time consuming; the parties generally have the power to determine the outcome of the dispute; the parties can design the procedures involved; and the parties choose an independent mediator or arbitrator with appropriate and expert knowledge. Litigation, on the other hand, will be more appropriate if one wishes to rely on existing precedent or if media coverage is important to the parties. Unfortunately, choosing the appropriate dispute resolution process — especially in environmental disputes — may not fall within the discretion of the adversely affected parties. Quite often the appropriate forum will be decided by statute, by regulation[2] or, in the case of many corporate institutions, by contractual obligations.[3]

NEMA and the National Water Act,[4] however, both require ADR.[5] The National Water Act established a Water Tribunal to hear appeals against decisions taken by institutions operating under the authority of the Act.[6] The Act also provides for environmental dispute resolution through the processes of mediation and negotiation.[7] NEMA further broadens the scope of environmental dispute resolution. Any Minister, MEC or Municipal Council may, in decisions where the environment is concerned, refer the matter for conciliation.[8] Where this procedure proves inappropriate, the matter can be referred to facilitation.[9] NEMA also provides for arbitration[10] and investigation.[11]

Another important consideration in deciding on the appropriate forum in environmental disputes is the relief sought. Given that environmental infringements are often caused by multi-national corporations, it might be more appropriate to file in another country against the mother company than to litigate in South Africa. In *Englebert Ngcobo & Others v Thor Chemical Holdings (Pty) Ltd*,[12] for example, the applicants filed in the United Kingdom and not in South Africa. The applicants were all temporary workers at the Thor Chemical Holdings plant at Cato Ridge, KwaZulu Natal. They had been exposed at the plant to hazardous and

[1] For a discussion on approaches to environmental dispute resolution in South Africa, see Johan van den Berg 'Environmental Dispute Resolution in South Africa — Towards Sustainable Development' (1998) 5 *SAJELP* 71.

[2] Regulations may require an independent third party to investigate the matter.

[3] A contractual provision may provide that an environmental dispute be referred to an arbitrator for arbitration.

[4] Act 36 of 1998.

[5] Water Act s 150. See *Naude & Andere v Heatlie & Andere; Naude & Andere v Worcester-Oos Hoofbesproeingsraad & Andere* 2001 (2) SA 815 (SCA)(on competency of the Water Court). See *Jansen van Vuuren & Andere v Van der Merwe & Andere* 1992 (1) SA 124 (A)(discussion of the jurisdiction and power of the Water Court established under the previous Water Act 54 of 1956). See also *Kruger v Le Roux* 1987 (1) SA 866 (A); *Mathee en Ander v Lerm* 1980 (3) SA 742 (C).

[6] Water Act Chapter 16.

[7] Water Act s 150.

[8] NEMA ss 17-18.

[9] Ibid.

[10] NEMA s 19.

[11] NEMA s 20.

[12] No 1994 N 1212 (UK) reprinted in *UNEP Compendium of Judicial Decisions on Matters related to Environment: National Decisions* (Volume 1, 1998) 237.

unsafe quantities of mercury, mercury vapour and mercury compounds. Legislation on occupational compensation prevented the applicants from suing in South Africa.[1]

(b) The issue of standing[2]

Standing in environmental litigation is substantially easier to secure as a result of FC s 24. Prior to its inclusion, unless standing was expressly granted under legislation,[3] applicants had to show a direct personal interest in the environmental dispute.[4] This cramped position on standing made environmental public interest litigation virtually impossible. FC s 38 dramatically expands traditional standing rules and permits people to sue in the public interest, on behalf of a class of people, on behalf of others who cannot represent themselves and associations whose members have an interest in a matter.[5] Section 32(1)*(e)* of NEMA provides even broader standing by allowing any person or group of persons to seek appropriate relief in respect of any breach of NEMA, its s 2 principles, or any provision of any statutory provision pertaining to environmental protection. The only limitation is that the person acts in the 'interest of protecting the environment'.[6]

Pickering J provided powerful early support for wide standing in environmental litigation in *Wildlife Society of South Africa v Minister of Environmental Affairs and Tourism*:

> One of the principal objections often raised against the adoption of a more flexible approach to the problem of *locus standi* is that the floodgates will thereby be opened, giving rise to an uncontrollable torrent of litigation. It is well, however, to bear in mind … that it may sometimes be necessary to open the floodgates in order to irrigate the arid ground below them. I am not persuaded by the argument that to afford *locus standi* to a body such as first applicant in circumstances such as these would be to open the floodgates to a torrent of frivolous or vexatious litigation against the State by cranks or busybodies. Neither am I persuaded, given the exorbitant costs of Supreme Court litigation, that should the law be so adapted cranks and busybodies would indeed flood the courts with vexatious or frivolous

[1] Workmen's Compensation Act 31 of 1941 s 7 prohibited actions by employees against employers for injuries sustained at work. Irrespective of fault a claim must be lodge against the Workman's Compensation Commissioner. Section 8 of the Act, however, permits a workman to sue a third-party tortfeasor. The third-party tortfeasor in this instance was a UK-based company.

[2] For a detailed discussion of standing in Bill of Rights litigation, see C Loots 'Standing, Ripeness & Mootness' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 7.

[3] See *Society for the Prevention of Cruelty to Animals, Standerton v Nel & Others* 1988 (4) SA 42 (W).

[4] For a detailed discussion of this issue, see M Kidd *Environmental Law — A South African Guide* (1997) 26.

[5] FC s 38 reads:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

[6] NEMA s 32(1)*(e)*.

> applications against the State. Should they be tempted to do so, I have no doubt that an appropriate order of costs would soon inhibit their litigious ardour.
>
> In any event, whilst cranks and busybodies who attempt to abuse legal process do no doubt exist, I am of the view that lawyers are sometimes unduly apprehensive and pessimistic about the strength of their numbers. The meddlesome crank and busybody with no legal interest in a matter whatsoever, mischievously intent on gaining access to the court in order to satisfy some personal caprice or obsession, is, in my view, as has been remarked elsewhere, more often a spectral figure than a reality.[1]

However, notwithstanding the clear and unequivocal broadening of standing under FC s 38 and NEMA, it is often a preliminary issue addressed in environmental litigation. For example, in *All the Best Trading CC t/a Parkville Motors v S N Nyagar Property Development and Construction CC* the court held that applicant lacked standing because the suit did not turn on the advancement of environmental rights. The suit was crafted solely around the firm's pecuniary interests.[2] However, in two further filling station cases — *Capital Motors CC v Shell SA Marketing (Pty) Ltd*[3] and *Fuel Retailers*[4] — applications for protection of business interests as part of the right to economic and social development were successfully based on FC s 24. In *Tergniet and Toekoms Action Group & Thirty Four Others v Outeniqua Kreosootpale (Pty) Ltd & Others*[5] the court accepted the wider basis for standing provided by FC s 38 and s 32 of NEMA when it allowed an application by an informal residential grouping without a founding constitution or fixed membership and 34 inhabitants or property owners of the affected area. Their complaint, ultimately successful, was against the illegal manufacturing of creosote-treated wooden poles and accompanying unlawful release of offensive and noxious vapours.

(c) Scope of application

FC s 8(1) states that all the substantive provisions in the Bill of Rights apply to all law and bind the legislature, the executive, the judiciary and all organs of state.[6] FC s 8(2) provides that a right 'binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.' The extension of the environmental right's application to non-state actors means that the parties most likely to impair the enjoyment of the right — the mining sector, industries and corporate institu-

[1] 1996 (3) SA 1095 (Tks).
[2] 2005 (3) SA 396 (T).
[3] Unreported decision (T), Case No. 3016/05 (18 March 2005)(on file with authors).
[4] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & Others* 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC), [2007] ZACC 13 ('*Fuel Retailers*') at para 109 (Sachs J, dissenting)('It is ironic that the first appeal in this Court to invoke the majestic protection provided for the environment in the Bill of Rights comes not from concerned ecologists but from an organised section of an industry frequently lambasted both for establishing worldwide reliance on non-renewable energy sources and for spawning pollution. So be it. The doors of the Court are open to all, and there is nothing illegitimate or inappropriate in the Fuel Retailers Association of Southern Africa seeking to rely on legal provisions that may promote its interests'.)
[5] [2009] ZAWCHC 6 (23 January 2009).
[6] FC s 8(1).

tions — can be held directly accountable. FC s 24 can apply to a natural person or a juristic person in two ways. It can apply directly to a legal dispute that engages the constitutionality of an express rule of law as a point of possible infringement. It can apply indirectly to an environmental dispute in which the court is asked to interpret legislation or develop the common law in light of the general spirit, purport and objects of the Bill of Rights.[1]

In *The Director, Mineral Development, Gauteng Region & Sasol Mining (Pty) Ltd v Save the Vaal Environment & Others*, the principle of intergenerational equity applied directly to the conduct of an organ of state.[2] But, had there been no express rule of law governing the dispute, FC s 8(2) could have been used to extend the legal force of FC s 24*(a)* directly to the conduct of mining rights holder. Where no express rule of law exists to govern conduct, FC s 8(2) creates the space to apply evolving principles of international environmental soft law to disputes between private parties. For example, courts could create legal duties — in addition to those responsibilities already imposed by legislation — for companies to conduct their construction, manufacturing or mining activities in an ecologically sustainable manner, to manage their waste streams effectively in terms of the 'polluter pays' and 'cradle-to-grave' principles, or to take adequate steps in terms of the precautionary principle to prevent greenhouse gas emissions and contributions to global warming.

(d) Limitation of the environmental right

FC s 36(1) permits a law of general application to limit the environmental rights in FC s 24 to the extent that the limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom'.[3] In addition to the general limitation clause, parts of FC s 24 can be viewed as 'internal limitations'. Particularly, the qualifications 'reasonable' and 'ecological' in FC s 24*(b)* could be seen as internal modifiers of an otherwise absolute right. A practical application of the general limitation clause in relation to the environmental right is yet to be considered by the courts.

(e) Interpretational guidelines

In addition to existing rules of statutory interpretation, the Bill of Rights mandates courts to promote the spirit, purport and objects of the Bill of Rights

[1] FC ss 8(3) and 39. For detailed discussions of the application of the Bill of Rights, see S Woolman 'Application' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31; S Woolman 'The Amazing, Vanishings Bill of Rights' (2007) 124 *SALJ* 762; C Sprigman & M Osborne '*Du Plessis* is not Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights in Private Disputes' (1999) 15 *SAJHR* 25; Jan Glazewski *Environmental Law in South Africa* (2000) 88; I Currie & J de Waal *The Bill of Rights Handbook* (2005); Alfred Cockrell 'Private law and the Bill of Rights: A Threshold of Horizontality' (1997) *Bill of Rights Compendium* 3A1-17. See also *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC), [1996] ZACC 10.

[2] 1999 (2) SA 709, 719 (SCA).

[3] For a detailed discussion of the limitation of the rights contained in the Bill of Rights, and internal limitations found within the rights themselves, see S Woolman & H Botha 'Limitation' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

in the interpretation of legislation.[1] In the environmental context, courts have effectively employed this mandate in order to give effect to both the objective of FC s 24 as well as the Environmental Principles, the Duty of Care and the concept of Integrated Environmental Management envisaged in NEMA.[2] In *Sasol*, the Supreme Court of Appeal had to decide whether a regulation permitted the government to regulate filling stations generally, or only the storage and use of hazardous substances at filling stations. In rejecting the High Court's conclusion that the regulation only had limited application, Cachalia AJA explicitly relied on FC s 24, particularly its endorsement of sustainable development. He reasoned: 'To attempt to separate the commercial aspects of a filling station from its essential features is not only impractical but makes little sense from an environmental perspective. It also flies in the face of the principle of sustainable development.'[3]

But the clearest example of interpreting legislation in line with FC s 24 — and FC s 33 — is *MEC: Department of Agriculture, Conservation and Environment & Another v HTF Developers (Pty) Limited*. In *HTF Developers*, the question before the High Court was whether the applicant required environmental authorization before it could subdivide its property. The state contended that the land constituted 'virgin ground' and the applicant therefore required authorization. Murphy J avoided deciding the precise meaning of 'virgin ground'. Instead Murphy J interpreted s 31A of the ECA — which permits the state to intervene in emergency situations to prevent damage to the environment — in light of the constitutional imperative of promoting conservation and securing ecologically sustainable development. By so doing, the court granted the MEC the power to intervene in *any* activity if it was necessary to protect the environment.

HTF Developers appealed to the SCA.[4] By this stage the 'virgin ground' regulation had been repealed. However, the question at the heart of the dispute still required statutory interpretation. HTF argued that the MEC was obliged to follow the procedural requirements in s 32 before acting in terms of s 31A. Section 32 required the government to publish a notice in the Government Gazette and to allow 30 days for comments if it made a 'direction'. Section 31A also used the word 'direction' to describe interventions to prevent individuals causing harm to the environment. The majority agreed with HTF that as the word 'direction' was used in both sections, the procedure in s 32 had to apply to s 31A. Jafta JA was the lone voice of dissent. He argued that the two sections served different purposes: s 32 was meant to 'promote the right to administrative justice, particularly the

[1] FC s 39(2).

[2] See *MEC for Agriculture, Conservation, Environment & Land Affairs v Sasol Oil Pty Ltd & Bright Suns Development CC* [2005] ZASCA 76 ('*Sasol*') at para 13; *HTF Developers (Pty) Ltd v the Minister of Environmental Affairs (1)* 2006 (5) SA 512 (T) (this decision was over turned on appeal on different grounds in *HTF Developers (Pty) Ltd v the Minister of Environmental Affairs* 2007 (5) SA 438 (SCA)(A majority of the SCA held that the MEC had failed to follow the procedural requirements in ECA s 32. Jafta JA dissented, concluding that s 31A was for urgent situations and therefore s 32 was not applicable.) which was in turn reversed by the Constitutional Court *MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Limited* 2008 (2) SA 319 (CC), 2008 (4) BCLR 417 (CC), [2007] ZACC 25 (The Court supported Jafta JA's judgment) These decisions are discussed in detail below.)

[3] *Sasol* (supra) at para 16 quoting *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124, 160A-E (W).

[4] *HTF Developers (Pty) Ltd v Minister of Environmental Affairs* 2007 (5) SA 438 (SCA).

right to procedural fairness' while s 31A's purposes was to ensure a healthy environment as envisaged by FC s 24.[1] Requiring the government to follow the s 32 procedure, which included a 30-day notice and comment procedure, would defeat the purpose of s 31A.[2] The s 31A power would, however, still have to comply with the procedural strictures of PAJA.

The government appealed the SCA's decision. The Constitutional Court preferred Jafta JA's dissenting view.[3] Skweyiya J noted that while words that appeared more than once in a statute should ordinarily be given the same meaning, this rule could and *should* be abandoned if it would lead to absurd results.[4] That would be the case if s 32 applied to cases where the government had to act promptly to prevent harm to the environment. The Court distinguished between two uses of 'direction': it is employed to refer to decisions that affect the public generally, and to decisions that only engage the interests of individuals. Only in the first case was the 30-day procedure necessary or appropriate.[5] PAJA offered a much better procedural check for the s 31A power as its requirements were flexible, depending on the circumstances of the case.[6] Justice Ngcobo wrote a concurring judgment emphasizing that

> the Constitution and the environmental legislation require authorities to adopt an integrated approach to the environment; an approach that protects the environment while promoting socio-economic growth. To this end, the authorities are enjoined to adopt a risk averse and cautious approach and to prevent and remedy negative impacts on the environment.[7]

(f) The role of international law in environmental disputes

Three constitutional provisions create a role for international law in South Africa. One: FC s 39(1) requires any court, tribunal or forum to consider international law when interpreting the Constitution. Two: Customary international law is, FC s 232 tells us, South African law, provided that it is not in conflict with the Final Constitution or an Act of Parliament. Three: FC s 233 reads: 'Every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.[8] During the application of FC s 24, international environmental law becomes integral to the decision making process for two reasons. First, international law obviously informs the interpretation of the section. Second, the absence of a sound South African environmental jurisprudence that takes contemporary developments in the field of environmental law into account makes international law particularly important in addressing novel problems. The need to consider international law in environmental dispute settlement applies not only

[1] *HTF Developers (Pty) Ltd v Minister of Environmental Affairs* (supra) at paras 19-21.
[2] Ibid at paras 22-27.
[3] *MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Limited* 2008 (2) SA 319 (CC), 2008 (4) BCLR 417 (CC), [2007] ZACC 25.
[4] Ibid at para 33.
[5] Ibid at paras 34-36.
[6] Ibid at paras 43 and 46.
[7] Ibid at para 65.
[8] FC ss 232 and 233.

to the courts, but to the Water Tribunal and the environmental arbitrators required by NEMA.

While international environmental law provides a rich source of jurisprudence, two decisions are worthy of special mention. *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* provides a useful account of sustainable development and may therefore assist courts and counsel in determining the ambit of FC s 24*(b)*.[1] This hermeneutical approach was followed by the Constitutional Court in *Fuel Retailers:* the Court broadly canvassed the meaning of the concept of sustainable development in international law.[2]

Second, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria (SERAC)* — discussed earlier[3] — offers a lucid explanation of the meaning of a right to a satisfactory environment.[4] The decision of the African Commission in *SERAC* notes the wide range of government obligations in the environmental arena. These duties run from the obvious — to prevent pollution and ecological degradation — to duties with a longer-term view — to promote conservation and ensure ecological sustainable development and the use of natural resources — to the procedural — to permit independent scientific monitoring of threatened environments, to undertake environmental and social impact assessments prior to industrial development, to provide access to information to communities involved, and to grant those affected an opportunity to be heard and to participate in the development process. The Commission's discussion provides an invaluable touchstone for future engagement of these complex issues.

In addition, and as noted earlier,[5] international environmental law principles can find — and have found[6] — direct application through the constitutional provisions on international law. These principles include: the polluter must pay, biodiversity, intergenerational equity, and Environmental Impact Assessments.

(g) The role of foreign law in environmental disputes

FC s 39(1)*(c)* provides that a tribunal may use foreign law to assist in interpreting a right. The decision of the Rhodesian Appeal Court in *King v Dykes* is, for example, often cited in the scholarly literature and in domestic litigation to explain the concept of intergenerational equity.[7] Claasens J, in *BP Southern Africa*, cites *King* for the following proposition:

> [t]he idea which prevailed in the past that ownership of land conferred the right on the owner to use his land as he pleases is rapidly giving way in the modern world to the more

[1] See *UNEP Compendium of Judicial Decisions — International Decisions* (Volume I, 1998) 255.

[2] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & Others* 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC), [2007] ZACC 13 at paras 46-56.

[3] §50.2*(c)* above.

[4] *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Communication 155/96 2001.

[5] §50.3*(c)*(i)(dd)*(x)*(1) above.

[6] §50.3*(c)*(i)(dd)*(x)*(2) above.

[7] 1971 (3) SA 540 (RA).

> responsible conception that an owner must not use his land in a way which may prejudice his neighbours or the community in which he lives, and that he holds the land in trust for future generations.[1]

South African courts, particularly the Constitutional Court, have regularly engaged with, drawn on and distinguished foreign law when reasoning their way to a conclusion. They have, however, been careful to note dual constraints that obtain when our courts undertake comparative constitutional analysis. First, foreign jurisdictions possess dissimilar legal frameworks that may work in such a way that facially similar texts produce alternative outcomes. Second, foreign laws and judgments are either tools in getting to grips with similar disputes or rhetorical devices that serve to justify a particular outcome. They never bind a South African court.

(h) Remedies in Environmental Disputes

(i) *Choosing a remedy*

Before discussing some specific remedial options, we set out some basic principles that should inform the choice of remedy. In environmental dispute resolution, judges, arbitrators and other decision makers must resolve the particular disputes before them and craft a remedy that fits the parties before them and the dispute.[2] That said, judicial, administrative or contractual remedies should take note of the conflicting imperatives of economic growth, social progress and environmental protection and attempt to place the particular outcome on the path towards sustainability.

When crafting a remedy, a court, tribunal or other forum should keep in mind the 'polluter pays' principle. The 'polluter pays' principle requires the offending party to create or to restore that habitat which is necessary for biological diversity.[3] They should, in addition, undertake their work in terms of the following assumptions:

(i) That legal and factual means are present in order to establish liability,
(ii) That they have a statutory/ inherent power to mould the appropriate judgment,
(iii) That courts have the power to enforce decisions through sanctions, and
(iv) Judges (decision-makers) are independent from outside influence.[4]

Remedies in environmental disputes are often complex. Adjudicators should draw on expert testimony in a variety of forms: government reports, court-appointed experts, or independent EIA studies.[5]

[1] J Glazewski *Environmental Law in South Africa* (2000) 87.

[2] For a detailed discussion of how courts choose a remedy in constitutional cases, see M Bishop 'Remedies' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) §9.2.

[3] These considerations are largely based on a PowerPoint presentation of Judge Scott Fulton, Environmental Appeals Board, US Environmental Protection Agency, delivered at the Southern African Judges Needs Assessment Seminar on Environmental Law held in Johannesburg (December 2003.)

[4] Ibid.

[5] Ibid. See also *National Fresh Produce Growers Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N) (polluter pays principle).

Fulton offers a useful 'remedial hierarchy' for courts to follow when constructing environmental remedies. Firstly, remedies must *eliminate violations and present dangers*. To eliminate violations, orders may require a halt to activities, emergency clean-ups or renewal.[1] Secondly, remedies should *address long-term environmental damage*. This desideratum presents adjudicators with the challenge of moving past immediate concerns to focus on mechanisms that reverse the long-term effects of pollution. Such remedies normally entail detailed studies and technical assistance that lay bare the nature of the environmental dilemma and the costs of a range of solutions. Typical remedies at this stage are soil, water and sediment remediation or the treatment of contaminated ground water.[2] Thirdly, remedies should provide *adequate compensation*. Compensation for damages can be classified into non-restorable natural resource damages and private party damages (i.e. property or health).[3] Lastly, remedies must *punish violators and deter future violations*. These ends can be met through a combination of criminal sanctions, monetary fines and civil penalties.[4]

(ii) *Specific remedies in environmental disputes*

The primary remedies in environmental cases are: (1) review of state action; (2) injunctions (pre-emptive or directive); (3) damages; (4) punitive sanctions; and (5) permit revocation and asset forfeiture.

(aa) Judicial Review of State Action

Judicial review of state action allows a litigant to invalidate unlawful government decisions. It can, for example, be used to set aside the granting of mining permits or zoning decisions that might negatively impact on the environment. Although litigants ordinarily seek to have a decision set aside, it is also possible to force government to take a decision, or for the court to replace the state's decision with its own.[5]

[1] Fulton (supra).
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] *UNEP Compendium of Judicial Decisions on Matters Related to Environment — National decisions* (Volume 3, 2001) 3. See *Pharmaceutical Manufacturers Association of SA & Another: In Re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC), [2000] ZACC 1 (extent of powers of judicial review of state action). In the South African Environmental Authorisation context cases dealing with review applications include: *Compass Waste Services (Pty) Ltd v The Head of Department, Department Agriculture and Environmental Affairs of the Province Kwa-Zulu Natal and Others* unreported decision (N), Case No: 2280/2003 (on file with the authors); *Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs and Tourism & Eskom Holdings* 2005 (3) SA 156 (C); *Evans & Other v Llandudo/Houtbay Transitional Metroplolitan Substructure & Another* 2001 (2) SA 342(C); *MEC for Agriculture, Conservation, Environment & Land Affairs v Sasol Oil Pty Ltd & Bright Suns Development CC* [2005] ZASCA 76; *South Durban Community Environmental Alliance v Head of Department: Department of Agricultural and Environmental Affairs, Kwazulu-Natal, & Others* 2003 (6) SA 631 (D); and *SLC Property Group (Pty) Ltd & Longlands Holdings (Pty) Ltd v Minister of Environmental Affairs and Economic Development (Western Cape) & Municipality of Stellenbosch* unreported decision (C) Case No. 5542/2007 (on file with the authors).

(bb) Interdicts

Interdicts are powerful instruments in seeking environmental relief. Environmental disputes feature three kinds of interdicts: (1) prohibitory interdict; (2) mandatory interdict; or (3) structural interdict.

(x) Prohibitory interdict

Where an activity or its continuation constitutes a threat to the environment, an injured party may approach the court for relief in the form of a prohibitory interdict. In *The Minister of Health and Welfare v Woodcarb (Pty) Ltd & Another*, the Minister applied for an interdict to prevent the respondent from operating a sawmill in contravention of the prohibition of carrying out scheduled processes in a controlled area.[1] The court held that the without the registration certificate required by the Atmospheric Pollution Act,[2] the generation of smoke was unlawful and violated the Interim Constitution's environmental rights. The prohibitory interdict was granted.

(y) Mandamus (mandatory interdict)

A mandatory interdict in environmental disputes can be utilised in two ways. First, it can be employed to compel government to commence environmental clean-up or some other remedial action. Second, it can compel environmental authorities to grant a permit or issue a licence. That was the situation in *Myburg Park Langebaan (Pty) Ltd v Langebaan Municipality & Others*, where the High Court granted a mandatory interdict to compel the respondent to issue a permit giving the applicant the necessary permission to develop his property.[3]

In addition to the normal interdict available when the necessary requirements are met, s 28(12) of NEMA introduces a statutory mandamus to South African environmental law. It allows a person to apply to court for an order directing the Director-General ('DG') of the Department of Environmental Affairs and Tourism or the head of the provincial environmental department ('HOD') to take steps specified in s 28(4) of NEMA to ensure a polluter addresses significant pollution or environmental degradation. However, the interdict is only available if he or she informed the DG or HOD of the problem and the DG or HOD failed to provide written confirmation that the responsible party was instructed to take remedial action. Considering the wording of s 28(4), these interdicts are likely to function more like structural interdicts.

(z) Structural interdict

A structural interdict recognises that damage to the environment cannot always be remedied by a 'once and for all' order. Remedial action may require judicial oversight of programs over a relatively long period of time to resolve the problem

[1] 1996 (3) SA 155 (N).
[2] Act 45 of 1965 s 9.
[3] 2001 (4) SA 1144 (C).

that gave rise to the dispute. The basic model of a structural interdict requires respondents to present a remedial plan to the court and report at regular intervals on the implementation of the plan.[1] In crafting a structural interdict, one of the important considerations is the period of corrective measures imposed in relation to the restoration of a habitat necessary to preserve biological diversity. Structural interdicts in environmental disputes can aid in fulfilling multiple requirements of Fulton's 'remedial hierarchy': A structural interdict can move past the immediate concern and focus on mechanisms to address the long-term effects of pollution such as clean-up operations and addressing damage to natural resources.

Structural interdicts can involve multiple stages that employ various different techniques: studies, technical assistance, analysis of the environmental dilemma and costing. Although structural interdicts are normally employed to compel government to comply with its constitutional obligations, they may be equally appropriate in private disputes that engage the commercial sector. Pure structural interdicts have not, yet, been employed in the environmental context, although our courts — including the Constitutional Court[2] — have made use of structural interdicts in a variety of other contexts.[3]

However, the environmental statutory interdict procedure introduced in s 28(12) of NEMA was applied in *Hichange Investments (Pty) Ltd v Cape Produce (Pty) Ltd t/a Pelt Products & Others*.[4] The environmental authorities failed for some time to prevent effectively the illegal environmental impact of the tannery on the applicant's neighbouring premises. The Court ordered the HOD of the provincial environmental department to instruct the owner of the tannery to investigate, evaluate and assess the impact of gasses emitted from its tannery. The HOD then had to take the necessary steps to ensure that the polluter complied with the tannery's registration certificate and its environmental obligations under NEMA.

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[1] S Liebenberg 'Judicial and Civil Society Initiatives in the Development of Economic and Social Rights in the Commonwealth' (2001) 19 (unpublished, on file with authors). See also Wim Trengrove 'Judicial Remedies for Violations of Socio-Economic Rights' (1999) 1(4) *ESR Review: Economic and Social Rights in South Africa* 8.

[2] See, for example, *Sibiya & Others v Director of Public Prosecutions* 2006 (2) BCLR 293 (CC); [2006] ZACC 22; *Sibiya & Others v Director of Public Prosecutions: Johannesburg High Court and Others* 2006 (2) BCLR 293 (CC); [2005] ZACC 16; *Sibiya & Others v Director of Public Prosecutions: Johannesburg High Court & Others* [2005] ZACC 6, 2005 (5) SA 315 (CC), 2006 (1) SACR 220 (CC), 2005 (8) BCLR 812 (CC) (Court granted a supervisory order to monitor the replacement of death sentences); *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo & Another* [2009] ZACC 32 (supervisory order to monitor language policy in schools).

[3] See, for example, *EN & Others v Government of RSA & Others* 2007 (1) BCLR 84 (D); *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W)(The Court found that certain prisoners had a right to electrical plug points in their cells and ordered the Minister to make them available. Schwartzman J required the Minister to submit a report indicating the timeline for completion of the project.); *Kiliko & Others v Minister of Home Affairs & Others* 2007 (4) BCLR 416 (C). For a fuller discussion of structural interdicts, see M Bishop 'Remedies' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) §9.4*(c)*.

[4] 2004 (2) SA 393 (EC). See also *Lone Creek River Lodge and Others v Global Forest Products & Others* Unreported decision (T), Case No. 1994/2005 (6 November 2007)(on file with the authors)(The Court interdicted the DG of DEAT in terms of s 28(12) of NEMA to ensure a comprehensive investigation is undertaken with other organs of state in terms of s 28(4) of NEMA that investigates, evaluates and assesses the negative environmental impacts of the operations of the Respondent against its environmental obligations contained in various statutes and regulations (specified in the interdict).)

(cc) Criminal sanctions

NEMA, like most legislation dealing with the environment,[1] provides a list of environmental crimes. (They appear in Schedule 3.) Section 34(1) of NEMA permits the organ of state or private party that has incurred costs to rehabilitate the environment from damage caused by an environmental crime to reclaim the costs from the convicted criminal in the criminal trial. The successful party need not lodge a separate civil claim.[2] In addition, the criminal court may assess the financial advantage, if any, that the offender gained as a result of the environmental crime and order the offender to pay back the fruits of the crime as damages, compensation or a fine.[3] The offender may even be required to pay the costs of the prosecution of the crime.[4]

One of the most important innovations of s 34 of NEMA is the introduction of strict criminal liability for environmental crimes. It holds employers and directors of companies criminally liable for the environmental crimes committed by their employees or companies if they failed to take all reasonable steps that were necessary under the circumstances to prevent the commission of the offence.[5] All directors of companies, whether executive or non-executive, can be found criminally liable — and fined or imprisoned — if they do not act reasonably in their executive capacity and ensure that the company meets its duty of care to prevent environmental degradation. Liability is not, however, limited to the employer. A manager, an agent or an employee may also be found guilty of the environmental crime and treated as if they were the employer.[6]

Poor enforcement of environmental law by state authorities has been a serious problem for South African environmental law. In an attempt to remedy the problem, s 34 of NEMA was amended to grant Environmental Management Inspectors ('EMIs') extremely broad powers of search, seizure and arrest.[7] The EMIs, also known as the 'Green Scorpions', have already undertaken investigations that have led to the successful prosecution of several environmental crimes.

[1] An exception to this is that a failure to exercise your duty of care to prevent pollution under NEMA s 28 is not listed as an environmental crime in Schedule 3.

[2] NEMA s 34(2).

[3] In terms of NEMA s 34(3).

[4] NEMA s 34(4).

[5] NEMA s (9) reads:

In subsection (7) and (8) —

(a) 'firm' shall mean a body incorporated by or in terms of any law as well as a partnership; and

(b) 'director' shall mean a member of the board, executive committee, or other managing body of a corporate body and, in the case of a close corporation, a member of that close corporation or in the case of a partnership, a member of that partnership.

[6] NEMA s 34(6).

[7] See NEMA ss 34A-34G, inserted by National Environmental Management Amendment Act 46 of 2003 s 7, as amended by the National Environmental Laws Amendment Act 44 of 2008. See generally F Craigie, P Snijman & M Fourie 'Environmental Compliance and Enforcement Institutions' in A Paterson & LJ Kotze *Environmental Compliance and Enforcement in South Africa* (2009) 88-96.

(dd) Declaration of Rights[1]

In a declaratory order, the court makes a declaration in respect of the rights and duties of the parties in a dispute. The declaration, unlike an interdict, does not direct the parties to take specific action. It merely requires that the parties not act in contravention of the legal position set out by the court's order. In *Myburg Park Langebaan (Pty) Ltd v Langebaan Municipality & Others*, the applicant sought a declaration of rights that the requirements of s 22(1) of the Environmental Conservation Act relating to written authorisation were not applicable in relation to a proposed development scheme.[2] Selikowitz J used his power under 19(1)*(a)*(iii) of the Supreme Court Act[3] to grant the declaration. He reiterated the two-stage process for granting a declarator: First, the applicant must be a person 'interested' in an 'existing, future or contingent right or obligation'. Secondly, if the applicant is such an interested person the court must decide whether the case is a proper one in which to exercise its discretion to grant a declarator.[4] In *Myburg,* only the court could 'clear the decks' to allow the applicant to proceed with its development.[5]

(ee) Contractual Obligations

The entities most likely to violate FC s 24 are corporations in the mining, steel, forestry, construction, engineering and manufacturing sectors. Remedies in environmental dispute settlement will often, therefore, include contractual remedies. Contractual remedies traditionally include: (1) specific performance; (2) interdict; (3) declaration of rights; (4) cancellation; and (5) damages.

Here is but one example of how contractual claims can arise in an environmental context. In *Grand Mines (Pty) Ltd v Giddey NO*, the respondent, liquidator of Bercon, sued Grand Mines in terms of a contract.[6] The contract required Bercon to mine coal from a site owned by Grand Mines and then deliver it to Grand Mines. Bercon was, in turn, paid for the coal delivered. Bercon sued Grand Mines for not paying for all the delivered coal. Bercon was, however, under a contractual obligation to rehabilitate the site during the mining process. Bercon fell behind with the rehabilitation and did not fulfil its contractual obligations. Grand Mine's defence to the respondent's suit relied on the *exceptio non adimpleti contractus*. It maintained that Bercon's obligation to rehabilitate was reciprocal to its obligation to pay. Smalberger JA rejected the defence:

> notwithstanding the bilateral nature of their contract and the degree of interdependence between payment and rehabilitation, the parties could not have intended that they would be

[1] For more on declarations of rights in constitutional cases, see Bishop (supra) at §9.5*(b)*.
[2] 2001 (4) SA 1144 (C)('*Myburg Park*').
[3] Act 59 of 1959.
[4] *Myburg Park* (supra) at 1153A quoting *Reinecke v Incorporated General Insurance Ltd* 1974 (2) SA 84, 93A-C (A).
[5] Ibid at 1154C.
[6] 1999 (1) SA 960 (SCA).

reciprocal obligations in the strict sense … [Grand Mines]…could not raise the *exceptio* as the payment and rehabilitation were not reciprocal obligations.[1]

(ff) Delictual Damages

Delictual damages are awarded to a party based on the foundational principle that a wronged party should be placed in the position that person would have been in had the wrongful act not occurred. In environmental disputes, damages could take the form of eliminating immediate threats to the environment, emergency clean up or renewal operations, long-term clean up operations and addressing damage to natural resources. For instance, in *Dews & Another v Simon's Town Municipality*, the plaintiff's properties were damaged by 'contained' fires started by the respondent in good faith.[2] The respondent claimed to be exempt from liability in terms s 87 of the Forest Act.[3] The court issued judgment in favour of the plaintiffs.[4]

(gg) Constitutional remedies

As mentioned earlier, under FC s 24 and FC s 38, courts can declare laws, regulations or other measures invalid or unconstitutional. These provisions also empower courts to award damages, order interdicts or administrative remedies or issue a declaration of rights.[5] The relationship between constitutional remedies and their common-law and statutory counterparts is complicated.[6] In short, litigants should always rely first on non-constitutional remedies.[7] Only when those remedies are inadequate to protect the right to a healthy environment should litigants rely on FC s 38 to either expand the reach of the existing remedies or craft a brand new, purely constitutional remedy.

(hh) Costs

Section 32(2) of NEMA encourages the litigation of environmental cases by giving courts a discretion whether to award costs against an unsuccessful applicant. A court can decline to order costs if the applicant acted 'reasonably out of a concern for the public interest or in the interest of protecting the environment

[1] Ibid at 967D-G. See also *Government of the Province of the Eastern Cape v Frontier Safaris (Pty) Ltd* and *Government of the Province of the Eastern Cape v Frontier Safaris (Pty) Ltd* 1998 (2) SA 19 (SCA)(The government brought a special plea arguing that a contract that gave a private party control over a game reserve was void *ab initio* because it was contrary to legislation requiring the government to maintain control of the parks. The High Court rejected the argument on the grounds that the legislation was permissive and that the contract made clear that the government retained residual control.).

[2] 1991 (4) SA 479 (C).

[3] Act 122 of 1984.

[4] Other South African cases in which damages were awarded for harm to the environment include *HL & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd* 2001(4) SA 814 (SCA); *Johannesburg City Council v Television & Electrical Distributors ((Pty) Ltd* 1997 (1) SA 157 (A); *Louw & Others v Long* 1990 (3) SA 45 (E); and *Viljoen v Smith* 1997 (1) SA 309 (A).

[5] For a detailed discussion of constitutional remedies see J de Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (2000) 154; M Bishop 'Remedies' in S Woolman, T Roux & M Bishop(eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

[6] See Bishop (supra) at §9.2*(f)*.

[7] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC), [1997] ZACC 6.

and had made due efforts to use other means reasonably available for obtaining the relief sought'. This statutory power reflects the general approach to costs in constitutional litigation.[1]

In *Silvermine Valley Coalition v Sybrand Van der Spuy Boerdery & Others,* Davis J decided not to award costs against the applicant non-governmental organisation ('NGO') that had failed to secure an interdict compelling the respondent to conduct an EIA.[2] Davis J wrote:

> The fact, however, remains that applicant had acted in the public interest, in terms of a reasonable interpretation of the regulations and, furthermore, after a failure on the part of the authorities to protect the precious environment within the Cape Peninsula. The manner in which this case has come before this Court is unfortunate. Had [the state] performed its environmental stewardship, it would not have been necessary for an NGO to have so acted. Unfortunately the manner in which this dispute has been placed before this Court leaves it with no other alternative than to rule on the basis of the relief sought. However, that does not mean that the Court should not exercise its discretion insofar as costs are concerned. In further support of this particular conclusion it seems to me that NGOs should not have unnecessary obstacles placed in their way when they act in a manner designed to hold the State and indeed the private community accountable to the constitutional commitments of our new society, which includes the protection of the environment.[3]

In contrast, the court in *Eagles Landing Body Corporate v Molewa NO & Others* decided not to waive costs against an unsuccessful applicant.[4] The High Court found that parties had not acted in the public interest in order to protect the environment, but had rather sought to protect their members' individual property interests.

The Constitutional Court — in *Biowatch Trust v Registrar Genetic Resources & Others*[5] — recently summarised the appropriate approach to costs in constitutional disputes and constructed clear principles to govern a court's discretion in such disputes. The High Court[6] had granted two adverse costs awards against Biowatch — an 'environmental watchdog'[7] — that was litigating in the public interest to obtain information about genetically modified organisms ('GMO'). The Registrar, Genetic Resources ('the Registrar'), the government authority responsible for the information, had denied Biowatch's request for information. Biowatch had no option but to sue. A company involved in GMO production, Monsanto, intervened in the litigation to prevent Biowatch from gaining access to confidential information held by the Registrar. Biowatch was largely successful in its application and secured access to eight out of 11 categories of information it sought (including the release of some information that Monsanto had attempted to block). However, because it felt that Biowatch had framed its request for information vaguely and ineptly, the High Court did not grant a costs order against the Registrar and

[1] For a detailed discussion of costs in constitutional cases, see A Friedman & M Bishop 'Costs' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS2, October 2010) Chapter 6.

[2] 2002 (1) SA 478 (C).

[3] Ibid at 493.

[4] 2003 (1) SA 412, 445 (T).

[5] [2009] ZACC 14 ('*Biowatch*').

[6] 2005 (4) SA 111 (T).

[7] *Biowatch* (supra) at para 2.

other governmental bodies involved. In addition, it ordered Biowatch to pay Monsanto's costs because the vague request for information by Biowatch had forced the company to intervene to protect its interests.

In a unanimous judgment authored by Sachs J, the Constitutional Court reversed *both* costs awards. First, Sachs J firmly rejected a suggestion by Biowatch that it should be treated differently because it was a public interest NGO:

> Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well-endowed or indigent or, as in the case of many NGOs, reliant on external funding. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.[1]

In litigation between a private party and the state, the Constitutional Court re-asserted the general rule initially laid down in *Affordable Medicines Trust v Minister of Health*:[2] if the private party wins, the government must pay its costs, but if the private party loses, each party should bear its own costs.[3] That rule was designed, primarily, so as not to discourage potential litigants from asserting constitutional claims. When it came to constitutional disputes between two private parties, Sachs J argued that constitutional disputes between private parties are 'far more likely to arise' as a result of the state's failure to regulate the relationship between private parties than as pure private disputes with no state involvement.[4] In these cases 'the dispute turns on whether the governmental agencies have failed adequately to fulfil their constitutional and statutory responsibilities.'[5] As the dispute in *Biowatch* suggests, this situation is particularly likely to arise in environmental disputes where government regulation is all but ubiquitous. Justice Sachs summarised the rule in these cases as follows:

> [T]he state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door — at the end of the day, it was the state that had control over its conduct.[6]

On the facts, Sachs J stressed that the dispute had not arisen from the conduct of either Biowatch or Monsanto, but from the state's failure to regulate the dispute.[7] He therefore ordered the state to pay Biowatch's costs and Monsanto to bear its own costs. The *Biowatch* principles ensure that all people or groups with legitimate concerns about harm to the environment can litigate to prevent or remedy without the fear of adverse costs orders.

[1] *Biowatch* (supra) at para 16.
[2] 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC), [2005] ZACC 3 at para 138.
[3] *Biowatch* (supra) at para 21.
[4] Ibid at para 28.
[5] Ibid.
[6] Ibid at para 56.
[7] Ibid at para 59.

51 Criminal Procedure: Rights of Arrested, Detained and Accused Persons

Frank Snyckers and Jolandi le Roux

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51.1 A Framework for Criminal Procedure Rights

(a) General

(i) *Introduction*

FC s 35 sets out the rights of arrested, detained and accused persons.[1] These sections are therefore not limited to 'criminal procedure', but relate as well to the rights of detainees who are not arrested for criminal prosecution.[2]

In the pre-constitutional era, due process of law in the criminal sphere was regulated by the provisions of the Criminal Procedure Act[3] and by a body of common law principles constituting the procedural safeguards upon which an individual could rely as he or she passed through the criminal justice system. As far as internationally recognized rights of detainees were concerned, the process in pre-constitutional days was often far from 'due'.[4] Part of the challenge of interpreting FC s 35, and one which has much troubled the courts, is determining to what extent the constitutionalization of criminal procedure rights should be regarded as having established rights which went unrecognized before, or as having imbued existing common law principles or statutory safeguards with new content, or as having merely accorded entrenched status to familiar principles and safeguards.[5]

(ii) *The due process wall*

The reference to 'due process' as the rubric for criminal procedure rights introduces the problem of the proper conceptual and structural framework for

* The authors would like to thank Michael Bishop, Theunis Roux, Anthony Stein and Stu Woolman for their editorial assistance with this chapter.

[1] Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)('FC' or Final Constitution'). See also Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or Interim Constitution') s 25.

[2] Under the European Convention on Human Rights art 5, for example, lawful reasons for detention are conviction, arrest for non-compliance with a court order or to secure the fulfilment of a legal obligation, arrest on suspicion of having committed an offence, or when reasonably necessary to prevent the commission of an offence or to prevent flight after commission, the detention of minors for educational supervision or to be tried, the prevention of disease, the detention of the insane, alcoholics, drug addicts or vagrants, and the detention of illegal immigrants or those to be deported or extradited. The Constitutional Court has rejected the contention, under FC s 12, that the only 'just cause' for which a person could be imprisoned was the prevention or punishment of crime or possibly 'in the broader sense' where necessary for the maintenance of law and order, but not for any other non-punitive coercion. *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at paras 10-11 and 29-41.

[3] Act 51 of 1977

[4] See M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 40.

[5] See § 51.1*(b)*(iii) infra. See also L Du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 3.

criminal justice rights in the South African constitutional context. The criminal justice process constitutes an interference with the liberty of the subject by the state — from the framing of laws prohibiting conduct, to the arrest and detention of suspects, to the process of determining guilt, to passing and enforcing sentence, up to the restoration of the subject's liberty, either upon acquittal, or after the setting aside of a conviction, or after service of sentence, or on parole. It would seem, then, that FC s 35 should be regarded as a specific instance of the right to freedom and security of the person, FC s 12, which includes the right not to be detained without trial. FC s 12 also embraces the right not to be deprived of freedom arbitrarily or without just cause.[1]

If this were the approach adopted by our courts, FC s 12 would assume the character and status of a generic and residual due process right, which would operate independently and would inform the interpretation of all the rights contained in FC s 35. Recourse to American 'due process' and Canadian 'fundamental justice' jurisprudence would then be based upon a structural and conceptual similarity in analytical processes. South African courts could have then allowed for the transplantation of persuasive doctrines and principles with relatively little scope for foundational confusion. Furthermore, such common law rights or safeguards as were based upon this conceptual structure would then be easily assimilated into analyses of constitutional criminal procedure rights. It is therefore of cardinal importance to stress that the Constitutional Court has navigated, perhaps decisively, away from the course set out above. The cumulative effect of the judgments of the court in *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others*,[2] *Nel v Le Roux NO & Others*,[3] and *De Lange v Smuts NO & Others*[4] is to erect a conceptual wall between the right not to be arbitrarily deprived of liberty (FC s 12) and the rights of persons once detained, arrested or accused (FC s 35). This wall prevents 'due process' seepage from FC s 12 to FC s 35 respectively.[5]

In order to understand the different structural relationships pertaining to criminal procedure rights and to due process deprivation of liberty in the South African constitutional framework, a brief look at the conceptual framework of 'due process', and at the relationship between liberty deprivation and criminal procedure rights, in the United States, Canada and Europe is warranted.

In the United States, where 'due process' constitutional jurisprudence was born, the relevant conceptual framework that has developed over the years can

[1] FC s 12(1)*(a)*.
[2] 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)('*Ferreira*').
[3] 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC)('*Nel*').
[4] 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC)('*De Lange*').
[5] For more on the analytical problems relating to the degree of 'substantive due process' and of qualification implied in the right to freedom and security of the person, see M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 40.

be attributed mainly to two factors: first, the fact that there is no general right to a 'fair trial' in any of the enumerated rights contained in the Bill of Rights requires 'due process' seepage from the Fifth or the Fourteenth Amendments into the enumerated rights pertaining to the criminal process contained in the Fourth, Fifth, Sixth, and Eighth Amendments in order that a general or residual fair trial right may operate around or within these latter Amendments. Secondly, the complicated interplay between the Fifth and Fourteenth Amendments, and the consequences for state, as opposed to federal, liability for interpreting the 'due process' clause with 'independent potency',[1] cannot be underestimated as a factor which is as important to American due process jurisprudence as it is idiosyncratic.[2]

In Canada, as in South Africa, there *is* a general 'fair trial' provision, albeit one less obviously accorded residual status than its South African counterpart. It is contained within a specifically enumerated 'fair trial' right, the right to be presumed innocent.[3] Nevertheless, the Canadian courts have opted for 'due process' seepage from the provision in the Charter relating to deprivations of liberty 'in accordance with the principles of fundamental justice' (s 7) to the specifically enumerated criminal procedure rights found in ss 10 and 11 of the Charter. In other words, the Canadian equivalent to FC s 12(1)*(a)* is allowed to operate as a general 'due process' provision, with residual operation in the sphere of fair trial rights. In *Re BC Motor Vehicle Act* Lamer J held that the enumerated criminal justice rights in ss 8–14 of the Canadian Charter were merely 'illustrative' of the generic due process right contained in s 7.[4]

Now, it may well be said that a provision requiring procedure according to the 'principles of fundamental justice' is more conducive to being interpreted as a generic or residual due process right to operate 'with independent potency' than one which either lays down no express procedural requirement at all (the right to freedom and security of the person in FC s 12) or refers merely to a 'trial' (the right not to be detained without trial in FC s 12(1)*(b)*), or modestly prohibits deprivation of freedom 'arbitrarily or without just cause' (FC s 12(1)*(a)*). Furthermore, the 'fundamental justice' formulation is clearly more readily afforded the dimension of 'substantive due process' than are its South African counterparts.[5]

Given the extent to which Canadian courts have allowed the due process right contained in the 'fundamental justice' provision in s 7 of the Canadian Charter to determine the ambit of residual or unenumerated aspects of the right to a fair

[1] See *Adamson v California* 332 US 46, 66 (1947).

[2] See, generally, JH Israel, Y Kamisar & WR LaFave *Criminal Procedure and the Constitution: Leading Supreme Court Cases and Introductory Text* (1989).

[3] Section 11*(d)* of the Canadian Charter of Rights and Freedoms gives any person charged with an offence the right 'to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent tribunal'.

[4] [1985] 2 SCR 486, 502ff.

[5] For a detailed discussion of 'substantive due process', and the degree of substantive due process afforded by FC s 12, see Bishop & Woolman 'Freedom & Security of the Person' (supra) at § 40.1*(b)*.

trial, it is not surprising that the courts and commentators seem pressed to find any separate *raison d'être* for the general fair trial right contained in s 11*(d)*.[1] Peter Hogg does point out that the residual fundamental justice right operates only when life, liberty or property is at stake, and hence affords general fair trial rights only in cases where imprisonment is a competent sentence. As a result, the general fair trial right contained in s 11*(d)* operates in other criminal cases.[2]

The European Convention for the Protection of Human Rights and Fundamental Freedoms possesses an analytical structure that closely resembles FC s 35 combined with FC s 12. Here, the general right to a fair trial, contained in article 6, is separated from the right not to be arbitrarily deprived of liberty in article 5. However, the latter right is combined with the rights of detained and arrested persons, leaving article 6 to deal only with fair trial rights.[3] The general fair trial right in article 6(1) is not confined to criminal charges, and reads: '. . . [I]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing.'[4] Although the specifically enumerated fair trial rights in article 6 are not stipulated as being included under the right to a fair hearing, they are preceded, apart from the presumption of innocence (article 6(2)), by the stipulation that 'everyone charged with a criminal offence has the following minimum rights' (article 6(3)). The Convention organs have held the 'fair trial' concept to imply unenumerated components – and in this respect the analysis is on all fours with that which obtains in South Africa.[5] So although the article 6 fair trial right

[1] See PW Hogg *Constitutional Law of Canada* (3rd Edition, 1992, 1996 supplement) § 48.5*(c)* and § 44.16; D Stratas *The Charter of Rights in Litigation: Direction from the Supreme Court of Canada* (No 19, August 1997) § 29.

[2] Hogg (supra) at § 44.10*(a)*. This is a strange argument. It concentrates exclusively on the ultimate sentence in determining whether there is a deprivation of liberty. The reasoning seems at odds with the philosophy behind due process seepage in the first place. The coercive process — the criminal process, from arrest or detention to ultimate release — is the paradigmatic deprivation of liberty that requires due process. As Lamer J put it in *Re ss 193 and 195.1 of Criminal Code,* 'the restrictions on liberty and security of the person that s 7 is concerned with are those that occur as a result of an individual's interaction with the justice system, and its administration'. [1990] 1 SCR 1123, 1173. The resolution of this problem lies beyond the scope of this section. See, generally, Bishop & Woolman 'Freedom & Security of the Persons' (supra) at § 40.1 and 40.2

[3] Robertson and Merrills are at pains to 'distinguish' art 5 rights from fair trial rights. See AH Robertson & JG Merrills *Human Rights in Europe: A Study of the European Convention on Human Rights* (3rd Edition, 1993) 72 and 74. See also JES Fawcett *The Application of the European Convention on Human Rights* (2nd Edition, 1987) 69 ('Art 5 'is at a number of important points linked closely with . . . in particular Article 6, so that it cannot be examined in isolation'.)

[4] For detailed examination of the scope of article 6 regarding proceedings and penalties to which it relates, see S Stavros *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: An Analysis of the Convention and a Comparison with Other Instruments* (1993) 1-39.

[5] See *Barberá, Messegué and Jabardo v Spain* (1988) 11 EHRR 360 (Illustrates the manner in which the European Court has given effect to a residual operation of the 'fair trial' concept in art 6 jurisprudence. See, generally, Stavros (supra) at 42ff. For the South African take on the subject, see *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 16 (The right to a fair trial was held to be 'broader' than the list of specific fair trial rights listed under it. This interpretation is rendered compulsory by the provision FC s 35(3) that the right to a fair trial 'includes' the specific rights which follow.)

does not apply only to criminal proceedings, from the point of view of criminal procedure, article 5 rights and article 6 rights are to be distinguished on the grounds that they apply to different stages of the criminal process. Once again, the analytical structure of the European Convention resembles that of the South African criminal process rights. However, the fact that the due process right relating to the deprivation of liberty occurs with the rights of detained and arrested persons in article 5 means that due process is able to operate as a residual principle operating with respect to the rights of arrested and detained persons.[1] This phenomenon is absent from the South African framework.

Article 5 'due process' is secured by the interpretation of the phrase 'prescribed by law' as a term of art: the law in question must be 'adequately accessible' and 'formulated with sufficient precision to enable the citizen to regulate his conduct'.[2] Furthermore, it is not enough to show that the procedural and substantive rules of domestic law have been applied where these rules have resulted in arbitrary deprivation of liberty.[3] The law must also conform to the Convention's own standards: for example it must be a 'fair and proper procedure', be free from arbitrariness, and be carried out by 'an appropriate authority'.[4] This is, however, 'substantive due process' only in the weaker sense of requiring the law in question to possess certain minimum attributes. These attributes are in turn of a procedural nature or reflect the requirements of the rule of law. They do not reflect 'substantive due process' in the stronger sense of prohibiting certain kinds of criminal laws because their substantive content is thought to infringe a fundamental freedom.

The result of the different attitude of the Canadian courts to due process seepage into the fair trial sphere is that Canadian courts may deal more easily with the relationship between substantive liberty questions and the right to a fair trial than South African courts can. Those principles that flow from an analysis based on the concept of liberty, and which seem to underlie certain residual or potential aspects of the right to a fair trial, may be applied by Canadian courts in the fair trial context as part of an interpretation of the general due process right contained in the 'principles of fundamental justice' without engendering the sacrifice of conceptual coherence. In the South African context, on the other hand, analyses of fair trial principles will find themselves colliding with the conceptual wall erected between freedom rights and criminal procedure rights every time the

[1] See *De Wilde, Ooms and Versyp v Belgium* (1971) 4 EHRR 443 at paras 66 and 76.

[2] See *Sunday Times v UK* (1979) 2 EHRR 245 at para 49 (Court interprets the phrase for the purposes of the right to freedom of expression contained in article 10.) For more on the meaning of 'prescribed by law', and the South African equivalent, 'law of general application', see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[3] See *Bouamar v Belgium* (1988) 11 EHRR 1 at para 47; R Beddard *Human Rights and Europe* (3rd Edition, 1993) 132.

[4] See *Winterwerp v Netherlands* (1980) 2 EHRR 245 at para 46; Robertson & Merrills (supra) at 60.

analysis is framed in terms of the right to freedom from unjustifiable interference. Furthermore, once a matter has been understood to raise a fair trial question, the Constitutional Court has also accorded the fair trial provision a measure of 'pre-emptive' effect by rejecting recourse to a general right contained elsewhere.[1]

The courts have often not been particularly concerned with this problem of conceptual foundations, and have at times based their reasoning, in the context of IC s 25, squarely upon principles of liberty and due process, thereby smuggling some due process jurisprudence through cracks in the *Ferreira* and *Nel* wall.[2] In *Moeketsi v Attorney-General, Bophuthatswana, & Another*, the foundations of the right to a trial within a reasonable time after being charged were discussed in terms of liberty.[3] This liberty foundation beneath the right to pass through the criminal justice system within a reasonable period was the sole pivot around which the court in *S v Manyonyo* constructed its reasoning in deciding whether there had been unreasonable delay in the review of a sentence.[4] The *Manyonyo* court relied exclusively on common law material, all of which was framed in terms of the liberty of the individual.[5]

In *Msomi v Attorney-General, Natal, & Others*, the court decided a question involving the taking of fingerprints without consent in terms of the right against self-incrimination contained in IC s 25(3)*(d)*, rather than in terms of IC s 11, but relied on Canadian seepage jurisprudence relating to the 'principles of fundamental justice' to hold that there was no violation of the right against self-incrimination.[6] Its rejection of a possible argument in terms of IC s 11 ostensibly endorsed the views of Claassen J in *S v Huma & Another*.[7] However, *Huma* did not consider the freedom component of IC s 11 at all. *Huma* entertained an argument on IC s 11 only as far as the provision relating to cruel, inhuman and degrading treatment (IC s 11(2)) was concerned, and not surprisingly rejected the challenge in

[1] See *Shabalala v Attorney-General, Transvaal* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC), 1995 (2) SACR 761 (CC) at para 34 (The court held the problem of docket privilege to be a fair trial question, rather than an access to information question, and that, once the fair trial question had been answered, it was 'difficult to see how s 23 [could] take the matter any further'.)

[2] In *Ferreira* itself, Chaskalson P, although expressly rejecting the idea that IC s 11(1) contained a residual fair trial right,, nevertheless held that the due process analysis carried out by Ackermann J in terms of IC s 11(1) at para 79 could 'in substance' be applied to an analysis under IC s 25(3). *Ferreira* (supra) at para 186.

[3] 1996 (7) BCLR 947, 961, 964 (B), 1996 (1) SACR 675 (B).

[4] 1996 (11) BCLR 1463 (E)(*'Manyonyo*').

[5] See *S v Letsin* 1963 (1) SA 60, 61 (O), cited with approval in *Manyonyo* (supra) at 1465–6 ('[D]it [is] een van die hoogste roepinge van ons howe … om toe te sien dat die vryheid van die individu … gewaarborg sal word. Dit is 'n ingrypende aantasting van individuele vryheid om 'n persoon in die gevangenis te laat aanhou … en die indruk moet nooit geskep word dat ons howe onverskillig staan teenoor die vryheid van die individu nie.') See also *S v Ramuongiwa* 1997 (2) BCLR 268, 270 (V), referring to the *dictum* in the Indian case of *Maneka Gandhi v Union of India* (1978) AIR SC 597 ('Procedural safeguards are the indispensable essence of liberty. In fact, the history of personal liberty is largely the history of procedural safeguards.')

[6] 1996 (8) BCLR 1109 (N).

[7] 1996 (1) SA 232 (W).

that regard. It is therefore quite striking to find an *obiter* remark in the judgment of Grobbelaar J in *S v Vilakazi en 'n Ander* to the effect that the learned judge could not think of an example which entailed a greater infringement of a suspect's innocence and resulting constitutional rights ('onskuld en gevolglike konstitutionele regte') than the improper taking of a fingerprint.[1] How exactly the suspect's innocence would be infringed and which rights would be affected does not emerge from this *dictum*. It is would appear that the learned judge had in mind some relation between the presumption of innocence and unlawful interference with liberty. That the extension of due process rights in an area such as the fingerprinting context requires liberty analysis seems to be a very compelling supposition. But the Constitutional Court's due process wall does not permit conceptual clarity in this sort of case. Similarly, the link between the 'right not to assist the state's case' and the 'right to freedom' was recognized in *S v Mathebula & Another*. However the recognition of the link was ultimately grounded in the accused's right to a fair trial.[2]

The most forthright recognition of the inextricable link between a liberty interest and the presumption of innocence occurred in *Uncedo Taxi Service Association v Maninjwa & Others*, where Pickering J declared:

> In my view it is clearly unconstitutional to deprive a person of his liberty upon proof merely on a balance of probabilities.[3]

Uncedo Taxi Service vaults over the due process wall in the most bizarre fashion. The possibility of imprisonment on notice of motion in contempt proceedings was seen as a liberty problem under FC s 12. Instead of determining that the respondent in such proceedings was an 'accused person' for the purposes of FC s 35(3), Pickering J held that the principles underlying FC s 35(3) were relevant to the FC s 36 *limitations analysis* of the impairment of FC s 12.[4] In this way, fair trial principles can always be rendered applicable to FC s 12 problems. This solution, albeit attractive, does violence to the scheme of rights as set out in FC ss 12 and 35. In any event, it demands that FC s 35(3) apply to liberty analysis only after a finding that FC s 12 has actually been violated, ie at the limitation stage. The logical conclusion of such an approach would eventually drain FC s 12 of its independent content. Still, the approach suggested itself to the court because due process rights are tradtionally understood to be rights that engage the state's regulation of and interference with liberty. A similar example of the difficulty

[1] 1996 (1) SACR 425, 429 (T)('*Vilakazi*').

[2] 1997 (1) BCLR 123, 147 (W), 1997 (1) SACR 10 (W). See § 51.4*(b)* infra.

[3] 1998 (3) SA 417 (E), 1998 (6) BCLR 683, 692D (E)('*Uncedo*'). Of course, this finding contains an additional premise: the presumption of innocence requires not only a burden of proof upon the prosecution but also a particular standard of proof, namely proof beyond reasonable doubt.

[4] The Zimbabwean Supreme Court cited *Uncedo* with approval in *In re Chinamasa*. 2001 (2) SA 902, 921E-922F (ZS). The Court used *Uncedo* to support a finding that contempt proceedings attracted such fair trial protections as the right to be tried by an impartial tribunal. Put differently, *Uncedo* grounded, what would, in South Africa parlance, be a finding that the person on trial was an 'accused person' in terms of FC s 35.

of heeding the existence of the due process wall occurred in *De Lange v Smuts NO & Others*.[1] Ackermann J, having helped to entrench the wall, noted that the requirement of an 'ordinary court' for hearings which might lead to imprisonment for criminal offences. He then reasoned that this requirement was an indication that only courts of law were 'appropriate' tribunals for proceedings that might lead to incarceration outside the criminal sphere.[2]

Of course, the issue of the onus (or default position) in the granting of bail – arguably the most important difference between FC s 35 and IC s 25 – can hardly be properly analysed without doing violence to the *Ferreira* and *Nel* due process wall.[3] The same can be said of the *habeas corpus* provision in IC s 25(1)*(e)* and FC s 35(2)*(d)*.[4] The Free State Provincial Division's rejection of the burden placed on an accused by s 60(11) of the Criminal Procedure Act as 'out of place' in a democratic constitutional regime was, unsurprisingly, built exclusively upon liberty analysis. In defense of its defiance of the due process wall, the High Court in *Ramokhosi* wrote:

> Dit word algemeen aanvaar en spreek eintlik vanself dat die vryheidsontneming van 'n onveroordeelde persoon weens arrestasie neerkom op 'n ernstige en drastiese inbreukmaking van 'n fundamentele reg. [5]

Such defiance is all the more noteworthy since the Constitutional Court, when certifying the new bail provision contained in FC s 35(1)*(f)*, failed to undertake any form of a liberty analysis in its summary rejection of the challenge to the onus aspect of the right.[6]

(iii) *Substantive due process and criminal procedure rights*

The relationship between liberty rights and the enumerated criminal procedure rights is put under particular strain in the determination of fair trial or due process questions that contain a strong 'substantive' dimension. The due process wall would, strictly speaking, require objections to the substantive content of criminal provisions to be framed in terms of the infringement of other substantive rights, or in terms of whatever succour might be found in the residual right to liberty contained in FC s 12.[7]

The most striking illustration of this problem occurred in the Constitutional Court's decision in *S v Coetzee & Others*.[8] The relevant question for our purposes

[1] 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC)('*De Lange*').
[2] Ibid at para 74. The hidden premise of this reasoning is incompatible with the due process wall.
[3] See § 51.4*(d)* infra.
[4] See § 51.3*(e)* infra.
[5] *Prokureur-Generaal Vrystaat v Ramokhosi* 1996 (11) BCLR 1514, 1524 (O), 1997 (1) SACR 127 (O).
[6] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 88.
[7] See Bishop & Woolman (supra) at § 40.1 and § 40.2. See also *De Lange* (supra) at paras 22–5.
[8] 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC)('*Coetzee*'). As far as its IC s 11 and FC s 12 significance is concerned, see Bishop & Woolman (supra) at §§ 40.3*(c)*(ii).

was whether a provision for vicarious criminal liability by an agent of a company for criminal acts of the company –which provided that such liability attached 'unless it [was] proved that he did not take part in the commission of the offence and that he could not have prevented it' — was an infringement of the presumption of innocence, an unlawful interference with liberty, or neither.[1] If the question were framed as a 'reverse onus' question, then the analysis could be confined to the fair trial right to be presumed innocent contained in IC s 25(3)*(c)* (now FC s 35(3)*(b)*.) This approach required regarding the attribution of liability as a separate criminal offence, guilt or innocence of which would require proof, and such proof would require an onus. If the question were considered in terms of the substantive dimension, it would entail asking whether attribution of criminal liability for someone else's undoubtedly criminal act was constitutionally objectionable. This mode of analysis would then move one into the waters of strict liability and the relationship between *mens rea* principles and liberty. The interesting thing about the minority judgment of Kentridge AJ is that it opted irrevocably for the latter course. It regarded the addition of a defence, not as bringing the matter back into the world of the reverse onus and IC s 25, but as saving the liability in question from being strict.[2] In this way Kentridge AJ managed to stay on one side of the conceptual wall, but was perhaps thereby prevented from seeing how the IC s 25 question is inextricably bound up with the IC s 11 question.[3]

[1] Section 332(5) of the Criminal Procedure Act 51 of 1977.

[2] *Coetzee* (supra) at para 85ff.

[3] See *S v Meaker* 1998 (8) BCLR 1038 (W), 1998 (2) SACR 73, 83I–85C (W). In *Meaker* the state sought to argue that s 130 of the Road Traffic Act 29 of 1989, which presumed the owner of a vehicle photographed while speeding to have been the driver, did not contain a reverse onus, since the state had to prove the offence (speeding), after which the identity of the offender was presumed. In effect, this was Kentridge AJ's argument in another form. Cameron J rejected this argument on the authority of *Coetzee*. See *Osman & Another v Attorney-General of Transvaal* 1998 (4) SA 1224 (CC), 1998 (11) BCLR 1362 (CC), 1998 (2) SACR 493 (CC)('*Osman*'). *Osman* involved a similar conceptual puzzle. The peculiar offence of being unable to provide a satisfactory explanation for possessing goods reasonably suspected of being stolen, created by s 36 of Act 62 of 1955, was challenged as violating the right to silence, the right against compelled self-incrimination, and the presumption of innocence. See § 51.4*(b)*(iii) infra. The court *a quo* analysed the offence exclusively in terms of the right to silence and against compelled self-incrimination. 1998 (2) BCLR 165 (T), 1998 (1) SACR 28 (T). The Constitutional Court did consider the possibility that a reverse onus was at stake, but rejected the argument on the ground that the inability to explain was clearly an element of the offence that the prosecution had to prove beyond reasonable doubt. *Osman* (supra) at para 16. But every reverse onus can be rewritten into an element of a substantive offence and essentially achieve the same result. If the legislature had provided that one who was in possession of goods reasonably suspected of being stolen would be presumed to have been harbouring stolen goods unless he or she could provide a satisfactory account of such possession, then the case would simply have been another reverse onus case. It was, after all, the difficulty of proving that those who possessed goods reasonably suspected of being stolen were harbouring stolen goods that lay behind fashioning the odd offence of being unable to explain one's position. The law is not aimed at those who are unable to explain. It is aimed at thieves and fences. Similar reasoning lay behind the court's reasoning in *S v Zondo.* 1999 (3) BCLR 316 (N). It found that the offence contained in s 82 of the same Act, of being in possession of housebreaking equipment and unable to explain why, did not cast an onus on the accused, but merely an evidentiary burden, which — unlike the burden struck down in *Scagell & Others v Attorney-General of the Western Cape & Others* 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC) — was activated only once the state had proved a *prima facie* case against the accused. Again the substance of the offence was clouded by its statutory form.

The problem of accommodating substantive due process under the fair trial rights arose again in *S v Lavhengwa*.[1] The problem, for present purposes, was the proper basis for a challenge to the substantive aspects of the crime of contempt *in facie curiae*. The court rejected the position put forward in the writing of Professor J M T Labuschagne: namely, that that there was no necessity for the crime. It did so based upon the 'weight of authority' (in the common law) in favour of the existence of the crime.[2] The court ignored the liberty implications behind the challenge and concerned itself entirely with the procedural aspects of the summary conviction peculiar to this offence. The portion of Labuschagne's argument cited by the court is framed in terms of liberty — if other crimes cover all possible excesses, and no other crime is being committed, why criminalize the conduct in question?[3] One further objection which might have been directed against the substantive content of the crime of contempt *in facie curiae* is the 'chilling' effect the existence of such an offence may have on the vigorous defence by counsel of their clients' fair trial rights. It may be argued, then, that the Damoclean sword of contempt *in facie curiae* threatens not so much the right of the legal representative as that of the client. In this way a substantive due process liberty problem for one individual becomes a procedural due process fair trial problem for another.

The difference between substantive and procedural questions in *Lavhengwa* did not end there. The question whether the offence of contempt was excessively vaguely framed in the statute — another charge levelled at the offence by Labuschagne[4] — was dealt with under the fair trial right 'to be informed with sufficient particularity of the charge', contained in IC s 25(3)*(b)*. The requirement of certainty in criminal offences is one of the traditional requirements of the rule of law. It straddles the divide between substantive and procedural due process — affecting the content of a provision, as opposed to merely its enforcement, but not reaching all the way into its merits. The fact that it was termed part of 'the first essential of due process of law' in the American decision of *Connolly v General Construction Co*,[5] cited with apparent approval and as authority by the court in *Lavhengwa*,[6] does not tell one whether the substantive aspect or the procedural aspect of due process is thereby invoked. And it certainly does not fit in comfortably with the *Lavhengwa* court's analysis in terms of the right of an accused person

[1] 1996 (2) SACR 453 (W)('*Lavhengwa*').

[2] Ibid at 472–75.

[3] For the application of similar reasoning in the sphere of free assembly, see *Beatty v Gilbanks* (1882) 9 QBD 308. See also *In Re Chinamasa* 2001 (2) SA 902 (ZS)('*Chinamasa*')(The Zimbabwean Supreme Court was confronted with the offence of contempt *ex facie curiae*. It relied on, and endorsed, the *Lavhengwa* assessment, but had, earlier in the judgement analysed the question of the propriety of the existence of the offence in terms of liberty (free speech).)

[4] See *Lavhengwa* (supra) at 476 (Provision in question was s 108(1) of the Magistrates' Courts Act 32 of 1944, and the view of Labuschagne that the offence is 'seker die misdaad met die vaagste inhoud wat aan my bekend is' is quoted.)

[5] 269 US 385, 391 (1926).

[6] *Lavhengwa* (supra) at 484.

to be informed with sufficient particularity of the charge. The vagueness of the offence and the vagueness of the charge are very different things, and it is not difficult to conceive of an immaculately formulated charge indicating with fastidious precision exactly how one has breached a very unsatisfactorily vague offence. The peculiar phenomenon of summary conviction for contempt *in facie curiae* obscures this distinction. This reasoning informed the following finding in *Uncedo Taxi Service Association v Maninjwa & Others* regarding contempt *ex facie curiae*:

> A wide range of conduct may fall within the ambit of contempt of court *ex facie curiae* . . .. It does not follow therefrom, however, that the 'charge' against the offender cannot be formulated with sufficient clarity and certainty in the affidavits filed in support of the summary procedure. Once the details of the alleged contempt have been so specified the requirement entrenched in section 35(3)*(a)* will have been met.[1]

In *S v Mamabolo (ETV and Others Intervening)*, the Constitutional Court drew a clear and timely distinction between the substantive and procedural aspects entailed by the offence of contempt *ex facie curiae*.[2] It analyzed the question of the desirability of the existence of the offence in terms of liberty (FC s 16's protection of free speech),[3] and rejected the inquisitorial aspects of the procedure on the basis of repugnance with the provisions of FC s 35.[4] It may be noted that part of the reasoning was based on the fact that contempt *ex facie curiae* concerned comment outside of, and after, the proceedings in question, and therefore had no disruptive effect on the proceedings that might warrant special procedures.[5] Whether the analysis would be applicable to the offence of contempt *in facie curiae* was therefore left an open question.[6] In *S v Singo*, the summary procedures found in section 72(4) of the Criminal Procedure Act, which deal with an accused who fails to appear, were expressly distinguished from the situation that obtained in *Mamabolo*.[7] Moreover, decisive consideration was given to the distinction drawn in *Mamabolo* between an offence that deals with conduct outside the ambit of, and merely pertaining to, court proceedings, on the one hand, and mechanisms to address disruptions to the court's proceedings, on the other hand.[8] The assessment in

[1] 1998 (3) SA 417 (E), 1998 (6) BCLR 683, 690A–B (E).

[2] 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC)('*Mamabolo*').

[3] The treatment in the Zimbabwean Supreme Court in *Chinamasa* was endorsed wholeheartedly as 'lucid and exhaustive' and the observation made that anything beyond adoption would be supererogatory. Ibid at para 20

[4] *Mamabolo* (supra) at paras 51 to 59. For further treatment of the offence of contempt *ex facie curiae*, see *S v Bresler* 2002 (2) SACR 18 (C).

[5] *Mamabolo* (supra) at para 52.

[6] See *S v Mbaba* 2002 (1) SACR 43 (E)(Finding that the absence of a representative did not properly constitute the offence of contempt *in facie curiae* and finding that, even if the summary procedure found unconstitutional in *Mamabolo* as to contempt *ex facie curiae* were appropriate, it ought to have been terminated where the accused was given no opportunity to be present, essentially left the question of the constitutionality of the procedure in the sphere of contempt *in facie curiae* unaddressed.)

[7] 2002 (4) SA 858 (CC), 2002 (8) BCLR 793 (CC), 2002 (2) SACR 160 (CC)('*Singo*')

[8] Ibid at para 17.

Singo did not rely on a comparison of the liberty impact of the one offence with that of the other, mainly because the situation of failing to appear (as opposed to, say, insulting the judicial officer) is one that does not readily appear to attract liberty.

In *S v Ntshwence*, the court followed both *Lavhengwa* and *Singo* and found that a summary procedure was justifiable in the sphere of contempt *in facie curiae*.[1] Note that in both *S v Solomons*[2] and in *Ntshwence,* the substantive liberty question did not feature in the assessment. *Solomons* more obviously entailed liberty concerns than did *Ntshwence*. The former concerned insulting behaviour on the part of the accused as the basis of the contempt. The latter had more to do with disrupting the court's procedures in the true sense of the concept (although even here it was not clear whether the insulting behaviour was more significant than the disruptive effect of the behaviour).

Confusion between substantive rights and criminal procedure rights could also be found in an argument raised but rejected in *S v Phallo & Others*.[3] The argument was that since false statements might constitute the relevant assistance for the purposes of liability as an accessory after the fact, the right to silence would be violated if the acts entailed remaining silent to shield the perpetrators. This contention was tantamount to claiming that liability for fraudulent non-disclosure violated the right to silence. Whenever the law requires one to disclose and penalizes one for not disclosing, the relevant concern is liberty, not silence.[4]

Rigorous analytical identification of the substantive liberty question at play occurred in *S v Thebus*.[5] A constitutional challenge was mounted against aspects of the common law doctrine of common purpose. The particular point of law challenged concerned the doctrine's lack of a requirement of a causal link between the conduct of the accused and the consequence for which the law held the accused liable. The doctrine attributes to the accused responsibility for the conduct of others. One difficulty faced by the challenge was to enunciate the objection on the basis of a constitutional right or principle that was violated by the manifestation of causation allowed by the doctrine. The challenge was founded on dignity, liberty and the fair trial incident of the presumption of innocence.[6] Moseneke J was not distracted by the applicant's conceptual confusion: for the judge the issue was one of substance, and, in essence, one of liberty analysis — was the Final Constitution content to allow a person to be deemed criminally liable (and his or her freedom to be affected) on the basis of the attribution to him or her of the conduct of another without the requirement of causation? The essence of the complaint had to be against the criminal norm at issue.[7] Once it

[1] 2004 (1) SACR 506 (Tk)('*Ntshwence*').
[2] 2004 (1) SACR 137 (C)('*Solomons*').
[3] 1998 (3) BCLR 352 (B).
[4] See, eg, JW Child 'Can Libertarianism Sustain a Fraud Standard?' (1993-4) 104 *Ethics* 722. For a discussion of the relationship between silence and self-incrimination, see § 51.4*(b)* infra.
[5] 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC), 2003 (2) SACR 319 (CC)('*Thebus*').
[6] Ibid at para 17.
[7] Ibid at para 36.

was held that the manner in which the doctrine approached the causation question did not amount to arbitrary deprivation of freedom,[1] the question was settled. The Court was then only required to indicate that analysis in terms of dignity or process did not add to the proper analytical framework.[2] This outcome is a striking illustration of the fact that the due process wall makes irrelevant the criminal procedure rights in FC 35 with respect to due process analysis of the constitutionality of a norm by which criminal liability is attributed to the individual.

(iv) *Fair trial seepage*

The erection of the due process wall in *Ferreira v Levin NO & Others; Vryenhoek v Powell NO & Others*,[3] *Nel v Le Roux NO & Others*,[4] and *De Lange v Smuts NO & Others*[5] has the following consequences:

1. The right to a fair trial, and the specific instances of that right contained in FC s 35(3), apply only to accused persons. There is to be no seepage of fair trial rights from FC s 35(3) into other spheres.
2. There should be no due process seepage from FC s 12 into FC s 35. That is, 'deprivation of liberty' analysis should not inform the interpretation of the fair trial right of an accused person under FC s 35(3). It also means that there is no residual due process principle operating around the rights of detainees and arrestees contained in FC s 35(2).
3. The sort of 'trial' one is entitled to under FC s 12(1)*(b)* differs from the sort of trial one is entitled to under FC s 35(3). The former lays down less rigorous requirements, or requirements less generous to the individual concerned, than the latter.

The most disquieting feature of *Nel v Le Roux NO & Others* is the logical extension of its reasoning. In its desire to distinguish sharply between the sort of fair trial rights an accused person may expect and the sort of 'trial' that is the minimum requirement for a lawful detention the court has rendered decisive to one's chances of being afforded the 'full' right to a fair trial the degree of arbitrariness or informality in the proceedings which lead to imprisonment. The more arbitrary or informal the proceedings in question, ie the less closely they resemble a criminal trial, the less claim the imprisoned individual has to 'full' fair trial rights under FC s 35. If the state were to embark upon a general practice of instituting summary proceedings which bear little resemblance to criminal trials as its main process to incarcerate those suspected of crimes, the reasoning in *Nel* would

[1] *Thebus* (supra) at paras 36 to 40. It was not without significance that the inquiry in *Coetzee* was the point of reference.
[2] Ibid at paras 35, 41, 42 and 43.
[3] 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)('*Ferreira*').
[4] 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC)('*Nel*').
[5] 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC)('*De Lange*').

hold that the new class of criminal 'accused' would not be entitled to the right to a fair trial with trimmings. The finding of the Constitutional Court in *De Lange*, that the 'trial' required by FC s 12 was 'a hearing presided over or conducted by a judicial officer in the court structure established by the 1996 Constitution and in which section 165(1) ha[d] vested the judicial authority of the Republic',[1] removed the most serious potential danger of the *Nel* finding. But the 'full' right to a fair trail remains the privilege of those who can be classified as 'accused' under the Final Constitution. One might have thought the main function of FC s 35 was to prohibit alternative routes to gaol which bypass the fair criminal trial.[2]

One way around this problem is to interpret the term 'accused' generously. Of course, to the extent that courts allow seepage of fair trial rights from FC s 35(3) into the rest of FC s 35, the injunction in *Nel* is being defied. In *Legal Aid Board v Msila & Others*[3] the Eastern Cape Division decided to adopt 'as wide and broad an approach as possible' in interpreting the meaning of the word 'accused' in IC s 25(3)*(e)*, thereby achieving the award of the right to counsel as an 'accused' person to a litigant applying for the setting aside of an interdict. Since violation of an interdict created the criminal trial from which the fair trial right could be imported, 'the applicant's envisaged action in seeking to have the interdict set aside [might], in a broad sense, be equated with, and as part of (*sic*), his defence to the charge laid against him'.[4] How this 'broad sense equation' is to be distinguished from other civil claims — which in some more or less tenuous way are also the subject-matter of criminal proceedings — does not immediately appear clear. One can only remark that the 'broad' interpretation of 'accused' in *Msila* contrasts rather sharply with the restrictive interpretation of 'trial' in *Nel*.

Whether a similar extension of the meaning of 'accused person' occurred in *S v Sebejan & Others*[5] is not altogether clear. In this case, the question was whether a suspect who could not be described as a 'detained or arrested person', let alone an 'accused person', at the relevant time was entitled to be informed of constitutional

[1] *De Lange* (supra) at para 57.

[2] The recognition by the Supreme Court of Zimbabwe in *Mutasa v Makombe NO* of Parliament's right to regulate its own affairs by means of disciplinary procedures without being encumbered by 'fair trial' requirements cannot be faulted, but such proceedings may be ominous breeding grounds for conducting criminal trials by means of bills of attainder. 1997 (6) BCLR 841 (ZS). As long as the 'offence' in question *as well as the punishment* remains Parliament-bound, the danger will be averted. The imposition of fines may involve questions of due process deprivation of property, and, of course, the whole would be subject to requirements of administrative justice. See *De Lille & Another v Speaker of the National Assembly* 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C)(Disciplinary proceedings of Parliament were held to be subject to constitutional scrutiny and to the requirements of natural justice. Section 5 of the Powers and Privileges of Parliament Act 91 of 1963, which ousted the court's jurisdiction in respect of some matters of parliamentary privilege, was unconstitutional.) For more on bills of attainder, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[3] 1997 (2) BCLR 229 (E).

[4] Ibid at 243.

[5] 1997 (8) BCLR 1086 (W), 1997 (1) SACR 626 (W)('*Sebejan*').

rights upon being questioned by the police.[1] Satchwell J pointed out that the accused had not been 'arrested or detained' at the relevant time, but then proceeded to consider whether she should not, as a 'suspect', have been given due process rights. The learned judge then observed that the 1931 Judges' Rules provided for cautioning suspects upon questioning them and, given the three questions the learned judge posed ('what is a suspect?' 'what rights accrue to a suspect?' and 'was the accused a suspect at the relevant time?'),[2] one would be entitled to think that the result would be rights to which a suspect was entitled *qua* suspect. But the reasoning ultimately followed left the suspect *qua* suspect in the hands of the Judges' Rules. Satchwell J proceeded to analyse the position from the point of view of an *accused* whose right to a fair trial was affected by something which happened while that accused was a suspect. The conclusion was built upon the solid foundations of the proposition that '[t]he requirements of due process extend to the pre-trial conduct of law enforcement authorities', and it is clear that the judgment placed itself within the jurisprudence relating to extending the view backwards in time from the date of trial to determine whether the *accused* was receiving a fair trial.[3] It is rather unfortunate, then, that the learned judge asked 'how can a *suspect* have a fair trial where pre-trial unfairness has been visited upon her by way of deception?' (our emphasis). How, indeed, can a suspect have a fair trial at all? Whichever way the matter is considered, *Msila* and *Sebejan* must be

[1] It is not clear whether the rights of which the accused claimed she should have been informed were those of an 'arrested person' under IC s 25(2), which include and add to those of a 'detained person' under IC s 25(1), or those of a 'detained' person, which do not include silence and incrimination safeguards or, indeed, whether the complaint related to 'fair trial rights' of an 'accused person' provided by IC s 25(3). The conclusion reached by the court was framed in terms of IC s 25(3).

[2] *Sebajan* (supra) at 631.

[3] See *S v Melani & Others* 1995 (4) SA 412 (E), 1996 (2) BCLR 174 (E), 1996 (1) SACR 335 (E). Later, however, one reads: 'No less than an accused is the suspect entitled to fair pre-trial procedures.' *Sebajan* (supra) at 636. This does seem to be a return to the perspective of the suspect *qua* suspect. The right of a suspect to 'the benefit of a caution or a warning' was assumed for the purposes of argument in *S v Ndlovu*. 1997 (12) BCLR 1785, 1791I-J (N)('*Ndlovu*'). But the definition of 'suspect' which was laid down for these purposes in *Sebejan* was viewed *obiter* as perhaps setting the standard 'too low'. *Ndlovu* (supra) at 1792B. See *Sebejan* (supra) at 1092I ('[O]ne about whom there [was] some apprehension that he [might] be implicated in the offence under investigation and, it [might] further be, whose version of events [was] mistrusted or disbelieved.') Magid J made the above assumption in the context of the Judges' Rules, having determined that IC s 25 was 'of no relevance' to the case. Ibid at 1791C. *Sebejan* was not followed in *S v Langa & Others*. 1998 (1) SACR 21, 27 (T)(Held that the discussion of a suspect's rights in *Sebejan* was *obiter*, given the finding that the accused had not been a suspect at the relevant time.). The accused in *Langa*, however, had undoubtedly been suspects when questioned concerning their possession of goods suspected to be stolen. They had not, held MacArthur J, enjoyed rights to counsel or silence at that stage. No attention was paid to the effect on their rights as *accused* persons as to what had happened while they were suspects. The absence of any due process right under IC s 25 or FC s 35 outside the sphere of arrest and detention comes most starkly to the fore in such situations. For a discussion of the right to silence, see § 51.4*(b)*(ii).

classed among those cases that have subverted the seepage prohibition issued by the Constitutional Court.[1]

The approach adopted by the court in *S v Mthethwa* further illustrates the blurred line between the trial sphere and the pre-trial sphere.[2] Here, the issue was the effect, at the trial, of the absence of any caution that the accused was a suspect (at the time of questioning) and did not have to answer questions. The difficulty was discussed with reference to *Sebejan* and *S v Van der Merwe*[3], namely that the 'suspect', before becoming an arrested or detained person as understood in terms of FC s 35, did not appear to enjoy any FC s 35 rights. The court adopted the approach endorsed in *Van der Merwe*. It regarded the fairness of the treatment of the subject as a question of the fairness of the trial that occurred subsequently[4]. What was interesting for present purposes was that the court still found it necessary to analyse the question whether the accused had indeed been a 'suspect' at the relevant time.[5] The question arose again in *S v Orrie & Another*.[6] Here, the court squarely confronted the distinction between saying, on the one hand, that there was something about being a 'suspect' that attracted FC s 35 rights, and, on the other hand, saying that the question whether one had been a suspect or not at the relevant time would be a relevant consideration, when one became an accused at trial, in considering the effect upon the fairness of the trial of what had happened while one was a suspect. Bozalek J had no difficulty in ignoring the orthodoxy underpinning the due process wall. The judge found that a purposive interpretation of the FC s 35 rights, with a view to the interests the rights were intended to protect, required according to a suspect the relevant rights of an arrested and detained person in terms of FC s 35.[7]

An instructive decision by the Constitutional Court, and one that, if it did not vault the wall, at least offered a step-ladder, is that in *S v Baloyi*.[8] What was at issue was the question of whether proceedings to determine violations of family violence interdicts granted in terms of the now superseded Prevention of Family Violence Act were sufficiently criminal in nature to turn those being prosecuted into 'accused persons'

[1] See *Uncedo Taxi Service Association v Maninjwa & Others* 1998 (3) SA 417 (E), 1998 (6) BCLR 683 (E)(Court did not have to determine that proceedings on motion for 'civil contempt' *ex facie curiae* were criminal for the purposes of rendering the respondent an 'accused person' under FC s 35(3). Its application of FC s 35(3) in FC s 12 'limitation' analysis clearly subverted the seepage prohibition.) See also § 51.1*(a)*(ii) supra.

[2] 2004 (1) SACR 449 (E)('*Mthethwa*').

[3] 1998 (1) SACR 194 (O)('*Van der Merwe*').

[4] *Mthethwa* (supra) at 454G.

[5] Ibid at 454G-J.

[6] 2005 (1) SACR 63 (C)('*Orrie*').

[7] Ibid at 69I-70C. The reasoning was quite subversive of the due process wall, as it implied that the interests at issue would determine whether (and also which) section 35 rights applied, instead of asking whether one was dealing with the kind of person protected by the right, and then according that person all the rights set out in the relevant section.

[8] 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC), 2000 (1) SACR 81 (CC) ('*Baloyi*').

for the purposes of FC s 35(3)*(h)*. The noteworthy aspect of the judgement was not the result — namely that the proceedings were indeed sufficiently criminal in nature for the fair trial rights to apply; it was the fact that this result occurred on the premise that the form of the proceedings was 'neither that of a normal civil trial, nor that of an ordinary criminal trial, but of a special enquiry involving elements of both'.[1] What makes this decision so important for present purposes is the fact that it gave comfort that even proceedings that did not form part of the criminal justice system, or were not criminal trials proper, could attract section FC s 35 protection if the character of what the proceedings were aimed at achieving sufficiently approximated that of a criminal prosecution.[2]

(v) *Maintaining the wall*

The Explanatory Memorandum to the Early Draft Bill of Rights of 9 October 1995 states the following:

> Section 25 deals separately with the rights of detained (including sentenced), arrested and accused persons in the context of the right to freedom of the person (s 11) and the right to fair pre-trial and trial proceedings. This represents a departure from international instruments and foreign Bills of Rights, but it is an innovation which constitutes an improvement on these international and national instruments as it allows for greater clarity and certainty.

If the *Ferreira* and *Nel* wall had been scrupulously guarded by the courts, more 'clarity and certainty' might well have resulted. But that clarity would have come at the cost of recourse to liberty analysis and due process principles, and with the result that arrested and detained persons could find no generic principle to flesh out their rights under FC s 35. The interpretation of the residual right to a fair trial to which only accused persons are entitled would then be starved of philosophical foundations in the common law or in comparative human rights jurisprudence.

But the wall has been pierced in so many ways that the time has come for the courts to enforce it or to abandon it. As far as the relationship between liberty, due process, and FC s 35 is concerned, there is no sign currently of the 'clarity and certainty' to which the Explanatory Memorandum refers.

[1] *Baloyi* (supra) at para 19 (Sachs J). The observation that these special proceedings were necessary because of the inadequacy of the 'criminal justice system' in addressing family violence logically entailed the proposition that what was at issue before the Court was something outside of the 'criminal justice system'. Ibid at para 12.

[2] An examination of a potential state witness in terms of section 205 of the Criminal Procedure Act 51 of 1977, although aimed at the criminal trial, did not place the witness in the position of an accused vis-à-vis the state and therefore did not attract the protections of FC s 35. See *S v Mahlangu* 2000 (1) SACR 565 (W). See also *Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & Others* 2000 (4) SA 621 (C)(A person appearing before an administrative tribunal in a disciplinary inquiry was not an 'accused' for the purposes of enjoyment of section 35 rights such as the right to counsel); *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 (5) SA 449 (SCA)(Discussion of the issue on appeal); *Mhlekwa v Head of The Western Tembuland Regional Authority And Another; Feni v Head of The Western Tembuland Regional Authority & Another* 2000 (2) SACR 596 (Tk)(Assumed without any difficulty that those who were prosecuted in these courts were 'accused persons' for the purposes of FC s 35 rights.)

There is one more twist to the problem of due process seepage. The structure and wording of art 6 of the European Convention on Human Rights point to an interesting new possibility for due process seepage under the Final Constitution. Article 6(1) is the general fair trial provision. It applies to 'everyone', 'in the determination of his civil rights and obligations or of any criminal charge against him'. This general fair trial right has been afforded an 'extensive and autonomous' interpretation by the Convention organs.[1] The result is that it not only operates as the residual fair trial right, but may also lift from the confines of liability to criminal conviction those aspects of a fair trial which are specifically provided to accused persons in art 6(2) and art 6(3).[2] The right to be presumed innocent, for example, a right not even contained under the 'minimum' inclusionary umbrella of art 6(3) but granted in isolation to everyone 'charged with a criminal offence', has been held to apply outside the sphere of criminal conviction wherever a penalty may be exacted.[3]

The Final Constitution contains a clause which bears uncanny resemblance to the relevant portion of art 6(1) of ECHR. It is the 'access to courts' provision contained in FC s 34, which reads:

> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal.[4]

This clause is beyond question capable of performing all the due process seepage into FC s 35 which the Constitutional Court in *Ferreira* and *Nel* denied to the deprivation of liberty clause. In fact, its express mention of a 'fair public hearing', as opposed to the unqualified reference in FC s 12(1)*(b)* to a 'trial', and the modest reference in FC s 12(1)*(a)* to deprivation of freedom 'arbitrarily or without just cause', would seem to arm this new provision with a greater claim to operating as a general due process clause than the freedom clause.[5] Be that as it may, only the most ardent supporter of due process seepage would hope that the Constitutional Court might allow FC s 34 to do what it took great pains to prohibit IC s 11 from doing. Still, if it is recognized that the courts have to turn to liberty analysis when extending the residual scope of fair trial rights, and that the conceptual wall often hampers a more foundationally secure development of the criminal procedure rights, both of accused persons and of arrested

[1] R Beddard *Human Rights and Europe* (3rd Edition, 1993) 172.

[2] See S Stavros *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: An Analysis of the Convention and a Comparison with Other Instruments* (1993) 1-39.

[3] See *Adolf v Austria* (1982) 4 EHRR 313; *Minelli v Switzerland* (1983) 5 EHRR 554; Beddard (supra) at 172.

[4] See A Friedman & I Currie 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 60.

[5] See *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at paras 102-6.

and detained persons, the court may decide to vindicate the wholesale due process smuggling discussed above by taking the jack-hammer of FC s 34 to the due process wall. The Constitutional Court has given a strong indication that it will not use this jack-hammer. In *S v Pennington & Another*, the unanimous court remarked *obiter* that FC s 34 did not apply to criminal proceedings. Chaskalson P declared:[1]

> The words 'any dispute' may be wide enough to include criminal proceedings, but it is not the way such proceedings are ordinarily referred to. That section 34 has no application to criminal proceedings seems to me to follow not only from the language used but also from the fact that section 35 of the Constitution deals specifically with the manner in which criminal proceedings must be conducted.

It is nevertheless interesting to note that Chaskalson P justified this *obiter* finding with regard to FC s 34 by invoking art 6(1) of the European Convention on Human Rights.[2]

Another possibility for 'due process' seepage is the rather enigmatic provision that is section FC s 173. FC s 173 provides that the Constitutional Court, Supreme Court of Appeal and High Courts have inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice. This jurisdictional provision was employed in *Hansen v The Regional Magistrate, Cape Town and Another* to allow the court to set aside a sentence and to substitute a lesser sentence for it on review, despite the fact that the applicant had exhausted his legal remedies of appeal by the time the application had been brought.[3] The facts were that two brothers had been charged with the same offence, but only the applicant had been prosecuted and convicted, as his brother had absconded. The brother was apprehended, tried, convicted and sentenced some five years later, and received a much lighter sentence than the applicant, who successfully reviewed his heavier sentence. The difficulty was finding jurisdiction for the court in circumstances where the courts were *functus officio* in relation to the criminal proceedings, and where common law authority stood in the way. The answer was FC s 173. It should be stressed that the possibility of using FC s 173 to establish jurisdiction does not entail the power to augment or to supplant the provisions of FC s 35 with substantive liberty analysis. That said, the precise use to which FC s 173 may be put in filling in possible gaps in the due process wall have not been decisively determined.

[1] 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC)('*Pennington*') at para 46.

[2] *Pennington* (supra) at paras 47-50. See also *Monnell and Morris v United Kingdom* (1987) 10 EHRR 205. The fact that FC s 34 does not apply to criminal proceedings does not mean it cannot apply in proceedings ancillary to criminal proceedings — such as measuring the fairness of property preservation orders obtained *ex parte* in terms of section 38 of the Prevention of Organised Crime Act 121 of 1998. See *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC), 2003 (5) BCLR 476 (CC).

[3] 1999 (2) SACR 430 (C).

(b) Interpretation of FC s 35

(i) *General*

Like the other sections in the Bill of Rights, FC s 35 should be interpreted liberally, purposively and in favour of the individual arrested, detained or accused person.[1] The Constitutional Court has clearly endorsed an interpretation *in favorem libertatis* with respect to FC s 35.[2] However, it has not wholly avoided very narrow constructions. The restrictive interpretation of the word 'trial' in *Nel v Le Roux NO & Others* discussed above — where the same word's appearance in IC s 25 was insufficient to persuade the court to accord it the IC s 25 meaning in IC s 11 because of the absence of a 'textual link' between the words[3] — is a clear example of an interpretive method which would be regarded as restrictive in whatever field of law it operated. Enough has been said about due process seepage; suffice it to add that the decree in favour of generosity and the due process wall do not pull in the same direction. Furthermore, the extraordinarily cursory treatment meted out to the arguments against the final bail provision in the *First Certification Judgment* hardly constitutes a ringing proclamation *in favorem libertatis*.[4] In *S v Thebus & Another*, the Constitutional Court specifically required a 'generous' interpretation of the application of FC s 35(3)*(h)*. It held that the qualification 'during the proceedings' governed only the right not to testify, and did not limit the operation of the right to silence at issue in FC s 35(3)*(h)*.[5]

(ii) *Abdication*

The interpretation of difficult or vague provisions in FC s 35 (and IC s 25) has given rise to a phenomenon which can fairly be said to hamper the development of a rigorous constitutional criminal procedure jurisprudence: namely interpretive abdication. The abdication has taken the form either of insistence upon the *ad hoc* nature of the fair trial right and a concomitant refusal to lay down anything that may be in danger of being regarded as a general guiding

[1] See L Du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 3.

[2] *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 15. See *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC)('*Sanderson*') at para 22 (Constitutional Court unanimously invoked the duty to interpret IC s 25(3) in a 'broad and open-ended' manner as an important substantiation for interpreting IC s 25(3)*(a)* in a manner contrary to what it regarded as a persuasive textual argument.)

[3] 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC)('*Nel*') at para 13.

[4] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 88('*First Certification Judgment*').

[5] 2003 (6) SA 505 (CC), 2003 (2) SACR 319 (CC); 2003 (10) BCLR 1100 (CC)('*Thebus*') at para 104. This conclusion led the court to find 'inappropriate' the drawing of a distinction between the pre-trial right to silence and the right to silence during the trial: 'The right to silence is initially conferred by FC s 35(1)*(a)* and thereafter by FC s 35(3)*(h)*'. Ibid at para 104.

principle,[1] or of talk of judicial 'discretion' in the strong sense,[2] or of a *non possumus* declaration coupled with an appeal to Parliament to fill in the details in

[1] For more on 'flexibility', see *S v Nombewu* 1996 (12) BCLR 1635, 1659 1661 (E), 1996 (2) SACR 396 (E)(Erasmus J found 'nothing' in the Interim Constitution that 'dictate[d] a strict test . . . or for that matter a slack test' as far as the exclusion of evidence in violation of rights was concerned. Erasmus J stated that 'the Canadian test of "disrepute"' [could not] displace our standard of "a fair trial"', but the learned judge went on to say that the Canadian test was a 'useful even necessary *check* in the exercise of the court's discretion' (emphasis added), only to suggest in the next paragraph that 'consideration of the public mood [ie the 'disrepute test'] [lent] *flexibility* to the application of Chapter 3'. (emphasis added).) See also *Coetzee & Others v Attorney-General, Kwazulu-Natal, & Others* 1997 (8) BCLR 989 (D), 1997 (1) SACR 546, 560 (D)(Thirion J could find 'no virtue in trying to formulate a rule for determining a point in time from which the delay in commencing a trial [had] to be reckoned for the purpose of deciding whether the delay [had] been unreasonable'.) See, further, *S v Shaba en 'n Ander* 1998 (2) BCLR 220 (T), 1998 (1) SACR 16, 20C (T)('Daar *mag* mettertyd sekere riglyne uitkristalliseer wat 'n hof behulpsaam *mag* wees by die ondersoek en beoordeling van die vraag of daar aan die voorskrif van art 25 voldoen was. Sulke riglyne *kan* egter *nooit* tot wet of regsreëls verhef word nie' (emphasis added)). Kriegler J's refusal to lay down 'normal periods' for specific kinds of cases of delay in *Sanderson* should not be regarded as a form of 'abdication' of this sort. *Sanderson* (supra) at para 34. There is a difference between shying away from the possibility of laying down rules and principles, on the one hand, and refusing to compile a laundry list of acceptable periods of delay for certain kinds of criminal trials, on the other. Strong dicta from the Constitutional Court have entrenched the growing orthodoxy that fairness is a fact-sensitive question essentially to arise on an *ad hoc* basis, and is not capable of being determined in the abstract with references to rules of thumb, or in a fact-free 'vacuum'. See *S v Steyn* 2001 (1) SA 1146 (CC), 2001 (1) SACR 25 (CC), 2001 (1) BCLR 52 (CC) at para 13 (Endorsed by Yacoob J in his separate concurring judgement in *Thebus* (supra) at para 111.) Very welcome, if atypical, was the endorsement in *Thebus* by the majority (on the issue in question) of a general principle at the expense of such *ad hoc* assessment — when it came to the question whether the right to silence was violated by the use in evidence of pre-trial silence on a certain issue, the question was approached as one that yielded a uniformly applied answer. *Thebus* (supra) at para 85. This question should be distinguished from the different question of whether the violation in the case in question rendered the trial unfair. Ibid at para 93. Yacoob criticized this conclusion and, not without justification, asked why an ad hoc approach should be avoided in the case of pre-trial silence, where fairness was used as a barometer in other cases. Ibid at paras 97 and 109. One might as readily ask why the desirability of forging general rules ought not also to apply to other inquiries into criminal due process rights violations beyond the sphere of the illegitimate use of pre-trial silence.

[2] See R Dworkin *Taking Rights Seriously* (1977, 1996 impression) 32. Dworkin helpfully distinguishes between 'discretion' in a weak sense and discretion in a strong sense. Weak discretion is not 'discretion' properly so called, and includes: (1) the exercise of a judgment the correctness of which is difficult to ascertain, an example of which is the lieutenant's order to the sergeant to take his five most experienced men on patrol where it is hard to determine which are the most experienced, and (2) someone's having final authority to make a decision which cannot be reversed by someone else. Discretion in the strong sense is 'not merely to say that an official must use judgment in applying the standards set him by authority, or that no one will review that exercise of judgment, but to say that on some issue he is simply not bound by standards set by the authority in question'. The most frequent invocation of strong discretion has been in the area of excluding evidence obtained in violation of rights. See *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC)('*Zuma*'); *Ferreira v Levin & Others*; *Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC); *S v Mathebula & Another* 1997 (1) BCLR 123, 133H–135B (W). FC s 35(5), which requires the exclusion of unconstitutionally obtained evidence 'if the exclusion of that evidence would render the trial unfair and otherwise be detrimental to the administration of justice', is an excellent example of 'discretion in the weak sense'. It is properly described as a rule calling for judgment, rather than a 'discretion' in the strong sense. It is indeed fortunate for the legitimacy of fair trial interpretation that this distinction was recognized in *S v Naidoo & Another*. 1998 (1) BCLR 46 (D), 1998 (1) SACR 479, 499G-500D (N)('*Naidoo*'). The High Court rejected the approach adopted in *S v Madiba & Another*. 1998 (1) BCLR 38 (D). The portion from the judgment in *Madiba*, with respect, confused a decree requiring judgment, on the one hand, with a discretion, on the other. *Naidoo* (supra) at 499A-D (See the reference in the passage to a discretion, coupled with the notion

interpreting the rights in question.[1] It is of the utmost importance to the legitimacy of a judiciary with the power to strike down legislation that it regard itself, when interpreting fundamental rights, not as having a discretion in the strong sense, but as obeying the dictates of the supreme authority, namely the Final Constitution, even if the task calls for judgment rather sweeping in nature. The court in *S v Mathebula & Another* recognizes this imperative.[2] (However, the court's assumption that if the question of the violation of a right is a matter of constitutional interpretation and not discretion, then the determination of the remedy should likewise be a matter of constitutional interpretation and not discretion, does not necessarily follow.) Similarly, in *S v Vermaas; S v Du Plessis*, the Court held that whether an accused is entitled to representation should 'pre-eminently'

of a 'duty' to make a decision which was fair to both sides.) Having to decide what fairness *requires* does *not* equal having a discretion in the strong sense. If it did, the courts should grasp the nettle and declare all of FC s 35 to be a matter of discretion — appealable only on the principles applicable to the exercise of a judicial discretion. This is plainly not the case. It is respectfully to be regretted that the Transvaal Provincial Division in *S v Makofane* — 1998 (1) SACR 603, 617A-I (T) — based its decision that the Interim Constitution had not disturbed the discretion to refuse a discharge under s 174 of the Criminal Procedure Act 51 of 1977 on a passage in *Key v Attorney-General, Cape Provincial Division, & Another* — 1996 (4) SA 187 (CC), 1996 (6) BCLR 786 (CC) — which discussed the tension between the public interest in bringing criminals to book and the public interest in ensuring a fair trial, and which contained the observation that the trial judge was the 'person best placed to take that decision' (concerning the requirements of fairness). *Key* certainly did not say that every IC s 25 and FC s 35 question boiled down to an exercise of discretion. *S v Shongwe & Others* reiterated the misinterpretation of *Key* as laying down a 'discretion'. 1998 (9) BCLR 1170 (T), 1998 (2) SACR 321 (T) 1998 (9) BCLR 1170 (T), 1998 (2) SACR 321 (T). For more on *Makofane*, see § 51.5*(j)*(iii) infra.

[1] See *S v Mhlakaza & Others* 1996 (6) BCLR 814, 833H (C). Van Deventer J makes the extraordinary complaint that the governing principles and guidelines relating to the exact scope and content of the right to counsel provided in IC s 25(1)*(c)* should not be left to the courts. See also *S v Nortjé* 1997 (1) SA 90, 101–2 (C)('[W]hether the system of trapping is to continue in South Africa is obviously a matter for Parliament and the Constitutional Court'. Given that the court had jurisdiction to decide the constitutional question before it, and given that it had embarked on a discussion of the constitutional merits of trapping in the context of the right to a fair trial, its disavowal of responsibility for deciding the question cannot be supported. A finding that the constitutional merits of trapping were not strictly relevant to the decision in the case would of course have been a different matter altogether.) See also *S v Dube* 2000 (2) SA 583, 607D-E (N). The *Dube* court was confronted with an entrapment question in circumstances where the then newly enacted provisions of section 252A of the Criminal Procedure Act 51 of 1977, which comprehensively addressed the question, were held not to apply. The court approached the matter as one of determining whether the admission of the relevant evidence harmed the administration of justice and the fairness of the trial. Note that the proliferation of legislative codification of some perennial questions of due process reflected in section 35 (such as section 252A dealing with trapping, and section 342A dealing with unreasonable delays in trials) have the tendency to create doubt about the intended exhaustiveness with which the legislature has seen fit to regulate the topic, and the status of the legislative codification relative to the over-arching constitutional principle the codification seeks to address. The difficult question in each such case would arise where the legislative codification is held, on its own terms, not to apply, and whether that then means that recourse to the constitutional principle would be in conflict with the legislative intention. Of course, since the legislation in question has no constitutional status, it can only, in theory, add to the rights of an accused person, and not limit them by purporting to set criteria for the application of the FC s 35 rights. But courts would naturally tend to approach such questions as if they were comprehensively governed by the statutory provision, at the expense of the development of vibrant self-standing constitutional jurisprudence in these areas.

[2] 1997 (1) BCLR 123, 133–5 (W).

left to the officer trying the case,[1] and should not be read as a reference to a discretion in the strong sense. It is, rather, a reference to the privileged position of the judicial officer trying the case to make the decision required by the Final Constitution.[2]

These generous constructions once again run up against *Nel v Le Roux NO & Others*. In *Nel*, the Constitutional Court held that if conducting a trial in private was a violation of the right to a public trial, then leaving the decision as to whether to violate the right to the strong discretion of the trial judicial officer meant that 'the question of an infringement of any right of the applicant in this regard simply [did] not arise' until the discretion was exercised.[3] This conclusion seems to be a very unfortunate violation of the principle that granting a wide discretion to infringe a right is itself an infringement of that right.[4] The judgment of the court as to the question whether unconstitutionally obtained evidence would render the trial unfair or otherwise be detrimental to the administration of justice, circumstances that FC s 35(5) decreed 'must' lead to the exclusion of the evidence, was regarded by the Supreme Court of Appeal in *S v M* as 'no doubt' entailing a 'discretion'.[5] Likewise, the Constitutional Court in *S v Thebus* called the determination in terms of FC s 35(5) a 'discretion'.[6] Both cases relied on a passage in *Key v Attorney-General, Cape Provincial Division, & Another*.[7] The passage refers to the determination as ultimately a matter for the trial judge to assess. Abdication of responsibility for interpreting the fundamental rights in FC s 35 is not the proper way of engaging issues of institutional comity.[8] The discourse of discretion threatens to engulf

[1] 1995 (3) SA 292 (CC), 1995 (7) BCLR 851 (CC), 1995 (2) SACR 125 (CC) at para 15.

[2] The same should be said of the decision in *Msila v Government of the Republic of South Africa & Others*. 1996 (3) BCLR 362 (C). The court in *S v Maduna en 'n ander* admittedly did regard the decision to grant legal representation as one of a discretion in the strong sense. 1997 (1) SACR 646, 664 (T). This conclusion, with respect, is wrong.

[3] 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC) at para 17.

[4] See S Woolman & H Botha 'Limitation' in S Woolman, T Roux, J Klaaren, A Stein, M Chakalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[5] 2003 (1) SA 341 (SCA) at para 30.

[6] *Thebus* (supra) at para 108.

[7] 1996 (4) SA 187 (CC), 1996 (6) BCLR 786 (CC) at paras 11–13.

[8] The discussion in *S v Mathebula* of the relationship between public approbation, discretion and constitutional authority, with the greatest respect, seemed to confuse the issue of legitimate authority with that of the public approval rating of a given decision to exclude improperly obtained evidence. 1997 (1) BCLR 123, 135 (W). The argument was that an exclusion which was based upon a rejection of an appeal to IC s 33(1) to save the evidence in question would have less disreputable consequences for the administration of justice than one based upon a discretion. It is true that if a constitutional decision, however much people may disagree with it, is ultimately a *bona fide* application of the dictates of the Interim Constitution, however that be understood, rather than an exercise in strong discretion, then such a decision, from the point of view of the theory of constitutional democracy, is more justifiable as consonant with the legitimate function of the court. But whether the public will cry 'the law is an ass' on a particular exclusion of evidence will be a question independent of the source of the supposedly asinine activity. A court cannot avoid the unpopular consequences of its interpretation by relying on the fact that it is in fact interpreting.

the fair trial constitutional jurisprudence at the cost of the jurisprudentially important affirmation of the difference between acknowledging a discretionary power on the part of the judiciary and requiring the courts to interpret what a fair trial requires.

(iii) *The common law and FC s 35*

The relationship between the common law and FC s 35 is the most conceptually challenging problem of interpretation in the sphere of criminal procedure rights. There is, on the one hand, no question that the principles underlying criminal procedure rights have a venerable history in the common law. As Erasmus J put it in *S v Nombewu*:[1]

> The common law has special significance in the sphere of criminal procedure and evidence. The law in this regard has a long tradition of seeking to achieve much the same objectives as are now entrenched in the Constitution.

On the other hand, the Constitutional Court has made it clear that that foundational common law principles stand to be re-evaluated in light of FC s 35.[2] As Kentridge AJ stated in *S v Zuma & Others*:

> Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them in line with the common law (*Attorney-General v Moagi* 1982 (2) Botswana LR 124 at 184). The caveat is of particular importance in interpreting section 25(3) of the Constitution.[3]

This caveat was heeded in *S v Maseko*. Borchers J held that, as far as the protection of the right to silence during plea proceedings was concerned, the principles developed in the common law were 'no longer sound reasoning' in light of the Interim Constitution's provisions, and that the court was consequently not bound by precedent based upon them.[4] A similarly pronounced example of basing the interpretation of an IC s 25 right upon a rejection of the governing common law position in favour of a conclusion more in keeping with the underlying principles of the Interim Constitution occurred in *Prokureur-Generaal, Vrystaat v Ramokhosi*. The court rejected the practice of affording deference to the Attorney General's assessment of the risks of bail. The Court's new approach flowed from the values that permeated the Interim Constitution ('[d]ie tussentydse Grondwet en veral Hoofstuk 3 daarvan, is deurdrenk met 'n nuwe en meer demokratiese benadering').[5] Where the courts are called upon expressly

[1] 1996 (12) BCLR 1635, 1656 (E), 1996 (2) SACR 396 (E).

[2] *Bernstein* (supra) at paras 59–64; *Nel v Le Roux* (supra) at paras 8–9, 18; *Shabalala v Attorney-General (Transvaal)* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC), 1995 (2) SACR 761 (CC) at para 9.

[3] *Zuma* (supra) at para 19. See also *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC), 1996 (1) SACR 94 (CC) at para 1 and *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) at para 22.

[4] 1996 (9) BCLR 1137, 1141 (W), 1996 (2) SACR 91 (W).

[5] 1996 (11) BCLR 1514, 1531 (O).

to consider a principle of common law criminal procedure rights protection and to measure its adequacy against the standards of the Final Constitution,[1] the break between the paradigms is most apparent. As was pointed out in *S v Thebus*:

> [T]he need to develop the common law under s 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the 'objective normative value system' found in the Constitution.[2]

There are, however, several examples of a 'pure codification' approach to the criminal procedure rights — an approach which regards FC s 35 as entrenching common law principles and doctrines. In *Davis v Tip & Others*[3] Nugent J held that the right to remain silent during trial granted by IC s 25(3)*(c)* did not 'enlarge upon' the common law right to be presumed innocent until proved guilty beyond reasonable doubt, but merely 'guarantee[d] its future existence'. In *S v Malefo en Andere*, M J Strydom J held that 'die Grondwet [het] slegs die bestaande beginsels betreffende 'n regverdige verhoor herbevestig soos dit onder andere in die gemene reg gegeld het.'[4] In *Msomi v Attorney-General of Natal & Others*[5] Moodley J accepted the proposition articulated in *S v Huma & Another*[6] that IC s 25(3)*(d)* was 'merely a codification of the common law privilege against self-incrimination and that it did not take the common law principle any further'.[7] The 'weight of authority' that put paid to a constitutional challenge *S v Lavhengwa* was exclusively common law authority.[8] And in *S v Maduna en 'n Ander* the analysis of the discretionary nature of the right to counsel was again based exclusively on common law principles.[9]

[1] See, for example, the consideration afforded to the question as to whether the Final Constitution introduced any hardening of the rule against admitting hearsay evidence against an accused person, and the conclusion that the current statutory regime passed muster, in *S v Ndhlovu & Others.* 2002 (6) SA 305 (SCA). See also *Mbambo v Minister of Defence* 2005 (2) SA 226 (T)(Testing the common law principle that an appeal lay only where the statute afforded an appeal, against the requirements of the right to an appeal found in section 35(3)*(o)*, as interpreted in *S v Twala (SA Human Rights Commission Intervening)* 2000 (1) SA 879 (CC), 2000 (1) BCLR 106 (CC) at paras 9 and 10 and in *S v Steyn* 2001 (1) SA 1146 (CC), 2001 (1) BCLR 52 (CC) at paras 5, 11, 13 and 23.)

[2] *Thebus* (supra) at para 28.

[3] 1996 (1) SA 1152 (W), 1996 (6) BCLR 807, 811 (W).

[4] 1998 (2) BCLR 187 (W), 1998 (1) SACR 127, 152F (W).

[5] 1996 (8) BCLR 1109 (N)('*Msomi*').

[6] 1996 (1) SA 232 (W).

[7] *Msomi* (supra) at 1119 and 1120. The reference to the 'American common law (in so far as it was relevant to the protection afforded by the Fifth Amendment to the United States Constitution . . .)' is unfortunate: Fifth Amendment jurisprudence is *not* common law jurisprudence.

[8] 1996 (2) SACR 453, 473 (W).

[9] 1997 (1) SACR 646 (T).

In the context of self-incrimination and silence rights, the common law has proved quite resilient and the adoption of its analyses most comfortable. This approach is reflected in both *S v Singo*[1] and *S v Monyane & Others*.[2] The appropriate manner of approaching double jeopardy, and identifying whether it was entailed by impugned conduct or not, as considered in *S v Basson*,[3] was determined by common law analysis. Important reiterations of codification discourse, occur in *S v M*, with its reference to 'standards of fairness which the common law recognizes and the Constitution guarantees to an accused person',[4] and in *S v Manamela & Another (Director-General of Justice Intervening),* which refers to the right to silence and the presumption of innocence as 'procedural rights which are central to the adversarial criminal process which was developed under the common law and subsumed into the Bill of Rights.'[5] Importation of common law principles of due process is most natural where the residual fair trial principle is at play, and may occur without much concern about the precise constitutional rubric for the importation.[6]

Sometimes the codification approach, once adopted for the content of the right in question, is taken to apply also to the remedy to be granted. In *Klein v Attorney-General, Witwatersrand Local Division, & Another* the court adopted a codification approach to the right to a fair trial.[7] Its statement that 'there has … never been a principle that a violation of any of the specific rights encompassed by the right to a fair trial would automatically preclude the trial' was cited with approval in *Moeketsi v Attorney-General, Bophuthatswana, & Another*.[8] In *Moeketsi,* Friedman J seemed to assume that the common law character of a particular right necessitated compliance with the common law attitude to the remedies available upon

[1] 2002 (4) SA 858 (CC), 2002 (8) BCLR 793 (CC), 2002 (2) SACR 160 (CC) at para 30 (The starting point was one couched in terms of codification — a reference to the rights to silence and against compelled self-incrimination as 'primarily rooted in our common law and statutory law … [and] now constitutionally entrenched'.)

[2] 2001 (1) SACR 115 (T).

[3] 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC) at paras 61-69.

[4] 2003 (1) SA 341 (SCA) at para 28.

[5] 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC)('*Manamela*') at para 23. See also *Thatcher v Minister of Justice & Constitutional Development & Others* 2005 (1) SACR 238 (C) at para 86; *S v Chabedi* 2004 (1) SACR 477 (W) at para 21; *S v John* 2003 (2) SACR 499, 505B (C).

[6] Several examples come to mind: the idea of an evolution of a more pro-active judicial role, recognized as necessary to ensure the fairness of the proceedings in English common law, and regarded as appropriate in a 'modern South African context' (*S v Joors* 2004 (1) SACR 494, 500C (C)), or the importation, with reference to the work of Steytler, of the 'common law principle of a fair trial' not to have an 'unduly hasty trial' (*S v Chabalala* 2002 (1) SACR 5, 6D-E (T)), or the incorporation of the common law principle of *nulla poena sine culpa* as a 'fundamental rule of a fair trial' (*S v Lubisi: In re S v Lubisi & Others* 2004 (3) SA 520, 528J-529D (T)).

[7] 1995 (3) SA 848 (W), 1995 (2) SACR 210 (W).

[8] 1996 (7) BCLR 947, 958-9 (B).

violation of that right.[1] This, with respect, is a *non sequitur*. A failure to be alive to the distinction between the common law character, if any, of the right in question and the common law remedies for violations of the right resulted in a lamentable lack of clarity about the relationship between the doctrine of abuse of process and the right to a fair trial in *Coetzee v Attorney-General, Kwazulu-Natal, & Others*.[2]

The pure codification approach can take some strange turns. In *S v Scholtz* Basson J held, as far as the right to silence during trial and inferences from silence were concerned, that the failure of the Final Constitution expressly to have altered the right and remedy in question had to be taken as an indication that the common law right had not been altered.[3] In *S v Lavhengwa*, the only difference that the existence of the Interim Constitution seemed to have made to the merits of the offence of contempt *in facie curiae* was to have fortified the justifiability of the incursion into liberty entailed by the offence in question, since an affront to the 'authority, dignity and repute' of the courts as 'watchdogs of constitutional rights' had now seemingly become a more serious matter.[4] In *Seapoint Computer Bureau (Pty) Ltd v McLoughlin & Others NNO*, the court based its decision on a codification approach which regarded the right to silence as the embodiment of the common law privilege against self-incrimination.[5] But it then went on to reject counsel's arguments based upon the common law protection against self-incrimination enunciated in *Jamalodien v Ajimudien*.[6] It did sopartly on the basis that that case, not being 'concerned with the right to remain silent', was not authoritative in the instant case.[7]

Some courts have attempted a golden mean approach to avoid the Scylla of pure codification and the Charybdis of re-inventing the wheel. In *S v Hassen & Another*,[8] the Transvaal Provincial Division displayed a sensitivity to the problems discussed above in deciding whether the common law position, that entrapment was not a substantive defence, was still applicable under the Interim Constitution.[9] In *S v Kester* Friedman JP based his decision on the extent of the

[1] For a similar assumption, see *S v Malefo en Andere* 1998 (2) BCLR 187 (W), 1998 (1) SACR 127, 152F–G (W). The interpretation of FC s 35(5), which provides for the exclusion of unconstitutionally obtained evidence if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice, and the jurisprudence under IC s 25, where no such remedy is expressly granted, is discussed in PJ Schwikaard 'Evidence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 52.

[2] 1997 (8) BCLR 989 (D), 1997 (1) SACR 546 (D).

[3] 1996 (11) BCLR 1504, 1508 (NC), 1996 (2) SACR 40 (NC).

[4] 1996 (2) SACR 453, 474 (W).

[5] 1996 (8) BCLR 1071 (W)('*Seapoint*').

[6] 1917 CPD 293.

[7] *Seapoint* (supra) at 1081.

[8] 1997 (2) SA 253 (T), 1997 (3) BCLR 377 (T).

[9] The court's main concern was with the evidential consequences of unconstitutional trapping if trapping were to be regarded as unconstitutional and hence it did not exhaustively address the arguments in favour of the American position establishing a substantive defence in the case of entrapment on the basis of Fifth Amendment due process. Ibid at 381f. Cf *United States v Russell* 411 US 423 (1973). See also *S v Dube* 2000 (2) SA 583 (N), 2000 (1) SACR 53 (N).

information required to be presented to the accused on an incisive exploration of common law principles, and then added that his view was 'fortified' by the provisions of IC s 25(3)*(b)*.[1] An identical attitude was adopted by Claassen AJ in *S v Moilwa*, where the right of an unrepresented accused to assistance by the court was based on common law and first principles which were then 'supported' ('gesteun') by IC s 25(3).[2] In *S v Brown & 'n Ander*, the court acknowledged the required reappraisal and refinement of common law principles which constitutionalization entailed, and came to the conclusion that, as far as the right not to testify was concerned, the Interim Constitution had not altered the substance of the law, but had brought about a shift in emphasis ('klem verskuiwing').[3] And in *S v Nombewu*,[4] Erasmus J noted 'a trend in recent years towards greater recognition of the role of public policy in criminal procedure and evidence',[5] and found that, as far as excluding improperly obtained evidence was concerned, '[t]he Constitution did not leave the existing law unchanged.'[6] He put the matter thus: 'With the enactment of the Constitution, public policy acquired a new dimension.'[7] In *S v Letaoana* Marcus AJ came to the noteworthy conclusion that the clause in the Final Constitution which decreed the manner of interpreting the common law, FC s 39(2), had the effect of requiring judges to keep their eyes more closely on the Final Constitution in interpreting the common law than was the case under the Interim Constitution.[8] The substitution of a requirement to 'promote' the spirit, purport and objects of the Bill of Rights in FC s 39(2) for the requirement to 'have due regard' to these factors in IC s 35(3) led to the following conclusion:

> To 'promote' in this context, means to further or advance. It means more than taking into proper account.[9]

A rare and welcome expression of the 'a fortiori' principle occurred in *S v Legoa*.[10] This doctrine (an incident of a predilection towards generosity in interpretation) holds that when one interprets the scope of a constitutional due process right, one should afford it at least the scope of its common law parent; or, put differently, the constitutional protection should always at least include the degree of protection afforded by the now codified right under common law. With regard to this principle, Cameron JA made the following observations:

[1] 1996 (1) SACR 456, 470 (B). See also § 50.5*(n)*(iii) infra (On the interpretation of the *dictum* in *McIntyre & Others v Pietersen NO & Another* 1998 (1) BCLR 18, 21C (T), *sub nomine S v McIntyre en Andere* 1997 (2) SACR 333 (T), that one found in the Interim Constitution a 'samevatting' of the ancient right of an accused to avail himself of the defence of autrefoit acquit.)
[2] 1997 (1) SACR 188, 193 (NC).
[3] 1996 (11) BCLR 1480, 1489 (NC), 1996 (2) SACR 49 (NC).
[4] 1996 (12) BCLR 1635 (E), 1996 (2) SACR 396 (E).
[5] Ibid at 1657J.
[6] Ibid at 1658D.
[7] Ibid at 1658D
[8] 1997 (11) BCLR 1581 (W).
[9] Ibid at 1591.
[10] 2003 (1) SACR 13 (SCA)('*Legoa*').

> Under the common law it was therefore 'desirable' that the charge-sheet should set out the facts the State intended to prove in order to bring the accused within an enhanced sentencing jurisdiction. It was not, however, essential. The Constitutional Court has emphasised that under the new constitutional dispensation, the criterion for a just criminal trial is 'a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution of the Republic of South Africa Act 108 of 1996 came into force'. The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific rights set out in the sub-sections of the Bill of Rights' criminal trial provision. One of those specific rights is 'to be informed of the charge with sufficient detail to answer it'. What the ability to 'answer' a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge-sheet.[1]

The courts should acknowledge without equivocation that the content of the rights contained in FC s 35 are a matter of constitutional interpretation. The remedies to be granted upon violation are likewise a matter of constitutional interpretation. The questions are distinct. That many, if not all, of the criminal procedure rights have a common law ancestry, and require argument on the basis of the principles which justify that common law ancestry, is beyond question. But the conclusions reached by the common law courts are not authority to bind the courts when it comes to the interpretation of FC s 35. FC s 35 lay down fundamental rights. These rights may mean little without their common law histories, but they may well mean a lot more than their common law histories. The common law principles were developed as a function of public or state interests over procedural safeguards in the interests of individual liberty, and parliamentary intrusion had to be accommodated as smoothly as possible. The Final Constitution shifts the paradigm by listing the individual's rights irrespective of other interests and prohibiting violation of these rights by any means other than those laid down in the limitations clause.[2] The common law equation is unravelled and those interests that accrued on the other side of liberty now require justification to overturn the listed rights. That the answer may often be the common law answer does not change the conceptual picture. Nor does this mean that the wheel will be re-invented for every question: some common law justifications speak with such authority that much of the analytical work will be done, for practical purposes, by that weight of authority. An exploration of the justification process is therefore a useful next step in the analysis.

[1] *Legoa* (supra) at para 20.

[2] See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31 (The Final Constitution — and the doctrine of constitutional supremacy — make the rights found in Chapter 2 — the Bill of Rights — the departure point for analysis.)

(iv) *Limitation*

According to the general theory of limitation, the court should first determine the scope of FC s 35 rights, then require the applicant to indicate that the right thus interpreted has been infringed, and then allow the state or the party relying upon the law to justify a limitation of that right by discharging the burden of justification under FC s 36(1).[1] This two-stage analysis, asking first whether the individual's right has been infringed, and then asking whether the infringement can be justified by sufficiently weighty state interests, was specifically endorsed for the purposes of criminal procedure rights by the Constitutional Court in *Ferreira v Levin NO & Others; Vryenhoek v Powell NO & Others*[2] and *Scagell & Others v Attorney-General of the Western Cape & Others*.[3] In fact, the application of the general 'double-barrelled approach' to criminal procedure rights was regarded as 'trite' by the Witwatersrand Local Division in *S v Lavhengwa*,[4] and expressly insisted upon in *S v Mathebula & Another*[5] and *S v Sebejan*.[6]

Nevertheless, the criminal procedure rights, particularly the right to a fair trial, involve a nightmare for limitation analysis. First, the fair trial right and a number of the specifically enumerated criminal procedure rights contain a number of 'internal modifiers' and 'internal limitations' that make two-stage limitation analysis exceedingly difficult.[7] The only true 'internal limitation' in the criminal procedure rights was the bail proviso contained in ICs 25(2)*(d)*, which establishes a right to be released from detention 'unless the interests of justice require otherwise'. But even this 'internal limitation' has a lesser claim to being a limitation proper if the interpretation of this clause in *Ellish en Andere v Prokureur-Generaal, Witwatersrandse Plaaslike Afdeling*[8] and *Prokureur-Generaal van die Witwatersrandse Plaaslike Afdeling v Van Heerden en Andere*[9] — that the clause did not place an onus

[1] See S Woolman & H Botha 'Limitation' in S Woolman, T Roux, J Klaaren, A Stein, M Chakalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[2] 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)(Applied to compelled self-incrimination).

[3] 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC) at para 19. Naturally, a statutory provision that limits certain rights, in particular rights that do not relate to the fairness of the trial, is more readily analysed in terms of the orthodox two-stage analysis without much ado. See, for example, the analysis of the provisions relating to violent arrest in section 49 of the Criminal Procedure Act 51 of 1977 embarked upon in *Ex parte Minister of Safety & Security: In re S v Walters*. 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC), 2002 (2) SACR 105 (CC). On the assessment of the constitutionality of section 37 of the General Law Amendment Act 62 of 1955 in the light of its reversal of the onus, see *S v Manamela & Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC). The same applies to a rule of the common law that is challenged on the basis of being contrary to the adequate protection of rights. See *S v Thebus & Others* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC)('*Thebus*') at paras 29–32; *S v Mamabolo (E TV & Others Intervening)* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC) at para 48ff.

[4] 1996 (2) SACR 453, 477 (W).

[5] 1997 (1) BCLR 123, 135 (W), 1997 (1) SACR 10 (W).

[6] 1997 (8) BCLR 1086 (W), 1997 (1) SACR 626, 628 (W).

[7] For more on internal modifiers and internal limitations, see S Woolman & H Botha 'Limitation' in S Woolman, T Roux, J Klaaren, A Stein, M Chakalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 34.4 and § 34.5

[8] 1994 (4) SA 835 (W), 1994 (5) BCLR 1 (W).

[9] 1994 (2) SACR 469 (T).

upon the State is accepted. The alteration of this clause to remove the possible burden of justification on the State in IC s 25 and to replace it with a condition ('if the interests of justice permit') in FC s 35 means that there are no 'internal limitations' proper in the Final Constitution's criminal procedure rights.[1]

However, internal qualifications framed in terms of reasonableness, adequacy, sufficiency, or the interests of justice abound.[2] These qualifications, while not distinctly separable from the right concerned as a permissible 'internal limitations', are also not the kind of 'internal modifiers' which Woolman and Botha identify as distinguishable from internal limitations on the basis that they are part of an inquiry into the content of the right.[3] If the right to a fair trial can be transcribed as the right not to receive an unfair trial, then the problem of the relationship between defining the right in question and justifying its limitation may seem identical to that pertaining to the prohibition of 'unfair discrimination' in FC s 9(3).[4] But whether 'unfair discrimination' should be regarded as conceivably justifiable is not the same as asking whether an unfair trial is justifiable. It seems easier in principle to separate the practice of 'unfair discrimination' from the reasons offered to justify it, especially as far as 'indirect discrimination' is concerned,[5] than to separate the fairness of a trial from the interests of the state invoked as justification for conducting a trial in a certain way. This is because the common law notion of a fair trial developed as a function of the interests of the individual accused against those of the state in the first place.

[1] On 'internal limitations', see Woolman & Botha (supra) at § 34.5.

[2] See IC s 25(1)*(b)*, IC s 25(1)*(c)*, IC s 25(2)*(b)*, IC s 25(2)*(d)*, IC s 25(3), IC s 25(3)*(e)*, IC s 25(3)*(j)*; FC s 35(1)*(d)*, FC s 35(1)*(f)*, FC s 35(2)*(c)*, FC s 35(2)*(e)*, FC s 35(3), FC s 35(3)*(b)*, FC s 35(3)*(d)*, FC s 35(3)*(g)*, FC s 35(5).

[3] See Woolman & Botha (supra) at § 34.4.

[4] See C Albertyn and B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chakalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 35.

[5] 'Indirect discrimination' or 'disparate impact' refers to a practice the effect of which is disproportionally to disadvantage members of a protected group. Such a practice, while being recognized as discrimination, allows justification rendering it lawful. It is by no means contrary to the principles of anti-discrimination law to hold that indirect discrimination, while being recognized as 'unfair' from the victim's point of view, is reasonable and justifiable in many cases. If affirmative action is regarded as a form of direct discrimination, then the potential applicability of a two-stage analytical structure to *direct* discrimination would of course follow naturally. See *Kalanke v Freie Hansestadt Bremen* [1995] IRLR 660 (ECJ)(Absolute tie-break in favour of appointing equally well-qualified women candidates to civil service a violation of EC Equal Treatment Directive, even where Directive contained allowance for affirmative action); *Jepson and Dyas-Elliott v The Labour Party* [1996] IRLR 116 (Women-only constituencies for election candidates 'direct discrimination' for the purposes of British anti-discrimination statute); B Hepple 'Can Direct Discrimination be Justified?' (1994) 55 *Equal Opportunity Review* 48; *Adarand Constructors Inc v Pena* 115 SCt 2097 (1995)(Both state and federal affirmative action programmes in the United States subject to 'strict scrutiny' analysis). In South Africa the matter is complicated by the potential internal limitation structure of FC s 9. See *Minister of Finance & Another v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC); *Public Servants Association of South Africa & Others v Minister of Justice & Another* 1997 (3) SA 925 (T), 1997 (5) BCLR 577 (T). See also C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006).

It is no wonder, then, that when it comes to the right to a fair trial the courts so often introduce the kind of balancing in the definition stage of the analysis which Woolman characterizes as 'the worst kind of analytical confusion'.[1] It is truly unfortunate
that the decision of the Constitutional Court in *Shabalala v Attorney-General of Transvaal* did not indicate exactly to which part of the analysis competing state interests were being attached.[2] In *Attorney-General, Eastern Cape v D* the Eastern Cape Division was of the opinion that

> 'it [was] a misconception that the fundamental right to a fair trial focuse[d] exclusively on the rights and privileges of the accused as those rights [had to] be interpreted and given effect to in the context of the rights and interests of the law-abiding persons who [made] up the bulk of society and, in particular, the victims of the crime'.[3]

In *Klink v Regional Court Magistrate NO & others,* the South Eastern Cape Local Division, faced with the question whether allowing a child witness to testify through an intermediary violated the accused's right to a fair trial, held that 'in deciding whether [the accused's] rights had been violated it [was] also necessary to take into account the interest of the child witness'.[4] The 'trite' two-stage analysis was also completely absent from the judgment in *Moeketsi v Attorney-General, Bophuthatswana, & Another*. In its stead Friedman JP offered, as the method of defining trial within a reasonable time, 'an "*ad hoc* balancing"' process in certain cases requiring the skill and ability of a juggler',[5] and elaborated, not entirely helpfully, that 'a more vital approach' than an 'all embracing formula' lay in 'an effort to weigh the factors detailed objectively within the inner framework of justice' and that '[t]his process require[d] a constant intellectual communication and interflow of the relevant components as extracted from the authorities'.[6] In *Msomi v Attorney-General of Natal & Others*[7] Moodley J held that because Sachs J had expressed the view in *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* that a practice like compulsory fingerprinting would have far less difficulty in passing IC s 33 scrutiny than would testimonial compulsion,[8] this dictum

[1] S Woolman 'The Limitations of Justice Sachs's Concurrence: *Coetzee v Government of the Republic of South Africa*' (1996) 12 *SAJHR* 99, 115-21. See also Woolman & Botha (supra) at § 34.3.

[2] 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC), 1995 (2) SACR 761 (CC) at para 52. The analysis should be regarded as maintaining the two-stage structure, but the dimensions of fairness, interest-balancing and 'discretion' were far too inextricably intertwined in the reasoning of the court to allow a clear vision of different analytical stages to emerge. This tension is reflected throughout the judgment. Ibid at para 52, para 56 ('[t]he crucial determinant is what is fair in the circumstances, regard being had to what might be conflicting but legitimate considerations') and para 68 ((by the use of 'moreover') that the impugned rule in question, *in addition* to impairing the right to a fair trial unjustifiably, could *also* not be justified under IC s 33.)

[3] 1997 (7) BCLR 918 (E), 1997 (1) SACR 473, 476 (E). See also *S v Sonday & Another* 1994 (4) BCLR 138 (C), 1994 (2) SACR 810 (C).

[4] 1996 (3) BCLR 402, 412 (SE).

[5] 1996 (7) BCLR 947, 965 (B).

[6] Ibid at 970–1.

[7] 1996 (8) BCLR 1109 (N).

[8] 1996 (1) SA 964 (CC), 1996 (1) BCLR 1 (CC) ('*Ferreira*') at para 259.

meant that the right against self-incrimination did not extend to fingerprinting.[1] The learned judge thereby completely conflated the two discrete questions regarding the scope of the right and the justifiable limitation of the right.

It would seem as if cases introducing an internal balancing act into the definition of the relevant fair trial right threaten the sort of confusion Woolman warns against. In any event, the very idea of balancing the interests of the state against that of the individual in fleshing out the meaning of a right to a fair trial requires scrutiny, whatever objections the general doctrine of limitations might have to such an approach. Procedural due process, the idea of the rights of the accused, arrested or detained individual, operates in a sphere where the interests of the state which rendered the individual an accused, arrested or detained person in the first place are a given background to the question as to how to be fair towards that person and respectful of his or her liberty interests. Due process asks what rights a person has, *given* that the state has an interest in placing him or her in the position to have the due process question asked. Of course the scope of the individual's due process rights will be determined by his or her status as an accused, arrested or detained person — in other words, the right cannot extend to the point where the individual's status is disregarded. This is the only role that state interests should play in defining the scope of internally qualified criminal procedure rights. It must be remembered that the individual complainant bears the onus of demonstrating a violation of a right. It is to be expected that such a demonstration, where a previously unrecognized aspect of the right in question is argued for, or where 'reasonableness' is to be demonstrated, will have to be sensitive to the parameters allowed by the applicant's status as accused, arrested or detained. But that is a different matter from requiring the applicant to negate the possible weight of state interests against his or her claim.

The idea that the essence of the fair trial right ought to be arrived at by a process of balancing (i.e. in the first stage of the conceptual two-stage analysis), and that what is to be balanced in defining the right are the interests of the state (or of the community) against those of the accused, is sometimes incorrectly attributed to the following passage in the judgement in *Key v Attorney-General, Cape Provincial Division & Another*:

> In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial.[2]

[1] *Ferreira* (supra) at 1120.
[2] 1996 (4) SA 187 (CC), 1996 (6) BCLR 788 (CC)('*Key*') at para 13.

The passage above was delivered in the context of determining the difficult question whether unconstitutionally obtained evidence was to be admitted or excluded in terms of section 35(5), which required an assessment of the question whether the administration of justice would be served by the admission of the evidence. That so much of our constitutional fair trial analysis has, in practice, been reduced to this question is a function of the practicalities of criminal prosecution — the question whether a right has been violated and what ought to be done about it tends to arise in the situation when evidence is sought to be led against the accused, or inferences of guilt are sought to be based on evidence led. But that ought not to confuse the question to what extent the orthodox two-stage analysis is capable of being appropriately applied to the question of violations of, and in particular, the question of the definition of, section 35 rights. An example of use of the passage as authority for the process of defining the right to a fair trial by means of balancing the interests of the accused against those of the state is the following passage from the separate concurring judgement of Yacoob J in *S v Thebus & Another*:

> Another implication is that all the separate rights in the section must be given meaning in the light of a notion of a fair trial. Although a principal and important consideration in relation to a fair trial is that the trial must be fair in relation to the accused, the concept of a fair trial is not limited to ensuring fairness for the accused. It is much broader. A court must also ensure that the trial is fair overall, and in that process, balance the interests of the accused with that of society at large and the administration of justice.[1]

Whether an unfair trial can ever be justified is a question which has been considered in Canada, in the context of the 'principles of fundamental justice' required for any procedure depriving an individual of liberty.[2] The different approaches are contained in the respective views of Lamer CJ and Wilson J in *R v Swain*.[3] Lamer CJ, being of the opinion that the state's interests could never operate within the definition of the 'principles of fundamental justice', was inclined to say that these interests were to be considered under the limitation clause.[4] Wilson J expressed the view that violations of the principles of fundamental justice could never be justified under the limitations clause.[5]

The correct approach to this question should be to draw a distinction, first between the general (residual) fair trial right and specific instances of that right, and then between internally qualified specific rights and absolutely framed specific rights. The general right of an accused to a fair trial must be delineated as described above. State interests play the part only of keeping the inquiry within

[1] *Thebus* (supra) at para 107. The passage was followed by a citation of the passage in *Key*. See also *Thebus* (supra) in para 109.

[2] See D Stratas *The Charter of Rights in Litigation: Direction from the Supreme Court of Canada* (No 19, August 1997) § 17:12.

[3] [1991] 1 SCR 933.

[4] Ibid at 977.

[5] Ibid at 1034.

its parameters. There would seem to be no real room for justifiable limitation.[1] Specifically enumerated rights that state baldly and without qualification that to which the accused, arrested or detained person is entitled are to be treated in the traditional two-stage way. Specifically enumerated rights that contain qualifications (or modifiers) are in principle subject also to the two-stage approach. However, in their delineation, state interests will play a parameter-maintaining part. As a result, in the second stage, justifiable limitation will be more difficult to demonstrate than in the case of the unqualified rights. Nevertheless, justifiable limitation on the right to a trial within a reasonable time is conceivable, and justifiable failure to provide legal representation at state expense where substantial injustice would result equally conceivable. It is not at all incoherent to recognize that the position of indigent accused relative to wealthy accused is a situation of 'substantial injustice', while at the same time acknowledging that state justifications for a failure to rectify the injustice may pass limitation clause muster. If it is recognized that the 'reasonableness' required by the right and the 'reasonableness' of the justifications offered by the state refer to different types of enquiries with different objects of attention, then the seeming paradox of reasonably justified limitations upon reasonably framed rights becomes less daunting.[2]

[1] It is interesting to note that most of the rights of accused, arrested and detained persons were originally included in the list of candidate 'illimitable' rights submitted by The Combined Meeting of the Ad Hoc Committee and the Technical Committee on Fundamental Rights (14 September 1993). See S Woolman & H Botha 'Limitation' in S Woolman, T Roux, J Kllaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 34.2.

[2] See P Hogg *Constitutional Law of Canada* (3rd Edition, 1992; 1996 supplement) § 35.14*(e)*. See *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) at paras 25 and 35 (Court referred, without approval or disapproval, to the 'balancing' approach towards speedy trial rights adopted in some jurisdictions including South Africa. Kriegler J did not adopt a balancing approach without more, but did include an assessment of state interests or burdens as factors in determining the 'reasonableness' of the delay. Culpability played a part in this assessment of 'reasonableness'. An 'objective' and an accused-centred assessment of reasonableness might be separated from the 'reasonableness' of the state's actions for two-stage analytical purposes.) For 'objective reasonableness' in the field of delict, see the discussion in PQR Boberg *The Law of Delict: Vol I Aquilian Liability* (1984; 1989 revision) 39–40. The problem with trying to reserve state interest assessment for the limitation stage, a problem raised in discussion by Anthony Götz, is that few state actions would seem to comply with the requirement in FC s 36(1) of being 'law of general application'. This difficulty probably informed the finding in *S v Naidoo & Another* — 1998 (1) BCLR 46 (D), 1998 (1) SACR 479, 499I-500D (N) — that Claassen J's approach in *S v Mathebula & Another* 1997 (1) SACR 10 (W), 1997 (1) BCLR 123 (W) of assessing waiver in the context of unconstitutionally obtained evidence in terms of the limitations clause was not suited to a situation where the potential justifying factor was not a 'law of general application' understood in its natural sense. The 'general application' requirement should be seen as operating as a safeguard against arbitrary or discriminatory action, rather than as requiring a measure which applies to everybody. The status of the action as 'law' need refer only to the legally empowered nature of the action, rather than to its character as a legislative stipulation or common law rule. Such legal empowerment may then entail elements of substantive due process. In this way the two-stage process can be preserved even in cases dealing with 'reasonableness' and with administrative action on a small scale. The advantage is that state interests would require justification by the state, rather than elimination by the accused. See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at paras 95-104. See also Woolman & Botha 'Limitations' (supra) at § 34.7 (For a detailed discussion of the meaning of 'law of general application'.) It must be conceded that such an interpretation faces severe

Admittedly, in *Scagell & Others v Attorney-General of the Western Cape & Others,*[1] the Constitutional Court unanimously applied limitation analysis to the *residual* right to a fair trial contained in IC s 25(3). The limitation in question did not pass muster, but this judgment must be taken as clear authority for the view that the general fair trial right is in principle to be subjected to the two stages of definition and limitation. Still, although O'Regan J made it clear that the right in question was the residual fair trial right,[2] the character of the limitation reasoning adopted seemed to indicate that the court should have regarded the right at stake to have been the presumption of innocence, rather than the general fair trial right. Such a conclusion would then have offered a more satisfactory explanation for the easy applicability of the two-stage analysis to the facts.[3]

The criminal procedure rights belong to that group of rights which could be limited under IC s 33(1) only where limitations were 'necessary' in addition to being 'reasonable and justifiable in an open and democratic society based on freedom and equality'. The 'necessity' hurdle was dropped in the Final Constitution, and the limitation principles in FC s 36 have been altered, seemingly to incorporate the limitation analysis laid down by Chaskalson P in *S v Makwanyane*.[4] Woolman's observation that the factors as listed in FC s 36(1) reflect a 'continuing failure clearly to separate the stages of fundamental rights analysis and to recognize that not every limitation question involves issues of proportionality'[5] will be especially pertinent in the sphere of criminal procedure rights for the reasons expounded above.

The removal of the requirement of necessity for limitations upon criminal procedure rights should in principle result in the possibility that limitations which would not pass the tests laid down under the 'necessary' regime of IC s 33(1)*(b)* would not fail the less restrictive requirements of FC s 36(1). Some doubt must therefore be cast upon the persuasiveness of *dicta* rejecting justification arguments under IC s 33(1)*(b)*. Although the Constitutional Court was wary of entrenching a 'necessity' jurisprudence readily distinguishable from a 'reasonableness' jurisprudence, and indicated in *First Certification Judgment* that substitution of

conceptual difficulties in the light of the finding by the Constitutional Court in *Premier of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal.* 1999 (2) SA 91 (CC), 1999 (2) BCLR 125 (CC)(Declined to justify *ad hoc* administrative action, on the basis that such action did not constitute law of general application.)

[1] 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC) at paras 16 and 19.

[2] Ibid at para 16.

[3] The justifiability of an evidential burden seems to require an identical sort of analysis to that pertaining to the justifiability of a persuasive burden. The fact that the possibility of justifiable limitation was framed in terms of facility of proof seems to confirm this view. Ibid at para 19.

[4] 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC). See Woolman & Botha 'Limitations' (supra) at § 34.2.

[5] S Woolman 'Limitations' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS 5, 1999) § 12.13*(b)*.

a general 'proportionality' approach for the two-tier 'necessity' and 'reasonableness' regime should accommodate due allowance for the possibly varying weight of rights claims,[1] such criminal procedure limitations analysis as has been expressly reasoned in terms of the 'necessity' requirement must at the very least be noted as subject to reappraisal. In *Scagell & Others v Attorney-General of the Western Cape & Others*, a unanimous Constitutional Court based its rejection of an offered justification for limiting the right not to be encumbered with an evidential burden exclusively on the lack of 'necessity' for the limitation in question.[2] And in *S v Mathebula & Another*, Claassen J expressly took cognizance of the fact that the fair trial rights were 'of a higher order' because of the presence of a 'necessity' requirement, but held that what the learned judge regarded as a limitation in that case was indeed 'reasonable, justifiable and necessary'.[3]

The removal of the 'necessity' requirement from FC s 36(1) can be saved from meaninglessness on the one hand and ominous significance on the other by isolating the kind of consideration the necessity requirement reflected. The requirement that the state eliminate alternative routes to safeguarding the interests relied upon in an IC s 33(1) or FC s 36(1) argument is the factor most directly affected by the removal of the 'necessity' requirement.[4] In other words, the 'necessity' qualification is not to be regarded as permeating every factor of the limitation analysis; rather, it is to be regarded merely as adding a requirement focused upon the elimination of all reasonable alternatives. Limitation reasoning in the sphere of criminal procedure rights may, therefore, be lifted from its 'necessity' context without doing violence to the reasoning in question, once aspects of the reasoning specifically directed at the requirement of necessity have been disregarded.

But this conclusion should not be taken as far as to allow limitation analysis 'in the air'. The Cape Provincial Division's finding in *Dabelstein & Others v Hildebrandt & Others*[5] that an IC s 33 justification which was good for the purposes of privacy was equally good for the purposes of self-incrimination played much too fast and

[1] *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 at para 90. See Woolman 'Limitation' (supra) at § 12.1*(d)(i)*.

[2] 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC) at para 19.

[3] 1997 (1) BCLR 123, 138 (W).

[4] See *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 104, cited with approval in *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 90 n78.

[5] 1996 (3) SA 42, 66 (C). See also *S v Meaker* 1998 (8) BCLR 1038 (W), 1998 (2) SACR 73, 88 (W)('*Meaker*')(FC s 36 analysis in the context of reverse onus provisions). It is in the context of this analysis and the inextricable conceptual relationship between the specific rights in question that Cameron J found that 'whatever justification [might] serve to save the infringement of the presumption of innocence [would] operate likewise to save any violation of the right to remain silent and not to testify during proceedings'. Ibid at 85I.

loose with the requirements of 'proportionality' and the guidelines set out in *Makwanyane* and in FC s 36(1).[1]

In *S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat*[2] the Constitutional Court indicated that the justifiability of a statutory provision under FC s 36(1) might depend upon 'the prevailing climate'. How variable such a climate may be, is something that will require further development by the court.

51.2 'Arrested', 'Detained' and 'Accused' Persons

It is clear from the structure and the wording of FC ss 35(1) and (2), that 'detention' for the purposes of the criminal procedure rights must be regarded as the generic reference to coercive physical interference with the subject's liberty, while 'arrest' always involves 'detention'. Moreover, the new wording of FC s 35 adds to 'detention' the dimension of being apprehended 'for the alleged commission of an offence'.[3] Furthermore, the structure of the rights in question and the existence of the due process wall mean that the lawfulness of how one comes to be detained is a FC s 12 question, and the rights one possesses once one is a detainee are a FC s 35 question.[4] This distinction extends also to the merits of continued detention, which must be decided in terms of FC s 12.[5] It is

[1] See *Osman & Another v Attorney-General of Transvaal* 1998 (2) BCLR 165 (T), 1998 (1) SACR 28, 32GF-H (T); *S v Dlamini & Another* 1998 (5) BCLR 552, 560C-D (N)('[A] justifiable limitation of the right so as to avoid bringing the entire administration of criminal justice into disrepute' was apparently regarded as sufficient s 36(1) analysis.)

[2] 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC), 1999 (2) SACR 51 (CC).

[3] See J Kriegler *Hiemstra Suid-Afrikaanse Strafproses* (5th Edition, 1993) 87 ('Inhegtenisneming is vryheidsontneming met die doel om aan te kla.') This notion was repeated by Kriegler J in the Constitutional Court in *Ex parte Minister of Safety & Security: In re S v Walters*. 2002 (4) SA 613 (CC), 2002 (2) SACR 105 (CC), 2002 (7) BCLR 663 (CC) at paras 49-50 ('The purpose of an arrest is to take the suspect into custody to be brought before court as soon as possible on a criminal charge.Arrest is not an objective in itself; it is merely an optional means of bringing a suspected criminal before court.[T]he fundamental purpose of arrestis to bring the suspect before a court of law, there to face *due prosecution before a court*' (emphasis added).) See the Canadian jurisprudence in this regard, particularly as regards the meaning of 'detained', discussed in D Stratas *The Charter of Rights in Litigation: Direction from the Supreme Court of Canada* (No 19, August 1997) § 20:05; Hogg (supra) at § 47.2. It should be stressed, however, that the Canadian provision in question, viz s 10 of the Charter of Fundamental Rights and Freedoms, applies to 'arrested and detained' persons, giving these persons identical rights. Once one is 'charged with an offence' one is entitled to s 11 fair trial rights. The arrested person is not specifically given any rights additional to those of a detained person. Hence in Canada self-incrimination problems, and the concomitant right to silence which must be regarded as the *raison d'être* of the separate rights of an arrested person in the South African constitutional regime, require recourse to the common law or an interpretation of the right to silence as a 'principle of fundamental justice' which seeps into s 10 from s 7. The latter approach enjoys the endorsement of the Supreme Court of Canada. *R v Hebert* [1990] 2 SCR 151.

[4] See § 51.1*(a)*(ii) supra.

[5] This distinction does not mean that a violation of a detainee's rights might not render the detention itself unlawful. Those rights of detainees which are most closely concerned with the period immediately after, or even during, initial apprehension, such as the right to reasons, may render the detention itself unlawful upon their breach. The court in *Naidenov v Minister of Home Affairs & Others* assumed that the information right contained in IC s 25(1)*(a)* set down a requirement for lawful detention. Whether killing

therefore of some moment that the term 'arrested person' for the purposes of defining the beneficiary of FC s 35(1) is narrower than that of 'arrested person' generically speaking.[1]

The rights one enjoys *qua* arrested or detained person are to be distinguished from the effect on one's rights *qua* accused person of things that happened while one was an arrested and detained person.[2] In *S v Hlalikaya & Others* Van Rensburg J spoke throughout in terms of the right of an 'accused person' to be legally represented at every pre-trial procedure.[3] He relied for his main authority upon the decision in *S v Melani*.[4] In *Melani*, the source of the right in question was said to be IC s 25(1)*(c)* – which pertained to detained persons (almost invariably arrested persons incorporating this right from their status as detained persons). The judgment in *Melani* then continued to combine IC ss 25(2) and (3) to argue that the right to counsel was a continuing right throughout the criminal process.[5] It does not emerge clearly from the *Hlalikaya* record whether the procedure in

can be regarded as a form of detention or arrest is philosophically intriguing. 1995 (7) BCLR 891, 899 (T). It would be difficult to squeeze the question of the constitutionality of s 49(2) of the Criminal Procedure Act 51 of 1977, which allows killing in an attempt to effect arrest or to prevent escape concerning Schedule 1 offences, into the confines of FC s 35 (although the wording of s 49(2) certainly seems to assume that killing is a form of arrest). Nevertheless, the question of the amount of force used in effecting arrest straddles the divide between FC s 12 and FC s 35. The ultimate use of force does not, in principle, straddle the divide any less. The practical significance of these questions may lie in a proliferation of causes of action and foundations for compensation. In *Raloso v Wilson & Others,* an application to refer the constitutionality of s 49(2) to the Constitutional Court was refused in the light of the intended amendment of the section. The court did, however, endorse counsel's contention that 'a manifestly unconstitutional statute remain[ed] on the statute books purporting to give legal authority for the killing of persons in circumstances which [could] not be countenanced by the Constitution', by terming it 'indeed a sorry state of affairs'. 1998 (1) BCLR 26, 35 -36 (NC), 1998 (2) SACR 313 (C). The Constitutional Court in *Ex parte Minister of Safety & Security: In re S v Walters* remarked upon the irony of the fact that the restraint in *Raloso* had been partially prompted by the imminence of the legislative amendment, that had, by the time *Walters* was decided five years later, still not become law. 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC), 2002 (2) SACR 105 (CC) at para 19. The noteworthy aspect about the treatment of the constitutionality of section 49 by the Court in *Walters* was that it did not occur under the rubric of the FC s 35 rights, and that Kriegler J expressed what must be taken as a strong caveat about the philosophically intriguing question posed above in this footnote, when pointing out that killing a suspect defeated the fundamental purpose of an arrest, which was to bring a suspect before a court. Ibid at para 50.

[1] See *Lawyers for Human Rights v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC)('*Lawyers for Human Rights*'). The question of FC s 35(1) did not arise, but there was room for debate on whether a person in certain circumstances could be said to have been 'arrested' as envisaged in the Act. It might have been interesting, had silence and self-incrimination rights been at issue, to have argued whether 'arrest' for the purposes of FC s 35(1) required, not only that the arrest be *for the alleged commission of an offence*, but that it be *for the purposes of prosecuting for the alleged commission of an offence*. One might have argued that seeking to enter the Republic illegally entailed the commission of an offence, and being arrested for deportation purposes on the basis of seeking to enter illegally entailed being arrested *for the alleged commission of an offence*.

[2] See § 51.1*(a)*(iv) supra.

[3] 1997 (1) SACR 613 (SE)('*Hlalikaya*').

[4] 1995 (4) SA 412 (E), 1996 (2) BCLR 174 (E), 1996 (1) SACR 335 (E)('*Melani*').

[5] Ibid at 348-9.

question occurred after the person had been formally charged, but the case does illustrate the fact that, since the main focus of the inquiry in the vast majority of criminal procedure constitutional cases is on the consequences at the trial of an accused person of alleged violations that occurred somewhere during the criminal process, the analysis would tend naturally to drift towards the perspective of the accused at trial and the significance of previous stages from that perspective. Still, determining the ambit of the right of a detainee or an arrestee before he or she has become an accused, or who for some reason or other does not eventually become an accused, is crucial, since violations of the detainee's rights should entail remedial possibilities irrespective of what the consequences might be on the admissibility of evidence at some later date. In Canada and under the European Convention on Human Rights, a person is entitled to fair trial rights upon being 'charged with an offence'.[1] In order to allow for a distinction between arrested and accused persons, and to enable the courts to make appropriate use of comparative jurisprudence in this area, it would make sense to interpret 'accused' in FC s 35(3) to refer to someone who has been formally charged.[2] This bright line rule is always subject to the fact that pre-charge occurrences may affect the right of the *accused* person to a fair trial.

The structure of the rights of arrested and detained persons in FC s 35(1) and FC s 35 (2), however, casts doubt upon the picture set out above. The rights of an

[1] Section 11 and art 6 respectively.

[2] This definition of 'accused' was assumed by all the members of the Constitutional Court in *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others*. 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC). Stavros suggests that the broad definition of 'charged' adopted in the jurisprudence of speedy trial rights should be applied for the purposes of determining when a person is to be treated as 'charged' in order to become a rights holder under art 6 of the European Convention on Human Rights. But this analysis does not fit the South African framework. *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: An Analysis of the Convention and a Comparison with Other Instruments* (1993) 72. The broad definition of 'charged' under the ECHR is 'substantially affected by the suspicion against him'. See *Foti v Italy* (1982) 5 EHRR 313; *De Weer v Belgium* (1980) 2 EHRR 439. In the Southern African context, a broad definition of 'charged' has been applied for the purposes of determining the scope of the right to trial within a reasonable period after having been charged (IC s 25(3)*(a)*). See *S v Mlambo* 1992 (2) SACR 245 (ZS)('[T]he start of the impairment of the individual's interests in the liberty and security of his person'); *Moeketsi v Attorney-General, Bophuthatswana, & Another* 1996 (7) BCLR 947 (B)(When accused has knowledge of charge); *Bate v Regional Magistrate, Randburg, & Another* 1996 (7) BCLR 974 (W)(Endorsing *Mlambo*); *Du Preez v Attorney-General of the Eastern Cape* 1997 (3) BCLR 329 (E)(Advised by a competent authority that a decision has been taken to prosecute). Adoption of this definition to define an accused, as opposed to employing it in determining the period relevant to an accused person's right to trial within a reasonable time, would obliterate the distinction between arrested and accused persons. See JES Fawcett *The Application of the European Convention on Human Rights* (2nd Edition, 1987) 184. *Prokureur-Generaal, Vrystaat v Ramokhosi* represents an interesting illustration of how the interpretation of the term 'charged' can be narrowed or broadened depending on the purpose for which the interpretation is undertaken. In this case *in favorem libertatis* interpretation required a narrow meaning ('eng juridiese betekenis') to attach to 'charged' in order to restrict the application of the onus provision in bail applications regarding persons 'charged' with certain offences under s 60(11) of the Criminal Procedure Act. 1996 (11) BCLR 1514, 1532 (O). The extent to which the 'charge' in question must of necessity relate to criminal proceedings as they are known is discussed above in the section on the due process wall. See § 51.1*(a)*(iv) supra.

arrested person now appear first in the list of rights, to be followed by the rights of a detained person, and then by those of an accused person. This arrangement by itself already encourages the idea that, consonant with a popular or natural understanding of the distinction between arrest and detention, arrest is a lesser interference with liberty than detention, or that arrest is something that may be followed by detention. The former refers to the act of apprehension only, and the latter to continued restriction in custody.[1] JES Fawcett assumes this latter distinction without more for the purposes of considering a particular question under art 5 of the European Convention on Human Rights.[2] In *Van der Leer v Netherlands*, however, the generic status of detention and the specific status of arrest, and the fact that a detention need not be an arrest, came starkly to the fore.[3] Since only 'arrested persons' were entitled to being informed of reasons for their arrest and of 'any charge' against them, the Dutch government argued that someone confined (ie detained) in a psychiatric hospital, and thus not 'arrested', was not entitled to reasons. The Strasbourg Court held that 'arrest' was to be interpreted 'autonomously' and that it 'extended beyond the realm of criminal law measures', despite the reference in art 5(2) to a 'charge'.[4]

Application of a similar interpretation to FC s 35(1) would mean that those who are detained but not arrested would presumably also be entitled to protection against compelled statements, the right to silence, and speedy judicial process. But *Van der Leer* was possible only because the rights of an 'arrested' person, although framed to include reference to a 'charge', are not expressly confined to someone 'arrested' for a particular (criminal) purpose in art 5 of ECHR, as they are in FC s 35(1).[5] Nevertheless, although silence, compelled evidence, and speedy process rights are inextricably bound up with the criminal process, there may be scope for an application of the spirit of *Van der Leer* in the context of FC s 35. Since 'arrest' refers to 'detention' for the purposes of criminal prosecution, a detainee who is apprehended and detained for the purposes of an investigatory procedure which, although it may lead to imprisonment, does not amount to 'criminal proceedings',[6] would not be entitled to silence, protection from compelled evidence, and speedy process rights. He is neither an 'arrestee', nor an 'accused'.[7] Application of *Van der Leer* reasoning would

[1] See *S v Langa & Others* 1998 (1) SACR 21, 27 (T)(MacArthur J, with whom Mynhardt J concurred, held 'detention' in IC s 25(1) referred to incarceration. There was no discussion of the relevant jurisprudence around the term.)

[2] Fawcett (supra) at 87.

[3] (1990) 12 EHRR 567 ('*Van der Leer*').

[4] *Van der Leer* (supra) at para 27.

[5] 'For the alleged commission of an offence' — IC s 25(2); 'for allegedly committing an offence' — FC s 35(1).

[6] See *Nel v Le Roux* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC)('*Nel*') at para 11.

[7] In the circumstances of *Nel*, there could be no 'arrest' stage between detention for the purposes of answering questions under s 205 of the Criminal Procedure Act and summary imposition of a sentence of imprisonment upon failure to comply under s 189. For confirmation of the applicability of *Nel* in circumstances that could not be plausibly distinguished, see *S v Mahlangu* 2000 (1) SACR 565 (W)(FC s 32 (the right to access to information) was at issue.)

then mean that detainees who are apprehended for purposes which are quasi-criminal, yet not sufficiently 'criminal' to attract 'fair trial' rights, should be afforded those rights which accrue to an 'arrested' person under FC s 35(1). In other words, 'arrested for allegedly committing an offence' in FC s 35(1) should be interpreted broadly to apply to proceedings which may have a criminal character but are insufficiently criminal to render FC s 35(3) applicable at later stages.[1]

A person who is apprehended for some reason other than 'for allegedly committing an offence' is not an arrested person. However, as soon as his or her detention is based upon his or her suspected responsibility for the commission of an offence such person becomes an arrested person. The problem with the wording of FC s 35(1), as opposed to that used in IC s 25(2), is that the new wording, if anything, narrows the definition of arrest. 'For allegedly committing an offence' must be read as relating to an offence committed by the person apprehended, whereas 'for the alleged commission of an offence' can refer to an offence committed by anybody. Someone apprehended for interrogation purposes will therefore not be an arrested person unless the apprehension can be said to be 'for allegedly committing an offence'. As soon as the detainee becomes a suspect, however, it is submitted that he or she will then be detained 'for the alleged commission of an offence', and henceforth be arrested. In this respect the effect of the finding in *Park-Ross v Director: Office for Serious Economic Offences*[2] on the meaning of the phrase 'for allegedly committing an offence' must be re-considered.[3] The court held that the compulsory detention inherent in inquiries conducted under s 5 of the Investigation of Serious Economic Offences[4] did not amount to 'arrest' for the purposes of enjoyment of the rights of silence and self-incrimination granted to arrested and accused persons by IC s 25(2) and (3).[5] The court declared:

> [A]n enquiry under s 5 is not part of any criminal process and cannot be regarded as the investigative stage of criminal process. *Non constat* that, because such an inquiry takes place, criminal charges are likely to follow therefrom. Nobody is an accused at that stage nor is anyone *necessarily* likely to be.[6]

[1] It should be noted that the detainee in *Nel* was expected to rely upon his right against self-incrimination as an *accused* person in future possible proceedings in which his incriminating answers would operate to his prejudice. This does not mean that he was afforded a right against self-incrimination as a detainee or as an arrestee. It means merely that a violation of his rights as an accused in later proceedings could be invoked as a 'sufficient cause' not to answer questions under compulsion. *Nel* (supra) at paras 5-9. His status as an accused in the notional later proceedings must not be confused with the denial of this status to him for the purposes of the summary proceedings under s 189 of the Criminal Procedure Act. Ibid at para 11.

[2] 1995 (2) SA 148 (C), 1995 (2) BCLR 198 (C)('*Park-Ross*').

[3] The applicable phrase in *Park-Ross* was, in terms of IC s 25(2), 'for the alleged commission of an offence'.

[4] Act 117 of 1991.

[5] The compulsory proceedings would, however, be relevant at any criminal trial consequent upon them, to determine whether the affected persons' rights as *accused* persons were being respected. See *Park-Ross* (supra) at 164. See also § 51.4(*b*)(iii) supra.

[6] *Park-Ross* (supra) at 164 (emphasis added).

A literal interpretation of this finding would lead to great difficulties about the rights of those persons arrested for purposes of interrogation upon the suspicion that they may have committed an offence, where it is by no means clear to anybody that the persons concerned are 'necessarily likely' to become accused persons. It simply cannot be maintained that such persons are not apprehended 'for allegedly committing an offence'.[1]

The structure of the rights of arrestees and detainees has the following consequence: the more the authorities can argue that a particular detention is not effected or continued 'for allegedly committing an offence', the more they can keep self-incrimination and speedy process rights away from the door. But the less the reasons for detention have to do with a desire to prosecute, the more pressed the authorities will be to provide proper justification for the deprivation of liberty in question. It has been held that an arrest which does not comply with the requirements for arrest under the Criminal Procedure Act renders subsequent detention unlawful.[2] But an arrest which does not comply with the requirements of lawful arrest cannot be saved from being declared an unlawful *detention* by reliance upon its not being an 'arrest'. If arrest is effected 'for allegedly committing an offence', but there is no intention at all to bring the person before a court, the person is still 'arrested' for the purposes of FC s 35(1) rights. The arrest is rendered unlawful for not complying with the requirements of lawful arrest.[3] The significance would be that violations during detention of the rights of an *arrested* person would entitle a person unlawfully arrested to compensation, irrespective of the remedies available for unlawful arrest.

More important than whether some detained persons should be entitled to the rights of arrested persons is the question whether the omission from FC s 35(1) of the express indication that 'arrest' is to be taken to include 'detention', coupled with the switch in the sequence of the rights of arrested and detained persons, is to be accorded any significance. The answer could have devastating and absurd consequences for arrested persons: they would have no right to counsel, nor to reasons immediately after apprehension, unlike detainees, who enjoy these rights under FC s 35(2)*(a)*, *(b)* and *(c)*. This rubric would make sense only if FC s 35 were to be read as having engineered a complete transformation of the definitions of 'arrested' and 'detained' persons reflected in IC s 25. If not, then every arrested

[1] The fact that s 50(1)*(a)* of the Criminal Procedure Act as amended by Act 85 of 1997 employs 'arrest' as a generic term which includes arrests 'for allegedly committing an offence' and 'for any other reason' is unfortunate in the extreme. More potential confusion is engendered by the reference in subsec (6)*(a)*(ii) to a person who 'was not arrested *in respect of an offence*'. This latter formulation seems to suggest that any apprehension 'in respect of an offence' is what is meant by an arrest 'for allegedly committing an offence' in s 50(1)*(a)*. This makes sense. It indicates that the Criminal Procedure Act distinguishes between those apprehended 'for offences' and those apprehended for other reasons. The former category is 'arrested' for the purposes of the Constitution. The latter is detained, but not arrested. The Criminal Procedure Act loosely employs the term 'arrested' for both categories.

[2] See *Minister of Law and Order, KwaNdebele, & Others v Mathebe & Another* 1990 (1) SA 114 (A) 112.

[3] See *Duncan v Minister of Law and Order* 1986 (2) SA 805, 820 (A).

person is a detained person in any event, and continues to enjoy the rights to reasons and to counsel in that capacity. The latter view is the only reasonable construction of the structure of FC s 35.[1] This was not, however, how Yacoob J visualized the interplay between FC s 35(1) and FC s 35(2) in *S v Thebus and Another*.[2] Justice Yacoob conceived of detention as something that might follow upon arrest, but did not necessarily do so, thereby rendering an arrested person only a candidate detained person for the purposes of FC s 35(1) and FC s 35(2):

> The three subsections intersect, complement each other and demonstrate a logical pattern when viewed from the point of view of the criminal justice process that might unfold in relation to a person who is suspected of having committed an offence. The first step envisaged is the arrest of a person for allegedly having committed an offence. That person is not yet an accused and the arrest itself does not render him a detainee entitled to the right set out in ss (2). The rights in ss (1) and (2) will be applicable to everyone who is arrested and thereafter detained. Every person arrested for allegedly committing an offence has the right, at the first court appearance, to be charged, to be informed of the reason for the detention to continue, or to be released. If she or he is released the process is at an end. Presumably the person may be detained further and informed that the matter is under further investigation. In that event, the person concerned remains a detainee and is entitled to the rights described in ss (1) and (2). It is only if the person is charged that he or she becomes an accused and has the right to a fair trial in terms of ss (3).[3]

This view conflicts with the acceptance of the broader and more generic conceptualization of 'detention' endorsed by the Court in *De Lange v Smuts NO & Others*.[4] *De Lange*'s conception of 'detention' captures the restriction of physical movement — an essential way of looking at detention if it is to retain its conceptual integrity under the pressure created by the interplay between the subsections in FC s 35. One possible way of giving the new formulation some significance is to argue that, although the important notion that arrest always entails detention is maintained, the new structure should be read as preventing the trivialization of 'detention' for the purposes of FCs 35(2) rights. How restrictions on liberty not amounting to detention should be treated is a matter discussed elsewhere.[5] As far as detention is concerned, if every compelled physical interference with liberty were deemed a 'detention' for the purposes of FC s 35, the consequence would be that the person involved would have to be informed of the right to counsel and be afforded the opportunity of actually

[1] The Constitutional Court has accepted the generic meaning of 'detention' for the purposes of FC s 12. See *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 28 (Ackermann J held 'detention' to apply to the 'restriction of physical movement.')

[2] 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC)('*Thebus*').

[3] *Thebus* (supra) at para 103.

[4] 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 28.

[5] See M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 40.3.

obtaining counsel. The criticism by Peter Hogg of this consequence in Canada seems well founded.[1] FC s 35(2), in setting out the rights of detained persons, does not contain any qualification that restricts the operation of those rights to any particular sphere (such as the criminal process). That means that, apart from the difficulties associated with silence and speedy process rights discussed above, a person detained for reasons other than to deal with him or her as a criminal suspect enjoys the rights of a detained person in terms of FC s 35(2). This consequence is imperiled by any interpretation of 'detention' as being necessarily bound up with 'arrest'. It is disconcerting to read in *S v Monyane* that 'it is clear that the provisions of s 25(1) and (2) of the Interim Constitution do permit an accused person to have legal assistance from the time of his arrest and during the interrogation process.'[2] *Monyane* dealt with occasions, in interacting with the agents of the state, the arrested person was entitled to legal representation. But what was absent from the discussion was a consideration of the right to counsel as an incident of being detained, which, after all, is what the Final Constitution makes it.[3] The Constitutional Court in *Lawyers for Human Rights v Minister of Home Affairs* had no difficulty accepting the applicability of FC s35(2) rights to those detained as 'illegal foreigners' for the purposes of deportation, wholly outside the sphere of criminal procedure.[4] The right to legal representation as an incident of the rights of the illegal foreigners being detained did not feature in *Lawyers for Human Rights*. More's the pity, as it would have been of some interest whether the Court would have held that such rights applied only on the occasion that the illegal foreigner was in danger of incriminating himself or herself. Suffice it to note that it makes little sense to confine this right, an incident of a right that is not confined to the criminal sphere, to occasions for self-incrimination, since these occasions do not feature prominently outside the criminal sphere.[5]

[1] See P Hogg *Constitutional Law of Canada* (3rd Edition, 1992; 1996 supplement) § 47.2 citing *R v Therens* [1985] 1 SCR 613 (Demand for breath sample authorized by statute); *R v Thomsen* [1988] 1 SCR 640 (Roadside breath test where denial of right to counsel was justified under limitation clause); *R v Hufsky* [1988] 1 SCR 621 (Spot checks on motorists for licences); *R v Simmons* [1988] 2 SCR 495 (Strip search of traveller by customs officer); and the confusion generated by a right to counsel which did not entail the right to exercise it in *R v Debot* [1989] 2 SCR 1140 (Frisk on reasonable grounds under statutory authority). See also *Elliot v Commissioner of Police & Another* 1997 (2) SACR 306 (ZS)(Being stopped by policemen and asked to produce one's identification document was held to be a detention and an interference with the right to freedom of movement.) That such interferences involve FC s 12 is beyond question. Whether they should entail counsel rights there and then is a different matter altogether.

[2] 2001 (1) SACR 115, 135C (T)('*Monyane*').

[3] Although the matter was determined under IC s 25, Borchers J made it clear that the decision would have been the same if considered in terms of FC s 35. *Monyane* (supra) at 128C.

[4] *Lawyers for Human Rights* (supra) at paras 19, 26 and 41. The question was whether there were territoriality problems and whether those with no right to enter the Republic were entitled to the benefits of FC s 35(2), not whether the section had any meaning outside the scope of criminal proceedings. Fortunately for such persons, it was held that 'everyone' meant 'everyone'. Ibid at para 41.

[5] See § 51.3*(f)* infra, for discussion of the link between counsel rights and the risk of self-incrimination.

In *S v Shongwe,* Preller AJ evinced this predisposition towards regarding detention as a condition which followed upon arrest. However, he indicated that a definition of arrest which did not include detention would have the anomalous consequence of depriving arrested persons of the rights incidental to the right to humane conditions of detention.[1] The learned acting judge also enunciated some concern about the attribution to all arrested persons of all the rights of detained persons.[2] The difficulty is that some of the rights of detainees are clearly aimed at detainees traditionally so called, others are relevant to all apprehended persons, and the entire scheme of the relevant rights makes sense only if all arrested persons are necessarily 'detained'. The problem with reading detention narrowly, however, is that it deprives suspects of any due process rights under FC s 35 in situations where they are being questioned without physical apprehension. The right to silence and against self-incrimination may suffer in such cases, if the absence of physical detention is abused to obtain incriminating statements without the safeguard of a caution.[3] This is part of the reason why there is a perennial difficulty with dealing with 'the suspect' in that capacity.[4]

51.3 The Rights of Detained Persons

(a) The right to receive required information in a language one understands

In FC s 35(4), the right to receive information required in a language the person concerned understands — as required by every other subsection of FC s 35 — is

[1] 1998 (9) BCLR 1170, 1181E-G (T), 1998 (2) SACR 321 (T)('*Shongwe*'). Such anomalies also occur in the context of the right to counsel. A striking illustration of this phenomenon occurred in *S v Ngwenya & Others* 1999 (3) BCLR 308 (W). Leveson J said:

> When it comes to consideration of [IC] section 25(1) the factor which gives rise to the requirement that the suspect be notified of his right to legal representation is the fact of detention. There is nothing in the section which embraces any other aspect than detention. On that basis it seems to me that the only factor relevant in notifying the suspect of his rights is the simple fact of detention. That is the *raison d'être*, the very reason for the existence of the section. I cannot read into it any requirement that action is required on any other occasion.

Ibid at 312E-F. The passage demonstrates that Leveson J assumed that it required no elaboration that 'detention' did not include such 'occasions' as identification parades. The traditional meaning of 'detention' retains a strong hold, despite the logic of IC s 25 and FC s 35.

[2] See *Shongwe* (supra) at 1181G-J ('Aan die ander kant kan dit ook problematies wees as elkeen wat gearresteer is weens besit van 'n daggasigaret of dronkenskap op straat, terwyl hy vervoer word van die plek waar hy gearresteer is na die naaste landdroshof, kan aandring op besoeke van sy lewensmaat, godsdienstige raadgewer, ensovoorts. Te oordeel na die geheel van die artikel en veral subartikel [IC s 25](1)(*c*), behoort hy hierdie voordele te geniet minstens vanaf die oomblik wat hy in 'n sel opgesluit word.')

[3] See *S v Langa & Others* 1998 (1) SACR 21, 27A-B (T)('The use of the word "detained" in s 25(1) is intended . . . to deal with situations where the person is incarcerated, as for example illegal immigrants. It does not deal with the situation where a policeman stops a person of whom he has cause to be suspicious and asks him what he is doing.') See § 51.1*(a)*(iv) supra and § 51.4(*b*)(ii) infra. The definition of detention as incarceration is clearly too narrow, since all arrests must entail detention.

[4] See § 51.1*(a)*(iv) supra.

substituted for the repeated addition of this qualification to some of the information rights contained in IC s 25.[1] The strange discrepancy afflicting IC s 25 between rights to be informed of something in a language one understands and rights merely to be informed of something has therefore been remedied.[2]

In *Naidenov v Minister of Home Affairs* it was pointed out that the right to be informed of the reasons for one's detention in a language one understood did not mean one had to be addressed in one's own language.[3] In *Naienou* a Bulgarian's passive understanding of English was regarded as sufficient to have rendered communication to him in English constitutionally adequate. Spoelstra J's explanation that '[h]e never called for or insisted on the services of an interpreter'[4] may be taken as a finding that, even if the Bulgarian's understanding were insufficient, his failure to call for an interpreter amounted to a waiver of his right. Or the failure may be regarded as having precluded the applicant from discharging the burden that his right had been violated.[5] After all, later protestations based upon inadequate understanding may be difficult to refute. Still, the right is violated when one is not informed in a language one understands. If it later emerges that one did not understand the language in question, then enough has been done to prove that the right was violated. It is therefore incumbent upon arresting and detaining authorities to ascertain whether the detainee understands the language they are employing. But the fact that the answer to this question is often within the peculiar knowledge of the detainee should be borne in mind when the state wishes to justify what later turns out to have been insufficient understanding. It is best, therefore, to be alive to the operation of FC s 36(1) in this area.[6]

The phrase 'in a language he understands' occurs in the description of the rights of arrested persons in the European Convention on Human Rights (art 5(2)). Fawcett points out that "informed" must require that the information be

[1] IC s 25(1)*(a)*, IC s 25(2)*(a)*.

[2] See, eg, IC s 25(1)*(c)*(Right of a detainee to be informed promptly of the right to counsel), IC s 25(3)*(b)* (Right of an accused to be informed with sufficient particularity of the charge), and IC s 25(3)*(e)*(Right of an accused to be informed of the right to counsel and to state funding where substantial injustice would otherwise result). These rights are conspicuously unadorned with language qualifications, giving rise to the pernicious possibility of *expressio unius est exclusio alterius* arguments.

[3] 1995 (7) BCLR 891 (T).

[4] Ibid at 899.

[5] The learned judge refers to the absence of any *allegation* by the applicant that he had indicated his lack of understanding, if any, to those dealing with him.

[6] See *S v Soci* 1998 (3) BCLR 376, 395 (E), 1998 (2) SACR 275 (E)(Police forms setting out the detainee's rights should be available in the detainee's preferred language.) See also *S v Monyane & Others* 2001 (1) SACR 115 (T). The accused in *Monyane* had sought to attach significance to the fact that they had had their rights explained to them in Afrikaans despite the fact that there had been 'a black policeman available at all times'. Ibid at 120. The police testified to their confidence that the accused had understood them, and there had been no evidence to the contrary. Borchers J accepted for the purposes of the judgement that the warnings had been understood (in the circumstances the finding was not decisive), but expressed reservations about addressing arrestees whose home language was clearly not Afrikaans, without an interpreter, given the technicality of constitutional rights. Ibid at 120C-E.

conveyed in language which the person understands, as well as in a language which the person understands.'[1] Robertson and Merrills suggest that quoting an unintelligible statutory provision, even in the detainee's home language, will not be sufficient.[2]

(b) The right to be informed promptly of the reason for being detained

The better view is that the requirement to give reasons for detention is one of common law.[3] Still, in *Omar v Minister of Law and Order*[4] the majority of the Appellate Division held that a detainee was not entitled to reasons for the 'renewal' of detention, and the general history of granting reasons for detention to detainees is not a happy one.[5] The kind of 'reasons' accepted by the Natal Division in *Kloppenberg v Minister of Justice*,[6] namely verbatim reproduction of the empowering statutory provision, will obviously not suffice. Since an obligation to 'inform' implies providing as much information as is not known, the extent of the detainee's knowledge of the reason for his or her detention which arises out of the circumstances will naturally enough have an effect on the extent of the obligation to inform.[7] It is doubtful whether one should go as far as Fawcett does in endorsing the proposition laid down by Viscount Simon in *Christie v Leachinsky*[8] that the requirement 'does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.'[9] For when one is dealing with a detainee who is not an arrestee, such a detainee might well be more in the dark about the reason for the detention than an arrestee normally is, and is not ensured of promptly being brought before a court to determine the merits of continued detention. The problem will be one of onus: if knowledge from the circumstances amounts to being adequately informed, then the applicant will have to show not only that he or she was not informed but also that the circumstances were not such as to render information unnecessary. In *Lawyers for Human Rights v Minister of Home Affairs & Another*, the right to be informed of the reasons for being detained featured prominently (although not expressly under that rubric) in the context of persons being detained outside the

[1] JES Fawcett *The Application of the European Convention on Human Rights* (2nd Edition, 1987) 99-100.
[2] AH Robertson & JG Merrills *Human Rights in Europe: A Study of the European Convention on Human Rights* (3rd Edition, 1993) 73. See also *Kloppenberg v Minister of Justice* 1964 (4) SA 31 (N), as discussed in § 51.3*(b)* infra.
[3] *Ngqumba v Staatspresident & Others* 1988 (4) SA 224, 263-5 (A); *Minister of Law and Order v Parker* 1989 (2) SA 633, 637-41 (A).
[4] 1987 (3) SA 859, 900-1 (A).
[5] 'Detention' under the Constitution would include the widespread 'banning orders' passed under apartheid, which orders did not tend to come replete with reasons. See Baxter's discussion of 'the notorious case of Dr Manas Buthelezi'. L Baxter *Administrative Law* (1984) 783.
[6] 1964 (4) SA 31 (N).
[7] See *Minister of Law and Order v Kader* 1991 (1) SA 41 (A).
[8] [1947] AC 567, 573.
[9] Fawcett (supra) at 99.

criminal sphere, namely 'illegal foreigners'.[1] The matter dealt with the situation where an immigration officer decreed that an illegal foreigner be detained on the 'ship' (which included all vessels) that he or she occupied at a port of entry, pending deportation, in terms of the Immigration Act[2]. Such ship detentions were not subject to the provisions of other sections of the Act that governed, in particular, the early release of a detainee held for the purposes of deportation.[3] The provision was saved from unconstitutionality largely as a result of the Court's interpretation of the relevant section as being subject to the provision that the detainee be notified in writing of the decision to deport him or her and of his or her right to appeal such decision.[4] This finding reveals the main purpose behind the right to being informed — namely being placed in a position to challenge the charge effectively. That this may prove cold comfort to one who is being kept in a hull by the master of his or her ship, while the South Africans are going about their business on the port, is of course quite another matter.

In *Fox, Campbell and Hartley v UK*[5] the European Court held that suspects who had initially been arrested as 'terrorists' and not told of their suspected involvement in specific crimes were nevertheless adequately informed for the purposes of art 5(2) when the fact that they were suspected for the specific crimes appeared from the nature of their interrogation. This holding obviously has significance also for the requirement of 'promptness'.[6]

(c) The right to conditions of detention consistent with human dignity

The inclusion of a reference to conditions consistent with human dignity entails a potentially problematic relationship with the general right to human dignity contained in FC s 10.[7] Furthermore, the relationship with the prohibition of cruel, inhuman or degrading treatment or punishment contained in IC s 11(2) and FC s 12(1)*(e)* seems to entail substantial overlap, particularly as the rights of detained persons apply to sentenced prisoners.[8] However, that the detainee's right to humane conditions, albeit framed in terms of dignity, is not to be equated with the dignity right, nor is it merely an affirmation of the existence of the prohibition

[1] 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC)('*Lawyers for Human Rights*').
[2] Act 13 of 2002.
[3] Immigration Act s 34(8). .
[4] Immigration Act s 34(1)*(a)*. See *Lawyers for Human Rights* (supra) at para 46. .
[5] (1990) 13 EHRR 157.
[6] Cf P van Dijk & GJH van Hoof *Theory and Practice of the European Convention on Human Rights* (2nd Edition, 1990) 270.
[7] See S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.
[8] On IC s 11(2) and FC s 12(1)*(e)*, see D Van Zyl Smit 'Sentencing and Punishment' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2003) Chapter 49; M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 40.

against cruel, inhuman and degrading treatment or punishment in detention.[1] The residual right to dignified conditions indicates that the adequacy of accommodation, nutrition, reading material and medical treatment is to be interpreted in terms of dignity considerations, and the specified enumerations in their turn act as an *eiusdem generis* indication of the sort of dignity with which the provision is concerned. In FC s 35(2)*(e)* the right to exercise has been added to the list, and accommodation has been added to the list of things to be 'adequately' provided. Note that the qualification 'adequate' in FC s 35(2)*(e)* is to be read as a zeugma governing the full list of nouns following it.[2] The reference to reading material immortalizes the notorious decision in *Rossouw v Sachs*.[3] In *Rossouw v Sachs*, the court held that since the purpose of the detention in question was interrogation, the provision of reading material to a detainee would frustrate that purpose by relieving the tedium of the detention, thereby lessening the readiness of the detainee to talk. This reference is a clear indication of the mischief the right was intended to address: the reasons for detention are not to be relied upon to argue for envisaged discomfort on the part of detainees, and conditions of detention are not to be arranged so as to maximize 'tedium'. The insistence on affording detained persons the incidents of human dignity is an important affirmation of the 'residuum' principle, namely that a prisoner remains, as a subject and a human being, entitled to all rights of a citizen save those that have been deprived him or her due to law. This principle was re-affirmed and discussed in *Minister of Correctional Services & Others v Kwakwa & Another*,[4] in the context of the rights of so-called 'unsentenced prisoners' — i.e. those who were awaiting trial or who had been convicted but were awaiting sentence. In the world we inhabit, these events may take years. More, then, the surprise, as a matter of basic philosophy, at the law's treatment of those who are awaiting trial and have not yet been convicted of anything in the same way as, and even worse than, criminals. The 'residuum' principle is an important *caveat* when dealing with those whom the law has declared guilty and therefore, depending on one's views of the purpose and legitimacy of punishment, as in some sense deserving of hardship. But when it comes to the rights of those not yet found guilty of anything, it is hard to suppress indignation at an attitude that any aspect of normal life they manage

[1] *Van Biljon & Others v Minister of Correctional Services & Others* 1997 (4) SA 441 (C), 1997 (6) BCLR 789 (C), 1997 (2) SACR 50, 59 (C)('*Van Biljon*'). Brand J distinguished American cases relating to the provision of medical care to prisoners on the basis that these cases were based on standards determined by the Eighth Amendment to the United States Constitution prohibiting cruel and unusual punishment, whereas FC s 35(2)*(e)* specifically entrenched rights to adequate medical care.

[2] Brand J interpreted it thus in *Van Biljon*.

[3] 1964 (2) SA 551 (A).

[4] 2002 (4) SA 455 (SCA)('*Kwakwa*').

to retain must be seen as a privilege.[1] Of course, as with the necessary evil of pre-trial incarceration in appropriate cases, the law must have a way of making sure those it wants to try do not abscond. There ought, however, to be an insistence — when it comes to those who have not yet been convicted — on a regime of treatment that invades their liberty and comfort in as minimal a manner as possible. The misery they suffer must not be a jot greater than is necessary to ensure their continued residence in the waiting rooms of justice. Indeed, the more burdensome the need to cater properly for the as yet unconvicted, the greater the incentive on the part of the state to ensure that their trials begin and end without unreasonable delay. One may wonder to what extent the awful incidents of incarceration (rape and torture by fellow criminals, for example) are tacit fringe benefits of the punishment of prison time. But they are surely not a necessary incident of being kept from running away while the law decides, for several years, whether one is guilty of anything at all. *Kwakwa* dealt with the inversion of such sentiments. The unsentenced had, for badly or scantily articulated reasons of bureaucratic convenience, been deprived of most of the 'privileges' enjoyed by the convicted and sentenced prisoners. This, it was held, was not right.

In *Van Biljon,* the Cape Provincial Division rejected the argument that prisoners were not entitled to better medical treatment under FC s 35(2)*(e)* than would be provided by provincial hospitals to individuals in an identical diagnostic position. The court observed that FC s 35(2)*(e)* provided more extensive positive rights for detainees than were enjoyed by the population at large, and that, since imprisonment denied HIV prisoners the access to resources to obtain treatment, and put them at higher risk of opportunistic infections, the authorities could not rely on the provincial standard.[2] It is unfortunate that the court regarded budgetary constraints as part of the definition of 'adequacy',[3] since that would in principle require proof by an applicant that funds were available. The court, however, placed the onus to disprove the availability of funds upon the prison authorities,[4] an exercise that should have occurred under FC s 36(1).

[1] The inappropriateness of such discourse in the context of prisoners generally, in the light of the residuum principle, was discussed in *Kwakwa*. See *Kwakwa* (supra) at 468H. The court expressed some understanding for the relative lack of sympathy among the public for the discomforts suffered by the unsentenced, and expressed the view that '[i]t is accepted that prison is a bleak place and that prisoners are not entitled to be imprisoned with all the comforts that they enjoyed before their incarceration'. Ibid at para 29. But, apart from the obvious practical need for 'some form of standardisation', how, if one decrees that 'proper effect must be given to the residuum principle', does one ever justify even a largely equivalent treatment between convicted prisoners and those awaiting trial? Ibid at paras 31–32.

[2] The rejection of similar treatment rights to applicants who had not had the treatment in question prescribed to them, on the basis that the court should not dictate to medical practitioners what to prescribe, rested uncomfortably with the finding that those to whom the treatment had been prescribed were entitled to it, not because of their prescriptions but because it was the 'state of the art' treatment according to the weight of expert opinion. See *Van Biljon* (supra) at 65.

[3] Ibid at 62.

[4] Ibid at 64.

In *S v Mpofana* the appellant in an appeal against the refusal of bail complained *inter alia* of a violation of the right to dignified conditions of detention. He had been held in a cell with 14 other prisoners.[1] Testimony confirmed that the cell had been designed for 10 prisoners, with 12 being 'not bad'.[2] Mbenenge AJ did not rule upon the violation question, save to hold that the appellant should first have applied to the prison authorities to remedy his complaints and, upon their failure to do so, could have challenged the constitutionality of the detention or applied for a mandamus.[3]

Illegal foreigners being detained on a ship by their shipmaster at the behest of the South African immigration officers are entitled to the benefits of FC s 35(2).[4] In *Lawyers for Human Rights v Minister of Home Affairs and Another,*[5] the Court held as follows:

> The fact that the s 35(2) safeguards of the Constitution are available to the person detained on a ship avoids detention in intolerable or inhumane circumstances. If the circumstances of detention on a ship render it impossible for s 35(2) to be complied with, the immigration officer will have no option but to cause the detention of the suspected illegal foreigner at a State facility in the exercise of the s 34(8) choice.[6]

This conclusion raises some disconcerting questions. The Court held that the substantive distinction between detentions governed by s 34(1) of the Act and the detentions on the ship governed by s 34(8) of the Act to be that the former related to detentions at state facilities.[7] Part of the reasoning behind this finding was that in the case of ship detention there was no 'officer attending' to whom queries could be directed, and so the provisions relating to queries to officers attending in s 34(1) clearly did not apply to detention on a ship.[8] All of this tended to suggest that the absence of executive control might in practice give rise to difficulties of enforcement of the rights those detained on the ship were said to possess. The ultimate finding that it was reasonable for the ship detainees not to be protected by the provision for release within 48 hours, but that court confirmation of their continued detention after 30 days was required,[9] is cause for some discomfort.

Stanfield v Minister of Correctional Services & Others[10] was a review of a refusal to grant parole for medical reasons.[11] The applicant had been convicted of tax

[1] 1998 (1) SACR 40 (Tk).
[2] Ibid at 43D–E.
[3] Ibid at 45F–I. See § 51.3*(g)* infra.
[4] See Immigration Act 13 of 2002 s 34(8).
[5] *Lawyers for Human Rights* (supra) at paras 26 and 41.
[6] Ibid at para 42.
[7] Ibid at para 40. The provisions of s 34(1)*(a)* were held to apply also to detentions in terms of s 34(8).
[8] *Lawyers for Human Rights* (supra) at para 39.
[9] Ibid at paras 42–46.
[10] 2004 (4) SA 43 (C)('*Stanfield*').
[11] Such release was governed by the provisions of section 69 of the Correctional Services 8 of 1959.

evasion and had served some months of a six year sentence when he was diagnosed with a form of lung cancer that generally entailed further life expectancy of some six months to one year. He needed treatment of a sort that would render the risk of infection expected from prison conditions fatal. The authorities were concerned about a slippery slope of precedent, as the applicant was, to outward appearances, asymptomatic, and the precise imminence of his expected death was not a matter of certainty — a condition the authorities felt arguably applied to many cases of prisoners infected with HIV/AIDS.[1] The court's finding that 'conditions consistent with human dignity' depended on the circumstances is, perhaps, the most pertinent part of the holding for present purposes.[2] Thus, what may be perfectly humane for a healthy prisoner would not be dignified or humane for a terminally ill prisoner. It was, for example, held to have been inconsistent with dignity not to have afforded the applicant and his condition the degree of individualization it deserved, but rather to treat his case as a precedent along with all other cases of terminal illness.[3] Moreover, the court found it particularly degrading and inhumane to insist that the prisoner remain incarcerated for as long as he was still physically able (in theory) to commit crimes.[4] It was noteworthy indeed that Van Zyl J turned the slippery slope argument on its head and joined in the call of Judge Fagan[5] for more attention to be given to release on the grounds of terminal illness:

> The alternative is grotesque: untold numbers of prisoners dying in prisons in the most inhuman and undignified way. Even the worst of convicted criminals should be entitled to a humane and dignified death.[6]

Finally, the court concluded that the only appropriate remedy of the violation of the right to conditions of detention consistent with human dignity was an order to be released. It might have been argued that the possibilities offered by prison set the outer bounds of what could be demanded by one who was properly imprisoned. The court set no such limits. Rather, the finding amounted to saying that the right to conditions of detention consistent with human dignity sometimes demanded that those who could not be thus detained should therefore not be detained at all.

(d) Communication and visitation rights

Closely aligned to the right to humane conditions is the detainee's right to the opportunity to communicate with, and be visited by, his or her spouse or

[1] See *Stanfield* (supra) at paras 34 and 37.
[2] Ibid at para 89.
[3] Ibid at para 127.
[4] Ibid at para 126.
[5] Pursuant to the Judicial Inspectorate of Prisons.
[6] *Stanfield* (supra) at para 128 and para 51.

partner,[1] next-of-kin,[2] religious counsellor,[3] and medical practitioner.[4] These rights, apart from also respecting the dignity of the detainee, have an important consequentialist motivation: open channels of communication and frequent access to those who matter to the welfare of the detainee will minimize the opportunities for physical and psychological abuse by allowing complaints to be lodged on behalf of the detainee by those who are concerned for his or her welfare.[5] FC s 38 provide standing to such persons to enforce the detainee's rights.

(e) The right to challenge the lawfulness of detention

FC s 35(2)*(d)* constitutionalize the right to *habeas corpus*. The common law remedy, known also as the *interdictum de libero homine exhibendo*, places the burden on the state to prove that the detention is not unlawful.[6] FC s 35(2)*(d)*'s proviso — 'if the detention is unlawful' — seems at first blush to be syntactically identical to the new bail proviso contained in FC s 35(1)*(f)*, which allows release 'if the interests of justice permit', and to the right to counsel at state expense 'if substantial injustice would otherwise result', contained in FC s 35(2)*(c)* and (3)*(g)*. The equivalent provisions in IC s 25(1)*(c)* and (3)*(e)* contained 'where' rather than 'if'. It would seem that if an onus attaches to one, an onus, and the same onus, should attach to the others. But there are a number of reasons why the *habeas corpus* condition should not be read as imposing an onus on the applicant to prove unlawfulness. On the weight of authority, the common law positions regarding onus seem to differ.[7] The effect of the same formulation in the clauses may

[1] How close the relationship must be is a question of nicety. Presumably a homosexual partner is included. The detainee alleging a violation of the right will bear the onus of proving that the person in question is the detainee's 'partner'.

[2] Again one may ask whether certain degrees of relation are excluded, particularly when nearer relatives are available. Presumably the right is not so strict as to require only the 'nearest-available-of-kin', nor so generous as to extend to any number of distant relatives.

[3] See P Farlam 'Freedom of Religion' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 41. Again, in doubtful cases, the complainant will bear the onus of convincing the court that the person in question is a 'religious counsellor' for the purposes of FC s 35(2)*(f)*(iii).

[4] See *S v Mpofana* 1998 (1) SACR 40 (Tk)('*Mpofana*')(The appellant argued that a refusal to allow him to consult with a medical practitioner of his choice, as opposed to the district surgeon, was a circumstance sufficient to entitle him to bail. Mbenenge AJ held that the magistrate had 'quite correctly' ordered the prison officials to allow the appellant to consult with the medical practitioner of his choice, and that that had put paid to any complaint. Ibid at 45H-I.) See, further, § 51.3*(g)* infra. The reference to a 'chosen medical practitioner' in FC s 35(2)*(f)*(iv) is clear. A generous definition of 'medical practitioner' should be employed, given the importance of heeding the detainee's wishes in this regard.

[5] The Red Cross' insistence that it be given access to the 'non-combatants' held at the pleasure of the Bush administration at Guantanamo Bay is driven by this very concern.

[6] See *Swart v Minister of Law and Order* 1987 (4) SA 452 (C); *Minister of Law and Order, KwaNdebele v Mathebe* 1990 (1) SA 114 (A); *Visagie v State President* 1989 (3) SA 859 (A).

[7] On the common law onus in the case of bail and the interpretation of the bail clause, see §51.4*(d)* infra.

arguably differ as well, as constitutional formulations should hardly be read as reversing a common law position which constituted a significant safeguard *in favorem libertatis*. The common law onus in *habeas corpus* cases clearly reflects the operation, in the least controversial domain of liberty, vis-a-vis freedom of the person, of the 'presumption of liberty'.[1] The pivotal role that this notion plays in the jurisprudence of *habeas corpus*[2] should not be obliterated by the use in FC s 35(2)*(d)* of the word 'if'. Most important of all is the grammatical logic of FC s 35(2)*(d)*: it is a mistake to read the clause as providing the right to challenge coupled with the right to be released if a requirement (unlawfulness) is met, the existence of the requirement being a matter of proof. The clause provides the right to challenge the lawfulness of the detention. Nothing is implied about onus. The common law onus therefore operates. If the state cannot prove the lawfulness of the detention, the court declares the detention unlawful and the right to be released follows automatically from the decision of the court. That is what is meant by 'if the detention is unlawful'. The new word order of FC s 35(2)*(d)* confirms this reading.

The reference to the right to challenge 'in person before a court' is another indication of a specifically focused response to the past: the decision in *Schermbruker v Klindt* denied a detainee the right to testify in person to allegations of torture.[3] The European Court of Human Rights has stated, as far as the right in art 5(4) of the European Convention is concerned — the right to 'take proceedings by which the lawfulness of his detention shall be decided speedily by a court' — that the envisaged proceedings 'need not always be attended by the same guarantees as those required under art 6(1) for civil or criminal litigation'.[4] The European Court of Human Rights also held, in *Weeks v United Kingdom*:

> The 'court' . . . does not necessarily have to be a court of law of the classic kind integrated within the standard judicial machinery of the country . . . The term 'court' serves to denote 'bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case . . . but also the guarantees' — 'appropriate to the kind of deprivation of liberty in question' — 'of a judicial procedure'.[5]

This approach is in line with *Nel v Le Roux NO & Others*.[6] It is to be stressed that the merits of a detention will be an FC s 12 question, even if such merits have to be determined under the auspices FC s 35(2). However, a violation of an

[1] See *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC). See also Bishop & Woolman (supra) at § 40.1*(b)*.
[2] See Robertson & Merrills (supra) at 80.
[3] 1965 (4) SA 606 (A).
[4] *De Wilde, Ooms and Versyp v Belgium* (1971) 1 EHRR 373 at para 78.
[5] (1987) 10 EHRR 293 at para 61.
[6] 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC).

IC s 25(1) or FC s 35(2) right may well affect the merits of the detention.[1] As pointed out above,[2] the fact that an illegal foreigner being detained on a ship pending deportation had the benefit of notification of such detention and of the right to appeal it was an important reason why the Constitutional Court in *Lawyers for Human Rights v Minister of Home Affairs & Another*[3] upheld the constitutionality of detaining such persons for longer than 48 hours, subject to a requirement of court confirmation after 30 days of such detention.[4] But one might consider what this holding implied for the presumption of unlawfulness. The Immigration Act 13 of 2002 distinguished between those illegal foreigners detained at state facilities and those declared illegal by an immigration officer and detained on the ship on which they arrived, in both cases pending deportation. The former had to be released within 48 hours if no warrant for their continued detention was obtained. The latter not. Why?

This is reasonable and justifiable bearing in mind that it applies to persons who have not formally entered South Africa and have no right to do so. It is reasonable that people who arrive in South Africa without the necessary documents to enable their admission into the country be sent back to the ship in which they arrived. The date of departure of the ship is not under the control of the South African authorities. That the detention of illegal foreigners on a ship is both limited to 48 hours is therefore also reasonable particularly in the context that, according to this judgment, the s 34(1)*(a)* safeguard[5] will be applicable.

Who is to say that the people in question 'have no right' to enter South Africa? Who is to say that their documents are inadequate? The Immigration Officer? It should have been a court. Yes, there is an appeal. But this is detention without trial of someone entitled to the benefits of FC s 35(2).

(f) The right to counsel

Every detainee is given the right, in the Interim Constitution, 'to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner at state expense';[6] and in the Final Constitution, 'to choose, and consult with, a legal practitioner, and to be informed of this right

[1] In *Mpofana,* Mbenenge AJ held that a detainee with a complaint against the conditions of his or her detention first had to call upon the prison authorities to remedy the complaint, and then, upon the authorities' failure to heed the call, 'it [was] available to the detainee concerned either to challenge the detention before a court of law as being unconstitutional or obtain a court interdict to force the prison authorities to comply with the law'. *Mpofana* (supra) at 45G-H. It was clearly assumed that violations of a detainee's rights might render the detention unlawful.

[2] See § 51.3*(b)* supra.

[3] 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC).

[4] Ibid at para 46.

[5] This 'safeguard' refers to the right to be notified of the detention and intended deportation and to the right to appeal it.

[6] IC s 25(1)*(c)*.

promptly; [and] to have a legal practitioner assigned to the detained person at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly'.[1]

The detainee's right to counsel should be distinguished from that of the accused provided in FC s 35(3)*(f)* and *(g)*. Of course, the overwhelming majority of cases will involve arrested persons, and arrested persons tend to become accused persons. Since the effects of an infringement of the right to counsel during the pre-trial stage will most often be regarded from the point of view of the rights of the accused person at trial and in terms of the possibility of the exclusion of evidence obtained by the violation, 'right to counsel' jurisprudence will tend to develop as an aspect of the right to a fair trial, leaving the propriety of extrapolation into the sphere of detention a matter of conceptual concern, given the problem of the due process wall discussed above.[2]

The difference between the detainee's right and that of the accused, apart from the fact that the one has a right to 'consult' and the other a right to be 'represented', will lie mainly in the nature of successful justifications for denying the

[1] FC ss 35(2)*(b)* and *(c)*. The express stipulation of the right to be informed not only of the right to choose and consult but also of the right to be provided with a practitioner in appropriate cases will presumably render a finding such as that of Gihwala AJ in *S v Van der Merwe* 1997 (10) BCLR 1470 (O), that there was nothing in the Interim Constitution which required any sort of caution beyond that contained in the Judges' Rules (at 1474F), untenable under the Final Constitution, if it was at all tenable under the Interim Constitution. See *Mgcina v Regional Magistrate, Lenasia, & Another* 1997 (2) SACR 711, 732 (W)(IC s 25(1)*(c)* rendered it 'incumbent upon a presiding officer to establish at the earliest opportunity whether these rights have been imparted to an accused person who appear[ed] before him without legal representation'.)

[2] See § 51.1*(a)*(ii) supra. See also *S v Nombewu* 1996 (12) BCLR 1635, 1648-50 (E), 1996 (2) SACR 396 (E). In *Nombewu*, the point emerged starkly: the absence of a warning about the right to counsel before the operation of the Interim Constitution could not be a violation of the detainee's right because he did not have such a right; nevertheless, the pre-trial failure was capable of vitiating the accused's right to a fair trial at the time of trial, although it was held not to have done so. This, as explained by Kentridge AJ in *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) at para 12 was the effect of the judgment in *S v Mhlungu & Others. 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC)('Mhlungu*'). The approach of the Constitutional Court in *Key v Attorney-General, Cape of Good Hope Provincial Division, & Another*, however, seemed to be in conflict with this reasoning: the infringement of privacy inherent in searches and seizures conducted in the pre-constitutional era before the right was entrenched could not be held to violate the fairness of the accused's trial conducted under the auspices of the Interim Constitution. 1996 (4) SA 187 (CC), 1996 (6) BCLR 788 (CC). See also *S v Khan* 1997 (2) SACR 611, 618 (SCA), in which Howie JA clearly regarded himself as bound to apply the dictates of IC s 25(3) in determining whether the admission as evidence of a confession at a trial conducted when the Interim Constitution had come into effect was constitutionally vitiated, but then went on to hold that, since the Interim Constitution had not come into effect at the time of the arrest and confession in issue, the appellant could not rely on his right to counsel under IC s 25(1)*(c)* to challenge the conduct at arrest. Howie JA held as follows:

> Reliance was placed on numerous passages in the judgments of Mahomed J and Kriegler J in *Mhlungu*. There is no support in those passages for the suggested retroactivity. What they deal with is the availability of the fair trial right and its related [IC] s 25(3) rights in a trial pending or incomplete as on the date of coming into operation of the Interim Constitution. They do not state, or even suggest, that [IC] s 25(1) rights applied to an arrest and confession-taking which occurred before that date.

Ibid at 618.

right under FC s 36(1) and in the sorts of considerations bringing about 'substantial injustice' on denial of the right to state-funded counsel. Clearly the directive of the Constitutional Court in *S v Vermaas; S v Du Plessis*,[1] that the decision to provide state-funded counsel was 'pre-eminently' that of the officer trying the case, cannot be applied in the sphere of detention, where no case is being tried. Questions about the possibility of 'substantial injustice' are more comfortably answered in the context of the trial than that of detention.[2] In this respect, however, it is submitted that the sort of 'justice' to which reference is made in IC s 25(1)*(c)* and FC s 35(2)*(c)* should not be restricted to that which is meant by 'a failure of justice', lest the 'justice' demanded for detainees outside the parameters of the criminal trial be deprived of any content.[3] It is clear that the 'injustice' contemplated by IC s 25(1)*(c)* and FC s 35(2)*(c)* involves questions of social justice — ie equality considerations. That the right to have counsel *appointed*, as opposed to the right to employ counsel, was based on considerations of equal protection of rich and poor has been beyond doubt since the decision of the US Supreme Court in *Douglas v California*.[4] In *S v Melani & Others* Froneman J declared:

> The failure to recognize the importance of informing an accused of his right to consult with a legal adviser during the pre-trial stage has the effect of depriving persons, especially the uneducated, the unsophisticated and the poor of the protection of their right to remain silent and not to incriminate themselves. This offends not only the concept of substantive fairness … but also the right to equality before the law.[5]

The importance of the right to be represented during the pre-trial stages, particularly when one is about to be invited to do something incriminating, does not mean that the degree to which a detainee ought to be advised of this right is as extensive as that pertaining to the advice one would expect an accused to be

[1] 1995 (3) SA 292 (CC), 1995 (7) BCLR 851 (CC), 1995 (2) SACR 125 (CC) at para 15.

[2] *S v Gasa & Others* 1998 (1) SACR 446 (D) attached decisive significance to the failure to inform arrestees at subsequent procedures (a pointing out and the taking of a statement) of their right to be provided with the services of a legal practitioner *at state expense*, where there had been a reference to the right to have an attorney present at prior interviews. Nothing was said of the principles relating to substantial injustice. *S v Soci* 1998 (3) BCLR 376 (E), 1998 (2) SACR 275 (E) illustrated the difficulty of getting the meaning of FC s 35(2)*(c)* across to a detainee before a pointing out: the inspector who interpreted the caution to the detainee had great difficulty interpreting into isiXhosa the phrase 'waar dit andersins tot wesenlike onreg sou lei'. What was conveyed was something like 'where there can be a want from you'. Ibid at 389G. Again there was no guidance regarding the meaning of 'substantial injustice' in the context of detention.

[3] See the worrying syndrome described in *S v Motsasi* 1998 (2) SACR 35, 59-60 (W), namely the difficulty experienced by *pro Deo* counsel in obtaining interpreters for consultations with prisoners, a matter which De Villiers J deemed to require negotiation and resolution between the Bar Council and the Department of Correctional Services. If counsel are to employ their own interpreters in this regard, as suggested by the correctional authorities, then questions of financing come into play. To what extent the state should pay for interpreters in these matters is surely a question which itself raises questions about the sort of 'justice' invoked in this right.

[4] 372 US 353 (1963).

[5] 1995 (4) SA 412 (E), 1996 (2) BCLR 174 (E), 1996 (1) SACR 335, 347 (E).

afforded about the importance of legal representation at trial. The Full Court in *S v Vumase*,[1] for example, held that the fact that it was expected of a presiding officer at trial to encourage an accused who wished to remain unrepresented to employ the services of a legal representative in serious cases[2] did not translate into a duty on the part of an arresting officer to encourage an arrested suspect to make use of legal representation for the decision to make a statement or not. The officer need only be reasonably satisfied that the suspect understood the existence of the right and was in a position to decide whether to avail himself or herself of it.

S v Mfene enunciated a clear conception of the right to state-funded legal representation in the sphere of detention in the following terms:

> [I]t is necessary to inform a detainee of his right to be provided with the services of a legal practitioner by the State at least in every case in which the detainee is indigent, in the sense that he is unable to afford the services of his own legal practitioner, and he has been detained in connection with a charge which, in the event of a conviction, might lead to imprisonment.[3]

McCall J dealt as follows with the practical problems inherent in requiring the police officer in question to make the above findings: first, the officer in question must explain the three options available to the detained person: (1) consult with a chosen legal practitioner if in a position to do so; (2) have a lawyer appointed by the state if not able to employ one and if substantial injustice would otherwise result; or (3) dispense with a lawyer, having been fully apprised of all relevant rights, particularly of the right to silence and of the potential consequences of co-operation. If the person concerned does not elect to dispense with a lawyer, he or she should be questioned concerning his or her ability to employ a lawyer. If the person appears to be unable to procure a lawyer, the option of the Legal Aid Board should be explained and the 'necessary arrangements' should be made to enable the detainee to consult with the Legal Aid Board. If a lawyer is thus appointed and is not present when the relevant act is to be carried out, the right to such lawyer's presence should be explained. If a lawyer is not appointed, or an appointed lawyer is not present, the procedure should not be carried out unless the officer in question is satisfied that the detainee wishes to dispense with the services of a lawyer.[4]

The facts of *S v Mphala & Another* illustrate the function of the right to counsel to protect the right to silence.[5] The family of the accused had employed an attorney on their behalf, and the attorney had requested the police not to take any statements from the accused until he had seen them. The investigating officer, however, '[stole] a march on the accused's attorney',[6] and the court held that *both*

[1] 2000 (2) SACR 579 (W).
[2] See *S v Mbambo* 1999 (2) SACR 421 (W).
[3] 1998 (9) BCLR 1157, 1167D (N)('*Mfene*').
[4] See *Mfene* (supra) at 1166 and 1164.
[5] 1998 (4) BCLR 494 (W), 1998 (1) SACR 388 (W).
[6] Ibid at 501J.

the right to silence *and* counsel rights had been violated.[1]

In *S v Mhlakaza & Others* the right of a detainee to consult with a legal practitioner was held to apply to an identification parade.[2] The court's finding that it could not be known what would have happened if the detainees had been allowed the proper opportunity to consult with counsel and to have counsel present at the parade, particularly with reference to the possibility that more people might have been put on the parade,[3] might be read as suggesting that the right to counsel at identification procedures was at least partly motivated by considerations of accuracy. It was on this point that the decision in *S v Hlalikaya & Others*[4] turned. Van Rensburg J invoked[5] the following dictum of Froneman J in *S v Melani & Others*:

> The purpose of the right to counsel and its corollary to be informed of that right (embodied in [IC] s 25(1)*(c)*) is thus to protect the right to remain silent, the right not to incriminate oneself and the right to be presumed innocent until proven guilty. Sections [IC] 25(2) and 25(3) … make it abundantly clear that this protection exists from the inception of the criminal process, that is on arrest, until its culmination up to and during the trial itself. *This protection has nothing to do with a need to ensure the reliability of evidence adduced at the trial.*[6]

The analogy counsel drew between a 'photo identification parade' at which the accused was not present and the identification parade in *Mhlakaza* was rejected on the ground that the only basis for the analogy would be to ensure the reliability of the evidence adduced at the trial.[7] The court's distinction between the kind of parade where the suspect's co-operation was required and the kind where neither the presence nor the co-operation of the suspect was required was based on the 'self-incrimination' dimension present only in the former case.[8] Two comments are called for: first, Froneman J's *dictum* in *Melani* about accuracy should be read as a caveat against regarding issues of fairness *solely* in terms of accuracy, and ignoring rights violations which do not affect accuracy. It ought not to be read as refusal to acknowledge the role of accuracy safeguards in the rights of arrested a

[1] The accused had been warned of their rights to counsel and to silence. The key to the character of the violation in question is this: withholding the fact that an attorney had already been appointed from the accused meant that their choice to make statements without an attorney was not an informed choice. 'They were as entitled to be informed of facts obviously relevant to the exercise of their election as they were of the express provisions of the Constitution itself.' Ibid at 504A-C

[2] 1996 (6) BCLR 814 (C)('*Mhlakaza*').

[3] Ibid at 826.

[4] 1997 (1) SACR 613 (SE)('*Hlalikaya*'). *Hlalikaya*, although dealing with a pre-trial procedure arguably more investigative than that in *Mhlakaza*, considered the matter from the perspective of an accused. See the discussion in § 51.2 supra. See also *S v Zwayi* 1998 (2) BCLR 242 (Ck), 1997 (2) SACR 772, 779-8 (Ck), which followed *Hlalikaya*. *S v Mphala & Others* 1998 (4) BCLR 494 (W), 1998 (1) SACR 654 (W) was decided on the assumption that the right to counsel applied at an identification parade.

[5] *Hlalikaya* (supra) at 615-16.

[6] 1995 (4) SA 412 (E), 1996 (2) BCLR 174 (E), 1996 (1) SACR 335, 348-49 (E)('*Melani*')(emphasis added).

[7] *Hlalikaya* (supra) at 617.

[8] Ibid at 616.

and accused persons.[1] Secondly, Van Rensburg J's identification of self-incrimination with an activity which cannot be described as 'communicative' conflicts with the holdings in *S v Maphumulo & Another*[2] and in *Msomi v Attorney-General of Natal & Others*[3] that self-incrimination extended only to communicative acts.[4] The danger of Van Rensburg J's interpretation of Froneman J's *dictum* is that if a restrictive meaning were to be attached to self-incrimination, the right to counsel might be regarded as operating only in spheres accompanied by this restricted notion of self-incrimination. This reading would leave the right to counsel of a detainee who was not arrested and who would not become an accused without any foundation. It would further render FC s 36(1) questions and 'substantial injustice' questions exceedingly difficult to answer.[5] Nevertheless, one can only agree with the observation that a suspect should surely not be entitled to legal representation at investigatory procedures not involving the suspect at all, like pointings out made to the police by state witnesses.[6] The pertinent question about the analogy between photo identification and 'live' identification is whether the former involves an important interaction between the authorities and the detainee. The reason a detainee is afforded the right to counsel at important interactions with the authorities is not confined to avoiding self-incrimination. It is so that his or her interests may be duly protected in the battle between liberty and the power of the state.[7]

Having determined that a detainee had a right to counsel at an identity parade, the court in *Mhlakaza* proceeded to express extreme concern about the practical and administrative difficulties attaching to the right to counsel at important pre-trial procedures and the duty upon the state to provide legal services to indigent detainees (in the context of their position as arrestees). The court adopted a *non possumus* attitude to filling in the details of the right in question and called for legislative codification of this area.[8] No attempt was made to provide guidance about the meaning of 'substantial injustice' in the pre-trial sphere.

In *S v Mathebula & Another*,[9] the Witwatersrand Local Division had to decide

[1] See JH Israel, Y Kamisar & WR LaFave *Criminal Procedure and the Constitution: Leading Supreme Court Cases and Introductory Text* (1989) 219 (The authors state without qualification that the right to counsel is aimed at 'insuring the reliability of the guilt-determining process', as opposed to 'insuring respect for the dignity or liberty of the individual without regard to the reliability of the criminal process'.)

[2] 1996 (2) BCLR 167 (N)('*Maphumulo*').

[3] 1996 (8) BCLR 1109 (N).

[4] See *S v Mokoena & 'n Ander* 1998 (2) SACR 642 (W); *S v Ngwenya* 1999 (3) BCLR 308 (W).

[5] For more on the link between the right to counsel and the right against self-incrimination, see *Miranda v Arizona* 384 US 436 (1966).

[6] *Maphumulo* (supra) at 617.

[7] See *United States v Wade* 388 US 218 (1967)(US Supreme Court based its finding that there was a right to counsel in a 'line-up' on the confrontation clause of the Sixth Amendment, and there is much talk of the dangers of inaccuracy.)

[8] *Mhlakaza* (supra) at 833-34.

[9] 1997 (1) BCLR 123 (W)('*Mathebula*').

whether a detainee who had been warned of his right to silence and to counsel about an hour and a quarter before a crucial pointing out, and in the context of a discussion about the pointing out, should have been warned again of his right to counsel and to silence as the pointing out was about to commence under different police personnel. Instead of asking simply whether one was dealing with two important stages or with only one, and whether, if two, the warning given at the first about the second was to be regarded as effectively governing the second,[1] the court took a more circuitous route. It determined first that the right to counsel and to be informed of this right had been violated at the pointing out itself.[2] Then it observed that waiver could be a justification of this violation under IC s 33(1).[3] It then asked whether there had, at the first warning occasion, been waiver of the rights in question for the purposes of the pointing out. It answered this question in the negative, based on the absence of clear and unequivocal evidence of informed waiver.[4] With respect, the approach of Cameron J in *S v Marx & Another* is clearly preferable:

> It seems to me that to import the rigours of the law of waiver into the area may be inappropriate and undesirable. It seems to me to be sufficient if the accused or the suspect is informed of his right, and chooses, knowing of it, to proceed to make the statement or pointing out in question.[5]

The wording of FC s 35(2)*(b)* entrenches the approach adopted by Cameron J, giving as it does the right to 'choose' a legal practitioner. The choice referred to may easily accommodate also the choice *whether* to consult with a legal practitioner at all.

In *S v Brown & 'n Ander*, it was said that there was obviously ('ooglopend') no 'yes' or 'no' answer to the question whether the right to counsel should be explained to a suspect at every stage of the investigation and before every interview, and that the answer would depend upon the circumstances of every case. Important factors encompass the intelligence and the 'development' ('ontwikkeling') of the suspect and the period of time between interviews.[6] The finding that there was no onus upon an applicant to show that his or her right had not been explained to him or her, or that he or she had not understood the explanation,[7] is strange. It is odd given the trite status of the proposition that the applicant has to prove a violation before the state must prove justification.

[1] See *R v Schmautz* [1990] 1 SCR 398 (Canadian Supreme Court regarded pre-detention warning as governing period after detention as part of a single incident.)

[2] *Mathebula* (supra) at 133.

[3] Ibid at 137.

[4] Ibid at 139ff. *Mathebula* was followed in *S v Gasa & Others*. 1998 (1) SACR 446 (D).

[5] 1996 (2) SACR 140, 148 (W). See also *S v Shaba & 'n Ander* 1998 (2) BCLR 220 (T), 1998 (1) SACR 16, 20E-G (T)('*Shaba*').

[6] 1996 (11) BCLR 1480, 1502 (NC), 1996 (2) SACR 49 (NC).

[7] Ibid.

In *S v Shaba & 'n Ander* Spoelstra J went so far as to assert that, although it might sometimes or even always be desirable to warn a detainee of rights to counsel and silence on every potential occasion for self-incrimination, failure to do so could *never* by itself render elicited evidence inadmissible.[1] This proposition, with respect, cannot be accepted in the absence of further elaboration upon the relationship between violation, remedy and fairness. Apart from recourse to the assertion in *Key v Attorney-General, Cape Provincial Division, & Another*[2] that questions of fairness are to be decided upon the facts of each case, and that unconstitutionally obtained evidence need not necessarily be inadmissible, little authority exists to support Spoelstra J's conclusion.[3]

The approach adopted in *S v Malefo & Andere* causes similar disquiet.[4] The admissibility of pointings out and of statements made to magistrates was challenged on the basis that the accused had at no stage been informed of their right to legal representation. Strydom J regarded the admissions as unconstitutionally obtained evidence, and endorsed the Canadian approach of excluding such evidence only if admissibility would bring the administration of justice into disrepute. The finding that such exclusion was inappropriate was left unsubstantiated, except for mention of the consideration that the complaint concerning the right to counsel had been dragged in by the hair ('by die hare ingesleep').[5] The finding, with respect, demonstrated a problem inherent in regarding all FC s 35 violations as questions of unconstitutionally obtained evidence. If it could be recognized before the constitutional era that there was value in excluding admissions or confessions which were not freely made *as a matter of rule*, then it remains to be asked why the addition of constitutional guarantees to the meaning of 'freely made admissions' should result in a denial of that value.[6]

Although *S v Mfene & Another* expressed a preference for the *Shaba* approach over the *Mathebula* approach, McCall J accurately captured the true question: at any given point, the question as to whether the arrested person had been properly informed about his or her right to counsel relative to any particular interaction with the state must be aimed at discovering the extent to which previously given explanations might still be regarded as operative, or by the extent to which the arrested person might properly be said to be aware of his or her right and of its

[1] *Shaba* (supra) at 20D–E (T).
[2] 1996 (4) SA 187 (CC), 1996 (6) BCLR 786 (CC) at para 13.
[3] *Shaba* (supra) at 20-1.
[4] 1998 (2) BCLR 187 (W), 1998 (1) SACR 127 (W)('*Malefo*').
[5] *Malefo* (supra) at 157G–H. Why belated awareness of a violation should be so decisive did not appear from the judgment.
[6] See also the invocation in *S v Makofane* 1998 (1) SACR 603, 617J-618H (T) of *S v Khan* 1997 (2) SACR 611 (SCA). A similar approach was adopted in *S v Mphala & Another* 1998 (4) BCLR 494 (W), 1998 (1) SACR 654 (W), where the absence of counsel during an identification parade was regarded in terms of FC s 35(5). This meant that the delicate question whether the accused had waived their right to counsel, or, more accurately, had decided to participate in the parade without counsel, well aware of their right, was rendered unnecessary to decide, although Cloete J found in any event that the circumstances indicated informed action on the part of the accused. Ibid at 659D-E.

application to the procedure at hand.[1] But then McCall J crafted a rule every bit as peremptory as that applied in *Mathebula*: if the arrested person was indigent, and if the charge at hand might lead to imprisonment, failure to warn about the right to have counsel appointed at state expense *would* result in an unfair trial *unless* the person was, in fact, fully aware of the content of his or her right and elected not to be represented at the relevant procedure (in that case, a pointing-out).[2] Although the conclusion did not follow from the preceding premises, the rule as formulated in *Mfene* neatly accommodated the suggested approach of regarding this question as one dealing with informed voluntariness.[3]

S v Soci regarded a failure to advise an accused of his right to counsel *relative to the particular procedure at hand* (a pointing out) as a violation of the right,[4] and correctly, with respect, declined to speculate upon whether the accused would or would not have made the incriminating pointing out had his right not been violated, consequently excluding the evidence under FC s 35(5).[5] Erasmus J decreed that police forms should set out the rights of arrested and detained persons fully, clearly and simply, and that such persons should not merely have the wording of FC s 35(2)*(c)* repeated to them, but should be informed 'in practical terms of the availability of the services of a legal practitioner at that place and time' and of what should be done to obtain state assistance. The forms should also be available in the detainee's language.[6]

In its decision concerning the constitutionality of the new bail provisions[7] the

[1] 1998 (9) BCLR 1157, 1163 (N)('*Mfene*').

[2] Ibid at 1167-68.

[3] Ibid.

[4] 1998 (3) BCLR 376, 394G (E), 1998 (2) SACR 275 (E)('*Soci*').

[5] See the opposite approach adopted in *S v Mphala & Another* 1998 (4) BCLR 494, 660B-G (W), 1998 (1) SACR 388 (W)(Cloete J, having determined that the absence of counsel during an identification parade was a question of potentially unconstitutionally obtained evidence, held that the absence of an indication that the presence of counsel would have made any difference to the outcome of the parade was a telling factor against excluding the evidence. Cloete J specifically distinguished the position pertaining to confessions and pointings out. This, with respect, begged the question whether parades should not be regarded in a similar light, particularly given the recognition of self-incrimination considerations in *S v Hlalikaya & Others* 1997 (1) SACR 613 (SE).) See also *S v Shongwe & Others* 1998 (9) BCLR 1170 (T), 1998 (2) SACR 321 (T)(Instead of recognizing that uninformed absence of legal representation rendered statements imperfectly 'voluntary' for the purposes of admissibility, the court first regarded such statements as improperly obtained evidence to be dealt with under FC s 35(5), and then held the question to be essentially a discretionary one. The fact that the court did not invoke public outcry when excluding statements made by the co-accused from admissibility against accused number 3, although accused number 3 was 'most probably the instigator in the murders' ('bes moontlik die aanstigter van die moorde' (at 1195J)) was an indication that the rules relating to the admissibility of confessions were still regarded as sacrosanct by the court. If these 'rigid exclusionary rules' ('starre uitsluitingsreëls') could be upheld without question in the face of probable guilt, but in the absence of a self-incriminatory dimension, it is difficult to see why public disapprobation should be invoked against those who are damned by their own tainted confessions.)

[6] See *Soci* (supra) at 394I–395C.

[7] Criminal Procedure Act 85 of 1997. See *S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC), 1999 (2) SACR 51 (CC).

Constitutional Court gave its stamp of approval to the approach criticized here. It preferred an *ad hoc* 'fair trial' test over a decision in principle as to whether a particular statutory procedure violated the right against compelled self-incrimination.[1]

This approach now governs most violations of pre-trial rights: it reduces the entire analysis to an 'analysis' in terms of FC s 35(5). With its stock invocation of *Key* and its 'balancing of interests', this approach will inevitably lead to a hardening towards admission of cogent evidence on the basis that the violation cannot be demonstrated to have made a difference to the fairness of the trial. The incommensurable relationship between violations of pre-trial rights and the 'fair outcome' of the trial process must lead to a discarding of the weight of violations. Unless violations are treated as having some inherent effect upon the 'fairness of the outcome', the identity of the right violated (counsel right? silence right? self-incrimination?) will matter less and less, and the violation itself will tend to have no weight in the court's utilitarian calculus.

S v Ngcobo illustrates the state of the law.[2] A pointing-out occurred without a warning about its consequences. *Key* and the interests of society were invoked. The absurdity of allowing a technical violation to result in a successful appeal was mentioned, and the conclusion drawn was that the trial remained fair nevertheless. There was no 'causal link' between the violation and the evidence obtained.[3] Some creativity in the field of constitutional remedies for FC s 35 rights violations is required, as well as a recognition that not every question under FC s 35 is a question under FC s 35(5).[4]

The right to counsel during identity parades[5] was rejected in *S v Mokoena & 'n Ander*,[6] *S v Ngwenya & Others*,[7] and *S v Monyane & Others*.[8] These cases differ significantly in their reasoning.

Claassen J in *Mokoena* took issue with the notion that an identification parade involved the right against self-incrimination and held that, the detainee being at all times 'passive' and the evidence in question being real and not communicative, the right against self-incrimination was simply not at issue. Yet he did hold that because the detainee had not been warned of counsel rights before the parade, his right to counsel had been violated ('geskend').[9] However, since the court was not dealing with the voluntariness of a confession, it was not a matter for a trial-within-a trial, but a question merely of the weight to be attached to the evidence

[1] See § 51.5*(j)*(iii) infra.
[2] 1998 (10) BCLR 1248 (N).
[3] Ibid at 1255A. The absence of a 'causal link' was to be gleaned from the passage recognizing the significance of such a link.
[4] See § 51.3*(g)* supra; § 51.5*(b)* infra.
[5] *S v Mhlakaza & Others* 1996 (6) BCLR 814 (C); *S v Hlalikaya & Others* 1997 (1) SACR 613 (SE).
[6] 1998 (2) SACR 642 (W)('*Mokoena*').
[7] 1999 (3) BCLR 308 (W)('*Ngwenya*').
[8] 2001 (1) SACR 115 (T)('*Monyane*').
[9] *Mokoena* (supra) at 650G.

in question.[1] The finding that the right did exist, but not because of self-incrimination, freed the existence of counsel rights of a detainee from the requisite presence of a self-incrimination dimension. The effect of rejecting the analogy with involuntary confessions meant that the recognition of the violation of the right in this sphere would tend to have little practical meaning.

In *Ngwenya* Leveson J agreed that the 'inert' nature of a suspect at an identification parade meant that self-incrimination did not enter the picture.[2] But, more fundamentally, Leveson J found that counsel rights, belonging only to the sphere of detention (under IC s 25(1)) and trial (under IC s 25(3)), did not operate on any 'other occasion'.[3] He assumed therefore that it went without saying that an identification parade did not amount to 'detention' for the purposes of IC s 25(1).[4] The effect of not having been warned of counsel rights was therefore to be tested against the standard of a fair trial. Indeed, Leveson J asked: 'But what is there in the section [IC s 25(3)] that renders it clear that the legislation required anything more than representation at the trial itself?'[5] Leveson J went on to reject the reliance in *Mathebula* based upon the reasoning in *United States v Wade*. This reasoning led to the finding that counsel rights should be explained at every important pre-trial interaction between state and suspect. Leveson J held that IC s 25(3) required less than the American Sixth Amendment right to 'have the assistance of counsel for [one's] defence'. The latter right, so he held, was wider in its scope than the right to counsel at trial provided by IC s 25(3). And since IC s 25(1) did not apply outside 'detention', as it was narrowly interpreted by Leveson J, no counsel right applied to the parade.

In *Monyane*, although IC s 25 was at issue, Borchers J made it clear that the reasoning would not have been different had the mater fallen for consideration under FC s 35.[6] The need to have a self-incrimination dimension present in order to trigger the counsel right was once again affirmed. This affirmation was endorsed in the subsequent decision of Bertelsmann J in *S v Thapedi*.[7] Borchers J in *Monyane* saw the counsel right as making sense only in a context where legal advice would serve a purpose. He found that, where a detainee had no right to

[1] *Mokena* (supra) at 650. One might well ask exactly how one is to determine the effect upon the weight (cogency) of the evidence of the uninformed absence of a lawyer. Presumably one should speculate about questions of accuracy and participation, which would almost inevitably lead to ignoring the violation in the determination.

[2] See *Ngwenya* (supra) at 314D. Interestingly, this was held to be so in *United States v Wade* — 388 US 218 (1967)('*Wade*') — even where a suspect is made to speak words at the identification parade. See *Ngwenya* (supra) at 314.

[3] Ibid at 312E-F.

[4] See § 51.2 supra.

[5] *Ngwenya* (supra) at 313B.

[6] *Monyane* (supra) at 128C.

[7] 2002 (1) SACR 598, 602E (T)('*Thapedi*') This confirmation was somewhat watered down by the finding, citing in support the unreported decision of the full court in *S v Bailey* (CPD 25/2000), that not being advised of the right to counsel at an identification parade did not 'per se' violate the right to counsel, or that any violation would not be material. *Thapedi* (supra) at 603H-I.

choose whether to participate in an identification parade, and any hypothetically present legal adviser would have no right to interfere in the manner of its conduct, it made little sense to demand that the right to counsel be triggered on such an occasion.[1] These decisions place some pressure on the foundation for the counsel right as an incident of the right of being a detainee (as opposed to being an accused person or an arrested person). It may also be asked with some pointedness whether the advice of counsel may not be seen as serving a necessary purpose in circumstances other than those where the advice can have an immediate effect on the procedure at hand. It is of immense value to a person who is being taken through the mills of some part of the state machinery to be advised by a lawyer about why some process is taking place and what he or she can do about it — even if he or she cannot lawfully do anything about it.

The finding of Magid J in *S v Gumede & Others*,[2] that the word 'promptly' in IC s 25(1)*(c)* and FC s 35(2)*(c)* '[could] only mean immediately or as soon as possible after the person in question [had] been detained or sentenced', cannot be supported. First, it ignored the ongoing nature of detention. Secondly, it begged the pertinent question in these cases: whether any warning that was given should be regarded as operative at any particular self-incriminatory activity.[3]

It is of course necessary to afford the detainee a reasonable opportunity to exercise the right to counsel.[4] In *R v Manninen*[5] the Canadian Supreme Court held that if the detainee indicated that he or she wished to exercise the right to counsel, then he or she had to be provided with a reasonable opportunity to retain and to instruct counsel without delay, and that the authorities had to allow the detainee to telephone a relative or to make contact with counsel by telephone or otherwise.[6]

The right to choose a legal representative must obviously be confined to reasonable limits of availability. Normal availability contingencies naturally should

[1] See *Monyane* (supra) at 129-131. The rejection of *United States v Wade* was accompanied by an observation that United States jurisprudence generally did not demand counsel rights at identification parades prior to the stage of being formally charged, and the Canadian cases were distinguished on the ground that, since one had the right to refuse to participate in a parade in Canada (unlike the case in South Africa), it made sense to obtain legal advice on such an occasion. See *Monyane* (supra) at 134H-135B. See also *Thapedi* (supra) at 603B-E.

[2] 1998 (5) BCLR 530 (D).

[3] The finding ibid at 540I, with respect, was equally questionable: '[IC s 25(1)*(c)*] has in my judgment nothing to do with the issue in this case, in the light of our unanimous finding as to the voluntariness of the pointings out.' It is submitted that the entrenched counsel rights have added an important gloss to the meaning of voluntariness.

[4] This proposition can be regarded as the ratio in *Mhlakaza*. See also *Powell v Alabama* 287 US 45 (1932); *S v McKenna* 1998 (1) SACR 106, 112I-113A (C)(In the context of the right of an accused to legal representation, Ngcobo J declared '. . . [I]f the right to legal representation is to have any meaning, it must include the right to be afforded a reasonable opportunity to secure it.')

[5] [1987] 1 SCR 1233, 1241.

[6] But see *R v Smith* [1989] 2 SCR 368 (The detainee should be 'reasonably diligent' in attempting to contact counsel.)

qualify the right, rather than act as a potential source of limitation clause justification. But if the circumstances of detention or the requirements of the authorities render specificity of election impracticable, then these factors are best dealt with as limitation questions.

(g) Remedies for detainees

The overwhelming majority of criminal procedure constitutional cases concern the effect upon admissibility of evidence of violations of IC s 25 and FC s 35. The possibility of a permanent stay of proceedings, which occurs mainly in the context of cases dealing with delayed justice, is similarly concerned with the effect of violations upon the outcome of a criminal trial. One may well be excused for thinking that the jurisprudence around the rights of detained, arrested and accused persons and the jurisprudence of the admissibility of unconstitutionally obtained evidence are one and the same.[1] Employing admissibility as a remedy assumes that there is a trial, and also that an adverse ruling on admissibility possesses a rational connection with the violation in question.[2] But a detainee whose rights are violated must turn elsewhere, and so must the analyst who is to determine what remedies detainees and arrested persons have *qua* detainees and arrested persons, irrespective of their intended future status as accused persons. Furthermore, as far as an accused is concerned, violations of rights that have no connection with the gathering of evidence often require remedies that are likewise not necessarily connected with the outcome of the trial.

The main weapon that the detainee possesses is the right to challenge the lawfulness of the detention.[3] Some violations of detainee rights should properly render the detention unlawful.[4] Since the applicant bears the onus of proving a violation, but the state bears the onus of proving lawfulness in *habeas corpus* applications, the state will have to show the otherwise lawful character of the detention in question, the applicant would then have to show that a right has been violated, and the state in its turn should prove that such violation was justified under IC s 33(1) or FC s 36(1). If the violation cannot be justified, it would make most sense to require the state to show cause why the detention should not therefore be regarded as unlawful, and that another remedy would be

[1] See PJ Schwikkard 'Evidence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 52.

[2] Peter Hogg writes of the American approach, that unconstitutionally obtained evidence is inadmissible: 'In favour of the American rule, it could be argued that lawless behaviour by law enforcement officers should not be rewarded by allowing them to use the fruits of such behaviour. On the other side of the argument was the point that when reliable evidence is excluded, a guilty person usually goes free; it is arguable that it would be more sensible to discipline the police officer directly than to confer such a windfall on the undeserving accused.' P Hogg *Constitutional Law of Canada* (3rd Edition, 1992; 1996 supplement) § 38.2 citing *Mapp v Ohio* 367 US 643 (1961).

[3] See § 51.3*(e)* supra.

[4] Ibid.

more appropriate in the circumstances. It should be stressed that a minor violation which cannot be justified is easily conceivable; the consequences of violation, the magnitude of violation, and whether violation can be justified being distinct questions. In such cases the remedy of damages may play a very important role.[1] Article 5(5) of the European Convention on Human Rights, for example, establishes an 'enforceable right to compensation' for violations of the rights of an arrested or detained person. The advantage of damages as a remedy is that it avoids the objection of remedying one evil by creating another, and it possesses the flexibility so problematically lacking in all-or-nothing rulings relating to release, or to the admissibility of evidence, or to a stay of proceedings. It should, however, be used only to fill the gaps, and not to deprive an applicant of a more effective remedy in a case where the proceeding or detention in question is vitiated beyond redemption by the violation of rights. It should also be awarded sparingly in situations where an interdict to stop violating, or a *mandamus* to start fully respecting, the right in question, makes more sense.[2] Litigation of criminal procedure rights should not become a gold rush; nor should the state be encouraged to purchase violations of liberty with rands.

Before the passing of the Constitutional Court Complementary Act, a conflict of authority existed about the power of a court to order release of a detainee pending referral to the Constitutional Court of the question of the constitutionality of the empowering provision.[3] In *Matiso & Others v Commanding Officer, Port Elizabeth Prison, & Another*, the release of an imprisoned person was ordered pending such a referral.[4] This decision displayed conspicuous concern for liberty. *Wehmeyer v Lane NO & Others* followed the same approach.[5] *Bux v Officer Commanding, Pietermaritzburg Prison, & Others*[6] and *De Kock & 'n Ander v Prokureur-Generaal van Transvaal*[7] did not.

The remedy question fell to be decided in *S v Mpofana*.[8] The appellant argued that violation of his right to dignified conditions of detention merited a setting aside of the refusal of his bail application. Mbenenge AJ pointed out that, while detainees had certain constitutional rights, 'the proper course to follow when such rights [had] been violated [was] a different matter'.[9] The learned judge also

[1] See J Klaaren, M Chaskalson & S Budlender 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 9.

[2] See, eg, the *Van Biljon & Others v Minister of Correctional Services & Others* 1997 (4) SA 441 (C), 1997 (6) BCLR 789 (C), 1997 (2) SACR 50 (C)(On the provision of adequate medical treatment).

[3] Act 13 of 1995.

[4] 1994 (3) SA 899 (SE), 1994 (4) SA 592 (SE), 1994 (3) BCLR 80 (SE).

[5] 1994 (4) SA 441 (C), 1994 (2) BCLR 14 (C).

[6] 1994 (4) SA 562 (N), 1994 (4) BCLR 10 (N).

[7] 1994 (2) SACR 113 (T). The Constitutional Court Complementary Act 13 of 1995 added IC s 101(7). IC s 101(7) granted provincial and local divisions of the Supreme Court (now High Courts) jurisdiction to grant an interim interdict or similar relief pending determination of referrals to the Constitutional Court).

[8] 1998 (1) SACR 40 (Tk).

[9] Ibid at 45C.

recognized the possibility of challenging the detention before a court as unconstitutional, and obtaining a mandamus to remedy the complaint.[1] But, with respect, what was open to question in the judgment was the ruling that internal remedies (application to the prison authorities) had first to be exhausted before the violation could be brought to the attention of a court.[2] Such rights violations are justiciable disputes under FC s 34.[3] The fact that a court might well order no more than compliance as a proper remedy in certain cases should not mean that FC s 35 entails some doctrine of exhaustion of internal remedies.[4]

As discussed above,[5] in *Stanfield v Minister of Correctional Services & Others*[6] the applicant could not be detained in conditions consistent with human dignity, and was therefore released. The order was the result of a setting aside of a refusal of parole on review, rather than an order flowing from an application for release as of right, but the result was nevertheless significant for the remedial question.

51.4 The Rights of Arrested Persons

(a) Statutory lawfulness

An arrested person is a person detained 'for allegedly committing an offence', and as such enjoys the rights of a detained person as well as those specified for an arrested person under IC s 25(2) and FC s 35(1). An arrest is effected under s 39 of the Criminal Procedure Act ('The Criminal Procedure Act').[7] Because the manner of arrest is fully regulated by the Criminal Procedure Act, an arrest is lawful only when it complies with the statute. Physical contact with the arrested person is required for a valid arrest, unless the person in question unmistakably subjects himself or herself to the arresting officer.[8] Section 39(2) of the Criminal Procedure Act requires that the person effecting an arrest shall at the time of

[1] *Mpofana* (supra) at 45H–I.

[2] Ibid at 45G–H.

[3] See Adrian Friedman & Iain Currie 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 60.

[4] See *Baramoto & Others v Minister of Home Affairs & Others* 1998 (5) BCLR 562 (W)(The applicants, who were not detainees, but who were threatened with arrest, detention and deportation under s 44(1) of the Aliens Control Act 96 of 1991, *inter alia* sought a declarator to the effect that they were refugees under international law. The applicants argued that the informal administrative procedures that had been established for the implementation of South Africa's obligations under international refugee law were inappropriate for the resolution of a rights dispute, for the determination of which FC s 34 demanded an independent and impartial tribunal. Joffe J did not analyse the requirements of independence and impartiality under FC s 34, holding merely that there was no reason to expect the administrative procedures in question to be unfair.) Ibid at 576E.

[5] See § 51.3*(c)* supra.

[6] 2004 (4) SA 43 (C).

[7] Act 51 of 1977

[8] *S v Thamaha* 1979 (3) SA 487, 490 (O). See E du Toit, FJ de Jager, A Paizes, A Skeen & S van der Merwe *Commentary on the Criminal Procedure Act* (2004) § 39.

effecting the arrest, or immediately thereafter, inform the arrested person of the cause of the arrest, and entitles the arrested person to demand a copy of the warrant authorizing arrest.[1] According to *S v Matlawe*,[2] an arrested person becomes an arrested person only upon formal notification of the reason for arrest, whether he or she is aware of it or not.[3]

(b) Silence and self-incrimination

(i) *The seamless web*

Silence and self-incrimination rights before trial are intimately bound up with the right to a fair trial, and difficult to separate from the perspective of the accused at trial. As long as it is remembered that the question of whether a person's right as an arrested person has been violated can be distinguished from the question of whether that person's right as an accused has been violated, pre-trial silence and self-incrimination from both perspectives may be examined together, especially since the remedies in this case, like the right itself, are sharply focused on the trial. Indeed, the difficulty of separating the spheres for analytical purposes has even led to observations such as the following from Yacoob J in his separate concurring judgment in *S v Thebus & Another*:

> The distinction between the pre-trial right to silence and the right to silence during trial is inappropriate in our constitutional jurisprudence. The right to silence is initially conferred by s 35(1)*(a)* and thereafter by s 35(3)*(b)*.[4]

Aspects of silence and compelled self-incrimination which are purely trial-bound will be discussed in the section on the rights of an accused.[5]

The conceptual relationship between the right to silence, the right against self-incrimination, and the presumption of innocence is a jurisprudential minefield. Some hold the view that the right to silence is the governing principle.[6] In *R v Director of Serious Fraud Office, ex parte Smith*[7] Lord Mustill expressed the opinion that the 'right to silence' did not denote any single right, but referred to 'a disparate group of immunities, which differ[ed] in nature, origin, incidence and importance'. The six identified 'immunities' were: a universal immunity from being compelled on pain of punishment to answer questions, a universal immunity from being thus compelled to answer questions which may incriminate, a

[1] On the right to reasons, which the accused enjoys as a detainee, see § 51.3*(a)* supra.

[2] 1989 (2) SA 883, 884-85 (B).

[3] See §§ 51.2 and 51.3*(e)* and *(g)* supra, for a discussion of the significance of unlawful arrest upon one's status as 'arrested' for the purposes of FC s 35(1), and for the effect of violations of rights upon the lawfulness of detention.

[4] 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC).

[5] § 51.5 infra.

[6] See *R v Brophy* [1982] AC 476, 481 (The right not to be compelled to incriminate oneself was discussed in terms of the right to silence.)

[7] [1993] AC 1, 30-1 (HL) ('*Ex Parte Smith*').

specific immunity of suspects undergoing interrogation from being thus compelled to answer questions, a specific immunity possessed by accused persons at trial from being thus compelled to testify and answer questions, a specific immunity by persons charged with an offence from being interrogated, and a specific immunity possessed by an accused in certain circumstances from having adverse comment made on a failure to answer questions before the trial or at the trial. The learned judge commented:

> Each of these immunities is of great importance, but the fact that they are all important and that they are all concerned with the protection of citizens against the abuse of powers by those investigating crimes makes it easy to assume that they are all different ways of expressing the same principle, whereas in fact they are not. In particular it is necessary to keep distinct the motives which have caused them to become embedded in English law; otherwise objections to the curtailment of one immunity may draw spurious reinforcement from association with other, and different, immunities commonly grouped together under the title of the 'rights to silence'.[1]

The view that the principle against self-incrimination, or *nemo tenetur se ipsum prodere*, is the archetype principle has been expressed by the Cape Provincial Division in *Park-Ross v Director: Office for Serious Economic Offences*,[2] the Australian High Court,[3] and the Canadian Supreme Court.[4] Lamer CJ in *R v Jones* invoked the 'principle' against self-incrimination, and distinguished it from the 'privilege' against self-incrimination. The latter belongs to the 'narrow traditional common law rule relating only to testimonial evidence at trial', while the former, the principle *nemo tenetur se ipsum accusare*, possesses the 'status of a principle of fundamental justice'.[5] The fallacy of the argument in *S v Phallo & Others*,[6] that all instances where silence might lead to criminal consequences involve the right to silence, illustrates the necessary conceptual link between the silence and self-incrimination rights.[7]

The most coherent view is that the governing principle in the triad is the presumption of innocence. Once it is accepted that criminal justice rights flow

[1] *Ex parte Smith* (supra) at 30-31. Lord Mustill's view is referred to by Ackermann J in *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 93 (In the context of the right against self-incrimination. Ackermann J refers to the second listed immunity as that applicable to the privilege against self-incrimination.)

[2] 1995 (2) SA 148, 162 (C), 1995 (2) BCLR 198 (C)('The underlying right embodied in [IC] s 25(2) and (3) is that no accused person shall be compelled to be a witness against himself. It has its origins in the principle *nemo tenetur se ipsum accusare*.')

[3] See *Pyneboard (Pty) Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346 (Murphy J).

[4] See *R v Hebert* [1990] 2 SCR 151, 57 CCC (3d) 1, 34 (McLaghlin J).

[5] [1994] 2 SCR 229, 249. The explanation was given in the course of a dissenting judgment. The subordination paradigm is often determined by the textual framework within which the particular jurisprudence operates. The US Constitution speaks of the right 'not to be compelled in any criminal case to be a witness against himself' (in the Fifth Amendment), and so silence becomes a question of self-incrimination.

[6] 1998 (3) BCLR 352 (B).

[7] See § 51.1*(a)*(iii) supra; § 51.4*(b)*(ii) infra.

from a concern with the justification for interference with liberty,[1] and that this concern is most clearly perceived in the foundational status of the presumption of innocence in the criminal process, then the character of the right to silence and that of the right to protection from self-incrimination as natural consequences of the presumption of innocence should be readily visible. The seamless web of rights recognized by the Constitutional Court in *S v Zuma & Others*, while rendering separate development of the rights in question difficult, clearly illustrates that the 'silence rights' to which Lord Mustill referred are governed by the presumption of innocence:

> [T]he common law rule in regard to the burden of proving that a confession was voluntary has been not a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey's 'golden thread' — that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt … Reverse the burden of proof and all these rights are seriously undermined.[2]

The conceptual difficulty in reverse onus cases of distinguishing questions that pertain to the presumption of innocence from those questions that relate to silence and (or) self-incrimination questions is further proof of the close link joining these three concepts, and of the foundational status of the presumption of innocence.[3] Madala J put it thus in *Osman & Another v Attorney-General, Transvaal*:

> Section 25(3)*(c)* [IC] enshrines both the right to be presumed innocent and the right to remain silent during plea proceedings or trial. The rights contained in the subsection are both integral to the right to a fair trial. That these rights stand side by side in s 25(3)*(c)* is not accidental; the framers of the Interim Constitution sought to demonstrate that these rights reinforce each other.[4]

(ii) *The right to remain silent*

IC s 25(2)*(a)* makes only implied reference to the right to silence, incorporating it into the right to be 'informed … that he or she has the right to remain silent and

[1] R Dworkin *Law's Empire* (1986) 93-94 (Goes so far as to say that the point of all law is the justification of state coercion.)

[2] 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 33. See also *Thomson Newspapers Ltd v Canada (Director of Investigation & Research, Restrictive Trade Practices Commission* [1990] 1 SCR 425, 480 (Right against self-incrimination grounded in the notion that the 'state must have some justification for interfering with the individual and cannot rely on the individual to produce the justification out of his own mouth'.)

[3] See *S v Zuma & Others* 1995 (2) SA 652 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC) at para 34; *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC), 1996 (1) SACR 371 (CC) at para 11; *S v Meaker* 1998 (8) BCLR 1038 (W), 1998 (2) SACR 73, 85D-I (W)(Cameron J assumed for the purposes of argument that a reverse onus provision violated the right to remain silent.)

[4] 1998 (4) SA 1224 (CC), 1998 (11) BCLR 1362 (CC), 1998 (2) SACR 493 (CC)('*Osman*') at para 12. For more on the Court's finding with respect to the presumption of innocence § 51, see.1*(a)*(iii) supra.

to be warned of the consequences of making any statement'. The substantive dimension to the right to silence is expressly provided in FC s 35(1)*(a)* and is clearly distinguished from the right to be informed of its existence and of the consequences of not remaining silent contained in FC s 35(1)*(b)*(i) and (ii). What is particularly remarkable about the wording of FC s 35(1)*(b)*(ii) is that, unlike the reference to 'any statement' in IC s 25(2)*(a)*, the warning about the consequences of 'not remaining silent' can hardly be read as including a reference to the possibly incriminating consequences of indeed remaining silent. The entrenchment of the right to remain silent independently of the information right should now be read as constitutionally prohibiting the use as incriminating evidence of the exercise by the accused of the right to remain silent while he or she was an arrested person. And that is why it is justifiable to omit a reference to the right to be warned, not only of the consequences of not remaining silent, but also of the consequences of remaining silent. The two rights read together compel the interpretation that no grave consequences may attach to exercising the right to remain silent during or after arrest. The abolition of the common-law protection against use of pre-trial silence as incriminating evidence[1] by the Criminal Justice and Public Order Act of 1994[2] in the United Kingdom required the caution upon arrest to be amended to a warning, not only that anything said might be used against the apprehended person in a court but also that silence inconsistent with anything relied upon at trial might harm the apprehended person's defence.[3]

The authority in favour of allowing negative inferences from a failure to testify at trial should not be read as allowing the use of pre-trial silence as positive evidence of guilt.[4] There are a number of reasons for this view: first, there is a world of difference between allowing the court to draw inferences from the very course of the trial before it, and allowing conduct by the accused before trial which amounted to the exercise of a right to be used as evidence at the trial. The character of the defence at trial, and whether it involves testimony from the accused to explain matters raised by the state, cannot easily be ignored in the determination of whether the onus has been discharged. What the accused did

[1] At common law an exercise of the right to silence, particularly after a caution about its existence, does not by itself amount to a positive piece of evidence of guilt. See *R v Patel* 1946 AD 903; *R v B* 1960 (2) SA 424, 426 (T); *S v Maritz* 1974 (1) SA 266 (NC). In England this was the position before 1994. See *Hall v The Queen* [1971] 1 WLR 298 (PC), *R v Gilbert* [1977] 66 Cr App Rep 237. This general rule is subject to a fine distinction between conduct (including silence) which can be taken as acceptance of an accusation of guilt, and hence as an admission (*R v Christie* [1914] AC 545 (HL); *S v Mogotsi* 1982 (1) SA 190 (B)), and a refusal to respond, especially if such silence is an exercise of the right to silence. Furthermore, a distinction, equally fine, has to be drawn between the circumstantial inference that may be drawn from the sudden and belated appearance of a defence like an alibi, on the one hand, and use of silence by itself as evidence of guilt, on the other. See *R v Littleboy* [1934] 2 KB 408, 413.

[2] Section 34.

[3] See *R v Condron and Condron* [1997] 1 Cr App Rep 185; *R v Bowden* [1999] 1 WLR 823 (CA).

[4] See *Attorney-General v Moagi* (1982) II BLR 124 (CA). See also *S v Lavhengwa* 1996 (2) SACR 453, 487 (W); § 51.5*(j)*(ii) infra; *Osman* (supra) at paras 19-22.

not say at some previous occasion, however, can be left out of the reckoning more readily. The accused at trial is fully aware of the fact that he or she is standing trial, that guilt is being determined by what people, including the accused, do or say at the trial, and that his or her testimony, or lack of it, will be his or her side of the story, as far as the court is concerned.[1] Upon apprehension, however, the picture is radically different. The arrested person is in a vulnerable position and has been told that nothing need be said, and that grave consequences may flow from saying anything.[2] Finally, the common law differs

[1] The awareness flows from the nature of the experience itself, as interpreted and explained to the accused by counsel or the court, as the case may be. If the accused is unable with guidance to comprehend the significance of what is going on, he or she would not be competent to stand trial.

[2] For a similar significance attached to the greater vulnerability of a suspect due to uncertainty than that of an arrested person, see *S v Sebejan & Others* 1997 (8) BCLR 1086 (W), 1997 (1) SACR 626, 633-4 (W). Therefore, if a trick is used to circumvent the arrested person's opportunity to claim the right to silence at a police interview, such evidence as emerges should not be admissible. See *R v Hebert* [1990] 2 SCR 151. This should apply also to a person not yet arrested, when the activity aimed at extracting the admission should properly have been conducted at a police interview. The vulnerability and ignorance arguments in *S v Sebejan* are most apposite here. This does not mean that all cases of entrapment violate the right to silence or the right against self-incrimination. But see *Mendes & Another v Kitching NO & Another* 1996 (1) SA 259 (E), 1995 (2) SACR 634, 646f (E)(Kroon J's view that an accused's right not to incriminate himself or his right to silence was not 'at issue' in a trapping case overstated the case.)

An interesting problem arose in *S v Van der Merwe* 1997 (10) BCLR 1470 (O), 1998 (1) SACR 194 (O). The accused had been approached by a policeman after a shooting incident, and the policeman had asked him what had happened, ignorant of the fact that the accused had been responsible for the shooting. The accused was not a suspect, and obviously not arrested, at that stage. The accused offered an exculpatory account, upon which the policeman cautioned him 'in terms of the Judges' Rules' and arrested him. The court held the statement to have been admissible. Reasons, or factors, were the exculpatory nature of the statement, the *bona fide* character of the policeman's actions, the spontaneity of the statement, the fact that the accused was not an ignorant person ('nie 'n oningeligte persoon nie'), the absence of disadvantage to the accused due to the statement, and the present attitude of the community to the scourge of crime. Ibid at 1476-7. The less said about the last factor, the better. 'Spontaneous' the statement was not, having been elicited by questioning by a police officer. 'Exculpatory' it could be only if viewed relative to a statement assuming full responsibility — after all, the statement led to the accused's immediate arrest. What is important is to recognize some similarities between a *mala fide* trap and a *bona fide* 'trap'. The misapprehension in the accused's mind as to the character of the questioning in a situation of extreme uncertainty and vulnerability should have led to a finding along the lines of *Sebejan*. If the conviction was substantially based upon this statement, one might justifiably feel a sense of unease about the turn of events. The absence of a caution was a mistake. The accused should not be the one to pay for it. The problem arose also in *S v Ndlovu* 1997 (12) BCLR 1785 (N). In this case it was unclear whether an offence had in fact been committed by anybody, but the fact that the appellant was followed and questioned in connection with a motor vehicle suspected to have been stolen, with a trap acting as intermediary in the process, illustrated the dangers of dodging interview safeguards by reliance upon uncertainty. It was disconcerting that IC s 25 could be regarded as 'of no relevance' in such cases. Ibid at 1791C. See also *S v Langa & Others* 1998 (1) SACR 21, 27 (T). See, generally, §§ 51.1*(a)*(iv) and 51.2 supra. In *S v Khan,* the accused had not been warned of his right to legal representation upon arrest or immediately before making a spontaneous confession at a time before the Interim Constitution had come into effect. 1997 (2) SACR 611 (SCA). This was lawful, but 'unfair'. Ibid at 620. The court wrote: 'What the unfairness . . . essentially did was to deprive appellant of the opportunity to be advised to remain silent. As against that, here was an accused who spontaneously, voluntarily, without improper influence or ill treatment, knowing of his right to silence and his privilege against self-incrimination, confessed, apparently reliably, to two murders'. Ibid at 621. It is unsurprising that Howie JA proceeded to hold that the factors in favour of admission outweighed those in favour of exclusion. That the seriousness of the charge was employed as a factor in favour of admission is disconcerting, the gravity of the consequences of the 'unfairness' in question surely belongs in the debit column.

in relation to the respective situations. The significance of expressly adding the substantive right to pre-trial silence to the rights of an arrested person must be something other than to deprive the arrested person of a common-law protection.

It is therefore disquieting to note that Jones J in *S v Nombewu* stressed that, although the warning required by IC s 25(2)*(a)* would 'extend not only to what was said but also to what was done',[1] the warning did not apply to '*every* act or omission by an accused person which [gave] rise to an adverse inference against him because it amount[ed] to a tacit admission', and that the learned judge invoked as illustration the common-law cases concerned with acquiescent silence, on the basis that 'action spoke louder than words'.[2] The learned judge's view that no warning as to silence was required in England[3] did not take into account the fact that the very sort of inference in question required the alteration of the caution in England. It is not suggested that our courts should require a similarly puzzling caution;[4] rather, it should be recognized that the absence of such a caution in our Constitution means that pre-trial silence is not to be used as evidence of guilt.[5]

At which precise occasion one must be warned of the right to silence, and when an earlier warning may still be said to be operative, are questions considered above under the discussion of counsel rights.[6] Where the relevant officer had deliberately refrained from warning the suspect at the scene of the pointing-out of a right to silence (the suspect having been so warned originally upon his arrest), so as not to discourage the suspect from making incriminating statements at the scene, it was hardly surprising that the court in *S v Seseane*[7] found such failure to

[1] 1996 (12) BCLR 1635, 1644 (E), 1996 (2) SACR 396 (E)('*Nombewu*').

[2] Ibid at 1645.

[3] *Nombewu* (supra) at 1646.

[4] What a suspect is to make of the following is something for criminal psychologists to ponder: 'You do not have to say anything but it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you say may be given in evidence.' *See R v Condron and Condron* [1997] 1 Cr App Rep 185 (CA)(For guidelines on inferences from silence in such cases.)

[5] This holding does not mean that every time the omission to speak carries criminal consequences the right to silence is involved. If fraud is perpetrated by means of non-disclosure, criminal liability has nothing to do with the right to silence. See §§ 51.1*(a)*(iii) and 51.4*(b)(i)* supra. This response is the short answer to the ingenious but, with respect, absurd argument raised in *S v Phallo & Others* 1998 (3) BCLR 352 (B). In order to get around the binding authority of *S v Jonathan & Andere* 1987 (1) SA 633 (A) in the context of accessory after the fact liability, the appellants argued that *Jonathan* was unconstitutional. The principle in *Jonathan* that was uncomfortable to the accused in *Phallo* was that one might be held liable as accessory after the fact to a crime which one might have committed oneself. *Jonathan* recognized that one might assist another to evade his or her crime by means of words as well as deeds. So, the argument went, one might do so also by means of silence. Hence the 'logical conclusion' that *Jonathan* violated the right to silence, and, lo!, that the holding in *Jonathan* was unconstitutional. The court evaded the silence question by pointing out that *Jonathan* did not hold that silence might constitute the *actus reus* of accessory-after-the-fact liability. *Phallo* (supra) at 364. The fact that the question could be left there proved the irrelevance of the constitutional argument to the principles from *Jonathan* that were actually applied in *Phallo*.

[6] See § 51.3*(f)* supra.

[7] 2000 (2) SACR 225 (O).

activate the right at the relevant moment decisive in rejecting the evidence thus elicited. This finding stands in stark contrast with the finding in *S v Ndhlovu & Others* that an adequate warning given to the relevant accused when he was arrested immediately before setting off to the pointing-out was so 'bound up' with the pointing out as still to have been operative for the purposes of the pointing-out.[1]

S v Thebus & Another concerned the use to be made by the prosecution at trial of the late emergence of an alibi defence — ie, of the fact that an alibi defence had not been asserted on an earlier occasion.[2] The Justices of the *Thebus* Court adopted four different approaches to the issue. The appellant, on arrest on suspicion of involvement in an offence committed in Ocean View, Cape Town, was asked whether he wished to give an account. His answer was the rather enigmatic one that his family had been in Hanover Park at the relevant time. At trial, the appellant presented an alibi that placed him neither in Ocean View nor in Hanover Park. He was cross-examined on the version he had put about his family's presence in Hanover Park. He explained that he had told the police where his family had been at the time, not where he had been. He could not offer an explanation for why he would have done this. The interesting question was whether this line of cross-examination, and inferences arising from the appellant's performance, violated his right to silence. The view adopted by Ngcobo J and Langa DJP that this had nothing to do with the right to silence, had much to recommend it. The other Justices all dealt with the issue as one involving a deliberate failure to speak (ie not mentioning the alibi earlier). But the judgment of Ngcobo J and Langa DJP implicitly warned against the fallacy that every version offered at trial that differed from a version offered when questioned pre-trial entailed remaining silent pre-trial about the trial version. The fallacy is that every version *x* is silent about version *y* to the extent that the two differ. Indeed, quite the contrary is usually true — every version *x* talks about version *y* to the extent that the two differ, since version *x* implies that version *y* is false to the extent of the difference. When the appellant had told the police officer that his family had been in Hanover Park at the time (on being asked to account in respect of an offence occurring in Ocean View), what was he saying? If he was implying that he had also been in Hanover Park, then his alibi contradicted that statement, and he ought surely to have been cross-examined accordingly, without engaging the right to silence. In testing whether that was indeed what he was implying, cross-examination about the implausibility of merely telling the police where his family had been made perfect sense. All that had happened in the instant case was that the appellant had been tested in cross-examination on his contradictory or nonsensical statements. Silence did not really enter the picture.[3]

[1] 2001 (1) SACR 85 (W) at paras 10–11, 40.
[2] *S v Thebus* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC), 2003 (2) SACR 319 (CC)('*Thebus*').
[3] See *Thebus* (supra) at paras 119 and 121.

On the assumption that the case was properly viewed as one concerning the failure to mention an alibi earlier (as the rest of the Court viewed it), the right to silence appeared to score a victory, but one threatened by imminent defeat at the hands of defence discovery. The 'main judgment' (three judges on the silence issue) found the use of a pre-trial failure to mention an alibi to be constitutionally valid. However, the failure must go to credibility and not to guilt.[1] The concurrence of four judges that constituted the majority grouping on this issue found this distinction to be too close for comfort,[2] a logically appealing scruple, and did not countenance cross-examination of an accused on such pre-trial silence — the victory.[3] The threat to the victory was the suggestion that an adequate pre-trial warning that failure to mention an alibi might be used at trial would take care of the violation.[4] This conclusion should give us pause. In the United Kingdom, a suspect is entertained with the following gibberish: 'You do not have to say anything. But it may harm your defence if you fail to say something now on which you later rely at your trial. Anything you do say may be used against you.'[5] Furthermore, why accord an alibi special treatment? Why allow (subject to a confusing warning) making something of the failure to mention an alibi but not making something of the failure to mention other exculpatory evidence? Why tell the suspect he or she has the 'right to silence' at all? One should either tell a suspect that he or she has the right not to say anything, and actually mean it, or scrap the whole idea.

What was particularly welcome, if somewhat atypical, was the avoidance by the majority group on the silence issue of an *ad hoc* approach to the question whether such silence could legitimately be used or not. In his separate concurring judgment, Yacoob J asked, quite legitimately, why an *ad hoc* approach should be avoided in the case of pre-trial silence, whilst a fairness barometer was used in other cases.[6] One may point out that a distinction must be maintained between the question of whether a violation occurred and the question whether the trial has been rendered unfair as a result.[7] But the strong insistence on the police discipline principle to justify outlawing the use of pre-trial silence as a deterrent[8] remained noteworthy. Why limit this approach to the use of pre-trial silence?

[1] *Thebus* (supra) at paras 59-68.

[2] Ibid at para 90.

[3] Ibid at para 91. This group found cross-examination on the Hanover Park statement not to involve the right to silence. Quite how such cross-examination could be sensibly conducted without probing what that statement was meant to imply about the accused's own presence, and therefore to what extent it was different from the trial alibi, was not clear.

[4] Ibid at para 92.

[5] The reservations about confusing warnings expressed by Yacoob J echoed such worries. Ibid at para 111.

[6] Ibid at paras 97 and 109.

[7] Indeed, the majority group held the violation to have occurred, but the trial not to have been rendered unfair as a result. Ibid at para 93.

[8] Ibid at para 85.

(iii) *The right against compelled self-incrimination*

The link between the right against compelled pre-trial self-incrimination and the context of the trial itself was forged by the Constitutional Court in *Ferreira v Levin NO & Others*; *Vryenhoek & Others v Powell No & Others*[1] and *Bernstein & Others v Bester & Others NNO*,[2] and reinforced in *Nel v Le Roux NO & Others*.[3] In *Ferreira* the subjection of company directors to which, inquiries conducted in the course of the liquidation of companies under s 417(2)*(b)* of the Companies Act 61 of 1973 provided no protection against use of the answers elicited in subsequent criminal proceedings, was held to violate the right against self-incrimination. The incrimination would render the envisaged criminal proceedings unfair. The criminally enforceable compulsion to answer was itself justifiable under the limitation clause, but the absence of a use immunity in the criminal proceedings could not be justified under the limitation clause. The result of this approach was the effective transformation of the right against self-incrimination into a use immunity which operated only at the specific proceedings where the incrimination might occur: where the use immunity would apply, the right was exhausted; no complaint based on self-incrimination had any meaning outside that context.[4] Nevertheless, one could still validly refuse to answer questions if other rights would be threatened by the answers. However, the threatened violation would be upheld as justified under limitation analysis.[5]

[1] 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)('*Ferreira*').

[2] 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC)('*Bernstein*') at para 60f.

[3] 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC)('*Nel*'). See also *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C), 1995 (2) BCLR 198 (C).

[4] *Nel* (supra) at para 4 ('In view of the transactional indemnity and use immunity provisions in section 204(2) and (4) respectively of the CPA, the applicant could not validly (and did not) object to answering self-incriminating questions.') See also *Dabelstein & Others v Hildebrandt & Others* 1996 (3) SA 42, 66 (C), in the context of Anton Piller orders. This was the foundation for the short shrift accorded the arguments in *Thatcher v Minister of Justice and Constitutional Development* 2005 (4) SA 543 (C) that the right to silence and against compelled self-incrimincation had been violated in that case. The applicant brought review proceedings against various official acts that amounted to granting consent that he be questioned by officers of a foreign state concerning his knowledge of facts relating to an attempted coup d'etat in that state. Since the applicant was being prosecuted in South Africa in connection with the foreign coup, it was argued that he should not be submitted to such questioning, which would be used both to gather ammunition against him in the South African proceedings and to prepare a case for his possible extradition to face an unfair trial and a potential death penalty in the foreign state, at least until the finalization of his criminal case. The rejection of a similar argument in *Mitchell & Another v Hodes & Others NNO* 2003 (3) SA 176 (C), which had found that no substantive basis for distinguishing the case from the *Ferreira* use immunity had been presented, was invoked as almost axiomatically suggesting the untenability of the applicant's argument in *Thatcher*. Ibid at paras 92 to 94.

[5] See *Bernstein* (supra) at para 61; *Nel* (supra) at para 6ff. The striking consequence of this approach is that, because the ability to refuse to answer criminally compelled questions would depend upon a final determination also of the applicability of the limitation clause, a person faced with compulsory questioning is able to avoid criminal liability for a refusal to answer, if and only if the fine balancing entailed by a limitation analysis would be decided in his or her favour. However,a 'just excuse' for the purposes of avoiding criminal liability should be based upon more subjective factors than the possible outcome of a limitation analysis entertaining state interests.

The requirement of compulsion laid down in FC s 35(1)*(c)* and (3)*(j)* has been interpreted not to include the Hobson's choice between sacrificing one's interests in non-criminal proceedings and incriminating oneself as far as future or pending criminal proceedings are concerned. In *Davis v Tip & Others*[1] and *Seapoint Computer Bureau (Pty) Ltd v McLoughlin & Others NNO,*[2] the courts decided that only coercive compulsion actually to answer questions, as opposed to the exercise of a free choice to defend one's interests in the non-criminal proceedings, amounted to the sort of compulsion required for a violation of the right against self-incrimination.[3] The *Davis* court based its finding upon IC s 25(3)*(c)* — the presumption of innocence and the right to silence at trial — rather than on the self-incrimination provision. The *Seapoint* court first based its decision on the equation of the common law right to silence and the right against self-incrimination, and then, perplexingly, rejected the application of a remedy granted in the self-incrimination sphere at common-law, partly because the authority in question was not concerned with the 'right to silence'.[4] The *Seapoint* court's identification of the presence of the relevant kind of 'coercive power', as emphasized in a series of Canadian cases,[5] missed the point. The cases in question were at pains to point out that the kind of coercion which the *Seapoint* court required was *not* a requirement for the applicability of the self-incrimination right. A lesser form of 'coercion' in the background is deemed sufficient.[6] The lack of an actual compulsion to speak was similarly decisive in *Osman & Another v Attorney-General of Transvaal.*[7]

[1] 1996 (1) SA 1152 (W), 1996 (6) BCLR 807 (W)('*Davis*').

[2] 1996 (8) BCLR 1071 (W)('*Seapoint*').

[3] See *S v Mbolombo* 1995 (5) BCLR 614 (C)(Bail). *Mbolombo*'s approach was based on *dicta* in *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 30. On this view, the right against self-incrimination was grounded upon an abhorrence of coercive methods of extracting confessions from accused persons especially by the Star Chamber in the seventeenth century. This is the orthodox view of the right's history. See LW Levy *Origins of the Fifth Amendment* (1968). In *Ferreira,* Ackermann J noted that recent scholarship in legal history had cast doubt upon the link between the privilege against self-incrimination and the horrors of coerced extraction of evidence during the seventeenth century. Ibid at para 92 n124. See JH Langbein 'The Historical Origins of the Privilege Against Self-Incrimination at Common Law' (1994) 92 *Michigan LR* 1047 (Langbein argues, and musters impressive material in support, that the structure of the pre-eighteenth-century English criminal trial was completely inconsistent with the right to remain silent, being focused upon forcing or allowing the accused to tell his side of the story, and that the origins of the right to remain silent and the privilege against self-incrimination must be sought in the development of the adversarial process and the enjoyment of legal representation by the accused.) Ackermann J also refers to the theory offered by Eban Moglen. See E Moglen 'Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege against Self-Incrimination' (1994) 92 *Michigan LR* 1086. This theory of the justifying principle behind the silence rights supports the status of the presumption of innocence as the governing rationale. The recognition of this governing rationale in *Zuma* should not be obscured by the references to the history of compelled confessions, given that *Zuma* itself dealt with the operation of the principle in the context of involuntary confessions, and that the Star Chamber history was apposite to that context.

[4] *Seapoint* (supra) at 1081 (Rejects the applicability of *Jamalodien v Ajimudien* 1917 CPD 293.)

[5] *Phillips v Nova Scotia (Commission of Enquiry into the Westray Mine Tragedy)* (1993) 117 NSR (2d) 218; *Williams v Deputy Superintendent* 18 CRR (2d) 315.

[6] See *edcor Bank Limited v Benhardien* 2000 (1) SA 307 (C).

[7] 1998 (4) SA 1224 (CC), 1998 (11) BCLR 1362 (CC), 1998 (2) SACR 493 (CC)('*Osman*').

A facial challenge to a statutory provision — that created the offence of being unable to give a satisfactory account of possession of goods reasonably suspected of being stolen — failed on self-incrimination and silence grounds. It failed because the statute did not penalize silence or a failure to account. It penalized an *inability* to give a satisfactory account, ie being in a position where one was not possessed of a satisfactory explanation. The satisfactory account could have been produced at any time before judgment — hence the court's analogy with the position of an accused unable to rebut a *prima facie* case.[1] The *Osman* Court held that the section did not compel anything.[2] Since the real target of the section is harbouring stolen goods, the mechanism of explanation is nothing more than an evidential tool disguised as a substantive offence.[3]

Msomi v Attorney-General of Natal & Others[4] invoked the division between 'real' and 'communicative' evidence emphasized in Canada,[5] and the notion that only the compulsion of the latter could be regarded as violating the right against self-incrimination.[6] In this respect, a distinction should be drawn between real evidence independent of the person of the accused and real evidence intimately connected with the person of the accused. Compulsory production of the former does not by itself amount to self-incrimination.[7] Compulsory production of the

[1] *Osman* (supra) at paras 15, 19–23.

[2] Ibid at para 11.

[3] See § 51.1*(a)*(iii) supra.

[4] 1996 (8) BCLR 1109 (N)('*Msomi*').

[5] See *R v Collins* [1987] 1 SCR 265.

[6] See *S v Huma & Another* 1996 (1) SA 232 (W); *S v Maphumulo* 1996 (2) BCLR 167 (N), both cited in *Msomi* (supra). All three cases dealt with fingerprints. See also § 51.1*(a)*(ii) supra; *S v Vilakazi en 'n Ander* 1996 (1) SACR 425, 428 (T). *Msomi* followed the American decision in *Schmerber v State of California* 384 US 757 (1966)(Blood sample not self-incrimination). In Canada this reasoning was applied by the Ontario Court of Appeal to a breath sample. *R v Altseimer* (1982) 38 OR (2d) 783 (CA). But see *R v Therens* [1985] 1 SCR 613 (Supreme Court holds that a breath sample amounts to conscription of the accused against himself). See also *R v Dersch* [1993] 3 SCR 768 (Blood sample) and *R v Greffe* [1990] 1 SCR 755 (Object extracted from rectum). It should be pointed out that the self-incrimination principles recognized to be involved in these Supreme Court decisions are difficult to disentangle from violations of the right to counsel. In England the privilege against self-incrimination at common law is interpreted as not extending to the compelled production of intimate samples. See *R v Apicella* (1985) 82 Cr App Rep 295 (CA); *R v Smith* [1985] 81 Cr App Rep 286 (CA); and *R v Cooke* [1995] 1 Cr App Rep 318. On the confirmation of the communicative requirement, see *S v Mokoena* 1998 (2) SACR 643 (W); *S v Ngwenya* 1999 (3) BCLR 308 (W)(Dismissing the notion of a self-incrimination dimension at identification parades, in the sphere of counsel rights.) See also § 51.3*(f)* supra.

[7] The case of the compulsory production of evidence often straddles the line between communicative and real evidence, particularly when the real evidence is documentary evidence. It is important first to separate questions of *seizure* from questions of compelled *production*, and then to separate compelled *production* from compelled *disclosure*.

(1) Seizure and production: *Seizure* of pre-existing evidence independent of the person is not compelled self-incrimination. It may violate privacy, and such violation may have evidential consequences. For the privacy question, see *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C), 1995 (2) BCLR 198 (C)('*Park-Ross*') and *Key v Attorney-General, Cape of Good Hope Provincial Division, & Another* 1996 (4) SA 187 (CC), 1996 (6) BCLR 788 (CC)('*Key*'). For more on the right to privacy, and its relation to search and seizure, see D McQuoid-Mason 'Privacy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) § 38.3*(a)*(ii). Documents, although containing 'communications' from their maker, do not seem to become

latter may be a different matter.[1] The recognition in *S v Hlalikaya & Others*[2] of a

compulsorily produced communicative evidence when they are seized. *United States v Fisher* 425 US 391 (1976); *United States v Doe* 465 US 605 (1984). For critical and comprehensive discussion of this issue, see DE Will 'Dear Diary — Can You be Used against Me?' (1994) 35 *Boston College LR* 965. The compelled *production* of incriminating pre-existing evidence known to be in existence should also not by itself violate the right against self-incrimination. But see *Boyd v United States* 116 US 616 (1886)(Reliance upon the Fifth Amendment (self-incrimination) coupled with the Fourth Amendment (unreasonable searches and seizures) led the court to declare compulsory production of documents (incriminating invoices) *per se* to violate the right against self-incrimination. This aspect of the case was seemingly overruled in *United States v Fisher*.) In *Bernstein*, Ackermann J implicitly distinguished the possible privacy infringement inherent in a compelled search and seizure from questions of self-incrimination: 'In the present context a claim to privacy can surely only be founded on the content of the information which the examinee is being forced to disclose, not on his desire not to disclose it.' *Bernstein* (supra) at para 64. The right against self-incrimination was not directly claimed in *Bernstein* for the production of documents — as the claim would in any event have been covered by the decision in *Ferreira*. In *Park-Ross*, the court dismissed self-incrimination complaints against production and inquisition powers conferred by s 5(8) of the Investigation of Serious Economic Offences Act 117 of 1991 on the basis that the persons concerned were not arrested or accused at the relevant time, and that a use immunity at criminal proceedings against 'evidence given by a person' in such inquiries would provide adequate protection of self-incrimination rights. The court did not distinguish the documents produced, on the one hand, from questions answered and evidence (including documents) discovered as a result of questions answered, on the other. In *Key* the attack upon *seizures* of documents was framed on privacy grounds and dismissed on the basis that the seizures were lawfully carried out in the absence of constitutional rights before the passing of the Interim Constitution. The claim to a use immunity based on *Park-Ross* was therefore primarily a question of the consequences of possible privacy infringements. The Court endorsed the reasoning in *Ferreira, Bernstein*, and *Nel* regarding self-incrimination use immunities and held this reasoning to be applicable to the claim before it. *Key* (supra) at paras 10-11. This should perhaps not too readily be regarded as tacit approval for the notion that the right against self-incrimination did apply to compulsory production of documents *per se*. Nevertheless, the extension of the privilege against self-incrimination in England to Anton Piller orders and Mareva injunctions seems to cover the very production of the documents themselves, irrespective of any communicative significance in disclosure. See *Rank Film Distributors Ltd & Others v Video Information Centre & Others* [1981] 2 All ER 76 (HL) and *AT&T Istel Ltd & Another v Tully & Others* [1992] 3 All ER 523 (HL). For criticism of the Lord Chancellor's Department Consultation Paper, see *The Privilege Against Self-Incrimination in Civil Proceedings* (1992) at para 30. Approval of the English cases expressed in *Dabelstein v Hildebrandt & Others* might indicate endorsement of the application of self-incrimination principles to the production of documents *per se*, although the issue was not addressed. 1996 (3) SA 42 (C)('*Dabelstein*').

(2) Production and disclosure: *Disclosure* of (the existence of) documents, which disclosure leads to compelled production or seizure of the documents in question, creates self-incrimination problems, first, because the disclosure may be used as an admission and secondly, because of the problem of the 'derivative use' of compelled *testimony* (the disclosure) which is entailed by the use of the documents as evidence. See *United States v Fisher* (supra) at 410). The second problem was addressed in *Dabelstein* (supra) at 66-67 (Regarding the use of documents obtained by means of interrogation under an Anton Piller order.) See also *Baltimore Department of Social Service v Bouknight* 493 US 549 (1989)(Supreme Court held that an order addressed to a mother to produce a child to the court involved the Fifth Amendment because of the confessional effect of the act of production. Of course, an order to 'produce' documents the existence of which is unknown or in dispute would amount to an order to disclose and produce, and the communicative aspect of the production would involve self-incrimination problems.)

[1] A bullet lodged in the body of the accused is an alien body the forcible removal of which may entail invasions of bodily integrity, but not self-incrimination. See *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C); *Minister of Safety and Security & Another v Xaba* 2004 (1) SACR 149 (D); *S v Orrie & Another* 2004 (1) SACR 162 (O).

[2] 1997 (1) SACR 613 (SE).

self-incrimination dimension to a suspect's standing in an identity parade may well be seen as softening the 'communicative' requirement. And the test laid down in *S v Melani*[1] — that conscription by the accused against himself 'through some form of evidence emanating from himself' — can be read as authority for a wider definition than that applied in *Msomi*.[2] But in *S v Mokoena*[3] *S v Ngwenya*[4] and *S v Monyane*,[5] the *Msomi* requirement of a communicative act was reaffirmed in the sphere of counsel rights. In all of these cases, the WLD held identification parades not to involve self-incrimination at all.[6] Furthermore, the rather firm confirmation of the communicative or testimonial requirement by the Supreme Court of Appeal in *Levack v Regional Magistrate, Wynberg*,[7] in the context of the compulsion of a voice sample, probably put paid to the extension of the sphere of self-incrimination beyond the truly testimonial. More important, however, is the fact that a recognition of the status of the presumption of innocence as the governing rationale behind the cluster of silence rights would lead courts to acknowledge the argument by counsel in *Msomi* that these rights extend beyond the principle *nemo tenetur se ipsum prodere* to a principle that, since the state is to bear the full burden of proving its case, the individual should not be obliged to assist the state in any way in proving its case against him or her.[8] In *R v S (RJ)*[9] cited with approval by Ackermann J in *Ferreira v Levin*,[10] the Canadian Supreme Court discussed the right against self-incrimination in terms of protecting the person concerned 'against assisting the Crown in creating a case to meet'. This principle was expressly accepted in *S v Mathebula & Another* as part of the right to a fair trial.[11] The seamless web of silence rights recognized by the Constitutional Court

[1] 1995 (4) SA 412 (E), 1996 (2) BCLR 174, 191 (E), 1996 (1) SACR 335 (E).

[2] This is possible especially given the fact that the learned judge did apply his mind to the question of exceptions, and confined these to 'the discovery of existing facts or objects and not to incriminating evidence of the accused himself'. Ibid at 191-92. Evidence emanating from the accused's own body or movements is therefore not to be classed among the 'existing facts or objects' exempted from the scope of the right.

[3] 1998 (2) SACR 617 (W).

[4] 1999 (3) BCLR 308 (W).

[5] 2001 (1) SACR 115 (T).

[6] See § 51.3*(f)* supra.

[7] 2003 (1) SACR 187 (SCA) at paras 19 and 21.

[8] 1996 (8) BCLR 1109, 1117 (N).

[9] [1995] 1 SCR 451, 26 CRR (2d) 1, 76.

[10] *Ferreira* (supra) at para 145.

[11] 1997 (1) BCLR 123, 147 (W)('*Mathebula*'). See the discussion of *Msomi* (supra), *S v Vilakazi* 1996 (1) SACR 425 (T) and *Mathebula* (supra) in § 51.1*(a)*(ii) supra. The theory that the right against self-incrimination is based on the right not to be compelled to assist the state was derisively referred to as the 'fox hunt' theory by Jeremy Bentham. *Rationale for Judicial Evidence Considered* (1827 ed) 238f. Bentham's derision was aimed at the very idea of the privilege against self-incrimination. For judicial recognition of this factor as integral to the right against compelled self-incrimination in the United States, see *Miranda v Arizona* 384 US 436, 460 (1988); *Murphy v Waterfront Commission* 378 US 52, 55 (1964). See also JH Wigmore (JH Chadbourn ed) *Evidence in Trials at Common Law* (1974) § 2251. In Canada further support for this view can be found in *Thomson Newspapers Ltd v Canada (Director of Investigation & Research, Restrictive Trade Practices Commission* [1990] 1 SCR 425, 428. For the role of this factor as the foundation of the right against self-incrimination, see M Hor 'The Privilege against Self-Incrimination and Fairness to the

in *Zuma*, although unlikely to please those who prefer to distinguish sharply between the disparate immunities collected under the right to silence,[1] acts as clear authority to employ the golden thread in that web, the presumption of innocence, as the governing principle in determining the extension and the development of the scope of the rights in question.

The use of a principle of not being obliged to assist the state in proving its case has significance for the question of the admissibility of 'derivative evidence' obtained because of compelled statements. This principle is especially relevant where the statements themselves would be subject to the use immunity. In *Ferreira v Levin,* Ackermann J cited with approval the conclusion of the Canadian Supreme Court in *R v S (RJ)*,[2] that such derivative evidence 'though not *created* by the accused and thus not self-incriminating by definition' was 'self-incriminating none the less because the evidence could not otherwise have become part of the Crown's case'.[3] Ackermann J further approved of the granting of 'discretion' to exclude such evidence to ensure a fair trial.[4] The term 'discretion' is misleading if it refers to the duty of the trial judge to ensure compliance with the constitutional requirement of a fair trial. The *Ferreira* majority's statement that derivative evidence was 'subject to "fair criminal trial standards"'[5] is preferable.[6]

In *Dabelstein & Others v Hildebrandt & Others*[7] the rule applied in England in the context of *Anton Piller* orders and *Mareva* injunctions — that self-incrimination was concerned only where there was a 'real and appreciable risk' of criminal proceedings being taken — was accepted by the Cape Provincial Division.[8] The question whether the right against self-incrimination, as opposed to the

Accused' (1993) *Singapore Journal of Legal Studies* 35 ('Conceptually, it would seem that, if there is any single organizing principle in the criminal process, it is the right of the accused to resist any effort to force him to assist in his own prosecution.') See also M Schiller 'On the Jurisprudence of the Fifth Amendment Right to Silence' (1979) 16 *American Criminal LR* 197, 218ff; C Whitebread & C Slobogin *Criminal Procedure* (2nd Edition, 1986) 323.

[1] See § 51.4*(b)(i)* supra.

[2] [1995] 1 SCR 451.

[3] Ibid at para 145.

[4] Ibid at para 153. See also *Dabelstein* (supra) at 66-67 (Court endorses the derivative evidence 'discretion', on the authority of *Ferreira*, for the purposes of evidence obtained by the use of Anton Piller orders.)

[5] *Ferreira* (supra) at para 185 (Chaskalson P).

[6] See § 51.1*(b)*(ii) supra.

[7] 1996 (3) SA 42 (C).

[8] See *Rank Film Distributors Ltd & Others v Video Information Centre & Others* [1982] AC 380 (HL); *AT&T Istel Ltd & Another v Tully & Others* [1992] 3 All ER 523 (HL); *Renworth Ltd v Stephenson* [1996] 3 All ER 244 (CA). It is to be stressed, however, that self-incrimination in England is not limited to criminal incrimination. It extends also to 'penalties', which include penalties for civil contempt. See *Bhimmji v Chatwani (No 3)* [1992] 1 WLR 1158. It extends to penalties imposed by the European Economic Community for breach of the terms of the EEC Treaty (*Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547 (HL)('*Rio Tinto*')). It does not extend to civil liability, as the Constitutional Court in *Bernstein* pointed out. *Bernstein* (supra) at para 115. Ackermann J rejected a claim based on 'equality', alternatively on 'fairness in civil proceedings', that use of compelled self-incriminating evidence at civil proceedings provided the adversary with an unfair advantage. Ibid at paras 102-23.

common-law privilege, was possessed by corporations was avoided in *Seapoint Computer Bureau (Pty) Ltd v McLoughlin & Others NNO*.[1] The applicant corporation relied on the right against self-incrimination of one of its directors. In England, the better view is that the privilege does apply to corporations.[2] In the United States[3] and Canada the human rights status of the privilege entails its non-applicability to corporations. The common-law rule's applicability to corporations was reversed in Canada as a result of the Charter incorporation of the right.[4] This 'colonization' of the privilege by natural persons because of its human rights status has been recognized even where, as in Australia, there is no Bill of Rights.[5]

(c) The right to be brought before a court

FC s 35(1)*(d)* entrenches an obligation upon the authorities to bring the arrested person before a court as soon as reasonably possible, but not later than 48 hours after arrest. Allowance is made for the expiry of the period during non-court days.[6] It is therefore possible for the arrested person to claim that his or her right has been violated if he or she is brought before a court within 48 hours of arrest, when it would have been reasonably possible to bring him or her to court sooner.[7] The reference to a 'court' in FC s 35(1)*(d)*, as opposed to an 'ordinary

Reliance was placed upon the American decision in *Kastigar et al v United States* that government might compel testimony from a witness invoking the Fifth Amendment by conferring on the witness use and derivative use immunity in criminal proceedings only. 406 US 441 (1972). For the purposes of this analysis, it is significant that the court did not hold that the right against self-incrimination did not apply to the production of documents in any event.

[1] 1996 (8) BCLR 1071 (W).

[2] See *Triplex Safety Glass Co Ltd v Lancegay Safety Glass (1934) Ltd* [1939] 2 KB 395, 404 (CA); *Rio Tinto* (supra)(Where it was assumed to attach without argument); *Sociedad N de Co Angola UEE v Lundqvist* [1991] 2 QB 310 (CA). But see *British Steel Corporation v Granada Telivision Ltd* [1981] AC 1096, 1127 (CA)(Dictum to the contrary by Lord Denning does not reflect the weight of authority.)

[3] See *Bellis v United States* 417 US 85 (1974); *Braswell v United States* 487 US 99, 109 (1988).

[4] The common-law applicability of the privilege to corporations was recognized in *Webster v Solloway Mills & Co* [1931] 1 DLR 831, and reversed because of the new status of the privilege as a human right in *R v Amway Corporation* [1989] 1 SCR 21. See also *BC Securities Commission v Branch* [1995] 2 SCR 3, 29.

[5] *Environment Protection Authority v Caltex* (1993) 178 CLR 477.

[6] See also s 50 of the Criminal Procedure Act 51 of 1977 as amended by Act 85 of 1997, which came into force on 1 August 1998. Although gaps left by the provisions of IC s 25(2)*(b)* and FC s 35(1)*(d)* are filled by having recourse to the statute, such gaps as exist mean that there is no constitutional protection against adverse amendment of the statute in the areas concerned.

[7] There is a body of jurisprudence under the European Convention on Human Rights relating to the meaning of the right 'promptly' to be brought before a court, but, given that the right in question does not specify a maximum period, the authority in question will be of limited use as far as a 'reasonable possibility' before 48 hours is concerned. See *Brogan et al v United Kingdom* (1988) 11 EHRR 117 (The ECHR Commission considered a period of four days and eleven hours not to violate the 'promptness' requirement. The contrary opinion of the ECHR Court was decided by a majority of twelve to seven.) See also AH Robertson & JG Merrills *Human Rights in Europe: A Study of the European Convention on Human Rights* (3rd Edition, 1993) 77-79. See, further, *Garces v Fouche & Others* 1998 (9) BCLR 1098 (Nm)(Recognized the logical implication of the equivalent provision in the Namibian Constitution: the 48-hour period was a maximum, not an entitlement. A bail application could be brought before that period had expired.)

court of law' in IC s 25(2)*(b)*, presumably has the effect that the kind of court envisaged need not be the kind associated with the full rigours of the right to a fair trial.[1]

According to FC s 35(1)*(e)* (the right to be charged, informed, or released), at the first court appearance the arrested person is entitled to be charged or informed of the reason for further detention. It is a pity that it is not stipulated how or even by whom the informing is to be done. A strict reading would entitle the authorities to bring the arrested person before a court, not necessarily have anything decided by the court, and then to inform the arrested person of the reasons why he or she is to remain in detention. FC s 35(1)*(e)* makes it clear that the charging or informing is to be done 'at the first court appearance after being arrested'. The right should clearly be read as requiring the informing of continued detention to be a communication to the arrested person of the decision of the judicial officer by the judicial officer himself or herself.

The structure of the speedy process rights in IC s 25 left a potential gap between IC s 25(2)*(b)* and (3)*(a)*. The latter right related only to the period after charge. This gap seems to have been filled by the amendment to the right of an *accused* to trial within reasonable time contained in FC s 35(3)*(d)*. FC s 35(3)*(d)* omits the qualification 'after having been charged' (IC s 25(3)*(a)*) and substitutes the right 'to have their trial begin and conclude without unreasonable delay'. But the gap has been filled only for the *accused* person at trial looking back at what went before.[2] Under FC s 35(1)*(d)* one is still faced with the question as to what speedy process rights the *arrested* person has after he or she has been brought to a court within 48 hours after arrest and has been *informed* that his or her detention is to continue. The fact that violations of speedy trial rights may vitiate the fairness of the trial is cold comfort to the arrested person who never reaches trial at all.

Article 5(3) of the European Convention on Human Rights, for example, expressly provides an arrested person with the right (1) to be brought before a court 'promptly' (although no hour limit is provided), and (2) to trial within a reasonable time or to release pending trial. This latter right is to be distinguished from the accused person's right, provided in art 6(1), to a fair and public hearing

[1] For more on *De Wilde, Ooms and Versyp v Belgium* (1971) 1 EHRR 373 and *Weeks v United Kingdom* (1987) 10 EHRR 293, see § 51.3*(e)* supra. The European jurisprudence on the equivalent right in art 5(3) of the ECHR should not be invoked for the meaning of 'court' in the South African context, since art 5(3) expressly allows the arrested person to be brought 'before a judge *or other officer authorized by law to exercise judicial power*' (emphasis added). Article 5(3) has been held to apply to the Swiss District Attorney acting in his investigative capacity. See *Schiesser v Switzerland* (1979) 2 EHRR 417. Strasbourg jurisprudence based on allowances for inquisitorial systems of justice should not be permitted to dilute the rights of an arrested person under an adversarial system. See *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 57 (The 'trial' required for detention under FC s 12 had to be presided over or conducted by 'a judicial officer in the court structure established by the 1996 Constitution . . . in which s 165(1) ha[d] vested the judicial authority of the Republic.')

[2] On the right of an accused to trial within a reasonable time, see § 51.5*(f)* infra.

within a reasonable time.[1] The speedy trial right in South Africa, as in the United States and Canada, is to be viewed from the perspective of the accused, given that there is no speedy process right for an arrestee. But in the United States the absence of speedy process rights relating to the pre-charge period is easily circumvented by recourse to the due process clause.[2] And in Canada, although the speedy trial right is expressly confined to those 'charged with an offence', due process seepage from s 7 of the Charter may cover pre-charge delay which is not easily accommodated under the general right to a fair trial.[3]

The problem may be solved by extrapolation from the judgment of the Witwatersrand Local Division in *Bate v Regional Magistrate, Randburg & Another*.[4] Stegman J decided that an accused person whose trial was being delayed unreasonably could before the trial rely on a 'threatened violation' under IC s 101(3) of his or her right to trial within a reasonable time under IC s 25(3)*(a)*, and that deciding otherwise

> would condemn accused persons who had good reason to fear that the trial they were facing would be in violation of their right to a fair trial, to submit to the inconvenience and expense of an unfair trial before being able to persuade this court to do anything about it . . . [I]f a proper case is made out that a trial which is due to start will be a violation of the accused's right to a fair trial, this court should intervene at once and should not leave the accused to be subjected to an unfair trial in the hope that he will be acquitted on some other ground and that the question of his constitutional right to a fair trial may never have to be dealt with.[5]

The *arrested* person would therefore be able to rely on this reasoning, and under the Final Constitution, the arrested person, or somebody acting for him or her,

[1] See R Beddard *Human Rights and Europe* (3rd Edition, 1993) 138. JES Fawcett *The Application of the European Convention on Human Rights* (2nd Edition, 1987) 105-108 (Describes the rather complicated relationship and overlap between these two undue delay rights.) See also *Neumeister v Austria* (1968) 1 EHRR 91 (A two-year detention period encompassing a 15-month period without any interrogation amounted to a violation of art 5(3) but not of art 6(1).); *Wemhoff v Germany* [1968] ECHR 2 (The Court explained that art 5(3) covered persons charged and detained and the period until the judgment of the court of first instance and that art 6(1) extended from the initial arrest to the final determination of the charges, comprising the entire appellate stage. Fawcett (supra) at 107 points out, however, that the application of art 6(1) to the period after arrest and before charge should have no bearing on the applicability of art 5(3) to that period.); *Koplinger v Austria* (1966) Application No 1850/63, 9 *Yearbook* 240 (The Commission was of the opinion that 'the reasonable nature of the period concerned should be assessed in a less restrictive manner when the length of proceedings under Art 6(1) and not the period of detention under Art 5(3) of the Convention is being considered'.) See also S Stavros *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: An Analysis of the Convention and a Comparison with Other Instruments* (1993) 77.

[2] *United States v Lovasco* 431 US 783 (1977).

[3] *R v L (WK)* [1991] 1 SCR 1091. Once again, the concurrent operation of the general right to a fair trial and the principles of fundamental justice seemingly rendered arbitrary the decision whether the question was one under s 11*(d)* or s 7.

[4] 1996 (7) BCLR 974 (W)('*Bate*').

[5] *Bate* (supra) at 991-92. For more on the aspects of this judgment which deal with an *accused* person's right to trial within a reasonable time, see § 51.5 infra.

would claim under FC s 38 that the right under FC s 35(3)*(d)* was 'threatened', and the court in question would then decide this 'constitutional matter' under FC s 172, and 'make any order that is just and equitable' under FC s 172(1)*(b)*. The purpose of the right to be brought to court is to force the state to declare its hand when it is purporting to detain a person 'for allegedly committing an offence'. In other words, the purported purpose — charging the person with an offence, and prosecuting the charge before a court — entitles the arrested person to demand treatment as one who is reasonably soon to become an accused and tried person, and if his or her treatment under detention is such as to vitiate the envisaged trial, the arrested person has reason to complain *qua* arrested person. FC s 35, however, does not provide a basis for this complaint after the requirements of FC s 35(1)*(d)* have been complied with, and hence the arrested person who has not been charged is to complain as a future accused person.

(d) The right to be released (bail)

FC s 35(1)*(f)* — the right of an arrested person to be released in certain circumstances — is distinct from the right to be brought before a court, charged, informed or released. The latter right operates absolutely (in the absence of a limitation justification) to entitle the arrested person to release if not charged or informed within 48 hours. The release right in FC s 35(1)*(f)* operates independently.[1]

The reference to 'bail' in IC s 25(2)*(d)* has been dropped in FC s 35(1)*(f)*. Bail (in the pecuniary sense) will therefore be one of the 'reasonable conditions' to which release may be subject.[2] It is significant that, unlike art 5(3) of the European Convention on Human Rights, FC s 35(1)*(f)* does not confine the grounds upon which bail must be set to 'guarantees to appear for trial'. The problem of 'preventive detention' as a ground for denying bail is therefore left open. In its comprehensive decision on the constitutionality of most of the bail provisions introduced into the Criminal Procedure Act[3] ('the Code'),[4] the Constitutional

[1] Compare the right in art 5(3) of the European Convention on Human Rights, where the right of an arrested person to be charged within a reasonable time or be released *subject to reasonable conditions* is set out as a unit. In Canada the 'bail' right belongs to an *accused* (s 11*(e)* — 'not to be denied reasonable bail without just cause') — arrested and detained persons together being given the *habeas corpus* right (s 10*(c)*). 'Bail' is read to refer to all the conditions of release, whether pecuniary or not, 'just cause' relating to the merits of denying release, and 'reasonable bail' to the conditions of release. *R v Pearson* [1992] 3 SCR 665. In the United States the right to be released on bail can be read into the prohibition contained in the Eighth Amendment against 'excessive bail'. See *Stack v Boyle* 342 US 1 (1951). But see *United States v Salerno* 481 US 739 (1987)(The merits of being granted bail at all were said to flow not from the Eighth Amendment but from the due process clause of the Fifth Amendment.)

[2] See Fawcett (supra) at 116 (On the European Convention provision, he writes: 'Bail is not specifically mentioned, perhaps because in some contracting states it is frowned on as unduly favouring persons of means, and seldom used … The amount of bail would be outside the purview of the Commission, unless there appeared to be an element of abuse.')

[3] Act 85 of 1997.

[4] Act 51 of 1977.

Court addressed the role of preventive detention.[1] Kriegler J, for a unanimous Court, held:

> Section 35(1)*(f)* presupposes a deprivation of freedom — by arrest — that is constitutional. This deprivation is for the limited purpose of ensuring that the arrestee is duly and fairly tried. But s 35(1)*(f)* neither expressly nor impliedly requires that in considering whether the interests of justice permit the release of that detainee pending trial, only trial related factors are to be taken into account. The broad policy considerations contemplated by the 'interests of justice' test, in that context, can legitimately include the risk that the detainee will endanger a particular individual or the public at large. Less obviously, but nonetheless constitutionally acceptably, a risk that the detainee will commit a fairly serious offence can be taken into account. The important proviso throughout is that there has to be a likelihood, i.e. a probability, that such risk will materialize. A possibility or suspicion will not suffice. At the same time, a finding that there is indeed such a likelihood is no more than a factor, to be weighed with all others, in deciding what the interests of justice are. That is not constitutionally offensive. Nor does it resemble detention without trial, the reprehensible institution really targeted when one speaks of preventive detention. Absent a proper basis for the original arrest, it will be set aside. But if there was a proper cause, one cannot justify release solely on the absence of trial-related grounds.[2]

What the *Dlamini* Court did not decide was whether such crimes and dangers as might be entailed by release had to have any bearing upon the offence, or the conduct of the case, in respect of which the bail applicant had been arrested. It is submitted that this should be so. Otherwise a person thought to be a dangerous criminal or a recidivist may be incarcerated without trial as long as any arrest for any offence would be justified. Surely such a course of conduct would indeed be detention without trial, and would violate the presumption of innocence?[3]

The *Dlamini* Court 'reluctantly' accepted the constitutionality of taking into account, in deciding upon bail, the vigilante's veto (the relevance of, broadly speaking, the public reaction to a bail decision) introduced by s (4)*(e)* and 60(8A) of s 60 of the Code as amended by Act 85 of 1997. The Court found these subsections to be justified limitations under FC s 36(1), mainly because 'it would be irresponsible to ignore the harsh reality of the society in which the Constitution [was] to operate'.[4] This finding, coupled with the rider that

[1] *S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC), 1999 (2) SACR 51 (CC)('*Dlamini*').

[2] *Dlamini* (supra) at para 53.

[3] See, eg, *Stack v Boyle* 342 US 1 (1951); *United States v Salerno* 481 US 739 (1987)(Minority decision). Contrast the majority decision in *Salerno* and the decision of the Canadian Supreme Court in *R v Morales* [1992] 3 SCR 711, 12 CRR 2d 31. *Morales* is cited by Kriegler J in *Dlamini*. *Dlamini* (supra) at paras 71 and 72. But note the basis in *Salerno* for allowing possible criminality to feature as a factor: the state bore a heavy onus to establish 'clear and convincing evidence'. See also the rider accepted in *Morales* — the denial of bail must be necessary to promote the proper functioning of the bail system and not be undertaken for any purpose extraneous to the bail system. *Morales* (supra) at 48. Since *Morales*, section 515(1)*(c)* of the Canadian Code introduced the possibility of denying bail to 'maintain confidence in the administration of justice'. The argument that this violated the unconstitutionality of extraneous factors was rejected in *R v Hall* [2003] 2 SCR 309.

[4] *Bate* (supra) at paras 55-56.

democratic societies would find these subsections 'reasonable and justifiable *in the prevailing climate in our country*',[1] came very close to a finding that FC s 36(1) might operate as a quasi-emergency provision that would justify a statutory provision the one day, but not necessarily the next, depending on the vicissitudes in the harshness of realities on the ground.[2] Be that as it may, there would seem to be very little scope left for an argument that the Final Constitution directs that certain considerations should not feature at bail applications. One might have thought that, when passion was at its highest, principle should stand at its most firm.[3]

It follows from this finding that the formula — 'the interests of justice' — bears a wide meaning.[4] One cannot argue anymore, it seems, that whether certain people are intent on killing the applicant or raising a riot has nothing to do with the interests of justice relevant to the bail decision.[5] Kriegler J pointed to the unfortunate use of the phrase 'the interests of justice' in s 60 of the Code to mean, at times, all the relevant considerations pertaining to a bail decision, and at other times, those factors within the broader question that are to be weighed against the liberty interest of the applicant.[6] The Constitutional Court has now

[1] *Bate* (supra) at para 55.

[2] The definition of a 'prevailing climate' may upset the certainty inherent in decisions such as *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC). When does a climate change sufficiently for a different application of FC s 36 to a statutory provision?

[3] The court found that '[e]xperience [had] shown that organized community violence, be it instigated by quasi-political motives or by territorial battles for control of communities for commercial purposes, [did] subside while ringleaders [were] in custody'. The fact that pre-trial detention was inherently temporary and followed upon a judicial determination was a source of comfort, there being 'a close relationship and appropriate fit between the temporary withholding of liberty and the disruption that release would unleash'. *Dlamini* (supra) at para 56. Kriegler J expressed what is respectfully submitted to have been a sanguine confidence that '[c]ourts [would] no doubt be alive to the danger of public sentiment being orchestrated by pressure groups to serve their own ends'. Ibid at para 56.

[4] See *S v Tshabalala* 1998 (2) SACR 259, 272C (C).

[5] It appears as if the community reaction indeed did not form part of the 'interests of justice' under FC s 35(1)*(f)*, although its invocation by the legislation was saved from unconstitutionality by the limitation provision. See *Dlamini* (supra) at para 55. The use of the qualification 'ordinarily' obscured this finding somewhat: 'Ordinarily, the factors listed in s 60(4)*(e)* and (8A) would not be relevant in establishing whether the interests of justice permit the release of the accused. It would be disturbing that an individual's legitimate interests should so invasively be subjected to societal interests. It is indeed even more disturbing where the two provisions do not postulate that the likelihood of public disorder should in any way be laid at the door of the accused. The mere likelihood of such disorder independently of any influence on the part of the accused, would suffice. Nevertheless, . . . [the subsections are saved by FC s 36(1)].' In other words, the shift of attention on to the community heralded by the amendments to the bail provisions violated FC s 35(1)*(f)*, but justifiably so. Ibid at para 14.

[6] *Bate* (supra) at paras 47-48.

authoritatively given its blessing to the codification of the 'interests of justice' that is to be found in subsecs (4), (9) and (10) of s 60 of the Code.[1]

In *S v Mbolombo*, a bail amount was set which would be justified only on the assumption that the applicant was indeed guilty of the crime in question.[2] Whether the applicant was able to afford the R50 000 bail depended upon whether he had taken part in the robbery of a large sum of money. The Cape Provincial Division pointed out that bail proceedings were investigatory, or inquisitorial, in nature ('ondersoekend van aard') — thus rendering hearsay evidence admissible to enable the court to take all factors into consideration[3] — that action upon the risk of guilt informed the very detention of suspects in the first place, and that the possibility that guilt would render a small bail amount absurdly inappropriate could simply not be ignored ('kan tog nie weggedink word nie').[4]

The reference to the 'inquisitorial' nature of bail proceedings introduces the vexed problem of onus.[5] The onus at common law to show why release on bail should be granted lay on the applicant.[6] An important question faced by a number of courts was whether the wording of IC s 25(2)*(d)*, laying down a right to be released 'unless the interests of justice require otherwise', shifted the onus to the state.[7] *Magano & Another v District Magistrate, Johannesburg, & Others (1)*[8] decided that it had, and so did Southwood J in the minority judgment in *Ellish & Andere v Prokureur-Generaal, Witwatersrandse Plaaslike Afdeling*.[9] The majority in *Ellish*, however, as well as Eloff JP in *Prokureur-Generaal van die Witwatersrandse Plaaslike Afdeling v Van Heerden & Andere*,[10] decided that there was no such onus placed on the state.[11] The state bore an evidentiary burden, and the proceedings, being

[1] It found that subsec (4), directing when a refusal of bail *shall* be in the interests of justice, did not interfere with the independence of the judicial determination of the interests of justice in any given case. The court held that the open-ended nature of the factors to be considered in deciding whether a ground in subsec (4) had been established rendered subsec (4) 'permissive', and meant it was not a deeming provision. Ibid at paras 42-44. With respect, it may be objected that the fact that a court is entitled to employ any criteria it pleases in deciding whether one of the grounds in subsec (4) is present can hardly mean it is not *obliged* by subsec (4), as a matter of law, to regard detention as 'in the interests of justice' once it has concluded, as a matter of fact, that such a ground is indeed present.

[2] 1995 (5) BCLR 614 (C).

[3] Ibid at 616.

[4] Ibid at 617.

[5] See § 51.3*(e)* supra.

[6] See *Perkins v* R 1934 NPD; *Leibman v Attorney-General* 1950 (1) SA 607, 611 (W); *R v Grigoriou* 1953 (1) SA 479 (T); *S v Nichas & Another* 1977 (1) SA 257 (C); *S v Hlongwa* 1979 (4) SA 112 (D); *S v Mataboge* 1991 (1) SACR 539 (B); *S v Acheson* 1991 (2) SA 805 (Nm); Du Toit et al *Commentary on the Criminal Procedure Act* (2006) § 60.

[7] See *Nieuwoudt & Andere v Prokureur-Generaal van die Oos-Kaap* 1996 (3) BCLR 340 (SE)(Court found that formulation of a charge-sheet on 27 September 1995 resulted in the onus being placed upon the applicants to show that they should be released on bail.)

[8] 1994 (4) SA 169 (W), 1994 (2) BCLR 125 (W).

[9] 1994 (4) SA 835 (W), 1994 (5) BCLR 1 (W).

[10] 1994 (2) SACR 469 (W).

[11] See *Bolofo & Others v Director of Public Prosecutions* 1997 (8) BCLR 1135, 1143ff (Lesotho CA).

inquisitorial, entailed no onus in the real sense of the word. The difficulty that this position entailed for a determination when the probabilities were evenly balanced, or when it could not be said with any degree of satisfaction which way they pointed, was persuasively expounded in the minority judgment in *Ellish*. The attempt of Edeling J in *Prokureur-Generaal, Vrystaat v Ramokhosi*[1] to reconcile the undeniable force of Southwood J's reasoning[2] with the theory that there was no onus proper in 'inquisitorial' bail applications[3] illustrated the very real conceptual difficulties inherent in the governing approach.[4] Leveson J's remark in *S v Mbele & Another*[5] that he was 'unable to perceive any mystical significance in the word [ie "unless"]' cannot be comfortably reconciled with the judgment of the Constitutional Court in *S v Coetzee* that the use of 'unless' in a statute was sufficient for a violation of the presumption of innocence.[6] Although Marcus AJ regarded himself as bound by *Ellish* in *S v Letaoana*,[7] the learned judge relied upon the changed wording of the clause referring to the interpretation of the common law under the Final Constitution to imply, without considering it necessary to decide, that *Ellish* did not 'promote' the spirit, purport and objects of the Bill of Rights.[8] At the very least, Marcus AJ's pertinent digression indicated that *Ellish* stood to be reconsidered concerning its adherence to the principles of due process.

The pertinent question under the Final Constitution is whether the change in wording heralded by FC s 35(1)*(f)*, an alteration which appeared without qualifying reservations for the first time in the draft of 15 April 1996, can be said to have made any difference. The arrested person is entitled to release 'if the interests of justice permit'. Two questions need to be asked: Does this place an onus on the applicant? Is placing an onus on the applicant unconstitutional?

The Constitutional Court declined to answer these questions in *First Certification Judgment*.[9] The challenge to the bail provision, based on the onus it was said to place on the applicant, was rejected in a single paragraph as having 'no merit'. The only ground for denying certification to the clause would be if it failed to recognize a 'universally accepted fundamental right', and the right to bail was not universally formulated.

[1] 1996 (11) BCLR 1514 (O).

[2] Having accepted the *prima facie* right of the applicant to be released as its starting point ('uitgangspunt'), the court pointed out that it went without saying ('spreek vanself') that, where the person opposing bail did not succeed in convincing a court that justice required detention, release was to be ordered and that in that sense there was indeed an onus on the state. Ibid at 1523-24.

[3] Ibid at 1526-27.

[4] Ibid at 1528. The learned judge could not agree with the finding in *S v Mbele & Another. 1996 (1) SACR 212 (W)(IC s 25(2)(d)* had nothing to do with onus.)

[5] 1996 (1) SACR 212, 215 (W).

[6] 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC). Admittedly the provision in *Coetzee* included the term 'proved'.

[7] 1997 (11) BCLR 1581, 1590 (W).

[8] Ibid at 1590-91.

[9] *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 88.

If the onus is placed on the applicant, it is a lamentable inversion of the ordinarily operative presumption in favour of liberty in the sphere closest to its core. The discussion in *United States v Salerno* was premised upon the constitutional necessity of requiring the state to prove the applicability of the grounds for refusing bail.[1] Section 11*(e)* of the Canadian Charter grants the right 'not to be denied reasonable bail without just cause'.[2] The formulation in the International Covenant on Civil and Political Rights (art 9(3)) reads '… it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial'. *Prokureur-Generaal, Vrystaat v Ramokhosi*[3] regarded the placing of an onus on a bail applicant as something for which there was 'no place' in the new democratic constitutional order. The court in *S v Tshabalala*[4] disagreed. Comrie J *obiter* regarded FC s 35(1)*(f)* as allowing 'Parliament to enact bail legislation which [cast] an onus or burden of proof or persuasion on the arrestee in appropriate circumstances'.[5] Canadian authority[6] was invoked as *a fortiori* substantiation that the constitutional standard in Canada is 'more generous to an arrestee than our own s 35(1)*(f)*'.[7]

The Constitutional Court in *Dlamini* decisively 'harmonized' FC s 35(1)*(f)* with the provisions of the Criminal Procedure Act ('the Code')[8] regulating bail. It held that s 60(1)*(a)* of the Code, which entitled a bail applicant to be released unless it was found that it was in the interests of justice that the applicant be detained, favoured 'liberty more than the minimum required by the Constitution'.[9] The Court recognied that the new constitutional bail provision is less generous than the old and that the old formulation reflected the more generous provision found in s 60(1)*(a)* of the Code. The 'non-fit' between the default position in s 60(1)*(a)* of the Code and the new constitutional provision was problematic

[1] 481 US 739 (1987).

[2] Nevertheless, the Canadian Supreme Court in *R v Pearson* upheld the constitutionality of a provision requiring those accused of drug trafficking to show cause why their detention was not justified. [1992] 3 SCR 665, (1993) 12 CRR 2d 1 ('*Pearson*'). The Canadian Supreme Court reasoned that the statute itself amounted to a denial of bail, and then proceeded to find that such denial was for 'just cause' in the circumstances, given the ease and frequency with which drug traffickers undermined the bail system. It is submitted that it is at least arguable that s 11*(e)* required the 'just cause' question to be asked at every bail hearing, which logically required an onus upon the prosecution. But see the similar reasoning applied in *R v Morales* [1992] 3 SCR 711, (1993) 12 CRR 2d 31 in the context of a person accused of committing a crime while on bail. Note the considerations regarded as 'vital' in *Pearson* and *Morales*: (1) that bail be denied only in very narrow circumstances; (2) that the denial of bail be necessary to promote the proper functioning of the bail system and not be undertaken for any purpose extraneous to the bail system. *Morales* (supra) at 20 and 48. Since *Morales*, section 515(1)*(c)* of the Canadian Code introduced the possibility of denying bail to 'maintain confidence in the administration of justice'. The argument that this violated the unconstitutionality of extraneous factors was rejected in *R v Hall* [2003] 2 SCR 309.

[3] 1996 (11) BCLR 1514, 1531 (O).

[4] 1998 (2) SACR 259 (C).

[5] Ibid at 274C-D.

[6] *Pearson* (supra); *Morales* (supra).

[7] *Morales* (supra) at 274E.

[8] Act 51 of 1977 as amended by Act 85 of 1997.

[9] *Dlamini* (supra) at para 38.

> because the default position changed: whereas previously the starting point was that an arrestee was entitled to be released, the position under s 35(1)*(f)* is more neutral. Now, unless there is sufficient material to establish that the interests of justice do permit the detainee's release, his or her detention continues.[1]

Despite Kriegler J's Pilatean attempt to avoid the debate, the above paragraph lapses into the miasma of onus discourse.[2] Kriegler J did, however, make it clear that an onus upon the accused was not precluded by FC s 35(1)*(f)*.[3] In fact, his 'default position' language in effect established that FC s 35(1)*(f)* envisages an onus upon the applicant.[4]

The following propositions emerged from the judgment in *Dlamini*:

1. The Code and FC s 35(1)*(f)* must be read together, as a harmonious whole, sanctioned by the Final Constitution.
2. The constitutional provision is 'more neutral' than s 60(1)*(a)* of the Code, but entails the 'default position' of continued detention.[5]
3. Section 60(1)*(a)* of the Code (applying to all offences except the serious and the very serious found in Schedules 5 and 6 respectively) 'favours liberty more' than does the 'minimum' required by the constitutional provision.[6]
4. Section 60(11)*(a)* and *(b)* (relating to very serious and serious offences respectively) entail a 'formal onus' upon the applicant.[7]
5. There is nothing unconstitutional about an onus on the applicant as such.[8]
6. Section 60(11)*(a)*, requiring something more ('exceptional circumstances') than the constitutional standard ('the interests of justice') before release would be allowed, violates FC s 35(1)*(f)*,[9] but is justifiable under FC s 36(1).[10]
7. The 'public outrage' provisions are saved from unconstitutionality because they entail an onus (upon the state) to 'establish a likelihood' of their applicability.[11]
8. The 'exceptional circumstances' to be proved by an accused under s 60(11)(*a*) and the 'formal onus' upon an accused laid down by s 60(11)*(b)* both relate to proof of the applicability of the codified incidents of the 'interests of justice' found in subsections (4)–(9) of s 60 of the Code, and 'exceptional circumstances' include an 'exceptional degree' of applicability.[12]

[1] *Dlamini* (supra) at para 45.
[2] Ibid at para 45 n74 (Kriegler J accepted that subsec (11) of the Code did indeed cast an onus upon an applicant in respect of the two categories of serious and very serious offences to which it related. The Court also found that 'a formal onus rests on a detainee to "satisfy the court"'. Ibid at para 61.)
[3] Ibid at para 78.
[4] Ibid para 5 n13 ('Under s 35(1)*(f)*, of course, there is no release unless the interests of justice permit it'; and at para 41, '[FC] s 35(1)*(f)* . . . required something positive to permit release.')
[5] Ibid at paras 5, 41 and 45.
[6] Ibid at para 38.
[7] Ibid at para 61.
[8] Ibid at para 78.
[9] Ibid at para 64.
[10] Ibid at paras 66-77.
[11] Ibid at para 53.
[12] Ibid at paras 76 and 65.

Three questions require serious attention.

(i) Can the state rely on FC s 35(1)*(f)* as an overall standard that trumps s 60(1)*(a)* of the Code in cases not dealing with serious offences?
(ii) How are propositions 7 and 8 above to be reconciled?
(iii) If it is true that 'exceptional circumstances' do not necessarily mean something 'above and beyond, and generically different from those enumerated',[1] then why did this test violate FC s 35(1)*(f)* and require justification under FC s 36?

As far as the first question is concerned, the answer must be 'no'. The key lies in the reference by Kriegler J to a 'minimum' standard.[2] Although one may argue that if IC s 25(2)*(d)* could not cast an onus upon the state it is odd to find that the similarly worded s 60(1)*(a)* of the Code does so. However, it can be stated with some confidence that s 60(1)*(a)* of the Code does indeed cast an onus upon the state.[3] This standard, as Kriegler J pointed out, goes further than the 'minimum' required by FC s 35(1)*(f)*. Section 35(1)*(f)*, being a right, and not a bail test, to apply irrespective of legislation, sets out the minimum entitlement of a bail applicant. The Code simply allows an applicant more than the minimum in cases not concerned with the serious offences of Schedule 5 and the very serious offences of Schedule 6.[4]

The second question is far more difficult to resolve, and entails grave practical problems. If such grounds as require 'likelihoods' must be *established on the probabilities* by the state, and if these same grounds are the factors constituting 'the interests of justice' in respect of which an applicant bears a 'formal onus' under s 60(11)*(a)* and *(b)* of the Code, how does one decide what the 'default position' is in respect of the existence of such grounds? The presence or absence of 'exceptional circumstances' is perhaps an easier question to decide in this regard. If what the applicant adduces is not 'exceptional' in some way or another, then he or she remains in custody. But what of s 60(11)*(b)*? The problem is particularly vexing because some of the provisions in subsecs (4) and (8A) were saved from unconstitutionality by FC s 36 only because they (also) placed an onus upon the state. If s 60(11)*(b)* were to be applied so as to require the applicant to negate these grounds, then the reasoning relating to the constitutionality of these grounds would be undermined. All the platitudes about the 'inquisitorial' nature of bail proceedings, and all the clichés about the 'inappropriateness' of questions relating

[1] *Dlamini* (supra) at para 76.
[2] Ibid at para 38.
[3] See *S v Vermaas* 1996 (1) SACR 528, 530 (T); *S v Tshabalala* 1998 (2) SACR 259, 269 (C)('*Tshabalala*').
[4] But see *Tshabalala* (supra) at 274A-C (Court regards FC s 35(1)*(f)* as an overall standard to be invoked 'in every decision allowing or refusing bail'. This approach would allow the state to invoke its default position against the dictates of s 60(1)*(a)*.)

to onus, will not lend coherence to the onus (or 'default') puzzle inherent in s 60 of the Code.[1]

The third question cannot be answered with any satisfaction. Time and precedent will have to build a workable and conceptually acceptable relationship between the 'ordinary' criteria and 'exceptional circumstances'.[2]

The bail provisions newly introduced into the Code[3] survived a number of constitutional attacks in *Dlamini*. The 'exceptional circumstances' requirement in cases involving the most serious charges was justified under FC s 36(1). First, the extraordinary crime situation was mentioned, with a note of caution that 'one must be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights'.[4] Then the situations in which bail was denied in the United Kingdom, the United States, Canada and Australia were explored.[5] In this regard it is notable that the United Kingdom provisions require demonstration of a relevant danger by the state, that the United States provision allows bail to be denied in certain capital cases 'where the proof is evident or the presumption great', and that the Canadian allowance for an onus on the accused in serious drug cases was made subject to the finding that this was 'necessary to promote the proper functioning of the bail system'.[6] The Australian reverse presumption in serious cases was perhaps the closest to our own. The Court concluded that bail was limited in open and democratic societies, and that the limitation in s 60(11)*(a)* might be more invasive than the comparative limitations.[7] Kriegler J accepted that the 'exceptional circumstances' test retained a flexibility to allow a decision to be tailored to the requirements of a case, and dismissed an objection that the test was unconstitutionally vague.[8] The fact of ultimate judicial control was essentially what saved the 'exceptional circumstances' test under FC s 36.

[1] It is not entirely clear what the *Dlamini* Court meant when it said that it went without saying that the following did *not* apply to applications struck by s 60(11). See *Dlamini* (supra) at para 49 n 80 ('In deciding whether the interests of justice permit the release on bail of an awaiting trial prisoner, the court is advised to look to the five broad considerations mentioned in paragraphs *(a)* to *(e)* of subsection (4), as detailed in the succeeding subsections. And then it has to do the final weighing up of factors for and against bail as required by subsections (9) and (10).')

[2] See *S v Coetzee* 1998 (2) SACR 721 (C). *Coetzee* held that if s 60(11)*(a)* meant that someone who could establish the ordinary criteria for release on bail did not pass the test, then there were serious reservations about the constitutionality of the test. Perhaps the finding that the applicant could with crystal clarity — 'klinkklaar' — establish the ordinary criteria) was the finding Kriegler J had in mind. See *Coetzee* (supra) at 723G and 726A. But the finding that the legislature could not have intended something *additional* to the ordinary criteria to be required can, like Kriegler J's finding — *Dlamini* (supra) at para 76 — not be reconciled with Kriegler J's finding — *Dlamini* (supra) at para 64 — that the test violated s 35(1)*(f)* because it required something more than the constitutional norm codified in subsections (4)-(9) of s 60 of the Code.

[3] Act 85 of 1997.

[4] *Dlamini* (supra) at para 68.

[5] Ibid at paras 70-73.

[6] See *Pearson* (supra) at 20; *Morales* (supra) at 48.

[7] *Dlamini* (supra) at para 73.

[8] Ibid at paras 74-76.

Another attack concerned the combined effect of s 60(11)*(a)*, 60(14) and 60(11B)*(c)* of the Code. Section 60(14) deprives the bail applicant of a right of access to the docket such as would be enjoyed under FC s 35(3)*(a)* for the purposes of trial. Section 60(11B)*(c)* renders the record of the bail proceedings admissible at the criminal trial. As far as s 60(14) and 60(11)*(a)* together were concerned, the court found as follows: first, s 60(14) did not do violence to the decision in *Shabalala & Others v Attorney-General, Transvaal, & Another*,[1] which established the right to 'docket access' of an accused at trial under IC s 25(3), now FC s 35(3)(*a*).[2] Kriegler J wrote:

> The judgment makes it clear (in paragraph 56) that disclosure of material in the police docket depends, among others, on the timing of the request, and that the risk of interference with the investigation is a factor to be weighed. The judgment in Shabalala is no authority for the proposition that applicants for bail, or their legal representatives, are entitled to access to the police docket. The case was concerned with the trial and what is fair in relation thereto. It had nothing to do with bail.[3]

Second, the accused faced with the task of satisfying the court of 'exceptional circumstances', or that the interests of justice permitted release, had to be given a 'reasonable opportunity' of doing so, as stipulated in s 60(11) of the Code. So, 'a prosecutor [might] have to be ordered by the court, under sub-s (11), to lift the veil in order to afford the arrestee the reasonable opportunity prescribed there'.[4] Hence, s 60(14) had to be read to be subject to such duty of revelation as might be required to afford the applicant the 'reasonable opportunity' to discharge the burden in cases of serious offences.[5] But there was no general access right corresponding to the right at trial recognized in *Shabalala*.[6]

The attack on the combined effect of s 60(11)*(a)* and s 60(11B)*(c)* was captured neatly in the rhetorical question posed by Slomowitz AJ in the court *a quo* in *S v Schietekat*: 'Is it by fashioning this weapon that those who would seek their liberty are to be discouraged from asking for it?'[7]

This court elaborated upon this point as follows:

[1] 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC)('*Shabalala*').
[2] See § 51.5*(c)* infra.
[3] *Shabalala* (supra) at para 82.
[4] Ibid at para 84.
[5] See *Nieuwoudt & Andere v Prokureur-Generaal van die Oos-Kaap* 1996 (3) BCLR 340 (SE)(Court held that because the strength of the state's case was relevant at bail proceedings, an applicant for bail, under IC s 23, was entitled to access to the docket, and that the right to access was particularly important where there was an onus on the accused.) See § 51.5*(c)* infra. *Nieuwoudt* must now be read subject to the finding in *Dlamini*.
[6] *Shabalala* (supra) at paras 84–85.
[7] 1999 (2) BCLR 240, 248F (C).

> The accused is entitled to a reasonable opportunity to make out a case; without the testimony of the accused there is no hope of proving the requisite exceptional circumstances, especially as there is no access to the information in the police docket, and such testimony may be used against the accused at trial. In many cases such circumstances add up to compulsion on an accused to testify.[1]

The Constitutional Court's response was to uphold s 60(11B)*(c)* on an independent analysis of its self-incrimination and silence implications, rather than to entertain the rhetorical question from the point of view of FC s 35(1)*(f)*. Hence this aspect of the judgment is discussed in the section on self-incrimination at trial.[2]

The most jurisprudentially noteworthy point about the Constitutional Court's bail judgment in *Dlamini* was its treatment of the presumption of innocence. Although the court found that the 'basic objective' of the institution of bail was to 'maximize personal liberty',[3] its dismissal of objections to placing an onus on the applicant was essentially founded on the unexpressed premise that the presumption of innocence had to do with the determination of guilt, not with the protection of liberty. Kriegler J later declared:

> This Court has in the past unhesitatingly struck down provisions that created a reverse onus carrying the risk of conviction despite the existence of a reasonable doubt; but what we have here is not a reverse onus of that kind. Here there is no risk of a wrong conviction, the objection that lies at the root of the unacceptability of reverse onuses. All that the subsection does in this regard, is to place on an accused, in whose knowledge the relevant factors lie, an onus to establish them in a special kind of interlocutory proceeding not geared to arriving at factual conclusions but designed to make informed prognoses.[4]

This argument, with respect, ignores the fact that the presumption of innocence is but an incident of the presumption in favour of liberty, and is sacred only because liberty is sacred. We are concerned about dubious convictions because they entail unjustified deprivations of liberty, and we proclaim someone innocent until proved guilty because we demand justification for a deprivation of liberty, not because we have qualms about using the term 'guilty' without adequate justification.

The relationship between the bail right and the right to liberty led the courts at common law to recognize the need to allow bail applications at all hours as a matter of urgency. The court in *Twayie & 'n Ander v Minister van Justisie & 'n Ander* declared:

> Elke verhoorafwagtende is 'n potensiële onskuldige, en onnodige inperking van die burger se vryheid druis teen alle beskaafde gevoel in … Teen die agtergrond van hierdie algemene beginsels sal al bevredigende antwoord wees dat beide die Hooggeregshof sowel as die

[1] *Schietekat* (supra) at para 89.
[2] See § 51.5*(j)*(iii) infra.
[3] *Dlamini* (supra) at para 6.
[4] Ibid at paras 11 and 78.

> laerhowe 'n gearresteerde, wat hom oor sy arrestasie beswaard voel, te enige tyd, op sy aansoek, sal aanhoor en dit wel uit hoofde van voormelde artikel 60 [of the *Criminal Procedure Act 51 of 1977* before amendment] ten einde die werking van hierdie artikel ten volle effektief te maak.[1]

The new s 50(6)*(b)* of the Criminal Procedure Act introduced by Act 85 of 1997 decrees bluntly:

> An arrested person contemplated in paragraph *(a)(i)* [arrested for allegedly committing an offence] is not entitled to be brought to court outside ordinary court hours.

What value liberty?[2]

Magistrate, Stutterheim v Mashiya was one of those cases that obviously entailed dimensions only hinted at in the report.[3] The respondent had been accused of raping his daughter. He was arrested on Saturday and appeared on Monday, when he applied for bail. The state applied for the seven-day postponement that it was possible to obtain in terms of s 50(1)*(b)* of the Code. The state's application was refused, and the matter was argued on the Tuesday. The matter was then postponed, for nine days, 'for judgment'. There ensued attempts to have the judgment delivered earlier, which culminated in an application to the High Court for a mandamus (after a rule nisi had been issued) that the matter be 'argued' and judgment be handed down by 16.00 of the day of the mandamus. The matter duly commenced on the day ordered by the mandamus, was argued, but there was no judgment. The matter was postponed, again to the originally intended postponed day, for what was promised to be a 'well-considered judgment'.[4] Further proceedings, including contempt proceedings, ensued, and the respondent was ultimately granted bail by the High Court pending the well-considered judgment of the court below. The Supreme Court of Appeal was careful, whilst affirming the entitlement of a bail applicant to a 'prompt decision one way or another', not to lay down any rule as to what such promptness would require. Indeed, the rigid time-frame decreed by the High Court was held in the circumstances not to have been justified precisely because of its rigidity.[5]

[1] 1986 (2) SA 101, 104E–F (O).

[2] See also *Prokureur-Generaal, Vrystaat v Ramokhosi* 1996 (11) BCLR 1514, 1519-20 (O)(Court holds bail appeals to be *prima facie* urgent, in spite of acknowledgement that, in the case of appeals, bail had already been judicially considered.) See also *Garces v Fouche & Others* 1998 (9) BCLR 1098, 1104-05 (Nm)('*Garces*')(Namibian High Court entrenched an arrested person's right to bring a bail application outside normal court hours in cases of urgency. Hannah J remarked pertinently: 'What is of importance is that we are dealing with the liberty of the individual'. He did, however, stress that 'real grounds for urgency [had to] exist before a court [would] hear a bail application outside normal court hours'. The recognition that the unavailability of prosecutors after hours should not preclude the determination of bail applications was particularly welcome.)

[3] 2004 (5) SA 209 (SCA).

[4] Ibid at para 6.

[5] Ibid at paras 16-25. Several observations left little room for doubt that the Court found it hard to believe that the well-considered judgment required so long to be delivered in the instant case. Ibid at para 17.

51.5 The Rights of Accused Persons

(a) Introduction

In order to distinguish an accused person from an arrested person, the former has to be regarded as someone who has been formally charged with an offence.[1] The fact that pre-charge occurrences are relevant to a determination whether an accused's rights have been violated should not confuse matters.

(b) The right to a fair trial

The fair trial right is expressly set out as a residual right which includes, but is not limited to, the enumerated fair trial rights in FC s 35(3).[2] The Appellate Division in *S v Rudman & Another*[3] held held that the exhaustive extent of the common-law right to a fair trial was a determination 'whether there ha[d] been an irregularity or illegality', ie 'a departure from the formalities, rules, and principles of procedure according to which our law require[d] a criminal trial to be initiated or conducted'. This view left no room for a residual fair trial right. However, *Rudman* has been decisively overruled by the creation of a residual fair trial right.[4] In *S v Ramuongiwa*[5] Noorbhai J said that '[a]bstract notions of fairness and justice' were now the 'acid test' and that *Khanyile* had been 'resuscitated', infusing and giving 'flesh and bone to the right to a "fair trial" '.[6] In *S v Mazingane* the High Court observed that the right to a fair trial included no fewer than fifteen rights relating to the procedure and process of a trial, but that it was also broader than this: it had been extended to 'substantive fairness' or a residual fair trial right.[7]

The existence of a residual fair trial right must surely go without saying. How it is to be 'given flesh and bone' is a difficult question.[8] The first conceptual problem is the question whether the fact that the right to a fair trial 'is broader than the list of specific rights set out' below it[9] means:

1. There are unenumerated aspects of a fair trial to be added to the rights set out in FC s 35(3), but the enumerated rights themselves determine their own extension,

or

[1] See § 51.2 supra. If arrest is detention with the purpose of charging — 'vryheidsontneming met die doel om aan te kla' — then it can hardly be coextensive with charging itself. See Hiemstra *Suid-Afrikaanse Strafproses* (5th Edition, 1993) 87.

[2] See § 51.1*(a)*(ii) supra.

[3] 1992 (1) SA 343 (A).

[4] *See S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC)('*Zuma*') at para 16.

[5] 1997 (2) BCLR 268, 272 (V).

[6] On the relationship between the common law and the due process rights, see § 51.1*(b)*(iii) supra.

[7] 2002 (6) BCLR 634, 637 (W).

[8] On the problem of accommodating state interests in the definition of the right to a fair trial, see § 51.1*(b)*(iv) supra.

[9] *Zuma* (supra) at para 16.

2. There are unenumerated aspects of a fair trial to be added to the rights set out in FC s 35(3), and the residual fair trial principle operates also within the interpretation of the extension of the specifically enumerated rights themselves.

In *Nel v Le Roux NO & Others*[1] the Constitutional Court decided that the 'trial' referred to in the right not to be detained 'without trial' did not incorporate all the aspects of a fair trial set out in IC s 25(3), but incorporated minimum 'due process' and 'natural justice' principles only.[2] The pertinent question, therefore, is whether this is to be taken to mean not only that the fair trial rights in FC s 35(3) extend further than the minimum requirements of due process and natural justice but also that the residual fair trial right, operating either in a sphere outside the spheres occupied by the specifically enumerated rights or operating in such a sphere as well as in the extension of the specifically enumerated rights themselves, should be interpreted and developed as 'due process and something more', given the reasoning in *Nel*. If this latter be the case, due process jurisprudence would indeed be relevant to an interpretation of the right to a fair trial, *a fortiori* to indicate what the right to a fair trial always embraces.[3]

What guidance does one find in the case law regarding the two alternatives set out above? Peter Hogg, writing of the residual operation of the principles of fundamental justice in Canada, where it has been held that these principles have generic status and that the fair trial and due process rights enumerated in the Charter are but 'illustrative' of the generic due process principle,[4] argues that the enumerated rights consequently operate as an *eiusdem generis* limitation upon the scope of the principles of fundamental justice.[5] This argument is partly motivated by a desire to avoid unlimited and undefined operation of the principles of fundamental justice, and partly by a desire to avoid rendering the specific provisions otiose by allowing vague principles to determine the extension of rights contained in relatively precisely framed clauses.[6]

This reasoning, however, was directly contradicted by the reasoning in *S v Nombewu*[7] and in *Coetzee & Others v Attorney-General, Kwazulu-Natal, & Others*.[8] In *Coetzee* the Durban and Coast Local Division declared that the enumerated rights in FC s 35(3) 'should … be interpreted as extending the ambit of the main

[1] 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC)('*Nel*').

[2] See M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) § 40.4*(c)*. See also § 51.1*(a)* supra.

[3] On the 'due process wall', see § 51.1*(a)*(ii) supra.

[4] On *Re BC Motor Vehicle Act* [1985] 2 SCR 486, 502f, see § 51.1*(a)*(ii) supra.

[5] P Hogg *Constitutional Law of Canada* (3rd Edition, 1992; 1996 supplement) § 44.10*(a)*.

[6] Hogg's argument that the operation of the residual right leads to palm-tree justice and a poverty of principle may be a useful caveat for invocations of the *ad hoc* and 'flexible' nature of the right to a fair trial. See § 51.1*(b)*(ii) supra.

[7] 1996 (12) BCLR 1635 (E), 1996 (2) SACR 396 (E)('*Nombewu*').

[8] 1997 (1) SACR 546 (D), 1997 (8) BCLR 989 (D).

provision rather than restricting it'.[1] In *Nombewu* Erasmus J read the specific right to counsel enumerated in IC s 25(1)*(c)* in effect as being limited by the residual fair trial right in IC s 25(3). The specific right could not be read in isolation, but had to be read 'as determined by the concept of a "fair trial" ', which meant that an apparent infraction of the specific right was not an infraction when read 'with' the residual right.[2] In *S v Msenti* Snyders J in effect rendered the specific wording of an enumerated right irrelevant, given the overriding importance of 'fairness' in FC s 35 analysis.[3] The learned judge held that the alteration in the wording of a specific right could not have altered its relationship with substantive fairness, since '[FC s 35 was] essentially the same as [IC s 25]'.[4] These decisions, in different ways, conflict with Hogg's argument that the specific rights limit the ambit of the general right.

In *Scagell & Others v Attorney-General of the Western Cape & Others*[5] the Constitutional Court interpreted the imposition of an evidential burden on an accused as a violation of the right to a fair trial, rather than of the presumption of innocence set out in IC s 25(3)*(c)*.[6] Other courts have also had recourse to the residual fair trial right in situations where a specifically enumerated right was potentially applicable: *S v Mbeje*[7], *S v Younas*[8] and *S v Dzukuda & Others; S v Tshilo*.[9] The problem with recourse to the residual right in spheres at least prima facie governed by the specifically enumerated rights is that such an approach seriously undermines the development of a jurisprudence incrementally defining the scope of the specifically enumerated rights, and encourages facile and idle invocation of the residual right whenever a hard case arises on any one of the enumerated rights the sort of precipitate ('halsoorkop') invocation of the right to a fair trial that the Free

[1] *Nombewu* (supra) at 556E.

[2] See *Nombewu* (supra) at 1654. See also *S v Simanaga* 1998 (1) SACR 351, 353G-I (Ck).

[3] 1998 (3) BCLR 343 (W), 1998 (1) SACR 401 (W).

[4] Ibid at 347G I. Such reasoning renders all the enumerated rights otiose and reduces all FC s 35 analysis to assessment of 'substantive fairness'. See §51.5*(o)* infra.

[5] 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC).

[6] See § 51.1*(b)*(iv) supra.

[7] 1996 (2) SACR 252 (N)(Failure to allow an unrepresented accused to address the court before judgment as required by s 175(1) of the Criminal Procedure Act 51 of 1977 was analysed in terms of a general requirement to avoid prejudice to the accused, rather than as a potential violation of the right to adduce and challenge evidence under IC s 25(3)(*d*).)

[8] 1996 (2) SACR 272, 274 (C)(Failure by a court in proceedings under the Prevention of Family Violence Act 133 of 1993 to allow an accused to call a witness was analysed in terms of a denial of the 'fundamental right to a fair hearing', rather than in terms of the right to adduce and challenge evidence under IC s 25(3)*(d)* although the accused's desire to 'adduce the evidence of others' was specifically referred to by the court.)

[9] 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC), 2000 (2) SACR 443 (CC)(The court considered the constitutionality of s 52 of the Criminal Law Amendment Act 105 of 1997, in terms of which an accused could be referred to the High Court for sentencing, with reference to the accused's right to a fair trial, rather than the right to a trial that began and concluded without unreasonable delay (FC s 35(3)*(d)*)). See also S Jagwanth 'Recent Cases: Constitutional Application' (2001) 14 *South African Journal for Criminal Law* 122.

State Provincial Division decried in *S v Strauss*,[1] and the Transvaal Provincial Division in *S v Vilakazi & 'n Ander*[2].

The soundest practice would be to attempt to demarcate spheres of sovereignty for the specifically enumerated rights, in which spheres the applicability of the rights in question must be determined for any challenge by those principles which inform and justify the particular right. A fair trial challenge is therefore to be dissected by attributing aspects of the challenge to particular spheres of sovereignty of particular fair trial rights. If an aspect is fully covered by such a sphere, then a determination that the right in question is not violated exhausts the challenge as far as that particular aspect is concerned. There may be aspects which do not comfortably fit into any of the domains of the enumerated rights. In such a case the question should be entertained whether the challenge should not succeed on the residual fair trial right. Only if an analytically rigorous practice of defining domains of operation for the enumerated fair trial rights is successfully adopted can the residual fair trial right be given meaningful 'flesh and bones'. We should not allow the residual right to impoverish the jurisprudence of the specific rights as the favoured panacea of idle counsel.

One principle that has started to emerge as part of the domain of the residual fair trial right is the right of an unrepresented accused to the assistance of the court in conducting his or her defence.[3] Unfairly obtained evidence which is not accommodated under self-incrimination principles has been regarded from the point of view of the residual right to a fair trial.[4] Aspects of the trial that concern the course of evidence and its effect upon the fairness of the proceedings are most comfortably addressed in terms of the general notion of fairness. In

[1] 1995 (5) BCLR 623, 625 (O).

[2] 1996 (1) SACR 425 428 (T).

[3] See *S v Kester* 1996 (1) SACR 456 (N); *S v Simxadi* 1997 (1) SACR 128 (C); *S v Mungoni* 1997 (2) SACR (VH); *S v N* 1998 (1) BCLR 97 (Tk), 1997 (1) SACR 84 (Tk); *S v Xaba* 1997 (1) SACR 194 (W)(In which the principle could be said to have been extended to the accused defended by inexperienced counsel); *S v Moilwa* 1997 (1) SACR 188 (NC). In *S v Malatji & Another* 1998 (2) SACR 622 (W)(Cameron J held that an accused's rights had to be explained by the judicial officer through the interpreter, and not by the interpreter with no input from the judicial officer. The judgment was scathing of the conduct of the magistrate relative to the existence of fair trial rights and their explanation. FC s 35(3) was not expressly invoked.) See also *S v Shiburi* 2004 (2) SACR 314 (W)(The court held that there was a duty incumbent upon judicial officers to inform an unrepresented accused of his legal rights. These rights included the right to the docket or state witnesses' statements. In the instant case the accused was not advised of his right of access to the police docket and was consequently convicted in the court a quo. The Witwatersrand Local Division held this irregularity to be so fundamental as to vitiate the trial proceedings.)

[4] See *Pillay & Others v S* 2004 (2) BCLR 158 (SCA); D Ally '*Pillay and Others v S*: Trial Fairness; the Doctrine of Discoverability; and the Concept of 'Detriment' — the Impact of the Canadian s 24(2) Provision on South African s 35(5) Jurisprudence' (2005) 1 *South African Journal for Criminal Justice* 66. See also *S v M* 2003 (1) SA 341 (SCA); *Mitchell & Another v Hodes & Others NNO* 2003 (1) SACR 524 (C) and N Whitear-Nel 'Evidence' (2003) 16 *South African Journal for Criminal Justice* 431. See also *S v Nortjé* 1997 (1) SA 90 (C); *S v Hassen & Another* 1997 (2) SA 253 (T), 1997 (3) BCLR 377 (T)(Both deal with trapping); *S v Manuel* 1997 (11) BCLR 1597 (C) at para 20 (Brand J relied upon the general right to a fair

S v Mhlakaza & Others[1] the court determined that the admissibility of identification evidence should be ruled upon before the accused should be required to decide whether to testify or not, because an accused was entitled to know the strength of the case against him or her before deciding whether to testify.[2]

The role of accuracy, or truth, in the determination of fairness is a problematic one. In the context of the exclusion of improperly obtained evidence, for example, courts across the common-law world, both within the operation of rights jurisprudence and outside it, have often determined 'fairness' as very much influenced by the cogency of the evidence in question.[3] Although the dictum of Froneman J in *S v Melani & Others*,[4] that the rights to counsel, to the presumption of innocence, to silence and to protection from compelled self-incrimination had nothing to do with ensuring the reliability of evidence adduced at trial, was too broadly stated, and has given rise to difficulties,[5] it represents an important caveat that the fairness of a trial should not be measured by its capacity to produce the

trial to rule that a confession which had been obtained unfairly on a broader constitutional basis than not freely, voluntarily and without undue influence should not have been admitted. The accused, a juvenile, had been interviewed with his mother present, and then, his mother having been sent away, had been further interviewed until he agreed to confess. The finding upon the general fair trial right was not clearly necessary, given the fact that Brand J seemed to indicate that the circumstances had amounted to 'undue influence' of a special kind.) See, further, *S v Khan* 1997 (2) SACR 611 (SCA); *Key v Attorney-General, Cape Provincial Division, & Another* 1996 (4) SA 187 (CC), 1996 (6) BCLR 788 (CC) at para 13; *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at paras 153 and 186; *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 16. Ibid at 618. In *Khan* the appellant, who was 19 years old at the time, had been arrested and warned of his right to silence before the Interim Constitution had come into effect. He had spontaneously confessed to murder and repeated this confession to a magistrate upon being asked to do so by the police after another caution. The magistrate took the confession after cautioning the appellant. At no stage was the appellant informed of his right to counsel under s 73(1) of the Criminal Procedure Act 51 of 1977. Howie JA held the right to counsel under IC s 25(1)*(c)* not to have been applicable at arrest. *Khan* (supra) at 618. The conduct in obtaining the confession, however, had been 'unfair'. Ibid at 620. Nevertheless, s 217 of the Criminal Procedure Act being concerned with fairness, and the conduct in question revealing 'none of the mischief against which s 217 [was] aimed', the 'factors which justif[ied] admission materially outweigh[ed] those which call[ed] for exclusion'. Ibid at 621.

[1] 1996 (6) BCLR 814 (C).

[2] A similar concern that the accused not be forced into the box by uncertainty about the admissibility of hearsay evidence was expressed by the Appellate Division in *S v Ramavhale* 1996 (1) SACR 639, 651 (A).

[3] See *R v Wray* [1971] SCR 272. The distinction between real and self-incriminatory evidence, which is so important in Canada, is influenced strongly by cogency considerations. See *R v Collins* [1987] 1 SCR 265; *R v Burlingham* [1995] 2 SCR 869. In England, s 78 of the Police and Criminal Evidence Act 1984 allows courts to exclude evidence if the admission would have 'such an adverse effect on the fairness of the proceedings that the court ought not to admit it'. Reliability is an important factor in determining 'fairness'. *R v Smurthwaite* [1994] 1 All ER 898 (CA) and the House of Lords in *R v Latif and Shahzad* [1996] 1 WLR 104 (HL) attached perhaps decisive weight to the cogency of unlawfully obtained evidence in deciding that admission was not 'unfair'. Furthermore, there is the strong influence of the view that 'fairness' means 'fairness at the trial', and should be confined to prejudice in conducting the defence, or to questions of cogency. See the view of Lord Diplock in *R v Sang* [1980] AC 402 (HL). See also *R v Christou and Wright* [1992] QB 979.

[4] 1995 (4) SA 412 (E), 1996 (2) BCLR 174 (E), 1996 (1) SACR 335, 348-9 (E).

[5] See § 51.3*(f)* supra.

truth.[1] The finding by Tshabalala J in *S v Simanaga*,[2] that the trial was fair because the accused was guilty, with respect, provides a stark illustration of the wrong approach.

Another principle that will cause more harm than good if employed as the governing principle in defining the right to a fair trial is the principle of equality. There is no doubt that equal protection concerns that all accused be afforded equal justice underlie some of the aspects of the right to a fair trial, particularly those dealing with a duty upon the state or the court to assist the accused by providing information or counsel or assistance throughout the conduct of the trial to ensure that accused persons are not disadvantaged in defending themselves because of inequality.[3]

Be that as it may, a concern for equal protection or equal justice for accused persons relative to other accused persons should not be conflated with the notion of 'equality of arms'. The latter term of art refers to the respective positions of defence and prosecution in a criminal trial.[4] 'Equality of arms' is a concrete right formulated by the European tribunals out of the residual fair trial right in art 6(1) of the European Convention on Human Rights:[5]

> The principle of the equality of arms . . . is an expression of the rule *audi alteram partem*, and implies that each party to the proceedings before a tribunal must be given a full opportunity to present his case, both on facts and in law, and to comment on the case presented by his opponent. This opportunity must be equal between the parties and limited only by the duty of the tribunal to prevent in any form an undue prolongation or delay of the proceedings.[6]

As Robertson and Merrills point out, the 'equality of arms' principle in criminal trials represents those procedural mechanisms with which the vast inequality in power between the state and the accused is sought to be addressed.[7] The use of the principle in the criminal sphere may have unfortunate consequences if the

[1] See DJ Galligan 'More Scepticism about Scepticism' (1988) 8 *Oxford Journal of Legal Studies* 249; ME Frankel 'The Search for Truth: An Umpireal View' (1975) 123 *University of Pennsylvania LR* 1031; R Dworkin 'Policy, Principle, Procedure' CFH Tapper (ed) *Crime, Proof, and Punishment* (1981) 193. See also *S v Mtyuda* 1995 (5) BCLR 646, 651 (E); *S v Zingilo* 1995 (9) BCLR 1186 (O), *S v McKenna* 1998 (1) SACR 106, 118F-G (C).

[2] 1998 (1) SACR 351, 353H-J (Ck)(Court rejects 'no-difference rule').

[3] See *S v Rens* 1996 (1) SA 1218 (CC), 1996 (2) BCLR 155 (CC), 1996 (1) SACR 105 (CC); *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC), 1996 (1) SACR 94 (CC); *S v Melani & Others* 1995 (4) SA 412 (E), 1996 (2) BCLR 174 (E), 1996 (1) SACR 335, 347 (E); *Douglas v California* 372 US 353 (1963); *Griffin v Illinois* 351 US 12 (1956); *S v Ramuongiwa* 1997 (2) BCLR 268 (V). See also § 51.3*(f)* supra.

[4] See *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 106.

[5] S Stavros *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: An Analysis of the Convention and a Comparison with Other Instruments* (1993) 43.

[6] JES Fawcett *The Application of the European Convention on Human Rights* (2nd Edition, 1987) 154-55.

[7] AH Robertson & JG Merrills *Human Rights in Europe: A Study of the European Convention on Human Rights* (3rd Edition, 1993) 95. Leading cases on 'equality of arms' include *Unterpertinger v Austria* (1986) 13 EHRR 434; *Kostovski v Netherlands* (1989) 12 EHRR 175.

'equality' notion is taken too literally: the tendency would be to think an accused should not be entitled to any procedural or evidential privileges to which the prosecution is not entitled, even though those privileges might well have been created to seek to 'equalize' the forces between prosecution and defence in the first place.[1]

An illustration of this phenomenon is provided by *S v Chavulla & Andere*.[2] Invoking the logic employed in *S v Majavu*,[3] that giving a 'proper meaning' to equality before the law required 'an equality before the law of both the accused and the state', Lategan J pondered whether an accused person should not be obliged to provide the state with previous inconsistent statements as a tit-for-tat for the right to 'docket access' enjoyed by an accused.[4] Such notions indicate vividly how concepts such as 'balancing' and 'equality' may wreak havoc with the right to a fair trial. Is the presumption of innocence then to be regarded as an unfair advantage to an accused?

Whatever the proper role of 'equality of arms', it has nothing to do with non-discrimination or equal protection. The journey into the fields of equality analysis undertaken in *S v Scholtz*[5] and *S v Lavhengwa*,[6] with the greatest respect, produced the sorts of confusion that fair trial analysis could very well do without. It is sincerely hoped that the following sober observation by Cameron J in the *Lavhengwa* will be heeded in future:

> I have some doubt as to whether an equality issue (from the point of view of the right to 'equality before the law') can really be said to arise when a presiding magistrate tries someone summarily on a charge of statutory contempt.[7]

The question of the appropriate remedy for a violation of the right to a fair trial is touched upon and discussed elsewhere.[8] In *S v Shikunga* the Namibian Supreme Court was confronted with the question as to what the effect of a violation of the right to a fair trial should be in a case where evidence had been admitted at trial and such admission was contrary to the right to a fair trial, but the conviction obtained was independent of the impugned evidence.[9] Mahomed CJ analysed the South African common-law approach and the constitutional approach adopted in

[1] See the rejection of the applicant's claim in *Blastland v United Kingdom* (1986) 10 EHRR 528 that the use of hearsay evidence of third-party confessions by an accused should be allowed, given the state's ability to rely on the accused's own confessions.

[2] 1999 (1) SACR 39 (C)('*Chavulla*').

[3] 1994 (4) SACR 268 (Ck).

[4] *Chavulla* (supra) at 44I-45A.

[5] 1997 (1) BCLR 103 (NmS).

[6] 1996 (2) SACR 453 (W).

[7] Ibid at 496.

[8] See § 51.3*(g)* supra (Concerning the tendency to view the criminal procedure rights as exclusively concerned with whether evidence should be admitted or proceedings be proceeded with.) See also § 51.5*(f)* infra (Concerning the problematic relationship between right and remedy as far as the right to a trial within a reasonable time is concerned.)

[9] 1997 (9) BCLR 1321 (NmS).

other jurisdictions, most notably the development of a possibility of 'harmless constitutional error' in the United States. Mahomed CJ concluded that it might be a mistake to assume that the breach of every constitutional right would have the same consequence.[1] Even if this assumption was valid, the learned judge continued, that did not mean the consequence should be the setting aside of the conviction on appeal. He concluded:

> It would appear to me that the test that is proposed by our common law is adequate in relation to both constitutional and non-constitutional errors. Where the irregularity is so fundamental that it can be said that in effect there was no trial at all, the conviction should be set aside. Where one is dealing with an irregularity of a less severe nature then, depending on the impact of the irregularity on the verdict, the conviction should either stand or be substituted with an acquittal on the merits. Essentially the question … is whether the verdict has been tainted by such irregularity.[2]

In *S v Mazingane*, the High Court held that violations of the right to a fair trial had to be examined with reference to their causal impact on the verdict.[3] The impact had to be clearly of such a nature that it resulted in an unfair trial or a failure of justice before a convicted person would be entitled to have a conviction set aside purely by reason of an irregularity.[4] The question whether there had been a failure of justice was, in turn, dependent upon whether or not, when the effect of the irregularity was eliminated, there remained sufficient evidence for proof of guilt beyond reasonable doubt.[5] In *S v Khan,* Howie JA held as follows:

> Of course we are not dealing here … with unconstitutionally obtained evidence but it is just, I think, to adopt the same approach if evidence is unfairly obtained or said to have been unfairly obtained.[6]

The fact of a rights violation, if not justified under the limitations clause, should always entitle the victim to a remedy. This fact is independent of the question of what to do as far as the trial is concerned, although that question will often be the answer to the remedy problem.[7] A damages claim is always on the cards. It might not be too far-fetched to adjust the punishment a guilty person receives in

[1] *Shikunga* (supra) at 1332G.

[2] Ibid at 1332H-I. This approach was endorsed by the Supreme Court of Appeal in *S v Smile & Another* 1998 (5) BCLR 519 (SCA), 1998 (1) SACR 688 (SCA)('*Smile*').

[3] 2002 (6) BCLR 634 (W).

[4] Ibid at 365. See also *S v Jaipal* 2005 (4) SA 581 (CC), 2005 (5) BCLR 423 (CC), 2005 (1) SACR 215 (CC).

[5] See *Tshona & Others v Regional Magistrate, Uitenhage & Another* 2001 (8) BCLR 860, 879 (E). See also *S v Maputle & Another* 2003 (2) SACR 15, 16 (SCA).

[6] 1997 (2) SACR 611, 619 (SCA).

[7] The failure of the Supreme Court of Appeal in *Smile* to distinguish clearly between the questions whether a right had been violated and what should be done about a rights violation essentially left the appellants without any remedies for what seemed at least to have been some violation of the right to be informed with sufficient particularity of the charge, in circumstances where it was held that the 'irregularity' did not merit the drastic response of setting aside the conviction.

accordance with the extent to which his or her constitutional rights were violated.[1] In this way violations might be treated as serious wrongs inflicted upon the person concerned without entailing the sometimes dubious consequence of completely absolving such a person of the liability to suffer punishment.[2] Of course, disciplinary proceedings for rights violations are not barred by any of this, and may well be a valuable educating mechanism.[3]

(c) The right to be informed with sufficient particularity of the charge

The Criminal Procedure Act sets out the extent to which an accused is entitled to particulars of the charge for statutory purposes, entitling the accused to object to the lack of detail, and the court to order further particulars on pain of quashing the charge.[4] The most important constitutional litigation in this area has revolved around the extent to which an accused should be allowed, in the face of the common law litigation privilege, to have access to the police docket relevant to his or her case.[5] The first wave of litigation in this area was concerned with the right of 'access to information' under IC s 23.[6] In *Shabalala & Others v Attorney-General of Transvaal & Another,*[7] the Constitutional Court declared that the question was a fair trial question, particularly one of the right to be informed with sufficient particularity of the charge, rather than an access to information question, the exhaustive operation of the former question rendering recourse to the latter incompetent.[8] Mahomed DP, on behalf of a unanimous court, distinguished

[1] See *Wild & Another v Hoffert NO & Others* 1998 (3) SA 695 (CC), 1998 (6) BCLR 656 (CC), 1998 (2) SACR 1 (CC) at para 36 (Recognizes the possibility of adjustments 'when structuring sentence' to accommodate a rights violation (in that case the right to a speedy trial).)

[2] See the discussion of the tendency to reduce questions of pre-trial violations to FC s 35(5) questions in the context of the right to counsel and its relationship with notions of voluntariness. § 51.3*(f)* above. See also *S v Joors* [2003] 4 All SA 628, 639 (C)(Order by Binns-Ward AJ).

[3] See *S v Philemon* 1997 (2) SACR 651, 667 (W)(Claassen J suggested referring to the Magistrates' Commission the conduct of a magistrate who revealed a predisposition to being dismissive about an accused's right to counsel.)

[4] See Hiemstra (supra) at 216ff; E du Toit, FJ de Jager, A Paizes, AS Skeen & S van der Merwe *Commentary on the Criminal Procedure Act* (RS, 29, 2003) § 84. The principle that the accused was entitled to as much information as necessary for a proper preparation of a defence was enunciated in *R v Moyage & Others* 1958 (3) SA 400, 413 (A). See also *S v Cooper & Others* 1976 (2) SA 875, 885 (T). The wording of FC s 35(3)*(a)* makes this principle explicit. The sufficiency referred to in IC s 25(3)*(b)* is qualified by FC s 35(3)*(a)* thus: 'to be informed of the charge with sufficient detail to answer it'.

[5] The common law litigation privilege attaching to police dockets was authoritatively laid down in *R v Steyn*. 1954 (1) SA 324 (A). See also *Du Toit & Andere v Direkteur van Openbare Vervolging, Transvaal: In re S v Du Toit & Andere* 2004 (2) SACR 584 (T).

[6] *S v Fani & Others* 1994 (3) SA 619 (E), 1994 (1) BCLR 43 (E); *Qozeleni v Minister of Law & Order & Another* 1994 (3) SA 625 (E), 1994 (1) BCLR 75 (E); *S v James* 1994 (3) SA 881 (E), 1994 (1) BCLR 57 (E); *S v Smith & Another* 1994 (3) SA 887 (SE), 1994 (1) BCLR 63 (SE); *Khala v Minister of Safety & Security* 1994 (4) SA 218 (W), 1994 (2) BCLR 89 (W); *S v Majavu* 1994 (4) SA 268 (Ck), 1994 (2) BCLR 56 (Ck); *S v Botha & Andere* 1994 (4) SA 799 (W), 1994 (3) BCLR 93 (W); *S v Khoza & Andere* 1994 (2) SACR 611 (W); *S v Sefadi* 1995 (1) SA 433 (D), 1994 (2) SACR 667 (D).

[7] 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC), 1995 (2) SACR 761 (CC)('*Shabalala*').

[8] Ibid at para 34.

four categories of statement which were covered by the blanket privilege which attached to the docket at common law:

(1) The statements of witnesses which need no protection on the grounds that they deal with state secrets, methods of police investigation, the identity of informers, and communications between a legal advisor and his or her clients.
(2) The statements of witnesses in circumstances where there is no reasonable risk that such disclosure might lead to the intimidation of such witnesses or otherwise impede the proper ends of justice.
(3) The statements of witnesses made in circumstances where there is a reasonable risk that their disclosure might constitute a breach of the interests sought to be protected in paragraph (1).
(4) The statements of witnesses made in circumstances where their disclosure would constitute a reasonable risk of the nature referred to in paragraph (2).[1]

The following principles were laid down:[2]

(1) Exculpatory material was to be made available to the accused.[3]
(2) The prosecution's *ipse dixit* that non-exculpatory documents in the docket fell within the third and fourth categories would not defeat a claim for disclosure unless sufficient evidence were placed before the court for it to establish whether this was the case.
(3) The test was whether a reasonable person in the position of the prosecution would believe that the documents indeed fell within those categories. The court might to this end examine the documents without revealing them to the accused.[4]

Where the relevant risk was found to exist, the *Shabalala* Court held:

> The court should exercise a proper discretion in such cases by balancing the degree of risk involved in attracting the consequences sought to be avoided by the prosecution (if access is permitted) against the degree of the risk that a fair trial might not ensue (if such access is denied). What is essentially involved is a judicial assessment of the balance of risk not wholly unanalogous to the function which a judicial officer performs in weighing the balance of convenience in cases pertaining to interdicts pendente lite.[5]

[1] *Shabalala* (supra) at para 40.
[2] Ibid at para 55.
[3] This requirement is recognized by English courts: *R v Maguire & Others* [1992] 2 All ER 433 (CA); *R v Ward* [1993] 2 All ER 577 (CA). Both cases were discussed comprehensively in *S v Scholtz*, 1997 (1) BCLR 103 (NmS). This obligation extends also to information the authorities are aware of, but do not wish to record. See *S v Xaba* 1997 (1) SACR 194 (W)(Witwatersrand Local Division holds that the right to a fair trial included the right to have one's counsel informed of the existence of incriminating confessional evidence lest counsel be unable to avoid embarrassing revelations in cross-examination.)
[4] See the authority for a similar practice in the field of 'Crown privilege' (public interest immunity) in *Van der Linde v Calitz* 1967 (2) SA 239 (A).
[5] *Shabalala* (supra) at para 55g.

The *Shabalala* Court also held that the rule prohibiting consultation with state witnesses was too wide:[1] consultation might be refused on reasonable apprehension that witnesses would be intimidated, evidence tampered with, state secrets or the identity of informers disclosed, or the proper ends of justice otherwise threatened. Once again the court has to balance the respective interests at stake once the accused had approached the prosecution requesting consultation and consultation had been denied. Consultation might, for example, be unnecessary if cross-examination would adequately perform the same task. Witnesses could not be forced to consult with an accused.[2]

In *S v Smile & Another*,[3] an application by the defence for witness summaries had been dismissed at a time when the relevant provincial division had not yet authoritatively established the entitlement of an accused to such material.[4] After the existence of the relevant right had been authoritatively recognized, the state provided the appellants with statements of witnesses who had testified and of those who were yet to testify. The appellants argued that the fact that the right had not been complied with before the hearing amounted to a violation of the right. The Supreme Court of Appeal held that the violation in question was 'potentially remediable' and any unfairness entailed by it had been purged before the state had closed its case:[5] '[T]he defence could have applied to recall witnesses

[1] *Shabalala* (supra) at para 60f.

[2] It should be noted that aspects of the 'privilege' discussed by Mahomed J refer to public interest immunity rather than litigation privilege. In this regard it is significant to note that the common-law position on public interest immunity in England has shifted radically towards accepting the position argued for in the Scott Report Volume III (1995), that no immunity should be claimable against the accused who wishes to prove his innocence in a criminal case. The innocence exception had been recognized in the sphere of the identity of police informers as early as the case of *Marks v Beyfus* (1890) 25 QBD 494. See *R v Keane* [1994] 2 All ER 478; *R v Agar* [1990] 2 All ER 442; *R v Ward* [1993] 2 All ER 577 and *R v Adams* [1997] Crim LR 292. Ward went so far as to suggest that if the public interest to be protected was too sensitive to yield to innocence, the proper course would be to drop the prosecution. The problem with police dockets, however, is that they attract not only the public interest immunity which yields to innocence but also at least litigation privilege, and often legal professional privilege (legal advice privilege) as well, mostly in the form of what is referred to in the United States as 'work product'. For 'work product' at common law, see *Kennedy v Lyell* (1833) 23 ChD 387. For legal professional privilege attaching to the Department of Public Prosecutions, see *Auten v Raynor* (No 2) [1960] 1 QB 669. Legal professional privilege has most recently been accorded absolute status, even against the claims of an accused wishing to prove innocence. See *R v Derby Magistrates' Court ex parte B* [1996] 1 AC 487 (HL), overruling *R v Barton* [1972] 2 All ER 1192 (Cr Ct). See also *Carter v Managing Partner, Northmoore Hale Davy & Leake* (1995) 183 CLR 121 (HCA). Ironically, this absolute status of the privilege is based on its being a 'fundamental human right'. It seems as if litigation privilege does not enjoy this absolute immunity. See *Re L (a minor)* [1996] 2 All ER 78 (HL). See also *Els v Minister of Safety and Security* 1998 (4) BCLR 434, 439, 443 (NC), 1998 (2) SACR 93 (NC)(Held the *Shabalala* approach to be 'relevant, not only to docket privilege, but also to informer privilege'. This was in the civil context, where an applicant desired disclosure of the identity of an informer in order to institute an action for damages against the informer. The court held the applicant's interests to be outweighed by the public interest served by the privilege attaching to informers.)

[3] 1998 (5) BCLR 519 (SCA), 1998 (1) SACR 688 (SCA).

[4] But see *Phato v Attorney-General, Eastern Cape & Another; Commissioner of the South African Police Services v Attorney-General, Eastern Cape, & Others* 1995 (1) SA 799 (E), 1994 (5) BCLR 99 (E).

[5] *Smile* (supra) at 524D-F.

who had already testified and sufficient time was available to consider the contents of the statements and to prepare for the further conduct of the trial.'[1] Melunsky JA did add the following rider:

> But it should be emphasized that this does not mean that it is open to the State, as a matter of course, to postpone disclosure of the statements of prosecution witnesses provided only that they are disclosed at some time before the closure of its case. Disclosure of statements should usually be made when the accused is furnished with the indictment or immediately thereafter in accordance with the practice suggested in *Shabalala*.[2]

The High Court court's reluctance in *S v M* to allow a possible violation of the right to docket access to upset a conviction in circumstances where such a reversal would seemingly have been outrageous led it to find that no violation had occurred.[3] It did so by requiring evidence of prejudice and a factual basis for a finding that access would have made a difference to the result of the case.[4] The accused had applied 'too late' in the trial for witness statements from the state, ie after the state had closed its case.[5] All of these findings are unfortunate, if they are taken out of context. Sensitivity to the possibility of other ways of addressing violations, rather than by allowing an appeal or excluding evidence, would lead to less anxiety about recognizing violations.[6]

Documents disclosed as a result of the right recognized in *Shabalala* do not constitute 'further particulars' binding upon the state. They should be requested from the Attorney-General and not sought by invoking the procedure for further particulars of the charge set out in s 87 of the Code.[7]

In *S v Scholtz*, the Namibian Supreme Court adopted equality analysis as the basis for determining access to police dockets.[8] This approach, criticized above,[9] may well entail the unfortunate development that the prosecution, in fulfilment of

[1] *Smile* (supra) at 524F.

[2] Ibid at 524 referring to *Shabalala* (supra) at para 56. The degree to which the conduct of the defence up to the point of disclosure had been prejudiced by non-disclosure should have received more attention, particularly given the court's approach of assessing the impact of the irregularity on the verdict. See *S v Chikunga & Another* 1997 (2) SACR 470 (NmS), 1997 (9) BCLR 1321 (NmS). It was also unfortunate, with respect, that the court did not clearly separate the question whether a violation had occurred from the question what should be done about any violation that did occur. Ibid at 523I-524H.

[3] 1999 (1) SACR 664 (C)('*M*').

[4] Ibid at 671J-672A and 673D–E.

[5] *M* (supra) at 672B.

[6] See § 51.5*(b)* supra.

[7] *S v Tshabalala* 1999 (1) SACR 163, 166 (T)(Van der Walt J held the right to disclosure to flow from FC ss 32 and s 35(3), despite the apparent exclusion of FC s 32 from this sphere in *Shabalala*. It was pointed out that the legislature was still to lay down a procedure to be adopted for exercising the right to 'docket access'.)

[8] 1997 (1) BCLR 103 (NmS)('*Scholtz*').

[9] See § 51.5*(b)* supra. The court's proposition, '[t]o achieve equality between the prosecution and the defence is what the Constitution demands when it says "All persons shall be equal before the law"', with respect, is a striking example of confusion between equality of arms and equal protection of the law. Ibid at 112.

its entitlement to 'equality with the accused', is allowed similar disclosures of the defence work product and brief, or at least of the general nature of the defence envisaged. The court's reference to the position in England, where the requirement of prosecution disclosure of exculpatory and other relevant information to the defence was developed without a Bill of Rights, should now be viewed in the ironic light of the recent legislative provisions in that jurisdiction placing an onerous duty upon the accused to disclose in advance the general outline of the defence.[1] It seems the English legislature has partly implemented the kind of 'equality' that the *Scholtz* court had in mind. It is to be hoped that the observation of the Canadian Supreme Court in *R v Stinchcombe*[2] that account should be taken of the 'fundamental difference in the respective roles of the prosecution and the defence' will be heeded in South Africa and that 'equality' analysis will not be allowed to place the right to a fair trial on a false path.[3]

In *S v Angula & Others*; *S v Lucas* the High Court of Namibia held, on the authority of *Shabalala*, that the principles laid down in *Scholtz* applied also to proceedings before the lower courts[4] However, fairness did not require access to the docket in every case. The complexity and the possibility of imprisonment are important factors that point towards disclosure. Simplicity and the minor nature of an offence point against disclosure. In *Koortzen & Others v Prosecutor-General & Others* the High Court of Namibia held that the state bore the onus of showing that no complexities of fact or law were involved necessitating discovery.[5] The court held that where the refusal of a lower court to order discovery had been unjustified, the High Court was entitled in terms of its inherent review power to intervene before the proceedings were completed to direct that discovery be made.

In *Nieuwoudt & Andere v Prokureur-Generaal van die Oos-Kaap*,[6] where it was assumed that the onus was on the applicant in bail proceedings to persuade the court to release him,[7] the opinion was expressed that the higher the onus on an accused, the greater was the degree of access to information to which such an accused was entitled.[8] This proposition is difficult to accept when an accused is defending himself or herself against a charge and the full onus is generally placed upon the state. Why should the accused defending himself or herself be entitled to less information than the accused upon whom the law has chosen to place an onus? The proposition is also not easily reconciled with the court's argument that the stronger the state's case against the accused, the more difficult it should be to obtain bail.[9] Would an increase in the strength of the state's case,

[1] See Criminal Procedure and Investigations Act, 1996, s 5.
[2] [1991] 3 SCR 326, (1992) LRC (Crim) 68, 73.
[3] See § 51.5*(b)* supra.
[4] 1997 (9) BCLR 1314 (Nm).
[5] 1997 (10) BCLR 1478 (Nm).
[6] 1996 (3) BCLR 340 (SE)('*Nieuwoudt*').
[7] For more on the onus in bail proceedings, see § 51.4*(d)* supra.
[8] *Nieuwoudt* (supra) at 344.
[9] Ibid at 344.

rendering discharge of the onus more difficult, have increased the accused's right to information?

Be that as it may, *Nieuwoudt* held that IC s 23 entitled a bail applicant to insight into the docket because of the relevance to bail proceedings of the strength of the state's case.[1] The finding in *Nieuwoudt* was left in tatters by the Constitutional Court's judgment in *S v Dlamini*; *S v Dladla & Others*; *S v Joubert*; *S v Schietekat*.[2] A constitutional challenge to s 60(14) of the Criminal Procedure Act,[3] which subsection disentitled the bail applicant from such insight into the docket as he or she would have at trial, was dismissed unanimously by the Court.[4]

In *S v Kester*[5] it was held that the right of an unrepresented accused to be informed of the particulars of charge included a right to be informed of all competent verdicts lest an unrepresented accused be surprised by a verdict based exclusively on a plea explanation under s 115 of the Criminal Procedure Act 51 of 1977.[6] The decision of the Witwatersrand Local Division in *S v Lavhengwa*[7] to analyse the substantive question of the vagueness of an offence in terms of the right to be informed with sufficient particularity of the charge is discussed above.[8]

(d) The right to adequate time and facilities to prepare a defence

This right, which is one of the new rights added by s 35 of the Final Constitution (FC s 35(3)*(b)*), seems, in its 'facilities' component, to represent a generic principle which is capable of covering access to information and to witnesses and consultation with legal representatives.[9] The most helpful comment is perhaps that of Stavros, who writes:

[1] *Nieuwoudt* (supra) at 344-45.

[2] 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC), 1999 (2) SACR 51 (CC). See also H Axam 'If the Interests of Justice Permit: Individual Liberty, the Limitations Clause, and the Qualified Constitutional Right to Bail' (2001) *SAJHR* 320.

[3] Act 51 of 1977 as recently amended by Act 85 of 1997.

[4] See § 51.4*(d)* supra.

[5] 1996 (1) SACR 456 (N).

[6] See *S v Chauke & Another* 1998 (1) SACR 354 (V).

[7] 1996 (2) SACR 453 (W).

[8] See § 51.1*(a)*(iii) supra, on the finding in *Uncedo Taxi Service Association v Maninjwa & Others* 1998 (3) SA 417 (E), 1998 (6) BCLR 683, 690A-B (E).

[9] For a discussion of the identical right in art 6(3)*(b)* of the European Convention on Human Rights, see AH Robertson & JG Merrills *Human Rights in Europe: A Study of the European Convention on Human Rights* (3rd Edition, 1993) 110ff; JES Fawcett *The Application of the European Convention on Human Rights* (2nd Edition, 1987) 188ff. The main concern, as far as 'facilities' go, is with access to information, the opportunity to consult with one's lawyer, and the opportunity to present evidence. These rights, it would seem, are adequately covered by FC s 35(3)*(a)*, *(f)*, *(g)* and *(i)*. See the accommodation of the right to adequate information under the 'facilities' right of the Namibian Constitution, effected in *S v Kandovasu* 1998 (9) BCLR 1148, 1152D (NmS). Counsel for the respondent in *National Director of Public Prosecutions v Mohamed & Others* 2003 (2) SACR 258 (C) at para 57 argued unsuccessfully that s 26(6) of the Prevention of Organised Crime Act 121 of 1998 was unconstitutional since it infringed the respondent's right to have adequate facilities to prepare a defence.

> The second function of [this right][in addition to the question of time] is to provide a rather broad and flexible rule against which to measure the opportunity of the defence in each particular case to present its case effectively to the court. The proper role of [this right] in this context is similar to that of the fair trial guarantee. The accused may be affected in his enjoyment of the right to adequate facilities for the preparation of his defence in ways which cannot be identified in advance: limited time for preparation for the hearing, failure to order an adjournment and the introduction of surprise witnesses are examples chronicled in the case law.[1]

FC s 35(3)(*b*) was invoked by the court in *S v Nkabinde*,[2] in which the 'bugging' of the consultations and telephone conversations between the accused and his legal advisors was held to have compromised this right.

It may be noted that the question of access to state witnesses discussed in *Shabalala & Others v Attorney-General of Transvaal & Another*[3] would seem more suited to the domain of FC s 35(3)*(b)* than to that of FC s 35(3)*(a)*. Furthermore, the right to assistance by the court to which an unrepresented accused has been held entitled under the residual fair trial right may well now be accommodated under this right.[4]

An example of what would be a violation under FC s 35(3)*(a)* of the right to 'adequate time' occurred in *S v N*,[5] in which the 'remarkable haste' with which a juvenile offender's trial had been conducted was held to violate the residual fair trial right. The right in question serves to remind the authorities that the speedy process requirement is always subject to a prohibition on excessive speed.[6]

(e) The right to a public trial before an ordinary court

(i) *Ordinary courts and impartiality*

The right of an accused to trial before an ordinary court can be profitably compared with the *Nel* Court's gloss on the right of any person not to be detained 'without trial' under FC s 12(1)*(b)*.[7] The 'ordinary court' requirement is also

[1] S Stavros *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: An Analysis of the Convention and a Comparison with Other Instruments* (1993) 186.

[2] 1998 (8) BCLR 996, 1002B E (N). See also PJ Schwikkard 'Arrested, Detained and Accused Persons' in I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 777.

[3] 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC), 1995 (2) SACR 761 (CC).

[4] See § 51.5*(b)* supra. The proliferation of areas of overlap between enumerated rights *inter se* and between enumerated rights and the residual portion of the fair trial right is not conducive to the development of reasonably stable domains of application for the different fair trial rights and the residual right.

[5] 1998 (1) BCLR 97 (Tk), 1997 (1) SACR 84 (Tk).

[6] Questions relating to the propriety of summary trials such as those for contempt *in facie curiae* could perhaps also be properly decided under FC s 35(3)*(a)*. See *S v Lavhengwa* 1996 (2) SACR 453 (W)(Summary proceedings for contempt were upheld as constitutional, although the analysis was undertaken on equality and impartiality grounds.) See also *S v Singo* 2002 (4) SA 858 (CC), 2002 (8) BCLR 793 (CC), 2002 (2) SACR 160 (CC) at para 20.

[7] *Nel v Le Roux NO & Others* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC)('*Nel*). See § 51.1*(a)*(iv) supra; M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds*) Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 40.4.

absent from the right of any detainee to challenge the lawfulness of his or her detention,[1] and from the right of an arrested person under the Final Constitution to be brought before a court within 48 hours.[2] It is clear that, in order to lend significance to the more stringent requirement concerning the nature of the tribunal, 'ordinary court' should be interpreted to refer to a tribunal which not only is not specially constituted for the occasion[3] but is also adorned with the power and the facilities to ensure compliance with all the fair trial rights listed in FC s 35. The clear aim of this provision is to ensure that normal criminal trials with full fair-trial protection are the only acceptable method whereby the state may prosecute individuals for committing offences. Exceptions to this rule require FC s 36(1) justification. The possibility that this aim was undermined by the reasoning in *Nel* has been discussed above.[4]

The 'ordinary court' requirement has to accommodate the requirement laid down in other human rights documents that the tribunal be 'independent or impartial'.[5] Although the sorts of tribunals referred to by the prohibition against detention without 'trial' FC s 12(1)*(b)* do not need to comply with FC s 35(3), they do need to satisfy standards of impartiality implicit in the minimum requirements of natural justice.[6] The 'ordinary court' standard of impartiality and independence should be read as more rigorous than the minimum standard applicable to detention in a non-criminal context.[7]

The requirement of impartiality was discussed at length by the Witwatersrand Local Division in *S v Lavhengwa*.[8] Doctrinal clarity in this area of the law was not advanced by the court's decision to analyze 'impartiality' in terms of the equality clause.[9] The result was the creation of two kinds of 'impartiality' analysis: 'equality impartiality' analysis and 'general impartiality' analysis.[10] The question in *Lavhengwa* was whether a summary conviction by the presiding judge for contempt

[1] See § 51.3*(e)* supra.

[2] See § 51.4*(c)* supra.

[3] The provision in s 148 of the Criminal Procedure Act 51 of 1977 for a specially constituted court by the State President and Minister of Justice in cases of state security or public order must therefore be justified under FC s 36(1) in order to be constitutional.

[4] See § 51.1*(a)*(iv) supra.

[5] See Canadian Charter s 11*(d)*; European Convention on Human Rights art 6(1).

[6] See *Nel v Le Roux NO & Others* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC), as discussed in § 51.1*(a)*(iv) supra and Bishop & Woolman (supra) at § 40.4. On the independence and impartiality required for the FC s 12 'trial', see *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC)('*De Lange*') at paras 67-75.

[7] See § 51.5*(b)* supra. After *De Lange*, it is going to be very difficult to maintain any conceptual space between FC s 12 and FC s 35 as far as independence and impartiality are concerned. The requirements of independence and impartiality laid down in the Canadian cases to which the court in *De Lange* referred seem to fill all the conceptual space to which FC s 35(3)*(c)* entitles an accused.

[8] 1996 (2) SACR 453 (W)('*Lavhengwa*').

[9] See § 51.5*(b)* supra. The fact that 'equality of arms' jurisprudence under the European Convention on Human Rights quite often involves issues of impartiality, it is respectfully submitted, was probably the reason for the Court's journey into the world of discrimination. See *Bönisch v Austria* (1985) 9 EHRR 191.

[10] *Lavhengwa* (supra) at 477f and 492f.

in facie curiae violated the requirements of impartiality: the judge in such cases was, to some extent, *iudex in sua causa*. The Court held that the situation itself was insufficient without more to render the officer in question not impartial. The Court endorsed the reasoning of the Connecticut state court in *Naunchek v Naunchek*[1] that evidence of 'personal embroilment' on the part of the presiding officer was required for summary contempt proceedings to violate the impartiality requirement.[2] The Court 'relied extensively' on the decision of the Ontario Court of Appeal in *R v Cohn*[3] and rejected the conclusion reached in the Zimbabwean case of *In re Muskwe*[4] that the summary contempt offence violated the requirements of a fair trial.[5] This attempt to distinguish *Cohn* and *Muskwe* would appear to be wrong in law: the principles established in *Cohn* and in *Muskwe* as far as impartiality was concerned were the same. Indeed, *Muskwe* relied on *Cohn* for its finding that the contempt before it was the sort directed at the magistrate herself and that such a contempt hearing required adjudication by a different judicial officer. It was with respect to the summary nature of the proceedings that *Muskwe* adopted a different approach. However, no complaint can be made with respect to the *Lavhengwa* Court's adoption of the common-law test of a 'reasonable apprehension of bias',[6] and the distinction between conviction for contempt directed at the dignity of the court and conviction for contempt directed at the person of the judicial officer is sound in principle. But it is surely arguable that the very fact that the two are in practice so difficult to disentangle should lead to a 'reasonable apprehension of bias' in the very nature of summary convictions for contempt *in facie curiae*.[7] Such a 'reasonable expectation of bias' cannot be based

[1] 463 A2d 603, 37 ALR 4th 995 at 1001 (1983).

[2] *Lavhengwa* (supra) at 481. See also *S v Ntshwence* [2004] 1 All SA 328 (Tk)(Maya J acknowledged that summary proceedings for contempt *in facie curiae* infringed the right to a public trial before an ordinary court. It was found, in that case that the limitation was justified.)

[3] (1984) 13 DLR (4th) 680 ('*Cohn*'). See *Lavhengwa* (supra) at 494.

[4] 1993 (2) SA 514 (ZH)(' Muskwe').

[5] *Cohn* (supra) at 494.

[6] Ibid at 493. In *S v Phallo & Others,* an objection to extensive interrogation by assessors was loosely based on the right to a fair trial. 1998 (3) BCLR 352, 357 (B). It was natural in the circumstances that the court would base its enquiry in this regard upon the common law principles relating to judicial intervention and apparent partiality.

[7] In *S v Maghuwazuma,* Brand J referred to *Lavhengwa* and extracted the ratio that the encroachment ('inbreuk') upon an accused's right to a fair trial entailed by summary contempt proceedings was justified in a case where such proceedings were necessary to 'protect the dignity, authority and procedural integrity of the Court'. 1997 (2) SACR 675, 680 (C) citing *Lavhengwa* (supra) at 474. Having determined that the *Lavhengwa* approach did not differ much from the common-law approach, Brand J regarded the case before him, involving the failure by an attorney to appear in a criminal matter, not to be appropriate for summary proceedings, particularly given the attorney's declared and not unjustified ('nie onredelike') fear of personal bias on the part of the magistrate in question. Ibid at 680-81. An important decision that illustrates the problematic nature of summary convictions for contempt *in facie curiae* is *S v Solomons* 2004 (1) SACR 137 (K). See also *In re Chinamasa* 2001 (2) SA 902, 922 (ZS); *S v Mamabolo (E TV & Others Intervening*) 2001 (3) SA 409) (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC) at para 54 (Court held the summary procedure employed for a summary charge of contempt of court *in facie curiae* to be irreconcilable with FC s 35(3)(*i*).)

on the fact that the presiding officer belongs to a different race to that of the accused. The Cape Provincial Division in *S v Collier* determined that a fair trial did not entitle an accused to be tried by a presiding officer 'more representative of the society from which the accused [came], being the previously disenfranchised majority'.[1]

The requirements of independence and impartiality were discussed in the context of FC s 12 in *De Lange v Smuts NO & Others*. Ackermann J referred to the requirement of an 'ordinary court' for criminal incarceration in holding that anything but a court constituted or presided over by a judicial officer of the court structure established under the Final Constitution would not be 'appropriate' — in terms of FC s 34 — for a hearing which might lead to non-criminal incarceration.[2] He endorsed the following dictum from *R v Valente*:

> Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word 'impartial' connotes absence of bias, actual or perceived. The word 'independent' reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the Executive Branch of government, that rests on objective conditions or guarantees.[3]

The three essential conditions of independence identified were security of tenure, a basic degree of financial security free from arbitrary interference, and institutional independence with respect to matters relating directly to the judicial function.[4] Ackermann J also endorsed the elaboration provided in *R v Genereux* that independence entailed 'not only freedom from interference by the executive and legislative branches of government but also by 'any other external force, such as business or corporate interests or other pressure groups'.[5]

The Cape Provincial Division in *Freedom of Expression Institute & Others v President of the Ordinary Court Martial NO & Others* followed the Canadian example set in Genereux and struck down as unconstitutional the general court martial.[6] The power of interference by the executive in the constitution of the court and in the prosecution and determination of cases in courts martial constituted the core of the constitutional ill. Allowing lay people the power to convict and to imprison people for up to two years violated the 'ordinary court' provision.[7] In rejecting an

[1] 1995 (8) BCLR 975, 979 (C), 1995 (2) SACR 648 (C)('*Collier*').
[2] *De Lange* (supra) at para 74.
[3] (1985) 24 DLR (4th) 161, 172.
[4] Ibid at para 70.
[5] (1992) 88 DLR (4th) 110, 118 at para 72.
[6] 1999 (3) BCLR 261 (C)('*Freedom of Expression Institute*').
[7] Ibid at para 18.

argument that an ordinary court martial was rendered an 'ordinary court' by FC s 166*(e)*,[1] Hlophe ADJP held:

> [W]hether the terminology 'court' is appropriate for [a court martial] in its present form … does not matter. No accused person should be subjected to being tried by just any court. It must be an ordinary court which conforms with the spirit of the Constitution and which affords an accused person a fair trial. By no stretch of the imagination can the ordinary court martial be 'an ordinary court' within the meaning of sections 35(3)(*c*) and 34 of the Constitution.[2]

There were ways, the Court held, of structuring courts martial without violating the independence standards required by the constitutional right to a fair trial.[3] Common-law principles regulate the extent to which a judicial officer should participate in such hearings — ie, cross-examining an undefended accused — and ensure that the officer's behaviour does not have even the appearance of impropriety or bias.[4]

Some food for thought was provided in the judgment of the full court of the Natal Provincial Division in *S v Ngcobo*.[5] Having determined that a judge's questioning of an accused to make up for an inept prosecution did not violate the principle of impartiality, Squires J held that the Final Constitution did not hold adversarial principles so sacred as to forbid the intrusion of any elements of an inquisitorial nature.[6] Furthermore, the *Ngcobo* Court disagreed that the Final Constitution militated against allowing a lack of sophistication on the part of the prosecuting and investigative process to lead to greater intrusion by the judge to avoid travesties of justice.[7] It was held that such an approach, followed in *S v Van den Berg*,[8] showed 'a realistic and sensible appreciation of the situation that must indeed be faced by courts from time to time in this country, as well as Namibia'.[9] This may be so, but it would be a cause for concern if an accused had to fear an inept prosecutor more than a competent one, since the former might receive more help from the Bench than the latter. Indeed, the Zimbabwe Supreme Court in *Smyth v Ushewokunze & Another*[10] held the right to a 'fair hearing … by an … impartial court', expressly entrenched in s 18(2) of the Zimbabwean Constitution, to 'include within its scope and ambit not only the impartiality of the decision-making body, but the absolute impartiality of the prosecutor

[1] FC s 166(*e*) defines the courts as including 'any other court established or recognized in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts'.

[2] *Freedom of Expression Institute* (supra) at para 21.

[3] See *Findlay v United Kingdom* 24 EHHR 221, 244-45 at paras 26-27. The panacea was to split functions and to reduce the role and interference of an executive 'convening authority'.

[4] See *S v Mosoinyane* 1998 (1) SACR 583, 594C-597G (T).

[5] 1998 (3) BCLR 298 (N)('*Ngcobo*').

[6] 1998 (8) BCLR 996 (N). See § 51.5*(j)*(ii) infra.

[7] *Ngcobo* (supra) at 305H-306D.

[8] 1995 (4) BCLR 479 (Nm)('*Van den Berg*')

[9] *Ngcobo* (supra) at 306D.

[10] 1998 (2) BCLR 170 (ZS).

himself whose function, as an officer of the court, form[ed] an indispensable part of the judicial process'.[1]

Institutional independence is to be distinguished from 'impartiality'. The fact that the right requires the court in question to be an 'ordinary court' means that the question of institutional independence will be ensured by the provisions relating to the separation of powers. In *S v Dodo*[2] counsel for the accused argued that the provisions of s 51(1) of the Criminal Law Amendment Act,[3] which prescribed the imposition of minimum sentences in certain circumstances, offended the right to a trial in an ordinary court as entrenched in FC s 35(3)(*c*) and the separation of powers doctrine. Smuts AJ held that the extent of the infringement was significant, that there was no apparent relation between the limitation and its purpose and that there were less restrictive measures to combat crime.[4] The High Court declared s 51(1) inconsistent with FC s 35(3)(*c*) and the separation of powers doctrine. It then referred this declaration to the Constitutional Court for confirmation. The declaration of invalidity was, however, not confirmed by the Constitutional Court.[5] Ackermann J, following the approach enunciated in *S v Malgas*,[6] held that the sentencing court retained the discretion to impose a lesser sentence than that prescribed should there exist 'substantial and compelling circumstances' to do so. The sentencing court was thus not obliged to impose a sentence which would limit the accused's FC s 12(1)(*e*) right.[7] As to the argument that s 51(1), read with s 51(3) of the Criminal Law Amendment Act, constituted a breach of FC s 35(3)(*c*) because a sentencing court would be bound by s 51(1) and would thus no longer be an 'ordinary court', the Constitutional Court held that this could only hold true if s 51(1) had a material effect on the sentencing court's independence or if it deprived such court of some judicial function to such an extent that it could no longer be classified as an 'ordinary court'. The Constitutional Court rejected this argument.[8] Ackermann J further wrote that there was no absolute separation of powers between the judicial function and the legislative and executive functions under the Final Constitution. The latter two shared an interest in the execution of punishment imposed by the judiciary.[9]

[1] The view expressed by Etienne du Toit SC in the 1st Edition version of this chapter, that impartiality extended also to the role of the prosecutor, was specifically endorsed. Ibid at 178B. Gubbay CJ regarded this as a 'broad and creative' interpretation of the right, which was necessary to avoid the prejudice inherent in being faced with a prosecutor who bore a personal grudge. The reasoning renders problematic the propriety of private prosecutions under the right to be tried by an impartial court. Although the thrust of Gubbay CJ's reasoning was based on the role of a public prosecutor acting on behalf of the state and with its resources at his or her disposal, the fact that such impartiality was grafted on to the accused's right would mean that private prosecutions prima facie violated that right.

[2] 2001 (1) SACR 301 (E)('*Dodo HC*').

[3] 105 of 1997.

[4] *Dodo HC* (supra) at 315.

[5] *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC), 2001 (1) SACR 594 (CC)('*Dodo*'). See also A Pillay 'Recent Cases: Constitutional Application' (2001) 14 *South African Journal for Criminal Justice* 282.

[6] 2001 (2) SA 1222 (SCA), 2001 (1) SACR 469 (SCA)('*Malgas*').

[7] Ibid at para 40.

[8] *Dodo* (supra) at para 50.

[9] Ibid at para 24. See also *Mhlekwa v Head of the Western Tembuland Regional Authority and Another; Feni v Head of the Western Tembuland Regional Authority & Another* 2000 (2) SACR 596 (Tk).

The virtues of the separation of powers doctrine and its relationship to judicial independence and impartiality were subject to further criticism from the bench in *Bangindawo & Others v Head of the Nyanda Regional Authority & Another*. The *Bangindawo* Cout saw 'no reason whatsoever for the imposition of the Western conception of the notions of judicial impartiality and independence in the African customary law setting' and rejected an argument that regional authority courts, which had the power to conduct criminal trials, violated the principles of independence and impartiality demanded by IC s 96(2).[1] Madlanga J reasoned that 'the embodiment of all these powers [judicial, executive and law-making] in a judicial officer [would] in the minds of those schooled in Western legal systems, or not exposed to or sufficiently exposed to African customary law, or not believing in African customary law, be irreconcilable with the idea of independence and impartiality of the judiciary.'[2] *Bangindawo* offers a striking illustration of the contrast between the universalist turn reflected in the Bill of Rights and the Final Constitution's simultaneous attempt to accommodate African customary law.[3] The problem in *Bangindawo* was not so much one of how to interpret judicial independence and impartiality in the African customary context as one concerning areas of penal sovereignty. It is one thing to say the Interim Constitution insulated certain courts from the strictures of IC s 25. But, with great respect, it is quite another thing to contend that there is some way in which a regional authority court can be regarded as 'independent', or even as 'impartial' in criminal matters.[4] Why IC s 25(3)*(a)* never rates a mention in *Bangindawo* remains a mystery. It is particularly odd given that the court found that the right to counsel guaranteed by IC s 25(3)(*e*) could not yield to the procedures of African customary law — which knew, at that time, of no such phenomenon.[5]

(ii) *The right to a public trial*

The accused is given the right to a public trial in order that justice be seen to be done. Access to the public ensures the legitimacy of the criminal justice system

[1] 1998 (3) BCLR 314, 327D (Tk), 1998 (2) SACR 16 (Tk)('*Bangindawo*').

[2] Ibid at 326H-I.

[3] See generally TW Bennett & C Murray 'Traditional Leadership' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 25.

[4] See *Valente v R* (1985) 24 DLR (4th) 161, cited as (1986) 19 CRR 354 (SC) in *Bangindawo* (supra) at 325J; *R v Beauregard* (1986) 26 CRR 59 (SCC) at 68, 1987 LRC 180, 187 (SCC); *R v Généreux* 8 CRR (2d) 89 (SCC), (1992) 88 DLR (4th) 110. See *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at paras 67–75; *S v Van Rooyen & Others* 2001 (2) SACR 376 (T), 2001 (4) SA 396, 405 (T).

[5] *Bangindawo* (supra) at 330-331. See § 51.5*(b)* infra. The court could admittedly have arrived at the same finding on independence by holding that the term 'ordinary court' in IC s 25(3)(*a*) had to be read either as carrying a different meaning in the areas of operation of those courts the existence of which was saved for the interim in IC s 214(1), or simply as subject to such savings. See *Bangindawo* (supra) at 323ff.

and acts as an important safeguard of impartiality.[1] However, an important distinction exists between democratic and free speech concerns, on the one hand, and the element of publicity inherent in an accused's right to a fair trial on the other. Indeed, publicity and free speech concerns often conflict with an accused's right to a fair trial.[2] These two sometimes opposing interests were, unfortunately, conflated in *Klink v Regional Court Magistrate NO & Others*. Worse still, the distinct right to challenge evidence (our 'confrontation right') was not extricated from the following jurisprudential cocktail:

> [T]he requirement that the trial must be public amounts to the constitutionalization of a long-recognized principle of transparency in criminal proceedings. The purpose of insisting on a public trial is to enable the public to be fully informed of the evidence, as far as it is possible to do so, so that it may be properly able to evaluate any judgment (*S v Leepile & others* (4) 1986 (3) SA 661 (W) at 665I J) [free speech interest]. The enshrinement of the right to a public trial ensures that secret trials employed by totalitarian states will not be tolerated under the Constitution [both free speech interest and fair trial interest]: but it does not guarantee the right of the accused and the witness to be physically present in the same room [confrontation problem].[3]

The court left open the question of the constitutionality of ss 153 and 154 of the Criminal Procedure Act providing for trials to be held in camera and for information not to be published in certain cases.[4] The impugned provision in this case, which allowed vulnerable witnesses to testify by video-link and to be cross-examined through an intermediary, had little to do with the right to a public trial.

[1] In *Freedom of Expression Institute,* an order to convene a court martial in camera and to exclude the media was set aside. But this was based upon the interference of the executive 'convening authority' in the independence of the tribunal, not on any notion of the right to a public trial or the public's right to a free flow of information relating to criminal trials. The press, who had been excluded from a court martial, succeeded in having the institution declared unconstitutional for failing to provide its accused with a fair trial. If the front door is locked, one can always get in by breaking the house down. The right to a public trial does not, however, extend to disciplinary hearings before administrative tribunals. See *Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & Others* 2000 (4) SA 621 (C).

[2] See *Nebraska Press Association v Stuart* 427 US 539, 96 SCt 2791 (1976)(A restraining order against the press and broadcasters interdicting publication of confessions made by the accused in a high-profile murder case was struck down as an impermissible prior restraint on free speech, which ironically was more serious given the interest of the public in information about the criminal justice process. The US Supreme Court starkly subordinated fair trial rights to public access. The problem with adverse pre-trial publicity is that the press and public do not generally conduct their discourses with due regard to the presumption of innocence.) Stuart can be contrasted with the approach adopted by the Chancery Division in England in *Bunn v British Broadcasting Corporation & Another The Times* 23 June 1998 (On grounds of public policy the court protected the confidentiality of a statement made to the police under caution, where the defendants desired to publish the statement after the Maxwell fraud prosecutions had failed to result in any convictions.)

[3] 1996 (3) BCLR 402, 414 (SE)('*Klink*').

[4] Ibid. See the decision in *Richmond Newspapers Inc v Commonwealth of Virginia* 448 US 555 (1980)('*Richmond*'), referred to in *Klink* (supra) at 413-414 (A blanket ban on public access to a criminal trial was held to violate the First Amendment protection of free speech. *Richmond* was another case in which the interests of the defence were opposed to the publicity which the newspapers were seeking.)

The Constitutional Court in *Nel v Le Roux NO & Others*[1] referred, obiter, to the 'well-recognized exceptions in our criminal procedure to the general rule that criminal proceedings [were] to be conducted in open court' and cited s 153 of the Criminal Procedure Act as an example.[2] The court also referred to exceptions recognized by the US Supreme Court to the public's right to access to trials inherent in the First Amendment right to free speech.[3] Exceptions to the public's free speech rights, however, are not the same thing as exceptions to the accused's fair trial rights.

The Zimbabwe Supreme Court in *Banana v Attorney-General* was 'confronted for the first time with the contention that widespread pre-trial publicity adverse and hostile to an accused person [might] so indelibly prejudice the minds of the judge and assessors at the criminal trial as to negate the constitutional protection of a fair hearing before an independent court'.[4] Gubbay CJ stated categorically: '[T]here can be no doubt that the right to receive a fair trial, which is the central precept of our criminal law, must be given priority over freedom of the press.'[5] He proceeded by acknowledging that the administration of the criminal law in notorious cases could not be allowed to be derailed by the mere fact of publicity. He then added:

> [M]edia reporting of a judicial process, or in advance of it, may, in exceptional circumstances, be so irresponsible and prejudicial as to make the unfairness irreparable and the administration of justice impossible. If that were to occur then there is, quite literally, nowhere to go. The court will have no option but to grant a stay of proceedings; for it is more important to retain the integrity of the system of justice than to ensure the punishment of even the vilest offender.

One would have expected, then, an investigation into the question as to whether *Banana* reflected the sort of 'exceptional circumstances' that demanded a stay of proceedings. But the judgment did not proceed thus. It detailed the extent of the press barrage of accusation and scandal, and held this to have exceeded the boundaries to be expected even in high-profile cases.[6] But then, having determined the test to be whether a 'real and substantial risk' of an unfair trial had resulted,[7] Gubbay CJ held that, given that judges and assessors could take publicity without being unduly affected by it, the challenge had to be dismissed. The reasoning cannot but be regarded as applicable to all cases, thereby undoing the notional possibility of 'exceptional circumstances', and the acknowledgement of the humanity and fallibility of judges entertained in the judgment:

[1] 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC)('*Nel*').
[2] Ibid at para 17. Well-established statutory exceptions and properly justified limitations on rights need not be co-extensive. See §§ 51.1*(b)*(iii) and (iv) supra.
[3] *Nel* (supra) at para 17.
[4] 1999 (1) BCLR 27, 28J–29A (ZS)('*Banana*').
[5] Ibid at 32B.
[6] *Banana* (supra) at 32-34.
[7] Ibid at 34F.

> To accept that there is a real or substantial risk of a judge's mind becoming so clogged with prejudice by what he has read or heard about an accused, would mean that it would be impossible to find an impartial judge for a high profile case; and that such an accused could never receive a fair trial. The result would be nothing less than judicial abdication. The proposition needs merely to be stated to convince of its unsoundness.[1]

(f) The right to trial within a reasonable time

The relationship between the arrested person's speedy process rights and those of the accused person is discussed above.[2] The accused person's right to trial within a reasonable time is one right which quite obviously includes consideration of a period before the commencement of the proceedings — it is, after all, the speed with which such proceedings have come about that is at issue. The right in IC s 25(3)*(a)* refers to a reasonable time 'after being charged', and much of the IC s 25(3)*(a)* jurisprudence is naturally concerned with the requirements of 'being charged'.[3] The Final Constitution has dropped the requirement that one be 'charged' before the period of delay can be considered, and has also clarified that the scope of the right to trial within a reasonable time extends to the conclusion of the trial as well as its inception. FC s 35(3)*(d)* reads, in relevant part, 'to have their trial begin and conclude without unreasonable delay'. (IC s 25(3)*(j)* provided separately for the right to be 'sentenced within a reasonable time after conviction'.) All appellate and review procedures would seem to be embraced by the phrase 'their trial'.[4]

However, *S v Pennington & Another* the Constitutional Court unanimously left this point open by way of obiter dictum.[5] It was unnecessary for the *Pennington* Court to decide whether to regard the right contained in IC s 25(3)*(a)* or that in FC s 35(3)(*d*) as extending also to appellate delay, since whichever of the two rights were to be applicable, such delay as did occur would not entitle the applicants to have their convictions set aside or their sentences reduced, which was the

[1] *Banana* (supra) at 36I-37A.

[2] See § 51.4*(c)* supra.

[3] See § 51.2 supra for a discussion of the necessity to keep distinct, on the one hand, the definition of 'charged' for the purposes of determining the relevant period under IC s 25(3)*(a)* and, on the other hand, the definition of 'charge' for the purposes of determining when a person is to be regarded as an accused person, as distinct from an arrested person.

[4] See *Attorney-General, Eastern Cape v D* 1997 (1) SACR 473, 475 (E), 1997 (7) BCLR 918 (E)(The Eastern Cape Local Division remarked: 'An appeal is not a re-trial or a trial de novo. It . . . is an extension or a continuation of the lis between the state on the one hand and the accused person on the other.') This seems equally applicable to the case of a review of sentence, delay in the effecting of which concerned the court in *S v Manyonyo* 1996 (11) BCLR 1463, 1465-1466 (E). The *Manyonyo* court decided the matter in terms of a common-law concern with not depriving the individual of his or her liberty unless it was necessary, and mentioned the possibility that such a delay might itself amount to a failure of justice. The court did not have recourse to IC s 25(3)*(j)*. See § 51.1*(a)*(ii) supra, for more about the common-law liberty analysis adopted by the court. See also D Sing 'The Constitutional Right to a Fair Trial: Understanding Section 35(3)*(d)* Through the Cases' (2000) 63 *Journal for Contemporary Roman-Dutch Law* 121.

[5] 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC)('*Pennington*') at para 41.

relief claimed.[1] The Court did point out, however, that although undue delay in hearing criminal appeals was 'obviously undesirable', it did not follow that such delay constituted an infringement of the constitutional right to a fair trial.[2]

The jurisprudence around the meaning of the word 'charged' need not be abandoned in interpreting the more openly defined right in FC s 35(3)(*d*). The degree of apprehension on the part of the individual that the state is intent on prosecuting him or her[3] or the extent to which the individual's liberty has been

[1] The Court held that the applicants were not entitled to invoke the provisions of the Final Constitution, which finding rendered the obiter conclusion on relief twice removed. *Pennington* (supra) at para 36.

[2] Ibid at para 41. The Court's reference to the dispute in the Canadian Supreme Court about the extension of the right to trial within a reasonable time to appeals merits consideration. The minority judgment in the case concerned — *S v Potvin* [1993] 2 SCR 880, 105 DLR (4th) 214 ('*Potvin*') — is to be preferred over that of the majority. The different considerations pertaining to appeal would naturally result in different factors of reasonableness. The majority decision, that the relevant right to be tried within a reasonable time did not apply to appeal delays, was decisively influenced by three considerations relevant for present purposes:

1. The general due process seepage from s 7 of the Charter could take care of any due process problems not covered by s 11*(b)*'s domain of the trial proper. Ibid at 229ff. One should not forget that the majority held appellate delay capable of violating the 'principles of fundamental justice' enshrined in s 7. The pertinent American jurisprudence invoked by the Court involves a similar structure: Fourteenth Amendment due process performs a similar sweeping function. Ibid at 228. This difference in doctrine is significant given the due process wall in the South African framework.
2. The *Potvin* majority 'agreed' with the European Court of Human Rights decision in *Wemhoff v Germany* (1968) 1 EHRR 55. The right to trial within a reasonable time contained in art 5(3) of the European Convention applies 'only to trial', whereas the right in art 6(1) to a 'fair and public hearing' 'in the determination . . . of any criminal charge against him' applied to appeals as well. It requires little illustration that confining the only 'speedy process' right in a Charter to such circumstances as apply to one of a pair of twin speedy process rights in another Convention is highly questionable. Closer scrutiny of the stages of the criminal process to which art 6(1) and art 5(3) apply reveals complexity, but in any event a framework in which the gaps left by the one right are filled by the other. See § 51.4*(c)* supra.
3. The *Potvin* majority's decision was based upon the requirement that 'charged' be afforded the same narrow meaning throughout s 11. See *Potvin* (supra) at 223-26. This finding entails no grave consequences for a system where due process seepage can take care of pre-trial and post-trial delay. The difference for the purposes of IC s 25(3)*(a)* is that 'charged' requires a broader meaning there than is appropriate for determining the definition of 'accused', in order to allow pre-trial delay to be relevant to an accused's right to a fair trial, and to distinguish accused persons from arrested persons. See § 51.2 supra. For the purposes of FC s 35(3)*(d)*, the purpose and the effect of the alteration of the wording and of the omission of the reference to speedy sentencing after conviction are to overcome the gaps referred to in § 51.4*(c)* supra, and to allow the speedy process right to extend in both directions beyond the confines of the trial itself, to apply to all relevant pre-trial occurrences and to apply until the *lis* between individual and state is finally concluded as the section demands.

On 'knowledge of the charge', see *Du Preez v Attorney-General of the Eastern Cape* 1997 (3) BCLR 329, 338 (E)(The person concerned must be 'advised by a competent authority that it has been decided that he is to be prosecuted'.) The Moeketsi report creates the impression that the jurisprudence around the word 'charged' entered our courts through the Canadian decision of *R v Kalanj* (1989) 1 SCR 1594, whereas the extensive passage quoted ostensibly from that case was derived from the Zimbabwean decision in *In re Mlambo*. 1992 (2) SACR 245, 249-50 (ZS)('*Mlambo*').

[3] See *Moeketsi v Attorney-General, Bophuthatswana, & Another* 1996 (7) BCLR 947, 963 (B).

interfered with[1] are animated by the same principles that underly the right to trial within a reasonable time and hence should inform our interpretation of FC s 35(3)(*d*).

In *Sanderson v Attorney-General, Eastern Cape,* Kriegler J wrote — of IC s 25(3)*(a)* and FC s 35(3)(*d*) — that the 'respective sections, though not identical, [were] substantially the same'.[2] Having pointed out that human rights jurisprudence had attached varying meanings to the word 'charged', ranging from 'formal arraignment or something tantamount thereto' to 'broadly and imprecisely … signify[ing] no more than some or other intimation to the accused of the crime(s) alleged to have been committed',[3] Kriegler J proceeded to find it unnecessary to decide where along the continuum of meanings the word fell. The occurrence in question in the instant case (appearing in the dock for the formal remand of a criminal case) clearly fell within the meaning of the provision.[4] What was significant was Kriegler J's intimation that the meaning of the word 'charged' in any given case, being determined by context, could be informed by the degree of 'anxiety, stress and social embarrassment suffered by a public figure accused of a morally reprehensible crime'.[5] Still, the difficulty of basing the significance of the pre-charge period on constitutional grounds, once 'charge' has been defined, has now been remedied.[6]

The right to be tried within a reasonable time was comprehensively discussed in *Moeketsi v Attorney-General, Bophuthatswana, & Another.*[7] The court did not indicate clearly whether it was adopting a comparative constitutional approach, or whether its statement that its approach was one 'guided by principles that ha[d] been formulated by the Supreme Court over decades'[8] was to be taken as incorporating the common law into IC s 25(3). It distilled from the Canadian and American case law the following four governing factors:

[1] *Mlambo* (supra) at 249-250 endorsed the approach of the European Court of Human Rights in *Eckle v Germany (Federal Republic)* (1985) 5 EHRR 1 and *Foti v Italy* (1983) 5 EHRR 313 (Relevant period was from the time the situation of the suspect had been materially affected: '[T]he start of the impairment of the individual's interests in the liberty and security of his person.') *Mlambo* was followed in *Bate v Regional Magistrate, Randburg, & Another* 1996 (7) BCLR 974 (W). For a discussion of the history and rationale of the right to a speedy trial see B Farrell 'The Right to a Speedy Trial Before International Criminal Tribunals' (2003) 19 *South African Journal for Human Rights* 99.

[2] 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC)('*Sanderson*') at para 17.

[3] Ibid at para 18.

[4] Ibid at para 19.

[5] Ibid.

[6] See *Du Preez v Attorney-General of the Eastern Cape* 1997 (3) BCLR 329, 339 (E). See *Coetzee & Others v Attorney-General, Kwazulu-Natal, & Others* 1997 (8) BCLR 989 (D), 1997 (1) SACR 546, 560-61 (D)(It was remarked, for the purposes of FC s 35(3)(*d*), that delay before arrest might be more prejudicial than delay after arrest, there being no safeguards of direct court control before arrest as there are after arrest. The authorities may want to counter that the 'direct court control' after arrest is the consequence of a speedy process right in that sphere, not a reason for having a different speedy process right in another sphere.)

[7] 1996 (7) BCLR 947 (B), 1996 (1) SACR 675 (B)('*Moeketsi*').

[8] Ibid at 959.

1. the length of the delay alleged;
2. the reasons for the delay;
3. any 'clearly and unequivocally' proved 'waiver of time periods' by the accused; and
4. the degree of prejudice suffered by the accused.[1]

The reasons for the delay were then divided into:

1. those caused by the state;
2. those caused by special circumstances such as complexity;
3. those caused by systemic or institutional factors; and
4. those caused by the accused's conduct (the state to prove this cause).[2]

Liberty, security and a just trial were identified as the interests affected,[3] and 'prejudice' was divided into:

1. oppressive pre-trial incarceration;
2. anxiety and concern; and
3. impairment of the defence.[4]

These considerations were then all to be assessed by an '*ad hoc* balancing' act 'requiring the ability and skill of a juggler'.[5] Conceptual problems with this analytical framework abound: the meaning of 'prejudice' and its relationship with the length of the delay (some circularity seeming unavoidable), the operation of a 'reasonableness' element within the determination of the length period itself, which is to act as a factor in determining 'reasonableness',[6] the operation of a more specific species of 'actual prejudice' within the generic category of 'prejudice',[7] the operation of the accused's conduct as a cause within the category of 'prejudice',[8] and whether 'prejudice' is a necessary but not sufficient requirement,[9] or not a necessary but often a sufficient requirement.[10] It had appeared from the judgment in *Coetzee & Others v Attorney-General, Kwazulu-Natal, & Others* that 'trial prejudice' — ie the impairment of the ability to present an adequate defence — was the most important and ultimately decisive factor in the juggler's act.[11] The

[1] *Moeketsi* (supra) at 961. See also *R v Askov* (1990) 2 SCR 1199.
[2] *Moeketsi* (supra) at 965.
[3] Ibid at 961.
[4] *Barker v Wingo* 407 US 515 (1972).
[5] *Moeketsi* (supra) at 965.
[6] Ibid.
[7] Ibid at 968.
[8] Ibid.
[9] See *United States v Lovasco* 431 US 783 (1977), as cited in *Moeketsi* (supra) at 962-963.
[10] See *United States v Marion* 404 US 307, 320 (1971), cited in *Moeketsi* (supra) at 961. See also P Hogg *Constitutional Law of Canada* (3rd Edition, 1992) § 49.10 ('[A] finding of prejudice is not a necessary condition of a ruling of unreasonable delay'); *Coetzee v Attorney-General*, *Kwazulu-Natal* 1997 (8) BCLR 989 (D), 1997 (1) SACR 546 (D)(The intensity of prejudice at trial was in effect the governing factor decisively determining whether a fair trial was possible or not.)
[11] 1997 (8) BCLR 989 (D), 1997 (1) SACR 546 (D)('*Coetzee v Attorney-General*').

High Court's adoption of the English abuse of process jurisprudence led to the following conclusion and problem: if undue delay was culpable, a stay of proceedings might be ordered, depending ultimately on the degree of prejudice suffered. If, on the other hand, there was only prejudice (no culpability in the undue delay), a stay could be ordered provided prejudice was sufficient to render the trial unfair. Both tests clearly turned on the degree of 'trial prejudice' suffered by the accused. The threshold for both tests was whether the threat to a 'fair trial' had reached critical mass. This threshold cannot be different for the two cases. It therefore becomes vital to ask what effect, in principle, fault on the part of the authorities should have on the fairness assessment — irrespective of the degree of prejudice. The independent force of the reasonable time right within the fair trial canon must be given some meaning. A question-begging test in terms of ultimate fairness, while perhaps appropriate for a decision on the remedy, is a conceptually unsatisfactory way of establishing whether the right has been violated in the first place.[1] Abuse of process analysis has not yielded clarity.[2] One should also note

[1] See *R v Carosella* (1997) 142 DLR (4th) 595 at paras 26-40 (The majority held that a determination whether a fundamental right had been breached based upon the degree of resulting trial prejudice conflated the remedy question and the violation question. The court categorically held that the question of the degree of prejudice suffered by an accused was not a consideration to be addressed in the context of determining whether a substantive Charter right had been breached, such prejudice being relevant only to the remedy stage. Whatever the merits of this latter, rather striking pronouncement, a similar effort to distinguish the remedy question from the violation question is crucial for a proper approach to the speedy process rights in South Africa.) The Natal Provincial Division in *Wild & Another v Hoffert NO & Others* regrettably allowed the conclusion that there had been no violation of rights under IC s 25(3)*(a)* to follow from the finding that the drastic remedy of dismissing the case or granting a stay of the prosecution was not called for. 1997 (7) BCLR 974, 987 (N). The Constitutional Court, in *Wild & Another v Hoffert NO & Others,* made the following welcome observations about the finding:

> I would respectfully suggest that the finding that there had been no infringement conflates the question of infringement under s 25(3)*(a)* with that of remedy under s 7(4)*(a)*. Although the successive steps of the analysis should not be performed in watertight compartments, their separate and distinct requirements should not be overlooked. . . . A finding that the consequential relief sought is inappropriate must not be confused with the antecedent finding as to infringement.'

1998 (3) SA 695 (CC), 1998 (6) BCLR 656 (CC), 1998 (2) SACR 1 (CC) at para 28 (per Kriegler J).

[2] On the extensive trawl of common law abuse of process jurisprudence, see *Coetzee v Attorney-General* The jurisprudence of abuse of process, while accepting the rights of the individual and the fairness of the trial as factors within the inquiry, is concerned with essentially a different question from that posed by the definition of the rights of the individual: the question is whether the execution of a prosecution in a certain manner should be countenanced by the courts. The famous formulation of the principle in *S v Ebrahim*, requiring the state to come to court with clean hands ('met skoon hande'), indicates that a quasi-estoppel principle operates in the question of abuse. 1991 (2) SA 553 (A). The most recent test for abuse formulated by the House of Lords was whether continuing the prosecution would be 'shocking to the public conscience' *R v Latif and Shazhad* [1996] 1 WLR 104 (HL). This test suffers from the same problem, were it to be taken seriously, as afflicts the Canadian 'disrepute' test applied to the admission of unlawfully obtained evidence: the abandonment of the proceedings due to delay would almost invariably be more 'shocking to the public conscience' than a continuation of the prosecution despite delay. See Hogg (supra) at § 38.6. The decision of the House of Lords in *Latif* may well have sounded the death knell to the prospects of success of abuse of process claims in cases involving unlawfully engineered prosecutions: the extraordinary latitude afforded the authorities to lure suspected drug traffickers into the jurisdiction was a direct result of their lordships' concern with the effect a stay of proceedings in serious drug cases would have on the 'public conscience'.

that if 'trial prejudice' is to become the focal point in the inquiry, that such doubt favours the defence, and that 'trial prejudice' caused by delay may often be more serious for the prosecution than for the defence.[1] One form of 'prejudice' which is not relevant — because it is 'too remote from the exigencies of a fair trial' — is the consideration that if the trial had finished earlier, the accused would have been imprisoned earlier, and would have been closer to eventual release.[2]

The question of unreasonable delay, and particularly the kinds of prejudice relevant to the enquiry, came before the Constitutional Court in *Sanderson v Attorney-General, Eastern Cape*.[3] Kriegler J asserted in a unanimous judgment that the right to trial within a reasonable time was 'expressly cast as an incident of the right to a fair trial'. Thus, the question in South Africa was whether non-trial-related interests were catered for at all — the inverse of the question in North America. Kriegler J regarded this fact, and the fact that paras *(b)*-*(j)* of IC s 25(3) all related directly to the conduct of the trial itself, coupled with the clear emphasis of IC s 25(3) on the trial, in obvious contrast to that of IC s 25(1) and (2), as a persuasive textual argument for the proposition that only trial prejudice was contemplated by IC s 25(3)*(a)*. We would suggest that because the right in question by definition points outwards beyond the confines of the trial as far as 'time' is concerned, one might legitimately draw the conclusion that it is not confined to the trial as far as 'prejudice' is concerned. Be that as it may, Kriegler J held that all three kinds of interest at play — liberty, security and trial-related interests — were protected by IC s 25(3)*(a)*. The pivot for the Court's reasoning was the presumption of innocence.[4] Given the 'punishment' inherent in being taken through the mills of the criminal justice system, and given that the law wished to punish only those found guilty, the right to a trial within a reasonable time served to reduce to a minimum any unnecessary punishment caused by the slow turning of the mill.[5]

[1] See *R v L* (WK) [1991] 1 SCR 1091, 1100; *R v Finta* [1994] 1 SCR 701, 875. See also *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) at para 36 n 41. Kriegler J points out that social prejudice might also diminish as the delay progressed. Ibid at para 30 n 31. In *Smyth v Ushewokunze & Another* the applicant complained of a five-year delay between the occurrence of an incident for which he was being charged with culpable homicide and the proceedings themselves, *inter alia* on the basis that potential defence witnesses had become unavailable or would have dimmed memories. 1998 (2) BCLR 170 (ZS). The court required the actual unavailability of these witnesses to be proved, as well as any actual loss of memory that they might have undergone. One reads: 'Without their personal say-so, no actual prejudice to the applicant's defence has been shown. An apprehension that there may be prejudice does not suffice. There must be real prejudice to the applicant's ability to mount a full and fair defence resulting from the inordinate delay on the part of the state in charging him with the offences.' Ibid at 181C.

[2] *Coetzee v Attorney-General* (supra) at 565.

[3] 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC)('*Sanderson*').

[4] Ibid at para 23. See also P Schwikkard 'Arrested, Accused and Detained Persons' in I Currie & J De Waal *The Bill of Rights Handbook* (5th Edition, 2005) 786; *S v Dzukuda* 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC) at para 51 (Categorized the protected interests in a similar manner.)

[5] Kriegler J made the following important point: 'But the object of the current exercise is not the general disadvantages suffered by an accused in consequence of serious charges being preferred. Our focus is on delay and the prejudice that it causes.' *Sanderson* (supra) at para 40. He continues: 'One is therefore not so much concerned with the prejudice flowing from the charges and the publicity they initially generated, but with the aggravation of that prejudice ascribable to the delay.' Ibid at para 41.

Indeed, Kriegler J conceived of the possibility of cases where a permanent stay might be appropriate without there being trial prejudice.[1]

In the course of raising a caveat about the usefulness of slavish invocation of comparative jurisprudence in this area, Kriegler J held that the requirement of an 'assertion of right' laid down in *Barker v Wingo*[2] was inappropriate in South Africa, 'where a vast majority of South African accused [were] unrepresented and [had] no conception of a right to a speedy trial'.[3] The Court's approach to the role of time appears from the following dictum:

> [T]ime has a pervasive significance that bears on all the factors and should not be considered at the threshold or, subsequently, in isolation. Time does not only condition the relevant considerations, such as prejudice, it is also conditioned by them. The factors generally relied upon by the state — waiver of time periods, the time requirements inherent in the case, and systemic reasons for delay — all seek to diminish the impact of elapsed time.[4]

It then emerged clearly that for Kriegler J the most important equation was the function of time and prejudice.[5] Employing the factors as positive and negative influences in a function was Kriegler J's method of defining 'reasonableness' for the purposes of IC s 25(3)*(a)*.[6] One may describe the function thus:

> (un)reasonableness = time x (prejudice + aggravating circumstances — alleviating circumstances)[7]

Alleviating circumstances encompass waiver and contributory responsibility. Kriegler J also included culpability on the part of the authorities as a factor in the equation on the side of aggravating circumstances.[8] One should note that the calculation employed by Kriegler J was exhaustive of the question of violation and

[1] *Sanderson* (supra) at para 42.

[2] 407 US 515 (1972).

[3] *Sanderson* (supra) at para 26. It was held that the question was not whether the accused wanted to go to trial but whether he had actually suffered prejudice as a result of the lapse of time. Ibid at para 32. Kriegler J did proceed to explain that this did not mean an accused who had been the primary agent of delay should be able to rely on it in vindicating his or her rights under IC s 25(3)*(a)*.. There was, however, 'no need for an accused to assert his right or actively compel the state to accelerate the preparation of its case.' Ibid at para 33.

[4] Ibid at paras 28-29.

[5] Ibid at para 31.

[6] Ibid at para 27.

[7] A similar sort of exercise obtains in assessments of negligence in the law of delict, in cases where reasonableness = risk x (seriousness of harm + cost of precaution). See *Wasserman v Union Government* 1934 AD 228 and *Bolton & Others v Stone* [1951] AC 850 (HL).

[8] On 'systemic delay' being 'probably more excusable' and 'exculpatory', see *Sanderson* (supra) at para 35. In *Wild & Another v Hoffert NO & Others* Kriegler J said of *Sanderson*: '. . . [T]he judgment makes plain that fault on the part of the prosecution which results in delay is an important circumstance. Although the ultimate enquiry is whether the time between the charge and the trial is unreasonable, it is obviously relevant that the one or the other party is to blame, in whole or in part, for the delay.' Ibid at para 8. Later one reads: 'In a case such as this, where there is a period of ostensibly culpable inactivity on the part of the prosecution, an inference of unreasonableness can more readily be drawn if no explanation is proffered.' Ibid at para 25 citing 1998 (3) SA 695 (CC), 1998 (6) BCLR 656 (CC), 1998 (2) SACR 1 (CC)('*Wild*'). The operation of complexity (or simplicity) as an aggravating (or mitigating) factor, is also emphasized in *Wild*. Ibid at para 7.

justification, and did not fit comfortably into the two-stage analysis of rights interpretation.[1]

Mention was made in *Moeketsi* of the fact that the only available remedy in Canada and the United States was a stay of proceedings, and that this view had not 'found favour in all quarters'. Commentators such as Amsterdam and Hogg had argued that 'the primary form of judicial relief against a denial of a speedy trial should be to expedite the trial, not to abort it'.[2] This suggestion makes sense in a situation where the suspect or the accused is arrested or charged, and is suffering prejudice (in the broad sense) from a failure on the part of the authorities to get the matter settled. Action on the part of the individual concerned to expedite the trial would seem to be required lest 'waiver of time periods' be an inescapable inference.[3] But where the individual has been surprised by a prosecution after a matter of years, or is suffering under suspicion but can hardly be expected to demand to be arrested,[4] or to be informed of the exact state of the

[1] See § 51.1*(b)*(iv) supra. Difficulties which such an approach entailed for the question as to whether there had been a violation appeared in para 35 of the judgment: it had to be accepted that South Africa had 'not yet' reached the stage where the undeniably substantial systemic burdens could 'no longer be regarded as exculpatory'. Nevertheless, the right was a right and not an aspiration. See § 51.5*(b)* infra, on the remedial value of a finding of a violation which is nevertheless held justified.

[2] *Moekesti* (supra) at 970. See A Amsterdam 'Speedy Criminal Trial: Rights and Remedies' (1975) 27 *Stanford LR* 525, 535; Hogg (supra) § 49.10.

[3] See *Berg v Prokureur-Generaal, Gauteng* 1995 (2) SACR 623 (T)(Discussion about the expectation that the accused exhaust lesser remedies before a stay of proceedings could be considered.) The pronouncement that a stay was an extraordinary and drastic remedy only to be granted exceptionally was seemingly endorsed in *Moeketsi. Moeketsi* (supra) at 970.

[4] See *Bate v Regional Magistrate, Randburg* 1996 (7) BCLR 974 (W)(The applicant should have asserted the right to a trial within a reasonable time after it had been 'intimated to him' that he was under suspicion for murder. Before one has been formally charged or at least arrested for an offence the hope that suspicions may pass and not bloom into charges is only reasonable.) See also *Du Preez v Attorney-General of the Eastern Cape* 1997 (3) BCLR 329 (E) were whether there was any duty upon the authorities to speed up an investigation when there were public suspicions damaging to the person suspected, and whether a certain degree of promptness was required after a decision to charge had been reached, but before it had been communicated in any way to the person concerned, was considered. These questions, it is submitted, are best distinguished from the question of keeping to a minimum the period somebody is denied his or her liberty without having been proved guilty. The Zimbabwe Supreme Court, relying on *Coetzee v Attorney-General* (supra) at 999G-1000A assumed that the Zimbabwean speedy trial right, which in s 18(2) of the Zimbabwean Constitution was conferred upon someone who had been 'charged', permitted redress where an unreasonable delay on the part of the state in commencing the trial preceded the date upon which the accused person was officially notified that he had committed a criminal offence. *Smyth v Ushewokunze & Another* 1998 (2) BCLR 170, 180B-C (ZS). This was odd, given the Court's minute attention to the question whether a person had been 'charged' for the purposes of s 18(2) (Ibid at 178-179), and particularly given the following finding: 'The fact that the applicant must have realized that he was under suspicion in relation to allegations of *crimen injuria* and culpable homicide and that investigations were being undertaken on behalf of the second respondent, did not start the clock ticking against the State. Even the request for a statement concerning the drowning did not amount to an official notification that the applicant had committed a criminal offence'. Ibid at 179H. See also *Feedmill Developments (Pty) Ltd & Another v Attorney-General, Kwazulu-Natal* 1998 (9) BCLR 1072 (N)(Saw the problem of pre-summons delay in circumstances where complex investigations and vetting have to be carried out in order to determine whether a prosecution should ensue. The facts rendered the complaint of trial prejudice due to the delay rather unpersuasive. But the case illustrated that cases might arise in which the justifiable delay in deciding to prosecute occasioned by complex investigations could give rise to real trial prejudice on the part of the eventually surprised and unprepared accused.)

investigation, or where the delay which has already occurred is 'unreasonable', then expediting the proceedings may only put an end the violation, not remedy it. In such instances, a damages claim may be regarded as more appropriate than a stay of proceedings.[1]

In *Sanderson,* Kriegler J established authoritatively that, unlike the 'remedial context' in the United States and Canada, our constitutional framework allowed remedies other than a stay of proceedings for violations of the speedy process right.[2] Kriegler J pointed out that '[o]ur flexibility in providing remedies [might] affect our understanding of the right'.[3] This statement should not be understood to conflate the right with the remedy, or as allowing a finding of violation to depend on the appropriateness of the remedy sought. On the contrary, it is to be taken as a cue to separate the question of violation from that of the remedy sought. For while the broad array of remedies available under the Final Constitution does make it easier for a court to find a violation of a fundamental right, one must keep in mind that the finding of a violation need not entail the very drastic remedy of what amounts to unconditional discharge.[4] With a warning that one was not dealing with fixed rules,[5] Kriegler J declared as follows:

> Release from custody is appropriate relief for an awaiting-trial prisoner who has been held too long; a refusal of a postponement is appropriate relief for a person who wishes to bring matters to a head to avoid remaining under a cloud; a stay of prosecution is appropriate relief where there is trial prejudice.[6]

One might add: damages may be appropriate relief for unjustifiable violations that cannot be redressed in any other appropriate manner.

[1] See *S v Pennington & Another* 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC) at paras 41-43 (Dicta of the unanimous Constitutional Court in that whatever 'appropriate relief' the applicants were entitled to under IC s 7 for any unreasonable delay in their appeal, it would be contrary to the public interest and bring the administration of justice into disrepute if such delay were to result in excusing the applicants from serving their sentences. It should be stressed that in *Pennington* the relevant (and final) appeal had already failed, which meant that the persons concerned could be regarded as having been finally and authoritatively declared 'guilty'.)

[2] *Sanderson* (supra) at para 27 (Invokes *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC).)

[3] *Sanderson* (supra) at para 27. See also *Wild* (supra) at para 9 (Kriegler J put it thus: 'Because of the flexibility allowed by [IC s 7(4)*(a)*], a court can tailor a snug fit between infringement and remedy.')

[4] It should be noted that Kriegler J did not actually rule on whether the delay in *Sanderson* had been 'unreasonable', and therefore did not give a finding on whether the right had been violated. The ruling that the remedy sought (a stay) was inappropriate put paid to the enquiry. *Sanderson* (supra) at para 42. See also *Wild* (supra) at paras 25-26 (Kriegler J remarked that the reasonableness question was 'really beside the point' in a case where the only remedy sought was inappropriate. This was because the remedy of a permanent stay of the prosecution was competent only in cases of trial prejudice or extraordinary circumstances. It may be asked whether the unreasonableness of the delay may not in some cases be relevant to the presence of 'extraordinary circumstances'.)

[5] *Sanderson* (supra) at para 42.

[6] Ibid at para 41.

The remedy was the focus of the Constitutional Court's judgment in *Wild & Another v Hoffert NO & Others*. The focus, however, was not so much on appropriate remedies as on the fact that a stay was inappropriate. It may now be said with some confidence that the possibility of a stay as a remedy will be entertained only where the defence has suffered trial prejudice by the delay, or where 'extraordinary circumstances' are present.[1]

Kriegler J made it quite clear that the jurisprudence of speedy process was not merely a question of stay or no stay:

> On the contrary, the true effect and scope of the protection against unreasonable delay is much wider and more significant than and should not be obscured by the more dramatic and far-reaching remedy of a stay of prosecution. The crucial point of [IC s 25(3)*(a)*] is that the Constitution demonstrably ranks the right to a speedy trial in the forefront of the requirements for a fair criminal trial. That means that the state is at all times and in all cases obligated to ensure that accused persons are not exposed to unreasonable delay in the prosecution of the cases against them. That, in turn, means that both state prosecutors and presiding officers must be mindful that they are constitutionally bound to prevent infringement of the right to a speedy trial. Where such infringement does occur, or where it appears imminent, there is a duty under [IC s 7(4)*(a)*] to devise and implement an appropriate remedy or combination of remedies.[2]

In the instant case, a series of remands for 'further investigation' meant that the trial began in the new constitutional era.[3] The obvious advantage of newly minted constitutional rights for the appellants outweighed any prejudice up to that point, and from then on 'the prosecution was dilatory in a number of respects while the defence showed little eagerness for the trial to start'.[4] The process was paralysed

[1] *Sanderson* (supra) at paras 25-26. The appellants had complained of what the Court *a quo* called 'prejudice of a personal nature': adverse publicity affecting their careers, personal and family anxiety, expense, and a difficulty in exercising access rights to children. *Wild & Another v Hoffert NO & Others* 1997 (7) BCLR 974, 987 (N). See *McCarthy v Additional Magistrate, Johannesburg* 2000 (2) SACR 542 (SCA)(Court decided that a party asserting an unreasonable delay in prosecution was required to show more than average systemic delay and that an indefinite stay of prosecution would seldom be granted in the absence of extraordinary circumstances); *Director of Public Prosecutions KZN v Regional Magistrate, Durban & Another* 2001 (1) SACR 463, 470 (N)(Hugo J emphasized that a complainant had no legal right to the comfort afforded by a successful prosecution and that such complainant consequently enjoyed no right to be heard before a permanent stay in prosecution was ordered.)

[2] *Wild* (supra) at para 11.

[3] Kriegler J was at pains to criticize the phenomena of district court trials characterized by a succession of routine postponements 'for further investigation' and 'the curious practice of postponing cases for no other reason than to fix a trial date later'. Ibid at para 30. The failure of prosecutors and magistrates to do what they could to alleviate the administrative chaos was lamented. Ibid at paras 31-34. On the other hand, the legislative efforts to introduce a mechanism for enforcement under s 342A of the Criminal Procedure Act 51 of 1977 was praised as a step in the right direction, though one that had to be 'mindful of the constitutional context'. Ibid at para 32. See also *S v Maredi* 2000 (1) SACR 611, 614 (T)(Mynhardt J had to consider a case on review after the accused had been in custody for 17 months before charges of housebreaking with the intent to steal and theft were put to him. He had been in custody for 22 months before the case was finalized. The court found that the delays amounted to a breach of the accused's right to a speedy trial as intended by FC s 35(3)*(d)* and that the conduct of the prosecutors and magistrates involved in the proceedings was deserving of censure. Disciplinary steps against the prosecutors and magistrates were deemed appropriate.)

[4] *Wild* (supra) at para 17.

by the introduction of a constitutional defence, and the applications spawned thereby were not attended to with vigorous alacrity. A new front was opened through allegations of grand conspiracy, and the ultimate result was that the magistrate struck the matter from the roll. The focal point of 'unreasonable delay' became the four-month period between the withdrawal of the constitutional application (when the matter was struck) and the fresh prosecution. This period was 'arguably … unreasonably long'.[1] But, absent a showing or an allegation of trial prejudice or extraordinary circumstances, a stay of prosecution was inappropriate.[2] This refusal to grant such a remedy, however, 'by no means [put] paid to [the appellants'] rights under [IC s 25(3)*(a)*]'. These rights and the duty to devise appropriate remedial relief for their infringement continue throughout the trial.[3] *Wild* should be recognized as a clear invitation to practitioners to be more selective, realistic, and perhaps inventive, in their quest for remedies for unreasonable delay. But since a stay will remain the Holy Grail, one may expect challenges in future to concentrate on showing 'extraordinary circumstances' where trial prejudice is hard to establish.[4]

The grant of a stay of proceedings — essentially on grounds of 'significant extra-judicial prejudice' — was upheld by the Lesotho Court of Appeal in *Director of Public Prosecutions & Another v Lebona*.[5] The respondent had been summarily 'interdicted' from her civil service position without pay, and for periods at half pay, owing to investigations into alleged fraudulent activities on her part. The intended criminal proceedings underwent the most flabbergasting series of delays and abortions, described by Steyn P as a 'litany of incidents demonstrating the failure of the criminal justice system in respect of this citizen'.[6] Apart from engaging in futile efforts to challenge her 'interdiction' by civil means, the respondent 'was not a willing or even supine accused who [was] content to let her

[1] *Wild* (supra) at para 25. One matter of concern to which Kriegler J referred was the fact that the withdrawal of a charge was not 'a mere formality nor a device to circumvent the refusal of a postponement' '. . . [I]t can and should be observed', said Kriegler J, 'that a withdrawal can in itself carry considerable weight in any evaluation . . . of the reasonableness of a time lapse, and also in deciding on an appropriate remedy . . ..' Ibid at para 35. This should be particularly true if the refusal of a postponement was in any way due to unreasonable delay. *Director of Public Prosecutions & Another v Lebona* 1998 (5) BCLR 618, 637D (LesCA)(Argument that the respondent complaining of unfair delay should have invoked her right to a discharge where the prosecution did not appear for trial was rejected on the basis that it would be absurd if the right to a trial within a reasonable time could be 'rendered nugatory by a ready recourse to the stratagem suggested by the Crown')

[2] *Wild* (supra) at para 27. See also Erasmus J in *Naidoo & Others v National Director of Public Prosecutions & Others* [2003] 4 All SA 380 (C).

[3] *Wild* (supra) at para 36.

[4] The trial prejudice should, of course, have a sufficiently serious impact upon the fairness of proceedings to merit the remedy. It is submitted that once it has been determined, using the *Sanderson* formula, that the right has been violated, and then that the violation would lead to trial prejudice, it should be up to the state to argue why a stay should not be granted.

[5] 1998 (5) BCLR 618 (LesCA)('*Lebona*').

[6] Ibid at 627C.

criminal trial drag on at a snail's pace determined by the authorities. Her counsel [wrote] about her criminal trial and plead[ed] to 'have this matter finalized so that [the] client [might] know her fate soonest'.[1] The appellant's complaint that extra-trial prejudice was taken into account in granting the stay was dismissed on three grounds. First, extra-trial prejudice was relevant and significant.[2] Secondly, society itself demanded trials within a reasonable time, irrespective of the effect on a particular accused's defence.[3] Thirdly, perhaps fortunately, there was 'a very specific trial prejudice allegedly suffered by respondent which [was] not denied by the appellants'.[4] As a result, a stay was upheld because of the gravity of the extra-trial prejudice suffered. While the judgment did not make a specific finding that the circumstances were 'extraordinary', such a finding would have been appropriate in this case more than in any other. One ironic danger about a test framed in terms of 'extraordinary circumstances' emerged from this matter: if chaos and paralysis become the order of the day, an argument that chaos and paralysis are 'extraordinary' would, strictly speaking, have little purchase. It is to be hoped that the authorities will not be allowed to invoke the frequency and ubiquity of their own failures as an argument that defeats a stay of proceedings in extreme cases.[5]

(g) The right to be present when being tried

This right, found in FC s 35(3)*(e)*, is another right not found in the Interim Constitution. FC s 35(3)*(e)* has, as its source, International Covenant on Civil and Political Rights art 14*(d)*. Both FC s 35(3)*(e)* and art 14*(d)* have a very different purpose than such protection as is afforded by art 6(3)*(c)* of the European Convention on Human Rights. Article 6(3)*(c)* of the European Convention on Human Rights grants the accused the right 'to defend himself in person or through legal assistance of his own choosing'. Fawcett observes that a legally represented accused has

[1] *Lebona* (supra) at 635D.
[2] Ibid at 632H-635A.
[3] Ibid at 632E, 636C-D.
[4] Ibid at 636E-G. This piece of trial prejudice entailed the unavailability of potential defence witnesses. Steyn P held that the respondent would have been well advised to furnish greater particulars of such prejudice to demonstrate it more sufficiently, but that, since the appellants had not bothered to challenge the averments concerning trial prejudice, these had to be accepted. Ibid at 636F-G.
[5] See *S v Motsasi* 1998 (2) SACR 35, 39, 48, 49 (W)(De Villiers J discussed at length the shockingly disconcerting ('besonder skokkend en verontrustend') situation prevailing at Johannesburg Central Prison, which led in that case to the late arrival at court of the accused. The court exercised its powers under s 342A(3) of the Criminal Procedure Act 51 of 1977, as amended, in ordering an enquiry into the cause of this particular manifestation of tardiness, symptomatic of what De Villiers J described as the tip of an iceberg threatening to sink the 'Titanic' of South African society. The judgment, and the reports it engendered, would provide some insight to interested persons into the degree of chaos threatening the administration of justice in this country. The extent of the problem, which could be alleviated by the introduction of a modicum of diligence at a general level, is alarming. In the words of a prison official quoted by a newspaper: 'Sekere beamptes doen hulle bes, maar 'n mens kan nie teen 'n muur baklei as jou kollegas net nie wil help nie.')

no article 6 claim to be present at the proceedings.[1] However, if legal representation were regarded as an absolute substitute for the right to appear in person under FC s 35(3)*(e)*, then it should be required that such legal representation be that chosen by the accused person or at least be accepted as competent to act as his or her representative at the proceedings. Unless it is so understood, FC s 35(3)*(e)* would be in danger of being sidestepped in the few cases where vigilant insistence upon its observance would be required.[2] Justifiable restrictions should be a matter for FC s 36(1). The right in question is one unproblematically framed in positive and absolute terms and thus makes it easily subject to two-stage analysis. The presence requirement is closely related to 'confrontation' or 'challenge' considerations entailed by the right to adduce and challenge evidence in FC s 35(3)*(i)*.[3] Since the right to adduce and to challenge does not guarantee 'confrontation' in the strict sense required by the American Sixth Amendment, the express provision of a 'presence' right may lend a more concrete dimension to the 'challenge' rights.[4]

The accused's constitutional right to be present when being tried is also contained in s 158 of the Criminal Procedure Act. This section, however, does not guarantee the physical presence of the witness and the accused in the same room. Provision is made for the giving of evidence by a witness 'by closed circuit television or similar electronic media'.[5] The circumstances in which criminal

[1] JES Fawcett *The Application of the European Convention on Human Rights* (2nd Edition, 1987) 190.

[2] For a sober reminder of what sorts of legal representation might be offered in lieu of personal appearance, see L Fernandez 'The Law, Lawyers and the Courts in Nazi Germany' (1985) 1 *SAJHR* 124, 128. See also S Stavros *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: An Analysis of the Convention and a Comparison with Other Instruments* (1993) 194-201; *X v Norway* Application No 5923/72 (Complaint was that defendant's lawyer had agreed with the judge not to examine witnesses, one witness not having been called owing to the defendant's absence. The claim was rejected on the importance of the witness in question. Stavros discusses the case law on trials *in absentia* and points out that the European Court has moved away from requiring a showing of prejudice and has acknowledged a positive obligation on the part of the authorities to assist in transporting the accused to the proceedings in addition to the requirements of fair notice and opportunity.) Stavros discusses the problems inherent in waiver of this right (particularly if done by the legal representative without instructions from the accused), with particular focus on the case of absconding or malingering accused or those who deliberately render themselves unable to be tried, eg through hunger strikes. The requirement of co-operation by an accused in securing a speedy trial referred to in *Berg v Prokureur-Generaal, Gauteng* would presumably operate by analogy in cases of *in absentia* objections where the accused himself or herself has rendered a determination of the trial in his or her presence impossible or severely hampered this possibility. 1995 (2) SACR 623 (T). The Criminal Procedure Act s 159(1) is concerned with exactly such a situation where the accused renders continuation of the proceedings in his presence impracticable. See also *Illinois v Allen* 397 US 337 (1970). For more on speedy trials, see § 51.5*(f)* supra.

[3] See *Klink v Regional Court Magistrate NO & Others* 1996 (3) BCLR 402 (SE)(Suggestion that the right to a public trial did not guarantee the presence of the witness and the accused in the same room.)

[4] See *Coy v Iowa* 487 US 1012 (1988); *Maryland v Craig* 497 US 836 (1990)(On the literal meaning of 'confrontation' (physical presence face to face with accusers) irrespective of the degree of challenge a particular procedure allows an accused.)

[5] See *K v The Regional Court Magistrate NO & Others* 1996 (1) SACR 434 (E); *S v Stefaans* 1999 (1) SACR 182 (E); *S v M* [2004] 2 All SA 74 (D).

proceedings may be conducted in the absence of the accused are listed in s 159. Section 160 prescribes the procedures to be followed where an accused is absent.

(h) The right to counsel

Many of the considerations that pertain to the right of a detainee to pre-trial counsel apply also to the right of an accused to counsel at the trial.[1] The role of the right to counsel as ensuring respect for equality, the right to silence, the right against self-incrimination and the presumption of innocence[2] must guide the courts in the kinds of protection to be offered the unrepresented accused when the court is providing such an accused with the right to assistance recognized under the residual fair trial right.[3]

The right to be informed of the right to counsel, as well as the right to be informed of the right to have counsel appointed at state expense if substantial injustice would otherwise result, must be regarded as operating independently of the right to counsel itself, given the independent entrenchment of the information rights in FC s 35(3)*(f)* and *(g)*.[4] Failure to inform the accused accordingly has been held to amount to an irregularity rendering the trial unfair.[5] That one is entitled to have counsel appointed at state expense if substantial injustice would otherwise result might come as a surprise to some accused — and it might well affect the extent to which waiver of the right to counsel represents an exercise of informed choice.[6] The informing duty imposed upon the presiding officer does not entail

[1] See § 51.3*(f)* supra.

[2] See *S v Melani* 1995 (4) SA 412 (E), 1996 (2) BCLR 174 (E), 1996 (1) SACR 335, 347-8 (E)(In the pre-trial context.)

[3] See § 51.5*(b)* supra.

[4] The Final Constitution's information right is expressly governed by the general right contained in FC s 35(4) to have all constitutionally required information provided in a language one understands. See § 51.3*(a)* supra.

[5] *S v Gouwe* 1995 (8) BCLR 968 (B). See *S v Pienaar* 2000 (2) SACR 143 (NC)(The accused, who was Afrikaans speaking, asked his legal representative, who was English speaking and could not speak Afrikaans, to withdraw, which she then did. The proceedings continued without legal representation for the accused and the accused was accordingly convicted of dealing in dagga. The reviewing court held that the right to a fair trial included that the accused be entitled to the assistance of a legal representative with whom he could communicate in his own language, whether directly or in exceptional cases where this was not possible, by means of an interpreter. The magistrate's failure to explain this right to the accused resulted in a breach of his right to a fair trial, which amounted to an irregularity in the proceedings. The court held further that the magistrate's failure to explain this right to the accused was the same as a failure to inform the accused of his right to legal representation. The end result was that the accused had not received the legal assistance to which he was entitled in the case and the conviction and sentence were set aside.) See also *S v M* [2004] 2 All SA 74 (D) at para 13; PM Bekker 'The Right to Legal Counsel and the Constitution' (1997) 30 *De Jure* 219.

[6] See *Mgcina v Regional Magistrate, Lenasia, & Another* 1997 (2) SACR 711, 732 (W)(Borchers J recognized that being informed by an unspecified 'lady from legal aid' that one might obtain representation through 'the Legal Aid' did not necessarily also entail being apprised of the fact that a lawyer could be appointed at state expense where substantial injustice would otherwise result.) It is submitted that speculation about the accused's probable knowledge of his or her rights given his or her past brushes with the law should not be encouraged, as it waters down an important safeguard and focuses the judicial mind upon matters threatening the presumption of innocence. The finding in *S v*

a formalistic obligation to recite the exact words of the section.[1] Indeed, advice that one is entitled to appointed counsel 'if substantial injustice would otherwise result' might puzzle more than it informs.[2] Although a court should naturally not be required to explain the conditions upon which such a finding might eventuate, some sense that the accused would be entitled to appointed counsel if the court were satisfied that it would be good for justice should be conveyed to the accused. The crucial idea is that this right exists, but that entitlement is not automatic. The question 'are you going to conduct your own defence?' can hardly be said to imply the extent of the entitlement sufficiently.[3] Whether advice of rights given at stages prior to the proceedings may still be operative at the proceedings is a question which involves similar problems to those that obtain during pre-trial procedures.[4] In *S v Langa,* the Natal Provincial Division was confronted with the situation where an arrested person had been informed of his rights to legal representation and silence upon arrest, but not by the presiding officer at the initiation of plea proceedings under s 119 of the Criminal Procedure Act 51 of 1977.[5] The court regarded itself as bound by the pre-constitutional decision of the Appellate Division in *S v Mabaso.*[6] *Mabaso* held that failure to advise of the right to legal representation upon plea proceedings did not amount to a fatal irregularity,

Moilwa 1997 (1) SACR 188, 192 (NC) that such an approach was a complete misdirection ('totale mistasting') must therefore be welcomed. See *S v Moos* 1998 (1) SACR 372 (C)(Court displayed sensitivity to the difficulty of finding waiver to have constituted an exercise of informed choice in the present context. The accused had intimated that he would arrange his own representation, but this did not come about. After conviction and referral to a regional court for sentencing, it emerged that the accused had been unaware of the possibility of appointed and funded representation, and that he would have wanted to avail himself of it throughout. On review, Van Reenen J pointed out that an awareness of one's right to employ a lawyer did not necessarily entail awareness of the right to have a lawyer appointed in the circumstances set out in IC s 25(3)*(e)*. Ibid at 380G-381A. The learned judge then considered waiver, and was inclined to regard it as inappropriate to the right to legal representation, regarding as more apposite a species of election which did not entail irrevocable abandonment of alternatives not chosen. Ibid at 381F-G. In any event, informed election was essential, and its absence resulted in a failure of justice. Ibid at 381H-383.); *S v Orrie & Another* 2005 (1) SACR 63 (C)(The accused had been informed of his right to choose and consult with a legal practitioner but the state did not prove that he had been informed that he was entitled to a legal aid lawyer. The accused made use of privately-funded counsel throughout the trial. On an allegation by the accused that his rights were not properly explained to him, the Court held that the omission from the warning given to the accused had not led to his suffering any prejudice at all. Furthermore, no evidence had been led to suggest that the accused would ever have relied on state-provided counsel.)

[1] *M en Andere v Streeklanddros, Middelburg, Transvaal, en Andere* 1995 (2) SACR 709 (T)(Substantive compliance with the requirement in IC s 25(3)*(e)* was required.)

[2] See *S v Soci* 1998 (3) BCLR 376 (E), 1998 (2) SACR 275 (E). See § 51.3*(f)* supra.

[3] See *S v Ramuongiwa* 1997 (2) BCLR 268 (V)(Exclusive employment of this question amounted to a fatal failure to inform); *S v Solomons* 2004 (1) SACR 137 (C)(Dlodlo AJ held that it would be an extremely dangerous practice to 'assume' that an accused person did not want to be legally represented. On the contrary, the court had to satisfy itself that the accused person's choice to conduct his own defence was indeed an informed decision. Ibid at para 13.)

[4] See § 51.3*(f)* supra.

[5] 1996 (2) SACR 153 (N).

[6] 1990 (3) SA 185 (A)('*Mabaso*').

the link between the failure to inform and the plea of guilty being 'entirely speculative and remote'.[1] Magid J indicated agreement with counsel's view that the minority judgment in *Mabaso*, which laid great stress on the court's responsibility to protect the illiterate and unsophisticated accused against the consequences of ignorance, was more 'well reasoned' and more 'in accord with the legal and human rights philosophy … enshrined in the [Interim] Constitution than that of the majority'.[2]

What did not emerge clearly from the report was what kind of advice the accused had received upon arrest. Even more than in the case of different stages of pre-trial procedure, the transition from the pre-trial situation to the plea proceedings requires a reiteration of the right to representation, given that it by no means follows — for the average reasonable person — that the right to have a lawyer present during custody translates into the right to be represented in court proceedings.[3]

The distinction between the right to choose a legal representative and the right to have one appointed at state expense has been held to imply that the latter right does not entitle the accused to choose the representative which the state is to appoint.[4] Nevertheless, the absence of such a right does not mean that the sort of accommodation of the accused's wishes which was respected at common law in the case of *pro Deo* counsel is no longer required.[5] These accommodating requirements should be seen not as granting the accused the right to 'choose' the representative to be appointed, but as part of an assessment whether substantial injustice would otherwise result. The latter question is relevant both to the question whether to assign counsel and to the question what sort of counsel should be assigned. In *S v Manguanyana* an indication was given of the extent to

[1] *Mabaso* (supra) at 209F (Hoexter JA).

[2] Ibid at 155-156. A similar stance was taken by the court in *S v Mbambo,* where an unrepresented accused was not informed of his rights contained in FC s 35(3)*(f)* and *(g)* and was not encouraged to exercise them. 1999 (2) SACR 421 (W). The accused faced a severe mandatory sentence upon conviction. Goldstein J held that the failure to inform the accused had the effect that the proceedings were not in accordance with justice in terms of s 52(3)*(b)* of the Criminal Law Amendment Act 105 of 1997 and had to be set aside.

[3] The fact that the accused is a lawyer does not mean he or she is not entitled to counsel. See *S v Maghuwazuma* 1997 (2) SACR 675, 681 (C); *S v McKenna* 1998 (1) SACR 106 (C).

[4] *S v Lombard en 'n Ander* 1994 (3) SA 776 (T), 1994 (3) BCLR 126 (T). Although the referral of this matter to the Constitutional Court was held incompetent, the Court, did endorse this aspect of the *Lombard* decision, stating that it was 'certainly so' that the right to choose pertained to the right to employ, and not to the right to have counsel appointed. *S v Vermaas; S v Du Plessis* 1995 (3) SA 292 (CC), 1995 (7) BCLR 851 (CC), 1995 (2) SACR 125 (CC) at para 15.

[5] See *S v Solo* 1995 (5) BCLR 587 (E)(A refusal to allow a postponement when the accused sought more senior and experienced counsel to be appointed upon appreciation by the accused of the seriousness of the charges was declared to be an error, given that dissatisfaction which was neither feigned nor unreasonable should be respected and postponements granted notwithstanding great inconvenience and severe disruption of the court rolls, unless other exceptional circumstances justified refusal.) See also *S v Dangatye* 1994 (2) SACR 1 (A).

which courts would not allow magistrates to dismiss as 'delaying tactics' reservations or objections an accused might have about the suitability of counsel appointed by the state.[1] Holding that refusal to allow the accused to reject the second of two attorneys assigned to him by the Legal Aid Board amounted to denial of the accused's rights, the court remarked:[2]

> It is so that an accused . . . who has been assigned a legal representative at state expense . . . is generally speaking to accept the practitioner assigned to him. . . . Circumstances may arise where the accused person is quite justified in seeking to dispense with the services of the practitioner assigned.

The line, however, had to be 'drawn somewhere', and a further rejection by the accused would have justified refusal to countenance more.[3] In *S v Manale,* the accused had been convicted in a regional court of five counts of rape and was committed for sentence to the High Court.[4] Being improvident and having had his right to legal representation and legal aid funding explained to him at his first appearance in the regional court, the accused elected to be legally represented and a local attorney was appointed to conduct his defence. Before the trial resumed, the accused terminated the mandate of his attorney. The High Court held that the regional magistrate had erred in failing to enquire about the reason for the termination of the attorney's mandate and in merely accepting it. The correct attitude would have been to establish the basis on which the choice to waive the right to legal representation had been made.[5] In the circumstances, the conviction was, nevertheless, confirmed. An important decision concerning the degree to which the absence of counsel might be attributed to the accused was that of the Transvaal Provincial Division in *S v Maduna*.[6] It seems that a misunderstanding between the accused and their families concerning the appearance of legal representatives on the accused's behalf led to a failure by the accused to produce the

[1] 1996 (2) SACR 283 (E)('*Manguanyana*').

[2] Ibid at 287. See *Boesak v Chairman, Legal Aid Board* 2003 (2) SACR 181 (T)(Southwood J emphasized that the Board had a very important function in providing legal assistance at state expense in terms of the Constitution and therefore had to act responsibly in allocating funds to deserving applicants. The Board was therefore entitled to a full disclosure of all the facts pertaining to the applicant's financial position.)

[3] *Manguanyana* (supra) at 287. The facts illustrate how the different counsel rights may operate simultaneously. The magistrate apparently dismissed the accused's assurances that his mother would be able to finance a third attorney for him, and the court held that the magistrate should have been alive to the possibility of loans and donations. This consideration involves the right to choose one's lawyer, rather than the right to have one appointed for one. The court in *S & Others v Swanepoel* held, likewise, that an accused who declined to be defended by counsel instructed by the Legal Aid Board and selected according to the roster system in force, must accept that the range of choice would be constrained by his or her financial means. 2000 (7) BCLR 818 (O). See also *S v Halgryn* 2002 (2) SACR 211 (CC) at paras 11-12.

[4] 2000 (2) SACR 666 (NC).

[5] Ibid at 671.

[6] 1997 (1) SACR 646 (T)('*Maduna*').

representatives they had been intimating would appear.[1] The court pointed out that the magistrate's finding — that the absence of a representative was due to negligence on the part of the accused — ignored the fact that the accused were justifiably under the impression that counsel had been arranged for them by their families.[2] Furthermore, it was not competent to assume that attorneys, if properly instructed, would be present at court, and that their absence indicated negligence or deceit on the part of the accused, who had indicated that they would appear.[3]

S v McKenna saw a public prosecutor convicted of contempt for engaging in a 'go-slow' (or rather 'go-late') campaign in the magistrate's court.[4] On the first occasion of lateness, the accused had been warned to arrange legal representation the next day for possible contempt proceedings, and was not given more than five minutes to arrange representation when the magistrate actually decided to commence the contempt proceedings upon the second occasion. Ngcobo J held that the moment at which the reasonableness of the opportunity to obtain representation was to be assessed was when it was intimated that contempt proceedings were actually to commence, not when these proceedings were threatened as a possibility.[5] Ngcobo J regarded the absolute terms of the following pronouncement as essential to his finding:

[1] The magistrate's finding that the accused were engaging in play-acting and stalling ('toneelspel' and 'halsstarrigheid') seemed on the record at least to possess a modicum of merit. The magistrate's mistake, it seems, was to decide that the accused were not *bona fide* and then to regard all claims and demands, including the repeated and justifiable demands concerning the absence of their representatives, to be symptomatic of this 'halsstarrigheid'. The trial record was absurdly sparse, yet one word which seemed to occur more than any other in the sea of lacunae was 'prokureur'. The case illustrates, yet again, how slow the courts are to humour the frustrations of magistrates at the expense of the rights of the accused. See also *S v Philemon* 1997 (2) SACR 651, 656-657 (W)(The accused had told the magistrate at his trial, which had been postponed a number of times over a period of several months, that he had appointed an attorney two days before the trial and that the attorney was not present, so that the accused could not proceed with his plea. The magistrate adopted the attitude that attorneys could not be expected to appear on such short notice, that the accused had had ample opportunity to obtain an attorney, and that the accused's insistence on the presence of his attorney was an improper attempt to organize the court ('[e]k gaan nie toelaat dat jy my hof reël nie') or a kind of game ('jy is besig met 'n speletjie'). Claassen J held that the accused's conduct amounted to a request for a postponement and that it was incumbent upon the magistrate at least to enquire into the reasons for the absence of the attorney and to give the accused an opportunity to obtain his or her services. Given indications during the trial that the accused had expected his attorney to be present and had relied upon such presence, the proper response by the magistrate would have been to grant a postponement.)

[2] *Maduna* (supra) at 665.

[3] Ibid at 654. See *S v Molenbeek en Andere* 1997 (12) BCLR 1779, 1784 (O)(Cillié J expressed displeasure at the notion that the defence might postpone a matter at will due to the unavailability of a particular legal representative. The learned judge remarked that tardiness ('sloerdery') in the criminal justice system played a major role in public scepticism about the administration of justice and that legal representatives, be they attorneys or advocates, should endeavour to ensure that a matter proceeded on the date of set-down, which endeavour would entail efforts to arrange alternative representation in case of personal unavailability. What did not emerge clearly from the report was to what extent the accused, as opposed to their representative, had insisted upon their being represented by the particular practitioner at a time convenient to the practitioner.)

[4] 1998 (1) SACR 106 (C)('*McKenna*').

[5] *McKenna* (supra) at 113E-G.

> A denial of a reasonable opportunity to secure legal representation where one is demanded is, in my view, a denial of the right to legal representation and it is a denial of the right to a fair trial guaranteed by the Constitution. Where this occurs, the ensuing conviction and sentence cannot stand.[1]

The Court in *S & Others v Swanepoel* emphasized that the right 'to choose, and be presented by, a legal practitioner, and to be informed of this right promptly' required that an accused person be given a fair and reasonable opportunity to obtain legal representation.[2] According to Cillié J, the circumstances of each case would determine what would constitute a reasonable opportunity. In determining whether an accused person has had 'a reasonable opportunity' the following factors should be considered: the gravity of the charges; the availability of sufficiently experienced practitioners; the amount of preparation required and the complexity of the case.[3] Courts ought to also consider the interests of the complainants, the witnesses and the co-accused, as well as the undersirability of disrupting court rolls and delaying the disposal of criminal cases. The same stance was taken by the court in *S v Tsotetsi & Others*.[4]

McKenna can be contrasted with the decision in *S v Simanaga*.[5] In *Simanaga*, the fact that the accused's trial had proceeded in the absence of intended legal representation was 'a mistake'. Still, held Tshabalala J, this fact did not render the trial unfair. The conviction had to stand, the court held, because the unrepresented 17-year-old accused had proved her guilt by her answers when questioned at the plea proceedings.[6] This finding, with respect, confuses fairness with accuracy and ignores the purpose of questioning an accused after he or she had pleaded guilty.[7]

Guidelines concerning the difficult question of 'substantial injustice' in denying state-funded counsel to an accused were offered obiter by Didcott J in *S v Vermaas*; *S v Du Plessis*.[8] Indeed, it was the learned judge who had laid down the 'common law' guidelines in this regard in *S v Khanyile*.[9] In *Khanyile*, the factors were said to be the 'inherent simplicity or complexity of the case, so far as both the law and the facts [went]', the maturity, sophistication and level of intellect of the accused, and the gravity of the case, including the sentence. The ultimate test, 'vague' and 'fickle' though it was, was whether the accused would be 'placed at a

[1] *Mckenna* (supra) at 113A.
[2] 2000 (7) BCLR 818 (O).
[3] Ibid at 821.
[4] 2003 (2) SACR 623, 635 (W). See also *Pretorius & Others v Minister of Correctional Services & Others* 2004 (2) SA 658 (T).
[5] 1998 (1) SACR 351 (Ck).
[6] Ibid at 353F-I.
[7] See NC Steytler *The Undefended Accused on Trial* (1988) 107-117; § 51.5*(j)*(ii) infra.
[8] 1995 (3) SA 292 (CC), 1995 (7) BCLR 851 (CC), 1995 (2) SACR 125 (CC)('*Vermaas*').
[9] 1988 (3) SA 795, 815-816 (N). See D McQuoid-Mason '*Rudman* and the Right to Counsel: Is it Feasible to Implement *Khanyile*?' (1992) 8 *SAJHR* 96. See also *Legal Aid Board v Msila & Others* 1997 (2) BCLR 229, 243 (SE)(Similar factors). The '*Khanyile* rule' was cited at length in *S v Lavhengwa* 1996 (2) SACR 453, 490-491 (W)('*Lavhengwa*').

disadvantage palpable and gross, that the trial would be palpably and grossly unfair, were it to go ahead without a lawyer.' In *Vermaas*, one reads of the 'ramifications and their complexity or simplicity, the accused person's aptitude or ineptitude to fend for himself or herself in a matter of those dimensions, how grave the consequences of a conviction may look, and any other factor that needs to be evaluated in the determination of the likelihood or unlikelihood that, if the trial were to proceed without a lawyer for the defence, the result would be 'substantial injustice'. Most importantly, the *Vermaas* Court held that the decision was 'pre-eminently' that of the officer trying the case.[1]

In *Msila v Government of the Republic of South Africa & Others,* the Court held that the application for legal assistance itself was a procedure complicated enough — though it involved essentially an indication of indigence by the applicant — to require state-funded assistance in such application lest 'substantial injustice' should result. On an appeal to a Full Bench of the decision to deny appointed counsel for an application to have an interdict set aside, the South Eastern Cape Local Division interpreted the term 'accused' generously to entitle the applicant to legal representation in the interdict application,[2] and also determined that failing the Legal Aid Board's means test was not the relevant *prima facie* consideration entitling one to state-funded counsel. The threshold question was simply whether the accused was unable to afford a lawyer.[3] In *Bangindawo & Others v Head of the Nyanda Regional Authority & Another,* the Transkei High Court upheld the right to counsel in criminal proceedings before regional authority courts.[4]

[1] *Vermaas* (supra) at para 15. This ruling should not be seen as referring to a discretion. See § 51.1*(b)*(ii) supra. See *Mgcina v Regional Magistrate, Lenasia, & Another* 1997 (2) SACR 711, 733 (W)(Borchers J held that 'substantial injustice' in IC s 25(3)*(e)* did not refer to the narrow case where the presiding officer determined that the final decision would be wrong if the trial proceeded without representation, but referred rather to the question 'whether procedurally the trial would be a fair one'.)

[2] See §§ 51.1*(b)(i)* and 51.2 supra.

[3] *Msila* (supra) at 242-43. It may be pointed out that indigence is a factor of the 'injustice' test, not a necessary precondition to be considered for it. It may be difficult to argue that 'substantial injustice' would result if someone who can afford a lawyer is not provided with one at state expense, but that assumes a particular meaning to be attached to 'injustice'. It may for instance be that in a cut-throat defence involving two co-accused, not providing both with legal aid would threaten substantial injustice, irrespective of the fact that one of them is not sufficiently indigent to be entitled to assistance in other circumstances. 'Substantial injustice' is something every accused may invoke for the purposes of IC s 25(3)*(e)* and FC s 35(3)*(f)*. *Msila* left open the position obtaining when an accused was able to contribute towards the defence. *Msila* (supra) at 243.

[4] 1998 (3) BCLR 314 (Tk). This conclusion was reached despite the court's finding elsewhere in the judgment that there was 'no reason whatsoever for the imposition of the Western conception of the notions of judicial impartiality and independence in the African customary law setting' and the court's recognition that legal representation was 'unknown' in African customary law. Ibid at 327, 330. See § 51.5*(e)*(i) supra. It was, however, pointed out in *Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & Others* that the right to legal representation did not extend to persons appearing before an administrative tribunal. 2000 (4) SA 621 (C). See also G van der Walt & A van der Walt *The Right to Legal Representation When Appearing Before a Disciplinary Enquiry* (2004) 538.

The practical difficulty of heeding the right to counsel, even where 'substantial injustice' would result from a failure, is pre-eminently a limitation question. The right to counsel is the closest the criminal procedure rights come to second-generation rights. However, the ability of the state to respect this right should not be regarded as part of the definition of the right. Two-stage analysis is possible, and the question whether substantial injustice would result need not be answered pusillanimously if it is acknowledged that such injustice might be justifiable under the limitations clause. The declaratory force of a *prima facie* violation, albeit justified, would serve to affirm the continued recognition of the right as a right rather than as a hope.[1]

The Witwatersrand Local Division was asked to accept this argument as persuasive in *Mgcina v Regional Magistrate, Lenasia, & Another*.[2] Trengove SC argued that imposing the punishment of imprisonment upon an undefended accused would in all cases amount to 'substantial injustice'. Borchers J declined to rule on the issue.[3] He found, instead, that the accused's right to be informed of the right to counsel to have been violated. Stegmann J regarded the argument as 'very persuasive', but remarked that if the framers had intended such a simple and straightforward rule they could, and presumably would, have enshrined it in the Interim Constitution.[4] He also pointed out that the *dicta* in *S v Vermaas*; *S v Du Plessis* did not support such a rule.[5] Still, he did offer the following qualification:

> Any magistrate, faced with the trial of an indigent accused who has no legal representation, will be conscious that if he should try the accused and sentenced [sic] him to imprisonment (without the option of a fine or any other non-custodial sentence) there will be a considerable likelihood of an approach being made to the High Court on behalf of the accused for an order setting aside his trial and conviction on the ground that his fundamental rights . . . were infringed. For practical purposes, therefore, although we cannot now enunciate such a rule, we may well find that (apart from a few exceptional cases, such as those in which the accused person is himself legally qualified and experienced) no indigent accused persons will be sent to prison unless they have been provided with a defence at state expense.[6]

[1] See *Vermaas* (supra) at para 16 (On the lack of any perceptible progress.) The reasoning in *Lavhengwa* on this issue is hard to follow. The court tracked the gradual recognition of the right to counsel in the United States over 34 years and remarked: 'South Africa may very well require a longer period to reach the ideal of an unqualified right to legal counsel'. Ibid at 489. If the American development referred to was of a practical or economic nature, the conclusion would be sound. But the learned judge was referring to a conceptual development: the development of an argument. If this argument is persuasive, there is no reason to wait 34 years or more to accept it.

[2] 1997 (2) SACR 711 (W)('*Mgcina*').

[3] Ibid at 733.

[4] Ibid at 739.

[5] 1995 (3) SA 292 (CC), 1995 (7) BCLR 851 (CC), 1995 (2) SACR 125 (CC).

[6] *Mgcina* (supra) at 739.

An important decision concerning the duration of the right to legal representation is to be found in *S v Mofokeng*.[1] The accused was convicted of robbery with aggravating circumstances and sentenced to eight years' imprisonment in the Regional Division of Southern Transvaal. Thereafter his counsel had filed heads of argument on appeal in which he had set out the facts and then submitted that the appellant had correctly been convicted and that the sentence imposed was appropriate. The Witwatersrand Local Division held that the right to legal representation did not end when the trial court pronounced its sentence, but that this right existed during the whole of the legal process until the last court had spoken the last word.[2] The sentenced person was entitled to challenge the court's decision in review proceedings or by way of an appeal. The essence of the right to legal representation is the right to effective legal representation.[3] In the instant case there was no indication that the appellant had withdrawn his appeal or had instructed his counsel to concede the correctness of any of the trial court's findings. Counsel had thus breached his duty of loyalty and had been obliged to withdraw from the case if he felt he could not advance his client's case on appeal.[4]

(i) The right to be presumed innocent

The right to be presumed innocent, in the shape of a right to expect the state to bear the full burden of proving the case and therefore not to be allowed to compel assistance from the accused, should be regarded as the governing principle behind the silence and self-incrimination rights of accused and arrested persons.[5] The presumption of innocence has been linked to the right to counsel[6] and played a pivotal role ascribed in determining the ambit of the right to a trial within a reasonable time.[7] The presumption of innocence exerts the greatest influence,

[1] 2004 (1) SACR 349 (W)('*Mofokeng*'). See also *S v Ntuli* 2003 (4) SA 258 (W)('*Ntuli*').

[2] *Mofokeng* (supra) at para 17.

[3] Ibid at para 18. See also *Beyers v Director of Public Prosecutions, Western Cape & Others* 2003 (1) SACR 164, 166-167 (C) and *Ntuli* (supra) at para 16.

[4] *Mofokeng* (supra) at para 19.

[5] See §§ 51.4*(b)*(i) and (iii) supra. See, particularly, *S v Mathebula* 1997 (1) BCLR 123 (W)(Held that the principle that an accused need not assist the state in creating a case to meet rendered a discharge under s 174 of the Criminal Procedure Act 51 of 1977 imperative where there was no admissible evidence upon which a reasonable court might convict, but there was a reasonable possibility that the accused might supplement the state's case in his or her defence); *S v Jama & Another* 1998 (4) BCLR 485 (N)('*Jama*')(In *Jama* this principle was applied with some vigour: the accused had all but convicted themselves of rape in their plea explanations, and there was every prospect that they would do so again in their testimony (as indeed they proceeded to do), although there was no admissible evidence at the end of the state's case linking them to the rape of the complainant.) Cf. *S v Makofane* 1998 (1) SACR 603 (T).

[6] See § 51.5*(g)* supra.

[7] *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC)('*Sanderson*')(Discussed in § 51.5*(f)* supra.) See also *Uncedo Taxi Service Association v Maninjwa & Others* 1998 (3) SA 417 (E), 1998 (6) BCLR 683 (E)(On the link between liberty and the presumption of innocence. For more on this link, see § 51.1*(a)*(ii) and (iv) supra. This link was responsible for the court's application of fair trial principles in the sphere of contempt proceedings brought by way of notice of motion.)

however, during the evidential sphere at trial. The presumption of innocence requires the final burden of persuasion to be on the prosecution. It is violated wherever a conviction may follow in a case where there is doubt about the accused's guilt. This aspect of the presumption is discussed in detail elsewhere.[1] The presumption of innocence is by no means confined to this aspect.[2] The presumption is the golden thread which runs throughout the criminal law. A Lord Sankey noted,[3] and, as Sir James Fitzjames Stephen pointed out, the presumption, 'though by no means confined to the criminal law, pervades the whole of its administration'.[4] These observations have significance for the interpretation of evidence as well as for the ultimate burden of proof,[5] and also for the opportunity of the accused to present evidence and have it entertained by the Court.[6] Activity in court premised on the guilt of the accused threatens the presumption of innocence. Procedures designed to protect victims of crime from further victimization place considerable strain upon the presumption of innocence, since the difficult suspension of disbelief entailed by respect for the presumption becomes almost impossible where the procedures adopted assume the accused is guilty as charged.[7]

[1] The main case law in this area has been that concerned with reverse onus provisions. The leading case is *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC). Whether the presumption is at stake should not be mechanically tied to the syntax of a statutory provision, lest reverse onus provisions be easily avoided by creating peculiar statutory offences. See § 51.1*(a)*(iii) supra.

[2] See *S v Strauss* 1995 (5) BCLR 623, 629 (O)(Rejects the claim that confessional evidence *per se* violated the presumption of innocence. Hattingh J said: 'Die reg om onskuldig geag te word is, in populêre terme, 'n manier om uitdrukking te verleen aan die feit dat die staat beklee is met die primêre en finale bewyslas om die skuld van die beskuldigde bo redelike twyfel te bewys'.) See also A Skeen 'A Bill of Rights and the Presumption of Innocence' (1993) 9 *SAJHR* 523.

[3] *Woolmington v DPP* [1935] AC 462, 481.

[4] *General View of the Criminal Law of England* (2nd Edition, 1890) 183.

[5] See *McKinley's case* (1817) 33 St Tr 275 (Construction of oaths *in favorem libertatis* was based upon the presumption of innocence.) See also JB Thayer *A Treatise on Evidence at the Common Law* (1898) 272ff. The proper way to accord respect to the presumption in the forms of reasoning and chains of inference adopted by a court famously exercised the Australian High Court in *Chamberlain v R(2)* (1984) 153 CLR 521. See also *Morin v R* [1988] 2 SCR 345; *R v Blom* 1938 AD 188. See *S v Thebus & Another* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC)(The Constitutional Court upheld the constitutionality of the common purpose doctrine as it did not relate to a reverse onus or any presumption relieving the State of any part of the burden of proof.)

[6] See LH Tribe 'Trial by Mathematics: Precision and Ritual in the Legal Process' (1971) 84 *Harvard LR* 1329, 1370-1371 ('[N]o less important are what seem to me the intangible aspects of that commitment [the presumption]: its expressive and educative nature as a refusal to acknowledge prosecutorial omniscience in the face of the defendant's protest of innocence, and as an affirmation of respect for the accused, a respect expressed by the trier's willingness to listen to all the accused has to say before reaching any judgment, even a tentative one, as to his probable guilt. . . . The presumption retains force not as a factual judgment but as a normative one — as a judgment that society ought to speak of accused men as innocent, and treat them as innocent, until they have been properly convicted after all they have to offer in their defense has been carefully weighed. The suspicion *that many are in fact guilty need not undermine either this normative conclusion or its symbolic expression through trial procedure*.' (emphasis added).)

[7] On the rejection of a claim that use of a shield between a rape complainant and the accused violated the presumption of innocence, see *R v Levogiannis* [1993] 4 SCR 475. *Levogiannis* secured the approval of the court in *Klink v Regional Court Magistrate NO & Others* 1996 (3) BCLR 402, 415 (SE). In *Klink*, however, the point was argued and decided on the right to a public trial. Consider the analogous problem

In *S v J* the Supreme Court of Appeal rejected the cautionary rule as applied to the testimony of complainants in sexual cases, on the basis that the rule was outdated, irrational and sexually discriminatory.[1] The court held that the rule in fact increased the burden of the state to an onus to do more than prove the accused's guilt beyond reasonable doubt.[2] Since the presumption of innocence demanded no more than proof beyond reasonable doubt, there was no basis for the rule.[3]

Violation of the presumption before trial may be difficult to bring under the fair trial right if the accused has not been formally charged, but where such violation would be operative at the trial itself, the accused's right to be presumed innocent is violated at trial. A striking example of this phenomenon occurred in *S v Mbolombo*.[4] The assumption that the bail applicant was guilty, which led to the high bail amount, would be the direct operating cause of regarding the applicant's payment of the amount as an indication of guilt at the trial. The pre-trial inversion of the presumption, in other words, became a violation of the right of an accused to be presumed innocent at the trial. It is submitted that whether the violation was

of having the absence of a witness through fear of intimidation explained to the Court to the great prejudice of the accused's entitlement to the presumption of innocence. English courts have been anxious to avoid such prejudice. See *R v Ricketts* [1991] Crim LR 915; *R v Churchill* [1993] Crim LR 285. See also *S v Baloyi* 2000 (1) SACR 81 (CC), 2000 (2) SA 425 (CC)(Court held that s 3(5) of the Prevention of Family Violence Act 133 of 1993, read with s 170 of the Criminal Procedure Act 51 of 1977, did not impose a reverse onus on the accused as it merely invoked the procedure in s 170 and not the reverse onus it included.)

[1] 1998 (2) SA 984 (SCA), 1998 (4) BCLR 424 (SCA), 1998 (1) SACR 470 (SCA)('*J*'). This decision was affirmed in *S v M* 2000 (1) SACR 484 (W). A contrary view was, however, taken in *S v Van der Ross* 2002 (2) SACR 362 (C).

[2] *J* (supra) at 1008G-1009B.

[3] Ibid at 1009F. It is respectfully submitted that the Court's reasoning, if applied literally, would mean that all rules of procedure designed to act as safeguards to ensure that the presumption of innocence was adequately protected would be unnecessary additions to the state's burden of proof. This could be so only if the 'beyond reasonable doubt' standard could be measured with mathematical precision, which is not the case. See BJ Shapiro *'Beyond Reasonable Doubt' and 'Probable Cause': Historical Perspectives on the Anglo-American Law of Evidence* (1991); CR Nesson 'Reasonable Doubt and Permissive Inferences: The Value of Complexity' (1979) 92 *Harvard LR* 1187. *J* was not really concerned with a higher (or lower) standard than proof beyond reasonable doubt — it was concerned merely with the merits of some built-in pointers to potential doubt. That there was a strong thread of prejudice and stereotype to the underlying assumptions in the case of sexual complainants cannot really be denied. But the Supreme Court of Appeal, with respect, overwhelmingly over-emphasized the influence of this thread in the development of the rule. The method in the rule's madness was captured in the passage from *S v Snyman.* 1968 (2) SA 582 (A) as cited in *J* (supra) at 1007A-E. That the volatile rule will no longer be applied mechanically in every sexual case is probably for the best. But the rhetorical over-emphasis on the offensive aspects of its lineage by the Supreme Court of Appeal may have unfortunate results for the presumption of innocence. It may spawn a self-censored reluctance on the part of judicial officers, in cases where an 'evidential basis' suggests that caution is appropriate, to take into consideration the complainant's peculiar knowledge and particularly 'exculpatory' motives in situations where consensual sex would have entailed serious negative consequences for the complainant.

[4] 1995 (5) BCLR 614 (C). See § 51.4*(d)* supra.

justified at the granting of bail was a different question from whether it should have been allowed to operate at the trial.[1]

The accused's constitutional right to be presumed innocent has prompted the Constitutional Court to declare unconstitutional various provisions that place a reverse onus on the accused.[2] Thus in *S v Hoosen* the High Court held that s 37 of the General Law Amendment Act,[3] which relieved the state of proving *mens rea* on the part of the accused, infringed the accused's right to be presumed innocent.[4] It had the effect that an accused could be found guilty in spite of the existence of reasonable doubt as to his or her guilt. This infringement could not be justified, especially since the burden to prove the presence of *mens rea* was not too onerous for the state. The Constitutional Court later confirmed this proposition in *S v Manamela & Another*.[5]

Section 21(1)*(a)(i)* of the Drugs and Drug Trafficking Act[6] created a presumption that, where an accused was found in possession of more than 115 grams of dagga, such accused had been dealing in dagga and would be so convicted unless the accused could prove that he or she was not dealing in dagga. The Constitutional Court in *S v Bhulwana*; *S v Gwadiso*[7] and in *S v Manyonyo*[8] declared the presumption unconstitutional as an unjustifiable limitation of the accused's right to be presumed innocent as contained in FC s 35(3)(*h*).[9]

The Constitutional Court in *S v Mbatha*; *S v Prinsloo*[10] considered the constitutionality of s 40*(i)* of the Arms and Ammunitions Act.[11] The Act contained a presumption assisting the state in proving the *actus reus* of 'possession' for a conviction of unlawful possession of arms and ammunition. The *Mbatha* Court held that this provision was an unjustifiable infringement of the accused's right to be presumed innocent. In another reverse onus matter, the Constitutional Court

[1] For analogous reasoning which fuelled the creation of a use immunity at trial but allowed pre-trial compulsion of self-incriminating evidence, see *Ferreira v Levin & Others*; *Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC). See also *S v Botha & Others* 1995 (2) SACR 605 (W); *S v Dlamini*; *S v Dladla & Others*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC), 1999 (2) SACR 51 (CC) as discussed in § 51.5*(j)*(iii) infra.

[2] Presumptions against the accused are created in numerous statutory provisions. See J Burchell *Principles of Criminal Law* (2005) 124 (Lists, amongst others, the following examples: s 1(2) of the Prevention of Illegal Squatting Act 52 of 1951; s 2 of the Witchcraft Suppression Act 3 of 1957; s 2 of the Gambling Act 51 of 1965; s 1A(2) of the Intimidation Act 72 of 1982; and ss 217(1)*(b)*(ii), 245 and 332(5) of the Criminal Procedure Act 51 of 1977.)

[3] Act 62 of 1955.

[4] 1999 (9) BCLR 987 (N).

[5] 2000 (1) SACR 414 (CC), 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC)('*Manamela*'). See also Burchell (supra) at 121.

[6] 140 of 1992.

[7] 1996 (1) SA 388 (CC), 1995 (2) SACR 748 (CC).

[8] 1999 (12) BCLR 1438 (CC)('*Manyonyo*').

[9] Ibid at para 16.

[10] 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC), 1996 (1) SACR 371 (CC).

[11] Act 75 of 1969.

in *S v Coetzee* declared unconstitutional s 245 and s 332(5) of the Criminal Procedure Act as unjustifiable infringements of the accused's right to be presumed innocent.[1]

The constitutionality of s 72(4)[2] of the Criminal Procedure Act was also successfully challenged in *S v Singo*.[3] The effect of the phrase 'unless such a person satisfies the court that his failure was not due to a fault on his part' was that, if the probabilities were evenly balanced, the accused would fail to satisfy the Court as required and conviction and sentence would follow. This limited the right of an accused to be presumed innocent and the right to remain silent. Although the incursion into the right to silence was found to be justifiable,[4] the legal burden requiring conviction despite the existence of reasonable doubt was not. The Court found it necessary to read in words to establish the evidentiary burden: s 72(4) was to be read as though the words 'there is a reasonable probability that' appeared between the words 'that' and 'his failure'.[5]

Finally, the Transvaal Provincial Division in *Lodi v MEC for Nature and Conservation and Tourism, Gauteng, & Others*[6] declared unconstitutional reverse onus provisons found in s 37(1)*(c)*[7] and s 110(1)*(b)* and *(c)*[8] of the Nature Conservation Ordinance.[9] Patel J, applying both *Manamela* and *Singo*, held that these provisions violated the accused's constitutional right to be presumed innocent and to remain silent.[10]

(j) Silence and self-incrimination at trial

(i) *Silence, self-incrimination, and the presumption of innocence*

The right to silence at trial is coupled with the right to be presumed innocent in FC s 35(3)*(h)*. But the right not to be compelled to give self-incriminating evidence is given separately in FC s 35(3)*(j)*.

That silence and self-incrimination rights at trial are based upon the presumption of innocence requires less argument than that pre-trial silence and self-incrimination rights are based upon the presumption; the endorsement of the latter proposition by the Constitutional Court in *S v Zuma & Others*[11] must be taken as *a fortiori* confirmation of the less controversial former proposition.[12] Furthermore,

[1] 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC) at para 52 (Langa J).
[2] Section 72(4) provides for a summary judgment procedure.
[3] 2002 (4) SA 858 (CC), 2002 (8) BCLR 793 (CC)('*Singo*').
[4] Ibid at para 37.
[5] Ibid at para 44.
[6] 2005 (3) SA 381 (T).
[7] Section 37(1)*(c)* called for 'reasonable cause, proof of which shall be on the accused'.
[8] Sections 110(1)*(b)* and *(c)* provided for the application of certain presumptions 'until the contrary is proved'.
[9] 12 of 1983 (G).
[10] *Singo* (supra) at paras 30 and 35.
[11] 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 33.
[12] See § 51.4*(b)* supra.

silence and self-incrimination are very closely related.[1] The difference for practical and analytical purposes is that silence deals with the prohibition on a compulsion to testify and with the inferences that may be drawn from a failure to testify, and self-incrimination with the extent to which the accused can be said to be compulsorily conscripted against himself or herself by any given procedure. Overlap is difficult to avoid, and elements of self-incrimination are often discussed in terms of the right to silence, and silence in terms of self-incrimination.[2]

(ii) *The right to silence at trial*

In *S v Maseko,* the court held that the words 'during plea proceedings' found in IC s 25(3)*(c)* were not restricted to proceedings following upon a plea of not guilty, but extended also to proceedings held upon a plea of guilty.[3] Thus, the right to be informed of the right to silence applied to such proceedings and any violation of the right entailed the inadmissibility at the trial of what was said during the plea proceedings. The wording in FC s 35(3)*(h)* refers only to 'the proceedings'. It draws no distinction between 'plea proceedings or trial' (IC s 25(3)*(c)*). This phrase must be read to include plea proceedings and should not be understood to indicate that the right to silence has been limited to the trial proper.[4]

[1] On the 'seamless web', see § 51.4 *(b)(i)* supra.

[2] See § 51.4*(b)* supra. For more on the presumption of innocence in the sphere of bail see § 51.4*(d)* supra.

[3] 1996 (9) BCLR 1137 (W), 1996 (2) SACR 91 (W)('*Maseko*').

[4] The decision in *S v Damons & Others* — in which *Maseko* was held to have been 'clearly wrong' — should be regarded as an aberration. 1997 (2) SACR 218 (W)('*Damons*'). Nugent J's finding that it had not been settled law before the constitutional era that the accused enjoyed the right to remain silent at s 119 plea proceedings flew in the face of Milne JA's pertinent observation in *S v Mabaso & Another* 1990 (3) SA 185, 211D (A) that *S v Nkosi & 'n Ander* 1984 (3) SA 345 (A) clearly implied that the right to silence did exist at such proceedings and that this proposition was not questioned (by the *Mabaso* majority or by the state). Milne JA's principled rejection of the incongruous denial of the right to be informed of this right must now be afforded the full weight of its persuasion, in light of the constitutional authority, to allow the right to silence to make sense — particularly given the sensitivity to rights jurisprudence displayed in the minority judgment in *Mabaso.* It is remarkable that the *Damons* judgment could deny the post-constitutional existence of a right while conceding that it was assumed to exist before the Interim Constitution, merely because it was never expressly held to have existed. The argument that 'a right to continue to remain silent [was] inherently incompatible with a plea of guilty' — *Damons* (supra) at 224 — premised as it was on the notion that a plea of guilty constituted absolute and final incrimination in any event — *Nkosi* (supra) at 353; *Mabaso* (supra) at 205; *Damons* (supra) at 225 — begged the very question which was the only legitimate purpose of questioning under s 112(1)*(b)* via s 119 — namely whether the accused actually intended to admit guilt on every element of the relevant charge. See *Mabaso* (supra) at 212. If s 112(1)*(b)* can only substitute Star Chamber interrogation for adversarial justice, then s 112(1)*(b)* must go. If it is merely intended to ensure that a guilty plea was really a guilty plea, then that is all it should be allowed to do. See NC Steytler *The Undefended Accused on Trial* (1988) 107-17. If there is a contradiction between the right to silence or against self-incrimination and the s 112 procedure, then the problem is the procedure, not the right. (It should be stressed that the *Damons* court was not competent to pronounce upon the constitutionality of s 112(1)*(b). Damons* (supra) at 220C-D.) It is the height of irony that the procedure in our law which so closely resembles the orthodox source of the self-

The fact that arguments in favour of inferences from silence at trial do not support inferences from pre-trial silence does not mean that those arguments should be accepted in the trial context. The view expressed by Etienne du Toit — that an adverse inference from silence at trial would amount to an unacceptable penalty for the exercise of a right, as persuasively argued in the minority judgments of Kentridge and Baron JJA in *Attorney-General v Moagi*[1] — was rejected by Claassen J in *S v Lavhengwa*[2] in favour of the view expressed by Wim Trengove. The latter view holds that such inferences were in line with common sense, affected only the choice to use the right and not the right itself, and were in any event justifiable if violative of the right to silence.[3] The argument on choice was endorsed also by the Northern Cape Division in *S v Scholtz & Another*.[4] But in *S v Brown & 'n Ander*[5] the same division held that use of silence at trial as evidence of guilt, as opposed to allowing the silence not to upset a *prima facie* case based on uncontroverted evidence, would be in direct conflict ('direk in stryd') with the right to silence guaranteed by the Interim Constitution. Moreover, the common law authorities relied upon in *Scholtz* were subject to reassessment in view of the 'shift in emphasis' brought about by the Interim Constitution:[6] 'Geen nadelige afleiding kan teen die beskuldigde gemaak word, bloot omdat hy sy reg om te swyg uitgeoefen het nie.'[7]

Brown was endorsed in *S v Khomunala & Another*.[8] There Noorbhai AJ held that the interaction between the right to silence, the right to present evidence, and the consequence of silence should be explained to the accused as set out in *Brown*.[9]

incrimination privilege was regarded as an exception to the exercise of this privilege as a constitutional right. The fact that the relevant guilty pleas in *Damons* were found to have been improperly offered was the best illustration of the instant abuse of s 112. See, eg, *S v Nkabinde*. 1998 (8) BCLR 996, 1001D-E (N)('Through our new Constitution those inquisitorial elements in the Criminal Procedure Act are being systematically hunted down and erased, where found to be inimical to the tenets of the Constitution. . . .')

[1] (1982) II BLR 124 (CA).

[2] 1996 (2) SACR 453, 486 (W). See also C Theophilopoulos 'The Historical Antecedents of the Right to Silence and the Evolution of the Adversarial Trial Systems' (2003) *Stellenbosch Law Review* 183.

[3] See C Theophilopoulos 'The Evidentiary Rule of Adverse Inferences from the Accused's Right to Silence' (2002) *South African Journal of Criminal Justice* 336.

[4] 1996 (11) BCLR 1504 (NC), 1996 (2) SACR 40 (NC)('*Scholtz*'). See also PM Bekker 'An Undefended Accused's Right to Silence During a (Fair) Trial' (2004) *Journal for Contemporary Roman-Dutch Law* 469.

[5] 1996 (11) BCLR 1480 (NC), 1996 (2) SACR 49 (NC)('*Brown*').

[6] Ibid at 1489-90. The fact that the relevant silence in *Brown* was silence at a *voir dire* determination of the voluntariness of a confession must not be confused with the question of the propriety of the use of admissions (including silence) made during a *voir dire* as evidence of guilt at the main trial. See § 51.5*(j)*(iii) infra. The inference sought to be drawn in *Brown* was a negative inference as to voluntariness, ie an inference the effects of which were to be contained within the confines of the *voir dire*.

[7] Ibid at 1491. See SE van der Merwe 'The Constitutional Passive Defence Right of an Accused Versus Prosecutorial and Judicial Comment on Silence: Must We Follow *Griffin v California*' (1994) 15 *Obiter* 1; T Geldenhuys & G Joubert (eds) *Criminal Procedure Handbook* (1994) 6-7. Both works were cited with approval by the court. See also *Brown* (supra) at 1487-89 and 1491 respectively.

[8] 1998 (1) SACR 362 (V)('*Khomunala*').

[9] Ibid at 365E-366A. It must be respectfully submitted that the magistrate in *Khomunala* seemed to have done a good job of explaining the situation, apart from a failure to mention the fact that silence as such could not incriminate, and that a plea explanation did not act as evidence for the defence.

The Constitutional Court refrained from ruling directly on this question in *Osman & Another v Attorney-General, Transvaal*.[1] But it expressed clear approval of the view of the majority in *Moagi*, and based its decision upon the premise that there was no violation of the right to silence if a court took account of a failure to testify. Madala J cited with approval, as 'aptly put', the following extract from *S v Sidziya & Others*:

> The right entrenched in [IC] s 25(3)*(c)* means no more than that an accused person has a right of election whether or not to say anything during the plea proceedings or during the stage when he may testify in his defence. The exercise of this right like the exercise of any other must involve the appreciation of the risks which may confront any person who has to make an election. Inasmuch as skilful cross-examination could present obvious dangers to an accused should he elect to testify, there is no sound basis for reasoning that, if he elects to remain silent, no inferences can be drawn against him.[2]

It is one thing to allow the uncontroverted character of state evidence, especially if it is evidence the cogency of which depends on the degree to which it is unexplained, to ripen into proof beyond reasonable doubt when explanations are not forthcoming.[3] It is quite another to employ silence as positive evidence of guilt. The distinction is fine, but real, and should be insisted upon, not only for pre-trial silence but also as far as silence at trial is concerned. The Final Constitution, after all, entrenches the right to silence separately, in addition to the right against compelled self-incrimination. A suggestion that the reasoning of the US Supreme Court in *Griffin v California*[4] — which prohibited comment upon and permission for the jury to use inferences from silence — should not apply outside the context of jury trials[5] would ignore the fact that the exposure of a judge who is the trier of fact to inadmissible evidence puts considerable strain on the presumption of innocence. A judge, hardened by a quotidian pageant of hardened criminals, may find it very hard indeed to heed the presumption, so that it may well be more, rather than less, important for rules of evidence to be strictly followed where a judge is acting as the factfinder.[6]

The accused's right to silence is also protected by the rule that he or she need not disclose the nature of his or her defence in advance, and can await developments in the trial to decide whether it is necessary to lead evidence on certain

[1] 1998 (4) SA 1224 (CC), 1998 (11) BCLR 1362 (CC), 1998 (2) SACR 493 (CC)('*Osman*') at para 22.
[2] 1995 (12) BCLR 1626 (Tk) as cited in *Osman* (supra) at para 20.
[3] See *Osman & Another v Attorney-General of Transvaal* 1998 (2) BCLR 165 (T), 1998 (1) SACR 28, 31-32 (T)(In the context of a failure to provide a satisfactory account of possession of goods reasonably suspected of being stolen. The facial challenge to s 36 of Act 62 of 1955 failed as a result.
[4] 380 US 609 (1965). See also K van Dijkhorst *The Right to Silence: Is the Game worth the Candle?* (2001) 33.
[5] See *Brown* (supra) at 1490.
[6] For a comprehensive discussion of binding judges to rules of evidence, see S Doran, JJ Jackson & ML Seigel 'Rethinking Adversariness in Nonjury Criminal Trials' (1995) 23 *American Journal of Criminal Law* 1.

points and, frankly, to determine what to say about certain things. As a result, the relevance of what the accused is up to is not always clear to the court. Determining the relevance of questions may prejudice this privilege of passivity. This problem confronted the court in *S v M.*[1] Because the magistrate did not know that the unrepresented accused was to employ an alibi as his defence to a charge of rape, thereby rendering irrelevant almost all the harrowing questioning of the complainant about the details of the rape,[2] the accused was allowed a nine-hour free run until the alibi defence was revealed. Donen AJ (Davis J concurring) held:

> The value accorded to the right to human dignity stands alongside the right to life in the Interim and Final Constitutions. Before this kind of questioning can be tolerated in cross-examination, its relevance to the issues must first be established from the cross-examiner. There are limits to an accused's right of silence. The protection of the dignity of a rape victim raises an area of reasonable and justifiable limit to an accused's right of silence. . . . In this matter the fairness of the appellant's trial would not have been affected in any way had the relevance of the offending questions to the appellant's defence been investigated and then ruled inadmissible.[3]

This view can be defended on the basis that the asking of a question in cross-examination amounts to a representation of its relevance. If the question is problematic for dignity, it makes sense to ask why it is relevant to the defence, with due sensitivity to the accused's passivity right. In any event, the simple question whether intercourse is at issue or not, or intercourse at a particular time or place or in a particular manner, may be answered as a matter of practice when questions suggesting such a dispute are asked in cross-examination and tacitly place the accused's version in opposition to that of the complainant. It is true that relevance to general credibility does not require relevance to the issue, but there is surely little wrong with limiting invasive and embarrassing questions that go solely to credibility and consistency. Furthermore, the biggest danger of violating this aspect of passivity, namely doing away with the accused's entitlement to be safe until a case is made out by the state, can be addressed adequately if the state may not, when seeking to avoid a discharge under s 174,[4] rely upon the possibility that the accused might supplement the state case, based upon intimations from the defence during the presentation of the state case.[5] In *S v Ndlangamandla & Another* Willis J held that FC s 35(3)(*h*) had the following three consequences on the discharge of the accused under s 174 of the Criminal Procedure Act at the close of the state's case:[6] (1) The Court *mero motu* had to raise the question of possible discharge of the accused where it appeared to the court that there might

[1] 1999 (1) SACR 664 (C)('*M*'). See § 51.5*(k)* infra.

[2] 'Almost all' because the accused did allege consensual sexual intercourse with the complainant on other occasions, in order to explain the medical evidence.

[3] *M* (supra) at 673H-J.

[4] Criminal Procedure Act 51 of 1977.

[5] See § 51.5*(j)*(iii) infra.

[6] 1999 (1) SACR 391 (W)('*Ndlangamandla*').

be no evidence that the accused committed the crime; (2) If the state's evidence was of such poor quality that no reasonable person could possibly accept it, its credibility should be considered at that stage; (3) In the absence of evidence on which a reasonable person would convict the accused, there was no basis for refusing discharge merely because there was a possibility that the defence might supplement the state's case.[1]

In *S v Manamela & Another,* a majority of the Constitutional Court excised a reverse onus from the offence contained in s 37(1) of the General Law Amendment Act[2] (receiving stolen goods without reasonable cause for believing that the person from whom the goods were acquired was the owner thereof).[3] The provisions were found to constitute a justifiable infringement of the right to silence. The court found further that the provision constituted an infringement of the accused's right to be presumed innocent and the phrase 'proof of which shall be on such first-mentioned person' in s 37(1) was declared unconstitutional. The reverse onus was recast as an evidential burden in that s 37(1) was altered to include an additional sentence: 'In the absence of evidence to the contrary which raises a reasonable doubt, proof of such possession shall be sufficient evidence of the absence of reasonable cause'.[4]

(iii) *Self-incrimination at trial*

The operation of the right against self-incrimination *at the trial itself*, according to the orthodox theory of the history of the privilege against self-incrimination, lies at the core of the principle.[5] What is prohibited by this right is compelled self-incrimination at the trial and what is constitutionally relevant is what is meant by self-incrimination at trial and by compulsion at trial.[6] May an accused person be compelled to perform certain activities, or undergo certain tests, at trial?[7] In *Minister of Safety and Security & Another v Gaqa* the High Court was approached for an order compelling the respondent, who was suspected of having committed attempted robbery, to submit himself for an operation for the removal of a bullet

[1] *Ndlangamundla* (supra) at 393.

[2] Act 62 of 1955.

[3] 2000 (1) SACR 414 (CC), 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC)('*Manamela*'). See also T van der Walt & S de la Harp 'The Right to Pre-Trial Silence as Part of the Right to a Free and Fair Trial: An Overview' (2005) *African Human Rights Law Journal* 81.

[4] See J Burchell *Principles of Criminal Law* (2005) 121. The Constitutional Court in *Osman* held that s 36 of the General Law Amendment Act 62 of 1955 (failure to give a satisfactory account after being found in possession of goods reasonably suspected of having been stolen) is constitutional since it contains no shift in onus or infringement of the right to silence.

[5] See § 51.4*(b)*(iii) supra.

[6] Other aspects of the right against self-incrimination are dealt with in § 51.4*(b)*(iii) supra.

[7] See the discussion on the difference between real and communicative evidence in § 51.4*(b)*(iii) supra, particularly the 'self-incrimination' dimension recognized by Van Rensburg J to distinguish a 'live' identification parade from a photograph identification 'parade'. *S v Hlalikaya & Others* 1997 (1) SACR 613 (SE).

from his leg.[1] The respondent argued, unsuccessfully, that the order sought by the applicant would infringe his constitutionally entrenched right to be presumed innocent, the right not to be compelled to give self-incriminating evidence, the right to dignity and the right to bodily and psychological integrity.[2] Desai J held that s 27 of the Criminal Procedure Act, providing for the use of force in order to search a person, as well as s 37(1)*(c)* of the Criminal Procedure Act, permitting an official to take such steps as he deemed necessary to ascertain whether the body of any person had any mark, characteristic or distinguishing feature, permitted the order. Although the order sought involved the limitation of the respondent's rights, his interests were regarded as being of lesser significance. While the intrusion was substantial, community interests had to prevail in that instance.[3] Counsel for the respondent on a number of occasions argued that the removal of the bullet resulted in the respondent's giving self-incriminating evidence, but he did not refer to any authorities in this regard. On the facts this case was also clearly distinguishable from the application the United States Supreme Court had to consider in *Winston v Lee*.[4] In *Levack & Others v Regional Magistrate, Wynberg, & Another*[5] Cameron JA held that it would be wrong to suppose that requiring accused persons to submit voice samples infringed their right not to give self-incriminating evidence. The power that the police enjoyed under s 37 of the Criminal Procedure Act thus included the power to request the accused to supply voice samples.[6] However, the formulation of the right in FC s 35(3)*(j)* would certainly seem to cover such compulsion. The accused would be 'giving evidence' incriminating himself or herself if forced to perform such activities or to undergo tests or experiments before the court. And should this then extend also to presenting himself or herself for identification purposes in court? In principle it should, and, given the dangers of dock identification,[7] the ostensibly compelling reasons to justify such violations under FC s 36(1) do not appear as obvious as they might.[8] Inferences from a refusal to co-operate with the prosecution at trial

[1] 2002 (1) SACR 654 (C)('*Gaqa*').

[2] Ibid at 658.

[3] Ibid at 659.

[4] 470 US 753 (1985). For a comparative perspective on the right against self-incrimination, see PM Bekker 'The Constitutional Privilege against Compulsory Self-incrimination: A Defendant's Right to Silence in the Criminal Justice System of the United States of America' (2004) 67 *Journal for Contemporary Roman-Dutch Law* 584.

[5] 2003 (1) SACR 187 (SCA)('*Levack*').

[6] *Levack* (supra) at para 26.

[7] See the discussion in C Tapper *Cross and Tapper on Evidence* (8th Edition, 1995) 797f.

[8] Mention should be made, however, of the decision of the US Supreme Court in *Holt v United States*, in which the idea that being compelled to fit a shirt as a demonstration to the jury was a violation of the Fifth Amendment was regarded as 'extravagant'. 218 US 245, 252-253 (1910). The Court remarked: '[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof.' Ibid. The Court did leave open the question as to 'how far a court would go in compelling a man to exhibit himself'.

seem to demand similar treatment to that relevant to inferences from a failure to testify.

As far as compulsion at trial proceedings is concerned, an important area of concern is the relationship between various stages, or proceedings, within the same trial.[1] The admission of guilt inherent in the payment of a bail amount, which amount was determined on the basis that the applicant had been enriched by the robbery for which he was being charged, led the court in *S v Mbolombo*[2] to conclude that the dilemma ('verknorsing') with which the applicant was faced as a result of payment of the bail would amount to an admission of guilt was a limitation upon the applicant's rights ('inkorting van die appellant se regte') which he simply had to accept.[3] Although this approach would accord with that of the courts in rejecting a Hobson's choice as a form of compelled self-incrimination,[4] it is not clear whether the court in effect held that there had been a justified violation of the right against self-incrimination, or that the right did not apply. While the finding may be used as authority for the recognition of the violation of the protection against compelled self-incrimination in such circumstances, the court ultimately held the violation to have been justified.[5] In *S v Botha & Others (2)*, the accused had not been informed of his right to silence during a bail application, and the Witwatersrand Local Division held that admissions made during the bail application could not be used against the accused at the trial.[6] In *S v Cloete & Another*, the court, although not endorsing the blanket exclusion of evidence given by an accused at a bail application from the subsequent trial, recognized that it amounted to compelled evidence where an accused faced incarceration for lengthy periods of time.[7] The dilemma the accused in *Mbolombo* simply 'had to accept' was regarded as sufficiently objectionable to require a *voir dire* insulating the bail application from the main trial. The objection that this dilemma does not amount to compulsion may be met by reference to those cases which have sought to protect an accused from being 'compelled' to go into the box to defend admissions elicited during a *voir dire* determination of the voluntariness of a

[1] See § 51.5*(j)*(ii) supra. See also *Thatcher v Minister of Justice and Constitutional Development & Others* [2005] 1 All SA 373 (C) at para 89.

[2] 1995 (5) BCLR 614 (C).

[3] Ibid at 617-18.

[4] See § 51.4*(b)*(iii) supra.

[5] On the presumption of innocence dimension in this case, see § 51.5*(i)* supra.

[6] 1995 (2) SACR 605 (W). See also W de Villiers 'The Admissibility at the Subsequent Criminal trial of Evidence Tendered by Accused for Purposes of the Bail Proceedings' (2002) *Journal for Contemporary Roman-Dutch Law* 208.

[7] 1999 (2) SACR 137 (C).

confession.[1] The following dictum from the House of Lords in *R v Brophy*[2] suggests that the compulsion may be attributed to the *voir dire* determination itself:

> It is of the first importance for the administration of justice that an accused person should feel completely free to give evidence at the *voir dire* of any improper methods by which a confession or admission has been extracted from him, for he can almost never make an effective challenge of its admissibility without giving evidence himself. He is thus virtually compelled to give evidence at the *voir dire*, and if his evidence were admissible at the substantive trial, the result might be a significant impairment of his so-called right to silence at the trial.

Botha, and the force of the argument in *Brophy*, suffered a heavy blow in the decision of the Constitutional Court in *S v Dlamini*; *S v Dladla & Others*; *S v Joubert*; *S v Schietekat*.[3] In *Dlamini*; the applicant challenged constitutionality of s 60(11B)*(c)* of the Criminal Procedure Act ('the Code').[4] The provision rendered the record of a bail application admissible at the subsequent criminal trial. The argument was focused particularly upon the plight of the bail applicant accused of an offence under Schedule 6, since such an applicant had to demonstrate, by leading evidence, that 'exceptional circumstances' existed, which, in the interests

[1] See *S v De Vries* 1989 (1) SA 228 (A); *S v Sithebe* 1992 (1) SACR 347 (A). See also the reference in *S v Ramavhale* 1996 (1) SACR 639, 651 (A) to an accused's being 'compelled to go into the box' if uncertain about the admissibility of state evidence. See also *S v Mhlakaza & Others* 1996 (6) BCLR 814 (C).

[2] [1982] AC 476, 481. The combined effect of the decision in *Brophy* and that of the Privy Council in *Wong Kam-Ming v R* was that, prior to the passing of the Police and Criminal Evidence Act 1984 in the United Kingdom, the position regarding admissions made in the *voir dire* could be put thus: such admissions could not be used to prove guilt, irrespective of whether the confession which formed the subject-matter of the *voir dire* turned out to be admissible. [1980] AC 247. If the challenged confession did turn out to be admissible, admissions made in the *voir dire* could be used, but only as previous inconsistent statements going to credit. If the challenged confession turned out to be inadmissible, admissions could not be used even for the purposes of credit. In *S v Sabisa* it was suggested that cross-examination to credit should always be allowed. 1993 (2) SACR 525 (Tk). See also *S v Gquma & Others (2)* 1994 (2) SACR 182 (O); E Du Toit, FJ De Jager, A Paizes, AS Skeen & S Van der Merwe *Commentary on the Criminal Procedure Act* (2004) § 217. The 'compulsion' and presumption of innocence considerations should operate consistently: they render use at the trial of the admissions elicited at the *voir dire* repugnant. Either subsequent admissibility should undo this objection both for substantive use of the admissions and for their use as to credit, or such subsequent admissibility should have no effect on the repugnance. Clearly the latter is to be preferred. How can the arguments on 'compulsion' or on respecting the presumption of innocence be affected by what the court decides in the *voir dire*? Furthermore, the distinction between use as to credit and use as to guilt should either be applied consistently whether the challenged statement is subsequently ruled admissible or not, or should be done away with. It makes no sense to attach significance to the distinction according to whether the statement is admitted or not. The objections to attaching significance to the distinction between credit and guilt when it comes to the accused's own testimony are manifest. Whether the accused is lying when asserting his or her innocence and whether he or she is guilty are not questions liable to yield different answers in a significant number of cases. This distinction should not determine the applicability of the accused's right against compelled self-incrimination or the respect accorded the presumption of innocence.

[3] 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC), 1999 (2) SACR 51 (CC)('*Dlamini*').

[4] Act 51 of 1977 as amended by Act 85 of 1997.

of justice, permitted his or her release.[1] The applicant invoked *Botha* and drew an analogy between the applicant for bail and the accused at the trial within a trial challenging the voluntariness of a confession. Kriegler J held that the argument stood or fell with its invocation of *Botha*.[2] He held that *Botha* must fall. First, *Botha* was distinguishable because it dealt with an accused who had not been warned at the bail hearing of the right against self-incrimination. Secondly, choice was not compulsion, even if it was Hobson's choice:[3]

> It is true that evidence given at a bail hearing may ultimately redound to the prejudice of the accused. It can therefore not be denied that there is a certain tension between the right of an arrested accused to make out an effective case for bail by adducing all the requisite supporting evidence, and the battery of rights under s 35(1) and (3) of the Constitution. But that kind of tension is by no means unique to applicants for bail. Nor does its mere existence sound constitutional alarm bells. Choices often have to be faced by people living in open and democratic societies. Indeed, the right to make one's own choices is an indispensable quality of freedom. And often such choices are hard.[4]

This analysis, with respect, begs the question: when is a choice not a choice? After all, the robber asks one to choose between one's money and one's life. The bail provision asks one to choose between detention and testimony. If the unpleasant consequences attendant upon a choice are such as deserve disapproval of the agent responsible for them, then one is dealing with coercion.[5] Kriegler J qualified the finding by stipulating that the choice had to be an informed choice.[6] The analogy with evidence elicited at the trial within a trial was left tantalizingly unaddressed. After all, the accused attempting to show that a confession was not voluntarily made also has a choice to keep quiet. Yet the protection of the trial within a trial process is accepted as important to advance the presumption of innocence and liberty. Kriegler J avoided the analogy by resorting to the device of regarding a self-incrimination question as a question of potentially unconstitutionally obtained evidence. If the trial would still be fair, the evidence went in. If not, it stayed out. Abuse of cross-examination on the merits might render the subsequent trial unfair if incriminating answers were admitted.[7] The right against self-incrimination did not give an accused 'the right to lie'.[8] Again, one may ask: what exactly is the difference between the concern for the liberty of a bail applicant and

[1] See § 51.4*(d)* supra.
[2] *Dlamini* (supra) at para 92.
[3] See § 51.4*(b)*(iii) supra.
[4] *Dlamini* (supra) at para 94.
[5] On the truth of the proposition that the definition of coercion is essentially normative, and depends upon our disapproval of the kind of dilemma put before the patient, see R Nozick 'Coercion' in S Morgenbesser, P Suppes & M White (eds) *Philosophy, Science and Method: Essays in Honour of Ernest Nagel* (1969) 440.
[6] *Dlamini* (supra) at para 94.
[7] Ibid at paras 97 and 100.
[8] *S v Chavulla en Andere* 1999 (1) SACR 39 (C) at para 95.

the concern for the liberty of an accused asserting that a confession had been obtained improperly? Why recognize the need for a rule in the latter case but not in the former? The principle informing the following provision in the Canadian Charter addresses the concerns adequately while entrenching the right against self-incrimination:

> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.[1]

In *S v Aimes & Another,* the High Court declined to require admissions elicited at bail proceedings in the absence of a warning about silence and self-incrimination rights to be inadmissible at the trial itself.[2] In this case a co-accused desired to cross-examine the accused about the accused's admissions in order to further the co-accused's defence. The court preferred the compromise of allowing the admissions to serve as previous inconsistent statements as far as the co-accused's defence was concerned, but not to be substantively admissible against the accused. The admission of the evidence against the accused would have rendered the trial unfair.[3] In *S v Cloete & Another* the burden on the presiding officer properly to inform the accused of his or her right against self-incrimination was afforded more weight.[4] In *Cloete,* the accused was unrepresented during a bail application and was advised of his rights only once by the presiding officer. As a result, the accused gave clear, self-incriminatory evidence. Davis J held this evidence to be inadmissible during the subsequent trial. Also in *S v Sejaphale*[5] the Transvaal Provincial Division, per Jordaan J, emphasized that the fact that an accused had legal representation during a bail application did not exempt a presiding officer from the duty to explain to the accused his rights in terms of s 60(11B)*(c)* of the Criminal Procedure Act. In the instant case the magistrate failed to explain to the accused his rights in terms of s 60(11B)*(c)* but such rights were explained to the accused by his legal representative. Jordaan J held that the magistrate did not have a discretion to allow the record of the bail proceedings at the subsequent trial. Non-compliance with the requirements of s 60(11B)*(c)* thus made the record inadmissible, as was the case in *S v Botha & Others (2).*

[1] Section 13.

[2] 1998 (1) SACR 343 (C)('*Aimes*').

[3] Ibid at 350D. Although our courts do not have to consider the prejudicial effect such evidence may have on a jury, it is nevertheless optimistic to expect the judicial officer to keep the two cases separate in the determination of respective guilt. The only way to avoid the conflict of fair trial rights (silence and self-incrimination against the right to adduce evidence) would be to allow a separation of trials. But then the opportunity to cross-examine on the admissions would fall away to the prejudice of the co-accused, and the admissions would become hearsay. This problem has vexed the common law courts in the commonwealth. See *R v Beckford and Daley* [1991] Crim LR 833; *R v Myers* [1996] 2 Cr App R 335 (England); *McLay v HM Advocate* (1994) SCCR 397 (Scotland); *Bannon v R* (1995) 132 ALR 87 (Australia); *R v Crawford* [1995] 1 SCR 858 (Canada). In South Africa there would be a strong argument for allowing the admissions to be proved substantively as defence hearsay in terms of s 3 of Act 45 of 1988.

[4] 1999 (2) SACR 137 (C).

[5] 2000 (1) SACR 603 (T).

A much more lenient approach was adopted in *S v Thusi & Others*[1] where the court per Magid J held that there was nothing in s 60(11B)*(c)* of the Criminal Procedure Act which required a court hearing a bail application to warn the applicant that the evidence given by him in the course of the application might form part of the record at the subsequent trial. If the applicant were treated fairly during the subsequent trial, the fact that no such warning was given would not render the trial unfair. It remained desirable that an unrepresented accused should be warned, although such warning was not deemed to be a prerequisite for a reference to be made to the record of the bail proceedings during the subsequent trial.[2]

S v Makofane[3] in effect ignored the effect upon the right against self-incrimination of the discretion to refuse a discharge under s 174 of the Criminal Procedure Act 51 of 1977. That a court should wait for an accused person to supplement the state's case against him or her when there is insufficient evidence upon which a reasonable court might convict seems unquestionably to be a *prima facie* violation of the principle, underlying the right against compelled self-incrimination, that the state should bear the full burden of proof of guilt. Recourse to the 'balancing' nature of fairness cannot, with respect, answer the question whether a discretion to allow a *prima facie* violation withstood the transition to constitutionalism.[4] Nor, with respect, can the question be answered by invoking principles relating to improperly obtained evidence.[5] It is respectfully submitted that the finding in *S v Mathebula & Another*,[6] that the constitutional right against self-incrimination displaced the discretion to refuse a discharge where there was no evidence upon which a reasonable court could convict, was unjustifiably rejected as 'clearly wrong' in *Makofane*.[7] A related question (indeed the real question in *Makofane* and *Mathebula*) is whether the possibility that one's co-accused may incriminate one should be regarded as a legitimate ground upon which to refuse a discharge. The questions should not be confused. Self-incrimination problems, while relevant in the latter situation, are not as obviously present as in the former.[8] But the latter situation undoubtedly asks fairness questions. If the material upon which the possibility is based is not admissible evidence against the accused, a separation of trials seems the only fair option, lest the inadmissible evidence, rather than that which it was hoped it would spawn, ultimately convict the accused.

[1] 2000 (4) BCLR 433 (N).
[2] Ibid at 439.
[3] 1998 (1) SACR 603 (T)('*Makofane*').
[4] See *Makofane* (supra) at 617 invoking *Key v Attorney-General, Cape Provincial Division, & Another* 1996 (4) SA 187 (CC), 1996 (6) BCLR 786 (CC). See also § 51.1*(b)*(ii) supra.
[5] See *Makofane* (supra) at 617I-618H, invoking *S v Khan* 1997 (2) SACR 611 (SCA).
[6] 1997 (1) SACR 10 (W), 1997 (1) BCLR 123 (W).
[7] *Makofane* (supra) at 618H
[8] But see *R v Machinini & Others (2)* 1944 WLD 91, 96. Blackwell J remarks about the accused's dilemma in such a case: 'The prosecution's hope is not only that the co-accused may incriminate the accused but, more probably, that a combination of the co-accused's defence and the accused's efforts to deal with it may achieve what the state has failed to do.'

S v Ndlangamandla & Another[1] provided welcome resurrection of the *Mathebula* insistence on the constitutional impropriety of allowing the state to avoid a discharge on the possibility that the accused might supplement the state's case. The Canadian decision of *Du Bois v R*[2] was invoked as substantiation for the proposition that 'the provisions of FC s 35(3)(*h*) with regard to the presumption of innocence, the right to silence, and the right not to testify' had the consequence of disallowing such reliance by the state.[3] Neither *Mathebula* nor *Makofane* was mentioned. Again the close relationship between the presumption of innocence, the right to silence, and the right against compelled self-incrimination was prominent. In an appeal from the Cape Provincial Division the Supreme Court of Appeal in *S v Lubaxa*,[4] referring to both *Mathebula*[5] and *Makofane,*[6] confirmed that the failure to discharge an accused where, at the close of the prosecution's case, there was no possibility of a conviction other than if the accused entered the stand and incriminated herself, constituted a breach of the accused's rights contained in FC s 35(3). Nugent AJA opined that this would ordinarily vitiate a conviction based exclusively on the accused's self-incriminatory evidence.[7]

(k) The right to adduce and challenge evidence

In *S v Mosoetsa* the Transvaal Provincial Division emphasized that an accused had to be informed of his right to dispute any evidence which the state might submit and that he could present any evidence to the contrary should he wish to.[8] This right, however, did not override the right of the co-accused not to incriminate himself or to remain silent.[9] This twofold right, contained in IC s 25(3)*(d)* and FC s 35(3)*(i)*, may create more constitutional problems than first meet the eye. Clearly, it covers denials of the accused's right to call witnesses. In *S v Younas*[10] a magistrate's refusal to allow the accused in proceedings under the Prevention of Family Violence Act 133 of 1993 to call witnesses, on the basis that the Act gave presiding officers wide powers to depart from normal procedures, that the magistrate was impressed by the complainant's evidence, and that the accused was engaging in 'delaying tactics', was held to have been a denial of the accused's 'fundamental right to a fair hearing'.[11] In *S v Mbeje*[12] the failure to allow an

[1] 1999 (1) SACR 391 (W)('*Ndlangamandla*').
[2] (1985) 23 DLR (4th) 503.
[3] *Ndlangamandla* (supra) at 393G-I.
[4] 2001 (4) SA 1251 (SCA).
[5] Ibid at para 13.
[6] Ibid.
[7] Ibid at para 18.
[8] 2005 (1) SACR 304, 310 (T).
[9] *S v Lungile & Another* 1999 (2) SACR 597, 605 (SCA).
[10] 1996 (2) SACR 272 (C).
[11] Ibid at 274. It was clearly a case calling for the application of the specific right to adduce evidence.
[12] 1996 (2) SACR 252 (N).

accused to address the court before judgment was regarded as an 'outright denial of the *audi alteram partem* rule'.[1] In *S v Dodo*, the Court (per Smuts AJ) held that s 51 of the Criminal Law Amendment Act 105 of 1997, which prescribed the imposition of minimum sentences in certain circumstances, did not preclude the accused from adducing evidence.[2]

The right is a twofold right rather than two separate rights because the adduction of evidence by the accused in a criminal trial represents his or her challenge to the state's evidence: the accused is not ordinarily[3] required to bring anything to the Court's attention, and so as much evidence as he or she does adduce amounts to a challenge to the evidence produced by the state in its efforts to justify the deprivation of liberty it is urging. In Canada, the right to adduce and challenge is contained in the single 'principle of fundamental justice' to 'present full answer and defence'.[4] The close relationship between the right to adduce evidence and the right to challenge evidence emerged starkly in the American case of *Chambers v Mississippi*:[5] an inability to cross-examine a third party about a retraction of the third party's confession to the crime with which the accused was charged was compounded by an inability to adduce evidence of repetitions of the confession made to other parties. The US Supreme Court's finding that the retraction of the confession by the third party amounted to evidence against the accused[6] illustrates the very close relationship between the two parts of the right to adduce and challenge evidence. The inabilities referred to entailed a violation of the due process clause of the Fifth Amendment, 'coupled with' the right to confront one's accusers, contained in the Sixth Amendment.[7] The exclusion of evidence sought to be presented by an accused may therefore raise constitutional problems

[1] The court was of the opinion that, since the ultimate question was whether the prosecution could demonstrate that the accused had not been prejudiced, overwhelming evidence against the accused might be sufficient to justify such a violation. This, it is submitted, was a violation of the principle that *audi alteram partem* should not yield where fairness would make 'no difference'. The point was pertinently made in *S v McKenna* 1998 (1) SACR 106 (C). On a charge of contempt against a public prosecutrix, the magistrate had relied upon enquiries he had privately conducted to investigate the truth of the accused's explanation. Ngcobo J held that the failure to allow the accused to deal with such evidence was a violation of the right to adduce and challenge evidence. The learned judge made the following welcome comment on arguments from futility: 'There is no place for the so-called no-difference rule under our Constitution.' Ibid at 118G. See also *S v Zingilo* 1995 (9) BCLR 1186 (O).

[2] 2001 (1) SACR 301, 315 (E).

[3] Whether the imposition of an evidential burden upon the accused violates the presumption of innocence was, strictly speaking, not answered by the Constitutional Court in *Scagell v Attorney-General of the Western Cape & Others* 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC).

[4] See *R v Seaboyer* [1991] 2 SCR 577. See generally DM Pacioccio 'The Constitutional Right to Present Defence Evidence in Criminal Cases' (1985) 63 *Canadian Bar Review* 519.

[5] 410 US 284 (1973)('*Chambers*').

[6] Ibid at 297. This was despite the fact that the retraction contained no allegations against the accused; it was, however, inconsistent with the accused's innocence if the state's theory that there had been only one killer was accepted.

[7] Ibid at 302.

of much the same kind, involving much the same principles and reasoning, as are entailed by preventing the accused from cross-examining witnesses.[1] The exclusion, for example, of hearsay evidence sought to be adduced by the defence is therefore as much of a potential problem as is the use by the prosecution of hearsay evidence to convict an accused.[2]

Use of hearsay evidence by the state violates the accused's right to challenge evidence by cross-examination.[3] Schutz JA in *S v Ramavhale* said the following of the discretion to admit hearsay evidence under s 3 of the Law of Evidence Amendment Act of 1988 in criminal trials: 'An accused person usually has enough to contend with without expecting him also to engage in mortal combat with the absent witness.'[4]

In *S v Ndlovu & Others*[5] the Court held that the provisions of s 3(1)*(c)* of the

[1] See *R v Seaboyer* [1991] 2 SCR 577 (A rule prohibiting the defence from cross-examining a rape complainant about certain categories of her past sexual experience irrespective of the relevance of the evidence was struck down as violating the right to 'present full answer'.)

[2] See, on the objections to excluding evidence sought to be adduced by the defence on the basis that it is hearsay, *Lucier v R* [1982] 1 SCR 28, 32f; *R v Finta* [1994] 1 SCR 701, 853f; *R v Daylight* (1989) 41 A Crim R 354 (Queensland Supreme Court); *R v A*still (1992) 63 A Crim R 148, 58. See also the United Kingdom Law Commission *Criminal Law Evidence in Criminal Proceedings: Hearsay and Related Topics* Consultation Paper No 138 (1995) at paras 1.30, 5.32, 5.39, 7.83 and 7.36 (Expressing concern that exclusion of defence hearsay may violate the United Kingdom's obligations under art 6 of the European Convention on Human Rights); Scottish Law Commission *Evidence: Report on Hearsay Evidence in Criminal Proceedings* Scot Law Com No 149 (1995) at para 4.29; G Williams *The Proof of Guilt: A Study of the English Criminal Trial* (3rd Edition, 1963) 211; A Choo *Hearsay and Confrontation in Criminal Trials* (1996) 66, 67, 94, 104, 105, 129, 141, 179 and 196; DM Paciocco (supra); SG Churchwell 'The Constitutional Right to Present Evidence: Progeny of *Chambers v Mississippi*' (1983) 19 *Criminal Law Bulletin* 131.

[3] There exists a close link in the United States between the hearsay rule and confrontation clause jurisprudence. See *Dutton v Evans* 400 US 74, 86 n16 (1970); *California v Green* 399 US 149, 155 (1976); *United States v Inadi* 475 US 387, 393 n5 (1986); *Idaho v Wright* 497 US 805, 814 (1990). Generally speaking, 'firmly rooted' exceptions to the hearsay rule at common law are regarded as justified. See *Ohio v Roberts* 448 US 56 (1980); *Idaho v Wright* (supra) at 814. In Canada the position is governed by *R v Potvin* [1989] 1 SCR 525 (Recognizing the implications for the right to 'full answer and defence' of admitting state hearsay) and *R v Khan* [1990] 2 SCR 531 (Subjecting the whole exercise to one of determining the 'necessity and reliability' justifying admission of hearsay evidence.) The European Convention on Human Rights art 6(3)*(d)* provides for the right to 'examine and have examined the witnesses against him'. Although the Convention operates with a 'margin of appreciation', (ie deference to state arrangements on procedural matters, particularly in the area of the laws of evidence and must allow for the co-existence of inquisitorial and adversarial jurisdictions) the European Court of Human Rights has confirmed the fact that the right to 'examine and have examined' the witnesses against one is seriously implicated by the use of statements, particularly of anonymous witnesses, that are not subjected to adverse cross-examination. See *Unterpetinger v Austria* (1986) 13 EHRR 434; *Barberá, Messegué and Jabardo v Spain* (1988) 11 EHRR 360; *Kostovski v Netherlands* (1989) 12 EHRR 175; S Stavros *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: An Analysis of the Convention and a Comparison with Other Instruments* (1993) 230-32 (For qualifications.)

[4] 1996 (1) SACR 639, 651 (A).

[5] 2001 (1) SACR 85 (W)('*Ndlovu*').

Law of Evidence Amendment Act[1] were not in conflict with the provisions of FC s 35(3)*(i)* as these provisions did not affect the accused's right to adduce and challenge evidence.[2]

The constitutionality of admitting hearsay documentary evidence against an accused under s 212(4)*(a)* of the Criminal Procedure Act 51 of 1977 came before the Full Court of the Witwatersrand Local Division in *S v Van der Sandt*.[3] The documentary hearsay in question was a certificate handed in by a forensic analyst who had taken a blood specimen from the accused and had concluded that the accused's blood-alcohol level while driving had been such as to render him guilty of an offence under the Road Traffic Act 29 of 1989. The provision in question allowed such evidence to state merely the qualifications of the deponent and the fact that the decisive result had been obtained by a process 'requiring skill in chemistry'. The objection was that the right to cross-examine was violated in the context of a statement conclusively deciding the issue before the Court. Van Dijkhorst J held that the mere fact that evidence was tendered by affidavit did not render the proceedings unfair, and that the question lay in the nature of the evidence.[4] The Court observed that the kind of evidence normally provided under s 212 was of a formal non-contentious nature, and that the capacity to admit such evidence on affidavit was 'essential to the proper administration of justice', which was the reason the provision would be justified under FC s 36(1) even if it did violate the right to cross-examine. The Court then focused on the nature of the evidence, particularly its conclusive effect on the issue, and avoided grasping the nettle concerning the untested nature of such evidence by pointing to the provision for calling the expert in question to testify, which would render such a witness, still a state witness, subject to cross-examination. There was therefore no denial of the opportunity to cross-examine, and the question whether such a denial relating to such evidence would be unconstitutional was in effect left open. The Court did require affidavit evidence to be subject to challenge, and held that the provision in question had to be read to require the deponent to attest to the basis of the finding and the workings of the equipment, in order to render

[1] Act 45 of 1988. Section 3(1) stipulates the following:
'3 Hearsay evidence
(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless- *(a)* each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings; *(b)* the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or *(c)* the court, having regard to- (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.'

[2] *Ndlovu* (supra) at para 63.

[3] 1997 (2) SACR 116 (W)('*Van der Sandt*').

[4] Ibid at 132.

meaningful challenge possible.[1] It should be clear that an attempt by the accused to adduce positive evidence would involve the same principle. If the distinction between cross-examination about past experience and adduction of evidence of past experience is one between relevance to credit and relevance to the issue respectively, then there would be a relevant distinction between cross-examination and evidence adduced, but any 'full answer' objection to denial of cross-examination as to credit should apply *a fortiori* to a denial of evidence relevant to the issue.

The existence of the right to cross-examine must be adequately explained to the unrepresented accused,[2] and the court's duty to fill in the gaps in examining witnesses in the case of an unrepresented accused may be regarded as a fulfilment of the accused's right to adduce and challenge evidence.[3]

A strong line was taken by Khumalo J in *S v Motlhabane*[4] on the denial of the accused's right exhaustively to cross-examine an adverse witness. A prosecution witness who had already been extensively cross-examined died before cross-examination could be completed. The difficulty of predicting what would have emerged under further cross-examination was sufficient to render a conviction based on such incompletely tested evidence a violation of the right to a fair trial.

An equally strong line was taken in *S v Lukhandile*[5] to the violation of an accused's right to adduce the evidence of a witness on the ground that the witness had been present in court. Such a situation, the Court held, had to be assessed for weight; it could not be grounds for ignoring the right to adduce evidence. The irregularity was so fundamental that there had been no trial at all, and the proceedings were set aside.[6]

In *Klink v Regional Magistrate NO & Others*[7] the Court had to determine whether the provision in s 170A of the Criminal Procedure Act 51 of 1977 for a child witness to be cross-examined through an intermediary was an unconstitutional dilution of the right to cross-examination, particularly as the intermediary could convey merely the general purport of the questions put by the cross-examiner. The Court observed that s 170A did not exclude the right to cross-examine.[8] It added that the right to cross-examine was inevitably limited by a court's discretion to disallow oppressive or irrelevant questioning.[9] Whether a procedure infringed

[1] See *Van der Sandt* (supra) at 138. See also L Meintjies-Van der Walt 'Expert Evidence and the Right to a Fair Trial: A Comparative Perspective' (2001) *South African Journal for Human Rights* 301.

[2] In *S v Mbeje* it was held that a repetition of the right before each witness was not required, the following advice given before the first witness having been sufficient: 'It is vitally important that you put your defence to all the state witnesses. Don't allow anything you dispute to go unchallenged. Do you understand?' Magistrates might do worse than adopt this formula as a practice direction. 1996 (2) SACR 252 (N).

[3] See *S v Moilwa* 1997 (1) SACR 188 (NC).

[4] 1995 (8) BCLR 951 (B).

[5] 1999 (1) SACR 568 (C).

[6] Ibid at 571A-B.

[7] 1996 (3) BCLR 402 (SE)('*Klink*').

[8] Ibid at 409.

[9] Ibid at 410.

the right depended on the effect it had on the purpose of cross-examination, viz to elicit favourable evidence and to cast doubt on the state's case, and hence depended on the circumstances.[1] The Court examined the problems of secondary victimization of vulnerable complainants[2] and found that the ordinary procedures of the criminal justice system were inadequate to address the needs and requirements of child witnesses.[3] The Court's finding that the right to cross-examine was not impaired came by a puzzling route: first, the filtering of questions through an intermediary was regarded as no limitation on the right to cross-examine, the intermediary acting as an 'interpreter'.[4] Then the acknowledgement that the forcefulness and full benefits of cross-examination were denied in the circumstances was accounted for by balancing the interests of the child against those of the accused, which 'led' to the conclusion that the right to challenge was 'not impaired'.[5] The Court then returned to the objection about general purport and filtering, and answered it by weaving together the interests of the child and the consideration that the court's control over the filtering proces ensured that the integrity of the questions asked was maintained.[6] Finally, consideration of the importance of truth-finding 'modified' by due process requirements was added to conclude that the right had not been violated, and that no limitation analysis was called for.[7] It is submitted that, whatever the merits of protecting the child's interests, these interests had no logical effect on the extent to which the right was being impaired: they should have been regarded solely as justification for such impairment as was entailed by the filtering process.

A sharp division of the degree of impairment and the extent of justification would have answered the crucial question: how much impairment of the effectiveness of rigorous cross-examination is required before the right to adduce and challenge evidence may be said to be sufficiently adversely affected to require justification of the violation under the limitations clause? That there was some impairment of the cross-examination cannot be doubted. This question should have applied also to the degree of impairment inherent in the introduction of physical or technological barriers between the cross-examiner and the witness, since such measures equally undeniably have an adverse effect upon the full force of cross-examination. It was not conducive to an engagement with the

[1] *Klink* (supra) at 410.

[2] Ibid. For a caveat about the unfortunate effects of this discourse on the presumption of innocence see § 51.5*(i)* supra. See also F Cassim 'The Rights of Child Witnesses versus the Accused's Right to Confrontation: A Comparative Perspective' (2003) *Comparative and International Law Journal of South Africa* 63.

[3] The court's balancing of state interests (protecting the witness) against those of the accused within the definition of the right, in the face of its endorsement of the two-stage analytical structure, is discussed in § 51.1*(b)*(iv) supra.

[4] *Klink* (supra) at 411.

[5] Ibid at 412.

[6] Ibid at 412- 413.

[7] Ibid at 413.

crucial question that the analysis of the procedure concerned — separation by video-link — was undertaken in terms of the right to a public trial.[1] The fact that the American jurisprudence most urgently in point naturally dealt with confrontation issues was employed as grounds for distinguishing the cases, when recognition that the right to adduce and challenge was at issue would have led to a full appreciation of the confrontation issue.[2] The Court admittedly alluded to and endorsed some confrontation reasoning in *Maryland v Craig*[3] and the 'full answer and defence' reasoning of the decision of the Supreme Court of Canada in *R v Levogiannis*,[4] but the focus of its finding remained throughout on the right to a public trial.

The Court in *S v Nkabinde* was far more focused on the right to confront one's accusers as being integral to the adversarial system, a system that received stirring praise in the judgment.[5]

S v Stefaans[6] cautioned against too unthinking an application of the intermediary procedure without thorough investigation into its necessity and the applicability of the statutory requirements. The following caveats of fairness had to inform the decision, and the accused had to be made aware of his or her right to oppose the procedure:[7]

1. An intermediary may affect the effectiveness of cross-examination.
2. An accused prima facie had the right to confront his or her accusers and to be confronted by them.
3. Human experience shows that it is easier to lie about someone behind his or her back than to his or her face.

The judgment recognized that s 170A made inroads into the right to challenge evidence, and decreed that this be borne in mind in the interpretation and application of the section. A similar sensitivity was displayed in *S v F*,[8] where it was pointed out that the procedure encroached upon an accused's rights, and where the Court laid down that its jurisdictional facts had to be established on a balance of probabilities.

[1] See § 51.5*(e)*(ii) supra. 'Confrontation' aspects of the case which might be accommodated under the right to be present when being tried have been alluded to above. See § 51.5*(g)* supra.

[2] For arguments as to whether the 'presence' dimension of the right to confront should have been separated from those arguments related to the 'impairment of cross-examination' dimension of the right — the former being considered under the right to be tried in one's presence and the latter under the right to adduce and challenge evidence — see *Coy v Iowa* 487 US 1012 (1988); *Maryland v Craig* 497 US 836 (1990).

[3] 497 US 836 (1990), cited in *Klink* (supra) at 414.

[4] [1993] 4 SCR 475. See *Klink* (supra) at 415.

[5] 1998 (8) BCLR 996, 1001B-E (N).

[6] 1999 (1) SACR 182 (C).

[7] Ibid at 188. See the list of guidelines for applying the procedure..

[8] 1999 (1) SACR 571 (C).

A socially explosive question, and one replete with human rights dilemmas, is the clash between the accused's right to challenge evidence and the rape complainant's right to dignity and to freedom from invasive interrogation not reasonably related to the protection of the rights of the accused. A focus on the plight of the 'victim' endangers the presumption of innocence; but allowing the accused a completely free rein tramples the dignity of the complainant and may amount to curial brutality. This is especially problematic when the accused is unrepresented. On the one hand, far more leeway is allowed to ensure that all sources of possible doubt have been addressed, and that an injustice is not done to the innocent accused whose sense of relevance may not be acute. On the other hand, the guilty rapist gets the opportunity of subjecting his victim to another ordeal at first hand, few holds barred. In *S v M*[1] the magistrate 'seemed to have allowed the appellant a degree of leeway which ethical, moral and legal imperatives would have prevented, were the appellant legally represented. One serious consequence thereof was the failure to protect the dignity of the complainant during cross-examination'[2] It may be that the erection of a screen between the accused and the complainant during cross-examination could be called for, to reduce some of the possible trauma for the complainant.[3]

The main problem in *S v M* was the irrelevance of the offensive questioning to the accused's defence in circumstances where the irrelevance appeared only once the accused had revealed the nature of his defence (an alibi), after nine hours of cross-examination including intimate interrogation of the complainant about the most delicate and basic details of the trauma.[4]

(l) The right to be tried in a language one understands

The need to understand the proceedings in order to make informed choices in exercising one's rights to defend oneself is not the only rationale for this right. If it were, it could be argued that as long as the accused's lawyer understood the language spoken in court and the accused and the lawyer understood one another (a right inherent in the right to a fair trial as held by Buys J in *S v Pienaar*[5]), there would be no reason to ensure understanding on the part of the accused. The

[1] 1999 (1) SACR 664 (C)('*M*').

[2] Ibid at 665I.

[3] See *R v Levogiannis* [1993] 4 SCR 475; § 51.5*(i)* supra and above in this section. See also *R v Brown* (Milton) *The Times* 7 May 1998 (CA), as reported in Archbold *Criminal Pleading: Evidence and Practice* (1999) 1032, § 8-113. The Court of Appeal reminded judges that a trial was not 'fair' when the unrepresented accused gained an advantage he would not otherwise have had by abusing the rules in relation to relevance and repetition when cross-examining. Suggestions in *Brown* relating to an examination of the relevance of various lines of enquiry in advance, in the absence of the jury, are of limited assistance in a system where the judicial officer is both factfinder and judge of law.

[4] Since this question was examined from the point of view of the right to silence, it is dealt with in § 27.5*(j)*(ii) above.

[5] 2000 (2) SACR 143, 156 (NC). See also F Cassim 'The Accused Person's Competency to Stand Trial — A Comparative Perspective' (2004) 45 *Codicillus* 18.

exercise of the coercive power of a criminal trial carries a burden of justifying the coercion to those who are coerced, in order to satisfy as far as reasonably possible the ideal of democratic government, which requires the constructive consent of the governed for the coercive measures attendant upon an exercise of state power. The accused is to be made a conscious participant in the exercise of state power over his or her person, so that the notion that the deprivation of the accused's liberty entailed by the trial is an exercise of collective self-government can be afforded a degree of reality. The trial is the ritual of justification in which the merits of the deprivation of the accused's liberty are authoritatively and finally determined.[1] In the absence of a jury system, the accused must find democratic legitimacy in reasons and justifications from the Bench. Courts are equipped to act as fora of justification. For these reasons, the degree of understanding required by FC s 35(4) for information given to detained, arrested and accused persons in circumstances which do not form part of the ritual of 'being tried' is less strict than that required for participation in the trial itself. The Transvaal Provincial Division in *S v Ngubane* observed, in relation to the right to an interpreter, where trial in a language one understood was not practicable:

> [T]he interpretation should take place simultaneously with the testimony being given by the witness; . . . the interpretation will be in a language which the accused fully understands and not into a language which he understands partially.[2]

The conviction of the accused, an isiZulu-speaker, was accordingly set aside where the proceedings were interpreted to him in seTswana.[3] The Eastern Cape Provincial Division in *S v Siyotula*,[4] however, did not interpret the *Ngubane* judgment as laying down an absolute rule that, if the interpretation was not done simultaneously with the evidence given, there was automatically a failure of justice. There was no unfairness and no miscarriage of justice if this irregularity could be cured without prejudice to the parties.

In *S v Ndala*[5] the Cape Provincial Division confirmed that the provision for an interpreter required a sound and faithful ('juis en getrou') translation[6] and that, given that the very necessity for an interpreter arose because the linguistic competence of the Court and of the accused did not coincide, the safeguard of requiring an interpreter to be officially appointed after the taking of an oath was the only practically feasible way of ensuring the required peace of mind

[1] See WO Weyrauch 'Law as Mask: Legal Ritual and Relevance' (1978) 66 *California LR* 699.

[2] 1995 (1) BCLR 121, 122 (T).

[3] See *S v Abrahams* 1997 (2) SACR 47 (C)(The question of the competence of an interpreter for a 'deaf mute' was determined as one of fairness under s 6(2) of the Magistrates' Courts Act 32 of 1944, entirely on the basis of the common law principles laid down in *S v Mafu* 1978 (1) SA 454 (C) and *S v Siwela* 1981 (2) SA 56 (T).)

[4] 2003 (1) SACR 154, 158 (E)('*Siyotula*').

[5] 1996 (2) SACR 218 (C)('*Ndala*').

[6] *Ndala* (supra) at 221. See also NC Steytler 'Implementing Language Rights in Court: The Role of the Court Interpreter' (1993) *South African Journal for Human Rights* 205.

concerning the accuracy of what was being said in Court.[1] Evidence given through an interpreter not thus appointed was therefore not evidence, and the proceedings had to be set aside for a trial *de novo* before a different magistrate: the violation was irrevocable given the requirement of simultaneity.[2] Noorbhai AJ in *S v Chauke & Another*[3] sounded the 'caveat to magistrates and interpreters alike' that it had to be clear from the record that an accused was tried in a language he or she understood.[4]

The state is given the option under FC s 35(3)*(k)* to provide an interpreter only where it is 'impracticable' actually to try the accused in a language he or she understands. The distinction between this formulation and the formulation in IC s 25(3)*(i)*[5] means that the accused has the opportunity under FC s 35(3)*(k)* to compel the Court to try him or her in a language he or she understands, rather than leaving the choice entirely up to the state. Of course, the accused bears the burden, according to the formulation, to show that it is not 'impracticable' to accede to his or her demand, a burden which may be difficult to discharge given that the *probanda* are within the knowledge of the officials concerned, rather than of the accused. Nevertheless, it is by no means inconceivable that an accused would be able to show the practicality of, for example, having a court constituted in such a way as to try the case in a language other than English or Afrikaans, particularly since the provision does not require 'reasonable practicability'.[6]

It seems that the appellant in *Mthetwa v De Bruin NO & Another*[7] employed this argument, but without success.[8] The appellant, an isiZulu-speaking teacher who

[1] *Ndala* (supra) at 223.

[2] Ibid at 224. The decisiveness of the interpreter's unofficial status for the ratio of the case was somewhat diminished by the finding that the magistrate had additionally ('daarbenewens') displayed clear reservations about the interpreter's competence ('duidelike bedenkinge oor sy bekwaamheid'). Ibid at 223.

[3] 1998 (1) SACR 354, 357 (V).

[4] The learned judge clearly meant 'tried in a language which he understood' to include 'interpreted in a language which he understood'. Ibid at 357I.

[5] 'Every accused person shall have the right . . . to be tried in a language which he or she understands, or, failing this, to have the proceedings interpreted to him or her.'

[6] See *S v Collier* 1995 (2) SACR 648 (C), discussed in § 51.5*(e)*(i) supra. Accused persons, it is submitted, should not be allowed to subvert the reasoning in *Collier* by demanding trials by judicial officers and lawyers who speak their language. The grave consequences of such 'forum shopping' for the kind of impartiality ensured only by a reasonably strong degree of random selection of the most competent officials would seem to outweigh the demands of being tried in one's language where this is practicable. Nevertheless, such arguments, it is submitted, would have to be made under FC s 36(1) in a case where an accused person has shown the 'practicability' of being tried in a language he or she understands. For a discussion of the state's duty to pay for competent interpreters as part of a fair trial at common law, see I Currie 'Official Languages' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 65.7. The issues canvassed in Chapter 65 will have an effect on the proper approach a court must take to this potentially problematic provision, but it is to be remembered that the fair trial dimension of the language question is concerned with the right to a fair trial, not with cultural or linguistic equality.

[7] 1998 (3) BCLR 336 (N).

[8] The court referred, without comment, to counsel's argument that rights might be limited only under FC s 36.

understood English, was held not to have been entitled to have his trial conducted in isiZulu, for reasons of impracticability. The impracticability at issue was the linguistic constitution of the court staff and of the judiciary in the case of review or appeal. It may be added, and cannot practically or sensibly be ignored, that Afrikaans and English, apart from being thoroughly entrenched in the textual fabric of our law, are peculiarly possessed of an adequate legal infrastructure and vocabulary.[1]

(m) Retroactivity

The provisions in IC s 25(3)*(f)* and FC s 35(3)*(l)* and *(n)* incorporate the fundamental principle of legality expressed in the maxims *nullum crimen sine lege* and *nulla poena sine lege*. In 1798, Chase J said the following in *Calder v Bull*:[2] 'Every law that takes or impairs rights vested agreeably to existing laws is retrospective and is generally unjust and may be oppressive.' This overriding principle indicates how closely connected are the prohibition against retroactive creation of crimes and the provision allowing the accused person the benefit of ameliorative alterations in the law relating to punishment.[3]

Whether a particular crime is retroactively created may not always be an easy question to answer since it involves subsidiary questions of legal philosophy about the very meaning of 'law'.[4] In *SW v United Kingdom*[5] the European Court of Human Rights confronted the problem of judicial transformation of the definition of a crime through incremental common-law development. The applicant challenged his conviction for rape of his wife on the basis that the *actus reus* had occurred before the decision of the English Court of Appeal, confirmed by the House of Lords,[6] which self-professedly 'changed' the position obtaining at

[1] See *S v Matomela* 1998 (3) BCLR 339 (Ck)(The High Court in Bisho recognized the propriety of proceedings which had been conducted and recorded entirely in isiXhosa as a matter of necessity, but pointed to the practical problems such a practice would create for appeals and reviews. Tshabalala J inclined to the view that one official language of record might be a practical necessity, given the impossibility of heeding linguistic equality in the courts. The matter required the urgent attention of the Department of Justice. Ibid at 342F-G. It is submitted that the sacrifice of Afrikaans, on the basis that its privileged position relative to other non-English South African languages was unwarranted, would amount to an unfortunate and short-sighted denial of the textual, linguistic and historical infrastructure of our Roman-Dutch legal system.)

[2] 3 US 386 (1798).

[3] For the constitutional requirements relating to punishment generally, see D Van Zyl Smit 'Sentencing and Punishment' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 49.

[4] See the classic debate between Hart and Fuller about the legal merits of arguments that the laws under which Nazi judges and officials acted during the Third Reich were not laws, and that the activities they permitted could consequently be described as crimes. HLA Hart 'Legal Positivism and the Separation of Law and Morals' (1958) 71 *Harvard LR* 598 and L Fuller 'Positivism and Fidelity to Law' (1958) 71 *Harvard LR* 630. See also HLA Hart *The Concept of Law* (2nd Edition, 1994) 208-212.

[5] (1995) 21 EHRR 363 ('*SW*').

[6] *R v R (Rape: Marital Exemption)* [1992] 1 AC 599.

common law that a husband could not rape his wife. In other words, retroactive application to the applicant's detriment of the judicial alteration of the common law would violate the prohibition of retroactive criminal provisions contained in art 7 of the European Convention. The Court pointed out that the provision in question embodied the general principle that only the law could define a crime and prescribe a penalty,[1] and proceeded to examine the application of this principle to the very difficult question of judicial development under the common law. The 'inevitable element of judicial interpretation' which was necessary both for the elucidation of the law and for its application to specific facts was held to be an entrenched and necessary part of the English legal tradition.[2] This would of course apply to our system as well. The pertinent finding was that such 'gradual clarification' of the rules of criminal liability through judicial interpretation was not inconsistent with the principle against retroactivity, provided that the resulting development was consistent with the essence of the offence and could be reasonably foreseen.[3] Given this peg upon which to hang the finding, the court proceeded to find that the development finally recognized authoritatively by the English courts was foreseeable at the time the offence was committed, as it had followed a 'perceptible line of case law'.[4]

The clearest principle to be extracted from the case is the idea that it is the surprise entailed by retroactive provisions that is the abhorrent feature. This makes eminent sense in the context of determining moral culpability at the time the offence was committed. It is submitted that this principle should be borne in mind when the exception to retrospectivity pertaining to offences which were crimes 'under international law' is applied.[5] The provision in IC s 25(3)*(f)* did not allow circumvention of the retrospectivity objection by reliance upon the status of the newly enacted crime as criminal under international law at the time it was committed.[6] The most important questions in this regard will be whether persons who committed acts which were not criminal under the laws of apartheid, but were criminal under international law:

1. may be prosecuted for such acts (with or without enabling legislation);
2. may be prosecuted if they have been afforded some form of amnesty, particularly by the quasi-judicial proceedings of the Truth and Reconciliation Commission; and
3. should be so prosecuted.

[1] *SW* (supra) at para 35/33.
[2] Ibid at para 36/34.
[3] Ibid.
[4] Ibid at para 43/41.
[5] This exception was added to the wording of FC s 35(3)*(l)*.
[6] See *Azanian Peoples' Organisation (AZAPO) & Others v Truth and Reconciliation Commission & Others* 1996 (4) SA 562 (C); J Dugard *International Law: A South African Perspective* (1994) 352 (Dugard *International Law*); J Dugard 'Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question, *AZAPO v Truth & Reconciliation Commission*' (1997) 13 *SAJHR* 258 (Dugard 'Unanswered Question').

It is well beyond the scope and purpose of this chapter to answer these questions. To some extent they have been addressed by the Constitutional Court's decision in *Azanian Peoples Organisation (AZAPO) & Others v President of the Republic of South Africa & Others*,[1] which concerned the question whether international law as incorporated by the Interim Constitution permitted the non-prosecution of those responsible for human rights violations under apartheid, a policy that was in turn expressly authorized by the Interim Constitution.[2] What should be noted, however, is that a distinction should be drawn not only between acts criminal under 'positive' laws during apartheid and acts criminal, not under the positive laws of apartheid but under undeniably well-established laws of international criminal law, but also between acts criminal under the undeniably well-established principles of international law and those the criminality of which under customary international law is a matter of controversy.[3] It is submitted, for example, that it cannot be maintained that the 'crime of apartheid', as defined by the General Assembly's 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid,[4] at any stage attained the status of a well-established principle of customary international law rendering it binding upon those, including most of the West, not party to its terms. It is interesting to muse on the significance of the judgment of the Constitutional Court in *Key v Attorney-General, Cape of Good Hope Provincial Division, & Another*[5] for retrospective trumping by international human rights norms over previously applicable positive law. The unanimous court in *Key* applied strongly positivist thinking to declare: '[T]here is no warrant in justice for retroactively casting a blanket of illegality over what was properly … [done] according to the law as it stood at the time.'[6] In any event, the extreme jurisprudential niceties involved in establishing the status of an act as criminal under international law where such status is controversial should not be a decisive determinant of the surprise factor underlying the prohibition against retroactive penal laws. The person who acts under the impression that his or her action is sanctioned by law is no less surprised by a law declaring such action criminal if he or she is informed that the source of the criminality is international law. The moral force of the argument at Nuremberg in favour of retroactivity was

[1] 1996 (4) SA 671 (CC), 1996 (8) BCLR 1015 (CC).

[2] The extent to which the question of international law was left open by the Court's decision is thoroughly examined in Dugard 'Unanswered Question' (supra). See also C Braude & D Spitz 'Memory and the Spectre of International Justice: A Comment on *AZAPO*' (1997) 13 *SAJHR* 269.

[3] The leading Canadian war crimes case, *R v Finta,* while not possessed of the benefit of clarity on the principles relating to retroactivity, nor of unanimity on whether retroactivity was prohibited by the Canadian Charter, found a violation of Canadian 'positive law' as a basis for its decision, in effect rendering the degree of conflict between domestic and international penal provisions an academic issue. [1994] 1 SCR 70. The case possessed the peculiar complicating feature that the offence itself was criminal in Canada — in the abstract — at the time it was committed, but the acts in question were not committed anywhere near Canada. The relationship between substantive legality and extra-territoriality consequently assumed crucial significance for the retroactivity question in that case.

[4] See Dugard *International Law* (supra) at 214 and 351f.

[5] 1996 (4) SA 187 (CC), 1996 (6) BCLR 788 (CC)('*Key*').

[6] Ibid at para 7.

proportional to the extent that those concerned could simply not have been unaware of the criminality of their acts.[1] The subjective state of mind of those concerned, after all, is what the principle of retroactivity is directly concerned with. It is submitted that this dimension should be a governing factor in assessing the extremely sensitive questions involved in the area of retrospectivity.

One problem with the change of wording to accommodate international-law crimes is that the retroactivity clause relating to punishment does not lend itself to similar accommodation. The 'prescribed punishment' for a particular act is pre-eminently a question of domestic law, and the reference in FC s 35*(n)* to a 'change' in the prescribed punishment hardly fits comfortably with arguments about universally prescribed punishments. In any event, what was the 'prescribed punishment' in South Africa for an act which was not criminal under South African law but criminal under international law? Freedom, one might say. The more realistic problem, it seems, is that an indemnity for an act that was criminal and did have a prescribed punishment under apartheid operates as a change for the better as far as the 'prescribed punishment' goes, and a revocation of such an indemnity would therefore violate the right to the optimum position on punishment in the relevant period.[2]

Finally, if amnesty is consequent upon a proceeding as judicial in character as that before the Truth and Reconciliation Commission, it may well amount to a violation of the *ne bis in idem* or 'double jeopardy' provision in FC s 35(3)*(m)* to attempt to resuscitate the prosecution.

(n) Ne *bis in idem* (double jeopardy)

(i) *General*

One possible *ne bis in idem* problem raised by prosecutions which follow on indemnities or amnesties has already been mentioned.[3] 'Double jeopardy' is the American version[4] of the maxim *ne bis in idem* upheld in South African law by the defences of *autrefois convict* and *autrefois acquit*.[5] In essence, the *ne bis in idem* maxim stipulates that no person shall be subjected to repeated prosecution for the same

[1] For a discussion of the views of Gustav Radbruch, see HLA Hart 'Legal Positivism and the Separation of Law and Morals (1958) 71 *Harvard LR* 598; L Fuller 'Positivism and Fidelity to Law' (1958) 71 *Harvard LR* 630.

[2] See CS Nino 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina' (1991) 100 *Yale LJ* 2619, 2624. Nino is responding to the seminal article on this question by Dianne Orentlicher. See D Orentlicher 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale LJ* 2537. See also MP Zimmett 'The Law of Pardon' (1974/5) *Annual Survey of American Law* 179. For more on indemnity, see R Keightley 'Political Offences and Indemnity in South Africa' (1993) 9 *SAJHR* 334.

[3] See § 51.5*(m)* supra.

[4] The Fifth Amendment decrees that no person 'shall be subject for the same offense to be twice put in jeopardy of life or limb'. The American clause stems from the English common law.

[5] See Criminal Procedure Act 51 of 1977 ss 106(1)*(c)* and *(d)*.

criminal act and is recognized in international law.[1] Certain exceptions to the prohibition against double jeopardy do, however, exist.[2] Furthermore, our common law recognizes the *exceptio rei judicatae* both for civil and for criminal law.[3] In *S v Basson*[4] the Constitutional Court was afforded the opportunity to adjudicate upon, amongst others, the relevance of the constitutional proscription on double jeopardy contained in FC s 35(3)*(m)* to the interests of justice in the application for special leave to appeal to the Constitutional Court against certain findings of the Supreme Court of Appeal. It was held (per Ackermann J) that the purpose of the right contained in FC s 35(3)*(m)* was to protect individuals against the possibility of repeated prosecutions for the same criminal conduct. Such protection was deemed necessary in the interests of fairness and the public interest in the finality of judgments.[5] The conclusion reached was that, since the accused's retrial did not give rise to double jeopardy, the retrial would not amount to an unfair trial violation of FC s 35(3)*(m)*.[6]

(ii) *Multiple punishments*

It is to be observed that the right in IC s 25(3)*(g)* and FC s 35(3)*(m)* is confined to a prohibition against being 'tried', IC s 25(3)*(g)* referring to 'being tried again for any offence of which he or she has previously been convicted or acquitted', and FC s 35(3)*(m)* referring to being 'tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted'. There is therefore no express prohibition on being punished twice for the same offence, a prohibition comprising one of the pillars of the 'double jeopardy' right recognized by the US Supreme Court.[7] Since it is not a constitutional requirement that a person be 'tried' for the purposes of IC s 25(3) or FC s 35 before imprisonment may be imposed on that person,[8] a second punishment, even

[1] See art 20 of the ICC Statute, art 10 of the ICTY Statute and art 9 of the ICTR Statute.

[2] See *Prosecutor v Akayesu* ICTR-96-4-T at para 468 and C De Than & E Shorts *International Criminal Law and Human Rights* (2003) 6.

[3] See E du Toit, FJ de Jager, A Paizes, A Skeen & S van der Merwe *Commentary on the Criminal Procedure Act* (2004) § 106*;* Hiemstra *Suid-Afrikaanse Strafproses* (5th Edition, 1993) 260-68. See particularly, on the *exceptio rei judicatae*, *S v Ndou* 1971 (1) SA 668 (A).

[4] 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC), 2004 (1) SACR 285 (CC)('*Basson*').

[5] Ibid at para 66.

[6] Ibid at para 66-67.

[7] See *United States v Di Francesco* 449 US 117 (1980); *United States v Dixon* 509 US 688 (1993); *Witte v United States* 515 US 389 (1995)(The majority of the US Supreme Court held that the double jeopardy clause prohibited not only the imposition of a second punishment at a second occasion but also the imposition of two punishments for the same offence.) See also art 14.7 of the International Covenant on Civil and Political Rights, the relevant part of which has been incorporated into art 4 of the Seventh Additional Protocol to the European Convention on Human Rights and declares that 'no one shall be liable to be tried or punished again.' See, further, G Kemp 'The Application of the Principle *Ne Bis In Idem* in Respect of Judgment Rendered by International Criminal Courts' (2001) 1 *Journal for South African Law* 147.

[8] *Nel v Le Roux NO & Others* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC)('*Nel*').

imprisonment, imposed by procedures which do not amount to 'trials' under IC s 25(3) or FC s 35 would at first sight not seem to be unconstitutional under our double jeopardy clause, and such measures would have to be challenged by reference to the rights they affect,[1] or by reference to the 'deprivation of liberty' provision of IC s 11 and FC s 12.[2] Still, if the US courts could extract the prohibition against double punishment from the clause prohibiting a person from being 'subject for the same offence to be twice put in jeopardy of life or limb', then a similar broadened meaning may well be attached to the term 'tried'. Significant in this regard is the fact that FC s 35(3)*(m)* has left out the qualification 'again' which occurs in IC s 25(3)*(g)*, which may be taken to suggest that the sort of 'trying' which is prohibited by the clause is not confined to the sort of 'trying' that led to the first peril. In other words, 'tried' in FC s 35(3)*(m)* may encompass the kind of 'trial' which is not a 'trial' for the purposes of fair trial rights, such as identified in *Nel v Le Roux NO & Others*.[3] There is nothing conceptually paradoxical about a fair trial provision referring to matters outside the scope of the trial, the right to trial within a reasonable time being the clearest example.[4] It is, after all, the possibility of punishment that most concerns the individual who is accused of a criminal offence, and which animates the anxiety and uncertainty the repetition of which *ne bis in idem* is designed to avoid. 'Doubt about guilt is immediately translatable into doubt about the justice of punishment.'[5] The absurdity of a position which is indifferent to successive punishments as long as there has been only one trial requires little exposition.

If double punishment is covered by this clause, as it is submitted it should be, then penal aspects of procedures which flow from criminal convictions will require *ne bis* scrutiny — for example, forfeitures of property,[6] penal

[1] On property or privacy rights, see A Itzikowitz 'Constitutional Validity of the Search and Seizure and Related Provisions of the Exchange Control Regulations' (1995) 11 *SAJHR* 281.

[2] See M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 40 (Offers analysis of these sections.)

[3] This argument has significance also for the applicability of the *ne bis in idem* clause to 'acquittals' entailed by grants of amnesty before a quasi-judicial body such as the Truth and Reconciliation Commission. See § 51.5*(m)* supra.

[4] See §§ 51.4*(c)* and 51.5*(f)* supra.

[5] AAS Zuckerman *The Principles of Criminal Evidence* (1989) 129.

[6] For a discussion of relevant provisions, see Itzikowitz (supra) at 281. See also *People v 1988 Mercury Cougar* 607 NE 2d 217 (1992)(An Illinois state court held that forfeiture of a motor vehicle consequent upon a narcotics conviction did not violate the double jeopardy clause because the forfeiture proceedings were *in rem* proceedings not amounting to a penal measure.) It is to be observed that the peculiar notion in American law of regarding the property involved in crime as itself the wrongdoer was an essential premise for the finding that the forfeiture did not amount to punishment. In South African law this peculiar notion does not exist. This notion has been qualified by the US Supreme Court and cannot be relied upon without more to avoid double jeopardy scrutiny in forfeiture cases. See *United States v Halper* 490 US 435 (1989); *Austin v United States* 509 US 602 (1993); *Department of Revenue of Montana v Kurth Ranch* 511 US 767 (1994). See AD Ronner 'Prometheus Unbound: Accepting a Mythless Concept of Civil in Rem Forfeiture with Double Jeopardy Protection' (1996) 44 *Buffalo LR* 655.

'taxes',[1] or deportation.[2] It is submitted that the guiding principle in a given case should be whether the administrative, legislative or judicial measure which follows upon conviction and punishment and involves further detrimental consequences for the person punished undermines the exhaustiveness of the sentence passed upon the person by the court as punishment. The sentence, after all, is the result of a careful and precise exercise of judgment applied to the individual's case, and is intended to be the full measure of punishment proportionate to the offence.[3] In order for this principle to be respected, it is submitted, sentencing officials should take into account other possible detrimental consequences the convicted accused may face, in which case the enforcement of these consequences would be less liable to objection on the basis of double punishment.

The merits of taking previous convictions into account when imposing sentence will require consideration under the *ne bis in idem* clause.[4] It is submitted, however, that a sound distinction in principle can be drawn between punishing a convicted person again for previous convictions by adding to the sentence for the current conviction, on the one hand, and, on the other, regarding the very commission of the later offence in circumstances where one has done it many times before as aggravating the blameworthiness of the later commission. In cases where the latter approach is appropriate, an increase of the sentence on the basis of previous convictions does not amount to double punishment. But in circumstances where it cannot be said that the recidivism inherent in repeat commissions augments blameworthiness, employment of previous convictions as aggravating factors should be regarded as a violation of *ne bis in idem*.

(iii) *Multiple trials*

It should be noted that the wording of FC s 35(3)*(m)* is less restrictive than that of IC s 25(3)*(g)* regarding the activities covered by the previous peril. Unlike

[1] See *Department of Revenue v Kurth Ranch* 511 US 767 (1994)(The US Supreme Court held by a majority that a 'tax' on an illegal activity was not immune from double jeopardy scrutiny merely for being a tax, and that the punitive characteristics of such a tax were subject to the double jeopardy clause. The court held that taxes imposed on illegal activities were fundamentally different not only from taxes for pure revenue purposes but also from taxes imposed partly to deter undesirable activities and partly to raise money (such as 'sin taxes' on tobacco).)

[2] See *Urbina-Mauricio v INS* 989 F 2d 1085 (1993)(The United States Court of Appeals for the Ninth Circuit held that deportation of an illegal alien convicted of drug offences did not constitute a second punishment for the purposes of double jeopardy, since deportation was a civil action and not a punishment.) It is submitted that state action detrimental to an accused should always be scrutinized carefully for possible penal elements — the enforcement of a private right by private individuals or the state in a private capacity being a different consideration, less likely to involve 'punishment' problems. In any event, civil action grossly disproportionate to the activity penalized may amount to double punishment if the person has already been punished for the activity. See also *United States v Halper* 490 US 435 (1989).

[3] For the principles of punishment in the constitutional context, see D Van Zyl Smit 'Sentencing and Punishment' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 49.

[4] Criminal Procedure Act 51 of 1977 s 271.

s 25(3)*(g)*, which limits the prohibition to being tried again for the same offence, FC s 35(3)*(m)* prohibits being tried for an offence in respect of an act or omission for which one has previously been either acquitted or convicted. The altered wording is strikingly broad.[1] It means that any criminal charge is vitiated if it relates to acts or omissions which have already to some extent formed the subject-matter of previous charges upon which the accused was acquitted or convicted. The determination of the relationship entailed by 'in respect of', as well as the degree to which the act or omission acted as the subject-matter of the previous acquittal or conviction, is therefore crucial to the meaning of 'for which'.[2] It cannot be assumed without more that the common-law test rides roughshod over these questions. That test, formulated in *R v Kerr*[3] and *Petersen v R*,[4] and authoritatively endorsed in *S v Ndou*,[5] sought 'substantial identity' between the offences concerned, as expounded thus:

> [W]hether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first . . .; or . . . whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction[6]

or:

> Would the facts alleged in the second indictment have sufficed to procure some conviction on the first indictment?[7]

[1] The International Covenant on Civil and Political Rights art 14.7, the European Convention on Human Rights, Seventh Additional Protocol art 4, the United States Constitution's Fifth Amendment, and the Canadian Charter of Rights and Freedoms s 11*(h)* all refer to the 'same offence', or 'it', or 'the offence'. The Inter-American Convention on Human Rights art 8.4 refers to the 'same cause', which formulation is less exactly coextensive than 'same offence' but certainly not as broad as that in FC s 35(3)*(m)*. See also L Jordaan 'Multiple Trials for Crimes Arising from the Same Facts and the Constitutional Right of the Accused to be Protected Against Double Jeopardy' (1998) 11 *SA Journal for Criminal Justice* 21.

[2] The facts of a New York case decided by the Second Circuit Court of Appeals, *United States v Ahmed,* provide a useful illustration. 980 F 2d 161 (1992). The prosecution in a drug case introduced evidence of the defendant's failure to appear in court in order to show consciousness of guilt. A later prosecution was brought (in a different state) for jumping bail. The evidence for this offence was the same as that introduced in the drug prosecution. Double jeopardy was not violated. Clearly the omission in question was not an omission 'for which' the accused had already been acquitted or convicted. But if on such facts the bail offence were prosecuted first, might the drug charge not amount to being 'tried for an offence in respect of an act or omission for which that person ha[d] previously been either acquitted or convicted'? The *ne bis* question in such a case should be distinguished from the possible problems raised by the rule in *Hollington v F Hewthorn & Co Ltd* [1943] KB 587, which bedevils proof of previous convictions based on the 'opinion' evidence comprised by a court's judgment. See *S v Mavuso* 1987 (3) SA 499 (A). See, generally, DT Zeffertt, AP Paizes & A St Q Skeen *The South African Law of Evidence* (2003) Chapter 9.

[3] (1907) 21 EDC 324.

[4] 1910 TPD 859.

[5] 1971 (1) SA 668 (A).

[6] *R v Kerr* (1907) 21 EDC 324, 340.

[7] See *Petersen v R* 1910 TPD 859, as cited in *S v Ndou* 1971 (1) SA 668, 678 (A).

Given the broad sweep of the common-law test, it is clear that this test does amount to a plausible interpretation of the clause in question. It captures the core idea behind that aspect of 'double jeopardy' concerned with retrial, namely that conduct which has placed a person in peril before the courts on one occasion should not be allowed to do so again, once the courts have decided the matter. Be that as it may, the altered wording seems a clear basis for concluding that the Constitution requires, in the case of a 'single transaction' giving rise to multiple offences, that those offences all be dealt with in one prosecution, and that a later retrial of the same issues determined for one offence in order to try another offence is prohibited. In *McIntyre & Others v Pietersen NO & Another*[1] Eloff JP recognized that FC s 35(3)*(m)* broadened ('verbreed') the IC right:

> Die klem lê op die handeling wat hom ten laste gelê word, nie so seer op die omskrywing van die misdryf wat ter sake is nie.[2]

In *McIntyre*[3] Eloff JP said that one found in the Constitution a 'samevatting' of the ancient right of an accused to avail himself of the defence of *autrefoit acquit*. In the context of the judgment it is clear that the word 'samevatting' should be read to mean 'inclusion' rather than 'summary'. Given the court's liberal interpretation of FC s 35(3)*(m)*, it naturally preferred the approach of Voet 48.2.12 to that apparently endorsed by Ogilvie-Thompson JA in *S v Ndou & Others*.[4] Voet held that, if one had been acquitted of wounding, one could not later be charged with murder if the wounded person died after the acquittal, because one had already been held innocent of the relevant act; but if one had been found guilty of wounding, one could be charged with murder if the wounded person died after the verdict. Ogilvie-Thompson JA was inclined to regard a murder charge as competent after acquittal or conviction, provided the victim died after the verdict. Eloff JP left open the question whether one could be charged with the consequence which eventuated after one had been convicted of the act.[5] *S v Gabriel*[6] provided an affirmative answer to this question at common law, but was distinguished in *McIntyre*.[7] FC s 35(3)*(m)*, however, seems to demand a negative answer. If one distinguishes between act and consequence, the murder charge would be 'in respect of an act … for which that person has previously been … convicted'.

[1] 1998 (1) BCLR 18 (T); *sub nomine S v McIntyre en Andere* 1997 (2) SACR 333 (T)('*McIntyre*').

[2] 'The emphasis lies on the conduct for which he is being charged rather than the formulation of the crime at issue.' See *Ashe v Swenson* 397 US 436 (1970)(Brennan, Marshall and Douglas JJ concurring). This 'single transaction' test is more generous to the accused than the traditional 'same evidence' test laid down in *Brown v Ohio*. 432 US 161 (1977). *Brown* asks whether each offence 'requires proof of a fact which the other does not'. The latter test causes problems in cases where the second (greater) offence does not theoretically require proof of a fact required by the first (lesser) offence, but the facts are such that only facts sufficient for the first offence are relied upon in proving the second offence. See *Illinois v Vitale* 447 US 410 (1980); *Grady v Corbin* 495 US 508 (1990).

[3] *McIntyre* (supra) at 21B-C.

[4] 1971 (1) SA 668, 776D-E (A).

[5] *McIntyre* (supra) at 22G-H

[6] 1971 (SA) 646, 652E-G (RA)('*Gabriel*').

[7] *McIntyre* (supra) at 23A-B.

It is only if one reads 'act or omission' as capable of referring to the consequences of an act as well as to the act itself, that one may allow a charge for the consequences where the accused has already been convicted for the act. Interpretation *in favorem libertatis* compels the more liberal reading. Whether and to what extent the state is prohibited from appealing against an unfavourable finding is possibly the most important question to be asked about the clause. Under the Criminal Procedure Act 51 of 1977 as amended, the state may not appeal on a finding of fact, but may on a finding of law,[1] and the Attorney-General may appeal against a sentence.[2] Aspects of the state's right to appeal, or the court's power to increase a sentence *mero motu*,[3] have been constitutionally assessed, but not directly under the *ne bis in idem* clause. In *S v Van den Berg* the Namibian provision entitling the state to appeal on the facts was upheld as constitutional, which was unsurprising given the express provision of the Namibian Constitution allowing for state appeals. In *S v Sonday & Another*[4] the power of the court to increase a sentence upon an appeal against conviction was upheld as constitutional, on the basis that it did not infringe the general fair trial right contained in IC s 25(3), nor the applicant's right to appeal under IC s 25(3)*(h)*.[5] Nothing was said of the *ne bis in idem* clause. The Court dismissed as 'nonsense' any suggestion that an increase of sentence on appeal could violate the fairness of a trial,[6] basing its finding on what is respectfully submitted to have been a misconceived 'balancing' definition of the right to a fair trial.[7] It may be pointed out that the sort of 'nonsense' his lordship was referring to has spawned an enormously sophisticated body of double jeopardy law in the United States.[8] In *S v Kellerman* the full extent

[1] Section 110. The idea that it is repugnant for the Crown to appeal a finding of fact is historically connected with the sovereignty of the jury over acquittals. See *Bushell's case* (1670) Vaughan 135. See, generally, TA Green *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* (1985); AW Scheflin 'Jury Nullification: The Right to Say No' (1972) 45 *Southern California LR* 168; P Devlin *Trial by Jury* (3rd Revised Impression, 1966) 84.

[2] Section 110A. This right gradually developed, from a right granted in 1935 to cross-appeal against sentence upon an appeal by the accused, to a unilateral right to appeal against sentence. See *S v Van den Berg* 1996 (1) SACR 19 (Nm)('*Van den Berg*'). *Van den Berg* concerned the constitutional merits of the even further development in Namibia allowing the state to appeal against a finding on the facts.

[3] Criminal Procedure Act 51 of 1977 s 309(3).

[4] 1994 (4) BCLR 138 (C), 1994 (2) SACR 810 (C)('*Sonday*').

[5] Presumably, the reasoning behind this claim was that the right to appeal would suffer a 'chilling effect' if exercising it could lead to an increase in sentence.

[6] *Sonday* (supra) at 822.

[7] Ibid at 820. See the discussion of 'balancing' within the determination of the scope of the right to a fair trial in § 51.1*(b)*(iv) supra.

[8] See P Westen 'The Three Faces of Double Jeopardy: Reflections of Government Appeals of Criminal Sentences' (1980) 78 *Michigan LR* 1001; CL Cantrell 'Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis' (1983) 24 *Southern Texas LJ* 735. The position and general principles are well summarized in *United States v Di Francesco* 449 US 117 (1980)(The rule is that appeals on law or reviews on sentencing are prohibited if there is a threat that the procedure would in substance amount to a successive prosecution, or if the person concerned has an 'expectation of finality' in the outcome of the first trial. Explicit enabling statutes generally negate such expectations.)

of the Court's finding that the new unilateral right of the Attorney-General to appeal against sentence was constitutional was contained in the assertion that proper administrative action and a fair trial would include the imposition of a proper sentence and its reconsideration on appeal.[1] In *Attorney-General of the Eastern Cape v D*[2] the Court was confronted with double jeopardy jurisprudence, in the shape of *Benton v Maryland*,[3] in a challenge to the constitutionality of s 310A of the Criminal Procedure Act 51 of 1977. Nothing was said of the *ne bis in idem* provision, but the Court's reasoning did address its concerns, even though the finding was in the end based on a general sense of fairness.[4] The Court apparently endorsed the force of the folowing *dictum* from *Benton*:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty.[5]

The Court proceeded to draw a conceptual distinction between a conviction and a sentence,[6] but left the distinction unelaborated,[7] answering the submission that the possibility of an increased sentence entailed similar anxiety and uncertainty with the finding that the appeal provision was saved from constitutional objection by its stipulation that the appeal be brought within 30 days.[8] Can the Court's distinction be read as implying the unconstitutionality of the state's power to appeal against conviction, even on the law? Not if the following dictum is taken seriously:

> An appeal is not a re-trial or a trial *de novo*. It merely obliges the court to make a decision on a record of the evidence placed before the court *a quo*. As such it is an extension or continuation of the *lis* between the state on the one hand and the accused person on the other.[9]

It may be observed that this reasoning has an absolute ring to it: there is nothing in it that would distinguish a continuation of the 'factual' *lis* from a continuation of the 'legal' *lis*.

[1] 1996 (1) SACR 89, 93 (T).
[2] 1997 (1) SACR 473 (E), 1997 (7) BCLR 918 (E)('*D*').
[3] 395 US 784 (1969)('*Benton*').
[4] *D* (supra) at 476-77.
[5] Ibid at 476.
[6] Ibid.
[7] The court apparently endorsed the finding in *Van den Berg* as applicable to a 'similar statutory provision', although the court recognized the fact that the Namibian provision upheld in that case allowed state appeals generally (including appeals on the facts). *D* (supra) at 476. This endorsement should not be taken as authority for the proposition that a similarly far-reaching provision would be constitutional in South Africa.
[8] *Benton* (supra) at 476.
[9] Ibid at 475.

(o) The right to appeal or review

Aspects of the right to appeal or review have surfaced in the domain of *ne bis in idem*.[1] The most important question to answer concerning this right is the degree to which it guarantees an appeal without subjecting such appeal to conditions, such as obtaining leave. In this respect it is important to point out that the wording of FC s 35(3)*(o)* differs from that of IC s 25(3)*(h)*. Whereas the former speaks of a 'right of appeal to, or review by, a higher court', the latter refers to 'recourse by way of appeal or review to a higher court'. This difference is significant because the decision in *S v Rens,* which found that limitations on the right to appeal were authorized under the Interim Constitution, turned on the use of the word 'recourse' in IC s 25(3)*(h)*.[2] The following dictum in *S v Bhengu*[3] endorsed by the court in *Rens*[4] is evidently crucial:

> If that had been the intention (to create an absolute right of appeal) I should have expected the words 'to have recourse by way' to have been omitted from the provision of [IC] s 25(3)*(h)*.

There can be no stronger argument for the interpretation of FC s 35(3)*(o)* as having entrenched such an absolute right of appeal than this passage.[5]

The objection in *Rens* was to the requirement in s 316(1)*(b)* of the Criminal Procedure Act 51 of 1977 for leave to appeal a decision of a superior court.[6] Apart from equality considerations, the Court's reasoning was not confined to the significance of the word 'recourse'. The Court observed that s 316(1)*(b)* gave the convicted person 'two bites of the cherry', since a refusal of leave by the trial court allowed the person concerned to seek leave from the Chief Justice, who was required to refer the matter to two members of the Appellate Division. Similarly, the convicted accused had the

[1] See § 51.5*(n)* supra. The idea is that the spectre of an increase in sentence on appeal may have a 'chilling effect' on the right to appeal.

[2] 1996 (1) SA 1218 (CC), 1996 (2) BCLR 155 (CC)('*Rens*') at paras 21-22.

[3] 1995 (3) BCLR 394, 397-8 (D)('*Bhengu*').

[4] *Rens* (supra) at para 22.

[5] But see *S v Msenti* 1998 (3) BCLR 343, 347 (W), 1998 (1) SACR 401 (W)(Snyders J held that the textual argument in *Rens* was 'superficial and of no persuasive value' when applied to the alteration of the text in FC s 35(3)*(o)*.) The circumvention of the textual dicta in *Rens* cannot be supported and may set an unfortunately cavalier precedent as far as the wording of specific rights is concerned. See § 51.5*(b)* supra.

[6] The complaint was focused on the fact that such leave was not a requirement in the case of an appeal from lower courts, leaving those appealing from superior courts in a disadvantaged position. The equality question was clearly separated from the merits of the obstacles to appeal as far as IC s 25(3)*(h)* was concerned, as was the case also in *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC), 1996 (1) SACR 94 (CC). In *Ntuli* the Court found a sufficiently relevant differentiation (between unrepresented prisoners and others) for a violation of the equality clause, whereas in *Rens* the differentiation in question related to different stages of proceedings rather than to relevantly different groups. This question can safely be set aside for the purposes of the analysis. For the constitutional principles of equality, see C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 35.

opportunity to petition the refusal of leave to two Appellate Division judges on points of law and procedural irregularities. Argument in writing in the petition was provided for. The Court therefore intimated that such a procedure amounted to 'recourse' (or 'resort') to a higher court, and it is but a small step away from reasoning that such a procedure amounts to 'appeal' to a higher court.[1] Finally, the Court's argument that 'it [could] not be in the interests of justice and fairness to allow unmeritorious and vexatious issues of procedure, law or fact to be placed before three judges of the appellate tribunal sitting in open court to rehear oral argument' as 'the rolls would be clogged by hopeless cases'[2] must be seen as applying whether the right is expressed as one of 'recourse' or of 'appeal'.[3]

The small step referred to above suffered a setback in *S v Ntuli*[4] in so far as the requirement of a judge's certificate for appeals by unrepresented prisoners is concerned.[5] Didcott J directly addressed the question whether the very application for a judge's certificate, irrespective of its result, constituted 'recourse by way of appeal or review to a higher court'. No, was the answer. The minimum implied by the 'recourse' requirement was 'the opportunity for an adequate reappraisal of every case and an informed decision on it'. Since the statute made no provision for such opportunity, and did not ensure that a certificate would not be refused without it, the application itself could not be the requisite 'recourse'.[6] It should be clear *a fortiori* that an application on a horizontal level cannot amount to an 'appeal' as guaranteed by FC s 35(3)*(o)*. Whether 'vertical' leave would amount to an 'appeal', as opposed to 'recourse by way of appeal', will depend on whether the *Rens* Court's reasoning about clogging the rolls with hopeless cases prevails over its reasoning based on the significance of the use of the word 'recourse' instead of an unqualified right of appeal.

[1] The Court's reference to the jurisprudence of the European Court of Human Rights under art 2 of Protocol 7 (*Monnell and Morris v United Kingdom* (1987) 10 EHRR 205 (cited in para 24) and *Axen v Germany* (1984) 6 EHRR 195; *Sutter v Switzerland* (1984) 6 EHRR 272 (cited in para 24n)) may be regarded as endorsing the notion accepted by the European Court that leave to appeal itself amounted to the 'appeal' guaranteed by the article. Of this notion Robertson and Merrills observe that '[t]his is, however, a very limited interpretation of the concept of review and must be regarded as questionable'. AH Robertson & JG Merrills *Human Rights in Europe: A Study of the European Convention on Human Rights* (3rd Edition, 1993) 248 n95. Crucial in this respect is the margin of appreciation required in this context to allow for greatly varying review and appeal procedures by the contracting states. There is no reason for our courts to be equally deferential to established procedures.

[2] *Rens* (supra) at para 25.

[3] The refusal in *S v Msenti* to attach any significance to the textual alteration was naturally accompanied by emphasis on these latter considerations in *Rens*. 1998 (3) BCLR 343, 345–346 (W), 1998 (1) SACR 401 (W). With respect, rather than holding that the alteration in the wording of a specific right could not make any difference to the relationship between that right and 'substantive fairness', it would have been preferable for the Court to have given some effect to the textual reasoning in *Rens* and to the apparent expression of a deliberate intention by the framers of FC s 35(3)*(o)*, and then to have rendered the clogging considerations decisive by way of FC s 36(1) limitation analysis.

[4] 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC), 1996 (1) SACR 94 (CC).

[5] Criminal Procedure Act 51 of 1977 s 309(4)*(a)* and s 305.

[6] *Bhengu* (supra) at para 17.

S v Thobakgale & Others[1] raised the difficult problem of time constraints on the right to appeal. Flemming DJP held that the necessity to show cause for condonation of the late filing of an appeal did not violate the right to appeal.[2]

In *S v Kgampe & Others*[3] Cameron J expressed reservations about the finding in *Thobakgale* that prisoners who apply for condonation for the late filing of notices of appeal should have their prospects of success assessed upon the lower court's judgment only, as was the case with applications for condonation from those on bail pending appeal. Cameron J was of the opinion that the reasoning in *Ntuli* that required a proper reappraisal of an appellant's case would be violated if the usually inept and uninformed applications from inside prison were to be assessed only on the magistrate's judgment, and not on what might lie hidden in the record. The whole record was to be produced for prospects of success to be assessed for the purposes of condonation.[4] Cameron J did not deal with the issue of a time limit on the right to appeal in *Kgampe*.[5]

In *S v Pennington & Another*[6] the Constitutional Court remarked obiter that

[1] 1998 (1) SACR 703 (W)('*Thobaglale*').

[2] Ibid at 710B-C. Flemming DJP seemed to be of the opinion that such limitation upon the right as was entailed by time limits was justifiable (presumably under the limitations clause) and that time limits could not, in principle, be said to violate the right in any event. He reasoned:

> I believe that the normal approach to condonation does not without adequate justification impose a limitation on or a detraction from the 'right' to appeal. Should I be wrong on that score, a reason why the *Ntuli* decision does not apply is relevant. Time limits do not fall beyond permissibility of the Constitution. When a party wishes to appeal after expiry of the limited time, he no longer has a 'right' to appeal, the Court is dealing with the resuscitating of a right which perished.

With respect, the mere existence of time limits certainly does not necessarily violate the right to appeal. But a time limit is a limit as much as any other. It 'detracts' from the right so limited, unless the very concept of the right implies some sort of period for its exercise which, it is conceded, may arguably be the case as far as appeals go. If the time limit effectively renders the right nugatory, or sufficiently severely 'detracts' from it, one has reached a point of violation requiring justification under the limitations clause. Where this point is, is a question of nicety and judgment. See, for example *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC)(The six-month prescription period for claims against the Defence Force violated the right of access to courts (FC s 34).) The point of the violation requiring justification under s 36(1) will be reached more quickly under FC s 35(3)*(o)* than under IC s 25(3)*(h)*, given the broader formulation of the right in FC s 35(3)*(o)*.

[3] 1998 (2) SACR 617 (W)('*Kgampe*').

[4] In some of the cases at issue in *Kgampe* the discovery of multiple irregularities in the record after Cameron J's order to produce the whole record led to confirmation of his view of the necessity for such full disclosure. See *S v Malatji & Another* 1998 (2) SACR 622 (W). In *Uitenhage Transitional Local Council v South African Revenue Service,* Heher JA emphasized the fact that condonation was not a right but a concession granted at the Court's discretion. 2003 (4) All SA 37 (SCA). An application for condonation had to provide a full, detailed and accurate account of the causes of the delay and their effects to enable the Court to understand clearly the reasons and to assess the responsibility. Ibid at para 7. See also *Mahlangu v S* 2004 (2) All SA 652 (NC) at para 3.

[5] But he did condone a 14-month interval between conviction and filing of the application on the basis of the 'context of imprisonment and the disabilities which that necessarily [brought] about', accepting in the circumstances 'the usual' excuse of ignorance of entitlements and requirements. *Kgampe* (supra) at 621B).

[6] 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC)('*Pennington*').

FC s 34 did not apply to appeals in criminal cases, and that, since no provision was made in FC s 35(3)*(o)* for public appeals in person, there was no right to have an appeal heard 'in public', nor to be present when the appeal was heard, and that, although it was settled practice for appeals to be heard in public, there was no constitutional bar to considering applications for leave to appeal in chambers.[1] It may be observed that an interpretation of FC s 35(3)*(o)* as not providing for appeals to be heard in public nor for the presence of the accused during appeals begs the question whether the right to a fair trial extends to the final determination of the appeal, alternatively whether the specific right to be tried before an ordinary court, and to be present when being tried, extends to appellate stages.[2] It would be odd if the Constitution scrupulously provided for safeguards against secret trials, but had nothing to say about the question whether the decisions reached in these trials could be overturned on appeal in circumstances that would not be countenanced for the first, provisional, determination of the matter.

In *S v S*[3] the right to appeal or review filled a judicially created gap in the law relating to a convicted prisoner's entitlement to have a sentence reviewed. Courts had interpreted the entitlement to appeal against a sentence 'resulting' from a conviction not to include an entitlement to appeal against an order putting into operation a suspended sentence.[4] With similar parsimony, the Natal Provincial Division[5] had interpreted the provision allowing special review in cases not subject to ordinary review[6] not to include a review of such an order, because such a review would not be a review of the proceedings 'in which a magistrate's court [had] imposed a sentence'.[7] The result was that an order putting a suspended sentence into operation was subject neither to review nor to appeal. In the same vein, the Court in *Phillips & Others v National Director of Public Prosecutions*[8] had to decide whether a restraint order was appealable or not. The respondent had successfully obtained a restraint order, in terms of the Prevention of Organized Crime Act 121 of 1998, in respect of the first appellant's realizable property. The respondent argued that a restraint order was not appealable since it was not variable or rescindable by the Court that made the order. An appeal was aimed only at decisions that were final and definite and, so the argument went, restraint orders did not finally dispose of any issue. The Court, *per* Howie P, held that judicial decisions of a High Court had to be 'a judgment or order' for it to be appealable.[9] A judgment or order was, according to the Court, *(a)* final in effect,

[1] *Pennington* (supra) at paras 45-51.

[2] See §§ 51.5*(e)* and *(g)* supra. For more comment on *Pennington,* see § 51.1*(a)(v)* supra. On the related but not necessarily similarly fated question whether the right to have one's trial begin and conclude without unreasonable delay should be confined to pre-appeal stages of the *lis* between state and individual. see § 51.5*(f)* supra.

[3] 1999 (1) SACR 608 (W)('*S*').

[4] Ibid at 611E-H.

[5] *Gasa v Regional Magistrate for the Regional Division of Natal* 1979 (4) SA 729 (N).

[6] Section 304(4) of the Criminal Procedure Act 51 of 1977.

[7] *S* (supra) at 612C.

[8] 2003 (4) All SA 16 (SCA)('*Phillips*').

[9] Ibid at para 18.

(b) definitive of rights of the parties and *(c)* dispositive.[1] A decision meeting any of the above would be appealable. A restraint order could not be changed and this unalterable situation made restraint orders appealable.

S v S illustrated, with facts suggesting one of the most bizarre moments of curial injustice ever reported, precisely why such a position did not 'promote the spirit, purport and objects of the Bill of Rights', as required by FC s 39(2). Nugent and Schwartzman JJ set out the following general principle, to govern the meaning of the right in question:[2]

> In our view it would be a parsimonious construction of the Bill of Rights which confined [the right to appeal or review] only to the immediate consequences of the trial itself. In our view the clear spirit, purport and object of that section is to ensure that no person is condemned to endure a penalty provided for by the criminal law without recourse being had to another court in order to correct any irregularity or injustice which might have occurred in the course of the proceedings which have had that result.

And in *S v Lukhandile* Ntsebenza AJ offered the following sober reminder:

> Incidentally, not so long ago, opinions and comments were solicited from the Judges, amongst others, about their views on the wisdom of the continued existence of the right to automatic review.[3] This is in view of proposed amendments in the Superior Courts Bill that might do away with this right of the accused. When magistrates deal with the rights of the accused in the way this presiding officer did and give 'reasons' such as he did it becomes clear that some safeguards, in the interests of the proper administration of justice, need to be built into the system to ensure that some monitoring of the process in the lower courts takes place.[4]

In *S v Steyn*[5] the Court (*per* Madlanga AJ) considered the constitutionality of ss 309B and 309C[6] of the Criminal Procedure Act with reference to the right to appeal to, or review by, a higher court in terms of FC s 35(3)*(o)*. For an appeal procedure to serve its desired purpose, the Court held that the procedure had to be suited to the correction of error.[7] The unsatisfactory features[8] of the

[1] *Phillips* (supra).

[2] *S* (supra) at 612H.

[3] Of an unrepresented accused convicted of an offence carrying a threshold sentence by a magistrate with less than a prescribed number of years experience s 302 of the Criminal Procedure Act 51 of 1977.

[4] 1999 (1) SACR 568, 569B-D (C).

[5] 2001 (1) SA 1146 (CC), 2001 (1) SA 52 (CC)('*Steyn*').

[6] Section 309B provides for the application procedure for leave to appeal whereas s 309C stipulates petition procedure where an application referred to in s 309B is refused.

[7] *Steyn* (supra) at para 23.

[8] The Court held that the paucity of information, which in terms of s 309C(3) must be lodged with the High Court, failed to allow for an adequate reappraisal. Ibid at para 10. This situation was also not much improved by the provisions of s 309C(5), which allowed a presiding officer considering a petition to call for further information. The language of these provisions was permissive and, as a result, some judges might insist on the production of the record while some might not. The court then referred to the following dictum in *S v Ntuli*:

> No uniform practice prevails there. Some Judges obtain the record habitually, once the case is not the sort where the information already available satisfies them that a certificate should be granted straight away. Others do so rarely, being content by and large to rely rather on the magistrate's account of the

procedure made it unsuitable for the purpose envisaged in the Constitution, in that the procedure did not accord with an adequate reappraisal and the making of an informed decision. The procedure accordingly constituted an unjustified limitation of the right of appeal to, or review by, a higher court, as entrenched in FC s 35(3)*(o)*. Sections 309B and 309C were declared inconsistent with the Constitution and accordingly invalid, but the declaration of invalidity was suspended for six months from the date of the order.[1] In *S v Danster; S v Nqido*[2] the Court (*per* Davis J) confirmed that this period had come to an end. Sections 309B and 309C are thus no longer valid, and an appellant has the right to appeal in terms of the provisions of the Criminal Procedure Act read without the invalid provisions. Appeals launched but not completed by 28 May 2001 (six months from the date of the declaration of invalidity in *S v Steyn*) stand to be governed by s 309(1) and (2) of the Criminal Procedure Act.[3]

trial. The refusal of a certificate on that footing worries one. Those Judges who do not read the record will have no means of knowing whether the evidence substantiated the findings made by the magistrate on the credibility of witnesses and other factual issues. They will not learn of any procedural irregularities that may have marred the trial. Nothing dispels their ignorance on those scores. Nothing alerts them to flaws in the magistrate's findings or conduct of the proceedings which are hidden for the time being but the record may in due course reveal. No petition prepared by counsel is there to guide them in that direction. Nor is the possible presence of such defects likely to have been mentioned either by the prisoner or even by the magistrate, the one oblivious to the true character of the features in question, the other failing to attribute any such character to them.

S v Ntuli (supra) at para 15.

[1] *Steyn* (supra) at para 53.

[2] 2002 (4) SA 749 (C) ('*Nqindo*').

[3] Ibid at 755. See *S v Jaars; S v Williams; S v Jantjies* 2002 (1) SACR 546 (C)(The accused had been convicted and sentenced in the magistrate's court before 29 May 2001 — six months from the date of the declaration of invalidity in *Steyn*. In none of the cases had leave to appeal, as prescribed by ss 309B and 309C, been considered by the magistrate's court. The Court held that the decision by the Constitutional Court in *Steyn* did not have retroactive effect and that the provisions of ss 309B and 309C were therefore still applicable to their appeals. The applicants thus ought to have obtained leave to appeal from the respective magistrates. See *S v Jafta; S v Ndondo; S v Mcontana* 2004 (2) SACR 103 (E)(The appellants were also convicted at a time when ss 309B and 309C had required them to appeal to the High Court, either from the trial court or upon petition to the Judge President. Subsequently, the appellants sought to have their appeals heard without having obtained leave to appeal from the trial courts. The Court was called upon to decide *in limine* whether the appeals were properly before the Court. The Court, *per* Leach J, held that they were not, since the appellants had been convicted and sentenced prior to the date upon which the declaration of invalidity came into effect and failed to obtain leave to appeal.)

52 Evidence

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52.1 Function and constitutionality

The law of evidence serves many functions. The rationalist tradition recognises the promotion of accuracy in decision-making as its primary function.[1] Evidence rules are also shaped by 'non-rationalist values such as the acceptability of verdicts and the need for efficient resolution of disputes'.[2] Legitimacy constitutes a third important function.[3] It requires rules that are not only directed at maximising factual accuracy but also at giving 'moral and expressive authority'[4] to verdicts.[5] Evidence rules accomplish this end by both excluding inherently unreliable evidence and excluding reliable evidence 'if it carries significant risks of impairing the moral authority of the verdict'.[6] Ashworth and Redmayne suggest that 'legitimacy' amounts to no more than 'accuracy and respect for rights'.[7] In our legal order, the moral authority or the legitimacy of evidentiary rules require that they be consistent with an express set of constitutional rights and values. The rights component of 'legitimacy' forms the focus of this chapter.[8]

The appropriate contextual reference points for determining the legitimacy of legal verdicts will inevitably vary between procedural regimes. For example, the requirement of proof beyond reasonable doubt in a criminal trial is a direct product of the presumption of innocence; the absence of the presumption of innocence from civil procedure legitimates a standard of proof expressed as a balance of probabilities. Because the criminal trial is a concrete expression of state power, constitutional issues are far more prominent in criminal proceedings than they are in civil proceedings.

The principle of constitutional supremacy has affected South Africa's law of evidence in a number of ways. A host of common law rights have now been

[1] See ML Siegel 'A Pragmatic Critique of Modern Evidence Scholarship' (1994) 88 *Northwestern University LR* 995, 996. On the rationalist tradition generally, see W Twining *Rethinking Evidence, Exploratory Essays* (1990). See also CR Nesson 'The Evidence of the Event? On Judicial Proof and the Acceptability of Verdicts' (1985) 98 *Harvard Law Review* 1357.

[2] JD Jackson 'Modern Trends in Evidence Scholarship: Is All Rosy in the Garden? 2003 (21) *QLR* 893, 899.

[3] IH Dennis 'Rectitude Rights and Legitimacy: Reassessing and Reforming the Privilege Against Self-incrimination in English Law' (1997) 31 *Israel Law Review* 24, 36.

[4] Ibid.

[5] Ashworth and Redmayne are sceptical of 'the legitimacy-based account of the criminal trial' and prefer to ground their own theory in retributive justice. A Ashworth & M Redmayne *The Criminal Process* (3rd Edition, 2005) 25. Despite these plausible reservations, I find Dennis' functional account, which emphasises legitimacy, extremely useful in so far as it is restricted to the law of evidence.

[6] Dennis 'Rectitude' (supra). Both inquisitorial and adversarial procedural models exclude reliable evidence on grounds of public policy. See C Bradley 'The Emerging International Consensus as to Criminal Procedure Rules' (1993) 14 *Michigan Journal of International Law* 171 (Gives examples of the exclusion of evidence in German courts on the basis of privacy and personality rights.) See also M Damaska 'Evidentiary Barriers to Conviction and Two Modes of Criminal Procedure: A Comparative Study' (1973) 121 *University of Pennsylvania LR* 500.

[7] Ashworth & Redmayne (supra) at 25.

[8] Although not appropriate for consideration in this chapter, it should be noted that it is not entirely clear whether the promotion of legitimacy can also explain those evidence rules based on the utilitarian function of avoiding undue delay and expense. In order to bring these utilitarian considerations under the legitimacy umbrella it might be necessary to extend the components of legitimacy to include the broader, redistributive demands of social justice.

accorded constitutional recognition: the right to adduce and challenge evidence, the right not to incriminate oneself, and the rights to remain silent and to be presumed innocent. Consequently, any departure from these rights requires justification; the absence of sufficient justification may have a direct impact on admissibility. These fair trial rights, located in FC s 35(3), have altered the shape of rules regulating state privilege, various presumptions and the admissibility of admissions and confessions. The rights to equality, dignity and privacy have also changed the contours of a diverse range of evidence rules. However, FC s 35(5) — which provides for the exclusion of evidence obtained in violation of any right in the Bill of Rights where admission would render the trial unfair or be detrimental to the administration of justice — is the most significant.

52.2 The right to a fair trial

(a) Criminal proceedings

The right to a fair trial was a rather sterile concept prior to 1994. Its character is probably best captured by the following, oft quoted, extract from *S v Rudman; S v Mthwana*:

> [A court of appeal] does not enquire whether the trial was fair in accordance with 'notions of fairness and justice', or with 'the ideas underlying … the concept of justice which are the basis of all civilised systems of criminal administration'. The enquiry is whether there has been an irregularity or illegality that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated and conducted… . What an accused person is entitled to is a trial initiated and conducted in accordance with those formalities, rules and principles of procedure which the law requires. He is not entitled to a trial which is fair when tested against abstract notions of fairness and justice.[1]

In its very first judgment, *S v Zuma*, the Constitutional Court resoundingly rejected this formalistic approach. It held that the constitutional right to a fair trial embraced 'a concept of substantive fairness' that 'required criminal trials to be conducted in accordance with just those 'notions of basic fairness and justice'.[2] The *Zuma* Court also held that the right to a fair trial was not restricted to those rights now found in FC s 35(3).[3] That the content of the right to a fair trial extends beyond those rights enumerated in FC s 35(3) and embraces procedural and substantive concerns located elsewhere in the Bill of Rights was first articulated by Justice Ackermann in *S v Dzukuda; S v Tshilo*:

> [A]n accused's right to a fair trial under s 35(3) of the Constitution is a comprehensive right and 'embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force'. Elements of this comprehensive right are specified in paras *(a)* to *(o)* of ss (3). The words 'which include the right' preceding this listing indicate that such specification is not exhaustive of what the right to a fair trial comprises. It also does not warrant the conclusion that the right to

[1] 1992 (1) SACR 70, 100 and 109 (A).

[2] 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC), [1995] ZACC 1 ('*Zuma*') at para 16.

[3] See, for example, *S v Msithing* 2006 (1) SACR 266 (N); *S v Khumalo* 2006 (1) SACR 447 (N); *S v Muller* 2005 (2) SACR 451 (C).

a fair trial consists merely of a number of discrete sub-rights, some of which have been specified in the subsection and others not. The right to a fair trial is a comprehensive and integrated right, the content of which will be established, on a case by case basis, as our constitutional jurisprudence on s 35(3) develops. It is preferable, in my view, in order to give proper recognition to the comprehensive and integrated nature of the right to a fair trial, to refer to specified and unspecified elements of the right to a fair trial, the specified elements being those detailed in ss (3)… It would be imprudent, even if it were possible, in a particular case concerning the right to a fair trial, to attempt a comprehensive exposition thereof. In what follows, no more is intended to be said about this particular right than is necessary to decide the case at hand. At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what, for purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution. An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused. There are, however, other elements of the right to a fair trial such as, for example, the presumption of innocence, the right to free legal representation in given circumstances, a trial in public which is not unreasonably delayed, which cannot be explained exclusively on the basis of averting a wrong conviction, but which arise primarily from considerations of dignity and equality.[1]

(b) Other proceedings

The right to a fair trial applies only to accused persons.[2] The FC s 35(3) right does not extend to civil trials, nor does it apply to interrogation procedures outside of the criminal process.[3]

Several statutory enactments provide for interrogation procedures that are not directed at a finding of guilt. Many of these schemes authorise designated officials to compel persons to appear before them and to answer questions, whether

[1] *S v Dzukuda; S v Tshilo* 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC), 2000 (2) SACR 443 (CC), [2000] ZACC 16 at paras 9 and 11. See also *Zuma* (supra) at para 16; *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC), 1996 (1) SACR 94 (CC), [1995] ZACC 14; *Key v Attorney-General Cape Provincial Division* 1996 (4) SA 187 (CC), 1996 (6) BCLR 788 (CC), 1996 (2) SACR 113 (CC), [1996] ZACC 25; *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC), 1998 (1) SACR 227 (CC), [1997] ZACC 18 at para 22; *S v Jaipal* 2005 (4) SA 581 (CC), 2005 (5) BCLR 423 (CC), 2005 (1) SACR 215 (CC).

[2] *Omar v Government Republic of South Africa* 2006 (2) SA 289 (CC), 2006 (2) BCLR 253 (CC), 2006 (1) SACR 359 (CC), [2005] ZACC 17, at para 51; *Sibiya v Director of Public Prosecutions, Johannesburg* 2005 (5) SA 315 (CC), 2005 (8) BCLR 812 (CC), 2006 (1) SACR 220 (CC), [2005] ZACC 6 at para 31.

[3] See *Nel v Le Roux NO & Others* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC), [1996] ZACC 6 at para 11 (Court held that the application of s 25(3) of the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC') was restricted to criminal proceedings.) See also *Ferreira v Levin and Vryenhoek v Powell NO* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC), [1993] ZACC 13 ('*Ferreira v Levin*') at para 41; *Bernstein v Bester* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC), [1996] ZACC 2 ('*Bernstein*'); *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC), [1997] ZACC 5; *Key* (supra); *National Director of Public Prosecutions v Rebuzzi* 2002 (2) SA 1 (SCA), 2002 (1) SACR 128 (SCA); *Parbhoo v Getz* 1997 (4) SA 1095 (CC), 1997 (10) BCLR 1337 (CC); *De Lange v Smuts NO* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC), [1998] ZACC 6; *Mitchell and Another v Hodes & Others NNO* 2003 (1) SACR 524 (C)('*Mitchell v Hodes*'); *Thatcher v Minister of Justice and Constitutional Development* 2005 (1) SACR 238 (C).

incriminating or not.[1] As the subject of the examination is not an accused person, she cannot claim fair trial rights. However, if an examinee is subsequently charged, and the prosecution seeks to use evidence obtained at such an interrogation in a subsequent trial, then the protections afforded by FC s 35(3) will apply. Even where an examinee has been arrested and charged prior to an examination which occurs independently of the criminal trial, they can only claim FC s 35(3) rights if evidence from the examination is sought to be introduced at the trial.[2] However, where the purpose of the examination relates specifically to the offence charged, the accused may not be summoned for interrogation.[3] If the evidence elicited at an examination is found to have been obtained in contravention of the privilege against self-incrimination, then it may be excluded in terms of FC s 35(5) at a subsequent trial.[4] Thus, the right to a fair trial is protected by use of immunity in respect of evidence arising out of the 'non-trial' interrogation. However, the subsequent use of derivative evidence is less clear cut and its admissibility falls to be determined in terms of a competent court's FC s 35(5) discretion to exclude evidence.[5] This discretion does not mean that an examinee is deprived of the right to procedural fairness prior to becoming an accused.[6] An examinee will still be subject to the residual procedural safeguards to be found in the FC s 12(1) right to freedom and security of person.[7] In addition, a person detained for non-trial purposes — say, for deportation — may nevertheless rely on the FC s 35(2) rights of detainees.[8]

[1] For example, s 65 of the Insolvency Act 24 of 1936; ss 415 and 417 of the Companies Act 61 of 1973; s 66(1) of the Close Corporations Act 69 of 1984, ss 3, 4, 6, 8 and 9 of the Inspection of Financial Institutions Act 38 of 1984; ss 7, 9 and 17 of the Maintenance and Promotion of Competition Act 96 of 197; ss 5(7) and 14 of the Harmful Business Practices Act 71 of 1988; s 6 of the Banks Act 94 of 1990; s 51 of the National Ports Act 12 of 2005.

[2] *Mitchell and Another v Hodes and Others NNO* 2003 (1) SACR 524 (C). See also *Equisec (Pty) Ltd v Rodrigues and Another* 1999 (3) SA 113 (W).

[3] See *Shaik v Minister of Justice and Constitutional Development* 2004 (1) SACR 105 (CC), [2003] ZACC 24 at para 19. (The Constitutional Court held that the reference to 'any person' in s 28*(b)* of the National Prosecuting Authorities Act, which permits the Investigating Director to summons any person who is believed to be able to furnish any information in respect of the commission of a specified offence, did not include an accused who is being tried on charges covered by the s 28 summons.) Cf *Thatcher v Minister of Justice and Constitutional Development* 2005 (4) SA 543 (C), 2005 (4) BCLR 388 (C).

[4] See *Mohamed NO and Others v National Director of Public Prosecutions and Another* 2003 (1) SACR 286 (W). For a fuller discussion of investigative inquiries, see DT Zeffertt, A Paizes & A Skeen *The South African Law of Evidence* (2003) 527; PJ Schwikkard & SE Van der Merwe *Principles of Evidence* (2009) §10.2.4. and PJ Schwikkard *Presumption of Innocence* (1999) 65–75.

[5] See *Key* (supra); *Bernstein* (supra); *Ferreira v Levin* (supra); *National Director of Public Prosecution v Mohamed* 2003 (2) SACR 258 (C); *S v Basson* 2007 (3) SA 582 (CC), 2005 (12) BCLR 1192 (CC), 2007 (1) SACR 566 (CC), [2005] ZACC 10.

[6] *Nel v Le Roux NO* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC), [1996] ZACC 6 ('*Nel*') at para 11. See also *Bernstein* (supra); *Geuking v President of the Republic of South Africa & Others* 2003 (3) SA 34 (CC), 2004 (9) BCLR 895 (CC), 2003 (1) SACR 404 (CC), [2002] ZACC 29.

[7] See, generally, M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 40. See also *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC), [1995] ZACC 7 at para 43.

[8] *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2003 (8) BCLR 891 (T).

The Constitutional Court in *Nel v Le Roux*[1] considered the extent to which the right to a fair trial applies only to accused persons when it engaged with the constitutionality of s 205 of the Criminal Procedure Act ('CPA').[2] In terms of this section, a judge or magistrate, upon receiving a request from a Director of Public Prosecutions ('DPP') or public prosecutor, may request a person, who is likely to give material or relevant information about an alleged offence, to appear before them for examination by the DPP or public prosecutor. Such an examination may be conducted in private.[3] The applicants challenged CPA s 205 in terms of the following provisions of the Interim Constitution: IC s 8(1) (equality); IC s 11(1) (freedom and security of person); IC s 11(2) (cruel, inhuman or degrading treatment or punishment); IC s 13 (privacy); IC s 15(1) (freedom of speech and expression); IC s 23 (access to information); IC s 24 (administrative justice); IC s 25(3) (fair trial); IC s 25(3)*(a)* (public trial); IC s 25(3)*(c)* (the right to be presumed innocent and to remain silent) and IC s 25(3)*(d)* (the privilege against self-incrimination).

The *Nel* Court found that CPA s 205 was not inconsistent with any of the above provisions. Arguments pertaining to the infringement of IC s 11(2) and IC s 23 were not pursued before the court and were dismissed by Ackermann J as not being worthy of serious consideration.[4] The *Nel* Court was also not convinced that IC s 24 was applicable to CPA s 205 proceedings and held that, even if it was, its provisions were not infringed by CPA s 205.[5] In relation to the privilege against self-incrimination the *Nel* court held that '[i]n view of the transactional indemnity and use of immunity provisions in s 204(2) and (4) respectively of the Criminal Procedure Act, the applicant could not validly object to answering self-incrimination questions'.[6] As to the general strength of the applicant's Bill of Rights challenge, the *Nel* Court wrote:

> If the answer to any question put to an examinee at an examination under s 205 of the Criminal Procedure Act would infringe or threaten to infringe any of the examinee's Chapter 3 rights, this would constitute a 'just excuse' for purposes of s 189(1) for refusing to answer the question unless the s 189(1) compulsion to answer the particular question, would in the circumstances, constitute a limitation on such right which is justified under s 33(1) of the Constitution. In determining the applicability of s 33(1), regard must be had not only to the right asserted but also the State's interest in securing information necessary for the prosecution of crimes. … There is nothing in the provisions of s 205 read with s 189 of the Criminal Procedure Act which compels or requires the examinee to answer a question (or for that matter to produce a document) which would unjustifiably infringe or threaten to infringe any of the examinee's Chapter 3 rights.[7]

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[1] *Nel* (supra).

[2] Act 51 of 1977.

[3] Sections 162–5, 179–81, 187–9, 191 and 204 are applicable to proceedings held in terms of s 205. Section 205(4) provides that a person who refuses or fails to give information shall not be sentenced to imprisonment as contemplated in s 189 unless the presiding officer is of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.

[4] *Nel* (supra) at para 24.

[5] Ibid at para 24.

[6] Ibid at para 4.

[7] Ibid at para 7.

The applicant contended that CPA s 205 infringed the IC s 11(1) right not to be detained without trial: the CPA s 205(3) procedure (incorporating the summary incarceration procedure of s 189) did not, he alleged, constitute a 'trial'. This argument was rejected on the grounds that a 'trial' in the context of IC s 11(1) merely required 'the interposition of an impartial entity, independent of the Executive and the Legislature to act as arbiter between the individual and the State'.[1] The Court found a s 205 enquiry met these requirements. The *Nel* Court also noted that CPA s 205(4) specifies that presiding officers can only sentence a recalcitrant examinee to imprisonment where they are 'of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order'. This limitation on the presiding officer's discretion to jail a recalcitrant witness, Ackermann J held, demonstrated that 'the s 205 provisions are as narrowly tailored as possible to meet the legitimate State interest of investigating and prosecuting crime'.[2]

The *Nel* Court held that the IC s 25(3) right to a fair trial applied only to accused persons and, as a reluctant CPA s 205 examinee could not be said to be an 'accused', it was not necessary to consider IC s 25(3) in determining the constitutionality of CPA s 205.[3] The Court also dismissed the arguments that s 189 summary imprisonment proceedings denied the applicant his right to a public trial and his right 'to be informed with sufficient particularity of the charge'. Noting that there are several recognised exceptions to the rule that criminal proceedings should be held in public, the *Nel* Court found that there might well be 'important and justified policy grounds for holding the CPA s 205 enquiry in private.'[4] Furthermore, as a presiding officer had a discretion whether to hold such an enquiry in public or private, until such a discretion has been exercised the question of whether a constitutional right had been infringed did not arise. Similarly, the question whether the examinee's right 'to be informed with sufficient particularity of the charge' had been infringed could not be decided in the abstract as there was no provision prohibiting a presiding officer from properly informing the examinee of the possible consequences of refusing to answer a question.[5] These two observations suggest that while CPA s 205 itself is not unconstitutional, there may well be circumstances in which its application infringes an examinee's Chapter 2 rights.

The application of FC s 35(3) is not only dependent on the claimant of the relevant rights being an accused; the claimant must also be an accused in criminal trial proceedings. Consequently, an accused in bail proceedings is entitled to claim the rights of an arrested and detained person but not fair trial rights.[6] In

[1] *Nel* (supra) at para 14. See also para 20.
[2] Ibid at para 20.
[3] Ibid at para 11. See also *S v Mahlangu* 2000 (1) SACR 565 (W).
[4] Ibid at paras 17–19.
[5] Ibid at para 19.
[6] See *S v Dlamini, S v Dladla, S v Joubert, S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC), 1999 (2) SACR 51 (CC), [1999] ZACC 8 ('*Dlamini*') at para 78 (Kriegler J held that the imposition of an onus on an applicant for bail was not constitutionally objectionable as the question of erroneous conviction did not arise.) Bail is discussed more fully below at § 52.6.

S v Dlamini, S v Dladla, S v Joubert, S v Schietekat, Kriegler J drew the following distinction between bail and trial proceedings:

> [T]here is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial, and that entails in the main protecting the investigation and prosecution of the case against hindrance.[1]

(c) Arrested, detained and accused persons[2]

FC s 35 specifies particular sets of rights in respect of three categories of people. FC s 35(1) applies to arrested persons, FC s 35(2) to detained persons and FC s 35(3) to accused persons. FC s 35(4) applies to arrested, detained and accused persons. However, FC s 35(5) may not be similarly restricted.[3] In order to determine the scope of FC s 35, it is necessary to understand what constitutes an arrested, detained or accused person. Unfortunately, there are no convenient statutory definitions.

In terms of s 39(1) of the Criminal Procedure Act '[a]n arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body'. In terms of s 39(3) of the Criminal Procedure Act '[t]he effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.' FC s 35(1) specifically refers to accused persons arrested for *allegedly committing an offence*. Given that the language of FC s 35(1) squares with the underlying requirement for a lawful arrest in terms of the Criminal Procedure Act, FC s 35(1) rights will accrue to a person arrested in terms of CPA s 39.[4] An arrested person will also be a detained person: thus the rights specified in FC s 35(2) will also accrue to an arrested person. But a detained person will not always be an arrested person. Since FC s 35(1) only applies to persons 'arrested for allegedly committing an offence' a person who is detained for other purposes will not be an 'arrested person' for the purposes of FC s 35(1). If the definition of arrest or detention is restricted to those who are in some way physically confined, then the suspect who has not been arrested is potentially in a very vulnerable position. As Satchwell J noted in *S v Sebejan*:

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[1] *Dlamini* (supra) at para 11. See also *Geuking v President of the Republic of South Africa* 2003 (1) SACR 404 (CC), 2003 (3) SA 34 (CC), 2004 (9) BCLR 895 (CC), [2002] ZACC 29 at para 47 (Court held that '[a] person facing extradition is not an accused person for the purposes of the protection afforded by s 35(3) of the Constitution'.)

[2] See, generally, F Snyckers & J le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 51.

[3] For more on FC s 35(5), see § 52.10 infra.

[4] See, generally, E Du Toit et al *Commentary on the Criminal Procedure Act* (2011) 5-1 — 5-2.

> The crux of the distinction between the arrested person and the suspect is that the latter does not know without equivocation or ambiguity or at all that she is at risk of being charged. The suspect may herself have an inkling that she is mistrusted by the investigating officer; she may even have been told that she is at some risk of being arrested; but the suspect has not been placed on terms. Indeed the suspect may have no qualms or concerns whatsoever and may therefore continue to operate in a state of ignorance — ignorance that she is mistrusted, may be under surveillance, that the investigator is enquiring into her actions and behaviour, that there may be an attempt to develop sufficient evidence against her. In this situation there is no bliss in ignorance. The suspect is in jeopardy of committing some careless or unwise act or uttering some incautious and potentially incriminating words which would subsequently be used against her in a trial.[1]

Sebejan acknowledges that the right to a fair trial does not begin in court but at the inception of the criminal process.[2] In order to protect the accused's fair trial right not to incriminate herself, Satchwell J held (albeit obiter[3]) that a suspect was entitled to the same warning as an arrested person.[4]

However, the High Courts have diverged on this point. In *S v Langa,* the court held that IC s 25 did not apply to suspects.[5] Pickering J in *S v Mthethwa* similarly held that the rights of arrested, detained and accused persons set out in FC ss 35(1),(2) and (3) were irrelevant in respect of a suspect.[6] However, the *Mthethwa* court found that as the statement had been obtained in breach of the Judges Rules[7] and that the admission of the evidence would render the trial unfair and bring the administration of justice into disrepute, the evidence fell to be excluded in terms of the court's common law discretion.

This vexed question of when fair trial rights kick-in might also be answered in terms of the meaning of 'detention'. The concept of 'detention' extends beyond physical incarceration.[8] For example, the Supreme Court of Canada has held that detention occurs not only when persons are deprived of their liberty by physical constraint, but also 'when a police officer or other agent of the state assumes control over the movement of a person by demand or direction which may have

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[1] *S v Sebejan* 1997 (1) SACR 626, 636 (W)('*Sebejan*').

[2] Ibid at 635d. See also *S v Mpetha (2)* 1983 (1) SA 576 (C); *S v Lwane* 1966 (2) SA 433 (A); *R v Kuzwayo* 1949 (3) SA 761 (A); *S v Dlamini* 1973 (1) SA 144 (A); *S v Agnew* 1996 (2) SACR 535 (C); *S v Mathebula* 1997 (1) SACR 10 (W). Cf *S v Ngwenya* 1998 (2) SACR 503 (W)(Leveson J, referring to the Interim Constitution, held that the IC s 25(3) right to a fair trial did not include pre-trial procedures.)

[3] This line of reasoning did not assist the accused in *Sebejan*. The court found that she had not been a suspect at the time of making the statement in question.

[4] *Sebejan* (supra) at 636b. See also *S v Van der Merwe* 1998 (1) SACR 194 (O); *S v Orrie* 2005 (1) SACR 63 (C)(The court held that a suspect must be made aware of their status as a suspect.)

[5] *S v Langa* 1998 (1) SACR 21 (T). See also *S v Ndhlovu* 1997 (12) BCLR 1785 (N). IC s 25 contained substantially similar provisions to those found is FC s 35 and similarly made a distinction between arrested, detained and accused persons.

[6] *S v Mthethwa* 2004 (1) SACR 449, 453e–f (E).

[7] See also *S v Khan* 2010 (2) SACR 476 (KZP). Judges Rule 2 provides: 'Questions may be put to a person whom the police have decided to arrest or who is under suspicion where it is possible that the person by his answers may afford information which may tend to establish his innocence. … In such a case a caution should first be administered. Questions, the sole purpose of which is that the answers may afford evidence against the person suspected, should not be put.'

[8] On the meaning of 'detention' in FC s 12, see M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 40.

significant legal consequence and which prevents or impedes access to counsel'.[1] The Canadian Supreme Court has held that 'the necessary element of compulsion or coercion to constitute a detention may arise from criminal liability for refusal to comply with a demand or direction, or from a reasonable belief that one does not have a choice as to whether or not to comply'.[2] Were the Canadian gloss on detention to be placed on FC s 35, it would appear that suspects who are questioned by the police in their homes will not be 'detained' and will not be entitled to be advised of their right to legal representation — as the police have no power to compel suspects to answer questions.[3] However, if a suspect reasonably believes that she must answer the question then she will be 'detained' and must be advised of her right to legal representation. On this definition of 'detention' the test for reasonable belief would be subjective. (That fact would hardly make the definition of detention unique: the test for undue influence in relation to confessions also contains an element of subjectivity.[4]) The test then would run as follows: a person who is questioned by the police, and who does not know that she is not obliged to answer the questions, and feels compelled to speak, will be detained for purposes of FC s 35.

52.3 A FAIR PUBLIC HEARING[5]

FC s 34 is viewed by some as the civil proceedings equivalent of FC s 35. Section 34 provides that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. The impact of FC s 34 on the admissibility of evidence has been relatively limited. However, it may play a role in restricting the exclusion of evidence when state privilege[6] is claimed and it may assist the court in determining the admissibility of improperly obtained evidence in civil trials.[7]

52.4 THE PRESUMPTION OF INNOCENCE AND RELATED RIGHTS

The presumption of innocence in FC s 35(3)*(h)* traditionally provides the ballast for fairness in criminal justice proceedings. Although the presumption of innocence as a constitutional right has a narrowly defined content, its operational efficacy is dependent on a number of associated rights: The right to remain silent at both trial (FC s 35(3)*(h)*) and pre-trial stages (FC s 35(1)*(a)*), and the privilege against self-incrimination at trial (FC s 35(3)*(j)*) and the right not to make a confession or admission at the pre-trial stage (FC s 35(1)*(c)*). These rights in turn would be, in many instances, illusory if arrested, accused and detained persons did not have

[1] *R v Therens* [1985] 1 SCR 613, 642-645; *R v Rahn* [1985] 1 SCR 659; *R v Trask* [1985] 1 SCR 655; *R v Thomsen* [1988] 1 SCR 640. Cf *R v Goodwin* [1993] 2 NZLR 153.

[2] *Thomsen* (supra).

[3] *R v Esposito* (1985) 53 CR (2d) 356.

[4] See PJ Schwikkard & SE Van der Merwe *Principles of Evidence* (2009) at 339.

[5] See, generally, J Brickhill & A Friedman 'Access to Courts' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 59.

[6] See § 52.6 infra.

[7] Ibid.

the right to be advised of the existence of such rights (FC s 35(1)*(b)*, FC s 35(2)*(b)*, FC s 35(3)*(f)*) and did not have access to legal representation (FC s 35(2)*(b)* and *(c)*, FC s 35(3)*(f)* and *(g)*) to enable them to effectively exercise those rights.

(a) The presumption of innocence

(i) *Content and rationale*

The presumption of innocence, as a consequence of poetic licence in *Woolmington v DPP*,[1] is frequently viewed as an ancient principle of English law. It has, as a consequence of our historical relationship with England, been absorbed into South African law as a fundamental legal principle.[2] However, it seems that the presumption of innocence is neither particularly ancient nor English.[3] That said, it has secured a place in a number of modern constitutions. The rationale for its prominence of place is varied. Rationales range from a concern that individual rights need to be protected from the potentially coercive authority of the state to policy concerns directed at maintaining the legitimacy of the criminal-justice system and the normative force of the criminal law. The most persuasive rationale turns on the recognition that the presumption of innocence is necessary to reduce the possibility of erroneous convictions.[4]

The presumption of innocence is most powerfully expressed in terms of the reasonable doubt standard. The reasonable doubt standard demands that the burden of proof rests on the prosecution to prove guilt beyond a reasonable doubt. The correlation between the rationale for the presumption of innocence and the reasonable doubt standard is succinctly expressed by Wilson in the following passage:

> Although the reasonable doubt standard is less a precise formula than it is a symbol it satisfies certain imperatives. It offers society assurance that people innocent of crime shall not be convicted; and although it creates an inevitable margin of error, 'our society [has determined] that it is far worse to convict an innocent man than to let a guilty man go free'. Second, the reasonable doubt standard protects the individual against the state's considerable resources and its potentially oppressive power to secure the conviction of the essentially powerless defendant. Perhaps most important, the reasonable doubt standard has captured society's belief in the security of its own standards of criminal justice. '[I]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt, whether innocent men are being condemned.' It is also important in our free society that 'every individual going about his ordinary affairs have confidence

[1] *Woolmington v DPP* [1935] AC 462 (HL) 481.

[2] See PJ Schwikkard *Presumption of Innocence* (1999) 2–7 (Offers a general discussion of the origins and rationale of the presumption of innocence.)

[3] Ibid.

[4] See *S v Dlamini, S v Dladla, S v Joubert, S v Schietekat* 1999 (4) SA 623 (CC), 1999 (2) SACR 51 (CC), [1999] ZACC 8 at para 78. See C Collier 'The Improper use of Presumptions in Recent Criminal Law Adjudication' (1986) 38 *Stanford LR* 423, 457.

> that his government cannot adjudge him guilty of a criminal offence without convincing a proper fact finder of his guilt with utmost certainty.[1]

The South African case law shows that the presumption of innocence is used to describe two different phenomena: (1) a rule regulating the standard of proof; and (2) a policy directive that the subject of a criminal investigation must be treated as innocent at all stages of the criminal process irrespective of the probable outcome of the trial.[2]

Potential definitional difficulties arise if we do not distinguish between those rights that cohere with the presumption of innocence and the presumption of innocence itself. Whilst the rationale of rights such as the right to remain silent and the privilege against self-incrimination may be partially attributable to the presumption of innocence, their existence can also be attributed to policy considerations separate from those applicable to the presumption of innocence. Accordingly their application will give rise to considerations which may not arise when considering the extension of the presumption of innocence. The danger of conflating the presumption of innocence and other separately enumerated rights is that those rights become vulnerable to the argument that in situations where the presumption of innocence is not applicable, or where the burden imposed by the presumption of innocence has been discharged, then those rights no longer apply. For example, the Constitutional Court, in *S v Manamela,* drew a distinction between an infringement of the right to remain silent and the presumption of innocence.[3] The *Manamela* Court was required to consider whether the reverse onus in s 37 of the General Law Amendment Act infringed the constitutional right to a fair trial, and, in particular, the right to be presumed innocent, the right to remain silent, and the right not to testify during proceedings.[4]

The *Manamela* Court held that s 37(1) required the prosecution to prove the following beyond a reasonable doubt: (1) that the accused was found in possession of goods, other than stock or produce; (2) that the goods were acquired otherwise than at a public sale; and (3) that the goods had been stolen. Once the prosecution had discharged this burden the accused must establish on a balance of probabilities that: (1) he or she believed, at the time of acquiring the goods, that the person from whom he or she received them was the owner of the goods or was duly authorised by the owner to dispose of them; and (2) his or her belief was reasonable. Section 37(1) effectively creates statutory liability for the negligent acquisition or receipt of stolen goods. The *Manamela* Court held that s 37(1) was a justifiable infringement of the right to remain silent but an unjustifiable infringement of the presumption of innocence. It held that the reverse onus justifiably infringed the right to silence because the accused had to establish that they had reasonable

[1] V Wilson 'Shifting Burden in Criminal Law: A Burden on Due Process' (1981) 8 *Hastings Constitutional Law Quarterly* 731, 732-3. See also LJ Harris 'Constitutional Limits on Criminal Presumptions as an Expression of Changing Concepts of Fundamental Fairness' (1986) 7 *Journal of Criminal Law and Criminology* 308, 310; D Dripps 'The Constitutional Status of the Reasonable Doubt Rule' (1987) 75 *California LR* 1665, 1670.

[2] See Schwikkard *Presumption of Innocence* (supra) at 35–36.

[3] *S v Manamela* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC), 2000 (1) SACR 414 (CC), [2000] ZACC 5.

[4] Act 62 of 1955.

grounds for believing that the seller of the goods was authorised to sell the goods or was the owner of the goods, even where the prosecution had led no evidence regarding the reasonableness of that belief. A failure to adduce evidence of the reasonableness of that belief leads to a reasonable inference that the accused knew of the purloined nature of the goods. However, the presumption of innocence was unjustifiably infringed because s 37 'imposed a full legal burden of proof on the accused'.[1] Similarly, in *S v Singo*, the Constitutional Court indicated that the presumption of innocence as a constitutional right is restricted to the requirement that guilt be proved beyond a reasonable doubt.[2] Although this burden is a partial product of the right to remain silent, the right to remain silent appears to be a far more malleable right.

(ii) *The scope of the presumption of innocence*

The Constitutional Court has had ample opportunity to reiterate that the right to be presumed innocent requires the prosecution to prove the guilt of an accused person beyond reasonable doubt.[3] The presumption of innocence applies to those elements of the state's case that must be established in order to justify punishment.[4] The presumption of innocence will be infringed whenever there is the possibility of a conviction despite the existence of reasonable doubt. The arena in which the presumption of innocence has found greatest application is in that of reverse onus provisions. Reverse onus provisions in civil cases merit some attention.[5] However, because the constitutional right to a presumption of innocence arises only in the context of an accused's right to a fair trial, reverse onus provisions attract far greater attention in the context of criminal trials.[6]

Likewise, because the presumption of innocence arises only in the context of an accused's right to a fair trial, the presumption of innocence has been held not to apply to interrogation procedures outside of the criminal process, nor to

[1] *S v Manamela* (supra) at para 25. For a critical discussion of this case, see P Schwikkard 'Evidence' (2000) 13 *SACJ* 237, 239. Cf *Osman v Attorney-General Transvaal* 1998 (4) SA 1224 (CC), 1998 (11) BCLR 1362 (CC), 1998 (2) SACR 493 (CC), [1998] ZACC 14. See also PJ Schwikkard 'A Dilution of the Presumption of Innocence and the Right to Remain Silent' (1999) 116 *SALJ* 462. However, s 37(1) has since been amended to omit the offending phrase. See DT Zeffert, A Paizes & A Skeen *The South African Law of Evidence* (2003) 555.

[2] *S v Singo* 2002 (4) SA 858 (CC), 2002 (8) BCLR 793 (CC), 2002 (2) SACR 160 (CC), [2002] ZACC 10.

[3] See, for example, *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC); *S v Coetzee* 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC); *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC), 1995 (2) SACR 748 (CC)('*Bhulwana*'); *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC) at para 16.

[4] Schwikkard *Presumption of Innocence* (supra) at 40-42.

[5] See, for example, the Constitutional Court's consideration of the allocation of the burden of proof in defamation cases in relation to FC s 16 in *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC). See also *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC), [1995] ZACC 7 ('*Coetzee v Government*')(Court held the civil imprisonment of debtors unconstitutional.); *Laubscher v Laubscher* 2004 (4) SA 350 (T).

[6] See *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 752 (CC), [1997] ZACC 5. See also *NDPP v Phillips* 2002 (4) SA 60 (W).

proceedings that take place after conviction.[1] Quasi-exceptions to this rule are the civil imprisonment of debtors and the contempt of court proceedings instituted by means of civil proceedings.[2]

(iii) *Reverse onus provisions*

Reverse onus provisions were considered for the first time by the Constitutional Court in *S v Zuma*.[3] CPA s 217(1)(*b*)(ii) placed a burden on the accused to prove, in specified circumstances, the inadmissibility of a confession on a balance of probabilities. Kentridge AJ held that the presumption of innocence will be infringed whenever there is a possibility of conviction despite the existence of a reasonable doubt. Furthermore, where a statutory presumption requires the accused to prove or disprove an element of an offence or excuse on a balance of probabilities, such a presumption would create the possibility of conviction despite the existence of a reasonable doubt.[4] Finding that the effect of the presumption contained in CPA s 217(1)*(b)*(ii) was to place a burden on the accused to prove a fact on a balance of probabilities, Kentridge AJ concluded that the section breached the constitutional right to be presumed innocent.

In *S v Coetzee*,[5] the Constitutional Court had the opportunity to deal with the effect of the presumption of innocence on statutory provisions requiring the

[1] In *S v Dzukuda; S v Tshilo* 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC), 2000 (2) SACR 443 (CC), [2000] ZACC 16 at para 53 (Court held that while the accused's liberty and security interests were not extinguished during the sentencing phase of the trial, they were reduced in that the presumption of innocence was no longer applicable. However, Ackermann J held that the accused's rights to remain silent and not to testify during proceedings were still applicable at the sentencing stage. Ibid at para 40.) See also *NDPP v Phillips* 2001 (2) SACR 542 (W)(The court held that proceedings in terms of chapter 5 of the Prevention of Organised Crime Act 121 of 1998, relating to confiscation orders commencing after conviction, could not be affected by the presumption of innocence as guilt or innocence was not in issue.)

[2] *Uncedo Taxi Service Association v Maninjwa* 1998 (2) SACR 166 (E). The presumption of innocence has clear application in contempt of court proceedings. See, generally, *S v Baloyi* 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC), 2000 (1) SACR 81 (CC); *S v Mamabolo* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC); *S v Singo* 2002 (4) SA 858 (CC), 2002 (8) BCLR 793 (CC), 2002 (2) SACR 160 (CC). Cf *S v Chinamasa* 2001 (1) SACR 278 (ZS).

[3] *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC).

[4] See *Bhulwana* (supra)(The Constitutional Court similarly found that the presumption contained in s 21(1)(*a*)(i) of the Drugs and Drug Trafficking Act 140 of 1992 unconstitutional.) See also *S v Ntsele* 1997 (11) BCLR 1543 (CC), 1997 (2) SACR 740 (CC)(Section 21(1)(*b*) of the Drugs and Drug Trafficking Act held unconstitutional); *S v Mello* 1998 (3) SA 712 (CC), 1998 (7) BCLR 908 (CC), 1999 (2) SACR 255 (CC)(Section 20 of the Drugs and Drug Trafficking Act was struck down); *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC), 1996 (1) SACR 371 (CC)(The Court held s 40(1) of the Arms and Ammunition Act 75 of 1960 unconstitutional); *Lodi v MEC for Nature Conservation and Tourism, Gauteng* 2005 (1) 556 SACR (T)(The court found s 37(1)*(c)* and s 110(1)*(b)* and *(c)* of the Nature Conservation Ordinance 12 of 1983 unconstitutional, but favouring the approach taken in *Osman v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC), 1998 (11) BCLR 1362 (CC), 1998 (2) SACR 493 (CC) held that s 37(1)*(b)* which required a person to give a satisfactory account of possession of dead game, did not constitute a reverse onus provision.)

[5] *S v Coetzee* 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC), 1997 (1) SACR 379 (CC), [1997] ZACC 2. For a further discussion of *Coetzee*, see G Kemp 'Die Grontwetlikheid van Statutere Vermoedens' (1998) 9 *Stellenbosch LR* 106.

accused to prove an exemption, exception or defence.[1] The *Coetzee* Court was required to determine the constitutionality of CPA s 332(5):

> When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the offence, unless it is proved that he did not take part in the commission of the offence and that he could have prevented it, and shall be liable to prosecution therefore, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefore.

Langa J (as he then was) held that CPA s 332(5) imposed an onus on the accused to prove an element relevant to the verdict. Whether this element pertained to the offence or to an exemption was not relevant; the issue was the substance of the offence: 'If a provision is part of the substance of the offence and the statute is formulated in a way which permits a conviction despite the existence of a reasonable doubt in regard to that substantial part, the presumption of innocence is breached.'[2] The *Coetzee* Court, by implication, rejected the 'greater includes the lesser test'.[3] Consequently, a reverse onus provision cannot be saved by the argument that the legislature, by creating a special defence in respect of which the accused bears the onus, has ameliorated the hardship the accused would otherwise have suffered if it had chosen to create an absolute liability offence.[4]

The Constitutional Court in *Scagell v Attorney-General of the Western Cape*, without distinguishing between permissive and mandatory evidentiary presumptions, held that an evidentiary burden does not create the possibility of conviction despite the existence of a reasonable doubt.[5] One of the provisions considered in *Scagell* was s 6(3) of the Gambling Act:[6]

> When any playing-cards, dice, balls, counters, tables, equipment, gambling devices or other instruments or requisites used or capable of being used for playing any gambling game are found at any place or on the person of anyone found at any place it shall be prima facie

[1] See also *S v Nduku* 2000 (2) SACR 382 (TkHC). See, generally, A Paizes 'A Closer Look at the Presumption of Innocence in Our Constitution: What is an Accused Presumed to be Innocent of?' (1998) 11 *SACJ* 409.

[2] *S v Coetzee* (supra) at para 38.

[3] This American phraseology is used to reflect the argument that since the legislature in formulating offences is not obliged to provide any defence, it is free to determine the rules of proof in relation to any defences it gratuitously creates, ie the greater power to eliminate the defence is seen as including the lesser power of shifting the burden of proof. See D Dripps 'The Constitutional Status of the Reasonable Doubt Rule' (1987) 75 *California LR* 1665.

[4] While it might not be possible to challenge absolute liability offences on the basis that they infringe the presumption of innocence, they remain vulnerable to challenge on the basis of the constitutional right to freedom and security of person. See *S v Coetzee* (supra) at paras 93 and 159. O'Regan J held that it was necessary to distinguish between two separate constitutional inquires that may arise where a statutory provision creates a strict liability offence and places a burden on the accused. The first inquiry is whether it is constitutionally legitimate for Parliament to impose the form of criminal liability. The second inquiry focuses on the legitimacy of imposing a burden on the accused. For more on FC s 12, see M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 40.

[5] *Scagell v Attorney-General of the Western Cape* 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC), 1996 (2) SACR 579 (CC), [1996] ZACC 18 ('*Scagell*').

[6] Act 51 of 1965.

> evidence in any prosecution for a contravention of subsection (1) that the person in control or in charge of such place was playing such game at such place and was visiting such place with the object of playing such game.

O'Regan J noted that the words 'shall be prima facie evidence' used in s 6(3) were generally believed to impose no more than an evidentiary burden on the accused. Such an evidentiary burden merely requires 'evidence sufficient to give rise to a reasonable doubt to prevent conviction'.[1] She held that unlike the imposition of a legal burden, an evidentiary burden did not create the possibility of conviction despite the existence of a reasonable doubt. The Court found it unnecessary to consider whether s 6(3) nevertheless infringed the presumption of innocence by relieving the prosecution of its duty to prove all the elements of the offence charged. It did not have to give the presumption of innocence further consideration because s 6(3) contained sweeping provisions that permitted innocent persons to be brought to trial 'merely upon proof of a fact which itself is not suggestive of any criminal behaviour'.[2]

One of the weaknesses of *Scagell* is the Court's failure to draw a distinction between permissive and mandatory evidentiary burdens. It is clear that s 6(3) created a mandatory presumption. The presumption requires the court to presume, once certain items had been found, that the person in control of or in charge of such place permitted the playing of a gambling game. There can be no doubt that proof of the basic fact in s 6(3) has a very tenuous relationship with the presumed fact and could in no way be considered to lead inexorably to the conclusion presumed. Consequently, if the accused exercised his constitutional right to remain silent and led no defence evidence, then he would, in the absence of other evidence capable of raising a reasonable doubt, be liable to conviction despite the existence of a reasonable doubt.[3] In the absence of a mandatory presumption, the prosecution would be forced to lead additional evidence of the presumed fact in order to secure conviction or avoid discharge. The application of such a presumption could lead to conviction despite the existence of reasonable doubt. Ironically, this line of reasoning is implicit in O'Regan J's reasons for holding that s 6(3) infringed the right to a fair trial. O'Regan J held that the effect of s 6(3) was that 'innocent persons, against whom there is no evidence suggestive of criminal conduct at all, may be charged, brought before a court and required to lead evidence to assert their innocence'.[4]

The issue of determining the application of the presumption of innocence to regulatory offences has yet to be properly considered by the courts. However, the Constitutional Court has indicated that the regulatory nature of an offence is better considered as a factor in establishing whether a provision constitutes a justifiable limitation on the right to be presumed innocent rather than in establishing breach. This approach is to be preferred. It allows the court to concentrate on 'the values

[1] *Scagell* (supra) at para 12.
[2] Ibid para 16.
[3] See *R v Wholesale Travel Inc* 1992 8 CR (4th) 145.
[4] *Scagell* (supra) at para 16.

at stake in the particular context'[1] rather than focusing on the unruly distinction between regulatory and criminal offences.[2]

Although the Constitutional Court has made it clear that there may well be instances where a reverse onus provision is justified,[3] it has been remarkably consistent in refusing to find justification for an infringement of the presumption of innocence. The normative value accorded to the presumption as a fundamental right has been underlined by the Court's insistence that any justification for infringing the presumption of innocence would have to be clear, convincing and compelling.[4]

(b) Right to remain silent; right not testify during proceedings and right not to give self-incriminating evidence

(i) *Content and rationale*

The right to remain silent can be described as the absence of a legal obligation to speak.[5] Its underlying rationale is three-fold: (1) concern for reliability (by deterring improper investigation) which relates directly to the truth-seeking function of the court; (2) a belief that individuals have a right to privacy and dignity which, whilst not absolute, may not be lightly eroded; (3) the right to remain silent is necessary to give effect to the privilege against self-incrimination and the presumption of innocence.[6] The Final Constitution offers its protection with respect to both pre-trial procedures (FC s35(1)*(a)*)[7] and trial procedures (FC s 35(3)*(h)*). An arrested person must be promptly informed of the right to remain silent and of the consequences of not remaining silent (FC s 35(1)*(b)*). The advice must be conveyed in a language that is understood by the accused (FC s 35(4)). The failure to properly advise the accused of his or her right to remain silent will constitute a constitutional breach, it may infringe the right to a fair trial[8] and it might lead to subsequent statements made by the accused being deemed inadmissible in terms of FC s 35(5). However, if an accused is aware of his right to remain silent, then the failure to advise him of this right will not necessarily render the trial unfair.[9]

[1] See *S v Coetzee* (supra) at para 43.

[2] See D Stuart *Canadian Criminal Law — A Treatise* (3rd Edition, 1995) 160. See also PJ Schwikkard *Presumption of Innocence* (1999) 97–109. Cf *S v Fransman* 2000 (1) SACR 99 (W).

[3] *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC) at para 41.

[4] See *S v Mbatha*; *S v Prinsloo* 1996 (1) SACR 371 (CC) at para 10. *S v Ntsele* 1997 (2) SACR 740 (CC), 1997 (11) BCLR 1543 (CC) at para 4. For a fuller discussion of limitation's analysis in relation to reverse onus provisions, see Schwikkard *Presumption of Innocence* (supra) at 133–165; PJ Schwikkard & SE Van der Merwe *Principles of Evidence* (2009) 517.

[5] *S v Thebus* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC), 2003 (2) SACR 319 (CC)('*Thebus*') at para 55; *R v Esposito* (1985) 49 CR (3d) 193 (Ont CA).

[6] *Thebus* (supra) at para 55. See also *S v Manamela* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC); *Osman v Attorney-General Transvaal* 1998 (4) SA 1224 (CC), 1998 (11) BCLR 1362 (CC), 1998 (2) SACR 493 (CC).

[7] See *S v Mcasa* 2005 (1) SACR 388 (SCA) at para 15.

[8] *Director of Public Prosecutions, Natal v Magidela* 2000 (1) SACR 458 (SCA) at para 18.

[9] *Director of Public Prosecutions, Transvaal v Viljoen* 2005 (1) SACR 505 (SCA) at para 43. Cf *S v McKenna* 1998 (1) SACR 106 (C); *S v Solomons* 2004 (1) SACR 137 (C).

(ii) *Negative inferences from silence*

In the constitutional context, an issue that has been the subject of both national[1] and international[2] debate is whether a negative inference can be drawn from an accused's election to exercise her right to remain silent. Although the issue of a negative inference will only arise at the trial stage, there are significant policy issues differentiating silence prior to trial and silence at trial.

At common law, the right to remain silent prohibited a court from drawing adverse inferences from silence at the investigative stage of the proceedings. However, at common law, if an alibi defence is raised for the first time at trial, then the court, in determining whether the alibi is reasonably possibly true, may take into account that there has been no opportunity for the state to investigate the alibi properly.[3]

The constitutionality of the common-law approach to the late disclosure of an alibi was considered by the Constitutional Court in *S v Thebus*. The *Thebus* Court also applied its mind to the permissibility of drawing an adverse inference of *guilt* from pre-trial silence and the constitutionality of drawing an adverse inference as to the *credibility* of the accused from pre-trial silence.

These issues were raised on appeal by one of two co-accused whose conviction on a charge of murder and two counts of attempted murder had been confirmed by the Supreme Court of Appeal. On arrest, the accused was warned of his right to remain silent but nevertheless elected to make an oral statement in which he described the whereabouts of his family at the time of the shooting. At trial, he testified that this statement was not intended to include himself. (If it did, then it would have contradicted the details of his alibi defence.) After making this initial oral statement, the accused refused to make a written statement and only disclosed his alibi defence two years later when the matter came to trial. The alibi defence was rejected by the trial court and the accused was convicted. The accused's appeal to the Supreme Court of Appeal failed and the matter then proceeded to the Constitutional Court. The accused contended that the Supreme Court of Appeal had erred in drawing a negative inference from the accused's failure to disclose his alibi defence timeously. Although the Justices concurred on the ultimate fate of the appeal on this point, it attracted four separate judgments.

Moseneke J (Chaskalson CJ and Madala J concurring) emphasised the distinction between pre-trial silence and trial silence. In terms of this distinction, the objective of the right to silence during trial is to secure a fair trial, whereas '[t]he protection of the right to pre-trial silence seeks to oust any compulsion to speak'.[4]

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[1] See South African Law Commission, Project 73 *Simplification of Criminal Procedure: A More Inquisitorial Approach to Criminal Procedure — Police Questioning, Defence Disclosure, the Role of Judicial Officers and Judicial Management of Trials* (2002); K Van Dijkhorst 'The Right to Silence: Is the Game Worth the Candle?' (2001) 118 *SALJ* 26; RW Nugent 'Self-incrimination in Perspective' (1999) 116 *SALJ* 501; P Schwikkard 'Silence and Common Sense' (2003) *Acta Juridica* 92.

[2] See, for example, S Easton *The Case for the Right to Silence* (2nd Edition, 1998); I Dennis 'Silence in the Police Station: The Marginalisation of Section 34' [2002] *Criminal Law Review* 25; J Jackson, M Wolfe & K Quinn *Legislating Against Silence: The Northern Ireland Experience* (2000).

[3] *R v Masbele* 1944 AD 571; *S v Zwayi* 1997 (2) SACR 772 (Ck).

[4] *Thebus* (supra) at para 55.

Moseneke J then categorically stated that '[i]n our constitutional setting, pre-trial silence of an accused can never warrant the drawing of an inference of guilt'[1] as this would undermine both the rights to remain silent and to be presumed innocent.[2] It is the ambiguity of pre-trial silence that prohibits an inference from silence being drawn. On Moseneke J's account, the drawing of an inference would render the mandatory warning of the right to remain silent 'a trap instead of a means for finding out the truth in the interests of justice'.[3]

Moseneke J drew a distinction between an inference as to guilt and an inference pertaining to credibility on the basis of a person's pre-trial silence. The latter would not necessarily infringe the presumption of innocence.[4] This distinction is somewhat tendentious. For example, with respect to the late disclosure of an alibi defence, a negative inference as to credibility will inevitably be a factor taken into consideration in the ultimate determination of guilt or innocence. Moseneke J's judgment also supports a distinction being drawn between an inference as to guilt and the effect of late disclosure on the evaluation of the weight to be accorded the alibi evidence. The latter is simply treated as an unavoidable consequence of adversarial proceedings: late disclosure precludes the prosecution from properly investigating the alibi defence. As a result, the alibi evidence will not be fully tested and less weight must be attached to it. The effect on weight is not a result of a negative inference as to credibility or guilt. It is simply a product of the evaluation of evidence in the context of an adversarial system. Nevertheless, Moseneke J appears to equate this procedural consequence with an inference as to credibility and argues that drawing an inference as to credibility amounts to a compulsion to speak and consequently limits the accused's right to silence. Moseneke J further noted that it is constitutionally mandatory to warn accused of their right to remain silent but that it is not mandatory that they be warned that their silence may possibly be used against them and that their silence will be taken into account in determining the weight to be accorded an alibi. Taking into account the limited use of an inference based on the late disclosure of an alibi, he concluded that the common-law rule is a justifiable limitation of the right to remain silent and that late disclosure of an alibi may have consequences which 'can legitimately be taken into account in evaluating the evidence as a whole'.[5] Moseneke J acknowledged that 'an election to disclose one's defence only when one appears on trial is not only legitimate but also protected by the Constitution'.[6] However, he then held that this protection would not preclude cross-examination on the accused's election to remain silent as such cross-examination would go to credit. Such cross-examination 'would not unjustifiably limit the right to remain silent'[7] provided it was conducted with due regard to the dictates of trial fairness.[8]

[1] *Thebus* (supra) at para 57. See also *S v Maasdorp* 2008 (2) SACR 296 (NC).
[2] *Thebus* (supra) at para 58.
[3] Ibid at para 58.
[4] Ibid at para 59.
[5] Ibid at para 68.
[6] Ibid at para 69
[7] Ibid at para 69.
[8] Ibid at para 70.

Goldstone and O'Regan JJ (Ackermann and Mokgoro JJ concurring) concurred in the result but dissented insofar as they reached the conclusion that drawing an adverse inference from the first appellant's failure to timeously disclose his alibi was an unjustifiable infringement of the right to remain silent. In considering the rationale for prohibiting inferences from silence, they rejected the argument that it is unfair to place the accused in a position where he will suffer adverse consequences whatever his election: hard choices are unavoidable in the adversarial process.[1] But they went no further than suggesting that it is inevitable that there may be adverse consequences from exercising the right to remain silent and avoided concluding that silence itself is an item of evidence.

Goldstone and O'Regan JJ also rejected the argument that drawing an adverse inference infringes the presumption of innocence because it relieves the state of part of its burden of proving guilt beyond a reasonable doubt. They argued that the Final Constitution 'does not stipulate that only the state's evidence may be used in determining whether the accused person has been proved guilty'.[2] However, taking the historical record of policing into account, they found that the prohibition on adverse inferences was justified insofar as it protected accused persons from improper police questioning and procedures.[3] They held that this rationale does not extend to silence in court. They also endorsed the view that it is unfair to warn accused persons of their right to remain silent in a formulation that implies that there will be no penalty for silence, and then to permit a court to draw a negative inference from that silence.[4] Although it is legitimate for an accused to be compelled to make a choice, that choice must be an informed choice and 'an accused person needs to understand the consequences of remaining silent'.[5] The warning also constitutes a barrier to drawing an adverse inference in that in many cases it 'will render the silence by the accused ambiguous'.[6] Goldstone and O'Regan JJ rejected the distinction between adverse inferences going to guilt and those going to credit. Although they might be conceptually different, the two Justices wrote, 'the practical effect of the adverse inference to be drawn for the purposes of credit, namely, that the alibi evidence is not to be believed, will often be no different to the effect of the inference to be drawn with respect to guilt, namely that the late tender of the alibi suggests that it is manufactured and that the accused is guilty'.[7] They also rejected Moseneke J's conclusion that it is constitutionally permissible to cross-examine accused on their election to remain silent. First, an accused should not be required to explain why she chose to exercise a constitutional right;[8] and, second, it would be unfair in the light of the constitutionally mandated warning in respect of silence.[9] However, the two Justices concluded that, if the warning was revised, an adverse inference from the

[1] *Thebus* (supra) at para 83.
[2] Ibid at para 83.
[3] Ibid at para 85.
[4] Ibid at para 86.
[5] Ibid at para 87.
[6] Ibid at para 88.
[7] Ibid at para 90.
[8] Ibid at para 91.
[9] Ibid.

late disclosure of an alibi would constitute a justifiable limitation of the right to remain silent.[1]

Yacoob J, although concurring in the result, took a somewhat different approach. He rejected the distinction between trial and pre-trial silence and held that FC s 35(1)*(a)* and FC s 35(3)*(h)* 'represent a continuum'.[2] He identified the purpose of the right to silence as being to 'ensure that people are protected from self-incrimination in the process of police interrogation'.[3] However, the ultimate objective of the right to remain silent, Yacoob J held, is to ensure a fair trial. Furthermore, he wrote that

> [the right to a fair trial] is not limited to ensuring fairness for the accused. It is much broader. A court must also ensure that the trial is fair overall, and in that process, balance the interests of the accused with that of society at large and the administration of justice.[4]

Because this broad concept of trial fairness cannot, presumably, be found in FC s 35(3), Yacoob J locates it in FC s 35(5). FC s 35(5) confers a discretion on the courts to admit evidence even if it was unconstitutionally obtained provided that it is fair to do so and its admission is not detrimental to the interests of justice. Consequently, Yacoob J wrote that provided that the drawing of inferences from the exercise of the right to remain silent — or the interrogation of such exercise on cross-examination — does not ultimately render the trial unfair, there is no basis on which to forbid the drawing of such inferences. He reasoned as follows:

> In the exercise of the duty to ensure a fair trial, it would become necessary to balance the rights of the accused, the rights of the victim and society at large. The right to silence of the accused could well become implicated in this balancing exercise when the judicial officer makes decisions concerning the admissibility of evidence, the allowing of cross-examination, as well as the drawing of inferences. Indeed inferences arising out of silence cannot ordinarily be drawn unless there is evidence of the silence of the accused and evidence of the circumstances surrounding the silence. Any investigation around the accused's silence cannot be said to infringe his right to silence unless the trial is thereby rendered unfair. The same goes for all decisions concerning admissibility of evidence as well as the use of silence in the drawing of inferences. The fairness of the trial as an objective is fundamental and key. The right to silence can only be infringed if it is implicated in a way that renders the trial unfair. It is a contradiction in terms to suggest that the right to silence has been infringed if it is implicated in a way that does not compromise the fairness of the trial but enhances it.[5]

The reasoning in this passage ought not to be endorsed. First, FC s 35(5) only becomes applicable once it has been established that evidence has been unconstitutionally obtained. In respect of the right to remain silent, it first needs to be established whether the right to remain silent in FC s 35(1)*(a)* or FC s 35(3)*(h)* has been infringed. The right to remain silent attaches only to arrested and to accused persons and does not embrace the rights of the victim and society at

[1] *Thebus* (supra) at para 34.
[2] Ibid at para 104.
[3] Ibid at para 105.
[4] Ibid at para 107.
[5] Ibid at para 109.

large. The broader notion of trial fairness may possibly be read into FC s 35(5) — but is precluded at any earlier stage of the inquiry. Secondly, by conflating the right to silence and the right to a fair trial at all stages, Yacoob J implies that the only remedy for infringing the right to remain silent is the exclusion of evidence. An arrested person who is subjected to improper police questioning that infringes her right to remain silent must surely (at least theoretically) be able to seek relief for the infringement of this pre-trial right prior to going to trial. Undue emphasis on trial fairness may result in insufficient attention being given to the underlying relationship between the right to remain silent and the right to dignity.

However, there is much to say for the contextual approach taken by Yacoob J in respect of the appropriate warning to be given to arrested persons. He suggests that a more complex warning as to the consequences of remaining silent may well 'tilt the balance in favour of getting [a] person to speak'[1] and that such a consequence may not necessarily be fairer than the constitutionally prescribed warning that 'encourages silence on the part of an arrested person'.[2] As a result, Yacoob J concluded that the more limited warning did not result in any unfairness to the appellant.[3] Contextualising these particular constitutional rights might also lead to the conclusion that a more complex warning will make little difference to the fairness of the trial: it is very likely that neither warning will be properly understood. Therefore adverse inferences should not be permitted in these circumstances as silence in response to an incomprehensible warning would inevitably be too ambiguous to sustain an inference.[4]

Given the divergent judgments, it is difficult to state, with any clarity, what the law now is. Ten judges heard the case: surprisingly, only two of the 10 justices found that it was unnecessary to determine whether the failure to disclose an alibi defence to the police could attract an adverse inference — on the facts of the case, the appellant had not exercised his right to silence and after being duly warned had responded to a question concerning his whereabouts.[5] In effect, the Court treated the matter as a previous inconsistent statement. Seven of the 10 judges held that it was constitutionally impermissible to draw an adverse inference as to guilt from the accused's pre-trial silence. However, four of the seven judges indicated that if the constitutionally mandated warning was rephrased so as to apprise arrested persons of the consequences of remaining silent, an adverse inference for pre-trial silence might be constitutionally justifiable. Three other judges held that although an adverse inference as to guilt was not justifiable, an adverse inference as to credibility was a justifiable limitation on the right to remain silent and that it was permissible to cross-examine the accused on his failure to disclose an alibi timeously. Four justices expressly rejected this conclusion. All eight of the judges dealing with the question of adverse inferences would appear to concur with the view that there may well be acceptable negative consequences

[1] *Thebus* (supra) at para 111.

[2] Ibid.

[3] Ibid.

[4] Yacoob J, like Goldstone and O'Regan JJ, rejects the distinction between inferences that go to credibility and those that go to guilt.

[5] Ngcobo J, with Langa DCJ concurring.

that attach to remaining silent. It would seem, therefore, that the common law position remains largely intact and that it is constitutionally permissible to take the late disclosure of an alibi into account in determining what weight should be attached to the alibi defence.

As to the drawing of inferences from pre-trial silence, Moseneke J makes it categorically clear that negative inferences are constitutionally impermissible. On the other hand, the concurring judgment of Goldstone and O'Regan JJ suggests that such inferences might be constitutional if arrested persons are warned of the consequences of their silence. One conclusion that would be consistent with both judgments is that the ambiguity of silence (and the impermissibility of drawing any inference) would remain if an arrested person did not understand the revised warning. Such a restatement of the law would make it highly unlikely that a negative inference could ever be drawn from silence at any stage where an arrested person or accused person is not represented by counsel.

The position as regards inferences from trial silence likewise remains unclear. At common law, the prosecution could refer to the accused's silence once a *prima facie* case had been established. Clear authority exists for the proposition that, in certain circumstances, an accused's refusal to testify, when the prosecution had established a prima facie case, could be a factor in assessing guilt.[1]

The High Court in *S v Brown* held that whilst the right to remain silent was recognised at common law, its constitutional status required a change in emphasis as regards its application.[2] (The most obvious change is that any infringement of the right to remain silent is required to be justified with reference to the limitations clause.) Buys J, finding that the use of silence as an item of evidence amounted to an indirect compulsion to testify and that the drawing of an adverse inference from silence diminished and possibly nullified the right to remain silent, held that it would be unconstitutional for the court to draw an adverse inference where accused persons elect to exercise their constitutional right to remain silent.[3] However, the court held that this conclusion does not mean that no adverse consequences could arise should an accused exercise the right to remain silent.[4] Where the state has established a *prima facie* case against the accused, and the accused fails to testify or to adduce any other evidence to rebut the *prima facie* case, the court is required to base its decision on the uncontradicted evidence of the state. In this situation, it is possible, indeed common, that the *prima facie* case will be sufficient to sustain a conviction. In other words, although the accused's silence may not be treated as an item of evidence, he or she will have to accept the risk of conviction on the basis of the state's uncontradicted *prima facie* case. However, let

[1] *S v Mthetwa* 1972 (3) SA 766 (A); *S v Snyman* 1968 (2) SA 582 (A); *S v Letsoko* 1964 (4) SA 768 (A); *R v Ismail* 1952 (1) SA 204 (A).

[2] *S v Brown* 1996 (2) SACR 49 (NC).

[3] Ibid at 62.

[4] Ibid at 63.

us be clear: any inference drawn by the court is drawn from the uncontroverted evidence and not from the silence of the accused.[1]

Reaching the opposite conclusion (and without reference to *Brown*), the court in *S v Lavhengwa* fully endorsed the view that an adverse inference could be permitted in appropriate circumstances:

> It accords, first, with common sense. The inference is permissible only when the accused fails to give evidence despite the fact that the prosecution evidence strongly indicates guilt, an innocent accused would have refuted evidence against him, and there is no other explanation of his failure to do so. In these circumstances common sense demands that an inference be drawn and human nature is such that one would be all but inevitable. It has indeed been suggested that 'no rule of law can effectively legislate against the drawing of an inference from a failure to testify'. Secondly, it is not mere sophistry to reason … that an accused's right to remain silent is not denied or eroded by an inference drawn from his choice to exercise that right in circumstances where an innocent person would have chosen to do so. It is suggested thirdly that, even if the rule permitting an adverse inference impinged upon the right of the accused to remain silent, it is in any event probably a justifiable limitation. [2]

The Constitutional Court has not expressly ruled on whether drawing an adverse inference from silence at trial would pass constitutional muster. However, it has on more than one occasion pronounced that trial silence may have such untoward consequences. In *Thebus*, the Court wrote that 'if there is evidence that requires a response and if no response is forthcoming … [then] the Court may be justified in concluding that the evidence is sufficient, in the absence of an explanation, to prove the guilt of the accused'.[3]

The Supreme Court of Appeal, after *S v Monyane*, also appears prepared to expand the ambit of negative consequences to drawn from silence of an accused.[4] As Ponnan JA writes:

> Secondly, somewhat surprisingly, the fourth appellant did not testify. The presence of his vehicle and the evidence of the second appellant linked him to the crime scene. In those circumstances, a reasonable expectation existed that, if there were an explanation consistent with his innocence, it would have been proffered. He, however, refused to rise to the challenge. For him to have remained silent in the face of the evidence was nothing short of damning.[5]

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[1] See also *S v Hlongwa* 2002 (2) SACR 37 (T); *S v Scholtz* 1996 (2) SACR 40 (NC). See also SE Van der Merwe 'The Constitutional Passive Defence Right to an Accused versus Prosecutorial and Judicial Comment on Silence: Must We Follow *Griffin v California*' (1994) *Obiter* 1. See, further, *R v Noble* (1997) 1 SCR 874, 6 CR (5th) 1 (The Canadian Supreme Court held that using silence as an item of evidence infringed both the presumption of innocence and the right to remain silent.)

[2] *S v Lavhengwa* 1996 (2) SACR 453, 487 (W) ('*Lavhengwa*'). Cf *S v Mseleku* 2006 (2) SACR 574 (D).

[3] *S v Thebus* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC), 2003 (2) SACR 319 (CC) at para 58. See also *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC); *S v Mokoena* 2006 (1) SACR 29 (W); *S v Hena* 2006 (2) SACR 33 (SE). Cf *S v Sithole* 2005 (2) SACR 504 (SCA).

[4] 2008 (1) SACR 543 (SCA) at para 19.

[5] Ibid at para 19. Cf *S v Mavinini* 2009 (1) SACR 523 (SCA); *S v Mdlongwa* 2010 (2) SACR 419 (SCA) at para 25.

The Supreme Court of Appeal did not have to reach such a conclusion because the state had produced sufficient evidence to establish guilt beyond reasonable doubt. An inference from silence would not have altered the outcome.[1]

Another difficulty arises with drawing inferences from trial silence: what inference should be drawn if the accused remains silent on the advice of counsel? Under such circumstances, it would be seem unjust for any court to conclude that an inference to credibility or to guilt was the only reasonable inference. The Supreme Court of Appeal skirted this vexed issue in *S v Tandwa*.[2] The accused alleged that his right to a fair trial had been compromised, as a result of incompetent legal representation, because counsel had advised him not to testify. The court, recognising that the constitutional right to legal representation encompassed a right to competent representation, held:

> When an accused … complains about the quality of legal representation, the focus is no longer, as before the Constitution, only on the nature of the mandate the accused conferred on his legal representative, or only on whether an irregularity occurred that vitiated the proceedings — the inquiry is into the quality of the representation afforded.[3]

Two obvious evidential questions arise when the accused lodges a complaint of poor legal representation. First, would admitting an affidavit by the impugned counsel constitute a breach of legal professional privilege? The *Tandwa* court drew a distinction between implied and imputed waiver of legal professional privilege:

> Implied waiver occurs … when the holder of the privilege with the full knowledge of it so behaves that it can objectively be concluded that the privilege was intentionally abandoned. Imputed waiver occurs where — regardless of the holder's intention — fairness requires that the court conclude that the privilege was abandoned. Implied waiver entails an objective inference that the privilege was actually abandoned; imputed waiver proceeds from fairness, regardless of actual abandonment.[4]

The *Tandwa* court, following Wigmore,[5] held that waiver must be imputed where a client alleges incompetence on the part of his or her legal representative.[6]

The second evidential difficulty is whether an appeal court will be confronted by conflicting affidavits, one from the accused alleging incompetence and one from the legal representative denying incompetence. The *Tandwa* court held that such a conflict would not prove an insurmountable difficulty. The court possesses the inherent power to cut the Gordian knot 'in an appropriate case by a commission or [some] other suitable proceeding'.[7] In the instant matter, the *Tandwa* court found it unnecessary to embark upon such measures because it had readily concluded that the accused's version was improbable at best:

> [W]hen an accused raises a fair-trial complaint involving allegedly incompetent legal representation that raises a dispute about what occurred between him and his lawyer, (a) the

[1] Cf *S v Lotter* 2008 (2) SACR 595 (C).
[2] 2008 (1) SACR 613 (SCA).
[3] Ibid at para 7 (footnotes omitted).
[4] Ibid at para 18.
[5] *Wigmore on Evidence in Trials at Common Law* (JT McNaughton rev. 1961) Vol VIII at para 2328.
[6] *Tandwa* (supra) at paras 19 & 20.
[7] Ibid at para 22.

> lawyer's response to the allegations is admissible in assessing the veracity of the complaint; (b) if the allegations raise a real possibility that there was incompetence or that bad advice was given or that misconduct occurred, it may be necessary for appropriate mechanisms to be developed to establish the facts; (c) in this case, the accused's complaint is inherently contradictory and implausible and must be rejected without further inquiry.[1]

However, no party disputed the claim that the accused did not testify because of the advice of his counsel. The *Tandwa* court — adopting a similar approach to the *Monyane* Court — held that this *troublesome* silence could still give rise to an inference of guilt and assist the court in establishing guilt beyond reasonable doubt. Indeed, this inference led to the accused's conviction.

The troublesome silence, refracted through the Supreme Court of Appeal's views on inference and inadequate legal counsel, raises another troubling conclusion. Given the undisputed fact that the accused remained silent on counsel's uninterrogated advice, the *Tandwa* court failed to explain why an inference of guilt was the only reasonable inference under such contested facts. A reader is left with the impression that, as a general matter, the possibility of incompetent legal counsel is an inconvenient truth barring the way to a conviction based, in part, on the silence of the accused.

(iii) *Discharge at the close of the state case*

The rights to remain silent,[2] not to testify during the proceedings[3] and not to be compelled to give self-incriminating evidence[4] also fall to be considered when dealing with discharge at the close of the state case. Two relatively recent decisions of the Supreme Court of Appeal go some way towards clarifying the limits of judicial discretion in granting a discharge at the close of the state case in terms of CPA s 174. Section 174 reads as follows:

> If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may convicted on the charge, it may return a verdict of not guilty.

Prior to the new constitutional dispensation, a significant body of case authority supported the proposition that the use of the word 'may' in CPA s 174 conferred a discretion on the court to refuse discharge in the absence of evidence supporting a conviction — provided there was a 'reasonable possibility that the defence evidence might supplement the state case'.[5] The correctness of this approach was challenged soon after the Interim Constitution came into force. Claassen J in *S v Mathebula* held that an accused's right to freedom and security of person as well as his rights to be presumed innocent and remain silent severely curtailed the discretion conferred by s 174 and held that a court did not have a discretion

[1] *Tandwa* (supra) at para 29.
[2] FC s 35(3)*(h)*.
[3] Ibid.
[4] FC s 35(3)*(j)*.
[5] See *S v Shuping* 1983 (2) SA 119 (B) 120; *R v Kritzinger* 1952 (2) SA 401 (W); *S v Zimmerie* 1989 (3) SA 484 (C); *S v Campbell* 1991 (1) SACR 435 (Nm).

to refuse discharge when there was no evidence tendered against the accused.[1] However, the court expressly acknowledged that its judgment did not lay down a general rule in those cases where there was some evidence against the accused. This approach was not uniformly adopted by the High Court.[2]

The Supreme Court of Appeal in *S v Legote*[3] and *S v Lubaxa*[4] extends the line of reasoning proffered in *Mathebula*.[5] In *Legote*, Harms JA held that it was clear that a court had a duty to ensure that an unrepresented accused against whom the state had not made out a *prima facie* case was discharged and the principle of equality required that this duty be extended to the represented accused. In *Lubaxa,* Nugent AJA (as he was then) held:

> I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero motu*, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.[6]

However, the *dictum* of Nugent AJA, albeit obiter, casts some doubt as to whether the relevant threshold to be passed in order to avoid discharge is that of a *prima facie* nature. It also clearly advocates a different approach in respect of co-accused. The *Lubaxa* court found that the right to be discharged did not necessarily arise from the rights to be presumed innocent, to remain silent or not to testify but from the constitutional rights to dignity and personal freedom which require the existence of a 'reasonable and probable' cause to believe that the accused is guilty'.[7] However, the court appeared to have difficulty in drawing a clear line between the constitutional rights to dignity, personal freedom and a fair trial. It concluded that the protection afforded by the rights to dignity and personal freedom will be 'pre-eminently' eroded 'where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination'. Presumably, the privilege against self-incrimination underlies the *Lubaxa* court's finding that '[t]he same considerations do not necessarily arise, … where the prosecution's case against one accused might be supplemented by the evidence of a co-accused'.[8] The express reason given by the *Lubaxa* court for this distinction is that as '[t]he prosecution is ordinarily entitled to rely upon the evidence of an accomplice and it is not self-evident why it should necessarily be precluded from doing so merely because it has chosen to prosecute more than one person jointly'.[9] However, it is not self-evident as to why the rights to privacy and to freedom of the person

[1] *S v Mathebula* 1997 (1) SACR 10 (W), 1997 (1) BCLR 123 (W).
[2] See, for example, *S v Makofane* 1998 (1) SACR 603 (T).
[3] *S v Legote* 2001 (2) SACR 179 (SCA).
[4] *S v Lubaxa* 2001 (2) SACR 703 (SCA)('*Lubaxa*'). See also *S v Zwezwe* 2006 (2) SACR 599 (N).
[5] *Mathebula* (supra).
[6] *Lubaxa* (supra) at para 18. See also *S v Zwezwe* 2006 (2) SACR 599 (N).
[7] *Lubaxa* (supra) at para 19.
[8] Ibid at para 20. See also *S v Tusani* 2002 (2) SACR 468 (TD); *S v Tsotetsi and Others (2)* 2003 (2) SACR 638 (W).
[9] *Lubaxa* (supra) at para 20.

cease to be infringed merely because the prosecution has chosen to prosecute more than one person jointly. One argument that might support this view is that the refusal of discharge is premised, not on the possibility that the accused will incriminate himself, but rather on the likelihood that the co-accused will complete the prosecution's task.[1]

The uncertainties raised by *Lubaxa*[2] were partially addressed by the Supreme Court of Appeal in *S v Nkosi*.[3] It was common cause that in the court *a quo* the state had failed to establish 'any evidence against the first appellant on which a reasonable man could convict him at the end of the case'.[4] (This wording suggests that the state must establish a *prima facie* case to avoid discharge.) The court *a quo* refused to recognize that in matters with multiple accused it ought to assess whether conflicting interests and conflicting accounts — or their absence — might constitute adequate grounds for discharge. The *Nkosi* court held that *Lubaxa* foresaw the possibility that the failure to discharge a co-accused might amount to an infringement of the right to a fair trial.[5] In the instant matter, the first appellant's right to a fair trial had been compromised by the court *a quo*'s refusal to even hear an application for discharge given that no 'reasonable basis … for an expectation that his co-accused might incriminate him' obtained.[6] Despite this gloss on the holding in *Lubaxa*, *Lubaxa* cannot, logically, be invoked as binding precedent for the proposition that refusing to discharge an accused party in a case involving multiple co-accused constitutes a violation of the right to a free trial.

In *S v Agliotti,* the court reviewed the post-constitutional development of s 174 jurisprudence.[7] It discharged the accused because the sole state witness incriminating Agliotti lacked any semblance of credibility. However, the court, relying in part on *S v Mpetha*,[8] noted that in s 174 proceedings credibility plays only a limited role and will generally only be taken into consideration where 'it was of such poor quality that no reasonable person could possibly accept it'.[9]

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[1] In *Zuma*, Van der Merwe JA refers to *Lubaxa* and then stands the right to be presumed innocent and the constitutional requirement that an accused's guilt be established beyond a reasonable doubt on their respective heads. The learned judge apparently refused discharge on the basis that he was *not* convinced of the accused's *innocence beyond a reasonable doubt*. *S v Zuma* 2006 (2) SACR 191 (W)(The court held that it 'could therefore not find beyond reasonable doubt that the accused did not have the required *mens rea*'. This finding appears to be contrary to the presumption of innocence that requires the State to prove guilt beyond a reasonable doubt.) See also *S v Masondo: In Re S v Mthembu* 2011 (2) SACR 286 (GSJ)(High Court judgment clearly deviates from SCA precedent). 'Innocence beyond a reasonable doubt' is not a principle of evidence or criminal procedure in any known legal jurisdiction.

[2] For more on the uncertainties that arise from this judgment, see Schwikkard & Van der Merwe *Principles of Evidence* (supra) at 567–568.

[3] *S v Nkosi* 2011 (2) SACR 482 (SCA).

[4] Ibid at para 24.

[5] Ibid at paras 25 and 26.

[6] Ibid at para 26.

[7] 2011 (2) SACR 437 (GSJ)(*'Agliotti'*).

[8] 1983 (4) SA 262 (C).

[9] *Agliotti* (supra) at para 262.

(c) The right not to be compelled to make any confession or admission that could be used in evidence; the right not to be compelled to give self-incriminating evidence; and the right to legal representation.

(i) *The right to legal representation and the privilege against self-incrimination*[1]

Arrested persons have the right not to be compelled to make any confession or admission that could be used in evidence against them (FC s 35(1)*(c)*). Accused persons have the right not to be compelled to give self-incriminating evidence (FC s 35(3)*(j)*). Detainees and accused (and inevitably arrested persons as at the moment of arrest they will also be detained) have the right to 'to choose, and to consult with, a legal practitioner, and to be informed of this right promptly' (FC s 35(2)*(b)* and FC s 35(3)*(f)*).[2] They must also all be informed of the right 'to have a legal practitioner assigned to … [them] by the state and at state expense, if substantial injustice would otherwise result' (FC s 35(2)*(c)* and s 35(3)*(g)*).[3]

In the United States, the Fifth Amendment — which gives constitutional protection to the privilege against self-incrimination — was extended in *Miranda v Arizona* to incriminating statements made by persons in police custody.[4] In *Miranda,* the US Supreme Court, relying upon *Escobedo v Illinois*,[5] found that the right to counsel was essential in order to protect the right against self-incrimination. The holding of the Supreme Court in *Miranda* can be summarised as follows:

> Statements obtained during custodial interrogation of the accused may not be admitted into evidence unless the prosecution can show the appropriate procedural safeguards were used to secure the privilege against self-incrimination. The appropriate procedural safeguards are that a person must be warned that she has the right to remain silent, that any statement that she makes may be used in evidence against her, and that she has a right to the presence of a legal representative and if substantial injustice would otherwise occur to legal representation at state expense. The failure to inform an accused of these rights will generally result in the exclusion of testimonial communications from evidence.

The link between the right to counsel and the privilege against self-incrimination (and other related rights) was succinctly restated by Froneman J in *S v Melani:*

> The purpose of the right to counsel and its corollary to be informed of that right … is thus to protect the right to remain silent, the right not to incriminate oneself and the

[1] The constitutional right to legal representation specified in FC s 35 is restricted to arrested, detained and accused persons. This list embraces sentenced prisoners, see *Ehrlich v CEO, Legal Aid Board* 2006 (1) SACR 346 (E). See also *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Another* 2002 (5) SA 449 (SCA), 2002 (7) BCLR 756 (SCA).

[2] See *Mhlekwa v Head of the Western Tembaland Regional Authority & Another; Feni v Head of the Western Tembuland Regional Authority* 2000 (2) SACR 596 (TK)(The court held that s 7(1) of the Regional Authority Courts Act infringed s 35(3)*(f)* in so far as it provided that neither the complainant nor the accused could be legally represented during criminal proceedings in a regional authority court.)

[3] The constitutional right to legal representation is reflected in s 73 of the Criminal Procedure Act 51 of 1977. The constitutional right to legal representation is not restricted to South African citizens. See *S v Thomas* 2001 (2) SACR 608 (W)(The court held that it applies to non-South African citizens accused in South Africa.)

[4] 384 US 436 (1966). See, further, G Smith 'The Threshold Question in Applying *Miranda*: What Constitutes Custodial Interrogation?' 1974 (25) *South Carolina LR* 699, 735; *Harris v New York* 401 US 222 (1970); *Rhode Island v Innis* 446 US 291 (1980); *New York v Quarles* 467 US 649 (1984).

[5] *Escobedo v Illinois* 378 US 478 (1964).

> right to be presumed innocent until proven guilty. Section 25(2) and 25(3) of the [Interim] Constitution make it abundantly clear that this protection exists from the inception of the criminal process; that is on arrest, until its culmination up to and during the trial itself. This protection has nothing to do with the need to ensure the reliability of evidence adduced at the trial. It has everything to do with the need to ensure that an accused is treated fairly in the entire criminal process: in the 'gatehouse' of the criminal justice system (that is the interrogation process), as well as in its 'mansions' (the trial court).[1]

There have been conflicting views as to whether it is necessary to advise a person of her right to legal representation at every pre-trial stage. The most pragmatic approach is that in each case the crucial inquiry should be whether the accused, after having been apprised of her rights on arrest, was in a position to decide voluntarily how to exercise her rights at each subsequent pre-trial procedure.[2]

The common law did not recognise a right to legal representation for those unable to afford a lawyer.[3] The Final Constitution only affords detained and accused persons the right to be provided with legal assistance at state expense 'if substantial injustice would otherwise result'.[4] However, if legal representation is necessary to uphold the privilege against self-incrimination (and associated rights) and the protection of the right not to incriminate oneself is necessary to ensure a fair trial, then a person must have access to legal representation to realise the above rights and such representation should not be dependent on her income. The logical conclusion of this line of reasoning is that if the state finds itself unable to provide legal representation to an arrested, detained or accused person, then the police must refrain from interrogating persons who desire legal representation but who are not in a position to obtain it.[5] However, there can be little doubt that the reason for imposing a restriction on the substantive right to legal representation is the concern that the South African state simply does not have the resources to provide legal representation for every indigent accused. The right to legal representation could, otherwise, paralyse an already overburdened criminal justice system. Factors that will be taken into account in determining whether substantial injustice would result through the absence of legal representation include: the complexity of the case,[6] the severity of the potential sentence,[7] the ignorance and

[1] See *S v Melani* 1996 (1) SACR 335, 348I–J (E); *S v Gasa* 1998 (1) SACR 446 (D); *S v Marx* 1996 (2) SACR 140 (W); *S v Viljoen* 2003 (4) BCLR 450 (T). However, such exclusion is not as automatic under FC s 35(5) as it was under *Miranda*. See *S v Lottering* 1999 (12) BCLR 1478 (N); *S v Soci* 1998 (2) SACR 275 (E); *S v Orrie* 2005 (1) SACR 63 (C). See also DT Zeffertt, A Paizes & A Skeen *The South African Law of Evidence* (2003); PJ Schwikkard & SE Van der Merwe *Principles of Evidence* (2002) 215; *S v Mathebula* 1997 (1) SACR 10 19f–20a (W).

[2] See *S v Shaba* 1998 (1) SACR 16 (T); *S v Shongwe* 1998 (2) SACR 321 (T); *S v Malefo* 1998 (1) SACR 127 (W); *Shabalala v S* 1999 (4) All SA 583 (N); *S v Soci* 1998 (2) SACR 275 (E); *S v Ngcobo* 1998 (10) BCLR 1248 (N); *S v Mfene* 1998 (9) BCLR 1157 (N); *S v Gumede* 1998 (5) BCLR 530 (D); *S v Nombewu* 1996 (2) SACR 396 (E). Cf *S v Mathebula* 1997 (1) SACR 10 (W); *S v Marx* 1996 (2) SACR 140 (W).

[3] *S v Rudman and Another; S v Mthwana* 1992 (1) SA 343 (A).

[4] FC s 35(2)*(c)* and s 35(3)*(g)*.

[5] But see *Mgcina v Regional Magistrate Lenasia* 1997 (2) SACR 711 (W).

[6] See, generally, *Pennington v The Minister of Justice* 1995 (3) BCLR 270 (C); *Msila v Government of the RSA* 1996 (3) BCLR 362 (C); *S v Khanyile* 1988 (3) SA 795 (N).

[7] See *S v Moos* 1998 (1) SACR 372 (C)(The court held that substantive injustice would occur if the charge was one which would attract a sentence of imprisonment and the accused did not have legal representation.) See also *S v Du Toit* 2005 (2) SACR 411 (T).

indigence of the accused.[1] Where the potential for 'substantial injustice' is clear, a trial may not proceed in the absence of legal representation: the accused would have to make an informed decision to waive her right to legal representation.[2]

Where an accused is unrepresented, presiding officers have a duty to ensure that the accused is informed of her rights:[3] eg, the right to legal representation, and that this exercise should occur prior to the commencement of the trial.[4] Depending on the seriousness and complexity of the charge, or on the applicable legal rules, an accused should not only be told of his right to legal representation, he should also be encourage to exercise it.[5] Where there is the possibility of a lengthy term of imprisonment, an accused should be advised of this possibility and encouraged to avail himself of the services of a legal representative.[6] A presiding officer must also ensure that the accused is aware of and understands his right to legal representation at state expense,[7] and where appropriate of his right to appeal against the refusal of legal aid and/or his right to request the court to order that legal representation be provided.[8] The presiding officer must also be satisfied that the accused's choice not to be represented is an informed one.[9] An accused must be given a reasonable opportunity to obtain legal aid.[10] If an accused initially declines legal representation, but subsequently changes his mind, then he must be given the opportunity to obtain legal representation.[11] Similarly, if a legal representative withdraws, then the accused must be given the opportunity of applying to the Legal Aid Board for the appointment of another legal representative.[12] The duty to provide an accused with a fair opportunity

[1] See *S v Vermaas; S v Du Plessis* 1995 (3) SA 292 (CC), 1995 (7) BCLR 851 (CC), 1995 (2) SACR 125 (CC). See also *S v Ambros* 2005 (2) SACR 211 (C).

[2] *S v Manuel* 2001 (4) SA 1351 (W).

[3] This obligation embraces a proper explanation of the proceedings and concepts such as 'cross-examination' and 'opportunity to address the court'. See *S v Lekhetho* 2002 (2) SACR 13 (O). See also *S v Matladi* 2002 (2) SACR 447 (T); *S v Njikaza* 2002 (2) SACR 481 (C); *S v Mathole* 2002 (2) SACR 484 (T); *S v Shiburi* 2004 (2) SACR 314 (W); *S v May* 2005 (2) SACR 331 (SCA); *S v Mokoena* 2005 (1) SACR 594 (T). See also *S v Lusu* 2005 (2) SACR 538 (E)(Plasket J condemned the magistrate's refusal of a postponement to facilitate an application for legal aid on the basis that the application was unlikely to succeed.) See also *S v Fielies* 2006 (1) SACR 302 (C); *S v Ndou* 2006 (2) SACR 497 (T); *S v Zwezwe* 2006 (2) SACR 599 (N); *S v Mseleku* 2006 (2) SACR 574 (D); S *v Hlangabezo* 2008 (1) SACR 218 (E); *S v Mabuza* 2009 (2) SACR 435 (SCA).

[4] *S v Radebe, S v Mbonani* 1988 (1) SA 191 (T). See also *S v Van Heerden en Ander Sake* 2002 (1) SACR 409 (T); *S v Thusi* 2002 (12) BCLR 1274 (N); *S v Mdali* 2009 (1) SACR 259 (C). This duty is equally applicable in bail proceedings. See *S v Nzima* 2001 (2) SACR 345 (C). *S v Moetjie* 2009 (1) SACR 95 (T).

[5] *S v Radebe, S v Mbonani* 1988 (1) SA 191, 196g (T). See also *S v Manale* 2000 (2) SACR 666 (NC); *S v Nkondo* 2000 (1) SACR 358 (W); *S v Sikhipha* 2006 (2) SACR 439 (SCA).

[6] *S v Ndlovu* 2001 (1) SACR 204 (W); *S v Mbambo* 1999 (2) SACR 421 (W); *S v Dyani* 2004 (2) SACR 365 (E). See also *S v Tshidiso* 2002 (1) SACR 207 (W); *S v Ndlovu; S v Sibisi* 2005 (2) SACR 645 (W) ('*Ndlovu*').

[7] *S v Visser* 2001 (1) SACR 401 (C); *S v Monyane* 2001 (1) SACR 115 (T); *S v Ambros* 2005 (2) SACR 211 (C); *Ndlovu* (supra).

[8] *S v Ambros* 2005 (2) SACR 211 (C); *S v Du Toit (2)* 2005 (2) SACR 411 (T).

[9] *S v Solomons* 2004 (1) SACR 137 (C).

[10] *S v Lusu* 2005 (2) SACR 538 (E); *S v Makhandela* 2007 (2) SACR 620 (W); *S v Saule* 2009 (1) SACR 196 (CkHC).

[11] *S v Pitso* 2002 (2) SACR 586 (C). See also *S v Gedezi* 2010 (2) SACR 363 (WCC).

[12] *S v Kok* 2005 (2) SACR 240 (NC).

to obtain legal representation also arises in summary proceedings.[1] A decision of the Legal Aid Board not to provide representation may be reviewed for 'reasonableness'. However, the courts will be slow to overturn a decision of the Legal Aid Board. The Board is specifically designed to make funds available for legal representation and to decide when legal representation to indigent accused is warranted.[2] All that being said, the failure to inform an accused of his right to legal representation will only result in an unfair trial if it can be shown 'that the conviction has been tarnished by the irregularity'.[3]

The right to have legal representation at state expense does not include the right to have a legal representative of the accused's choice.[4] However, an accused is entitled to effective representation[5] and to be legally represented by a 'person who has placed himself or herself in a position to present' his or her case as instructed.[6] The legal representative must be given a reasonable opportunity to adequately represent his or her client.[7] In *S v Mofokeng,*[8] the court held that '[t]he right to legal representation exists during the whole of the legal process until the court has spoken the last word'.[9]

(ii) *Admissions and confessions*

The law as it stands makes a distinction between admissions and confessions in respect of admissibility in criminal trials.[10] The only requirement that needs to be met before an admission will be accepted into evidence is that it must be made voluntarily.[11] 'Voluntary' in this context has a very restricted meaning. An admission will be found to be involuntary only if it has been induced by a promise or threat proceeding from a person in authority.[12] FC s 35(1)*(c)* may well provide the courts with the opportunity for departing from the artificial and technical common-law interpretation of the requirement of 'voluntariness'. FC s 35(1)*(c)*

[1] *S v Solomons* (supra).

[2] *Legal Aid Board v S* 2011 (1) SACR 166 (SCA). This new position would appear to reflect a deviation from rather recent precedent that held that even if an accused does not meet the means test set by the Legal Aid Board, he will still retain his constitutional right to legal representation at state expense and that right must be explained to the accused. See *S v Cornelius* 2008 (1) SACR 96 (C); *S v Makhandela* 2007 (2) SACR 620 (W).

[3] *S v May* 2005 (2) SACR 331 (SCA). See also *Hlantlalala v Dyanti NO* 1999 (2) SACR 541 (SCA); *S v Mshumpa* 2008 (1) SACR 126 (E).

[4] See *S v Manguanyana* 1996 (2) SCR 283 (E); *S v Halgryn* 2002 (2) SACR 211 (SCA); *R v Mochebelele* 2010 (1) SACR 256 (LesA).

[5] *S v Mofokeng* 2004 (1) SACR 349 (W). See also *S v Du Toit (2)* 2005 (2) SACR 411 (T); *S v Halgryn* (supra); *S v Tandwa* 2008 (1) SACR 613 (SCA).

[6] See *S v Charles* 2002 (2) SACR 492 (E). See also *Beyers v Director of Public Prosecutions, Western Cape* 2003 (1) SACR 164 (C); *S v Ntuli* 2003 (1) SACR 613 (W).

[7] *B v S* 2003 (9) BCLR 955 (E).

[8] *S v Mofokeng* 2004 (1) SACR 349 (W) at para 17. See also *S v Nkosi* 2010 (1) SACR 60 (GNP).

[9] *Mahomed v National Director of Public Prosecutions* 2006 (1) SACR 495 (W) at para 7 (The court with reference to legal professional privilege held that the confidentiality of communications between an accused and his legal representative was fundamental to an accused's right to a fair trial.) See also *Bennett v Minister of Safety and Security* 2006 (1) SACR 523 (T).

[10] See *S v Ralukukwe* 2006 (2) SACR 394 (SCA).

[11] Section 219A of the Criminal Procedure Act 51 of 1977.

[12] *R v Barlin* 1926 AD 459.

reflects the accused's pre-trial privilege against self-incrimination. It provides that an arrested person shall have the right 'not to be compelled to make any confession or admission that could be used in evidence against' him or her.

Nothing in FC s 35(1)*(c)* suggests that admissions and confessions should be treated differently. CPA s 217 requires a confession to be made freely and voluntarily whilst the maker is in his sound and sober senses and without having been unduly influenced thereto. In *R v Barlin,* Innes CJ held that the requirement of undue influence pertaining to confessions was elastic and went beyond the ambit of voluntariness. It was restricted to an inducement, threat or promise coming from a person in authority.[1] The constitutional entrenchment of the principles of due process and the right to a fair trial in FC s 35(3), as well as the wording of FC s 35(1)*(c)*, which draws no distinction between admissions and confessions, favours an interpretation of voluntariness which is indistinguishable from undue influence.

In *S v Agnew*, Foxcroft J questioned the artificial distinction drawn between confessions and admissions.[2] He noted that, historically, one of the reasons for the distinction was the assumption that admissions need not be guarded against to the same extent as confessions.[3] However, in many instances admissions could be just as damaging as confessions.[4] The *Agnew* court held that '[i]f full effect is given to the maxim that no one should be obliged to incriminate himself, then it is difficult to understand how incriminating statements contained in confessions should be treated differently from words amounting to admissions only'.[5] The obvious reason for taking this approach is that all the reasons for excluding involuntary confessions apply equally to involuntary admissions. Involuntary confessions and admissions are excluded not only because they are potentially unreliable,[6] but also because a conviction based on an involuntary admission or confession would be one obtained without due process of law.[7] The admission of a forced admission or confession would likewise be contrary to the right not to incriminate oneself.[8] As the South African Law Commission has noted, admissions, confessions and pointings out should all be subject to the same requirements of admissibility: namely that they must be made freely and voluntarily, in sound and sober senses

[1] *R v Barlin* (supra).
[2] *S v Agnew* 1996 (2) SACR 535 (C)('*Agnew*').
[3] Ibid at 538.
[4] Cf *R v Xulu* 1956 (2) SA 288 (A). See also *S v Orrie* 2005 (1) SACR 63, 76a–c (C).
[5] *Agnew* (supra).
[6] See *S v Radebe* 1968 (4) SA 410 (A) at 418-419.
[7] *Brown v Allen* 344 US 443 (1953).
[8] See *R v Duetsimi* 1950 (3) SA 674 (A); *S v Sheehama* 1991 (2) SA 860 (A).

and without undue influence.[1] No admission or confession should be the product of coercion or abuse.[2]

Our highest appellate courts have yet to follow these sage recommendations. The existing distinction between admissions and confessions was first challenged in the Constitutional Court in *S v Molimi*.[3] Nkabinde J held that 'although the argument may be sound', the Court need not determine the ongoing validity of the distinction because it had not been raised in the lower courts.[4] Despite the express criticism of the rule, the common-law distinction between admissions and confessions was firmly reinforced by the Supreme Court of Appeal in *S v Libazi*.[5]

(iii) *Ascertainment of bodily features*

CPA s 37(1) authorises police officials to take fingerprints, palm prints or footprints of any person who has been arrested or charged. The police are also authorised to take such steps as are necessary to ascertain whether the body of any arrested person has any mark, characteristic or distinguishing feature or shows any condition or appearance. Obviously, evidence of this nature might incriminate the accused. The question then arises whether CPA s 37 is in conflict with the constitutional right not to be compelled to make an admission which can be used in evidence against the maker. Prior to legislative authorisation, there was some authority for the view that the ascertainment of bodily features, without the consent of an accused, infringed the common-law privilege against self-incrimination. In *R v Maleke,* the court refused to admit evidence of a footprint compelled by force.[6] Krause J expressed his objection to the admission of such evidence as follows: '[I]t compels an accused person to convict himself out of his own mouth; that it might open the door to oppression and persecution of the worst kind; that it is a negation of the liberty of the subject and offends against our sense of natural justice and fair play…' [7]

However, this line of reasoning was firmly reversed by the Appellate Division in *Ex parte Minister of Justice: In re R v Matemba*.[8] The court considered the admissibility of evidence of a palm-print taken by compulsion and found that the privilege

[1] South African Law Commission Project 73 *Simplification of Criminal Procedure: A More Inquisitorial Approach to Criminal Procedure — Police Questioning, Defence Disclosure, the Role of Judicial Officers and Judicial Management of Trials* (August 2002). The various rights enumerated in FC s 35 also provide an entirely different basis for the exclusion of admissions and confessions. FC s 35(5) confers a discretion on the court to exclude evidence obtained in violation of any right in the Bill of Rights. So, for example, Leach J in *S v Mdyogolo* held that the failure to hold a trial-within-a-trial to determine the admissibility of a confession infringed the constitutional right to remain silent and constituted a fatal irregularity. 2006 (1) SACR (E). See also *Director of Public Prosecution, Transvaal v Viljoen* 2005 (1) SACR 505 (SCA). For further discussion of trial-within-trial procedures, see § 52.10*(e)* below.

[2] See *S v January; Prokureur-Generaal, Natal v Khumalo* 1994 (2) SACR 801 (A).

[3] 2008 (3) SA 608 (CC), 2008 (5) BCLR 451 (CC), 2008 (2) SACR 76 (CC), [2008] ZACC 2.

[4] Ibid at paras 48–49.

[5] 2010 (2) SACR 233 (SCA).

[6] *R v Maleke* 1925 TPD 491.

[7] Ibid at 534. See also *Gooprushad v R* 1914 35 NLR 87; *R v B* 1933 OPD 139.

[8] *Ex parte Minister of Justice: In re R v Matemba* 1941 AD 75.

against self-incrimination applied only to testimonial utterances. Watermeyer JA held:

> Now, where a palm-print is being taken from an accused person, he is, as pointed out by Innes CJ in *R v Camane* (1925 AD 570, 575), entirely passive. He is not being compelled to give evidence or to confess, any more that he is being compelled to give evidence or confess when his photograph is being taken or when he is put upon an identification parade or when he is made to show a scar in court. In my judgment, therefore, neither the maxim *nemo tenetur se ipsum prodere* nor the confession rule make inadmissible palm-prints compulsorily taken.[1]

This line of reasoning had been used to justify the admission of evidence of a thing or place pointed out, under coercion, by the accused.[2] In *S v Sheehama*, the Appellate Division found this reasoning to be untenable. It held that 'a pointing out is essentially a communication by conduct and, as such, is a statement by the person pointing out'.[3] Consequently, a pointing out, like any other extra-judicial admission, has to be made voluntarily before it will be admitted into evidence. However, although a pointing out like the ascertainment of bodily features usually results in the production of 'real' evidence, it can be distinguished from the latter in that it involves some degree of active or communicative conduct.[4]

In *S v Huma (2)*, Claassen J held that the taking of fingerprints did not constitute testimonial evidence by the accused and was therefore not in conflict with the privilege against self-incrimination.[5] The *Huma (2)* court relied heavily on the reasoning of the US Supreme Court in *Schmerber v California*.[6] In *Schmerber*, a majority of the Supreme Court held that the Fifth Amendment privilege against self-incrimination relates only to the testimonial or communicative acts of the accused and does not apply to non-communicative acts such as submission to a blood test. This approach was adopted by the Supreme Court of Appeal in *Levack v Regional Magistrate, Wynberg*.[7] In *Levack,* the Supreme Court of Appeal held that compelling an accused to submit a voice sample infringed neither the right to remain silent nor the right not to give self-incriminating evidence. In *S v Orrie,* the High Court found that the involuntary taking of a blood sample for the purposes of DNA profiling infringed both the right to privacy and the right to bodily security and integrity, but that the infringement was justifiable.[8] Desai J, in *Minister of Safety and Security v Gaqa*,[9] confirmed an order compelling the respondent to submit himself to an operation for the removal of a bullet from his leg. In so doing, the High Court rejected the respondent's argument that to do so would infringe his constitutional right not to incriminate himself. The *Gaqa* court held that CPA ss 27 and 37 sanctioned the violence necessary to remove the

[1] *Ex parte Minister of Justice: In re Matemba* (supra) at 83.
[2] See s 218 of the Criminal Procedure Act 51 of 1977.
[3] *S v Sheehama* 1991 (2) SA 860 (A).
[4] See *S v Binta* 1993 (2) SACR 553 (C).
[5] *S v Huma (2)* 1995 (2) SACR 411, 419 (W). See also *S v Maphumulo* 1996 (2) SACR 84 (N); *Msomi v Attorney-General of Natal* 1996 (8) BCLR 1109 (N).
[6] *Schmerber v California* 384 US 575 (1966).
[7] 2003 (1) SACR 187 (SCA).
[8] *S v Orrie* 2004 (1) SACR 162 (C) at para 20.
[9] *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C).

bullet, and that although these procedures constituted a serious infringement of dignity and bodily integrity, they met the requirements of the limitation clause. A similar application was made to the High Court in *Minister of Safety and Security v Xaba.*[1] The respondent's arguments were, it appears, limited to the right to be free from all forms of violence (FC s 12(1)*(c)*) and the right to have security and control over one's body (FC s 12(2)*(b)*). Southwood AJ held that the conclusion of the court in *Gaqa* was clearly wrong. In the absence of a law of general application authorising the specific constitutional infringements, Southwood AJ reasoned, the requirements of the limitation clause could not be met.

Can a clear distinction be made between the ascertainment of bodily features and testimonial or communicative statements? Black and Douglas JJ, dissenting in *Schmerber v California,* thought not:

> [T]he compulsory extraction of a petitioner's blood for analysis so that the person who analysed it could give evidence to convict him had both a 'testimonial' and a 'communicative nature'. The sole purpose of this project which to be successful was to obtain 'testimony' from some person to prove that the petitioner had alcohol in his blood at the time he was arrested. And the purpose of the project was certainly 'communicative' in that the analysis of the blood was to supply information to enable a witness to communicate to the court and jury that the petitioner was more or less drunk.[2]

The distinction between 'testimonial' and 'communicative' conduct is perhaps necessary in the absence of a limitation clause. FC s 36 permits the South African courts to take a more generous approach in determining the content of the right against self-incrimination without compromising the effective administration of the criminal justice system.

Another question that arises in relation to the ascertainment of bodily features is whether an accused must be advised of his or her right to legal representation prior to an identification parade being held. At present it appears to be an open question. Leveson J, in *S v Ngwenya*, held that the right to a fair trial did not require the accused to be advised of his right to legal representation at every stage of the pre-trial process and that the passive role played by the accused at the identification parade did not involve any process of self-incrimination.[3] In *S v Mokoena*, the court held that the failure to advise the accused of his right to legal representation at an identity parade merely affected the weight of the evidence and not its admissibility.[4] However, in *S v Mhlakaza*, the court found

[1] *Minister of Safety and Security v Xaba* 2004 (1) SACR 149 (D).

[2] *Schmerber* (supra) at 921 (Black J). The minority judgment in *Schmerber* was preferred by the Canadian Supreme Court in *R v Stillman* (1997) 42 CRR (2d) 189.

[3] *S v Ngwenya* 1998 (2) SACR 503, 509 (W). See also *S v Zwayi* 1997 (2) SACR 772 (Ck); *S v Monyane* 2001 (1) SACR 115 (T); *S v Thapedi* 2002 (1) SACR 598 (T). See also *S v Hlalikaya* 1997 (1) SACR 613 (E)(The court held that there was no right to legal representation at a 'photo identification' parade.) However, the court in *S v Thapedi* 2002 (1) SACR 598 (T) referring to *US v Wade* 288 US 218 (1967), acknowledged that there may well be circumstances in which the right to a fair trial would require that the accused be represented at an identity parade.

[4] *S v Mokoena* 1998 (2) SACR 642 (W). Cf *S v Mphala* 1998 (1) SACR 654 (W). See SE Van der Merwe 'Parade-uitkennings, Hofuitkennings en die Reg op Regverteenwoordiging: Enkele Grondwetlike Perspektiewe' 1998 (9) *Stellenbosch LR* 129 (Discusses and compares case law in South Africa, the United States and Canada.)

the failure to advise the accused of their right to representation coupled with the accused's express objection to the absence of any legal representation, rendered the evidence of the identification parade inadmissible; this approach has received little support in subsequent cases.[1]

52.5 Right to adequate time and facilities to prepare a defence[2]

The central role of access to information in enabling an accused to exercise his or her fair trial rights was recognised by the Constitutional Court in *Shabalala v Attorney-General of Transvaal*.[3] *Shabalala* abolished 'blanket docket privilege' and broadened the accused's access to state witnesses. The *Shabalala* Court's order provides the best summary of the prevailing position and reads as follows:

> A. 1. The 'blanket docket privilege' expressed by the rule in *R v Steyn* 1954 (1) SA 324 (A) is inconsistent with the Constitution to the extent to which it protects from disclosure all the documents in a police docket, in all circumstances, regardless as to whether or not such disclosure is justified for the purposes of enabling the accused properly to exercise his or her right to a fair trial in terms of s 25(3).[4]
>
> 2. The claim of the accused for access to documents in the police docket cannot be defeated merely on the grounds that such contents are protected by a blanket privilege in terms of the decision in *Steyn's* case.
>
> 3. Ordinarily an accused person should be entitled to have access to documents in the police docket which are exculpatory (or which are *prima facie* likely to be helpful to the defence) unless, in very rare cases, the State is able to justify the refusal of such access on the grounds that it is not justified for the purposes of a fair trial.
>
> 4. Ordinarily the right to a fair trial would include access to the statements of witnesses (whether or not the State intends to call such witnesses) and such of the contents of a police docket as are relevant in order to enable an accused person properly to exercise that right, but the prosecution may, in a particular case, be able to justify the denial of such access on the grounds that it is not justified for the purposes of a fair trial. This would depend on the circumstances of each case.
>
> 5. The State is entitled to resist a claim by the accused for access to any particular document in the police docket on the grounds that such access is not justified for the purposes of enabling the accused properly to exercise his or her right to a fair trial or on the ground that it has reason to believe that there is a reasonable risk that access to the relevant document would lead to the disclosure of the identity of an informer or State secrets or on the grounds that there was a reasonable risk that such disclosure might lead to the intimidation of witnesses or otherwise prejudice the proper ends of justice.
>
> 6. Even where the State has satisfied the Court that the denial of access to the relevant documents is justified on the grounds set out in paragraph 5 hereof, it does not follow that access to such statements, either then or subsequently, must necessarily be denied to the accused. The Court still retains a discretion. It should balance the degree of risk involved in attracting the potential prejudicial consequences for the proper ends of justice referred to in paragraph 5 (if such access is permitted)

[1] *S v Mhlakaza* 1996 (2) SACR 187 (C). See also *S v Mathebula* 1997 (1) SACR 10 (W).

[2] FC 35(3)*(b)*.

[3] *Shabalala v Attorney-General of Transvaal* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC), 1995 (2) SACR 761 (CC)('*Shabalala*').

[4] This summary refers to IC s 25(3): the corresponding provision is now found in FC s 35(3).

against the degree of the risk that a fair trial may not enure for the accused (if such access is denied). A ruling by the Court pursuant to this paragraph shall be an interlocutory ruling subject to further amendment, review or recall in the light of circumstances disclosed by the further course of the trial.

B. 1 Insofar as and to the extent that the rule of practice pertaining to the right of an accused or his legal representative to consult with witnesses for the State prohibits such consultation without the permission of the prosecuting authority, in all cases and regardless of the circumstances, it is not consistent with the Constitution.

2. An accused person has a right to consult a State witness without prior permission of the prosecuting authority in circumstances where his or her right to a fair trial would be impaired, if, on the special facts of a particular case, the accused cannot properly obtain a fair trial without such consultation.
3. The accused or his or her legal representative should in such circumstances approach the Attorney-General or an official authorised by the Attorney-General for consent to hold such consultation. If such consent is granted the Attorney-General or such official shall be entitled to be present at such consultation and to record what transpires during the consultation. If the consent of the Attorney-General is refused the accused shall be entitled to approach the Court for such permission to consult the relevant witness.
4. The right referred to in paragraph 2 does not entitle an accused person to compel such consultation with a State witness: —
   (a) if such State witness declines to be so consulted; or
   (b) if it is established on behalf of the State that it has reasonable grounds to believe such consultation might lead to the intimidation of the witness or a tampering with his or her evidence or that it might lead to the disclosure of State secrets or the identity of informers or that it might otherwise prejudice the proper ends of justice.
5. Even in the circumstances referred to in paragraph 4*(b)*, the Court may, in the circumstances of a particular case, exercise a discretion to permit such consultation in the interest of justice subject to suitable safeguards.[1]

The application of this order does not appear to have given the state much trouble. Few cases have arisen out of a refusal to disclose.[2]

Shabalala was decided in terms of IC s 23.[3] The corresponding section of the Final Constitution, FC s 32, significantly departs from its predecessor in a number

[1] *Shabalala* (supra) at para 72.

[2] But see *S v Makiti* [1997] 1 All SA 291 (B)(The court clearly encourages disclosure as a default position); *S v Naude* 2005 (2) SACR 218 (W)(The court held that the prosecution retains the duty to bring previous inconsistent statements made by a state witness to the attention of the court.) See also *S v Mvelasi* 2005 (2) SACR 266 (O)(Regarding the ambit of the state's duty to disclose real evidence at trial.)

[3] IC s 23 read, in relevant part: '[e]very person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her… rights'.

of ways.[1] For starters, under FC s 32, the right to information held by the state is no longer qualified by the requirement that the information is necessary for the exercise or protection of any other rights. However, FC s 32 needs to be enforced through the legislation enacted in terms of FC s 32(2): the Promotion of Access to Information Act ('PAIA').[2] In terms of s 7, PAIA does not apply to ongoing criminal or civil proceedings.[3]

S v Rowand makes no direct reference to the distinction between the contents of the access to information clauses in the Interim Constitution and Final Constitution.[4] However, the content of the judgment implies that the High Court was cognisant of the change in wording. Labuschagne J held that the prosecution could not deny access to information on the basis that it was not contained in the collection of documents labelled the 'docket'.[5] Nor could the prosecution avoid disclosure by attempting to draw a superfluous distinction between the 'prosecution' and the 'state'. These conclusions are entirely in keeping with the purpose of FC s 32 and the holding of the Constitutional Court in *Shabalala*.

The most interesting finding in *Rowand* is that the relevance of the requested documents to the accused is not a factor in determining whether they should be disclosed. This part of holding constitutes a notable departure from *Shabalala*. *Shabalala* permitted the state to deny access if the accused did not require the information to exercise his right to a fair trial. However, as noted above, FC s 32 and PAIA do not require that the information be necessary to protect a right. Relevance should no longer be seen as a requirement for access. Nevertheless, the state must be able to invoke the limitations clause to protect itself from vexatious requests for information (designed, inevitably, to force the wheels of justice to grind even more slowly.) In *Rowand*, however, the state did not invoke any legislation to limit the otherwise untrammelled right to access in FC s 32.

Shabalala was not entirely clear about the point in the proceedings at which an accused becomes entitled to access the docket. The right to such information only

[1] FC s 32 reads:

(1) Everyone has the right of access to —
   (a) any information held by the state; and
   (b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

[2] Act 2 of 2000.

[3] But see *PFE International v Industrial Development Corporation of SA* 2011 (4) SA 24 (KZD)(Motala AJ held that s 7 of PAIA did not exclude the operation of PAIA where it was invoked to facilitate the production of or access to records required for civil litigation where there was no rule of court that made provision for such access. Consequently, it held that PAIA could be invoked where the records required were in the possession of person who was a party to the civil proceedings and the records in question were required prior to trial (eg for the purposes of pleading.) This decision was recently overturned in *PFE International Inc (BUI) & Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC), 2013 (1) BCLR 55 (CC), [2012] ZACC 21. See also *Kerkhoff v Minister of Justice and Constitutional Development* 2011 (2) SACR 109 (GNP)(The High Court held that the raw data compiled by a third party in order to assist the state in assessing whether it was in the child's interest to testify through an intermediary in terms of s 170A of the CPA did not form part of the police docket. The applicant should have sought access to the documentation in terms of the relevant provisions of PAIA.)

[4] 2009 (2) SACR 450 (W).

[5] Ibid at paras 17–18.

arises once the accused has been charged.[1] However, even then, the right to docket access is not automatic and the prosecution is entitled to resist disclosure.[2] Access to the docket may also be refused when the court is asked to grant bail.[3] Here, as elsewhere, the court retains the discretion to override prosecutorial refusal.[4]

One might be tempted to ask whether courts ought to be in a position to determine whether a refusal, or failure to disclose infringes the right to a fair trial. In *S v Crossberg*,[5] Navsa JA considered whether the failure to disclose the statements of a number of witnesses had impaired the accused's right to a fair trial and, if so, what the appropriate remedy should be. In canvassing his options, Navsa JA leaned heavily upon the following passages from the judgment of the Canadian Supreme Court in *R v Taillefer:*

> First, the onus is on the accused to demonstrate that there is a *reasonable possibility* that the verdict might have been different but for the Crown's failure to disclose all of the relevant evidence. The accused does not have the heavy burden of demonstrating that it is probable or certain that the fresh evidence would have affected the verdict. … As this court held in *Dixon*: "[i]mposing a test based on reasonable possibility strikes a fair balance between an accused's interest in a fair trial and the public's interest in the efficient administration of justice. It recognises the difficulty of reconstructing accurately the trial process and avoids the undesirable effect of undermining the Crown's disclosure obligations. …
>
> Second. Applying this test requires that the appellate court determine that there was a reasonable possibility that the jury, with the benefit of all the relevant evidence, might have had a reasonable doubt as to the acccused's guilt. … [A]n overall effort must be made to reconstruct the overall picture of the evidence that would have been presented to the jury had it not been for the Crown's failure to disclose the relevant evidence. Whether there is a reasonable possibility that the verdict might have been different must be determined having regard to the evidence in its entirety.[6]

Navsa JA noted that, in *Taillefer,* the Supreme Court of Canada had distinguished between: (a) the inquiry into whether disclosure would have had an impact on the outcome of the trial; and (b) the inquiry into the overall fairness of the trial. In the circumstances of the case, the *Crossberg* court found that the missing statements were 'highly relevant to the outcome *and* to the issue of a fair trial'.[7] In sum, the probative value of the undisclosed statements was relevant to the outcome *and* the dishonesty of the police rendered the trial unfair.

In practice, it seems that the two inquiries will inevitably be closely connected. To demonstrate the difficulty in drawing a distinction between 'outcome' and

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[1] *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C).

[2] See, generally, DT Zeffertt, A Paizes & A Skeen *The South African Law of Evidence* (2003) 604–615; PJ Schwikkard & SE Van der Merwe *Principles of Evidence* (2009) 171–175.

[3] See s 60(14) of the Criminal Procedure Act 51 of 1977 and *S v Dlamini, S v Dladla, S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC), 1999 (2) SACR 51 (CC). See also PAIA s 39(1)*(a)*(Permits officials to refuse PAIA requests for information that is covered by s 60(14) of the CPA.)

[4] Presiding officers have a duty to advise unrepresented accused of their right of access to the docket. See *S v Shiburi* 2004 (2) SACR 314 (W).

[5] 2008 (2) SACR 317 (SCA).

[6] (2004) 114 CRR (2d) 60 (SCC) at paras 81–2 quoted in *Crossberg* (supra) at paras 77–78.

[7] *Crossberg* (supra) at para 80 (my emphasis).

'fairness', consider the following question: would the unethical behaviour of the police result in an unfair trial if their actions would have had no bearing on the outcome of the trial? The answer is no. As a result, the two inquiries are invariably linked.[1]

In *Prinsloo v Bramley Children's Home,* the applicants, who were also the accused in respect of a charge involving two children (cited as the second and third respondents) made application for information not contained in the police docket.[2] The applicants sought access to the personal files of the two children kept by the Children's Home. The applicants sought the files in the hope that they might discover that the children had previously been involved in sexual misbehaviour or improper conduct. The court held that the right to a fair trial included 'the right to information in the possession of the State and possibly State witnesses in order to enable the applicants to prepare properly for their defence'.[3] However, it concluded that the requests for access in the instant matter were 'vague, superficial and unsupported by factual allegations'.[4] Furthermore, the applicants' fair trial rights had to be weighed against the children's right to privacy, emotional and psychological integrity and dignity in the context of a constitutional injunction that '[a] child's best interest is of paramount importance in every matter concerning the child'.[5] The applicants therefore bore the onus of establishing that the resultant infringements of the children's rights in the event of the success of the application were justified. Release of the requested information would be justifiable if the information was essential to the applicants' defence and if access was necessary at this stage of the proceedings to enable them to prepare their defence: '[T]hey must prove on a balance of probabilities that, unless the information sought is obtained immediately, their right to a fair trial will be irreparably infringed.'[6] The court noted that a party wishing to obtain information not contained in the police docket from a third party must establish the relevance of the evidence that is sought and that this showing must be done with reference to the issues between the state and the applicant. This 'test' for the release of documents would, in effect, require the applicants to disclose the basis of their defence.[7] This early disclosure of the applicants' defence did not infringe the right to remain silent as the choice as to whether to disclose remained with

[1] Mlambo JA, dissenting, reached the surprising conclusion that the non-disclosure had a minimal impact on the outcome of the trial. For a contrary view, supporting the conclusion of Navsa JA, see *Crossberg* (supra) at paras 153–156 (Ponnan JA, in a separate judgment, rebuts Mlambo JA's conclusion that non-disclosure was immaterial.) See also *Mngomezulu v NDPP* 2008 (1) SACR 105 (SCA); *S v Rozani; Rozani v Director of Public Prosecutions, Western Cape* 2009 (1) SACR 540 (C); *S v Makiti* [1997] 1 All SA 291 (B); *S v Naude* 2005 (2) SACR 218 (W); *S v Mvelasi* 2005 (2) SACR 266 (O).

[2] 2005 (2) SACR 2 (T)('*Bramley Children's Home*').

[3] Ibid at 8i–j.

[4] Ibid at 7f.

[5] FC s 28(2).

[6] *Bramley Children's Home* (supra) at 12a.

[7] Given that the applicants hoped to turn up some prior sexual history, they would also have had to satisfy the relevance requirements of s 227 of the Criminal Procedure Act 51 of 1977. See § 52.8*(d)* infra.

the applicant. The applicant had to accept the consequences of disclosure and non-disclosure.[1]

52.6 Right to adduce and challenge evidence

The right to a fair trial includes the right to adduce and challenge evidence.[2] This right affects both the rules governing the admissibility of evidence and the conduct of presiding officers. Presiding officers must ensure that unrepresented accused are aware of their right to adduce evidence and must assist accused in exercising their right to testify.[3] Ntsebeza AJ, in *S v Ismail* held that a magistrate had been responsible, inter alia, for two gross irregularities: excluding relevant evidence and failing to give the accused an opportunity to address the court on the admissibility of the evidence.[4] In *S v Muller,* the High Court held that the right to a public trial embraces the right to adduce and to challenge evidence: these rights, in turn, encompass the right to address the court on the merits.[5]

(a) Cross-examination

The failure to allow cross-examination will generally be viewed as a serious irregularity that encroaches upon the accused's right to a fair trial.[6] Presiding officers have a duty to advise unrepresented accused of their right to cross-examine and to provide an explanation as to how this procedure should be undertaken.[7]

What are the consequences if an accused is denied the right to cross-examine? The High Court in *S v Nnasolu*[8] held that a magistrate's failure to allow the accused to cross-examine a state witness on a relevant aspect of his testimony constituted both an irregularity at common law and an infringement of the accused's constitutional right to adduce and challenge evidence.[9] While the *Nnasolu* court excluded that part of the evidence that had not been subject to cross-examination, it held that the irregularity had not resulted in a 'failure of justice'. In reaching this conclusion, the court applied the test set out in *S v Msithing*:

> [A] fundamental irregularity which violates an accused's right to a fair trial must result in a failure of justice. If the irregularity is not of a fundamental nature, the focus shifts to what would have happened but for the irregularity. The setting aside of the conviction based on the violation of the right to a fair trial in circumstances of a minor 'tainting' of the proceedings will undermine the 'pressing social need' to prosecute crime.[10]

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[1] See *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC), 2001 (1) SACR 1 (CC). See § 52.4*(b)* supra, for further discussion of the right to remain silent.

[2] FC s 35(3)*(i)*.

[3] *S v Matladi* 2002 (2) SACR 447 (T).

[4] 2006 (1) SACR 593 (C).

[5] 2005 (2) SACR 451 (C).

[6] *S v Heslop* 2007 (1) SACR 461, 473 (SCA). See *S v Mgudu* 2008 (1) SACR 71 (N); *S v Kok* 2005 (2) SACR 240 (NC); *R v Ndawo* 1961 (1) SA 16 (N); *S v Malatji* 1998 (2) SACR 622 (W). See also *S v Manqaba* 2005 (2) SACR 489 (W)(See further discussion at § 52.6 infra).

[7] *S v Ndou* 2006 (2) SACR 497 (T); *S v Tyebela* 1989 (2) SA 22 (A).

[8] 2010 (1) SACR 561 (KZP).

[9] Ibid at paras 16–18.

[10] 2006 (1) SACR 266, 273 (N).

Having set out the above test, the *Nnasolu* court reached the conclusion that the irregularity was not fundamental. This approach creates some uncertainty as to the proper relationship between the 'failure of justice' standard and the 'but for' test. Stewart AJ's reasoning appears to run as follows. Despite the fact that the 'tainted evidence' was integral to the court *a quo*'s reasoning, cross-examination would have made little difference to the weight accorded the evidence. In any event, sufficient evidence had been adduced to sustain a conviction (without the inclusion of the 'tainted evidence'.) The logic of *Nnasolu* suggests that deciding whether or not an irregularity is 'fundamental' is inevitably tied to the 'but for' test. For a presiding officer to disallow cross-examination on evidence that he or she clearly regards as important to the fact-finding process surely constitutes a serious violation of the fair trial right. The only reason that it should not, arguably, result in a failure of justice is because, in retrospect, the cross-examination would have made no difference to the outcome. This approach may well be an appropriate way of ensuring that the criminal justice system is not undermined by unduly technical acquittals. However, it would be misleading to suggest that a bright line divides the two inquiries. Moreover, it strains credulity to contend that the right to a fair trial has not been limited — even if reasonably and justifiably so.

That strain is also evident in the *Nnasolu* court's succinct justification for the exclusion of the tainted evidence: 'In the result, the magistrate's refusal to allow … cross-examination was an irregularity and the evidence elicited by the magistrate with regard to the voice identification must consequently be excluded'.[1] A reader can be forgiven for not tracking the High Court's logic. The voice identification evidence in question did not flow from the magistrate's restriction on cross-examination. This evidence existed prior to the restriction. In reaching its conclusion, the *Nnasolu* court makes no reference to FC s 35(5) or to the common-law discretion to exclude evidence when prejudicial effect exceeds probative value. Nor does the court refer to FC s 38, which might have been invoked as a ground for excluding evidence as a form of 'appropriate relief'. For the sake of doctrinal coherence, it might have been better if the *Nnasolu* court had elected to accord no weight to the evidence rather than excluding it altogether.

(i) *Hearsay*

The effective exercise of the court's truth seeking function in adversarial systems is dependent on the parties' ability to present evidence and to cross-examine witnesses. The right to challenge and to adduce evidence can be fulfilled both by calling witnesses and through cross-examination. However, in *S v Ndhlovu,* the Supreme Court of Appeal held that the right to challenge evidence does not necessarily require the right to cross-examine.[2] In *Ndhlovu,* the Supreme Court of Appeal was required to consider, inter alia, the constitutionality of s 3 of the Law of Evidence Amendment Act.[3] Section 3 governs the admissibility of hearsay

[1] *S v Nnasolu* (supra) at para 18.

[2] *S v Ndhlovu* 2002 (2) SACR 325 (SCA)('*Ndhlovu SCA*'). But see *S v Msimango* 2010 (1) SACR 544 (GSJ).

[3] Act 45 of 1988.

evidence. Section 3(4) defines hearsay as 'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'. It is clear from s 3(1) that the general rule is that hearsay evidence is inadmissible subject to three exceptions: *(a)* where the party against whom the evidence is adduced consents to its admission; *(b)* where the person upon whose credibility the probative value of the evidence depends testifies; and *(c)* where a court is of the opinion that it is in the interests of justice that the hearsay be admitted.

The court in *Ndhlovu* identified the following disadvantages that may accrue as a result of the admission of hearsay evidence. First, it is 'not subject to the reliability checks applied to first-hand testimony' and secondly, 'its reception exposes the party opposing its proof to the procedural unfairness of not being able to counter effectively inferences that may be drawn from it'.[1] Presumably it was on the basis of such potential prejudice that counsel for the accused based the assertion that the accused's constitutional right to challenge evidence was infringed. The court noted that s 3 is primarily an exclusionary rule and that its significant departure from the common law was intended to create 'supple standards within which courts may consider whether the interests of justice warrant the admission of hearsay notwithstanding the procedural and substantive disadvantages its reception might entail'.[2] Cameron JA held that the criteria to be taken into account in applying the interests of justice test were 'consonant with the Constitution'[3] and reiterated the court's reluctance to admit or rely 'on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so'.[4]

Cameron JA set out a number of criteria that presiding officers ought to consider in order to ensure that an accused's fair trial rights are upheld when 'hearsay evidence' is offered. These criteria require judges: *(a)* to actively guard against the inadvertent admission or 'venting' of hearsay evidence;[5] *(b)* to ensure that the significance of the contents of s 3 are properly explained to an unrepresented accused;[6] and *(c)* to protect an accused from 'the late or unheralded admission of hearsay evidence'.[7] These requirements are not to be found in the 1988 Act but rather in the courts' application of the Act.

In *S v Molimi*, the Constitutional Court emphasised the import of the third of these safeguards: the importance of a timeous, clear and unambiguous ruling on admissibility.[8] It stressed that there is no burden on the accused to request clarification from the presiding officer: 'There is no obligation on the defence to assist the prosecution in the execution of its duties and the advancement of its case. If that were so, an unwarranted burden would be imposed on the accused who has to contend with the allegations levelled against him or her. That might

[1] *Ndhlovu SCA* (supra) at para 13. See also *Harksen v Attorney General Cape* 1999 (1) SA 718 (C).
[2] *Ndhlovu SCA* (supra) at para 14. See also *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA).
[3] *Ndhlovu SCA* (supra) at para 16.
[4] Ibid at para 16.
[5] See also *S v Zimmerie* 1989 (3) SA 484, 492 F–H (C); *S v Ramavhale* 1996 (1) SACR 639, 651c (A).
[6] See also *S v Ngwani* 1990 (1) SACR 449 (N).
[7] *Ndhlovu SCA* (supra) at para 18. See also *S v Ralukukwe* 2006 (2) SACR 394 (SCA).
[8] 2008 (3) SA 608 (CC), 2008 (5) BCLR 451 (CC), 2008 (2) SACR 76 (CC), [2008] ZACC 2.

also have the potential of increasing the risk of convictions which are likely not to be in accordance with justice.'[1] Nkabinde J stressed that the failure to pay proper attention to appropriate procedural guards set out in *Ndhlovu* — such as the timeous and unambiguous ruling on the admissibility of evidence — would likely undermine the accused's right to a fair trial and threaten the legitimacy of judicial proceedings.[2]

In *Ndhlovu*, Cameron JA had also underscored the 'rigorous legal framework' created by s 3 and referred to the level of scrutiny to which a decision to admit hearsay evidence is subject.[3] The point is that a decision to admit evidence is not simply an exercise of judicial discretion but a decision of law that can be overruled by an appeal court.[4] The court also noted that the manner in which s 3 regulates the admission of hearsay evidence is 'in keeping with developments in other democratic societies based on human dignity, equality and freedom'.[5] It concluded that the constitutional right to challenge evidence had not been infringed. The crux of the court's reasoning is found in the following passage:

> It has correctly been observed that the admission of hearsay evidence 'by definition denies an accused the right to cross-examine', since the declarant is not in court and cannot be cross-examined. I cannot accept, however, that 'use of hearsay evidence by the State violates the accused's right to challenge evidence by cross-examination', if it is meant that the inability to cross-examine the source of a statement in itself violates the right to 'challenge' evidence. The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of s 36) to 'challenge evidence'. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed. Put differently, where the interests of justice require that the hearsay statement be admitted, the right to 'challenge evidence' does not encompass the right to cross-examine the original declarant.[6]

Although not expressly articulated, Cameron JA's interpretation of the right to challenge evidence rejects a notional approach to the interpretation of rights. Woolman describes this (common, if undesirable) approach as follows: 'an interpretive method which holds that any activity … which could notionally fall within the ambit of a right would be protected'.[7] There can be little doubt that the right to challenge evidence must ordinarily include the right to cross-examine. The admission of hearsay evidence, by virtue of the definition of hearsay, excludes the cross-examination of the person upon whom the probative value depends. Therefore we must assume that the Supreme Court of Appeal eschewed a notional approach and adopted what Woolman describes elsewhere as a value-

[1] *S v Molimi* (supra) at para 40.
[2] Ibid at paras 41-42.
[3] *Ndhlovu SCA* (supra) at para 22.
[4] See *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd* 1997 (1) SA 1, 27E (A).
[5] *Ndhlovu SCA* (supra) at para 23.
[6] Ibid at para 24.
[7] S Woolman '*Beinash v Ernst & Young*: The Right Consistency' (1999) 15 *SAJHR* 166, 173.

based approach to rights interpretation.[1] Had it not done so, the Supreme Court of Appeal would have been forced to engage in the second, justificatory stage of limitations analysis.[2] This reading of *Ndhlovu* — and its value-based approach to rights analysis — is confirmed by the Constitutional Court in *S v Molimi*. Nkabinde J held that the *Ndhlovu* approach 'may be understood as narrowing the ambit of the right to challenge evidence as guaranteed in [FC s 35(3)*(i)*]'.[3] The *Molimi* Court declined to decide whether *Ndhlovu* was, in fact and in law, correct.

In *S v Libazi,*[4] the Supreme Court of Appeal adopted a more generous approach to the interpretation of FC s 35(3)*(i)*. The *Libazi* court had to consider whether the court *a quo* had correctly admitted an extra-curial admission by a co-accused who had implicated the appellant, but who had died prior to trial. It noted that the right to cross-examine is integral to the accused's capacity to assert actively his rights of defence. The court, whilst questioning the correctness of the *Ndhlovu* approach, did not disavow it. Instead Mlambo JA distinguished the two cases on the basis that in *Ndhlovu* the maker of the statement in question had testified but disavowed the content of his 'hearsay' statement, whereas in *Libazi* the maker of the statement was absent (having died). Furthermore, the absent declarant was an accomplice, to which a well-established cautionary rule applied. These two factors would militate against the admission of the statement, even if one adopted the *Ndhlovu* approach.

(ii) *Cross-examination of the child witness*

CPA s 170A permits a court to appoint a person as an intermediary through whom examination, cross-examination and re-examination of a child will take place. In *K v The Regional Court Magistrate NO*, the court rejected the argument that s 170A infringed the right to cross-examine and consequently concluded that there was no necessity to enter into a limitations analysis.[5] This position accords with the view expressed by the South African Law Commission that the use of an intermediary would not inhibit the purpose of cross-examination: '[t]he purpose of "translated" cross-examination is not to weaken intelligent and even sharp cross-examination, but rather to limit aggressiveness and intimidation towards the

[1] See also S Woolman & H Botha 'Limitations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[2] For a more detailed discussion of this case, see PJ Schwikkard 'The Challenge to Hearsay' (2003) 120 *SALJ* 63. Challenges based on the right to adduce and challenge evidence were also rejected by the courts in the following cases: *S v Singo* 2002 (4) SA 858 (CC), 2002 (8) BCLR 793 (CC), 2002 (2) SACR 160 (CC) at para 21 (Held that s 72(4) of the Criminal Procedure Act 51 of 1977 did not infringe the right to adduce and challenge evidence); *S v Dodo* 2001 (1) SACR 301 (E)(The court held that s 51(1) and s 51(3) of the Criminal Law Amendment Act 105 of 1997 (minimum sentencing provisions) affected the weight to be attached to evidence and did not infringe the right to adduce and challenge evidence); *S v Van der Sandt* 1997 (2) SACR 116 (W)(The court rejected an argument that s 212 curtailed the right to cross-examine.)

[3] *Molimi* (supra) at para 47.

[4] 2010 (2) SACR 233 (SCA).

[5] *K v The Regional Court Magistrate NO* 1996 (1) SACR 434 (E).

child witness'.[1] The child witness also has the right to be protected against unfair cross-examination.[2]

The High Court in *S v Mokoena, S v Phaswane* ('*Mokoena*') raised, *mero motu,* concerns about the constitutionality of legislation regulating the testimony of a child witness.[3] Bertelsmann J concluded that ss 153, 158, 164 (read with ss 162 and 163, 192 and 206) and s 170A of the Criminal Procedure Act[4] ('CPA') were, in terms of FC s 28,[5] unconstitutional.[6] In addition to the specific protections afforded children by FC s 28, Bertelsmann J relied upon the Children's Act,[7] international law and the extensive literature on the topic, to arrive at the conclusion that the child victim and child witness were extremely vulnerable and disadvantaged participants in adversarial criminal procedures. Within this hotly contested framework, courts must ensure that children 'are protected from further trauma and are treated with proper respect for their dignity and their unique status as vulnerable young human beings'.[8]

In terms of s 170A of the CPA, a child witness would only receive the protections afforded by the Act — intermediaries — if the court concluded that testifying would cause the witness 'undue stress'. Unfortunately, the phrase had been interpreted in some High Court cases to require something more than the 'ordinary stress' of a young victim in a sexual offence cases.[9] For Bertelsmann J, the requirement of 'undue stress' placed a limitation upon the best interests of the child that was neither rational nor justifiable when weighed up against the legitimate concerns of the accused, the court and the public interest. The child is entitled as of right to a procedure that eliminates as much as possible of the anguish that accompanies the necessity of having to relive the horror of abuse, violation, rape, assault or deprivation that the child experienced when he or she became a victim or witness. To demand an extraordinary measure of stress

[1] For a more detailed discussion of s 170A and decided cases, see E Du Toit et al *Commentary on the Criminal Procedure Act* (2011) 22–30A — 32C; PJ 'Schwikkard 'The Abused Child: A Few Rules of Evidence Considered' (1996) *Acta Juridica* 148. See also *S v Domingo* 2005 (1) SACR 193 (C); *S v Staggie* 2003 (1) SACR 232 (C); PJ Schwikkard & SE van der Merwe *Principles of Evidence* (2009) 381; *S v F* 1999 (1) SACR 571 (C)(Section 158 may be used to allow other vulnerable witnesses to testify via closed circuit television.)

[2] *Tshona & Others v Regional Magistrate, Uitenhage & Another* 2001 (8) BCLR 860 (E). The courts have recognized some limits to the protection afforded to the child witness. See, for example, *S v Manqaba* 2005 (2) SACR 489 (W)(Court held that the presiding officer's refusal to allow cross-examination of the 12 year old rape complainant on the basis of a previous inconsistent statement infringed the accused's fair trial right to adduce and to challenge evidence.) See also *R v Ndawo* 1961 (1) SA 16 (N).

[3] 2008 (5) SA 578 (T), 2008 (2) SACR 216 (T)('*Mokoena*').

[4] Act 51 of 1977.

[5] A Pantazis, A Friedman & A Skelton 'Children's Rights' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS1, July 2009) Chapter 47.

[6] Many of these provisions had already been amended by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[7] Act 38 of 2005 (Section 42(8) 'emphasises that the proceedings of the children's courts should be held in a locality that should be specifically adapted to put children at ease and should be conducive to an informal conduct of proceedings'. *Mokoena* (supra) at para 43.)

[8] *Mokoena* (supra) at para 50.

[9] See *S v Stefaans* 1999 (1) SACR 182 (C); *S v F* 1999 (1) SACR 571 (C).

or anguish before the assistance of an intermediary can be called upon clearly discriminates against the child and is constitutionally untenable.[1]

The High Court concluded that s 170A(1) was unconstitutional in so far as it granted a court a discretion as to whether to appoint an intermediary in respect of child witnesses in criminal proceedings and ordered that the section be read to mandate the appointment of intermediaries.[2]

The High Court's declarations of invalidity were referred to the Constitutional Court for confirmation. In *DPP v Minister of Justice and Constitutional Development,* Ngcobo J rejected the High Court's declarations of invalidity.[3] He held that if '[p]roperly interpreted and applied in the light of FC s 28(2)', s 170A(1) served to protect the best interests of the child complainant.[4] The Constitutional Court held that previous inconsistency in the interpretation and application of s 170A by the High Courts[5] should not lead to a finding of constitutional invalidity.[6] Justice Ngcobo sought, instead, to lay down guidelines for a constitutionally consistent implementation of s 170A. First, the meaning of the phrase 'undue mental stress or suffering' should be interpreted in accordance with the objective of s 170A: 'to protect child complainants from exposure to undue mental stress or suffering when they give evidence in court'.[7] Second, 'it must be accepted that a child complainant in a sexual offence who testifies without the assistance of an intermediary faces a high risk of exposure to undue mental stress or suffering'.[8] Third, a child need not 'first be exposed to undue mental or suffering, before an intermediary may be appointed'.[9] Fourth, it should be standard practice for a child to be assessed prior to testifying in order to determine whether an intermediary ought to be appointed.[10] Fifth, presiding officers have a duty in each case to enquire whether an intermediary should be appointed (including where the prosecution fails to bring an application for an intermediary).[11] Presiding officers, in making this determination must 'apply the best-interests principle by considering how the child's rights and interests are, or will be, affected by allowing the child complainant in a sexual offence case to testify without the aid of an intermediary'.[12] Sixth,

[1] *Mokoena* (supra) at para 79.

[2] Ibid at para 85 (Court ordered that the section should read as follows: 'Subject to subsection(4), whenever criminal proceedings are pending before any court in which any witness under the biological or mental age of eighteen years is to testify, the court shall appoint a competent person as an intermediary for each witness under the biological age of eighteen years in order to enable such witness to give his or her evidence through that intermediary as contemplated in this section, unless there are cogent reasons not to appoint such intermediary, in which event the court shall place such reasons on record before the commencement of proceedings, and the court may appoint a competent person for a witness under the mental age of eighteen years in order to give his or her evidence through that intermediary.')

[3] 2009 (4) SA 222 (CC), 2009 (7) BCLR 637 (CC), 2009 (2) SACR 130 (CC), [2009] ZACC 8 ('*DPP*').

[4] Ibid at para 177.

[5] Ibid at para 81.

[6] Ibid at para 117.

[7] Ibid at para 100.

[8] Ibid at para 109.

[9] Ibid at para 110.

[10] Ibid at para 111.

[11] Ibid at para 112.

[12] Ibid at para 113.

the inquiry into the desirability of appointing an intermediary is not one which[1] attracts a burden of proof: 'It is an enquiry which is conducted on behalf of the interests of a person who is not party to the proceedings but who possesses constitutional rights.'[2] Seventh, the *DPP* Court found that a discretion whether or not to appoint an intermediary was necessary in order to ensure that each child's individual interests were met;[3] in some cases it might be in the child's best interest to directly confront the accused.[4]

Despite creating these constitutionally compliant guidelines for reading CPA s 170A, the Court acknowledged that court proceedings were generally traumatic for a child witness, and that, as a result, the appointment of an intermediary would likely enhance the truth-seeking function of the trial court. The Court's goal in saving s 170A was the creation of an environment 'conducive to a trial that is fair to all'.[5]

Although Bertelsmann J was overturned, his objective — ensuring the appointment of intermediaries in all cases involving child witnesses — might yet be achieved. If properly construed, then the principles enunciated by the Constitutional Court in *DPP* should make it virtually impossible for a court, (particularly in a sexual offence case) to avoid the appointment of an intermediary for a child.[6] However, given the well-entrenched, and somewhat conservative, practices of the bench, the 'best interests of the child' would have been better served if entrenched in amendments to the CPA or in an entirely new piece of legislation.

Section 158(5) of the CPA requires a court to provide reasons for refusing an application for a child complainant to give evidence by means of closed-circuit television, if the child is below the age of 14 years. Section 170A(7) creates an identical obligation when a court refuses an application for the appointment of an intermediary. Bertelsmann J in *Mokoena* held that the discrimination between children above and below the age of 14 was irrationally discriminatory and unconstitutional. Courts, he held, should always provide reasons.

In *DPP v Minister of Justice*, the Constitutional Court found that neither sections precluded the giving of reasons for children over the age of 14. Interpreted in light of the Constitution, the sections required the courts to give reasons no matter the age of the child. The wording of the sections merely emphasised the additional vulnerability of younger children by requiring that reasons be given immediately in respect of the younger group. For children over the age of 14, it was acceptable to give reasons at a later stage or at the end of the case.[7] Again the Constitutional Court appears to have avoided a declaration of unconstitutionality but achieved the same objective as the High Court: reasons for all refusals. But here too, it may be that the normative value — and the practical effect — of constitutional interpretation could be enhanced by legislative amendment.

[1] *DPP* (supra) at para 116. See also P Schwikkard 'The Abused Child: A Few Rules of Evidence Considered' (1996) *Acta Juridica* 148.
[2] *DPP* (supra) at para 114.
[3] Ibid at para 123
[4] Ibid at para 127.
[5] Ibid at para 114.
[6] See *Kerkhoff v Minister of Justice and Constitutional Development* 2011 (2) SACR 109 (GNP).
[7] *DPP* (supra) at para 161.

(iii) *The hostile witness*

At common law, a party may not cross-examine their own witness unless the court has declared the witness hostile. In *Chambers v Mississipi,* the United States Supreme Court questioned the rationale of the rule.[1] Normally, a party who calls a witness vouches for the credibility of that witness. The *Chambers* Court held that, under the circumstances, the rule infringed the accused's right to defend himself. The lack of a coherent rationale for this rule — inherited from English law — makes it difficult to disagree with Van der Merwe's assertion that the rule needs to be reconsidered in the context of the accused's right to a fair trial.[2]

(b) Record of bail application

The right to adduce evidence includes the right to testify, to call witnesses[3] and if necessary to receive assistance in ensuring that defence witnesses are able to attend court.[4] In *S v Aimes,* the court was required to solve the following dilemma: could the record of accused No 1's bail application, which had been unconstitutionally obtained, be adduced by accused No 2.[5] It was clear that the admission of the bail record would render the trial unfair in respect of accused No 1, at the same time that its exclusion would render the trial unfair in respect of accused No 2. No 2's right to adduce evidence would be violated. The court ruled that the bail record of accused No 1 could be admitted for the sole purpose of assisting accused No 2 in his defence, subject to the proviso that it was not admissible against accused No 1.[6]

Bail applications often involve unrepresented accused. The courts have repeatedly held that a duty rests upon a presiding officer to assist the unrepresented accused in exercising his or her right to adduce and to challenge evidence.[7]

However, the reach of trial fairness extends beyond the accused. In *S v Basson,* the Constitutional Court was seized with an appeal against the acquittal of Dr Wouter Basson.[8] One of the issues before the court was the admissibility of the bail record. At the bail proceedings in question, the state had made use of the record of prior proceedings conducted under the Investigation of Serious

[1] 410 US 284 (1973).

[2] Schwikkard & Van der Merwe (supra) at 459. While we believe the rule undesirable, the justification for the rule remains coherent. Witnesses may offer their support in pre-trial depositions and affidavits, and even agree to lend support in open court. However, as both English and American courts have made transparent, a witness may change her story for any number of reasons (ie, intimidation, *animus* or a genuine inability to stand up to cross-examination in the courtroom.)

[3] See *S v Younas* 1996 (2) SACR 272 (C); *S v Gwala* 1989 (4) SA 937 (N).

[4] See *Pennington v Minister of Justice* 1995 (3) BCLR 270 (C). See, generally, N Steytler *Constitutional Criminal Procedure* (1998) 345.

[5] *S v Aimes* 1998 (1) SACR 343 (C).

[6] See also *S v Jeniker (2)* 1993 (2) SACR 464 (C).

[7] See, for example, *S v Simxadi* 1997 (1) SACR 169 (C); *S v Stowitzki* 1995 (2) SA 525 (NmHC); *S v Sishi* [2000] 2 All SA 56 (N), *S v Dyani* 2004 (2) SACR 365 (E); *S v Mungoni* 1997 (2) SACR 366 (V), 1997 (8) BCLR 1083 (V).

[8] 2007 (3) SA 582 (CC), 2005 (12) BCLR 1192 (CC), 2007 (1) SACR 566 (CC), [2005] ZACC 10 ('*Basson*').

Economic Offences Act ('ISEO').[1] In terms of ISEO a witness examined under s 5(6) may not claim the privilege against self-incrimination.[2] However, the section also provides that the record of the examination may not be used in subsequent criminal proceedings against the witness. Dr Basson had been questioned for 39 days under the ISEO, without legal representation. His examiner turned out to be the same person who represented the state in Basson's subsequent bail proceedings.

At trial, prior to pleading, the defence applied for a ruling on the admissibility of the bail proceedings. The trial court found the record of the bail proceedings to be inadmissible. The state appealed against this ruling on two bases: (1) the trial court should not have heard argument on the admissibility of the bail record at such an early stage; and (2) the trial court should not have made a ruling on the inadmissibility of the entire record. The Supreme Court of Appeal declined to deal with the issue on the ground that it arose from matters of fact and did not concern a question of law.

The *Basson* Court held that the SCA had erred. It concluded that the admissibility of the bail record was a constitutional matter.[3] Although CPA s 60(11B)*(c)* stipulates that the record of the bail proceedings should form part of the trial record, the Constitutional Court had previously held in *S v Dlamini*[4] that the trial court retains a discretion to exclude the bail record if its admission would render the trial unfair. Given the Constitutional Court's clear and repeated view that a trial court 'is best placed to determine what will constitute a fair trial or not',[5] the Justices turned their minds to devising a means of evaluating the trial court's exercise of that discretion. It held:

> [T]he test on appeal is not whether the trial Court was correct in the exercise of its discretion to exclude evidence on the grounds that it may render the trial unfair. The question is whether … the lower Court has not exercised its discretion judicially, or been influenced by wrong principles of law or a misdirection on the facts, or reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and legal principles.[6]

After applying this test to the case at hand, the *Basson* Court concluded that no grounds existed to interfere with the exercise of the trial court's discretion either in regard to the timing of argument, or the scope of the ruling.[7] The state had not argued that the exclusion of the bail record had rendered the trial unfair. And as the Court noted: 'An allegation that an interlocutory ruling was wrongly made which may have had a material impact on the outcome of a case is not sufficient to demonstrate that the trial was unfair'.[8] The nature of the interlocutory proceedings meant that the ruling 'could have been revisited at any point during the

[1] Act 117 of 1991.
[2] Section 5(8).
[3] *Basson* (supra) at para 12.
[4] 1999 (4) SA 623 (CC), 1999 (7) BCLR (CC), 1999 (2) SACR 51 (CC), [1999] ZACC 8.
[5] *Basson* (supra) at para 109.
[6] Ibid at para 117.
[7] Ibid at para 119.
[8] Ibid at para 120.

trial'.[1] One striking theme running through the *Basson* Court's deliberations is the acceptance of the proposition that in determining the admissibility of evidence, considerations of trial fairness apply *both* to the accused *and the prosecution*.[2]

(c) State privilege

State privilege allows a government to assert that information in its possession is privileged from disclosure in court on the basis that it would be against the public interest to disclose such information. The question that then arises is whether a court can override the claim of state privilege in the interests of justice.

At common law, *Duncan v Cammel Laird* was taken as authority for the proposition that the executive had the final say in state privilege cases and that the courts had no power to override a clear assertion of privilege by an appropriate executive official.[3] Post-1961, the English courts departed from this position whilst the South African courts remained bound by *Duncan*. However, 1967 marked a decisive shift. In *Van der Linde v Calitz*[4] the Appellate Division chose to follow the Privy Council in *Robinson v State of South Australia (No 2)*[5] rather than the House of Lords in *Duncan*. The Appellate Division held that the court had the final say as to whether state privilege should be upheld. However, it left open the question as to whether the court also possessed such power with respect to issues of national security. Section 29 of the General Law Amendment Act answered this question. It ousted the courts' jurisdiction in respect of a claim of state privilege pertaining to state security. This ouster clause was incorporated into s 66 of the Internal Security Act.[6] After the repeal of the Internal Security Act in 1996, the common law was reinstated. It must now, however, be interpreted in light of the Final Constitution.

FC s 35(3)'s right to adduce evidence is not the only provision that will influence the interpretation of the common law of evidence regarding state privilege. FC s 165 vests judicial authority in the courts and enables the courts to determine their own rules. FC s 32(1) provides that everyone has the right to access any information held by the state. FC s 34 ensures access to courts and a fair hearing.

[1] *Basson* (supra) at para 121.

[2] Ibid at para 113 ('When a trial court assesses the question whether the admission of evidence would render the trial unfair, it has to consider a range of factors: the nature of the evidence in question, and how much of it is of advantage to the parties; the need to be fair not only to the accused but also to the prosecution, in the interests of the broader community; the need to ensure that a trial can run efficiently and reasonably quickly; and the reasons underlying the fact that the admission of the evidence may render the trial unfair. These are complex factors which may well pull in different directions. If the evidence is wrongly admitted and the trial is rendered unfair, the accused will clearly have a right to raise that on appeal and the question for an appeal court will be whether the trial was unfair. The more difficult question arises, as in this case, where the evidence is excluded on the basis that its admission may render the trial unfair. An assessment of whether the evidence would have rendered the trial unfair is inevitably hypothetical and difficult to assess in the relatively rarefied atmosphere of an appellate court. It is indeed a matter which the trial court is best placed to judge.')

[3] [1942] 1 All ER 587 (HL).

[4] 1967 (2) SA 239 (A).

[5] 1931 AC 704.

[6] Act 74 of 1982.

Joffe J, in *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*, held that in light of the Final Constitution the following approach should be taken in dealing with a claim of state privilege:

1. The Court is not bound by the *ipse dixit* of any cabinet minister or bureaucrat irrespective of whether the objection is taken to a class of documents or a specific document and irrespective of whether it relates to matters of State security, military operations, diplomatic relations, economic affairs, cabinet meetings or any other matter affecting the public interest.
2. The Court is entitled to scrutinise the evidence in order to determine the strength of the public interest affected and the extent to which the interests of justice to a litigant might be harmed by its non-disclosure.
3. The Court has to balance the extent to which it is necessary to disclose the evidence for the purpose of doing justice against the public interest in its non-disclosure.
4. In this regard the onus should be on the State to show why it is necessary for the information to remain hidden.
5. In a proper case that Court should call for oral evidence, in camera where necessary, and should permit cross-examination of any witnesses or probe the validity of the objection itself.[1]

The above five principles track those first formulated by Zeffertt, Paizes and Skeen who add a sixth principle:

> [T]he onus borne by the state is widely regarded as being a heavy one which is not discharged by vague appeals to considerations of candour or emotive reliance on such things as 'national security' and 'diplomatic relations' (or both), but requires the state to show (i) the *likelihood* (as opposed to the possibility) of *particular* (as opposed to generic) injury; and (ii) that this injury is greater than that which would be caused to the interests of justice by non-disclosure.[2]

Finally, Van der Merwe suggests that after a court has inspected a document in private, then it should, in certain circumstances, be permitted to grant partial disclosure in order to best accommodate the competing interests of the parties.[3]

(d) Informer's privilege

The informer's privilege can be viewed as a form of state privilege. In terms of this privilege, no question may be asked and no document may be received in evidence that would tend to reveal the identity of an informer or the content of the information supplied by him. The court must ensure that this privilege is upheld regardless of whether the parties to the litigation seek to enforce it.

In *Ex parte Minister of Justice: In re Pillay,* the court held that the informer's privilege might be relaxed where: *(a)* it was in the interests of justice; *(b)* where it was necessary to show the accused's innocence; and *(c)* where there was no

[1] 1999 (2) SA 279, 343–344 (T).

[2] DT Zeffertt, A Paizes & A Skeen *The South African Law of Evidence* (2003) 655; See also D Zeffertt 'Evidence' (1996) *Annual Survey of South African Law* 803, 813.

[3] Schwikkard & Van der Merwe (supra) at 164. See also *Independent Newspapers (Pty) Ltd v Minister for Intelligence Service: In re Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC), 2008 (8) BCLR 771 (CC), [2008] ZACC 6 (While the Court did not deal directly with state privilege as a rule of evidence, the judgment fully explores the right to open justice.)

reason for secrecy — say, where everybody knows who the informer is.[1] The constitutionality of this privilege was considered in *Els v Minister of Safety and Security*.[2] The applicant said that he was entitled to the documents in terms of his constitutional right to access to information. The court found that there was an infringement of the accused's constitutional right of access to information but that it was justifiable. In reaching this conclusion the court took the following factors into consideration: *(a)* the person who gave the information was an informer who had been used over a number of years and had given information that had led to successful prosecutions; *(b)* the informer gave the information in confidence; *(c)* confidentiality was essential to the police-informer relationship; *(d)* it would be against public interest to expose informers to claims for damages; *(e)* the police rely heavily on informers; *(f)* the police had taken adequate steps to ensure that the informer was reliable; *(g)* disclosing the informer's identity would have far-reaching effects and would be against the public interest in that informers are essential in the battle against organised crime; *(h)* there was nothing to suggest that the informer was mendacious or malicious; *(i)* the applicant's interest in claiming damages was outweighed by the public interest in keeping the informer's identity secret. Van der Merwe is of the opinion that the informer's privilege *per se* is not unconstitutional but that the constitutional right to a fair trial must be considered when deciding whether and when the privilege must yield to constitutional dictates.[3]

(e) Interpretation

The right to adduce and challenge evidence requires compliance with FC s 35(3)*(k)*, which vouchsafes the right 'to be tried in a language that the accused person understands, or, if that is not practicable to have the proceedings interpreted in that language'.[4]

In *S v Manzini*, Tshiqi J stressed the importance of competent interpretation in ensuring the fairness of a trial.[5] He lamented the 'alarming[ly] poor performance by the interpreter'[6] and concluded that the appellant's constitutional right to a fair trial had been breached as a result. In setting aside the sentence and conviction the court explained:

> A presiding officer … relies on the interpreter to interpret correctly what is being said by a witness. If what is being conveyed to the presiding officer is incorrect, then the presiding officer may not be in a position to make correct findings on contradictions and credibility of witnesses. This would in turn affect the reliability and the evaluation of the evidence of the

[1] 1945 AD 653. See also *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W); *S v Du Toit* 2005 (1) SACR 47 (T)(The court refused to grant an order prohibiting the publication of the name of a state witness on the basis that in the circumstances the potential infringement of trial fairness and press freedom outweighed the interests of the witness.)

[2] 1998 (2) SACR 93 (NC). See also *Swanepoel v Minister van Veiligheid en Sekuriteit* 1999 (2) SACR 284 (T).

[3] See Schwikkard & Van der Merwe (supra) at 169–170.

[4] For more on FC s 35(3)*(k)*, see F Snyckers & J Le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 51.5(l).

[5] 2007 (2) SACR 107 (W).

[6] Ibid at 108.

> witnesses as a whole. The respective legal representatives, who may not be conversant with the language of the witness, will also not be in a position to conduct proper examination of the witnesses, and may in the end make incorrect submissions to the court.[1]

Binns-Ward AJ raised a similar concern in *S v Mponda*.[2] Inadequate interpretation had resulted in the poor translation of the accused's evidence into English. Moreover, the evidence adduced against the accused had not been satisfactorily translated into 'a language with which he was sufficiently conversant'.[3] This failure to provide adequate interpretation infringed the accused's right to a fair trial in terms of s 35(3)*(k)*.[4]

The courts' concern with the quality and the regulation of interpretation was reiterated in *S v Saidi*.[5] Yekiso J noted that s 6(2) of the Magistrates' Courts Act[6] gave effect to FC s 35(3)(*k*)[7] by providing that if 'evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant', the court must appoint an interpreter to translate for the accused.[8] This proviso applies irrespective of the language in which the evidence is proferred, and independent of whether the accused's lawyer understands the language in which the evidence is offered. The Magistrates' Court Rules attempt to ensure an appropriate level of interpretation by requiring both permanent and casual interpreters to take an oath that they will interpret 'truly and correctly' and to the best of their ability.[9] Endorsing the approach of Binns-Ward AJ in *Mponda*, Yekiso J held that a presiding officer should be satisfied that the appointed interpreter has the appropriate expertise, which could be established through questioning, before he or she is sworn in. The record of the court *a quo* did not reflect any enquiry into the linguistic competency of the interpreter and, in one instance, it remained unclear as to whether the interpreter had been sworn in at all. Yekiso J held that the accused's testimony, as translated by an unsworn interpreter, had the status of unsworn testimony and was consequently inadmissible. This deprived the accused

[1] *S v Manzini* (supra) at 109.

[2] 2007 (2) SACR 245 (C).

[3] Ibid at para 17.

[4] The court also stressed the importance of ad hoc interpreters being properly sworn in. Ibid at para 34 ('[W]hen the services of an ad hoc interpreter are used in trial proceedings it is essential that the presiding officer formally satisfy him- or herself as to the relevant expertise of the interpreter. This would ordinarily be done by swearing in the interpreter in open court during the proceedings and by appropriately questioning the interpreter to establish his or her linguistic competence before the interpreter commences with the function of interpreting any evidence.') See also *S v Naidoo* 1962 (2) SA 625 (A).

[5] 2007 (2) SACR 637 (C).

[6] Act 32 of 1944.

[7] Although the reported judgment refers to subsection (*c*), it is clearly subsection (*k*) that the court intended to invoke.

[8] Magistrates' Court Act s 6(2) reads: '[i]f, in a criminal case, evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, irrespective of whether the language in which the evidence is given, is one of the official languages or whether the representative of the accused is conversant with the language used in the evidence or not.'

[9] Magistrates' Court Rule 68(1).

of his constitutional right to adduce and challenge evidence and violated his right to a fair trial.[1]

S v Mbezi represents how extremely deleterious an accused's inability to understand the proceedings can be with respect to her ability to secure a fair trial.[2] During the trial, the presiding magistrate realized that that the accused could neither hear nor understand the proceedings. The accused, who had severely impaired hearing, could neither lip-read nor understand sign language. Despite reasonable attempts by the court *a quo* to comply with s 35(3)*(k)* of the Constitution, the accused remained unable to understand the proceedings. This conundrum, Dlodlo J held, meant that it was not possible for the accused to have a fair trial. There was no choice but to conclude that a failure of justice had occurred.[3]

52.7 Equality and dignity

The common law contains a number of rules of evidence that curtail the ability of children and women to give evidence. The invidious distinctions between women and men lack a rational basis and, for the most part, ought to be found constitutionally infirm. The Criminal Law (Sexual Offences and Related Matters) Amendment Act[4] ('Sexual Offences Act') addresses most of these iniquities through significant and much needed changes to the rules of evidence applied in sexual offence cases.

(a) Cautionary rule: Complainants in sexual offence cases

The iniquities of the cautionary rule applicable to complainants in sexual offence cases have been well documented and are, consequently, not repeated here.[5] This rule was soundly rejected by the Supreme Court of Appeal in *S v Jackson*. The *Jackson* court held that the common-law cautionary approach to complainants in sexual offence cases was irrational and had no place in our law.[6] The court in *Jackson* made it clear that the only instance in which the testimony of a complainant or any witness could be treated with caution was when there was an evidentiary basis for doing so.[7] It was this qualification that led the Law Commission to conclude that *Jackson* was capable of being interpreted so as to retain the cautionary rule in respect of some sexual offence cases 'because of the nature of the case'.[8] At the time that the Law Commission report was published, this concern about

[1] *Saidi* (supra) at para 21.

[2] 2010 (2) SACR 169 (WCC).

[3] The court ordered that the proceedings be started *de novo* at the discretion of the Director of Public Prosecutions, 'provided that the apparent disability of the accused 1 be taken care of'. Ibid at para 12.

[4] Act 32 of 2007.

[5] See South African Law Commission, Project 107 *Sexual Offences Discussion Paper* (2002) at paras 31.2.4.5–31.2.4.10; S Jagwanth & PJ Schwikkard 'An Unconstitutional Cautionary Rule' 1998 (11) *SACJ* 87; D Symthe & B Pithey (eds) *Sexual Offences Commentary Act 32 of 2007* (2011) 23–25.

[6] 1998 (1) SACR 470, 476 (SCA). See also *S v Zuma* 2006 (2) SACR 191, 212 (W).

[7] See also *S v Mponda* 2007 (2) SACR 245 (C); *S v Cornick* 2007 (2) SACR 115 (SCA); *S v M* 2006 (1) SACR 135 (SCA) (Cameron JA, dissenting) at paras 271–273; *S v Gentle* 2005 (1) SACR 420 (SCA).

[8] South African Law Commission, Project 107, *Sexual Offences Report* (2002) 472 at para 31.2.4.7. Cf *S v Zuma* 2006 (7) BCLR 790, 856 (W).

the exception to the new rule might have been easily dismissed. However, subsequent applications of *Jackson* by the High Courts appear to have proved the Law Commission right. For example, in *S v Van der Ross*, Thring J clearly found that the sexual 'nature of the offence' was a matter over and above the single witness status of the complainant and that this single witness status still required the court to take a doubly cautious approach.[1] Any ambiguity that could have been read into *Jackson* has, hopefully, been eliminated by the Sexual Offences Act. Section 60 of the Act provides that '[n]otwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.'

(b) Children

Given the body of literature that indicates that children are able to give reliable evidence,[2] the cautionary rule applicable to the evidence of children is certainly susceptible to constitutional scrutiny. The abolition of the cautionary rule applicable to children was recommended by the Law Commission in its *Sexual Offences Report*.[3] However, this recommendation does not seem to have found favour with the legislature and is not reflected in the Sexual Offences Act. A possible explanation for the legislature's silence in this regard is that it would not necessarily make sense to abolish the cautionary rule *only* in respect of children testifying in sexual offence cases. This anomaly could be avoided by providing for appropriate amendments to the Criminal Procedure Act[4] and the Civil Proceedings Evidence Act.[5]

Getting rid of the cautionary rule applicable to children's evidence is by no means a novel idea. In England, the cautionary rule applicable to children's evidence was abrogated by s 34(2) of the Criminal Justice Act of 1988. The Supreme Court of Canada has also rejected the notion that children's testimony is inherently unreliable and consequently needs to be treated with special care.[6]

In line with this international trend, a number of recent cases show a promising shift in the manner in which the cautionary rule is applied to children. In *S v MG,* the defence challenged the court *a quo's* findings on credibility on the basis that it had failed to pay sufficient attention to the cautionary rule applicable to a single, child witness.[7] Jones J did not appear to take the age or the single status of the witness, on its own, as cause for diminishing the credibility of the witness. Instead, he took care to sift through the evidence in order to establish the absence or the

[1] *S v Van der Ross* 2002 (2) SACR 362, 365 (C).
[2] See J Spencer & R Flin *The Evidence of Children: The Law and Psychology* (1993). See also PJ Schwikkard 'The Abused Child: A Few Rules of Evidence Considered' (1996) *Acta Juridica* 148.
[3] *SALC Sexual Offences Report* (supra) at para 5.2.3.
[4] Act 51 of 1977.
[5] Act 25 of 1965.
[6] *R v W (R)* (1992) 74 CCC (3d) 134. See also *S v B (G)* (1990) 56 CCC (3d) 200.
[7] 2010 (2) SACR 66 (ECG).

presence of a factual basis for taking a cautionary approach. He summarised his approach as follows:

> It is therefore necessary to examine the quality of the evidence of the single child witness in this case, in the light of the background facts, the inherent probabilities, and her merits and demerits as a witness. What are the weaknesses in the State case? What are the reasons, if any, for the need to apply a cautionary rule to the facts and circumstances of this case?[1]

In South African law, age is not the determining factor in deciding whether a child is competent to testify. Under the Criminal Procedure Act, children will be competent to testify if they can appreciate the duty to tell the truth.[2] The obvious consequence of this state of the law is that presiding officers must inquire as to whether children understand what it means to tell the truth. No similar test is applied to convicted perjurers or to other persons convicted of crimes involving an element of dishonesty. Truth and the duty to tell the truth are abstract notions that a young child might not be able to understand or explain. However, the rarefied nature of such abstractions does not mean that children cannot give a reliable account of relevant events.

Adults are presumed to be competent witnesses and the party alleging incompetence bears the onus of proof.[3] In testing the competence of an adult there may be two inquiries: (i) the witness's ability to understand the nature of the oath; and (ii) the witness's ability to communicate.[4] Where adults do not understand the nature of the oath, they may give unsworn evidence after being admonished to tell the truth.[5] The purpose of administering the oath or admonishing a witness to tell the truth is primarily to encourage the witness to tell the truth.[6] However, in assessing credibility, the court will place little weight, if any, on the fact that a witness took the oath or was admonished to tell the truth. The ability to reason morally does not mean that a person will behave morally. The court, in assessing credibility, will look to such factors as coherence under cross-examination, evidence of surrounding circumstances and demeanour. The fact that a child cannot understand or articulate its understanding of the duty to tell the truth does not necessarily hinder the court in its assessment of credibility. The second leg of the competence inquiry is far more important. Clearly, a child who cannot communicate and who is unable to give an understandable coherent account of the relevant events will be of little assistance to the court. On the other hand, a child who does not understand the duty to speak the truth but who is able to give an accurate account of relevant events will be of great assistance.

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[1] *S v MG* (supra) at para 9. See also *S v MN* 2010 (2) SACR 225 (KZP)(Similar, although less explicit, approach was taken to the cautionary rule.) Cf *S v Hanekom* 2011 (1) SACR 430 (WCC).

[2] Criminal Procedure Act 51 of 1977 s 164 ('CPA')('Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.')

[3] See CPA s 192 and s 42 of the Civil Proceedings Evidence Act 25 of 1965.

[4] *R v Ranikolo* 1954 (3) SA 255 (O). See *Stephen's Digest of the Law of Evidence* (12th Edition, 1946); *Wigmore on Evidence* (Vol II, 3rd Edition) 506, 596.

[5] Section 41 of the Civil Proceedings Evidence Act 25 of 1965, CPA s 164.

[6] *S v Munn* 1973 (3) SA 734 (NC).

But does the court need to test a child's ability to communicate prior to the child testifying? Wigmore, recognising the difficulties and futility of assessing a child's credibility prior to the child giving evidence, wrote that 'it must be concluded that the sensible way is to put the child upon the stand and let it tell its story for what it may seem worth.'[1] Over a two decades ago in England, the Pigot Committee concluded that the requisite inquiry into the child's ability to tell the truth:

> … appears to be founded upon the archaic belief that children below a certain age or level of understanding are either too senseless or too morally delinquent to be worth listening to at all. It follows that we believe the competence requirement which is applied to potential child witnesses should be dispensed with and that it should not be replaced.[2]

The English legislation was consequently amended to make the sole criterion for competence the ability to communicate with the court.[3]

In the United States, the Federal Rules of Evidence do not distinguish between children and adults, and consequently a child can testify without a preliminary testing of competency.[4] Similarly, in *S v Katoo* Jafta, AJA (as he then was) held that one way of determining the competency of a 16-year-old 'imbecile' would be to allow the child to testify so that the court could form its own opinion on the witness' ability to provide reliable testimony.[5]

Provided the accused is afforded the opportunity of challenging the evidence of a child witness, it is difficult to see how the abandonment of the competence test could in any way infringe the accused's right to a fair trial. In addition, the requirement that a judge must be satisfied that a child understands the duty to speak the truth before the child is considered a competent witness 'singles out some of society's most vulnerable members for treatment that effectively deprives them of the protection and the vindication of the criminal justice system'.[6] Birch notes that 'child abuse occurs in part because of the inequalities between child and adult in size, knowledge and power' and that these inequalities 'have been institutionalised by one-sided rules of evidence'.[7] The abandonment of the 'competency test' will increase the potential for successful prosecutions and will act as a buttress for a child's constitutional right to security and freedom from abuse.

Consistent with foreign jurisprudence, the South African Law Reform Commission's *Sexual Offences Report* recommended that the ability to communicate be the sole criterion for determining competence.[8] Once again, this recommendation did not find favour with the legislature.

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[1] Wigmore (supra) at 509, 601.

[2] *Report of the Advisory Group on Video Recorded Evidence* (1989).

[3] In England and Wales the applicable legislative provisions are to be found in s 53 of the Youth Justice and Criminal Evidence Act 1999.

[4] See, generally, L McGough *Child Witnesses* (1994) 98.

[5] 2005 (1) SACR 522, 528a–b (SCA).

[6] A Harvison Young 'Child Sexual Abuse and the Law of Evidence: Some Current Canadian Issues' (1992) 11 *Canadian Journal of Family Law* 11, 19.

[7] D Birch 'Children's Evidence' (1992) *Criminal Law Review* 262, 269.

[8] SALRC *Sexual Offences Report* (supra) at para 4.3.4.

In *S v Mokoena; S v Phaswane*[1] the High Court declared that the proviso to s 164(1) was unconstitutional and invalid. This result would have made the ability to communicate with the court the sole criteria for competency in respect of children and would have brought South African law into line with other Anglo-American jurisdictions.[2]

Unfortunately, when the Constitutional Court decided the appeal in *DPP v Minister of Justice and Constitutional Development*, it found the proviso necessary in order to ensure the accused's right to a fair trial.[3] It reached this conclusion without reference to international law or foreign practice. However, the damage wrought by *DPP* can be contained if one accepts the proposition that the failure to admonish a child to tell the truth in terms of the proviso in s 164(1) would only render a trail unfair where non-compliance would result in a substantive failure of justice.[4] This gloss on *DPP* would be one way of promoting the values embedded in FC s 28 without undermining the accused's right to a fair trial.

A closely related question is when should criminal proceedings involving children — whether as accused or as witnesses — be held behind closed doors? The CPA distinguishes between sexual offences and other offences. For sexual offences, s 153(3) permits the complainant (or her parent or guardian) to request that the proceedings be held in camera. Under s 153(3A), when a child testifies in a sexual offence case, the public *must* be excluded. For non-sexual cases, CPA s 153(5) confers a discretion on the court to hold the trial in camera if one of the witnesses is a child, while s 153(4) requires that the trial must be held in camera where the accused is a child.

The High Court in *Mokoena* found that there was no rational justification to distinguish between child witnesses and accused children, particularly in relation to sexual offences.[5] For witnesses, the court has a discretion as to whether or not to hold the proceedings in camera. The court has no discretion in respect of a child accused. The Constitutional Court in *DPP* again disagreed. Ngcobo J (as he then was) held that the child witness and child accused were not similarly situated because a witness would only be in court while she was testifying whereas an accused was required to be present throughout the proceedings. The rational basis for distinguishing between the two categories of children was the amount of time each spent in the courtroom. Ngcobo J argued that the discretion to permit child witnesses to testify in open court was necessary in order to protect the important principle of open justice.[6]

[1] 2008 (2) SACR 216 (T)('*Mokoena*').

[2] See PJ Schwikkard 'The Abused Child: A Few Rules of Evidence Considered' in R Keightly (ed) *Children's Rights* (1996) 148.

[3] 2009 (4) SA 222 (CC), 2009 (2) SACR 130 (CC), 2009 (7) BCLR 637 (CC), [2009] ZACC 8 ('*DPP*') at paras 165–167.

[4] See *S v Motaung* 2007 (1) SACR 476 (SE); cf *S v Swartz* 2009 (1) SCR 452 (C).

[5] *Mokoena* (supra) at para 108.

[6] *DPP* (supra) at para 146.

(c) Previous consistent statements

At common law, the general rule is that previous consistent statements are considered irrelevant and are therefore inadmissible. One exception to this rule applies to a prior consistent statement made by a complainant in a sexual offence case. The effect of this rule is that if the complainant does not make a report as soon as reasonably possible after the alleged incident, the court can draw a negative inference about her credibility. Even prior to the enactment of the Sexual Offences Act in 2007, some cases expressly acknowledged that no necessary correlation obtains between late reporting and unreliability.[1] However, the approach of our courts has not been uniform.[2] Fortunately, the Sexual Offences Act appears to have acknowledged the strong body of social science evidence that indicates that victims of sexual offences may postpone reporting the offence for a considerable period. Section 58 of the Act provides that a previous consistent statement made by the complainant in a sexual offence case will be admissible and that the court 'may not draw any inference only from the absence of such previous consistent statement'.[3] Section 59 of the Act prohibits the court from drawing an inference from a delay in reporting the offence.[4]

The prohibition on drawing an inference from the absence of a previous consistent statement appears to be a non-sequitur. For the rule to make any sense there would always have to have been a previous consistent statement made in a court of law. However, a previous consistent statement also refers to a statement made out of court that is similar to the statement made by the witness in court. For the matter to have come to court the complainant must have told somebody about the incident. The issue in each instance is not whether (or where) a previous consistent statement was made — but when it was made. Section 59 of the Act may well have the desired effect of making High Court evaluations of delays both consistent and fair to the alleged victim of a sexual assault.[5]

The same effect might have been achieved by simply retaining the general exception that applies to all types of case and allows previous consistent statements to be admitted when there is an allegation of recent fabrication. This approach was adopted by the Canadian legislature.[6] Indeed, it can be argued that if previous consistent statements are irrelevant in relation to other categories of offence, it

[1] See, for example, *Holtzhauzen v Roodt* 1997 (4) SA 766 (W); *S v Cornick* 2007 (2) SACR 115 (SCA).

[2] See, for example, *S v Van der Ross* 2002 (2) SACR 362 (C); *S v Zuma* 2006 (2) SACR 191 (W); *S v Naude* 2005 (2) SACR 218 (W).

[3] Sexual Offences Act s 58 reads: 'Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous consistent statements.'

[4] Sexual Offences Act s 59 reads: 'In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.'

[5] Compare the approach taken in *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) and *S v M* 1999 (1) SACR 664 (C) with *S v De Villiers* 1999 (1) SACR 297 (O); *S v Van der Ross* 2002 (2) SACR 362 (C) and *S v Naude* 2005 (2) SACR 218 (W). Unfortunately, as matters currently stand in 2013, the positive effect of s 59 on the conduct of sexual offense cases by our trial courts appears to be rather limited: see *S v Dyira* 2010 (1) SACR 78 (ECG); *S v Leve* 2011 (1) SACR 87 (ECG).

[6] Section 275 of the Canadian Criminal Code.

is difficult to see why they should be relevant in sexual offence cases. Conversely, another way of ameliorating the different and discriminatory application of the rules of evidence to complainants in sexual offence cases is to narrow the common-law restriction on the admission of previous consistent statements in all cases. Singh argues that the Law Commission did not go far enough in this regard and would have done better to follow the approach adopted in the United Kingdom.[1] Section 120(7) of the United Kingdom's Criminal Justice Act 2003 permits all first reports provided they are made 'as soon as could reasonably be expected' to be admitted into evidence, not only to show consistency but also as evidence of their content.

The difficulty with the UK's approach is this: if we allow all previous consistent statements to be admitted as evidence, there is a high risk of the courts being subjected to a great deal of irrelevant evidence. On the other hand, as soon as the admissibility of first reports is restricted to those made 'as soon as reasonably expected', complainants in sexual offence cases are prejudiced. The social science evidence indicates that there can be no 'reasonable expectation' in respect of the time of reporting a sexual offence. In this respect, the Law Commission proposals as reflected in the Act are to be preferred.

However, Singh's argument extends to the *use* of previous consistent statements. He favours the recent change in English law which allows a previous consistent statement to be admitted as evidence of its *contents*. And this is really the nub of the issue. If the sole purpose of admitting the previous consistent statement was to show consistency,[2] then the common law recent fabrication rule would be sufficient. It would have the advantage of circumventing the requirements that the statement be made 'as soon as reasonably expected'. The English approach has merit if it is accepted that an immediate report makes it more likely that the complainant's allegations are true. The *difficulty* that then arises is that presiding officers, who have previously drawn negative inferences from the failure to report, must now conclude that although an early report makes the allegation more likely to be true, the late reporting in sexual offences does not make the allegations less likely to be true. Given the limited probative value of a previous consistent statements, it may indeed be prudent to interpret s 58 as going no further than permitting previous consistent statements to be admitted to establish consistency.

(d) Character of the complainant in sexual offence cases

In all criminal cases where the complainant testifies he or she may be cross-examined, and the cross-examiner may ask questions that are pertinent to exposing the witness's credibility or lack thereof. However, the character or disposition of the complainant is not relevant to credibility. Consequently, evidence which is solely directed at establishing that the complainant has a bad character is prohibited, as is evidence of good character. Nevertheless, in a few exceptional categories of cases

[1] K Singh 'Evaluating the "First Report": The Persistent Problem of Evidence and Distrust of the Complainant in the Adjudication of Sexual Offences' (2006) 19 *SACJ* 37.

[2] See, for example, *S v Gentle* 2005 (1) SACR 420 (SCA) at para 19.

the complainant's character is viewed as relevant. One of these exceptions is the character of the complainant in sexual offence cases.

There is a common-law rule that, in a case involving a charge of rape or indecent assault, the accused may adduce evidence as to the complainant's bad reputation for lack of chastity. Prior to 1989,[1] CPA s 227 provided that in sexual offence cases the admissibility of evidence as to the 'character of any woman' would be determined by the application of the common law. In terms of the common law the defence could question the complainant as to her previous sexual relations with the accused.[2] The accused was prohibited from leading evidence of the complainant's sexual relations with other men.[3] However, the complainant could be questioned on this aspect of her private life in cross-examination because it was considered relevant to credibility. Evidence to contradict any denials could be led only if such evidence was relevant to consent.[4] The South African Law Commission in 1985 noted that, in practice, the application of CPA s 227 resulted in few (if any) restrictions being placed on the admissibility of sexual history evidence.[5] In accordance with the recommendation of the Law Commission, CPA s 227 was amended.[6] In terms of the amendment both cross-examination and the leading of evidence on the prior sexual history of the complainant was prohibited except on application to court. Leave to cross-examine or to adduce such evidence would only be granted subsequent to a demonstration of relevance.

Prior to the amendments to CPA s 227 in 1989, the common-law provision had been criticised on a number of grounds: *(a)* whilst cross-examination concerning prior sexual history traumatised and humiliated the victim, the evidence it elicited was irrelevant and at most established a general propensity to have sexual intercourse; *(b)* evidence of this nature is held to be inadmissible in other cases and there are no grounds for admitting it where the case is of a sexual nature; *(c)* the possibility of such cross-examination deterred victims from reporting the offence. The reforms introduced by the 1989 amendment to CPA s 227 did not escape criticism. The objections were simple: the very purpose for which the amendments were enacted was undermined by the discretion conferred on judicial officers.[7] The same judicial officers who in the past failed to exercise their discretion to

[1] The Criminal Law and Criminal Procedure Act Amendment Act 39 of 1989 introduced significant amendments to s 227.

[2] *R v Riley* 1987 18 QBD 481. As this type of evidence was always considered relevant to the issue, evidence could be adduced to contradict a denial.

[3] *R v Adamstein* 1937 CPD 331.

[4] *R v Cockcroft* 1870 11 Cox CC 410; *R v Cargill* 1913 2 KB 271.

[5] Project 45 *Report on Women and Sexual Offences* (1985) 48.

[6] By s 2 of the Criminal Law and Criminal Procedure Amendment Act 39 of 1989.

[7] See J Temkin 'Sexual History Evidence' (1993) *Criminal Law Review* 3. Temkin identifies one of the major problems underlying the relevance test, namely, that relevance is an insufficiently objective criterion. She refers to the following apt description by L'Heureux-Dubé J in *R v Seaboyer; R v Gayme* [1991] 2 SCR 577, 83 DLR (4th) 193:

> Regardless of the definition used, the content of any relevancy decision will be filled by the particular judge's experience, common sense and/or logic … There are certain areas of enquiry where experience, common sense and logic are informed by the stereotype and myth … This area of the law [sexual history evidence] has been particularly prone to the utilization of stereotypes in determinations of relevance.

exclude irrelevant previous sexual history evidence were now asked to exercise the very same discretion, albeit preceded by an application held *in camera*. Indeed, in *S v M,* the Supreme Court of Appeal noted that 'the members of this Court are not aware of any instance where s 227(2) has been applied in this country. It seems likely that it is more honoured in the breach that in the observance'.[1] It had been thought that one way of addressing this ongoing problem would be to specify criteria for relevance. The Law Commission, in its *Sexual Offences Report*, had recommended a set of appropriate criteria endorsed by the Supreme Court of Appeal in *S v M*. These recommendations have, subsequently, been enacted as legislation. The Sexual Offences Act amends CPA s 227 so as to provide that the following criteria are taken into account in determining relevance:

> … whether such evidence or questioning —
> *(a)* is in the interests of justice, with due regard to the accused's right to a fair trial;
> *(b)* is in the interests of society in encouraging the reporting of sexual offences;
> *(c)* relates to a specific instance of sexual activity relevant to a fact in issue;
> *(d)* is likely to rebut evidence previously adduced by the prosecution;
> *(e)* is fundamental to the accused's defence;
> *(f)* is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or
> *(g)* is likely to explain the presence of semen or the source of pregnancy or disease or injury to the complainant, where it is relevant to a fact in issue.[2]

The amendment also stipulates that an application to lead or to cross-examine on prior sexual history will not be permitted if the purpose of such evidence is to support an inference that the complainant — '*(a)* is more likely to have consented to the offence being tried; or *(b)* is less worthy of belief.'[3] The court is required to give reasons for granting or refusing the application.[4]

The trial court clearly still retains some discretion. That such discretion persists creates the danger that, in the absence of judicial training, old practices will endure. However, the requirement that reasons be given for allowing such evidence should ensure that presiding officers at least apply their minds to the relevance of the evidence. The discretion which requires that the court must be satisfied that the accused's right to a fair trial is not compromised was no doubt in part shaped by the decision of the Canadian Supreme Court in *R v Seaboyer; R v Gayme*.[5] *In Seaboyer*, the Canadian Supreme Court struck down the so-called 'rape shield' provision in s 276 of the Criminal Code on the basis that its application would permit the exclusion of evidence relevant to the accused's defence.

[1] 2002 (2) SACR 411 (SCA) at para 17. See also *S v Zuma* 2006 (2) SACR 191 (W)(Section 227 was expressly applied.) For further discussion, see PJ Schwikkard *Juta's Quarterly Review* 'Evidence' (2006) 2. See also *Prinsloo v Bramley Children's Home* 2005 (2) SACR 2 (T); *S v Katoo* 2005 (1) SACR 522 (SCA).

[2] CPA s 227(5).

[3] CPA s 227(6)

[4] CPA s 227(7).

[5] [1991] 2 SCR 577, 7 CR (4th) 117, 66 CCC (3d) 321.

52.8 Rule 31 of the Constitutional Court rules[1]

Rule 31(1) of the Constitutional Court rules[2] provides that any party to any proceedings before the court, and an *amicus curiae* properly admitted by the court, shall be entitled, in documents lodged in terms of the rules of the Constitutional Court, to canvass factual material which is relevant to the determination of the issues and which does not appear on the record.[3] The proviso, however, is that such facts must be either common cause or otherwise incontrovertible,[4] or of an official, scientific, technical or statistical nature, capable of easy verification.[5] In terms of rule 31(2) all other parties are entitled to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Constitutional Court.[6]

Rule 31 should be understood in the context of the distinction drawn between 'adjudicative' and 'legislative facts'. This distinction, recognised by the Constitutional Court in *S v Lawrence*[7] was first elucidated by Kenneth Culp Davis.[8] He explained the distinction as follows:

> When a court or an agency finds facts concerning the immediate parties — who did what, where, when, how, and with what motive and intent — the court or agency is performing an adjudicative function, and the facts so determined are conveniently called adjudicative facts. When a court or an agency develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation, and the facts which inform the tribunal's legislative judgment are called legislative facts. Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses. Legislative facts are those which help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take. Legislative facts are ordinarily general and do not concern the immediate parties. In the great mass of cases decided by courts and by agencies, the legislative element is either absent, unimportant, or interstitial, because in most cases the applicable law and policy have been previously established. But

[1] See, generally, PJ Schwikkard & SE van der Merwe *Principles of Evidence* (3rd Edition, 2009) 493-497.

[2] Government Notice R1675 in *GG* 25726 of 31 October 2003.

[3] On evidence and amicus curiae, see G Budlender 'Amicus Curiae' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 8. On relevant rules and procedures of court regarding the admission of evidence, see K Hofmeyr 'Rules and Procedures in Constitutional Matters' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 5. See also K Hofmeyr & N Ferreira 'Rules and Procedures in Constitutional Matters' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS6, forthcoming) Chapter 5.

[4] Constitutional Court Rule 31(1)*(a)*.

[5] Constitutional Court Rule 31(1)*(b)*.

[6] Rule 31, contains the same provisions as rule 34 of the Constitutional Court rules under the Interim Constitution. Government Notice, No 16204, 6 January 1995 and rule 30 as set out in Government Notice, No 575, 29 May 1998.

[7] *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC), 1997 (2) SACR 540 (CC), [1997] ZACC 11 ('*S v Lawrence*'). In drawing the distinction between legislative and adjudicative facts the court held that the question of who bears the burden of proof is less important when dealing with legislative facts than when adjudicative facts are in issue.

[8] K Davis 'An Approach to Problems of Evidence in the Administrative Process' (1942) 55 *Harvard LR* 364.

> whenever a tribunal is engaged in the creation of law or of policy, it may need to resort to legislative facts, whether or not those facts have been developed on the record … The exceedingly practical difference between legislative and adjudicative facts is that, apart from facts properly noticed, the tribunal's finding of adjudicative facts must be supported by evidence, but finding or assumptions of legislative facts need not, frequently are not, and sometimes cannot be supported by evidence.[1]

Rule 31 cannot be relied upon by the parties in respect of facts which are essentially 'adjudicative'. In respect of these facts, the parties are bound by the evidence on the record and the normal common-law and statutory rules which govern judicial notice. But for purposes of 'legislative facts', the parties may go beyond the record of the case by relying on rule 31. Judicial notice of legislative facts might be necessary when the court must decide upon the constitutional validity of a statute or a common-law rule 'upon grounds of policy, and the policy is thought to hinge upon social, economic, political or scientific facts'.[2]

Rule 31 allows for the submission of evidence similar to that found in American 'Brandeis briefs'. Peter Hogg offers the following support for the 'Brandeis brief':

> There are two justifications for the Brandeis brief. The first is the pragmatic one that the Brandeis brief may be the only practicable way to inform the court of the full range of professional opinion on a particular point of social science. It is true that expert opinion evidence could be adduced, but on many topics no one expert or group of experts could easily canvass the entire range of professional opinion within the limits of the law of evidence, and especially the hearsay rule. Moreover, any attempt to do so by conventional sworn testimony, subject to cross-examination, would be extremely time-consuming and expensive … The second justification for the Brandeis brief is more principled and more conclusive. The nature of judicial review is such that it is not necessary to prove legislative facts as strictly as adjudicative facts. While a court must reach a definitive conclusion on the adjudicative facts which are relevant to the disposition of litigation, the court need not be so definite in respect of legislative facts in constitutional court cases. The most that the court can ask in respect of legislative facts is whether there is a rational basis for the legislative judgment that the facts exist.[3]

The Constitutional Court has on several occasions referred to and relied upon so-called discussion documents submitted by the parties.[4] One useful example appears in *S v Lawrence*. In *Lawrence,* the Court was required to determine the constitutionality of certain provisions of the Liquor Act. The appeal was subject to the provisions of the Interim Constitution and the appellants conceded that

[1] K Davis 'Judicial Notice' (1955) 55 *Columbia LR* 945, 952. See also K Davis *Administrative Law Treatise* (Vol 3, 2nd Edition, 1980) § 15.2.

[2] EW Clearly (ed) *McCormick on Evidence* (2nd Edition, 1984) § 328.

[3] P Hogg 'Proof of Facts in Constitutional Cases' (1976) 26 *University of Toronto Law Journal* 387, 396.

[4] See, for example, *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC), [1995] ZACC 3; *Shabalala v Attorney-General of the Transvaal* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC), 1995 (2) SACR 761 (CC); S *v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC), 1996 (1) SACR 94 (CC), [1995] ZACC 14; *Ferreira v Levin NO; Vryenhoek v Powell* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC), [1995] ZACC 13; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC), [2000] ZACC 17; *Prince v President, Cape Law Society* 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC), [2000] ZACC 28. Cf *S v Katamba* 2000 (1) SACR 162 (NmS)(O'Linn AJA expressed some disquiet at the extension of the boundaries of judicial notice.)

the magistrate had correctly convicted them. Their sole defence was that the provisions in terms of which they had been convicted were unconstitutional.

No evidence relevant to the constitutionality of the provisions in issue was contained in the appeal record. After the noting of the appeal to the Constitutional Court, the representatives of the appellants and the Attorney-General agreed that 'expert affidavits' would be lodged by the appellants, the Attorney-General being entitled to lodge answering affidavits, and the appellants could then lodge replying affidavits.

Expert affidavits were lodged by the appellants, the Attorney-General and the Minister of Trade and Industry. In addition, appellants' counsel at the hearing tendered numerous extracts from publications purportedly relied upon by one of the appellants' experts. No accompanying affidavit by the expert offered an explanation as to why the extracts had not been dealt with in his affidavit. Counsel for the Attorney-General and counsel for the Minister of Trade and Industry objected to the admission of these extracts as well as the 'expert affidavits' lodged by the appellants on the basis that they exceeded the ambit of rule 34 of the (interim) Constitutional Court rules. In response the appellants made an application in which it was contended that the affidavits were admissible in terms of rule 19[1] and rule 34. Alternatively, the appellants requested that the Court exercise its general power under rule 35 to condone non-compliance with its provisions.

The *Lawrence* Court rejected the appellants' submission that the general rule, permitting new evidence on appeal only in exceptional circumstances, did not apply to an appeal based on a constitutional question falling exclusively within the jurisdiction of the Constitutional Court. Chaskalson P (as he then was) held that nothing had prohibited the appellants from placing the evidence on record at the time of their trial: they could also have taken the opportunity of tendering such evidence when appealing to the High Court.[2]

The *Lawrence* Court also dismissed the appellants' contention that rule 19 of the (interim) Constitutional Court rules (regulating the procedure to be followed in appeals in which leave to appeal is required) permitted parties to supplement the trial record with new evidence. It held that rule 19 'prescribes a procedure for circumscribing the record and not a means for introducing new evidence on appeal'.[3] In the absence of an express provision in rule 19 facilitating the introduction of new evidence, an interpretation of the rule which required all eleven judges of the Constitutional Court to hear disputed evidence could not be justified. The Court held that the circumstances of the cases did not justify the exercise of its powers in terms of rule 33 to admit new evidence and that only

[1] Rule 19 of the interim rules is virtually identical with rule 20 of the current rules. For more on the new Constitutional Court rules, and which rules supplant the old rules, see K Hofmeyr 'Rules and Procedures in Constitutional Matters' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 5.

[2] See also *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), (2000) 1 BCLR 39 (CC), [1999] ZACC 17; *Parbhoo v Getz NO* 1997 (4) SA 1095 (CC), 1997 (10) BCLR 1337 (CC), [1997] ZACC 9. Cf *Prince v President of the Law Society of the Cape of Good Hope* 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC), 2001 (1) SACR 217 (CC), [2000] ZACC 28.

[3] *S v Lawrence* (supra) at para 19.

those portions of the new evidence that fell within the parameters of rule 34 would be admitted.

In drawing the distinction between legislative and adjudicative facts, the *Lawrence* Court held that the question of who bears the burden of proof is less important when dealing with legislative facts than when adjudicative facts are in issue. The *Lawrence* Court then proceeded to take judicial notice of the legislative fact that:

> [E]xcessive consumption of liquor is universally regarded as a social evil. It is linked to crime, disturbance of the public order, impairment of road safety, damage to health, and has other deleterious social and economic consequences.[1]

The appellants, who objected to the restrictions imposed by the Liquor Act on hours during which the holder of a grocer's wine licence may sell table wine, argued that restricted hours do not reduce alcohol-related problems and that such restrictions were therefore irrational. In support of this contention, the appellants submitted an affidavit of an expert witness referring to studies undertaken in other countries. The Minister of Trade and Industry relied on the affidavit of a different expert witness who disputed the correctness of this proposition. The *Lawrence* Court held that it was inappropriate in the circumstances for the court to prefer one expert above the other. Chaskalson P held that:

> The expert evidence was not placed before the Court in a proper form and the attempt to cure the defect by tendering unverified extracts from publications on which the expert is said to have relied is unacceptable. The proposition relied upon by the appellants is, moreover, not 'common cause or otherwise incontrovertible' nor does it depend on 'official, scientific, technical or statistical' material that is capable of 'easy verification'. In any event the conflict is not decisive of the case. The question to be decided is not whether the policy underlying the Liquor Act is an effective policy; it is whether there is a rational basis for such policy related to the purpose of the legislation.[2]

The *Lawrence* Court did accept evidence contained in another of the appellants' expert affidavits to the effect that the control of the availability of alcohol is a recognised means of combating the adverse effects of alcohol. That the same expert disputed the efficacy of such measures was not relevant. The Court was required to determine whether there was a rational basis for the policy related to the purpose of the legislation, not the efficacy of the policy.

In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* O'Regan J held that evidence sought to be introduced in terms of rule 31 was inadmissible since it was 'all put in issue by the respondent …[and] therefore [had] to be excluded on that basis alone'.[3] In short, if the evidence sought to be adduced under rule 31 is controvertible, then it is inadmissible.[4] Even if the evidence is incontrovertible, its

[1] *S v Lawrence* (supra) at para 54.

[2] Ibid at para 68. See also *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC), [2002] ZACC 1 ('*Prince II*').

[3] 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC), [2004] ZACC 20 at para 38.

[4] *In re Certain Amicus Curiae Applications: Minister of Health v Treatment Action Campaign* 2002 (5) SA 713 (CC), 2002 (10) BLCR 1023 (CC), [2002] ZACC 13; *Mabaso v Law Society, Northern Provinces* 2005 (2) SA 117 (CC), 2005 (2) BCLR 129 (CC), [2004] ZACC 8 at para 45; *Prince II* (supra) at para 11.

admissibility depends on the nature and the substance of the dispute.[1] The facts canvassed in the evidence must be relevant to the dispute.[2]

The Constitutional Court's approach to Rule 16A of the Uniform Rules of Court is also noteworthy. Rule 16A deals with *amici curiae* and permits them to make 'submissions'. A two-judge bench of the High Court had held that amici curiae could not introduce new evidence. In *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp & Others,* the Constitutional Court overruled this finding.[3] Courts of first instance, it held, should consider all available evidence: 'They should not knowingly leave relevant evidence that could have been received by them to be adduced at the appellate level.'[4] The *Children's Institute* Court concluded that 'submissions' should be interpreted to include evidence.

52.9 Privacy and privilege

(a) Professions

The legal recognition of a privilege attaching to communications between categories of people inevitably creates two conflicting social goods: (1) a polity's interest in preserving and in promoting certain relationships; and (2) the interest of the legal system (and others responsible for the administration of justice) in ensuring that all relevant evidence is before the court. Historically, preference has been given to the latter interest. Consequently, professional privilege pertains only to the lawyer-client relationship and is not enjoyed (at least to the same degree) by other professional relationships.[5] Bankers possess a limited privilege: they need not produce their books unless ordered to do so by the court.[6] Conversely, while privilege is generally not accorded to a doctor-patient relationship,[7] any statement made by an accused during court-mandated observation by a health care professional for mental observation will be inadmissible in criminal proceedings 'except to the extent to which it may be relevant to the determination' of her 'mental condition'.[8]

Priests, insurers and accountants do not enjoy any professional privilege. Journalists too can be compelled to disclose the sources of their information.[9]

[1] *Prince II* (supra) at para 10.

[2] *S v Shaik* 2008 (2) SA 208 (CC), 2007 (12) BCLR 1360 (CC), 2008 (1) SACR 1 (CC), 2008 (1) SACR 1 (CC), [2007] ZACC 19 at para 19; *Prince II* (supra) at para 11.

[3] [2012] ZACC 25.

[4] Ibid at para 29.

[5] See, for example, *Trust Sentrum (Kaapstad) (Edms) Bpk v Zevenburg* 1989 (1) SA 145 (C); *Howe v Mabuya* 1961 (2) SA 635 (D); *Chantrey Martin v Martin* 1953(2) All ER 691.

[6] CPA s 236(4); Civil Proceedings Evidence Act 25 of 1965 ('CPEA') s 31 .

[7] *Botha v Botha* 1972 (2) SA 559 (N); *Davis v Additional Magistrate, Johannesburg* 1989 4 SA 299 (W).

[8] See CPA ss 77, 78 and 79 and, especially, s 79(7).

[9] *S v Pogrund* 1961 (3) SA 868 (T); *S v Cornelissen; Cornelissen v Zeelie NO* 1994 (2) SACR 41 (W)(Court, whilst holding that no legally recognized privilege gave journalists immunity from testifying, found that under the circumstances the journalist had a just excuse for not testifying.) See also *Munusamy v Hefer NO* 2004 (5) SA 112 (O)(High Court held that *Cornelissen* should not be interpreted as authority for the view that journalists have the right to be called only as witnesses of the last resort.) For more on the protection afforded journalists and other members of the media under FC s 16, the freedom of expression, see D Milo, G Pennfold & A Stein 'Freedom of Expression' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 42.

However, it would appear that some relief is available to these professionals if they can establish that they have a 'just excuse' for not testifying.[1]

Despite the limited scope of professionally-based privilege at common law, some professional communications may be protected from disclosure by the constitutional right to privacy. FC 14*(d)* provides that everyone has the right not to have the privacy of their communications infringed. A communication between doctor and patient may well be regarded as a personal and private communication. Where the state seeks to compel disclosure of such a communication, either party might assert that a privilege attaches to their relationship in terms of FC s 14. However, that prima facie recognition of privilege may, of course, be overcome if the state is able to establish that a law of general application reasonably and justifiably limits the alleged privilege (in terms of FC s 36).

A constitutional recognition of privilege grounded in the right to privacy would not necessarily constitute a radical departure from the common law as has been understood in other jurisdictions. For example, the putative FC s 14-based privilege could be squared with Wigmore's preconditions for the recognition of a privilege:[2]

(1) the communication must originate in a confidence that it will not be disclosed;
(2) the element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
(3) the relationship must be one that in the opinion of the community ought to be sedulously fostered;
(4) the injury that would inure to the relationship by the disclosure of the communication must be greater than the benefit gained through the correct disposal of the litigation.[3]

(b) Spouses

Spouses are entitled to refuse to disclose communications from the other spouse that were made during the marriage.[4] Despite the general decline of personal privacy due to public and private surveillance, and the intrusion of social media into the previously private domain, this privilege remains intact because the public opinion still finds the revelation of intimate exchanges unacceptable and would be outraged if spouses could be forced by the courts to disclose communications received from each other.[5]

The only pre-requisites for the existence of the privilege is that the communication must have been made whilst the spouses were married. The

[1] See *Cornelissen* (supra).

[2] Wigmore (supra) at para 2285.

[3] C Tapper *Cross & Tapper on Evidence* (10th Edition, 2004) 494. See *S v Makhaye* 2007 (1) SACR 369 (N)(Court suggested that if these conditions were met, then a privilege between confessant and spiritual adviser might arise.) Cf *S v Mshumpa* 2008 (1) SACR 126 (E); *Smit v Van Niekerk NO* 1976 (4) SA 292 (A); *S v B* 1980 (2) SA 946 (A). See also *S v Bierman* 2002 (5) SA 243 (CC), 2002 (10) BCLR 1078 (CC), [2002] ZACC 7 (Court left the question open.)

[4] See CPA s 198 and CPEA s 10. A marriage encompasses indigenous law marriages as well as a marriages concluded under any system of religious law. See CPA s 195(2) and CPEA s 10A.

[5] DT Zeffert, A Paizes & A Skeen *The South African Law of Evidence* (2003) 619.

privilege persists after divorce with regard to communications made whilst the couple were still married.[1]

In terms of CPA s 199, each spouse may refuse to answer a question that the other spouse could not have been compelled to answer.[2] However, should the spouse who received the communication wish to disclose it, the other spouse can do nothing to prevent such disclosure: the marital privilege can only be claimed by the spouse to whom the communication was made. The traditionally accepted view is that a third person who hears or intercepts the communication cannot be prevented from disclosing it.[3] This common-law approach may well be challenged on the basis that it infringes the constitutional right to privacy.[4] Indeed, the very loss of private space generally may warrant the expansion of this privilege — especially as it pertains to third parties.

Some commentators may argue that little justification exists for favouring the privacy of marital relationships above other personal or professional relationships. But rather than diminishing the scope of the marital privilege, this contention actually cuts the other way: it suggests that the privilege ought to be extended to persons with whom one shares equally intimate, and integral, aspects of one's life.

It may be true that this common-law privilege originated in a conception of marriage that is no longer shared by the vast majority of us or was originally designed to protect the interest of one spouse (the husband) rather than some idyll of marital bliss. And it is certainly interesting to note that a majority of the Australian High Court has recently found insufficient authority for the existence of the privilege at common law.[5] But whether we should more vigourously defend such private spaces or let all our intimate relationships attrite in the face of ever greater public and private impositions on the self is a matter that our highest courts will invariably be asked to address in due course. Our Constitution invites this very debate.

(c) Parents and children

Section 192 of the CPA (read together with CPA s 206) makes it clear that parents/guardians can be compelled to testify against their children/wards, and vice versa. Our courts do not recognize a privilege pertaining to communications between parent and child. In terms of CPA s 73(3), even when parents participate in and support their child in criminal proceedings against the child, the law offers the parents no sanctuary from prosecutors who might wish the parents to offer testimony that incriminates their progeny.

But surely one might ask whether sound public policy militates against forcing parents to testify against their children. In *S v M,* the Appellate Division held that CPA s 73(1) and 73(2), read together, conferred a right upon a child to be assisted

[1] See CPA s 198(2) and CPEA s 10(2). However, widows or widowers cannot claim the privilege.

[2] Zeffertt, Paizes & Skeen (supra) at 620 ('It has been suggested that the privilege not to answer questions which tend to incriminate the other spouse must be regarded as excluded by implication in those cases in which one spouse is a compellable witness in a prosecution against the other.')

[3] See *Rumping v DPP* 1962 (3) All ER 256.

[4] FC s 14. See, generally, *S v Hammer* 1994 (2) SACR 496 (C).

[5] *Australian Crime Commission v Stoddart* [2011] HCA 47.

by a parent or guardian from the time of the child's arrest, in the same manner as an adult would be entitled to the assistance of a legal adviser[1] If parental assistance is equivalent to the assistance of a legal adviser, then it follows that parent-child communications in this context should be afforded the same privilege as communications between a legal adviser and a client.

However, even where a parent does not appear to assist the child in legal proceedings, constitutional grounds for holding that communications between parent and child should be privileged may still exist. In the United States, the courts have recognized that confidential communications between children and their parents, guardians or other caretakers are privileged from disclosure on the basis of the constitutional right to privacy.[2] When read together with the right to family or parental care in FC s28(1)*(b)*, FC s 14 is surely susceptible to a similar interpretation.[3]

52.10 Unconstitutionally obtained evidence

(a) Scope of discretion and rationale

FC s 35(5) provides a remedy for constitutional breach to arrested, detained and accused persons at the trial stage of criminal proceedings with respect to unconstitutionally obtained evidence. However, this remedy for a constitutional breach[4] is not restricted to arrested, detained and accused persons alone.[5] Moreover, the rationale underlying the rule is far broader than that of providing a remedy for any single aggrieved individual. The rule is seen as playing an integral role in ensuring constitutional and judicial integrity in the criminal justice system as a whole. It is designed to promote a rule of law culture and overall constitutional compliance by the police, the prosecutorial services and other law enforcement agencies.[6] FC s 35(5) provides that '[e]vidence obtained in a manner that violates

[1] 1993 (2) SACR 487 (A). See also *S v Manuel* 1997 (2) SACR 505 (C)(Court stressed the importance of parental assistance); *S v N* 1997 (1) SACR 84 (TkSC).

[2] *In re A & M* 61 AD 2d 426, 403 NYS 2d 375 (1978); *People v Fitzgerald* 101 Misc 2d 712, 422 NYS 2d 309.

[3] See Neil Van Dokkum 'Unwelcome Assistance: Parents Testifying Against Their Children' (1994) 7 *SACJ* 213. Article 2(21) of the African National Congress' draft Bill of Rights gave recognition to parent-child privilege. See also *S v Hammer* 1994 (2) SACR 496 (C)(An 18-year-old accused, whilst in police custody, after receiving permission to write a letter to his mother, asked a member of the South African Police Services to deliver the letter to his mother. The policeman, instead of delivering the letter, read it and handed it over to the prosecution. Although the court did not base its decision on the constitutional right to privacy, it found the evidence to be inadmissible because it had been improperly obtained. The court found that the policeman had, in all probability, committed an *injuria* against the accused, that he had acted unlawfully and immorally in reading and handing the letter over to the Attorney-General, and that this action constituted a serious and deliberate breach of the accused's common-law right to privacy. The court further concluded that the unfairly obtained evidence had to be excluded because to admit it would bring the administration of justice into disrepute.)

[4] For a more extensive discussion of remedies, see M Bishop 'Remedies' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

[5] See for example, *S v Mark* 2001 (1) SACR 572 (C)(Exclusion was sought on the basis that the witnesses' constitutional rights had been violated.) See also SE van der Merwe 'Unconstitutionally Obtained Evidence' in PJ Schwikkard & SE Van der Merwe *Principles of Evidence* (3rd Edition 2009) 221.

[6] See DT Zeffertt, A Paizes & A Skeen *The South African Law of Evidence* (2003) 625–630; Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 182 (Offers detailed discussion of the history and the rationale of the rule.)

any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice'.

The Interim Constitution did not contain an express exclusionary rule. However, the courts under the Interim Constitution developed an exclusionary rule either through reliance on their common-law discretion to exclude evidence[1] or by invoking s 7(4) of the Interim Constitution, which provided for 'appropriate relief'.[2] The 'exclusionary jurisprudence' developed during this period remains influential in the interpretation and application of FC s 35(5).

Once it has been established that a right in the Bill of Rights was unjustifiably infringed[3] in obtaining the evidence in question, then a court must exclude the evidence if its admission would: *(a)* render the trial unfair; or *(b)* otherwise be detrimental to the administration of justice. To admit evidence that would render the trial unfair will always be detrimental to the interests of justice. However, if admission would not render the trial unfair, its admission might nevertheless be detrimental to the interests of justice. The section is peremptory in so far as it directs the court to exclude evidence once the court has determined that admission would render the trial unfair or otherwise be detrimental to the administration of justice.[4] The court must exercise a value judgement in ascertaining whether either of these two conditions for exclusion exists: it is in this sense that the section is discretionary.[5]

A pre-requisite for exercising such discretion is the establishment of a link between the violation of the right and the procurement of the evidence. This issue has received relatively little attention from South African courts. It would appear that a generous approach is favoured in terms of which evidence obtained subsequent to the breach will be viewed as being obtained as a result of the breach — unless the accused has had an opportunity to re-assert his rights and thereby breaks the chain of events.[6] In order for the evidence to fall within the scope of FC s 35(5), it makes no difference whether the evidence was procured by the state or a private person. As long as the state seeks to use it,[7] then FC s 35(5) holds that

[1] See, for example, *S v Motloutsi* 1996 (1) SACR 78 (C); *S v Mayekiso* 1996 (2) SACR 298 (C); *S v Hammer* 1994 (2) SACR 496 (C).

[2] See, for example, *S v Melani* 1995 (2) SACR 141 (E); *S v Melani* 1996 (1) SACR 335 (E).

[3] Where evidence is not obtained in violation of the Bill of Rights, but it is nevertheless determined that its admission would render the trial unfair, then such evidence should be excluded by virtue of the court's common-law discretion to exclude improperly obtained evidence. See *S v Kidson* 1999 (1) SACR 338 (W); *S v Mansoor* 2002 (1) SACR 629 (W); *S v Hena* 2006 (2) SACR 33 (SE)(Plasket J held that a non-Chapter 2 breach compounded a Chapter 2 breach.) See also Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 203.

[4] See *S v Soci* 1998 (2) SACR 275, 394 (E). See also Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 201; N Steytler *Constitutional Criminal Procedure* (1998) 36.

[5] See *Pillay & Others v S* 2004 (2) BCLR 158 (SCA); *S v Lottering* 1999 (12) BCLR 1478 (N). See also Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 214; N Steytler *Constitutional Criminal Procedure* (1998) 36.

[6] See *S v Soci* 1998 (2) SACR 275, 293g–294d (E). See also Zeffertt, Paizes & Skeen (supra) at 638; Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 220.

[7] See *S v Dube* 2000 (1) SACR 53 (N); *S v Hena* 2006 (2) SACR 33 (SE). Cf *S v Mansoor* 2002 (1) SACR 629 (W). See also Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 223.

it was obtained as a consequence of a constitutional violation.[1] In the absence of a constitutional breach, the evidence may still be excluded in terms of the court's common-law discretion to exclude evidence improperly obtained.[2]

(b) When will the admission of evidence render a trial unfair?

If the admission of evidence would be unfair to the prosecution, should it be excluded on that ground alone? It is clearly the accused's constitutional right to a fair trial which is sought to be protected by FC s 35 as a whole and consequently it would be consistent to interpret FC s 35(5) as being primarily concerned with protecting the accused's right to a fair trial.[3] However, fairness to the prosecution may well be a factor to be taken into account in determining whether the admission of evidence would 'otherwise be detrimental to the administration of justice'.[4] Exclusion of evidence that would result in substantial unfairness to the prosecution may well be detrimental to the administration of justice.[5]

The broad formulation of the right to a fair trial in *S v Zuma*[6] and *S v Dzukuda; S v Tshilo*[7] provides the grounds for arguing that even if one of the discrete sub-rights enumerated in FC s 35(3) as a component of the right to a fair trial is infringed, the admission of evidence procured as a result of such an infringement will not necessarily render the trial unfair. Although it can be argued that this approach requires a high degree of agility in separating two inquiries — namely *(a)* has a fair trial right been breached and *(b)* will admission of the evidence obtained as a result of the fair trial breach render the trial unfair — the courts have clearly shown themselves capable of meeting this challenge.[8] Consequently, if the breach of a recognised fair trial right is neither deliberate nor flagrant, and despite the violation the 'police conduct was objectively reasonable having regard to the facts of the case,'[9] the admission of evidence might not render the trial unfair.[10]

In determining whether the admission of evidence will render a trial unfair, the court will take into account a complex matrix of competing and complimentary

[1] See *S v M* 2002 (2) SACR 411 (SCA).

[2] See, for example, *S v Mthethwa* 2004 (1) SACR 449 (E)(The court exercised its common-law discretion to exclude evidence obtained in breach of the Judges Rules on the basis that it would render the trial unfair and bring the administration of justice into disrepute.)

[3] See Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 229.

[4] Cf *S v Madiba* 1998 (1) BCLR 38 (D). See Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 229 (Van der Merwe seems to suggest that unfairness to the prosecution is a factor that can be taken into account in determining trial fairness vis-à-vis the accused.)

[5] See *S v Basson* 2007 (3) SA 582 (CC), 2005 (12) BCLR 1192 (CC), 2007 (1) SACR 566 (CC), [2005] ZACC 10 at para 113 (The court's approach reflects an acceptance that in determining the admissibility of evidence considerations of trial fairness apply both to the accused and the prosecution.)

[6] 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC), [1995] ZACC 1.

[7] 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC), 2000 (2) SACR 443 (CC), [2000] ZACC 16. See also § 52.2 supra.

[8] *See S v Lottering* 1999 (12) BCLR 1478 (N); *S v Madiba* 1998 (1) BCLR 38 (D); *Key v Attorney-General, Cape Provincial Division* 1996 (4) SA 187 (CC), 1996 (6) BCLR 788 (CC), 1996 (2) SACR 113 (CC), [1996] ZACC 25; *S v M* 2002 (2) SACR 411 (SCA); *S v Ngcobo* 1998 (10) BCLR 1248 (N). Cf *S v Naidoo* 1998 (1) SACR 479 (N).

[9] Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 229.

[10] See, for example, *S v Lottering* 1999 (12) BCLR 1478 (N).

factors. The court must take into account competing societal interests. In *Lawrie v Muir,* Lord Cooper expressed the conflict as follows:

> From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict — *(a)* the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and *(b)* the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical ground.[1]

Other factors the court will take into account include: the type and degree of breach;[2] the type and the degree of prejudice to the accused — if any;[3] and public policy.[4]

Partially due to the distinction made between testimonial or communicative acts and non-testimonial conduct resulting in the production of real evidence,[5] and the fact that real evidence inevitably exists irrespective of the constitutional breach, a court is less likely to find that the admission of real evidence will undermine trial fairness.[6] However, the courts are likely to be more cautious in admitting real evidence discovered as a result of a testimonial communication following a breach of the privilege against self-incrimination. In *S v Pillay* the Supreme Court of Appeal, *obiter*, appears to have approved the approach taken by the Canadian Supreme Court in *Burlingham v The Queen.*[7] In *Burlingham,* the court wrote: 'evidence derived (real or derived) from conscriptive evidence, ie self-incriminating evidence obtained through a violation of a Charter right, will be excluded on grounds of unfairness if it is found that but for the conscriptive evidence the derivative evidence would not have been discovered'.[8] The Supreme Court of Appeal, finding that the real evidence had been discovered as a consequence of an infringement of the accused's right to privacy (and not in breach of a fair trial right), held that the admission of the impugned evidence would not render the trial unfair.[9] Despite the speed of the discovery, the court excluded the real evidence on the basis that its admission would be detrimental to the administration of justice.

In *S v Tandwa*[10] the accused identified, in court, money and an AK47. The court accepted that the pointing out had been made as a consequence of various acts of

[1] *Lawrie v Muir* 1950 SC (J) 19, 26–27. See, for example, *S v Soci* 1998 (2) SACR 275 (E).

[2] *S v Seseane* 2000 (2) SACR 225 (O). See, for example, *S v Lottering* 1999 (12) BCLR 1478, 1483D–E (N)(The court held that a flagrant and deliberate violation of a constitutional right must inevitably result in exclusion.) See also *S v Mphala* 1998 (1) SACR 388 (W).

[3] *S v Soci* 1998 (2) SACR 275 (E); *S v Lottering* 1999 (12) BCLR 1478 (N).

[4] Ibid.

[5] See § 52.4*(c)*(iii) supra. Section 218 of the Criminal Procedure Act 51 of 1977 provides for the admission of real evidence discovered as a consequence of an inadmissible admission or confession. However, it remains subject to FC s 35(5).

[6] See D Zeffert, A Paizes & A Skeen *The South African Law of Evidence* (2003) 639–641; Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 238. See, for example, *S v Mkhize* 1999 (2) SACR 632 (W); *S v R* 2000 (1) SACR 33 (W); *S v M* 2002 (2) SACR 411 (SCA).

[7] *Burlingham v The Queen* (1995) 28 CRR (2d) 244.

[8] 2004 (2) SACR 419 (SCA) at para 89.

[9] Ibid at para 90.

[10] 2008 (1) SACR 613 (SCA), [2007] ZASCA 34.

police brutality directed at the accused. The trial judge, whilst excluding statements accompanying the pointing out, admitted the real evidence. He reasoned that it would be detrimental to the administration of justice to exclude the real evidence as it had been obtained independently prior to the police brutality and the accused was well positioned to provide an exculpatory explanation for his possession of the real evidence.

The Supreme Court of Appeal held that the trial judge had erred. FC s 35(5), the Court explained, 'plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused'.[1] The Court continued:

> Though 'hard and fast rules' should not be readily propounded, admitting real evidence procured by torture, assault, beatings and other forms of coercion violates the accused's fair trial right at its core, and stains the administration of justice. It renders the accused's trial unfair because it introduces into the process of proof against him evidence obtained by means that violate basic civilised injunctions against assault and compulsion. And it impairs the administration of justice more widely because its admission brings the entire system into disrepute, by associating with barbarous and unacceptable conduct.[2]

In *S v Mthembu,*[3] the source of the evidence in question was not the accused, but a state witness who had been subject to torture during the investigation some four years prior to the trial.[4] The torture led to the discovery of the two highly pertinent items of real evidence. The Supreme Court of Appeal found that there was nothing in FC s 35(5) to suggest that it did not apply to violations of constitutional rights of a person other than the accused. Cachalia JA held the fact that the witness's subsequent testimony was voluntary did not negate the fact that the real evidence was obtained through torture. The fact that the evidence was 'real' in nature and probably reliable could not assist the prosecution in the face of such an 'egregious human rights violation'.[5] To admit the evidence would be

> tantamount to involving the judicial process in 'moral defilement'. This 'would compromise the integrity of the judicial process (and) dishonour the administration of justice'. In the long term, the admission of torture-induced evidence can only have a corrosive effect on the criminal justice system. The public interest, in my view, demands its exclusion, irrespective of whether such evidence has an impact on the fairness of the trial.[6]

The Court was, nevertheless, prepared to admit other evidence that was referred to in the statement obtained by torture on the basis that it was discovered independently, prior to any constitutional violation.[7] In sum, while the 'real' nature of evidence might be a factor weighing in favour of admission, it is merely a factor that can be trumped by the right to a fair trial or the interests of the administration of justice.

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[1] *S v Tandwa* (supra) at para 116.
[2] Ibid at para 120.
[3] 2008 (2) SACR 407 (SCA), [2008] ZASCA 51.
[4] Ibid.
[5] Ibid at paras 31 and 36.
[6] Ibid at para 36.
[7] Ibid at para 35.

(c) When will the admission of evidence be otherwise detrimental to the administration of justice?

The admission of evidence that would render the trial unfair will always be detrimental to the administration of justice. As a result, there will inevitably be an overlap between the two inquiries animated by FC s 35(5). The inquiry as to whether the admission of the evidence would be *otherwise* detrimental to the administration of justice arises when it is determined that the admission of the evidence would not render the trial unfair. The competing public interests identified in *Lawrie v Muir*[1] remain and, in relation to this second component of the FC s 35(5) test, were described in *S v Mphala* as follows:

> So far as the administration of justice is concerned, there must be a balance between, on the one hand, respect (particularly by law enforcement agencies) for the Bill of Rights and, on the other, respect (particularly by the man in the street) for the judicial process. Overemphasis of the former would lead to acquittals on what would be perceived by the public as technicalities whilst overemphasis of the latter would lead at best to a dilution of the Bill of Rights and at worst to its provisions being negated.[2]

Far greater weight is accorded to public opinion in determining whether admission would 'otherwise be detrimental to the administration of justice'. Unfortunately the high crime rate in South Africa — and concern about retaining public confidence in the criminal justice system — has resulted in some courts[3] and commentators being reluctant to remain within the parameters of the approach advocated by the Canadian Supreme Court in *R v Collins*.[4] The *Collins* approach requires a court to take into account the views of the reasonable person, who is usually the average person in the community, 'but only when the community's current mood is reasonable'.[5] However, the court in exercising its discretion must consider 'long-term community values' and not 'render a decision that would be unacceptable to the community when that community is not being wrought with passions or otherwise under passing stress due to current events'.[6] The danger of not giving due accord to 'long-term community values' is that the educational role

[1] *Lawrie v Muir* 1950 SC (J) 19.

[2] *S v Mphala* 1998 (1) SACR 388 (W).

[3] See *S v Ngcobo* 1998 (10) BCLR 1248, 1254 (W)('At the best of times but particularly in the current state of endemic violent crime in all parts of our country it is unacceptable to the public that such evidence be excluded. Indeed the reaction is one of shock, fury and outrage when a criminal is freed because of the exclusion of such evidence'.) See also Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 235.

[4] *R v Collins* 1987 (28) CCR 122.

[5] Ibid at 136.

[6] Ibid.

decisions of the court play in promoting constitutional values is sacrificed to the more expedient demands of placating the public.[1]

To date it would appear that the approach taken by the courts in the vast majority of cases has been rather prudent. Indeed, the courts have identified a number of factors that militate against admission. The evidence should not be admitted if its admission would encourage 'police officers to ignore or overlook the constitutional protection afforded to accused persons'.[2] In this regard, the absence of good faith and reasonableness in police conduct would constitute a barrier to admission.[3] However, good faith will not be sufficient where the infringement is a result of systemically poor practices: good faith cannot save improper conduct that arises from incorrect training, instruction or departmental directives.[4] Evidence will be excluded if its admission 'might create an incentive for law enforcement agents to disregard an accused person's constitutional rights'.[5] The good faith must also be reasonable.[6] Reasonable good faith conduct has been identified with the need to promote public safety.[7]

The nature and the extent of the violation will inevitably be factors taken into consideration by the court in the exercise of its FC s 35(5) discretion in regard to both legs of the inquiry.[8] If there were alternative lawful means of obtaining the evidence, then the breach will be regarded as more serious.[9] If it is real evidence that is in issue, which pre-existed the breach, and it would have been discovered in any event, then it is more likely to lead to the conclusion that its exclusion would not be detrimental to the administration of justice. However, even if all these conditions exist in relation to real evidence, the court will still consider its admissibility in relation to all relevant facts. For example, in *S v Pillay* the court found that the real evidence in question would have been found irrespective of the breach against self-incrimination. (It would have been found in any event as a result of an earlier breach of the right to privacy arising out of an improper

[1] See *S v Naidoo* 1998 (1) SACR 479, 531a–b (N). McCall J writes:

> There may be those members of the public who will regard the exclusion of the evidence as being evidence of undue leniency towards criminals. The answer to that is that crime in this country cannot be brought under control unless we have an efficient, honest, responsible and respected police force, capable of enforcing the law. One of the lessons which must be learnt from past mistakes is that illegal methods of investigation are unacceptable and can only bring the administration of justice into disrepute, particularly when they impinge upon the basic human rights which the Constitution seeks to protect.

[2] *S v Lottering* 1999 (12) BCLR 1478, 1483 (N).

[3] See, for example, *S v Naidoo* 1998 (1) SACR 479 (N); *S v Mphala* 1998 (1) SACR 388 (W); and *S v Hena* 2006 (2) SACR 33 (E)(Absence of good faith was taken into account in excluding the evidence.) But see *S v Madiba* 1998 (1) BCLR 38 (D)(Absence of bad faith and clearly reasonable conduct on the part of the police played an important role in the admission of the evidence.) Cf *S v Motloutsi* 1996 (1) SACR 78 (C); *S v Nel* 2009 (2) SACR 37 (C); *S v Lachman* 2010 (2) SACR 52 (SCA); *S v Cwele* 2011 (1) SACR 409 (KZP).

[4] See, for example, *S v Soci* 1998 (2) SACR 275 (E). Cf *S v Tsotetsi and Others (1)* 2003 (2) SACR 623 (W) read together with *S v Tsotetsi and Others (3)* 2003 (2) SACR 648 (W).

[5] *S v Pillay* 2004 (2) SACR 419 (SCA) at para 94.

[6] See DT Zeffertt, A Paizes & A Skeen *The South African Law of Evidence* (2003) 639; SE Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 256.

[7] See, for example, *S v Madiba* 1998 (1) BCLR 38 (D); *S v Lottering* 1999 (12) BCLR 1478 (N).

[8] See *S v Mark* 2001 (1) SACR 572 (C); *S v Mkhize* 1999 (2) SACR 632 (W); *S v Pillay* (supra).

[9] *S v Pillay* (supra); *S v Hena* (supra).

telephone tap.) The court held that to admit a statement elicited from a person on a false undertaking that they would not be charged 'would be more harmful to justice than advance it'.[1] In reaching its conclusion, the court noted that in a society with a high crime rate the public must be encouraged to assist the police.[2] False undertakings undermine the public's faith in the criminal justice system.

(d) Entrapment

CPA s 252A(3)*(a)* reads:

> If a court in criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.[3]

However, in those instances where the entrapment evidence was unconstitutionally obtained, FC s 252A(3)*(a)* remains subject to the provisions of FC s 35(5).[4]

In terms of CPA s 252A(6), 'the burden of proof to show, on a balance of probabilities, that the evidence is admissible, shall rest on the prosecution'. The question of whether a balance of probabilities should indeed be the standard has given rise to some judicial debate. In *S v Reeding,* Bozalek J found that, on a plain reading of the section, the burden must be discharged on a balance of probabilities, not beyond a reasonable doubt.[5]

Steyn J reached the opposite conclusion in *S v Naidoo.*[6] However, her reasoning seems to be based on two errors. First, she misquotes the relevant extract from *Reeding* by inadvertently substituting the word 'appropriate' for 'inappropriate'.[7] Second, Steyn J quotes an extract from the judgment in *S v Kotzé*[8] in which Wallis AJA, in an obiter dictum, suggests that proof beyond a reasonable doubt was required in order to make s 252A(6) constitutionally compliant. Steyn J incorrectly

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[1] *S v Pillay* (supra) at para 96. Cf *Wesso v Director of Public Prosecutions, Western Cape* 2001 (1) SACR 674 (C).

[2] *S v Pillay* (supra) at para 96.

[3] Section 252A(3)*(b)* instructs the court in determining the admissibility of evidence 'to weigh up the public interest against the personal interest of the accused' and lists a number of factors that must be taken into account in engaging in this exercise. For an example of the application of s 252A, see *Amod v S* 2001 (4) All SA 13 (E).

[4] *S v Odugo* 2001 (1) SACR 560 (W). See also *S v Spies* 2000 (1) SACR 312 (SCA); *Mendes v Kitching* 1995 (2) SACR 634 (E); *S v Dube* 2000 (1) SACR 53 (N); *S v Hassen* 1997 (3) BCLR 377 (T); *S v Hayes* 1998 (1) SACR 625 (O); *S v Reeding* 2005 (2) SACR 631 (C); *S v Van der Bergh* 2009 (1) SACR 661 (C) See, generally, DT Zeffertt, A Paizes & A Skeen *The South African Law of Evidence* (2003) 643; E Du Toit et al *Commentary on the Criminal Procedure Act* (2007) 24–134.

[5] 2005 (2) SACR 631, 639–640 (C).

[6] 2010 (1) SACR 369 (KZN) at para 5.

[7] The extract reads: 'In my view, however, this standard of proof is inappropriate in the context of determining the admissibility as opposed to the weight of the evidence and, moreover, sets the bar too high. Section 252(6) provides instead that an onus rests on the State to prove the admissibility of evidence on a balance of probabilities. This, in my view, is the correct standard of proof'. *Reeding* (supra) at 640a.

[8] 2010 (1) SACR 100 (SCA).

refers to this portion of Wallis AJA's judgment as a definitive ruling on the issue. Considering the wording of s 252A(6), her conclusion that proof beyond reasonable doubt is required is difficult to justify in the absence of a finding of invalidity of s 252A(6) by the Supreme Court of Appeal.[1]

Nevertheless, even if not definitive, Wallis AJA's obiter assertion that s 252A(6) is unconstitutional will no doubt attract further attention. His argument can be summarised as follows: if the admissibility of a confession must be proved beyond a reasonable doubt, then so must the admissibility of entrapment evidence, as both concern evidence necessary to secure a conviction. To apply a different standard infringes the presumption of innocence and the right to remain silent. This reasoning, although superficially attractive, ignores several difficult conceptual problems. If this part of the court's dictum had not been obiter, the court would have paid more attention to the following issues:

(a) In a criminal trial, must the admissibility of all evidence be proved beyond a reasonable doubt? In applying the presumption of innocence, is it necessary to distinguish between the weight to be accorded to evidence and admissibility?
(b) Do confessions constitute a special category since they have been held to amount to the equivalent of a plea of guilty?
(c) Is a standard of proof appropriate in circumstances where the court is required to exercise a discretion?
(d) Should we draw a distinction between evidence excluded on grounds of policy and evidence excluded as a consequence of insufficient relevance?

These questions will have to be answered when a court is confronted directly with the constitutionality of s 252A(6).

(e) Trial-within-a-trial

CPA s 252A(7) states that the determination of admissibility in terms of CPA s 252A(3)*(a)* should take place in a trial-within-a-trial. As a general matter, the admissibility of all unconstitutionally obtained evidence in terms of FC s 35(5) should be determined by having a trial-within-a-trial.[2] However, the trial-within-a-trial may not be necessary where the facts are not disputed in any material way[3] or where voluntariness is not in issue.[4] In *S v Tsotetsi & Others (3)*, Visser AJ held that a ruling on admissibility in a trial-within-a-trial was interlocutory and could be reviewed at the end of the trial in light of all the evidence.[5] Cloete JA, in *S v*

[1] Steyn J's interpretation of *Kotzé* may also be read as obiter, as it is unclear what bearing it had on the court's decision.

[2] *S v Ntzweli* 2001 (2) SACR 361 (C); *S v Mhlakaza* 1996 (2) SACR 187 (C); *S v Maake* 2001 (2) SACR 288 (W); *S v Ngcobo* 1998 (10) BCLR 1248 (N); *S v Mayekiso* 1996 (2) SACR 298 (C). Cf *S v Vilakazi* 1996 (1) SACR 425 (T). See also *Director of Public Prosecutions v Viljoen* 2005 (1) SACR 505 (SCA)(The court held that the court *a quo* had erred in holding that the determination of a constitutional violation must be held prior to and separately from a trial-with-in-a-trial to determine the admissibility of a confession or other extra-curial statement.)

[3] *S v Kidson* 1999 (1) SACR 338 (W); *S v Hena* 2006 (2) SACR 33 (E).

[4] *S v Matsubu* 2009 (1) SACR 513 (SCA).

[5] *S v Tsotetsi and Others (3)* 2003 (2) SACR 648, 654 (W). Cf *S v Ntuli* 1993 (2) SACR 599 (W).

Maputle & Another, noted that the fact that the nature of the impugned evidence becomes known to the court during FC s 35(5) proceedings will not render the trial automatically unfair.[1]

(f) Civil proceedings

The pre-dominant weight of authority holds that FC s 35(5) does not apply to civil proceedings.[2] However, unconstitutionally or otherwise improperly obtained evidence may be still excluded in terms of the common-law discretion to exclude such evidence.[3] Furthermore, since the common law must be developed so as to 'promote the spirit, purport and objects'[4] of the Bill of Rights, evidence may be excluded if it infringes the constitutional right to a fair civil trial.[5] However, an infringement of a constitutional right in the procurement of the evidence will not automatically lead to the exclusion of the evidence.[6] The case law has not developed sufficiently to identify all of the factors that may influence a decision to exclude evidence. However, one factor that appears to have emerged is whether the evidence in question could have been obtained, eventually, by lawful means. If the evidence could not have been so obtained, then a court is likely to be more reluctant to admit the evidence.[7] In *Protea Technology Ltd v Wainer,* Hefer J held:

> The common law rule is however inconsistent with the Constitution to this extent: it starts with the assumption that all evidence however obtained is admissible subject to the court's discretion to exclude it. If the common law is at odds with the Constitution the courts must, if that can realistically be done, develop the common law in such a manner as to promote the spirit, purport and object of the Bill of Rights. Such development requires the test of admissibility to be formulated differently: any evidence which depends upon the breach of a fundamental constitutional right can only be admitted if the admission of the evidence is justifiable by the standards laid down in s 36(1). Thus if a person proves, whether in civil or criminal proceedings, that a right identified in chap 2 of the Constitution (other than a non-derogable right) has been infringed, the onus lies upon the party who seeks to benefit in any way from that infringement to satisfy the Court that the common law (or a statute as the case may be) provides a limitation of the nature referred to in s 36(1). Prima facie, the complainant has the right to have it excluded. In order to decide whether the right should prevail with unmitigated force or whether it should be regarded as partially or wholly overridden, each case will have to be considered on its own facts and the discretion

[1] 2003 (2) SACR 15 (SCA) at para 11.

[2] See *Protea Technology Ltd v Wainer* 1997 (9) BCLR 1225 (W) ('*Protea Technology*'); Zeffertt, Paizes & Skeen (supra) at 28–9 and 644–5; PJ Schwikkard & SE Van der Merwe *Principles of Evidence* (2009) 264; N Steytler *Constitutional Criminal Procedure* (1998) 38. Cf *Tap Wine Trading v Cape Classic Wines (Western Cape)* 1999 (4) SA 194 (C).

[3] See *Shell SA (Edms) Bpk v Voorsitter, Dorperaad van die OVS* 1992 (1) SA 906 (O); *Motor Industry Fund Administrators Pty Ltd v Janit* 1994 (3) SA 56 (W); *Lenco Holdings Ltd v Ekstein* 1996 (2) SA 693 (N) ('*Lenco Holdings*').

[4] FC s 39(2).

[5] FC s 34.

[6] See, eg, *Fedics Group (Pty) Ltd v Matus* 1998 (2) SA 617 (C)('*Fedics Group*'); *Protea Technology Ltd v Wainer* 1997 (9) BCLR 1225 (W).

[7] See *Fedics Group* (supra); *Lenco Holdings* (supra).

> exercised with judicial regard to the substance of s 36(1). Thus for example, that the breach of rights occurred in conjunction with the breach of criminal law is not of itself decisive.[1]

Hefer J's reasoning suggests that evidence obtained in breach of a constitutional right would only be admissible if the admission of the evidence was justifiable by the standard laid down in the limitations clause.[2] This approach conflates the limitations inquiry and an admissibility inquiry. And it would appear to be wrong as a matter of law. An admissibility inquiry turns, in large part, on 'the facts' surrounding the manner in which the evidence was secured. Limitations analysis focuses entirely on the justification offered for a 'law of general application' that impairs a constitutional right.[3] In short, admissibility inquiries are fact driven and are properly located within FC s 35(5). Limitations analysis would only occur when the evidence at issue was secured in terms of a law — common law or statute — that infringed a constitutional right. With respect, Hefer J would appear to have misunderstood the purpose of FC s 36 and what it is designed to justify. One would hope that the courts develop more coherent analytical structure regarding the admissibility of evidence in civil trials.

(g) Burden of proof and burden of justification

An accused who wishes to have evidence excluded in terms of s 35(5) of the FC bears the responsibility of objecting to the admissibility of the evidence.[4] Buys J in *S v Mgcina*[5] held that the state bore the burden of proving that the evidence was obtained without infringing the accused's constitutional rights. The applicable standard of proof was that of beyond reasonable doubt and the burden would arise once the accused alleged that the evidence had been procured as a consequence of an infringement. However, the accused did no have to prove the infringement. The allocation of the burden of the proof thereafter to prove admissibility or inadmissibility remains an open question. There are strong similarities between FC s 35(5) and s 24(2) of the Canadian Charter. Charter s 24(2) provides: Where in proceedings under ss (1) a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances the admission of it in the proceedings would bring the administration of justice into disrepute.

The Canadian approach requires the accused to prove a Charter violation on a balance of probabilities.[6] Stuart asserts: 'Given that the accused has the burden of

[1] *Protea Technology* (supra) at 1241–2 cited with approval by Lewis J in *Waste Products Utilisation (Pty) Ltd v Wilkes* 2003 (2) SA 515 (W).

[2] *Protea Technology* (supra) at 1241H–1242F.

[3] See S Woolman & H Botha 'Limitations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[4] *Key v Attorney General, Cape of Good Hope Provincial Division* 1996 (6) BCLR 788 (CC), 1996 (4) SA 187 (CC), [1996] ZACC 25 at para 14. See also *S v Naidoo* 1998 (1) BCLR 46 (D), 1998 (1) SACR 479 (D)('*Naidoo*').

[5] 2007 (1) SACR 82 (T).

[6] *R v Collins* (1987) 56 CR 193 (SCC)('*Collins*'). See also *R v Oakes* (1986) 19 CRR 308 (SCC). See further, § 52.11 infra.

establishing a Charter violation, it follows that the accused also bears the burden of justifying a remedy under s 24 or s 52 of the Charter'.[1] There is clear authority for this proposition in relation to s 24(2). In *R v Collins*, Lamer J held:

> [T]he use of the phrase 'if it is established' that places the burden of persuasion on the applicant, for it is the position which he maintains which must be established. Again, the standard of persuasion required can only be the civil standard of the balance of probabilities. Thus the applicant must make it more probable than not that the admission of the evidence would bring the administration of justice into disrepute.[2]

However, in *S v Naidoo,*[3] the High Court found that despite the similarities to be found in FC s 35(5) and Charter s 24(2), significant differences remain. Most significantly FC s 35(5) does not contain the words 'if it is established that'. This proviso justified Lamer J's conclusion that the applicant bore the burden of establishing on a balance of probabilities that the evidence should be excluded.[4] McCall J, in *Naidoo*, whilst taking note of the distinction, made no finding regarding the onus, if any, pertaining to establishing the exclusion of evidence.

Erasmus J in *S v Soci*[5] endorsing his own judgment in *S v Nombewu*,[6] seems to express the view that the question of onus does not arise regarding the exclusion of evidence in terms of FC s 35(5):

> In my view, the procedural principles which underlie our accusatorial system of criminal trials are inappropriate for such enquiry. The court at this stage is not required to decide whether the accused did in fact perform the alleged self-incriminating acts or acted voluntarily, or indeed whether he is guilty as charged. The exercise of its discretion requires that the court form a value judgment in regard to the fairness of the trial. A court cannot, I think, arrive at such judgment by way of the general rules relating to issues such as relevancy and judicial cognisance. Importantly, the rules of law relating to the burden of proof do not apply, either for the final decision on the question, or for proof of the individual facts which bear on that decision … .[7]

In determining which approach is to be preferred it is interesting to note that in Canada the defence must prove that 'it [is] more probable than not that the admission of the evidence would bring the administration of justice into disrepute'.[8] The advantage of taking such an approach is to encourage judicial rigour in the exercise of discretion.[9] It also requires a commitment to the degree of unfairness that will be tolerated within the legal system. If the balance of probabilities standard is applied then it must be accepted that the judicial system

[1] D Stuart *Charter Justice in Canadian Criminal Law* (3rd Edition, 2001) 42.
[2] *Collins* (supra) at 209.
[3] *Naidoo* (supra) at 52.
[4] The other distinctions between the two sections are: unlike s 35(5), s 24(2) does not specifically refer to the concept of a fair trial. (However, it is clear from *Collins* (supra) that this concept is incorporated in the Canadian exclusionary rule); furthermore s 24(2) refers to 'bringing the administration of justice into disrepute' whereas s 35(5) refers to the admission of evidence being 'detrimental to the interests of justice'.
[5] 1998 (3) BCLR 376 (E)('*Soci*').
[6] 1996 (2) SACR 396 (E)('*Nombewu*').
[7] *Soci* (supra) at 387 quoting from *Nombewu* (supra) at 420.
[8] *Collins* (supra) at 522.
[9] See D Mathias 'Fairness and the Criminal Standard of Proof' (1991) *New Zealand LJ* 159, 160.

is prepared to tolerate a reasonable possibility that the admission of the evidence would be unfair to the interests of justice.

The presumption of innocence clearly demands the exclusion of reasonable doubt as to the factual guilt of the accused determined in accordance with the 'comprehensive principles' of criminal liability. The determination of the relevancy of evidence, and hence its admissibility, plays an important role in ensuring the accuracy of the fact finding process. However, unconstitutionally obtained evidence is not excluded because it otherwise lacks relevance or compromises factual accuracy. It is excluded because its admission compromises constitutionally guaranteed rights. Its exclusion accords with the doctrine of legal guilt, in terms of which

> a person is not to be held guilty of a crime merely on a showing that in all probability based upon reliable evidence, he did factually what he is said to have done. Instead, he is to be held guilty if and only if these factual determinations are made in a procedurally regular fashion and by authorities acting within competences duly allocated to them.[1]

If evidence is admitted despite the existence of a reasonable doubt as to fairness or whether it will be detrimental to the interests of justice, then the possibility arises of a conviction despite the existence of a reasonable doubt as to legal guilt. Simultaneously, the admission of the same piece of evidence may be material in ensuring that the prosecution has proved all the elements of its case beyond a reasonable doubt. An argument can be made that the presumption of innocence only requires the admissibility of evidence pertinent to factual guilt to be proved beyond a reasonable doubt,[2] and it is only when the question of admissibility of evidence is inextricably linked to proof of factual guilt that the standard of proof beyond reasonable doubt in respect of admissibility should rest on the state. This rubric would allow the court to distinguish between the different constitutional violations that potentially bring FC s 35(5) into play.

In *Mgcina,* the constitutional infringement in question pertained directly to the admissibility of a confession.[3] (The right in issue was the accused's FC s 35(2)*(b)* right to choose and to consult with a legal practitioner, and to be informed of this right promptly.) Would the court's conclusion have been different if it was not the admissibility of a confession that was at stake? A confession is a very special type of evidence in that it is a statement that admits to all the elements of the offence charged. Consequently, if admissibility is not proved beyond a reasonable doubt by the state, there is a risk of conviction despite the existence of reasonable doubt as to factual guilt and consequently the presumption of innocence will also be infringed.[4]

However, where there is no possibility of unreliability, and relevance is not at issue, is it in the interests of the administration of justice to require the state to prove beyond a reasonable doubt that it did not infringe, say, the right to privacy and if it fails this hurdle that the admission of evidence will not be detrimental

[1] HL Packer *The Limits of the Criminal Sanction* (1968) 166.
[2] See § 52.4*(a)* supra.
[3] 2007 (1) SACR 82 (T).
[4] *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC), [1995] ZACC 1.

to the interests of justice? There is no possibility of a conviction despite the existence of a reasonable doubt as to factual guilt and neither requiring the accused to establish an infringement of a right nor establishing that admission would be detrimental to the interests of justice seems unduly onerous where the question of factual guilt is not in issue.

Whether the accused must bear the burden of persuading the court that unconstitutionally obtained evidence must be excluded on a balance of probabilities, or the state bear the burden of proving inclusion beyond a reasonable doubt, will no doubt have an impact on the number of successful prosecutions. Whilst the presumption of innocence reflects society's tolerance that a number of guilty persons escape conviction in order to minimise the possibility of an erroneous conviction, such tolerance is not infinitely elastic. A system of criminal justice may still operate effectively where the effect of the presumption of innocence is that X number of guilty escape conviction in order to ensure that one innocent is not erroneously convicted. If X is the optimal number, then the presumption of innocence will reinforce the legitimacy of the criminal justice system. However, where the number of persons erroneously escaping conviction increases significantly, *or is perceived to increase significantly,* the very opposite will occur. Furthermore, whilst most people would not dispute the abhorrence of wrongly convicting a factually innocent person, there is far more ambiguity when the question of legal guilt is separated from factual guilt.

52.11 Limitations analysis

The burdens and standards of proof applicable in civil and criminal trials are not easily transposed into the context of constitutional breach and justification because the proportionality analysis called for by FC s 36 requires a determination which—

> is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.[1]

Our courts have held that a party alleging the violation of a constitutional right bears a burden of proving 'the facts upon which they rely for their claim of infringement of the particular right in question'.[2] It is not clear whether this burden is merely an evidentiary burden or a burden of proof, and no standard of proof has been specified by the Constitutional Court.[3]

Once a violation is established, the party wishing to establish that the violation is justifiable in terms of the limitations clause bears the burden of proving such

[1] *S v Manamela* 2000 (3) SA 1 (CC), 2000 (1) SACR 414 (CC), 2000 (5) BCLR 491 (CC), [2000] ZACC 5 at para 32; *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC), [2000] ZACC 11 at para 31.

[2] *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) BCLR 1 (CC), 1996 (1) SA 984 (CC), [1995] ZACC 13 ('*Ferreira*') at para 44; *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC), [1995] ZACC 3 at para 26.

[3] For more on burdens in limitations analysis, see Woolman & Botha (supra) at § 34.6.

justification.[1] But again the Constitutional Court has been silent as regards the standard of proof, if any, that must be met.

Dicta to date would suggest that the burden is indeed merely an evidentiary one. For example, in *Phillips v Director of Public Prosecutions, Witwatersrand Local Division*, the burden was described as follows:

> The burden placed upon the State is no ordinary onus. The State should place before a Court evidence and argument on which it intends to rely in support of justification. Although absence of this evidence and argument does not necessarily result in invalidity of the challenged provision, it may tip the scales against the State, but in appropriate cases only. It follows that the absence of evidence and argument from the State does not exempt the Court from the obligation to conduct the justification analysis and to apply what was described by Somyalo AJ as 'the primary criteria enumerated in s 36 of the Constitution'.[2]

The aforementioned paragraph refers to Somyalo AJ's judgment in *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development (Women's Legal Centre as Amicus Curiae)*. The *Moise* Court observed:

> It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under s 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing-up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the Court. It is for this reason that the government functionary responsible for legislation that is being challenged on constitutional grounds must be cited as a party. If the government wishes to defend the particular enactment, it then has the opportunity — indeed an obligation — to do so. The obligation includes not only the submission of legal argument but placing before Court the requisite factual material and policy considerations. Therefore, although the burden of justification under s 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment.[3]

This approach — which goes no further than placing a duty on a party wishing to justify a limitation to adduce evidence of facts or policies in order to reduce the risk of losing — was endorsed by the Constitutional Court in *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)*.[4] Here the Court noted the distinction between matters of fact which may be established by drawing of inferences from empirical data and matters of policy that are not always capable of such proof. It held that where a party relies on the underlying policy for justification, it

> should place sufficient information before the Court as to the policy that is being furthered, the reasons for that policy and why it is considered reasonable in pursuit of that policy to limit a constitutional right. That is important, for if this is not done the Court may be unable

[1] *Ferreira* (supra) at para 44; *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) 491 (CC), 2001 (8) BCLR 765 (CC), [2001] ZACC 21 ('*Moise*') at para 19.

[2] 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC), [2003] ZACC 1 at para 20.

[3] *Moise* (supra) at para 19.

[4] 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC), [2004] ZACC 10 ('*NICRO*').

> to discern what the policy is, and the party making the constitutional challenge does not have the opportunity of rebutting the contention through countervailing factual material or expert opinion. A failure to place such information before the Court, or to spell out the reasons for the limitation, may be fatal to the justification claim. There may, however, be cases where, despite the absence of such information on the record, a court is nonetheless able to uphold a claim of justification based on common sense and judicial knowledge.[1]

As the 'special type' of onus appears to be an evidentiary one, it will inevitably shift between the parties once prima facie proof in respect of a particular issue has been established.[2] This kind of shift of justification would not be the case if a 'real' onus or legal burden were placed on the parties.[3] It seems clear that the Constitutional Court is reluctant to impose any particular standard of proof on what is essentially a balancing process.[4] It would further appear that the burden of justification's functionality is restricted to assisting the court in conditions of uncertainty.

In contrast, the Canadian Supreme Court has clearly held that the party wishing to establish that the limitation of a Charter right is demonstrably justified in terms of s 1 of the Charter must do so on a preponderance of probability.[5] If a standard of proof is to be applied, the civil standard would seem most appropriate as the policy considerations that arise in the determination of guilt are absent.[6] However, it would seem artificial to attempt to impose either the civil or the criminal standard when a party attempts to discharge the burden of justifying the limitation of a fundamental right. It can be argued that the standard is already set by FC s 36: namely, the limitation must be reasonable and justifiable in a specified context, namely an open and democratic society based on human dignity, equality and freedom. It does not seem particularly useful to ask whether on a balance of probabilities (or beyond reasonable doubt) a limitation is reasonable and justifiable. The terms 'balance of probability' or 'beyond reasonable doubt' are not quantifiable measurements but rather the product of historical judicial intuition and there is no reason why a different standard of proof should not apply to limitations analysis.[7]

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[1] *NICRO* (supra) at para 36. See also *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC), [2002] ZACC 1 at para 57; *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering Gauteng* 2001 (11) BCLR 1175 (CC), [2001] ZACC 4 at para 7.

[2] Burden shifts are discussed in Woolman & Botha 'Limitations' (supra) at § 34.6. Woolman and Botha prefer to use the term 'burden of justification' to describe what is required at each stage of fundamental rights analysis, and to distinguish burdens in fundamental rights analysis from burdens in other forms of legal analysis.

[3] For a discussion of the distinction between legal and evidentiary burdens, see D Zeffertt, A Paizes & A Skeen *The South African Law of Evidence* (2003) 121–124; PJ Schwikkard & S Van der Merwe *Principles of Evidence* (2009) 571.

[4] See *NICRO* (supra) at para 37. For a critique of balancing, generally, see Woolman & Botha 'Limitations' (supra) at § 34.8.

[5] *R v Oakes* [1986] 1 SCR 103, 50 CR (3d) 1, 24 CCC (3d) 321.

[6] See § 52.4 supra.

[7] See Woolman & Botha 'Limitations' (supra) at § 34.8 (The authors would appear to agree with this assessment.)

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Labour Relations

23. (1) Everyone has the right to fair labour practices.

(2) Every worker has the right —

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Every employer has the right —

(a) to form and join an employers' organisation; and

(b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right —

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this chapter, the limitation must comply with section 36(1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this chapter, the limitation must comply with section 36(1).[1]

53.1 INTRODUCTION

FC s 23 regulates labour relations rights,[2] both of an individual and a collective nature. While the labour relations rights in the Final Constitution largely track those in the Interim Constitution,[3] there have, however, been some significant changes: The right to strike is unencumbered,[4] employers' recourse to the lock-out has been excluded; giving effect to the international practice that the right to strike and lockout are not equivalent; labour-related association rights reflect more closely the protections afforded by the ILO;[5] the right to collective

[1] The Constitution of the Republic of South Africa Act 108 of 1996 ('FC' or 'Final Constitution').

[2] The impact of the Final Constitution on labour relations is not confined to the labour relations rights. Other rights are also of relevance, among them the right to equality (FC s 9), privacy (FC s 14), assembly, demonstration, picket and petition (FC s 17), human dignity (FC s 10), freedom of expression (FC s 16), and freedom of association (FC s 18).

[3] See Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution'). Section 27 read: '(1) Every person shall have the right to fair labour practices. (2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations. (3) Workers and employers shall have the right to organise and bargain collectively. (4) Workers shall have the right to strike for the purposes of collective bargaining. (5) Employers' recourse to the lockout shall not be impaired, subject to section 33 (1).'

[4] FC s 23(2)*(c)*. Under the Interim Constitution, the right to strike was granted for the purposes of collective bargaining. This purpose has now been omitted.

[5] (1948) ILO No 87, 68 UNTS 17 (Ratified by South Africa on 19 February 1996). Articles 2, 3 and 5 of the Convention read as follows: Art 2 'Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.' Art 3 '1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful

bargaining has been reformulated, arguably to give effect to the statutory collective bargaining regime;[1] and union security arrangements contained in national legislation are permitted.[2]

The Constitutional Court has, under the Final Constitution, had little occasion to develop jurisprudence on the labour rights — no doubt because of the extensive regulation of labour relations. Nevertheless, the case law that has emerged has been critical to a deeper understanding, in particular, of fair labour practices and the right to strike. The Constitutional Court has also had to consider its approach to the interpretation of labour legislation, where that legislation, such as the Labour Relations Act (LRA),[3] seeks to give effect to and to regulate FC s 23 rights. Finally, the Court has been obliged to determine the constitutional jurisdiction of other superior courts in relation to labour matters arising under FC s 23. Jurisprudence has also been developed by the High Court with respect to constitutional labour rights, but sometimes with a less than satisfactory result. For instance, the High Court has advanced contrasting interpretations of the constitutional right to engage in collective bargaining (see below).[4]

(a) Application

(i) *Burdens*

The Bill of Rights in the Final Constitution applies to all law and binds the legislature, executive, organs of state and the judiciary. FC s 8(2) provides that the Bill of Rights may be applied horizontally to private persons (including juristic persons), provided it is applicable, thus bringing the conduct of private citizens under constitutional scrutiny.[5] Labour rights are eminently suited to horizontal application. The reference in FC s 23 to workers and employers and their organizations indicates that the rights have primarily to do with the relationship between private citizens.[6] Labour practices, trade unions and employer organizations, organizational activities, collective bargaining, strikes, and union security

exercise thereof.' Art 5 'Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.' See IC ss 23(2)*(a)* and *(b)*; (3)*(a)* and *(b)*; (4)*(a)*, *(b)* and *(c)*.

[1] FC s 23(5). The Interim Constitution granted the right to collective bargaining; the Final Constitution grants the right 'to engage' in collective bargaining. § 53.5 infra.

[2] FC s 23(6).

[3] Act 66 of 1995.

[4] See *South African National Defence Union v Minister of Defence & Others* 2003 (3) SA 239 (T), (2003) 24 *ILJ* 1495 (T); *South African National Defence Union & Another v Minister of Defence & Others* 2004 (4) SA 10 (T), 2003 (9) BCLR 1055 (T), (2003) 24 *ILJ* 2101 (T).

[5] See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31. See also *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC).

[6] That labour rights are eminently capable of horizontal application is indicated by international law. Articles 1 and 2 of the International Labour Organization's Right to Organize and Collective Bargaining Convention envisages that the protection accorded to workers and employers and their organizations regarding their activities relates to private conduct as well as to legislative enactments. (1949) ILO No 98, 96 UNTS 257 (ratified by South Africa on 19 February 1996).

arrangements — the subject matter of the FC s 23 rights — all relate to the mediation of private relationships on an individual or a collective basis. As we have seen above, however, little jurisprudence on disputes between employers and workers under the labour rights has emerged because labour legislation regulates, to a large degree, the private conduct between employers and employees, and leaves little space for constitutional contestation.[1]

(ii) *Benefits*

The labour relations rights in FC s 23 are granted mainly to workers and employers, and their organisations. The use of the term 'worker' rather then 'employee' is significant. The terms are not synonymous. 'Worker' has a meaning that is broader than the term 'employee'.[2]

The constitutional scope of the term 'worker' was examined in *South African National Defence Union v Minister of Defence & Another*.[3] The *SANDU I* Court found that the term 'worker' in FC s 23 was used in the context of employers and employment. It referred to those persons who worked for an employer, which would, primarily, be those who had entered into a contract of employment to provide services to such employer. By comparison, members of the permanent defence force did not enter into contracts of employment. They enrolled in the force.[4] However, the *SANDU I* Court found that in many respects the relationship between members of the permanent defence force and the military was 'akin' to an employment relationship, which argued in favour of these members being considered 'workers' for the purposes of the right.[5] They could, therefore, claim the protection of the right and were entitled to form and join trade unions.[6]

[1] The Final Constitution instructs a court when applying a right to natural or juristic persons to develop the common law to the extent that legislation does not give effect to the right. See FC s 8(3). The fairly comprehensive scope of labour legislation means that there will probably be little need to develop the common law, and thus the impact of the labour rights on such law will be slight.

[2] Section 213 of the 1995 LRA defines an employee as '*(a)* any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any *remuneration*, and *(b)* any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of "employee"'.

[3] 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC), (1999) 20 *ILJ* 2265 (CC)('*SANDU I*'). The Court was called on to decide whether prohibiting members of the defence force from forming and joining trade unions was an infringement of the right to freedom of association which applies to 'workers' (and employers).

[4] Ibid at para 22.

[5] Ibid at para 24. The Court stated that members of the armed forces rendered a service for which they received a range of benefits, the latter including salaries and allowances, leave, medical and transport benefits and certain mess expenses. Termination of membership, in general, occurred on the basis of misconduct or retirement and at the request of a member. However, misconduct was punishable in terms of the Military Disciplinary Code. The Code provided that members were criminally liable for specific forms of misconduct and might be sentenced to prison. In that respect, at least, the relationship was different from the employment relationship.

[6] Ibid at paras 35 and 36.

The above finding of the *SANDU I* Court suggests that the notion of 'worker' contained in FC s 23 should be generously interpreted. It thus could encompass persons who have not entered into a formal contract of employment but are in work relationships 'akin' to the employment relationship governed by a contract of employment. Thus, workers in atypical work relationships could fall within the scope of the term 'worker' and be protected by the right.[1] Currently, many workers are treated as independent contractors, when, in truth, they are workers as they are dependent on the person for whom they undertake the work. In other words, the formal nature of the employment relationship does not conform to its reality. Labour legislation is alert to the problem of workers being falsely portrayed as independent contractors. Both the LRA[2] and the BCEA[3] provide for a process whereby the real nature of the relationship between an employer and a person providing a service may be determined so as to ensure that persons who work in a subordinate and dependent manner are captured as employees in terms of the definition of employee under the Acts.[4] A generous interpretation of the term 'worker' in terms of FC s 23 will protect not only these workers, but other dependent and subordinate workers who might currently lack protection under the existing statutory framework.

Distinct from the other sub-sections in FC s 23, FC s 23(1) grants the right to fair labour practices to 'everyone'. The Constitutional Court has written that FC s 23(1) engages 'broadly speaking, the relationship between the worker and employer'[5] This embedding of FC s 23(1) within the employment relationship inevitably curtails the reach of the term 'everyone'. The Court's characterisation of the right's ambit as 'broadly speaking' encompassing the employment relationship is an indication, nevertheless, that the parameters of the right should remain flexible. As with the expanded notion of the term 'worker', this 'broad' reading

[1] For a detailed exposition of this argument, see H Cheadle 'Labour Relations' in *South African Constitutional Law: The Bill of Rights* 18-4–18-7.

[2] Section 200A of the 1995 LRA provides that a person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present:

'*(a)* The manner in which the person works is subject to the control or direction of another person; *(b)* the person's hours of work are subject to the control or direction of another person; *(c)* in the case of a person who works for an organization, the person is part of that organization; *(d)* the person has worked for that other person for an average of at least 40 hours per month over the last three months; *(e)* the person is economically dependent on the other person for whom that person works or renders services; *(f)* the person is provided with tools of trade or work equipment by the other person; or *(g)* the person only workers for or renders services to one person.'

[3] See 1997 BCEA s 83A. The wording of the provision is the same as that found in 1995 LRA s 200A.

[4] See Cheadle (supra) at 18-6. Cheadle argues that the criteria for determining whether a person is a worker is the personal nature of the service and whether the person works for another in a manner which is subordinate and dependent. He relies on the following: *ILO Meeting of Experts* (2000) 4; The UK's Employment Rights Act 1996 (section 202(3)); P Davies & M Freedland *Employees* (2000) 267; and Article 1 of the *Draft Convention on Contract Labour* (1998) ILO Report V (2B).

[5] *NEHAWU v UCT* (2003) 24 *ILJ* 95 (CC), 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC), ('*NEHAWU*') at para 40.

could encompass persons on the margins of the employment relationship, including those in the employee-like relationships mentioned above.[1]

The Final Constitution recognises that 'everyone' may include not only natural persons, but juristic persons as well.[2] Employers are typically either natural or juristic persons depending on the nature of the organisation and the way in which they conduct their business.[3] In *NEHAWU*, the applicant's argument that 'everyone' in FC s 23*(c)* referred only to workers, and excluded employers, was based on the mistaken view that all employers were juristic persons and thus not embraced by the term 'everyone'. The *NEHAWU* Court, finding that the right applied equally to workers and to employers, correctly held that not all employers were juristic persons and that the right should apply to all employers, juristic or otherwise.[4]

(b) Jurisdiction

The Final Constitution makes the Constitutional Court the highest court in all constitutional matters. It may decide only constitutional matters and issues connected with constitutional matters, and makes the final decision whether a matter is a constitutional matter or an issue connected with a constitutional matter.[5] These general terms do not, however, speak to the somewhat unique character of constitutional jurisdiction in matters relating to labour relations.

The jurisdiction of the Constitutional Court in relation to labour matters was an issue under the Interim Constitution. Under the latter, provision was made to limit judicial intervention on the grounds that decision-making

[1] The right might protect job applicants from discrimination. While such persons are now protected by the Employment Equity Act 75 of 1998 (section 6(1) read with section 9) and have recourse under the constitutional right to equality, nevertheless it could be argued that they may also rely on the right to fair labour practices.

[2] FC s 8(4).

[3] According to company law, a juristic person comprises incorporated companies, close corporations and foundations, while it excludes partnerships and trusts. See H Cilliers & M Benade *Corporate Law* (2000) 6.

[4] *NEHAWU* (supra) at 113.

[5] FC s 167 (3)*(a)*, *(b)*, *(c)*. The Constitutional Court has interpreted the notion of constitutional matters broadly. See *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC), 2001 (1) SACR 1 (CC) at para 13 ('If regard is had to the provisions of s 172(1)*(a)* and s 167(4)*(a)* of the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of state. Under s 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters. So too, under s 39(2), is the question whether in the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.')

on such matters was best managed by specialist courts and tribunals provided for under the statutory labour regime. IC s 33(5)*(a)* read: 'The provisions of a law in force at the commencement of this Constitution promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain in full force and effect until repealed or amended by the legislature.' The effect of this provision was to immunize labour law provisions falling within the specified categories from constitutional attack.

This provision reappeared in the draft Final Constitution in a slightly modified form. It stated that the provisions of the LRA 1995 were to remain valid until they were amended or repealed.[1] The Constitutional Court refused to certify this provision. In the *First Certification Judgment*, the Court found it to be in conflict with Constitutional Principles (CPs) II, IV and VII. These principles, read together, made it plain that all statutory provisions had to be subject to the supremacy of the Final Constitution unless they were made part of the Final Constitution itself.[2] If that latter route were followed, the provisions had to comply with the special procedures as contemplated in CP XV. If not made part of the Final Constitution, then the provisions were subject to constitutional review as contemplated by principles II and VII. The Court found that it could not have been the intention of the drafters of the CPs to shield ordinary statutes from constitutional review and held that the section was not, as a result, in compliance with the CPs.

The LRA provides that the Act has been enacted to give effect to the Constitution.[3] One way of reading this provision is that the LRA is an extension of the Final Constitution and is thus fully constitutive of the constitutional labour rights. On such a reading, the provisions in the LRA would be placed beyond constitutional scrutiny. The Constitutional Court has rejected the view that the LRA is immunized from constitutional scrutiny simply because it purports to give effect to the constitutional labour rights. In *National Education Health and Allied Workers Union v University of Cape Town & Others*, the Court held that our constitutional democracy 'envisages the development of a coherent system of law that is shaped by the Constitution'[4] and to which all law is subordinate. Where an Act is passed to give effect to a constitutional right it will be subject to constitutional scrutiny to ensure that its provisions are not inconsistent with the Final Constitution.[5] It follows that where the constitutional validity of an Act is challenged, a court must first determine the extent of the constitutional right in order to assess whether the legislation gives effect to it. According to the NEHAWU Court, where the legislation falls within 'constitutional limits', a court, interpreting the legislation, must then give full

[1] Draft FC s 241.
[2] *First Certification Judgment* (supra) at 149.
[3] Section 1*(a)* of the1995 LRA.
[4] *NEHAWU* (supra) at 106.
[5] Ibid at para 14.

effect to the legislative purpose.[1] The 'proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and as such will be a constitutional matter.'[2] If the effect of this requirement, the *NEHAWU* Court held, was that it would have jurisdiction in all labour matters, then that would be an inevitable 'consequence of our constitutional democracy.'[3] The Court thus unequivocally asserted its right to adjudicate constitutional issues in all labour matters. The Court in *National Union of Metalworkers of South Africa & Others v Bader Bop (Pty) Ltd* confirmed this assertion of jurisdiction by stating that it would be shirking its constitutional duty if it were to hold that it would never hear appeals from the Labour Appeal Court (LAC).[4]

While the Court has emphasised its judicial responsibility to scrutinize labour matters, it has indicated that it will not always intervene in such matters.[5] The overall test is whether the interests of justice require the Court to hear the dispute. The Court has adumbrated the following factors as relevant to determining whether it will assert jurisdiction:

- the prospects of success on appeal;[6]
- the nature of the constitutional issue and its importance;[7]
- whether the dispute should be left to the specialist courts to resolve.[8]

In addition to determining its own jurisdiction under FC s 23, the Constitutional Court has also considered the constitutional jurisdiction of the Supreme

[1] *NEHAWU* (supra) at para 14. The court has stated that the infringement of a fundamental right by a legislative provision is a constitutional matter.

[2] Ibid at para 14.

[3] Ibid at para 16.

[4] *NUMSA v Bader Bop* (2003) 24 *ILJ* 305 (CC), 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC), ('*NUMSA v Bader Bop*') at para 20.

[5] *NEHAWU* (supra) at para 18.

[6] *NEHAWU* (supra) at paras 25 & 26, *NUMSA v Bader Bop* (supra) at para 17. See also *Xinwa & Others v Volkswagen of SA (Pty) Ltd* 2003 (4) SA 390 (CC), 2003 (6) BCLR 575 (CC), (2003) 24 *ILJ* 1077 (CC) at para 16 (in which the Constitutional Court declined to consider the matter of an allegedly procedurally unfair dismissal because there were no prospects that the Court would find that the dismissal had been procedurally fair.)

[7] *NEHAWU* was the first occasion on which the Court was required to consider and define its approach to the interpretation of a provision which was part of legislation designed to give effect to a constitutional right. Moreover, the application would affect some 267 workers who had lost their employment. In *NUMSA v Bader Bop*, which concerned the alleged limitation of the constitutional right to strike, the Court stated that the restriction would affect all trade unions and their members and thus the issue deserved to be heard on appeal from the LAC.

[8] In *NEHAWU*, the Court acknowledged the need for labour disputes to be resolved expeditiously in the interests of the economy and labour peace and that the legislature had provided specialist courts for that purpose. Because of this, said the court, it would be slow to hear appeals from the LAC unless they raised important issues of principle, which was the case in the matter under consideration. *NEHAWU* (supra) at paras 30, 31, & 32. In *NUMSA v Bader Bop* the Court reiterated this position by stating that the establishment of specialist courts to resolve matters expeditiously in the field of labour relations meant that the Court would be slow to intervene in such disputes. However, where it had been alleged that there had been an infringement of a constitutional right that would be a factor in favour of granting leave to appeal. *NUMSA v Bader Bop* (supra) at para 20.

Court of Appeal (SCA) over labour matters on appeal from the Labour Appeal Court (LAC). A central issue is whether there is an appeal to the SCA from the LAC on constitutional issues in labour matters, or whether the Constitutional Court should be the only court of appeal. The *NEHAWU* Court held that although the LRA constituted the LAC as a final court of appeal in matters from the Labour Court,[1] it was not the equivalent of the SCA in respect of appeals on constitutional matters.[2] The SCA could decide appeals in any matter and was the highest court of appeal except in constitutional matters.[3] While the legislature's intention that labour disputes should be resolved expeditiously and cheaply could be undermined by this finding, the *NEHAWU* Court showed that it was alive to the potential negative effect of its ruling by holding that there was nothing to prevent a litigant from appealing directly to the Constitutional Court.[4]

The issue of the jurisdiction of the superior courts and the specialist labour courts over constitutional issues is likely to be short-lived. The Superior Courts Bill proposes that the specialist labour courts be abolished and that a specialist labour panel be established within the main court system.[5]

[1] LRA s 167(2) and (3).

[2] *NEHAWU* (supra) at para 23.

[3] Ibid at para 21. See also FC s 168(3).

[4] *NEHAWU* (supra) at para 22. See FC s 167(6)*(b)* read together with s 16(2) of the Constitutional Court Complementary Act 13 of 1995 and rule 18 of the Rules of the Constitutional Court. The Court has also had occasion to consider the constitutional jurisdiction of the High Court (HC) in labour matters, but under different constitutional rights. See *Fredericks & Others v MEC for Education & Training, Eastern Cape & Others* 2002 (2) SA 693 (CC), 2002 (2) BCLR 113 (CC), (2002) 23 *ILJ* 81 (CC) ('*Fredericks*'). In *Fredericks*, the Court had to consider the HC's jurisdiction where it was alleged that the application of a collective agreement concluded in terms of s 24 of the 1995 LRA infringed the rights to just administrative action and equality in a context where the state was the employer. The LRA provides that disputes over such agreements are to be arbitrated under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA) established under the LRA and are not justiciable in the Labour Court (LC). Arbitration awards are binding and there is no appeal to the LC against a ruling of the arbitrator, only a right of review. The Constitutional Court found firstly, that in terms of FC s 169, the HC's constitutional jurisdiction could only be ousted where the legislature had accorded that jurisdiction to a court of similar status. Section 24 of the LRA, the Court found, did not oust the HC's jurisdiction because the CCMA was not a court of similar status to the HC. Secondly, the court then considered whether elsewhere the Act had assigned jurisdiction over the matter to the LC, which the LRA had cast as a court of similar status to the HC [section 151(2)], as that would have had the effect of ousting the jurisdiction of the HC. It found that the Act conferred exclusive jurisdiction on the LC to hear all matters [section 157(1)] — which would include constitutional matters — where it was specifically assigned such jurisdiction in the Act. It found that there was no express provision of the Act affording the LC jurisdiction to determine disputes arising from an alleged infringement of constitutional rights by the state acting in its capacity as employer, other than s 157 (2). However, that provision accorded concurrent jurisdiction to the LC and the HC. Thus the provision did not oust the jurisdiction of the HC. Accordingly, the Court found, contrary to the decision of the court a quo, that the HC did have jurisdiction over the matter. This finding of the CC should not be read as granting the HC jurisdiction over disputes of a constitutional nature arising from collective agreements as a matter of course. The Act envisages that disputes over the interpretation and application of agreements should be settled only by binding arbitration. This is not the place to discuss the full ramifications of the decision. Suffice it to say that on policy grounds alone there are good reasons for the HC to demonstrate caution before intervening in such disputes.

[5] B52-2003, s 3(1)*(a)*(ii) & s 12.

There is a strong case to be made for judicial deference in labour matters. In essence, the relationship between employers and workers is one of power mediated through a variety of mechanisms. Because of their complex and polycentric nature and the trade off in power which lies at their heart, labour disputes are ill-suited to constitutional adjudication.[1] Labour law needs to be responsive to the changing demands of the employment relationship and the context in which it operates. It needs to be negotiated and renegotiated to balance multiple competing interests within an ever-changing economic environment.[2]

Nevertheless, cognisance also needs to be taken of the imperatives of our new constitutional dispensation. Those negotiating the Final Constitution saw fit to include labour relations among its fundamental rights and freedoms. The Court's approach to date is one that strikes the correct balance between the poles of interventionism and abstentionism. It has demonstrated its awareness that principles governing the wage-work bargain should be left more fluid and amenable to change and thus has indicated that it will exercise its constitutional jurisdiction in a supervisory manner, intervening in labour matters only when necessary to do so to fulfil it role as the guarantor of constitutional labour rights.[3]

[1] JM Weiler sums up the case for deference as follows:

> 'I believe our current system of collective bargaining regulating the relations between workers and employers is too complicated and sophisticated a field to be put under the scrutiny of a judge in a contest between two litigants arguing vague notions such as 'reasonable' and 'justifiable' in a free and democratic society. I have no confidence that our adversary court system is capable of arriving at a proper balance between the competing political, democratic and economic interests that are the stuff of labour legislation When we consider that collective bargaining law is polycentric in nature, adjustments to the delicate industrial relations balance in one part of the system might have unanticipated and unfortunate effects in another. The lessons of the evolution of our labour law regime in the past 50 years displays very clearly that the legislatures are far better equipped than the courts to strike the appropriate balance between the interests of the individual employee, the union, the employer and the public.'

JM Weiler 'The Regulation of Strikes and Picketing under the Charter' in Weiler & Elliot (eds) *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (YEAR) 226, quoted in M Brassey Employment Law note 1 at C3:16 Juta 1998.

[2] For a sceptical view as to whether constitutional adjudication has any positive value at all in resolving labour conflict, see H Arthurs *The Constitutionalisation of Labour Rights* (2005). Arthur argues that constitutional adjudication purports to lay down the law 'for all time' — which is the antithesis of what is required to resolve labour conflict. Constitutional adjudication, he argues, is ill-suited to contend with the dynamic context of labour law. Thus he states:

> 'Trade offs in labour law involve power, not just logic or ethics. They are dynamic and not static. That is why labour laws have to be negotiated in the first place, then constantly renegotiated over time as power shifts, as the economy changes, as technology and demography changes, as social attitudes change, as we learn from experience, as new insights emerge.'

Ibid at 12. Arthurs's position that constitutional adjudication is unlikely to play any positive role is questionable. In the two cases in which the Constitutional Court has intervened to determine the nature of labour rights, *NEHAWU* and *NUMSA*, it has overturned decisions of the LAC which were inimical to the interests of workers, and which were at odds with the intention of the legislature. However, his view that constitutional adjudication is unlikely to play a systemic transformative role is probably true — the transformation of the underlying structures relevant to labour relations is a matter of political will and inclination.

[3] *NUMSA v Bader Bop* (supra) at paras 13 and 20.

53.2 Right to Fair Labour Practices

While other constitutions contain rights to freedom of association, collective bargaining and the right to strike, it is rare to find a constitution that includes the broad and vague right to fair labour practices. The motivation for its inclusion was a demand by public sector employees for access to the unfair labour practice law on dismissals developed under the 1956 LRA. They viewed such access as an essential means of protecting their jobs during the transition to a new political dispensation.[1] In the constitutional negotiations this concern led to the embedding of this right in Constitutional Principle XXVII and its subsequent appearance as a fundamental right in both the Interim and Final Constitutions.

International jurisprudence is of limited use in providing a definitive interpretation of the right. International law extensively regulates labour rights, in particular through the conventions and recommendations of the International Labour Organisation (ILO). Nowhere, however, do these conventions and recommendations provide specifically for a right to fair labour practices, although many of the practices so protected could be co-incident with the right.[2] A similar point can be made in relation to the rights protected under the European Social Charter.[3] Foreign law is similarly unenlightening. British law, for instance, is unsatisfactory as a guide because its unfair labour practice regime is narrowly linked to its law on unfair dismissal. In the US, the unfair labour practice jurisprudence is concerned primarily with prohibitions relating to collective labour practices.[4] In India, the

[1] See H Cheadle 'Labour Relations' in H Cheadle, D Davis & N Haysom *South African Constitutional Law: The Bill of Rights* (1st Edition, 2002) 18-9. Cheadle has stated that the provision was inserted in the Interim Constitution as part of the package of provisions to secure the support of the public service for the new constitutional dispensation and in particular for the restructuring and the transformation of the public service into a single public service that would be broadly representative of the South African community.

[2] They embrace such varied concerns as health, safety and social security; working time; minimum wages, equal pay, and other remuneration matters; job security; minimum age and forced labour protections; and discrimination.

[3] The European Social Charter of 1961 guarantees, among other things, the right to just conditions of work (art 2); and the right to a fair remuneration (art 4). The Charter's right to just conditions of work includes reasonable daily and working hours and a progressive reduction in the working week; public holidays with pay; two weeks' annual holiday with pay; weekly rest periods and additional holidays or reduced working hours for those in dangerous or unhealthy occupations. While just working conditions conveys a similar meaning to 'fair labour practices' ('just' includes the notion of fairness, and 'conditions' are the product of practices), the rather arbitrary inclusion of some working conditions and the exclusion of others from the category limits its usefulness as an interpretive guide.

[4] In summary, s 8 of the National Labour Relations Act (NLRA) provides that it is an unfair labour practice by an employer to:

1. interfere with employees' collective bargaining rights;
2. interfere with the formation or administration of any labour organization;
3. discriminate in hiring or regarding any term or conditions of employment as a way of influencing membership of a labour organization;
4. dismiss or discriminate against an employee for exercising rights under the unfair labour practice provision;
5. refuse to bargain collectively with representatives of his employees.

unfair labour practice jurisprudence is limited to victimization for trade union activities and unfair dismissal.[1] A more fruitful avenue for determining the content of the right lies in our own labour law. Specific regard should be had to the unfair labour practice jurisprudence grounded in the 1956 LRA,[2] the 1995 LRA[3] and the 1997 Basic Conditions of Employment Act.[4]

(a) Construction of 'everyone'

As noted above, the Constitutional Court has found that FC s 23(1) refers 'broadly speaking' to the employment relationship. Thus the right may be interpreted as embracing persons on the margins of that relationship. The term 'everyone' should be interpreted within this context.

(b) Labour Practices

Labour relations are essentially concerned with the employer-worker relationship, and labour practices with matters of mutual interest which arise from that relationship. A wide range of matters may potentially fall within the ambit of labour practices covered by FC s 23(1). As we have seen above, international law provides little real guidance as to the ambit of FC s23(1), whereas domestic law constitutes a much richer source for determining the meaning of the right. Under the 1956 LRA, the Industrial Court fashioned an equity based jurisprudence arising from the unfair labour practice provision introduced into the law in 1979.[5] The very broad and vague nature of the initial provision,[6] which stated that an unfair labour practice was 'any labour practice which in the opinion of the industrial court is an unfair labour practice', gave the court wide scope in developing its jurisprudence. Later refinements to the provision gave it greater content, and over time the court developed a body of rights-based rules in terms of which

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Labour organizations commit an unfair labour practice by

1. coercing or restraining employees in the exercise of collective bargaining rights;
2. causing an employer to discriminate against non-union members;
3. refusing to bargain collectively with an employer;
4. engaging in or pressurizing workers to engage in certain strikes and boycotts;
5. charging discriminatory agency fees;
6. requiring employers to pay for services not performed;
7. picketing where the object is to force an employer to bargain with a labour organization as the representative of his employees.

R Blanpain (ed) *International Encyclopaedia of Industrial Relations and Labour Law: Vol 5, USA* (Supplement 86, February 1988) 124-7.

[1] Blanpain (supra) *Vol 6, India* (Supplement 101, June 1989) at 103.

[2] Act 28 of 1956.

[3] Act 66 of 1995.

[4] Act 75 of 1997.

[5] See Commission of Enquiry into Labour Legislation (1979) Part 5 4.127.17 (The Wiehann Commission). The Commission was responsible for the recommendations that led to this change in the LRA.

[6] Industrial Conciliation Amendment Act 94 of 1979.

fairness was seen broadly as encompassing a balancing of employees' and employers' interests in order to achieve the Act's object of labour peace. [1] The Industrial Court's labour practices were, in terms of this new provision, found to cover both individual and collective practices, but were confined to the employer-employee relationship.[2] The generous equity-based jurisprudence developed by the court led to the following findings of unfairness: *(a)* unfair dismissals because of the absence of a fair reason and procedure;[3] *(b)* the dismissal of strikers for participating in a lawful strike;[4] *(c)* failure to reemploy in terms of an agreement; *(d)* failure to renew a contract where there was a reasonable expectation of such renewal;[5] *(e)* selective dismissal;[6] *(f)* racial discrimination;[7] and *(g)* victimisation for trade union activities.[8] Among the unfair labour practices struck down by the court as conducive to labour unrest and the undermining of the employment relationship were: *(a)* a refusal to bargain;[9] *(b)* bad faith bargaining;[10] *(c)* a failure to accord rights relevant to the bargaining process;[11] *(d)* the use of unfair bargaining tactics;[12] and *(e)* the resort to industrial action before deadlock had been reached in negotiations.[13] The court, however, declined to consider matters relating to bargaining topics, bargaining levels, and the wage-work bargain, on the grounds that this would have constituted an unwarranted descent into the collective bargaining arena.[14]

[1] See *Consolidated Frame Cotton Corporation v The President, Industrial Court* (1986) 7 *ILJ* 489 (A).

[2] In this body of jurisprudence, 'practice' was interpreted as including both habitual action and a single act or omission. See *Trident Steel (Pty) Ltd v John NO* (1987) 8 *ILJ* 27 (W); *SAAWU v Border Boxes (Pty) Ltd* (1987) 8 *ILJ* 467 (C). Labour included both mental and physical labour. See *Bleazard v Argus Printing & Publishing Co Ltd* (1983) 4 *ILJ* 60, 70 (IC).

[3] See A Rycroft & B Jordaan *A Guide to South African Labour Law* (1992) Chapter 4.

[4] See *NUM v Marievale Consolidated Mines Ltd* (1986) 7 *ILJ* 123 (IC).

[5] See *Mtshamba v Boland Houtnywerhede* (1986) 7 *ILJ* 563 (IC).

[6] See *Fihla v Pest Control* (1984) 5 *ILJ* 165 (IC).

[7] See *MWU v East Rand Gold & Uranium Co Ltd* (1990) 11 *ILJ* 1070 (IC).

[8] See *Mbatha v Vleissentraal Co-operative Ltd* (1985) 6 *ILJ* 333 (IC).

[9] See *FAWU v Spekenham Supreme* (1988) 9 *ILJ* 628 (IC); *SACWU v Sasol Industries (Pty) Ltd* (1989) 10 *ILJ* 1031 (IC); *Buthelezi v Labour for Africa* (1991) 12 *ILJ* 588 (IC); *NUM v East Rand Gold & Uranium Co Ltd* 1992 (1) SA 700 (A); (1991) 12 *ILJ* 1221 (A); *Macsteel (Pty) Ltd v NUMSA*(1990) 11 *ILJ* 995 (LAC).

[10] See *Mawu v Natal Die Casting Co (Pty) Ltd* (1986) 7 *ILJ* 520 (IC).

[11] See *NUM v Free State Consolidated Gold Mines (Operations) Ltd* (1988) 9 *ILJ* 804 (IC).

[12] See *East Rand Gold & Uranium Co Ltd v NUM* (1989) 10 *ILJ* 683 (LAC).

[13] See *NUM v Henry Gould (Pty) Ltd* (1988) 9 *ILJ* 1149 1154-1155 (IC); *Olivier v AECI Plofstowwe & Chemikaliee, Bethal* (1988) 9 *ILJ* 1052, 1058-1059 (IC).

[14] The resolution of such disputes, considered to be 'interest' disputes, is left to collective (and individual) bargaining between the parties. While interest disputes generally encompass disputes over new terms and conditions of work, rights disputes, on the other hand, refer to disputes arising from the application or interpretation of an existing law, collective agreement or contract and are usually settled through adjudication. Not all disputes are easily classifiable, and some may migrate from one category to another. Thus under the LRA disputes over dismissals for operational requirements were initially regarded as disputes of right adjudicable in the Labour Court, but now certain of these disputes may be resolved through strike action. Unions may elect to follow one course or the other (sections 189 & 189A of the 1995 LRA). See, more generally, *Conciliation and Arbitration Procedures in Labour Disputes* ILO 5 and *Wiehahn Commission Report*: Part 1 (1979) 89-90 para 4.5.

Drawing on the jurisprudence of the Industrial Court on unfair labour practices, the 1995 LRA has codified the following as unfair labour practices: unfair conduct in relation to workers' security (unfair dismissal, including dismissal during a transfer of a business, unfair suspension and the failure to re-employ or reinstate), unfair treatment in relation to work opportunities (promotion, demotion, probation, training and benefits[1] — more recently victimisation arising from whistle blowing has been added to the list[2]), and unfair disciplinary action.[3] However, in contrast to the 1956 Act, the 1995 LRA — while promoting collective bargaining through the creation of the mechanisms for such bargaining, the protection of trade unions and employer organisations, the recognition of organisational rights, the establishment of industrial councils and the right to strike — has not codified a right to collective bargaining and the correlative duty to bargain. Nor does it regulate issues relating to such bargaining, such as bargaining in good faith. The stance of the Act is that these and other bargaining issues, such as bargaining agents and levels, are to be decided by power play. In accordance with the previous regime, the 1995 LRA also leaves to power play the resolution of disputes over the substantive economic demands of the parties. This schema does not ignore the situation of more vulnerable non-unionised workers: they are protected by minimum standards legislation in the form of the Basic Conditions of Employment Act (BCEA), which sets a floor of rights in respect of a wide range of terms and conditions of work, as well as by legislation on health and safety.[4]

The Constitutional Court has held that the right to fair labour practices is incapable of precise definition. Taking into account the development of the law outlined above, the scope of the notion of 'labour practices' may embrace at least the practices set out below. Firstly, the right should provide protection against unfair practices relating to work security and employment opportunities as codified in the 1995 LRA, both of a substantive and procedural nature.[5] Secondly, it

[1] See the recent concept paper by Halton Cheadle, in which he proposes a re-evaluation of the unfair labour practice concept and its boundaries. In particular he suggests that the unfair labour practice over benefits would be better conceived as a wage-work issue subject to collective bargaining, rather than adjudication. H Cheadle 'Regulated Flexibility and Small Business: Revisiting the LRA and the BCEA' (2006) ILJ 27.

[2] In terms of an amendment (s 42 of Labour Relations Amendment Act 12 of 2002) to the LRA, victimization due to whistle-blowing was included as an unfair labour practice (s186(2)*(c)*). This followed the promulgation of the Protected Disclosures Act 26 of 2000, which protects an employee from victimization for having made a protected disclosure defined in that Act.

[3] Unfair discrimination originally fell under the provision on unfair labour practices in the LRA (Schedule 7 item 2(1)*(a)*), but is now regulated in terms of the Employment Equity Act. It was always the intention that unfair labour practices would be incorporated into a separate Act. This has occurred in respect of unfair discrimination, while the remaining unfair labour practices have now been included in the main body of the 1995 LRA under s 186(2).

[4] For instance, the Occupational, Health and Safety Act 83 of 1993.

[5] See *SANDU & Another v Minister of Defence & Others* 2004 (4) SA 10 (T), 2003 (9) BCLR 1055 (T), (2003) 24 *ILJ* 2101 (T)('*SANDU III*'). The High Court found that regulation 73 of the Military Regulations, which provides for the Minister of Defence to appoint 'independent persons' to the Military Arbitration Board, infringed the right to fair labour practices because it amounted to an unfair procedure. The function of the board to determine disputes (referred to it in terms of regulation 71(5)*(b)*) would

should underwrite the minimum standards accorded in the BCEA since one of the BCEA's objects is to give effect to and regulate the right to fair labour practices in FC s 23(1).[1] Whether the right should encompass rights regulated in other labour legislation, such as health and safety rights at work, is debatable, but there is no apparent reason why such protection should be excluded. Thirdly, the right should not engage the wage-work bargain. In other words, it should be concerned with the adjudication of disputes of right as opposed to disputes of interest. A further issue for consideration is whether FC s 23(1) is an overarching right encompassing the other labour relations rights, or whether it should be viewed as distinct from them. The structure of FC s 23 suggests that the subsections are distinct, each traversing a different terrain, and militates against an interpretation which sees the right to fair labour practices as a catchall right, capable of embracing any person and any matter. This was not, however, the approach of the High Court in *South African National Defence Union & another v Minister of Defence & Others*. Without considering the scope of the right to fair labour practices, the court assumed that it included collective bargaining rights, finding that restrictions in the military regulations[2] on matters over which bargaining could take place infringed both this right and the right to engage in collective bargaining.[3] Sachs J in his minority judgment in

include disputes involving the Minister in his capacity as employer. The independence and impartiality of the arbitration board would be compromised as it was appointed by the Minister who would also appear before it in his representative capacity as employer. The Court referred to *De Lange v Smuts NO & others* 1998 (3) SA 785 (CC); *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455, Series A No 13 at para 95; *Campbell and Fell v United Kingdom* 28 June 1984 Series A no 80 para 78; *Sramek v Austria* 22 October 1984 Series A no 84. The Court found that regulation 41 of the military regulations which conferred on the Minister the power to appoint the registrar also violated the right to fair labour practices on the basis that the minister as employer had an interest in the decisions to be taken by the registrar. On an objective test, a reasonable person might believe that the registrar might favour the minister to whom he is beholden for his appointment and continuing office — at 2128E-G.

[1] Section 2*(a)* of the BCEA.

[2] Amendment to the General Regulations for the South African National Defence Force and Reserve, Government Gazette Vol 411 No. 20425 1 September 1999 Regulation Gazette No 6620 No. R1043. Regulation 3*(c)* provides for collective bargaining on 'certain' issues of mutual interest, while regulation 36 provides that military trade unions 'may engage in collective bargaining, and may negotiate on behalf of their members, only in respect of: 'a) the pay, salaries and allowances of members, including the pay structure; b) general service benefits; c) general conditions of service; *(d)* labour practices; and e) procedures for engaging in union activities within units and bases of the Defence Forces.' The court found that these provisions derogated from the right of a military trade union to negotiate over all matters of mutual interest between the employer and the military trade union and its members. See *SANDU III* (supra) at 2123. The provision, it found, infringed the right to fair labour practices and the right to engage in collective bargaining. The Court further found that the minister had failed to justify the restriction. It ordered that the word 'certain' be severed from regulation 3*(c)* and declared regulation 36 inconsistent with the Constitution and invalid to the extent that it purported to limit the right of military trade unions to engage in collective bargaining in respect of the matters in paras *(a)-(e)*.

[3] Similarly, the court, again without considering the nature of the right, found that the prohibition on a military trade union representative representing a member in grievance and disciplinary proceedings in terms of regulation 27 of the Military Regulations infringed the right. This particular claim should have been considered instead under the freedom of association rights, in particular the right to form and join a trade union and the right of a trade union to organize as it falls squarely within the scope of those rights.

SANDU I,[1] also viewed FC s 23(1) as an overarching right, capable of encompassing trade union rights. He proposed such a reading despite the fact that these rights are separately provided for under FC 23. He found that if the military personnel's claim to trade union rights had been considered under the right to fair labour practices — which is granted to 'everyone' — rather than under the provision on trade union rights, it would not have been necessary to have given an expansive meaning to the term 'worker' in order to embrace those personnel, a position adopted by the majority of the court.[2]

A related issue is whether matters specifically excluded from the ambit of one of the other rights as not worthy of constitutional protection could nevertheless be protected by FC s 23(1). There is good reason for holding that interests which have been rejected as not worthy of constitutional protection should not find a home under the section.[3]

(c) Fairness

The Constitutional Court in *NEHAWU* stated that the focus of FC s 23(1) is, broadly speaking, the relationship between workers and employers and the continuation of that relationship on terms that are fair to both.[4] It held that the right was incapable of precise definition and that problems relating to its definition were compounded by the tension between the interests of workers and employers. Thus it was neither necessary nor desirable to define the right. What was fair would depend on the circumstances of each case and would 'essentially involve a value judgment'.[5] While the concept of fairness does indeed present difficulties of interpretation, nevertheless some understanding needs to be reached on the principles embodied by the right for scrutiny of law and the development of a consistent jurisprudence under the right.

See *National Union of Metalworkers of South Africa v Bader Bop* 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC), (2003) 24 *ILJ* 305, 324 (CC)('*NUMSA v Bader Bop*')(Constitutional Court, considering a similar issue relating to trade union representation, did so in terms of the constitutional rights to form and join a trade union and to organize.)

[1] *SANDU* I (supra) at para 48.

[2] The High Court in *SANDU* III also located a remedy for the prohibition on a military trade union representing its members at disciplinary or grievance proceedings within the right to fair labour practices rather than under the rights to organise or to determine its activities. See § 53.4 infra.

[3] An example would be the right to a lockout. The drafters of the Constitution deliberately chose not to protect the lockout. Given this, it would be anomalous to allow for its protection under the right to fair labour practices. A further example relates to the right to engage in collective bargaining. One interpretation of that right is that it does not impose a correlative duty to bargain, and that disputes over a refusal to bargain, including the related issues of bargaining in good faith, bargaining levels, bargaining topics and bargaining tactics, should be resolved through industrial action rather than adjudication and are excluded from the right to engage in collective bargaining. If this restrictive view of the structure of the right were to be adopted, it should not be possible to seek redress in relation to those matters under the right to fair labour practices instead.

[4] 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC), (2003) 24 *ILJ* 95, 110 (CC)('*NEHAWU*') at para 40.

[5] Ibid at para 33.

The interests of employers are underpinned by the right to the economic development of their enterprises through enhanced production and efficiency; informing the interests of workers are the principles of social justice and democracy in the workplace. These principles encompass workers' rights to job security and advancement, a democratic work environment, and the right to be treated with dignity and equality. The right indicates that both parties' interests should be considered[1]: however, it does not tell us where the balance between these interests should be struck in any situation. The Constitutional Court, while acknowledging the legitimacy of the commercial requirements of the employer, has pointed to the role the Final Constitution plays in protecting the vulnerable in society. 'Our Constitution,' the Court has said, 'protects the weak, the marginalized, the socially outcast, and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secure that our own rights are protected.'[2] Although this finding was made under FC s 9, it nevertheless has resonance for many of the rights in the Final Constitution, including labour rights.[3]

[1] As seen above, the scope of the right includes the interests of both employers and workers.

[2] *Hoffman v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para 34. The Hoffmann Court was asked to consider the refusal of SAA to appoint a flight attendant because of his HIV status. The High Court had upheld the employer's argument that employing an HIV positive person as an attendant would, among other things, have an adverse impact of the airline's commercial interests. The Constitution Court, while acknowledging the legitimacy of employers' commercial interests, nevertheless held that they could not always be paramount, particularly when weighed up against the discrimination and marginalisation of persons with HIV.

[3] As far as international law is concerned, many ILO conventions offer a greater appreciation of where the balance between the interests of employers and workers should be struck so as to give effect to the notion of fairness. The conventions which are relevant to those practices which may fall under the rubric of fair labour practices have in common a focus of on the protection of workers. For instance, the ILO Convention on the Termination of Employment (1982) stipulates the parameters for a fair dismissal or retrenchment, which would be of relevance in testing the constitutionality of the provisions in the LRA on dismissal. An examination of the terms of the convention reveals that the provisions in the LRA closely reflect the requirements for a fair dismissal contained therein. Similarly, other conventions, such as the Holidays with Pay Convention of 1970, Protection of Wages Convention of 1949, and Hours of Work (Industry) of Convention 1919, would be relevant in testing the constitutionality of provisions in the BCEA. Although South Africa has not ratified the conventions mentioned here, they represent universally accepted norms and therefore constitute a touchstone against which the notion of fairness may be gauged. Again, this is not to suggest that the notion of fairness is exclusive of employers' legitimate commercial interests, but indicates that a central purpose of modern employment law is to guarantee the protection of workers. This has been succinctly put by Kahn Freund:

> 'The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation — legislation on the employment of women, children and young persons, on safety in mines, factories, and offices, on payment of wages in cash, on guarantee payments, on race or sex discrimination, on unfair dismissal, and indeed most labour legislation altogether — must be seen in this context.'

P Davies & M Freedland *Kahn-Freund's Labour and the Law* (1983 3rd Edition) 18.

In *NEHAWU*, the Constitutional Court was called on to establish whether the interpretation of s 197 of the LRA by the LAC infringed the right to fair labour practices.[1] The Court held that the purpose of s 197, which regulates the transfer of employees' contracts during the transfer of a business, was to protect workers' rights to job security as well as the interests of employers by facilitating the transfer of the business. The Court found this balance to be consistent with the right to fair labour practices.[2] On this basis, the Court held that the judgment handed down by the majority of the LAC that the contract of employment could be transferred only if an agreement existed between the old and new owners of the business was not reflective of the legislative intent. Nor, however, was the minority's view that the provision was designed solely to protect the interests of workers.[3] In support of its approach, the *NEHAWU* Court had regard to the purpose of the LRA to promote economic development, social justice and labour peace;[4] the section of the Act protecting workers from unfair dismissal, of which s 197 forms part;[5] and international law on the transfer of a business, designed to protect workers from dismissal during such a transfer.[6]

The Court's approach to the notion of fairness as articulated in the case has much in common with that of the Industrial Court under the 1956 Act. Under this Act, the definition of an unfair labour practice treated the interests of

[1] The University of Cape Town (UCT) had outsourced parts of its services to independent contractors, leading to the retrenchment of staff, some of whom were employed by the contractors but on less favourable conditions. NEHAWU sought an interdict and declaratory relief. The legal question was whether in terms of s 197 of the 1995 LRA, which deals with the transfer of a business as a going concern, the workers were automatically transferred without prior agreement. The LC held that s 197 did not provide for an automatic transfer of contracts in the case of the transfer of a business as a going concern. The court's view was that contracts of employment may only be transferred without the consent of the employees if the seller and purchaser of the business agree that the contracts will be transferred together with the business. NEHAWU appealed to the LAC. The majority of that court dismissed the appeal. The LAC held that in terms of s 197 a business is transferred as a going concern only if its assets, including the workforce, are transferred by prior agreement between the seller and the purchaser and the workers are part and parcel of the transaction. As there had been no prior agreement between UCT and the contractors that the workforce would be transferred as part of the transaction, there was no transfer of a business as per s 197(1)*(a)*.

[2] *NEHAWU* (supra) at paras 53 and 62. The focus of FC s 23, the Court said, was the relationship between the worker and the employer and the continuation of that relationship on terms that were fair to both: 'In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.' Ibid at para 121.

[3] *NEHAWU* (supra) at para 45.

[4] Ibid at para 62.

[5] Ibid.

[6] Ibid at paras 47–51. The court referred to the Acquired Rights Directive 77/187 EEC (adopted by the European Commission 1977) and the British Transfer of Undertakings (Protection of Employment) Regulations 1981/1794 ('TUPE') (enacted pursuant to the directive.). See *Landsorganisatioen I Danmark for Tjenerforbundet I Danmark v Ny Molle Kro* [1987] ECR 5465 at para 12 (construed the directive as holding that its purpose was to protect workers against the loss of employment in the event of the transfer of a business. The title of the regulations promulgated by the United Kingdom pursuant to the British Directive, the court said, also demonstrated an intention to protect workers against unfair dismissals in the event of the sale of a business).

employees and employers as equivalent:[1] workers were to be protected in relation to work security and opportunities[2] and employers against conduct detrimental to their businesses.[3] Employees relied on the provision to build increased rights in the workplace.[4] In adjudicating the individual rights disputes before it, the industrial court developed over time a jurisprudential standard of fairness that required that both the employer's commercial interests and the legitimate workplace interests of employees be taken into account.

The *NEHAWU* Court, following the approach in the 1956 LRA, found that although S197 was concluded in similar language to the two international instruments mentioned above, its purpose was not solely to protect the interests of workers, as provided in the instruments. Rather, its purpose was to strike a balance between the interests of both workers and employees. Similarly, even though s 197 forms part of the section of the Act on dismissals, which is specifically designed to protect workers, the court chose not to emphasise this. That said, the Court's finding that FC s 23 required the LRA to be interpreted so as to include workers' interests was critical in rectifying the misconstrual of the section by the LAC.

One implication of the Court's approach to the notion of fairness is that the LRA's provisions on unfair labour practices and unfair dismissal become vulnerable to constitutional attack. This is because, in contrast to the 1956 LRA, protection against unfair labour practices and unfair dismissals in the 1995 LRA is granted to employees only and not vice versa. The 1995 LRA thus reflects the belief that a central object of labour law is to act as a corrective to the generally weaker position of workers.[5] The Labour Court, called on to consider the constitutionality of the provision on unfair labour practices has found, however, that the LRA need not specifically protect the right of employers against an unfair labour practice by employees. The Court held that the Act was not

[1] The notion of equivalence is given expression, for instance, in the holding of the court in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & Others* 1996 (4) SA 577, 593G-H (A)(Court wrote: 'The fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee. Fairness to both means the absence of bias in favour of either. In the eyes of the LRA of 1956, contrary to what counsel for the appellant suggested, there are no underdogs.)

[2] The definition stated that an unfair labour practice was any practice which had the effect that '*(i)* any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardized thereby'.

[3] As far as employers were concerned, the definition of an unfair labour practice was a practice which had the effect that '(ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby'.

[4] It was employees, not surprisingly given the imbalance in power between them and employers, who relied overwhelmingly on the provision to build increased rights in the workplace.

[5] This is not to say that employers have no recourse to the law to defend their conduct in terms of the 1995 LRA: employers may escape a claim of unfairness by demonstrating that there was a substantively fair reason for their actions and that they acted in accordance with a fair procedure. However, they may not prosecute a claim for an unfair labour practice themselves. See 1995 LRA ss 185, 186 and 188, the Code of Good Practice: Dismissal (Schedule 8 of the 1995 LRA); and the Code of Good Practice on Dismissals based on Operational Requirements, promulgated by General Notice 1517, Government Gazette 20254 (16 July 1999).

intended to 'regulate exhaustively the entire concept of a fair labour practice as contemplated in the Constitution'.[1]

A further question is where legislation fails to give effect to the constitutional right, whether the right may be relied upon directly for the fashioning of a remedy. The High Court in *NAPTOSA* warned against such an approach.[2] It argued that because of the complex social and policy issues which mark the employment relationship, the right to fair labour practices is not a right which may, without 'an intervening regulatory framework, be applied directly in the workplace.'[3] If this were to occur, the High Court reasoned, it would lead to the development of parallel streams of jurisprudence in the labour arena. This stance has much to recommend it, and if the LRA were found to be constitutionally wanting, the better approach would be for the Constitutional Court to direct that the LRA be amended to remedy this limitation.[4]

In general the development of the notion of fairness as it applies to the conduct between employers and workers will take place through the specialist labour courts and the arbitration mechanisms established under the LRA. The *NEHAWU* Court acknowledged this in stating that the concept of a fair labour practice 'must be given content by the legislature and thereafter left to gather meaning, in the first instance, from the decisions of the specialist tribunals including the LAC and the Labour Court', and, in the second instance, with regard to domestic and international law.[5] Nevertheless, the Constitutional Court retains a supervisory role in assessing whether legislation honours the rights guaranteed in FC s 23(1). Labour legislation, the *NEHAWU* Court held, will 'always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution.'[6] So too, it follows, will the interpretation of that legislation.

53.3 Freedom of Association Rights

(a) Right to form and to join trade unions and employer organisations

The Final Constitution guarantees every worker the right to form and join a trade union and to participate in the activities and programmes of the union.[7] Similar

[1] *National Entitled Workers Union v CCMA* (2003) 24 ILJ 2335, 2340 (LC)('*NEWU*'). The CCMA had refused to hear a case involving the resignation of an employee which the employer held to be an unfair labour practice. The CCMA commissioner's decision was referred to the Labour Court for review. The Labour Court upheld the decision, and found that the applicant had other common law remedies at his disposal.

[2] (2001) 22 ILJ 889 (CC) at 895F-J, 895A-I, 896A-J, 897A-E.

[3] Ibid at 896-7.

[4] In NEWU, the Labour Court held differently, stating that should the employer wish to prohibit a labour practice which is unfair and which is not regulated by a conventional statute, it could approach a court relying on FC s 23 to grant the relief which it sought. *NEWU* (supra) at 2337.

[5] *NEHAWU* (supra) at para 34.

[6] Ibid at para 14. This stance was congruent with the Court's statement in *First Certification Judgment* that the development of labour law would 'in all probability' occur via the labour courts in terms of labour legislation. Nevertheless, the legislation would always be subject to constitutional oversight to ensure that the rights of workers and employers as entrenched in FC s 23 would be honoured.

[7] FC s 23(1)*(a)* and *(b)*.

provisions apply to employers as regards their own organizations.[1] It also guarantees that these organizations may determine their own administration, activities and programmes.[2] These freedom of association rights[3] constitute the bedrock of the related rights to organise, bargain collectively, and, in the case of workers, to strike.[4] The right to freedom of association has long been recognised internationally both by the International Labour Organization[5] and other international instruments.[6] The individual[7] and collective right[8] to freedom of association protects workers and employers and their organisations from control and undue interference by the state (executive and legislature), and trade unions and their members from victimisation by employers.[9] The fundamental importance of the right to freedom of

[1] FC s 23(3)*(a)* and *(b)*.

[2] FC s 23(3) and (4).

[3] FC s 23(4).

[4] In separating out the right to form and join representative organisations, the right of those organisations to carry out their activities and to organise, the right to bargain collectively and to strike, the Final Constitution avoids possible conflict over the interpretation of the scope of the right to freedom of association, as has occurred in other jurisdictions. In Canada, the right to freedom of association has been interpreted to exclude the associational activities of collective bargaining, strikes and picketing. The state is not constitutionally required to support or refrain from restricting these activities. *Reference re Public Service Employee Relations Act* (1987) 38 DLR (4th) 161, [1987] 1 SCR 313 ('*Re PSERA*'); *PSAC v Canada* (1987) 38 DLR (4th) 249 (SCC); *Saskatchewan v RWDSU, Locals 544, 496, 635 and 955* (1987) 38 DLR (4th) 277 (SCC). In Germany the opposite is the case in terms of article 9, section 3 of the Basic Law. R Blanpain (ed) *International Encyclopaedia of Industrial Relations and Labour Law: Volume 5 Germany* (Supplement 162, September 1994) 122.

[5] Convention Concerning Freedom of Association and Protection of the Right to Organise (1948) ILO No 87, 68 UNTS 17 (ratified by South Africa on 19 February 1996) ('Convention 87') and International Labour Organization's Right to Organize and Collective Bargaining Convention (1949) ILO No 98, 96 UNTS 257 (ratified by South Africa on 19 February 1996) ('Convention 98').

[6] The right to freedom of association as it pertains to labour relations is also found in the following international instruments: the International Covenant on Economic, Social and Cultural Rights (1966) (article 8); the International Covenant on Civil and Political Rights (1966)(article 22); the Covenant for the Protection of Human Rights and Fundamental Freedoms (1950)(article 11); the European Social Charter (1961)(part 1 article 5 and part 2 article 5); and the Additional Protocol to the American Convention in the area of Economic, Social and Cultural Rights (1988)(article 8).

[7] The right of workers to join organizations of their own choosing is guaranteed in ILO Conventions 87 and 98. Convention 87 article 2 reads: 'Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.' Convention 98 articles 1 and 2 read: '(1) Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. (2) Such protection shall apply more particularly in respect of acts calculated to *(a)* make the employment of a worker subject to the condition that he shall not join a trade union or shall relinquish trade union membership; *(b)* cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.'

[8] Convention 87 article 3 protects the collective right by granting organizations the right to draw up their constitutions and rules, freely elect their representatives, and to organize their administration and activities and formulate their programmes and to join federations and international organizations. Convention 98 protects organizations from interference from each other and workers' organizations from employer domination.

[9] On freedom of association generally, see S Woolman 'Freedom of Association' in in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

association in the context of labour relations is captured in this cogent and oft-quoted statement by Dickson CJ in *Reference re Public Service Employee Relations Act*:[1]

> Freedom of association is most essential in those circumstances where the individual freedom is liable to be prejudiced by the action of some larger and more powerful entity, like the government or an employer. Association has always been the means by which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.

Freedom of association rights are also protected in the 1995 LRA. Individual rights to freedom of association are guaranteed by granting employees the right to participate in forming a trade union[2] (or federation),[3] to join a trade union, subject to its constitution,[4] and to participate in its lawful activities;[5] and by protecting employees and work seekers from victimization for exercising these and other rights under the Act.[6] Similar rights are conferred on employers in respect of their organisations.[7] The 1995 LRA also protects the associated rights of trade unions and employer organizations to determine their own constitutions, to plan and to organize their administration and lawful activities,[8] and to join federations[9] and international labour bodies.[10]

Members of the defence force are not protected by the LRA, and therefore do not benefit from the trade union rights under that Act. In *South African National Defence Union v Minister of Defence & Another*, the Constitutional Court was called on to decide whether s 126B(1) of the Defence Act,[11] which prohibited members of the permanent force from becoming members of a trade union, infringed the

[1] *Re PSERA* (supra).

[2] A trade union is defined in 1995 LRA s 213 as 'an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organizations'.

[3] 1995 LRA s 4(1)*(a)*.

[4] 1995 LRA s 4(1)*(b)*.

[5] 1995 LRA s 4(2)*(a)*.

[6] 1995 LRA ss 5 and 187(1).

[7] 1995 LRA ss 6 and 7.

[8] 1995 LRA ss 8*(a)* and *(b)*.

[9] 1995 LRA s 8*(c)*.

[10] 1995 LRA s 8*(e)*.

[11] Act 44 of 1957. Section 126B(1) of the Act provided as follows:

(1). A member of the Permanent Force shall not become a member of any trade union as defined in section 1 of the Labour Relations Act, 1956 (Act 28 of 1956): Provided that this provision shall not preclude any member of such Force from being or becoming a member of any professional or vocational institute, society, association or like body approved by the Minister.

As mentioned earlier, members of the South African National Defence Force, National Intelligence Agency, and the South African Secret Service are excluded from the ambit of the 1995 Labour Relations Act. See § 53.1*(a)*(i).

constitutional right to form and to join a trade union.[1] In order for the Court to find that members of the SANDF were protected by the right, the Court had to find that they were 'workers'. This the Court did. O'Regan J argued that although such members were not employees in the strict sense of the term, their relationship with the defence force was 'akin' to an employment relationship and they could therefore be considered 'workers' for the purposes of the right. Relying on FC s 200(1) — which states that the 'defence force must be structured and managed as a disciplined military force' — the respondents had claimed that allowing members to join and to form trade unions would entitle them to bargain and to strike, which would, in turn, undermine the discipline of the military force and have 'grave consequences' for the security of the South African state.[2] The *SANDU I* Court disagreed. It held, instead, that union membership would likely have the opposite effect. It would enable the establishment of proper channels for grievances and complaints and thus might enhance the discipline and the efficiency of the force.[3] It found therefore that the total ban on trade unions in the SANDF went beyond what was reasonable and justifiable under FC s 36 and declared s 126B(1) invalid.[4]

The Military Regulations[5] governing members of the defence force have also come under constitutional scrutiny in relation to freedom of association rights. In SANDU III the High Court found that regulation s 37(1) and (2) infringed FC s 23(2)*(b)*. FC s 23(2)*(b)* provides that every worker has the right to participate in

[1] *SANDU I* (supra) at para 30. The matter came to the Constitutional Court by way of referral from the Transvaal Provincial Division, where Hartzenberg J had declared s126B(1) and (3) unconstitutional and invalid. *South African National Defence Union v Minister of Defence & Another* 1999 (2) SA 736 (T), 1999 (3) BCLR 321 (T), (1999) 20 *ILJ* 299 (T). In both courts the case also involved the constitutionality of s 126B(2) of the Defence Act, which prohibited a member of the SANDF from performing any act of public protest. Section 126B(2) also prohibited members of the SANDF from participating in any strike, but in this respect the constitutionality of the section was not disputed in either court.

[2] *SANDU I* (supra) at para 32. A research memorandum of the respondents showed that in England, the USA, and France no trade unions were permitted in the armed forces. But in none of these countries was there an express constitutional right to form and to join trade unions. Trade unions in the armed forces were permitted in the Netherlands, Germany and Sweden, where they were often not afforded the rights to negotiate on behalf of their members but were only afforded rights of consultation and representation. The Court did not accept the argument that the research supported the view that members of the armed forces could not join trade unions without putting the discipline and efficiency of the armed forces under threat, but rather suggested that a range of different responses to trade unions in the armed forces existed. Ibid at para 34.

[3] Ibid at para 35.

[4] Ibid at para 36. Note, however, that the Court suspended its order of invalidity for a period of three months in order to allow the respondents time to decide how to regulate trade union rights in the SANDF. This period of suspension was three months shorter than the period suggested by the High Court. Justifying the shorter period, the Constitutional Court pointed out that the SANDF had already had five years in which to address the issue of procedures to regulate trade unions in the SANDF, but had failed to do so. It also noted that as the matter could be the subject of regulation by the Minister of Defence rather than parliamentary legislation, an appropriate regulatory framework could be established within three months.

[5] Amendment to the General Regulations for the South African National Defence Force and Reserve Government Gazette vol 411 No. 20425 1 September 1999 Regulation Gazette No 6620 No. R1043.

the activities and programmes of a trade union.[1] Regulation 37(1) stated that no member 'may participate in the activities of a military trade union while participating in a military operation,' while regulation 37(2) held that no military trade union 'may liaise with its members whilst such members participate in a military operation or exercise.' The justification proffered by the Minister was that it would cause 'a threat to safety and a danger not only to the country concerned, but to the members themselves' if members were permitted to engage in trade union activities whilst engaged in military training'. The Court rejected the Minister's justification as too general, and ordered that the provision be severed from the regulations.

In the same case the High Court held that the prohibition in the regulations[2] on military trade unions' affiliating or associating with any labour organisation, labour association, trade union or labour federation that is not recognised and registered infringed FC s 23(4)*(c)*. FC s 23(4)*(c)* provides that every trade union has a right to form and to join a federation. The High Court referred to the findings of the ILO Committee on Freedom of Association that international trade union solidarity constitutes one of the fundamental objectives of any trade union movement and underlies the principle in article 5 of Convention 87. The Court rejected the minister's reasoning that the limitation was justified because of the need to keep the defence force politically independent and to maintain high standards of discipline. It was, the Court pointed out, regulation 13*(b)*, which prohibits a military trade union from associating with any political party, that spoke properly to the minister's concern. The fact that union federations COSATU[3] and NACTU[4] might be affiliated to political parties did not mean that all labour organisations would be so affiliated and thus the provision was overly broad. The Court ordered that the provision be severed from the regulations.[5]

(b) Union security arrangements

A highly contested issue is whether or not the right to form and join trade unions includes the right not to do so. In other words, does the right to freedom of association as applied to the workplace imply the negative right not to associate? Other jurisdictions, such as Germany and Canada, have found that the

[1] *SANDU III* (supra) at 2123H-J and 2124A-E. The High Court also held that regulation 37 infringed the right to engage in collective bargaining.

[2] Regulation 13*(a)* of the Amendment to the General Regulations for the South African National Defence Force and Reserve, Government Gazette Vol 411, No 20425 (1 September 1999).

[3] Congress of South African Trade Unions

[4] National Council of Trade Unions

[5] *SANDU III* (supra) at 2119E-J and 2120A-E.

positive right includes the negative right not to associate.[1] The European Court of Human Rights has reached a similar conclusion.[2] ILO Conventions 87 and 98 on the right to freedom of association and the right to organise and to collective bargaining do not explicitly include the right not to associate, although the exercise of the negative right has been found not to infringe the conventions.[3] Proponents of the approach that the right to freedom of association includes the negative right view the freedom to associate and the freedom from association as symmetrical in nature and as two sides to the same right to autonomy. The negative freedom is said to be part and parcel of the overall protection of human freedoms that mark a democratic state.[4]

The contrasting approach holds that the closed shop, and its lesser form, the agency shop, are justified in that they advance democracy in the workplace. The closed shop, in particular, operates to ensure an equilibrium of power on which the system of labour relations rests. It brings stability to the workplace and prevents friction on the shop floor through orderly and stable collective bargaining by preventing the proliferation of trade unions and by ensuring that the union represents the entire workforce.[5] It also avoids a situation where free-riders enjoy the benefits of collective bargaining without bearing any of the costs. The importance attached to the role of trade union membership in furthering the collective bargaining goals of workers is reflected in the Canadian Supreme Court's

[1] The German Federal Labour Court has found that the Freedom of Association provision (article 9) in the Basic Law protects the freedom not to associate and that the closed shop violates the right. See. R Blanpain (ed) *International Encyclopaedia of Labour Law and Industrial Relations: Vol 5 Germany* (Supplement 162, June 1994) 122. In *Lavigne v Ontario Public Service Employees Union* a majority of the Supreme Court of Canada accepted that the freedom to associate also entails the freedom not to associate. (1991) 81 DLR (4th) 545 (SCC).

[2] See *Young, James and Webster v United Kingdom* (1981) 4 EHHR 38, (1981) 2 HRLJ 185. The court found that the right to freedom of association guaranteed under article 11(1) of the European Convention of Human Rights protects the freedom not to associate. Although the court invalidated the closed shop agreement on the facts, it did not challenge the legitimacy of the closed shop *per se*.

[3] In its preparatory work for Convention 87 in 1947 the ILO rejected an amendment to grant workers the right not to join an organization. See ILO *Freedom of Association and Collective Bargaining* (1994)('ILO *Freedom of Association and Collective Bargaining* 1994') 45. At the time of the adoption of Convention 98 the relevant ILO committee agreed that the Convention 'could in no way be interpreted as authorizing or prohibiting union security arrangements, such questions being matters for regulation in accordance with national practice.' The Committee of Experts has found that systems which prohibit union security practices in order to guarantee the right not to join an organization, as well as 'systems which authorize such practices, are compatible with the Convention.' Ibid at 46 para 100.

[4] On this approach, just as the individual's right in the political sphere to join or not to join a political party is essential to the notion of democracy, so too is the worker's right to choose whether to join a trade union or not in the industrial sphere. Critics, however, point to a fundamental fallacy in an approach which equates democracy in the political sphere with the right to join or not to join political parties. In the workplace the right to form or join a trade union is foundational to the exercise of democracy, as it is essentially through the trade union and the process of collective bargaining that workers are able to play a role in determining their terms and conditions of work. The equivalent, in the political sphere, is not the citizen's right to belong to the party of his or her choice, but to exercise the franchise. The trade union is to the worker what parliament is to the citizen. See P Davies & M Freedland *Kahn Freund's Labour and the Law* (1983) 246.

[5] Davies & Freedland (supra) at 244-5.

decision in *Lavigne*.[1] In *Lavigne*, several judges argued that compelled association is necessary to further the collective goals of workers and the more general aims of a social democratic state. The Canadian Supreme Court recognized that to the extent that union security arrangements limit individual freedom as little as possible, they should pass constitutional muster.

Section 23(6) of the Final Constitution recognises the role which union security arrangements may play in the workplace by permitting national legislation to recognise such arrangements as long as they are contained in collective agreements. The import of the provision is that legislative union security arrangements which comply with the requirement will not per se be unconstitutional. To pass constitutional muster, however, the legislation must comply with FC s 36 and limit constitutional rights as little as possible. The fundamental rights which closed shops are most likely to infringe are the general right to freedom of association, the right to freedom of religion, belief and opinion, political rights, as well as the labour freedom of association rights.

The 1995 LRA provides for collective agreements containing closed and agency shops. As the provisions in the Act fulfil the requirements of FC s 23(6), they should survive constitutional scrutiny.

We have seen above that the purpose of union security arrangements is the fostering of democracy in the workplace through collective bargaining and the creation of a stable industrial relations environment. Agency shops, representing a lesser form of compulsion — as they do not require workers to join a union but merely to pay an agency fee — are less susceptible to constitutional challenge than closed shop arrangements.[2] The provisions in the 1995 LRA permitting collective agreements that include agency shops should pass constitutional muster. Firstly, there is no compulsion to join a trade union,[3] but merely to pay the union an agency fee. If there is compulsion, then the agency agreement will not be binding on non-members.[4] Moreover, the agency shop is subject to democratic controls that limit the way in which it may operate. Thus, it may be introduced only by collective agreement, and only if the union or unions involved represent the majority of the affected workers. The fee may not be used for party political purposes[5] but only to serve the socio-economic interests

[1] See *Lavigne v Ontario Public Service Employees Union* (1991) 81 DLR (4th) 545 (SCC) ('*Lavigne*'); *Bhindi v British Columbia Projectionists Loc 348* (1986) 29 DLR (4th) 47 (BCCA); *Remai Investment Co* (1987) 18 CLRBR (NS) 75 (Sask), quoted in G Adams *Canadian Labour Law* (2nd Edition, Release No 4, November 1995) 3-78 — 3-79. In Lavigne, he copurt required that to pass muster the stautory language must be permissive.

[2] See, eg, *Abood v Detroit Board of Education* 431 US 209 (1977)('*Abood*').

[3] 1995 LRA s 25(1).

[4] 1995 LRA s 25(3)*(a)*.

[5] 1995 LRA s 25(3)*(d)*. Foreign jurisdictions have found differently on the political use of agency fees: In *Abood*, the US Supreme Court, while giving the nod generally to such arrangements, upheld the objection to the arrangement on the grounds that the dues were used for political causes unrelated to collective bargaining. In *Lavigne*, on the other hand, the Canadian Supreme Court upheld an agency shop agreement in a public sector collective agreement even though a portion of the dues were to go to political and social causes not immediately connected with collective bargaining.

of the workers.[1] It must be paid into a separate account which is subject to scrutiny by the auditor conducting the annual audit of the union's records of account and financial statements.[2] The 1995 LRA makes provision for a conscientious objector to request that the agency fee be paid into a fund administered by the Department of Labour rather than into the trade union's coffers.[3] This exemption should take care of instances where a worker's religion prohibits him or her from supporting secular bodies. Finally, to ensure that the fees are not misused, the 1995 LRA provides for an appeal to the Labour Court over the use of fees.[4]

The ultimate purpose of the closed shop is the same as that of the agency shop: the achievement of democracy in the workplace through orderly and stable collective bargaining. The difference is in the level of compulsion. Closed-shop arrangements compel workers to join a particular union if they wish to work in a particular workplace. The pre-entry closed shop requires workers to join the union before they apply for work with a particular employer. The post-entry closed shop requires membership only once workers have been employed, on pain of dismissal. Because of this compulsion, closed shops have had a more difficult constitutional ride internationally than agency shops. While they have survived constitutional scrutiny in the US and Canada, they have not done so in Ireland, West Germany and the West Indies. The European Court of Human Rights has also found against them.[5]

The closed shop in South Africa is post entry in nature. While this might attenuate the degree of compulsion involved, it does not remove the compulsion and thus the closed shop remains susceptible to constitutional attack. It is for this reason that the 1995 LRA subjects the operation of the closed shop to a series of controls designed to ensure that in achieving its democratic purpose, constitutional rights are limited as little as possible. As in the case of an agency shop, only a trade union or trade unions representing the majority of workers may enter into a closed shop agreement.[6] Moreover, a closed shop will be binding only if a ballot has been held of the employees to be covered by the agreement and two thirds of employees vote in favour.[7] In addition, agreements will be binding only if there is no provision for a pre-entry closed shop and the requirements for membership fees, which are the same as for agency shops, are followed.

One of the chief complaints against the closed shop is that it has drastic consequences for a worker who refuses to join the union. The employer is compelled to dismiss him or her. The 1995 LRA attempts to restrict the circumstances in which this might occur. First, existing employees may not be

[1] 1995 LRA s 25(3)*(d)*(iii).
[2] 1995 LRA s 98(1)*(b)*(ii).
[3] 1995 LRA s 25(4)*(b)*.
[4] 1995 LRA ss 24(5), (6) and (7) .
[5] Adams (supra) at 3-82.
[6] 1995 LRA ss 24(1) and (3).
[7] 1995 LRA s 26(3).

dismissed for refusing to join a union party to the closed shop.[1] Second, the 1995 LRA also prohibits a trade union from refusing a worker membership in or expelling a worker from the union unless the refusal or the expulsion is in accordance with the trade union's constitution and the reason for the refusal or the expulsion is fair.[2] Third, the Act protects from dismissal persons who refuse to join a union on conscientious grounds.[3] Both existing employees and conscientious objectors, however, may be required to pay an agreed agency fee.[4] The Act also provides for the termination of the closed shop by a majority of those who voted, after a ballot instigated by a third of those covered by the agreement.[5] These democratic controls should weigh in favour of the closed shop in any limitation enquiry.

The only challenge mounted against the closed shop under the Final Constitution so far has focused on the right to negotiate over the establishment of a closed shop rather than attacking the nature of the closed shop itself. Regulation 19 of the military regulations prohibited military trade unions from negotiating a closed or agency shop with their employer.[6] The South African National Defence Union (SANDU) argued that this prohibition infringed the union's right to engage in collective bargaining.[7] What was at issue, the High Court found, was not the legitimacy of a closed shop in the military but the refusal to give SANDU the opportunity, through negotiation, of persuading the Minister 'that there are circumstances rendering a closed shop agreement appropriate.'[8] The *SANDU III*

[1] 1995 LRA s 26(7)*(a)*. It thus avoids the obstacle that stood in the way of the survival of the closed shop in *Young, James and Webster v United Kingdom* (1981) 4 EHHR 38, (1981) 2 HRLJ 185. Although the European Court of Human Rights recognized that the closed-shop provision was advantageous for the union and employer, it found that the compulsion on existing employees to join the closed shop or face dismissal constituted a breach of Article 11 of the European Convention on Human Rights. The article includes in para 2 a limitation clause which accepts restrictions on freedom of association which are 'prescribed by law' and 'necessary in a democratic society' for the purpose, among other things, of 'the protection of the rights and freedoms of others.' The closed shop provision in the case breached article 11 on the ground that the infringement was not 'necessary' in a democratic society. The court held that pluralism, tolerance and broadmindedness were all hall marks of a 'democratic society' and that 'democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.' The court's view that majoritarianism in and of itself is not a sufficient justification for curtailing the rights of minorities in the context of a closed shop points to a requirement for additional mechanisms to protect minority rights. The democratic controls in the 1995 LRA should prove sufficient to ensure fair and proper treatment of minorities.

[2] 1995 LRA s 26(5). The expulsion will be fair if the conduct undermines the trade union's collective exercise of its rights. These democratic controls should weigh in favour of the survival of the closed shop in any limitations inquiry.

[3] LRA 1995 s 26(7).

[4] LRA 1995 s 26(8).

[5] LRA 1995 s 26(15) and 26(16).

[6] Regulation 19 of the Amendment to the General Regulations for the South African National Defence Force reads: 'Military trade unions shall not have the right to negotiate a closed shop or agency shop agreement with the employer.' Regulation Gazette 6620, R1043, Government Gazette 20425 (1 September 1999).

[7] *South African National Defence Union & Another v the Minister of Defence & Others* 2004 (4) SA 10 (T), 2003 (9) BCLR 1055 (T), (2003) 24 *ILJ* 2101, 2120 (T)('*SANDU III*').

[8] Ibid.

court took issue with — and rejected — the proposition that closed shops and agency shops were undesirable in all contexts. Despite the relatively satisfactory outcome, the judgment contains one notable lacuna: in addressing the minister's arguments on the legitimacy of the closed shop, it fails to make any reference to FC s 23(6).

53.4 Right to Organise

The main difference between the current right of every trade union and every employer's organization to organize and the comparable right in the Interim Constitution is that the right is now granted not to individuals but to organizations.[1] FC s 23(4)*(b)*'s right to organize refers to the right of an organization to build its structures to enable it to represent its members and engage effectively in collective bargaining. As far as trade unions are concerned, this right embraces the recruiting of members, the granting of stop-order facilities, the right of union representatives to fulfil their duties, and access to necessary information to ensure that bargaining is meaningful.

Rights to organization are guaranteed by ILO conventions and decisions. They protect workers from dismissal for union activities,[2] recognize the right of trade unions to hold trade union meetings, including public meetings,[3] to have access to places of work, especially where employees live on employers premises,[4] enable employees to communicate with management,[5] allow employees to be represented by union officials,[6] permit unions to collect union dues,[7] and enable

[1] FC s 23(4)*(b)*.

[2] Right to Organize and Collective Bargaining Convention (1949) ILO No 98, 96 UNTS 257 (ratified by South Africa on 19 February 1996) article 1 upholds the worker's right to protection against dismissal for participating in union activities outside working hours or, with the consent of the employer, within working hours.

[3] See ILO Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO 1996 ('ILO *Freedom of Association* 1996') 30.

[4] See *Freedom of Association and Collective Bargaining* (1994) (supra) at 57; and ILO *Freedom of Association* (1996) (supra) at 198. See also ILO *Prelude to Change Industrial Relations Reform in South Africa, Report of the Fact Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa* (1992) at para 717. This right is qualified in that there should be no interference with the conduct of work during working hours and appropriate precautions for the protection of the employer's property should be taken. The ILO states that in sectors where trade unions experience particular difficulties, such as agriculture, there is a duty on employers to provide unions with 'facilities for the conduct of their normal activities, including free office accommodation [and] freedom to hold meetings.' Instruments were also adopted requiring governments to 'take concrete steps to obviate these various difficulties in the rural sector by actively facilitating the establishment and functioning of such organizations.' ILO *Principles, Standards and Procedures concerning Freedom of Association* (1989) 11, with reference to the Rural Workers' Organization Convention 141 and the Associated Recommendation 149 of 1975, as quoted in Du Toit et al *The Labour Relations Act of 1995* (2003) at 89.

[5] See ILO *Freedom of Association and Collective Bargaining* 1994 (supra) at 57.

[6] Ibid. The ILO recognises the right of a trade union to engage in any activity involved in the defence of members' interests which would include the right to representation.

[7] See ILO 'The Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking' (1971) Recommendation No 143.

unions to gain access to information for collective bargaining purposes.[1] The right to organize constitutes fertile ground for constitutional contestation because of the potential for conflict between this right and other rights: namely, the constitutional rights to privacy and to freedom of expression and the common-law proprietary rights of employers.

The 1995 LRA gives positive effect to the right to organize by providing for a range of organizational rights for trade unions.[2] In framing the provisions, attempts have been made to balance the potential conflict between these rights, and rights to privacy, property and ownership. Thus a trade union's right of access to an employer's premises is subject to any 'conditions as to time and place that are reasonable and necessary to safeguard life or property or to prevent the undue disruption of work.'[3] Similarly, a trade union's right to relevant information is balanced against the employer's right not to disclose information which could cause substantial harm to his or her business or employees; or private, personal information relating to an employee unless the employee agrees.[4] A concern not to infringe rights to privacy and property is clearly the intention behind the denial of organizational rights of access and disclosure to trade unions in the domestic sector.[5] Even though domestic employees are notoriously difficult

[1] The Committee of Experts has referred with approval to practices communicating to workers information on the economic situation of the bargaining unit. See ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 111.

[2] See Part A of Chapter 3 of the 1995 LRA. It grants unions which achieve a particular level of representation the rights of access to the workplace (section 12), to deduct union dues (section 13), to have elected union representatives in the workplace (section 14), to leave for union activities (section 15), and to disclosure of information (section 16). Unions may also gain organisational rights via a collective agreement (section 20), or by virtue of being a party to a bargaining or statutory council, but only in respect of rights of access and deduction of union dues (section 19). Where there is a dispute over organisational rights unions with the required level of representation may choose to have the dispute settled by arbitration or to strike (sections 22 and 65(2)*(a)*). Non-representative unions have no right to arbitration but they may strike to try to persuade an employer from granting them organisational rights. See *National Union of Metalworkers of South Africa v Bader Bop* 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC), (2003) 24 *ILJ* 305, 324 (CC).

[3] 1995 LRA ss 12(1), (2) and (4). In Canada, in the context of freedom of association, the right to engage in union activities has generally been held not to include the right to do so in the employer's time. Canadian Charter s 26.

[4] 1995 LRA s 16(5)*(c)* and *(d)*. The requirement to balance rights is specifically referred to in the Act: in a dispute about the disclosure of information the commissioner is obliged to 'balance the harm that the disclosure is likely to cause to an employee or employer against the harm that the failure to disclose the information is likely to cause to the ability of a trade union representative to perform effectively the functions referred to in section 14(4) or the ability of a representative trade union to engage effectively in consultation or collective bargaining' (s 16(11)). The provision that the employer can request that the information be kept confidential is also a factor which might weigh in favour of disclosure. In Canada a Charter challenge in terms of s 8 (providing protection against search and seizure) was unsuccessful. The labour board's decision that the documents be produced was saved in that it did not require the taking of the documents, that there were built-in provisions for the maintenance of confidentiality, and that the employer's duty to bargain in good faith created an obligation of disclosure in the interests of a full discussion between the parties. See *Gainers Inc and UFCW (Re)* (1986) 14 CLRBR (NS) 191 (Alta), as quoted in Adams (supra) at 3-93.

[5] 1995 LRA s 7.

to organize because of the isolated nature of their work, the limitation may be justified because of the private character of the home.

A number of points of conflict have emerged in other jurisdictions and may arise here. They relate to whether the right to communicate with and serve members' interests includes the right to political activities,[1] whether the right of access to employers' premises includes lunch and rest periods (are these working or non-working hours?),[2] and whether freedom of expression means that employers can attempt to dissuade employees from joining unions.[3]

The 1995 LRA places limitations on organizational activities according to the level of representativeness of a union or unions acting jointly.[4] For some rights the requirement is that the union or unions acting jointly should represent the majority of members. For other rights the threshold is that of sufficient representativeness. The ILO has found that such provisions are not in themselves contrary to the principles of freedom of association. The ILO finding is subject to two provisos: (1) the determination of the most representative organization must be based on 'objective, pre-established and precise criteria so as to avoid the possibility of bias or abuse';[5] (2) the provisions must not have the effect of entrenching an exclusive union system. In the main, the requirements in the LRA 1995 relating to representation should survive constitutional scrutiny. The test for majoritarianism is clear and objective. While the test of sufficient representation is less clear, its guidelines offer adequate direction to a commissioner called upon to decide a dispute over representativeness.[6] The Act also guards against entrenching a unitary union system by providing that the majoritarian and sufficiently representative requirements may be met by unions acting together.[7] Moreover, a commissioner may withdraw representation rights if another union is found to be more representative. However, whether the section that provides that a majority union and employer may set their own thresholds for the achievement of organizational rights[8] in a binding collective agreement will constitute a

[1] See, eg, *Adams Mine, Cliffs of Canada Ltd* (1982) Can LRBR (NS) 384 (Ont)('*Adams Mine*') (Ontario Labour Relations Board refused to allow a trade union to use its exclusive bargaining status to capture an audience for its political activities unrelated to collective bargaining, but warned against a construction on its decision that would be seen as generally condoning a constraint on trade union communication with its members in the workplace).

[2] See, eg, *Michelin Tires (Canada) Ltd* 80 CLLC 16 009 (NSLRB); *United Rubber Workers of America v Michelin Tires* (Canada) Ltd 80 CLLC 14 012 (NSSCTD); *Re Jarvis and Associated Medical Services Inc* 61 CLLC 16 218 (OLRB).

[3] In Canada prohibition on such speech has been found to be justified where it takes the form of threats and coercion. See *Placer Development Ltd* (1985) 11 CLRBR (BS) 195 (BC); *Union Bank Employees and Bank of Montreal* (1985) 10 CLRBR (NS) 129 (Can).

[4] 1995 LRA Chapter III part A.

[5] ILO *Freedom of Association and Collective Bargaining* (supra) at 44-45.

[6] In a dispute as to whether a union is sufficiently representative to achieve certain organizational rights a commissioner, in exercising his/her discretion, must take into account the nature of the workplace, the nature of the organizational rights sought, the nature of the sector, and the organizational history at the employer's workplace. 1995 LRA s 21(8)*(b)*.

[7] 1995 LRA s 21(8)*(c)*.

[8] 1995 LRA s 18.

justifiable limitation of FC s 23 is unclear. It might, as currently construed, operate to prevent weaker unions from exercising their own organizational rights.

In *NUMSA v Bader Bop*, the Constitutional Court pointed to the desirability of minority unions being able to represent their members, and therefore assert their organisational rights, in the workplace.[1] In this case, a dispute arose over the union's intention to strike because of the employer's unwillingness to recognise the union's shop stewards and to bargain collectively with the union on the grounds that the union was not representative of the majority of its workforce — a requirement for formal recognition under s 14 of the LRA 1995. The Constitutional Court found that the dispute engaged two fundamental principles. The first was the right to freedom of association in FC s 18. This right is given specific content by the right to form and join trade unions (FC s 23(2)*(a)*) and by the right of trade unions to organise (FC s 23 (4) *(b)*).[2] Those rights would be impaired where workers were not permitted to have their union represent them in workplace disciplinary and grievance matters, but were required to be represented by a rival union which they had chosen not to join.[3] The second principle raised by the dispute related to the right to strike,[4] in particular, whether workers' right to strike in support of their right to be represented by shop stewards in grievance and disciplinary proceedings had been limited by the Act.[5] The Court found that prohibiting a 'right to strike in relation to a demand that itself relates to a fundamental right otherwise not protected as a matter of right in the legislation would constitute a limitation on the right to strike' in FC s 23.[6] The Court held that s 21 of the 1995 LRA should not be used to deny a minority union the right to pursue organisational rights through the mechanism of collective bargaining and, if necessary, strike action. [7] The implication of the judgment is that a limitation on the right to organise by imposing thresholds on the exercise of legislative organisational rights may be justifiable provided that another means exists for a union to exert pressure to obtain those rights.

[1] (2003) (3) SA 513 (CC), 2003 (2) BCLR 182 (CC), 2003 (24) *ILJ* 305 (CC)('*NUMSA v Bader Bop*').

[2] Ibid at para 34. The Court relied on Art 2 of the ILO Convention of Freedom of Association and the Right to Organise which provides that workers have the right to join organisations of their own choosing. The Convention has been interpreted to mean that a majoritarian system of trade unionism would not be compatible with the Convention as long as minority unions were allowed to exist, to organise and to represent members in relation to individual grievances, and could also seek to challenge majority unions.

[3] Ibid at para 34.

[4] While ILO Conventions do not grant a right to strike, the ILO's committees have both asserted that such a right is essential to collective bargaining. The Court held that a reading of the Act which permitted minority unions the right to strike over the issue of shop steward recognition, particularly for the purpose of the representation of union members in grievance and disciplinary hearings, would be more in accordance with the principles of freedom of association in FC s 18 and the rights of workers to form and join trade unions, to organise and bargain collectively, and to strike.

[5] Ibid at para 35.

[6] Ibid at para 35.

[7] Ibid at paras 43 and 44. The Court found that there was nothing in chapter 4 of the LRA of 1995 which regulates strike action, which places a limitation on minority unions' striking to achieve organisational rights.

53.5 Right to Engage in Collective Bargaining

Collective bargaining is inextricably linked to the right to join and form representative organisations, to organise and to strike. These rights — jointly and severally — promote democracy in the workplace and the achievement of worker dignity. While freedom of association rights, more narrowly construed, have a value in and of themselves, their full value may only be achieved through the right to collective bargaining. It is through such bargaining that workers can most effectively challenge the countervailing power of employers.[1]

Collective bargaining comprises a complex system of interlinking elements underpinned by a particular regulatory framework. Collective bargaining is, firstly, a process constituted by the recognition of the representative organisations of the parties, the actual bargaining process — which includes matters relating to thresholds for bargaining, the nature of the bargaining unit, topics for bargaining, and bargaining levels — and the outcome of bargaining. Secondly, collective bargaining comprises the institutions and the mechanisms through which such bargaining takes place.

The Final Constitution recognizes the importance of collective bargaining by granting trade unions, employer organizations and employers the right to engage in collective bargaining.[2] The wording in FC 23 is consonant with that in Constitutional Principle XXVIII. CP XXVIII states that '… the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected.' In the *First Certification Judgment*, the Constitutional Court upheld an objection to the wording of the draft Final Constitution which excluded individual employers from the right.[3] While accepting the exclusion of individual workers was rational on the basis that collective bargaining by workers in their individual capacity was not possible,[4] the Court held that the same could not be said for individual employers. The failure of the text to protect this right of individual employers represented a failure to comply with the language of CP XXVIII.[5]

[1] P Davies and M Freedland *Kahn-Freund's Labour and the Law* (1983) 69.

[2] FC s 23(5).

[3] *Ex parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the Republic of South Afrcia, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253, 1405-6 (CC)('*First Certification Judgment*') at para 69.

[4] Martin Brassey correctly takes issue with the reasoning of the court:

> [t]he issue is where the right should reside and who should be entitled to exercise it. That it can be exercised only in a collective manner can shed light on this question, but cannot determine it. As we have seen, the right in the Interim Constitution was vested in individual workers, and freedom of association, another right whose expression must necessarily be collective, remains individuated in the Final Constitution.

Employment and Labour Law (1998) 1 C3:45.

[5] See *First Certification Judgment* (supra) at para 69. The wording of FC s 23 differs from that in the Interim Constitution in two respects: the Interim Constitution granted the right to workers and employers (rather than their organisations) and it granted a right to bargain collectively rather than the right 'to engage' in collective bargaining. The import of these differences is discussed below.

The Final Constitution differs from most other constitutions in that it explicates the different aspects of the broader right to freedom of association[1]. That is, it expressly guarantees the right freely to form and join trade unions and employer organisations, the right of those organisations to conduct freely their activities and programmes, the right to organise, the right to collective bargaining and, in the case of workers, the right to strike. In so doing it has avoided problems that have marked other constitutional jurisdictions where a right to collective bargaining is reliant on the interpretation given to the right to freedom of association. In Canada, the scope of the entrenched right to freedom of association has been a source of considerable contestation. Until recently, the Canadian Supreme Court consistently interpreted the right narrowly to exclude the right to collective bargaining and the right to strike.[2]

While the specific enumeration of labour rights avoids the above mentioned problems of interpretation, questions regarding the nature and extent of the right to engage in collective bargaining have still arisen. Rights are generally viewed as imposing a correlative duty or obligation on another party to ensure the protection of the right. With respect to the right to engage in collective bargaining, the exact nature of that obligation has been the subject of conflicting judgments.[3] At issue is whether the right places on the state and employers a positive duty to

[1] Belgium, Spain and Poland are among the few countries whose constitutions also contain a right to collective bargaining. See M de Vos 'Belgium', J Wratny 'Poland' and J Garcia Blasco 'Spain' in R Blanpain (ed) *The Actors of Collective Bargaining* (2003)('Blanpain *The Actors*'). In Canada, New Zealand and the Netherlands, constitutional freedom of association rights have been narrowly interpreted to exclude the right to collective bargaining. See T Archibald 'Canada', G Andrews 'New Zealand', and W Bouwens 'The Netherlands' in Blanpain *The Actors* (supra) at 93, 193 and 277 respectively.

[2] See *Reference Re Public Service Employee Relations Act* (1987) 38 DLR (4th) 161, [1987] 1 SCR 313 ('*Re PSERA*'); *Dunmore v Ontario (Attorney General)* (2001) 207 DLR (4th) 193 (SCC). In the latter case, the issue was whether the exclusion of agricultural workers from collective bargaining legislation violated the constitutional guarantee of freedom of association and equality. The court held that the failure to protect vulnerable farm workers in the legislative scheme amounted to under-inclusion, but this did not mean that freedom of association automatically required collective bargaining rights. If workers had an alternative means, such as a political avenue, to express an associational voice, or had non-union associations for the representation of their interests, there was no constitutional violation.

At the provincial level, Canadian labour legislation, influenced by the US Wagner Act, generally affords access to collective bargaining. In the main, recognition of the union comprises recognition for bargaining purposes. Employers may recognise a union voluntarily, but more commonly, the union files an application for certification with the Labour Relations Board. Once this is granted, after a determination of the relevant bargaining unit and the representativeness of the union, the union is recognised for the purposes of collective bargaining, with an attendant duty on both parties to bargain in good faith.

While the US Constitution does not provide for a right to collective bargaining, the constitutions of several states, such as Florida, Hawaii, Michigan, Missouri, New Jersey, New York and Oregon, recognise the right of employees to bargain collectively. Moreover, at the federal level, the National Labour Relations Act declares that it is an unfair labour practice for an employer to refuse to bargain collectively with the representatives of its employees. Section 8*(a)*(5). See E Render 'United States of America' in Blanpain *The Actors* (supra) at 303.

[3] Compare *South African National Defence Union v Minister of Defence & Others* 2003 (3) SA 239 (T), (2003) 24 ILJ 1495 (T)('*SANDU II*') with *South African National Defence Union & Another v Minister of Defence & Others* 2004 (4) SA 10 (T), 2003 (9) BCLR 1055 (T), (2003) 24 ILJ 2101 (T)('*SANDU III*').

bargain.[1] If there is such a positive duty, the question arises as to the extent of that duty. Does it require a delineation of levels of membership for recognition of the parties, bargaining topics, bargaining levels, and the bargaining unit and a requirement to bargain in good faith? Or is it more like a negative right or freedom that requires merely that there should be no impediment to, constraint upon, or interference with, parties' voluntary and autonomous exercise of collective bargaining? In terms of the negative conception, the decision whether to negotiate or not rests with the parties and is underpinned by economic power play and not legal enforcement. The content of the constitutional right has implications for the constitutionality of the current labour law regime, in particular, the Labour Relations Act, as well as the regulations governing members of state sectors excluded from the ambit of the LRA, such as the South African National Defence Force (SANDF).[2]

The 1995 LRA studiously avoids imposing a duty to bargain on employers, employers' organisations and trade unions. This is not because it regards collective bargaining as unimportant. On the contrary, one of the objects of the Act is to provide a framework for collective bargaining within which employees, trade unions, employers and employers' organisations can bargain collectively on matters of mutual interest. A further object is to promote orderly collective bargaining and orderly bargaining at sectoral level.[3]

In support of these objects the Act facilitates the acquiring of the different rights relating to collective bargaining: it protects the right of workers to form and to join trade unions and employers', employers' organisations, and the right of

[1] It has been argued that the right to engage in collective bargaining is in the nature of a freedom rather than a right. The use of this terminology has spawned a somewhat confusing analysis on the differences between a freedom and a right in the Bill of Rights. Thus it has been held, incorrectly, that where the term 'freedom' is used in the Constitution, the relevant provision does not encapsulate a right. See *SANDU III* (supra) at 2113. What is at issue, no matter the terminology, is the nature of the obligation imposed by a provision. As far as the right to engage in collective bargaining is concerned the issue is whether an obligation is placed on someone to do something, that is on the parties to bargain, or whether this should be something left to the parties freely to decide. Those arguing that the right is in the nature of a freedom rely on the distinction between rights and freedoms characterized by Dickson CJ of the Canadian Supreme Court as follows: 'Rights are said to impose a corresponding duty or obligation on another party to ensure the protection of the right in question, whereas 'freedoms' are said to involve simply an absence of interference or constraint.' *Re PSERA* (supra) at 192-3. An illustration of such interference would be where legislation was passed which prohibited collective bargaining or which would have the effect of prohibiting it, such as the extension of a collective agreement beyond its expiry date by 'legislative fiat' as in the *PSERA* case. See H Cheadle 'Labour Relations' in H Cheadle, D Davis & N Haysom *South African Constitutional Law: The Bill of Rights* (1st Edition, 2002) 18-25 and 27)

[2] See the amendments to chapter XX of the military regulations set out in Amendment to the General Regulations for the South African National Defence Force and Reserve, Regulation Gazette 6620, R1043, Government Gazette 20425 (1 September 1999)('Amendment to the General Regulations'), made in terms of section 87(1)(rB) read with section 126C of the Defence Act 44 of 1957. The other state sectors excluded from the 1995 Labour Relations Act are the National Intelligence Service and the South African Secret Service. 1995 LRA s 2.

[3] 1995 LRA s 1*(c)* and *(d)(i)* and (ii).

those organisations to conduct their own activities and programmes, providing a judicial remedy for the infringement of these rights.[1] The Act also facilitates the acquisition of organisational rights by granting these rights to trade unions which can demonstrate a sufficient level of representativeness. Disputes over the granting of organisational rights may be resolved either by arbitration or strike action.[2] In further support of collective bargaining, the 1995 LRA provides for the voluntary establishment of bargaining councils and their weaker counterpart, statutory councils,[3] and for the products of collective bargaining to be made binding on parties and their members and, on application, non-parties. The Act also provides for the enforcement of parties' demands, if collective bargaining should fail, through industrial action in the form of the strike and the lockout. Finally, the 1995 LRA is not altogether silent on the issue of a refusal to bargain and provides for advisory arbitration where there is a dispute over such a refusal. However, the parties are not obliged to abide by the ensuing arbitration award since, as the 1995 LRA says, it is merely advisory in nature.

Having provided this support for collective bargaining, the 1995 LRA leaves its enforcement to industrial action. Thus, an employer's failure to agree to bargain would be a dispute over a matter of mutual interest to be resolved by recourse to strike action. The right to strike to enforce collective bargaining is a right available to both representative and non-representative unions.[4]

The defence force regulations are cast differently, to take account of the specific nature of the armed forces. While collective bargaining is one of the objects of the military regulations,[5] it is more carefully controlled. In their original form, the regulations prescribed a list of topics for bargaining[6] under the bargaining council established by the regulations.[7] Moreover, there was no compulsion on either party to bargain.[8] A major difference between the regulations and the

[1] 1995 LRA ss 4-10.

[2] 1995 LRA ss 12-16 and 65(2).

[3] The establishment of statutory councils is triggered by one or other of the parties. Once triggered, however, such a council must be established provided the requirements for representation have been met. See 1995 LRA ss 39–41.

[4] See *National Union of Metalworkers of SA & Others v Bader Bop (Pty) Ltd & Another* 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC), (2003) 24 *ILJ* 305, 324 (CC)('*NUMSA v Bader Bop*'). In *NUMSA v Bader Bop*, Constitutional Court underscored the importance of the right to strike for minority unions as a means of forcing employers to the bargaining table over organisational rights (in this instance the recognition of trade union representatives). Granting the right to strike, it said, would avoid a limitation of the right of trade unions to organise and bargain collectively. (at para 36). It thus highlighted the importance of the strike as a lever to enforce bargaining.

[5] Amendment to the General Regulations s 3*(c)*.

[6] Amendment to the General Regulations s 62.

[7] Amendment to the General Regulations s 36.

[8] Ibid. In *SANDU III*, however, the court read this provision as peremptory in nature and thus enforcing a legal duty to bargain.

1995 LRA is that under the regulations striking is prohibited.[1] Such a prohibition is not unusual in relation to the armed forces worldwide. The absence of both a strike weapon and a duty to bargain led to a constitutional challenge to the regulations on the grounds that the combined effect of these omissions was to deprive members of the opportunity to play any real role in the determination of their terms and conditions of work.

There are persuasive arguments both in favour of and against a legally enforceable duty to bargain at constitutional level.

One of the main arguments in support of such a duty is the consistent stance of the Constitutional Court that a constitutional right should be generously interpreted. Such an approach suggests that as far as the right to engage in collective bargaining is concerned, it should be construed broadly enough to provide protection for all workers, no matter what the applicable regulatory regime. Thus it should be able to protect both those workers who are covered by the LRA, as well as those falling under other employment regulatory regimes, such as that governing the defence force. Where appropriate, limitations on the right may be imposed, but the constitutional right should not be interpreted with unnecessary limitations in mind.

The Constitutional Court has not yet had occasion to consider directly the nature of the constitutional right to engage in collective bargaining. Nevertheless, it has underlined the importance of collective bargaining as a means for workers to defend their interests in the workplace[2] and has stated that the Final Constitution conditions a fair industrial relations environment on the existence of collective bargaining.[3] While recognising the centrality of collective bargaining, the Court has cautioned against 'setting in constitutional concrete, principles governing that bargain which may become obsolete or inappropriate as social and economic conditions change.'[4]

[1] Amendment to the General Regulations s 6.

[2] *First Certification Judgment* (supra) at para 66.

[3] *NUMSA v Bader Bop* (supra) at para 13.

[4] Ibid at para 13. Moreover, as we have seen above, collective bargaining is critical to the achievement of democracy in the workplace and for the dignity of workers, both of which are consonant with the spirit and values underlying the Constitution. Thus narrowing the right would potentially undermine these goals. As already mentioned, the Constitutional Court itself has found that collective bargaining is key to a fair industrial relations system. See *NUMSA v Bader Bop* (supra) at para 13. The negative effect of a refusal to bargain or bargaining in bad faith on democratic values within the workplace has been succinctly put: 'There is nothing so subversive of collective bargaining, however, as to refuse to bargain entirely or to pretend to bargain without doing so, going through the motions with no intention of reaching agreement.' See M Brassey in Brassey et al *The New Labour Law* (supra) at 151. The Industrial Court was alive to the potential to subvert the process of collective bargaining in this manner, and no doubt this formed an essential factor in its decision to hold, under the unfair labour practice provisions in the 1956 LRA, that there was a duty to bargain. See, on the notion of a general duty to bargain, *FAWU v Spekenham Supreme* (1988) 9 *ILJ* 628 (IC); *Nasionale Suiwelkoöperasie Bpk v FAWU* (1989) 10 *ILJ* 712 (IC); *SACWU v Sasol Industries (Pty) Ltd* (1989) 10 *ILJ* 1031 (IC); *Buthelezi v Labour for Africa* (1991) 12 *ILJ* 588; *SACTWU v Maroc Carpets and Textile Mills (Pty) Ltd* (1990) 11 *ILJ* 1101 (IC); *RTEAWU v Tedelex (Pty) Ltd* (1990) 11 *ILJ* 1272 (IC); *Sentraal-Wes (Ko-op) Bpk v FAWU* (1990) 11 *ILJ* 977 (LAC); *Macsteel (Pty) Ltd v NUMSA* (1990) 11 *ILJ* 995 (LAC)). In relation to bargaining in good faith, the following forms of

The view that the constitutional right confers a positive duty to bargain was recognized in *SANDU III*. Regulations governing members of the military provided for collective bargaining[1] on certain issues only and established a military bargaining council for this purpose.[2] The military regulations, however, did not clearly confer a duty to bargain. They provided only that military trade unions 'may' engage in collective bargaining, and 'may' negotiate on behalf of their members on the specified issues.[3] The applicants sought a declarator from the High Court stating that the Minister of Defence was under a duty to negotiate with SANDU on all matters of mutual interest that might arise between them in his official capacity as the employer and a mandamus directing the minister to negotiate accordingly.[4] The court granted the declarator and mandamus.[5] The High Court's conclusions were grounded in the need to interpret constitutional rights broadly, the essential role of collective bargaining in a fair industrial relations system,[6] the decisions of the Industrial Court under the 1956 LRA that there was a duty to bargain,[7] and the importance of collective bargaining where

bargaining conduct were among those deemed to be unfair: unfair or unreasonable preconditions to bargaining (*Sentraal-Wes (Ko-op) v FAWU* (1990) 11 *ILJ* 977 (LAC); *FAWU v Sam's Foods* (1991) 12 *ILJ* 1324 (IC)); premature unilateral action (*NUM v Goldfields* (1989) 10 *ILJ* 86 (IC)); illegitimate pressure tactics; denial of union access (*Doornfontein Gold Mining Co Ltd v National Union of Mineworkers* (1994) 15 *ILJ* 527 (LAC)); sham bargaining; inadequate substantiation of proposals; the failure to disclose information; dilatory tactics (*MAWU v Natal Die Castings Co (Pty) Ltd* (1986) *ILJ* 520); bypassing a recognized union and negotiating directly with the employees when the union is not in bad faith (*NUM v East Rand Gold and Uranium Co Ltd* (1991) 12 *ILJ* 1221 (A)); and unilaterally implementing an unnegotiated proposal (*NUM v East Rand Gold and Uranium Co Ltd* (1991) 12 *ILJ* 1221 (A). See A Rycroft & B Jordaan *A Guide to South African Labour Law* (1992) 132–40. The court, however, drew the line at determining the level at which the parties should bargain, but only in the absence of manifest unfairness. See, for instance, *Bleazard v Argus Printing & Publishing Co Ltd* (1983) 4 ILJ 60 (IC); *SA Union of Journalists v Times Media Ltd* (1993) 14 ILJ 387 (IC). In *Paper Printing Wood & Allied Workers Union v SA Printing & Allied Industries Federation* (1990) 11 ILJ 345 (IC). The court refused to compel an employers' organisation to remain a member of an industrial council. In general it also stopped short of deciding appropriate bargaining topics: the Court intervened only where the bargaining demand was 'unconscionable or so outrageous that one can infer that there was no intention to negotiate'. See *Buthelezi v Labour for Africa* (1991) 12 ILJ 588, 592G-I.

[1] Collective bargaining is defined in section 1 as 'the process whereby the employer and military trade unions engage in negotiation on matters of mutual interest'. Only a registered military trade union has collective and organisational rights in respect of members (section 9).

[2] Regulation 3*(c)* stated: 'Military trade unions may engage in collective bargaining, and may negotiate on behalf of their members, only in respect of a. the pay, salaries and allowances of members, including the pay structure; b. general service benefits, c. general conditions of service; d. labour practices; and e. procedures for engaging in union activities within units and bases of the Defence Force.'

[3] Regulation 36.

[4] *SANDU III* (supra) at 2111E-F.

[5] Ibid at 2115H.

[6] The *SANDU III* Court quoted the Constitutional Court's statement in *NUMSA v Bader Bop* (at para 13) that 'the Constitution contemplates that collective bargaining between employers and workers is key to a fair industrial relations environment.'w

[7] *SANDU III* (supra) at 2112G.

workers were prohibited from striking.[1] The *SANDU III* court held that the constitutional right to collective bargaining placed a duty on the state as employer to bargain collectively. It stated that if the minister was not 'burdened with an obligation to negotiate in good faith' the union would be deprived of any method of enforcing its right to engage in such bargaining. A right without a remedy, it contended, was meaningless.[2] The High Court also found that the regulations themselves could be read in such a way so as to give effect to the duty to bargain, thus obviating the need to amend them to ensure their consistency with its interpretation of FC s 23.[3] Co-incident with the enquiry over the duty to bargain itself, the court also considered the issue of bargaining topics. It found that restrictions on the matters over which collective bargaining could take place — to 'certain' issues (regulation 3*(c)*), which were specified in regulation 36 — violated the Final Constitution and ordered that the offending provisions be deleted.[4]

A case can, however, be made that FC s 23 does not impose a legally enforceable duty to bargain. Central to this view is Article 4 of Convention 98 of the ILO which does not prescribe a positive duty to bargain. The Article states:

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.[5]

The committees[6] of the ILO have highlighted the two central principles of this article: (1) the voluntary and autonomous nature of collective bargaining and (2) that positive action should be taken by public authorities to promote such bargaining.[7] In underscoring the voluntary nature of collective bargaining and the autonomy of the bargaining parties, the committees have rejected recourse to

[1] *SANDU III* (supra) at 2113H.

[2] Ibid at 2113H. The regulations make provision for a Military Arbitration Board to settle disputes which remain unresolved at bargaining council level. The bargaining council is granted the power to hear disputes over any dispute in respect of a collective agreement, or any other matter which is or could be the subject of collective bargaining. This provision is based on the premise that collective bargaining will occur. A dispute about the fact of bargaining cannot itself be the subject matter of bargaining and therefore may not be referred to the arbitration board.

[3] *SANDU III* (supra) at 2115I. The court did so by arguing that the word 'may' in regulation 36 which provides that military trade unions 'may engage in collective bargaining and may negotiate on behalf of their members', was the legislature's customary manner of conferring powers. See *Paper Printing Wood and Allied Workers Union v Pienaar & Others* 1993 (4) SA 621, 640A-B (A), (1991) 12 *ILJ* 308 (A). Contrary to this view it has been held that the word 'may' reflects a certain amount of discretion and will be interpreted as directory rather than peremptory, unless the purpose of the provision indicates otherwise. See *Amalgamated Packaging Industries v Hutt* 1975 (4) SA 943 (A). With respect, within the context of the regulations, it is difficult to see how the provision could be anything other than directory in nature.

[4] *SANDU III* (supra) at 2130J and 2131A.

[5] ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 107 para 235.

[6] The Committee of Experts on the Application of Conventions and Recommendations and the Freedom of Association Committee of the Governing Body of the ILO.

[7] ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 106 para 235.

compulsion to ensure that bargaining occurs. The role of authorities is to provide the legal framework and administrative machinery for collective bargaining to which parties on a voluntary basis and by mutual agreement may have recourse.[1] Even when highlighting the importance of collective bargaining as an element of freedom of association, the ILO states that the bargaining should be 'free'.[2] It is not sufficient, however, that bargaining should be permitted. It must be actively encouraged and promoted.[3] The committees have held, in addition, that when bargaining occurs, it must take place in good faith.[4] Even here, it must be noted, the committees envisage that a lack of good faith bargaining is a matter for negotiation between the parties rather than a matter that requires compulsion.[5] Moreover, the committees have stated that the determination of bargaining levels[6] as well as bargaining topics should also be left to the parties and not be imposed by law or by the authorities.[7]

[1] ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 110, para 247. See also ILO *Freedom of Association* (1996) (supra) at 170-171, paras 844, 845 and 846:

> 'The voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners, is a fundamental aspect of the principles of freedom of association' . . . 'Collective bargaining, if it is to be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining,' . . . 'Nothing in Article 4 of the Convention places a duty on the government to enforce collective bargaining by compulsory means with a given organisation; such an intervention would clearly alter the nature of bargaining.'

[2] ILO *Freedom of Association* (1996) (supra) at 159 para 782.

[3] The ILO's position is highlighted in its observations on New Zealand's previous regulatory regime (the Employment Contracts Act), to the effect that what was required was not merely that the Act permit collective bargaining, but that it should actively promote and encourage it. See *Interim Decision of the ILO's Committee on Freedom of Association* Case No 1698, Official Bulletin vol 77 series B no 3 at para 137*(e)*. The committee stated: 'Considering that, taken as a whole, the Employment Contracts Act does not encourage and promote collective bargaining, the committee requests the Government to take appropriate steps to ensure that legislation encourages and promotes the development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations with a view to the regulation of terms and conditions of employment by means of collective agreements.' In its Final Decision, the committee wrote: 'In effect it seems that the Act *allows* collective bargaining by means of collective agreement, along with other alternatives, rather than promoting and encouraging it.' Ibid at para 255. See G Anderson 'Collective Bargaining and the Law: New Zealand's Employment Contracts Act Five Years On' (1996) 9(2) *Australian Journal of Labour Law* 107, 107-108.

[4] ILO *Freedom of Association* (1996) (supra) at 165 para 814 'It is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties.'

[5] Ibid at 166, para 817 ('While the question as to whether or not one party adopts an amenable or uncompromising attitude towards the other part is a matter for negotiation between the parties, both employers and trade unions should bargain in good faith making every effort to reach an agreement.')

[6] Ibid at 172, para 851 ('According to the principle of free and voluntary bargaining embodied in art 4 of Convention No 98 the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority.') See also ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 112 para 249.

[7] ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 112-3 para 250. The only time the ILO seems to regard an obligation to bargain as amounting to a legally enforceable duty is where a union is representative of workers in an industry. In these circumstances, the committee has held that employers should recognise the union for the purposes of collective bargaining

Proponents of the voluntary position also base their arguments on the wording of FC s 23 itself.[1] They argue that because FC s 23(5) requires that national legislation may be enacted to regulate collective bargaining and may limit a fundamental right, it is envisaged that the regulation of collective bargaining should be left to the legislature. This position, so the argument goes, is reinforced by the wording of the right that parties may 'engage' in collective bargaining (as opposed to the right in the Interim Constitution which granted the right 'to' collective bargaining). However, several constitutional rights require national legislation to make good their promise and all such legislation must comply with constitutional dictates. Whether the word 'engage' connotes the negative right to bargain rather than a hard right with its correlative duty to bargain has been a matter of some contestation. It was previously argued that nothing material turns on this difference in wording.[2] It does not constitute conclusive proof that the right avoids imposing a duty to bargain.

A further argument against a legally enforceable duty to bargain is that the determination of an appropriate collective bargaining regime is an issue of policy which is best left to the legislature to determine. The regime which finds expression in the 1995 LRA is one which positively promotes collective bargaining at industry level, rather than at enterprise level, although, in compliance with the Final Constitution, bargaining at the latter level is not excluded.[3] The 1995 LRA supports industry-level bargaining because of the benefits attached to such a regime.[4] It eschews a general duty to bargain as it would undermine industry-level bargaining by encouraging bargaining at enterprise level. According to this view, interpreting the constitutional right to give effect to a duty to bargain would

[1] H Cheadle 'Labour Relations' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (1st Edition, 2002) 18-27.

[2] See M Brassey & C Cooper 'Labour Relations' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) 30-32. See also *South African National Defence Union v Minister of Defence & Others* 2003 (3) SA 239 (T), (2003) 24 *ILJ* 1495 (T)('*SANDU II*'). The High Court relied on the wording to decide that the right did not impose a correlative duty to bargain. However, it did hold that the absence of a duty to negotiate did not mean that participation in the process of negotiation and bargaining was so voluntary that the Defence Force could decide capriciously or at whim not to negotiate. Nor could it refuse because bargaining would be inconvenient or difficult. The reasoning in this judgment was held to be incorrect by the High Court in *South African National Defence Union & Another v Minister of Defence & Others* 2004 (4) SA 10 (T), 2003 (9) BCLR 1055 (T), (2003) 24 *ILJ* 2101 (T)('*SANDU III*').

[3] The constitutional right to engage in collective bargaining is granted not only to trade unions and employer organisations but to individual employers as well. An attempt to restrict the ambit of the right to employer organisations and exclude individual employers was rejected by the Constitutional Court in *First Certification Judgment*.

[4] See Cheadle (supra) at 18-28 and 29. Cheadle lists the benefits of industry-level bargaining as follows: it removes conflict from the workplace and lowers the transactional costs for employers and trade unions; it generally sets a floor of standards, allowing for further negotiations at the workplace — a combination which both protects workers and allows for flexibility; by setting industry standards, it ensures that competition does not take the form of a race to the bottom by lowering standards for workers; because it is voluntary it has greater legitimacy; and fewer strikes occur where there is such bargaining and they are less damaging for the individual employer.

conflict with the policy regime embodied in the 1995 LRA. Whether one agrees with the merits of industry-level bargaining or not, there is much to be said for the argument that it should be left to the legislature to determine the appropriate collective bargaining regime. Nevertheless, a policy of complete judicial deference within a constitutional democracy is not defensible.[1]

The case against a duty to bargain is also based on the view that conflicts over bargaining agents, levels of bargaining, bargaining tactics, and the bargaining agenda are best left to power play between the interested parties and not to the courts to resolve.[2] The counter argument is that a legal duty to bargain, rather than impeding bargaining, may clear the way for bargaining to take place.[3] Under the 1995 LRA, potential conflict over bargaining rights is minimised by the existence of organisational rights, in particular trade union representation rights, which drive the process leading up to collective bargaining.[4] Disputes over organisational rights are resolved either by industrial action or arbitration, thus minimising the role of the courts and the possible delays inherent in the judicial process. This legislative approach, however, is less helpful in those sectors where workers are hard to organise, such as the farming sector. A duty to bargain would give such vulnerable workers greater opportunity to determine their terms and conditions of work.

There is a valid concern that the imposition of a legally enforceable duty to bargain — and the consequent determination by the judiciary of levels of bargaining, bargaining partners and bargaining topics — could lead to rigidities in the labour market, with negative consequences for South Africa's ability to compete internationally.[5] A system that allows parties to determine

[1] See *National Educators Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC), (2003) 24 *ILJ* 95, 109-110 (CC); *National Union of Metalworkers of SA & Others v Bader Bop (Pty) Ltd & Another* 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC), (2003) 24 *ILJ* 305, 317-319 (CC). The Constitutional Court has stated that it will be slow to intervene where a statute, such as the LRA, aims to give effect to a constitutional right. Nevertheless it would be shirking its constitutional duty if it did not ensure that the legislation gave proper effect to the right. It would intervene when it was in the interests of justice to do so.

[2] In the US, the duty to bargain has spawned jurisprudence over issues relating to bargaining agents, the manner of bargaining, bargaining units and so on which has led to delays in the actual bargaining itself. See D Leslie *Labor Law in a Nutshell* (4th Edition, 2000) 181–228.

[3] See Brassey (supra) at 151. Under both the 1956 and 1995 LRAs, the position was/and is more nuanced than the above analysis might suggest. While under the 1956 Act the duty to bargain was juridified, this did not extend to all aspects of the duty. Once a duty to bargain had been established by the Industrial Court, the majority of cases thereafter related to good faith bargaining. See Rycroft & Jordaan (supra) at 132-140.

[4] As the granting of union representation rights is dependent on the union having majority support in the workplace and the extent of the representation is highly regulated, conflict over bargaining agents and the bargaining unit is reduced.

[5] The 'Explanatory Memorandum on the Labour Relations Bill' Government Gazette 16259 (10 February 1995) addresses the problem as follows:

> [T]he fundamental danger in the imposition of a legally enforced duty to bargain and the consequent determination by the judiciary of levels of bargaining, bargaining partners and bargaining topics, is the rigidity which is introduced into a labour market that needs to respond to a changing economic environment. The ability of the South African economy to adapt to the changing requirements of a competitive international market is ensured only where the bargaining parties are able to determine the

the contours of bargaining and bargaining outcomes, and which includes the possibility of such arrangements being amended, is more suited to the imperatives of a globally competitive market to which the South African economy needs to be attuned. The Constitutional Court, as we have seen, has indicated that it is alert to the danger of judicially imposed rigidities that might become obsolete under new economic circumstances.[1]

An interpretation of the right to engage in collective bargaining which imposes a correlative duty to bargain would undoubtedly provide the greatest protection to both private and public sector workers and enhance their ability to determine their terms and conditions of work.[2] It would also give effect to the general approach of the Constitutional Court to interpret fundamental rights in a generous manner. At the same time, however, it would be dissonant with the requirements of international law as well as with the legislative regime in the LRA. The alternative reading — that the constitutional right is a negative right or freedom — accords with ILO Convention 98 and the LRA.

An interpretation of the constitutional right as imposing a correlative duty to bargain would mean that the LRA fails to give effect to that right. It would then have to be shown that this limitation is justifiable under FC s 36. We have seen above that one of the main objects of the LRA is to promote collective bargaining and that that purpose is made manifest through the promotion of representative organisations and their activities, organisational rights, the right to industrial action and the provision of mechanisms and institutions for bargaining. Given

nature and the structure of bargaining institutions and the economic outcomes that should bind them, and, where necessary, to renegotiate both the structures within which agreements are reached and the terms of these agreements . . . While giving legislative expression to a system in which bargaining is not compelled by law, the draft Bill does not adopt a neutral stance. It unashamedly promotes collective bargaining. It does so by providing a series of organizational rights for unions and by fully protecting the right to strike.

[1] *NUMSA v Bader Bop* (supra) at para 13.

[2] Interpretative assistance in evaluating the competing claims over a duty to bargain may be provided by foreign law. However, the caveat against importing law out of context from other jurisdictions should be borne in mind. Few foreign constitutions contain a specific right to collective bargaining. Where such a right is included, it is not always the case that it translates into a positive legislative duty. Thus in Spain and in Poland, the constitutional right to collective bargaining is reflected in a legislative duty to bargain. See Juan Blasco 'Spain' in Blanpain *The Actors* (supra) at 241-242 and Jerzy Wratny 'Poland' in Blanpain (supra) at 219-220. Not so in Belgium. See Marc de Vos 'Belgium' in Blanpain *The Actors* (supra) at 65-66. In Belgium, collective bargaining is voluntary, although that country's constitution guarantees the right to such bargaining. Conversely, it is often the case that even where a constitution does not contain a right to collective bargaining, a legislative duty to bargain nevertheless exists or the courts have interpreted the law to give effect to such a duty. Generally a distinction is made between a duty to bargain and a duty to bargain in good faith. Countries with a legislative duty to bargain include Canada, Poland, Sweden, Turkey and France. Countries with a specific duty to bargain in good faith include New Zealand, Poland, Spain, and Israel. Voluntary collective bargaining systems are found in Belgium, Germany, Norway, the Netherlands, Israel, Great Britain, New Zealand, and Turkey. Thus there is no uniform approach, the collective bargaining regime in any specific country being a result of a mix of policy, legal history and social and political norms unique to that country.

that the 1995 LRA promotes collective bargaining and is reflective of international law, the limitation on the right to engage in collective bargaining arising from the absence of a duty to bargain could be justifiable.

A further issue for consideration is whether the right to collective bargaining may be interpreted as incorporating the right to a lockout. The Final Constitution explicitly protects the right to strike, but there is no equivalent right to lock out. In *First Certification Judgment*, the Constitutional Court found that implicit in a right to collective bargaining was the right to 'exercise some economic power against partners in collective bargaining'.[1] This statement should not be read as providing for an implicit right to a lockout, particularly as the court in the same judgment unequivocally rejected the separate inclusion of a right to a lockout on the grounds that the rights to strike and to lock out were not equivalent. Moreover, it would be anomalous to allow the inclusion of the lockout through 'the back door' via another right once it has been explicitly rejected by the Court as worthy of constitutional protection.

One of the provisions of the LRA most vulnerable to constitutional attack under the right to engage in collective bargaining is section 32 of the 1995 LRA. Section 32 provides that a collective agreement drawn up in a bargaining council can be extended to non-parties within the scope of the council, thereby binding them to the terms of the agreement. The effect of this section is not only to limit non-parties' rights to collective bargaining but also, because parties can agree to exclude industrial action as a means of resolving a dispute, to prohibit non-parties' right to strike where such agreement is reached. The imposition on non-parties of limitations which might infringe their fundamental rights could be open to constitutional challenge. It remains to be seen whether such agreements would, under such circumstances, be found to be justifiable on the grounds that they are based on notions of democratic majoritarianism, contain safeguards on the application of the majoritarian principle, and are designed to ensure the promotion of a stable, sectoral collective bargaining system.[2] While the extension will

[1] *Ex parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253, 1284 (CC). On the basis that Constitutional Principle XXVIII did not require that the constitutional text should recognize any particular economic mechanism, the Court declined to determine the nature and extent of that right.

[2] Safeguards apply, firstly, to the operation of the bargaining councils: they may only be established voluntarily (1995 LRA s 27), the parties must be sufficiently representative of the interests they purport to represent (1995 LRA s 29(11)(iv)), objections may be raised in relation to their establishment (1995 LRA s 29(3)), the demarcation of the scope of councils must be approved by the National Economic Development and Labour Council (Nedlac) (1995 LRA s 29(8)) or the Minister (1995 LRA s 29(9)), adequate provision must be made in bargaining councils' constitutions for the representation of small and medium enterprises (1995 LRA s 29(11)(3)), and parties which are refused admission to councils may seek redress in the Labour Court (1995 LRA s 56(5)). In respect of collective agreements, the Act requires that for an agreement to be declared binding both parties should vote in favour, and they should represent (in the case of trade unions) and employ (in the case of employers' organisations) the majority of members/employees of the parties to the council (1995 LRA s 32(1)). Moreover, the Minister may not extend the agreement unless the majority of workers to be affected are members of the relevant trade unions, and employers employ a majority of the workers to be covered (1995 LRA s 32(3)*(b)* & *(c)*). The Act also provides for exemptions from the terms of an agreement by an independent body according to

generally be granted only where unions and employers can fulfil the required majoritarian requirement, the Act does make provision for the extension of agreements where the parties are merely sufficiently representative if the Minister deems this to be in the interests of sectoral collective bargaining. [1] This grants a wide discretion to the Minister, and is more susceptible to constitutional challenge than extension based on the majoritarian requirement.[2]

Collective agreements struck at the level of the enterprise may also be made binding on non-union employees in terms of s 23(1)*(d)* of the 1995 LRA provided the union represents the majority of employees. This has the effect of depriving non-union employees of the right to negotiate their own agreements. The more limited scope of such agreements, the majoritarian requirement and the objective of stable collective bargaining might ensure the constitutional survival of such agreements.

Collective bargaining is also limited by sectoral determinations in terms of s 51 (1) of the Basic Conditions of Employment Act. However, as the purpose of these determinations is to set minimum conditions of employment to protect more vulnerable employees and are arrived at through a process of public consultation, they are unlikely to be impugnable.

53.6 Right to Strike

The right to strike is widely regarded as fundamental to the protection of workers' interests. Without a right to strike, workers' rights to freedom of association and to collective bargaining are compromised.[3]

Although ILO Conventions do not specifically recognise the right to strike, the ILO's Committee on Freedom of Association has held that 'the right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social interests'.[4] The committee has interpreted the right as integral to the right of trade unions to organise their activities and programmes in order to defend and further workers' interests under the Freedom of Association and Right to Organise Convention.[5] The ILO does permit limitations to be placed on the right to strike under certain

fair and objective criteria (1995 LRA s 32(3)*(e)* and *(f)*), and that levels of representativeness of bargaining councils in respect of which a collective agreement has been extended must be reviewed annually (1995 LRA s 49(2)). The Act does not limit collective bargaining at enterprise level altogether thus allowing for the exercise of bargaining rights of employees within their own enterprise over terms and conditions not bargained at council level, as well as over terms and conditions which improve on those set at council level.

[1] S 32(5)*(a)* and *(b)* of the LRA 1995.

[2] FC s 158(1)*(g)* read with FC s 3*(b)* and FC s 157 (1).

[3] The right is provided for in the International Covenant on Economic, Social and Cultural Rights of 1966; the European Social Charter of 1961; and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988.

[4] ILO *Freedom of Association* (1996) (supra) at 101, para 475.

[5] Articles 3, 8, and 10 of Convention No 87 of 1948. The committee considers that the ordinary meaning of the word 'programmes' includes strike action. ILO *Freedom of Association and Collective Bargaining* (1994) at 65-66, paras 147, 148.

circumstances, but requires compensatory guarantees in the form of impartial and rapid conciliation and arbitration processes, and binding and rapidly implemented awards.[1]

The ILO's Committee of Experts and its Committee on Freedom of Association have confirmed that the purpose of strike action is not confined to addressing demands relating to collective bargaining, but may have a broader focus. Their view is summed up in the following statement:

> The right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. These interests not only have to do with better working conditions and pursuing collective demands of an occupational nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers.[2]

The ILO distinguishes between strikes for broad socio-economic purposes and 'purely political strikes' which it views as falling outside the scope of freedom of association and thus the right to strike.[3] Recognising that it will not always be easy to draw a distinction between the categories, the ILO, nevertheless, has made it clear that it does not regard as 'purely political' those strikes aimed at criticising a government's economic and social policies.[4] Political strikes, as opposed to socio-economic ones, are not recognised by most other countries whose constitutions contain a right to strike.

In *First Certification Judgment,* the Constitutional Court stated that strike action was the primary mechanism through which workers exercised collective power and that the capacity to strike enabled them to bargain effectively with employers.[5] The right, it said, was entrenched in many constitutions. More recently, the Court has asserted that the

> right is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system.[6]

[1] ILO Freedom of Association and Collective Bargaining (1994) (supra) at 72, para 164.

[2] ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 65, para 147; ILO *Freedom of Association* (1996) (supra) at 102, para 482. ('[T]rade unions should be able to have recourse to protest strikes, in particular where aimed at criticising a government's economic and social policies.' Ibid at para 484: 'The right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement; workers and their organisations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests.')

[3] ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 72,t para 165. It would seem that most countries place a limit on purely political strikes.

[4] Ibid at 102 para 482.

[5] *First Certification Judgment* (supra) at para 66.

[6] *NUMSA v Bader Bop* (supra) at para 13.

The Interim Constitution granted workers the right to strike for the purpose of collective bargaining.[1] The right to strike under the Final Constitution is still cast as an individual right, but is no longer linked to any specific purpose.[2] The effect is to broaden the scope of the right. A purposive interpretation of the right will embrace strikes for social and economic purposes. A conception of the right to strike which narrows its scope to collective bargaining issues strictly defined would offend the requirement that the Final Constitution be interpreted to give effect to international law. The LAC has recognised that the constitutional right to strike should not, in the absence of express limitations, be restrictively interpreted.[3]

The scope of the constitutional right to strike has arisen in relation to strike provisions in the 1995 LRA. In conformity with the constitutional labour rights, an individual right to strike is guaranteed to workers in terms of the Act.[4] The Act also makes provision for protest action to promote or to defend the socio-economic interests of workers,[5] but imposes certain restrictions on such action. Protest action may be called only by a registered union or federation of trade unions, is subject to certain procedures, and may be curtailed by the Labour Court acting according to specified criteria.[6] Although these restrictions may constitute infringements on the right to strike, they would probably be justifiable given the potentially deleterious consequences of protest action on the general public.

Whether the legislative right to protest action over socio-economic issues is protected by the constitutional right to strike was considered in *Business South Africa v Congress of South African Trade Unions & Another*.[7] The case turned on whether, in calling for protest action over a deadlock in negotiating employment standards within the Labour Market Chamber of NEDLAC, the Congress of South African Trade Unions (COSATU) had followed the procedural requirements for such action under 1995 LRA s 77, specifically s 77(1)*(c)*. Section 77 provides that an employee has the right to participate in protest action to promote or defend the socio economic interests of workers provided that such action is called by a registered trade union/federation,[8] a

[1] IC s 27(4).

[2] Every worker has the right to strike — FC s 23(1).

[3] See Chemical Workers Industrial Union (1999) 20 *ILJ* 321 (LAC). On the interpretation of fundamental rights generally, see *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 15.

[4] While the right to strike is granted as an individual right, the definition of strike in the Act casts it as a right which may only be exercised in concert with other workers. 1995 LRA s 213 states:

> 'strike' means the partial or complete concerted refusal to work or the retardation or obstruction of work, by persons who are or have been employed by the same or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory.

[5] 1995 LRA s 77.

[6] 1995 LRA s 77(2).

[7] (1997) 18 *ILJ* 474 (LAC), (*BSA*).

[8] 1995 LRA s 77(1)*(a)*.

notice has been served on NEDLAC giving the reasons for and the nature of the protest action,[1] the matter giving rise to the action has been considered by NEDLAC or another appropriate forum,[2] and the union/federation has served a notice of the impending action on NEDLAC 14 days before commencing with the action.[3] Business South Africa held that COSATU had not complied with s 77(1)*(c)*, as the matter giving rise to the intended protest action had not been properly considered by NEDLAC. At issue was whether, given the guarantee of a constitutional right to strike, a requirement of compliance with a procedural pre-condition for a strike should be liberally or restrictively interpreted. [4] The Labour Appeal Court (LAC), which heard the matter as a court of first instance, handed down a split decision. The majority was reluctant to find that the constitutional right to strike embraced strikes or protest action over socio-economic issues. The court sought to make a distinction between the right to strike and the right to protest action on a number of grounds. Firstly, it stated that the labour rights in the Interim Constitution and the Final Constitution underpinned collective bargaining, while protest action fell outside of that context.[5] Secondly, the court held that the LRA conceptualised the right to strike and the right to protest action over socio-economic issues as mutually exclusive. This approach, the court argued, was supported by international law which drew a distinction between strikes relating to collective bargaining and political strikes.[6] Thirdly, as the committees of the ILO had found that the right to strike over economic and social interests was integral to the right to freedom of association, the existence of both a right to freedom of association and an independent right to strike in the Final Constitution did not necessarily mean that the right to protest action in LRA s 77 formed part of the constitutional right to strike.[7] Finally, the court held that because of the different nature and character of the right to protest action, it needed to be assessed in a context broader than that of the fundamental labour rights. The latter in general related to collective bargaining, and thus were restricted to the relationship between employer and employee. However, the right to protest action had an impact not only on the interested parties, but also on the interests of the public. Consonant with the Act's purpose to advance economic development, the right to protest action should therefore be weighed up against these broader interests.[8]

[1] 1995 LRA s 77(1)*(b)*.
[2] 1995 LRA s 77(1)*(c)*.
[3] 1995 LRA s 77(1)*(d)*.
[4] 1995 LRA s 77(1)*(c)* reads: '(1) Every employee who is not engaged in an essential service or maintenance service has the right to take part in protest action if — . . . *(c)* the matter giving rise to the intended protest action has been considered by Nedlac or by any other appropriate forum in which the parties concerned are able to participate to resolve the matter . . .'
[5] *BSA* (supra) at 479B-480A-B.
[6] Ibid at 480C-D.
[7] Ibid at 480E-F.
[8] Ibid at 481D-F.

On the basis of the above arguments, the *BSA* court concluded that the purpose of the Act did not necessarily require an expansive or liberal interpretation of 1995 LRA s 77.[1]

The *BSA* court's arguments are flawed in a number of respects. Firstly, in holding that the scope of the right to strike was constrained by its collective bargaining context, the court ignored the fact that the constitutional right to strike is no longer predicated on the right to collective bargaining. Secondly, the court erred in its interpretation of the ILO's position on the ambit of the right to strike. The ILO sees socio-economic strikes as integral to the right to strike but excludes purely political strikes from its scope. The court argued, incorrectly, that the ILO's view was that socio-economic strikes were coincident with political strikes,[2] and thus fell outside the ambit of the right to strike. Problematic too is the court's view that the right to strike excludes the right to protest action because these rights are dealt with in a mutually exclusive manner in the 1995 LRA. The fact that these rights are dealt with separately in the LRA in contrast to the Constitution does not mean that the scope of the constitutional right to strike should be narrowly construed to include only strikes relating to collective bargaining. It is the Constitution which ultimately sets the boundaries of rights and not legislation. Also open to question is the court's view that protest action does not form part of the right to strike because the ILO views strikes over socio-economic issues as part of the right to freedom of association. The fact that the Final Constitution contains a more general right to freedom of association[3] does not mean that the right to protest action should be disassociated from the constitutional right to strike and be given a home under the general freedom of association right. Finally, in justifying a restrictive reading of 1995 LRA s 77, the BSA court emphasised the economic development purpose of the Act without considering its other purposes, in particular its commitment to the advancement of social justice.[4]

By contrast, the minority judgment found unequivocally that the right to strike did include strikes for socio-economic purposes: 'the fact that s 23 of the new Constitution does not restrict a strike to the purpose of collective bargaining must

[1] The *BSA* court, with reference to *S v Makwanyane & Another* , rejected the view that interpreting a legislative provision in a purposive fashion was synonymous with a liberal or expansive interpretation. Depending on the proper purpose of the Act, a particular section might have to be interpreted 'restrictively rather than extensively'. In this case, the purpose of the Act (to advance economic development) did not 'necessarily require an expansive or liberal interpretation of s 77, in the sense that the exercise of the right to protest action must be restricted as little as possible'. The procedural requirement could be interpreted narrowly to mean that the next procedural step could be proceeded with only if one (or both) of the parties was no longer committed to resolving the matter. *BSA* (supra) at 479A-B.

[2] See *BSA* (supra) at 480C-D.

[3] FC s 18

[4] 1995 LRA s 1. A consideration of social justice objectives need not necessarily mean that an extensive interpretation of the procedural requirements is called for, but it should have been given due consideration by the court in weighing up the relevant factors.

mean that the word "strike" is used in its widest sense.'[1] This interpretation is preferable in that it reflects ILO findings and is consonant with the Constitutional Court's approach that constitutional rights should not be restrictively interpreted. The minority held, in addition, that the purpose of protest action to advance the cause of unorganised workers and economic victims of apartheid was an embodiment of the constitutional rights to freedom of expression and the freedom to demonstrate. This suggested that a liberal rather than a restrictive construction should be placed on 1995 LRA s 77(1)*(c)*.[2] The minority court argued that although the provisions in LRA s 77 were peremptory, compliance with them would have been fulfilled if this had occurred in a real sense (ie substantively, and not in a strictly legal sense).[3] A broad interpretation of s 77(1)*(c)* did not mean that an impasse had to occur before the next procedure could be embarked on. The issue in dispute merely had to have been considered. An interpretation that allowed meetings to be prolonged indefinitely could undermine the right to protest action and the other freedoms guaranteed by the Final Constitution.[4] While the minority's view is to be preferred, it is also open to the criticism that it relies on the nature of other protest rights as the basis for its conclusion that s 77(1)*(c)* should be liberally construed. A better approach would have been for the minority court to locate its analysis solely within the nature of the right to strike and FC s 23's labour rights as a whole.

The LRA places other procedural and substantive limitations on the statutory right to strike that may infringe FC s 23.[5]

The Act requires that specific procedures must be followed before workers can

[1] *BSA* (supra) at 493E.

[2] *BSA* Ibid citing *S v Zuma & Others* 1995 (2) SA 642, 651A–653B (CC), 1995 (4) BCLR 401 (CC), in which the following reference was made to *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321, 395–6, 18 CCC (3d) 385:

> The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect . . . The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter's protection.

[3] *BSA* (supra) at 500E–F. In support of his argument Nicholson J quoted Van Dijkhorst J in Ex parte Mothuloe (Law Society Transvaal intervening) 1996 (4) SA 1131 (T) at 1137H–1138D who said the following:

> In *Maharaj & Others v Rampersad* 1964 (4) SA 638, 646C (A) Van Winsen AJA, after having concluded that the legislative provision he was concerned with was peremptory, went on to enquire whether it was fatal that it had not been strictly complied with. The learned judge laid down the following test: 'The enquiry, I suggest, is not so much whether there has been "exact", "adequate" or "substantial" compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold that, even though the position as it is, is not identical with what it ought to be, the injunction had nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object had been achieved are of importance.'

[4] *BSA* (supra) at 501B–C.

[5] The Committee of Experts recognizes that the right to strike cannot be considered an absolute right: not only may it be subject to a general prohibition in exceptional circumstances but it may also be governed by provisions laying down the conditions for, or restrictions on, its exercise. See ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 66-7, para 151.

embark on a protected strike.[1] The ILO has accepted legal procedures preceding a strike as long as they are not so complicated as to make it 'practically impossible to declare a legal strike'.[2] The procedural limitations in the LRA requiring prior conciliation and advance warning of 48 hours (or seven days where the employer is the state) should survive constitutional scrutiny. The requirement for conciliation is in line with the notion of strike action as a weapon of last resort. The notice period is short enough so as not to undermine the effectiveness of the action, while allowing the employer time to reconsider its position or to make provision for the action.[3]

At a substantive level, the Act limits the right to strike during the currency of a collective agreement if the issue in dispute is regulated[4] by the agreement.[5] This limitation is accepted by the ILO on the grounds that collective agreements may be viewed as social peace treaties of fixed duration,[6] as long as workers have recourse to 'impartial and rapid arbitration machinery for individual or collective grievances concerning the interpretation or application of collective agreements.'[7] The rationale for this conclusion is that, having bargained and settled an issue, parties should abide by the agreement until it expires. Peace obligations are also common in other jurisdictions. The Act meets the ILO requirements in that it provides for disputes over the interpretation or application of issues in such agreements to be referred in the first instance to conciliation and, if the dispute is not resolved, to voluntary arbitration. The limitation should be deemed justifiable because it is narrowly tailored to meet the ILO's objective of social harmony and is a product of a voluntary and collective bargain between employer(s) and workers. The provision should also survive constitutional attack as collective agreements often provide for minimum wages only, leaving it to individual enterprises to negotiate actual wages.[8]

[1] 1995 LRA s 64.

[2] ILO *Freedom of Association* (1996) (supra) at 105 paras 498, 499 and 502.

[3] The ILO permits prior conciliation and mediation provided that the process is not 'so complex or slow that a lawful strike becomes impossible in practice or loses its effectiveness'. It also permits a period of advance notice which is shorter than the conciliation period if the conciliation period is lengthy, provided that the period is not an additional obstacle to bargaining. ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 75 para 172.

[4] Peace agreements have been found to include agreements about the implementation and application of the collective agreement, thus precluding a strike over such issues. In *Samancor Ltd v NUMSA* (2000) 21 *ILJ* 2305 2314 (LC), the Court stated: 'The issues in dispute, variously described in both the dispute declaration and the strike notice, are issues relating to the application and/or the implementation of those agreements and not to the substance thereof and are accordingly disputes of right, regarding which industrial action is expressly precluded by the collective bargaining agreement within the ambit of which they were concluded.' See also *Fidelity Guards Holdings (Pty) Ltd v PTWU* [1997] 11 BLLR 1425 (LC) in which the Court held that an issue is regulated by a collective agreement not only where it is substantive in nature but also where it relates to the process for the resolution of the issue.

[5] 1995 LRA s 65(3)*(a)(i)*.

[6] ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 73 para 166.

[7] Ibid at para 167.

[8] For apposite decisions under the 1956 LRA, see *BAWU v Asoka Hotel* (1989) 10 *ILJ* 167 (IC); *SEAWU v BRC Weldmesh* (1991) 11 *ILJ* 1304 (IC); *SAWU v Rutherford Joinery (Pty) Ltd* (1990) 11 *ILJ* 695 (IC). For an apposite decision under the 1995 LRA, *PSA v Minister of Justice and Constitutional Development & Others* (2001) 22 *ILJ* 2303 (LC).

The Act also provides for peace obligations in respect of binding arbitration awards. Parties are precluded from embarking on industrial action where the award regulates the issue in dispute.[1] This limitation should pass constitutional muster on the basis that where the arbitration process is available to parties, they should not be allowed a second bite of the cherry if dissatisfied with the outcome of that process.

More susceptible to constitutional challenge is the prohibition on strike action during the currency of a statutory council agreement where the parties are not representative within the council's scope.[2] Such agreements, if promulgated as determinations by the Minister of Labour, will bind non-parties and thus deprive certain workers of their right to strike without their consent. The provision, however, should survive constitutional scrutiny as the determination may only be made on a recommendation by the employment standards commission after an investigation by the director general of labour. Moreover, the investigation must take cognisance of a wide range of interests, including those of workers deprived of the right to strike.[3] The Act provides, furthermore, for applications for exemption from the terms of the agreement to an independent body appointed by the Minister.[4]

The 1995 LRA provides that parties may contract out of the right to strike by means of a collective agreement.[5] This limitation should be justifiable on the basis that the right to strike is being waived in terms of an agreement which is voluntary in nature, and the result of the collective power of the employees rather than the result of negotiation between the more vulnerable individual worker and employer. Moreover, the Act, in line with ILO requirements, provides for alternative dispute resolution for such disputes through conciliation and arbitration.[6] More problematic is the provision providing that the agreement may be extended to non-parties under certain conditions.[7] These parties will, without their consent, be denied the right to strike during the agreement's currency. Whether such an infringement will pass constitutional muster will depend on whether it can be justified in terms of the imperatives of orderly collective bargaining and the majority principle.

The 1995 LRA states that a person may not take part in a strike if he or she is bound by an agreement requiring the issue in dispute to be referred to

[1] 1995 LRA s 65(3)*(a)(i)*.

[2] 1995 LRA s 65(3)*(a)*(ii) read with s 44.

[3] 1995 LRA s 44 read with sections 53 and 54 of the Basic Conditions of Employment Act 75 of 1997.

[4] 1995 LRA s 44(3). The Act also prohibits industrial action if the person is bound by a determination in terms of the Wage Act regulating the issue in dispute during the first year of that determination. Act 5 of 1957. The Wage Act has since been repealed, and wage determinations are now sectoral determinations under the Basic Conditions of Employment Act. To the extent that the provision limits the right to strike, similar arguments as above as to its justifiability would apply.

[5] 1995 LRA s 65(1)*(a)*.

[6] 1995 LRA s 24.

[7] 1995 LRA ss 23(1)*(d)* and 32.

arbitration.[1] The provision refers to both individual and collective agreements. A collective agreement waiving the right to strike in favour of arbitration may be constitutionally justifiable. Less certain is the case of individual agreements as individual employees remain vulnerable in ways union members are not.

According to the 1995 LRA, a person may not strike if the issue in dispute is one that a party has a right to refer to arbitration or to the Labour Court in terms of the Act.[2] Where the Act requires arbitration or adjudication for disputes best left to industrial action for resolution, there may be grounds for challenging the constitutionality of such a restriction.[3] Dismissals over retrenchment, for instance, were originally justiciable in the Labour Court, even though there were strong arguments for their being treated as economic disputes. Subsequent amendments to the LRA have now opened the way for certain workers to have the choice of either striking or going to court where such disputes arise.[4]

Under the 1995 LRA, the choice of arbitration or strike action has always been available to representative unions concerning disputes over organisational rights that they are granted as of right under the Act.[5] Unrepresentative unions, however, are denied organisational rights as of right by the Act, and may not refer disputes over such rights to arbitration. Whether they may strike in order to persuade the employer to grant them such rights was considered in *NUMSA v Bader Bop*.[6] The Constitutional Court in *NUMSA* found that denying minority unions the right to strike over trade union representation rights constituted an infringement of the right to strike.[7] There was nothing in the relevant part of the Act that prevented non-representative unions from 'using the ordinary process of collective bargaining and industrial action to persuade employers to grant them

[1] 1995 LRA s 65(1)*(b)*.

[2] 1995 LRA s 65(1)*(a)*. See R Birk 'Industrial Conflict: The Law of Strikes and Lockouts' in R Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (4th Edition, 1990) 281.

[3] While not explicit, the Act follows the schema whereby disputes of right are either adjudicated or arbitrated, while disputes of interest (economic disputes) are left for resolution through power play by the parties.

[4] 1995 LRA s 189A.

[5] Where disputes are over organizational rights, the Act grants parties a choice either to resolve the dispute through adjudication or by industrial action. A similar choice is granted to certain workers in relation to disputes over operation requirements dismissals. See 1995 LRA s 189 and s 189A.

[6] 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC), (2003) 24 *ILJ* 305 (CC)('*NUMSA v Bader Bop*').

[7] But see *Bader Bop v NUMSA* (2002) 23 *ILJ* 104, 316 (LAC). The LAC had found that the requirements of representativeness for the exercise of organisational rights in s 21 precluded unrepresentative unions from striking in order to conclude a collective agreement with employers over the granting of such rights. The union, which was not sufficiently representative, had sought to obtain the organisational rights in ss12-15 of the LRA. While the employer was willing to grant the union access to its premises and stop order facilities, it was not prepared to recognise the union's shop stewards or to bargain collectively with the union. The union had then indicated its intention to strike over these matters. The employer had sought an interdict preventing the strike. The Labour Court had dismissed the application, but on appeal a divided Labour Appeal Court granted it. The majority argued that unless the union was representative of the majority in the workplace it could not be granted shop steward recognition nor could it strike over such a demand.

organisational facilities.'[1] The Constitutional Court stated that these were matters of 'mutual interest' to employers and unions and thus were capable of forming the subject matter of collective agreements, of being referred to conciliation, and of being resolved through strike action.[2] Support for this view, the Court held, was also found in s 20 of the Act. Section 20 states that nothing in the part of the Act on organisational rights precluded the conclusion of a collective agreement that regulated such rights. The Constitutional Court rejected as narrow and inappropriate in an Act committed to freedom of association and collective bargaining the LAC's view that s 20 of the 1995 LRA merely clarified the position that employers and representative unions might regulate organisational rights.[3] Instead the Court viewed 1995 LRA s 20 as an express confirmation of the internationally recognised rights[4] of minority unions to seek to gain access to the workplace, and the recognition of their shop stewards and other organisational facilities through the techniques of collective bargaining.[5]

The 1995 LRA also limits the right to strike in essential services and minimum services. The ILO recognises that it might be necessary to prohibit strikes in essential services but that such services should be restrictively defined. Without a restrictive definition, the notion would lose all meaning. The ILO defines essential services as those services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.[6] It was not prepared to draw up a definitive list of which services could be determined as essential.[7] The method of declaring services as essential differs from country to country. The two main methods are either to list the essential services or to provide a definition and declare services as essential according to that definition from time to time.[8] Both methods have their advantages and disadvantages. Although the list system benefits from its specificity, it may embrace whole services or parts of services which are not truly essential. The definition method allows for an assessment according to consistent criteria as to whether services are essential services or not. The disadvantage is that too many services may be captured by too broad a definition. The benefit of the ILO's definition is that it is restrictively cast and thus allows for the prohibition of strike action in very limited circumstances. Critically, the ILO requires that where a strike is

[1] *NUMSA v Bader Bop* (supra) at 326.
[2] Ibid.
[3] Ibid at 327.
[4] The ILO has declared that a ban on strikes relating to recognition disputes is not in conformity with the principles of freedom of association.
[5] *NUMSA v Bader Bop* (supra) at 327.
[6] ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 70 para 159.
[7] Ibid.
[8] See C Cooper 'Strikes in Essential Services' (1994) 15(5) *ILJ* 903-929.

prohibited, there should be access to quick and impartial mediation and arbitration procedures for workers hit by the prohibition.[1]

The 1995 LRA basically adopts the definitional approach to essential services. It defines as essential a service 'the interruption of which endangers the life, personal safety or health of the whole or any part of the population'.[2] It also specifically declares as essential the parliamentary service and the South African Police Service. The prohibition of strikes in essential services (including minimum services) provided for in the LRA should pass the requirements of the limitations test in the Final Constitution, particularly as the prohibition is consonant with ILO requirements.[3] The Act's definition of an essential service replicates that of the ILO. Both provide for a prohibition on strikes only in very restricted circumstances. The specific inclusion of parliamentary and police services as essential services, thereby removing the right of employees in these services to strike, is also defensible in terms of the public importance of these functions, and is accepted by the ILO and is common elsewhere. The ILO states that the right to strike may be restricted or prohibited in the public service in so far as such a strike could cause 'serious hardship' to the 'national community and provided that the limitations are accompanied by certain compensatory guarantees.'[4]

The Act provides for an independent essential services committee to investigate the declaration of services as essential, whether in whole or part, for representations from any interested party, and the variation or the cancellation of the declaration after following the same process.[5] Moreover, it also provides for the committee to investigate disputes over the interpretation or application of the designation of services as essential. In making its decision the committee will be guided by the restrictive definition of an 'essential' service.[6]

[1] ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 72 para 164. The ILO also recommends the establishment of an independent body to examine the difficulties raised by the definition of essential services and to issue enforceable decisions. The ILO recognises that under certain circumstances a service which may not amount to an essential service in the strict sense of the term may become essential if a strike in that service exceeds a certain duration or extent so that the life, personal safety or health of the population are endangered. Thus it provides that in such a case it should be possible to establish a minimum service provided that the service is 'genuinely and exclusively a minimum service', and, secondly, as this would limit the right to strike of workers in those services, that workers be allowed to participate in defining such a service, along with employers and the public authorities. ILO *Freedom of Association* and Collective Bargaining (1994) (supra) at 71, para 161.

[2] 1995 LRA s 213.

[3] 1995 LRA s 65(1)*(d)(i)*.

[4] ILO *Freedom of Association* (1996) (supra) 110, para 533.

[5] 1995 LRA s 70; 1995 LRA s 71.

[6] The approach of the British Columbia Labour Board in defining essential services is instructive: See *School District No 54 and Bulkley Valley Teachers' Assn (Re)* 93 CLLC 16,070 (BCLRB) as cited in G Adams *Canadian Labour Law* (2nd Edition, Release No 4, November 1995) 10-36.3 ('In summary, the factors that the Board will consider in its investigation and recommendation and in its subsequent designation of essential services, include such matters as the length of the dispute, the timing of the dispute, the type of

The LRA also provides for the resolution of disputes in essential services via simple, impartial and accessible conciliation and arbitration processes, including provision for parties to designate a specific commissioner to resolve their disputes[1] and for the speedy issuing of awards.[2] These conditions, in that they meet the demand for a restrictive limitation of the right to strike and the provision of appropriate compensatory arbitration processes, should render the limitation justifiable in terms of FC s 36.[3] The Act also requires the committee to ratify the designation by collective agreement of parts of an essential service as a minimum service. In such circumstances, only workers in the minimum service are prohibited from striking.[4] This arrangement has the effect of further limiting the restriction on the right to strike, thus conforming to ILO precepts[5] and immunizing the provision against constitutional attack.

In an innovative provision, the LRA limits strikes in what it terms maintenance services. These services are defined as those which, if interrupted, will have the effect of the 'material physical destruction to any working area, plant or machinery.'[6] The difference between the provisions on maintenance and minimum services is that the former are concerned with preventing the potential damage a strike may have on the wealth creating capacity of the business and the latter the effect of a strike on the safety of people. Maintenance services may be instituted in any plant either via collective agreement or, if there is no such agreement, on application by the employer to the essential services committee. The declaration of a service as a maintenance service has the effect of depriving the right of employees in that service to strike.[7] The Act provides that the committee may refer the dispute to arbitration but only if the number of employees employed in the maintenance service is greater than the number who would be entitled to strike.[8] The effect of this requirement is not to deprive the whole workforce of

"facilities, production and services" which the employer seeks to have designated, and the actual impact of the dispute on both the parties and the public.' The Board went on to say: 'Finally this Board is not naive with regard to the impact of essential service designations on a dispute. The employer will often seek higher levels than necessary in order to lessen the impact and force a strike. The union will often seek lower designations in order to increase the effectiveness of its strike. The Board in all of this must keep the public interest firmly in its view.')

[1] 1995 LRA s 135(6)*(i)*.

[2] 1995 LRA ss 135 and 136. There are special provisions in the Act relating to time limits for the coming into force of an arbitration award in essential services disputes where the employer is the state and the award has financial implications. As monies have to be voted by Parliament to fulfil awards which have financial implications, the longer period should be justifiable.

[3] See *Mbelu & Others v MEC for Health and Welfare, Eastern Cape & Others* 1997 (2) SA 823, 835E–836A (Tk)(Upheld s 19 of the Public Service Labour Relations Act Proc 105 of 1994 as a justifiable limitation of IC s 27(4), the right to strike. The Public Service Labour Relations Act has been repealed by the 1995 LRA. Section 19 prohibited strikes in essential services and was not as closely tailored to ILO requirements in this regard as is the 1995 LRA.)

[4] 1995 LRA s 72.

[5] ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 69 and 70 para 159.

[6] 1995 LRA s 75(1).

[7] 1995 LRA s 65(1)*(d)*(ii).

[8] 1995 LRA s 65(1)(ii).

the right to strike if the majority are entitled to do so. Employers who have been granted their application for the declaration of a maintenance service may not use replacement labour in place of those on strike or where they have locked out employees, unless the lockout is defensive in nature. It is unlikely that many employers will make use of this provision, as it limits their ability to keep production in operation through the use of replacement labour. The restriction on the right to strike in a maintenance service should prove to be justifiable because such a service is narrowly defined and includes a ban on the use of replacement labour.

The ILO has stressed the importance of the protection of those who go on strike from dismissal and other retaliatory measures. Legislation, the ILO has held, should provide genuine protection for workers on strike. Without such protection, the right might be 'devoid of content'.[1] The LRA meets this requirement by guaranteeing protection against unfair dismissal and granting immunity from civil liability (delict and breach of contract[2]) to strikers who follow the required strike procedures.[3] The Act protects workers who have been unfairly dismissed by providing that they should be reinstated or re-employed. However, it does grant discretion to the adjudicator not to grant reemployment or reinstatement under certain circumstances.[4] This provision needs to be narrowly construed. If not, it could undermine the right to strike by failing to protect adequately those unfairly dismissed for going on strike.[5]

A generous interpretation of the constitutional right to strike would include secondary strikes. The LRA recognises the legitimacy of such strikes, but places limitations on them. It follows the universal practice of requiring a link between the primary strike and any secondary strike.[6] The requirements should pass constitutional muster on the grounds that the restrictions are based on notions of proportionality and are reflective of common and accepted practice in other jurisdictions.

[1] ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 62 para 139.

[2] Although striking is not a breach of contract under the Act, and therefore strikers should be remunerated, the Act deals with this anomaly by providing that the employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike 1995 LRA s 67(3).

[3] 1995 LRA ss 187(1)*(a)* and 67. The Committee of Experts has found that striking workers should be protected against dismissal or discrimination: 'Since the maintaining of the employment relationship is a normal consequence of the recognition of the right to strike, its exercise should not result in workers being dismissed or discriminated against.' ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 77-8, para 179. However, conduct which amounts to a criminal offence is expressly excluded from protection. 1995 LRA s 67(8).

[4] 1995 LRA s 193(2).

[5] Additional protection for striking workers is provided in s 5 of the Act which protects an employee from discrimination (1995 LRA s 5(1)) or prejudice (s 5(2)*(a)*(iv)) for exercising a right conferred by the Act, and from being prevented from exercising a right under the Act (s 5(2)*(b)*), or being advantaged for not exercising such a right (1995 LRS s 5(3)). Our courts have found that a financial reward to non-striking workers should be strictly prohibited. See *FAWU v Pet Products (Pty) (Ltd)* 2000 (7) BLLR 781 (LC).

[6] Secondary strikes are prohibited unless 'the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect the secondary strike may have on the business of the primary employer'. 1995 LRA s 67(3). See C Cooper 'Sympathy Strikes' (1995) 16(4) *ILJ* 759-784.

Members of the South African National Defence Force have no right to strike: the military regulations[1] prohibit them from doing so and they are excluded from the protections afforded workers in terms of the 1995 LRA.[2] This infringement of their right to strike will most likely be found to be justifiable on two grounds. Firstly, they are public servants who exercise authority in the name of the state.[3] The ILO accepts that a limitation of the right to strike is acceptable where public servants are concerned. Secondly, as the Constitutional Court noted in *SANDU I,* the constitutional imperatives of maintaining a disciplined and effective force may justify the different treatment to which military trade unions (and therefore their members) are subject.[4]

(a) Lockouts

One of the most significant changes to the constitutional labour rights in the Final Constitution is the absence of a lock-out right for employers. The Interim Constitution stated that 'recourse to the lock-out for the purposes of collective bargaining shall not be impaired, subject to section 33(1).'[5] The absence of a constitutional right or recourse to a lock-out reflects a worldwide trend.[6] Many countries protect a right to strike without offering employers a right to a lock-out.[7] Support for this view can also be found in the decisions of the ILO's Committee of Experts and the International Covenant on Economic, Social and Cultural Rights, which recognize the right to strike but accord no equivalent status to the lockout.

Opponents of the right to lock-out argue that the employee's 'right or freedom to strike is already balanced by the employer's right of property and his prerogatives to hire and fire at will.'[8] It is the employer's power to act unilaterally that

[1] See Amendment to the General Regulations for the South African National Defence Force and Reserve s 6.

[2] 1995 LRA s 2.

[3] ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 69 para 158.

[4] *SANDU v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC), (1999) 20 *ILJ* 2265, 2281 (CC).

[5] IC s 27(5).

[6] Lockouts are entrenched only in the constitutions of Guatemala, the Dominican Republic, Ecuador, El Salvador, Mexico and Sweden. See D Ziskind 'Labour Law in 143 Countries' *Comparative Labour Law* 223. The absence of a right to a lock-out in the constitutions of France, Italy and Portugal, despite a constitutional right to strike, illustrates the lack of equivalence granted these forms of industrial action in other jurisdictions. *The Regulation of Industrial Conflict in Europe, Strikes and Lockouts in 15 Countries* EIRR Report No 2 (December 1989).

[7] The right to strike (with various qualifications) is enshrined in the constitutions of many countries, including: Argentina, Bolivia, Burkina Faso, Bolivia, Chile, Colombia, Cyprus, Ecuador, El Salvador, Dominican Republic, Dahomey, France, Greece, Guatemala, Honduras, Italy, Malagasy Republic, Mexico, Morocco, Panama, Paraguay, Portugal, Romania, Rwanda, Senegal, Sweden, Venezuela. ILO *Freedom of Association and Collective Bargaining* (1994) (supra) at 64 n12; Ziskind (supra) at 222.

[8] R Ben Israel 'Introduction to Strikes and Lockouts: A Comparative Perspective' in 'Strikes and Lockouts in Industrialized Market Economies' (1994) 29 *Bulletin of Comparative Labour Relations* 14.

is the true equivalent of the strike. Granting the employer an additional economic weapon in the form of the lockout would upset 'the delicate balance created by the recognition of the right or freedom to strike.'[1]

This argument was accepted by the *First Certification Judgment* Court. Rejecting the employers' case for the inclusion of a right to lock out in the Bill of Rights, the Constitutional Court stated that the ability of workers to act collectively (through collective bargaining and the right to strike) was necessary to enable them to counteract the greater social and economic power of employers. In contrast, the court said, employers have a range of other weapons at their disposal by means of which they may exercise their economic power against workers such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace.[2] Given that the Constitutional Court has explicitly rejected the inclusion of a right or recourse to the lockout in the Final Constitution, no part of FC s 23 should be interpreted to include such a right.[3]

The 1995 LRA contains an attenuated 'recourse' to a lockout.[4] The absence of a constitutional provision for a lock-out does not render unconstitutional the recourse to the lockout in the 1995 LRA. What it does mean, however, is that employers have no constitutional protection against the curtailing of their recourse to the lock-out in the LRA.[5]

(b) Picketing

Picketing is a common activity engaged in by workers to obtain the support of other workers and the general public for their cause.[6] The right to picket is recognised by the ILO which holds that pickets may be prohibited only if they cease to be peaceful. The right to picket is

[1] A Rycroft & B Jordaan *A Guide to South African Labour Law* (1992) 141.

[2] *Ex parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR (CC) 1253, 1284 ('*First Certification Judgment*'). On the basis that a lockout was not a universally accepted right, the Constitutional Court also rejected the argument that the exclusion of the lock-out meant that the text failed to comply with CP II, which requires that 'all universally accepted fundamental rights, freedoms and civil liberties' shall be provided for and protected in the Final Constitution 'due consideration [having been given] to, *inter alia*, the fundamental rights' contained in the Interim Constitution. Ibid.

[3] This is particularly relevant in relation to the scope of the right to engage in collective bargaining as it is possible for the lock out to be considered an adjunct to that right. See § 53.5 supra.

[4] Significantly, many other countries accord less recognition to the lock-out than the LRA. Portugal prohibits lock-outs altogether, their use in Spain is strictly curtailed, while in France and Italy they have no statutory recognition. D du Toit et al *The Labour Relations Act of 1995* (supra) at 196-7.

[5] *First Certification Judgment* (supra) at 1285.

[6] See ILO *Freedom of Association and Collective Bargaining* (1994) (supra) 76 at para 174.

provided for in terms of FC s 17 but not explicitly in the labour rights.[1] However, in SANDU III, the High Court read FC s 23(2)*(b)* as conferring a right to picket on workers. The section states that every worker has the right to 'participate in the activities and programmes of a trade union'. Section 8*(b)* of the military regulations provided that the right of members of the force to assemble, to demonstrate, to picket and to petition was subject to the limitation that such right should not be exercised 'in respect of any matter concerning either the employment relationship with the Department of Defence or any matter related to the Department of Defence.' In declaring the provision invalid, the Court referred to ILO Committee of Freedom of Association findings that workers should enjoy the right to peaceful demonstration to defend their occupational interests.[2]

Picketing in the 1995 LRA takes the form of a trade union right.[3] The limiting of the right to a trade union right where the constitutional formulation grants an individual right is one possible ground for a constitutional challenge. The limitation should survive constitutional scrutiny on the basis of the potentially disruptive effect of a picket on the public and the need to ensure that the parties who call the picket are sufficiently accountable.

The most probable constitutional challenge to the LRA's picketing provision will arise in the context of claims by employers that their common-law right to property has been infringed.[4] The Act provides for picketing on an employer's premises only with the permission of the employer, but states that this permission may not be withheld unreasonably.[5] The CCMA is empowered to assist parties (at their request) to reach agreement on picketing rules, including rules regarding picketing on an employer's premises if the CCMA is satisfied that the employer has withheld permission unreasonably.[6] Thus to it initially falls the difficult task of balancing the right to picket against the employer's property rights. Disputes over picketing which remain unresolved by the CCMA will be heard by the Labour Court.

[1] See S Woolman 'Freedom of Assembly' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson, M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 43 (Contains an extensive discussion of the right to picket and conditions for its appropriate limitation.)

[2] SANDU III (supra) at 2118C-D. The High Court found that the Minister of Defence's justification for the provision that 'mass action against the SANDF is usually, if not always, in basic conflict with the type of discipline desired in a defence force', did not fulfil FC s 36's requirements for justification. Ibid at 2118H-J.

[3] 1995 LRA s 69(1). A registered trade union may authorize a picket by its members and supporters for the purposes of peacefully demonstrating in support of any protected strike or in opposition to any lock-out.

[4] See Woolman 'Assembly' (supra) at § 43.7 (Analysis of picketing under the 1995 LRA.)

[5] 1995 LRA ss 69(2) and (3).

[6] 1995 LRA s 69(6).

54 Freedom of Trade, Occupation and Profession

Dennis Davis

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54.1 THE HISTORY OF THE INTERIM CONSTITUTION S 26 AND THE FINAL CONSTITUTION S 22

Section 26 of the Interim Constitution[1] contains a broad, but by no means transparent, formulation of the right to economic activity. It reads:

> (1) every person shall have the right of freely to engage in economic activity and to pursue a livelihood anywhere in the national territory;
> (2) sub-section (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices and equal opportunities for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

Generating a best rendering of IC s 26 was not without difficulty. The Court in *S v Lawrence; S v Negal; S v Solberg* was left with two basic choices. As Chaskalson P observed:

> The first [alternative] focuses on a meaning of free participation and an economic activity and the pursuing of a livelihood. In a modern democratic society a right 'freely' to engage in economic activity and to earn a livelihood does not imply a right to do so without any constraints whatsoever. . . . The alternative approach is to read s 26(1) and (2) together as indicating that all constraints upon economic activity and the earning of a livelihood which fall outside the purview of s 26(2) will be in breach of s 26. This construction is less restrictive of 'free economic activity.[2]

The *Solberg* Court opted for the second, less expansive approach to IC 26.

By contrast, section 22 of the Final Constitution[3] leaves little room for alternative readings. FC s 22 turns the core protections of IC s 26 into a substantially more limited right.[4] That said, the concatenation of the Constitutional Court's

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[1] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

[2] 1997(4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) ('*Solberg*') at paras 32, 37. Later in the same judgment, Chaskalson warned that:

> [S] 26 should not be construed as empowering a court to set aside legislation expressing social or economic policies infringing 'economic freedom' simply because it may consider the legislation to be ineffective or is of the opinion that there are other and better ways of dealing with the problems. If s 26(1) is given the broad meaning for which the appellants contend, of encompassing all forms of economic activity and all methods of pursuing a livelihood, then, if regard is had to the role of the courts and democratic society, s 26(2) should also be given a broad meaning. To maintain a proper balance between the roles of the Legislature and the courts, s 26(2) should be construed as requiring only that there is a rational connection between the legislation and the legislative purpose sanctioned by the section.

Ibid at 44.

[3] Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC').

[4] In examining the ambit of the Interim Constitution s 26, Chaskalson P in *Solberg* noted that:

> Certain occupations call for particular qualifications prescribed by law and one of the constraints of the economic sphere is that persons who lack such qualifications may not engage in such occupations. For instance, nobody is entitled to practice as a doctor or as a lawyer unless he or she holds the prescribed qualifications, and the right to engage 'freely' and economic activity should not be construed as conferring such a right on unqualified persons; nor should it be construed as entitling persons to ignore legislation for regulating the manner in which particular activities have to be conducted, provided always that such regulations are not arbitrary.

narrowreading of IC s 26, the linguistic similarity of FC s 22 and IC 26 and our courts continued reference to the cases decided under IC s 26 justify our ongoing reliance on the jurisprudence generated by IC s 26.

29.2 THE LOGIC OF S 22

(a) An Overview

FC s 22 provides as follows:

> Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

Despite the similar juridical constructions of IC s 26 and FC 22, the difference of wording between s 22 and its predecessor s 26 must represent the starting point for our analysis of FC 22. In short:

(i) the right contained in s 22 appears to be granted only to South African citizens[1];
(ii) the more specific formulation of choice of trade, occupation and profession has replaced the more general phrase regarding engagement in economic activity; and
(iii) the use of every citizen requires that the provision's benefits be restricted to individuals and not extended to juristic bodies.[2]

Finally, IC s 26's expansive language could have been read as a neo-liberal, free market bulwark against interventionist economic policies. FC s 22, on the other hand, must be read as a corrective to historical employment inequities created by Apartheid. In *JR 1013 Investments CC and Others v Minister of Safety and Security and Others*, Jones J noted:

> We have a history of repression in the choice of a trade, occupation or profession this resulted in disadvantage to a large number of South Africans in earning their daily bread. In the pre-Constitution era implementation of the policies of apartheid directly and indirectly impacted upon the free choice of a trade, occupation or profession: unequal education, the prevention of free movement of people throughout the country, restrictions on where and

[1] The restriction of the right to 'every citizen' was the subject of an objection during the Certification process. The objectors contended that in order to comply with Constitutional Principle II the right of occupational choice should be extended to everyone, irrespective of citizenship. The Constitutional Court rejected this argument on the grounds that even where international human rights instruments recognize the right of occupational choice, there is nothing in these documents that would prohibit States Parties from imposing suitable conditions limiting the rights of non-nationals in respect of freedom of occupational choice. See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at paras 17 and 18.

The Court further observed that this right is not contained in a number of different international instruments. The European Convention for the Protection of Human Rights and Fundamental Freedoms contains no right to occupational choice, and neither does the International Covenant on Civil and Political Rights. Article 6.1 of the International Covenant on Economic, Social and Cultural Rights recognizes the right of everyone to 'the opportunity to gain his living by work which he freely chooses or accepts'. Ibid at 18.

[2] See *City of Cape Town v AD Outpost (Pty) Ltd and Others* 2000 (2) SA 733, 747 A-C (C), 2000 (2) BCLR 130 (C).

> how long they could reside in particular areas, and the practice of making available structures to develop skills and training in the employment sphere to selected sections of the population only, and the statutory reservation of jobs for members of particular races. The result was that all citizens in the country did not have a free choice of trade, occupation or profession. Section 22 is designed to prevent a perpetuation of this state of affairs.[1]

(b) Comparative Jurisprudence

A number of foreign constitutions possess a right similar to that of FC s 22. Article 12(1) of the German Basic Law provides that all Germans have the right freely to choose their trade, occupation, or profession, their place of work and their place of training. The practice of trades, occupations and professions may be regulated by statute. Japan's 1947 Constitution contains two provisions that guarantee freedom of economic activity: (1) article 22 provides freedom to change residence and freedom to choose an occupation; and (2) article 29 provides for the right to property.

At a minimum, the comparative jurisprudence suggests that a South African court should, in light of the second proviso of s 22, require a rational connection between the purpose of the regulatory statute under scrutiny and the objective it seeks to vindicate.[2] The purpose of this proviso — which authorizes regulation to govern trades, occupation and the professions — thereby gives content to the right itself. FC 22 clearly protects choice. However, the space to exercise such choice is constrained by the legitimate need for the state to police any given market for the common good.

(i) *German case law*

The German courts have generally taken the view that the regulation of a profession as a commercial practice is easier to justify than barriers of entry into the profession itself. David Currie writes:

> A great many limitations of occupational freedom have been upheld by the [German] courts, such as compulsory retirement ages for chimney sweeps and midwives, the sale of headache remedies to pharmacists, the closure of shops on Saturday afternoons, Sundays, holidays and in the evening and the requirement that employers must hire the handicapped, limit the number of notaries and require them to serve welfare applicants without charge.[3]

Despite upholding this series of limitations upon the right, German courts have insisted on strong measure of rationality review. For example, the German Constitutional Court has held that article 12(1) was unjustifiably infringed when licences to practise law were denied or revoked on the because the applicant

[1] 1997 (7) BCLR 950, 980B-E (E)

[2] But see *SA Post Office Ltd v Van Rensburg & another* 1998 (1) SA 796, 805G–806B (E), 1997 (11) BCLR 1608 (E) ('*SA Post Office I*') (Lang AJ appears to suggest that any form of licensing system will automatically satisfy the requirements of s 22).

[3] David P Currie *The Constitution of the Federal Republic of Germany* (1994) 303.

engaged in employment thought to be menial and therefore inconsistent with the integrity or image of the legal profession.[1]

This last case suggests that the protection of individual choice remains the departure point for analysis. In *German Pharmacy*, the German Constitutional Court wrote:

> The practice of an occupation may be restricted by reasonable regulation predicated on considerations of the common good. The freedom to choose an occupation, however, may be restricted only in so far as an especially important public interest compellingly requires . . . [and] only to the extent that protection cannot be accomplished by a lesser restriction on freedom of choice.[2]

At issue in *German Pharmacy* was the decision of the state of Bavaria to pass laws restricting the number of pharmacies that could be licensed in a given community. The state's Apothecary Act provided for the issue of additional licences only if (a) the new pharmacy was commercially viable and (b) the new pharmacy caused no economic harm to nearby competitors. The applicant — a qualified pharmacist from East Germany — had been denied a licence to open a pharmacy.

In applying article 12 of the Basic Law to the state's Apothecary Act, the court stated that a practice or occupation could be restricted by *reasonable* regulations predicated on considerations of the common good. However, the freedom to choose an occupation could be restricted only for the sake of

> *a compelling public interest*; that is, if after careful deliberation the legislature determines that a common interest must be protected, then it may impose restrictions in order to protect that interest — but only to the extent that the protection cannot be accomplished by a lesser restriction on freedom of choice. In the event that an encroachment on freedom of occupational choice is unavoidable, law-makers must always employ the regulative means least restrictive of the basic right.[3]

Bavaria's Apothecary Act failed the court's *compelling public interest* test. The court found that the legislature intended to impose a restriction on admission in order to protect practising pharmacists from competition. Indeed, the court held that the Act reflected a set of naked preferences designed, not to safeguard public health, but to advance the pecuniary interests of existing pharmacies and pharmacists. It wrote:

> . . . between the lines of the legislation, we . . . can discern the political aims of a pharmacy profession at work to protect its [narrow] interests and the traditional concept of the "apothecary".[4]

German Pharmacy stands for the proposition that a relatively strict standard of review must be applied where there is regulation of occupational choice. The state

[1] 87 *BVerfGE* 287 (1992).
[2] 7 *BverfGE* 377 (1958) as cited in Currie (supra) at 300.
[3] See Donald P Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989) 288. (Emphasis added).
[4] Ibid at 290.

may regulate such choice only in so far as it is necessary to ensure proper and adequate training of an individual wishing to embark upon the trade which the legislature purports to control.

This strict standard of review for occupational choice does not preclude state intervention designed to further the common good. In *Long-Haul Truck-Licensing*,[1] transportation officials refused to grant permits to certain companies because the quota for such permits, fixed by law, had already been filled. The court found that in the light of the nature, complexity and cost of long-haul freight traffic, this restriction was indeed a justifiable and adequate means of preventing a major threat to a compelling public interest. The court stated that:

> The federal railroad is indispensable for the national economy. This is true not only for passenger transportation but for freight traffic as well, whose protection fixed quotas are meant to serve. The modern economy based on the division of labour cannot do without this means of transportation, which moves great volumes of freight quickly and over long distances . . . [S]upplying the population with vital goods could not be guaranteed without the railroad; thus the railroad helps to safeguard the existence of every individual.[2]

Of additional interest is the social democratic cast of the German Basic Law's economic activity jurisprudence. In *Numerus Clausus,*[3] the German Constitutional Court declared that the right to obtain a professional education is worthless if the state did not provide one. Access to public education is, therefore, not a matter of legislative discretion. Accordingly, the court has applied art 12(1) together with the equality guarantee in terms of art 3(1) and the social state principle to analyse carefully any restriction on access of applicants to public educational facilities.[4] Given the social democratic or transformative character of the South African Constitution, a South African court would be justified in reading s 7(2)[5] together with s 22 and s 29(1)(b)[6] to arrive at a similar conclusion.

(ii) *Japanese Case Law*

As I noted above, article 22 of the Japanese Constitution has a similar provision to FC s 22: namely that every person shall have the freedom to choose his or her occupation to the extent that it does not interfere with the common good. The 'common good' *proviso* has been given content similar to that of our own IC s 26(2).

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[1] 40 *BVerfGE* 296 (1975).

[2] *Long-Haul Truck-Licensing* (supra) at 297-8.

[3] 33 *BVerfGE* 303 (1972).

[4] See D Currie (supra) at 303.

[5] Final Constitution s 7(2), Rights, reads as follows: '(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

[6] Final Constitution s 29(1)(b), Education, reads as follows:

'(1) Everyone has the right —

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.'

In *Gypsy Taxi Cab*,[1] an unlicensed taxi operator was charged with a violation of the road transportation law. The law prohibited the use of private automobiles for such commercial activities as transporting passengers for profit. Upon conviction, the cab operator appealed to the Supreme Court on the grounds that the provision unreasonably restricted his freedom of occupation. The court rejected his appeal. The court observed that the objective of the transportation law was to promote the public welfare by ensuring fair competition and the proper and orderly operation of the road transportation system. The court held that leaving the 'paid transportation business' unregulated by promoting the use of non-commercial vehicles would not only lead to the development of unlicensed business but would render 'regulation less effective under the licensing system'. As a result, the law — which granted a vehicle transportation license only upon compliance with certain standards — did not contravene the constitutional guarantee. The law was a manifestly justifiable restriction designed to improve existing state of traffic and road transportation in Japan. It is worth noting that in reaching its decision, the court emphasized that the justification for its decision flowed from the need to regulate a commercial practice. It did not view its decision through the prism of an individual's right to choose a field of employment.

But regulations of commercial practice do not always justify curtailment of individual autonomy. In 1972, the Supreme Court had to determine the constitutionality of the Retail Business Adjustment Special Measures Act. The Act controlled retail markets by requiring that entrants into new markets be licensed. The court identified two categories of occupational restriction. The first category — a negative restriction — maintains public safety and order. The second category — a positive restriction — advances welfare state socio-economic policies. With respect to this second category, positive or affirmative restrictions will be found unconstitutional if (a) they are patently unreasonable and (b) the legislation reflects the naked preferences of its legislators and some cohort of constituents. However, because the Retail Business Adjustment Special Measures Act was an affirmative restriction enacted to protect small or medium-sized enterprises from economic collapse caused by an excess numbers of retail markets, the court held the law to be constitutional.[2]

In 1975, the Supreme Court had another opportunity to examine economic zoning practices. In its review of the zoning provisions of the Pharmaceutical Business Act, the court first held that a negative restriction's purpose (a) had to be necessary and reasonable and (b) could only impose minimum restrictions on occupational activity. In reviewing the necessity and reasonableness of zoning pharmacies, the court found that zoning criteriator a new pharmacy were

[1] *Koizumi v Japan* 17 Keishu 12 (1963) 2434, translated and reprinted in Hiroshi Itoh & Lawrence W Beer *The Constitutional Case Law of Japan. Selected Supreme Court Decisions, 1961—1970* (1963) 80–1.

[2] See Mutsu Nakamura 'Freedom of Economic Activities and the Right to Property' (1990) 53 *Law and Contemporary Problems* 1–5. While the infringement of occupational choice in the context of regulation of trade could be examined as a limitation problem in terms of FC s 36, it will, as we shall see, must often be treated as a inquiry engaged by the second proviso of s 22 itself.

negative restrictions designed mainly to protect life and health. Employing a strict reasonableness or strong rationality test, the court rejected the state's purely speculative argument that there was a danger of supplying defective medicine caused by a sudden increase of competition and the instability of the pharmaceutical business.[1]

54.3 Section 22 Jurisprudence

At issue in *South African Post Office v Van Rensburg and another*[2] was the operation of a private business that collected and delivered letters, accounts and documents. The Post Office sought an interdict restraining the respondent from conducting this service because it contravened s 7 of the Post Office Act.[3] Section 7 grants the Post Office the exclusive power to conduct any and all postal services. Relying on FC s 22, the respondent contended that s 7 of the Post Office Act contravened his right to freedom of trade.

Lang AJ noted that while FC s 22 was the 'direct successor' of IC s 26, 's 26 had both a different title and materially different wording'.[4] Lang AJ observed that the Minister, under s 90A of the Post Office Act, could grant another party permission to run a postal service if he deemed it to be in the public interest. Lang AJ held that the respondent's rights under s 22 had not been infringed or denied, but simply regulated by law.[5]

In *Van Rensburg v South African Post Office Ltd*,[6] a Full Bench had the opportunity to consider the appeal against the decision in *South African Post Office I*. In writing for the *SA Post Office II* court, Jones J stated that:

> the content of the right in s 22 of the Constitution is the right to choose a trade, occupation or profession, within the framework of any lawful regulation which controls its practice. The power of government to control the practice of a trade, occupation or profession necessarily involves the power to place such restrictions on the practice of a particular trade, occupation or profession as are considered necessary or desirable.

The test for such restrictions is that they must 'be reasonable'.[7] In dismissing the appeal, the *SA Post Office II* court held that it was permissible and reasonable for the Post Office Act to give the Post Office an exclusive franchise over the

[1] Nakamura (supra) at 6–7.
[2] *SA Post Office I* (supra).
[3] Act 44 of 1958 ('the Post Office Act').
[4] *SA Post Office I* (supra) at 805D.
[5] *SA Post Office I* (supra) at 805G–806B. In arriving at this conclusion Lang AJ considered and then distinguished the decision in *Grand Slam Entertainment Centre v Minister van Veiligheid en Sekuriteit* 1996 (2) BCLR 213 (O). In *Grand Slam*, an unqualified prohibition in terms of s 6 of the Gambling Act was deemed unconstitutional. In the instant case, the Post Office Act did not impose an unqualified prohibition. *S A Post Office I* (supra) at 806F. It would appear that the wording of the legislation rather than the practical possibility of running an alternative service by gaining permission determined the conclusion reached by the court.
[6] 1998 (10) BCLR 1307 (E) ('*SA Post Office II*').
[7] *SA Post Office II* (supra) at 1322E.

postal service in South Africa. The Act did not negate the appellant's right to trade. In reasoning similar to that of Lang AJ in *SA Post Office I,* the *SA Post Office II* court found that the appellant's right was 'reasonably' limited to a range of exceptions set out in s 7(1)(c) of the Act.[1] In coming to this conclusion, the *SA Post Office II* court implicitly gave the word 'trade' a broad extension. That is, it did not restrict the section to a class of employment, but suggested that that all forms of business or employment fall within the protective ambit of s 22.[2]

Dictum in *SA Post Office II* that any restriction of trade in terms of a regulation must be reasonable raises, but does not answer, the question of the relationship between such a test and that required by the general limitations inquiry under s 36. Even if the regulation is found to be unreasonable under s 22, the party relying on the regulation could still — technically — have an opportunity to justify the law in question in terms of the general test set out in s 36. Under s 36, reasonableness is but one important part of the analysis.[3] The *SA Post Office II* court also left open, perhaps wrongly, the question of whether s 22 applies only to natural persons and not corporate bodies.[4]

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[1] These exceptions relate to any letter —

'(a) sent or conveyed to or from any post office;

(b) exceeding the dimensions prescribed for letters;

(c) continuing process of or proceedings or pleadings in any court of justice or affidavits or depositions;

(d) exclusively concerning goods sent and to be delivered therewith; or

(e) sent by any person exclusively concerning his private affairs or the private affairs of the bearer or the receiver.'

[2] Trade' is given a similar meaning in the Income Tax Act 58 of 1962 as amended. Trade means every profession, trade, business, calling, occupation or venture, including the letting of property. This definition captures *SA Post Office II*'s notion that all forms of business or employment fall within the protective ambit of s 22.

[3] On the relationship between internal limitations and the general limitations clause, see Stu Woolman 'Limitations' in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz and Stu Woolman (eds) *Constitutional Law of South Africa* (1st Edition, 5th Revision, 1999) and Henk Botha and Stu Woolman 'Limitations' in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz and Stu Woolman (eds) *Constitutional Law of South Africa* (2nd Edition, Original Service, 2004). As a general matter, a failure to satisfy the requirements of 'reasonableness' at the rights stage will make it difficult to satisfy the requirements of the general limitations test.

[4] The court most certainly exercised excessive caution. The section must attach only to natural persons. Chapter 2 of the Constitution employs the words 'every person' and 'citizen' to indicate to whom the any given right attaches. Where 'citizen' is used, the right attaches only to natural persons with South African citizenship.

Note, however, that because of the doctrine of objective unconstitutionality, a corporate applicant will not need to show that a law infringes its own constitutional rights to challenge the validity of that law. If a law unconstitutionally violates the s 22 rights of natural persons, it is objectively invalid, and any corporate applicant with an interest in setting aside the law has standing to challenge its constitutional validity. See *Ferreira v Levin NO & others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at paras 27–30 and 158–68. See also Matthew, Chaskalson and Cheryl Loots 'Access to the Courts and Justiciability' and Jonathan Klaaren 'Judicial Remedies' in Matthew Chaskalson , Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz and Stu Woolman (eds) *Constitutional Law of South Africa* (1st Edition, 5th Revision, 1999).

The phrase 'regulated by law' in s 22 represents an important restriction on the ability of the government to limit the practice of a trade, occupation or profession. In *Janse van Rensburg NO en 'n ander v Minister van Handel en Nywerheid en 'n ander*[1], the Minister invoked provisions of the Harmful Business Practices Act[2] in order to curtail certain practices of the applicant's enterprise.

Van Dijkhorst J found that the Act was designed to protect consumers. As a result, the general and uniform restrictions placed on business did not breach the provisions of s 22.[3] However, Van Dijkhorst J went on to say that any restrictions imposed under the Act had to be set out in the form of a law of general application. In terms of s 8(5)(a) of the Act, the Minister was empowered to take steps to prevent a business from continuing to operate and to attach and seize assets. The *Janse van Rensburg* court found that because the section empowered the Minister to take *ad hoc* administrative action to restrict the activities of individuals, such measures did not fall within the category of regulations authorized by s 22.[4]

54.4 Restraint of Trade Clauses

IC s 26 elicited a number of challenges to covenants in restraint of trade. These challenges foundered on the shoals of *dicta* set out in the pre-constitutional *Magna Alloys and Research (SA) (Pty) Ltd v Ellis.*[5] In *Magna Alloys,* the court wrote that a restraint of trade clause within a contract was *prima facie* valid and that whoever wished to prove the contrary bore the onus of showing that 'the restriction conflicted with the public interest.'[6].

The more restrictive formulation of FC s 22 has not prevented further challenges to the validity of agreements in restraint of trade. In *Coetzee v Comitis and Others*[7], the court was confronted with rules of the National Soccer League (NSL) that provided that any footballer wishing to play professional football (1) had to register with the NSL; (2) had to obtain a clearance certificate from his club before he could be registered by the NSL as a player of a new club; (3) had to ensure that after conclusion of a contract with a new club, his former club was duly compensated; and (4) had to remain a registered player of the club with which he was last employed for a period of thirty months (only after this period would the club no longer be entitled to compensation). The applicant asked for an

[1] 1999 (2) BCLR 204 (T) ('*Janse van Rensburg*').
[2] Act 71 of 1988.
[3] *Janse Van Rensburg* (supra) at 212A.
[4] Ibid at 221D. See also *Janse Van Rensburg NO v Minister of Trade and Industry* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC) (Constitutional Court confirms order).
[5] 1984 (4) SA 874 (A) ('*Magna Alloys*').
[6] For examples of such unsuccessful challenges, see *Waltons Stationery Co. (Pty) Ltd v Fourie and Another* 1994 (4) SA 507 (O), 1994(1) BCLR (50) (O); *Kotze en Genis (Edms) Bpk v Potgieter* 1995 (3) SA 783 (C), 1995(3) BCLR 349 (C); *AK Entertainment CC v Minister of Safety and Security* 1995 (1) SA 783, 793 (C), 1994 (4) BCLR 31 (C); *Knox D'Arcy (Ltd) and Another v Swar and Another* 1996 (2) SA 651 (W), 1995 (12) BCLR 1702 (W).
[7] 2001(1) SA 1254 (C), 2001 (4) BCLR 323 (C).

order declaring these restraints unconstitutional. Traverso J began by noting that the jurisprudence generated under IC s 26 had 'been uniformly dismissive of a suggestion that the Interim Constitution necessitated a revision of the restraint of trade law.'[1] She went on to add that:

> [c]onsideration of public policy cannot be constant. Our society is an ever-changing one. We have moved from a very dark past into a democracy where the Constitution is the supreme law, and public policy should be considered against the background of the Constitution and the Bill of Rights. . . . If we should therefore find that the regulations of NSL are contrary to public policy, it is self evident that the contract which the applicant has with Hellenic, which incorporates the NSL regulations, is contrary to public policy and that, accordingly, the 'restraint of trade' should not be enforced.[2]

According to Traverso J,

> the rules of NSL were akin to treating players as goods and chattels who are at the mercy of the employer once their contract has expired. In my view, these rules violate the most basic values underlying our Constitution.[3]

By arriving at the conclusion that the contractual regime reflected in the governing rules of the NSL constituted a restraint of trade that was both unreasonable and contrary to public policy, the court altered the approach endorsed in *Magna Alloys*. The court found that the onus now lay with the NSL to satisfy the court that the contractual regime was a reasonable and justifiable limitation on the freedom of trade, occupation and profession.[4]

Liebenberg J adopted a similar approach in *Fidelity Guards v Pearmain*.[5] After setting out the *Magna Alloys* test and confirming that restraint clauses could only be enforceable if they were *not* in conflict with public policy, Liebenberg J went on to say:

> In terms of *Magna Alloys* . . . the onus in matters of this nature is on the party wishing to show that the restraint should not be enforced. It seems that the position in terms of the Constitution *may* now be that onus will be on the party wishing to enforce it to show that it complies with the provisions of the Constitution.[6] (italics added).

Unfortunately Liebenberg J stopped just short of determining exactly where the onus lay.

The significance of these judgments is that they invite an investigation into the nature of the restraint of trade agreement within the context of current public policy considerations. Such considerations were unquestionably not present at the time when Rabie CJ adopted the traditional approach in *Magna Alloys*.[7] In

[1] Ibid at para 30.
[2] Ibid at para 32.
[3] Ibid at para 38.
[4] *Magna Alloys* (supra) at para 40.
[5] 2001 (2) SA 853 (SE), 1997 (10) BCLR 1443 (SE).
[6] Ibid at 862 G.
[7] The jurisprudence confirmed in *Magna Alloys* (supra) and the failure to recognize the effect of power relations in restraint of trade clauses was not greeted with unqualified acceptance even at the time of the judgement. See, for example, Brahm Du Plessis and Dennis Davis 'Restraint of Trade and Public Policy' (1984) 101 *SALJ* 86.

Comitis, the court correctly examined the effect of the restraint of trade and the nature of the power relations between the contracting parties in coming to the conclusion that the contract violated important public policy considerations made manifest in the Constitution.

54.5 The Regulation of Conduct by Professionals and those Engaged in Trade

The second proviso of s 22 — that the practice of a trade occupation of professionals may be regulated by law — acknowledges that

> certain occupations call for particular qualifications described by law and one of the constraint of economic spheres that persons who lack such qualifications may not engage in such occupations.[1]

In *Law Society of the Transvaal v Machaka and Others (No. 2)*[2], the respondents failed to take such constraints seriously and had their names struck from the roll of attorneys. Respondents raised an issue *in limine* in which they argued that the Constitution deprived the court of the right to strike an attorney from the roll or to suspend him from practice on the basis that such action, *inter alia,* would deny respondents 'their right to chose their trade, occupation or profession freely'. In dismissing this argument, Kirk-Cohen J wrote:

> The respondents have in fact exercised their rights under s 22. They have freely chosen their occupation, profession and exercised those rights. The point they overlook is that the Constitution, both old and new, does not provide that a person may abuse the right enshrined on the s 22 of the new Constitution. Taken into its logical conclusion, the submission of the first and third respondents would be that attorneys would be entitled to commit any offence, including theft of trust moneys, but not be liable to be struck off the roll or suspended from practice because the new Constitution has impliedly repealed s 22 of the Attorneys' Act and also the Courts inherent power over practitioners who practice within its jurisdiction.[3]

As *Machaka* makes clear, the right to choose one's trade, occupation or profession freely does not mean that this right creates an unqualified freedom. In *Ernst and Young v Beinash and Others*,[4] the applicant sought an order in terms of the Vexatious Proceedings Act[5] against the respondents to the effect that no legal proceedings could be instituted by the respondents against any person in any division of the High Court of South Africa or an inferior court without the leave

[1] *Solberg* (supra) at para 33.
[2] 1998(4) SA 413, 416 (T) ('*Machaka*')
[3] Ibid at ???
[4] 1999(1) SA 1114 (W) ('*Beinash*'). See also *Beinash v Ernst and Young* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC).
[5] Act 3 of 1956.

of that court or any judge of the High Court.[1] The respondents sought sanctuary in s 22. Fevrier AJ rejected their prayer. He correctly held that the order itself would not prohibit any person from choosing a trade, occupation or profession. He noted that there were many cases where an adverse court order may create a perception that a person is an unattractive employee or business associate:

> One need merely consider a person who has been convicted for fraud, theft or other crimes. He may thereby become a most unattractive business associate. An insolvent, against whom a final order of sequestration has been made, may also labour under a disadvantage when seeking employment. It would be ludicrous to suggest that the provisions of the law, pursuant to which such orders and findings are made, should be struck down as being unconstitutional.[2]

In short, the respondents' argument was fundamentally flawed because it was not the Vexatious Proceedings Act that violated a person's choice of trade, occupation or profession. Rather, it was the person's conduct itself that gave rise to an order being granted in terms of the Act.[3]

[1] *Beinash* (supra) at 1146C. The respondents had launched forty five different proceedings against applicants, only one of which had been successful and all of which turned on events relating to the winding up of a company. In opposing the application respondents argued, *inter alia*, that were such an order to be granted

> one must ask oneself whether anyone would ever become a partner of the respondents and run the risk in due course of finding that a valid and enforceable claim against a third party which would have to be taken in the name of a partnership would not succeed unless the respondents first obtain the permission of the Court to be a plaintiff in such proceedings.

Ibid.

[2] *Beinash* (supra) at 1146G-H.

[3] See, for a similar treatment of the argument that s 22 provides an unqualified right, *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape* 2001(3) SA 582, 589-590 (SCA), 2001 (6) BCLR 545 (SCA).

55 Housing

Kirsty McLean

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Housing

26. (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.[1]

55.1 INTRODUCTION*

In addition to the housing rights provided for in FC s 26, FC ss 28(1)*(c)* and 35(2)*(e)* provide, respectively, for the rights of children to 'shelter'[2] and the rights of prisoners to 'adequate accommodation'.[3]

Until recently, most writing on housing law and policy, and FC s 26, has been undertaken either by legal academics or by housing practitioners. The former tend to focus on the jurisprudence of socio-economic rights and the Constitutional Court's seminal decision in *Grootboom*,[4] while the latter tend to be preoccupied with the practical implementation of State housing policy, unaware of its nuanced legal interpretations. This chapter attempts to marry these two discourses, and in so doing, develop a more multifaceted treatment of housing law generally. For the lawyer, it contexualizes housing rights and litigation within the practical constraints and difficulties of government bureaucracy, financing and planning. For the housing practitioner, it views policy analysis through the lens of FC s 26's right to adequate housing.

Housing law is animated by a complex network of law, policy, social welfare, politics, international law, macro-economic planning, co-operative government and finance. Today, housing is also about much more than simply providing shelter from the elements. It is about creating sustainable, integrated housing settlements, and generating wealth through asset creation. For the very poor or indigent, it is also about social welfare and access to basic services.

From 1 April 1994 until December 2005, the South African government subsidized the construction of 1 916 918 houses[5] and in so doing, at an average of 4.1 people per household, provided housing to approximately 7 859 363 people in South Africa.[6] As Kecia Rust points out:

* I would like to thank Geoff Budlender, Marie Huchzermeyer, Theunis Roux, Kecia Rust, Hendrik van Rensburg, Alison Wilson, Stu Woolman and David Zeffertt for comments on earlier drafts of this chapter. Any errors remain my own.

[1] Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)('FC' or 'Final Constitution').

[2] See § 55.7 infra.

[3] See § 55.8 infra.

[4] *Government of the RSA & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)('*Grootboom*').

[5] These figures are the latest available up to December 2005: see http://www.housing.gov.za (accessed on 11 May 2006). The website also states that, as of December 2005, the government had approved 2 784 675 subsidies and 1 698 788 beneficiaries.

[6] The average of 4.1 persons per household is based on the figure used by the Department of Housing. National Department of Housing *Ten Year Review* (2003).

> South Africa has tackled issues of housing finance, social housing, and consumer protection. It has institutionalised the concept of 'people's housing', made space for women in the construction industry, and supported the role of emerging builders. It has built a single, non-racial department of housing out of a previously fragmented and inefficient system. And, perhaps most importantly, it has entrenched the right to adequate housing in its constitution. Each of these developments is a significant achievement. Their combination, especially given South Africa's history, is unparalleled.[1]

Despite this glowing commendation, there remain a number of problems with housing policy and delivery in South Africa. This chapter will examine these problems in light of the constitutional right to adequate housing.

The chapter begins with a brief overview of South African housing policy since 1994. It then moves into a discussion of FC s 26(1) and (2) and the standards established by the *Grootboom* Court that determine the 'reasonableness' of the State's measures to realize progressively access to adequate housing. These standards are used, in the following section, to examine extant housing policy. The chapter then considers international law on housing. International law provides one of many critical perspectives on our courts' current housing jurisprudence. In the final sections of the chapter, eviction law and the protection afforded by FC s 26(3), a child's right to shelter in terms of FC s 28(1)*(c)*, and a prisoner's right to adequate accommodation under FC s 35(2)*(e)* are assayed. These latter two provisions are not dealt with in detail as they are discussed more thoroughly elsewhere in this volume.[2]

55.2 Overview of South African Housing Policy 1994–2000

(a) Historical background

In order to chart the State's response to *Grootboom*, it is essential that one first come to grips with State housing policy from 1994 through to 2000.[3] Indeed,

[1] K Rust 'No Shortcuts: South Africa's Progress in Implementing its Housing Policy, 1994–2002' (Unpublished paper prepared for the Institute for Housing of South Africa, 2003, on file with the author) 7. The Department of Housing has also provided secure tenure to approximately 500 000 families living in old public housing stock. See National Department of Housing *Breaking New Ground: The Comprehensive Plan for the Creation of Sustainable Settlements* (2004)('*Breaking New Ground*') 4.

[2] For a general overview of the jurisprudence on socio-economic rights, see S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33. For a more detailed discussion of children's rights, see A Friedman & A Pantazis 'Children's Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 47. For more on prisoner's rights, see F Snyckers & J Le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 51; D van Zyl Smit 'Sentencing and Punishment' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 49. Knowledge of this material is largely assumed in the writing of this chapter and duplication is avoided where possible.

[3] For a good discussion of pre-1994 housing policy, see P Wilkinson 'Housing Policy in South Africa' (1998) 23 *Habitat International* 215, 216–24.

housing policy, as it is currently conceived, actually antedates the new dispensation. Discussions about a new housing policy began with the establishment of the National Housing Forum in 1992. The findings of this 'multi-party non-governmental negotiating body'[1] were used by the Government of National Unity in formulating South Africa's National Housing Policy. While the Forum's processes have been criticized for not giving effective voice to the homeless and poor,[2] the primary purpose of the Forum was to reach a working consensus between different interest groups on key issues.[3] It did exactly that — but at the cost of plastering over many unresolved contradictions in the aims and wishes of the various interest groups.[4] In October 1994, a National Housing Accord (known as the 'Botshabelo Agreement') was signed by 'a range of stakeholders representing the homeless, government, communities and civil society, the financial sector, emerging contractors, the established construction industry, building material suppliers, employers, developers and the international community'.[5] In December 1994, the government produced the White Paper on Housing[6] and South Africa's first universal housing strategy.[7]

(b) Constitutional and legislative framework

The documents at the heart of contemporary housing policy are the Final Constitution, the Housing White Paper, the Housing Act[8] and the *Housing Code*. Other influential documents are the Reconstruction and Development Programme (RDP), the Growth, Employment and Redistribution Strategy (GEAR), the Urban and Rural Development Frameworks, and various other white papers and legislation on local government and the public service.[9] In September 2004, the Minister of Housing announced a refined and renovated housing policy:

[1] National Department of Housing *National Housing Code* (2000) 3UF.

[2] See M Huchzermeyer 'Housing for the Poor? Negotiated Housing Policy in South Africa' (2001) 25 *Habitat International* 303, 305–11.

[3] See F Khan 'Introduction' in F Khan & P Thring (eds) *Housing Policy and Practice in Post-Apartheid South Africa* (2003) 1, 12.

[4] See MR Tomlinson 'South Africa's New Housing Policy: An Assessment of the First Two Years, 1994–96' (1998) 22 *International Journal of Urban and Regional Research* 137, 144. Some of these conflicts and contradictions are responsible for many of the problems experienced in implementing the housing programme to date, many of which are currently being addressed in *Breaking New Ground* — the Department's new housing policy.

[5] *National Housing Code* (supra) at 4UF.

[6] National Department of Housing *White Paper: A New Housing Policy and Strategy for South Africa* (1994).

[7] See S Gutto 'Housing' in *The Law of South Africa* 11 (First Reissue, 1998) 1, para 11. The Development Facilitation Act was also pivotal in bringing about the new approach to housing development. Act 67 of 1995. The Act aimed to 'facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land'. Preamble to the Development and Facilitation Act. See Gutto (supra) at paras 12–17.

[8] Act 107 of 1997.

[9] *National Housing Code* (supra) at 5UF.

'*Breaking New Ground': The Comprehensive Plan for the Creation of Sustainable Human Settlements. Breaking New Ground* has significant implications for the Housing Act and the *Housing Code* as both the Act and the *Code* are being redrafted in light of this new policy document.[1]

The Housing Act is the central piece of national legislation regulating housing policy. At the heart of the Act is the aim to 'provide for the facilitation of a sustainable housing development process'.[2] 'Housing development' is defined as

> the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to —
> *(a)* permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and
> *(b)* potable water, adequate sanitary facilities and domestic energy supply.[3]

The Housing Act lays down 'general principles' for housing development. These include prioritizing the needs of the poor (s 2(1)*(a)*), consulting with affected parties (s 2(1)*(b)*), and regulating affordable and sustainable housing development (s 2(1)*(c)*) through the principles of co-operative government set out in FC s 41.[4] The Act describes in detail the powers and duties of the various spheres of government, and the ways in which they should interact and co-operate in order to give effect to FC s 26. It does not, however, contain a detailed account of actual housing policy. For instance, the Housing Act does not specify that housing delivery should be carried out through project-linked subsidies, or that individual ownership should be given precedence over communal ownership or rental options.

Instead, the Housing Act states that the Housing Minister must publish a *Housing Code* which contains national housing policy (s 4(2)*(a)*) that binds provincial and local spheres of government (s 4(6)). The content of the *Code* is

[1] Unfortunately, revised drafts of the Housing Act and the *National Housing Code* were not available at the time of writing this chapter. These amendments will be dealt with in future revisions of this chapter. *Breaking New Ground* has been considered, where possible, to indicate future development in housing policy. It should be noted, however, that housing policy is currently (mid-2006) in a state of revision and that caution should be used in relying on the information in this chapter as it may soon become outdated. For a discussion of the relationship between *Breaking New Ground* and other legislation and policy, see §55.4*(b)* infra. Readers are also advised that the national Department of Housing's website is frequently out of date (for example, *Breaking New Ground* is not available on the website) and that, if accurate information is required, they should contact the Department directly.

[2] 'Long Title' of the Housing Act.

[3] Housing Act s 1.

[4] For a general discussion of the principles of co-operative government, see S Woolman, T Roux & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 14.

determined wholly by the Minister. Moreover, the Minister is not obliged to engage in any deliberative or consultative process in determining national housing policy.[1] The only requirement is that the Minister must publish updated lists of housing programmes and national institutions established in terms of the Act, in the Government Gazette 'from time to time' (s 3(6B)). Furthermore, 'new national housing policy applies notwithstanding that such a policy has not yet been included in a revision of the *Code*' (s 4(5)).

This framework raises two concerns. First, this requirement 'expressly sanctions the inversion of the usual relationship between policy and legislation'.[2] The typical, and desirable, relationship is that policy documents should state the overall objectives of government strategy, while the detailed rules are set out in primary or secondary legislation. The authorization, by the Housing Act, for virtually all rules pertaining to housing to be contained in the *Housing Code* — whose terms can be altered by ministerial fiat — is undesirable. The current policy revision process is even more convoluted. *Breaking New Ground* — the State's new housing policy — is at odds with various provisions of the Housing Act and *Housing Code*. The latter two documents must now be amended so as to be consistent with the new policy.

The second, related concern involves the democratic and constitutional appropriateness of including most, if not all, of the housing development framework in policy rather than legislation. The Final Constitution mandates the State to take 'reasonable *legislative* and other measures' (emphasis added) to realize the right of everyone to have access to adequate housing. A purposive interpretation of this injunction would mean that the most important principles and policy choices relating to housing delivery should be deliberated upon in Parliament.[3] Of course, it is always open to government departments to include substantial portions of 'policy' in regulations, and pure 'policy documents', but the more important aspects of policy should be contained in legislation. At present, the *Housing Code* (and now *Breaking New Ground*) exhaust the universe of important policy concerns and render the Act superfluous in terms of determining how the State gives effect to the right to adequate housing. This situation arguably amounts to the abdication by Parliament of its constitutionally mandated role, and may, in addition, violate the principle of legality and the rule of law.[4]

[1] The Act, however, does specify that the *Code* may contain 'administrative or procedural guidelines' regarding 'the effective implementation and application of national policy' or 'any other matter that is reasonably incidental to national housing policy' after consulting with the various provincial housing MECs as well as SALGA. Housing Act s 4(2)*(b)*.

[2] T Roux 'Background Report 2: Review of National Legislation Relevant to Informal Settlement Upgrading' (Unpublished paper written for the National Department of Housing, 2004, on file with the author) 1.

[3] *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 327.

[4] For a general discussion of the content of the legality principle and the rule of law, see F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11.

Low-income housing development in South Africa is financed primarily through the housing subsidy, predominantly a once-off capital grant through which developers have developed housing for allocation to qualifying beneficiaries. For the poorest households, the housing subsidy was originally set at a maximum of R 16 000, which was then increased in 2002 to R 20 300, and in 2006 to R 36 528 per household.[1] In order to qualify for a housing subsidy, the beneficiary must (1) be married or 'constantly living with another person', or, if single, must have 'proven financial dependents'; (2) be a South African citizen or a permanent resident; (3) be competent to contract and of sound mind; (4) have a (combined) monthly household income that does not exceed R 3 500; (5) not already have received a housing subsidy, either personally or through another member of his or her household; and (6) not previously have owned a house (with certain exceptions).[2] Ideally (and according to the original intention of the policy), beneficiaries should also obtain credit to supplement the subsidy. In practice, however, very few beneficiaries have been able to access formal credit: in 1994 only six per cent of beneficiaries obtained credit, and by 2002, this figure had fallen to less than two per cent.[3]

South African housing policy's primary aim is to deliver housing to the 'poor', defined as those earning under R 3 500 per month. In 1994, the poor accounted for 85 per cent of the population. Today, this percentage is substantially lower. The lowering of this percentage, however, is mostly due to inflation rather than a significant improvement in income in real terms.[4] While the Department of Housing is committed to ensuring that the amount of the subsidy keeps pace with inflation, there is no similar commitment to moving the subsidy bands.

[1] Initially, there were different subsidy bands, depending on what the beneficiary household earns per month. Households earning over R 3 500 per month do not qualify for a subsidy. The new housing policy proposes collapsing the subsidy bands and providing a single subsidy for every household earning under R 3 500 per month, and providing financial assistance in obtaining bank loans to those earning between R 3 500 and R 7 000 per month. See *Breaking New Ground* (supra) at 8–9. A list of the various subsidies and the amounts granted are available on the Department of Housing website: http://www.housing.gov.za. Note that, at the time of writing, the figures on the website were out of date and the figures cited in this chapter were obtained directly from the Department.

[2] This information was obtained from the Department of Housing website, http://www.housing.gov.za (accessed on 11 January 2006). Immediately noticeable is the restrictive scope of the beneficiary group. By comparison, the text of the Final Constitution extends the right to 'everyone'. For example, persons who are not in a relationship or with dependants are excluded, which would include many young and elderly people. This restrictive provision of housing benefits may be subject to challenge in the future, where, on the basis of the holding in *Khosa & Others v Minister of Social Development & Others; Mahlaule & Another v Minister of Social Development & Others*, the State would have to demonstrate that this restriction was reasonable or did not constitute unfair discrimination. 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC)('*Khosa*').

[3] See Rust (supra) at 10. Access to formal credit, however, is not solely a problem of financial institutions refusing to grant credit. Rather, there is a range of complex reasons for beneficiaries not wanting or not being able to afford formal credit, which arise independently of the subsidies. See I Melzer 'How Low Can You Go?: Charting the Housing Finance Access Frontier: A Review of Recent Demand and Supply Data' (Unpublished paper prepared for the FinMark Trust, 2006, on file with the author) 31–49, available at http://www.finmarktrust.org.za (accessed on 10 May 2006).

[4] See Rust (supra) at 7.

Initially, housing development was carried out primarily by the private sector, with large, for-profit construction companies undertaking substantial government-subsidized projects on 'greenfields land'. This strategy enabled the State to deliver a significant number of houses. Developers used the housing subsidy to purchase land, build bulk infrastructure and develop a core or starter house. Approximately 46.8 per cent of the subsidy was spent on land and infrastructure.[1] Due to the high costs of infrastructure, policymakers envisaged that beneficiaries would incrementally add to a core house that often consisted of little more than a slab of concrete, a roof on beams with one or two walls, a tap and a toilet.

Some notable shifts in policy have, however, occurred over the last few years. First, by the late 1990s, the State emphasized the delivery of better top-structures and completed houses.[2] Second, the State's housing efforts were frustrated by both the failure to create a secondary market in RDP houses and the lack of proper valuation of the houses by the beneficiaries themselves. (A large number of RDP houses were sold for substantially less than the cost incurred in building them.) As a result, in April 2002, the State began to require beneficiaries to contribute either an amount of R 2 479[3] or an equivalent amount of labour or 'sweat equity' to their houses. (Pensioners, the disabled, and those with proven health problems were not required to make this contribution, and, due to poor households' difficulty in making these payments, *Breaking New Ground* later amended this to exclude those earning less than R 1 500 per month.) This requirement of 'own contribution' from beneficiaries reinforces the National Department of Housing's renewed emphasis on the 'people's housing process' — the notion that the dignity and responsibility that flow from and attach to home ownership must be matched by a commitment on the part of the beneficiaries themselves to the homes they build and the communities to which they belong. A third development is that the notion of secure tenure has been widened to include rental housing, resulting in increased interest in 'social housing' as a solution for providing low-cost rental stock for the poor.[4] Lastly, local government has been granted a broader mandate for housing delivery, including informal settlement upgrading.[5]

[1] The new housing policy, *Breaking New Ground,* envisages that the funding for the acquisition of well-located land should no longer come out of the housing subsidy, but should be financed through a separate fund. See *Breaking New Ground* (supra) at 14.

[2] See S Charlton, M Silverman & S Berrisford *Taking Stock: Review of the Department of Housing's Programme, Policies and Practice (1994–2003)* (Unpublished paper prepared for the Department of Housing, 2003, on file with the author) 67. Minimum norms and standards for houses were also introduced on 1 April 1999.

[3] This sum is calculated as the difference between what it actually costs to build a $30m^2$ top-structure and the housing subsidy. See Department of Housing 'Memorandum: Adjustment of the Quantum of the Housing Subsidy' (2002).

[4] See Rust (supra) at 9.

[5] The significance of this mandate for the realization of housing rights is discussed in COHRE 'Any Room for the Poor? Forced Evictions in Johannesburg, South Africa' (Centre on Housing Rights and Evictions (COHRE), 2005) 98–99, available at http://www.cohre.org/downloads/ffm-johannesburg-lo.pdf (accessed on 13 May 2006). For a discussion of informal settlement upgrading, see § 55.4*(c)*(iii).

55.3 FC s 26(1) AND (2)

A number of cases have engaged the meaning and the reach of FC s 26(1) and (2). One case alone, however, canvasses the vast majority of issues raised by the Final Constitution's commitment to adequate housing: *Grootboom*.

(a) Overview of *Grootboom*[1]

Grootboom began with an informal community's occupation of private land. The community named their new settlement 'New Rust' — and it was, all things being equal, an improvement upon the deplorable conditions of their previous settlement. The owner of the land, however, sought and obtained an order for the community's eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.[2] The community then sought shelter on a municipal sports field. After requesting assistance, but receiving none, from the relevant local government authorities, the community sued the local municipality in the Cape High Court for an order granting temporary shelter. In so doing, they relied on FC s 26 and FC s 28. Davis J granted an order in terms of FC s 28(1)*(c)*, instructing the State to provide shelter for the children in the community, as well as their parents. The State appealed against this order to the Constitutional Court. After the intervention of an amicus curiae, the original claim based on FC s 26(1) and (2) was also reargued.[3]

The Constitutional Court held that the rights in FC s 26 and FC s 28 did not entitle 'the respondents to claim shelter or housing immediately upon demand'.[4] At the same time, the Court emphasized that socio-economic rights are justiciable and that the right to housing is enforceable.[5] That enforcement, as a general matter, takes the form of direct regulation of State policy. Proper enforcement, according to the *Grootboom* Court, required the State to have in place a reasonable plan to realize the right to housing over time and within its budgetary constraints, including a plan to provide relief to those in desperate need. The declaratory order of the *Grootboom* Court reads as follows:

[1] *Grootboom*'s impact on the evolving jurisprudence around interpretation and enforcement of socio-economic rights generally is discussed in considerable detail in Sandra Liebenberg's chapter. They will not be rehearsed here. See S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33. For the application of the *Grootboom* criteria to other socio-economic rights, see D Brand 'Food' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 56C; D Bilchitz 'Health' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 56A; M Swart 'Social Security' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 56D.

[2] Act 19 of 1998.

[3] *Grootboom* (supra) at paras 3–16.

[4] Ibid at para 95.

[5] Ibid at para 94.

(a) Section 26(2) of the Constitution requires the State to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing.

(b) The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

(c) As at the date of the launch of this application, the State housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements in para *(b)*, in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.

(b) The relationship between FC s 26(1) and (2)[1]

In *Grootboom*, the Constitutional Court was quick to point out that FC s 26(1) and (2) should be seen as one distinct right and that the two subsections 'must be read together'.[2] Having said that, the *Grootboom* Court found that FC s 26(1) imposed a negative obligation on the State not to interfere with the right to housing[3] and that FC s 26(2) delineated the State's positive duty to realize progressively the right of all South Africans to adequate housing.[4] FC s 26(1) does not provide a right to housing itself, but only a right to have *access* to adequate housing. Despite this narrow formulation, the wording of FC s 26(2) indicates that the State's obligation is more extensive than the duty merely to provide an enabling environment for everyone to realize the right to housing themselves. For example, a macro-economic strategy like GEAR alone would be insufficient. Indeed, FC s 26(2) points to a duty on the State to provide *housing* — either itself or through the private sector.

The Constitutional Court first addressed the nature of the relationship between subsections (1) and (2) of FC s 27 (and its cognate, FC s 26) in *Soobramoney*, where Chalskalson P wrote that:

> What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.[5]

[1] For further discussion of the relationship between subsections (1) and (2) of FC s 26 and 27, see Liebenberg (supra) at 33-17 — 33-19.

[2] *Grootboom* (supra) at para 34.

[3] Ibid at paras 34–37.

[4] Ibid at paras 38–46. It may perhaps have been preferable for the Constitutional Assembly not to have separated FC s 26(1) and FC s 26(2), but to have drafted them as one right. Such a textual choice might have helped to prevent confusion regarding the relationship between FC s 26(2) and FC s 26(3). See, for example, *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) at para 7.3.

[5] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC)('*Soobramoney*') at para 11.

In this passage, the *Soobramoney* Court presses a conceptual connection between the obligations imposed on the State by FC s 26(2) and FC s 27(2) and the 'corresponding right'. While the obligations on the State are clearly circumscribed by available resources, it is not entirely apparent what the Court means when it states that the 'corresponding rights themselves are *limited* by reason of the lack of resources' (my emphasis). This sentence could be interpreted in three ways. The *Soobramoney* Court could be saying that the rights in FC s 26(1) and FC s 27(1) are 'limited' by the nature of the State's obligation. That is, while the content of the right (FC s 26(1)) might remain the same, any relief granted against the State will be contingent upon 'available resources' (FC s 26(2)). In other words, a claim against the State at Time 1 may be less likely to succeed than a similar claim against the State at (the later) Time 2 (because more resources are available at Time 2), but the 'right' remains the same. Alternatively, the *Soobramoney* Court could be saying that the ambit of the right itself must be restrictively interpreted, that is, 'available resources' truncates or delimits the scope of the right. This would mean that the scope of the right would change over time (or possibly between litigants), depending on available resources. Or, third, in Geoff Budlender's words, FC s 26(1) could create a general right, while FC s 26(2) and FC s 26(3) are best regarded as 'manifestations of the general right'.[1]

One consequence of the first and third readings is that FC s 26(2) acts in the manner of an internal limitations clause with regard to FC s 26(1), in the same way that FC s 36 permits a justifiable limitation of a right. Hence, the 'content of the right is not limited to the duties in Section 26(2) or the prohibitions in Section 26(3)'.[2] On the second (Hohfeldian) reading, the content of the right is *determined* by FC s 26(2) duties, which are, in turn, determined by issues such as available resources.

In *Grootboom*, the Constitutional Court accepted the approach adopted in *Soobramoney*, stating that the obligation in FC s 26(2) 'does not require the State to do more than its available resources permit'.[3] Again, the *Grootboom* language is ambiguous and does not clarify the conceptual distinction between the nature of the duty and its relationship to the scope of the right. The same point was raised again in *Khosa* in relation to FC s 27. In summarizing the Court's previous jurisprudence, Mokgoro J states:

> This Court has dealt with socio-economic rights on four previous occasions. What is clear from these cases is that section 27(1) and section 27(2) cannot be viewed as separate or discrete rights creating entitlements and obligations independently of one another. Section 27(2) exists as an internal limitation on the content of section 27(1) and the ambit of the

[1] G Budlender 'Justiciability of the Right to Housing — The South African Experience' in S Leckie (ed) *National Perspectives on Housing Rights* (2003) 207, 208.
[2] Ibid.
[3] *Grootboom* (supra) at para 46.

> section 27(1) right can therefore not be determined without reference to the reasonableness of the measures adopted to fulfil the obligation towards those entitled to the right in section 27(1).[1]

Thus, while the content of the FC s 27(1) right is '*determined with reference*' to the duty placed on the State in FC s 27(2), the fact that some of the same factors may be used to determine the right and the duty does not mean that the right and the duty map onto each other in a strict one-to-one relationship. Subsequent paragraphs in the judgment indicate that the Court may still accept a conceptual distinction between the right and the duty and that the scope of the right may be more extensive than the duty. The *Khosa* Court writes:

> [E]ven where the state may be able to justify not paying benefits to everyone who is entitled to those benefits under section 27 on the grounds that to do so would be unaffordable, the criteria upon which they choose to limit the payment of those benefits (in this case citizenship) must be consistent with the Bill of Rights as a whole.[2]

This passage implies that it is possible to have entitlements under FC s 27 (presumably FC s 27(1)) while the State can justify not extending those benefits to everyone on the basis of budgetary limitations (presumably under FC s 27(2)). Thus, even though the same factors are taken into consideration in determining the right and the duty, these determinations remain discrete inquiries. While it is accepted that the text does not clearly or explicitly favour this interpretation, it is argued that the text is at least ambiguous, and that this interpretation is one which could reasonably be adopted from a reading of these passages.

The question that then arises is why anyone would want to make this conceptual distinction. A claimant would only be entitled to make a claim with respect to the duty imposed on the State by FC s 26(2) (or FC s 27(2)). It can be argued that there are three grounds for preferring this interpretation. First, it seems to be more jurisprudentially convincing to have a stable core interpretation of the right which is not contingent on available resources. The justification for any limitation of the core right then takes place in terms of either the internal limitations in FC s 26(2) or FC s 27(2) or through the general limitations clause in FC s 36. This approach would allow the courts to align interpretations of the scope of the right with international and comparative norms, rather than make the scope of the right entirely contingent on immediate exigencies. It also forces the State to justify any 'failure' to realize fully the right.[3] In this sense, then, FC s 26 and s 27 are different from other 'internally-modified' rights in the Constitution, such as the right to freedom of expression, where the text of the right in FC s 16 indicates

[1] *Khosa* (supra) at para 43 (footnotes omitted). The four judgments referred to are: *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('*First Certification Judgment*'), *Soobramoney* (supra), *Grootboom* (supra), and *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC)('*TAC*').

[2] *Khosa* (supra) at para 45.

[3] See E Mureinik 'A Bridge to Where?: Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31.

clearly that the scope of FC s 16(1) is curtailed by the internal modifiers found in FC s 16(2).[1] A second reason for preferring this interpretation is that this approach seems to be consistent with the general approach to rights interpretation in the Bill of Rights where, if a right, such as the right to dignity, is limited by other rights, such as another's rights to free speech, it does not follow that the right to dignity is diminished or extinguished. Rather, a claimant may not be entitled to enforce her right to dignity because, on the merits of the case before the court, another right might be deemed to take precedence. Third, and perhaps most fundamentally, this distinction touches on what we think rights are. If we view rights as simply the corresponding correlation of what we can claim as a legal duty or obligation against the State, then there is no practical point in distinguishing between rights and duties. If, however, we adopt a wider socio-political understanding of rights, then rights can be understood as political or ethical claims against the State which stand, even where the State is not able to realize these rights fully.[2] As the discussion in the following section demonstrates, this line of reasoning has important consequences for how the courts conceptualize the 'reasonableness' test currently used to evaluate the State's compliance with its constitutional obligations in socio-economic rights cases.

(c) The reasonableness standard in *Grootboom*[3]

In *Grootboom*, the Court established what Cass Sunstein has described as an administrative law model of socio-economic rights. According to this approach, the courts accord a measure of deference to the executive where reasonable choices have been made to give effect to socio-economic rights.[4] In *Khosa*, the Court expanded the reasonableness enquiry to include consistency with other rights in the Final Constitution and a range of factors usually considered under FC s 36.[5]

This test has, so far, been used to assess all socio-economic rights claims made on the basis of FC ss 26 and 27. The test is clearly more generous than a *Wednesbury*-style[6] standard, yet it is difficult to pinpoint its exact nature owing to the limited number of judgments handed down by the Court. *Soobramoney* and *TAC* are

[1] On the difference between internal limitations and internal modifiers, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[2] For a more nuanced account of this proposition, see Bilchitz (supra) at 56A-31 — 56A-34.

[3] See Liebenberg (supra) at 33-32 — 33-41 and Bilchitz (supra) at 56A-1 — 56A-13, for a fuller discussion of the reasonableness test in socio-economic rights jurisprudence. It should be noted, however, that when the chapter by Liebenberg was published, *Khosa* had not been handed down.

[4] See CR Sunstein *Designing Democracy: What Constitutions Do* (2001) 222, 234.

[5] See *Khosa* (supra) at para 44.

[6] The so-called *Wednesbury* test for unreasonableness arises from the oft-cited English case of *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. The *Wednesbury* Court makes the standard for (un)reasonableness of administrative action that which is so unreasonable that no reasonable person could have made it. This high threshold for unreasonableness (or low threshold for reasonableness) marks a willingness on the part of the Court to defer to the executive with respect to the legality of its actions.

the least difficult judgments to explain, as the State action was clearly reasonable in the case of *Soobramoney* and clearly unreasonable in the case of *TAC*, on any standard of reasonableness which the Court could have devised. In *Grootboom*, the Court expanded the reasonableness test set out in *Soobramoney* to include the substantive requirement that the State's housing policy should provide relief for those in desperate need. In *Khosa*, the Court found that the enquiry into reasonableness should embrace consideration of other rights in the Bill of Rights. What is clear is that the extant reasonableness test allows the Court considerable freedom when assessing the constitutionality of State action.

Unfortunately, this flexible reasonableness test threatens the conceptual distinction which has been argued for between FC s 26(1) and FC s 27(1), on the one hand, and FC s 26(2) and FC s 27(2), on the other. By focusing solely on the reasonableness of State action, the Court has systematically failed to give substantive content to the rights to 'adequate housing', 'health care services' 'sufficient food and water' and 'social security'. The test is also sufficiently wide to allow the Court to engage in an analysis of subsection (1) on the grounds of reasonableness and to achieve (arguably — in the light of *Khosa*) any result it thinks just. In addition to the reasons given in the previous section for maintaining a conceptual distinction between the two subsections, there are three further reasons for maintaining the distinction for the reasonableness test, rather than collapsing the two subsections into a singe reasonableness inquiry. First, it is difficult for a court to determine the reasonableness of State action intended to realize a right without having some point of reference regarding what the State is obliged to achieve. One would think that such a reference point would require that the Court first carve out some normative conception of the right. In *Grootboom*, however, the Court accepted the State's version of what adequate housing entails and then went on to assess the reasonableness of the State's measures in securing adequate housing in light of these objectives.[1] While the State's current understanding of adequate housing may make such deference — with respect to both means and ends — acceptable, one can easily imagine the difficulties that might present themselves were the State to set its sights considerably lower. (One could argue, for instance, that with respect to social security, such a low threshold already exists.[2]) While a clearly defined ambit for the right to adequate housing will not determine the reasonableness of State action, it will provide a meaningful framework for undertaking the reasonableness enquiry. Second, without the clear articulation of the objective or the purpose of a socio-economic right, it is extremely difficult for the State to make an internal assessment as to whether its action

[1] The requirements set out in *Grootboom* to assess the adequacy of State policy are discussed below in the chapter's analysis of current housing policy.

[2] For more on the State's current understanding of its obligation to realize progressively the right to social security, see M Swart 'Social Security' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 56D.

(or inaction) would pass constitutional muster. Third, the failure to articulate clearly the objective or the purpose of a socio-economic right also leaves the courts with far too much discretion. Moreover, the absence of clear guidelines for judicial review of socio-economic rights complicates immeasurably the process by which lower courts assess constitutional challenges brought in terms of FC s 26. For all of these reasons, therefore, it would be preferable for the courts to distinguish conceptually between the nature of the right and the extent of the duty, as well as engage in some discussion of the substantive content of socio-economic rights.

55.4 Housing Policy 2000–2006

Since 2000, and the decision in *Grootboom*, several shifts have occurred in housing policy. First, 'sustainability' has emerged as a key concept both internationally and within the national Department of Housing.[1] Second, as the Medium Density Housing Programme reflects, *Grootboom* has been the catalyst for two significant policy developments: the recognition that the State must cater for 'all' housing needs (which resulted in the addition of Chapter 12 of the *Housing Code* 'Housing Assistance in Emergency Housing Circumstances' and Chapter 13 of the *Housing Code* 'Upgrading of Informal Settlements'); and the State's commitment to use both market-driven and non-market-driven mechanisms to diversify housing delivery.[2]

(a) Grootboom criteria

Grootboom sets out the criteria by which the discharge of the duties imposed by FC s 26(1) and FC s 26(2) on the State will be determined. In particular, the State is obliged to adopt a coherent, coordinated programme which must be capable of bringing about the realization of the right.[3] While the State is given a measure of discretion in determining the details of the policy, the policy itself must be reasonable. In deciding this question, the Constitutional Court laid down a number of criteria which the policy must meet, namely: it must be adopted through both legislative and policy means; it must be reasonably implemented; it must be flexible and balanced; it must not exclude a significant segment of society; and finally, there must be a clear and efficient assignment of functions to the three spheres of government.

[1] See S Charlton, M Silverman & S Berrisford *Taking Stock: Review of the Department of Housing's Programme, Policies and Practice (1994–2003)*(Unpublished paper prepared for the Department of Housing, 2003, on file with the author) 31.

[2] Ibid.

[3] See *Grootboom* (supra) at para 41.

(b) Evaluation of the housing policy in terms of *Grootboom* criteria

(i) *Reasonable legislation, policies and programmes*

FC s 26(2) obliges the State to take reasonable legislative and other measures to ensure the realization of the right of access to adequate housing. The Constitutional Court has affirmed that this obligation requires both legislative measures and the adoption of 'well-directed policies and programmes implemented by the executive' to support that legislation.[1] In order to determine whether housing legislation and policies are reasonable, regard must be had to the social, economic and historical context of housing in South Africa, as well as the capacity of the various institutions responsible for implementing housing programmes.[2] In addition, reasonableness must be assessed within the context of the Bill of Rights and, in particular, in light of the values of dignity, freedom and equality.[3]

On the whole, extant housing legislation and policy represents a well-considered and balanced response to achieving the right of access to adequate housing. That is not to say that there are not problems and gaps in housing policy, but these problems have largely been recognized and the National Department of Housing is attempting to address these concerns in its current legislative and policy-review process.

It is important to note that where the State has taken measures to realize the right to adequate housing, the courts have been generally supportive of these steps, even where such measures potentially undermine other rights in the Bill of Rights, notably the right to property.[4] In *Minister of Public Works v Kyalami Ridge Environmental Association*, for example, the State decided to establish emergency temporary housing on State-owned land to assist flood victims until permanent housing could be provided.[5] The neighbouring residents (who were not consulted) challenged this decision on the grounds that it violated their rights to just administrative action. The State (together with one of the flood victims) contended that the State had a constitutional obligation to take reasonable measures to realize the right of everyone to adequate housing. The Constitutional Court, in deciding that the applicant's rights to just administrative action had not been violated, adopted a sympathetic stance to the State's steps to provide for the housing needs of those affected. In deciding that the applicants did not have a *right* that had been adversely affected (a precondition for a claim of unjust administrative action), the *Kyalami Ridge* Court rejected arguments based on possible loss of property value or a perceived negative effect on the character of the neighbourhood.[6]

[1] *Grootboom* (supra) at para 42.
[2] Ibid.
[3] Ibid at para 44.
[4] See the general discussion of the State's housing policy, where the Constitutional Court is largely supportive of the State's measures. Ibid at paras 47–56.
[5] See *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC).
[6] Ibid at para 99.

(ii) *Reasonable implementation*

In addition to adopting reasonable legislative and policy measures, housing legislation and policy must be reasonably implemented.[1] There are four major criticisms of the reasonableness of housing delivery or housing policy implementation: first, the poor location of housing development; second, the poor quality of many of the houses built; third, the lack of effective assistance in maintaining housing stock; and fourth, the failure of housing delivery to address the housing backlog.

First, most new housing developments are located far from the main economic centres. They also often fail to provide adequate 'settlements' and access to other social services, such as schools, clinics and work opportunities, thereby creating 'mono-functional settlements'.[2] In addition, the developments generally lack vegetation, public spaces and other amenities required for a healthy environment.[3] The primary reasons for this are the high cost of well-located land, the cost of developing leftover land (which has not been developed previously because it was found to be unsuitable), and finally, resistance from existing communities who fear the social and economic consequences of living adjacent to a low-cost housing development. The Department of Housing has identified an additional reason for the unsatisfactory location of developments as being the 'poor alignment of budgets and priorities between line function departments and municipalities responsible for providing social facilities in new communities'.[4] The cruel irony of locating housing developments in such far-flung areas is that it reinforces and perpetuates apartheid planning.[5] This risk was anticipated in the *Housing Code* itself:

> The complexity of our housing crisis requires much more than a straightforward approach to building houses. Our crisis is not just about an enormous backlog, but also about a dysfunctional market, torn communities and a strained social fabric, spatial as well as social segregation, and a host of other problems. Our response to this crisis must be innovative and diverse. If we respond only to the numbers that must be built, we risk replicating the distorted apartheid geography of the past.[6]

The lack of affordable public transport exacerbates this problem, as beneficiaries who have employment often have to rent housing, or set up temporary shacks, close to places of work, leaving other members of their households at home. Poor location of housing may thus have the perverse effect of increasing the housing backlog.

[1] *Grootboom* (supra) at para 42.

[2] L Royston 'On the Outskirts: Access to Well-Located Land and Integration in Post-Apartheid Human Settlement Development' in F Khan & P Thring (eds) *Housing Policy and Practice in Post-Apartheid South Africa* (2003) 234, 234.

[3] See W Smit *Expanding Socio-Economic Rights and Access to Housing* (Unpublished paper prepared for the Department of Housing by Urban Sector Network, 2003, on file with the author) 25–26.

[4] National Department of Housing *Breaking New Ground: The Comprehensive Plan for the Creation of Sustainable Settlements* (2004)('*Breaking New Ground*') 4.

[5] See M Huchzermeyer 'Low Income Housing and Commodified Urban Segregation in South Africa' in C Haferburg & J Oβenbrügge (eds) *Ambiguous Restructurings of Post-Apartheid Cape Town: The Spatial Form of Socio-Political Change* (2003) 115 (Huchzermeyer 'Low Income Housing').

[6] National Department of Housing *National Housing Code* (2000) part 1, 15.

The State plans to respond to this problem by seeking to find better-located land and to create integrated settlements.[1] Another key response is the emphasis on the creation of more rental housing stock, primarily through social housing schemes. The new housing policy, *Breaking New Ground*, also envisages the application of a 'multi-purpose cluster concept' to provide 'primary municipal facilitates such as parks, playgrounds, sport fields, crèches, community halls, taxi ranks, satellite police stations, municipal clinics and informal trading facilities'.[2] All of these responses, if implemented effectively, will help to create sustainable, integrated settlements.[3]

The second major criticism of housing development to date has been the poor quality of the housing produced. Many low-cost houses fail to cope with even normal weather conditions and a number have developed serious cracking.[4] The People's Housing Process envisages the improvement of the quality of housing stock through beneficiary participation.[5] A second way in which the State has sought to improve the quality of top structures is by extending the warranty provided by the National Home Builders Registration Council (NHBRC) to subsidized housing.[6]

Third, the policy can be criticized for its lack of long-term sustainability in the provision of low-cost housing. The receipt of subsidized housing has not always resulted in poverty alleviation. In some instances, it has resulted in deepening poverty and debt, as beneficiaries have to pay for municipal services and increased transport costs.[7] As Alan Gilbert puts it:

> The government's success in providing housing for the very poor has produced ghettos of unemployment and poverty. Many of the new owners cannot afford to maintain the accommodation or pay the charges for their water and electricity. . . . [As a result] many households have decided to move out. . . . Views differ as to the cause of this movement. While some criticise the new owners for trading in the subsidy for quick cash, others believe that the cause lies in the fact that the beneficiaries cannot actually afford to live in the new

[1] See § 55.4*(b)* infra, on *Breaking New Ground* policy. For a discussion of local government attempts to provide low-cost housing in well-located areas, see A Todes, C Pillay & A Kronje 'Urban Restructuring and Land Availability' in Khan & Thring (supra) at 256; S Charlton 'The Integrated Delivery of Housing: A Local Government Perspective from Durban' in P Harrison, M Huchzermeyer & M Mayekiso (eds) *Confronting Fragmentation: Housing and Urban Development in a Democratising Society* (2003) 263.

[2] *Breaking New Ground* (supra) at 15.

[3] See A Todes 'Housing, Integrated Urban Development and the Compact City Debate' in Harrison, Huchzermeyer & Mayekiso (supra) 109. (Critical discussion of urban compaction in South Africa.)

[4] See Charlton, Silverman & Berrisford (supra) at 47.

[5] See K Rust 'No Shortcuts: South Africa's Progress in Implementing its Housing Policy, 1994–2002' (Unpublished paper prepared for the Institute for Housing of South Africa, 2003, on file with the author) 10. See also People's Housing Process at § 55.2*(b)* supra.

[6] Despite this development coming into effect in April 2002, there are still substantial problems with the implementation of this policy.

[7] See R Behrens & P Wilkinson 'Housing and Urban Passenger Transport Policy and Planning in South African Cities: A Problematic Relationship?' in Harrison, Huchzermeyer & Mayekiso (supra) 154, 161 (The authors cite, as an example of the inefficiency of the current system, the fact that, in 1999, the annual bus subsidy for one commuter in Cape Town was the equivalent of one-fifth of the full housing subsidy.)

> housing. Unlike many shack areas, all of the new housing is fully serviced and inhabitants are expected to pay for the services. Given the extraordinary high rates of unemployment in South African cities, many families simply cannot afford the sums involved.[1]

While some (particularly the wealthier) municipalities have introduced indigent policies and free basic services, in the absence of real economic opportunities and job creation, it is simply unrealistic to expect beneficiaries to be able to afford to pay for services, over and above the free basic services offered (if any). It is also unclear, where government does provide subsidized transport and free basic services, whether this is sustainable in the long term, where one of the main contributors to this economic stress is the poor location of housing. Clearly, more consideration ought to be given to the long-term viability of service and housing provision, and more resources should be made available for the provision of free basic services.

Perhaps the most pervasive criticism of housing policy is that it has failed to deal adequately with the housing backlog. Despite the tremendous scale at which housing has been delivered in South Africa, the housing backlog has actually increased. An average of 200 000 more new housing units are required annually.[2] In 2005, the backlog was 1.8 million housing units. The number of people living in shacks in informal settlements and backyard shacks in formal settlements has grown from 1.45 million in 1996 to 1.84 million in 2001.[3] These figures are attributable to high levels of unemployment, an annual population growth of 2.1 per cent, decreasing average size of households from 4.5 people in 1996 to 3.8 in 2001, and rapid urbanization.[4] The increase in the housing backlog may be the aspect of housing policy implementation that is most susceptible to constitutional challenge. The success of such a challenge would turn, in part, on the status of those bringing the application — that is, how long they had been on the housing waiting list — and the State's response in setting out reasonable timeframes for the provision of housing to the applicants.[5]

[1] A Gilbert 'Helping the Poor through Housing Subsidies: Lessons from Chile, Colombia and South Africa' (2004) 28 *Habitat International* 13, 31–32.

[2] Ibid at 24.

[3] See § 55.4*(c)*(iii) infra, on the Informal Settlement Upgrading Programme.

[4] See *Breaking New Ground* (supra) at 3–4.

[5] In practice, it appears that many municipalities and provincial governments are moving away from the waiting-list system and delivering housing on a project-by-project basis to specific identified communities. See S Charlton 'An Overview of the Housing Policy and Debates, Particularly in Relation to Women (or Vulnerable Groupings)' (Unpublished report for the Gender Programme of the Centre for the Study of Violence and Reconciliation, 2004, on file with the author) 23, available at http://www.wits.ac.za/csvr/papers/papcharl.htm (accessed on 14 May 2006) (Charlton 'Vulnerable Groupings'). Those who have been on the 'waiting list' for a substantial period of time and who are not set to benefit from any planned projects may have grounds to argue that they have a 'legitimate expectation' of housing within a reasonable period which has not and will not be met. Recently, however, it appears that the government is making renewed efforts to revive the waiting list. See Department of Housing 'Government Starts With the Updating and Verification Processes of the National Housing Waiting List in the City of Cape Town' (7 December 2005), available at http://www.housing.gov.za (accessed on 13 May 2006). The Department's website now also allows for a verification process so that potential beneficiaries can check whether they are on the list.

(iii) *Flexibility*

The third criterion laid down in *Grootboom* is that the housing 'programme must be balanced and flexible, and make appropriate provision for attention to housing crises and to short, medium and long term needs'.[1] There are two major flaws in the housing policy in this regard.

The first flaw relates to the restricted choice of tenure options and housing types available to beneficiaries. For many beneficiaries of subsidized housing, one of the most significant benefits is secure tenure.[2] Prior to *Breaking New Ground*, however, housing policy narrowly understood tenure security as individual ownership of freestanding homes. Many commentators have questioned the wisdom of having a housing policy driven solely by individual ownership — especially given such problems as poor location, population mobility and an inability to provide a sufficient quantity of houses.[3] Recent developments in policy have indicated a move away from this narrow conception of 'secure tenure' to one that embraces the creation of rental properties. This development is largely a response to the great demand for inner-city rental accommodation.[4] As Wilkinson notes, the standard conception of a single house with a yard has

> dominated public and private residential development throughout South Africa for most of the twentieth century and ... in the context of current patterns of urban growth, almost inevitably confines low income housing projects to the peripheries of urban centres.[5]

Perceptions and expectations of adequate housing should be re-examined to ensure that sustainable housing solutions are not hindered by predefined notions of what people want or need with regard to housing types or tenure options. A related criticism concerns the inflexibility of housing options which arise from the supply-based, project-driven approach: although an individual, demand-side subsidy mechanism does exist as one of the subsidy options in the *Housing Code*, in reality, potential beneficiaries cannot access individual subsidies to build or buy a house of their own. Beneficiaries are therefore restricted, as a matter of practice, to the housing available in a developer-built project. This restriction is another instance of unreasonable implementation. For although the policy is in place to provide individual subsidies, which could potentially play a major role in delivering housing more quickly, existing institutional mechanisms are simply not accessible for this purpose.

[1] *Grootboom* (supra) at para 43.

[2] See P Wilkinson 'Housing Policy in South Africa' (1998) 23 *Habitat International* 215, 224.

[3] See M Huchzermeyer 'Consent and Contradiction: Scholarly Responses to the Capital Subsidy Model for Informal Settlement Intervention in South Africa' (2001) 12 *Urban Forum* 71, 81–93; A Gilbert 'Some Observations on What Might be Done about Rental Housing in South Africa' in Khan & Thring (supra) at 367–377; Huchzermeyer 'Low Income Housing' (supra) at 26–28.

[4] This development is discussed in greater detail at § 55.4*(d)* infra.

[5] Wilkinson (supra) at 224.

The second major criticism relating to the lack of flexibility in housing policy is that the current housing subsidy is too rigid in the provision of assistance through fixed subsidy bands. The housing subsidy is targeted at those who earn below R3 500 per household per month. This cut-off mark has not increased with inflation, with the result that the population group which stands to benefit from State assistance is shrinking. Many have pointed out that this ceiling may be too low, and that the policy should be extended to those earning up to R 7 000 per month.[1] This rigidity in the benchmark for subsidies has had the effect of placing many of those households earning between R 3 501 and R 7 000 in a worse-off position with respect to housing than their poorer counterparts.[2] In this regard, commercial banks have a significant role to play in providing access to loans to this target group to enable them to access their own housing.[3]

(iv) *Vulnerable groups*

Grootboom stipulates that a reasonable policy cannot exclude 'a significant segment of society'[4] and that

> [t]o be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.[5]

In *Grootboom*, the Constitutional Court found that the National Housing Policy was unconstitutional to the extent that it did not establish policy measures 'to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations'.[6] Although the judgment was handed down in 2000, the national Department of Housing only amended the *Housing Code* to introduce a chapter dealing with the provision of

[1] In 2005, the Minister of Housing announced the introduction of a State-funded subsidy for households who managed to obtain finance from a commercial lender to buy a house, and whose combined monthly income is between R 3 500 and R 7 500. This initiative has yet to be implemented, but has the potential to assist significantly this income group's access to housing. See I Melzer 'How Low Can You Go?: Charting the Housing Finance Access Frontier: A Review of Recent Demand and Supply Data' (Unpublished paper prepared for the FinMark Trust, 2006, on file with the author) 26, available at http://www.finmarktrust.org.za (accessed on 10 May 2006). See also 'Statement by LN Sisulu, Minister of Housing, on the South African Programme of Implementation on the Resolution of the WSSD and the Johannesburg Plan of Implementation as it Relates to Human Settlements: A Ground Breaking Plan to Build Sustainable Communities' (7 September 2004, Johannesburg) available at http://www.housing.gov.za (accessed on 13 May 2006).

[2] See Rust (supra) at 19.

[3] See § 55.4*(c)*(ii) infra, for discussion on private sector involvement in housing and the Financial Sector Charter.

[4] *Grootboom* (supra) at para 43.

[5] Ibid at para 44.

[6] Ibid at para 99.

housing in emergency situations in 2004.[1] The aim of the programme is to 'provide temporary assistance in the form of secure access to land and/or basic municipal engineering services and/or shelter in a wide range of emergency situations of exceptional housing need'.[2] 'Exceptional housing need' is defined broadly and includes all those who find themselves in need of emergency housing and are living in dangerous conditions.[3] The programme, however, fails to provide adequate short-term relief for those in crisis situations, and relies on a cumbersome set of procedures which do not allow for the immediate accommodation of those in need.[4]

A further difficulty with the emergency housing policy is the failure of many municipalities to put the policy into practice.[5] *City of Cape Town v Rudolph* serves to demonstrate this systemic weakness.[6] The facts of *Rudolph* are similar to *Grootboom*. Both involved an attempt to evict a group of illegal occupiers from State-owned land by the Cape Town municipality.[7] Both groups were living with 'no access to land, no roof over their heads … in intolerable conditions' or crisis situations.[8] *Rudolph*, however, was decided almost three years after *Grootboom* and Selikowitz J took great care to apply the holding of the *Grootboom* Court to the facts of *Rudolph*. The *Rudolph* Court found that 'despite the clear statement by the Constitutional Court, applicant has still not implemented the AMLSP [Accelerated Managed Land Settlement Programme] or any equivalent programme' and

[1] See *National Housing Code* (supra) at Part 3: National Housing Programmes: Chapter 12 *Housing Assistance in Emergency Housing Situations*, available at http://www.housing.gov.za/Content/legislation_policies/Emergency%20%20Housing%20Policy.pdf (accessed on 25 January 2006).

[2] Ibid at 12.2.1. This programme is not restricted to those who would benefit from the usual housing subsidy scheme, and is applicable to anyone 'not in a position to address their housing emergency from their own resources or from other sources such as the proceeds of superstructure insurance policies.' Ibid at 12.3.2.

[3] Ibid at 12.2.2.

[4] In order to apply for relief in terms of this programme, a municipality must investigate and make an application to the relevant provincial housing department, which then collaborates with the municipality in submitting an application to the Emergency Housing Steering Committee in the national Department of Housing. If the Emergency Housing Steering Committee approves the application, it transfers funds to the relevant provincial housing department, which then assists the municipality in implementing the programme. No time frames are established for this process, apart from the 21-day deadline which the Emergency Housing Steering Committee must take to assess the application. Ibid at 12.4. For a discussion of this aspect of the policy, see *City of Cape Town v Rudolph & Others* (Unreported decision of the Cape High Court, 5 December 2005)('*Rudolph II*') 5.

[5] See *The City of Johannesburg v Rand Properties (Pty) Ltd & Others* (Unreported decision of the Witwatersrand Local Division, 3 March 2006) at paras 47, 53 (Discussion of the City of Johannesburg's failure to put in place an emergency housing programme.)

[6] *City of Cape Town v Rudolph & Others* 2004 (5) SA 39 (C), 2003 (11) BCLR 1236 (C), [2003] 3 All SA 517 (C)('*Rudolph I*').

[7] In *Rudolph I*, the primary application was for eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 by the Cape Town Metropolitan Municipality. The respondents brought a counter-application for an order by the Court that the applicants were in breach of their constitutional and statutory duties. *Rudolph I* (supra) at 547.

[8] *Grootboom* (supra) at para 52; *Rudolph I* (supra) at 552.

that 'applicant has displayed and continues to display, an unacceptable disregard for the order of the Constitutional Court — and therefore the Constitution itself.'[1] It is, however, the order in *Rudolph* that is most striking:

> The circumstances and, in particular, the attitude of denial expressed by applicant in failing to recognise the plight of respondents as also its failure to have heeded the order in *Grootboom* … makes this an appropriate situation in which an order, which is sometimes referred to as a structural interdict, is 'necessary', 'appropriate' and 'just and equitable'.[2]

The *Rudolph* Court then handed down a far-reaching order requiring the City of Cape Town to deliver a report within four months which outlined the 'steps it has taken to comply with its constitutional and statutory obligations'.[3] After this, the respondents were to be afforded an opportunity to respond and the applicants, a further opportunity to reply. A second judgment was recently handed down by Selikowitz J in this matter. The second judgment reveals that the City of Cape Town has generated four reports since the original 2003 judgment and that 'on each occasion when it has reported, the City has shifted its ground in respect of its policy and its implementation of the orders.'[4] Initial reports continued to deny the existence of an obligation on the part of the State to cater specifically and adequately for the applicants. Only the fourth report acknowledged that the city was obliged to take clear steps to house the applicants and that it had fulfilled part of its obligations by providing basic municipal services in a nearby emergency housing project. The City of Cape Town had not, however, adopted a temporary housing programme and it tendered no evidence that it had implemented or had planned to implement this policy. As a result, Selikowitz J issued a declaration that the City of Cape Town had failed to comply with his earlier order, but declined to issue a further structural interdict because the applicants had finally acknowledged their constitutional obligations.

Grootboom focuses largely on the recognition of the poor as a 'vulnerable group'.[5] The general class of persons who might qualify as poor is, however, made up of any number of different sub-classes of persons. Each of these sub-classes — for example, those with physical disabilities, those with HIV/AIDS, and those incarcerated by the State,[6] women, and children[7] — have distinct needs. The current policy does cater for the needs of these vulnerable groups to some extent: those with physical disabilities are provided with physical modifications to their contractor-built house;[8] and those persons with physical disabilities or those persons with 'health stricken problems' (which would

[1] *Rudolph I* (supra) at 553, 554.
[2] Ibid at 558.
[3] Ibid at 560.
[4] *Rudolph II* (supra) at 2.
[5] *Grootboom* (supra) at para 36.
[6] See § 55.8 infra, for a discussion of prisoners' housing rights.
[7] See § 55.7 infra, for a discussion of children's housing rights.
[8] Disability subsidies appear, however, to be infrequently provided. As of June 2003, only 160 disability grants had been approved. See Charlton 'Vulnerable Groupings' (supra) at 16.

presumably include those in the late stages of HIV/AIDS) — and are therefore not able to contribute physically to the building of their own homes — and who earn less than R 1 500 per month, are not required to make a financial contribution to the housing subsidy and receive the full subsidy of R 36 528.

Difficulties remain, however, with the linking of subsidies to nuclear households. This link between subsidy and family structure may not be sufficiently flexible to deal with fluid household formation[1] or to counter systemic gender power imbalances within households. It may compel many women to remain in relationships that they would otherwise leave, say, for reasons of domestic violence. Such compulsion could occur even where the title deed is registered in the name of both parties. While South African housing policy is not expressly discriminatory, studies have shown that some women find it considerably more difficult to access housing or to secure tenure.[2] Moreover, older women and men, who do not have dependants, are not eligible for a housing subsidy. The same is true for those under 21 with children. This criterion deleteriously affects young women because women under 21 account for more than half of pregnant women in South Africa.[3] The United Nations Committee for Economic Social and Cultural Rights has made it clear that the right to housing ought not to be framed solely as a 'family' or household right, and a strong argument could be made that FC s 26 read with FC s 9 requires that the State make provision for the rights of *individuals* to adequate housing, rather than conferring the benefit on households.[4]

Many social practices also ensure that women are marginalized with respect to housing rights. Customary succession laws, for instance, may result in women loosing their ownership or tenure rights when their male partner dies. Several courts have shown a willingness to interpret legislation so that it will not result in women losing their homes as a consequence of customary law succession rules. In *Nzimande v Nzimande*, for instance, the Court found that the Director-General of Housing had the discretion to consider the discriminatory effects of the succession rules in the Black Administration Act.[5] In so doing, it overturned a pre-constitutional certificate giving housing rights to the appellant (the brother of the deceased) and granted them to the respondent (the former customary-wife of the deceased).[6] In coming to this conclusion, the Court construed this Act and the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 in

[1] See Huchzermeyer 'Low Income Housing' (supra) at 127.

[2] See Minister of Housing, Minister Mabandla 'Promoting Access for Women in Housing' (8 August 2003), available at http://www.housing.gov.za (accessed on 13 May 2006).

[3] See C Marx 'Supporting Informal Settlements' in F Khan & P Thring (eds) *Housing Policy and Practice in Post-Apartheid South Africa* (2003) 299, 306–07.

[4] See MCR Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (1995) 334.

[5] Act 38 of 1927.

[6] See *Nzimande v Nzimande & Another* 2005 (1) SA 83 (W), [2005] 1 All SA 608 (T)('*Nzimande*').

light of the 'spirit, purport and objects' of the Bill of Rights (FC s 39(2)) and the right to access to adequate housing in FC s 26(1).[1]

While some steps clearly have been taken by the Department of Housing to cater for vulnerable groups,[2] more needs to be done to ensure that there is sufficient flexibility and commitment within housing policy to ensure that the needs of vulnerable groups are met.[3] The courts are particularly well placed to evaluate and to assist the State in developing a rights-based approach to housing policy that adequately caters for the most vulnerable members of society.[4]

(v) *Co-operative government and local government*[5]

The final criterion laid down in *Grootboom* for ensuring a reasonable housing policy is a clear and an efficient assignment of functions to the three spheres of government:

> What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government. . . . The Constitution allocates powers and functions amongst these different spheres emphasising their obligation to co-operate with one another in carrying out their constitutional tasks. In the case of housing, it is a function shared by both national and provincial government. Local governments have an important obligation to ensure that services are provided in a sustainable manner to the communities they govern. A reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.[6]

[1] See *Nzimande* (supra) at paras 43, 63.

[2] See, for example, the following reports: Charlton 'Vulnerable Groupings' (supra); National Department of Housing 'HIV/AIDS: Framework Document' (2003); CSIR 'Integrating Gender in Housing and Human Settlements' (Unpublished report for the National Department of Housing, 2003, on file with the author). A section-21 company has also been established to promote women in the construction industry. See http://www.womenforhousing.org.za (accessed on 13 May 2006).

[3] See *Housing Indaba: Social Contract for Rapid Housing Delivery* (2005) 2.5.d. This document only discusses the needs of vulnerable groups as an aspect of the commitment of civil society organizations to meet housing needs, and makes no mention of the State's role. The Department of Housing appears to have assumed that the responsibility for providing for vulnerable groups is the responsibility of other departments, in particular, the Department of Social Development. A rights-based approach to this issue, however, would indicate that, while it is highly desirable for departments to co-operate with each other where the needs of vulnerable groups are not being met, it is the responsibility of each department to ensure that vulnerable groups are catered for as far as possible.

[4] See M Wesson '*Grootboom* and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court' (2004) 20 *SAJHR* 284.

[5] For a fuller, although now somewhat dated, account of co-operative government and housing provision, see K McLean 'Housing Provision through Co-operative Government in Post-Apartheid South Africa' in G Mhone & O Edigheji (eds) *Governance in the New South Africa* (2003) 146. See also D Pottie 'Challenges to Local Government in Low-Income Housing Delivery' in Khan & Thring (supra) at 429. For a more general statement of the law on co-operative government, see S Woolman, T Roux & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 14.

[6] *Grootboom* (supra) at para 39 (footnotes omitted).

The White Paper on Housing, discussing Schedule 6 of the Interim Constitution, argues that, while national and provincial governments are given concurrent legislative capacity, '[t]he intent … is clearly that appropriate housing functions and powers should be devolved to the maximum possible extent, to the provincial level.'[1] By the time the Housing Act was promulgated, however, the State had begun to include local government in housing delivery. In so doing, it was following the new paradigm laid down in the White Paper on Local Government and the Development Facilitation Act in establishing 'development principles' to be followed by all spheres of government.[2] This 'new' position is set out in the *National Housing Code* as follows:

> A critical policy challenge for the governance of housing is to facilitate the maximum devolution of functions and powers to provincial and local government spheres, while at the same time, ensuring that national processes and policies essential to a sustainable national housing development process are in place. The Housing Act, No. 107 of 1997, determines roles in respect of such devolution, and defines key national and provincial responsibilities with respect to empowerment at the provincial and local spheres of government.[3]

This 'shift in policy' mostly legitimates an existing situation. Larger metropolitan governments have thus already recognized, and begun to act upon, the socio-political imperative to build low-cost housing. Housing is understood by local government politicians as an essential service and, therefore, necessary for the development of credibility and 'electability'.

In 2002 a 'new procurement regime' — in line with the accreditation process initiated in the Housing Act — shifted the obligation to initiate and to develop housing projects down to local government. *Breaking New Ground* states that municipalities should lead the process of locating new housing developments because they are better placed to ensure that such developments meet the needs of the beneficiaries.[4] While *Breaking New Ground* envisages the ultimate accreditation of all municipalities over the next ten years,[5] the national government has been criticized for failing to appreciate fully the financial implications for local government of engaging in housing delivery. In addition to the financial burden of administering a housing programme, the municipalities will bear the

[1] National Department of Housing *White Paper on Housing* (1994) at para 5.2.1.1. See *DVB Behuising v North West Provincial Government & Another* 2001 (1) SA 500 (CC), 2000 (4) BCLR 374 (CC) at para 17 (Court held that there is no presumption in favour of national or provincial competencies.)

[2] Act 67 of 1995.

[3] National Department of Housing *National Housing Code* (2000) Part 1, 8.

[4] National Department of Housing *Breaking New Ground: The Comprehensive Plan for the Creation of Sustainable Settlements* (2004)('*Breaking New Ground*') 10.

[5] Ibid at 21.

brunt of ongoing maintenance, service and increased infrastructure costs. For smaller municipalities, non-payment for municipal services already results in substantial debt.[1] The 2003 Public Service Commission Report noted that:

> In spite of the evidently high levels of severe poverty in many HSS [housing subsidy schemes] projects local authorities continue to expect payment for rates and services. Only the larger metros have developed indigent policies that allow the poorest households a basic lifeline of water and/or energy supply, and also zero rating for rates payments. Poorly resourced small town municipalities face up to 80 or 90% default on rates or services but appear not to have the means, or the national or provincial support, to be able to put in place appropriate indigent policies. This affects the social and economic viability not just of the housing projects but also of these small municipalities.[2]

The Constitutional Court has instructed that a 'reasonable programme must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available' in order to pass constitutional muster. To ensure that it discharges its constitutional duties, the State must give further consideration to the long-term financial sustainability of municipal housing and service provision, particularly in poorer areas with high rates of unemployment and payment default.[3] The recent 'Accreditation Framework for Municipalities to Administer National Housing Programmes' (2006) goes some way towards ensuring that municipalities will have the capacity to carry out the housing function by allowing for 'progressive delegation' before full accreditation. As with many of the initiatives introduced or carried forward in *Breaking New Ground*, it is too early at this stage to make a meaningful assessment of the assignment process.

(c) 'Breaking New Ground'

The national Department of Housing's new policy statement — *Breaking New Ground* — responds to a number of problems already identified within the housing sector.[4] In so doing, the document makes many important contributions. In particular, it requires the Department of Housing to focus on the entire residential housing market in order to help bring about 'increased integration between the

[1] See M Huchzermeyer 'Low Income Housing and Commodified Urban Segregation in South Africa' in C Haferburg & J Oβenbrügge (eds) *Ambiguous Restructurings of Post-Apartheid Cape Town: The Spatial Form of Socio-Political Change* (2003) 115 (Huchzermeyer 'Low Income Housing') 126. See also *Breaking New Ground* (supra) at 4 (Problem is acknowledged.)

[2] Public Service Commission *Report on the Evaluation of the National Housing Subsidy Scheme* (2003) 101. For further discussion on the problems experienced with local government housing delivery, see W Smit *Expanding Socio-Economic Rights and Access to Housing* (Unpublished paper prepared for the Department of Housing by Urban Sector Network, 2003, on file with the author) 27–29.

[3] For a more detailed discussion of the financial implications of local government housing delivery, see McLean (supra) at 166–71.

[4] *Breaking New Ground* was announced by the Minister of Housing on 2 September 2004 after receiving Cabinet approval on 1 September 2004. The new policy has a fairly complex relationship with existing policy. See § 55.2*(b)* supra. In brief, the existing legislation and the *National Housing Code* are being redrafted to conform to the new developments set out in *Breaking New Ground*. Current legislation and policy is therefore in a state of flux.

primary and secondary housing market'.[1] *Breaking New Ground* also emphasizes the sustainability of human settlements, the involvement of the private sector and the upgrading of informal settlements. This section briefly discusses three of the more important developments set out in the new policy which were not covered in the previous discussion of housing policy.

(i) *Sustainable human settlements*

Sustainability is part of an international trend. States have committed themselves to it in a range of documents: Agenda 21 (1992), Habitat Agenda (1996), the UN Millennium Goals (2000) and the World Summit on Sustainable Development (2002). Sustainable development is defined as a commitment to

> pursue development especially for the improvement of quality of life and standard of living for all (especially those in poverty and high levels of vulnerability) while being mindful and responsive to the environmental and resource limits as defined through scientific evaluations and monitoring.[2]

The new housing policy, *Breaking New Ground*, defines sustainable human settlements as

> well managed entities in which economic growth and social development are in balance with the carrying capacity of the natural systems on which they depend for their existence and result in sustainable development, wealth creation, poverty alleviation and equity.[3]

To further ensure sustainability, the Department of Housing is promoting the integration of previously excluded communities into existing urban areas.[4] By emphasizing such integration, *Breaking New Ground* recognizes the limitations of a policy based primarily on (poorly located and poorly serviced) single-stand housing.[5]

(ii) *Private sector involvement*

While the involvement of the private sector in housing provision is not new (it was already envisaged in the White Paper), *Breaking New Ground* forges a new type of partnership — one which is negotiated and demand-led.[6] *Breaking New Ground*

[1] *Breaking New Ground* (supra) at 8.

[2] S Charlton, M Silverman & S Berrisford *Taking Stock: Review of the Department of Housing's Programme, Policies and Practice (1994–2003)*(Unpublished paper prepared for the Department of Housing, 2003, on file with the author) 31.

[3] *Breaking New Ground* (supra) at 11.

[4] Ibid at 12.

[5] Ibid at 8. For a general discussion on the concept of sustainability in housing policy in South Africa, see DK Irurah & B Boshoff 'An Interpretation of Sustainable Development and Urban Sustainability in Low-Cost Housing and Settlements in South Africa' in P Harrison, M Huchzermeyer & M Mayekiso (eds) *Confronting Fragmentation: Housing and Urban Development in a Democratising Society* (2003) 244.

[6] See 'Press Statement by LN Sisulu Minister of Housing on the Public Unveiling of the New Housing Plan' (Pretoria, 2 September 2004), available at http://www.housing.gov.za (accessed on 13 May 2006).

suggests that the State can attract private-sector involvement in housing provision in a number of ways: (1) revision of the housing subsidies to promote public-private partnerships in construction; (2) expansion of the subsidy band to allow medium-income households to access formal finance; (3) funding to provide social housing and risk-sharing with the private-sector lenders; (4) developing mechanisms to counter volatile interest rates and the creation of a functioning residential property market; (5) skills-transfer from the private to the public sector in construction and project management; and (6) employer involvement in housing provision for its employees.[1]

At the same time as *Breaking New Ground* looks forward to a revived role for the private sector, the *Financial Sector Charter* is an exciting reciprocal development on the part of commercial lenders, committing South African financial institutions to the provision of greater access to credit for low-income housing.[2] As part of the Charter, financial institutions have committed to providing R 42 billion worth of finance to households earning between R 1 500 and R 7 500 by the end of 2008.[3] In 2005, a 'Memorandum of Understanding' signed by the four major South African banks and the Minister of Housing created mortgage-finance products targeted at this group, with State assistance for the insurance or underwriting of these loans.[4] While the final details of this arrangement have yet to be hammered out, three of the four major banks have recently started offering mortgage products for this group. A number of other institutions also offer similar loans.[5] This partnership between the formal financial sector and the government promises to open up significant opportunities for those within the target group to enter the property market.

(iii) *Informal settlements and backyard shacks*

Current statistics indicate that there are approximately one million backyard shacks in South Africa. Until recently, the State appeared to have assumed that, as a result of the massive housing delivery drive, most people living in shacks in informal settlements and back yards would eventually be housed in State housing. *Breaking New Ground* acknowledges that, despite massive delivery, there has been a

[1] *Breaking New Ground* (supra) at 8–11.

[2] *Financial Sector Charter* (2003) at paras 2.27.3 read with 2.22, 2.34.3 and 8.3.2. The *Financial Sector Charter* is available at http://www.treasury.gov.za/press/other/2003101701.pdf (accessed on 16 December 2005).

[3] See Melzer (supra) at 8. This group is said to comprise about 4 million households, or 12 million persons aged over 16. Ibid at 10.

[4] See 'Access Housing' (April 2006, Issue 1) 2, available at http://www.finmarktrust.org.za (accessed on 10 May 2006).

[5] See Melzer (supra) at 22–30. (Discussion of the products offered.) Other institutions which provide finance to the target group include the National Housing Finance Corporation, the Mpumalanga Housing Finance Company, Ithala Limited, Beehive, Masakeni Credit Corporation, Real People Housing, and Greenstart Home Loans (Pty) Ltd. Ibid at 23.

steady growth of households living in shacks.[1] The policy therefore suggests a shift in attention — one that recognizes the intractability of the problem of informal settlements and backyard shacks and seeks to address them. The new Informal Settlement Upgrading Programme provides for interim servicing of informal settlements. Planning is still underway for a more comprehensive approach to informal settlements and backyard shacks.[2] As part of the new interim programme, a single municipality in each province has been charged with the upgrading of informal settlements on a pilot-scheme basis.[3] The best practices that emerge will be used to inform the new programme. It is, as yet, too early to make any meaningful assessment of these schemes.[4]

(d) Social Housing

In addition to so-called 'RDP housing', funded through the project-linked capital subsidy, the dominant subsidy scheme to date, another housing type provided and funded through the institutional subsidy is social housing. Social housing is defined as '[a] rental or co-operative housing option for low income persons at a level of scale and built form which requires institutional management and which is provided by accredited social housing institutions or in accredited social housing projects in designated restructuring zones'.[5] Social housing projects have generally been well located and rentals are subsidized through State and donor funding.[6]

Since 2001, the State has rekindled interest in rental housing as a mechanism for fulfilling the housing needs of the poor at the same time as it regenerates urban areas and creates sustainable settlements.[7] This new development has come

[1] See 'Speech by LN Sisulu Minister of Housing at the Occasion of the Tabling of the Budget Vote for the Department of Housing for the 2004/05 Financial Year' (National Assembly, 10 June 2004), available at http://www.housing.gov.za (accessed on 15 May 2006). See also Minister of Housing, Minister Sisulu, 'Speech Regarding Millennium Development Goals at the 13th session of the UN Commission on Sustainable Development, Committing African Governments to the Eradication of Slums in African Cities' (20 April 2005), available at http://www.housing.gov.za (accessed on 13 May 2006).

[2] The Programme was introduced through an amendment to the *Housing Code* to include a new Chapter 13 'National Housing Programme: Upgrading of Informal Settlements' (2005). At the time of writing, the final version of the new chapter was still not available on the Department's website.

[3] See *Breaking New Ground* (supra) at 12.

[4] See M Huchzermeyer 'The New Instrument for Upgrading Informal Settlements in South Africa: Contributions and Constraints' in M Huchzermeyer & A Karam (eds) *Informal Settlements — A Perpetual Challenge at the Local and Policy Level* (forthcoming 2006, on file with the author)(Offers a preliminary discussion of this new policy.)

[5] National Department of Housing *Social Housing Policy for South Africa: Towards an Enabling Environment for Social Housing Development* (2005)('*Social Housing Policy for South Africa*') 8. Note that although the policy itself states that it is still a draft, it has apparently been adopted as the final policy.

[6] See M Fish 'Social Housing' in Khan & Thring (supra) at 404.

[7] See F Khan & C Ambert 'Preface' in Khan & Thring (supra) at iv and xvi. For a general discussion on the use and desirability of public rental housing internationally, see A Gilbert 'Some Observations on What Might be Done about Rental Housing in South Africa' in Khan & Thring (supra) at 367.

about for a number of reasons: first, the national Department of Housing has broadened its interpretation of 'secure tenure' to include rental housing; second, the Department has recognized the demand, particularly for those earning between R 2 500 and R 3 500 per month, for well-located rental accommodation; and third, rental housing is able to achieve integrated development in ways which 'RDP housing' has not done to date.[1] Unfortunately, social housing, with its emphasis on the provision of well-located rental stock, still does not take into account the needs of the poorest of the poor. As Charlton, Silverman and Berrisford note:

> To date an engagement with the idea of rental, and mobility, by the National Department of Housing seems to have narrowed to a focus on social housing. . . . [S]ocial housing appears to have an inappropriate over-emphasis . . . given its limited ability to contribute to housing the poor, the complexities associated with its management, and the competitive alternatives offered by a range of private sector rental options.[2]

The very poor will continue to be forced to the urban periphery. Despite this, *Breaking New Ground* places great importance on social housing, or 'medium-density' housing, for enhancing mobility and promoting urban integration.[3] A range of social housing types are envisaged in the new policy, including:

> [M]ulti-level flat or apartments options [sic] for higher income groups (incorporating beneficiary mixes to support the principle of integration and cross-subsidization); cooperative group housing; transitional housing for destitute households; communal housing with a combination of family and single room accommodation with shared facilities and hostels.[4]

Social housing will, the State argues, 'contribute to urban regeneration, . . . to urban efficiency' and to urban integration of previously excluded groups of people.[5] *Breaking New Ground* envisages the promulgation of a Social Housing Act[6] that will provide a comprehensive framework for mixed-used projects and increase subsidies for social housing to levels substantially above those allocated to RDP housing.

To date, the high cost of social housing has been borne by donors. These high costs have, up until recently, contributed to the general instability and non-sustainability of the social housing sector.

[1] See K Rust 'No Shortcuts: South Africa's Progress in Implementing its Housing Policy, 1994–2002' (Unpublished paper prepared for the Institute for Housing of South Africa, 2003, on file with the author) 15.

[2] Charlton, Silverman & Berrisford (supra) at 84.

[3] See *Breaking New Ground* (supra) at 18.

[4] Ibid at 18. See also 'Business Plan 4: Social (Medium-Density) Housing Programme' in *Breaking New Ground*.

[5] *Social Housing Policy for South Africa* (supra) at 4.

[6] The timing for the new Social Housing Act is still uncertain, but it is planned to be submitted to and adopted by Parliament by the end of 2006.

55.5 International Law of Housing

FC s 39(1)*(b)* provides that when courts, tribunals or forums interpret the Bill of Rights they must consider international law.[1] This body of law embraces international agreements that South Africa has ratified, those which it has not,[2] and customary international law.[3] International law has influenced both the courts' and the government's understanding of South Africa's obligations to realize the right to housing. South Africa's *National Action Plan for the Protection and Promotion of Human Rights*, submitted to the United Nations in 1998, identifies the primary international law documents which inform South Africa's approach to the rights to housing and shelter as art 25 of the Universal Declaration of Human Rights (UDHR), art 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[4] and the United Nations Habitat's Global Urban Observatory programme and Habitat Agenda.[5] Of particular importance is the Habitat Agenda 'Istanbul Declaration on Human Settlements' in which South Africa 'reaffirm[ed] … [its] commitment to the full and progressive realization of the right to adequate housing'.[6]

The central international instruments for the interpretation of the right to housing are the ICESCR and the Committee for Economic, Social and Cultural

[1] For more on the relationship between international law, constitutional law, and municipal law, see H Strydom & K Hopkins 'International Law and International Agreements' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 30.

[2] *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 35.

[3] FC s 232.

[4] (1966) 993 UNTS 3, U.N. Doc. A/6316 (signed by South Africa on 3 October 1994, but not yet ratified).

[5] Available at http://www.unhabitat.org/programmes/guo/default.asp and http://www.unhabitat.org/unchs/english/hagenda/ (accessed on 11 May 2006). In addition to these documents, there are a number of international and regional treaties which are relevant to the international right to housing. The International Convention Relating to the Status of Refugees (1951) 189 UNTS 150 (acceded to by South Africa on 12 January 1996)(Provides for refugee housing rights on the same level as that of nationals); The International Convention on the Elimination of All Forms of Racial Discrimination (1965) UN Doc A/6014, 660 UNTS 195 (ratified by South Africa on 10 December 1998)(Provides for equality in recognizing the right to housing); The Convention on the Elimination of All Forms of Discrimination Against Women (1979) UN Doc A/34/46 (ratified by South Africa on 15 December 1995)(Prohibits discrimination against women in rural areas in the enjoyment of the right to housing); The African Charter on Human and People's Rights (1981)(ratified by South Africa on 9 June 1996)(Has been read as containing an implied right to housing); The Convention on the Rights of the Child (1989) UN Doc A/44/49 (ratified by South Africa on 16 June 1995)(Provides for children's housing rights); The African Charter on the Rights and Welfare of the Child (1990)(ratified by South Africa on 7 January 2000)(Contains children's housing rights.)

[6] Habitat Agenda 'Istanbul Declaration on Human Settlements', available at http://www.unhabitat.org/declarations/ist-dec.htm (accessed on 16 January 2006). See also Agenda 21 (1992), adopted by the United Nations Conference on Environment and Development, available at http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm (accessed on 16 January 2006).

Rights' (CESCR) General Comments 3 (GC 3),[1] 4 (GC 4),[2] and 7 (GC 7).[3] On 3 October 1994, the then President of South Africa, Nelson Mandela, signed the ICESCR and the International Covenant on Civil and Political Rights (ICCPR).[4] By doing so, he signalled the new government's commitment to be bound by international human rights norms and South Africa's commitment to protecting economic, social and cultural rights. Unfortunately, South Africa has not yet ratified the ICESCR, so it is not yet bound by the Covenant. Nevertheless, South Africa does incur certain obligations under the Vienna Convention on the Law of Treaties (Vienna Convention) in the period between signature and ratification: South Africa must refrain from 'acts which would defeat the object and purpose of the treaty';[5] it should use the interim period to review its laws for consistency with the ICESCR; and it incurs a general duty to act in 'good faith' and cannot use domestic law as a justification for failure to ratify the Convention.[6]

Article 2(1) of the ICESCR governs the State's general obligations relating to substantive rights in the Covenant and provides that:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Article 2(1) is the primary clause — the 'linchpin' according to Matthew Craven[7] — that deals with the obligations placed on States Party to the Covenant. It sets out the nature of the duties assumed by member States, namely that the rights in the Covenant are to be realized progressively, subject to the available resources of the States Party. This obligation reflects a compromise between two groups — those of which wished to create a fully binding obligation on member States, and those of which recognized the need for greater flexibility in creating an obligation where member States vary greatly in economic means.[8]

[1] See General Comment 3 'The Nature of States Parties' Obligations' (Article 2 of the Covenant)(5th session, 1990) UN Doc. E/1991/23 ('GC 3').

[2] See General Comment 4 'The Right to Adequate Housing' (Article 11 of the Covenant)(6th session, 1991) UN Doc. E/1992/23 ('GC 4').

[3] See General Comment 7 'The Right to Adequate Housing: Forced Evictions' (16th session, 1997) UN Doc. E/1998/22 ('GC 7'). GC 7 is discussed in detail at § 55.6*(d)* infra.

[4] (1966) 999 UNTS 171 (ratified by South Africa on 10 December 1998).

[5] Article 18 of the Vienna Convention on the Law of Treaties ('Vienna Convention').

[6] Articles 26 and 27 of the Vienna Convention.

[7] See MCR Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (1995) 106.

[8] Ibid at 150–51.

Under the ICESCR, member States are not required to realize all of the rights in the Covenant immediately; rather, they are under a duty to realize the rights progressively, depending on their available resources. Available resources are to be interpreted broadly and objectively to include all resources available, rather than just the resources allocated to a particular domain by the State.[1] Thus, the obligation of each State Party 'to take steps' was chosen in preference to the duty 'to promote', since the former locution is viewed as a less onerous obligation on member States. Nevertheless, the obligation to 'take steps' is immediate, while the obligation to realize the full right may be implemented progressively.[2] There are two ways to describe the nature of the obligations imposed by the ICESCR.

The first description involves a distinction between obligations to respect, to protect and to fulfil a right.[3] The duty to respect places an obligation on States Party to ensure that the State does not interfere with the rights of individuals and is, in this sense, a 'negative' right. The duty to protect places an obligation on States Party to ensure that others do not interfere with the rights of individuals.[4] The duty to fulfil (or promote) requires States Party to take such steps as are necessary to enable the individual to satisfy the right where he or she is unable to do so without assistance. These latter two duties are 'positive' in that they require the State to undertake affirmative action to protect and to fulfil the rights in the Covenant.

A second way to describe the obligations imposed by the ICESCR is to look at the nature of the obligation entailed. It is often said that civil and political rights give rise to 'obligations of result' and socio-economic rights give rise to 'obligations of conduct'.[5] An obligation of result is one in which the party has an obligation to achieve a particular result and the means of achieving that result is left to the discretion of the party; an obligation of conduct, on the other hand, is where a particular course of action is mandated to achieve a specific goal. This distinction between socio-economic and civil and political rights is not especially helpful, as both sets of rights give rise to a range of obligations. The duties to respect and protect are primarily obligations of result — the obligation on States

[1] See Craven (supra) at 137.

[2] The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights UN Doc E/CN.4/1987/17 Annex, reproduced in (1987) 9 *Human Rights Quarterly* 122 ('The Limburg Principles') at para 16; P Alston & G Quinn 'The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156, 166.

[3] Today, this formulation is usually attributed to Henry Shue. H Shue *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2nd Edition, 1996). But it also appears in a slightly different form elsewhere. See A Eide *Right to Adequate Food as a Human Right* (1989); GJH van Hoof 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views' in P Alston & K Tomaševski (eds) *The Right to Food* (1984) 97.

[4] See *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) at paras 31–34 (Constitutional Court described obligation in *Jaftha* as an instance of protecting a negative right.) See § 55.6 infra for further discussion.

[5] See Alston & Quinn (supra) at 185.

Party is to ensure that the rights in the ICESCR are respected and protected, and the States Party are given a wide measure of discretion on how to achieve this. The obligation in art 2(1) to 'take steps' 'progressively' to achieve the right, on the other hand, has been said to constitute primarily an obligation of conduct.[1] As Alston points out, however, the duty is also partly an obligation of result, as 'states must match their performance with their objective capabilities'. Only where the text specifies steps to be undertaken by States Parties would Alston describe the obligation as being solely one of conduct.[2] Nonetheless, the clear objective set out in art 2(1) is the 'full realization of the rights recognized in the present Covenant' and it is important for States Party not to get too caught up with measuring their progressive realization and to lose sight of the ultimate aim of the Covenant. As Craven notes: 'The compliance of a State with its obligations ultimately is to be measured not merely by compliance with some notion of "due process", but by the degree to which it has achieved the full realization of the rights.'[3]

The jurisprudence of the ICESCR and the GCs is referred to extensively in *Grootboom*. FC s 26(2) places a duty on the State to take 'reasonable legislative and other measures' towards the realization of the right in FC s 26(1) and thereby echoes the language of the ICESCR. FC s 26(2)'s obligation is qualified in two main ways: it must be within the State's 'available resources' and it must be progressively realized. Again, the Final Constitution rehearses the words of the ICESCR. In interpreting 'reasonable measures', the Committee on Economic, Social and Cultural Rights has held that this means that the State must show that it has taken steps which are 'deliberate, concrete and targeted as clearly as possible' towards fulfilling that right.[4] The CESCR's gloss on 'reasonable measures' resonates with the *Grootboom* Court's understanding of 'reasonableness'.

(a) 'Adequate' housing

GC 4 is the most comprehensive and authoritative analysis of the meaning of 'adequate housing' in international law. The CESCR begins its analysis by stating that the right to housing should not be interpreted narrowly to refer only to shelter, but should be understood to encompass the right to live in 'security, peace and dignity'.[5] The Committee then goes on to emphasize that housing must be *adequate* and explains this concept through identifying a number of aspects which should be taken into account when determining adequacy of housing. Specifically, adequate housing should (1) provide legal security of tenure which does not necessarily include ownership and which must provide 'protection

[1] For a contrary view, see Craven (supra) at 107–09.
[2] See Alston & Quinn (supra) at 185.
[3] Craven (supra) at 109.
[4] GC 3 (supra) at para 2.
[5] GC 4 (supra) at para 7.

against forced eviction, harassment and other threats'; (2) provide the 'facilities essential for health, security, comfort and nutrition', such as water and power; (3) be affordable such that 'the attainment and satisfaction of other basic needs are not threatened or compromised'; (4) be habitable, that is, housing should provide 'the inhabitants with adequate space … protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors'; (5) be accessible to all groups, including disadvantaged groups which should be given a 'degree of priority consideration'; (6) be located to provide 'access to employment options, health-care services, schools, childcare centres and other social facilities' and should not be located in areas hazardous to health; and (7) express the cultural identity and diversity of those who inhabit it.[1]

In *Grootboom*, Yacoob J initially distinguishes the right to 'access to adequate housing' in FC s 26(1) from the right to 'adequate housing' found in the International Covenant on Economic, Social and Cultural Rights (ICESCR) by emphasizing the phrase 'access to':

> The right delineated in s 26(1) is a right of 'access to adequate housing' as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in s 26. A right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The State must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.[2]

The *Grootboom* Court thus recognized that the State's obligation must be context-sensitive: its policy must cater for both those who can afford to pay for adequate housing themselves, and those who require State assistance. Consideration must also be given as to whether the person requiring assistance lives in a rural environment or an urban area — and there may be differences across provinces and cities. The Court's reluctance to follow the CESCR's interpretation of the ICESCR stands in stark contrast to the national government policy laid

[1] GC 4 (supra) at para 8.
[2] *Grootboom* (supra) at para 35.

down in the *Housing Code*, which expressly accepts the CESCR's interpretation of the ICESCR. In explaining what the word 'adequate' means in FC s 26(1), the *Code* states that

> [t]he wording of the housing right provision corresponds with the International Covenant on Economic, Social and Cultural Rights (1966). In that context, 'adequate housing' is measured by certain core factors: legal security of tenure; the availability of services; materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy. South Africa's housing policy concurs with this concept of housing.[1]

Thus Yacoob J's interpretation of what constitutes adequate housing is more restrictive than the interpretation adopted by the national Department of Housing. Of course, courts are free to set a lower constitutional standard than that adopted in State policy. In light of the express adoption of the ICESCR definition by the State, however, the Court's lower standard reflects two things. First, it reveals the Court's inadequate assessment of the policy before it. It is particularly important for the Court to have an accurate and a balanced understanding of what State policy is before it decides whether it is reasonable or not.[2] Second, the Court's rejection of the CESCR definition says less about differences in wording between the Final Constitution and the ICESCR, and more about the Court's refusal to engage in a discussion over the substantive meaning of FC s 26(1).[3]

(b) Progressive realization

The term 'progressive realization' was introduced into the ICESCR in order to account for the existing differences in States' abilities to realize socio-economic rights and to allow all States to adhere to the obligations imposed by the Covenant, irrespective of their social and economic development. Those opposed to the use of the term argued that it would enable States to escape their obligations and act as a limitation on the right.[4] Despite the obligation to realize rights progressively, States Party have an obligation to 'take steps' immediately, since this obligation is not subject to budgetary constraints or any other qualifications. In the CESCR's words:

> [W]hile the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations in the Covenant.[5]

[1] National Department of Housing *National Housing Code* (2000) Part 1, 7 (footnotes omitted).

[2] Of course, this point could be used to bolster the argument that courts, due to institutional limitations, are poorly placed to assess social and economic policy. This is not, however, the point which is being made here. The Court is well placed to assess whether State housing policy is consistent with international norms and, in order to do so, greater and better evidence should be put before the Court with regard to the nature and content of State policy. If this is not done, the Court should call for more detailed evidence or research the area itself.

[3] See § 55.3*(b)* supra.

[4] See Alston & Quinn (supra) at 172–75; Craven (supra) at 130–31.

[5] GC 3 (supra) at para 2. See also Limburg Principles (supra) at para 21.

In interpreting the term 'progressive realization', the Court in *Grootboom* referred to GC 3 of the ICESCR Committee and found that the phrase in the Final Constitution has the same meaning as that in the Covenant. The *Grootboom* Court noted that this provision did not mean the State could take as long as it liked in realizing the right, and that it must 'move as expeditiously and effectively as possible towards that goal'.[1]

Article 2(1) does not indicate what steps should be taken and merely states that steps should be taken 'by all available means'. While this gives States a large measure of discretion, the Committee has indicated that it will make 'the ultimate determination as to whether all appropriate measures have been taken'.[2] Despite the text of art 2(1), the Committee states that while legislation, as a general rule, is not mandatory, it is 'highly desirable and in some cases may even be indispensable.[3] New legislation would, however, be required where existing legislation conflicted with the obligations imposed under the Covenant.[4] Legislative measures alone, however, are 'by no means exhaustive of the obligations of States parties',[5] and member States are required to take other methods necessary to secure the progressive realization of the right.

In addition, the obligation to realize rights *progressively* has been interpreted by the Committee to contain a general prohibition on what it calls 'retrogressive measures', that is, any action which would undermine the existing provision of social, economic and cultural rights under the ICESCR. Any such retrogressive measure would have to be justified in the context of the overall provision of rights:

> Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realties of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[6]

States Party would therefore bear the justificatory burden of demonstrating that any retrogressive measure was economically necessary or was aimed at improving the overall provision of rights contained in the Covenant. Moreover,

[1] GC 3 (supra) at para 9, cited in *Grootboom* (supra) at para 45.
[2] GC 3 (supra) at para 4.
[3] Ibid at para 3; Craven (supra) at 125.
[4] See Limburg Principles (supra) at para 18; Alston & Quinn (supra) at 167; Craven (supra) at 126.
[5] GC 3 (supra) at para 4.
[6] Ibid at para 9.

as Craven argues, a retrogressive measure would constitute a limitation and will therefore have to comply with the provisions of the limitations clause in art 4 of the ICESCR.[1] The prohibition on retrospective measures was accepted by the Constitutional Court in *Grootboom*.[2]

(c) Within available resources

The financial cost to the State of realizing social and economic rights is one of the primary reasons given for distinguishing between these rights and civil and political rights. While this difference is often overstated, social and economic rights do raise significant budgetary concerns.[3] These concerns may make it difficult for most States Party to commit to immediate, full realization of the rights in the Covenant. For this reason, art 2(1) obliges States to take measures 'to the maximum of its available resources' so that the obligation to realize the rights progressively is dependent on individual member States' financial position. In deciding what resources to allocate in fulfilling its socio-economic rights obligations, a State has a large measure of discretion. Such discretion cannot, however, be completely unfettered, as this would undermine the rationale behind the obligation itself.[4] Indeed, the State's grounds for exercising discretion in a manner that leaves it short of the goal of fulfilling the rights must be open to judicial interrogation. Alston and Quinn sum up the position as follows:

> [A] plea of resource scarcity *simpliciter*, if substantiated, is entitled to deference especially where a state shows adherence to a regular and principled decision-making process. In the final resort, however, such a plea remains open to some sort of objective scrutiny by the body entrusted with responsibility for supervising states' compliance with their obligations under the Covenant.[5]

While it is clear from the text of the ICESCR that budgetary constraints are the most important limitation on the provision of social and economic rights, the *travaux préparatoires* also indicate that that this limitation is meant to operate only for countries which do not have sufficient resources. For countries that do have

[1] See Craven (supra) at 132.

[2] *Grootboom* (supra) at para 45. In addition to the general requirement in art 2(1) to take steps, certain of the substantive provisions in Part III of the Covenant set out specific steps that States Party are required to take. See arts 6(2), 11(2), 12(2), 13(2) and 15(2) of the ICESCR. In terms of steps which the ICESCR obliges member States to take, the *travaux préparatoire* indicate that the drafters of the Covenant considered it unnecessary for States Party to provide domestic judicial remedies for violations of the rights under the Covenant. See Alston & Quinn (supra) at 169–70. In practice, however, many States have provided for judicial remedies for many of the rights, and a growing number of countries have included social and economic rights in their domestic constitutions with varying degrees of enforceability and influence.

[3] As is frequently noted, civil and political rights may also raise significant budgetary concerns. See, eg, *August v Electoral Commission* 1999 (3) SA 1 (CC), 1999 (4) SA 363 (CC); *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC).

[4] See Alston & Quinn (supra) at 177–80; Craven (supra) at 137.

[5] Alston & Quinn (supra) at 181.

sufficient resources, the State incurs an obligation to fulfil the rights in the Covenant immediately. This interpretation has not, however, been followed by the CESCR, which has interpreted the obligation on developed countries to be the same as that of developing countries — progressive implementation subject to budgetary restrictions.[1]

Article 2(1) requires a State to take steps 'to the maximum of its available resources'. It is clear from the *travaux préparatoires* that 'available resources' does not simply refer to the resources allocated to a particular sector. Nor should the phrase be interpreted to refer solely to the resources available to the State — it must include international resources as well.[2] While developed country member States may have some sort of obligation to assist developing States in realizing the social, economic and cultural rights in the Covenant, the nature of such a duty to provide assistance to poorer countries, as Craven points out, remains unclear. The 'general consensus' is that developing countries are 'entitled to ask for assistance', but they cannot 'claim it as a legal right'.[3]

The qualification in FC s 26(2), that the State need only fulfil the right to adequate housing within 'available resources', is notably different from the wording in art 2(1) of the ICESCR. The ICESCR provides that a State must take steps 'to the *maximum* of its available resources'.[4] Thus the duty imposed by the Final Constitution to realize the right is less onerous than the duty imposed by the ICESCR. South Africa is, therefore, unlikely to follow the jurisprudence of the CESCR in determining its financial obligations to realize the right to adequate housing.

(d) Minimum core[5]

Finally, the CESCR has made it clear that States are to provide for the basic needs of their citizens through the provision of the 'minimum core' of each of the rights in the ICESCR. The notion of a minimum core is not expressly included in the ICESCR. The CESCR introduced the notion in General Comment No 3:

> [T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals

[1] See Craven (supra) at 132–33.

[2] Ibid at 137–38, 144–50; Alston & Quinn (supra) at 179; Limburg Principles (supra) at para 26.

[3] See Craven (supra) at 145, 149; Limburg Principles (supra) at paras 29–34.

[4] Article 2(1) of the ICESCR states that '[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

[5] See S Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) 33-22 — 33-32; and D Bilchitz 'Health' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) 56A-28 — 56A-37 (Offers a fuller discussion of the minimum core in socio-economic rights jurisprudence.)

> is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps 'to the maximum of its available resources'. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.[1]

The minimum core notion thus shifts the obligation on to the State Party to 'demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.[2] It does not, however, oblige States Party to satisfy the minimum core where resource constraints prevent them from doing so.[3] The notion of a minimum core also prohibits countries from prioritizing among the rights in the ICESCR where doing so would undermine the minimum core of non-prioritized rights.[4]

Whether the minimum core approach constitutes a 'universal' standard, or whether there is room for local interpretation is a difficult question. Often the answer will depend on the degree of specificity which the minimum core is given. For example, if a party defines the minimum core of housing as a brick house of 100 square metres of at least four rooms, with electricity, a television, running hot and cold water and heating, such a standard is unlikely to be adopted as an appropriate universal standard. The minimum core of the right to housing could, however, be said to encompass: security of tenure to ensure protection from 'forced eviction, harassment and other threats'; access to 'services, materials, facilities and infrastructure'; adequate space and protection 'from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors'; and 'a location which allows access to employment options, health-care services, schools, childcare centres and other social facilities'.[5] Such a flexible

[1] GC 3 (supra) at para 10.

[2] Ibid.

[3] See Craven (supra) at 142–44. Craven interprets this obligation differently. Where a State Party has not discharged its minimum core obligations, this establishes a 'presumption of guilt', and budgetary restrictions are then used as the basis for a limitation of the minimum core obligation. This, he notes, stands in contradiction to the general approach adopted in art 2(1), where budgetary restrictions are used to carve out the extent of the member State's obligation.

[4] See Craven (supra) at 141.

[5] GC 4 (supra) at para 8 (Discussing the content of 'adequate housing'.)

standard, capable of catering for local needs, is a more likely and compelling candidate for adoption as a universal benchmark by which the CESCR and States Party can assess whether the minimum core of the rights has been met.

The question as to whether the minimum core should be incorporated into the interpretation of FC ss 26 and 27 has been the subject of intense academic discussion in South Africa. The Constitutional Court in *Grootboom* rejected the minimum core approach on two grounds: significant differences in the wording of the two provisions, and insufficient evidence before the Court to justify adoption of the standard.[1] These two reasons lack purchase. First, the *Grootboom* Court should have taken into consideration the fact that national housing policy has already demonstrated a willingness to conform to the norms laid down by the ICESCR. Second, the issue of evidence is a red herring. The Committee of the ICESCR has laid down a minimum standard in interpreting the meaning of adequate housing, which could be applied irrespective of local conditions.[2] The minimum core obligation is not meant to be a flexible standard, but to 'describe the minimum expected of a State in order to comply with its obligation under the Covenant'.[3]

Despite these criticisms of the Court's reasoning, it must be recognized that adopting the minimum core approach at the domestic level raises a number of concerns. The concept of a minimum core was developed by the CESCR in order to create a set of standards by which the Committee could evaluate meaningfully reports submitted to it by member States, and not as a justiciable standard to which a *court* should hold a government accountable.

Both the ICESCR and the Final Constitution were born out of a realization that social justice is indispensable to a sustainable democracy. Nevertheless, the interpretation and the enforcement of these two texts operate in different contexts and fulfil different political functions. States voluntarily submit reports to the CESCR, which then engages in a 'constructive dialogue' with States Party to the ICESCR regarding the extent to which State policies are aimed at meeting its obligations under the ICESCR. The CESCR is thus able to engage in a more far-reaching discussion over fundamental questions of policy, such as privatization and the impact of free-market economics on the vulnerable and disadvantaged within a community.[4] The South African Constitutional Court, on the other hand, is located within an adversarial judicial system, where the Court assesses whether and to what extent the State has complied with its constitutional obligations. The Court then makes a judgment which is binding on the State and which could oblige the State to change its policy or resource allocation.

The CESCR and the Constitutional Court thus differ in their adjudicative processes in four critical respects. First, the nature of the adjudication is different: States Party to the ICESCR submit periodic reports to the CESCR to engage in a

[1] *Grootboom* (supra) at para 32.
[2] See GC 3 (supra) at para 10.
[3] *Grootboom* (supra) at para 31.
[4] See Craven (supra) at 122.

dialogue over their progress in realizing the rights in the Covenant; while the South African government is brought, generally unwillingly, before the Constitutional Court to have its policies assessed in an adversarial forum. Second, the extent to which the CESCR and the Constitutional Court can examine fundamental choices of policy differs: the CESCR is able to engage in a far-reaching discussion over fundamental questions of policy, while the Court, for reasons of institutional comity and separation of powers, cannot undertake a top-to-bottom review of policy choices and is left with the more modest task of assessing the reasonableness of a particular set of State actions. Third, the Constitutional Court is able to grant remedies which may have far-reaching policy and budgetary implications. It must thus be careful about how it crafts its remedies; the CESCR, by contrast, may make broad, sweeping findings about State compliance with the provisions of the ICESCR. Lastly, the level of scrutiny to which State policies are subject will usually differ. The Constitutional Court must attempt to do justice to the parties to a particular dispute and its findings are generally confined to the facts brought before it. The Court will undertake a detailed review of the specific problem raised by a party alleging a constitutional violation. The CESCR is free, on the other hand, to engage in a broad review of the State's entire socio-economic policy, and need not worry about the results of its findings in specific sets of circumstances.

These differences are illustrative of the different political functions which socio-economic rights play at the international level and in the domestic context. In the international arena, they serve to establish a higher ideal to which States Party to the ICSECR subscribe and desire to commit themselves for future achievement. The South African Constitution, however, establishes a standard to which the South African government must be held accountable immediately, or be found in breach of its constitutional obligations. While the two sets of institutional imperatives clearly do not need to map directly onto each other, the conclusions drawn by each institution — the decisions of the Constitutional Court and the General Comments of the CESCR — will be valuable in informing the approach of the other.

55.6 FC s 26(3): Evictions

FC s 26(3) provides that '[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

The clause contains three notable features. First, the provision relates to the eviction from one's *home*.[1] 'Home' is intended to distinguish the occupant facing eviction from occupants on land or property who do not have their home on that land, but engage in some other activity, say farming or another commercial

[1] On the meaning of 'home', see I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 587 (Authors argue that '[i]n order to qualify as a "home" an intention to occupy a dwelling for residential purposes permanently or for a considerable period of time is probably required.')

pursuit.[1] Second, FC s 26(3) includes a duty on the State not to enact legislation which allows for 'arbitrary' evictions. FC s 26(3) does not, however, prohibit evictions, even where such an eviction results in the loss of a home.[2] And third, FC s 26(3) must also be understood within the context of the right to housing as a whole. In *Jaftha v Schoeman,* the Constitutional Court wrote:

> [S]ection 26 of the Constitution must be read as a whole. Section 26(3) is the provision which speaks directly to the practice of forced removals and summary eviction from land and which guarantees that a person will not be evicted from his or her home or have his or her home demolished without an order of court considering all of the circumstances relevant to the particular case. The whole section, however, is aimed at creating a new dispensation in which every person has adequate housing and in which the state may not interfere with such access unless it would be justifiable to do so.[3]

The *Jaftha* Court went on to interpret the protection against eviction from one's home as part of the negative aspect of the right to housing. It held that 'any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1)',[4] and must therefore be justified under the general limitations clause of the Final Constitution.

(a) The impact of FC s 26(3) on the common law of evictions

The common law pleading requirements for an action for ejectment are set out in *Graham v Ridley*[5] and *Chetty v Naidoo.*[6] According to these two judgments, a plaintiff need only allege and prove two facts: first, that he is the owner of the land, and, second, that the defendant is in occupation. The defendant, if she wishes to oppose the eviction, must plead that the occupation is lawful in terms of a contractual or statutory right. If the plaintiff wishes to succeed, he must obviously counter this plea in his replication, alleging the unlawfulness of the occupation.

The Interim Constitution contained no provision equivalent to FC s 26(3). It was therefore only after the coming into force of the Final Constitution that courts were obliged to consider whether the common law gives adequate effect to constitutional imperatives relating to the granting of an order for eviction.[7] Early High

[1] See *Pareto Ltd & Others v Mythos Leather Manufacturing (Pty) Ltd* 2000 (3) SA 999 (W)(Common law used in an application for ejectment of a business.)

[2] See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC)('*Port Elizabeth Municipality*') at para 21.

[3] *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC)('*Jaftha*') at para 28 (footnote omitted).

[4] Ibid at para 34.

[5] *Graham v Ridley* 1931 TPD 476, 479.

[6] *Chetty v Naidoo* 1974 (3) SA 13, 20A–E (A).

[7] For a discussion of possible interpretations of FC s 26(3), written prior to the handing down of *Brisley v Drotsky*, see G Budlender 'Justiciability of the Right to Housing — The South African Experience' in S Leckie (ed) *National Perspectives on Housing Rights* (2003)(Budlender 'Justiciability') 211–12.

Court decisions differed on this issue.[1] In *Ross v South Peninsula Municipality*,[2] for example, the Court held that the plaintiff has an onus to allege and prove those circumstances that would justify the granting of an order for the eviction of the defendant from her home. While the *Ross* Court declined to list exactly what those circumstances might be, it held that 'guidance' could be sought in the factors set out in PIE.[3] By contrast, in *Betta-Eiendomme (Pty) Ltd v Ekple-Epoh*,[4] Flemming DJP interpreted FC s 26(3) as a 'never again' provision and restricted its application to instances where the ejectment order was sought under apartheid-style legislation. On this reading, FC s 26(3) did not apply to 'ordinary trespass, whether in the form of squatting or holding over or otherwise' and, furthermore, only applied where the State was the plaintiff.[5] According to the *Betta-Eiendomme (Pty) Ltd* Court, FC s 26(3) had no impact on the existing common-law position on evictions.

The exact extent of FC s 26(3)'s effect on the common law was eventually dealt with by the Supreme Court of Appeal in *Brisley v Drotsky*.[6] In *Brisley*, the Court found that the only 'relevant circumstances' were those that were 'legally relevant', rather than any social or personally relevant circumstances facing the defendant.[7] As a result, FC s 26(3) does not confer discretion on a court to refuse to grant an eviction order where it would be granted under the common law or statute. *Brisley* has been criticized for rendering 'nugatory' the impact of FC s 26(3) on the common law and for embodying a non-transparent 'policy choice in favour of the legislature's power to give content to [FC] s 26(3) as against the judiciary's power to develop the common law'.[8] To a large extent, however, the consequences of *Brisley* have been overcome or circumvented by the High Courts' general reluctance to grant eviction orders in the absence of alternative accommodation.[9]

This general reluctance is consistent with the Constitutional Court's recent findings in *Jaftha v Schoeman*. The *Jaftha* Court found that the provisions in the Magistrates' Courts' rules which allowed for the granting of an order for sale in execution of immovable property by the clerk of the court were unconstitutional because they failed to provide for judicial oversight of the order. In this case, both appellants had been recipients of State subsidies, and both would have had no alternative accommodation if they had been evicted in consequence of the sale of

[1] For a fuller discussion of the High Court jurisprudence, see T Roux 'Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) of the Constitution on South African Law' (2004) 121 *SALJ* 466 (Roux 'Continuity and Change').

[2] *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C)('*Ross*').

[3] Ibid at 596H–J. See § 55.6*(b)*(ii) infra for a discussion of the relevant considerations listed in PIE.

[4] *Betta-Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) at para 7.2.

[5] Ibid at paras 7.2 and 7.3. Flemming DJP then went on to hold that where 'relevant circumstances' are to be considered, these will include 'the unfairness of causing loss to the owner so that the impertinence of land grabbing can stand', and the rights of landowners. Ibid at paras 12.1–12.3.

[6] *Brisley v Drotsky* 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA)('*Brisley*').

[7] Ibid at para 42.

[8] For a detailed discussion of *Brisley*, see Roux 'Continuity and Change' (supra) at 485, 486.

[9] See § 55.6*(c)* infra.

their property.[1] While the Magistrates' Court Act contains measures designed to protect vulnerable defendants, the *Jaftha* Court found that many defendants are not aware of or are unable to approach a court to avail themselves of this protection. The *Jaftha* Court held that the sale of homes in execution constituted an infringement of the negative right to adequate housing in FC s 26(1).[2] The Court concluded that the provisions of the Magistrates' Court Act did not constitute a justifiable limitation in terms of FC s 36 because they did not give a court a meaningful opportunity 'to consider all the relevant circumstances of a case to determine whether there is good cause to order execution'.[3] The Magistrates' Court rules were accordingly amended by reading in provisions that ensured that courts would, in future, possess such an opportunity.[4]

'The precise ambit of the *Jaftha* decision has been refined in subsequent court decisions. In *Nedbank Ltd v Mortinson*, the Court held that where execution is sought against immovables which have been specifically hypothecated in order to secure the debt, there has been no abuse of the court procedure, and the debt exceeds that of the Magistrates' Court's jurisdiction, a creditor may seek default judgment from the High Court Registrar.[5] The Court did, however, amend its practice directions to require the creditor to file an affidavit setting out a number of relevant considerations which would enable a Registrar to decide whether the application should be heard in open court. Similarly, in *Standard Bank of South Africa v Saunderson*, the Supreme Court of Appeal held that where immovable property had been hypothecated to secure a debt, FC s 26 was not implicated.[6] It did, however, order a practice direction such that defendants should be made aware of their right to raise FC s 26 issues. An appeal against the *Saunderson* decision was dismissed by the Constitutional Court.[7]

(b) Legislative impact on the common law of evictions

Substantial reform of the common law of evictions has occurred as a result of two pieces of legislation that give effect to FC s 26: (1) PIE; and (2) the Extension of Security of Tenure Act (ESTA).[8] ESTA extends protection against eviction to rural occupiers whose occupation was based upon consent and was initially lawful. PIE extends protection against eviction to certain categories of unlawful occupiers in both rural and urban areas.

[1] See *Jaftha* (supra) at para 12.
[2] Ibid at para 34.
[3] Ibid at para 54.
[4] Unfortunately, it appears that persons benefiting from RDP housing are still having their homes sold in execution for minor debts, despite a 2001 amendment to the Housing Act prohibiting the sale of RDP houses for eight years. See F Rank 'Residents Fight to Salvage Home from Debt Collectors' in The Herald On-Line available at http://www.theherald.co.za/herald/news/n01_17022006.htm (accessed on 20 February 2006).
[5] *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) at para 33.
[6] *Standard Bank of South Africa v Saunderson & Others* (Unreported decision of the Supreme Court of Appeal, 15 December 2005).
[7] *The Campus Law Clinic (University of KwaZulu-Natal Durban v Standard Bank of South Africa Ltd & Another* (Unreported decision of the Constitutional Court, 31 March 2006).
[8] Act 62 of 1997.

(i) *ESTA*

ESTA was enacted to give effect to FC s 25(6) and FC s 26(3).[1] The Act protects a class of 'occupiers'[2] — which would clearly include those residing in their 'home' for the purposes of FC s 26(3) — from arbitrary eviction. It also regulates the relationship between owners and occupiers. ESTA thereby amends the common law of eviction where a landowner seeks to evict an 'occupier' and extends the legal protection promised in FC s 26(3) to that statutorily-designated group.

Under ESTA, a court may only grant an eviction order where the rights of residence are terminated on lawful grounds and where 'such termination is just and equitable, having regard to all relevant factors', including 'the fairness of any agreement' on which the plaintiff relies, the 'conduct of the parties', the comparative 'interests of the parties', 'the existence of a reasonable expectation of the renewal of the agreement', and the 'fairness of the procedure followed' in terminating the agreement to reside on the land by the plaintiff.[3] ESTA thus grants courts considerable latitude in determining whether granting an eviction order would be just and equitable.

(ii) *PIE*

PIE is commonly regarded as the companion statute to ESTA. Whereas ESTA protects lawful occupiers, PIE extends statutory protection to unlawful occupiers. Like ESTA, PIE provides that certain factors are to be considered by a court before an eviction order is granted and thereby extends considerable benefits to those facing eviction from their home by requiring a court to take into account a welter of socio-economic circumstances.[4] The factors to be considered will depend on the length of time that the defendant has been in occupation. If the defendant has been in occupation less than six months, a court may grant an eviction order only if it is 'just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.'[5] Where the defendant has been in occupation for more than six months, a court may grant an order for

[1] See ESTA, Preamble.

[2] An occupier is defined as a person residing on land which belongs to another and who had consent to do so, but does not include a person residing on land and using it for commercial purposes, or a person who earns more than R 5 000 per month. The definition of occupier therefore includes the rural poor who live on land as their 'home'. ESTA, s 1. See *Robertson v Boss* (Unreported decision of the Land Claims Court, 30 September 1998)(On the meaning of 'residing on land', which the Court interpreted as meaning residing in a permanent home.)

[3] ESTA, s 8(1).

[4] An interesting recent judgment illustrates the courts' powers to adopt a more inquisitorial approach to determining relevant circumstances under PIE. See *Ritamor Investments (Pty) Ltd & Others v The Unlawful Occupiers of Erf 62, Wynberg & Others* (Unreported decision of the Witwatersrand Local Division, 27 January 2006). Bertelsmann J, apparently frustrated with the lack of cooperation from the City of Johannesburg and Gauteng MEC for Housing (two of the respondents) and their refusal to provide relevant information to the Court, ordered those two respondents to return to court at a later date to provide oral evidence, subject themselves to examination and cross-examination, and provide information specified by the Court, including information on the availability of alternative accommodation and reasons for the failure to comply with the earlier requests from the Court regarding this information. Unfortunately, at the time of writing this chapter, the final judgment had not yet been handed down.

[5] PIE, s 4(6).

eviction only 'if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of State or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.'[1] In addition, the Constitutional Court has held that PIE, when read with FC s 26(3), requires a court to consider, as a further relevant circumstance, whether the parties have engaged in mediation to resolve the matter.[2]

The term 'unlawful occupier, is defined in PIE as meaning:

> [A] person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1996).

The ambiguity of the term 'occupies' led to some confusion. It could be interpreted to apply to the initial act of occupation (such as a 'land invasion' or where people 'squat' on land). It could also, however, be interpreted to apply to a current state of illegal occupation where the initial act of occupation may have been legal (such as in instances of 'holding over'[3]). The High Court handed down conflicting decisions on this matter[4] before it was finally resolved by the Supreme Court of Appeal in *Ndlovu v Ngcobo*. The *Ndlovu* Court found that the Act does indeed extend to instances of 'holding over': that is, it extends to instances in which the initial occupation may have been lawful, but subsequently became unlawful.

The Department of Housing, evidently unhappy with this interpretation, has tabled the Prevention of Illegal Eviction From and Unlawful Occupation of Land Amendment Bill, 2005[5] ('PIE Amendment Bill'). According to the draft bill, it was never Parliament's intention to extend the reach of PIE to tenants and to mortgagors. Proposed amendments to s 2 of PIE make this intention clear. The PIE Amendment Bill is, however, still under discussion — and the State must also now take account of the conclusions reached by the Constitutional Court in

[1] PIE, s 4(7).

[2] See *Port Elizabeth Municipality* (supra) at para 45.

[3] 'Holding over' is defined as the continued occupation of property where a contract of lease has expired, or where the occupier has defaulted on her mortgage bond repayments. See Currie & de Waal (supra) at 590.

[4] See, for example, *ABSA Bank Ltd v Amod* [1999] 2 All SA 423 (W)(Court found that PIE did not extend to cases of holding-over.) This decision was followed in *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C); *Cape Killarney Property Investments (Pty) Ltd v Mahamba & Others* 2000 (2) SA 67 (C); *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter & Others* 2000 (2) SA 1074 (SE); *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W); and *Van Zyl NO v Maarman* [2000] 4 All SA 212 (LCC). But see *Bekker & Another v Jika* [2001] 4 All SA 573 (SE)(Court held that PIE does apply to mortgage defaulters.) For a discussion of these cases, see AJ van der Walt 'Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law' (2002) 18 *SAJHR* 371, 385–90; *Ndlovu v Ngcobo; Bekker & Another v Jika* 2003 (1) SA 113 (SCA)('*Ndlovu*') at paras 51–64.

[5] Available at http://www.pmg.org.za/docs/2005/050525hanli.htm (accessed on 8 February 2006)(Latest available draft of the Bill.)

Modderklip.[1] At the time of writing, the final form of the PIE Amendment Bill had yet to be determined.[2]

(c) The reach of FC s 26(3)

As a result of ESTA, PIE and *Ndlovu*, the common law will apply to very few evictions.[3] The dispute in *Brisley*, for example, would, in light of *Ndlovu*, be decided under PIE.[4] As Theunis Roux points out, the real benefit of FC s 26(3) has not been to alter directly the common law, but to provide a constitutional justification for legislation protecting people from arbitrary and unjust evictions.[5] FC s 26(3) has therefore had a profound impact on the law of evictions in South Africa and extended both procedural and substantive benefits to those facing eviction from their homes. These benefits do not, of course, preclude eviction, but they do mean that those living in South Africa are less likely to face the threat of arbitrary, inhumane or unjust evictions in the future.[6]

As has already been noted, recent case law indicates that courts are increasingly reluctant to grant eviction orders in the absence of alternative accommodation. Indeed, as Geoff Budlender points out, courts have now developed a general principle that 'in the absence of special justification, an eviction which would otherwise result in homelessness or deprivation of access to housing and shelter is not permitted by the Constitution *unless alternative accommodation is available*.'[7] Budlender identifies three sets of circumstances which would, according to the courts, constitute 'special justification' for the granting of an eviction in the absence of alternative accommodation: (1) where the eviction is required to

[1] *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others, Amici Curiae)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC)('*Modderklip CC*').

[2] See, for example, the minutes of the meeting of the Housing Portfolio Committee on 1 June 2005 discussing this matter, available at http://www.pmg.org.za/viewminute.php?id=5916 (accessed on 8 February 2006).

[3] Whereas PIE will apply to all unlawful occupiers, ESTA only applies to lawful occupiers in rural areas who earn under R 5 000 per month. Thus, where lawful occupiers reside in an urban area, irrespective of their income, or where they reside in a rural area and earn over R 5 000 per month, ESTA will not apply to any application for their eviction. In both instances, however, an application for eviction will either be dealt with under the law of contract, the Interim Protection of Informal Land Rights Act 31 of 1996 or the Land Reform (Labour Tenants) Act 3 of 1996.

[4] Clearly, the proposed amendments to PIE would reverse this situation. See § 55.6*(b)*(ii) supra, on the proposed amendments of PIE.

[5] See Roux 'Continuity and Change' (supra) at 469–70. See also Budlender 'Justiciability' (supra) at 210.

[6] Of course, this statement is based on the premise that, in eviction proceedings, ESTA and PIE are properly placed before the court and argued. There is, unfortunately, much evidence that this is not the case in undefended applications in magistrates' courts, particularly where ESTA should be applied. See, for example, *Skhosana & Others v Roos t/a Roos se Oord & Others* 2000 (4) SA 561 (LCC); *Pitout v Mbolane* [2000] 2 All SA 377 (LCC).

[7] G Budlender 'The Right to Alternative Accommodation in Forced Evictions' in J Squires, M Langford & B Thiele (eds) *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (2005)(Budlender 'Alternative Accommodation') 127, 131. See also *Jaftha* (supra) at para 34 (Constitutional Court held that 'any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1). Such a measure may, however, be justified under section 36 of the Constitution.') See, eg, *The City of Johannesburg v Rand Properties (Pty) Ltd & Others* (Unreported decision of the Witwatersrand Local Division, 3 March 2006) at para 67 (Court interdicted the City of Johannesburg from evicting the respondents until the municipality developed a coherent programme to cater for the respondents, which must also include alternative accommodation for the respondents.)

reverse a 'land invasion' undertaken with the purpose of forcing the State to provide housing; (2) where not granting the eviction would result in the denial of State-assisted housing to another group who were to be allocated housing on the land in question; and (3) where an eviction is necessary as a result of an immediate and dangerous situation.[1]

President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd adds another layer to the constitutional development of the law of evictions in South Africa. In this case, the respondent sought and obtained an eviction order against 40 000 illegal occupiers under PIE. The cost of evicting the illegal occupiers, however, exceeded the value of the land.[2] For this reason, the respondent approached the State for assistance to evict the illegal occupiers; alternatively, it sought to have the State purchase the property. After receiving no assistance, the respondent turned to the courts for relief.[3] The Supreme Court of Appeal found that the failure of the State either to purchase the property or to find alternative accommodation for the illegal occupiers amounted to a breach of the illegal occupiers' FC s 26(1) rights.[4] The Constitutional Court, on the other hand, decided the matter based on an expansive interpretation of the principle of the rule of law in FC s 1*(c)* read with FC s 34's right of access to courts. In particular, the Constitutional Court found that the failure of the State to assist with the evictions or to purchase the land threatened the social fabric and was a 'recipe for anarchy'.[5] It accordingly ordered the State to compensate the respondents for the use of the land by the illegal occupiers, and to purchase the land for settlement by the occupiers or to provide alternative accommodation to the illegal occupiers before evicting them.

(d) International law of evictions

Numerous international instruments condemn the practice of forced evictions.[6] GC 7 of the CESCR contains a general prohibition on forced evictions, which it defines as 'the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection'.[7] FC s 26(3) should, when interpreted in the light of GC 7, effectively prohibit forced evictions, since, under FC s 26(3), no person may be evicted from their home without a court order 'made after considering all the relevant circumstances'.

[1] See Budlender 'Alternative Accommodation' (supra) at 130–31.

[2] *Modderklip CC* (supra) at paras 8–9.

[3] Ibid at paras 9–10.

[4] *Modderklip Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa & Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA), 2004 (8) BCLR 821 (SCA) at para 52.

[5] *Modderklip CC* (supra) at paras 43, 45.

[6] See, eg, Agenda 21 (1992), adopted by the United Nations Conference on Environment and Development, available at http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm (accessed on 16 January 2006) at paras 7.6 and 7.9*(b)* and the Habitat Agenda (supra) at para 40*(n)*.

[7] GC 7 (supra) at para 3.

GC 7 also sets out the limited circumstances under which forced evictions are permissible and the conditions under which they may be carried out. First, the right to be protected against 'arbitrary or unlawful interference' with one's home is also given recognition in the ICCPR and is therefore not subject to the internal limitation 'available resources'.[1] This reading is consistent with the interpretation of FC s 26(3) adopted by the Constitutional Court in *Jaftha*.[2] Second, in order to give effective protection to the prohibition against forced eviction, States must enact legislation providing security of tenure and which control the circumstances in which evictions may be carried out.[3] Again, these requirements are largely satisfied by ESTA, PIE, the Interim Protection of Informal Land Rights Act and the Land Reform (Labour Tenants) Act. Third, GC 7 outlines a number of procedural and due-process measures which must be observed when undertaking a forced eviction. These measures include: (1) giving those affected adequate notice; (2) consulting with those affected prior to the evictions; (3) where possible, identifying alternative land or housing; (4) providing information on the evictions; (5) offering legal remedies and, where possible, legal aid to persons who need it; (6) clear identification of those carrying out eviction; (7) a requirement that eviction should not take place at night or in bad weather; and (8) the presence of government officials where a large group of people is to be evicted.[4]

Finally, GC 7 provides that evictions should not result in those evicted 'being rendered homeless or vulnerable to the violation of other rights' and that a State Party 'must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available'.[5] The Constitutional Court has recently confirmed that the obligation under PIE to consider the availability of suitable alternative accommodation is 'not an inflexible requirement' and that a court may still grant an eviction order even where there is no alternative accommodation.[6] Nevertheless, the Constitutional Court has written that 'a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available'.[7] Despite these caveats, the South African jurisprudence on evictions falls short of two ICESCR requirements: (1) that the State is obliged to provide alternative accommodation 'to the maximum of its available resources' and (2) that the State's obligation extends, not solely to 'relatively settled occupiers', but to all those facing eviction.

[1] See ICCPR art 17(1); GC 7 (supra) at para 8.
[2] *Jaftha* (supra) at para 31.
[3] GC 7 (supra) at para 9.
[4] Ibid at para 15.
[5] Ibid at para 16.
[6] See *Port Elizabeth Municipality* (supra) at para 28.
[7] Ibid.

55.7 CHILDREN'S RIGHT TO SHELTER[1]

There are two textual sources for children's right to shelter or housing: FC s 26 and FC s 28. FC s 28(1)*(c)* provides that every child has the right to basic shelter.

The High Court in *Grootboom,* relying on the precedent established by the Constitutional Court in *Soobramoney*, found that the respondents had 'produced clear evidence that a rational housing programme has been initiated at all levels of government and that such programme has been designed to solve a pressing problem in the context of the scarce financial resources'.[2] As such, the application based upon FC s 26 had to fail.

The High Court then considered the alternative claim based on FC s 28(1)*(c)* and found that, while the primary obligation to maintain and shelter children rests on their parents, when parents are unable to provide such shelter there is an obligation on the State to do so.[3] In coming to this conclusion, Davis J noted the textual difference between the two provisions and interpreted this textual difference as according a stronger right of shelter to children:

> Accordingly the question of budgetary limitations is not applicable to the determination of rights in terms of section 28(1)*(c)*. . . . The right is conferred upon children. That right has not been made subject to a qualification of availability of financial resources.[4]

In making this finding, Davis J was quick to point out that this did not mean that the right would be enforceable on demand by all children. All claims would have to be evaluated on their individual merits and the merit of each claim would have to be assessed in terms of the Final Constitution as a whole.[5] For this reason, Davis J went on to hold that:

> A parsimonious interpretation of section 28(1)*(c)* which denied shelter to 276 infants as well as other children would be incongruent with a constitutional instrument which envisages the establishment of a society based on freedom, equality and dignity. To implement the right in this case so that shelter will be provided for the children in circumstances where they will be denied the psychological comfort and social support of their parents would be to permit the breakup of family life of a kind which the new Constitution is determined to prevent. In my view such a conclusion cannot be justified and hence the relief given must allow the parents to move with their children to the shelter provided to the latter as the bearers of such a right.[6]

[1] For a discussion of children's right to shelter, see A Friedman & A Pantazis 'Children's Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) 47-6–47-14; S Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) 33-48–33-52. Since this topic is already considered in detail in these two chapters, the discussion in this chapter will not be lengthy.

[2] *Grootboom v Oostenberg Municipality* 2000 (3) SA 277, 286 (C)('*Grootboom HC*').

[3] Ibid at 288.

[4] Ibid at 291.

[5] Ibid.

[6] Ibid.

FC s 28(1)*(c)*, on Davis J's reading, means that children have an unconditional right to shelter. Whether this right is, in fact, enforceable against the State will depend on the circumstances of a given case. In this case, the parents of the applicant children were unable to provide shelter for them and therefore the children had a claim against the State. Moreover, since it was in the best interests of the children that they remain with their parents, the parents of the applicant children had a derivative right to shelter.

As already discussed, the Constitutional Court in *Grootboom* focused on FC ss 26(1) and (2). In so doing, it rejected the argument that FC s 28(1)*(c)* provides an unqualified socio-economic right to children to adequate shelter. In the view of the Constitutional Court, the High Court's reasoning 'produces an anomalous result':

> People who have children have a direct and enforceable right to housing [note the use of the word *housing* rather than *shelter*] under s 28(1)*(c)*, while others who have none or whose children are adult are not entitled to housing under that section, no matter how old, disabled or otherwise deserving they may be. The carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the State on demand. Moreover, there is an obvious danger. Children could become stepping stones to housing for their parents instead of being valued for who they are.[1]

There are five primary problems with the *Grootboom* Court's reasoning in this passage. First, the Court conflates shelter and housing, finding that there is no 'real distinction' between the two.[2] It contends that on the High Court's account, parents are accorded two overlapping rights — a right to housing, subject to available means and progressive realization, in FC s 26, and a right to *housing* on demand in FC s 28(1)*(c)*. Yet the constitutional drafters clearly intended there to be a difference in meaning between shelter and housing — that intention is reflected in the difference in the language of FC s 26 and FC s 28(1)*(c)*. Second, as Yacoob J himself points out, the *Grootboom* Court's reading undermines the construction for progressive realization in FC s 26 in a way that the High Court judgment does not. Third, the *Grootboom* Court's reasoning is based on an inexplicably narrow reading of FC s 28(1)*(c)*. In consequence of the Court's decision, that provision must now be understood to apply only to children who are not in the care of their parents or immediate family. This reading is neither justified by the text nor is it consistent with the constitutionally entrenched 'best interests of the child' principle. Fourth, the Court focuses on the rights of the parents rather than the child, thereby subsuming children's rights under general socio-economic provisions. This subordination of children's rights is reflected in the *Grootboom* Court's conclusion that

[1] *Grootboom* (supra) at para 71.
[2] Ibid at para 73.

> [t]he obligation created by s 28(1)*(c)* can properly be ascertained only in the context of the rights and, in particular, the obligations created by ss 25(5), 26 and 27 of the Constitution. . . . There is an evident overlap [in content] between the rights created by ss 26 and 27 and those conferred on children by s 28. Apart from this overlap, the s 26 and 27 rights are conferred on everyone including children while s 28, on its face, accords rights to children alone. This overlap is not consistent with the notion that s 28(1)*(c)* creates separate and independent rights for children and their parents.[1]

The *Grootboom* Court then purports to solve this 'problem' by reading FC s 28(1)*(b)* and *(c)* together. FC s 28(1) provides that: 'Every child has the right — . . . *(b)* to family care or parental care, or to appropriate alternative care when removed from the family environment; *(c)* to basic nutrition, shelter, basic health care services and social services.' The *Grootboom* Court, reading these two sections together, concludes that 'appropriate alternative care' in FC s 28(1)*(b)* is what is outlined in FC s 28(1)*(c)*. This reading means that when children are in the care of their families, they are entitled to basic nutrition, shelter, basic health care services and social services from their parents, and it is only when they are not in family or parental care that they are entitled to these social goods from the State. Where children are in the care of their parents but their parents are unable to provide these social goods to their children, the children can have no claim against the State. Again, this reading is not justified by the text, and results in a watering down of children's rights. The conclusion is particularly disturbing in a country where a large proportion of parents cannot afford to provide adequate care for their children. This state of affairs cannot be in the best interests of children. This rather harsh position seems, however, to have been somewhat ameliorated in *Treatment Action Campaign* (*TAC*). In *TAC*, the Constitutional Court considered the relevance of FC s 28(1)*(c)* to the applicant's contention that it was unreasonable for the State to restrict the provision of Nevirapine to two pilot sites per province. The *TAC* Court found that its interpretation of FC s 28(1)*(b)* and *(c)* in *Grootboom* did not mean that the State had no obligation to care for children who were still in the care of their families. It held, to the contrary, that '[t]he State is obliged to ensure that children are accorded the protection contemplated by section 28 that arises when the implementation of the right to parental or family care is lacking.'[2] Although difficult to square this last line of reasoning with the interpretation placed by the *Grootboom* Court on FC s 28(1)*(c)*, the *TAC* Court used FC s 28(1)*(c)* to bolster conclusions already reached under FC s 27.[3] Indeed, the *TAC* Court's analysis suggests, in a manner consistent with *Grootboom*, that the socio-economic rights articulated in FC s 26 and FC s 27 have priority over those socio-economic rights to found in FC s 28.

The final criticism of the *Grootboom* Court's reasoning on children's socio-economic rights is that the Court fails to appreciate that, according to the current

[1] *Grootboom* (supra) at para 74.
[2] *TAC* (supra) at para 79 (footnotes omitted).
[3] Ibid at paras 74–79.

housing subsidy scheme programme, only adults (over 21 years of age) can apply to benefit from low-cost housing. Children are therefore effectively denied housing under FC s 26 where they have no parent or guardian to provide housing on their behalf, and where they do not already have access to adequate housing. Child-headed households, which are increasing significantly in number as a result of the ravages of HIV/AIDS, are often not, in practice, under the care of the State, and are therefore not able to claim housing or shelter under either FC s 26 or FC s 28.

55.8 Prisoners' Right to Adequate Accommodation[1]

Section 35(2)*(e)* of the FC provides that every detained person has the right to 'conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment'. Like the children's right to shelter in FC s 28(1)*(c)*, prisoners' right to 'adequate accommodation' is not qualified by a provision equivalent to FC s 26(2). It may, of course, be limited under the general limitations clause in FC s 36.

The most striking aspect of this right is the seemingly carefully crafted wording of the right of prisoners to 'adequate accommodation'. The term 'adequate accommodation' must be contrasted with children's rights to 'shelter' and everyone's rights to 'access to adequate housing'. Clearly, the constitutional drafters intended to introduce a subtle distinction between these rights. A sensible heuristic framework would interpret a child's 'right to shelter' as merely affording protection against the elements, a prisoner's 'right to adequate accommodation' to permanent accommodation and access to services for the duration of imprisonment, and everyone's 'right to access to adequate housing' to actual housing, subject to the provisos of progressive realization and available resources.

To date, there has been no case law on prisoners' rights to adequate accommodation.[2] The High Court's decision on prisoners' rights to medical treatment in *Van Biljon v Minister of Correctional Services*, however, sheds some light on the meaning of 'adequate accommodation'.[3] *Van Biljon* concerned an application based on FC s 35(2)*(e)* for adequate medical treatment at State expense. The dispute turned on whether the applicants, who were HIV-positive and 'who [had] reached the symptomatic stage of the disease and whose CD4 counts [were]

[1] See D Van Zyl Smit 'Sentencing and Punishment' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) 49-31 — 49-35.

[2] At the time of writing this chapter, there was, however, one case pending in the Cape High Court: *Prison Care & Support Network & Another v Government of the Republic of South Africa* (Case No 9188/05). This case was recently reportedly postponed *sine die*. See W Roelf 'Prison Overcrowding Case Postponed' available at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=qw1145452143638B263 (accessed on 23 April 2006).

[3] *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C), 1997 (6) BCLR 789 (C)('*Van Biljon*').

less than 500/ml,[1] were entitled to have prescribed and to receive at State expense appropriate anti-viral medication'. In deciding this matter, Brand J considered carefully the standard of 'adequate medical treatment' set by FC s 35(2)*(e)*.[2] The respondents contended that the right in FC s 35(2)*(e)* means that detained persons are only entitled to the medical treatment that they would have received at provincial hospitals, had they not been incarcerated.[3] It was common cause that patients in provincial hospitals in the same position as the applicants would not be entitled to anti-retroviral drugs at State expense.[4] The respondents contended that the Court should not scrutinize provincial health policy regarding HIV-positive patients as this policy is 'dictated by budgetary considerations which is a matter of polycentric nature and, therefore, non-justiciable by this Court.'[5]

The applicants countered this argument by contending that the State could not rely on budgetary constraints as a legitimate reason to refuse adequate medical treatment.[6] The *Van Biljon* Court accepted this argument, but then went on to find that budgetary considerations were nevertheless relevant in determining what constitutes 'adequate medical treatment'. The Court reasoned as follows:

> In principle, I agree . . . that lack of funds cannot be an answer to a prisoner's constitutional claim to adequate medical treatment. Therefore, once it is established that anything less than a particular form of medical treatment would not be adequate, the prisoner has a constitutional right to that form of medical treatment and it would be no defence for the prison authorities that they cannot afford to provide that form of medical treatment. I do not, however, agree with the proposition that financial conditions or budgetary constraints are irrelevant in the present context. What is 'adequate medical treatment' cannot be determined *in vacuo*. In determining what is 'adequate', regard must be had to, *inter alia*, what the State can afford. If the prison authorities should, therefore, make out a case that as a result of budgetary constraints they cannot afford a particular form of medical treatment or that the provision of such medical treatment would place an unwarranted burden on the State, the Court may very well decide that the less effective medical treatment which is affordable to the State must in the circumstances be accepted as 'sufficient' or 'adequate medical treatment'.[7]

The *Van Biljon* Court then went on to find that the 'respondents did not make out a proper case that the medical treatment claimed by applicants [was]

[1] CD4 is a type of white blood cell or lymphocyte involved in fighting infection. The Centre for Disease Control measures the progression of the Human Immunodeficiency Viral (HIV) infection using a CD4 count since the further the disease has progressed, the lower the CD4 count and the less likely the patient is to be able to fight off infection.
[2] *Van Biljon* (supra) at para 41.
[3] Ibid at para 43.
[4] Ibid at para 44.
[5] Ibid at para 45.
[6] Ibid at para 48.
[7] Ibid at para 49 (footnote omitted).

unaffordable'[1] since the respondents only referred to the level of care available in provincial hospitals. The appropriate test was whether the Department of Correctional Services — and not the provincial hospitals via the Department of Health — could afford such services. Furthermore, the Court found the respondent's case flawed because it was based on a premise that the State did not owe a higher duty of care to those in detention. It suggested that the State may well have such a duty because prisoners who are kept in detention under existing conditions are made more vulnerable to opportunistic infections. For all these reasons, the Court ordered the respondents to supply the applicants with the anti-retroviral medication that had been prescribed for them, concluding as follows:

> Applicants have, therefore, established, in my view, that anti-viral therapy is at present the only prophylactic. The benefits of this treatment — in the form of extended life expectancy and enhanced quality of life — are such that this treatment must be provided for the unfortunate sufferers of HIV infection if at all affordable. As I have already stated, respondents have failed to make out a case that the Department of Correctional Services cannot afford to provide HIV infected prisoners in the stated category with the combination anti-viral therapy claimed by applicants. In these circumstances, I believe that the medical treatment claimed by applicants must be regarded as no more than the 'adequate medical treatment' to which they are entitled in terms of s 35(2)*(e)* of the Constitution. It follows that the failure to provide applicants with this treatment amounts to an infringement of applicants' constitutional rights.[2]

In short, the *Van Biljon* Court held that, since the State had failed properly to make out a case that it could not afford the medical treatment claimed by the applicants, budgetary considerations could not be taken into account in determining *adequate* medical treatment. If the State had made out such a case, the Court implied, its assessment of what constituted adequate medical treatment might have been different.

The reasoning in this judgment has been set out at length because it has a direct bearing on the more immediate question of what constitutes 'adequate accommodation' for prisoners. Thus, while budgetary considerations are relevant to the type and quality of accommodation which is provided to prisoners, lack of funding could not be used to justify the absence of accommodation to prisoners or accommodation which is inconsistent with their right, say, to dignity.[3]

A strong argument could be made that the current overcrowding in prisons undermines prisoners' right to dignity and, consequently, does not constitute adequate accommodation.[4] There are currently 238 operational public prisons in South Africa which were intended to accommodate 114 000 prisoners. As of

[1] *Van Biljon* (supra) at para 50.
[2] Ibid at para 60.
[3] For more on dignity, see S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.
[4] See *Kalashnikov v Russia* (2003) 36 EHRR 34 (European Court of Human Rights found that the overcrowding and poor conditions in Russian prisons amounted to degrading treatment in violation of the European Convention on Human Rights and awarded damages to the applicant.)

March 2004, these prisons were accommodating 187 640 prisoners. 53 876 were awaiting-trial.[1] On average, prisons are approximately 65 per cent overcrowded. The 10 most overcrowded prisons are, however, between 285 to 386 per cent over capacity. This situation is clearly intolerable and, as Justice Fagan notes in his 2004 report, amounts to an on-going breach of prisoners' rights to adequate accommodation.[2]

[1] See Judicial Inspectorate of Prisons *Annual Report for the Period 1 April 2003 to 31 March 2004* available at http://judicialinsp.pwv.gov.za/Annualreports/2004a.pdf (accessed on 16 February 2006) 22. This figure was reduced in April and May 2005 by the release of certain prisoners and prisons are currently accommodating approximately 160 000 inmates. See MP Ntsobi *Privatisation of Prisons and Prison Services in South Africa* (Unpublished Masters thesis submitted to School of Government Faculty of Economic and Management Sciences University of the Western Cape, November 2005, on file with the author) 78.

[2] Judicial Inspectorate of Prisons *Annual Report* (supra) at 21.

56A Health

David Bilchitz

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Health care, food, water and social security

1. Everyone has the right to have access to—

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

3. No one may be refused emergency medical treatment.

56A.1 Introduction

The Final Constitution[1] is one of few in the world that contains a genuinely justiciable right to health.[2] This chapter offers a summary of the black letter law on the right to health in South Africa (§ 56A.2), a critique of the emerging jurisprudence (§ 56A.3), a preferred approach to the interpretation of the right that draws on international law (§ 56A.4), and an indication of the manner in which current South African health-care policy is failing to realize the right in practice (§ 56A.5).

56A.2 The Right to Health in the Final Constitution

(a) A justiciable constitutional right to health: the black letter law

The key principles enunciated in the general body of socio-economic rights jurisprudence[3] in South Africa may be summarized as follows:

* I would like to thank Stu Woolman, Theunis Roux and Michael Bishop for their astute comments and editorial wisdom. Their contributions have made writing this chapter a pleasure and have enabled me to improve its form significantly.

[1] Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC').

[2] See FC s 27(1)*(a)* and FC s 27(3). It is interesting to note that the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC') did not enshrine any of the traditional socio-economic rights and thus there was no right to health expressly included in it. The only aspect of health protected within that Constitution was contained within the environmental right, which guaranteed each person the right to 'an environment which is not detrimental to his or her health or well-being' (IC s 29). Put slightly differently, the Interim Constitution guaranteed a right to a healthy environment — without any guarantee that one would be entitled to the resources or services necessary to stay healthy. For more on the right to a healthy environment, see M van der Linde & E Basson 'Environment' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 50.

[3] The leading Constitutional Court cases are: *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC)('*Soobramoney*'); *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)('*Grootboom*'); *Minister of Health v Treatment Action Campaign No. 2* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1023 (CC)('*TAC*'); *Khosa & Others v Minister of Social Development & Another* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC)('*Khosa*'). For comprehensive analysis of this body of jurisprudence, see D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (2001) 119 *SALJ* 484; D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 1; T Roux 'Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court' (2003) 4 *Democratization* 10; S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33; S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 22; M Pieterse 'Towards a Useful Role for Section 36 of the Constitution in Social Rights Cases' (2003) 120 *SALJ* 41; M Pieterse 'Coming to Terms with the Judicial Enforcement of Socio-Economic Rights' (2004) 20 *SAJHR* 383;

- Socio-economic rights do not, generally speaking, embrace an individual entitlement to the immediate provision of any services or resources.[1]
- These rights require the State to develop a systematic, comprehensive programme that is designed to realize these rights progressively within 'available resources'.[2]
- Whether the State has discharged its duty to realize progressively any particular socio-economic right will be evaluated by the courts in terms of the 'reasonableness' of the programme concerned.[3]
- The reasonableness enquiry does not depend on a closed list of criteria. Rather, the criteria will vary according to the context and circumstances of each case. Some of the criteria that have already been considered are that the programme: (1) must ensure that 'the appropriate financial and human resources are available'; (2) 'must be capable of facilitating the realisation of the right'; (3) must be reasonable 'both in its conception and its implementation'; (4) must be flexible; (5) must attend to 'crises'; (6) must not exclude 'a significant segment' of the affected population; and (7) must balance short, medium and long-term needs.[4]

These four principles can be traced through the following three cases.

In *Soobramoney*, a 41–year-old unemployed man from KwaZulu-Natal, in the final, terminal stages of chronic renal failure, had been denied access by provincial health authorities to regular renal dialysis treatment required to extend his life. He challenged their decision on the grounds that he was entitled, in terms of several

D Moellendorf 'Reasoning About Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims' (1998) 14 *SAJHR* 327. For accounts that approve of the court's deferential approach, see CR Sunstein 'Social and Economic Rights? Lessons from South Africa' (2001) 11 *Constitutional Forum* 123 (Defending the Court's 'administrative law model of socio-economic rights'); M Wesson 'Grootboom and Beyond: Reassessing the Socio-Economic Rights Jurisprudence of the South African Constitutional Court' (2004) 20 *SAJHR* 284.

[1] See *Soobramoney* (supra) at paras 11 and 31, *Grootboom* (supra) at paras 93–94 and *TAC* (supra) at para 34.

[2] See *Soobramoney* (supra) at paras 28–31. See also *R v Cambridge Health Authority, Ex Parte B* [1995] 2 All ER 129, 137 (CA):

> I have no doubt that in a perfect world any treatment which a patient or a patient's family sought would be provided if doctors were willing to give it, no matter how much it cost, particularly when a life was potentially at stake. It would however, in my view, be shutting one's eyes to the real world if the Court were to proceed on the basis that we do live in such a world. It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like; they cannot provide the treatments they would like; they cannot purchase all the extremely expensive medical equipment they would like; they cannot carry out all the research they would like; they cannot build all the hospitals and specialist units they would like. Difficult and agonizing judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients.

[3] See *Khosa* (supra) at para 43:

> In determining reasonableness, context is all-important. There is no closed list of factors involved in the reasonableness enquiry and the relevance of various factors will be determined on a case by case basis depending on the particular facts and circumstances in question.

[4] *Grootboom* (supra) at paras 39–46, 52, 53, 63–69, 74, 83. For a similar explication of the criteria that a court may employ in the health care context, see C Sprague & S Woolman 'Moral Luck: Exploiting South Africa's Policy Environment to Produce a Viable ARV Programme' paper presented at XVI International AIDS Conference (Toronto, 2006)(On file with author).

constitutional rights, including FC s 27(1)*(a)*, to such care.[1] The Constitutional Court rejected his claims. It held that the obligations imposed on the State by FC s 27(1)*(a)* are dependent on the resources available for such purposes and that the rights themselves may be justifiably limited because of a lack of resources. With respect to the budgetary allocations at issue, the Court noted that there were many more patients who required renal dialysis than could be accommodated by the existing dialysis machines in the province. It wrote: 'This is a nationwide problem and resources are stretched in all renal clinics throughout the land.'[2] The Court then held that the guidelines that had been developed by the health authorities were fair and rational. They were aimed at benefiting the greatest number of patients possible and such benefits could be measured by the extent to which they saved or extended lives. Such benefits were limited in the case of a person — like Mr Soobramoney — in the terminal stages of illness. The Court reasoned that if everyone in a condition comparable to that of Mr Soobramoney were to be provided with renal dialysis, the existing provincial renal dialysis programme would collapse and no one would receive its benefits.[3] Moreover, the Court held, the State was under a duty to manage its limited resources in order to address *all* the basic claims made upon it: 'There will be times when this requires it to adopt an holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.'[4] On this basis, it concluded that the failure to provide renal dialysis to those suffering from chronic renal failure did not represent a breach of the State's obligations in terms of FC s 27(1)*(a)*. Mindful of the suffering caused by its rejection of Mr Soobramoney's complaint, the Court acknowledged the hardship worked on the applicant, his family and all those persons who might be similarly situated.[5]

In *Van Biljon v Minister of Correctional Services; B & Others v Minister of Correctional Services & Others,* four prisoners diagnosed as HIV positive sought orders

[1] I shall consider its decision concerning emergency medical treatment below at § 56A2*(e)*.

[2] *Soobramoney* (supra) at para 24.

[3] The *Soobramoney* Court found that if all those with chronic renal failure were to be treated

> the cost of doing so would make substantial inroads into the health budget. And if this principle were to be applied to all patients claiming access to expensive medical treatment or expensive drugs, the health budget would have to be dramatically increased to the prejudice of other needs which the State has to meet.

Ibid at para 28. The provincial administration had to make difficult choices in fixing the health budget, and in deciding upon the priorities to be met. Chaskalson P held importantly that '[a] court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters'. Ibid at para 29.

[4] Ibid at para 31.

[5] The Court framed its difficult decision against the harsh realities of South African life:

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.

Ibid at para 8.

declaring that, under FC s 35(2)(e), they had the right to the provision, at state expense, of adequate medical treatment.[1] All four had CD4 counts of less than 400/ml. All four therefore satisfied generally accepted criteria for anti-retroviral treatment. Two of the prisoners had already been prescribed appropriate anti-retrovirals by medical practitioners. The other two prisoners had not had any anti-retroviral treatment prescribed by the State. The High Court held that the two prisoners who had been prescribed a combination of AZT and DDL by medical practitioners were entitled to provision of that cocktail at State expense, but that the two prisoners who had not as yet been prescribed either antiretroviral mono-therapy or antiretroviral combination therapy were not entitled to provision of any treatment at State expense. Although not decided under FC s 27, but under the provision for medical treatment of prisoners in FC s 35(2), *Van Biljon* stands for the proposition that socio-economic rights do not necessarily entitle individuals to specific remedies unless the State has already committed itself to the provision of specific benefits. Thus, in *Van Biljon*, only the first two applicants were provided with antiretroviral drugs because only the first two applicants could point to a legitimate expectation that the State would provide such treatment to them.

In *TAC,* the applicants took issue with the South African government's policy toward the provision of nevirapine, an antiretroviral drug that considerably reduces the likelihood of HIV transmission from mother to child at birth. Despite the fact that the manufacturers of nevirapine had offered to make the drug available to the South African government free of charge for a period of five years in order to reduce the risk of the vertical transmission of HIV, only a fraction of the hundreds of thousands of pregnant women infected with HIV had access to nevirapine at a small number of research and training sites throughout the country.[2] The Constitutional Court held that, in terms of FC s 27, the government's decision to confine nevirapine to a limited number of research and training sites was manifestly unreasonable.[3] The Court viewed the facts in *TAC* through the prism of the criteria developed in *Grootboom* and found that a comprehensive and coordinated programme of nevirapine could substantially reduce the risk of vertical transmission of HIV without placing a significant burden on the fiscus. It issued a mandamus that required the government to extend the provision of nevirapine beyond the current sites and ordered the government to provide the requisite testing and counselling services needed to make effective use of nevirapine.

[1] 1997 (4) SA 441 (C), 1997 (6) BCLR 789 (C)('*Van Biljon*').
[2] *TAC* (supra) at para 16.
[3] Ibid at para 47.

(b) An explanation of some basic conceptual issues attending the right to have access to health-care services in FC s 27

(i) *Right to health and the right to a healthy environment*

In international law, the right to health is a shorthand expression for a composite right with two elements: a right to health care and a right to healthy conditions.[1] The Final Constitution divides these two elements of the right between FC s 27(1)*(a)* (the right to have access to health-care services) and FC s 24*(a)* (the right to a healthy environment). When a health-related dispute arises, the first step is to determine the Final Constitution provision under which to pursue the matter.

(ii) *Right to have access to health-care services and not a right to resources necessary for health*

The formulation of the right in FC s 27(1)*(a)* is fairly narrow: it only provides for a right to have access to health care *services*; it does not provide for the general resources necessary to preserve and to maintain health. It is possible to adopt an expansive interpretation of 'services' to include such resources. Alternatively, it is possible to understand that the resources necessary to maintain health are specified in some of the other socio-economic rights provisions, including the right to have access to adequate housing (FC s 26(1)), the right to have access to sufficient food and water (FC s 27(1)*(b)*), and the right to have access to social security (FC s 27(1)*(c)*).

(iii) *The relationship between the right to have access to health-care services and other socio-economic rights in FC s 27*

The right to have access to health care services appears together with the right to have access to sufficient food and water, and the right to have access to social security. In addition, FC s 27(3) confers a right to emergency medical treatment. The question thus arises as to what connects all these elements of FC s 27? Are they completely disparate rights, or is there some reason for their inclusion in one section of the Final Constitution? It is possible to read FC s 27(1)*(a)*, *(b)* and *(c)* disjunctively as separate rights completely disconnected from one another. However, this does not explain why the drafters decided to include them together in one section. It is submitted that the purpose for doing so was to indicate the interrelated nature of these rights. It would be meaningless to have access to health-care services where one lacks sufficient food and water. Social security in turn allows people to access sufficient food and water, and universal public health care is a form of social security. In fact, the narrow formulation of the right to

[1] See § 56A.4 infra, concerning the development of the right at international law. See also P Hunt *Reclaiming Social Rights: International and Comparative Perspectives* (1996) 111; DM Chirwa 'The Right to Health in International Law: Its Implications for the Obligations of State and Non-state Actors in Ensuring Access to Essential Medicine' (2003) 19 *SAJHR* 541, 545.

health-care services may be broadened through its inclusion in a provision dealing with rights to particular resources. The failure to include a right to specific resources in FC s 27(1)*(a)* can thus be said to be remedied by the structure of FC s 27.[1]

(iv) *The interdependence of rights*

The structure of FC s 27 indicates that the right to have access to health-care services cannot be considered in isolation from other rights, and that the links and interdependencies between this right and other rights need to be explored. The UN Committee responsible for interpreting the right to health has recognized these interdependencies through widening the ambit of the right to include such elements as nutrition, clean water and sanitation.[2] The Final Constitution likewise makes it clear that an integrated understanding of health care will be required when interpreting FC s 27.

(v) *The right to have access to health-care services and immediate benefits*

In *Soobramoney*, the Constitutional Court expressly refused to adopt an understanding of the right to health-care services that would require the State to provide individuals with any immediate benefits. Instead, the majority construed the right in light of the broader needs of society:

> The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt an holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.[3]

The Court adopted a similar position in *Grootboom*. It held that the positive obligations imposed on the State by FC s 26(1) and (2) do not entitle individuals to claim housing or shelter on demand.[4] Rather, they require the State to develop a comprehensive and workable plan to meet its obligations.[5] In *TAC*, too, the Court declined to recognize an approach to socio-economic rights that could be 'construed as entitling everyone to demand that the minimum core be provided to them'.[6] Rather, the Court held, the State is required to 'take reasonable measures

[1] On the relationship between the various rights in FC s 27, see D Brand 'Introduction to FC s 27' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 56.

[2] See United Nations Committee on Economic, Social and Cultural Rights ('UNCESCR') General Comment No 14 'The Right to the Highest Attainable Standard of Health' (Article 12 of the Convention)(22nd Session, 2000) UN Doc. E/C. 12/2000/4 available at www.unhchr.ch/tbs/doc.nsf (accessed on 28 January 2006) at para 4. See A Kok & M Langford 'Water' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 56B.

[3] *Soobramoney* (supra) at para 31. See S Scott & P Alston 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*'s Legacy and *Grootboom*'s Promise' (2000) 16 *SAJHR* 206 (Arguing that the *Soobramoney* decision was in part driven by utilitarian considerations).

[4] *Grootboom* (supra) at para 95.

[5] See *Grootboom* (supra) at para 38.

[6] *TAC* (supra) at para 34.

progressively to eliminate or reduce the large areas of severe deprivation that afflict our society'.[1]

(vi) *Progressive realization and available resources*

The general approach to the interpretation of socio-economic rights in the Final Constitution is outlined in *Grootboom*. Yacoob J, writing on behalf of the Court, held that 'the real question in terms of our Constitution is whether the measures taken by the State to realise the right afforded by s 26 are reasonable'.[2] Reasonable measures require the establishment and implementation by the State of a coherent, well co-ordinated and comprehensive programme directed towards the progressive realization of the right of access to adequate housing. Essentially, the Court has found that FC s 26(2) (and its cognate provision, FC s 27(2)) embrace three significant and distinct internal limitations on the rights articulated in FC s 26(1) and FC s 27(1): first, the measures must be reasonable (the factors involved in assessing reasonableness will be summarized below); secondly, the rights have to be realized progressively; and, finally, the measures that are adopted must be within the available resources of the State. I will consider each of the last two limitations in turn.

(aa) Progressive Realization

The Court has had little to say about progressive realization.[3] The only clear dictum on this facet of the socio-economic rights provisions has been in *Grootboom*. There the Court held that this term indicates that socio-economic rights need not be realized immediately. Nevertheless, 'the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the State must take steps to achieve this goal.'[4] This goal, in turn, requires that 'accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time.'[5] In the end, according to the Court, housing must not only be made more accessible to a larger number of people, it must be made available to a wider range of people as time progresses.

Lastly, the Court refers to the origins of the phrase 'progressive realisation' in the International Covenant on Economic, Social and Cultural Rights ('ICESCR').[6] It then quotes the analysis of this notion by the UNCESCR with approval, arguing that the meaning of the phrase in our Final Constitution is the same as

[1] *TAC* (supra) at para 36. See further S Liebenberg 'The Interpretation of Socio-Economic Rights' (supra) at § 33.

[2] *Grootboom* (supra) at para 33.

[3] Liebenberg 'The Interpretation of Socio-Economic Rights' (supra) at 33-41–33-44.

[4] *Grootboom* (supra) at para 45.

[5] Ibid.

[6] (1966) UN Doc. A/6316, 993 UNTS 3 (signed but not yet ratified by South Africa), available at http://www.unhchr.ch/html/menu3/b/a_cescr.htm (accessed on 28 January 2006).

that it bears in the ICESCR. The Committee refers to the notion of progressive realization, as a 'necessary flexibility device, reflecting the realities of the world and the difficulties involved in ensuring full realisation of economic, social and cultural rights'. The phrase must not be seen to deprive the obligations on State parties of content but imposes an obligation to move as 'expeditiously and effectively as possible towards that goal'. Moreover, 'any deliberately retrogressive measures would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'.[1]

The Court's analysis of progressive realization is problematic and deficient. It imposes a duty on the State to take steps towards the achievement of socio-economic rights: but what steps should be taken? When are the steps insufficient? The Court says that obstacles to the realization of these rights need to be lowered over time. But what are the implications of this statement? For instance, where a statute lowers the obstacles to housing for some by making it simple to acquire a home loan, it has in one sense lowered the barriers for some to gain access to housing. But what about those who cannot afford the loan? This measure in no way improves their access to housing. Are State obligations only the facilitative ones of removing obstacles or does the State need to take active steps towards fulfilling these rights?

(bb) Available resources

Soobramoney was decided largely on the basis of the scarcity of resources. Chaskalson P held that the obligations imposed on the State by FC ss 26 and 27 are dependent on the resources available for such purposes and the rights themselves are limited because of a lack of resources. In relation to current budgetary allocations, there were many more patients than could be accommodated by the existing dialysis machines.[2] The Court held that the guidelines that had been developed were fair and rational: they were aimed at benefiting the most patients and directed towards the curing of patients. On the other hand, if everyone in the condition of Mr Soobramoney were to be provided with dialysis, the current programme would collapse and no one would benefit.

The Court emphasized this last point: if Mr Soobramoney were to be provided with dialysis, then others in a similar position would also have to be treated. That

[1] See UNESCR General Comment No 3 'The Nature of States Parties Obligations' (Article 2(1) of the Convention)(5th Session, 1990) UN Doc. E/1991/23 at para 9, available at http://www.unhchr.ch/tbs/doc.nsf (accessed on 28 January 2006)('GC 3').

[2] *Soobramoney* (supra) at at para 24.

would prove very costly. The Court took note of the KwaZulu-Natal provincial Department of Health's budget and the significant overspending of the department in the year 1996–1997.[1] It found that if all those with chronic renal failure were to be treated

> the cost of doing so would make substantial inroads into the health budget. And if this principle were to be applied to all patients claiming access to expensive medical treatment or expensive drugs, the health budget would have to be dramatically increased to the prejudice of other needs which the State has to meet.[2]

Chaskalson P noted that '[a] court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters'.[3] The Court then held that the State is required to manage its limited resources in order to address *all* the basic claims upon it. Chaskalson P concluded on this basis that the failure to provide renal dialysis to those suffering from chronic renal failure did not represent a breach of the State's obligations in terms of FC s 27.

Curiously, in *Soobramoney*, the majority did not engage with the internal limitation in FC s 27(2). Instead, it seemed to rule purely in terms of FC s 27(1)*(a)* that the very content of the right did not embrace a right to renal dialysis where there is a scarcity of resources.[4] This approach would seem to do away with the need to have an internal limitation clause in FC s 27(2).

[1] In that year, there had been overspending of R152 million, and in the year of the decision overspending was likely to reach R700 million. See *Soobramoney* (supra) at para 24.

[2] Ibid at para 28.

[3] *Soobramoney* (supra) at para 29.

[4] There appear to be conflicting dicta in this regard. The dominant approach appears to be expressed in *Soobramoney*. See *Soobramoney* (supra) at para 11. Chaskalson P writes: 'what is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources.' The Court's statement here suggests that the availability of resources must be considered in defining the very content of the right itself. In a separate judgment, Sachs J specifically endorses adapting traditional rights analyses to take account of the problem of scarcity and competing interests. He holds that, '[w]hen rights by their very nature are shared and inter-dependent, striking appropriate balances between equally valid entitlements or expectations of a multitude of claimants should not be seen as imposing limits on those rights (which would then have to be justified in terms of s 36), but as defining the circumstances in which the rights may most fairly and effectively be enjoyed'. Ibid at para 54. In *Grootboom* the Court held that FC '[s]ection 26 does not expect more of the state than is achievable within its available resources' and in so doing suggested that the content of the right itself was determined by the availability of resources. *Grootboom* (supra) at para 46. The approach of the Court in *TAC* comes close to viewing socio-economic rights as providing a right to reasonable government action. Since the reasonableness of government action must be determined by having regard to the resources which are available, the content of the right is partially determined by the resources that are available. To that end, Madala J in *Soobramoney* writes that 'the guarantees of the Constitution are not absolute but may be limited in one way or another. One of the limiting factors to the attainment of the Constitution's guarantees is that of limited or scarce resources.' Ibid at para 43. But there is a subtle difference of emphasis here. Madala J seems to construe constitutional rights as having a content determined prior to a consideration of the availability of resources. The scarcity of resources represents a limitation on the ability to fulfil a constitutional

Grootboom addressed the issue of availability of resources only briefly and in the context of the internal limitation in FC s 26(2). Yacoob J held that 'both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.'[1] The decision itself did not have to address whether there were sufficient resources available for housing: it merely held that the government had to allocate a reasonable proportion of the housing budget to providing relief for those in desperate need.

In *Khosa*, the Court held that it would not simply accept a statement by the State that it could not afford to extend benefits to a group to which it had not previously catered. The criterion according to which any exclusion occurs must be consistent with the purposes of the Bill of Rights and must not amount to unlawful discrimination or create a serious impact upon dignity.[2] The information concerning the actual cost of extending benefits to permanent residents was sketchy and was estimated to be between R243 million and R672 million.[3] It is interesting to note that the Court was prepared to use this speculative estimate to conclude that the actual cost of extending benefits to permanent residents would only be a small proportion of the total expenditure on grants.

These decisions suggest that the Court has not given extensive thought to what is meant by the notion of 'available resources'. The following is a fair summary of the Court's approach towards this criterion thus far: firstly, the Court will focus its enquiry upon the current allocations within a particular department that is directed towards the realization of a particular right; secondly, the Court will be more ready to order reallocations within existing budgets rather than require an increased budget in a particular area; and finally, the Court will not readily accept a defence that there is a lack of available resources where the exclusion of individuals or groups from a government programme constitutes unlawful discrimination or a serious invasion of dignity.[4]

guarantee. The majority judgment in *Soobramoney* can also be interpreted as suggesting that socio-economic rights confer entitlements that go beyond what the government can at present be required to provide: '[g]iven this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not *presently* be capable of being fulfilled.' *Soobramoney* (supra) at para 11 (my emphasis). In *Grootboom*, the Court claims that available resources only qualify the content of the obligation in relation to 'the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result.' Ibid at para 46. This, too, could provide support for the contention that the entitlements conferred by the Final Constitution are to be determined separately from a consideration of the availability of resources.

[1] *Grootboom* (supra) at para 46.

[2] *Khosa* (supra) at para 45.

[3] Ibid at para 62.

[4] Further important features of the 'availability of resources' limitation that have not been adequately dealt with by the Court are discussed at § 56A.4 infra.

(vii) *The reasonableness approach*

General understanding of reasonableness

Soobramoney represents the first decision the Constitutional Court had to make in relation to socio-economic rights. The decision was difficult and had tragic results: Mr Soobramoney died within four days of the judgment. The statements of the Court in this decision must be viewed in light of the Court's cautious approach to novel doctrinal questions. For instance, the Court stated that it would interfere with State decisions relating to budgets only where they are irrational. This standard of review appears to have been revised in more recent decisions. The Court has held that State programmes should be evaluated for their reasonableness rather than their rationality.[1]

Grootboom was the first major decision to develop the reasonableness approach. Its use in this context is partially reminiscent of its use in administrative law.[2] For example, Hoexter writes that the notion of reasonableness is designed to refer to that which lies within the 'limits of reason' and allows for a legitimate diversity of views. What is reasonable is not only that which is correct but refers to decisions that lie in between correctness and capriciousness. A reasonable decision is one that is supported by reasons and evidence, rationally connected to a purpose, and is objectively capable of furthering that purpose. A reasonable decision generally also tends to reflect proportionality between ends and means, and between benefits and detriments.[3] The notion of reasonableness is thus designed to allow for the substantive judicial review of decisions by another branch of government, whilst granting the original decision-making body a margin of appreciation.

This standard conforms to the separation of powers doctrine, and the idea that the body that has been mandated to make a decision or has the greatest institutional competence to do so may choose between a number of measures that fall within the range of the reasonable. In the context of socio-economic rights, reasonableness allows the legislature and executive a margin of appreciation in deciding on the measures that need to be taken. Thus, in response to doubts about the institutional competence of courts in making judgments on socio-economic rights,[4] or the legitimacy of judicial decision-making in this

[1] See, for example, T Roux 'Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court' (2003) 4 *Democratization* 10, 97 (Discussing the different standards of review adopted by the Court in socio-economic rights matters.)

[2] Sunstein terms the court's approach the 'administrative law model of socio-economic rights'. See CR Sunstein 'Social and Economic Rights? Lessons from South Africa' (2001) 11 *Constitutional Forum* 123. But see M Wesson 'Grootboom and Beyond: Reassessing the Socio-Economic Rights Jurisprudence of the South African Constitutional Court' (2004) 20 *SAJHR* 284 (Critiques Sunstein's model.)

[3] C Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484, 509–13. See also HWR Wade & CF Forsyth *Administrative Law* (2000); M Elliott 'The Human Rights Act and the Standard of Substantive Review' (2001) 60 *CLJ* 301.

[4] See, eg, E Mureinik 'Beyond a Charter of Luxuries' 1992 (8) *SAJHR* 464.

arena,[1] the Constitutional Court has crafted a doctrine of reasonableness that allows it to demonstrate appropriate deference to the legislature and executive.

Reasonableness is also a notion familiar from the limitations analysis in FC s 36.[2] In this context it involves a proportionality analysis investigating the importance of the ends involved, the relationships between means and ends and the use of the least restrictive means to further those ends. From the dicta of the courts, however, it does not appear that reasonableness in the context of socio-economic rights replicates the notion that appears in administrative law, nor does it map exactly onto the notion of reasonableness used in the limitations analysis. Rather, it is something in between that can only be understood by considering its specific features.

Specific features of reasonableness

The most extensive discussion of reasonableness takes place in *Grootboom*. However, *TAC* and *Khosa* each add to our understanding of what is involved in this test. The list below reflects an attempt to systematize some of the thinking of the Constitutional Court on this issue:

(1) A reasonable programme must allocate responsibilities and tasks to the different spheres of government.
(2) It must ensure that the appropriate financial and human resources are available.
(3) The programme must be capable of facilitating the realization of the right in question.
(4) A wide range of possible measures can be reasonable. The question is not whether other measures are more desirable or favourable. (This criterion seems to indicate a difference between reasonableness in the context of socio-economic rights and reasonableness in relation to the limitations clause; the limitation clause requires that the measures adopted be the least restrictive means of violating a right and realising an important social purpose.)[3]
(5) The measures must be reasonable 'both in their conception and their implementation'.
(6) A reasonable programme must be balanced and flexible.
(7) A reasonable programme must attend to 'crises': a reasonable programme must 'respond to the urgent needs of those in desperate situations'.
(8) A reasonable programme must not exclude 'a significant segment' of the affected population.
(9) A reasonable programme must balance short, medium and long-term needs.[4]

[1] See, for instance, D Davis 'The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 *SAJHR* 475.
[2] See S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 34.
[3] See Woolman & Botha (supra) at § 34.7.
[4] *Grootboom* (supra) at paras 39–46, 52, 53, 63–69, 74, 83.

(10) A reasonable programme does not render the best the enemy of the good: it is not necessary to design the ideal programme prior to its initial implementation. For instance, in *TAC*, waiting for the best programme to be developed for a protracted period of time before deciding to extend the use of nevirapine beyond the research sites was not reasonable given the benefits that could be achieved by rolling out the drug in the interim.[1]

(11) A reasonable programme will not discriminate unlawfully between persons on grounds which can have a serious impact upon dignity.[2]

(c) Beneficiaries of health-care rights as opposed to the ambit of the right: application not interpretation

The approach outlined thus far concerns the content of health-care rights; this does not, however, answer the question as to who is entitled to such rights. The recent case of *Khosa* dealt with this question. It concerned a number of Mozambican citizens ('the applicants') who had acquired the status of permanent residents in South Africa after living in the country since 1980. All of these people were destitute and thus would have been entitled to pension grants as well as other social assistance grants — such as child-support grants — but for the fact that they were not South African citizens.[3] The applicants challenged the constitutionality of prevailing legislation (the Social Assistance Act 59 of 1992) that limited social assistance grants to South African citizens. They argued that FC s 27 guaranteed the right to social security to 'everyone'. Because 'Everyone', they argued, included permanent residents, the legislation excluding this group was unconstitutional.

After confirming the approach towards the content of rights in *Grootboom* and *TAC*, Mokgoro J, writing for the majority, went on to consider the ambit of the right to have access to social security. The Court reasoned that certain rights such as political rights (FC s 19) and the right to have access to land have been expressly limited to citizens (FC s 25(5)). However, FC s 27 does not contain such a modification — it applies to 'everyone'. Since there was no indication that FC s 27 was limited only to citizens, Mokgoro J held that the word 'everyone' could not be construed as referring only to citizens.[4]

The Court then curiously applies its 'reasonableness' approach — that was developed in the context of providing normative content to socio-economic rights — to the question of scope.[5] It asks whether the exclusion of permanent

[1] *TAC* (supra) at para 81.
[2] *Khosa* (supra) at para 68.
[3] Ibid at paras 3–4.
[4] Ibid at para 47.
[5] There appears to be a conflation here of two separate questions: the question of scope and the question of content. This matter cannot, however, be addressed in detail here. Iles argues that the difference determines whether the Court should have decided the case under the internal limitations clause or the general limitations clause. See K Iles 'Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses' (2004) 20 *SAJHR* 448.

residents from having access to social assistance grants is reasonable. In reaching a conclusion on this matter the Court considers a number of factors. First, it considers the purpose of providing social security to those in need. The reason for the inclusion of a right to social security was because 'as a society we value human beings and want to ensure that people are afforded their basic needs.'[1] Such a purpose included within its ambit the needs of non-citizens. Secondly, there were no good grounds for differentiating between citizens and permanent residents in relation to social assistance benefits. Permanent residents have made South Africa their home and, like citizens, have lived in the country legally for a considerable length of time. In most respects, permanent residents also have similar obligations to citizens; it thus seems unclear why they should not achieve similar benefits.[2] On the evidence, the inclusion of permanent residents would not seem to place an inordinate burden on the state.[3] The impact, however, of the exclusion of permanent residents forces them into relationships of dependency with families, friends and communities. For them, Mokgoro J writes, 'the denial of the right is total and the consequences of the denial are grave. They are relegated to the margins of society and are deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution.'[4] In light of these considerations, the Court reaches the conclusion that insufficient reasons exist for the invasive treatment of the rights of permanent residents and that consequently, 'the exclusion of permanent residents is inconsistent with section 27 of the Constitution'.[5] In light of this, the Court orders that the words 'or permanent residents' be read into the legislation (after the citizenship requirement) so as to allow for benefits to be allocated to permanent residents.

Although *Khosa* dealt with social assistance benefits, it is likely that its reasoning will be applicable to the rest of FC s 27. FC s 27 was said to involve the protection of the basic needs of people within South Africa. The protection of the health of permanent residents falls clearly within the ambit of this purpose and thus it is likely that permanent residents will have the same rights as citizens in connection with health care.

The fact that the Court indicates that there is a universalist justification for these rights could, however, form the basis of an extension of such rights to all people within the borders of South Africa, including illegal immigrants and temporary residents. The court in *Khosa* did not discuss this issue in detail but indicated that, given the tenuous nature of the links such individuals have to the country, there may be a justification for denying them social assistance benefits. In relation to illegal immigrants, it would make no sense for the law to regard their very presence as illegal, but to be able to use that presence to secure a legal entitlement to social assistance benefits. In relation to temporary residents,

[1] *Khosa* (supra) at para 52.
[2] Ibid at para 59.
[3] Ibid at paras 60–62.
[4] Ibid at para 77.
[5] Ibid at para 85.

matters are not so simple. Temporary residents often become permanent residents and legally reside in the country. If they become destitute whilst in the country, it is unclear why the temporary nature of their stay should in any way diminish their entitlement to assistance. If the criterion upon which benefits is distributed is one of need and dignity, then the automatic exclusion of temporary residents does not appear to be clearly justifiable.

This reasoning applies a fortiori in the case of health care, and, in particular, health care for those suffering from acute conditions. Whilst social assistance benefits may be said to be linked to permanence and one's contribution to a community, health care is a requirement of all who fall within the borders of a country. Anyone anywhere can become ill at any time. To allow someone to die or suffer merely because they are temporarily or even illegally resident in a country runs counter to basic universalist principles of political morality.[1] Many societies, such as those in Europe, provide medical assistance for anyone who falls upon hard times within their countries. This is not dependent on their status in the country (for example, as a tourist). Common humanity and solidarity dictate that a sick person should be treated irrespective of who they are or why they are in a country.[2] At international law, this principle extends to the obligation on an army to treat the wounded enemy soldiers it captures.[3] Thus, in the case of access to health-care services (even if not in the case of social assistance grants), the judgment in *Khosa* should be extended to all persons within South Africa irrespective of their status.[4]

[1] The basis of this duty may lie in need or simply human vulnerability. See, for example, RE Goodin 'Vulnerabilities and Responsibilities: An Ethical Defence of the Welfare State' in G Brock (ed) *Necessary Goods* (1998).

[2] Where a person suffers from a chronic condition or one that requires medical treatment over a long period, it may be argued that this kind of care is similar to a social benefit and that the same legal regime should apply: treatment of such conditions should only be available to those with more permanent connections to the political community concerned. Tourists and illegal immigrants may well not qualify for such treatment.

[3] Article 3(2) of the Geneva Convention Relative to the Treatment of Prisoners of War (1950) 75 UNTS 135 (ratified by South Africa on 31 March 1952). The same is true of prisoners, for whom society often has little sympathy. See the discussion in § 56A.2*(a)* of *Van Biljon v Minister of Correctional Services.* 1997 (4) SA 441 (C), 1997 (6) BCLR 789 (C).

[4] The question of scope also includes the question of our duties to non-human animals. Animals under human control may well have a right to medical treatment from those within whose care and control they fall. A right to such treatment might be implied from the duty to avoid cruelty and neglect in the Animal Protection Act 71 of 1962. It could also be argued that the term 'everyone' in FC s 27(1) should include non-human animals to the extent that they are capable of having these rights attributed to them. At present, it is generally accepted that the rights in the Bill of Rights are only applicable to natural persons (and, in some cases, to juristic persons). See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 31.3. At this stage in our legal development, only human beings have been recognized as constituting natural persons. In my view, animals are capable of bearing rights, and our law should develop to recognize such rights. For some writing on this question, see P Singer *Animal Liberation* (2nd Edition, 1995); T Regan *The Case for Animal Rights* (1988); S Wise *Rattling the Cage: Towards Legal Rights for Animals* (2001).

(d) The relationship between internal and external limitations

Khosa also considered but did not decide some difficult questions relating to the limitation of socio-economic rights, in particular, the relationship between the internal limitation clause in each socio-economic right (FC s 26(2) and FC s 27(2)) and the general limitation clause in FC s 36. After raising this question, both the majority and the minority declined to decide it.[1]

Though this matter cannot be engaged at length here, it is unlikely that the indeterminate notion of reasonableness can be shown to bear an inherently different meaning in these two contexts.[2] It would also be extremely confusing for these notions to bear entirely different meanings. However, some guidance can be given as to the distinction between these two enquiries by considering the differing functions of the internal limitation and the general limitations clause. The internal limitation is focused on a particular right: in this context, the right to have access to adequate health-care services. The enquiry requires us to consider whether, in the context of this *particular* right, and the competing priorities in relation to this *particular* right, the measures taken by the State are reasonable.[3]

FC s 36 involves a more global enquiry. It requires us to situate the right to have access to health-care services and the measures adopted by the State against a background of others rights and interests that people possess. It allows for the consideration of legitimate government purposes other than those relating to the particular right that has been limited, and requires consideration of a measure's impact on society beyond the sphere of health care.

In standard Bill of Rights analysis, we are required to focus first on a particular context — of health care for instance — and to consider the interests at stake in this context and the measures that the State is required to adopt to alleviate suffering in this area. Policies and decisions can be adopted in this context that may address the problems relating to health care or fail to do so. *TAC* is an example of a case where there was no need for a wider enquiry: the State failed to adopt a reasonable (or even rational) policy relating to the health care of individuals, and there were virtually no ramifications for other policy areas because of the negligible costs of rolling out a drug that had been offered to the State free of charge. The failure to adopt a comprehensive programme for rolling out the drug was therefore patently unreasonable.

[1] *Khosa* (supra) at paras 83–84 and 105–106.

[2] For alternative constructions of the relationship between FC s 36 and socio-economic rights, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 34; S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) 33-54–33-56; P de Vos 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution' (1997) 3 *SAJHR* 67, 79–80; M Pieterse 'Towards a Useful Role for Section 36 of the Constitution in Social Rights Cases' (2003) 120 *SALJ* 41–48 (Pieterse 'Towards a Useful Role'); Iles (supra) at 455–57.

[3] See Woolman & Botha (supra) at § 36.6.

As an abstract matter, however, the existence of the FC s 36 enquiry suggests that a consideration of the health care context alone may not be enough. There may well be legitimate governmental purposes unrelated to health care that could justify a limitation of an FC s 27 right in terms of FC s 36 that could not be limited in terms of FC s 27(2).[1]

(e) FC s 27(3)

(i) *Summary of the Constitutional Court's approach to FC s 27(3)*

FC s 27(3) provides that no one may be refused emergency medical treatment. The question as to what constitutes emergency medical treatment arose in *Soobramoney*. In this instance, the Court could not avoid giving content to the right since its ambit was unclear. The Court held that emergency medical treatment is to be provided in the following cases:

- There must be a sudden or unexpected event or catastrophe.[2]
- This event must be of a passing nature and not be continuous.[3]
- The event must lead to a person requiring medical attention or treatment.[4]
- To the extent such treatment is necessary and available, it must be provided.[5]

(ii) *Analysis of the Constitutional Court's approach to FC s 27(3)*

In *Soobramoney*, counsel for the applicant contended that people who suffer from terminal illnesses and require treatment such as renal dialysis to prolong their life are entitled to such treatment by the State in terms of FC s 27(3).[6] Chaskalson P held, on behalf of the majority, that there were several reasons against extending the phrase 'emergency medical treatment' to include ongoing treatment for chronic illnesses for the purpose of prolonging life. First, this was not the ordinary meaning of the term and, 'if this had been the purpose which s 27(3) was intended to serve, one would have expected that to have been expressed in positive and specific terms'.[7] Secondly, if FC s 27(3) were to be construed in this broad manner, it would make it substantially more difficult for the State to fulfil its primary obligations under FC ss 27(1) and (2) to provide health care services to 'everyone' within its available resources. Thirdly, it would entail the prioritizing of the treatment of terminal illnesses over other forms of medical care and would reduce the resources available to the State for purposes such as preventative health care and medical treatment for persons suffering from illnesses or bodily infirmities which are not life threatening. Again, Chaskalson P states,

[1] See Woolman & Botha (supra) at § 36.6.
[2] *Soobramoney* (supra) at para 18–20, 38, 51.
[3] Ibid at para 21, 38.
[4] Ibid at para 18.
[5] Ibid at para 20.
[6] Ibid at para 12.
[7] Ibid at para 13.

'for such a conclusion to be reached, clearer language would have to be used than occurs in s 27(3).'[1]

Moreover, the Court holds that FC s 27(3) itself is couched in negative terms: it is a right not to be refused emergency treatment. This means, according to the Court, that the purpose of the right seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities. Chaskalson P also suggests that, in light of our history, this provision is designed to prevent, for instance, the refusal to grant emergency treatment on grounds of race.[2] Thus, the content of the section is to ensure that

> a person who suffers a sudden catastrophe which calls for immediate medical attention should not be refused ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment. What the section requires is that remedial treatment that is necessary and available be given immediately to avert that harm.[3]

Since Mr Soobramoney suffered from a chronic condition and required dialysis treatment two to three times a week, his condition did not fall within the ambit of an emergency. His incurable condition was an ongoing state of affairs resulting from a deterioration of his renal function. Consequently, FC s 27 (3) did not apply to such facts. Madala J, in his separate judgment, agreed with Chaskalson P that FC s 27(3) envisaged a

> dramatic, sudden situation or event which is of a passing nature in terms of time. There is some suddenness and at times even an element of unexpectedness in the concept 'emergency medical treatment.'[4]

Sachs J tied the purpose of FC s 27(3) to the particular

> sense of shock to our notions of human solidarity occasioned by the turning away from hospital of people battered and bleeding or of those who fall victim to sudden and unexpected collapse. It provides reassurance to all members of society that accident and emergency departments will be available to deal with the unforeseeable catastrophes which could befall any person, anywhere and at any time.[5]

He held further that the values protected by FC s 27(3) would be undermined rather than reinforced by any unwarranted conflation of emergency and non-emergency treatment.[6]

One of the important consequences of this judgment is that no one who satisfies the court's criteria can be refused treatment. In light of the split between private and public health care in South Africa, FC s 27(3) arguably places an obligation on private health-care providers to offer emergency medical treatment to individuals even if the people who are brought to these hospitals lack health insurance.

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[1] *Soobramoney* (supra) at para 19.

[2] FC s 9 outlaws such conduct and it is thus unclear why there would need to be a specific clause to guard against this evil.

[3] *Soobramoney* (supra) at para 20.

[4] Ibid at para 38.

[5] Ibid at para 52.

[6] Ibid.

The Court clearly had to restrict the scope of FC s 27(3) for fear of supplanting the right in FC s 27(1)*(a)*.[1] On the other hand, the negative formulation of the right is confusing: if no one may be refused treatment, must they, as a necessary corollary, be provided with it? The formulation suggests that the State merely has a duty not to interfere, but it is unclear how one can fail to refuse treatment without providing it. The supposedly negative formulation thus seems to imply that there are in fact positive obligations on the State. FC s 27(3) could, in addition, be developed to impose a positive duty on private health-care providers to offer emergency services where they have facilities and services available.[2]

However, the Court did not in fact indicate the extent to which the State is required to take measures to ensure that people are provided with emergency treatment.[3] For instance, most cities in South Africa have a chronic shortage of ambulances. In remote areas, helicopters would be necessary to ensure people have access to emergency medical treatment. In order to notify authorities about an emergency, some form of communication system is necessary. Is the State required to ensure that telephones are placed in all areas in the country to enable citizens to have access to emergency medical treatment? Is the State required to have adequate ambulance facilities and provide helicopters for inaccessible areas? These questions still need to be determined. It is quite clear, however, that without some of these measures, FC s 27(3) will be meaningless for many people in this country.

56A.3 General Critique of the Constitutional Court's Approach to FC s 27

This brings to an end the discussion of the various facets of the right to health-care services in FC s 27.[4] The main approach adopted by the Constitutional

[1] See Liebenberg 'The Interpretation of Socio-Economic Rights' (supra) at 33–21 (Agrees with this line of analysis when she states that the 'restriction of the scope of the right to genuine medical emergencies seems appropriate'.) Scott and Alston, however, argue that the Court's interpretation of FC s 27(3) renders the right virtually redundant in light of the fact that its content surely falls within any minimal understanding of FC s 27(1). S Scott & P Alston 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*'s Legacy and *Grootboom*'s Promise' (2000) 16 *SAJHR* 206, 247.

[2] Scott and Alston further suggest this as a possible manner in which to avoid rendering the right in FC s 27(3) redundant. See Scott & Alston (supra) at 248. For more on the possible horizontal application of socio-economic rights, see also Liebenberg 'The Interpretation of Socio-Economic Rights' (supra) at 33-57–33-59; Woolman 'Application' (supra) at § 31.4.

[3] See *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) AIR SC 2426 (Indian Supreme Court required positive measures to be taken to ensure emergency medical facilities were available.) See also Liebenberg 'The Interpretation of Socio-Economic Rights' (supra) at 33–21.

[4] The Final Constitution contains specific guarantees of health care for children and prisoners. The focus of this chapter has been on the right in FC s 27(1), which is a right to which 'everyone' is entitled. The special vulnerability of children may require the State to take special measures to protect their health. In the case of prisoners, the fact that their imprisonment deprives them of resources to gain access to medical treatment imposes a duty on the State to provide them with these resources. It has been held that

Court has been to focus on the notion of 'reasonableness'. The Court's 'reasonableness approach' has attracted a number of important academic critiques.[1] The primary problem raised is that the vague notion of reasonableness fails to provide adequate content to socio-economic rights. I shall now elaborate on a few of these critiques.

(a) The failure to integrate FC s 27(1) and (2)

In *TAC* the Court held that FC ss 26(2) and 27(2) require the State to take 'reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right'. The reference to 'this right', it claimed, is clearly aimed at the FC ss 26(1) and 27(1) rights. This wording, together with the inclusion of these subsections within the same overall section of the Bill of Rights, provides evidence that the two subsections are linked and meant to be read together. The Court reasoned that this defeated the approach of the amici curiae who contended that the Final Constitution conferred on each person two distinct causes of action: one under FC ss 26(2) and 27(2), and another under FC ss 26(1) and 27(1) read with FC s 7(2).

From a purely formal point of view, the Court's approach seems to offer the more natural construction of the relationship between FC ss 27(1) and (2). Yet, the Court's argument still raises interpretative difficulties.[2] The Court is clearly eager to emphasize that the rights referred to in FC ss 26(2) and 27(2) are the same rights referred to in FC ss 26(1) and 27(1) respectively.[3] This argument implies that the reasonable measures that the State adopts must be assessed in relation to whether or not they are aimed at the progressive realization of the rights expressed in FC ss 26(1) and 27(1). If so, then an enquiry into the reasonableness of the measures adopted by the State must also involve an enquiry into the content of the rights contained in FC ss 26(1) and 27(1). The problem with the Court's approach in *TAC* is that it fails to provide an analysis of what the

the State has a higher duty of care towards prisoners than towards free persons for the following two reasons: first, they are solely dependent on the State for treatment and cannot use any of their own income to obtain treatment unlike free persons; secondly, the conditions in the prisons often render individuals peculiarly susceptible to illness. These principles are discussed in *Van Biljon*.

[1] See D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (2001) 119 *SALJ* 48; D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 1; Liebenberg 'The Interpretation of Socio-Economic Rights' (supra) at 33-38–33-41; S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 22; Pieterse 'Towards a Useful Role' (supra); M Pieterse 'Coming to Terms with the Judicial Enforcement of Socio-Economic Rights' (2004) 20 *SAJHR* 383 (Pieterse 'Judicial Enforcement').

[2] See Scott & Alston (supra) at 249 (Argue that already in *Soobramoney*, the Court shows that it has not applied its mind to the precise role of FC s 27(1) and (2).)

[3] *TAC* (supra) at para 30.

right to have access to health-care services involves. What are the services to which one is entitled to claim access? Do these services involve preventative medicine, such as immunizations, or treatment for existing diseases, or both? Does the right entitle one to primary, secondary, or tertiary health care services, or all of these?[1] The enquiry concerning the reasonableness of the measures adopted by government cannot be conducted in a vacuum and requires that some content be given to the right to which these measures are designed to give effect.

(b) Content of the right to health-care services

As will be discussed in § 56A.4 below, the normative content of the right to health has been analysed by the UNCESCR in its General Comment 14,[2] and by a number of writers.[3] No doubt the task of specifying the content of this right is a difficult matter, and the Court should not attempt to provide in one case a final and exhaustive definition of what is included therein. That said, *TAC* could have provided greater specification of the obligations imposed by the right.

For instance, the Final Constitution requires that when interpreting rights, a court must consider international law.[4] Thus, the right in *TAC* could have been interpreted in light of the ICESCR, which provides specifically in article 12(2)(a) that there be provision for the 'reduction of the still-birth rate and of infant mortality and for the healthy development of the child'. The UNCECSR has interpreted this article as requiring State parties to adopt measures designed to improve child and maternal health, and to extend sexual and reproductive health services. Recognizing such an obligation to provide the services necessary for healthy child development could have provided the basis for the decision to require the government to make nevirapine available beyond the research sites.

Similarly, an argument could have been made to determine the content of FC s 27(1)*(a)* in accordance with article 12(2)(c) of the ICESCR, which provides for the 'prevention, treatment and control of epidemic, endemic, occupational and other diseases'. The UNCECSR has interpreted this article to require the provision of urgent medical care in cases of epidemics.[5] The *TAC* Court could have

[1] I do not suggest that the Court was required to answer all these questions, but that it was obliged to provide some analysis of the right in order to reach the conclusion that it did: that access to nevirapine fell within the entitlements conferred upon people by FC s 27(1)*(a)*.

[2] UNCESCR General Comment No 14 'The Right to the Highest Attainable Standard of Health' (Article 12 of the Convention)(22nd Session, 2000) UN Doc. E/C. 12/2000/4 available at www.unhchr.ch/tbs/doc.nsf (accessed on 28 January 2006)('GC 14').

[3] See, for instance, P Hunt *Reclaiming Social Rights: International and Comparative Perspectives* (1996); B Toebes *The Right to Health as Human Right in International Law* (1999); A Chapman 'Core Obligations Related to the Right to Health' in D Brand & S Russell (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002).

[4] FC s 39(1)*(b)*.

[5] GC 14 (supra) at para 16.

reached its decision by recognizing that FC s 27(1)*(a)* imposed at least this obligation on the State.

Some of the judges seem to have shown a willingness in *New Clicks* to provide some normative content to the right in FC s 27(1).[1] Ngcobo J, for instance, made the important statement that 'the right to health care services includes the right of access to medicines that are affordable. The state has an obligation to promote access to medicines that are affordable'.[2] This would involve the imposition of specific obligations upon the State: *New Clicks* however, turned on issues of administrative law rather than on FC s 27(1).

In sum, the Court has approached socio-economic rights cases by asserting that the test in terms of the Final Constitution is whether the measures adopted by the government are reasonable. This approach fails to integrate FC ss 27(2) and 27(1): it focuses the entire enquiry on FC s 27(2) without providing a role for FC s 27(1). Yet, FC s 27(1) is, in fact, the primary statement of the right, and the Final Constitution directs us to evaluate the reasonableness of government policy in relation to an understanding of what the right in question demands of the State.

(c) Reasonableness and its lack of content

This structural point is mirrored by a further complaint against the reasonableness approach. By focusing on the notion of 'reasonableness' the Court has demonstrated that it will scrutinize the government's policy and conduct for its ability to meet this standard of justification. This development ties in with a prominent argument for constitutionalism: that it resists a culture in which authority is to be respected for its own sake and promotes an environment in which all decisions of those in positions of authority, even those of the legislature, must be justified.[3] An emphasis on justification, in turn, has certain salutary effects on laws and policies: it requires a high degree of accountability and thus provides incentives for public servants to consider carefully their reasons for making decisions, thus helping to expose any weaknesses.[4]

The distinctive role of rights, however, is not simply to draw attention to a failure in the justification of government policy. It is a particular type of failure that we are concerned with: a failure to address adequately certain vital interests. One of the main theoretical defects of this approach to adjudicating socio-economic rights is the failure to place the fundamental interests of individuals at the centre of its enquiry. Instead, the Court has attempted to focus the enquiry on

[1] *Minister of Health & Another v New Clicks SA (Pty) Ltd & Others (Treatment Action Campaign and Innovative Medicines SA as Aminci Curiae)* 2006 (1) BCLR 1 (CC) at para 514. For a brief discussion of this case, see § 56A.4*(e)* infra.

[2] Ibid at para 514.

[3] See E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31.

[4] See E Mureinik 'Beyond a Charter of Luxuries' (1992) 8 *SAJHR* 464.

more abstract and procedural concerns that can tend to obscure the vulnerabilities of individuals.

But it is difficult to find adequate reasons for including socio-economic rights in the Final Constitution without recognizing that they are designed to protect the fundamental interests of individuals in having access to such essential goods as housing, food, water and health care. Thus, the roots of the reasonableness approach do not clearly correlate with the intention behind including socio-economic rights in the Final Constitution.

(d) Reasonableness and context

What is considered reasonable will vary in large measure with the circumstances being evaluated.[1] However, even this approach requires the articulation of some general standards that can be used to appraise State action in a variety of contexts. Otherwise, the enquiry into reasonableness would be empty. For instance, in *Grootboom,* it was stated that a government programme that was reasonable must be balanced and flexible. That general standard can then be applied to a variety of cases to see whether the programme or policy in question is in fact balanced and flexible.[2]

A contextual determination of reasonableness thus presupposes certain a-contextual standards that guide our appraisal in different contexts. If we analyse what is required by the reasonableness approach more closely, it involves evaluating the justifiability of the links between policies that are adopted and ends that are constitutionally endorsed. It becomes evident in this context that the very contextual sensitivity of reasonableness rests on the fact that different circumstances allow for different conclusions concerning these linkages. However, in any such enquiry, it must be possible to specify the ends that are being aimed at in a way that is general and not specifically related to the particular context. Thus, the very benefits of the reasonableness approach rest upon our ability to identify general ends against which government policy must be evaluated. In this context, those ends are provided by the rights in FC ss 26 and 27. An approach that rejects the need to determine the content of these rights is empty.

[1] The Court seems to recognize this point in *TAC*. See *TAC* (supra) at para 24.

[2] It is unclear whether the Court has correctly identified flexibility as being 'reasonable' in all circumstances. In *Soobramoney,* the government's a policy of rationing the provision of health-care resources was fairly inflexible, yet it seemed reasonable in light of the desire to use the available resources in the best possible manner. The Court's analysis demonstrates the difficulty of giving content to such a vague notion as reasonableness.

(e) Separation of powers

The formalism of the Court's current approach means that 'reasonableness' stands for whatever the Court regards as desirable features of government policy. The problem with such an approach is that it lacks a principled basis upon which to found decisions in socio-economic rights cases. Without clear guidance as to the role of the courts in these cases, the Constitutional Court and other courts may overstep their legitimate role in this area by ruling on matters that should be left to other branches of government. They may also fail to intervene when they should, and their orders may lack practical efficacy.[1] At the same time the Court's amorphous standards fail to provide guidance to other branches of the State concerning the content of these rights and the duties they impose.[2]

(f) Remedies

The vagueness of the Constitutional Court's reasonableness approach is reflected in its orders. In *Grootboom*, the Court merely made a declaratory order, which has been largely ineffective.[3] In *TAC*, the Court went further and issued a mandatory order requiring the government to make nevirapine available beyond the dedicated research sites it had identified. However, the Court declined to exercise supervisory jurisdiction over the implementation of its order. This deference occurred in the context of a government policy that had singularly failed to deal with the HIV/AIDS crisis in South Africa, and a government that was reluctant to roll out nevirapine. This lack of a structural injunction led to delays in the rolling out of the drug in a number of provinces, a situation that, arguably, could have been avoided if the Court had opted for a more intrusive remedy.[4] Numerous academics have criticized the *TAC* Court for its order in this case and have called for more effective remedies to be implemented in future cases. The types of remedy suggested include mandatory orders, structural interdicts (which involve the courts in ongoing supervision to ensure that their orders are implemented) and constitutional damages.[5]

[1] See Bilchitz 'Towards a Reasonable Approach' (supra) at 10.

[2] Pieterse 'Judicial Enforcement' (supra) at 407 (States that the 'interpretative task should be viewed as courts assisting other branches of government to establish the precise content of their obligations rather than as an antagonistic mandate from the judiciary to the legislature and executive.')

[3] See K Pillay 'Implementing *Grootboom*: Supervision Needed' (2002) 3(1) *ESR Review* 13–14; K Pillay 'Implementation of *Grootboom*: Implications for the Enforcement of Socio-Economic Rights' (2003) 6 *Law, Democracy and Development* 255; M Swart 'Left out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor' (2005) 21 *SAJHR* 215, 215–16.

[4] See Bilchitz 'Towards a Reasonable Approach' (supra) at 23–24; Swart (supra) at 223.

[5] See on the issue of creating more effective remedies, W Trengove 'Judicial Remedies for Violations of Socio-economic Rights' (1999) 1(4) *ESR Review* 8; Bilchitz 'Towards a Reasonable Approach' (supra); Pieterse 'Judicial Enforcement' (supra); J Klaaren 'A Remedial Interpretation of the Treatment Action Campaign Case' (2003) 19 *SAJHR* 460; K Roach & G Budlender 'South African Law on Mandatory Relief and Supervisory Jurisdiction' (2005) 122 *SALJ* 325; and Swart (supra) at 215.

56A.4 A Preferred Reading of FC S 27 that Draws on International Law

In § 56A.3, I argued that there are numerous weaknesses in the Constitutional Court's current approach to the right to have access to health-care services. This section sets out a preferred approach to this right that draws on some of the developments in international law concerning the right to health. It involves a discussion of the minimum core approach to the right, amplifies to the notion of progressive realization and develops a better understanding of the term 'available resources'.

(a) Philosophical progression: a right to the conditions necessary for health rather than a right to be healthy

Explicit discussions of the right to health at the international law level are of a relatively recent vintage. They can be traced to the Russian Revolution of 1917,[1] the serious economic misery of the Great Depression, and the horrors of the Second World War and the Holocaust.[2] Prior to this, health care for the sick was largely seen as the responsibility of private actors and civil society institutions, such as churches and charities.[3] Little thought was given to the exact nature of a State's responsibility for the health of its citizens.[4]

The early formulations of the right to health within human rights documents situate it within the general basic welfare rights of the individual. The first explicit mention of the right to health within an international human rights instrument is in article 25(1) of the United Nations Declaration of Human Rights:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[5]

[1] See E de Wet *The Constitutional Enforceability of Economic and Social Rights* (1996) 1–15 (Traces the turning point in the struggle for socio-economic rights to the Russian Revolution of 1917.)

[2] See Chapman (supra) at 39; B Toebes 'The Right to Health' in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights* (2001) 169, 171; and DM Chirwa 'The Right to Health in International Law: Its Implications for the Obligations of State and Non-state Actors in Ensuring Access to Essential Medicine (2003) 19 *SAJHR* 541, 543–44.

[3] See Chirwa (supra) at 543.

[4] One could trace this entitlement back to many of the early philosophical treatises that provided the foundation for rights discourse. For instance, the individual's basic interest in self-preservation in the theories of Thomas Hobbes and John Locke provide a very early basis for recognizing a fundamental individual right to health care. See T Hobbes *Leviathan* (1651, Penguin Classics Edition 1985) 192 and J Locke *Two Treatises of Government* (1690, Cambridge University Press Edition 1988) 271. Such a right can also be traced to political documents that represent the first major advances in the recognition of fundamental rights. See the French Declaration of the Rights of Man; the United States' Declaration of Independence; T Paine *Rights of Man* (1791).

[5] Universal Declaration of Human Rights (1948) GA res. 217A (III), UN Doc A/810 available at http://www.un.org/rights/50/decla.htm (accessed on 28 January 2006).

Health was thus seen as different from medical care and related to 'a right to an adequate standard of living, which included other basic needs'.[1] This formulation points to the wider role of health in the lives of human beings (and indeed other sentient creatures). Being in a state of health is a basic condition for the functioning of a human being: it is the state in which people can realize their purposes and goals and to be free from a range of unpleasant phenomenal experiences that hinder the enjoyment of life. Health would be what John Rawls terms a 'natural primary good': goods that are 'necessary conditions for realizing the powers of moral personality and are all-purpose means for a sufficiently wide range of final ends'.[2] It is a natural primary good as opposed to a social primary good because health cannot be completely guaranteed by any society.

This last point is important in understanding the evolution of the right to health at international law. One of the very first formulations of the right occurs in the Constitution of the World Health Organisation ('WHO').[3] The preamble recognizes that 'the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.' Health is understood in this document as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.'[4] Again, we see that health is understood in relation to general well-being. However, although health is often connected to this wider notion, conceptualizing the right to health in this manner was a recipe not only for theoretical confusion but also practical inaction.

A right entitles a human being to a certain good and allows for a claim to be made for this good against another party. The problem with conceptualising the right to health in this way is that no one can guarantee any other person that they will be in such a state of physical and mental well-being. Many of the factors affecting health lie within the province of the individual herself: smoking, for instance, can ruin a person's health, but this is generally an individual choice. The individual cannot ask anyone else to guarantee that she does not smoke: she must make that choice herself. Moreover, the actual state of health is not something that can be guaranteed by a society or even individuals themselves. Whilst one can limit the health risks one is exposed to, even fit young people at times naturally develop debilitating diseases. A right to health conceptualized in this manner seems to go against the basic facts of nature.[5]

[1] See Hunt (supra) at 113, quoting H Fuenzalida-Puelma & S Scholle Connor (eds) *The Right to Health in the Americas* (1989) 601.

[2] J Rawls 'Social Unity and Primary Goods' in S Freeman (ed) *John Rawls: Collected Papers* (1999) 367.

[3] World Health Organization ('WHO') Constitution (1946), available at http://www.opbw.org/int_inst/health_docs/who-constitution.pdf (accessed on 28 January 2006).

[4] Ibid at preamble.

[5] There have been many critiques of a right to health conceptualized in this way. See, for instance, V Leary 'The Right to Health in International Human Rights Law' 1994 (1) *Health and Human Rights* 24, 28; Hunt (supra) at 111; Chapman (supra) at 39; and Chirwa (supra) at 545.

Since there can be no right to be healthy, philosophical analysis shows that the right to health must mean something different. It must relate to that which can in fact be guaranteed to individuals by third parties: certain resources and conditions that are necessary for a person to be healthy. To maintain health and bodily functioning, certain goods are necessary. For instance, it is crucial that people are provided with food adequate to meet the nutritional requirements of a human being. Here, it is interesting to note, that one cannot just be provided with that level of food necessary to be free from threats to one's survival. Such a level of provision may well keep one alive but still undernourished. A person who is undernourished, however, will be hindered in the pursuit of a wide range of purposes. As such, if we wish to protect the conditions necessary to pursue diverse purposes,[1] we must make sure that people are not undernourished and constantly hungry. In such an instance, the food must be sufficient that human beings have the energy and vitality necessary to pursue a range of purposes. The level of food required does not entail that individuals share a basic interest in such luxuries as ice cream and caviar. However, it does mean that individuals have a basic interest in well-balanced nutritional food that enables them to be healthy and physically vigorous, thus being capable of realizing a wide range of purposes.

Similar remarks could be made in relation to human beings about having access to housing, clothing and medical care. Such goods all concern the resources and conditions that must be obtained if individuals are to be in conditions such that they are able to realize a wide range of purposes. Law can affect the ability of individuals to access these resources and conditions such that they are able to function optimally. A right to health ought to entail a right to have access to the resources and conditions necessary for human beings to function in a state of health. The right to health at international law embodies this understanding of the right. It goes beyond a right to health care services such as doctors and medicines,[2] and encompasses the right not to be exposed to dangerous conditions that threaten one's health through, for example, environmental pollution and degradation, or occupational safety hazards. The right to health thus becomes a shorthand expression with two components: a right to health care and a right to healthy conditions.[3] As has been mentioned, these two components are split in the Final Constitution.

[1] This argument assumes that the pursuit of diverse purposes is an important value for human beings. Such an account will be defended in my forthcoming book, D Bilchitz *Combating Poverty through Human Rights: The Justification and Enforcement of Socio-Economic Rights* (forthcoming, 2007). Similar accounts of value are provided by A Gewirth *Reason and Morality* (1978) and J Raz *The Morality of Freedom* (1986).

[2] The General Comment on the Right to Health ('GC 14') begins by recognizing that the right to the highest attainable standard of health is not a right to be healthy: it is a right 'to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health'. GC 14 (supra) at para 9. The Committee goes on to interpret the right to health as extending not only to timely and appropriate health care but also to the underlying determinants of health. These include 'access to safe and potable water and adequate sanitation; an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.' Ibid at para 11.

[3] Hunt (supra) at 111; Chirwa (supra) at 545. For an extensive discussion of the right to health at international law, see B Toebes *The Right to Health as Human Right in International Law* (1999) 245.

(b) A minimum core?

Despite, or because of, the diverse developments in a range of regional and international instruments, the exact content of the right to health remained unclear. Apart from the work of the World Health Organisation the rights possessed little content and were largely unenforceable. The Constitutional Court's approach thus far suffers from similar defects.

To cure this defect at international law, the UNCESCR drafted General Comment 14 on the Right to Health. The aim of this General Comment was to give greater content to the right to health contained in the ICESCR.[1] The UNCESCR had previously adopted what may be termed the 'minimum core approach' to socio-economic rights in GC 3. GC 3 outlines the general principles that govern the obligations of State parties to the ICESCR.[2] GC 3 states that a 'minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels

[1] The most important statement of the right to health at international law is in the ICESCR. Whilst there remains a right to an adequate standard of living in article 11, this is separated from the right to health enshrined in article 12. It reads as follows: '(1) The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) the provision for the reduction of the still-birth rate and of infant mortality and for the healthy development of the child; (b) the improvement of all aspects of environmental and industrial hygiene; (c) the prevention, treatment and control of epidemic, endemic, occupational and other disease; (d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness.' The ICESCR is available at http://www.unhchr.ch/html/menu3/b/a_cescr.htm (accessed on 28 January 2006). Numerous other international instruments contain a right to health. Perhaps the clearest and most explicit expression of such a right is contained in article 24 of the Convention on the Rights of the Child (1989) 1577 UNTS 3, UN Doc. A/RES/44/25 (ratified by South Africa on 16 July 1995) available at http://www.unhchr.ch/html/menu3/b/k2crc.htm (accessed on 28 January 2006). Since this relates specifically to children, it will not be dealt with in depth in this chapter, which deals with provisions of a more universal applicability. For more on children's rights and entitlements, see A Pantazis & A Friedman 'Children's Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (2nd Edition, OS, December 2004) Chapter 48. The Convention on the Elimination of All Forms of Racial Discrimination ('CERD') prohibits racial discrimination in the provision of health care and provides that health care must be provided on a basis of equality (1969) 660 UNTS 195 (ratified by South Africa on 10 December 1998). The Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') obligates states to ensure that discrimination in relation to health care is eliminated and that the provision of health-care services takes place on a basis of equality between men and women. (1981) UN Doc A/34/46 (ratified by South Africa on 13 December 1995). Particular provisions impose health-care obligations to provide adequate health care to women in connection with all matters relating to pregnancy. A range of regional instruments contains provisions concerning the right to health. These instruments include the European Social Charter as well as the Additional Protocol to the Inter-American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. Of particular relevance to South Africa is the fact that the African Charter of Human and Peoples' Rights contains a guarantee in article 14(1) of a general right to 'enjoy the best attainable state of physical and mental health'. It places an obligation on state parties to take the necessary measures to 'protect the health of their people and to ensure that they receive medical attention when they are sick'. The African Charter on the Rights and Welfare of the Child contains provisions similar to the Convention on the Rights of the Child. It recognizes health as a human right and provides a list of particular measures that the state must take in fulfilling these rights.

[2] See UNESCR General Comment No 3 'The Nature of States Parties Obligations' (Article 2(1) of the Convention)(5th Session, 1990) UN Doc. E/1991/23, available at www.unhchr.ch/tbs/doc.nsf (accessed on 28 January 2006)('GC 3').

of each of the rights is incumbent upon every State party'.[1] A State party in which any significant number of individuals is deprived of essential foodstuffs, primary health care, shelter and housing is in prima facie breach of its obligations. The UNCESCR went on to qualify this statement by recognizing that such an obligation must be considered in light of the resource constraints faced by a country. It concluded: '[i]n order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'[2]

General Comment 14 ('GC 14') amplifies the content of this minimum core obligation in the context of the right to health. GC 14, as guided by the Alma-Ata Declaration,[3] lays out the content of these core obligations as follows:

- To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- To ensure equitable distribution of all health facilities, goods and services;
- To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.

[1] GC 3 (supra) at para 10.
[2] Ibid.
[3] A most important development in understanding what is entailed by the right to health took place at an International Health Conference held at Alma-Ata. Delegates came up with a declaration that stressed the notion of primary health care: a notion that focuses upon the importance of preventing and treating illness at the community level. The idea here was that the problem in the world was not simply a shortage of health resources but a misallocation: instead of focusing all medical resources in urban areas with a very specialized, high-level and curative focus, there was a need to distribute such services more evenly and focus on the prevention of illness. After this conference, several indicators were developed which could help measure the level of primary health-care access in countries around the world. This strategy has had an impact on the right to health in international law and, as is explained in the text above, has come to form part of the minimum core obligations imposed by this right upon all State parties to the Covenant.

It also recognizes what it terms obligations of comparable priority. These obligations include the following:

- To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;
- To provide immunization against the major infectious diseases occurring in the community;
- To take measures to prevent, treat and control epidemic and endemic diseases;
- To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;
- To provide appropriate training for health personnel, including education on health and human rights.[1]

(c) Conceptual issues relating to the minimum core and the right of access to health-care services

The right to health care raises a number of complex questions about the notion of a minimum core.[2] Dealing with these questions involves recognizing that this concept serves several purposes. In this section, I shall attempt to disentangle some of these strands of thought.

First, it is important to consider the reasons for the introduction of this notion by the UNCESCR. In General Comment 3, the Committee provides two fairly rather opaque rationales: first, it mentions that it became necessary to recognize a

[1] GC 14 (supra) at paras 43–4.

[2] The Constitutional Court has declined to follow the minimum core approach adopted at international law, regarding the minimum core as possibly only being relevant to reasonableness rather than providing independent content to the right. Nevertheless, it is arguable that a number of its underlying reasons for reaching the conclusions it does rest upon notions that implicitly invoke the idea of a minimum core. See Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (2001) 119 *SALJ* 48 (Bilchitz 'Giving Rights Teeth') 497–99. The notion may also over time come to play a more important role in socio-economic rights jurisprudence both here and abroad. Moreover, most academics who have written on socio-economic rights in South Africa have been in favour of adopting a minimum core approach towards socio-economic rights. A non-exhausting list of writers in favour of adopting some variety of this notion, see C Scott & P Macklem 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 *Univ of Pennsylvania LR* 1, 77; S Liebenberg 'Socio-Economic Rights' in M Chaskalson, J Klaaren, J Kentridge, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) 41–43; P de Vos 'Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 67, 97; G van Bueren 'Alleviating Poverty through the Constitutional Court' (1999) 15 *SAJHR* 52, 57; S Scott & P Alston 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*'s Legacy and *Grootboom*'s Promise' (2000) 16 *SAJHR* 206, 250; T Roux 'Understanding Grootboom — A Response to Cass R. Sunstein' (2002) 12 *Constitutional Forum* 41, 50; and D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Layng the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 1 ('Towards a Reasonable Approach'). For some arguments against this approach see E de Wet *The Constitutional Enforceability of Economic and Social Rights* (1996) 96 and M Wesson 'Grootboom and Beyond: Reassessing the Socio-Economic Rights Jurisprudence of the South African Constitutional Court' (2004) 20 *SAJHR* 284.

minimum core obligation as a result of its experience in examining the reports of States concerning their compliance with the Covenant; secondly, it makes the following claim: '[i]f the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'etre.'[1]

The first reason fails to explain adequately the problems that the Committee had experienced and why recognition of a minimum core obligation would serve to rectify such difficulties. Presumably, these were practical difficulties relating to the development of normative standards against which to measure State compliance. One central reason for a minimum core is the ability to develop at least minimal benchmarks against which to evaluate state action.

The second reason provided by the Committee is incomplete: it requires an understanding of the purposes behind the Covenant and an explanation as to why recognition of a minimum core obligation is necessary to realize these purposes. As a result, the motivation for introducing a minimum core obligation into the discussions concerning socio-economic rights does not appear clear from the statements in the General Comment. That has allowed for different understandings of the purpose of a minimum core. A reconstruction of the reasons for such an approach is necessary in order to understand why it is of importance to the enforcement of socio-economic rights.[2]

Although a detailed reconstruction of these reasons cannot be provided here,[3] it is enough to note that the General Comment conflates two ways in which the minimum core can be understood. While both of these notions are of importance to the content and enforcement of social rights, they need to be distinguished conceptually.

(i) *The principled minimum core*

The first notion is what may be termed the 'principled minimum core'. Essentially, this notion relates to the statement by the UNCESCR that the minimum core describes 'minimum essential levels of the right'. The minimum core here refers to the minimum basic resources that are necessary to allow individuals to survive and achieve a minimal level of well-being. The minimum core does not encompass the resources necessary to live a decent life or a dignified life in a community, but rather the basic resources that allow people to move beyond starvation, thirst and homelessness.

[1] GC 3 (supra) at para 10.

[2] I cannot, for reasons of length, investigate all the reasons that have been offered for a minimum core approach, and instead provide here my own limited understanding.

[3] I have dealt with this subject elsewhere. See Bilchitz 'Giving Rights Teeth' and Bilchitz 'Towards a Reasonable Approach'. I engage it at greater length in my forthcoming book, *Combating Poverty through Human Rights, The Justification and Enforcement of Socio-Economic Rights* (forthcoming, 2007).

However, in the context of health care, the specification of a standard of resources that is necessary for survival causes problems for the minimum core approach. For one of the key evils sought to be remedied by the minimum core approach is a lack of practical benchmarks against which to evaluate the performance of States in meeting the needs of people. In relation to food, water and housing, it seems that the principled minimum core notion can provide such benchmarks. We can determine the amount of food necessary to prevent malnutrition or water necessary to avoid dehydration. The State's actions can then be measured against whether it provides this level of food or water. However, matters are different in the context of health care.

There are several strong reasons which can be given to show the difficulty, if not impossibility, of realizing the principled minimum core obligation in the context of health care. First, consider the definition of the principled minimum core obligation as the duty to ensure that individuals are able to survive. In relation to health care, the imposition of such an obligation would involve not only primary health care, but also the provision of expensive drugs and treatments such as dialysis and heart transplants that are necessary to preserve life. The imposition of such an obligation could preclude spending on any other area of human endeavour and result in the entire budget of a country being absorbed by health-care expenditure.[1] The problem with providing such care universally is explained eloquently by Moellendorf:

> The cost of providing needed medical resources to all citizens, unlike the costs of providing universal housing and access to food and water, may be limitless since the costs of new technology are high and resources needs will continue to grow as new treatments become available. If the costs of providing needed medical resources to all citizens is limitless, then clearly available resources are insufficient to meet all claims and a system of rationing available resources is needed.[2]

The second problem with focusing all expenditure on the provision of health-care services is that it will inevitably affect the realization of other less expensive needs, such as the provision of housing and food. The failure to realize these interests in turn has an impact upon the health of individuals. Thus, focusing expenditure purely on health-care services that meet survival needs can be self-defeating — even from a point of view that is concerned with the promotion of the health of individuals.[3]

[1] The problems mentioned here will vary in their severity according to the level of development of a country.

[2] D Moellendorf 'Reasoning about Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims' (1998) 14 *SAJHR* 327, 327–33.

[3] The UNCESCR has recognized these points by including access to basic food, water and shelter as part of the minimum core of the right to health. See GC 14 (supra) at para 11.

A UNESCO publication has recognized a similar point in relation to health-care services. The provision of equal access to high-technology care even in industrialized nations, it states, 'would inevitably raise the level of spending to a point which would preclude investment in preventive care for the young, and maintenance care for working adults.'[1]

Finally, the vast spending necessary to maintain everyone at the level of the principled minimum core in relation to health care would ensure that people could only attain a very low standard of living. Few resources would be available for people to use to fulfil their projects and goals beyond those focused on guaranteeing survival needs. It is unlikely that individuals will be content to live in a society which offers such minimal conditions and ambitions for individuals.

Thus, in the context of health care, it is possible to say that there is indeed a principled minimum core that provides strong reasons for prioritizing the health care necessary for survival and to alleviate suffering. However, there are strong countervailing reasons not to impose a practical obligation upon governments to realize the principled minimum core: simply put, giving people in all cases the level of health care necessary to survive can be too costly for a society. In light of this conclusion, it may be objected that the idea of a 'principled minimum core' loses its usefulness and that we should rather focus our energies on defining practical minimum standards against which government action can be measured.

It is important to make two points in response to this objection. The first is to point out the reasons behind identifying the principled minimum core apply to the case of health care as much as to any other important interest: they represent the necessary conditions that must be in place for individuals generally to be able to survive and be free from certain negative experiences which hamper their ability to lead good lives. This threshold recognizes the crucial importance to people of having the health care necessary to survive. Any failure to provide such health care has tragic consequences for the individual, and we should not attempt to pretend otherwise. The provision of such health care remains a priority and only strong reasons can justify the failure to provide such services. The principled minimum core ensures that we recognize the urgency of individual interests and that these have a central place on our list of concerns that governments are obliged to address. That importance persists even if there are strong reasons why a government cannot afford to provide the entire principled minimum core. To focus only on pragmatic standards loses sight of the urgency that certain interests have for individuals irrespective of resource constraints.[2] Tragic consequences may follow for individuals even if it is simply not possible to assist

[1] EB Brody *Biomedical Technology and Human Rights* (1993) quoted in *Soobramoney* (supra) at para 53.

[2] The urgency of many health needs may be the foundation of the view that the obligation exists irrespective of the resources available to a country. See B Toebes *The Right to Health as Human Right in International Law* (1999) 244.

them in realizing these important interests. A principled minimum core thus has the virtue of placing these interests in clear view, and, practically, still requiring justification for the failure to realize them.[1]

Secondly, the formulation of pragmatic minimum standards does not take place in a vacuum. The point is that without some form of principled foundation, the pragmatic standards are likely to be arbitrary. It is thus necessary to have a background theory which determines why the minimum practical standards are determined in the way that they are. Central to any formulation of practical standards in relation to fundamental rights must be a recognition of the interests involved, and the differing levels of urgency that must be attached to the realisation of such interests. Thus, even though the principled minimum core will not itself provide the minimum standard against which government action will be evaluated, it remains of importance in helping to define — along with a range of other factors — the practical standards which will be used.

(ii) *A pragmatic minimum threshold*

While there is good reason to retain the idea of a principled minimum core in the case of health care, a focus on the principled minimum core alone might mean that we fail to articulate practical minimum standards that governments must meet in the provision of health care.

Defining such a 'pragmatic minimum threshold' would involve a number of factors — apart from the urgency of the interests that I have already mentioned — only some of which are canvassed here. First, the cost of the treatment required would clearly be of relevance. Secondly, the availability of resources needs to be taken into account. Thirdly, it will be important to balance a strategy focused on preventing health-care problems from arising against a curative strategy that focuses on treating health-care problems as they arise. Finally, it is important to ensure that each individual is offered equal opportunities for treatment.

The pragmatic minimum threshold is thus arrived at through considering the principled minimum core as well as other theoretical considerations together with the resources and the capacity available in a particular society. These considerations are then used in the process of formulating a threshold which specifies a pragmatic minimum standard to which governments must devote urgent attention. This pragmatic standard is a conglomeration of several considerations that lacks the simplicity of the principled minimum core.[2]

[1] On the importance of the minimum core approach in placing a burden on the state to justify its failure to fulfil minimum core obligations, see S Liebenberg 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty' (2002) 6 *Law, Democracy and Development* 159, 176–77.

[2] Eide writes in a similar vein: '[i]t is required to accept a pragmatic compromise between the ideal and the realistic'. A Eide 'The Realisation of Social and Economic Rights and the Minimum Threshold Approach' (1989) 10 *HRLJ* 35, 47. Russell also states that the notion of minimum state obligations bridges the gap 'between fundamental entitlements and scarce resources'. S Russell 'Minimum State Obligation: International Dimensions' in D Brand & S Russell (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002).

The UNCESCR has in fact defined a 'pragmatic minimum core' in its General Comment 14 on the right to health care. As was seen above, in this General Comment, the UN Committee purports to define a core obligation to 'ensure the satisfaction of, at the very least, minimum essential levels' of the right to the highest attainable standard of health in the International Covenant.[1] However, the obligations it identifies do not meet even people's survival needs. Much life-saving health care is left out of the scope of the minimum core.[2] Thus, it is evident that the definition of the minimum core has not only been governed by the 'essential' nature of the interests involved but by pragmatic considerations as well. Distinguishing the principled and pragmatic strands in the minimum core concept, especially where they cannot be reconciled, allows us to understand the various important theoretical and practical purposes that such a concept must fulfil.

(d) The relationship between the minimum core and progressive realization of the right to health-care services

It is curious that in *Grootboom* Yacoob J approves of the UN Committee's approach to progressive realization but not of its use of the minimum core. In the UN Committee's approach, the two notions are linked.[3] To see this, it is important to recognize that there is an ambiguity in the notion of 'progressive realisation'.

One way of understanding this notion could be in relation to the fact that it imposes an obligation upon the government to make a resource such as housing or health care accessible to a greater number of people over time. Progressive realization thus involves more people gaining houses (or health care) over time. There are several problems with this interpretation. First, the rights in FC s 26(1) and FC s 27(1) vest immediately in everyone. But the failure to offer temporary alleviation of vulnerability (through homelessness or lack of health care) would result in some persons never enjoying the 'full realization' of their right (as some people would not be able to survive). For these people, their rights would be effectively negated. Secondly, this interpretation is unable to capture the important point that some persons are at a greater relative disadvantage than others in South African society. Consider a situation in which the government focused its housing programme on those who could afford to repay loans that it granted for the purpose of building houses. Similarly, the government could focus the health-care programme largely on middle-class health needs and not the problems

[1] GC 14 (supra) at para 43. This definition of the minimum core comes from GC 3. See GC 3 (supra) at para 10.

[2] For instance, surgery and treatment of life-threatening illnesses that do not constitute epidemic diseases are not part of the minimum core.

[3] See Scott & Alston (supra) at 250.

affecting the poorest in society. It seems that such a programme would constitute 'progressive realization', on the above interpretation, even though it completely ignored those who are most significantly deprived. Again, there is no recognition of the urgent priority that some interests must take over others.

An alternative interpretation, however, exists, and fits very well with the socio-economic provisions in the Final Constitution. It understands the notion of 'progressive realization' as involving two components: the first component is a minimum core obligation to realize as a matter of priority the minimally adequate levels of provision required to meet basic needs; the second component is a duty on the State to take steps to improve the adequacy of the provision of the resource over time. In other words, progressive realization means, in the context of housing, the movement from the realization of a minimal interest that people have in not being subjected to the elements to the realization of the maximal interest of having a place to live in which people are able to flourish as human beings. Progressive realization involves an improvement in the adequacy of housing for the meeting of human interests. It does not mean that some receive housing now, and others receive it later; rather, it means that each is entitled as a matter of priority to basic housing provision, which the government is required to improve gradually over time. Such an interpretation makes sense of the idea that the socio-economic rights enshrined in the Final Constitution have an aspirational dimension but, like other rights, also impose obligations as a matter of priority for the provision of certain goods.

The problem with trying to divorce the UNCESCR's analysis of progressive realization from its adoption of the minimum core approach to socio-economic rights can now be seen. The Committee claims that the notion of 'progressive realization' imposes 'an obligation to move as expeditiously and effectively as possible towards' the full realization of the right, and to refrain from deliberately retrogressive measures.[1] Thus, the State has a duty to take steps towards the full realisation of the right, but is at the same time under an obligation to come up with the essential levels of provision required by the minimum core. While these two duties are fundamentally intertwined in the interpretation given by the Committee, Yacoob J attempts to divorce the one element from the other. Such an interpretation lacks coherence and significantly weakens the protection that socio-economic rights provide for individuals.

What then should the meaning of the term 'progressive realization' be in the context of the right to have access to health care? The Constitutional Court has not really considered this question and its approach in fact militates against providing meaning to this term. The reasonableness approach does not involve considering the content of socio-economic rights and thus how the State can qualitatively improve the realization of the right over time. The Court does not attempt to set any base line below which the standards of health care should not

[1] See GC 3 (supra) at para 9.

fall; this reticence complicates, if not confounds any appraisal of progressive realization. No doubt, if the State withdraws services that it currently provides, such retrogressive measures might be deemed to violate the demand for progressive realization. However, it is unclear what would constitute an actual progression. It is suggested that what needs to happen in the health-care sector is a determination of pragmatic benchmarks against which government actions can be measured. A number of goals need to be set for government policy (this need not be done by the courts), a minimum level of service specified, and the government must then present its plans and programmes for an increase in the quality of health care over time to citizens. Should it fail to meet these targets, it will be in breach of its constitutional duty to realize the right to health care progressively over time. This requirement thus points a way to the future; it requires that there be a plan in place to ensure decent health care for all over time. That plan requires clear benchmarks and a willingness by the courts to measure the government's progress against such benchmarks.

(e) Providing normative content to the right to health-care services

The Final Constitution makes it clear that what needs to be progressively realized is the right to have access to health-care services. What exactly is involved in this right? One of the main theoretical defects of the approach to adjudicating socio-economic rights that has been adopted by the Constitutional Court is its failure to place the fundamental interests of individuals at the centre of its enquiry. It is in fact difficult to find adequate reasons for including socio-economic rights in the Final Constitution without recognizing that they are designed to protect the fundamental interests of individuals in having access to such essential goods as housing, food and health care. An 'interests-based approach' to the right that is advocated here thus places the interests that are involved in the right (and those that are affected in a particular case) under the spotlight. This approach also questions the extent to which government policy detrimentally impacts upon these interests.[1] There are a range of interests impacted upon by health, but the most important ones are survival, the ability to be free from negative phenomenal experiences and the ability to function optimally to be able to realise a range of diverse purposes.[2]

Further guidance in giving content to this right and the interests involved can be obtained from General Comment 14. It attempts to specify various elements of the right including:

[1] See D Bilchitz 'Placing Basic Needs at the Centre of Socio-Economic Rights Jurisprudence' (2003) 4(1) *ESR Review* 2; D Bilchitz 'Right to Health and Access to HIV/AIDS Drug Treatment' (2003) 1 *International Journal of Constitutional Law* 524–34.

[2] Again, a full account of relevant interests cannot be provided here.

(a) Availability: there have to be functioning public health facilities and programmes available in sufficient quantity within the State party. This will include the determinants of health — water, food, and sanitation — hospitals, clinics, sufficient trained medical personnel and essential drugs.

(b) Accessibility: This has four dimensions:
- Non-discrimination: health facilities must be accessible to all, particularly the vulnerable and marginalized, without discrimination on prohibited grounds.
- Physical accessibility: health facilities must be within a safe physical reach of the population. This includes adequate access to buildings for people with disabilities.
- Economic accessibility: health facilities must be affordable for all.[1]
- Information accessibility: this involves the right to seek, receive and impart information and ideas concerning health issues.

(c) Acceptability: All health facilities must be respectful of medical ethics and be culturally appropriate. They must respect confidentiality.

(d) Quality: Health facilities must be scientifically and medically appropriate and of a good quality. This involves skilled medical personnel; scientifically approved and unexpired drugs and hospital equipment; safe and potable water and adequate sanitation.

GC 14 then elaborates upon the specific examples contained in article 12(2) of the ICESCR. For instance, the right to health facilities, goods and services (article 12(2)*(d)*) must embrace: the provision of equal and timely access to basic preventive, curative, rehabilitative health services and health education; regular screening programmes; appropriate treatment of prevalent diseases, illnesses, injuries and disabilities, preferably at community level; the provision of essential drugs; and appropriate mental health treatment and care.[2]

The right to health imposes three types of obligations upon State parties: the obligations to respect, protect and fulfil these rights.[3] The obligation to *respect* demands the State refrain from interfering directly or indirectly with the enjoyment of the right to health. The state must not deny any person access to

[1] See *Minister of Health & Another v New Clicks SA (Pty) Ltd & Others (Treatment Action Campaign and Innovative Medicines SA as Amici Curiae)* 2006 (1) BCLR 1 (CC)(*'New Clicks CC'*)(Constitutional Court held that the right to access health-care services embraces the right to affordable medicines.)

[2] The General Comment also elaborates on the importance of non-discrimination and equal treatment in relation to accessing health care. It recommends the use of a gender perspective in health planning and policies as a result of impact of sex and gender upon health. GC 13 (supra) at para 20. There are also sections dealing specifically with women (para 21), children (paras 22–4), older persons (para 25), persons with disabilities (para 26), and indigenous peoples (para 27).

[3] For an analysis on the obligations imposed by international law with respect to socio-economic rights, see P de Vos 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution' (1997) 3 *SAJHR* 67.

preventative, curative or palliative health services, abstaining from discriminatory practices, and not limiting access to contraceptives or other means of maintaining sexual or reproductive health.

The obligation to *protect* requires the State to take measures to prevent third parties from interfering with the right to health. The State must adopt legislation: to regulate health services provided by third parties; to ensure that privatisation does not affect the availability of health care services to all; to control the marketing of medicines and medical equipment by third parties; and to ensure that medical practitioners meet appropriate standards of education, skill and codes of conduct.

The obligation to *fulfil* requires the State to adopt an appropriate national health policy that will lead to the full realization of the right. States must ensure the provision of health-care services, including immunisation, equal access to the underlying determinants of health, access to medical personnel, hospitals and clinics, and treatment of diseases. The obligation to fulfil can be further broken down into an obligation to facilitate, provide and promote. The obligation to *facilitate* involves the taking of positive measures that enable and assist individuals and communities to enjoy the right to health. States are required actually to *provide* a service where an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. The obligation to *promote* involves undertaking actions that create, maintain and restore health among the population: this includes assisting people to make informed choices about their health and to know about healthy lifestyles.

Two recent interventions by the government and the courts have led to the development of the content of the right to health-care services in accordance with the approach suggested above. Although *New Clicks* concerned primarily the pricing of medicines,[1] and little was said in connection with the right to health care, Ngcobo J stated that

[1] In trying to make drugs affordable to people, the government has attempted to enact regulations to ensure that pharmacies do not overcharge for drugs. Such regulations became mired in conflict and have recently been the subject of a lengthy judgment by the Constitutional Court after conflicting judgments were delivered by the Cape High Court and then the Supreme Court Appeal. The High Court decision is reported as *New Clicks SA (Pty) Ltd v Msimang NO & Another; Pharmaceutical Society of SA & Others v Minister of Health & Another* 2005 (2) SA 530 (C), [2005] 1 All SA 196 (C). In its judgment, the Supreme Court of Appeal made the following important remarks relating to the right to health care:

> one has to agree that the right of access to health care includes the right of access to medicines although this right is not without limitations. It is also correct that the prohibitive pricing of medicines may be tantamount to a denial of the right of access to health-care.

Pharmaceutical Society of South Africa & Others v Tshabalala-Msimang & Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health & Another 2005 (3) SA 238 (SCA), 2005 (6) BCLR 576 (SCA) at para 42. The Supreme Court of Appeal went further arguing that the obligations of the state in this regard involve affordability as well as access: 'Cheap medicines available at two hypermarkets provide cold comfort to the poor living in a township or on the platteland.' Ibid at para 77. The Supreme Court of Appeal, however, struck down these regulations as ultra vires as they did not comply with the principle of legality. The Constitutional Court overturned that part of the decision of the SCA that held that the whole regulatory scheme was invalid. It held instead that only certain individual regulations were invalid. *New Clicks CC* (supra) at paras 13–20. The majority held that the dispensing fee that was set was not 'appropriate.' It decided to remit the matter back to the Pricing Committee and Minister for reconsideration and ordered that the Minister publish the amended regulations within 60 days. The judgment was mainly decided on administrative-law grounds.

> The right to health care services includes the right of access to medicines that are affordable. The state has an obligation to promote access to medicines that are affordable.[1]

Similarly, Moseneke J writes that 'the right of access to health care services embraces the right to access quality and affordable medicines' and that 'access to affordable medicines is an important component of any scheme directed at poverty reduction and the physical well-being of all people.'[2] These judgments place an important obligation on the State and begin to do what the other more direct judgments on socio-economic rights have failed to do: provide content to the right to have access to health-care services.

Secondly, framework legislation passed in the form of a National Health Act[3] has the express goal of uniting 'the various elements of the national health system in a common goal to actively promote and improve the national health system in South Africa.' The Act gives specific content to the right to have access to health care by guaranteeing *(a)* the right of pregnant women and children under six years of age to free health services and *(b)* all persons the right to free primary health care services unless the individual is a member of a medical aid.[4]

(f) Further issues relating to the scarcity of resources and the right to health care

The problem of scarcity of resources is particularly acute in the case of the right to health care. In accordance with the philosophical principle that 'ought implies can', it is not possible to impose obligations that cannot be realized. However, the difficult problem that generally arises is in interpreting the phrase 'cannot be realized'. It is rare that there is an absolute scarcity of resources. More thus needs to be said about the interpretation of the phrase 'within available resources' which appears in FC ss 26(2) and 27(2).[5]

(i) *Relationship between availability of resources and the right: content or limitation?*

The first question to determine is whether the availability of resources must be considered in the process of defining the very content of a right, or whether that very content is determined independently of the availability of resources. Under the latter scenario, the scarcity of a resource would represent a limitation on the ability to fulfil a right, whose content is determined independently.

[1] *New Clicks CC* (supra) at para 514.
[2] Ibid at paras 704–705.
[3] Act 61 of 2003. Other important statutes relating to the right to health-care services that have been passed since 1994 are: Choice on Termination of Pregnancy Act 92 of 1996; Traditional Health Practitioners Act 35 of 2004; and Mental Health Care Act 17 of 2002.
[4] Section 4(3) of the National Health Act.
[5] For a discussion of the international law relating to this notion, see RE Robertson 'Measuring State Compliance with the Obligation to Devote the Maximum Available Resources to Realizing Economic, Social and Cultural Rights' (1994) 16 *Human Rights Quarterly* 693.

Is there any value, then, in recognizing that a right exists when it cannot presently be fulfilled? Is it not better to recognize only those rights that are presently capable of being fulfilled?[1] In answering this question, it is important to go back to the underlying rationale for the recognition of rights. Fundamental rights protect certain basic interests that people have. These guarantees are designed to enable people to survive, avoid significantly negative experiences and to be capable of achieving the purposes they value in the world. Inherent in this conception of rights is the idea that there are entitlements that people have merely by virtue of their status as beings with certain characteristics.[2] If we accept this as one of the underlying ideas behind the protection of fundamental rights, then it becomes clear that rights should be recognized even where they are not presently capable of being fulfilled. People have rights by virtue of being creatures of a certain type with certain interests and not in virtue of having control over a certain quantity of resources. The scarcity of resources does not affect a person's having a right, but rather the capacity to realize that right.[3]

The recognition that people have rights even where there is no ability to realize them is important in that it recognizes that in a world of scarcity, there are often cases where people are not able to acquire that to which they are entitled. It suggests that as the scarcity is lessened, there are entitlements that are already in existence which must now be realized. The idea that people have rights even when these are not presently capable of being fulfilled thus helps to express the idea that there is a moral loss, something deeply disturbing that occurs when we admit that not everyone can be provided with life-saving health care, food, water, and shelter. It enjoins us to change this situation as soon as we can so that people can be given that to which they are entitled. Without such recognition, the failure to meet basic needs under conditions of scarcity does not violate any claim people have. The situation does not demand reform. The recognition of a right's violation confirms our original intuition that there is something morally defective about such a situation.

In addition to these two conceptual arguments for thinking that rights should be recognized even when they are not presently capable of being fulfilled, there are also some textual arguments in favour of this claim. Consider the structure of the principal socio-economic rights in the Final Constitution. First, there is the recognition of the rights in FC ss 26(1) and 27(1). These rights are expressed in

[1] See M Kramer 'Getting Rights Right' in M Kramer (ed) *Rights, Wrongs and Responsibilities* (2001) 28, 65–78.

[2] Such an approach has a long history, and can, for instance, be traced to Immanuel Kant's idea of treating rational agents as ends in themselves. See I Kant *The Groundwork of the Metaphysics of Morals* (1785), reprinted in MJ Gregor (ed) *Immanuel Kant: Practical Philosophy* (1996) 80. For a lengthy discussion of Kant's notion of individuals as ends-in-themselves, see S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36. For similar, but more contemporary philosophical approaches, see A Gewirth *Reason and Morality* (1978); J Donnelly 'Human Rights as Natural Rights' (1982) 4 *Human Rights Quarterly* 391; G Vlastos 'Justice and Equality' in J Waldron (ed) *Theories of Rights* (1984) 41, 55; and M Nussbaum *Women and Human Development* (2000).

[3] Donnelly (supra) at 394–95 argues that this analysis of socio-economic rights accords with how cases of impossibility of performance are dealt with in relation to private law rights as well.

unqualified terms and are recognized as existing no matter what the circumstances. FC ss 26(2) and 27(2), however, stress that what can be required of the State in realizing these rights may be limited by the resources that are available. It is important to recognize that the rights and their content are thus to be determined independently of the current obligations of the State in realizing those rights. The State's current obligations must take account of the current situation of scarcity. Where such scarcity is lessened, the obligations of the State change accordingly. Scarcity thus conditions the extent to which the right can be realized but does not qualify the actual content of the right itself.

It may be objected, however, that there is no practical virtue in recognizing a right that is essentially inchoate. What is the difference between recognizing that such a right exists and cannot be fulfilled, and not recognizing that any such right exists? Apart from the theoretical virtues I have mentioned, there could be certain practical effects to adopting an approach of recognizing rights that are not presently capable of being fulfilled. First, the recognition of an existing entitlement entails that the government is required to modify the current position so as to fulfil people's rights as soon as possible. As such, the government can be expected to make every effort to increase its control over those resources that will enable it to fulfil these rights. Secondly, the continued existence of these entitlements can also help influence the behaviour of those who have resources available but are not legally obligated to provide for those suffering from deprivation (private parties or other countries, for instance). The idea that people are being deprived of something that they are entitled to by virtue of their humanity may well have significant persuasive power.[1] Finally, recognizing that a right exists even when not fulfilled entails that, as soon as resources do become available, the government is required to act in order to realize the rights that have been abrogated.[2]

(ii) *The pool of available resources*

The preceding discussion has considered in what context the availability of resources should be relevant to the right to health-care services. However, it is

[1] See Woolman 'Dignity' (supra) at § 36.1*(a)*(Argues that 'the recognition of the inherent dignity of our fellow South Africans broadens the reach of this right [to dignity] from mere duties of justice to duties of virtue that impose on us obligations that have as their aim the qualitative perfection of humanity.')

[2] In dealing with conditions of scarcity and possibility, it is also important to bring in a principle of equality: each individual is entitled to have access to these rights. But, as such, one cannot prioritize the rights of one individual over any other. Thus, a policy must be instituted that is capable of realizing the rights of all individuals to the greatest possible extent. That will usually mean under conditions of scarcity that each specific individual cannot claim their full entitlements under the right; but it also implies that each individual will be provided equally with some access to what resources allow. In this way, we can retain a focus on individuals, as individual rights demand, whilst taking account of the need to make decisions in a collective context. Sachs J comes close to taking this approach to health-care rights in *Soobramoney*. See *Soobramoney* (supra) at paras 53–54. Although I have disagreed with his approach to defining the content of the right in relation to resources, he at least recognizes the need to take account of the shared context in which rights are realized, and the extent to which the meaningful exercise of rights is parastic upon substantive equality of access to material resources.

important to consider the pool of resources that are to be regarded as being available for purposes of realizing socio-economic rights claims. Moellendorf has pointed out that the notion of 'available resources' is ambiguous:

> It may mean those resources that a ministry or department has been allotted and has budgeted for the protection of the right. Alternatively, it may mean any resources that the state can marshal to protect the right.[1]

Moellendorf recognizes that these are two extreme versions of what the term means and that it may fall somewhere between these extremes. In *Soobramoney*, he argues, Chaskalson P generally employs the term in its narrowest sense: the resources allocated by the provincial government to kidney dialysis.

This position, he points out, does not accord with the position the Court adopted in its *First Certification Judgment*.[2] Whilst the *First Certification Judgment* Court recognized that socio-economic rights might well have direct implications for budgetary matters, it also found that this was true when the enforcement of civil and political rights was at issue. It concluded that '[i]n our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.'[3]

The Court in this passage does not limit its role in the adjudication of rights claims to the framework of existing allocations. 'Rather' as Moellendorf notes, 'the court may pass judgments on these rights, as with other rights, that require a change in fiscal priorities'.[4] Moellendorf supports this broader reading of 'available resources'[5] because he claims that the narrow reading would reduce rights to mere 'policy priorities'. Rights, he claims, 'must have some role in guiding policy rather than being merely dependent upon it, if they are to be real rights and not mere priorities'.[6]

But Moellendorf does not attend to the manner in which he uses the term 'priority' and fails to explain what the exact difference is between rights and policy priorities. His reasoning suggests this is a distinction in kind between different types of reasons. Yet, when the notion of priority is considered properly, the distinction becomes not one of kind but one between reasons with differing degrees of strength.[7] The right in FC s 27(1) provides a reason which has a

[1] D Moellendorf 'Reasoning About Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims' (1998) 14 *SAJHR* 327, 330.

[2] *Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC).

[3] Ibid at para 77.

[4] *Moellendorf* (supra) at 331–332.

[5] Ibid at 331.

[6] Ibid at 332.

[7] I cannot develop this argument here. The full argument will be contained in my forthcoming book, *Combating Poverty through Human Rights, The Justification and Enforcement of Socio-Economic Rights* (forthcoming, 2007).

special weight.[1] If we recast Moellendorf's argument in this light, it becomes evident what the real problem with the narrow interpretation of 'available resources' is.

To construe 'available resources' in the narrowest sense would be to ignore the special weight that should be attached to rights. As Molloendorf correctly argues: 'It would be remarkable, for example, for the court to claim that the right to a fair trial need not be protected because those legislating and administering the budget have simply not allowed the resources to provide for fair trials.'[2] That would allow the government to avoid realizing rights merely by virtue of its allocation of the budget. Such allocations may be well motivated but it is also possible that they can fail to have sufficient regard for the urgent interests of individuals or be based upon the poor management of resources. In order to justify a limitation on the right in FC s 27(1), it is essential to raise reasons of sufficient weight to do so.[3]

Thus, if the allocation of the budget is to provide a sufficient reason for not fulfilling certain rights, that allocation itself needs to be justified by reasons of sufficient weight to justify the failure to fulfil such rights. This explains why the mere allocation by the government of resources cannot alone be taken to justify the non-fulfilment of rights. There must be good reasons lying behind such an allocation, which take account of the special weight to be attached to rights.[4] Any other interpretation is incompatible with the decision to include socio-economic rights in a bill of rights. Thus, since the State may be called upon to justify its allocation of resources, the pool of resources that must be considered as being 'available' must be all those that lie within the control of the State.

That formulation, however, itself admits of various meanings. It is clear that it refers at least to those resources that are controlled by the State and form part of the national budget.[5] Any narrower construal of this phrase is not consistent with a purposive approach to interpreting socio-economic rights. What is controversial, however, is whether the notion of 'available resources' can be given an even wider gloss. It is plausible to suggest, for instance, that capital from foreign loans

[1] See, for instance, R Dworkin *Taking Rights Seriously* (1977) 188 (Argues that '[i]n most cases, when we say that someone has the 'right' to do something, we imply that it would be wrong to interfere with his doing it, or at least that some special grounds are needed for justifying any interference.')

[2] Moellendorf (supra) at 331.

[3] See S Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 31, 31–47 (Makes a similar point when she states that 'the courts should not simply accept unsubstantiated allegations regarding resource shortages. The Court's role is to scrutinise the validity of this defence'.)

[4] See, for instance, E Mureinik 'Beyond a Charter of Luxuries' (1992) 8 *SAJHR* 464 (Argues that socio-economic rights place a burden upon the state to justify its resource allocations in light of the commitments contained within the Bill of Rights.)

[5] Scott and Alston claim that the court in *Soobramoney* was implicitly working from the narrow assumption that available resources refers only to *existing* state resources. See S Scott & P Alston 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobrammoney*'s Legacy and *Grootboom*'s Promise (2000) 16 *SAJHR* 206.

may also be said to be 'available' to a State.[1] The question thus arises as to whether there are any limits to — or what the appropriate limits are with respect to — the pool of available resources that should be considered when determining the obligations of a society.

To some extent, the answer to this question depends upon the particular context with which we are concerned and the branch of government that is making decisions about the realization of socio-economic rights. The judiciary generally lacks expertise in macro-economic policy. It would therefore generally be inappropriate for courts to require the government to take out foreign loans in order to meet their constitutional obligations. There would be legitimate fears of the judiciary straying well beyond their sphere of competence and thus, for judges, the notion of 'available resources' would generally not include higher levels of foreign capital than that to which the government currently has access. Courts could only recommend that other branches of government consider this as an option for improving the realization of rights and require that the other branches of government justify their decisions properly in this regard. The executive, however, is well-placed to consider the amount of foreign capital that can be marshalled for the fulfilment of rights and, as such, a realistic assessment of foreign assistance should be part of its understanding of 'available resources'. The extent to which such capital can be acquired will, however, depend on a number of economic and political factors determined by such institutions as the International Monetary Fund and World Bank, which lie beyond the control of any one State.

Privately-held resources within a State may also lie within its control through its regulatory and taxation powers as well as its powers to expropriate property. The question once again arises as to whether the notion of 'available resources' can also be said to include the State's ability to control privately-held resources. That question is an important one to consider, but cannot be developed here as it requires a discussion of the nature and role of property rights in a democracy such as South Africa.[2]

Determining the 'availability of resources' is thus more complicated than it initially appears. Scarcity is in many instances a result not of natural facts but human institutions and decisions. As a result, the availability of resources is not a fixed parameter and its meaning needs to be considered as part of an overarching enquiry into the content of the State's obligations in relation to socio-economic rights. I have argued in this section that the phrase 'available resources' should

[1] Van Bueren argues that resources should not only be considered to include direct economic resources but also human and organisational resources:

> Human resources include the time, energy, motivation, skills, professionalism, the vision and desire of the individual adults and children and communities. Organisational resources include both the formal and the informal relationships by which actions are taken in society including political organisations, indigenous people's organisations, families and non-governmental organisations.

G van Bueren 'Alleviating Poverty through the Constitutional Court' (1999) 15 *SAJHR* 52, 61–2.

[2] I discuss this question in my forthcoming book, D Bilchitz *Combating Poverty through Human Rights, The Justification and Enforcement of Socio-Economic Rights* (forthcoming, 2007).

be interpreted so as to refer to all those resources that lie within the control of the State. In determining what lies within the control of the State, consideration must first be given to those resources that lie directly within the State's budget. However, the 'availability of resources' may legitimately encompass the ability to secure international loans, to increase taxes, and to interfere with private property rights. The executive may consider this phrase to include all these elements whilst judges may adopt a more restrictive approach consonant with their role in our system of government.

56A.5 Health-care Policy and the Final Constitution

(a) Background

I conclude this chapter in a manner that indicates the way in which health rights are in many ways honoured in the breach in South Africa. In a departure from standard academic practice, I shall relate a tragic story concerning the operation of the South African health-care system with which I was personally involved. Academic writing should not be divorced from such practical realities. That the law needs to be cognizant of the lived experience ordinary people has been confirmed repeatedly by the Constitutional Court.[1] It is in this spirit that I relate a story which, though it provides only anecdotal evidence, nevertheless highlights the multiple ways in which current health-care policy is failing to realize even the most basic elements of the right to have access to health-care services. The story also provides a method of illustrating some of the challenges involved in developing the content of the right in FC s 27.

(b) Themba's story: HIV/AIDS in the public health-care system

On 25 May 2005 at 02h45, Themba Baloyi,[2] aged 25, died at a care home in Johannesburg. Themba's death is attributable to serious deficiencies in the South African health care system. Whilst in hospital, he lay next to many people suffering in the same way that he did. His story exemplifies the suffering of poor people in South Africa.

[1] See, eg, *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC), 1997 (1) SACR 567 (CC). Taking account of the fact that *de facto* women still remain the primary caregivers in society for children. See also *Soobramoney* (supra) at para 111 ('Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.')

[2] Name changed by request of family.

Themba first became ill at the beginning of 2005. Unable to work, he went to his rural home close to Madibogo, near Mafikeng. With severe vomiting and diarrhoea, Themba was taken to the local clinic. He was given treatment to re-hydrate him and sent back home. His blood was taken. Themba discovered shortly thereafter that he was HIV-positive.

Being unable to travel into Madibogo as an outpatient, Themba returned to Johannesburg, hoping for better treatment. After a short stay in hospital, however, he was discharged whilst still extremely ill. Miraculously, he slowly improved and returned to his employment. His employer had kept Themba's job open because he was an excellent employee: trustworthy and reliable.

Themba tried to have a CD4 count taken. He waited for hours in the Johannesburg General Hospital for a blood test and was sent away without the test having been taken. Because he did not understand how the State health care system operates, Themba accepted this treatment.

At the beginning of May 2005, Themba was taken to the Johannesburg General Hospital with pneumonia. His feet were extremely painful and he was unable to stand on his own. He could not hold down food. Despite his desperate condition, he was kept waiting to see a doctor for ten hours in casualty. There was no triage nurse to assess the urgency with which patients were to be seen in casualty. He was also provided with no information as to when he would be seen.

The doctor who eventually saw Themba helped him to die. Instead of attempting to save this 25-year-old, the doctor sent him from the Johannesburg General to Selby Park Hospital. This hospital is completely under-equipped and, from what we saw, sections of this hospital are used as a warehouse facility in which patients are 'permitted' to die. Themba was given minimal care: whilst he was given anti-biotics, he could not hold down food or drink properly. In any decent hospital, he would have been put on a drip. For most of Themba's stay in Selby Park, he lay without a drip. His body, trying to fight with minimal resources against the illnesses that beset him, now had to cope with dehydration and starvation. Since Themba had AIDS-defining illnesses he was also entitled to anti-retroviral treatment. All attempts to get him such treatment in hospital failed, and he was initially even denied a CD4 count test with the excuse that this was too expensive. The cost of a CD4 count is currently R150.

Placing Themba on a government anti-retroviral programme proved impossible. Despite being malnourished and very sick, the hospital discharged him. On the way to the care home, we managed to arrange for Themba to be placed on a US-funded anti-retroviral programme. He was due to begin his treatment on Wednesday 25th May. We hoped his body ravaged from illness and neglect could cope with these drugs.

Themba died in the early hours of 25 May. His CD4 count was 1.

56B Water

Malcolm Langford, Richard Stacey & Danwood Chirwa

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Section 27 of the Final Constitution reads, in relevant part, as follows:

(1) [E]veryone has the right to have access to … sufficient … water.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [this] right.

56B.1 Introduction

Many commentators describe the South African Constitution[1] as the gold standard for all contemporary attempts to arrive at a legitimate basic law. Much, but not all, of this praise flows from the Final Constitution's inclusion of justiciable socio-economic rights.

Such tributes tend to gild the lily. The inclusion of justiciable socio-economic rights is, in reality, part of a broader trend in constitution-making from the mid-1980s onwards rather than a manifestation of any South African exceptionalism.[2] However, when it comes to the right to water and sanitation, the title of frontrunner may be justified. The recognition of the right in FC s 27, together with the right to sanitation in the Water Services Act,[3] has played an important role in shaping international law and policy developments. In 2006, the United Nations Development Programme ('UNDP') recommended that states recognise the right to water and pointed to South Africa as an example of the best model (if not practice).[4] The South African experience grounded two decisive United Nations resolutions in 2010 that removed any doubts over the legal status of water and sanitation rights.

The politics and practice surrounding the right to water (and sanitation) within South Africa presents a more complicated picture. Access to water in South Africa has historically been conditional upon land ownership, and wealth or residency rights in formal urban areas. Race was therefore the primary determining factor in whether one had access to water and sanitation. Since the end of apartheid, the South African government has made significant strides in reversing some of these patterns. According to its definition of access, the proportion of those without access to water fell from 40 to 7 per cent, while the equivalent figures for sanitation are 51 and 21 per cent.[5]

At this juncture, many academics, jurists and social movement leaders might be tempted to shout: 'Lies, damned lies and statistics.' The debate over the actual degree of 'progress' made with respect to water and sanitation rights is quite heated. Critics of the government's efforts will point to the high number of disconnections, the many urban inhabitants and rural communities that have been

[1] Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC').

[2] Of particular note are the post-authoritarian constitutions in Latin America, Eastern Europe, sub-Saharan Africa and, increasingly, Asia. See M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008); B Simmons 'Should States Ratify? Process and Consequences of the Optional Protocol to the ICESCR' 27(1) *Nordic Journal of Human Rights* 64.

[3] Act 108 of 1997.

[4] See, for example, UNDP *Beyond Scarcity: Power, Power and the Global Water Crisis* (2006)

[5] Government of South Africa *Millenium Development Goals Report* (2005) and Department of Water Affairs and Sanitation *Dashboard* available at http://www.dwaf.gov.za/dir_ws/wsnis/default.asp?nStn=wsnisindex (accessed on 12 May 2011).

unable to move beyond the most basic level of access due to the tardy pace of slum upgrading, impediments that flow from extremely slow land reform and a range of other limitations on effective access.[1] More time or a growing financial base alone will not solve such problems. Quantitative research across all of South Africa's municipalities shows that the level of 'available resources' within municipalities cannot explain the slow progress in securing access to adequate water and sanitation for all. Politics and policy would appear to hinder progress as much as the purse.[2]

The law's responses to these contemporary dilemmas — on the statute books and in the courtroom — have been the subject of equally intense debate.

The Water Services Act sets out a range of obligations and measures for implementing the right of access to water. It guarantees the right to a basic water supply, incorporates protective procedures against deprivations of water and provides for the setting of national standards and norms for tariffs. This Act and the Local Government: Municipal Systems Act[3] ('Municipal Systems Act') create an elaborate framework designed to use private service providers to overcome obstacles in the delivery of water services.[4] The National Water Act[5] was promulgated to ensure that the nation's water resources are *sustainably developed*, conserved, managed and controlled.[6] Sustainable development by its very definition takes the needs of the worst off members of our community and protection of the environment into account.[7]

The case law reflects a number of positive developments as well. *Grootboom* affirmed that access to water (and sanitation) were part of the right to housing and that the state had positive obligations to ensure its progressive realisation.[8] In *Joe Slovo*, the Constitutional Court found that water and sanitation were key elements of the basic standards for alternative accommodation in the case of eviction.[9] The High Courts and Land Claims Court have provided some guidance with respect to the protection from interference with access to water.[10] National (as opposed to

[1] K Tissington, M Dettmann, M Langford, J Dugard & S Conteh *Water Services Fault Lines: An Assessment of South Africa's Water and Sanitation Provision across 15 Municipalities* (2008) available at http://www.cohre.org/sites/default/files/water_services_fault_lines_sa_nov08.pdf (accessed on 13 May 2011).

[2] M Langford, E Anderson & J Dugard 'Law, Economics and Politics: The South African Experience' in M Langford & A Russell (eds) *The Right to Water: Theory, Practice and Prospects* (forthcoming 2012).

[3] Act 32 of 2000.

[4] Municipal Systems Act s 10 and ss 76-78 respectively.

[5] Act 36 of 1998.

[6] National Water Act s 2.

[7] See M Van der Linde & E Basson 'Environment' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS 2, October 2010) Chapter 50.

[8] *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), [2000] ZACC 19('*Grootboom*') para 35.

[9] *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes & Others* 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC), [2009] ZACC 16('*Joe Slovo*') at para 10.

[10] See § 56B.3 and 56B.4 below.

local) officials in the water sector show a high degree of cognisance of the policy implications of *Grootboom*.[1]

However, recent judicial developments have tempered some of this early promise. The Constitutional Court's findings and its reasoning in *Mazibuko*,[2] and, to some degree, *Nokotyana*,[3] complicate a number of the basic legal assumptions about the right to water that had emerged in the early 2000s. In coming to a conclusion that prepaid water meters did not constitute a form of 'disconnection or limitation' or indirect discrimination, and that a policy to provide an average 25 litres per person per day in Johannesburg was reasonable, the Constitutional Court in *Mazibuko* appears to narrow the promise of its earlier socio-economic rights jurisprudence. Similarly, *Nokotyana* raises, rather than lowers, the threshold for success in challenges to the adequacy of government policy in sanitation cases. Of course, both decisions could be explained away (or have their potentially deleterious effects limited) by reference to their facts or the litigation strategy of the applicants. Nonetheless, as matters currently stand, the two judgments represent a particular challenge to advocates who seek to expand the horizons of the constitutional right to water.

This chapter will begin by adumbrating the available international and comparative law on the right to water. These bodies of law have developed rapidly in the last few years and their increasing divergence from the South African jurisprudence on the right to water provides a useful external perspective. §52B.3 offers an analysis of the different elements of the right to water as manifestly expressed in the Constitution. §52B.4 discusses the respective constitutional duties of different levels of Government. §52B.5 explores the emergence of the right to sanitation (internationally and in South Africa).

56B.2 International and Comparative Law

(a) International recognition

The Universal Declaration on Human Rights does not, interestingly enough, contain a right to water: the most elemental ingredient for life at all. The right to water did not appear in international law until 1977. The Mar del Plata Declaration at the 1977 UN Water Conference announced that '[A]ll peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.' The right to water was recognized in the 1992 Dublin Principles[4] action plans emanating from the inter-governmental summits held in 1992 in Rio[5] and 1994 in

[1] See C Human 'The Human Right to Water in Africa: The South African Example' in E Riedel & P Rothen (eds) *The Human Rights to Water* (2006) 83-93.

[2] *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC), [2009] ZACC 28('*Mazibuko*').

[3] *Nokotyana & Others v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC), [2009] ZACC 33.

[4] *Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment: Development Issues for the 21st Century* UN Doc. A/CONF.151/PC/112 (1992) available at http://www1.umn.edu/humanrts/instree/dublinwater1992.html (accessed on 13 May 2011).

[5] *Agenda 21: The United Nations Programme of Action from Rio* (1992) available at http://www.un.org/esa/dsd/agenda21/ (accessed on 13 May 2011).

Cairo[1] and such regional political bodies such as the Committee of Ministers to Member States on the European Charter on Water Resources.[2] Despite this growing appreciation, the right was not expressly acknowledged in the final statements of a significant number of international meetings on water.[3]

The catalyst for the international recognition of the right to water has been the authoritative but non-binding General Comment 15 on the Right to Water.[4] The UN Committee on Economic, Social and Cultural Rights ('CESCR') had earlier made passing references to a right to water.[5] In 2002, it devoted an entire recommendation to the topic. Article 11 of the International Covenant on Economic Social and Cultural Rights ('ICESCR') states that everyone has the 'right to an adequate standard of living, including food, clothing and housing' and the Committee reasoned that the 'use of the word "including" indicates that this catalogue of rights was not intended to be exhaustive'.[6] According to the Committee, the right to water 'clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.'[7]

The creation of the right to water attracted some controversy. For example, Tully levelled a number of arguments against the General Comment: (1) Article 11 offers no interpretive space for 'new' rights; (2) an amendment to the Covenant was necessary for incorporation of the right to water in the treaty; and (3) deference must be given to the states' omission of water in the drafting of the

[1] UNDP *Programme of Action of the United Nations International Conference on Population & Development* (1994) available at http://www.un.org/ecosocdev/geninfo/populatin/icpd.htm (accessed on 13 May 2011) principle 2.

[2] *Recommendation 14* (2001) available at https://wcd.coe.int/wcd/ViewDoc.jsp?id=231615&Site=COE (accessed on 13 May 2011) at para 5 ('Everyone has the right to a sufficient quantity of water for his or her basic … '[i]nternational human rights instruments recognise the fundamental right of all human beings to be free from hunger and to an adequate standard of living for themselves and their families. It is quite clear that these two requirements include the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene.') The Ministers went on to provide specific recommendations on affordability and prevention of arbitrary disconnections. First. Social measures should be put in place to prevent the supply of water to destitute persons from being cut off.' Ibid. Second. It sets out a user pays system subject to the right to water: 'Without prejudice to the right to water to meet basic needs, the supply of water shall be subject to payment in order to cover financial costs associated with the production and utilisation of water resources.') Ibid at para 19.

[3] See, for example, *Ministerial Declaration of the Third World Water Forum* (Kyoto, 23 March 2003) available at http://www.mofa.go.jp/policy/environment/wwf/declaration.html (accessed on 13 May 2011); *Ministerial Declaration of The Hague on Water Security in the 21st Century* (The Hague, 22 March, 2000) available at http://www.cmaq.net/en/node/5025 (accessed on 13 May 2011); *Final Declaration, International Conference on Water and Sustainable Development* (Paris, 21 March 1998) available at http://www.waternunc.com/gb/decfingb.htm (accessed on 13 May 2011).

[4] CESCR General Comment 15: The Right to Water (Twenty-ninth session, 2002) U.N. Doc. E/C.12/2002/11 (2003)('General Comment 15').

[5] See CESCR General Comment 6: The Economic, Social and Cultural Rights of Older Persons (Thirteenth session, 1995), U.N. Doc. E/1996/22 at 20 (1996) at para 5 (Water is referred to as a 'basic right'); CESCR *Concluding Observations of CESCR: Israel* UN Doc. E/C.12/1/Add.27 (12 April 1998) at para 28 (it had called on Israel to 'recognize the existing Arab Bedouin villages, the land rights of the inhabitants and their right to basic services, including water').

[6] General Comment 15 (supra) at para 2.

[7] Ibid. The Committee also stated that the right can be derived from the right to health in Article 12 though it devotes less attention to this argument.

Covenant.[1] He alleged that the General Comment has received only a lukewarm or negative reaction from states and contended that the topic of access to water would be better placed within other social rights, such as food, housing and health.

Nonetheless, most scholars recommended or applauded the Committee's stance.[2] The Committee offers a coherent legal argument.[3] The Committee draws on earlier state practice in reaching its conclusions,[4] and limits the undue expansion of the number of rights by requiring that new rights are comparable to the rights to food, clothing and housing and are of a serious and fundamental nature.[5]

In any case, in the wake of General Comment 15, states formally recognised (or re-recognised) the right to water and sanitation.[6] In July 2010, the UN General Assembly declared that 'the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.'[7] Two months later, the UN Human Rights Council 'affirm[ed] that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.'[8]

[1] See S Tully 'A Human Right to Access Water? A Critique of General Comment No. 15' (2005) 23 *Netherlands Quarterly of Human Rights* 35-63. (He makes a number of other arguments such as the absence of a UN agency for water which is somewhat absurd given the late creation of an agency for housing and the absence of one for clothing. In any case, UN Water was recently established as an initiative of 23 UN agencies.) See also M Dennis & D Stewart 'Justiciability of Economic, Social, and Cultural Rights' (2004) 98 *American J of Internatioanl* L 462.

[2] See S McCaffrey 'A Human Right to Water: Domestic and International Implications' (1992) 5 *Georgetown International Environmental Law Review* 1; P Gleick 'The Human Right to Water' (1999) 1 *Water Policy* 487, 478-503; H Smets 'Le Droit de Chacun a L'Eau' (2002) 2 *Revue Europeene de Droit de L'environnement* 123; M Vidar & M Mekouar *Water, Health and Human Rights* (2001); S Salman & S McInerney-Lankford *The Human Right to Water: Legal and Policy Dimensions* (2004); S McCaffrey 'The Human Right to Water' in E Brown Weiss, L Boisson-De Chazournes & N Bernasconi-Osterwalder (eds) *Fresh Water and International Economic Law* (2005); T Kiefer & C Brolmann 'Beyond State Sovereignty: The Human Right to Water' (2005) 5 *Non-State Actors and International Law* 183, 183–208; A Cahill 'The Human Right to Water — A Right of Unique Status: The Legal Status and Normative Content of the Right to Water' (2005) 9 *International Journal of Human Rights* 389, 389-410; A Cahill 'The UN Concept of the Right to Water: New Paradigm for Old Problems?' (2005) 21 *International Journal of Water Resources Development* 273, 273-282; Riedel & Rothen (supra).

[3] The arguments are fully set out in M Langford 'Ambition that Overleaps Itself? A Response to Stephen Tully's "Critique" of the General Comment on the Right to Water' (2006) 26 *Netherlands Quarterly of Human Rights* 433, 433-459. See also S Tully 'Flighty Purposes and Deeds: A Rejoinder to Malcolm Langford' (2006) 26 *Netherlands Quarterly of Human Rights* 461, 461-472; M Langford 'Expectation of Plenty: Response to Stephen Tully' (2006) 26 *Netherlands Quarterly of Human Rights* 473, 473-479.

[4] See generally M Langford, A Khalfan, C Fairstein & H Jones *The Right to Water: National and International Standards* (2003) 120.

[5] General Comment 15 (supra) at para. 3.

[6] Between 2002 and 2010 there was a growing acknowledgment of the status of the right to water at various levels. See, for example, European Parliament *Resolution on Water Management in Developing Countries and Priorities for EU Development Cooperation* (4 September 2003); Commission on Human Rights *Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights* resolution 2004/17, E/CN.4/RES/2004/17 (2004).

[7] *The Human Right to Water and Sanitation* U.N. Doc A/64/L.63/Rev.1 (2010) at para 1.

[8] *Human Rights and Access to Safe Drinking Water and Sanitation* U.N. Doc. A/HRC/15/L.14 (2010).

Water and sanitation have long been accepted as elements of other human rights. The 1972 Stockholm Declaration mentions the need to protect natural resources, including water resources, for future generations[1] in the context of what became the right to environmental health.[2] The social dimensions of the emerging global water crisis have also been acknowledged internationally. The Convention on the Elimination of Discrimination Against Women ('CEDAW') explicitly mentions water and sanitation in the context of ensuring that rural women have access to adequate health care facilities.[3] In General Recommendation 24, the CEDAW Committee commented that water and sanitation were critical for the prevention of disease and the promotion of good health care.[4] Article 24 of Convention on the Rights of the Child ('CRC') maintains that access to clean drinking water is a part of a child's right to health. The CRC explicitly draws a strong link between the social and environmental dimensions of water:[5]

> States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: … *(c)* To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.

[1] See E Riedel 'International Environmental Law — A Law to Serve the Public Interest?' in J Delbrück (ed) *New Trends in International Lawmaking — International 'Legislation' in the Public Interest* (1997) 61 and E Riedel 'Change of Paradigm in International Environmental Law' (1998) 57 *Law and State* 22.

[2] *Declaration of the United Nations Conference on the Human Environment* (1972) available at http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503 (accessed on 13 May 2011)(Principle 1 reads: 'Man [sic] has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment'). In Resolution 45/94, the UN General Assembly recognised 'that all individuals are entitled to live in an environment adequate for their health and well-being.' This position was reaffirmed by Judge Weeramentary in the *Gabcikovo-Nagymaros* case who declared that protection of the environment is a 'sine qua non for numerous human rights'. *Case Concerning the Gabcikovo-Nagymaros Project (Slovakia-Hungary)* 37 ILM 162, available at http://www.icj-cij.org/docket/files/92/7383.pdf (accessed on 13 May 2011). It is also arguable that the earlier International Covenant on Economic, Social and Cultural Rights recognises a right to environmental health in article 12(2)*(b)*.

[3] Convention on the Elimination of All Forms of Discrimination against Women , G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force 3 September 1981.

[4] General Recommendation 24 (20th session, 1999) at para 28.

[5] Article 24(2) reads:

States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

The CESCR too acknowledged the role of access to water and sanitation as essential components of other rights in the ICESCR. The right to housing is said to include 'safe drinking water', 'sanitation and washing facilities' and 'site drainage'[1] and the right to education demands an adequate school with safe drinking water and sanitation facilities for both sexes.[2] In terms of the right to health, the CESCR identifies access to safe and potable water and adequate sanitation as key components of the availability, accessibility and quality of health care services, an underlying determinant of the right, a minimum core obligation and a means to realise the additional obligation in the ICESCR to improve all aspects of environmental and industrial hygiene.[3] Regional human rights instruments pay limited attention to the right to water. The situation may be changing — particularly in Africa. The European Social Charter does not explicitly refer to a right to nutrition or water, although article 11 requires contracting parties to act to combat the causes of ill-health and prevent epidemic, endemic and other diseases. This obligation naturally rests on the provision of proper sanitation and a clean water supply.[4] Article 11 of the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights merely provides a right 'to live in a healthy environment and to have access to basic public services'.[5] The African Charter on Human and Peoples' Rights ('ACHPR') proclaims that state parties 'must take the necessary measures to protect the health of their people'.[6] The provision of water and sanitation clearly qualifies as 'necessary measures' to protect health. The African Commission on Human and Peoples' Rights, in *Free Legal Assistance v Zaire,*[7] held that '[t]he failure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine … constitutes a violation of Article 16'.[8] This relationship is made explicit in the later Protocol to the ACHPR on the Rights of Women in Africa. The first element of the right to nutrition and food in Article 15 is a requirement for states to take appropriate measures to provide women with access to clean drinking water. Article 14(2) *(c)* of the African Charter on the Rights and Welfare of the Child also links safe drinking water to the right to health.[9] Without safe drinking water, neither good health nor adequate nutrition is possible.

[1] General Comment 4: *The Right to Adequate Housing*, (Sixth session, 1991) U.N. Doc. E/1992/23, annex III at 114 (1991).

[2] General Comment 13: *The Right to Education* (Twenty-first session, 1999) U.N. Doc. E/C.12/1999/10 (1999), para. 6a.

[3] General Comment 14: *The Right to the Highest Attainable Standard of Health* (Twenty-second session, 2000) U.N. Doc. E/C.12/2000/4 (2000).

[4] A similar logic applies to the right to housing contained in article 31 of the Revised European Charter.

[5] Article 11 of the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

[6] Article 16(2).

[7] *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehova v Zaire* Communications 25/89, 47/90, 56/91, 100/ ('*Free Legal Assistance v Zaire*').

[8] Ibid at para 47.

[9] Article 14(2)*(c)* of the African Charter on the Rights and Welfare of the Child: 'State parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures: …*(c)* to ensure the provision of adequate nutrition and safe drinking water.'

Turning to international humanitarian law, the 1949 Geneva Conventions provide that occupying powers must provide access to minimum water supplies for prisoners and other interned persons.[1] In addition, prisoners are to be provided with shower and bath facilities as well as water, soap and other facilities for their daily personal toilet and washing requirements.[2] The Additional Protocols of 1977 prohibit the destruction of '[o]bjects indispensable to the survival of the civilian population, such as … drinking water installations and supplies and irrigation works.'[3]

International criminal law has transformed a number of these provisions into prosecutable war crimes[4] and crimes against humanity.[5] South Africa has largely incorporated the International Criminal Court Statute ('ICC Statute') into domestic law.[6] Under the ICC Statute, it is a war crime to intentionally use starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival.[7] This phrase obviously resonates with the terminology in the Additional Protocols and would by implication embrace water as necessary for basic needs and livelihoods. The crime has not yet been prosecuted before international tribunals. However, the UN Security Council has often condemned the denial of food.[8] Collective punishments, including specifically collective disciplinary measures that affect food, have also been identified as a crime in the Statute of the International Criminal Tribunal for Rwanda ('ICTR').[9] The denial of food and water are potential war crimes under customary international law in other tribunals.[10]

Acts or omissions that intentionally or recklessly deprive protected persons of food, leading to death, may amount to the war crimes of 'wilful killing' or 'murder'. The International Committee of the Red Cross has commented that 'it

[1] See Geneva Convention (III) relative to the Treatment of Prisoners of War (1949) arts 20, 26 and 46; and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) arts 89 and 127.

[2] See Geneva Convention III arts 29 and 85.

[3] See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) (1977) art 54; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977) art 14.

[4] A war crime is a serious and criminally punishable violation of international humanitarian law committed by any person with sufficient connection to armed conflict, international or internal, against a protected person. See generally *Prosecutor v Dusko Tadic a.k.a. 'Dule': Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* Case No. IT-94-1-AR72 (2 October 1995) available at http://www.icty.org/x/cases/tadic/acdec/en/51002.htm (accessed on 22 May 2011) '*Tadic-Interlocutory*' and *Prosecutor v Dusko Tadic a.k.a. 'Dule': Opinion and Judgment* Case No. IT-94-1-AR72 [1997] ICTY 1.

[5] Crimes against humanity involve acts or omissions committed against any civilian population, in a widespread and systematic manner based upon State, organisation or group policy.

[6] Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

[7] Statute of ICC art 8(2)*(b)*(xxv). The almost identical prohibitions appear in art 54 Additional Protocol I and art 14 Additional Protocol II, and could also constitute international crimes given the decision in *Tadic Interlocutory* (supra) at para 134 ('Customary international law imposes criminal liability for serious violations of Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict.')

[8] UN Security Council 'Statement by the President' UN Doc S/25334 (25 February 1993).

[9] Article 4*(b)*.

[10] It is prohibited under Geneva Convention IV art 33 and Protocol II art 4 at para 2*(b)*.

seems, that persons who gave instructions for the food rations of civilian internees to be reduced to such a point that deficiency diseases causing death occurred among the detainees' would be responsible for wilful killing.[1] Rottensteiner notes, however, that in three cases before the International Criminal Tribunal for the former Yugoslavia ('ICTY') involving deprivation of food to inmates, prosecutors have not utilised this category of war crime.[2] Denial of water may, in some circumstances, amount to the war crime of torture, inhumane treatment, cruel treatment, or wilfully causing great suffering or serious injury to body or health.[3] For example, the Trial Chamber of the ICTY found in *Deliac* that the 'creation and maintenance of an atmosphere of terror in the Celebici prison camp, by itself and *a fortiori*, together with the deprivation of adequate food, water, sleeping and toilet facilities and medical care' constituted both cruel treatment and wilfully causing great suffering or serious injury to body or health.[4]

In relation to crimes against humanity, a number of such crimes have an explicit water dimension. Extermination is defined in the Statute of the ICC to include the 'intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.'[5] Torture and other inhumane acts also constitute a crime against humanity.[6] *Deliac* indicates that a crime against humanity might encompass the deprivation of water. The Prosecutor of the ICTY, in the *Nikolic* indictment, contended that the accused committed such a crime by:

> Participating in inhumane acts against more than 500 civilians … endangering the health and welfare of detainees by providing inadequate food, endangering the health and welfare of detainees by providing living conditions failing to meet minimal basic standards.[7]

(b) Content of the Right

Beyond the mere recognition of the right, the CESCR has determined its content in significant detail. The most difficult issue was the scope of the right. As water is ubiquitous in human life, identifying a universal and inalienable entitlement was a challenge. It is particularly necessary for realising a range of rights in the ICESCR:

[1] J Pictet (ed) *Commentary, IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958) 597.

[2] She suggests that this may relate to the time and resource burdens in establishing the necessary causality. C Rottensteiner 'The Denial of Humanitarian Assistance as a Crime under International Law' (1999) 835 *International Review of the Red Cross* 555.

[3] These are grave breaches under common art 3 of the Geneva Conventions and art 4(2)*(a)* of Additional Protocol II. Rottensteiner suggests that denial of humanitarian assistance in some circumstances may amount to an 'outrage upon personal dignity, in particular humiliating and degrading treatment' which is prohibited under the Geneva Conventions and their Protocols and constitutes an international crime under art 4*(e)* ICTR Statute, and arts 8(2)*(b)*(xxi) and *(c)*(ii) ICC Statute. Rottensteiner (supra).

[4] *The Prosecutor v Zejnil Dlalic et al* (16 November 1998) Case No IT-96-21-T at para 422.

[5] Arts 7(1)*(b)* and 7(2)*(b)*. Extermination involves murder on a large scale but allows for sparing of some member of a group unlike genocide.

[6] Arts 7*(f)* and *(k)* Statute of ICC.

[7] *The Prosecutor v Dragon Nikolic, a.k.a. 'Jenki'*, Indictment (4 November 1994) Case No IT-94-2, ICTY at para 24.1.

water is necessary for food production and environmental health as well as various livelihoods and cultural practices. The Committee eventually hived off household water uses (consumption, cooking, hygiene and, where necessary, sanitation) from other uses on the basis that they were universal and constant. Everyone requires a basic amount of water every day.

To the extent that greater amounts of water are needed for realising other rights in the ICESCR, such as food, work or environmental health, the right to water becomes conditional. That is, the CESCR states that in realising the right to food, sufficient priority should be 'given to the water resources required to prevent starvation and disease' and efforts should be directed towards 'ensuring that disadvantaged and marginalised farmers, including women farmers, have equitable access to water and water management systems'.[1] Some have argued that the Committee erred in not explicitly considering such household uses as kitchen gardening or livestock herding.[2] It may be culturally and contextually appropriate to consider such uses in some countries as 'household uses'. Van Koppen, Smits and Mikhail have demonstrated that in rural areas such uses of water are sometimes prioritised before some of the household uses identified by the CESCR.[3]

In setting out the key elements of the right, the CESCR closely hues to its approach of disaggregating according to the supply dimensions of availability and quality and the demand-side factors like accessibility and affordability. These elements should, however, be understood in a broader context: the content of the right should be framed by the principles of human dignity, life and health and must be understood as a social and cultural good and not primarily as an economic good. The CESCR argued that the right must be realized in a sustainable manner.[4]

As regards availability, the Committee chose not to specify a precise minimum amount. Instead, it stipulated that the amount must be sufficient and regular for personal and household uses. However, the amount must correspond to World Health Organisation ('WHO') guidelines. The Committee quotes two studies[5] that argue that approximately 50 litres of water is needed per day, with 20 litres as a minimum, although one of the studies places greater emphasis on minimising the distance to a water point as it is the greatest determinant of how water can be practically accessed. Other scholars argue for a higher amount and the policy in a number of developing countries is to aim higher than 50 litres.[6] In

[1] General Comment 15 (supra) at paras 6-7.

[2] M Langford 'Crossfire: There is no Human Right to Water for Livelihoods: A Debate with Melvin Woodhouse' (2009) 28(1) *Waterlines* 5.

[3] B Van Koppen, S Smits & M Mikhail 'Homestead- and Community-scale Multiple-use Water Services: Unlocking New Investment Opportunities to Achieve the Millennium Development Goals' (2009) 58 *Irrigation and Drainage* 73.

[4] General Comment 15 (supra) at para 11.

[5] See J Bartram & G Howard 'Domestic Water Quantity, Service Level and Health: What Should be the Goal for Water and Health Sectors' (2002). See also PH Gleick 'Basic Water Requirements for Human Activities: Meeting Basic Needs' (1996) 21 *Water International* 83.

[6] M Falkenmark 'Meeting Water Requirements of an Expanding World Population' (1997) 352 *Philosophical Transactions of the Royal Society London* 929.

any case, General Comment 15 notes that some 'may also require additional water due to health, climate, and work conditions'.[1]

Water must be of sufficient quality. The CESCR refers to the WHO Guidelines on Drinking Water Quality[2] and indicates that water must be free from 'micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health'.[3] Quality is interpreted broadly to include acceptability. Acceptability, in turn, encompasses colour, odour and taste.

The key contributions of the CESCR are its accessibility elements: (1) physical accessibility; (2) affordability; (3) non-discrimination; and (4) access to information. 'Physically accessible' means that water must be within or in close proximity to people's homes, schools, health care facilities and workplaces. The facilities must be of sufficient quality and culturally appropriate. The Committee strongly emphasises the role of gender, noting that facilities must be designed with privacy and lifecycle concerns in mind and that physical security should not be threatened when women access water facilities.[4]

Water must also be *affordable* for all purposes. The Committee uses a formulation earlier deployed in defining the right to housing: 'The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights.'[5] Thus, the Committee steers clear of demanding water be provided free, but, later in the General Comment, it lists a number of options to ensure that water is affordable. These options include provision of free or low-cost water. Other policies such as low-cost techniques and technologies and income supplements are intended to ensure affordability.[6]

The third aspect of accessibility is *non-discrimination*. States parties must guarantee that the right to water is enjoyed without discrimination,[7] and equally between men and women.[8] The CESCR has observed that states parties are obliged to take steps to remove 'de facto discrimination' which means that 'the allocation of water resources, and investments in water, facilitate access to water for all members of society'.[9] To make the point, the Committee comments on a familiar scenario in Africa:

[1] General Comment 15 (supra) at para 12*(a)*.

[2] World Health Organisation *Guidelines for Drinking-water Quality* (2nd Edition, vols. 1-3, 1993).

[3] General Comment 15 (supra) at para 15. The Committee refers States parties to standards that are 'intended to be used as a basis for the development of national standards that, if properly implemented, will ensure the safety of drinking water supplies through the elimination of, or reduction to a minimum concentration, of constituents of water that are known to be hazardous to health.'

[4] General Comment 15 (supra) at para 12*(c)*(i).

[5] Ibid at para 12*(c)*(ii).

[6] Ibid at para 27.

[7] ICESCR art 2 para 2.

[8] ICESCR art 3. The express and implied prohibited discrimination on the grounds according to the Committee are race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status.

[9] General Comment 15 (supra) at para 14.

> investments should not disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population, rather than investing in services and facilities that benefit a far larger part of the population.[1]

The General Comment makes extensive reference to the duty of government to confront the obstacles faced by women, children, rural and deprived urban areas, indigenous peoples, nomadic communities, refugees, asylum seekers, people with disabilities, and prisoners and detainees. Importantly, the General Comment covers residents of informal settlements, and stresses their right to receive water irrespective of the legal status of their occupation of the land or housing. The CESCR has often addressed the situation of ethnic groups in its concluding observations. Libya, for example, was urged to 'implement the right of the Amazigh population to access safe water in the regions of Nefoussa and Zouara, and to report back to the Committee on this issue in its next report' given that other regions in the country had greatly improved access.[2] The Committee has also expressed concern about discrimination with respect to access to water in the following situations: Palestinians, Bedouins and Israeli Arabs in Israel;[3] prisoners in Yemen and Zambia;[4] Roma in various European countries;[5] Travellers in Ireland; indigenous peoples in Canada;[6] internally displaced people and a range of other marginalised groups in Georgia; and refugees and internally displaced people in Azerbaijan.[7]

The final dimension is *information* accessibility. The right to water must embrace the ability to seek, to receive and to impart information that ensures the efficacy of it use.[8]

[1] General Comment 15 (supra).

[2] *Concluding Observations of CESCR: Libyan Arab Jamahiriya* UN Doc. E/C.12/LYB/CO/2 (25 January 2006) at paras 18 and 35. See also comments on Amazigh population and right to water in *Concluding Observations of CESCR: Morocco* UN Doc. E/C.12/MAR/CO/3 (2006); and access to water in Republika Srpska in *Concluding observations of CESCR: Bosnia and Herzegovina* E/C.12/BIH/CO/1 (2006) at paras 27 and 49.

[3] *Concluding Observations of CESCR: Israel* UN Doc. E/C.12/1/Add.27 (1998) at paras 10, 24, 26 and 28.

[4] *Concluding Observations of CESCR: Yemen* E/C.12/1/Add.92 (2003) at para 18; *Concluding Observations of CESCR: Zambia* UN Doc. E/C.12/1/Add.106 (2005).

[5] See *Concluding Observations of CESCR: The former Yugoslav Republic of Macedonia* 24/11/2006. E/C.12/MKD/CO/1.

[6] See *Concluding Observations of CESCR: Canada* UN Doc. E/C.12/CAN/CO/4-E/C.12/CAN/CO/5 (2006) at para 16.

[7] *Concluding Observations of CESCR: Azerbaijan* E/C.12/1/Add.20 (1997) at para 52.

[8] General Comment 15 (supra) at para 48.

(c) State Obligations

The general duty of state parties to progressively realise the right to water and avoid deliberate retrogressive measures is articulated by the CESCR in General Comment 15. The Committee appears to be at pains to emphasise that the right to water can be realised quickly:

> Realization of the right should be feasible and practicable, since all states parties exercise control over a broad range of resources, including water, technology, financial resources and international assistance, as with all other rights in the Covenant.[1]

The General Comment then breaks down state parties' obligations into three simple duties: respect, protect and fulfil.

The *duty to respect* is understood as a state obligation not to interfere unjustly with a person's access to water. The following examples spring to mind: denial of equal access; interference with customary or traditional arrangements for water allocation; pollution; and extraction. The Committee clearly specifies that when a household cannot pay for water, disconnection should only proceed if there is sufficient justification, due process and an alternative, adequate and appropriate water source.[2] The Committee has taken up these issues in its concluding observations on Israel. It expressed concern about the impact of security fences on access to water resources for Palestinians and the 'inequitable management, extraction and distribution of shared water resources' by the Israeli government which limited 'access to, distribution and availability of water for Palestinians in the occupied territories.'[3]

General Comment 15 is more precise about the *duty to protect* than earlier general comments.[4] The Committee first provides examples of state duties to protect: legislate; ensure private actors do not deny equal access; and prevent pollution and inequitable extraction by third parties. However, the General Comment then addresses private actors who provide water services. It specifically requires the state to create a sufficient regulatory framework, including penalties for non-compliance, that ensures that the private sector will act consistently with *democratic principles* such as participation, and that pushes private actors to take the *necessary steps* to assist in the realisation of the right to water — or at least not frustrate the objective. An earlier draft used even stronger language. The deleted language called for the deferral of privatisation until a regulatory framework was in place. At the same time, the General Comment opens with the phrase that water is a 'public good'. A 'public good' suggests, at a minimum, that a state should ensure that its possession, use or development is a collective concern. By placing the gloss of a public good on the right to water, the Committee suggests the degree of its unease with private solutions. Some authors, such as Matthew Craven, have criticised the CESCR though for not going far enough on the question of privatisation: 'one may sense that the Committee may be legislating for its own

[1] General Comment 15 (supra) at para 18.

[2] Ibid at para 56. It concludes its prescriptions on due process by noting that '[u]nder no circumstances shall an individual be deprived of the minimum essential level of water'.

[3] *Concluding Observations of CESCR: Israel* (supra) at para 25.

[4] Ibid at paras 23-24.

absence — or excluding its own competence — in the very area in which the discussion of water rights is most acute and in which the Committee's voice is perhaps most needed'.[1] Nonetheless, the CESCR has perhaps been more stringent in its concluding observations than in the General Comment. In the case of Morocco, it expressed concern over 'privatization of public services such as water and electricity in urban centres in Morocco, the effect of which is to impose an additional economic burden on families living in shantytowns and thus aggravate their poverty.'[2] In 2001, it recommended that Nepal 'ensure that projects involving privatization of water supply provide for continued, assured and affordable access to water by local communities, indigenous people, and the most disadvantaged and marginalized.'[3]

The final domestically-oriented obligation is the *duty to fulfil*. As we noted earlier, the CESCR strives to emphasise that the realisation of the right was practical (despite the reality that water scarcity and resources constraints are growing problems in many states, and therefore a limiting factor with respect to the right's realisation.) Accordingly, the Committee writes that the Covenant requires that governments use all available resources to progressively implement the right to water. The right does not have to be realised overnight, the Committee maintained, but the government must immediately take steps in the direction of ensuring universal access. According to the General Comment, this includes developing a plan and strategy to expand affordable access while also protecting the quality of the water supply. States must also: actively search for the necessary resources, nationally and locally; implement the plan and monitor its implementation over time; and provide systems of accountability so that citizens, NGOs and others can provide information or complaints about failures in the system. For the first time in the CESCR's jurisprudence, reference is made to a duty of states to properly engage with provincial or regional governments and local authorities. The national government must ensure that these units have sufficient resources to fulfil the right to water and do not discriminate in its provision.[4]

In concluding observations, the Committee has been growing slightly more specific on the steps needed to improve access. In the case of Georgia, the Committee recommended that the state:

> [T]ake effective measures, in consultation with relevant civil society organizations, to improve the situation of internally displaced persons, including the adoption of a comprehensive programme of action aiming at ensuring more effectively their rights to adequate housing, food and water, health services and sanitation, employment and education, and the regularization of their status in the State party … [and] continue its efforts to improve the living conditions of its population, in particular by ensuring that the infrastructure for water, energy provision and heating is improved[.] [5]

[1] M Craven 'Some Thoughts on the Emergent Right to Water' in E Riedel & P Rothen (eds) *The Human Rights to Water* (2006) 35 at 45-46.

[2] *Concluding Observations of CESCR: Morocco* (supra).

[3] *Conclusions and recommendations of CESCR, Nepal* U.N. Doc. E/C.12/1/Add.66 (2001) at paras 41-42.

[4] General Comment 15 (supra) at para 51.

[5] *Concluding Observations of the CESCR: Georgia* E/C.12/1/Add.83 (2002) at paras 31 and 40.

In the case of Yemen, a water-stressed state, the Committee addressed the human rights dimension of water allocations and the need to take preventive action to protect and improve water resources.[1]

The General Comment also sets out the 'international' obligations to respect, protect and fulfil under article 2(1). In the case of the right to water these obligations are quite specific. States are required to: respect the right in other countries; prevent their nationals and registered corporations from harming the water rights of others overseas; take steps to provide financial and in-kind support to poorer countries struggling to assist their residents; ensure that the international financial institutions of which they are members do not violate the right;[2] and impose sanctions regimes that provide for repairs to infrastructure essential to provide clean water and do not disrupt access to water.

(d) Comparative Law

While South Africa was one of the first countries to incorporate the right to water into its constitution, the right has increasingly become more common and detailed in constitutions across the globe.[3] Since 2000, the number of constitutions with the right to water has tripled.[4] For example, article 23(20) of the Constitution of Ecuador provides that the state shall 'recognise and guarantee to the people' the 'right to a quality of life that ensures … potable water'. Article 249 goes on to clarify that:

> The State shall be responsible for the provision of public utilities of potable water and irrigation … The State may provide those services directly or by means of delegation to mixed public-private companies or private companies, through concession, association, capitalisation, or other contractual forms. The contractual conditions may not be unilaterally modified … The State shall guarantee that public utilities supplied under its control and regulation, respond to the principles of efficiency, responsibility, universality, accessibility, continuity and quality; and will ensure that their tariffs are equitable

The Ecuadorian state is also mandated by its constitution to promote local and communal solutions for the management and provision of water.[5] Article 14 of

[1] *Concluding Observations of the CESCR: Yemen* (supra) at paras 19, 37, 38 ('The Committee is concerned about the persisting water crisis which constitutes an alarming environmental emergency in the State party, and which prevents access to safe and affordable drinking water, particularly for the disadvantaged and marginalized groups of society, and for rural areas…. The Committee urges the State party to introduce strategies, plans of action, and legislative or other measures to address the scarcity of water problems, in particular the sustainable management of the available water resources. The Committee recommends that effective water management strategies and measures be undertaken in urban setting, exploring possibilities for alternative water treatment and developing ecological dry sanitation methods in rural settings.')

[2] See, further, A Khalfan *Implementing General Comment No. 15 on the Right to Water in National and International Law and Policy* (2005).

[3] See, generally, M Langford, A Khalfan, C Fairstein & H Jones *Legal Resources for the Right to Water: International and National Standards* (2004)('*Legal Resources*').

[4] See T Kiefer *Legal Recognition of the Right to Water* (2009).

[5] Art 246 states: 'The State shall promote the development of communal or self-management companies, such as cooperatives … potable water management councils and others of similar type, whose property and management belongs to the community or the people that work in them, use their services or consume their products.'

the Constitution of Uganda provides that 'all Ugandans enjoy rights and opportunities and access to … clean and safe water'. Another notable example is Uruguay. A successful constitutional referendum in 2004 recognised the right to water and was supplemented with a proviso that the water supply was to remain in public hands.[1] Other constitutions specifically impose duties upon the state to ensure adequate water for the population at large or contain directive principles for state policy in the area.[2] The environmental aspects of water supply are also protected in a significant number of constitutional documents. These constitutions empower, or command, the states to protect their natural water resources.[3]

Even when the right to water has not been explicitly included in the text of the constitution, foreign constitutional jurisprudence evinces a number of instances in which the right to water has been derived from other constitutional rights. In *Arrêt no 36/98*, the Belgian Court of Arbitration recognised the right of everyone to a minimum supply of drinking water by utilising article 23 of Belgium's Constitution — the right to the protection of a healthy environment.[4] In India, in *Hussain v Union of India*, the High Court of Kerala found that the 'right to sweet water, and the right to free air, are attributes of the [constitutional] right to life, for these are the basic elements which sustain life itself'.[5] This holding was later affirmed by the Indian Supreme Court.[6] In *Ryan v AG*, the Irish Supreme Court similarly recognised the right to water as a natural consequence of the expressly articulated right to life.[7]

The following sections provide a brief overview of how national and regional adjudicators have addressed various dimensions of the right to water.

(i) *Availability*

In *Delhi Water Supply & Sewage Disposal Undertaking & Another v State of Haryana & Others*, the Supreme Court of India found that there was insufficient water, even for drinking, available in Delhi in the summer months.[8] The State of Haryana, the upper riparian on the River Yamuna, did not release sufficient water from the Tejwala Head. The Court accorded priority to water use for drinking purposes and held that 'it would be mocking nature to force the people who live on the bank of a river to remain thirsty, whereas others incidentally placed in an advantageous

[1] See 'Referendum Gives Resounding "No" to the Privatisation of Water' *Inter Press Service News Agency* (1 November 2005) available at http://www.ipsnews.net/print.asp?idnews=26097 (accessed on 22 May 2011).

[2] See, for example, the constitutions of Colombia, Zambia, Iran, Zambia, Gambia and Venezuela and commentary in M Langford 'The Right to Water in National Law: A Review' in Riedel & Rothen (supra) at 115-126; and M Langford, A Khalfan, C Fairstein and H Jones, *Legal Resources for the Right to Water: International and National Standards* (Geneva: COHRE, 2004), available at www.cohre.org.water.

[3] Examples include Uganda (preamble), Cambodia (art 59), Eritrea (art 10), Co-Operative Republic of Guyana (art 10), Iran (art 45), Laos (art 17), Mexico (art 27), Nigeria (art 20), Portugal (art 81), and Venezuela (art 127).

[4] Wemmel Community, Moniteur Belge, 24/4/98 (1 April 1998).

[5] *Hussain v Union of India* OP 2741/1988 (26 February 1990).

[6] *Subhash Kumar v State of Bihar & Others* (1991) AIR 420.

[7] [1965] IR 294, 315.

[8] AIR 1996 SC 2992, (1996) 2 SCC 572, [1996] 3 SCR 13 ('*Delhi Water Supply*').

position are allowed to use the water for non-drinking purposes'.[1] It found that the upper riparian may not deny the lower riparian 'the benefit of using the water … for quenching the thirst of its residents' and directed the State of Haryana to supply a sufficient quantity of water for domestic purposes to Delhi. In addition, the Court ordered that the two reservoirs in Delhi be kept full to capacity through the supply of water from the River Yamuna.

(ii) *Quality of water*

Cases concerning the quality of water have addressed both discrete communities and all residents in a water catchment area. An excellent example of the former is *Valentina Norte Colony, Defensoría de Menores Nro 3V Poder Ejecutivo Municipal s/ acción de amparo* in Argentina.[2] A provincial Children's Public Defender brought a case on behalf of the children of a rural community whose drinking water was contaminated by oil. The court of first instance ordered that the authorities immediately supply 100 litres per day of drinkable water to each child and to each member of their families until the contamination had been removed. The Court later slightly reduced the amount of water and limited it to those families that were legally settled. However this reversal in course was later overturned by the provincial Supreme Court. The provincial Supreme Court took its cue, in part, from provisions of the UN Convention on the Rights of the Child and the internationally recognised demands for higher daily allotments of water for children. In a similar case, the Public Defender filed an amparo action to protect indigenous Mapuche children from water contaminated with lead and mercury.[3] The provincial Civil Court of Appeals upheld the trial court order compelling the province to provide 250 litres of drinking water daily per inhabitant and to take measures to address any damage to health caused by metal contamination. While water was brought in on a daily basis to the community, the state failed to comply with the more systemic orders in relation to water supply and health. A complaint was later filed with the Inter-American Commission on Human Rights.[4] The state then committed itself to provide affected children with treatment at Gutierrez Hospital, in Buenos Aires, to establish a water treatment plant, and to disclose information on the source of the contamination.

In various countries, public interest litigants have invoked a panoply of constitutional rights to protect water sources. In *Hussain v Union of India*, the High Court considered conflicting evidence regarding the impact on water quality of a government agency's plans to dig wells on a set of islands.[5] The court required that the agency's plans be referred for official review in order to protect the right

[1] *Delhi Water Supply* (supra).

[2] Expte. 46-99. Acuerdo 5 del Tribunal Superior de Justicia. Neuquen (2 March 1999).

[3] *Menores Comunidad Paynemil s/acción de Amparo* Division II of Neuquen's Civil Court of Appeals (19 May 1997).

[4] *Mapuche Paynemil and Kaxipayiñ Communities* Case No 12.010.

[5] *Hussain v Union of India* (supra). For an overview of the extensive litigation on water pollution in India, see S Muralidhar 'India: The Expectations and Challenges of Judicial Enforcement of Social Rights' in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 102.

to water. In Bangladesh, in *Dr. Mohiuddin Farooque & Others v Bangladesh & Others*, the Government authorities were directed to implement and to ensure compliance with water and air pollution control laws based upon a sweeping interpretation of the constitutional right to life.[1] The Minister of Industries was also directed to ensure that no new industrial units and factories were set up without first arranging adequate and sufficient measures to control pollution. In *Surendra Bhandari*, in Nepal, the Supreme Court found violations of an implied Constitutional right to environmental health and issued an interdict that forced the respondent industry to comply with its promise to remove pollution of water sources within three months. The relevant District Administration Office was required to monitor the implementation of the order.[2] In *Matanza-Riachuelo*, collective action was taken against the Argentinean government for failing to regulate more than 3,000 corporations whose industrial activities affected a large river basin, home to 7 million people and the largest proportion of Argentina's poorest communities.[3] After a process involving multiple parties, the Argentinean Supreme Court issued a series of interim structural orders for the development of detailed plans and monitoring procedures. By 2007, a plan had been adopted and the Court requested a federal court to monitor enforcement of the decision.

The quality of water in urban and peri-urban supply services has been challenged. In *Prakash Mani Sharma*,[4] the Nepal Supreme Court agreed that the state had a responsibility to respect the people's right to pure and clean drinking water as well as to implement legislation requiring it to oversee, to inspect and to monitor the activities of the Water Services Corporation. However, the Court found that it could not assess whether the level of parasites and pathogens in the water contravened WHO standards — as claimed by the applicants. [5] At the same time, it stressed that the Water Services Corporation could not claim immunity from its duties. The Court requested that the Ministry of Physical Planning give appropriate directives to the corporation.[6] In *Bhojraj Aire*,[7] the Nepal Supreme Court was stricter in relation to the setting of quality standards and ordered the water and

[1] Supreme Court, High Court Division, Special Original Jurisdiction, Writ Petition No 891 of 1994 (15 July 2001).

[2] *Surendra Bhandari & Others v Shree Distillery Private Ltd & Others* Writ No 3259 of the Nepali year 2053, reprinted in *Supreme Court Judgments on Constitutional Issues* (2001) 206. See also *Surya Shama Dhungel v Godavari Marbles Industries, N.K.P. Golden Jubilee* Special Issue 2052 at 169.

[3] File M. 1569. XL, Supreme Court of Argentina (8 July 2008).

[4] *Prakash Mai Sharma v Nepal Khanepani Sansthan (Nepal Water Supply Corporation) & Others*, Writ No 2237 of the year 2047, decision dated 2057/3/26.

[5] The petitioner also cited a study report conducted by the Contagious Disease Department of the Ministry of Health, where the department had collected samples from the water of different restaurants. The study showed the presence of 9000 germs in 100ml of water. According to the petitioner the activities of the Corporation stood against art 11(1) of the 1962 Constitution and ss 3, 5, 6 of the Water Supply Corporation Act 2046.

[6] One can understand that under the 1962 Constitution the Court had difficulty in evaluating evidence, but by the time it gave the decision, the 1990 constitution was already in operation. It could have referred to that.

[7] *Bhojraj Aire v Ministry of Water Resources & Others* Writ No 3305 of the Nepali year 2056, decision dated 2058/6/11.

environmental ministries to ensure that the water quality standard and pollution tolerance limit met statutory requirements.[1]

(iii) *Physical Accessibility and Affordability*

In Botswana, the Court of Appeal drew on international standards concerning the right to water to address a prohibition on repairing a well for drinking water. In 2006, a majority of the High Court in *Sesana* found that an indigenous San community had been wrongfully evicted from the Kalahari Game Reserve and the refusal to provide hunting licenses violated the Constitution.[2] However, the community was later denied permission to repair a borehole for drinking water. In *Mosetlhanyane & Matsipane v The Attorney General*, the Court of Appeal unanimously held that the community had a statutory right, under the Water Act, as lawful occupiers of land to sink a borehole for domestic purposes.[3] The Court went further and agreed with the applicants that the denial amounted to degrading treatment under the Constitution. After referring to the dire health impacts on the community, the Court cited the international consensus on the right to water as embodied in General Comment 15 and the UN General Assembly's formal recognition of the right in July 2010. The Government was ordered to 'refrain from inflicting degrading treatment'. The Court took steps to facilitate the community's exercise of their right to rehabilitate the bore hole, albeit at the community's own expense.

In *Kranti v Union of India & Others*, the Supreme Court of India dealt with the adverse living conditions faced by the inhabitants of the Andaman and Nicobar Islands after the tsunami in 2004: the tsunami had caused extensive damage to the shelters and livelihoods of the island inhabitants.[4] The petitioners applied for interim relief to mitigate the effects of the disaster and argued that the available funds were being utilised improperly. The Court issued an interim order directing the local administration to take immediate steps for rain water harvesting, to clean out and to recharge the existing wells and to dig new wells if necessary in order to provide for the drinking water needs of the inhabitants.

A number of foreign cases address the direct or indirect responsibility of private actors. In *Mme Lefevre v Ville d'Amiens, Cour de Cassation, Troisième chambre civile*, a French tenant had complained that a public housing provider had failed to provide running water.[5] The High Court agreed with the provider that it was not possible to provide water and noted that the tenant had been offered alternative accommodation. The Supreme Court disagreed and found that reasonable housing accommodation — one of the constitutional objectives to protect human

[1] See also *Bhojraj Aire v Ministry of Population and Environment*, Writ No 4193 of the Nepali year 2056, decision dated 058/10/26. Failure to set standards for other areas of water and air pollution was a violation of constitutional rights to life and environmental health.

[2] *Sesana & Others v Attorney General* [2006] (2) BLR 633 (HC).

[3] Case No CACLB-074-10 (27 January 2011).

[4] *Kranti v Union of India & Others*, Civil Appeal No. 2681 of 2007, arising out of S.L.P *(c)* No. 4716/2006, decided on 16 May 2007.

[5] Supreme Court, 3rd Civil Chamber, Arrêt No 1362 (15 December 2004).

dignity — includes the provision of running water. It ruled that a landlord is responsible for providing access to potable water to a tenant.

In Indonesia, the Constitutional Court reviewed the constitutionality of the Indonesian Law on Water Resources. A challenge mounted by various NGOs contended that the law had encouraged the privatisation of water services.[1] The Court rejected the petition and declared the law to be conditionally constitutional. It passed muster only if it was interpreted, implemented and applied in accordance with the conditions established by the Court. If these conditions were not met, then the law could be subjected to a further review. In its judgment, the Court acknowledged that access to water is a human right: it grounded its finding in various sources of international law and article 28H of the Indonesian Constitution (the right to a life of well-being in body and mind.) The Court stressed that the state has the obligation to respect, to protect and to fulfil the human right to water and held that the responsibilities of the Government, as laid down in the Law on Water Resources, must be interpreted in light of the right to water. Regarding water resources allocation, the Court stressed that '[t]he Government is obligated to prioritize untreated water to fulfil the daily needs for every individual'.[2] The Court further stated that a price can be charged for water processing and distribution. However, the price must not be unaffordable, the mechanism for arriving at the price should be transparent and the various costs should be determined in consultation with communities. The Court also suggested that community participation, as a general matter, should be prioritised in water management.

(iv) *Disconnections*

Disconnection of water services has often been dealt with under consumer or utility law. However, treatment of water as a utility — when the utility is state-owned — has often been a bulwark against private overreach and subjected the utility to state oversight. Of course, state ownership or regulation of a monopoly is no guarantee that those persons in the greatest need will receive the water that they require. As a result, challenges to disconnection have increased in lock step with the increased recognition of the right to water. In England, the Queen's Bench has held that automatic cut-offs of the water supply upon the exhaustion of credit in a prepaid meter were inconsistent with the statutory requirement of notice before disconnection.[3] In Brazil, the Special Jurisdiction Appellate Court of Paraná found that the disconnection of a water supply, even for non-payment, violated constitutional rights to essential services.[4] In *Rajah Ramachandran v Perbadanan Bekalan Air Pulau Pinang Sdn Bhd*, the High Court of Malaya, found that disconnection of water services due to non-payment of an inexplicably high

[1] *Judicial Review of the Law No 7 of 2004 on Water Resources*, Constitutional Court of the Republic of Indonesia, 058-059-060-063/PUUII/2004 (19 July 2005).

[2] Ibid.

[3] *R v Director of Water Services, ex parte Lancashire County Council, Liverpool City Council, Manchester City Council, Oldham Metropolitan Borough Council, Tameside Metropolitan Borough Council and Birmingham City Council* [1999] Env LR 114, [1998] EWHC 213 (QB). This case is discussed in some depth in § 56B.4*(c)* (ii) below.

[4] Bill of Review, 0208625-3.

water bill was unreasonable.[1] The Court argued that the defendant should have taken a less drastic action that would have caused less inconvenience to the consumer. It could sue the consumer in Court as a 'reasonable' person would. The Court held that the consumer was entitled to an explanation for the bill and that the 'draconian act of cutting off supply was too harsh in the circumstances of this case'.[2]

In *François X & the Union Fédérale des Consommateurs d'Avignon v Société Avignonnaise des Eaux*, the Avignon Federal Union of Consumers applied to the Court for the reconnection of their water supply. It had been disconnected following a dispute concerning the application of tarification.[3] The French Court found that, pursuant to article 809(1) of the New Code of Civil Procedure, a Circuit Court judge may make an order to prevent imminent prejudice. It ruled that 'disconnecting water amounted to depriv[ing] an essential element of the life of a family made up of six people, of which four are children … and constitutes an important impediment and health risk which could only be remedied by the immediate reconnection of water supply'.[4]

56B.3 South African Law

(a) Explicit and implicit recognition

Section 27(1)*(b)* of the Final Constitution provides that 'everyone has the right to have access to sufficient food and water'. This right belongs to a cluster of rights that obliges the state to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights'.[5] It must be pointed out that the constitutional protection of the right to water does not flow only from FC s 27(1)*(b)*. Rather, a range of other constitutional provisions indirectly recognise and support the right to water. This multiple and overlapping recognition demonstrates the significance of water to humanity and underscores the interrelatedness of water rights and other rights. For example, the right of access to sufficient food is protected in the same provision as the right of access to water because food and water are intimately connected in practice and theory.[6] Water forms an essential component of human nutrition as it is an indispensable raw material for food production[7] Likewise, '[a]ccess to sufficient,

[1] Civil Suit No 22-716-2003 (2 March 2004).

[2] Ibid.

[3] Swiss Tribunal de Grande Instance (District Court) of Avignon, Order No. 1492/95 (12 May 1995) ('*François X*'). See also *In CISE v Association Consommateurs Fontauliere, Tribunal de Grande Instance (District Court) of Privas*, Order No. 9800223 (5 March 1998).

[4] *François X* (supra).

[5] FC s 27(2).

[6] The right of children to nutrition is specifically protected in FC s 28(1)*(c)*. For more on FC s 28(1)*(c)*, see A Friedman, A Pantazis & A Skelton 'Children's Rights' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS 1, July 2009) § 47.4.

[7] D Chirwa 'Water Rights' in S Khoza (ed) *Socio-economic Rights in South Africa: A Resource Book* (2007) 343, 352.

affordable, clean water for hygiene purposes should be seen as part of the primary health care services'[1] protected in FC s 27(1)*(a)*.[2]

The significance of water to housing cannot be gainsaid. It thus does not come as a surprise that, in *Government of the Republic of South Africa & Others v Grootboom & Others*, the Constitutional Court proffered an expansive definition of adequate housing that 'requires available land, appropriate services such as the provision of water and the removal of sewage.'[3] Apart from linking water with housing, this dictum establishes another important connection, in the South African context at least, between water and land. In South Africa, access to water has historically been interwoven with access to land. The so-called riparian principle held that a landowner had the exclusive right to use the water sources on her land, including water emanating from streams and dams on their land and ground water. This principle, in the context of a state-backed apartheid system of disinheriting black people from land ownership, meant that the majority of the people in South Africa did not have control over water resources. In order to rectify this historical injustice, the right of equitable access to land protected by FC s 25 provisions regarding land reform are critical. To the extent that we remain 'locked in' to apartheid era, quasi-private control of riparian rights, the majority of South Africans will continue to be denied adequate access to water. Seen in light of the FC s 26 right of access to housing and its concomitant right against arbitrary evictions, restrictions on access to water for domestic use or for cultivating crops and animals may amount to a constructive eviction that has to be justified in terms of the Land Reform (Labour Tenants) Act[4] and the Extension of Security of Tenure Act[5] ('ESTA').[6]

Claims to water can also be grounded in FC s 24: the only so-called 'third generation' right protected in the South African Bill of Rights. FC s 24 entitles everyone to 'an environment that is not harmful to their health or well-being', and imposes an obligation on the state to protect the environment by, among other

[1] *White Paper on Water Policy for South Africa* (1997) available at www.dwaf.gov.za/documents/policies/nwpwp.pdf (accessed on 22 May 2011) at para 2.1.8.

[2] In *Free Legal Assistance Group & Others v Zaire* Communications 25/89, 47/90, 56/91, 100/93 (2000) AHRLR 74 (ACHPR 1996) at para 47 (The African Commission on Human and Peoples' Rights held that 'the failure of the government [of Zaire] to provide basic services such as safe drinking water and electricity and the shortage of medicine' amounted to a violation of the right to health under article 16 of the African Charter on Human and peoples Rights).

[3] 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), [2000] ZACC 19 ('*Grootboom*') at para 35.

[4] Act 3 of 1996 ('Labour Tenants Act').

[5] Act 62 of 1997.

[6] The Labour Tenants Act s 1(vi) defines 'eviction' as including the deprivation of a right to occupy or use land. 'Right in land' means 'any real or personal right in land, including a right to share cropping or grazing land'. See Labour Tenants Act s 1(xvi). Similarly, ESTA s 1(1)(vi) defines 'evict' as to 'deprive a person against his or her will of residence on land, or the use of land, or access to water that is linked to a right of residence in this Act'. See also *Mosetlhanyane & Another v The Attorney General* CACLB-074-10 (27 January 2011)(The Botswana Court of Appeal emphasised that lawful occupiers of land have an 'inherent' right to extract groundwater from beneath that land for domestic purposes. Ibid at para 16. The Court pointed out that limitation or restriction of access to water necessary for domestic use, to the extent that such limitation or restriction makes continued occupation of the relevant land difficult and induces lawful occupiers to relocate, 'render[s] meaningless' any rights of lawful occupation. Ibid at paras 7, 12 and 16.)

things, preventing pollution and promoting conservation 'through reasonable legislative and other measures'.[1] At the same time, the right requires the 'ecologically sustainable development and use of natural resources' in a way that promotes 'justifiable economic and social development'.[2] The Water Services Act[3] represents a legislative attempt to meet these obligations. Water is a fundamental component of a healthy environment and a critical natural resource, and the Water Services Act recognises this in the clear connection it draws between the rights to sufficient water and to a clean and healthy environment. The preamble to the Act emphasises that it rests on 'the rights of access to basic water supply and basic sanitation … and an environment not harmful to health or well-being'. The interconnected web of rights in which our concern for water is anchored is reflected in the set of interconnected obligations that the state bears in terms of these rights. The National Water Act[4] articulates many of these obligations, and sets out in law a commitment to both sustainable and equitable use of water.[5] The preamble to the Act recognises that South Africa's discriminatory history has prevented equal access to water, and acknowledges the government's responsibility to protect the nation's water resources and ensure the redistribution of water. In line with this governmental responsibility, s 3 of the Act vests ownership of water in the nation as a whole, as 'an indivisible national asset', and designates the executive as the public trustee of that asset.

While the National Water Act establishes the principles and procedures for the management and protection of the nation's water resources, the Water Services Act deals with the supply of water to the population. The substance of the two Acts is closely linked. Proper water supply is impossible without effective management of water resources. Although the provision of water supply and sanitation services is distinct from the overall management of water resources, the preamble to the Water Services Act notes that water provision 'must be undertaken in a manner consistent with the broader goals of water resource management'. The Constitutional Court, for its part, has recognised this connection. In *Mazibuko v City of Johannesburg,* O'Regan J, writing for a unanimous Court, stated that the Water Services Act 'highlights the connection between the rights of people to have access to a basic water supply and government's duty to manage water ser-

[1] FC ss 24*(a)* and *(b)*(i) & (ii). For more on FC s 24, see M Van der Linde & E Basson 'Environment' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS 2, October 2010) Chapter 50.

[2] FC s 24*(b)*(iii).

[3] Act 108 of 1997.

[4] Act 36 of 1998.

[5] Sustainability and equity are guiding principles of the National Water Act. They appear both in the Act's preamble and the general explanatory paragraphs at the beginning of each chapter, as well as in many of the operative sections of the Act. Section 2 states that the purpose of the National Water Act is to ensure that the country's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account the need to promote equitable access to water and the need to promote efficient, sustainable and beneficial use of water. The section lists a number of factors to be taken into account in the management of water resources, ranging from social concerns like the need to meet growing water demand, promote social and economic development and meet the basic water needs of present and future generations, to the environmental imperatives to protect biodiversity and aquatic ecosystems and prevent pollution and degradation of water resources.

vices sustainably.'[1] Fulfilling the promise of sufficient water for all, she continued, 'will require careful management of a scarce resource. The need to preserve water is a responsibility that affects all spheres of government'.[2]

The following discussion does not set out an exhaustive analysis of all the rights that are relevant to the protection and to the advancement of water rights.[3] It does however give a glimpse of the fluidity of the right to water as a constitutional claim, its connection with other rights and, most importantly, its essentiality. It also exposes the difficulty in the contextual or reasonableness approach to the constitutional interpretation of socio-economic rights adopted by the Constitutional Court. In *Soobramoney v Minister of Health*,[4] the Court refused to hold that the right to life imposes a positive obligation on the state to provide life saving treatment to a critically ill patient. It contended, implicitly, that limited public health system resources placed an inevitable and unfortunate brake on claims brought under FC s 11's the right to life. (The decision itself largely limits its analysis to claims brought by Mr Soobramoney under FC s 27's rights of access to adequate health care and to emergency medical treatment.) However, claims to water rights are clearly multifaceted and cannot be resolved comprehensively and effectively through FC s 27(1)*(b)* alone. Boldly stated, therefore, the right of access to water can only be fully realised by a combination of water-specific policies and carefully constructed generic policies concerning other social services such as the environment, sanitation, health, food, housing and land.

(b) The meaning of FC s 27(1)*(b)*

(i) *The prevailing approach to FC s 27 rights*

While *Mazibuko* represents the first case in which the Constitutional Court has dealt directly with the FC s 27(1)*(b)* right to sufficient water, the Court's prevailing approach to the socio-economic rights conferred in s 27(1) retains a determinative influence over our nascent right-to-water jurisprudence. This interpretative authority flows, on a formal level, from the fact that the right to have access to sufficient water in FC s 27(1)*(b)* is qualified in exactly the same way by FC s 27(2) as the rights to health care, social assistance and food, in FC ss 27(1)*(a)*, *(c)* and *(d)*. Along with the FC s 26(1), the right to have access to adequate housing, all of these rights are subject to the state's obligation to take reasonable and other legislative measures, within available resources, to achieve their progressive realisation.

In addition, the Constitutional Court has made it clear in judgments dealing with these rights that neither the s 26(1) right nor the s 27(1) rights exist as self-contained or stand-alone entitlements to the socio-economic resources they concern. Rather, the Court's conjunction of ss 27(1) and 27(2) has resulted in a somewhat inverted analysis in terms of which the content of each right rests on the reasonableness of the state's response to progressively realising that right. Determining

[1] 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC), [2009] ZACC 28 ('*Mazibuko*').

[2] Ibid at para 3.

[3] Other relevant rights include the right to equality, dignity, life, administrative justice and the right of detainees to conditions of detention that are consistent with human dignity.

[4] 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC), [1997] ZACC 17 ('*Soobramoney*') at para 15.

the content of each right in the first place — that is, working out what the right entitles citizens to — is to proceed on the basis of a determination in the second place of what it would be reasonable for the state to provide, within its available resources, in order to realise the right progressively. In *Minister of Health v Treatment Action Campaign* the Court held that 'section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2).'[1] This approach was affirmed in *Khosa v Minister of Social Development*, where Mokgoro J stated that 'the ambit of the s 27(1) right can … not be determined without reference to the reasonableness of the measures adopted to fulfil the obligation towards those entitled to the right in s 27(1).'[2] The Court extended this understanding of socio-economic rights to the right to water in *Mazibuko*:

> Applying this approach to section 27(1)*(b)*, the right of access to sufficient water, coupled with section 27(2), it is clear that the right does not require the state upon demand to provide every person with sufficient water without more; rather, it requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right to sufficient water, within available resources.[3]

This approach has drawn criticism.[4] It is difficult to understand quite how the content of a justiciable right to a socio-economic good, claimable against the government, is defined by the action that government itself takes in providing access to that socio-economic good. The Court has, since *Grootboom*, fallen back on the notion of reasonableness to assess whether the state's legislative and policy responses to a socio-economic need will pass constitutional muster.

Criticism notwithstanding, the approach is consistent with the Court's reluctance to accept the idea that socio-economic rights carry some kind of 'minimum core content' enforceable against the state in all circumstances.[5] It is important to note though that the CESCR separates the two dimensions: ie, the content of the rights and the minimum core obligations. In each General Comment, it sets out some broad elements — the content of each of the rights (affordability, quality, physical accessibility) — which are to be achieved progressively. But the CESCR requires immediate realisation of a basic threshold for many of these elements. The Constitutional Court has been reluctant to move forward on either front. So although, it has technically rejected the notion of a minimum core, it has

[1] 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC), [2002] ZACC 15 ('*Treatment Action Campaign*' or '*TAC*') at para 39.

[2] 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC), [2004] ZACC 11 ('*Khosa*') at para 43.

[3] *Mazibuko* (supra) at para 50.

[4] See for example, K Iles 'Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses' (2004) 20 *SAJHR* 448, 457 (arguing that the approach misses the distinction between first-stage rights determination and second-stage justification); C Steinberg 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence' (2006) 123 *SALJ* 264; N de Villiers 'Procedural Fairness and Reasonableness Administrative Action within the Social Assistance system: Implications of Some Settled Cases' (2006) 22 *SAJHR* 405; and D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007).

[5] *Grootboom* (supra) at para 32, *TAC* (supra) at paras 26-39*, Mazibuko* (supra) at paras 46-68. On the rejection of the idea of minimum core content to socio-economic rights, see §56B.3(iii)*(bb)* below.

occasionally filled in the content of socio-economic rights in housing and health litigation.[1]

Similarly, the logic of the principle of 'constitutional subsidiarity' squares with the prevailing approach to the socio-economic rights. In terms of this principle, litigants cannot rely directly on the terms of the Final Constitution in support of a rights claim where legislation has been enacted to give effect to that right.[2] Would-be rights-claimants must instead access the constitutional rights through the legislation, and frame a case in the express terms of the legislation rather than in the terms of the constitutional right. Of course, one must remember that the super-ordinate legislation must be consistent with the constitutional provision to which it gives effect. The mere fact that the state says the legislation gives such effect does not make the legislation constitutional and immune to contestation. Applied to socio-economic rights, the principle of subsidiarity has the effect of restricting socio-economic rights claims to the express terms of the legislation enacted to give effect to those rights, unless a challenge to the constitutionality of the legislation is mounted. A fuller consideration of the implications of the Court's jurisprudence, and the connection between this principle and the Court's stance against reading a minimum core content into socio-economic rights, appears below in §§ 56B.3*(a)*(iii) and (iv).

(ii) *Right holders and protected uses of water*

The right to have access to water as defined in FC s 27(1)*(b)* may be claimed by 'everyone'. This term opens up the possibility for juristic persons to be considered as holders of this right. (At the same time, juristic persons, given the horizontal application of the Bill of Rights, may be called upon to make provision for a particular good over which it possesses control.[3]) The Final Constitution explicitly states that a juristic person can hold rights 'to the extent required by the nature of the rights and the nature of that juristic person'.[4] The relevance of this provision

[1] *Grootboom* (supra) at para 35.

[2] The citation in support of this principle is by now a familiar one in the Court's own judgments. The following list is taken directly from *Mazibuko* (supra) at n 54: 'See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC), [2004] ZACC 15 at paras 22-6 (in the context of the Promotion of Administrative Justice Act 3 of 2000 which gives effect to the constitutional right to administrative justice in s 33 of the Constitution); *MEC for Education, KwaZulu Natal and Others v Pillay* 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) [2007] ZACC 21 at para 40 (in the context of s 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the Equality Act) and *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC) [2007] ZACC 10 at para 52 (in the context of labour legislation and the labour rights protected in s 23 of the Constitution).'

[3] See *School Governing Body of Juma Musjid Primary School & Others v Ahmed Aruff Essay & Others* [2011] ZACC 13 (CC)(Court holds that private trust has violated the right to basic education of learners in a public school by abrogating terms of lease for school grounds and shutting the learners out. The private actor's behaviour unjustifiably infringed the learners' access to a basic education in terms of FC s 29(1).) See S Woolman 'Application' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31; S Woolman 'Between Charity and Clarity: Kibitizing with Frank Michelman on How Best to Read the Constitutional Court' in D Bilchitz & S Woolman (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy* (2011).

[4] FC s 8(4).

to the right to water is sharply underscored by the fact that there are many uses to which water may be put. These range from domestic use, cultural practices, personal hygiene, environmental protection, agricultural production to industrial use. Juristic persons such as corporations and commercial farmers may, therefore, also be entitled to the right to water. These diverse water uses will invariably lead to conflicts whose settlement would depend on the manner in which the right is interpreted. Typically, difficult decisions would need to be made concerning how much water should be allocated for domestic use on the one hand and industrial use on the other hand.[1] Such conflicts lie at the heart of the 'sustainable development' jurisprudence slowly developing under FC s 24*(b)*(iii).

While FC s 27(1)*(b)* — read with FC s 8(4) — admits of an interpretation that considers corporations as right holders and a wide spectrum of protected water uses, priority ought to be given to basic human water needs in preference to commercial needs. The Water Services Act[2] provides that '[i]f the water services provided by a water services institution are unable to meet the requirements of all its existing consumers, it must prioritise the provision of basic water supply and basic sanitation to them'. This provision is consistent the CESCR's General Comment 15. The Comment states that 'priority in the allocation of water must be given to the right to water for personal and domestic uses'[3] and 'to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.'[4]

(iii) *'Sufficient'*

To begin, it must be noted that FC s 27(1)*(b)* protects the right to have access to 'sufficient' water, not 'adequate' water in terms of the ICESCR. No reason exists to suggest that the South African Constitution intended a different meaning to be accorded to the term 'sufficient' from that ascribed to 'adequate'. The two terms tend to be used interchangeably and should be understood to mean the same thing. Hence, the meaning attached to the term 'adequate' in CESCR's General Comment 3 is of critical relevance to the understanding the right of access to water under the Final Constitution.

[1] Water in South Africa is a very scarce resource. The growth of the industrial sector and commercial farming since the last half of the 20th century has increased the demand for water considerably. According to the United Nations Development Programme (UNDP), South Africa is already swimming below the water-stress threshold. This gloomy picture is replicated regionally and worldwide. UNDP estimates that a quarter of the world's population currently lives in river basins that are closed and the number of people in water-stressed areas is forecast to spiral upwards from 700 million to 3 billion in 2025. In Sub-Saharan Africa, the percentage of people in water-stressed areas will shoot up from 30 per cent to a whopping 85 per cent. UNDP *Beyond Scarcity: Power, Poverty and the Global Water Crisis* (2006) 135. The water-stress threshold is determined on the basis of the availability of water against the population. Thus, 1700 cubic metres per person is considered as the national threshold for meeting water requirements for agriculture, industry, energy and the environment. 1000 cubic metres per person constitutes a situation of water scarcity while the availability of under 500 cubic metres per person represents the case of 'absolute scarcity of water'. Ibid.

[2] Act 108 of 1997.

[3] General Comment 15 (supra) at para 6.

[4] Ibid.

The use of the term 'sufficient' serves the primary purpose of underlining the qualitative and quantitative dimensions of the right. Sufficiency presupposes the existence of adequate facilities and mechanisms that enable people to access water services. It also imposes an obligation of result on the state to achieve specified goals with regard to the quantity and the quality of water. As the CECSR has stated, the right to water demands that the state ensure that the water supply for each person is 'sufficient and continuous for personal and domestic uses'.[1] However, the precise quantity of water that may be deemed to be 'sufficient' has not yet been established. It is particularly difficult to set a global benchmark due to the different water demands and needs in different parts of our richly diverse world. The CESCR itself sidestepped the issue in its General Comment 15 and instead deferred to the guidelines developed by the World Health Organisation.[2] However, the two studies the CESCR cites both conclude that approximately 50 litres of water would be needed per day, with 20 litres as a minimum, in order to achieve sufficient health outcomes. [3]

What may be more important than rough numbers is the recognition that the state has an obligation to demonstrate not only that access to water is being measurably extended to a larger number of people, but also that the quality and quantity of access is increasing over time.[4] We shall turn return to this issue when we address the free water policy of the South African government.

It would be pointless to require the state to provide sufficient access to water in clearly delineated quantitative amounts without first taking cognisance of the quality of the water. This right should be understood, following the CESCR, to oblige the state to ensure that the water it provides is 'safe, therefore free from micro-organisms, chemical substances and radiological *hazards* that constitute a threat to a person's health'.[5] The qualitative dimension of the right also relates to the acceptability of the colour, odour and taste of the water required for personal and domestic use.[6]

(aa) Background to *Mazibuko v City of Johannesburg*

The question of sufficient water in terms of FC s 27(1)*(b)* was placed squarely before the Constitutional Court in *Mazibuko v City of Johannesburg*.[7] At this point it is worthwhile setting out the parameters of the case, describing briefly the policies adopted by the City of Johannesburg and Johannesburg Water (Pty) Ltd and the terms of the challenge to that policy.

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[1] CESCR General Comment 15: The Right to Water (Twenty-ninth session, 2002) U.N. Doc. E/C.12/2002/11 (2003)('General Comment 15') at para 12*(a)*.

[2] According to the CESCR, '[t]he quantity of water available for each person should correspond to World Health organisation (WHO) guidelines.' Ibid at para 12*(a)*.

[3] See J Bartram & G Howard 'Domestic Water Quantity, Service Level and Health: What Should be the Goal for Water and Health Sectors' *WHO* (2002). See also PH Gleick 'Basic Water Requirements for Human Activities: Meeting Basic Needs' (1996) 21 *Water International* 83.

[4] See S Liebenberg 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty' (2002) 6(2) *Law, Democracy and Development* 159, 172.

[5] General Comment 15 (supra) at para 12*(b)* (emphasis in original).

[6] Ibid.

[7] 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC), [2009] ZACC 28 ('*Mazibuko*').

Johannesburg Water is a private company incorporated in January 2001 and wholly owned by the City of Johannesburg.[1] The court challenge against Johannesburg Water and the City of Johannesburg revolved around two aspects of the water service delivery policy: the first was Johannesburg Water's policy of providing 6 kilolitres (6000 litres) of water per month, free of charge, to every accountholder in the city; and the second was the company's programme of upgrading water infrastructure and billing systems — Operation Gcin'amanzi — which involved the installation of either communal taps within 200 metres of each dwelling, yard taps with restricted flow, or metered connections with pre-paid meters. The applicants complained that the free basic water policy was in conflict with FC s 27(1)*(b)* and that the installation of pre-paid meters in their homes in Phiri, Soweto was unlawful. The latter challenge was primarily based on principles of administrative justice. We discuss this leg of the argument in §56B.4*(c)*(ii) below. Our focus, for now, is on the first claim: that the City's provision of free basic water up to a limit of 6 kilolitres violates the constitutional right to sufficient water.

The Water Services Act 108 of 1997 defines 'basic water supply' to mean:

> the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.

The 'prescribed minimum' referred to in this definition has been set in terms of national regulations.[2] Regulation 3*(b)* of these regulations provides that the 'minimum standard for basic water supply services' includes a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month, at a minimum flow rate of not less than 10 litres per minute, within 200 metres of a household, and with an effectiveness such that no-one is without a water supply for more than seven full days in any year. In effect, *these provisions adopt a minimum core approach*: they set out in legislation and regulations a quantity of water to which every household absolutely must have access. One might contend, therefore, that the South African government has accepted the principle of a minimum core obligation in respect of water, even though, as the litigation in *Mazibuko* demonstrates all too clearly, the sufficiency of the minimum core obligations it has assumed remain very much in dispute.

[1] Although a private company, Johannesburg Water is nevertheless a 'municipal entity' in terms of s 1 read with ss 86B(1) and 86D(1)*(a)* of the Local Government: Municipal Systems Act 32 of 2000 ('Municipal Systems Act'), because the municipality, as the sole owner, retains effective control of the company. The establishment and corporate structure of the company governed by the Municipal Systems Act, while its financial management is governed by the Local Government: Municipal Finance Management Act 56 of 2003. As the City of Johannesburg remains accountable and responsible for the actions of Johannesburg Water, it would perhaps be inaccurate to describe this as an instance of privatisation.

[2] 'Regulations Relating to Compulsory National Standards and Measures to Conserve Water' *Government Gazette* No 22355, Notice R509 of 2001 (8 June 2001). These regulations are ostensibly made in terms of s 9 of the Water Services Act, which empowers the Minister to 'prescribe compulsory national standards' relating to the provision of water services, the effective and sustainable use of water resources, among others.

In the Johannesburg High Court, where the applicants launched their challenge to the constitutionality of the Johannesburg water policy, Tsoka J held that the free water policy adopted by the City and Johannesburg Water was irrational and unreasonable. The High Court replaced the policy with an order requiring the City and Johannesburg Water to provide each applicant and similarly placed residents of Phiri with 50 litres of free water per day.[1] The Supreme Court of Appeal upheld the City's and Johannesburg Water's appeal against the High Court judgment. However, the outcome of this victory was surely only marginally more appealing to the City and the company than the High Court's order.[2] The SCA held that the free water policy had been based on the mistaken belief that regulation 3*(b)* imposed no obligation to provide the prescribed minimum free of charge to those who could not afford to pay. As such, the City and Johannesburg Water's decision had been 'materially influenced by an error of law' and could be set aside on that basis.[3] The SCA declared that 42 litres of water per day would constitute 'sufficient water' within the meaning of FC s 27(1)*(b)* and ordered the City and Johannesburg Water to revise their water policy accordingly.

It is worth noting that both the High Court and the SCA seem to have approached the challenge to the free basic water policy as an application for judicial review of an exercise of public power, and that both courts appear to have disposed of the matter in terms of the principles of administrative justice. Both courts used the language of administrative justice to issue orders which 'reviewed and set aside' the decision to adopt the policy: The High Court held that the policy was irrational and unreasonable and the SCA found that adoption of the policy had been materially influenced by an error of law. While neither court mentioned the provisions of the Promotion of Administrative Justice Act ('PAJA')[4] as part of their reasons for setting aside the free basic water policy, s 6 of PAJA provides that administrative actions can be reviewed on the grounds of 'irrationality', 'unreasonableness' or if the action was materially influenced by 'an error of law'. So although the SCA found that the Johannesburg water policy amounted to a violation or limitation of the FC s 27(1)*(b)* right to sufficient water, the opinion is framed in language best suited to review of executive action under administrative law. [5]

In the Constitutional Court, on the other hand, the applicants relied directly on the Constitution for the argument that the free basic water policy should be

[1] *Mazibuko & Others v City of Johannesburg & Others (Centre on Housing Rights and Evictions as Amicus Curiae)* [2008] 4 All SA 471 (W).

[2] *City of Johannesburg & Others v Mazibuko & Others* 2009 (3) SA 592 (SCA), 2009 (8) BCLR 791 (SCA) ('*Mazibuko SCA*').

[3] Ibid at para 38.

[4] Act 3 of 2000.

[5] It is difficult to criticise either court too roundly for taking an administrative law approach here, since it is unclear whether either court actually did so. The terms of their judgments certainly suggest that PAJA and the principle of administrative justice were determinative, but neither court is explicit in basing its reasons for 'reviewing and setting aside' the water policy on PAJA or administrative justice principles. Indeed, it is doubtful that PAJA would even apply to the decisions involved in adopting water policy, because the definition of 'administrative action' is explicit in excluding the executive functions of municipalities. The judgments can, of course, be heartily criticised for their vagueness in this regard.

declared invalid because it is unreasonable within the meaning of FC s 27(2). The applicants further invited the Court to quantify the amount of water that would be 'sufficient' within the meaning of FC s 27(1)*(b)*. They contended that 50 litres per person per day met FC s 27(1)*(b)*'s requirements. They also argued that since the standards set in regulation 3*(b)* constituted minimum standards, the Court was free to set even higher basic standards.[1]

The *Mazibuko* Court disagreed. In the first place, it held that the free basic water policy 'falls within the bounds of reasonableness and therefore is not in conflict with either s 27 of the Constitution or with the national legislation regulating water services'.[2] Second, the Court declined the invitation to set a minimum core — at the current levels or higher. As we explain in the discussion that follows, however, the Court's grounds for rejecting the notion of a minimum core for the right to water is not entirely consistent with the use it makes of the concept of reasonableness.

(bb) The consolidation and extension of the stance against 'minimum core content'

The arguments that the applicants urged upon the Constitutional Court in *Mazibuko* would have required the Court to jettison its prevailing approach to socio-economic rights. The correct approach, the applicants submitted, is to first set out the content of the right by quantifying the amount of water sufficient for dignified human life, and only then to consider whether the state has acted reasonably in seeking to progressively achieve access for all to that quantity of water.[3] In *Nokotyana*,[4] heard and decided shortly after *Mazibuko,* the Constitutional Court was presented with the same form of argument. There, the applicants urged the Court to find that the right to housing in FC s 26(1) had to be interpreted to include basic sanitation and electricity, and that the Court's previous decisions with respect to FC s 26 should be revised accordingly.[5]

In both cases, the Court identified this argument as a call for the identification of a minimum core, or basic content, to socio-economic rights. It relied on judgments in its previous socio-economic rights cases — *Grootboom* and *TAC* — to reject it.[6] In those cases, the Court declined the invitation to specify a minimum

[1] *Mazibuko* (supra) at para 44.

[2] Ibid at para 9.

[3] Ibid at para 51. It is worth mentioning, as the Court did, that the applicants' proposal was in fact for a quantified content of the right to water that exceeds a minimum core or basic content. The applicants were explicit in arguing that the quantity of 50 litres of water per person per day is what is sufficient for 'dignified human life', not merely the minimum necessary to support life. Applicants' Heads of Argument at paras 342 and 355; *Mazibuko* (supra) at para 56. In making this argument the applicants urged on the Court the SCA's interpretation in the court below, which held that the right of access to water 'cannot be anything less than a right of access to that quantity of water that is required for dignified human existence'. *Mazibuko SCA* (supra) at para 17, quoted in the Applicants' Heads of Argument at para 324.

[4] *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* 2010 (4) BCLR 312 (CC), [2009] ZACC 33 ('*Nokotyana*').

[5] Ibid at para 47.

[6] *Mazibuko* (supra) at paras 46-68.

core content to the rights to housing and health care. In both of those earlier cases, though, the Court gave some ground to the concept of minimum core by admitting that evidence could be presented to show that a particular right has a particular minimum content, and that such an evidence-based minimum could be influential in assessing the reasonableness of the state's conduct in meeting its socio-economic obligations. The *TAC* Court was careful to note that establishing such a minimum generally falls beyond the limits of the judicial function:

> Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.[1]

In *Grootboom* and *TAC*, then, the Court seemed to accept that a minimum core content to socio-economic rights could be established, on the basis of evidence, by institutions other than the judiciary. In *Mazibuko*, the Court reiterates that it would be 'institutionally inappropriate' for a court to determine what the achievement of any particular socio-economic right would entail:

> This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights.[2]

In the preceding paragraph, the Court had said that whatever decisions the legislature and the executive take in this regard, they should never be constrained by a minimum core understanding of socio-economic rights. What these rights require, the Court noted, will vary over time: 'Fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context.'[3] In the face of an apparent willingness on the part of government to assume a minimum core obligation in respect of water, which it has done with a regulative prescription of a 'minimum standard for basic water supply services', the Court's response is disappointing and retrogressive.[4]

The implications of this position are twofold. First, the Court has effectively discharged the government from any obligation the Constitution may have imposed on it to set and work towards concrete goals of socio-economic provision. Second, the Court has sidestepped the question of what 'sufficient' means in the FC s 27(1)*(b)* right of access to sufficient water. In doing so it has relied on numerous contextual factors which, it argues, influence the sufficiency of a quantity of water, including the manner of water delivery and the uses to which water is put. The obligation to supply water will vary depending on the circum-

[1] *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC), [2002] ZACC 15 ('*Treatment Action Campaign*' or '*TAC*') at para 38.

[2] *Mazibuko* (supra) at para 61.

[3] Ibid at para 60.

[4] On retrogressive state policies or laws and socio-economic rights, see S Woolman, C Sprague & V Black 'Why State Policies that Undermine HIV Lay Counsellors Constitute Retrogressive Measures that Violate the Right of Access to Health Care for Pregnant Women and Infants' (2009) 25 *SAJHR* 102.

stances of each water-user.[1] More than this, the Court's reasoning ensures that the state bears no obligation to specify a quantity of sufficient water within the meaning of this right, or to take reasonable steps to progressively realise such a goal. Whatever content the legislature or the executive might happen to give to the term 'sufficient' is subject to constitutional scrutiny only against the amorphous concept of reasonableness.

Mazibuko sets out what appears to be the high watermark of its preparedness to enforce the Constitution's socio-economic rights against government:[2] First, it will order a government to take steps to realise rights if it has not taken any steps. Secondly, it will assess the reasonableness of any steps the government has taken, and order government to review its adopted measures, if they turn out to be unreasonable. Following *Grootboom,* the Court may order government to make provision for those desperately in need, and following *TAC*, the court may order government to remove unreasonable limitations or exclusions from measures or policies that it has already adopted. The Court stated finally that the obligations imposed by the socio-economic rights provisions of the Constitution further require government to continually revise its policies in order to ensure the progressive realisation of rights. The Court, under the right circumstances, may be prepared to order such revisions.[3]

(cc) A brief note on comparative approaches to questions of sufficient water

It is interesting to note that courts in similarly-situated or poorer countries have taken a more expansive approach to the amount of water to be provided in accordance with the right to water. In Argentina, courts have regularly ordered 100 to 250 litres of water per person per day be provided for situations of emergency relief.[4] In *CEDHA v Provincial State and Municipality of Córdoba*, the Court relied more explicitly on international standards. CEDHA launched legal actions against provincial and municipal authorities for failing to prevent pollution of communal water sources.[5] The culprit was an under-maintained and over-stretched sewer-treatment plant. The Court implied the right to water from the constitutional right to health and, after quoting General Comment 15, ordered as follows:

[1] *Mazibuko* (supra) at para 62.

[2] Ibid at para 67.

[3] Ibid at para 67 ('If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom*, it is cleat that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in *Treatment Action Campaign,* the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty on government continually to revise its policies to ensure that the achievement of the right is progressively realised.') See also *Nokotyana* (supra) at para 4 (the Court stated that 'the role of the courts in the achievement of socio-economic goals is an important but limited one').

[4] See discussion of *Valentina Norte Colony, Defensoría de Menores N° 3V. Poder Ejecutivo Municipal s/ acción de amparo* expte, 46–99 Acuerdo 5 del Tribunal Superior de Justicia, Neuquen (2 March 1999) in 56B.2*(d)*(ii).

[5] *CEDHA v Provincial State and Municipality of Córdoba*. See R Picolotti, 'The Right to Safe Drinking Water as a Human Right' (2005) 1 (4) *Housing and ESC Rights Quarterly* 1.

> [T]he municipality of Córdoba adopt all of the measures necessary relative to the functioning of the [facility], in order to minimise the environmental impact caused by it, until a permanent solution can be attained with respect to its functioning; and that the Provincial State assure the [plaintiffs] a provision of 200 daily litres of safe drinking water, until the appropriate public works be carried out to ensure the full access to the public water service, as per decree 529/94.

While 200 litres clearly exceeds the standards referred to in General Comment 15, the Argentine courts have focused more on common, rather than minimum, usage in Argentine society.

In Indonesia, the Constitutional Court has required the Government and municipalities to take heed of international standards on water quantity. The Court has held that '[t]he volume of daily basic needs should be established based on the universally applied standard regarding the minimum water needs to fulfil the daily basic needs.'[1]

(iv) *The principle of constitutional subsidiarity*

FC ss 32 and 33 — the right of access to information and the right to administrative justice[2] — demand that national legislation 'must be enacted to give effect to these rights'. Similarly, FC s 9(4) requires that national legislation 'must be enacted' to give effect to constitutional equality rights and to prevent or to prohibit unfair discrimination. The right to fair labour practices set out in FC s 23 provides that national legislation 'may be enacted' to regulate certain aspects of the right. FC s 9(2) provides that legislative measures intended to remedy the effects of past discrimination may be promulgated. Legislation has been enacted in respect of each of these five rights.[3] In two of the cases where the Constitution required legislation to be passed — access to information and administrative justice — the rights as set out in the relevant sections of the Constitution were deemed to be inoperative until such time as the required legislation was passed. In order to ensure that people were not left without those rights, Item 23 of Schedule 6 of the Final Constitution reproduced the text of the relevant rights from the Interim Constitution to stand in place of the text of FC ss 32 and 33 until the legislation was passed.

FC ss 32 and 33 were thus inchoate until Parliament promulgated the legislation giving effect to them. This interaction between constitutional rights and the enabling 'super-ordinate' legislation that fleshes them out provides 'a picture' of the Court's constitutional principle of subsidiarity. Subsidiarity views legislation as an optimal method for giving effect to a constitutional right. The principle of subsidiarity is restated in *Mazibuko* as follows:

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[1] *Judicial Review of the Law No. 7 of 2004 on Water Resources* Constitutional Court of Indonesia 058-059-060-063/PUUII/2004 (19 July 2005).

[2] For more on FC s 33, see J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, M Bishop & J Brickhill *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 63.

[3] In relation to FC s 32, the Promotion of Access to Information Act 2 of 2000; in relation to FC s 33, the Promotion of Administrative Justice Act 3 of 2000; in relation to FC s 23, the Labour Relations Act 66 of 1995 and the Basic Conditions of Employment Act 75 of 1997; in relation to FC s 9, the Employment Equity Act 55 of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

> This Court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.[1]

It makes some sense that the principle should apply to the socio-economic rights enshrined in FC ss 26(1) and 27(1). In the first place, the state 'must take legislative and other measures' to give effect to those rights. Secondly, the prevailing approach to socio-economic rights and the Court's stance regarding the minimum core content of those rights suggests that only through the state's 'legislative and other measures' will the Constitution's socio-economic rights contain any clear content at all. Indeed, the Court says as much in *Mazibuko*:

> The Constitution envisages that legislative and other measures will be the primary instrument for the achievement of social and economic rights. Thus it places a positive obligation upon the state to respond to the basic social and economic needs of the people by adopting reasonable legislative and other measures. By adopting such measures, the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness.[2]

A similar approach was taken by the Durban High Court in one of the first water rights cases.[3] In a decision handed down before the regulations prescribing a basic minimum water supply had been promulgated, the Court held that without state action, the constitutional right to sufficient water is 'incomplete, and accordingly unenforceable'.[4] As the Constitutional Court subsequently held in *Mazibuko,* the Durban High Court rejected the applicant's argument that FC s 27(1)*(b)* read with the Water Services Act entitles people to some basic quantity of water:

> It is clear that the Water Services Act was directed at achieving the right embodied in the Constitution. The difficulty, however, is that in the absence of regulations defining the extent of the right of access to a basic water supply, I have no guidance from the Legislature or executive to enable me to interpret the content of the right embodied in s 3 of the Act.[5]

On this approach, the primary obligation the state bears in terms of constitutional socio-economic rights are those that it places on itself in terms of legislative or other measures. These measure may then be assessed for reasonableness in terms of FC ss 26(2) and 27(2). However, it is important to note, that the state is obliged to create a plan that is reasonable, sufficiently well-funded, appropriately administered, capable of realisation, cognisant of short, medium and long-term goals, and sensitive to the plight of those persons in desperate need. The principle of

[1] *Mazibuko* (supra) at para 73. On the principle of constitutional subsidiarity more generally, see the exchange between AJ van der Walt and Karl Klare. See AJ van der Walt 'Normative Pluralism and Anarchy: Reflections on the 2007 Term' (2008) 1 *Constitutional Court Review* 77; K Klare 'Legal Subsidiarity and Constitutional Rights: A Reply to AJ van der Walt' (2008) 1 *Constitutional Court Review* 129. See also L du Plessis 'Subsidiarity: What's in the Name for Constitutional Interpretation and Adjudication?' (2006) 17 *Stellenbosch Law Review* 207; L du Plessis 'Interpretation' in S Woolman, M Bishop & J Brickhill *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32.

[2] *Mazibuko* (supra) at para 66.

[3] *Manqele v Durban Transitional Metropolitan Council* 2002 (6) SA 423 (D).

[4] Ibid at 427F.

[5] Ibid at 427C-D.

subsidiarity does not permit the state to ignore these desiderata in the conception of a plan, nor does it allow the state to offer no plan at all.

Nokotyana reinforces the Court's rubric for socio-economic rights analysis and its general commitment to the principle of subsidiarity. The Court states that the housing legislation in question had been 'promulgated to give effect to the rights conferred by section 26 of the Constitution'.[1] It is clear from what follows in *Nokotyana* that the Court was concerned largely with the rights the applicants bore in terms of the housing legislation in question. Indeed, it applauded the applicants for relying primarily on the legislation, and stated emphatically that they 'cannot be permitted' to rely *only* on the Constitution.[2] The decision went the applicants' way because, in the Court's view, the municipality's delay in complying with the obligations imposed on it by the legislation was unacceptable and unreasonable. The obligations themselves, however, and people's corresponding rights, were held to depend entirely on the national housing legislation and the obligations the state imposed on itself therein. Viewed in isolation, little appears to separate this model of constitutional rights from a democratic system based upon parliamentary supremacy. Although the *Grootboom* criteria remain the measure of 'reasonableness' for socio-economic rights jurisprudence, one should be concerned that our commitment to constitutional supremacy could lose much of its bite were the principle of subsidiarity to allow Parliament (largely alone) to determine the scope and the extent of people's rights.[3]

Were Parliament alone to determine the initial scope of a right, the only thing standing between constitutional socio-economic rights and unbridled parliamentary supremacy would be the possibility of a challenge to the constitutionality of legislation giving effect to those rights. Even so, it is difficult to see how legislation enacted in terms of FC s 26(2) or FC s 27(2) could be found to infringe the rights in FC s 26(1) or FC s 27(1), when the legislation defines the content of those rights.

If an effective constitutional challenge to the state's legislative and other measures has been rendered largely impossible by the Court's convoluted doctrine, it must fall, as the Court loudly proclaims, to the FC s 27(2) concept of reasonableness to assess the constitutionality of the state's actions in meeting its socio-economic obligations. But it is here that the Court's logic begins to, but does not entirely, unravel. In considering whether the principle of constitutional subsidiarity applies to the City of Johannesburg's free basic water policy, the Court in *Mazibuko* said only that 'it may not'.[4] Were the principle to apply in every instance, water service providers and other organs of state would need only comply with the terms of national legislation giving effect to the right to have

[1] *Nokotyana* (supra) at para 47. Chapters 12 and 13 of the National Housing Code deal with determinations of the status of settlements and the municipal services those determinations entitle them to receive. The Housing Code was published in terms of section 4 of the Housing Act 107 of 1997, and was apparently treated by the Court to form part of that legislation. See further §56B.4*(c)*(i) infra.

[2] Ibid at para 49.

[3] See further D Bilchitz 'Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*' (2010) 127 *SALJ* 591, and S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 463ff.

[4] *Mazibuko* (supra) at para 74.

access to sufficient water in order to discharge their constitutional obligations. So, for example, if a municipality or other water services authority had within its available resources the capacity to exceed the basic water supply standards set in national legislation, the subsidiarity principle would not require the water service provider or state to provide any more than stated minimum.[1] Such a position is hard to square with the Constitution's own commitment to progressive realisation — a notion that reflects a developmental state's obligation to provide the goods necessary for living a life worth living as those goods become available in greater quantities and quality. That the *Mazibuko* Court ultimately avoided giving an answer to the question as to whether subsidiarity operates here — by deciding instead that the City's policy could not be said to be unreasonable — suggests that the reasonableness standard has not been displaced by the tautological principle of subsidiarity.

Another important consideration follows from this analysis of the Court's treatment of reasonableness. Whatever teeth the reasonableness requirement retains rests, we believe, on the existence of some prior conception of what a given socio-economic right requires. In other words, reliance of the concept of reasonableness necessarily commits the Court to determining — at least to some degree — the content of the rights the Final Constitution confers on South Africans.

(v) *'Access'*

The formulation of the right in FC s 27(1)*(b)* is one of 'access to water' rather than a 'right to water'. In *Grootboom*, the Constitutional Court purported to draw a distinction between the right to housing and the right 'to have access to housing' in FC s 26. In highlighting the distinction between the two terms of art, it stated that the right of access to housing recognises that housing entails more than the possession of a box-like physical structure. It also requires 'available land, appropriate services such as the provision of water and the removal of sewerage and the financing of these including the building itself'.[2] More expansively still, the Court went on to add that the words 'access to' suggests that the state possesses the power to require private individuals and organisations to provide housing. It stated: 'it is not only the state who is responsible for the provision of houses, but … other agents within our society, including individuals themselves, who must be enabled by legislative and other measures to provide housing.'[3]

In truth, no meaningful difference really exists between 'the right to housing' and 'the right to have access to housing'. Indeed, the CESCR has interpreted the right to housing in exactly the same terms as those employed by the Constitutional Court when interpreting the right of 'to have access to housing'. The Committee stated that shelter does not mean 'merely having a roof over one's head' and

[1] *Mazibuko* (supra).
[2] *Grootboom* (supra) at para 35.
[3] Ibid.

cannot be understood 'exclusively as a commodity'.[1] Instead, it has emphasized that shelter should be seen as 'the right to live somewhere in security, peace and dignity'.[2] The CESCR has also extracted from the right to water strikingly similar obligations to those identified by the Constitutional Court under FC s 26's right to housing. To be sure, what the Constitutional Court describes as the meaning and the implications of 'access' for the state is in essence a subset of the state's obligation to fulfil rights. The latter, as we explained above, has two limbs: the obligation to facilitate the realisation of the right and the obligation to provide the basic good to those who cannot afford it.[3]

Nevertheless, the Constitutional Court's definition of the right of access to housing in *Grootboom* has significant implications for the interpretation of the state's obligations in relation to socio-economic rights generally and the right of access to water specifically. Firstly, it drew attention to the need to discriminate between the obligations of the state to those persons who can afford to exercise socio-economic rights on their own and those who cannot. It stated: 'For those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance.'[4] By contrast, the Court required the state to provide actual assistance to those who cannot afford to pay for adequate housing: 'Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. … The poor are particularly vulnerable and their needs require special attention.'[5]

By implication, the right of access to water requires that the state must not only refrain from interfering with existing access to this right, it must also take measures to facilitate the realisation of this right so that people are able to exercise it relying on their own means and resources. Moreover, the state has the obligation to provide water to those who cannot afford it. This outcome can also be achieved by reading the right of access to water under FC s 27(1)*(b)*, together with FC s 7(2), which recognises the state's duty to fulfil rights. We discuss the interaction of FC ss 7(2) and 27(1)*(b)* in the next section.

[1] CESCR General Comment 4: The Right to Adequate Housing, (Sixth session, 1991) U.N. Doc. E/1992/23 (1991) at para 7. In the same paragraph, the CESCR endorses the views of the Commission on Human Settlements an the Global Strategy for Shelter to the Year 2000: 'Adequate shelter should mean … adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities — all at a reasonable cost.'

[2] Ibid.

[3] General Comment 15 (supra) at paras 25–29.

[4] *Grootboom* (supra) at para 36.

[5] Ibid.

In general, however, the state has an obligation to ensure that water and water facilities are accessible to everyone — poor or not — without discrimination. As the CESCR has stated, this duty means that the state must ensure both physical access and economic access.[1] The former indicates that water and water facilities must be within the physical reach for all sections of the population and that the personal security of the people accessing water services is guaranteed. The latter indicates that water services must be affordable for all.[2]

Intriguingly, the Constitutional Court's statement that 'it is not only the state who is responsible for the provision of housing'[3] can be interpreted to mean that privatisation is not prima facie unconstitutional. The state can, through law, rely upon private persons to provide water services. International human rights law lends credence to the idea that the involvement of the private sector in water provision may not be objectionable unless it can be proved that the private party violates the right.[4] Ultimately, however, the Constitution places the burden upon the state to ensure that all of its obligations to respect, protect, promote and fulfil the right to water are met whether it is the service provider, the co-service provider, or the state that determines how other social actors vouchsafe this essential guarantee.

56B.4 Duties of the State

As noted earlier, the South African Constitution expressly recognises the duties to respect, protect, promote and fulfil human rights. These duties are addressed in more detail elsewhere in this work.[5] Here, we focus on the application of these duties to the right to have access to water.

(a) Different spheres of government

The provision of water services is a joint responsibility of all three spheres of government — national, provincial and local.[6] The Final Constitution requires the national government to adopt legislation concerning the establishment of municipalities that takes into account 'the need to provide municipal services [including water services] in an equitable and sustainable manner'.[7] It has done so, in respect of water services, in terms of the legislation discussed already in this chapter — the Water Services Act and the National Water Act. The national government has also promulgated numerous regulations setting standards of water quality, outlining the principles of water management and service delivery, and establishing pricing and

[1] General Comment 15 (supra) at paras 12*(c)*(i) and (ii).

[2] Ibid.

[3] *Grootboom* (supra) at para 35.

[4] See General Comment No. 3: The Nature of States Parties Obligations (Fifth Session, 1990) UN Doc. 12/14/1990 at para 8; and *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (1986) at para 6.

[5] See S Woolman 'Application' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

[6] D Chirwa 'Water Rights' in S Khoza (ed) *Socio-economic Rights in South Africa: A Resource Book* (2007) 343, 351.

[7] FC s 155(4).

tariff structures.[1] Moreover, the rule of law, the obligations imposed by the rights to clean water and to a clean and healthy environment, and the provision in FC s 8(1) that all organs of state are bound by the rights in the Bill of Rights, together require that all levels of government meet the legislative and constitutional obligations to manage water resources and provide water services.

According to FC s 152(1), one of the objects of local government is to 'ensure the provision of services to communities in a sustainable manner'. The Water Services Act, accordingly, requires every municipality functioning as a water services authority to make bylaws containing conditions for the provision of water services. These bylaws must provide, at least, for 'the technical conditions of supply, including quality standards, units or standards of measurement, the verification of meters, acceptable limits of error and procedures for the arbitration of disputes relating to the measurement of water services provided.'[2]

However, according to Schedule 4, part B of the Final Constitution — as read with FC s 155(1)*(a)* and (7) — both the national government and provincial governments have competence through legislation and other measures to monitor and to support local government in the provision of water services. Similarly, any standards of service or water quality set by municipal bylaws are subject to national standards prescribed by the Minister under the Water Services Act. [3] Rates and tariffs charged by water services providers are also subject to the norms and standards set by the Minister.[4] Despite these national regulatory powers, a vast disparity in tariff and pricing structures for water services exists across water services authorities. These disparities, and the injustice they work, suggests the urgent need for a greatly enhanced and engaged role for the national government in the standardisation of water pricing.[5] To put it somewhat differently, the decentralisation of public functions and the distribution of competences in various functional areas across national, provincial and local government is a source of inequality and administrative inefficiency. While water and sanitation services are local government matters, for example, the functional areas of healthcare and housing are matters of national and provincial legislative competence. The close conceptual link between the rights to health, housing and water is thus not mir-

[1] See, for example, 'Regulations Relating to Compulsory National Standards and Measures to Conserve Water', *Government Gazette* 22355, GN R509 of 2001 (8 June 2001)(Deals among other things, with water quality, water and sanitation services, and the disposal of effluent and other objectionable substance); 'General Authorisations in terms of Section 39' *Government Gazette* 20526, GN 1191 (8 October 1999) revised in *Government Gazette* 26187, GN 398 (26 March 2004)(Authorising the use of water resources without need of a license and setting 'wastewater limit values' for the discharge of wastewater into water sources); and 'Establishment of a Pricing Strategy for Water Use Charges in Terms of Section 56(1) of the National Water Act 36 of 1998' *Government Gazette* 20615, GN 1353 (12 November 1999).

[2] Water Services Act s 21(1)*(b)*.

[3] Water Services Act s 9(1).

[4] Water Services Act ss 10(1) and (2).

[5] K Tissington, M Dettmann, M Langford, J Dugard & S Conteh *Water Services Fault Lines: An Assessment of South Africa's Water and Sanitation Provision across 15 Municipalities* (2008) available at http://www.cohre.org/sites/default/files/water_services_fault_lines_sa_nov08.pdf (accessed on 13 May 2011) 4-5 and 49.

rored in the regulatory and administrative scheme through which water needs are and are not met in South Africa.[1]

The collaborative relationship between national, provincial and local governments in the provision of municipal services is reinforced by FC s 154(1). The section requires national and provincial governments, by legislative and other means, to 'support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions' In at least one case, the national government has provided significant financial assistance to a municipality unable to effectively manage its wastewater treatment facilities. The Emfuleni municipality, responsible for numerous sewage spills into the Vaal River near Parys in the Free State between 2005 and 2009, was allocated R130 million by the national Minister of Water Affairs for the upgrade of facilities and staff.[2]

Further, FC s 155(7) requires the national and provincial governments to monitor the performance of local government structures in fulfilling their constitutional obligations and exercising their functions.[3] In the same vein, s 62(1) of the Water Services Act mandates national and provincial government oversight of the performance of all water services institutions.[4] The national government maintains fairly comprehensive monitoring programmes in respect of water service delivery and water resource management. The 'Blue Drop' system is a monitoring scheme designed to assess the quality of drinking water provided by water service authorities across the country. The 2010 Blue Drop Report describes the Blue

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[1] Tissington et al (supra) at 17 and 41.

[2] J Tempelhoff 'Civil Society and Sanitation Hydropolitics: A Case Study of South Africa's Vaal River Barrage' (2009) 34 *Physics and Chemistry of the Earth* 164, 170. See also *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* 2010 (4) BCLR 312 (CC), [2009] ZACC 33('*Nokotyana*') (The Constitutional Court noted that the national government and provincial executive in Gauteng had agreed to make an amount of R1.1 million available to the Ekurhuleni local government in order to increase access to chemical toilets in informal settlements. Ibid at para 36. The SCA has held, however, that FC s 139, which empowers provincial governments to intervene in local government matters to ensure that local governments are able to meet executive obligations in terms of the Constitution or legislation, does not impose a duty on provincial (or national) government to provide financial assistance when a municipality finds itself unable to cover its debts. *Member of the Executive Council for Local Government, Mpumalanga v Independent Municipal and Allied Trade Union & Others* 2002 (1) SA 76 (SCA)).

[3] FC s 155(7) provides:

The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156 (1).

[4] Water Services Act s 62(1) provides:

Monitoring of water services institutions

(1) The Minister and any relevant Province must monitor the performance of every water services institution in order to ensure-

(a) compliance with all applicable national standards prescribed under this Act;

(b) compliance with all norms and standards for tariffs prescribed under this Act; and

(c) compliance with every applicable development plan, policy statement or business plan adopted in terms of this Act.

(2) Every water services institution must-

(a) furnish such information as may be required by the Minister after consultation with the Minister for Provincial Affairs and Constitutional Development; and

(b) allow the Minister access to its books, records and physical assets to the extent necessary for the Minister to carry out the monitoring functions contemplated in subsection (1).

Drop reporting process as part of a drinking water quality regulation programme with the objective of 'ensuring the improvement of tap water quality by means of compliance monitoring.'[1]

Monitoring, however, does not always lead to action. In a recent 'Green Drop' report by the Department of Water Affairs on the quality of the nation's sewage treatment plants, fewer than half were found to score 'better than 50% in measurement against the stringent criteria set'. Only slightly more than half of the country's plants were even assessed, since many plants 'were not sufficiently confident in their levels of competence to be subjected to assessments', or simply did not respond to calls for assessment.[2] Water services authorities constitute one of the biggest groups of polluters of the country's water, and it would appear that even where water service authorities are identified as polluters, little action is taken against them. South Africa's situation is not uncommon. In the US, more than 9400 out of 25000 sewage systems have violated water laws by dumping raw or insufficiently treated sewage into rivers and other water sources. And yet, fewer than one in five of these US sewage treatment authorities is ever sanctioned in any way for its violations of the law.[3] In the US, the reluctance to prosecute organs of state is often put down to a desire to avoid 'political problems'[4] and the obligations of 'co-operative federalism' that animate the US Clean Water Act.[5] The South African Constitution, for its part, establishes a set of principles of 'co-operative government and intergovernmental relations', which include the obligation for organs of state to avoid legal proceedings against one another and make all reasonable efforts to resolve disputes using the 'mechanisms and procedures established for that purpose'.[6] The apparent injunction to avoid confrontation in these provisions has led some commentators to blame them for the failure of national and provincial governments to take action against municipalities in persistent violation of their obligations under the National Water Act.[7]

The legislative and constitutional framework envisages the national government both as a monitor and a regulator of the water services functions of local government. Unfortunately, during the first decade of the Final Constitution (with its scheme of cooperative government), the national government largely

[1] Department of Water Affairs *Blue Drop Report 2010: South African Drinking Water Quality Performance Management* available at www.dwa.gov.za/dir_ws/DWQR/subscr/ViewNewsDoc.asp?FileID=73 (accessed on 14 April 2011) 1.

[2] Department of Water Affairs *Green Drop Report 2009: South African Waste Water Quality Management Performance* available at http://www.dwa.gov.za/Documents/GreenDropReport.pdf (accessed on 12 April 2011).

[3] C Duhigg 'As Sewers Fill, Waste Poisons Waterways' *New York Times* (23 November 2009).

[4] See statements of environmental advocacy group Riverkeeper, quoted by Duhigg ibid.

[5] R Kundis-Craig *The Clean Water Act and the Constitution* (2009) Chapter 1.

[6] FC ss 41(1)*(h)*(vi) and 41(3). The preamble to the Water Services Act states that 'in striving to provide water supply services and sanitation services, all spheres of Government must observe and adhere to the principles of co-operative government'. See also S Woolman & T Roux 'Cooperative Government and Intergovernmental Relations' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS 1, July 2009) Chapter 14.

[7] Tempelhoff (supra) at 171; J Tempelhoff, V Munnik & M Viljoen 'The Vaal River Barrage, South Africa's Hardest Working Water Way: An Historical Contemplation' (2007) 3 *TD: The Journal for Transdisciplinary Research in Southern Africa* 107, 130.

failed to play its part as regulator. In recent years, however, it has begun to take a more active role. Between 2006 and 2008 the Department of Water Affairs ('DWA') developed a National Water Services Regulation Strategy for ensuring compliance with water law and policy at all levels of government. To this end, DWA operates a Compliance, Monitoring and Enforcement Directorate, for a time known as the 'Blue Scorpions', mandated, as its name suggests, to monitor and to enforce compliance with water legislation. The Directorate uses four legal instruments against offenders: its starts with notices known as 'pre-directives' and injunctions in the form of directives, and ends with cases in the water tribunal and criminal prosecutions in normal courts of law. In its August 2010 report to Parliament, the Directorate broke down offenders into the following categories: mines; agriculture; industry; water services authorities; and others. In the year up until June 2010, water services authorities had been issued with 86 out of 264 pre-directives, 23 out of 97 directives, had appeared in one out of six cases before the water tribunal, and faced six out of 23 criminal prosecutions.[1]

Along the same lines, the draft National Water Services Regulation Strategy anticipates that the DWA will have the power to reassign water services functions to other departments or spheres of government if major problems arise, or to intervene directly in service delivery in cases of gross failure or where lives or the environment are at risk.[2] This approach seems consistent with the provisions in the Final Constitution that allow for the assumption of responsibility for the fulfilment of constitutional obligations by different spheres of government. FC s 139 empowers provincial executives to intervene in municipal affairs if a municipality 'cannot or does not fulfil an executive obligation in terms of the Constitution or legislation'.[3] The powers of intervention set out in the Constitution are not exhaustive, but they include the assumption of responsibility for the obligation in question and the dissolution of the municipal council and the appointment of an administrator. The national government has a similar power of intervention in respect of provincial government affairs[4]

[1] 'Regulation, Compliance Monitoring and Enforcement in the Water Sector' briefing to Parliament's Portfolio Committee on Water and Environmental Affairs (11 August 2010) available from the Parliamentary Monitoring Group website at http://www.pmg.org.za/report/20100811-departemnt-water-affairson-blue-scorpions-setting-compliance-and-enfo (accessed on 27 September 2010).

[2] Tissington et al (supra) at 16.

[3] FC s 139(1).

[4] FC s 100. Provincial governments have intervened far more readily in local government affairs than has the national government in provincial affairs. See generally C Murray & Y Hoffman-Wanderer 'The National Council of Provinces and Provincial Intervention in Local Government' (2007) 18 *Stellenbosch Law Review* 7, and Y Hoffman-Wanderer & C Murray 'Suspension and Dissolution of Municipal Councils under section 139 of the Constitution' (2007) *Tydskrif vir die Suid-Afrikaanse Reg* 141. The first cases in which a province sought to dissolve a municipal council entirely, in the North West municipality of Lekwa-Teemane, did not arise until 2004. The Lekwa-Teemane municipality in that case was crippled by financial instability and an inability to meet many of its service-delivery obligations. One of its problems was an outstanding account with the DWA for unpaid water bills in the amount of R11.7 million, which had led DWA to contemplate the reduction of water supply to the municipality. 'Report of the ad hoc Committee on Intervention in the Lekwa-Teemane Local Municipality in terms of section 139(1)*(c)* of the Constitution' Proceedings of the National Council of Provinces (11 February 2004) 114ff. The National Council of Provinces did not approve the province's

We offer two brief comments about the constitutionality of this strategy: First, it is unclear as to whether a provincial government or the national government is constitutionally entitled to intervene in matters for which local government bears executive authority. These matters are listed in Part B of Schedule 4 to the Final Constitution, and they include '[w]ater and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems'. It makes no sense, however, to read FC s 139 to mean that the provincial government may intervene only in those functional areas over which the local governments enjoy no executive authority, because, obviously, local government has no executive obligations within the meaning of FC s 139 in those functional areas. Nevertheless, the subject matter is important when considering the constitutional validity of a FC s 139 intervention. *City of Cape Town v Premier, Western Cape & Others* concerned the lawfulness of the Western Cape Premier's appointment of a commission of inquiry into the affairs of the Cape Town local government. The Cape High Court held that the lawfulness of the Premier's action depended on whether the subject matter of the abortive commission of inquiry was such that a FC s 139 intervention could rationally result from the commission's findings.[1] The implication here is that FC s 139 interventions are limited to certain subject matters, and that the validity of a FC s 139 intervention will rest on the existence of a rational connection between the purpose and the subject matter of the intervention. Since local governments enjoy executive authority only in respect of the matters listed in Part B of Schedule 4 — read with FC s 156(1)*(a)* — and any matters assigned to them by national or provincial legislation in terms of FC s 156(1)*(b)*, it is reasonable to conclude that the provincial government retains a right of intervention, in terms of FC s 139, only in respect of those subject matters over which local government has executive authority. The provinces therefore retain a right to intervene in, and if necessary assume responsibility for, water and sanitation services at the local level.

Second, one might suspect that the assumption by national government of a local government's water service obligations in terms of the National Water Services Regulation Strategy infringes the provincial right of intervention in terms of FC s 139. Indeed, FC s 100 provides only for national intervention in provincial executive affairs, not in local government matters. The authority for the national government to intervene in this way, however, is founded on FC s 139(7). FC s 139(7)provides that if a provincial government is unable to or chooses not to exercise the powers of intervention set out in the rest of FC s 139, 'the national executive must intervene…in the stead of the relevant provincial executive'.

request to dissolve the council and assume its functions itself in terms of FC s 139(1)*(c)*, with the result that the province intervened only in terms of FC s 139(1)*(b)* to assume responsibility for certain local government obligations. 'Second Report of the ad hoc Committee on Intervention in the Lekwa-Teemane Local Municipality in terms of section 139(1)*(c)* of the Constitution' Proceedings of the National Council of Provinces (4 March 2004) 114ff). The national Department of Basic Education recently announced its intention to intervene in the Eastern Cape in terms of FC s 100(1)*(b)* and assume responsibility for constitutional and legislative obligations in the field of education. *Statement to the National Assembly on the Eastern Cape Education Department Intervention by Minister of Basic Education Angie Motshekga* (16 March 2011).

[1] 2008 (6) SA 345 (C) at para 89.

(b) The constitutional obligation to respect, protect, promote and fulfil rights

All spheres of governments have obligations with respect to the right of access to water. The question that arises is whether all three spheres of government are equally burdened by the obligations to respect, protect, promote and fulfil the right to have access to water. The duty to fulfil may be different from the other three duties. According to Jaap de Visser and others, the duty to fulfil is onerous: 'local government's hands might be tied by its [limited] constitutional mandate' so it cannot take 'legislative, administrative, budgetary and judicial or other similar measures to fulfil these rights'.[1] However, municipalities would still be bound to respect, protect and promote the right to water.[2] The flip-side of this reasoning is that national and provincial governments are primarily responsible for the duty to fulfil the right of access to water through legislation, budgetary allocation and policies.

In practice, it is not possible to arrive at a clear-cut apportionment of the four duties among the three spheres of government; the determination of which sphere of government is responsible for the failure to comply with any of these duties will depend on the facts of each case. A municipality may be bound by the duty to fulfil the right just as the other two spheres of government may be. Municipalities design policies or make budgetary allocations aimed at implementing their own goals, and the legislation promulgated or policies adopted by national or provincial governments. Municipalities are essentially the implementation arm of the national and provincial governments. They have the constitutional duty to provide municipal services to communities in a sustainable manner.[3]

On the other hand, the obligations of national and provincial governments extend beyond the duty to fulfil. For example, a simple case of disconnection of water by a municipality may flow directly or indirectly from water policies adopted at the national or provincial level. In such an instance, it may be easy to isolate the local authority as a possible violator of the duty to respect the right to water while ignoring the responsibilities of national and provincial governments pertaining to the adoption, through legislation and policies, of protective measures against such matters as arbitrary disconnections of water services.

The upshot of this discussion is that all three spheres of government have obligations in relation to the right of access to water. They are all enjoined to respect, protect, promote and fulfil this right. While local government operates

[1] J de Visser, E Cottle & J Mettler 'Realising the Right of Access to Water: Pipedream or Watershed' (2003) 7(1) *Law, Democracy & Development* 27, 29.

[2] Ibid.

[3] The Municipal Structures Act 117 of 1998 provides that a municipal council must annually review the needs of the community, its priorities to meet those needs, its organizational and delivery mechanisms for meeting those needs, and its overall performance in achieving the objects of FC s 152. Similarly, the Local Government: Municipal Systems Act 32 of 2000 ('Municipal Systems Act') requires municipalities to 'give effect to the provisions of the Constitution and … ensure that all members of the local community have access to at least the minimum level of basic municipal services'. Municipal Systems Act s 73(1)*(c)*. 'Basic municipal service' means 'a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment'. Municipal Systems Act s 1.

at the contact point with communities and, as such, is primarily obligated to provide municipal services to communities, it is important not to ignore the linkages between this responsibility and those of national and provincial governments. As was emphasized in *Grootboom*, measures aimed at realising socio-economic rights must be comprehensive and well-coordinated in the sense that they must 'clearly allocate responsibilities and tasks to the different spheres of government and ensure that appropriate financial and human resources are available'.[1] Comprehensiveness and coordination are the hallmarks of cooperative government and *conditiones sine qua non* for the effective realisation of the right to water.[2]

As the roles in relation to the provision of water of national, provincial and local governments are closely intertwined, so are the functions of various government departments. DWA (formerly the Department of Water Affairs and Forestry) is the principal organ responsible for water services. But, as noted earlier, water is a cross-cutting issue which transcends departmental boundaries. Other government departments dealing with the environment, housing, land, and industrial development are also directly and indirectly responsible for water services. For the state to comply with its obligations under the Constitution, it must put in place and implement legislation and policies that focus both on water directly and on other services that have implications for access to water. These policies must be coherent and comprehensive so that everyone is guaranteed access to water.

(c) Respect

The duty to respect creates a buffer between the state and the individual: it insulates individuals from state interference with their existing access to water. The state can violate this duty through, for example, limiting or cutting off access to water, or destroying water infrastructure and pollution.[3]

(i) *Disconnections*

As Michael Kidd has argued,[4] disconnection of existing access to water constitutes a prima facie limitation of the right of access to water. The Constitutional Court has recognised that rights in the Bill of Rights impose negative duties on the state, in the sense that any measure that deprives a person of existing access to, for example, adequate housing constitutes an infringement of the right to have access to adequate housing.[5] In South Africa, due in part to the implementation

[1] 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), [2000] ZACC 19 ('*Grootboom*') at para 39.

[2] Principles of cooperative government are laid down in Chapter 3 of the Final Constitution and include the principle that all spheres of government should provide 'effective, transparent, accountable and coherent government for the Republic as a whole'. FC s 41(1)*(c)*. See, generally, S Woolman & T Roux 'Co-operative Government and Intergovernmental Relations' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS 1, July 2009) Chapter 14.

[3] CESCR General Comment 15*:* The Right to Water (Twenty-ninth session, 2002) U.N. Doc. E/C.12/2002/11 (2003)('General Comment 15') at para 21.

[4] M Kidd 'Not a Drop to Drink: Disconnection of Water Services for Non-Payment and the Right of Access to Water' (2004) 20 *SAJHR* 119.

[5] *Jaftha v Schoemann & Others; Van Rooyen v Stoltz & Others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC), [2004] ZACC 25 at para 34.

of commercialisation principles, disconnections of water supply have become a common occurrence as a means of enforcing payment for water services.[1] Are these disconnections of water for personal and domestic use constitutional? This question is particularly important because, as we have noted above, s 3(1) of the Water Services Act guarantees everyone the right of access to 'basic water supply and basic sanitation'. The Act defines 'basic water supply' as 'the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene'.[2] The regulations promulgated in terms of this provision effectively establish a minimum quantity of water, and minimum standards of access to water, that the state has committed to providing, apparently regardless of the availability of resources.

The Water Services Act restricts the right of a service provider to discontinue water services on any ground. According to s 4(3)*(a)* of this Act, service providers[3] have the obligation to adopt procedures for the limitation or discontinuance of water services that are fair and equitable. Furthermore, these procedures must:

> *(b)* provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless —
> (i) other consumers would be prejudiced;
> (ii) there is an emergency situation; or
> (iii) the consumer has interfered with a limited or discontinued service; and
> *(c)* not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water service authority, that he or she is unable to pay for basic services.[4]

According to these provisions, a disconnection of water service for any reason must accord with the prescribed minimum procedural fairness guarantees of notice and the right to be heard. In *Joseph & Others v The City of Johannesburg & Others,* the Constitutional Court commented on the need for procedural fairness when electricity supplies are disconnected.[5] It held that where people are 'already receiving a service as a matter of right', the service provider is obliged to fol-

[1] For example, it has been alleged that about 800-1000 disconnections per day were taking place in early 2003 in Durban affecting about 25 000 people in a week. Another study has revealed that between 1999 and 2001, 159 886 households experienced water cut-offs on grounds of non-payment in Cape Town and Tygerberg. See, for example, A Loftus '"Free water" as Commodity: The Paradox of Durban's Water Service Transformations' in D McDonald & G Ruiters (eds) *The Age of Commodity: Water Privatization in Southern Africa* (2005) 189, 194; L Smith 'The Murky Waters of Second Wave Neoliberalism: Corporatisation as a Service Delivery Model in Cape Town' in McDonald & Ruiters (supra) at 168, 180.

[2] Water Services Act s 1(iii).

[3] In terms of Water Services Act s 1(xxiii), 'water services provider' means 'any person who provides water services to consumers or to another water services institution but does not include a water services intermediary.' The latter means 'any person who is obliged to provide water services to another in terms of a contract where the obligation to provide water services is incidental to the main object of that contract'. See Water Services Act s 1 (xxii).

[4] Water Services Act s 4(3).

[5] 2010 (3) BCLR 212 (CC), 2010 (4) SA 55 (CC), [2009] ZACC 30 ('*Joseph*').

low fair procedures before terminating those services.[1] *Joseph*, as has been argued elsewhere, appears to follow a constitutional doctrine of legitimate expectations.[2]

Significantly, a water service provider cannot disconnect water supply where the consumer satisfies the relevant service provider that he or she is unable to pay. In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*,[3] Budlender AJ held that the effect of these provisions when read in the light of FC ss 27(1) and 7(2) is that disconnection of an existing water supply to consumers by a local authority is a *prima facie* breach of its constitutional duty to respect the right of existing access to water. These legislative restrictions are critical to ensuring that poor communities have continued access to water services.

Similarly in *Highveldrige Residents Concerned Party v Highveldridge Transitional Local Council & Others*, the local authority was directed to reinstate residents' water supply as a form of interim relief.[4] While the judgment primarily deals with the *locus standi* of the applicant, the Court made an assessment of the balance of convenience. It reasoned that any potential pecuniary losses of the respondents could not outweigh the human need and suffering that would occur due to the lack of fresh water. It relied for that conclusion on both FC s 27 and the rights of children to adequate nutrition in FC s 28.[5] It is clear that section 4(3) *(c)* of the Water Services Act imposes the onus on the consumer to prove that he or she is unable to pay for basic services. A trickier question is how proof 'to the satisfaction of the relevant service authority' should be interpreted. In the past, such a phrase was interpreted as conferring wide discretion on the authorities. As long as they proved that they were satisfied about the existence of the facts on which the opinion was based, they could not be faulted even if, objectively speaking, the information before them could not have justified the opinion they reached.[6] In the new constitutional order, the Constitutional Court has expressed disquiet against the grant of unguarded and broad discretionary powers because the exercise of such powers comes with a propensity to infringe constitutional rights.[7] In the present case, to leave the determination of who is unable to pay solely within the discretion of a service provider would render

[1] *Joseph* (supra) at para 47.

[2] See C Sprague & S Woolman 'Moral Luck: Exploiting South Africa's Policy Environment to Produce a Sustainable National Antiretroviral Treatment Programme' (2006) 22 *SAJHR* 337 (Discussing *Van Biljoen v Minister of Correctional Services* 1997 (4) SA 441 (C) in which the High Court found that two prisoners with HIV/AIDS previously on ARVs in penal institutions had a legitimate expectation to receive ART while incarcerated.)

[3] 2002 (6) BCLR 625 (W).

[4] High Court (Transvaal Provincial Division) Case No 28521/2001 (17 May 2002).

[5] For more on this aspect of FC s 28, see A Friedman, A Pantazis & A Skelton 'Children's Rights' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS1, July 2009) §47.4.

[6] There is a rich, if odious, body of judicial opinion supporting this point in South Africa's security legislation cases. See, example, *Kabinet van die Tussentydse Regering vir Suidwes-Afrika v Katofa* 1987 (1) SA 695 (A).

[7] See *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC), [2000] ZACC 8; *Janse van Rensburg NO v Minister of Trade & Industry NO* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC), [2000] ZACC 18. For a more detailed discussion on subjective phrases, see C Hoexter *Administrative Law in South Africa* (2007) 265-271.

the protection of s 4(3)*(c)* nugatory. Inability to pay should be determined by an objective standard rather than a subjective standard.

How much protection, it may be asked, does s 4(3)*(c)* of the Water Service Act really offer to those that are unable to pay for basic services? An answer to this question was attempted in *Manqele v Durban Transitional Metropolitan Council*.[1] The applicant was an unemployed 35 year-old-woman who resided, with seven children, in a flat owned by the respondent. Water supply to her flat was disconnected by the respondent due to non-payment for the service. In her application to have the water reconnected, she relied, among other legal provisions,[2] on her right under s 4(3)*(c)* to have continued access to water despite her inability to pay. However, the judge responded that since the applicant had used more water than that available under the respondent's free water policy, she could not rely on the protection under this section.[3] According to the Court:

> The applicant chose however not to limit herself to the water supply provided to her free of charge by the respondent, but to consume additional quantities of water in respect of which she has an obligation to pay… . This in my view, takes the applicant outside the ambit of being a person contemplated by section 4(3)*(c)*.

The judgment thus holds that disconnections for non-payment are acceptable where consumers use more water than the relevant water services provider has undertaken or is obliged to provide for free. It is unclear whether, on this view, disconnection for non-payment would result in consumers being denied access to, or even the basic quantity of, free water. Properly constructed, then, *Manqele* holds that disconnections for non-payment for use of amounts over and above the allotted amount are acceptable so long as people continue to have access to the amount of water supplied for free by the relevant water services provider. The holding may seem tortured — but it retains a certain consistency. End users are entitled to a certain amount of water per month free of charge. After use of their free water, they remain responsible for payment of the remainder. However, disconnection for repayment of the remainder ought not to result in the denial of their monthly free allotments.

The Constitutional Court approved of this approach in *Mazibuko*. O'Regan J held that the automatic disconnection of water supplied from a prepaid metered system or a yard standpipe after six kilolitres per month was beyond constitutional reproach. The Court concluded that in circumstances where the water supply has been cut off because the basic, free, quantity of six kilolitres has been exhausted, but will be reconnected at the beginning of the following month, it cannot be said that a 'limitation or discontinuation of water services' in terms of s 4(3) of the

[1] [2002] 2 All SA 39 (D).

[2] The applicant also relied on the right to basic water supply in Water Services Act s 3. As the regulations defining the extent of this right had not yet been promulgated, Niles Duner J held that this section was not justiciable. This holding is problematic simply because the right to water is itself a justiciable right under the Constitution. The failure to promulgate the regulations itself should have been considered as a violation of the right to water under the Act as read with FC s 27(1)*(b)*.

[3] The respondent's policy later received national legislative approval under the Regulations to the Water Services Act referred to above.

Water Services Act has occurred. It is a 'temporary suspension in supply' to which section 4(3) does not apply.[1]

In sum, people who are unable to pay for water are entitled to no more than the six kilolitres of free water per month per household. If that was what Parliament had intended, however, it would have had no reason to include s 4(3)*(c)* in the Water Services Act. Section 3 of the Water Services Act provides that everyone has a right of access to a basic water supply, while s 1(iii) defines 'basic water supply' to mean the 'prescribed minimum standard of water supply services necessary…to support life and personal hygiene'. The regulations in turn prescribe the minimum basic water supply as six kilolitres a month per household. Together, these provisions suffice to ensure that people have access to a minimum basic water supply. The *Mazibuo/Manqele* gloss on FC s 27 and the Water Services Act holds that where the basic water supply is provided free of charge, WSA s 4(3) *(c)* — which deals with denial of basic water supply for non-payment –does not apply. Section 4(3)*(c)*, on the *Mazibuko* and *Manqele* approach, can apply only in situations where the basic water supply is not supplied for free. Since February 2001, however, the South African government has been providing basic water for free in terms of the free basic water policy.[2] While it is true that the government is under no constitutional obligation to provide free basic water,[3] in the context of the prevailing policy landscape, the courts have altered the meaning of s 4(3)*(c)* of the Water Services Act from disconnection to temporary suspension. If that outcome is what the Court intended, then it should make such a dramatic holding, with all its unfortunate consequences, clear to the reader and to the people of Phiri and other locales.

A policy decision by cabinet and the subsequent implementation of that policy cannot be allowed to alter the meaning of a legislative provision.[4] And it remains true that s 4(3)*(c)* was designed to protect the water rights of abjectly poor people.

It is for this reason that we propose an alternative interpretation of the provision. Our starting point is the recognition that what is prescribed as a basic water supply in the regulations is the minimum, not the maximum, amount of basic water. The provision of the minimum amount of water does not exhaust the state's obligations under s 3 of the Water Services Act as read with FC s 27(1)*(b)*'s obligation to progressively realise the right to water for those who are unable to pay for it. Section 4(3)*(c)* states explicitly that the discontinuation of water services for non-payment must not result in the denial of access to basic water. To the

[1] *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC), [2009] ZACC 28 ('*Mazibuko*') at paras 119-124.

[2] 'Free Basic Water Implementation Strategy (version 2)' (2002) available at http://www.dwaf.gov.za/Documents/FBW/FBWImplementStrategyAug2002.pdf (accessed on 17 April 2011).

[3] *Mazibuko* (supra) at para 85. For further discussion on this point, see § 56B.4*(f)*(ii) below.

[4] But see the approach taken to the principle of constitutional subsidiarity in *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* 2010 (4) BCLR 312 (CC), [2009] ZACC 33 ('*Nokotyana*') (Rights to receive basic service were held to depend on the provisions of chapters 12 and 13 of the National Housing Code — a policy document developed in terms of the Nation Housing Act 107 of 1997.) See also D Bilchitz 'Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*' (2010) 127 *SALJ* 591 (Contends that this approach has the result of allowing 'a policy document to overrule a legislative obligation' to provide basic sanitation services in terms of the National Water Act and its regulations.).

extent that the paragraph protects only that minimum quantity of basic water, and not any amount of water in excess of that minimum, the provision is inconsistent with the constitutional and policy scheme that sets a minimum, but not a maximum amount, of basic water. The paragraph should rather be read to ensure that no discontinuation (as opposed to suspension) of water services occurs for reasons of non-payment, regardless of how much water is used, in circumstances where people are genuinely unable to pay for water services. It therefore may be reasonable to set some form of maximum limit for persons who cannot pay. All residents face some (soft) limits on high water usage: such limits generally take the form of higher prices.

Last, but not least, it may be asked whether s 4(3)*(c)* of the Water Services Act can be relied upon in connection with premises that are not private dwellings. A comparison can be made between this section and s 63A of the British Water Industry Act 1991. The British Act makes it an offence for a water services provider to use a limiting device with the intention of enforcing payment of charges due in respect of the supply of water for a list of specified premises: private dwelling houses, children's homes, residential care homes, prisons and detention centres, schools and premises used for children's day care. Although similar provisions are absent from the Water Services Act, Michael Kidd has argued, quite persuasively, that it cannot be deemed 'equitable and fair' in terms of s 3*(a)* of the Act to discontinue water supply for non-payment from such premises as schools.[1] Alternatively, he has argued that in the case of schools, learners are innocent and not direct customers of the water service provider. Consequently, they should be regarded as being unable to pay for the water supply to the private service provider and therefore deserving of protection under s 4(3)*(c)*. Kidd's interpretation would mean that premises like schools and prisons are protected from disconnections where the owners are unable to pay for water services. The Courts' approach to s 4(3)*(c)*, with its manifest difficulties, is unlikely to leave vulnerable classes of persons — learners and prisoners — clearly protected by rights enshrined in FC s 29 and FC 35 vulnerable to disconnection.

(ii) *Prepaid meters*

Due to the prevalence of non-payment for water services, particularly in black communities, municipalities have increasingly resorted to using prepaid meters as a credit control mechanism in South Africa. These meters have the effect of discontinuing a service automatically after the credit expires. During the 1990s, the use of prepaid meters was opposed in the United Kingdom both by consumers and municipalities concerned about the health risks associated with water cut-offs.

[1] M Kidd 'Not a Drop to Drink: Disconnection of Water Services for Non-Payment and the Right of Access to Water' (2004) 20 *SAJHR* 119, 136.

Litigation that sought to have prepaid meters declared unlawful was ultimately successful:[1] the use of prepaid water meters was prohibited by legislation in 1999.[2]

In the English litigation, the Queen's Bench held automatic cut-offs of the water supply upon the exhaustion of credit in a prepaid meter to be inconsistent with the statutory requirement that notice be given to the social services department — which can indefinitely delay disconnection — and the requirement that water consumers be given seven days' notice of disconnection and an opportunity to contact and make representations to the relevant social services department. In the South African context, it would seem that prepaid meters circumvent the procedures for discontinuing water service set out in s 4(3) of the Water Services Act. The argument that the installation and operation of prepaid meters violates both the Act and FC s 27(1)*(b)* was directly before the Constitutional Court in *Mazibuko*.

The Court's response was vastly different to the Queen's Bench's response in *Director of Water Services*.[3] Leaving aside the question of whether a cut-off amounts to an administrative action for the purposes of the Promotion of Administrative Justice Act, s 4(3)*(b)* of the Water Services Act in any case requires procedures for the disconnection of water services to 'provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations'. The Court considered the meaning of this provision:

[1] *R v Director of Water Services, ex parte Lancashire County Council, Liverpool City Council, Manchester City Council, Oldham Metropolitan Borough Council, Tameside Metropolitan Borough Council and Birmingham City Council* [1999] Env LR 114, [1998] EWHC 213 (QB). See, generally, M Drakeford 'Water Regulation and Prepayment Meters' (1998) 25 *Journal of Law and Society* 588; J Dugard 'Rights, Regulation and Resistance: The Phiri Water Campaign' (2008) 24 *SAJHR* 593; and E Harvey 'Managing the Poor by Remote Control: Johannesburg's Experiment with Pre-Paid Water' in D McDonald & G Ruiters (eds) *The Age of Commodity: Water Privatisation in South Africa* (2005) 120.

[2] The Water Industry Act of 1991 was amended in 1999. The new section 63A, inserted by section 2 of the Water Industry Act of 1999 provides:

Prohibition of use of limiting devices.

(1) A water undertaker shall be guilty of an offence under this section if it uses a limiting device in relation to any premises specified in Schedule 4A to this Act, with the intention of enforcing payment of charges which are or may become due to the undertaker in respect of the supply of water to the premises.

(2) For the purposes of this section "a limiting device", in relation to any premises, means any device or apparatus which—

(a) is fitted to any pipe by which water is supplied to the premises or a part of the premises, whether that pipe belongs to the undertaker or to any other person, and

(b) is designed to restrict the use which may be made of water supplied to the premises by the undertaker.

(3) An undertaker does not commit an offence under this section by disconnecting a service pipe to any premises or otherwise cutting off a supply of water to the premises.

(4) An undertaker guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale.

[3] The Final Constitution does not oblige courts to consider foreign law when interpreting the rights in the Bill of Rights, although it may do so. FC s 39(1)*(c)*. Moreover, it does not appear from the Heads of Argument that either the applicants or the amicus curiae cited the case to the Court. Nevertheless, the point here is not to berate the Court for its failure to refer to foreign law, but for the poverty of its logical and intellectual approach in the face of a patently better one.

> Could section 4(3) mean that every time a water supply, provided through a pre-paid meter is about to be suspended because the credit purchased for the water supply is at its end, reasonable notice and an opportunity to be heard must be provided to the relevant customer by the municipality? This would, in my view, have a result that borders on the absurd. It would require the municipality to give advance notice and an opportunity to be heard, possibly several times a month or more to every person who has a pre-paid meter installed. For there is no reason why the reasonable notice should only apply when the suspension of the service arises because the basic water supply has been exhausted. On the applicants' argument it would arise every time the pre-paid water allowance has been consumed and it is time to purchase a further allocation.[1]

To require such onerous procedures, the Court concluded, would be administratively untenable, and for that reason should not be required.[2] In this way, the Court has essentially limited any rights of procedural fairness by seeking to justify their limitation against the difficulty of respecting those rights. To say that rights are too difficult to respect, however, is an unacceptable excuse for abrogating them. The English court in *Director of Water Services* was faced with precisely the same conundrum. Its response to the situation in which a technology of water reticulation and a set of rights are incompatible was to reject the technology of water reticulation — that is, prepaid meters — rather than to reject the rights. If the only way to respect the welfare rights granted by s 4(3) of the Water Services Act is to ban the use of prepaid meters, then so be it. As to whether disconnection can be justified in terms of FC s 27, our socio-economic jurisprudence permits the Court to balance administrative costs and the provision of basic goods. We would argue that 'access to water' constitutes an urgent need for those persons in desperate circumstances, and that the established criteria for reasonableness articulated in *Grootboom* ought to prevent disconnection or suspension.

Finally, the applicants argued that the change in water supply policy from one in which people had been charged a flat rate in the form of a 'deemed consumption tariff' to one involving the installation of prepaid meters amounted to a deprivation of existing rights of access to sufficient water and thus a violation of the negative duty to respect rights.[3] Under the terms of the previous system,

[1] *Mazibuko* (supra) at para 122.

[2] Ibid at para 123. Consider the US Supreme Court's response to the debate around whether statutory welfare and disability rights can be terminated without prior notice or hearing in the two cases of *Goldberg v Kelly* 397 US 254 (1970) and *Mathews v Eldridge* 424 US 319 (1976). Having held in *Goldberg* that welfare rights constitute property for the purposes of the 5th and 14th Amendments' protections of due process, the Supreme Court considered in *Mathews* the administrative burden the requirements of due process place on officials. It held that any burden placed on the bureaucratic machinery of state welfare support has to be balanced against the urgency of the need in which welfare or disability claimants find themselves. The urgency of need is a theme the Constitutional Court has embraced in its earlier judgments on socio-economic rights, notably *Government of the Republic of South Africa v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), [2000] ZACC 19; *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Another (Mukhwevho Intervening)*,2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) [2001] ZACC 19; and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC), [2009] ZACC 16. It is odd, then, that the Court shows so little willingness to take the urgency of the need for water into account, or, as in *Mathews*, to balance the administrative burden against the urgent need for water.

[3] *Mazibuko* (supra) at paras 135-136.

residents of Phiri in Soweto had paid a flat rate of R68,40 per month for an unlimited amount of water for domestic use. The free basic water policy provides an amount of six kilolitres per month for free, with water in excess of that amount charged for on the basis of a subsidised block tariff. The Court's response to this argument turns on whether or not water supplied using pre-paid meters is more expensive overall for consumers than the old deemed consumption scheme. The flat rate charged under the old scheme was based on a deemed consumption of 20 kilolitres per month. In terms of the new free basic water programme and pre-paid meters, the charge for 20 kilolitres would come to R95,80 per month. This charge is clearly more than the old flat rate of R68,40. However, the Court points out that according to the 2006/2007 tariff for combined water and sanitation services, consumers 'still charged on the deemed consumption tariff will be charged a flat rate of R131,25 for water and sanitation. Thus, the flat rate appears to cost 25 per cent more than the amount charged to pre-paid meter customers.'[1] The Court concluded from this costs comparison 'that the move from the deemed consumption system to the pre-paid metered system with a free allocation of 6 kilolitres per month [does not] constitute a retrogressive step.'[2]

(d) Protect

The duty to protect is critical to the realisation of the right to water principally because of the increasing involvement of private actors in the provision of water services. The state can privatise the provision of water services but not its obligations implicit in the right to water.[3] In the context of the privatisation of water, the state remains primarily responsible for regulating private service providers so that they do not deny individuals or groups their right to water.[4]

Water services were previously provided predominantly by state departments. The White Paper on the Transformation of the Public Service 1995 marked a formal transition from the state dominated system of service provision to one in which private service providers are allowed to play a part. Privatisation of water services[5] was given a legal boost by the enactment of the Water Services

[1] *Mazibuko* (supra) at para 140

[2] Ibid at para 142. Against this conclusion see the argument that the tariff structure implemented by Johannesburg Water, with steeply rising water prices at the lower end of the usage scale after the free water allocation has been exhausted rather than a convex curve with steeper price increases at the 'luxury', high consumption end of the scale, impacts negatively on low-income households and makes water bills unaffordable. P Bond & J Dugard 'The Case of Johannesburg Water: What Really Happened at the Pre-paid "Parish Pump"' (2008) 12 *Law, Democracy and Development* 1, 7; P Bond & J Dugard 'Water, Human Rights and Social Conflict: South African Experiences' (2008) 11(1) *Law, Social Justice and Global Development* 1, 9-11; and J Dugard 'Civic Action and Legal Mobilisation: The Phiri Water Meters Case' in J Handmaker & R Berkhout (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 71, 79-80.

[3] D Chirwa 'Privatization and Freedom from Poverty' in G van Bueren (ed) *Freedom from Want* (forthcoming 2011).

[4] K de Feyter & FG Isa 'Privatization and Human Rights: An Overview' in K de Feyter & FG Isa (eds) *Privatization and Human Rights in the Age of Globalization* (2005) 1, 3–4.

[5] Privatisation is used here to refer to the process through which the state involved private actors in the provision of services. It embraces many forms including the total sale of assets, private-public partnerships, management contract, employee buyout and outsourcing.

Act in 1997.[1] The form of privatisation tried in a number of municipalities[2] is a management contract. Under this arrangement, operation of the water system is contracted out to a private provider while the system itself is still owned by the government.

(i) *Privatisation*

Due partly to the public resistance to privatisation and partly to the failure of these 'pilot' privatisation initiatives to live up to the expectations of greater efficiency,[3] better service quality and enhanced accessibility, the state has now leaned towards corporatisation as a more preferable mode for providing water services. Corporatisation is a process whereby a government department is turned into a public company with the aim of letting it function as a commercial entity.[4] Ownership, control and management of the assets remain in the hands of the state, but the new entity operates in accordance with business principles. Amendments to the Municipal Systems Act in 2003 have made it more difficult for private service providers to become involved in water provision through management contracts or outright sale of state assets than was initially planned.[5] Chances for a private service provider to be awarded a contract such as those awarded to BiWater and SAUR International in Dolphin Coast are now rather slim. Thus, contrary to popular assumptions, water is mostly provided by state departments and corporatised entities. Although municipalities still outsource certain services related to water provision, such as meter reading, very few municipalities have contracted the provision of these services to private companies. In *Nkonkobe Municipality v Water Services South Africa (PTY) Ltd & Others,*[6] the case turned in large part on the lack of participation in the awarding of a concession for private

[1] Water Services Act s 11.

[2] The delivery of water and sanitation services in three Eastern Cape municipalities — Queenstown, Stutterheim and Fort Beaufort — were the first basic municipal services to be privatised in 1992, 1993 and 1994 respectively. Lyonnaisse Water Southern South Africa (restructured in 1996 as Water and Sanitation Services (WSSA)) was the private actor that won the relevant management contracts. The provision of water services in Nelspruit was in 1999 contracted out to Bi-water, a British based multinational corporation, for 30 years. Again, in 1999, the provision of water and sanitation services in Dolphin Coast and Durban was contracted out to multinational companies SAUR International and Bi-Water respectively. In 2001, management contracts to provide similar services were won by WSSA in respect of Johannesburg.

[3] For assessments of the performance of privatisation initiatives in South Africa, see generally D McDonald & G Ruiters (eds) *The Age of Commodity: Water Privatization in Southern Africa* (2005).

[4] D McDonald 'Privatization and the New Ideologies of Service Delivery' in D McDonald & L Smith (eds) *Privatizing Cape Town: Service Delivery and Policy Reforms since 1996* Municipal Services Project, Occasional Paper Series No 7 (2002) 20.

[5] For example, the procedures now require municipalities to involve communities when deciding to involve external delivery mechanisms and concluding agreements with private service providers, to assess different mechanisms before going external and to opt for an external mechanism only where it presents the best chance of achieving the objectives of the providing municipal services that are accessible and equitable. See D Chirwa 'Water Privatisation and Socio-economic Rights in South Africa' (2004) 8(2) *Law, Democracy and Development* 181, 191-192; N Steytler 'Socio-economic Rights and the Process of Privatizing Basic Municipal Services' (2004) 8(2) *Law, Democracy and Development* 157, 169-176.

[6] [2001] ZAECHC 3.

operation of water services. The municipality was successful in nullifying the 6 year-old contract. However, the municipality did not succeed because it claimed it could no longer afford the high management fees of R400 000 per month being charged by the private contractor. Rather, the High Court found that the municipality itself had not complied with the necessary consultation and public participation requirements in awarding the tender.

While the involvement of private service providers creates peculiar problems relating to their regulation by the state and their accountability to the public,[1] issues pertaining to access to water services are essentially the same whether these services are provided by the state, by private service providers, or jointly. This is so because public providers now use commercial principles in providing water services: full cost recovery measures, ring fencing, removal of subsidies, and the use of harsh credit enforcement mechanisms. We explore below the ramifications that these commercial principles have on the right of access to water services.

(ii) *Farm owners and other landowners*

In some circumstances, interference with water supplies should require a court order in advance. If the disconnection, denial or limitation of access to water services or supplies amounts to a constructive eviction — a resident is forced to leave their home as a result — then there is precedent to suggest that disconnection cannot occur without a court order. Under FC s 26(3) an eviction cannot proceed without the imprimatur of judicial approval. The Land Claims Court, itself, has suggested that severe restrictions on the use of land may amount to an eviction.[2]

The duty to *protect* the rights in the Bill of Rights may require the state to prevent violations of the right of access to sufficient water by third parties.[3] For instance, if a farmer unreasonably and arbitrarily cuts off access to water to lawful occupiers of his property, then the state must act to restore access to sufficient water to the occupiers. Likewise, water services operated by private operators must be sufficiently regulated by the government to ensure that such operations do not interfere with the right to water of other members of the commonweal.

(e) Promote

The duty to promote is educational in nature. It requires the state to raise awareness among water users about their right to water, including the hygienic use of water, the protection of water sources and sustainable use of water.[4] Indeed, the regulation giving effect to the right to have access to a basic water supply and basic sanitation services contains a requirement that 'appropriate education in respect of effective water use' must be provided.[5]

[1] See, for example, D Chirwa 'Privatization of Water in Southern Africa: A Human Rights Perspective' (2004) 4(2) *African Human Rights Law Journal* 218.

[2] See *Van der Walt & Others v Lang & Others* Case No 102/98 (LCC); *Dhladhla & Others v Erasmus* Case No 11/98 (LCC).

[3] Maastricht Guidelines on violations of Economic, Social and Cultural Rights (1997) at para 6.

[4] General Comment 15 (supra) at para 25.

[5] Regulation 3*(a)* of the Regulations relating to compulsory national standards and measures to conserve water, *Government Gazette* 22355, Notice R509 of 2001 (8 June 2001).

The government's duty to promote a right is also a shield against claims arising from other legal provisions or constitutional rights.[1] In *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others*, the right to adequate housing assisted the national government in defending its right to create temporary housing for flood victims in the face of claims by neighbouring residents that property values would fall and their peaceful environment would be disturbed.[2] In the case of water such protection is also buttressed by the property right enshrined in FC s 25(8): 'No provision of this section may impede the state from taking legislative and other measures to achieve land, *water* and related reform, in order to redress the results of past racial discrimination' (Our emphasis).

(f) Fulfil

The duty to fulfil, as mentioned earlier, has two elements: the obligation to facilitate the realisation of the right and the obligation to provide the goods guaranteed by the right. The former requires that the state must put in place measures that enable people to have access to the right using their own means. The latter requires the state to provide direct assistance to those who cannot afford water services so that they can have access to these services. This obligation, as will be demonstrated below, has particular relevance to disconnections, pricing for water services and tariff enforcement mechanisms.

(i) *Ensuring Affordability*

Access to water in South Africa is determined by consumer tariffs that seek to recover the full cost of the service.[3] According to the *White Paper on a National Water Policy for South Africa 1997*, '[t]o promote the efficient use of water, the policy will be to charge users for the full financial costs of providing access to water, including infrastructure development and catchment management activities'. While this policy also stipulates that provision will be made for some or all of these charges to be waived in order to promote equitable access to water for basic human needs, it does not explain how this is to be done. This policy now takes the form of the Water Services Act. The Act requires that the Minister, when prescribing norms and standards in respect of tariffs for water services,

[1] See G Budlender 'The Justiciability of the Right to Housing: The South African Experience' in Scott Leckie (ed) *National Perspectives on Housing Rights* (2003) 207-216. In the context of the right of access to sufficient water, the state's duty to *promote* the rights in the Bill of Rights might mean the creation of educational and informational programmes designed to enhance awareness and understanding of the right of access to sufficient water. See CESCR General Comment 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cutural Rights (19th session, 1998) UN doc E/C12/1999/22 at para 3*(a)*. See also *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC), [1997] ZACC 17 at para 49 (Madala J)('Perhaps a solution may be to embark upon a massive education campaign to inform the citizens generally.')

[2] , 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC), [2001] ZACC 19.

[3] S Flynn & D Chirwa 'The Constitutional Implications of Commercialising Water in South Africa' in McDonald & Ruiters (eds) (supra) at 59, 65.

consider, among other things, the recovery of the costs reasonably associated with the provision of the water services.[1]

'Full cost recovery' means that the tariff for water services must reflect the initial cost of installing the infrastructure (capital cost) and the expenses associated with operating and maintaining the infrastructure (marginal costs).[2] Where water is provided by a private service provider, the cost of providing it is easy to ascertain. By contrast, where water is provided by a public operator, the cost can only be determined if the accounting system for water services is separated from other services. Thus, the Water Services Act expressly provides that '[w]hen performing the functions of a water service provider, a water services authority must manage and account separately for those functions.' This practice is known as 'ring-fencing'. It enables a service provider to eliminate subsidies and cross-subsidies that might have otherwise enabled the service provider to reduce the full cost of providing water services and hence lowering the tariffs.

Unbridled application of the full cost recovery principle may occasion unfairness in the South African context. As Pape and McDonald have argued, white South Africans and the industrial sector benefited enormously from heavily subsidised municipal services during the apartheid era.[3] As the geographical distribution of the people in South Africa still follows predominantly racial patterns, white communities and the industrial sector continue to benefit from reasonably good infrastructure. Most black communities, in contrast with white communities, require new infrastructure for water services. It follows that charging them the full cost of service delivery will result in higher tariffs, thereby perpetuating and reinforcing the effects of past unfair discrimination.[4]

Subsidies can be provided by the state. In *City Council of Pretoria v Walker*,[5] the South African Constitutional Court concluded that cross-subsidisation among consumers and differentiation in tariffs for services is not *per se* unconstitutional.[6] *Walker* concerned a claim of discrimination by a white person living in a predominantly white community that a neighbouring black community was being favoured with respect to tariffs for municipal services. In the black community, flat rates were charged. In the white community, the tariffs were charged according to the

[1] Water Services Act s 10(3)*(d)*. Other considerations in s 10(3) include social equity, the need for the return on the capital invested for the provision of water services and the financial sustainability of the water services in the area in question.

[2] See also P Bond, G Ruiters & D McDonald 'Water Privatization in Southern Africa: The State of the Debate' (2003) 4(4) *ESR Review* 12.

[3] J Pape & DA McDonald 'Introduction' in DA McDonald & J Pape (eds) *Cost Recovery and the Crisis of Service Delivery in South Africa* (2002) 20–22.

[4] It has been shown, for example, that the tariff per litre of water in rural KwaZulu-Natal is multiple times higher than that for the previously advantaged suburbs of Richard's Bay. See E Cottle & H Deedat *The Cholera outbreak: A 2000-2002 Case Study of the Source of the Outbreak in the Madlebe Tribal Authority areas, uThungulu Region, KwaZulu-Natal*' (2002) 79, available at <ftp://ftp.hst.org.za/pubs/research/cholera.pdf> (accessed on 31 May 2011).

[5] 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC), [1998] ZACC 1 ('*Walker*').

[6] The *Walker* Court stated that 'There may be cases where it is not unfair to charge according to different rates for the same services; it seems to me to be inconsistent with the equality jurisprudence developed by this Court to hold that all cross-subsidisation is precluded by sect 8(2) of the 1993 Constitution'. Ibid at para 42.

exact amount of services consumed. Langa DCJ held that special measures taken to ensure that disadvantaged communities enjoy access to basic services were necessary.[1] The flat rate was permissible 'while phasing in equality in terms of facilities and resources, during a difficult period of transition'.[2] This holding is consistent with comments made by the CESCR regarding service pricing. According to the CESCR:

> Any payment for water services must be based on the principle of equity, ensuring that these services whether publicly or privately provided are affordable for all including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.[3]

Legislation does place limits on the notion of full cost recovery. For example, the Minister, when setting the norms and standards in respect of tariffs for water services is empowered under s 10(1) of the Water Services Act to differentiate among geographical areas, categories of water users or individual water users.[4] Similarly, s 97(1)*(c)* of the Municipal Systems Act requires credit control and debt collection policies to make provision for indigent debtors. This statutory provision is consistent with its rates and tariff policies and any national policy on indigents.

However, apart from the free water policy discussed below, it is not clear how equity considerations apply in tariff determination. On the contrary, evidence suggests that municipalities tend to use full cost recovery as the overriding yardstick in setting tariffs.[5] Full cost recovery is achieved through the use of prepaid meters and a pricing system for post-paid meters which operates so that after the first block of free water, the charges for the next blocks rise steeply.[6] This practice contradicts the state's commitments under the Constitution, the Water Services Act and the National Water Act. Together, the Constitution and these two acts require the state to structure tariffs for water services so that the poor are not denied access to water.

(ii) *Free water policy*

The duty to fulfil the right to water summons the state to provide the means through which poor people can gain access to water. The free water policy is a principal means through which the state has, thus far, provided direct assistance to poor people in accessing water services. To restate: the minimum standard for basic water supply is '25 litres per person per day or 6 kilolitres per household per month' at a minimum flow rate of not less than 10 litres per minute, within 200 metres of a household.[7]

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[1] However, selective enforcement of payment for tariffs (not forming part of the special measures) was held to be a violation the non-discrimination clause.

[2] *Walker* (supra) at para 27.

[3] General Comment 15 (supra) at para 27.

[4] Sec 10(1)*(a)* of the Water Services Act.

[5] See, eg, Cottle & Deedat (supra) at 71–72.

[6] Ibid. See also McDonald (supra) at 28.

[7] Regulations relating to compulsory national standards and measures to conserve water, *Government Gazette* 22355, Notice R509 of 2001 (8 June 2001), regulation 3*(b)*.

Many writers have argued that this amount of free water is grossly inadequate.[1] These arguments were presented to the Constitutional Court in *Mazibuko*. The trend at the international level suggests that about 50 litres per person per day is the recommended basic amount of water for drinking and sanitation.[2] In addition to challenging the ultimate amount, some have attacked the free water policy on the ground that it has not been implemented uniformly and properly in all municipalities.[3] For example, a case-study of the Ilembe District Municipality undertaken by the South African Human Rights Commission revealed that over 40 per cent of the population does not have access to free basic water.[4] It has also been argued that those living in informal structures do not benefit from this policy.[5] Of particular concern is the fact that the current pricing system operates in such a way that after the first block of free water, charges for the next blocks rise sharply.[6] It is likely that this last issue will soon be the subject of constitutional litigation.[7]

In *Mazibuko*, the Constitutional Court made it clear that the state is under no constitutional obligation to provide free water. Referring specifically to the City of Johannesburg, the Court held that 'the City is not under a constitutional obligation to provide any *particular* amount of free water to citizens per month. It is under a duty to take reasonable measures progressively to realise the achievement of the right.'[8] Indeed, in overturning the Supreme Court of Appeal's decision, the Constitutional Court held that the applicants had based their challenge to the policy on the position that the city was under an obligation to provide a certain amount of free water. The SCA had held that since the City's policy had been formulated on the misconception that it was not under an obligation to provide free water to those who could not afford to pay, the policy was materially influenced by an error of law and should be set aside on that basis.[9] The Constitutional Court overturned this finding. In so doing, it affirmed that the City is under no obligation to provide free water in terms of the prescribed minimum basic water supply.[10]

The Supreme Court of Appeal based at least part of its reasoning on s 4(3) *(c)* of the Water Services Act.[11] Reading this provision alongside the Constitutional Court's dictum generates a couple of thought-provoking observations. The

[1] See, eg, J de Visser, E Cotle & J Mettler 'Realising the Right of Access to Water: Pipedream or Watershed (2003) 7(1) *Law, Democracy & Development* 27, 43; C Mbazira 'Privatization and the Right of Access to Sufficient Water in South Africa: The Case of Lukhanji and Amahlati' in J de Vissser & C Mbazira (eds) *Water Delivery: Public or Private?* (2006) 57–85.

[2] See, eg, P Gleick, 'The Human Right to Water' (1999) 1(5) *Water Policy* 587–503.

[3] See S Booysen *The Effect of Privatization and Commercialisation of Water Services on the Right to Water: Grassroots Experiences in Lukhanji and Amahlati* (Community Law Centre, 2004) 53.

[4] South African Human Rights Commission *6th Economic and Social Rights Report* (2006) 111.

[5] Flynn & Chirwa (supra) at 71–73.

[6] McDonald (supra) at 28.

[7] Private communication from lawyers acting for residents in two informal settlements with Malcolm Lanford (3 May 2011).

[8] *Mazibuko* (supra) at para 85.

[9] Ibid at para 28.

[10] Ibid at para 85.

[11] *City of Johannesburg and Others v Mazibuko and Others (Centre on Housing Rights and Eviction as amicus curiae)* 2009 (3) SA 592 (SCA), 2009 (8) BCLR 791 (SCA) at paras 29-38.

section provides that: 'Procedures for the limitation or discontinuation of water services must not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services provider, that he or she is unable to pay for basic services.' In other words, if a person cannot pay for basic water services, providing that person has an existing connection to a water supply and has been receiving basic water services, that person is entitled to continue receiving basic water services, for free. The protection against water cut-off for reasons of non-payment contained in s 4(3)*(c)* of the Water Services Act effectively establishes a statutory right to receive free basic water services.

It must be noted, however, that this protection applies only against water cut-offs, or the limitation or discontinuation of water services. The statutory right to free basic water thus only applies to people with existing connections to a metered or deemed-consumption water supply. If this is correct, then it establishes a slightly bizarre disparity between poor people with water connections who cannot afford to pay for basic water, and poor people with no connection who cannot afford to pay for that water. Plainly, people with no existing connection to a water supply cannot be charged for water. In terms of the City of Johannesburg's free basic water policy, these individuals and households are people with access to water in terms of 'service level 1'. Service level 1 constitutes access to water from a communal standpipe with unlimited flow no more than 200 metres away from the dwellings in question.

The more pressing point, however, is this: the statutory entitlement to free basic water does not extend to poor people without an individual connection to a water supply. There is no absolute statutory right to free basic water, and poor people without individual connections to a water supply could be required to pay for a basic water supply. Only once a person has an individual connection to a water supply which is capable of being discontinued do they enjoy a right of free access to basic water services — subject to the provision that they cannot pay for the water themselves. The statutory scheme is consequently under-inclusive. It creates a distinction between two classes of people. The distinction is arbitrary because it is entirely conditional on whether they had a pre-existing connection to a municipal water source or not. The Constitutional Court's jurisprudence on reasonableness in the context of socio-economic rights holds that any reasonable measures must take account of those in desperate circumstances or in urgent need of socio-economic resources. The statutory scheme confers a benefit on one class of people who cannot afford to pay for water, while denying that benefit to a class of people whose need for water is arguably more urgent and desperate. For this reason, the statutory plan would appear to be unreasonable within the Constitutional Court's own understanding of FC s 27(2).

(g) Equality Guarantee

FC s 27 does not create a directly enforceable set of rights. That is, an individual will not be able to sue the government for immediate relief: unless he or she

is already in receipt of service or goods in question.[1] However, the rights do require that the government put in place a reasonable plan to effect their progressive implementation. Courts may decide that FC s 27 is not directly enforceable against private parties such as private water service providers.[2]

To avoid the difficulties associated with the individual enforcement of socio-economic rights, an alternative argument could be based on FC s 9. The advantage of basing a claim on s 9 is twofold: Private parties are explicitly prohibited from unfairly discriminating and the right is immediately and directly enforceable. Pierre De Vos[3] proffers the following argument for a FC s 9 claim. He first notes that the Constitutional Court has on various occasions affirmed that all the rights in the Bill of Rights are interdependent, interrelated and often mutually supporting.[4] The Court has also accepted that the Constitution embraces a substantive notion of equality, as opposed to a formal understanding of equality.[5] In deciding whether discrimination is 'unfair,' the deciding factor is the impact of the conduct on the complainant. De Vos puts it as follows:

> What is required is to take into account the *impact* of the state's action or omission on a specific group with reference to the social and economic context within which the group finds itself. The more economically disadvantaged and vulnerable a group is found to be, the greater the possibility that a court may find that there was a constitutional duty to pay special attention to the needs of such a group.[6]

He further argues that the factors a court would consider in deciding whether the state's plan in realising socio-economic rights is *reasonable* are comparable to the factors a court would consider when deciding whether *unfair* discrimination occurred. A failure to take into account the structural inequalities in society, or the failure to take into account the impact of particular conduct on particularly vulnerable groups, could in appropriate circumstances amount to 'unfair' discrimination.[7]

A claim based on unfair discrimination, either against the state or a private water supplier, will only succeed if an appropriate 'prohibited ground' is identified. Two possible grounds are socio-economic status and gender. Socio-economic status is not explicitly listed in the Constitution. A court would have to be persuaded

[1] See *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC), [2002] ZACC 15 '*Treatment Action Campaign*' or '*TAC*') at para 39 ('We therefore conclude that FC s 27(1) does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2).')

[2] See *Grootboom* (supra) at para 34; *TAC* (supra) at para 39. The Constitutional Court held that FC s 26(1) and (2) and FC s 27(1) and 27(2) must be read together to identify the scope of the right. FC s 26(2) only obliges the 'state' to take reasonable measures to realise the right and a court that follows a literal interpretation may then decide that if water supply has been privatised, that only the state may be held liable, as only the state is addressed in FC 26(2).

[3] P De Vos '*Grootboom*, the Right of Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 *SAJHR* 258.

[4] See General Comment 15 (supra) at para 1 ('State parties have to adopt effective measures to realize, *without discrimination*, the right to water, as set out in this general comment') and at para 12*(c)*(iii) ('Water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and fact, *without discrimination* on any of the prohibited grounds.')

[5] De Vos (supra) at 267.

[6] Ibid.

[7] Ibid at 272.

that such a ground could be read into the list by analogy.[1] Should such an analogy prove successful and should the state or a private water supplier's policy be shown to disparately and negatively impact on the poor, a claim could be brought by an individual or group of individuals against the state or against the private supplier directly.[2] Similarly, a gender-based discrimination suit could be brought against a private water supplier[3] in cases where it can be demonstrated that its water supply policies impact disproportionately on (rural) women. It goes without saying that exhaustive empirical research would probably have to be undertaken to support either the class or gender based claim.

While courts have been very careful in crafting appropriate remedies in socio-economic rights decisions and have not granted immediate relief to claimants,[4] the same situation should not necessarily apply to a claim based on the equality guarantee. The Constitution allows for 'appropriate' relief and the qualifiers contained in FC ss 26(2) and 27(2) do not appear in s 9.[5] It would therefore be open to a court to grant immediate relief to a particular claimant. Courts will, of course, be inclined to hold that since the socio-economic rights as framed in the Constitution explicitly spell out the state's duties, the equality provision may not be used to create more onerous obligations. Indeed, the *Grootboom* Court, for example refused to allow the more onerous provisions in FC s 28 (Childrens'

[1] 'Social origin' and 'birth' are protected grounds in the Constitution but courts will not necessarily interpret these grounds to include socio-economic status. Section 34 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 hints that 'socio-economic status' is a prohibited ground for discrimination in South African law.

[2] For example, if a particular private water supplier terminates cross-subsidisation measures that lead to an increase in the tariffs charged to poor 'customers', such a supplier could arguably be interdicted to reintroduce cross-subsidisation measures. Cross-subsidisation was found to be 'fair' discrimination in *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) [1998] ZACC 1. The Court implicitly recognised the need for cross-subsidisation measures in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC), [1998] ZACC 17 at paras 80, 121-125 and 169. See also E Wamugo 'Privatisation and Regulation in Sub-Saharan Africa: Issues for Consideration' (2001) June *International Business Lawyer* 263 at 265 ('Some level of cross-subsidisation (eg between rural and urban users) may be socially desirable'); COSATU 'The Realities of Privatisation' (2002) 26 *SA Labour Bulletin* 30 (Raises an argument that privatisation may not occur if it would end cross-subsidisation of services for the poor or would have a negative impact on the poor); De Visser et al (supra) at 43 (Notes that local businesses have been excluded from cross-subsidisation policies and argues that in light of the fact that 78 per cent of water in South Africa is consumed by commercial agriculture and industry and only 12 per cent by domestic water consumption, that equal treatment is unreasonable and local businesses should be expected to participate in cross-subsidisation.)

[3] S Liebenberg & M O'Sullivan 'South Africa's New Equality Legislation: A Tool for Advancing Women's Socio-Economic Equality?' University of Cape Town and the Law, Race and Gender Unit, Faculty of Law (January 2001) 3 (Copy on file with authors)('[W]hile all the poor in South Africa are disadvantaged by a lack of access to social services such as water women are disproportionately affected because they bear a vastly disproportionate burden of household maintenance, child care, and care for elderly or sick relatives.') The authors also note that the Constitutional Court has taken judicial notice of the disproportionate burden of reproductive work performed by women. See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) ('*Hugo*') at para 37. See also G Brodsky & S Day 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty' (2002) 14 *Canadian J of Women and the Law* 185.

[4] In *Soobramoney*, the Court refused to grant relief to the applicant and did not order the state to provide life-saving treatment. In *Grootboom* and *TAC*, the Court found that the existing government plans and policies were unreasonable and merely ordered the state to devise and implement a reasonable plan.

[5] FC s 38.

Rights) to allow children with families to secure immediate relief in the form of housing, when the family itself would not be entitled to such relief under FC s 26. Such a conclusion would sorely test Kriegler J's view that the Final Constitution is primarily and emphatically an egalitarian document.[1] And yet it is a conclusion which Kreigler J — and the rest of the Constitutional Court — signed on.

In *Mazibuko*, the Constitutional Court recognises the validity of this kind of equality claim, even though it ultimately rejects both versions of the applicants' challenges on the basis of equality.[2] In terms of existing constitutional jurisprudence, any differentiation between classes of people that is not rationally connected to a legitimate government purpose is prohibited by FC s 9(1).[3] The applicants in *Mazibuko* presented the argument that the introduction of prepaid meters in only the Phiri region of Soweto drew a distinction between classes of people that is not related to any legitimate government purpose.[4] There were three other areas in Johannesburg that, like Phiri, had for many years received water as 'deemed consumption areas': Orange Farm, Ivory Park and Alexandra. In none of these other three areas, however, had prepaid water meters been introduced.[5] The Court held, however, that prepaid meters had been introduced in part to reduce water wastage, and in part to remedy the problem of unaccounted for water distributed in Soweto, for which no payment was received and from which no revenue was generated. The attempt to remedy a situation the Court appeared to agree was unsustainable was in the Court's view a legitimate government purpose that could not be held to be irrational in terms of FC s 9(1).[6]

The applicants' second equality challenge to the installation of prepaid meters was that their introduction in predominantly black neighbourhoods, but not in predominantly white neighbourhoods, amounted to unfair discrimination between white and black water consumers. Unfair discrimination by the state is prohibited by FC s 9(3), and discrimination on the basis of race or colour is presumptively unfair in terms of s 9(5). The Court set out the test for unfair discrimination

[1] See *Hugo* (supra) at para 74 ('The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution's focus and its organising principle.')

[2] *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC) [2009] ZACC 28 ('*Mazibuko*').

[3] *Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 42. See also *Mazibuko* (supra) at 84 (Court quoted *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) [1997] ZACC 5 at para 25 as follows: 'In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate government purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner.')

[4] *Mazibuko* (supra) at para 145.

[5] Prepaid electricity meters have been introduced in Orange Farm, and the struggle against them has been going on for some years under the banner of the Soweto Electricity Crisis Committee. See A Egan & A Wafer, 'The Soweto Electricity Crisis Committee: A Case Study for the UKZN Project on Globalisation, Marginalisation and New Social Movements in Post-Apartheid South Africa' (2004) 12. See also R Ballard, A Habib & I Valodia*Voices of Protest: Social Movements in Post-apartheid South Africa* (2006).

[6] *Mazibuko* (supra) at para 146.

as follows: 'To determine whether the discrimination is unfair it is necessary to look at the group affected, the purpose of the law and the interests affected.'[1] The Court held that the impact of the City's water policy could not be said to be harmful or disadvantageous to the residents of Phiri. They were not treated less favourably under the terms of the City's water policy than residents of other, predominantly white areas in which no prepaid meters were installed. Indeed, the Court continued, Phiri residents actually pay less for their water than consumers in other parts of the City.[2] The differentiation between Phiri residents and others, then, because it entailed no disadvantage or harmful impact for the residents of Phiri, did not amount to unfair discrimination.

The Court went on to make an important comment on how to understand equality in a deeply unequal society such as ours:

> The conception of equality in our Constitution recognises that, at times, differential treatment will not be unfair. Indeed, correcting the deep inequality which characterises our society, as a consequence of apartheid policies, will often require differential treatment.[3]

Slavish adherence to an ideal of equal treatment, in other words, is not necessarily the best way in which to go about achieving a more equal society, nor is it always feasible. The implication of the Court's reasoning here is that where benefits can be brought to one group of people by treating them differently to other groups of people, the ideal of equality should not prevent that. The achievement of equality may necessitate and justify different, perhaps unequal, treatment.[4]

In *Nokotyana & Others v Ekurhuleni Metropolitan Municipality*, however, the Constitutional Court blatantly ignores the principle set out in this dictum.[5] In *Nokotyana*, the applicants had sought from the respondent an increase in the number of ventilated improved pit latrines in the Harry Gwala informal settlement, so that each family, or alternatively every two families, would have access to a single latrine.[6] The municipality indicated that it was in a position to offer only one latrine to every ten households.[7] It emerged during the litigation that the national and Gauteng provincial governments had offered to finance the provision of toilets to meet the applicants' prayers. The municipality resisted this offer on the ground that to improve access to sanitation services for the residents of the Harry Gwala settlement while not doing the same for other residents of the municipality and the province would amount to unequal treatment. The Court agreed:

> It would not be just and equitable to make an order that would benefit only those who approached a court and caused sufficient embarrassment to provincial and national authorities to motivate them to make a once-off offer of this kind.[8]

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[1] *Mazibuko* (supra) at para 150. The Court referred here to *Harksen v Lane NO* (supra) at para 54 (Test for unfair discrimination is set out in full.)

[2] Ibid at para 152.

[3] Ibid at para 156.

[4] On the distinction between equal treatment and treatment as an equal, see, especially, R Dworkin *Taking Rights Seriously* (1977), 227ff.

[5] 2010 (4) BCLR 312 (CC), [2009] ZACC 33 ('*Nokotyana*').

[6] Ibid at paras 2 and 21.

[7] Ibid at para 33.

[8] Ibid at para 54. The Court referred here to FC s 172(1)*(b)*. This section enables courts deciding constitutional cases to make any order that is 'just and equitable'.

It is hard to reconcile the approach taken by Van der Westuizen J in *Nokotyana* with O'Regan J's observations about the nature of equality in *Mazibuko*, or the Court's well-entrenched precedent in *Walker*. The Court's adherence to an unachievable ideal of equal treatment in *Nokotyana* denies access to vastly improved sanitation services to a large number of people.[1] Such a *volte face* is difficult to explain, let alone stomach.

56B.5 Right to Sanitation

The right to basic sanitation is not mentioned expressly in the Bill of Rights. It has, however, has been recognised in statutory law. In international law and in foreign jurisprudence, as we noted above, sanitation is often viewed as an element of other rights, particularly housing, health and the right to environmental health or clean environment. Failure to control sanitary excreta disposal is one of the major causes of environmental pollution and waterborne diseases.

(a) International Law

(i) *Express and implied recognition*

A range of international human rights and humanitarian law instruments explicitly protect and promote access to sanitation. Article 14(2)*(h)* of the Convention on the Elimination of All Forms of Discrimination against Women explicitly obliges states parties to ensure that women in rural areas have the right to 'enjoy adequate living conditions, particularly in relation to housing, *sanitation*, electricity and water supply, transport and communications'. Under the Convention on the Rights of the Child, states parties are to ensure that all segments of society 'are informed, have access to education and are supported in the use of basic knowledge of … hygiene and *environmental sanitation*.' Under Geneva Convention (III) relative to the Treatment of Prisoners of War, 1949, occupying powers are 'bound to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics': the article then goes on to specify in some detail the type of measures required.[2] The same treatment is required in relation to civilian internees under Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War.[3] Water resources and infrastructure, which would

[1] For trenchant criticism of this glaring inconsistency in the Court's jurisprudence, see D Bilchitz 'Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*' (2010) 127 *SALJ* 591, 601-04.

[2] Geneva Convention, Article 29:

Prisoners of war shall have for their use, day and night, conveniences which conform to the rules of hygiene and are maintained in a constant state of cleanliness. In any camps in which women prisoners of war are accommodated, separate conveniences shall be provided for them. Also, apart from the baths and showers with which the camps shall be furnished, prisoners of war shall be provided with sufficient water and soap for their personal toilet and for washing their personal laundry; the necessary installations, facilities and time shall be granted them for that purpose.

[3] Geneva Convention, article 89.

arguably include sewage treatment plants and other sanitation facilities must also be protected during armed conflict.[1]

In the last decade, there have been increasing attempts to recognise a so-called freestanding or independent international human right to sanitation. Until recently, the international recognition of such a right to sanitation has been thin. In 1992, the International Conference on Water and the Environment identified four 'guiding principles'. The fourth principle contained this statement: 'it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price.'[2] Two years later, 177 States at the 1994 Cairo Conference on Population and Development, endorsed a Programme of Action that recognises, in Principle 2, that all individuals have the 'right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, water and *sanitation*.'[3] While the 2002 Johannesburg Declaration does not explicitly acknowledge the right to sanitation, it affirms its fundamental connection with human dignity: the principle from which all human rights are said to derive.[4]

The Committee on Economic Social and Cultural Rights was pressed to imply the right to sanitation along with the right to water enunciated in General Comment 15 in 2002. It declined to do so and gave no public reasons. However, in its General Comment 19, issued in 2008, the Committee began to open the door.[5] This change was largely prompted by a push for recognition within the UN System. In 2001, a Special Rapporteur was appointed by the UN Sub-Commission on Human Rights to report on the right of everyone to drinking water.[6] His draft guidelines begin by identifying sanitation as 'unquestionably a human right'. The guidelines go on to state that '[e]veryone has the right to have access to adequate and safe sanitation that is conducive to the protection of public health and the environment.'[7] In 2006, the newly formed Human Rights Council asked the High

[1] See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) art 54; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, art 14.

[2] *Dublin Statement on Water and Sustainable Development* (1992).

[3] The later UN-Habitat Global Plan of Action (1996) contains identical language to the Cairo Conference. UN-Habitat, The Habitat Agenda Goals and Principles, Commitments and the Global Plan of Action (1996) at para 11:

More people than ever are living in absolute poverty and without adequate shelter. Inadequate shelter and homelessness are growing plights in many countries, threatening standards of health, security and even life itself. Everyone has the right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, water and sanitation, and to the continuous improvement of living conditions.

[4] See Committee on Economic, Social and Cultural Rights, General Comment 4, at para 2.

[5] When discussing the coverage for certain social security benefits, it uses the language of rights in relation to sanitation: 'Family and child benefits, including cash benefits and social services, should be provided to families, without discrimination on prohibited grounds, and would ordinarily cover food, clothing, housing, water and sanitation, or other rights as appropriate.' CESCR General Comment 19, The Right to Social Security (Thirty-Ninth session, 2007) U.N. Doc. E/C.12/GC/19 at para 6.

[6] Final report of the Special Rapporteur on the Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation, 14 July 2004, E/CN.4/Sub.2/2004/20.

[7] The guidelines are available at http://www2.ohchr.org/english/issues/water/index.htm.

Commissioner for Human Rights to prepare a study on the scope and content of relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments. The Commissioner acknowledged that the debate as to whether water and sanitation were human rights remained open, but forcefully concluded that she 'believes that it is now time to consider access to safe drinking water and sanitation as a human right'.[1] In 2009, the newly appointed UN Independent Expert on the Issue of Human Rights Obligations related to Access to Safe Drinking Water and Sanitation, submitted her report to the General Assembly with a similar finding.[2]

The issue was finally resolved in 2010 when the UN General Assembly affirmed 'the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.'[3] In September 2010, the UN Human Rights Council confirmed the recognition of the right to sanitation[4] and the CESCR immediately issued a Statement on the Right to Sanitation that declared:

> The Committee reaffirms that, since sanitation is fundamental for human survival and for leading a life in dignity, the right to sanitation is an essential component of the right to an adequate standard of living, enshrined in Article 11 of the International Covenant on Economic, Social and Cultural Rights. The right to sanitation is also integrally related, among other Covenant rights, to the right to health, … the right to housing, … as well as the right to water, which the Committee recognized in its General Comment No. 15. It is significant, however, that sanitation has distinct features which warrant its separate treatment from water in some respects. Although much of the world relies on waterborne sanitation, increasingly sanitation solutions which do not use water are being promoted and encouraged.[5]

A number of social rights have also been interpreted by UN human rights treaty bodies to include *access* to sanitation. According to the CESCR, the right to housing embraces facilities for 'sanitation and washing facilities' and 'site drainage'.[6] With regard to the right to health, the same Committee listed sanitation as one of the underlying determinants of health, and thus part of the right to health, on the basis of the drafting history of the Covenant and the wide wording of the provision.[7] Sanitation is mentioned a number of times in General Comment 14 on the Right to Health, particularly in the context of the availability, the quality and the accessibility elements of the right to health.

Sanitation was given equal attention in the CESCR's General Comment 15 although the degree of recognition was still criticised as paltry by some experts at the Day of General Discussion that preceded its adoption. The content of the

[1] High Commissioner for Human Rights 'Report on the Right to Water and Sanitation as Human Rights' available at http://www2.ohchr.org/english/issues/water/docs/HRC_decision2-104.pdf (accessed on 31 May 2011).

[2] U.N. Doc A/HRC/12/24 (2009).

[3] The human right to water and sanitation, U.N. Doc A/64/L.63/Rev.1 at para 1.

[4] *Human Rights and Access to Safe Drinking Water and Sanitation*, U.N. Doc. A/HRC/15/L.14.

[5] U.N. Doc. E/C.12/45/CRP.1.

[6] CESCR General Comment 4 (supra) at para 8*(b)*.

[7] CESCR General Comment 14, The Right to the Highest Attainable Standard of Health (Twenty-second session, 2000) U.N. Doc. E/C.12/2000/4 at para 4.

right to water is said to include water for personal hygiene and sanitation and the Committee was anxious to emphasise that access to sanitation was both 'fundamental for human dignity and privacy' and a 'principal mechanisms for protecting the quality of drinking water supplies and resources'.[1] The effective provision of sanitation was articulated as a clear state responsibility: 'States parties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children.'[2]

The interplay between sanitation and various social rights is particularly visible in foreign jurisprudence. The very first Indian public interest litigation social rights matter engaged sanitation. In *Municipal Council, Ratlam v Shri Vardhichand & Others*, the Supreme Court of India found that the failure of a municipality to provide toilets for informal settlements and drainage not only violated the Municipality Act but threatened human health and implicated human rights due to the assault on decency and dignity.[3] In the first reported cases that invoked General Comment 15, sanitation was at the forefront. Provincial and municipal authorities in Argentina were found to have violated the rights to health and water by failing to provide the degree of sanitation necessary to prevent pollution of communal water sources.[4]

(ii) *A co-right with water?*

What is interesting about the recognition of the right to water and sanitation is the use of a singular not a plural noun. All the documents refer to water and sanitation as *a* human right *not* human right*s*. Sanitation and water appear to be conceived as twins — a co-right as it were. Some environmentalists express some concern that the constant lumping of water and sanitation together in development and now human rights discourse promotes water-based solutions to sanitation. While such a concern may have merit, it is difficult to imagine that all sanitation issues will invariably necessitate the use of water or engagement with the right to water.

An analogy with the civil right to freedom of thought, conscience and religion might shed some light on the relationship between water and sanitation. Although rights to thought, conscience and religion are related and overlap, they each possess relatively distinct characteristics.

Water quality is largely dependent on the provision of sanitation (water-borne or dry), both water and sanitation services require good hygiene to be effective, and where sanitation is waterborne, infrastructure is often twinned.

However, there are also a number of differences. Responsibility for providing sanitation services is normally spread among many different departments and ministries, and is delivered by a wider range of service providers. The timeframe for the delivery of sanitation services and particularly hygiene promotion tends to be longer. Due to the nature of their delivery, when water services fail, they

[1] CESR, General Comment 15, The Right to Water (Twenty-ninth session, 2002) U.N. Doc. E/C.12/2002/11 at para 29.

[2] Ibid.

[3] (1981) SCR (1) 97 available at http://www.judis.nic.in/supremecourt/qrydisp.aspx?filename=4495 (accessed on 31 May 2011). We are grateful to Justice Krishna Iyer for pointing out this fact to us.

[4] *CEDHA v Provincial State and Municipality of Córdoba*.

tend to fail in a geographic area, sparking immediate public demand for improvement or replacement services. However, when sanitation services fail, they are more likely to fail by household (full pit or septic tank), so the public demand for improvement is more localised and therefore not as effective. Where only a few people lack sanitation though, all feel the health impact. Nonetheless, it is difficult to assess the weight of such differences. For instance, providing water can be complex if it must be pumped from a distance and if good quality dry toilets are available in a location. The timeframe for the delivery of sanitation services and particularly hygiene promotion tends to be longer because it is simply not prioritised. A manager at a South African local municipality recently commented that the directive from national government was to meet the water targets first and concentrate on sanitation afterwards.[1]

In the South African context, no distinction is drawn between water and sanitation supply and they are lumped together as 'water services'. 'Water authorities' are thus burdened with a range of obligations with respect to them, even where sanitation services are not water-based sewerage services.

(iii) *Individual or collective right?*

The right to sanitation raises the classical issue of individual rights vs. collective rights. It is not even immediately clear into which category it falls. Sanitation is frequently promoted by health and development practitioners and policymakers on the basis of its public health benefits. Human excreta is the leading cause of water pollution and a major cause of preventable illnesses that lead to death. But how does this translate into human rights terms? Does it imply that we are primarily concerned not with a personal right to sanitation but rather a right for *all* people to have sanitation, in order that *everyone* will be protected. Many see 'environmental sanitation' as equally important — focusing not just on human excreta but developing sanitation systems that deal with all types of waste, and which demands not just a collection point of excreta, but also safe transport, treatment and disposal.[2] Sanitation thus possesses the features of a collective right. Could sanitation be better viewed as part of the right to environmental health or merely as a duty stemming from the right to health or water?

International human rights treaty law is largely structured in individual terms and each right is usually premised on a direct connection with human dignity. This question is further complicated in the case of sanitation: practitioners frequently express frustration with a lack of demand for sanitation. 'People need to be educated', they say. How does this fit with human rights? If human rights are meant to spring from universal and basic demands, do we need to be educated about them? Should people not be helped to demand them?

There are two ways to address this conceptual challenge. The first approach denies that the lack of individual access to sanitation is in and of itself an affront to human dignity. A lack of sanitation clearly raises issues of privacy, individual health, personal dignity and equality. Thus the objective impact on the individual

[1] Communication from local official, 17 February 2009.
[2] See WHO *What is Environmental Sanitation?* (2002).

of a lack of sanitation, whether mental or physical, and its impact on access to other human rights, could be sufficient.

A second, and better, approach is to downplay the theoretical difficulties of recognising a human right with inherent individual and collective characteristics and acknowledge that a right with individual and collective dimensions is acceptable within the international framework. For example, articles 8 and 13(4) of the ICESCR recognise collective rights. The former contains the 'right of trade unions' to establish federations and function freely. Article 13(4) grants 'individuals *and bodies*' the liberty from interference in the establishment of educational institutions, although it is constructed more as a defence than a right. Indeed, there are many parallels between trade union rights and the broader civil right to freedom of association and a right to sanitation. If only one person has the right to association, but it is denied to others, it is of little value.[1] The utility of the right to freedom of association lies in the ability of all individuals to exercise it and thus jointly organise, express their opinions and take collective action. The cultural rights in articles 1*(a)* and 3 of the ICESCR also have strong collective dimensions. Collective rights are also recognised in Article 27 of the ICCPR in relation to ethnic, religious and linguistic minorities.

Interestingly enough, the right to both a basic water supply and basic sanitation in s 2 of the Water Services Act is framed in such an individual and collective fashion: 'the right of access to a basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being'. Thus the purpose of the right to sanitation is to protect other people's human health and well-being. Similar language is used in the UN Sub-Commission guidelines, which arguably go further since they aim to protect the environment generally, and not just human health.[2]

(iv) *Content*

In the case of sanitation, one challenge is the level of technology. Does everyone have the right to a flush toilet or a dry toilet with equivalent effect? Are ventilated pit latrines or community toilets acceptable in any case or only in communities insufficient resources? How much should be left to progressive realisation and national interpretation? These questions are the subject of a growing debate. Many development agencies favour the use of Ventilated Improved Pits ('VIPs'). VIPs entail lower water demand and maintenance and no need for cost-recovery and revenue collection. However, some question the appropriateness of 'dry systems' for humid environments where, in fact, faecal matter does not easily dry. A further problem with VIPs is that they need to be emptied regularly, which often does not happen. In South Africa, Kathy Eales notes that —

[1] See S Woolman 'Freedom of Association' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

[2] UN Sub-Commission on the Promotion and Protection of Human Rights Guidelines for the Realization of the Right to Drinking Water and Sanitation (2006) available at www.ielre.org/content/e501.pdf (accessed on 1 June 2011) 2. (Everyone has the right to have access to adequate and safe sanitation that is conducive to the protection of public health and the environment.)

> Many VIPs are now full and unusable. In many areas, VIPS are now called full-ups. Some pits were too small, or were fully sealed … . South Africa's household sanitation policy is grossly inadequate. It speaks primarily to dry systems, and does not clarify roles and responsibilities around what to do when pits are full. National government under-estimated the scale of technical support required. [1]

This assessment suggests that, even leaving the issue of personal dignity aside, VIPs are not a panacea. They are *not* necessarily more affordable. The key issue becomes prioritisation.

The WHO guidelines describe sanitary excreta disposal as the isolation and control of faeces from both adults and children so that they do not come into contact with water sources, food or people. The UN Independent Expert has proposed a definition for the *right* to sanitation which was endorsed by the CESCR in 2010:[2] 'a system for the collection, transport, treatment and disposal or re-use of human excreta and associated hygiene … which is safe, hygienic, secure, socially and culturally acceptable, provides privacy and ensures dignity.'[3] She then went on to lay out the system's various substantive elements:

1. *Availability*. There must be a sufficient number of sanitation facilities (with associated services) within, or in the immediate vicinity, of each household, health or educational institution, public institutions and places, and the workplace. There must be a sufficient number of sanitation facilities to ensure that waiting times are not unreasonably long….
2. *Quality*. Sanitation facilities must be hygienically safe to use, which means that they must effectively prevent human, animal and insect contact with human excreta. Sanitation facilities must further ensure access to safe water for hand washing as well as menstrual hygiene, and anal and genital cleansing, as well as mechanisms for the hygienic disposal of menstrual products. Regular cleaning, emptying of pits or other places that collect human excreta, and maintenance are essential for ensuring the sustainability of sanitation facilities and continued access….
3. *Physical Accessibility*. Sanitation facilities must be physically accessible for everyone within, or in the immediate vicinity of, each household, health or educational institution, public institutions and places, and the workplace. Physical accessibility must be reliable, including access at all times of day and night. The location of sanitation facilities must ensure minimal risks to the physical security of users….
4. *Affordability*. Access to sanitation facilities and services, including construction, emptying and maintenance of facilities, as well as treatment and disposal of faecal matter, must be available at a price that is affordable for all people without limiting their capacity to acquire other basic goods and services, including water, food, housing, health and education guaranteed by other human rights. Water disconnections resulting from an inability to pay also impact on waterborne sanitation, and this must be taken into consideration before disconnecting the water supply….

[1] B Amisi, P Bond, D Khumalo, & S Nojiyeza 'The neoliberal loo' (18 February 2008) available at http://www.ukzn.ac.za/ccs/default.asp?2,40,5,1514 (accessed on 15 October 2008).

[2] U.N. Doc. E/C.12/45/CRP.1 (2010) at para 8.

[3] *Report of the Independent Expert on the Issue of Human Rights Obligations related to Access to Safe Drinking Water and Sanitation* U.N. Doc A/HRC/12/24 (2009) available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-24_Epdf (accessed on 1 June 2011) ('*Report of Independent Expert*') at para 63.

5. *Acceptability*. Sanitation facilities and services must be culturally acceptable. Personal sanitation is still a highly sensitive issue across regions and cultures and differing perspectives about which sanitation solutions are acceptable must be taken into account regarding design, positioning and conditions for use of sanitation facilities. In many cultures, to be acceptable, construction of toilets will need to ensure privacy.[1]

In relation to the first element, the UN Independent Expert particularly notes that 'it is tempting to determine a specific minimum number of toilets.'[2] However, she concedes that that specifications can be 'counterproductive' and that it is crucial that the 'assessment of the sanitation requirements of any community is informed by the context' as well as 'the characteristics of particular groups which may have different sanitation needs'. However, she emphasises the importance of participation in determining such acceptable standards. Of equal significance to the South African context, and the tasking of informal settlement residents to emptying pit latrines, is her comment that:

> Ensuring safe sanitation requires adequate hygiene promotion and education to encourage individuals to use toilets in a hygienic manner that respects the safety of others. Manual emptying of pit latrines is considered to be unsafe (as well as culturally unacceptable in many places, leading to stigmatization of those burdened with this task), meaning that mechanized alternatives that effectively prevent direct contact with human excreta should be used.[3]

(v) *Obligations*

In its 2010 Statement, the Committee expressed the view that the right to sanitation requires full recognition by states parties in compliance with the human rights principles related to non-discrimination, gender equality, participation and accountability. Following the logic of respect, protect and fulfil, the UN Independent Expert has again attempted to articulate the general contours of state obligations. States are to:

- Refrain from measures which threaten or deny individuals or communities existing access to sanitation. States must also ensure that the management of human excreta does not negatively impact on human rights.
- Ensure that non-State actors act in accordance with human rights obligations related to sanitation, including through the adoption of legislative and other measures to prevent the negative impact of non-State actors on the enjoyment of sanitation. When sanitation services are operated by a private provider, the State must establish an effective regulatory framework.
- Take steps, applying the maximum of available resources, to the progressive realization of economic, social and cultural rights as they relate to sanitation. States must move as expeditiously and effectively as possible towards ensuring access to safe, affordable

[1] U.N. Doc A/HRC/12/24 (2009) at paras 70–80. These elements are also mentioned, but not elaborated upon, in the United Nations Sub-Commission on the Promotion and Protection of Human Rights, Promotion of the *Realization of the Right to Drinking Wand Sanitation*, (2006) UN Doc. A/HRC/Sub.1/58/L11, adopting the *Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation* (2005), UN Doc. E/CN.4/Sub.2/2005/25, section 1.3.

[2] *Report of Independent Expert* (supra) at para 71.

[3] *Report of Independent Expert* (supra) at para 74.

and acceptable sanitation for all, which provides privacy and dignity. This requires deliberate, concrete and targeted steps towards full realization, in particular with a view to creating an enabling environment for people to realize their rights related to sanitation. Hygiene promotion and education is a critical part of this obligation.

- Carefully consider and justify any retrogressive measures related to the human rights obligations regarding sanitation.
- Take the necessary measures directed towards the full realization of economic, social and cultural rights as they relate to sanitation, inter alia, by according sufficient recognition of human rights obligations related to sanitation in the national political and legal systems, and by immediately developing and adopting a national sanitation strategy and plan of action.
- Provide effective judicial or other appropriate remedies at both the national and international levels in cases of violations of human rights obligations related to sanitation. Victims of violations should be entitled to adequate reparation, including restitution, compensation, satisfaction and/or guarantees of non-repetition….
- [P]ay special attention to groups particularly vulnerable to exclusion and discrimination in relation to sanitation, including people living in poverty, sanitation workers, women, children, elderly persons, people with disabilities, people affected by health conditions, refugees and IDPs, and minority groups, among others….
- [E]nsure that concerned individuals and communities are informed and have access to information about sanitation and hygiene and are enabled to participate in all processes related to the planning, construction, maintenance and monitoring of sanitation services….[1]

However, she cautions that human rights law 'does not aim to dictate specific technology options, but instead calls for context-specific solutions' and that a 'safe and otherwise adequate facility in close proximity would suffice as an intermediate step towards full realization of related rights.'[2] States are also not obliged to provide 'sanitation free of charge'.[3]

(b) South African law and jurisprudence

(i) *The constitutional and legislative position*

This section began by noting that there is no explicit constitutional right to sanitation in South Africa. At most, other rights in the Constitution could be read to contain some concession to sanitation. The right to water is often understood to include an amount of water for sanitation, but it should be noted that sanitation can be achieved through means other than water-borne sewerage systems. The FC s 24*(a)* right to an environment that is not harmful to health or well-being could be read to ensure that sanitation systems capable of safely processing human waste are in place. The link between health and effective sanitation has been alluded to above, but in the South African context there is a right only to health care, not to health, or to be healthy.[4] Finally, the right to adequate housing

[1] U.N. Doc A/HRC/12/24 (2009) at para 64.
[2] Ibid at para 67.
[3] Ibid.
[4] On the distinction between these concepts, see N Daniels *Just Health: Meeting Health Needs Fairly* (2008). See also N Daniels *Just Health Care* (1985).

could be understood to include sanitation systems as an element of the meaning of 'adequate housing'. The latter argument was made before the Constitutional Court in *Nokotyana and Others v Ekurhuleni Metropolitan Municipality*.[1] The Court chose not to engage with this argument. It held, in the first place, that the principle of constitutional subsidiarity prevented the applicants from relying on anything other than the legislative provision that it held had been enacted to give effect to the right to housing. It then held, in the second place, that the applicants had failed to challenge the constitutionality of the relevant legislative provisions in terms of FC's s 26 right to adequate housing.[2] At the very least, however, the Court has not ruled out the possibility that a right to basic sanitation is contained within the right to housing or other rights in the Bill of Rights.

There is, on the other hand, statutory recognition of the right to basic sanitation. The Water Services Act treats water supply services and sanitation services as co-extensive or at least complimentary. The preamble to the Act begins by recognising the rights of access to basic water supply and basic sanitation, and to an environment that is not harmful to health or well-being.[3] Further, the operative provisions of the Act deal with both water and sanitation. Section 3(1) provides that everyone 'has a right of access to basic water supply and basic sanitation'. Section 1 of the Act in turn defines 'basic sanitation' to mean 'the prescribed basic minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewage from households, including informal households. 'Water services' is further defined to include both water supply services and sanitation services.

Regulations promulgated in terms of the Act prescribe that the basic minimum standards of basic sanitation include:

> *(a)* the provision of appropriate health and hygiene education; and
> *(b)* a toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests.[4]

In *Nokotyana,* the applicants sought to rely on these provisions before the Constitutional Court to establish a free-standing right to basic sanitation and to support their prayers for ventilated improved pit latrines. Note in this regard that the legislative right to sanitation, insofar as a toilet meeting the requirements set out in the regulations does not need to be connected to a water-borne sewerage system, is not derived from the right to water. It is telling then that the applicants in *Noko-*

[1] 2010 (4) BCLR 312 (CC), [2009] ZACC 33 ('*Nokotyana*') at para 47.

[2] Ibid at paras 47 - 49.

[3] The preamble itself is rather oddly worded in this regard. It reads:

Recognising the rights of access to basic water supply and basic sanitation necessary to ensure sufficient water and an environment not harmful to health or well-being;…Be it enacted…

Clearly, the second clause of this sentence is nonsense. It is submitted that this is a drafting error, and the paragraph should rather be read as follows: 'Recognising the rights of access to basic water supply and *sufficient water necessary to ensure basic sanitation* and an environment not harmful to health or well-being…' This result is achieved by neither adding nor removing words, but by rearranging them.

[4] 'Regulations Relating to Compulsory National Standards and Measures to Conserve Water', *Government Gazette* 22355, Notice R509 of 2001 (8 June 2001), Regulation 2.

tyana did not pray for flush toilets, but for pit latrines. The Court did not engage with the argument based on the Water Services Act and its regulations. Despite referring directly to these legislative and regulatory provisions, the Court said little more about them. It appears that the Court refused to entertain arguments based on a statutory right to basic sanitation because they were raised for the first time in the Constitutional Court.[1] Again, the Court has not denied that a right to basic sanitation exists. It has simply chosen not to decide if such a right exists. It is presumably open to another set of litigants to raise the argument that such a right exists in a form that will allow the Constitutional Court to engage directly with it.

The Court's approach in *Nokotyana* is somewhat different to its approach in *Joseph & Others v City of Johannesburg & Others*. In *Joseph*, the applicants had argued that the right to adequate housing entails a right to electricity. [2] As in *Nokotyana*, the Court declined to engage with this submission, preferring to approach the matter of the basis of whether the requirements of the Promotion of Administrative Justice Act 3 of 2000 required the City to follow fair procedures and afford the applicants a hearing before terminating the electricity supply.[3]

Having declined to decide whether a right to electricity can be derived from the right to adequate housing, the Court went on to hold that a right to receive electricity does arise from the broad duties on local government to provide services.[4] Referring to its earlier judgment in *Mkontwana*,[5] and the Local Government: Municipal Systems Act 32 of 2000 read together with the National Housing Act 107 of 1997, the *Joseph* Court concluded that municipalities are under an obligation to provide electricity as 'an important basic municipal service.'[6]

One might expect that on this basis, a right to basic sanitation services follows from the obligations that municipalities bear to their constituents to provide basic municipal services. It is puzzling, then, that the Court in *Nokotyana* did not rely on *Joseph,* decided a month previously, to say something about the existence of a right to sanitation.

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[1] *Nokotyana* (supra) at paras 29–31 and 45. The Court would appear to be wrong on this point. In the Court below, the Johannesburg High Court, the applicants relied quite explicitly on regulation 2 of the regulations in terms of the Water Services Act in submitting that the respondent municipality had a duty to comply with 'constitutional and statutory obligations to provide basic sanitation. *Nokotyana and Others v Ekurhuleni Metropolitan Municipality & Others* [2009] ZAGPJHC 14 at paras 34-35. Even if the applicants did not raise the argument in the court below, David Bilchitz argues that the Court's formalist insistence on rules of pleading has allowed it to shirk its constitutional responsibility to those who are most vulnerable in society to adjudicate fundamental rights claims. See D Bilchitz 'Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*' (2010) 127 *SALJ* 591, 595-96, 600-01.

[2] 2010 (4) SA 55 (CC) [2009] ZACC 30 ('*Joseph*').

[3] Ibid at paras 12, 21 and 32-32.

[4] Ibid at paras 34-40. It is apparent that the Court felt it necessary to consider whether a right to electricity existed, since the protections of the Promotion of Administrative Justice Act only apply to actions which affect 'rights'.

[5] *Mkontwana v Nelson Mandela Metropolitan Municipality & Another; Bissett & Others v Buffalo City Municipality & Others; Transfer Rights Action Campaign & Others v MEC, Local Government & Housing, Gauteng, & Others (KwaZulu-Natal Law Society & Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) [2004] ZACC 9 at para 38.

[6] *Joseph* (supra) at para 40.

(ii) *Sanitation, health and the environment*

Effective sewage reticulation systems are linked to people's health and to a healthy environment in South Africa. This is because limitation of water supplies forces people to make unhealthy choices about water usage. A link exists between sickness and poorly functioning household and community sewage systems. Poorly functioning sewage treatment plants have an effect on the environment, and particularly water sources.

In the debate over the government's free basic water policy, which provides only six kilolitres of free water per household per month, it is often pointed out that families or households who cannot afford more water than the free basic water policy

> are forced to make undignified and unhealthy choices about basic hygiene and health. For example, people living with HIV/AIDS must choose between bathing or washing their soiled bed sheets, and parents must choose between providing their children with body washes before they go to school or flushing the toilet.[1]

In the English litigation which led to the statutory prohibition on the use of prepayment water meters, the Queen's Bench acknowledged the municipalities' concern that the increase in disconnections due to prepaid meters had an effect on public health, which in turn stressed the municipalities' capacity to meet public health demands.[2] In the court of first instance in *Mazibuko*, Tsoka J made a similar observation, saying that 'to expect the applicants to restrict their water usage, to compromise their health, by limiting the number of toilet flushes in order to save water, is to deny them the rights to health and to lead a dignified lifestyle.'[3]

The South African government, too, has recognised the link between poor sanitation and poor health. In a 1999 policy document the National Department of Health acknowledges that a lack of water and sanitation is a cause of cholera, diarrhoea and other illnesses, and that communicable diseases like TB are more easily spread in conditions of squalor.[4] The disconnection from free water services in Natal in 2000 was linked to a massive outbreak of cholera in which 182 people died.[5] At the same time, the government has recognised the connection between inadequate sewage treatment and processing and pollution, and the

[1] J Dugard 'Rights, Regulation and Resistance: The Phiri Water Campaign' (2008) 24 *SAJHR* 593, 606.

[2] *R v Director of Water Services, ex parte Lancashire County Council, Liverpool City Council, Manchester City Council, Oldham Metropolitan Borough Council, Tameside Metropolitan Borough Council and Birmingham City Council* [1999] Env LR 114, [1998] EWHC 213 (QB).

[3] *Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as Amicus Curiae)* [2008] 4 All SA 471 (W) at para 160.

[4] *Health Sector Strategic Framework, 1999-2004* (1999).

[5] See C Mugero and A Hoque, 'Review of Cholera Epidemic in South Africa, with Focus on KwaZulu-Natal Province' (2001); D Roithmayr 'Lessons from *Mazibuko*: Shifting from Rights to Commons' (2010) 3 *Constitutional Court Review* (forthcoming).

associated health risks it poses.[1] The breakdown of sewage treatment facilities in the Free State municipality of Emfuleni near Parys, between 2005 and 2010, is a dramatic example of the environmental and health effects of poor sanitation systems.[2] The pollution of water sources, moreover, poses a threat to the right to water itself. The integrity of water sources must be maintained if fresh and clean water is to be available to people for drinking, washing and cooking. The need to control pollutants, including sewage, is thus directly related to the capacity to provide clean water.[3]

Even if no explicit right to sanitation exists in the South African Constitution, the need for sanitation and the government's obligations to provide this service has direct statutory protection in the Water Services Act and its regulations. But we need not give up on the basic law. On the basis of the Constitutional Court's approach in *Joseph,* a right to sanitation arises from local government's ordinary obligations to provide municipal services. However, in a recent, extremely significant judgment, the Western Cape High Court has given the right to sanitation genuinely meaningful content in terms of FC s 27 and the rights to dignity,

[1] The former Minister of Water Affairs and Forestry, Ronnie Kasrils, reported to Parliament that 'Unacceptable sanitation services resulting in sever water pollution, especially bacteriological pollution, is a grave concern in Gauteng' quoted in P Bond & J Dugard 'The Case of Johannesburg Water: What Really Happened at the Pre-Paid "Parish Pump"' (2008) 12 *Law, Democracy and Development* 1, 22.

[2] Save the Vaal Environment, an NGO representing property owners along the banks of the Vaal River, was successful in court applications seeking to interdict the municipality from continuing to release untreated sewage into the river. The enforcement of these court orders left much to be desired. There are seven separate High Court judgments dealing with the matter, with the only written judgment in the matter lamenting the municipality's persistent failure to comply with court orders, stop polluting the Vaal River, and fix its sewage treatment operations (*SAVE v Emfuleni Local Municipality* (Unreported), Johannesburg High Court Case No 2009/20978, 3 June 2009).

[3] The Constitutional Court recognised this in *Mazibuko*, highlighting 'the connection between the rights of people to have access to a basic water supply and government's duty to manage water services sustainably' *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC), [2009] ZACC 28 at para 3. Further, Water Services Act s 9 empowers the executive to prescribe quality standards for drinking water and for water discharged into water resources. The Minister of Water Affairs has done this in terms of regulations which, among other things, deal with the contamination of water resources. The 'Regulations relating to compulsory national standards and measures to conserve water' Notice No R509, *Government Gazette* 22355 (8 June 2001) provide:

Control of objectionable substance

6(1) A water services institution must take measures to prevent any substance other than uncontaminated storm water to enter —

(a) any storm water drain; or

(b) any watercourse, except in accordance with the provisions of the National Water Act.

(2) A water services institution must take measures to prevent storm water from entering its sewerage system.

The National Water Act 36 of 1998 referenced in regulation 6(1)*(b)* above delegates to the executive the discretion to determine how water resources may be used, including for the purposes of disposing of waste water. In 1999, the Department of Water Affairs promulgated regulations governing the discharge of waste or water containing waste into water resources, and set out 'wastewater limit values' 'General Authorisations in terms of section 39' Notice 1191, *Government Gazette* 20526 (8 October 1999). These values specify maximum concentrations of pollutants like faecal coliforms, ammonia, arsenic, cadmium, cyanide, chlorine and suspended solids. They also set standards of water quality based on chemical oxygen demand and electrical conductivity.

FC s 10, and to privacy, FC s 14.[1] Finally, it is clear that sanitation is an important element of a network of interrelated rights, and the denial of sanitation services will adversely limit the realisation of the rights to water and to an environment that is not harmful, to health or well-being.

[1] *Beja & Others v Premier, Western Cape & Others* (Unreported), Western Cape High Court Case No. 21332/10, 29 April 2011 (Court holds that Local Government: Municipal Systems Act 32 of 2000 echoes the constitutional precepts and obliges a municipality to provide all members of communities with 'the minimum level of basic municipal services', which includes the provision of sanitation and toilet services: 'Any housing development which does not provide for toilets with adequate privacy and safety would be inconsistent with [FC] s 26 … and would be in violation of the constitutional rights to privacy and dignity.')

56C Food

Danie Brand

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56C.1 INTRODUCTION*

In their seminal book, *Hunger and Public Action*, Jean Drèze and Amartya Sen explore the role of law and legal rights in relation to problems of starvation, hunger and malnutrition.[1] The law is, in the first place, at least partly responsible for these social ills:

> The legally guaranteed rights of ownership, exchange and transaction delineate economic systems that can go hand in hand with some people failing to acquire enough food for survival.[2]

But, so Drèze and Sen argue, the very complicity of law in starvation, hunger and malnutrition also points to law's role in its solution. For if the law indeed maintains starvation and hunger, the most obvious 'remedy to this problem of terrible vulnerability', is 'to turn towards a reform of the legal system, so that rights of social security can be made to stand as guarantees of minimal protection and survival.'[3]

Despite the fact that there is enough food in South Africa to meet the population's nutritional needs,[4] the 'terrible vulnerability' to which Dréze and Sen refer is disturbingly prevalent. Some 14.3 million people in South Africa are vulnerable to food insecurity.[5] 21.6% of children under nine are stunted, 10,3% are underweight and 3,7% experience wasting.[6] At the same time, South Africa has taken the first step toward the reform of its legal system that Dréze and Sen identify as part of the solution. The Final Constitution[7] entrenches a right of everyone to have access to sufficient food,[8] a right of children to basic nutrition[9] and a right of detained persons to adequate nutrition.[10] These constitutional rights are in the process of being translated into concrete legal claims that the 14.3 million people

* My thanks to Len de Vries and Etienne Fourie for research assistance, to Annette Christmas and Moeniba Isaacs for answering questions about security of tenure and subsistence fishing and to Stuart Woolman for expert editorial comment. Mistakes are my own.

[1] J Drèze & A Sen *Hunger and Public Action* (1989).

[2] Ibid at 20.

[3] Ibid.

[4] Department of Agriculture *Integrated Food Security Strategy for South Africa* (2002) 19–20. See M de Klerk, S Drimie, M Aliber, S Mini, R Mokoena, R Randela, S Modiselle, B Roberts, C Vogel, C de Swardt & J Kirsten *Food Security in South Africa: Key Policy Issues for the Medium Term* (2004) 3:

> Despite its comparatively unfavourable natural resource base, [South Africa] is a net exporter of agricultural commodities. Its *per capita* income is high for a developing country. It does not have a tight foreign exchange constraint. It is not landlocked. Its transport infrastructure is generally good . . . Clearly, food ought always to be available in South Africa.

[5] Food Pricing Monitoring Committee *Final Report* (2003) i (Report relies on data from Statistics South Africa). Food insecurity means that a person does not enjoy regular access to sufficient food.

[6] D Labadarios (ed) *The National Food Consumption Survey* (1999) 167–169. *Underweight* indicates a weight-for-age ratio under two standard deviations from the norm; s*tunting* a height-for-age ratio under two standard deviations from the norm; and *wasting* (an indicator of severe current malnutrition) a weight-for-height ratio under two standard deviations from the norm.

[7] Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC').

[8] FC s 27(1)*(b)*.

[9] FC s 28(1)*(c)*.

[10] FC s 35(2)*(e)*.

in South Africa who experience the 'daily terrorism of hunger' can use to secure regular access to sufficient food.[1] This chapter assesses the progress of this South African translation. After first describing how the right to food is protected in international law and is entrenched in the Final Constitution, I provide an overview of existing legislation and case law through which this right has been given effect in South Africa.

56C.2 The Right to Food in International Law

International law is an important source for the interpretation of the right to food. This is so not only because FC s 39 requires courts to have regard to international law on the right to food, or because the way in which the right to food is entrenched in the Final Constitution closely tracks the way in which it features in international law. It is, rather, a function of the fact that the right to food is not explicitly protected in other domestic constitutions. As a result, there is very little relevant foreign jurisprudence available.[2]

The right to food is entrenched in a range of international treaties, declarations, resolutions and plans of action.[3] The most important instrument remains the International Covenant on Economic, Social and Cultural Rights ('ICESCR').[4] Article 11 of the ICESCR proclaims a right of everyone to adequate food and to freedom from hunger.[5]

(a) Content

The United Nations Committee on Economic, Social and Cultural Rights ('Committee on ESCR') — the authoritative interpreter of the ICESCR — describes the content of the right to food in international law as follows:

[1] 'Address of Constitutional Court Justice Madala' *International Workshop on the Right to Food* (January 2001)(unpublished manuscript on file with author).

[2] While the right to food is not generally protected in domestic legal systems, it is sometimes recognised indirectly through the interpretation of other rights or application of broader legal norms. In Germany, price control regulations were upheld against a freedom of competition-based constitutional challenge because the State, in terms of the 'social state' principle, was held to be obliged to combat high food prices. See *Milk and Butterfat Case* 18 *BVerfGE* 315 (1965) 317. In India, the right to basic nutrition has been read into the right to life. See *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* (1981) 2 SCR 516, 529. See also *People's Union for Civil Liberties v Union of India* Writ Petition [Civil] 196 (Supreme Court of India 2002)(Interim orders in case over which Supreme Court retains jurisdiction) available at www.righttofoodindia.org/mdm/mdm_scorders.html, (accessed on 15 December 2004).

[3] For a relatively comprehensive list of the different instruments at international law that recognise the right to food, see D Brand 'The Right to Food' in D Brand & CH Heyns (eds) *Socio-economic Rights in South Africa* (2005) 155, 156–163.

[4] South Africa has signed, but not ratified the ICESCR. It is not legally bound by its specific provisions, but may not act in a way contrary to the general tenor of the document.

[5] General Comment 12 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Right to Adequate Food' (Article 11 of the Covenant)(20th session, 1999) UN doc.E/C.12/1999/5 ('GC 12') at para 15. This document provides a particularly useful elaboration of the content of the right to food and the duties that it imposes.

> The *availability* of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; [and] . . . the *accessibility* of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.[1]

By distinguishing between the availability and the accessibility of food, the Committee recognises that people do not usually go hungry because there is not enough food available. They go hungry because they have no claim to the food that is available.[2] Achieving food security therefore depends both on the existence of a sufficient supply of food and on the ability of people to acquire that food.

Availability of food refers to *national food security*. National food security requires *(a)* the existence of a national supply of food sufficient to meet the nutritional needs of all the people in the country; *(b)* distribution networks to make this supply physically available to everyone; and *(c)* the existence of opportunities for production of food by individuals, families and communities for their own use.[3]

Accessibility of food, in turn, refers to *household food security*. Household food security requires that people be able to acquire the food that is available or to make use of available opportunities to produce food for own use. This capacity exists if people exercise some entitlement over food or its means of production. That is, they must be able to earn income by selling labour or other commodities which they then, in turn, may use to buy food; or they must have an entitlement to monetary or in-kind social assistance from the State with which they then acquire food; or they must own, or exercise some other form of legal control over, means of food production (land, implements, water etc) so that they can produce food for their own consumption.[4] In the words of the Committee on ESCR:

> [A]ccessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food.[5]

[1] GC 12 (supra) at para 8 (my emphasis).

[2] A Sen *Poverty and Famines: An Essay on Entitlement and Deprivation* (1981) 1. See also R Ravindran & A Blyberg (eds) *A Circle of Rights. Economic, Social and Cultural Rights Activism: A Training Resource* (2000) 222; GC 12 (supra) at para 5.

[3] GC 12 (supra) at para 12.

[4] Drèze & Sen (supra) at 20 ('[C]ommand over food can be established by . . . growing food oneself and having property rights over what is grown, or selling other commodities and buying food with the proceeds. The third alternative . . . is to receive free food or supplementary income from the state.')

[5] GC 12 (supra) at para 13 (GC 12 distinguishes between *economic* and *physical* accessibility. Economic accessibility refers to entitlements self-sufficient people require to gain access to food (income, control of means of food production). Physical accessibility refers to those who are not self-sufficient and have to receive State assistance to gain access to food. The distinction emphasises that States must both facilitate access to food for those who are reasonably self-sufficient and provide food or the means to acquire it directly to those who are not.)

For the right to food to be realised, availability and accessibility of food must be sustainable. Food must be available for and accessible to future generations.[1]

The Committee further emphasises that all persons may claim availability of and access to *adequate food* — food of a certain quality, quantity and nature. This means, in the first place, that people have an entitlement to food that is *nutritionally adequate* — that possesses the requisite amounts and balance of nutrients 'for physical and mental growth, development and maintenance, and physical activity … in compliance with human physiological needs … throughout the life cycle.'[2] This definition of adequate food has been leveraged so as to ensure that everyone has access to *safe* food. In short, food must also be free from harmful agents or contaminants.[3] The Committee on CESCR has, finally, read the right to adequate food to embrace an entitlement to food that is *culturally adequate*.[4]

(b) Duties

The overarching duty that the right to food imposes on states in international law is described in article 2(1) of the CESCR: the duty to take steps, to the maximum of available resources, progressively to achieve the full realisation of the right.[5] This duty mandates conduct rather than result. The State must act in a certain way — such as to ensure that, over time, and within its resource limitations, a sufficient supply of nutritionally adequate, safe and culturally acceptable food is made available and accessible to everyone on a sustainable basis. More specifically, the Committee on ESCR has said this means the right to food must be *respected*, *protected,* and *fulfilled*:[6]

- To respect the right to food, the State must refrain from impairing existing access to adequate food. It must, where such impairment is unavoidable, take steps to mitigate its impact. It must likewise refrain from placing undue obstacles in the way of people gaining or enhancing access to food.
- To protect the right to food, the State must take steps to protect people's existing access to food and their capacity to enhance their existing access to food and newly to gain access to food, against third party interference.

[1] GC 12 (supra) at para 7.
[2] Ibid at para 9.
[3] Ibid at para 10.
[4] Ibid at para 11. The cultural turn of the General Comment fits the willingness of the Committee to view compliance with the Covenant in light of the particular conditions of a country. Adequacy, access, nutrition and safety are simultaneously necessary and relative conditions. They are relative to such factors as climate, endemic disease, prevalent body type of population and traditional dietary patterns. Ibid at para 7; A Eide 'The Right to Adequate Food and to be Free from Hunger' (1999) E/CN 4/Sub 2/1999/12 at para 49.
[5] See Committee on ESCR, General Comment No 3, 'The Nature of States Parties' Obligations' (1990)('GC 3')(Describes duty in general terms.)
[6] GC 12 (supra) at para 15.

- To fulfil the right to food the State must take steps to create access to food where none exists and to enhance access where it is currently insufficient. The Committee distinguishes between a duty to fulfil as *facilitation* — which requires the State to enhance the opportunities for self-sufficient people to gain or to enhance access to adequate food — and a duty to fulfil as *provision* — which requires the State to take steps to make it possible for people who are not self-sufficient to gain access to food. A duty to provide requires the State to supply food directly or to give people the actual means with which to acquire it.

According to the Committee on CESCR, the right to food does not require States to adopt specific measures to achieve its realisation:

> The most appropriate ways and means of [respecting, protecting, promoting and fulfilling] the right to adequate food will inevitably vary significantly from one State party to another [and] [e]very State will have a margin of discretion in choosing its own approaches.[1]

States must adopt those measures that will lead to both the availability and accessibility of adequate food under the specific conditions that obtain in their countries. However, States must adopt measures that in some manner address *all* elements of food security.[2] This means that the State must create programmes to ensure: (1) the creation and maintenance of a sufficient supply of food (agricultural production planning and subsidisation, food import and export planning and sustainable management and use of natural and other resources for food production); (2) that standards of nutritional adequacy, safety and cultural acceptability of food are maintained (nutritional supplementation of basic foodstuffs and regulation pertaining to toxicity, storage and handling of foodstuffs); (3) facilitation of access to food (tax zero-rating of basic foodstuffs, food-price monitoring, market regulation, subsidisation or actual price control); (4) provision of food in conditions of deprivation (programmes to provide food directly to disaster victims; food stamp or other social assistance programmes to help indigent people gain access to food); (5) that food policies are informed by meaningful information about the country's nutritional situation; (6) that access to food is not marked by discrimination;[3] and (7) that vulnerable groups secure food even under conditions in which the State faces severe resource constraints.[4]

The Committee suggests that States adopt a 'national strategy'[5] set out in a 'framework law'[6] to achieve the realisation of the right to food. This national strategy should ensure the proper coordination of functions and responsibilities between different sectors and levels in government and must contain measures addressing all issues related to food security identified above.[7] The strategy should

[1] GC 12 (supra) at para 21.
[2] Ibid at para 25.
[3] Ibid at para 26.
[4] Ibid at para 28.
[5] Ibid at para 21.
[6] Ibid at para 29.
[7] Ibid at para 22.

also be developed by way of a transparent and participatory political process and should ensure transparency and accountability in its implementation.[1]

As we have already seen, the States' duty to achieve the realisation of the right to food under the ICESCR is subject to the proviso that it need be done only 'progressively' and 'to the maximum of available resources'. These two conditions on the duty ensure that the intended beneficiaries of the right cannot assert a legal claim to a good that simply does not exist. However, in article 11, by referring both to a right to adequate food and a right to freedom from hunger, the ICESCR distinguishes two different kinds of duties that flow from two different kinds of deprivation. The first engages inadequate access to food. The second addresses hunger as starvation.[2] The Committee on ESCR has made clear that the duty to avoid hunger as starvation takes priority. The failure to meet this duty will attract heightened scrutiny. The Committee writes that:

> when a state fails to ensure the satisfaction of the minimum essential level required to be free from hunger [it] has to demonstrate that *every effort* has been made to use *all the resources at its disposal* to satisfy, *as a matter of priority*, those minimum obligations.[3]

56C.3 The Right to Food in the Final Constitution

The right to food appears in three different provisions in the Final Constitution. FC s 27 reads, in relevant part: '(1) Everyone has the right to have access to … sufficient food … and water; and (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [this] right[s].' FC s 28 reads in relevant part: '(1) Every child has the right … to basic nutrition.' FC s 35 reads in relevant part: '(2) Everyone who is detained, including every sentenced prisoner, has the right … *(e)* at state expense, … [to] adequate … nutrition.'

(a) Content

The right to food is protected in the same way as the other socio-economic rights in the Final Constitution. The right does two things.

First, it creates duties. All three food-related provisions are given content by FC 7(2). The State must 'respect, protect, promote and fulfil' them. As at international law, this requirement means that the State must refrain from interfering

[1] GC 12 (supra) at paras 23 and 24.

[2] This distinction tracks that made in a scientific context between *nutritional deprivation* (a condition of not receiving enough food to avoid stunting, wasting and other serious health risks) and *under-nourishment* (a condition of not receiving enough food to live a normal, active working life, without, however, facing serious and long-term health risks). See Drèze & Sen (supra) 35. This is — politically, ethically and analytically — a difficult distinction to make. See K Van Marle 'No Last Word' — Reflections On The Imaginary Domain, Dignity and Intrinsic Worth' (2002) 13 *Stellenbosch LR* 307; Drèze & Sen (supra) 35–45.

[3] GC 12 (supra) at para 17 (my emphasis).

with the exercise of these rights, must adopt measures to protect against interference in the exercise of the rights by private sources, and must take steps to extend access to them to everyone.[1]

Second, it creates standards of justification or standards of scrutiny. When it is shown that the State has violated the duties imposed by the right to food — that, for example, it has interfered with existing access to food; that it has failed adequately to protect against interferences in access to food; or that it has taken insufficient steps to fulfil the right to food — the state must justify its conduct. The right to food then poses a standard of scrutiny that courts use to assess the justification proffered by the State.

Depending on which of the three food-related provisions and which of the duties to respect, protect, promote and fulfil are at issue, the standard of scrutiny that the State is required to meet in this respect will vary. In principle, a failure by the State to meet any of the four different duties in respect of any of the three rights is subject to the proportionality standard of scrutiny in terms of FC s 36(1), the general limitation provision.[2] However, with respect to the latter three of the s 7(2) duties (the 'positive' duties to protect, to promote and to fulfil the right to food as opposed to the 'negative' duty to respect), FC s 27(1)*(b)* — the right of everyone to sufficient food — offers only a *qualified* right. FC s 27(2) states that in order to comply with the duties to protect, promote and fulfil the FC s 27(1)*(b)* right, the State must take *reasonable* steps, *within available resources*, to achieve the *progressive realisation* of the right of everyone to have access to sufficient food. This qualification has been interpreted by the Constitutional Court — in the context of the rights to adequate housing,[3] health care services[4] and social assistance[5] — as an internal limitation, applying to the duties to protect, promote and fulfil the rights in question. This means that, should the State fail to protect, promote or fulfil a socio-economic right subject to this internal limitation (a right such as the FC s 27(1)*(b)* right of everyone to have access to sufficient food), its conduct must be justified in terms of a special reasonableness test, distinct from the FC s 36(1) standard of justification. This 'reasonableness' standard of justification usually operates at the intermediate level of a means-end effectiveness test,[6] rising

[1] GC 12 (supra) at para 15. See § 56C.2*(b)* supra.

[2] Proportionality analysis requires that the public interest advanced by the limitation of a right be weighed up against the harmful impact the limitation has on the general exercise of the right and the claimants before the court and that a court consider whether means are available to achieve the purpose of the limitation that are less restrictive of the right and the interests of the claimants. See, generally, S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition OS, August 2005) Chapter 34.

[3] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) ('*Grootboom*').

[4] *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) ('*TAC*').

[5] *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC)('*Khosa*').

[6] *Grootboom* (supra) at paras 39–45; *TAC* (supra) at paras 38 and 123. See *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC), 1997 (12) BCLR 1696 (CC)('*Soobramoney*') at paras 27 and 29 (Court applied an even more lenient rationality standard of scrutiny.)

only in exceptional cases to the level of a proportionality inquiry.[1] As a rule, this reasonableness standard does not allow courts to prescribe specific measures to the state to remedy its breach of the socio-economic right in question. However, the courts can, and must, require the State to put in place a comprehensive programme that is capable of achieving the realisation of the rights in question over time, subject to the resources at the State's disposal.[2]

The duties to protect and to promote and fulfil the FC s 28(1)*(c)* nutritional rights of children and the FC s 35(2)*(e)* nutritional rights of detainees, by contrast, are not subject to the same internal limitation as the FC s 27 right of everyone to have access to sufficient food. FC ss 28(1)*(c)* and 35(2)*(e)* are unqualified. The absence of an internal limitation in these rights leaves the impression that the duties to protect, promote and fulfil in respect of these rights are more direct than those found in FC s 27 right of everyone. These two rights appear to entitle individuals to claim specific, concrete relief from the state. But appearances may be deceptive. While FC ss 28(1)*(c)* and 35(2)*(e)* may not be subject to an internal limitation test (such as that required by FC s 27(1)*(c)*), the State will still have an opportunity to justify the laws or conduct intended to discharge its duties under the proportionality test grounded in FC s 36(1). The absence of the internal limitation simply means that a failure by the State adequately to protect and to promote and fulfil the nutritional rights of children and of prisoners is, as a rule, subject to a higher standard of scrutiny than is a failure to protect, promote or fulfil the right of everyone to sufficient food. Put slightly differently, the absence of an explicit fiscal out in FC ss 28(1)*(c)* and 35(2)*(e)* means that the State will have greater difficulty in justifying any *prima facie* infringement of the right to basic nutrition of children or the right to adequate nutrition of prisoners.[3]

The two-stage analysis that applies to the positive State duties in FC ss 28(1)*(c)* and 35(2)*(e)* applies also to the 'negative' duties to respect *all* three food-related rights in FC ss 27(1) 28(1)*(c)* and 35(2)*(e)*. The negative duty to respect grounded

[1] See *Khosa* (supra) at paras 65 and 82. The Constitutional Court confirmed a High Court ruling that the exclusion of permanent residents from social assistance benefits violated the right to have access to social assistance, FC s 27(1)*(c)*. The measures were found unreasonable because the purpose of the exclusion (to prevent people immigrating to South Africa from becoming a burden on the State) could be achieved through means less restrictive of permanent residents' rights (stricter control of access into the country) and because 'the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has far outweighs the financial and immigration considerations on which the state relies.' Ibid at para 82.

[2] *Grootboom* (supra) at para 41; *TAC* (supra) at para 38; *Khosa* (supra) at para 43.

[3] The absence of an internal limitation in FC ss 28(1)*(c)* and 35(2)*(e)* places the onus on the state to make its case for justification of its conduct. It must demonstrate that it does not have the requisite resources with which better to give effect to the right in question. Where a FC s 27(2) type of internal limitation applies, however, the onus remains on the claimant to show that the state's conduct is unjustifiable, and particularly to show that the state has the requisite resources to give effect to the right in question.

in FC s 27(1) is not subject to FC s 27(2)'s internal limitation. If the state fails to comply with that duty, then it must satisfy the more stringent requirements of FC s 36(1).[1]

(b) Duties and violations

The concrete legal duties that the Final Constitution's nutritional rights impose on the State and others and the concrete entitlements it creates for poor people can most usefully be elucidated by following the framework established in FC s 7(2). FC s 7(2) identifies duties to respect, to protect and to promote and to fulfil the rights found in chapter 2. An overview of the various existing statutory and other entitlements that give expression to these duties, together with an indication of the instances in which these duties are *prima facie* infringed, illustrate the different ways in which the right to food can be used as a practical legal tool.

Apart from the three food-related constitutional rights, the right to food is given little explicit expression in our law. The reason for this may be the extent to which the right to food is inextricably linked with other rights. The right to food both depends on and makes possible the enjoyment of other rights, and other rights can be used to protect or advance the enjoyment of the right to food.[2] To acquire food, one needs access to land, to education, to employment and income generation and, in some instances, to social security or assistance. Food does not, in our day, just fall from trees. It has to be produced or acquired through exchange. The ability to produce food or to acquire it through exchange depends on realising these other rights to land, education, employment and social security. Similarly, research has shown that a person's ability to be nourished by food physically acquired and ingested 'depends crucially on characteristics of a person that are influenced by such non-food factors as medical attention, health services, basic education, sanitary arrangements, provision of clean water [and] eradication of infectious epidemics.'[3] So, a person suffering from a simple disease such as diarrhoea, caused by contaminated water, is unable to ingest the nutrients and calories of food eaten. The right to food is thereby compromised by deficiencies in the realization of the right to water. A person who suffers from malaria requires, among other things, additional quantities of iron. State failures in the

[1] *Jaftha v Schoeman* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC)('*Jaftha*') at paras 32–34.

[2] Although rights are often characterized as interdependent, the right to food is particularly dependent upon the interpretation and realization of other socio-economic rights. Eide notes a trend in international law to see the right to food, with the rights to education and health care, as elements of a broader right to nutrition, which is again a component of a right to an adequate standard of living. See Eide (supra) at para 44. In the Convention on the Rights of the Child (CRC), the right to food is not guaranteed as a free-standing right, but in conjunction with the rights to health care and education. Article 24(2)*(c)* requires State Parties to take 'measures to combat disease and malnutrition, including . . . the provision of nutritious foods. . .' Article 24(2)*(e)* requires State Parties to ensure that 'parents and children are informed about child health and nutrition.' In most international documents the right to food is an element of the right to an adequate standard of living. See, eg, ICESCR, Article 11(1).

[3] Drèze & Sen (supra) at 13.

provision of health care that result in extended malaria morbidity thereby undermine State efforts intended to provide access to sufficient food. Likewise, state failure with respect to the provision of education will result in people being unable to obtain the full benefit of food acquired because they lack the requisite knowledge about optimal storage and preparation of food. The right to equality and the prohibition on unfair discrimination (FC s 9) and the administrative justice rights (FC s 33) are also essential bulwarks for the protection of our right to food.[1] In short, the conditions necessary for the vindication of the right to food are often embedded in the conditions necessary for the vindication of other rights. As a result, the violation of the right to food is often inseparable from the violation of a range of other rights.

(i) *The duty to respect the right to food*

The duty to respect the right to food requires the State to refrain from impairing people's existing access to adequate food. When such impairment is unavoidable, the State must take steps to mitigate its impact. In addition, it must not place obstacles in the way of people newly gaining access or enhancing existing access to food.

(aa) Refraining from impairing existing access to food

In *SERAC,* Nigerian military forces attempting to quell community opposition to uncontrolled development of oil fields intentionally destroyed crops and killed animals in attacks on Ogoni villages.[2] This wanton destruction led to malnutrition and starvation. Having found that the right to food can be read into the right to life in the African Charter on Human and Peoples' Rights (ACHPR) the African Commission found that these actions violated the duty to respect the right to food of the Ogoni people.[3] The intentional destruction of food as a weapon of war to effect starvation is an unjustifiable infringement of the right to food that is not likely to occur often in South Africa.[4]

[1] See *Khosa* (supra) at para 42 (On the intersection between equality and socio-economic rights.)

[2] *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* African Commission, Communication 155/96 (1996) ('*SERAC*'). See C Mbazira 'Reading The Right to Food into the African Charter on Human and People's Rights' (2004) 5(1) *ESR Review* 5.

[3] *SERAC* (supra) at paras 64–66. Intentional use of starvation as a weapon of war is a crime in international law. See, eg, Article 8(2)*(b)*(xxv) of the Rome Statute of the International Criminal Court (1998). *SERAC* also stands for the proposition that a violation of the duty to respect the right to food can occur as a result of the destruction of the means for and environment conducive to the production of food. First, Nigerian forces destroyed farmland and implements. Ibid at para 9. Second, the Nigerian government participated in irresponsible development of oil fields, '[poisoning] much of the soil and water upon which . . . farming and fishing depended'. Ibid. The African Commission found that both the military's destruction of the means for food production and the government's wilful neglect violated the duty to respect the right to food. Ibid at para 66.

[4] Intentional destruction of food was last used as a weapon of war in South Africa during the Anglo-Boer War. British forces instituted a 'scorched earth' policy, systematically destroying herds, crops, food stores and farmsteads to deprive Boer fighters of food and other resources.

The duty to respect the right to food is more often violated indirectly. The State interferes with the entitlements that people use to produce food, thus making it impossible, or very difficult, for people to continue producing food. South Africa's apartheid history provides a particularly pointed and pernicious example of such interference. Segregationist 'homeland' policies, dispossession, forced removals from productive agricultural land, and overcrowding in 'native reserves' or 'homelands' unsuited to agricultural use and particularly unsuitable for subsistence farming meant that people who were once food self-sufficient were rendered food insecure.[1] Recurrence of this kind of large-scale interference by the State in people's access to the resources with which to produce food is unlikely. Indeed, the statutory measures in terms of which these dispossessions occurred have been repealed and new legal measures have been put in place to prevent such a recurrence. (The legacy of such displacement remains.)

Although the best examples of these new legal measures focus explicitly on protecting property rights or housing and security of tenure rights rather than the right to food, they can be, and in some cases have already been, developed by courts to operationalise the duty to respect the right to food. Dispossession of land by the State can now only occur within the limits of FC s 25, through regular expropriation, for a public purpose, following the payment of 'just and equitable' compensation, the amount, and time and manner of payment of which must be determined after all relevant circumstances have been considered.[2] In those cases where a dispossession of land used for subsistence farming is unavoidable, an argument can be made that the fact that the land was used to exercise the constitutional right to food is a circumstance that is eminently relevant to the determination of the amount of 'just and equitable' compensation. This line of argument is illustrated by the interpretation the Land Claims Court has given to elements of the compensatory framework established in the Restitution of Land Rights Act (Restitution Act).[3] Section 2(2) of the Restitution Act states that a claim for the restitution of land rights will only be successful if the claimant can show it did not receive just and equitable compensation at the time of the dispossession. In *In Re Kranspoort Community,* the validity of a restitution claim in terms of the Restitution Act was challenged on the grounds that the claimant community had been adequately compensated for its loss of rights in land at the time of dispossession[4] The *Kranspoort* Court found that the compensation that was received covered only improvements to the land and not the loss of 'beneficial occupation'. The community's loss of grazing and cultivation rights — their entitlements to food - had not been compensated. As such the compensation was not 'just and equitable.'[5]

[1] On this history's impact on black farmers' capacity to produce food for own use, see, in general, C Van Onselen *The Seed is Mine: The Life of Kas Maine, a South African Sharecropper, 1886–1914* (1996).
[2] FC ss 25(2) and (3). The Expropriation Act further regulates expropriation. Act 63 of 1975.
[3] Restitution of Land Rights Act 22 of 1994.
[4] *In Re Kranspoort Community* 2000 (2) SA 124 (LCC) ('*Kranspoort*').
[5] Ibid at para 78.

In addition, eviction of people from State land, or by the State from private land, is heavily regulated by a raft of new laws that seek to improve security of tenure for people exercising informal rights to land. These laws are intended to protect both the right to housing and the right to use land as a resource with which to produce food and generate income against State interference. The two most important examples of such legislation in the context of State-owned land and State-sponsored eviction are the Extension of Security of Tenure Act (ESTA)[1] and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE).[2] These laws protect informal rights of residence and use of land. They do so by making eviction from land in certain instances more difficult than it would ordinarily be. They require, amongst other things, that a court, before granting an eviction order, consider whether an eviction would be just and equitable in light of all relevant circumstances.[3] Although neither ESTA nor PIE state this explicitly, where the land in question is used to produce food, the exercise of this discretion by a court should surely include a consideration of the extent to which the granting of an eviction order would deleteriously affect the exercise by the evictee of the constitutional right to food.[4] Indeed, some of the factors to be taken into account when making an ESTA or PIE assessment engage circumstances in which occupiers use land to produce food. For example, ESTA s 8(1)*(c)* requires courts to consider the comparative hardship to the owner or person in charge and the occupier before rendering a decision as to whether or not occupation rights were lawfully terminated.[5] If 'hardship' encompasses 'the impairment of access to sufficient food,' then ESTA can be deployed to ensure that the duty to respect any existing exercise of the right to food is discharged.

People's ability to produce food for their own use and for sale was, under Apartheid, diminished in more insidious ways than dispossession and eviction. The statutory prohibition on sharecropping — a practice in terms of which black farmers were allowed by white landowners to cultivate part of their land in return for a share in the resultant crop — denied to black farmers and their families

[1] Act 62 of 1997. ESTA applies to rural land occupied with the tacit or explicit consent of the owner or person in charge. See ESTA, s 2(1). For the definitions of 'occupier' and 'consent', see ESTA, s 1.

[2] Act 19 of 1998. PIE applies to all land, including State-owned land. See PIE, ss 6 and 7. See also the Land Reform (Labour Tenants) Act 3 of 1996 (Labour Tenants Act). The Labour Tenants Act, s 1, applies to rural land occupied and used in terms of a labour tenancy agreement. This Act will, in practice, not apply to State land. Labour tenancy agreements are usually with private landowners. ESTA, PIE and the Labour Tenants Act also regulate private evictions and as such give effect to the duty to protect the right to food. See § 56C.3*(b)*(ii)(aa) infra.

[3] See ESTA, ss 8(1) and 11(1), (2) and (3); PIE, ss 4(6) and (7), 5(1)*(b)* and 6(1) and (3).

[4] The relevant factors identified in PIE and ESTA for a decision as to whether the termination of an occupier's residence was lawful or an eviction order should be granted do not constitute a closed list.

[5] See also ESTA s 9(3)(Requires a court, under some circumstances, to consider a report of a probation officer that must, amongst other things, indicate how an eviction will affect the constitutional rights (which would presumably include the right to food) of the occupier, before granting an eviction order.) See also *City of Cape Town v Rudolph* 2004 (5) SA 39 (C) at para 48 (Selikowitz J describes the discretion to grant an eviction order that PIE affords a court as 'wide and open' and goes further to say that the 'circumstances to be taken into account by the court . . . are also wide-ranging.')

access to existing stocks of food and blocked any efforts they might have undertaken to enhance those stocks.[1] Regulation of the South African fishing industry in the apartheid era operated in such a way that subsistence fishing was effectively prohibited.[2] This violation of the duty to respect the right to food in apartheid South Africa has seen recent redress. In 1998, the Marine Living Resources Act (MLRA)[3] was adopted. One of the purposes of the MLRA was to regularise the position of subsistence fishers through the so-called Individual Transferable Quotas (ITQ) system. The ITQ system makes provision for licenses for subsistence fishers.[4] However, despite its laudable aims with respect to subsistence fishers, the MLRA's implementation has been beset with problems. First, after an initial allocation of licenses for subsistence fishing, the annual allocation process, due to administrative backlogs, was postponed a number of times. No quotas were allocated for those years.[5] Second, due to a combination of factors, including influence peddling in the award of quotas; the relatively high costs and complex procedures involved in the application process and government's tendency to favour access for larger commercial enterprises, people who have been subsistence fishers all their lives have been unable to obtain quota access.[6] The State's execution of the MLRA and its attendant interference with the right of subsistence fishers to acquire food from the sea can, therefore, be characterised as a *prima facie* violation of the duty to respect the right to food.

(bb) Mitigating the impact of interferences in the exercise of the right to food

The duty to respect the right to food does not constitute an absolute bar on State interference with existing access to food. The State must often interfere in food-rights entitlements in order for it to achieve some other important public purpose.

[1] See Van Onselen (supra) at 167. The prohibition on share-cropping was, at least at first, not very successful. Because share-cropping arrangements worked to the benefit of both black (property-less) and white (propertied) farmers, they remained in wide-spread use. However, the prohibition did have another less obvious, but, in practical terms, very serious effect. It meant that, in cases where white farmers reneged on share-cropping agreements, black farmers could not, as they could have previously, rely on the law to enforce the agreements.

[2] Subsistence fishers operated in a legal vacuum. No quota category existed for subsistence fishing and subsistence fishers had to obtain recreational or commercial licences to operate legally. Both options were out of their reach. See E Witbooi 'Subsistence Fishing in South Africa: Implementation of the Marine Living Resources Act' (2002) 17 *Int J of Marine and Coastal Law* 431, 432. As with the prohibition of share-cropping this meant both that subsistence fishers operated illegally and that they could not rely on the law to protect their fishing against interference. Subsistence fishing is a form of direct food entitlement for a small but significant proportion of South Africa's population: 30 000 fishers depend on subsistence fishing to survive, and at least another 30 000 depend on subsistence fishing in combination with seasonal commercial employment. See J Sunde 'On the Brink' (2003) 12 *SPC Women in Fisheries Information Bulletin* 30, 30.

[3] Marine Living Resources Act 18 of 1998.

[4] M Isaacs 'Subsistence Fishing in South Africa: Social Policy or Commercial Micro-Enterprise?' (2001) 3(2) *Commons Southern Africa* 20.

[5] Although exemptions from the regulatory scheme were awarded for those years, the exemptions were granted only after fishers resorted to civil disobedience. Ibid at 21–22. See also Witbooi (supra) at 436–437.

[6] Sunde (supra) at 31.

In such cases, the duty to respect requires that an effort be made to mitigate the effect of the interference in the exercise of the right to food. The security of tenure laws referred to above provide a good example of how this constitutional duty has been translated into a statutory entitlement. The laws, in some instances, require courts to consider to what extent suitable alternative land is available for evictees before granting an eviction order. An eviction order can be denied if such an alternative is absent.[1] Suitable alternative land is, in one instance, defined as land that is suitable with regard to the needs of occupiers for both residential and agricultural use.[2] The laws thereby give expression to the duty of the State to mitigate its interference with existing access by providing alternative modes of access to food.

(cc) Removing obstacles in the way of the exercise of the right to food

The duty to respect the right to food is violated if the State makes it difficult or impossible for people to gain access to food or to enhance their existing access to food. In *Mashavha v The President of the Republic of South Africa,*[3] the Constitutional Court confirmed a High Court order invalidating a presidential proclamation[4] assigning the administration of the Social Assistance Act (SAA)[5] to provincial governments. Mr Mashavha, an indigent, permanently disabled person, had applied for a disability grant to the Limpopo provincial Department of Health and Welfare in October 2000. After approximately four months he was told that he had been awarded the grant and could start collecting it from the Department's payment offices. However, despite his efforts, the grant was never paid. Only after Mr Mashavha initiated legal action against the Department was the grant finally paid out — on 25 January 2002. Even then, the Department refused to pay the amount owed from the date of the award.[6] Mr Mashavha contended that, had it not been for the assignment of the administration of the SAA to the provinces, his grant would have been approved and paid out to him within a reasonable time. The payment of the grant would have been serviced by an efficient, standardised and adequately resourced national administration rather than the inadequate administration of the Limpopo Department of Health and Welfare. Nor would the grant have had to compete with 'potential demands for the reallocation of social assistance monies to other [provincial] purposes.'[7] Although the presidential proclamation was found constitutionally infirm only

[1] See ESTA, ss 9(3)*(a)*, 10(2) and (3) and 11(3); PIE, s 6(3)*(b)*.
[2] See ESTA, s 1 (Definition of 'suitable alternative accommodation'.)
[3] *Mashavha v The President of the Republic of South Africa* 2004 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC)('*Mashavha*').
[4] Proclamation R7 of 1996, *Government Gazette* 16992 GN R7, 23 February 1996. The assignment was made in terms of s 235 of the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').
[5] Social Assistance Act 59 of 1992.
[6] See *Mashavha* (supra) at para 9.
[7] Ibid at para 10.

with respect to the competency to make the assignment,[1] the case is very much about Mr Mashavha's constitutional rights to social assistance and to food. Mr Mashavha and his dependents relied on the regular and efficient payment of his disability grant for their 'daily sustenance and well-being.'[2] In the absence of employment, the disability grant was their only means to acquire food. The administrative inefficiency that bedevilled its payment constituted an obstacle to the exercise of the right to food.[3] The *Mashavha* Court's ruling supports the proposition that the State must give effect to the duty to respect the right to food by removing an impediment to its effective exercise.

(ii) *The duty to protect the right to food*

The duty to protect the right to food requires the State to protect the existing enjoyment of this right. The capacity of people to enhance their enjoyment of this right or to gain access to the enjoyment of this right depends on the ability of the State to prevent third party interference.

(aa) Legislative and executive measures

The State can give effect to the duty to protect the right to food by regulating, through legislation or executive/administrative decisions, the manner in which private entities participate in the production, storage and transfer of food. The State must regulate these activities in such a manner, as to enhance everyone's access to food.

One such form of regulation is price regulation. The State either sets a maximum price that may be charged by private producers and retailers for basic foodstuffs to ensure that basic foodstuffs remain reasonably affordable, or introduces other measures to ensure food price stability.[4] The price of a standard loaf of bread used to be regulated in this way in South Africa. However, a general drive towards the deregulation of agricultural markets has seen this protective measure fall away. The result is instructive. In the absence of regulation there

[1] *Mashavha* (supra) at para 1.

[2] Ibid at para 9.

[3] The extent to which access to social assistance and access to food are directly linked and the lack of access to a social assistance grant translates into the lack of access to food has been demonstrated by a number of studies. See M Chopra, N Sogaula, D Jackson, D Sanders, N Karaolis, A Ashworth & D McCoy 'Poverty Wipes Out Health Care Gains' (2001/02) 6(4) *ChildrenFirst* 16. It has also been estimated that social assistance grants close the 'poverty gap' (the gap between a grantee's household income and the subsistence income line) by an average of 23%. See Department of Social Development *Transforming the Present — Protecting the Future: Report of the Commission of Enquiry into a Comprehensive System of Social Security for South Africa* ('Taylor Commission') 59.

[4] Measures to introduce or maintain stability in food prices (including stock-piling of food reserves), and direct interventions in the food trade sector such as requiring grain traders to report regularly on realised and planned imports) combined with accurate systems of crop estimates could contribute to stabilising food markets.

has been a 'hidden price rise' in bread. Although the price per loaf in rand remained relatively stable in the period 1990 to 2001, both the weight and quality of the standard loaf deteriorated to such an extent that the real price per gram rose 293% in the same period.[1]

Another form of regulation that enables the State to protect access to adequate food against the depredations of profit-oriented free-market players is through standard setting in respect of the safety and the nutritional value of food. The Foodstuffs, Cosmetics and Disinfectants Act (FCDA) regulates fungicide and pesticide residue and additive and preservative levels in food by setting minimum and maximum standards and creating mechanisms for the monitoring of these levels in foodstuffs.[2] South Africa has also recently introduced mandatory micro-nutrient fortification of certain basic foodstuffs.

A final form of food-protection regulation is manifest in statutory safeguards of informal tenure rights. As I noted above, PIE, ESTA and the Labour Tenants Act protect informal rights to land as a resource for food production against private interference in the same way as they protect these rights against the State: by making eviction more difficult than it would otherwise be through imposing additional procedural and substantive safeguards that have to be met before an eviction order can be granted by a court.[3] In this way, a small but significant constituency have their access to food protected.[4]

The duty of the State to protect the right to food through the regulation of private conduct does not only require it to create a regulatory framework. It must also implement and enforce that framework effectively.[5] Concerns have recently been raised about the extent to which the FCDA is effectively enforced. Studies indicate that the required monitoring is not taking place and that the standards created in the Act are not applied.[6] Similar concerns have been articulated with respect to the effectiveness of security of tenure legislation in rural areas. Critics of government efforts with respect to land tenure cite a host of infirmities in South Africa's regulatory scheme: complicity between magistrates, police, and private landowners; disregard for the law by landowners; the absence of legal aid in rural areas; and the absence of alternative accommodation on farms, in

[1] E Watkinson & N Makgetla *South Africa's Food Security Crisis* (2002) 4, 13.

[2] Act 54 of 1972.

[3] See § 56C.3*(b)*(i) and (ii) supra.

[4] 600 000 people in South Africa depend on farming as their main source of food. A further 1 million use farming to supplement other means of obtaining food. See Watkinson & Makgetla (supra) at 2. See also Magistrates' Courts Act 32 of 1944, s 67*(c)*(Prohibits the attachment and sale in execution to satisfy a judgment debt of the 'stock, tools and agricultural implements of a farmer' and so protects the capacity of a subsistence farmer to produce food against interference from creditors.)

[5] See *Grootboom* (supra) at para 42 (Constitutional Court held that '[a]n otherwise reasonable programme [to give effect to a socio-economic right] that is not implemented reasonably will not constitute compliance with the State's obligations.')

[6] Watkinson & Makgetla (supra) at 5. They attribute the deterioration in the weight and quality of standard bread partly to the lack of effective enforcement of regulations. Ibid at 4.

municipal housing projects or other available land distribution programmes.[1] Such systemic failures to implement regulatory measures intended to protect people's right to land tenure security create the conditions for food insecurity and further reflect the State's failure to discharge its duty to protect the right to food.

(bb) The judiciary

The courts can protect the right to food in two ways.

In the first place, the courts can protect the right to food by insulating State measures to give effect to the right to food against legal challenge based on other constitutional or statutory rights. This protective role of the courts is on display with respect to the right to adequate housing in *City of Cape Town v Rudolph*. In this case, the Cape High Court rejected a property-based constitutional challenge to PIE. The *Rudolph* Court held that although the law infringed property rights, the State was justified in enacting the legislation because the Final Constitution required it, or at least authorised it to do so.[2] With respect to the right to food, the German Federal Constitutional Court ('FCC') rejected a challenge to legislation that regulated the price and the sale of drinking milk.[3] This legislation - intended both to keep the price of drinking milk at an affordable level and to ensure that the dairy industry survived over-production - restricted the price of drinking milk and limited the sale of drinking milk to the region in which it was produced.[4] Dairy suppliers and dairies challenged the regulatory scheme on the basis that it infringed their freedom of competition. The German Constitutional Court rejected the challenge on the grounds that milk was a basic foodstuff and that the good of the commonwealth required its price be kept at an affordable level. The FCC identified the dairy sector as a national asset. This finding justified the control of the sale of milk and the imposition of a special tax that invariably

[1] E Lahiff 'Land Reform in South Africa: Is It Meeting the Challenge?' (2001) 1 *PLAAS Policy Brief* 2.

[2] See G Budlender 'Justiciability of Socio-Economic Rights: Some South African Experiences' in Y Ghai & G Cottrell (eds) *Economic, Social And Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (2004) 33, 36. See also *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC)(State decision, taken in exercise of the constitutional duty to provide access to adequate housing, to house temporarily destitute flood victims on the grounds of a prison outside Johannesburg, was challenged by surrounding property owners as a violation of administrative justice rights. The Court rejected the challenge, albeit without any direct reliance on the State's duty to protect the right to have access to adequate housing.)

[3] 18 *BverfGE* (supra) at 317.

[4] The price of processed dairy products was not similarly restricted and milk intended for processed dairy products could be sold and bought freely across Germany. The effect of increasing surplus production of milk in this unequally regulated industry was that prices for processed dairy products were significantly lower than prices for drinking milk. To offset this disadvantage for suppliers and dairies selling milk for processed dairy products, suppliers and dairies selling drinking-milk were required to pay a special tax.

restricted the freedom of competition. The FCC's ruling can be read as an affirmation of the existence of an implicit right to have access to adequate food on a sustainable basis.[1]

Courts can protect the right to food in another manner. South African courts are constitutionally obliged to interpret legislation or develop rules of common law so as to promote the 'spirit, purport and objects' of the Bill of Rights.[2] Access to food in a private ownership economy is centrally determined by 'a [statutory and common law] system of legal relations (ownership rights, contractual obligations, legal exchanges, etc).'[3] Quite literally, 'the law stands between food availability and food entitlement.'[4] As a result, the constitutionally informed law-making role of courts is potentially an extremely important way in which the protection of the right to food can be advanced.

The interpretation of legislation offers manifold opportunities for such advancement. Courts have, for example, extended the scope of protection afforded by ESTA and the Labour Tenants Act.[5] They have found that various forms of interference with food production activities constitute evictions that have to comply with the stringent procedural and substantive safeguards imposed by these laws. In *Ntshangase v The Trustees of the Terblanché Gesin Familie Trust,* the Land Claims Court held that when a property owner prevents an occupier from accessing grazing lands and a watering hole on his property that the occupier had previously used for her cattle, it constitutes an eviction for purposes of ESTA.[6] In respect of the Labour Tenants Act, the Land Claims Court, in *Van der Walt v Lang,*[7] held that where a property owner had previously allowed an occupier to graze a certain number of cattle on his land, a subsequent restriction of the number of cattle allowed constituted an eviction subject to the Act's safeguards. Similarly, in *Zulu v Van Rensburg*[8] the Land Claims Court held that impounding the cattle of an occupier constituted an eviction that had to comply with the Act's safeguards.[9]

The Constitutional Court in *Jaftha v Schoeman* suggested some new directions for court-sponsored development of statutory law. The *Jaftha* Court was asked to consider the constitutionality of provisions of the Magistrates' Courts Act[10] that

[1] See E de Wet 'Can the Social State Principle in Germany Guide State Action in South Africa in the Field of Social and Economic Rights?' (1995) 11 *SAJHR* 30, 38.

[2] FC s 39(1).

[3] Sen (supra) at 166.

[4] Ibid.

[5] See §§ 56C.3.3*(a)*(i) and (ii), and *(b)*(i) supra.

[6] *Ntshangase v The Trustees of the Terblanché Gesin Familie Trust* [2003] JOL 10996 (LCC)('*Ntshangase*') at para 4.

[7] *Van der Walt v Lang* 1999 (1) SA 189 (LCC)('*Van der Walt*') at para 13.

[8] *Zulu v Van Rensburg* 1996 (4) SA 1236, 1259 (LCC)('*Zulu*').

[9] The Land Claims Court has interpreted the term 'rights in land' in the Restitution of Land Rights Act to include 'beneficial occupation'. As a result, the long term use of land for grazing and cultivation purposes also constitutes a right in land that can be reclaimed. See, eg, *Kranspoort* (supra) at para 78.

[10] MCA, s 66(1)*(a)*.

allowed, where sufficient movables could not be found, the sale in execution of the immovable property, including the home, of a debtor to satisfy a judgment debt. To protect the right of everyone to have access to adequate housing, the Court, through a combination of statutory construction and reading words into the Act, changed the Act in such a way that a judgement debtor's home can now only be sold in execution if a court has ordered it after considering all relevant circumstances.[1] The holding in *Jaftha* is limited to the protection of a judgment debtor's home in the context of the right to have access to adequate housing. However, in future cases, in which a creditor seeks the sale in execution of immovable property that a judgment debtor uses to produce food, the courts can extend the reasoning in *Jaftha* to make any sale of immovable property contingent upon the ability of the debtor to exercise his or her right to food.[2] Such extensions of the holding are grounded in the *Jaftha* Court's emphasis on the severe impact that the execution process could have on the human dignity of a judgment debtor and on a judgement debtor's capacity to have access to the basic necessities of life.[3] Where an indigent person's human dignity and basic survival hang on the attachment and the sale in execution of immovable property used to produce food for personal consumption, any such execution must be understood in the context of the desiderata of the right to food.

Regrettably, the courts have done little to develop socio-economic rights through the development of the common law.[4] In *Afrox v Strydom*, the Supreme Court of Appeal declined the invitation to develop the common law rules of contract so as better to protect the right to have access to health care services.[5] However, the Courts have been fairly active with respect to the development of the common law rules of eviction. Given that access to land often determines access to food, the existing body of common law rules of eviction that hold that a property owner is entitled to an eviction order upon a showing she is indeed owner of the land in question and that the person occupying it is doing so unlawfully has a direct bearing on the right to food. Where this two-fold showing is made, a court possesses no discretion as to whether or not to award the order.[6] FC s 26(3) of the Constitution could be read so as to alter this rule. FC s 26(3)

[1] *Jaftha* (supra) at paras 61–64 and 67.

[2] Ibid at para 60 (Court lists factors that should be considered: 'the circumstances in which the debt was incurred; . . . attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt *and any other factor relevant to the . . . facts of the case* . . .' (my emphasis)).

[3] Ibid at paras 21, 25–30, 39 and 43.

[4] I say 'regrettably' because the realization of socio-economic rights is conditional upon the development of common law rules of contract and property that fundamentally determine access to basic resources, and because one would have expected courts to be more comfortable with the use of the common law — which they make — to enforce socio-economic rights than with the creation of constitutional remedies for the same purpose.

[5] *Afrox Health Care Bpk v Strydom* 2002 (6) SA 21 (SCA)(Court rejected argument that common law rules supporting disclaimers in admissions contracts to private hospitals are contrary to the public interest, are unenforceable and should be developed in light of FC s 27(1)*(a)*.)

[6] *Graham v Ridley* 1931 TPD 476.

states that an eviction from a home may only take place in terms of a court order granted *after all relevant circumstances had been considered.* (Emphasis added). The tenure security laws — which require courts to consider all relevant circumstances before granting an eviction order — give effect to FC s 26(3).[1]

Recent conflicting decisions in the High Courts created some uncertainty over whether the tenure security laws, particularly PIE, applied also to cases of so-called 'holding over' - cases where initially lawful occupation subsequently became unlawful.[2] High Courts were asked to consider whether FC s 26(3) changed the common law rules of eviction in holding-over cases where PIE did not apply and the common law, by default, did. In *Ross v South Peninsula Municipality,*[3] the Cape High Court found that an applicant for an eviction order in holding-over cases governed by common law had to address all the relevant circumstances before the court was entitled to grant the order.[4] However, the Witwatersrand High Court in *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* rejected the *Ross* Court's development of the common law.[5] This High Court split reached the Supreme Court of Appeal in *Brisley v Drotsky*.[6] The *Brisley* Court held that FC s 26(3)'s 'relevant circumstances' could only mean *legally* relevant circumstances. The only circumstances legally relevant to the question as to whether an eviction should be allowed were whether the evictor was owner of the land in question and the evictee was occupying it unlawfully. FC s 26(3) did not change the extant rules of common law governing holding-over.[7] As a result all evictions from residential property where the occupant was 'holding over' remained subject to the old common law rule, which afforded a court no discretion in deciding whether to grant an eviction order. This position soon changed again. In *Ndlovu v Ngcobo; Bekker v Jika,* the Supreme Court of Appeal held that PIE applied to evictions in cases of 'holding over'.[8] In short, FC s 26(3) required the courts to construe PIE in light of constitutional dictates.[9] In cases of 'holding over' a court now possesses, in terms of PIE, the discretion, exercised in light of all relevant circumstances, to grant an eviction order. The holding in *Ndlovu* has important consequences for those South Africans who access food through small-scale agricultural production. The kind of property at issue in cases like *Ndlovu* is used not only for residential purposes but

[1] ESTA, PIE and the Labour Tenants Act. See §§ 56C.3*(a)*(i) and (ii) and *(b)*(i) supra for a discussion of these laws.

[2] The question raised was whether PIE applied to such evictions. See, eg, *Ellis v Viljoen* 2001 (4) SA 795 (C), 2001 (5) BCLR 487 (C)(PIE does not apply); *Bekker v Jika* [2001] 4 All SA 573 (SE)(PIE does apply.)

[3] *Ross v South Peninsula Municipality* 2000 (1) SA 589 (K).

[4] Ibid at 596.

[5] *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 486 (W)(FC s 26(3) only applied to evictions by the State and not to evictions by natural or juristic persons.)

[6] *Brisley v Drotsky* 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA)('*Brisley*').

[7] Ibid at para 42.

[8] *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA).

[9] Ibid at para 23.

also to produce food for personal consumption.[1] Indeed, through various measures the State encourages the cultivation of food gardens on residential plots as a way for people to enhance their access to food.[2] The protection afforded the security of tenure of occupiers of such property after *Ndlovu* protects both the right to have access to adequate housing and their right to have access to adequate food.

The refusal of the Supreme Court of Appeal in *Brisley* to develop the common law of eviction could come back to haunt it. At the end of 2003, prompted by lobbying efforts from banks and large property management concerns, the Department of Housing published for public comment a draft amendment Bill to PIE.[3] It changes the definition of an unlawful occupier so that cases of 'holding over' would once again be excluded from PIE. Should this Bill be adopted, the law would revert back to the *Brisley* Court's characterization. In cases of 'holding over,' a court will no longer be able to take account of the impact the eviction would have on the capacity of the evictee to have access to food.

(iii) The duty to promote and fulfil the right to food

The duty to promote and fulfil[4] the right to food requires the State to 'adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures'[5] so that those that do not currently enjoy access to food can secure access and so that those who possess access to food may enhance such access.

The standard of justification articulated by the Constitutional Court in socio-economic rights cases has closely tracked the description of the State's duty to fulfil the right to food in international law.[6] If this 'reasonableness' standard of justification were applied to the right to food, it would generate the following criteria by which to assess the State efforts to promote and fulfil the right to food.

First, the State must devise and implement measures to give effect to the right to food.[7] The speed with which, and extent to which, the State can fulfil the right

[1] De Klerk *et al* (supra) at 54–58. The authors note that food gardens in both urban and rural areas make a significant contribution to food security. They contend that the biggest obstacle to the establishment and the maintenance of food gardens is access to land and security of tenure.

[2] See, eg, the Department of Social Development's Poverty Relief Programme.

[3] The Draft Prevention of Illegal Eviction from and Unlawful Occupation of Land Bill, *Government Gazette* 25391, GN 2276 of 2003 (27 August 2003).

[4] I discuss the duties to promote and to fulfil here as one. Sandra Liebenberg has suggested that the duty to promote requires the State to undertake educational measures in respect of a right. That is, the State must educate people about the nature and content of a right and the tools and the opportunities with which to secure meaningful access to it. S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2003) (2nd Edition, OS, December 2003) 33–6. Geoff Budlender describes it as a duty of executive and administrative agencies 'to have proper regard' to the advancement of socio-economic rights in their decision-making. Both these meanings are included in my discussion of the 'duty to promote and fulfil' the right to food. Budlender (supra) at 37.

[5] Committee on ESCR General Comment No 14 'The Right to the Highest Attainable Standard of Health' (Article 12 of the Covenant) (22nd session, 2000) UN Doc. E/C. 12/2000/4 at para 33.

[6] GC 12 (supra) at paras 21–28.

[7] Ibid at para 21.

to food are determined by the resources at its disposal. The right also only needs be fulfilled progressively.[1] Still, the State must be able to show that it has measures in place and that it is in the process of implementing them. Any deliberate retrogression would constitute a *prima facie* violation of the right to food and would require a particularly convincing justification.[2]

Second, the state's measures to fulfil the right to food must be reasonable. As a rule, this means that the measures must meet at least the following requirements:

- they must be comprehensive and coordinated and clearly allocate responsibilities to different spheres within government;[3]
- the financial and human resources to implement them must be available;[4]
- they must be both reasonably conceived and reasonably implemented;[5]
- they must be 'balanced and flexible' and capable of responding to intermittent crises and to short-, medium- and long-term food needs;[6]
- they may not exclude 'a significant segment of society';[7]
- they may not 'leave out of account the degree and extent of the denial' of the right to food and must respond to the extreme levels of food insecurity of people in desperate situations; that is, the State's measures must make provision both for access to food being *facilitated* for those who are able to make use of opportunities for themselves and for access to food being *provided* to those who are in desperate conditions and cannot make do for themselves;[8] and
- they must be transparent; they must be made known, both during their conception and once conceived, to all affected.[9]

As yet, the duty to fulfil the right to food has not been the basis of a court decision in South Africa.[10] In the absence of any direct indication of what this duty means, a useful way in which to illustrate the concrete legal entitlements and duties that the duty to fulfil the right to food entails is to consider the extent to which the State's existing measures to realise this right indeed meet the kinds of

[1] FC s 27(2) reads, in relevant part: 'The state must take reasonable legislative and other measures, *within available resources*, to achieve the *progressive realisation* of [this] right. . .' (my emphasis).

[2] *Grootboom* (supra) at para 45. See also GC 3 (supra) at para 9 (Deliberate retrogression would require full justification 'by reference to the totality of rights . . . in the Covenant and in the context of the full use of the maximum available resources.')

[3] *Grootboom* (supra) at para 39. See also GC 12 (supra) at paras 22 and 25.

[4] Ibid. See also GC 12 (supra) at para 21.

[5] Ibid at para 42.

[6] Ibid at para 43.

[7] Ibid. See also GC 12 (supra) at para 26.

[8] Ibid at para 44. See also GC 12 (supra) at para 28.

[9] *TAC* (supra) at para 123. See also GC 12 (supra) at paras 23 and 24.

[10] The right to food did make a brief, but unsuccessful, appearance in *TAC*. The Treatment Action Campaign argued that government should be ordered to provide, as part of a comprehensive package to prevent mother-to-child transmission of HIV, breast milk substitutes free of charge and on demand to HIV positive mothers who give birth at public health facilities. The *TAC* Court declined to do so, arguing that the complex nature of the question as to whether or not substitutes are appropriate militated against the Court making a binding order in this respect and that such decisions are best left to health professionals. *TAC* (supra) at para 128.

constitutional demands delineated above. Below, I focus on three elements of the duty to fulfil the right: (1) the duty to have in place a national strategy with which to fulfil the right to food; (2) the duty to ensure that such a national strategy be reasonable; and (3) the duty to avoid any deliberate retrogression in the progressive fulfilment of the right to food.

(aa) A national strategy

Until relatively recently, it was difficult to fill out a constitutional scorecard on the South African government's record in discharging its duty to fulfil the right to food. No coherent policy framework was directed specifically at giving effect to the right. In fact, it seemed that government had no 'national strategy' to fulfil the right to food as it is required to have both in terms of international law[1] and in terms of the Constitutional Court's post-*Grootboom* jurisprudence.[2] This in itself constituted at the time a *prima facie* infringement of the right to food.

Prompted in part by the national outcry over the sharp rises in food prices in 2001 and the resultant further erosion of food security amongst the poor, the government has introduced a range of new measures to address specific aspects of food insecurity.[3] It has also made a significant effort to develop and publicise a coherent national strategy, focussed on addressing food insecurity in South Africa. Policies related to the fulfilment of the right to food are currently co-ordinated by the Department of Agriculture.[4] The Department's *Integrated Food Security Strategy for South Africa* (IFSS) sets out a broad policy framework for measures aimed at enhancing food security and is intended to 'streamline, harmonise and integrate diverse food security sub-programmes'[5] through a cross-departmental and cross-sectoral management structure.[6] The IFSS also identifies a number of key focus areas for policy development and implementation.[7]

[1] GC 12 (supra) at para 21.

[2] *Grootboom* (supra) at para 39.

[3] In the year ending June 2002, the food price index rose 16.7% whilst non-food inflation was only 7.2%. In the same period, the price of a bag of maize meal doubled. Watkinson & Makgetla (supra) at 1. For a full assessment of the extent and nature of the food price volatility in 2001/2002, see Food Pricing Monitoring Committee (supra) at 5–8.

[4] Department of Agriculture *Integrated Food Security Strategy for South Africa* (2002)('IFSS').

[5] Ibid at 11.

[6] An Inter-Ministerial Committee, chaired by the Minister of Agriculture, heads the IFSS at a political level. It is managed and implemented by a National Co-ordinating Unit. The National Co-ordinating Unit works with Provincial Coordinating Units, which, in turn, oversee both the work of District Food Security Officers and, at the local government level, Food Security Officers. The IFSS envisages the establishment of a National Food Security Forum (NFSF), with membership drawn from the public sector, the private sector and civil society and with corollaries at provincial level (Provincial Food Security Forums), at district level (District Food Security Forums) and local level (Local Food Security Action Groups). The role of the NFSF is to provide 'strategic leadership and advisory services on food security' and to set standards and recommend policy options. Ibid at 34.

[7] These key focus areas are: (1) increasing household food production and trading; (2) improving income-generation and job-creation; (3) improving nutrition and food safety; (4) increasing safety nets and food emergency systems; (5) improving analysis and information management systems; (6) Capacity-building; and (7) holding stakeholder dialogues. Ibid at 6.

(bb) Ensuring that the national strategy is reasonable

The policies and programmes the state adopts in order to fulfil the right to food must be reasonable in light of the tests that the Constitutional Court has enunciated in *Grootboom*, *Treatment Action Campaign*, and *Khosa*. As recently as two years ago, government's existing measures to address food insecurity failed this reasonableness test in at least two respects. As I argued at the time, the measures were neither sufficiently focussed nor adequately coordinated to pass a *Grootboom*-inspired test.[1] No specific government department at national, provincial or local level focused on the right to food in a manner comparable to the Department of Health's focus on the right to have access to health care services. As a result, measures intended to foster food security developed in a piece-meal fashion. Different aspects — and sometimes the same aspects — of nutritional policy were addressed by different departments.[2] This higgledy-piggledy approach confounded all attempts to assess the reasonableness of the State's measures to fulfil the right to food. In light of the constitutional requirement of transparency in policy formulation and implementation, this lack of transparency in food-related policy was itself constitutionally suspect.[3] Both of these potential violations of the right to food have since been adequately addressed. The IFSS coordinates measures to achieve food security. The Department of Agriculture has line-management authority over efforts to fulfil the right to food. Finally, the government has initiated right to food framework legislation, which, if successful, would further enhance the focus, coordination and transparency of measures to fulfil the right to food.[4]

Despite these important advances, there are two general problems with government's national strategy to fulfil the right to food. The first relates to the comprehensiveness of the strategy; the second to its implementation.

The different measures coordinated within the IFSS come close to constituting the kind of 'comprehensive' programme[5] that addresses 'critical issues and measures in regard to *all* aspects of the food system' required by the FC s 27(2)'s reasonableness test.[6] A number of programmes *facilitate* access to food. Such programmes as the Department of Agriculture's Food Security and Rural

[1] D Brand 'Between Availability and Entitlement: The Constitution, *Grootboom* and the Right to Food' (2003) 7 *Law, Democracy and Development* 1, 22 ('Availability and Entitlement'). See *Grootboom* (supra) at para 39.

[2] See Department of Agriculture (2002) (supra) at 11 (Problem acknowledged by government.)

[3] *TAC* (supra) at para 123. See also GC 12 (supra) at paras 23 and 24.

[4] See S Khoza 'Protecting the Right to Food in South Africa. The Role of Framework Legislation' (2004) 5(1) *ESR Review* 3.

[5] *Grootboom* (supra) at para 39.

[6] For a more comprehensive overview of these measures, see D Brand 'Budgeting and Service Delivery in Programmes Targeted at the Child's Right to Basic Nutrition' in E Coetzee & J Streak (eds) *Monitoring Child Socio-Economic Rights in South Africa*: *Achievements and Challenges* (2004) 87, 93–101 ('Budgeting'); and E Watkinson 'Overview of the Current Food Security Crisis in South Africa' *SARPN*, available at www.sarpn.org.za/documents/d0000222/watkinson/Watkinson_SA_Food_crisis.pdf, (accessed on 14 July 2005).

Development programme,[1] the Departments of Agriculture and Land Affairs' Land Redistribution for Agricultural Development programme,[2] the Department of Public Works' Community Based Public Works (CBPW) programme,[3] and the Department of Social Development's Poverty Relief Programme (PRP)[4] enable more and more South Africans to produce their own food and to generate the income needed to purchase adequate amounts of food. A variety of measures *provide* access to food to those who cannot make use of existing opportunities to obtain access to food. The bulk of these measures are special needs social assistance cash grants that enable especially vulnerable groups of people to acquire food.[5] Two permanent programmes provide food and nutritional supplementation to children: the Primary School Feeding Scheme (PSFS)[6] and the Protein Energy Malnutrition Programme (PEMP) (the PEMP targets children with acute protein malnutrition).[7] In 2002, government introduced short-term crisis measures in response to rising food prices in the form of a programme to provide food parcels and agricultural starter packs to destitute families.[8]

Government's measures also take account of the need to ensure the availability of food. The Department of Agriculture (through appropriate production policies) and the Department of Trade and Industry (through appropriate food import strategies) have programmes in place to maintain an adequate national food supply and thereby to ensure national food security.[9] Different departments and institutions within government also run programmes to monitor different aspects of national and household food security in South Africa and to enhance

[1] Brand 'Budgeting' (supra) at 95 (Agricultural starter-packs and information packs to enable food production for own consumption is provided to food insecure rural households.)

[2] Ibid at 96 (Financial support is provided for farmers from previously disadvantaged communities to enable them to buy land and agricultural implements.)

[3] Ibid (Jobs are created by involving poor rural communities in public works projects.)

[4] Ibid (The department establishes communal rural food production clusters: food gardens, poultry houses, pig units.)

[5] Ibid at 98 (Special needs grants include the State Old Age Pension; the Child Support Grant; the Foster Care Grant; the Disability Grant; the War Veteran's Grant; the Care Dependency Grant; and Grant in Aid. The Social Relief in Distress Grant, although narrowly tailored, is not a special needs grant.)

[6] Ibid at 104–116 (In terms of the PSFS, a nutritious meal is provided once every school day to primary school learners at school.)

[7] The PEM programme provides treatment in hospitals and clinics to severely malnourished children and discharges them when they have recovered. For a description and evaluation of PEM, see Chopra *et al* (supra) at 16–17.

[8] In addition to the provision of food parcels and agricultural starter packs, government announced that it would increase a variety of social assistance grants (ranging from an increase of 2% in the Foster Care Grant to an increase of 8% in the Child Support Grant). See E Watkinson & K Masemola 'The Food Crisis: More Action Needed' (2002) November *NALEDI Policy Bulletin* 4, 4 (Critique of these measures as inadequate to task.)

[9] De Klerk *et al* (supra) at 3 ('Despite its comparatively unfavourable natural resource base, [South Africa] is a net exporter of agricultural commodities. Its per capita income is high for a developing country. It does not have a tight foreign exchange constraint. It is not landlocked. Its transport infrastructure is generally good.')

nutritional status through nutritional education and micronutrient fortification of foodstuffs. An important recent addition to these programmes was the appointment of the Department of Agriculture's National Food Pricing Monitoring Committee — for a period of one year — to investigate and to advise government on food prices in South Africa.[1]

Such measures look, in the aggregate, to be comprehensive. However, government's national strategy fails to fulfil the right to food in one important respect. It does not make any provision for the sustained access to food of a substantial number of people currently in food crisis. The Constitutional Court requires any comprehensive socio-economic rights programme to 'respond to the needs of those most desperate',[2] to take into account the 'amelioration of the circumstances of those in crisis',[3] and not to exclude 'a significant segment of society'.[4] This requirement is closely linked to a requirement of flexibility. Flexibility demands a set of measures that 'make appropriate provision for attention to crises and to short-, medium- and long-term needs.'[5]

These requirements of inclusion and flexibility are echoed in international law. In General Comment No 12, the Committee on ESCR states that a national strategy to fulfil the right to food must include measures of an immediate nature, to address food crises[6] and must include measures to 'ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger.'[7]

Many South Africans do not enjoy *basic essential* levels of food, let alone fully adequate nutrition. Although the desperate nature of this situation is evident from a wide variety of statistics — both food intake data and anthropometric indicators[8] — it is revealed most dramatically in the number of South African households living in food poverty[9] — 43% — and the number of households nationally that experience hunger on a regular basis — 52%.[10] This crisis is not of a passing nature nor can it be attributed to an aberrant event such as a natural disaster or a period of unusual food market volatility. This crisis is a function of deep structural problems in the economy that deny a majority of South Africans access to basic resources. It is an 'endemic crisis'.[11]

[1] The Committee was appointed for a period of one year. It has completed its work and has submitted its final report to the Department of Agriculture.

[2] *Grootboom* (supra) at para 44.

[3] Ibid at para 64.

[4] Ibid at para 43.

[5] Ibid.

[6] GC 12 (supra) at para 16.

[7] Ibid at para 17.

[8] See Watkinson (supra) at 1–6 (For a recent overview of the available food intake data and anthropometric indicators showing this crisis.)

[9] De Klerk *et al* (supra) at 25.

[10] Ibid at 28.

[11] See Watkinson (supra) at 5 (In fact, not only are the same people who were in food crisis ten years ago still in food crisis — the situation has worsened.)

Those South Africans who do not enjoy the most basic essential levels of 'access to' food are, in *Grootboom*'s terms, 'desperate', 'in crisis' and 'living in intolerable conditions'. Children who waste away because of lack of food and do not grow to their full physical and mental potential because of under- and malnourishment, and people who go hungry every day of their lives, exhibit the same urgent, immediate need with regard to the right to food as the community in *Grootboom* exhibited with regard to the right to have access to adequate housing. The case law suggests that government is obliged to take account of the needs of such people. The current national food security strategy does not do so. Against the background of a general focus on longer-term capacity building interventions that focus on facilitating access to food for reasonably self-sufficient people, government's food policy scheme of course makes quite substantial provision for the direct transfer of food or the means with which to acquire food. However, all these initiatives - the Primary School Feeding Scheme, the PEM Programme and the various social assistance grants — target only special needs. The Primary School Feeding Scheme benefits only children at primary school and only when they are at school. The PEM programme benefits severely malnourished children treated at public health facilities. The Child Support Grant, when fully extended, will benefit children under 14; the State Old Age Pension men older than 65 and women older than 60; and the Disability Grant disabled persons. The result is that if one is older than 14 years of age and younger than 60 (for women) or 65 (for men), physically and mentally able, not in foster care and not a war veteran, there is no regular State assistance to meet even the most basic of food needs.[1] The only State assistance that is available for such persons is Social Relief in Distress and the current emergency food parcel programme. Both these programmes provide only temporary relief. Social Relief in Distress is provided monthly for a maximum of 3 months at a time. Food parcels are handed out for 3 months in any given year and the programme is only in place until 2005. As such, neither of these crisis response programmes addresses the endemic nature of South Africa's food security crisis. Moreover, the coverage of both programmes is extremely low.[2] The national strategy fails those in desperate need.

A second limitation in our national strategy concerns implementation. The Constitutional Court has repeatedly emphasised that it is not enough for the State simply to conceive a reasonable national strategy. It must also implement it reasonably.[3] In addition, the Court has said that a programme must be reasonably resourced. Regard must be had to the human, financial and institutional

[1] See Taylor Commission (supra) at 59 (More than half of poor South Africans, or 11 840 597 people — the majority of whom are in food crisis — exist in this social assistance vacuum.)

[2] The implementation of the Social Relief of Distress grant is notoriously patchy. See, eg, *Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province* Case 671/2003 (unreported 23 October 2003)(B)('*Kutumela*'). Legal action was taken against the North West Provincial Government for its failure to take adequate steps to implement Social Relief of Distress Grant Programme. The case resulted in a wide-ranging order requiring the provincial government to take adequately resourced steps to ensure that those entitled to the grant do in fact get it.

[3] *Grootboom* (supra) at para 42.

resources that a programme requires for its implementation. Once adopted, those resources must be made available for and used for its implementation.[1]

The number of beneficiaries reached through government's various food access facilitation programmes (roughly 120 300 by 2001) constitute only a very small percentage of the nutritionally needy in South Africa.[2] The same can be said of government efforts to provide food or the means through which to acquire food. The uptake rate of the different social assistance grants, despite significant annual gains, remains relatively poor. The Child Support Grant, for instance, currently enjoys an uptake rate of only 2.5 million children. However, an estimated 6.1 million children between the ages of 6 and 15 live below the poverty line and presumably require social assistance.[3]

Two cases illustrate how the 'reasonable implementation' element of the duty to fulfil the right to food can be used to leverage a positive shift in the execution of a comprehensive national food security programme. In *People's Union for Civil Liberties v Union of India*,[4] the Indian Supreme Court was approached with an application that, in part, was directed at obtaining an order that existing national measures to address food insecurity and famine be adequately resourced and implemented at State level so as to reach intended beneficiaries. The complaint noted that both massive food reserves and legal measures exist to address the food insecurity of poor households and, in specific instances, to address famines. The complaint alleged, however, that India's food delivery system failed to reach intended beneficiaries due to: (1) administrative inefficiency or complacency and (2) the routine diversion by state governments of funds from the Federal government, intended to implement these food programmes, to other needs. The Indian Supreme Court has responded with a series of interim orders requiring, amongst other things, that: (1) the identification of beneficiaries qualifying for State assistance be standardised and completed; (2) the effectiveness of the current public distribution system for food be enhanced and that corruption in the process be rooted out; and (3) that funds allocated from national level to state governments for use in public distribution of food and famine measures be used for those purposes.[5]

In *Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province*, the High Court engaged a similar set of problems.[6] A number of indigent persons from the North-West Province had applied for a

[1] *Grootboom* (supra) at para 39. See also GC 12 (supra) at para 21.
[2] Brand 'Budgeting' (supra) at 102.
[3] Ibid.
[4] For a discussion of *People's Union*, see KB Mahabal 'Enforcing the Right to Food in India: The Impact of Social Activism' (2004) 5(1) *ESR Review* 7.
[5] These orders remain interim orders. The Supreme Court has retained jurisdiction while giving the State the opportunity to discharge this initial set of responsibilities. *People's Union Civil Liberties v Union of India* (Supreme Court cf India 2002), available at http://www.righttofoodindia.org/mdm/mdm_scorders.html, (accessed on 9 March 2005).
[6] Case 671/2003 (Unreported 23 October 2003)(B)('*Kutumela*').

Social Relief of Distress grant. The indigent persons clearly qualified for the grant in terms of the established criteria. They did not receive it. The complaint alleged that although, in terms of the Social Assistance Act and its regulations, provincial governments were required to provide the grant to eligible individuals upon application, the North-West Province had not dedicated for its implementation the necessary human, institutional and financial resources. As a result, the grant was available on paper but not in practice. The case was settled between the parties. The settlement agreement was made an order of court. The order is particularly wide-ranging. Apart from granting specific relief to the applicants, it provides for various forms of general relief. It requires the North-West provincial government to acknowledge its legal responsibility to provide Social Relief of Distress grants effectively to those eligible for it. It must devise a programme to ensure the effective implementation of the Social Relief of Distress Grant Programme. This programme must enable the province to process applications for Social Relief of Distress grants on the same day that they are received. The programme must allow officials to assess and to evaluate applications and to ensure the eventual payment of the grant. It must put in place the necessary infrastructure for the administration and payment of the grant. In addition, the National Department of Social Development was ordered to develop uniform standards and procedures across the Republic with regard to the Social Relief of Distress Grant Programme. Finally, the provincial government was ordered to make the availability of Social Relief of Distress grants known to the public.

(cc) Avoiding retrogression

The duty to fulfil the right to food requires the State to 'avoid retrogressive measures'.[1] Any deliberate retrogression in the fulfilment of the right to food will constitute a *prima facie* infringement of the right to food and will require a compelling justification. This element of the duty to fulfil socio-economic rights has been emphasised by the Constitutional Court[2] and is recognised at international law.[3]

Recent efforts by the National Department of Agriculture (NDA) and the National Department of Land Affairs (DLA) to effect redistribution of agricultural land are good examples of such retrogressive measures. Before 2001, the NDA redistributed agricultural land to farm workers and emerging farmers from previously disadv antaged groups with the explicit purpose of 'improv[ing] their livelihoods and quality of life'.[4] Land was redistributed through a system of State subsidy. Qualifying households would receive a Settlement/Land Acquisition Grant (SLAG) of R16 000 with which to buy land. The Grant for the Acquisition

[1] Liebenberg (supra) at 33–34.
[2] *Grootboom* (supra) at para 45.
[3] GC 3 (supra) at para 9.
[4] Department of Land Affairs *White Paper on Land Policy* (1997) 56.

of Municipal Commonage enabled municipalities to make communal land available to the urban and rural poor for grazing and cultivation. These land redistribution efforts enabled people to produce food for their own food needs and to create the additional income needed to purchase extra food and other basic commodities. Problems in the redistribution process and an emphasis on promoting equitable access for emergent black farmers in commercial agriculture[1] led to a reconsideration of the programme in 2000. A new programme — Land Redistribution for Agricultural Development (LRAD) — was launched in 2001. In LRAD, the focus has expressly shifted from improving livelihoods and quality of life to enabling access to the commercial agriculture sector for 'those aspiring to become full-time, medium to large-scale commercial farmers'.[2] This change in focus is reflected in LRAD's structure. To qualify for a SLAG subsidy, a recipient household had to fall under a maximum monthly income of R1 500. To qualify for a grant under LRAD, a recipient has to make a minimum own contribution to the acquisition of land of R5 000. As Edward Lahiff has pointed out, this requirement clearly excludes the poorest of the poor from the benefit of the programme and dramatically reduces the extent to which LRAD can make a contribution to the fulfilment of the right to food.[3] A change in redistribution policy that withdraws its benefits from such a large cohort of individuals is a *prima facie* infringement of the right to food.

[1] Lahiff (supra) at 4.

[2] Ibid.

[3] The shift in strategy had another much more direct retrogressive effect. See Lahiff (supra) at 4. Lahiff points out that when the Department of Land Affairs was reconsidering its land redistribution measures during 2000, a moratorium on new projects was introduced. The result was that capital expenditure for land redistribution dropped by R358 million in 1998/99, to R173 million in 1999/2000 and to R154 million in 2000/01. As a consequence, the Medium Term Expenditure Framework allocations for land redistribution dropped by 23% in the period 1999/2001.

56D Social Security

Mia Swart

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27 Health care, food, water and social security:

(1) Everyone has the right to have access to:

(c) Social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative measures, within its available resources, to achieve the progressive realization of each of these rights.[1]

56D.1 INTRODUCTION

> To be held in poverty is a cursed condition. Quite apart from the physical discomfort of deprivation it reduces a human in his or her dignity. The inevitable result of being unlawfully deprived of a grant that is required for daily sustenance is the unnecessary further endurance of that condition for so long as the unlawfulness continues.[2]

Roughly half of South Africa's population lives in poverty.[3] Meaningful participation in constitutional democracy is often dependent on financial resources and desperate poverty deprives people of such participation. Providing measures which relieve poverty must, therefore, be South Africa's most pressing social goal.

The social security system includes a host of measures that aim to alleviate poverty: Benefits are paid to the aged, people with disabilities, pregnant women, the unemployed and for the caregivers of children. In 2011, close to 15 million South Africans received social grants.[4] Yet, it is uncertain whether these programmes can actually relieve poverty. Because the South African economy fails to create sufficient employment, many South Africans turn to the social security system for the income they require just to survive. Social grants redistribute existing wealth, but in the absence of increased employment or entrepreneurship, cannot create additional wealth.

[1] Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) ('Final Constitution' or 'FC').

[2] *MEC, Department of Welfare v Kate* 2006 (4) SA 478 (SCA), [2006] 2 All SA 455 (SCA), [2006] ZASCA 49 ('*Kate SCA*') at para 33.

[3] Sandra Liebenberg 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) 12 *SAJHR* 234.

[4] See Chris Bathembu 'South Africa Widens Social Security Net' (23 February 2011) available at http://www.expatica.com/za/finance_business/pensions_insurance/South-Africa-widens-social-security-net_17204.html (accessed on 26 February 2012). See also *Cele v South African Social Security Agency and 22 Related Cases* 2009 (5) SA 105 (D) at para 26 (there were 11 million recipients in 2007). Government projects that the social security budget will grow from R132 billion in the next year to R146.9 billion in 2013 and up to R171 billion by 2014. See also *South African Social Security Agency 2010/11 Annual Report* (2011) available at http://www.sassa.gov.za/Portals/1/Documents/a197c6cc-9e32-4f9a-8d71-10aa6aa77e94.pdf (accessed on 26 February 2012).

The interdependence of rights means that individuals can only enjoy the full spectrum of constitutional rights if they have the economic security to do so.[1] Poverty not only limits the right to social security, it limits access to food, water, housing and healthcare and the ability to exercise or enjoy political rights such as freedom of expression and freedom of association. The Constitutional Court itself has acknowledged the disjuncture between our founding constitutional values and existing conditions of material deprivation.[2] Giving content to the right to social security is, I shall argue, an important means of closing or narrowing this gap between ideal and reality.

The constitutional jurisprudence on the right to social security remains inchoate. The rather piecemeal legislative framework and the limited corpus of case law engaging the meaning of the right to access to social security means that we can expect a broad array of constitutional challenges to legislation and policy in the future. It also means that some of what follows in these pages about the scope of the right to social security remains speculative. Hard law on the right to social security is, however, emerging. The Constitutional Court's decision in *Khosa*[3] currently constitutes the core of this body of jurisprudence.

This chapter does not aim to cover every nook and cranny of social security law. Instead, it aims to give an overview of the meaning and implementation of the constitutional right to social security through the cases, legislation, policy and international law. I begin by considering some fine terminological distinctions in the social security field. Next, in §56D.3, I discuss the content of the constitutional right to social security as it has been developed in the case law. Thereafter, I examine some of the decisions that have dealt with the social assistance, primarily through the laws of administrative justice. I argue that these cases, rather than those dealing directly with the FC s 27(1)*(c)* represent the coalface of attempts to enforce the right to social security.

Having discussed the Court's decisions on social security, I turn my attention to extant social security legislation and policy. In the penultimate section, I look at international law on the right to social security and what impact it should have on South African law. The final section highlights instances in which the current social security system could still be challenged on the basis of non-discrimination/inequality.

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[1] See C Scott 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Convention on Human Rights' 1989 (2) *Osgoode Hall LJ* 769, 786. See also Sandra Liebenberg: 'Interpretation of Socio-Economic Rights' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) 33-1. *Grootboom* stated that there is a 'close relationship' between the various socio-economic rights.' *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), 2000(11) BCLR 1169 (CC)('*Grootboom*') at para 24. See also Albie Sachs 'Social and Economic Rights: Can they be Justiciable?' (2000) 53 *Southern Methodist University Law Review* 1389 ('We do not want bread without freedom, nor do we want freedom without bread; we want bread and we want freedom.')

[2] See *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC), [1998] All SA 268 (CC) at para 8; *Grootboom* (supra) at para 2 (Constitutional Court confirmed the commitment to transformation.)

[3] *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) [2004] ZACC 11 ('*Khosa*').

56D.2 TERMINOLOGY

To understand the language of social security one has to navigate one's way through a maze of terminology. One encounters the following terms in the context of social security: social protection, social security, social insurance,[1] social assistance and social welfare. This chapter will focus on social security and social assistance. The most important distinction that needs to be made is between social security and social assistance. Although the two terms are sometimes used interchangeably, we shall see that it remains important to distinguish between them.

No uniform legal definition of 'social security' exists,[2] nor does the Final Constitution define the term. The *White Paper for Social Welfare* ('White Paper'), however, defines social security as follows:

> Policies which ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child rearing, widowhood, disability and old age, by means of contributory and non-contributory schemes for providing for their basic needs.[3]

State social assistance includes the flowing four categories of benefits: those associated with old age, disability, child and family care and relief for the poor.[4] A striking feature of the White Paper definition of social security is that it refers to 'all people' and not 'all citizens'.

The International Labour Organisation[5] defines 'social security' as:

> The protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise will be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families with children.[6]

The White Paper definition embraces one of the most generous — and in my view preferred — constructions of 'social security'. Unlike the international definition of 'social security' the White Paper's definition includes private measures. In *Law Society of South Africa* the Constitutional Court seemed to

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[1] Elize Strydom 'Introduction to Social Security Law' in Elize Strydom (ed) *Essential Social Security Law* (2nd Edition, 2006) 7 (Strydom 'Introduction').

[2] M Olivier, N Smit, E Kalula & G Mhone *Introduction to Social Security* (2004) 15.

[3] Department of Welfare *White Paper for Social Welfare* (1997) available at http://www.info.gov.za/view/DownloadFileAction?id=127937 (accessed on 26 February 2012) 100.

[4] Ibid.

[5] In terms of FC s 39(1)*(b)*, courts 'must consider international law' when interpreting the Bill of Rights.

[6] International Labour Organization *Introduction to Social Security* (3rd Edition, 1984) 3 available at http://www.ilo.org/public/libdoc/ilo/1984/84B09_34_engl.pdf (accessed on 26 February 2012). See also ILO Convention 102 *Convention concerning Minimum Standards of Social Security* (1952) discussed in § 56D.6*(a)* below.

adopt an expansive conception of the term by holding that compensation of road accident victims fell within the ambit of 'social security'.[1]

By contrast, 'social assistance' is normally funded from the general revenue of the state rather than individual contributions.[2] In social assistance schemes individuals receive need-based assistance from public funds without ever contributing directly to the scheme. Social assistance schemes are administered by the state. An individual's entitlement to social assistance is generally determined by the application of a means test that assesses both the individual's current wealth and present need.[3]

The White Paper's use of the term 'developmental social assistance' indicates the state's recognition that a substantial percentage of the South African population cannot care for themselves because our society lacks the capacity (currently and in the medium term) to allow them to participate meaningfully in society.[4] Social assistance aims at ensuring that those who are poor at least gain access to minimum income in order to satisfy their basic needs. Liebenberg, however, points out that in modern social security systems, there is no watertight division between contributory and non-contributory social security schemes.[5] The international trend is to give social security a wide interpretation that recognises both types of social security.[6]

'Social protection', finally, is a broader term than social security. Social protection incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum living standards for all citizens.[7]

56D.3 The Constitutional Right to Social Security

One can understand a right by the company it keeps. In the Final Constitution, social security is grouped with well-recognised socio-economic rights such as the rights to housing and health. Thus, the general jurisprudence on social security

[1] *Law Society of South Africa & Others v Minister for Transport & Another* 2011 (1) SA 400 (CC), 2011 (2) BCLR 150 (CC), [2010] ZACC 25 ('*Law Society of South Africa*') at para 66 ('[T]he [Road Accident Fund] Act is itself a social security measure directed at protecting the victims of motor vehicle accidents. It may properly be seen as part of the arsenal of the state in fulfilling its constitutional duty to protect the security of the person of the public and in particular of victims of road accidents. Its principal object is to ameliorate the plight of victims rendered vulnerable by motor accidents. The state may also respect and protect bodily integrity by creating a statutory right to compensation in the event of bodily injury or death arising from a motor collision. In this sense, the impugned legislation is part of that social security.')

[2] Social welfare is a synonym for social assistance. Strydom 'Introduction' (supra) at 7.

[3] Olivier, Smit, Kalula & Mhone (supra) at 15.

[4] D van der Merwe *Social Transformation in South Africa by Means of Social Assistance: A Legal Perspective* (1998) 20. See also Olivier, Smit, Kalula & Mhone (supra) at 23.

[5] S Liebenberg 'Children's Right to Social Security, South Africa's International and Constitutional Obligations' (2001) *Socio-Economic Rights Project*, UWC 1 (Liebenberg 'Children's Rights').

[6] Ibid.

[7] See Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present — Protecting the Future* (2002) 41-42, available at www.cdhaarmann.com/Publications/Taylor%20report.pdf (accessed on 26 February 2012). As part of a comprehensive social protection package, the Taylor Commission suggested the introduction of a Basic Income Grant; the gradual extension of the Child Support Grant and reform of the current Disability Grant, Foster Child Grant and Child Dependence Grant. I discuss the Taylor Report in greater detail in §56D.5 below.

rights forms the backdrop against which we shall view the more specific right to social security.

I begin my discussion of the content of the right by outlining various important elements. First, I discuss the protection against negative infringement of the s 27(1)*(c)* right. Second, I explain the meaning of the word 'access' in s 27(1). Third, I expand on the meaning of 'reasonableness' and how it relates to the concept of a 'minimum core content' for the right. Fourth, I briefly consider the meaning of 'available resources' in the context of the right to social security. Fifth, I describe who the beneficiaries of the right to social security are. Finally, I give an overview of the existing case law on the content of s 27(1)*(c)*.

(a) Negative interference

The *First Certification Judgment* held that '[a]t the very minimum, socio-economic rights can be negatively protected from improper invasion.'[1] In *Jaftha v Schoeman & Others* the Constitutional Court indicated that a high level of protection will be afforded in the case of negative violations of socio-economic rights.[2]

The sudden suspension of a social grant probably constitutes 'negative interference' with FC s 27(1)*(c)*.[3] The maladministration of social grants may also amount to 'negative interference.' In the context of disability grants, Nick de Villiers states that 'misinterpreted tests, mass discontinuations and the sustained failure to implement the most basic form of a hearing' likewise violate the negative dimension of the right.[4] The logic of negative interference also suggests that social grants that do not keep up with inflation steadily erode the right to social security and might therefore be characterized as a form of negative interference.[5] However, as Sandra Liebenberg notes, the law of social security is still underdeveloped and it is not clear whether the standard for a finding of negative violation is a total deprivation of access or whether partial reductions will meet the constitutional threshold for such a finding.[6]

[1] *Ex Parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 78. Importantly, the Court in *Jaftha* held that a negative violation of the right to housing is not subject to FC s 26(2) qualifications of 'reasonable measures', 'progressive realisation' and the availability of resources. *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC), [2004] ZACC 25 at para 31 read with para 34.

[2] *Jaftha* (supra).

[3] Many people claim that they are not given reasons for the sudden suspension of grant payments and some are unable to do what they need to do to get their grants reinstated (for example the old and bed-ridden).

[4] Nick de Villiers 'Social Grants and the Promotion of Administrative Justice Act' (2002) 12 *SAJHR* 320.

[5] See Sandra Liebenberg 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) 12 *SAJHR* 234, 241.

[6] Sandra Liebenberg 'The Judicial Enforcement of Social Security Rights in South Africa: Enhancing Accountability for the Basic Needs of the Poor' in Eibe Riedel (ed) *Social Security as a Human Right* (2007) 9.

(b) Access

FC s 27 confers the right of 'access to' social security. What does this mean? In the context of housing, the *Grootboom* Court acknowledged that 'access to housing' in FC 26(1) could be interpreted as a right that extends beyond an entitlement to a particular physical structure.[1] *Grootboom* recognizes that housing requires available land, appropriate services such as the provision of water, the removal of sewage and adequate financing.[2] Similarly, the right to 'access to' social security must be understood as extending beyond the payment of monthly grants to embrace all welfare measures that could allow people to escape poverty.[3]

Nick de Villiers points out that the applicant for a social grant has no substantive right to receive a grant in terms of the Social Assistance Act but has a right to access to social assistance in terms of FC s 27(1)*(c)*.[4] According to de Villiers, 'access' must, therefore, refer to 'the process by which an individual enters into the social assistance system and must include access to the decision-making process.'[5] FC s 27(1) vouchsafes a set of procedural rights that protect a person's interest in the fair and equitable consideration of her social assistance application.[6]

(c) Reasonableness

The right to social security is — like the other rights in FC ss 26 and 27 — a qualified socio-economic right. In terms of s 27(2), the state is required to 'take *reasonable* legislative and other measures *within its available resources*, to achieve the *progressive realisation*' of the right to social security.[7] The policy of government to focus on developmental social assistance corresponds with the idea of progressive realization as expressed in FC s 27(2).[8]

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[1] *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), [2000] ZACC 19 ('*Grootboom*') at para 35.

[2] Sandra Liebenberg 'Interpretation of Socio-economic Rights' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) at 33-22.

[3] When it comes to children's grants, for example, the take-up of the child-support grant has been low. Access to this grant can be improved by properly publicizing the grant, removing administrative barriers to receiving the grant and changing the onerous requirements that have to be met in order to get access to the grant. See R Liffmann, B Mlalazi, V Moore, S Ogunrombi & M Olivier 'Scope of Application' in M Olivier, N Smit, E Kalula & G Mhone *Introduction to Social Security* (2004) 34.

[4] De Villiers (supra) at 322. De Villiers writes that the judicial mechanism available to protect the rights of persons with disabilities is due process (legal remedy through courts).

[5] Ibid.

[6] Ibid at 323. De Villiers offers two additional interpretations of FC s 27(1)*(c)*. First, if the process of reviewing an application simultaneously determines an applicant's constitutional right of access to social assistance, then the decision constitutes administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000. The second related gloss on FC s 27(1)*(c)* is that the state is obliged to provide a coherent system by which people can obtain access to social grants and that fair administrative action is an unmistakable part of such system. Ibid.

[7] Liebenberg 'Interpretation of Socio-Economic Rights' (supra) at 33-5.

[8] *Grootboom* (supra) at para 44 ('Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though strategically successful, fail to respond to the needs of those most desperate, they may not pass the test').

The *Grootboom* Court interpreted the phrase 'progressive realisation' in FC s 26 (2) to impose a duty on the state progressively to 'facilitate the accessibility of housing by lowering the legal, administrative and financial hurdles over time'.[1] The state has a similar duty to facilitate the accessibility of social grants.

That still leaves the phrase 'reasonable measures'. The *Grootboom* Court interpreted reasonableness as follows:

> Mere legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative result will invariably have to be supported by appropriate well-directed policies and programs implemented by the Executive. These policies must be reasonable both in their conception and implementation…An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State's obligation.[2]

The *Grootboom* Court also decided that to be reasonable, measures must be comprehensive and co-ordinated and must prioritise the needs of the poorest of the poor.[3]

If one agrees that social security aims to relieve poverty, a distinction has to be made between poor and desperately poor.[4] The use of a means test to determine eligibility for social grants can be seen as an attempt to prioritize the needs of the most vulnerable South Africans.

As it stands, however, significant numbers of the poorest of the poor cannot access the current social assistance system. In addition, many children who live on the streets and many persons with chronic illness or moderate disabilities do not meet the criteria for care-dependency or disability grants. Difficulties regarding access and the implementation of various means tests (far from facilitating social security) often serve to exclude the poorest of the poor. Such problems with the most basic forms of access suggest that the social security system as a whole does not satisfy a *Grootboom*-based test for reasonableness.[5]

(d) Reasonableness and the minimum core

The *Grootboom* Court adopted a standard of reasonableness — rather than the international benchmark of a 'minimum core' — for determining whether

[1] Sandra Liebenberg 'Children's Right to Social Security, South Africa's International and Constitutional Obligations' (2001) *Socio-Economic Rights Project*, UWC 1 (Liebenberg 'Children's Rights') 9.

[2] *Grootboom* (supra) at para 42.

[3] Ibid at para 44.

[4] The definition of poverty is the subject of considerable debate. See W Magasela 'Towards a Constitution–based Definition of Poverty in Post–Apartheid South Africa' in S Buhlungu, Daniel Lutchman & R Southall (eds) *State of the Nation: South Africa 2005-2006* (2006) 46. By some state-accepted indicators, there has been an increase in poverty since 1994. See Statistics South Africa *Earning and Spending in South Africa: Selected Findings and Comparisons from the Income and Expenditure Survey of October - 1995 and October 2000* (2002).

[5] See C Haarman *Social Assistance in South Africa: Its Potential Impact on Poverty* (2000)(unpublished PhD thesis, University of the Western Cape) 105.

the state has discharged its duties under FC s 27(2).[1] Since *Grootboom*, the Court has repeatedly re-affirmed its commitment to the reasonableness approach and rejected attempts to adopt some form of the minimum core.[2] This choice has elicited significant criticism from some academics.[3] Whatever its merits, the reasonableness standard is now fully entrenched in South African law.

Despite the doctrinal choice by the Constitutional Court, the Committee of Inquiry into a Comprehensive System of Social Security (also known as the 'Taylor Commission') recommended that the obligation to take reasonable measures should translate into making a *minimum* level of social security available to everyone.[4] The Committee also stated that while the state is rolling out medium to long-term programmes, it must still provide 'temporary relief' to the most vulnerable of the poor.[5]

According to Williams, the reasonableness standard and the minimum core standard are not mutually exclusive. Williams writes that the Court in *Khosa*, without expressly stating that it was doing so, articulated at least one 'minimum core obligation' under FC s 27(1)*(c)*: permanent residents are entitled to social security benefits.[6] For Williams, *Khosa* suggests that reasonableness analysis can be used to build up, over time, a notion of what constitutes a minimum core.[7] Others — particularly David Bilchitz[8] — have supported a similar analysis concluding that

[1] See Committee on Economic, Social and Cultural Rights *General Comment No 3: The Nature of States Parties Obligations* (Fifth Session 1990) (art 2 para 1) UN doc E/1991/23, paras 9-12 (each State Party is under 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations').

[2] See *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC), [2002] ZACC 15 at paras 34 and 38 (Court held that in *Grootboom* 'Minimum core was thus treated as possibly being relevant to reasonableness under section 26(2), and not as a self-standing right conferred on everyone under section 26(1)'); and *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC), [2009] ZACC 28, 2010 (3) BCLR 239 (CC) ('Mazibuko') at paras 52-55 (rejecting an argument that people should be entitled to a minimum of 50 litres of water per day).

[3] See, for example, David Bilchitz *Poverty and Fundamental Rights* (2007) ('*Poverty*').

[4] Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present — Protecting the Future* (2002) 43, available at www.cdhaarmann.com/Publications/Taylor%20report.pdf (accessed on 26 February 2012)('While the *Grootboom* case has emphasized that it is incumbent on the state to take reasonable measures, to give effect to each one of these rights, the committee believes that this should be translated into making available a minimum level or measure of provision for everyone. As a result, it may be advisable for the State to stipulate up front its considered minimum obligations for service delivery, such as it is doing for the free water programme, and its intended schedule for progressively realizing this.')

[5] Ibid 'In all likelihood, the state will be unable to ensure that all of its capability and asset programmes have built-in measures for temporary relief for those most vulnerable.') This view is consistent with the emphasis *Grootboom* placed on not neglecting particularly vulnerable groups. See *Grootboom* (supra) at para 44.

[6] Lucy Williams 'Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South Africa Analysis' (2005) 21 *SAJHR* 450 (Williams writes that the court in *Khosa* effectively granted permanent residents individually enforceable constitutional entitlement).

[7] Ibid.

[8] Bilchitz *Poverty* (supra).

the reasonableness must include some form of minimum core to be a meaningful tool of analysis.

(e) Beneficiaries of the right

Liebenberg notes that the restriction of social assistance to those who are unable to support themselves and their dependants raises the question of whom the Final Constitution envisages as being 'unable' to care for themselves and their dependants.[1] It is clear that the right extends to those who cannot afford to provide for their own or their dependants' basic needs because they are old, very young or because they are living with a disability. The critical issue, according to Liebenberg, is 'whether the right has a broader scope, extending to those who are unable to support themselves due to an inability to find employment, very low wages or insufficient access to productive assets.'[2] Liebenberg argues that the high levels of structural unemployment in South Africa support a broader interpretation of the persons the right should be understood to protect.[3]

The right to social security is intimately and inextricably linked to the rights to dignity and equality. Liebenberg writes that dignity demands that society does its utmost to ensure that those groups who are unable to secure access to basic goods through paid employment still receive those goods required to live a dignified life.[4] Mokgoro J identified the connection between social security and equality in *Khosa* by recognizing that 'decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society'.[5] In *Mashavha v President of the RSA*, Van der Westhuizen J noted that the right to equality and the right to social assistance required fairness and equality in relation to 'distribution and application of resources and assistance.'[6] These cases suggest that there may be support for including the unemployed in the net of those entitled to claim social assistance in terms of s 27(1)*(c)*.

(f) Case law

(i) *Constitutional Court*

The Constitutional Court has heard only one case focusing directly on the right to social security: *Khosa*.[7] In addition, it has heard four cases tangentially dealing

[1] Sandra Liebenberg 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) 12 *SAJHR* 234, 239.

[2] Ibid.

[3] Ibid.

[4] See S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 17.

[5] *Khosa & Others v Minister of Social Development & Others, Mahlaule & Another v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC), [2004] ZACC 11 ('*Khosa*') at para 74. For a general discussion of *Khosa*'s place within South African dignity jurisprudence, see Stu Woolman 'Dignity' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

[6] 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC), [2004] ZACC 6 ('*Mashavha*') at para 57.

[7] *Khosa* (supra).

with the s 27(1)*(c)* right: *Mashavha,*[1] *Minister of Social Development*,[2] *Njongi*[3] and *Law Society of South Africa*.[4] In *Khosa* the Court had to decide whether the right to social security extends to permanent residents. *Mashavha* concerned the more mundane question of whether social security should be provided by national or provincial government. *Minister of Social Development* involves an application to extend the order granted in *Mashavha*. In *Njongi*, the Court considered the claim of an individual for back pay of her social grant. Finally, *Law Society of South Africa* addresses limitations on the benefits paid to victims of road accidents. I address *Khosa*, *Mashavha* and *Minister of Social Development* in detail and *Law Society of South Africa* briefly. *Njongi* is covered in the subsequent section.

Khosa offers the most detailed available account of the right to social security. The applicants in *Khosa* were Mozambican citizens living in South Africa as permanent residents. They sought an order confirming the invalidity of sections of the Social Assistance Act, 1992 ('SAA 1992')[5] that disqualified non-citizens from receiving social grants.[6] Had the applicants been South African citizens they would have been entitled to receive welfare grants in terms of SAA 1992.

In the High Court the applicants argued that the requirement of citizenship infringed their rights to equality and to social security. The High Court agreed and struck down the challenged provisions. The effect of striking down the offending sections and failing to replace them with any other limiting criterion placed an obligation on the state to provide social assistance to all indigent persons. It was clear that such far-reaching consequences went beyond the relief originally sought.[7]

Writing for the majority of the Constitutional Court, Justice Mokgoro held that the right to social security vests in 'everyone' and that permanent residents were therefore bearers of the rights. The Court further held that the 'intentional, statutorily sanctioned unequal treatment of part of the South African community' had a 'strong stigmatizing effect' and therefore violated the right to equality.[8]

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[1] *Mashavha* (supra).

[2] *Ex Parte Minister of Social Development* 2006 (4) SA 309 (CC), 2006 (5) BCLR 604 (CC), [2006] ZACC 3 ('*Minister of Social Development*').

[3] *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC), 2008 (6) BCLR 571 (CC), [2008] ZACC 4 ('*Njongi*').

[4] *Law Society of South Africa & Others v Minister for Transport & Another* 2011 (1) SA 400 (CC), 2011 (2) BCLR 150 (CC), [2010] ZACC 25 ('*Law Society of South Africa*').

[5] Act 56 of 1992.

[6] The applicants were denied old-age grants (in terms of s 3*(c)* of the Social Assistance Act 59 of 1992) and the child-support grants and care-dependency grants reserved for South African citizens (in terms of the Welfare Laws Amendment Act 106 of 1997).

[7] See *Khosa & Others v Minister of Social Development* Case No 25455/02 (Unreported decision of the Transvaal Provincial Provision).

[8] *Khosa* (supra) at para 74.

To remedy this defect, the Court read in the phrase 'permanent resident' into each of the challenged provisions.[1]

Williams believes that the difference between *Khosa* and other socio-economic rights lies in the fact that *Khosa* did not deal with citizens waiting in the queue for progressive realization of their right but with a class of persons entirely excluded from the scheme of social grants created by Parliament. In *Khosa*, the focus shifted from the reasonableness of measures for progressive realization to the reasonableness of exclusion. As a result, the *Khosa* court granted specific individuals (permanent residents) an individual legally enforceable entitlement. This departure from the Court's general refusal to grant specific relief was interpreted as indicating that the Court may be moving towards a jurisprudence of socio-economic rights that recognizes 'substantive individually enforceable content.'[2]

However, the Court's more recent judgments in *Mazibuko*[3] and *Nokotyana*[4] make it clear that it has not altered its stance on socio-economic rights generally. Rather, it seems to be the fact that, in *Khosa*, the denial of social assistance was combined with unfair discrimination that led the Court to simply expand a socio-economic right to a group of previously excluded people. As Mokgoro J wrote in *Khosa*: 'What makes this case different to other cases that have previously been considered by this Court is that, in addition to the rights to life and dignity, the social-security scheme put in place by the state to meet its obligations under section 27 of the Constitution raises the question of the prohibition of unfair discrimination.'[5] If the government decided to exclude permanent residents from receiving water, healthcare or housing, one would expect the Court to react in the same way it did in *Khosa*. Yet that does not seem to be an indication that the Court will change its response to socio-economic rights claims that are not coupled with unfair discrimination.

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[1] Notwithstanding the outcome in *Khosa*, the Social Security Act 13 of 2004 must also be applicable to refugees. The courts have taken the view that, unless the relevant provision indicates that a constitutional right is available only to citizens, it is available to everyone. See *Tettey v Another v Minister of Home Affairs & Another* 1999 (3) SA 715, 729 (D), 1999 (1) BCLR 68 (D) and *Patel & Another v Minister of Home Affairs & Another* 2000 (2) SA 343, 349 (D), [2000] 4 All SA 256 (D). See also *Submission to the Department of Social Development on the Regulations in terms of the Social Assistance Act*, 2004 (14 March 2005) (Manuscript on file with the author). In addition, in terms of art 2 of the Convention on the Rights of the Child (ratified by South Africa in 1995), a state party to the Convention may not discriminate against or deny any of the rights in the Convention (including social security) to a child due to the child's national origin.

[2] Lucy Williams 'Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South Africa Analysis' (2005) 21 *SAJHR* 450, 451.

[3] *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC), [2009] ZACC 28. For discussion of *Mazibuko*, see Daria Roithmayr 'Lessons from *Mazibuko*: Persistent Inequality and the Commons' (2010) 3 *Constitutional Court Review* 317; Malcolm Langford, Richard Stacey & Danwood Chirwa 'Water' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS3, May 2011) Chapter 56B.

[4] *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* 2010 (4) BCLR 312 (CC), [2009] ZACC 33. For discussions of *Noktyana*, see Redson Kapindu 'The Desperate Left in Desperation: A Court in Retreat — *Noktyana v Ekurhuleni Metropolitan Municipality* Revisited' (2010) 3 *Constitutional Court Review* 201; David Bilchitz 'Is the Constitutional Court wasting away the rights of the poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*'(2010) 127 *SALJ* 591.

[5] *Khosa* (supra) at para 44.

While *Khosa* concerned the core substantive question of who can claim the right to social security, *Mashavha* turned on the validity of a presidential proclamation which sought to assign the administration of the Social Assistance Act of 1992 to the provincial governments.[1] The Court declared the proclamation invalid on the grounds that the Act fell within the ambit of IC s 126(3) and was, therefore, not capable of assignment to the provinces. The *Mashavha* Court touched only briefly on the content of the rights to equality and social security. Van der Westhuizen J stated:

> In my view social assistance to people in need is indeed the kind of matter referred to in section 126(3)*(a)*, and in a wider sense envisaged by the meaning of the need for minimum standards across the nation in subsection *(c)*. Social assistance is a matter that cannot be regulated effectively by provincial legislation and that requires to be regulated or co-ordinated by uniform norms and standards that apply generally throughout the Republic, for effective performance. Effective regulation and effective performance do not only include procedural and administrative efficiency and accuracy, but also fairness and equality for example as far as the distribution and application of resources and assistance are concerned. A system which disregards historical injustices and offends the constitutional values of equality and dignity could result in instability, which would be the antithesis of effective regulation and performance.[2]

The Court suggested that it might be possible to distinguish between the budgeting and allocating of money for social grants, and the more practical matter of paying those grants. While the former clearly needed to be performed at the national level, the latter activity might be more efficiently performed at the provincial level.[3] However, since the Social Assistance Act of 1992 was not structured so as to distinguish between these two types of functions, the Court left the matter undecided. The new Social Assistance Act of 2004 places the administration primarily in the hands of national government, particularly the South African Social Security Agency.

In order to avoid unnecessary disruption, the *Mashavha* Court suspended the order for eighteen months, by which time it was envisaged that the new Social Assistance Act would be in force. However, on Saturday 4 March 2006, two days before the period of suspension was to expire, the Minister of Social Development approached the Court to request an urgent extension of the period of suspension. The new Social Assistance Act was due to come into force about a month later. The failure to extend the suspension order might threaten the ability of the government to pay social grants.

In *Minister of Social Development*, the Court refused the application because, by the time it heard the matter, the period had already expired.[4] Van der Westhuizen J held that it lacked the power to extend an order that had already expired.[5] In

[1] *Mashavha* (supra) at para 1.
[2] Ibid at para 57.
[3] Ibid at para 59.
[4] *Minister of Social Development* (supra).
[5] Ibid at para 38. For a discussion of the Court's power to extend suspension orders, see Michael Bishop 'Remedies' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) §9.4*(e)*(i)*(ee)*.

reaching that conclusion, the Court noted its concern for 'the plight of those in need of payments in terms of the [Social Assistance Act 2004].'[1] However, because its hands were tied by the late application, all the Court could do was remind the state that it was 'crucial for the relevant organs of government to fulfil their constitutional obligation and make every effort and to fully explore all legal possibilities to prevent the interruption of the payment of pensions and other social grants.'[2]

Law Society of South Africa concerned various challenges to an amendment to the Road Accident Fund Act that would limit the benefits that victims of motor vehicle accidents could claim, and prevent them from raising common-law claims against the wrongdoer. The state successfully defended a rationality challenge in part on the ground that it was an interim measure in moving to a comprehensive social security system that would offer 'life, disability and health insurance cover for all accidents and diseases.'[3] The Court accepted that the measure was part of a move towards a more 'equitable platform for delivery of social security services.'[4] It is implicit in the Court's judgment that equity is an important element of a social security system.

(ii) *Eastern Cape social grant cases*

The constitutional right to social security is meaningless without proper implementation and service delivery. The current social grant system is rife with corruption. The problems of corruption and maladministration of grants are particularly acute in the Eastern Cape, one of the poorest provinces in South Africa. In *Kate* Froneman J observed that for a number of years there has been a 'persistent and huge problem with the administration of social grants in the Eastern Cape'.[5] The Supreme Court of Appeal has lamented the 'conspicuous and endemic failure' of the Eastern Cape provincial government to effectively pay social grants.[6]

[1] *Minister of Social Development* (supra) at para 45.

[2] Ibid at para 46. See also ibid at para 59 (Ngcobo J concurring)('We are not unmindful of the plight of those individuals who are receiving the social welfare grants as well as those who are seeking such grants. They are entitled to be paid those grants as and when they are due. Similarly, those who are seeking such grants are entitled to have their applications considered and, if they meet the relevant criteria, to be awarded such grants. Regrettably, this application was brought ex parte and without any notice either to the applicants in the original application or to their attorneys. However, there is nothing in this judgment which prevents any person who might be adversely affected by the refusal to extend the period of suspension from approaching any court of competent jurisdiction to seek relief, if so advised.')

[3] *Law Society of South Africa* (supra) at para 45.

[4] Ibid at para 54.

[5] *Kate v MEC for Welfare, Eastern Cape* 2005 (1) SA 141 (SE), [2005] 1 All SA 745 (SE)('*Kate*'). For novel forms of constitutional relief designed to address both maladministration and the refusal to follow court orders see *Mahambehlala v MEC for Welfare, Eastern Cape & Another* 2002 (1) SA 342 (SE), 2001 (9) BCLR 890 (SE)('*Mahambehlala*') and *Mbanga v MEC for Welfare*, Eastern Cape 2002 (1) SA 359 (SE), 2001 (8) BCLR 821 (SE)('*Mbanga*').

[6] *Kate SCA* (supra) at para 3.

The result of the large-scale maladministration of social grants in the Eastern Cape has been 'a plethora of litigation in the High Court between the poor of that province and the provincial administration. In some cases the failure of the administration lies in not expeditiously considering applications for social grants. In other cases it lies in not paying what is due to beneficiaries once their applications have been approved. At times it lies even in disregard of court orders for the payment of moneys that are due.'[1] The history of the Eastern Cape government's failures and the consequent litigation as summarized by the Constitutional Court in *Njongi*.[2]

The Eastern Cape social grant cases can be divided into three categories. One category consists of cases which affirm the rights of litigants to relief when social security grants are cancelled without notice. *Ngxuza* is one such a case.[3] *Ngxuza* concerned a large class action on behalf of all people in the Eastern Cape whose grants had been improperly terminated during an overzealous attempt to root out fraudulent claimants. The High Court certified the class and the Supreme Court of Appeal upheld the decision.

A second category of cases concerns officials who fail to render timeous decisions regarding applications for social grants. In *Vumazonke*,[4] the High Court held that the delay by the provincial department in taking a decision on the applicants' application for social grants was unreasonable in terms of s 6(2)*(g)* read with s 6(3)*(a)* of the Promotion of Administrative Justice Act.[5]

The third category consists of cases in which the state fails to pay out retrospectively grants plus interest for applications that were approved after long delays. In *Kate*, for example, Froneman J ordered the Eastern Cape Department of Welfare to pay interest and retrospectively grant disbursements.[6] In the case of large-scale state contempt for court orders, Froneman J stated that the courts were obliged to devise ways to ensure compliance with court order and suggested courts could summon recalcitrant welfare officials to explain their non-compliance with court orders.[7] Failure to heed both the original order and the order to appear could be followed with a finding of contempt.[8] The decision was confirmed by the Supreme Court of Appeal.[9]

Similarly, in *Njongi*, the applicant's disability grant had been inexplicably cancelled only to be re-instated nearly three years later. She brought a claim to set aside the original decision to cancel her payments and claim the outstanding

[1] *Kate SCA* (supra) at para 4.

[2] *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC), 2008 (6) BCLR 571 (CC), [2008] ZACC 4 ('*Njongi*') at paras 8-26.

[3] *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government & Another v Ngxuza & Others* 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039 (SCA)('*Ngxuza SCA*').

[4] *Vumazonke v MEC for Social Development, Eastern Cape, & Three Similar Cases* 2005 (6) SA 229 (SE) ('*Vumazonke*').

[5] Act 3 of 2000.

[6] *Kate* (supra).

[7] Ibid at para 24.

[8] Ibid at para 11 ('[I]f nevertheless, the State failed to comply with the court order of payment, the possibility of contempt of court, or at least a declaration to that effect, could help individual public officials to pay heed to their constitutional public duties.')

[9] *Kate SCA* (supra).

arrear payments to which she was entitled. The High Court initially granted the claim, only to be overturned by a Full Bench on the ground that the claim had prescribed.

In the Constitutional Court Yacoob J held that the claim had not prescribed as Ms Njongi could only bring the claim once the initial decision had been set aside. More importantly, he questioned whether 'prescription could legitimately arise when the debt that is claimed is a social grant; where the obligation in respect of which performance is sought is one which the Government is obliged to perform in terms of the Constitution; and where the non-performance of the Government represents conduct that is inconsistent with the Constitution.'[1] Justice Yacoob went on to hold that, even if prescription could technically be raised in a claim involving a social grant, '[t]here is an inevitable and, in my view, moral choice to be made in relation to whether a debtor should plead prescription'.[2] In this case, the decision to raise a defence of prescription to avoid paying social grants 'was unconscionable conduct on the part of the Provincial Government'.[3] The Court expressed its displeasure through a costs order against the state on an attorney-and client scale.[4]

Despite this long litany of government incompetence and obstruction there was, for a time, some doubt about the remedies that were available to enforce compliance. In *Jayiya,* the Supreme Court of Appeal questioned whether courts had the power to order retrospective disbursements — plus interest — as a remedy for unreasonable delays and as a form of constitutional damages.[5] *Jayiya* also created doubt about the ability of courts to hold recalcitrant officials in contempt of court.[6] Any doubt was put to rest by the Supreme Court of Appeal in *Kate*. Nugent JA awarded the applicant constitutional damages in the form of retrospective damages. He also explicitly held that there was nothing in *Jayiya* that prevented courts from holding officials who failed to implement court orders in contempt.[7] *Njongi* also specifically raised the possibility of a *de bonis propriis* costs order against the relevant officials, although the Court ultimately decided it was inappropriate.[8] Moreover, since the Constitutional Court's decision in *Nyathi* it is also possible to execute against state property.[9] Courts should not hesitate to employ the full arsenal of remedies at their disposal to ensure the payment of social grants.

The biggest challenge facing the Department of Social Development in the Eastern Cape has been internal corruption. In the Ciskei and other areas corrupt

[1] *Njongi* (supra) at para 42.
[2] Ibid at para 78.
[3] Ibid at para 85.
[4] For more on costs in constitutional matters, see Michael Bishop 'Costs' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, October 2010) Chapter 6.
[5] *Jayiya v MEC for Welfare, Eastern Cape & Another* 2004 (2) SA 611 (SCA) at paras 8-11.
[6] Ibid at para 19.
[7] *Kate SCA* (supra) at para 30.
[8] *Njongi* (supra) at paras 61-63.
[9] *Nyathi v Member of the Executive Council for the Department of Health Gauteng & Another* 2008 (5) SA 94 (CC), 2008 (9) BCLR 865 (CC), [2008] ZACC 8.

officials registered ghost beneficiaries and paid themselves on a monthly basis.[1] Officials from the Department also collected monies from beneficiaries who did not collect their vouchers.[2] To combat these forms of corruption, the payment system was privatized. It introduced a system of verification by way of fingerprints.[3] Similar initiatives have also been taken on the national level. In *Vumazonke*, the court attempted to address the maladministration of grants in the Eastern Cape by directing that the judgment be served on the chairperson of the South African Human Rights Commission. The chairperson was asked to consider 'whether to institute an investigation into the conduct of the respondent's department.'[4]

It is, however, not only officials working directly with social assistance that are responsible for such corruption. Some citizens of the new Eastern Cape province exploited the fact that one could legally use identity documents of the former Transkei and Ciskei to secure more than one social grant. Others have tried to obtain social grants by applying under false identities. Some applicants applied several times until they were successful. (The success was made possible by the deficiencies of a manually driven system.[5]) The implementation of a right to social security will only be progressively realized when government has successfully addressed these problems.

56D.4 Administration of Social Grants — The Treatment by the South African Courts

A survey of recent South African social security cases show that very few cases involve constitutional issues (or *rights* issues) such as non-discrimination. Most of the litigation on social security involves the non-payment of social grants and the inadequate administration of social grants. They are, at heart, administrative law matters. Most recent cases on social security can be grouped into the following four categories:

(a) Protection of Procedural Interests

Beneficiaries must be given an opportunity to state their case before a grant may be suspended,[6] and the government must furnish written reasons when the decision is made to cancel a grant.[7] The affected person should, finally, be informed of his or her right to appeal.[8]

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[1] See *Magidimisi v The Premier of the Province of the Eastern Cape* Case No 2180/2004 (Unreported decision of the Eastern Cape High Court)('*Magidimisi*') at para 16, n 63.

[2] Ibid.

[3] Ibid at para 17.

[4] *Vumazonke* (supra) at para 18.

[5] Since the system was manually driven, it was difficult to determine whether a person applied more than once.

[6] *Rangani v Superintendent-General, Department of Health and Welfare* 1999 (4) SA 385 (T)('*Rangani*').

[7] *Bushula & Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government & Another* 2000 (2) SA 728 (E).

[8] *Njongi v Member of the Executive Council for Social Development, Eastern Cape Province* 2005 JDR 0718 (SE).

In *Sikutshwa v The Member of The Executive Council For Social Development, Eastern Cape Province*[1] the court considered the applicant's rights to receive reasons for the rejection of his application for a disability grant in terms of s 5(2) of the Promotion of Administrative Justice Act ('PAJA').[2] According to PAJA, the Department of Welfare was required to furnish 'adequate reasons' for refusal within 90 days of being requested to do so. Instead, the Department took eight months to process the request. The court indicated that the applicant was entitled to be treated with dignity and respect,[3] which required that he be given reasons on request for why his application had failed.

(b) Application of Administrative Justice Rules

South African courts have widely applied administrative justice rules in social assistance matters.[4] Administrative justice principles play a crucial role in protecting the rights of those dependent on the support of the courts against arbitrary and unlawful state action.

Courts have often dealt with unreasonable delays in the payment of social grants and have routinely held that such unreasonable delays may amount to unlawful administrative action.[5] Courts emphasized that the unilateral withdrawal or suspension of grants without adherence to the principles of natural justice is unlawful and invalid.[6]

Irrational decisions made by social security officials will not meet the standard of administrative law. In *Rangani v Superintendent-General, Department of Health and Welfare*[7] the state's policy that a medical officer must find an applicant to be 60% disabled in order to qualify for a permanent disability grant was found to be irrational.[8]

Social assistance grants may only be suspended for reasons and on the grounds provided for in the relevant legislation and regulations. In *Maluleke v MEC for Health, Northern Province*[9] the provincial government decided to cancel almost 92 000 grants of those it deemed to be suspect beneficiaries. The court held that the suspension was unlawful.[10]

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[1] 2009 (3) SA 47 (TkH), [2005] ZAECHC 18 ('*Sikutshwa*').

[2] Act 3 of 2000.

[3] *Sikutshwa* (supra) at para 81

[4] For more on the right to administrative justice, see Jonathan Klaaren & Glenn Penfold 'Just Administrative Action' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 63; Cora Hoexter *Administrative Law* (2nd Edition, 2012).

[5] See *Mpanga v MEC for Welfare* 2002 (1) SA 359 (SE). See also *Mahambehlala v MEC for Welfare (Eastern Cape)* 1998 (1) SA 342 (SE)(held that more than three months to process an application for welfare amounted to an unreasonable delay.)

[6] See *Bacela v MEC for Welfare (Eastern Cape Provincial Government)* [1998] 1 All SA 525 (E).

[7] *Rangani* (supra).

[8] Court held that the degree of severity of the medical condition was not rationally linked to the duration of the disability.

[9] 1999 (4) SA 367 (T).

[10] Ibid.

The High Court has also attempted to tackle the ongoing problems with the payment of social grants in a more systemic fashion. In *Cele v South African Social Security Agency*[1] Wallis AJ held that in terms of FC s 27(2) and the right to just administrative action South African Social Security Agency ('SASSA') has an obligation to overcome the administrative problems that beset the social security system.[2] The court held that the congestion of the Durban and Natal High Courts' rolls[3] with SASSA's inability to properly process and pay social grants was untenable.[4] It appeared that the system was being driven by a small group of attorneys and advocates who had created a very profitable cottage industry. To address the scourge of unnecessary and costly litigation, Wallis AJ issued a new practice directive that required litigants to first approach both SASSA and the state attorney before approaching the High Court.

(c) Class Actions

Access to social assistance is enhanced by the availability of the class action. Class actions allow a large group of claimants who would be unable to act individually to act collectively to enforce their rights.[5] In *Ngxuza*[6] the Legal Resources Centre applied to certify a class of all people whose disability grants had been improperly suspended. This included some 37 000 people with disabilities. The High Court permitted the litigation on behalf of the class, and the Supreme Court of Appeal upheld the decision.[7] It identified the following requisites for a class action:

> (1) the class is so numerous that joinder of all its members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the applicants representing the class are typical of the claims of the rest; and (4) the applicants through their legal representatives, … will fairly and adequately protect the interests of the class.[8]

Class actions are a particularly appropriate litigation vehicle in social security cases where the potential litigants may not have the means to act individually. It also avoids the problem of excessive litigation identified in *Cele*.

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[1] 2009 (5) SA 105 (D).

[2] Ibid at para 26.

[3] The court in *Cele* stated that there were approximately 300 such matters on the motion rolls in Durban during a calendar year which resulted in legal expenses of R12 million to R15 million a year.

[4] The matters on the role included: *(a)* the suspension of social grants without the provision of reasons; *(b)* matters where applicants apply for social grants but receive no response; and *(c)* matters where the refusal of a grant has been appealed but no arrangements were made for the hearing of the appeal. Ibid at para 3.

[5] For more on class actions, see Cheryl Loots 'Standing, Ripeness and Mootness' in Stu Woolman, Michael Bishop Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) § 7.2*(c)*(iii).

[6] *Ngxuza & Others v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E).

[7] *Ngxuza SCA* (supra).

[8] Ibid at para 16.

(d) Extending social security benefits to non citizens:

In the spirit of *Khosa*, the High Court in *Centre for Child Law and Another v Minister of Home Affairs*[1] (also referred to as the *Lindela* case after the holding camp for refugees in Gauteng) dealt with the rights of child refugees. Specifically, the case concerned whether unaccompanied foreign children should be treated as children in need of care through the formal child protections system, or whether they could be processed through the immigration system. The Court acknowledged that there is a duty on the state to ensure basic socio-economic provision for children who lack family care, including unaccompanied foreign children. The court ordered government departments within the 'social cluster of departments' to address the problem collectively.

56D.5 POLICY

Social security under the apartheid governments was described as 'fragmented, inequitable and fraud-ridden'.[2] Social security was administered by 14 different departments for different population groups and homelands.[3] From 1992 until 2006, the position was regulated by the Social Assistance Act, 1992. That entire regime has been replaced by the Social Assistance Act, 2004, which came into force on 1 April 2006.[4] The 2004 Act provides for a regime that is non discriminatory and applies throughout the whole of South Africa.

Together with the Constitution, the source of this reform was the White Paper for Social Welfare ('the White Paper'). In line with government's new focus on development, the White Paper focuses on developmental social assistance which aims to make people self-sufficient. As a result of the White Paper's interventions, South Africa now has 'one of the most extensive welfare systems in the developing world'.[5]

One of the most important changes in the system has been the centralisation of social assistance administration. Previously social grants were administered through the provinces. This decentralized approach was found unconstitutional in *Mashavha*.[6] The restructuring of the system involved transferring the social

[1] 2005 (6) SA 50 (T).

[2] S Liebenberg 'Human Rights and Social Security' (1998) 1(2) *ESR Review* 1. Liebenberg writes that the history of social assistance in South Africa is one of pervasive racial discrimination. Even though South Africans were eligible for the State Maintenance Grant, African women, for example, were effectively excluded from the process. See Sandra Liebenberg 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) 12 *SAJHR* 234, 242 (Liebenberg 'Social Assistance'). According to de Villiers, however, the current practices and standards of provinces vary significantly; and the worst of these provincial administrations perpetuate the pre-1994 apartheid social policy. Nick de Villiers 'Social Grants and the Promotion of Administrative Justice Act' (2002) 12 *SAJHR* 320, 321.

[3] Liebenberg 'Social Assistance' (supra) at 243.

[4] Act 13 of 2004. Chapter 4 of this Act is not yet in effect. Chapter 4 creates an Inspectorate for Social Assistance. The Inspectorate is meant to operate independently from the Minister or the Department of Social Development.

[5] Beth Goldblatt 'Gender and Social Assistance in the First Decade of Democracy: A Case Study of South Africa's Child Support Grant' (2005) 32(2) *Politikon* 239.

[6] *Mashavha v President of the Republic of South Africa & Others* 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC), [2004] ZACC 6.

assistance function to the national government where it is now being administered through the South African Social Security Agency ('SASSA'), an organ of the state. The purpose of the South African Social Security Agency Act is to ensure that national standards are set for the efficient and effective use of the limited resources available to the State for social security.[1] Provincial social development departments were relieved of the responsibility to finance social security from 1 April 2005. Today, the eligibility criteria, means testing and size of grants are all specified in national welfare regulations.[2]

This section discusses the various policy and legislative instruments that enabled the transition to the current system and that constitute the current legal framework for the provision of social grants.

(a) Statutory Framework: White Paper and SASSA

The starting point for understanding the social assistance legislative framework is the White Paper, which identified the following key restructuring priorities:

(a) Building consensus around a national restructuring of the social policy framework;
(b) Creating a single national welfare department as well as provincial welfare departments;
(c) The phasing out of all disparities in social welfare;
(d) Developing a financially sustainable welfare system[3]

The purpose of the Social Assistance Agency Act is to effect to these priorities and ensure that national standards are set for the effective use of the limited resources available to the state to give content to social security.

The framework created by the Social Assistance Act can be described as a centralized institution with limited autonomy. It makes provision for extensive Ministerial direction and involvement. No provision is made for a Board or supervisory and advisory structure or institution of a representative nature that could assist the Minister of Social Development or supervise or scrutinize the Minister's decisions.

The system is administered by SASSA.[4] A creature of statute, SASSA is a juristic person and is intended to be the sole agent that ensures the management, administration and payment of social assistance. It serves as an agent for the payment of social security. Its functions are described in Chapter 3 of the Social Assistance Act and include collecting, collating, maintaining and administering the information necessary for the payment of social security in a national database. The 2008 Social Assistance Amendment Bill enables applicants for social grants to appeal the decisions of SASSA. SASSA is also tasked with establishing a compliance and fraud mechanism to ensure the integrity of the social security system[5]

[1] Act 9 of 2004. The date of commencement for this Act was 15 November 2004.
[2] GN R 1233 in *Government Gazette* 22852 (23 November 2002) 1.
[3] Elize Strydom (ed) *Essential Social Security Law* (2nd Edition 2006) ('*Essential*') 22.
[4] SASSA was established pursuant to a recommendation by the Committee of Inquiry into a Comprehensive System of Social Security for South Africa of 2002.
[5] Social Assistance Act, 2004 s 4.

As a general rule, social grants are paid subject to a means test. Means testing implies the evaluation, by *the responsible agency, of the income and assets of the person applying for the social grant so as to* establish whether the person's means are below a stipulated amount. The applicable means test varies from one social grant to another. The separate urban and rural income thresholds that existed previously have been removed.[1]

(b) Basic Income Grant (BIG)

In 2000, Cabinet established a Committee of Inquiry to investigate social security in South Africa. The committee was chaired by Prof Vivienne Taylor and is commonly known as the 'Taylor Commission'. The Taylor Commission came to the conclusion that South Africa's social security system is neither 'comprehensive nor adequate.'[2] For this reason, the Taylor Commission concluded that the existing social security system cannot adequately address the problem of poverty.[3] One of the most pressing problems the Commission identified was the position of people excluded from the present formal social security classification.[4]

The Taylor Commission, the Committee of Inquiry into a Comprehensive Social Security System and the South African Human Rights Commission have recommended the implementation of a Basic Income Grant (BIG) to help the poorest of the poor.[5] Such a grant is to be financed by tax revenue. The introduction of the BIG will assist those persons previously excluded from social security to escape conditions of extreme deprivation.[6] It is proposed that R100 should be paid per month to everyone in South Africa who does not receive social assistance and who falls through the social safety net.[7] Children who do not, for example, receive another grant such as a Child Care Grant will receive a BIG.[8] Sandy Liebenberg has argued that the BIG is the most effective and appropriate measure for fulfilling the right to social security because it fulfills all the requirements of the *Grootboom* reasonableness test.[9] Others have argued that the introduction of BIG will go a long way in alleviating desperate poverty

[1] National Treasury *National Budget Review: 2009* (2009) 89 available at http://www.treasury.gov.za/documents/national%20budget/2009/review/ (accessed on 26 February 2012).

[2] Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present — Protecting the Future* (2002) 154, available at www.cdhaarmann.com/Publication/Taylor%20report.pdf (accessed on 26 February 2012).

[3] It has however been claimed that social grants have played a critical role in reducing poverty. See Michael Appel 'Poverty in South Africa is "Declining"' (2 October 2008) available at www.southafrica.info/about/social/poverty-021008.htm (accessed on 26 February 2012).

[4] Rene Liffman, Ben Mlalazi, Valerie Moore, Sunday Ogunronbi & Marius Olivier 'Those Who Have and Those Who Don't: An Investigation into the Limited Scope of Application of Social Security in South Africa' (2000) 4(1) *Law, Democracy and Development* 15.

[5] See Sandra Liebenberg 'The Judicial Enforcement of Social Security Rights in South Africa: Enhancing Accountability for the Basic Needs of the Poor' in Eibe Riedel (ed) *Social Security as a Human Right* (2007) at 5.

[6] See South African Human Rights Commission *4th Annual Economic and Social Rights Report* (2000-2002) 229.

[7] See Avinash Govindjee *Social Assistance as a Framework for Social Policy in South Africa* (2009) 132.

[8] Ibid.

[9] S Liebenberg 'Universal Access to Social Security Rights: Can a Basic Income Grant Meet the Challenge?' (2002) 3(2) *ESR Review* 10.

because social grants alleviate poverty more effectively than public works.[1] The Taylor Report indicated that the BIG 'has the potential, more than any other possible social protection intervention, to reduce poverty and promote human development and sustainable livelihoods.' The feeling is that a BIG will at least 'put food on the table.' [2]

The South African government has, however, largely ignored the recommendations of the Taylor Commission.[3] President Mbeki was quoted as saying that a single intervention will make no difference to the poor.[4] Instead, he advocated for a comprehensive social security system. There is however still strong lobbying for the introduction of the BIG.

The fact that the South African social security system excludes millions of destitute people from its ambit could found a constitutional challenge based on the right to social security. The Social Assistance Act, 2004 has a limited scope and millions of South Africans fall through the net. Combined with the high rate of unemployment, this makes a constitutional challenge to compel the government to adopt the BIG — or something similar — feasible. The government's continued unwillingness to institute the BIG, despite numerous recommendations and studies indicating how it could be funded, demonstrate that it has acted unreasonably.

(c) Social grants

This section will focus on the most prominent social grants: old-age grants, disability grants and child care grants. There are two common forms of 'social insurance' that I do not address in this section: social security measures for employees who are injured at work as a result of an accident;[5] and social assistance paid to relieve the results of unemployment and the result of sickness during employment.[6]

The South African government also pays compensation to individuals who have suffered hardship as the result of having the status of victims of war[7] and persons who have sacrificed their jobs and education in the process of overturning oppressive governments and establishing a democratic government.[8] Since this form of compensation more accurately falls under 'social compensation' than social assistance and since far fewer individuals benefit from these forms of

[1] C Meth 'Finding BIG Political Will' *Mail & Guardian* (August 13 2004) 29.

[2] Ibid.

[3] See the rejection of the BIG by the Finance Minister in the *2004 Budget Speech* (18 February 2004) available at http://www.info.gov.za/speeches/2004/04021815161001.htm (accessed on 27 February 2012)('[T]here were submissions on the idea of a basic income grant. I have sympathy with the underlying intent. Government's approach, however, is to extend social security and income support through targeted measures, and to contribute also to creating work opportunities and investing further in education, training and health services. This is the more balanced strategy for social progress and sustainable development.')

[4] Cited in Meth (supra) at 29.

[5] For more on compensation for occupational injuries see AA Landman 'Employment Injuries' in Strydom (ed) *Essential* (supra) 39.

[6] For more on compensation as a result of unemployment, see AA Landman 'Unemployment' in Strydom (ed) *Essential* (supra) 83.

[7] This type of compensation is paid under the Military Pensions Act 84 of 1976.

[8] This compensation is paid in terms of the Special Pensions Act 69 of 1996.

grants than from child care grants or old-age grants, I will not discuss these forms of compensation any further.[1]

(i) *Old-age grants*

Old-age grants form the largest portion of the social security budget. From 1 April 2011 the old-age grant is R1140 per month.[2]

Old-age grants have become increasingly important as a measure to relieve poverty. Social change and growth in the number of poor has reduced the ability of traditional support networks and the extended family to provide a safety net for the elderly. Old-age pensions play a critical role in relieving poverty, in part because pension money circulates widely in many poor communities and helps to sustain not only the elderly themselves, but also their relatives. Grandparents, for example, often carry the responsibility of taking care of children orphaned as a result of AIDS.

Unlike its predecessor, s 10 of the Social Assistance Act, 2004 expressly provides for social grants for the aged. Originally, s 10 drew a sex-based distinction with regard to age of eligibility. Women were eligible for an older person's grant at the age of 60 years, while men had to wait until they turned 65. This age discrepancy was challenged in *Roberts v Minister of Social Development*.[3] In a somewhat confusing judgment, Mavundla J upheld this gender based distinction. He recalled that women (especially African, Coloured and Indian women) had been particularly disadvantaged by Apartheid. It was, therefore, not unfair discrimination to privilege them by allowing them to claim their old-age grants before men. He also held that it would be inappropriate for a court to interfere by forcing the government to provide benefits to both men and women at the age of 65. He held:

> I am of the view that it is the prerogative of the State, to determine its financial resources and the deployment thereof. Outside agencies, and the so called experts, may give an opinion, when requested by the government, as to how to allocate and expend its resources. To elevate such opinions given outside governmental brief, to an authoritative level would be encroaching in the domain of government, and this should not be countenanced by the courts, and I decline to do so.[4]

This reasoning ignores the Constitutional Court's willingness in *Khosa* to extend social grants to permanent residents despite government's protestations of a lack of funds. More recently, the Court has held as follows:

> This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not

[1] For more on this form of compensation see the chapter by Piet Myburgh 'Hardship Caused by the State' in Strydom (ed) *Essential* (supra) at 185.

[2] *Increase in Respect of Social Grants* GN R285 in *Government Gazette* 34169 (13 March 2011).

[3] *Roberts & Others v Minister of Social Development & Others* TPD Case No 32838/05 ('*Roberts*') available at http://www.communitylawcentre.org.za/court-interventions/equalisation-case-of-pensionable-age (accessed on 10 February 2012).

[4] Ibid at para 40.

> good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.[1]

If Mavundla J had concluded that it was unconstitutional to distinguish between men and women in the allocation of old-age grants, the government's lack of resources should not have been a bar to abolishing that distinction. In any event, in 2008 the Social Assistance Act of 2004 was amended to allow South African men to receive grants at the age of 60.[2]

Old-age pensions are subject to a means test. The value of a grant is reduced on a sliding scale basis if a beneficiary receives additional income above a certain amount. People with incomes over R44 880 per year similarly do not qualify for a state pension.[3] The means test also has an asset component: Those persons with assets worth more than R252 000 (in case of a single person) do not qualify for old-age grants.

Van der Berg describes the operation of the means test as follows:

> In order to prove eligibility for the receipt of the means test elderly persons who wish to apply for social pensions have to provide a detailed account of all their sources of private income and their assets, and this needs to be confirmed by a person familiar with the applicant. If such income and assets fall below the exclusion level such persons qualify to receive a pension.[4]

Determining the income of older persons who are no longer formally employed is, of course, very difficult. Many such older persons are adequately supported by family members or by subsistence farming.[5] Because of these difficulties, the means test is inconsistently applied and is, at times, even unenforceable. As a result, the old-age grant system, as currently conceived, does not effectively target the poorest of the poor.

(ii) *Disability grants*

The disabled are one of the most vulnerable groups in society.[6] The government's policy for the disabled must do more than recognize their vulnerability and increase their access to grants. It must embrace the disabled as part of mainstream

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[1] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* [2011] ZACC 33 at para 74.

[2] Social Assistance Amendment Act 6 of 2008.

[3] *Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance* GN R898 in *Government Gazette* 31356 (22 August 2008)('*Social Assistance Regulations*') regulations 2 and 19 read with Annexure A.

[4] Servaas Van den Berg *Issues in South African Social Security* (1994) 35.

[5] Ibid at 249.

[6] The Constitutional Court makes clear that vulnerability is a critical consideration in determining whether an individual or group has been discriminated against. See *Harksen v Lane* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 49; *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 20; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 126; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1235 (CC).

society. The state currently advocates a 'social model of disability'.[1] This model characterizes disability as a 'human rights and development issue' and not merely a welfare issue.[2] The key difference is the recognition of the equal worth of people with disabilities as contributing members of society, rather than recipients of social largesse.

Like old-age grants, eligibility for disability grants is related to gender. Section 9 of the Social Assistance Act provides that a man is eligible for a disability grant if he is between 18 to 59 years old, but women are eligible if they are between 18 and 62 years old. Although this discrepancy in ages for men and women appears to be discriminatory, it could be argued on the authority of *Roberts v Minister of Social Development* that the discrimination is not unfair. However, even assuming that *Roberts* was rightly decided, it would seem that different considerations apply to disability grants. Disability is itself a ground of historical discrimination. To deprive some people with disabilities access to grants in order to privilege other people with disabilities, would seem difficult to justify.

A person is only eligible to receive a disability grant if he or she does not receive any other social grant in respect of him or herself. This principle seems mistaken. Although the principle that an individual should not benefit from more than one social grant is generally salient, those who suffer from 'double vulnerability' because of old age and disability should be compensated more generously because they have greater needs. This failure to appreciate the particular needs of people with disabilities may be open to constitutional challenge.

A distinction has to be made between those who receive long-term disability grants — as required by permanently and severely disabled persons living in poverty — and short-term disability grants — as required by persons receiving medical treatment and unable to work during such time.[3]

To be eligible for a disability grant[4] one needs to provide proof that the degree of disability is such that it makes the person unable to earn a living and that he or

[1] See M Olivier, N Smit, ER Kalula & GCZ Mhone *Introduction to Social Security* (2004) 255. This is the model advocated by Office of the Deputy President *White Paper on an Integrated National Disability Strategy* (1997) available at www.disabilitygauteng.org/National%20Disability%20Strategy.pdf (accessed on 14 February 2012)('*Disability White Paper*').

[2] See *Disability White Paper* (supra) at 9 ('An understanding of disability as a human rights and development issue leads to a recognition and acknowledgement that people with disabilities are equal citizens and should therefore enjoy equal rights and responsibilities. This implies that the needs of every individual are of equal importance, and that needs must be made the basis for planning. It further implies that resources must be employed in such a way as to ensure that every individual has equal opportunities for participation in society. In addition to rights, people with disabilities should have equal obligations within society and should be given the support necessary to enable them to exercise their responsibilities. This means that society must raise its expectations of people with disabilities. A human rights and development approach to disability focuses on the removal of barriers to equal participation and the elimination of discrimination based on disability.')

[3] The latter should take the form of relief available under other regulations such as illness benefits under the Unemployment Insurance Act 63 of 2001.

[4] See Social Assistance Act, 2004 s 9, read with *Social Assistance Regulations* regulation 3.

she does not refuse employment within his or her ability.[1] Nick de Villiers writes that the vague and abstract criteria used to determine disability often invite 'unfair misapplication'.[2] So, for example, a 100 per cent blind man was categorized as temporarily disabled because there 'might' be employment for him in a year's time.[3]

A discrepancy exists between those who are entitled to disability grants and those who actually receive them. Given this discrepancy, the state may well be in breach of its FC s 27 duty to ensure the accessibility of grants and other social services to the disabled.[4] There is, as yet, no legislation specifically designed to protect the rights of persons with disabilities.

The spread of HIV/aids poses further challenges to government in allocating resources for the disabled.[5] Efforts are currently being made to introduce a chronic illness grant for people with HIV and diseases such as tuberculosis. This move will massively expand the pool of people eligible for disability grants. It would also seem that it would engender the use of disability grants as an imperfect proxy for poverty alleviation.

(iii) *Child Care Grants*

Since 1998 provincial governments have been financing and delivering three social assistance programmes for children:[6] the child support grant; the foster care grant; and the care dependency grant.[7]

(aa) Child Support Grant ('CSG')

The CSG is an important poverty-alleviating grant. The primary purpose of the CSG is to provide a regular source of income to caregivers of children living in poverty to assist them to meet the needs of children in their care. The CSG is

[1] Elsabe Klinck 'People with Disabilities' in M Olivier, N Smit & E Kalula (eds) *Social Security: A Legal Analysis* (2004) at 327. (Klinck points out that the gross misconceptions with regard to the nature and the extent of many types of disabilities might mean that a person can be objectively fit to find employment but may be unsuccessful in doing so owing to factors unrelated to the stated criterion.) See also Nick de Villiers 'Social Grants and the Promotion of Administrative Justice Act' (2002) 12 *SAJHR* 320, 348 n 23 (De Villiers writes of the 'misconceived forms, misinterpreted tests, misapplied lapses and mass discontinuations' in the context of the entire disability grant system.)

[2] De Villiers (supra) at 330.

[3] Ibid.

[4] Klinck (supra) at 329. General legislation applies to persons with different disabilities with respect to education, employment, the right to marriage, the right to parenthood/family, political rights, access to court-of-law, the right to privacy and property rights. The following benefits are guaranteed by law to persons with disabilities: health and medical care, training, rehabilitation and counselling, financial security, employment and independent living.

[5] The Department of Social Development has commissioned a study by M Schneider, G Boyce, C Desmond & J Goudge *Developing a Policy Response to Provide Social Security Benefits to People with Chronic Diseases* (2007).

[6] Judith Streak 'What Benefits will Centralisation of Social Assistance Budgeting and Delivery bring Vulnerable Children?' (2005) *IDASA Budget Brief* No. 159, available at www.idasa.org/media/uploads/outputs/files/Budget%20Brief%20159.pdf (accessed on 26 February 2012).

[7] The government introduced the CSG in 1998 as a measure to replace the State Maintenance Grants. The other two grants already existed in 1998. Under apartheid, it had benefited primarily white children. Ibid.

currently the state's most extensive and largest social assistance programme in terms of the number of beneficiaries reached.[1]

Since 1 January 2011 the amount of the grant is R270 per month for every child who qualifies. Over the years, the age for eligibility has been raised. In 1998 the cut-off age for eligibility was 6. In 2003/2004, the age of eligibility was raised to 14. On 1 January 2011 the age of eligibility was raised to 17 and on 1 January 2012 the grant was further extended to primary caregivers with children under the age of 18.[2] Despite these welcome extensions, the amount of R270 remains insufficient to meet 'even the minimum needs of a child'.[3] Grants are often used to finance other household needs, which should be provided by the state, such as school fees, water and electricity.[4]

To receive a CSG, two requirements have to be met. First, a person must be the primary caregiver of a child under 18. The caregiver need not be the biological parent of the child — it is sufficient that he or she is the primary person providing for the needs of the child.[5] Second, the applicant must pass the means test based upon personal income. A single caregiver is entitled to a CSG if she earns R2600 or less per month whereas a married couple will be entitled to the grant if the earn R5 200 or less per month. Presently the means test does not take into account the number of people in the household or the number of children being supported by the primary caregiver's income. Interestingly, almost all of the primary caregivers applying for the CSG are women.[6]

Liebenberg criticises the especially burdensome conditions imposed on those seeking childcare grants. In her view, conditions such as requiring the applicant to prove that he or she has not 'without good reason' refused employment are unnecessarily onerous.[7] While Liebenberg argues that the Department of Social Development should concentrate on the progressive improvement of the Basic Income Grant, in the interim she notes that the CSG ought to be increased in order to make a genuinely meaningful impact on the lives of impoverished children.[8]

Children living separately from their parents should be able to claim social security.[9] This was confirmed in *Centre for Child Law v Minister of Home Affairs* where the court found that unaccompanied foreign children are entitled to social

[1] Aislinn Delany, Zenobia Ismail, Lauren Graham & Yuri Ramkissoon *Review of the Child Support Grant, Uses Implementation and Obstacles* (June 2008) available at www.unicef.org/southafrica/SAF_resources_childsupport.pdf (accessed on 27 February 2012)('*Review of Child Support Grant*') 1.

[2] *Increase in Respect of Social Grants* GN R285 in *Government Gazette* 34169 (31 March 2011).

[3] See Beth Goldblatt 'Gender and Social Assistance in the First Decade of Democracy: A Case Study of South Africa's Child Support Grant' (2005) 32(2) *Politikon* 239, 241 (Goldblatt 'Gender') (Goldblatt states that R180 per month (the previous amount of the grant) was not sufficient. It can be argued that in light of the current rate of inflation R270 is also not sufficient).

[4] Ibid at 241.

[5] A primary caregiver may apply for a CSG for any number of his or her biological children. The maximum number of non-biological children for whom a primary caregiver can apply is six.

[6] *Review of Child Support Grant* (supra) at 1.

[7] Sandra Liebenberg 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) 12 *SAJHR* 234, 246 n 75.

[8] Sandra Liebenberg 'Children's Right to Social Security, South Africa's International and Constitutional Obligations' (2001) *Socio-Economic Rights Project*, UWC 1, 2 n 4.

[9] See Anne Skelton 'Girl's Socio-Economic Rights in South Africa' (2010) 26 *SAJHR* 141.

services and to accommodation in a place of safety.[1] In a subsequent case, *Centre for Child Law and Others v MEC for Education, Gauteng and Others*,[2] the High Court dealt with the position of children who had been removed from their families due to abuse or neglect, and placed in a school of industry. Unfortunately, the children found themselves in equally bad or worse conditions when they were placed in the care of the state. The Court ordered both short-term relief in the form of sleeping bags for the children as well as medium-term relief in the form of the appointment of therapeutic services personnel and a process of quality-assurance process.[3] It maintained supervision of the case to ensure the state complied with the order. According to Skelton the state should render similar services to needy children who still live with their parents.[4]

Beth Goldblatt highlights the predicament of women collecting childcare grants as the primary caregivers. In order to collect these grants, women have to pass a means test. This test means that poor unemployed women, who are often not in a position to feed themselves, have less incentive to seek employment if they are to collect the grant they need to support their children.[5] Even more troubling is the exclusion of children living in child-headed households from the child support grant programme. Goldblatt rightly contends that the exclusion is unconstitutional because it breaches the rights to equality, social security and children's socio-economic rights.[6]

The profound effect of the AIDS epidemic on family life in South Africa cannot be ignored in the debate on child care grants. The Children's Institute has cautioned that 'idealising particular care arrangements or rejecting others outright, inappropriately stereotypes the nature of household forms'.[7] The social security system should be sensitive to the realities of South African family arrangements.

(bb) Foster care grant[8]

Foster children are children who are 'in need of care' due to either neglect or abuse.[9] Foster care grants are paid to foster parents in respect of a child who has been removed from parental care due to unfavourable home circumstances.[10] In 2011 the foster care grant was R740 per month. The amount is adjusted almost every

[1] 2005 (6) SA 50 (T).

[2] 2008 (1) SA 223 (T).

[3] For more on this and similar remedies, see Michael Bishop 'Remedies' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) § 9.6.

[4] Skelton (supra) at 158.

[5] Golblatt 'Gender' (supra) at 242 n65.

[6] B Goldblatt & S Liebenberg 'Giving Money to Children: The State's Constitutional Obligation to Provide Child Support Grants to Child Headed Households' (2004) 20 *SAJHR* 151.

[7] S Giese, H Meintjes, R Croke & R Chamberlain *Health and Social Services to Address the Needs of Orphans and Other Vulnerable Children in the context of HIV/AIDS in South Africa* (2003) xiv.

[8] The Constitutional Court recently considered the procedure for removing children from their parents in order to place them in foster care. *C & Others v Department of Health and Social Development, Gauteng & Others* [2012] ZACC 1 at para 75 ('It can never be in the interests of children for their safety or well-being to be endangered. The removal provisions are aimed precisely at preventing this and ensuring that the interests of the children are positively catered for.')

[9] Elize Strydom (ed) *Essential Social Security Law* (2006)('*Essential*') 171.

[10] Ibid.

year. Significantly, the foster care grant is R470 per month more than the CSG.[1] This higher amount makes the grant the object of greater abuse. Strictly speaking, the foster care grant is not a means-tested grant: in other words the grant does not depend on the foster parent's income. To be eligible to foster a child a person must be a South African citizen, permanent residents or documented refugees over the age of 18.[2] Interestingly, the Social Assistance Act, 2004 makes provision for temporary assistance for those who are in desperate need of support but who have not yet received their foster grant, in the form of the Social Relief of Distress ('SRD').[3] SRD can take the form of a food parcel, a voucher or cash.

(cc) Care dependency grant

A care dependency grant puts the responsibility on government to provide social assistance to children whose parents or primary caregivers are unable to support them financially. Care-dependent children need full-time care at home due to severe mental or psychological disability.[4] A grant is paid to the parent or foster parents of a care-dependent child between the ages of one and eighteen years in their care.[5]

In the case of this grant, a means test is applied to parents or primary caregivers but not to foster parents. Foster parents may therefore access the grant regardless of how much they earn. From 1 April 2011 the Care Dependency Grant is R1140 per month. To qualify for the grant a single parent or caregiver must earn R11 400 or less per month whereas a married couple may only jointly earn R22 800 or less per month.[6] SRD is also available for those whose grants have been approved and are in desperate need of temporary assistance.

56D.6 International Social Security Standards

There are many reasons why international law must be considered in the context of the right to social security. The Final Constitution recognizes the importance of international law and the place of international law.[7] FC s 232 grants customary international law the force of law in the Republic, unless it is inconsistent with the Final Constitution or an Act of Parliament. FC s 233 states that 'when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.' And, in terms of FC s 39(1)*(b)*, courts 'must consider international law' when interpreting the Bill of Rights.

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[1] *Increase in Social Grants Regulations* (supra).
[2] *Social Assistance Regulations* Regulation 7*(c)*.
[3] Social Assistance Act, 2004 s 13.
[4] Strydom *Essential* (supra) at 172.
[5] Ibid.
[6] *Social Assistance Regulations* Annexure D.
[7] For more on international law, see Hennie Strydom & Kevin Hopkins 'International Law' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 30.

As the *Grootboom* Court noted, international law, including non-binding international instruments, is an important guide to interpreting the rights in the Final Constitution.[1] A treaty can be used as an aid to interpretation even if South Africa has not ratified the relevant treaty, as can official interpretations of the treaty. The Constitutional Court has, for example, regularly relied on General Comments to the International Covenant on Economic, Social and Cultural Rights ('ICESCR') even though it is only a signatory to the document.[2]

Although many international instruments can and should assist in interpreting the right to social security,[3] this chapter will focus on the ILO Conventions, the ICESCR and the European Convention on Human Rights. Since the bulk of social grants are paid to children, I also consider the International Convention on the Rights of the Child.

(a) ILO Conventions

The International Labour Organsiation ('ILO'), has, since its establishment in 1919, played an important role in developing standards for social security. It has done so through both Conventions and Recommendations.[4] The ILO Conventions contain the minimum conditions that should be reflected in a country's law once the country has ratified the instrument.[5]

The Social Security (Minimum Standards) Convention No 102 ('Convention 102') sets the most comprehensive standard with regard to social security. Convention 102 covers nine social risks. Each part of the Convention provides specific standards aimed at guaranteeing the benefits of social security. An ILO Member State can only ratify Convention 102 after complying with the standards relating to at least three of the nine risks: medical care,[6] sickness benefits,[7]

[1] *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), [2000] ZACC 19 at para 26 (The *Grootboom* Court, however, indicated that the weight to be attached to a particular principle would vary. The Court stated that 'where a relevant principle of international law binds South Africa, it may be directly applicable.')

[2] See, for example, *Grootboom* (supra) at paras 29-30; *Minister of Health and Others v Treatment Action Campaign & Others (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC), [2002] ZACC 15 at para 26; and *Jaftha v Schoeman & Others, Van Rooyen v Stoltz & Others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC), [2004] ZACC 25 at para 24.

[3] The Universal Declaration of Human Rights (1948), for example, which was adopted 'as a common standard of achievement for all peoples and all nations' also recognizes the right to social security and assistance (arts 22-25).

[4] Whereas Conventions are binding on ratifying states, recommendations are non-binding instruments which provide guidelines for national policy and action. See L Jansen van Rensburg & MP Olivier 'International and Supra-National Law' in M Olivier, N Smit & E Kalula (eds) *Social Security: A Legal Analysis* (2004) 646.

[5] Elize Strydom 'The Role of the International Labour Organisation in Social Security' in Strydom *Essential* (supra). See also L Lamarche 'Social Security as Human Right' in D Brand & R Sage (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2003) 109.

[6] Part II arts 7–12.

[7] Part III arts 13–18.

unemployment benefits,[1] old-age benefits,[2] workers' compensation,[3] family,[4] maternity,[5] invalidity,[6] and survivor's benefits.[7] One of the three schemes chosen must be either an old-age benefit, unemployment benefit, invalidity or survivor's benefit. Convention 102 provided an initial framework and was supplemented by subsequent conventions on specific risks.[8]

Convention 102 was designed to accommodate, and to provide flexibility for, less developed countries.[9] Article 3 of Convention 102 allows a state, in the case of insufficient medical or financial capacity, to ratify the Convention and avail itself temporarily of less stringent conditions concerning the duration of benefits and categories of protected persons.[10] Although South Africa has not signed or ratified Convention 102, it remains a vital source to determine the minimum social security obligations imposed by international law.

(b) The International Convention on Economic, Social and Cultural Rights ('ICESCR')

South Africa signed the ICESCR on 3 October 1994. It has not yet ratified the Convention. As a result, the ICESCR is not yet binding on South Africa under international law and does not have any direct legal effect under South African domestic law. The act of signing is however not without consequence; under the Vienna Convention on the Law of Treaties, South Africa may not undertake steps designed to flout provisions of the ICESCR, and to refrain from 'acts which would defeat the object and purpose of the treaty.'[11]

The wording of many of the provisions in the Bill of Rights closely resembles the provisions of the ICESCR. It is therefore only natural to have recourse to the interpretation offered in respect of the Covenant when interpreting Chapter 2 of the Final Constitution.

Article 9 of the ICESCR 'recognize[s] the right of everyone to social security, including social insurance.' The Covenant also makes explicit provision for social

[1] Part IV arts 19-24.
[2] Part V arts 25-30.
[3] Part VI arts 31-38.
[4] Part VII arts 39-45.
[5] Part VIII arts 46-52.
[6] Part IX arts 53-58.
[7] Part X arts 59-64
[8] See Lamarche (supra) at 113. Convention 102 was subsequently amended by the adoption of a few specific social security conventions including Convention 128 on Invalidity, Old Age and Survivors' Benefit (1967) and Convention 130 on Medical Care and Sickness Benefits (1969).
[9] See also article 19(2) of the ILO Constitution which provides that the General Conference of the ILO must have due regard to those countries in which climactic conditions, the imperfect development of industrial organization, or other special circumstances make industrial conditions substantially different. The General Conference will then suggest the modifications which it considers necessary to meet the need of such countries.
[10] Ibid.
[11] Vienna Convention on the Law of Treaties (1969) 8 ILM 679, art 18. See also *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, reprinted in (1987) 9 *Human Rights Quarterly* 122 ('Limburg Principles'); *General Comment 3 'The Nature of State Parties Obligations'* (Article 2 of the Covenant) (5th Session 1990) UN Doc E/1991/23 ('*GC 3*'); Jansen van Rensburg & Olivier (supra).

security for mothers.[1] The Committee on Economic Social and Cultural Rights ('the Committee') provided its interpretation of the right to social security in General Comment 19, adopted in 2007.[2] The General Comment recognizes the central importance of social security as a means to the realization of other socio-economic rights: 'The right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant rights.'[3]

The Committee identified four core elements of the right: *(a)* the social security system must be *available*;[4] *(b)* it must cover the nine *social risks and contingencies* identified in Convention 102;[5] *(c)* the system must be *adequate* in amount and duration;[6] and *(d)* the system must be *accessible* in terms of coverage, eligibility, affordability participation and physical accessibility.[7] This closely tracks the content that the Committee has given to other rights, such as the right to education.[8]

The general principles of the ICESCR are also useful in interpreting the scope of the state's obligations under FC s 27(1)*(c)*. However, they need to be read in light of the growing South African case law on the FC ss 26(2) and 27(2).[9] Article 2 of the ICESCR provides:

> Each State Party to the Present Convention undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Convention by all appropriate means, including particularly the adoption of legislative measures.

This article can assist in interpreting the concept of 'progressive realisation'. Like the ILO Convention, the ICESCR also makes provision for the particular circumstances of developing countries. However, this clause should not be interpreted as allowing states to defer indefinitely efforts to ensure the enjoyment of Covenant rights.

Article 3 has particular significance for South Africa:

> Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

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[1] ICESCR art 10(2) reads: 'Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.'

[2] *General Comment 19 'The Right to Social Security'* (Article 9 of the Convention) (39th Session, 2007) UN Doc E/C.12/GC/19 ('*GC 19*').

[3] *GC 19* (supra) at para 1.

[4] Ibid at para 11.

[5] Ibid at paras 12-21.

[6] Ibid at para 22.

[7] Ibid at paras 23-27.

[8] See Stu Woolman & Michael Bishop 'Education' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 57.

[9] See *Grootboom* (supra); *TAC* (supra); *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC), [2009] ZACC 28. Sandra Liebenberg *Socio-economic Rights: Adjudication under a Transformative Constitution* (2010).

Notwithstanding their level of national wealth, State Parties have to move immediately and quickly as possible towards the realization of economic, social and cultural rights. The speed at which rights will be implemented will depend on the nature of the right. The non-discrimination provisions of the ICESCR, for example, were meant to be implemented immediately. Socio-economic rights may also not be subject to 'deliberate retrogressive measures.'[1]

With respect to the proviso — 'to the maximum of its available resources' — the Limburg Principles state that this requirement obliges State Parties to ensure minimum subsistence rights for everyone, regardless of the level of economic development in a given country.[2] That is, when it comes to the use of available resources, the state should give priority to the realization of rights recognized in the Covenant: to do this, the state must assure everyone the satisfaction of subsistence requirements, as well as the provision of essential services.[3]

(c) UN Convention on the Rights of the Child

Children's rights are guaranteed through the UN Convention on the Rights of the Child ('CRC') and in the African region through the African Charter on the Rights and Welfare of the Child ('ACRWC').[4] South Africa ratified the CRC on 16 June 1995. According to article 6 of the CRC, State Parties are under an obligation to ensure the survival and development of children to the maximum extent possible. This article gives rise to numerous derivative social security rights, including the right to health care and a standard of living that meets the need for clothing, shelter and education. The fundamental principle of the Convention, captured in art 3, is that all actions concerning children must be in the best interest of the child. In that respect, the CRC is in harmony with FC s 28.[5]

For the purposes of social security, the following provisions of the CRC are particularly relevant:

(i) Article 18 provides that the state should provide appropriate assistance to parents and legal guardians in the performance of their child-rearing duties.[6]
(ii) Article 23 affords disabled children the right to special care and assistance.[7]

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[1] *GC 3* (supra) at para. 9. The General Comments to the ICESCR have an important impact on the interpretation of the right to social security. Particularly important are General Comments No 1 (1989), No 3 (1990), No 4 (1991), No 5 (1994) and No 6 (1995).

[2] The Limburg Principles of 1987 are a commentary on the duties of State Parties to the ICESCR and constitute an example of soft law for the purpose of social security.

[3] *GC 3* (supra) at para. 13.

[4] The ACRWC does not, however, contain a right to social security for children. The only provision relating to maintenance is art 18(3) which states that no child is to be deprived of maintenance due to the marital circumstances of the parent.

[5] For more on the relationship between the CRC and FC s 28, see Adrian Friedman, Angelo Pantazis & Ann Skelton 'Children's Rights' in Stu Woolman, Michael Bishop & Jason Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2009) Chapter 47.

[6] CRC art 18(3) reads: 'States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.'

[7] CRC art 23(1) reads: 'States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.'

(iii) Article 26 provides children with a the right to benefit from social security.[1]

(iv) Article 27 provides that every child have the right to a standard of living which is adequate to cater for the child's physical, mental, spiritual, moral and social development. Although the primary responsibility lies with the parents it is the duty of the state to assist parents.

As a party to the Convention, South Africa must submit reports to the Committee on the Rights of the Child ('the Child Committee') describing the measures it has adopted to give effect to the rights of the child. South Africa submitted its first report in 1997. In its response, the Child Committee expressed pressing concerns about a number of social welfare issues.[2] However, much has changed since 1997, so the analysis of the Child Committee will have to be re-evaluated against the current law and facts.

(d) Africa

The African Charter on Human and People's Rights ('African Charter') only directly recognizes a limited right to social security.[3] However, the African Commission on Human and People's Rights ('African Commission') has held that the right 'can be derived from a joint reading of a number of rights guaranteed under the Charter including (but not limited to) the rights to life, dignity, liberty, work, health, food, protection of the family and the right to the protection of the aged and the disabled.'[4] The African Commission defined the minimum content of this implied right as follows:

> Ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education consistent with human life, security and dignity.[5]

[1] CRC art 26 reads:

'(1) States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.'

(2) The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.'

[2] Committee on the Rights of the Child *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Addendum: South Africa* (1999) CRC/C/51/Add.2 (The most pressing concerns articulated in the response were the inadequate prioritisation of budgetary resources to ensure the rights of children, the phasing out of the state maintenance grant, the high incidence of child mortality and the high incidence of drug and substance abuse among youth. The Committee also stressed the importance of South Africa's ratification of the ICESCR. The ratification of the ICESCR and the ILO Convention 102 of 1952 might well assist South Africa in bringing its current social security policies into line with the international standards ratified in these instruments.)

[3] African Charter art 18(4) provides that: 'The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.'

[4] African Commission *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (2010) at para 81.

[5] Ibid at para 82*(i)*.

(e) SADC

On a Southern African level, there has been significant interest in the development and promotion of social security. Many countries in the region must confront deep levels of poverty, the impact of HIV and AIDS, weak economic conditions and the absence of appropriate institutional frameworks.[1] These problems naturally have an impact on social security.

In recent years, the question of social security has been high on the agenda of the Southern African Development Community ('SADC').[2] Three important SADC documents deal with social security: *(a)* the Founding Treaty of SADC;[3] *(b)* the Charter of Fundamental Social Rights in SADC of 2003 (the 'SADC Charter');[4] and *(c)* the 2007 Code on Social Security ('Code on Social Security').[5]

Of these instruments, the Founding Treaty of SADC forms the main regional basis for the development of social security in SADC countries. The objectives as stipulated in the Treaty include the promotion of both economic and social development and the establishment of common ideals and institutions. Importantly, article 5 of the SADC treaty states that it is an objective of SADC to 'alleviate poverty, enhance the quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration'.

One of the objectives of the SADC Charter is to 'promote the establishment and harmonisation of social security schemes'.[6] To meet this objective it contains specific provisions for rights to social security for both workers,[7] and non-workers.[8]

The Code on Social Security contains aims to further promote social security in the region. It specifically recognizes a right to social security[9] and refers back to both the SADC Charter[10] and the ILO Convention 102.[11] It provides a set of principles and standards and a monitoring framework.[12] An innovative feature of the Code is that instead of enforcing standards by following the normal route of international monitoring, the Code introduces a promotional independent

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[1] B Jordaan, E Kalula & E Strydom (eds) *Understanding Social Security* (2009)('*Understanding*') 45. The Southern African Development Community was formed in 1980. It consists of a loose alliance of nine Southern African states: Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

[2] Jordaan, Kalula & Strydom (ed) *Understanding* (supra) at 45.

[3] Available at www.chr.up.ac.za/undp/subregional/docs/sadc8.pdf (accessed on 21 February 2012*)*.

[4] Available at http://www.sadc.int/index/browse/page/171 (accessed on 21 February 2012).

[5] Available at http://www.ilo.org/gimi/gess/RessFileDownload.do?ressourceId=10371 (accessed on 24 February 2012).

[6] SADC Charter art 1*(e)*.

[7] SADC Charter art 10(1) reads: 'Member States shall create an enabling environment so that every worker in the Region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits.'

[8] SADC Charter art 10(2) reads: 'Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be entitled to receive sufficient resources and social assistance.'

[9] Code on Social Security arts 4-6.

[10] Code on Social Security art 4.2.

[11] Code on Social Security art 4.3.

[12] Jordaan, Kalula & Strydom (ed) *Understanding* (supra) at 51.

committee of experts.[1] The Committee is tasked with monitoring compliance with the Code and making recommendations within the relevant SADC structures. The Code emphasizes the importance of solidarity and redistribution[2] as key components of a social security system aimed at achieving greater equality between rich and poor. Intriguingly, the Code recognizes that the State is not able, on its own, to fully provide for the social security needs of the SADC populations. It emphasizes the importance of a multi-actor approach[3] and specifically mentions special contingencies relevant in the SADC region such as political conflict and natural disasters.[4]

In spite of the laudable objectives of the SADC system, many questions remain with regard to implementation and enforcement. The virtual suspension of the activities of the SADC Tribunal during the SADC 2010 summit casts serious doubt on the effectiveness of the SADC system.[5]

56D.7 Non-Discrimination

It is essential that all those in need should have equal access to social security. In line with international trends, South Africa should develop progressively towards a wider and deeper sense of social obligation.[6]

At present, social security in South Africa is not all-inclusive[7] and shows insufficient respect for the principles of equality and non-discrimination.

In the remainder of this section, I consider a few prominent examples of discrimination in the social security system:

First, many of the relevant statutes[8] extend social security to those who qualify as an 'employee'. This means that formal employment becomes a requirement for access to social security benefits.[9] As a result, a vast proportion of the economically active population is excluded from eligibility for social security. Those who are

[1] Code on Social Security art 21.3.

[2] Code on Social Security art 2.2*(a)*.

[3] Code on Social Security art 2.2*(c)*.

[4] Code on Social Security art 18.

[5] Currently only four (of ten) judges have been appointed and the Tribunal does not currently hear cases. Brigitte Weidlich 'SADC Tribunal in limbo' *The Namibian* (11 November 2010).

[6] See Helen Bolderson & Deborah Mabbet 'Non-Discriminating Social Policy?' Policy Scenarios for Meeting Needs without Categorization' in Jochen Clasen (ed) *What Future for Social Security? Debates and Reforms in National and Cross-National Perspective* (2001) 53.

[7] This is consistent with the objective of 'comprehensive' social security as recommended by Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present — Protecting the Future* (2002) 41 available at www.cdhaarmann.com/Publications/Taylor%20 report.pdf (accessed on 26 February 2012)(The Committee explained comprehensive social security as follows: 'Comprehensive social protection for South Africa seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development, Comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens.')

[8] See, for example, Compensation for Occupational Injuries and Diseases Act 130 of 1993; Unemployment Insurance Act 63 of 2001.

[9] Elize Strydom (ed) *Essential Social Security Law* (2006)('*Essential*') 262

unemployed, self-employed, independent contractors or informally employed are excluded from receiving certain classes of social security benefits.

Basson has argued that excluding certain categories of workers from the social security legislation amounts to indirect discrimination on the basis of race or sex.[1] She points out that black women overwhelmingly dominate the domestic worker sector. Excluding domestic workers from certain forms of social security coverage therefore impacts on them disproportionately and could amount to unfair discrimination in terms of FC s 9(3). The position of migrant workers is similarly precarious.[2] Since migrant workers are exposed to the same risks as any other worker in South Africa (such as the risk of large scale retrenchments), it can be argued that they should benefit equally from the South African social security system. The portability of social security has thus far received no attention in our constitutional jurisprudence.[3]

Second, Goldblatt writes that women's access to social security in South Africa requires significant improvement.[4] She argues that the social security system should better reflect a feminist vision in determining the content of grants affecting women.[5] A truly inclusive social security framework should, Goldblatt writes, consider the needs of female non-citizens.[6]

Third, in the realm of retirement funds, discrimination on the basis of race is still rife. This was vividly illustrated in *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd*.[7] In *Leonard Dingler* black employees were treated differently from white employees. All black employees were paid on a weekly basis while white employees were paid monthly. The company insisted that only monthly-paid employees were permitted to join the staff benefit fund.[8] This was a clear example of direct discrimination on the basis of race.

I discussed the former disparity in eligibility of men and women for old-age grants earlier.[9] In spite of the fact that men and women can now both claim pensions at the age of 60, research has shown that the take up rate is lower for women than for men.[10] Commentators have speculated that this is caused by government officials' discriminatory attitudes towards women.

Fourth, those individuals living with HIV should, arguably, be entitled to a disability grant. According to the current state of the law, however, those HIV

[1] Anneli Basson 'Discrimination in Social Security Legislation' in Strydom (ed) *Essential* (supra) at 264.

[2] See Redson Kapindu 'Social Protection for Malawian Migrants in Johannesburg: Access, Exclusion and Survival Strategies' (2011) 11 *African Human Rights Law Journal* 93.

[3] Daleen Millard 'Migration and the Possibility of Social Security Benefits: The Position of Non-citizens in the Southern African Development Community' (2008) 8 *African Human Rights Law Journal* 37.

[4] Beth Goldblatt 'The Right To Social Security — Addressing Women's Poverty and Disadvantage' (2009) 25 *SAJHR* 442.

[5] Ibid.

[6] Ibid.

[7] (1998) 19 *ILJ* 285 (LC).

[8] The court concluded that by treating black employees differently from white employees, the company directly discriminated on the basis of race.

[9] §56D.4*(c)*(i) above.

[10] Basson (supra) at 268.

positive individuals who are unemployed but still fit for work are not eligible for a disability grant.[1] The policy of the Department of Social Development is that a person with HIV is only eligible for benefits if he or she has a CD4 count of below 50 or a major opportunistic infection. Although this seems to reflect the Constitutional Court's approach in *Hoffmann*,[2] this policy can be said to be discriminatory because it creates a perverse incentive. It could encourage HIV-positive people deliberately not to take their Aids medication in order to stay 'ill enough' to qualify for a disability grant. There is a plausible argument that an unemployed HIV-positive person should be deemed to be unable to support him or herself and should, therefore, receive a disability grant. On this reasoning, the policy will not meet the *Grootboom* reasonableness test since it does not priorities the needs of the poorest of the poor.

[1] See Aids Law Project *HIV/AIDS and the Law: A Resource Manual* (2nd Edition, 2001).

[2] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1235 (CC), [2000] 12 BLLR 1365 (CC), [2000] ZACC 17.

57 Education

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29 Education

(1) Everyone has the right—

(a) to a basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—

(a) equity;

(b) practicability; and

(c) the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—

(a) do not discriminate on the basis of race;

(b) are registered with the state; and

(c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

> It would not be a sign of health if such an important social interest as education were not also an arena of struggles, practical and theoretical. . . . [However,] [i]t is the business of an intelligent theory of education to ascertain the causes for the conflicts that exist and then, instead of taking one side or the other, to indicate a plan of operations proceeding from a level deeper and more inclusive than is represented by the practices and ideas of the contending parties.
>
> John Dewey *Education and Experience* (1938)

57.1 INTRODUCTION: LIBERTÉ, EGALITÉ, FRATERNITÉ

This brief introduction traces the historical, economic and political antecedents that led to the current constitutional and statutory framework for education. It begins with the widely accepted — but radically incomplete — account of how the National Party's belated attempts to decentralize control over public school education, and subsequent concerns about Afrikaner succession, resulted in the current, and significant, degree of constitutional and statutory control exercised by provincial governments, unions, principals, parents, learners and school governing bodies (SGBs). Or to put it more pointedly, the standard account emphasizes how the weakness of the ANC-led government in 1994 required it to cede authority to multiple groups in order to avoid concentrating power in a group that might contest the government's new agenda.

* The authors would like to thank Ross Kriel and Faranaaz Veriava for their contributions to this chapter. However, the positions we stake out in this chapter are substantially different than those of our colleagues, and we bear sole responsibility for the conclusions reached and the manner in which we arrived at them. We would also like to thank the editors of the *South African Journal of Human Rights*, *Perspectives in Education*, the *Stellenbosch Law Review*, and the *Journal on Education and the Law* for permission to use material from articles published by Stu Woolman and Brahm Fleisch in those journals.

Our historical account, culled from the travaux préparatoires of both the Interim Constitution[1] and Final Constitution[2], as well as extant education framework legislation (The South African Schools Act, The National Education Policy Act and The Educators Employment Act), demonstrates that appeasing the privileged or the provincial bureaucracy or the unions is but a small part of this story. School Governing Body autonomy, for example, was driven to a very large extent by the fundamentally democratic — not autocratic — commitment of African National Congress to grassroots politics.[3]

[1] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

[2] Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) ('Final Constitution' or 'FC').

[3] See S Woolman & B Fleisch 'Democracy, Social Cohesion and School Governing Bodies' (forthcoming 2008). Extant SGB autonomy has its roots in the very history of liberation movements — and in particular, the ANC. Many of the State's early education initiatives were predicated on the assumption that sustained school improvements must develop organically out of community participation and that community participation is contingent upon stronger (read autonomous) school governance structures. See Gauteng Department of Education 'Gatueng School Renovation Programme Implementation Plan' (1994)('Physical reconstruction and visible improvement in conditions at schools are tied to an incentive for strengthened school governance structures.') See also Gauteng Department of Education 'Circular No. 2' (1995)('The key to successful school development lies in the capacity of communities at all levels to guide and manage their own development. . . . In the short term, a priority is on the revitalization of participatory structure [sic] at the school governance level, and creating the space for their development and empowerment'); Gauteng Department of Public Works 'Evaluation of the Gauteng Schools Toilet Building Project' (1997) 10–11 ('It was envisaged that community participation would prompt greater civil society participation in school governance, and stimulate emerging builders. . . . It was believed that the toilet project would help to transfer power from the state to school governing bodies.') See, generally, African National Congress 'The Reconstruction and Development Programme' (1994)('[T]he people affected must participate in decision-making. . . . Democracy is not confined to periodic elections. It is, rather, an active process enabling everyone to contribute to reconstruction and development'); ANC National Education Co-ordinating Committee *National Education Policy Initiative* (1992)(Calls for dual structures of power: the state, on the one hand, community stakeholders on the other.) It is, amongst other things, a testament to the ANC's commitment to democracy that a party without a real opposition would divest itself of decision-making power based upon its belief that local schools and local communities would be best served by local political structures — in this case the SGB. However, the ANC's belief in the need of a strong central government to effect transformation may have militated against giving too much power to the community. See Y Sayed 'Discourses of the Policy of Educational Decentralisation in South Africa since 1994: An Examination of the South African Schools Act' (1999) 29 (2) *Compare* 141, 143 (Sayed notes that community representatives — unlike parents — do not have voting status on SGBs in terms of SASA. But it seems reasonable to ask why community representatives, who have no direct tie to the school, should have such status?) But see R Mahlerbe 'Centralization of Power in Education: Have Provinces Become National Agents?' (2006) 2 *TSAR* 237 (Contends that the ANC believed that 'political power should centralized as far as possible.')

The drafting history discloses how the multiple constituencies with whom the State had to contend and the conflicting imperatives within the State's own agenda led to greater decentralization of decision-making. Three points need to be made about this commitment to decentralization. First, the partial decentralization of decision-making may have had less to do with a belief that local is always lekker, and more to do with the State's need to ensure that no one interest group would be able to use the law as a means of organizing in opposition to the State. Secondly, the partial decentralization of decision-making flows from inevitable conflicts between deontological, utilitarian and communitarian commitments that manifest in the ANC's political agenda (as it would in any well-developed, non-reductionist political theory.) Thirdly, while the de facto policy of choice that arose out of this conscious attempt to dismantle the old bureaucracy and to distribute power throughout the new educational system was not actually anticipated by the ANC, the new government did realize that this particular aspect of its agenda might

Our specific views, about FC s 29(1), FC s 29(2), FC s 29(3) and FC s 29(4), as developed in Parts 2, 3, 4 and 5 of this chapter, are premised on three general assumptions. First, the legal space we describe is a variable space.[1] That space expands and contracts as a result of the political exigencies of a given historical moment. Second, the legal history of education in South Africa follows a discernible narrative arc. The South African system of public education is no longer the product of a parlous, fragile State: it is the product of a government with a firm

have such unintended consequences. The drafting history is, as a result, replete with references to the provisional nature of the structures being created by the State and the State's commitment to revisiting and to revamping those structures as it consolidated its power and it shifted its policy imperatives. Indeed, the state also appeared to put on notice those parties who might conclude that the political vicissitudes experienced by the State in such variable space lay beyond the government's control. In the Department of Education's second white paper, then Minister of Education Bengu wrote:

> Policies are stated in general terms and cannot provide for all situations. Our legacy of injustice and mistrust continuously throws up problems which need the wisdom of Solomon to settle. In this protracted transitional period, in which new policies for a democratic society are being developed and implemented, the chances are that we shall collectively make many mistakes, either in conception or execution. They must be recognised and corrected. The possibility of damage will be reduced if new policies are based on knowledge of our charter of fundamental rights and on sufficient consultation with those who are affected by them, if conflicts are negotiated, and if principled compromises are sought.

See Department of Education *White Paper 2: The Organisation, Governance and Funding of Schools* General Notice 1229 (November 1995) 6 ('*White Paper II*' or '*WP II*'). The preceding paragraph suggests that the new government's understanding was not limited to the proposition that its imperatives pulled in numerous directions and that no amount of analysis could anticipate the manner in which a complex set of policy initiatives would interact with a dynamic social environment. Minister Bengu seems to being saying that the State understood that it would have an opportunity to revisit these experiments in education at some later date and to revise them as circumstances required. And so it has.

[1] Why characterize FC s 29 and South African education law as a variable legal space? Every legal regime is a variable space in which general legal norms — the axes — interact with a range of variables — political exigencies and economic conditions — to generate a range of possible outcomes. The universe of South African education law that came into being in 1994 with the Interim Constitution was determined by an *unusual* concatenation of reconciliation politics and liberation politics. The ANC's liberation movement turned government possessed an ideological commitment to, and a well-founded faith in, the power of the people to effect real change. As a result, the ANC crafted a legal regime for education that sought to tap the transformative potential of local communities and was designed to rebuild a decimated school system from the ground up. At the same time, the new State, though highly centralized in terms of actual political power and policy determination, relied heavily on provincial government for the execution of its directives — and for the parents of learners in privileged communities to run their own schools. By choice, and by necessity, the South African government created a legal regime for education that permitted a broad array of disparate groups to determine outcomes and that produced results that few in government could have contemplated and even fewer would have desired. This tension between liberation and reconciliation dominated the early documents produced by the Department of Education. See, for example, Department of Education *White Paper 2: The Organisation, Governance and Funding of Schools* General Notice 1229 (November 1995) 5 ('The Review Committee proposes that the new structure of school organisation should create the conditions for developing a coherent, integrated, flexible national system which advances redress, the equitable use of public resources, an improvement in educational quality across the system, and democratic governance. The new structure must be brought about through a well- managed process of negotiated change, based on the understanding that each public school should embody a partnership between the state and a local community.') See also Sayed (supra) at 142 ('Both the previous ruling National Party and the opposition anti-apartheid movement shared a commitment to some form of educational decentralization albeit for very different political and ideological reasons.')

grip on the levers of power.[1] This narrative arc correlates with the state's attempt — with varying degrees of success – to use the variable space of the law to effect changes in education policy that more closely approximate the ANC's current political agenda. Third, and most importantly perhaps, that complex political agenda embraces egalitarian, utilitarian, democratic and communitarian commitments. The ANC as a governing party in the 21st century, and no longer a liberation movement in the 20th, pursues: *(a)* an egalitarian agenda that aims to provide a formally equal start for all its denizens; *(b)* a utilitarian agenda designed to create the greatest good for the greatest number of its learners; *(c)* and a communitarian agenda that privileges, in some respects, the face-to-face relationships found in kin, clan and commune over the more abstract relationships that bind us as citizens. How do these competing political claims — evident in any social democratic state — play themselves out in our Final Constitution, the enabling legislation and the case law?[2]

[1] The politics of education in South Africa, circa 1994, is the politics of a fragile state. The ANC government in 1994 inherited a system of education that ill-served the needs of the vast majority of South Africans. The dimensions of this fragility are well-documented: a lack of managerial legitimacy; inequitable funding; poor physical plants; inadequate teacher training; insufficient provision of and access to necessary social services in the related domains of housing, health care, nutrition, and transportation. Our secondary interest, in this chapter, is to document the manner in which the state has attempted to use the Final Constitution and other forms of law to move education from this parlous state to one that effectively delivers equal access to an adequate education to all learners. Take the subject matter of school fees: which we discuss at greater length below. See also B Fleisch & S Woolman 'On the Constitutionality of School Fees: A Reply to Roithmayr' (2004) 22 (1) *Perspectives in Education* 111; D Roithmayr 'Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education' (2003) 19 *SAJHR* 382. Shortly after ascending to power in 1994, the ANC promulgated several statutes — and a host of regulations — that permitted school fees. Although it ceded authority to SGBs to make significant decisions about such things as fees, policy-makers underestimated the ability of parents to organize. They believed that few SGBs would secure the statutorily required 50% approval rate of parents for fees if they attempted to charge excessive amounts. This initial miscalculation meant that the state did not anticipate the lengths to which the poor would go to fund the education of their children in fee-expensive schools and the concomitant interest some schools would have in excluding learners who would not or could not pay fees. It is also underestimated the extent to which information asymmetries would skew the distribution of educational goods. Ten years later, the state has a much better conception of the interests that shape and distort the market. The national DoE has promulgated amendments to the South African Schools Act designed to correct various market distortions. It divests SGBs of some of their current authority to hire teachers. It eliminates fees for the poorest 40% of schools and pushes for tighter enforcement of exemptions. It requires the reissuance of circulars that inform learners and their parents of their rights with regard to such exemptions. All of these initiatives are designed to minimize information asymmetries and to promote greater access to existing educational resources. The fragile State that governed from the mid-nineties through the *fin de siecle* did not possess the requisite power to effect such changes. An ever-strengthening state has announced its intention to reshape the environment in a manner that moves beyond reconciliation to redress.

[2] For a demonstration of how egalitarian, democratic, communitarian and libertarian commitments in our basic law and in our enabling education have produced a de facto (as opposed to a de jure) commitment to school choice, see S Woolman & B Fleisch 'South Africa's Unintended Experiment in School Choice: How the National Education Policy Act, the 'South Africa Schools Act and the Employment of Educators Act Create the Enabling Conditions for Quasi-Markets in Schools' (2006) *Journal of Education and the Law* 31; S Woolman & B Fleisch 'Creating Quasi-Markets in Public Schools' (2006) *Perspectives in Education* 1. Woolman and Fleisch focus on three pieces of enabling legislation — the National Education Policy Act (NEPA), the South African Schools Act (SASA) and the Employment of

Take the right to basic education, and to adult basic education, granted in FC s 29(1). They are unequivocally granted to all. And they are granted in a manner *unqualified* by standard socio-economic tropes such as 'available resources', 'progressive realization' or 'reasonable legislative measures'. Thus, the commitment to basic education looks to be unswervingly egalitarian. Look again. Nowhere does FC s 29(1) indicate that 'basic education' means 'free education'. It doesn't. Basic education may mean charging fees — under the current statutory framework — in the top three quintiles of schools. These poor, working class, middle class and upper middle class schools are manifestly unequal, and are generally better than their poorer brethren in the lowest two quintiles. And the Final Constitution permits such inequality (at least for the moment). The drafters of the Final Constitution also undertook a utilitarian approach to basic education premised upon the view that allowing school fees and school choice would allow for meaningful cross-subsidization of poor learners by wealthy learners. The complex political agenda does not end there. 'Basic education' and the devolution of powers to local school governing bodies was born from a deep-seated ANC belief in the democratic power of local communities to liberate themselves.

Basic education — and FC s 29(1) — is but one example of the egalitarian, libertarian and democratic convictions made manifest in the Final Constitution. Take FC s 29(2). On its face, it promises all learners education in any of the 11 official languages of their choice — thus displacing the hegemony of English and Afrikaans. But effective delivery — let alone the overall welfare of the polity — could hardly be served by education in all 11 official languages. So the drafters, good rule-utilitarians too, qualified this right with the phrase 'reasonably practicable'. However, FC s 29(2) was also forged at a time when Afrikaner nationalists worried — with good reason — about having all their socio-political institutions taken over by a majority of South Africans who preferred their children to learn English rather than Afrikaans. So

Educators Act (EEA). They show how the enabling legislation and a raft of regulations produce a market of schools from which learners can choose: for example, NEPA regulations manifest an express intent to 'co-ordinate parental preferences'; SASA enables SGBs to charge fees and thereby create an incentive to admit as many full fee-paying students as the school can accommodate; EEA — and Education Labour Relations Council (ERLC) resolutions — create additional incentives for principals to compete for bums in seats by tying promotion posts to the number of learners who attend the school. The authors then look at the concurrent constitutional competency for education exercised by national government and provincial government and show how co-operative government functions as an additional enabling condition for the creation of markets. Viewed collectively, the provisions of NEPA, SASA and EEA — as well as the Final Constitution — create the conditions for a conventional, if not the most efficient, market in education. Woolman and Fleisch then assess the available data on how schools and parents respond to the variable spaces created by the law and suggest why markets are established in some South African communities and not in others. Although statistics demonstrate that the majority of learners do *not* exercise meaningful school choice, a surprisingly large cohort do. The authors then track the State's responses to the de facto policy of school choice. They note how the State ensures greater access to existing quasi-markets, even as it asserts increasing control over the parties whose 'legal', and thus legitimate, practices conspire to form markets in the first place.

FC s 29(2) contains a tiny bit of wiggle room — not a right, exactly, more an entitlement to reasons — for those Afrikaans-speakers who wish to maintain the linguistic and cultural homogeneity of their single medium public schools. As we shall see, this nod to communitarianism — to fraternity — in the face of both egalitarian and libertarian interests, has been the source of most of the litigation surrounding educational rights.

FC s 29(3) takes these communitarian concerns seriously. To the extent that FC s 29(2) allows the right of each public school learner to tuition in their preferred official language to trump a local majority's preference for single medium public school instruction — in the name of equity, historical redress and practicability — egalité and liberté will trump fraternité. However, FC s 29(3) enables linguistic, cultural and religious communities to create *independent educational institutions* that advance a particular way of being in the world. Thus, where the state declines to support such a communitarian good as a single medium public school, FC s 29(3) promises that space for single medium institutions will continue to exist — to the extent that parents and learners are willing to pay for their preferred form of instruction.

FC s 29(4) goes FC s 29(3) one half-step better. To the extent that the needs and the concerns of South Africa's historically disadvantaged learners displace the desires of smaller communities — read Afrikaans-speaking communities — to keep public institutions as they are, FC s 29(4) announces that independent educational institutions may still be entitled to state subsidies. Thus, even on their surface, with no further explication by enabling legislation, national departmental regulations or provincial school circulars, FC s 29(1), FC s 29(2), FC s 29(3) and FC s 29(4) demonstrate the egalitarian, libertarian, communitarian and democratic tensions repeatedly reflected in our founding document. If one wishes to understand our basic law's favourite catch-phrase — an 'open and democratic society based upon human dignity, equality and freedom' — there may be no better place to start one's journey than FC s 29.

57.2 FC 29(1)

(a) Section 29(1)*(a)*: Basic Education

(i) *Nature of the right*

(aa) Education as empowerment

The purpose of the right to a basic education is perhaps most evident in the opening lines of the Committee on Social, Economic and Cultural Rights' General Comment on the Right to Education:

> Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.[1]

Empowerment rights, such as education, serve two purposes that are not fulfilled by the majority of other rights found in Chapter 2.[2] First, they ensure that citizens are able 'to set the rules of the game, and not merely be assured that the rules are applied as written'.[3] Secondly, 'they allow the individual to determine the shape and direction of his or her life.' Empowerment rights also facilitate the enjoyment of other constitutional rights.[4]

Beiter identifies four ways in which the right to education serves as an empowerment right.[5] First, education possesses the potential to liberate people from

[1] General Comment 13 (21st Session, 1999) 'The Right to Education (art 13)' UN Doc E/C.12/1999/10 at para 1. See also *Brown v Board of Education of Topeka* 347 US 483, 493 (1954):

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Article 1(4) of the World Declaration on Education for All recognises that 'Basic education is more than an end in itself. It is the foundation for lifelong learning and human development on which countries may build, systematically, further levels and types of education and training.'

[2] J Donnelly & R Howard 'Assessing National Human Rights Performance: A Theoretical Framework' (1988) 10 *Human Rights Quarterly* 214 (The pair identify four categories of rights and ten essential rights which can effectively represent all human rights: 'survival rights' (life, food and healthcare); 'membership rights' (family rights and equality); 'protection rights' (habeas corpus and an independent judiciary) and 'empowerment rights' (education, expression and association). While one may quibble with the content of their categories, the mere identification of a category of empowerment rights proves both analytically sound and rhetorically useful.)

[3] Ibid at 234.

[4] F Coomans 'In Search of the Core Content of the Right to Education' in D Brand & S Russel (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002) 160-161; K Tomasevski *Education Denied* (2003) 1 (Tomasevski, a former special Rapporteur for Education of the UN Human Rights Commission, writes: 'Leaving seven-year-olds to fend for themselves routinely drives them into child labour, child marriage or child soldiering. The right to education operates as a multiplier. It enhances all other human rights when guaranteed and forecloses most, if not all, when denied.')

[5] K Bieter *The Protection of the Right to Education by International Law* (2006) 28-30. See also Coomans (supra) at 160-161.

oppression. An educated populace is, allegedly, more willing to oppose political domination than an uneducated citizenry. Second, education permits people to participate in political life. Meaningful political participation requires both an understanding of the structures of a given polity and the capacity to exploit what one knows about the world in order to effect political change. Third, education is deemed essential for 'socio-economic development': only educated individuals possess the ability to secure both the basic necessities for survival and the other material goods required for flourishing. Finally, education enhances a person's ability to participate in the life of a given linguistic, cultural or religious community — and that ability, in turn, enables the community to maintain its preferred way of being in the world.

Education's status as an empowerment right might well explain why it receives, on its face, greater protection than other socio-economic rights: housing, healthcare, food, water and social security. The Constitutional Assembly apparently believed that an adequate education provides the quickest route to a polity of a creative, productive and self-sufficient population of citizens — and not a country in which the majority of decisions relied on some form of state largesse.

(bb) Negative dimension and positive dimension

FC ss 26 and 27 – the rights to housing, healthcare, food, water and social security – contain separate positive rights and negative rights. FC s 29(1)*(a)* and *(b)* do not draw a specific distinction between positive entitlements and negative entitlements. However, in *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of the Gauteng School Education Bill of 1995*, the Constitutional Court held that IC s 32*(a)*,[1] the precursor of FC s 29(1)*(a)*, created 'a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education.'[2] Given the virtually identical wording of the two sections, the Constitutional Court would likely find that FC s 29(1)*(a)* confers both positive entitlements and negative entitlements.

(x) Negative dimension

By ensuring that people are not prevented from accessing existing educational resources, FC s 29 operates like an ordinary civil and political right. Any interference with the legitimate exercise of the right can be justified only in terms

[1] IC s 32*(a)* read: 'Every person shall have the right — *(a)* to basic education and to equal access to educational institutions.'

[2] 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC) at para 9. The Constitutional Court has identified a similar negative dimension in FC s 26(1)'s right to access to adequate housing. See *Jaftha v Schoeman & Others; van Rooyen v Stoltz & Others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) at para 34.

that meet the test set out in FC s 36(1).[1] Schools may not refuse to admit learners of a particular race,[2] or expel learners for trivial non-compliance with dress codes.[3]

This negative dimension may well have horizontal application. Private or independent schools will, in terms of FC s 8(2), be bound by a right 'to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'[4] FC s 29(3), when read with FC s 9(4) (the right to equality as applied to private parties), and statutory provisions governing both independent schools and the promotion of equality, narrows dramatically the space for the denial of access to 'private' educational goods.[5]

(y) Positive dimension

The positive right to basic education and to adult basic education must be regarded as a socio-economic right. However, not all socio-economic rights function in the same manner. Some commentators speak of 'strong' and 'weak' positive rights.[6] Others refer to 'qualified' and 'unqualified' rights.[7] Whatever the nomenclature, the phrasing of FC s 29(1)*(a)* reflects a 'strong' right, 'unqualified' by any of the 'promises' or 'aspirational language' found in FC ss 26 and 27.[8] The

[1] See, further, S Woolman & H Botha 'Limitations' in in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 34.8.

[2] See *Matukane & Others v Laerskool Potgietersrus* 1996 (2) SA 223 (T)('*Matukane*').

[3] See *Antonie v Governing Body, Settlers High School & Others* 2002 (4) SA 738 (C); *KwaZulu-Natal MEC for Education & Others v Pillay* [2007] ZACC 21 (CC).

[4] For a detailed discussion of FC s 8(2), see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2005) § 31.4*(c)*.

[5] See § 57.4 infra; S Woolman 'Defending Discrimination: On the Constitutionality of Independent Schools that Promote a Particular, If Not Comprehensive, Vision of the Good Life' (2007) 18 *Stellenbosch Law Review* 31; B Fleisch & S Woolman 'On the Constitutionality of Single Medium Public Schools' (2007) 23 *SAJHR* 34.

[6] R Kriel 'Education' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS 5, 1999) 38-1–38-3.

[7] Sandra Liebenberg distinguishes between three categories of socio-economic rights in the Final Constitution. First, some rights are qualified by: *(a)* 'access' to the thing; *(b)* reasonable measures; *(c)* progressive realization; and *(d)* available resources. These rights are found in FC ss 26(1) and 27(1) and are qualified by FC ss 26(2) and 27(2). They are housing, health, food, water and social security. Second, unqualified positive rights encompass basic education (FC s 29(1)*(a)*), rights of children (FC s 28(1)*(c)*) and rights of prisoners (FC s 35(3)*(e)*). Third, other rights afford solely negative protection: FC ss 26(3) and 27(3). S Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) 33-5—33-6.

[8] Berger asks whether the qualification in the second part of FC s 29(1)*(b)* is meant to apply to FC s 29(1)*(a)* as well. E Berger 'The Right to Education Under the South African Constitution' (2003) 103 *Columbia Law Review* 614, 638-639 n 139. This argument is, as Berger notes, entirely unconvincing. The grammar of FC s 29(1) separates the qualification in FC s 29(1)*(b)* from FC s 29(1)*(a)* with both an 'and' and a semicolon. This formal distinction clearly suggests that the qualifications are not meant to apply to FC s 29(1)*(a)*. In addition, FC ss 26 and 27, which include similar limitation clauses in their respective subsection (2)'s, contain specific references back to the rights in FC ss 26 and 27 (1). That the Constitutional Assembly chose such a palpably different structure for FC s 29(1) clearly suggests that the drafters did not intend FC s 29(1)*(b)*'s internal limitations to apply to FC s 29(1)*(a)*.

strong, unqualified character of FC s 29(1)*(a)* is reflected in four distinct linguistic tropes.

Firstly, everyone has the right to basic education itself, not, as might be the case in FC s 26 or FC s 27, to 'access' to basic education. Recall that in *Grootboom* the Constitutional Court interpreted the inclusion of the word 'access' in the FC s 26 right to housing to mean that the State could fulfil its constitutional obligations by 'enabling' people to provide their own housing.[1] The corollary must be that the absence of 'access' in FC s 29(1)*(a)* means that the State itself must provide a basic education to everybody.[2]

Second, the right to education is not subject to a standard socio-economic rights limitation such as 'reasonable legislative measures'. This internal limitation lies at the core of the Constitutional Court's textual argument for adopting a 'reasonableness' standard for the socio-economic rights to housing and to health in *Grootboom* and *TAC*. Accordingly, FC s 29(1)*(a)* cannot be satisfied unless everyone receives a basic education. The State's 'reasonable' measures to meet its obligation cannot justify a failure to provide this good. FC s 29(1)*(a)*'s obligations can only be fulfilled by the provision of classrooms, teachers and textbooks.

Third, FC s 29(1)*(a)* is not contingent on the availability of resources.[3] As Seloane notes, whether the State has enough resources to fulfil its constitutional obligations does not release the State from the duty FC s 29 imposes.[4] We argue below that the most effective manner to deal with a lack of resources in the domain of educational rights is by constructing creative remedies to meet the State's constitutional obligations: it makes little sense, as an interpretative matter, to read in an internal limitation in FC s 29(1) that simply is not there.

Finally, the right is not subject to progressive realization. In *Grootboom* Yacoob J described progressive realization in the following terms:

> It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.[5]

Basic education is not a good that can be made gradually available to more people 'over time'.

In sum, the text of FC s 29(1)*(a)* indicates that, unlike the 'traditional' socio-economic rights, the right to basic education and adult basic education is: *(a)* not

[1] *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at paras 35-36 ('A right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The State must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.')

[2] See M Seleoane 'The Right to Education: Lessons from *Grootboom*' (2003) 7(1) *Law, Democracy and Development* 137, 140-142.

[3] Ibid at 140-141.

[4] Ibid at 140.

[5] *Grootboom* (supra) at para 45.

subject to a reasonableness standard; *(b)* not dependent on the availability of resources; and *(c)* the source of a direct, immediate and specific entitlement.

However, despite these clear textual indications that FC s 29(1)*(a)* imposes a fairly onerous burden on the State, the Constitutional Court's existing socio-economic rights jurisprudence suggests that the Court will be inclined to limit the impact of FC s 29(1)*(a)*'s unqualified wording. The *TAC* Court, in rejecting the minimum core approach to socio-economic rights, held that

> [i]t is impossible to give everyone access even to a 'core' service immediately. All that is possible, and all that can be expected of the State, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.[1]

Thus, despite the difference in the texts of FC ss 26 and 27, on the one hand, and FC s 29(1)*(a)*, on the other, the alleged 'impossibility' of providing basic education immediately may well push the Court to limit the scope of FC s 29(1)*(a)*. Berger identifies the source of this tension in FC 29(1)*(a)* — the tension between the unqualified right and the qualified right — as follows:

> [t]o announce standards that cannot be met would ultimately cheapen the Constitution; the Court can preach whatever message it wants, but that message — and the Constitution itself — will ring hollow once people begin to realize that its rulings do not improve their everyday lives. A narrow constitution, goes the argument, is better than an empty one.[2]

The manner in which the Court has approached both qualified rights and unqualified rights also suggests that it will be hesitant to read FC s 29(1)*(a)* in a full and unqualified manner. In *Grootboom,* the Court adopted the following contextual approach to interpreting socio-economic rights:

> Interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of Chapter 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context.[3]

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[1] *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC)('*TAC*') at para 35.

[2] Berger (supra) at 642. This danger was specifically recognised by the Constitutional Court in *Soobramoney*:

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.

Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) at para 8. The flip side of this argument, as Berger notes, is that the Final Constitution is, quite self-consciously, a transformative and aspirational document that proclaims the ideals upon which the new South Africa must be founded. In his words: 'if championing these rights without realizing them risks emptying the Constitution, then abandoning than altogether would surely drain out even more of its content.' Berger (supra) at 643. The Court will, some time in the future, have to tread a fine line between placing a gloss on FC s 29(1)*(a)* that promises too much and a reading of this unqualified right that offers far too little.

[3] *Grootboom* (supra) at para 22.

In interpreting FC s 26, the Constitutional Court held that '[s]ocio-economic rights must all be read together in the setting of the Constitution as a whole.'[1] No matter how important one views the right to education, it is difficult to argue that it should trump rights to housing, food, water, healthcare and social security. Housing, food, water, healthcare and social security provide, after all, the basic conditions of existence — without them, the right to education, however lavishly realized, will be of little worth.

In addition, the post-apartheid State inherited an education system that purposefully tried to ensure that the majority of the population could not be anything more than hewers of wood and drawers of water. This historical gloss on FC s 29(1)*(a)* emphasizes the restitutional character of the right of education. However, it also indicates the size of the problem facing the State and why the Court might be inclined to soften the budgetary impact of an unqualified FC s 29(1)*(a)*.

But how would the Court craft a softer right? *Grootboom*, interestingly, offers an example. Although the applicants' primary complaint was based on FC s 26, the right to housing, they also claimed relief under the seemingly unqualified FC s 28(1)*(c)* right to shelter for children (and their families). Davis J, in the High Court, accepted FC s 28(1)*(c)*'s unqualified content and granted the children and families the specific remedy requested.[2] The Constitutional Court reversed the High Court. It held that FC s 28(1)*(b)* required that a child's needs be provided primarily by his or her family. The obligation to provide shelter under FC s 28(1)*(c)* rests 'primarily on the parents or family' and, therefore, 'only alternatively on the State.'[3] That primary obligation would only shift to the State if children were removed from their families. However, under normal circumstances, the State would only bear a minimal enabling duty.[4] Although education is not

[1] *Grootboom* (supra) at para 24 (The Court continued: 'The State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the State has met its obligations in terms of them.')

[2] *Grootboom v Oostenberg Municipality & Others* 2000 (3) BCLR 277 (C).

[3] *Grootboom* (supra) at para 77.

[4] The *TAC* Court also appears to subject the FC s 28(1)*(c)* right to healthcare to 'progressive realization'. See *TAC* (supra) at para 77. For a criticism of the Constitutional Court's approach to FC s 28(1)*(c)*, see A Friedman & A Pantazis 'Children's Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2004) 47-9–47-11 (The authors note that 'if the sections are read literally, the grounds for rejecting the [High Court's] order are shaky at best.' While they acknowledge the gravity of the Court's concerns, they argue that '[r]ather than claiming that the overlap of the rights is inconsistent with the notion that separate rights are created, the Court should have made it clear that a purposive, rather than a literal, interpretation of the section made it compatible with a scheme for progressive realization of housing.') See also M Pieterse 'Reconstructing the Private/Public Dichotomy? The Enforcement of Children's Constitutional Social Rights and Care Entitlements' (2003) *TSAR* 1, 11 ('While the court's concerns with the overlap of parental interests with section 28(1)*(c)* right and the possible abuse of such rights by indigent parents are perhaps understandable . . . [v]iewing section 28(1)*(c)* as subject to the resource and other constraints in sections 26 and 27 would seem completely unsupported by the text of the Constitution. . .. If the court's interpretation is to be preferred, the separate inclusion of section 28(1)*(c)* in the bill of rights would be rendered almost entirely without purpose.')

mentioned in FC s 28(1)*(c)*, the Court might be open to a set of similar arguments — and that train of propositions would begin with a *Grootboom*-like contention that parents bear a primary duty to educate their children. Or the Court could rely on its reasoning in *Grootboom* that 'the carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped'[1] by the right to education and that the right to education must therefore be read in conformity with that scheme.[2]

The High Courts have sent mixed messages regarding unqualified socio-economic rights. In *B & Others v Minister of Correctional Services & Others,* Brand J held that the FC s 35(2)*(e)* right of prisoners to be provided with adequate medical care required that the State provide prisoners with anti-viral medication — if they had a *legitimate expectation* of receiving such treatment (namely previous treatment by the State and a doctor's assessment that such treatment was necessary).[3] However, prisoners who had no legitimate expectation of such treatment were not entitled to such treatment — even if they met the criteria (a particular CD4 count) for treatment.[4] When the issue of HIV medication for prisoners arose again in *EN & Others v Government of RSA & Others*,[5] Pillay J adopted a reasonableness standard for his evaluation of the applicants' FC s 27 *and* FC s 35(2)*(e)* claims.[6]

The Witwatersrand Local Division has upheld a right to electricity for maximum security prisoners sourced, largely, in FC s 35(2)*(e)*.[7] However, Schwartzman J's judgment in *Strydom* appears to fudge the justification for the outcome: he does not clearly state that the right was independent of state resources; and he appears to grant the relief solely because he remained unconvinced by the State's arguments about budgetary deficiencies.[8]

[1] *Grootboom* (supra) at para 71.

[2] On reading constitutional provisions in conformity with one another, see *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae)* (No 2) 2003 (1) SA 495 (CC)('*UDM*'); *South African Broadcasting Corp Ltd v National Director Of Public Prosecutions & Others* 2007 (1) SA 523 (CC), 2007 (2) BCLR 167 (CC).

[3] 1997 (6) BCLR 789 (C).

[4] Ibid at paras 58 and 60 ('If a proper case were to be made out by respondents that, due to the constraints of its own budget, the Department of Correctional Services could not afford the medical treatment claimed by applicants, I might have . . . found that "adequate medical treatment" for applicants is dictated by such budgetary constraints. From what I have already stated, it is apparent, however, that on the facts of this case it is not necessary for me to make a definite finding on these difficult issues.' (our emphasis)) On legitimate expectations and socio-economic rights, see Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2005) at § 34.2.

[5] 2007 (1) BCLR 84 (D).

[6] Ibid at paras 30-31.

[7] *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W) at para 15.

[8] Ibid at para 17.

Woolman and Fleisch offer a reading of FC s 29(1)*(a)* that would explain the unqualified nature of the right in a manner that does not make a hash of the budgetary constraints faced by the post-apartheid State:

> The absence of an internal limitation for the right to a basic education makes sense when viewed through the lens of Apartheid-era funding inequalities. The drafters wanted to reaffirm the primacy of education in a social democracy and to undermine any attempt to perpetuate unequal levels of state funding. The historical context and aspirational content of the South African Constitution requires a more nuanced reading of the absence of the internal limitation in [FC s] 29(1)*(a)*. In short, the section should be read as a reminder that the state may never again use education as a vehicle for the reproduction of — and must make every effort possible to eliminate all vestiges of — apartheid-era patterns of inequality.[1]

As Woolman and Fleisch note, the absence of an internal modifier does not make it impossible for the State — or another social actor — to justify a limitation of the right. Any person can, in terms of FC s 29, demonstrate that they do not currently have access to a school that would enable them to secure a basic education. That showing, if accepted, would establish a limitation of FC s 29(1)*(a)*.[2] Then, assuming the right to a basic education had been impaired by a law of general application, the justificatory burden would shift to the State to justify the limitation under FC s 36(1).[3] (If the source of the limitation is mere government policy, or obstruction by particular schools, it will not be possible to justify the limitation.) The State will be able to raise resource constraints and the need to fulfil other constitutional obligations in showing that the limitation is 'reasonable and justifiable'.

The other way to limit the unqualified character of FC s 29(1)*(a)* is through the remedy. While a person who establishes that the government has failed to provide her with a basic education is entitled to relief, that relief need not necessarily be an order that the government immediately provide a basic education. A court must give an order that is just and equitable. Such an order could encompass a simple declaratory order, a suspended order or a structural interdict that would give the government an opportunity to offer a bona fide plan to realize the right to a basic

[1] B Fleisch & S Woolman 'On the Constitutionality of School Fees: A Reply to Roithmayr' (2004) 22(1) *Perspectives in Education* 111 n 10.

[2] It is necessary to stress that, prior to any judicial gloss on its meaning, FC s 29(1)*(a)* ought to be given the full, unqualified reading that the text suggests.

[3] For more on the meaning of 'law of general application', and the distinction between 'law' and 'conduct', see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 34.7 ('Law that fails to meet the 'law' requirement of law of general application falls into roughly two categories. Those categories are: (aa) grant of power to government officials not constrained by identifiable legal standards; and (bb) commissions and omissions. Commissions and omissions that fail to meet the desiderata for 'law of general application' fall into two related categories: *(x)* conduct carried out under colour of law but beyond the scope of actual legal authority; *(y)* the failure to discharge constitutional duties.')

education. The benefit of the remedial approach is that a court can simultaneously affirm the right to education, and still leave the government sufficient room to manoeuvre. The remedial approach avoids compromising rights by tying their interpretation to a restrictive vision of available remedies. As Justice Kriegler noted in *Sanderson v Attorney-General, Eastern Cape*, remedies must be designed to give maximum effect to the rights enshrined in Chapter 2: 'our flexibility in providing remedies may affect our understanding of the right'.[1] Because our courts have broad discretion to fashion an 'appropriate' constitutional remedy, they are less likely to be deterred from finding a violation of the right than would be the case if they had a rather narrow menu of remedies from which to choose. The Constitutional Court has repeatedly emphasized flexibility in the provision of remedies and has held that courts must 'forge new tools' and 'shape innovative remedies' to ensure effective relief.[2] As Mokgoro and Sachs J succinctly put it in *Bel Porto*: 'It is the remedy that must adapt itself to the right, not the right to the remedy.'[3]

(ii) *Content of the positive right*

(aa) Defining 'Basic Education'

(x) Goals and years

The courts have yet to interpret the meaning of the term 'basic education'. Two possible constructions appear plausible. 'Basic education' could refer to a specific period of schooling, ie primary school. 'Basic education' could refer to a standard

[1] *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1998 (1) SACR 227 (CC), 1997 (12) BCLR 1675 (CC) at para 27.

[2] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at para 69 quoted with approval in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC)('*NCGLE v Minister of Home Affairs*') at para 65. See also *Bel Porto School Governing Body v Premier, Western Cape & Another* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC)('*Bel Porto*')(Mokgoro and Sachs JJ) at paras 181 and 186 ('The flexibility in the provision of constitutional remedies means that there is no constitutional straightjacket'. . . . 'It would indeed be most unsatisfactory and have negative consequences for constitutionality to fail to provide a remedy where there has been an infringement of a constitutional right. While courts should exhibit significant deference towards the administration and recognise the practical difficulties which the administration faces, it could create a misleading impression that in instances where there is an infringement of a constitutional right, and there are significant practical difficulties in remedying the injustice caused, a decision-maker will not be held to account.')

[3] *Bel Porto* (supra) at para 186. Although the Constitutional Court has as yet been hesitant to employ structural interdicts, the Justices in two recent hearings seemed to express considerable dissatisfaction with the State's continued non-compliance with court orders and hinted that structural interdicts might be appropriate in certain circumstances. *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others* CCT 24/07 (Heard on 28 August 2007); *Nyathi v Member of the Executive Council for the Department of Health Gauteng & Another* CCT 19/07 (Heard on 30 August 2007). At the time of writing, these cases had not yet been decided.

of education: its quality or its adequacy. As Berger bluntly puts it: 'Does section 29 promise merely a place to go to school, or does it provide for an "adequate" education?'[1]

The term 'basic' does have determinate content at international law.[2] The World Declaration on Education for All de-emphasizes the completion of specific formal programs or certification requirements.[3] Instead it stresses the acquisition of that level of learning necessary for an individual to realize his or her full potential. The World Declaration states:

> Every person-child, youth and adult - shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to survive, to develop to their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.[4]

The Education Department's *White Paper on Education and Training* initially appears to endorse this reading of 'basic education'.[5] However, the *White Paper* then immediately goes on to undermine this construction by stating that meeting the certification requirements of the General Education Certificate (GEC) satisfies the constitutional entitlement to a 'basic education'.[6] The GEC thus shies away from an express commitment to meeting the Declaration's goals.

[1] E Berger 'The Right to Education Under the South African Constitution' (2003) 103 *Columbia Law Review* 614, 625.

[2] South African courts are required to look to international law when interpreting the Bill of Rights. See FC s 39(1)*(b)*.

[3] See Article 4: the 'focus of basic education must, therefore, be on actual learning acquisition and outcome rather than exclusively upon enrolment, continued participation in organised programmes and completion of certification requirements'.

[4] See Article 1. American courts have adopted a similar approach in their understanding of a state's educational obligations. See, eg, *Brown v Board of Education* 347 US 483, 493 (1954); *San Antonio Independent School District v Rodriguez* 411 US 1, 112 (1973) (Marshall J dissenting); *Serrano v Priest* 487 P2d 1241, 1258 (1971); *Abbott v Burke* 575 A2d 359, 397 (1990). The German jurisprudence has taken a similar tack. See D Kommers *Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 294-304.

[5] *White Paper on Education and Training* (March 1995) at paras 13-15.

[6] Ibid at para 15: 'basic education' is 'appropriately designed programmes to the level of the proposed General Education Certificate (GEC), whether offered in school to children, or through other forms of delivery to young people and adults.' The GEC is awarded after completion of the one-year reception class (pre-school) plus Grades One through Grade nine. In terms of Section 3(1) of the Schools Act 84 of 1994, it is compulsory for a learner to attend school from the age of seven until the age of fifteen or the ninth grade which ever comes first. This phase of education is also prioritised in terms of actual allocation of resources. See also Norms and Standard for School Funding General Notice 2362 *Government Gazette* 19347 (October 1998) at para 95 (Requires that in the building and extension of schools this phase of education take precedence.)

That these two connotations of 'basic' reflect a distinction with a difference is illustrated in *Campaign for Fiscal Equity Inc v The State of New York*.[1] The applicant had argued that the standard of education in New York City schools did not meet the requirement of a 'sound basic education' found in the State of New York's Constitution.[2] The New York State Court of Appeal (the State's highest court) had, in a preliminary judgment, defined 'sound basic education' as 'the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury'.[3] The definition therefore embraced the ability to *(a)* find employment and *(b)* participate in political life. The Appellate Division, on remand, then found that an 8th grade education was sufficient to meet the Court of Appeal's standard: such an education would enable a person to obtain employment so as 'not to be a charge on the public fiscus' and to read the newspapers and the jury instructions necessary to fulfil their civic obligations. On appeal, the Court of Appeal disagreed. It held that an education had to enable people to obtain competitive employment and that the requirement of civic participation 'means more than just being qualified to vote or serve as a juror, but to do so capably and knowledgeably'.[4] It concluded that 'a sound basic education should not be pegged to the eighth or ninth grade, or indeed to any particular grade level.'[5] Thus while an 8th or 9th grade education might have served in 1894 when New York State's Fourth Constitution was drafted, only a full and an adequate high school education would now meet the twin goals that the right to a basic education was designed to serve. The Court of Appeal's decision suggests that the right to a 'basic education' requires the state to meet a substantive — measurable — goal and not merely a formal goal that any student marking time and any school pushing through students could satisfy.

The *Campaign for Fiscal Equity* Court focused on active political participation and competent jury service as the ultimate measures of basic education. By contrast, the West Virginia Supreme Court articulated a detailed list of knowledge that learners would be required to possess in order to meet West Virginia's constitutional requirement of a 'thorough and efficient' education system:

> '(1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work — to know his or her options; (5) work training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioural and abstract, to facilitate compatibility with others in this society.'[6]

[1] 100 NY 2d 893 ('*CFE II*').
[2] Article XXII, paragraph 1.
[3] 86 NY 2d 316.
[4] *CFE II* (supra) at 906.
[5] Ibid.
[6] *Pauley v Kelly* 255 SE2d 859, 877 (1979).

A South African court would find itself hard pressed to enforce either the New York or the West Virginia definition of basic education. Brahm Fleisch's scathing analysis of our primary school system — a function of our two parallel economies, of our two separate nations — causes him to arrive at the following conclusions:

> After the end of apartheid – South Africa has not one, but two education 'systems'. The first 'system' is well resourced, consisting mainly of former white and Indian schools, and a small but growing independent sector. The first 'system' produces the majority of university entrants and graduates, the vast majority of students graduating with higher-grade mathematics and science. Enrolling the children of the elite, white-middle and new black middle-classes, the first system does a good job in ensuring that most children in its charge acquire literacy and mathematics competences that are comparable to those of middle-class children anywhere in the world. [NB: As tertiary educators know, Flesich is being far too generous in this assessment.] The second school 'system' enrolls the vast majority of working-class and poor children. Because they bring their health, family and community difficulties with them into the classroom, the second primary school 'system' struggles to ameliorate young people's deficits in institutions that are themselves less than adequate. In seven years of schooling, children in the second system do learn, but acquire a much more restricted set of knowledge and skills than children in the first system. They 'read', but mostly at a very limited, functional level; they 'write', but not with fluency or confidence. They can perform basic numeric operations but use inappropriately concrete techniques that limit application.[1]

Thus, the accepted criteria for a basic education in New York or West Virginia — literacy, numeracy skills, problem-solving skills and the basic knowledge necessary to function in society — is, unequivocally, beyond the current reach of the South African educational system. The massive current deficits — much of it inherited from apartheid — must not, however, be used as an excuse or a justification by the State for failing to provide a 'basic education'. However South Africa goes about achieving the constitutionally-mandated goal of a basic education, it ought to keep in mind Amy Gutmann's description of the philosophical bases for the right: *(a)* the participation in and the promotion of government; *(b)* the ability to function in the economic community; *(c)* the inherent dignity of the individual.[2]

(y) Criteria for assessment

The International Committee for Economic, Social and Cultural rights has accepted the so-called 'Four A's' as an appropriate standard by which to measure a state's compliance with its obligation to provide a basic education: *(a)* availability/adequacy; *(b)* accessibility; *(c)* adaptability; and *(d)* acceptability.[3] While there

[1] B Fleisch *Primary Education in Crisis* (2007) 1–2. Fleisch explains, from soup to nuts — from the absence of food, to the presence of parasites, to the lack of adequately trained teachers, especially in maths and sciences — why South Africa will not, for the foreseeable future, provide their students with a basic, let alone, adequate education.

[2] A Gutmann *Democratic Education* (1987); John Dewey *Democracy and Education* (1916).

[3] General Comment 13 'The Right to Education (art 13)' UN Doc E/C12/1999/10 (21st Session, 1999)('GC 13').

may be more to a basic education than is captured by these terms, they do provide a valuable departure point for thinking about what, practically-speaking, a basic education requires.

(aaa) Availability/Adequacy

General Comment 13 states that 'availability' means that

> functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology.[1]

This passage suggests that 'availability' is a slight misnomer. What the General Comment appears to envisage is the availability *and the adequacy* of educational infrastructure. The quality of education depends not only on the content of the curriculum, but on the material circumstances in which learners receive their education.

The New York State Court of Appeal has identified three categories of 'inputs' to determine the adequacy of a school system: *(a)* teaching; *(b)* school facilities and classrooms; and *(c)* instrumentalities of learning.[2] 'Teaching' encompasses the quality of teaching staff and the number of teachers per learner. 'School facilities and classrooms' require structures that protect learners from the elements. This category also requires desks, chairs, water, electricity and sanitation. As for the 'instrumentalities of learning', they embrace textbooks, blackboards, stationery and possibly computers.[3]

[1] GC 13 (supra) at para 6*(a)*.

[2] *CFE II* (supra) at 908.

[3] The American learning in this area is both deceptive and instructive. As Danie Brand notes, the United States case-law indicates a willingness on the part of 'United States courts to strike down school funding systems that rely on an unequal revenue-raising basis.' D Brand 'Community Participation and User Fees' (2003) 2 (Unpublished manuscript on file with authors). These US cases, however, engage disparities 'in *state funding* of schools generated on an unequal tax basis.' Ibid at 3. They do not engage a system of progressive redistribution of state funds married to a policy that permits 'additional private funding of state schools.' Ibid. Thus, the form of institutional arrangement challenged in South Africa is quite distinct from its American counterpart.

Difference of form aside, the attempts to establish standards of adequacy through both litigation under US federal and state constitutions has proved decidedly difficult. See F Michelman 'The Supreme Court, 1968 Term - Foreword: On Protecting the Poor through the Fourteenth Amendment' (1969) 83 *Harvard Law Review* 7. As Morgan, Cohen and Herskoff argue, the primary problem with tying together minimum adequacy requirements to minimum funding requirements is that the two variables do not permit a sufficiently close fit. See S Herskoff 'Positive rights and State Constitutions: The Limits of Federal Rationality Review' (1999) 112 *Harvard Law Review* 1132; J Morgan, T Cohen & S Herskoff 'Establishing Education Program Inadequacy: The Alabama Example' (1995) 28 *University of Michigan Journal of Legal Reform* 559.

According to relatively recent statistics, our Department of Education has acknowledged that significant numbers of schools lack the most basic resources: water, sanitation and electricity.[1] Large numbers of schools face serious problems with class size, the quality of educators and the availability of learning materials.[2] It is, of course, extremely difficult to set a precise standard for when an absence of resources will limit FC s 29(1)*(a)*. Is it possible to learn with electricity but no water, with small classes but no textbooks, or qualified teachers but no blackboards?

Two possible solutions exist for this doctrinal difficulty. The first solution sets a very high standard — based on international norms and expert evidence — so that even a small deviation would constitute a limitation of the right. So, for example, if maximum class sizes are set at 30 learners, then any school that has classes with more than 30 learners has limited the right. This approach saves courts from having to make difficult assessments of the educational impact of various kinds of deficiencies. The disadvantage of this approach is that an extremely high percentage of our schools would fail to meet these international standards. Moreover, such criteria would unduly focus educators on meeting specific numerical targets rather than finding innovative ways to improve education.

The second approach would eschew discrete standards — teacher/student ratios, presence of running water, qualification level of the teaching staff, quality of the physical infrastructure – and allow a court to make an ad hoc inquiry as to whether the school provides a 'basic education'. In reaching its conclusion, a court could look beyond the provision of facilities, and consider exam results and drop out rates.

The second approach suffers from two primary disabilities. First, the most obvious downside of this standardless approach is that courts are more likely to defer to executive or to administrative claims of practical difficulties in fulfilling

Even where minimum funding requirements have been put in place and minimum adequacy guidelines have been established, historically disadvantaged schools struggle to improve performance. These difficulties have not prevented a couple of courts in the US from requiring that the state provide equal funding and — in some instances — an adequate education. See, eg, *Rose v Council for a Better Education* 790 SW2d 186 (Ky 1989). However, the majority of courts have concentrated on removing disparities in public school funding created by unequal municipal property taxes. See, eg, *Abbott v Burke* 575 A2D 359 (NJ 1990); *Edgewood Independent School District v Kirby* SW2d 391 (Tex 1991).

Improved performance at historically disadvantaged schools turns out to be a function of a number of factors: not the least of which is the management model employed at the school district level and by the principal. The difficulty in disaggregating the causes of improved performance is no argument against parity in funding. It serves, however, as a cautionary note when various NGOs and other actors attempt to determine school policy through the prism of very narrowly focused litigation.

[1] The 2000 statistics reflect that 36% of schools did not have telephones, 29% lacked water; 45% were without electricity and 9% had no toilets. Department of Education *Education for All — 2005 Country Status Report: South Africa* (2005) 9.

[2] Ibid (40% of students reported classroom shortages. In 2002, there were 12 000 under-qualified teachers. By 2004, that number of unqualified teachers had dropped to 5000.)

their mandates.[1] Second, as any student of constitutional property law now knows, the employment of a reasonableness standard employed outside the context of socio-economic rights faces the prospect of what Theunis Roux has described as a 'arbitrariness vortex'.[2] All conceivably relevant factors will be considered under FC s 29(1)*(a)*. Having considered those factors, the court is then free to generate an outcome that it believes does justice to the parties before the court. The problem with this reasonableness vortex in the context of FC s 29(1)*(a)* is that it provides little or no discernible criteria as to what will or will not fail FC s 29(1)*(a)*'s test for availability and adequacy.

(bbb) Accessibility

Accessibility requires that once the schools have been built and stocked with teachers and textbooks, learners are able to make use of them. Accessibility takes account of three discrete factors: Non-discrimination; financial accessibility; physical accessibility. Accessibility engages both negative dimensions and positive dimensions of the right to basic education. Accessibility requires: (1) that people are not (unjustifiably) turned away; and (2) that appropriate steps are taken to make access easier for persons from groups that were either consigned to inferior institutions or excluded from certain educational institutions altogether.

(xx) Non-discrimination

The cases that have engaged in discrimination in education can usefully be divided into two general categories: direct discrimination and indirect discrimination. Direct discrimination occurs when a rule or a practice specifically prohibits members from a certain group from having access to education.

Minister of Home Affairs v Wathenuka & Another remains the only discrimination case to be decided specifically under FC s 29(1). In *Wathenuka*, the Supreme Court of Appeal struck down regulations which prohibited asylum seekers from studying in South Africa.[3] The court held that it could never be reasonable or justifiable to deny education to a child lawfully in the country to seek asylum.[4] The general prohibition on study by asylum-seekers was therefore an unjustifiable limitation of FC s 29(1).[5]

[1] See, for example, D Brand 'The Proceduralisation of South African Socio-economic Rights Jurisprudence, or 'What are Socio-economic Rights For?' in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33.

[2] See T Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46. Cf A van der Walt *Constitutional Property Law* (2006).

[3] 2004 (4) SA 326 (SCA).

[4] Ibid at para 36.

[5] As the prohibition applied to all form of study, the regulation in question would limit both FC s 29(1)*(a)*'s guarantee of basic education, and FC s 29(1)*(b)*'s right to higher education. Nugent JA did not uphold the principle that asylum-seekers would always be entitled to study at an institution of their choice. He sent the matter back to the administrative body for reconsideration in light of his reconstruction of the regulation and the body's newly limited ability to exercise its discretion. Ibid at para 37.

Watchenuka stands for two further propositions. First, it reinforces the notion that 'everyone' in FC s 29(1)*(a)* means precisely that: FC s 29(1)*(a)*'s guarantees are not limited citizens or even permanent residents.[1] Secondly, while total bans on certain classes will generally be unacceptable, a requirement that certain classes of person seek permission to study may conform to the dictates of FC s 36(1). Both of these findings are to be welcomed. However, it is important to re-iterate that there will seldom, if ever, be a reason to refuse a child access to education, even if she is only in the country temporarily.

The second non-discrimination matter to arise in South African courts, *Harris v Minister of Education*, concerned age limits for entry into primary school.[2] In 2000, the Minister of Education published a notice that stated that from 2001 learners would not be permitted to enrol at independent primary schools before the year in which they would turn seven. Mrs Harris, the mother of a child who would turn six in 2001, argued that the notice violated her daughter's rights to equality and to have her best interests protected. Mrs Harris, along with expert witnesses, contended that her daughter was academically ready for primary schooling and that delaying her education would have a negative effect on her development. The Pretoria High Court agreed. It held that the measure was discriminatory on the basis of age and, because it was likely to impair the child's development, was both presumptively and ultimately unfair.[3] Coetzee J also held that the measure limited the child's FC s 28(2) right to have her best interests be considered paramount.[4] The Minister attempted to justify the limitation on three grounds: *(a)* younger learners tend to fail and create backlogs in the education system; *(b)* the state possessed no educationally sound manner to grant exemptions; and *(c)* the age requirement was based on sound educational principles.[5] Coetzee J first noted that the notice only applied to independent schools. He then ended the matter by finding that the Minister had failed to provide any evidence in support of his arguments.[6] The notice was therefore declared invalid.[7]

[1] See *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC).

[2] 2001 (8) BCLR 796 (T).

[3] Ibid at 800J-804D.

[4] Ibid at 804E-805B.

[5] Ibid at 805C-E.

[6] Ibid at 805E-806D.

[7] The Minister took the matter on appeal to the Constitutional Court. The Court dismissed the matter on the grounds that the Minister lacked the power under NEPA to issue such a notice. It did not, as a result, have to consider the issue of age discrimination. *Minister of Education v Harris* 2001 (4) SA 1297 (CC), 2001 (11) BCLR 1157 (CC). The South African Schools Act makes identical provision for public schools. This section has not yet been challenged. It appears from *Harris* that different set of concerns may apply to public schools. For example, a child's continued failure in a public school places a strain on the public purse — the costs of the failure of a child in an independent school is borne primarily by individual parents.

An earlier case, *Matukane & Others v Laerskool Potgietersrus*, straddles the boundary between direct and indirect discrimination. Laerskool Potgietersrus – a parallel-medium Afrikaans and English school – was a traditionally white school that catered primarily for Afrikaans learners and that had refused to admit black learners.[1] The disgruntled black parents took Laerskool Potgietersrus to court. The school denied that it had discriminated on the basis of race. It argued, firstly, that the school was full and, secondly, that it was striving to maintain the school's Afrikaans ethos. IC s 32 ostensibly protected a certain degree of cultural homogeneaity in public schools. The High Court was unimpressed. It held that, despite the respondent's protestations to the contrary, the evidence showed that the school could accommodate more learners and that black learners had been refused access while white students had been admitted. While ducking a finding that the discrimination had occurred on purely racial grounds — as opposed to potentially legitimate grounds of culture, language or ethnic social origin — Spoelstra J rejected the respondent's argument that the school would be unable to maintain its predominantly Afrikaans character by admitting a small number of English-speaking black students. At a minimum, *Matukane* must be read as standing for the proposition that cultural exclusion cannot be used as a proxy for racial discrimination.

A third form of exclusion arises where a school's code of conduct, although seemingly neutral, excludes or punishes members of particular communities. In *Antonie v Governing Body, Settlers High School & Others,* a learner had been found guilty of 'serious misconduct' for attending school with dreadlocks and a cap — essential parts of the practice of her Rastafarian religion.[2] In the High Court, Van Zyl J held that codes of conduct should not be assessed in a rigid manner, but rather in 'a spirit of mutual respect, reconciliation and tolerance. The mutual respect, in turn, must be directed at understanding and protecting, rather than rejecting and infringing, the inherent dignity, convictions and traditions of the offender.'[3] Van Zyl J also emphasized the need to read any code of conduct in light of a learner's FC s 16 rights to freedom of expression. The conduct was held to fall well short of the definition of 'serious misconduct', and the High Court set aside the School Governing Body's decision.[4]

In *KwaZulu-Natal MEC for Education v Pillay,* the Constitutional Court had to consider whether a Hindu learner should be entitled to wear a nose stud to school as an expression of her South Indian, Tamil and Hindu culture and as a a part of the practice her Hindu religion.[5] The school had refused to permit her to wear the stud on the grounds that the wearing of the stud was not a religious obligation. Ms Pillay instituted the action as a discrimination claim under the Promotion

[1] *Matukane & Others v Laerskool Potgietersrus* 1996 (2) SA 223 (T)('*Matukane*').
[2] 2002 (4) SA 738 (C).
[3] Ibid at para 17.
[4] Ibid at paras 18-20.
[5] [2007] ZACC 21 ('*Pillay*').

of Equality and Prevention of Unfair Discrimination Act.[1] The Constitutional Court found that the 'norm embodied by the Code is not neutral, but enforces mainstream and historically privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically excluded forms.'[2] Chief Justice Langa also found that both religious and cultural practices should be protected and that voluntary practices could be entitled to the same protection as obligatory practices. He emphasized the importance of 'reasonable accommodation': such accommodation meant that schools would have to take positive steps to accommodate learners whose cultural practices might not easily comply with a school's existing rules. While recognizing the importance of codes of conduct and the need to ensure discipline, Chief Justice Langa held that a mere appeal to uniformity would not be sufficient to refuse an exemption from a code. Instead, a school would have to show that a particular exemption was likely to cause a real disruption to school activities.[3] In this case, no such evidence was presented and the Court found that Sunali should have been granted an exemption.

(yy) Financial accessibility

No person should be denied a basic education because they or their parents cannot afford school fees. That much is uncontroversial.[4] Whether FC s 29(1)*(a)* demands that a basic education be free to all has generated heated debate.

At international law, some support exists for the proposition that primary education (which is not necessarily equivalent to 'basic education') must be free for all. Indeed, South Africa is bound by the Convention on the Rights of the Child ('CRC') to progressively '[m]ake primary education compulsory and available free to all'.[5] However, the fact that the drafters of FC s 29(1)*(a)* chose the words 'basic education' and not 'free primary education' in the Final Constitution suggests that they did not intend to limit the manner in which the government could go about ensuring a basic education for all.[6] While the Bill of Rights must

[1] Act 4 of 2000.

[2] *Pillay* (supra) at para 44.

[3] Ibid at para 114.

[4] See D Roithmayr 'Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education' (2003) 19 *SAJHR* 382, 394-395 (Roithmayr refers to *Grootboom* (supra) at para 36 and *TAC* (supra) at paras 70-71 as supporting the proposition that socio-economic rights must take account of differing financial circumstances and that the state has an obligation to provide housing and HIV drugs to those who cannot afford them. That seems to us to be an errant reading of *Grootboom* and *TAC*.)

[5] Ratified by South Africa on 16 June 1995.

[6] See B Fleisch & S Woolman 'On the Constitutionality of School Fees: A Reply to Roithmayr' (2004) 22(1) *Perspectives in Education* 111, n 10; Roithmayr (supra) at 396.

be interpreted in light of international law,[1] the Final Constitution's purposeful departure from a widely used international law formulation must be respected.[2] In sum, we would argue that while South Africa has an obligation under international law to gradually make primary education free for all, that international obligation does not automatically translate into a constitutional obligation to provide immediately free basic education.[3]

However, some commentators have argued that the current system for financing basic education violates both FC s 29(1)*(a)* and FC s 9. The basic structure of the system is as follows: South African public schools are separated into five quintiles based upon the economic wealth of the surrounding community. The top quintile receives the least funding from government while the bottom quintile receives the most. Schools are then entitled to charge fees agreed to by 51% or more of the learner's parents in order to make up for any shortfall and to provide for additional services. In order to avoid the exclusion of some poorer learners that necessarily follows from a fee scheme, the South African Schools Act[4] creates a fee exemption system. Schools that charge fees must grant full or partial exemptions to parents for whom the fees are more than a set percentage of their income. In theory, this system should comply with the obligation that education must be financially accessible to all: those who can afford to pay fees will pay and those who cannot will receive free, subsidised education.

Daria Roithmayr correctly notes that schools have not been granting exemptions to parents who cannot afford to pay, have discriminated against learners who do not pay fees and that many people are unwilling to apply for exemptions because of the embarrassment that accompanies an admission of poverty.[5] These flaws in implementation, she argues, mean that the fee-exemption system does not meet the government's obligation to provide a basic education for everyone.

Similar challenges have been brought in state courts in the United States to so-called 'fee waiver' systems. The argument is that such schemes constitute a violation of that state's guarantee of free education. For example, in *Hartzell v Connell*, parents were not required to pay fees for a basic education but were required to pay fees for their children's extra-curricular activities.[6] A fee waiver policy was instituted to ensure that the fees would not deny children the opportunity of participating in extra-curricular programmes. A parent challenged the 'fee waiver'

[1] FC s 39(1). For more on FC s 39(1) see H Strydom & K Hopkins 'International Law and International Agreements' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) §30.3.

[2] FC s 29(1)*(a)*'s obligation is immediate. The CRC obligation is progressively realisable. This difference suggests that the Final Constitution prefers that a basic education be made immediately available to all, by whatever means necessary, and that basic education ought not to be postponed in order to realise a free education for all.

[3] See §57.2*(a)*(ii)(bb) infra for further discussion of why 'basic education' in FC s 29(1) does not mean free or equal, and why solace might better be found in the commitment to equity and to historical redress in FC s 29(2).

[4] Act 84 of 1996.

[5] Roithmayr (supra).

[6] 679 P2d 35 (Cal 1984)('Hartzell').

scheme on the grounds that it violated the state's constitutional guarantee to free basic education. The court first held that extra-curricular activities did form part of the California State Constitution's free education guarantee.[1] Next, the court concluded that the imposition of fees for educational activities, even with a waiver policy, violated the free education guarantee:

> The free school guarantee reflects the people's judgement that a child's public education is too important to be left to the budgetary circumstances and decisions of individual families. It makes no distinction between needy and non-needy families. Individual families needy or not, may value education more or less depending upon conflicting budget priorities.[2]

Bird CJ further noted that the stigmatization that flows from categorising students as fee-paying and non-fee-paying and characterized both the waiver procedure and its outcomes as a 'degrading experience'.[3]

Hartzell's 'fee waiver schemes' are analogous to the South African fee exemption system in two significant ways. First, they both aim to assist 'needy' families who are unable to pay the required fees. Second, the decision to charge fees, and the amount of fees charged, are determined by school governing bodies made up of both parents and educators from the communities.

No one wants a second-class, a third-class or a *no-class* education. Roithmayr has argued, persuasively, that just such an inferior education is what many, perhaps the majority, of South African primary and secondary school students receive. The problem with Roithmayr's analysis — as Fleisch and Woolman point out — is that she attempts to redress ongoing problems of adequacy, access and equality through the elimination of school fees.[4] Fleisch and Woolman explain why, as an empirical matter, as well as a matter of policy and law, the

[1] *Hartzell* (supra) at 42 (The Court held: 'Such activities are 'generally recognized as a fundamental ingredient of the educational process.' They are [no] less fitted for the ultimate purpose of our public schools, to wit, the making of good citizens physically, mentally, and morally, than the study of algebra and Latin.')

[2] Ibid at 43.

[3] Ibid at 44. But see *Chandler v South Bend Community Corp* (1974) 312 NE 2d 915 (A child challenged the charging of rental for textbooks on the basis that it violated the state constitutional guarantee to free education. The Court however took the view the texts books did not fall within the ambit of the guarantee and accordingly did not have to deal with whether the waiver scheme was unconstitutional.)

[4] Let us assume, for the sake of argument, that Roithmayr's comparison of Pretoria Boys High School to a tree school in Limpopo demonstrates to the Justices that some impairment of human dignity, and perforce, equality, has taken place. In many equality cases, eliminating the apparent source of the offense would enhance human dignity. However, in this particular case, the elimination of the school fees would not improve the *per capita* spending on the tree school (indeed, given the dependency of the state on fees for cross-subsidisation it might well diminish it) and thus not improve the human dignity of the those learners. At the same time, the elimination of school fees and caps on spending could well result in the impairment of the dignity of all school-going children. All children would be funded at the same non-fee supplemented rate. Only the most cynical view of human nature would hold that one's dignity is repaired by witnessing the suffering of others. Whatever the apt description of this response, *schadenfreude* perhaps, it can hardly be equated with according a class of invidiously differentiated learners greater dignity. And yet, the equality argument intended to dismantle the school fee system entails just such a result.

elimination of the current fee scheme will not create the conditions for an adequate basic education or a meaningfully equal education. So while we must acknowledge the validity of some of the concerns raised by Roithmayr, as well as by the California Supreme Court in *Hartzell*, we remain unconvinced that these problems (of implementation) warrant a finding that a fee-exemption system is necessarily unconstitutional.[1]

First, the empirical evidence strongly suggests that school fees are in fact *not* the primary financial obstacle to education. Rather, other education-related costs – transport, uniforms, food, books and stationary — constitute far more serious barriers to access.[2] As a result, while school fees are an easily identifiable barrier

[1] Roithmayr and Fleish/Woolman's respective positions would, at first blush, seem entirely antithetical. However, the self-conscious irony of Roithmayr's article flows from her recognition that a system of user fees may well be necessary to ensure the progressive realisation of equality, quality and accessibility in our public schools. Fleisch and Woolman note this convergence in their respective positions and the extent to which these shared beliefs require retention of and modification to the existing user fee system in public schools. See Fleisch & Woolman 'On the Constitutionality of School Fees' (supra) at 119-120.

[2] See Fleisch & Woolman 'On the Constitutionality of School Fees' (supra) at 113-114. Fleisch and Woolman note that the Vuk'nyithate Research Consortium (VRC) findings relied on by Rothmayr actually support their claims. First, the VRC study of out-of-school children demonstrates that the reasons for a family's decision not to enrol children in school was not primarily related to fees, but was the result of a combination of factors including deep poverty, lack of family structure, stability and support, residential mobility, illness, learning barriers and temperament, and community violence. Second, school fees do not even rate a mention in the executive summary's discussion of the various barriers to school access and the various causes of absenteeism. Third, the study notes that even when fees are discussed by interviewees, fees as a barrier to access are invariably mentioned in conjunction with school uniforms. Fourth, the study identifies abject poverty as the primary cause of absenteeism. However, abject poverty takes a variety of forms and has a number of pernicious effects on school attendance. In short, while the study supports the conclusion that poverty impedes some children's access to a basic education, it clearly does not support the conflation of poverty, failure to pay school fees and restricted educational access. K Porteus, G Clacherty & L Mdiya 'Understanding Out-of-School Children and Out-of-Age Learners in the Context of Urban Poverty in South Africa' (2000) *Vuk'uyithathe Research Consortium*. The VRC study takes great care to unpack and rank the range of economic pressures attendant to school-going under conditions of abject poverty. For example, according to the Consortium study, if a child is not within walking distance of her school, transport costs are the highest cost of attending school borne by the household.' Ibid at 36. This statistic is especially significant given that out-of-school children in this urban area are far more likely than the in-school control group to live out of walking distance from a language appropriate school. The study then establishes that uniforms (including shoes) are the 'largest initial investment required for school entry.' For poor families with children out-of-school, the purchase of the school uniforms becomes *the* primary barrier to entry. Ibid at 36-43. And where do school fees rank as a barrier to entry? The VRC report concludes that 'in reality, (school fees) were less of a practical barrier than the school uniform. . . . They represent the 'last straw' when combined with other costs.' School fees for the children in the poorest quintile averaged R50 per year. The VRC study estimates that the annual cost of attending an out-of-walking distance school without a feeding programme is approximately R950. Even with respect to within-walking-distance schools, the lion share of school attendance costs takes the form of uniforms, shoes, stationery, books, school 'donations' and pressure to provide 'pocket money'. Thus, the VRC study strongly suggests that while abject poverty is a barrier to a basic education for 2% to 3% of the population, school fees do not appear to be a meaningful factor for access or attendance. Ibid at 43-44. According to Perry, the most current statistics available suggest that 92% of children in the age range 7 to 13 years are enrolled in *age appropriate* grades. However, a large number of 13 year olds remain in Grade 8. When the statistics are adjusted to account for this state of affairs, the actual proportion of children between 7 and 13 years attending school stands at 97%. See H Perry & F Arends 'Public Schooling between 1975-2000' in A Kraak (ed) *A Directory of Human Resource Development in South Africa* (2003).

to access to a small cohort of schools, it does not follow that school fees, rather than uniform costs or the scarcity of schools in rural areas, are to blame for the exclusion of many learners from many, if not most, public schools. Second, eliminating school fees will remove several billion rand from the public fiscus and diminish the capacity for multiple forms of cross-subsidization between privileged and impoverished communities.[1] Learners from poor and working class families can secure access to more privileged institutions through effective fee exemption. Fees enable the State to direct money away from schools in the top quintiles to schools in the bottom quintiles. Fees keep middle class parents from leaving the public school system: by remaining within the system, good school stock is preserved (through private funding) and learners from more privileged backgrounds remain committed, as citizens in training, to such democratic institutions as public schools.[2] Finally, the arguments against school fees are based

[1] Elimination of school fees would not only eliminate R3.5 billion from the public purse for public school education. It would mean that all schools would be entitled to the same minimum per learner expenditure — and whatever level of inadequacy that may entail. State expenditure on education will increase slightly over the next few years. Department of Finance *Review of the Financing, Resourcing and Costs of Education in Public Schools* (2003) 52. However, such growth will not offset the loss associated with the discontinuation of fees (8%). Department of Education *Intergovernmental Fiscal Review* (2003) 79.

Arguments about equality are invariably complicated by disputes about whether equality should be measured in terms of opportunity or outcome. Should equality in education be measured in money spent per learner or achievements per learner? Should equality in education be measured in terms of public monies spent per learner or in terms of public and private monies spent per learner? However, even analysts who make such distinctions — and acknowledge room for debate — offer problematic examples of equality and inequality. For example, Fiske and Ladd argue that 'if an educational system were reformed in such a way that more resources were provided for learners at the bottom, making those students better off in absolute terms, but at the same time even more resources were made available to schools at the top, the new system would be deemed even more inequitable than the old.' E Fiske & H Ladd 'Financing Schools in Post-apartheid South Africa: Initial Steps toward Fiscal Equity' Paper prepared for the International Conference on Education and Decentralisation: African Experiences and Comparative Analysis, Johannesburg, (10-14 June 2002)(On file with authors) 4. But this argument suggests that if the new system offered a meaningful education in terms of opportunity and outcome for the least well-off, but the old system offered none, the old system is to be preferred. That may fit some definition of equality, but one might reasonably ask whether one would want it. It seams clear that what strikes Fiske and Ladd as objectionable is that the new system reproduces basic patterns of inequality: that is, the wealthy remain wealthy and remain proportionally better off than the less well off. However, if equality is to be a meaningful concept, then it must take cognizance of improvements in opportunity and outcome which realise palpable differences in the lives of the less well off. The primary issue for those concerned with inegalitarian distributions should be whether citizens of unequal economic standing in a democracy will remain equals in so far as they engage one another as citizens. Fleisch & Woolman 'On the Constitutionality of School Fees' (supra) at 119.

[2] Two further policy considerations suggest the intrinsic value of a user fee system. Both are grounded in a commitment to participatory democracy. The first argument based on democracy focuses primarily on the integrity of the polity and the creation of a common set of referents. Public schools, through both curriculum and status, make South Africa their students' primary reference point for identity formation, and not, as with many private schools, England, Europe, North America or the Antipodes. The argument about needing to maintain white and/or wealthy families within the system in order to keep politically influential persons happy is a red herring. Public schools with fees *may* well make middle class black and white parents happy. However, the ultimate aim of user fees is not to reinscribe existing patterns of class disparity. Rather the current system, or a modified system, ensures that the vast majority of South African children continue to participate in public institutions and see themselves as part of the

almost entirely on problems of implementation and abuse by schools. In our view, the answer to these problems is, and has always been, the proper enforcement of the regulations and the elimination of fees for the poorest schools.

In 2005, government, while keeping the basic fee exemption system intact, made a few important changes. Under the new system, the government classifies each school as either a 'fee school' or a 'no-fee' school.[1] No-fee schools must be schools in the bottom two quintiles of schools. Fee schools are still entitled to charge fees. However, the schools must grant total exemptions to parents for whom the annual fee is 10% or more of their annual income. Partial exemptions are available to parents for whom the fee forms between 2% and 10% of the learner family's income.[2]

Despite these improvements, Faranaaz Veriava has charged that the new system still falls short of FC s 29(1)*(a)*'s obligations.[3] Indeed, it is possible that a proper evidentiary platform could be laid for a challenge to the fee exemption system. However, the evidentiary basis necessary to support a finding of unconstitutionality will have to show that such abuse is pervasive, that fees themselves (and not other education-related costs) are the actual barriers to access and that universal free education would result in improved access to a better education by a significant cohort of learners. Moreover, we think that any Brandeis brief challenging fees in toto must overcome the presupposition of SASA's drafters — and ourselves — that a well-calibrated fee system can be used to improve the education of learners from historically disadvantaged backgrounds.

larger political community. The second argument, as suggested to us by Danie Brand, advances the claim that the user fee system — in concert with a commitment to greater government funding — may 'further important principles of community engagement and interdependence'. D Brand 'Community Participation and User Fees' (Unpublished manuscript on file with authors). By promoting community engagement and parental responsibility, even a modified fee system may foster the kinds of changes in institutional culture that, as much as increased resources per learner, affect the quality of education. Indeed, Brand suggests that values critical to a democracy — participation, citizenship, cooperation, self-governance — can 'potentially be advanced by the user fee system not only within specific schools, but also across racial and class lines . . . if creative forms of cross-subsidisation can be implemented.' Ibid at 4. See also Fleisch & Woolman 'On the Constitutionality of School Fees' (supra) at 121.

[1] For a useful summary of both the old and new regulatory schemes, see F Veriava 'The Amended Legal Framework for School Fees and School Funding: A Boon or a Barrier?' (2007) 23 *SAJHR* 180.

[2] The new norms include other changes to improve the fee-exemption system to make it easier for poor learners to get exemption and more difficult for schools to discriminate against learners who do not pay fees: *(a)* schools are prohibited from charging anything other than a basic school fee subject to strict exemption criteria; *(b)* clear terms prohibit the more pernicious forms of discrimination such as denial of access to school, sport or cultural activities, refusing to provide reports, suspension and verbal or non-verbal abuse; *(c)* an onus is placed upon the School to prove it has implemented the regulations before instituting legal action against a parent; and *(d)* automatic exemptions are extended to parents who receive child care grants (whereas in the past the government encouraged parents to use the grants to pay school fees.) Veriava (supra) at 187.

[3] Veriava contends that the manner in which the schools are put into the appropriate quintile fails to take account of the fact that many poorer students travel to school in richer areas with fee-charging schools. Ibid at 188-189.

(zz) Physical accessibility

Physical accessibility requires that learners are in fact able to travel from their homes to schools. A 2000 study suggests that 'if a child is not within walking distance of her school, transport costs are the highest cost of attending school borne by the household.'[1]

(ccc) Acceptability

We often presume that education, no matter what its content, is an unalloyed good.[2] But that is not so. Education can just as easily be manipulated to perpetuate human rights abuses as it can to end them.[3] International law requires that education be 'directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.'[4] The Constitutional Court has reinforced the view that teaching children the value of human rights — and in particular the values of equality and diversity — is essential if they to become adults who fully participate in the governance of our society.[5]

While our courts will likely be loath to interfere with the judgment of educators who design school curricula, FC s 29(1)*(a)* could support a claim that what our children are being taught is either biased or blatantly wrong. For example, in the United States there has been significant debate over the teaching of intelligent design or evolution in public schools. In *Epperson v Arkansas*, the US Supreme Court overturned a state law that prohibited the teaching of evolution.[6] In *Edwards v Aguillard,* the US Supreme Court hewed to an even stricter

[1] Porteus, Clacherty & Mdiya (supra) at 44 as quoted in Fleisch & Woolman 'On the Constitutionality of School Fees' (supra) at 114.

[2] K Beiter *The Protection of the Right to Education by International Law* (2006) 493.

[3] Ibid at 493 (The author quotes an example of the Special Rapporteur of how schools in Rwanda were used to enforce theories of ethnic differences between Hutus and Tutsis and thus to promote mutual Hutu-Tutsi prejudices.) See also K Tomasevski *Education Denied* (2003) 17 (She gives the following historical examples of how education has been abused. In Nazi Germany a mathematics textbook contained the following example: 'The construction of a lunatic asylum costs 6 million DM. How many houses at 15,000 DM each could have been built for that amount?' During the USSR's invasion of Afghanistan, the US printed maths books for Afghani refugees. They included this question: 'If you have two dead Communists, and kill three more, how many dead Communists do you have?' Finally, in Tanzania during the 1970's, children were required to solve this problem: 'A freedom fighter fires a bullet into an enemy group consisting of 12 soldiers and 3 civilians and all equally exposed to the bullet. Assuming one person is hit by the bullet, find the probability that the person is *(a)* a soldier, *(b)* a civilian.')

[4] Art 26(2) of the Universal Declaration of Human Rights. See also Art 13(1) of the ICESCR; art 29(1)*(b)* of the Convention on the Rights of the Child; art 11(2)*(b)* of the African Charter on the Rights and Welfare of the Child.

[5] *Pillay* (supra) at para 104 ('Teaching the constitutional values of equality and diversity forms an important part of education.')

[6] 397 US 97 (1968).

line in finding unconstitutional a law that permitted evolution to be taught only in conjunction with creationism.[1] In *Edwards*, Brennan J stressed the

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.[2]

A similar situation occurred in post-World War II Japan. Textbooks often removed or softened confirmed reports of Japanese atrocities. A textbook author, Mr Saburo Ienaga, challenged the government's screening of text books and the censoring of some of his own works. The Japanese Supreme Court upheld the screening process, and thus the censorship, but stated that textbooks had to be accurate, neutral and fair as 'students do not have enough capability to criticise the content of class education and they can hardly choose a school or a teacher.'[3] In 1997, the Supreme Court partially upheld another claim by Mr Ienaga. Ienaga took issue with the state's deletion from a textbook of a description of Japan's biological experiments on 3000 people in northern China. The Court found that reliable evidence existed to substantiate the claim.[4]

The manner in which students are taught may also be contested in terms of 'acceptability'. Teachers must conduct themselves in a manner that respects the rights of their students. In *Ross v New Brunswick School District No 15*, a teacher who had published anti-Semitic pamphlets in his capacity as a private citizen, had, as a result, been given a non-teaching position.[5] The Canadian Supreme Court held that the decision to move the man to a non-teaching position was a justifiable limitation of his right to freedom of expression:

> Young children are especially vulnerable to the messages conveyed by their teachers. They are less likely to make an intellectual distinction between comments a teacher makes in the school and those the teacher makes outside the school. They are, therefore, more likely to feel threatened and isolated by a teacher who makes comments that denigrate personal characteristics of a group to which they belong. Furthermore, they are unlikely to distinguish between falsehoods and truth and more likely to accept derogatory views espoused by a teacher. The importance of ensuring an equal and discrimination free educational environment, and the perception of fairness and tolerance in the classroom are paramount in the education of young children. This helps foster self-respect and acceptance by others.[6]

'Acceptability' also requires that learners are not treated in a manner that violates their dignity. In South Africa, corporal punishment and initiation practices are

[1] 482 US 578 (1987).
[2] Ibid at 584.
[3] *Ienaga v Japan* No 1428 of 1986 (16 March 1993).
[4] *Ienaga v Japan* No 1119 of 1994 (29 August 1997).
[5] [1996] 1 SCR 825, 133 DLR (4th) 1.
[6] Ibid at para 82.

banned in all schools.[1] The ban on corporal punishment was the subject of a constitutional challenge in *Christian Education South Africa v Minister of Education*.[2] The applicants contended that the ban violated their FC s 15 and FC 31 rights to religious belief and religious practice because corporal punishment constituted a core tenet of their belief system. The *Christian Education* Court rejected the challenge in terms of the rights to dignity and to security of the person:

> The outlawing of physical punishment in the school . . . represented more than a pragmatic attempt to deal with disciplinary problems in a new way. It had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children.[3]

(ddd) Adaptability

Education must be 'flexible so that it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.'[4] Adaptation, like accessibility, speaks to the content of the curriculum and the means of deploying that content. The advent, and ubiquity, of computer technology probably requires that learners leave school properly equipped for the modern social and work environment.

Adaptation also means that a curriculum and a school environment must adapt to accommodate diverse people. This obligation dovetails with the right to non-discrimination. The accommodation of disabled learners is a paradigmatic example of the requirement of adaptability.[5] The constitutional obligation to ensure that that differently abled individuals receive comparable education was specifically recognised by Chief Justice Langa in *Pillay*:

> Disabled people are often unable to access or participate in public or private life because the means to do so are designed for able-bodied people. The result is that disabled people can, without any positive action, easily be pushed to the margins of society.[6]

Although some South African schools cater for disabled learners, they are in the minority and are unevenly spread across the provinces.[7]

[1] SSA s 10; SSA s 10A.
[2] 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC).
[3] Ibid at para 50.
[4] General Comment 13 'The Right to Education (art 13)' UN Doc E/C.12/1999/10 (21st Session, 1999) at para 6*(d)*.
[5] See Beiter (supra) at 507.
[6] *Pillay* (supra) at para 74.
[7] B Bekink & M Bekink 'Children with Disabilities and the Right to Education: A Call for Action' (2005) *Stellenbosch Law Review* 125, 138-139, 144 (Bekink and Bekink argue that it is both inadequate legislation and implementation that led to this state of affairs, but that recent changes in policy should improve the situation if properly implemented.) See also Department of Education *White Paper: Special Needs Education: Building an Inclusive Education and Training System* (July 2001) 16 (280 000 disabled learners were out of school in 2001.)

(iii) *Adult Basic Education ('ABE')*

The right to an adult basic education receives the same degree and the same kind of constitutional solicitude afforded all learners in terms of the right to basic education. Thus, while the right to ABE might not, as a technical or a textual matter have been necessary,[1] the express inclusion of ABE in the Final Constitution emphasizes the importance of redressing the past inequalities of South African education under apartheid. Indeed, a delay in the realization of the right will undermine one of the main reasons the drafters specifically mentioned it in the Final Constitution.

The right to ABE is not solely reactive. Rule identifies three further purposes: *(a)* to improve personal and community development; *(b)* to foster democracy; and *(c)* to develop sustainable livelihoods.[2] Rule criticizes current efforts because they appear to view ABE as an instrumental good designed solely to achieve economic growth.[3] From a constitutional perspective, the instrumental good is only of passing concern. ABE must be provided because it promotes dignity, equality, community, and democracy: in other words, ABE, like all forms of education, is intended to realize ensure the basic law's commitment to a society based upon liberty, equality and fraternity.

The Adult Basic Education and Training Act ('ABETA')[4] defines ABE[5] as all learning or training programmes for people over 16 up to the qualitative equivalent end of compulsory schooling.[6] As noted in the above discussion

[1] R Kriel 'Education' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS 5, 1999) 38-4 (Kriel points out, firstly, that the World Declaration on Education for All simply states that all people, including adults, are entitled to a basic education without mentioning ABE separately. Secondly, ABE was not included in the Interim Constitution, but was still government policy.)

[2] P Rule '"The Time is Burning": The Right of Adults to Basic Education in South Africa' (2006) 39 *Journal of Education* 113, 122-123.

[3] Ibid at 120.

[4] Act 52 of 2000.

[5] The Act refers to 'adult basic education *and training*'. FC s 29(1)*(b)* refers only to adult basic education. Rule notes that this change reflects 'an official preoccupation with linking Education and Training'. Rule (supra) at 115. For the purposes of the constitutional right, there does not seem to be any meaningful difference between training and education. ABETA itself does not draw a distinction between the two. For the purposes of this chapter, we do not attempt to distinguish between 'education' and 'training'.

[6] The Act refers to 'framework level 1 as contemplated in the South African Qualifications Authority Act, 1995'. Level 1 is defined as:

> A learning programme leading to the award of a qualification or unit standards at NQF level 1 shall develop learners who demonstrate with regard to:
>
> *(a)* applied competence—
>
> (i) a general knowledge of one or more areas or fields of study, in addition to the fundamental areas of study;
>
> (ii) an understanding of the context within which the learner operates;
>
> (iii) an ability to use key common tools and instruments;
>
> (iv) sound listening, speaking, reading and writing skills;
>
> (v) basic numeracy skills including an understanding of the symbolic systems;
>
> (vi) an ability to recognise and solve problems within a familiar, well-defined context;

of basic education, these terms should be defined by substantive outcomes and not by formal criteria. Properly understood, ABE is basic education for adults and the definition of ABE simply uses the expected substantive outcome of compulsory schooling as a readily identifiable benchmark.[1] Indeed, it is only a benchmark: no reason exists to deny ABE to adults who received nine years of schooling under apartheid when the quality of that education likely failed to meet the currently accepted criteria for a basic education.[2]

The nature of the right to ABE is much the same as the right to a basic education: it is immediate, direct and does not depend on the availability of resources. The unqualified nature of the right raises innumerable questions about delivery in a country where, according to the most recent census, 8.6 million people over the age of 20 (34.9%) are functionally illiterate.[3] The difficulties in realizing the right must not dilute its content: genuine difficulties in delivery must be addressed — as a constitutional matter – through a combination of limitations analysis under FC s 36 and the crafting of innovative remedies in terms of FC s 38 and FC s 172.

In an attempt to meet these challenges, the legislature enacted ABETA. ABETA establishes a scheme of both public and private centres for ABE. Public centres are funded by the government and may, if other facilities cannot be found, make reasonable use of school facilities. The Act, however, contains three troublesome features. First, s 18, while requiring that centres do not discriminate in their admissions procedures, permits the Head of Department to refuse an application without the provision of reasons for refusal. Secondly, s 23 mentions that centres may raise funding through monies 'payable by learners for adult basic education and training provided by the centre'. However, the Act provides no regulation with regard to those fees or any possibility for an exemption. The legislative framework would seem to contemplate financial exclusions

(vii) an ability to recall, collect and organise given information clearly and accurately; and
(viii) an ability to report information clearly and accurately in spoken and written form;

(b) autonomy of learning—

(i) a capacity to apply themselves to a well-defined task under direct supervision;
(ii) an ability to sequence and schedule learning tasks;
(iii) an ability to access and use a range of learning resources; and
(iv) an ability to work as part of a group.

[1] On increasing the breadth of adult education, see S Walters 'Adult Learning Within Lifelong Learning: A Different Lens, A Different Light' (2006) 39 *Journal of Education* 7 (Walters contends that the focus on adult education improperly limits the scope of life-long adult learning. She may be correct that, as a matter of policy, we should not focus unduly on basic education but concentrate equally on lifelong learning. However, as a matter of constitutional interpretation, it seems that 'adult basic education' should be given the same meaning as 'basic education'.)

[2] Rule (supra) at 115.

[3] Statistics South Africa *Census 2001: Primary Tables South Africa: Census '96 and 2001 Compared* (2004) 37. The definition of functionally illiterate is the combination of those who have no schooling and those who did not complete primary schooling. See J Aitchison & A Harley 'South African Illiteracy Statistics and the Case of the Magically Growing Number of Literacy and ABET Learners' (2006) 39 *Journal of Education* 89, 90.

— and thus an obvious prima facie limitation on the right to an adult basic education. Finally, ABETA criminalizes the offering of non-ABETA sanctioned ABE.[1] While these penalties may serve as a guarantee of quality, they have the potential (1) to discourage the provision of ABE, and (2) by requiring supervision by a state bureaucracy, to make ABE more expensive to provide.[2]

The Act faces serious barriers to effective implementation. ABE is primarily funded by provincial education departments. In 2002, provincial departments allocated a mere 0.8% of their budgets to ABE. In 2004/5 that figure dropped to 0.5%.[3] In addition, the number of Public Adult Learning Centres and the number of NGO's offering ABE has actually decreased over recent years.[4]

A further statistic indicates that the political support for ABE is more a matter of rhetoric than reality. South Africa has ratified the Dakar Framework of Action. The Framework would require South Africans to decrease levels of adult illiteracy by 50% by 2015. That commitment would require the education of some 7 million South African adults. At present, only 260 000 adults are enrolled in ABE programmes. The government would have to more than double that figure to 575 000 to have any hope of meeting that target.[5]

ABE is further undermined by its conflation of basic education with skills training for the workplace.[6] Firstly, skills-training does not necessarily provide the same outcomes as a basic education. Secondly, skills-training tends to focus on the employed. It thereby fails to connect adult illiteracy with large-scale structural unemployment (and abject poverty).[7]

(iv) *Looking in the wrong place for 'free and equal' public schools*

FC s 29(1)'s 'basic education' requires adequate, accessible, acceptable and adaptable public schools. Contrary to what many commentators would like to believe, 'basic' does not mean 'free', nor does it even mean 'equal'. Had the drafters intended basic education to carry such a burden, the text would surely reflect that choice. However, an explanation exists for the absence of such language in FC s 29(1). First, FC s 29(2) commits the state to the provision of public school education in the language of the learner's choice (where reasonably practicable) in an environment committed to equity and to historical redress. Second, FC s 9(2) and FC s 9(3) commits the state to the eradication of inequality on a host of listed (and unlisted) grounds.

[1] ABETA s 38.
[2] See J Aitchison 'Struggle and Compromise: A History of South African Adult Education from 1960-2001' (2003) 29 *Journal of Education* 125, 161-162.
[3] RA Wildeman *Reviewing Provincial Education Budgets 2002* (2002) 16.
[4] Rule (supra) at 117 and 121.
[5] Ibid at 124.
[6] Ibid at 121.
[7] Ibid at 117-118.

(b) FC s 29(1)*(b)*: Further Education

The Department of Education has identified the following three roles of further education in 'a knowledge-driven world':

> Human resource development: the mobilisation of human talent and potential through lifelong learning to contribute to the social, economic, cultural and intellectual life of a rapidly changing society.
>
> High-level skills training: the training and provision of personpower to strengthen this country's enterprises, services and infrastructure. This requires the development of professionals and knowledge workers with globally equivalent skills, but who are socially responsible and conscious of their role in contributing to the national development effort and social transformation.
>
> Production, acquisition and application of new knowledge: national growth and competitiveness is dependent on continuous technological improvement and innovation, driven by a well-organised, vibrant research and development system which integrates the research and training capacity of higher education with the needs of industry and of social reconstruction.[1]

The differences in purpose between a basic education and a higher education should be kept in mind as we consider the constitutional obligations that a right to further education imposes upon the State.

(i) *Nature of the right*

Unlike the strong positive right enshrined in FC s 29(1)*(a)*, FC s 29(1)*(b)* provides only a 'weak' or 'qualified' positive right. It reads:

> Everyone has the right … to further education, which the state, through reasonable measures, must make progressively available and accessible.

The right to further education is quite clearly qualified by the terms 'reasonable measures'[2] and 'progressively available and accessible'. The Constitutional Court has, for better or worse,[3] made 'reasonableness' the bedrock of its socio-economic rights jurisprudence and has begun to give significant content to the term. Generally, the Court requires a comprehensive and coordinated plan, and

[1] Department of Education *Education White Paper 3: A Programme for the Transformation of Higher Education* (1997) 12.

[2] FC s 29's wording is slightly different from that of FC ss 26 and 27. FC ss 26 and 27 employ the phrase 'reasonable *legislative and other* measures'. However, the catch-all 'other' in FC ss 26 and 27 seems to eliminate any meaningful difference between the two formulations.

[3] For a sustained critique of the reasonableness approach, see D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007). See also S Liebenberg 'Socio-Economic Rights: Evaluating Reasonableness Review and Minimum Core Obligations' in S Woolman & M Bishop (eds) *Constitutional Conversations: Proceedings of the Constitutional Law of South Africa Conference and Public Lecture Series* (forthcoming 2008).

that the plan be genuinely capable of implementation.[1] 'Progressive realisation' requires the state to 'move as expeditiously and effectively as possible towards [fulfilment of the right]. Moreover, any deliberately retrogressive measures … would require the most careful consideration and would need to be fully justified'.[2] The State is thus obliged to ensure that access to further education does not decrease and that it is improved with all deliberate speed. Finally, although it is not specifically phrased as an 'access right', the qualification that the State need only make the right 'progressively available and accessible' suggests that it should be interpreted much like the access rights found in FC s 26 and FC s 27.

However, FC s 29(1)*(b)* does not, unlike the rights in FC ss 26 and 27, include the phrase 'available resources'. While some commentators have argued that the absence of this phrase should be largely ignored,[3] we prefer a reading that gives the difference in wording some real bite. Veriava and Coomans contend that a lack of resources alone will not justify a failure to make further education 'available and accessible' and that the state *must* make the necessary funds available. At the very least, Veriava and Coomans argue, it would entail that

> where a state policy or programme is challenged in terms of this right, the criteria for assessing the reasonableness of the programme, could, in addition to those set out in *Grootboom*, also entail an evaluation of the sufficiency of funding available for the policy or programme's implementation.[4]

(ii) *Content of the right*

(aa) Defining 'Further Education'

The term 'further education' is not used in international law. International law refers instead to 'secondary education' and 'higher education'.[5] In South Africa,

[1] Sandra Liebenberg identifies five basic elements of a reasonable programme mentioned by the Court in *Grootboom*:
(a) it must be comprehensive and co-ordinated;
(b) it must be capable of realising the right;
(c) both the conception and implementation must be reasonable;
(d) it must be balanced and flexible and cater for the short, medium and long terms;
(e) it must be capable of responding to urgent needs.
S Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) 33-34.

[2] Committee on Economic, Social and Cultural Rights General Comment 3 'The Nature of States Parties Obligations (art 2)' U.N. Doc. E/1991/23 (5th Session, 1990) at para 9. The Constitutional Court accepted the meaning assigned to the phrase by the General Comment in *Grootboom* (supra) at para 45. For more on 'progressive realisation', see Liebenberg 'Interpretation' (supra) at §33.5*(g)*.

[3] D Davis 'Education' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law* (2nd Edition, 2005) 24-5–24-6.

[4] F Veriava & F Coomans 'The Right to Education' in D Brand (ed) *Socio-economic Rights in South Africa* (2003) 74.

[5] See, for example, ICESCR art 13(2); San Salvador Protocol to the Inter-American Convention for Human Rights art 13(3); Convention on the Rights of the Child art 28(1); African Convention on the Rights and Welfare of the Child art 11(3).

the Further Education and Training Colleges Act distinguishes between 'general education' (compulsory schooling), 'further education' (everything up to matriculation) and 'higher education' (everything after matriculation). However, that distinction does not make sense in the context of FC s 29(1). FC s 29(1) makes mention only of 'basic' and 'further' education. The only sensible interpretation of 'further education' in terms of FC s 29(1) is that it denotes all education after basic education.[1] It seems unnecessary and unwise to provide any further — or more restrictive — definition of the term. It should cover any and all forms of education that do not fall under 'basic education' or 'adult basic education'. Such education would encompass technical and vocational training as well as traditional tertiary education. It should embrace secondary education and pre-primary education if such schooling is not captured by the extension of the term 'basic education'.[2]

(bb) Negative dimension of the right

Only two cases directly address FC s 29(1)*(b)*.

In *Minister of Home Affairs & Another v Watchenuka*, the Supreme Court of Appeal held that an absolute ban on study by asylum seekers, including further education, constituted an unjustifiable limitation of FC s 29(1)*(b)*.[3] However, the Supreme Court of Appeal did endorse a procedure that would require asylum-seekers to apply for permission to study.

In *Thukwane v Minister of Correctional Services*, the applicant was a prisoner attempting to complete his law degree from prison.[4] He argued that he needed access to a computer and the internet to complete his studies. Van Loggerenberg AJ recognized that even this slight interference with the applicant's studies limited his FC s 29(1)*(b)* right.[5] However, the High Court held that the 'prison is a place of incarceration, not an internet café, private training institution, university campus, university hostel or the like'.[6] The potential security risks of permitting the applicant to access the internet combined with the fact that the ban would last only as long as the applicant was incarcerated — and only precluded him from courses that required internet access — easily justified the limitation.[7]

Thukwane stands for two important propositions. First, prisoners have the right to further education. Second, any interference with access to further education, no matter how slight, limits FC s 29(1)*(b)*. The Constitutional Court has made it clear

[1] Veriava & Coomans (supra) at 74-75.

[2] While the term 'further' would seem to apply only to education that is more advanced than a basic education, that need not be so. 'Further' can also be read, as suggested here, as simply meaning any education that is not 'basic'. The advantage of this reading is that it would require the state to gradually introduce early childhood learning. The alternative interpretation would mean that, despite its proven benefits, early childhood education would not raise any constitutional obligations.

[3] 2004 (4) SA 326 (SCA).

[4] 2003 (1) SA 51 (T).

[5] Ibid at para 44 read with para 24.

[6] Ibid at para 39.

[7] Ibid at para 44.

that prisoners do not lose their rights at the prison door.[1] With regard to the second proposition, any limitation of this 'negative right' must take place in terms of FC s 36(1). In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*, the Constiutional Court reached a similar conclusion regarding the limitation of the negative right found in FC s 26(1). Mokgoro J held that 'any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in s 26(1)'.[2] Limitations of negative rights can, therefore, only be justified in terms of FC s 36(1).

One of the more interesting issues to arise under FC s 29(1)*(b)*'s 'right to further education' involves affirmative action admission policies. In *Motala & Another v University of Natal*, the applicant challenged the admission procedures of the University's medical school on the basis that it treated Black applicants better than Indian applicants.[3] She argued both that the measure constituted unfair discrimination and that that it impaired her right under IC s 32*(a)* to 'equal access to educational institutions'. Hurt J dismissed both claims. He held that although both groups had been mistreated under apartheid, black South Africans had suffered considerably greater disadvantage than Indian South Africans. Granting black South Africans preferential treatment did not, therefore, fall afoul of the prohibition on unfair discrimination.[4] More importantly, for present purposes, Hurt J held that although IC s 32*(a)* applied to institutions of higher learning, IC s 32*(a)* had to be read — in the instant matter — with IC s 8(3)'s promotion and protection of measures designed to rectify historical wrongs.[5]

Questions of affirmative action policies in universities have not generated the same degree of heated debate in South Africa as they have in the United States. However, the continued existence of ethnic tensions in South Africa and the competition for limited university spots will likely lead to a challenge similar to *Motala*. In our view, the basic claim was correctly disposed of by Hurt J. A similar analysis should flow from the provisions of the Final Constitution. A policy which denies a person access to further education because of their race or their ethnicity would undoubtedly limit FC s 29(1)*(b)*. However, that limitation could be justified in terms of FC s 36(1) *if it was properly designed to redress past discrimination.* And that is the acid test. The question is not whether affirmative admissions policies are acceptable. FC s 9(2) disposes of that question.[6] The question is, and will continue to be, what types of policies are constitutionally permissible? Can a university have a strict quota system? Can it make race a decisive factor? Or must race be only one of many factors?

[1] *August & Another v Electoral Commission & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at paras 18-19.

[2] *Jaftha v Schoeman & Others; van Rooyen v Stoltz & Others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) at para 34.

[3] 1995 (3) BCLR 374 (D).

[4] Ibid at 383B-D.

[5] Ibid at 383E-F.

[6] See *Minister of Finance & Another v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC).

The US Supreme Court has adopted the requirement that an affirmative action policy must be 'narrowly tailored' to achieve the outcome of redress and must grant only the minimum necessary preference to disadvantaged candidates. The Court famously rejected strict quotas in *Bakke*.[1] In two recent cases decided together, *Gratz v Bollinger*[2] and *Grutter v Bollinger*,[3] the Court gave further content to what would and would not be permissible. Both cases concerned affirmative action policies at the University of Michigan. In *Gratz*, the Court invalidated the School's undergraduate admission program. The program assigned up to 150 points to each student: 20 points were awarded if the applicant was Black, Latino or Native American. The *Gratz* Court found that the system gave dispositive weight to an individual's race and did not permit individualized review. By contrast, the law school's admissions policy at issue in *Grutter* made race a relevant factor. However, rather than adopt a mechanical algorithm, the policy required that each applicant to be evaluated individually. The Court upheld that program.

The different history and constitutional framework of the United States suggests caution when using their precedents to understand uniquely South African concerns. However, a respectful engagement with US jurisprudence does serve to highlight a range of possible responses to affirmative action or restitutionary programmes. That said, FC s 9(2)'s explicit constitutional endorsement of measures to address past inequalities should lead to far greater leniency from our courts when evaluating affirmative action admissions policies. The political,[4] legislative[5] and constitutional demand for transformation will mean that *Motala*-like programmes, which would undoubtedly have been rejected in the US, will survive constitutional scrutiny under the Final Constitution.[6]

[1] *Regents of the University of California v Bakke* 438 US 265 (1978).

[2] 539 US 244 (2003).

[3] 539 US 306 (2003).

[4] See Department of Education *White Paper 3* (supra) at 18 ('The principle of equity requires fair opportunities both to enter higher education programmes and to succeed in them. Applying the principle of equity implies, on the one hand, a critical identification of existing inequalities which are the product of policies, structures and practices based on racial, gender, disability and other forms of discrimination or disadvantage, and on the other *a programme of transformation with a view to redress. Such transformation involves not only abolishing all existing forms of unjust differentiation, but also measures of empowerment,* including financial support to bring about equal opportunity for individuals and institutions.' (our emphasis).)

[5] See the preambles of the National Student Financial Aid Scheme Act 56 of 1999 and the Higher Education Act 101 of 1997 ('it is desirable to redress past discrimination and ensure representivity and equal access') and s 39(1) of the Higher Education Act ('The Minister must, after consulting the CHE and with the concurrence of the Minister of Finance, determine the policy on the funding of public higher education, *which must include appropriate measures for the redress of past inequalities*, and publish such policy by notice in the Gazette.' (our emphasis))

[6] See C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 35.

(cc) Positive dimension of the right

The positive dimension of the right to a further education does not mean that everybody may study whatever course wherever they please. Indeed, at international law, the right is limited by the phrase 'equally accessible on the basis of capacity'. And it is worth taking note of the international community's construction of this phrase, before we turn back to our own. As Beiter notes, 'capacity' possesses two distinct denotations.[1] First, it denotes an individual applicant's intellectual capacity.[2] Second, it denotes the quantitative ability of educational institutions to accommodate students.[3] While the text of FC s 29(1)*(b)* does not mention capacity, we believe that the drafters would have assumed both forms of capacity — as internal demarcations of the right — before granting this positive entitlement.

Institutions of further learning need not admit (grant access to) students who lack the requisite intellectual capacity to complete a course of study. To require institutions to do so will prevent them from producing the kind of graduate who would serve the three ends of further education described above. At the same time, selection criteria based solely on previous school results would have the undesirable consequence of barring access to a large segment of the population who have historically received and continue to receive inferior schooling. And thus schools, and especially universities, in South Africa must take into account — in some instances — the limited capacity of some of its matriculants during the admissions process. Universities could, and do, base entrance on tests that 'assess the potential of students whose schooling results do not necessarily qualify them for university entrance but who nevertheless through these tests demonstrate an ability to succeed at university.'[4] They could also admit students for a probation period or create bridging courses to help disadvantaged students reach levels necessary for the meaningful use of further education.

Institutional capacity creates a related set of problems. No authority exists for the proposition that further education should be free. It should, rather, be affordable for all those who wish to pursue it.[5] That may not be immediately possible, but the State must make reasonable steps to ensure that further education becomes gradually more accessible. One example of government action to achieve that goal is the establishment of the National Student Financial Aid

[1] K Beiter *The Protection of the Right to Education by International Law* (2006) 524-525.

[2] According to Gerbert, the following methods would be acceptable methods to ascertain a student's capacity: *(a)* successful completion of prior education; *(b)* entrance exams; *(c)* occupational experience; *(d)* an interview; *(e)* a period of probation; *(f)* or a combination of the above. P Gerbert *Das Recht auf Bildung nach Art. 13 des UNO-Paktes über wirtschaftliche, soziale und kulturelle Rechte und seine Auswrkungen aus das schweizerische Bildungswesen* (1996) 461 cited in Beiter (supra) at 524.

[3] Beiter notes that the state may only restrict student numbers for acceptable reasons. It may not, for example, pander to the needs of the labour market. Beiter (supra) at 524.

[4] Veriava & Coomans (supra) at 75.

[5] Ibid at 76.

Scheme (NSFAS). The scheme provides loans and bursaries to students.[1] The NSFAS is funded primarily by government and the repayment of previous loans.[2] The criteria for eligibility for a loan are simply academic potential and financial need.[3] In 2005, it assisted 106 852 students,[4] 92.7% of whom were Black.[5] The total value of the awards was R1.2 billion.[6] Today's totals reflect a marked increase from 1994: only R70 million was awarded to just 25 574 students.[7] Of course, the NSFAS is not the only way that government funds further education. Government funds public universities and technikons directly,[8] provides money for research and research facilities[9] and facilitates further skills training in the workplace.[10] However, the greatest benefit of the student aid scheme is that, like the fee-exemption policy, it reserves benefits for the students most in need of aid, and through loan repayments provides an additional source of revenue.

57.3 LANGUAGE RIGHTS IN PUBLIC SCHOOLS[11]

> Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account: *(a)* equity; *(b)* practicability; and *(c)* the need to redress the results of past racially discriminatory laws and practices.

(a) Historical background

Conflict around the issue of language informs just about every stage of this Republic's history.[12] According to Giliomee, the language issue began to smoulder

[1] Act 56 of 1999.

[2] NSFAS *Where Does the Money Come From?* available at https://www.nsfas.org.za/web/view/donors/Donor/home (accessed on 22 October 2007)(74.42% came from Government and 18.25% from loan repayments.)

[3] NSFAS *Student Guide to Funding* available at https://www.nsfas.org.za/resources/109/NSFAS_universityBrochure011.pdf (accessed on 22 October 2007) 2.

[4] NSFAS *2006 Annual Report* (2006) available at https://www.nsfas.org.za/resources/169/NSFASAnnualReport2006.pdf (accessed on 22 October 2007) 10 (fig 2).

[5] Ibid at 11 (fig 3).

[6] Ibid at 11.

[7] NSFAS *NSFAS Fact Sheet* available at https://www.nsfas.org.za/web/view/general/statistics/loanstatistics (accessed on 22 October 2007).

[8] Higher Education Act 101 of 1997 s 38G(1).

[9] National Research Foundation Act 23 of 1998.

[10] Skills Development Act 97 of 1998.

[11] Much of this section is drawn from B Fleisch and S Woolman 'On the Constitutionality of Single Medium Public Schools' (2007) 23 *SAJHR* 34.

[12] For the general contours of this history, see LM Thompson *A History of South Africa* (2001); W Beinart *Twentieth Century South Africa.* (2001). For an understanding of the links between culture, language and racism, see S Dubow *Scientific Racism in Modern South Africa* (1995).

in the ashes of the South African War when Britain introduced English as the sole official language in the ex-republics. While the principle of linguistic equality between English and Dutch was enshrined in the Union Constitution, the prevailing assumption amongst English speakers was that English would, ultimately, prevail. Indeed, in the 1920s, big business and the civil service were dominated by English speakers. While new appointments to the civil service were required to be bilingual, Afrikaners were vastly underrepresented. The reason: few Afrikaner children finished the seventh year of school required for state employment.[1]

The political pressure for single medium education surfaced during the rise of Afrikaner nationalism in the late 1920s and early 1930s. The demands began when the Dutch Reformed Church made the connection between white poverty and education, and particularly the failure of poor Afrikaner children to master the dual mediums of instruction: English and Dutch. The Church and other members of civil society placed increasing pressure on provincial governments to make Afrikaans, rather than Dutch, the medium of instruction for Afrikaans-speaking children. At the same time as they sought to supplant Dutch with Afrikaans, they pressed for single medium Afrikaans-speaking institutions. Between 1932 and 1958, single medium Afrikaans schools rose, as a proportion of all white schools, from 28 percent to 62 percent.[2] Over time, Afrikaner nationalist teachers, committed to a very particular cultural, linguistic, religious and political project, came to form the core of single medium Afrikaans school staffs.

Prior to the Second World War, South Africa possessed a complex network of language practices and an equally complex arrangement of single medium, dual medium and parallel medium institutions.[3] This surface complexity masked the increasingly strong shift, amongst the Afrikaner majority, towards a preference for the 'purity' of single medium schools. After the outbreak of the Second World War, the gloves on education policy came off.[4] The United Party articulated a vision of a unified *white* South Africa that could be achieved through a policy of compulsory bilingual education. The National Party hit the stumps on a campaign that emphasized a comprehensive, and exclusive, vision of Afrikaner cultural, linguistic, religious and political life. For the National Party, however, this ostensibly 'authentic' vision was primarily a vehicle for achieving political hegemony. Malherbe observes:

[1] See H Giliomee 'The Rise and Possible Demise of Afrikaans as Public Language' (2004) 10(1) *Nationalism and Ethnic Politics* 25.

[2] See EG Malherbe *Education in South Africa: Volume 2* (1977).

[3] The diversity of language medium types and the various effects of these language practices was the pretext for EG Malherbe's famous study: *The Bilingual School: A Study of Bilingualism in South Africa* (1946).

[4] For an account of the conflict over bilingual schooling, see B Fleisch 'Social Scientists as Policy Makers: EG Malherbe and the National Bureau for Social and Educational Research, 1929-1943' (1995) 21 (3) *Journal of Southern African Studies* 349.

> The United Party maintained that in a bilingual country like South Africa it was wrong to segregate Afrikaans and English-speaking children living in the same community. By keeping the children together in the same school they would learn to appreciate each other as persons by playing on the same school teams, and thus lay the foundation for a common loyalty as South Africans. . . . Against this the National Party contended that bilingualism was not the aim of education . . . [T]he nationalists had no scruples about artificially segregating Afrikaans-speaking children in order to foster exclusive Afrikaner nationalism . . . Both parties wanted to use the education system to achieve their political ends — the one to unite, the other to divide.[1]

Despite the fact that both political parties clearly understood that language policy was a powerful mechanism for both galvanizing their political bases and an effective instrument for social engineering, one essential difference between the two parties remained. The National Party, and Afrikaner nationalists generally, experienced a recurring anxiety that 'one culture would be swamped by the other.'[2] The National Party exploited this anxiety — and the related fantasy that single medium public schools would eliminate the source of the anxiety — to win the 1948 elections.

Apartheid ushered in a new set of linguistic, cultural and political imperatives. No objective was more important, perhaps, than the use of the state machinery to privilege Afrikaans in Afrikaner communities and to place Afrikaans on an equal footing with its historical rival, English.

The logic of apartheid led, almost inexorably, to the Eiselen Commission Report on Native Education.[3] The Eiselen Report made a strong case for compulsory *African* language instruction — for *African* students — up to and through high school. While facially consistent with UNESCO's best linguistic practices, the policy was opposed by missionaries and local African 'pro-English' elites. The National Party presupposed that African 'language' communities had a vision of themselves similar to the comprehensive vision of the good life offered by the Afrikaner, Christian, nationalist community.[4] The foundation for such a

[1] EG Malherbe *Education in South Africa* (supra) at 39.

[2] While originally articulated in the 1930s, the theme has retained its currency. Rassie Malherbe has expressed this anxiety as follows:

> Although in principle, dual and parallel medium institutions or instruction may, under suitable circumstances, be the appropriate option to fulfill the right to education in one's preferred language, it has the shortcoming that diminishing numbers of a particular language group puts tremendous pressure on that language and may in practice lead to an institution eventually becoming single medium. . . . [I]n parallel and dual medium schools the English component is numerically becoming progressively larger and that in relation, the other language component of such schools is becoming smaller and marginalized. Many parallel medium schools will eventually become completely English medium.

R Malherbe *Submission to President Nelson Mandela on Behalf of a Group of Afrikaans Organizations* (15 May 1996).

[3] Republic of South Africa 'Report of the Commission on Native Education: Chair: WNN Eiselen' (1951). See also LE Meyer 'A Report on South Africa's Black Universities' (1959) 4(3) *Issue: A Journal of Opinion of the African Studies Association* 12.

[4] For a fuller account of the issues of language in Bantu Education, particularly the work of WNN Eiselen as one of the key architects of apartheid, see C Kros *Economic, Poltical and Intellectual Origins of Bantu Education, 1926-1951* (Unpublished PhD thesis, 1996, University of the Witwatersrand).

community for true believers and politicians alike was the 'single language school'.

To impose this vision of the good life and its requirement of single medium schools upon a largely resistant populace required social engineering on an unprecedented scale.[1] Despite the logistical and political hurdles, the National Party had, by the 1970s, achieved its aim. Most primary school learners were initially educated in their mother tongue. Few children were schooled in the 'wrong' language. Although African learners switched to English, and in some instances Afrikaans, at the end of primary school, these learners were still confined, as far as possible, to 'ethnic' schools in the townships and the homelands.[2]

In 1976, apartheid in education began to fall apart. The resistance did not flow from the rejection of single medium schooling. What African learners rejected was the imposition of both English and Afrikaans. The engineers of apartheid and Christian National Education had overplayed their hand.[3]

And yet the belief that single medium schooling would serve as the glue that bound the unique linguistic, cultural and religious features of the Afrikaner people together remained very much alive. It survived the Multi-Party Negotiating Forum ('MPNF') at Kempton Park. Interim Constitution s 32 continued to allow communities 'to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.'[4] Negotiations in the Constitutional Assembly around the issue of single medium schools under the Final Constitution were rather protracted and led to a deadlock between the ANC and the NP.[5]

[1] See M Horrell, *A Decade of Bantu Education* (1964); P Kallaway (ed) *Apartheid and Education* (1984). See also K Hartshorne *Crisis and Challenge: Black Education 1910-1990*. (1992) 186-217; J Hyslop *The Classroom Struggle; Policy and Resistance in South Africa: 1940-1990* (1999).

[2] See Hartshorne (supra) at 203-207.

[3] For a contemporary account, see J Kane-Berman *Soweto: Black Revolt, White Reaction* (1979). See also C MacDonald *Crossing the Threshold to Standard 3* (1991)(Macdonald notes that within African schools, from 1977 onward, the debate shifted away from Afrikaans as a medium of instruction, and focused on English as the medium of instruction. By the mid 1980s, most schools in the Department of Education and Training used mother-tongue instruction up until the end of Standard 2 (now Grade 4) and then switched to English as a medium of instruction. This practice became the focus of the HSRC Threshold Project in the late 1980s. This project identified the source of the high failure rate and subsequent drop-out problem as the abrupt shift from mother-tongue to English between Standards 2 and 3. Initially in some homelands, and then later on in some township schools in the 1990s, this shift to English started earlier and earlier. Within Afrikanerdom, the period was marked by a shift, in some quarters, from using the State as a means for preserving cultural identify to a set of policies that linked the community's survival to a new, and not necessarily, conducive discourse of minority rights.)

[4] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

[5] On the history of the negotiations for the Interim Constitution, see LM Du Plessis 'A Background to Drafting the Chapter on Fundamental Rights' in B de Villiers (ed) *Birth of a Constitution* (1994) 89; H Corder 'Towards a South African Constitution' (1994) 57 *Modern Law Review* 491; H Corder & L Du Plessis *Understanding South Africa's Transitional Bill of Rights* (1995). On the history of the negotiations for the Final Constitution, see G Heald *Learning Amongst Enemies: A Phenomenological Study of the South African Constitution Negotiations from 1985 to 1998* (Unpublished PhD thesis, 2007, on file with authors); I Currie & J De Waal (eds) *The Bill of Rights Handbook* (5th Edition, 2005) 1, 23; H Klug, J Swanepoel & S Woolman 'Constitutional History' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2008) Chapter 2.

The ANC, which viewed single medium Afrikaans schools as vehicles for continued racial exclusion and the perpetuation of minority privilege, refused to sanction any reference to single medium schools in the Final Constitution.[1] The NP, which viewed single medium schools as the last vestige of public power in the new dispensation, repeatedly pushed for their inclusion. The ANC, though assured of the passage of a national referendum on its version of the Final Constitution should constitutional negotiations fail, believed that the good will derived from some compromise on this issue, and a Final Constitution supported by all the major parties, outweighed the benefits to be secured from an outright victory on single medium schools. The NP knew that it could not win either in the Constitutional Assembly or at the polls. It therefore engaged in the kind of political brinkmanship that would satisfy its constituents, but ultimately capitulated when the ANC agreed to make some mention of single medium schools in the Final Constitution. Here – again – is the result of that compromise — FC s 29(2):

> Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account — *(a)* equity; *(b)* practicability; and *(c)* the need to redress the results of past racially discriminatory laws and practices.

Does this passage secure — as some authors argue — continued state support for all single medium public schools, and, in particular, single medium Afrikaans public schools? Or does it — as other authors contend — eliminate any express entitlement for single medium public schools except where such schools offer redress for communities whose mother tongues were repressed under English and Afrikaner rule? FC s 29(2) does not support either of these two readings. It rather raises the question of the extent to which the particularist demands of linguistic communities can be accommodated in our public schools.[2] FC s 29(2) also draws

[1] Then ANC spokesperson on education, Blade Nzimande wrote: 'The issue of single medium institutions is a mere red herring. What the NP wants the constitution to guarantee is the right to have exclusive white Afrikaner schools, not single medium institutions.' B Nzimande 'Address to the Constitutional Assembly — 7 May 1996', available at www.polity.co.za, (accessed on 1 December 2006). Evidence to support this supposition has emerged in recent work on school financing. Motala has recently shown that Afrikaans single medium schools continue to be financially advantaged in terms of state expenditure even after the end of apartheid. S Motala *Education Transformation in South Africa: Finance Equity Reform in Schooling after 1998*. (Unpublished PhD thesis, 2005, University of the Witwatersrand).

[2] For more on the history of Afrikaans as a medium of instruction in our public schools, see P Plüddemann, D Braam, M October & Z Wababa 'Dual-Medium and Parallel-Medium Schooling in the Western Cape: From Default to Design' *PRAESA — Occasional Papers No. 17* (2004); W Visser 'Coming to Terms with the Past and the Present: Afrikaner Experience of and Reaction to the "New" South Africa' Seminar Lecture presented at The Centre of African Studies, University of Copenhagen (30 September 2004).

our attention, in the form of its sister clause FC s 29(3), to the space that the Final Constitution creates for the expression of the particularist claims of linguistic, cultural and religious communities and the ability of those claims to be (better) accommodated in independent schools.[1]

There exists, after some twelve years of constitutional jurisprudence, a sizeable body of case law that engages issues of language, culture and religion and their place in public schools and independent schools. The primary driver of this body of education litigation is the State's and the Afrikaans-speaking community's concern about the continued existence of single medium Afrikaans public schools. Put another way, both the State and the Afrikaans-speaking community want to know the extent to which the Final Constitution vouchsafes the right of school governing bodies to determine and to retain their language policies in the face of opposition from provincial government and/or small groups of learners and their parents who wish to change the language policies in these institutions.

This section of the chapter attempts to answer the following question: does South Africa's legal regime guarantee existing public single medium Afrikaans institutions — or any single medium school — the right to retain their language policies? It grounds the answer to that question in a particular reading of the history and the language of those constitutional provisions designed to promote and to protect religious, linguistic and cultural communities. This reading demonstrates that our constitutional democratic order affords religious, linguistic and cultural communities significant latitude when it comes to the establishment and the maintenance of private or independent schools designed to further particular comprehensive visions of the good life and offers such communities far less solace when it come to the establishment and the maintenance of single medium public schools.

However, this section takes a fairly hard-nosed view of the law that governs admissions policies and language policies in public schools. After mapping the most critical bodies of law — the Final Constitution, the South African Schools Act ('SASA'), the Promotion of Equality and Prevention of Unfair Discrimination Act ('PEPUDA') and our courts' nascent jurisprudence — on to the admissions policies and language policies of public schools, this section arrives at the following conclusions. First, some real constitutional space remains for single medium public schools – and, therefore, for single medium Afrikaans public schools. Second, the hard truth is this: the constitutional and statutory entitlement to such schools — under current historical conditions — is relatively weak. A recent line of cases in the High Court and the Supreme Court of Appeal suggests that 'language and culture' will not be so readily permitted to determine the admissions policies of a public school and that single-medium Afrikaans schools are fighting

[1] S Woolman 'Defending Discrimination: On the Constitutionality of Independent Schools that Promote a Particular, If Not Comprehensive, Vision of the Good Life' (2007) 18 *Stellenbosch Law Review* 31.

a rear-guard, and potentially losing, battle with the State over transformation.[1] Third, the upshot of this legal analysis is that communities which wish to preserve their linguistic, cultural and religious ways of being in the world will find themselves on much more solid legal ground when they create independent schools — in terms of FC s 29(3) — designed to further their comprehensive visions of the good. Afrikaans-speaking communities, like any other linguistic, cultural or religious community, have no special status in our liberal democratic order and must be able to create independent schools if they wish to be assured of retaining their cultural and linguistic integrity.

(b) Drafting history of the language provisions in the Interim Constitution and the Final Constitution

In this section, we examine the drafting history of the Interim Constitution and the Final Constitution and some of the jurisprudence generated during the brief period between these two founding documents. This history goes some distance towards explaining why political group rights — and rights to public institutions such as single medium Afrikaans primary and secondary schools — were never enshrined in our basic law.

For starters, before the velvet revolution of 1994, most political claims based on culture, language, ethnicity and religion were greeted with suspicion, and, sometimes, outright hostility by the majority of South Africans.[2] From the passive resistance of Ghandi, through worker movements of the early 20th century to the Freedom Charter, the preferred language of liberation was that of human rights discourse. The liberation movement's utilization of rights discourse reflected a considered rhetorical response to romantic assertions of white, Christian, English and Afrikaner supremacy.

The African National Congress ('ANC') universalist orientation provides a partial explanation for the failure of most group-based claims during CODESA and the MPNF. The ANC rejected every attempt to entrench what it termed

[1] This battle is not only being lost in the courts. Students themselves are choosing English medium (or at least parallel-medium public) schools over single-medium Afrikaans public schools. Given that each secondary school draws on one or two primary schools, the fact that there are approximately 300 single medium Afrikaans secondary schools means that the number of single medium Afrikaans schools (primary, secondary and combined) falls somewhere between 600 and 850. Even the higher figure means that single medium Afrikaans public schools constitute only 2% of the estimated 30 000 public schools in the country. A colourable claim can be made that such a low figure warrants some degree of judicial solicitude. On the other hand, no number, large or small, can be used to justify overt discrimination or radical inequity in the distribution of such an important public good as education.

[2] See A Sachs 'Opening Remarks' *KAS Multiculturalism Seminar* (1999) available at www.kas.org.za/Publications/SeminarReports/Multiculturalism/SACHS1.pdf (accessed on 1 April 2005) 1; H Giliomee 'The Majority, Minorities and Ex-nationalities in South Africa and the Proposed Cultural Commission' *KAS Multiculturalism Seminar* (1999) available at www.kas.org.za/Publications/Seminar Reports/Multiculturalism/GILIOMEE (accessed on 6 January 2005) 37.

'racial group rights'.[1] For Afrikaner nationalists, political power would have to be traded for a negotiated settlement. That peace, and the retention of economic privilege by the white minority, would be vouchsafed by a firm ANC commitment to a justiciable Bill of Rights.[2] However, the Interim Constitution's and Final Constitution's rejection of group political rights was at least partially compensated by the 'notable levels of constitutional significance' to which cultural, linguistic and religious matters were elevated. The Final Constitution contains six different provisions concerned with culture, eight with language and four with religion.[3] The Final Constitution, as a liberal political document, carves out the 'private' space within which self-supporting cultural, linguistic and religious formations might flourish.[4]

[1] See S Woolman 'Community Rights: Religion, Language and Culture' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 58; S Woolman & J Soweto-Aullo 'Commission for the Promotion and the Protection of the Rights of Religious, Linguistic and Cultural Communities' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24F.

[2] The problem of accommodating, and protecting, ethnic, religious and linguistic communities in a democratic state dominated the political debates and the lengthy constitutional negotiations that preceded the enactment of the Interim Constitution. Between 1986 and 1991, the South Africa Law Commission investigated various mechanisms for the protection of group rights. See South Africa Law Commission *Group and Human Rights, Working Paper 25, Project 58* (1989). To this end, it solicited submissions from white right-wing intellectuals on the right of minorities to seek recognition as distinct societies and to resist assimilation into a common national culture. See South Africa Law Commission *Group and Human Rights, Interim Report* (1991). Notwithstanding the contentiousness of white minority concerns, the language and cultural rights provision of the Interim Constitution's Bill of Rights secured virtually universal consent from Multi-Party Negotiating Forum participants. See LM Du Plessis 'A Background to Drafting the Chapter on Fundamental Rights' in B de Villiers (ed) *Birth of a Constitution* (1994) 89, 93. IC s 31 attracted near universal assent because, though it echoed art 27 of the International Covenant on Civil and Political Rights, it avoided art 27's protection of discrete sets of rights-holders. Both the ANC and the NP eschewed more substantial minority rights protection.

However, community rights were not entirely anathema to the ANC or to the NP. The NP believed that white minority interests would be better protected at the level of distribution of governmental power, rather than by judicial mechanisms. The National Party proposed only non-discrimination guarantees and individual rights to speak a language or to participate in 'cultural life'. See Government of the Republic of South Africa *Proposals on a Charter of Fundamental Rights* (2 February 1993) arts 6 and 34. We have already noted the degree to which the ANC was ill-disposed towards recognition of community, minority, collective or group rights. The most the ANC would concede were rights to form 'cultural bodies', to religious freedom, and, perhaps, to require that the State act positively to further the development of the eleven South African languages to be treated as official languages. See African National Congress *A Bill of Rights for a New South Africa: Preliminary Revised Version* (1992) arts 5(3)-(7). The ANC insisted that minority rights *qua* static, non-demographically representative levels of political representation were unacceptable. The Bill of Rights constitutes the ANC's compromise between unfettered majority rule on the one hand, and structural guarantees for privileged, but now 'vulnerable', political minorities.

[3] Provisions of the Final Constitution dealing with culture, language and religion include, but are not limited to: *(a)* FC ss 9, 30, 31, 235 (culture); *(b)* FC ss 6, 29, 30, 31, 35, 235 (language); and *(c)* FC ss 9, 15, 30, 31 (religion).

[4] We can offer a three-fold, and relatively uncontroversial, explanation of the basic law's protection of such private space. First, every liberal democratic constitution is committed to zones of privacy, autonomy, self-governance and self-actualization that lie somewhere beyond the reach of the State. Second, the fragility of the new South African government married to a deeply religious South African citizenry obliged the government to cede authority over the manner in which 'private' or 'independent'

Justice Kriegler, in *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* ('*Gauteng School Education Bill*')(1996), offers a succinct account of the basis for and the extent of the basic law's protection of this private space in the educational domain.[1] IC s 32 *(c)*, (soon thereafter, FC s 29(3)), and then extant national and provincial education legislation and subordinate legislation, collectively constitute

> a bulwark against the swamping of any minority's common culture, language or religion. For as long as a minority actually guards its common heritage, for so long will it be its inalienable right to establish educational institutions for the preservation of its culture, language or religion . . . . There are, however, two important qualifications. Firstly, . . . there must be no discrimination on the ground of race . . . . A common culture, language or religion having racism as an essential element has no constitutional claim to the establishment of separate educational institutions. The Constitution protects diversity, not racial discrimination. Secondly, . . . [the Constitution] . . . keeps the door open for those for whom the State's educational institutions are considered inadequate as far as common culture, language or religion is concerned. They are at liberty harmoniously to preserve the heritage of their fathers for their children. But there is a price, namely that such a population group will have to dig into its own pocket.[2]

Justice Kriegler offers no comment on, and certainly no support for, the contention that communities bound by common culture, language or religion have some entitlement to state support. Quite the opposite. While sympathetic to the belief that communities bound by common culture, language or religion are an important source of meaning for many South Africans, Justice Kriegler seems to suggest that the post-apartheid State will no longer support public institutions that privilege one way of being in the world over another.

schools were permitted to serve rather narrow sectarian interests — even where the State could predict that privileged communities would use religion as a proxy for class so as to re-inscribe existing patterns of privilege. Third, the long history of school autonomy produced a reality, on the ground, that was simply impossible to ignore. The politically expedient motivations behind Afrikaner nationalism had ultimately created a genuine community — with a particular religious, cultural and linguistic vision of the good — that sought to further the ends of the community through single medium schools. But this last conclusion is, of course, where the rubber meets the road. The extent to which the Final Constitution protects 'public' space and provides 'public' goods in the service of particularist ends is the question at issue. Liberal constitutional theory, with its dual commitments to 'equality of respect' (individual dignity) and 'equality of recognition' (pluralism), is invariably at odds with itself over claims made on state resources for the particular ends of a specific cultural, linguistic or religious community. See S Woolman 'Community Rights: Language, Culture and Religion' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa: Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 58. See also C Taylor *The Ethics of Authenticity* (1991).

[1] *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC)('*Gauteng School Education Bill*').

[2] Ibid at paras 39-42.

But the truth about the existence of continued public support within public institutions for particularistic, comprehensive visions of the good in our post-apartheid constitutional order is more complex, and more nuanced than one quote from a single judgment allows. Here, at least, is one place where the Constitutional Court's jurisprudence is not so radically under-theorized that it leaves us with no useful guidance as to how the State ought to engage the religious, cultural and linguistic communities that make the State up and how those communities ought to engage one another.

For example, in *Fourie*, the Constitutional Court found that the State could not continue to enforce common-law rules and statutory provisions that prevented same-sex life partners from entering civilly-sanctioned marriages and that denied same-sex life partners the status, the responsibilities and the duties enjoyed by opposite-sex life partners.[1] State-sponsored discrimination would not be tolerated. The *Fourie* Court did not make the same demands of religious denominations or religious officials. It held that the Final Constitution had nothing to say about religious prohibitions on gay and lesbian marriage and could not be read to require religious officials to consecrate a marriage between members of a same-sex life partnership. So long as religious communities do not distribute public goods — or are not the sole distributors of such goods — the State, on the *Fourie* Court's account, cannot justifiably coerce a religious community into altering its basic beliefs and practices.[2] But therein lies the rub for advocates of single

[1] *Minister of Home Affairs v Fourie (Doctors For Life International & Others*, Amici Curiae*)*; *Lesbian & Gay Equality Project & Others v Minister of Home Affairs* 2006 (1) SA 524 (CC), 2006 (3) BCLR 354(CC)('*Fourie*'). See also *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA), 2005 (3) BCLR 241 (SCA).

[2] The *Fourie* Court wrote:

> [The amici's] arguments raise important issues concerning the relationship foreshadowed by the Constitution between the sacred and the secular. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. . . . They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of a people's temper and culture, and for many believers a significant part of their way of life. . . . In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. . . . The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom. . . . The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.

Fourie (supra) at paras 90-96. The *Fourie* Court commits itself to *five* propositions that are fundamental for associational rights generally, and for religious, cultural and linguistic community rights in particular. First, religious, cultural and linguistic communities are a critical source of meaning for the majority of South Africans. Second, religious, cultural and linguistic communities create institutions that support the material, intellectual, ethical and spiritual well-being of many South Africans. Third, religious, cultural and linguistic associations, as part of civil society, play an essential role in mediating the relationship between the State and its citizens. Fourth, while religious, cultural and linguistic associations are entitled to articulate — and make manifest through action — their 'intensely held world views', they may *not* do so

medium public schools. Public schools *are* public, not private, entities, and the state has an overriding obligation to ensure equal treatment of *all* of its citizens by *all* of its state officials (including teachers and principals). Single medium public schools that engage in exclusive and discriminatory linguistic admissions practices would appear to constitute, on their face, a departure from the requirements of the rights to equality and to dignity.[1]

Is there space within our liberal constitutional framework for *public* institutions that service the (exclusive and discriminatory) ends of religious, cultural and linguistic communities with relatively comprehensive visions of the good? A significant number of constitutional structures and justiciable rights in the Final Constitution, as well as our Constitutional Court's gloss on the basic law, support the proposition that such space exists.

For example, the Commission for the Promotion and the Protection of the Rights of Cultural, Religious and Linguistic Communities ('CRLC') does not merely regulate disputes between the state and various communities or resolve conflicts between communities themselves. The CRLC is charged with the active promotion of such communities though the creation of cultural councils. Moreover, it possesses a clear mandate to build a constitutional democracy predicated on ethnic diversity and value pluralism.[2]

FC s 15(2) offers another clear example of state accommodation of comprehensive visions of the good within existing state structures. FC s 15(2) reads: 'Religious observances may be conducted at state or state aided institutions provided that *(a)* those observances follow rules made by the appropriate public authorities; *(b)* they are conducted on an equitable basis; and *(c)* attendance at them is free and voluntary.' Assume one religion represents all learners in a public school: the public school is well within its rights to hold religious observances. Assume learners from several different religions attend a given public school: the public school may legitimately observe multiple religious rituals for its different

in a manner that *unfairly* discriminates against other members of South African society. Fifth, although the 'intensely held world views' and practices of various religious, cultural and linguistic associations must, by necessity, exclude other members of South African society from some forms of membership and of participation, such exclusion does necessarily constitute unfair discrimination. Indeed, the *Fourie* Court's decision makes it patently clear that to the extent that exclusionary practices are designed to further the legitimate constitutional ends of religious, cultural and linguistic associations, and do not have as their aim the denial of access to essential primary goods, then our constitution's express recognition of religious, cultural and linguistic pluralism commits us to a range of practices that the Constitutional Court will deem fair discrimination. The refusal of some religious officials to consecrate same-sex life partnerships as marriages under religious law is but one form of *fair* discrimination.

[1] See S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36. See also N Haysom 'Dignity' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 123.

[2] Woolman & Soweto-Aullo 'CRLC' (supra).

constituencies. In either case, public space is being used to advance the ends of specific religious communities.[1]

The same must be said of the extent to which our constitutional order takes customary law and traditional leaders seriously. Traditional leaders have an entire chapter of the Final Constitution and a significant amount of normal legislation devoted to the exercise of their customary authority within a constitutional democracy. And here, it is not a matter of two systems operating in parallel or the traditional within the constitutional.[2] Traditional leaders often exercise direct political authority over their constituents — and it is often the case that constituents turn to such leaders when municipal or provincial authorities fail to deliver services or resolve disputes. The traditional leaders exercise public power in public spaces.

The Final Constitution also places customary law on an equal footing with legislation, subordinate legislation, regulation and common law. FC s 39(2) reads: 'When interpreting any legislation, and when developing the common law or customary, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' FC s 39(2) says nothing about two bodies of law — one public and one private. Indeed, as the *Pharmaceutical Manufacturers* Court famously put it: 'There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.'[3] The Constitutional Court has mediated conflicts between individual traditional interests and community traditional interests governed by both traditional bodies of law and statutory bodies of law as if there is but one system of law shared by multiple groups, associations and social formations. In *Bhe v Magistrate, Khayelitsha & Others*, the Constitutional Court found that the customary law rule of male primogeniture — and several statutory provisions that reinforced the rule — impaired the dignity of and unfairly discriminated against the deceased's two female children because the rule and the other impugned provisions prevented the children from inheriting the deceased's estate.[4] However, it is the manner in which the *Bhe* Court negotiates two different kinds of claim for equal respect — from within the traditional community and from the perspective of western constitutional norms — that is most instructive for our current purposes. The *Bhe* Court characterizes the customary law of succession in terms that validate its spirit without necessitating that the Court be beholden to its letter. By having

[1] See P Farlam 'Freedom of Religion, Conscience, Thought & Belief' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, Original Service, December 2003) Chapter 41. See also I Currie & J De Waal (eds) *The Bill of Rights Handbook* (5th Edition, 2005) 336.

[2] See TW Bennett & C Murray 'Traditional Leaders' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 26.

[3] *Ex parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 44.

[4] *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('*Bhe*').

shown that the spirit of succession lies in its commitment to family cohesion, that the traditional family no longer coheres as it once did, and that the 'distorted' rules of customary law as frozen in statute and case law that 'emphasizes … patriarchal features and minimises its communitarian ones,' the *Bhe* Court closes the gap between constitutional imperative and customary obligation.[1] Had customary law been permitted to develop in an 'active and dynamic manner,' — and not manipulated or perverted by apartheid — it would have already reflected the *Bhe* Court's conclusion that 'the exclusion of women from inheritance on the grounds of gender is a clear violation of … [FC s] 9(3).'[2] Had customary law not been allowed to ossify, traditional communities would have noted how male primogeniture entrenched 'past patterns of disadvantage among a vulnerable group' and endorsed the *Bhe* Court's re-working of customary understandings of the competence 'to own and administer property' in a manner that vindicates a woman's right to dignity under FC s 10.[3] The *Bhe* Court is able, therefore, to assert that traditional communities have conceptions of dignity worth protecting without being obliged to endorse a rule that quite clearly offends the dignity interests of many women and female children within those communities.[4] And so, again, there are not two bodies of law — one public, one private. The force of all law flows from one body of law: the basic, the constitutional.

This brief constitutional history of community rights — and especially the rights of linguistic communities — captures the terrain upon which schools — public and private — based upon a particular comprehensive vision of the good can operate. No iron wall exists between the public and the private, the sacred and the profane, in South African politics. That said, the Final Constitution's active encouragement of diversity and pluralism in the public realm does not diminish its equally aggressive commitment to the rooting out of discriminatory practices. As a result, the ability of communities to maintain institutions that rely upon exclusionary admissions or membership practices, and still receive state support, is, as a constitutional matter, quite limited. The egalitarian commitments of our basic law also suggest that community-based institutions that rely upon exclusionary practices, but which do not receive a penny of state support, must likewise ensure that they do not offend constitutional and statutory norms designed to promote the dignity of all South Africans.

[1] *Bhe* (supra) at para 89.
[2] Ibid at para 83.
[3] Ibid at para 84.
[4] Judge Hlophe employs a similar disabling strategy in *Mabuza. Mabuza v Mbatha* 2003 (4) SA 218 (C), 2003 (7) BCLR 743 (C). He recognizes the supremacy of the Final Constitution at the same time as he asserts that the protean nature of customary law should enable it to conform, as necessary, to the dictates of the Bill of Rights. His nuanced assessment of the role of *ukumekeza* reconfigures siSwati marriage conventions in a manner that *(a)* refuses to allow *ukumekeza* to be used by the groom's family as a means of control over the bride and *(b)* consciously places the husband and wife on an equal footing with respect to subsequent determinations of whether a valid marriage under siSwati customary law has taken place. See S Woolman & M Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 64.

(c) Legal framework for admissions policies and language policies in public schools

As we noted at the conclusion of the last section, the public space afforded for the advancement of sectarian interests — be they religious, linguistic or cultural — is quite limited. The importance of education as a public good in the modern nation state — for instrumental reasons associated with the future success of learners in the market or for intrinsic reasons that turn on every republic's need for citizens capable of making informed and just political decisions — means that the use of public school space for sectarian ends is even more tightly circumscribed. Thus, while independent schools benefit from FC s 29(3)'s clear commitment to the creation of schools that further the ends of particular linguistic, cultural or religious communities — and permit exclusionary practices intended to further those ends — *no* public school is granted such autonomy.[1]

(i) *Language rights and the Final Constitution*

Earlier on, we noted that the Constitutional Court's (and other commentators') gloss on IC s 32*(c)* was quite generous. Recall that IC s 32*(c)* reads, in relevant part: 'educational institutions based on a common culture, language or religion' can be established, 'provided that there shall be no discrimination on the ground of race.' Justice Kriegler, writing for the Court in *Gauteng School Education Bill*, characterized IC s 32's entitlements as follows:

> [the Constitution] keeps the door open for those for whom the State's educational institutions are considered inadequate as far as common culture, language or religion is concerned. They are at liberty harmoniously to preserve the heritage of their fathers for their children. But there is a price, namely that such a population group will have to dig into its own pocket.[2]

Again our liberal democratic Constitution permits communities to establish institutions — such as schools — designed to further their preferred way of being in the world. However, there is no concomitant commitment made by the Interim Constitution to state funding for such 'parochial' schools. As Matthew Chaskalson points out

> The placing of a positive obligation on the state to fund cultural and religious schools is not commonplace in comparative constitutional and public international law. Had this been the purpose of IC s 32*(c)*, one might have expected it to have been expressed in unambiguous language. This is certainly what one finds in the rew constitutions which do oblige the state to funds school based upon a common culture. Thus s 23 of the Canadian Constitution confers under subsection (1) a right on English and French speaking minority populations of any province to receive primary and secondary school instruction in their own language and then states categorically:

[1] See S Woolman 'Defending Discrimination: On the Constitutionality of Independent Schools that Promote a Particular, If Not Comprehensive, Vision of the Good Life' (2007) 18 *Stellenbosch Law Review* 31.

[2] *Gauteng School Education Bill* (supra) at para 42.

> "(3) The rights of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or the French minority population of a province . . . *(b)* includes, where the number of those children so warrants, the right to have them receive that instruction in minority educational facilities provided out of public funds.
>
> . . .The absence in [IC] s 32*(c)* of any explicit provision for state funding of schools based upon a common language, religion, or culture therefore suggests that there is no constitutional obligation on the state to provide such funding.[1]

Chaskalson does note, however, that his findings are limited to the text of IC s 32*(c)*.

FC s 29 is both more and less expansive with respect to the latitude afforded parents of learners in both independent schools and private schools. FC s 29(3) reads: 'Everyone has the right to establish and maintain, at their own expense, independent educational institutions that a. do not discriminate on the basis of race; b. are registered with the state; and c. maintain standards that are not inferior to standards at comparable public educational institutions.' FC s 29(3) is on all fours, it would seem, with the gloss placed upon IC 32*(c)* by Justice Kriegler in *Gauteng Education Bill* and Advocate Chaskalson in his memorandum.

The real action, in so far as public schools are concerned, revolves around FC s 29(2). FC s 29(2) is a complex provision. It reads:

> Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account: a. equity; b. practicability; and c. the need to redress the results of past racially discriminatory laws and practices.

It is possible to identify two interpretive poles for this passage. At one end of the spectrum, some commentators contend that FC s 29(2) eliminates any express entitlement for single medium public schools except where such schools offer redress for communities whose mother tongues were repressed under English and Afrikaner rule. At the other end of the spectrum, other commentators contend that FC s 29(2) vouchsafes continued state support for all single medium public schools, and, in particular, single medium Afrikaans schools.

FC s 29(2) does not support either of these two readings.

Let's begin with the uncompromisingly egalitarian position defended by Blade Nzimande.[2] Nzimande construes FC s 29(2)'s second sentence requirements as matters of administration and policy, and not constitutional law. Though FC s 29(2)'s second sentence may provide a rather weak test for justification, it

[1] M Chaskalson 'Constitutional Issues Relevant to School Ownership, Governance and Finance' *Durban Education Conference Paper* (1995, on file with authors).

[2] See B Nzimande 'Address to the Constitutional Assembly — 7 May 1996' available at www.polity.co.za (accessed on 1 December 2006).

does not turn the choice of medium of instruction into a matter of mere policy preference. Moreover, FC s 29(2) does not, as Advocate Chaskalson suggested of IC 32, possess the structure of an affirmative action provision. FC s 9(2) provides the perfect example of a constitutional norm whose aim is restitutionary justice.[1] Whereas FC s 9(2) differentiates between groups that have been historically disadvantaged and those that have not, FC s 29(2) does not do so. Single medium public schools could be approved for any preferred language of instruction so long as instruction in a preferred language is reasonably practicable and the single medium public school, as the best means of accommodating such instruction, satisfies the three criteria of equity, practicability and redress. As we have consistently been at pains to point out, the Final Constitution, as a liberal political document, does not view all social, legal and economic arrangements through the prism of equality and reparations.

Commentators such as Rassie Malherbe, occupying the opposite end of the ideological spectrum, contend that FC s 29(2) provides a strong guarantee — a rebuttable presumption — that linguistic communities can create and maintain publicly funded single medium schools.[2] With respect, Mahlerbe misreads FC s 29(2). He collapses, repeatedly, the distinction between the individual right to instruction in a mother tongue or preferred language (where practicable) and the obligation imposed upon the state to consider a range of options as to how to offer such instruction. Malherbe privileges single medium schools.[3] FC s 29(2) does not. It mentions single medium public schools as only one in a range of alternatives that the state has an obligation to consider. Moreover, any option considered by the State for delivering mother-tongue instruction — *one* of which is single medium schooling — must satisfy, to some degree, the three criteria of equity, practicablity and historical redress. Malherbe characterizes the three FC s 29(2)*(a)-(c)* criteria as mere factors to be considered in some global proportionality assessment. This characterization of the three criteria is far too weak. For a single medium public school to be preferred to another reasonably practicable institutional arrangement — say dual medium instruction or parallel medium instruction — its advocates must demonstrate that a single medium public school is more likely to advance or to satisfy the three criteria. Malherbe further claims that because the Final Constitution specifically refers to 'single medium institutions' that 'whenever they [single medium institutions] are found to be the most effective way to fulfill the right to education in one's preferred language,

[1] See, for example, *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC).

[2] See R Malherbe 'The Constitutional Framework for Pursuing Equal Opportunities in Education'. (2004) 22(3) *Perspectives in Education* 9 ('Constitutional Framework'); R Malherbe 'A Fresh Start I: Education Rights in South Africa' (2000) 4(1) *European Journal for Education Law and Policy* 49. Malherbe's positions on FC s 29(2) are not new. He articulates virtually the same point of view in R Malherbe 'Reflections on the Background and Contents of the Education Clause in the South African Bill of Rights' (1997) 1 *TSAR* 85.

[3] Malherbe 'Constitutional Framework' (supra) at 21.

single medium institutions should be the first option'.[1] Once again, because Malherbe collapses the distinction between a right to mother-tongue instruction and a state duty to consider single medium public schools, he fails to recognize that the right to the former — mother-tongue instruction — is subject to 'practicability', and that the derivative or secondary 'privilege' with respect to the latter — a single medium public school — can only be a 'first option' for mother-tongue instruction if it meets the three threshold criteria of equity, practicability and redress. Finally, that Malherbe's obvious interest in protecting single medium public schools leads him to misread FC s 29(2) — virtually in its entirety — is made patently clear from his final claim that the 'right to education in one's preferred language is guaranteed *unequivocally* in the South African Bill of Rights'.[2] This statement is false. As the above language of FC s 29(2) indicates, the right to receive education in the official language or languages of [one's] choice in public educational institutions' is subject to a powerful internal modifier — namely, the right exists only where the provision of 'that education is *reasonably practicable*'.[3]

Given the above analysis, we believe FC s 29(2) should be parsed as follows.

[1] Malherbe 'Constitutional Framework' (supra) at 22.

[2] Ibid (Our emphasis).

[3] FC s 29(2)(Our emphasis). For another reading of FC s 29(2) that falls somewhere between the Nzimande position and the Malherbe position, see G Bekker 'The Right to Education in the South African Constitution' *Centre for Human Rights Occasional Papers*, available at http://www.chr.up.ac.za/centre_projects/socio/compilation2part1.html. Bekker writes:

> The Constitution does not guarantee mother-tongue education for minorities, as does for example section 23 the Canadian Charter of Rights and Freedoms. The Constitution, however, guarantees the right in public institutions to education in the language of one's choice. This is limited to education in an official language or languages and is further limited by the proviso — "where reasonably practicable"... . With regard to what would be "reasonably practicable", the Department of Education's Language in Education Policy provides that: it is reasonably practicable to provide education in a particular language of learning and teaching if at least 40 in Grades 1 to 6 or 35 in Grades 7 to 12 learners in a particular grade request it in a particular school. . . . This is in keeping with the internationally practised sliding scale formula: the larger the number of speakers of a language in a particular area, the greater the obligation to provide mother-tongue education in that area. . . . Furthermore, the Language in Education Policy provides that where there are fewer than the requisite number of learners that request to be taught in a particular language not already offered by a school in a particular school district, the head of the provincial department of education will determine how the needs of those learners will be met, taking into consideration the duty of the state and the right of the learners as spelled out in the Constitution. . . . The second part of section 29(2) provides that the state has to ensure effective access to and implementation of the right to education. In this regard, the State must consider all reasonable alternatives including single medium education, taking into account equity, practicability, and the need to redress the imbalances of the past. This would mean that where, for example, there are equal numbers of students seeking education in two different languages, a dual medium school might be the most equitable. *Conversely, the most equitable solution might be a single medium school in cases where the majority of students wish to be educated in one particular language.* However, equitability is not the only deciding factor — practicability will also have to be a taken into account. Here factors such as resources and numbers of teachers will play a role. Finally, the need to redress the imbalances of the past is emphasised. Thus, anything that will have the effect of denying or impeding the right to education of previously disadvantaged communities will also have to be taken into account. (Emphasis added).

(ii) *FC s 29(2) and the right to receive education in the official language of choice*

FC s 29(2) grants all learners 'the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable.' First note that the right to receive education in the official language or languages of one's choice is not, as the Supreme Court of Appeal in *Mikro* noted, an unqualified right.[1] The right is subject to a standard of reasonable practicability. How should this internal limitation of the right be read?[2] We suggest that where sufficient numbers of learners request instruction in a preferred language — and, as we shall see below, we do possess regulations, as well as standards and norms, that make clear what those numbers are — and no *adequate alternative* school exists to provide such instruction, then a public school is under an obligation — with assistance from the State — to provide instruction in the language of choice.[3]

(iii) *FC s 29(2) and the right to receive education in the official language of choice, where that education is reasonably practicable*

Before we proceed to the second sentence in FC s 29(2), it is worth taking another look at the meaning of 'reasonably practicable'. As an evidentiary matter, the learner or the learners or the State must be able to show that instruction in the language of choice is 'reasonably practicable' at the institution where the learners have applied for admission. So, for example, a single learner who requests instruction in Sepedi in a single medium IsiZulu school may be hard pressed to demonstrate that it is reasonably practicable to accommodate her at a single medium IsiZulu school. An inability to establish reasonable practicability would be even more pronounced where the learner, who preferred instruction in Sepedi, possessed access to an adequate school that offered Sepedi instruction. The failure to demonstrate that a request for instruction is 'reasonably practicable' ends, as the *Mikro* Court found, the FC s 29(2) inquiry.

It is not clear why, on Bekker's account, a majority of learners ought to be able to determine that a single-medium school remains a single-medium school. That position is not consistent with the DoE's language policy, international practice or the text of FC s 29(2). A single-medium public school is simply one available means to ensure preferred language instruction: it is not a right possessed by all official language speakers. For a critique of Bekker and Mahlerbe's positions on linguistic rights, see J Jansen 'Race and Restitution in Education Law and Policy in South Africa and the United States' in C Russo, J Beckmann & J Jansen (eds) *Equal Education Opportunities: Comparative Perspectives in Educational Law* (2006) 284-285.

[1] *Western Cape Minister of Education & Others v The Governing Body of Mikro Primary School* 2006 (1) SA 1 (SCA), 2005 (10) BCLR 973 (SCA).

[2] For more on how internal limitations clauses function in various substantive provisions in the Bill of Rights, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[3] See *High School Ermelo & Another v Head of Department Mpumalanga Department of Education & Others* [2007] ZAGPHC 232 (17 October 2007).

(iv) *The State's obligation to ensure effective access to and implementation of the right to instruction in an official language and its relationship to single medium public schools*

Assume that a learner has shown that instruction in the language of choice is reasonably practicable at the institution where she has applied for admission. Only then do we consider the import of the second sentence of FC s 29(2).[1]

The second sentence of FC s 29(2) states that '[i]n order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account: 'a. equity; b. practicability; and c. the need to redress the results of past racially discriminatory laws and practices.' The second sentence of FC s 29(2) makes it patently clear that single medium institutions are but one way of accommodating the right of a learner to instruction in the language of choice. Moreover, the mere mention of single medium schools in no way privileges such institutions over dual medium schools, parallel medium schools, or schools that accommodate the multilingualism of the student body in some other way. All that this portion of FC s 29(2) requires is that the state consider 'all reasonable educational alternatives' that would make mother tongue or preferred language instruction possible.

However, even if single medium public schools are found to be one of the reasonable alternatives for preferred language instruction, the single school medium school must be able to satisfy a three factor test. That is, for a single medium school to be preferred to another reasonably practicable institutional arrangement — say dual medium instruction or parallel medium instruction — it must demonstrate that it is more likely to advance or to satisfy the three listed criteria of equity, of practicability and of historical redress.

FC s 29(2)'s concession to single medium schools is quite weak indeed. It is, in fact, not really a right at all. It is, perhaps, best described as a right to have reasons or an entitlement to justification for the State's refusal to sanction a single medium public school. That said, this entitlement is not without value for proponents of single medium public schools. What the second sentence of FC s 29(2) ultimately requires is that the State be able to justify its preference for one form of school instruction over another. Given the Final Constitution's recognition of single medium public schools as a legitimate means of providing preferred language education, the State will find itself under an obligation to demonstrate why another form of instruction — dual medium, parallel medium, special tutoring — will better serve the learners in question. Moreover, the Final Constitution's recognition of community rights, associational rights, religious rights, cultural

[1] It is worth drawing attention, here, to the basic structure of FC s 29(2). FC s 29(2)'s first sentence bestows upon individual learners a right to instruction in a language of their choice. FC s 29(2)'s second sentence sets out what the State's obligations are vis-à-vis the decision-making process for determining whether schools ought to be single-medium, parallel-medium, dual-medium or something else entirely. Neither sentence in FC s 29(2) affords individual schools any rights with respect to determining the school's medium of instruction.

rights and linguistic rights creates a set of background conditions against which claims for single medium schools must be taken seriously. For where preferred language instruction is reasonably practicable, and where single medium schools satisfy the desiderata of equity, practicability and historical redress, the State cannot simply invoke an overriding commitment to 'equality' or 'transformation' in order to dismantle single medium institutions. The Final Constitution is, ultimately, a post-apartheid constitution. Thus, at the same time as it sets its face against exclusion and discrimination, it rejects the totalizing view of the apartheid state. Space remains — within both the private realm and the public realm — for the accommodation of multiple ways of being in the world. That public space, as we have seen, is extremely narrow for single medium public schools.[1] But however narrow it may be, it cannot be entirely wished away.

Where does this analysis leave us? Contrary to Mahlerbe and others, FC s 29(2) provides no right to single medium public schools. At best, FC s 29(2) recognizes such schools as one option to be considered amongst a range of other institutional arrangements designed to further the instruction of learners. At best, FC s 29(2) places an obligation on the State to justify any refusal to recognize and to support single medium public schools. Advocates of single medium Afrikaans public schools must recognize that, when it comes to equity and to historical redress, they are batting on a sticky wicket.

(v) *Statutory and regulatory framework for linguistic rights*

The apposite legislation governing this area seem of a piece. They suggest that few exceptions to the egalitarian commitments of these documents will be countenanced. The South African Schools Act ('SASA')[2] rejects unfair discrimination on any grounds. The Promotion of Equality and Prevention of Unfair Discrimination Act ('PEPUDA)[3] and regulations passed under the Gauteng School Education Act[4] subject admissions requirements at public schools to even stricter scrutiny than the enabling legislation.[5] While these regulations expand — in line with FC s 9 — the grounds for a finding of unfair discrimination with respect to admission policies, they do not make it *absolutely* impossible for a school governing body to run a public school with a particular comprehensive vision of the good life in mind. That said, FC s 29(2), when read with PEPUDA, SASA, and

[1] One reader asked, given our reading of FC s 29(2), under what circumstances the State would be justified in creating a separate single-medium public school rather than a parallel-medium school or a dual-medium school. Presumably, one could argue that a Khoi-San medium public school is necessary because of the historical disadvantage experienced by the Khoi-San people. FC s 29(2) expressly recognizes equity and historical redress as appropriate grounds for the creation of single-medium public schools — as well as parallel-medium or dual-medium schools. The irony, of course, is that FC s 29(2) arguments are being deployed by communities that, over the past 50 years at least, have been historically privileged.

[2] Act 84 of 1996.

[3] Act 4 of 2000.

[4] Act 6 of 1995.

[5] Regulations passed under the GSEA s 11(1) and the Gauteng Education Policy Act 12 of 1998 ('GEPA'), s 4*(a)(i)*, entitled 'Admission of Learners to Public Schools' General Notice 4138 of 2001 (PG 129 of 13 July 2001).

GSEA, dramatically restricts the conditions under which single medium public schools can claim the right to exclude learners who are 'non-speakers' of the single medium of instruction.

A raft of other statutory provisions, regulations and policies work to further restrict the space within which single medium institutions can operate. For example, SASA s 5(3), states that 'no learner may be refused admission to a public school on the grounds that his or her parent … *(b)* does not subscribe to the mission statement of the school.' One can't over-emphasize the importance of this provision. Some school governing bodies have, under existing law, arrogated to themselves sweeping powers of control over the governance and the management of public schools. One mechanism of governance that such SGBs have employed in order to exclude unwanted learners is the school mission statement: such statements about a school's ethos cause many learners and their parents to self-select out of applying to given schools. This not-so-subtle form of exclusion occurs despite the fact that, according to SASA s 5(3)*(b)*, a mission statement which proclaims that the school environment and curriculum must advance the interests of the Zulu nation cannot be used to exclude learners who are not Zulu or committed to the furtherance of Zulu tradition, language and culture.

Another source of support for the argument that single medium public schools, and their SGBs, cannot dictate school language policy in a manner that inhibits multilingualism can be found in the Norms and Standards for Language Policy in Public Schools promulgated in terms of SASA and the National Education Policy Act.[1] These norms and standards place significant constraints on the ability of single medium public schools to turn away learners who prefer, and will benefit from, instruction in another language. The Norms and Standards for Language Policy in Public Schools, promulgated in terms of SASA s 6(1) read, in relevant part:

> C. The rights and duties of the school
> (1) Subject to any law dealing with language in education and the Constitutional rights of learners, in determining the language policy of the school, *the governing body must stipulate how the school will promote multilingualism through using more than one language of learning and teaching*, and/or by offering additional languages as full-fledged subjects . . . or through other means approved by the head of the provincial education department. (Emphasis added.)
> (2) Where there are less than 40 requests in Grades 1 to 6, or even less than 35 requests in Grades 7 to 12 for instruction in a language in a given grade not already offered in a particular school district, the head of the provincial department will determine how the needs of those learners will be met, taking into account: *(a)* the duty of the state and the rights of learners in terms of the Constitution; *(b)* the need to achieve equity; *(c)* the need to redress the results of past racially discriminatory laws and practices; *(d)* practicability; *(e)* the advice of the governing bodies and principals of the public schools concerned.
> D. The rights and duties of the Provincial Education Departments
> (3) It is reasonably practicable to provide education in a particular language of learning and teaching if at least 40 in Grades 1 to 6 or 35 in Grade 7 to 12 learners in a particular grade request it in a particular school.
> (4) The provincial head of department must explore ways and means of sharing scare

[1] Act 27 of 1996.

> human resources … and providing alternative language maintenance programmes in schools … that cannot be provided with … additional languages of teaching.[2]

These norms and standards contain a number of notable features. The norms make it clear that a group of 40 learners (grades 1 to 6) or a group of 35 learners (grades 7 to 12) constitute a sufficiently large cohort to demand instruction in a preferred language. A bar for linguistic accommodation has been set against which all schools may be measured. That said, these threshold requirements are not obligatory. They remain guidelines. What these norms tell us, again, is that the new South African State is not, unlike the apartheid state, a totalizing entity. It will not subordinate the plural, comprehensive visions of the good held by its citizenry to an ideological commitment to equality. So, while the State will apply pressure — through the law — on single medium public schools to accept learners who prefer instruction in another language, it cannot use the mechanisms of a totalizing state to achieve such ends. The somewhat ironic result of the norms and standards' commitment to linguistic pluralism and the status of the norms and standards as mere guidelines is that single medium public schools — especially single medium Afrikaans public schools — are 'encouraged' to maintain their current cramped sense of identity.

(vi) *Case law on single medium public schools: Matukane; Middelburg; Mikro; Seodin; Ermelo*

Given the argument that has proceeded, advocates of single medium public schools may find our contention that single medium public schools are actually 'encouraged' by the Final Constitution to maintain their identity and to retain their integrity difficult to believe. After all, when viewed through the prism of single medium public school advocacy, the statutes, the regulations and the policy circulars that articulate equity requirements at public schools and the body of case law built up over the past ten years appear to evince nothing more than the State's desire to rid itself of single medium Afrikaans-speaking public schools.[3] What is beyond doubt, however, is that the case law demonstrates that the primary fault line in public school admissions policy litigation occurs around the use of Afrikaans as the sole medium of instruction.

[1] These policy statements are drawn from the language in education policy in terms of NEPA s 3(4)*(m)* and the *Norms and Standards Regarding Language Policy Published in Terms of Section 6(1) of the South African Schools Act, 1996 Government Notice No 383, Vol 17997* (9 May 1997).

[2] See *Address by Naledi Pandor, MP, Minister of Education, Introducing the Debate on the Education Budget Vote 15, National Assembly* (17 May 2005) available at http://www.pmg.org.za/briefings/briefings.php?id=208:

> On Sunday I read reports in the press that English was to be made optional in schools. The report suggested that children will no longer learn English. That is not the intention of the policy. It opens up the possibility of developing the other official languages into languages of learning and teaching. Clearly while we work to achieve this noble objective, the current choice of English and Afrikaans as the languages of learning and teaching will remain. In the past, before 1998, pupils were locked into a system that privileged Afrikaans and English for those in search of a matric endorsement. That is now no longer true and all languages will now be equally available as subject choices.

Two features of this body of case law are worth noting at the outset. First, the courts have charted a course largely consistent with the analysis offered above — even if the cases themselves do not offer especially close readings of FC s 29(2) or other applicable laws.[1] The cases discussed below reflect the extent of the State's power in determining public school admissions requirements. They also reflect the sectarian interests that secure continued judicial solicitude — even in the face of the State's pursuit of increasingly egalitarian arrangements. Second, this quick survey of the cases litigated over language policy in public schools allows us to contrast, meaningfully, the space that various forms of community life — religion, language, culture — are afforded in the public realm with the space afforded various forms of community life in the private realm. It should come as no surprise that the Final Constitution and our courts refuse to endorse any arrangement of public institutions that distribute public goods in a manner that perpetuates the systemic discrimination, exclusion and oppression associated with apartheid. However, the Constitutional Court has made it patently clear that it recognizes that the majority of South Africans draw the better part of the meaning in their lives from the religious, linguistic and cultural communities of which they are a part.[2] Thus, while the State may be entitled to set limits on the extent to which state resources can be used to advance sectarian ends, the Final Constitution vouchsafes significant amounts of private space within which various comprehensive visions of the good can be pursued.

[1] We would like to emphasize that the grounds for deciding these five cases do not generally 'fit' within the analytical rubric supplied by FC s 29(2) and the gloss we place on FC s 29(2). As most readers of South African case law and jurisprudence know, South African courts prefer technical textual solutions over answers to vexed questions about the content of fundamental rights. See *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae) (No 2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1164 (CC)('*UDM*')(Court strikes down legislation because the government failed to pass the Act in the timeframe required by the Final Constitution rather than finding the legislation invalid in terms of FC s 19 or a more basic commitment to a principle of democracy.) See, especially, I Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 138 (Endorses the proposition, first articulated in *Mhlungu*, that courts ought to avoid deciding the issues before them in terms of constitutional dictates.) See, further, C Sunstein *One Case at a Time* (1996). It seems reasonable to conclude, given this disposition of our courts, that our courts have avoided addressing the extent to which FC s 29(2) vouchsafes single medium public schools because the matter is so politically charged. As we shall see, the *Mikro* court opts to resolve the dispute over single-medium public schools in terms of SASA and the *Laerskool Middleburg* court ultimately turns to FC s 28(2) and the ostensibly unassailable proposition that the rights of the child are always paramount. However, all close and meaningful readings of legal texts go beyond the express language of a decision and concentrate their attention on the internal logic of a judgment or set of judgments. The internal logic of the five judgments speak pretty directly to the appropriate contours of FC s 29(2).

[2] See *Minister of Home Affairs v Fourie (Doctors For Life International & Others, Amici Curiae); Lesbian & Gay Equality Project & Others v Minister of Home Affairs* 2006 (1) SA 524 (CC), 2006 (3) BCLR 354(CC)('*Fourie*'); *KwaZulu-Natal MEC for Education & Others v Pillay* [2007] ZACC 21.

MATUKANE[1]

As one might have predicted, the State has weighed in on the side of black students who wish to receive instruction in English, but found themselves excluded from Afrikaans medium, or predominantly Afrikaans medium, schools. At issue in *Matukane & Others v Laerskool Potgietersrus* was the attempt by the parent of three learners, Mr Matukane, to enroll his three children (13, 13 and 8) at the Laerskool Potgietersrus. The Laerskool Potgietersrus was then, and remains still, a state-aided *parallel-medium* primary school.

Mr Matukane, a black resident of Potgietersrus spoke to the principal on 11 January 1996. The principal informed Mr Matukane that Mr Matukane would have to wait until 25 January 1996 for a determination as whether there was space available at the school. Mr Matukane was not convinced that any such delay was warranted. He approached the provincial Department of Education ('DoE'). DoE informed Mr Matukane that his children could be enrolled in the school. Mr Matukane arrived at the school on 22 January 1996, completed the necessary application forms and bought the school uniforms as directed. The application form included a section requiring that parents and children agree to adhere to the rules and the objectives of the school. The stated objective on the application form read: 'the provision of excellent and relevant education with a Christian national character in mother-tongue medium Afrikaans or English.' Mr Matukane returned the next day with his children for their first day at school. The entrance of the school was blocked by a group of white parents who refused to allow Mr Matukane or his children to enter the school. Mr Matukane returned to the school again the following day. A standoff between a group of black parents and students and white parents and students ensued. Once again the Matukane children were denied access to the school. After being rebuffed this second time, Mr Matukane managed to secure a temporary place for his children at the already overcrowded Akasia School, the only other English medium school in the town.

Other black parents had experienced less dramatic rejections by the school. They were told that their children could not be accommodated because the school was full: at least 55 black children had been refused admission to the school in this manner. No black child had ever been admitted to the school. No black children appeared on the current waiting list. On top of these indignities, the school bussed in white children from Zebediela, a neighboring town — despite the fact that a school catering to Afrikaans-speaking students in Zebediela had space available. After Mr Matukane's experience of overt racial discrimination, a group of black parents decided to approach the High Court for an order requiring the Laerskool Potgietersrus to accept their children.

[1] *Matukane & Others v Laerskool Potgietersrus* 1996 (3) SA 223 (T).

In the High Court, Laerskool Potgietersrus argued that it was unable to accommodate more children and that it had not rejected the children on racial grounds. At the time of the hearing, Laerskool Potgietersrus had 580 Afrikaans-speaking students and 89 English-speaking students. The Laerskool Potgietersrus expressed concern that if it admitted these children, it would be swamped by English-speaking children who would destroy the Afrikaans ethos of the school. The school contended that IC Section 32*(c)* vouchsafed the right 'to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race' and entitled the school to adopt admissions requirements designed to maintain the existing 'culture' and 'ethos' of the school. The Laerskool Potgietersrus also asserted that a DoE directive gave the school governing body the sole power to determine its criteria for admission.

Despite the school's assertion that the refusals were based on overcrowding, not race, the facts clearly painted a different picture. No black children had been admitted to the school. There were no black children on the waiting list. White English speaking learners had already been admitted. Afrikaans-speaking students were being bussed in. Room existed to accommodate *more* English-speaking children. Little danger existed of the school's Afrikaans culture and ethos being destroyed even if every black English-speaking learner were to be accepted. The ratio of Afrikaans-speaking students to English-speaking students would remain 5:1. Given these facts, the *Matukane* court held that it could draw no other inference as to actual intent of the school's admissions policy other than that it discriminated directly on the basis of race, ethnic and social origin, culture and language. Given that the discrimination took place one or more of IC s 8's listed grounds, unfairness was presumed. The burden shifted to the school to show that the discrimination was fair.

As *Gauteng Education Bill* clearly holds, the respondents had the right, under IC s 32*(c)*, to establish an independent educational institution designed to promote Afrikaans language and culture so long as they did not discriminate on the basis of race.[1] The school had no right to exclude learners from a public institution based upon culture, and it certainly had no right to exclude any learner from a public institution or a private institution based upon race. (Moreover, while the Laerskool Potgietersrus might have been justified in its desire to privilege Afrikaans over English, the school failed to demonstrate why a modest increase in black English-speaking students would deleteriously affect the school's promotion of Afrikaans language and culture.) The *Matukane* Court concluded that 'language and culture' were operating as surrogates for 'race', that the school had discriminated intentionally against the Matukane children and other black learners on the grounds of race, and that the respondent could not, therefore, discharge its burden of proving the fairness of its (racist) admissions policies.

[1] *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC).

MIDDELBURG[1]

Laerskool Middelburg & 'n ander v Departementshoof, Mpumalanga Departement van Onderwys, & andere extends the holding in *Matukane* from parallel-medium to single-medium schools. However, in *Laerskool Middelburg,* the High Court was clearly more troubled by the conflict between the right to a single-medium school and the right to be educated in the official language of one's choice.

At the level of rhetoric, the *Laerskool Middelburg* court initially rebuffed the provincial Department of Education's attempt to turn the single medium school into a parallel medium school. It held that neither SASA, nor the regulations issued under them, authorised the provincial Head of the Department to instruct a school to change from single-medium instruction to parallel-medium instruction and declared that the Head's administrative conduct was prima facie unfair.[2] The *Laerskool Middelburg* court then rejected the Department's argument that the applicant school's admission policy discriminated unfairly against English learners. The High Court held that in circumstances in which the English learners could be accommodated elsewhere, the Department's actions simultaneously violated the FC s 29(2) right of Afrikaans-speaking students to single medium schools and the FC s 29(2) right of English-speaking students to an education in the official language of their choice in public educational institutions.[3]

Having notified the State that it had failed to take cognizance of FC s 29's commitment to linguistic diversity, the *Laerskool Middelburg* court conceded that any entitlement to a single-medium school was subordinate to the right of every South African to a basic education, the right to be educated in a language of choice and the palpable need of all South Africans to share education facilities with other linguistic and cultural communities. The *Laerskool Middelburg* court was unwilling to allow the needs of 40 English-speaking — and largely black — learners to be prejudiced by the State's failure to play by the rules and by the school's intransigence on the issue of parallel-medium education. FC s 28(2)'s guarantee that 'the best interests of the child' are always of 'paramount importance' was held by *Laerskool Middelburg* court to trump the language and cultural rights of the school's Afrikaans learners.[4] So while the State's actions had, in fact, been *mala fide*, it was still able to secure a victory for educational equity by getting the proper parties — namely the children — before the court.

[1] 2003 (4) SA 160 (T) ('*Laerskool Middelburg*').
[2] Ibid at 171-172, 176.
[3] Ibid at 173 and 175.
[4] In deciding that the 'minority' students must be accommodated, the *Laerskool Middelburg* court correctly concluded that the right to a single-medium public educational institution was clearly subordinate to the right which every South African had to education in a similar institution and to a clearly proven need to share education facilities with other cultural communities. The *Laerskool Middelburg* court seems to be on far shakier grounds when it suggested that it was an open question as to whether the exercise of own language and culture was better furthered where provision was made in a school for the exclusion of other languages or cultures. Moreover, the court's claim that a single-medium institution was probably best defined as a claim to emotional, cultural, religious and social-psychological security

Although the outcome was certainly correct, the *Laerskool Middelburg* court's route in arriving at its conclusion cannot pass without comment. If our reading of FC s 29(2) offered above is correct, then the *Laerskool Middelburg* court should never had had to rely on FC s 28(2). In terms of FC s 29(2), the court should have first determined whether it was 'reasonably practicable' to accommodate English-speaking students in Laerskool Middelburg. The court's conclusion — that the only public school in the area had to take in 20 local learners — suggests that it was 'reasonably practicable'. That should, or could, have been enough. But further support for the court's conclusion can be found in the second sentence of FC s 29(2): 'In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single-medium institutions, taking into account: a. equity; b. practicability; and c. the need to redress the results of past racially discriminatory laws and practices.' The court's conclusion that a single medium school must, in order to accommodate these 20 learners, become a parallel-medium school is consistent with a reading of FC s 29(2) that makes it patently clear that single-medium institutions are but one way of accommodating the right of a learner to instruction in the language of choice and that the mere mention of single medium schools in no way privileges such institutions over parallel medium schools or dual medium schools. The second sentence of FC s 29(2) — and its commitment to equity, practicability and historical redress — provides further justification for the *Laerskool Middelburg* court's conclusion that a single-medium institution was obliged, under the circumstances, to become a parallel-medium institution.

MIKRO[1]

At issue in *The Western Cape Minister of Education & Others v The Governing Body of Mikro Primary School* was the refusal of an Afrikaans medium public school to accede to a request by the Western Cape Department of Education ('WCDoE') to change the language policy of the school so as to convert it into a parallel-medium school. Acting on behalf of 21 learners, the WCDoE had directed the primary school to offer instruction in their preferred medium: English. The WCDoE had interpreted the Norms and Standards issued by the National Department of Education under SASA as requiring all primary schools with 40 learners who preferred a particular language of learning and teaching to offer instruction in that language.

trivializes the desire to maintain basic, constitutive attachments. The desire to sustain a given culture — especially a minority culture, as Afrikaner culture now is — is best served by single-medium institutions that reinforce implicitly and expressly the importance of sustaining the integrity of that community. As a result, the *Laerskool Middelburg* court must also be wrong when it claims that the conversion of a single-medium public institution to a dual-medium school cannot *per se* diminish the force of each ethnic, cultural and linguistic communities claim to a school organized around its language and culture. Ibid at 173. That is, with respect, exactly what the conversion *per se* does.

[1] *Western Cape Minister of Education & Others v The Governing Body of Mikro Primary School* 2006 (1) SA 1 (SCA), 2005 (10) BCLR 973 (SCA)('*Mikro*').

The Supreme Court of Appeal summarily rejected both the WCDoE's reading of the Norms and Standards and its gloss on FC s 29(2). It did so on three primary grounds.

First, the Supreme Court of Appeal overturned Bertelsmann J's finding in *Laerskool Middelburg* that the Norms and Standards provided a mechanism for the alteration of the language policy of a public school. At best, the Supreme Court of Appeal said, the Norms and Standards constitute a guideline for members of the department and those parties responsible for the governance of public schools. Second, the Supreme Court of Appeal held that SASA s 6(1) grants neither the national Minister of Education nor the provincial MEC or HoD the authority to determine the 'language policy of a particular school, nor does it authorize him or her to authorize any other person or body to do so.' The power to determine language policy vests solely with the SGB of a given public school and is subject only to the Final Constitution, SASA and any applicable provincial law. Third, the Supreme Court of Appeal rejected the applicant's contention that FC s 29(2) could be 'interpreted to mean that everyone had the right to receive education in the official language of his or her choice at *each and every* public educational institution where this was reasonably practicable.'[1] Such a reading, the *Mikro* Court held, would mean that any significant cohort of learners could demand instruction in their preferred language if it was conceivably possible to do so. The *Mikro* Court noted that such a reading would lead to the absurd consequence that 'a group of Afrikaans learners would be entitled to claim [a right] to be taught in Afrikaans at an English medium school immediately adjacent to an Afrikaans medium school which has vacant capacity provided they can prove that it would be reasonably practicable to provide education in Afrikaans at that school.'[2] The Supreme Court of Appeal held that the correct reading of FC s 29(2) affords the State significant latitude in deciding how best to implement this right and that FC s 29(2) grants everyone a right to be educated in an official language of his or her choice at a public educational institution if, in the totality of circumstances, it is reasonably practicable to do so. That means, of course, that the right is only to language instruction, generally, and, thus to instruction at some school within an accessible geographical domain, and not, as the applicants had claimed, to language instruction at each and every public educational institution and thus to any school the applicants wished to attend.

The decision is notable in two important respects. First, it curbs the State's power to determine — exclusively — public school admissions policies and language policies. Such power continues to be shared — to some degree — with each existing SGB. Second, while affirming the rights of learners to instruction in a preferred language, it simultaneously confirmed that some individual schools were entitled to offer instruction in a single medium.

[1] *Mikro* (supra) at para 30.
[2] Ibid.

The effect of the Supreme Court of Appeal's decision in *Mikro* is to reverse, partially, the spin of *Laerskool Middelburg*. Neither parallel-medium instruction nor dual-medium instruction are automatic default positions for public school language policy. The *Mikro* Court takes the language of FC s 29(2) seriously. It places the State under an obligation to show that its language policy — designed to give learners instruction in their preferred language — is reasonably practicable. Where, as in *Mikro*, it is not reasonably practicable to give English speaking students instruction at a single medium Afrikaans speaking institution, *because other adequate alternatives exist*, then the State cannot force a single medium Afrikaans speaking institution to offer parallel instruction. Although the *Mikro* Court does not engage the second sentence of FC s 29(2), one can easily draw the inference that the State would have failed to discharge the burden of showing that it had considered all reasonable alternatives for accommodating the English speaking learners in question and that it had also failed to demonstrate that maintaining a single medium Afrikaans-speaking school — in circumstances where adequate English medium instruction was available elsewhere — offended the constitutional commitment to equity and to historical redress. It is impossible to read *Mikro* and not come away with the impression that a community's interest in maintaining its linguistic and cultural integrity may — under a very narrow set of conditions — legitimately trump purely ideological commitments to equity.

SEODIN[1]

Seodin reinforces the holdings in *Matukane* and in *Laerskool Middelburg* and appears to confirm the impression that *Mikro* only protects single medium public schools under a relatively narrow set of circumstances. In *Seodin Primary School v MEC Education, Northern Cape*, the High Court held that the SGBs of three Afrikaans medium public schools could not use language preference alone to exclude black, English speaking learners from admittance where the provision of English language instruction was 'reasonably practicable'. In addition, in all three cases heard in *Seodin*, the single medium Afrikaans schools were undersubscribed. Finally, the High Court found that public pronouncements by the MEC for Education on the need for greater integration in the public school system could not be interpreted as an *ultra vires* act aimed at the elimination of single-medium — read Afrikaans — public schools. Where public schools are concerned, *Seodin* makes it clear that the Final Constitution will not tolerate racist and discriminatory admissions policies masquerading as policies that claim to be about the need to maintain the language and the culture of a given community. As Northern Cape Judge President Frans Kgomo noted in his judgment:

[1] *Seodin Primary School v MEC Education, Northern Cape* 2006 (4) BCLR 542 (NC), [2006] 1 All SA 154 (NC)('*Seodin*').

> It would be a sad day in the South African historical annals that hundreds of children remained illiterate or dropped out of school because they were excluded from under-utilised schools purportedly to protect and preserve the status of certain schools as single-medium Afrikaans schools.[1]

ERMELO[2]

Hoërskool Ermelo offers perhaps the best set of circumstances under which to assess — in terms of FC s 29(2) — the respective rights of learners to choose their preferred language of instruction, the ability of SGBs to determine public school language policy and the power of the State to alter language policy where the needs of learners so warrant.

In *Hoërskool Ermelo I*, Judge Prinsloo, of the Pretoria High Court, suspended a decision of the Mpumalanga Department of Education to dissolve the school's governing body and to replace it with a departmentally appointed committee. The dissolution would have enabled the Mpumalanga Department of Education to alter the school's language policy and would have allowed 113 English-speaking pupils to receive instruction in English.[3]

On appeal, Transvaal Judge President Ngoepe, and Judges Seriti and Ranchod set aside the High Court ruling in *Hoërskool Ermelo I*. The *Hoërskool Ermelo II* court found that the single medium Afrikaans public school must admit English-speaking pupils.[4] Of particular moment for the *Hoërskool Ermelo II* court was the under-subscription of Hoërskool Ermelo. Given that Hoërskool Ermelo was operating at only half-capacity, the Full Bench found that it was 'reasonably practicable' — as contemplated by FC s 29(2) — for the high school to accommodate the 113 grade eight learners.[5] The mere fact that all classrooms were being employed and that the existing curriculum turned on the current availability of classrooms

[1] *Seodin* (supra) at para 56.

[2] *Hoërskool Ermelo & 'n Ander v Departement van Onderwys & Andere* [2007] ZAGPHC 4 (2 February 2007)

[3] Judge Bill Prinsloo's interim order froze Mpumalanga education MEC Siphosezwe Masango's instruction that Ermelo High School enrol 113 children that the provincial government claimed could not be placed in the other schools in the area. Prinsloo J ruled that his interim order should stand until a full hearing on the matter was held. The Department of Education decided not to wait for the full hearing. In their papers, the DoE and the parents of the learners claimed that right to education in the language of choice was impaired by the school's language policy and its refusal to admit children who were not prepared to be taught in Afrikaans. In addition, the Mpumalanga DoE claimed that its position was underwritten by the under-subscription at Ermelo and the oversubscription at adjacent high schools. These facts were not disputed by the parties. Ermelo was built for 1200 students and carried a mere 589 in some 30 classrooms at the time of litigation.

[4] *High School Ermelo & Another v Head of Department Mpumalanga Department of Education & Others* [2007] ZAGPHC 232 (17 October 2007)('*Ermelo II*').

[5] It is also important to note that much of the *Emerlo II* court's decision turned on the power of the provincial government to withdraw the powers of the School Governing Body to determine language policy and to determine that language policy itself.

did not constitute sufficient grounds for excluding English learners and maintaining Hoërskool Ermelo as a single medium Afrikaans public school. Equity, practicability and historical redress — the three express grounds for assessment of existing language policy in terms of FC s 29(2) — justified the transformation of Hoërskool Ermelo from a single medium public school into a parallel medium public school.

The numbers of the other primarily black schools in the immediate vicinity are worth noting. Ligbron Academy of Technology possesses 20 classrooms and accommodates 917 learners; Ermelo Combined School has 14 classrooms and accommodates 463 learners; Lindile School possesses 29 classrooms and accommodates 1799 learners; Cebisa School has 19 classrooms and accommodates 926 learners; Ithafa School posseses 36 classrooms and accommodates 1677 learners; Reggie Masuku School has 21 classrooms and 804 learners. Hoërskool Ermelo, the applicant, had 32 classrooms for 589 learners.[1] Judge President Ngoepe and his fellow judges believed that the numbers — schools such as Lindile and Ithafa teach three times as many learners as Hoërskool Ermelo in a comparable space — spoke for themselves.

While the conclusions of the *Hoërskool Ermelo II* court are hard to gainsay, the court's inability to undertake basic fundamental rights analysis is troubling — and does little to advance our understanding of the structure of FC s 29(2). The first paragraph the *Ermelo II* court devotes to FC s 29(2) analysis reads as follows:

> Counsel for the applicants submitted that the admission of English speaking learners would prejudice the rights of the Afrikaans speaking learners. Section 33 provides that the rights contained in the Bill of Rights may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. From the above provisions it is clear that, firstly, a learner has a right to basic education; secondly, that no right is unlimited. In case of competing rights, it becomes necessary to balance them. In the present case, the rights of the current learners of Ermelo High School to enjoy an extended curriculum which is offered at their school must be balanced against the right to basic education of the learners who would otherwise not gain admission to any school. Assuming for a moment that there is such an encroachment of the rights of the current students, that, in our view, would constitute a reasonable and justified limitation insofar as it limits the enjoyment of an extended curriculum which offers far more than the basic government curriculum. But, as already mentioned, the real difficulty for the applicants is that they have not placed before the courts the facts showing precisely in which way the current students would be prejudiced. They are also vague on the nature of the prejudice to be suffered.[2]

[1] *Ermelo II* (supra) at 26.
[2] Ibid at para 62.

First, general limitations analysis occurs under FC s 36 — not FC s 33. Second, FC s 29(2) is clear about the State's obligations with regard to the right to education in an official language and its duty to investigate the manner in which that right would be best accommodated. Third, since FC s 29(2) does not grant a right to single medium public schools, there cannot be a conflict of rights. An appellate court would do well to reconsider the *Ermelo II* court's mode of analysis and frame the discussion largely, if not entirely, in terms of FC s 29(2).

A second paragraph — quoting the judgment of Olivier J in *Hoërskool Victoria-Wes en Andere v Die Departementshoof, Departement van Onderwys, Noord-Kaapse Provinsiale Regering* — makes somewhat better sense of the matter:

> To my understanding, actions such as these (introducing dual medium of instruction) by the respondent would not in any way unreasonably affect the integrity of the applicants or their collective components. Mr Colditz suggests in this regard that the respondent's decision regarding dual medium instruction infringes the rights of the Afrikaans learners in terms of Section 29(2) of the Constitution. I fail to understand this argument. Section 29(2) guarantees the right to education 'in an official language or language of choice. . .' This however does not include the situation where dual-medium instruction is implemented. In such a situation, the Afrikaans learners will in predetermined times receive their lessons in Afrikaans, which ultimately is their language of choice, and then they will receive the same lesson again, in the same period, but in English this time. I cannot imagine how such a system could infringe any rights of the learners in terms of Section 29(2).[1]

Olivier J, and by extension Ngoepe JP, recognize that FC s 29(2) only entitles a learner — be they Afrikaans or not — to instruction in the official language of their choice (where practicable). It does not entitle a learner to any particular arrangement — single-medium, dual-medium, parallel-medium or special education. Both Olivier J in *Hoërskool Victoria-Wes* and Ngoepe JP in *Hoërskool Ermelo II* reach the right conclusion: FC s 29(2) does not guarantee the right of any learner to a single medium public school.

(vii) *Current status of single medium public schools*

The foregoing account supports a number of relatively uncontroversial conclusions. The Final Constitution — and a broad array of statutes — recognize that for religious, cultural and linguistic communities to survive and to flourish in South Africa, these communities must be able to establish educational institutions that cater for their specific 'ethos'. Such institutions must, by their very nature, enforce admissions policies that discriminate between learners who wish to participate in the affairs of a given religious, linguistic and cultural community, and those learners who do not wish to participate in or advance the ways of being of a given community. The Final Constitution, PEPUDA, SASA, NEPA and a raft of regulations certainly allow *independent schools or private schools* to employ admissions policies that discriminate between learners in a manner carefully designed to

[1] Case No 357/2004 (Northern Cape Division, Unreported) 17 at para 42 (translation Natasha Sott).

advance legitimate constitutional ends.[1] However, when it comes to public schools, the State's tolerance for discrimination of any kind — even via means narrowly tailored to realize otherwise legitimate constitutional objectives — ought to be tightly circumscribed and rightly inclines in favour of learners from historically disadvantaged communities. As we have seen in our analysis of FC s 29(2), where sufficient resources exist to ensure that all South African learners receive an adequate, and for all intents equal, education in their preferred language of instruction, then the state ought to do everything it can to accommodate linguistic and cultural diversity and operate in a manner that enables single-medium schools to continue to exist. However, the Final Constitution's commitment to meaningful transformation means that the right of all learners to a basic education in their preferred language of instruction at public schools generally trumps more particularistic claims on public resources. The Final Constitution's answer to those parents who wish to school their children in the language, culture or religion of their choice is straightforward: you may 'dig into your own pocket' and build an independent school on your own time.

Thus, when we ask whether a public school that wishes to provide an education in Afrikaans for Afrikaans children can employ an admissions policy that discriminates between applicants on the basis of their willingness to adhere to a curriculum that requires that all classes be taken in Afrikaans, the answer must be 'that depends'. The Final Constitution, SASA, PEPUDA and cases such as *Matukane*, *Laerskool Middelburg, Seodin* and *Ermelo* all buttress the rather unassailable proposition that discrimination on the basis of language or culture cannot be used as a proxy for discrimination on the basis of race. A proper analysis of FC s 29(2) reinforces the proposition — at least implicitly accepted by the *Matukane*, *Laerskool Middelburg, Mikro, Ermelo* and *Seodin* courts — that where learners do not have ready access to a public school that offers them adequate instruction in their preferred medium of instruction, neither a School Governing Body nor a principal can exclude learners in terms of an admissions policy that seeks to privilege a particular language. The lesson of the Supreme Court of Appeal's

[1] See S Woolman 'Defending Discrimination: On the Constitutionality of Independent Schools that Promote a Particular, If Not Comprehensive, Vision of the Good Life' (2007) 18 *Stellenbosch Law Review* 31. See also *Taylor v Kurtstag* [2004] 4 All SA 317 (W)(FC s 18 — freedom of association — 'guarantees an individual the right to choose his or her associates and a group of individuals the right to choose their associates.' The right of a group to choose their associates of necessity means the right to require those who wish to join the group to conform their behaviour to certain dictates, and the right to exclude those who refuse to conform); *Wittmann v Deutsche Schulverein, Pretoria* 1998 (4) SA 423, 451 (T), 1999 (1) BCLR 92 (T)('Does this mean that private parochial schools which do not receive State aid may not prescribe obligatory attendance at their morning prayers and confessional religious instruction classes? The answer is negative. Section 17 of the [I]nterim Constitution and s 18 of the [Final] Constitution recognise the freedom of association. [IC] Section 14(1) and [FC] s 15(1) respectively recognise the freedom of religion which includes the right to join others in worship, propagation of the faith etc. Freedom of association entails the right with others to exclude non-conformists. It also includes the right to require those who join the association to conform with its principles and rules.')

decision in *Mikro* is that the window for exclusion on the basis of language and culture is rather small indeed: only where the learners in question already have easy access to a school that offers them adequate instruction in their preferred medium of instruction, can the single medium school in question claim, with some force, that neither the learners nor the State has any business forcing a single-medium institution into becoming a parallel-medium institution.[1]

Let us be clear. The Final Constitution neither provides a guaranteed right to single-medium public schools nor does it prohibit the existence of such institutions. The Final Constitution sets its face against the kind of cultural and linguistic hegemony that marked apartheid and, at the same time, recognises the necessity of a multiplicity of patterns of school language policy. The principle constitutional norms that bracket language policy do not entail some ideological pre-commitment to any particular language practice: say English over Afrikaans, or IsiZulu over IsiXhosa. Instead these norms require that any language policy meet such fixed, yet fluid, desiderata as equity, practicability and historical redress. In some instances, this set of constitutional desiderata will allow for the continued existence of single medium Afrikaans public institutions. In other instances, circumstances will dictate that such schools change their language policy. In either case, the State must be in a position to offer a compelling evidentiary basis for its conclusion regarding the change or the maintenance of a single medium schools' language policy. In the absence of such reasons, our courts will view state-sponsored changes in policy as arbitrary exercises of state authority and violations of the apposite constitutional and statutory provisions.

For many, the constitutional obligation placed upon the State to justify its actions may not provide sufficient solace. For those learners and their parents for whom the window provided by FC s 29(2) is too small and for whom a single medium school designed to further a particular linguistic, cultural or religious vision of the world is an absolute necessity, the Final Constitution again has an

[1] The wilful misconstruction of the constitutional space that exists for single-medium schools is evident from the following press release:

> The Federation of Afrikaans Cultural Associations, the FAK, welcomes the Supreme Court of Appeal's rejection of an appeal by the Western Cape MEC for Education to try and force Laerskool Mikro to change its language policy. This judgment is a victory for the autonomy of communities and in fact represents a small step closer to the application of the National Department's policy of mother-tongue instruction for all South African children. The FAK hopes that the continuing pressure by provincial education departments on Afrikaans schools to anglicize in the name of greater access will cease. Currently several Afrikaans schools countrywide are subject to such pressure, with possible court action involved. The FAK appeals to provincial education departments to stop playing off the right to access against mother-tongue instruction, and to alleviate the crisis of access to quality education for all by applying themselves to make mother-tongue instruction a reality for all South African children.

Federation of Afrikaans Cultural Associations 'FAK welcomes the *Mikro* Judgment" (June 27, 2005) available at http://vryeafrikaan.co.za/lees.php?id=272 (accessed on 24 January 2007).

answer. Under FC s 29(3), they may 'dig into their own pocket' and build the school on their own time and in their own fashion.[1]

57.4 Language rights in independent schools[2]

(a) Community rights and language rights in a liberal constitutional order

This section answers the following question: to what extent may independent schools discriminate fairly between learners in order to advance the legitimate constitutional objectives of various religious, cultural and linguistic communities? A close reading of the Final Constitution tells us that while our basic law does not guarantee a right to single medium public schools, faith-based public schools or culturally homogenous public schools, FC s 29(3) grants learners and their parents the right to 'dig into their own pocket' in order to build an independent school that offers their preferred medium of instruction, that reinforces a specific cultural ethos, or that promotes a comprehensive religious vision of the good. The answer regarding the extent to which these FC s 29(3) schools may discriminate lies in a close analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act. Rightly construed, PEPUDA contemplates the ability of independent schools to advance linguistic, cultural and religious understandings of the good in a manner that may, on its face, look discriminatory. The admissions policies or expulsion procedures employed by independent schools may discriminate between learners so long as the discrimination *(a)* advances the *legitimate* linguistic, cultural or religious objectives of the independent school; *(b)* does so in terms of means narrowly tailored to meet those objectives; and *(c)* does not impair the dignity of the learner.

This space is not insignificant. For as we have just seen, when it comes to public schools, the State's tolerance for discriminatory religious, cultural and linguistic admissions policies or expulsion procedures is extremely limited and rightly inclines in favour of learners from historically disadvantaged communities. As one of the authors has argued elsewhere,[3] the Final Constitution does not guarantee a right to single-medium public schools, faith-based public schools or culturally homogenous public schools.

[1] See *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC) at para 42.

[2] Much of this section is drawn from S Woolman 'Defending Discrimination: On the Constitutionality of Independent Schools that Promote a Particular, if not Comprehensive Vision of the Good Life' (2007) 18 *Stellenbosch Law Review* 31.

[3] See S Woolman 'Community Rights: Religion, Culture and Language' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 58; B Fleisch & S Woolman 'On the Constitutionality of Single-Medium Public Schools' (2007) 23 *SAJHR* 34.

However, it bears repeating that for those learners and their parents who want to know whether they are entitled to create and to maintain a school that furthers a particular linguistic, cultural or religious way of being in the world, the Final Constitution has a much more sanguine response. Under FC s 29(3), learners and their parents may, using their own resources, build an independent school that offers their preferred medium of instruction, that reinforces a specific cultural ethos, or that promotes a comprehensive religious vision of the good. The justification for the drafter's choice lies in the recognition that it would be foolish to dismantle such institutions solely on the grounds that either some form of exclusion takes place or that some re-inscription of privilege occurs. Human beings work, and make meaning in the world, through social networks of various kinds. Taking a sledgehammer to social institutions that create and maintain large stores of real and figurative capital is a recipe for a terribly impoverished State. The *hard* question, so far as independent schools that further a particular way of being in the world are concerned, is the extent to which religious, cultural and linguistic communities can engage in justifiable forms of discrimination in the furtherance of constitutionally legitimate ends and the extent to which the State and other social actors can make equally legitimate claims on the kinds of goods that are made available in these communal formations and that cannot be easily accessed elsewhere.

(b) State attempt's to control independent schools

Over the past several years, the ANC government, emboldened by ten years of democracy and majority rule, has started to flex its muscle. Concerns about consolidating power through reconciliation have receded. The State is now in a better position to consolidate its power through policy initiatives closer to its heart and to challenge existing patterns of privilege. The open textured character of the law in this area (of admissions policy, language policy and equity requirements) creates the necessary terrain for political contestation.

As one of the authors has argued elsewhere with respect to school fees, school choice and single medium public schools, the lacuna in the law must, at some level, be viewed as intentional.[1] Whether the issue was school choice, school fees, the medium of instruction, teacher-hiring, or language policies, the fragile post-apartheid State of the mid-1990's crafted legislation and regulation that divided management, governance and policy-making responsibilities between national

[1] See B Fleisch & S Woolman 'On the Constitutionality of School Fees: A Reply to Roithmayr' (2004) 22(1) *Perspectives in Education* 111; S Woolman & B Fleisch 'South Africa's Education Legislation, Quasi-markets and School Choice' (2006) 24(2) *Perspectives in Education* 1; B Fleisch & S Woolman 'On the Constitutionality of Single-Medium Public Schools' (2007) 23 *SAJHR* 34; S Woolman & B Fleisch 'South Africa's Unintended Experiment in School Choice: How the National Education Policy Act, the South Africa Schools Act and the Employment of Educators Act Create the Enabling Conditions for Quasi-Markets in Schools' (2006) *Journal of Education & The Law* 31.

government, provincial government, provincial Heads of Department, teachers, principals, unions, SGBs, parents and learners without establishing clear hierarchies of authority. The result was that private actors in the mid-1990s were able to assert their interests through legal channels without having to worry about being rebuffed by the State. The price the State paid for such assertions of private power was small by comparison to the compensatory legitimation that it secured through *de jure* and *de facto* decentralisation.

By the *fin de siecle*, however, the State's concerns had shifted from anxiety about its quiescence to apprehension about the speed of transformation. A good example of this shift is on display in the State's efforts to bring independent schools to heel by attempting to control their age of admittance. This contrivance benefitted from the fact that age — unlike religion, culture or language — appears to be a neutral identifier. The State believed that it could go after independent schools in this manner without having to worry about alienating a particular constituency — a constituency that would mobilise around such ascriptive identifiers as language, religion or culture. What the State failed to take sufficiently seriously was the ability of individual parents to mobilise around the interests of their own children.

In *Harris v Minister of Education*, the High Court found that the State's age restrictions on admission to Grade 1 constituted an unjustifiable impairment of Talya Harris' right to equality.[1] While the *Harris* court did not doubt that the State had the authority to pass such regulations with regard to independent schools, it found that the State had failed to tender any adequate justification for its policy.[2] *Harris* stands for two propositions. It reinforces this chapter's basic contention that the Final Constitution creates significant space within which independent schools may flourish. It also underwrites the argument that the State will have to meet a fairly high evidentiary threshold should it wish to alter the admissions policies of independent schools.

(c) Legal framework for admissions policies in independent schools

As we noted at the outset, one purpose of this section is to assess the extent to which the laws governing admissions policies (and expulsion procedures) at independent schools permit such schools to discriminate in the pursuit of legitimate

[1] 2001 (8) BCLR 796 (T)(The King David School refused to admit Talya to Grade 1 in 2001 — even though her parents believed she was ready. The refusal to admit Talya was based upon a notice issued by the Minister of Education stating that independent schools could only admit learners to Grade 1 at the age of seven. Unwilling to take the risk that Talya might experience a developmental deficit after being held back a year, Talya's parents decided to challenge the constitutionality of the notice so that their daughter could be admitted to Grade 1 in 2001.)

[2] The Minister was naturally afforded an opportunity to rebut the presumption of unfair discrimination. First, the Minister argued that six-year old children were more likely to fail than seven-year old children and such failure rates had serious financial consequences for the State. Secondly, the Minister argued that the diversity of cultures and languages within South Africa produced insuperable difficulties for the creation of a school readiness test. Thirdly, the Minister argued that there are sound pedagogical reasons for starting formal education at age 7.

constitutional and statutory objectives: namely the furtherance of particular religious, cultural and linguistic ways of being in the world. This section's exercise in constitutional and statutory interpretation attempts to set out the correct legal framework for understanding the limits of exclusionary admissions policies designed to promote particular or comprehensive visions of the good in independent schools. With respect to the admissions policies of independent schools, this section pays particular attention to the circumstances in which associational interests, or community rights, trump considerations of equality. In short, those exclusionary admissions policies in independent schools that can be closely tied to the furtherance of constitutional legitimate objectives — say an academic curriculum that makes religious instruction mandatory in order to instill a deeper sense of faith within the broader religious community or a syllabus that makes language instruction in a particular tongue obligatory in order to sustain its use within a given cultural community — will likely pass constitutional muster.

(i) *The Final Constitution*

The language of FC s 29(3) reflects both the initial fragility of the post-apartheid State and the basic law's commitment to carving our 'private' space for the establishment of institutions designed to further the legitimate constitutional objectives of religious, cultural and linguistic communities:

> Everyone has the right to establish and maintain, at their own expense, independent educational institutions that *(a)* do not discriminate on the basis of race; *(b)* are registered with the State; and *(c)* maintain standards that are not inferior to standards at comparable public educational institutions.[1]

The language of FC s 29(3) suggests that independent schools possess substantially more latitude than public schools with respect to their admissions requirements (and their expulsion procedures).

The Court rejected all three arguments tendered by the Minister because the State had failed to adduce any evidence. As a result, the State failed to rebut the presumption that unfair discrimination on the grounds of age had taken place. More importantly, the result thwarted State efforts, on apparently neutral grounds, to control private power as exercised through private institutions. *Harris* stands for the proposition that the State may not assert control over independent schools simply because they are privileged. Associational rights in independent schools trump State interests in equality where the equality interest asserted cannot be backed up by any compelling pedagogical reason.

The Constitutional Court added insult to injury in *Minister of Education v Harris.* 2001 (4) SA 1297 (CC), 2001 (11) BCLR 1157 (CC). It decided the matter without reaching the substance of the equality challenge. The Constitutional Court found that the Minister lacked the requisite authority under NEPA s 3(4) to create a rule that obliged independent schools to admit learners to Grade 1 only after they turned seven. Ibid at paras 11-13. NEPA s 3(4) empowered the Minister to create non-binding policy, but not law, with respect to the provinces and the independent schools found therein.

[1] IC s 32*(c)* read, in pertinent part: '*(e)*very person shall have the right . . . to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race'.

(ii) *Statutory framework and statutory interpretation*

(aa) SASA and PEPUDA

Statutory interpretation may appear to be a rather dry, academic exercise. However, in historical circumstances such as ours, the stakes can be quite high. A State that is cognizant of the canons of statutory interpretation can use them to great advantage without actually announcing to the general public what advantage it seeks. In the case of admissions policies in independent schools, we want to suggest that a South African State growing in confidence, and moving from a reconciliatory politics to a politics of redress, has been able to use accepted canons of statutory interpretation to narrow the space within which privileged communities can continue to exclude persons from historically disadvantaged communities from independent, and often exclusive, educational institutions.

The statutory language around admissions policies at independent schools is quite permissive. Section 46(3)*(b)* of the South African Schools Act[1] ('SASA'), engages independent school admissions policies as follows:

> [A provincial] Head of Department *must* register an independent school if he or she is satisfied that — . . . the admission policy of the school does not discriminate on the grounds of race.[2]

To understand just how permissive the constitutional, statutory and regulatory framework for admissions at independent schools appears to be, one need only look at how admissions policies at public schools are treated in SASA. The SASA test for unfair discrimination with respect to admissions requirements at public schools tracks the test for unfair discrimination found in FC s 9.[3] Indeed, it would appear to encompass just about any imaginable ground for unfair discrimination. According to section 5(1) of SASA:

[1] Act 84 of 1996.

[2] While no mention of admissions policies is made in these regulations, the enabling provision for these regulations in SASA, s 46(3)*(b)*, states that a provincial 'Head of Department *must* register an independent school if he or she is satisfied that — . . . the admission policy of the school does not discriminate on the grounds of race'. The language of the Gauteng School Education Act 6 of 1995 ('GSEA') and the regulations issued pursuant to the Act, appear equally permissive. See GSEA Chapter 8 *Discrimination at Private Schools*, s 68: 'Admissions requirements for private schools shall not directly or indirectly discriminate unfairly on grounds of race.' Regulations passed by Gauteng under SASA, entitled 'Notice Regarding the Registration and Withdrawal of Registration of Independent Schools', do *not* make the registration — and the continued accreditation — of independent schools contingent upon the conformation of admissions policies with specific equity requirements.

[3] PEPUDA analysis largely tracks FC s 9. According to FC s 9(4), 'no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)'. Private persons and juristic persons are clearly bound by FC s 9. FC s 9(3) establishes the prohibited grounds for discrimination: 'The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.' FC s 9(5) establishes a rebuttable presumption of unfair discrimination where discrimination on a prohibited ground occurs: 'Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.' See, for example, *Harksen v Lane* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 53.

> A public school must admit learners and serve their educational requirements without unfairly discriminating in any way.

Sections 5(2) and 5(3) of SASA also bars the use of tests, fees, mission statements or a refusal to sign a waiver for damages as grounds for refusing admission to any learner.[1]

These statutory provisions suggest that a significant gap exists between the equity requirements for admissions at independent schools and public schools. Permitting such a significant disjunction to occur between the law governing public institutions and the law governing private institutions might appear consistent with the imperatives of both a fragile and a liberal state.[2] Indeed, were one to read — today — only those constitutional and statutory provisions that engage educational institutions directly, the change in the legal landscape, of which we shall now speak, might pass unnoticed.

The enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act[3] ('PEPUDA') — in 2000 — demonstrates both the increased power of the State and its willingness to use the law to challenge privilege and to further redress. For starters, PEPUDA applies to private parties.[4] An independent school, as a juristic person, is thus bound by PEPUDA.

More importantly, the tests for unfair discrimination set out in PEPUDA and SASA that engage expressly admissions policies at independent schools, are not identical. The tests set out in the sectoral legislation governing admissions policies at independent schools limit the grounds for a finding of unfair discrimination to race. The tests set out in PEPUDA are demonstrably broader in scope. Resort

[1] According to GSEA Chapter 3, s 11: 'Admission requirements for public schools shall not unfairly discriminate on grounds of race, ethnic or social origin, colour, gender, sex, disability, sexual orientation, religion, conscience, belief, culture or language.' Regulations passed under GSEA, entitled 'Admission of Learners to Public Schools', subject admissions requirements at public schools to even stricter scrutiny than the enabling legislation. See Regulations passed under GSEA s 11(1) and the Gauteng Education Policy Act 12 of 1998 ('GEPA') s 4*(a)(i)*, entitled 'Admission of Learners to Public Schools', GN 4138 of 2001 (PG 129 of 13 July 2001). The regulations expand — in line with s 9 of the Constitution — the grounds for a finding of unfair discrimination with respect to admissions policies. Express grounds now embrace ethnic or social origin, pregnancy, HIV/AIDS status, or any other illness. Indeed, the regulations — in line with FC s 9 and SASA — leave the list of grounds open-ended so as to encompass 'unfair discrimination against a learner in any way'. They likewise bar the use of admissions tests or fees to exclude a learner. The regulations' one open window for disparate treatment enables a gender specific school to refuse admission on the grounds of gender.

[2] That we have good reasons for treating 'public' social formations differently from 'private' social formations is a matter that lies beyond the scope of this article. A strong commitment to associational freedom is determined elsewhere in this work. See S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

[3] Act 4 of 2000.

[4] See PEPUDA s 5(1): 'The State and all persons are bound by the Act.' See also PEPUDA s 6: 'Neither the State nor any person may unfairly discriminate against any person.'

must be had to standard canons of statutory interpretation in order to determine which law applies to admissions policies at independent schools.[1]

Accepted canons of statutory interpretation tell us to look first to the language of the apposite pieces of legislation when attempting to determine which law has primacy of place.[2] PEPUDA makes it clear that its provisions prevail over all other law — save where an Act expressly amends PEPUDA or the Employment Equity Act[3] applies. Section 5 of PEPUDA reads, in relevant part:

> Application of Act: . . . (2) If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail. (3) This Act does not apply to any person to whom and to the extent to which the Employment Equity Act, 1998 (Act 55 of 1998), applies.

A second canon of statutory interpretation tells us that more recent legislation ought to prevail. PEPUDA postdates SASA. Finally, although canons of statutory interpretation state that, *ceteris paribus*, more specific sectoral legislation or subordinate legislation ought to trump more general legislation, SASA does not contain any language that would suggest that in the event of a conflict between those pieces of legislation and another piece of legislation, SASA ought to prevail.[4] PEPUDA, both as a piece of ordinary legislation, and as a piece of super-ordinate legislation that gives effect to the equality provision of the Final Constitution,[5] would appear to prevail over all other pieces of legislation that engage equality considerations in independent schools.

[1] The supremacy clause of the Final Constitution requires that all law be consistent with its provisions. However, where no inconsistency exists, and where provisions of a statute or subordinate legislation or a rule of common law afford an applicant an adequate remedy and enable a court to decide the case before it, it is now trite law that the courts ought not to analyse the matter in terms of the provisions of the Final Constitution. See *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 59 ('[W]here it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.') See also *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC), 1995 (10) BCLR 1424 (CC) at para 8. For the purposes of this chapter, we assume that the apposite provisions of PEPUDA and SASA — and all subordinate legislation — are consistent with any and all provisions of the Constitution. That does not mean that provisions of PEPUDA or SASA cannot be found to be constitutionally infirm. It only means that an analysis of their susceptibility to a constitutional challenge is not germane to this chapter. A court is also apt to take into account the fact that PEPUDA is the piece of super-ordinate legislation contemplated by FC s 9(4) '[t]o promote the achievement of equality, . . . [and] to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination . . . .' At a minimum, a court will attempt to read down the provisions of PEPUDA in order to save them from a finding of invalidity. See, for example, *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC).

[2] See, generally, LM Du Plessis *The Re-interpretation of Statutes* (5th Edition, 2002); C Botha *Statutory Interpretation* (4th Edition, 2005).

[3] Act 55 of 1998.

[4] SASA s 2 reads, in relevant part: '(1) This Act applies to school education in the Republic of South Africa. . . .(3) Nothing in this Act prevents a provincial legislature from enacting legislation for school education in a province in accordance with the Constitution and this Act.'

[5] FC s 9(4).

This result might come as a bit of a surprise to those persons *au fait* with the regulation of school admissions by sector specific education legislation. Certainly, nothing in the express wording of PEPUDA would tell a reader that this legislation displaces SASA. No amendments have been made to various pieces of education specific legislation that would suggest a sea-change in the State's approach to the admissions policies of independent schools. And yet the law is clear. The State has quietly shifted the goal-posts.

(bb) PEPUDA and admissions policies at independent schools

Neither the application provisions of PEPUDA nor the date of its passage tell us how the provisions of that statute — or at least the test for unfair discrimination — ought to be applied to admissions policies in independent schools.[1] How then should PEPUDA be construed in this context?

Although neither SASA nor apposite provincial legislation dictates how the general terms of PEPUDA ought to be applied to the sectoral specific context of admissions policies in independent schools, a court will, generally, take into account the distinctions made in such sectoral specific education legislation.[2]

Of course, it is also possible that both the national government and various provincial governments believe that the admissions policies of public schools and independent schools ought to be treated differently. The content of that differential treatment is that, in the furtherance of legitimate constitutional objectives, an independent school may adopt admissions policies that have a discriminatory effect so long as there is no intent to discriminate on the basis of race. The rationale for this differential treatment is found in the Final Constitution itself. Independent schools may be set up in order to further a particular religious or cultural vision of the good life so long as the policies of the independent school pursuit 'do not discriminate on the basis of race'. What explains the permissive attitude of our basic law with respect to the admissions, membership and expulsion practices of private religious or cultural or linguistic associations? As Van Dijkhorst J wrote

[1] The only mention of education in PEPUDA occurs in the 'Illustrative List of Unfair Practices in Certain Sectors' that appears as a Schedule to the Act. Section 2 of the Schedule reads, in relevant part: 'Education – *(a)* Unfairly excluding learners from educational institutions, including learners with special needs. *(b)* Unfairly withholding scholarships, bursaries, or any other form of assistance from learners of particular groups identified by the prohibited grounds.' The list does not purport to distinguish between public, State-aided independent schools and non-State-aided independent schools.

[2] As we have already seen, the national government and the Gauteng provincial government subject the admissions policies at public schools and independent schools to fundamentally different tests for unfair discrimination. The prohibited grounds for unfair discrimination in GSEA and in the regulations for admissions in public schools passed under GSEA and GEPA track closely the prohibited grounds found in PEPUDA. The prohibited grounds for unfair discrimination in GSEA and SASA for independent schools are limited to race. In addition, the Gauteng provincial government has not seen fit to pass regulations governing admissions policies at independent schools. At least one implication of these distinctions is inescapable. If the Gauteng provincial government is aware of the shift in the legal landscape wrought by PEPUDA, then it has decided not to announce its awareness of that shift.

in *Wittmann v Deutsche Schulverein, Pretoria*, the right to create and to maintain these independent schools must, to be meaningful, embrace 'the right … to exclude non-users of that language and non-adherents of that culture or religion, or to require from them conformity'.[1]

How then should we read the provisions of PEPUDA — and the apposite provisions of SASA, the Final Constitution, as well as our extant body of common law — when attempting to determine when, or even whether, independent schools may exclude learners? The following account delineates the appropriate form of legal analysis for educators, schools and courts faced with such a question.

(cc) PEPUDA's test for admissions at independent schools

According to PEPUDA, no person — public or private — may discriminate in a manner that imposes, directly or indirectly, burdens upon and withholds, directly or indirectly, benefits from any person on prohibited grounds.[2] According to PEPUDA, *prima facie* demonstration of discrimination on a prohibited ground shifts the burden to the respondent to show that the discriminatory law, rule or conduct is fair.[3] In the case of independent schools that discriminate against — or exclude — learners on the basis of religion, culture or language, the burden of proof shifts to them to show that the discrimination manifest in their admissions policies is fair, given the purpose or the nature of the school.

An Equality Court hearing a PEPUDA challenge to admissions policies at an independent school will likely find a school's rejection of a learner, because she refused to take religion, language or culture classes, to constitute 'discrimination'. That initial finding does not, of course, mean that the Equality Court is obliged to find that the practice constitutes unfair discrimination. PEPUDA anticipates expressly the requisite grounds for justification of discrimination. Section 14(3) of PEPUDA states that fair discrimination may occur where the respondent can demonstrate that: '*(f)* … the discrimination has a legitimate purpose; [and] *(g)* … the … discrimination achieves its purpose'.

An independent school will first have to show that the set of religious, linguistic or cultural practices that form the basis for its restrictive admissions policies offer a coherent account of the religion, language or culture ostensibly being advanced. Most independent schools that have the furtherance of religion, culture or language as an end should be able to meet this test for 'legitimate purpose'.

[1] 1998 (4) SA 423, 454 (T).

[2] See PEPUDA s 1. 'Discrimination' means 'any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantage on; or *(b)* withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.' 'Prohibited grounds' are 'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, *religion*, conscience, belief, culture, language and birth' (emphasis added).

[3] See PEPUDA s 13: 'If the discrimination did take place on a ground in paragraph *(a)* of the definition of 'prohibited grounds', then it is unfair, unless the respondent proves that the discrimination is fair.'

The next leg of the test is somewhat more onerous. Once a legitimate purpose is established, the question becomes whether the discriminatory admissions policy is necessary to achieve the school's purpose of offering an education grounded in a particular faith, language or culture. One argument — consistent with our discussion of voice, entrance and exit below — is that an independent school committed to the furtherance of a particular religion, language or culture needs to be able to control its message and that such control requires it to have relatively unfettered control over admissions practices. How strict can such exclusionary admissions policies be?

At a minimum, any learner must agree to adhere to the curriculum of the school — at least in so far as it requires specific forms of religious, linguistic or cultural instruction. After all, if the purpose of the school is to further a given religion, language or culture, then the curriculum must be designed to advance that religion, language or culture. If the curriculum is essential for the achievement of the school's legitimate purpose, then the exclusionary rule based upon a learner's refusal to follow the curriculum must be viewed as a measure that — while discriminatory — is narrowly tailored to meet the legitimate purpose.

Can a school adopt exclusionary criteria (and expulsion procedures) that go beyond adherence to the school's curriculum? That depends. The school would be obliged to show that something more than the education itself is necessary to sustain a religion, a language or a culture. The fluidity of language and the permeability of culture suggest that pre-existing membership in the linguistic or cultural community ought not to be, as a general matter, a basis for exclusion.[1] Anyone can speak Afrikaans; anyone, over time, can become a South African.

[1] As one of the authors, Stu Woolman, contends elsewhere, one cannot speak of religious, linguistic and cultural communities as if they all took the same form and were therefore subject to identical treatment under the Final Constitution. See S Woolman 'Community Rights: Religion, Culture and Language' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 58. At a gut level, some readers of the constitutional text would like to be able to say that there is a sliding scale of judicial solicitude for these communities: a scale that runs from fairly weak in so far as linguistic communities are concerned, to medium strength with respect to cultural communities, to very strong with regard to religious communities. This intuition is driven primarily by the varying degrees of permeability of linguistic communities, cultural communities and religious communities. Anyone can learn to speak a language and thereby join a community of fellow conversants. Religious communities, on the other hand, can make admission almost impossible. Cultural communities possess an 'I know it, when I see it' character, and thus make any talk about ease of entrance (and potential membership) rather elusive: is it easier to become American or French? Is it easier to become Zulu or Sotho? The text of the Final Constitution and the decisions handed down by our Courts tend to confirm this admittedly limp set of intuitions. See *Fourie* (supra) at paras 90-98 (In *Fourie*, the Constitutional Court goes out of its way to note that no religious order and no religious officer will be required to consecrate same-sex life partnerships as marriages under religious law.) The Constitutional Court has, however, shown demonstrably less hesitancy in altering customary law arrangements enforced by traditional leaders, common law and statute. See, for example, *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)(Court declared the customary law rule of male primogeniture invalid.)

The primary difficulty with trying to squeeze any further analytical precision out of the terms 'religious community', 'linguistic community' and 'cultural community' flows from the lack of consensus as to how terms like 'cultural community', 'religious community' or 'linguistic community' are to be used. With respect to this difficulty, Amy Gutmann notes:

When the term culture is loosely used, cultural identity subsumes the entire universe of identity groups, and every social marker around which people identify with one another is called cultural. Culture, so considered, is the universal glue that unites people into identity groups, and the category becomes so broad as to be rather useless for understanding differences.

Identity in Democracy (2003) 38. See also IM Young *Justice and the Politics of Difference* (1990) 22-23, 152-155.

Other theorists take a tougher line. For Raz and Margalit, the only legitimate candidates for treatment as cultural communities are those communities which provide an 'all-encompassing' or a 'comprehensive' way of being in the world. J Raz & M Margalit 'National Self-determination' in J Raz (ed) *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) 119. See also S Benhabib *The Claims of Culture: Equality and Diversity in the Global Era* (2002); A Shachar *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (2001); S Macedo (ed) *Deliberative Politics: Essays on Democracy and Disagreement* (1999); A Gutmann & D Thompson *Democracy and Disagreement* (1996); W Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995). In addition, Raz and Margalit write that such communities provide both an 'anchor for self-determination and the safety of effortless, secure belonging'. Raz & Margalit (supra) at 118. Belonging, in turn, is a function of membership: 'Although accomplishments play their role in people's sense of their own identity, it would seem that at the most fundamental level our sense of our own identity depends upon criteria of belonging rather than on those of accomplishment. Secure identification at that level is particularly important to one's well-being.' Ibid at 117. What Raz and Margalit fail to make fully explicit is the connection between a community that provides a comprehensive way of being in the world and a community that provides a secure sense of belonging. A community that provides a comprehensive way of being in the world generally provides a host of rules that govern most aspects of daily life. The benefits of belonging — of membership — flow to those who follow the rules. Follow the rules and one belongs. Flout the rules and one can find oneself on the outside of the community looking in. (Comprehensiveness then is a feature of communities with very strict codes of behaviour and harsh penalties — shunning or ex-communication — for rule non-compliance.) Although Raz and Margalit's definition of 'cultural community' — properly understood — certainly provides greater traction than looser definitions, it would seem to exclude too many social formations that we would intuitively describe as cultural communities. Amish Americans constitute a community that fits the rule-following, comprehensive vision of the good life model that Raz and Margalit's definition is meant to capture. The strict dictates of the Amish's version of Christianity married to a pastoral existence that eschews almost all forms of modern technology sets the Amish apart. Moreover, continued membership in the community is contingent upon adherence to religious dictates and other non-religious norms. Such communities would, if they could, withdraw entirely from the largely secular polity within which their community exists. As it stands, they simply draw invisible lines between us and them. But the Amish community in America does not fit commonplace understandings of cultural communities. Most individuals experience a sense of belonging to communities in which no penalties can be exacted for rule non-compliance and 'membership' can never be threatened. Thus, Raz and Margalit's definition of 'cultural community' confirms the foremost difficulty: locating precise definitions for the entities protected by FC ss 15, 29, 30 and 31. However, what matters, for the purposes of the constitutional analysis of community rights are, in fact, membership and rule-following. For an extended analysis of the relationship between membership and rule-following, see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) § 44.1*(c)*. Since community-appropriate rule-following behaviour determines continued membership within the community, then the conflict that confronts the court will often be whether a person's behaviour (or State action) conforms to the community's accepted canons of rules.

Problems with community identification are not limited to internal debates about who belongs and who does not. As the recent judgment in *Pillay* reflects, community identification will arise, as a constitutional problem, far more often in the context of exclusion and discrimination, and in terms of PEPUDA and FC s 9. *Pillay* accepts Guttmann's and Woolman's warning that, even in the realm of discrimination, 'culture' must have meaningful boundaries; at the same time, *Pillay* declines to describe the contours of those boundaries. Ibid at para 49. However, once the individual's identification with a 'culture' is established, the discrimination inquiry shifts to the centrality of that cultural identification to the individual. Chief Justice Langa notes, in support of this position, that cultures cannot be described from outside as uniform bodies of rules and practices but are instead 'living and contested formations'. Ibid at para 54. A cultural practice may have meaning for one member of a culture but not another. *Pillay* therefore requires that people receive protection from external sources of discrimination in a manner that turns on how the individual value cultural norms. Ibid at para 88. We agree with this approach in the

But what of smaller cultural groups and linguistic communities? Could a colourable claim be made that because the Khoi community in South Africa is small and has such limited resources, an independent school must be able to direct its limited funds to the education of children of Khoi descent? In the abstract, that claim seems plausible enough. Moreover, the argument from equity might support measures designed to advance a previously disadvantaged group — even if such measures come at the expense of another previously disadvantaged group. This argument secures somewhat greater support in the context of schools designed to advance religion. It seems credible, if perhaps disturbing to non-adherents, to suggest that a religious education requires a religious environment. But the effective promotion of a faith may require that a learner be educated in an environment where others take their faith seriously and do not merely put up with curriculum requirements because of other instrumental educational advantages afforded by the institution. Whether this claim about the need for a homogeneous religious environment supports a strict policy of exclusion — or only the more lenient curriculum-based policy — is a very close question.

What is interesting about this 'close' question is that the State — through PEPUDA — is able to force a private actor to look to the Final Constitution to support its position. Given that the Final Constitution is always the last port of call, and that its generally stated precepts admit to any number of different constructions, the State, through PEPUDA, has succeeded in putting independent schools on their back foot.

But being on one's back foot is not the same as being underfoot. In crafting their justifications for exclusionary admissions policies and expulsion procedures, independent schools can rely upon various general provisions in the Final Constitution — FC ss 15, 18, 29, 30 and 31 — that protect religious belief, practice, tradition, association and community, as well as the express right in FC s 29(3) to create independent educational institutions. Independent schools can therefore argue that they exist in order to advance the basic law's general commitment to the protection a variety of religious, cultural or linguistic ways of life. Moreover, as Van Dijkhorst J noted in *Deutsche Schulverein*, the right to education guarantees that members of a religious, linguistic or cultural community may 'establish their own [private] educational institutions based on their own values'.[1] It was held that the right to create these independent schools is parasitic upon 'the right … to exclude non-users of that language and non-adherents of that culture or religion, or to require from them conformity.'[2] In sum, the constitutional right to run an

context of discrimination or equality analysis. But *Pillay* does not resolve the difficult problems of group membership for individuals who wish to participate in the practices of community life, and whose views on the meaning of those practices differ from those persons within a community who determine how and whether those practices have been correctly interpreted. The notion that the South African State will displace the Pope as the ultimate interpreter of Catholic dogma has no place in our jurisprudence.

[1] *Wittmann v Deutsche Schulverein, Pretoria* 1998 (4) SA 423, 454 (T), 1999 (1) BCLR 92 (T)('*Deutsche Schulverein*').

[2] Ibid at 454.

independent school grounded in culture, language or religion inevitably entails a concomitant right to exclude students who do not wish to adhere to curriculum requirements grounded in a given language, culture or religion. The only thing an independent school may not do — under PEPUDA or SASA — is exclude a learner on the grounds of race.[1]

The last point we want to make in this section is that while the State — through PEPUDA — has narrowed the space within which independent educational institutions can exercise their discretion over admissions policies, our State remains a constitutional democracy that must work within a framework of basic rights and freedoms. That means that an ever more powerful State cannot assume that 'redress' legitimates each and every policy initiative it undertakes. So while the burden of justification for the discriminatory admissions policies may fall on independent schools, the factors in s 14(3) of PEPUDA place genuine responsibility on the complainant (and the State) to demonstrate that the exclusionary admissions policies or expulsion procedures in question do, in fact, deleteriously affect the complainant.[2]

(i) *Constitutional constraints on PEPUDA in the context of independent school admissions*

(aa) Rule-following as a condition of membership

Recent constitutional case law supports the contention that independent religious associations and independent culture-specific schools have the right to expel members who agree to follow the rules or decisions of the association's governing body and subsequently refuse to do so. In *Taylor v Kurtstag*, the Witwatersrand High Court upheld the right of the Beth Din to issue a *cherem* — an excommunication edict — against a member of the Jewish community who had agreed to follow its ruling with regard to an order for child maintenance.[3] In *Wittmann v Deutsche Schulverein, Pretoria*, the Pretoria High Court upheld the right of a school

[1] The apposite language of SASA mirrors that of FC s 29(3). SASA s 46(3)*(b)* reads: 'The admission policy of the school may not discriminate on the grounds of race.'

[2] PEPUDA s 14(3)*(b)* states that the trier of fact must take into account 'the impact or likely impact of the discrimination on the complainant'. Assume that an independent Jewish secondary school in Johannesburg requires all matriculants to consent to a curriculum that includes Hebrew and Talmudic study. One can safely assume that that most, if not all, non-Jewish students will experience the most minimal impairment of their dignity if they are turned away from the school based upon their refusal to accept the curriculum. The reason the impairment is minimal is that a non-Jewish student (or even a Jewish student) who does not wish to follow such a curriculum has a significant amount of choice with respect to school matriculation in an urban area such as Johannesburg. Moreover, any child in a position to afford private school fees has an even greater array of options. The contention that the educational opportunities of a non-Jewish student with such resources will be significantly diminished by being denied admission to an independent Jewish school in an urban or a peri-urban area lacks purchase.

[3] 2004 (4) All SA 317 (W)('*Kurtstag*') at para 38 (FC s 18 — freedom of association — 'guarantees an individual the right to choose his or her associates and a group of individuals the right to choose their associates'. The right of a group to choose their associates of necessity means the right to require those who wish to join the group to conform their behaviour to certain dictates, and the right to exclude those who refuse to conform.)

governing body to expel a student who knew that she was obliged to attend language and religious instruction classes and who subsequently refused to attend these classes.[1] Both cases underwrite the proposition that in order for a religious association or cultural association to remain committed to the practice of certain beliefs, it must control the voice of, the entrance to and the exit from the association. Thus, to the extent that a learner has agreed to abide by school curriculum policy in order to secure entrance to an independent school, such an independent school would be well within its constitutional rights to expel that pupil for failure to adhere to those requirements.

(bb) Expulsion, rule-following and fair hearings

An independent school's right to expel a student who fails to adhere to the rules is subject to two provisos. The first proviso is that the independent primary and secondary school must make clear what curriculum requirements are to be followed by the learner prior to her admission. The second proviso is that a learner (or family) facing expulsion must receive a fair hearing from the independent school in question.[2]

[1] 1998 (4) SA 423, 451 (T)('Does this mean that private parochial schools which do not receive State aid may not prescribe obligatory attendance at their morning prayers and confessional religious instruction classes? The answer is negative. Section 17 of the interim Constitution and s 18 of the Constitution recognise the freedom of association. Section 14(1) [of the interim Constitution] and s 15(1) [of the Constitution] respectively recognise the freedom of religion which includes the right to join others in worship, propagation of the faith etc. Freedom of association entails the right with others to exclude non-conformists. It also includes the right to require those who join the association to conform with its principles and rules.')

[2] South African Courts have engaged associational rights and fair hearings in four relatively recent cases. See *Kurtstag* (supra); *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T); *Ward v Cape Peninsula Ice Skating Club* 1998 (2) SA 487 (C); *Deutscher Schulverein* (supra). The Courts have upheld the rights of associations to control the grounds for expulsion so long as they met basic standards of procedural fairness. In the *Cronje* case, the High Court deferred to the United Cricket Board when it came to deciding how and whether to deal with Hansie Cronje once he had been expelled from the association. In *Kurtstag*, the Court deferred to the Beth Din with respect to the excommunication of a member of the Jewish community who had voluntarily submitted himself to the jurisdiction of the Beth Din and had subsequently violated the edicts of the Beth Din. The High Court found that the Beth Din's procedures met the requirements of a fair hearing for a member of the community who had agreed expressly to follow the Beth Din's recommendations and that the grounds for the expulsion were consistent with the parties' agreement to enter into arbitration with regard to a maintenance order. In the *Ward* and *Wittmann* cases, the High Court reversed the expulsion. But they did not do so on the ground that the expulsion occurred for some politically or morally reprehensible reason. Indeed, to the extent that the Court in the *Wittmann* case weighs in on the power of an association to terminate membership when the member acts in a manner contrary to the decisions of the association's board and engages in expressive conduct that leads to criticism of the association, the Court decides that the association does possess such power. All four cases can be read as standing for the proposition that a member has vested interests in the association that, at a minimum, require a fair termination hearing. A non-member, on the other hand, possesses no such rights. Read this way, the *Kurtstag, Wittmann*, *Ward* and *Cronje* cases are of a piece. What ties them together at a theoretical level is the notion that once a person has been granted entry into an association, he or she accepts the basic principles upon which the association operates and thus the principles that may lead to his or her exclusion. The potential for exclusion is part of the consideration the member offers in return for admittance. As the Court in the *Kurtstag* case notes: 'The potential for exclusion is part of the consideration the member offers in return for admittance.' *Kurtstag* (supra) at para 37.

(cc) Capture

The existing case law begs some important questions. In general, however, they reduce to a single query: why should we allow any association — including an independent school — to exclude anyone who wishes to join? One answer is 'capture'.

The argument from capture, broadly speaking, runs as follows. Capture is a function of — one might even say a necessary and logical consequence of — the very structure of associational or community life. In short, capture justifies the ability of associations and communities to control their association or community through selective membership policies, the manner in which they order their internal affairs and the discharge of members or users. Without the capacity to police their membership and expulsion policies, as well as their internal affairs, associations would face two related threats. First, an association would be at risk of having its aims substantially altered. To the extent the original or the current *raison d'être* of the association matters to the extant members of the association, the association must possess ability to regulate the entrance, voice and exit of members. Without built-in limitations on the process of determining the ends of the association, new members, existing members and even outside parties could easily distort the purpose, character and function of the association. Secondly, and for similar reasons, an association's very existence could be at risk. Individuals, other groups, or a State inimical to the values of a given association, could use ease of entrance into an association to put that same association out of business.

In a world without high transaction costs for the creation of associations, the risk of such penetration and alteration might be a tolerable state of affairs. But in the real world, the costs of creating and of maintaining associations are quite high. Just starting an association — be it religious, cultural, economic, political or intimate — takes enormous effort. To fail to take such efforts seriously, by failing to give individuals 'ownership' over the fruits of their continued labour, is to risk creating significant disincentives to form, build and maintain their relationships. To fail to permit an independent school, a marriage, a corporation, a church, a golf club or a law society to govern its boundaries and its members in appropriate ways, would make these arrangements impossible to maintain. It would, in some respects, be equivalent to saying that anyone and everyone owns these associations — which is, of course, tantamount to saying that no one owns them. It is the purpose of freedom of association, freedom of religion, community rights and the right to create independent schools to ensure that both literal forms and

figurative forms of property are protected from *capture* by those who would use them for ends at a variance with the objectives of the existing, and rightful members, of the association.[1]

(dd) Constitutive attachments

Associational freedom is often justified on the ground that it enables individuals to exercise relatively unfettered control over the various relationships and practices deemed critical to their self-understanding. But individual autonomy as the basis for associational freedom overemphasizes dramatically the actual space for self-defining choices.

As one of the authors has maintained elsewhere, each self is best understood as a centre of narrative gravity that unifies a set of dispositional states that are determined by the practices of the various communities — religious, cultural, linguistic, national, familial, ethnic, economic, sexual, racial, social (and so on) — into which that self is born.[2] This determined, conditioned theory of the self supports some pretty straightforward conclusions about associational freedom and community rights in the context of independent schools.[3]

Freedom of association, freedom of religion and community rights, correctly understood, force us to attend to the *arationality* of our most basic attachments and to think twice before we accord *our* arational attachments preferred status to

[1] How much control do we cede to the existing members of an association to determine who is entitled to membership? It depends. We tend to cede a great deal of control over entrance to marriages and over membership in religious institutions. However, when we move on to more public institutions such as trade unions or universities or law societies, then we may want such institutions to bear some sort of burden for demonstrating that the grounds for exclusion are reasonably or even inextricably linked with the purposes of the institution. The basis for the distinction between the two groups of associations should be obvious. It is not clear what, if anything, a State would gain through interference in entrance criteria for marriages and religions. It is, however, clear that issues of power, participation and opportunity in a liberal democratic society may require that institutions designed to deliver such goods — trade unions, political parties, universities — must do so in a fair manner — a manner that is in some sense congruent with the values of a liberal democratic society. See N Rosenblum 'Compelled Association, Public Standing, Self-respect and the Dynamic of Exclusion' in A Gutmann (ed) *Freedom of Association* (1998) 75.

[2] See S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) § 44.1(b); S Woolman *The Selfless Constitution: Experimentation and Flourishing as the Foundations of South Africa's Basic Law* (forthcoming 2008).

[3] At the same time this account of the self demonstrates the extent to which associations and communities are constitutive of the self. It dispels the notion that individuals are best understood as 'rational choosers' of the ends they seek. The self should be seen as the inheritor and the executor of a rather heterogenous set of practices — of ways of responding to or acting in the world. The centrality of inherited practices or social endowments for both the creation and the maintenance of identity introduces an ineradicable element of arationality into the domain of individual decision-making. That is, despite the dominance of the enlightenment vision of the self as a rational agent, the truth of the matter is that the majority of our responses to the world are arational.

the arational attachments of *others*.[1] These observations regarding constitutive attachments buttress our contention that independent educational institutions that pursue a particular way of being in the world ought to be able to exclude from the institution those learners who do not derive meaning from that way of being in the world, and whose presence, in significant numbers, would make the institution, *qua* religious, linguistic or cultural school, impossible to sustain.

(ee) Associational rights, self-governance and pluralism

If we accept that the practice of religion, the use of a language and the participation in cultural life are legitimate, constitutionally-sanctioned objectives, then discrimination narrowly tailored to meet those objectives must be able to pass constitutional muster. The alternative proposition — that no educational institution may discriminate on the basis of religion, language and culture — makes the possibility of sustaining, in South Africa, a diverse array of religious, linguistic and cultural communities an empirical impossibility.

(ii) Common law norms and the proper construction of PEPUDA in the context of the admissions policies of independent schools

The extant common law on association reinforces more general jurisprudential considerations in support of the proposition that independent schools intended to support a religion, a culture or a language, possess a significant degree of latitude with respect to admissions policies that differentiate between adherents and non-adherents. One old and venerable strand of the common law on association tolerates little internal or external interference with the critical purposes — or voice — of an association.[2] Another equally important line of cases is designed to prevent insiders and outsiders from altering the fundamental purposes of an

[1] The constitutive nature of our attachments also forces us to attend to another often overlooked feature of associations. We often speak of the associations that make up our lives as if we were largely free to choose them or make them up as we go along. We have suggested, in these pages, why such a notion of choice is not true of us as individual selves. It is also largely not true of associational life generally. As Walzer has convincingly argued, there is a 'radical givenness to our associational life'. M Walzer 'On Involuntary Association' in A Gutmann (ed) *Freedom of Association* (1998) 64, 67. What he means, in short, is that most of the associations that make up our associational life are *involuntary* associations. We don't choose our family. We generally don't choose our race or religion or ethnicity or nationality or class or citizenship. They choose us. Moreover, to the extent that these involuntary associations provide our life with meaning, we must draw the conclusion that over a very large domain of our lives 'meaning makes us' — we, as individuals, do not make that meaning. A reasonably equal and democratic society must mediate the givenness of our associational life and the aspirations of all of us to have the ability to discriminate (and sometimes choose) between those associational forms which still fit and those which do not. It is often the case that not choosing to leave an association, but choosing to stay, is what we truly cherish as freedom. As Walzer suggests, we ought to call such decisions to reaffirm our commitments 'freedom simply, without qualification'. Ibid at 73.

[2] See *Mitchell's Plain Town Centre Merchants Association v McLeod* 1996 (4) SA 159 166 (A) citing *Total South Africa (Pty) Ltd v Bekker* 1992 (1) SA 617 624 (A)(emphasis added).

association.[1] Although both lines of case law might have to yield to constitutional and statutory dictates, the courts ought to consider the learning in these cases as they attempt to strike the appropriate balance between equality, on the one hand, and community rights, on the other.

(iii) Conclusions about constitutional and common law constraints on the PEPUDA test for admissions policies of independent schools

This brief foray into constitutional law and common law services the following set of conclusions. While the ends pursued by PEPUDA are largely egalitarian, a panoply of rights in the Final Constitution vouchsafes objectives that cannot be reduced to equality without doing substantial violence to the meaning of those objectives or to the heterogeneous society in which we live. Indeed, to put the matter more bluntly, the Final Constitution does not commit us to a society solely based upon equality. It commits us to 'an open and democratic society based upon human dignity, equality and freedom'. The Final Constitution recognizes that great stores of social capital (that can be used for transformative ends) will be lost unless we leave many 'conservative' institutions just as they are.

The foregoing account allows us to reach at least one simple conclusion: the fact that PEPUDA applies to admissions policies at independent schools does not undermine the ability of independent schools to advance linguistic, cultural and

[1] A well-established body of common law precedent supports the contention that any proposed alteration of the fundamental objectives of an association requires the unanimous support of the association's members. This body of case law also underwrites the general proposition that courts ought to be loath to disturb associational relations on the basis of general assertions of equity or fairness. See, generally, B Bamford *The Law of Partnership and Voluntary Association in South Africa* (3rd Edition, 1982); *Murray v SA Tattersall's Subscription Rooms* 1910 TH 35, 41 (Curlewis J: 'If I be right in the view which I have taken of the object and purpose of the association, then the applicant cannot be compelled by a majority of the members — *no matter how great* — to become a member of an association or a club having a different object; he joined a betting club and cannot now be forced by a majority to become a member of a social club.') At the same time as this line of cases applies to the internal affairs of associations, it also offers insight into the extent to which parties outside an association ought to be allowed to transform that association. A very recent, and perhaps even more apposite, judgment is *Nederduitse Gereformeerde Kerk in Afrika (OVS) v Verenigende Gereformeerde Kerk in Suider-Afrika* 1999 (2) SA 156 (SCA). The Dutch Reformed Church in Africa ('NGKA') attempted to merge with the Dutch Reformed Mission Church in South Africa ('NGSK'). However, several individual churches and regional synods of the NGKA refused to accept the general synod's decisions. They asserted that the manner in which the NGKA general synod altered the constitution was *ultra vires*. They sought to have the amendments to the NGKA constitution and the consequent merger with the NGSK declared invalid. The Supreme Court of Appeal agreed. It held that the decision of the general synod of the NGKA to merge with the NGSK and the intermediate steps leading up to the merger conflicted with the clear and unambiguous wording of the constitution and vitiated, without the requisite authority (unanimity of the regional synods), the fundamental objectives of the association; all of the alterations to the NGKA constitution without the requisite authority were therefore *ultra vires* and invalid. Ibid at 168-175. The Supreme Court of Appeal's decision in *Nederduitse Gereformeerde Kerk in Afrika* provides exceptionally strong support for the proposition that independent schools designed to promote a particular religion, language or culture cannot be changed from an association acting to further those interests into an association that simply furthers the educational interests of any South African learner.

religious understandings of the good life. The reason PEPUDA does not, necessarily, undermine the ability of independent schools to advance linguistic, cultural and religious understandings of the good life is that although discrimination in the admissions process may occur, any discrimination that advances the *legitimate* linguistic, cultural or religious objectives of the independent school and does so in terms of means narrowly tailored to meet those objectives, ought to survive PEPUDA analysis.

Furthermore, the Final Constitution's undeniable commitment to transformation does not mean that every egalitarian claim will trump a more particularistic claim. The Final Constitution's answer to those parents who wish to school their children in the language, culture or religion of their choice is unequivocal. Parents and learners may create and maintain privately funded independent schools that advance linguistic, cultural and religious understandings of the good life provided that they do not employ admissions policies or expulsion procedures that serve as proxies for discrimination based upon race.

57.5 STATE SUBSIDIES FOR INDEPENDENT EDUCATIONAL INSTITUTIONS

We lay significant emphasis on the distinction between state-aided independent schools and non-state-aided independent schools because the former are subject to constitutional constraints to which the latter are not. The best example of this distinction engages the exercise of religious practices in a school environment.

FC s 15(2) requires that attendance at religious observances be free and voluntary. FC s 15(2) states that:

> Religious observances may be conducted at *state or state-aided institutions*, provided that (a) those observances follow rules made by the appropriate public authorities; (b) they are conducted on an equitable basis; and (c) attendance at them is free and voluntary. (Emphasis added).

Thus, FC s 15(2) introduces a level of equity at state-aided independent schools that makes the religious character of such an institution difficult, if not impossible, to maintain. However, by forsaking state aid, an independent school seeking to advance the tenets of a given faith can do so without having to concern itself with FC s 15(2)'s requirements of equity and voluntariness. Non-state-aided independent schools that seek to advance a culture or a language need not worry about finessing FC s 15(2)'s dictates. They simply do not apply. However, while such independent schools devoted to the promotion of a language or a culture are not subject to any state aid-related constraints, FC s 30 and FC s 31 make plain that the right to form 'cultural … and linguistic associations' … may not be exercised in a manner inconsistent with any provision of the

Bill of Rights.' The implication of this proviso in both FC s 30 and FC s 31 is that the rights of such associations are more likely to fall before other constitutional imperatives, say the right to equality.[1]

In any event, while the distinction we make between state-aided independent schools and non-state-aided independent schools is real, our reliance on it here is largely rhetorical. It is simply easier to contrast how constitutional and statutory equity requirements for admissions policies play out in two contexts, rather than three. It is also easier to contrast how FC s 9 and PEPUDA operate differently in the private domain than in the public domain. State-aided independent institutions must — by the very nature of their state support — occupy a somewhat murky middle ground between the private and the public.

[1] But see S Woolman 'Community Rights: Culture, Language and Religion' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 58. Of course, as one of the authors has argued elsewhere, the internal limitations clauses of FC s 30 and FC s 31 merely beg the question of whether the other rights in Chapter 2 trump FC s 30 and FC s 31. One can, in many instances, argue that community rights are both consistent with and reinforce others rights — eg, to dignity, to equality, to expression, to association, and to various socio-economic rights. The strength of FC s 30 and FC s 31 turn, to a significant degree, on the extent to which the Constitutional Court recognizes the associational rights of various religious, cultural and linguistic communities. The Constitutional Court's recent judgments in *Fourie* and *Pillay* suggest a growing appreciation for South Africa's diverse communities and a well-deserved recognition of the deep reservoir of meaning that those communities provide their members (as well as South Africans generally).

58 Community Rights: Language, Culture & Religion

Stu Woolman

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30 Language and culture
Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

31 Cultural, religious and linguistic communities
(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community —
(a) to enjoy their culture, practise their religion and use their language; and
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

235 Self-determination
The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.

29 Education
(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account — *(a)* equity; *(b)* practicability; and *(c)* the need to redress the results of past racially discriminatory laws and practices.
(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that *(a)* do not discriminate on the basis of race; *(b)* are registered with the state; and *(c)* maintain standards that are not inferior to standards at comparable public educational institutions.*

58.1 INTRODUCTION

In the heady days following the fall of the Berlin Wall in 1989, it seemed possible that we might be able to have our cake and eat it too. Velvet revolutions in Eastern Europe and South Africa offered evidence that we were all 'social democrats' now. More amazing still, separatist claims were resolved either through partition — as occurred with the neat cleavage of Czechoslovakia into the Czech Republic and Slovakia — or through public referenda in which minority communities concluded that it would be best if they did not withdraw from the polity of which they were currently members — as occurred in French-speaking Quebec in Canada and in white South Africa. The two great strains of enlightenment thought — the individualism of Locke and the American Revolution and the romanticism of Rousseau and the French Revolution — seemed to have

* I would like to thank Iain Currie for allowing me to make generous use of his previously published material on the international law on minority rights. I am also indebted to Theunis Roux and Solomon Dersso for their editorial interventions.

finally played themselves out with the end of the Cold War. We suddenly found our selves free to be 'me' and 'we'. That is, each individual could freely be her many selves (in an order of priority largely left to the citizen herself), maintain her affiliations with the associations that made such selves possible, and not have to worry that the state would force her to choose one of her identities over all others.

But within five years, from 1989 to 1994, the cheery, non-postmodernist, optimism with which we (global citizens) greeted placards in Prague and Pretoria bearing the words 'Freedom', 'Truth' and 'Justice' morphed into something decidedly more modest.[1] Yugoslavia disintegrated into a war of all against all. In Rwanda, Hutus only agreed to beat their machetes into ploughshares after they had already beaten a million Tutsis to death. Something had changed. Or more accurately, we had missed something — in this brief epoch — along the way. Today, too many nations still seemed inclined to use the machinery of the state to eliminate alternative and non-dominant ways of being in the world.

Three hundred and fifty years ago, Locke's *Letter on Toleration* suggested that we could end such civil wars by denying the state the right to dictate that its citizens conform their behaviour to a comprehensive (and totalizing) vision of the good life and by ensuring that the state accorded religious, cultural and linguistic groups sufficient autonomy to pursue their own preferred way of being in the world. Was he wrong? Again, what had we missed? What he missed is the difference between a politics of respect that issues from claims grounded in human dignity and a politics of difference that issues from claims grounded in equal recognition. And that, I suggest below, is exactly the difference between a politics that can accommodate both the right to be 'me' and the right to be 'we' — and one that fails to do both.

It may well be that, in many societies, individual liberty, multicultural recognition and nation building are incompatible. Indeed, for a society in transition, multicultural recognition and national identity formation appear to pull in opposite directions. For even if individual identities are formed in open dialogue, these identities are largely shaped and limited by a pre-determined set of scripts. Collective recognition becomes important, in large part, because the body politic has denied the members of some group the ability to form — on an individual basis — a positive identity. In a perfect world, the elimination of group-based barriers

[1] For more on the non-relativist, shared (if necessarily narrow), understanding of such basic political terms as freedom, justice and truth in substantially different contexts, see M Walzer *Thick and Thin: Moral Argument at Home and Abroad* (2002). As a steadfast defender of the politics of difference, Walzer does not suggest that we all share a maximalist account of what morality, justice and truth entail. (We are not all adherents of Rawls' difference principle in politics, nor we do we all subscribe to a correspondence theory in epistemology.) Walzer does, correctly, claim that we (global citizens) share a minimalist account of justice with those persons marching and revolting in Prague and Pretoria. And what is that? Walzer writes: 'What they meant by . . . justice . . . was simple enough: an end to arbitrary arrests, equal and impartial law enforcement; the abolition of the privileges and prerogatives of the party elite common, garden variety justice.' Ibid at 2.

to social goods would free individuals to be whatever they wanted to be. But even in a perfect world, claims for group recognition do not dissipate so readily.

What is the basis for the demand for group recognition? In any multicultural society, two different kinds of claims for equal respect and two different senses of identity sit uncomfortably alongside one another. The first emerges from what Charles Taylor calls a politics of equal dignity.[1] It is based on the idea that each individual human being is equally worthy of respect. The second issues from a politics of difference. This form of politics tends to revolve primarily around the claim that every group of people ought to have the right to form and to maintain its own — equally respected — community. The important distinction between the two is this. The first focuses on what is the same in all of us — that we all have lives and hopes and dreams and that we should all be allowed to pursue these dreams in an equal manner. The second focuses on a specific aspect of our identity — our membership of a group — and says that the purpose of our politics ought to be, ultimately, the nurturing or the fostering of that particularity. The power of this second form of liberal politics springs largely from its involuntary character — the sense that we have no capacity to choose this aspect of our identity. It chooses us.[2] One of the problems South Africa faces is that it is difficult, if not impossible, to accommodate both kinds of claim. As Taylor himself notes, while 'it makes sense to demand as a matter of right that we approach … certain cultures with a presumption of their value … it can't make sense to demand as a matter of right that we come up with a final concluding judgment that their value is great or equal to others.'[3] But the demand for political recognition of distinct religious, cultural and linguistic communities often amounts to that second demand. Moreover, such recognition often reinforces a narcissism of minor difference that, in turn, provokes anxiety about the extent to which members of other groups secure access to the most important goods in a polity. Such anxiety about a just distribution of goods — and the manner in which group affiliation distorts that distribution — necessarily interferes with national identity formation. The African National Congress (ANC) has, for both historical reasons and for reasons associated with its vision of transformation, refused to lend significant support to group politics. The Constitutional Court is also predisposed towards claims of equal respect (for individuals and, occasionally, groups) grounded in a politics of equal dignity.[4]

[1] See C Taylor 'The Politics of Recognition' in A Gutmann (ed) *Multiculturalism* (1996) 1.

[2] See M Walzer 'On Involuntary Association' in A Gutmann (ed) *Freedom of Association* (1998) 64, 67.

[3] Taylor (supra) at 16.

[4] See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at paras 28–30 ('[I]t is clear that the constitutional protection of dignity requires us to acknowledge the value and the worth of all individuals as members of society.') See also *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41 ('[D]ignity is at the heart of individual rights in a free and democratic society… [E]quality means nothing if it does not represent a commitment to each person's equal worth as a human being, regardless of their differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second class citizens.') See also S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, December 2005) Chapter 36.

(a) Exclusion, unfair discrimination and mere differentiation

Should we, like the ANC, the Constitutional Court, and Amartya Sen, be group identity sceptics? Sen contends that:

> Our shared humanity gets savagely challenged when the manifold divisions in the world are unified into one allegedly dominant system of classification — in terms of religion, or community, or culture, or nation, or civilization (treating each as uniquely powerful in the context of that particular approach to war and peace.) The uniquely partitioned world is much more divisive than the universe of plural and diverse categories that shape the world in which we live. It goes not only against the old-fashioned belief that 'we human beings are all much the same' … but also against the less discussed but much more plausible understanding that we are diversely different. The hope of harmony in the contemporary world lies to a great extent in a clearer understanding of the pluralities of human identity, and in the appreciation that they cut across each other and work against a sharp separation along one single hardened line of impenetrable division.[1]

That much seems incontestable. Totalizing views of identity (with their ostensibly comprehensive visions of the good life) have led to a hardening of boundaries between groups. The hardening of boundaries has led, in turn, to a hardening of hearts that enables many nations (and many communities or groups with claims to nationhood) to pillage, bomb and plunder with increasingly greater abandon. The more difficult question for group identity sceptics in South Africa is how to draw down on our constitutive attachments in a manner that both protects the social capital we require to build the many institutions that make us human *and* prevents specific religious, cultural, and linguistic communities from using that social capital to undermine our 'more perfect union'. Here Sen knows he — or we — are in trouble, but can only state the problem thus:

> The sense of identity can make an important contribution to the strength and the warmth of our relations with others, such as our neighbours, or members of the same community, or fellow citizens, or followers of the same religion. Our focus on particular identities can enrich our bonds and make us do things for each other and can help us to take us beyond our self-centred lives … [But] [t]he well-integrated community in which residents do absolutely wonderful things for each other with great immediacy and solidarity can be the very same community in which bricks are thrown through the windows of immigrants who move into the region from elsewhere. The adversity of exclusion can be made to go hand in hand with the gifts of inclusion.[2]

Sen's last sentence is telling — '*can* be made to go hand in hand'. Not *must*, not *inevitably*, and certainly not *ought*. But again, Sen's invocation of diverse difference (within individuals, as within nations) and his ringing defence of the freedom to

[1] A Sen *Identity and Violence: The Illusion of Destiny* (2006) xiv.
[2] Ibid at 2-3.

think critically about our multiple identities does not do the hard work — the line-drawing and the rule-making — that constitutional law requires.[1]

Here, at least, is one place where the Constitutional Court's jurisprudence offers us useful guidance as to how the state ought to engage the religious, cultural and linguistic communities that make up the state and how those communities ought to engage one another. In *Fourie*, the Constitutional Court found that while the state could not continue to enforce common-law rules and statutory provisions that prevented same-sex life partners from entering civilly-sanctioned marriages, the Final Constitution had nothing immediate to say about religious prohibitions on gay and lesbian marriage and could not be read to require religious officials to consecrate a marriage between members of a same-sex life partnership.[2] The *Fourie* Court wrote:

> [The amici's] arguments raise important issues concerning the relationship foreshadowed by the Constitution between the sacred and the secular. They underline the fact that in the open and democratic society contemplated by the Constitution, although the rights of non-believers and minority faiths must be fully respected, the religious beliefs held by the great majority of South Africans must be taken seriously. As this Court pointed out in *Christian Education*, freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity that form the cornerstone of human rights. Such belief affects the believer's view of society and founds a distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries. For believers, then, what is at stake is not merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation. . . . Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes. They command ethical behaviour from their members and bear witness to the

[1] For a substantially more optimistic view about our capacity to recognize diverse difference, and our ability to sustain political institutions, in heterogeneous societies, through rational discourse, see KA Appiah *Cosmopolitanism: Ethics in a World of Strangers* (2006) 113, 144 ('We do not need, have never needed, settled community, a homogenous system of values. The odds are that, culturally speaking, you already live a cosmopolitan life, enriched by literature, art, and film that comes from many places, and that contains influences from many more. And the marks of cosmopolitanism in [my] Asante village soccer, Muhammed Ali, hip-hop entered [our] lives, as they entered yours, not as work, but as pleasure. . . . One distinctly cosmopolitan commitment is to pluralism. Cosmopolitans [therefore] think that there are many values worth living by and that you cannot live by all of them. So we hope and expect that different people and different societies will embody different values. But they have to be values worth living by.')

[2] *Minister of Home Affairs v Fourie (Doctors For Life International & Others, Amici Curiae); Lesbian & Gay Equality Project & Others v Minister of Home Affairs* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)('*Fourie*') at paras 90–98. See also *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA), 2005 (3) BCLR 241 (SCA) at paras 36–37 (No religious denomination would be compelled to marry gay or lesbian couples.)

> exercise of power by State and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of a people's temper and culture, and for many believers a significant part of their way of life. . . . In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom. The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.[1]

The *Fourie* Court commits itself to five propositions that are fundamental for associational rights, generally, and for religious, cultural and linguistic community rights, in particular. First, religious, cultural and linguistic communities are a critical source of meaning for the majority of South Africans. Second, religious, cultural and linguistic communities create institutions that support the material, intellectual, ethical and spiritual well-being of many South Africans. Third, religious, cultural and linguistic associations, as part of civil society, play an essential role in mediating the relationship between the state and its citizens. Fourth, while religious, cultural and linguistic associations are entitled to articulate — and make manifest through action — their 'intensely held world views', they may *not* do so in a manner that *unfairly* discriminates against other members of South African society. Fifth, although the 'intensely held world views' and practices of various religious, cultural and linguistic associations must, by necessity, exclude other members of South African society from some forms of membership and of participation, such exclusion does necessarily constitute unfair discrimination. Indeed, the *Fourie* Court's decision makes it patently clear that, to the extent

[1] *Fourie* (supra) at paras 90-98.

that exclusionary practices are designed to further the legitimate constitutional ends of religious, cultural and linguistic associations, and do not have as their aim the denial of access to essential goods, the Final Constitution's express recognition of religious, cultural and linguistic pluralism commits us to a range of practices that the Constitutional Court will deem *fair* discrimination. The refusal of some religious officials to consecrate same-sex life partnerships as marriages under religious law is but one form of *fair* discrimination.

If we accept the *Fourie* Court's fifth proposition — which goes to the heart of the matter in conflicts between egalitarian concerns and associational rights — then South Africans, as members of a socially democractic, but still liberal constitutional, state, are obliged to ask a number of other questions about the 'effects' of exclusionary practices. The easy question is whether communities possess the power to exclude members who initially agree to follow the rules of the community, but then subsequently refuse to do so. Of course, they do. The *hard* question is whether South African society as a whole would be better off if it eliminated those exclusionary practices that not only remove non-compliant individuals but prevent other individuals — who begin as outsiders — from gaining entrance into the community?

The answer to this *hard* question turns primarily on access to those goods which individuals require in order to flourish. In 21st-century social democratic, but liberal constitutional, states – such as South Africa – there are no hard and fast lines between the public sphere and the private sphere (and the various goods they provide to individuals.) The result is that the Final Constitution affords no easy answers about what remains in the private domain and thus subject to some constitutional pre-commitment to non-interference. (Even questions of sexual intimacy, as the *Jordan* Court made clear, are matters of public interest.) Instead, the Final Constitution — and super-ordinate legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act[1] — is primarily concerned with questions about individual and group access to the kind of goods that enable us to lead lives worth living.

Sen, for his part, is sceptical of the value of many forms of exclusionary and discriminatory behaviour practised by some religious, cultural and linguistic communities. It is the virulence of these practices that leads Sartre to conclude, somewhat rhetorically, that the anti-Semitism of European Christianity and Nazi Germany 'makes the Jew'.[2] (By this, Sartre meant that the dominant and the discriminatory script of Christian Europe denied the Jew the most basic features

[1] Act 4 of 2000.

[2] See Jean-Paul Sartre *Portrait of the Anti-Semite* (trans E de Mauny 1968) 57 ('The Jew is a man whom other men look upon as a Jew; . . . it is the anti-Semite who makes the Jew.')

of humanity.[1]) But this critical stance toward the exclusionary practices of many communities does not commit us to the proposition that all of these exclusionary practices are constitutionally infirm. (Nor does it commit us to the proposition, implicit in Sartre's brief against anti-Semitism, that there is nothing of value left in Judaism once one dispenses with the discriminatory script of Christian Europe.[2]) As I have argued at length elsewhere[3] — and as Sen recognizes[4] — no form of meaningful human association — marriages, nuclear families, extended families, friendships, burial societies, trade unions, neighbours, neighbourhood security watches, political parties, bowling clubs, political action groups, stokvels,

[1] Edward Said voices similar sentiments about double consciousness and its dependency on a dominant power's hypocrisy, when he writes:

> The moment one became a student at VC [Victoria College in Cairo, a public school in effect created to educate those ruling-class Arabs and Levantines who were going to take over after the British left] one was given the school handbook, a series of regulations governing every aspect of school life the kind of uniform we were to wear, what equipment was needed for sports, the dates of school holidays, bus schedules and so on. But the schools first rule, emblazoned on the opening page of the handbook, read: English is the language of the school; students caught speaking any other language will be punished. Yet there were no native English-speakers among the students. Whereas the masters were all British, we were a motley crew of Arabs of various kinds, Armenians, Greeks, Italians, Jews and Turks, each of whom had a native language that the school had explicitly outlawed. Yet all, or nearly all, of us spoke Arabic many spoke Arabic and French and so we were able to take refuge in a common language in defiance of what we perceived as an unjust colonial stricture. British imperial power was nearing its end immediately after World War Two, and this fact was not lost on us, although I cannot recall any student of my generation who would have been able to put anything as definite as that into words.

'Between Worlds' (1999) 9 *London Review of Books* 20.

[2] While Sartre's views on sincerity and his negative assessment of religion might lead him to this conclusion, few non-practising cultural Jews would endorse this position. Shakespeare offers the fuller account of the Jew as a person with friends, family, community, and employment, and not just the possessor of an identity that constitutes a negative place holder, when he has Shylock say:

> He hath disgraced me, and hindered me half a million; laughed at my losses, mocked at my gains, scorned my nation, thwarted my bargains, cooled my friends, heated mine enemies; and whats his reason? I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? Fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same summer and winter, as a Christian is? If you prick us do we not bleed? If you tickle us do we not laugh? If you poison us, do we not die? And if you wrong us, shall we not seek revenge? If we are like you in the rest, we will resemble you in that. If a Jew wrong a Christian, what is humility? Revenge. If a Christian wrong a Jew, what should his sufferance be by Christian example? Why, revenge. The villany you teach me, I shall execute and it shall go hard but I will better the instruction.

W Shakespeare *The Merchant of Venice*, Act III, Scene 1.

[3] See S Woolman *The Selfless Constitution: Experimentalism & Flourishing as the Foundations of South Africa's Basic Law* (2007); S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44; S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36. See also P Lenta 'Religious Liberty and Cultural Accommodation' (2005) 122 *SALJ* 352 (For more on how to resolve the tension between associational and egalitarian imperatives.)

[4] Sen (supra) at 151 ('[S]ometimes a classification that is hard to justify may nevertheless be made important by social arrangements. That is what competitive examinations do (the 300th candidate is still something, the 301st is nothing). In other words, the social world constitutes differences by the mere fact of designating them.')

corporations, non-governmental organizations, professional regulatory bodies, charities, guilds, churches, synagogues, mosques, temples, schools, parent-teacher committees, school governing bodies, co-op boards, landless people's movements, internet forums, foundations, trusts — is possible without some form of discrimination.[1]

The critical question — as the *Fourie* Court notes — is whether such discrimination rises to the level of an unjustifiable impairment of the dignity of some of our fellow South Africans.[2] Again, this question turns on access to the kinds of goods that enable us to lead lives that allow us to flourish. It is easy to conclude that golf clubs that have been the bastion of white male Christian privilege must open their doors to persons of all colours, all sexes and all religions. But what of the large stores of social (and hard) capital that have been invested in such institutions, and what of that capital which continues to offer the possibility of significant returns to the original members (and future members)? What of stokvels that provide access to capital to members of a community — but not to outsiders? What of religious secondary schools that discriminate on the basis of an applicant's willingness to accept a prescribed religious curriculum and, at the same time, offer a better education than that generally available in our public schools? It would be foolish to dismantle such institutions solely on the grounds that either some form of exclusion takes place or that some re-inscription of privilege occurs. Almost all meaningful human labour occurs within the context of self-perpetuating social networks of various kinds. Taking a sledgehammer to social institutions that create and maintain large stores of real and figurative capital is a recipe for a very impoverished polity. The *hard* question thus turns on the extent to which religious, cultural and linguistic communities can engage in justifiable forms of discrimination in the furtherance of constitutionally legitimate ends *and* the extent to which the state and other social actors can make equally legitimate claims on the kinds of goods made available in these communal formations that cannot be accessed elsewhere.

[1] Why defend the parochial, the partial, the provincial? Why defend any community that excludes others by virtue of genealogy, rules, beliefs, traditions or practices? Edmund Burke wrote: '[T]o love the little platoon we belong to is the first principle, (the germ as it were) of public affections. It is the first link in the series by which we proceed towards love of country and to mankind.' E Burke *Reflections on the Revolution in France* (JCD Clark (ed), 2001) 202. Burke thereby connects the parochial with the universal. K Anthony Appiah comes at the problem from a slightly different direction. K Anthony Appiah defends cosmopolitionism — what he calls universality plus difference — on the grounds that cosmopolitanism is committed to *(a)* pluralism the notion that there are different values worth living by and *(b)* fallibilism the notion that our knowledge and our values are imperfect, provisional, subject to revision in the face of new evidence. Appiah (supra) at 144. So, for Appiah, religious, cultural and linguistic communities retain their value when they provide us with values worth living by, (as they almost all do to one extent or another), and when the members of those communities do not insist that there is one right way for human beings to live and do not then insist on imposing that one right way on others so as to truly set them free. Ibid. The members of religious, cultural and linguistic communities must commit themselves as citizens or a republic, or citizens of the world to some significant degree of value laissez-faire.

[2] See, further, G Pienaar 'The Effect of Equality and Human Dignity on the Right to Religious Freedom' 2003 (66) *THRHR* 579.

(b) Inclusion, unfair discrimination and mere differentiation

This concern about the inegalitarian arrangements found within various religious, cultural and linguistic communities is not limited to exclusionary practices. Quite often, or often enough, members of religious or cultural communities will complain that their own community's 'traditional practices', when married to a constitutionally-recognized claim of group autonomy, perpetuate systemic discrimination and structural disadvantage.[1]

Take, for example, the experience of women within the federally and legally autonomous Pueblo tribe in the United States. Under Pueblo law,

> Pueblo women — but not Pueblo men — are denied membership if they intermarry; only women [who intermarry] lose residency rights (for themselves and their children), voting rights, and rights to pass their tribal membership on to their children, along with related welfare benefits that are tied to tribal membership.[2]

Julia Martinez and other women within the Santa Clara Pueblo community challenged these tribal laws as violations of both the federal equal protection clause and the Indian Civil Rights Act. The latter reads as follows: 'No Indian tribe in exercising powers of self government shall . . . deny to any person within its jurisdiction the equal protection of the laws.'[3] What is remarkable about the US Supreme Court's judgment in *Santa Clara Pueblo v Martinez* is that although the Court refused to grant tribal authorities absolute sovereignty over affairs within their jurisdiction, the *Martinez* Court was still willing to grant them sufficient autonomy to deny half of their members the equal protection of the law.[4]

The South African Constitutional Court has had somewhat greater 'success' in mediating conflicts that pit the interests of the individual against the interests of the religious, cultural or linguistic community. In *Christian Education South Africa*, the Court had to assess the relative virtues of arguments that *(a)* justified corporal punishment of children in terms of the tenets of a specific religious faith, and that *(b)* called for bans on such punishment because it turned the children of religious parents into mere instruments for the articulation of a community's beliefs. While the Court skirted the highly charged question of whether a child's dignity was impaired by corporal punishment meted out by religious parents in religious

[1] See S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44; S Woolman & M Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 64.

[2] A Gutmann *Identity in Democracy* (2003) 45.

[3] *Martinez v Santa Clara Pueblo* 540 F2d 1039, 1042 (10th Cir 1976).

[4] 436 US 49 (1978). But see *Santa Clara Pueblo v Martinez* 436 US 49, 83 (1978)(Justice White, in dissent, writes: 'The extension of constitutional rights to citizens is *intended* to intrude upon the authority of government.')

homes, it had no difficulty determining that the dignity of children was impaired by corporal punishment meted out by teachers in private religious schools.[1]

The Constitutional Court has had even greater success in mediating the individual interests and the community interests at stake in a number of recent challenges to rules of customary law. In *Bhe v Magistrate, Khayelitsha & Others*, the Court found that the customary law rule of male primogeniture — and several statutory provisions that reinforced the rule — impaired the dignity of, and unfairly discriminated against, the deceased's two female children because the rule and the other impugned provisions prevented the children from inheriting part of the deceased's estate.[2] However, it is the manner in which the *Bhe* Court negotiates two different kinds of claims for equal respect that is most instructive for our current purposes.

The *Bhe* Court begins with the following bromide. While customary law may provide a comprehensive vision of the good life for many South African communities that warrants some level of constitutional solicitude,[3] the new-found constitutional respect for traditional practices does not immunize them from constitutional review.[4] Everyone — whether traditional leader or Constitutional Court judge — must locate any putatively valid justification of extant customary law in the provisions of the Final Constitution.

The *Bhe* Court then characterizes the customary law of succession in terms that validate its spirit without necessitating that the Court be beholden to its letter. The customary law of succession is, according to the *Bhe* Court, a set of rules

[1] *Christian Education of South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 51 (CC)('*Christian Education*') at para 25 ('It might well be that in the envisaged pluralistic society members of large groups can more easily rely on the legislative process than can those belonging to smaller ones, so that the latter might be specially reliant on constitutional protection, particularly if they express their beliefs in a way that the majority regard as unusual, bizarre or even threatening. Nevertheless, the interest protected by section 31 is not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity.') For criticism of *Christian Education*, see S Woolman 'Dignity' (supra) at § 36.4*(c)*(iii). See also S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) § 44.3*(c)*(viii); P Lenta 'Religious Liberty and Cultural Accommodation' (2005) 122 *SALJ* 352.

[2] *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('*Bhe*').

[3] See, eg, FC s 39(3): The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

[4] See *Bhe* (supra) at paras 42-46 ('At the level of constitutional validity, the question in this case is not whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are consistent with the Constitution. This status of customary law has been acknowledged and endorsed by this Court.') See also *Alexkor Ltd & Another v Richtersveld Community & Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC)(*Richtersveld*) at para 51 ('While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution'); *Mabuza v Mbatha* 2003 (4) SA 218 (C), 2003 (7) BCLR 743 (C)(*Mabuza*) at para 32 ('It bears repeating, however, that as with all law, the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights.')

> . . . designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community. . . . The heir did not merely succeed to the assets of the deceased; succession was not primarily concerned with the distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit. Property was collectively owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. He inherited the property of the deceased only in the sense that he assumed control and administration of the property subject to his rights and obligations as head of the family unit. The rules of the customary law of succession were consequently mainly concerned with succession to the position and status of the deceased family head rather than the distribution of his personal assets.[1]

Customary law has not, the *Bhe* Court ruefully observes, evolved to meet the changing needs of the community. It fails African widows because: '*(a)* . . . social conditions frequently do not make living with the heir a realistic or even a tolerable proposition; *(b)* . . . the African woman does not have a right of ownership; and *(c)* the prerequisite of a good working relationship with the heir for the effectiveness of the widow's right to maintenance', as a general matter, no longer exists.[2] Again the Court takes care to note that the fault for this arrested development lies outside traditional communities. Ruptures within traditional ways of life — caused by apartheid, the hegemony of western culture, and capitalism — have prevented the law's evolution.[3] This aside sets the stage for the delivery of the *Bhe* Court's coup de grâce: that 'the official rules of customary law of succession are no longer universally observed.'[4] The trend within traditional communities is toward new norms that 'sustain the surviving family unit' rather than those norms that re-inscribe male primogeniture.

By showing that the spirit of succession lies in its commitment to family cohesion, that the traditional family no longer coheres as it once did, and that the 'distorted' rules of customary law are frozen in apartheid-era statute and case law that 'emphasises . . . patriarchal features and minimises its communitarian ones,' the *Bhe* Court closes the gap between constitutional imperative and customary obligation.[5] Had customary law been permitted to develop in an 'active and dynamic manner,' it would have already reflected the *Bhe* Court's conclusion that 'the exclusion of women from inheritance on the grounds of gender is a clear violation of . . . [FC s] 9(3).'[6] Had customary law not been allowed to ossify, traditional communities would have noted how male primogeniture entrenched

[1] *Bhe* (supra) at para 75.

[2] See South African Law Reform Commission *The Harmonisation of the Common Law and the Indigenous Law: Succession in Customary La*w Issue Paper 12, Project 90 (April 1998) 6-9. See also TW Bennett *Human Rights and African Customary Law under the South African Constitution* (1997) 126-127.

[3] See, eg, *Richtersveld Community & Others v Alexkor Ltd & Another* 2003 (6) SA 104 (SCA), 2003 (6) BCLR 583 (SCA) at paras 85-105.

[4] *Bhe* (supra) at para 84.

[5] Ibid at para 89.

[6] Ibid at para 83.

'past patterns of disadvantage among a vulnerable group' and endorsed the *Bhe* Court's re-working of customary understandings of the competence 'to own and administer property' in a manner that vindicates a woman's right to dignity under FC s 10.[1] In this way, the *Bhe* Court is able to assert that traditional communities have conceptions of dignity worth protecting without being obliged to endorse a rule that quite clearly offends the dignity interests of many women and female children within those communities.[2]

These inquiries into both the physical coercion and the non-physical coercion of children and adults by the practices of traditional religious and cultural communities are united by considerations of exit.[3] The Constitutional Court has proved itself quite adept at distinguishing circumstances in which neither child nor adult can meaningfully vote with their feet, from those instances in which adults willingly remain members of traditional communities in which their rights and privileges may well be subordinate to the rights and the privileges of other members of the community. The Court's ability to distinguish the objective conditions of second-class citizenship from the subjective decisions of equal citizens has blunted critics of religious and cultural communities who attribute 'false consciousness' to any individual or group of individuals who remain within their community's traditional confines.

(c) Distinctions between religious, linguistic and cultural communities

One cannot speak of religious, linguistic and cultural communities as if they all took the same form and were therefore subject to identical treatment under the Final Constitution. At a gut level, however, one would like to be able to say that there is a sliding scale of judicial solicitude for these communities: a scale that runs from fairly weak protection in so far as linguistic communities are concerned, to medium strength with respect to cultural communities, to very strong protection with regard to religious communities. This intuition is driven primarily by the varying degrees of permeability of linguistic communities, cultural communities and religious communities. Anyone can learn a language and thereby join a community of fellow speakers. Religious communities, on the other hand, can make admission almost impossible. Cultural communities possess an 'I know it,

[1] *Bhe* (supra) at para 84.

[2] Judge Hlophe employs a similar disabling strategy in *Mabuza*. *Mabuza v Mbatha* 2003 (4) SA 218 (C), 2003 (7) BCLR 743 (C). He recognizes the supremacy of the Final Constitution at the same time as he asserts that the protean nature of customary law should enable it to conform, as necessary, to the dictates of the Bill of Rights. His nuanced assessment of the role of *ukumekeza* reconfigures siSwati marriage conventions in a manner that *(a)* refuses to allow *ukumekeza* to be used by the grooms family as a means of control over the bride and *(b)* consciously places the husband and wife on an equal footing with respect to subsequent determinations of whether a valid marriage under siSwati customary law has taken place. See, further, S Woolman & M Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 64.

[3] See S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

when I see it' character, and thus make any talk about ease of entrance (and potential membership) rather elusive: Is it easier to become American or French? Is it easier to become Zulu or Sotho? The text of the Final Constitution and the decisions handed down by the courts tend to confirm this admittedly limp set of intuitions.[1]

There are two primary difficulties with trying to squeeze any further analytical precision out of the text of FC ss 30 and 31. The first difficulty flows from the lack of consensus as to how terms like 'cultural community' or 'religious community' or 'linguistic community' are to be used. The second, related, difficulty stems from the fact that many of the specific social formations or entities that fall within the protective ambit of FC ss 30 and 31 can often be described in all three terms — religion, language, culture. This descriptive over-determination could complicate our analysis of the constitutional claim being made. Is a Jewish independent school promoting a religion, a culture, a people, a nation, or just the language of Hebrew? Is a single-medium Afrikaans public school promoting a culture, a people, a nation, a language, or a religion?

With respect to the first difficulty, Amy Gutmann notes

> When the term culture is loosely used, cultural identity subsumes the entire universe of identity groups, and every social marker around which people identify with one another is called cultural. Culture, so considered, is the universal glue that unites people into identity groups, and the category becomes so broad as to be rather useless for understanding differences.[2]

Other theorists take a tougher line. For Raz and Margalit, the only legitimate candidates for treatment as cultural communities are those communities which provide an 'all-encompassing' or a 'comprehensive' way of being in the world.[3] In

[1] As I argue below, FC s 15, when read with FC s 31, would appear to afford religious practices, and thus religious communities, greater protection than linguistic practices and cultural practices, and thus linguistic communities and cultural communities. FC s 15 protects religious belief, and per force religious practice, since the protection of belief alone is utterly empty (until such a time as mind control is literally possible.) FC s 15 protects religious practices, and thus the religious communities that engage in them, without subjecting them, as occurs in FC s 30 and FC s 31, to an internal limitation that requires the latter set of practices to be consistent with the rest of the substantive provisions found in Chapter 2. In *Fourie*, for example, the Constitutional Court goes out of its way to note that no religious order and no religious official will, as a result of the Court's finding that the state must treat the marriage of same-sex life partners in the same manner as it treats opposite-sex life partners, be required to consecrate same-sex life partnerships as marriages under religious law. See *Fourie* (supra) at paras 90-98. The Constitutional Court has, however, shown demonstrably less hesitancy in altering customary law arrangements enforced by traditional leaders, common law and statute. See, eg, *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('*Bhe*')(Court declares customary law rule of male primogeniture invalid.)

[2] A Gutmann *Identity in Democracy* (2003) 38. See also IM Young *Justice and the Politics of Difference* (1990) 22-23, 152-155.

[3] J Raz & A Margalit 'National Self-determination' in J Raz (ed) *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) 119. See also S Benhabib *The Claims of Culture: Equality and Diversity in the Global Era* (2002); A Shachar *Multicultural Jurisdictions: Cultural Differences and Womens Rights* (2001); S Macedo (ed) *Deliberative Politics: Essays on Democracy and Disagreement* (1999); A Gutmann & D Thompson *Democracy and Disagreement* (1996); W Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995).

addition, they write, such communities provide both an 'anchor for self-determination and the safety of effortless, secure belonging.'[1] Belonging, in turn, is a function of membership:

> Although accomplishments play their role in people's sense of their own identity, it would seem that at the most fundamental level our sense of our own identity depends upon criteria of belonging rather than on those of accomplishment. Secure identification at that level is particularly important to one's well-being.[2]

What Raz and Margalit fail to make fully explicit is the connection between a community that provides a comprehensive way of being in the world and a community that provides a secure sense of belonging. A community that provides a comprehensive way of being in the world generally provides a host of rules that govern most aspects of daily life. The benefits of belonging — of membership — flow to those who follow the rules. Follow the rules and one belongs. Flout the rules and one can find oneself on the outside of the community looking in. (Comprehensiveness then is a feature of communities with very strict codes of behaviour and harsh penalties — shunning or ex-communication — for rule non-compliance.)

Although Raz and Margalit's definition of 'cultural community' — properly understood — certainly provides greater traction than looser definitions, it would seem to exclude too many social formations that we would intuitively describe as cultural communities. Amish Americans constitute a community that fits the rule-following, comprehensive vision of the good life model that Raz and Margalit's definition is meant to capture. The strict dictates of the Amish's version of Christianity married to a pastoral existence that eschews almost all forms of modern technology sets the Amish apart. Moreover, continued membership in the community is contingent upon adherence to religious dictates and other non-religious norms. Such communities would, if they could, withdraw entirely from the larger polity within which their community exists. As it stands, they simply draw invisible lines between us and them.

But the Amish community in America, or the Ultra-Orthodox Jewish community in Johannesburg, do not fit commonplace understandings of cultural communities. For example, I would, at one point in my life, have certainly identified myself as part of the Jewish community of the greater New York metropolitan area. But there were no rules to follow — and I followed none. So while I certainly felt a sense of belonging, no penalties could be exacted for non-compliance and my 'membership' could never be threatened.

Thus, Raz and Margalit's definition of 'cultural community' confirms our first difficulty: developing precise definitions for the entities protected by FC ss 30 and 31. But they also tell us something important about our second difficulty — that of descriptive over-determination. ('Descriptive over-determination' means the

[1] Raz & Margalit (supra) at 118.
[2] Ibid at 117.

ability to describe the same community in terms of two or more of the following characteristics: religion, culture and/or language.) It would seem that descriptive over-determination — though a fact about many communities — is not a constitutional problem. What matters, for the purposes of constitutional analysis under FC ss 30 and 31, is membership and rule-following.[1] And that holds for linguistic communities, cultural communities and religious communities alike.

In sum, our attention is drawn to FC ss 30 and 31 when we are confronted by questions of membership in the community and the willingness (or the refusal) of individuals both within and without the community to follow those rules that both define membership in the community and determine the ability to participate fully in community life. Issues of membership and rule-following come up much more frequently in religious communities than in cultural communities or linguistic communities because many religious communities offer quite comprehensive visions of the good life. Most religions are defined by reams of ecclesiastical doctrine: a refusal to follow established doctrine can lead to excommunication. Languages, on the other hand, are defined by their grammar and their syntax. People are rarely excommunicated from communities for bad grammar (though they may be shunned in Paris). And so, my initial intuitions about a sliding scale of judicial solicitude are borne out by the comprehensiveness of the tenets and practices of religious communities, and the necessary, but hardly comprehensive, role that language plays in linguistic communities.

What then are we to do in cases of descriptive over-determination — where religion, language and culture all serve to define a particular community and the institutions upon which members have built the community? Since community-appropriate rule-following behaviour determines continued membership within the community, the conflict that confronts the court will often be whether a person's behaviour (or state action) conforms to the community's accepted canon of rules. The primary kind of community practice — religious, linguistic, cultural — at issue will reveal itself in the very terms of the dispute: Is a cherem — an act of excommunication – about a refusal of a member of the Orthodox Jewish community to follow an edict of the community's ecclesiastical authority, the Beth Din? Is the rejection of an admission application to a single-medium Afrikaans public school about the applicant's refusal to accept instruction in Afrikaans? Is the refusal by a traditional leader to consecrate a marriage based upon a couple's rejection of the ritual of lobolo? Thus, while members of the Orthodox Jewish religious community may well speak Hebrew, the conflict at issue is clearly over religious doctrine (and not language). When it comes to lobolo, the constitutionality of this cultural community's custom is at issue (not

[1] For an extended analysis of the relationship between membership and rule-following, see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) § 44.1*(c)*.

language or religion.[1]) When it comes to making Afrikaans the language of public school instruction, the issue is linguistic — less cultural, certainly not religious — and turns on whether the state has the resources necessary to maintain a single-medium public school and whether non-Afrikaans speaking individuals have educational opportunities at other institutions.[2]

58.2 Historical Background: Negotiating Community Rights

The Final Constitution, as a liberal political document, certainly carves out the space within which self-supporting cultural, linguistic and religious formations may flourish. Some commentators take solace in the fact that the Final Constitution contains six different provisions concerned with culture, eight with language and four with religion.[3] However, as we shall see, the drafting histories of IC ss 31 and 184 and FC ss 30, 31 and 185 give the lie to the claim that the basic law sets great store in the vindication of specific group claims based upon language, culture and religion.[4]

[1] Distinctions between religious and cultural practices are not always so easy to make in our context. A person may practice Christianity and still view the animist practise of honouring her ancestors as a form of religious conviction rather than a traditional ritual. Religion and culture constitute a potent mix in many South African communities and are often impossible to disaggregate in the minds of community members.

[2] That members of the Afrikaans-speaking community may view the issue through the prism of culture and nationality does not for constitutional purposes make it so. Of course, members of the Afrikaans-speaking community are largely free to create private institutions intended to preserve not only Afrikaans, but very particular views of Afrikaner culture and religion. See *Ex parte Gauteng Provincial Legislature: in re Dispute Concerning the Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill*. 1996 (3) SA 289 (CC), 1996 (4) BCLR 537 (CC)(Interim Constitution and now the Final Constitution provide the requisite space for linguistic communities and cultural communities to create and to sustain institutions private schools that serve the sectarian interests of those communities); *Western Cape Minister of Education v The Governing Body of Mikro Primary School* 2006 (1) SA 1 (SCA), 2005 (10) BCLR 973 (SCA)(*Mikro*)(Single medium public schools that might emphasize Afrikaans culture and history in addition to language have right to exist to exist so long as other learners have meaningful access to public schools that offer instruction in another medium.) See also S Woolman 'Defending Discrimination: On the Constitutionality of Independent Schools that Promote a Particular, if not Comprehensive, Vision of the Good Life' (2007) 22 *Stellenbosch Law Review* 31.

[3] See also F Venter The Protection of Cultural, Linguistic and Religious Rights: The Framework provided by the Constitution of the Republic of South Africa, 1996, Konrad Adenauer Stiftung Seminar on Multiculturalism (1999) 19, available at http://www.kas.org.za/publications/seminarreports/multiculturalism/VENTER.pdf (accessed on 1 April 2004). Provisions of the Final Constitution dealing with culture, language and religion include, but are not limited to: *(a)* ss 9, 30, 31, 235 (culture); ss 6, 29, 30, 31, 235 (language); and *(c)* ss 9, 15, 30, 31 (religion). These various provisions were driven by three constitutional principles enshrined in the Interim Constitution. Adherence to these principles as part of the negotiated settlement was the price of peace. Two of the principles required recognition of minority rights and another required the inclusion in the Final Constitution of a provision ensuring a right of self-determination for any community sharing a common cultural and linguistic heritage.

[4] The one notable exception with respect to constitutionally mandated group claims would be land. The Constitutional Court and the Supreme Court of Appeal have recognised the legitimacy of such claims against both the state and other private parties. *Alexkor Ltd & Another v Richtersveld Community & Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC); *Abrams v Allie* 2004 (4) SA 534 (SCA). However, these claims are grounded largely in dispossession of title based upon racially discriminatory classifications.

(a) The Interim Constitution

The problem of accommodating and protecting, ethnic, religious and linguistic communities in a democratic state dominated the political debates and the lengthy constitutional negotiations that preceded the enactment of the Interim Constitution. Between 1986 and 1991, the South African Law Commission investigated various mechanisms for the protection of group rights.[1] To this end, it solicited submissions from white right-wing intellectuals on the right of minorities to seek recognition as distinct societies and to resist assimilation into a common national culture.[2] Conservative Party, Afrikaner Volkswag and Boere-Vryheidsbeweging testimony before the Commission reflected deep dissatisfaction with mere 'minority group protection'. These parties favoured 'national group protection'. National group protection meant self-determination 'in its widest form'. This widest of forms was understood by most Afrikaner nationalists to mean a right to secession.[3]

Notwithstanding the contentiousness of white minority concerns, the language and cultural rights provisions of the Interim Constitution's Bill of Rights secured virtually universal consent from Multi-Party Negotiating Forum participants.[4] IC s 31 attracted near universal assent because, though it echoed art 27 of the International Covenant on Civil and Political Rights, it avoided art 27's protection of discrete sets of rights-holders. Both the ANC and the National Party eschewed more substantial minority rights protection. However, each party found collective rights for linguistic, religious and cultural minorities politically unpalatable for different reasons.

As noted above, the National Party government had asked the South African Law Commission to investigate mechanisms for the recognition and protection of 'group rights'.[5] The Commission accepted the existence of what it termed 'numerous groups or communities' and 'strong inter-group conflict and rivalry' in South African society.[6] Nevertheless, such internecine conflict did not constitute a legitimate ground for recognizing the existence of 'statutorily definable groups with statutorily definable 'rights'.[7] According to the Commission, South

[1] South Africa Law Commission *Group and Human Rights, Working Paper 25, Project 58* (1989).
[2] South Africa Law Commission *Group and Human Rights, Interim Report* (1991).
[3] Ibid at 39-80.
[4] LM Du Plessis 'A Background to Drafting the Chapter on Fundamental Rights' in B de Villiers (ed) *Birth of a Constitution* (1994) 89, 93. By contrast, the economic activity, fair labour practices and property rights provisions of the Chapter were the subject of vociferous debate. See H Corder 'Towards a South African Constitution' (1994) 57 *Modern Law Review* 491, 513.
[5] South African Law Commission *Group and Human Rights, Working Paper 25, Project 58* (1989) 1.
[6] South African Law Commission *Group and Human Rights, Interim Report* (1991). The Conservative Party, Afrikaner Volkswag and Boere-Vryheidsbeweging testimony before the Commission expressed its dissatisfaction with mere minority group protection. Instead, these parties favoured national group protection, which they understood as a right to Afrikaner self-determination in its widest form, including the right to secession. Ibid at 39-80.
[7] Ibid at 35.

Africa would be better served if the 'needs of individuals who are members of different linguistic, cultural and religious groups' were adequately protected by 'individual rights in a bill of rights'.[1]

The Commission's suspicion of community rights — and the concomitant 'special status' they accord to groups — was not surprising considering the National Party's and the Commission's determination to create a 'colour-blind' constitutional order.[2] The Commission — and the National Party — recognized that community rights or group rights would, inevitably, be tainted by their conceptual correspondence to apartheid 'group' discourse. 'Community', 'minority' or 'group' had worked as code for apartheid's racially defined and racially discriminatory politics.[3] The Commission therefore recommended that a future Bill of Rights contain individual rights to practise a culture or religion, to use a language and to be protected from religious, cultural or linguistic discrimination.

However, community rights were not entirely anathema to the Commission or the National Party. The Commission concluded that minority populations could find protection in the form of such constitutional arrangements as federalism or minority representation in an upper house of Parliament or the Cabinet.[4] These conclusions were largely shared by the National Party. The National Party believed that white minority interests would be better protected at the level of distribution of governmental power, rather than by judicial mechanisms.[5] The National Party — like the Commission — proposed only non-discrimination guarantees and individual rights to speak a language or to participate in 'cultural life'.[6]

The ANC was similarly ill-disposed towards community, minority, collective or group rights. And for good reason. Before the velvet revolution of 1994, most

[1] *Interim Report* (supra) at 679-680.

[2] Ibid at 647 ('What is certain is that the vast majority of this country's total population is opposed to further discrimination or exclusion or favouring on the ground of race or colour. We are striving for a system of equality before the law, and therefore justice, for all.')

[3] After reviewing international legal mechanisms for the protection of minorities, the Commission deliberately steers away from a solution grounded in the recognition of group rights. It cites the perception that community or minority protection is undemocratic or anti-democratic, and that it is advocated merely to perpetuate white domination under another name. Ibid at 112. According to the Commission, community and minority protection which is aimed at furthering domination by minority groups or granting them undue preference would not be accepted by the majority and would ultimately be rejected. However, if a minority perceives itself to be dominated and its needs are treated with contempt, it will strive constantly to rid itself of the regime. Ibid at 113. The sensible solution, the Commission concludes, would therefore be to steer a course between these two dangers. Ibid. The Commission's solution can be found in FC s 9's protection from unfair discrimination, FC s 29's right to mother tongue education, and FC s 31's right to be a member of the religious, cultural or linguistic community of one's choice.

[4] These mechanisms were the subject of a separate investigation by the Commission. See South African Law Commission *Project 77: Constitutional Models* (1991).

[5] P Olivier 'Constitutionalism and the New South African Constitution' in Bertus de Villiers (ed) *Birth of a New Constitution* (1994) 50, 73-74.

[6] See Government of the Republic of South Africa *Proposals on a Charter of Fundamental Rights* (2 February 1993) Articles 6 and 34.

political claims based on culture, language, ethnicity and religion were greeted with suspicion, and, sometimes, outright hostility.[1] From the passive resistance of Gandhi, through worker movements of the early 20th century, to the Freedom Charter, the preferred language of liberation was that of human rights. The liberation movement's utilization of rights discourse reflected a considered rhetorical response to romantic assertions of white, Christian, English and Afrikaner supremacy.

The liberation movement's universalist turn provides a partial explanation for the failure of group-based rights to secure a foothold within the Interim Constitution.[2] Much of the white minority political posturing in the 1980s and the early 1990s over alternatives to apartheid focused on the need for a 'broad-based, multi-racial government to contain possibly explosive ethnic or cultural demands'.[3] While representatives of the white minority may have forsaken justiciable 'group' rights, they continued to insist on various forms of constitutional protection of existing privilege in exchange for relinquishing political power.[4] The ANC rejected every attempt to entrench what it termed 'racial group rights'.[5] Political power would have to be traded for peace. That peace, and the retention of economic privilege by the white minority, would be vouchsafed by a firm ANC commitment to a justiciable Bill of Rights.[6] And the most the ANC would concede in such a Bill were rights to form 'cultural bodies', to religious freedom,[7]

[1] A Sachs Opening Remarks *Konrad Adenauer Stiftung Seminar on Multiculturalism* (1999) 9 available at http://www.kas.org.za/Publications/SeminarReports/Multiculturalism/SACHS1.pdf, (accessed on 1 April 2004); H Giliomee The Majority, Minorities and Ex-Nationalities in South Africa and the Proposed Cultural Commission *Konrad Adenauer Stiftung Seminar on Multiculturalism* (1999) 37, available at http://www.kas.org.za/Publications/SeminarReports/Multiculturalism/GILIOMEE.pdf, (accessed on 6 January 2005).

[2] Human rights discourse demands democratic majority rule. Majority rule as manifest in free and fair elections is the generally accepted departure point for most transitions from authoritarian rule to a more just political order. In South Africa, democratic majority rule meant black majority rule. Neither the rhetoric of universal human rights nor the actual demographics of South Africa supported the Swiss-like cantonal arrangements that the more sophisticated apologists for the white right offered up.

[3] See J de Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (4th Edition, 2001) 470. See also Giliomee (supra) at 37.

[4] De Waal et al (supra) at 470.

[5] See I Currie 'Minority Rights' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Chapter 35.

[6] See Giliomee (supra) at 40. The ANC insisted that minority rights qua static, non-demographically representative levels of political representation were unacceptable. The ANC proposed a compromise between two political positions: the demand for unfettered majority rule on the one hand, and the insistence of some whites for structural guarantees that majority rule will not mean domination by blacks on the other. The Bill of Rights is, in large part, the content of that compromise. See, eg, A Sachs *Protecting Human Rights in a New South Africa* (1990) 150 ('There just cannot be co-existence between racial group rights and non-racial democracy. It would be like saying that just a little bit of slavery would be allowed, not too much, or that the former colonial power would exercise just a small amount of sovereignty, not a lot. While the phased replacement of race rule by non-racial democracy can be contemplated, the constitutional co-existence of the two is philosophically, legally and practically impossible.')

[7] African National Congress *A Bill of Rights for a New South Africa: Preliminary Revised Version* (1992) Articles 5(3)-(5)('*ANC Bill of Rights*')

and, perhaps, to require that the state act positively to further the development of the eleven South African languages to be treated as official languages.[1]

Political parties that could have been expected to press hard for the inclusion of community rights in the Bill of Rights chose instead to focus on other constitutional strategies. The Inkatha Freedom Party (IFP), which during the negotiations had beaten the drum of ethnic nationalism, sought to shore up minority interests through federal mechanisms. The goal of the white right-wing parties was nothing less than self-determination in a wholly separate constitutional entity.

The result of these different strategies was that the Interim Constitution possessed little by way of specific community rights. Individual members of religious, linguistic and cultural communities were protected by rights to equality, to religious freedom, to association and to the establishment of private schools designed to maintain the integrity of a given community. Only in the provisions for the recognition of official languages did the Interim Constitution go beyond the bare minimum: it required positive action by the state to ensure the maintenance and the development of minority languages.[2]

(b) The Final Constitution

Despite the relative ease of agreement over justiciable community rights in the Interim Constitution, the three Constitutional Principles ('CPs') that engaged community rights meant that the previous accord could be revisited and recast. The National Party entered the Constitutional Assembly ('CA') drafting process with the express aim of deepening community rights.[3] The Freedom Front, though still wedded to CP XXXIV and the ideal of a Volkstaat, also sought 'a way to ensure that there is no oppression over the minority.'[4] The other ethnically-based political party — the IFP — chose to further the ends of the 'Zulu' kingdom through constitutional mechanisms that would increase the devolution of power to the provincial level of government.[5] The ANC, habitually suspicious of claims to minority rights, was set to resist any attempt to constitutionalize measures which might be used to favour particular ethnic groups.

The Final Constitution's Bill of Rights contains three provisions with a direct bearing on community interests — FC ss 29, 30 and 31. Only FC s 30 had a smooth passage through the drafting process. The right made an early appearance in the 19 October 1995 draft. The committee with responsibility for the Bill of Rights reported that 'there is consensus among the parties as to the inclusion of this right in the final Bill of Rights.' Apart from occasional stylistic amendments,

[1] *ANC Bill of Rights* (supra) at arts 5(6)-(7).

[2] See I Currie 'Official Languages' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 65.

[3] 'Minority Rights Must be Protected NP' (1995) 1 *Constitutional Talk* (13-26 January 1995).

[4] 'Volkstaat High on FFs Agenda' (1995) 1 *Constitutional Talk* (13-26 January 1995).

[5] 'IFP Seeks Strong Provincial Government' (1995) 1 *Constitutional Talk* (13-26 January 1995). The IFP was later to boycott the Constitutional Assembly in protest over the refusal of the ANC and the NP to enter international mediation over constitutional recognition of the Zulu monarchy. It played no significant role in the drafting of the Final Constitution.

the right remained unchanged in all succeeding drafts. As was the case with its predecessor — IC s 31 — the individualistic phrasing of FC s 30 and its careful avoidance of any mention of 'minority' or 'community' ensured that its inclusion occasioned no controversy.

FC s 31 contains what FC s 30 so delicately avoids. It provides a set of non-discrimination and non-interference guarantees and secures these rights for 'persons belonging to a cultural, religious or linguistic community'. FC s 31 does not appear in any of the five working drafts of the Final Constitution, nor, it must be noted, in the Constitution Bill of 23 April 1996 — less than two weeks before the new text had to be adopted. FC s 31 appears for the first time in the second Constitution Bill of 6 May 1996 — the result of intense, last-minute bargaining.[1] The eleventh-hour inclusion of FC s 31 appears to have been the result of an ANC desire to placate the Freedom Front.[2] The inclusion of FC s 31 may also have been motivated by fears that FC s 30 and the Bill of Right's non-discrimination guarantees alone might be insufficient to comply with the requirements of CP XII.[3]

The earliest draft of the education clause — FC s 29 — reveals little that would lead one to anticipate the controversy that it was to evoke in the last weeks of the drafting process. Early iterations of FC s 29 guarantee a right to instruction in any language in state institutions where such instruction could be reasonably provided and a right to establish private schools — subject to duties related to non-discrimination and to the maintenance of educational standards.[4] In the working

[1] 'The Night the Constitution was Settled' (1996) 3 *Constitutional Talk* (22 April-18 May 1996).

[2] 'NP, ANC Strive for a Package Deal' *Weekly Mail and Guardian* (19 April 1996).

[3] Without FC s 31, the draft text would probably not have complied with CP XII (collective rights of self-determination to be recognised and protected in a Final Constitution). According to the Constitutional Court, the Principle required certain collective rights of self-determination to be recognised and protected in the [new Constitution]. *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('*First Certification Judgment*') at para 220. FC s 31 achieved these objectives by providing protection for cultural, religious and language communities. The *First Certification Judgment* made no mention of FC s 30. This structured silence suggests that the individualistic framing of the right prevented it from providing the collective protection required by CP XII. The KwaZulu/Natal government raised a more substantial argument that the amended draft failed to comply with CP XII in *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC)('*Second Certification Judgment*'). The *Second Certification Judgment* Court once again relied upon the presence of FC s 31 to secure compliance with the CP XII Principle:

> The requirements of CP XII are therefore met by the provisions of . . . [AT s] 31, the institutional structures provided by the . . . [Constitution] and the express protection of rights of association in . . . ch 2 together with the procedural provisions governing their enforcement.

Ibid at para 27.

[4] Clause 23 of the draft Bill of Rights of 9 October 1995 read: (1) Everyone has the right to - *(a)* a basic education, including adult basic education, in a state or state-aided institution; *(b)* further education, which the state must take reasonable and progressive measures to make generally available and accessible; and *(c)* choose instruction in any language where instruction in that language can be reasonably provided at state or state-aided institutions. (2) Everyone has the right to establish and maintain, at their own expense, private educational institutions that - *(a)* do not discriminate on the basis of race; *(b)* are registered with the state; and *(c)* maintain standards that are not inferior to standards at comparable state-aided educational institutions.

draft of 19 October 1995, however, an additional right was proposed by the National Party (NP). The NP contended that FC s 29 must embrace a right 'to educational institutions based on a common culture, language, or religion, provided that there shall be no discrimination on the ground of race and, provided further that the state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it has been established on the basis of a common language, culture, or religion'. According to the NP, this right would ensure the continued existence of state-funded schools with a distinctive linguistic, cultural or religious character (or all three). The ANC viewed this formulation as a neo-Verwoerdian attempt to entrench educational apartheid. It responded by stating that state-aided Afrikaans-only schools were well beyond the political pale.[1]

The NP proposal remained a flashpoint throughout the remainder of the drafting process. By the fifth Working Draft of 15 April 1996, an 'agreement' had been reached by the parties to 'seek ways of accommodating the sentiments embodied' in the NP proposal elsewhere in FC s 29 without adopting the NP's preferred formulation of the right. As a result, the first Constitution Bill of 23 April 1996 contained no mention of the NP clause. In the second Constitution Bill of 6 May 1996, the right to state-funded education in any language was changed to a right to state-funded education in any *official* language. The text bore no sign of the NP's commitment to single-medium public schools. Single-medium public schools — together with the lockout right and the property clause — was one of the three Bill of Rights issues on which the NP dug in its heels. The ANC likewise refused further compromise: 'to compromise would be a betrayal of victims of apartheid.'[2]

The NP — confronted with the spectre of a public referendum to approve the constitutional draft in the event of the requisite majority not being obtained in the Constitutional Assembly — was obliged to capitulate. However, true to the spirit of reconciliation that had made both the Interim Constitution and the Final Constitution possible, FC s 29 contains a diluted version of the original NP proposal. The right to state-sponsored education in an official language, where reasonably practicable, is reinforced by the requirement that the state must consider 'all reasonable educational alternatives' in seeking to implement the right. These alternatives allow for the possibility of 'single-medium' public schools where such institutions are equitable, practicable and in accordance with the need to redress past discrimination.[3]

58.3 Community Rights in International Law

The Final Constitution has been carefully crafted to avoid, in most instances, the language of minority rights. Two primary reasons exist for this textual choice.

[1] 'Trio of Trouble' *Weekly Mail and Guardian* (1 May 1996).
[2] 'High Drama in Constitutional Danger Zone' *Weekly Mail & Guardian* (1 May 1996).
[3] For more on the history and the meaning of FC s 29(3), see B Fleisch & S Woolman 'On the Constitutionality of Single-Medium Public Schools' (2007) 23 *South African Journal on Human Rights* (forthcoming).

First, minority — in the context of the negotiations over the Interim Constitution and the Final Constitution — meant 'white'. The ANC, as we have seen, was steadfastly opposed to rights that would entrench expressly any form of 'white' privilege. Second, the ANC's use of individual rights reflects a considered response to the use of terms like 'group' or 'people' that worked as code for any number of discriminatory policies under apartheid.

That said, at international law, the term 'minority', and not 'community', describes the social units that can claim entitlement to rights to religious freedom and linguistic and cultural autonomy. Indeed, protecting the rights of ethnic, religious and linguistic minorities has become one of the most pressing concerns of international law over the past decade. Yugoslavia, Rwanda, Chechnya, Sri Lanka, Congo, Lebanon, Iraq, Israel, Somalia and Sudan each summon up the spectre of ethnic nationalism and intractable civil war that haunt the contemporary political order. Each reminds us that struggles for self-determination can often lead to the collapse of the nation state.[1] Where, as in the Middle East, attempts have been made by a dominant population to suppress minority aspirations, the resultant violence has led to the displacement of thousands of people and massive human rights violations.[2] We tend to think of religion and ethnicity as the primary drivers of internecine strife — but it can also be fuelled by linguistic nationalism. Although the threat has now largely abated, a perception of discrimination against the French-speaking people of Quebec sparked a 'legal' secessionist movement in the century-old Canadian federation. International law attempts to shield minorities from abuses of state power in the hope that the struggles of minorities against persecution, marginalization or assimilation will not degenerate into a baleful cycle of violent resistance and new forms of oppression.

(a) Minority rights and community rights

Despite the existence of a vast body of literature on the subject, and the efforts of two subsidiary organs of the United Nations Commission on Human Rights,[3] no

[1] A list of countries home to the most visible current ethnic conflagrations would encompass the former Soviet Union, India, Sri Lanka, Northern Ireland, the former Yugoslavia, Sudan, Congo, Somalia, Myanmar, Indonesia, Iraq, Cyprus, Nigeria, Lebanon, Israel, Guyana, Trinidad, Liberia, Uganda, Rwanda and Burundi. See N Lerner 'The Evolution of Minority Rights in International Law' in C Brölman (ed) *Peoples and Minorities in International Law* (1993) 77, 78n.

[2] A Anghie 'Human Rights and Cultural Identity: New Hope for Ethnic Peace?' (1992) 33 *Harvard International Law Journal* 341. Researchers in 1990 identified 261 groups of non-sovereign peoples regarded as being at risk of future human rights violations because of their differential status and aspirations. See TR Gurr & JR Scarritt 'Minorities Rights at Risk: a Global Survey' (1989) 11 *Human Rights Quarterly* 375, 392-3. Unfortunately, the following decade made Gurr and Scaritt look extraordinarily prescient.

[3] The protection of the rights of minorities has been the subject of the work of the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. See P Thornberry *International Law and the Rights of Minorities* (1991) 124-132. The Working Group on Indigenous Populations, a subsidiary organ of the Sub-Commission, expanded the field of study to consider the particular needs of indigenous peoples. See H Hannum 'New Developments in Indigenous Rights' (1988) 28 *Virginia Journal of International Law* 649, 657-662.

settled definition of 'minority' or 'community' exists at international law.[1] Of all the definitions bandied about, that proposed by Francesco Capotorti, the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, has proved the most influential. According to Capotorti, a minority is:

> [a] group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members — being nationals of the state — possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[2]

[1] See MN Shaw 'The Definition of Minorities in International Law' in Y Dinstein & M Tabory (eds) *The Protection of Minorities and Human Rights* (1992) 1; P Thornberry *International Law and the Rights of Minorities* (1991) 164-172. As I have already noted, FC s 31 studiously avoids the term minority employed in ICCPR article 27 and instead uses the term community. The choice of terminology is primarily political. Community rights simply do not carry the baggage of minority rights in South African political discourse. In my view, the meaning of minority rights at international law services this chapters understanding of community rights under the Final Constitution. The substitution might also be thought a clever trope designed to finesse controversies over the definition of a minority that have bedevilled the analysis of ICCPR article 27. However, defining a community proves no less difficult. Employed at its highest level of most general, community can mean simply an aggregation of people (similar to state or society). However, in contemporary parlance the word denotes an aggregation of people held together by a particular kind of relationship or bond. See R Williams *Keywords: A Vocabulary of Culture and Society* (1976) 75-76. See also A Cohen *The Symbolic Construction of Community* (1985) 15 ('Community is that entity to which one belongs, greater than kinship but more immediately than the abstraction we call society. It is the arena in which people acquire their most fundamental and most substantial experience of social life outside the confines of the home. In it they learn the meaning of kinship through being able to perceive its boundaries that is by juxtaposing it to non-kinship; they learn friendship; they acquire the sentiments of close social association and the capacity to express or otherwise manage these in their social relationships. Community, therefore, is where one learns and continues to practice how to be social. At the risk of substituting one indefinable category for another, we could say it is where one acquires culture.') This common bond, this kinship, this dense latticework of relationships determines our willingness to identify a group of persons, that would otherwise be a mere aggregation of individuals, as a community. For example, one would not tend to describe left-handed people as forming a community, although they undoubtedly share something in common. Nor would one think of the shareholders of a large, listed public company as a community, although, unlike left-handed people, they have something in common that is a matter of their own choosing and not simply an arbitrary characteristic. The employees of that same company, on the other hand, might well constitute a community: they might share a culture and even a language (broadly construed). See R Thornton & M Ramphele The Quest for Community in E Boonzaaier & J Sharp (eds) *South African Keywords* (1988) 29. What of the speakers of the Afrikaans language? At a minimum, they share an important characteristic: language. But they share more than that. They share a common history, a common culture, and, quite often, a common politics. See J Sharp Introduction: Constructing Social Reality in E Boonzaaier & J Sharp (eds) *South African Keywords* (1988) 1, 14-5. While Afrikaans speakers may be divided in any number of significant ways, such as race and class, it seems clear that most speakers of the language would feel aggrieved if a legal measure impacted deleteriously on the use of the Afrikaans language even if the measure had little or no effect on them personally.

[2] F Capotorti *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (1991) UN Sales no E.91.XIV.2, 7. While the Capotorti definition cannot claim to be the settled orthodoxy in the field, a slight reformulation of Capotorti's definition is accepted as authoritative by Sachs J in *Ex parte Gauteng Provincial Legislature: in re Dispute Concerning the Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill*. 1996 (3) SA 289 (CC), 1996 (4) BCLR 537 (CC) at para 61.

Three elements of this definition warrant emphasis. First, the definition requires an objective demonstration: to constitute a minority, a community must exist as a separate and distinct entity within a state. An ascriptive characteristic — such as race, religion or language — will set the group apart from other groups within the state. Second, a subjective element must be established: the minority must manifest a sense of community and a desire to preserve the identity of that community. The definition tends to exclude groups inclined toward assimilation within the rest of the population.[1] The third element is of particular moment in South Africa: the community that seeks recognition should be in a position of non-dominance. Political, economic and social non-dominance — and the discrimination that often attends non-dominance and insularity — makes necessary the guarantee of community rights. Put slightly differently, a minority community often lacks the ability to participate politically in a manner that enables it to retain a coherent identity and to secure defensible boundaries.[2] Community rights carve out space beyond the hurly burly of majoritarian political institutions in a manner that permits the furtherance of community-specific ways of being in the world.

(b) Structure of international community rights

The work of the UN Sub-Commission on Minorities suggests that the effective protection of minorities requires two kinds of legal guarantee: measures aimed at securing equal treatment for minorities and measures aimed at the protection of minority identity. Both categories require the disaggregation of minority communities from the polity as a whole.

The goal of equality of treatment is furthered by measures that protect individual members of minority groups against discrimination. However, the absence of discrimination will do little more than create the conditions for formal equality. Special treatment of minorities — restitutionary measures or affirmative action — may be required to create conditions of substantive equality.[3]

However, for most minority communities, the goal is not so much equal participation in the affairs of the larger community, but self-governance — in a non-political sense — with respect to the manner in which the community is organized. As a result, the communities for whom minority rights really matter are

[1] The rights of such groups, termed involuntary minorities, need be protected only by a guarantee of non-discrimination. See Thornberry (supra) at 10.

[2] The inclusion of the non-dominance requirement in the Capotorti definition was intended to distinguish those minorities requiring the protection of international human rights guarantees from the situation of the white minority in apartheid South Africa. See P Thornberry *International Law and the Rights of Minorities* (1991) 8-9, J Dugard 'The Influence of Apartheid on the Development of UN Law Governing the Protection of Minorities' (1989, manuscript on file with author).

[3] See *Minority Schools in Albania* 1935 PCIJ (ser A/B) No 64, 20 ('To apply the same legal regime to a majority as to a minority, whose needs are quite different, would create only a formal equality. Rather, measures for the protection of minorities are designed to ensure a genuine and effective equality.') See also C Albertyn and B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 35 (Describes the nature of FC s 9(2), the restitutionary justice clause in FC s 9's right to equality.)

often not interested in mere assimilation into the dominant national culture.[1] International law recognizes the legitimacy of the desire of many minority communities to preserve their traditions and to resist the loss of their identity.[2]

This commitment to both 'equality of recognition' and 'equality of respect' means that international law offers two different sets of community rights. First, universal non-discrimination provisions attempt to ensure equality of treatment for all individuals. These guarantees ensure the protection of individual members of minority communities. Second, 'special' guarantees are designed to ensure the continued existence of minority communities. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities explains the difference between the two kinds of guarantee as follows:

> 1. Prevention of discrimination is the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish.
> 2. Protection of minorities is the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population... If a minority wishes for assimilation and is debarred, the question is one of discrimination.[3]

(i) *International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights ('ICCPR') is the primary instrument for the protection of the rights of persons belonging to minority communities. Indeed, ICCPR art 27 remains the only expression of a universal entitlement to community identity in modern human rights conventions.[4] It reads, in relevant part:

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

When combined with the ICCPR's non-discrimination provision, art 27 ought to enable minorities to preserve their separate identity without turning that separateness into a badge of inferiority.[5] However, the limitations of the article should not

[1] F Capotorti *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (1991) UN Sales no E.91.XIV.2 at para 98.

[2] Ibid at para 97.

[3] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities E/CN.4/52, Sect V, quoted in P Thornberry 'The Rights of Minorities' in DJ Harris & S Joseph (eds) *The International Covenant on Civil and Political Rights and United Kingdom Law* (1995) 597, 605.

[4] P Thornberry *International Law and the Rights of Minorities* (1991)(Thornberry *International Law*) 142.

[5] Article 26 requires that, at national level, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

be overlooked. Article 27 does not recognize minorities as collective entities that possess legal rights. The individual remains the principal juridical unit of the Covenant.[1] Thus, while the ICCPR embraces minority rights, it does so in a manner that denies communities the legal subjectivity necessary for their protection.[2]

Article 27 has been the subject of a general comment by the UN Human Rights Committee ('UNHRC'). General Comment 23 attempts to answer some of the criticisms levelled above.[3] According to the UNHRC, art 27 was intended to ensure the survival and the continued development of the cultural, religious and social identity of minority communities. As a result, the Committee contends that the right granted by art 27 must be distinguished from other personal rights conferred on individuals by the ICCPR.[4] While the UNHRC has emphasized that the right is a right of individuals (held by 'persons belonging to such minorities'), and should not be confused with the collective right of peoples to self-determination,[5] the UNHRC recognizes that any meaningful enjoyment of culture, practice of religion and use of language presupposes a *community* of individuals with similar rights.[6] This recognition, according to the UNHRC, means that art 27 may require positive measures by states to protect the identity of a minority and to promote the ability of its members to enjoy their culture, religion or language in community.[7] As long as these measures are aimed solely at correcting conditions that impair the enjoyment of these community rights, these measures will constitute a legitimate ground for differentiation and will comply with the non-discrimination requirements of the ICCPR.[8]

(ii) *UN Declaration on Minorities*

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities was the product of fourteen years of work by

[1] Anghie (supra) at 343 ('The exception to the individualistic orientation of the Covenant is Article 1 which confers the right of self-determination on all peoples.')

[2] Ibid at 346.

[3] General Comment 23, Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights UN Doc CCPR/C/21/Rev 1/add 5 (26 April 1994)('GC 23'). On the nature and authoritativeness of general comments of the Committee, see D McGoldrick *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1991) 92-96 (General comments are potentially very important as an expression of the accumulated and unparalleled experience of an independent expert human rights body of a universal character in its consideration of the implementation of the ICCPR.)

[4] Section 27 can thus be contrasted with the non-discrimination guarantees under Articles 2 and 26. The latter two articles apply to all individuals within the territory or under the jurisdiction of a state whether or not those persons belong to a minority. See GC 23 (supra) at paras 4 and 9.

[5] Ibid at para 2.

[6] Thornberry *International Law* (supra) at 173.

[7] See GC 23 (supra) at para 6.2. This position contrasts with the view of commentators that the negative phrasing of the Article (shall not be denied) prevents the inference of positive state obligations to affirmative action. See M Nowak 'The Evolution of Minority Rights in International Law' in Brölman (supra) at 109.

[8] See GC 23 (supra) at para 6.2.

a Working Group of the Commission on Human Rights.[1] This document goes beyond the articulation of individual rights of persons belonging to minority communities and addresses squarely the content of state obligations to respect, to protect and to promote minority communities.

The Declaration sets global minimum standards.[2] First, it contains a principle of non-discrimination of minorities.[3] Second, it protects community identity through two discrete mechanisms: *(a)* one set of mechanisms protect minority 'existence'; and *(b)* another set of mechanisms promote the 'conditions' under which minority communities might flourish.[4] The right to existence embraces background rights against genocide and forced assimilation.[5] With respect to the manner in which states encourage the flourishing of minority communities, the Declaration obliges the state: *(a)* to remove legal obstacles to cultural development; *(b)* to facilitate the growth of institutions that underpin a vibrant linguistic, religious or cultural community; *(c)* to respect the distinctive characteristics of minority communities; and *(d)* to protect the territorial claims of aboriginal groups and to permit aboriginal groups to associate within their traditional territories.[6]

(iii) *African Charter on Human and People's Rights*

The African Charter, also known as the Banjul Charter, entered into force in 1986 and was ratified and acceded to by South Africa in 1996. It contains a large number of provisions that speak to the rights of religious, linguistic and cultural communities.

Article 2 enshrines the general principle of non-discrimination. It reads: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.' Articles 8 and 11 contain standard rights to freedom of religion and freedom of association.

With Article 12, the African Charter begins to look like something more than a plain vanilla convention. Article 12(5) states: 'The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.'

[1] General Assembly Resolution 47/135 (18 December 1992).

[2] P Thornberry 'The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations and an Update' in A Philips & A Rosas (eds) *Universal Minority Rights* (1995)('Rights of Ethnic, Religious and Linguistic Minorities') 30.

[3] See Articles 2(1), 2(5), 3(1), 3(2), 4(1).

[4] Article 1(1) reads: States shall protect the existence and the national or ethnic, cultural, religious identity of minorities within their respective territories, and shall encourage conditions for the promotion of that identity.

[5] Thornberry 'Rights of Ethnic, Religious and Linguistic Minorities' (supra) at 40.

[6] Ibid at 41.

Article 19 contemplates somewhat less dire circumstances, but nevertheless recognizes the recent penchant for internecine strife. It reads: 'All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.'

Article 20 offers an even greater challenge to state sovereignty. It commits Charter members to the recognition of some form of self-determination of the various peoples who inhabit a political realm. Article 20 reads, in relevant part:

(1) All peoples have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
(2) Colonised or oppressed people shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

Article 17 takes us out of the domain of negative duties into the realm of positive obligations. Article 17(2) and (3) read as follows:

(2) Every individual may freely take part in the cultural life of his community.
(3) The promotion and protection of morals and traditional values recognized by the community shall be the duty of the state.

Article 22 amplifies the content of the positive obligations found in Article 17. It reads:

(1) All people have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
(2) States shall have the duty, individually and collectively, to ensure the exercise of the right to development.

Article 17(3), read together with Article 22(1), would, finally, appear to make communities themselves the bearers of justiciable rights.

Although the strength of the Charter has yet to be adequately tested by effective enforcement of the African Commission on Human and People' Rights' decisions, a significant body of jurisprudence has developed around the community rights set out above.[1] The Commission has, over the past decade, issued judgments that speak directly to the meaning of self-determination,[2] religious

[1] For more on the how the African Charter and the African Commission work, see C Heyns 'The African Regional Human Rights System: The African Charter' (2004) 108 *Penn State LR* 679; F Viljoen 'A Human Rights Court for Africa, and Africans' (2004) 1 *Brooklyn Journal of International Law* 30; C Heyns & M Killander (eds) *Compendium of Key Human Rights Documents of the African Union* (2nd Edition, 2006).

[2] *Katangese Peoples Congress v Zaire* (2000) *African Human Rights Law Reports* 72 (ACHPR 1995) at para 4 (The Commission believes that 'self-determination may be exercised in any of the following ways: independence, self-government, local government, federalism, confederalism, unitarism, or any other form of relations that accords with the wishes of the people, but is fully cognizant of other recognised principles such as sovereignty and territorial integrity.')

freedom,[1] and minority community rights.[2]

58.4 FC s 31

(a) Content of FC s 31

(i) *Individual right exercised communally*

FC s 31 accords rights of participation to members of cultural, linguistic and religious communities 'with other members of that community'. FC s 31 thus echoes ICCPR art 27's phrase 'in community with other members of their group'.

The UNHRC has observed that this phrase turns art 27 into a hybrid individual/collective right. In General Comment 23, the Human Rights Committee notes that '[a]lthough the rights protected under art 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion.'[3] In other words, the right of a member of a cultural or linguistic or religious community cannot meaningfully be exercised alone and presupposes the existence of a community of individuals with similar rights.[4]

The same reasoning applies to FC s 31. An individual right of enjoyment of culture, language or religion assumes the existence of a community that sustains a particular culture, language or religion. Accordingly, FC s 31 right protects both individual and group interests in a community's cultural, linguistic or religious integrity.[5] The hybrid scope of the right complicates its application. Individual and group interests in cultural integrity frequently coincide. Where an individual member of a linguistic community challenges, for example, legislation or executive action that restricts the public use of his or her language, the individual interest and the communal interest in the preservation of that language converge. However, they may, just as frequently, diverge.

[1] *Amnesty International & Others v Sudan* (2000) African Human Rights Law Reports 72 (ACHPR 1995) at paras 73-76 ('Another matter is application of Sharia law. . . . [I]t is fundamentally unjust that religious law should be applied against non-adherents of the religion. . . . It is alleged that non-Muslims were persecuted in order to cause their conversion to Islam. . . . Christians are subjected to arbitrary arrest, expulsions and denial of access to work and food aid. . . . Accordingly, the Commission holds a violation of Article 8.')

[2] *Prince v South Africa* ACHPR Communication 255/2002 (Commission finds that while the general prohibition of the use of cannabis limits the Rastafarian sacramental use of cannabis, the states prohibition serves a legitimate purpose, is rationally related to that purpose (the health, safety and welfare of the commonweal) and is therefore a justifiable limitation of complainants right to freedom of religion. However, the Commission then made the entirely risible claim that since the prohibition applied to all South Africans, 'it cannot be said [to be] so discriminatory as to curtail the complainants free exercise of his religious rights.' Were that true then all facially neutral laws crafted to suppress the religious, linguistic or cultural practices of any minority community on the continent would be consistent with the Charter. The Charters drafters could not have intended such an outcome.)

[3] GC 23 (supra) at para 5.2.

[4] Thornberry *International Law* (supra) at 173; GC 23 (supra) at para 6.2.

[5] SJ Anaya *Indigenous Peoples in International Law* (1996) 101 (Commenting on the hybrid nature of Article 27.)

The Constitutional Court in *Gauteng School Education Bill* granted communities the right to create *independent* schools based upon a common culture, language or religion — and expressly recognized the importance of such constituitive attachments for individual dignity and group identity.[1] The Supreme Court of Appeal in *Mikro* gave this finding teeth by holding that FC s 29(2) — the right to receive education in an official language of choice at a *public* educational institution, where practicable — did not grant learners the right to receive instruction in their preferred language at each and every public educational institution.[2] *Mikro* thereby resists majoritarion pressures that would dilute the integrity of a 'minority' linguistic community that wishes to maintain a single medium public school. In *Gauteng School Education Bill* and *Mikro,* individual rights and group rights dovetail and reinforce one another.

In *Prince v President, Cape Law Society*, a sharply divided Constitutional Court held that although a Rastafarian's right to freedom of religion in terms of FC ss 15 and 31 permitted him to engage in Rastafarian rituals, the state was justified in proscribing the sacramental use of cannabis.[3] What is essential for our immediate purposes is the manner in which the case for a religious exemption presented itself to the Court. Prince was concerned with his right*(s)* to practise professionally as an attorney and to practise religiously as a Rastafarian. So although the Court spills quite a significant amount of ink on the religious practices of the Rastafarian community, the matter ultimately pits Prince's individual interests against the state's interests in effective law enforcement, in domestic narcotics trafficking and in keeping faith with its international obligations. Had the matter been brought to court on behalf of the Rastafari community as a whole — or at least in concert with Mr Prince — dicta in the majority judgment and the strongly worded dissents suggest that the Court might have interrogated more closely the possibility of creating a meaningful exemption to existing laws proscribing dagga use.[4] *Prince* suggests that individuals pressing religious rights claims would do well to have the backing of the community of which they are a part.

[1] *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC)(Court held that IC s 32*(c)* permitted communities to create independent schools based upon common culture, language and religion. It further held that IC 32*(c)* provided a defensive right to persons who sought to establish such educational institutions and that it protected that right from invasion by the State. It did not, however, impose upon the State an obligation to establish such educational institutions.)

[2] *Western Cape Minister of Education v The Governing Body of Mikro Primary School* 2006 (1) SA 1 (SCA), 2005 (10) BCLR 973 (SCA)(*'Mikro'*).

[3] 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC)(*'Prince'*).

[4] Justice Ncgobo's judgment offers some solace for those inclined to treat religious belief with greater dignity:

> Apart from this, as a general matter, the Court should not be concerned with questions whether, as a matter of religious doctrine, a particular practice is central to the religion. Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet that their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice.

The Constitutional Court's decision in *Christian Education South Africa v Minister of Education* reverses the spin in *Prince* on the relationship between individual rights and community rights. The judgment assumes, without argument, that s 10 of the South African Schools Act[1] limits FC ss 15 and 31. The Court then explains why the state is justified in barring corporal punishment in all schools and why it need not consider an exemption for such punishment when religious doctrine so dictates.

The manifold problems with the judgment are canvassed at length elsewhere in this work.[2] As I have previously argued, it is perfectly reasonable to override religious dictates and to bar corporal punishment that impairs the dignity of children. The problem is with the distinction between the practice of religion in schools and the practice of religion elsewhere (eg, the home.) If children lack the capacity to decide for themselves whether religious practices will prove deleterious to their health — and it therefore becomes incumbent upon the state to intervene on their behalf to protect their dignity — then it would seem reasonable to conclude that barring religion-sanctioned corporal punishment at home should be no different than barring religion-sanctioned corporal punishment at school. But that is not what the Court concludes. Rather, it argues that the parents 'were not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They could do both simultaneously.'[3]

That is, parents could follow their conscience and religion at home — and beat their children — but still obey the law of the land by having their children attend school free from corporal punishment. The Court cannot have it both ways. Either a child's right to dignity is of such paramount importance that it precludes corporal punishment at home and at school, *or* the dignity interests of a religious community in practising its faith justify corporal punishment in school and at home. To say, as the Court does, that the crux of the matter is the use of a

Ibid at 813. Justice Ncgobo recognizes: (1) how associations are constitutive of the beliefs and practices of individuals; and (2) how the fact of their being constitutive entitles them to constitutional protection. The judgment is remarkable in that it does not rely upon a model of rational moral agency to distinguish those beliefs that are entitled to judicial solicitude from those beliefs that are not. For a further discussion of the Constitutional Court's analysis in *Prince*, *Christian Education* and other religion cases, see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44; P Farlam 'Freedom of Religion, Conscience, Thought and Belief' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 41. For a further discussion of the Constitutional Court's analysis in *Prince*, and Sachs J's dissent in particular, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[1] Act 84 of 1996.

[2] See S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36; S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

[3] *Christian Education* (supra) at para 51.

teacher as the instrument of religious discipline is pure sophistry. If the teacher was the parent or the school was at home, then the court's basis for enabling the parents 'to do both simultaneously' would evaporate. In any event, the *Christian Education* Court takes a quintessentially collective right — FC s 31 — and turns it into a predominantly individual right. But, given the presence of FC s 15, FC s 31 is, on the facts of *Christian Education*, largely redundant.

If *Christian Education* and *Prince* represent low-water marks with respect to the Court's treatment of community rights, then the Court's recent ruling in *Fourie* might be judged a marked improvement. In finding that the equality and the dignity interests of same-sex life partners were unjustifiably limited by rules of common law and statutory provisions that prevented them from entering civilly-sanctioned marriages, the *Fourie* Court went out of its way to note that religious prohibitions on gay and lesbian marriage did not constitute unjustifiable infringements of the rights to dignity and to equality and that religious officials could legitimately refuse to consecrate a marriage between same-sex life partners.[1] In other words, the Court recognized community rights that had nothing to do with, and which might even be viewed as inimical to, egalitarian concerns.

The inevitable divergence between the individual interests in FC s 31 and the collective interests in FC s 31 are evident in two High Court judgments: *Taylor v Kurtstag*[2] and *Wittmann v Deutscher Schulverein, Pretoria, & Others.*[3] In *Taylor v Kurtstag*, the Witwatersrand High Court upheld the right of the Beth Din to issue a cherem — an excommunication edict — against a member of the Jewish community who had agreed to follow its ruling with regard to an order for child maintenance. Taylor had contended that the cherem violated his right to participate in the affairs and the practices of the Jewish community. The High Court rightly rejected this claim on the ground that the group's right to choose its associates by necessity means the right to require those who wish to join the group to conform their behaviour to certain dictates, and the right to exclude those who refuse to conform.[4] Taylor's refusal to follow the dictates of

[1] *Fourie* (supra) at paras 90-98. See also *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA), 2005 (3) BCLR 241 (SCA) at paras 36-37 (No religious denomination would be compelled to marry gay or lesbian couples.)

[2] 2005 (1) SA 362) (W), 2005 (7) BCLR 705 (W), [2004] 4 All SA 317 (W)('*Taylor*').

[3] 1998 (4) SA 423, 451 (T), 1999 (1) BCLR 92 (T)('Does this mean that private parochial schools which do not receive State aid may not prescribe obligatory attendance at their morning prayers and confessional religious instruction classes? The answer is negative. Section 17 of the [I]nterim Constitution and s 18 of the [Final] Constitution recognise the freedom of association. [IC] Section 14(1) and [FC] s 15(1) respectively recognise the freedom of religion which includes the right to join others in worship, propagation of the faith etc. Freedom of association entails the right with others to exclude non-conformists. It also includes the right to require those who join the association to conform with its principles and rules.')

[4] *Taylor* (supra) at para 38 (FC s 18 freedom of association guarantees an individual the right to choose his or her associates and a group of individuals the right to choose their associates citing with approval Woolman 'Association' (supra) at § 44.3 as authority for the proposition that the right to choose entails a right to exclude.) See also AWG Rath & SA de Freitas 'Church Tribunals, Doctrine Sanction and the South African Constitution' 43 (1 & 2) *Deel* (2002) 276 (Doctrinal sanctioning by ecclesiastical courts enjoys protection of FC s 15 and that protection has been recognized by civil courts.)

the Beth Din effectively meant that he had forsaken his rights to participate in the affairs of the community. In *Wittmann v Deutsche Schulverein, Pretoria*, the Pretoria High Court upheld the right of a school governing body to expel a student who knew that she was obliged to attend language and religious instruction classes and who subsequently refused to attend these classes. The learner's views on what constituted a 'religious' or 'cultural' education clearly conflicted with the views of the school's broader community. Both cases underscore the relatively unassailable proposition that in order for a religious association or a cultural association to remain committed to specific practices, it must control the voice of, the entrance to and the exit from the association.[1]

Not every conflict between the individual's right to participate in the affairs of the community will fall before the community's interest in determining the rules for such participation. In *Lovelace v Canada,* the UN Human Rights Committee took the view that the withdrawal by a Canadian statute of a Maliseet Indian woman's right to reside on the Tobique Reserve in Canada reserve because of her marriage to a non-Indian violated her ICCPR art 27 right.[2] According to the UNHRC, 'the right of Sandra Lovelace to access to her native culture and language, in community with other members of her group, has in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists.'[3]

In *Lovelace*, the community's interest in preserving a distinct ethnic identity through legal mechanisms discouraging inter-ethnic marriages clashed with the individual's right of participation in the life of her community.[4] Although the

[1] See also *Mohamed & Another v Jassiem* 1996 (1) SA 673 (A)(Members of the Ahmadiya movement, treated as apostates by orthodox Muslims, may not enter mosques, may not marry a Muslim, may not be buried in Muslim cemeteries or have any association with Muslims.)

[2] *Lovelace v Canada* Communication No R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) (1981). Section 14 of the Indian Act (1970) provided that [an Indian] woman who is a member of a band ceases to be a member of that band if she marries a person who is not a member of that band. The loss of membership status entailed the loss of the right to the common use and benefits of the reserve land allotted to the band. Should the woman marry a member of another band, she would acquire membership of her husbands band and associated land rights. Lovelace married a non-Indian, thereby losing her Indian status in terms of the Act and all rights of residence on reserve land. Lovelaces principal complaint in her communication to the Committee was that the Act was discriminatory. For jurisdictional reasons, the Committee sidestepped the discrimination issue, deciding the matter instead on the basis of Lovelace's claim that '[t]he major loss to a person ceasing to be an Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity.' Ibid at para 13.1.

[3] Ibid at para 15.

[4] According to the Canadian government, the Indian Act was

> an instrument designed to protect the Indian minority in accordance with art 27 of the Covenant. A definition of the Indian was inevitable in view of the special privileges granted to the Indian communities, in particular their right to occupy reserve lands. Traditionally, patrilineal family relationship were taken into account for determining legal claims. Since, additionally, in the farming societies of the nineteenth century, reserve land was felt to be more threatened by non-Indian men than by non-Indian women, legal enactments as from 1869 provided that an Indian woman who married a non-Indian man would lose her status as an Indian. These reasons were still valid.

Ibid at para 5. See also GC 23 (supra) at para 5.

UNHRC interpreted art 27 in favour of the individual's rights of participation, it stressed that not every interference with an individual's right of enjoyment of cultural and community life could be considered a denial of rights under art 27. National legislation might legitimately define rights of residence on communal land to protect resources and preserve the identity of a people. However, such restrictions on rights of residence must be reasonable, justifiable and consistent with the other provisions of the Covenant.[1]

(ii) *Membership in and belonging to a 'cultural, religious or linguistic community'*

FC s 31's use of the word 'belong' — as in 'belonging to a cultural, religious or linguistic community' — echoes ICCPR art 27's phrase 'persons belonging to … [ethnic, religious or linguistic] minorities.' The UN Human Rights Committee has stated that 'belonging' indicates that the right is designed to protect 'those who belong to a group and who share in common a culture, a religion and/or a language' and is not, therefore, a right to which everyone is necessarily entitled.[2] In *Lovelace v Canada*, the UN Human Rights Committee had this to say about Sandra Lovelace's membership in the Maliseet community:

> The rights under art 27 of the Covenant have to be secured to 'persons belonging' to the minority. … Persons who are born and brought up on a reserve, who keep ties with their community and wish to maintain those ties must normally be considered as belonging to that minority within the meaning of the Covenant. Since Sandra Lovelace is ethnically a Maliseet Indian and has only been absent from her home reserve for a few years during the existence of her marriage, she is, in the opinion of the Committee, entitled to be regarded as 'belonging' to this minority and to claim the benefits of art 27 of the Covenant.[3]

The Committee recognized that 'belonging' occurs in a number of different but often overlapping ways. For example, birth or ethnic origin determined, in part, that Lovelace was a Maliseet. However, birth alone would not necessarily be a sufficient condition to tie Lovelace to the Maliseet community. Courts may look for additional evidence of continued affinity with an ethnic group. Indeed, South African courts are likely to consider continued residence or formal identification with the community to be more important than birth. Culture, language and religion are more a matter of shared experience than genetics.

With respect to language, courts may want some proof that the language in question is the individual's mother tongue and that the language constitutes an essential part of the personal, family and communal experience.[4] With respect to

[1] But see *Kitok v Sweden* Communication No 197/1985 (1985) 96 ILR 637. *Kitok* demonstrates that the UNHRC recognizes that article 27 may protect the interests of the community at the expense of individual interests. In *Kitok*, the Committee found statutory restrictions on individual membership of a Sami village had, as their raison d'être, the preservation of the Sami minority. Such objectives were considered to be reasonable, justifiable and consistent with the purpose of article 27.

[2] GC 23 (supra) at para 5.1.

[3] Ibid at para 14.

[4] F de Varennes *Language, Minorities and Human Rights* (1996) 149.

religion, a claimant will be obliged to show that they practice a religion and she is actively involved in the religious life of her community. In all cases, the requirement of membership or belonging demands that the individual claimant demonstrates a history of shared experience and continued identification with the community in question.

(iii) *May not be denied the right*

Some of the phrasing of FC s 31 — 'may not be denied the right' — suggests that FC s 31 is primarily a negative liberty. That is, members of communities may freely engage in the practice of culture, language and religion without interference by the state or from any other source.

However, one might argue that FC s 31 requires more than mere sufferance. The inclusion of FC s 31 indicates a commitment to the maintenance of cultural pluralism. Such a commitment might well require that the state take positive measures to ensure the survival and the development of a variety of non-dominant communities. A state genuinely committed to pluralism cannot simply remain neutral in the face of larger social, political and economic currents that threaten its religious, linguistic and cultural heterogeneity. One need not be committed to pluralism for pluralism's sake to recognize that the centripetal forces of modernity augur an increasingly dull uniformity.

As for FC s 31's avatar, ICCPR art 27, opinion remains divided as to whether the right requires positive measures in support of minority cultures. For some academics, the purpose of the right is '*laisser vivre,* of allowing members of those minorities the right to maintain their language or religion freely without any assistance from the state, but also without any hindrance or oppression that has been the all too frequent burden of minorities throughout human history'.[1] However, the contrary opinion — that the right necessarily requires positive measures — enjoys the support of UN Human Rights Committee. The Committee writes:

> Although the rights protected under art 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with other members of their group.[2]

Sachs J has offered a similar gloss on community rights — and thus FC s 31 — in *Gauteng School Education Bill, Fourie, Prince* and *Volks.* In *Gauteng School Education Bill,* Sachs suggests that the minority rights provisions of the Interim Constitution bar the state from interfering with initiatives undertaken by a non-dominant community to preserve its culture, and might, in addition, require the state to provide material assistance to particularly vulnerable, threatened or disadvantaged

[1] Varennes (supra) at 151.
[2] GC 23 (supra) at para 6.2.

cultures.[1] In *Fourie*, Sachs J's opinion — which attracts a majority of the Court — articulates an even more emphatic defence of community rights:

> Equality … does not presuppose … suppression of difference … Equality … does not imply … homogenisation of behaviour …. [T]here are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space has been found for members of communities to depart from a majoritarian norm.[2]

(iv) *Right to enjoyment of culture in community with others*

The Final Constitution uses the terms 'culture' or 'cultural' in two distinct senses. FC Schedule 4 indicates that concurrent national and provincial legislative competence is exercised on the subject of 'cultural matters'. The adjective is used here to mean the practice of intellectual and artistic activity and the works that issue from this activity.[3] Put simply, 'culture' in Schedule 4 embraces literature, music, painting, sculpture and theatre.[4] As TS Eliot noted, this is culture 'in the reduced sense of the word, … everything that is picturesque, harmless and separable from politics'.[5]

[1] *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC) at paras 70 and 90.

[2] *Fourie* (supra) at paras 60-61. See *Prince v Law Society* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC)(*'Prince'*)(Sachs J dissenting at para 149 ('[W]here there are [religious] practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the Constitution obliges the State to walk the extra mile and to find adequate means perhaps a carefully constructed exemption of accommodating the practice at issue.') See also *Volks v Robinson* 2005 (5) BCLR 466 (CC)(*'Volks'*)(Sachs J dissenting) at paras 154 and 156 (Sachs J rejects the majority's finding that 'the appellant, having chosen cohabitation rather than marriage, … must bear the consequences and thus could not avail herself of the benefits of the Maintenance of Surviving Spouses Act.' He contends that: 'Respecting autonomy means giving legal credence not only to a decision to marry but to choices that people make about alternative lifestyles. Such choices may be freely undertaken, either expressly or tacitly. Alternatively, they might be imposed by the unwillingness of one of the parties to marry the other. Yet if the resulting relationships involve clearly acknowledged commitments to provide mutual support and to promote respect for stable family life, then the law should not … penalise or ignore them because they are unconventional. It should certainly not refuse them recognition because of any moral prejudice, whether open or unconscious, against them.')

[3] See R Williams *Keywords: A Vocabulary of Culture and Society* (1983) 90.

[4] An example of the type of legislation envisaged by Schedule 6 is the Culture Promotion Act 35 of 1983. Section 3 of the Act empowers the Minister of National Education to establish regional councils for cultural affairs. Section 3(5) provides that the functions of such a council are the preservation and the development of culture in the fields of the visual, musical and literary arts, the natural and human sciences, and of leisure and recreational activities.

[5] TS Eliot *Notes Towards the Definition of Culture* (1962) 93 as quoted in C Kukuthas 'Are There Any Cultural Rights?' in W Kymlicka (ed) *The Rights of Minority Cultures* (1995) 228.

FC s 31 and FC s 30 deploy a different connotation of the word. In these two sections, culture means a particular way of life for an identifiable group of people: FC s 31 does not refer to 'culture' in general, but to 'their culture'. Culture does the work of a range of synonymous terms: tradition, customs, civilisation, race, nation, way of being in the world, and even comprehensive vision of the good life.[1] Understood in this way, 'culture' functions as a source of identity and draws distinctions between groups of people based upon such characteristics as belief-sets, practices, mores, language, rules of kinship, modes of education or forms of social relations.[2] FC s 31's use of the term 'culture' is, of course, broad enough to encompass all that falls within the FC Schedule 4 definition. It goes without saying that the activities of writers, artists and musicians all contribute to the cultural life of a community. But they do not exhaust that community's culture.

What constitutes 'culture' for the purposes of FC s 31? One might begin with the specific practices, customs and traditions of the community and, by logical extension, those institutions responsible for the preservation and the transmission of culture — schools, publications, libraries, publishing houses, museums and religious institutions.[3] (The list may then be extended to the conservation of historical objects and the commemoration of significant dates or events.[4]) The right grants communities the freedom to establish and to maintain such institutions without interference from any source in order to ensure their survival as a cultural entity. Certain institutional aspects of 'cultural life' are accorded specific protection elsewhere in the Bill of Rights — language use at official and unofficial levels,[5] local control by a cultural, linguistic or religious community of the education of its members,[6] and state support for religious practices.[7] These different forms of protection are dealt with at greater length elsewhere in this work.

[1] See R Thornton 'Culture: A Contemporary Definition' in E Boonzaaier & J Sharp (eds) *South African Keywords* (1988) 17, 26. As I have noted above, we should take great care before we suggest that all cultures provide comprehensive visions of the good life. Most cultures, properly understood, fall far short of doing so.

[2] M Leiris *Race and Culture* (1958) 20-21.

[3] P Thornberry *International Law and the Rights of Minorities* (1991) 188.

[4] F Capotorti *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (1991) UN Sales no E.91.XIV.263-68.

[5] FC s 6 and FC s 30. FC s 35 guarantees accused persons the right to be informed of their rights and to use a language they understand in criminal proceedings. For more on official languages and the right to use the language of one's choice, see I Currie 'Official Languages' in S Woolman, T Roux, J Klaaren, A Stein , M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 65.

[6] FC s 29(3). For more on the right to create and to maintain independent educational institutions, see S Woolman, F Verrieva & M Bishop 'Education' in S Woolman, T Roux, J Klaaren, A Stein , M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 57.

[7] FC s 15. For more on the freedom of religion, see P Farlam 'Freedom of Religion' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 41. See also G Van Der Schyff 'Freedom of Religious Autonomy as an Element of the Right to the Freedom of Expression' (2003) 3 *TSAR* 512 (Describes five distinct elements of freedom of religion autonomy, choice, observance, reaching and propagation.)

(v) *Right to practice a religion in community with others*

FC s 31 must be read together with FC s 15, the freedom of religion, and FC s 18, the freedom of association. The Constitutional Court has been quite clear about what lies at the core of FC s 15's protection of freedom of religion. In *Prince*, Ngcobo J writes:

> This Court has on two occasions considered the contents of the right to freedom of religion. On each occasion, it has accepted that the right to freedom of religion at least comprehends: *(a)* the right to entertain the religious beliefs that one chooses to entertain; *(b)* the right to announce one's religious beliefs publicly and without fear of reprisal; and *(c)* the right to manifest such beliefs by worship and practice, teaching and dissemination. Implicit in the right to freedom of religion is the 'absence of coercion or restraint'. Thus 'freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs'.[1]

What then does FC s 31(1) do that FC s 15(1) does not? According to Ngcobo J:

> Section 31(1)*(a)* emphasises and protects the associational nature of cultural, religious and language rights. In the context of religion, it emphasises the protection to be given to members of communities united by religion to practise their religion.[2]

In sum, the protection of a right to religious practice in community with others in FC s 31 and the right to freedom of religion in FC s 15 do not so much differ as they do 'complement' one another.[3]

FC s 31, alone, clearly allows for the establishment and the maintenance of those institutions that make possible the practice of a religion: the creation of houses of worship, schools, seminaries and burial sites, the publication of religious texts and the production of objects required for religious rites.[4] FC s 31, when read with FC s 15 and FC s 18, does substantially more: it grants religious associations the ability to control the entrance into, the voice of, and the expulsion from a community.

Recent constitutional case law supports the contention that religious associations have the right to expel members who agree to follow the rules or the decisions of the association's governing body and subsequently refuse to do so.

[1] *Prince v President, Cape Law Society & Others* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC)('*Prince*') at para 38 quoting *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC), 1997 (2) SACR 540 (CC), 1997 (10) BCLR 1348 (CC) at para 92 and citing, in support, *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC). The *Prince* Court also quoted with approval the following dictum by Dickson J in *R v Big M Drug Mart Ltd* 18 DLR (4th) 321, 353, [1985] 1 SCR 295, 311: 'The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination.' See also Y Dinstein Freedom of Religion and Religious Minorities in Y Dinstein & M Tabory (eds) *The Protection of Minorities and Human Rights* (1992) 145, 147.

[2] *Prince* (supra) at para 39.

[3] Ibid.

[4] Dinstein (supra) at 158.

In *Taylor v Kurstag*, the Witwatersrand High Court upheld the right of the Beth Din to issue a cherem — an excommunication edict — against a member of the Jewish community who had agreed to follow its ruling with regard to an order for child maintenance.[1] In *Wittmann v Deutsche Schulverein, Pretoria*, the Pretoria High Court upheld the right of a school governing body to expel a student who knew that she was obliged to attend language and religious instruction classes and who subsequently refused to attend these classes.[2] Both cases underscore the relatively unassailable proposition that in order for a religious association to remain committed to the practice of certain beliefs in a given environment, it must control the voice of, the entrance to and the exit from the association.

The Constitutional Court's recent judgment in *Fourie* further reinforces this conclusion. In finding that the equality rights and the dignity interests of same-sex life partners were unjustifiably limited by rules of common law and statutory provisions that prevented them from entering civilly-sanctioned marriages, the *Fourie* Court went out of its way to note that religious officials could legitimately refuse to consecrate a marriage between members of a same-sex life partnership. It wrote:

> In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. . . . The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all. . . . It is clear from the above that acknowledgment by the State of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by

[1] 2005 (1) SA 362) (W), 2005 (7) BCLR 705 (W), [2004] 4 All SA 317 (W) at para 38 ('The right of a group to choose their associates of necessity means the right to require those who wish to join the group to conform their behaviour to certain dictates, and the right to exclude those who refuse to conform.')

[2] 1998 (4) SA 423, 451 (T), 1999 (1) BCLR 92 (T)('Freedom of association entails the right with others to exclude non-conformists. It also includes the right to require those who join the association to conform with its principles and rules.')

> invoking the rights of believers to have their religious freedom respected. The two sets of interests involved do not collide; they co-exist in a constitutional realm based on accommodation of diversity.[1]

In short, religious groups are still free to exclude gay and lesbian life partners — individually and jointly — from participating in the practices and the rituals of a given community.

Why would the Final Constitution grant religious associations the power to control their own membership requirements, their own internal affairs and their own expulsion procedures at the risk of limiting another person's desire to belong? As I have argued elsewhere, an appropriate appreciation of freedom of association — of which the right to practice a religion in community with others is a subset — turns on the recognition of two arguments. First, freedom of association, rightly understood, forces us to attend to the *arationality* of our most basic attachments and to think twice before we accord *our* arational attachments preferred status to the arational attachments of *others*.[2] This observation regarding our constitutive religious attachments buttresses the contention that religious associations that pursue a particular way of being in the world ought to be able to exclude from a religious association or a religious institution those persons who do not derive meaning from that way of being in the world, and whose presence, in significant numbers, would make the religious association or institution impossible to sustain. Second, religious associations must have the capacity to protect themselves from capture. Without the capacity to police their membership and to enforce expulsion policies, associations would face two related threats. For starters, an association would be at risk of having its aims substantially altered. To the extent that the original *raison d'être* of the religious association matters to the extant members of the association, the association must possess ability to regulate the entrance, voice and exit of members. Without built-in limitations on the process of determining the ends of the religious community, the entrance of new members, and the continued member-

[1] *Fourie* (supra) at paras 94-98.

[2] The constitutive nature of our attachments also forces us to attend to another often overlooked feature of associations. We often speak of the associations that make up our lives as if we were largely free to choose them or make them up as we go along. I have suggested why such a notion of choice is not true of us as individual selves. It is also largely not true of associational life generally. As Michael Walzer has convincingly argued, there is also a 'radical givenness' to our associational life. M Walzer 'On Involuntary Association' in A Gutmann (ed) *'Freedom of Association'* (1998) 64, 67. What he means, in short, is that most of the associations that make up our associational life are involuntary associations. A reasonably equal and democratic society must mediate the givenness of our associational life and the aspirations of all of us to have the ability to discriminate (and sometimes choose) between those associational forms which still fit and those which do not. It is often the case that not choosing to leave an association, but to stay, is what we truly cherish as freedom. As Walzer suggests, we ought to call such decisions to reaffirm our commitments 'freedom simply, without qualification'. Ibid at 73.

ship of existing members, outside parties could easily distort the purpose, the character and the function of the association. Moreover, a religious association's very existence could be at risk. Individuals, other groups, or a state inimical to the values of a given association could use ease of entrance into an association to put that same association out of business.

The extant common law on association reinforces more general constitutional jurisprudential considerations in support of the proposition that religious communities possess a significant degree of latitude with respect to policies that differentiate between adherents and non-adherents. One old and venerable strand of the common law on association tolerates little internal or external interference with the critical purposes — or voice — of a community or an association.[1] Another, equally important line of cases is designed to prevent insiders and outsiders from altering the fundamental purposes of a religious community. In *Nederduitse Gereformeerde Kerk in Afrika*, the Supreme Court of Appeal held that the attempt of the Dutch Reformed Church in Africa ('NGKA') to merge with the Dutch Reformed Mission Church in South Africa ('NGSK') could not proceed without the unanimous consent of regional synods.[2] The Supreme Court of Appeal's decision in *Nederduitse Gereformeerde Kerk in Afrika* provides exceptionally strong support for the proposition that associations designed to promote a particular religious denomination cannot be changed into another form or denomination of religious community without securing unanimity or special majorities designed to secure near unanimous approval.

What then does FC s 31(1) do that FC s 15(1) does not? The case law suggests that FC s 31(1) protects the religious community from interference — from both public and private sources — with the practice of its rituals and traditions. It is not clear, however, that such protection would not exist in the singular presence of FC s 15 and the total absence of FC s 31. Perhaps, it is safest to say that FC s 31 eliminates any doubt about what kind of protection FC s 15 should be understood to afford South Africans.

[1] A well-established body of common law precedent supports the contention that any proposed alteration of the fundamental objectives of an association requires the unanimous support of the associations members. This body of case law also underwrites the general proposition that courts ought to be loath to disturb associational relations on the basis of general assertions of equity or fairness. See, generally, B Bamford *The Law of Partnership and Voluntary Association in South Africa* (3rd Edition, 1982). *Murray v SA Tattersalls Subscription Rooms* provides support for my thesis that a majority of the members of an association formed for a given purpose cannot simply alter the constitution of that association in order to pursue an entirely unrelated set of ends and still expect the other, dissenting, minority members of the association to accept the change. 1910 TH 35. See also *Mitchell's Plain Town Centre Merchants Association v Mcleod & Another* 1996 (4) SA 159, 166 (A) citing *Total South Africa (Pty) Ltd v Bekker* 1992 (1) SA 617, 624 (A).

[2] *Nederduitse Gereformeerde Kerk in Afrika (OVS) en 'n Ander v Verenigende Gereformeerde Kerk in Suider-Afrika* 1999 (2) SA 156, 168-175 (SCA).

(vi) *Right to use a language of choice*

Specific protection of an individual right to speak a language is unnecessary — since the individual protection of a right to speak a language is meaningless without express protection for, and the existence of, a community of same-language speakers. And yet, such individual protection is exactly what both FC s 30 and FC s 31 appear to provide.[1]

But assume then, as a logical matter, that the protection afforded by FC s 31 must be communal in nature to have any purchase. One would then conclude that FC s 31 was intended to prevent interference with the use of a particular language in various public fora,[2] in schools or universities,[3] in daily commerce, or in the press or broadcasting media.[4] The same should hold true of similar restrictions imposed by natural or juristic persons. So, for example, FC s 31 could be applied horizontally to an employer who sought to restrict the use of a language by its employees while at work.[5]

It is also logical to conclude that FC s 31's silence with regard to any positive state duties with respect to the use of a language is intentional. The Final Constitution already contains a number of provisions designed to promote greater linguistic parity.[6]

[1] A right to use a language, along with a prohibition of discrimination on grounds of language, appears in all the principal international minority protection clauses. S Roth 'Toward a Minority Convention: Its Need and Content' in Y Dinstein & M Tabory (eds) The *Protection of Minorities and Human Rights* (1992) 83, 113. FC s 31 thus accords a right similar to that guaranteed in more detailed terms in a number of post-World War I Minorities Treaties. For example, Article 7 of the Treaty between the Allied Powers and Poland (1919) provided that '. . . [n]o restriction shall be imposed on the free use by any Polish national of any language in private intercourse, in commerce, in religion, in the press or in publications of any kind, or at public meetings.' See H Hannum (ed) *Documents on Autonomy and Minority Rights* (1993) 682.

[2] In some cases, a state has prohibited the use of a minority language in public places. For example, the Turkish Anti-Terrorist Act 3713 of 1991 prohibited the use of the Kurdish language in public places. Similarly, Algerian legislation made it an offence to hold public meetings or conferences or to put up signs or posters in any language other than Arabic. The prohibition effectively prevented the Berber minority from using its mother tongue. See F de Varennes *Language, Minorities and Human Rights* (1996) 164-165.

[3] See *Meyer v Nebraska* 262 US 390 (1923)(Statute prohibiting the teaching of any language other than English to students who had not passed the eighth grade violates due process.)

[4] While governmental restrictions on the language of private media (eg by banning publications in a particular language) would violate FC s 31, FC s 31 does not oblige the state to grant unrestricted access to the airwaves to linguistic minorities. FC s 9 would only require that it exercise control over such access in a non-discriminatory manner. See de Varennes (supra) at 164.

[5] See *Gutierrez v Municipal Court* 838 F2d 1031 (9th Cir 1988)(Rules prohibiting employees from speaking any language other than English while at work discriminatory against minorities because the cultural identity of certain minority groups is tied to their use of their own language.)

[6] See, eg, FC ss 6, 29(2), 35(3)*(k)* and 35(4). See also I Currie 'Official Languages' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 65.

(vii) *Right to form, join and maintain cultural, religious and linguistic associations*

FC s 31(1)*(b)* borrows some of the language of CP XII: 'Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.' Given that the subsection adds little to the guarantees contained in FC s 31(1)*(a)*, it seems reasonable to conclude that it was included to ensure compliance with CP XII. The Constitutional Court offers some support for this conclusion when its writes, in the *Second Certification Judgment*, that the '[c]ollective rights of self-determination' in CP XII were 'associational individual rights, namely, those rights which cannot be fully or properly exercised by individuals otherwise than in association with others of like disposition.'[1]

Whatever the intention of the drafters of FC s 31 may have been, the right to form, to join and to maintain cultural, religious and linguistic associations must be understood to be a subset of the right to freedom of association, FC s 18. As I have written elsewhere in this work, FC s 18 has a four-fold purpose. First, associational rights are correlative: they make good the promise of other rights and freedoms. Second, associational rights take our constitutive attachments seriously: they recognize the centrality of associations for the formation and the maintenance of individual identity. Third, associational rights enable us to determine an association's membership policies, internal affairs and expulsion procedures: they thereby prevent the capture — the hostile takeover — of those associations that we deem central to our identity. Fourth, associational rights justify disassociation: compelled or forced association is incompatible with the dictates of an open and democratic society.

The golden thread running through all four justifications for associational freedom is social capital. Social capital is a necessary consequence of our collective efforts to build and to fortify the things that matter to us. It is our collective grit and elbow grease, our relationships and their constantly re-affirmed vows. Social capital consists both of the instrumental networks that flow from collective efforts, and of the intrinsic ethical goods — trust, respect, loyalty, care, empathy and commitment — that also flow from such collective efforts.

Social capital links up the four justifications for the protection of associational life in the following manner. Social capital — qua correlative associational rights — is what keeps our intimate, economic, political, cultural, traditional, linguistic, union and religious associations going. Without it, nothing works. Social capital — qua constitutive attachments — recognizes that we store the better part of our meaning in involuntary associations. Squander that social capital, and nothing that matters *is*. Social capital — qua capture — recognizes that the dominant rationale for ceding control over membership, internal affairs and expulsion to associations

[1] *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at paras 23-27.

is the only way to protect the real property and the figurative property that associations create. For if anyone can claim ownership in and of an association, then no one owns it and no one will take care of it. Finally, social capital takes seriously the threat of various kinds of compelled association. Trust, respect, empathy, care and loyalty — the essence of social capital — have no meaning where association is coerced.[1]

The Constitutional Court captures much of what is at stake in associational matters — be they intimate, religious, cultural or linguistic — when it writes:

> A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society. The issue goes well beyond assumptions of heterosexual exclusivity, a source of contention in the present case. The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting. As was said by this Court in *Christian Education*, there are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in s 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space has been found for members of communities to depart from a majoritarian norm. The point was made in *Christian Education* that these provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern. For

[1] See S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) § 44.1*(c)*. For more on social capital, see R Putnam *Bowling Alone: The Collapse and Revival of American Community* (2000); R Putnam *Making Democracy Work: Civic Traditions in Modern Italy* (1993); P Bordieu 'Forms of Capital' in JC Richards (ed) *Handbook of Theory and Research for the Sociology of Education* (1986) 241.

> present purposes it needs to be added that acknowledgment of the diversity that flows from different forms of sexual orientation will provide an extra and distinctive thread to the national tapestry. The strength of the nation envisaged by the Constitution comes from its capacity to embrace all its members with dignity and respect.[1]

The holding in *Fourie* is equally critical for our understanding of the rights that religious communities possess with respect to the exclusion of non-members or the expulsion of non-rule following members. The *Fourie* Court found that while the state may not enforce laws that patently discriminate against homosexual life partners who wish to marry, religious communities are entitled to refuse to consecrate homosexual unions where homosexual marriage is proscribed by religious law. The holding signals a significant victory for religious communities whose mores might not be on all fours with the values articulated in the Final Constitution.

As I note in greater detail below, the Supreme Court of Appeal recognized that a linguistic community — Afrikaans-speakers — could, under very narrow circumstance, legitimately exclude non-Afrikaans speakers from a public primary school.[2] In *Western Cape Minister of Education & Others v Governing Body of Mikro Primary School*, the Supreme Court of Appeal held that FC s 29(2) could not be 'interpreted to mean that everyone had the right to receive education in the official language of his or her choice at *each and every* public educational institution where this was reasonably practicable.'[3] As a result, the school governing body had the right to exclude non-Afrikaans-speaking learners where another public school in close proximity could cater for the preferred language of instruction of the non-Afrikaans-speaking students.

But *Mikro* and *Fourie*, as important as they may be, do not reflect the extent to which our basic law will favour egalitarian concerns over associational rights. Where an applicant's challenge has been grounded in FC s 31(1)*(b)*, FC s 31(1)*(a)*, FC s 15, FC s 18 or FC s 29, the courts have not, on balance, demonstrated significant solicitude for cultural, religious and linguistic associations. In *Prince*, Rastafarians found that the state's general commitment to the safety of the commonweal trumped their sacramental use of cannabis.[4] In *Christian Education*, parents found that the state's interest in eliminating corporal punishment trumped the right to punish learners in a manner consistent with religious dictates.[5] Both

[1] *Fourie* (supra) at paras 60-61.

[2] The *Western Cape Minister of Education & Others v The Governing Body of Mikro Primary School* 2006 (1) SA 1 (SCA), 2005 (10) BCLR 973 (SCA)('*Mikro*'). See also *Governing Body of Mikro Primary School v Western Cape Minister of Education* [2005] 2 All SA 37 (C).

[3] *Mikro* (supra) at para 30.

[4] See also *Prince v President of the Law Society of the Cape of Good Hope* 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC)('*Prince*').

[5] 2000 (4) SA 757 (CC), 2000 (4) BCLR 1051 (CC)('*Christian Education*').

cases suggest that religious, cultural or linguistic difference will *only* be tolerated where such differences are not deemed to be a threat to the basic law's commitments to equality, to dignity and to the promotion of the common good.

58.5 FC s 30

(a) Content of FC s 30

IC s 31 represented the Interim Constitution's Bill of Rights sole attempt to engage vexed questions of language and culture. It read as follows: 'Every person shall have the right to use the language and to participate in the cultural life of his or her choice.'

IC s 31's grant of an individual right to non-interference in aspects of culture and language accomplished two things. First, it guaranteed a right to participation in cultural life even where that participation might be against the wishes of the particular community practising that culture.[1] Second, it protected individual interests in the maintenance of cultural life.[2]

The phrasing of IC s 31 left it unclear as to whether the right could ground claims for the protection of cultural communities and linguistic communities *in toto*. FC s 31 constitutes a full-blown right of cultural, linguistic and religious communities to a significant degree of tolerance for the practices of those communities. It has thereby made disputes about the ambit of IC s 31 — and its successor FC s 30 — largely academic.

Indeed, given the work FC s 31 now does with respect to the protection and the promotion of communal interests in culture, religion and language, one might well ask what, if anything, remains for FC s 30 to do. The individual right to maintain membership within a particular cultural community or to use a language of one's choice has been made superfluous by FC s 31's rights to form cultural associations and to use a language in community with others.

However, it is possible (rather easy, in fact) to conceive of an individual interest in using a language or belonging to a cultural community that is *not*, at the same time, an interest shared by other speakers of the language or other members of a cultural community. *Bhe* pits the individual interests of the female members of the Bhe family (and other similarly situated women) in securing an equal share of the deceased's estate against the (alleged) communal interest in maintaining the rule

[1] FC s 30 looks to be the equivalent of article 15 of the International Covenant on Economic, Social and Cultural Rights (1966). Article 15 provides that 'The States Parties to the present Covenant recognize the right of everyone: *(a)* to take part in cultural life.'

[2] *Christian Education* (supra) at para 23 ('[L]anguage rights and rights of belief are first spelt out fully as individual rights in ss 15 and 30, even though they have a community dimension and are frequently exercised in a community setting.') See also *Mhlekwa v Head of The Western Tembuland Regional Authority & Another*; *Feni v Head of The Western Tembuland Regional Authority And Another* 2001 (1) SA 574 (Tk)(Court found that the right to language and culture in terms of FC s 30 gives individual the right to choose to be part of a culture, and persons could choose to forfeit another entrenched right in the Bill of Rights in exercising that right to culture.)

of male primogeniture.[1] *Taylor* pits the individual's right to continued participation in community life against the right of the community to determine the rules which govern the community and thus the rules which membership within the community.[2] Both *Martinez*[3] and *Lovelace*[4] pit the rights of female members of a traditional community to equal treatment against the right of a traditional community to maintain customs that discriminate against particular classes of person within the community. Courts here and abroad have recognized the competing claims and split down the middle as to whose claim should be afforded primacy of place.

FC s 30 provides a partial answer to the question as to whether individuals may be excluded, entirely or partially, from participation within the linguistic and the cultural communities of which they are a part. As I have argued above, continued individual membership in a religious denomination, a linguistic group or cultural association is parasitic upon the continued existence of the particular faith, language or culture in question. The converse is not true. The continued existence of a particular faith, language or culture in question is not — as a general matter — contingent upon the continued membership of any given individual. As a result, while FC s 31 protects the interests of the community, FC s 30 ensures that individuals retain the right to participate within the cultural and the linguistic communities to which they belong. So although FC s 30 may look, at first blush, like a free exercise clause for language and culture, the robust role played by FC s 31 makes such an additional guarantee redundant. What is unique about FC s 30 — and what may distinguish it from all other rights in Chapter 2 — is that its primary purpose is to regulate the horizontal relationships between individuals and other members of linguistic and cultural communities. It is, in other words, concerned less with 'state' action, than it is with 'private' action.

In order for religious, cultural and linguistic communities to be able to create and to maintain the institutions that enable them to flourish, they must be able to control the conditions and the rules that govern entrance, membership, voice and exit within the community.[5] However, such rules must, as the courts have been quick to note, conform, to basic conditions of fairness. That is, just as FC s 18 and FC s 31 afford religious, cultural and linguistic communities the right to establish the conditions for inclusion and exclusion, FC s 30 vouchsafes an individual's right to some degree of procedural fairness when a community enforces its membership and expulsion rules.

A significant body of High Court decisions supports the proposition that the right of an association — cultural, linguistic, religious or otherwise — to expel a member who fails to adhere to the rules of the association is subject to two

[1] *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC).
[2] *Taylor v Kurtstag* 2005 (1) SA 362 (W), 2005 (7) BCLR 705 (W), [2004] 4 All SA 317 (W)('*Taylor*').
[3] *Santa Clara Pueblo v Martinez* 436 US 49, 83 (1978) and *Martinez v Santa Clara Pueblo* 540 F2d 1039, 1042 (10th Cir 1976).
[4] *Lovelace v Canada* Communication No R.6/24, U.N. Doc. Supp. No. 40 (A/36/40)(1981).
[5] See Woolman 'Association' (supra) at § 44.1*(c)*.

provisos. The first proviso is that the community or association in question must make clear what requirements are to be followed by the community member prior to, or sometime during, her admission into the community. The second proviso is that a member of the community facing expulsion must receive a fair hearing from the community in question.[1] Again, FC s 30's emphasis on the right of a member to participate in the affairs of her community is not made redundant by FC s 31 if FC s 30 is understood to stand for the proposition that a person retains a rebuttable presumption of membership within the linguistic or the cultural community to which she has, historically, belonged.

(b) Internal limitations on FC s 30

The Courts have not, as yet, had an opportunity to consider the purpose of the internal limitation found within FC s 30. However, given that the structure of this internal limitation clause is virtually identical to that found in FC s 31(2), there is no reason to believe that the analysis ought to be different. As noted above, the Final Constitution makes it clear that an individual's cultural or linguistic practices enjoy constitutional protection only where they do not limit the exercise of other fundamental rights. However, this proposition does not mean that the other substantive rights in Chapter 2 cannot be read in a manner that actually supports cultural and linguistic concerns.[2] That is, rights to equality, dignity, life, privacy, expression, association and assembly, properly understood, may, in fact, buttress FC s 30 claims rather than undermine them.

58.6 Relationship Between Internal Limitations Clauses in FC ss 30 and 31 and the General Limitations Clause in FC s 36

Two things must be said about the Constitutional Court's general failure to recognize the purpose of the internal limitation clauses found in FC s 30 and FC s 31(2). First, it could simply be attributable to a lack of analytic precision. Second, it really does pay to understand how the internal limitations clauses in FC s 30 and FC s 31 and the general limitations clause in FC s 36 relate to one another should the Court ever decide to engage this troika.

The three clauses relate to one another in the following fashion. A right to community religious, linguistic and cultural practice (and thus the practice itself) could *(a)* be deemed *consistent* with the other rights in Chapter 2 and *(b)* still be

[1] See *Taylor* (supra); *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T)('*Cronje*'); *Ward v Cape Peninsula Ice Skating Club* 1998 (2) SA 487 (C)('*Ward*'); *Wittmann v Deutscher Schulverein, Pretoria, & Others* 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T)('*Wittmann*'). As the *Taylor* court notes, the potential for exclusion is part of the consideration that the member offers in return for admittance. See *Taylor* (supra) at para 37 quoting S Woolman 'Association' (supra) at § 44.3*(c)*(viii).

[2] For more on the internal limitations clause found in FC 31(2), see § 58.4*(b)* supra.

impaired by the law in question. (The existing case law suggests — correctly — that the most likely grounds for a finding that a community practice is inconsistent *and* subordinate to another substantive provision in the Bill of Rights are to be found in FC s 9 — equality[1] — and FC s 10 — dignity.[2]) If the practice is protected by FC s 30 or FC s 31 and impaired by law of general application, then the analysis would proceed to FC s 36. The party relying upon the law challenged in terms of FC s 30 or FC s 31 would have the opportunity to demonstrate that another set of interests or values — not expressly manifest in the specific substantive rights and freedoms of Chapter 2 — justified the infringement of FC s 30 and FC s 31. (Remember: it would have to be 'another set of interests or values' because the cultural, linguistic or religious practice in question has already been deemed consistent with the entire body of substantive rights found in Chapter 2.) In terms of this restricted FC s 36 analysis, the grounds most likely to result in a finding by a court that a limitation of FC s 30 or FC s 31 is warranted are: *(a)* the protection of the general welfare (and the protection of public order, health or morals);[3] *(b)* the rights of other religious, cultural and linguistic groups to form robust associations and communities;[4] and *(c)* the promotion of national unity and greater social cohesion.[5]

57.7 FC s 29

It should come as no surprise that a good amount of the constitutional litigation surrounding cultural, religious and linguistic communities has taken place in terms

[1] *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC).

[2] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC).

[3] *Prince v President, Cape Law Society, & Others* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC); *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC), 1997 (2) SACR 540 (CC), 1997 (10) BCLR 1348 (CC). Article 18(3) of the ICCPR provides that '. . .[f]reedom to manifest ones religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.' For example, the practice known as female circumcision, widespread in parts of Africa, is often opposed on the grounds that it constitutes a serious threat to the health of those subjected to it. See K Engle 'Female Subjects of Public International Law: Human Rights and the Exotic Other Female' (1992) 26 *New England LR* 1509, 1513-1515 (Offers an outline and critique of this argument.)

[4] Many international documents recognize that community rights may conflict and that the resolution of such conflicts is an essential factor for peace, justice, stability and democracy. See, eg, *The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe* (CSCE)(June 29 1990) at para 30 reprinted in (1990) 29 ILM 1305; *The Preamble to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, GA Res 47/135 (18 December 1992)('[T]he promotion and protection of the rights of persons belonging to minorities contributes to the political and social stability of the States in which they live. The UN Human Rights Committee has found that limitations on an individuals right of enjoyment of her culture FC s 30 for our purposes may be permissible where they are designed to protect the existence or identity of a a minority population FC s 31 for our purposes.')

[5] Given the depredations of apartheid, the obvious need for the state to pass laws and other measures designed to repair the divisions of the past may ground FC s 36 arguments that justify the limitation of community rights.

of the autonomy that the basic law grants to independent schools and public schools. Communities of every kind place the greatest emphasis on such autonomy because schools are, outside of the home, one of the primary places where cultural, religious and linguistic communities can consciously replicate themselves. The basic law takes cognizance of the central role that independent schools and public schools play in advancing the ends of cultural, religious and linguistic communities by expressly describing the degree of autonomy that cultural, religious and linguistic communities will receive with respect to each kind of school: independent schools in FC s 29(3) and public schools in FC s 29(2).

(a) FC s 29(3) and independent schools that further the ends of cultural, religious and linguistic communities

The Final Constitution and apposite statutes ensure that independent schools — along with their learners, parents, educators and school governing bodies (SGBs) — enjoy a substantial degree of autonomy.[1] In *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, Kriegler J wrote, on behalf of a unanimous Constitutional Court, that IC s 32*(c)*[2] and then extant national and provincial education legislation and subordinate legislation collectively constituted

> a bulwark against the swamping of any minority's common culture, language or religion. For as long as a minority actually guards its common heritage, for so long will it be its inalienable right to establish educational institutions for the preservation of its culture, language or religion … There are, however, two important qualifications. Firstly, … there must be no discrimination on the ground of race … A common culture, language or religion having racism as an essential element has no constitutional claim to the establishment of separate educational institutions. The Constitution protects diversity, not racial discrimination. Secondly, [the Constitution] keeps the door open for those for whom the State's educational institutions are considered inadequate as far as common culture, language or religion is concerned. They are at liberty harmoniously to preserve the heritage of their fathers for their children. But there is a price, namely that such a population group will have to dig into its own pocket.[3]

[1] See S Woolman 'Defending Discrimination: On the Constitutionality of Independent Schools that Promote a Particular, if not Comprehensive, Vision of the Good Life' (2007) 22 *Stellenbosch Law Review* 31; B Fleisch & S Woolman 'On the Constitutionality of School Fees: A Reply to Roithmayr' (2004) 22 (1) *Perspectives in Education* 111; S Woolman & B Fleisch 'South Africa's Education Legislation, Quasi-Markets and School Choice' (2006) 24 (2) *Perspectives in Education* 1.

[2] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

[3] *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC)('*Gauteng School Education Bill*') at paras 39-42. Section 23 of the Constitution of the Netherlands guarantees the right of all people to establish schools with their own funds and, in practice, has been understood to secure the support of the state for such private initiatives. See C Bakker & I Ter Averst 'School Ethos and its Religious Dimension' (2005) 89 *Sciptura* 350.

Kriegler J's gloss on the constitutional protection afforded independent schools grounded in a common culture, language or religion was certainly correct in 1996. Other laws, of more recent vintage, buttress Kriegler J's claims. FC s 29(3) reads:

> Everyone has the right to establish and maintain, at their own expense, independent educational institutions that *(a)* do not discriminate on the basis of race; *(b)* are registered with the state; and *(c)* maintain standards that are not inferior to standards at comparable public educational institutions.

The language of FC s 29(3) suggests that independent schools possess substantially more latitude than public schools with respect to their admissions requirements and the manner in which they order their internal affairs. FC s 29(3)'s only noteworthy intervention is to bar independent schools from discriminating on the basis of race. Similarly, the South African Schools Act ('SASA') does not make the registration — and the continued accreditation — of independent schools contingent upon the conformation of admissions policies or of curriculum with specific equity requirements. It, too, only bars independent schools from discriminating on the basis of race.[1]

That said, the statutory framework that governs admissions to or expulsions from independent schools has quietly shifted in the last ten years. The Promotion of Equality and Prevention of Unfair Discrimination Act applies to private institutions: it expands the prohibited grounds for discrimination and develops a test for unfair discrimination that appears, at least at first blush, to be stricter than the test developed by the Constitutional Court under FC s 9.

According to PEPUDA, no person — public or private — may discriminate in a manner that imposes, directly or indirectly, burdens upon, and withholds, directly or indirectly, benefits from any person on prohibited grounds.[2] According to PEPUDA, a prima facie demonstration of discrimination on a prohibited ground shifts the burden to the respondent to show that the discriminatory law, rule or conduct is fair.[3]

[1] While no mention of admissions policies is made in these regulations, the enabling provision for these regulations in SASA states that 'a provincial Head of Department must register an independent school if he or she is satisfied that . . . the admission policy of the school does not discriminate on the grounds of race'. SASA s 46(3)*(b)*.

[2] See PEPUDA, s 1, 'discrimination' means 'any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantage on; or *(b)* withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds. Prohibited grounds are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'. (Emphasis added).

[3] See PEPUDA, s 13, 'if the discrimination did take place on a ground in paragraph *(a)* of the definition of prohibited grounds, then it is unfair, unless the respondent proves that the discrimination is fair.'

An Equality Court hearing a PEPUDA challenge to admissions policies at an independent school will likely find a school's rejection of a learner, because she refuses to take religion, language or culture classes, to constitute 'discrimination'. That initial finding does not, of course, mean that the Equality Court is obliged to find that the practice constitutes unfair discrimination. PEPUDA anticipates expressly the requisite grounds for justification of discrimination. PEPUDA, s 14(3), states that fair discrimination may occur where the respondent can demonstrate that: '*(f)* … the discrimination has a legitimate purpose; [and] *(g)* … the … discrimination achieves its purpose'.

An independent school will first have to show that the set of religious, linguistic or cultural practices that form the basis for its narrow admission's policies offer a coherent account of the religion, language or culture ostensibly being advanced. Most independent schools that have the furtherance of religion, culture or language as an end should be able to meet this test for 'legitimate purpose'.

The next leg of the test is somewhat more onerous. Once a legitimate purpose is established, the question becomes whether the discriminatory admissions policy is necessary to achieve the school's purpose of offering an education grounded in a particular, faith, language or culture. One argument is that an independent school committed to the furtherance of a particular religion, language or culture needs to be able to control its message and that such control requires it to have relatively unfettered control over admissions practices and the management of their internal affairs. How strict can such exclusionary admissions policies or internal policing of curriculum requirements be?

At a minimum, any learner must agree to adhere to the curriculum of the school — at least in so far as it requires specific forms of religious, linguistic or cultural instruction. After all, if the purpose of the school is to further a given religion, language or culture, then the curriculum must be designed to advance that religion, language or culture. If the curriculum is essential for the achievement of the school's legitimate purpose, then the exclusionary rule that justifies a learner's expulsion (or non-admittance) should she refuse to accede to the curriculum's requirements must be viewed as a measure that — while discriminatory — is narrowly tailored to meet the legitimate purpose.[1]

In making their PEPUDA arguments, independent schools can draw down on a diverse array of constitutional provisions, constitutional doctrine and common law rules. For starters, FC ss 15, 18, 29, 30 and 31 — read together — underscore the prima facie justifiability of exclusionary admissions policies or of expulsion policies for curriculum non-compliance. As Van Dijkhorst J noted in *Wittmann v Deutsche Schulverein, Pretoria*, the right to education guarantees that members of a religious, linguistic or cultural community may 'establish their own [private or independent] educational institutions based on their own

[1] *Fourie* (supra) at paras 90-98.

values.'[1] He then held that the right to create these independent schools is parasitic upon 'the right … to exclude non-users of that language and non-adherents of that culture or religion, or to require from them conformity.'[2] In sum, recent constitutional case law supports the contention that independent religious, cultural and language specific schools have the right both to expel learners who agree to follow the rules or decisions of the association's governing body and subsequently refuse to do so. More general or communitarian considerations — arguments from capture,[3] constitutive attachment,[4] and pluralism[5] — support the argument that members of a given community have an obligation to 'follow

[1] 1998 4 SA 423, 454 (T).

[2] Ibid at 454. See also *Taylor*(supra) at para 38. (The right of a group to choose their associates of necessity means the right to require those who wish to join the group to conform their behaviour to certain dictates, and the right to exclude those who refuse to conform.)

[3] Capture is a function of one might even say a necessary and logical consequence of the very structure of associational and community life. In short, capture justifies the ability of associations and communities to control their association or community through selective membership policies, the manner in which they order their internal affairs and the discharge of members or users. Without the capacity to police their membership and expulsion policies, as well as their internal affairs, associations would face two related threats. First, an association would be at risk of having its aims substantially altered. Without built-in limitations on the process of determining the ends of the community or the association, new members, existing members and even outside parties could easily distort the purpose, the character and the function of the association. Second, an associations or a community's very existence could be at risk. Individuals, other groups, or a state inimical to the values of an association or a community could use ease of entrance to put that same association or community out of business. See Woolman 'Association' (supra) at 44.1*(c)*.

[4] Associational freedom is often justified on the ground that it enables individuals to exercise relatively unfettered control over the various relationships and practices deemed critical to their self-understanding. But individual autonomy as the basis for associational freedom overemphasizes dramatically the actual space for self-defining choices. As I have maintained elsewhere, each self is best understood as *just* a centre of narrative gravity that unifies a set of dispositional states that draw down on the practices of the various communities — religious, cultural, linguistic, national, familial, ethnic, economic, sexual, racial, social (and so on) – into which that self is born. This view of the self supports some pretty straightforward conclusions about community rights in the context of independent schools. Freedom of association, freedom of religion and community rights, correctly understood, force us to attend to the *arationality* of our most basic attachments and to think twice before we accord *our* arational attachments preferred status to the arational attachments of *others*. These observations regarding constitutive attachments buttress my contention that independent educational institutions that pursue a particular way of being in the world ought to be able to exclude from the institution those learners who do not derive meaning from that way of being in the world, and whose presence, in significant numbers, would make the institution, *qua* religious, linguistic or cultural school, impossible to sustain. See Woolman 'Association' (supra) at § 44.1*(b)*.

[5] If we accept that the practice of religion, the use of a language, the participation in cultural life are legitimate, constitutionally-sanctioned objectives, then discrimination narrowly tailored to meet those objectives must be able to pass constitutional muster. The alternative proposition that no educational institution may discriminate on the basis of religion, language and culture makes the possibility of sustaining, in South Africa, a diverse array of religious, linguistic and cultural communities an empirical impossibility.

the rules' should they wish to remain members of the community.[1] As I noted above, the extant common law on associational rights supports the proposition that independent schools designed to support a religion, a culture or a language possess a significant degree of latitude with respect to admissions policies that differentiate between adherents and non-adherents.[2] And finally, a decade after *Gauteng School Education Bill*, we have seen the Constitutional Court re-confirm its commitment to the autonomy of religious, linguistic and cultural communities in *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project v Minister of Home Affairs*.

These various strands of our law support a couple of fairly straightforward conclusions about the degree of constitutional and statutory autonomy granted independent schools that advance the ends of particular religious, cultural and linguistic communities. Say, for example, that an independent school wishes to provide a Jewish education for Jewish children and employs an admissions policy that discriminates between applicants on the basis of their willingness to adhere to a curriculum that requires both Hebrew and Talmudic instruction. The first reason we can easily defend such discrimination is that it furthers the legitimate religious objectives of the independent school and does so by way of means narrowly tailored to meet those objectives.[3] The second reason we can easily

[1] South African courts have engaged associational rights, communitarian rights and fair hearings in four relatively recent cases. See *Taylor v Kurtstag* [2004] 4 All SA 317 (W)(*'Taylor'*), *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T)(*'Cronje'*), *Ward v Cape Peninsula Ice Skating Club* 1998 (2) SA 487 (C)(*'Ward'*), *Wittmann v Deutscher Schulverein, Pretoria, & Others* 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T) (*'Wittmann'*). All four cases can be read as standing for the proposition that a member has vested interests in the association that, at a minimum, require a fair termination hearing. A non-member, on the other hand, possesses no such rights.

[2] For more on the common law right of an association to protect its critical purposes from both internal and external interference, see *Mitchell's Plain Town Centre Merchants Association v Mcleod and Another*1996 4 SA 159, 166 (A) citing *Total South Africa (Pty) Ltd v Bekker* 1992 1 SA 617, 624 (A)(Emphasis added.) For more on the common law right of an association to protect its critical purposes from alteration by internal and external forces, see *Murray v SA Tattersalls Subscription Rooms* 1910 TH 35, 41; *Nederduitse Gereformeerde Kerk in Afrika (Ovs) En 'n Ander v Verenigende Gereformeerde Kerk in Suider-Afrika*. 1999 2 SA 156 (SCA)(Supreme Court of Appeal held that the decision of the general synod of the NGKA to merge with the NGSK, and the intermediate steps leading up to the merger, conflicted with the clear and unambiguous wording of the constitution and vitiated, without the requisite authority (unanimity of the regional synods), the fundamental objectives of the association.)

[3] For a reading of FC s 29 in which religious, linguistic and cultural communities are entitled to significant degrees of autonomy in the context of maintaining *independent* primary and secondary schools, see S Woolman 'Defending Discrimination: On the Constitutionalality of Independent Schools that Promote a Partial, if not Comprehensive, Vision of the Good Life' (2007) 22 *Stellenbosch Law Review* 31. See also R Malherbe 'The Constitutional Framework for Pursuing Equal Opportunities in Education' (2004) 22 (3) *Perspectives in Education* 9. For more on the challenges that other ethnically diverse societies face in accommodating religious, cultural and linguistic difference, see J De Groof & G Lauwers 'Education Policy and Law: The Politics of Multiculturalism in Education' (2001) 19(4) *Perspectives in Education* 47.

defend such discrimination is that neither the school's curriculum nor any exclusion based upon a refusal of the learner to follow the school's curriculum constitutes an impairment of the learner's dignity. Why? The learner can secure access to an adequate independent school education elsewhere. Because most learners in a position to pay for an independent school can receive an adequate independent school education elsewhere, it is difficult to construe the refusal of admission — based upon the learner's own refusal to accept the curriculum as an essential part of her matriculation at the school — as a diminution of the learner's dignity.[1]

(b) FC s 29(2) and the right to maintain public schools that further the ends of cultural, religious and linguistic communities

The real action, in so far as religious, linguistic and cultural communities are concerned, revolves around FC s 29(2). FC s 29(2) asks and answers the following question of moment: Does a public school that wishes to provide a single medium education in Afrikaans possess a constitutional right to employ an admissions policy that discriminates between applicants on the basis of their willingness to adhere to a curriculum that requires that all classes be taken in Afrikaans? The answer to that question is, generally, no. As we shall see, however, both the text of the Final Constitution and the case law recognize a very narrow set of conditions within which an entitlement to such a school may be legitimately asserted.

FC s 29(2) is a complex provision. It reads:

> Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account:
> *(a)* equity;
> *(b)* practicability; and
> *(c)* the need to redress the results of past racially discriminatory laws and practices.

It is possible to identify two interpretive poles for this passage. At one end of the spectrum, some commentators contend that FC s 29(2) eliminates any express entitlement for single-medium public schools except where such schools offer redress for communities whose mother tongues were repressed under English and Afrikaaner rule. At the other end of the spectrum, several commentators contend that FC s 29(2) vouchsafes continued state support for all single-medium public schools, and, in particular, single-medium Afrikaans schools.

FC s 29(2) does not support either of these two readings.

[1] But see *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC)(Court found that while provisions in SASA that barred the use of corporal punishment constituted prima facie infringements of an independent school's FC s 15 and FC s 31 rights, the learners' right to dignity trumped the school's right to freedom of religion and its communal right to practice its religion.)

Let's begin with the uncompromisingly egalitarian position defended by Blade Nzimande.[1] Nzimande construes FC s 29(2)'s second sentence requirements as matters of administration and policy, and not constitutional law. Though FC s 29(2)'s second sentence may provide a rather weak test for justification, it does not turn the choice of medium of instruction into a matter of mere policy preference. Moreover, FC s 29(2) does not, as Matthew Chaskalson has suggested of IC 32, possess the structure of an affirmative action provision.[2] FC s 9(2) provides the perfect example of a constitutional norm whose aim is restitutionary justice.[3] Whereas FC s 9(2) differentiates between groups that have been historically disadvantaged and those that have not, FC s 29(2) does not do so. Single-medium public schools could be approved for any preferred language of instruction so long as instruction in a preferred language is reasonably practicable, and the single-medium public school, as the *best* means of accommodating such instruction, satisfied the three threshold criteria of equity, practicability and redress. The Final Constitution, as a liberal political document, does not view all social, legal and economic arrangements through the prism of equality and reparations.

Commentators such as Rassie Malherbe, occupying the opposite end of the ideological and interpretative spectrum, contend that FC s 29(2) provides a strong guarantee — a rebuttable presumption — that linguistic communities can create and maintain publicly funded single-medium public schools.[4] Malherbe misreads FC s 29(2). In particular, he repeatedly collapses the distinction between the right to instruction in a mother tongue or preferred language (where practicable) with the obligation imposed upon the state to consider a range of options as to how to offer such instruction. Malherbe privileges single-medium public schools.[5] FC s 29(2) does not. It mentions single-medium schools as only one in a range of alternatives that the state has an obligation to consider. Moreover, any option considered by the state for delivering mother-tongue instruction — *one* of which is single-medium schooling — must satisfy, to some degree, the three criteria of equity, practicability and historical redress. Malherbe characterizes the three FC s 29(2) criteria as mere factors to be considered in some global proportionality assessment. This characterization of the three criteria seems far too weak. For a single-medium public school to be preferred to another reasonably practicable

[1] B Nzimande 'Address to the Constitutional Assembly' 7 May 1996 (1996), available at www.polity.co.za (accessed on 1 December 2006).

[2] M Chaskalson 'Constitutional Issues Relevant to School Ownership, Governance and Finance Paper Presented at the Durban Education Conference' (1995) 8-9 (Manuscript on file with author).

[3] *Minister of Finance v Van Heerden* 2004 (6) SA 121(CC), 2004 (11) BCLR 1125 (CC).

[4] See R Mahlerbe 'The Constitutional Framework for Pursuing Equal Opportunities in Education' (2004) 22(3) *Perspectives in Education* 9 ('Constitutional Framework'); R Malherbe 'A Fresh Start: Education Rights in South Africa' (2000) 4 *European Journal for Education Law and Policy* 49; R Malherbe 'Submission to President Nelson Mandela on Behalf of a Group of Afrikaans Organizations' (15 May 1996).

[5] Malherbe 'Constitutional Framework' (supra) at 21.

institutional arrangement — say dual medium instruction or parallel medium instruction — it must demonstrate that it is more likely to advance or to satisfy the three criteria. Malherbe further claims that because the Final Constitution specifically refers to 'single medium institutions' then 'whenever they [single medium institutions] are found to be the most effective way to fulfill the right to education in one's preferred language, single medium institutions should be the first option.'[1] Once again, because Malherbe collapses the distinction between mother-tongue instruction and single medium public schools, he fails to recognize that the right to the former — mother-tongue instruction — is subject to 'practicability' and the derivative or secondary 'privilege' of the latter — a single medium public school — can only be a 'first option' for mother-tongue instruction if it meets the three threshold criteria of equity, practicality and redress. Finally, that Malherbe's interest in protecting single medium public schools leads him to misread FC s 29(2) in its entirety is made patently clear from his final claim that the 'right to education in one's preferred language is guaranteed unequivocally in the South African Bill of Rights.'[2] This statement is clearly false. As the above language of FC s 29(2) indicates, the right to receive education in the official language or languages of [one's] choice in public educational institutions' is subject to a powerful internal modifier — namely, the right exists only where the provision of 'that education is reasonably practicable.'[3]

[1] Malherbe 'Constitutional Framework' (supra) at 22.

[2] Ibid.

[3] For another reading of FC s 29(2) that falls somewhere between the Nzimande position and the Malherbe position, see G Bekker 'The Right to Education in the South African Constitution' *Centre for Human Rights Socio-Economic Rights Papers*, available at http://www.chr.up.ac.za/centre_projects/socio/compilation2part1.html (accessed 12 December 2006.) Bekker writes:

> The Constitution does not guarantee mother-tongue education for minorities, as does for example section 23 the Canadian Charter of Rights and Freedoms. The Constitution, however, guarantees the right in public institutions to education in the language of ones choice. This is limited to education in an official language or languages and is further limited by the proviso - where reasonably practicable. . . . With regard to what would be reasonably practicable, the Department of Education's Language in Education Policy provides that: it is reasonably practicable to provide education in a particular language of learning and teaching if at least 40 in Grades 1 to 6 or 35 in Grades 7 to 12 learners in a particular grade request it in a particular school. . . . This is in keeping with the internationally practised sliding scale formula: the larger the number of speakers of a language in a particular area, the greater the obligation to provide mother-tongue education in that area. . . . Furthermore, the Language in Education Policy provides that where there are fewer than the requisite number of learners that request to be taught in a particular language not already offered by a school in a particular school district, the head of the provincial department of education will determine how the needs of those learners will be met, taking into consideration the duty of the state and the right of the learners as spelled out in the Constitution. . . . The second part of section 29(2) provides that the state has to ensure effective access to and implementation of the right to education. In this regard, the State must consider all reasonable alternatives including single medium education, taking into account equity, practicability, and the need to redress the imbalances of the past. This would mean that where, for example, there are equal numbers of students seeking education in two different languages, a dual medium school might be the most equitable. Conversely, the most equitable solution might be a single medium school in cases where the majority of students wish to be educated in one particular language. However, equitability is not the only deciding factor - practicability will also have to be a taken into account. Here factors such as resources and numbers of teachers will play a role. Finally, the need to

Given this trenchant analysis, how should FC s 29(2) be parsed? FC s 29(2) should be interpreted as follows.[1]

First, FC s 29(2) grants all learners 'the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable.' Note that the right to receive education in the official language or languages of one's choice is not, as the Supreme Court of

redress the imbalances of the past is emphasised. Thus, anything that will have the effect of denying or impeding the right to education of previously disadvantaged communities will also have to be taken into account.

It is not clear why, on Bekker's account, a majority of learners ought to be able to determine that a single-medium public school remains a single-medium public school. That position is not consistent with the DoEs language policy, international practice or the actual text of FC s 29(2). A single-medium public school is simply one available means to ensure preferred language instruction: it is not a right possessed by all official language speakers.

[1] For further analysis of FC s 29(2), see B Fleisch & S Woolman 'On the Constitutionality of Single-Medium Public Schools' (2007) 23 *SAJHR* (forthcoming).

Appeal in *Mikro* noted, an unqualified right. The right is subject to a standard of reasonable practicability. How should this internal limitation of the right be read?[1] It is suggested that where sufficient numbers of learners request instruction in a preferred language — and South Africa does possess regulations, as well as standards and norms, that make clear what those numbers are — and no *adequate alternative* school exists to provide such instruction, then a public school is under an obligation — with assistance from the state — to provide instruction in the language of choice.[2]

[1] For more on how internal limitations clauses function in various substantive provisions in the Bill of Rights, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, Original Service, July 2006) Chapter 34.

[2] The lesson of the Supreme Court of Appeal's decision in *Mikro* is that where learners already have easy access to a school that offers them instruction in their preferred medium, then neither the learners nor the state has any business in forcing a single medium Afrikaans public school into becoming a dual medium or a parallel medium institution. But *Mikro* must also be read as creating the very narrowest of spaces for the assertion of sectarian interests in our public schools.

At issue in *The Western Cape Minister of Education & Others v The Governing Body of Mikro Primary School* was the refusal of an Afrikaans medium public school to accede to a request by the Western Cape Department of Education (WCDoE) to change the language policy of the school so as to convert it into a parallel medium school. Acting on behalf of 21 learners, the WCDoE had directed the primary school to offer instruction in their preferred medium: English. The WCDoE had interpreted the Norms and Standards issued by the National Department of Education under SASA as requiring all primary schools with 40 learners who preferred a particular language of learning and teaching to offer instruction in that language.

The Supreme Court of Appeal summarily rejected both the WCDoE's reading of the Norms and Standards and its gloss on FC s 29(2). It did so on three primary grounds. First, the Supreme Court of Appeal overturned Bertelsmann J's finding in *Laerskool Middelburg* that the Norms and Standards provided a mechanism for the alteration of the language policy of a public school. At best, the Supreme Court of Appeal said, the Norms and Standards constituted a guideline for members of the department and those parties responsible for the governance of public schools. Second, the Supreme Court of Appeal held that SASA s 6(1) granted neither the national Minister of Education nor the provincial MEC or HoD the authority to determine the language policy of a particular school, nor does SASA authorize any other person or body to do so. The power to determine language policy vests solely with the SGB of a given public school and is subject only to the Final Constitution, SASA and any applicable provincial law. Third, the Supreme Court of Appeal rejected the applicants contention that FC s 29(2) could be interpreted to mean that everyone had the right to receive education in the official language of his or her choice at each and every public educational institution where this was reasonably practicable. *Mikro* (supra) at para 30. Such a reading, the *Mikro* Court held, would mean that any significant cohort of learners could demand instruction in their preferred language if it was conceivably possible to do so. The *Mikro* Court noted that such a reading 'would lead to the absurd consequence that a group of Afrikaans learners would be entitled to claim [a right] to be taught in Afrikaans at an English medium school immediately adjacent to an Afrikaans medium school which has vacant capacity provided they can prove that it would be reasonably practicable to provide education in Afrikaans at that school'. Ibid. The Supreme Court of Appeal held that the correct reading of FC s 29(2) affords the state significant latitude in deciding how best to implement this right and that FC s 29(2) grants everyone a right to be educated in an official language of his or her choice at a public educational institution if, in the totality of circumstances, it is reasonably practicable to do so. That means, of course, that the right is only to language instruction, generally, and, thus to instruction at some school within an accessible geographical domain, and not, as the applicants had claimed, to language instruction at each and every public educational institution and thus to any school the applicants wished to attend.

The decision is notable in two important respects. First, it diminishes, under current law, the ability of the state to determine admissions policy with regard to language. Such power continues to vest in the

Second, before proceeding to the second sentence in FC s 29(2), it is worth taking another look at the meaning of 'reasonably practicable'. As an evidentiary matter, the learner or the learners or the state must be able to show that instruction in the language of choice is 'reasonably practicable' at the institution where the learners have applied for admission. So, for example, a single learner who requests instruction in Sepedi in a single-medium isiZulu school may be hard pressed to demonstrate that it is reasonably practicable to accommodate her at a single-medium isiZulu school. An inability to establish reasonable practicability would be even more pronounced where the learner who preferred instruction in Sepedi had access to an adequate school that offered Sepedi instruction. The failure to demonstrate that a request for instruction is 'reasonably practicable' ends, as the *Mikro* Court found, the FC s 29(2) inquiry.

Third, assume that the learner has shown that instruction in the language of choice is reasonably practicable at the institution where she has applied for admission. Only then do we consider the import of the second sentence of FC s 29(2).

Fourth, the second sentence of FC s 29(2) states that '[i]n order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account: a. equity; b. practicability; and c. the need to redress the results of past racially discriminatory laws and practices.'

Fifth, the second sentence of FC s 29(2) makes it patently clear that single-medium institutions are but one way of accommodating the right of a learner to instruction in the language of choice. Moreover, the mere mention of single-medium schools in no way privileges such institutions over dual-medium schools, parallel-medium schools, or schools that accommodate the multilingualism of the student body in some other way. All that this portion of FC s 29(2) requires is that the state consider 'all reasonable educational alternatives' that would make mother tongue or preferred language instruction possible.

Sixth, even if single-medium schools are found to be one of the reasonable alternatives for preferred language instruction, the single-medium school must be able to satisfy a three factor test. That is, for a single-medium school to be preferred to another reasonably practicable institutional arrangement — say dual-medium instruction or parallel-medium instruction — it must demonstrate that it is more likely to advance or to satisfy the three listed criteria of equity, practicability and historical redress.

Seventh, FC s 29(2)'s concession to single-medium public schools constitutes a very weak right indeed. (It is, perhaps, best described as a right to have reasons or an

SGB. Second, while affirming the rights of learners to instruction in a preferred language, it simultaneously confirmed the power of individual schools to continue to offer instruction in a single medium. The effect of the Supreme Court of Appeals decision in *Mikro* is to reverse the spin of *Laerskool Middelburg*. Not only is parallel medium instruction not the default position, the current language preferences of a single medium public school may trump the policy preferences of national and provincial DoEs. It is impossible to read *Mikro* and not come away with the impression that linguistic associational interests may, on *rare* occasion trump, equity concerns, and that they may even do so in public schools.

entitlement to justification.) That said, it is not without value for proponents of single-medium public schools. What the second sentence of FC s 29(2) ultimately requires is that the state be able to justify its preference for one form of school over another. Given the Final Constitution's recognition of single-medium schools as a legitimate means of providing preferred language education, the state will find itself under an obligation to demonstrate why another form of instruction — dual-medium, parallel-medium, special tutoring — will better serve the learners in question. Moreover, the Final Constitution's recognition of community rights, associational rights, religious rights, cultural rights and linguistic rights creates a set of background conditions against which claims for single-medium schools must be taken seriously. For where preferred language instruction is reasonably practicable, and where single medium schools satisfy the desiderata of equity, practicability and historical redress, the state cannot simply invoke an overriding commitment to 'equality' or 'transformation' in order to dismantle single medium institutions. The Final Constitution is, ultimately, a post-apartheid constitution. Thus, at the same time as it sets its face against exclusion and discrimination, it also rejects apartheid's totalizing view of the state. Space remains — within both the private realm and the public realm — for the accommodation of multiple ways of being in the world. That public space, as we have seen, is extremely narrow with respect to single medium public schools. But however narrow it may be, it cannot be entirely wished away.

Where does this analysis leave us? Pace Mahlerbe, FC s 29(2) provides no right to single medium public schools. At best, FC s 29(2) recognizes such schools as one option to be considered amongst a range of other institutional arrangements designed to further the instruction of learners. At best, FC s 29(2) places an obligation on the state to justify any refusal to recognize and to support single-medium public schools. Given FC s 29(2)'s commitment to equity and to historical redress, advocates of single-medium Afrikaans public schools are clearly batting on a sticky wicket.

[1] *Matukane & Others v Laerskool Potgietersrus* 1996 (3) SA 223 (T). At issue in *Matukane & Others v Laerskool Potgietersrus* was the attempt by the parent of three learners, Mr Matukane, to enroll his three children (13, 13 and 8) at the Laerskool Potgietersrus. The Laerskool Potgietersrus was then, and remains still, a state-aided parallel medium primary school.

Mr Matukane, a black resident of Potgietersrus spoke to the principal on 11 January 1996. The principal informed Mr Matukane that Mr Matukane would have to wait until 25 January 1996 for a determination as whether there was space available at the school. Mr Matukane was not convinced that any such delay was warranted. He approached the provincial Department of Education (DoE). DoE informed Mr Matukane that his children could be enrolled in the school. Mr Matukane arrived at the school on 22 January 1996, completed the necessary application forms and bought the school uniforms as directed. Mr Matukane returned the next day with his children for their first day at school. The entrance of the school was blocked by a group of white parents who refused to allow Mr Matukane or his children to enter the school. Other black parents were similarly rebuffed. On top of these indignities, the school bussed in white children from Zebidiela, a neighboring town, despite the fact that a school catering to Afrikaans-speaking students in Zebidiela had space available.

Extant case law confirms this reading of FC s 29(2). *Matukane*,[1] *Laerskool Middelburg*,[2] *Seodin*[3] and *Ermelo*[4] also confirm a number of additional critical propositions. First, discrimination on the basis of language cannot be used as a proxy for discrimination on the basis of race. Second, where learners do not have

In the High Court, Laerskool Potgietersrus argued that it was unable to accommodate more children and that it had not rejected the children on racial grounds. At the time of the hearing, Laerskool Potgietersrus had 580 Afrikaans students and 89 English students. The Laerskool Potgietersrus expressed concern that if it admitted these children, it would be swamped by English-speaking children who would destroy the Afrikaans nature of the school. The school contended that IC s 32*(c)* entitled the school to adopt admissions requirements designed to maintain the existing culture and ethos of the school.

Despite the school's assertion that the refusals were based on overcrowding, not race, the facts clearly painted a different picture. No black children had been admitted to the school. There were no black children on the waiting list. Room existed to accommodate more English-speaking children. Little danger existed of the schools Afrikaans culture and ethos being destroyed even if every black applicant were to be accepted. The ratio of Afrikaans-speaking students to English-speaking students would remain 5:1. The *Matukane* Court was driven to conclude that language and culture were operating as surrogates for race and that that the respondent had failed to discharge its burden of proving the fairness of its (racist) admissions policies.

[1] 2003 (4) SA 160 (T). *Laerskool Middelburg en 'n ander v Departementshoof, Mpumalanga Departement van Onderwys, en andere*, litigated in 2003, extends the holding in *Matukane* from parallel — medium to single-medium schools. However, in *Laerskool Middelburg,* the High Court was clearly more troubled by the conflict between the right to a single-medium school and the right to be educated in the official language of ones choice. The *Laerskool Middelburg* court initially rebuffed the provincial Department of Education's power-play. It held that neither SASA, nor the regulations issued under them, authorised the Head of the Department to instruct a school to change from single-medium to dual-medium tuition and declared that the Head's administrative conduct was prima facie unfair. Ibid at 171-172, 176. The *Laerskool Middelburg* court then rejected the Department's argument that the applicant school's admission policy discriminated unfairly against English learners. The High Court held that in circumstances in which the English learners could be accommodated elsewhere, the Department's actions simultaneously violated the FC s 29(2) entitlement of Afrikaans-speaking students to single medium public schools and the FC s 29(2) right of English-speaking students to an education in the official language of their choice in public institutions. Ibid at 173 and 175. That said, the *Laerskool Middelburg* court noted that the FC s 29(2) *entitlement* to a single — medium public educational institution was subordinate to the FC s 29(2) *right* of every South African to a basic education and the proven need to share education facilities with other linguistic and cultural communities. As a result, the *Laerskool Middelburg* court was unwilling to allow the needs of 40 English-speaking learners to be prejudiced by the state's failure to play by the rules and the schools intransigence on the issue of parallel — medium education. The *Laerskool Middelburg* court relied upon FC s 28(2)'s guarantee that the best interest of the child are always of paramount importance to trump the language and cultural rights of the school's Afrikaans learners. So while the state's actions had been *mala fide*, it was still able to secure a victory for educational equity by getting the proper parties before the court.

In deciding that the minority students must be accommodated, the *Laerskool Middelburg* court correctly concluded that the right to a single medium public educational institution is clearly subordinate to the right every South African has to education in a similar institution and to a clearly proven need to share education facilities with other cultural communities. The *Laerskool Middelbur*g court seems to be on far shakier grounds when it suggests that a claim to a single-medium institution is probably best defined as a claim to emotional security. This trivializes the desire to maintain basic, constitutive attachments. It seems clear that the desire to sustain a given culture especially a minority culture, as Afrikaaner culture now is, is best served by single medium institutions that reinforce implicitly and expressly the importance of sustaining the integrity of that community. The *Laerskool Middelburg* court must be wrong — as an empirical matter – when it claims that the conversion of a single-medium school to a parallel — medium school cannot *per se* diminish the force of each ethnic, cultural and linguistic communitys claim to a school organized around its language and culture. Ibid at 173. That is, with respect, exactly what conversion *per se* does.

ready access to a public school that offers them adequate instruction in their preferred medium of instruction, then neither a School Governing Body nor a principal can exclude learners in terms of an admissions policy that seeks to privilege a particular language. One lesson of the Supreme Court of Appeal's decision in *Mikro* is that the window for exclusion on the basis of language and culture is rather small indeed: only where the learners in question already have easy access to a school that offers them adequate instruction in their preferred medium of instruction, can the single-public medium school in question claim, with some force, that neither the learners nor the state has any business forcing a single-medium public school into becoming a parallel-medium or a dual-medium public school.[1] Third, and most importantly, *the Final Constitution neither provides a*

[2] *Seodin Primary School v MEC Education, Northern Cape* 2006 (1) All SA 154 (NC). While *Mikro* might have brought some relief to the SGBs of single-medium Afrikaans-speaking schools, there is every reason to believe that such a respite will be brief. *Seodin* reinforces the holdings in *Matukane* and in *Laerskool Middelburg*. In *Seodin Primary School v MEC Education, Northern Cape*, the High Court held that the SGBs of three Afrikaans medium public schools could not use language preference to exclude black English-speaking students from admittance.

[3] *Hoërskool Ermelo I* and *Hoërskool Ermelo II* offer perhaps the best set of circumstances under which to assess, in terms of FC s 29(2), the respective rights of learners to choose their preferred language of instruction, the ability of SGBs to determine public school language policy and the power of the state to alter language policy where the needs of learners so warrant. In *Hoërskool Ermelo I*, Judge Prinsloo, of the Pretoria High Court, suspended a decision of the Mpumalanga education department to dissolve the school's governing body to replace it with a departmentally appointed committee. *Hoërskool Ermelo & Others v Departmentshoof van die Mpumalanga* Case Number 3062/07, Pretoria High Court (Unreported, 2 February 2007). The dissolution would have enabled the Mpumalanga education department to alter the schools language policy and allowed 113 English-speaking pupils to receive instruction in English. On appeal, Transvaal Judge President Ngoepe, and Judges Seriti and Ranchod set aside the High Court ruling in *Hoërskool Ermelo I*. The *Hoërskool Ermelo II* court found that the Afrikaans-medium school must admit English-speaking pupils. Of particular moment for the *Hoërskool Ermelo II* court was the under-subscription of Hoërskool Ermelo. Given that Hoërskool Ermelo was operating at only half-capacity, the Full Bench found that it was reasonably practicable, as contemplated by FC s 29(2), for the high school to accommodate the 113 eighth grade learners. The mere fact that all classrooms were being employed and that the existing curriculum turned on the current availability of classrooms did not constitute sufficient grounds for excluding English learners and maintaining Hoërskool Ermelo as a single-medium Afrikaans public school. Equity, practicability and historical redress justified the transformation of Hoërskool Ermelo from a single-medium public school into a parallel-medium public school.

[1] The wilful misconstruction of the constitutional space that exists for single medium public schools is evident from the following press release by the Federation of Afrikaans Cultural Associations:

> The Federation of Afrikaans Cultural Associations, the FAK, welcomes the Supreme Court of Appeals rejection of an appeal by the Western Cape MEC for Education to try and force Laerskool Mikro to change its language policy. This judgment is a victory for the autonomy of communities and in fact represents a small step closer to the application of the National Departments policy of mother-tongue instruction for all South African children. The FAK hopes that the continuing pressure by provincial education departments on Afrikaans schools to anglicize in the name of greater access will cease. Currently several Afrikaans schools countrywide are subject to such pressure, with possible court action involved. The FAK appeals to provincial education departments to stop playing off the right to access against mother-tongue instruction, and to alleviate the crisis of access to quality education for all by applying themselves to make mother-tongue instruction a reality for all South African children.

Federation of Afrikaans Cultural Associations FAK Welcomes *Mikro* Judgment (June 27, 2005) http://vryeafrikaan.co.za/lees.php?id=272 (accessed on 24 January 2007).

guaranteed right to single-medium public schools nor does it prohibit the existence of such institutions. The Final Constitution sets its face against the kind of cultural and linguistic hegemony that marked apartheid and, at the same time, recognises the necessity of a multiplicity of patterns of school language policy. The principal constitutional norms that bracket language policy do not entail some ideological pre-commitment to any particular language practice: say English over Afrikaans, or isiZulu over isiXhosa. Instead these norms require that any language policy meet such fixed, yet fluid, desiderata as equity, practicability and historical redress. In some instances, this set of constitutional desiderata will allow for the continued existence of single-medium Afrikaans institutions. In other instances, circumstances will dictate that such schools change their language policy. In either case, the state must be in a position to offer a compelling evidentiary basis for its conclusion regarding the change or the maintenance of a single medium schools' language policy. In the absence of such reasons, our courts should view state-sponsored changes in policy as arbitrary exercises of state authority.

For many, the constitutional obligation placed upon the state to justify its actions may not provide sufficient solace. For those learners and their parents for whom the window provided by FC s 29(2) is too small and for whom a single-medium school designed to further a particular linguistic, cultural or religious vision of the world is an absolute necessity, the Final Constitution again has an answer. Under FC s 29(3), they may 'dig into their own pocket' and build the school on their own time and in their own fashion.

58.8 SELF-DETERMINATION

(a) Self-determination in international law

At international law, self-determination is a right of 'all peoples … freely to determine, without external interference, their political status and to pursue their economic, social and cultural development'.[1] Competing understandings of self-determination indicate differences of emphasis rather than fundamental divergence over the basic content of the right.

[1] *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations* (*Friendly Relations Declaration*) GA Res 2625 (1970) reprinted in H Hannum (ed) *Documents on Autonomy and Minority Rights* (1993) 36. For formulations of the right in treaty law, see Article 1 of the ICCPR, Article 1 of the International Covenant on Social, Economic and Cultural Rights (1966), and Article 20 of the African Charter of Human and Peoples Rights (1982). For a ringing defence of economic, social and cultural rights on the African continent, see SC Agbakwa 'Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights' (2002) 5 *Yale Human Rights & Development Law Journal* 177, 177 (Argues that the rights of peoples to economic, social and cultural self-determination is often the only means of self-defense for millions of impoverished and marginalized groups all over the world.) For more on self-determination in Africa, see, generally, C Heyns & K Stefizyn (eds) *Human Rights, Peace and Justice in Africa* (2006).

On the one hand, the term is used to underpin the claims of a group of people who have a strong sense of national consciousness and the desire to form their own state and to govern themselves. In the recent past, self-determination often formed part of a process of decolonization. With the end of the direct colonial period, self-determination has often taken placed through secession from an existing independent state. This first connotation of self-determination may be termed 'external' self-determination, since the exercise of the right entails changes to the international personality of a state.

On the other hand, self-determination may also be understood as having an 'internal' dimension. Internal self-determination concerns the relationship between a people and the government of the state in which that people lives. This right of 'internal' self-determination is a right of groups within an existing sovereign state to a degree of political autonomy and to their own economic, social and cultural development. 'Internal' self-determination does not imply a right of any such group to a sovereign state of its own.[1] Understood in this way, the right of self-determination closely tracks such modern principles as popular participation and representation in government and respect for fundamental human rights and the rule of law.[2]

(b) Self-determination and the Final Constitution

(i) *Interim Constitution, constitutional principles and certification*

Given South Africa's long history of ethnic division and political orchestration of minority fears, it could be expected that self-determination claims would find a receptive constituency. During the transitional negotiations, political groupings claiming to represent the interests of ethnic minorities saw little purpose in entrenching minority rights in a Bill of Rights. In the view of these parties, a better refuge from majority rule could be found in the elaboration of the right of external self-determination.

Self-determination claims came to dominate the MPNF negotiations. Two major political groupings insistently pressed the issue, backing their demands with dire threats of violent secession and civil war. White right-wing parties, grouped in a succession of loose alliances, mobilized around the issue of an

[1] Authority for a right of internal self-determination of peoples living within independent states can be found in the penultimate paragraph on 'rights of peoples in existing states' in the *Friendly Relations Declaration*. The paragraph reads: 'Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.' See P Thornberry 'The Democratic or Internal Aspect of Self-determination with Some Remarks on Federalism' in C Tomuschat (ed) *Modern Law of Self-Determination* (1993) 101, 114.

[2] A Rosas 'Internal Self-determination' in C Tomuschat (ed) *Modern Law of Self-Determination* (1993) 225, 230.

independent Afrikaner state, a Volkstaat.[1] As the Inkatha Freedom party ('IFP') increasingly felt its federalist ambitions frustrated in the course of the negotiations, the language of self-determination and secession became more and more attractive. The party unveiled a 'Constitution of the State of KwaZulu/Natal' in December 1992. While this 'KwaZulu/Natal Constitution' ostensibly set out the IFP's vision of a federal system, and what it termed 'internal regionalisation', commentators observed that the document looked more like a charter for an independent state.[2] This secessionist strain in IFP politics grew louder as the party became more estranged from the Kempton Park process. It culminated in declarations of a sovereign kingdom of KwaZulu-Natal.

While attempts were made by the negotiators to accommodate IFP demands by increasing the political power of provincial governments, right-wing fears were addressed by two constitutional principles dealing with self-determination: CPs XII and XXXIV. The first principle emerged from consideration of submissions made by right-wing parties shortly after the recommencement of negotiations in 1993. These submissions argued for a right of external self-determination: secession of an independent Afrikaner Volkstaat from the remainder of South Africa. The Technical Committee on Constitutional Issues, however, addressed the right of self-determination through a package of guarantees that corresponded to internal 'self-determination'. This package encompassed guarantees of non-discrimination, provisions ensuring meaningful participation in the political process by minority parties, rights of linguistic and cultural diversity, and collective or community rights of linguistic, cultural and religious association.[3]

CP XXXIV was inserted as a last-minute attempt to entice the right-wing — which had abandoned negotiations and declared its intention to boycott the election — to participate in the transitional process.[4] This principle, read together

[1] Once considered the preserve of intellectuals and eccentrics, the Volkstaat strategy entered the mainstream of right wing politics in the late 1980s. Until then, the right wing had put its faith in parliamentary politics to deliver it from the prospect of majority rule. It was thought that an election victory would enable a right-wing majority in the white parliament to set about repairing the damage wrought to the Verwoerdian state by two decades of sporadic reform. But stark defeats in the 1989 general election, the 1992 constitutional referendum and the steady attrition of parliamentary power after February 1990 necessitated the abandonment of this strategy in favour of secessionist politics. See J Grobbelaar 'Bittereinders: Dilemmas and Dynamics on the Far Right' in G Moss & I Obery (eds) *South African Review* 6 (1992) 103.

[2] S Friedman *The Long Journey: South Africa's Quest for a Negotiated Settlement* (1993) 164; S Ellmann 'Federalism Awry: the Structure of Government in the KwaZulu/Natal Constitution' (1993) 9 *SAJHR* 165. On the litigation over the KZN Constitutition and recent failed efforts to revive it, see S Woolman 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 21.

[3] Technical Committee on Constitutional Issues 'Fourth Supplementary Report on Constitutional Principles' (26 July 1993) 7.

[4] The Principle was inserted by the Constitution of the Republic of South Africa Amendment Act 2 of 1994. See, generally, R Humphries, T Rapoo & S Friedman 'The Shape of the Country: Negotiating Local Government' in S Friedman & D Atkinson (eds) (1994) 7 *South African Review* 148, 170.

with Chapter 11A of the Interim Constitution,[1] gives qualified recognition to a right of external self-determination. The principle provided:

> 1. This Schedule and the recognition therein of the right of the South African people as a whole to self-determination, shall not be construed as precluding, within the framework of the said right, constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way.
>
> 2. The Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for such a form of self-determination.
>
> 3. If a territorial entity referred to in paragraph 1 is established in terms of this Constitution before the new constitutional text is adopted, the new Constitution shall entrench the continuation of such territorial entity, including its structures, powers and functions.

(ii) *Volkstaat Council*

As I noted above, the problem of accommodating, and protecting, ethnic, religious and linguistic minorities in a democratic state dominated the political debates and the lengthy constitutional negotiations that preceded the enactment of the Interim Constitution. One substantive outcome of these 'debates' was the establishment of a 'Volkstaat Council' under the Interim Constitution.[2] IC ss 184A and 184B gave effect to an informal agreement between the National Party government, the ANC and those Afrikaner groups who wished to pursue the creation of a Volkstaat.[3] Talk of a Volkstaat represented the ambitions of

[1] Chapter 11A of the Interim Constitution provided for the establishment of a Volkstaat Council. It was intended to enable proponents of the idea of a Volkstaat to constitutionally pursue the establishment of such a Volkstaat. IC s 184B(1). The now defunct Council was an advisory body, with powers to gather information and make representations on the Volkstaat issue to the Constitutional Assembly. See IC s 184B(1)*(a)*.

[2] See Constitution Amendment Act 2 of 1994, s 9 (Inserts Chapter 11A into Interim Constitution).

[3] The exact nature of the bargain is found in the Accord on Afrikaner Self-Determination Between the Freedom Front, the African National Congress and the South African Government/National Party (23 April 1994). This document was signed by General Constand Viljoen, Leader, Freedom Front; Mr Thabo Mbeki, National Chairman, African National Congress; Mr Roelf Meyer, Minister of Constitutional Development and of Communication, Government of the Republic of South Africa and the National Party. The Accord took note of the IC ss 184A and 184B, Constitutional Principle 34 and a previously unsigned memorandum between the ANC, the AVF and the South African government. The Accord read, in relevant part, as follows:

> 1. The parties agree to address, through a process of negotiations, the idea of Afrikaner self-determination, including the concept of a Volkstaat. The parties further agree that in the consideration of these matters, they shall not exclude the possibility of local and/or regional and other forms of expression of such self-determination. 3. They agree that their negotiations shall be guided by the need to be consistent with and shall be governed by the requirement to pay due consideration to Constitutional Principle XXXIV, other provisions of the Constitution of the Republic of South Africa, Act 200 of 1993 as amended, and that the parties take note of the Memorandum of Agreement, as referred to above. 3.1 Such consideration shall therefore include matters such as: 3.1.1 substantial proven support for the idea of self-determination including the concept of a Volkstaat; 3.1.2 the principles of democracy, non-racialism and fundamental rights; and 3.1.3 the promotion of peace and national reconciliation. 4. The parties further agree that in pursuit of 3.1.1 above, the support for the

some white Afrikaans-speaking South Africans — and the willingness of the ANC to accede to those demands necessary to secure a peaceful election.[1] The Council was charged with gathering the requisite data necessary to make an informed decision about the contours, the powers and the political structures of a Volkstaat. The amendment that created the Council also introduced CP XXXIV. This principle required that the Final Constitution make some provision for the exercise of the right to self-determination by any community 'sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way'.[2]

The Volkstaat Council was created by an Act of Parliament in November 1994.[3] In March 1999, the Volkstaat Council concluded its activities with a presentation to the State President of its 'Final Report' on the logistics required for the creation of an autonomous Afrikaner state.[4] That report went nowhere.

Express provision for a Volkstaat died with the advent of the Final Constitution.[5] The desire to protect the cultural, religious and linguistic interests of Afrikaners did not. After discussing the meaning of FC s 235 — and the limits its

idea of self-determination in a Volkstaat will be indicated by the electoral support which parties with a specific mandate to pursue the realisation of a Volkstaat will gain in the forthcoming election. 4.1 The parties also agree that, to facilitate the consideration of the idea of a Volkstaat after the elections, such electoral support should be measured not only nationally, but also by counting the provincial votes at the level of: 4.1.1 the electoral district; and 4.1.2 wherever practical the polling stations as indicated by the parties to, and agreed to, by the Independent Electoral Commission. 5. The parties agree that the task of the Volkstaatraad shall be to investigate and report to the Constitutional Assembly and the Commission on the Provincial Government on measures which can give effect to the idea of Afrikaner self-determination, including the concept of the Volkstaat. 6. The parties further agree that the Volkstaatraad shall form such advisory bodies as it may determine. 7. In addition to the issue of self-determination, the parties also undertake to discuss among themselves and reach agreement on matters relating to matters affecting stability in the agricultural sector and the impact of the process of transition on this sector, and also matters of stability including the issue of indemnity inasmuch as the matter has not been resolved. 8. The parties further agree that they will address all matters of concern to them through negotiations and that this shall not exclude the possibility of international mediation to help resolve such matters as may be in dispute and/or difficult to conclude. 8.1 The parties also agree that paragraph 8.0 shall not be read to mean that any of the deliberations of the Constitutional Assembly are subject to international mediation, unless the Constitutional Assembly duly amends the Constitution to enable this to happen. 8.2 The parties also affirm that, where this Accord refers to the South African Government, it refers to the South African Government which rules South Africa until the April 1994 elections.

[1] D Basson *South Africa's Interim Constitution: Text and Notes* (1994) 237.

[2] See Constitution Amendment Act 2 of 1994, s 13*(b)*(Inserts Constitutional Principle 34 into Interim Constitution.)

[3] The Volkstaat Council Act 30 of 1994. The 20 members of the council provided for in the Interim Constitution were elected from among members of the Freedom Front by a joint session of the National Assembly and the Senate.

[4] Volkstaat Council *Final Report: Findings and Recommendations* (31 March 1999).

[5] While a Volkstaat is not mentioned by name in the Final Constitution, FC s 235 still holds out the possibility for self-determination for any community sharing a common cultural and language heritage, within a territorial entity in the Republic. The constitutional basis for the Volkstaat Council disappeared with the certification of the Final Constitution. The Council, as a statutory body, limped on for another two years. The Volkstaat Council Act itself has not been repealed.

language places on any identification of 'secession' with 'self-determination' — the final subsection of this chapter discusses the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities ('CRLC'). The CRLC was understood by many of the principals in the Constitutional Assembly negotiations to have been the compensation extracted by representatives of white minority parties for the elimination of any textual support in the Final Constitution for a Volkstaat Council or a Volkstaat.[1] The volume of complaints lodged thus far with the CRLC on issues of concern to members of various Afrikaans-speaking communities underwrites this conclusion.

(iii) *FC s 235*

Agreement on the interpretation and the implementation of CP XXXIV proved elusive during the Constitutional Assembly's two-year effort to draft a Final Constitution. The Freedom Front interpreted the principle as supporting constitutional recognition of its demand for a territorial Volkstaat. The ANC justified its resistance by pointing to the failure of the Volkstaat Council to produce a viable blueprint for an independent Volkstaat. In the end, the Constitutional Assembly did not promulgate a constitutional provision for external self-determination. However, CP XXXIV lived on in FC s 235.[2]

When considering objections that the Constitutional Assembly had failed to comply with CP XXXIV, the Constitutional Court, in *First Certification Judgment*, held that the constitutional provision guaranteeing the right to self-determination ensured some degree of political autonomy for any community sharing a common cultural and language heritage within — as CP I required — a unitary sovereign state. CP XXXIV was regarded by the Court as a permissive rather than an obligatory provision.[3] The only mandatory provision in CP XXXIV was that if a territorial entity was established in terms of the Interim Constitution before the adoption of the Final Constitution, then such an entity must be

[1] Dr Mulder claims that the Freedom Front engaged the ANC leadership in a vigorous debate about a Volkstaat. The Freedom Front's aspirations for Afrikaner territorial and political self-determination were rebuffed. The ANC would only go so far as to recognise the Freedom Charters commitment to internal cultural and religious self-determination. Both parties seemed to accept the CRLC as an institution that could satisfy the requirements of internal cultural and religious self-determination. Phone Interview between Dr C Mulder and Dr C Landman, Spokesman of the Freedom Front (5 January 2005). Interview with Dr C Landman, Commissioner, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (5 January 2005). Confirmation of this assessment comes in the form of then Minister of Provincial and Local Government FS Mufamadi's statement that the Volkstaat Council would be phased out and its responsibilities handed over to the CRLC. Interview with Dr C Landman, Commissioner, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (5 January 2005). The brinkmanship of white minority politicians also meant that agreement on official language policy and state-funded education in minority languages eluded the Constitutional Assembly until the very end.

[2] The section appeared for the first time in the second Constitution Bill of 6 May 1996.

[3] *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)('*First Certification Judgment*').

entrenched in the Final Constitution. Since no such entity had in fact been established, no obligatory entrenchment had to be made.[1]

What then is the import of FC s 235? We have seen that self-determination possesses both a narrow internal dimension and a broader external dimension. Internal self-determination affects only the relationship between an autonomous group and the state. It implies neither a right of secession, nor political rights aimed at entrenching specific levels of representation and participation. But FC s 235 would seem to require that the term 'self-determination' should not be understood to exclude the possibility of external self-determination.

According to FC s 235, a 'community sharing a common cultural and language heritage' (a euphemism for an ethnic minority) may assert the right to self-determination 'in a territorial entity within the Republic or in any other recognised way'. While the phrasing of FC s 235 appears to favour self-determination by internal means, it does not exclude the possibility that secession may be another 'recognised way' of achieving self-determination. The criteria for recognition of a legitimate demand for secession or for internal self-determination are not set out.

When reading FC s 235, it might seem reasonable to conclude that a 'recognised way' is a form of self-determination sanctioned by international law. But no right of secession exists in international law. Moreover, the recognition of the right of self-determination in international law must confront, and overcome, the predisposition to recognize the territorial integrity of states.[2] An act of secession that disrupts existing territorial arrangements — without the approval of the sovereign state from which the new 'nation' secedes — would likely be treated with disfavour at international law. FC s 235 read in light of international law puts something of a damper on claims for external self-determination.[3]

International law would appear to be less hostile to strong forms of internal self-determination. So while secession may meet with disapproval, a considerable body of literature supports the proposition that the right of self-determination may require a state to adopt a federal structure of government.[4]

[1] *First Certification Judgment* (supra) at para 218.

[2] See Vienna Declaration and Programme of Action of the United Nations World Conference on Human Rights (adopted by acclamation, 25 June 1993) (1993) 32 ILM 1661, 1665:

> All peoples have the right of self-determination. By virtue of this right they freely determine their political status, and freely pursue their economic, social and cultural development. . . . In accordance with . . . [the Friendly Relations Declaration *(n)*], this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.

As to the practice of African states, see J Dugard 'Secession: Is the Case of Yugoslavia a Precedent for Africa?' (1993) 5 *African Journal of International and Comparative Law* 163, 164 ('[T]he principle of territorial integrity and the rejection of secession are firmly entrenched as part of African international law.')

[3] R McCorquodale 'Self-determination: A Human Rights Approach' 10 *SAHJR* 4 (1994) 21, 23.

[4] See P Thornberry 'The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism' in C Tomuschat (ed) *Modern Law of Self-Determination* (1993) 133-137; Y Dinstein 'The Degree of Self-rule of Minorities in Unitarian and Federal States' in C Brölman (supra) at 221; B de Villiers 'Federalism in South Africa: Implications for Individual and Minority Protection' (1993) 9 *SAJHR* 373.

(iv) *Commission for the Promotion and the Protection of the Rights of Cultural, Religious and Linguistic Communities ('CRLC')*[1]

If one is inclined to link the secessionist aspirations that lay behind the promulgation of IC s 184 and the creation of the Volkstaat Council to the subsequent inclusion in the Final Constitution of FC s 185 and FC s 186 and the creation of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities ('CRLC'), then it is easy to see why the CRLC was the last of the Chapter 9 Institutions to be launched and why it remains something of a white elephant.

(aa) Purpose of the CRLC

The Final Constitution is committed to 'healing the divisions of the past', 'establishing a society based on democratic values, social justice and fundamental human rights', and building a South Africa 'united in [its] diversity'.[2] The CRLC is similarly tasked. It is responsible for deepening our appreciation for the wide array of distinct and unique South African cultures, languages and religions.[3] At the same time, it is obliged to build bridges between communities in a country riven by racial, ethnic, cultural and linguistic strife.[4] The CRLC has used its bridge-building mandate to arrogate to itself a third mandate — national identity formation. At a high enough level of abstraction, multicultural recognition and national identity formation appear compatible. But as the debate at the compulsory launch of the CRLC in November 2004 suggests, persons and groups silenced by years of oppression have a greater interest in being heard than they do in pledging allegiance to a nation still in the early stages of gestation. Whether such a broad brief as national identity formation is coherent — or if coherent, even plausible given the current political environment and the CRLC's fiscal constraints — is discussed at length in my chapter on the CRLC.[5]

[1] For a general overview of the CRLC and its work, see S Woolman & J Soweto-Aullo 'Commission for the Promotion and the Protection of Cultural, Linguistic and Religious Communities' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24F.

[2] See FC Preamble.

[3] See CRLC Act s 4. Section 4 reads, in relevant part:

(a) to promote respect for and further the protection of the rights of cultural, religious and linguistic communities;

(b) to promote and develop peace, friendship, humanity, tolerance and national unity among and within cultural, religious and linguistic communities on the basis of equality, non-discrimination and free association;

(c) to foster mutual respect among cultural, religious and linguistic communities;

(d) to promote the right of communities to develop their historically diminished heritage; and

(e) to recommend the establishment or recognition of community councils

[4] See CRLC Act Preamble.

[5] See S Woolman & J Soweto-Aullo (supra) at Chapter 24F.

(bb) The Weakness of the CRLC

Efforts to establish the CRLC did not begin until August 1998 — almost two years after certification of the Final Constitution. Another three years past before Parliament undertook deliberation regarding the CRLC Act.[1] During parliamentary debate, some members of the Provincial and Local Government Select Committees expressed concern over whether the CRLC should, in fact, possess the power to protect the cultural, religious and linguistic rights of communities.[2] In the end, the majority of parliamentarians ultimately preferred to see the CRLC as a mediator between communities.[3] This role as mediator, rather than litigator, meant that the CRLC was only granted the power to bring matters of concern to the attention of 'appropriate authorities' and to request an appropriate response.[4]

[1] Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002 ('CRLC Act'). The Department of Provincial and Local Government (DPLG), which possessed ministerial authority over the CRLC, solicited submissions on the functions and structures of the CRLC. The first pre-commission National Consultative Conference ('NCC') engaged solicited submissions, research by the Human Sciences Research Council ('HSRC'), white papers from government and policy statements from key civil society stakeholders. This process was repeated again, a year later, in September 1999. See Human Sciences Research Council *Final Report: Second National Consultative Conference* (November 1999)(*Report of the 2nd NCC*). The two most hotly debated issues were the role of the cultural councils and representation on the CRLC itself. The councils are intended to elicit, to amplify and to mediate local, geographically bounded concerns of religious, linguistic and cultural communities. They are tools for mobilisation and dispute resolution. Stakeholders articulated strong differences about *(a)* how such councils would be recognised; and *(b)* the extent of state support they should receive. Conditions of fiscal austerity have largely resolved the latter problem. Financial support will be limited. The issue of how councils will be recognised and thus who speaks for a particular community still vexes the CRLC. Interview with T Thitanyana, Corporate Affairs Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (11 January 2005). The Second NCC was more decisive with respect to representation. Legitimacy is conferred on the CRLC through an open nomination process for its full-time chairperson and some 17 part-time commissioners.

[2] Bill (B62-2002), Government Gazette No 22573 (17 August 2001). Debate on the Bill by the Provincial and Local Government Portfolio and Select Committees: Joint Sitting ('PLGP Committee') (commenced on 25 September 2001).

[3] Minutes of the PLGP Committee hearings of 24 October 2001, Appendix 1, available at www.pmg.org.za/docs/2001, (accessed on 04 April 2004).

[4] Minutes of the PLGP Committee hearings of 02 October 2001, available at www.pmg.org.za/docs/2001 (accessed on 04 March 2004). The prevailing consensus is made manifest in the CRLC Act. The powers of the Commission enable it to:

(g) facilitate the resolution of friction between and within cultural, religious and linguistic communities or between any such community and an organ of state, and where the cultural, religious or linguistic rights of a community are affected;

(h) receive and deal with requests related to the rights of cultural and linguistic communities;

(i) make recommendations to the appropriate organ of state regarding legislation that impacts, or may impact, on the rights of cultural, religious and linguistic communities.

CRLC Act, ss 5(1)(g)–(i). Passage of the Act did not end debate about its content. Barely a year after the Act came into force, and prior to the actual establishment of the CRLC, a Bill was introduced in Parliament to amend the powers of the Commission under the Act. A van Niekerk (MP), *Private Members Legislative Proposal on Enforcement Powers for the Section 185 Commission* (12 September 2003) available at www.pmg.org.za/docs/2003 (accessed on 4 March 2004).

The apparent weakness of the CRLC also reflects concern about its redundancy — and the ANC government's hostility towards 'independent' institutions not designed to advance its political agenda. The Pan South African Language Board, the Youth Commission, the Commission for Gender Equality, the South African Human Rights Commission, the Public Protector, the Judicial Inspectorate, the National House of Traditional Leaders and the Free State Centre for Citizenship, Education and Conflict Resolution have briefs that overlap with that of the CRLC.[1] Many MPs have expressed anxiety about the expenditure of limited public funds on an entity that duplicates the briefs of existing institutions.[2] However, Parliament's stonewalling with respect to budget requests and its refusal to provide little more than token funding in the CRLC's first two years suggests that the motivations for creating a toothless institution lie elsewhere.[3] Without putting too fine a point on it, the CRLC's questionable provenance, its lack of meaningful constituencies, and its nominal independence give the government little motivation to take the CRLC seriously.

[1] For example, the CRLC is given the power, under FC s 185(3), to investigate any matter that falls within the purview of the South African Human Rights Commission. FC s 185(3) was amended by Constitution of the Republic of South Africa Amendment Act 65 of 1998, s 4.

[2] Ibid.

[3] Under-funding of the Chapter 9 Institutions is a common problem. Parliament has been put on notice that low levels of funding and overweening executive oversight make effective operation of these institutions difficult, if not impossible. The *Corder Report* is absolutely scathing in this regard. See H Corder, S Jagwanth & F Soltau 'Report on Parliamentary Oversight and Accountability Report to the Speaker of the National Assembly' (1999), available at www.pmg.org.za/docs/2001/viewminute.php?id=811, (accessed 10 January 2005)('*Corder Report*') at paras 7.2 and 7.2.1 ('In their submissions to us, many constitutional institutions have also pointed out that the present arrangement may result in a very low priority being given to constitutional institutions as government departments may be slow in recognising the interests of an institution which does not form part of the core business of the department. The very direct control by the executive of constitutional institutions can have a devastating effect on the independence and credibility of these offices. . . . In the first place, to make institutions dependent on budget allocations received through the very departments that they are required to monitor is not desirable. Secondly, these institutions must be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of the government. Approval by the executive of budgets, or other issues such as staffing, is thus inconsistent with independence, as well as the need to be perceived as independent by the public when dealing with their cases. This executive power could render impotent state institutions supporting constitutional democracy through the potential denial of both financial and human resources. Furthermore, the special constitutional features of these institutions are not recognised as executive priorities are set.') On the specific problems of under-funding faced by each of the Chapter 9 Institutions, see M Bishop & S Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B; S Woolman & Y Schutte 'Auditor-General' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B; J Klaaren 'South African Human Rights Commission' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24C; C Albertyn 'Commission on Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 24D; J White 'ICASA' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24E; S Woolman & J Soweto-Aullo 'Commission for the Promotion and the Protection of Cultural, Linguistic and Religious Communities' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24F.

59 Access to Courts

Jason Brickhill & Adrian Friedman

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Access to courts

34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.[1]

59.1 Introduction[2]

The right of access to courts is a pre-requisite to the enjoyment of other constitutional rights. Without it, the extensive protections and guarantees provided in our Bill of Rights would be meaningless. In this chapter, we attempt to give meaning to the rights enshrined in FC s 34 and to emphasize how this provision of the Final Constitution gives effect to the founding value of the rule of law.

To do so, we begin in §59.2 by considering the tools necessary to offer a proper construction of FC s 34. Without a basic understanding of the appropriate modes of interpreting FC s 34, the analysis that follows lacks context. Having discussed these modes of interpretation, and before considering the content of the right in detail, we consider, in §59.3, the nature and the application of the right of access to courts. Once the applicability of FC s 34 has been considered, we engage in §59.4, in depth, with the different elements of the right. We have found it appropriate to focus on four discreet aspects of the right: *(a)* the right of access to courts; *(b)* the right to a fair public hearing before such courts; *(c)* the right, where appropriate, to have one's dispute resolved in another independent and impartial tribunal and forum; and *(d)* the right to enforcement of an effective remedy. The first three components are expressed in the text of FC s 34 itself. The last arises from the interpretation of FC s 34 by the Constitutional Court. We conclude in §59.5 with an analysis of reasonable limitations of the right.

59.2 Interpreting FC s 34

When interpreting FC s 34, it is important to consider, first, the historical background underlying access to courts; second, the (constitutional) textual context of the right; third, relevant international law; and, finally, significant foreign law.

(a) Historical context

The right of access to courts must be interpreted in the light of South Africa's history of deliberate state denial of access by various means.

One of the key legal tools in implementing apartheid was the use of 'ouster clauses'. Ouster clauses deny courts the jurisdiction to review conduct of the executive. These clauses were used, in particular, to prevent review of executive

[1] The Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC').

[2] We are greatly indebted to Kate Hofmeyr: Her input has been indispensable and has assisted in moulding certain critical components the chapter. We would also like to thank Michael Bishop, whose editorial interventions have benefited us greatly.

decisions to detain political activists and decisions regarding immigration.[1] Although certain decisions mitigated the impact of these clauses,[2] ouster clauses were largely successful in immunizing the worst of apartheid executive conduct from judicial scrutiny.[3] In the pre-constitutional era, parliamentary supremacy limited the power of the courts to review legislation to non-compliance with procedural limitations that had been imposed by Parliament itself. However, even the exercise of these partial review powers invited the ire of the government.

One of the most blatant instances of apartheid-state interference with judicial authority occurred after the famous Appellate Division decision in *Harris I*.[4] In *Harris I*, the Appellate Division struck down the Separate Representation of Voters Act:[5] the Act provided for 'the separate representation of European and non-European voters in the Province of the Cape of Good Hope'.[6] The government sought to circumvent the judgment by passing the High Court of Parliament Act, which purported to turn Parliament itself into the highest court in constitutional matters, with the power to review and set aside, by simple majority vote, any Appellate Division decision declaring an Act of Parliament invalid. The 'High Court of Parliament' proceeded to declare *Harris I* wrongly decided. Thus followed *Harris II*,[7] in which a unanimous Appellate Division struck down the High Court of Parliament Act.

As apartheid intensified, South Africa saw increasing interference with the independence of the judiciary. Such blatant interference included the practices of 'packing' courts and making political appointments of judges: the most notorious appointment was that of LC Steyn, the senior state law advisor, to the Transvaal Provincial Division and ultimately to Chief Justice.[8] In addition, the state appointed executive-minded judges to decide political cases.[9]

[1] For example, s 29(6) of the notorious Internal Security Act 74 of 1982 provided that '[n]o court of law shall have jurisdiction to pronounce on any action taken in terms of this section, or to order the release of any person detained in terms of this section.'

[2] See *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A)(The Appellate Division endorsed reasoning that a decision that was *ultra vires* had not been taken 'in terms of' s 29 of the Internal Security Act, and accordingly was not hit by the ouster clause excluding judicial review of decisions taken in terms of the section.)

[3] On ouster clauses, see C Hoexter *Administrative Law in South Africa* (2007) 522–525.

[4] *Harris v Minister of the Interior* 1952 (2) SA 428 (A).

[5] Act 46 of 1951.

[6] The basis of the decision was that the Act was not passed in conformity with the provisions of the South Africa Act of 1909. It required more than a two-thirds parliamentary majority, and special procedures to disqualify any person as a voter on the ground of race. See 'Constitutional History' Heinz Klug, Jonathan Swanepoel & Stu Woolman in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2008) Chapter 2.

[7] *Minister of the Interior v Harris* 1952 (4) SA 769 (A).

[8] A debate took place during the early 1980s regarding whether judges should resign for moral reasons. Professor Raymond Wacks argued that they should, while John Dugard contended that judges should rather use what power they retained to oppose apartheid. See R Wacks 'Judges and Injustice' (1984) 101 *SALJ* 267; J Dugard 'Should Judges Resign? A Reply to Professor Wacks' (1984) 101 *SALJ* 286; R Wacks 'Judging Judges: A Brief Rejoinder to Professor Dugard' (1984) 101 *SALJ* 295. The role of judges in apartheid has attracted much criticism. See, for example, E Cameron 'Nude Monarchy: The Case of the South African Judges' (1987) 3 *SAJHR* 338.

[9] See S Ellmann *In a Time of Trouble* (1992)(Ellmann considered the record of the Appellate Division in cases concerning the exercise of emergency powers).

Another relevant slice of historical perspective is found in the bifurcated judicial system established in 1927 with the creation of chiefs' and headmen's courts, Commissioners' Courts and Black Appeal Courts to decide disputes between black people.[1] This bifurcation brought with it a set of overtly racist choice of law rules that determined whether a black person ought to be governed by the common law or customary law.[2]

The proper interpretation of FC s 34 must take into account that the provision aims to immunize everyone (and, indirectly, the courts) against a recurrence of these historical ills.

(b) Related constitutional provisions

It is appropriate to view FC s 34 within the matrix of related constitutional provisions, both within the Bill of Rights and outside it.[3] At the level of underlying constitutional values, FC s 34 is most closely related to the provisions of FC s 1*(c)*. FC s 1*(c)* recognizes the founding values of supremacy of the Final Constitution and the rule of law. FC s 34 concretizes the higher-level value of the rule of law.[4]

At the outset, FC s 34 forms part of a three-piece cluster of rights with FC s 32 (the right of access to information) and FC s 33 (the right to just administrative action). Access to courts is a 'leverage' right: it allows litigants to leverage their other (substantive) rights. Accordingly, depending on the nature of the underlying substantive dispute in any case, FC s 34 is the constitutional tool that allows a person to vindicate the particular substantive rights in issue. In this sense, FC s 34 is related to all the rights in Chapter 2. FC ss 32 and 33 are also leverage rights. Access to information is obviously often required to determine *whether* one in fact has rights to vindicate. The right to reasons which forms part of FC s 33, is also a substantive rights-determining tool. The primary FC s 33 right to fair administrative action may also be regarded as a leverage right. It ensures that a fair process must be followed in taking administrative decisions that invariably affect other substantive rights, such as environmental and property rights. As leverage rights, FC ss 32 to 34 consist mainly of procedural guarantees, rather than rights to specific entitlements. All presuppose the existence of another, independent, substantive right. However, this largely procedural nature should not be overemphasized: an element of *meaningful* access (to courts, information or reasons for administrative action) is the remedy that lies at the end of the road.

[1] Black Administration Act 38 of 1927.

[2] See, eg, *Ramothatha v Makhothe* 1934 NAC (N&T) 74 (The plaintiff lived a 'European lifestyle' and so the common law applied); *Mbuli v Mehlomakulu* 1961 NAC 68.

[3] See *Beinash v Ernst & Young* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC) at para 17 (Mokgoro J linked FC s 34 to other particular constitutional provisions: she noted in her limitations analysis that FC ss 7(2), 34, 35 and 165 are rights that require the protection of '*bona fide* litigants, the processes of the courts and the administration of justice against vexatious litigants'.)

[4] See *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC) at para 61; *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) at para 32.

FC s 34 bears an intricate relationship, in particular, to FC s 33, the right to just administrative action. In the first place, Currie and de Waal argue that FC s 34 applies to disputes that may be resolved by the application of the law, which include disputes in respect of administrative action; but only *after* the relevant administrative decision is taken, because only then does a legal dispute arise.[1] By contrast, the requirements of FC s 33 apply to administrative action at the time of the decision. In our view, at least some decisions will constitute both administrative action in terms of FC s 33 *and* give rise to a dispute capable of resolution by the application of law such as to engage FC s 34. For example, as Hoexter notes, administrative action of a judicial nature, such as decisions of a valuation court, would give rise to a 'dispute' of the sort contemplated in FC s 34.[2] The majority of the Constitutional Court in *Sidumo v Rustenburg Platinum Mines* has recently endorsed this view in relation to arbitrations of the Commission for Conciliation, Mediation and Arbitration. The Court held that the CCMA's decisions constitute administrative action under FC s 33 *but are also* an instance of another independent and impartial tribunal or forum performing a function under FC s 34.[3] Therefore, although the distinction between FC s 33 and FC s 34 causes of action is a useful one, it is not absolute or impermeable. One of the consequences of the relationship between the two rights, however, is that if administrative review to another independent and impartial forum is available to litigants in respect of a legal dispute, procedures that exclude the ordinary courts' jurisdiction may not infringe FC s 34.[4] Another dimension to their relationship is that FC s 33 envisages a judicial-review power in respect of all administrative action: as embodied in the Promotion of Administrative Justice Act ('PAJA').[5] In this respect, therefore, FC s 33 bolsters FC s 34 and guarantees a limited right of access to courts in respect of review of administrative action.[6]

FC s 34 is also, in a sense, the twin of FC s 35. FC s 35 is concerned with criminal matters and provides for the right to a fair trial. FC s 35 is far more detailed than FC s 34 in fleshing out the content of the right to a fair (criminal) trial. FC s 34 does not apply to criminal matters.[7] As a result, the two provisions

[1] See I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 705. See also *Baramoto v Minister of Home Affairs* 1998 (5) BCLR 562 (W)(The court accepted that the decision of an administrative body to grant or refuse refugee status did not implicate the FC s 34 right.)

[2] Hoexter (supra) at 524.

[3] [2007] ZACC 22 ('*Sidumo*'). We discuss *Sidumo* in more detail at § 59.4*(c)*(ii) infra, when we consider arbitration proceedings.

[4] *Metcash Trading Ltd v Commissioner, South African Revenue Service* 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC). However, it should be noted that FC s 169 provides that a High Court may decide 'any matter not assigned to another court by an Act of Parliament.' This potentially precludes the ousting of the jurisdiction of the High Court unless another court, as opposed to tribunal, has been given jurisdiction. See *Fredericks v MEC for Education and Training, Eastern Cape, and Others* 2002 (2) SA 693 (CC), 2002 (2) BCLR 113 (CC) at para 31.

[5] Act 3 of 2000.

[6] See J Klaaren & G Penfold 'Administrative Justice' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2002) 63–22.

[7] See § 59.3*(a)*(iii) infra.

do not overlap or regulate the same area of law. Still, given this textual proximity and relationship, is it possible that FC s 34 confers, albeit tacitly, any of the specific sub-rights contained in FC s 35? Some of the content of FC s 35 is clearly inapplicable in the civil context: the rights to be presumed innocent and to remain silent. However, much of the content of the criminal fair trial right in FC s 35(3) may form part of its civil counterpart in FC s 34. In particular, the right to receive adequate notice,[1] the right to have proceedings begin and conclude without unreasonable delay,[2] to adduce and challenge evidence,[3] and, as we argue below, the right to free legal representation[4] should form part of the content of a 'fair hearing' in terms of FC s 34.[5]

FC s 34 must also be interpreted with due regard to the provisions that recognize and endorse the application of customary law, and the jurisdiction of traditional authorities. The constitutional rights to culture in FC ss 30 and 31, read with FC s 39(3) and FC s 211, which recognize the customary law, require the legislature and the courts to give effect to the customary law and the dispute-resolution roles of traditional leaders. However, these powers must be exercised in a manner consistent with the other rights in the Bill of Rights.[6] FC s 166*(e)* recognizes that the courts include 'any other court established or recognized in terms of an Act of Parliament': eg, the chiefs' and headmen's courts recognized in terms of the Black Administration Act.[7] The recognition of customary law, and the chiefs' and headmen's courts that apply it, is significant for FC s 34 in a number of ways. It may indicate that the notion of 'fairness' contained in FC s 34 must be read to apply in a context-sensitive way to customary law dispute resolution. For example, traditional authorities do not observe the doctrine of separation of powers: legislative, executive and judicial powers reside in the same persons.[8] This appears to be a limitation of the right in FC s 34. However,

[1] The equivalent rights are described in criminal terms in FC ss 35(3)(*a*) and (*b*) as the 'right to be informed of the charge with sufficient detail to answer it' and 'to have adequate time and facilities to prepare a defence'.

[2] FC s 35(3)(*d*).

[3] FC s 35(3)(*i*).

[4] FC s 35(3)*(g)*.

[5] See § 59.3*(a)*(iv) infra.

[6] On the internal limitations, or consistency requirements, found in FC s 30 and FC s 31, see S Woolman 'Community Rights: Language, Culture & Religion' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 58.

[7] Act 38 of 1927.

[8] See *Bangindawo v Head of the Nyanda Regional Authority* 1998 (4) SA 631 (Tk), 1998 (3) BCLR 314 (Tk)(The High Court rejected a challenge to the independence and impartiality of traditional courts established under old-order Transkei legislation. The challenge was premised on the fact that the king or chief exercises judicial functions in addition to law-making and law-enforcing functions. The court held (at 327D) that there was no room for 'the Western conception of the notions of judicial impartiality and independence in the African customary law setting'.) See also I Currie & J de Waal *The New Constitutional and Administrative Law: Volume One, Constitutional Law* (2001) 311.

it may be that this is a limitation of a right by another provision of the Constitution, as envisaged by FC s 36(2).

The decision of the Constitutional Court in *Modderklip* has revealed the relationship between FC s 34 and the entitlement in terms of FC s 38 to approach a court for 'appropriate relief' when a right in the Bill of Rights has been threatened or infringed.[1] It would seem that, in the light of *Modderklip*, FC s 38 entrenches the right to a remedy for a breach of a substantive right, while FC s 34 entrenches the right to have that remedy enforced.

Finally, FC s 34 must be read with the provisions of Chapter 8 of the Constitution, which governs the courts and the administration of justice. The means and level of access to courts contemplated by FC s 34 must be consistent with the court machinery contemplated in FC s 166, with the powers and regulated as set out in the other provisions of Chapter 8.

(c) International law

In terms of FC s 39(1)*(c)*, when interpreting the Bill of Rights, a court must consider international law. It is incumbent on courts, therefore, to have regard to analogous rights of access to courts (or their equivalent, regardless of differences in nomenclature) in international law when interpreting FC s 34. FC s 233 also requires courts interpreting legislation to prefer an interpretation that is consistent with international law over any inconsistent interpretation. Therefore, when legislation is tested against FC s 34, the legislation must first be interpreted, if possible, so that it accords with relevant international law.

South Africa is a party to the United Nations Charter, the African Charter on Human and Peoples' Rights of 1981, and the International Covenant on Civil and Political Rights of 1966 (ICCPR), to which South Africa is accordingly bound. Other treaties to which South Africa is not a party, such as regional instruments outside Africa, together with decisions interpreting their provisions, could nevertheless assist courts interpreting the Bill of Rights. As held by Chaskalson P in *S v Makwanyane*, both binding and non-binding international law have a role to play in interpreting provisions of the Bill of Rights.[2] Binding norms of international law are likely to come to bear far more heavily in the interpretation of rights in the Bill of Rights. Non-binding norms are likely to serve as no more than a guide.[3]

[1] *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC)('*Modderklip*').

[2] *S v Makwanyane and Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC)('*Makwanyane*') at para 35.

[3] H Strydom & K Hopkins 'International Law' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) 30-11 — 30-14. See also *Makwanyane* (supra) at paras 34, 35 and 39 (Chaskalson P); *Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 26.

Article 14(1) of the ICCPR provides that all persons shall be equal before the courts and tribunals. The article goes on to guarantee a 'fair and public hearing by a competent, independent and impartial tribunal established by law … in the determination of any criminal charge against a person, or of a person's rights and obligations in a suit at law'. Article 14(1), at least, is therefore a guarantee applicable to both criminal and civil matters.[1] The remainder of art 14 is concerned with criminal fair trial rights. In its General Comment on art 14(1), the United Nations Human Rights Committee discussed the requirements of the fair trial right in art 14(1) and identified the following elements: 'equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary [must be] established by law and guaranteed in practice'.[2] The Committee discussed the obligation of states parties to enact laws which provide for the establishment of the courts and to ensure that they are independent, impartial and competent. In this regard, the Committee emphasized the regulation of the appointment and tenure of judges, their promotion, transfer and removal, and the independence of the judiciary from the executive and legislative branches. Article 14(1) of the ICCPR permits the exclusion of the press and the public from a trial 'for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'. However, art 14(1) requires that any judgment rendered in a criminal case or in a suit at law shall be made public except where otherwise required in the interest of juvenile persons or the proceedings concern matrimonial disputes or the guardianship of children.

Like art 14 of the ICCPR, art 7 of the African Charter[3] establishes a general fair-trial guarantee that applies to civil and criminal matters. It then provides a number of more specific rights applicable only in the criminal context. The umbrella right in art 7, which applies to civil and criminal matters, is the right of 'every individual … to have his cause heard'. This right encompasses a number of constituent rights, one of which is 'the right to an appeal to competent national

[1] United Nations Human Rights Committee 'General Comment No. 13: Equality Before The Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14)' (Twenty-first session, 1984) UN Doc. HRI/GEN/1/Rev.1 ('GC 13') at para 2.

[2] Ibid at para 3.

[3] Article 7 of the African Charter provides:

1. Every individual shall have the right to have his cause heard. This comprises:
   (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
   (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
   (c) the right to defence, including the right to be defended by counsel of his choice;
   (d) the right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force'. A rich, although non-binding, jurisprudence on art 7 is already emerging out of the African Commission on Human and Peoples' Rights, which has fleshed out the fairly general terms of the provision. The decisions of the Commission do not formally have the binding force of a ruling of a court but constitute persuasive authority similar to the opinions of the UN Human Rights Committee.[1]

Evans and Murray criticize the vagueness of art 7, which leaves much to the interpretive imagination, for failing to provide expressly for rights such as the right to a public hearing, the right to have proceedings interpreted, the right against self-incrimination and the right against double jeopardy.[2] However, the Commission has interpreted art 7 to include a number of these elements, some of which are relevant to the interpretation of FC s 34. In particular, the Commission has concluded that the decree of a military government ousting the jurisdiction of the ordinary courts violates art 7;[3] that the nullification by executive decree of ongoing suits at law violated the article;[4] that the dismissal of judges opposed to the establishment of special courts and their replacement by military tribunals was a violation of the right;[5] and that art 7 prohibits the determination of a dispute by a court with the appearance of partiality.[6] It should be noted that the word 'appeal' in art 7 refers not to an appeal in the sense of challenging a decision of a lower court in a higher court. Rather it denotes the general right to seek a judicial remedy, and is therefore the African Charter equivalent to 'access' in FC s 34.[7]

(d) Foreign law

In terms of FC s 39(1)*(c)*, when interpreting the Bill of Rights, a court *may* consider foreign law. It is permissible and may be appropriate, therefore, to have regard to the constitutional rights of access to courts in other constitutional

[1] M Evans & R Murray *The African Charter on Human and People's Rights: The System in Practice, 1986–2000* (2002) 10.

[2] Ibid at 155.

[3] *Civil Liberties Organisation v Nigeria* Communication 129/94, 9th Activity Report 1995–1996, Annex VIII, referred to in Evans & Murray (supra) at 156.

[4] *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* Communications 140/94, 141/94 and 145/95, 13th Activity Report 1999–2000, Annex V at para 33, referred to in Evans & Murray (supra) at 157.

[5] *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Right, Association of Members of the Episcopal Conference of East Africa v Sudan* Communications 48/90, 50/91, 52/91 and 89/93, 13th Activity Report 1999–2000, Annex V at paras 68–69, discussed in Evans & Murray (supra) at 162.

[6] *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v Nigeria* Communications 137/94, 139/94, 154/96 and 161/97, 12th Activity Report 1998–1999, Annex V at para 95.

[7] Evans & Murray (supra) at 156.

regimes, and the approach of foreign courts to such provisions. Below we consider the constitutional position on access to courts in Germany and Canada. We have selected these jurisdictions because they have similar constitutional schemes to our own.

Article 19(4) of the German Basic Law (*Grundgesetz*) provides:

> Should any person's rights be violated by public authority, recourse to the court is open to him. Insofar as no other jurisdiction has been established, recourse is available to the courts of ordinary jurisdiction. . . .

This right is regarded as a core aspect of the German *Rechsstaat*. It reflects a particular concern, with strong German historical resonance, for the need for judicial review of actions of 'public authority', that is, executive and administrative action. In addition, art 101(1) of the Basic Law prohibits 'extraordinary courts' and the removal of persons from the jurisdiction of their lawful judge, while art 103 states the perhaps axiomatic principle that, in the courts, everyone is entitled to a hearing in accordance with the law. Article 97(1) provides for judicial independence. Strong rule of law and separation of powers themes are prominent in the Basic Law.

In Canada, the Charter contains no fundamental right of access to courts. However, s 24(1) does provide that '[a]nyone whose rights or freedoms, as guaranteed by th[e] Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.' This is only a partial right of access to courts: it applies only to Charter rights and freedoms. It is perhaps more accurately described as a provision confirming the justiciability of Charter rights and freedoms and the entitlement to relief for their infringement. Section 24(1) is narrower than FC s 34 in another sense: it only applies to the ordinary courts, and not to other fora. Accordingly, s 24(1) of the Charter is possibly more akin to FC s 38, which similarly provides for a right to approach a competent court when a right in Chapter 2 has been infringed or threatened, and to obtain appropriate relief. This similarity between s 24(1) and FC s 38 highlights, in our view, the relationship between FC ss 34 and 38 and reinforces our view — set out in §59.4*(d)* — that access includes an entitlement to the enforcement of the relief guaranteed by FC s 38.

59.3 THE NATURE AND THE APPLICATION OF THE RIGHT

(a) Application

In respect of all rights in the Bill of Rights, it is necessary to ask who benefits from the rights that they confer, and who bears the obligations that they impose. In particular, one must usually ask two questions: whether the right applies to juristic persons; and whether the right applies horizontally, that is, whether it imposes obligations on private persons. In this section, we consider these two

questions in relation to FC s 34. We then consider three further questions of relevance to the application of the rights contained in FC s 34. First, we consider whether FC s 34 has any application to criminal matters. Next, we consider whether FC s 34 applies to appeals. Lastly, we consider the fact that FC s 34 applies only to disputes capable of resolution by the application of law.

(i) The Bearer of the Rights: Juristic Persons

FC s 8(4) provides that a 'juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.' This entails an enquiry specific to each right in the Bill of Rights, in which a court must consider the nature of the right and the nature of the juristic person seeking to invoke it.[1]

In *Hallowes v The Yacht 'Sweet Waters'*, Hurt J considered the application of s 22 of the Interim Constitution,[2] the predecessor to FC s 34, to juristic persons.[3] An employee of the defendant close corporation which was the owner of the arrested vessel in issue in the case purported to appear for the defendant. The employee was not admitted to practise in the Supreme Court. It was contended that an aspect of the right in IC s 22 was the right to present one's own case in court, and that the procedural requirement that a company must be represented in court by an admitted legal representative limits the right in IC s 22 of juristic persons that lack the financial means to secure legal representation.[4] The court was urged to develop a rule of procedure permitting such a party to be represented by an 'agent'. The court noted that IC s 7(3) provided that juristic persons are entitled to the rights enshrined in the Bill of Rights where, and to the extent that, the nature of the rights permits.[5]

The court held that IC s 22 includes within its ambit the right of the 'person' to stand up in court and argue his own case, but that a juristic person is incapable of doing so.[6] Therefore, the court held that the right to present one's own case is a right which cannot vest in a juristic person, since it is a right which, by its nature, a juristic person cannot exercise.[7] The court therefore dismissed the constitutional challenge to the rule requiring juristic persons to be represented by an admitted legal representative. So, while Hurt J appeared to accept as a starting point that the express constituent rights in IC s 22 apply to juristic persons to the extent that

[1] On the beneficiaries of constitutional rights, and the benefits that flow to juristic persons, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) § 31.3.

[2] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or IC'). IC s 22 provides that '[e]very person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.'

[3] 1995 (2) SA 270 (D)('*Hallowes*').

[4] *Hallowes* (supra) at 272I–273F and 276B.

[5] Ibid at 272I.

[6] Ibid at 272B–C.

[7] Ibid at 278B–C.

the nature of the specific rights in the provision permit, *Hallowes* is ultimately authority for the proposition that at least some aspects of the right of access to courts are not applicable to juristic persons.

In *Lees Import and Export (Pvt) Ltd v Zimbabwe Banking Corporation Ltd*,[1] the Zimbabwean Supreme Court considered the same question that had arisen in *Hallowes*. It reached the opposite conclusion. Subsection (1) of s 18 of the Constitution provides that every person is 'entitled to the protection of the law'; and ss (9) provides that every person is 'entitled to be afforded a *fair hearing* within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations' (our emphasis).

Gubbay CJ, on behalf of a unanimous court, declined to follow the decision in *Hallowes*, holding:

> True, a juristic person, being a purely legal concept, is incapable of being physically present at any place and must always act through an agent. This is what the corporation Hallowes sought to do through Mr Labuschagne. It would seem, however, that Hurt J regarded a juristic person as lacking the capacity to exercise the right to present its own case before him, even if it were to do so through an organ or *alter ego*. This, I think, was to confuse the content of the right with the manner of its exercise.[2]

Gubbay CJ concluded that the common-law rule offends against s 18(9) of the Constitution of Zimbabwe to the extent that it prohibits the duly authorized organ or alter ego of a company from appearing in the person of the company before the High Court or the Supreme Court of Zimbabwe.[3] The court held that the right given to 'every person' under this constitutional mandate includes within its reach a corporate body appearing through its alter ego. He held that this view does not undermine the general rule of practice requiring juristic persons to obtain legal representation, but merely provides an exception to it. It does not permit a company to appear before the Superior Courts through someone who is a mere director, officer, servant or agent. Companies that are not embodied by any natural person, will not qualify under s 18(9), because 'no human being personifies the company 'in person'.[4] In general, however, the court envisaged that small companies should be able to avail themselves of the exception.[5]

Gubbay CJ made an order directing that, provided that the applicant's managing director, Mr Phiri, was able to satisfy the High Court that he was the alter ego of the applicant with the requisite authority to appear, 'the applicant through him must be permitted to argue the application for rescission of the default

[1] 1999 (4) SA 1119 (ZSC), 1999 (10) BCLR 1181 (ZSC)('*Lees Import and Export*').
[2] Ibid at 1128I–1129A.
[3] Ibid at 1130G.
[4] Ibid at 1130H–I.
[5] Ibid at 1131A.

judgment granted against it, since a denial of appearance would amount to a violation of the applicant's entitlement to the protection of the law and to be afforded a fair hearing as guaranteed by sub-ss (1) and (9) of s 18 of the Constitution'.[1]

In our view, the approach of the Zimbabwean Supreme Court in *Lees Import and Export* is to be preferred to that of Hurt J in the High Court in *Hallowes*. Both cases are consistent with the proposition that, in general, the right of access to courts applies to juristic persons. However, *Lees Import and Export* adopts a more generous approach, in terms of which the common law 'alter ego' doctrine is employed to enable small companies to enjoy access rights that are, by their nature, rights that can only be exercised by natural persons. This approach is consistent with the Constitutional Court's *dicta* to the effect that the failure to accord constitutional rights to juristic persons would 'undermine the very fabric of our democratic state'[2] and the Court's statements that, in general, rights in the Bill of Rights should be given the most generous interpretation.[3] In respect of FC s 34, a generous interpretation is one that extends the application of the right to juristic persons as far as possible within the language of the provision and the nature of the rights that it confers.

(ii) *The Bearer of the obligations: Horizontality*

The second question to consider in respect of the application of FC s 34 is whether the right applies horizontally and imposes obligations on private persons.[4] In our view, the *positive* obligations to protect, promote and fulfill the right of access to courts imposed by FC s 34 fall on the state. It fulfils them primarily by establishing the judicial system with all its necessary trappings. In §59.4*(b)*(i), we consider whether these positive obligations extend to an obligation to provide free legal assistance to indigent civil litigants. In addition, in §59.4*(d)* we note that *Modderklip* has extended the state's obligations beyond merely providing for dispute-resolution mechanisms: it must provide effective enforcement of remedies. FC s 34 imposes negative obligations upon the state: the obligations not to interfere with the independence of the judiciary and not to oust impermissibly, by legislation, the jurisdiction of the courts.

[1] *Lees Import and Export* (supra) at 1131B–C.

[2] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 18 (Discussion of the right to privacy in FC s 14), cited with approval in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 42.

[3] *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 14; *S v Mhlungu* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 8; *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SabMark International (Freedom of Expression Institute as* Amicus Curiae*)* 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC) at para 47.

[4] On the horizontal application of rights generally, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) § 31.4.

However, FC s 34 must also impose at least some *negative* obligations on private persons to respect the right of access to courts and not to interfere with the fairness of judicial proceedings. For example, the conduct of an employer who unlawfully forbids an employee from instituting court proceedings against the employer, or a civil litigant who attempts unlawfully to influence a judicial officer, may infringe FC s 34. In addition, the obligation to provide notice of court proceedings,[1] which is necessary to ensure a 'fair' hearing, falls on private litigants themselves. In *Barkhuizen v Napier*, the Constitutional Court established that FC s 34 is applicable to private contractual relations, in particular in relation to time-bar clauses in contracts.[2] However, Ngcobo J (for the majority) held that FC s 34 should be applied to such clauses indirectly, through the medium of the common-law principle of 'public policy', of which the right of access to courts now forms a part.[3] (We discuss this aspect in *Barkhuizen* in more detail in §59.4*(a)*(ii) in the context of prescription.) To this extent, at least, FC s 34 may apply horizontally.[4]

(iii) *Application to criminal law*

Two decisions of the Constitutional Court have helped to set out the limits of the applicability of FC s 34 to criminal matters. In *S v Pennington*, the Court held that FC s 34 does not apply to criminal appeals.[5] The Court held that the phrase 'any dispute' may be wide enough to cover criminal proceedings but that criminal proceedings were not normally described in this way. In any case, FC s 35 deals in detail with the way in which criminal proceedings must be conducted and this degree of detail led the court to the conclusion that FC s 34 has no application to criminal matters.[6]

When it comes to extradition proceedings, on the other hand, it is FC s 34 and not FC s 35 that is applicable. In *Geuking v President of the Republic of South Africa and Others*, the Court pointed out that a person facing extradition is not an accused person: the enquiry into extradition does not result in conviction or sentence.[7]

The Final Constitution provides a scheme in which both criminal and civil matters are engaged. Since there is an inevitable overlap between FC s 34 and FC s 35, it is convenient to demarcate the reach of the two sections. The line drawn by the Constitutional Court is that only in matters directly concerning

[1] See § 59.4*(b)*(iv) infra.
[2] 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC)('*Barkhuizen*').
[3] Ibid at para 33.
[4] For a criticism of *Barkhuizen*'s indirect application of the Bill of Rights, as opposed to the direct application of FC s 34, see S Woolman 'The Amazing Vanishing Bill of Rights' (2007) 624 *SALJ* 742. The views expressed in this article are not necessarily those of the authors.
[5] 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC), 1999 (2) SACR 329 (CC) at para 46.
[6] Ibid.
[7] 2003 (3) SA 34 (CC), 2004 (9) BCLR 895 (CC) at para 47.

arrest, detention, conviction or sentence of an accused person does FC s 35 apply.[1] In other matters that may properly be characterized as 'any dispute', of which extradition cases must clearly be examples, FC s 34 applies.

(iv) *Application to appeals*

The leading case of the Constitutional Court on the question whether the right of access to court includes the right to an appeal is *Besserglik v Minister of Trade, Industry and Tourism and Others (Minister of Justice intervening)*.[2] In that case, the applicant challenged the constitutionality of s 20(4)*(b)* of the Supreme Court Act 59 of 1959.[3] The applicant argued that the precondition to prosecute an appeal provided by this section — that leave to appeal be granted — violated his right to equality and his right of access to court. The matter was resolved in terms of IC s 22, the equivalent of FC s 34.[4]

In a very brief judgment, resolved without oral argument, the Constitutional Court rejected the applicant's IC s 22 argument:

> The applicant's argument was that the purpose of section 22 was to ensure that persons have the right to have their disputes determined fairly by a court of law until final determination, which includes a right of appeal. In *Bernstein v Bester*[5] considerable doubts were expressed about the correctness of such an approach to section 22, although it was unnecessary for any firm decision to be made on that point. In my view, whatever the purpose and scope of section 22, it cannot be that the considerations relied upon by Madala J in *S v Rens*[6] would not equally be applicable to civil appeals. Even were the applicant correct in his characterisation of the scope of section 22, therefore, a matter about which there is some doubt, he would still have to persuade this court that the leave to appeal procedure, coupled with the petition procedure as provided for in section 20(4)*(b)*, fails to provide potential appellants with an adequate right of appeal. The applicant has failed on that score.

[1] FC s 35(1) applies to arrested persons, FC s 35(2) applies to detained persons and FC s 35(3) applies to accused persons. In the case of the latter, appeals and sentencing are dealt with in the same subsection (see FC s 35(3)*(n)* and *(o)*). For more on FC s 35, see F Snyckers & J le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006).

[2] 1996 (4) SA 331 (CC), 1996 (6) BCLR 745 (CC)('*Besserglik*').

[3] Section 20(4)*(b)* of the Supreme Court Act reads as follows:

No appeal shall lie against a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of that court given on appeal to it except—

(a) in the case of a judgment or order given in any civil proceedings by the full court of such a division on appeal to it in terms of subsection (3), with the special leave of the Appellate Division;

(b) in any other case, with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the Appellate Division.

[4] IC s 22 reads: 'Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.'

[5] 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC)('*Bernstein*') at paras 102–106.

[6] 1996 (1) SA 1218 (CC), 1996 (2) BCLR 155 (CC)('*Rens*').

> Whatever the scope of section 22, it cannot be said that a screening procedure which excludes unmeritorious appeals is a denial of a right of access to a court. As long as the screening procedure enables a higher court to make an informed decision as to the prospects of success upon appeal it cannot be said to be in breach of section 22.[1]

Madala J's apposite remarks in *S v Rens* are as follows:

> In my view the petition procedure which is available to every accused whose application for leave to appeal has been refused by the supreme court in which he or she was convicted, allows such accused recourse to a higher court to review, in a broad and not a technical sense, the judgment of the trial court. The procedure involves a re-assessment of the disputed issues by two judges of the higher court, and provides a framework for that reassessment, which ensures that an informed decision is made by them as to the prospects of success.[2]

The procedure applicable to appeals from decisions of the High Court in civil matters is substantially similar to that applicable to appeals from the High Court in criminal matters. A litigant seeking leave to appeal against a decision of a High Court applies for leave to appeal first to the judge or judges that heard the matter.[3] If leave to appeal is refused, the litigant may petition the Supreme Court of Appeal for leave to appeal. Just as in the case of criminal appeals, two judges of the Supreme Court of Appeal consider, in chambers, petitions in civil matters.[4] The Constitutional Court in *Besserglik* did not decide the question whether the right of access to courts includes the right to an appeal because it held that, even if it did, the right would not be violated by the leave to appeal process provided in the Supreme Court Act. As in the case of criminal appeals, the fact that two judges of the Supreme Court of Appeal are required to consider a petition before leave to appeal is refused was considered to constitute a sufficient safeguard to the interests of litigants in a fair process.

The question, however, is whether FC s 34 does include a right to an appeal. In expressing doubt that the right of access to courts includes a right to an appeal, O'Regan J referred to *Bernstein v Bester*. The relevant part of *Bernstein* was concerned, however, with a slightly different question. Section 22 of the IC differed from FC s 34 in one material respect, it did not guarantee, expressly, the fairness of civil proceedings. The question dealt with in *Bernstein* concerned the contention that the right to fair civil proceedings was implicit in IC s 22. The Constitutional Court was not concerned, in those paragraphs, with the question whether IC s 22

[1] *Besserglik* (supra) at para 10.

[2] *Rens* (supra) at para 26.

[3] The only exception, which is dealt with in s 20(4)*(a)* of the Supreme Court Act, is where the full bench of the High Court hears an appeal. If such a decision is to be appealed, special leave is required from the Supreme Court of Appeal.

[4] Supreme Court Act s 21(3)*(b)*.

includes the right to an appeal. Furthermore, there are clear textual differences between IC s 22 and FC s 34. Whereas the latter provides for a 'fair public hearing', the former merely provides for the right to have 'justiciable disputes settled by a court of law'. So, while O'Regan J expressed doubt that IC s 22 includes a right to an appeal, the question has not been resolved conclusively in regard to FC s 34, and remains open to argument. As noted above,[1] art 14 of the ICCPR and Art 7 of the African Charter do not confer a right to an appeal.[2]

In 1999, a single judge in a provincial division, without referring to the Constitutional Court's decision in *Besserglik*, struck down a rule of the Uniform Rules that required security to be provided by an appellant for costs on appeal.[3] Although the respondent argued that the right to access to courts does not extend to appeals, the court upheld the applicant's access to court argument without directly responding to the respondent's contention. This judgment was reached by a single judge in a provincial division. However, because his decision was not appealed, the Uniform Rules of Court were amended to give effect to his judgment.

This decision notwithstanding, it would seem that the question whether FC s 34 extends to appeals remains open. This is particularly so because the Supreme Court of Appeal has twice recently referred to the debate surrounding a civil right to appeal without deciding the question. Furthermore, in the latter of the two cases, it expressed grave doubt about a right to appeal.

First, Harms JA pointed out in *New Clicks* that FC s 34 does not provide an explicit right to appeal and felt it unnecessary to decide whether a right to appeal is implicit.[4] He held, however, that the general right to a fair hearing provided by FC s 34 applied to a hearing envisaged by the Supreme Court Act. According to this approach, regardless of whether there is a right to appeal in civil proceedings, once the legislature provides for an appeal process, this process must be fair.

Secondly, in *National Union of Metalworkers of SA and Others v Fry's Metals (Pty) Ltd*, the issue before the Supreme Court of Appeal was whether a litigant may appeal a decision of the Labour Appeal Court to the Supreme Court of Appeal. The court held that a litigant may indeed appeal from the LAC to the SCA.[5] Part of the reasoning of the court rested on the proposition that legislation may not undermine the structure of the courts as established in the Final Constitution. Since the Final Constitution provides that the SCA is the final appellate court in all matters other than constitutional matters, legislation could not oust this power

[1] See § 59.2*(c)* supra.

[2] Although art 7 refers to an 'appeal', it does so in the sense of access at instance.

[3] *Shepherd v O'Niell and Others* 1999 (11) BCLR 1304 (N). See § 59.4*(a)*(viii) 'Security for Costs' infra.

[4] *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA), 2005 (6) BCLR 576 (SCA) at para 30 n27.

[5] 2005 (5) SA 433 (SCA), 2005 (9) BCLR 879 (SCA)('*Fry's Metals*').

and render another tribunal the final appellate court. In reaching this conclusion, the court confronted the following argument raised by the parties: if legislation may not validly preclude appeals from the LAC to the SCA, legislation may not preclude appeals in any matter. In other words, provisions of statutes such as the Small Claims Court Act 61 of 1984 or the Arbitration Act 42 of 1965 – which provide that proceedings envisaged there are final – would be problematic. In rejecting this argument, the SCA pointed out that this line of reasoning was 'to confuse the existence of appellate jurisdiction with the question whether a right of appeal exists at all. The scope of institutional authority is one thing; the question whether and under what conditions it can be invoked is quite another'.[1] Therefore, FC s 168(3), which provides that the SCA is the highest court other than in constitutional matters, deals only with the scope of the SCA's institutional authority. The question whether one has a right of access to that court and, if so, the circumstances in which it may be invoked, are to be answered with reference to other provisions of the Final Constitution, such as FC s 34. As to whether there was a general right to appeal in all civil proceedings, one of the parties argued that the right of access envisaged in FC s 34 includes a right of access to all courts of appeal. In response, the SCA held:

> We do not agree. The provision does not explicitly include a right of appeal. In this it stands in pronounced contrast to s 35(3)*(o)*, which expressly entrenches within an accused person's right of fair trial a right of appeal or review to a higher Court. We do not consider that s 34 by necessary implication entails the same right; and even if it did, it would be capable of reasonable and justifiable limitation: all such decisions are in any event subject to the principle of legality, and thus to constitutional review. The suggestion that the assertion by this Court of a general appellate jurisdiction entails the appealability of all justiciable rights can therefore not be maintained.[2]

The SCA concluded its reasoning on this issue as follows:

> The question before us is in any event not whether all constitutionally recognised rights are intrinsically appealable, but whether a provision that purports to restrict a litigant's right of appeal to a hierarchy of specialised Courts, to the exclusion of this Court, complies with the Constitution. We find only that once appellate jurisdiction falls to be exercised, this Court is empowered to exercise it finally (apart from the CC), since final appellate tribunals with authority similar to this Court are not envisaged in the Constitution. We add only the obvious corollary: that the conferral on this Court of general appellate power does not render all judgments and orders immediately appealable.[3]

It is apparent that the SCA's remarks on the right to an appeal in FC s 34 were *obiter*. The *ratio* of this part of the judgment is that the appellate structure envisaged by the Final Constitution gives the SCA appellate jurisdiction in all matters, including matters within the jurisdiction of the Labour Appeal Court.

[1] *Fry's Metals* (supra) at para 29.
[2] Ibid at para 31.
[3] Ibid at para 32.

Also part of the *ratio* is that this conclusion has no bearing on the question whether there is a right to appeal in the first place. However, the SCA clearly felt sufficiently strongly about the interpretation of FC s 34 to make relatively emphatic remarks against the existence of a civil right to appeal.

What is one to make of the comparison to FC s 35(3), which entrenches the fair-trial rights of an accused person? On the one hand, it is true that FC s 35 explicitly provides a right to an appeal, and that FC s 34 does not. However, if one compares the two provisions it is apparent that there are many more detailed guarantees provided by FC s 35 than by FC s 34. Arguably, the explicit mention by FC s 35(3) of certain rights could mean that those same rights are not guaranteed by FC s 34. Such a line of argument, as apparently offered by the SCA, cannot be supported. FC s 35(3) explicitly guarantees, amongst others, the following rights: the right to have a trial begin and conclude without unreasonable delay; the right to choose, and be represented, by a legal practitioner (this is distinct from the right to legal representation at state expense); and the right to adduce and challenge evidence. As we argued above, each of these rights arguably forms part of the understanding of fairness envisaged by FC s 34.[1] The logical end-point of the SCA's reasoning is that none of these rights is protected by FC s 34, since they are explicitly mentioned in FC s 35 but not in FC s 34. The differences in structure of FC s 34 and FC s 35 make it dangerous, in our view, to draw inferences with regard to the content of the former by reference to the latter.[2]

(v) Disputes that can be resolved by the application of law

The text of FC s 34 makes clear that one only has the right of access to court to resolve a dispute that can be resolved by the application of law. There is not much case law on this topic and there is no decided case of which we are aware in which a claim based on FC s 34 failed on the basis that the dispute was not capable of being resolved by the application of law. One can surmise, however, from the reluctance of the Constitutional Court in *Prince* and *Christian Education* to make rulings on the objective legitimacy of certain religious practices, that certain religious disputes would not be capable of being resolved by the application of law.[3] On the other hand, it has been held that where a party seeks to review a decision of an administrator in the High Court, the review proceedings

[1] See G Budlender 'Access to Courts' (2004) 121 *SALJ* 339, 342. See further §59.2*(b)* supra.

[2] We have benefited greatly from a helpful discussion with Mark Wesley, of the Johannesburg Bar, on this aspect of the chapter.

[3] See Currie & De Waal (supra) 707. See also *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC) at para 42. But see *Taylor v Kurtstag* [2004] 4 All SA 317 (W)(The High Court upholds the right of Bet Din to excommunicate member of community who failed to follow its judgments.)

constitute a 'dispute' within the ambit of FC s 34.[1] This conclusion was unsurprising.

Another possible interpretation of this aspect of FC s 34 is that it refers to certain non-justiciable political questions that are not to be determined by the courts. The Constitutional Court, especially in high-profile, highly-charged cases involving an intersection between law and politics, has had occasion to state that the question of the merits of government policy is a political question upon which courts should not pronounce.[2] It could be argued that the text of FC s 34 makes clear that litigants do not have a right to have such disputes resolved by a court.

The complex question that arises from the term 'dispute' used in FC s 34 is the applicability of FC s 34 to more substantive questions. Is it merely a procedural right that protects the right to have disputes resolved by a court but says nothing about the content of the dispute? Or, does FC s 34 say something about the substantive content of disputes?

Jooste v Score Supermarket Trading (Pty) Ltd is authority for the proposition that FC s 34 does not apply to the removal of common-law rights.[3] The case concerned the constitutionality of s 35(1) of the Compensation for Occupational Injuries and Diseases Act.[4] The effect of s 35(1) of the Compensation Act is to remove the common-law right of employees to sue their employers for injuries arising from their employers' negligence and to replace it with a right to claim compensation in terms of the Act. In short, this precludes employees from obtaining general damages[5] for injuries suffered and restricts them to damages for pecuniary loss, but relieves them of the burden of proving negligence and provides a cheaper and easier procedure. The applicant argued that the denial of the right to claim general damages violated her right of access to court. Yacoob J held, for a unanimous Court, that the right of access to court in the Constitution 'does not call for the retention of all common law rights of action which existed at any stage.'[6]

[1] *National & Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government and Another* 1999 (1) SA 701, 703J (O). See also *SAD Holdings Ltd and Another v SA Raisins Pty (Ltd) and Others* 2000 (3) SA 766, 775 (T)(Ngoepe JP held that the right to have justiciable disputes determined, in terms of FC s 34, meant that, until the Competition Appeal Court was established (it had at the time of the judgment not yet been), litigants had the right to approach the High Court to review or appeal against decisions of the Competition Tribunal.)

[2] See, for example, *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as* Amici Curiae*) (No 2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) at para 11 (The Court said: 'This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional.')

[3] 1999 (2) SA 1 (CC), 1999 (2) BCLR 139 (CC)('*Jooste*').

[4] Act 130 of 1993 ('Compensation Act').

[5] This would include damages for pain and suffering, loss of amenities of life, future loss of earnings and future medical expenses.

[6] *Jooste* (supra) at para 21.

This conclusion is logical. The removal of a common-law right may often constitute a violation of a right protected by the Bill of Rights. If that is the case, the removal will be unconstitutional unless justified by FC s 36. However, if the removal of a common-law right is not a violation of a substantive right, it seems logically problematic to treat it as a violation of the right of access to courts. Although the right of access to courts has substantive components it is, in the end, a largely procedural right. Its purpose is to ensure that all disputes are resolved in fair proceedings and there is nothing in its text or purpose to suggest that it has a bearing on the existence of substantive legal rights. The rest of the Bill of Rights, in addition to the common law and statute, must determine whether a person has a particular right. FC s 34 guarantees to litigants that any proceedings to determine whether a particular right exists will be fair. It guarantees further that litigants cannot be barred (without justification) from having such disputes resolved by a court or alternative forum, and it entitles them to the enforcement of remedies, where such remedies have been provided by a court.[1] It does not, however, seek to resolve the substantive content of such disputes.[2]

However, it is not always possible to draw a neat line between questions of substantive rights (to which other provisions of the Bill of Rights apply but which cannot be resolved by recourse to FC s 34) and the right to have those questions resolved (which is provided by FC s 34). The facts of *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*[3] demonstrate the potential overlap between questions regarding the applicability of FC s 34 and questions concerning substantive rights. The case concerned the constitutionality of s 66(1)*(a)* of the Magistrates' Courts Act.[4] In short, this provision facilitated the summary execution against immovable property of a debtor against whom judgment had been taken. The nub of the complaint was that, while the debtor would have recourse to court to contest his indebtedness, the debtor would have no recourse to court in regard to the question whether his immovable property ought to be executed against.[5]

[1] See § 59.4*(d)* infra, for a discussion of *Modderklip*.

[2] See Currie & De Waal (supra) at 718. The authors describe the conclusion of the court as 'somewhat odd' in that it reduces FC s 34 to no more than a procedural fairness guarantee. However, as this chapter and the authors' own chapter make clear, there is more to FC s 34 than mere procedural fairness. All that *Jooste* implicitly establishes is that FC s 34 does not say anything about the substantive content of justiciable disputes. There is nothing in the text or purpose of FC s 34 that suggests otherwise.

[3] 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC)('*Jaftha*').

[4] Act 32 of 1944.

[5] If, having had judgment taken against him, the debtor was unable to pay the debt, the sheriff was to visit his home and seek to attach his movable property. If the debtor had insufficient movable property to cover his debt, the sheriff was to issue a *nulla bona* return indicating this status and the creditor was then entitled to execute against the debtor's immovable property. This execution was authorized by the clerk of the court and not by the court itself. So, in the case of a default judgment, the only court supervision from beginning to end was the initial proceedings in which judgment was given, which of course did not involve input from the debtor. In the case of a debtor who entered an appearance to defend, the court would determine the dispute in regard to the debt. However, from that moment onwards, the process of execution would also take place without court supervision.

The case was brought as a right to housing case. In particular, the case engaged the negative aspect of the right to housing in FC s 26(1). The appellants argued that they had access to housing and that the measures permitted by s 66(1)*(a)* of the Magistrates' Courts Act interfered with this existing access. In this sense, the provision violated the duty of the State to respect existing access to housing. The Constitutional Court agreed. Mokgoro J held that the measure limited existing access to housing and so limited the right to access to housing in FC s 26(1).[1] She held further that the measure did not pass limitation analysis to the extent that it allowed a debtor to lose his immovable property in unjustified circumstances. In other words, the measure was overbroad — there might be some circumstances in which it would be justified for a debtor to lose his immovable property to discharge his obligations to a creditor but there would be other circumstances in which the prejudice to the debtor in execution outweighed the benefit to the creditor and it would therefore be unjustified to permit execution.[2] By allowing execution in all cases, the measure went too far.

The Court's approach to remedy in *Jaftha* is of interest to us here. The court held that the best way to solve the overbreadth of the measure was to require court supervision over the execution process. Such supervision would enable the court to determine each case on its merits and to decide whether, on the facts of the case, it was justified to allow execution.[3] The premise of this relief is that there are many factors to be taken into account when determining whether the creditor's right to payment outweighs the debtor's interest in keeping his home. Rather than attempting to set out all of these factors in a reading-in exercise or sending the matter back to the legislature to seek to establish such factors, the Court in *Jaftha* felt it appropriate to instruct courts to supervise the process and make sure that justice is done in each case.

Courts are constrained by the way in which cases are argued. This case was argued in terms of FC s 26(1) and that was how it was resolved by the Constitutional Court. The question is whether this case also engaged FC s 34.

In *Chief Lesapo v North West Agricultural Bank & Another*, the Constitutional Court considered the validity of an ouster clause that allowed the respondent bank to attach and sell its debtors' property in execution without an order of court.[4] The right of the bank to execute in this manner arose where the debtor was in default to repay a loan. Before the Constitutional Court, the bank argued that the execution procedure only applied where there was no dispute between the parties about the underlying indebtedness and, as such, FC s 34 could have no application: there was no dispute between the parties capable of resolution by the application of law. In rejecting this argument, Mokgoro J held as follows:

[1] *Jaftha* (supra) at para 34.
[2] Ibid at paras 43–44.
[3] Ibid at paras 53–55.
[4] 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC)('*Chief Lesapo*').

> The judicial process, guaranteed by section 34, also protects the attachment and sale of a debtor's property, even where there is no dispute concerning the underlying obligation of the debtor on the strength of which the attachment and execution takes place. That protection extends to the circumstances in which property may be seized and sold in execution, and includes the control that is exercised over sales in execution.
>
> On this analysis, section 34 and the access to courts it guarantees for the adjudication of disputes are a manifestation of a deeper principle; one that underlies our democratic order. The effect of this underlying principle on the provisions of section 34 is that *any constraint upon a person or property shall be exercised by another only after recourse to a court recognised in terms of the law of the land.*[1]

It would seem that, on this reasoning, *Jaftha* did indeed engage FC s 34 and that, had the appellants relied on FC s 34, the Court would have reached a similar result. In fact, it seems as if the remedy adopted by the Court in *Jaftha*, although appropriate in the context of FC s 26(1), fits more neatly into the paradigm of FC s 34. The execution against immovable property involves, clearly, a constraint upon a person's property. Under the test as enunciated in *Chief Lesapo*, s 66(1)*(a)* of the Magistrates' Court Act would clearly limit FC s 34 by permitting such a constraint to be exercised without recourse to a court of law. Of course, it could be argued that the constraint was not exercised without recourse to court because the initial question whether the debtor was indeed indebted to the creditor, and hence deserved judgment to be granted against him, was determined by a court. However, *Chief Lesapo* and *Jaftha* stand for the proposition that the question of indebtedness and the question whether it is justifiable to lose one's property in respect of that indebtedness are separate enquiries and that court supervision is necessary in respect of both.

A cumulative reading of the cases discussed in this section yields the following conclusions. FC s 34 does not apply to the question whether the legislature is entitled to remove a common-law or statutory right. That is an anterior question which must be determined with reference to other substantive rights. Once it is established that a person has a common-law or statutory right, that person has a right to have disputes in respect of that right resolved by a court. Furthermore, whenever a person is entitled to impose a constraint on the person or property of another without recourse to a court (or other tribunal), FC s 34 will be limited and the constitutionality of this entitlement will need to be tested with reference to FC s 36. Lastly, a litigant is entitled to the enforcement of an appropriate remedy.[2] This reading of FC s 34 demonstrates that, although the word 'dispute' in FC s 34 is not wide enough to embrace any removal of rights, a narrow understanding of the term 'dispute' is also inappropriate. *Chief Lesapo* establishes the proposition that whenever a constraint on a person or her property is sought to be exercised, a dispute exists: the dispute is about the extent of the constraint and the manner in which the constraint is to be imposed.

[1] *Chief Lesapo* (supra) at paras 5–16 (our emphasis).
[2] For more on appropriate relief and FC s 34, see the discussion of *Modderklip* at § 59.4*(d)* infra.

(b) Nature of the state's obligations/nature of the right

FC s 34 imposes a range of positive and negative obligations on the state, and limited negative obligations on private persons. The state's negative obligations encompass the obligation not to restrict access to courts. *Beinash v Ernst & Young*,[1] is a good example of a case that implicates the negative obligations of the state. In *Beinash*, the court's enquiry into whether s 2(1)(*b*) of the Vexatious Proceedings Act[2] infringes FC s 34 was extremely brief:

> The effect of s 2(1)*(b)* of the Act is to impose a procedural barrier to litigation on persons who are found to be vexatious litigants. This serves to restrict the access of such persons to courts. That is its very purpose. In so doing, it is inconsistent with s 34 of the Constitution, which protects the right of access for everyone and does not contain any internal limitation of the right. The barrier which may be imposed under s 2(1)*(b)* therefore does limit the right of access to court protected in s 34 of the Constitution.

Section 2(1)(*b*), which is discussed more fully below,[3] imposes a limitation on the pre-existing, largely unfettered, right of access to courts of litigants. The section may be read as an impairment of the state's negative obligation not to inhibit access to courts. The fact that the limitation was ultimately found to be reasonable and justifiable does not alter the fact that a negative obligation was found to have been breached.[4] However, not every apparent obstacle to access constitutes an infringement of the negative obligations of the state. For example,[5] in *Besserglik*, the Constitutional Court held that '[w]hatever the scope of section 22 (the predecessor to FC s 34), it cannot be said that a screening procedure which excludes unmeritorious appeals is a denial of the right of access to a court.'[6] It is accordingly necessary, in the first place, to interpret the negative component of FC s 34 before determining whether state action has infringed the right.

The nature of the state's *positive* obligations has been clarified in *Modderklip*. In *Modderklip*, the Constitutional Court identified two broad obligations. First, the state has an obligation to provide the necessary mechanisms for citizens to resolve disputes that arise between them:[7] a legislative framework, institutions such as the courts, and an infrastructure designed to facilitate the execution of court orders.[8] This obligation must be read with FC s 165(4). FC s 165(4)

[1] 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC)('*Beinash*').
[2] Act 3 of 1956.
[3] See § 59.4*(a)*(vi) infra.
[4] For a critical discussion of the case, see S Woolman 'The Right Consistency: *Beinash v Ernst & Young* 1999 (2) SA 116 (CC)' (1999) 15 *SAJHR* 166, 170–175. The views expressed in that article do not necessarily reflect those of the authors.
[5] See further § 59.3*(a)*(iii) supra.
[6] *Besserglik v Minister of Trade, Industry and Tourism and Others (Minister of Justice intervening)* 1996 (4) SA 331 (CC), 1996 (6) BCLR 745 (CC) at para 10.
[7] *Modderklip* (supra) at para 39.
[8] Ibid at para 41.

provides that organs of state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.

Secondly, the Court in *Modderklip* held that the state is obliged to take 'reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law'.[1] The Court added that the precise nature of the state's obligation will depend on what is reasonable, having regard to the nature of the right or interest that is at risk, as well as the circumstances of each case.[2] In *Modderklip*, the Court applied this test to the facts of the case as follows:

> The question that needs to be answered is whether the State was, in the circumstances, obliged to do more than it has done to satisfy the requirements of the rule of law and fulfil the section 34 rights of Modderklip. I find that it was unreasonable of the State to stand by and do nothing in circumstances where it was impossible for Modderklip to evict the occupiers because of the sheer magnitude of the invasion and the particular circumstances of the occupiers.[3]

Modderklip was an extraordinary case, and the Court explained that the execution of an eviction order would not normally raise problems that cannot be accommodated through the existing mechanisms established by the state.[4] Therefore, this second obligation to take 'reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law' applies only in exceptional circumstances. It is implicated only when the mechanisms established by the state in the discharge of its primary FC s 34 obligation would, if applied in the normal way, result in 'large-scale disruptions in the social fabric' and undermine the rule of law. The Court found that the state should have anticipated such consequences if the eviction order in *Modderklip* were executed.[5] *Modderklip* demonstrates that the discharge of this extraordinary, second obligation to take reasonable steps to ensure that large-scale disruptions in the social fabric do not take place may require extraordinary remedies. The Court ultimately awarded what must be regarded as *constitutional* damages. (However, the Court chose not to use this term.[6])

[1] *Modderklip* (supra) at para 43.
[2] Ibid.
[3] Ibid at para 48.
[4] Ibid at para 47.
[5] Ibid.
[6] Ibid at paras 59–66.

When does the extraordinary obligation of the state established in *Modderklip* arise? It appears to arise where normal judicial and enforcement mechanisms cannot operate, and, as a result, a polycentric conflict occurs which is likely to cause a 'large-scale disruption in the social fabric'. What are disruptions in the social fabric? The Court also used the language of 'order in society', 'societal disruptions' and 'social upheaval'.[1] This poetic, but vague, reference to the 'social fabric', in our view, should be taken to refer, not to the anticipated public reaction to the execution of an unpopular court order, but rather to whether it is *possible* to execute the order in the light of the exceptional consequences of execution. In *Modderklip*, the Court referred, albeit tangentially, to the obligation of the state 'progressively to ensure access to housing or land for the homeless' and by implication for the specific occupiers in that case.[2] Eviction in this case would have been inconsistent with the rights of occupiers and the obligations of the state under FC s 26. In our view, that fact constituted the threat of 'disruption in the social fabric'. The judgment should not be read as imposing an obligation on the state to find alternatives to the execution of every order likely to be met with a hostile public reaction.

Later in its judgment, the Court expresses the obligation of the state under the rule of law and FC s 34 in the language of 'relief' and 'remedy':

> The obligation resting on the State in terms of section 34 of the Constitution was, in the circumstances, *to take reasonable steps to ensure that Modderklip was, in the final analysis, provided with effective relief*. The State could have expropriated the property in question or provided other land, a course that would have relieved Modderklip from continuing to bear the burden of providing the occupiers with accommodation. The State failed to do anything and accordingly breached Modderklip's constitutional *rights to an effective remedy* as required by the rule of law and entrenched in section 34 of the Constitution.[3] (our emphasis)

This obligation to take reasonable steps to ensure that a litigant is provided with effective relief is, in our view, something different from the extraordinary obligation to take reasonable steps to ensure that, in executing a court order, large-scale disruptions in the social fabric do not occur. The focus lies in two different places: in the 'relief' formulation, the focus is on the right-holder's entitlement to relief; whereas in the earlier 'social fabric' formulation, the focus is on society and the impact of execution on other persons. The answer to this apparent conundrum lies in the proposition that the rights conferred on individuals and the obligations of the state under FC s 34 and the rule of law in FC s 1*(c)* are neither corollaries nor contradictions. As concerns an individual who has obtained a court order, FC s 34 confers a right and imposes a concomitant

[1] *Modderklip* (supra) at para 46.
[2] Ibid at para 49.
[3] Ibid at para 51.

obligation on the state to enforce remedies that provide 'effective relief'. However, FC s 34 read with the rule of law value in FC s 1*(c)* also imposes constitutional obligations on the state to prevent disruption in the social fabric that might result from the execution of court orders by the state machinery. This obligation is owed not to the holder of such a court order, whose right is a right to enforcement of an 'effective remedy', but to *other* persons (perhaps the public as a whole) whose constitutional rights would be threatened or infringed by execution. In §59.4*(d)* below, we discuss the right to enforcement of an 'effective remedy' or 'effective relief' established by the Court in *Modderklip*.

The primary obligation identified in *Modderklip* — the obligation of the state to put in place mechanisms to facilitate the resolution of disputes — also contemplates the establishment, where appropriate, of alternative dispute resolution mechanisms to the ordinary courts. Furthermore, the state is obliged to ensure the 'appropriateness' and 'independence' of any tribunal or forum established to fulfil functions instead of a court and to ensure the fairness of such proceedings.[1]

59.4 THE CONTENT OF THE RIGHT

The issues considered in the previous section are relevant to the question whether FC s 34 applies in the first place, and, if so, what its nature and character are. It is now appropriate to turn to consider the content of the right of access to courts in detail. Given the text of the right, it is convenient to identify three topics to consider: first, the provision confers a right for disputes to be 'decided before a court'; this is the component of the right that directly confers the right of access to court and, in the context of this aspect of the right, it is necessary to consider provisions that limit somehow the access to court of particular litigants or litigants in general. Secondly, the text of FC s 34 suggests that a component of the right is the right to a fair public hearing. Thirdly, FC s 34 makes clear that, where appropriate, the right to a fair public hearing may be exercised not in a court, but in an independent and impartial alternative tribunal or forum. In this section, we consider each of these three topics in turn. Since the decision of the Constitutional Court in *Modderklip*, it is now necessary to add a fourth component of the right: the right to enforcement of a remedy. The Constitutional Court has now made it clear that a component of the right of access to court is the right to enforce the right to appropriate relief.

(a) Access to court

Perhaps the most prominent component of FC s 34 is the guarantee that litigants may bring their case before a court. A clear example of a provision that would violate this section is one that prohibits the bringing of legal proceedings against the state. Under apartheid, a decree applicable in the former homeland of

[1] See *De Lange v Smuts NO* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC).

Ciskei provided that '[n]o legal proceedings may be brought against the state in respect of any claim arising from any procedural irregularity, abuse of power, maladministration, nepotism, corruption or act of negative discrimination on the part of any member or servant of the Government of the Republic of Ciskei which was overthrown on 4 March 1990.'[1] Such a provision does not seek to extinguish the underlying claim but rather attempts to prevent the claim from being brought before a court. Unsurprisingly, this provision was held to conflict with the Ciskeian equivalent of FC s 34.[2] In the section that follows, we consider various provisions that, far less blatantly, have the effect of limiting, or potentially limiting, access to court.

(i) Ouster clauses

Ouster clauses were common during apartheid and were primarily used to prevent judicial review of executive conduct.[3] One of the reasons for entrenching FC s 34 in the Bill of Rights is to prevent such clauses from being used again.

The Constitutional Court has had a number of opportunities to consider the validity of provisions that permit disputes to be resolved without recourse to courts. These provisions differ from traditional ouster clauses because they do not concern attempts by the state to remove judicial supervision of its conduct. However, what these provisions do have in common with traditional ouster clauses is that, in both cases, the aggrieved party is denied recourse to a court in order to obtain relief. In this sense, these clauses may be considered 'implied ousters'. They have the effect of ousting the jurisdiction of the ordinary courts by establishing a parallel dispute-resolution process that lacks the protections afforded by the courts. So, although they do not expressly oust the jurisdiction of the courts, the effect is much the same.

The provision considered in *Chief Lesapo* allowed the first respondent bank to recall loans paid to debtors and, if the debtors were in default, to order the messenger of the court to attach and to sell in execution the debtors' property.[4] The direction given by the respondent bank to the messenger of the court was given without recourse to court.

In striking down the section, which allowed the Bank to bypass completely the scrutiny of the courts, Mokgoro J said the following:

[1] Definition of State Liability Decree 34 of 1990 (Ck) s 2(1).

[2] See *Ntenteni v Chairman, Ciskei Council of State and Another* 1993 (4) SA 546 (Ck), 1994 (1) BCLR 168, 182 (Ck).

[3] See C Hoexter with R Lyster *The New Constitutional and Administrative Law II — Administrative Law* (2002) 305. See § 59.2*(a)* supra.

[4] North West Agricultural Bank Act 14 of 1981 s 38(2).

> A trial or hearing before a court or tribunal is not an end in itself. It is a means of determining whether a legal obligation exists and whether the coercive power of the state can be invoked to enforce an obligation, or prevent an unlawful act being committed. It serves other purposes as well, including that of institutionalising the resolution of disputes, and preventing remedies being sought through self help. No one is entitled to take the law into her or his own hands. Self help, in this sense, is inimical to a society in which the rule of law prevails.[1]

The Court rejected the notion that the provision would only be offensive if there was a dispute about the underlying indebtedness. The right to protection against self-help extended to supervision by the court over the execution process.[2]

The Court's attitude to the resort to self-help facilitated by the section was expressed as follows:

> Section 38(2) authorizes the Bank, an adversary of the debtor, to decide the outcome of the dispute. The Bank thus becomes a judge in its own cause. The authority to adjudicate over justiciable disputes and to order appropriate relief and the enforcement of the order by attachment and sale of the debtor's goods in a civil matter, vests in the courts of the land. Section 38(2), however, limits the debtor's rights in section 34 by vesting that authority in the Bank. The Bank itself decides whether it has an enforceable claim against the debtor; the Bank itself decides the outcome of the dispute and the subsequent relief; and the Bank itself enforces its own decision, thereby usurping the powers and functions of the courts. The fact that the debtor may have recourse to a court of law after the attachment takes place does not cure the limitation of the right; it merely restricts its duration. For the period of limitation, the debtor has been deprived of possession of the assets in question without the intervention of a court of law and in a manner inconsistent with section 34.[3]

As part of its limitation analysis, the Court emphasized the importance of the right of access to courts. In particular, the Court described the right as 'a bulwark against vigilantism, and the chaos and anarchy which it causes.'[4] The Court acknowledged the purpose behind the measure — it provided the bank with a quick way to recover money, which, after all, it held in the public interest to begin with — but emphasized that this purpose was not at odds with having justiciable disputes resolved by courts.[5] The Court was also of the view that the measure did not manifestly succeed in saving substantial time and money for the Bank and that, compared with the inroad into the right of access to court, this purported advantage did not justify the measure.[6] The provision was therefore declared unconstitutional.[7]

[1] *Chief Lesapo* (supra) at para 11.
[2] Ibid at para 15.
[3] Ibid at para 20.
[4] Ibid at para 22.
[5] Ibid at para 24.
[6] Ibid at para 26.
[7] Ibid at para 29. See also *First National Bank of South Africa Limited v Land and Agricultural Bank of South Africa and Others; Sheard v Land and Agricultural Bank of South Africa and Another* 2000 (3) SA 626 (CC), 2000 (8) BCLR 876 (CC)('*Land Agricultural Bank*')(The Court struck down similar provisions of the Land Bank Act 13 of 1944. The Act has since been repealed.)

In *Zondi v MEC, for Traditional and Local Government Affairs and Others*,[1] the applicant challenged certain provisions of a KwaZulu-Natal Pound ordinance.[2] The ordinance provided for the seizure of a person's livestock that trespassed on another's land. In terms of the ordinance, if a landowner found livestock that had trespassed onto his land, then he was entitled to impound it. The landowner was not obliged to give notice to the owner of the livestock unless the owner of the livestock owned the land adjacent to the landowner's land,[3] in which case 12 hours' written or verbal warning would suffice.[4] Once the animals were seized they could be driven to a pound by the landowner. The ordinance obliged the landowner to provide various pieces of information to the poundkeeper, but not the identity of the livestock owner, even if this was known to him. The poundkeeper had to inform the livestock owner of the fact that the animals were impounded, but only if the owner's identity was known to him,[5] and only to facilitate a hearing to determine the quantum of damages to which the landowner was entitled as a consequence of the trespass. If the animals were not claimed, then they could be sold to defray costs and the remaining animals could be destroyed. If the livestock owner had been identified, then he could only reclaim his livestock on the payment of pound fees and any damages due to the landowner. The only notice of an impending sale of livestock by a pound was provided in local newspapers and the *Provincial Gazette*.

Having explained why access to court generally requires the prevention of self-help, Ngcobo J gave the following guidance on the application of FC s 34:

> Section 34, therefore, requires not only that individuals should not be permitted to resort to self-help, but it also requires that potentially divisive social conflicts must be resolved by courts, or other independent and impartial tribunals. Section 34 recognises that it is important to do so to ensure that orderly and fair solutions to such conflicts are found, to promote social cohesion and to avoid the exacerbation of division and unfairness. Determining whether it is necessary for such conflicts to be brought before courts will require a consideration of the potential for social conflict in relation to the particular matters concerned, the equality of arms of the parties that are likely to be involved in such conflict, and the practicalities of requiring such matters to be resolved by courts, amongst other things.

In considering the constitutionality of the impounding provision, the Court in *Zondi* did not consider whether the provision also limited the right of access to courts. Ngcobo J held that, even if the provision did, it would be justifiable in terms of FC s 36: it is necessary to have a provision that allows a landowner to impound animals on an immediate basis.[6] Standing alone, therefore, it would not

[1] 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC)('*Zondi*').

[2] Pound Ordinance 32 of 1947 (KZN). The applicant challenged ss 8, 10(2), 12, 16(1), 29(1), 33, 34, 37 and 41(4) of the Ordinance.

[3] Ownership was determined by the presence of the adjacent owner's brand on the livestock.

[4] See *Zondi* (supra) at paras 45ff.

[5] There is no obligation to take steps to ascertain the identity of the owner.

[6] *Zondi* (supra) at paras 66 and 67.

be improper for a provision to allow a landowner to impound animals without notifying the owner. It was necessary, however, to consider this provision in the context of the entire scheme.[1] Viewed in context, the entire scheme was held to limit the right of access to court.[2] The main problem with the scheme was not so much that the animals could be impounded without notice, but that the animals could be sold in execution and the quantum of damages suffered by the landowner would all be determined without any supervision by the courts:[3]

> The effect of the scheme, therefore, is to remove from the court's scrutiny one of the sharpest and most divisive conflicts of our society. The problem of cattle trespassing on farmland must be seen in the context I have outlined above. It is not merely the ordinary agrarian irritation it must be in many societies. It is a constant and bitter reminder of the process of colonial dispossession and exclusion. The potential for conflict between landless stockowners, whose forebears were deprived of their land, and farmers must be acknowledged. Moreover, in many cases, landless stockowners, for whom cattle constitute not only a form of material security, but also a way of life of tremendously significant social and communal importance, will have scant ability to approach courts for relief when their cattle are impounded. The effect of the impounding scheme as described, therefore, is to effectively remove from the arena of courts the sharp conflicts which will often underlie the process of impoundment.[4]

In assessing the justifiability of the measure, the Court in *Zondi* held that the more potentially divisive a conflict is, the more important it is for the dispute to be resolved by a court.[5] While it was clearly necessary to have an efficient, immediate mechanism to impound trespassing livestock, there was no reason why the process to determine damages and the execution process could not be supervised by a court.[6] The potentially devastating effects that the sale of livestock could have on poor people, coupled with the fact that it would not be necessary to oust the jurisdiction of the courts once the immediate problem of trespassing animals had been solved, led the court to conclude that the legislative scheme was not justifiable in terms of FC s 36.[7]

By contrast, the Constitutional Court in *Metcash*[8] found that certain provisions of the Value-Added Tax Act[9] did not limit the right of access to court. The

[1] *Zondi* (supra) at para 73.
[2] Ibid at para 78.
[3] Ibid at paras 74-76.
[4] Ibid at para 76.
[5] Ibid at para 82.
[6] Ibid at para 83.
[7] Ibid at para 86.
[8] *Metcash Trading Ltd v Commissioner, South African Revenue Service* 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC)('*Metcash*').
[9] Act 89 of 1991 ('the VAT Act'). The provisions of the Act that were struck down by the High Court (*Metcash Trading Ltd v Commissioner for the SA Revenue Service and Another* 2000 (2) SA 232 (W), 2000 (3) BCLR 318 (W)) were ss 36(1), 40(2)*(a)* and 40(5) of the Act.

VAT Act establishes a scheme in terms of which vendors are, in the first instance, obliged to police themselves and to submit VAT payments. However, if the Commissioner of the South African Revenue Service is not satisfied with a vendor's assessment, then he is entitled to intervene and inform that vendor that he will conduct an assessment into the vendor's VAT liability. The Commissioner's assessment has the effect of a civil judgment, but remains subject to an appeal-like process.[1] However, unlike the ordinary approach to noting of an appeal, which suspends the operation of the judgment appealed against, the VAT Act specifically provides that the Commissioner's assessment remains in effect. The Act creates a 'pay now, argue later' approach; only if the Commissioner's assessment turns out to be wrong is the vendor entitled to repayment of the excess amount, plus interest.[2]

The appeal process envisaged by the VAT Act allows a vendor to appeal the Commissioner's assessment to the Special Court created by the Income Tax Act[3] or a board.[4] Thereafter, the vendor possesses a further right to appeal the decision of the Special Court to an ordinary court of law.[5] The Court pointed out that the Act did not in any way oust the right of access to court. Had the special appeal process not been established, the decision of the Commissioner would, in any case, have been subject to judicial review.[6] Furthermore, the Commissioner's discretion would have to be exercised in the light of the Final Constitution.[7] The provision did not, therefore, limit the right of access to court.

The applicants also challenged the following provision:

> If any person fails to pay any tax, additional tax, penalty or interest payable in terms of this Act, when it becomes due or is payable by him, the Commissioner may file with the clerk or Registrar of any competent court a statement certified by him as correct and setting forth the amount thereof so due or payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were, a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement.[8]

[1] The Court in *Metcash* pointed out that the process is not technically an appeal because the Commissioner performs an administrative and not judicial function. The process was therefore 'proceedings in terms of a statutory mechanism specially created for the reconsideration of this particular category of administrative decisions — and appropriate corrective action — by a specialist tribunal'. *Metcash* (supra) at para 32.

[2] Also noteworthy is the fact that the Commissioner has the discretion to waive the right to immediate payment and to allow the vendor not to pay in terms of the assessment, pending the appeal process being finalized.

[3] Act 58 of 1962.

[4] *Metcash* (supra) at para 32.

[5] See VAT Act s 34.

[6] *Metcash* (supra) at para 33.

[7] Ibid at paras 41–3.

[8] VAT Act s 40(2)*(a)*.

The applicants argued that this provision sanctioned self-help by allowing the Commissioner to bypass the courts. The Constitutional Court rejected this contention. Although the provision provided a short-cut for the Commissioner, it did not in any way oust the normal judicial supervision over the execution process.[1]

In *Armbruster*, the Constitutional Court rejected the appellants' FC s 34 arguments. It held that the constitutional challenge failed on grounds similar to those that disposed of *Metcash*.[2] The impugned regulations deal with the seizure and forfeiture of foreign currency.[3] In terms of the regulations, foreign currency may not leave the country without an exemption or permission from the Treasury. The impugned regulations allow a customs official to search people leaving the country and seize foreign currency found in their possession. Furthermore, the seized currency is forfeited to the state unless the Treasury exercises its discretion to return the currency.

The Court in *Armbruster* distinguished *Zondi* and *Chief Lesapo* on three broad bases. *Zondi* and *Chief Lesapo* were concerned with respondents who could resort to self-help 'in the sense that they could execute and sell property without a court order and without any judicial supervision in respect of debts.'[4] The types of interventions in those cases, which amounted to sales of the complainants' property, were far more drastic and required far greater judicial control than forfeiture of currency about to be removed from the country: In the present case, '[t]he property has already been seized to achieve public purposes relating to protection of foreign exchange reserves.'[5] Secondly, a distinguishing feature of *Zondi* was that the impugned provisions had the potential to cause social conflict, which was not so in the case of the regulations impugned in *Armbruster*. Lastly, and perhaps most importantly, the decision whether to forfeit the currently was an administrative act, which meant that the *ratio* of *Metcash* was applicable. Thus, as in *Metcash*, the regulations did not infringe FC s 34.[6]

In the light of the above cases, and the recent case of *Armbruster* in particular, it seems that the greater the potential for social conflict, the more likely a particular measure will be to infringe FC s 34. Likewise, the more drastic the effect on an applicant's interests, the more likely a measure will be found to limit FC s 34. Furthermore, if an impugned measure provides for an administrative process, it is unlikely to infringe FC s 34, because the administrative conduct in question will

[1] Ibid at paras 50-51.

[2] *Armbruster and Another v Minister of Finance and Others* [2007] ZACC 17 (25 September 2007).

[3] The challenged regulations were regs 3(3) and 3(5) of Exchange Control Regulations promulgated under s 9 of the Currency and Exchanges Act 9 of 1933 (the Act), which empowers the Governor-General to make Exchange Control Regulations. The regulations were published under GN R1111 in *GG Extraordinary* 123 of 1 December 1961. The appellants technically challenged only the constitutionality of reg 3(5) but a consideration of that regulation was impossible without a consideration of reg 3(3).

[4] *Armbruster* (supra) at para 59.

[5] Ibid at para 60.

[6] Ibid at para 61.

be reviewable. It must be recalled that the Court, in *Zondi*, assumed that the measure limited FC s 34 and did its analysis under FC s 36. The factors that it introduced, such as the focus on the social context and divisiveness of the measure, were relevant to limitation analysis and not to whether FC s 34 had been limited. The Court was wrong in *Armbruster*, in our view, to take these factors into account when conducting its threshold analysis regarding the question whether FC s 34 had been limited. The only factor that leads to the conclusion that the impugned measures in *Metcash* and *Armbruster* did not limit FC s 34 is the fact that the administrative acts at issue are reviewable.

In another line of cases, the constitutional validity of common-law *parate executie* clauses, or summary-execution clauses, has been considered. These clauses provide for the sale of a debtor's property pursuant to a security agreement with a creditor. Before turning to those cases, it is necessary to provide some background to the common-law position. Susan Scott captures the common-law position succinctly and lucidly.[1] She points out that it is necessary to draw a distinction between three mechanisms that implicate a debtor's property. The first is a statutory mechanism allowing the state to seize a debtor's property without recourse to a court of law. Such mechanisms were considered in *Chief Lesapo* and *Land Agricultural Bank*. The second mechanism is a perfection clause in a contract creating a notarial bond. A notarial bond is essentially a mortgage in respect of movables. The perfection of the notarial bond creates a real right of security for the creditor.[2] It must be remembered that, in terms of a notarial bond, a creditor obtains a right of security in respect of the debtor's hypothecated movable without the debtor having to give possession of the movable to the creditor. (This feature reflects the most important distinction between a perfection clause and a pledge). However, in order for the creditor to obtain a real right of security, he needs to 'perfect' his claim by obtaining possession of the bonded movable.[3] The 'perfection clause' facilitates possession. The clause will permit the creditor to take possession of the bonded movables on the occurrence of certain events envisaged by the contract. Crucially, possession must occur either with the debtor's permission or with a court order.

The third mechanism is a summary-execution clause. In terms of such a clause, the debtor authorizes the sale of his hypothecated property by the creditor upon the debtor's default without court approval. In terms of the common law, such clauses are impermissible in respect of mortgage bonds but permissible in respect of pledges.[4] The crucial difference between the two is that in the case of mortgage bonds the debtor remains in possession of the property, whereas in the case of pledges, the creditor takes possession of the property in question upon conclusion of the pledge agreement.

[1] S Scott 'Summary Execution Clauses in Pledge and Perfecting Clauses in Notarial Bonds' (2002) 65 *THRHR* 656.
[2] Ibid at 659–60.
[3] Ibid at 660.
[4] Ibid at 660.

In *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd*, the applicant bondholder applied to court for an order allowing it to perfect its security agreement with the respondent by taking possession of the debtor's movable property hypothecated in terms of the contract and to sell it to discharge the security obligation.[1] In other words, the case concerned the second mechanism described above. Froneman J, relying upon *Chief Lesapo* and *Land Agricultural Bank*, held that, if such clauses were impermissible in terms of legislation, he could not see why the common law should permit them.[2] It is clear, therefore, that Froneman J treated perfection clauses as analogous to the statutory mechanisms struck down in *Chief Lesapo* and *Land Agricultural Bank*. In *Senwes Ltd v Muller*, Moseneke AJ (as he then was), relying too on *Chief Lesapo*, held that certain clauses in a contract that permitted the notarial bond-holder to attach and to execute against the hypothecated movables of the debtor without notice and without legal process were unenforceable.[3] This case was also concerned with a perfection clause. However, these clauses contained some particularly onerous provisions: — for instance, the creditor was unilaterally entitled to determine if default had occurred.

Harms JA made strong *obiter* remarks in *Bock and Others v Duburoro Investments (Pty) Ltd* indicating that he believed that *Findevco* was wrongly decided.[4] He drew attention to the distinction between summary-execution clauses where the hypothecated property remains in the possession of the debtor and such clauses where the creditor takes lawful possession of the property in terms of the contract. Harms JA pointed out that *parate executie* clauses are void in the former case and enforceable, subject to a condition, in the latter case.[5] The condition in the latter case is that clauses that impose obligations on the debtors that are too onerous are contrary to public policy: they are, therefore, not enforceable. Harms JA held that the common law had always rejected self-help, that the distinction drawn by the common law was aimed at prohibiting self-help and that the Constitutional Court in *Chief Lesapo* and *Land Agricultural Bank* was concerned with statutory exceptions to the norm. Those statutory exemptions permitted far more 'self-help' than the common law would tolerate.[6] *Findevco* was, therefore, wrongly decided.[7]

The Supreme Court of Appeal, in *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division*,[8] approved the following summary of the common-law position, set out by Hurt J in the court below:

[1] 2001 (1) SA 251 (E)('*Findevco*')(This case concerned the return day of a rule *nisi* on which the respondent was obliged to show cause why the applicant should not be entitled to take possession of its property and sell it as security in terms of the agreement.)
[2] Ibid at 256E–G.
[3] 2002 (4) SA 134F, 142 (T).
[4] 2004 (2) SA 242 (SCA)('*Bock*').
[5] Ibid at paras 7 and 14.
[6] Ibid at paras 14–15.
[7] Ibid at para 15.
[8] 2004 (5) SA 248 (SCA)('*Juglal*').

> In summary, the common law, insofar as stipulations for parate execution are concerned, is that stipulations, which are not so far-reaching as to be contrary to public policy, are valid and enforceable; that, as a matter of practice, creditors seeking to enforce such stipulations take the precaution of applying for judicial sanction before doing so; and that the debtor can avail himself of the court's assistance in order to protect himself against prejudice at the hands of the creditor.[1]

The Supreme Court of Appeal continued:

> To this I would add that the 'matter of practice' referred to is in fact a constitutional requirement: creditors not in possession are obliged to apply for judicial sanction. With that qualification, Hurt J's exposition seems to me to be a correct summary of the present state of the common law.[2]

It is important to note that *Juglal* was concerned with a perfection clause in respect of a notarial bond.

Van Zyl, a third Supreme Court of Appeal judgment on this subject, concerns a contract in terms of which the debtor ceded certain insurance policies to the creditor bank in a contract that entitled the bank to sell or keep the policies upon default by the debtor.[3] The Supreme Court of Appeal confirmed that *parate executie* clauses had been deemed acceptable in our law so long as their terms were not too onerous. The Supreme Court of Appeal provided two examples of terms too onerous: *(a)* terms that would entitle the creditor unilaterally to determine default; and *(b)* terms that would entitle the creditor to seize the debtor's property without the permission of the court.[4] The Supreme Court of Appeal in *Van Zyl* also approved the dicta in *Bock* and *Juglal* and, on the facts, held that the clauses in question did not authorize the creditor to determine whether default had occurred. Furthermore, the clauses did not purport to authorize the creditor bank to bypass the courts in a dispute regarding the validity of the cession agreements.[5]

Many of these judgments, including those of the Supreme Court of Appeal, draw an inadequate distinction between perfection clauses and summary execution clauses.[6] Many of the cases discussed above made wide-reaching comments about all forms of *parate executie* clauses despite the fact that they were concerned only with perfection clauses. We can see nothing constitutionally objectionable about perfection clauses. In terms of such clauses, if the debtor does not give permission to the creditor to perfect his right of security (at the time at which the creditor seeks to do so), the only way for a creditor to perfect his right of security is through the courts. To the extent, therefore, that the Supreme Court of Appeal rejected the categorical reasoning of the High Courts in regard to perfection clauses, it must be supported.

[1] *Juglal* (supra) at para 9.
[2] Ibid.
[3] *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA)('*Van Zyl*').
[4] Ibid at para 10.
[5] Ibid at paras 14–15.
[6] See S Cook & G Quixley 'Parate Executie Clauses: Is the Debate Dead' (2004) 112 *SALJ* 719, 728.

However, the really interesting constitutional question only seems to have been dealt with as part of the *ratio* of *Van Zyl*. *Van Zyl* engages the serious debate in the common law about the exact juridical definition of cessions *in securitatem debiti*.[1] For our purposes it is useful to see them as pledges of incorporeals. Therefore, *Van Zyl* dealt with the controversial aspect of the existing common law of *parate executie* clauses — the constitutionality of summary-execution clauses in which no court supervision is required. Although the High Court read the contract in such a way that there was no scope for the creditor unilaterally to determine default, it seems clear from the judgment that the contract allowed the creditor to sell the policies, once default had been established, *without a court order*.[2]

What, then, is the current position in regard to *parate executie* clauses? It seems that perfection clauses — which permit a creditor to take possession of movable property that is subject to a notarial bond, on the occurrence of events specified in the contract, provided that he obtains the debtor's permission or a court order — will be acceptable, so long as they do not contain unduly onerous terms. Furthermore, summary-execution clauses where the property remains in the possession of the debtor will only be acceptable if court supervision is required before the creditor may sell or deal with the hypothecated property. This reflects what has long been the common-law position. As far as summary-execution clauses in the case of pledges are concerned, the Supreme Court of Appeal is of the view that they are not per se inconsistent with FC s 34: the debtor must have the opportunity to approach a court to prevent prejudice and there must be no other unduly onerous clauses.

The crisp question then, is whether the Supreme Court of Appeal is correct in so far as summary-execution clauses in pledge agreements are concerned? Scott argues that summary-execution clauses in respect of pledges are constitutionally permissible. She accepts that the creditor and the debtor may not have equal bargaining positions but points out that the creditor is under no obligation to provide credit and the debtor is not compelled to seek it.[3] Furthermore, she points out that there will be greater costs involved for the creditor if he constantly has to approach the courts to oversee the process. Most importantly, she contends that, in terms of the common law, the pledgee is treated as a representative of the pledgor. He will therefore be bound by all the general duties of a representative.[4] Scott asks: 'if a person is willing to part with his/her property voluntarily to secure a debt, why should that person not be allowed to authorize the creditor to sell the property without recourse to the courts, should the debtor be in default?'[5]

[1] See Joubert (ed) *Law of South Africa* vol 17 at para 526 n5 (Additional authorities cited there.)
[2] See *Van Zyl* (supra) at para 8.
[3] Scott (supra) at 663.
[4] Ibid at 663.
[5] Ibid.

On the other hand, Cook and Quixley argue that much of the emphasis in *Bock*, in holding that *parate executie* clauses in the case of pledge will generally be acceptable, was on the fact that, since the property is already in the possession of the creditor in the case of pledge, there can be no question of self-help because there is no 'seizing' of the property.[1] However, Cook and Quixley correctly note that the selling of the pledged property without court supervision could ultimately amount to self help.[2] As a result, the fact that the debtor may approach a court in the case of alleged prejudicial conduct by the creditor may not cure the unconstitutional defect of such clauses.[3]

It is our view that a case-specific approach is vital in this context. Scott, Cook and Quixley all make the point that pledges are important commercial instruments. It would be unfortunate if an unduly rigid approach to their constitutionality were adopted by the courts. Such rigidity could have a chilling effect on the conclusion of these agreements. There is no doubt, however, that the constitutional enquiry cannot turn solely on the question whether the creditor is able to 'seize' the property. Self-help can also take the form of the creditor selling the property without supervision, even if the initial transfer of property (in terms of the pledge) occurs with the approval of the debtor. Context is all important. It seems that, where the parties to the contract are both powerful companies, the protection offered by the right of the debtor to approach the court in the case of prejudice ought to be sufficient to protect its interests. On the other hand, where the debtor is in a weak financial and social position, such that he may not be fully aware of his rights or may not have the resources to seek out the protection of the courts, it may be that it would be contrary to public policy (as informed by FC s 34) to allow a summary-execution clause. As will be discussed immediately below, the preferred approach of the Constitutional Court,[4] when considering the validity of contracts, is to see the clauses of the contract through the prism of the 'public-policy test' as informed by the Bill of Rights. This case-sensitive approach eschews the articulation of broad rules. A case-by-case approach is more likely to ensure that only those summary-execution clauses that operate unfairly in the circumstances will be set aside.

(ii) *Prescription*

In terms of the Prescription Act,[5] the standard period after which a civil debt prescribes is three years.[6] The Prescription Act itself creates exceptions,[7] but the

[1] Cook & Quixley (supra) at 726.
[2] Ibid at 726–727.
[3] Ibid at 726.
[4] See *Barkhuizen v Napier* 2001 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC).
[5] Act 68 of 1969.
[6] Section 11*(d)* read with s 10(1).
[7] See s 11 of the Act. An example is a debt secured by mortgage bond, which prescribes after only 30 years.

starting point is three years. *Mohlomi v Minister of Defence* was the first matter before the Constitutional Court in which an attempt by the legislature to shorten the period of prescription was challenged as a violation of FC s 34.[1]

The provision under attack was section 113(1) of the Defence Act.[2] Section 113(1) provided a six-month prescription of claims against the state and a requirement of notice at least one month before the commencement of an action against the state.[3] In *Mohlomi*, both aspects of this provision were challenged in terms of IC s 22 (FC s 34's precursor).

An important aspect of the scheme created by the Prescription Act is that prescription only begins to run once the creditor has knowledge of the debt due to him.[4] Although the Act speaks in terms of 'debts', 'creditors' and 'debtors', these rules apply to all claims. The basic rule is that prescription only begins to run where the plaintiff or applicant has knowledge (or reasonably ought to have had knowledge) of the existence of the cause of action, the identity of the debtor and the facts from which the debt arises.[5] One of the particularly harsh aspects of s 113(1) of the Defence Act, as interpreted by the courts, was that these rules of the Prescription Act did not apply to it. As a result, the six-month period was deemed a bar to the institution of an action against the state, regardless of whether the plaintiff had knowledge of his right to proceed within the six-month period or the facts necessary to proceed.[6]

In finding that the provision violated IC s 22, Didcott J held that the inflexible requirements of the section

> must be viewed against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons. The severity of s 113(1) which then becomes conspicuous has the effect, in my opinion, that many of the claimants whom it hits are not afforded an adequate and fair opportunity to seek judicial redress for wrongs allegedly done

[1] 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC).
[2] Act 44 of 1957. This Defence Act has almost entirely been replaced by the Defence Act 42 of 2002.
[3] Section 113 reads as follows:
No civil action shall be capable of being instituted against the State or any person in respect of anything done or omitted to be done in pursuance of this Act, if a period of six months . . . has elapsed since the date on which the cause of action arose, and notice in writing of any such civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof.
[4] Prescription Act 68 of 1969 s 12.
[5] Prescription Act s 12(3). See also *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906, 909A–B (N).
[6] *Pizani v Minister of Defence* 1987 (4) SA 592, 602D–G (A).

> to them. They are left with too short a time within which to give the requisite notices in the first place and to sue in the second. Their rights in terms of section 22 are thus, I believe, infringed.[1]

These remarks were made in the context of a test established by the court to determine whether a truncated prescription period violated the right of access to court. Didcott J held that it is not desirable for litigation to be drawn out forever and for cases to be determined long after the cause of action arose. It was therefore desirable for the legislature to fix a cut-off for the institution of litigation.[2] However, not all time-periods would be acceptable and the challenge in *Mohlomi* was to provide a test in terms of which to approach this matter. Didcott J explained that the dilemma with time-periods stems from the fact that any time period may operate to exclude, completely, the right of a plaintiff to obtain redress. Even a seven-year period of prescription could bar litigants from pursuing their actions. The court in *Mohlomi* chose not to adopt an approach in terms of which all prescription periods constitute limitations of the right of access to court, which must be justified, if possible, in terms of the limitation clause. Rather, the court in *Mohlomi* held as follows:

> What counts rather, I believe, is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right. For the consistency of the limitation with the right depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances characterising the class of case in question, to a real and fair one. The test, thus formulated, lends itself to no hard and fast rule which shows us where to draw the line. In anybody's book, I suppose, seven years would be a period more than ample during which to set proceedings in motion, but seven days a preposterously short time. Both extremes are obviously hypothetical. But I postulate them in order to illustrate that the enquiry turns wholly on estimations of degree.[3]

With respect to s 113(1) of the Defence Act, the particular circumstances prevailing in South Africa suggested that the six-month time frame was too short a period in which to exercise the right. The time-period limited the right of access to courts and analysis in terms of the limitation clause would be necessary to determine the provision's constitutionality.

The premise of the shortened period established by s 113(1) is that the state is beset by logistical obstacles which require shortened periods of time to apply in litigation initiated against it.[4] The Law Commission had rejected this argument in a detailed survey of prescription periods that it had conducted in the 1980s.[5]

[1] *Mohlomi* (supra) at para 14.
[2] Ibid at para 11.
[3] Ibid at para 12.
[4] Ibid at para 16.
[5] *Investigation into Time Limits for the Institution of Actions against the State* Project 42 (October 1985).

It had recommended scrapping these truncated prescription periods altogether. It favoured the ordinary rules applicable in the Prescription Act coupled with a notification period applicable only to actions against the state. Didcott J did not go so far as to endorse entirely these recommendations and, instead, referred to a provision recently enacted by the legislature in the new Police Act.[1] In that provision, the period in which actions concerning the police had to be brought was 12 months. In addition, the Police Act contained an equivalent provision to that in the Prescription Act: the provision delays the running of prescription 'until the date upon which the claimant became aware of the alleged act or omission, or after the date upon which the claimant might be reasonably expected to have become aware of the alleged act or omission, whichever is the earlier date.'[2] Furthermore, courts were given a discretion to dispense with the 12-month period if in the interests of justice.[3]

As part of his limitation analysis, Didcott J, unsurprisingly, left open the question of the constitutionality of the new provision in the SAPS Act. However, he pointed out that the difficulties facing the police were, if anything, greater than those facing the defence force and the legislature had been satisfied that the 12-month period would be adequate to protect the state's interests.[4] In particular,

> [t]he contrasts between section 113(1) and section 57 are striking. The time allowed by the latter for the start of any action, and accordingly for the prior notification of its imminence, is twice as long as that fixed by the former. The period begins to run not from the date when the cause of action arises, an occurrence of which a claimant may well be unaware at the time, but from the date when both the conduct in question and the identity of its perpetrator becomes or should reasonably become known to him or her. Ignorance of that second fact, more common perhaps than of the first, is easily illustrated. One thinks, for instance, of a hit and run collision caused by an unidentified motorist or an assault committed by somebody clad in battle dress of the sort worn by soldiers and the police alike which no civilian witness to the incident can tell apart. Then, in empowering the court to condone non-compliance with its requirements, section 57 permits account to be taken of the claimant's fault or the lack of that and the prejudice suffered by the state or its absence, factors that are wholly irrelevant to the operation of section 113(1). While paying due attention to the state's interests, section 57 is consequently much less stringent and detrimental to the interests of claimants than section 113(1).[5]

Section 113(1) was therefore deemed an unjustifiable limitation on the right of

[1] South African Police Service Act 68 of 1995 ('SAPS Act').
[2] SAPS Act s 57.
[3] SAPS Act s 57(5).
[4] *Mohlomi* (supra) at para 18.
[5] Ibid at para 19.

access to court and was found unconstitutional.[1] Although the Court did not say much about the notice period – other than to question why the state adopted an inflexible attitude requiring compliance in all cases – it too was set aside, since the whole of the provision was declared unconstitutional.[2]

Mohlomi concerned two mechanisms that differ slightly. Notice periods do not seek to determine, directly, the period of prescription of the claim. However, they serve as a condition precedent to the institution of actions. If the notice period is not complied with, the litigation may not proceed and the practical effect is as if the debt has prescribed: although again, the two periods are not legally equivalent. The second mechanism that, in fact, attracted the bulk of the court's attention was the actual prescription provision.[3]

In *Moise v Transitional Local Council of Greater Germiston*, the court was concerned with a 90-day notice period applicable to proceedings against local governments.[4] The independent two-year prescription period that was also applicable was not considered by the Court. It did, however, see the need to consider the notice period within the context of the whole procedure adopted by the relevant statute: the Limitation of Legal Proceedings (Provincial and Local Authorities) Act.[5] The provision, s 2, had the following attributes: notification of an intention to institute legal proceedings against the government entity had to be given within 90 days of the debt arising. The debt was deemed to have arisen once the creditor had knowledge of the identity of the debtor and of the facts giving rise to the debt. Furthermore, once notice had been given, the claimant was barred from proceeding with the action for another 90 days and the debt was deemed to prescribe after 24 months. Another noteworthy feature of the statutory scheme was that the Act gave a claimant the right to approach a court to serve the notice after the expiration of the 90 days, which permission the court could grant if it was satisfied: *(a)* that there was no prejudice to the debtor; or *(b)* that special circumstances prevented the claimant from reasonably sending the notice within 90 days.

It is clear, therefore, that the provision was less harsh than the one impugned in *Mohlomi*. In particular, the power of the court to condone non-compliance, as

[1] After *Mohlomi*, a High Court struck down s 32(1) of the Police Act of 1958. Section 32 was substantially similar to the provision struck down in *Mohlomi*. See *Baldeo v Minister of Safety and Security for the Republic of South Africa* 1997 (12) BCLR 1728 (D). Although, by the time of the decision in the High Court, this provision had been replaced by SAPS Act s 57, the repealed Act was applicable because of the date on which the action was instituted. Despite the fact that the case was heard in terms of the Interim Constitution, the parties agreed, in terms of IC s 101(6), that the court had jurisdiction to determine the provision's constitutionality.

[2] *Mohlomi* (supra) at para 26.

[3] There are a number of statutory provisions that impose limitations on the institution of civil proceedings in the form of notice requirements or prescription periods. See I Farlam et al *Erasmus's Superior Court Practice* (Service 27, 2007) E7-1–E7-36.

[4] 2001 (4) SA 1288 (CC), 2001 (8) BCLR 765 (CC)('*Moise*').

[5] Act 94 of 1970. This Act has since been repealed and replaced by the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. This Act seeks to standardize the period of prescription applicable to litigation against organs of state.

well as the fact that the 90 days only began to run when the claimant had knowledge of the relevant facts, gave the provision a measure of flexibility that did not apply to the provision in *Mohlomi*. Nevertheless, the Court still struck it down as an unjustifiable limitation on the right of access to court. The limitation analysis turned on the failure of the state to justify the measure adequately. Of interest to this chapter is the analysis in respect of the content of FC s 34.

The Court in *Moise* held that the provision provided a very short period of time in which to issue the notice.[1] Furthermore, the condonation possibility did not remove the obstacle that the notice-period presented to access to court:

> The obstacle remains regardless of this potential amelioration of its harshness. This is particularly so if one takes into account that many potential litigants (arguably the majority) are poor, sometimes illiterate and lack the resources to initiate legal proceedings within a short period of time. Many are not even aware of their rights and it takes time for them to obtain legal advice. Some come by such advice only fortuitously. For them a mere 90 days from the commission of the delict within which to serve formal notice on the debtor*(s)* is, in the words of Didcott J in *Mohlomi*, not a 'real and fair' 'initial opportunity' to approach the courts for relief.[2]

In particular, the Court in *Moise* emphasized that condonation was not there for the asking and that the considerations justifying condonation were clearly circumscribed.[3] The Court therefore concluded that the provision unjustifiably limited the right of access to court.[4]

A 90-day notice period in terms of the Mental Health Act,[5] similar to the one considered in *Moise*,[6] was also declared invalid by the Constitutional Court.[7] In *Potgieter* the Court held that, in the light of its judgments in *Moise* and *Mohlomi*, the 90-day period did not give litigants a fair or adequate opportunity to institute litigation.[8] The Court held that the time-limit was particularly outrageous and drastic given the class of person to whom it would apply.[9] No attempt was made by the respondents to justify the measure and it was declared unconstitutional.[10]

[1] *Moise* (supra) at para 13.
[2] Ibid at para 14.
[3] Ibid at para 15.
[4] Ibid at para 16.
[5] Act 18 of 1973.
[6] The provision, s 68(4) of the Act, reads:
No such proceedings shall be commenced after the expiry of three months after the act complained of, or, in the case of a continuance of the cause of action, after the expiry of three months with effect from the termination thereof: Provided that in estimating the said period of three months so limited for the commencement of proceedings, no account shall be taken of any time or times during which the person wronged was lawfully under detention as a mentally ill person or was ignorant of the facts which constitute the cause of action.
[7] *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering, Gauteng en Andere* 2001 (11) BCLR 1175 (CC).
[8] Ibid at para 7.
[9] Ibid.
[10] Ibid.

Recently, in *Engelbrecht v Road Accident Fund and Another*,[1] the Constitutional Court struck down regulation 2(1)(*c*) of the regulations made in terms of the Road Accident Fund Act.[2] The RAF Act established the Road Accident Fund (RAF), the purpose of which is to compensate those who have been injured as a result of the driving of a vehicle. Section 17(1)(*b*) of the RAF Act provides for compensation for bodily injuries to victims of so-called hit and run accidents where the identity of the driver or owner of the offending vehicle has not been established. Regulation 2(1)(*c*) provided that the RAF will not be liable to compensate a person in terms of s 17(1)(*b*) of the RAF Act unless the victim 'submitted, if reasonably possible, within 14 days after being in a position to do so, an affidavit to the police in which particulars of the occurrence concerned were fully set out'.

The Court in *Engelbrecht* held that it was unnecessary to approach the matter, as it had done in *Mohlomi*, against the background of the state of affairs prevailing in South Africa. The period of 14 days, especially in the light of the fact that a 6-month period had been struck down in *Mohlomi*, was simply too short.[3] What the *Engelbrecht* Court seems to have been saying is this: in *Mohlomi*, the focus was on the fact that there are particular difficulties facing members of South African society which make a 6-month prescription period unreasonable. In any society, 14 days would be too short and it was therefore unnecessary to rely upon the particular difficulties facing South Africa in reaching its conclusion.

Relatively soon before this matter arose, the Supreme Court of Appeal had handed down judgment in *Road Accident Fund v Makwetlane* and had upheld the constitutionality of reg 2(1)(*c*).[4] The Supreme Court of Appeal in *Makwetlane*, in a split decision, rejected the argument based on FC s 34. The majority was of the view that a victim of a hit and run accident has no action at common law and there is therefore no cause of action that is limited by the time frame imposed by reg 2(1)(*c*).[5] Without a justiciable claim, there can be no application of FC s 34.

The Constitutional Court rejected this reasoning in *Engelbrecht*. Kondile AJ held, for a unanimous court, that a victim of a hit and run accident has a common-law right to compensation. The capacity to recover damages pursuant to a hit and run claim was another matter, but the lack of good prospects of

[1] 2007 (5) BCLR 457 (CC)('*Engelbrecht*'). The discussion of this case draws heavily from K Hofmeyr & A Friedman 'Constitutional Law' (2007) January-March *Juta's Quarterly Review of South African Law*. We are grateful to Kate Hofmeyr for giving us permission to use this work and for her invaluable input in formulating our analysis.

[2] Act 56 of 1996 ('RAF Act').

[3] *Engelbrecht* (supra) at para 31.

[4] 2005 (4) SA 51 (SCA)('*Makwetlane*'). For a discussion of this case, and the related line of cases, see C Ala 'Submission of an Affidavit to the Police as a Prerequisite for Liability in Unidentified Vehicle Accident Claims: *Road Accident Fund v Thugwana* and *Road Accident Fund v Makwetlane*' (2006) 123 *SALJ* 573.

[5] *Makwetlane* (supra) at para 17.

success does not affect the existence of the common-law right. In any case, knowing the identity of the defendant is not a guarantee to recovery, which is why the legislature enacted the RAF Act and its predecessors in the first place.[1] The Court held that a victim of a hit and run claim has a common-law right to compensation that has been enhanced by the legislature with a view to giving the greatest possible protection to those who have suffered loss as a consequence of negligent driving. FC s 34 therefore had application to this matter and the applicant was entitled to rely on it.[2]

The Constitutional Court has, until recently, only been called upon to consider the constitutionality of time-based bars to the institution of claims arising from statute. In *Barkhuizen*, the Court, in a split decision, upheld a clause in an insurance policy that excluded insured parties from instituting legal proceedings against the insurer if not instituted within 90 days of the insurer repudiating liability in terms of the insurance contract.

The case is of interest because of the majority's and the minority's reasoning on the correct approach to determining the constitutionality of clauses in contracts. That issue falls beyond the scope of this chapter and we confine ourselves to a consideration of the Court's reasoning in regard to FC s 34. The Court's conclusion in regard to the correct approach to considering contractual clauses is relevant in one respect: the Court held that it was preferable to consider FC s 34 in the context of the question whether the clause was contrary to public policy, rather than applying FC s 34 directly to the clause.[3]

Ngcobo J, for the majority, referred to the fact, highlighted in *Mohlomi*, that time bars to the institution of actions serve an important purpose: in essence, ensuring that litigation is brought within a reasonable time, while evidence is still available, to prevent prolonged uncertainty. Ngcobo J held that there was no reason in logic or in principle to conclude that public policy would not tolerate time-limitation clauses subject to reasonableness and fairness.[4] Furthermore, the Final Constitution envisages that the right of access to court may be limited in terms of a law of general application where reasonable and justifiable. This too, according to Ngcobo J, reflected public policy.[5]

Ngcobo J held that there was no material difference between the *Mohlomi* test applicable in direct challenges based on FC s 34 and the public-policy approach adopted in *Barkhuizen*. In terms of *Mohlomi*, a time-limitation clause would limit the right of access to court if it did not give a litigant an adequate and fair

[1] *Engelbrecht* (supra) at para 20.
[2] Ibid at paras 23–4.
[3] *Barkhuizen* (supra) at para 30. Langa CJ dissented on this point, holding that FC s 34 may indeed be directly applicable to contractual clauses. Ibid at para 186. For a critique of the Court's method of analyzing such contractual claims in terms of 'indirect application' see S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *SALJ* 742.
[4] Ibid at para 48.
[5] Ibid.

opportunity to obtain redress. Similarly, it would be contrary to public policy to enforce a term of a contract that does not allow the person bound by it an adequate and fair opportunity to seek judicial redress.[1]

An interesting part of Ngcobo J's judgment is that it took one step further the debate between the Supreme Court of Appeal and the Constitutional Court on the scope of the right in FC s 34. In *Engelbrecht/Makwetlane*, the Supreme Court of Appeal found FC s 34 to be applicable only to claims that already exist. If a person has a pre-existing claim in terms of some or other law and the legislature seeks to limit the scope for prosecuting the claim by shortening the time within which to institute action, then FC s 34 becomes applicable and the question then is whether it has unjustifiably been limited. Where, however, the legislature creates the right for the first time but, at the same time, imposes a time limit on the exercise of the right, there can be no application of FC s 34 — the premise being that the legislature is free to impose conditions upon the exercise of a right which, but for the largesse of the legislature, would not have come into existence. In *Engelbrecht*, the Constitutional Court rejected this conclusion by holding that, in fact, a hit and run victim has a common-law claim and the fact whether such a person would ultimately be successful in obtaining redress does not affect this conclusion. In *Barkhuizen*, Ngcobo J went a step further:

> [T]here is a conceptual difference between a statute which introduces a limitation on the period within which a pre-existing right may be prosecuted and a contract which establishes rights and time periods within which those rights must be prosecuted. That conceptual difference, however, cannot have the consequence suggested by the Supreme Court of Appeal. Such a consequence would undermine the importance of the right of access to courts. In each case, of course, the question will be whether the contract contains a time limitation clause which affords a contracting party an adequate and fair opportunity to have disputes arising from the contract resolved by a court of law. In approaching this question, a court will bear in mind the need to recognise freedom of contract but the court will not let blind reliance on the principle of freedom of contract override the need to ensure that contracting parties must have access to courts.[2]

Ngcobo J held that, when considering whether the time-period imposed by a contract is fair, there are two questions: *(a)* is the time-clause itself unreasonable; *(b)* if not, is it nevertheless unenforceable in the light of the circumstances which caused non-compliance?[3] As far as the first question is concerned, a balancing between two interests is required to determine whether the term is unreasonable: on the one hand, there is a public interest in parties complying with terms to which they have agreed and, on the other hand, all individuals have a right to obtain judicial redress.[4] Once the clause, in the light of this test just described, is

[1] *Barkhuizen* (supra) at para 51.
[2] Ibid at para 55.
[3] Ibid at para 56.
[4] Ibid at para 57.

held to be reasonable, the party seeking to escape its consequences has a second opportunity to prevail: he may demonstrate that although the clause ordinarily is reasonable, it would be unreasonable in the light of the particular circumstances to enforce it. The onus would be on the party seeking to escape its consequences to demonstrate that it would be unreasonable to enforce the clause.[1] It seems that, when considering the first question, the main focus is on whether the clause is manifestly unreasonable in the light of the approach established in *Mohlomi*. When considering the second question, the focus seems mainly to be on the circumstances in which the contract was concluded: in particular, the relative bargaining positions of the parties. However, the court will also consider whether factors beyond the control of the party seeking to escape the clause prevented him from complying with its time frame.

The time bar in *Mohlomi* operated inflexibly: regardless of whether the plaintiff had sufficient knowledge to institute his action or not. In *Barkhuizen*, the Court pointed out that the 90-day period began to run only once the insured had full knowledge of his claim and had submitted his claim to the insurer. Such a time bar was not manifestly unreasonable.[2] As far as the second question was concerned the Court held that, although there may often be circumstances in South Africa in which contracts of this nature are signed as a consequence of the unequal bargaining power of the parties, there was nothing on the evidence to suggest that the parties were unequal in this matter. Therefore, there was nothing contrary to public policy about the clause.[3] In addition to considering the bargaining power of the parties, the Court also considered whether there were any good reasons why the applicant had been unable to comply with the time clause: the Court again pointed out that it would be contrary to public policy to enforce compliance with a time bar where non-compliance was a product of factors beyond the insured's control. In this case, the insured failed to plead facts explaining why he did not or could not have complied with the clause.[4]

Moseneke DCJ and Sachs J dissented in separate judgments.[5] Both disagreed with the focus in Ngcobo J's judgment on the personal circumstances of the person seeking to avoid the consequences of the time bar. They both preferred objective enquiries. And, indeed, both justices found that the particular clause in issue was contrary to public policy. Moseneke DCJ's preferred approach was to examine the time bar in the context of the contract as a whole to see whether it unreasonably limits the right to judicial redress.[6] This objective enquiry focuses

[1] *Barkhuizen* (supra) at para 58.
[2] Ibid at paras 62–63.
[3] Ibid at para 66.
[4] Ibid at para 84.
[5] Mokgoro J concurred in the judgment of Moseneke DCJ. Although the unpublished version of the judgment posted on the internet reflects Mokgoro J's concurrence after the judgment of O'Regan J, and not Moseneke DCJ, the text reflects that she concurred in Moseneke DCJ's judgment.
[6] *Barkhuizen* (supra) at paras 96 and 97.

on the terms of the contract and is unrelated to the personal circumstances of the applicant.[1] Sachs J noted that the time period established in the contract was less than

> ten per cent of that in respect of which either an ordinary contractual claim, or else a claim against the Road Accident Fund, would prescribe; has the effect of significantly limiting a right to have a dispute settled by a court, a right long recognised by the common law and now guaranteed as a fundamental right by the Constitution; is not subject to express qualifications in case of impossibility or difficulty of compliance, nor apparently permissive of condonation where considerations of justice would require that its harshness be tempered by prolongation of the time; [and] when invoked does not simply limit or qualify the insurance claim, but wipes the claim out altogether, enabling the insurer to keep the premium, while the insured loses the right to find out if he or she should in fact have been paid for the damage done to his car.[2]

Section 12 of the Prescription Act deals with the question when prescription begins to run. Section 12(3) provides that '[a] debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.' Section 5(1)*(c)* of the previous Prescription Act[3] contained a similar provision. In *Van Zijl v Hoogenhout*, the Supreme Court of Appeal considered the question whether a claim for damages arising from sexual abuse allegedly perpetrated between 1958 and 1967, where the victim had attained majority in 1973 and instituted action in 1999, had prescribed.[4] The claim would have prescribed within three years of the complainant reaching the age of majority, unless s 5(1)*(c)* of the 1943 Prescription Act was applicable. The potential application of s 5(1)*(c)* arose from the fact that the evidence was that it may take many years before victims of sexual abuse are able to see their assailant, as opposed to themselves, as being to blame.[5]

The *Van Zijl* court ultimately found that there was sufficient evidence to suggest that the appellant had only come to realize that the defendant was responsible for her abuse in 1997 and that the defendant had failed, therefore, to discharge the onus of proving the special plea of prescription. Although the court did not deal in detail with FC s 34, it did, as part of its reasoning, point out that 'the plaintiff is entitled to the benefits of a constitutional dispensation that promotes, rather than inhibits, access to courts of law.'[6]

[1] *Barkhuizen* (supra) at para 96.
[2] Ibid at para 183.
[3] Act 18 of 1943.
[4] 2005 (2) SA 93 (SCA).
[5] Ibid at paras 10–14.
[6] Ibid at para 7.

In *Ditedu v Tayob*, the High Court referred to the above dictum of the Supreme Court of Appeal and applied similar reasoning to s 12(3) of the current Prescription Act.[1] In so doing, the High Court held that a plaintiff's claim based on the negligence of her attorney only arose when she consulted another attorney and not when the negligent conduct actually took place. The defendant's negligent conduct was a 'fact', as envisaged in s 12(3), which would only come to the attention of a layperson upon receiving adequate advice from another lawyer.[2]

These cases demonstrate that FC s 34 is not only of relevance when considering whether legislation unreasonably truncates the period in which a plaintiff may claim. It also speaks directly to the question whether prescription has begun to run in the first place.

(iii) *Res judicata*

The special plea of *res judicata* arises from the common-law. In essence, it concerns a situation where the subject-matter of a dispute between the parties has already been determined previously by a court. If the requirements of the special plea are met, then the defendant who raises it will succeed in having the plaintiff's claim dismissed without engaging the merits. Furthermore, since this plea is not merely dilatory, raising it successfully should result in a final judgment in favour of the defendant. It is clear, therefore, how the doctrine could serve to limit a plaintiff's right of access to court. The constitutionality of the doctrine has not been considered in detail. In the one case in which it was considered,[3] the High Court, acknowledging that it was required to develop the common law in the light of the Final Constitution, used FC s 34 (and IC s 22)[4] to inform its understanding of the elements of the special plea. The High Court was concerned with the exact requirements of the special plea and, having considered the authorities in detail, held that the elements were that the previous judgment was given by a competent court and (1) was between the same parties, (2) was based on the same cause of action and (3) was with respect to the same subject matter, or thing.[5] The High Court then continued, somewhat cryptically, that

> [t]he subject matter claimed in the two relevant actions does not necessarily and in all circumstances have to be the same. However where there is a likelihood of a litigant being denied access to the courts in a second action, and to prevent injustice it is necessary that the said essentials of the threefold test be applied. Conversely in order to ensure overall fairness (2) or (3) above may be relaxed.[6]

[1] 2006 (2) SA 176 (W).
[2] Ibid at paras 9–12.
[3] *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (B), 1998 (11) BCLR 1373 (B)('*Bafokeng*').
[4] The court held that, for the purposes of the case, there was no material difference between the provisions of IC s 22 and FC s 34. *Bafokeng* (supra) at 1417.
[5] Ibid at 1419.
[6] Ibid.

It did, however, continue to point out that

> [a] court must have regard to the object of the *exceptio res judicata* that it was introduced with the endeavour of putting a limit to needless litigation, and in order to prevent the recapitulation of the same thing in dispute in diverse actions, with the concomitant deleterious effect of conflicting and contradictory decisions. This principle must be carefully delineated and demarcated in order to prevent hardship and actual injustice to parties.[1]

(iv) *Procedural rules*

O'Regan J, in *Giddey*, recently said the following:

> [F]or courts to function fairly, they must have rules that regulate their proceedings. Those rules will often require parties to take certain steps on pain of being prevented from proceeding with a claim or defence. A common example is the rule regulating the notice of bar in terms of which defendants may be called upon to lodge their plea within a certain time failing which they will lose the right to raise their defence. Many of the rules of court require compliance with fixed time limits, and a failure to observe those time limits may result, in the absence of good cause shown, in a plaintiff or defendant being prevented from pursuing their claim or defence. Of course, all these rules must be compliant with the Constitution. To the extent that they do constitute a limitation on a right of access to court, that limitation must be justifiable in terms of section 36 of the Constitution. If the limitation caused by the rule is justifiable, then as long as the rules are properly applied, there can be no cause for constitutional complaint. The rules may well contemplate that at times the right of access to court will be limited. A challenge to the legitimacy of that effect, however, would require a challenge to the rule itself. In the absence of such a challenge, a litigant's only complaint can be that the rule was not properly applied by the court. Very often the interpretation and application of the rule will require consideration of the provisions of the Constitution, as section 39(2) of the Constitution instructs. A court that fails to adequately consider the relevant constitutional provisions will not have properly applied the rules at all.[2]

The Constitutional Court seems to be saying that two important things must be kept in mind when considering the correct approach to the application of FC s 34 to procedural rules. First, as O'Regan J has made clear, the procedural rules are aimed at enhancing the fairness of proceedings and so the underlying rationale for the entire panoply of procedural rules is congruent with one of the aims of FC s 34.[3] This congruence will often make it easier to justify limiting a particular litigant's right of access in order to enhance access for all. Secondly, it is not just by way of direct challenge that the Final Constitution becomes relevant. There is much scope, within the rules, for the application of FC s 39(2). In

[1] *Bafokeng* (supra) at 1419.

[2] *Giddey NO v JC Barnard and Partners* 2007 (2) BCLR 125 (CC)('*Giddey*') at para 16.

[3] See also *Hekpoort Environmental Preservation Society and Another v Minister of Land Affairs and Others* 1998 (1) SA 349 (CC), 1997 (11) BCLR 1537 (CC) at para 8 (The Constitutional Court held that 'even the most public spirited of litigants cannot simply ignore those procedural rules which are designed to regulate the fair and orderly dispatch of Court business and the protection of the rights of all.')

particular, whenever a discretion may be exercised by a court (for example, in respect of costs), this discretion must be exercised in a way that promotes the spirit, purport and object of the Bill of Rights. FC s 39(2)'s obligation will require courts, when exercising a discretion that may have implications for a litigant's access to court, to bear the provisions of FC s 34 in mind.[1] Of course, since FC s 36 is also part of the Bill of Rights, it may be necessary to build the possibility of limitation into any exercise of a discretion.[2]

Eke v Sugden offers just such an example of a case in which FC s 34 was read with FC s 39(2) to interpret a particular rule in the spirit of the Bill of Rights: *Eke* concerned rule 10 of the Magistrates' Courts Rules.[3] Rule 10 provides that '[i]f summons in an action be not served within 12 months of the date of its issue or, having been served, the plaintiff has not within that time after service taken further steps in the prosecution of the action, the summons shall lapse.' The High Court held that the phrase 'further steps in the prosecution of the action', the meaning of which was undefined and in dispute, had to be interpreted in such a way as to impose the least possible restriction on litigants' right of access to courts.[4] Any act performed by a litigant that would advance the proceedings nearer to completion would evince his intention of pursuing the matter further, and would qualify as a further step as envisaged by rule 10.[5] This approach led the High Court to conclude that the furnishing of security for costs constituted a further step in terms of rule 10.[6]

It is a rule of the common law that review proceedings must be instituted within a reasonable time. If such proceedings are instituted within an unreasonable period of time, the presiding officer may nevertheless, in the exercise of a discretion, condone the delay and allow the review to proceed. It is now axiomatic that this discretion must be exercised in the light of FC s 34. In *Bellocchio Trust Trustees v Engelbrecht NO and Another*,[7] however, the applicant challenged the constitutionality of the common-law rule and argued that it prevented his access to court. Hlophe JP rejected this view. He held that the rule does not limit the right of access to court and that, even if it did, it is reasonable and justifiable. Hlophe JP stated that the applicant's argument would enable an applicant to institute unreasonably delayed review proceedings even if such delay would cause undue prejudice to the respondent. Furthermore, litigation would never be finalized.[8] Neither of these consequences could have been envisaged by the drafters of FC s 34.[9] The existence of the discretion, and the fact that the judge considers

[1] *Giddey* (supra) at para 18.
[2] See *Barkhuizen* (supra) at para 48.
[3] 2001 (2) SA 216 (E)('*Sugden*').
[4] Ibid at 221E.
[5] Ibid at 221F.
[6] Ibid at 222C.
[7] 2002 (3) SA 519 (C)('*Bellocchio*').
[8] Ibid at 523E–G.
[9] Ibid at 523H.

all relevant circumstances before refusing to allow the review to proceed, meant that the right of access to court was merely regulated, not prohibited.[1]

Rule 35 of the Uniform Rules deals with discovery. In terms of the rule parties involved in a trial provide copies of relevant documents by deposing to a discovery affidavit explaining the relevance of the documents in question and detailing which documents are to be provided to the other party. If a party is of the view that the other party is withholding relevant documents from him, then he has the onus of proving that there are relevant documents in the latter party's possession that are not being disclosed. Although access to all relevant documentation is a component of a fair civil trial, the fact that the onus is on the party seeking the additional documents does not violate FC s 34.[2] Notwithstanding the incidence of the onus, rule 35 is a vehicle that enables litigants to gain access to the documentation that is of relevance.[3]

Although not decided on the basis of FC s 34, *Jaftha v Schoeman; Van Rooyen v Stoltz* provides an example of a case in which the procedural rules of the Magistrates' Courts did not adequately protect the right of access to court.[4] The two applicants were unemployed women, with few assets, living in Prince Albert. Both women faced the threat of losing their homes in sales in execution for trifling debts. In a successful constitutional challenge to the relevant provision of the Magistrates' Courts Act,[5] the Constitutional Court held, relying on the right to housing in FC s 26, that the failure to provide judicial oversight over sales in execution against immovable property of judgment debtors in s 66(1)*(a)* of the Magistrates' Courts Act was unconstitutional. To remedy the defect, the Constitutional Court read words into the Act which had the effect of imposing judicial supervision on execution against immovable property.[6]

FC s 34 has also underwritten a more lenient approach to the substitution of parties where the plaintiff has incorrectly cited the wrong defendant. Substitution will be allowed

> unless the application to amend is *mala fide* or unless the amendment would cause such injustice or prejudice to the other side as cannot be compensated by an order for costs and, where appropriate, a postponement. A mere erroneous description of the defendant will be condoned. Even the citing of the wrong defendant will be condoned, where there is no prejudice.[7]

[1] *Bellocchio* (supra) at 523J–524C.
[2] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279, 320A–E (T).
[3] Ibid.
[4] 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC)('*Jaftha*').
[5] Act 32 of 1944.
[6] *Jaftha* (supra) at para 67.
[7] *Airconditioning Design & Development (Pty) Ltd v Minister of Public Works, Gauteng Province* 2005 (4) SA 103 (T) at para 11 ('*Airconditioning Design*').

A categorical denial of substitution where there is no prejudice would be incompatible with the right of access to courts.[1]

An example of a procedural rule that has the potential to limit litigants' access to court is contained in s 25(1) of the Supreme Court Act. That section provides that if a litigant wishes to sue a judge of the superior courts in any civil action he requires the leave of the court in which the action is brought.[2] This rule has been upheld along the same lines as the rules relating to vexatious litigants.[3] In *Soller*, Ngoepe JP pointed out that the rule serves a vital purpose: the independence of the judiciary, and the capacity of judges to perform their tasks fearlessly, would be severely hampered if judges were routinely required to face litigation as a consequence of their decisions.[4] The rule also ensured that judges would not spend more time on defending litigation than performing their function.[5] Important considerations leading to the conclusion that the rule is justifiable were that: first, the rule does not constitute a complete bar to the institution of proceedings — the section creates a bar only for claims without merit.[6] Secondly, if leave to sue the judge in question is refused, then the decision is appealable.[7]

Soller concerned an application to bring a defamation claim against a judge as a consequence of comments that he had made in one of his judgments. The considerations relating to the independence of the judiciary are particularly compelling in this context — if judges could be sued without leave as a consequence of their written judgments, there may indeed be a chilling effect on their capacity to render fearless judgments. Ngoepe JP held, however, that the rule is justified even in the context of ordinary debts and other proceedings against judges that are unrelated to their judgments.[8] It would seem that, in this context, the measure is justified solely on the basis that, without a screening process, judges' time would be wasted if they were required to defend litigation. While this justification is far less compelling than the first rationale, we agree that it is sufficient to justify the measure. Protecting judges from frivolous law-suits that have the potential to impede their capacity to perform their tasks properly serves the purpose of FC s 34.

[1] *Airconditioning Design* (supra) at para 8.
[2] Section 25(1) reads:
Notwithstanding anything to the contrary in any law contained, no summons or subpoena against the Chief Justice, a Judge of Appeal or any other Judge of the Supreme Court shall in any civil action be issued out of any court except with the consent of that court: Provided that no such summons or subpoena shall be issued out of an inferior court unless the Provincial Division which has jurisdiction to hear and determine an appeal in a civil action from such inferior court, has consented to the issuing thereof.
[3] *Soller v President of the Republic of South Africa and Others* 2005 (3) SA 567 (T)('*Soller*').
[4] Ibid at para 14.
[5] Ibid at para 14.
[6] Ibid at para 16.
[7] Ibid at para 16.
[8] Ibid at para 17.

In terms of the Constitutional Court rules, a litigant may approach the Court for direct access.[1] It is up to the Court to decide whether it is in the interests of justice to allow such access.[2] The Constitutional Court has rejected the argument that the requirement that leave be obtained before the court may be approached by way of direct access unjustifiably limits the right of access to courts. It did so for three reasons:[3]

(a) The Constitution itself envisages that leave be obtained before a litigant may approach the Constitutional Court by way of direct access.[4]

(b) FC s 34 of the Constitution does not give a litigant the right to approach any court in the court hierarchy for relief. So long as there is a court with the jurisdiction to grant the relief sought by the applicant, the requirements of FC s 34 are met. Since the High Courts have jurisdiction to decide constitutional matters, FC s 34 does not require direct access to the Constitutional Court as of right.

(c) The Constitutional Court, as the highest court in constitutional matters, is ordinarily a court of appeal and acts as a court of first and final instance only in limited circumstances. Other than in those circumstances, it is undesirable for the Constitutional Court to sit as a court of first and final instance.[5] If the Court routinely had to hear constitutional matters as a court of first instance, it would be required to 'deal with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and which might prove to be purely academic, and to hear cases without the benefit of the views of other courts having constitutional jurisdiction'.[6] Furthermore, it is generally undesirable for a litigant to have no prospect of appeal against a decision. Experience has shown that decisions are more likely to be correct if more than one court considers them, and this is not possible where the Constitutional Court grants direct access.[7]

It should be noted that the wording of the rule in the Constitutional Court's Rules that deals with direct access goes further than the text of the Final Constitution. The Final Constitution envisages that direct access will be granted with leave of the court when it would be in the interests of justice. The Constitutional Court's rules envisage that direct access will be granted only in 'exceptional circumstances'. Chaskalson P (as he then was) alluded to the possibility that it may be

[1] If direct access is granted, then the Constitutional Court hears the matter as a court of first and final instance, rather than as an appellate court, which is the norm.

[2] Constitutional Court Rules, 2003, Rule 18. The equivalent rule in the 1998 rules was Rule 17.

[3] *Dormehl v Minister of Justice and Others* 2000 (2) SA 987 (CC), 2000 (5) BCLR 471 (CC)('*Dormehl*') at paras 4–5.

[4] FC s 167(6).

[5] *Bruce v Fleecytex Johannesburg CC* 1998 (2) SA 1143 (CC), 1998 (4) BCLR 415 (CC)('*Bruce*') at para 8.

[6] Ibid at para 7.

[7] Ibid at para 8.

in the interests of justice for the court to grant direct access when the requirement of 'exceptional circumstances' is not met.[1] In other words, it would appear that the ambit of circumstances in which direct access may be granted by the Court in terms of its rules is narrower than that envisaged by the Final Constitution. He did not, however, decide this question. The requirement that direct access only be granted in exceptional circumstances would not, in any case, limit the right of access to court. As discussed above, the right of access to court does not include a right of access to any court.[2]

The move of the Constitutional Court to restrict rather than enlarge the circumstances in which direct access will be granted reduces, Jackie Dugard argues, its capacity to serve as a forum for the poor to be heard.[3] In order to reach the Court through the ordinary process, starting in the High Court and possibly appealing first to the Supreme Court of Appeal, significant resources are required.[4] Dugard contends that, in the absence of a right to free legal representation in constitutional matters,[5] the only hope for greater access to justice for the poor is for the Constitutional Court to expand the circumstances in which direct access will be granted.

Dugard argues that in terms of the test applied by the Constitutional Court when deciding whether to grant direct access, the following factors are relevant: whether there are exceptional circumstances requiring the court to sit as a court of first and final instance; whether the matter is urgent; whether there are prospects of success; and whether other remedies have been exhausted.[6] While Dugard accepts the criteria of prospects of success and 'exhaustion of other remedies and procedures', she argues that the requirements of 'urgency' and 'exceptional circumstances' should be replaced by a consideration of whether it would be in the public interest to grant direct access.[7] When determining whether it would be in the public interest to grant direct access, the Court should focus on whether the matter is of general application or fundamental importance and, particularly, whether the matter engages the fundamental rights of the poor.[8]

[1] *Bruce* (supra) at para 4.
[2] *Dormehl* (supra).
[3] J Dugard 'Court of First Instance? Towards a Pro-Poor Jurisdiction for the South African Constitutional Court' (2006) 22 *SAJHR* 261, 266 (Dugard 'Court of First Instance').
[4] Ibid
[5] Ibid at 268-270. See §59.4*(b)(i)* infra. See also S Woolman and D Brand 'Is There a Constitution in this Courtroom: Constitutional Jurisdiction after *Afrox* and *Walters* (2003) 19 *SA Public Law* 38.
[6] Ibid at 272–273.
[7] Ibid at 277.
[8] Ibid at 277 n77.

We share Dugard's concern that the poor lack meaningful access to the courts and support her attempt to devise an appropriate mechanism to enhance such access. We disagree, however, with her proposal regarding access to the Constitutional Court. We have noted at various points in this chapter that access to courts in this country is determined largely by the means of the potential litigants and that being poor makes it extremely difficult to enjoy one's right of access. The solution to this problem does not, in our view, lie in increasing the scope of the Constitutional Court's direct-access jurisdiction. Extremely good reasons exist for retaining the Constitutional Court's largely appellate function. All parties will be ill served if the Constitutional Court acts as a court of first and final instance too readily.

We disagree with Dugard's treatment of these arguments. As far as the leading of evidence is concerned, she suggests that the cases in which evidence will need to be led will be 'minimal'.[1] She suggests that

> Many Constitutional Court applications already are more in the form of abstract than concrete reviews, both in terms of the way the issue is framed and the relief granted, and the Court could further minimise its exposure to oral evidence and factual disputes by explicitly limiting argument to matters of law and constitutional interpretation.

In our view, the more urgent need is for constitutional litigation to be brought in line with ordinary litigation in our courts. Many constitutional challenges require the leading of evidence. The Constitutional Court has often had occasion to remark that the fact that a matter has been resolved on the papers is undesirable, given the disputes of fact that may be involved.[2] In particular, the Court has held that justification of a limitation will often be fact-based and that it will be necessary for the party seeking to justify a measure to lead factual evidence in support of a fact-based justification.[3] The truth is that thus far constitutional litigation has been treated as a special case in which litigants *repeatedly* bring applications to challenge law or conduct. These challenges often ought to be raised as constitutional matters within a trial. Litigants ought to recognize that the trial procedure is often better suited to determining constitutional challenges than the procedures of motion court. If they did, the Constitutional Court would possess far greater factual clarity in constitutional cases.

As far as the undesirability of the court being a court of first and final instance is concerned, Dugard suggests that it is the hardest argument to refute because it is the hardest argument to substantiate. She argues that this issue 'boils down to a matter of policy choices and balancing lesser harms'.[4] In other words, on the assumption that it would be better for the poor for the Constitutional Court to

[1] Dugard 'Court of First Instance' (supra) at 278.

[2] See, for example, *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at paras 52–6.

[3] See *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC), 2005 (5) BCLR 445 (CC) at para 36.

[4] Dugard 'Court of First Instance' (supra) at 278.

grant direct access more frequently, the Court would be entitled to make a policy choice to sacrifice the ordinarily desirable approach of having more than one court rule on cases in favour of a pro-poor approach. Dugard says that the Constitutional Court has shown that it is capable of acting as a court of first and final instance in those areas in which it has exclusive jurisdiction — such as disputes between national and provincial spheres of government.

Once again, we disagree. The Constitutional Court exercises exclusive jurisdiction in those rare cases, such as when the question arises whether the President has failed to discharge a constitutional obligation, in which the nature of dispute, and the organs of state involved, requires a court with the institutional status of the Constitutional Court to resolve the dispute. Other than in this narrow class of cases, which, after all, are expressly envisaged by the Final Constitution itself, it is plainly preferable for the parties to a matter to retain the possibility of an appeal. Of course, if expanding the circumstances in which direct access is to be granted by the Constitutional Court is indeed the elixir necessary to enhance the rights of the poor, perhaps the possibility of appeal ought to be sacrificed. However, it is in everyone's interest, including the poor, that the possibility of appeal exists in as many cases as possible. The decision-making process is enhanced when the possibility of appeal remains in place, and this is to the advantage of all litigants. Constitutional courts, such as the US Supreme Court, often argue that they benefit from the multiple perspectives that district and circuit courts offer on constitutional issues.

Furthermore, it is our view that it might set up something of a false dichotomy to offer a choice between expanded access and insufficient vindication of the rights of the poor. There are a range of measures that could be adopted at High Court level that would give the poor a louder voice without sacrificing the advantages that flow from the mainly appellate function exercised by the Constitutional Court. During the course of this chapter we discuss the question whether legal representation at state expense in certain civil matters is a component of the rights provided in FC s 34. We also point to the undeniable role that the approach to costs adopted by the High Court and SCA plays in inhibiting access to courts. There are a range of measures that could be adopted at High Court level to ensure greater access for the poor. These two are but examples. Another example might be for an enhanced role to be played by *amici curiae* at High Court level. We are aware of instances where judges have appointed members of the Bar to make submissions on issues implicating the rights of the poor, in circumstances where the parties themselves were inadequately represented. If this process could be adopted more often, there is no doubt that the poor's interests would be given more attention. It needs to be recognized that, ideally,

the High Courts should be the institutions that are able to give sufficient weight to the interests of the poor. The fact that there are certain aspects of their procedure that currently inhibit that possibility does not require that the Constitutional Court should regularly be made into a court of first instance.

(v) Refusing leave to appeal without reasons

In *Mphahlele v First National Bank of South Africa Ltd*,[1] the applicant challenged, as a violation of access to court, the constitutionality of the practice of the Supreme Court of Appeal of refusing leave to appeal without reasons. The Court in *Mphahlele* did not consider which aspect of the right of access to court is implicated by such a challenge. It is, however, an important question. On the one hand, if there is no right of appeal in civil matters (which, as described above, is by no means a clear question), then limiting the possibility of appeal may bear no relation to the right of access to courts at all. On the other hand, it may not be conceptually legitimate to see the question of reasons as speaking to the *fairness of the hearing*, since at the leave to appeal stage we are concerned with the anterior question whether a hearing ought to be conducted in the first place. As mentioned above in the discussion on whether FC s 34 includes a right to appeal,[2] the Supreme Court of Appeal has treated the question of the appeal process provided in the Supreme Court Act as speaking to the fairness of the process.

Either way, the Court in *Mphahlele* held that the practice of refusing leave without reasons did not violate the right of access to court. The Court pointed out that where a court of first instance gives a judgment, its reasons are of importance for the prosecution of an appeal. It might, therefore, be the case that there would be a failure to comply with the Final Constitution's requirements if a court of first instance failed to give reasons for its decision.[3] That said, the mere fact that there is no appeal against a decision of a court does not in itself justify the failure to give reasons:[4] the giving of reasons is not justified solely by their relevance to the appeal process. However, when dealing with appellate courts, there are other practical considerations that are relevant: it is not in the interests of justice for the rolls of appellate courts to be clogged with unmeritorious and vexatious issues of law and fact.[5] Since the Supreme Court of Appeal is the court of final instance in all but constitutional matters, a litigant will not be prejudiced by its failure to provide reasons. The litigant will already have received reasons from the court *a quo*, and implicit in a refusal without reasons is that there are no prospects of success on appeal.[6] To require full reasons from the Supreme

[1] 1999 (2) SA 667 (CC), 1999 (3) BCLR 253 (CC)('*Mphahlele*').
[2] See § 59.3*(a)*(iv) supra.
[3] *Mphahlele* (supra) at para 12.
[4] Ibid at para 13.
[5] Ibid at para 13, citing *S v Rens* 1996 (2) BCLR 155 (CC) at paras 24 and 25.
[6] *Mphahlele* (supra) at paras 14–15.

Court of Appeal inthis context would undermine the very reason for requiring leave in the first place[1] — to streamline the process in order to provide greater access for meritorious claims.

(vi) *Vexatious litigants*

Section 2(1)(*b*) of the Vexatious Proceedings Act[2] provides that a court may grant an order requiring a litigant to seek permission to institute legal proceedings in the following circumstances:

- On application from a person against whom proceedings have been brought or who has reason to believe that litigation is being contemplated against him;
- Where the litigant who is required to seek permission has 'persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons'; and
- Where the litigant who is required to seek permission has been given an opportunity to be heard.

Once a court has determined that a particular litigant may only institute proceedings with permission, that permission may only be granted where the court is satisfied that the proceedings are not an abuse of the process of court and that there are *prima facie* grounds for the proceedings to be brought.

In *Beinash and Another v Ernst and Young and Others*, Mokgoro J, for a unanimous Court, held that, as a procedural barrier to the institution of litigation, s 2(1)(*b*) of the Act limited the right of access to court in terms of FC s 34.[3] The limitation was, however, deemed reasonable and justifiable in terms of FC s 36.[4] In conducting its limitation analysis, the Court pointed out that the vexatious-litigation provision protects two interests: the interests of the victim of the vexatious litigation and the public interest in ensuring that the courts are not clogged by groundless claims.[5] The Court wrote:

> a restriction of access in the case of a vexatious litigant is in fact indispensable to protect and secure the right of access for those with meritorious disputes. Indeed, as the respondents argued, the court is under a constitutional duty to protect bona fide litigants, the processes of the courts and the administration of justice against vexatious proceedings. Section 165(3) of the Constitution requires that '[n]o person or organ of state may interfere with the functioning of the courts.' The vexatious litigant is one who manipulates the functioning of the courts so as to achieve a purpose other than that for which the courts are designed. This limitation serves an important purpose relevant to section 36(1)*(b)*. It

[1] *Mphahlele* (supra) at para 15.
[2] Act 3 of 1956.
[3] 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC)('*Beinash*') at para 16.
[4] Ibid at para 16.
[5] Ibid at para 15.

> would surely be difficult to anticipate the litigious strategies upon which a determined and inventive litigator might embark. Thus there is a requirement for special authorisation for any proposed litigation.[1]

The Court in *Beinash* pointed out that the order rendering a person a vexatious litigant is made by a court and only where the person has persistently, and without legal grounds, initiated legal proceedings.[2] The extent of the limitation was not, therefore, extreme since, first, the process was subject to judicial control and, secondly, the decision of a judge to declare someone a vexatious litigant is appealable.

The *Beinash* Court also held that the provision passed the proportionality test and achieved the correct balance between the relevant interests:

> The applicant's right of access to courts is regulated and not prohibited. The more remote the proposed litigation is from the causes of action giving rise to the order or the persons or institutions in whose favour it was granted, the easier it will be to prove bona fides and the less chance there is of the public interest being harmed. The closer the proposed litigation is to the abovementioned causes of action, or persons, the more difficult it will be to prove bona fides, and rightly so, because the greater will be the possibility that the public interest may be harmed. The procedure which the section contemplates therefore allows for a flexible proportionality balancing to be done, which is in harmony with the analysis adopted by this Court, and ensures the achievement of the snuggest fit to protect the interests of both applicant and the public.[3]

(vii) *Costs*

Rule 34 of the Uniform Rules of the High Court deals with settlement offers. The general practice in the High Court, which has an express analogue in the Magistrates' Courts Rules,[4] is that where a defendant makes a settlement offer that exceeds the amount ultimately awarded to the plaintiff, the plaintiff is liable for the defendant's costs from the time at which the offer was made.[5]

In *NM and Others v Smith and Others (Freedom of Expression Institute as* Amicus Curiae*)*, the appellants had sued the respondents for damages arising from the publication in a book of the fact that the appellants were HIV positive.[6] In the High Court, the respondents had made a settlement offer that was higher than the amount ultimately awarded by the court. The court ordered the appellants to pay the respondents' costs from the date on which the offer was made. In the Constitutional Court, the majority held that each party should bear its own costs. The basis for this appears to have been that each party's conduct was blameworthy to a greater or lesser extent, and does not seem to have had anything to do with the settlement offer.[7] Langa CJ, however, dealt squarely with the rule relating to

[1] *Beinash* (supra) at para 17.
[2] Ibid at para 18.
[3] Ibid at para 19. See § 59.3*(b)* 'Nature of the State's Obligations' supra.
[4] Rule 18(6).
[5] See Farlam et al *Superior Court Practice* (1994) at B1–143n7 and the cases cited there.
[6] 2007 (7) BCLR 751 (CC)('*NM*').
[7] Ibid at paras 83–89.

settlement offers in a minority judgment. The appellants argued that they should not have been penalized in costs by the High Court because the offer of settlement, although ultimately higher in money terms than the High Court's award, did not vindicate their constitutional rights because it did not acknowledge liability. The respondents, on the other hand, argued that the High Court's approach to costs orders in this context is important because if the approach was not followed then the defendants would be faced with a choice either to admit liability even when believing that they are not liable or to run expensive trials. Langa CJ held that the problem with the prevailing approach to rule 34 is that it failed to take cognizance of the fact that, in the context of violations of constitutional rights, sometimes more than money is necessary to vindicate the right. The acknowledgement of wrongdoing that comes in the form either of an acknowledgment of liability by the defendant or by a court order is often more valuable than money.[1] Langa CJ pointed out that:

> There is a danger that the risk of adverse costs orders, despite ultimate success, might permit rich and powerful defendants to prevent the law from adapting to meet constitutional imperatives by throwing money at plaintiffs who cannot afford to take that chance. It already takes immense courage for ordinary people to take large powerful defendants to court and the additional peril of an adverse costs order will mean even fewer plaintiffs get their day in court.[2]

Despite the general approach adopted by the High Court to rule 34, the question of costs always remains discretionary. The message of Langa CJ's judgment in *NM* is that this discretion must be exercised in the light of the spirit, purport and objects of the Bill of Rights.

In *Hlatshwayo & Another v Hein*[3] Dodson J read the Restitution of Land Act,[4] and the power of the Land Claims Court to make costs orders in the light of the right of access to court and held that it was necessary to interpret these powers in a way that does not deter litigants from having their justiciable claims determined by courts.[5] Dodson J pointed to the trend in the Constitutional Court to adopt a different approach to costs in public-interest litigation: the Constitutional Court has departed from the normal rule in civil matters that costs follow the result.[6] Dodson J was mindful of the potentially negative consequence of adopting an approach in terms of which costs do not necessarily follow the result in public-interest litigation — a risk of encouraging ill-founded claims and defences. However, the wide discretion retained by the court would ensure that costs would be awarded in appropriate cases.[7]

[1] *NM* (supra) at para 120.
[2] Ibid
[3] 1998 (1) BCLR 123 (LCC)('*Hlatshwayo*').
[4] Act 22 of 1994.
[5] *Hlatshwayo* (supra) at para 22.
[6] Ibid at para 24.
[7] Ibid at para 25.

Hlatshwayo was decided in 1997. In the intervening 10 years, the approach of Dodson J has been vindicated. The Constitutional Court has adopted an approach in terms of which a *bona fide* applicant who unsuccessfully raises an important constitutional issue will not be penalized in costs.[1] The Court retains a wide discretion, however, and does not hesitate to make adverse costs orders where the conduct of a party warrants it — say, for example, in the case of vexatious litigation.[2]

There is no doubt that the ordinary approach to costs — in which costs follow the result — implicates the right of access to courts. Experience reveals that litigation is, unfortunately, largely the preserve of the affluent in this country.[3] The ordinary approach to costs adopted by the High Court and the Supreme Court of Appeal (coupled with the fact that, in any case, most practitioners charge far in excess of what a taxed costs order will allow) exacerbates this problem. While not linking its approach directly to FC s 34, the Constitutional Court's approach to costs is clearly aimed at enhancing access to courts in constitutional matters.

(viii) *Security for costs*

Rule 47 of the Uniform Rules of the High Court deals with the requirement that a litigant furnish security for costs in certain circumstances.[4] In the Companies Act[5] specific provision is made for the furnishing of security by a company or a

[1] See A Friedman 'Costs' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) 6–2.

[2] Ibid at 6–5ff.

[3] See G Budlender 'Access to Courts' (2004) 121 *SALJ* 339, 340–1.

[4] Rule 47 of the Uniform Rules provides:

Security for costs

(1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.

(2) If the amount of security only is contested the registrar shall determine the amount to be given and his decision shall be final.

(3) If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.

(4) The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.

(5) Any security for costs shall, unless the court otherwise directs, or the parties otherwise agree, be given in the form, amount and manner directed by the registrar.

(6) The registrar may, upon the application of the party in whose favour security is to be provided and on notice to interested parties, increase the amount thereof if he is satisfied that the amount originally furnished is no longer sufficient; and his decision shall be final.

[5] Act 61 of 1973.

liquidator of a company that is being wound up.[1] There have been two ways in which FC s 34 has been implicated in cases concerning security for costs. As in the case of costs issues generally, these provisions give a court a discretion as to whether to require security for costs. In certain decisions, the courts have considered how this discretion must be exercised in the light of the Final Constitution.[2] It is easy to see how the obligation to give security for costs may implicate the right of access to court. In certain cases, the requirement to give security will prevent the party so required from proceeding with the litigation. The question, therefore, is how the discretion must be exercised in a way that gives due cognizance to FC s 34. In other cases, the requirement that security be provided has been challenged directly as violating FC s 34.

The issue of security for costs normally arises as follows: a plaintiff brings an action against a defendant in circumstances where the defendant has reason to believe that the plaintiff will be unable to pay the defendant's costs if the defendant is successful. The defendant delivers a notice in terms of rule 47(1) or, if necessary,[3] brings an application in terms of rule 47(3) requiring the plaintiff to give security for costs before proceeding. The general approach to costs, that an unsuccessful plaintiff must pay the defendant's costs, is designed, amongst other things, to prevent vexatious litigation. A plaintiff who anticipates being penalized in costs will think twice before proceeding with unmeritorious litigation.[4] The requirement of security for costs is aimed to buttress this rule:

> [T]he main purpose of section 13 is to ensure that companies, who are unlikely to be able to pay costs and therefore not effectively at risk of an adverse costs order if unsuccessful, do not institute litigation vexatiously or in circumstances where they have no prospects of success thus causing their opponents unnecessary and irrecoverable legal expense.[5]

In *Lappeman*, Joffe J considered how the courts had, up until that case, dealt with the discretion envisaged by s 13 of the Companies Act and its predecessor. He explained that the binding authority in his division (the WLD) was that courts will lean towards the ordering of security and will only refuse to do so when special

[1] Section 13 of the Companies Act reads as follows:
Where a company or other body corporate is plaintiff or applicant in any legal proceedings, the Court may at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given.

[2] *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) LTtd (No 1)* 1997 (4) SA 908 (W)('*Lappeman*'); *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W)('*Bookworks*'); *Giddey NO v JC Barnard and Partners* 2007 (2) BCLR 125 (CC)*('Giddey*').

[3] The process requires the party seeking security first to deliver a notice to his opponent setting out the grounds upon which security is sought and the amount claimed. If the party receiving the notice disputes liability to give security, then the party seeking security will need to apply to court.

[4] *Giddey* (supra) at para 7.

[5] Ibid at para 7.

circumstances exist.[1] It was argued that, in exercising its discretion and in order to protect the right of access to court, a court should incline against the requirement of security in the absence of evidence of abuse of process. Joffe J pointed out that while the requirement of security for costs itself pursued a laudable objective, it had to be balanced against the right of access to court. Such a balance was better achieved, in his view, if the court would begin without a disposition in favour of requiring security and that the courts should possess a wide discretion to consider all relevant factors before requiring security.[2] This approach was approved by the Supreme Court of Appeal in *Shepstone*:

> The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.[3]

There will be cases where the requirement of giving security will not put an end to the litigation – because the plaintiff will be able to comply with the order. It is only when the litigation will be brought to an untimely end by the order that the right of access to courts becomes relevant. Although not especially concerned with FC s 34, the Supreme Court of Appeal has remarked on the potentially dispositive effect of a security order:

> [T]he fact that an order of security will put an end to the litigation does not by itself provide sufficient reason for refusing it. It is a possibility inherent in the very concept of a provision like s 13 which comes into operation whenever it appears to the Court that the plaintiff or applicant will not be able to pay the defendant or respondent's costs in the event of the latter being successful in his defence. If there is no evidence either way, the mere possibility that the order will effectively terminate the litigation can plainly not affect the Court's decision. It only becomes a factor once it is established as a probability by the plaintiff or applicant. And, even if it is established, it remains no more than a factor to be taken into account; by itself it does not provide sufficient reason for refusing an order.

Whether this approach accords with the requirements of the Final Constitution was considered by the Constitutional Court in *Giddey*. The Constitutional Court in *Giddey* confirmed that, when a court exercises its discretion, it must have regard to the right of access to court.[4] The question was what principles ought to be applied by the court when exercising this discretion.

The applicant argued that whenever the effect of the order requiring security would be to put an end to the litigation (in the sense that the plaintiff would be unable to provide security and, hence, proceed) it would be in conflict with the

[1] *Lappeman* (supra) at 914G.
[2] Ibid at 919H–I.
[3] *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036, 1046 (SCA). quoting *Keary Developments Ltd v Tarmac Construction Ltd and Another* [1995] 3 All ER 534, 540 (CA).
[4] *Giddey* (supra) at para 30.

right of access to court. Therefore, one of the overarching principles guiding the discretion ought to be that the discretion will not be exercised where it will have this effect. The Court in *Giddey* rejected this approach to the interpretation of s 13:

> Section 13 contemplates that an order for security for costs will be made where a plaintiff or applicant company is in financial difficulties. The sharp commercial reality of such an order is that at times where the plaintiff or applicant cannot find security for costs it will not be able to pursue its action. This seems an inevitable and intended result of section 13. In my view, the section is not reasonably capable of being read as contended for by the applicant. The applicant did not challenge the constitutionality of the section, and in my view, it is not capable of being read, in light of the Constitution or otherwise, to mean that a court has no discretion to order security to be furnished where the effect of that order will be to terminate the litigation. The provision states the contrary quite clearly and the applicant's submissions in this regard must be rejected.[1]

The Court in *Giddey* held that the approach of the Supreme Court of Appeal in *Shepstone* accorded with what was required by the Final Constitution and that the courts should exercise a discretion neither inclined towards nor against requiring security.[2] The Court in *Giddey* stated that a court should take into account the following factors: the likelihood that the effect of an order to furnish security will be to terminate the plaintiff's action; the attempts the plaintiff has made to find financial assistance from its shareholders or creditors; the question whether it is the conduct of the defendant that has caused the financial difficulties of the plaintiff; and the nature of the plaintiff's action.[3]

The constitutionality of a rule was directly challenged in *Mthetwa and Others v Diedericks and Other*s.[4] Prior to its amendment in 1997, rule 49(1) of the Magistrates' Courts Rules, read as follows:

> A party to proceedings in which a default judgment has been given may within 20 days after the judgment has come to his knowledge apply to court upon notice to the other party to set aside such judgment and the court may upon good cause shown and, save where leave has been given to defend as a *pro Deo* litigant in terms of rule 53, provided the applicant has furnished to the respondent security for the costs of the default judgment plus an amount of R200 as security for the costs of the application, set aside the default judgment on such terms as it may deem fit: Provided that the respondent may by consent in writing lodged with the clerk of the court, waive compliance with the requirement of security.

Rule 53 establishes the procedure in terms of which a person may apply to litigate as a *pro Deo* litigant. In essence, if a court is satisfied that a person has a *prima facie* case and has insufficient means to enable him to pay the costs of the

[1] *Giddey* (supra) at para 29.
[2] The full bench of the WLD was also of the view that, although it did not say so explicitly, the SCA had adopted the approach in *Shepstone* based on what is required by FC s 34. *Bookworks* (supra) at 810B–G.
[3] *Giddey* (supra) at para 30.
[4] 1996 (7) BCLR 1012 (N)('*Mthetwa*').

action,[1] then the court may appoint an attorney to act for him, free of charge, and relieve him of the need to pay other costs. In *Mthetwa*, the High Court drew attention to the Legal Aid Act,[2] and pointed out that it establishes a detailed mechanism for indigent potential litigants to obtain legal aid.[3] The Legal Aid Act was enacted with the purpose of improving on the *pro Deo* procedure and a litigant would presumably prefer to obtain legal aid in terms of the Act, than to proceed by way of the *pro Deo* procedure.[4] However, following the Act would require such a person to forfeit the right not to provide security, since rule 49(1) exempted only *pro Deo* litigants. This was unfair.[5] The court pointed out that people frequently have default judgments taken against them without their knowledge. If such a person had a bona fide defence but was unable to cover the costs of security, he would be unable to have the judgment set aside, unless he applied to be a *pro Deo* litigant. At the very least, the rule should cover recipients of legal aid in terms of the Act.[6] The High Court therefore declared the whole of rule 49(1) unconstitutional.

It is always a difficult matter when a single judge of a provincial division declares invalid a rule or law where there is no requirement that the declaration of invalidity must be confirmed by the Constitutional Court. This difficulty was avoided by a 1997 amendment to the rules, which introduced a new rule 49, without the security requirement.

Shortly after this decision was handed down, a single judge in the same division struck down rule 49(13) of the Uniform Rules of the High Court.[7] The rule relates to the procedure to be adopted on appeal and envisages that security will be required.[8] The applicant argued that the rule limited his right of access to court because his inability to provide security effectively ended his possibility of prosecuting the appeal. The applicant relied on *Mthetwa*. The respondent sought to distinguish it as follows: the rule in the Magistrates' Courts Rules had the effect of preventing access to a court of first instance, whereas this rule only affects the right to appeal.[9] Implicit in this argument is the contention that FC s 34 (or IC s 22 as it then was) does not apply to appeals. Without directly responding to this argument, the High Court held:

[1] Rule 53(4).
[2] Act 22 of 1969.
[3] *Mthetwa* (supra) at 1013.
[4] Ibid.
[5] Ibid.
[6] Ibid at 1014.
[7] *Shepherd v O'Niell and Others* 1999 (11) BCLR 1304 (N)('*Shepherd*').
[8] At the time, the relevant rule read:
Unless the respondent waives his right to security, the appellant shall, before lodging copies of the record on appeal with the Registrar, enter into good and sufficient security for the respondent's costs of appeal. In the event of failure by the parties to agree on the amount of security, the Registrar shall fix the amount and his decision shall be final.
[9] *Shepherd* (supra) at 1307.

> There is much to be said for protecting a respondent in an appeal from an impecunious appellant who drags him from one court to the other. On the other hand to in effect bar access to a court of appeal because a deserving litigant is unable to put up security appears to me to be unfair and in conflict with the provisions of the Constitution. The conflicting rights of the litigants can in my view be adequately safeguarded were the court to be vested with the power to determine in the exercise of its discretion, whether a particular appellant should be compelled to put up security and in what amount. To the extent that Rule 49(13) does not embody that power I consider it to be in conflict with the Constitution and to that extent invalid.[1]

The High Court suspended the declaration of invalidity to provide the Rules Board with the opportunity to amend the rule. Rule 49(13) now provides a discretion to courts in regard to security for costs on appeal.[2]

(ix) *Champertous agreements*

A champertous agreement, broadly speaking, is an agreement in terms of which one party will fund (partially or fully) the litigation of another (in which the funding party has no interest) in exchange for a share of any amount awarded to the latter upon success. Such an agreement, therefore, has the potential to enhance, rather than limit, access to court by enabling litigants to proceed in matters that, without the champertous agreement, they would be unable to fund. Until the recent decision of the Supreme Court of Appeal in *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd*,[3] champertous agreements were generally considered contrary to public policy.

In *Price Waterhouse*, the Supreme Court of Appeal pointed out that the general disapproval of champertous agreements had been subject to one exception: if a party, in good faith, assisted a poor litigant in exchange for a reasonable interest in the suit, the agreement would not be contrary to public policy and void.[4] This exception was based on recognition that 'in a case where an injustice would be done if a litigant was not given financial assistance to conduct his case a champertous arrangement would not be contrary to public policy.'[5] The Supreme Court of Appeal pointed out that, other than this exception, champertous agreements continued to be considered contrary to public policy. Changed circumstances and the Final Constitution required a reassessment of the received wisdom.[6]

[1] *Shepherd* (supra) at 1310.
[2] Rule 49(13)*(a)* reads as follows:
Unless the respondent waives his or her right to security or the court in granting leave to appeal or subsequently on application to it, has released the appellant wholly or partially from that obligation, the appellant shall, before lodging copies of the record on appeal with the registrar, enter into good and sufficient security for the respondent's costs of appeal.
[3] 2004 (9) BCLR 930 (SCA)('*Price Waterhouse*').
[4] Ibid at para 27.
[5] Ibid at para 27.
[6] Ibid at paras 27–28.

The Supreme Court of Appeal pointed out that the antipathy to champertous agreements arose in times when the judiciary was not independent and there were insufficient safeguards to withstand corruption that might flow from such agreements; such as pressuring witnesses to relate a particular version or bribing judges. However, developments in England (where the antipathy to these agreements arose) and South Africa were such that an independent judiciary and a profession bound by strict ethics were strong enough to withstand such pressures.[1] Furthermore, both England and South Africa now allowed legal practitioners to charge contingency fees — albeit subject to strict controls.[2] This shift has direct implications for the right of access to court:

> As in England, this Act is designed to encourage legal practitioners to undertake speculative actions for their clients. The Legislature was obviously of the view that the conflict between the duty and interests of legal practitioners would not lead to an abuse of legal procedure. It clearly considered that it is better that people be able to take their disputes to court in this way rather than not at all.[3]

The Supreme Court of Appeal emphasized the importance of the right of access to court and the duty of courts to protect bona fide litigants. Allowing agreements of this sort would assist in facilitating access to court.[4] However, there might be circumstances in which a champertous agreement would constitute an abuse of process. Such agreements would not be enforced, notwithstanding the right of access to courts in FC s 34.[5]

(b) Fair public hearing before a court

One express component of FC s 34 is the right to a 'fair public hearing'. 'Fair' in FC s 34 therefore qualifies 'hearing'. 'Fairness' means different things in different places in the Final Constitution. FC ss 9(3) and 9(4) prohibit *unfair discrimination*. FC s 23 confers a right to 'fair labour practices'; FC s 33 is concerned with *procedural fairness* in the context of administrative decision-making; and FC s 35 guarantees the right to a *fair criminal trial*.[6] Although fairness is a central theme that runs through the Final Constitution, it does not possess a single denotation. FC ss 9, 23, 33, 34 and 35 all refer to 'fairness': but each uses fairness in relation to different proceedings and sets different standards of 'fairness'.

In *Bernstein v Bester*, faced with an IC s 22 which made no reference to a 'fair hearing', the Constitutional Court suggested that its exclusion might indicate a deliberate election by the drafters *not* to constitutionalize the right to a fair civil

[1] *Price Waterhouse* (supra) at para 39.
[2] Ibid at paras 40–1.
[3] Ibid at para 42.
[4] Ibid at paras 42–4.
[5] Ibid at paras 50–2.
[6] FC s 35(3) provides that '[e]very accused person has the right to a fair trial'.

trial.[1] FC s 34, which provides expressly for a 'fair public hearing' must be interpreted as a deliberate reaction to *Bernstein*.

In respect of FC s 34, it is clear that 'fairness' does not entail a right to legally *correct* decisions for litigants.[2] In our view, fairness nevertheless does have both procedural and substantive components. In the remainder of this section, we consider specific sub-components of the right to a 'fair public hearing' under FC s 34. First, we consider whether 'fairness' under FC s 34 requires the state to provide free legal representation to some civil litigants. After that, we consider the application of the principle of 'equality of arms' to civil matters. We then consider the requirements of independence and impartiality of the courts. We also look at other requirements that go to the fairness of a hearing, in particular notice and the right to be heard. Finally, we discuss the requirement of a *public* hearing.

(i) Legal representation[3]

Does FC s 34 impose positive obligations on the State to provide free legal representation to civil litigants? It does not make such a guarantee expressly, but arguably the notion of 'fairness' implies the obligation. Currie and De Waal contend that such an interpretation of FC s 34 is unlikely owing to the realities of the resource constraints faced by the state.[4] In our view, such an approach confuses the content of the right with the remedy that a court should (or is likely to) grant on the basis of the right.[5] Therefore, we consider whether FC s 34 imposes such an obligation, and then consider what remedies appropriately flow from it.

FC s 35(3)(*g*) provides that every accused person has a 'right to a fair trial, which includes … the right to have a legal practitioner assigned to the accused person by the State and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly'. As discussed further below, FC s 28 makes a similarly-worded guarantee in respect of civil proceedings affecting a child. FC s 34 is silent on the matter. Nevertheless, the matter does not end there. We believe that there may be a basis on which to interpret the reference to *fairness* in FC s 34 to impose such an obligation on the state.

The major international instruments mirror the Final Constitution in guaranteeing free legal representation in criminal cases and merely a 'fair' trial in civil

[1] *Bernstein and Others v Bester NO and Others* 1996 (2) SA 7519 (CC), 1996 (4) BCLR 449 (CC) at para 106.

[2] *Lane and Fey NNO v Dabelstein and Others* 2001 (2) SA 1187 (CC), 2001 (4) BCLR 312 (CC).

[3] In the discussion that follows, we draw in part from an earlier article by one of the authors. See J Brickhill 'The Right to a Fair Civil Trial: The Duties of Lawyers and Law Students to Act *Pro Bono*' (2005) 21 *SAJHR* 293.

[4] Currie & de Waal (supra) at 708–709.

[5] See *Bel Porto School Governing Body v Premier, Western Cape and Another* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) at para 186; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at para 69; *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) at para 27.

matters.[1] Nevertheless, the European Court of Human Rights has interpreted Art 6(1) of the European Convention on Human Rights to require a right to representation in some civil cases.[2] In *Airey v Ireland*, the European Court held that the Irish government's failure to provide Mrs Airey with free representation for the purpose of securing a judicial separation violated her right of access to court in Art 6(1).[3] Research presented as evidence could not provide a single instance in which a decree of judicial separation had been obtained in Ireland without legal representation.[4] The effect of *Airey* is that a fair civil hearing may, in certain circumstances, require the provision of legal representation at state expense. Article 6 of the European Convention is almost identical to FC s 34. This similarity provides a basis for interpreting FC s 34 in a manner that imposes a similar duty on government in circumstances where a litigant is unlikely to be able to obtain relief without representation. That said, *Airey* held that Art 6(1) does not guarantee a right to free civil legal aid. It merely obliges states parties to take steps to ensure the progressive realization of such a right.[5]

In *G (J)*, the Canadian Supreme Court confronted the question of a right to free representation in civil suits in the context of s 7 of the Canadian Charter of Rights and Freedoms.[6] Section 7 reads: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'[7] The *G (J)* Court held that the combination of stigmatization, loss of privacy and disruption of family life that might result from a custody suit are sufficient to constitute a restriction of security of the person.[8] In deciding whether 'fundamental justice' necessitated the provision of legal representation in a particular case, the court referred to 'the best interests of the child' as the paramount consideration.[9] Provided these are not compromised, a court should then consider the interests at stake, the complexity of proceedings and the capacities of the parent.[10] In the circumstances of the case, the Supreme Court held that the government was under an obligation to provide the appellant with state-funded counsel.[11] It is worth noting that this right to free legal representation under s 7 of the Canadian Charter, which arises only in respect of threats to 'life, liberty and security of the person', is significantly narrower than the right that we argue arises under FC s 34, which encompasses all civil matters.

[1] See, for example, Art 14(1) and Art 14(3)*(d)* International Covenant on Civil and Political Rights (1966); Art 6(1) and Art 6(3) European Convention on Human Rights (1950); Art 7 and Art 8(2)*(e)* American Convention on Human Rights (1969); Art 26 African Charter on Human and People's Rights (1981).

[2] *Airey v Ireland* (1979) 2 EHRR 305 ('*Airey*'). Article 6(1) refers to a 'fair and public hearing', while FC s 34 guarantees a 'fair public hearing'.

[3] *Airey* (supra) at para 28.

[4] Ibid at para 24.

[5] Ibid at para 26.

[6] *New Brunswick (Minister of Health and Community Services) v G (J)* 66 CRR (2nd) 267 (1999)('*G(J)*').

[7] Canadian Charter of Rights and Freedoms, Constitution Act 1982.

[8] *G (J)* (supra) at 289.

[9] Ibid at 291.

[10] Ibid at 292–3.

[11] Ibid at 296.

The position under the Final Constitution is slightly different, because FC s 28 deals specifically with legal representation in matters affecting children. Under the Final Constitution, the Canadian case of *G (J)* might have been considered an appropriate case for the appointment of a legal representative to act for the child concerned. In the case of children's rights in civil suits, which are distinct from the right of all persons under FC s 34, FC s 28(1)(*h*) guarantees a child's right to 'have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.' FC s 28, therefore, expressly guarantees legal representation for children. The right appears not to be limited by the state's resource constraints: it is, however, subject to a significant constraint. It can only be invoked where 'substantial injustice' would result if representation at state expense were not provided. The provision is applicable not only to matters in which a child is a party to a civil suit, but in any matter 'affecting' the child, which would include adoption, custody, maintenance and possibly even divorce matters. In such matters, the representative would be 'assigned to the child', and directly represent him or her.[1] In *Christian Education SA v Minister of Education*, Liebenberg J held that FC s 28 makes it clear that the state is responsible for the expenses of a legal representative appointed in terms of FC s 28(1)(*h*).[2] However, this right does not cater for the interests of parents. Their claim to state-funded legal aid falls under FC s 34. FC s 28 is concerned solely with the child's right to legal representation.

In *Nkuzi Development Association v Government of South Africa*, the Land Claims Court held that the Final Constitution does confer a right to legal representation at state expense in civil suits, at least in respect of land tenants in the circumstances of that case.[3] The court, in a judgment delivered by Moloto AJ, held that there is no logical basis for distinguishing between criminal and civil matters, as civil matters are equally complex.[4] The court held that persons who have a right to security of tenure under the Extension of Security of Tenure Act,[5] whose security of tenure is threatened or infringed, have a right to legal representation or legal aid at state expense if substantial injustice would otherwise result, and if they cannot afford the cost of representation.[6] The court held that substantial injustice would result where the potential consequences of the matter are severe and the person concerned is not likely to be able to present his or her case effectively without representation.[7]

[1] The role of such a FC s 28 legal representative was usefully discussed in *Soller NO v G* 2003 (5) SA 430 (W) at para 27 (Satchwell J explained: 'The legal practitioner stands squarely in the corner of the child and has the task of presenting and arguing the wishes and desires of that child . . . . The legal practitioner does not only represent the perspective of the child concerned. The legal practitioner should also provide adult insight into those wishes and desires which have been confided and entrusted to him or her as well as apply legal knowledge and expertise to the child's perspective.')

[2] 1999 (4) SA 1092 (SE) at 1097.

[3] 2002 (2) SA 733 (LCC)('*Nkuzi*').

[4] Ibid at 737.

[5] Act 62 of 1997.

[6] Order at para 1.1.

[7] Order at para 1.3.

The court in *Nkuzi* grounded the right to representation at state expense in the property right, specifically in FC s 25(6), which guarantees legally secure tenure 'or comparable redress'.[1] The court seemed to assume a right to representation where 'substantial injustice' would otherwise result. The criterion of 'substantial injustice', which is contained in FC s 35 is, however, applicable only to criminal trials. Therefore, the decision in *Nkuzi* does not have an express constitutional basis, either in respect of the constitutional provision in which the court located the right to representation or in terms of the threshold standard for determining when civil legal aid ought to be given.

While the *Nkuzi* decision may be correct in holding that there is no principled reason to distinguish between civil and criminal matters in relation to the importance of legal representation, the textual distinction in the Constitution cannot be ignored. FC s 35 refers explicitly to legal representation as an aspect of a fair criminal trial where 'substantial injustice' would otherwise result. FC s 34 makes no such guarantee in relation to a fair civil hearing. In *Legal Aid Board v Msila*, the court endorsed the principle, originally laid down in Legal Aid Board guidelines and adopted by the courts, that the substantial injustice test is satisfied where the applicant for legal aid is criminally charged and faces the danger of imprisonment without the option of a fine.[2] This test clearly cannot apply to civil matters.

However, the concepts of fairness in criminal and civil trials might still overlap. The Constitutional Court has held that the right to a fair criminal trial is not limited to the specific rights listed in FC s 35.[3] Therefore, if FC s 34 contains a similarly open-ended concept of 'fairness', the fact that legal representation is listed as an element of a fair criminal trial but is not expressly mentioned as an aspect of the right to a fair civil hearing does not preclude the courts from interpreting FC s 34 to include such a right.[4] This gloss on FC s 34 requires us to consider what 'fairness' requires in each civil case. For starters, fairness in the civil context requires consideration of factors different to those that apply when determining whether 'substantial injustice' will result in the criminal context.

In our view, FC s 34 does impose limited positive obligations on the state to provide free legal representation to civil litigants where the failure to provide such assistance would render a hearing 'unfair'. Factors relevant to this enquiry may include the interests at stake, the complexity of proceedings and the capacities of the individuals concerned to litigate without assistance. Evidence to the effect that the particular type of proceedings may not, in reality, be conducted without legal assistance, as was adduced in *Nkuzi*, will also be relevant.

The state has already established the mechanism by which to discharge its constitutional obligations to provide legal aid: the Legal Aid Board, established

[1] *Nkuzi* (supra) at 734.
[2] 1997 (2) BCLR 229 (E) at 236.
[3] *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 16.
[4] See § 59.3*(a)*(iv) supra.

in terms of the Legal Aid Act.[1] The Legal Aid Board prioritizes criminal legal aid, and currently provides far less assistance in civil matters. Its policy approach to the provision of legal aid is set out in the Legal Aid Guide, which is published by the Legal Aid Board in consultation with the Minister of Justice and Constitutional Development and revised periodically.[2] To receive legal assistance through any of the legal service providers funded by the Legal Aid Board, an applicant must meet certain criteria. In terms of the Legal Aid Board Act, legal aid is only rendered to 'indigent' persons.[3] The term is not defined in the Act, but has been defined, although not in the context of the Act, in *Smith v Mutual & Federal Insurance Co Ltd*, where the judge distinguished 'indigent' from 'poor'.[4] The judge stated that 'to be *indigent* means to be in extreme need or want whereas to be *poor* means having few things or nothing'.[5]

The Legal Aid Board has established a number of Justice Centres, Satellite Offices and High Court Units through which it dispenses legal aid.[6] Presumably on the basis of the term 'indigent', the Board has laid down a financial means test. This test, which is revised from time to time, remains low enough to exclude a large group. At present, the means test provides that to qualify one must earn less than R2 000 a month if single or less than R2 500 for a 'household.'[7] However, this threshold excludes a large proportion of the population — people who earn above this threshold but are still unable to afford private representation. This strict threshold limits the provision of legal aid to those persons in extreme need or want for the basic necessities of life. It certainly excludes the working poor and middle class. The provision of legal aid by the Board is also restricted according to the type of matter for which assistance is sought. Defamation matters, 'undeserving' divorce cases, most maintenance matters and family violence are excluded.[8] The Board largely prioritizes criminal matters over civil legal aid: 87% of the latest Board budget for new matters was spent on criminal legal aid.[9]

[1] Act 22 of 1969.
[2] Section 3A(1) of the Act.
[3] See the long title of the Legal Aid Act 22 of 1969.
[4] 1998 (4) SA 626 (C) at 632.
[5] Ibid.
[6] There are currently 58 Justice Centres, 33 Satellite Offices and 13 High Court Units, according to the Legal Aid Board *Annual Report 2005/6* (2006), available at http://www.legal-aid.co.za/publications/Legal%20Aid%20Board%20Annual%20Report%202005-06%20p% 2001-120.pdf (accessed on 1 November 2007) 23.
[7] See Legal Aid Board *Circular No. 4 of 2006* (2 October 2006) available at http://www.legal-aid.co.za/publications/circs2006/Circular%204%20of%202006_Means%20Test%20applicable%20wef%201%20October%202006.pdf (accessed on 1 November 2007).
[8] PJ Brits *Legal Aid Guide 2002* (10th Edition, 2002) available at http://www.legal-aid.co.za/publications/Legal%20Aid%20 Guide%202002.pdf (accessed on 1 November 2007) 49ff.
[9] Legal Aid Board *Annual Report 2005/6* (supra) at 25, Table 5.

The Legal Aid Guide, which is prepared by the Legal Aid Board in consultation with the Minister, who must table it in Parliament for ratification,[1] may constitute a 'law of general application'. Accordingly, if the Guide curtails the entitlement to civil legal aid that arises out of FC s 34, that limitation may be saved under FC s 36.[2] Ellmann contends that costs and resource constraints are likely to play a greater role in limiting the state's obligations in the context of civil legal aid under FC s 34 than in respect of criminal legal aid under FC s 35.[3] Budlender, noting certain conceptual difficulties with allowing resource constraints to justify a limitation under FC s 36, suggests that this factor should be considered in deciding on remedy.[4]

(ii) *Equality of arms*

In the previous section, we have considered whether FC s 34 confers a right to state-funded legal aid in civil matters. We have contended that, in at least some civil matters, it does create such a right. The principle of 'equality of arms' takes the issue a step further. The principle essentially entails that, where parties *are* legally represented in litigious proceedings, their representation should be commensurate.

In *Shilubana v Nwamitwa*,[5] the Constitutional Court was faced with an eleventh-hour application by the respondent to postpone the hearing of the matter. One of the grounds of the application was that the respondent contended that he should received funding from the State Attorney towards his legal expenses.[6] We have considered the state's obligations in that regard above.[7] However, the argument went further: the respondent contended that, because the State Attorney had refused to fund the respondent, the parties were not 'represented on an equal basis' before the Court. The Court characterized the respondent's submission as 'faced with applicants unfairly represented by the State Attorney who briefed senior counsel, as well as two amici curiae who broadly support the applicants' case — six advocates in total — and hampered by insufficient funds, there was not an 'equality of arms' between the parties.'[8]

[1] Legal Aid Act s 3A(2).

[2] See *Legal Aid Board (Ex Parte) v Pretorius and Another* [2007] 1 All SA 458 (SCA)(The SCA dismissed an application for leave to appeal against an order directing the Legal Aid Board to provide alternative representation to certain criminal accused in one of the so-called 'Boeremag' trials. Although the judgment applied the FC s 35 criterion of 'substantial injustice' (rather than FC s 34) to determine the entitlement of the accused to representation, the judgment is relevant in that the SCA confirmed that the Legal Aid Guide gives effect to the constitutional right (para 36), must be interpreted in light of the provisions of the Constitution (para 25), and that the ultimate question is whether the constitutional requirement of fairness has been met (paras 36–41). These principles will apply equally to an entitlement to legal aid in civil matters under FC s 34.

[3] S Ellmann 'Weighing and Implementing the Right to Counsel' (2004) 121 *SALJ* 318, 328–329.

[4] G Budlender 'Access to Courts' (2004) 121 *SALJ* 339, 353.

[5] [2007] ZACC 14 ('*Shilubana*').

[6] Ibid at para 6.

[7] See § 59.4*(b)(i)* supra.

[8] *Shilubana* (supra) at para 21.

The issue of equality of arms has been raised previously in the Constitutional Court, in the criminal context. In *Ex Parte Institute for Security Studies: In re S v Basson*,[1] the Court was faced with an application by the Institute for Security Studies (ISS) to be admitted as an *amicus curiae*. It was apparent from the application that the ISS would make submissions that broadly supported the state's case and were adverse to the interests of the respondent (Basson, the accused in the High Court proceedings). It was submitted at the hearing by counsel appearing for Basson that they would struggle to deal with additional issues and argument in the limited time available for preparation, given the size of the appeal record. Counsel also referred to the large number of advocates who would be arguing for the other side if the ISS were admitted, stating that Basson was represented by only two counsel. One of the court's reasons for dismissing the ISS' application was that admitting the ISS as an *amicus* might lead to an inequality of arms:

> As a general matter, in criminal matters a court should be astute not to allow the submissions of an *amicus* to stack the odds against an accused person. Ordinarily, an accused in criminal matters is entitled to a well-defined case emanating from the State. If the submissions of an *amicus* tend to strengthen the case against the accused, this is cause for caution. This, however, is not an inflexible rule. But it is a consideration based on fairness, equality of arms, and more importantly, what is in the interests of justice.[2]

The principle of equality of arms was also briefly referred to in *Bernstein v Bester*. The Court in *Bernstein* stated that '[t]he principle of "equality of arms"', implicit in the right to a fair trial, has not been applied to situations such as the one we are considering in the case before us.'[3] In *Shilubana*, the Court stated *obiter* that the concept of equality of arms 'has its constitutional basis, in the civil context, in section 34's guarantee of a fair public hearing.'[4] However, the Court held that, in the absence of submissions by all concerned parties, it was not appropriate to consider whether the alleged imbalance was 'constitutionally cognisable or problematic', and accordingly did not need to consider whether an imbalance actually existed in that matter, and if so, what an appropriate ratio of representatives would be or whether it necessitated a postponement.[5] The Court held that the relevant question in considering the postponement was what the interests of justice required. Part of that enquiry, however, required asking whether the parties were 'effectively represented'.[6] The Court, which ultimately granted the requested postponement, held:[7]

> When considering the interests of justice there is room to consider the alignment of both amici with the applicant, the one-to-six counsel ratio in this case and the fact that senior counsel could be helpful in wading through difficult and important constitutional issues.

[1] 2006 (6) SA 195 (CC), 2006 (2) SACR 350 (CC).
[2] Ibid at para 15.
[3] 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at fn 154.
[4] *Shilubana* (supra) at para 21.
[5] Ibid.
[6] Ibid.
[7] Ibid at para 22.

Where does that leave the status of the principle of 'equality of arms'? The Constitutional Court has, as yet, only considered the issue of equality of arms in interlocutory proceedings, never as the principal claim. The Court's *dicta* in *Basson (ISS amicus application)*, *Bernstein* and *Shilubana* all purported to leave open the question whether an inequality of arms gives rise to a constitutional cause of action. However, both *Basson (ISS amicus application)* and *Shilubana* gave weight to alleged imbalances in representation, in the context of an *amicus* application and a postponement application respectively. Both interlocutory applications were decided under the umbrella standard of 'the interests of justice'. Accordingly, equality of arms (regardless of nomenclature) is a factor relevant to the interests of justice, wherever that standard applies. This leaves open the question whether a free-standing substantive right to equality of arms arises in criminal proceedings (under FC s 35) or civil proceedings (under FC s 34). When *Shilubana* is heard on the merits, the question is likely again to go unanswered, unless the respondent presses the issue.

In our view, the principle of the equality of arms must flow from the right to legal representation in at least *some* civil matters that we argue above is conferred by FC s 34. For the right to legal representation to be meaningful, it must not result in an extreme imbalance in representation — for that would amount to a constitutional right to second-grade justice. If a right to legal representation in some civil matters exists, it must be a right to *effective* representation that is generally commensurate with the representation of the opposing parties. In this sense, equality of arms is a subsidiary concept to the right to legal representation. We have argued that the right to legal representation arises only in matters where the failure to provide such assistance would render a hearing 'unfair', taking into account factors such as the interests at stake, the complexity of proceedings and the capacities of the individuals concerned to litigate without assistance, as well as evidence to the effect that the particular type of proceedings may not, in reality, be conducted without legal assistance. Where these factors lead to the conclusion that free legal representation must be provided to secure a 'fair' hearing, a secondary question will arise in crafting an order: what type and scale of free representation must be provided to ensure fairness? In our view, this is where equality of arms must be considered: where FC s 34 requires free legal representation. Where FC s 34 does *not* require free legal representation at all, it would be premature for a free-standing claim to equality of arms to arise.[1]

[1] The European Court on Human Rights adopts a concept of equality of arms that applies more broadly than equality of arms with respect to legal representation. So, for instance, equality of arms has been held to require that each party should be given the opportunity to have knowledge of and to comment on the observations filed or evidence adduced by the other party. See *Buchberger v Austria* (2003) 37 EHRR 13 at para 50. The principle has been stated thus: 'Equality of arms' implies that each party must be afforded a reasonable opportunity to present his case — including his evidence — under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.' *Dombo Beheer v. Netherlands* (1994) 18 EHRR 213 at para 33. While this approach seems logical, no South African court has yet adopted it.

There is a risk that equality of arms, applied rigidly, would degenerate into counting heads and years of experience. In our view, even where FC s 34 does require legal representation to ensure fairness of civil proceedings, the right does not contemplate an absolute equality of arms. Rather, it requires representation that is substantially commensurate to that of opposing parties and sufficient to ensure effective representation in the particular proceedings. Head-counting will be, at most, a rough guide, because the fact that one party is represented by six counsel does not necessarily mean that every party requires six counsel to represent it effectively. Only in extreme cases, for example where the record in a matter is so bulky that numerical differences in representation will have a significant impact (such as, for example, in *Basson (ISS amicus application)*), should the courts give weight to such numbers concerns.

(iii) *Independence and impartiality*

FC s 34 provides for a right to a fair public hearing 'before a court or, where appropriate, another independent and impartial tribunal or forum'. Therefore, both the courts and, where it is appropriate to resolve disputes before them, other tribunals or fora must be *independent* and *impartial*.[1] In our view, these related requirements go to securing the *fairness* of dispute resolution proceedings. Below we look first at independence and then consider impartiality.

Independence is a structural or institutional requirement, as opposed to impartiality, which is concerned with actual or perceived bias in respect of specific judicial officers. In *De Lange v Smuts NO*, Ackermann J clearly articulated the basis for the distinction between independence and impartiality when he wrote:

> When the above principles are applied to the present case it illustrates even more clearly why officers in the public service do not enjoy the necessary independence, notwithstanding their actual competence and impartiality, for making the judicial decision to commit a recalcitrant examinee to prison. I am far from convinced that the first two essential requirements for independence referred to in the Canadian cases, namely those of security of tenure and a basic degree of financial security free from arbitrary interference by the Executive in a manner that could affect judicial independence, are present in the case of officers in the public service. It is unnecessary, however, to pronounce definitively on these requirements, for such officers undoubtedly lack the required objective structural independence and are not reasonably perceived to possess it.[2]

FC s 165(2) provides that '[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.' FC s 165(3) provides further that no person or organ of state may interfere with the functioning of the courts. In *Beinash v Ernst & Young*, Mokgoro J referred to this provision and, implying that it was violated by the

[1] See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) at para 30; *Sager v Smith* 2001 (3) SA 1004 (SCA) at para 15.
[2] *De Lange v Smuts NO* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 73.

conduct of the applicant, stated that a vexatious litigant manipulates the functioning of the courts so as to achieve a purpose other than that for which the courts are designed.[1] The key institutional guarantors of judicial independence include the process for the appointment of judicial officers,[2] the judicial oath,[3] security of tenure,[4] financial security[5] and the limitation of civil liability of judges.[6]

Impartiality, by contrast, relates to the particular presiding officer, and is the constitutional basis for her recusal. In *S v Basson* ('*Basson II*'),[7] the Constitutional Court considered an appeal by the state against the decision of the trial judge, Hartzenberg J, not to recuse himself. The Court noted that access to courts that function fairly and in public is a basic right guaranteed in FC s 34.[8] The Court stated that the impartiality of judicial officers is essential to a constitutional democracy, and is closely linked to the independence of courts,[9] which is guaranteed in FC s 165(2).

The Court in *Basson II* confirmed[10] the following finding in *President of the Republic of South Africa v South African Rugby Football Union* ('*SARFU II*'):[11] a judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that the judge may be biased, acts in a manner inconsistent with FC s 34 and in breach of the requirements of FC s 165(2) and the prescribed oath of office.[12] The Court in *SARFU II* framed the test for recusal as follows:

[1] 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC) at para 17.

[2] FC s 174 governs the appointment of judicial officers, providing both substantive criteria for appointment and a process, in which the Judicial Service Commission (JSC) plays a critical role. The JSC is established in terms of FC s 178. Its members include judges, practising lawyers, academics and politicians. FC s 174(7) governs the appointment of Magistrates. Magistrates are appointed by a Magistrates' Commission established in terms of the Magistrates' Courts Act 90 of 1993.

[3] FC item 6(1) of Schedule 2 requires judges to take a prescribed oath, swearing or affirming that they will be 'faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.'

[4] Security of tenure is protected by FC s 177. FC s 177 provides for the dismissal of judges by the President on the basis of a finding by the JSC or upon the passing of a resolution by two thirds of the members of the National Assembly.

[5] FC s 176(3) precludes the reduction of judges' salaries, allowances and benefits, which are determined in terms of the Judges' Remuneration and Conditions of Employment Act 88 of 1989. Section 10 of the Supreme Court Act 59 of 1959 repeats this prohibition on reduction.

[6] At common law, judicial officers may not be sued in delict for their judgments. See *Penrice v Dickinson* 1945 AD 6; *May v Udwin* 1981 (1) SA 1 (A). In addition, s 25(1) of the Supreme Court Act 59 of 1959 provides that no civil process may be issued against a judge without the consent of that court: that is, the consent of the Judge President of the relevant division or the President of the Supreme Court of Appeal, as the case may be. Section 5 of the Constitutional Court Complementary Act 13 of 1995 imposes an equivalent requirement in respect of judges of the Constitutional Court.

[7] 2005 (12) BCLR 1192 (CC).

[8] Ibid at para 23.

[9] Ibid at para 24.

[10] Ibid at para 25.

[11] 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC)('*SARFU II*')(This case concerned an application for the recusal of five judges of the Constitutional Court in a matter concerning a challenge to a decision of the President to appoint a commission of inquiry into rugby in South Africa. The recusal application failed.)

[12] Ibid at para 30.

> The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.[1] (Footnotes omitted.)

In *SARFU II*, the Court identified two different approaches for determining 'the appearance of bias'. The focus of the one is 'real likelihood of bias' and of the other 'a reasonable suspicion or apprehension of bias'.[2] The court preferred the latter approach, and, to avoid the potentially inappropriate connotations that the word 'suspicion' might carry, preferred the phrase 'reasonable apprehension of bias' to 'reasonable suspicion of bias'.[3] The Court also acknowledged that all judges as human beings bring to their work their life experience – that they are not neutral in an absolute sense. The Court held that it is not improper for judges to have individual perspectives and for these perspectives to be brought to bear on their adjudication of cases.[4]

In *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)*,[5] the Constitutional Court held that not only is there a presumption in favour of the impartiality of the court, but it is a presumption which is not easily dislodged. Cogent and convincing evidence is required to rebut the presumption.[6] The bar is also raised by the requirement that a *reasonable* person would *reasonably* apprehend judicial partiality. In *SACCAWU*, Cameron AJ discussed the double requirement of reasonableness of the *SARFU II* recusal test:

> It is no doubt possible to compact the 'double' aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the twofold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:
>
> > 'Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity.'[7]

[1] *SARFU II* (supra) at para 48.
[2] Ibid at para 36.
[3] Ibid at para 38.
[4] Ibid at paras 42-43.
[5] 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 (CC)('*SACCAWU*').
[6] Ibid at para 12.
[7] Ibid at para 15. The quote is from *R v S (RD)* [1997] 3 SCR 484 (SCC) at para 113.

In *Basson II*, the court held in the criminal context that the right to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the state.[1] This conclusion leads to the question whether, in civil matters, public-interest standing might entitle non-parties to apply for recusal of a presiding officer. While one can envisage a matter in which such an interest would be sufficient to grant standing, it would have to be a compelling interest, not only in the resolution of the underlying substantive dispute, but also in the public perceptions of the partiality of the court.

The Court in *Basson II* noted that both *SACCAWU* and *SARFU II* were concerned with perceived bias in appellate courts where the bench is composed of more than one judge. The *Basson II* court explained:

> In evaluating the situation regarding a trial before a single judge, a court must be sensitive to the different nuances of such a 'live' situation in a court of first instance, where demeanour or body language, tone of voice, the timing of remarks and the emotional response of participants in exchanges to one another may play a role. The context of the proceedings will be relevant to the determination of the apprehensions of a reasonable person. However, in principle, the test remains the same.[2]

The Court went on to distinguish between grounding a complaint of bias on the conduct of the judge in hearing the case and grounding such a complaint on the relationship between the judge and one of the parties or witnesses, and held that it was more difficult to establish a reasonable apprehension of bias based on the conduct of the judge.[3] The Court referred with approval to the dictum of Harms JA in the Supreme Court of Appeal that 'a Judge is not simply a 'silent umpire'.[4] The Court stated that inappropriate behaviour by a judge is unacceptable and may, in certain circumstances, warrant a complaint to the appropriate authorities. It will not, however, ordinarily give rise to a reasonable apprehension of bias. It will only do so where an applicant for recusal can show that it arises not from irritation or impatience with the way in which a case is being litigated, but from what may reasonably be perceived to be bias.[5] Ultimately, in *Basson II*, the Court held that although 'some of the rulings made by the judge were mistaken, and that some of his remarks were ill-considered', they did not give rise to a reasonable apprehension of bias.[6]

(iv) *Notice and hearing requirements*

One of the fundamental aspects of the *audi alteram partem* principle is that both sides in a dispute must be heard. This principle is the basis for the detailed rules

[1] *Basson (II)* (supra) at para 26.
[2] Ibid at para 32.
[3] Ibid at para 33. See also *R v Silber* 1952 (2) SA 475 (A) at 481C-H.
[4] *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565, 570 (A).
[5] Ibid at para 36.
[6] Ibid at para 102.

of service and notice that are applicable in all civil proceedings.[1] A rule or a provision that does away with the ordinary principles of notice may be seen to implicate the fairness of any subsequent hearing. Such a rule or provision could also implicate the right to have a justiciable dispute determined by a court if the rule or provision provides for an invasive measure to be granted against a respondent on an ex parte basis. Therefore, a measure that allows a hearing to take place with little or no notice to the other side, but where that side is still represented at the hearing, would implicate the fairness aspect of FC s 34. A measure that does not even entitle a respondent to be represented at a hearing that affects his rights would implicate the access component of FC s 34. For convenience, both types of measure will be discussed here.

In *De Beer NO v North-Central Local Council & South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)*, the Constitutional Court located the requirement of a hearing in the 'fairness' contemplated in FC s 34, and explained that reasonable notice was necessary to facilitate a hearing.[2] It wrote:

> This s 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. . . . It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected.[3]

In *National Director of Public Prosecutions and Another v Mohamed NO*,[4] the Constitutional Court (in a judgment of Ackermann J) referred with approval to the above passage from *De Beer*.[5] It confirmed the principle that, as a matter of statutory construction, the *audi* rule should be enforced unless it is clear that the Legislature has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify a court not giving effect to it.[6] In *NDPP v Mohamed*, a High Court had granted an order declaring the provision in s 38 of the Prevention of Organised Crime Act,[7] that permitted the National Director of Public Prosecutions to apply 'by way of an *ex parte* application' to a High Court for a preservation of property, unconstitutional. It ordered that s 38 was to be read as if the words 'by way of an *ex parte* application' did not

[1] See, for example, *Davids and Others v Van Straaten and Others* 2005 (4) SA 468 (C)(HJ Erasmus J held that the principles of *audi alteram partem*, as required by s 34 of the Constitution, were so fundamental to the fairness of a hearing that it was inappropriate to review a decision of an inferior court without notice to all parties, including the magistrate. Ibid at 486D–G).

[2] 2002 (1) SA 429 (CC), 2001 (11) BCLR 1109 (CC).

[3] Ibid at para 11.

[4] 2003 (4) SA 1 (CC), 2003 (5) BCLR 476 (CC)('*NDPP v Mohamed*').

[5] Ibid at para 36.

[6] Ibid at para 37.

[7] Act 121 of 1998.

appear in the provision.[1] The basis of the High Court's decision was that s 38 did not provide for a rule nisi procedure that would allow interested parties to oppose the confirmation of a preservation order obtained ex parte. Accordingly, the provision limited FC s 34 and the limitation could not be saved under FC s 36.

The Constitutional Court disagreed. It held that s 38 should be interpreted to include a right to be heard, that is, to include the ordinary rule nisi procedures, although the section did not expressly provide for them. The Court concluded that there was only one proper construction of s 38: namely, that the *audi* rule had not been excluded and that the principles relating to the issuing of rules nisi and the making of interim preservation orders by the High Courts were applicable to the s 38 procedures.[2] Ackermann J was prepared to assume that the temporary deprivation before the return day constitutes a limitation of FC s 34, but held that any such limitation would be justifiable under FC s 36.[3] *NDPP v Mohamed* is therefore authority for a presumptive principle of statutory interpretation in favour of the right to be heard, which must be discovered in the interpretation of legislation unless it is expressly or by necessary implication excluded, or there are exceptional circumstances which would justify not giving effect to it.

The Domestic Violence Act[4] contains various provisions that could be said to limit the right of access to court.[5] The aim of the Act is, of course, to provide protection for victims of domestic violence. It provides, amongst other things, for the issuing by a court of a protection order against a respondent suspected of committing domestic violence against an applicant. In terms of DVA s 4, an applicant may approach a court for an interim protection order without notice to a respondent. Section 5 determines the circumstances in which the interim order may be granted.[6] For our purposes, it is important to note that, if the court issues the interim order, the respondent must be given notice of this order and notice of a return day at which he may resist the finalization of the order. The respondent must be given at least 10-days' notice of the return day, but is entitled to anticipate it.[7] Section 5 also provides that a court may refuse to

[1] *NDPP v Mohamed* (supra) at paras 5-8. There were two High Court decisions. *Mohamed NO and Others v National Director of Public Prosecutions and Another* 2002 (4) SA 366 (W). The High Court reached this conclusion regarding the constitutionality of s 38 without considering certain issues. Accordingly, the Constitutional Court set aside the High Court's order and remitted the matter to the High Court. *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (4) SA 843 (CC), 2002 (9) BCLR 970 (CC). In a second unreported judgment delivered on 16 October 2002, the High Court reconsidered the matter and came to the same conclusion in respect of s 38.

[2] *NDPP v Mohamed* (supra) at para 51.

[3] Ibid at para 52.

[4] Act 118 of 1998('DVA').

[5] The scheme of the Act is summarized in *Omar v Government of the Republic of South Africa and Others.* 2006 (2) SA 289 (CC), 2006 (2) BCLR 253 (CC)('*Omar*') at paras 20-31.

[6] A court will grant an order if there is a *prima facie* case that the respondent is committing or has committed an act of domestic violence and undue hardship may be suffered by the applicant if the interim order is not granted.

[7] DVA s 5(5).

grant an interim order but put the respondent on notice that there will be a return day on which the question as to whether to issue an order will be determined. Where a court adopts this approach, there will be no limitation on the fairness of the proceedings since no justiciable dispute will have been determined without notice. DVA s 6 provides for the issuing of final orders. If the respondent does not appear on the return date, the court may grant the order if it is satisfied that proper service took place. If the respondent does appear, it must conduct a full hearing at which the respondent may present evidence.

In *Omar v Government of the RSA and Others*, the applicant challenged the constitutionality of DVA s 8. This provision gives a court the power, when issuing a protection order, to issue a warrant of arrest against a respondent. The idea is that the operation of the warrant will be suspended. However, if the respondent breaches the protection order (which, in terms of the Act, is a criminal offence),[1] the complainant may present the warrant to a member of the police service who must arrest the respondent if it appears to him that there are reasonable grounds to believe that the complainant will suffer imminent harm as a result of the respondent's breach of the protection order.[2] There is also provision for the police officer to decline to arrest the respondent there and then but to put the respondent on notice of a hearing at which the question as to whether he has breached the protection order will be determined.[3]

The question whether the court may issue a warrant of arrest along with an interim order, as opposed to a final order, is important to the determination of the question whether s 8 limits the right of access to court. If the warrant of arrest is only issued along with the final protection order, there can be little complaint from an access to courts point of view, since the respondent is put on notice in regards to the final order. The Court in *Omar* did not directly consider this matter but it would seem from the definition of 'protection order' in the Act, read with s 8, that an arrest warrant may accompany an interim order. The question, therefore, was whether this limited the right of access to court.

One might have expected the respondent to challenge the whole scheme providing for protection orders. He did not, for example, challenge s 5, which provides for the issuing of an interim order without notice. Not much turned on this, in the end, because the reasons given by the court for rejecting his challenge based on s 8 apply to s 5 as well. They may, for that matter, apply to many emergency provisions that allow interim relief to be granted without notice. It must be noted, however, that the court explicitly limited its ruling to s 8.[4]

The Court in *Omar* held that the procedure for warrants of arrest did not limit the right in FC s 34. The Court pointed out that it would defeat the purpose of the Act if notice had to be given to the respondent in advance of the issuance of

[1] DVA s 17*(a)*.
[2] DVA s 8(4)*(b)*.
[3] DVA s 8(5).
[4] *Omar* (supra) at para 33.

the interim order. However, despite the fact that the order could be issued without notice, it would only begin to operate once notice of it had been given to the respondent and, furthermore, would only be confirmed on the return day after notice had been given to the respondent. These procedures would enable him to make representations at the hearing for more permanent relief.[1] The Court explained:

> The procedure provided for to obtain a protection order is not uncommon for situations where a party who feels threatened by the immediate conduct of another approaches a court for urgent relief without giving notice to the respondent. Interim relief is granted by courts on a daily basis and respondents are called upon to appear before the court on a specified return date to show cause why the interim relief should not be made final. On the return date the court, after a proper hearing, decides whether to discharge an interim order or to grant final relief. It is also quite common that the return date may be anticipated by the respondent and that an interim order can be varied or set aside. It is not surprising that the legislature has opted to utilise established and well-known procedures for dealing with emergency situations, to adapt these to meet the needs related to domestic violence and to codify them in a statute. Section 8 does not deny a respondent access to the courts.[2]

The implication of this approach is that any 'justiciable dispute' that is determined by the court only takes place on the return day of the interim order. Since proper notice of the return day is given to the respondent and he may make representations on the return day, his right of access to court is not limited.[3]

(v) Public hearing

FC s 34 does not contain any internal limitations of the right to a *public* hearing. Therefore, any such limitations must survive limitations analysis under FC s 36. FC s 36 will, therefore, require that the publicity requirement be departed from only in terms of a law of general application. Useful guidance as to when the right to a public hearing may justifiably be limited may be drawn from art 14 of the ICCPR[4] which provides for exceptions

> for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. . . .

The Constitutional Court has recently endorsed the 'principle of open justice', a constitutional principle that flows from, among other provisions, the right to a

[1] *Omar* (supra) at para 37.
[2] Ibid at para 38.
[3] Another approach is to conclude that even an interim order constitutes a limitation of the right of access to court. However, the extent of the limitation is not severe (because of the return day at which submissions may be made) and the purpose of the limitation is very important (to prevent the respondent frustrating the order) and so such limitation will likely be found justifiable in terms of FC s 36.
[4] See § 59.2*(c)* supra.

fair *public* hearing in FC s 34 and the right to a *public* trial under FC s 35. In *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* ('*SABC*'),[1] the Court held that 'open justice' is an important part of those rights,[2] and explained the rationale for the principle:

> Courts should in principle welcome public exposure of their work in the courtroom, subject, of course to their obligation to ensure that proceedings are fair. The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the Judiciary as much as to other branches of government. These values underpin both the right to a fair trial and the right to a public hearing (ie the principle of open courtrooms). The public is entitled to know exactly how the Judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness.[3]

SABC concerned an application for leave to appeal against the order of the SCA refusing to allow the applicant to be present at and to record for the purpose of live broadcast the proceedings of the SCA in the high-profile criminal appeal of Mr Shaik. The majority ultimately held that there was no basis to interfere with the exercise of the SCA's discretion in refusing such access on the facts of this matter.[4]

In the subsequent judgment in *Shinga v The State & Another (Society of Advocates, Pietermaritzburg Bar, as* Amicus Curiae*); O'Connell and Others v The State*,[5] Yacoob J (for a unanimous Court) endorsed the above dictum in the context of a challenge to a provision of the Criminal Procedure Act.[6] The provision allowed criminal appeals to be held in chambers rather than in open court. Yacoob J wrote:

> It is important that the significance of this deviation from the rule of law, fairness and justice be fully understood. The section makes dangerous inroads into our system of justice which ordinarily requires court proceedings that affect the rights of parties to be heard in public. It provides that an appeal can be determined by a Judge behind closed doors. No member of the public will know what transpired; nobody can be present at the hearing. Far from having any merit, the provision is inimical to the rule of law, to the constitutional mandate of transparency and to justice itself. And the danger must not be underestimated. Closed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based.[7]

Yacoob J added that the principle of open justice is 'not without exception'.[8] In our view, examples of cases in which it would be appropriate to limit the right to

[1] 2007 (1) SA 523 (CC), 2007 (2) BCLR 167 (CC).
[2] Ibid at para 30.
[3] Ibid at para 32.
[4] Ibid at paras 61–67. For criticism of this decision see R Danay & J Foster 'The Sins of the Media: The *SABC* Decision and the Erosion of Free Press Rights' (2006) 22 *SAJHR* 563.
[5] 2007 (4) SA 611 (CC), 2007 (5) BCLR 474 (CC)('*Shinga*').
[6] Act 51 of 1977.
[7] Ibid at para 25.
[8] Ibid at para 27.

a *public* hearing include such matters as: testimony of child witnesses; sensitive family law matters;[1] confidential information implicating national security or public security interests;[2] and criminal matters (in particular, sexual offences) in which the complainant prefers privacy. In each case, the departure from the requirement of open justice must be justified by means of a law of general application. Therefore, a law of general application must ordinarily permit a judicial officer to hold a hearing behind closed doors. The absence of such a law would deny the court any discretion to hold in camera proceedings. In criminal proceedings, s 153 of the Criminal Procedure Act provides the statutory basis for a trial not to be held in open court.[3] The provision is concerned mainly with witness safety, sexual offences and offences involving 'inspiring fear' and with children involved in criminal proceedings. As a general rule, all High Court civil proceedings must be conducted in open court.[4] The High Court has a discretion to order otherwise in special cases.[5] These departures, in appropriate cases, will be reasonable and justifiable limitations of the right to have a hearing in open court.

Parties often agree that private arbitrations should be held behind closed doors. Christie contends that such agreements constitute a waiver of the right to a public hearing in FC s 34.[6] He further refers to the Supreme CA decision in *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd*[7] as authority for the proposition that FC s 34 probably does not apply to consensual arbitration — although it may apply to statutorily imposed arbitration.[8] We have argued above that FC s 34 may apply horizontally, at least when private parties litigate in the state courts.[9] In addition, however, FC s 34 is arguably capable of horizontal application in the context of private arbitration. The mere existence of

[1] *W v W* 1976 (2) SA 308, 310 (W)(Evidence was permitted to be given in camera in this divorce case).

[2] See *R v Muzorori* 1967 (2) SA 177 (RA). See also *Masetlha v President of the Republic of South Africa and Others (Independent Newspapers (Pty) Ltd and Minister for Intelligence Services Intervening)*, (Unreported, CCT 38/07, 22 August 2007)(The First Intervening Party, Independent Newspapers (Pty) Ltd, made application for parts of the record that had been removed from the public domain to again be made public. It also made an interlocutory application for its legal representatives and senior editors to have access to the record in the main proceedings so that they could properly prepare for the primary application. The First Intervening Party contended that the right in FC s 34 to a 'public hearing' extends to the documents contained in the appeal record. A majority of the Court issued an order dismissing the interlocutory application without reasons. The main application was heard in November 2007.)

[3] Act 51 of 1977.

[4] Supreme Court Act 59 of 1959 s 16.

[5] Ibid. See also *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd* 1984 (4) SA 149 (T); *Botha v Minister van Wet and Orde* 1990 (3) SA 937 (W) 944; *S v Mothopeng* 1978 (4) SA 874 (T); *S v Sekete* 1980 (1) SA 171 (N).

[6] For a critique of the notion of constitutional waiver, see S Woolman 'Category Mistakes and the Waiver of Constitutional Rights: A Reply to Deeksha Bhana' (2008) 125 SALJ –. This article does not necessarily reflect the views of the authors.

[7] 2002 (4) SA 661 (SCA) at paras 27–8.

[8] See RH Christie 'The Law of Contract and the Bill of Rights' in *Bill of Rights Compendium* (1996) 3H38.

[9] See § 59.3*(a)*(ii) supra.

a contract is not sufficient to exclude its application. In *Telcordia Technologies Inc v Telkom SA Ltd*, the Supreme Court of Appeal held that FC s 34 does apply to consensual arbitration proceedings, but that its requirements may be waived by parties entering into an arbitration agreement.[1] In our view, and as we discuss immediately below, arbitration may constitute dispute resolution in alternative independent and impartial fora, and, to that extent, will be regulated by FC s 34.

(c) Another independent and impartial tribunal or forum

The possibility of justiciable disputes being determined by alternative fora to courts has not been considered extensively by our courts. There are, however, various contexts in which, it seems, it will be acceptable for an alternative forum to determine a justiciable dispute. For example, the Value Added Tax Act, discussed above, creates a Special Court that resolves certain disputes. It is appropriate for this independent and impartial tribunal to be used in tax cases.[2] Since the resolution of disputes in alternative fora will only comply with FC s 34 where it is 'appropriate', the question whether an alternative forum may be used is clearly justiciable. But the nature of such 'appropriateness' has not yet been considered in detail. The other important question that arises is how the fair public hearing requirement of FC s 34 will be applied in fora other than courts. In the discussion that follows, we consider the application of FC s 34 to particular types of proceedings and proceedings held in special alternative fora and tribunals.

(i) Extradition hearings

In *Geuking v President, RSA and Others*[3] the applicant challenged the constitutionality of s 10(2) of the Extradition Act.[4] In order to understand this challenge it is necessary, briefly, to consider the mechanism for extradition provided in the Act.

Where a foreign state requests the extradition of a person present in South Africa a detailed procedure is invoked. For our purposes, it is necessary to note that, when a person is arrested pursuant to an extradition request, he is brought before a magistrate for a hearing.[5] The purpose of the hearing is to determine whether the person is 'extraditable'. If the person is found not to be extraditable, then he is released.[6] However, even if he is found to be extraditable, the process does not end there. The Minister must make the final determination whether to extradite him.[7]

[1] 2007 (3) SA 266 (SCA) at para 47.
[2] *Metcash Trading Ltd v Commissioner, South African Revenue Service* 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC) at para 47.
[3] 2003 (3) SA 34 (CC), 2004 (9) BCLR 895 (CC)('*Geuking*').
[4] Act 67 of 1962.
[5] Extradition Act s 9(1).
[6] Extradition Act s 10(3).
[7] See Extradition Act ss 10(1) and 11 .

Moreover, in order for a person to be extradited, the principle of 'double criminality' is applicable. The offence must constitute a crime both in South Africa and the country that seeks extradition.[1] Whether the offence, if proved, would constitute an offence here is an issue that is clearly within the expertise of the magistrate and he must hear evidence and submissions in this regard. However, the question whether the offence would constitute an offence in the foreign country is not within the expertise of local judicial officers and the Act provides that a certificate from the authorities of the foreign state to the effect that the offence, if proved, would indeed be an offence in the foreign country is conclusive proof of this fact.[2] So, a number of considerations must be taken into account by a magistrate before he may conclude that a person is extraditable. A full hearing, with evidence, takes place in respect of all of them. The exception is proof of the crime's status in the foreign country. The applicant in *Geuking* argued that this part of the process violated his right of access to court.

In rejecting his argument, the Court pointed out that the magistrate's hearing was merely a step on the way to the determination whether the person ought to be extradited. The Minister makes the final decision.[3] The Court held that it was not inappropriate or unfair of the legislature to relieve the magistrate of having to make a determination in respect of which South African lawyers would usually have no knowledge.[4] Furthermore, an appeal exists against the decision of the magistrate to a High Court.[5] In any case, before the Minister makes a final decision, she is obliged to take representations from the prospective extraditee and might, in appropriate cases, be called upon to determine whether the certificate issued by the foreign authorities was indeed sufficient evidence of the status of the alleged offence in foreign law.[6] The implication of this obligation is that the affected person will have the opportunity to lead evidence to the Minister before the decision is made and will have the opportunity to argue that the certificate issued by the foreign authorities should not be considered an accurate reflection of the status of the crime in that jurisdiction.

Implicit in the court's reasoning is that the provision for a hearing before the Minister constitutes an appropriate use of an alternative tribunal or forum. In determining whether the right of access to court had been violated the Court placed great stock in the fact that the Minister hears from the affected person and has a discretion whether to order extradition or not. The question whether a person ought to be extradited is clearly a justiciable dispute within the ambit of FC s 34. Therefore, *Geuking* could be understood in terms of that part of FC s 34 that allows for an alternative forum in appropriate cases. Of course, since the

[1] For the definition of 'extraditable offence', see Extradition Act s 1.
[2] Extradition Act s 10(2).
[3] *Geuking* (supra) at para 44.
[4] Ibid at para 45.
[5] Ibid at para 42.
[6] Ibid at paras 42 and 46.

attack was against the hearing before the magistrate, and not the Minister, the compliance of the hearing before the Minister with FC s 34 was not raised by the applicants. The Court did not directly consider this question and so the answer to the question as to whether the Minister is an 'independent and impartial' tribunal will have to wait for resolution in some future dispute.

(ii) *Arbitration*

There are two forms of arbitration proceedings: those that result as a consequence of agreement between the parties in terms of the Arbitration Act[1] and those that are compulsory in terms of legislation. An example of the latter is arbitration of disputes referred to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA, established by the Labour Relations Act,[2] is not a court of law.[3] In terms of the LRA, certain labour disputes must be determined by arbitration in the CCMA and there is no right to appeal.[4] There is, however, a right to review on limited grounds.[5] This structure envisages that the CCMA will be the final arbiter of certain disputes of fact or law. The Labour Appeal Court has held that this arrangement does not violate the right of access to court:

> There is no constitutional right to have matters capable of being decided by the application of law determined by a court of law. It may be done by another independent and impartial tribunal (section 34 of the Constitution). The Commission is such a tribunal. It is (and was, see *Hira v Booysen* 1992 (4) SA 69 (A) at 91E-I) quite proper to give an independent and impartial administrative tribunal the exclusive competence to decide not only matters of fact, but also of law, with no right of appeal to a court.[6]

It was previously unclear whether arbitration proceedings of the CCMA constitute administrative action under FC s 33 (and PAJA) and/or whether they fall under FC s 34 and are to be deemed proceedings conducted in another independent and impartial forum or tribunal. The Constitutional Court, in *Sidumo*, has resolved this uncertainty. The majority held that CCMA arbitrations constitute administrative action under FC s 33. However, they are not reviewable under PAJA, but must comply with the requirements of a 'fair public hearing' under FC s 34. In addition to clarifying the application of FC s 34 to CCMA arbitration proceedings, the reasoning of the Court, and the divergent views among its members, sheds light on the relationship between FC s 34 and other constitutional rights.

[1] Act 42 of 1965.
[2] Act 66 of 1995 ('LRA').
[3] *Carephone (Pty) Ltd v Marcus NO and Others* 1999 (3) SA 304 (LAC), 1998 (10) BCLR 1326 (LAC)('*Carwephone*') at para 18.
[4] LRA s 143(1).
[5] LRA s 145.
[6] *Carephone* (supra) at para 33.

Navsa AJ noted in his majority judgment that compulsory arbitrations by the CCMA under the LRA are distinct from private arbitrations.[1] CCMA commissioners exercise public power of a character which, under the pre-constitutional approach to categorisation of functions, would have been regarded as 'an administrative body exercising a quasi-judicial function'.[2] He concluded, therefore, that a commissioner conducting a CCMA arbitration is performing an administrative function.[3] However, he held that PAJA does not apply to the review of CCMA awards because they are reviewable under s 145 of the LRA — the specific, constitutionally-mandated legislation enacted to govern labour disputes.[4]

Against this background, Navsa AJ considered an argument advanced by counsel for the employee, in support of the argument that PAJA ought not to apply to the review of CCMA awards, that 'the rights sought to be vindicated in arbitrations conducted under the LRA are linked to the fundamental rights provided for in ss 23 and 34 and not to the right to just administrative action contained in s 33 of the Constitution'.[5] Navsa JA rejected this argument, and his reasoning sheds light on the Court's understanding of the relationship that the right of access to courts bears to other rights, in particular the labour and administrative justice rights in FC ss 23 and 33:

> This submission is based on the misconception that the rights in sections 23, 33 and 34 are necessarily exclusive and have to be dealt with in sealed compartments. The right to fair labour practices, in the present context, is consonant with the right to administrative action that is lawful, reasonable and procedurally fair. Everyone has the right to have these rights enforced before the CCMA acting as an impartial tribunal. In the present context, these rights in part overlap and are interconnected.[6] (Footnotes omitted)

In a separate concurring judgment, O'Regan J agreed with Navsa AJ that a CCMA arbitration constitutes administrative action that is subject to the requirements of FC s 33, and concluded that the CCMA constitutes an independent and impartial forum under FC s 34.[7] Her judgment is animated by a concern that

> if we understand section 33 and section 34 to be mutually exclusive constitutional provisions, we may end up with a formalist jurisprudence based on a distinction between 'administrative' in section 33 and 'judicial' or 'adjudicative' decisions by tribunals governed only by section 34 which is at odds with the substantive vision of our Constitution.[8]

[1] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22 at para 88. Moseneke DCJ, Madala J, O'Regan J and Van der Westhuizen J concurred in the judgment of Navsa AJ. The bench of ten judges split 5-4 in this matter, with Sachs J filing a judgment that purports to agree with both of the main divergent judgments. The judgment of Navsa AJ accordingly constitutes the majority judgment.

[2] Ibid

[3] Ibid

[4] Ibid at para 104. Navsa AJ held, further, that the reasonableness standard embodied in FC s 33 now infuses review under s 145 of the LRA, Ibid para 106.

[5] Ibid at para 111.

[6] Ibid at para 112.

[7] Ibid at para 124.

[8] Ibid at para 135.

In a minority judgment, Ngcobo J (Mokgoro, Nkabinde and Skweyiya JJ concurring) classified the function performed by the CCMA as judicial, identified it as an 'independent and impartial tribunal' within the scope of FC s 34 and concluded, therefore, that its decisions do not constitute administrative action as contemplated by FC s 33.[1]

In a judgment in which he claims to align himself with the positions of both Navsa AJ and Ngcobo J, Sachs J emphasized the hybridity of the rights relationship at issue and contended that FC ss 23, 33 and 34 apply to CCMA arbitrations.[2] Sachs J appears to believe that CCMA awards do constitute administrative action under FC s 33, that PAJA should nevertheless not apply to their review, and that CCMA arbitrations are subject to the 'fairness' requirements of FC s 34.[3] Sachs J holds that FC s 33 requires 'fair dealing'; FC s 23 requires that the 'arbitration process must not fall outside the bounds of reason [because] to accept it doing so would hardly represent a fair outcome'; and FC s 34 requires fairness which, according to Sachs J, entails 'some reasonably sustainable fit between the evidence and the outcome'.[4] Sachs J appears to have been alive to the criticism that this approach, emphasizing hybridity and permeability could conduce to imprecision. He defends his mode of reasoning as follows:

> Seepage should be understood not as a form of analytical blurring to be avoided, but rather as a desirable mechanism for ensuring that constitutional interests in appropriate cases are properly protected, and constitutional justice fully achieved.[5]

We share the concern expressed by Navsa AJ, O'Regan J and Sachs J as to the dangers of compartmentalizing FC ss 33 and 34 (and FC s 23). However, to subsume the requirements of the provisions of FC ss 23, 33 and 34 under a generalized standard of fairness-cum-reasonableness, as Sachs J seems to propose, cannot be supported. Fairness, as embodied in various rights in the Bill of Rights, is not a one-size-fits-all concept. Nor is it readily interchangeable with concepts such as reasonableness or rationality. Legal realists might contend that judges in any event exercise a wide discretion when they apply pliable standards such as reasonableness or fairness to decide particular cases and merely rationalize their decisions by applying specific legal rules. We do not wish to enter that complex jurisprudential debate here. Suffice it to say that, in our view, it remains important that the Constitutional Court, as an apex court, delivers judgments that provide lower courts and practitioners with sufficient guidance to take reasoned decisions on how to approach particular cases.

[1] *Sidumo* (supra) at paras 160–289, especially para 238.
[2] Ibid at taras 156–7.
[3] Ibid at para 158.
[4] Ibid.
[5] Ibid at para 151

The majority in *Sidumo* enunciates at least the following two principles:

(i) CCMA arbitrations constitute administrative action under FC s 33, but are reviewable under s 145 of the LRA, infused with the reasonableness standard of FC s 33. They are not reviewable under PAJA.
(ii) The CCMA constitutes an independent and impartial forum under FC s 34, and a CCMA arbitration must therefore (also) satisfy the requirements of a 'fair public hearing' in terms of FC s 34.

It is beyond the scope of this chapter to engage with the principles governing the review of CCMA awards under the LRA and FC s 33. From an access to courts perspective, however, we note that the application of the fair public hearing requirement of FC s 34 to CCMA arbitration proceedings will obviously not entail transposing the FC s 34 requirements for judicial proceedings onto the CCMA. We explore the issue of the flexible nature of fairness under FC s 34 in § 59.4*(c)*(v) and (vi) below. A similar approach is likely to be taken when fairness is applied to CCMA arbitrations.

When it comes to consensual arbitrations in terms of the Arbitration Act, there are two ways to view them: one could see them as constituting alternative independent and impartial fora, or one could see the parties to them as having waived their right of access to court.[1] The Supreme Court of Appeal in *Total Support Management*[2] left open the question whether the right of access to court may be waived.[3] It also did not directly decide that an arbitration proceeding constitutes an appropriate alternative forum.[4] It held, instead, that the fairness requirement of FC s 34 is, in any case, satisfied where the parties by mutual agreement define what is fair in their arbitration agreement.[5] In *Patcor Quarries CC v Issroff and Others*,[6] Mpati J (as he then was) progressed on the assumption that IC s 22 includes a right to appeal. It was argued that s 28 of the Arbitration Act, which provides that arbitration awards are final and not subject to appeal, violated the right of access to court. Mpati J pointed out that the Act provides that parties may agree to an appeal in their contract. Parties who signed arbitration agreements without providing for appeals could be said to have abandoned their right to appeal.[7]

This debate has now been resolved – at least until the matter comes before the Constitutional Court. In the recent case of *Telcordia Technologies Inc v Telkom SA Ltd*, the Supreme Court of Appeal unanimously held that FC s 34 applies to

[1] See Christie (supra) at 3H38.
[2] *Total Support Management (Pty) Ltd &Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA)('*Total Support*').
[3] Ibid at para 27.
[4] Ibid at para 27.
[5] Ibid at para 28.
[6] 1998 (4) BCLR 467 (SE).
[7] Ibid at 481.

arbitrations in terms of the Arbitration Act: however it also held that the requirements of FC s 34 may be waived.[1] Harms JA held that there was nothing preventing the parties from defining what is 'fair' for the purposes of their dispute.[2] Furthermore, Harms JA, referring to the Supreme Court of Appeal judgment in *Napier v Barkhuizen*,[3] held that the Final Constitution prizes the values of autonomy and dignity and that these values 'find expression in the liberty to regulate one's life by freely engaged contractual arrangements.'[4] Harms JA therefore held that the rights contained in FC s 34 could be waived unless the waiver was in conflict with another constitutional provision or was otherwise *contra bonos mores*.[5]

(iii) *Parliamentary disciplinary proceedings*

De Lille v Speaker of the National Assembly[6] concerned the decision of an *ad hoc* committee of Parliament to suspend the applicant and demand a formal apology from her for remarks made during a session of the National Assembly that were considered 'unparliamentary'. In short, the applicant had made remarks to the effect that certain senior members of the African National Congress (ANC) were spies during apartheid. Having been asked to withdraw these remarks she unconditionally did so, but was later punished by an *ad hoc* disciplinary committee. The relevant facts regarding the committee were as follows:[7]

- It was convened with proportionate representation of the National Assembly and was therefore dominated by ANC members.
- The chair of the committee was also a member of the ANC.
- The chair conducted himself in a way that suggested that the ANC had already come to a decision in regard to the appropriate sanction before the committee had begun its deliberations.
- The committee did not formally reach a conclusion that the applicant was guilty of the offence with which she was charged but, nevertheless, proceeded to consider the appropriate sanction.

The High Court found that the committee had acted in a biased and *mala fide* manner.[8] It therefore held that

> it was incumbent on the National Assembly to create a disciplinary mechanism which is consonant with the Constitution. The *ad hoc* committee was not and could not be an independent and impartial forum for purposes of s 34 because, unlike the disciplinary

[1] 2007 (3) SA 266 (SCA)('*Telcordia*')
[2] Ibid at para 47.
[3] *Napier v Barkhuizen* 2006 (4) SA 1 (SCA), 2006 (9) BCLR 1011 (SCA), [2006] 2 All SA 469 (SCA).
[4] *Telcordia* (supra) at para 47.
[5] Ibid at para 48.
[6] *De Lille and Another v Speaker of the National Assembly* 1998 (7) BCLR 916 (C)('*De Lille*').
[7] Ibid at para 6.
[8] Ibid at para 18.

committee envisaged in the rules [of Parliament], it was dominated by the majority party. Its independence or impartiality was significantly compromised.[1]

(iv) The status of refugees and immigrants

Prior to the enactment of the Refugees Act,[2] decisions as to refugee status were taken by the Refugee Affairs Standing Committee. There was however a right to appeal to a Refugee Affairs Appeal Board. In *Baramoto and Others v Minister of Home Affairs and Others*,[3] this set-up was alleged to violate the right of access to court because, as alternative tribunals, these boards were neither impartial nor independent. The High Court held that there was nothing to suggest that, on the facts of the case, the Committee and Board were neither independent nor impartial.[4] The focus was not on whether there was some form of institutional bias inherent in these tribunals but rather whether, in the context of the particular matter, the potential for bias existed.

In terms of the Refugees Act, decisions regarding applicants' refugee status are taken, at first instance, by a Refugee Status Determination Officer.[5] The Act establishes a Standing Committee for Refugee Affairs.[6] The Committee reviews the decisions of Refugee Status Determination Officers in certain cases.[7] The Act provides for appeals from decisions of the Standing Committee to an Appeal Board.[8] The same question engaged by *Baramoto* arises under the Refugees Act — is the Appeal Board an independent and impartial alternative forum to a court?[9]

Other similar tribunals, established in terms of legislation, exist and raise similar issues. For instance, in terms of the Immigration Act,[10] decisions as to immigration status are made, in the first instance, by immigration officers. Decisions of immigration officers may be reviewed by the Minister in certain cases and reviewed or appealed to the Director-General in others.[11] The latter may be appealed or reviewed further to the Minister. There is no right of appeal to a court. This arrangement naturally raises the question whether the Director-General and the Minister constitute independent and impartial tribunals.

[1] *DeLille* (supra) at para 36.
[2] Act 130 of 1998.
[3] 1998 (5) BCLR 562 (W).
[4] Ibid at 576.
[5] Refugees Act s 21.
[6] Refugees Act s 9(1).
[7] Refugees Act ss 11 and 25.
[8] Refugees Act s 26.
[9] It should be noted that the Immigration Act 13 of 2002 sought to amend s 26 of the Refugees Act to replace the appeal to the Appeal Board with an appeal to a court. This would have rendered the debate about whether the Appeal Board is an independent and impartial alternative forum somewhat moot, because a full appeal would be available before an ordinary court. This amendment has not, as yet, come into force. It should also be noted that if one consults Juta's versions of the statutes, it seems as if the amendment has indeed come into force. This is not, in fact, so and the Butterworths version reflects this.
[10] Act 13 of 2002.
[11] See, generally, Immigration Act s 8.

(v) Commissions of inquiry

In *Mbebe and Others v Chairman, White Commission and Others*, the applicants had been members of the Transkeian police force and, just prior to the advent of democracy, had received promotions.[1] In 1998, the White Commission, which had been appointed by the President in terms of IC s 236(6), found that the promotions had been irregular and, as a result, the promotions were either set aside or altered.[2] The applicants sought to have the findings of the White Commission set aside for various reasons. Of interest for our purposes is an amendment to the applicants' pleadings, which sought to challenge IC s 236(6) as being 'unconstitutional' for violating FC s 34. Although this contention may seem strange, it was a plausible argument to advance. Item 24 of Schedule 6 to the Final Constitution, which deals with transitional arrangements, preserved IC s 236(6) 'subject to consistency with the new Constitution'. It was therefore open to the applicants to argue that IC s 236(6) was inconsistent with FC s 34 and, therefore, invalid.

The High Court rejected this argument. It proceeded on the assumption that a commission envisaged by IC s 236(6) was not a court of law, but a *sui generis* tribunal.[3] The High Court held that this tribunal satisfied the criteria of independence and impartiality required by the Final Constitution. The commission was headed by a judicial officer and a judicial officer appointed in terms of the Constitution is in all material respects an 'impartial entity, independent of the executive and the legislature' who is 'to act as arbiter between the individual and the State'.[4] The High Court held, further, that the proceedings in an alternative forum or tribunal did not need to be identical to those conducted in court, but that, in any case,

> the procedures that were adopted by the first respondent were largely consistent with those employed in an ordinary court of law. The applicants were given the right to legal representation, the right to cross-examine the witnesses who were called by the official appointed by the Commission to perform such function and the right to give evidence and to call witnesses. In practice therefore the applicants were afforded the same rights as those enjoyed by a litigant in ordinary civil proceedings.[5]

[1] 2000 (7) BCLR 754 (Tk)('*Mbebe*').

[2] IC s 236(6) provided:

> Notwithstanding the provisions of this section, the conclusion or amendment of a contract, the appointment or promotion, or the award of a term or condition of service or other benefit, which occurred between 27 April 1993 and 30 September 1994 in respect of any person employed at any time during the said period by an institution referred to in subsection (1), or any class of such persons, may, at the instance of any interested party, before 31 December 1996 be referred to a commission appointed by the President and presided over by a judge, for review, and if not proper or justifiable in the circumstances of the case, the commission may reverse or alter the contract, appointment, promotion or award before a date to be determined by the Minister for the Public Service and Administration.

[3] *Mbebe* (supra) at 773.

[4] Ibid at 775, relying on *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC) at para 15.

[5] *Mbebe* (supra) at 776.

The Commission appointed by the President in this matter was therefore compliant with FC s 34. The court deemed it unnecessary to decide whether, in all such cases, a commissioner appointed in terms of IC s 236(6) had to be a judge.[1]

In *Bongoza v Minister of Correctional Services and Others*, the High Court reached a similar conclusion in respect of the same commission of inquiry as that considered in *Mbebe*.[2] Unlike the court in *Mbebe*, which focused on the similarities between the procedures adopted by the White Commission and those procedures used in a court of law, the court in *Bongoza* confronted the differences: in particular, it confirmed that the rules of evidence applicable to the commission differed from a court of law in that the commission could have regard to a wider range of evidence, such as hearsay evidence, and was not obliged to allow cross-examination of witnesses.[3] The *Bongoza* court confirmed that the requirements of fairness are flexible and that FC s 34 envisages that courts do not have a monopoly on independence and impartiality: an independent and impartial hearing is possible in a forum other than a court. The commission of inquiry at issue qualified as such.[4]

(vi) Specialist complaints tribunals

Statutes often establish tribunals the function of which is to determine the validity of specific complaints that fall within the scope of operation of a particular piece of legislation.[5] At times, these complaints embrace disputes that ought to be resolved by the application of the law as contemplated in FC s 34. At others, the tribunals are best understood as administrative decision-makers whose decisions may constitute 'administrative action', subject to PAJA review but not to FC s 34.

In *Islamic Unity Convention v Minister of Telecommunications and Others*,[6] the applicant challenged certain provisions of the now repealed Independent Broadcasting

[1] *Mbebe* (supra) at 775 and 776.
[2] 2002 (6) SA 330 (TkH)('*Bongoza*').
[3] Ibid at paras 17–18.
[4] Ibid at paras 22–5.
[5] Chapter 9 of the Final Constitution establishes certain institutions whose functions include the investigation and adjudication of complaints: the Public Protector, Human Rights Commission and Commission for Gender Equality. For more on the Chapter 9 Institutions, see S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS) Chapters 24A–F. Statutory examples include the Inspector-General of Intelligence established in terms of the Intelligence Services Control (Oversight) Act 40 of 1994, which investigates complaints against members of the intelligence services; the Independent Complaints Directorate established in terms of the South African Police Service Act 68 of 1995, which investigates complaints against members of the South African Police Service; and professional boards established to consider complaints against health professionals in terms of the Health Professions Act 56 of 1974. On oversight of the police and intelligence services see December 2007) Chapter 23B.
[6] Unreported WLD case no 3431/06, 26 April 2007 ('*Islamic Unity Convention*'). At the time of writing, the confirmation proceedings in this matter were pending before the Constitutional Court.

Act[1] (and regulations made under it) and its successor statute, the Independent Communications Authority of South Africa Act.[2] The challenge relied on FC s 34. It focused on the powers and functions of the Broadcasting Monitoring and Complaints Committee (BMCC), and had its origins in a complaint lodged against the applicant for broadcasting a programme concerning Zionism and Israel that contravened the Code of Conduct for Broadcasting Services contained in the IBA Act.[3] The applicant noted that the impugned provisions conferred monitorial, investigative and adjudicative powers on a single body, the BMCC — and it contended that the concatenation of such powers was inconsistent with FC ss 33 and 34.

The Court in *Islamic Unity* noted that '[t]he intermingling of these powers brings into question the impartiality of the BMCC'.[4] It stated that the appropriate test was to ask whether a reasonable apprehension of partiality and therefore bias existed in the scheme provided for under the impugned provisions. Van Oosten J referred with approval to the decision of the Canadian Federal Court of Appeal in *MacBain v Canadian Human Rights Commission et al, MacBain v Lederman et al*.[5] In *MacBain*, the fairness of proceedings arising from a complaint filed with the Canadian Human Rights Commission was in issue. Van Oosten J noted that the procedure adopted by the Commission, like that of the BMCC, involved it assuming the role of investigator, prosecutor and adjudicator of complaints.[6] In *MacBain*, the court found that this arrangement 'easily gives rise … to a suspicion of influence or dependency'. Van Oosten J approved of the reasoning in *MacBain* and adopted it in deciding *Islamic Unity*. After noting the separation of roles of investigator, prosecutor and decision-maker in criminal proceedings, Van Oosten J held:

> I can see no reason why the principles underscoring fundamental concepts such as independence, impartiality and resulting fairness should not with equal force apply to administrative bodies like the BMCC. It is accordingly my finding that a reasonable suspicion of influence, dependency or bias arising from the direct connection between the prosecutor of the complaint (the chairperson of the BMCC) and the decision maker (the BMCC) cannot be excluded. It follows that the constitutional challenge of the impugned provisions of the IBA Act must be upheld. The impugned provisions of the ICASA Act, which are similar to the impugned provisions of the IBA Act, must accordingly suffer the same fate.

We note that the court did not indicate whether the basis of its finding was FC s 33 and/or FC s 34, but its references to a 'fair hearing' in its reasons suggest that FC s 34 was applied. The High Court then turned to consider the constitutionality of regulations regarding the powers of the BMCC. The regulations

[1] Act 153 of 1993 ('IBA Act').
[2] Act 13 of 2000 ('the ICASA Act').
[3] Ibid at para 3.
[4] Ibid at para 16.
[5] 22 DLR (4th) 119 (FedCA).
[6] *Islamic Unity Convention* (supra) at para 18.

allowed for witnesses to be questioned through the Chairperson and to be cross-examined only if the Chairperson deemed it necessary and in the interests of the functions of the BMCC. The High Court held that these regulations were at odds with the 'normal rights of cross-examination' and unreasonably curtailed the right of a party to conduct its case.[1] Accordingly, the regulations were inconsistent with the right to a fair hearing in FC s 34.[2]

In our view, *Islamic Unity* erred in two respects. First, it is not clear that complaints referred to the BMCC constitute 'disputes that can be resolved by the application of law'. They may be. For example, the subject of a complaint could constitute actionable defamation and the outcome of the complaints process would be dispositive of such a civil claim. However, breaches of a broadcasting code of conduct will not necessarily constitute disputes falling within the ambit of FC s 34. As noted above, the question whether a dispute of law exists at all is one requirement for the application of FC s 34.

Secondly, and more fundamentally, however, the judgment rigidly equates the normal procedures applicable in courts to the *fairness* of a hearing in a complaints tribunal. We think that the approach adopted in *Bongoza,*[3] which acknowledges that fairness is a flexible concept that varies depending on a number of factors, and that it is not necessarily unfair to depart from the ordinary procedures of the courts, is to be preferred. We would also endorse the dicta of Van Niekerk AJ in *Avril Elizabeth Home for the Mentally Handicapped v Commission For Conciliation, Mediation & Arbitration and Others.*[4] Of procedural fairness as it applies in CCMA proceedings in terms of the LRA, the judge wrote:

> Where a commissioner is obliged (as commissioners are) to arbitrate dismissal disputes on the basis of the evidence presented at the arbitration proceedings, procedural requirements in the form that they developed under the criminal justice model are applied ultimately only for the sake of procedure, since the record of a workplace disciplinary hearing presented to the commissioners at any subsequent arbitration is presented only for the purpose of establishing that the dismissal was procedurally fair. The continued application of the criminal justice model of workplace procedure therefore results in a duplication of process, with no tangible benefit to either employer or employee.
>
> The signal of a move to an informal approach to procedural fairness is clearly presaged by the explanatory memorandum that accompanied the draft Labour Relations Bill. The memorandum stated the following:
>
> "The draft Bill requires a fair, but brief, pre-dismissal procedure. . . . [It] opts for this more flexible, less onerous, approach to procedural fairness for various reasons: small employers, of whom there are a very large number, are often not able to follow elaborate pre-dismissal procedures; and not all procedural defects result in substantial prejudice to the employee.'

[1] *Islamic Unity Convention* (supra) at para 23.
[2] Ibid
[3] *Bongoza* (supra).
[4] (2006) 27 ILJ 1644 (LC).

On this approach, there is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and complex 'charge-sheets', requests for particulars, the application of the rules of evidence, legal arguments, and the like.

In our view, FC s 34 requires a similarly flexible approach to fairness when disputes are resolved in an alternative forum or tribunal. Although criminal justice procedures may be followed as a matter of convenience, what is unfair in a court is not necessarily unfair in another forum.

(d) Right to enforcement of an effective remedy

In *Jooste v Score Supermarket*, the Constitutional Court held that the predecessor to FC s 34, IC s 22, did not call for the retention of all common law rights of action which existed at any stage of the litigation.[1] FC s 34 also provides no protection against legally incorrect judicial decision-making.[2] FC s 34 is therefore not concerned at all with the content of the substantive law: that is, what causes of action, defences and rules may exist at common law or in legislation. But where causes of action *do* exist under the substantive law, including but not limited to those founded on the specific terms within the Bill of Rights, FC s 34 entitles persons not only to have access to courts for the sake of access, but to meaningful access that leads ultimately to enforcement of an 'effective remedy'. In *Modderklip*, the Constitutional Court concluded, in the face of the intractable legal stalemate that gave rise to the dispute before it, that:

> The obligation resting on the State in terms of section 34 of the Constitution was, in the circumstances, to take reasonable steps to ensure that Modderklip was, in the final analysis, provided with effective relief. The State could have expropriated the property in question or provided other land, a course that would have relieved Modderklip from continuing to bear the burden of providing the occupiers with accommodation. The State failed to do anything and accordingly breached Modderklip's constitutional rights to an effective remedy as required by the rule of law and entrenched in section 34 of the Constitution.

In *Fose v Minsiter of Safety and Security*,[3] without reference to FC s 34, the Constitutional Court discussed the right to 'appropriate relief' in terms of IC s 7(4)*(a)* as follows:

> Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.[4]

[1] *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC), 1999 (2) BCLR 139 (CC) at para 21.
[2] *Lane & Fey NNO v Dabelstein and Others* 2001 (2) SA 1187 (CC), 2001 (4) BCLR 312 (CC).
[3] 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC).
[4] Ibid at para 19.

Other provisions of the Final Constitution refer to relief and remedial entitlements. FC s 172(1)*(b)* provides that a court deciding a constitutional matter may make 'any order that is just and equitable'. FC s 38 provides that a court may 'grant appropriate relief' to a person entitled to approach it. *Modderklip* has drawn a new and powerful link between the entitlement to relief in these non-rights provisions of the Final Constitution and the rights that the Final Constitution confers. The judgment is authority for the proposition that from FC s 34 flows an entitlement to judicial and enforcement mechanisms that allow persons to vindicate their substantive rights. This entitlement, which flows from the rule of law doctrine embraced in FC s 1*(c)*, extends beyond merely obtaining a court order. It requires its actual enforcement. It would seem, therefore, that FC s 38 entrenches the right to appropriate relief when a substantive provision of the Bill of Rights is infringed and that FC s 34 entrenches the right to the *enforcement* of a court order providing that relief in whichever way is most appropriate.[1] In most cases, the ordinary mechanisms of execution will suffice to discharge the state's obligations. But *Modderklip* is an example of a case in which they did not, owing to its exceptional facts.[2] In *Modderklip*, the Court vindicated the applicant's right by awarding damages, in lieu of execution of the eviction order that the applicant had obtained.[3] Although the Court used the mechanism of the Expropriation Act as a formula to calculate these damages, given that they arose out of the applicant's right in FC s 34, the damages may appropriately be described as 'constitutional'.

[1] See K Hofmeyr *Understanding Constitutional Remedial Power* (Unpublished MPhil thesis, University of Oxford, 2007)(The author draws attention to John Austin's two-tiered structure of rights in which a distinction is drawn between secondary, remedial rights (ie, the rights to relief following from violations of substantive rights) and primary rights, such as those deriving from a judgment of a court, from which secondary rights arise. Based on this distinction, Hofmeyr argues that FC s 34, as interpreted in *Modderklip*, entrenches the right to enforcement of a primary right provided by a judgment of a court (in this case, an eviction order). FC s 38, by contrast, gives rise to secondary rights to 'appropriate relief' for violations of constitutional rights.)

[2] An example of a case in which it was held that there were *not* exceptional facts such as would impose *Modderklip*-type obligations on the State is *Rootman v President of the RSA* [2006] SCA 80 (RSA). Mr Rootman sought an order against the President and the Minister of Justice compelling them to take steps to assist him in enforcing a money judgment against the Government of the Democratic Republic of Congo (the DRC). The DRC had refused to make payment and Rootman had succeeded in recovering only a small portion of the judgment debt. The Pretoria High Court dismissed Rootman's application for an order compelling the state to take steps to assist him to recover, and he appealed to the SCA. In the SCA, he sought only a declaratory order that the state has an obligation to take reasonable steps to assist him in achieving compliance with the court order. He relied, in part, on FC s 34 which, he argued, conferred a right to execute the judgment in his favour and imposed an obligation on the state to ensure the effectiveness of court orders. The SCA dismissed his appeal. Its main reason was that the Constitution does not apply extra-territorially. It relied on *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at paras 11–12. The court held further , in relation to the argument that the DRC's evasion of the debt threatened the rule of law, that the DRC was no different in this respect to any other (South African) commercial debtor. *Rootman* (supra) at para 12. Finally, the court noted that an order declaring that the state was required to take reasonable steps to assist Mr Rootman to recover the judgment debt would be satisfied by a mere request by the state to the DRC that it comply with the order, which would not constitute 'effective relief' for Mr Rootman. Ibid at 14.

[3] *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) at paras 59–66.

Modderklip has established that the relief or the remedy-enforcement component of FC s 34 may be engaged during the execution stage of proceedings. In *Modderklip*, the obstacles to execution arose from the facts, not from the law. However, provisions that limit the rights of litigants to execute court orders may also infringe this component of FC s 34. A prime example is s 3 of the State Liability Act.[1] The Act prohibits execution against property of the State, providing:

> 3. Satisfaction of judgment.–No execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings or against any property of the State, but the amount, if any, which may be required to satisfy any judgment or order given or made against the nominal defendant or respondent in any such action or proceedings may be paid out of the National Revenue Fund or a Provincial Revenue Fund, as the case may be.

In *Nyathi v MEC for the Department of Health, Gauteng and Another*, the Pretoria High Court declared s 3 inconsistent with the Final Constitution and invalid.[2] The applicant, Dingaan Nyathi, had a delictual claim against the state that arose out of the negligence of hospital staff who treated him for burns.[3] As a result of their negligence, he had suffered a stroke and severe left hemiplegia. He instituted action and claimed damages in the amount of R1 496 000. When he instituted action, the respondent MEC conceded the merits and the matter was set down for hearing on the quantum of damages. Mr Nyathi successfully applied for an order directing the MEC to make an interim payment of R317 700 to enable him to meet his medical and legal expenses, pending the determination of quantum. The MEC failed to pay.[4] Mr Nyathi then made urgent application for an order declaring s 3 of the State Liability Act inconsistent with the Final Constitution and invalid.[5] The MEC did not oppose the application: but the state still failed to pay.

Davis AJ noted that, at common law, a distinction is made between two types of civil orders: orders *ad factum praestandum* and orders *ad pecuniam solvendam* — that is, orders to do (or refrain from doing) something and orders to pay an amount of money.[6] The former may be enforced by civil contempt proceedings, and the latter by the issue of a writ of attachment followed by the attachment and sale in execution of the assets of the debtor. Arguably, s 3 of the State Liability Act prevents litigants from enforcing either type of order against the State. As concerns the possibility of contempt orders against organs of state, the case law is divided.[7] In *Jayiya v Member of the Executive Council For Welfare, Eastern Cape and*

[1] Act 20 of 1957.
[2] Unreported, TPD case no 26014/2005, (30 March 2007)('*Nyathi*'). At the time of writing, the confirmation proceedings in this matter were pending in the Constitutional Court.
[3] Ibid at para 2.
[4] Ibid at para 3.1.
[5] Ibid at para 3.3.
[6] Ibid at para 4.
[7] See P Hoffman 'Civil Servants can Commit Contempt of Court' (2006, October) *De Rebus* 45.

Another,[1] the Supreme Court of Appeal held that, save for a maintenance order, a money judgment is not enforced by contempt proceedings, but by execution. The State Liability Act precluded execution against the property of a provincial government, therefore closing that avenue of obtaining satisfaction of the appellant's debt. However, the prohibition against execution against the state or a provincial government did not allow, as an alternative, the introduction of civil imprisonment for officials who failed to carry out obligations resting upon the state.[2] However, the Supreme Court of Appeal in *MEC, Department of Welfare, Eastern Cape v Kate* has now clarified its earlier decision in *Jayiya*. It wrote:

> [m]uch of what was said in *Jayiya* was indeed *obiter* and the *ratio* in that case was decidedly narrow. *Jayiya* decided only that a money judgment given against a provincial government (which is the construction that was placed upon the relevant order) is not enforceable by incarcerating for contempt a defendant who has been cited nominally for the government if the government fails to comply with the order.[3]

Later in the judgment, the *Kate* court added the following in respect of orders to do or refrain from doing something:

> Moreover, there ought to be no doubt that a public official who is ordered by a court to do or to refrain from doing a particular act, and fails to do so, is liable to be committed for contempt, in accordance with ordinary principles, and there is nothing in *Jayiya* that suggests the contrary.[4]

In *Kate*, the Supreme Court of Appeal ultimately awarded constitutional damages to vindicate the rights of the particular ligitant. The court in *Kate* held that the state's unreasonable delay in discharging its obligation under FC s 33 (the right to just administrative action) to decide the applicant's application for social assistance led to a violation of her substantive right to social assistance.[5] In the circumstances, the court held, referring to the decision of the Constitutional Court in *Modderklip*, that the 'appropriate remedy' under FC s 38 was an award of constitutional damages.[6]

The challenge of crafting enforceable orders against the state has been met with other, similarly thoughtful, judicial approaches. In *Magidimisi and Others v MEC and Others*,[7] which also concerned non-compliance with an order sounding in money, Froneman J crafted an order that combined a declarator (of non-compliance with constitutional duties and an obligation to comply), a mandamus to take all necessary steps to ensure compliance, a supervisory order requiring a report to the court on progress in complying with the court order and an order requiring the State Attorney to hand the judgment personally to the individual state respondents and to report to court that this had been done.

[1] 2004 (2) SA 611 (SCA), 2004 (8) BCLR 821 (SCA) at paras 15–16.
[2] Ibid
[3] 2006 (4) SA 478 (SCA) at para 19.
[4] Ibid at para 30.
[5] Ibid at para 22.
[6] Ibid at paras 23–7.
[7] Unreported, SECLO case no 2180/04, 13 April 2006.

Given that the Supreme Court of Appeal in *Kate* was not faced with a frontal constitutional challenge to s 3 of the State Liability Act, its award of constitutional damages was appropriate. However, owing to the way the case was pleaded, the court was deprived of the opportunity to consider the constitutionality of s 3. That opportunity arose for the Pretoria High Court in *Nyathi*.

In upholding the constitutional challenge, Davis AJ held that s 3 infringed FC s 34 in two ways. First, because the failure to make the interim payment (which would go, in part, towards legal expenses) prevented Mr Nyathi from preparing for the quantum portion of his trial, there was a 'consequential encroachment' on FC s 34, which was particular to the facts of the case.[1] Secondly, however, the 'blanket ban' on executing an order sounding in money against the state contained in s 3

> constitutes a material limitation of the right of access to court and the consequent right to have the effects of such successful access implemented. The section therefore also offends against the provisions of section 34 of the Constitution.[2]

The court ordered that the following portion of s 3 is inconsistent with the Final Constitution and invalid: 'No execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings or against any property of the State'.[3]

Section 3 is, potentially, capable of an interpretation that does not preclude orders of contempt of court against state officials who wilfully and in bad faith fail to comply with an order directing them to do or refrain from doing something. Moreover, the latter part of s 3, which was not declared unconstitutional in *Nyathi*, provides that, although the normal execution procedures are precluded, a claim against the state sounding in money may be paid out of the National Revenue Fund or a Provincial Revenue Fund. On this reading, s 3 may not be inconsistent with the Final Constitution at all. It may, in fact, constitute a justifiable limitation of the right of access to court. The challenge may be to craft orders that are practicable in light of the proper construction of s 3. As concerns orders for performance, a supervisory order (such as was granted in *Magidimisi*) may often be appropriate, followed by a contempt order, where necessary. As concerns claims sounding in money, while s 3 provides the source of funds to satisfy such judgments (the National or relevant Provincial Revenue Fund), the same combination of supervisory and contempt orders may provide the practical mechanism with which to secure payment.

59.5 Reasonable limitations of the right

Azanian People's Organisation and Others v President of the Republic of South Africa and Others ('*AZAPO*') concerned the constitutionality of s 20(7) of the Promotion of

[1] *Nyathi* (supra) at para 13.
[2] Ibid at para 19.
[3] Ibid at para 30.

National Unity and Reconciliation Act.[1] The Act provided for amnesty to be granted to perpetrators of gross violations of human rights in certain circumstances. The main issue, as far as this chapter is concerned, was the civil consequences of such amnesties. In short, a person who was granted amnesty could not be held civilly liable in damages for the act, omission or offence for which he was given amnesty.[2] Furthermore, the state could not be held civilly liable in damages for the same act, omission or offence by virtue of the principles of vicarious liability.[3] Lastly, all other persons (natural or juristic) could not be held vicariously liable for acts for which amnesty was given.

The applicants challenged the Act as, amongst other things, violating their right of access to court in IC s 22 and argued that the state and individual perpetrators should be potentially liable in damages for the murdering and maiming of activists during apartheid.[4] The Court in *AZAPO* held that the extinction of civil liability clearly limited the right of access to court. The question was whether this limitation was envisaged by other provisions of the Interim Constitution or whether the limitation was reasonable and justifiable in terms of IC s 33 (the IC equivalent of FC s 36).

The conclusion that the provisions of the Reconciliation Act described above limit the right of access to court was inescapable. At the beginning of this chapter we gave the example of the Ciskeian decree that prevented the state from being held liable for certain unlawful acts. That decree was held to be clearly unconstitutional.[5] In substance, there is little difference between that provision and the provisions of the Reconciliation Act. One would assume, therefore, that it would be quite hard to justify such a limitation in terms of FC s 36 or IC 33. If one considers the dicta of the courts about the importance of the right of access to court, it would seem hard to imagine the circumstances in which it would be reasonable to obliterate the right in this manner. The Court in *AZAPO* was, however, spared the dilemma of having to subject the provisions to justification in terms of IC s 33. It held that other provisions of the Interim Constitution itself limited the right of access to court in this context. The advantage of this approach was that a full proportionality enquiry was rendered unnecessary.

The epilogue of the Interim Constitution referred broadly to the possibility of amnesty. Section 232(4) of the Interim Constitution provided that the epilogue was deemed to form part of the substantive provisions of the Interim Constitution. Mahomed DP, for the majority, held that, as a consequence of IC s 232(4), it was as if IC s 22 had, within its text, a subsection that read as follows:

[1] Act 34 of 1995 (Reconciliation Act).
[2] Reconciliation Act s 20(7)*(a)*.
[3] Reconciliation Act s 20(7)*(c)*.
[4] *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671) (CC), 1996 (8) BCLR 1015 (CC)('*AZAPO*') at para 8.
[5] See § 59.4*(a)* supra.

> Nothing contained in this sub-section shall preclude Parliament from adopting a law providing for amnesty to be granted in respect of acts, omissions and offences associated with political objectives committed during a defined period and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.[1]

In fact, Parliament not only had a right but an obligation to pass a law facilitating amnesty.[2] It was argued by the applicants that the word 'amnesty', as used in the epilogue, envisaged immunity from criminal prosecution but not civil liability.[3] The Court in *AZAPO* accepted that certain dictionaries contain definitions of amnesty that suggest that it applies to criminal proceedings only.[4] However, it held further that the term 'amnesty' has no technical and fixed meaning:

> Its origin is to be found from the Greek concept of 'amnestia' and it indicates what is described by Webster's Dictionary as 'an act of oblivion'. The degree of oblivion or obliteration must depend on the circumstances. It can, in certain circumstances, be confined to immunity from criminal prosecutions and in other circumstances be extended also to civil liability.[5]

As part of its reasoning in regard to criminal amnesties, the Court pointed out that one of the objectives of the amnesty process was to obtain the truth about atrocities committed during apartheid. Without a criminal amnesty, perpetrators would not be induced into making disclosure about the past and many facts would remain obscured. The Court held that this purpose was equally applicable to civil amnesties.[6] The Court was fortified in its conclusion by the fact that the epilogue envisaged amnesty for 'acts, omissions or offences'. Had the drafters intended to provide amnesty only for criminal prosecutions, they could simply have referred to 'offences'.[7]

As far as the amnesty for civil liability of the state by virtue of vicarious liability was concerned, it was argued by the applicants that it was not necessary to extinguish vicarious liability on the part of the state in order to facilitate the 'truth-seeking' objective. While a person might be inspired to keep silent for fear of facing a delictual claim against him personally, he would not be similarly reticent when the only possible consequence of his testimony might be liability in damages on the part of the state.[8]

The Court in *AZAPO* accepted that the truth-seeking objective that was vindicated by giving personal amnesties to those with information would be less

[1] *AZAPO* (supra) at para 14.
[2] Ibid at para 14.
[3] Ibid at para 33.
[4] Ibid at para 34.
[5] Ibid at para 35.
[6] Ibid at para 36.
[7] Ibid at para 37.
[8] Ibid at paras 39 and 40.

applicable in the case of an immunity for the state.[1] The Court held, however, that the bigger question related to the vision of transformation and how the drafters of the Interim Constitution envisaged this transformation taking place:

> Those negotiators of the Constitution and leaders of the nation who were required to address themselves to these agonising problems must have been compelled to make hard choices. They could have chosen to direct that the limited resources of the state be spent by giving preference to the formidable delictual claims of those who had suffered from acts of murder, torture or assault perpetrated by servants of the state, diverting to that extent, desperately needed funds in the crucial areas of education, housing and primary health care. They were entitled to permit a different choice to be made between competing demands inherent in the problem. They could have chosen to direct that the potential liability of the state be limited in respect of any civil claims by differentiating between those against whom prescription could have been pleaded as a defence and those whose claims were of such recent origin that a defence of prescription would have failed. They were entitled to reject such a choice on the grounds that it was irrational. They could have chosen to saddle the state with liability for claims made by insurance companies which had compensated institutions for delictual acts performed by the servants of the state and to that extent again divert funds otherwise desperately needed to provide food for the hungry, roofs for the homeless and black boards and desks for those struggling to obtain admission to desperately overcrowded schools. They were entitled to permit the claims of such school children and the poor and the homeless to be preferred.[2]

The crux of the Court's reasoning is to be found in the following passage:

> The election made by the makers of the Constitution was to permit Parliament to favour 'the reconstruction of society' involving in the process a wider concept of 'reparation', which would allow the state to take into account the competing claims on its resources but, at the same time, to have regard to the 'untold suffering' of individuals and families whose fundamental human rights had been invaded during the conflict of the past. In some cases such a family may best be assisted by a reparation which allows the young in this family to maximise their potential through bursaries and scholarships; in other cases the most effective reparation might take the form of occupational training and rehabilitation; in still other cases complex surgical interventions and medical help may be facilitated; still others might need subsidies to prevent eviction from homes they can no longer maintain and in suitable cases the deep grief of the traumatised may most effectively be assuaged by facilitating the erection of a tombstone on the grave of a departed one with a public acknowledgement of his or her valour and nobility. There might have to be differentiation between the form and quality of the reparations made to two persons who have suffered exactly the same damage in consequence of the same unlawful act but where one person now enjoys lucrative employment from the state and the other lives in penury.[3]

[1] *AZAPO* (supra) at para 41.
[2] Ibid at para 43.
[3] Ibid at para 45.

The Court concluded that there was a range of options that could have been adopted to facilitate the reconstruction of society other than to allow those with provable delictual claims to proceed with them. The Court was of the view that the epilogue, with its reference simply to 'amnesty' and the 'need for reparation', envisaged that the details were to be determined by an Act of Parliament.

As far as vicarious liability for other organizations was concerned, there were two justifications for excluding it: in the first place, the truth-seeking objective might well be undermined by not providing immunity from vicarious liability to such organizations because individuals with information might well still be reliant on such organisations for support and thus be induced not to reveal the truth. Secondly, those in power would never have agreed to the transformation in the first place if they were not guaranteed that their organizations (such as political parties) would not be hit with delictual claims after the transition.[1]

The decision in *AZAPO* has been discussed in great detail elsewhere and many criticisms have been levelled against the judgment.[2] We do not seek to add to, or endorse, the comments on this case or to discuss it with a particular political purpose in mind. Although the Court in *AZAPO* relied on the epilogue to the Interim Constitution as justification for the Act, there is no doubt that the Court read a lot into the epilogue to reach its result. Certain of the factors discussed in terms of the epilogue would have been better suited to limitation analysis. So, despite the Court's reliance on the epilogue of the Interim Constitution — and the unique status of that provision in our constitutional history – *AZAPO* still gives us an indication of the types of justification that will be necessary to save a provision that effectively obliterates the right of access to court in FC s 34.

Whether one accepts the reasoning of the Court, it is clear that the Court saw the amnesty provisions as constitutionally-envisaged mechanisms to facilitate reconciliation and balance various interests. At the time at which the judgment was written, there could be no social imperative and legislative purpose more important than reconciliation. Therefore, it is unsurprising that the Court in *AZAPO* refused to strike down the provisions of the Act facilitating amnesty, despite the fact that they effectively extinguished any common-law claims that victims might have had.

AZAPO, therefore, constitutes an exception that can be explained by the moment in history at which it occurred. The limitation of the right of access to Courts that was tolerated in that case could only possibly be acceptable in the

[1] *AZAPO* (supra) at para 49.

[2] See, for example, J Dugard 'Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question' (1997) 13 *SAJHR* 258; D Moellendorf 'Amnesty, Truth and Justice: AZAPO' (1997) 13 *SAJHR* 283; A O'Shea 'Should Amnesty be Granted to Individuals who are Guilty of Grave Breaches of Humanitarian Law? A Reflection on the Constitutional Court's Approach' (1997) 1 *HRCLJSA* 24. For a recent collection of discussions of *AZAPO*, see W le Roux & K van Marle (eds) *Law, Memory and the Legacy of Apartheid: Ten Years after* AZAPO v President of South Africa (2007).

context in which *AZAPO* was decided. Generally, the Court has been unsympathetic towards provisions that have the potential to oust access to court altogether. In the context of time bars, for example, the only case in which the shortened period in which to institute the action was upheld involved a contract.[1]

Equally difficult, if not impossible, to justify are provisions that allow self-help. The Constitutional Court has made clear that such provisions are the antithesis of the right of access to court and, as such, require compelling justification to be saved. Outside of an emergency situation, it is difficult to imagine a provision that truly warrants self-help being upheld.

On the other hand, the Court has been far more accepting of purported limitations of access to court which themselves facilitate greater access. Thus, provisions such as those governing vexatious litigants, as in *Beinash v Ernst & Young*, are far easier to justify because they have the effect of freeing the courts to adjudicate deserving cases.[2] This theme underlies most of the procedural rules that potentially limit access: although these rules were mainly introduced before the advent of the Final Constitution, most of them have, as their rationale, the aim of enhancing access to court.

When it comes to justification of limitations of the right of access to court, a broad spectrum of positions exist. On one side of the spectrum are limitations, such as those considered in *Chief Lesapo* and *AZAPO*, which not only obliterate the right but undermine its very purpose. Justification of such limitations will prove extremely difficult. On the other side of the spectrum are those provisions that limit access to a particular litigant, but have, as their underlying rationale, the aim of improving the functioning of the courts. The provisions at issue in *Beinash v Ernst & Young* are an example of justifiable limitations.[3] If such provisions actually achieve this purpose, they will almost always be upheld as reasonable limitations.

[1] See § 59.4*(a)*(ii) supra.
[2] See § 59.4*(a)*(vi) supra.
[3] *Beinash v Ernst & Young* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC).

60 Citizenship

Jonathan Klaaren

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3. Citizenship
(1) There is a common South African citizenship.
(2) All citizens are —
(a) equally entitled to the rights, privileges and benefits of citizenship; and
(b) equally subject to the duties and responsibilities of citizenship.
(3) National legislation must provide for the acquisition, loss and restoration of citizenship.

19. Political Rights
(1) Every citizen is free to make political choices, which includes the right — *(a)* to form a political party; *(b)* to participate in the activities of, or recruit members for, a political party; and (c) to campaign for a political party or cause.
(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
(3) Every adult citizen has the right — *(a)* to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and *(b)* to stand for public office and, if elected, to hold office.

20. Citizenship
No citizen may be deprived of citizenship.

21. Freedom of movement and residence
. . .
(3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.
(4) Every citizen has the right to a passport.

22. Freedom of trade, occupation and profession
Every citizen has the right to choose their trade, occupation, or profession freely. The practice of a trade, occupation, or profession may be regulated by law.

60.1 HISTORICAL BACKGROUND

The origins of citizenship in South Africa lie in the regulation of the mobility of its people. By means of a working framework of mobility, law and citizenship, one can identify the initial structuring of South African citizenship between 1897 and 1937, as well as its development and change through the war years, the apartheid period, and the more recent years of constitutional democracy.

Three significant moments may be identified in the crucial initial forty years.[1] In the first moment, provincial elites drafted a series of comprehensive immigration laws before joining together in the Union. These laws responded to the Asian migration of the time and culminated in the Transvaal migration regime of 1907. In the second moment, which lasted until 1927, the Transvaal-based immigration and Asiatic affairs bureaucracy extended its influence across the incipient South

[1] See J Klaaren *Migrating to Citizenship: Mobility, Law, and Nationality in South Africa, 1897-1937* (PhD Dissertation, Department of Sociology, Yale University, 2004.)

African territory through the drafting and administration of the Union immigration law as well as through increasing national control of the Asian population. By contrast with the Native Affairs Department, which largely retreated from its putative role in the regulation of migration except in respect of large-scale recruitment, the Department of the Interior played a strong role in the regulation of Asian affairs and immigration. In the third moment, the establishment of the office of the Commissioner for Immigration and Asiatic Affairs began a process that consolidated and extended control of, as well as the conceptual framework for, nationality over the South African population. Such control was of particular importance for resident Asian and African populations.

Subsequent to 1937, the starting point for exploring the peculiar warping of South African citizenship must be, as Deborah Posel argues, the story of the modernising of the South African state.[1] Initially, the outbreak of global war and the consequent development of state capacity drove migration regulation: pass laws were, for example, suspended. Although administrative policies showed great organizational variation, there was relatively little change in the legislative framework or the longer-term orientation of the South African polity with respect to migration and nationality policy. The Commissioner for Immigration and Asiatic Affairs fully nationalized registration of the Asian population and added registration responsibilities with respect to aliens to its mandate. After the war's end in 1945, the pass laws were re-instated. Even with the experience of suspended pass laws, growing calls were made for improving the enforcement of influx control. The state attempted to implement a variety of administrative initiatives for migration regulation. These initiatives encompassed a foreign farm labour scheme that presaged legislative changes under apartheid.

After the 1948 electoral victory of the National Party by the nearly entirely white electorate, the misnamed Abolition of Passes and Co-ordination of Documents Act 67 of 1952 together with the Population Registration Act 30 of 1950 attempted to completely regulate African movement and identity documentation.[2] The legal struggles of the formal apartheid era often related to citizenship and the homelands were a particular site of struggle. Denationalization was a dominant theme. Slogans such as 'foreigners in the land of their birth' were repeated, and resonated, throughout the struggle.

[1] D Posel 'Race as Common Sense: Racial Classification in Twentieth-Century South Africa' (2001) 44 *African Studies Review* 87, 99.

[2] J Klaaren 'Post-Apartheid Citizenship' in A Aleinikoff & D Klusmeyer (eds) *From Migrants to Citizens: Membership in a Changing World* (2000) 221-252 (Outlines the formal history of citizenship under apartheid.) For the classic text on South African law under apartheid, see J Dugard *Human Rights and the South African Legal Order* (1978). See also G Erasmus 'South African Citizenship in a Constitutional Context' (1998) 23(2) *Tydskrif vir Regswetenskap* 1.

More recent history, from 1990 to 1994, has placed citizenship within the framework of a constitutional democracy. Within such an overarching framework, other specific narratives can be identified: these narratives embrace stories of a rainbow nation, of truth and reconciliation, and of an African Renaissance.[1]

60.2 QUESTIONS OF INTERPRETATION

Accepting the relative determinacy of the historical account, the following relevant issue for understanding constitutional citizenship is the place that such an account might have in the interpretation of the right to citizenship. It could be the case that a generally preferred theory of constitutional interpretation would apply to constitutional citizenship. Nonetheless, there are reasons to investigate first the fit of interpretive theory to constitutional citizenship, since constitutional citizenship can itself be a constitution-determining and thus interpretation-determining concept.

Standard but nuanced South Africa-located accounts of interpretation identify five schools of interpretation: grammatical, systematic, teleological, historical, and comparative.[2] Taking this five part set as a starting point, we can investigate their fit with constitutional citizenship. A grammatical theory investigates the linguistic nuances and the multiplicity of meanings.[3] For citizenship, the texts — FC ss 3, 20, and 21 — are, of course, important but not crucial. They do not occupy the place within South African constitutionalism that the text of the US fourteenth amendment — forged in the American Civil War — does.[4] A systematic theory looks at linkages to the rest of the document or system.[5] The rest of the Final Constitution offers a variety of links to citizenship. However, citizenship is not the primary gatekeeper to the application and the force of the rest of the Final Constitution. (Nonetheless, the Department of Home Affairs, through its function of provision of identity documents, is, ironically a key gatekeeper in practice.) A teleological theory looks at values. Of course, values and effect-directedness is

[1] See, eg, G Maharaj (ed) *Between Unity and Diversity: Essays on Nation-Building in Post-Apartheid South Africa* (1999).

[2] See LM Du Plessis 'Interpretation' in *Law of South Africa*; LM Du Plessis 'Interpretation of the Bill of Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2008) Chapter 32.

[3] See G Budlender 'On Citizenship and Residence Rights: Taking Words Seriously' (1989) 5 *SAJHR*37 (Budlender argues — prior to the introduction of constitutional democracy — that statutory interpretation with respect to citizenship policy should take into account parliamentary speeches.)

[4] US Constitution, Amendment XIV, section 1 provides: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

[5] See, eg, *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at para 233 (O'Regan J).

important for citizenship. But again such a theory seems to lend itself as much to the entire document as to constitutional citizenship in particular. A historical theory examines the specific situation from which a legal instrument emerges. This strategy has real appeal when it comes to the domain of citizenship. A comparative theory looks at either public international law or at comparative foreign contexts.[1] Applied to constitutional citizenship, this approach would seem to miss specifically South African dimensions and determinants of citizenship.

This brief survey argues in favour of an historical approach to the interpretation of constitutional citizenship in South Africa — or at the least suggests that it is the best of the available options. That said, towards what substantive theory or vision of citizenship does this school of historical interpretation lead us?

60.3 THEORIES OF CITIZENSHIP

To answer our question, we need to take a step back into theory and then one forward into adjudicated cases. Widening the scope, we can identify four broad theories — four ideal types — of citizenship: cultural citizenship, membership citizenship, lawful status citizenship, and post-national citizenship.[2] Cultural citizenship identifies a particular culture (which may or may not consist of narrow conceptions of race, ethnicity or religion) with constitutional citizenship.[3] As articulated by TH Marshall, membership citizenship draws a sharp distinction between the status of citizens (who are equals as citizens and members) and that of non-citizens (who are defined as aliens and non-members). Lawful status citizenship extends citizenship through law: it views all persons who are lawfully and permanently residing within a country to be presumptively full members of the national community. Post-national citizenship (or universal citizenship) views all persons as entitled to human rights on account of their identification as human beings.[4]

While traction on each of these theories may be gained through each interpretive school, certain affinities exist between the various ways of reading the Final Constitution and the theories of citizenship envisaged. A particularly strong affinity exists between the historical school of interpretation and the lawful status citizenship theory.[5]

[1] See A Katz & M du Plessis 'Citizenship' in I Currie & J de Waal (eds) *Bill of Rights Handbook* (5th Edition, 2005) 468-476 (Applies a comparative theory (public international law) to citizenship.)

[2] For greater detail, see J Klaaren 'Contested Citizenship in South Africa' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 304-325.

[3] For an interesting exploration of the Israeli example, see A Shachar 'Citizenship and Membership in the Israeli Polity' in A Aleinikoff & D Klusmeyer (eds) *From Migrants to Citizens* 386-433.

[4] For a judgment drawing, in part, on this vision of citizenship, see *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA), 2004 (2) BCLR 120 (CC) at para 25 ('Human dignity has no nationality.')

[5] See G Budlender 'A Common Citizenship?' (1985) 1 *SAJHR* 210.

One might initially think that a grammatical school would have an affinity for membership citizenship. But this does not appear to be the case. Here, the content of FC ss 19, 20, and 21 steps to the fore. Each of these sections reserves rights to citizens (as do other sections of the Final Constitution). What does one make of these special reservations (the extent and content of which is discussed in greater detail below)? Through its linkage of citizenship status with important rights of political exercise, FC s 19 initially supports a republican reading of South African citizenship, a reading within membership citizenship. But this interpretation works only at the most superficial level — though it certainly has some weight at the polling station level of voting in state (but not necessarily party) elections! Even within the grammatical or systematic schools, such interpretations should admit that citizenship has become and has been used at the level of a signifier such as 'employer', 'worker' or 'child'. As such a signifier, there is of course some real work that is being done. But in most instances of designating rights and rights holders, the linkage between the status and the rights is obvious and relatively uncontroversial. Thus, the Bill of Rights, in these reservations, does not place citizenship above other signifiers. This constitutional deployment of citizenship is thus an argument for the downplaying of constitutional citizenship.

Furthermore, the very use of citizenship as a reservation is a particular argument for the constitutional fit of lawful status citizenship rather than membership citizenship. The constitutional baseline is not a grant of rights to citizens as opposed to other lawful members — the grant of rights to citizens is done as a special reservation from the other operating baseline of rights granted to 'everyone'.[1]

Against the background of such a theoretical and interpretive spectrum, we may now ask where the judiciary's and the political branches' understanding of constitutional citizenship fits. The legislative branch's understanding can be relatively quickly dispatched.[2] The South African Citizenship Act 88 of 1995[3] was largely a consolidation of pre-existing law.[4] The primary impetus for the 1995 Act was to create a unified national citizenship regime and it repealed, in the process, the various statutes governing the citizenships of the homelands. Apart perhaps from affirming the South African policy of relative tolerance of dual

[1] For more on the beneficiaries of the Bill of Rights, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2005) §31.3.

[2] While one should not neglect the executive branch's interpretation of the Final Constitution, this branch (at least in the form of the Department of Home Affairs) has neglected to articulate a substantive vision of citizenship. Indeed, from 2007, the government has recognized the dire situation at this Department. Its lack of vision with respect to citizenship services and has pushed the government to implement a concerted 'Turn Around' strategy for a 'New Home Affairs'.

[3] The 1995 Act has been amended by the South African Citizenship Amendment Act 17 of 2004.

[4] Klaaren 'Post-Apartheid Citizenship' (supra) at 233-235. The previous South African (as opposed to homelands legislation) Act was the South African Citizenship Act of 1949.

nationality and making several changes to naturalization policy and procedure,[1] the first post-apartheid citizenship statute was by no means a radical transformation of pre-existing citizenship policy. It was more an exercise of legislative continuity than one of constitutional change.

In the area of citizenship policy, the Constitutional Court has served as the leading forum for articulation and contestation of principle. The principal tension in the Court's jurisprudence has been driven both by a lawful residence concept of citizenship and a more republican vision of citizenship, and, by the relative textual significance of citizenship in the Bill of Rights, including FC s 7, and the citizenship 'rights, privileges, and benefits' clause set forth in FC s 3. This tension is clearly on display in the Court's multiple judgments in *Kaunda*. Although *Kaunda* concerns events and persons largely beyond the borders of South Africa, when read with *Khosa*,[2] this case provides the primary locus for discerning the Constitutional Court's vision of constitutional citizenship.

The majority in *Kaunda* denied the citizen applicants an order compelling the government to seek an assurance from Equatorial Guinea (to where the applicants faced extradition on serious charges) not to impose the death penalty on the applicants. Using a request and response paradigm, the majority judgment of Chaskalson CJ articulated a carefully circumscribed extra-territorial duty on the South African state to afford diplomatic protection of nationals where their rights in terms of international law were threatened. Chaskalson CJ's judgment rejected a strong view of the extraterritorial application of citizens' rights under the Bill of Rights.[3] The request and response obligation he did support entitles citizens to request diplomatic protection of their rights and requires the state to consider such requests fairly. The precise ambit and content of the right is considered below. As a number of commentators have noted, it is not 'a particularly strong right'.[4]

For present purposes, the conceptual reasoning behind the existence of the state's obligation is of interest. In the view of the majority, this duty was derived from an incident of citizenship, nationality, and hinged upon the national's request to have his or her international law rights respected. It was one of the privileges and the benefits of citizenship in FC s 3 to have such a request considered. In extreme instances, the state might have an obligation to act even without such a request by one of its nationals. For the majority, the obligation thus was not founded in the Bill of Rights: even though FC s 7(2) does point towards the constitutional duty of the executive to protect the fundamental rights

[1] Klaaren 'Post-Apartheid Citizenship' (supra) at 235-241 (dual citizenship policy) and 241-243 (changes to naturalization).

[2] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC).

[3] On extraterritorial application, generally, see Woolman 'Application' (supra) at § 31.7.

[4] M Du Plessis & G Penfold 'Bill of Rights Jurisprudence' (2004) *Annual Survey of South African Law* 18.

of its nationals. Indeed, the rights that would be protected would be the international law rights of the nationals, rather than any extra-territorial application of fundamental rights found in the Bill of Rights.[1] Chaskalson CJ relied upon the language of FC s 7(1): 'This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'[2] There is more to Chaskalson CJ's interpretation here than a mere textual reading of the word 'in'. This territorialized view is actually consistent with and draws down upon the lawful status conception of membership described above.

The main judgment may nonetheless be profitably contrasted with one of the concurrences and with the dissent. [3] The concurrence of Ngcobo J was driven by the status of the citizen and focused its attention on FC s 3(2) as a substantive domestic protection, rather than a mere vehicle for the protection of international law rights. Indeed, Ngcobo J's understanding of the rights at issue appears to envision multiple overlaps between the benefits flowing from citizenship status and benefits flowing from the Bill of Rights.[4] His analysis may be broken into several steps: the guarantee and the entrenchment of the right of citizenship is in the Bill of Rights (in particular FC s 20);[5] South African citizens have a right to 'rights, privileges, and benefits' in FC s 3(2)*(a)*; the rights are at least those guaranteed in the Bill of Rights and reserved to citizens,[6] but there are privileges and benefits beyond such rights;[7] diplomatic protection is at least a benefit;[8] and thus one must read FC s 3 and FC s 7(2) together to impose an obligation on the

[1] The import of *Kaunda* for the extra-territorial application of the Bill of Rights, and a criticism of a narrowly textual approach to the doctrine, is discussed in Woolman 'Application' (supra) at 31-113 — 31-122. While Chaskalson's reliance on the text of FC s 7(1) can be criticized as an over weighty interpretation of the preposition 'in', his interpretation of FC s 7(1) could also be argued to be directly supported by the lawful status citizenship theory that provides the best fit with the Final Constitution.

[2] *Kaunda* (supra) at para 37.

[3] Sachs J views the concurrence and the majority as saying virtually same thing. Ibid at para 275. Indeed, there is much that is shared in the three substantive judgments. Both the majority judgment of Chaskalson CJ and the concurrence of Ngcobo J mention, in an approving manner, an article in the academic literature. G Erasmus & L Davidson 'Do South Africans Have a Right to Diplomatic Protection' (2000) 25 *South African Yearbook of International Law* 113 (Discussed in *Kaunda* (supra) at paras 59 (Chaskalson CJ) and 184 (Ngcobo J)). Erasmus and Davidson argue that citizenship should include entitlement to diplomatic protection, harmonizing the national and international dimensions of citizenship.

[4] *Kaunda* (supra) at para 180 ('Some of the rights to which citizens are entitled are spelt out in the Bill of Rights.')

[5] Ibid at paras 176 and 185. This argument may constitute the strongest point of the opinion's difference from the majority's judgment.

[6] O'Regan seems to feel that the rights referred to in FC s 3(2)*(a)* are only the rights reserved to citizens in the Bill of Rights. Ibid at para 234.

[7] Ibid at para 176. On O'Regan J views on rights and privilege and benefits, respectively, see *Kaunda* (supra) at paras 234 and 235.

[8] Ibid at para 186.

state.[1] Ngcobo J's analysis is thus quite close to the classic TH Marshall understanding of membership citizenship: citizenship entitles the citizen to the right to have rights.

With some important differences of emphasis, O'Regan J also explored an obligation on the state to afford diplomatic protection to individual citizens through FC s 3(2)*(a)*. Part of her reasoning is that one must avoid ascribing no meaning to that status.[2] Still, her conclusion was reached as an extension of the values of the Final Constitution and motivated in terms of equality analysis.[3] In O'Regan J's view, the privilege of diplomatic protection by a state created an entitlement rather than mere equal protection: 'It is proper to understand s 3 as imposing on government an obligation to provide diplomatic protection to its citizens to prevent or repair egregious breaches of international human rights norms.'[4]

The majority confirmed that the decision by the government to respond to the request for diplomatic protection would be justiciable, at least on grounds of irrationality and bad faith.[5] Review would be exercised, however, at the relatively low level of intensity currently the practice in England and Germany.[6]

The concurrence and the dissent in *Kaunda* would have extended an obligatory mechanism of diplomatic protection to citizens that was, at the very least, stronger than the benefit offered by the majority. In any case, this regime of diplomatic protection would not be available to permanent residents or other non-nationals.

The content flowing from this distinction between citizens and non-citizens should not be over-emphasized. As the only extant duty specifically sourced to FC s 3, this relatively narrow protection would be the sum total of citizens' entitlements above (apart from the explicit political rights reservations discussed below) those possessed by other permanent residents in South Africa. The best theory of South African constitutional citizenship — perhaps paradoxically so for a nation that has struggled with citizenship questions since before 1910 — is one that downplays the significance of the concept.

This proposition is bolstered by an examination of *Khosa*. Here, the majority, per Mokgoro J, held unconstitutional the denial of social grants to permanent

[1] *Kaunda* (supra) at para 176.

[2] Ibid at para 235.

[3] By grounding her opinion in equality jurisprudence, O'Regan's analysis demonstrates an affinity for a post-national or universal citizenship.

[4] Ibid at para 238.

[5] Ibid at paras 78 and 80. The concurrence and the dissent are broadly in agreement on this point. Ibid at paras 193 and 244-47. In examining the claim for extradition from Zimbabwe or Equatorial Guinea to South Africa (eg for nationals to face process in SA), the court was willing to assume that the Promotion of Administrative Justice Act might apply to a decision not to prosecute. Ibid at para 84.

[6] Ibid at paras 74-75. The German position is given in *Hess*. 55 *BVerfGE* 349, 90 ILR 386 (1980). The British position is laid out in *Abbasi & Another.v Secretary of State for Foreign and Commonwealth Affairs & Another*. [2002] EWCA Civ 1598.

residents. The Court noted that the Final Constitution extended the socio-economic rights of social security to 'everyone' and that legislative policy presumptively equated the rights and duties of permanent residents and citizens.[1] Mokgoro J wrote:

> In my view, the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the State relies. For the same reasons, I am satisfied that the denial of access to social grants to permanent residents who, but for their citizenship, would qualify for such assistance, does not constitute a reasonable legislative measure as contemplated by s 27(2) of the Constitution.[2]

This holding is consistent only with a lawful status citizenship theory.[3] Indeed, within the forum of the *Khosa* Court, one should not be surprised to find Ngcobo J articulating an opposing position. In *Khosa*, Ngcobo J asserted that '[t]here are important differences between citizens and permanent residents.'[4] These differences amounted to the Final Constitutional rights of political rights and freedom of trade, occupation, and profession. Having particular regard to the benefits of a policy that would encourage naturalization, Ngcobo J was prepared to find the limitations of benefits to citizens reasonable.[5] While one might differ regarding the importance of these distinctions, Ngcobo J clearly relies upon a theory of membership citizenship.

60.4 Concepts of constitutional citizenship

The Final Constitution does not define the requirements for South African citizenship. This textual silence should not be read as a failing. There are indeed a number of models of relationship between a constitutional text and the definition of citizenship. For instance, within the Southern African Development Community, the countries with their primary source of citizenship rules outside of their constitutions (Angola, Botswana, Lesotho, Malawi, Seychelles, South Africa, Swaziland, and Tanzania) outnumber those with detailed rules in their constitutions

[1] *Khosa* (supra) at para 57 (Section 25(1) of Immigration Act reads: 'The holder of a permanent residence permit has all the rights, privileges, duties, obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship.'). See also SACA s 1*(b)*, as noted in *Khosa* (supra) at para 118, which provides, in part: '"South African citizen" includes any person who . . .*(b)* is a member of a group or category of persons defined by the Minister, with the concurrence of the Minister of Finance, by notice in the Gazette'.

[2] *Khosa* (supra) at para 82.

[3] Ibid at para 59 ('While they do not have the rights tied to citizenship, such as political rights and the right to a South African passport, they are, for . . . other purposes, . . . in much the same position as citizens.')

[4] Ibid at para 125.

[5] Ibid at paras 130 and 134.

(Mauritius, Mozambique, Namibia, Zambia, and Zimbabwe).[1] Instead of providing detailed rules, FC s 3(3) states: 'National legislation must provide for the acquisition, loss and restoration of citizenship.'

The scrutiny and the specific topics of such legislation will be discussed below. Apart from the requirement for such legislation, the Final Constitution further provides for at least three substantive concepts with respect to constitutional citizenship. First, it establishes a common South African citizenship. Second, and third, the Final Constitution mandates equality among citizens in terms of rights, privileges and benefits, as well as among citizens in terms of duties and responsibilities. The remainder of this section explores these concepts.

Initially, it should be recognized that there is a difference between the establishment of a common citizenship and the constitutional requirement of equal citizenship. Commonality is best understood as providing for the unity of the nation. The dangers being guarded against here are those usually associated with federalism and with provincialism. In *Mhlekwa v Head of the Western Tembuland Regional Authority*, the concept of Transkei citizenship was held not compatible with FC s 3 but nonetheless was authorized for use for jurisdictional purposes within the administration of justice.[2] The commonality of citizenship requirement will mean that the doctrinal difficulties faced by federal states to the incorporation of international human rights law (as part of international law) will not apply in South Africa.[3]

The equality requirement of citizenship likely does away with distinctions among classes of citizenship based on the acquisition of citizenship. Earlier citizenship policy has often used these concepts — for instance, citizenship by naturalization, by descent, or by birth — as the basis for different rights. Once one accepts the equality of citizenship, these classes can be used only for matters related to the acquisition of citizenship. For both the concurrence and the dissent in *Kaunda*, the content of the equality of citizens was understood to encompass more than formal equality.[4] This requirement is also consistent with the trend of contemporary South African citizenship legislation. The South African Citizenship Act 88 of 1995 ('SACA') no longer makes any significant distinctions among these acquisition classes of citizens. Note that other classifications, including the distinction between dual citizens and citizens, apparently remain valid bases for policy distinctions.

[1] J Klaaren & B Rutinwa 'Towards the Harmonization of Immigration and Refugee Law in SADC' (2004) 1 *MIDSA Report 14* 115-116.

[2] 2001 (1) SA 574 (Tk), 2000 (9) BCLR 979 (Tk).

[3] The incorporation of international law into substantive domestic law in South Africa is discussed in H Strydom & K Hopkins 'International Law and International Agreements' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 30.2.

[4] *Kaunda* (supra) at paras 237-238 (O'Regan J). Ngcobo is clear that differences are allowed. Ibid at para 177.

An as-yet hypothetical constitutional question regarding the relationship of this common citizenship to other transnational citizenships may be posed. Drawing particularly from the European Union experience, some have seen a shift from a constitutionalism based on the sovereignty of the nation state to constitutionalism based more upon overlapping of domestic and international legal orders.[1] The immediately analogous situation for South Africa would be citizenship in the Southern African Development Community (SADC). Such a citizenship does not as yet exist. But it could be proclaimed and established by the Treaty of the Southern African Development Community, as amended.[2] And one might even argue that there are trace elements of the sociological substance of regional citizenship.[3] SADC citizenship appears as yet a distant prospect — all the more so with regard given the current Zimbabwean crisis. Nonetheless, it is at least worth asking the legal interpretive question: would the South African Constitution adopt a preclusive or facilitative attitude towards legal effect in South Africa of a SADC citizenship? To answer this question, we must assume that SADC citizenship provides some rights beyond those provided by the Final Constitution properly interpreted — an assumption that may not in fact be the case. But assuming it is, one potential route for such rights (of such persons who are SADC citizens and South African citizens) to enter the South African legal order is through the (South African) citizenship ensured by FC s 3. While the requirement of equality would seem clearly not to stand against such a development, the requirement of commonness might. As discussed above, the best interpretation of the requirement of commonness is one that promotes national unity and guards against federalism. In this interpretation, the requirement proscribes citizenships from legal orders 'below' the national legal system but says nothing of those citizenships from legal orders 'above' the national legal system. Nonetheless, an interpretation that views commonness as precluding legal effect of citizenship from any legal order other than the national legal order remains a possible, if not likely, interpretation. An alternative, and as yet unexplored, route to the importation of SADC rights through FC s 3 may be through the development of the common law.[4]

60.5 National legislation

A number of subsidiary questions are raised by FC s 3(3)'s requirement that national legislation must provide for the acquisition, loss and restoration of citizenship. One initial question is the content of the national legislation. It seems

[1] M Hunt *Using Human Rights Law in English Courts* (1997) 3-5.

[2] The treaty is available at http://www.sadc.int/key_documents/treaties/sadc_treaty_amended.php (accessed 12 December 2007.)

[3] J Klaaren 'Southern Africa: As Seen Through Mobility, Sexuality, and Citizenship' (2006) 9(2) *African Sociological Review* 168.

[4] See R *v Secretary of State for the Home Department, ex parte McQuillan* [1995] 4 All ER 400 (Sedley J, as discussed in Hunt (supra) at 290-294.)

clear from the text that the constitutional mandate here is not for Parliament to enact a specific piece of legislation not yet enacted. This differentiates the constitutionally mandated citizenship legislation from the legislation that was enacted pursuant to the express directives contained within the right to equality, the right to just administrative action, and the right of access to information. While there is much legislation that has relevance to citizenship,[1] this section will limit itself to SACA. SACA satisfies the requirements of FC s 3(3) and is the primary piece of national legislation to do so.[2]

Before one examines the content of SACA, we need to know how intensely the Final Constitution will examine the legislation. A number of questions might arise. To what extent does the constitutional legislation forcing provision in FC s 3(3) influence the interpretation of such legislation? Is the less forceful mandate of this legislation forcing provision a factor to be considered? Is the placement of FC s 3(3) outside of the Bill of Rights an indication of less intense review? Taken together, it would seem that the national legislation should be subjected to at least some intensity of review greater than 'normal' legislation. As discussed in the next section, the greatest scrutiny will be in matters of loss rather than in those of acquisition.

(a) National legislation: loss

One section of the Bill of Rights provides that '[n]o citizen may be deprived of citizenship.' The term used differs from the term used in FC s 3(3), 'loss'. 'Loss' of citizenship is constitutionally acceptable. 'Deprivation' is not.

Note also that the existence of FC s 20 leads one to afford less deference to the statutory framework in matters of loss. In evaluating the constitutionality of SACA's chapter 3, which provides for loss, one will be using FC s 20 (reinforcing s 3(3)), and courts will employ a higher intensity of review than elsewhere in SACA.

SACA provides for loss via voluntary relinquishment as well as through acts by a citizen resulting in loss.[3] The constitutionality of acts automatically resulting in the loss of citizenship may be questioned. Foreign jurisdictions have found laws withdrawing citizenship from persons voting in foreign elections unconstitutional.[4] Legislation is, however, on surer footing where the loss of citizenship is directed to dual citizens. In terms of SACA, citizens automatically lose their

[1] For instance, the Department of Home Affairs administers a number of pieces of arguably relevant legislation: the Immigration Act 13 of 2002, the Refugees Act 130 of 1998, the South African Citizenship Act 88 of 1995, the Identification Act 68 of 1997, the Births and Deaths Registration Act 51 of 1992, the South African Passports and Travel Documents Act 4 of 1994, and the Alteration of Sex Description and Sex Status Act 49 of 2003 not to mention electoral and marriage/civil union legislation.

[2] The principal Act was amended by the South African Citizenship Amendment Act 17 of 2004.

[3] SACA s 7.

[4] *Afroyim v Rusk* 387 US 253 (1967)(US federal law that withdraws citizenship from persons voting in foreign elections held to be unconstitutional.)

citizenship if they acquire the citizenship of another country than the Republic by engaging in some voluntary and formal act other than marriage.[1] Likewise, dual citizens engaging in the armed services of a country at war with the Republic may also lose their citizenship.[2]

Ministerial deprivation of South African citizenship in the case of dual citizens presents a special statutory case. In terms of SACA, the Minister may deprive such citizens of their citizenship if such a citizen has been sentenced to 12 months or more of imprisonment resulting from an offence or if she is satisfied that it is in the public interest that such person cease being a South African citizen.[3] Both statutory powers would be susceptible to a reasonably strong constitutional challenge. One challenge would be that the SACA is overbroad: it allows for deprivation of citizenship without guidelines and thereby violates the principles articulated in *Dawood*.[4] Another potential challenge, based upon FC s 20, is that the deprivation must not leave the person deprived of South African citizenship stateless.[5]

(b) National legislation: acquisition

As noted in the previous section, national legislation possesses the greatest latitude with respect to providing for the acquisition of citizenship. The South African Citizenship Act currently provides for South African citizenship to be granted in three ways: birth, descent, and naturalisation.[6] At least for the purposes of this chapter, restoration will be considered as a special case of naturalisation.

In terms of birth, while South Africa is technically a *jus soli* jurisdiction with a territorial right to citizenship, the ambit of that right is restricted at law. Citizenship by birth is limited by legislation to a child born in the Republic of a South African citizen or to parents who are both permanent residents.[7] It may be the case that this requirement is significantly relaxed in its application and in policy.[8] Reflecting the *jus soli* norm, SACA provides citizenship by descent for persons born outside the Republic to at least one citizen parent (together with registration of birth).[9]

[1] SACA s 6(1)*(a)*.
[2] SACA s 6(1)*(b)*.
[3] SACA s 8(2)*(a)* and *(b)*.
[4] A Katz & M Du Plessis 'Citizenship' in I Currie & J de Waal (eds) *The Bill of Rights Handbook* (5th Edition, 2005) 471-472.
[5] F Venter 'Citizenship and Nationality' Volume 2(2), *Law of South Africa*; Katz & du Plessis (supra) at 471.
[6] SACA ss 2, 3, and 4.
[7] SACA s 2(2). There are exceptions to this rule in s 2 for children adopted by South African citizens and for stateless children registered in terms of the Births and Deaths Registration Act 51 of 1992.
[8] Indeed, there may be a case for a legitimate expectation or right of continued relaxed requirements.
[9] SACA s 3(1)*(b)(i)*.

This putative bar against citizenship for a large class of persons born in South Africa makes the conditions for obtaining naturalisation of greater interest and importance. It only through naturalisation that such second generation persons have a chance of becoming citizens in the land of their birth. In terms of SACA, citizenship by naturalisation may be obtained if a person is not a minor, admitted for permanent residence, continuously resident for one year before applying for naturalisation, ordinarily resident for at least four of the eight years preceding the application[1], of 'good character', intending to continue to reside in the Republic, able to communicate in one of the official languages, and has an adequate knowledge of the responsibilities and privileges of South African citizenship.[2] Minors admitted to permanent residence may be granted citizenship without these conditions.[3] In the case of permanent residents married to South African citizenship or in a partnership, the only requirement for citizenship is residence with the citizen spouse in South Africa for two years.[4] SACA s 13 provides for resumption of South African citizenship, particularly for those persons who have lost citizenship.

(c) National legislation: beyond acquisition and loss?

Are there topics within the legislation that are neither acquisition nor loss? There is at least one: criminalization of use of dual citizenship in order to gain an advantage over other citizens. SACA was amended in 2004 to add section 26B. Section 26B is entitled 'Use of foreign citizenship' and provides that:

> A major citizen who *(a)* enters the Republic or departs from the Republic making use of the passport of another country; or *(b)* while in the Republic, makes use of his or her citizenship or national of another country in order to gain an advantage or avoid a responsibility or duty, is guilty upon conviction to a fine or to imprisonment for a period not exceeding 12 months.

While undeniably substantive, this single topic does not expand the national legislation much beyond acquisition and loss. Indeed, it may not even fall within the scope of FC s 3(3). In any case, this legislative enactment further bolsters the argument of this chapter in favour of a downplayed notion of constitutional citizenship.

60.6 Rights, privileges and benefits of citizenship

When interpreting FC s 3(2)*(a)*, we start with the recognition that one category of constitutional rights that belong to citizens includes those rights reserved to citizens. FC ss 19, 20, 21, and 22 have a series of provisions that provide benefits

[1] Ngcobo J seemed to view this five year period as relatively short in *Khosa* (supra) at para 115. He noted also the provision allowing for naturalization before the expiry of that five year period. Ibid at para 116 citing SACA section 5(9)*(a)*.
[2] SACA s 5(1).
[3] SACA s 5(4).
[4] SACA s 5(5).

exclusively to citizens. Other places of the Final Constitution do so as well: FC s 47(1), FC s 106(1), and FC s 158(1). These rights and provisions are covered elsewhere in this text.[1] In particular, the protection against loss contained in FC s 20 is covered above in this chapter. The real question here is whether there are any rights attaching to citizenship that have not already been covered.[2]

Note that the citizen's right to have an extradition justified is based upon the protection afforded persons by the right to the freedom of movement and residence. This protection is restricted to citizens in terms of FC s 21(3).[3] Likewise, the right of a citizen to a passport is based upon FC s 21(4) and is implemented in terms of s 3 of the South African Passports and Travel Documents Act.

After *Kaunda*, there is at least one such right. What is clear from *Kaunda* is that part of the content of FC s 3's 'rights, privileges and benefits' consists of limited diplomatic protection. While the rationale and constitutional basis for this right of diplomatic protection is discussed elsewhere in this volume,[4] it is also appropriate to discuss here what the actual content of this duty is.

The majority in *Kaunda* views the obligation of the state (to the extent that it is an obligation) within a request and respond paradigm.[5] One suggested and reasonable interpretation is that the duty entails full consideration of the request, a fair procedure for the decision, and a duty to provide reasons for the decision regarding the request.[6] Another interpretation is that diplomatic protection may not be denied arbitrarily and without good cause.[7] In any case (as noted above), the protections afforded to citizens regarding exercises of public power will apply.

Is there an entitlement beyond the request and respond paradigm? A fair reading of *Kaunda* would say that there is. Certainly and explicitly for O'Regan J, the government has an obligation 'to provide diplomatic protection to its citizens to prevent or repair egregious breaches of international human rights norms.'[8] The

[1] On FC s 19, see J Brickhill & R Babiuch 'Political Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 45. On FC s 21, see J Klaaren 'Movement and Residence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 66. On FC s 22, see D Davis 'Freedom of Trade, Occupation and Profession' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 54.

[2] Note that what does not belong in this discussion is the doctrine of application and the place of nationality within that doctrine nor the doctrine of equality. See J Klaaren 'Movement and Residence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 66; C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 35; S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31.

[3] *Geuking v President of the RSA* 2002 (1) SA 204 (C), 2001 (11) BCLR 1208 (C).

[4] See K Hopkins & H Strydom in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 30.

[5] *Kaunda* (supra) at paras 66 and 67.

[6] See Katz & du Plessis (supra) at 475; du Plessis & Penfold (supra) at 18.

[7] *Kaunda* (supra) at para 184 (Ngcobo J citing views of Erasmus & Davidson).

[8] *Kaunda* (supra) at para 238.

obligation adumbrated in Ngcobo J's concurrence would be similar in effect to O'Regan J's dissent.[1] The *Kaunda* majority admits a similar possibility within its request and response paradigm:

> There thus may be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to the government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable, and a court could order the government to take appropriate action. There may even be a duty on government in extreme cases to provide assistance to its nationals against egregious breaches of international human rights which come to its knowledge. The victims of such breaches may not be in a position to ask for assistance, and in such circumstances, on becoming aware of the breaches, the government may well be obliged to take an initiative itself.[2]

Note that this duty will not apply where the individual citizen does not qualify at international law for assertion of rights as a national. O'Regan J writes: 'In practice, save where a State's claim that persons are its nationals is contested in an international forum, a State's citizens are its nationals, as international law generally leaves it to States to determine who their nationals are.'[3] Nonetheless, apart from fraud,[4] or some instances of dual nationality,[5] this duty will apply.

Do companies with South African nationality enjoy a similar right or benefit to diplomatic protection? The answer given in *Van Zyl v Government of the RSA*[6] was in the negative.[7] The reasoning of the *Van Zyl* court is persuasive. Although they are legal persons, companies are not citizens:

> [They] 'enjoy no rights or privileges in terms of section 3 of the Constitution. In consequence, the guarantee to citizens under section 3 of the Constitution which gives rise to the entitlement to citizens who are nationals to request diplomatic protection, does not apply to companies.[8]

So, is there anything in the general right of citizenship beyond the obligation for diplomatic protection? The answer is 'no'.

[1] *Kaunda* (supra) at para 169.
[2] Ibid at paras 69 and 70.
[3] Ibid at para 241 (O'Regan J discusses the relationship between the concepts of citizen and national at paras 239-241.) For more on citizenship and nationality, see A Pantazis and A Friedman 'Children's Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 47.
[4] Ibid at paras 63 and 239.
[5] Ibid at para 240.
[6] [2005] 4 All SA 96 ('*Van Zyl*'). See J Dugard & G Abraham 'Public International Law' (2005) *Annual Survey of South African Law* 155-6. Leave to appeal in this matter was recently refused by the Constitutional Court.
[7] *Van Zyl* (supra) at para 100.
[8] Ibid.

61 States of Emergency

Nicole Fritz

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States of Emergency

37. (1) A state of emergency may be declared only in terms of an Act of Parliament, and only when—

(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and

(b) the declaration is necessary to restore peace and order.

(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only—

(a) prospectively; and

(b) for no more that 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.

(3) Any competent court may decide the validity of—

(a) a declaration of a state of emergency;

(b) an extension of a declaration of a state of emergency; or

(c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

(4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that—

(a) the derogation is strictly required by the emergency; and

(b) the legislation—

(i) is consistent with the Republic's obligations under international law applicable to states of emergency;

(ii) conforms to subsection (5); and

(iii) is published in the national Government Gazette as soon as reasonably possible after being enacted

(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise—

(a) indemnifying the state, or any person, in respect of any unlawful act;

(b) any derogation from this section; or

(c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

Table of Non-Derogable Rights

1 Section number	2 Section title	3 Extent to which the right is protected
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language
10	Dignity	Entirely
11	Life	Entirely

12	Freedom and Security of the person	With respect to subsections (1)*(d)* and *(e)* and 2*(c)*
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to: — subsection (1)*(d)* and *(e)*; — the rights in subparagraphs (i) and (ii) of subsection (1)*(g)*; and — subsection (1)*(i)* in respect of children of 15 years and younger
35	Arrested, detained and accused persons	With respect to: — subsections (1)*(a)*, *(b)* and *(c)* and (2)*(d)* ; — the rights in paragraphs *(a)* to *(o)* of subsection (3), excluding paragraph *(d)* — subsection (4); and — subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair

(6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:

(a) An adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained.

(b) A notice must be published in the national government gazette within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained.

(c) The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.

(d) The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.

(e) A court must review the detention as soon as reasonable possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.

(f) A detainee who is not released in terms of a review under paragraph *(e)*, or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.

(g) The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.

(h) The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

(7) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.

(8) Subsections (6) and (7) do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.[1]

61.1 Introduction

South Africa's past made the inclusion in the Final Constitution of provisions allowing for states of emergency fairly controversial.[2] Under apartheid, states of emergency had been speciously invoked in order to perpetrate massive state-sponsored violence against the civilian population.[3] That South Africa's new, hard-won Bill of Rights should contain provisions allowing for the suspension of those selfsame rights must have struck some as fairly sinister. However, recent global events cast the inclusion of these provisions in a somewhat different light. International terrorist attacks — of the type orchestrated in New York, London, Delhi and Bali — and fears about the intensification of these attacks suggest that there may be circumstances in which some type of emergency legal order is warranted. Like many throughout the world concerned for the protection of human rights and civil liberties, South African human rights lawyers and practitioners are now more likely to believe that resort to emergency powers may in certain circumstances be legitimate.

Bruce Ackerman articulates a not uncommon view when he observes:

> The attack of September 11 is the prototype for many events that will litter the twenty-first century. We should be looking at it in a diagnostic spirit: What can we learn that will permit us to respond more intelligently the next time round?[4]

Certainly South Africa's emergency provisions, although untested, have occasioned considerable international interest, as legislators and theorists from other jurisdictions look about, searching for models of how legal regimes should respond in times of great peril. Paradoxically, within South Africa itself, relatively little consideration has been given to how these provisions might be utilized.

This chapter begins with a general discussion — attempting to position South Africa's state of emergency provisions within classical and contemporary debates on the need for legal regimes that regulate emergency periods — before narrowing its focus. § 67.3 examines two distinct themes emanating from South Africa's

* I would like to thank Julie Ebenstein and Omar Farah for the research assistance they provided on this chapter.

[1] Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)('Final Constitution' or 'FC').

[2] Gerhard Erasmus 'Limitation and Suspension' in Dawid van Wyk, John Dugard, Bertus de Villiers & Dennis Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1995) 650.

[3] For a discussion of states of emergency under apartheid, see John Dugard *Human Rights and the South African Legal Order* (1978); Stephen Ellmann *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992).

[4] Bruce Ackerman 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029.

state of emergency provisions (FC s 37): the heightened, supervisory role allocated the courts and the extent to which international law has influenced the drafting of FC s 37. § 67.4 examines the specific provisions of FC s 37.

61.2 Positioning Section 37

(a) Legal regimes that regulate states of emergency

In praising the Roman Senate's appointment of a dictator during periods of emergency, Machiavelli provides a justification that continues to be relied upon today for making provision within legal regimes for extraordinary measures to be taken during times of state peril:

> And truly, among the other Roman institutions, [the dictatorship] is one that merits to be considered and counted among those which were the cause of the greatness of so great an Empire: For without a similar institution, the Cities would have avoided such extraordinary hazards only with difficulty; for the customary orders of the Republic move too slowly (no council or Magistrate being able by himself to do anything, but in many cases having to act together) that the assembling together of opinions takes so much time; and remedies are most dangerous when they have to apply to some situation which cannot await time. And therefore Republics ought to have a similar method among their institutions. And the Venetian Republic (which among modern Republics is excellent) has reserved authority to a small group (few) of citizens so that in urgent necessities they can decide on all matters without wider consultation.[1]

In contemporary terms, the justification is this: observation of the rights and protections provided by modern constitutions in situations of emergency can prevent the government from responding efficiently and energetically to enemies or to events that would destroy those rights and, perhaps, even the constitutional order itself.[2] As Ferejohn and Pasquino note, following Machiavelli, this justification is fundamentally conservative in nature, aiming to address the threat to the system in such a way that the constitutional state is returned to its normal functioning. Rights are to 'be restored, legal processes resumed and ordinary life taken up again.'[3] The conservative nature of the extraordinary measures permitted is generally apparent from the fact that the provisions permit no permanent changes to be made to the constitutional system by the authority empowered to enact the extraordinary measures. Again, this safeguard can be traced to the rule of the Roman Senate. As Machiavelli explained:

> A dictator was made for a (limited) time and not in perpetuity, and only to remove the cause for which he was created; and his authority extended only in being able to decide by himself the ways of meeting that urgent peril, (and) to do things without consultation, and to punish

[1] Niccolo Machiavelli *Discourses on Livy* (Jon Roland ed., Henry Neville trans 1675) (1517) Book 1, Chapter 34, available at http://www.constitution.org/mac/disclivy_.htm.

[2] John Ferejohn & Pasquale Pasquino 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 *International Journal of Constitutional Law* 210, 210-11.

[3] Ibid.

> anyone without appeal; but he could do nothing to diminish (the power) of the State, such as would have been the taking away of authority from the senate or the people, to destroy the ancient institutions of the City and the making of new ones.[1]

The placement of the states of emergency provisions in the Bill of Rights of the Final Constitution suggests that the drafters of these provisions were all too appreciative of the ultimately conservative purpose of these provisions: that they, like Machiavelli, appreciated that 'no Republic will be perfect, unless it has provided for everything with laws, and provided a remedy for every incident, and fixed the methods of governing it' and that 'those Republics which in urgent perils do not have resort to either a Dictatorship or a similar authority, will always be ruined in grave incidents.'[2] There is thus no anomaly in the inclusion of provisions that allow for derogation from fundamental rights in a chapter that begins: 'This Bill of Rights is a cornerstone of democracy in South Africa'.[3] In fact, this placement serves fundamentally to underscore that rights are to be suspended only in order to preserve the larger constitutional edifice that safeguards such rights.

Were these powers to be used to undercut or to modify substantially the legal order of the constitution itself — were they to be used to effect permanent changes to the normal legal order — it would not only be a violation of the norms regulating the emergency powers, it would also 'no longer properly [be] an exercise of an emergency power at all but … an exercise of constituent power. It [would be] an abrogation or transformation of the constitution and … [would] not [be] functioning to preserve it.'[4] In addition, Jon Elster notes, in response to Ferejohn and Pasquino, that 'if the events calling for a state of emergency have structural rather than conjunctural roots, the exercise of emergency powers should aim, among other things, to prevent similar events from occurring in the future.'[5] Elster, however, fails to allow for the very real possibility that effective resolution might involve amendment to the underlying constitutional structure.

The placement of FC s 37 in the Bill of Rights indicates that it follows the orthodox justification offered for emergency regimes — that it is intended to allow for threats to the nation to be addressed in such a way that the constitutional state is returned to its normal functioning. There are, nonetheless, a variety of ways in which emergencies might be addressed and the legal regime returned to normal. To better appreciate the specific model adopted in the Final Constitution, it is worth examining the typology of emergency powers set out by Ferejohn and Pasquino.

As they explain, emergencies may be dealt with through resort to specifically enumerated constitutional powers, or through ordinary legislation.[6] The mere

[1] Machiavelli (supra) at Book 1, Chapter 34.
[2] Ibid.
[3] FC s 7(1).
[4] Ferejohn & Pasquino (supra) at 211.
[5] Jon Elster 'Comments on the Paper by Ferejohn and Pasquino' (2004) 2 *International Journal of Constitutional Law* 240.
[6] Ferejohn & Pasquino (supra) at 215.

existence of specifically enumerated constitutional provisions pertaining to emergencies does not necessarily mean that states will not resort to ordinary legislative measures — thus analogues of Britain's Defence Against Terrorism Act and the USA's Patriot Act might be enacted in other jurisdictions through ordinary legislative procedures, notwithstanding the existence of specific emergency provisions. South Africa, too, may, when faced with grave emergency, choose not to avail itself of its constitutional provisions but address the peril through ordinary legislation. There is, however, a disincentive for doing so in that such legislation would be checked for consistency against the ordinary provisions of the Bill of Rights, and not adjudicated in terms of the suspensive conditions expressly contemplated by FC s 37.

Ferejohn and Pasquino further distinguish between monist and dualist systems.[1] Monist systems insist that the normative order remains invariant at all times. They draw no distinction between regular government and exceptional government because the principle 'let the good of the people be the supreme law' operates not as the basis for derogation from regular government but as the very principle of ordinary government.[2] Dualist systems, conversely, maintain the possibility of two separate constitutional normative orders: each operates under different sets of circumstances.[3] Within dualist systems, a regulator allows, in exceptional circumstances, for the normal order or regular government to be replaced by a normative order in which the temporary suspension of the rights characteristic of the normal order is permitted.[4] The emergency provisions enumerated in FC s 37 indicate that our constitutional order may be classified within this typology as a dualist system.

Ferejohn and Pasquino further distinguish those systems that support the principle that necessity knows no law, or that in war, the laws are silent, from those systems which expressly regulate the emergency government.[5] In respect of the latter, a further distinction is made between those systems, classified as neo-Roman, that provide for regulation *ex ante* by constitutional ad hoc

[1] Ferejohn and Pasquino (supra) at 223-24.

[2] Ibid at 224.

[3] For a critique of Ferejohn and Pasquino's identification of dualist systems, see David Dyzenhaus 'Terrorism, Globalisation and The Rule of Law: *Schmitt v Dicey*: Are States of Emergency Inside or Outside the Legal Order?' (2006) 27 *Cardozo Law Review* 2005. Dyzenhaus maintains that one has to resist the categorization of dualism and insist on a legal order that is unitary. Otherwise, Dyzenhaus contends, Ferejohn and Pasquino are forced to concede Carl Schmitt's thesis that a state of emergency is a lawless void, a black hole, in which the state acts unconstrained by law. Dyzenhaus argues that Ferejohn and Pasquino ultimately contradict themselves in claiming 'that responses to emergencies require a dualist legal order, one divided between ordinary law that responds to the normal, and emergency law which responds to the exception', but also favouring 'the idea that the emergency legal system should be a legal order — a rule of law order, to the extent possible'. Ibid at 210. I am less troubled by this ostensible contradiction. I read Ferejohn and Pasquino, in their description of a dualist order that contains a constitutionally inscribed regulator, to mean not that the law or the rule of law is inapplicable during periods of emergency but that certain concessions to the emergency are made. However, I shall return to Dyzenhaus' argument in a later section when examining the role of the courts.

[4] Ferejohn & Pasquino (supra) at 221.

[5] Ibid at 229.

provisions, and 'those who believe that laws, special laws, or executive measures are better able to confront the crisis.'[1] It may be noted that, for Ferejohn and Pasquino, judicial oversight does not appear to be a characteristic of a truly emergency constitutional regime. . Constitutional emergency regimes for them tend to embrace a larger number of *ex ante* controls.

South Africa's constitutional system of emergency powers appears to fall somewhere between the latter two classifications. It is regulated *ex ante* by the temporal restrictions found in FC s 37(2)*(b)*. Again, temporal restrictions, as *ex ante* controls, have been a feature of constitutional emergency orders since Roman Senate times, when the appointment of a dictator was limited to a period of six months.[2] In South Africa, time limitations are more stringent: the first declaration of a state of emergency operates for only 21 days and extensions thereof are limited to three month periods.

Ferejohn and Pasquino submit that those who are supportive of special laws and extraordinary measures 'seem less worried about the exercise of emergency powers and its possible abuse by the regular branches of government. They seem to be more satisfied with *ex post* control by the judiciary on the measures taken to face the emergency.'[3] South Africa's constitutional arrangement reserves a prominent role for the courts during emergencies: in this hybrid arrangement the existence of *ex ante* controls is supplemented by stringent *ex post* controls.[4]

Yet, despite the many checks, an important control of Roman Senate times finds no place within South Africa's emergency order or for that matter any modern constitutional order. Under the Roman model, regulation was automatic in separating the agency declaring the emergency from the one invested with the emergency powers (heteroinvestiture): 'in the republican model, the executor is called by others (a senate) to the special position of dictator, which is dormant within the constitution, and is automatically dismissed when the emergency ends.'[5] As the agency declaring and the agency exercising emergency powers are separate there is limited incentive for the declaring agency to act opportunistically.

(b) Challenges brought about by new types of threat

As Ferejohn and Pasquino concede, '[m]odern circumstances of emergency are very much different from those faced by Rome and this seems especially true after the events of September 11.'[6] International terrorism does not share the features that generally defined emergencies of the past, which were limited

[1] Ferejohn & Pasquino (supra) at 229.
[2] Ibid at 212.
[3] Ibid at 229.
[4] See FC section 37(3).
[5] Ferejohn & Pasquino (supra) at 235. See also Elster (supra) at 240. Clinton Rossiter lists eleven criteria that must be met for a dictatorship to remain constitutional. The second of these is that 'the decision to institute a constitutional dictatorship should never be in the hands of the man or men who will constitute the dictatorship.' *Constitutional Dictatorship* (New Edition, 1979) 298.
[6] Ferejohn & Pasquino (supra) at 228.

spatially and temporally. These very obvious differences call into question the utility and the efficacy of modern constitutional emergency regimes.

This raises the spectre of needing a permanent emergency regime. The Roman practice of either being in a state or emergency or not may be too rigid. We may need to develop an emergency regime that operates alongside the normal regime. That is, it may be necessary to create legal boundaries around emergencies to substitute for geographic and temporal ones that no longer exist.[1]

Certainly, South Africa is not immune from these threats and, like governments elsewhere, may want to have resort to more flexible models, where governing instruments can be tailored to the actual exigencies of the situation — concerns which may increasingly incline governments to lean towards the use of legislative models. These types of laws might delegate a great deal of authority to the executive and may only be enacted for temporary periods. As with the USA's Patriot Act or India's Prevention of Terrorism Act, there may be a sense that the legislation is in some ways exceptional: 'But however unusual it may be, emergency legislation remains ordinary within the framework or the constitutional system: it is an act of the legislature working within its normal competence.'[2]

Ferejohn and Pasquino rightly express concern at this growing inclination. They contend that legislative emergency models are much more likely to bring about permanent changes to the normal legal order: 'the special danger of the legislative model is that the authority by which the president takes action is an ordinary statute, and statutes have, intrinsically, the potential to change the legal system in some permanent way.'[3]

Bruce Ackerman shares this concern over the normalization of emergency regimes in an era of international terrorism.[4] He calls for the design of a model that allows for short-term emergency measures while protecting against permanent changes.[5] His model, however, is rooted in a reassurance rationale rather than the traditional existentialist justification — i.e. that the emergency threatens the very existence of the state. As Ackerman explains:

> September 11 and its successors will not pose such a grave existential threat, but major acts of terrorism can induce short-term panic. It should be the purpose of a newly fashioned emergency regime to reassure the public that the situation is under control, and that the state is taking effective short-term actions to prevent a second strike.[6]

At the core of Ackerman's constitutional emergency model is the principle of supermajoritarian escalation.[7] While it may be necessary for the executive to act

[1] See Ferejohn & Pasquino (supra) at 228.

[2] Ibid at 215. South Africa has also made provision for international terrorist threat through ordinary legislation: The Protection of Constitutional Democracy Against Terrorist and Related Activities Act 40 of 2004.

[3] Ferejohn & Pasquino (supra) at 219.

[4] See Ackerman (supra) at 1047.

[5] For criticisms of Ackerman's reassurance model, see Lawrence Tribe & Patrick Guldridge 'The Anti-Emergency Powers Constitution' (2004) 113 *Yale Law Journal* 1801; David Cole 'The Priority of Morality: The Emergency Constitution's Blind Spots' (2004) 113 *Yale Law Journal* 1753.

[6] Ackerman (supra) at 1031.

[7] Ibid at 1047.

unilaterally in the early days of the emergency, the power to act unilaterally should avail only for the period necessary for the legislature to convene. Thereafter, the state of emergency

> should expire unless it gains majority approval. But this is only the beginning. Majority support should serve to sustain the emergency for a short time — two or three months. Continuation should require an escalating cascade of supermajorities: sixty percent for the next two months; seventy for the next; eighty thereafter.[1]

By requiring new and ever greater majority support for the state of emergency within the legislature, the process of supermajoritarian escalation marks the emergency regime as provisional and temporary, requiring 'self-conscious approval for limited continuation'.[2] The process also automatically places the emergency regime on the path to extinction. In the later stages of the emergency it will become virtually impossible to attain the heightened levels of support that the escalation requires. As Ackerman notes, 'modern pluralist societies are simply too fragmented to sustain this kind of politics — unless, of course, the terrorists succeed in striking repeatedly with devastating effect.'[3]

FC s 37(2)*(b)* already contains a supermajoritarian escalator. It requires that any extension of a declaration of a state of emergency, bar the first (which need only be supported by a majority vote within the legislature), must be supported by 'a supporting vote of at least 60 per cent of the members of the Assembly.' This is a fairly simple escalation, with no further escalation but for the 60 per cent majority vote required for any subsequent extension. Given South Africa's political realities — a ruling party, the ANC, that controls an overwhelming majority within Parliament — this particular supermajoritarian escalation may not hold out sufficient protection against the normalization of emergency regimes. Ackerman notes: 'Only a more elaborate multistage mechanism can reliably steer the system toward the eventual dissolution of emergency conditions.'[4]

As Dyzenhaus observes, Ackerman's model envisages a limited role for the judiciary:

> Because Ackerman does not think that judges are likely to do, or can do, better than they have in the past at containing the executive during an emergency, he proposes mainly the creative design of constitutional checks and balances to ensure, as did the Roman dictatorship, against the normalization of the state of emergency. Judges should not be regarded as 'miraculous saviors of our threatened heritage of freedom.' Hence, it is better to rely on a system of political incentives and disincentives, a 'political economy' that will prevent abuse of emergency powers.[5] (footnotes omitted)

For Dyzenhaus, the allocation of so limited a role to the judiciary is mistaken, both as a practical matter and normatively. Practically, the very political economy

[1] Ackerman (supra) at 1047.
[2] Ibid at 1048.
[3] Ibid.
[4] Ibid at 1055.
[5] Dyzenhaus (supra) at 2016.

Ackerman constructs to constrain emergency powers 'still has to be located in law in order to be enforceable, which means that Ackerman cannot help but rely on judges'.[1] Dyzenhaus asks: 'why should we accept his claim that we can rely on judges when the executive asserts the necessity of suspending the exceptional constitution, the constitution for the state of emergency, when one of his premises is that we cannot so rely?'[2]

Normatively, Dyzenhaus insists that the judiciary will always have some role to play in maintaining the rule of law and not just rule by law. Where the executive is given prerogative power or the equivalent to suspend the normal legal order, by the constitution or by statute, it is the duty of judges to try to understand that delegation as constrained by the rule of law:

> To the extent that the delegation cannot be so understood, judges must treat it as, to use terminology developed by Ronald Dworkin, an 'embeded mistake', that is, a fact which they have to recognize, but whose force they should try to limit to the extent possible. They are entitled to do this because they should adopt as a regulative assumption of their role the view that all the institutions of government are cooperating in what we can think of as the rule of law project, the project which tries to ensure that political power is always exercised within the limits of the rule of law.[3]

But Dyzenhaus never explains why such faith in the courts is well placed. Indeed if, as he points out, the executive asserts the necessity of suspending the exceptional constitution, and fails to adhere to the procedures stipulated, why would it be any more likely to comply with anti-executive orders handed down by courts, assuming courts were inclined to render such decisions in times of emergency? Dyzenhaus contends that 'judges also have an important role in calling public attention to a situation in which such cooperation wanes or ceases'. But if we return to Ackerman's supermajoritarian escalator, it is not at all clear why the legislature, if its procedures are violated, would not play that role equally well.

The scepticism of some academics, like Ackerman, regarding the judiciary's ability or inclination to properly supervise declarations of emergency and adopted responses, and the absence of convincing responses to such scepticism from other academics, like Dyzenhaus, must imbue South Africa's emergency provisions with some poignancy, if not concern. In the subsequent section, greater consideration is given to the role of the courts under South Africa's emergency provisions. But it is worth noting that the role of the courts in supervising the emergency is at all times underlined in the Final Constitution. The language and the structure of FC s 37 must be read as a rejection of South Africa's emergency past — a past during which the role of courts was minimized. And yet, despite the attempt at reassuring South Africans that the past will not repeat itself, the protections promised by judicial supervision under FC s 37 may not be well realized during future states of emergency.

[1] Dyzenhaus (supra) at 2017.
[2] Ibid.
[3] Ibid at 2035 citing Ronald Dworkin *Taking Rights Seriously* 81, 121-22 (1977)

61.3 Themes Emanating from Section 37

FC s 37 is fairly detailed in its provisions. These details will be discussed later in § 61.4. Two primary themes, however, emerge from this section, and both deserve sustained attention: the heightened role afforded the courts in supervising states of emergency; and the extent to which the provisions track those found in international law.

(a) Role envisaged for the courts

An essential feature of the state of emergency provisions are the powers carved out for the courts in supervising any emergency measures taken. Not only are the courts specifically empowered to decide the validity of any declaration of a state of emergency, any extension of such a declaration or any legislation enacted or action taken in consequence of a declaration,[1] but the Final Constitution explicitly prohibits any legislation or action that would place unlawful conduct on the part of the state or any person beyond the purview of the courts.[2] No indemnities for unlawful conduct can receive constitutional sanction. Moreover, there can be no derogation from the role afforded the courts under FC s 37.[3]

Furthermore, in respect of any detentions carried out in consequence of a declaration of a state of emergency, courts are to review these detentions as soon as reasonably possible but in any event no later than ten days after the date of detention.[4] A court must release the detainee unless further detention is necessary to restore peace and order.[5] Detainees not released are thereafter permitted to apply for further review of their detention once a period of ten days has expired since their previous review, and are entitled to release unless further detention is necessary, again, under the same standard.[6] On further review, the state is to provide written reasons to the court to justify the continued detention of the detainee and must provide a copy of those reasons to the detainee at least two days prior to the review.[7] Finally, in respect of detainees, once the court releases a person, that person is not to be detained again on the same grounds unless the state establishes before a court that there exists good cause for re-detaining that person.[8]

These provisions mark an obvious departure from the emergency provisions under the apartheid legal order and, in this sense, are some of the clearest indicators that the Final Constitution is, in Ruti Teitel's terminology, a 'transitional

[1] See FC s 37(3)
[2] See FC s 37(5)*(a)*.
[3] See FC s 37(5)*(b)*.
[4] See FC s 37(6)*(e)*.
[5] Ibid.
[6] See FC s 37(6)*(f)*.
[7] See FC s 37(6)*(b)*.
[8] See FC s 37(7).

constitution': being 'both backward- and forward-looking, as it disclaims past illiberal, and reclaims future liberal, norms.'[1] These provisions reflect are a clear rejection of parliamentary supremacy, the doctrine under which South Africa's notorious emergency provisions were enacted.[2] They are also an unambiguous refutation of the tenor of the previous emergency provisions, which sought time and again to oust judicial review, making protection by the courts, 'for all practical purposes, non-existent'.[3]

Implicit, if not explicit, in the constitutional arrangement for states of emergency, is the belief that the courts will temper the worst excesses of any legislation enacted or action taken pursuant to a declaration of a state of emergency — that in supervising emergency powers the courts will act to safeguard individual rights. And yet, as the academic debates reflected in the previous section suggest (together with actual court conduct in many jurisdictions, including South Africa), such faith may not be entirely well placed. Arguably, South Africa's past experience of states of emergency may account for the absence of greater appreciation for concerns such as Ackerman's and the concomitant design of a more elaborate *ex ante* type control procedure.[4]

Samuel Issacharoff and Richard Pildes conclude, in their study of US constitutional practice in times of emergency, that American courts have neither wholly endorsed executive unilateralism nor a civil libertarian stance:

> Instead, the courts have developed a process-based, institutionally oriented (as opposed to rights-oriented) framework for examining the legality of governmental action in extreme security contexts. Through this process-based approach, American courts have sought to shift the responsibility for these difficult decisions away from themselves and toward the joint action of the most democratic branches of the government.[5]

[1] Ruti Teitel 'Transitional Jurisprudence: The Role of Law in Political Transformation' (1997) 106 *Yale Law Journal* 2009, 2015, 2078 ('In ordinary times constitutionalism is conceived as entirely forward-looking in nature, designed to endure for generations. Constitutionalism in transitional times is particularly retrospective in nature, justificatory and constructive of the political transformation.')

[2] See Etienne Mureinik 'Book Review: Emerging from Emergency: Human Rights in South Africa: *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* By Stephen Ellman' (1994) 92 *Michigan Law Review* 1977, 1985.

[3] 'States of Emergency' Iain Currie & Johan de Waal (eds) *The Bill of Rights Handbook* (5th Edition, 2005) 801.

[4] Nonetheless it would be wrong to suggest that South Africa's emergency arrangement makes no provision for *ex ante* type controls: the powers given the legislature to extend states of emergency are of this type.

[5] Samuel Issacharoff & Richard Pildes 'Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights during Wartime' (2004) 2 *International Journal of Constitutional Law* 296, 297. Issacharoff and Pildes merely describe this approach. Cass Sunstein prescribes a 'minimalist' stance that he argues judges should adopt in deciding all constitutional matters. He insists that judicial minimalism is to be promoted during normal times but is even more essential under emergencies: 'Courts will not have the requisite information to second-guess the executive on the balance between security and liberty but they can still require clear congressional authorization for any executive action that intrudes on constitutionally protected interests.' Cass Sunstein 'Minimalism at War' (2004) 47 *Supreme Court Review* 48, 53-54.

This approach appears to have been conditioned by an appreciation, articulated by former US Chief Justice William Rehnquist, that '[j]udicial inquiry, with its restrictive rules of evidence, orientation towards resolution of factual disputes in individual cases, and long delays is ill-suited to determine an issue such as "military necessity"'.[1] The courts have felt more emboldened to issue orders against the executive when there is not found to be institutional endorsement by both political branches for departures from ordinary legal structures and rules.[2] Issacharoff and Pildes point out that although critics of the limited or deferential role that US courts have assumed in times of emergency have tended to 'frame the problem as a character failing — courts need to have more "courage" — this long-standing judicial practice, across many generations, suggests there are deeper structural and institutional reasons that consistently lead judges to define their role in specific, limited ways.'[3]

As I have already indicated, the emergency provisions of the Final Constitution are as yet untested.[4] Nonetheless, there is some reason to believe that South African courts may, at least in respect of the determination that a state of emergency exists, afford substantial deference to the executive. The Constitutional Court case that comes closest to touching on such security concerns is *Kaunda & Others v President of the Republic of South Africa & Others*.[5] At issue in *Kaunda,* were the arrests of 69 South African citizens in Zimbabwe on the suspicion of being mercenaries en route to stage a coup in Equatorial Guinea. The majority held that courts should be careful about intervening in areas where the executive possesses unique skills and experience — in this case the conduct of diplomacy and foreign relations. They therefore declined to issue any directive to the executive, notwithstanding the grave danger in which the applicants were placed.[6]

(b) International law and South Africa's emergency powers

There are two express references in FC s 37 to international law. First, FC s 37(4)*(b)*(i) requires that legislation enacted pursuant to a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that the legislation is 'consistent with the Republic's obligations under international law applicable to states of emergency'. Second, FC s 37(8) provides that non-South

[1] William Rehnquist *All the Laws But One: Civil Liberties in Wartime* (1998) 205.
[2] Issacharoff & Pildes (supra) at 315.
[3] Ibid at 332.
[4] The only appraisal occurred in the *Second Certification Judgement*. See *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1996 (1) BCLR 1253 (CC) at para 45.
[5] 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC). The applicants maintained that the South African government be required to take steps to have them extradited to South Africa so that any trial they might have to face could be conducted here and that it be required to seek assurances relating to their conditions of detention and to trial procedures should they face trial in Zimbabwe or Equatorial Guinea.
[6] O'Regan J's dissent offered a far less deferential approach.

Africans detained in South Africa in consequence of an international armed conflict may avail themselves of 'the standards binding on the Republic under international humanitarian law in respect of the detention of such persons'.

International law has also influenced the drafting of other provisions contained in FC s 37 — the formulation that a state of emergency may be declared only when 'the life of the nation is threatened' is drawn directly from the provisions dealing with states of emergency and derogation of rights in the authoritative international instruments. Similarly, the identification in FC s 37 of those rights that are non-derogable directly corresponds to such identification under international law. The stipulation that the right to equality is non-derogable 'with respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language' is lifted from Article 4(1) of the International Covenant on Civil and Political Rights (the ICCPR).[1]

International law provisions relating to state obligations during times of emergency are primarily concerned with two themes: the circumstances that must obtain before a derogation of rights can be justified; and the rights that may be derogated from as opposed to those that must be preserved no matter the exigency which the state faces. These two concerns are reflected, for example, in art 4 of the ICCPR: 'On the one hand, it allows for a State Party unilaterally to derogate temporarily from a part of its obligations under the Covenant. On the other hand, Article 4 subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards.'[2]

These concerns are also reflected in the derogation provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)[3] and the American Convention on Human Rights (American Convention).[4] Interestingly, the African Charter on Human and Peoples' Rights[5] makes no such provision for derogation: the drafters believed that the exclusion of a derogation provision from the Charter would discourage governments from

[1] International Covenant on Civil and Political Rights (1966) 999 UNTS 171, 6 *ILM* 368 (Ratified by South Africa on 10 December 1998). Article 4(1) provides: '[I]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'

[2] Human Rights Committee General Comment No 29 'States of Emergency' (art 4 of the Covenant) (2001) CCPR/C/21/Rev.1/Add.11 at para 2.

[3] Convention for the Protection of Human Rights and Fundamental Freedoms (1950, entered into force 3 September 1953) 213 UNTS 221 (Not ratified by South Africa). Article 15 reads in relevant part: 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation.'

[4] American Convention on Human Rights (1969, entered into force 18 July 1978) OAS Official Records OEA/ser K/XVI/1.1, 1144 U.N.T.S. 123, *ILM* 673 (1970). Article 27(1) provides: 'in time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations. . .'

[5] African Charter on Human and Peoples' Rights (1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev 5, 21 *ILM* 58 (1982)(Ratified by South Africa on 9 June 1996).

resorting too easily to extraordinary measures that would violate human rights.[1] More recent international initiatives like the Paris Minimum Standards of Human Rights Norms in a State of Emergency[2] and the Siracusa Principles[3] indicate a growing international consensus that states should be subject to more detailed restraints during times of emergency than the fairly generalized provisions of the core instruments — such as the ICCPR and European Convention — suggest.

And yet even the 'relaxed' threshold protections of the core instruments have not met with compliance. Despite the requirement that the life of the nation itself must be jeopardized by the emergency before the derogation of rights is justified, states have employed emergency powers in substantially less threatening circumstances. Rarely have international courts held states to the language of international legal instruments. The *Greek Case,* decided by the ECHR*,* is the exception: 'the Greek military declared a state of emergency to justify a coup and the repression of a general strike, [and] the European Institutions rejected [the] state's claim of the existence of an emergency'.[4] *Lawless*,[5] the most oft-cited case on emergency powers, is notable for the establishment of a strict test for the use of emergency powers — that the threat must be actual or imminent; that its effects must involve the whole nation and that the organized life of the community must be threatened. And yet the European Court deferred quite readily to the determination of the government of Ireland that an emergency threatening the life of the nation existed as a result of the activities of paramilitary groups using violence which substantially and negatively effected relations with its neighbours.[6]

Lawless therefore takes two somewhat contradictory legal positions: doctrinally, it is uncompromising in the showing it requires to justify states of emergency; at the same time, the case also establishes a deferential standard of review once the state of emergency has been called. This Manichean approach reflects the balance international law must strike on the issue of states of emergency: it cannot afford to overreach on this issue because it implicates national security concerns so sensitive for states. Too invasive and onerous an intervention would undermine the relevancy and the effectiveness of international law. However, the international legal regime cannot ignore the fact that many of the struggles to establish human rights and the rule of law are fought against governments that hide their authoritarianism behind a pretence of national emergency which demands, so they contend, the derogation of rights for the greater good.

[1] Stephen Livingstone 'International Law Relating to States of Emergency and Derogations from International Human Rights Treaties' Human Rights Centre, Queens University Belfast, 1, available at: www.interights.org/doc/Livingstone_derogation_final.doc (accessed on 9 January 2007).

[2] Adopted by the International Law Association (ILA) Conference in 1984.

[3] The Siracusa Principles on the Limitation and Derogation provisions in the International Covenant on Civil and Political Rights (1984), reprinted in (1985) 7 *Human Rights Quarterly* 3, 7-8.

[4] Livingstone (supra) at 4 (citing the European Court of Human Rights *Greek Case* (1969) 12 *Yearbook of the European Convention on Human Rights* 1.)

[5] *Lawless v Ireland (No. 3)* (1961) 1 EHRR 15.

[6] See Oren Gross 'Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies' (1998) 23 *Yale Journal of International Law* 437, 464-65.

The deferential standard that the European Court applied in *Lawless* was reaffirmed as recently as 2001. In fact, in the most recent derogation case considered, *Marshall v United Kingdom*:[1]

> the Court rejected as inadmissible on the grounds of being manifestly ill-founded a challenge to the derogation the United Kingdom maintains to this day in Northern Ireland. This was despite the fact that the major terrorist organisations in Northern Ireland had been on ceasefire for two years before the events which occurred in this case.[2]

The international legal system appears to have settled on a rational basis standard of judicial review where states of emergency are concerned. As a result, the European Court of Human Rights has held that 'a State has a wide margin of appreciation … to determine whether the life of the nation was threatened by a public emergency and, if so, how far it might go in attempting to overcome it.'[3] In a system where enforcement and sanction methods are limited and in many cases non-existent, this is the most tactically sound approach for international courts to take. It affords them the best chance to maintain their relevance without being ignored by states unwilling to subordinate the decision of a national government to an order of an international court. That said, this deference holds out the potential for permitting abuse.

It is because of the deference afforded states in their determination of states of emergency that commentators argue that the provisions identifying those rights from which no derogation is permitted offer more effective protection:

> Neither national nor international judicial institutions have been willing to challenge on a regular basis a state's assertions of the need for a state of emergency or the need for the measures taken to respond to it, measures which lead to substantial curtailment of non-derogable human rights. What they have been prepared to do is firmly uphold the status of non-derogable rights. Thus both the European and American Courts of Human Rights have firmly rejected arguments from states that killings by state forces or the use of force against suspects are in any way justifiable because of a situation of war or the threat of terrorism.[4]

In July 2001, the UN Human Rights Committee (HRC), in its authoritative General Comment 29 on Article 4 of the ICCPR, indicated that a number of rights should be upheld during a state of emergency, in part to give effect to the obligations of non-discrimination, customary law obligations or obligations under international humanitarian law:

- prohibition on taking hostages;
- prohibition on forced displacement of persons;
- the rights of minorities;

[1] *Marshall v United Kingdom* Application No 41571/98 (10 July 2001).
[2] Livingstone (supra) at 4.
[3] *Republic of Ireland v United Kingdom* 2 EHRR 25 (Series A) (1978) at III (C). On the substantial deference standard created by the margin of appreciation in the context of emergency derogation, see Gross (supra) at 495.
[4] Livingstone (supra) at 4. See also Gross (supra) at 498.

- the rights of all detained people to be treated in a way which respects their dignity;
- fundamental aspects of the right to fair trial, such as the presumption of innocence; and
- arbitrary deprivation of liberty.

Finally, it should be noted that South Africa is bound to comply with certain international obligations once a state of emergency is declared. The ICCPR, for instance, requires that a state derogating from its obligations under the Convention notify the UN Secretary-General of such derogation. General Comment 29 emphasized the need for immediate notification and for the notification to include full information on the measures taken (including the text of any relevant laws) plus a full explanation of the reasons why these measures were taken.

61.4 Analysis of FC s 37

(a) When may an emergency be declared?

FC s 37(1) authorizes the declaration of a state of emergency where two conditions are met, namely: that the 'life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency'; and where the declaration is 'necessary to restore peace and order'. There are thus two assessments to be made: *(a)* whether the disturbance qualifies as a threat to the life of the nation; and *(b)* whether the declaration is necessary — and not just desirable or advisable — for the restoration of peace and order.

There is little domestic jurisprudence that might guide an assessment of what constitutes a threat to the life of the nation. However, international human rights jurisprudence is instructive. The European Court of Human Rights has held that a state of emergency can be justified only by 'an exceptional situation of crisis which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed'.[1] In a later decision, the Court set down several criteria that had to be met before the derogation section of the European Convention[2] could be relied upon. These criteria are:

> *(a)* the threat must be actual or imminent; *(b)* its effects must involve the whole nation; *(c)* the continuance of the organised life of the nation must be threatened; *(d)* the crisis or danger must be exceptional, in that normal measures or restrictions permitted by the

[1] *Lawless* (supra) at para 28. See also Currie & de Waal (supra) at 803.

[2] Article 15 (Measures derogating from human rights are permissible 'in time of war or other public emergency threatening the life of the nation.')

> Convention for the maintenance of public safety, health and order, are plainly inadequate.[1]

The last criterion invokes the same concerns made explicit in the second condition set by the Final Constitution for the declaration of a state of emergency — that the declaration, and the extraordinary powers thereby availed, be necessary for the restoration of peace and order. Where ordinary measures would suffice — where the normal powers and processes of the criminal justice system could adequately address the threat — no declaration may be made. The obvious corollary of this second condition, as noted by Currie and de Waal, is that 'once peace and order are restored the justification for a state of emergency falls away and it should end.'[2]

It is interesting to note that, unlike Canada's Emergencies Act, which distinguishes between four types of emergency (natural disasters, threats to public order, international emergencies and states of war) and subjects each to different regimes,[3] neither the Final Constitution nor legislation[4] distinguishes between the types of occurrences that may constitute a state of emergency. Thus the same acts may be taken in response to an emergency brought about by general disorder

[1] *Greek Case* (supra) at 72. See also Currie & de Waal (supra) at 803. International and nongovernmental organizations have attempted to define in greater detail what circumstances will qualify as public emergencies. For example, a report submitted in 1982 to the UN Subcommission on Prevention of Discrimination and Protection of Minorities refers to 'states of emergency' as a generic juridical term reflecting the use of emergency powers in exceptional circumstances. Exceptional circumstances exist when there are:

> Temporary factors of a generally political character which in varying degrees involve extreme and imminent danger, threatening the organized existence of a nation, that is to say, the political and social system that it comprises as a State, and which may be defined as follows: a crisis situation affecting the population as a whole and constituting a threat to the organized existence of the community which forms the basis of the State.

Nicole Questiaux 'Study of the Implications for Human Rights Developments Concerning Situations Known as States of Siege or Emergency' UN ESCOR, 35th Sess. 60, at 16 UN Doc E/CN4/Sub2/1982/15 (1982). The International Law Association's *Paris Minimum Standards of Human Rights Norms in a State of Emergency* (1984), prescribes:

(a) The existence of a public emergency which threatens the life of the nation, and which is officially proclaimed, will justify the declaration of a state of emergency.

(b) The expression 'public emergency' means an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed.

The Siracusa Principles provide:

> A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that: affects the whole of the population and either the whole or part of the territory of the State, and threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence of basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.

[2] Currie and de Waal (supra) at 802.

[3] See Bruce Ackerman 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029, 1061-62. While emergencies responding to threats to public order require renewal every 30 days, an emergency response to war requires a revote every 120 days.

[4] See State of Emergency Act 64 of 1997.

as in response to an emergency brought about by invasion. Yet, whatever the genesis of the threat, only where the extraordinary powers that avail the government under a state of emergency are necessary to restore peace and order may a declaration be made. It is this threshold of necessity in the second condition which acts as safeguard against any default resort to emergency powers in circumstances of threat not requiring such measures.

This reading was confirmed by the Constitutional Court in the *Second Certification Judgment*: the Court observed that a declaration of a 'state of national defence', as permitted under FC s 203, would not in itself make for a declaration of a state of emergency.[1] It might provide grounds for the declaration, but even in that event all the provisions of FC s 37 would remain applicable. To be constitutional, any declaration of a state of emergency following on a declaration of a state of national defence would need to be necessary for the restoration of peace and order. The circumstances giving rise to the state of national defence would also need to be such that they threaten the life of the nation.

(b) Regulating declarations of a state of emergency

A state of emergency may be declared 'only in terms of an Act of Parliament'. The authorizing legislation is the State of Emergency Act.[2] The SoE Act provides that any declaration of a state of emergency must be by proclamation in the Government Gazette. The President may declare a state of emergency within the Republic or in any area within the Republic and must briefly state the reasons for the declaration.[3]

FC s 37 sets out a number of safeguards protecting against the possible abuse of state of emergency powers. Some of these protections are time-related: thus a state of emergency, and any ensuing legislation or action, is effective only prospectively.[4] Any declaration and ensuing legislation or action is valid only for 21 days from the date of the declaration unless the National Assembly resolves to extend the declaration, and it may do so for no more than three months at a time.

The role afforded the National Assembly in extending a state of emergency identifies additional institutional safeguards, and the prominent powers given other branches of government in supervising the state of emergency. No limit is set on the number of times the National Assembly may extend the declaration. However, while the first extension needs only the support of a majority of the members of the Assembly, any subsequent extension must be supported by at least 60 per cent of the members of the Assembly. Any resolution, to extend or to refuse to extend a state of emergency, can only be made following a public debate in the Assembly. The provisions relating to the National Assembly's extensions

[1] See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at para 45. See also Currie & de Waal (supra) at 803.

[2] Act 64 of 1997 ('SoE Act').

[3] SoE Act ss 1(1) and (2).

[4] See FC s 37(2)*(a)*.

are those to which Ackerman refers when he speaks of South Africa's 'super-majoritarian escalator'. As has already been noted, the provisions require only a fairly simple escalation and, given South African political realities, a more elaborate multistage mechanism might have been preferred to ensure that any extensions are genuinely necessary, command overwhelming public support, and are not a pretext for mere discrimination. Nonetheless, the requirement that resolutions must follow public debate in the Assembly ensures that opposition, if not sufficient to terminate the state of emergency, is at least heard and disseminated.

In addition to the role played by the National Assembly in supervising the operation of a state of emergency, the supervisory functions of the courts during this time are explicitly reinforced. They may decide on the validity of the initial declaration, on any extension, and on any ensuing legislation or action. As Currie and de Waal explain, the conditions stipulated in FC s 37(1) are thereby made justiciable — meaning courts may determine whether there did exist a threat to the life of the nation and whether a declaration was necessary to restore peace and order.[1] These authors further suggest that 'the requirement of "necessity" suggests a proportionality test'. They rely, as the basis for this argument, on the Siracusa Principles. The Principles provide that the 'severity, duration and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat of life to the nation and are proportionate to its nature and extent'.[2]

Currie and de Waal are not alone in maintaining that the requirement of necessity incorporates a proportionality test. In fact, Oren Gross insists that the principle of proportionality is one of the basic substantive principles underlying the derogation regime:

> Proportionality is essential to the legitimacy and justification of a claim to derogation from otherwise protected human rights. Even where an act of derogation may be justified under the conventions, the state does not enjoy unfettered discretion with respect to the derogation measures that it wishes to pursue. Such measures can only be taken to 'the extent strictly required by the exigencies of the situation'.[3]

I would argue, admittedly against the weight of authority, that the terms 'necessity' and 'strictly required' (both used in FC s 37) demand only that the state have no alternative means at its disposal, no less restrictive or less harmful measures to deploy, but not that the action taken be proportional to the result achieved. FC s 37 does not, contrary to what Currie and De Waal suggest, require the weighing of harms.

Recall that the South African emergency provisions are intended to allow for the preservation of the 'life of the nation'. This phrase embraces the 'organised

[1] Currie & de Waal (supra) at 804.

[2] *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* UN Doc E/CN4/1985/4 Annex (1985). See also Currie & de Waal (supra) at 804.

[3] Gross (supra) at 449. See also Ronald St J Macdonald 'Derogations Under Article 15 of the European Convention on Human Rights' (1997) 36 *Columbia Journal of Transnational Law* 225, 242-45; Jaime Oraa 'Human Rights in States of Emergency' (1992) 31 *International Law* 140, 140–70.

life of the nation' and thus the continued existence and functioning of the constitutional infrastructure. Within the constitutional emergency arrangement, this objective of preserving the 'life of the nation', and thus the 'organised life of the nation', reigns supreme. While it may be difficult to imagine circumstances in which this objective might weigh less than the harm caused in securing the objective, we might consider the following hypothetical.

Suppose three-quarters of South Africa's citizenry rises up in violent protest against current levels of crime and demands the suspension of the Bill of Rights: they believe the Bill unjustly enables and enriches criminals. Suppose that the state believes that in order to quell the insurrection that it must embark on a process of massive detention (assuming there were such facilities to detain so large a number) and that it declares a state of emergency on the grounds that the life of the nation is threatened by general insurrection and that the declaration is necessary to restore peace and order. In such a situation, we might argue that the declaration is necessary and the measures strictly required and yet still be forced to concede that they are not proportional to the measures taken and the harm caused: the detention of the majority of South Africa's citizenry cannot be proportional to safeguarding the continued functioning of the current constitutional infrastructure.

States of emergency will come to an end in one of two ways. Either the President, through a proclamation, will declare that the state of emergency is withdrawn, or the National Assembly will resolve not to extend the declaration or will allow the declaration of the state of emergency to lapse.[1]

(c) Action taken during an emergency

FC s 37 first protects against abuse by regulating the actual declaration of a state of emergency. But it then goes further and regulates the measures that may be taken once a state of emergency has been declared. The key characteristic of the emergency regime is that it allows for derogation from fundamental rights in a way that the normal constitutional order would not permit. However, any legislation authorizing derogation from the Bill of Rights must be strictly required by the emergency, must be consistent with South Africa's international law obligations applicable to states of emergency, and is to be published in the Government Gazette as soon as reasonably possible after enactment.

FC s 37(5) prohibits an Act of Parliament authorizing the declaration of emergency or any legislation enacted or other action taken pursuant to the declaration from indemnifying the state or any person for unlawful acts. As Currie and de Waal observe:

> These requirements are all justiciable. It is also specifically provided that no derogation from s 37 itself is permissible. This means that the jurisdiction of the courts cannot be ousted during emergencies.[2]

[1] See FC s 37(2)*(b)*; SoE Act s 4.
[2] Currie & de Waal (supra) at 805 (footnotes omitted).

(d) Non-derogable rights

FC s 37 contains a list of non-derogable rights and provides the extent to which these rights are non-derogable. Only the rights of human dignity and life are non-derogable in their entirety. As concerns the right to equality, which is non-derogable 'with respect to unfair discrimination, solely on the grounds of race, colour, ethnic or social origin, sex, religion or language', there are omissions which must register as peculiar. Why, for instance, is unfair discrimination on the basis of race or religion strictly prohibited during a state of emergency and yet unfair discrimination on the basis of gender or sexual orientation is not? Currie and de Waal argue that 'the fact that some rights are derogable does not make them "weaker" rights and does not make the non-derogable rights "core rights" or "superior rights"'[1] Still the omission of some of the listed grounds in FC s 9(3), prohibiting unfair discrimination, from those listed in the Table of Non-Derogable Rights suggests that within the Final Constitution not all unfair discrimination is viewed as equally offensive. It would appear that this more restrictive list of grounds than that which appears in FC s 9(3) is occasioned by the identical wording of art 4 of the ICCPR. Still, while the section might be laudable in seeking to keep faith with South Africa's international law obligations, it might yet be asked why the drafters did not consider that unfair discrimination on the basis of sexual orientation was as unlikely to advance the restoration of peace and order as unfair discrimination on the basis of colour.

It should be noted that the analogous provision under the Interim Constitution[2] (IC s 34) was more expansive in its listing of non-derogable rights. Gerhard Erasmus argued against such expansive incorporation, insisting that '[t]o make the list of non-derogable rights as wide as possible in the belief that a pro-rights approach is thereby displayed is mistaken.'[3] This is so, because as with FC s 37, a number of categories of threat might trigger a state of emergency and derogation of rights. However, Erasmus argues that:

> in the case of war, which is the gravest emergency, more extreme needs are experienced than in situations of less gravity. The temptation may then arise to resort to 'implied' powers going beyond s 34 in order to suspend certain rights because of extreme need despite the fact that they are listed in s 34 as non-derogable.[4]

The less expansive list contained in FC s 37 may be, in part, a response to concerns such as those of Erasmus. Still, the Table of Non-Derogable Rights is more extensive in its protections than many international instruments that contain 'four common non-derogable rights: the right to life; the right to be free from torture or inhuman or degrading treatment; freedom from slavery and servitude; and the right to be free from a retroactive application of penal laws'.[5] It is at least

[1] Currie & De Waal (supra) at 806.
[2] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').
[3] Gerhard Erasmus 'Limitation and Suspension' in Dawid van Wyk, John Dugard, Bertus de Villiers & Dennis Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 659.
[4] Ibid.
[5] Ibid at 660.

arguable that the directive contained in FC s 37(4)*(a)* that 'any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that the derogation is strictly required by the emergency' is sufficiently protective and preservative of rights that it diminishes the need to make as many explicitly non-derogable.

A related concern is that by placing certain rights outside the ambit of those which may be suspended, an incentive may be given to those enacting and interpreting emergency legislation to give non-derogable rights their bare minimum content. This seems to be particularly true in respect of the right to dignity. In fact, it may even be argued that a narrow reading of the right to human dignity, as it appears in the Table of Non-Derogable Rights, is textually mandated. The Table also lists certain sections relating to the rights of arrested, detained and accused persons as non-derogable. But, while FC s 35(2)*(d)* is specifically enumerated as non-derogable, that is not true of FC s 35(2)*(e)*. FC s 35(2)*(e)* provides that 'every prisoner has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.' This omission suggests that the latter provision may be suspended — a conclusion which seems difficult to square with the listing of the right to human dignity, in its entirety, as a non-derogable right.

(d) Rights of detainees

FC ss 37(6)*(a)* to *(h)* and 37(7) and (8) regulate detention without trial under a state of emergency. The detail of these regulations, and the protection they afford, is a reflection not only of the fact that detention without trial is generally the hallmark of emergency regimes throughout the world, but that detention without trial was among the most egregious features of apartheid emergency powers. The detention of political opponents of the apartheid state often served to facilitate further violations — torture, cruel, unusual and degrading treatment and, in some cases, disappearance.

Under a constitutionally mandated state of emergency, violations of the sort perpetrated in the past would be much more difficult to achieve: a friend or family member of the detainee must be informed of the detention as soon as is reasonably possible; and a notice in the Government Gazette identifying the detainee, place of detention and the emergency measure under which detention is made must be published within five days of the detention. Access to legal and medical practitioners is guaranteed. Most importantly, the courts' supervision of such detention is entrenched: detention is to be reviewed as soon as reasonably possible, but no later than 10 days after the date of detention. And unless it can be established that the detention is necessary to restore peace and order, the detainee must be released. If not released, the detainee may, after ten days have elapsed, apply for further review: and the same standard for continued detention applies. The detainee has the right to appear personally in court, to be represented by a legal practitioner and to argue against the detention. She must also have

access, at least two days prior to the review date, to the state's written reasons for continued detention. These written reasons must also be supplied to the court.[1]

To prevent the type of abuse perpetrated under South Africa's notorious 90 Day Detention Law of 1963, whereby on expiry of such period, detainees were released and simply re-detained,[2] FC s 37(7) provides that, 'if a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.'

Finally, FC s 37(8) regulates the treatment of non-South African detainees, detained 'in consequence of on international armed conflict', and guarantees to such persons rights correlative to South Africa's obligations under international humanitarian law. These obligations are primarily to be found in the Hague and the Geneva Conventions.[3] This provision may appear not to warrant much attention — simply underscoring as it does South Africa's international law commitments. However, some of the domestic protections afforded under FC s 37 are more extensive than those guaranteed under international law. This being the case, it is not clear why the exigencies of international armed conflict, whatever the circumstances, justify heightened protection for citizens over permanent or temporary residents, or even visitors.[4]

[1] These protections are all contained in FC s 37(6).

[2] See Ruth First *117 Days: An Account of Confinement and Interrogation Under the South African Ninety-Day Detention Law* (New Edition, 1989)(For a personal account of this type of abuse.)

[3] See, for comparison, the protections provided in art 75 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977) 1125 UNTS 3 (Ratified by South Africa on 21 November 1995.)

[4] For a discussion of the differences between citizens and non-citizens as beneficiaries of fundamental rights, see Stu Woolman 'Application' in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, Original Service, March 2005) Chapter 31; Jonathan Klaaren 'Freedom of Movement & Residence' in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, Original Service, March 2007) Chapter 66; Jonathan Klaaren 'Citizenship' in Stuart Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, Original Service, July 2007) Chapter 65.

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Access to Information

Jonathan Klaaren
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62.1 INTRODUCTION

Section 23 of the interim Constitution introduced a free-standing right of access to information.[1] The right of access to information is generally treated, in international instruments and foreign legislation dealing with such rights, as a corollary of the right to freedom of expression.[2] The separate and constitutional entrenchment of this right underscores its significance in the South African constitutional order.[3] In addition, this separate right makes it clear that the right is enforceable against the entity holding the information and is not simply a negative freedom to receive and impart information free of interference, which is a frequent interpretation of the right to freedom of expression.[4]

The final Constitution replaced and upgraded the interim Constitution's right of access to information with s 32, which reads as follows:

> '(1) Everyone has the right of access to —
> *(a)* any information held by the state; and
> *(b)* any information that is held by another person and that is required for the exercise or protection of any rights.
> (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state'.

The right set out in s 32 did not, however, come into operation immediately. The transitional provision in item 23 of Schedule 6 to the final Constitution stipulated that Parliament must enact the legislation referred to in clause 32(2) within 3 years of the commencement of the final Constitution (that is, by 3 February 2000). Prior to such enactment, the right in s 32 was to be read as set out in item 23(2)*(a)* of Schedule 6, which was essentially the same as the text in s 23 of the interim Constitution.

The right contained in s 32 of the final Constitution significantly expands the right of access to information in two fundamental respects. First, in relation to information held by the state, it applies to all information and removes the proviso in the interim Constitution

[1] Section 23 of the interim Constitution provided that: 'Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.' The importance of this constitutional right was underlined by Constitutional Principle IX, which provided that: 'Provision shall be made [in the final Constitution] for freedom of information so that there can be open and accountable administration at all levels of government.'

[2] See, for example, art 19 of the International Covenant on Civil and Political Rights, 1966 and *International Fund for Animal Welfare Inc v R* [1989] 35 CRR 359 (Canadian freedom of expression includes access to information pertinent to intended expression). Such a right is specifically included in s 16(1)*(b)* of the Constitution. For a comparison of the South African rights of freedom of expression and information with those of the international instruments, see L Johannessen 'Freedom of Expression and Information in the New South African Constitution and its Compatibility with International Standards' (1994) 10 *SAJHR* 216.

[3] Interestingly, a number of formerly communist states have included a separate access to information right in their constitutions. For example, art 24 of the Russian Constitution, 1993 states:

> '(1) It shall be forbidden to gather, store, use and disseminate information on the private life of any person without his/her consent.
> (2) The bodies of state authority and the bodies of local self-government and the officials thereof shall provide to each citizen access to any documents and materials directly affecting his/her rights and liberties unless otherwise stipulated under the law.'

[4] In *Leander v Sweden* 1987 (9) EHRR 433 at 456, the European Court of Human Rights held that the freedom to receive information in terms of art 10 of the European Convention on Human Rights 'basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him' but does not confer a positive right to personal information held by the state.

that the relevant information must be required for the exercise or protection of rights.[1] Secondly, it expands the reach of the right of access to information to include information held by persons other than the state.

Following the trend towards legislation in a number of other democracies,[2] s 32(2) of the Constitution goes further and obliges Parliament to enact access to information legislation to 'give effect to' the constitutional right. The national legislation envisaged in s 32(2) is the Promotion of Access to Information Act,[3] which was enacted on the day of the deadline, 3 February 2000.[4] Broadly speaking, the AIA provides for access to records held by both public and private bodies, and sets out the grounds on which disclosure must or may be refused and the manner in which such grounds may be overridden in the public interest, as well as mechanisms for the resolution of disputes over access, notably judicial review.

What are the rationales for a right of access to information?[5] The most significant argues that there is a fundamental connection between access to information and South Africa's effort to create a constitutional democracy based fundamentally on the principle of openness and transparency.[6] Access to relevant information is fundamental to meaningful participation in the democratic process and to ensure that government is accountable to the governed.[7] This 'good government' or 'open democracy' rationale has also been identified by the

[1] As G E Devenish, K Govender & H Hulme state in *Administrative Law and Justice in South Africa* (2001) 189, in relation to access to information held by the state: 'Section 23 of the Interim Constitution provides for access to information on *a need to know* as opposed to *a right to know*, whereas the 1996 Constitution provides for the latter.'

[2] In addition to the American Freedom of Information Act see, for example, the Australian Freedom of Information Act, 1982; the Canadian Access to Information Act, 1980; the New Zealand Official Information Act, 1982; and the recently enacted United Kingdom Freedom of Information Act, 2000 (which will take full effect in 2005).

[3] Act 2 of 2000 ('the AIA'). For a discussion of the drafting history of the AIA, previously called the Open Democracy Bill, see J White 'Open Democracy: Has the Window of Opportunity Closed?' (1998) 14 *SAJHR* 65; and Iain Currie & Jonathan Klaaren *The Promotion of Access to Information Act Commentary* (2002) paras 1.3–1.12 ('*AIA Commentary*').

[4] The AIA did not immediately come into force. Section 93(1) provided that it would come into operation on a date determined by the President in the *Government Gazette*. The President brought the AIA, save for ss 10, 14, 16 and 51, into force on 9 March 2001 in terms of Government Notice 22125, R20 of 2001. Those sections were brought into force on 15 February 2002 in terms of Government Notice R9 of 2002 *GG* 23119. The Judicial Matters Amendment Act 42 of 2001 made a series of textual corrections to the Act.

In the period between 4 February 2000 and 9 March 2001 it appears that the wording set out in Schedule 6 continued in force (see *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC), 2001 (2) BCLR 652 (CC) at para 53 in relation to administrative action). See also *Nextcom (Pty) Ltd v Funde NO & others* 2000 (4) SA 491 (T) at 503, which held that, as the AIA had been assented to but was not yet in force, the applicable constitutional right of access to information was that set out in Schedule 6 to the Constitution.

[5] For a detailed discussion of the rationales for the protection of access to information, see L Johannessen, J Klaaren & J White 'A Motivation for Access to Information Legislation' (1995) 112 *SALJ* 45. See also *AIA Commentary* paras 2.2–2.5.

[6] See, for example, *Qozeleni v Minister of Law and Order & another* 1994 (3) SA 625 (E) at 642: 'Section 23 [of the interim Constitution] is . . . a necessary adjunct to an open democratic society committed to the principles of openness and accountability.' See also *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W) at 225, 1994 (2) BCLR 89 (W): '[T]he purpose of s 23 is to enable a person to gain access to information held by the State in order to create, and thereafter to maintain, an open and democratic society.' This rationale of open and accountable administration is also emphasized in the wording of Constitutional Principle IX.

[7] E Mureinik 'Reconsidering Review: Participation and Accountability' (1993) *Acta Juridica* 35 states that transparency serves the dual purpose of promoting public accountability as well as greater public participation in government.

Constitutional Court as underpinning the access to information right.[1] In other words, access to information is fundamental to a proper functioning participatory democracy. Another rationale, self-actualization, argues that access to information about oneself is necessary in order to gain self-knowledge and indeed to constitute oneself. A further rationale for freedom of information is that access to information is vital to protecting a person's other rights and interests (including, for example, the constitutional rights to privacy and equality).

The need for open and accountable government is particularly important given South Africa's recent past. This was characterized by extreme levels of government secrecy in which vital decisions were taken behind closed doors on the basis of documents to which the public (including persons whose rights or interests were detrimentally affected by the relevant decisions) could not have access. During the years of apartheid a number of legislative and other legal devices were used to withhold information or restrict access to information.[2] The complete set of these rationales does not serve in the same manner to explain the right of access to information in private hands. In the private sector the justification for the right of access may lie more with the self-actualization and rights-based rationales, essentially more with promoting and supplementing rights than with enhancing democracy.[3]

In this chapter we begin by analysing the relationship between the Constitution, other legislation and the AIA. After a brief examination of the general structure of the AIA we discuss the few blanket exclusions from most of its provisions. This is followed by a discussion of the distinction between public and private bodies for purposes of access to information and an analysis of the fundamental requirement for access to private information — 'required for the exercise or protection of any rights'. We then examine a few of the grounds of non-disclosure under the AIA and the Act's public interest override. While this chapter adopts a constitutional perspective, it does, to some extent, necessitate an analysis of some of the provisions of the AIA. The detailed provisions of this Act are fundamentally important as it is these provisions that will form the real battleground for the protection of the constitutional right of access to information.

From the point of view of Bill of Rights jurisprudence, the most dramatic effect of the Act is that it removes most access to information litigation from direct Bill of Rights control. In other words, from the time of implementation of the Act, most cases in this area will involve statutory causes of action and the application of statutory rights and remedies and will no longer involve the direct application of the Bill of Rights.

[1] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 83.

[2] For example, the Official Secrets Act 16 of 1956, the Protection of Information Act 84 of 1982, the Nuclear Energy Act 92 of 1982 and the Internal Security Act 44 of 1950. See generally, A S Matthews *The Darker Reaches of Government: Access to Information About Public Administration in Three Societies* (1978).

[3] See *AIA Commentary* paras 2.6–2.9.

62.2 THE RELATIONSHIPS BETWEEN THE CONSTITUTION, THE ACCESS TO INFORMATION ACT AND OTHER LEGISLATION

(a) The relationship between the Constitution and the AIA and between the Constitution and other legislation

In terms of s 32(2) of the Constitution the AIA was enacted 'to give effect to' the constitutional right to access to information. The AIA therefore provides a legislative basis for access to information and the starting point for access applications will be the Act itself. The question here is, what role does the constitutional right continue to play?

One approach would be that the AIA is now the sole basis of the constitutional right and that the right itself has no further application. This would be the case if 'give effect to' was read to mean 'created by'. This approach should, however, be rejected on the basis (among others) that it would be anomalous to include the right of access to information as a fundamental right in an entrenched Bill of Rights only to enable the substance of the right to be altered by simple legislative amendment. It may be consistent with constitutional democratic theory to give Parliament the ability to flesh out the detail of a fundamental right, but not to construct the very meaning of the right.[1]

The better argument is that the AIA gives effect to the right in the sense of making the right more effective through providing a detailed elaboration of both the scope and content of the informational rights, as well as providing an institutional framework for their implementation and enforcement.[2] The thrust of this argument is that the constitutional right continues to exist, notwithstanding the enactment of the AIA. In other words, there is a freestanding constitutional right of access to information.

There appear to be three ways in which the constitutional right will continue to play a role: to challenge the constitutionality of the AIA itself; to challenge other legislation passed after the AIA; and to assist in interpreting the provisions of the AIA.[3] Additionally, there may be rare instances of direct application. Each of these roles for the constitutional right of access is discussed in turn below.

First, the most dramatic use of the constitutional right would be to challenge the constitutionality of the AIA itself. Currie & Klaaren divide these potential challenges to the AIA into two categories: 'underinclusive' and 'overrestrictive' challenges.[4] Possible attacks on the AIA on the basis that it is underinclusive may include the blanket exclusion of Cabinet records and records held by members of Parliament in their capacity as such, as well as the fact that the Act only applies to recorded information. Overrestrictive challenges to the Act could be founded on the basis that the procedures that the Act imposes for the exercise of rights are overly burdensome. This may include the fees payable for access.

[1] *AIA Commentary* paras 2.12–2.13.

[2] This is the view favoured by Currie & Klaaren *AIA Commentary* para 2.12. In addition, it finds support in the Constitutional Court's judgment in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC). During the course of its judgment the court held (at para 83) that the reason for the suspension of the right of access in terms of item 23 of Schedule 6 was 'a means of affording Parliament time to provide the necessary legislative framework for the implementation of the right to information. Freedom of information legislation usually involves detailed and complex provisions defining the nature and limits of the right and the requisite conditions for its enforcement.'

[3] For a detailed discussion of these uses of the constitutional right, see *AIA Commentary* paras 2.13–2.15.

[4] *AIA Commentary* para 2.15.

It is unclear what approach our courts will adopt to assessing the constitutionality of the AIA. One argument is to treat the AIA in the same manner as other parliamentary legislation, that is, the AIA is unconstitutional if it infringes the rights in s 32(1), unless such infringement is reasonable and justifiable in accordance with the Constitution's general limitation clause. Another approach is to afford the legislature a greater degree of deference in relation to the AIA. There are essentially two reasons for this: the AIA, unlike most other legislation, is constitutionally mandated to give effect to a fundamental right; and s 32(2) expressly provides that this legislation 'may provide for reasonable measures to alleviate the administrative and financial burden on the state'.[1] Klaaren suggests a two-tiered approach to adjudication of the AIA's constitutionality.[2] In terms of this approach the provisions of the AIA can be divided into two categories: those which define and detail substantive rights, and those which set out procedures and structures to enforce the relevant rights. While some extra deference is due to the legislature in relation to the latter, no special deference is due for the former. As Klaaren states:[3]

> 'Where Parliament enjoys extra authority mandated by the text of the Constitution, it should receive greater deference. However, since this extra enforcement power does not extend to Parliament's interpretative authority over the rights, Parliament receives no extra deference there.'

Regardless of the approach, in the event of a court finding that a provision of the AIA unconstitutionally fails to give effect to the constitutional right of access to information, the appropriate remedy would be for the court to allow Parliament a specified period within which to remedy the defect. A judicial approach in terms of which Parliament is required properly to give effect to the right within a set time would be consistent with the scheme provided for in the Constitution itself (that is, that Parliament was required to enact the relevant legislation within a period of three years). The issue of individual relief in the particular circumstances would, of course, need to be considered as well.

Secondly, the constitutional right could be used to challenge legislation enacted after the AIA which unjustifiably limits the right. Although the AIA prevails over previous legislation which is materially inconsistent with its objects or provisions,[4] the same cannot be said of subsequent inconsistent legislation. While every effort should be made to interpret the AIA and other subsequent legislation consistently, some such legislation may well be truly inconsistent. Such legislation can only be challenged by the constitutional right itself.

Finally, the constitutional right to access to information remains a valuable tool for the interpretation of the provisions of the AIA. In interpreting the Act, it should always be borne in mind that it is intended to give effect to the rights set out in s 32 of the Constitution. This is reiterated in the preamble to the Act and s 9, which states that the objects of the Act include

[1] It should be noted that the latter provision only indicates special deference in relation to burdens on the state, and not other non-state entities.

[2] J Klaaren 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (1997) 13 *SAJHR* 549.

[3] J Klaaren 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (1997) 13 *SAJHR* 549 at 563.

[4] Section 5 of the AIA.

giving effect to the constitutional right and promoting transparency, accountability and good governance of both public and private bodies.[1]

It could also be argued that the constitutional right to just administrative action may be used as a residual right to obtain access to information which would not be available under the AIA. This could include, for example, obtaining access to information which is not in recorded form. It may also include direct adjudication of the application of the right of access to information to organs of state such as Cabinet, the records of which are exempt from the AIA. This would apply to all instances of overrestrictive challenges and may be attractive to courts as it obviates the need to strike down provisions of the AIA. In addition, the constitutional right may be relied on directly in circumstances where a particular piece of information is not being requested. This may include access to information through physical access such as where the media requests access to courts and tribunals for purposes of obtaining information and access to an event.[2]

Courts should, in our view, resist directly invoking a residual constitutional right in circumstances where the AIA itself fails to 'give effect to' the constitutional right apart from in exceptional circumstances. First, the residual right approach undermines the role of Parliament, which the Constitution specifically contemplates as the body which is required to 'give effect to' the constitutional right. Whatever individual relief may be granted, the focus of a proper remedy would rather be for a court to order that Parliament rectify the position and give effect to the right through a suitable amendment to the AIA. Secondly, if applied generally, the residual right approach could create anomalies where the substantive law under the Constitution could differ from that under the AIA. Moreover, reliance on the residual right would create the anomaly that the procedural requirements of the AIA would not apply where the constitutional right itself is invoked (for example, the internal appeal procedure of the AIA would not apply).

Nonetheless, in some instances, direct application of the constitutional right may be appropriate to adjudicate an access to information matter. Our conclusion on this issue differs from our conclusion with respect to the constitutional right of just administrative action, where we do not see any such rare instances. The difference between our conclusions is really the result of a major textual difference between s 32 and the AIA, on the one hand, and s 33 and the AJA, on the other. The AIA is not like the AJA in that there is no equivalent in the AIA of the definition of 'administrative action' which sets the limits of enforceability of the rights to reasonable, fair and lawful administrative action. The AIA has been built around the concept of a 'record' not the concept of 'information held by the State'.[3] The lack of a precise statutory parallel in the AIA of the constitutional text in s 32 leaves room for rare instances of direct application.

A particular difficulty (and one instance where the right potentially directly applies) arises as a result of the fact that the AIA only applies to recorded information. An entity may have within its knowledge certain information that will not necessarily be recorded. A particular

[1] See also s 2(1) of the AIA, which directs that a court interpreting a provision of the Act 'must prefer any reasonable interpretation of the provision that is consistent with the objects of this Act over any alternative interpretation that is inconsistent with those objects'.

[2] See *In re Application NBC* 635 F2d 945 (2d Cir 1980) (television networks entitled to copy and disseminate videotapes entered in evidence at a criminal trial subject to the orderly conduct of the trial).

[3] See *AIA Commentary* para 2.13.

decision, for example, may not have been reduced to writing (or recorded in any manner). Information may be capable of being recorded but may not yet be compiled. In certain circumstances the information may not yet be in existence. For example, the media may request access to a particular tribunal where the oral evidence will only be adduced in the future.[1] Alternatively, the media may wish to have access to an event in order to record the event itself in some form. In such instances the AIA as currently drafted will not assist them.

The question of the constitutional right's application then arises. As we see it, there are three possible approaches to this issue. First, one could argue that the constitutional right of access to information, properly construed, only applies to recorded information. This argument would probably emphasize the use of the term 'held' in s 32(1) together with the term 'information'. Unless a particular piece of 'information' has been reduced to a physical form, it cannot be 'held'. 'Information held' would thus mean information that already exists in physical form. A second approach would be to accept that s 32(1) contemplates access to all types of information, but to argue that Parliament's decision to limit the right to recorded information, through the mechanism of the AIA, amounts to a justifiable limitation on the constitutional right. If this is the case, the AIA is constitutional and adequately gives effect to the right of access to information. While the first of these approaches is unsatisfactory as it depends upon a rather strained purposive interpretation, the second is not entirely satisfactory either. In particular, access to information through physical access — a form of access to information that was at least partially catered for in the Open Democracy Bill in the sections on open meetings — may mean that the Act is significantly underinclusive. In addition to direct adjudication in these exceptional circumstances an appropriate remedy might direct Parliament to draft legislation giving effect to this dimension of the right of access to information.

In another particular difficulty (and a second potential instance of direct application of the right) the AIA exempts from its ambit records of the Cabinet and the judiciary, for instance. But this does not mean that the Cabinet and judiciary are not bound to give effect to the right. Their Act exemption (which is a limited one) just indicates that these bodies do not have to respond to AIA requests for records. In our view, the argument that in exceptional cases the right of access to information may be directly applied to the Cabinet is a plausible and persuasive one.[2] Likewise, one may rely on the constitutional right to challenge the laws and practices of the courts in relation to access to their records.

(b) The relationship between the AIA and other legislation

Two provisions of the AIA deal with the relationship between the AIA and other legislation. Section 5 provides that the AIA applies to the exclusion of other legislative provisions that

[1] In the latter case the constitutional right to freedom of expression would appear to be more appropriate as the information to be divulged cannot be said to be 'held' for purposes of s 32 of the Constitution (see, for example, *Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v King NO & others* 2000 (4) SA 973 (C), which held that the blanket exclusion of broadcasting of the King Commission of Inquiry was contrary to s 16(1)*(a)* of the Constitution; see also *South Africa Broadcasting Corporation & others v The Public Protector & others* (unreported, TPD case no 13992/2001, relating to broadcasting of the arms deal investigations)).

[2] See below, 62–10. See also *AIA Commentary* para 4.17.

prohibit or restrict disclosure and that are 'materially inconsistent' with the AIA. It therefore appears that if another piece of legislation is materially inconsistent with the AIA, the provisions of the AIA will apply to the exclusion of such other legislation. Section 6 of the AIA makes it clear that the provisions of the Act do not restrict the application of other legislation set out in the schedules which provide for access to information.[1]

62.3 General Structure of the AIA

The AIA provides for requests for access to all records held by public bodies and those records held by private bodies which are 'required for the exercise or protection of any rights'.[2] The Act therefore generally follows the distinction set out in s 32(1)*(a)* and *(b)* of the Constitution, although the distinction between the state and other persons is replaced by a distinction between public and private bodies.[3]

The AIA could perhaps have been more accurately titled the Promotion of Access to Records Act. A 'record' is defined in s 1 of the AIA as recorded information, regardless of form or medium, in the possession or under the control of the relevant body, whether or not it was created by that body. Section 4 of the Act goes on to provide that every record in the possession or under the control of an official of, or an independent contractor engaged by, a body is regarded as being a record of such body. Accordingly, although the AIA only applies to recorded information, it is clear that it extends to a wide range of recorded information.

Requests for access to records must be made to the information officer of the public body or the head of the private body. The relevant person must then consider the request within the stipulated time period and, in certain circumstances, must notify affected third parties of the request and allow such third parties to make representations as to whether the request should be granted.[4] If the requester is dissatisfied with a refusal of access by a department of state or administration in any sphere of government, he or she must follow the internal appeal procedure provided in the AIA.[5] In addition, a dissatisfied requester can, on application, appeal a decision to refuse access to a court.[6]

The AIA then sets out a number of mandatory and discretionary grounds for refusal of requests for access to records of both public and private bodies. If the request for a record falls within a ground of refusal, the body that holds the record must or may refuse to disclose it, unless the public interest override applies.[7]

[1] The only legislation currently listed in the schedule are the National Environmental Management Act 107 of 1998 and the Finance Intelligence Centre Act 38 of 2001. For a detailed discussion of the operation of this provision to other legislation not listed in the schedule, see *AIA Commentary* paras 3.5–3.7.

[2] Sections 11(1) and 50(1) in relation to public and private bodies respectively.

[3] See below, § 62.6.

[4] The third-party notification and intervention procedures are set out in Chapter 5 of Part 2 and Part 3 of the AIA (ss 47–49 and 71–73).

[5] Chapter 1 of Part 4 (ss 74–77).

[6] Chapter 2 of Part 4 (ss 78–82). Section 79 provides that the Rules Board for Courts of Law must, within 12 months from the date on which that section came into force (that is, 9 March 2001), make and implement rules of procedure for the hearing of access to information appeals by the High Court and designated magistrates' courts. Prior to the implementation of such rules, applications may be lodged with a High Court or a court of similar status.

[7] Sections 46 and 70. See below, § 62.9.

The AIA additionally places some positive duties on public and private bodies to produce manuals identifying the types of records held by the body in order to facilitate requests and to encourage the Act's goal of participation and accountability.[1]

62.4 WHAT THE AIA IS NOT: DATA PROTECTION LEGISLATION

Prior to embarking on a more detailed discussion of the provisions of the AIA, it is important to point out what the AIA is not. It is not a data protection or privacy statute, like those which apply in a number of other jurisdictions,[2] which protects the right to privacy and other interests in data. Typically, data protection legislation performs three functions: it prevents unauthorized disclosure and use of private information; it allows for the correction of personal information held by another body; and it allows for access to one's own information (that is, for personal requesters). The focus of such legislation is on the protection of privacy and not on access to information.

The AIA does contain certain elements of data protection legislation in that it allows for personal requesters (defined as a requester seeking personal information about him- or herself) to obtain access to information. In addition, s 88 provides that public and private bodies must take reasonable steps to establish 'adequate and appropriate internal measures' providing for the correction of personal information, 'until legislation providing for such correction takes effect'.

Nevertheless, the AIA does not contain a general prohibition on the disclosure of certain categories of information. Rather, it is a request-driven statute which merely provides for mandatory grounds of non-disclosure in relation to requests under the Act.[3] The role of privacy in the AIA is merely a restriction (albeit a mandatory one) on the right of access to information.[4] In circumstances where private information is disclosed beyond the parameters of the AIA, affected persons would rather need to rely on the common law relating to breaches of privacy as well as the constitutional right to privacy.[5] The South African Law Commission is currently compiling a report with a view to preparing separate data protection legislation.

[1] See, for example, s 14 and s 51.

[2] See, for example, the United Kingdom Data Protection Act, 1984 and the Canadian Privacy Act, 1985. See also the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Information, 1980 and the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 1981.

[3] This creates the somewhat anomalous situation that a head of a private body or information officer is obliged, in certain circumstances, not to disclose information requested under the AIA. Nevertheless, the same person may disclose such information voluntarily where there has been no such request (for example, when data is transferred within a corporate group or to business partners). This, of course, also opens the way for abuse by bodies informally granting requests outside the Act, to the detriment of legitimate third-party interests.

[4] See below, § 62.8*(a)*.

[5] Privacy protection provisions were included in the initial version of the AIA, that is, Part IV the Open Democracy Bill, but were excluded at a later stage.

62.5 BLANKET EXCLUSION OF CERTAIN RECORDS

The AIA excludes certain categories of records from its application. Such exclusions have important consequences for the right of access to information as they have the effect that these categories of records may not be requested under the AIA even if the public interest override applies. We will briefly discuss each of these exclusions in turn.

(a) Records requested for criminal or civil proceedings

Section 7(1) of the AIA stipulates that the Act does not apply to a record that is requested for purposes of pending criminal or civil proceedings, where the production of or access to that record is provided for in any other law.[1] This provision relates to both public and private body requests. The provision indicates that the AIA was intended to have no impact on the current rules relating to discovery and compulsion of evidence at criminal and civil trials.[2] There are three elements that will have to be satisfied for s 7 to apply: the request must be for the purpose of proceedings, the request must be after the commencement of such proceedings, and the production of the records must be provided for in another law.[3]

In a case decided before the AIA, *Inkatha Freedom Party & another v Truth and Reconciliation Commission & others*,[4] Davis J had 'serious doubts' as to whether the constitutional right of access to information could be used to justify a principle of discovery before the time provided in the Court Rules, which 'would mean that a defendant who falls within the scope of s 32 [of the interim Constitution] must lay bare its entire case before any action is in fact launched'. While discovery is not so extended, since the exemption applies only where litigation has commenced and since reasons for requests to public bodies do not need to be furnished, the use of the AIA in pre-discovery contexts cannot be ruled out.

(b) Records of Cabinet

Section 12*(a)* provides that the AIA does not apply to records of the Cabinet and its committees. The purpose of this exclusion appears to be to perpetuate the Westminster tradition of Cabinet secrecy, a part of which is that the Cabinet as a whole is indivisibly responsible for the body's actions. As discussed above, this complete exclusion of a certain category of records from the application of the Act may arguably be unconstitutional.[5] There

[1] Section 7(2) goes on to provide that any record obtained in a manner which contravenes s 7(1) is not admissible in the relevant criminal or civil proceedings, unless the exclusion of such record would, in the court's opinion, be detrimental to the interests of justice.

[2] The Judicial Matters Amendment Bill [B43-2001] intends to amend s 7 and the index of the AIA to make it clear that the section applies to records *requested* and not records *required*.

[3] Discovery is currently provided for in Rule 35 of the Uniform Rules of the High Court and Rule 23 of the Magistrates' Court Rules. Generally speaking, discovery can only be obtained after the close of pleadings.

[4] 2000 (3) SA 119 (C) at 135–6. It should, however, be noted that s 7(1) only applies to requests made after commencement of proceedings, whereas Davis J was dealing with pre-action discovery.

[5] See *AIA Commentary* para 4.17, where the authors express the view that this provision is not unconstitutional. A similar exclusion is contained in s 34 of the Australian Freedom of Information Act, 1982. See also J White 'Open Democracy: Has the Window of Opportunity Closed?' (1998) 14 *SAJHR* 65 at 73, who argues that this exclusion is unconstitutional.

seems little justification for treating Cabinet records with such a degree of secrecy. In a legal system in which the right of access to all information held by the state is constitutionally protected, Cabinet should at least be required to disclose its records where the public interest in disclosure outweighs the instrumental value of Cabinet secrecy.[1] It is unacceptable for Cabinet secrecy, in effect, always to trump the right of access to information, particularly given the fact that such information goes to the heart of democratic decision-making.

(c) Records of judicial functions of courts

The AIA does not apply to a record of the 'judicial functions' of a court referred to in s 166 of the Constitution,[2] a special tribunal established in terms of s 2 of the Special Investigating Units and Special Tribunals Act[3] or a judicial officer of such court or tribunal.[4] The relevant judicial functions are not defined in the Act. It is submitted that they should be restricted to those functions of the judiciary that relate to the hearing or the determination of legal proceedings.[5]

(d) Records of members of Parliament

The AIA does not apply to a record held by an individual member of Parliament or of a provincial legislature 'in that capacity'.[6] For similar reasons to those discussed in relation to the Cabinet exclusion, this exclusion may be unconstitutional.

62.6 The Distinction between Public and Private Bodies

For purposes of deciding on requests for access to information the AIA adopts the distinction between a public and private body.[7] The definition of a 'public body' is substantially similar to the definition of an organ of state in s 239 of the Constitution, and reads as follows:

[1] In the English case of *Attorney-General v Jonathan Cape Ltd* [1996] QB 752 the Attorney-General sought to restrain a former Cabinet member from publishing an account of various Cabinet discussions, on the basis that such disclosure would amount to a breach of a duty of confidence. Lord Widgery CJ held that, although Cabinet discussions were confidential, the government's interest in maintaining confidence had to be balanced with the public interest in the freedom to impart information in a democratic society. In other words, the public interest in protecting Cabinet confidences was not indefinite.

[2] Section 166 of the Constitution lists the Constitutional Court, the Supreme Court of Appeal, the High Courts, the magistrates' courts and 'any other court established or recognized in terms of an Act of Parliament'.

[3] Act 74 of 1996.

[4] Section 12*(b)* of the AIA.

[5] See *AIA Commentary* para 4.18.

[6] Section 12*(c)* of the AIA.

[7] This distinction is different to the distinction between 'the state' and other bodies contained in s 32(1) of the Constitution. It is arguable that the state, properly construed, does not include all public bodies (see *Inkatha Freedom Party & another v Truth and Reconciliation Commission & others* 2000 (3) SA 119 (C) at 133, 2000 (5) BCLR 553 (C): '[T]he definition of organ of State in the 1996 Constitution expands the definition beyond [institutions which form part of the state] for it includes within the definition those institutions or functionaries who might otherwise be outside of the State but which exercise public power.' Davis J therefore concluded that the TRC was an organ of state even though it 'is not under the direct control of central government'). For example, an institution which performs a public regulatory function may be independent of the state. This development extends the effect of the right to access to information and is to be welcomed.

'*(a)* any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(b) any other functionary or institution when —

(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation.'

Paragraph *(a)* of the definition would include, for example, the Department of Agriculture and a local municipality.[1] Paragraph *(b)*(i) would include the Judicial Service Commission and the Auditor-General.[2] Paragraph *(b)*(ii) expands the scope of public bodies much wider and would cover entities such as the Financial Services Board, the Independent Communications Authority of South Africa and other entities exercising public power or performing public functions in terms of legislation.[3] This could include, for example, financial exchanges, universities and parastatals such as Eskom, Telkom and Transnet.[4]

In relation to the latter category it is important to note that s 8(1) of the AIA provides that such a public body may in one instance be a private body and in another a public body, depending on whether the relevant record relates to the exercise of a function as a public body or as a private body.[5] For such bodies the distinction between a public and private body is therefore less important. The important enquiry is rather whether the function to which the record relates is a public or private one.[6]

The crucial question in establishing whether a body, other than a state department or constitutional body, is a public or private body is therefore whether it is 'exercising a public power of performing a public function in terms of legislation'.

In light of the similarity between the definition of public body and that of organ of state in the Constitution it may be useful to have regard to the number of cases relating to the meaning of 'organ of state' under the interim Constitution. Although there was some initial

[1] See also *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) at para 27 (the Independent Electoral Commission is not an organ of state within the national sphere of government).

[2] The Truth and Reconciliation Commission would arguably fall within this category (see Davis J in *Inkatha Freedom Party & another v Truth and Reconciliation Commission & others* 2000 (3) SA 119 (C), 2000 (5) BCLR 553 (C), holding that the TRC forms part of the state for purposes of the access to information clause). Davis J at 131–2 emphasized that, amongst other things, the commissioners are appointed by the President, s 41 of the Promotion of National Unity and Reconciliation Act 34 of 1995 provides that the State Liability Act 20 of 1957 applies to the Commission, and the TRC's function was mandated by the postscript to the interim Constitution.

[3] See *Nextcom (Pty) Ltd v Funde NO & others* 2000 (4) SA 491 (T) at 503, where the court held that the South African Telecommunications Regulatory Authority (the predecessor to ICASA in relation to the regulation of telecommunications) amounted to an organ of state.

[4] See *Hoffman v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC).

[5] Section 8(1) provides for the same position in relation to private bodies. Section 8(1), however, does not apply to those public bodies falling within paras *(a)* and *(b)*(i) of the definition and applies only to para *(b)*(ii). This is important as it would arguably be unconstitutional for s 8(1) to apply to government departments as this would, in effect, mean that a requester would, in certain instances, be entitled to access to information held by the state only where it is necessary to exercise or protect rights. If this were the case, the AIA would not properly give effect to the right in s 32(1)*(a)* of the Constitution. To the extent that any body falling under para *(b)*(ii) of the definition constitutes part of 'the state', the operation of s 8(1) could be constitutionally problematic.

[6] This enquiry will often be a difficult one, particularly where a record may be prepared or kept for numerous purposes, some of which are public and others are private. Additionally, the requester may face an issue in choosing which forms (public body request or private body request) to use. Requests may of course be made in the alternative.

disagreement, our courts generally adopted the control test as to whether an institution amounted to an organ of state for purposes of the interim Constitution. In terms of this test an institution, which was not a state department, was an organ of state if it fell under the control of the state in one way or another.[1] It is, however, important to bear in mind that, whereas the interim Constitution defined an organ of state as 'any statutory body or functionary', both the final Constitution and the AIA shift the focus to the public nature of the function or power.[2] Accordingly, the cases decided under the interim Constitution are only of limited assistance in determining whether a body amounts to 'public body' under the AIA.[3] The focus should rather be on whether the function or power performed by the relevant entity is public in nature.[4]

An important consideration in assessing whether a body is exercising a public power or performing a public function in terms of legislation is whether the institution is obliged to act in the public interest. As Lawrence Baxter states,[5] discussing whether an institution is a 'public authority':

> 'Ultimately we are driven to an assessment of whether the institution concerned is under a duty to act in the public interest and not simply to its own private advantage.'

This emphasis on public interest is also consistent with the judgement of the Witwaterstrand Local Division in *Goodman Bros (Pty) Ltd v Transnet Ltd.*[6]

An additional issue will be whether the public function is exercised 'in terms of national legislation'. For instance, the function of providing universal service in terms of a cellphone licence granted to a private body in terms of telecommunications legislation may not be a function undertaken 'in terms of' that legislation but rather undertaken in terms of the licence.

[1] See, for example, *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting & others* 1996 (3) SA 800 (T); *Oostelike Gauteng Dienste Raad v Transvaal Munisipale Pensione Fonds* 1997 (8) BCLR 1066 (T). See above, ch 10 'Application' for a detailed discussion of these cases.

[2] Section 233(1)(x) of the interim Constitution. See Y Burns *Administrative Law under the 1996 Constitution* (1998); and see I M Rautenbach & E F T Malherbe *Constitutional Law* 2 ed (1996) 299.

[3] See, however, *Nextcom (Pty) Ltd v Funde NO & others* 2000 (4) SA 491 (T) at 503, which applied the control test in finding that SATRA constituted an organ of State under the final Constitution. See also *Hoffman v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) and *Korf v Health Professions Council of South Africa* 2000 (1) SA 1171 (T) at 1177, in which Van Dijkhorst J held that the definition in the final Constitution was not intended to differ materially from that under the interim Constitution and the control test thus remained determinative.

[4] A useful analysis of the term 'public function' is set out in De Smith, Woolf & Jowell *Judicial Review of Administrative Action* 5 ed (1995) at 167–8: 'A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides "public goods" or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services . . . They also do so if they regulate commercial and professional activities to ensure compliance with proper standards.'

[5] *Administrative Law* 100.

[6] 1998 (4) SA 989 (W). In this case Blieden J, in concluding that Transnet amounted to an 'organ of state' in terms of s 239 of the Constitution, stated at 995–6: 'Of particular importance are the provisions of ss 15 and 17 of [the Legal Succession to the South African Transport Services Act 9 of 1989], that the respondent is required to provide a service "that is in the public interest" and can be directed by the Minister not to act contrary to the strategic or economic interests of the Republic. In my view, this brings it squarely within the definition of an organ of State as required by s 239 of the Constitution in that it performs a public function in terms of the relevant legislation.'

62.7 REQUIRED FOR THE EXERCISE OR PROTECTION OF ANY RIGHTS

Section 50(1) of the AIA, following the lead of the constitutional right, provides that one can only obtain access under the Act to the record of a private body if such record is 'required for the exercise or protection of any rights'. The existence of a right and a link between the request and the protection or promotion of that right is therefore necessary in order to obtain access to a record of a private body.

The term 'rights' should not be limited to constitutional rights but should rather be read widely as including all legal rights whether constitutional, statutory or arising in common law. This was the position taken by Cameron J in *Van Niekerk v City Council of Pretoria*,[1] which was subsequently endorsed by the Supreme Court of Appeal.[2]

In another respect the term 'rights' could be broadly interpreted, namely, it should include circumstances where the state has unilaterally incurred liability without establishing a contractual *nexus* between the individual and the state.[3] In this case the term 'rights' moves closer to the meaning of legitimate expectations.

The other important term in relation to private bodies is 'required'. Several different interpretations of this term are possible.[4] Although often textually linked to the term 'required', the interpretations vary in their treatment of two analytically distinct ideas: the element of need and the element of relevance.[5] For present purposes, the element of need is most important. A strict interpretation of this element would demand that the information be necessary for the exercise or protection of a right. A more expansive interpretation would demand that the information be 'reasonably required', where all the circumstances promoting

[1] 1997 (3) SA 839 (T).

[2] *The Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & others* 2001 (3) SA 1013 (SCA), 2001 (10) BCLR 1026 (SCA) at para 27. During the course of his judgment Cameron J described the previous decision in *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting & others* 1996 (3) SA 800 (T), which held that 'rights' was limited to constitutional rights, as 'clearly wrong'. For the protection of at least statutory rights, see *Van Huyssteen & others v Minister of Environmental Affairs and Tourism & others* 1996 (1) SA 283 (C) at 300B–E, 1995 (9) BCLR 1191 (C) and *Balmoral Investments (Edms) Bpk v Minister van Mineraal- en Energiesake en andere* 1995 (9) BCLR 1104 (NC) (treating a statutory right of appeal under s 57(1) of the Minerals Act 50 of 1991 as falling within the category of rights protected by IC s 23, but finding that no such right of appeal existed against the action of a Regional Director). See also *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape* 1997 (7) BCLR 907 (C) at 913E–F; *NISEC (Edms) Bpk v Western Cape Provincial Tender Board & others* 1998 (3) SA 228 (C), 1997 (3) BCLR 367 (C) at 374H; *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W), 1997 (10) BCLR 1429 (W) (contractual and delictual rights).

[3] See the discussion of *Premier, Mpumalanga, & another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC) at 106n10. See below, ch 25 'Just Administrative Action'.

[4] *Shabala v Attorney-General, Transvaal & another; Gumede & others v Attorney-General, Transvaal* 1995 (1) SA 608 (T) at 624C–D, 1994 (6) BCLR 85 (T): 'the word "required" is capable of a number of meanings ranging from "desired" through "necessary" to "indispensable" . . . To my mind, "required" in s 23 conveys an element of need: the information does not have to be essential, but it certainly has to be more than "useful" . . . or "relevant" . . . or simply "desired".'

[5] For a detailed discussion of both the elements of need and relevance, and support for a generous approach to both elements, see the previous edition of this chapter. A strict interpretation of the element of relevance might demand that the information be personally relevant to the person asserting the right of access rather than relevant to the exercise or protection of that person's rights. A generous interpretation of this element would demand only that the information be relevant to the exercise or protection of the relevant right. The generous interpretation is supported by the text of s 32(1)*(b)* of the final Constitution, which refers to 'any rights' and not merely those of the requester.

need and relevance may be examined.[1] It is the latter, generous approach which has found favour with our courts. Such a generous interpretation is consistent with the constitutional value of openness and is to be welcomed.[2]

There is a potential further weakening of the right of access to information held by private bodies within the term 'exercise or protection'. Courts may read narrowly the forum in which a right is to be exercised or protected. In particular, access may be granted only where such information is required to exercise or protect one's rights through litigation, that is, through formal action in the courts. However, a broader reading is possible and, it is submitted, desirable. As the decided cases have recognized, one can also exercise or protect rights through informal action before administrative bodies, in front of a political forum, and through the public media.[3]

At a minimum, applicants for access to information would need to comply with the following requirements of the Supreme Court of Appeal in *The Cape Metropolitan Council v Metro Inspection Services*:[4]

> 'Information can only be required for the exercise or protection of a right . . . It follows that, in order to make out a case for access to information in terms of s 32, an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.'

A number of cases which have turned on the issue of whether the relevant information is 'required' for the exercise or protection of rights, relate to requests for information which the requester believes will reveal whether the requester has a legal claim (to either claim damages or to take a particular administrative decision on review).[5] Our courts have generally adopted two different approaches to this issue.

[1] See *Van Huyssteen & others v Minister of Environmental Affairs and Tourism & others* 1996 (1) SA 283 (C) at 299D–300F, 1995 (9) BCLR 1191 (C); *Nortje & another v Attorney-General (Cape) & another* 1995 (2) SA 460 (C) at 474H; *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape* 1997 (7) BCLR 907 (C) at 913G–H; see, in particular, the discussion of Cameron J in *Van Niekerk v City Council of Pretoria* 1997 (3) SA 839 (T) at 842J–846G; *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W), 1997 (10) BCLR 1429 (W); *Inkatha Freedom Party & another v Truth and Reconciliation Commission & others* 2000 (3) SA 119 (C), 2000 (5) BCLR 553 (C).

[2] See ss 1*(d)*, 36(1) and 39(1)*(a)* of the final Constitution.

[3] See *Van Huyssteen & others v Minister of Environmental Affairs and Tourism & others* 1996 (1) SA 283 (C) at 300E, 1995 (9) BCLR 1191 (C) ('It is to be noted that s 23 of the [interim] Constitution does not limit in any way the rights for the exercise or protection of which an applicant is entitled to seek access to officially held information, nor is there any limitation or restriction in respect of the manner or form in which such exercise or protection will take place'); *Qozeleni v Minister of Law and Order & another* 1994 (3) SA 625 (E) at 642; 1994 (1) BCLR 75 (E); *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (4) SA 174 (T) at 183F–G, 1997 (8) BCLR 1048 (T).

[4] *The Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & others* 2001 (3) SA 1013 (SCA), 2001 (10) BCLR 1026 (SCA) at para 28.

[5] These cases arose under the right of access to information against the state in the interim Constitution or Schedule 6 of the final Constitution.

The one approach requires the applicant to make out some *prima facie* case that its rights have been infringed. For example, in *Goodman Bros (Pty) Ltd v Transnet Ltd*[1] Blieden J refused to order the disclosure of certain documents relating to a tender because no basis has been established by the applicant that its constitutional rights had been infringed.[2]

A similar approach was adopted in another Witwatersrand Local Division decision[3] by Heher J, who stated that persons were only entitled to information in terms of s 23 of the interim Constitution if they could

> 'show a reasonable basis for believing a disclosure of documents in the possession of the State or an organ of State will assist him to protect or exercise a right, however derived . . . Even allowing for a broad and generous purposive approach to constitutional interpretation . . . the section is not capable of meaning that access should be ordered if insight into the document is required in order to determine whether a right needs to be protected. Desirable as that may be in theory, it seems to me to be commercially impracticable and wide open to abuse.'

In two earlier cases our courts adopted a more liberal approach to this issue in holding that an applicant was entitled to access to information in order to establish whether he or she had a claim, without the need to show the existence of a *prima facie* case. In *Van Niekerk v Pretoria City Council*[4] Cameron J held that the applicant was entitled to access to a report for purposes of establishing whether the applicant had a delictual claim against the local council in relation to a power surge which caused the applicant damage. As the learned judge stated:

> 'In the present case, there can be no doubt that having sight of the electricity department's report would assist the applicant in either proceeding with or abandoning his claim against the respondent. The report will disclose why the respondent considers that the report exonerated it of negligence. It may also reveal information which would advance the applicant's claim. Either way, disclosure will promote an early settlement of the dispute and bring the envisaged litigation, by settlement or abandonment, to a short, sharp end. In this sense, the applicant can in my view be said reasonably to "require" the report.'[5]

Similarly, Schwartzman J, in *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd*,[6] held that an unsuccessful tenderer was entitled to access to the other tenders and other relevant documentation, in order to assess whether its rights to procedural fairness had been infringed. During the course of its judgement, the court expressly rejected the argument that the applicant must show the appearance of an irregularity in the tender process in order to be entitled to the documentation:

> 'The applicant clearly requires the documents . . . in order to determine whether the tender process complied with the requirements of s 33 of the Constitution. Until it has had sight thereof, it cannot decide whether it has any claim for relief against the respondent. Sight of the documents could well result in forestalling any further litigation which is in itself a good reason for ordering their

[1] 1998 (4) SA 989 (W).

[2] During the course of his judgment the learned judge remarked as follows at 1000–1: 'It seems that the whole basis for the present portion of the application is for the applicant to gather information which it might or might not use in further legal proceedings which it might or might not embark upon . . . [I]t is my view that the applicant needs to have more than just an unsubstantiated apprehension of harm to it before it is to be entitled to [claim access to the relevant information].'

[3] *SA Metal Machinery Co Ltd v Transnet Ltd* (unreported, WLD, 22 March 1998) at page 11.

[4] 1997 (3) SA 839 (T).

[5] At 848.

[6] 1998 (2) SA 109 (W).

> production at this stage . . . To hold that a tenderer such as the applicant is required to lay a jurisdictional basis before being able to assert his constitutional right to information would serve to undermine the basis on which I am required to interpret the Bill of Rights.'[1]

A particularly interesting case in this context is the decision of the Cape Provincial Division in *IFP v TRC*.[2] In this case the IFP requested access to relevant documentation of the TRC in order to establish whether it had a claim for defamation against the TRC. Of particular relevance here was that the relevant legislation[3] provides that persons who perform tasks on behalf of the Commission may only be liable if they act in bad faith. As a result of this statutory exclusion of liability the applicants contended that they could only assess whether they had an action in law if they had sight of the relevant documents on which the TRC based its actions. Davis J, in principle, appeared to endorse this approach, stating that the applicants were entitled to information which would enable them 'to launch proceedings in an informed fashion' and held that:

> 'In the present case the question is thus whether information is reasonably required for the enforcement of applicants' rights in that, based on such information, applicants can obtain advice as to whether they have a claim and can then frame their pleadings in a manner which discloses a cause of action'.[4]

This liberal approach was, in our view, particularly appropriate in determining whether an applicant was entitled to access to information against the state in terms of interim Constitution. This is because such an approach better facilitates the underlying rationales of access to information against the state, that is, open and accountable, democratic governance. Nevertheless, this liberal approach may be less appropriate in deciding disputes relating to access to information held by private bodies under the final Constitution, where the focus is more on the protection of rights and less on the promotion of democracy, than in the public sector.

One case effectively avoids substantive limitations analysis by determining that there is no right at issue to be protected or exercised, exploiting the particular language (and the use of the past tense) of the internal limitation of the interim Constitution's formulation of the right. The danger of this 'no right to be protected' approach is demonstrated pointedly by *Tobacco Institute of Southern Africa & others v Minister of Health*.[5] This case essentially disregards any role for the right of access to information to play in a deliberative democracy

[1] At 119. This approach was subsequently endorsed by the Supreme Court of Appeal in *Transnet Ltd v Goodman Bros (Pty) Ltd* 2000 (1) SA 853 (SCA) at 867, 2001 BCLR 176 (SCA). This liberal approach is also consistent with the approach of the SCA in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & others* 2001 (3) SA 1013 (SCA), 2001 (10) BCLR 1026 (SCA) at paras 28–9.

[2] *Inkatha Freedom Party & another v Truth and Reconciliation Commission & others* 2000 (3) SA 119 (C), 2000 (5) BCLR 553 (C).

[3] Section 41(2) of the Promotion of National Unity and Reconciliation Act 34 of 1995.

[4] At 135. Davis J, however, expressed grave doubts as to whether the right of access to information gave rise to a general right to pre-action discovery. Interestingly, the learned judge rejected the argument that an ordinary defamation plaintiff is entitled to relevant information held by the defendant in order to establish whether the defendant had acted reasonably, in light of the new defence to defamation of reasonableness (see above, ch 20 'Expression'): '[T]o suggest that s 32 of the Constitution can now be interpreted so as to impose upon defendants in such cases an obligation to provide information to plaintiff and therefore to disclose the basis for their defence is indeed to extend the right of information far beyond that which is reasonably required for the enforcement of applicants' rights, that is to be able to launch proceedings in an informed fashion.'

[5] 1998 (4) SA 745 (C), 1999 (1) BCLR 83 (C).

by completely denying a multi-pronged request for information with regard to proposed legislation on the rationale that proposed legislation can affect rights only after it becomes enacted into law. With respect, this case eviscerated one aspect of the core rationale for the right of access to information — participation in democratic decision-making.[1] The preferable approach would have been instead to examine which of the requests for information were validly refused and which not. For instance, with the use of the exemptions in the AIA much, if not most, and perhaps all, of the information sought could have been validly withheld.[2]

62.8 GROUNDS OF REFUSAL

Like all other constitutional rights, the right of access to information is not absolute and may be limited, provided such limitation complies with the limitation clause of the Constitution, in that it is provided for by a law of general application and is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[3] The AIA, which is intended to give effect to that constitutional right, provides such a law of general application in at least most instances and allows for certain mandatory and discretionary grounds of non-disclosure. Such grounds will only withstand constitutional scrutiny if they constitute reasonable and justifiable limitations on the right.

In interpreting the grounds of refusal, as with interpreting the Act as a whole, it should be borne in mind that the primary object of the AIA is to promote openness and transparency through giving effect to the right of access to information. This should result in courts adopting a restrictive approach to the grounds of non-disclosure. As Currie & Klaaren state:[4]

> 'Access to information is the normal course. The Act is intended to give effect to the constitutional right of access to information. Access should only be denied where the denial is clearly justified. Any doubts as to whether the withholding of particular information is justified should be resolved in favour of disclosure.'[5]

A detailed discussion of all the grounds of non-disclosure is beyond the scope of this chapter.[6] We will, however, briefly discuss three of the grounds set out in the Act which raise particularly constitutional legal issues: privacy, national security and defence, and the operations of public bodies.

[1] This rationale, however, does not hold in the private sector.

[2] The Constitutional Court case of *Mphahlele v First National Bank of South Africa* 1999 (3) BCLR 253 (CC) also entertained an access to information claim, but denied it on the basis of the internal limitation. This case upheld the Supreme Court of Appeal's practice of not giving reasons for the dismissal of a petition to the Chief Justice for leave to appeal. The expressed rationale of the court was that since the petition was final, there was no right to be exercised or protected.

[3] Section 36 of the 1996 Constitution. See above, ch 12 'Limitations'.

[4] See *AIA Commentary* para 2.10.

[5] It should, however, be borne in mind that one specific object of the Act is to give effect to the constitutional right, subject to justifiable limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance (s 9*(b)*(ii)). Section 3(2) of the Australian Freedom of Information Act, 1982 specifically adopts a restrictive approach to exclusions, in providing that 'any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest possible cost, the disclosure of information'.

[6] For such a discussion, see *AIA Commentary* ch 8.

(a) Privacy

The protection of the privacy of third parties is an internationally recognized restriction on freedom of information.[1] In the context of the South African Constitution, this ground of non-disclosure is particularly important as it gives effect to the constitutionally protected right to privacy.[2] In principle, this ground of non-disclosure (which amounts to a limitation on the right of access to information) is therefore reasonable and justifiable. Nevertheless, interpreting this ground of non-disclosure in a constitutionally acceptable way will involve a careful balancing of the values of these two constitutional rights, the right of access to information and the right to privacy.

The text of the relevant ground of refusal in the AIA provides that a body must refuse a request for access if disclosure 'would involve the unreasonable disclosure of personal information about a third party, including a deceased individual'.[3] 'Personal information' is broadly defined as 'information about an identifiable individual'. The definition goes on to list a number of examples of personal information, including information relating to race, gender, pregnancy, medical, criminal or employment history, address, fingerprints or blood type, personal opinions, views or preferences, and private or confidential correspondence.[4] The relevant sections provide that this ground of refusal does not apply to certain information, including where the relevant individual has consented in writing to its disclosure, he or she was informed at the time that it was given to the relevant body that it belongs to a class of information that would or might be made available to the public; it is already publicly available; and, importantly, information 'about an individual who is or was an official of a public body and which relates to the position or functions of the individual'.[5]

[1] See, for example, the Australian Freedom of Information Act and the jurisprudence of the European Court of Human Rights interpreting art 10(2) of the European Convention on Human Rights.

[2] Section 14 of the Constitution. See generally above, ch 18 'Privacy'.

[3] Sections 34 and 63 for public and private bodies respectively.

[4] Section 1 of the AIA provides that 'personal information', includes, but is not limited to:

'*(a)* information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the individual;

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

(c) any identifying number, symbol or other particular assigned to the individual;

(d) the address, fingerprints or blood type of the individual;

(e) the personal opinions, views or preferences of the individual, except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual;

(f) correspondence sent by the individual that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;

(g) the views or opinions of another individual about the individual;

(h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual, but excluding the name of the other individual where it appears with the views or opinions of the other individual; and

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

but excludes information about an individual who has been dead for more than 20 years. . . .'

[5] Sections 34(2) and 63(2). The latter exception is particularly important as it gives effect to the related principles of open and accountable government and the diminished expectation of privacy of public officials. The privacy of such officials may not be used to frustrate access to information about that individual, which relates to that person's official functions. This type of information is obviously important in promoting an informed electorate and enhancing participatory democracy.

It is important to note that the AIA only prohibits the 'unreasonable' disclosure of personal information. The crucial question in applying these provisions will therefore be whether, in the relevant circumstances, disclosure will be unreasonable. The first stage of this enquiry will be whether the disclosure amounts to an infringement of privacy in that it is a disclosure of private facts.[1] This will only be the case where the third party can be said to have a legitimate or reasonable expectation of privacy in relation to the particular information.[2]

The next stage is to determine whether the disclosure is 'unreasonable'. This requires an examination of all the surrounding circumstances, including the strength of the third party's privacy interest, the nature of the particular record and the importance of the purpose for which it is requested.[3] It is submitted that our common law, as interpreted in the light of the Constitution, could play an important role in this enquiry as the common-law test for a breach of privacy is essentially the same. Under the common law a disclosure of private facts would only be wrongful if it is unreasonable in the circumstances and if one of the established defences is not met, including consent, qualified privilege, and truth in the public interest.[4] It is difficult to contemplate a situation in which disclosure would not be wrongful under the common law but would be prohibited under the AIA. For example, if the public interest in disclosure outweighs the individual's privacy interest, disclosure would not be 'unreasonable'.[5]

[1] An alternative approach would be that ss 34 and 63 of the AIA contemplate that any disclosure of 'personal information' (other than the categories of information set out in subsecs (2)) amounts to the disclosure of private facts. The only relevant question in each case is therefore whether such disclosure of private facts is reasonable in the circumstances. We, however, believe that the suggested preliminary enquiry is preferable in that the aim of the relevant sections, as their headings indicate, is to protect the privacy interests of third parties. If the privacy rights of a third party are not undermined by disclosure, this mandatory ground of non-disclosure would not be justified under the Constitution. In any event, the strength of the third party's privacy interest plays an important role in determining whether disclosure will be unreasonable.

[2] See above, ch 18 'Privacy' and especially the Constitutional Court in *Bernstein v Von Wielligh Bester NO* 1996 (2) SA 751 (CC) para 75: '[T]he party seeking suppression of the evidence must establish both that he or she has a *subjective expectation* of privacy and that the society has recognized that expectation as *objectively reasonable* . . . It seems to be a sensible approach to say that the scope of person's privacy extends *a fortiori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured.' One way of understanding the exceptions in ss 34(2) and 63(2) is that no legitimate expectation of privacy arises in relation to such information. See also G E Devenish, K Govender and H Hulme *Administrative Law and Justice in South Africa* (2001) at 203–4.

[3] A similar balancing approach is applied by the United States Courts in interpreting the Federal Freedom of Information Act. In *US Department of Justice v Reporters Committee for Freedom of Expression et al* 489 US 749 (1989) the United States Supreme Court stated that 'whether disclosure of a private document . . . is warranted must turn on the nature of the requested document and its relationship to "the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny" . . . rather than on the particular purpose for which the document is being requested'. See also *Department of Airforce v Rose* 425 US 352 (1977).

[4] See, generally J Neethling, J M Potgieter & P J Visser *Neethling's Law of Personality* (1996) at 239–77.

[5] It should be noted that the public interest contemplated here is broader than the public interest override contained in the AIA (see below, § 62.9). For example, while the disclosure of malfeasance has long been recognized as being in the public interest, this would not necessarily amount to a substantial contravention of law contemplated in the statutory public interest override. This is also consistent with the position in the United Kingdom that a defence to an action for breach of confidence exists if the public interest in disclosure outweighs the public interest in preserving the confidence (see, generally, G Robertson and A Nicol *Media Law* 3 ed (1992) 183–7 and D Feldman *Civil Liberties and Human Rights in England and Wales* (1993) 438–41).

(b) Defence, security and international relations

This discretionary ground of non-disclosure, contained in s 41 of the AIA, applies only to public bodies. This provision provides, in s 41(1), that the information officer of a public body may refuse a request if disclosure 'could reasonably be expected to cause prejudice to' the defence, security or international relations of the Republic.[1] Subsection (2) goes on to include a number of examples of specific records.[2] Section 41(4) goes further in providing that the information officer may refuse to confirm or deny the existence or non-existence of the record if such a disclosure would harm South Africa's defence, security or international relations.

National security is an important concern for any state. Instances where a genuine threat to national security or defence outweighs the constitutional right of access to information would accordingly constitute a justifiable limitation on that constitutional right.[3] Such an approach is consistent with the approach in foreign jurisdictions[4] and international conventions.[5] For example, in the Canadian decision of *Zanganeh v Canadian Security Intelligence Service*[6] the court held that the refusal to disclose information relating to national security was a justifiable limitation under the Canadian Charter's limitations clause, notwithstanding the fact that the Canadian government had made a false denial that it did not have the relevant information in its possession.

In the context of national security the important terms which require interpretation in s 41 of the AIA are 'reasonably be expected to cause', 'prejudice', 'defence' and 'security'. In interpreting these terms our courts should be careful to strike a proper balance between this

[1] Information which could prejudice the international relations of the Republic is subject to a sunset provision that this ground cannot be relied upon if the record came into existence more than 20 years before the request. Information which could prejudice defence or security is not, however, subject to such a provision.

[2] These records are records including information relating to: military tactics, strategy, exercises or operations 'undertaken in preparation of hostilities or in connection with the detection, prevention, suppression or curtailment of subversive or hostile activities'; the quantity, characteristics, capabilities, vulnerabilities or deployment of weapons; the characteristics of any military force and information held for the purposes of defence intelligence. The crucial issue is whether the list is of information that can be presumptively assumed to reasonably be expected to cause prejudice or whether the list is just a set of examples of the type of information that *could* have that effect, that is, if a record contains information about military tactics can it be refused for this reason, or is it additionally necessary for the public body to show that its disclosure can reasonably be expected to cause harm to defence? See *AIA Commentary* paras 8.89–8.95 for a more detailed discussion of this ground of non-disclosure, concluding that s 41(2) is presumptive.

[3] As Cameron J stated in the *Commission of Inquiry into Armscor Transactions, Ruling on in camera proceedings, (7 November 1994)* the concept of national security 'may be invoked to inhibit the public debate on the problem and the State's response to it. Thus, in South Africa, massive legislation was introduced under apartheid to preclude comment on the armaments and nuclear industries and other issues. In our view, the Commission needs to find a balance between too broad and too narrow a determination of national security and the national interest. In finding that balance, as we have indicated, we consider that commercial interests related to the country's future well-being and prosperity may play a legitimate role.'

[4] For example, in the context of freedom of expression, the United States Supreme Court adopted the 'clear and present danger' test in *New York Times v United States* 403 US 713 (1971), in holding that the United States administration had not justified its attempt to prevent publication of the so-called 'Pentagon papers'.

[5] See, for example, art 19 of the International Covenant on Civil and Political Rights, 1966 and art 10 of the European Convention on Human Rights, 1950.

[6] (1988) 50 DLR (4th) 747.

compelling interest and the constitutional right of access to information.[1] In striking the correct balance it is important to stress that access to information is a fundamental right. As Cameron J stated in the *Armscor* inquiry, assessing whether there was 'reason to believe' that the national security of South Africa may be threatened if the hearing is not conducted *in camera*:

> 'Reasonableness as a standard of public conduct in South Africa now requires that decision-makers should have due regard to appropriate constitutional standards and principles. These include in the present case the value of openness and visibility in the government and official processes. In other words, an assessment whether the reasonable justification test has been fulfilled may include, in the weighing process, giving consideration to the public's constitutional right to know, and the constitutional value of an open society. To put the matter differently, the public's right to know should not be omitted from the assessment whether the "reasonable justification" standard has been fulfilled.'[2]

Courts should, in particular, closely scrutinize an assertion of national security in view of the long history of the abuse of this ground in South Africa and elsewhere and in view of the conflict between the notion of national security and the constitutional value of openness.[3] It is all too easy for the government simply to assert national security as a ground for non-disclosure, particularly where the very existence of the record need not be confirmed under this ground. As David Feldman states:

> 'The security of the state and its institutions is an important public interest. Yet the law which buttresses those institutions is inevitably viewed with suspicion by democrats and libertarians, as a threat to state security can too easily be asserted by those in power, as a justification for restricting a wide range of freedoms in ways which protect the interests of the governing party rather than the public.'[4]

(c) Operations of public bodies

Section 44 of the AIA provides that the information officer of a public body may refuse access to a record if that record relates to the operations of the public body in a particular manner. Section 44(1)*(a)* applies if the record contains an opinion, advice, report or recommendation or an account of a consultation, discussion or deliberation 'for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law'. Paragraph *(b)* applies if 'the disclosure of the record could

[1] This balancing is implicit in the approach of Cameron J in the final Armscor inquiry judgment, in which he 'accept[ed] that no decision as to disclosure in this area can be without risk or harm, or without anxiety as to its consequences . . . [T]hat risk, in the present case, however, is not sufficient to entitle us to bar from the press and the public an important right to examine our past, including our past armaments dealings, whether or not that examination causes embarrassment, and even complexity, for other governments, and indeed for the present Government of National Unity.' (*Commission of Inquiry into Armscor Transactions, Ruling on in camera application — country classification for armaments trade: log 17 Pam 19.*)

[2] It should be noted that Cameron J specifically stated that this consideration may 'have a marginal influence' in that case. Nevertheless, it is submitted that its emphasis is useful in interpreting s 41 of the AIA.

[3] As G E Devenish, K Govender & H Hulme state in *Administrative Law and Justice in South Africa* (2001) at 192: '[I]n South Africa, there is no doubt that the courts will meticulously scrutinize any claim that information is privileged by virtue of considerations of national security as a result of the manifest abuse of national security as a cloak for covering up human rights violations and abuses that were committed on an inordinate scale during the era of white minority rule.'

[4] D Feldman *Civil Liberties in Human Rights in England and Wales* (1993) at 682.

reasonably be expected to frustrate the deliberative process in a public body or between public bodies' by inhibiting candid communication or deliberation; or the disclosure, by prematurely disclosing a policy or contemplated policy, could 'reasonably be expected to frustrate the success of that policy'.

This ground of non-disclosure protects the disclosure of public decision-making and therefore draws on the purposes behind the state communications privilege.[1]

The most striking feature of this ground of non-disclosure is the breadth of para *(a)*. On the face of it, this provision will permit public bodies to refuse to disclose almost all information which is formulated for the purposes of formulating a policy or taking a decision, including decisions which would constitute administrative action for purposes of the just administrative action clause.[2]

While the breadth of this provision may be constitutionally suspect, it is important that it is restrictively interpreted. In this regard, there are three respects in which it should be restrictively interpreted. First, this provision only protects pre-decision, and not post-decision, documents. A post-decision document cannot be 'for the purpose of assisting' in formulating policy or taking a decision. Thus, a pre-decision document which is adopted or incorporated in an administrative decision should also lose its protection.[3] Secondly, this ground should not ordinarily protect internal secret law, working law or administrative guidelines as such documents would constitute a policy or decision in themselves.[4] Thirdly, this provision should ordinarily be limited to documents containing opinion and not those which set out facts. These restrictive interpretations of the ground of non-disclosure are justified by the fact that the records contemplated in this ground go to the heart of open government and democratic functioning.

Section 44(2) further provides that the information officer may refuse a request if disclosure could 'reasonably be expected to jeopardize the effectiveness of a testing, examining or auditing procedure or method used by a public body'; or if the record contains evaluative material and disclosure would breach a promise to hold the information in confidence. Subsection (2)*(c)* provides that the information officer may refuse access if the

[1] Cases interpreting the executive privilege in the content of the US FOIA have distinguished three purposes behind the state communications or executive privilege. First, the privilege is designed to encourage open, frank discussions on policy matters between subordinates and superiors. Secondly, the privilege is designed to protect against premature disclosure of proposed policies before they are finally adopted. Thirdly, the privilege protects against public confusion by disclosure of reasons and rationales that were not the actual reasons for state actions. *Coastal States Gas Corp v Department of Energy* 617 F2d 854 (DC Cir 1980).

[2] Although s 44(4) provides that this provision may not be used to refuse a record 'insofar as it consists of an account of, or a statement of reasons required to be given in accordance with s 5 of the Promotion of Administrative Justice Act, 2000', this would not prevent a body from refusing to disclose information leading up to the decision. Applicants in judicial review applications would be entitled to such information as part of the record under Rule 53 of the Uniform Rules of the High Court of South Africa. G E Devenish, K Govender & H Hulme (eds) *Administrative Law and Justice in South Africa* (2001) at 206 argue that the 'or' between paras *(a)* and *(b)* of s 44(1) is an error and that the conjunctive 'and' should have been used instead, 'because otherwise a completely untenable and absurd situation would arise in terms of which the exception to the right of access to information would completely negate the operation of the right itself'. But see *AIA Commentary* para 8.99.

[3] *AIA Commentary* paras 8.100 and 8.101.

[4] See Justine White 'Open Democracy: Has the Window of Opportunity Closed?' (1998) 14 *SAJHR* 65 at 71–2 for a criticism of secret guidelines.

record 'contains a preliminary, working or other draft of an official of a public body'. The latter provision is unclear but appears to envisage draft documents held by a public official.[1]

62.9 PUBLIC INTEREST OVERRIDE

Sections 46 and 70 of the AIA, in relation to public and private bodies respectively, contain public interest overrides which provide for mandatory disclosure in the public interest. These provisions override all the grounds of non-disclosure included in the Act, save for one.[2] In terms of this provision, a request for access to a record must be granted, notwithstanding the other provisions of the Act, if:

'*(a)* the disclosure of the record would reveal evidence of —
(i) a substantial contravention of, or failure to comply with, the law; or
(ii) an imminent and serious public safety or environmental risk; and
(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.'

The public interest overrides therefore contemplate a particularly serious type of public interest, namely, a substantial contravention of law or an imminent and serious public safety or environmental risk. This provision does not require the mandatory disclosure of information which is in the public interest, in the general sense.[3]

It is unfortunate that the wider provision in clause 44(2) of the Open Democracy Bill was abandoned in the drafting process of the AIA. This clause would have required mandatory disclosure if the public interest in disclosure of the relevant information outweighed any right or interest which would be protected by the relevant ground of refusal.

Of particular concern is that the emphatic language of these provisions ('substantial contravention', 'imminent and serious' and 'clearly outweighs') could have the effect that the public interest override will seldom apply. If this is the case, the constitutional right of access to information could be undermined, which could call into question the constitutionality of the entire structure of the AIA.[4] Even with the liberal interpretation in favour of openness of information which is in the public interest which these terms should therefore be given, the clause seems unavoidably restrictive.

[1] This is consistent with the previous draft of the Open Democracy Bill, which contained the term 'working draft or note of an official of a government body'.

[2] Namely, s 35(1), which provides for the mandatory protection of certain records of the South African Revenue Service.

[3] The public interest, as a defence to a delictual claim for defamation or invasion of privacy, is significantly wider. The public interest, in this sense, is simply something which is of serious concern or benefit to the public. In *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1212, Hefer JA stated that the 'public interest' is 'material in which the public has an interest' as opposed to 'material which is interesting to the public'. For example, it would include a disclosure of simple malfeasance.

[4] It is, however, acknowledged that the broad public interest could have the effect that a particular ground of non-disclosure will not apply, in which case the public interest override is irrelevant. See above, 62–20 for a discussion of the manner in which a public interest may result in a disclosure of personal information not being unreasonable.

63 Just Administrative Action

Jonathan Klaaren
Glenn Penfold

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63.1 Introduction: Administrative Justice in a Constitutional Democracy

While this chapter focuses primarily on constitutional issues that engage just administrative action (FC s 33), this limited exercise will inevitably require a detailed discussion of the provisions of the Promotion of Administrative Justice Act ('PAJA').[1] PAJA is, in practice, the primary tool for FC s 33's enforcement. We begin by analysing the relationship between the Final Constitution, PAJA, and the common law. We follow that foundational analysis with an interrogation of the meaning of the most important phrase for purposes of both the constitutional right and PAJA: 'administrative action'. We then proceed to discuss each of the four components of the right to just administrative action: the constitutional rights to lawful, procedurally fair, and reasonable administrative action, as well as the right to written reasons for administrative action. We conclude with an examination of standing and substantive remedies in administrative law.[2]

Prior to the advent of the Interim Constitution, South African administrative law was generally understood to be founded on the common law.[3] The courts reviewed the exercise of public power based on their inherent jurisdiction.[4] In so doing, the courts developed and applied judge-made rules of review with which exercises of public power were required to comply. Accordingly, the actions of decision-makers could be set aside if they abused their discretion, failed properly to apply their minds or failed to follow the rules of natural justice.[5] In the

* The authors would like to thank Stu Woolman for editorial assistance and Theunis Roux for commenting on a portion of an earlier version of this chapter.

[1] Act 3 of 2000.

[2] The right to just administrative action no longer needs to carry the legal burden — the work — in providing a front line against the depredations of an apartheid state — that administrative law generally, and natural justice particularly, were obliged to do prior to the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC'). Accordingly, we have previously noted: 'The work performed in comparable constitutional instruments by a single, all-embracing due process clause has been divided and allocated to several distinct sections of the South African Constitution: the limitations clause, the right of access to information, and the right of access to court as well as the right of freedom and security of the person.' See J Klaaren 'Administrative Justice' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) § 25.1). See also *Minister of Health & Another v New Clicks SA (Pty) Limited & Others* 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 (CC) at para 587('*New Clicks*')(Sachs J)('[FC s 33] does not stand alone as a solitary bulwark against arbitrary or unfair exercise of public power. Administrative justice in itself has less work to do than it had in the pre-democratic era').

[3] But see *Zantsi v Council of State, Ciskei & Others* 1995 (4) SA 615 (CC), 1995 (10) BCLR 1424 (CC)(For an understanding of judicial review and the South African legal system prior to 1994 that emphasises its constitutional, as compared to its common law, nature.)

[4] *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC)('*Fedsure*') at paras 23 and 28. See also *Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council* 1903 TS 111, 115 ('Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court . . .')

[5] See *Johannesburg Stock Exchange & Another v Witwatersrand Nigel Ltd & Another* 1988 (3) SA 132, 152 (A)(Succinct formulation of the common-law grounds of review.)

pre-constitutional era, administrative law and the courts' power of review were based on the constitutional principles of the rule of law and sovereignty of Parliament.[1] Parliamentary sovereignty, in terms of which the will of Parliament was supreme, was the primary feature of South African constitutional law. Accordingly, the application of principles of judicial review was subject to the whim of Parliament. Parliament could limit the level of scrutiny of administrative action or even ultimately oust the courts' jurisdiction to enquire into the validity of administrative action.[2]

The legislative tools that flowed from Parliamentary sovereignty set the executive free to be as repressive as it wished in relation to laws governing racial segregation, national security statutes and a host of other apartheid legislation. They also affected areas of social and economic regulation less directly implicated in the apartheid legal apparatus. This dire set of legal circumstances was exacerbated by the executive-mindedness of certain judges who failed seriously to scrutinise the executive's actions. The result is that South Africa's history of administrative law and practice is littered with instances of abuses of power — particularly in the context of apartheid laws.[3]

The constitutionalisation of the right to administrative justice in the Interim Constitution amounted to a radical break in South African administrative law. Not only did the Interim Constitution replace the sovereignty of Parliament with the new governing principle of constitutional supremacy,[4] but the constitutional rights to lawful and reasonable administrative action, procedural fairness and written reasons began the process of political disentrenchment of legislative and executive abuse of power.[5] The basis for judicial review of administrative action is now the protection of a fundamental right (FC s 33), an express commitment to

[1] *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex parte President of the RSA & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC)('*Pharmaceutical Manufacturers*') at paras 33, 35 and 37.

[2] On ouster, see *Staatspresident en Andere v United Democratic Front en 'n Ander* 1988 (4) SA 830 (A) and *Natal Indian Congress v State President & Others* 1989 (3) SA 588 (D). Devices to reduce the level of judicial scrutiny included the legislative use of subjective discretions. See generally J Gauntlet 'The Satisfaction of Ministers, Judicial Review of "Subjective" Discretions in South Africa' in E Kahn (ed) *The Quest for Justice: Essays in Honour of Michael MacGregor Corbett* (1995) 208.

[3] A large amount of literature has been written on this issue. See D Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991) and S Ellmann *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992).

[4] FC s 2 proclaims that '[t]he Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

[5] IC s 24, entitled 'Administrative justice', read as follows:

'Every person shall have the right to —

(a) lawful administrative action where any of his or her rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such acts have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.'

constitutional supremacy (FC s 2) and the constitutionally-inspired principle of legality (or the rule of law doctrine (FC s 1)). The principle of legality — or the rule of law doctrine — recognizes that all public power flows from the Final Constitution and must be consistent therewith.[1] As Chaskalson P stated on behalf of the Constitutional Court in *Pharmaceutical Manufacturers*:

> The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law.[2]

The Final Constitution[3] replaced the Interim Constitution's right to administrative justice with FC s 33, entitled 'Just Administrative Action', which reads as follows:

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must —
    (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
    (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
    (c) promote an efficient administration.

Unlike most other fundamental rights in the Bill of Rights, the precise terms of the right set out in FC s 33 did not come into operation immediately on 3 February 1997. The transitional provision in item 23 of Schedule 6 to the Final Constitution provided that Parliament was required to enact the legislation referred to in FC s 33(3) within three years from the commencement of the Final Constitution (that is, by 3 February 2000). Prior to such enactment, the right in FC s 33 was to be read as set out in item 23(2)*(b)* of Schedule 6: that provision was essentially the same as the text of IC s 24.

The national legislation envisaged in FC s 33(3) is PAJA. PAJA was enacted on the day of the deadline, 3 February 2000.[4] Broadly speaking, PAJA elaborates on

[1] *Pharmaceutical Manufacturers* (supra) at paras 19–45. For a discussion of the principle of legality, see F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11.

[2] *Pharmaceutical Manufacturers* (supra) at para 45. See also *Fedsure* (supra) at paras 32 and 40; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) ('*Bato Star*') at para 22 ('The grundnorm of administrative law is now to be found in the first place not in the doctrine of *ultra vires*, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution.')

[3] The Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC')

[4] PAJA itself did not immediately come into force. Section 11 provided that it would come into operation on a date fixed by the President in the *Government Gazette*. The President brought PAJA, save for ss 4 and 10, into force on 30 November 2000 in terms of Government Notice R73 dated 29 November 2000. In respect of administrative action taking place between 4 February 2000 and 30 November 2000, the Constitutional Court stated, without discussion, that the form of the constitutional right provided for in Schedule 6 (ie the Interim Constitution's right to administrative

the broad constitutional right to just administrative action, clarifies the scope and content of the right to procedural fairness, enacts a detailed regime for the provision of reasons, provides a legislative basis for judicial review of administrative action, and provides an institutional framework for the enforcement of such rights.

Prior to the introduction of constitutional democracy in South Africa, there was a perception that 'good' administrative lawyers favoured judicial activism and intervention in carefully scrutinising and setting aside administrative decisions. 'Bad' administrative lawyers favoured judicial deference, which was equated with executive-mindedness and acquiescence in injustice. The reasons for this are not difficult to understand. There was a need to control the exercise of public power as much as possible when that power had the effect of applying unjust laws. In the absence of participation of the majority in legislative decision-making and without a justiciable Bill of Rights, administrative law was often the only tool for avoiding injustice and preventing the erosion of or indeed the snuffing out of most South Africans' basic rights.[1]

It has been generally recognised that this pro-interventionist approach to judicial review needed to be re-assessed in our new constitutional democracy. A pro-interventionist approach tends to be less respectful of democracy, and the democratic institution of the executive, than may be appropriate. It may also run contrary to the principle of separation of powers. That principle requires that the judiciary pay appropriate respect to the executive's sphere of operation.[2] A choice for constitutional democracy is, to some extent, a choice to respect the constitutional drafters' decision to confer decision-making powers and discretions on the executive branch of government.[3] In addition, it is no longer necessary for

justice) would apply. See *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Another* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC)('*Kyalami Ridge*') at para 52. For a discussion of the interpretive applicability of PAJA with respect to administrative action taking place in this period, see I Currie & J Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) ('*Benchbook*') 84–85. Sections 4 and 10 of PAJA were brought into force on 31 July 2002 by Proclamation R63 of 31 July 2002. As of the time of writing (October 2008), there remains one significant element of the envisaged PAJA enforcement scheme that is not yet in operation — the PAJA jurisdiction of the magistrates' courts. For a discussion of the drafting history of PAJA, see Currie & Klaaren *Benchbook* (supra) at 4–13 and I Currie *The Promotion of Administrative Justice Act: A Commentary* (2008) ('*The PAJA*') 18–23.

[1] See generally C Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 ('Future of Judicial Review'). South African administrative lawyers therefore generally supported 'red-light' theories of administrative law. See also C Harlow & R Rawlings *Law and Administration* (1984); J Klaaren 'Redlight, Greenlight' (1999) 15 *SAJHR* 209 ('Redlight, Greenlight').

[2] For a discussion of this principle or doctrine, see S Seedorf and S Sibanda Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12.

[3] See C Hoexter 'Future of Judicial Review' (supra) at 500 (Judicial activism creates problems of democracy and legitimacy); J Klaaren 'Structures of Government in the 1996 South African Constitution: Putting Democracy Back into Human Rights' (1997) 13 *SAJHR* 3. See also D Davis 'Administrative Justice in a Democratic South Africa' 1993 *Acta Juridica* 21.

administrative law to do all the work of rights protection. All public power must now comply with the requirements of the Final Constitution and, in particular, the Bill of Rights.[1]

At the same time, the Final Constitution should give the courts greater security to scrutinise administrative action closely, safe in the knowledge that their powers of review are constitutionally mandated and protected. They no longer have to push back the boundaries, using artificial devices like the intention of the legislature, to justify setting aside decisions. Their power is derived directly from the Final Constitution.[2]

These parallel developments could lead to the extension of administrative review in certain instances and its narrowing in others. It is thus appropriate to reassess administrative law in certain respects. In undertaking this reassessment, the courts should attempt to ensure that the actions of the administration are carefully scrutinised for compliance with the constitutional requirements of lawful, reasonable and procedurally fair administrative action. However they should not intervene in areas which are properly the executive's domain. In attempting to strike this difficult balance, the fundamental tension should be recognised, that is, between participation, accountability, transparency and fairness, on the one hand, and efficient, effective government on the other.

63.2 The relationship between the Final Constitution, PAJA, the principle of legality, and the common law

(a) The relationship between the Final Constitution and PAJA

As stated above, Parliament enacted PAJA pursuant to the Final Constitution's mandate 'to give effect' to the constitutional right to just administrative action as required in FC s 33(3). PAJA therefore provides guidance and rules for administrators to follow as well as a legislative basis for administrative review. As we shall discuss in more detail below, applications for judicial review will usually be brought in terms of PAJA itself.

The questions that we shall consider in this section are an initial question regarding the procedure for bringing applications for judicial review, the degree of exclusivity of PAJA and then what could be termed three pure constitutional questions. Those three questions are: Did the enactment of PAJA satisfy the

[1] Chapter 2 of the Final Constitution. The relevant constitutional requirements also include the principles of constitutional supremacy and legality. See *Pharmaceutical Manufacturers* (supra) at para 20: 'The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law'. See also K O'Regan 'Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative Law' (2004) 121 *SALJ* 424.

[2] See *Pharmaceutical Manufacturers* (supra) at para 45 ('But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised.').

constitutional command of FC s 33(3)? Is PAJA the only statute of Parliament that gives effect to FC s 33? What roles should the constitutional right to just administrative action continue to play in the accountability scheme now that PAJA has been enacted and brought into force?

(i) The extent of PAJA's exclusivity

The initial question is the degree to which PAJA is the exclusive procedural gateway for judicial review of administrative action. It is clear that the primary mechanism for asserting administrative justice rights is not direct reliance on FC s 33, but through review under PAJA.[1] If the proposition was not apparent from the text of the basic law itself, the Constitutional Court indicated in *Bato Star* that an application for judicial review of administrative action must 'ordinarily' to be brought in terms of PAJA.[2]

Assuming acceptance of this primary role of PAJA, several questions nonetheless remain. The first is the degree of exclusivity.[3] One practical way to pose this question is to ask: to what extent does PAJA cover the field of civil procedure for administrative review? *Bato Star* seemed to lean towards the position that s 6 of PAJA entirely replaces the substantive judicial review grounds found in the common law but added that it was not necessary in that case to consider 'causes of action for judicial review of administrative action that do not fall within the scope of PAJA'.[4] Chaskalson CJ in *New Clicks* seemed to go a step further, stating that PAJA 'was required to cover the field and purports to do so' and that '[a] litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on s 33(1) of the Final Constitution or the common law'.[5] In our view,

[1] See *Bato Star* (supra) at para 22; and *New Clicks* (supra) at paras 95–97 (Chaskalson CJ) and paras 433–438 (Ngcobo J).

[2] Ibid at para 25 ('The provisions of s 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past.')(O'Regan J).

[3] See *Zuma v National Director of Public Prosecutions*, Unreported Decision of the Natal Provincial Divisions, Case no. 8652\08 (September 2008) at para 57 ('*Zuma v NDPP*').

[4] *Bato Star* (supra) at para 25.

[5] *New Clicks* (supra) at paras 95–97. Chaskalson CJ continues: 'That would defeat the purpose of the Constitution in requiring the rights contained in s 33 to be given effect to by means of national legislation.' Ibid at para 96). See also *New Clicks* (supra) at paras 433–438 (Ncgobo J)('Our Constitution contemplates a single system of law which is shaped by the Constitution. To rely directly on s 33(1) of the Constitution and on common law when PAJA, which was enacted to give effect to s 33, is applicable, is, in my view, inappropriate. It will encourage the development of two parallel systems of law, one under PAJA and another under s 33 and the common law. . . . Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies it provides'.) See also *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2008 (2) SA 24 (CC), 2008 (2) BCLR 158 (CC)('*Sidumo*') at para 43.

FC s 33 envisages PAJA as the centerpiece of judicial review of administrative action, with the common law retaining only a gap-filling function (as well as of course an interpretive role with regard to PAJA and at least to some extent with regard to FC s 33). As will become apparent below, the position in relation to other legislation is more complex, with some legislation performing a supplementary role and other specialist legislation applying to the exclusion of PAJA.

A second closely related and properly constitutional question is whether any assertion of unlawfulness of government conduct by way of administrative law review necessarily proceeds via PAJA. In our view, the answer to this question is dependent on the placement of the conduct complained of within the ambit of 'administrative action'. Outside of administrative action, and only outside of administrative action,[1] it remains open to assert administrative unlawfulness via the common law, as interpreted and developed in the light of the Final Constitution.[2] Where the action to be reviewed is administrative action, the procedure to be followed is that of PAJA.[3]

The exception to this last point involves processes associated with internal, statutory review. Here, the relevant procedure and substantive grounds for the review of administrative action are those grounds contained in the statutory regime. Such procedures and grounds are separate and independent from the procedure governing, and the substantive grounds available in, PAJA causes of action.[4]

Another instance in which this issue may arise is where conduct that amounts to administrative action under FC s 33 does not fall to be regulated by PAJA because it is regulated by other specialist legislation. In *Sidumo*, the Constitutional Court held (per Navsa AJ) that arbitral decisions of the Commission for Conciliation Mediation and Arbitration ('the CCMA'), while amounting to 'administrative action' for purposes of FC s 33, are reviewable under the Labour Relations Act[5] and not PAJA, because the LRA is specialised labour legislation (and, indeed, special administrative law) that should apply in its sphere to the exclusion of the general administrative law contained in PAJA.[6] According to Navsa AJ:

[1] We refer here to 'administrative action' as conduct that falls within this concept under both FC s 33 and PAJA.

[2] See § 63.2*(c)* infra. One can, of course, review both administrative and non-administrative action on constitutional grounds other than those that flow from FC s 33, including a violation of the Bill or Rights or the principle of legality and rationality (§ 63.2*(b)* infra).

[3] The Constitutional Court has distinguished the question of whether PAJA covers the field of judicial review procedure from the question of whether PAJA provides 'an exclusive statutory basis for the review of all administrative decisions' in *Sidumo* (supra) at para 80.

[4] A majority of the Constitutional Court has assumed and used the availability of such a statutory ground of review as a factor in limiting its interpretation of PAJA. See *Walele v The City of Cape Town & Others*, Unreported Decision, Case no, CCT 64/07 (13 June 2008)('*Walele*') at para 32. The Court depended in part upon s 7 of the Building Standards Act 109 of 1977 to adopt a particular construction of s 3 of PAJA. This reasoning arguably demonstrates that PAJA and other review-granting statutory provisions should be treated as separate and independent.

[5] Act 66 of 1995 ('the LRA').

[6] See *Sidumo* at paras 90–104. As Navsa AJ remarked at para 103: 'This is an appropriate case for the application of the principle that specialised provisions trump general provisions'.

'[n]othing in section 33 of the Constitution precludes specialised legislative regulation of administrative action such as section 145 of the LRA alongside general legislation such as PAJA'.[1]

(ii) *The constitutional command to enact legislation contemplated in FC s 33(3)*

On the question as to whether the enactment of PAJA satisfied FC s 33(3), as distinct from whether the provisions of PAJA are in substance constitutional,[2] the test that should be adopted here is procedural. If Parliament has attempted in good faith to satisfy the demands of FC s 33(3) and enacted legislation that it believes emanates from FC s 33(3), then the legislation should pass constitutional muster.[3]

(iii) *Can other legislation give effect to the right to just administrative action?*

The satisfaction of the FC s 33(3) duty to pass legislation does not necessarily mean, however, that further legislation distinct from PAJA should not be considered as legislation enacted to 'give effect to' FC s 33.[4] To the extent that the limitations enquiry for statutes or provisions in statutes giving effect to FC s 33 differs from the general limitations enquiry (an open possibility that we cover below), the question whether legislation other than PAJA can give effect to FC s 33 has practical implications in assessing the constitutionality of such legislation.[5]

We would suggest that the approach to this question should be grounded in the structure of FC s 33 itself. As noted above, FC s 33, which is limited in scope to administrative action, encompasses four principal sub-rights: administrative action which is lawful, procedurally fair, reasonable, and for which reasons must be given. Sections 6, 7, and 8 of PAJA (apart from ss 6(2)*(c)* and 6(2)*(h)*)

[1] Ibid at para 91 and para 92 ('It is apparent . . . that [PAJA] is not to be regarded as the exclusive legislative basis of review'.)

[2] For a discussion of the approach to the constitutionality of the substance of PAJA, see § 63.2*(a)*(iv) infra.

[3] J Klaaren 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (1997) 13 *SAJHR* 549 ('Constitutional Authority').

[4] We take it as given that good faith amendments to PAJA would qualify as national legislation in terms of FC s 33(3).

[5] To the extent that one wishes to avoid dealing with this constitutional question and its implications, one might be tempted to adopt an interpretation of the FC s 33(3) limitations enquiry that parallels the FC s 36 enquiry. We note that the question as to the applicable limitations enquiry may also be directed at the two other primary pieces of national legislation mandated in the Bill of Rights and enacted at the same time as PAJA: the Promotion of Access to Information Act 2 of 2000 ('PAIA') and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('the Equality Act'). In relation to PAIA, FC s 32(2) provides that national legislation must be enacted to give effect to the right of access to information, which legislation 'may provide for reasonable measures to alleviate the administrative and financial burden on the state'. The scope for this argument in respect of the Equality Act is reduced by the fact that the wording of FC s 9(4) does not smack of an in-built limitations clause. It simply states that national legislation must be enacted 'to prevent or prohibit unfair discrimination'.

primarily implement the right to lawful administrative action. Sections 3, 4 and 6(2)*(c)* of PAJA implement the right to procedurally fair administrative action, s 6(2)*(h)* of PAJA implements the right to reasonable administrative action. PAJA s 5 implements the right to be given reasons for administrative action. Moreover, these sections implement these sub-rights generally. The intent to cover the field and the character of PAJA as general administrative law can and should serve to distinguish PAJA from other statutes and statutory provisions (which are specific administrative law). Apart from the Interpretation Act,[1] no other statutory enactments would appear to possess PAJA's broad, general sweep of application.[2]

The simplest of solutions is the one we prefer. Where Parliament has indeed enacted a law with general application designed to cover the field, only such a law should be given the potential benefit of an easier-to-satisfy limitations enquiry. Thus, specific statutes or statutory provisions providing for judicial review or for regimes of reasons-giving, for example, should be judged against FC s 33 and the FC s 36 limitations enquiry without reference to FC s 33(3).[3]

This use of Ockham's razor leaves us with one potential 'partner' to PAJA at the level of legislation with general application to administrative action: the Interpretation Act. We note that the draft Interpretation Bill proposed by the South African Law Reform Commission in fact contains several provisions that are not strictly speaking the province of interpretation and appear to belong more squarely within the coverage of general administrative law (indeed, of PAJA). For instance, the Interpretation Bill as currently proposed would, if enacted, require publication of legislation including subordinate legislation. It thus seems to us that the proposed Interpretation Act will need to be read with PAJA as a coherent and consistent whole — the expression of the Parliamentary will regarding the content and coverage of general administrative law in South Africa.[4]

In terms of the above analysis, the Constitutional Court's decision in *Sidumo* — to the effect that the LRA, and not PAJA, implements the FC s 33 guarantee of administrative justice in the labour context (or, put differently, it 'gives effect' to the FC s 33 right)[5] — is then best explained, as the Court did, by emphasising the

[1] Act 33 of 1957 ('Interpretation Act'). Note that the PAJA definition of administrative action is itself intended to 'cover the field' and thus another other piece of general administrative law — such as the Interpretation Act — must be interpreted — at least subject to FC s 33 — consistent with that definition. See *Sidumo* (supra) at para 90.

[2] Note that this is not necessarily the case with the other legislation mandated by the Bill of Rights. For instance, the Protection of Information Bill (B28–2008)('PoI Bill') apparently purports to cover the same field as PAIA.

[3] For an example of statutory review, see s 25 of the Refugees Act 130 of 1998. For an example of a regime of reasons-giving, see s 13(2) of the Electricity Regulation Act 4 of 2006. Note that in terms of the *Zondi*'s interpretation command, such specific statutes and statutory provisions will also have to be interpreted in a manner consistent with FC s 33 and, insofar as possible, in a manner consistent with PAJA (§ 63.2*(a)*(iv) infra).

[4] The revision and replacement of the Interpretation Act is currently the subject of a project of the South African Law Reform Commission (Project 25).

[5] See *Sidumo* (supra) at para 91.

implicit choice of Parliament, in passing PAJA, to allow the LRA to dispose of such discrete domain-specific administrative action.[1] In our view, Parliament is to be accorded some deference in its institutional choices regarding the enforcement of FC s 33.

(iv) *The continuing role of FC s 33*

Where does this then leave the role of FC s 33? One approach initially suggested was to the effect that PAJA would be the sole substantive basis of the constitutional right and that the right itself has no further application. This would be the case if 'give effect to' in FC s 33(3) was read to mean 'created by'.[2] This approach should be rejected on the basis that it would be anomalous to include the right to just administrative action as a fundamental right in an entrenched Bill of Rights only to enable the substance of the right to be altered by simple legislative amendment. It may be consistent with constitutional democratic theory to give Parliament the ability to flesh out the detail of a fundamental right, but not to possess the sole say on the construction of the right.[3]

The better argument is that PAJA gives effect to the right (including the sub-rights in FC s 33) in the sense of interpretation and enforcement: making the rights more effective through providing a detailed elaboration of both the scope and content of the rights, as well as providing an institutional framework for their implementation and enforcement.[4] The implication of this argument is that the constitutional right in FC s 33 continues to possess a meaningful purpose. In other words, despite PAJA's enactment, a free-standing constitutional right to just administrative action still exists. Given the continued viability of a free-standing constitutional rights, we can identify three ways in which the constitutional right to just administrative action will continue to play a role: to assist in interpreting the provisions of PAJA; to challenge the constitutionality of PAJA itself; and to interpret and to challenge other legislation.[5]

Firstly, the constitutional right to just administrative action remains a valuable tool for the interpretation of the provisions of PAJA. In interpreting the Act it

[1] A counter-argument to this is that decisions of the CCMA are not included in the specific exclusions listed in PAJA's definition of 'administrative action'. See § 63.3*(c)*(iv) infra.

[2] See Currie & Klaaren *Benchbook* (supra) at 27; I Currie & J Klaaren 'Just Administrative Action' in J de Waal, I Currie & G Erasmus (eds) *The Bill of Rights Handbook* 4 ed (2001)('Just Administrative Action') 496.

[3] See Currie & Klaaren *Benchbook* (supra) at 27.

[4] See Currie & Klaaren *Benchbook* (supra) at 27. The view finds some support in the Constitutional Court's judgment in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa.* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 83 (During the course of its judgment relating to the constitutional right of access to information which was suspended in a similar manner to the right to just administrative action, the Court held that the reason for the suspension was 'a means of affording Parliament time to provide the necessary legislative framework for the implementation of the right to information. Freedom of information legislation usually involves detailed and complex provisions defining the nature and limits of the right and the requisite conditions for its enforcement.').

[5] For a more detailed discussion of these uses of the constitutional right, see Currie & Klaaren *Benchbook* (supra) at 26–29.

should always be borne in mind that it is intended to give effect to the rights set out in FC s 33.[1] For example, as discussed below, the broad standing requirements of the Bill of Rights set out in FC s 38, rather than the more narrow grounds for standing in the common law, should be read into the Act.[2] The same goes for the interpretation of other statutes of general administrative law as well as for the other statute held to be giving effect to FC s 33, the LRA.[3]

While PAJA should generally be interpreted in a manner which best complies with FC s 33,[4] we wish to emphasize that our courts should not attribute an 'unduly strained' meaning of the language of PAJA.[5] If PAJA limits FC s 33 in a manner that cannot be reconciled through reasonable interpretation, then courts should adopt the position that PAJA limits the constitutional right. The court should then engage in a limitations enquiry in order to assess whether the limitation of the right is justified.[6] Of course, this limitations enquiry should acknowledge and even employ the factors laid out in FC s 33(3). If the PAJA provision is a justified limitation, then PAJA should be left undisturbed. If the provision is not a reasonable or justifiable limitation of the right, the challenged provision of PAJA must be declared unconstitutional. In engaging in this limitations enquiry, courts are obliged to engage with the countervailing considerations appropriate to the limitations stage of the enquiry that may be raised in support of the more restrictive approach adopted in PAJA and then to decide whether or not to extend PAJA's scope (through their remedial powers of, for example, reading in and severance).[7] This approach is superior to that of interpretation that results in an unduly strained reading of PAJA. The danger, from a constitutional perspective, in a court simply 'rewriting' the language of PAJA in the name of compliance with FC s 33 is that the court engages in 'legislating' and, in doing

[1] See *Bato Star* (supra) at para 44, *Grey's Marine Hout Bay (Pty) Limited & Others v Minister of Public Works & Others* 2005 (6) SA 313 (SCA), 2005 (10) BCLR 931 (CC) ('*Grey's Marine*') at para 22, *New* Clicks (supra) at para 100 (Chaskalson CJ) and *Walele* (supra) at para 123 (O'Regan J).

[2] See Currie & Klaaren 'Just Administrative Action' (supra) at 496 ftn 29. See also § 63.8 infra.

[3] For an example of this interpretation of s 145 of the LRA, see *Sidumo* (supra) at para 110 ('Section 145 [of the LRA] is now suffused by the constitutional standard of reasonableness.')

[4] See, for example, *Wary Holdings (Pty) Limited v Stalwo (Pty) Limited & Another*, (July 2008) CCT 78/07 at paras 44–47 (It is necessary to take the best of the possible interpretations in giving effect to the spirit, purport and objects of the Bill of Rights.)

[5] See *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at paras 23–24; *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 24; *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC) ('*Daniels v Campbell*'). For a discussion of these cases, see L Du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32.

[6] For a detailed discussion of the limitations enquiry, see S Woolman and H Botha 'Limitation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[7] See M Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

so, undermines the separation of powers.[1] In particular, FC s 33(3) identifies Parliament as the appropriate institution to give effect to the constitutional right to just administrative action. The principal separation of powers difficulty occasioned by such an approach (as opposed to, for example, the constitutional remedy of reading in) is that a court effectively re-writes legislation without first engaging in a limitations enquiry and making a finding of constitutional invalidity.[2]

Secondly, the most dramatic use of the constitutional right would be to challenge the constitutionality of PAJA itself. Potential challenges to PAJA may be divided into two categories: 'underinclusive' and 'overrestrictive' challenges.[3] Possible attacks on PAJA on the basis that it is underinclusive may include: the narrowing of the definition of 'administrative action' and the apparent limitation of the right to procedural fairness to circumstances where a person's rights or legitimate expectations are adversely affected.[4] They may also encompass certain categorical exclusions from the definition of administrative action.[5] Overrestrictive challenges to the Act would engage procedures that are overly burdensome. Such burdensome challenges may include the requirements that judicial review must be sought within a period of 180 days[6] and that an applicant must first exhaust internal remedies.[7]

While we offered some hints, it still remains unclear as what approach our courts will adopt in assessing the constitutionality of a provision of PAJA. Very broadly speaking, there are two options, and, perhaps, a middle way. One option is to treat PAJA in the same manner as other parliamentary legislation, that is,

[1] See *Daniels v Campbell* (supra) at paras 68, 83, 84 and 104 (Moseneke J dissenting).

[2] See M du Plessis and G Penfold 'Bill of Rights Jurisprudence' 2004 *Annual Survey of South African Law* 15 at 25–28 and M Du Plessis and G Penfold 'Bill of Rights Jurisprudence' 2005 *Annual Survey of South African Law* 27 ('Bill of Rights Jurisprudence') at 92–93.

[3] See Currie & Klaaren *Benchbook* (supra) at 29–30 (Authors refer to a third category of challenges to the constitutionality of PAJA, namely, fundamentalist challenges. These challenges maintain that PAJA may not impose any limitations on the constitutional right to just administrative action as FC s 33(3) empowers Parliament to 'give effect to' and not to limit the constitutional right. This approach finds some textual support in the fact that, unlike FC s 32(2), which performs a similar role in relation to access to information, FC s 33(3) does not expressly state that the national legislation 'may provide for reasonable measures to alleviate the administrative and financial burden on the state'. It is, however, submitted that fundamentalist challenges should be rejected on the basis that to apply the wide wording of FC s 33(1) without limitation would impose an impossible burden on the administration of government. In addition, an absolute right to just administrative action is inconsistent with the general limitation clause applying to all rights in the Bill of Rights (FC s 36(1)).

[4] See §§ 63.3*(c)* and 63.5*(d)*(ii) infra.

[5] See § 63.3*(c)*(iv) infra.

[6] Section 7(1) of PAJA.

[7] Section 7(2)*(a)*. Neither of these challenges is likely to succeed, particularly since PAJA allows for a relaxation of both these requirements (ss 7(2)*(c)* and 9(1) of PAJA).

PAJA is unconstitutional if it infringes the rights in FC s 33(1) or (2), unless such infringement is reasonable and justifiable in accordance with the Final Constitution's general limitation clause.[1] Another approach is to afford the legislature a greater degree of deference in relation to PAJA. Two arguments support the second approach. PAJA, unlike most other legislation, is constitutionally mandated to give effect to a fundamental right. FC s 33(3)*(c)* expressly provides that this legislation must 'promote an efficient administration', words that appear at least capable of a reading that would create a lower threshold for justification than that of the general limitations clause.[2]

One of the authors has suggested a middle way, a two-tiered approach to adjudication of PAJA's constitutionality based on its functions of interpretation and enforcement.[3] In terms of this approach, the content of PAJA can be divided into two categories: those provisions which define and detail substantive rights, and those provisions which set out procedures and structures to enforce the relevant rights. While some extra deference is due to the legislature in relation to the latter, no special deference is due for the former.[4]

The third function of the constitutional right would be to interpret and to challenge legislation other than PAJA. Although PAJA is mandated by the Final Constitution, it is not a constitutional document and is not specially entrenched. It could not, therefore, be used to challenge subsequent — and facially inconsistent — parliamentary legislation. The constitutional right would have to be relied on directly in such cases. As indicated above, the appropriate limitations vehicle would the inquiry supplied by FC s 33 read with FC s 36. For instance, the constitutional right to lawful administrative action could be invoked directly to challenge attempts in future legislation to oust the court's review jurisdiction.

The interpretive role of FC s 33 extends beyond PAJA to other statutes, at

[1] This option finds support in that, unlike the terminology in FC s 32(2), the wording of FC s 33(3) does not constitute a special limitation. See Currie *The PAJA* (supra) at 40. It perhaps counts against this interpretation to note the specific references to FC s 36(1), in the context of the national legislation referred to in FC ss 23(5), 23 (6), and 25(8).

[2] It should, however, be noted that the phrase 'promote an efficient administration' is capable of two meanings. See J Klaaren 'Constitutional Authority' (supra) at 561 (Klaaren points out that it could be read 'downwards' to authorise the reduction of legal burdens on the administration, promote cost-effectiveness and simplicity of procedures. On the other hand, it could be read 'upwards' to require an administration that is accountable, open, rational, effective and responsive). See also D Davis & G Marcus 'Administrative Justice' in *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 163.

[3] Klaaren 'Constitutional Authority' (supra) 561.

[4] See Klaaren 'Constitutional Authority' (supra) at 563 ('Where Parliament enjoys extra authority mandated by the text of the Constitution, it should receive greater deference. However, since this extra enforcement power does not extend to Parliament's interpretative authority over the rights, Parliament receives no extra deference there.').

least to the extent that they relate to administrative action.[1] This role should be viewed in concert with the role of FC s 33 in interpreting PAJA. Its effect is likely to be significant. According to the Constitutional Court: '[a]ll statutes which authorise the making of administrative action must now be read with PAJA unless their provisions are inconsistent with it. PAJA was intended to interface with all statutes (whether enacted before or during the current constitutional order) which authorise administrative action.'[2] We would make a distinction here between the strong 'suffusing' interpretative effect of FC s 33 — which has been used and is relevant to PAJA and other legislation giving effect to FC s 33 in the sense contemplated in FC s 33(3) — and the more ordinary 'reading with' interpretive effect of FC s 33 on ordinary legislation, which is sourced in both the principles of avoidance of unconstitutionality and, in line with FC s 39(2), of promoting the spirit, purport, and objects of the Bill of Rights. The effect of the more widespread interpretive role of FC s 33 in relation to legislation that does not give effect to the constitutional right is that, instead of raising the statutory provision to the level of PAJA, the particular administrative action taken in terms of that provision is subject to PAJA (unless of course the two statutes are inconsistent).[3]

Finally, we note that we do not see a possible role for the constitutional right to just administrative action to be used as a residual right to challenge the validity of administrative action that falls outside the scope of PAJA. In our view, such a direct role for FC s 33 would undermine the role of Parliament. As we have already argued, the proper remedy for under-inclusiveness in PAJA is not direct reliance on FC s 33. It is, rather, an order that PAJA is unconstitutional and does not properly give effect to the right.[4]

[1] The relevance of FC s 33 is arguably heightened to the extent that a particular statute provides for statutory review of administrative action authorised by that statute.

[2] See *Walele* (supra) at para 51 (citing *Zondi v MEC for Traditional and Local Government Affairs & Others* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC) at para 101).

[3] The use of the constitutional right in the interpretation of PAJA will be of particular value in determining the consistency of PAJA with other statutes that are also to be interpreted consistently with FC s 33. The influence of the constitutional right in both statutory contexts will give added force to the argument that non-PAJA statutes should be interpreted, to the extent feasible, in a manner consistent with PAJA. See Currie & Klaaren *Benchbook* (supra) 20–21 (Argue that subsequent non-PAJA legislation should be interpreted if at all possible to be consistent with PAJA as the authoritative expression of Parliament's interpretation of the administrative justice right in the Final Constitution. This view is consistent with the dictum in *Walele* quoted above.).

[4] See *Hlophe v Constitutional Court of South Africa and Others*, Witwatersrand Local Division, Case no. 09/22932 (25 September 2008)('*Hlophe v Constitutional Court*')(The action complained of in that case was not judicial action. The decision of the High Court in *Hlophe* could be read as interpreting the action of the Constitutional Court judges as an instance of action accountable in terms of the direct, judicial application of FC s 33. The case concerned the procedural fairness of judges (all the judges of the Constitutional Court) complaining about the alleged misconduct of another judge (the Judge President of

(b) The principle of legality

In a series of cases crucial for the project of constitutionalism, the Constitutional Court has clearly identified a principle of legality that is distinct from, yet supportive of, the constitutional right of just administrative action.[1] In *Fedsure,* the Court first identified and applied this principle of legality. The principle requires that public power may only be exercised in accordance with law, a requirement that has purchase far beyond the ambit of administrative action. *Fedsure* held that the principle of legality is a constitutional principle founded on the rule of law.[2] As Chaskalson P, Goldstone J and O'Regan J stated:[3]

> It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution.

The Constitutional Court went further in the *SARFU 1.*[4] It held that, although the President's decision to appoint a commission of inquiry was not administrative action, it was constrained by the principle of legality. According to the Court, the principle required that t the President must act personally, in good faith, and without misconstruing the nature of his powers.[5]

A third case reaffirmed the principle of legality and appeared to articulate an additional one of rationality — albeit a less clearly outlined principle. In *Pharmaceutical Manufacturers,* the Constitutional Court dealt with the President's decision to bring an Act into force despite the fact that the regulatory infrastructure for the operation of the Act had not yet been put in place. The Court held that the

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the Cape Provincial Division) as well as the fairness of making the fact of such a complaint public.) See *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa & Another* 2008 (5) SA 31 (CC), 2008 (8) BCLR 771 (CC)(*'Independent Newspapers'*) at para 161 fn 18 (Citing cases of on-the-spot exercises of judicial discretion. In this case a cluster of three rights comprising the concept of open justice is undertaken directly and judicially rather than by mediation of a statute.) Nonetheless, it is not clear whether the majority in *Hlophe v Constitutional Court* viewed the action of the Constitutional Court judges in laying a complaint as administrative action. Certain portions of the judgment indicate that the majority relied directly on the common law. Ibid at paras 20 and para 52. In any case, the result would perhaps better be understood as an application of the principle of legality and rationality. However, such a conclusion would be contrary to the finding of the Constitutional Court in *Masetlha v President of the Republic of South Africa & Another* 2008 (1) SA 566 (CC), 2008 (1) BCLR 1 (CC) (*'Masetlha'*). See § 63.2*(b)* infra.

[1] For a discussion of the principle of legality, see F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11.

[2] FC s 1*(c)* proclaims that two of the foundational values of the Republic of South Africa are the supremacy of the Constitution and the rule of law.

[3] *Fedsure* (supra) at para 58.

[4] *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) (*'SARFU 1'*).

[5] Ibid at paras 148 and 149. *SARFU 1* thus represents a conception of legality that moves beyond *ultra vires* in the narrow sense. See *Pepcor Retirement Fund & Another v Financial Services Board & Another* 2003 (6) SA 38 (SCA) (*'Pepcor'*), as discussed at § 63.4 infra.

President's decision was not 'administrative action'.[1] Chaskalson P went on to state that it was a general requirement of the Final Constitution that public officials should not only exercise their powers in good faith but that such powers may not be exercised arbitrarily. Decisions must therefore 'be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement'.[2] The Court therefore struck down the President's decision to bring the Act into operation on the basis that it was objectively irrational. Chaskalson P summed up the position, in words reminiscent of the traditional administrative law concerns over review on the merits:[3]

> Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision.

While this articulation initially appeared to indicate the existence of a second separate principle of rationality, later cases have made it clear that this requirement of objective rationality is best seen as a component of the principle of legality.[4]

The principle of legality remained largely undeveloped for several years. And, while it has played a role in a significant pair of Constitutional Court cases, it has essentially not moved on.

In *New Clicks*, it was the minority (of one) judgment of Sachs J that introduced a set of creative possibilities for further development of the principle of legality. Holding part of the subordinate legislation at issue in that case not to be administrative action,[5] Sachs J nonetheless would have held such subordinate legislation accountable to not only legality (in the narrow sense) but also procedural fairness and substantive reasonableness, identifying the principle of legality — or, in his words, 'an expansive notion of legality' — as the basis for such a regime.[6] Sachs J would thus have sourced not only narrow and broad *ultra vires* (e.g. lawfulness) limits on subordinate legislation but also rules for rule-making (e.g. procedural

[1] See § 63.3*(b)*(iii) infra.

[2] *Pharmaceutical Manufacturers* (supra) at para 85. In adopting this approach Chaskalson P drew on the Court's previous equality jurisprudence relating to mere differentiation (see, for example, *Prinsloo v van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 25).

[3] *Pharmaceutical Manufacturers* (supra) at para 90.

[4] See *Masetlha* (supra) at para 81 (The principle is termed 'the principle of legality and rationality'.)

[5] See § 63.3*(b)*(vi) infra.

[6] See *New Clicks* (supra) at paras 611–640.

fairness and reasonableness) in the principle of legality. Given the lack of a clear majority from the remaining members of the *New Clicks* Court, the use of the principle of legality to hold rule-making accountable was and remains a serious open question.[1]

Nonetheless, the second case of the recent pair, *Masetlha*, has at the very least closed off one principal avenue of development for the principle of legality. The *Masetlha* Court was given the opportunity to include procedural fairness within the principle of legality but chose firmly not to do so. Contesting his dismissal, the former head of the National Intelligence Agency ('NIA'), Mr Billy Masetlha, was afforded the protection of the law (namely, the Final Constitution) but not the specific protection of procedural fairness. On behalf of the majority, having found in FC s 209(2) an implied power to dismiss the head of NIA, Moseneke DCJ noted that the dismissal was a FC s 85(2)*(e)* exercise of executive authority. As such, it was excluded from PAJA, although subject to the principle of legality and rationality. In Moseneke DCJ's view, the executive nature of the power trumped the usual need for procedural fairness in a dismissal.[2] In the view of the majority, this exercise of executive authority gave priority to effective government over procedural fairness.[3] In dissent, Ngcobo J, with Madala J concurring, argued that the rule of law rationale at the heart of the principle of legality could and did found a legal basis in this case for a right to procedural fairness for the dismissed NIA chief.[4] In their view, 'the rule of law imposes a duty on those who exercise executive powers not only to refrain from acting arbitrarily, but also to act fairly when they make decisions that adversely affect an individual.'[5]

It seems to us that the decision of the majority in *Masetlha* was appropriate — and not only because of its national security context. To turn procedural fairness into a component of the principle of legality would effectively mean that the

[1] Note Moseneke DCJ's description of the views of Sachs J in *New Clicks* as 'immaculately reasoned'. See *New Clicks* (supra) at para 723. On rule-making, see § 63.3*(b)*(vi) infra. We express there the view that rule-making amounts to 'administrative action' and is thus subject to the rigours of FC s 33 and PAJA.

[2] See *Masetlha* (supra) at para 77 (Moseneke DCJ)('The power to dismiss — being a corollary of the power to appoint — is similarly executive action that does not constitute administrative action, particularly in this special category of appointments. It would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action.')

[3] Ibid at para 77 (Cites the Court's position from *Premier, Mpumalanga, & Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC)('*Premier, Mpumalanga*') at para 41: 'In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.' The reasoning here may leave room for a finding that legality can include a certain measure of procedural fairness protection in other contexts (e.g. in the context of rule-making, if our courts ultimately hold, contrary to our view, that rule-making does not amount to administrative action.)

[4] *Masetlha* (supra) at paras 178–189.

[5] Ibid at para 180.

performance of every public function, and not only administrative action, would attract challenges related to procedural fairness. The limiting of procedural fairness to contexts of administrative action is also sensitive to the relatively slender reed that is the rule of law claim at the heart of the constitutional principle of legality (and rationality). While most of the earlier principle of legality cases were incremental advances, the two-step of *New Clicks* and *Masetlha*, read in sequence, represents a significant (and, in our view, appropriate) retreat, in principle, from what might have been. As a result, the principle of legality has now attained a significant degree of clarity and certainty. Indeed, the view that the principle of legality could have grown to encompass or to even replace administrative law was an overstated and unlikely position.[1] That said, it cannot be denied that Ngcobo J's reasoning in dissent in *Masetlha* is cogent and powerful. There can be no watertight divide between the concepts of legality and of procedural fairness (as well as that of rationality). Thus, our courts would in an appropriate case be justified in incrementally expanding the existing jurisprudence to encompass within the principle of legality and rationality an element of procedural fairness. Even if the broad avenue is closed off, a few side streets could be mapped on to our current rule of law and legality jurisprudence. In any event, the development of the principle (and, to a certain extent, its cabining) is a significant constitutional development.

That said, one should note that the possibility explored by Sachs J in his minority opinion in *New Clicks* — that subordinate legislation should be governed by the principle of legality — is a route that may yet be taken by the legislature. It will, however, not be as wide a route, nor perhaps one as restrictive of other traffic, as the route Sachs J proposed. The initial recommendations made by Hugh Corder, proposing in part the adoption by Parliament of a legislative regime for the scrutiny of subordinate legislation, have not resulted in such a mechanism. A provincial legislature (Gauteng) has, however, taken some steps in this institutional direction, drawing both upon the principle of legality and the right of lawful administrative action to anchor its exercise of legislative oversight of subordinate legislation.[2] While complying with the basic thrust of Sachs J's proposal, this legislative scrutiny of subordinate legislation differs in two key respects: first it

[1] For a discussion of the open-ended possibilities presented by the principle of legality, see C Hoexter 'The Principle of Legality in South African Administrative Law' (2004) 4 *Macquarie Law Journal* 165. It seems to us that the more ambitious use of, or aspirations for, the principle of legality as a peg for administrative law review was born less from constitutional principle than from concerns relating to the overly restrictive definition of 'administrative action' in PAJA. We submit that the preferable way forward is not to stretch undely the principle of legality but rather to ensure that PAJA adequately gives effect to the constitutional right to just administrative action.

[2] The Final Report of the Task Team on Oversight and Accountability was presented to the Joint Rules Committee of Parliament on 19 March 2008, available at 20080319–final-report-task-team-oversight-and-accountability.htm. For the Gauteng structure, operative as of October 2008, see Standing Rules 220 and 224–227 of the Gauteng Provincial Legislature.

enforces only norms of lawfulness rather than additionally those of procedural fairness and of proportionality or reasonableness; and second, it anchors itself in the right to lawful administrative action as well as in the principle of legality.

(c) The relationship between the Final Constitution and the common law

It is now part of constitutional history that the Supreme Court of Appeal and the Constitutional Court once expressly differed on the degree of separation between the Final Constitution and the common law in the context of judicial review as part of administrative law. The Supreme Court of Appeal in *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd* held that '[j]udicial review under the Constitution and the common law are different concepts' and that the common-law system of judicial review was separate from the constitutional one.[1] Thus to the SCA, administrative law had not been constitutionalised in its entirety and one could still mount a challenge to administrative action based on the common law.[2]

The SCA's decision, however, was overruled by the Constitutional Court in *Pharmaceutical Manufacturers*:[3]

> The common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.[4]

Where is the common law left in the constitutional scheme of administrative law? We would make four points relevant to what we see as a clearly diminished, albeit by no means negligible, role. First, as discussed below, it appears that administrative action as contemplated in the Final Constitution (and more clearly under PAJA) relates to the exercise of *public* power and does not encompass private action. FC s 33 and its progeny, PAJA, are thus not available in this context for use in serving the purposes of accountability and transparency. Yet, under the common law the exercise of certain private powers was subject to judicial review for compliance with administrative law.[5] We maintain that it is possible that the

[1] *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 (3) SA 771 (SCA), 1999 (8) BCLR 833 (SCA) at para 20.

[2] Ibid. ('[T]o the extent that there is no inconsistency with the Constitution, the common-law grounds for review were intended to remain intact. There is no indication in the interim Constitution of an intention to bring about a situation in which, once a Court finds that administrative action was not in accordance with the empowering legislation or the requirements of natural justice, interference is only permissible on constitutional grounds.')

[3] *Pharmaceutical Manufacturers* (supra) at para 33. Ibid at paras 44 and 50.

[4] Note that perhaps the strongest interpretive use of the common law in the new constitutional scheme is that proposed by Ngcobo J. See *Masetlha* (supra) at paras 178–189 (Ngcobo J argued for a duty of fairness based on the rule of law.)

[5] See, eg, *Marlin v Durban Turf Club & Others* 1942 AD 112; *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) ('*Turner v Jockey Club*'); and *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A).

common law will continue to apply in this narrow sphere notwithstanding the constitutionalisation of administrative law generally.[1]

Secondly, the common law will play an indirect role in interpreting the provisions of both the Final Constitution and PAJA.[2] For example, in *Premier, Mpumalanga* the Court used the common-law meaning of 'legitimate expectations' to interpret this phrase in IC s 24*(b)*.[3] Several years later the majority in *Walele* did the same in the context of s 3(1) of PAJA.[4] Most importantly and pertinently, the common law will be of undoubted assistance in interpreting the content of the principle of legality.[5] But, in such a context, one must never forget that it is a constitutional principle that a court is interpreting and not a thread of the common law that one is articulating.

Third, the common law may still persist in its role as regulating the procedure for judicial review. This topic is of course covered by s 7 of PAJA. It remains in our view an open question as to whether PAJA covers the field of procedure for judicial review, thus completing ousting the common law. If s 7 does not oust the common law procedure for judicial review completely, then the common law will play a supplementary role. If s 7 does oust the common law procedure for judicial review, then the common law has no role here (apart from an interpretative one).

Fourth, it is of course the case that the common law often provides the regulatory backdrop against which administrative law operates. In this role, the common law provides the substantive and usually default rules for an operative legal background. We would argue that apart from these four specific and defined roles, the common law no longer has a direct part to play in administrative law in South Africa.

63.3 THE MEANING OF ADMINISTRATIVE ACTION

(a) ***Introduction***

The notion of 'administrative action' as the threshold to administrative law review arose for the first time through the use of this phrase in the right to administrative justice contained in IC s 24. This phrase is repeated in the right to just administrative action entrenched in FC s 33 and delineates the scope of application of PAJA. The label 'administrative action' is thus the crucial threshold concept in post-democratic administrative law. Generally speaking, conduct that amounts to

[1] For a welcome use of administrative law in a private setting, see *Klein v Dainfern College & Another* 2006 (3) SA 73 (T) at para 24 (Describing the application of natural justice to private, disciplinary tribunals as a 'branch of private administrative law.')

[2] *Pharmaceutical Manufacturers* (supra) at para 45 ('[T]hat is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development.') See also *SARFU 1* (supra) at paras 135–136.

[3] *Premier, Mpumalanga* (supra) at para 36.

[4] *Walele* (supra) at paras 28, 30 and 34 to 42.

[5] See, for example, the aspects of legality identified in *SARFU 1*.

administrative action is reviewable on a broad range of administrative law grounds (which are now set out in PAJA). Conduct that falls short of this threshold is not.[1]

The assessment of whether or not conduct amounts to 'administrative action' has proved often extremely difficult. Our courts (including the members of the Constitutional Court and the Supreme Court of Appeal) regularly disagree on whether or not conduct falls within its ambit. One reason for this difficulty is the complex definition of 'administrative action' in PAJA. While the elaboration of a constitutional concept by Parliament could in principle have assisted in providing clarity as to this concept, most agree that the statutory definition is at best unwieldy and at worst confusing and potentially internally inconsistent. Perhaps even more fundamental as a reason for the difficulty encountered is the fact that the assessment of 'administrative action' often raises difficult issues that go to the heart of public law, including the precise boundary between public and private power, the role of the doctrine of separation of powers, and the need to balance the principle of efficient administration with effective judicial oversight of administrative functioning. As a judge of the Constitutional Court has remarked, the classification of conduct as administrative action under the Final Constitution is 'a matter of considerable complexity'.[2]

In the absence of a Constitution-level definition of 'administrative action', the Constitutional Court began to give meaning to this phrase in a line of judgments handed down in the years following the enactment of the Interim Constitution. While these judgments did not generally tell us what administrative action is, they gave some measure of definition to the phrase by telling us what it is not. Most significantly, the Constitutional Court held that administrative action does not include legislative,[3] executive[4] and judicial action.[5] By contrast with this strategy of definition by exclusion, the drafters of PAJA tackled the task of defining 'administrative action' head-on: PAJA includes an extensive and extraordinarily complex definition of this term of art. In addition to the uncertainty that this statutory definition has created, it purports to cut down the ambit of administrative action and thus narrows the range of administrative conduct to which PAJA relates.

Given the high stakes at play as well as the complexities involved in deciding the issue, it is commonplace for a decision-maker, in the face of a challenge, to

[1] 'Absent [an administrative] act, the application for [administrative] review is stillborn.' *Gamevest (Pty) Limited v Regional Land Claims Commissioner, Northern Province and Mpumalanga, & Others* 2003 (1) SA 373 (SCA), 2002 (12) BCLR 1260 (SCA) at para 11. As discussed above, conduct that falls short of this threshold may, however, be subject to review on a number of other grounds, including legality and rationality, and a breach of the Bill of Rights.

[2] See *New Clicks* (supra) at para 720 (Moseneke J). See also *SARFU 1* (supra) at para 143 ('Difficult boundaries may have to be drawn in deciding what should and should not be characterised as administrative action for purposes of s 33.')

[3] *Fedsure* (supra).

[4] *SARFU 1* (supra).

[5] *Nel v Le Roux NO & Others* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC) ('*Nel*').

deny that its conduct amounts to administrative action.[1] As a result, a large amount of judicial time has been taken up in assessing whether particular conduct amounts to administrative action. The meaning of 'administrative action' has thus become a (if not *the*) 'focal point of South African administrative law'.[2]

A plethora of cases have been handed down on the meaning of administrative action under IC s 24, FC s 33 and PAJA. These cases are extensively discussed in other works,[3] and we do not aim to repeat the exercise here. For purposes of this chapter, we rather focus on the classification of administrative action from a constitutional angle. We assess: (1) the constitutional meaning of administrative action and the correct approach to defining the boundaries of this concept; and (2) the meaning of 'administrative action' under PAJA, viewed through the prism of the constitutional right to just administrative action, as well as the constitutionality of the PAJA definition.

As we aim to flesh out in further detail below, the correct approach to these threshold questions is to search first for a substantive understanding of 'administrative action' in FC s 33.[4] The priority of FC s 33 requires an assessment of whether it is consistent with constitutional purpose to hold the action accountable under FC s 33. In our view, this assessment must draw heavily on the doctrine of separation of powers.

The enquiry as to what is and what is not administrative action, however, does not end with FC s 33. In assessing whether conduct amounts to administrative action under PAJA, it is important to bear in mind that the drafters of the Final Constitution left it to Parliament to give effect to the constitutional right in FC s 33(1) and (2).[5] PAJA, as the product of that process, should thus be treated with respect. This respect does not mean that one blindly accepts PAJA's apparent restrictions on the scope of administrative action. It rather sets a context for the application of the rules of statutory interpretation.[6] For the reasons discussed

[1] If conduct is administrative action, then the full range of administrative law grounds of review set out in s 6(2) of PAJA applies. If it is not administrative action, the other grounds of review based on legality (or the application of administrative law rules in the private sphere) may of course apply. But these grounds are 'lesser' than PAJA grounds.

[2] Hoexter *Administrative Law* (supra) at 164. Hoexter laments that this focus on the meaning of 'administrative action' has taken our attention away from more important issues, such as the content of lawfulness, reasonableness and procedural fairness in particular contexts. See also C Hoexter "Administrative Action" in the Courts' 2006 *Acta Juridica* 303, 309 ('Administrative Action').

[3] See, for example, Hoexter *Administrative Law* (supra) 162–222; J de Ville *Judicial Review of Administrative Action in South Africa* (2005) ('*Judicial Review*') 35–87; Currie *The PAJA* (supra) at 42–91; Currie & Klaaren *Benchbook* (supra) at 34–86; Y Burns & M Beukes *Administrative Law under the 1996 Constitution (*3rd Edition 2006)('*Administrative Law*') 107–149.

[4] The language here is taken from para 137 of the separate, concurring judgment of O'Regan J in *Sidumo* (supra), in which she refers to 'a substantive understanding of section 33'.

[5] FC s 33(3). See § 63.2*(a)*(iv) supra.

[6] For a detailed discussion of statutory (and constitutional) interpretation under the Constitution, see L Du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32.

above, PAJA's definition of 'administrative action' should be interpreted in a manner which best complies with FC s 33, provided that the resulting interpretation is a reasonable reading of the language of PAJA and is not 'unduly strained'.[1] If PAJA's definition of 'administrative action' limits FC s 33 in a manner that cannot be reconciled through reasonable interpretation, courts should find a prima facie violation of FC s 33 and then engage in a limitations enquiry. If the PAJA limitation is justified, then the more limited definition in PAJA should be applied. If it is not, then PAJA should be declared unconstitutional and the remedies of striking down, reading in and severance could then be used to expand PAJA's scope.[2]

Another point that we wish to make at the outset is that the jurisprudence of our courts indicates that the classification of conduct as 'administrative action' is by no means a mechanical exercise in which the court simply applies established rules developed by the courts or the wording of the PAJA's detailed statutory definition. The approach of judges and academics to this question is coloured by a variety of theoretical concerns.

One such theoretical concern is the proper approach to the task of judicial review of administrative action in a constitutional democracy. Some (so-called red light) theorists see the primary function of judicial review as a means of holding the administration accountable and thereby hopefully improving effective decision-making. Other (so-called green light) theorists place greater emphasis on the need to ensure that administrative review does not become an unruly horse and thus undermine administrative efficiency. They would rather see administrators spending less time in court defending their decisions and more time getting on with the pressing task of running government.[3]

A related issue that may affect one's stance on the definition of administrative action is one's willingness to embrace the concept of variability or, in what may not be quite the identical exercise,[4] to apply different levels of review (or scrutiny) to different types of administrative action. If one accepts that the substance of the grounds of review are, at least to some extent, variable (as would be the case with different levels of review), one is likely to embrace a wide definition of 'administrative action' without the fear of opening the floodgates that may result if the full gamut of review grounds apply in the same way to all forms of administrative action. As the chief proponent of variability in administrative review, Cora Hoexter, says, this concept 'allows the courts to be more generous about the

[1] See § 63.2*(a)*(iv) supra.

[2] See M Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

[3] See Klaaren 'Redlight, Greenlight' (supra); and Hoexter 'Future of Judicial Review' (supra).

[4] For a brief discussion of the difference, and similarity, between variability and levels of scrutiny, see § 63.4 infra.

application of administrative justice and to vary its precise content according to the circumstances'.[1] Likewise, different levels of scrutiny applied to different types of administrative action will provide similar leeway.

A third theoretical issue that comes into play is one's view of the scope for the application of other available public law review mechanisms (and the substantive 'teeth' of such mechanisms). The most important contender in this regard is the constitutional principle of legality (which applies to all exercises of public power, and which Hoexter has described as 'a constitutional safety net').[2] The more one regards these alternative mechanisms as encompassing principles of administrative law, the more one is likely to be comfortable with giving a more limited interpretation to 'administrative action'. Perhaps the best illustration of this approach is the separate judgment of Sachs J in *New Clicks*. Sachs J's finding that regulation-making does not generally amount to administrative action is very much linked to his view that procedural fairness and substantive reasonableness can be accommodated under the umbrella of 'an expanded notion of legality'.[3] While we (and more importantly a Court plurality) disagree with Sachs J's position,[4] it is certainly both understandable and, with respect, wise to view the ambit of administrative action with due regard to other constitutional mechanisms of accountability.

[1] Hoexter *Administrative Law* (supra) at 201. See also Currie *The PAJA* (supra) at 83 ftn 144. A similar approach to Hoexter's notion of variability is, in effect, adopted by the Constitutional Court in relation to arbitrary deprivations of property under FC s 25(1). The Court has adopted a wide approach to the meaning of 'deprivation of property' and deals with the relevant importance of the property right at stake, and the extent of the interference with that right, in adopting a variable test for arbitrariness (a test that, depending on the circumstances, ranges from mere rationality to proportionality). See *First National Bank of South Africa Limited t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at paras 57 and 100. As Theunis Roux points out in the property chapter in this treatise, '[t]he more likely scenario is that a court hearing a constitutional property clause challenge will construe almost any interference with the use or enjoyment of property as a deprivation, and will deal with the level of intrusiveness of the deprivation when considering whether the requirements of s 25(1) have been met'. See T Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) § 46.4.

[2] Hoexter *Administrative Law* (supra) at 164. See § 63.2*(b)* supra.

[3] *New Clicks* (supra) at para 583. See also *New Clicks* (supra) at para 612(Sachs J):

> If the result of excluding such law-making from the purview of s 33 and PAJA would effectively be to immunise subordinate legislation from judicial review, save for limited grounds such as bad faith and outright irrationality, the outcome would be constitutionally unacceptable. A strained reading of PAJA would in these circumstances have much to commend it. I feel, however, that there is an alternative and better way of securing constitutional supervision of subordinate legislation. The approach I propose shares the philosophy underlying s 33, but is not founded on that section, nor is it constrained by the format of PAJA. In my view, the basis for judicial review of subordinate legislation lies in an expansive notion of legality derived from both express provisions and implied principles of the Constitution.

We note that, as stated at § 63.2*(b)*, the majority of the Constitutional Court in *Masetlha* held that the principle of legality does *not* incorporate procedural fairness and, by describing legality as including review for rationality, suggests that reasonableness is also not included within the scope of legality review. *Masetlha* (supra) at paras 78 and 81.

[4] See § 63.3*(b)*(vi) infra.

A final theoretical issue that arises from the case law is that the scope of administrative action is affected by one's approach to the proper interpretation of PAJA as constitutionally mandated legislation, and particularly the emphasis (or lack thereof) that one places on the text of PAJA. This approach, in turn, can depend on the level of respect that one accords to the legislature (as the drafters of PAJA) in light of the doctrine of separation of powers as well as, in another manifestation of the doctrine of separation of powers, on the competence and authority of the various institutions and structures set up by the Final Constitution.[1] As we point out below, certain judgments have tended to disregard the wording of the PAJA definition of 'administrative action', in favour of a strained interpretation that, according to the courts, is consistent with the scope of the constitutional right in FC s 33.[2]

The Constitutional Court has held that the proper approach to interpreting the scope of administrative action is first to consider whether the conduct falls within the meaning of 'administrative action' for purposes of FC s 33 and, if it does, to then assess whether PAJA nevertheless excludes this conduct from the scope of 'administrative action'.[3] The starting point is thus FC s 33. And that is where we begin.

(b) Administrative action under the Final Constitution

(i) The general scope of administrative action

Generally speaking, the constitutional reach of 'administrative action' extends to all action taken by persons and bodies exercising public power or performing public functions, save for specific exceptions that have been identified by the Constitutional Court. These exceptions are: legislative action by elected, deliberative legislatures; executive policy decisions (or matters of high political judgment); judicial action by judicial officers; and, it seems, the recently added category of labour relations.[4]

[1] One example of the latter aspect might concern the decisions of the Judicial Services Commission and the scope of administrative action. See § 63.3*(c)*(iv) infra.

[2] The best illustrations of this tendency are the decisions of the Supreme Court of Appeal in *Grey's Marine* and the Constitutional Court in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC) ('*Steenkamp*'). See § 63.3*(c)*(vi) infra.

[3] See *New Clicks* (supra) at para 100 (Chaskalson CJ), para 446 (Ngcobo J) and para 586 (Sachs J). This is repeated by Ngcobo J in his minority judgment in *Sidumo* (supra) at para 202, and on behalf of the majority in *Chirwa v Transnet Limited & Others* 2008 (4) SA 367 (CC), 2008 (3) BCLR 251 (CC)('*Chirwa*') at para 139 ('PAJA only comes into the picture once it is determined that the conduct in question constitutes administrative action under section 33. The appropriate starting point is to determine whether the conduct in question constitutes administrative action within the meaning of section 33 of the Constitution.')

[4] The boundaries between these types of public power may often be difficult to draw. See *SARFU 1* (supra) at para 143. See also *Grey's Marine* (supra) at para 25 ('The exercise of public power generally occurs on a continuum with no bright line marking the transition from one form to another. . .') In addition to these exceptions, a good argument can be made that the constitutional right to just administrative action does not extend to the exercise of a public power or the performance of a public

We discuss each of these exceptions, in turn, before considering two specific types of action which starkly raise the distinctions between the various categories of public power, and the classification of which have divided the Constitutional Court: rule-making and compulsory, statutory arbitrations. The Court's treatment of these types of action provides fertile ground for assessing the approach that the Constitutional Court has thus far adopted to the ambit of administrative action. We then turn to an assessment of the other important prerequisite for the label 'administrative action': namely, the meaning of public (as opposed to private) power.

(ii) *The distinction between legislative and administrative action*

In *Fedsure,* the Constitutional Court was called on to review a municipal council's decision to pass resolutions adopting a budget, imposing rates and levies, and paying subsidies. In examining whether the resolutions amounted to administrative action, the Constitutional Court emphasised the changed constitutional landscape in which administrative review operated following the advent of the Interim Constitution. In relation to legislative action, the Court pointed out the need to distinguish between the processes by which laws are made. The process by which delegated legislation is made by a functionary vested with such power by a legislature is different from the process by which laws are made by 'deliberative legislative bodies'.[1] The Court carefully examined the status of local government under the Interim Constitution and concluded that it recognised three levels of government: national, provincial, and local.[2] The municipal council was an elected, deliberative body which, like national and provincial legislatures, exercised original legislative power derived directly from the Constitution. The Court remarked that, although the detailed powers and functions of local government were to be determined by the laws of the competent authority, this did not mean that the powers exercised by them were delegated powers.[3] During the course of its judgment, the Court emphasised the political nature of municipal councils, the deliberative process and their political accountability:

function that, while not falling within these exceptions, fails to meet an impact threshold requirement, e.g. it does not have a discernable effect on a person's rights or interests. See Currie & Klaaren *Benchbook* (supra) 117 citing H Corder 'Administrative Justice: A Cornerstone of South Africa's Democracy' (1998) 14 *SAJHR* 38. This question has not yet received the attention of our courts, other than through giving a wide meaning to PAJA's threshold requirements of 'adversely affecting rights' and 'direct, eternal legal effect.' See § 63.3*(c)*(vi) and (vii)).

[1] *Fedsure* at paras 27 and 28.

[2] Ibid at paras 34–40.

[3] See also *Fedsure* (supra) at para 38 (The Court noted: 'The constitutional status of a local government is thus materially different to what it was when Parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures.' The Court therefore acknowledged the departure from the pre-constitutional position where municipal by-laws constituted delegated legislation, which courts would review but construe 'benevolently' if they were enacted by elected councils. See L Baxter *Administrative Law* (1984)('*Administrative Law*') 193. See also *Sehume v Attridgeville City Council & Another* 1992 (1) SA 41, 57–58 (A).

> The council is a deliberative legislative body whose members are elected. The legislative decisions taken by them are influenced by political considerations for which they are politically accountable to the electorate. . .. Whilst this legislative framework is subject to review for consistency with the Constitution, the making of by-laws and the imposition of taxes by a council in accordance with the prescribed legal framework cannot appropriately be made subject to challenge by 'every person' affected by them on the grounds contemplated by [IC] s 24*(b)* . . . . The deliberation ordinarily takes place in the assembly in public where the members articulate their own views on the subject of the proposed resolutions. Each member is entitled to his or her own reasons for voting for or against any resolution and is entitled to do so on political grounds. It is for the members and not the Courts to judge what is relevant in such circumstances.[1]

Accordingly, the Court held that the resolutions and by-laws passed by the municipal council were legislative and did not constitute administrative action.[2] In the course of its judgment, the Court also pointed out that the Interim Constitution reserved the power of taxation and the appropriation of government funds to legislatures. When a legislature exercises such powers it is therefore exercising a power 'peculiar to elected legislative bodies' after due deliberation.[3]

In *Ed-U-College,* the Constitutional Court held that a specific allocation by the MEC for Education in the Eastern Cape of funds for independent schools out of the total budgetary allocation for education in the province, which was derived from the explanatory memorandum to the relevant Appropriation Act, did not constitute administrative action. The *Ed-U-College* Court emphasised the legislative nature of the explanatory memorandum. It stated that the estimate expenditures set out in the memorandum are debated in the legislature itself and are the basis on which votes on the Bill are decided. This memorandum therefore 'play[s] an important role in the legislative process which leads to the approval of an appropriation Bill'.[4]

It is important to note that these cases do not simply exclude legislative action from the ambit of 'administrative action' because it is 'legislative' (or rule-generating), in the sense that it has a general effect or application. Legislative action is

[1] *Fedsure* (supra) at para 41.

[2] National legislation passed by Parliament and provincial legislation passed by a provincial legislature are obviously not instances of administrative action. In relation to provincial legislation, see *Permanent Secretary of the Department of Education and Welfare, Eastern Cape, & Another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA (1) (CC), 2001 (2) BCLR 118 (CC)('*Ed-U*-College') at para 12.

[3] *Fedsure* (supra) at paras 44 and 45.

[4] *Ed-U-College* (supra) at para 14. It is submitted that the reasoning here is open to criticism since the allocation did not directly derive from the explanatory memorandum. The MEC for Education, in deciding on the allocation for independent schools out of the total education budget, is not bound by the estimates in the explanatory memorandum, or so-called 'White Book'. The decision by the MEC to divide funds between independent schools and other categories of schools appears to be an executive one. A better basis for holding that this allocation decision does not amount to administrative action may be that it was an executive policy decision. The fact that the White Book, which formed the basis on which the legislation was passed, included these estimated expenditures supports this argument.

excluded because it is sourced in parliamentary, or other deliberative legislative, processes.[1] These cases do not therefore suggest that delegated legislation does not amount to administrative action. We return to this issue below.[2]

By the same token, the fact that the action is taken by a legislative body (such as Parliament) does not mean that the (non-legislative) actions of that body do not amount to administrative action.[3] For example, in *De Lille,* the Cape High Court found that the decision of a parliamentary committee to suspend Patricia De Lille MP was reviewable as administrative action.[4]

(iii) *The distinction between executive policy decisions, political judgments and administrative action*

During the course of its judgment in *Fedsure*, the Constitutional Court alluded to a further category of public action that does not amount to administrative action: certain types of executive action.[5]

This distinction between administrative and executive action took centre stage in the Constitutional Court's decision in *SARFU 1*. This case involved a review of President Mandela's decision to institute a commission of inquiry into South African rugby in terms of FC s 84(2)*(f)* and to declare the Commissions Act[6] applicable to the inquiry. During the course of its judgment, the *SARFU 1* Court pointed out that a determination as to whether conduct constitutes administrative action does not equate with the enquiry as to whether the action is performed by a member of the executive arm of government. In an oft-quoted passage, the court remarked that:

> [W]hat matters is not so much the functionary as the function. The question is whether the task itself is administrative or not.[7]

The difficulty which then emerges is how to distinguish between administrative action and other acts of the executive. The *SARFU 1* Court declared that the distinction between executive and administrative action essentially boils down to a

[1] See also *Colonial Development (Pty) Limited v Outer West Local Council* 2002 (2) SA 262 (N) at para 60 (Court held that, although the actions of a town planning commission in modifying a town planning scheme amounted to administrative action, the conduct of the local council in giving the commission's decision legal effect did not amount to administrative action as it was 'part of the law-making process').

[2] See § 63.3*(b)*(vi) infra.

[3] See *SARFU 1* (supra) at para 141.

[4] *De Lille v Speaker of the National Assembly* 1998 (3) SA 340 (C), 1998 (7) BCLR 916 (C)('*De Lille*').

[5] *Fedsure* (supra) at para 59 ('In relation to legislation *and executive acts* that do not constitute "administrative action", the principle of legality is necessarily implicit in the Constitution.' (Emphasis added).)

[6] Act 8 of 1947. This Act empowers the President to confer upon a commission of inquiry the powers to summon and examine witnesses, to administer oaths and affirmations, and to call for the production of books, documents and objects (s 3(1)).

[7] *SARFU 1* (supra) at para 141.

distinction between the implementation of legislation, which is administrative action, and the formulation of policy, which is not. Acknowledging that this line may be difficult to draw, the Court said it will depend primarily upon the nature of the power.[1] The factors relevant to this consideration in turn are: the source of the power, the nature of the power, its subject-matter, whether it involves the exercise of a public duty, and whether it is related to policy matters or the implementation of legislation.[2]

The President's power to appoint a commission of inquiry derived from FC s 84(2)*(f)*.[3] The *SARFU 1* Court noted that the powers in FC s 84(2) are original constitutional powers that are conferred upon the President as head of state rather than as head of the national executive.[4] The Court described a commission of inquiry as 'an adjunct to the policy formulation responsibility of the President' as it merely performed a fact-finding function for the President, who was not bound by its findings.[5] In addition, when the President appoints a commission of inquiry he is not implementing legislation but rather exercising an original constitutional power.[6] The Court therefore concluded that the appointment of the commission did not amount to administrative action.[7]

The President's decision to make the Commissions Act applicable to the rugby commission of inquiry was, according to the Court, a more difficult matter. The

[1] *SARFU 1* (supra) at paras 142 and 143.

[2] Ibid at para 143.

[3] FC s 84(2) provides that the President is responsible for a number of listed functions. These include assenting to and signing Bills, referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality, summoning the National Assembly, calling a national referendum, receiving and recognizing foreign diplomatic and consular representatives, appointing ambassadors, pardoning or reprieving offenders, and conferring honours.

[4] *SARFU 1* (supra) at para 144. The Court remarked that none of the powers in FC s 84(2) are concerned with the implementation of legislation in any sphere of government and are closely related to policy (at paras 145 and 146). The historical source of these powers is the prerogative. Nevertheless, they now find their source directly in the Constitution and may be reviewed for compliance with the supreme Constitution. (See *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC); A Breitenbach 'The Sources of Administrative Power: The Impact of the 1993 Constitution on the Issues raised by *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Department van Handel en Nywerheid* 1992 (4) SA 1 (A)' (1994) 5 *Stellenbosch Law Review* 197).

[5] *SARFU 1* (supra) at paras 146 and 147.

[6] Ibid at para 147.

[7] Ibid at para 147. The *SARFU 1* Court, at para 146, appears to state *obiter* that all the powers set out in FC s 84(2) are not administrative action: 'It is readily apparent that these responsibilities could not suitably be subjected to s 33.' It should, however, be noted that the Court's decision is confined to the President's decision to appoint a commission of inquiry. The Court expressly stated that the conduct of the commission itself 'is a different matter' (at para 147). It is submitted that the conduct of a commission of inquiry should be classified as administrative action (see the analogous case of the Truth and Reconciliation Commission proceedings in *Du Preez & Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A), 1997 (4) BCLR 531 (A)('*Du Preez*')).

source of this power was derived from legislation and not the Constitution itself. That fact suggested that its exercise constituted administrative action.[1] There were, however, indications to the contrary. As the Court stated, this power is closely related to the exercise by the head of state of the power to appoint a commission and to ensure it is able to perform its task effectively.[2] The Court, however, left this issue undecided and assumed for purposes of the judgment that the powers under the Commissions Act amounted to administrative action.[3]

The line-drawing exercise was even more difficult is *Pharmaceutical Manufacturers*. This case dealt with the President's decision to bring the South African Medicines and Medical Devices Regulatory Authority Act[4] into force (despite the regulations and schedules required to make sense of the Act not yet being ready). The President's power to bring the legislation into operation was derived from the relevant section of the legislation itself.[5] Nevertheless, the exercise of that power did not clearly amount to the implementation of legislation, as the legislation had not yet come into force. The Constitutional Court acknowledged that the President's power lay somewhere between the law-making process and the administrative process. It was a power derived from the legislation itself but was incidental to the law-making process.[6] The Court concluded that, having regard to the nature and source of the power, and particularly the fact that it required a 'political judgment as to when the legislation should be brought into force, a decision that is necessarily antecedent to the implementation of the legislation', the decision to bring the law into operation did not constitute administrative action as it was 'closer to the legislative process than the administrative process'.[7]

Unlike Presidential assent to Bills (which thus converts them into Acts of Parliament), the President who issues a proclamation is not, strictly speaking, engaging in a legislative act but is rather acting as the head of the national executive.[8] The decision in *Pharmaceutical Manufacturers* is thus best understood as an executive decision of the President which (because of its close link to the legislative process, the fact that it did not clearly involve the implementation of

[1] *SARFU 1* (supra) at para 165.
[2] Ibid at para 166.
[3] Ibid at para 167.
[4] Act 132 of 1998.
[5] Section 55 of the Medical Devices Regulatory Authority Act reflected fairly standard wording, i.e. that the Act shall come 'into operation on a date determined by the President by proclamation in the *Gazette*'.
[6] *Pharmaceutical Manufacturers* (supra) at para 79. It should, however, be noted that the President was not exercising a power circumscribed in legislation as the Medical Devices Regulatory Authority Act was not yet in force and therefore did not bind the President. Nevertheless, it was a power conferred by Parliament, without which the President could not simply bring legislation into force. Ibid at para 78.
[7] Ibid at para 79.
[8] *Kruger v President of the Republic of South Africa & Others*, [2008] ZACC 17 (2 October 2008) at para 6.

legislation[1] and that it required the exercise of a 'political judgment') was of a high policy nature and thus fell outside the ambit of administrative action.[2]

A more recent case in which the Constitutional Court has held that a decision amounts to executive action rather than administrative action is *Masetlha*.[3] As stated above, this case dealt with the President's decision effectively to dismiss the head of the NIA. Moseneke DCJ, writing on behalf of the majority of the Court, held that this type of dismissal fell into a special category because the implied power to dismiss the head of an intelligence service derived from both the Final Constitution and national legislation, and the power to dismiss was 'specially conferred upon the President for the effective business of government and, in this particular case, for the effective pursuit of national security'.[4] The nature of the special relationship that Moseneke DCJ refers to appears most clearly in the dissenting judgment of Ngcobo J,[5] who refers to the fact that the head of the NIA deals with extremely sensitive matters affecting national security, that the President must have absolute trust in the head of the NIA and '[t]he moment [the President] loses confidence in the ability, judgment or loyalty of the head of the NIA, he must have the power to remove him or her'.[6]

It is important not to over-extend the category of executive policy decisions so as to exclude a large range of actions from the application of the right to just administrative action. A number of public decisions which are affected by policy considerations (for example, a decision whether to continue to grant subsidies to Model C schools which were previously white schools) should properly be

[1] See Hoexter *Administrative Law* (supra) at 172 (Takes a different view and contends that the case was 'obviously concerned with the implementation of legislation'.)

[2] See Hoexter *Administrative Law* (supra) at 172–3 (Hoexter offers a critique of the Constitutional Court's reasoning in what she describes as a 'troubling case'. Hoexter points out that one difficulty with the Court's approach is that the making of delegated legislation will often require a 'political judgment' of some kind, both in relation to the timing of the legislation and its content. We submit that the 'political judgment' in *Pharmaceutical Manufacturers* should be limited to a judgment made by the head of the executive to bring legislation produced by an elected, deliberative, legislative body into force. Thus understood, the reasoning in this case does not apply to delegated legislation.)

[3] See also *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC), 2004 (9) BCLR 895 (CC)(Constitutional Court expressed the view that a decision of the President to consent to extradition was not administrative action. The President's decision 'is a policy decision which may be based on considerations of comity or reciprocity between the Republic and the requesting State. The decision is based not on the merits of the application for extradition but on the relationship between this country and the requesting State'. Ibid at para 26. The Constitutional Court expressed this view despite the fact that the President's power flowed from legislation — the Extradition Act, 1962.) Another instance of a court finding that an action amounted to executive rather than administrative action is found in *Nephawe v Premier, Limpopo Province* 2003 (5) SA 245 (T), 2003 (7) BCLR 784 (T) at pars 92 (Dealt with the decision of the Premier to refer a report of a commission of inquiry on traditional leaders to the relevant Minister 'as a contribution to the development of national policy'.)

[4] *Masethla* (supra) at para 77.

[5] Although Ngcobo J dissented as to the outcome of the case, he appears to agree with the majority that the dismissal of the head of the NIA did not amount to administrative action.

[6] *Masethla* (supra) at paras 166–7.

categorised as administrative action.[1] Such decisions are generally made in the course of implementing legislation. It is therefore important to distinguish between policy in the narrow sense and policy in the broad sense. The former cluster of actions includes decisions that are political. They are political in the sense of being a matter of controversy or party political debate or being taken by a high political authority.[2] The latter set of decisions — executive policy decisions — are themselves political in the sense of being subject only to the political accountability of the representative institutions of the Final Constitution. These decisions include the development of policy and the initiation of legislation. It is only policy decisions in the broad sense which should be excluded from the ambit of administrative action.[3] On this distinction, which is sometimes quite difficult to draw, O'Regan J, in *Ed-U-College,* wrote:[4]

> Policy may be formulated by the Executive outside of a legislative framework. For example, the Executive may determine a policy on road and rail transportation or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the Executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action.

In *Ed-U-College* the Court held that the determination of the formula for the grant of subsidies and the allocation of such subsidies (as opposed to the determination of the share of the budget for independent schools in the total education budget) contained an aspect of policy formulation, but it was policy in the narrow rather than the broad sense. The Court held that, having regard to the source of power (that is, the legislature), the constraints upon its exercise and its scope, it amounted to administrative action.

The approach of the *Ed-U-College* Court in distinguishing between policy in the narrow and broad sense has been employed in a number of subsequent decisions of our courts. These judgments hold that decisions do not fall beyond the reach of administrative justice simply because they have policy implications or 'overtones'.[5] As Nugent JA remarked in *Grey's Marine*: '[t]here will be few

[1] See *Premier, Mpumalanga* (supra) at para 41 ('Citizens are entitled to expect that government *policy* will ordinarily not be altered in ways which would threaten or harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker.' (Our emphasis).)

[2] See *Ed-U-College* (supra) at para 17 ('[T]he fact that a decision has political implications does not necessarily mean that it is not an administrative decision within the meaning of s 33.')

[3] Hoexter *Administrative Law* (supra) at 169 (Helpfully refers to these decisions as '(high) policy decisions'.)

[4] *Ed-U-College* (supra) at para 18.

[5] See *Hayes v Minister of Finance and Development Planning, Western Cape* 2003 (4) SA 598 (C) at 611 (Decision on applications for departures from zoning regulations); *Grey's Marine* (supra) para 27 (Decision to grant lease of quayside property in Hout Bay); *Mkhatshwa v Mkhatshwa & Another* 2002 (3) SA 441 (T) (Premier's power to appoint a 'chief' in terms of the Black Administration Act 38 of 1927); *Sebenza Forwarding and Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of South Africa (Pty) Limited t/a Petro SA & Another* 2006 (2) SA 52 (C)('*Sebenza*')(Decision of the Minister of Minerals and Energy not to conduct a formal enquiry into alleged irregularities in connection with a parastatal contract.)

administrative acts that are devoid of underlying policy — indeed, administrative action is most often the implementation of policy that has been given legal effect — but the execution of policy is not equivalent to its formulation'.[1]

As with *Pharmaceutical Manufacturers*, another case that is difficult to place in the categories of exceptions to administrative action is the decision of the Cape Provincial Division in *Steele v South Peninsula Municipal Council*.[2] In *Steele*, the High Court held that a resolution of a local council to remove speed bumps from two roads in its area of jurisdiction did not amount to administrative action. The *Steele* court also found that the decision was not legislative action but was rather 'a decision taken by a politically elected deliberative assembly whose individual members could not be asked to give reasons for the manner in which they had voted'.[3] The correctness of the decision in *Steele* is open to question. The mere fact that the local council is an elected, deliberative assembly is not necessarily sufficient to remove the decision from the realm of administrative action. The council was performing an executive act and did so in terms of a general statutory obligation in relation to traffic control and road safety. (However, as the court itself pointed out, it was not implementing any particular law).[4] While a decision to remove speed bumps may have certain overtones of executive policy in the local government context (particularly where the Final Constitution envisages that a local council acts both as a legislature and executive body at the local government level), a decision to remove speed bumps from two specific roads in a suburban area does not, in our view, amount to a high policy decision. Although there is merit in the *Steele* court's observation that one cannot expect individual members of an elected, deliberative body to give reasons for why they voted to remove the speed bumps, a local authority should not be able to avoid the requirements of administrative law by making administrative decisions in a deliberative forum.[5]

(iv) *The distinction between judicial and administrative action*

The third category of public power that does not amount to administrative action for purposes of FC s 33 is judicial action. In *Nel*, Ackermann J stated *obiter* that the summary sentencing procedure in s 205 of the Criminal Procedure Act[6] was 'judicial and not administrative action'.[7] One reason for this conclusion is that

[1] *Grey's Marine* (supra) at para 27.
[2] 2001 (3) SA 640 (C).
[3] Ibid at 644.
[4] Ibid at 633–4.
[5] For a preferable approach, see *King William's Town Transitional Local Council v Border Alliance Taxi Association* 2002 (4) SA 152 (E)(Holds that a decision of a local council to close a taxi rank amounts to administrative action.) See also *Richardson and Others v South Peninsula Municipality and Others* 2001 (3) BCLR 265 (C)(Holds that a municipal council's decision to approve a subdivision of property amounts to administrative action.)
[6] Act 51 of 1977.
[7] *Nel* (supra) at para 24.

the procedure was subject to appeal in the same manner as a sentence imposed in a criminal prosecution.[1]

This category of action — as with the category of legislative action — should be characterised by its source in the judicial process (involving the act of sentencing) rather than by its adjudicative nature (eg, the application of law to facts). It is the location of the courts' powers in the Final Constitution, and the accountability that flows from the constitutional position of judicial authorities, that is important for this purpose, not the adjudicative function they perform.[2] In this regard, a major area of contention has been whether arbitrations amount to administrative or judicial action. This question is discussed at length below.[3]

Again, as with the legislature, actions of judicial officers do not always fall on the judicial side of the administrative/judicial divide.[4] Judges and magistrates can act administratively. They exercise such powers under the Foreign Co-Operation in Criminal Matters Act[5] when issuing a letter of request to a foreign state for assistance[6] or, perhaps, when they issue a search warrant.[7]

(v) The distinction between administrative action and labour relations

A few years prior to the Interim Constitution, the Appellate Division in *Administrator, Transvaal & Others v Zenzile & Others*[8] held that the dismissal of a public sector employee was an exercise of pubic power and was subject to administrative law review. Nevertheless, since the advent of: *(a)* the Final Constitution, which not only entrenches the right to just administrative action but also guarantees to 'everyone' the right to fair labour practices[9] and *(b)* the post-constitutional LRA, which extends the protections of labour law to public sector employees, courts have grappled afresh with the question as to whether the relationship between public sector employers and employees is governed by administrative law.

Until the recent decision of the Constitutional Court in *Chirwa*, the focus of the dispute, which has been described as one of 'mystifying complexity',[10] was

[1] *Nel* (supra) at para 24.

[2] *Sidumo* employs a largely consistent approach. See § 63.3*(b)*(vii) infra. In *Independent Newspapers*, the Court noted but did not criticise the exclusion of judicial records from the scope of the PAIA in the arguably analogous context of the right of access to information.

[3] See § 63.3*(b)*(vii) infra.

[4] *SARFU 1* (supra) at para 141('[J]udicial officers may, from time to time, carry out administrative tasks.')

[5] Act 75 of 1996.

[6] See *Kolbatschenko v King NO & Another* 2001 (4) SA 336 (C), 2003 (3) BCLR 288 (C) at paras 355–356 (It appears that this issue was common cause between the parties in this case.)

[7] See *Terry v Botes and Another* [2002] 3 All SA 798 (C). But see *Pretoria Portland Cement Co Limited & Another v Competition Commission & Others* 2003 (2) SA 385 (SCA).

[8] 1991 (1) SA 21 (A) ('*Zenzile*') at 34.

[9] FC s 23.

[10] See *Transnet Ltd and Others v Chirwa* 2007 (2) SA 198 (SCA)('*Chirwa (SCA)*') at para 33, quoted by Ngcobo J in *Chirwa* (supra) at para 81.

whether the decision of the public sector employer to dismiss its employee was public or private *vis-à-vis* the employee. A line of cases held that such decisions were public and therefore amounted to administrative action,[1] while another line held that employment relationships should be governed exclusively by labour law, were private and thus did not amount to administrative action.[2] It was hoped that the Supreme Court of Appeal would provide greater clarity when the issue came before it in *Chirwa (SCA)* (a case arising from the dismissal of the Human Resources Executive Manager of the Transnet Pension Fund). But the SCA proved divided. Two judges (per Mthiyane JA) held that, in dismissing the applicant, Transnet 'did not act as a public authority but simply in its capacity as an employer' and did not engage in administrative action.[3] Two other judges (per Cameron JA) held that the dismissal involved the exercise of public power and thus amounted to administrative action.[4]

Given the long line of divergent cases that preceded it, it came as somewhat of a surprise that when *Chirwa* was decided by the Constitutional Court, it was virtually unanimous in finding that the dismissal of the employee concerned did not amount to administrative action.[5] A further surprise was that, despite the previous focus of the case law on the public / private divide, the majority of the Constitutional Court decided the matter on a different basis. Ngcobo J, who wrote the majority judgment on this issue, adopted the view that the dismissal of an employee by Transnet *did* involve the exercise of public power,[6] but that it nevertheless did *not* amount to administrative action because it fell into a newly identified constitutional-level category of employment and labour relations.

Ngcobo J adopts a functional approach to the meaning of administrative action, stressing, in the language of *SARFU 1*, that what matters in the identification of administrative action is the function and not the functionary, and that the most important consideration is the nature of the power involved.[7] Ngcobo J observes that the source and nature of the power in this case was contractual, that it did not involve the implementation of legislation and that the termination of the

[1] See, for example, *Police and Prisons Civil Rights Union & Others v Minister of Correctional Services & Others* (2006) 27 *ILJ* 555 (E). See also *Chirwa* (supra) at para 128 fn 63 (For other citations).

[2] See, eg, *SA Police Union & Another v National Commissioner of the SA Police Services & Another* (2005) 26 *ILJ* 2403 (LC). For other cases, see *Chirwa* (supra) at para 128 ftn 62.

[3] *Chirwa (SCA)* (supra) at para 15.

[4] The fifth judge (Conradie JA) decided the matter on a different basis and thus did not address whether the dismissal amounted to administrative action.

[5] Ten judges held that the dismissal was not administrative action. The eleventh, Skweyiya J, did not consider it necessary to decide this issue but added, in language suggesting that he had decided it anyway, that: 'If, however, I had been called upon to answer that question, I would have come to the same conclusion as Ngcobo J: namely, that the conduct of Transnet did not constitute administrative action under section 33 of the Constitution for the reasons that he advances in his judgment.' Chirwa (supra) at para 73.

[6] For a discussion of this aspect of the judgment in *Chirwa*, see § 63.3*(b)*(vii) infra.

[7] See *Chirwa* (supra) at paras 139–142.

contract of employment did not amount to 'administration' but was 'more concerned with labour and employment relations'.[1] Ngcobo J thus concludes that the dismissal did not amount to administrative action.[2] Ngcobo J then points to the structure of the Final Constitution in supporting his view. He remarks that '[t]he Constitution draws a clear distinction between administrative action on the one hand and employment and labour relations on the other' and contemplates that these two areas of law 'will be subject to different forms of regulation, review and enforcement'.[3] He goes on to emphasise the separate protection of the constitutional right to fair labour practices in FC s 23 and states that there is no indication that public sector labour disputes should be treated any differently to those in the private sector.[4] Ngcobo J then refers to the range of legal protections now available to public sector employees in labour law, and notes that is no longer necessary to extend the protection of administrative law to this category of employees.[5] He concludes as follows:

> In my judgement labour and employment relations are dealt with comprehensively in section 23 of the Constitution. Section 33 of the Constitution does not deal with labour and employment relations. There is no longer a distinction between public and private sector employees under our Constitution. The starting point under our Constitution is that all workers should be treated equally and any deviations from this principle should be justified. There is no reason in principle why public sector employees who fall within the ambit of the LRA should be treated differently from private sector employees and be given more rights than private sector employees. Therefore, I am unable to agree that a public sector employee, who challenges the manner in which a disciplinary hearing that resulted in his or her dismissal, has two causes of action, one flowing from the LRA and another flowing from the Constitution.

This approach of the majority of the Constitutional Court in *Chirwa* is novel. It identifies a category of public power to which the label 'administrative action' does not apply; an exception that is not based on the doctrine of separation of powers (unlike the traditional categories of legislative action, broad executive policy decisions and judicial decisions) but rather in a distribution of constitutional competence rooted in the Bill of Rights itself.[6] There are two important

[1] *Chirwa* (supra) at para 142.

[2] Ibid.

[3] Ibid at paras 143–4.

[4] Ibid at para 145 ('On the contrary, section 23 contemplates that employees regardless of the sector in which they are employed will be governed by it. The principle underlying section 23 is that the resolution of employment disputes in the public sector will be resolved through the same mechanisms and in accordance with the same values as the private sector, namely, through collective bargaining and the adjudication of unfair labour practice as opposed to judicial review of administrative action'.)

[5] Ibid at para 148. In this sense, the *Chirwa* majority interprets *Zenzile* as a pre-Bill of Rights decision necessary for its time.

[6] An analogous exclusion from the PAJA definition of administrative action is arguably s 1(hh), the exclusion of a decision taken in terms of the PAIA. FC s 33 arguably does not provide a separate and additional source of accountability for the action taken in implementing FC s 32. Of course, at the level of legislation giving effect to FC s 32, PAIA does at least provide an alternative source of accountability by including provisions for review of PAIA decisions.

threads in this portion of Ngcobo J's judgment. The one is that the decision to dismiss is contractual in nature, is concerned with labour and employment relations and is thus not 'administration'. The second thread is that the Final Constitution envisages that labour relations are dealt with separately to administrative action and that public sector employees have the same protections as their private sector counterparts. While the first thread suggests that the position would be different if the power to terminate the employment contract arose from legislation rather than contract, the second thread suggests that this is not the case.

Ngcobo J's judgment can thus be read as adopting the position that public sector employees enjoy protection under the fundamental right to fair labour practices (and the legislation that implements and enforces that right) and therefore do not need additional protection under the right to just administrative action. This approach to determining the ambit of FC s 33 would be an unusual way to interpret a constitutional right. There are many instances in which particular conduct infringes more than one right. In fact, it is seldom that a litigant in fundamental rights litigation goes to court asserting the breach of only one fundamental right.[1] It is, in our view, inadvisable for courts to limit the ambit of a particular fundamental right based on the ambit of other overlapping fundamental rights.[2] If a right is truly fundamental, its substance should not vary depending on other complementary rights that are placed alongside it (i.e. rights that operate in the same direction, as opposed to rights that are in opposition).[3] As Langa CJ

[1] There is, for example, often an overlap between freedom of expression and freedom of religion, between the right to property and equality, and between dignity and a number of other fundamental rights.

[2] Such an approach is also, we submit, contrary to that of the majority of the Constitutional Court in *Sidumo* (supra), discussed at § 63.3*(b)*(vii) infra. In *Sidumo* the majority rejected an argument that a decision of the CCMA did not amount to administrative action because it was governed by FC s 33 (labour relations) and FC s 34 (access to court). Navsa AJ held as follows: 'This submission is based on the misconception that the rights in ss 23, 33 and 34 are necessarily exclusive and have to be dealt with in sealed compartments. The right to fair labour practices, in the present context, is consonant with the right to administrative action that is lawful, reasonable and procedurally fair. Everyone has the right to have these rights enforced before the CCMA acting as an impartial tribunal. In the present context, these rights in part overlap and are interconnected.' Ibid at para 112. This apparent inconsistency in approach is even more surprising when one considers that the judgment in *Chirwa* was handed down less than two months after the judgment in *Sidumo* and that a number of judges signed on to both majority judgments. See also C Hoexter 'Clearing the Intersection? Administrative Law and Labour Law in the Constitutional Court' in 1 *Constitutional Court Review* (2008) — (forthcoming)('Clearing the Intersection?'). We acknowledge, however, that the practical outcomes of the decisions in *Chirwa* and *Sidumo* are not contradictory. The result of these decisions is that the dismissal of an employee (whether a public or private sector employee) will not amount to 'administrative action' but will rather enjoy the protection of labour law (i.e., FC s 23, the LRA and other applicable legislation). And while a decision of the CCMA in respect of such dismissal will amount to 'administrative action' for purposes of FC s 33, it will fall to be dealt with under the LRA rather than PAJA.

[3] We accept that the reach of one fundamental right may be limited by other fundamental rights that pull in a different direction in a particular case. Fundamental rights may be limited by countervailing considerations, including other rights. For example, in the context of defamation, the plaintiff's right to dignity may limit the defendant's right to freedom of expression. Fundamental rights should, however, not be limited by complementary or overlapping rights that pull in the same direction.

stated in his minority judgment in *Chirwa*: '[a] litigant is entitled to the full protection of both rights, even when they seem to cover the same ground'.[1]

On the other hand, Ngcobo J's judgment can be read as adopting the position that 'administrative action' requires an act of 'administration', in the sense of an other-regarding act through which the administrator engages with the subject of administration *qua* administrator.[2] In other words, the action must have an external effect.[3] This approach is also, in our view, not entirely convincing. As we stated in the original version of this chapter, the disciplining of a public servant can be seen to have a direct, external legal effect on the relevant person.[4]

Having examined the main categories of public power that are excluded from the ambit of administrative action, we now turn to consider two other contentious issues relating to the scope of administrative action: rule-making and compulsory, statutory arbitrations.

(vi) *Rule-making as administrative action*

Does rule-making qualify as administrative action? The question has attracted much attention since the advent of the Interim Constitution and the Final Constitution's protection of the fundamental right to administrative justice.

South African academic opinion is fairly unanimous: yes, delegated or subordinate legislation and other forms of rule-making should be treated as administrative action and should be subject to administrative review.[5] To restrict

[1] *Chirwa* (supra) at para 175.

[2] We reiterate in this regard that Ngcobo J states that the dismissal is not administrative action, on the basis that the nature of the power is contractual, is not the implementation of legislation and does not constitute 'administration'. Ibid at para 142. It is only after this conclusion that Ngcobo J goes on to state that this view is supported by the provisions of the Constitution that, according to him, draw a distinction between administrative action and labour relations. Ibid at paras 143–149.

[3] The requirement of this 'external' effect is reflected in the corresponding requirement in PAJA's definition of 'administrative action'. See § 63.3*(c)*(vii).

[4] The other important aspect of *Chirwa* (of course not directly relevant to the scope of the right to just administrative action) relates to the question as to the overlapping jurisdiction between the Labour Court (under the LRA) and the High Court (under PAJA). The *Chirwa* Court held that a public sector dismissal falls within the exclusive jurisdiction of the Labour Court. For a criticism of this aspect of the judgment, amongst others, see Hoexter 'Clearing the Intersection?' (supra). See also Nugent JA in *Makambi v The Member of the Executive Council, the Department of Education, Eastern Cape Province*, Unreported judgment of the SCA, Case no. 638/06 (29 May 2008)(Nugent JA writes: 'Regrettably I can find no clear legal — as opposed to policy — reason for the outcome in *Chirwa*' (at para 21). Nugent JA points out that it is impossible to reconcile *Chirwa* with the previous decision of the Constitutional Court in *Fredericks v MEC for Education and Training, Eastern Cape* 2002 (2) SA 693 (CC), 2002 (2) BCLR 113 (CC).)

[5] See Burns & Beukes *Administrative Law* (supra) at 131 ('Since the exercise of this authoritative power (the promulgation of subordinate legislation) potentially has far-reaching consequences for the individual and may often impact harshly on individual rights, it must be included in the definition of administrative action'); Currie *The PAJA* (supra) at 88; Currie & Klaaren *Benchbook* (supra) at 84; De Ville *Judicial Review* (supra) at 39–40; Hoexter *Administrative Law* (supra) at 191; I Currie & J de Waal *The Bill of Rights Handbook* (2005) 656 ('It seems extremely unlikely that [PAJA] does not apply to the making of delegated legislation'); and M Beukes 'The Constitutional Foundation of the Implementation and Interpretation of the Promotion of Administrative Justice Act 3 of 2000' in C Langa and J Wessels (eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) 1, 12.

'administrative action' to purely administrative decisions and adjudications would be unacceptable given the vast bulk of governmental administration undertaken by regulation. Nevertheless, the Constitutional Court has still not provided a clear answer to this question.

The first occasion on which the issue arose, albeit tangentially, was in in *Fedsure.* In *Fedsure,* the Court clearly supported coverage of the administrative justice clause beyond purely administrative decisions and adjudications.[1] The Court was thus willing to go beyond the bounds of *South African Roads Board v Johannesburg City Council.*[2] In *South African Roads Board v Johannesburg City Council,* Milne JA articulated a distinction between those government decisions applying generally (termed 'legislative') and those applying in a particular situation. According to the Court, the cases referred to by Milne JA in exempting the impact of natural justice from legislative decisions were of 'little assistance' in determining the content of administrative action in terms of the Interim Constitution.[3] The majority judgment, delivered by the triumvirate of Chaskalson P, Goldstone J and O'Regan J, noted:

> Laws are frequently made by functionaries in whom the power to do so has been vested by a competent legislature. Although the result of the action taken in such circumstances may be 'legislation', the process by which the legislation is made is in substance 'administrative'.[4]

The issue came before the Constitutional Court more squarely in the post-PAJA case of *Minister of Home Affairs v Eisenberg.*[5] *Eisenberg* involved a challenge to immigration regulations. Here the Court avoided the issue of classifying the delegated legislation. It assumed that the regulations amounted to administrative action for purposes of PAJA and then found that the regulations did not fall foul of PAJA's provisions. Passing statements of Chaskalson CJ, who delivered judgment on behalf of the Court in *Eisenberg*, are ambivalent. One dictum suggests that rule-making might not be administrative action for purposes of PAJA.[6] Yet another raises potential doubts about the constitutionality of such an outcome.[7]

[1] Hoexter *Administrative Law* (supra) at 173 describes the judgment in this case as giving a 'strong hint' that delegated legislation amounts to administrative action under the Constitution.

[2] 1991 (4) SA 1 (A).

[3] *Fedsure* (supra) at para 26.

[4] *Fedsure* (supra) at para 27.

[5] *Minister of Home Affairs v Eisenberg and Associates: In re Eisenberg and Associates v Minister of Home Affairs & Others* 2003 (5) SA 281 (CC), 2003 (8) BCLR 838 (CC)('*Eisenberg*').

[6] Ibid at para 52.

[7] Ibid at para 53 fn 30 (Chaskalson CJ states that the question as to the application of PAJA to this case 'raises complex issues including the question whether a construction of PAJA that excludes the making of regulations from the ambit of administrative action would be consistent with the Constitution'.) For another case which supports the view that the making of delegated legislation amounts to administrative action, see *Association of Chartered Certified Accountants v Chairman, Public Accountants' and Auditors' Board* 2001 (2) SA 980 (W).

The decision of the Constitutional Court in *New Clicks* was therefore read with keen interest to see how the Court would deal with the respondents' assertion that the delegated legislation (in that case, the ministerial regulations dealing with medicine pricing that had been promulgated under the Medicines and Related Substances Control Act)[1] amounted to administrative action and should be reviewed under PAJA. The decisions that preceded the appeal to the Constitutional Court were a mixed bag. The majority of the Full Bench of the Cape High Court[2] held that the Pricing Regulations, and the Pricing Committee's recommendations that preceded them, did not amount to administrative action under PAJA, but that they were, in any event, reviewable under FC s 33.[3] Traverso DJP wrote a dissenting judgment. She found that the Pricing Regulations were administrative action for purposes of both FC s 33 and PAJA.[4] The Supreme Court of Appeal unanimously struck down the Pricing Regulations on grounds of legality and therefore did not find it necessary to consider the administrative action question.[5] There is, however, a strong suggestion towards the end of the judgment that regulations should be treated as administrative action because it would otherwise result in the 'unlikely' situation of the scope of administrative justice being reduced under the Final Constitution and PAJA.[6]

Those who hoped that the Constitutional Court would clarify the issue once and for all in *New Clicks* came away disappointed. The Court was very much divided in the way that it dealt (or did not deal) with this issue. Of the five substantive judgments delivered by the Court in this case, only the opinion of Chaskalson CJ (in whose judgment O'Regan J concurs) came down in favour of the general principle that regulations amount to administrative action under both FC s 33 and PAJA. Chaskalson CJ starts by pointing out that rule-making was reviewable on administrative law grounds prior to the Interim Constitution,[7] and that neither the Interim Constitution nor Final Constitution showed any intention

[1] Act 101 of 1965 ('the Medicines Act'). The regulations at issue were the Regulations Relating to a Transparent Pricing System for Medicines and Scheduled Substances in Government Notice R553 in *Government Gazette* 26304 of 30 April 2004 ('the Pricing Regulations').

[2] The decision of the Cape High Court is reported as *New Clicks South Africa (Pty) Limited v Tshabalala-Msimang & Another NNO; Pharmaceutical Society of South Africa & Others v Tshabalala-Msimang & Another NNO* 2005 (2) SA 530 (C) ('*New Clicks (HC)*').

[3] *New Clicks (HC)* (supra) at paras 45, 49 and 50. Presumably this means that the majority found that the Pricing Committee's recommendation and the regulations amounted to 'administrative action' for purposes of FC s 33. As pointed out at § 63.2*(a)*(iv) supra, this approach to the relationship between FC s 33 and PAJA is incorrect. One cannot simply circumvent the requirements of PAJA by relying directly on FC s 33, unless one is challenging the constitutionality of PAJA.

[4] *New Clicks (HC)* (supra) at paras 41 and 58 (Traverso DJP).

[5] See *Pharmaceutical Society of South Africa & Others v Tshabalala-Msimang & Another NNO; New Clicks South Africa (Pty) Limited v Minister of Health & Another* 2005 (3) SA 238 (SCA), 2005 (6) BCLR 576 (SCA)('*New Clicks (SCA)*').

[6] *New Clicks (SCA)* (supra) at para 94. Under our common law, regulations were subject to review on administrative law grounds. See Baxter *Administrative Law* (supra) at 490–494.

[7] *New Clicks* (supra) at paras 101–106.

to exclude rule-making from the reach of administrative justice.[1] In fact, according to the Chief Justice, the Final Constitution does the opposite. Chaskalson CJ points to a number of constitutional provisions which reflect the importance of accountability, transparency and public participation in the law-making process,[2] and concludes that:

> The making of delegated legislation by members of the Executive is an essential part of public administration. It gives effect to the policies set by the Legislature and provides the detailed infrastructure according to which this is to be done. The Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies. To hold that the making of delegated legislation is not part of the right to just administrative action would be contrary to the Constitution's commitment to open and transparent government.[3]

Ngcobo J (with whom Langa DCJ and Van der Westhuizen J concur) agrees that the Pricing Regulations at issue in *New Clicks* amount to administrative action under both FC s 33 and PAJA, but leaves open the question as to whether delegated legislation *generally* amounts to administrative action.[4] As with other (more recent) judgments that Ngcobo J has penned on the meaning of administrative action,[5] his reasoning in *New Clicks* focuses on the nature of the powers and functions conferred by the relevant empowering provision (s 22G of the Medicines Act). He emphasises that s 22G provides for a 'unique process', in that the Minister must make regulations 'on the recommendation of the Pricing Committee'.[6] In other words, neither the Minister nor the Pricing Committee may act alone. They must act together.[7] The Pricing Committee's investigation, recommendation and the ministerial regulations are thus 'interlinked' and 'inseparable', and 'the recommendation of the Pricing Committee represents part of the process of regulation-making'.[8] Ngcobo J concludes that the nature of the power and its subject-matter in this particular case amounts to the implementation of legislation and can 'readily be subjected to s 33'.[9] We note that, although Ngcobo J left open

[1] Ibid at paras 107–113.

[2] See FC s 59 (Obliges the National Assembly to facilitate public involvement in the legislative process.) *New Clicks* (supra) at paras 110–113.

[3] *New Clicks* (supra) at para 113.

[4] Ibid at para 422.

[5] See § 63.3*(b)(v)* supra, and § 63.3*(b)*(vii) infra.

[6] *New Clicks* (supra) at para 441.

[7] Ibid.

[8] Ibid at para 442.

[9] Ibid at para 450. The nature of the power that, for Ngcobo J, seems to be determinative is the fact that the Pricing Regulations are specific, providing for a specific pricing system with particular prices and fees, and that the Pricing Committee operated in a similar way to an administrative decision-maker — ie it investigated the matter and made a recommendation. Ibid at paras 440–442 and 450. It is difficult to pin down Ngcobo J's reasoning on this score, particularly as he also states that PAJA applies to the specific regulations at issue in this case for the reasons set out in Chaskalson CJ's judgment but that 'there are additional reasons why PAJA is applicable'. Ibid at para 422.

the question as to whether general rule-making amounts to administrative action, much of his reasoning would seem to support of an argument that this question should be answered in the affirmative.[1]

Moseneke J (in whose judgment Madala, Mokgoro, Skweyiya and Yacoob JJ concurred) adopts the position that it was 'neither prudent nor necessary' to decide whether the Pricing Regulations amount to administrative action.[2] He confines himself to noting briefly that there are, on the one hand, compelling reasons for holding that ministerial regulation-making is reviewable under PAJA and, on the other, there are 'at the very least equally compelling considerations that ministerial legislation is not administrative action. . .'.[3]

The final judgment in *New Clicks* to deal with this question is that of Sachs J. Sachs J adopts a creative and thought-provoking approach to the question of the review of rule-making. His position is that the right to just administrative action is confined to 'adjudication' (in the sense of administrative decision-making) and does not extend to rule-making. As he states:

> Section 33 is directed towards administrative acts of an adjudicative kind, and not to legislative functions carried out by the administration. The notions of procedural fairness and the right to be given written reasons fit in closely with adjudicative justice for individuals. They are not, without undue interpretive strain consonant with subordinate legislation.[4]

Sachs J is therefore the only judge in the *New Clicks* saga (and, in fact, the only judge that we are aware of in any decision of our courts) who has held that regulation-making does not amount to administrative action for purposes of FC s 33. This is, however, not because he adopts a narrow view on the ambit of administrative law review. On the contrary, his judgment in *New Clicks* calls for 'an expansive notion of legality', which he regards as 'an alternative and better way of securing constitutional supervision of subordinate legislation'.[5] This expanded notion of legality would embody both procedural fairness (members of the public should be given a reasonable opportunity to comment during the rule-making process)[6] and substantive reasonableness.[7]

[1] See *New Clicks* (supra) at para 849 (O'Regan J) and para 851 (Van der Westhuisen J). See also W Wakwa-Mandlana and C Plasket 'Administrative Law' in 2005 *Annual Survey of South African Law* 104, 108. See also *New Clicks* (supra) at para 476 (Ngcobo J)('Nor am I persuaded that categorisation of the exercise of public power as adjudicative or legislative provides the criterion as to whether the exercise of the power in question amounts to administrative action. The trend in modern administrative law has been to move away from formal classification as a criterion'.)

[2] Ibid at para 722.

[3] Ibid at para 723.

[4] Ibid at para 596.

[5] Ibid at para 612.

[6] Ibid at para 630.

[7] Ibid at paras 635–637. Sachs J regards legality as, at least in part, a branch of administrative law: 'Thus to say that the making of subordinate legislation involves the implementation of primary legislation and is therefore part of administrative *law*, is to state the question, not to resolve it. The question that remains is: is it a form of implementation which falls under the concept of administrative *action* as envisaged in s 33 of the Bill of Rights, or is it in essence an extension of the legislative process that happens to be undertaken by the administration, thereby falling to be considered under a different constitutional rubric?' Ibid at para 582.

With regard to the specific regulations at issue in *New Clicks*, Sachs J holds that the Pricing Regulations are generally not administrative action because they are rule-making in form.[1] The regulation dealing with the more specific issue of the determination of a dispensing fee for pharmacists,[2] on the other hand, is, according to Sachs J, sufficiently specific to be 'adjudicative' in form and therefore falls within the scope of administrative action as contemplated in FC s 33 and PAJA.[3]

The approach of Sachs J is a salutary reminder of the importance of fairness and substantive reasonableness in all areas of administrative decision-making. Nonetheless, constitutional law is made from majority judgments. And the interesting pathway indicated by Sachs was not taken by the Court in *Masetlha*.[4] Thus, the substantive underpinning for the one judgment against rule-making as administrative action has been cut away, leaving five judges broadly in favour of treating rule-making as administrative action and five yet to decide. We contend that the preferable approach is that advanced by Chaskalson CJ in *New Clicks*. All administrative rule-making shall be accommodated under the rubric of 'administrative action'. This approach avoids attempting to draw difficult lines between different types of regulations (which Ngcobo J's approach intimates). More importantly, it is in our view consistent with a principled approach to the ambit of administrative action based on the separation of powers. A rule-making act performed by a member of the executive should not be characterised as a legislative (rather than an administrative) act simply because it has rule-making qualities. As stated above, legislative action should only fall beyond the label 'administrative action' when it is performed by a deliberative, legislative body in respect of which the Final Constitution provides an alternative form of accountability. As discussed below, this approach is, on our view, consistent with that of the majority of the Constitutional Court in *Sidumo* in the context of statutory arbitrations.[5]

We accept that there may well be a need for greater flexibility with respect to administrative law rules that apply to rule-making and the manner in which those rules are scrutinised on review. This conclusion does not, however, mean that rule-making should be excluded from the ambit 'of administrative action'. This

[1] *New Clicks* (supra) at para 642 (Sachs J states that the scheme created by the regulations 'affects the public at large and applies indefinitely into the future' and is thus '[l]aw-making in the fullest sense'.)

[2] Regulation 10.

[3] Sachs J explains that the objective in relation to the dispensing fee is 'not so much to establish a general normative structure as to determine a precise figure for a particular activity of a directly identified group of persons. The price tag put on the activity of the pharmacists affects their interests materially, adversely and in an immediately operative way.' Ibid at para 646. It is surprising that Sachs J did not find that the same applies to another key regulation in *New Clicks*, regulation 5(2)*(c)* which, read with Annexure A to the Pricing Regulations, sets out a detailed (though unclear) method for determining the initial single exit price of medicines. It would seem that this regulation would equally have a material and immediate effect on, at least, pharmaceutical manufacturers.

[4] See § 63.2*(b)* supra.

[5] See § 63.3*(b)*(vii) infra.

conclusion suggests that courts should develop an appropriate approach to scrutiny of administrative rule-making through the concepts of variability or levels of scrutiny.[1]

(vii) *Statutory arbitrations as administrative action*

Another contentious issue regarding the application of FC s 33 is whether or not it applies to decisions of arbitrators pursuant to compulsory, statutory arbitrations. The context in which this issue has arisen is compulsory arbitration before the CCMA under the LRA. It is an issue that divided the Constitutional Court in the *Sidumo*.[2]

The majority of judges (five to four)[3] held that a compulsory, statutory arbitration amounts to administrative action.[4] After noting the standard caution in *SARFU 1* that what matters is 'not so much the functionary as the function',[5] the majority notes that administrative tribunals 'straddle a wide spectrum', from those that implement and give effect to policy or legislation to those that resemble courts of law.[6] Navsa AJ goes on to point out some similarities between the CCMA process and courts (e.g. the manner of adducing evidence, the power of subpoena, the contempt power and the fact that an award is final and binding).[7] He, however, points out that there are important differences between the two fora (the CCMA must conduct matters with a minimum of legal formalities in order to determine the dispute fairly and quickly, there is no blanket right to legal representation, no system of binding precedents and CCMA commissioners do not have security of tenure).[8] As Navsa AJ says: '[t]he CCMA is not a court of law'.[9] Relying on this institutional characterisation of the CCMA, the majority concluded that, as the commissioners exercised public power, their decisions amounted to administrative action under FC s 33.[10]

Consistent with his other decisions, Ngcobo J commences his minority judgment by stressing that the test for determining whether conduct amounts to

[1] See § 63.4 infra.
[2] Supra.
[3] Navsa AJ delivered the majority judgment in *Sidumo*, in which four other judges concurred, including O'Regan J who wrote a separate concurring judgment. Ngcobo J penned the minority judgment, in which three judges concurred. Sachs J wrote a separate judgment concurring with both the majority and the minority judgments.
[4] A unanimous Supreme Court of Appeal had found that CCMA arbitrations amounted to administrative action for purposes of PAJA. See *Rustenburg Platinum Mines Limited (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA).
[5] *SARFU 1* (supra) at para 141.
[6] *Sidumo* (supra) at paras 81–82.
[7] Ibid at para 84.
[8] Ibid at para 85.
[9] Ibid.
[10] Ibid at para 88.

administrative action is whether the *function* is administrative in nature.[1] He even goes so far as to say that '[t]he identity of the functionary performing the function is *not relevant* for purposes of determining whether a particular conduct constitutes administrative action.'[2] True to his word, Ngcobo J focuses on the arbitral function of the CCMA. he notes that it 'involves a determination of facts and the application of legal principles in order to decide whether or not a dismissal is fair' and that CCMA arbitrations 'bear all the hallmarks of a judicial function'.[3] He points out that the CCMA thus constitutes an independent and impartial tribunal for purposes of FC s 34 and must therefore decide matters in a fair, public hearing.[4] The minority thus distinguishes between actions of the CCMA that are administrative in nature (which are governed by FC s 33) and those that are adjudicative in nature (to which FC s 34 applies). Ngcobo J concludes that the conduct of CCMA arbitrations is very different from the functions of other statutory tribunals. The CCMA's functions 'are closer to, if not identical to the judicial function'.[5] As a result, the decisions of the CCMA do not amount to administrative action.[6]

A comparison of the majority and the minority judgments in *Sidumo* reveals a significant difference of approach to the distinction between judicial and administrative action. The majority adopt a primarily *institutional* test in drawing the line between judicial and administrative action. By this, we mean that the majority considered whether the action was judicial (as opposed to administrative) by focusing on whether the CCMA was institutionally a court of law, rather than by adopting a functional approach which would emphasise the nature of the function that the CCMA performs (which, in this case, is adjudicative).[7] Accordingly, the actions of the CCMA are not taken out of the administrative realm simply because they are adjudicative (or judicial) in nature. By contrast, the

[1] *Sidumo* (supra) at para 203.

[2] With apparent reliance on *SARFU 1,* Ngcobo J adds: '[t]he fact that the CCMA is not a court of law and does not have judicial authority, is irrelevant'. Ibid at paras 203 and 220

[3] *Sidumo* (supra) at paras 207–208.

[4] Ibid at para 215.

[5] Ibid at para 238.

[6] Ibid at para 240. The Supreme Court of Appeal reached the same conclusion in *Total Support Management (Pty) Limited & Another v Diversified Health Systems (SA) (Pty) Limited & Another.* 2002 (4) SA 661 (SCA), 2007 (5) BCLR 503 (SCA) ('*Total Support Management*'). (This case, dealing with a private, consensual arbitration, held that it amounts to judicial action and is thus not administrative action. Ibid at para 25). This aspect of the SCA's decision is in effect overruled by the judgment of the majority of the Constitutional Court in *Sidumo.* Nevertheless, it is still possible to argue that private arbitrations amount to the exercise of private rather than public power and, for that reason, are not administrative action. See *Total Support Management* at para 24. See, further, the discussion on the distinction between public and private power at § 63.3*(b)*(viii). See also *Telecordia Technologies Inc v Telkom SA Limited* 2007 (3) SA 266 (SCA) at para 45.

[7] Navsa AJ accepts that the decision of the CCMA would, in pre-constitutional language, have been described as a 'quasi-judicial function' and bears many similarities to the judicial process. *Sidumo* (supra) at para 88.

minority adopt a thorough-going *functional* approach to the distinction. They repeatedly refer to the adjudicative nature of the CCMA's arbitrations and adopt the attitude that the functionary is irrelevant.[1] Ngcobo J's focus on a functional approach is evident in his regular reiteration of the *SARFU 1* test on numerous occasions in his judgment.[2]

The majority's approach in *Sidumo* is correct. And it can be reconciled with the dictum in *SARFU 1*. The ability to reconcile the two judgments does not, however, most clearly appear from Navsa J's majority judgment. It is rather to be found in the separate concurring judgment written by O'Regan J.[3]

O'Regan J calls for a 'substantive understanding of section 33'.[4] She stresses that 'the question of whether the CCMA falls within the scope of section 33 should be answered by determining the constitutional purpose of section 33 and then considering whether it is constitutionally suitable to impose the requirements of section 33 on the conduct of the CCMA.'[5] She refers to the passage in *SARFU 1* that focuses on the function rather than the functionary, but points out that this phrase was used by the Constitutional Court in that case in seeking to draw the line between two forms of executive action (policy decisions and administrative action), and was not used to distinguish between judicial and administrative action.[6] O'Regan J points to the decisions of the Constitutional Court in *Nel* and *De Lange v Smuts NO & Others*,[7] which, according to her, held that powers are judicial 'not only because they involved adjudication, but because they were powers which under our constitutional order, are to be exercised only by the judiciary'.[8] Although she accepts that arbitral decisions of the CCMA are adjudicative in nature and that the CCMA is an independent and impartial tribunal as contemplated in FC s 34, she rejects Ngcobo J's view that this description means that the decisions are judicial rather than administrative.[9] O'Regan J adopts the position that the distinctions between different forms of public power (legislative, executive, judicial, on the one hand, and administrative, on the other) should be based on the doctrine of separation of powers. It is for

[1] See, for example, *Sidumo* (supra) at paras 207–208, 215–220 and 233–238.

[2] Ibid at paras 203, 217, 225, 230 and 234.

[3] O'Regan J's judgment is, in our view, one of the most meaningful decisions on the proper approach to assessing the scope of 'administrative action' under FC s 33. It is unfortunate that no other judges signed on to it.

[4] *Sidumo* (supra) at para 137.

[5] Ibid at para 135. O'Regan J makes a similar point elsewhere. Ibid at para 132 ('In my view, the question needs to be answered by understanding the proper constitutional purpose of section 33 and then considering that purpose against the context of the adjudicative functions of the CCMA'.)

[6] Ibid at para 130.

[7] 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) ('*De Lange v Smuts*').

[8] *Sidumo* (supra) at paras 127–129.

[9] Ibid at paras 124 and 126.

this reason, she says, that the Constitutional Court has held that the legislative action of democratically elected legislative bodies, certain executive policy decisions and judicial actions of judicial officers do not amount to administrative action. Why? Again, because it is not constitutionally appropriate to review these actions on administrative law grounds.[1] In this regard, it seems that the most important question is whether the principles of responsiveness, transparency and, most importantly, accountability indicate that the conduct should be subject to administrative review.[2] In O'Regan J's words:

> The content of section 33 is straightforward. It requires administrative action to be 'lawful, reasonable and procedurally fair'. It also requires that written reasons be given for administrative action that adversely affects the rights of individuals. Section 33 should be understood as one of the key constitutional provisions giving life to the constitutional values of accountability, responsiveness and openness to be found in section 1 of our Constitution. It recognises that requiring administrative action to be lawful, procedurally fair and reasonable is one of the ways of ensuring the exercise of public power that is accountable. The question of purposive constitutional interpretation that thus arises is whether it is constitutionally appropriate to hold the CCMA to these standards.[3]

Turning to the classification of CCMA arbitrations, O'Regan J rightly concludes that the separation of powers doctrine has 'no application' to such decisions, and that there are 'powerful reasons' why adjudicative tribunals should be held to the standards of FC s 33.[4] These reasons flow from the fact that the CCMA is an organ of state exercising public power under legislation, that it determines disputes as to the fairness of labour practices, that the LRA contemplates that it should do so in a speedy and cheap fashion and that an appeal does not lie against its decisions.[5] To this we would only add that, whereas an entire constitutional chapter (as well as the doctrine of separation of powers more generally) structures the accountability of the judiciary,[6] FC s 33 imposes constitutional accountability on non-s 166 tribunals.

The approach of the *Sidumo* majority judgments reflects two principles that are, in our view, equally applicable to the classification of administrative rule-making.[7] The first is that an act of the administration is not removed from the ambit of administrative action merely because it has the characteristics of power

[1] *Sidumo* (supra) at para 136.

[2] O'Regan J points out that a similar approach was adopted by the Constitutional Court in *Fedsure*. *Fedsure* (supra) at para 41. It is noteworthy that the judgments of Ngcobo J in *Sidumo* and *Chirwa* are, in some respects, consistent with this general approach in that they emphasise the alternative form of constitutional accountability in relation to the decisions at issue in those cases, which accountability arises from FC s 34 and FC s 23, respectively.

[3] *Sidumo* (supra) at para 138.

[4] Ibid at para 137.

[5] Ibid at para 139–140.

[6] See Chapter 8 of the Final Constitution: Courts and the Administration of Justice.

[7] See § 63.3*(b)*(vi) supra.

that is traditionally exercised by one of the other branches. In other words, it does not fall beyond 'administrative action' simply because its nature is judicial (i.e. adjudicatory).[1] The related second principle is that the exercise of public power that is judicial in nature falls outside the ambit of administrative action when it is exercised by an institution that forms part of one of the other branches of government: namely, when a judicial function is exercised by a judicial authority, or, drawing on *Fedsure*, when a legislative power is exercised by an elected, deliberative legislature.[2] In both these instances, we note that the legislative or judicial power is a power that derives directly from the Final Constitution and that the exclusion of these acts is justified in light of the fact that these categories of action are subject to alternative forms of both political and constitutional participation and accountability. These actions are therefore subject to institutional accountability under the Final Constitution rather than the safeguards of administrative justice.[3]

These principles have important implications for the classification of rule-making. In *Sidumo,* the majority of the Constitutional Court held that the exercise of judicial (i.e. adjudicatory) powers by the executive does not mean that the power crosses over from the administrative to the judicial sphere. This suggests that the performance of legislative functions by the executive does not, in itself, go from being executive to legislative for purposes of determining the scope of administrative action. If action of the executive is only judicial (as opposed to administrative) when it is performed by a court of law (or other judicial authority), it seems to us that action is not legislative (for purposes of this characterisation) unless it is performed by a legislative body contemplated under the Final Constitution.

(viii) *The distinction between public and private power*

Administrative action is confined to the exercise of *public* power.[4] The difficulty is that the line between public and private power is a very difficult one to draw. As Langa CJ remarked in his minority judgment in *Chirwa* '[d]etermining whether a power or function is "public" is a notoriously difficult exercise. There is no simple definition or clear test to be applied'.[5]

The case law has dealt with a number of contentious areas in which the public/private divide is most difficult to identify. For purposes of this chapter, we do not aim to cover all these areas, but rather identify two broad areas which have

[1] See *Sidumo* (supra) at paras 88, 126 and 135.
[2] *Fedsure* (supra).
[3] See Currie & Klaaren *Benchbook* (supra) at 57.
[4] *Pharmaceutical Manufacturers* (supra) at para 45.
[5] *Chirwa* (supra) at para 186. See also *AAA Investments (Pty) Limited v Micro Finance Regulatory Council & Another* 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC) ('*AAA Investments*') at para 119 ('It is true that no bright line can be drawn between "public" functions and private ordering'.)

attracted the attention of our highest courts and which starkly raise the difficult question of the public/private divide, namely, the case of public entities exercising contractual rights (including in an employment context); and private bodies exercising regulatory powers. This is followed by an attempt to extract some of the factors that courts have identified as assisting in the classification of powers into either public or private.

The question as to the classification of contractual powers (or rights) exercised by public entities has recently become particularly significant in light of the increased practice of public entities engaging in outsourcing, corporatisation, privatisation and generally entering into contracts with third parties.[1] The question as to whether the exercise of contractual rights in such a setting amounts to administrative action is significant as its answer is not only important for the public entity to consider and implement but also dramatically affects the judicial scrutiny that can be brought to bear in relation to the exercise of those rights. Most importantly, the classification of 'administrative action' may mean that the public entity must engage in a fair process and in some circumstances may only exercise its contractual rights after giving the other party (and perhaps third parties) a hearing.

This issue has come before the Supreme Court of Appeal in two significant cases. The first is *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & Others*.[2] *Cape Metro* involved a decision by a municipal council to cancel an outsourcing contract with a private firm (for the collection of municipal levies and the identification of non-payers) on grounds of fraud. The contract had been concluded pursuant to a public tender process and, in canceling the contract, the municipal council relied on the contract's breach clause (rather than the alternative statutory power that the council enjoyed to cancel the contract in the event of fraud). The private party challenged the decision to cancel the contract on the basis that it had not been given a hearing prior to the cancellation. The Supreme Court of Appeal unanimously held that the cancellation of the contract did not amount to administrative action. According to the SCA, the municipal council was exercising a contractual power derived from the agreement between the parties. The Supreme Court of Appeal's reasoning is captured in the following passage:

[1] See *Transnet Limited v Goodman Bros (Pty) Limited* 2001 (1) SA 853 (SCA), 2001 (2) BCLR 176 (SCA) ('*Goodman Brothers*') at para 31 ('The identification of an administrative action, in contrast to an act regulated by private law, has become more difficult with the increasing use by the State of private law institutions, notably contract, to perform its duties. This takes place by privatisation, delegation, outsourcing, *etc*'.) For useful discussions of these developments, see A Cockrell 'Can You Paradigm? — A New Perspective on the Public Law/Private Law Divide' 1993 *Acta Juridica* 227; Y Burns 'Government, Contracts and the Public/Private Law Divide' (1998) 13 *SAPL* 234; and Hoexter *Administrative Law* (supra) at 147–159. On the meaning of organs of state, and the public/private divide, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31.

[2] 2001 (3) SA 1013 (SCA) ('*Cape Metro*').

> The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was therefore not acting from a position of superiority or authority *by virtue of its being a public authority* and, in respect of the cancellation, did not, *by virtue of its being a public authority*, find itself in a stronger position that the position it would have been in had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the *consensus* of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. Section 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers, not with the public administration acting as a contracting party from a position no different from what it would have been in had it been a private individual or institution.[1]

The SCA placed considerable emphasis on the contractual source of the right of cancellation. Streicher JA even went so far as to say that 'there can be no question' that if the council had chosen to exercise its statutory power of cancellation, it would have been exercising a public power that amounted to administrative action.[2]

This decision, read on its own, suggests that a large amount of public contracting will fall outside the realm of administrative action.[3] It should, however, now be read subject to the subsequent decision of the SCA in *Logbro Properties CC v Bedderson NO & Others*.[4] *Logbro* turns on a decision by a province to withdraw a property from tender in terms of the tender conditions: the SCA assumed (without deciding) that the tender constituted a contract between the province and the tenderers. The appellant relied on, amongst others, *Cape Metro* in arguing that the right to withdraw the tender flowed from the contract and therefore did not

[1] *Cape Metro* (supra) at para 18.

[2] Ibid at para 20. Streicher JA distinguishes the pre-constitutional cases in *Zenzile* (supra) and *Administrator, Natal & Another v Sibiya & Another* 1992 (4) SA 532 (A). Ibid at paras 11 and 12 (On the basis that they involved the exercise of statutory powers.) But see *The Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd*, Unreported Decision, Case no. 148/2007 (25 September 2008) ('*Thabiso Chemicals*'). The obiter statement in this judgment is most surprising, and concerning: 'I do not believe that the principles of administrative law have any role to play in the outcome of the dispute. After the tender had been awarded, the relationship between the parties in this case was governed by the principles of contract law .... The fact that the Tender Board relied on authority derived from a statutory provision (i.e. s4(1)(eA) of the State Tender Board Act) to cancel the contract on behalf of the Government, does not detract from this principle. Nor does the fact that the grounds of cancellation on which the Tender Board relied were, inter alia, reflected in a regulation. All that happened, in my view, is that the provisions of the Regulations — like the provisions of ST36 — became part of the contract through incorporation by reference'. Ibid at para 18.

[3] For a sustained criticism of the judgment in *Cape Metro*, see C Hoexter 'Contracts in Administrative Law: Life After Formalism?' (2004) 121 *SALJ* 595; Hoexter *Administrative Law* (supra) at 176–7.

[4] 2003 (2) SA 460 (SCA)('*Logbro*').

amount to administrative action. Cameron JA (with whom the remaining judges agreed) held that the decision, notwithstanding its contractual source, amounted to administrative action and was therefore subject to the constraints of procedural fairness.[1] He was careful to emphasise that *Cape Metro* turned on its own facts and certainly is not authority for the principle that the exercise of contractual rights by a public entity is never subject to the duty to act fairly. Instead, he noted, 'the answer depends on all the circumstances'.[2] According to Cameron JA, the impact of *Cape Metro* is limited to the following proposition:

> [A] public authority's invocation of a power of cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority *deriving from its public position*, does not amount to an exercise of public power.[3]

The crucial advance from *Cape Metro* by the *Logbro* Court was making explicit and more significant the recognition of the relative bargaining power of the parties, a relationship that does not always favour the public party to the contract. According to the SCA in *Logbro*, the province had itself dictated the tender conditions, and was thus undoubtedly acting 'from a position of superiority or authority by virtue of its being a public authority'.[4]

Logbro is a welcome caveat to the judgment in *Cape Metro*. It takes account of the variability and reality of public power in dealings with tenderers, promotes public accountability and cuts down the argument that the source of the power — be it contractual or legislative — automatically determines the classification of the power as public or private.[5] *Logbro* is also consistent with a long line of cases that hold that the rules of administrative law apply in the context of public tenders, even when the public body would otherwise be acting in an ordinary commercial capacity.[6] It is not so simple to draw the line between *Cape Metro* and *Logbro*. Despite the recognition that some public entities may not be in a position to 'dictate terms', it seems to us that in most instances in which government and other public entities contract, the public entity is in an advantageous position by virtue of its public authority. That said, many private entities obviously wield significant power in a contractual setting.

The public sector employment context is a particular contractual setting that has spawned a large number of cases on the distinction between public and

[1] *Logbro* (supra) at paras 7 and 8.

[2] Ibid at para 9.

[3] Ibid at para 10 (Our emphasis). See Currie & Klaaren *Benchbook* (supra) at 72 (Point out that the decision in *Cape Metro* 'turned on the equality of bargaining of the parties.')

[4] *Logbro* (supra) at para 11.

[5] The argument that the contractual source of a power automatically means that it is private has now been removed by the decision of the Constitutional Court in *Chirwa* (supra).

[6] In *Goodman Brothers*, the Supreme Court of Appeal held that a tender for long service gold watches amounted to administrative action for purposes of FC s 33. As Schutz JA stated, the actions of Transnet in calling for and adjudicating tenders amounted to administrative action 'whatever contractual arrangements may have been attendant upon it'. Ibid at para 9. See also G Penfold and P Reyburn 'Public Procurement' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) § 25.8 (Further case citations).

private power. Prior to the recent decision of the Constitutional Court in *Chirwa*, the case law was, as discussed above, heavily divided.[1] The SCA in *Chirwa* was similarly divided, with two judges saying the dismissal of the public sector employee was public, while two held it was private.

The applicant in *Chirwa* was dismissed from her position as the Human Resources Executive Manager of the Transnet Pension Fund, a business unit of Transnet Limited (a wholly state-owned enterprise). Ngcobo J delivered the majority judgment on the issue as to whether the dismissal amounted to the exercise of a public power. Ngcobo J held that it did.[2] The thrust of his reasons for this finding is that Transnet is obliged to act in the public interest, is established by statute and draws its authority from statute. As Ngcobo J states:

> In my view, what makes the power in question a public power is the fact that it has been vested in a public functionary, who is required to exercise it in the public interest. When a public official performs a function in relation to his or her duties, the public official exercises public power. I agree with Cameron JA that Transnet is a creature of statute. It is a public entity created by the statute and it operates under statutory authority. As a public authority, its decision to dismiss necessarily involves the exercise of public power and, '[t]hat power is always sourced in statutory provision, whether general or specific, and, behind it, in the Constitution'[3]

The minority judgment of Langa CJ (with whom Mokgoro and O'Regan JJ concurred) adopts the opposite view. The minority found that the applicant's dismissal was a private act. The minority based its conclusion on a consideration of four factors. First, 'the relationship of coercion or power that the actor has in its capacity as a public institution'.[4] In this regard, Langa CJ noted that Transnet has no specific authority over its employees by virtue of its status as a public body and the power it has over its employees is identical to that of other private entities.[5] The second factor is 'the impact of the decision on the public'. Langa CJ pointed out that the dismissal of the HR Executive Manager of the parastatal's pension fund would not have much impact on the public.[6] In particular, the applicant 'does not take decisions regarding transport policy or practice'.[7] The third factor is the source of the power, i.e. a contractual source. Langa CJ commented that, while this factor was not decisive, the contractual source 'points[s] strongly in the direction that the power is not a public one.'[8] The final factor,

[1] See § 63.3*(b)(v)* supra.

[2] *Chirwa* (supra) at para 138. Ngcobo J found, for different reasons, that the dismissal did not amount to administrative action. See § 63.3*(b)(v)* supra.

[3] Ibid. Ngcobo J then quotes the following dictum from *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) ('*Hoffmann v SAA*')("Transnet is a statutory body, under the control of the State, which has public powers and performs public functions in the public interest.').

[4] This factor, as Langa CJ pointed out, was particularly relevant in *Cape Metro*.

[5] *Chirwa* (supra) at para 187.

[6] Ibid at para 188.

[7] Ibid.

[8] Ibid at para 189.

according to the minority, is 'whether there is a need for the decision to be exercised in the public interest'. Langa CJ's view is that the public interest in the running of the Transnet Pension Fund is not as great as it is in relation to other public entities.[1]

At the conclusion of his judgment, Langa CJ notes that the minority's decision is very much based on the facts of the case, and should not be taken to mean that the dismissal of public sector employees will never amount to the exercise of public power. He offers three examples of a public dismissal: *(a)* where the person is dismissed in terms of a legislative provision; and *(b)* where the dismissal 'is likely to impact seriously and directly on the public' as a result of *(i)* 'the manner in which it is carried out' or (ii) 'the class of public employee dismissed'.[2]

While the approach of the minority in *Chirwa* is, to some extent, consistent with that of the SCA in *Cape Metro*, the same cannot necessarily be said of decision of the majority. One would think that the reasoning applied by the majority in *Chirwa* would result in a finding that a municipal council canceling a public, or outsourcing contract for fraud, would be obliged to act in the public interest and operates, directly or indirectly, under statutory authority. It seems to us that, in light of the majority's decision in *Chirwa*, a court will seldom find that an indisputably public body is not performing a public power or performing a public function. This is as it should be.[3]

Whereas the cases discussed above under this heading approach the public/private divide from one direction (ie public entities performing what would otherwise be classified as private functions), a number of other cases deal with the situation where this divide is approached from the other direction, namely, where a private entity performs a public function.[4] The most common type of case that arises in the latter context relates to the performance of regulatory powers. The most often cited example of this in the common law was the decision of Goldstone J in *Dawnlaan Belleggings (Edms) Beperk v Johannesburg Stock Exchange*.[5] The Court held that the decisions of the stock exchange were

[1] *Chirwa* (supra) at paras 190–193.

[2] Ibid at para 194.

[3] This conclusion is also consistent with the decisions of the SCA finding that, where the state exercises its rights of ownership in property in order to grant rights in respect of that property to private parties, the state engages in administrative action (at least insofar as rights are granted in relation to a valuable resource). See *Bullock NO v Provincial Government, North West Province* 2004 (5) SA 262 (SCA) ('*Bullock*')(Granting of a servitude over property on the banks of the Hartbeespoort Dam); *Grey's Marine* (supra)(Conclusion of a lease for quayside property in Hout Bay harbour). We point out, however, that the latter case involved the exercise of a statutory power. See also S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31 (On the nature of organs of state as public bodies.)

[4] Hoexter *Administrative Law* (supra) at 176 - 183 (Helpfully groups the cases into '[p]owers exercised by public bodies in a private-law setting' and '[p]rivate bodies exercising public powers'.)

[5] 1983 (3) SA 344 (W)('*Dawnlaan Beleggings*').

reviewable on administrative law grounds because, although it was not a statutory body, it was under a statutory duty to act in the public interest.[1]

A number of cases that attempt to draw the difficult line between when a non-statutory body exercises a public power and when it does not, have been decided since the advent of the Interim and Final Constitutions. The most significant one is the recent decision of the Constitutional Court in *AAA Investments*. *AAA Investments* involved a challenge to the rules of the Micro Finance Regulatory Council ('the MFRC') that regulate small lenders. The MFRC is a section 21 company that regulates members who agree to comply with its rules. The primary significance of the MRFC, in legal terms, is that the Usury Act[2] stipulates that the Minister of Trade and Industry may exempt categories of moneylending transactions from the application of the Usury Act 'on such conditions and to such extent as he may deem fit'.[3] The main effect of this stipulation is that an exempted moneylender may charge in excess of the rate of interest prescribed in the Usury Act. The exemption notice published by the Minister under this provision states that small moneylenders must, amongst other things, register with a regulatory institution approved by the Minister in order to qualify for exemption. The MFRC was established by representatives of government, money-lending institutions and community bodies, and was approved as the regulatory institution for purposes of the exemption notice.[4] Accordingly, as Yacoob J stated in *AAA Investments*, 'all micro-lenders who wished to qualify in terms of the exemption notice had to be registered with the [MFRC]' and, therefore, the MFRC 'has become responsible for the regulation of the micro-lending sector'.[5]

Whereas the High Court found that the MFRC exercised public power in making the rules,[6] the Supreme Court of Appeal held that the MFRC is not a 'public regulator' but is rather a 'private regulator' of moneylenders whose

[1] *Dawnlaan Beleggings* (supra) at 364. Goldstone J stated that: 'the decisions of the committee of the stock exchange affect not only its own members or persons in contractual privity with it, but the general public and indeed the whole economy. It is for that reason that the Act makes the public interest paramount. To regard the JSE as a private institution would be to ignore commercial reality and would be to ignore the provisions and intention of the Act itself. It would also be to ignore the very public interest which the Legislature has sought to protect and safeguard in the Act.' Ibid at 364– 365. The correctness of this approach was confirmed by the Appellate Division in *Johannesburg Stock Exchange & Another v Witwatersrand Nigel Ltd & Another* 1988 (3) SA 132 (A) at 152. See also *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] 1 All ER 564 (CA)('*Datafin*')(Held that the take-overs panel exercises public power despite not being a statutory body and not exercising statutory powers on the grounds that the panel exercised considerable powers, performed an important public duty which affected the public and the government in effect made use of the panel because its existence meant that the government did not itself need to establish a similar body. Ibid at 577 and 585. For a brief discussion of these cases, see Hoexter *Administrative Law* (supra) at 179–180.

[2] Act 73 of 1968.

[3] Section 15A of the Usury Act.

[4] *AAA Investments* (supra) at para 13.

[5] Ibid at paras 2 and 14.

[6] *AAA Investments (Pty) Limited v Micro Finance Regulatory Council & Another* 2004 (6) SA 557 (T).

authority derives from the agreement of the lenders.[1] This approach, which we submit does not give sufficient weight to the statutory context in which the MFRC operates and overstates the element of voluntary consent (in that, the reality is that one cannot operate effectively as a micro-lender without being registered with the MFRC), was overruled by the Constitutional Court on appeal. Yacoob J held that the MFRC exercised a public function.[2] The Minister passed on his regulatory power by creating a regime that enabled the MFRC to regulate the micro-lending sector[3] and the Minister exercised control over the functioning of the MFRC (eg approving the registration criteria for the MFRC's members).[4] As Yacoob J concluded:

> The fundamental difference between a private company registered in terms of the Companies Act and the Council [the MFRC] is that the private company, while it has to comply with the law, is autonomous in the sense that the company itself decides what its objectives and functions are and how it fulfills them. The Council's composition and mandate show that, although its legal form is that of a private company, its functions are, essentially, regulatory of an industry. These functions are closely circumscribed by the ministerial notice. I strain to find any characteristic of autonomy in the functions of the Council equivalent to that of an enterprise of a private nature. The Council regulates, in the public interest and in the performance of a public duty.[5]

The approach of the Constitutional Court in *AAA Investments* is to be welcomed. It provides for a context-sensitive test in which one assesses the public or private nature of a body exercising regulatory control by examining all relevant factors, including the legislative context, whether agreement to the rules is truly voluntary, the level of state control over the functioning of the body and whether the body regulates in the public interest.[6]

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[1] *Micro Finance Regulatory Council v AAA Investments (Pty) Limited & Another* 2006 (1) SA 27 (SCA) at para 24.

[2] *AAA investments* (supra) at paras 43–45. O'Regan J, who wrote a separate concurring judgment, agreed with this conclusion, adding that the MFRC's rules are 'coercive and general in their effect'. Ibid at paras 119–121.

[3] See *AAA Investments* (supra) at para 43 (Yacoob J): 'The fact that the Minister passed on the regulatory duty means that the function performed must, at least, be a public function'.

[4] Ibid at para 44.

[5] Ibid at para 45.

[6] A series of cases have dealt with the question as to whether non-statutory sports regulators exercise public power. See *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T)(Court held that because the United Cricket Board ('the UCB') was a voluntary body unconnected to the State and was not recognised in legislation, it did not exercise public power in banning the South African cricket captain Hansie Cronje for life. In our view, this decision does not give sufficient weight to the significant power that the UCB wields for those who pursue cricket as their chosen career, the extent of the regulatory function it performs, the public interest in the regulation of a national sporting code and the fact that the government would probably intervene to regulate cricket if the UCB did not exist.) For a critique of this case, see S Driver & C Plasket 'Administrative Law' 2001 *The Annual Survey of South African Law* 81, 116 (Point out, amongst other things, that this decision ignores the reality of the monopoly power at the disposal of the UCB and that it performs the equivalent of government function.) See also Y Burns 'Do Principles of Administrative Justice Apply to the Actions of Domestic Bodies and Voluntary Associations such as the South African Rugby Union and the United Cricket Board?' 2002 *SAPL* 372; Burns & Beukes *Administrative Law* (supra) at 140–144. We rather favour the approach adopted in

(ix) *Some relevant factors in assessing whether a power is private or public*

As the Chief Justice pointed out in his dissenting judgment in *Chirwa*, there is no precise test for determining whether a power is public or private. This enquiry depends on a consideration of all relevant factors.[1] Having examined some of the important decisions in this area, we now attempt to extract from the case law some of the factors that should be taken into account when making this assessment.

Perhaps the most important factor is whether the actor has a duty to act in the public interest rather than for its own private advantage. The Constitutional Court in *SARFU 1* remarked that one of the factors in assessing whether conduct amounts to administrative action is 'whether it involves the exercise of a public duty'.[2] Likewise, the majority of the Constitutional Court in *Chirwa* stated that 'what makes the power in question a public power is the fact that it has been vested in a public functionary, who is required to exercise the power in the public interest'.[3] In the context of English law, the point is well captured by De Smith, Woolf and Jowell:[4]

decisions of the Cape High Court in the following two cases. *Coetzee v Comitis Others* 2001 (1) SA 1254 (C)(Court held that the National Soccer League ('the NSL') performed public functions in the public interest and that any person who wants to play professional football is subject to the NSL's rules); *Tirfu Raiders Rugby Club v South African Rugby Union & Others* [2006] 2 All SA 549 (C) at para 28 (Court held that a decision of the Rugby Union which affected log positions of rugby teams was a matter of 'significant public interest'.) In light of the latter two decisions, it may be that the decisions of the Jockey Club would now amount to the exercise of public power (despite the decision of the Appellate Division in *Turner v Jockey Club* (supra), holding that the Jockey Club exercises private power but is subject to the rules of administrative law in so doing, pursuant to an implied term of the contract between the Club and its members). See Hoexter *Administrative Law* (supra) at 193. See also L Thornton 'The Constitutional Right to Just Administrative Action — Are Political Parties Bound' (1999) 15 *SAJHR* 351 (Argues that 'administrative action' should include certain private actions.)

[1] *Chirwa* (supra) at para 186.

[2] *SARFU 1* (supra) at para 143.

[3] *Chirwa* (supra) at para 138. This important factor is also recognised in Langa CJ's judgment. *Chirwa* (supra) at para 186 ('Whether there is a need for the decision to be taken in the public interest.') See also *AAA Investments* (supra) at para 45 ('The Council regulates in the public interest and in the performance of a public duty'); *Hoffman v SAA* (supra) at para 23. See further, *Police and Prisons Civil Rights Union & Others v Minister of Correctional Services & Others No. 1* 2008 (3) SA 91 (E), [2006] 2 All SA 175 (E) ('*POPCRU*') at para 53 (Public power not confined to power that impacts on the general public, but rather depends on whether it 'has been vested in a public functionary who is required to exercise it in the public interest, and not to his or her own private interest or at his or her own whim'); *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* [2006] 10 BLLR 960 (LC) at para 59; Olivier JA in *Goodman Brothers* (supra) at para 37; *Dawnlaan Belleggings* (supra) at 364; *Institute for Democracy in South Africa & Others v African National Congress & Others* 2005 (5) SA 39 (C) at para 27 (Relying on J Klaaren and G Penfold 'Access to Information' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) § 62–13, court remarked that a service or activity required to be undertaken in the public interest is an 'essential characteristic of a public power or function.')

[4] *Judicial Review of Administrative Action* (5th Edition 1995)('De Smith, Woolf and Jowell') at 167, quoted with approval by the Supreme Court of Appeal in *Mittalsteel South Africa Ltd v Hlatshwayo* 2007 (1) SA 66 (SCA) ('*Mittalsteel*') at para 20.

> A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest.

The next factor is the source of the power.[1] A legislative source is a very strong indication that the power is public.[2] After all, as our courts have remarked, the implementation of legislation is the quintessential example of administrative action.[3]

Another important factor is the extent of state control over the actor, either through an ownership interest (in the case of state-owned entities) or control over its functioning.[4] While this factor is taken into account, it is important to stress that it is by no means determinative. Although certain cases decided under the Interim Constitution held that the 'control test' was applicable in deciding whether or not an entity amounted to an 'organ of state',[5] this is not the case under the Final Constitution. In a recent decision, the Supreme Court of Appeal has helpfully pointed out that the fact of state control remains useful 'when it is necessary to determine whether functions, which by their nature might as well be private functions, are performed under the control of the State and are thereby turned into public functions instead'.[6]

A factor that, as we have seen, has played a significant role in classifying power as public or private in circumstances in which a public entity exercises contractual rights, is the power relationship between the public entity and the other party to the contract.[7]

Another factor is the impact of the decision on the public.[8] This consideration has played a role in assessing the nature of the state's exercise of its ownership rights in relation to valuable resources (such as waterfront property at

[1] *SARFU 1* (supra) at para 143; *Chirwa* (supra) at para 186.

[2] See P Craig 'What is Public Power?' in H Corder and T Maluwa *Administrative Justice in Southern Africa* (1997) 25 ('Public Power') at 27.

[3] *SARFU 1* (supra) at para 142; and Chaskalson CJ and Ngcobo J in *New Clicks* (supra) at paras 126 and 461, respectively. Nevertheless, as we have seen, a power is not private simply because it flows from a non-statutory source, such as a contract or a common law right of ownership. See § 63.3*(b)*(viii) supra.

[4] *Mittalsteel* (supra) at para 19; *AAA Investments* (supra) at paras 44–45. See also *Hoffmann v SAA* (supra) at para 23.

[5] See, for example, *Directory Advertising Cost Cutters v Minister of Posts, Telecommunications and Broadcasting* 1996 (3) SA 800 (T), [1996] 2 All SA 83 (T). For a discussion of the 'control test' and the authorities in support of — and against — that test, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 31.4*(f)*.

[6] *Mittalsteel* (supra) at para 19. See Hoexter *Administrative Law* (supra) at 154–155. See also *Goodman Brothers* (supra) at paras 37–38 (Olivier JA) and para 8 (Schutz JA).

[7] *Cape Metro* (supra) and *Logbro* (supra). See § 63.3*(b)*(viii) supra.

[8] See *Chirwa* (supra) at para 186 (Langa CJ).

Hartbeespoort Dam)[1] and has proved helpful in assessing whether rules made by an entity amount to the exercise of public power.[2] Although a public interest in a decision does not mean that the entity exercises a public function, significant public interest in a decision can operate as an indicator that the function is public.[3]

Another factor that has played a role in certain decisions is whether the conduct is 'governmental' in nature or, in other words, whether it corresponds to a power traditionally exercised by government.[4] This factor is particularly relevant when assessing whether a private actor is engaging in the exercise of public power, and it results in the characterisation of most regulatory power as public.[5] Moreover, certain cases suggest that the fact that an entity exercises monopoly power or near-monopoly power over its sphere of activity plays a role in coming to this conclusion.[6]

The final factor that we wish to mention is whether the existence of the function is recognised (expressly or impliedly) in a government's regulatory scheme.[7] Closely related to this consideration is whether the function is such that the government would intervene and itself regulate the activity if the actor did not exist.

[1] *Bullock* (supra) at para 14.

[2] In *AAA Investments,* O'Regan J stated that one of the criteria to be taken into account in assessing whether rules are public in character is whether they 'apply generally to the public or a section of the public.' Ibid at para 119 . The fact that a decision does not affect the public at large obviously does not mean that it is not the exercise of a public power. A great deal of administrative action only affects an individual or a small group of individuals. See Currie *The PAJA* (supra) at 76–77.

[3] See *Tirfu Raiders* (supra) at para 28; *POPCRU* (supra) at para 54 ('The pre-eminence of the public interest' in the proper administration of prisons indicated that the dismissal of a number of correctional officers amounted to the exercise of public power.)

[4] See *Mittalsteel* (supra) at para 22 ('In an era in which privatisation of public services and utilities has become commonplace, bodies may perform *what is traditionally a government function* without being subject to control by any of the spheres of government and may therefore . . . properly be classified as public bodies' (emphasis added)). See also *Goodman Brothers* (supra) at para 30 ('The essential characteristics of the concept of *administrative action* are seen as the exercise of a public (ie governmental) function by a public authority or official. . .') See further *R v Disciplinary Committee of the Jockey Club: ex parte Aga Khan* [1993] 2 All ER 853, 867 ('*Aga Khan*') (Jockey Club's powers not subject to public law review as its functions are not 'governmental.').

[5] See Currie *PAJA* (supra) at 76. As the Supreme Court of Appeal apparently noted in *Mittalsteel:* one sense of the term public power is 'being able to regulate or control the conduct of others'. *Mittalsteel* (supra) at para 12.

[6] See *Goodman Brothers* (supra) at para 8; and De Smith, Woolf and Jowell (supra) at 170 referred to in *Mittalsteel* (supra) at para 21. But see *Aga Khan* (supra) at 867.

[7] See *AAA Investments* (supra) at para 119 (One factor in assessing whether the power is public is whether it is 'related to a clear legislative framework and purpose'); *Datafin* (supra) at 577 and 585. See also De Smith, Woolf and Jowell (supra) at 170 referred to in *Mittalsteel* (supra) at para 21; Craig 'Public Power' (supra) at 29 (Describes this process as the 'Privatisation of the Business of Government', using a term coined by Hoffman LJ in *Aga Khan* (supra) at 874).

(c) The meaning of administrative action under PAJA

(i) *Background and the general approach to 'administrative action' under PAJA*

The definition of 'administrative action' in PAJA went through a tortuous drafting process. Although the broad definition initially proposed in the South African Law Commission's draft Administrative Justice Bill was largely accepted by Cabinet, the Parliamentary Portfolio Committee on Justice and Constitutional Development ('the Portfolio Committee') made a significant number of changes.[1] It appears that the changes made by the Portfolio Committee, particularly in the period shortly before the finalisation of PAJA, were intended to narrow the scope for judicial scrutiny of the administration.[2] The Committee, in particular, added a series of limitations to the definition (such as the requirements of a 'decision', 'adversely affects the rights of any person' and 'direct, external legal effect'). The result is a very complex and, on its face, narrow definition. As the Supreme Court of Appeal has remarked: '[t]he cumbersome definition [of administrative action] in PAJA serves not so much as to attribute meaning to the term as to limit its meaning by surrounding it within a palisade of qualifications'.[3]

Despite these problematic aspects of PAJA, it is worthwhile reiterating that an approach to interpreting PAJA properly mindful of the doctrine of separation of powers requires a court to respect the drafting choices of the legislature, while always ensuring that its provisions (including the definition of administrative action) are interpreted insofar as possible in a manner that is consistent with FC s 33. As noted above, the Constitutional Court has indicated that the correct approach to determining whether conduct amounts to administrative action is to assess whether it is 'administrative action' for purposes of FC s 33 and, if so, whether PAJA nevertheless excludes it.[4] The FC s 33 jurisprudence discussed

[1] For a useful discussion of the process of drafting PAJA, including a table comparing the wording of the definition of 'administrative action' in the various drafts, see Currie *PAJA* (supra) at 18–22.

[2] Ibid at 21 ftn 80.

[3] *Grey's Marine* (supra) at para 21. See also Hoexter *Administrative Law* (supra) at 185 (Hoexter agrees: 'The definition of administrative action in the Act is both extremely narrow and highly convoluted. Indeed, one feels that the legislature could hardly have made it more so'.) See also Hoexter 'Administrative Action' (supra) at 303 ('The statutory definition seems parsimonious, unnecessarily complicated and probably as unfriendly to users as it is possible to be'.) See also *Sebenza* (supra) at para 21.

[4] See § 63.3*(a)* supra. Certain statements of the Constitutional Court indicate that the meaning of 'administrative action' in PAJA cannot extend beyond that contemplated in FC s 33, and that a finding that conduct does not amount to 'administrative action' under FC s 33 is thus the end of the PAJA enquiry. See Ngcobo J, on behalf of a minority of judges in *Sidumo* (supra) at para 240 and, on behalf of a majority of judges, in *Chirwa* (supra) at para 150. See also Sachs J in *New Clicks* (supra) at para 607. The correctness of this approach is open to question. Although PAJA is intended to give effect to the constitutional right to just administrative action, there would seem to be no legal barrier to Parliament deciding to extend the scope of administrative review so as to cover a wider range of conduct than that contemplated in FC s 33 (eg to extend the reach of administrative justice to private decision-makers). At least absent another conflicting scheme of constitutional accountability (see, eg, *Independent Newspapers*), why should Parliament not be allowed to be expansive in its definition of administrative action? Perhaps the better interpretation of these dicta is that they only serve to reflect that a decision that is not of an administrative nature in terms of the constitutional jurisprudence will not amount to administrative action under PAJA (by virtue of the fact that the requirement of a decision 'of an administrative nature' is included in PAJA's definition). See § 63.3*(c)*(ii) infra.

above thus continues to play a significant role in interpreting the meaning of 'administrative action' under PAJA. In addition, to the extent that PAJA adopts a more restrictive definition of 'administrative action', the constitutional right could be used to challenge PAJA as failing to give effect to the constitutional right.

Section 1 of PAJA sets out the definition of administrative action for purposes of the Act.[1] This definition, when read with the definition of a 'decision',[2] essentially comprises six elements: (1) a decision of an administrative nature; (2) made in terms of an empowering provision (or the Final Constitution, a provincial constitution or legislation); (3) not specifically excluded from the definition; (4) made by an organ of state or by a private person exercising a public power or performing a public function; (5) that adversely affects rights; and (6) that has a direct external legal effect.[3] The first four elements relate to the nature of

[1] Administrative action is defined as 'any decision taken, or any failure to take a decision, by —
(a) an organ of state, when —
(i) exercising a power in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation; or
(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include —
(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)*(a)*, *(b)*, *(e)*, *(d)*, *(f)*, *(g)*, *(h)*, *(i)* and *(k)*, 85(2)*(b)*, *(c)*, *(d)* and *(e)*, 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;
(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)*(d)*, *(e)* and *(f)*, 126, 127(2), 132(2), 133(3)*(b)*, 137, 138, 139 and 145(1) of the Constitution;
(cc) the executive powers or functions of a municipal council;
(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;
(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
(ff) a decision to institute or continue a prosecution;
(gg) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission;
(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or
(ii) any decision taken, or failure to take a decision, in terms of section 4(1).'

[2] A 'decision' is defined in s 1 of PAJA as 'any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to
(a) making, suspending, revoking or refusing to make an order, award or determination;
(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
(d) imposing a condition or restriction;
(e) making a declaration, demand or requirement;
(f) retaining, or refusing to deliver up, an article; or
(g) doing or refusing to do any other act or thing of an administrative nature,
and a reference to a failure to take a decision must be construed accordingly.'

[3] This division of the PAJA definition into six elements draws down on Currie & Klaaren's *Benchbook*. See *Benchbook* (supra) at 40–82.

action, while the fifth and sixth relate to the effect of the action (i.e. the so-called 'impact threshold').[1]

The purpose of this portion of the chapter is not to replicate the texts that provide a detailed commentary on the meaning of 'administrative action' under PAJA and the growing body of cases interpreting PAJA.[2] It is, rather, to focus on those issues that raise fundamental questions about PAJA's scope and its constitutionality.

(ii) *A decision of an administrative nature*

The first element of the PAJA definition of administrative action is that it must be a decision 'of an administrative nature'. In our view, this is no more than an incorporation of the jurisprudence of the Constitutional Court discussed above.[3] The first element embraces all exercises of public power other than legislative action, judicial action, broad policy-making decisions and certain decisions in the context of public sector employment relations.

As we have seen above in the discussion of FC s 33, a crucial question is whether PAJA applies to administrative rule-making such as delegated or subordinate legislation (usually taking the form of regulations).[4] If one accepts, as we argue, that rule-making amounts to administrative action for purposes of FC s 33, then the correct question is therefore whether PAJA nevertheless excludes it. While this question was left open by the Constitutional Court in *Eisenberg*, several judges confronted the issue in *New Clicks*. Chaskalson CJ held that all regulation-making amounts to administrative action under PAJA and Ngcobo J found that the particular regulations at issue in that case amounted to administrative action (ie regulations that are inextricably linked to the recommendation from which they emanated).[5]

In coming to this conclusion, Chaskalson CJ made four important points that have a bearing upon the interpretation of PAJA's definition of 'administrative action'. First, the executive power of implementing legislation as contemplated in FC s 85(2)*(a)* is omitted from the list of executive powers expressly excluded from PAJA's definition of administrative action.[6] Second, although the making of

[1] See De Ville *Judicial Review* (supra) at 37.

[2] For detailed commentaries on the scope of 'administrative action' under PAJA, see Currie *The PAJA* (supra) 42–91; Currie & Klaaren *Benchbook* (supra) 34–86; Hoexter *Administrative Law* (supra) 184–222; De Ville *Judicial Review* (supra) 35–87; Burns & Beukes *Administrative Law* (supra) 107–149.

[3] See § 63.3*(b)*(ii) to *(v)* supra.

[4] See § 63.3*(b)*(vi) supra. The Law Commission's draft Bill contained a definition of a 'rule' and specifically included this within the definition of administrative action. Nevertheless, the Portfolio Committee deleted this definition and many of the provisions relating to rule-making. The decision to delete these provisions from PAJA was apparently based in part on the Australian jurisprudence that a 'decision' does not include rule-making. See Currie & Klaaren *Benchbook* (supra) at 83–84.

[5] See § 63.3*(b)*(vi) supra.

[6] *New Clicks* (supra) at paras 123–126. See *New Clicks* at para 461 (As Ngcobo J (whose reasoning is slightly different, though complementary, to that of Chaskalson CJ on this score) states: 'The conclusion that the deliberate exclusion of implementation of legislation from the list of executive powers or functions that do not fall within the ambit of PAJA was intended to bring those powers or functions within the ambit of PAJA is irresistible.')

regulations is not referred to in the definition of 'decision', the references in this definition to '*any* decision of an administrative nature' and 'doing or refusing to do *any* other act or thing of an administrative nature'[1] bring the making of regulations within the meaning of this definition.[2] Third, the definitions in PAJA must, in the case of doubt, be construed in a manner that is consistent with FC s 33: FC s 33, according to Chaskalson CJ, speaks to rule-making.[3] Finally, the inclusion of s 4 in PAJA, which provides for procedural fairness for administrative action affecting the public, suggests that regulations, 'the most common form of administrative action affecting the rights of the public', are subject to review under PAJA.[4]

(iii) *Made in terms of an empowering provision (or the Constitution, a provincial constitution or legislation)*

The second element of PAJA's definition of administrative action is that it must be made 'in terms of an empowering provision' or, as we explain below, 'in terms of the Constitution, a provincial constitution or legislation'. The definition of 'empowering provision' is extremely broad and includes 'a law, a rule of common law, customary law' or 'an agreement, instrument or other document in terms of which an administrative action was purportedly taken'.

The use of the phrase 'an empowering provision' in PAJA's definition of 'administrative action' and 'decision' is odd.[5] The phrase is used in the definition of 'decision' in a manner that suggests that it applies to all types of administrative action, i.e. the opening words of this definition read 'any decision of an administrative nature made, proposed to be made, or required to be made … under an empowering provision'. The definition of 'administrative action', on the other hand, only uses the phrase to qualify the definition insofar as it applies to the exercise of a public power or public function by a natural or juristic person *other than an organ of state*.[6] The phrases that are used to qualify the exercise of public powers and functions of an organ of state are rather 'in terms of the Constitution or a provincial constitution'[7] or 'in terms of any legislation'.[8]

[1] See para *(g)* of PAJA's definition of 'decision'.
[2] *New Clicks* (supra) at para 128. See also *New Clicks* at para 467 (Ngcobo J).
[3] At para 128.
[4] At para 133. See, however, Sachs J in *New Clicks* (supra) at paras 599–606 (Points to various provisions of PAJA in support of his conclusion that PAJA does not apply to rule-making, but does nonetheless apply to the making of one of the regulations at issue in this case (the specific determination of a dispensing fee). As discussed above, Sachs J is of the view that rule-making should rather fall to be scrutinised under an expanded notion of legality, while five judges in *New Clicks* did not consider the question of whether the Pricing Regulations amount to administrative action.) See § 63.3*(b)*(vi) supra.
[5] This phrase was included for the first time in the drafting process by the Parliamentary Portfolio Committee.
[6] See para *(b)* of the definition of 'administrative action'.
[7] See para *(a)*(i) of the definition of 'administrative action'.
[8] See para *(a)*(ii) of the definition of 'administrative action'.

In light of the very broad definition of 'empowering provision', this drafting discrepancy suggests that the scope of administrative action is, in some respects, narrower in respect of organs of state than it is in respect of non-organs of state. Such an inversion of public power and private power does not make sense. It cannot be that the reach of administrative justice is narrower in relation to government and organs of state than it is in relation to private entities.

It has been suggested that the phrases 'in terms of the Constitution or a provincial constitution' and 'in terms of legislation' are superfluous. These legal sources of power are, in any event, covered by the phrase 'empowering provision', and most commentators seem to express the view that the requirement of an 'empowering provision' should apply equally to organs of state and non-organs of state.[1] While this reading is artificial, it has the attraction of avoiding the anomaly of the scope of administrative action being broader in relation to non-organs of state than organs of state.[2]

The dilemma comes into sharp focus in the minority judgment of Langa CJ in *Chirwa*. The Chief Justice concludes that one of the bases for finding that the decision to dismiss the employee of the Transnet Pension Fund does not amount to administrative action under PAJA is that decision was not taken 'in terms of legislation', but rather in terms of the contract of employment.[3] To the extent that the minority in *Chirwa* is suggesting that, even though the power of dismissal may be public,[4] the fact that the decision was not taken in terms of legislation takes it out of the realm of administrative action, this suggestion is surprising. It is anomalous to find that a decision of an organ of state falters at the 'administrative action' threshold if it is not taken in terms of legislation, whereas the contract of employment would undoubtedly amount to an 'empowering provision' under PAJA should the entity in question be a private entity.[5] Such a result should be avoided.

It seems to us that another potential route of avoiding the absurdity described above, but that is more consistent with the text of PAJA than simply stating that the 'empowering provision' requirement applies to organs of state and non-organs of state alike, is to adopt the following two-step approach. Our analysis incorporates constitutional organ of state jurisprudence.[6] First, it could argued

[1] See Currie & Klaaren *Benchbook* (supra) at 40–1; De Ville *Judicial Review* (supra) at 46; Hoexter *Administrative Law* (supra) at 191–2; Currie *The PAJA* (supra) at 60.

[2] This position accords with the principle of statutory interpretation that the legislature did not intend that legislation would result in an absurdity. See *Walele* (supra) para 37. See also L du Plessis *Re-Interpretation of Statutes* (2002) at 162–164. Since the conflict here is between two definitions at the equivalent level of generality, the approach adopted by O'Regan ADCJ in *Walele* (at para 126) would appear not to apply.

[3] *Chirwa* (supra) at paras 182–185.

[4] Langa CJ goes on to find that the dismissal in this particular case was the exercise of private rather than public power. Ibid at para 194.

[5] The definition of 'empowering provision' expressly includes 'an agreement'.

[6] For more on the meaning of organ of state under FC s 239, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31.

that, in relation to bodies that qualify as 'organs of state' in terms of paragraph *(b)* of the definition in FC s 239,[1] such bodies amount to 'organs of state' only insofar as they exercise powers or perform functions in terms of the Constitution, a provincial constitution or legislation.[2] If they do not exercise powers in terms of such instruments, then they should then be judged according to paragraph *(b)* of the PAJA definition of 'administrative action' (i.e. do they exercise a public power or function in terms of an 'empowering provision'?). Such an approach effectively negates the 'Constitution or provincial constitution' or 'legislation' requirement in relation to this category of organ of state. This conclusion then leaves entities that are classified as organs of state by virtue of paragraph *(a)* of the definition in FC s 239, namely, a 'department of state or administration in the national, provincial or local sphere of government'.[3] The second leg of the argument is that, in relation to these bodies, any exercise of public power or performance of a public function by these entities necessarily takes place, directly or indirectly, in terms of the Final Constitution, a provincial constitution or legislation. We note that, although the decision of the majority of the Constitutional Court in *Chirwa* does not deal with the application of PAJA, it is explicitly consistent with the broad approach we suggest here. In this regard, Ngcobo J stated: '[a]s a public authority, [Transnet's] decision to dismiss necessarily involves the exercise of public power and, "that power is always sourced in statutory provision, whether general or specific, and, behind it, the Constitution."'.[4]

Lastly, it may be important to note that the definition of 'empowering provision' includes the phrase 'was purportedly taken'. Administrative action therefore includes acts that go beyond the power of the administrator. Exercises of public power are often challenged on the grounds that they were not made in terms of an empowering provision and are thus *ultra vires*. It would be nonsensical to argue that, due to its *ultra vires* nature, such action was not taken 'in terms of an empowering provision' and therefore does not amount to administrative action.[5]

[1] That is, any functionary or institution 'exercising a power or performing a function in terms of the Constitution or a provincial constitution' or 'exercising a public power or performing a public function in terms of any legislation'.

[2] This interpretation of the definition of organ of state in FC s 239 is supported by the use of the words 'exercising' and 'performing' in paragraph *(b)* of the definition.

[3] The difficulty is that entities and functionaries falling within this category of organs of state are organs of state *per se*. Their status cannot vary depending on the function that they perform. The dilemma that litigants have in challenging decisions of these entities or functionaries is reflected in the following statement in *Sebenza*. *Sebenza* (supra) at para 20 ('The applicant contended that the Minister's decision constituted administrative action as defined in ether s 1*(a)*(ii) or 1*(b)* of the PAJA. Since the first subsection relates to a decision taken by "an organ of State" and the second to a natural or juristic person other than an organ of State, the applicant cannot have it both ways. The Minister must either be an organ of State or not. Since she is sued in her representative capacity and having regard to the wide definition of an "organ of State" in s 239 of the Constitution, it would seem that s 1*(a)*(ii) is applicable.')

[4] See *Chirwa* (supra) at para 138, quoting Cameron JA in *Chirwa (SCA)* (supra) at para 52. Langa CJ disagrees with this approach. *Chirwa* (supra) at para 183. The difficulty with the argument we advance here is that it appears that organs of state do occasionally exercise public power without doing so in terms of either legislation or a constitution. See *Kyalami Ridge* (supra) at paras 33–48.

[5] See *Tirfu Raiders* (supra) at para 30. But see *Marais v Democratic Alliance* 2002 (2) BCLR 171 (C) at para 55.

(iv) *Specific exclusions from the definition of administrative action*

The definition of administrative action in PAJA contains a number of specific exclusions. These exclusions are, broadly speaking, as follows: executive powers or functions of the national executive, a provincial executive and a municipal council; legislative functions of Parliament, a provincial legislature or a municipal council; judicial functions of a judicial officer (including a judge or magistrate); judicial functions of a Special Tribunal and a traditional leader under customary law or any other law; decisions to institute or continue prosecutions; decisions relating to any aspect regarding the appointment of a judicial officer by the Judicial Service Commission; decisions in terms of PAIA; and a decision in terms of s 4(1) of PAJA.[1]

A number of these exclusions are based on, and consistent with, the categories of public power excluded from the meaning of administrative action in the Constitutional Court's jurisprudence.[2] For example, the exclusion of legislative acts of a municipal council in paragraph (*dd)* flows from the decision in *Fedsure*,[3] while the exclusion of the judicial functions of a judicial officer in paragraph (*ee*) is consistent with *Nel*.[4]

The first two exclusions in paragraphs (*aa*) and (*bb*) engage the executive powers or functions of the national executive and provincial executive and include a list of constitutional powers and functions that are specifically excluded.[5] It is important to ensure that these powers and functions are interpreted in a manner that ensures that only executive policy decisions (or matters involving high political judgment) are excluded.[6]

A similar issue arises in relation to the exclusion in paragraph (*cc*) of the executive powers or functions of a municipal council. This exclusion should be

[1] For a detailed discussion of these specific exclusions, see Currie & Klaaren *Benchbook* (supra) at 53–69; Currie *PAJA* (supra) at 60–75; Hoexter *Administrative Law* (supra) at 210–216; Burns & Beukes *Administrative Law* (supra) at 113–128.

[2] These express exclusions are not strictly speaking necessary as these decisions would in any event not amount to decisions 'of an administrative nature' for purposes of PAJA. See § 63.3*(c)*(ii) supra. These exclusions also do not limit the FC s 33 right and thus need not be scrutinised under the FC s 36(1) limitations enquiry.

[3] See § 63.3*(b)*(ii) supra.

[4] See § 63.3*(b)*(iv) supra.

[5] In *New Clicks,* Ngcobo J (with whom Langa DCJ and Van der Westhuizen J concurs) holds that the listed exclusions in paragraph (*aa*) are exhaustive. *New Clicks* (supra) at paras 453–460. In other words, the only executive powers and functions excluded under paragraphs (*aa*) and (*bb*) are those contemplated in the enumerated sections. See Burns & Beukes *Administrative Law* (supra) at 114 (Take the view that if a power or function is not specifically listed, it is not excluded from the meaning of administrative action.) But see Hoexter *Administrative Law* (supra) at 210 (States that the powers and functions listed in these paragraphs are not exhaustive.) In our view, since the exclusion of some non-enumerated categories also flows from the constitutional jurisprudence, it is the non-exhaustive interpretation that is to be preferred.

[6] Such an approach appears to be consistent with *Masetlha*. In assessing whether the President's power to dismiss the head of the NIA fell within the ambit of the exclusion of the President's performance of 'any other executive function provided for in the Constitution or national legislation' (paragraph (*aa*) of PAJA's definition of 'administrative action', read with s 85(2)*(e)* of the Constitution), Moseneke J emphasised that the President's special power to appoint is expressly conferred in the Constitution, that the power to dismiss is a corollary of that constitutional power and that it would not be appropriate to constrain the exercise of this executive power to the requirements of procedural fairness.

interpreted narrowly, and in accordance with the jurisprudence of the Constitutional Court,[1] to include only the deliberative exercise by municipal councils of decision-making power in the realm of broad policy-making or legislating and not the actions of municipal councils in implementing provincial legislation and national legislation.[2] If this exclusion is not given such a meaning, it may well be unconstitutional.

Paragraphs (*dd*) and (*ee*) exclude the legislative functions of Parliament, provincial legislatures and municipal councils as well as the judicial functions of a judicial officer of a court[3] and a Special Tribunal[4] and a traditional leader under customary law or any other law. The exclusion of the legislative functions of legislatures and judicial functions of judicial officers is based on the separation of powers doctrine and is consistent with the jurisprudence of the Constitutional Court on the distinction between administrative action, on the one hand, and legislative and judicial action, on the other. As the majority judgment in *Sidumo* makes clear, what matters is not only the nature of the function (administrative, legislative or adjudicative) but also the institution that is performing the function.[5]

As a number of authors have pointed out, the exclusion of the judicial functions of traditional leaders is, however, controversial. The legal safeguards of independence, impartiality and accountability are less extensive in relation to these functionaries.[6]

The remaining exclusions from the ambit of PAJA are pragmatic, legislative choices and, as such, should be narrowly interpreted in order to survive constitutional scrutiny.[7] We briefly discuss each of these exclusions in turn.

Paragraph *(ff)* stipulates that administrative action does not include 'a decision to institute or continue a prosecution'. This pragmatic exception is justified on the grounds that the criminal justice system would be delayed by administrative reviews before criminal proceedings have even commenced. The accused is, in any event, given an opportunity during the course of the criminal trial to address

[1] See § 63.3*(b)*(ii) and (iii).

[2] This interpretation is consistent with the use of the same phrase 'executive powers or functions' in paragraphs (*aa*) and (*bb*) followed by a list of powers and functions under the Final Constitution that are related to broad policy making or political judgment. This view is shared by a number of authors. See R Pfaff & H Schneider 'The Promotion of Administrative Justice Act from a Germen Perspective' (2001) 17 *SAJHR* 59 ('German Perspective') at 77; Currie & Klaaren *Benchbook* (supra) at 64–65; Hoexter *Administrative Law* (supra) at 212; and Burns & Beukes *Administrative Law* (supra) at 118–119.

[3] In terms of FC s 166, 'court' would encompass the Constitutional Court, the Supreme Court of Appeal, the High Courts, the Magistrates' Courts and 'any other court established or recognised in terms of an Act of Parliament' (the latter would include, for example, the Labour Appeal Court and the Competition Appeal Court).

[4] Tribunals may be established under s 2 of the Special Investigating Units and Special Tribunals Act 74 of 1996.

[5] But see the minority judgment in *Sidumo* (Ngcobo J).

[6] See Currie & Klaaren *Benchbook* (supra) at 66–67. For an updated discussion of the exclusion of judicial functions of traditional leaders, see Currie *The PAJA* (supra) at 71–72. For a discussion of the judicial powers of traditional leaders, see T Bennett & C Murray 'Traditional Leaders' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) § 26.6*(c)*(i).

[7] To the extent that the excluded actions amount to 'administrative action' under FC s 33, the exclusion of these decisions in PAJA would, if challenged, be subjected to the limitations test under FC s 36(1).

the case against him or her.[1] The extension of this exclusion to a decision not to prosecute or a decision to discontinue a prosecution is hotly contested.[2] Indeed, it has been discussed in the high-profile (and high-impact) judgment by Nicholson J in *Zuma v NDPP*.[3] It seems somewhat anomalous to have full-blown administrative accountability for a decision not to prosecute but not for a decision to prosecute, especially in the light of the protection offered in this area by the more specific legal regime relating to prosecution.[4] Nevertheless, it seems to us that the language of paragraph *(ff)* of PAJA, coupled with the need to interpret PAJA's exclusions in a restrictive manner, means that this exclusion does not extend to decisions not to prosecute or to discontinue prosecutions.[5] Such decisions are therefore reviewable under PAJA, where they meet the other requirements for 'administrative action'.

The next exclusion from the ambit of administrative action concerns decisions of the Judicial Services Commission ('the JSC') 'relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person'.[6] The JSC is a public entity that exercises powers granted by legislation and, although certain of its members are judges, it does not exercise judicial functions.

[1] A decision to institute a prosecution is thus similar to a decision to institute civil proceedings or, for example, a decision by the Competition Commission to refer a complaint to the Competition Tribunal, which decisions have been held to lack the requisite finality for a classification as administrative action. See *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Limited* 2001 (4) SA 661 (W), 2001 (4) BCLR 344 (W) ('*Peter Klein*'); *Norvartis SA (Pty) Limited and Others v Competition Commission and Others* (CT 22/CR/B/Jun 01, 2.7.2001) at paras 40–61; *Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Limited and Another* 2003 (3) SA 64 (SCA), [2003] 1 All SA 82 (SCA) at paras 16 and 17; and *Telkom SA Limited v The Competition Commission of South Africa & Another*, unreported judgment of the Transvaal Provincial Division under case no. 44239/04 (20 June 2008). See also *Podlas v Cohen No & Others* 1994 (4) SA 662 (T), 1994 (3) BCLR 137 (T) at 675 and *Park-Ross v Director, Office for Serious Economic Offences* 1998 (1) SA 108 (C) at para 18.

[2] A number of authors are of the view that this exclusion from PAJA does not apply to a decision not to prosecute: Currie *The PAJA* (supra) at 73; Hoexter *Administrative Law* (supra) at 213–214 (noting the South African Law Reform Commission rationale that whereas a positive decision to prosecute would lead to judicial accountability for that decision in a trial, a negative decision would not); De Ville *Judicial Review* (supra) at 65; Burns & Beukes *Administrative Law* (supra) at 126. Schneider & Pfaff (supra) express the opposite view (at 22). One should also note that unlike an accused who is prosecuted, a decision not to prosecute has a final effect in respect of the victim of a crime. The question of the extension of the exclusion was left open by Constitutional Court in *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) ('*Kaunda*') at para 84.

[3] The alternative to the inclusion of a decision not to prosecute is its review on 'mere' grounds of legality. Such a review regime may well accord with the Constitutional Court's seeming approval of the cautious approach to this issue in the United Kingdom in *Kaunda. Kaunda* (supra) at para 84 n64.

[4] See FC s 179(5). For more on the statutory framework and case law, see Currie *The PAJA* (supra) at 73 and Hoexter *Administrative Law* (supra) at 214 fn 340.

[5] A potential argument excluding the specialised area of prosecutions from administrative action in a parallel to the LRA, as understood by the Constitutional Court in *Sidumo,* could be constructed but would rely upon parallel grounding in the constitutional scheme of accountability (ie the FC s 33 regime).

[6] Paragraph (*gg*) of the definition of 'administrative action'. Note that the action of the JSC relating to misconduct of judges would not fall within this PAJA exclusion.

Some authors express doubts as to the justifiability of this exclusion.[1] Jacques De Ville is of the view that it is a justifiable exception on the basis that decisions on the appointment of judges are unsuitable for review on administrative law grounds.[2] Although the constitutionality of this exclusion is not free from doubt, the facts are that: *(a)* the JSC's powers to nominate judges, and to consult with and advise the President on the appointment of judges, are derived directly from the Final Constitution;[3] and *(b)* the appointment of judges is an inherently political decision, with considerable policy attributes, that is ultimately taken by the President in terms of a constitutional power. From these two facts it follows that this exclusion would survive constitutional scrutiny.

Paragraph (*ii*) of the definition excludes a decision taken, or a failure to take a decision, in terms of PAIA. This exception is justified in light of the specific internal appeal and statutory review mechanisms, as well as the reason-giving requirements, provided for in PAIA.[4]

The final express exclusion from the definition of 'administrative action' is any decision, or failure to take a decision, in terms of s 4(1) of PAJA. As discussed below, s 4(1) states that, in the case of administrative action affecting the rights of the public, an administrator *must* decide to follow one of a number of procedures for giving effect to procedural fairness under s 4(1) (e.g. to follow a notice and comment procedure or to hold a public inquiry). The full extent of this exclusion is that the administrator's choice of procedure under s 4(1) does not amount to administrative action, ie that the administrators choice of procedure is final.[5] The administrator is still obliged to make a decision and to follow one of the processes set out in s 4(1).[6] The subsequent conduct of the chosen process will be subject to administrative law review.[7]

(v) *A decision of an organ of state or person exercising public power or performing a public function*

In order to qualify as administrative action in terms of PAJA, the decision must be made by an organ of state or by another person exercising a public power or performing a public function. The crucial question that this element of the

[1] See Currie & Klaaren *Benchbook* (supra) at 68; Currie *The PAJA* (supra) at 73; Pfaff & Schneider (supra) at 77 (Describe the exclusion as 'unfortunate'); Hoexter *Administrative Law* (supra) at 214 (Describes paragraph (*gg*) as an 'enigmatic exclusion' and remarks that it may seem 'somewhat whimsical.')

[2] See De Ville *Judicial Review* (supra) at 66.

[3] FC ss 174(3), (4) and (6).

[4] It has been argued, however, that this should only be the case if the review of decisions by statutory bodies under PAIA is at least as extensive as that under PAJA (see I Currie & J Klaaren *The Promotion of Access to Information Act Commentary* 2002 at 202–209). In any case, this exclusion may have constitutional grounding in the competence asserted by FC s 32.

[5] *New Clicks* (supra) at para 132 (Chaskalson CJ) and *New Clicks* at para 468 (Ngcobo J).

[6] This follows from the principle of legality, coupled with the use of the mandatory word 'must' in s 4(1).

[7] Chaskalson CJ in *New Clicks* (supra) at para 132.

definition raises is whether the relevant actor is exercising a *public* power or performing a *public* function. Since the placement of this requirement in PAJA raises no issues apart from the understanding of this requirement in terms of FC s 33, the detailed discussion above on the distinction between public and private powers or functions for purposes of FC s 33 applies equally to this element of PAJA's definition of administrative action.[1]

(vi) *The requirement of adversely affecting rights*

As we have already noted, the most controversial element of the definition of administrative action in PAJA has been the requirement that the decision must 'adversely affect the rights of any person'. This requirement, together with the requirement of a 'direct, external legal affect', imposes an impact threshold[2] on the meaning of administrative action. This impact threshold, on the face of it, greatly restricts the scope of PAJA.[3]

It may be argued that the 'adversely affecting rights' requirement is unconstitutional. It fails to give effect to the constitutional right to just administrative action by restricting the meaning of administrative action to a class of action which is narrower than that contemplated in FC s 33. Depending on the meaning given to this phrase in PAJA, this argument may well succeed. In our view, this argument is strengthened by the fact that, while the right to written reasons in FC s 33(2) applies only to persons 'whose rights have been adversely affected' by administrative action, no similar limitation is placed on the application of FC s 33(1). If FC s 33(1) contemplates that administrative action arises only in circumstances where rights have been adversely affected, this qualification in FC s 33(2) would be unnecessary.[4]

We now turn to consider the meaning of the PAJA requirement that the decision 'adversely affects the rights of any person'. We then return to the question of its constitutionality below.

The word 'affects' is capable of two meanings — 'deprived' and 'determined'. If the former definition is to be preferred, PAJA will cover a narrow class of administrative action. If the latter is given precedence, then it will cover a relatively broad class of administrative action. For example, if 'affects' means 'deprived', a person whose licence is prematurely terminated will be protected by the rules of administrative justice but a first-time applicant for a licence will

[1] See § 63.3*(b)*(viii) and (ix) supra.

[2] The term 'impact threshold' to describe these two elements of the definition of 'administrative action' is used in De Ville *Judicial Review* (supra) at 37.

[3] As stated above, the 'adversely affecting rights' and 'direct, external legal effect' requirements were inserted during the drafting process by the Portfolio Committee and were not contained in the Law Commission's draft Bill. In fact, the draft Bill did not contain any impact threshold requirement; it defined administrative action with reference to its administrative character rather than its effect.

[4] Hoexter 'Future of Judicial Review' (supra) at 514 criticises this restriction on the definition of administrative action, stating as follows: 'This is a startling departure both from the definition proposed by the South African Law Commission and from the common law, and in my view its effect is to narrow the ambit of administrative action beyond what is acceptable. . . . On this score alone one must harbour the gravest doubts about the constitutionality of s 1 of the Act.'

not. This dispute between the determination theory and the deprivation theory of administrative justice is not new to our law and had already generated a considerable amount of debate in relation to the scope of natural justice prior to the finalisation of the Interim Constitution.[1]

While it is possible that the inclusion of the word 'adversely' indicates the deprivation theory, this interpretation would give administrative action such a limited meaning as to render PAJA unconstitutional. To hold that administrative justice only applies to decisions which deprive a person of his or her rights cannot be said to give effect to the constitutional right to just administrative action.[2] Such an interpretation should thus be avoided. Our courts should rather adopt the determination theory in interpreting this requirement of PAJA.[3] Although our courts have not, to date, expressly grappled with the deprivation versus determination theories in this context, the decision by the majority of the Constitutional Court in *Union of Refugee Women* clearly endorses the determination theory in the context of PAJA's definition of administrative action.[4]

Even if one accepts that the word 'affects' in the phrase 'adversely affects the rights of any person' means 'determines', the difficulty still remains as to how to

[1] See, for example, E Mureinik 'A Bridge to Where?: Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31. See also E Mureinik, 'Admin justice in the BoR' (6 July 1994, Unpublished memorandum on file with authors); E Mureinik 'Reconsidering Review: Participation and Accountability' (1993) *Acta Juridica* 35, 36–40 ('Reconsidering Review'). It is decidedly odd that this debate now takes place in the context of defining 'administrative action' as the threshold requirement for the application of PAJA (ie as a threshold requirement for the application of administrative review). It has, historically, been a debate attaching to the scope of natural justice (which is generally considered to have a more limited scope than the reach of administrative review), in which a compromise was found in the form of the legitimate expectation doctrine. See § 63.5*(d)*(ii) infra; *Laubscher v Native Commissioner, Piet Retief* 1958 (1) SA 546, 549 (A)(Indicates that natural justice attaches to deprivations of rights); *Hack v Venterspost Municipality & others* 1950 (1) SA 172, 189–90 (W)(Indicates that natural justice attaches to determinations of rights.) But see Currie & Klaaren *Benchbook* (supra) at 78–79 (Interpret the debate as having been appropriately and entirely displaced by a regime of constitutional supremacy, particularly in view of the two-stage theory of fundamental rights and limitations analysis.)

[2] See Hoexter 'Future of Judicial Review' (supra) at 516 (states that the deprivation theory 'clearly creates an unacceptably high threshold for admission to the category of "administrative action"'.)

[3] Such an approach, when combined with the other limitations contained in PAJA, will, in effect, result in the adoption of Mureinik's provisional determination theory (see Mureinik 'Reconsidering Review' (supra) at 37; and Currie & Klaaren *Benchbook* (supra) at 78–9). Courts will, in practice, work in from the determination theory by accepting that all public power which determines rights will constitute administrative action, unless the other elements of PAJA's definition are not met.

[4] *Union of Refugee Women & Others v Director: Private Security Industry Regulatory Authority & Others* 2007 (4) SA 395 (CC) at para 70 (Kondile AJ)('The refusal to register an applicant as a private security service provider is an adverse determination of the applicants' rights. The determination has an immediate, final and binding impact on the applicants, who have no connection with the Authority. The decisions therefore do have a direct, external legal effect and constitute administrative action in terms of PAJA.') Some support for the determination theory may also be found in the following *dictum* of Boruchowitz J in the pre-PAJA case of *Association of Chartered Certified Accountants v Chairman, Public Accountants' and Auditors' Board* 2001 (2) SA 980 (W) at 997, in holding that the relevant decision amounted to administrative action: '[T]he Board's decision has plainly affected the rights and interests of the applicant. It has *determined* its rights' (our emphasis). See also the decision of the SCA in *Grey's Marine* (supra) at para 23, stating that the administrative action must have 'capacity to affect rights'; and *Minister of Defence and Others v Dunn* 2007 (6) SA 52 (SCA)('*Dunn*') at para 4. The determination theory also enjoys extensive academic support. See, for example, Hoexter *Administrative Law* (supra) at 200; Currie & Klaaren *Benchbook* (supra) at 77; Currie *The PAJA* (supra) at 82.

interpret the other two key words, 'adversely' and 'rights'. The most significant decision on the meaning of this requirement in PAJA is that of the Supreme Court of Appeal in *Grey's Marine*. In dealing with the question whether a decision by the Minister of Public Works to grant a lease over the quayside in Hout Bay amounted to administrative action, Nugent JA remarked as follows on behalf of a unanimous SCA:

> While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that a literal meaning could have been intended. For administrative action to be characterized by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1) [of PAJA], which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct, external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications operating in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.[1]

Although this passage can be read to indicate that the test for the 'adversely affecting rights' requirement is whether the decision has the capacity to affect legal rights (which we take as a synonym for 'determines rights'), other statements in the judgment suggest that the *Grey's Marine* test is whether the decision has a a direct and immediate impact on individuals or groups.[2] Most dramatically, the SCA appears completely to disregard the word 'adversely' in the phrase 'adversely affects the rights of any person' (apparently in keeping with its view that classifying administrative action based on its effect is paradoxical). The SCA does so by basing its decision that the grant of the lease amounts to administrative action on the fact that it had direct and immediate consequences for *the lessee*.[3] As the lessee was the recipient of rights flowing from the lease, it cannot be said that the decision had an 'adverse' effect on the lessee's rights.[4]

The Court in *Grey's Marine* is not alone in disregarding the language of the PAJA phrase 'adversely affects the rights of any person'. The Constitutional Court has itself done so in a passage in *Steenkamp*. Moseneke DCJ remarks (on

[1] *Grey's Marine* (supra) at para 23.

[2] See *Grey's Marine* (supra) at paras 23, 24 and 28. Other decisions of our courts have followed this approach in *Grey's Marine* and focused on the direct and immediate impact of the decision. See *Chirwa (SCA)* (supra) at para 53; *Kiva v Minister of Correctional Services*, Unreported, Eastern Cape Local Division (27 July 2006) Case no 1453/04, [2006] JOL 188512('*Kiva*') at para 28; *Dunn* (supra) at para 4 (SCA remarked that the appointment of a person to a post in the South African National Defence Force amounted to administrative action 'even though it cannot be said to adversely affect the "right" of a person who is non-suited'). See also *Walele* (supra) at paras 27 and 31 ('There can be no doubt' that the decision to approve the building plans constitutes administrative action, despite later remarking that 'the approval could not, by itself, affect the applicant's rights.)

[3] *Grey's Marine* (supra) at para 28.

[4] See Du Plessis and Penfold 'Bill of Rights Jurisprudence' (supra) at 92–93.

behalf of the majority of the Court) that a decision to award or refuse a tender constitutes administrative action because the decision 'materially and directly affects the *legal interests or rights* of tenderers concerned'.[1] Moseneke J thus seems to ignore the legislative choice of the word 'rights' in the definition of administrative action, and adopts the position that an impact on legal *interests* is sufficient.[2] As with *Grey's Marine*, the Constitutional Court thus effectively disregards the language of PAJA and redraws the ambit of the Act.[3]

Another judicial route around the 'adversely affecting rights' requirement is to say that the term 'rights' includes the constitutional right to just administrative action. This approach was adopted by Schutz JA on behalf of the majority of the Supreme Court of Appeal in *Goodman Brothers* in the slightly different context of the constitutional right to written reasons under the Interim Constitution.[4] The problem is that, as Cora Hoexter has pointed out, this amounts to 'bootstrap' reasoning. In the PAJA context, it negates the requirement that the decision must adversely affect rights.[5] To say that the decision adversely affects the administrative rights of persons affected by it is to put the question, not to answer it.

These cases, in our view, adopt an overly artificial interpretation of PAJA's 'adversely affecting rights' requirement. If one looks back to the beginning of the process of drafting PAJA, what appears to have taken place is as follows: the Law Commission prepared a sensible, wide definition of 'administrative action'; in an effort to reduce judicial scrutiny of the administration, this definition was cut down by the Portfolio Committee, through various amendments including the introduction of the impact threshold; and the courts have subsequently clawed-back its extension by 'redrafting' the definition so as to restore administrative

[1] *Steenkamp* (supra) at para 21 (Our emphasis)(Although it may be suggested that Moseneke DCJ is referring to 'administrative action' under FC s 33 rather than PAJA, the language of this passage and the reference in ftn 15 to both s 1 of PAJA and *Grey's Marine* suggests that this is not the case.)

[2] Other courts, though not going as far as the *Steenkamp* Court, either equate rights and legitimate expectations or apparently read in that the action may affect legitimate expectations. See *Dunn v Minister of Defence* 2006 (2) SA 107 (T) para 5 (Decision is administrative action if it adversely affects 'rights and/or legitimate expectations'); and *Tirfu Raiders* (supra) at para 36 (Decision is administrative action if it affects 'rights, in the form of legitimate expectations'). For a comment on the latter case, see R Stacey 'Substantive protection of Legitimate Expectations in the Promotion of Administrative Justice Act — *Tirfu Raiders Rugby Club v South African Rugby Union*' (2006) 22 *SAJHR* 664.

[3] It may be argued that the word 'rights' has no natural limit and can bear a sufficiently broad meaning so as to encompass 'interests'. See, for example, De Ville *Judicial Review* (supra) at 53–54 (Argues that the 'adversely affecting rights' requirement simply means that the decision must have a discernable effect on an individual or group of individuals). We disagree. In our view, the terms rights, interests and legitimate expectations have meanings that are sufficiently established in our administrative law that the word 'rights' cannot simply be equated with the far broader concept of 'interests'. See Currie *The PAJA* (supra) at 82–83).

[4] *Goodman Brothers* (supra) at paras 11–12.

[5] C Hoexter 'The Current State of South African Administrative Law' in *Realising Administrative Justice* H Corder and L van der Vijver (eds) (2002) 20, 30–32 ('The Current State'). See also Hoexter *Administrative Law* (supra) at 202; Currie & Klaaren *Benchbook* (supra) at 80–81.

review to its more appropriate scope. The courts have, however, done so through an interpretation of the impact threshold which pays little attention to the language used in the statute.[1]

Although one is tempted to conclude that these judgments more appropriately delineate the scope of administrative justice than the drafters of PAJA have done and to accept these judgments as correctly proclaiming the law,[2] it is important not to lose sight of the fact that these judgments are, as a matter of constitutional principle, flawed. It is a trite principle of constitutional law, emphasised by the Constitutional Court on a number of occasions, that one can only interpret legislation in a manner which is consistent with the Final Constitution if the meaning arrived at is one that the language of the legislation is reasonably capable of bearing and is not 'unduly strained'.[3] In our view, the meanings attributed to the phrase 'adversely affects the rights of any person' in *Grey's Marine* and in *Steenkamp* are unduly strained. The courts are, in our view, effectively engaged in legislative redrafting. If PAJA's definition of 'administrative action' limits the scope of FC s 33, which we submit it does, the proper approach is to assess whether that limitation complies with the limitations clause. In this case, one must thus assess whether the 'adversely affecting rights' requirement amounts to a reasonable and justifiable limitation of FC s 33, taking into account any justification that the state advances for the narrowing of the scope of administrative action in this manner. If a court then finds that the phrase is unconstitutional, the court could apply ordinary constitutional remedies: such as striking down the definition of administrative action or engaging in severance (e.g. striking out the word 'adversely') or reading-in (e.g. reading in the word 'interests').

We can now return to the question as to whether the phrase 'adversely affects the rights of any person' amounts to a reasonable and justifiable limitation on the constitutional right. It should be borne in mind that if the determination theory applies in interpreting PAJA (as the case law, including that of the Constitutional Court, thus far indeed suggests), the restrictive impact of this phrase is significantly reduced. This restrictive impact is further reduced by interpreting 'rights' broadly in at least two respects. First, it should not be restricted to constitutional rights but should include all forms of legal rights, including statutory and common-law rights.[4] Second, O'Regan J, in examining the application of administrative justice in the Interim Constitution on behalf of the Constitutional Court,

[1] See Currie *The PAJA* (supra) at 46 ftn 9 ('One of the most problematic aspects of s 1 is that it does not mention "legal interests" but confines itself to "rights". But it is a great deal less troublesome if, as the approach in *Steenkamp* suggests, one ignores that small problem.')

[2] See, for example, Currie *The PAJA* (supra) at 79 (States that the SCA's interpretation of the 'adversely affecting rights' requirement in *Grey's Marine* 'cuts the Gordian knot created by this ill-advised insertion into the Act', and adds at 81 that the approach in *Grey's Marine* 'has considerable attraction'.)

[3] See § 63.2*(a)*(iv) supra.

[4] This approach finds support in the case law dealing with the analogous right of access to information in the Interim Constitution, which could only be invoked where it was required to exercise or protect a right. See J Klaaren and G Penfold 'Access to Information' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) § 62.7.

stated *obiter* that it 'may well be appropriate' to adopt a broader notion of 'right' than that used in private law, to include circumstances where the State has unilaterally incurred liability without establishing a contractual *nexus* between the individual and the State.[1]

If this broad meaning is given to 'rights' and the determination theory is adopted, then much of the potential unconstitutionality is alleviated. Nonetheless, we are of the view that the PAJA definition is still too narrow to comply with, and give effect to, the constitutional right to just administrative action in at least one limited respect. It would still exclude decisions that do not deprive or determine rights in an adverse manner despite the fact that such decisions may be administrative in nature, confer rights on some and impact adversely on the material interests of others (eg, the neighbouring landowners in *Bullock* or *Grey's Marine*). Cases of significant impact on the interests of third parties should constitute a category of administrative action excluded by PAJA but within constitutional purview, and which exclusion is not justifiable. Accordingly, the phrase 'adversely affects the rights of any person' is, in our view, unconstitutional as underinclusive. It seems to us that consideration should be given to removing this unconstitutionality in one of three ways: *(a)* deleting the phrase 'adversely affects the rights of any person'; *(b)* deleting the word 'adversely'; or *(c)* adding the words 'or interests' after the word 'rights'.

(vii) *A direct, external legal effect*

The final element of PAJA's definition of administrative action is that it must have 'a direct, external legal effect'. This requirement, which was yet another late addition to the Act by the Portfolio Committee, is derived from the German Federal Law of Administrative Procedure of 1976.[2] Pfaff & Schneider explain the phrase as follows:[3]

> As a general principle, . . . the decision must not only have an effect internally, ie within the sphere of public administration . . .. The purpose is to avoid legal disputes with regard to measures and actions of public authorities that may well influence the final decision, but do not determine individual rights in a binding way.

The most important implication of this definitional element is that, together with the phrase 'adversely affects the rights of any person', it introduces the concept of finality. A decision will have a direct legal effect only if it has an actual and final impact on a person's rights or interests. It therefore appears that preparatory steps and recommendations that do not have such an impact will not amount

[1] *Premier, Mpumalanga* (supra) at para 32 ftn 10.

[2] The relevant provision reads as follows: 'Administrative act is every order, decision or other sovereign measure taken by an authority for the regulation of a particular case in the sphere of public law and directed at immediate external legal consequences.'.

[3] Pfaff & Schneider (supra) at 71.

to administrative action.[1] Nevertheless, it is important to note that a preliminary or intermediate decision can still meet this requirement where it, in itself, has a material impact on individuals or groups.[2] In addition, an intermediate decision (e.g. a recommendation) can, together with the final decision that results from that intermediate decision, amount to administrative action which is reviewable as a composite whole.[3]

The phrase 'external effect' implies that the decision must have a direct impact on a person or entity other than the administrative actor. It would therefore exclude a decision of a subcommittee which makes a recommendation to the final decision-making body. The phrase should not be taken literally. If it were, then it would exclude actions which affect the members of (or the persons within) the public body itself.[4] For example, the internal transfer of a prisoner to a higher level of security has a direct, external legal effect on the relevant person and should constitute administrative action.

63.4 THE RIGHT TO LAWFUL ADMINISTRATIVE ACTION

The right to lawful administrative action was entrenched in IC s 24(*a)* and is now entrenched in FC s 32(1). While its content overlaps with the principle of legality, the right to lawful administrative action differs from that principle because it applies only to administrative action.

The content of the right to lawful administrative could be broken down and analysed in terms of two components: a prospective component and retrospective judicial review component. With respect to the first prospective component, the

[1] See, for example, *Registrar of Banks v Regal Treasury Private Bank (under curatorship) & Another (Regal Treasury Bank Holdings Ltd intervening)* 2004 (3) SA 560, 567 (W); *Sasol Oil (Pty) Ltd & Another v Metcalfe NO* 2004 (5) SA 161 (W) at para 13. This outcome may be at odds with the decision in *Nextcom Cellular (Pty) Ltd v Funde NO & Others* 2000 (4) SA 491 (T)(Coetzee AJ held that a recommendation of the South African Telecommunications Regulatory Authority to the Minister of Communications as to the award of the third cellular licence constituted a reviewable decision.) See also *Oosthuizen Transport (Pty) Limited & Others v MEC, Road Traffic Matters, Mpumalanga, & Others* 2008 (2) SA 570 (T) at paras 28–32 (Holds that a recommendation to suspend operating permits had a direct, external legal effect under PAJA, because it was a jurisdictional requirement for the suspension, the recommending body was responsible for the investigation of the matter and the recommendation was 'aimed at' affecting, and had the capacity to affect, rights.)

[2] See, eg, *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA), 1999 (8) BCLR 845 (SCA) and *South African Heritage Recourses Agency v Arniston Hotel Property (Pty) Ltd* 2007 (2) SA 461 (C) at para 24 (a provisional protection order had a 'direct, external legal effect' as it temporarily 'froze' certain property rights.)

[3] See, eg, *New Clicks* (supra) at paras 136–141.

[4] As discussed at § 63.3*(b)(v)* supra, the majority in *Chirwa* held that a decision to dismiss a public sector employee does not amount to administrative action. It is unclear whether the majority regarded these acts as internal to the administration, and therefore as lacking an external effect (this is partly explained by the fact that the majority found that the dismissal did not amount to administrative action for purposes of FC s 33 of the Constitution and thus did not consider the application of PAJA). The minority (per Langa CJ) expressly did not address whether the dismissal had an 'external' effect for purposes of PAJA. Ibid at para 181.

right — just like the principle of legality — is of immediate application.[1] Where administrative action is taken it is prospectively subject to the right of lawful administrative action. At a minimum, this component of the constitutional right serves the purpose of guarding against parliamentary ouster clauses covering administrative action. Such clauses would be invalid. Under our system of constitutional supremacy (and unlike the previous system of parliamentary sovereignty), an Act of Parliament can no longer unjustifiably oust a court's constitutional jurisdiction and deprive the courts of their review function to ensure the lawfulness of administrative action.[2] With respect to the retrospective component, the right of lawful administrative action is identified and enforced primarily through the mechanism of judicial review.[3] We focus on this second component in the pages that follow.

Both components of the right to lawful administrative action overlap with the principle of legality in relation to administrative action.[4] As noted above, this principle has been described as ensuring that the executive 'may exercise no power and perform no function beyond that conferred upon them by law'.[5] The right to lawful administrative action therefore constitutionalises the fundamental rule of administrative law that a decision-maker must act within his or her powers and must not act *ultra vires*.[6] It is clear that this right requires that an

[1] Indeed, it is presumably subject to the principle of objective constitutional invalidity. On this doctrine, see S Woolman 'Application' in in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31; M Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

[2] Parliamentary ouster clauses were, in the past, upheld in a number of cases, including *Staatspresident en Andere v United Democratic Front en 'n Ander* 1988 (4) SA 830 (A) and *Natal Indian Congress v State President & Others* 1989 (3) SA 588 (D). One could argue that the courts' general supervisory function with respect to administrative action is additionally or alternatively provided for by the right of access to court in FC s 34. See J Brickhill & A Friedman 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) § 59.4*(a)(i)*.

[3] This is not, however, exclusive. For instance, the administrative procedures of internal review and appeal are non-judicial mechanisms that would also seek to give effect to the right to lawful administrative action. See for instance the Refugees Appeal Board in the Refugees Act 130 of 1998 and s 38 of the National Health Act 61 of 2003. This body of administrative law is not currently fully-fledged or articulated but is likely to develop significantly under the Final Constitution. Note that this review is separate from the constitutionally authorised review in terms of the PAJA that a tribunal may engage in — although no such tribunals have been established or designated. See Currie *The PAJA* (supra) 154–155.

[4] See *Fedsure* (supra) at para 59. See also § 63.2*(b)* supra (Discussion of the application of this constitutional principle beyond administrative action.) Given the explicit entrenchment of the right to lawful administrative action in the specific context of administrative action, the general principle would seem to be that its protection would be at least equivalent to the protection offered by the implicit principle of legality outside of those bounds.

[5] See *Fedsure* (supra) at para 56.

[6] See *Pharmaceutical Manufacturers* (supra) at para 50 ('What would have been *ultra vires* under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality.')

administrator must act in terms of, and in accordance with, the terms of an empowering statute or other law. This right therefore prohibits a decision-maker acting beyond the terms of the relevant empowering legislation and thus outlaws action which is *ultra vires* in the narrow sense.[1]

We believe, however, that the right to lawful administrative action goes further and applies to acts that are *ultra vires* in a broader sense of that term. As Lawrence Baxter and other writers have pointed out, the traditional grounds of common-law judicial review are founded on this broad *ultra vires* principle. Where a decision-maker acts, for example, for an ulterior purpose, in bad faith, takes into account irrelevant considerations or fails to take into account relevant considerations, or makes an error of law, he or she acts beyond his or her powers.[2]

PAJA gives effect to this constitutional right to lawful administrative action principally by providing for judicial review of all administrative action in s 6 of the Act. Section 6(2) sets out a comprehensive list of grounds on which administrative action can be judicially reviewed, including: that the administrator was not authorised to take the action by the empowering provision; that the administrator acted under a delegation of power which was not authorised by the empowering provision; that a mandatory and material procedure or condition was not complied with; that the action was taken for a reason not authorised by the empowering provision; and that the action itself is not authorised by the empowering provision.[3]

While it is beyond the scope of this chapter to cover the materials interpreting each of the PAJA grounds of review, the remainder of this section is devoted to offering a constitutional perspective on these grounds. Other texts provide a view of the grounds of judicial review informed by canons of statutory interpretation.[4]

The most significantly shift is the constitutional basis for the institution of judicial review.[5] Consistent with our general approach in this chapter, we would argue that this change in the legal landscape has two particular implications: that the common law review jurisprudence may not be taken for granted, and that it

[1] See *Farjas (Pty) Ltd & Another v Regional Land Claims Commissioner; KwaZulu-Natal* 1998 (2) SA 900 (CC), 1998 (5) BCLR 579 (LCC) at para 18 (IC s 24*(a)* 'cast[s] a duty on reviewing courts to be all the more astute to ensure that public officials confine themselves strictly to the law which confers powers on them.')

[2] See Baxter *Administrative Law* (supra) 30–31. See *Estate Geekie v Union Government & Another* 1948 (2) SA 494, 502 (N)('In considering whether the proceedings of any tribunal should be set aside on the ground of illegality or irregularity, the question appears always to resolve itself into whether the tribunal acted *ultra vires* or not.')

[3] Section 6(2)*(a)(i)* and (ii), *(b)*, *(e)(i)* and *(f)(i)*. These provisions appear to provide for review for *ultra vires* in the narrow sense. In our view, the remainder of the grounds of review in s 6(2) also give effect to the right to lawful administrative action by providing that administrative action may be reviewed, for amongst other things, bias, errors of law, ulterior purpose or motive, or bad faith. All such defects in decision-making contravene the right to lawful administrative action in the broad sense.

[4] See, eg, Currie & Klaaren *Benchbook* (supra) at 150–74; and Currie *The PAJA* (supra) at 152–174.

[5] See Currie *The PAJA* (supra) at 155–156.

must be critiqued and reformulated; and, secondly, the intensity of judicial review must be evaluated in terms of the separation of powers doctrine.[1]

In respect of this latter contention, it may be appropriate to outline our view on the concept of standards of review.[2] In our view, the effect of the Final Constitution (and the entrenchment of the right to just administrative action, in particular) is not a rising tide that lifts all boats of judicial review. Its effect is not to achieve a general heightening of judicial review. Instead, the standard of intensity of judicial review of administrative action will differ according to the context. In this respect, we agree with Cora Hoexter's suggestion that there is a pressing need to develop an appropriate approach to variability. Nonetheless, this differentiation is by no means case specific and potentially casuistic — it ought nor to vary according to each and every set of circumstances.[3] In order to satisfy constitutional dictates of rationality and, insofar as possible, to provide predictability and accountability, the standard of judicial review should, we argue, differ according to general categories. For instance, decisions will need to take into account the statutory context in which they are taken and therefore vary in their degree of deference (or respect) offered to the administrators having taken the decision. While theoretically appealing, it remains to be seen whether this degree of discipline on the variability impulse will be accepted and, more significantly, usefully used by the judiciary.

Second, the constitutional right to lawful administrative action would also appear to prohibit vague and uncertain delegations of law-making power as well as the conferral of over-broad discretionary powers on a decision-maker. This view finds support in *Janse van Rensburg NO & Another v Minister of Trade and Industry & Another NNO.*[4] In *Janse van Rensburg,* the Constitutional Court struck down a provision of the Consumer Affairs (Unfair Business Practices) Act[5] that enabled the Minister of Trade and Industry to take steps to prevent the continuation of business practices which were the subject of an investigation and in addition to attach and freeze assets. Interpreting the right of just administrative action directly, the Court held that these far-reaching powers could not be used in the absence of procedural fairness and without guidance as to how

[1] The debate over whether subjective jurisdictional facts ought to be given less weight in the constitutional era ought to be considered against the backdrop of the doctrine of the separation of powers. See Currie *The PAJA* (supra) at 163; Hoexter *Administrative Law* (supra) at 270–271.

[2] See Currie *The PAJA* (supra) at 157, Hoexter *Administrative Law* (supra) at 143, 200–201, and 328–330, De Ville *Judicial Review* (supra) at 23–34 (Identifying an approach of institutional comity) and 213–216 (Identifying a deferential rationality, an unreasonableness, and a rational connection standard of review within reasonableness); H Corder 'Reviewing "Executive Action"' (supra) at 73–78; J Klaaren 'Five Models of Intensity of Review' in J Klaaren (ed) A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy (2006) 79 - 82. De Ville's entire work can be seen as a working out of a model of judicial review that attempts to specify different degrees of scrutiny.

[3] Cf Hoexter *Administrative Law* (supra) at 200–201 (Conceiving variability as case-specific.)

[4] 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC)('*Janse van Rensburg*').

[5] Act 71 of 1988.

they are to be exercised. Goldstone J, in striking down the relevant provision, concluded as follows:

> Every conferment by the Legislature of an administrative discretion need not mirror the provisions of the Constitution or the common law regarding the proper exercise of such powers. However, as this court has already held (in the context of a limitations analysis), the constitutional obligation on the Legislature to promote, protect and fulfill the rights entrenched in the Bill of Rights entails that, where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised.[1]

The Constitutional Court found that uncircumscribed administrative discretion, together with the other circumstances of the case, was contrary to the right to procedural fairness.[2]

Subsequent cases, albeit in a non-administrative action context, have emphasised the point of principle.[3] *Janse van Rensburg* thus represents authority for the fact that, in certain circumstances, a broad decision-making power, which does not give adequate guidance as to the manner in which it is to be exercised, may be unconstitutional.[4] Still, *Janse van Rensburg* does not stand for the proposition that such breadth on its own (at least in primary legislation) will constitute an infringement of the right of just administrative action. Any discretion will therefore need to be assessed on its own terms to determine whether it is constitutionally defective in the manner contemplated in *Janse van Rensburg*.

Third, the common law relating to mistake of law and that relating to subjective jurisdictional facts is inconsistent with the right to lawful administrative action and requires reconceptualisation in the constitutional era. In the pre-constitutional case of *Hira & Another v Booysen & Another,*[5] the Appellate Division held that an

[1] *Janse van Rensburg* (supra) at para 25. See also *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at paras 42–48, which held that an uncircumscribed discretion would not comply with the limitations clause where a fundamental right is infringed. The latter decision applies only where the exercise of a discretion has the effect of infringing a fundamental right.

[2] This case illustrates the close connection between the requirement of lawful administrative action and procedural fairness as the Court could just as easily have found that the relevant provisions contravened the right to lawful administrative action. This appears to have been accepted by the Constitutional Court. See *Janse van Rensburg* (supra) at para 19.

[3] See *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC)('*Affordable Medicines Trust*') at paras 27–28. Nevertheless, *Affordable Medicines Trust* can, in some respects, be seen as a retreat from *Dawood* and *Janse van Rensburg*. The Court in *Affordable Medicines Trust* held that sufficient guidance was given to the decision-maker, despite the wide wording of the relevant discretion (the power to issue licences 'on the prescribed conditions'), because the factors constraining that discretion could be established by having regard to the provisions and objects of the empowering legislation read as a whole. Ibid paras at 30–39.

[4] Nevertheless it is important to note that the breadth of the power was only one of the factors which led the Court to conclude that the right to procedural fairness was infringed in this particular instance. *Janse van Rensburg* (supra) at para 25. The Court also emphasised the cumulative effect of the other features set out in para 23 of the judgment.

[5] 1992 (4) SA 69 (A) at 93.

agency's interpretation of its empowering provisions is reviewable unless the legislature intended to commit the question of interpretation solely to the agency's discretion. Among others, Michael Asimow has convincingly argued that, under the Final Constitution, Parliament can no longer completely commit a question of legal interpretation to an agency's discretion as all interpretive issues must now be reviewable.[1] Asimow suggests, appropriately in our view, that courts retain interpretive authority but give deference to carefully reasoned interpretations of ambiguous statutory language where an agency's expertise gives it some interpretive advantage over the courts. While *Hira* is essentially on the right track, a recalibration (either general or in particular areas of statutory interpretation) is necessary: legislation should not be permitted effectively to oust the courts' power to review a mistake of law.[2] While we are somewhat more hesitant with respect to the doctrine of subjective jurisdictional facts[3] — due to its potential for judicial overreach — a similar argument can in principle be made for a version of that doctrine.[4] We should, however, not be read as suggesting that a subjectively-phrased discretion renders the administrative decision immune from administrative review. It may simply suggest that a lower level of judicial scrutiny is appropriate.[5]

Fourth, we note that the right of lawful administrative action has engendered a new ground of review: that of a material mistake of fact. In *Pepcor*, certificates issued on the basis of incorrect actuarial information were the basis for deciding to transfer money to a retirement fund. This decision was set aside on the basis of a material mistake of fact. In reaching this conclusion, the Supreme Court of Appeal drew more support from the principle of legality than from FC s 33(1). While PAJA does not list this ground of review explicitly, the Act's silence has not prevented its use.[6]

63.5 THE RIGHT TO PROCEDURALLY FAIR ADMINISTRATIVE ACTION

(a) Introduction

The right to procedurally fair administrative action, entrenched in FC s 33(1), is a right of participation. This right entitles persons to participate in the decision-making process in relation to administrative decisions that affect them. It, at a

[1] M Asimow 'Administrative Law under South Africa's Final Constitution: The Need for an Administrative Justice Act' (1996) 113 *SALJ* 613, 623.

[2] Cf Hoexter *Administrative Law* (supra) at 258–259 (Seeming to endorse the *Hira* approach without change in the constitutional era).

[3] Subjective jurisdictional facts include subjectively phrased discretions such as 'is satisfied that', 'in his discretion' and 'has reason to believe'.

[4] See J Klaaren 'Teaching Procedural Jurisdictional Facts' (1998) 14 *SAJHR* 60.

[5] For a similar approach, based on deference, see Hoexter *Administrative Law* (supra) at 270–271. Hoexter also points out that wide, subjective discretions may, at times, fall foul of the requirement that the conferral of decision-making power must not be unguided.

[6] Section 6(2)*(i)* of PAJA provides for a catch-all ground of review where 'the action is otherwise unconstitutional or unlawful'.

minimum, entrenches the common law rules of natural justice. These rules are embodied in two fundamental principles — the right to be heard *(audi alteram partem)* and the rule against bias *(nemo iudex in sua causa)*.

It is important, at the outset, to note that the right is to *procedural* fairness. It goes to the procedure by which administrative decisions are made and does not safeguard a right to *substantive* fairness. The majority of the Constitutional Court made this clear in *Bel Porto School Governing Body & Others v Premier, Western Cape, & Another*.[1] It concluded that a standard of substantive fairness 'would drag Courts into matters which, according to the separation of powers, should be dealt with at a political and administrative level and not at a judicial level'.[2]

(b) The rationales for procedural fairness

The primary rationale for the right to procedural fairness is that it improves the quality of administrative decision-making by ensuring that all relevant information, interests and points of view are placed at the administrator's disposal.[3] As Ngcobo J remarked on behalf of the Constitutional Court:

> It is a fundamental element of fairness that adverse decisions should not be made without affording the person to be affected by the decision a reasonable opportunity to make representations. A hearing can convert a case that was considered to be open and shut to be open to some doubt, and a case that was considered to be inexplicable to be fully explained.[4]

Procedural fairness thus promotes informed, rational and legitimate decision-making and reduces the risk of arbitrary decisions.[5] In so doing, it enhances the constitutional principles of openness, accountability and participation.[6]

This first rationale is related to a second: Procedural fairness gives a person potentially affected by a decision a chance to influence that decision.[7] The

[1] 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC)('*Bel Porto*') at para 88.

[2] We note, however, that the requirement of reasonable administrative action approaches that of substantive fairness and requires courts, to some extent, to engage with the merits of administrative decision-making. See § 63.6 infra.

[3] See *Janse van Rensburg* (supra) at para 24 ('[O]bservance of the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken.') See also Mokgoro J in *De Lange v Smuts* (supra) at para 131 ('Everyone has the right to state his or her case, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance'.)

[4] *Zondi* (supra) at para 112. See also Ngcobo J in *Masetlha* (supra) at para 187; and Megarry J in *John v Rees & Others; Martin & Another v Davis & Others; Rees & Another v John* [1970] Ch 345 ('*John v Rees*') at 402, quoted with approval in *POPCRU* (supra) at para 76.

[5] *POPCRU* (supra) at 76. See also *De Lange v Smuts* (supra) at para 131; De Ville *Judicial Review* (supra) at 217. See *Masetlha* (supra) at para 187 (Ngcobo J, dissenting)(Decision-maker having all the relevant facts at his or her disposal 'is essential to rationality, the sworn enemy of arbitrariness'.)

[6] See, eg, FC s 1*(d)* and FC s 195 (Setting out the values and principles of public administration).

[7] See *Masetlha* (supra) at para 75.

exercise of procedural fairness leaves those concerned 'with the feeling that their views have been taken into consideration in the process'.[1] At least two benefits flow directly from such participation. First, persons who have had a real chance to influence a decision are more likely to accept the decision even if it goes against them. As Megarry J remarked, one should not underestimate 'the feelings of resentment of those who find that a decision against them has been made without their being afforded an opportunity to influence the course of events'.[2] Second, allowing affected persons an opportunity to influence decisions that affect them affirms their equal worth and human dignity.[3] These rationales are well captured in the following passage:

> It is of first importance in a democracy that, when public bodies make decisions affecting the rights, liberties, interests, or legitimate expectations of individuals, they are obliged to treat such individuals with respect, and as participants in, rather than as mere objects of, the administrative process. In a relationship between citizen and state thus conceived lie the seeds of a healthy polity, in which public bodies earn the trust of individuals; in which individuals are paid the respect due to them by state bodies; and in which the chances of good decisions are enhanced. [4]

As discussed below, the right to procedurally fair administrative action is not confined to those decisions that have an effect on individuals. It extends to administrative decisions that have a general effect on the public. This post-constitutional development in our law enhances the constitutional principle of participatory democracy. Our Constitutional Court has described participatory democracy as 'one of [our democracy's] basic and fundamental principles': it 'provides vitality to the functioning of representative democracy'.[5] The Court's endorsement of the principle of participatory democracy, in the context of the right to participate in the parliamentary legislative process, is expressed in terms that apply equally to general administrative decisions (like rule-making):

> The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar

[1] See *Bel Porto* (supra) at para 245.

[2] See *John v Rees* (supra) at 402, quoted in *POPCRU* (supra) at para 76, fn 89.

[3] See De Ville *Judicial Review* (supra) at 217; Hoexter *Administrative Law* (supra) at 326–327; TRS Allan 'Procedural Fairness and the Duty of Respect' 1998 *Oxford Journal of Legal Studies* 497.

[4] *Beatson, Matthews and Elliott's Administrative law: Text and Materials* (3rd Edition, 2005) 391.

[5] *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) ('*Doctors for Life*') at para 145 (Ngcobo J) and *Matatiele Municipality v President of the Republic of South Africa* 2007 (1) BCLR 47 (CC). See K Govender 'An assessment of section 4 of the Promotion of Administrative Justice Act 2000 as a means of advancing participatory democracy in South Africa' (2003) 18 *SAPL* 404. For a discussion of the fundamental importance of democracy, including participatory democracy, under the Final Constitution, see T Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10. In *Doctors for Life*, the Constitutional Court used the principle of participatory democracy as a basis for holding that legislatures are often obliged to allow interested parties an opportunity to comment during the legislative drafting process.

> with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character, it acts as a counterweight to secret lobbying and influence-peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist. . . . Therefore our democracy includes, as one of its basic and fundamental principles, the principle of participatory democracy.[1]

In fact, it may be said that public participation is of greater importance in the context of administrative decision-making in that subordinate legislation lacks to some extent the democratic legitimacy of original legislation that emanates from democratically elected legislatures. Participation in such a decision-making process thus acts as a 'surrogate political process'[2] and enhances the legitimacy of administrative action 'by emphasising openness, consultation and reasoned decision-making'.[3] As with the right to a hearing in individual cases, public participation in relation to administrative action that has a general impact thus advances a number of important objects. As Cora Hoexter puts it:

> Public participation encourages people to exercise their rights and perform their duties as citizens; it educates citizens and counters their sense of 'powerlessness'; it leads to better and more informed decisions; and it helps ensure that administrators remain or become politically accountable to those affected by their decisions.[4]

(c) The flexible nature of procedural fairness

The content of procedural fairness varies widely depending on the contexts in which it is applied. This was true under the common law and continues to be the case under the Final Constitution.[5] As Ngcobo J has noted, '[t]he very essence of the requirement to act fairly is its flexibility and practicability'.[6]

This flexibility is reflected in s 3(2)*(a)* of PAJA. Section 3(2) provides that 'a fair administrative procedure depends on the circumstances of each case'. This

[1] See *Doctors for Life* (supra) at paras 115–116. See also *New Clicks* (supra) at paras 156–157 (Chaskalson CJ).

[2] L Baxter 'Rulemaking and Policy Formulation in South African Administrative Law Reform' in H Corder (ed) *Administrative Law Reform* (1993) 176, 179.

[3] Currie *The PAJA* (supra) at 118.

[4] Hoexter *Administrative Law* (supra) at 78. See also Hoexter's discussion of public participation at 75–84; C Mass 'Section 4 of the AJA and procedural fairness in administrative action affecting the public: A comparative perspective' in C Lange and J Wessels (eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) 63 at 63–64; Currie & Klaaren *Benchbook* (supra) at 108–9; and Currie *The PAJA* (supra) at 118.

[5] See, eg, *Premier, Mpumalanga* (supra) at para 39; *SARFU* (supra) at para 216; *Ed-U-College* (supra) at para 19; *Zondi* (supra) at paras 113–114; *Janse van Rensburg* (supra) at para 24; *Kyalami Ridge* (supra) at para 101; *New Clicks* (supra) at paras 145 and 152.

[6] *Masetlha* (supra) at para 190.

section has been described as '[codifying] the idea, at the heart of the right at common law, that procedural fairness is situation-specific and what is fair depends on the circumstances'.[1]

Flexibility is perhaps more important in the context of procedural fairness than in any other area of administrative law. There is a need to balance the interests of the individual or group affected by the administrative action against the public interest in efficient administration. In the Constitutional Court's first decision regarding procedural fairness, *Premier, Mpumalanga*, O'Regan J put the matter as follows:

> In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognized in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly. On the other hand, to permit the implementation of retroactive decisions without, for example, affording parties an effective opportunity to make representations would flout another important principle, that of procedural fairness.[2]

In another important decision reiterating the circumstances-based basis of the right to procedural fairness, the Constitutional Court in *Kyalami Ridge* wrote:

> Where, as in the present case, conflicting interests have to be reconciled and choices made, proportionality, which is inherent in the Bill of Rights, is relevant to determining what fairness requires. Ultimately, procedural fairness depends in each case upon the balancing of various relevant factors including the nature of the decision, the 'rights' affected by it, the circumstances in which it is made, and the consequences resulting from it.[3]

We now turn to examine the scope and the content of the right to procedural fairness. These concerns are primarily governed by PAJA and engage the right to procedural fairness in two contexts: that of administrative action affecting any person (ie individual administrative action) and that of administrative action affecting the public (ie general administrative action).

(d) The scope of procedurally fair administrative action affecting any person

The right to procedural fairness was constitutionally entrenched in IC s 24*(b)*. IC s 24*(b)* provided that 'every person shall have the right to procedurally fair administrative action where any of his or her rights or legitimate expectations is affected

[1] See *POPCRU* (supra) at para 70.

[2] *Premier, Mpumalanga* (supra) at para 41. See also *Walele* (supra) at para 123 (O'Regan J, dissenting)('That administrative action be procedurally fair is therefore an important constitutional right which we should seek to protect. Yet, the Constitution does not require a knee-jerk response of affording a right to a hearing in every case regardless of the context or the circumstances of those affected. These are countervailing considerations of equal importance to the interpretation of both section 33 of the Constitution and section 3(1) of PAJA.')

[3] *Kyalami Ridge* (supra) at para 101.

or threatened'. FC s 33(1) removed the in-built qualification (as it did with the other elements of the right) and simply provided that 'everyone' is entitled to administrative action that is procedurally fair.

Whereas FC s 33(1) suggests that *all* administrative action must be procedurally fair, s 3(1) of PAJA seems to reintroduce a similar threshold to that contained in IC s 24*(b)*. Section 3(1) of PAJA provides that '[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair'.

(i) *The difficulty in reconciling s 3(1) with the definition of 'administrative action' in s 1 of PAJA*

A significant interpretive difficulty that arises in relation to the scope of procedural fairness under PAJA is that s 3(1) applies to 'administrative action' which 'materially and adversely affects the *rights or legitimate expectations* of any person',[1] while 'administrative action' is defined in s 1 as a decision which adversely affects any person's *rights*. On the face of it, procedural fairness therefore appears, in some respects, to apply to a narrower category of action than 'administrative action' (the inclusion of the word 'materially') and, in other respects, to a wider category of action (that which affects legitimate expectations and not only rights).[2] The latter conclusion would, however, be logically inconsistent (at least under usual principles of statutory interpretation). Action must first constitute 'administrative action' under PAJA before one can consider whether it is subject to the requirement of procedural fairness. The ambit of s 3(1) cannot be wider than the ambit of 'administrative action' in s 1.[3]

The relationship between the definition of 'administrative action' in s 1 and the wording of s 3(1) comes into sharp focus when one considers the outcome in *Grey's Marine*. In *Grey's Marine*, the Supreme Court of Appeal held that the decision to lease quayside property in Hout Bay harbour amounted to administrative action because it had direct and immediate consequences for the lessee. As discussed above, the SCA thus effectively disregarded the word 'adversely' in the definition of 'administrative action'.[4] One of the reasons that the SCA offered for giving this non-literal meaning to the phrase 'adversely affect the rights of any person' in s 1 was because a literal construction would be inconsistent with s 3(1), 'which envisages that administrative action might or might not affect rights adversely'.[5] Despite holding that the decision amounted to 'administrative action'

[1] Emphasis added.

[2] Some commentators have used the differing directions in which these two conclusions pull to attempt to construct an interpretation of the PAJA consistent with their interpretation of FC s 33. We have referred to such interpretations above as strained and prefer here to work directly and closely with the doctrine of separation of powers.

[3] But see *Walele* (supra) at paras 37 and 126.

[4] See § 63.3*(c)*(vi) supra.

[5] *Grey's Marine* (supra) at para 23.

for purposes of PAJA, the SCA, however, held that s 3(1) was not triggered and the adjacent landowners were thus not entitled to a hearing prior to the decision. Nugent JA remarked that, while 'rights' may have a wide connotation in this context, and may include 'prospective rights that have yet to accrue', 'it is difficult to see how the term could encompass interests that fall short of that'.[1] Nugent JA then appeared to emphasise the word 'adversely' in s 3(1) — the same word that the court effectively disregarded in the definition of 'administrative action'. He wrote: 'It has not been shown that any rights — or even prospective rights — of any of the appellants (or of any other person) have been *adversely* affected by the Minister's decision.'[2]

A number of academics have attempted to reconcile the 'logical puzzle'[3] presented by the inclusion of 'legitimate expectations' (a wider concept than rights) in s 3(1), with the fact that PAJA only applies to action that adversely affects 'rights'.[4] One such approach to solving this puzzle is to emphasise the word 'materially' in s 3(1). The inclusion of this word indicates that a certain class of administrative action (as defined) will not require the application of procedural fairness. That is, those actions which affect rights but do not affect one's rights or legitimate expectations in a *material* manner do not trigger procedural fairness. In such a situation the rules of procedural fairness will apply if the action materially affects the relevant person's legitimate expectations.[5] According to this approach, legitimate expectations only matter when rights are adversely affected in a non-material manner. While logically consistent, this view appears to unduly strain the words of PAJA and would give legitimate expectations very little scope in which to operate.

A second approach is to regard a 'legitimate expectation' that is both materially and adversely affected, as contemplated in s 3(1), as a species of 'right' for purposes of the definition of 'administrative action'.[6] This approach is unattractive. It collapses the distinction between rights and legitimate expectations and is inconsistent with the fact that PAJA itself uses these two distinct terms. PAJA's use of these two terms of art suggests that they have different meanings. Indeed, they are placed alongside one another in s 3(1).

[1] In this regard, as is apparent from the footnotes in *Grey's Marine*, Nugent JA essentially followed the approach indicated by the Constitutional Court in *Kyalami Ridge. Kyalami Ridge* (supra) at para 100.

[2] *Grey's Marine* (supra) at para 30 ((Emphasis added). In the same paragraph, Nugent JA continued: 'None of the appellants has any right to use the property that has been let, or to restrict its use by others, nor has any case been made out that their rights of occupation of their premises have been unlawfully compromised'.)

[3] Currie & Klaaren *Benchbook* (supra) at 93.

[4] See Hoexter *Administrative Law* (supra) at 358 (The use of the phrase 'legitimate expectations' in s 3(1) 'seems entirely illogical'.)

[5] See Currie & Klaaren *Benchbook* (supra) at 93–94. The authors accept that this will only apply to a narrow class of action.

[6] See Hoexter *Administrative Law* (supra) at 359. Hoexter, however, notes that this approach 'fails to appeal to logic since . . . the whole point of legitimate expectations is that they are not rights'.

Jacques De Ville offers another interpretation. He contends that the phrase 'materially and adversely affects rights and legitimate expectations' does not qualify the scope of *application* of procedural fairness but rather identifies factors that affect the *content* of procedural fairness.[1] While this gloss on the text is creative, it seems to us to strain the language of s 3(1) of PAJA, which appears to use the phrase 'materially and adversely affects the rights or legitimate expectations' as a threshold requirement.[2] Moreover, to argue that s 3(1) merely sets out factors for the content of a duty to act fairly would potentially collapse the distinction between scope and content. This distinction — although never absolute — has been a useful and accepted concept in procedural fairness jurisprudence.

The approach to which we find ourselves most attracted requires that the phrase 'materially and adversely affects rights' in s 3(1) refers only to decisions which *deprive* one of rights and not those which determine one's rights. We point out that this approach differs from our preferred position under the definition of 'administrative action'. There, one will recall, we argued that the determination theory should apply.[3] If this approach is adopted, 'administrative action' could include a broad category of action which *determines* one's rights and procedural fairness could apply to a narrower class of action which *deprives* one of one's rights or legitimate expectations. Although this approach may also seem somewhat artificial, it does satisfy constitutional purpose and attaches real meaning to the term 'legitimate expectations'. In addition, this approach is supported by the fact that, unlike the definition of administrative action, s 3(1) couples the term 'rights' with 'legitimate expectations'. If rights meant the determination of one's rights in s 3(1), there would seem little need to include the phrase 'legitimate expectations'.[4]

In the recent decision of *Walele*, the Constitutional Court avoided the difficulty of attempting to reconcile PAJA's definition of 'administrative action' and s 3(1) by, in effect, holding that the definition of 'administrative action' in s 1 does not apply to the use of that term in s 3(1)(or the defined term is 'supplemented' for the purposes of s 3(1)). Jafta AJ, writing on behalf of a bare majority of the Court (which was divided six judges to five), pointed out that applying the definition of 'administrative action' to s 3 would lead to 'incongruity or absurdity' and, as a

[1] See De Ville *Judicial Review* (supra) at 222–223. See § 63.5*(e)* infra.

[2] See *Walele* (supra) at para 28 ('*The express precondition* for the requirement to act fairly, in terms of [s 3], is that the administrative action must materially and adversely affect the rights or legitimate expectations of the aggrieved person' (emphasis added).)

[3] See § 63.3*(c)*(vi) supra.

[4] See Mureinik 'Reconsidering Review' (supra) at 44–45 (Expresses the view that similar wording in drafts of the Bill of Rights proposed by the African National Congress and the government amounted to the adoption of the liberal version of the deprivation theory, ie, the deprivation theory expanded by the doctrine of legitimate expectations.) The down-side of this approach is that the scope of procedural fairness is limited in a manner which may not fully give effect to the constitutional right to procedural fairness, unless the broad approach to legitimate expectations discussed below is applied (ie, a legitimate expectation arises whenever the duty to act fairly requires a hearing.)

result, 'administrative action' in s 3 'cannot mean what was intended in the definition section'.[1] For purposes of s 3, s 1 was essentially read out of the statute. The majority, therefore, accepted that s 3 confers procedural fairness on persons whose legitimate expectations are materially and adversely affected.

O'Regan ADCJ, writing on behalf of the five-judge minority in *Walele*, dealt with what she described as 'the enigma' of the relationship between the definition of 'administrative action' and s 3(1), by adopting the position that, in determining the scope of procedural fairness, the specific provision of s 3(1) should take precedence over the general definition of 'administrative action' (particularly in light of the fact that s 3(1) is aimed at giving effect to the constitutional right to procedurally fair administrative action).[2] In this approach, s 1 is not read out of the statute but is essentially altered with respect to s 3 to fit the ends of the latter section. She reasoned that:

> The apparent contradiction between the two provisions should be resolved by giving effect to the clear language of section 3(1) which expressly states that administrative action which affects legitimate expectations must be procedurally fair. Thus, the narrow definition in section 1 must be read to be impliedly supplemented for the purposes of section 3(1) by the express language of section 3(1). If this were not to be done, the clear legislative intent to afford a remedy to those whose legitimate expectations are materially and adversely affected would be thwarted.[3]

While we are taking on a full set of eleven judges here (!), it seems to us that the approaches of both (!) the majority and the minority in *Walele* do not satisfactorily explain the relationship between the definition of 'administrative action' and s 3(1). The interpretation of s 3 of PAJA cannot be cabined within the specific constitutional sub-right of procedural fairness, but should rather be understood within the context of FC s 33 as a whole. It cannot, we submit, be the case that the right to procedural fairness applies to a wider category of administrative action than other aspects of the right to just administrative action reflected in PAJA. While it is sometimes argued that procedural fairness applies to all conduct that is susceptible to administrative law and to administrative law review, it is generally understood that it applies to a narrower range. It has never been suggested that the right to procedural fairness extends to a wider range of conduct than, for example, the right to lawful administrative action. In our view, the approach of the Constitutional Court in *Walele* is thus best understood as a decision in which the Court pragmatically engages with the proper scope of the application of s 3(1), while leaving the question of the constitutionality of the definition of 'administrative action' for another day.[4] Against this necessarily

[1] *Walele* (supra) at para 37.
[2] Ibid at para 126.
[3] Ibid.
[4] *Walele* also expressly leaves open the question as to the constitutionality of s 3(1). *Walele* (supra) at paras 30 and 123.

less-than-clear backdrop, we now consider the meaning of the crucial phrase in s 3(1): 'materially and adversely affects the rights or legitimate expectations of any person'.

(ii) *The meaning of 'materially and adversely affects the rights or legitimate expectations of any person'*

For the reasons discussed above, it may well be that the phrase 'adversely affects' in s 3(1) should be read as referring only to decisions that *deprive* one of rights or legitimate expectations and not also those that *determine* rights. We note, however, that the position is by no means clear. Some support for the determination theory can be found in the fact that a number of decisions of our courts have assumed, though not decided, that the phrases 'where any of his or her rights … is affected or threatened' in IC s 24*(b)* (and FC item 23(2)*(b)* of Schedule 6) and 'adversely affects the rights … of any person' in s 3(1) of PAJA (both of which delineate the scope of procedural fairness) cover not only existing rights but also prospective rights.[1]

In addition, and again for the reasons discussed above, we submit that the term 'rights' should be interpreted broadly as including all forms of legal rights as well as situations where the State has unilaterally incurred liability without establishing a contractual *nexus* between the individual and the State.[2]

Nevertheless, 'rights' cannot be equated with interests.[3] Such an interpretation would be inconsistent with the fact that the concepts of rights and interests are distinct in administrative law and the fact that, during the process of drafting PAJA, the Parliamentary Portfolio Committee specifically amended the version of PAJA prepared by the Law Commission which provided that administrative action must be procedurally fair where it 'adversely affects rights, interests or legitimate expectations'.

The next important question that arises is: what is meant by the phrase 'legitimate expectations' in s 3(1) of PAJA? The doctrine of legitimate expectations was accepted by the Appellate Division in *Administrator, Transvaal & Others v Traub & Others*.[4] This doctrine extended the scope of the right to a hearing

[1] See *Kyalami Ridge* (supra) at para 100 ('It may well be that persons with prospective rights such as applicants for licences or pensions, are entitled to protection …'); *Grey's Marine* (supra) at para 30: ('Rights' in s 3(1) of PAJA 'may include prospective rights that have yet to accrue'). The determination theory also enjoys academic support. See, eg, De Ville *Judicial Review* (supra) at 224–227). But see *Walele* (supra) at 32 (The reference to a 'pre-existing right' appears in Jafta AJ's judgment for the majority of the Constitutional Court — it thereby intimates a preference for the deprivation theory.)

[2] See § 63.3*(c)*(vi) supra.

[3] See *Kyalami Ridge* (supra) at para 100; *Grey's Marine* (supra) paras 30–31. These judgments indicate skepticism in this regard. The majority judgment of Jafta AJ in *Walele* fairly emphatically indicates that interests falling short of rights or legitimate expectations do not trigger the right to a hearing in s 3 of PAJA. *Walele* (supra) at para 44. See also *Walele* (supra) at para 127 (O'Regan J).

[4] 1989 (4) SA 731 (A).

beyond circumstances in which a person's property, liberty or existing rights were adversely affected, to those where he or she has a legitimate expectation which entitles him or her to a hearing. The traditional approach to legitimate expectations is that they arise 'either from an express promise given on behalf of the public authority or from the existence of a regular practice which the claimant can reasonably expect to continue'.[1] On this approach, a legitimate expectation flows from an express promise or undertaking or from a regular and long-standing past practice.[2] This traditional approach to the ambit of legitimate expectations has been applied by the Supreme Court of Appeal in a number of decisions. For example, in *South African Veterinary Council & Another v Syzmanski*, Cameron JA stated that the requirements for a legitimate expectation included that it was based on a clear, unambiguous representation that was induced by the decision-maker.[3]

It is important to note that a legitimate expectation can be either substantive or procedural. That is, as O'Regan J states in *Premier, Mpumalanga*, '[e]xpectations can arise either where a person has an expectation of a substantive benefit, or an expectation of a procedural kind'.[4] For example, a legitimate expectation will arise not only where an official promises that a particular procedure will be followed but also where an official promises that a particular substantive benefit will be given.

The problem with the traditional approach to the ambit of legitimate expectations in the context of s 3(1) of PAJA is that it fails to afford a right to a hearing where a person's rights are not materially affected by the decision and where there

[1] *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, 944 (HL).

[2] It will not always be reasonable to expect that a past practice will continue (in which case, that practice will not give rise to a legitimate expectation). See *Ed-U-College*, in which the Court examined all circumstances of the case, in holding that procedural fairness does not require the right to a hearing for all affected persons simply because a decision is taken which has the effect of reducing annual subsidies to schools. During the course of her judgment, O' Regan J wrote: 'Subsidies are paid annually and, given the precarious financial circumstances of education departments at present, schools and parents cannot assume, in the absence of any undertaking or promise by an education department, that subsidies will always continue to be paid at the rate previously established or that they should be afforded a hearing should subsidies have to be reduced because the legislature has reduced the amount allocated for distribution.' *Ed-U-College* (supra) at para 22. A single previous occurrence obviously does not give rise to a regular practice. See *Walele* (supra) at paras 41 and 135.

[3] 2003 (4) SA 42 (SCA), 2003 (4) BCLR 378 (SCA) para 19, quoting Heher J in *National Director of Public Prosecutions v Phillips & Others* 2002 (4) SA 60 (W), 2002 (1) BCLR 41 (W) at para 28, with approval. The requirements for a legitimate expectation set out in these cases are: *(a)* a representation that is 'clear, unambiguous and devoid of relevant qualification'; *(b)* the expectation is reasonable; *(c)* the representation was induced by the decision-maker; and *(d)* the representation was one which it was competent and lawful for the decision-maker to make. See also *Grey's Marine* (supra) at para 33 ('Counsel for the appellants could point us to *no conduct on the part of the State or any of its officials* to suggest that the appellants *were brought under the impression* that that state of affairs would continue indefinitely or even that they would be invited to comment before its use was changed.' (Emphasis added)).

[4] See *Premier, Mpumalanga* (supra) at para 36. See, generally, Hoexter *Administrative Law* (supra) at 381–382.

is no expectation based on prior conduct of the administrator — and yet the facts cry out for a hearing.[1] As Wandisile Wakwa-Mandlana and Clive Plasket observe in relation to the approach of the SCA in *Grey's Marine*:

> [It] highlights the problem created by the narrow and formalistic approach to procedural fairness that was taken by the drafters of the PAJA: the rights and legitimate expectations approach leaves a big hole in the net of procedural fairness in the form of cases that may not involve rights but interests of sufficient importance to warrant procedural protection. This rigidity may well undo the important developments that have taken place prior to the enactment of the PAJA in entrenching the fairness doctrine in South African administrative law.[2]

Despite the apparent endorsement of the traditional approach in these decisions of the SCA, and the views of certain authors that legitimate expectations are confined to these situations,[3] some recent authority suggests that current understandings of 'legitimate expectations' are somewhat broader.

In the decision of the Constitutional Court in *Premier, Mpumalanga* O'Regan J restated Corbett CJ's decision in *Traub* in the following terms:[4]

> Corbett CJ also recognized that a legitimate expectation might arise in *at least* two circumstances: first, where a person enjoys an expectation of a privilege or a benefit of which it would not be fair to deprive him or her without a fair hearing; and, secondly, in circumstances where the previous conduct of an official has given rise to an expectation that a particular procedure will be followed before a decision is made.

This statement suggests that the concept of legitimate expectations may be usefully thought of in three categories: express promise, past practice, and fairness. The first two fit into the category of the previous conduct of an official. The third category is a residual one, fairness, and is in fact the first category mentioned by O'Regan J in *Premier, Mpumalanga*. This approach may, depending on one's reading of the judgment, also be reflected in the following *dictum* of the Constitutional Court in *SARFU 1*:

> The question whether an expectation is legitimate and will give rise to the right to a hearing in any particular case depends on whether in the context of that case, procedural fairness requires a decision-making authority to afford a hearing to a particular individual before

[1] See *Traub* (supra) at 761. See also CF Forsyth 'Audi alteram partem since *Administrator, Transvaal v Traub*' in *The Quest for Justice: Essays in Honour of Michael McGregor Corbett* E Kahn (ed) (1995) 196('Audi'). Forsyth does not regard this as a failing of the legitimate expectation doctrine, but rather as an issue to be accommodated under the general 'duty to act fairly'.

[2] W Wakwa-Mandlana and C Plasket 'Administrative Law' 2005 *Annual Survey of South African Law* 74, 119.

[3] See, eg, Forsyth 'Audi' (supra) at 196, 204–205 (This is not because Forsyth is of the view that a right to a hearing should not arise in other circumstances, but because such a right should rather flow from the broad 'duty to act fairly' — 'to those situations where no existing rights were affected, where there was no legitimate expectation of anything at all, yet the facts cried out for a legal remedy'). See also CF Forsyth 'A Harbinger of a Renaissance in Administrative Law' (1990) 107 *SALJ* 387, 398–399.

[4] *Premier, Mpumalanga* (supra) at para 35 (Emphasis added).

> taking the decision. To ask the question whether there is a legitimate expectation to be heard in any particular case is, in effect, to ask whether the duty to act fairly requires a hearing in that case. The question whether a 'legitimate expectation of a hearing' exists is therefore more than a factual question. It is not whether an expectation exists in the mind of a litigant but whether, viewed objectively, such expectation is, in a legal sense, legitimate; that is, whether the duty to act fairly would require a hearing in those circumstances.[1]

In light of this jurisprudence from the Constitutional Court, Jacques De Ville argues persuasively that a legitimate expectation 'need not be coupled with previous governmental conduct' and 'is completely context-dependent'.[2] In fact, in *Nortje en 'n Ander v Minister van Korrektiewe Dienste en Andere*[3] the Supreme Court of Appeal held that the right to a hearing can arise where a decision is significantly prejudicial to a person (in that case, a decision to transfer a prisoner to a maximum security prison).[4] A broad approach to the scope of legitimate expectations is also evidenced in the decision of the SCA in *Bullock*, which held that a legitimate expectation arose from the fact that the yacht club had been the lessee of the foreshore (over which the servitude was granted) for 30 years in terms of successive leases, it had made substantial improvements on the property during that period and, 'perhaps most importantly', negotiations with the yacht club for a new lease on the property were far advanced.[5]

The recent decision of the Constitutional Court in *Walele* is, to date, the most comprehensive judicial consideration of the meaning of 'legitimate expectations' for purposes of s 3 of PAJA. *Walele* involved a challenge to the City of Cape

[1] *SARFU 1* (supra) at para 216. Nevertheless, it is conceivable that *SARFU 1* is consistent with the traditional approach to legitimate expectations (requiring a promise or past practice), with the quoted paragraph only relating to the additional requirement that the expectation must be 'legitimate'. See *SARFU 1* (supra) at paras 212, 215 and 216. See also *Walele* (supra) at para 38 (Majority appears to adopt this reading of the quoted paragraph in *SARFU 1*.)

[2] De Ville *Judicial Review* (supra) at 230–232. Other authors also support a broader approach to legitimate expectations. See, eg, J Hlophe 'Legitimate expectations and Natural Justice: English, Australian and South African law' (1987) 104 *SALJ* 165, 177–179; J Hlophe 'The Doctrine of Legitimate Expectations and the Appellate Division' (1990) 107 *SALJ* 197 at 200–201; J Grogan 'Audi after Traub' (1994) 111 *SALJ* 80, 89–90; PP Craig 'Legitimate expectations: a conceptual analysis' (1992) 108 *LQR* 79, 82–84. As De Ville points out, some support for a broad approach to legitimate expectations can be found in the case law. See *Foulds v Minister of Home Affairs & Others* 1996 (3) SA 137, 149 (W) ('*Foulds*'); *Minister of Justice, Transkei v Gemi* 1994 (3) SA 28 (TkA).

[3] 2001 (3) SA 472 (SCA).

[4] *Nortje* (supra) at para 14 ('The *audi* rule is applicable where an administrative decision can prejudice a person to such an extent that, in accordance with that person's legitimate expectation, the decision ought not to be taken unless he is heard' (translation from the headnote, quoted in Hoexter *Administrative Law* (supra) at 379). For a criticism of this judgment, see DM Pretorius 'Die Leerstuk van Regverdigbare Verwagtinge en die Reg op n Billike Aanhoring: *Nortje v Minister van Korrektiewe Dienste* 2001 3 SA 472 (HHA)' (2002) 64 *THRHR* 436.

[5] *Bullock* (supra) at para 22. The SCA judgment in *Grey's Marine* could, however, be read as clawing back from *Bullock*, in stating that the *Bullock* Court might have had in mind a legitimate expectation 'grounded in past practice'. *Grey's Marine* (supra) at para 31.

Town's approval of the building plans of a four-storey block of flats on a neighbouring property. The construction of the flats was consistent with the zoning scheme in respect of the relevant area. One of the bases for challenging the approval was that the applicant had not been afforded an opportunity to make representations in respect of the building plans application. The applicant asserted that he enjoyed the right to procedural fairness under s 3 of PAJA because, as the owner of the neighbouring property, his property would be devalued and his right to use and enjoyment of his property would be undermined because the flats would cast a shadow over his property. Although the Constitutional Court was split (six to five) on the outcome on other grounds, the Court unanimously agreed that the applicant did not enjoy a right to a hearing in this case. Both the majority and the minority held that the granting of approval did not affect the applicant's rights, that the applicant had not proved that his property would be devalued as a result of the erection of the flats and that the applicant could not rely on a legitimate expectation.[1] While we will not quibble with the outcome of the case, the attitude of the majority and the minority in *Walele* to the possible scope of legitimate expectations is of particular interest for present purposes.

The attitude of the majority appears to be that legitimate expectations are confined to the established categories of promises and past practices. For example, at one point in his judgment Jafta AJ states that '[a] legitimate expectation may arise either from a promise made by a decision-maker or from a regular practice which is reasonably expected to continue.'[2] At another point, he rejects the idea that an impact on interests that falls short of rights or legitimate expectations can found a right to a hearing.[3]

In her minority judgment, O'Regan ADCJ, while leaving open the question as to whether legitimate expectations extend beyond their traditional scope, suggests that there may well be room for such expansion under PAJA:[4]

[1] *Walele* (supra) at paras 31, 33, 42, 132. It is interesting to note that O'Regan ADCJ found that the applicant's rights had not been materially and adversely affected despite the fact that his use and enjoyment of his property may have been affected by the approval. In explaining this finding, she stated that '[o]ur use and enjoyment of property is affected by many things' and to hold that s 3(1) of PAJA applies in respect of every administrative action that impacts on use and enjoyment of property 'may well cause great disruption to the administration of urban spaces.' Ibid at para 132. O'Regan ADCJ thus appears to take policy considerations into account in assessing whether rights are materially and adversely affected for purposes of s 3(1), and may well advocate an understanding of 'material' in s 3(1) that goes beyond non-trivial.

[2] Ibid at paras 35, 37, 38 and 42 ('Since the concept of legitimate expectation referred to in section 3 of PAJA is not defined, it must be given its ordinary meaning as understood over a period of time by the courts in this country'. Jafta AJ goes on to assess whether a past practice gave rise to a legitimate expectation in this case and states that '[a] legitimate expectation may arise from an express promise or a regular practice. It cannot arise from ownership of a neighbouring property.').

[3] *Walele* (supra) at paras 44 and 45.

[4] *Walele* (supra) at para 133.

> From time to time, our courts have taken the view that a legitimate expectation may also arise simply because the administrative action in question constitutes a dramatic impairment of interests less than rights. It may well be that the concept of legitimate expectation in PAJA is not limited to the narrow requirement of a promise or a practice as set out in Lord Fraser's reasoning. Indeed, a broader understanding of 'legitimate expectation' may be appropriate given the language of section 33 of the Constitution that '[e]veryone has the right to administrative action that is … procedurally fair.'

It may be argued that an expansive approach to legitimate expectations, as outlined above, deviates from the concept of legitimate expectations understood in its pure form, and that an expansive approach to the ambit of procedural fairness should more appropriately be accommodated under a broad duty to act fairly (assuming that such duty is accepted in our law).[1] Nevertheless, it seems to us that the extension of legitimate expectations beyond the traditional categories of promises and past practices is useful in the context of s 3(1) of PAJA. It introduces sufficient flexibility so as to remove the constitutional difficulties with this section.[2] In addition, it does so without unduly straining the language of the provision. Where one, having regard to all the circumstances, has a reasonable expectation of a hearing, it can be said that one has a 'legitimate expectation' of that hearing.[3] In other words, an extended concept of legitimate expectations can be used to interpret s 3(1) in a manner that gives effect to the constitutional right to procedurally fair administrative action (particularly in circumstances in which s 3(1) adopts the deprivation theory, which we suggest it does).

[1] See W Wakwa-Mandlana and C Plasket 'Administrative Law' 2004 *Annual Survey of South African Law* 74 at 92–93. See also Forsyth 'Audi' (supra) at 196 and 205; DM Pretorius 'Ten years after Traub: The doctrine of legitimate expectation in South African administrative law' (2000) 117 *SALJ* 520, 523–525 ('Ten years after Traub'). See *Board of Education v Rice* [1911] AC 179, 182 (The duty to act fairly is 'a duty lying upon everyone who decides anything'.) A case that is often cited as supporting the application of the duty to act fairly in our law is *Van Huyssteen NO v Minster of Environmental Affairs and Tourism* 1996 (1) SA 283 (C), 1995 (9) BCLR 1191 (C). The decision held that procedural fairness entitles affected persons to 'the principles and procedures' which in the circumstances are 'right and just and fair' (quoting Lord Morris of Borth-Y-Gest with approval). See also *Mpande Foodliner* CC *v Commissioner for the South African Revenue Service & Others* 2000 (4) SA 1048, 1067 (T).)

[2] See Hoexter *Administrative Law* (supra) at 380 ('The trend towards a wider understanding of legitimate expectations is attractive because it would allow the doctrine to cover mere interests as well as expectations in the usual sense, thus offering a way around the wording of s 3 of PAJA.')

[3] We note that the expectation in this expanded context would appear to be limited to a procedural expectation (ie a reasonable expectation of a hearing). A reasonable expectation of a substantive benefit arising other than from a promise or past practice would not suffice for purposes of triggering the right to a hearing (unless the substantive expectation gave rise to an accompanying reasonable expectation of a hearing). See *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (HL)(Lord Diplock stated that the term 'legitimate' should be preferred to 'reasonable': 'in order thereby to indicate that it has consequences to which effect will be given in public law, whereas as expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a "reasonable" man, would not necessarily have such consequences.') We discuss the difference between procedural and substantive expectations above.

Before leaving the topic of the scope of the right of procedural fairness, we must note that there may well be (at least!) one other way of interpreting PAJA in order to come to the same conclusion. One could argue, with some conviction, that s 3(1) should be limited to decisions that affect rights and legitimate expectations in the traditional sense (ie based on past practice or promise); that s 3(1) is not exhaustive of the scope of administrative action but rather requires administrative action that 'materially and adversely affects the rights or legitimate expectations of any person' to be procedurally fair *in the sense contemplated in the remainder of s 3*; that all administrative action must be procedurally fair;[1] and that a failure to comply with procedural fairness in respect of any administrative action is reviewable under s 6(2)*(c)* of PAJA.[2] According to this approach, the duty to act fairly flows from s 6(2)*(c)* rather than from an expanded concept of legitimate expectations. While initially attractive, we would be wary of adopting such a position. A free-floating duty to act fairly sourced in s 6(2)*(c)* runs contrary to the concept that the content of ss 3 and 4 provides the material basis for the courts' review powers. Moreover, the language of s 3(1) suggests that it determines the scope for procedural fairness. Nonetheless, even if this approach is untidy, and in our view overly complex, it is at least conceptually possible that administrative enforcement of procedural fairness in FC s 33 (the business of ss 3 and 4 of PAJA) is based on the doctrine of legitimate expectations and judicial enforcement of procedural fairness in FC s 33 (the business of s 6 of PAJA) is based on the duty to act fairly.

(e) The content of procedurally fair administrative action affecting any person

As discussed above, the content of procedural fairness varies from case to case. Indeed, the most significant characteristic of procedural fairness is its flexibility. In the words of Lord Mustill, '[t]he principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects'.[3] This flexibility is particularly important if one accepts (as we do) that the ambit of administrative action to which procedural fairness applies is quite broad. Nevertheless, flexibility cannot alone determine the content of procedural fairness: were flexibility to determine the extension of procedural fairness it would

[1] This approach has the attraction of being consistent with the formulation of the right to procedurally fair administrative action in FC s 33(1).

[2] For more on this approach, see De Ville *Judicial Review* (supra) at 222–223 and 234. See also Wakwa-Mandlana and Plasket (supra) at 93 (Raise the alternative possibility of reviewing procedural unfairness in respect of decisions with an adverse impact on interests under the catch-all in s 6(2)*(i)* of PAJA.)

[3] See *Doody v Secretary of State for the Home Department and Other Appeals* [1994] 1 AC 531 (HL) at 560, quoted with approval by Chaskalson CJ in *New Clicks* (supra) at para 152; *Chairman, Board on Tariffs and Trade & Others v Brenco Inc & Others* 2001 (4) SA 511 (SCA) ('*Brenco*') at para 13.

inevitably lead to uncertainty. Administrative decision-makers and those affected by administrative decisions would not know what procedural fairness demands. There is thus a need for our courts to develop different standards of procedural fairness that apply to various different types of administrative action. This exercise, to some extent, requires a shift in focus from the scope of administrative action to the content of administrative justice in the particular circumstances of the case.

The content of procedural fairness in relation to administrative action affecting a person (ie individual administrative action) is governed by s 3 of PAJA. This section divides the content of procedural fairness into mandatory and directory elements.

Section 3(2)*(b)* lists those elements that fall into the former category: 'the core, minimum content of the right [to procedural fairness] when fairness requires a hearing to be given'.[1] As was the case under the common law, the focus of the mandatory elements is that affected persons must be given adequate notice and a reasonable opportunity to make representations prior to a decision being taken.[2] Mirroring the language of the Constitutional Court in *Premier, Mpumalanga*, paragraphs (i) and (ii) of s 3(2)*(b)* stipulate that an administrator 'must' give a person whose rights or legitimate expectations are materially and adversely affected: adequate notice of the nature and the purpose of the proposed administrative action; and a reasonable opportunity to make representations.[3] The use of the words 'adequate' and 'reasonable' in these provisions leave much room for flexibility as to the precise content of the notice and the opportunity given to make representations.

It is important to note that the notice provided to persons affected by the decision must include the reasons (or purpose) for the proposed administrative action, and must be 'adequate' both as to the time provided to make representations[4] and the information that is provided to affected persons.[5] The rule of thumb is that these persons must be provided with sufficient information in order for them to know the case they have to meet and so that their opportunity to make representations is a meaningful one.[6] Although the content of procedural fairness varies from case to case, this rule of thumb generally means that an affected person must be notified of the gist or substance of the case against

[1] *POPCRU* (supra) at para 70.

[2] As to the position under the common law, see *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture & Another* 1980 (3) SA 476, 486 (T)('*Heatherdale Farms*'). See also *Russel v Duke of Norfolk* [1949] 1 All ER 109, 117.

[3] *Premier, Mpumalanga* (supra) at para 41 (O'Regan J)('Citizens are entitled to expect that government policy will not be altered in ways which would threaten or harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker'.)

[4] See *Du Preez* (supra); *POPCRU* (supra) at para 73.

[5] See Hoexter *Administrative Law* (supra) at 332–337.

[6] See *Heatherdale Farms* (supra) at 486; *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism & Another* 2005 (3) SA 156 (C)('*Earthlife*') at para 52.

him or her,[1] any particular information that is adverse to him or her[2] and any significant policy considerations that apply to the proposed decision.[3] The remainder of the mandatory elements of procedural fairness set out in s 3(2)*(b)* are: a clear statement of the administrative action;[4] adequate notice of any right of review or internal appeal and the right to request reasons.[5]

Section 3(3) of PAJA sets out directory elements of procedural fairness. This subsection provides that the administrator 'may, in his or her or its discretion'[6] give a person whose rights or legitimate expectations are materially and adversely affected, the opportunity to: (1) obtain assistance and, in serious or complex cases, legal representation; (2) present and dispute information and arguments; and (3) appear in person. The placement of this provision is curious in that it suggests that elements such as legal representation and an oral hearing are purely discretionary and that a failure to allow for these elements cannot be challenged on the basis of procedural fairness.[7] Such an outcome should be avoided. It would, in our view, result in PAJA failing to give effect to the constitutional right to procedural fairness. One way to avoid this outcome is to adopt the approach that an administrator is obliged to consider granting these elements in a particular case,[8] and that the administrator's decision to refuse to provide for one or more of these elements is itself 'administrative action' and is thus

[1] *Du Preez* (supra) at 232; *Brenco* (supra) at para 42; and *Earthlife* (supra) at para 53. See also *New Clicks* (supra) at para 153 (Chaskalson CJ)(In the case of individual administrative action '[a]n individual needs to know the concerns of the administrator and to be given an opportunity of answering those concerns.')

[2] *Du Bois v Stompdrift Kamanassie Besproeiingsraad* 2002 (5) SA 186, 188–189 (C).

[3] See *Tseleng v Chairman, Unemployment Insurance Board* 1995 (3) SA 162 (T), 1995 (2) BCLR 138, 178–179 (T); *Foulds* (supra) at 148–149. See also *Yuen v Minister of Home Affairs & Another* 1998 (1) SA 958 (C).

[4] This requirement appears to demand a clear statement of the administrative action once it has been taken. See Hoexter *Administrative Law* (supra) at 337.

[5] On the consequences of non-compliance with these requirements, see I Currie & J Klaaren 'Remedies for Non-Compliance with Section 3 of the Promotion of Administrative Justice Act' in C Lange & J Wessels (eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) 31.

[6] The use of this subjectively-phrased discretion is unfortunate in an Act aimed at promoting administrative justice.

[7] The reason for this odd drafting is that the Parliamentary Portfolio Committee altered the Law Commission's draft Bill which listed these elements after the phrase '[a] fair procedure may also entail'. This wording would have made it clear that these elements may, depending on the circumstances, be required in order to give effect to procedural fairness. See Currie *The PAJA* (supra) at 103, fn 49. But see *POPCRU* (supra) at para 70 (Describes s 3(3) as '[providing] for discretionary additions to the core, minimum requirements when fairness makes them necessary'.)

[8] With respect to this obligation in respect of s 3(3), see *Schoon v MEC, Department of Finance, Economic Affairs and Tourism, Northern Province* [2003] 9 BLLR 963 (T) para 26 and 23 (Although the High Court seems to regard s 3(3)*(a)* as *requiring* legal representation in serious and complex cases, an earlier statement in the judgment partially undercuts this claim.) See also *Dladla v Administrator, Natal* 1995 (3) SA 79 (N)(Held that a disciplinary committee must properly exercise its discretion as to whether or not to afford the right to legal representation, and cannot fetter that discretion on the basis that the usual practice is not to allow such representation.)

susceptible to review under PAJA.[1] Iain Currie points out, for example, that if legal representation is essential in a particular case in order to ensure fairness, a decision by the administrator not to provide an opportunity for legal representation would be unreasonable (and thus susceptible to challenge).[2] A second approach would emphasise that the specific elements listed (as discretionary elements) in s 3(3) cannot diminish the mandatory obligation in s 3(2)*(b)*(ii) to provide affected persons with 'a reasonable opportunity to make representations', and that a failure to, for example, allow for legal representation where procedural fairness demands it would fall foul of this requirement.

The difficulty with the second approach is that, while it is most consistent with the underlying constitutional right to procedurally fair administrative action, it does strain the ordinary meaning of s 3(3). Although it is not necessarily an *unduly* strained reading, it would be preferable for s 3(3) to be amended to reflect that the discretionary elements are only directory in the sense that they do not generally apply but that they must be afforded where procedural fairness so requires.

Despite the use of the label 'mandatory' elements, PAJA retains the flexible nature of procedural fairness. It allows an administrator to depart from any of the mandatory elements in subsection (2) if to do so is 'reasonable and justifiable in the circumstances'.[3] PAJA goes on to provide that, in determining whether a departure is reasonable and justifiable, an administrator must take all relevant factors into account, including the urgency of the matter and the need to promote an efficient administration and good governance.[4] This provision is consistent with the post-constitutional case law on procedural fairness. These cases have allowed a relaxation of the right to make representations in cases of pressing urgency[5] and have held that an opportunity to make representations after the administrative action is taken can suffice in certain circumstances.[6]

Finally, s 3(5) provides that an administrator may act in accordance with a different procedure if he or she is granted the power to follow a different, but still fair, procedure. In assessing the fairness of a different procedure, the courts should carefully scrutinize the relevant procedure to ensure that it gives affected

[1] Currie & Klaaren *Benchbook* (supra) at 100 and Currie *The PAJA* (supra) at 103–104 and 110.

[2] Currie *The PAJA* (supra) at 110. See Baxter (supra) at 555 ('In unusually complex cases involving complex evidence or legal issues, legal representation might be regarded as a sine qua non of a fair hearing . . .') See also *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 (5) SA 449 (SCA) at paras 12–13.

[3] Section 3(4)*(a)* of PAJA. The Minister may also, with the approval of Parliament, exempt administrative actions or classes of administrative actions from s 3 where it is reasonable and justifiable to do so (s 2(1) of PAJA). For a criticism of this approach in PAJA, see Hoexter *Administrative Law* (supra) at 343–344.

[4] Section 3(4)*(b)*.

[5] *Kyalami Ridge* (supra) at paras 104–109.

[6] See, eg, *Hindry v Nedcor Bank Ltd & Another* 1999 (2) SA 757 (W) at 781–782; and *Buffalo City Municipality v Gauss & Another* 2005 (4) SA 498 (SCA), 2006 (11) BCLR 1314 (SCA) at para 14.

persons an adequate opportunity to be heard. After all, the constitutionally mandated aim of PAJA is to give effect to the constitutional right to procedural fairness.

(f) The scope and content of procedurally fair administrative action affecting the public

Whereas a large amount of PAJA codifies the common law position, s 4 constitutes a significant development. In what has been described as 'a great innovation in South African administrative law',[1] s 4 applies procedural fairness to administrative action that 'materially and adversely affects the rights of the public'. PAJA therefore introduces general procedures that must be followed in relation to administrative action affecting the public generally. This development represents a change from the common-law position where administrative decisions which had a general, rather than a particular, effect were not subject to the requirements of natural justice.[2] This development is to be welcomed. One positive effect of s 4 is that it requires public participation in the administrative rule-making process. Given that the administrative rule-making process is frequently employed by modern legislatures that devolve their law-making powers to administrative functionaries, a legal regime that enhances access to this process is a necessary complement to the constitutional commitment to participatory democracy.

Section 4(1) stipulates that where an administrative action 'materially and adversely affects the rights of the public' an administrator must decide between five courses of action. He or she must: either hold a public inquiry (which includes a public hearing on the proposed administrative action, and public notification of the inquiry);[3] follow a notice and comment procedure (which involves publishing the proposed action for public comment and written representations on the proposal);[4] follow both the public inquiry and notice and comment procedures; follow a fair but different procedure in terms of an empowering provision; or follow another appropriate procedure which gives effect to the right to procedural fairness in s 3 of PAJA (eg, granting hearings to the entire group affected by the proposed action).[5]

[1] Hoexter *Administrative Law* (supra) at 364.

[2] *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A). For a general discussion of administrative rule-making, see L Baxter 'Rule-making and Policy Formulation in South African Administrative-law Reform' (1993) *Acta Juridica* 176 and C O'Regan 'Rules for Rule-making: Administrative Law and Subordinate Legislation' (1993) *Acta Juridica* 157.

[3] The procedure for a public inquiry is set out in s 4(2), read with Chapter 1 of the Regulations on Fair Administrative Procedures published under GN R 1022 in *Government Gazette* 23674 of 31 July 2002 ('the Regulations').

[4] The notice and comment procedure is set out in s 4(3), read with Chapter 2 of the Regulations.

[5] For a discussion of the effect of this latter provision, and the thorny question as to the relationship between s 3 and s 4 of PAJA, see Hoexter *Administrative Law* (supra) at 374; Currie & Klaaren *Benchbook* (supra) at 130–131; Currie *The PAJA* (supra) at 119–122; and Mass (supra) at 67.

The important threshold test for s 4 is whether the relevant administrative action 'materially and adversely affects the rights of the public'. In interpreting this phrase, it is important to bear in mind that 'public' is defined in s 1 of PAJA as '[including] any group or class of the public'.

Currie and Klaaren propose that s 4 is triggered where administrative action: has a general impact; has a significant public effect; and if the rights of the public are in issue.[1] In order to have a general impact the administrative action must apply to members of the public 'equally' and 'impersonally', although it may impact on certain members of the public more than others (for example, a regulation prohibiting the consumption of alcohol on a particular day of the week).[2] The requirements of an adverse effect on the rights 'of the public' must be taken to mean that the action impacts on the rights of *members* of the public (rather than the rights of the group).[3] Whether the materiality requirement is met will depend on the circumstances of each case and should be judged cumulatively in relation to the public as a group.[4] As with individual administrative action under s 3, an administrator may depart from the requirements in s 4 if it is 'reasonable and justifiable in the circumstances', taking into account all relevant factors.[5]

(g) The rule against bias

The second component of procedural fairness[6] is the rule against bias. This rule is captured by the maxim *nemo iudex in sua causa* ('no one shall be a judge in their own cause'). This common law ground of review is now codified in s 6(2)*(a)*(iii) of PAJA. This provision stipulates that administrative action may be judicially reviewed if the administrator who took it 'was biased or reasonably suspected of bias'. This rule aims to ensure that a decision-maker is, and is seen to be, impartial. In the context of quasi-judicial bodies, the administrative law rule (which forms part of the constitutional right to procedurally fair administrative action) is supplemented by FC s 34. FC s 34 entrenches the right to have any

[1] Currie & Klaaren *Benchbook* (supra) at 114.

[2] Currie & Klaaren *Benchbook* (supra) at 114–116.

[3] Currie *The PAJA* (supra) at 125. We prefer this interpretation to the approach advocated by De Ville. De Ville argues that, as there are no rights in the traditional sense inhering in the public, the term 'rights' as used in s 4(1) must be understood as including 'interests'. De Ville *Judicial Review* (supra) at 227.

[4] An example of an administrative action affecting the public in a manner which does not meet the requirement of materiality would be Hugh Corder's example of a regulation requiring that the background of motor vehicle licence plates should be red rather than yellow. See H Corder 'Administrative Justice: A Cornerstone of South Africa's Democracy' (1998) 14 *SAJHR* 38, 46.

[5] Section 4(4) of PAJA. The Minister may also, with the approval of Parliament, exempt actions or classes of administrative actions from s 4 where it is reasonable and justifiable to do so (s 2(1) of PAJA).

[6] Bias is subsumed under procedural fairness at least in the sense in which the term is used in FC s 33. Under PAJA s 6, bias and procedural fairness are treated as separate grounds of review.

dispute that can be resolved by application of law decided by a court or 'an independent and impartial tribunal'.[1]

The primary rationales for the rule against bias are: *(a)* to enhance good administrative decision-making, as a person who is free from bias (or impermissible partiality) is more likely to come to a decision in the public interest; *(b)* promoting fairness — it is fundamentally unfair to expose an affected person to decision-making by an administrator that is biased (or perceived to be biased) against him or her; and *(c)* enhancing confidence in administrative decision-making processes.[2] As Lord Hewitt famously remarked, in the context of judicial decision-making: 'justice should not only be done, but should manifestly and undoubtedly be seen to be done.'[3]

Traditionally, the rule against bias was applied in the context of judicial and quasi-judicial decisions.[4] The rule now applies more broadly to all administrative decision-making. There are at least two reasons why this should be the case. First, the rule against bias is a component of the right to procedurally fair administrative action (which attaches to all administrative action under FC s 33(1)). Second, bias is specifically listed as one of the grounds of review of administrative action in s 6(2)*(a)*(iii) of PAJA. As the Constitutional Court stated in *SARFU 2*, the rule against bias is applicable to judicial cases 'as well as quasi-judicial and administrative proceedings'.[5]

Broadly speaking, there are two types of impermissible bias. The first is actual bias: the decision-maker was in fact biased or partial. This form of bias arises where the decision-maker approached the issues 'with a mind that was in fact prejudiced or not open to conviction'.[6] Actual bias has rarely been found to have arisen in our case law.[7]

[1] That a quasi-judicial tribunal is governed by both FC s 33 and FC s 34 is apparent from the decision of the majority of the Constitutional Court, and the separate concurring judgment of O'Regan J, in *Sidumo*. *Sidumo* (supra) at paras 112, 124 and 135. On FC s 34, see J Brickhill and A Friedman 'Access to courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 59, especially § 59.4*(c)*.

[2] See De Ville *Judicial Review* (supra) at 269; Hoexter *Administrative Law* (supra) at 405.

[3] *R v Sussex Justices, ex parte McCarthy* (1924) 1 KB 256 at 259. See also the Constitutional Court in *S v Jaipal* 2005 (4) SA 581 (CC), 2005 (5) BCLR 423 (CC) at para 31 ('The principle that justice must not only be done but also be seen to be done is well known'); *S v Roberts* 1999 (4) SA 915 (SCA)('*Roberts*') at para 22.

[4] See, eg, *Hack v Venterspost Municipality & Others* 1950 (1) SA 172 (W) at 189.

[5] *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) ('*SARFU 2*') at para 35. See also *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* [1997] 2 All SA 548, 552, 553 (A).

[6] *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers Union* 1992 (3) SA 673 (A) ('*BTR Industries*') at 690. See De Ville *Judicial Review* (supra) at 271–273.

[7] For a fairly recent instance of actual bias, see *De Lille* (supra), in which the High Court found that a decision of an *ad hoc* parliamentary committee to recommend the suspension of Patricia De Lille MP was vitiated by actual bias. Ms De Lille was suspended for alleging that a number of African National Congress MPs had acted as spies for the apartheid government. This decision was taken on the recommendation of a committee, where the majority of the committee members were ANC MPs and where certain members of the committee appeared to have pre-judged the matter.

The second form of bias, which more often arises in practice, is where there is a reasonable suspicion (or apprehension)[1] of bias. The reasonable suspicion test is objective. One considers whether the hypothetical reasonable person with ordinary intelligence, knowledge and common sense, placed in the circumstances of the person alleging bias, would be of the view that there was a reasonable suspicion that the decision-maker would be biased.[2] In *SARFU 2*, the Constitutional Court rejected such a biased-based application for the recusal of a number of judges of that Court:

> The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.[3]

The reasonable person postulated in this test is, as Lord Bingham recently remarked on behalf of the House of Lords, characterised by the following: 'he must adopt a balanced approach and will be taken to be a reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious'.[4] Our courts have, post-*SARFU 2*, emphasised that the test for bias in respect of judicial officers involves four requirements: *(a)* a reasonable suspicion that the judicial officer *might*, not would, be biased; *(b)* the suspicion must be that of a reasonable person in the position of the accused or litigant; *(c)* the suspicion must be based on reasonable grounds; and *(d)* the suspicion is one which a reasonable person *would*, not might, have.[5]

Our courts are likely to apply a similar test for a reasonable suspicion of bias in the context of administrative decision-makers — at least insofar as they exercise quasi-judicial or disciplinary power. In such a context, the test for disqualifying bias may be easier to meet than in the judicial realm. This is because there is a presumption that, in light of the oath of office, institutional independence, and legal training and experience of judicial officers, such officers act impartially and free from bias.[6] The stricter nature of the test for bias in the context of quasi-judicial decision-makers is reflected in the following statement in *Mönnig & Others v Council of Review & Others*:

[1] The term 'apprehension' was preferred by the Constitutional Court in *SARFU 2*, on the basis that the word 'suspicion' may possess 'inappropriate connotations'. *SARFU 2* (supra) at para 38.

[2] See *BTR Industries* (supra) at 693.

[3] *SARFU 2* (supra) at para 48.

[4] *R v Abdroikov; R v Green; R v Williamson* [2008] 1 All ER 315 at para 15.

[5] *Roberts* (supra) at paras 32–34. See also *South African Commercial Catering and Allied Workers Union & Others v Irvin & Johnson Limited* 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 (CC) and *S v Shackell* 2001 (4) SA 1 (SCA)('*Shackell*').

[6] See, for example, *SARFU 2* (supra) at para 48. The Supreme Court of Appeal in *Shackell* (supra) describes this as 'the weighty presumption of judicial impartiality' (at para 21). See also the Canadian Supreme Court in *R v S (RD)* (1997) 118 CCC (3d) 353 at para 113.

> [I]n the case of non-judicial officers performing functions indistinguishable from the judicial process, the test operates more strictly even than in the case of judicial officers. Reasonable litigants are less likely to regard judicially trained officers as inclined to succumb to outside pressures or to be influenced by anything other than the evidence given before them. The quality of impartiality is not so readily conceded to non-judicial adjudicators. Since the appearance of impartiality has to do with the public perception of the administration of justice, it is only to be expected that some tribunals will be more vulnerable to suspicion of bias than others. The most vulnerable, I venture to suggest, are tribunals — other than courts of law — which have all the attributes of a court of law and are expected by the public to behave exactly as a court of law does.[1]

It is important to note that the test of a reasonable suspicion of bias should vary. The variability of the test should turn on the nature of the administrative body concerned and the nature of the administrative action. As L'Hereux Dubé J noted on behalf of the Canadian Supreme Court: 'the standards for reasonable apprehension of bias may vary … depending on the context and the type of function performed by the administrative decision-maker involved.'[2] There is a significant difference as to the circumstances in which a reasonable suspicion of bias would arise in respect of, for example, a disciplinary tribunal as opposed to a committee that makes decisions based on broad policy considerations.[3]

(h) Institutional bias

Prior to the advent of the constitutional protection of procedural fairness, our courts applied the concept of 'institutional bias'. A finding of 'institutional bias' could preclude the conduct from review on the ground of bias. By 'institutional bias', we mean the term used to describe a lack of impartiality that is explicit or implicit in the empowering legislation. For example, legislation that specifically provides for a hearing before a person that has some or other interest in the matter, clearly contemplates and thus arguably authorises a degree of partiality in the conduct of that hearing. In the pre-constitutional era, the approach of our courts was that if a level of partiality was a necessary consequence of the legislative scheme, such partiality did not result in impermissible bias. In other words, institutional bias (sometimes referred to 'structural bias') operated as an exception to the rule against bias. Jacques De Ville explains the position as follows:

> Before the coming into effect of the 1993 Constitution, there was no possibility of challenging the validity of legislation setting up an administrative body with institutional bias. Such bias had to be tolerated 'because it had its origin in the nature of the hearing for which the Legislature has specifically provided'. Such a body would be acting improperly 'only if it

[1] 1989 (4) SA 866 (C) at 880.
[2] *Baker v Canada (Minister of Citizenship and Immigration)* (1999) 174 DLR (4th) 193 (SCC) at para 47.
[3] See De Ville *Judicial Review* (supra) at 270–271, fn 462 (Authorities cited there.)

> could be shown that it had approached the matter which it had to consider with a closed mind, that it had, for example, irrevocably decided on a certain cause of action and only went through the motions in considering objections', ie in the event of a real likelihood of bias.[1]

This approach was consistent with the doctrine of parliamentary sovereignty that applied prior to the Interim Constitution. As a result, the administrative law rule against bias could not be used to challenge the legality of a structure that was specifically envisaged in the legislation. As Etienne Mureinik stated:

> The point of calling bias institutional is that statutory approval means that it must be tolerated. . .. [I]f it is the institutional character of the bias which generates the statutory exclusion or curtailment, that must be because the legislature must be taken not to want to disqualify for bias arising from the decisionmaking procedure itself.[2]

The doctrine of parliamentary sovereignty has been eclipsed by doctrine of constitutional supremacy found in the Interim Constitution and the Final Constitution. In light of the constitutionally protected right to procedural fairness (which includes the rule against bias), there is a need to reassess the concept of 'institutional bias'. For if one has a constitutional right to an unbiased hearing, then even a law of Parliament cannot simply override such a right without justification. The difference between the approach to institutional bias before and after the Final Constitution is aptly described by Ross Kriel:

> [A]t common law one determines whether the legislature has authorised an 'institutional bias', and if so, it must be tolerated .... Under the Constitution, particularly given that section 34 separately grounds rights to independent and impartial tribunals, the question is not whether the legislature has authorized institutional bias, but whether it can justify institutional bias. These are two entirely different enquiries.[3]

63.6 THE RIGHT TO REASONABLE ADMINISTRATIVE ACTION

(a) Reasonableness: a (somewhat) controversial ground of review

FC s 33 proclaims that everyone has the right to reasonable administrative action. It is therefore indisputable that the Final Constitution subjects administrative action to a standard of reasonableness. Despite this clear starting point, it is important to bear in mind the somewhat controversial nature of this ground of review.

[1] De Ville *Judicial Review* (supra) at 281. See, eg, *Ciki v* Commissioner *of Correctional Services & Another; Jansen v Commissioner of Correctional Services & Another* 1992 (2) SA 269 (E) at 272; and *Loggenberg & Others v Robberts & Others* 1992 (1) SA 393 (C) at 405–406.

[2] 'Administrative Law' 1992 *Annual Survey of South African Law* 732–733.

[3] 'Administrative Law' 1999 *Annual Survey of South African Law* 73.

The traditional concern with review for unreasonableness is that it invites judicial scrutiny of the merits of the administrative decision or, more formalistically, that it narrows the distinction between a review and an appeal. Unreasonableness review therefore opens the way for courts to interfere with, and second guess, executive decisions and the policy prerogatives flowing from those decisions. It is, in particular, said that courts are ill-equipped to decide polycentric questions and are not institutionally competent to do so. The concern is therefore expressed that reasonableness review undermines the separation of powers.[1]

While it is correct that review for unreasonableness requires a court to assess the substance or merits of administrative decisions,[2] reasonableness review, properly construed, is both appropriate and consistent with the principle of separation of powers as entrenched in the Final Constitution. It is important, in this regard, that administrative decision-makers are required to act reasonably. It cannot, in principle, be correct that administrators should be at liberty to act unreasonably.[3] That a reasonableness standard strikes an appropriate balance is well expressed by Cora Hoexter:

> Standard dictionaries reveal that reasonable means 'in accordance with reason' or 'within the limits of reason'; and surely this is precisely what we are entitled to demand of discretionary administrative action. *Within the limits of reason* suggests an area of 'legitimate diversity', and a space within which various reasonable choices may be made. It does not suggest that a decision is reasonable only when it is correct or perfect. On the ordinary dictionary meaning of 'reasonable', in fact, s 33 captures exactly the right standard.[4]

It is important that, whatever form reasonableness review takes, the courts' role is confined to assessing the *reasonableness* of administrative action, and not its *correctness*. In this way, separation of powers is respected and the distinction between

[1] On the principle of separation of powers generally, see S Seedorf and S Sibanda 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12.

[2] See, for example, *Bato Star* (supra) at para 45; *Sidumo* (supra) at para 108. This is not, in itself, problematic. For one thing, a number of traditional grounds of administrative review involve, at least to some extent, an assessment of the substantive merits of the decision, including the old common law grounds of symptomatic or gross unreasonableness. See Hoexter 'Future of Judicial Review' (supra) at 512; C Hoexter 'Unreasonableness in the Administrative Justice Act' in C Lange and J Wessels (eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) 148, 157–158 ('Unreasonableness'); J Chan 'A Sliding Scale of Reasonableness in Judicial Review' in H Corder (ed) *Comparing Administrative Justice Across the Commonwealth* (2007) at 234–235).

[3] See E Mureinik 'Reconsidering Review: Participation and Accountability' 1993 *Acta Juridica* 35 ('Reconsidering Review') at 41 ('It is difficult to see why the fact that a decision is strikingly grossly unreasonable does not, on its own, prove abuse of discretion. Or, for that matter, why unreasonableness does not, on its own, prove abuse of discretion. After all, if we characterize a decision as unreasonable, we mean much more than that we disagree with it, or that we consider it wrong. We mean that we judge it to lack plausible justification. If so, how can we believe it to have been reached without an abuse of discretion?')

[4] 'Future of Judicial Review' (supra) at 510.

review and appeal is maintained.[1] Perhaps most significantly, the legitimacy of judicial review of the administration is maintained. As Froneman DJP stated, commenting on the test of 'justifiable' administrative action in IC s 24*(d)*:[2]

> In determining whether administrative action is justifiab1e in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' of the matter in some way or another. As long as the Judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.[3]

Reasonableness review only played a small role in pre-constitutional administrative law. In relation to the largest category of administrative conduct (so-called 'purely administrative decisions') the role played by reasonableness was limited to the application of two doctrines. First, symptomatic unreasonableness, which meant unreasonableness that established the existence of another ground of review.[4] The second related doctrine was that of gross unreasonableness. Gross unreasonableness stood for the proposition that a decision will be set aside only if the degree of unreasonableness is particularly egregious. In *National Transport Commission & Another v Chetty's Motor Transport (Pty) Ltd,*[5] the court wrote that a decision will be set aside if it is 'grossly unreasonable to so striking a degree as to warrant the inference of a failure to apply … [the] mind'.

Reasonableness review was not, however, entirely foreign to our common law during this period. Most significantly, unreasonableness was a ground for challenging delegated legislation, where the rule in *Kruse v Johnson*[6] was applied in a 'long train of cases'.[7] In addition, certain cases applied a variant of reasonableness review to 'purely judicial' administrative decisions.[8]

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[1] See *Bato Star* (supra) at para 45; and *Sidumo* (supra) at para 109 (Navsa AJ). As Ngcobo J stated in his minority judgment in *Sidumo* discussing the standard of review under s 145(2)*(a)* of the LRA: 'there may well be a fine line between a review and an appeal, in particular, where … the reviewing court considers the reasons given by a tribunal, not to determine whether the result is correct, but to determine whether a gross irregularity occurred in the proceedings. At times it may be difficult to draw the line. There is, however, a clear line. And this line must be maintained'. *Sidumo* (supra) at para 244,

[2] *Carephone (Pty) Ltd v Marcus NO & Others* 1999 (3) SA 304 (LAC), 1998 (10) BCLR 1326 (LAC) ('*Carephone*') at para 36.

[3] See also Mureinik 'Reconsidering Review' (supra) at 40–43 ('"Reasonableness" marks off decisions as tolerable even where they may be wrong.') See also *Kotze v Minister of Health & Another* 1996 (3) BCLR 417 (T) at 425–426.

[4] See, for example, *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd* 1928 AD 220, 236–237. The term 'symptomatic unreasonableness' was coined by J Taitz 'But 'Twas a Famous Victory' 1978 *Acta Juridica* 109, 111.

[5] 1972 (3) SA 726 (A) at 735.

[6] [1898] 2 QB 91 at 99–100.

[7] R *v Jopp* 1944 (4) SA 11, 13 (N). See Baxter *Administrative Law* (supra) at 478–479, fn 13. For a discussion of the application of reasonableness review to legislative administrative acts under the common law, see Hoexter *Administrative Law* (supra) at 296–301.

[8] *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A)(Jansen JA). See Baxter *Administrative Law* (supra) at 499 (Explains what Jansen JA appeared to mean by 'purely judicial' decisions are 'decisions that have to be reached by reference to clear rules, principles or standards, not decisions involving a high degree of policy', ie decisions with which the courts are closely familiar.) See also Hoexter *Administrative Law* (supra) at 301.

(b) The constitutional right to reasonable administrative action

IC s 24*(d)* dramatically altered the existing common-law position of the time. It provided that 'every person shall have the right to administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened'. The key substantive component of the administrative justice clause amounted to a constitutional command for rational decision-making.[1] Although the term 'justifiable' was used in the Interim Constitution, most authors expressed the view that 'justifiable' was synonymous with 'reasonableness'.[2] While certain courts agreed with this approach,[3] the majority of the Constitutional Court in *Bel Porto* suggested that 'justifiability', at least in the context of that case, meant no more than mere rationality.[4]

FC s 33(1) appears to have eliminated any uncertainty by simply and forthrightly stating that everyone has the right to administrative action which is 'reasonable'. If one adopted a more restrictive approach to the ambit of justifiability under the Interim Constitution, there is no doubt that FC s 33(1) went further in providing for reasonableness review. As Chaskalson CJ (who had penned the judgment of the majority in *Bel Porto*) remarked in his judgment in *New Clicks*, FC s 33 means that administrative action can be reviewed for reasonableness and that reasonableness is a 'higher standard' than rationality. This higher standard 'in many cases will call for a more intensive scrutiny of administrative decisions than would have been competent under the interim Constitution'.[5]

The question that inevitably arises is what is meant by 'reasonableness'? Part of the answer is that it, at a minimum, encompasses rationality. This overlaps with the constitutional principle of rationality discussed above,[6] and requires a rational

[1] J Klaaren 'Administrative Justice' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* 1st ed. (5th revision, 1999) § 25.8.

[2] See, for example, E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31; Klaaren 'Administrative Justice' (supra) at § 25.8; Hoexter 'Future of Judicial Review' (supra) at 511; L du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* (1994) at 169. But see D Davis & G Marcus 'Administrative Justice' in D Davis, H Cheadle & N Haysom (eds) *Fundamental Rights in the Constitution: Commentary and cases* (1997) 161, who suggest that reasonableness might be a wider concept than justifiability since a decision may be justifiable, although the reasons for the decisions do not have an objectively reasonable basis.

[3] See *Standard Bank of Bophuthatswana Ltd v Reynolds NO & Others* 1995 (3) BCLR 305 (B); and *Roman v Williams NO* 1998 (1) SA 270 (C), 1997 (9) BCLR 1267 (C) ('*Roman*').

[4] *Bel Porto* (supra) at paras 89 and 127–128 (per Chaskalson CJ). This portion of Chaskalson CJ's judgment suggests that certain administrative decisions may require a stricter standard of justifiability than rationality. Chaskalson CJ stated in his later judgment in *New Clicks* (supra) that IC s 24*(d)* 'in substance set rationality as the review standard' (at para 108). See, however, the minority judgment of Mokgoro and Sachs JJ in *Bel Porto*, stating that the rationality requirement in IC s 24*(d)* extended beyond rationality review and encompassed a proportionality standard (paras 162–166). For a criticism of the majority decision in *Bel Porto*, see A Pillay 'Reviewing reasonableness: An appropriate standard for evaluating state action and inaction?' (2005) 122 *SALJ* 419 at 427–428.

[5] *New Clicks* (supra) at para 108.

[6] See § 63.2*(b)* supra.

connection between the decision, the information before the decision-maker and the purpose that the decision seeks to achieve.[1] As Hoexter argues:

> Rationality means, first, that administrative action must be supported by the evidence before the administrator and the reasons given for it. This requirement may be summed up as follows: 'Is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?' [quoting from *Carephone*][2] Secondly, administrative action must be objectively capable of furthering the purpose for which the power was given and for which the action was purportedly performed.[3]

The next question that is commonly asked is whether 'reasonableness' includes proportionality. Broadly speaking, proportionality requires a proportionate balance between the objective sought to be achieved by the administrative action and the impact of that decision on persons' rights and interests.[4]

There is some judicial support for the idea that proportionality forms part of the test for reasonable administrative action.[5] In his minority judgment in *New Clicks*, Sachs J even goes so far as saying that '[p]roportionality will always be a significant element of reasonableness'.[6] Some support for the application of the proportionality principle as part of a reasonableness enquiry is also found in the arguably analogous decisions of the Constitutional Court which consider proportionality in assessing whether or not the State is complying with its obligation to

[1] The requirement of a rational connection between the decision and its purpose covers the same ground as the constitutional principle of rationality, which the Constitutional Court has held flows from the rule of law (see § 63.2*(b)* supra). As the Court stated in *Pharmaceutical Manufacturers* (supra) at para 85: 'Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement.' The requirement of a rational connection between the decision and the information before the decision-maker, however, goes further. In this latter sense rationality seems to mean illogical or arbitrary. It is thus akin to unreasonableness in the sense referred to by Mureinik 'Reconsidering Review' (supra) at 41 (ie lacking plausible justification) or, at the very least, gross unreasonableness.

[2] Supra, at para 37.

[3] 'Unreasonableness' (supra) at 153. See also Hoexter 'Future of Judicial Review' (supra) at 511.

[4] The principle of proportionality is well-known in South African constitutional law as it is integral to the general limitations analysis under FC s 36. Nonetheless, it is a contested concept. For a discussion and a critique of proportionality in this context, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 34.8*(b)* and *(d)*.

[5] *Roman* (supra) at 284–285 (in the context of review of administrative action for justifiability under IC item 23(2)*(b)* of Schedule 6); *Peter Klein* (supra) at para 36; *Schoonbee & Others v MEC for Education, Mpumalanga & Another* 2002 (4) SA 877 (T) at 885. See also the post-PAJA decision of the Constitutional Court in *Bato Star* (supra), at § 63.6*(d)* infra. A number of academics also favour the requirement of proportionality in relation to administrative action. See, eg, Hoexter *Administrative Law* (supra) at 309; and Pillay (supra) at 420 and 429; De Ville *Judicial Review* (supra) at 215–216 (Argues that proportionality review should apply to certain types of administrative action, ie where a fundamental right has been infringed, where a penalty is imposed or fees are determined.)

[6] *New Clicks* (supra) at para 637.

take 'reasonable measures' to achieve the progressive realisation of socio-economic rights.[1] This is significant, given the fact that the judicial enforcement of socio-economic rights raises similar separation of powers concerns as does reasonableness review in administrative law, namely, polycentric decision-making and involving courts in an assessment of policy matters, with which courts are generally considered ill-equipped to deal.[2]

In deciding on the appropriate test to adopt, one should not lose sight of the fact that the text of the Constitution specifically uses the term 'reasonable'. It is this term, rather than a substitute, that must be given meaning. As Froneman DJP, discussing the test of justifiability in the Interim Constitution, remarked:

> Without denying that the application of these formulations [of 'reasonableness, rationality' and 'proportionately'] in particular cases may be instructive, I see no need to stray from the concept of justifiability itself. To rename it will not make matters easier.'[3]

That being the case, a legitimate approach to reasonableness in FC s 33(1) is to regard it as importing the standard of a reasonable decision-maker (similar to the reasonable person test for negligence in delict). This standard does not, however, mean that the decision taken by the real-world administrator must be the same decision as that at which the Herculean reasonable person would arrive.[4] Such an approach would negate the administrator's legitimate area of administrative discretion. Moreover, such a standard would be virtually impossible to apply in the administrative law context, where one is dealing with a variety of polycentric decisions which are often driven by policy considerations and which courts are at times ill-equipped to assess. Accordingly, the reasonableness standard should mean that a court is required to establish whether the decision taken falls within the range of decisions that a reasonable administrator *could* have taken.[5] Although this test is not identical to the test for negligence, it is similar in that it postulates a reasonable decision-maker. As we will see below, the Constitutional Court in *Bato Star* has interpreted reasonableness in PAJA in this very manner.

[1] See Pillay (supra) at 421 and 429–432; C Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *SALJ* 264, 279–280.

[2] Pillay (supra) 420–421.

[3] *Carephone* (supra) at para 37.

[4] See R Dworkin *Law's Empire* (1986).

[5] The rationality aspect of reasonableness review can be accommodated within this approach. A reasonable decision-maker could not make an irrational decision. Similarly, it would generally follow that a reasonable decision-maker could not have taken a decision which is disproportionate in its effect. It should, however, be noted that proportionality goes further than this conception of reasonableness, in that proportionality does not simply focus on the perspective of the administrator; it looks at the impact of the action. It is conceivable that a decision may have a disproportionate effect although the administrator could not reasonably have been aware of this effect at the time of taking the decision (particularly in urgent circumstances). Accordingly, it may well be that reasonableness, in the sense contemplated in FC s 33, goes beyond the reasonable administrator test contemplated in the text above and extends to objective proportionality (although we acknowledge that this will, in the case of limitations of fundamental rights, overlap with the proportionality requirement flowing from FC s 36(1)).

(d) Reasonableness review under PAJA

The concept of reasonableness review is included in two ways in PAJA. First, s 6(1)*(f)* provides that administrative action may be judicially reviewed if it is not 'rationally connected' to: *(a)* the purpose for which it was taken; *(b)* the purpose of the empowering provision; *(c)* the information before the administrator; or *(d)* the reasons given by the administrator. This provision clearly requires that administrative action must be rational in the sense discussed above: that there is a connection between, on the one hand, the action and, on the other hand, the purpose, information and reasons, and that the connection flows in the 'correct' direction. (It may *not* be counterproductive).

The first two aspects of rationality review (ie *(a)* and *(b)*) ask whether the action objectively operates in the direction of fulfilling its purpose. This understanding accords with the concept of rationality in the general constitutional sense. It is, perhaps unnecessary now, as the exercise of all public power must, courtesy of the principle of legality, be rationally related to a legitimate objective.[1] (It does retain the virtue of having been codified in PAJA.) The last two aspects (*(c)* and *(d)*), however, add another dimension to rationality. They look not to the likelihood of a particular outcome, but rather assess whether the action is supported by the evidence and the reasons. While s 6(1)*(f)* helpfully identifies the matters to which there must be a rational connection, the extent of the connection remains unclear. What level of support is required for the decision or what likelihood of furthering the purpose is required? As we will see below, the judgment of the Constitutional Court in *Bato Star* suggests that there must be a *reasonable* link between the decision, the evidence on which it is based and the objective it seeks to achieve.[2] Section 6(2)*(h)* of PAJA goes further, in providing that administrative action may be set aside if it is 'so unreasonable that no reasonable person could have so exercised the power or performed the function'.[3]

While one might argue that this provision means that only particularly egregious instances of unreasonableness will be reviewable,[4] such an approach should be avoided because it would fail to give effect to the constitutional right to reasonable administrative action. Section 6(2)*(h)* should rather be read as simply

[1] See § 63.2*(b)* supra.

[2] *Bato Star* (supra) at para 48 (Suggests that a court may review a decision 'which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts').

[3] The draft of PAJA prepared by the Law Commission provided that a court could review administrative action if 'the effect of the action is unreasonable, including any: *(i)* disproportionality between the adverse and beneficial consequences of the action; and (ii) less restrictive means to achieve the purpose for which the action was taken'. See Hoexter 'Future of Judicial Review' (supra) at 518–519 for a criticism of s 6(2)*(h)*.

[4] One reason for this is that s 6(2)*(h)* employs very similar language to the test for unreasonableness in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*. [1947] 2 All ER 680 (CA) at 683 and 685 (Lord Greene referred to a decision 'so unreasonable that no reasonable authority could ever have come to it.') The *Wednesbury* test is similar to that of gross unreasonableness in our common law, and has been much-criticised in the United Kingdom. See, eg, HWR Wade and CF Forsyth *Administrative Law* 9th ed. (2004) 371–372. See also *Bato Star* (supra) at para 44.

providing for review for unreasonableness.[1] This standard requires a decision-maker to act reasonably, in the sense that the decision taken would have been one of the decision-making options open to the reasonable administrator in all the circumstances. It is therefore not the decision which a reasonable decision-maker *would* have made but rather one he or she *could* have made. In other words, reasonableness is assessed by examining whether the action of the administrator was one of the courses of action open to a reasonable administrator. This enquiry involves a limited proportionality enquiry as a wholly disproportionate action would not be one open to a reasonable decision-maker.

The Constitutional Court adopted this approach in *Bato Star*. Relying on the need to interpret s 6(2)*(h)* in light of the constitutional right in FC s 33(1), O'Regan J states as follows:[2]

> Even if it may be thought that the language of section 6(2)*(h)*, if taken literally, might set the standard such that a decision would rarely if ever be found to be unreasonable, it is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular section 33 which requires administrative action to be 'reasonable'. Section 6(2)*(h)* should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke's words,[3] it is one that a reasonable decision-maker could not reach.[4]

In other words, the administrative decision must be one that would be open to a reasonable decision-maker. Only if it goes beyond those parameters, is it open to challenge as unreasonable. The administrative decision at issue in *Bato Star* required a reasonable equilibrium to be struck between various factors. O'Regan J thus remarked that the precise 'equilibrium is best left to the decision-maker. The court's task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances'.[5] O'Regan J added that this test is a flexible, context-sensitive one:[6]

> What will constitute a reasonable decision will depend on the circumstances of each case. . .. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.

[1] See Currie & Klaaren *Benchbook* (supra) at 171–173.

[2] *Bato Star* (supra) at para 44.

[3] In *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 1 All ER 120, 157 (HL).

[4] The SCA in *Foodcorp (Pty) Ltd v Deputy Director General Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management & Others* 2006 (2) SA 191 (SCA) ('*Foodcorp*') at para 12 described the test in the following way: 'whether the decision was one that a reasonable decision-maker could not have reached or, put slightly differently, a decision-maker could not reasonably have reached'. Although the courts in *Bato Star* (supra) and *Foodcorp* have not adopted a strictly literal interpretation of s 6(2)*(h)*, it seems to us that this interpretation is not unduly strained and is thus, we submit, appropriate as a matter of constitutional principle.

[5] *Bato Star* (supra) at para 49.

[6] At para 45.

The decision in *Bato Star* is to be welcomed. It provides a flexible test for determining reasonableness, taking into account not only the impact of the decision and its benefits, but also factors that are policy-based (and which are sensitive to the institutional competence of courts and administrators). It allows for courts to vary the level of scrutiny depending on factors such as the nature of the decision and the 'identity and expertise of the decision-maker'. It also makes clear that reasonableness goes beyond rationality and includes at least some elements of proportionality.[1] The core focus of the test, however, remains the standard of the reasonable decision-maker and whether the decision is one that such decision-maker could have made. As O'Regan J reiterated in a slightly different context, and with reliance on her judgment in *Bato Star*, the standard of reasonableness requires the public authority's conduct 'to fall within the range of possible conduct that a reasonable decision-maker in the circumstances would have adopted.'[2]

Conscious of the potential of reasonableness review to blur the distinction between review and appeal, and to undermine the separation of powers, O'Regan J in *Bato Star* emphasised the need for appropriate 'respect' (the term that she prefers to 'deference') towards the administrative decision-maker. She did so in a manner that locates the idea of respect or deference not as an extra-legal trump card but as an incidence of the separation of powers:[3]

> [T]he need for courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the constitutional principle of the separation of powers itself. . . . In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend on the character of the decision itself, as well as the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. . . . This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported by the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.[4]

[1] See Hoexter *Administrative Law* (supra) at 316 (Points out that the references to 'the impact of the decision', 'the nature of the competing interests involved' and 'the range of factors relevant to the decision' in this dictum in *Bato Star* suggest a proportionality enquiry.) As we discuss above, there may be a need to go further, in light of FC s 33, and to accommodate proportionality within the grounds of review in s 6(2) of PAJA. One possibility in this regard is to bring disproportionality under the catch-all in s 6(2)*(i)* of PAJA: 'otherwise unconstitutional or unlawful'.

[2] *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at paras 86 and 87. See also *Sidumo* (supra) at para 119.

[3] See Hoexter *Administrative Law* (supra) at 138–147 and 318–321.

[4] *Bato Star* (supra) at paras 46–8.

63.7 THE RIGHT TO WRITTEN REASONS

(a) The constitutional right to written reasons

In an oft-noted and oft-lamented gap, there was no right to reasons in general administrative law under the common law.[1] This position was radically altered by IC s 24*(c)*. It proclaimed that every person has the right to be furnished with written reasons for administrative action which 'affects his or her rights or interests unless the reasons for such action have been made public'. The surprisingly broad ambit of this right to reasons (referring to both 'rights' and 'interests') was reduced under the Final Constitution. FC s 33(2) abandons the reference to 'interests' and states that everyone whose '*rights* have been adversely affected by administrative action has the right to be given written reasons'.[2] The right to written reasons in FC s 33(2) is thus subject to a threshold test of 'rights' (to which the right to lawful, reasonable and procedurally fair administrative action in FC s 33(1) is not subject). We return to the significance of this below.

(b) The rationales for the right to written reasons

The right to reasons has been described as 'the bulwark of the right to just administrative action'.[3] It promotes administrative justice and good decision-making in a constructive manner without the need to rely on judicial review. If a decision-maker knows that he or she is required to provide written reasons to justify his or her decision, then he or she will be more inclined to consider all alternatives and to act in conformity with principles of good administration.[4] The requirement of written reasons also promotes accountability, with decision-makers needing to justify their conduct. In so doing, it increases public confidence in the administration and advances the foundational constitutional values of accountability, responsiveness and openness.[5]

The furnishing of reasons simultaneously promotes the values of lawful and efficient administrative decision-making in the following manner. If the decision has been properly taken and adequate reasons are furnished in respect of that decision, then a person affected by it may well accept it and take the matter no

[1] Baxter *Administrative Law* (supra) at 226. Some statutes, however, required reasons for particular decisions. Ibid. See also Hoexter *Administrative Law* (supra) at 419–420.

[2] Emphasis added.

[3] See *Goodman Brothers* (supra) at para 42 (Olivier JA, concurring.)

[4] See *Bel Porto* (supra) at para 159. See also Baxter *Administrative Law* (supra) at 228 ('A duty to give reasons entails a duty to rationalise the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached requires one to address one's mind to the decisional referents which ought to be taken into account.')

[5] FC s 1*(d)*. See also FC s 195(1)(Sets out the principles of public administration); De Ville *Judicial Review* (supra) at 287; and *Kiva* (supra) at paras 22 and 37.

further (thus reducing the prospect of disgruntled persons bringing review applications for purposes of finding out whether a decision was properly taken, which undermines efficient administration). If, on the other hand, the reasons reveal that the decision was not properly taken (eg relevant considerations were not taken into account or irrelevant considerations were), the affected person would be able to make an informed decision as to whether and how to challenge the decision.[1] In other words, written reasons enable persons to assess whether or not their rights have been infringed and to review or, where appropriate, appeal a particular decision.

In addition, the right to written reasons can perform an educational function; informing, for example, an applicant for a licence how he or she can improve his or her chances of being awarded a licence the next time around.[2]

Some of these rationales are well-captured in the minority judgment of Mokgoro and Sachs JJ in *Bel Porto*:

> The duty to give reasons when rights or interests are affected has been stated to constitute an indispensable part of a sound system of judicial review. Unless the person affected can discover the reason behind the decision, he or she may be unable to tell whether it is reviewable or not and so may be deprived of the protection of the law. Yet it goes further than that. The giving of reasons satisfies the individual that his or her matter has been considered and also promotes good administrative functioning because the decision-makers know that they can be called upon to explain their decisions and thus be forced to evaluate all the relevant considerations correctly and carefully. Moreover, as in the present case, the reasons given can help to crystallize the issues should litigation arise.[3]

(c) The scope of the right to written reasons

As stated above, FC s 33(2) confers the right to written reasons on a person whose 'rights are adversely affected' by administrative action. Section 5(1) of PAJA gives this constitutional right statutory form. It provides that any person 'whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action' may request the administrator to furnish written reasons for the action.[4] The administrator is obliged to provide such reasons within 90 days after receiving the request.[5] Subsection (3) goes

[1] See *Bel Porto* (supra) at para 159. See also Hoexter *Administrative Law* (supra) at 416.

[2] Baxter *Administrative Law* (supra) at 138 (Quoted with approval in a number of decisions of our courts, including the SCA in *Goodman Brothers* (supra) at para 6 (per Schutz JA)). For more detailed discussions of the rationales for the right to written reasons, and the disadvantages of the requirement to furnish reasons, see Hoexter *Administrative Law* (supra) at 416–419; De Ville *Judicial Review* (supra) at 287–288; Currie *The PAJA* (supra) 137–139; Burns & Beukes *Administrative law* (supra) at 253–255.

[3] *Bel Porto* (supra) at para 159.

[4] The request for reasons must be made within 90 days from the date on which the affected person 'became aware of the action or might reasonably have been expected to have become aware of the action'. PAJA s 5(1).

[5] PAJA s 5(2).

on to provide that if an administrator fails to furnish adequate reasons, it will be rebuttably presumed in any judicial review proceedings that the administrative action was taken without good reason. An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances[1] and may follow a fair but different procedure in terms of an empowering provision.[2]

The right to written reasons therefore only arises under PAJA if a person's 'rights' have been 'materially and adversely affected'. Here, PAJA adds the qualification 'materially' as a threshold requirement that must be satisfied in order to invoke the right to written reasons as expressed in FC s 33(2). In order to ensure that PAJA properly gives effect to the constitutional right, only fairly insignificant, trivial effects should fall short of the 'materially' requirement.[3]

The more significant question (and one fundamentally parallel to our discussion above regarding s 3 of PAJA) is what is meant by an adverse effect on 'rights' in the context of s 5(1) of PAJA? One answer is to apply the approach of the Supreme Court of Appeal in *Goodman Brothers*. *Goodman Brothers* concerned a request for reasons by an unsuccessful tenderer. Although the case was decided in terms of the transitional FC s 33(2), which repeated the wording of IC s 24*(c)*,[4] the SCA did not consider whether the decision to award the contract to another tenderer adversely affected the unsuccessful tenderer's 'interests'. It focused on whether its 'rights' were adversely affected. Schutz JA, writing on behalf of the majority of the SCA, held that the affected right was that of lawful and procedurally fair administrative action. Schutz JA arrived at this conclusion because, without reasons, the affected person could not assess whether his or her right to lawful and fair administrative action had been violated.[5] Without reasons, the unsuccessful tenderer 'is deprived of the opportunity … to consider further action'.[6]

Some have suggested that the approach of the majority of the SCA in *Goodman Brothers* can usefully be employed in relation to s 5 of PAJA.[7] And at least one decision of our courts has indeed applied it to s 5.[8] However, if this approach

[1] PAJA s 5(4)

[2] PAJA s 5(4). Section 2 also provides for an exemption from the requirement to furnish written reasons.

[3] *Kiva* (supra) at para 23.

[4] FC item 23(2)*(b)* of Schedule 6.

[5] *Goodman Brothers* (supra) at paras 10–11.

[6] Ibid at para 12.

[7] De Ville *Judicial Review* (supra) at 290–291. Hoexter *Administrative Law* (supra) at 424–426 also seems to support the application of *Goodman Brothers* to s 5(1) of PAJA, though in more tentative terms, acknowledging the difficulties with the 'bootstraps' reasoning in *Goodman Brothers*, but stating that 'it is reasoning that will appeal to anyone who cares about the values of participation and accountability'.

[8] *Kiva* (supra) at paras 29–32 (Plasket J). The Court in *Kiva* also held that the rights to equality, access to court and fair labour practices were affected by the decision not to promote the applicant (at para 32).

is correct, then all administrative action which adversely impacts on a person will trigger the right to written reasons.[1] In adopting this approach, the differences between FC s 33(1) (which applies to all administrative action) and FC s 33(2) (which only applies to administrative action adversely affecting rights) would 'seem to be obliterated'.[2]

While we have some sympathy for the furtherance of the aims of the right to written reasons through this approach, it is, in our view, flawed. It amounts to 'bootstraps' reasoning that reads out the adversely affecting rights requirement in s 5 of PAJA (and FC s 33(2)).[3] It thus fails to give effect to the language used in both FC s 33(2) and PAJA. Perhaps most problematically, it undermines the clear choice of the drafters of the Final Constitution to list the right to written reasons (in FC s 33(2)) separately from the right to lawful, reasonable and procedurally fair administrative action (in FC s 33(1)) and to make the former right expressly subject to the additional threshold of adversely affected rights.[4] It also fails to pay due respect to the drafters of PAJA, who expressly limited the right to written reasons to situations where administrative action adversely affects 'rights', while providing that procedural fairness applies to a wider range of decisions (adversely affecting 'rights or legitimate expectations').[5] This 'lack of respect' for an important distinction made by another branch of government is inappropriate both as a means to interpret correctly a constitutional right (FC s 33(2)) as well as a provision of constitutionally mandated legislation (s 5(1) of PAJA).[6]

It seems to us that the purpose of the 'adversely affecting rights' requirement in FC s 33(2) is not to entitle persons to written reasons in order to assess whether or not their rights (including their rights to just administrative action) have been infringed (as laudable as such an approach would be), but rather to adopt the approach that has been used for some time in administrative law in the context of the right to a hearing; namely, to narrow the categories of persons who are entitled to that right based on the impact of the administrative decision on those persons.[7] In this regard, it is instructive to compare the language in FC s 33(2) with the right to access to information in private hands in FC s 32(1)*(b)*. FC s 32(1)*(b)* entitles persons to access information 'that is required for the exercise or protection of any rights'. While FC s 32(1)*(b)* contemplates the need to

[1] See De Ville *Judicial Review* (supra) at 291.

[2] Hoexter *Administrative law* (supra) at 424.

[3] See Hoexter *Administrative law* (ibid) and Hoexter 'The Current State' (supra) at 31.

[4] This purpose is particularly apparent when one has regard to the extensive use of this type of threshold in qualifying each of the rights to just administrative action under IC s 24.

[5] Compare s 5(1) and s 3(1) of PAJA.

[6] The problem is captured by Hoexter 'The Current State' (supra) at 32 in the following terms: '[*Goodman Brothers*] is a fairly clear illustration of what judicial enthusiasm can do to obliterate the limits deliberately drawn by any legislature. To put it rather crudely, the decision shows just how easy it is to make administrative justice fully applicable to everyone all the time'.

[7] This approach was also adopted in relation to the various aspects of administrative justice in IC s 24.

have sight of information in order to exercise or protect one's rights,[1] FC s 33(2) applies where the administrative action actually has an adverse effect on rights.

We submit that a more appropriate approach is to read the 'adversely affecting rights' requirement in s 5(1) of PAJA as denoting administrative action that *determines* one's rights. 'Rights' in this context includes *all* rights and may well extend to unilateral obligations undertaken by the State.[2] Differing significantly from our interpretation of the scope of ss 3 and 4 of PAJA but nonetheless not going so broad as *Goodman Brothers*, this 'determining' interpretation of s 5 would entitle a broad range of persons who are affected by administrative action to written reasons in respect of that action (including an unsuccessful tenderer such as in *Goodman Brothers*) but, in our view, gives effect to the wording of FC s 33(2) and s 5(1) of PAJA.

(d) The content of PAJA s 5: the meaning of 'adequate' reasons

Another important question for purposes of s 5 of PAJA is what constitutes 'adequate reasons'? Although PAJA does not provide guidance on this issue, a number of cases shed light on it.

In the pre-PAJA case of *Moletsane v Premier of the Free State & Another*, the Court laid down the general approach that 'the more drastic the action taken, the more detailed the reasons which are advanced should be'.[3] The degree of seriousness of the administrative act should therefore determine the particularity of the reasons furnished. This approach links the level of detail to the impact on the person affected by the action.

Shying away from such a unidimensional approach, Currie and Klaaren point out that there are other possible alternatives to assessing what is adequate in the

[1] See J Klaaren and G Penfold 'Access to Information' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) § 62.7.

[2] See § 63.3*(c)*(vi) supra. An interesting issue that would arise if this approach is adopted is the impact of the right to equality. See *Goodman Brothers* (supra) at para 42 (Olivier JA, in a separate concurring judgment, held that, in the context of a tender, the right to equality in FC s 9 gave rise to an effect on rights: 'The right to equal treatment pervades the whole field of administrative law, where the opportunity for nepotism and unfair discrimination lurks in every dark corner. How can such a right be protected other than by insisting that reasons be given for an adverse decision? It is cynical to say to an individual: you have a constitutional right to equal treatment, but you are not allowed to know whether you have been treated equally'.) At the risk of being accused of cynicism, we submit, for the reasons set out above, that the right to written reasons (under FC s 33(2)) does not arise simply because one needs to have sight of reasons in order to assess whether one has been subject to unequal treatment. Nevertheless, the nature of the right to equality (and particularly 'mere differentiation' contemplated in FC s 9(1)) may mean that a wide range of administrative action adversely affects the right to equality, in the sense that it results in different treatment (even though that different treatment is not unconstitutional). In addition, the context of tenders may have specific implications on the rights at issue and their interpretation and application. See G Penfold and P Reyburn 'Public Procurement' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 25.

[3] 1996 (2) SA 95 (O) at 98G-H, 1995 (9) BCLR 1285, 1228B (O).

circumstances and too much store should not be set by the seriousness of the administrative action. One should have regard to all relevant considerations, including the level of complexity relating to the matter and the cost of providing detailed reasons in the circumstances, in assessing the adequacy of reasons.[1] The guiding principle in this regard is that the reasons should be sufficient in order to serve the objects of the right to written reasons. Accordingly, 'a statement of reasons is adequate … when it is intelligible to the persons seeking the reasons and is of sufficient precision to give them a clear understanding of why the decision was made'.[2]

A helpful and authoritative statement as to the meaning of 'adequate reasons' and one that references the purposes of the right to written reasons is provided in the judgment of the Supreme Court of Appeal in *Phambili Fisheries*:

> [Section] 13(1) of the [Australian] Judicial Review Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: 'Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.'
>
> This requires that the decision-maker should set out his understanding of the relevant law, any finding of fact on which his conclusions depend (especially if those have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement.[3]

(e) The request-driven nature of the right to written reasons under PAJA

The starting-point of PAJA's treatment of reasons is that the process is request-driven. While this would probably not affect the constitutionality of PAJA, it equally should not be taken as a signal for the legislature to depart from the recent legislative trend to require that reasons be automatically given in relation to certain decisions. The automatic grant of written reasons serves the

[1] See Currie & Klaaren *Benchbook* (supra) at 143–146.

[2] Currie & Klaaren *Benchbook* (supra) at 144. See also in J Wessels '"Adequate reasons" in terms of the Promotion of Administrative Justice Act' in C Lange and J Wessels (eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) 116, 125–131.

[3] *Minister of Environmental Affairs and Tourism & Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism & Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 406 (SCA) at para 40 (Schutz JA), quoting Woodward J in the Australian case of *Ansett Transport Industries (Operations) Pty Ltd & Another v Wraith & Others* (1983) ALR 500, 507. On the adequacy of reasons, see *Nomala v Permanent Secretary, Department of Welfare, & Another* 2001 (8) BCLR 844 (E); *Commissioner, South African Police Service, & Others v Maimela & Another* 2003 (5) SA 480 (T).

interests of good administration. In addition to adhering to this trend in legislative drafting, the provisions of s 5(6) should be employed for this purpose.[1]

63.8 Standing to enforce the right to just administrative action

In administrative law, standing primarily refers to the right of an applicant to approach the court for relief by way of judicial review.[2] In enforcing the Bill of Rights, FC s 38 expands the common-law grounds of standing in cases in which it is alleged that a constitutional right has been infringed or threatened. In such cases the following persons may approach a court: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interests of its members.[3]

This constitutional position has a relatively clear implication for general administrative law and the enforcement of the right to just administrative action: that the approach to standing must be broader than has previously been the norm. The standing clause of the Bill of Rights should be read into the PAJA.[4] In our view, a broad approach to standing, such as has by and large been adopted by our courts thus far, would not only follow the constitutional direction in this area of public law[5] but would also be consistent with the fact that s 6(1) of the PAJA provides that 'any person' may institute judicial review proceedings. One specific implication is that final administrative action with a general effect should be justiciable regardless of its implementation or enforcement in individual cases.[6] Such a position would reverse the existing, narrow common-law understanding.

[1] Section 5(6)(*a)* provides that '[i]n order to promote an efficient administration, the Minister may, at the request of an administrator, by notice in the *Gazette* publish a list specifying any administrative action or a group or class of administrative actions in respect of which the administrator concerned will automatically furnish reasons to a person whose rights are adversely affected by such actions, without such person having to request reasons in terms of this section'.

[2] As noted above, standing may also be relevant in non-judicial administrative proceedings such as those of internal review and appeal.

[3] See C Loots 'Standing, Ripeness and Mootness' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 7.

[4] Currie *The PAJA* (supra) at 179. For a general discussion of standing in administrative law, see Hoexter *Administrative Law* (supra) chapter 9 'Standing' 434–460. While Hoexter considers standing to be a separate topic from that of ripeness and mootness, we consider these issues together.

[5] See *Ferreira v Levin NO & Others; Vryenhoek & others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 229 (O'Regan J emphasised that litigation of a public character is suited to such an expansion.)

[6] See Currie *The PAJA* (supra) at 181–182.

In one treatment of standing within administrative law, the Constitutional Court has supported a relatively expansive view of standing. In *AAA Investments*, the Court granted leave to appeal even where the case had become moot due to its important implications for regulation.[1]

An important class action case in the lower courts supports the general argument that the broad constitutional provision relating to standing should be applied in the context of review under the PAJA. In relation to administrative justice, Froneman J in *Ngxuza & Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government & Another*[2] adopted a broad approach to standing:

> Particularly in relation to so-called public law litigation there can be no proper justification of a restrictive approach [to standing]. The principle of legality implies that public bodies must be kept within their powers. There should, in general, be no reason why individual harm should be required in addition to the public interest of the general community. Public law litigation may also differ from traditional litigation between individuals in a number of respects. A wide range of persons may be affected by the case. The emphasis will often not only be backward-looking, in the sense of redressing past wrongs, but also forward-looking, to ensure that the future exercise of public power is in accordance with the principle of legality. All this speaks against a narrow interpretation of the rules of standing.

In this case a number of applicants, whose disability grants under social legislation had been cancelled or suspended, sought a declaration that the suspension or cancellation was unlawful. The same relief was claimed by the applicants on behalf of any other persons in the same position as themselves. Froneman J emphasised the conditions of poverty in the Eastern Cape in holding that there was evidence that many people in similar circumstances as the applicants were unable individually to pursue their claims through poverty, did not have access to legal representation, and would have difficulty in obtaining legal aid. They were thus effectively unable to act in their own name.[3]

The Court therefore held that the applicants had standing under s 38*(b)* on the ground that they were acting on behalf of others who could not act in their own names. The Court also held that the applicants had standing on the basis that they were members of a class of persons (s 38*(c)*) and were acting in the public interest (s 38*(d)*).

The finding that the applicants had standing on the basis that they were members of a class was upheld on appeal by the Supreme Court of Appeal.[4] In the course of his judgment Cameron JA emphasised that the class of applicants were

[1] *AAA Investments* (supra) at para 27.
[2] 2001 (2) SA 609 (E), 2000 (12) BCLR 1322 (E) ('*Ngxuza*') at 619 and 1327, respectively.
[3] *Ngxuza* (supra) at 622–623.
[4] *Permanent Secretary. Department of Welfare, Eastern Cape & Others v Ngxuza & Others* 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039 (SCA)('*Ngxuza SCA*')(It was unnecessary for the SCA to decide on the other grounds of standing as the applicants had subsequently chosen to proceed with a class action.)

drawn from a poor community, their claims were small and they were widely spread. Cameron JA therefore remarked that the situation 'seemed pattern-made for class proceedings'.[1]

63.9 Substantive relief

A detailed discussion of the remedies available in administrative law falls beyond the scope of this chapter.[2] Nevertheless, a significant issue, which raises fundamental questions in relation to the separation of powers, is the circumstances in which a court has the competence to grant substantive relief in an administrative review. In other words, when will a court substitute the decision of the administrator, rather than granting the normal remedy of setting aside the decision and referring it back to the relevant decision-maker? Under our common law, the courts were generally reluctant to substitute the decision of the original decision-maker but did so in what were determined to be exceptional circumstances.[3] This common law position is now reflected in s 8(1)*(c)*(ii)(aa) of PAJA. Section 8(1)*(c)*(ii)(aa) provides that 'in exceptional cases' the court may substitute or vary the administrative action or correct a defect resulting from the administrative action.

The emphasis on exceptional circumstances is not surprising, given the fact that the granting of such relief (eg ordering a licensing authority to award a licence to a particular applicant) amounts to a dramatic encroachment by the court into the executive sphere, and also blurs the distinction between review and appeal. In order to preserve the separation of powers, this intervention should only take place where it is warranted by strong countervailing considerations. As Heher JA stated in an important decision of the Supreme Court of Appeal on substantive administrative law relief, 'remittal is almost always the prudent and proper course', because:[4]

[1] *Ngxuza (SCA)* (supra) at para 11.

[2] Section 8 of PAJA provides that a court of tribunal in proceedings for judicial review of administrative action may grant 'any order that is just and equitable' including, for example, directing the administrator to give reasons, prohibiting the administrator from acting in a particular manner, setting aside the administrative action and remitting it for reconsideration, declaring the rights of the parties, granting a temporary interdict or other temporary relief. In relation to constitutional remedies generally, see M Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

[3] South Africa is traditionally somewhat divergent in this respect from its usual comparators in the Commonwealth, such as the United Kingdom, where a judicially reviewing court's power to substitute its decision for that of the reviewed administrator is more limited.

[4] *Gauteng Gambling Board v Silverstar Development Ltd & Others* 2005 (4) SA 67 (SCA) ('*Silverstar*') at para 29. *Silverstar* was an exception perhaps proving the rule, as the case saw substantive relief ordered.

> An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations.

The question that then arises is what circumstances are sufficiently exceptional to trigger a substantive remedy? It is likely that our courts will continue to turn to extant common law jurisprudence in seeking to answer this question. In our view, such reliance is generally appropriate. Nevertheless, in line with our adoption of the doctrine of the separation of powers as a lodestar, we would underline the call in *Premier, Mpumalanga* for reviewing courts to consider and respect fully the separation of powers in this as in other areas of administrative law.

Hiemstra J in *Johannesburg City Council v Administrator, Transvaal & Another*[1] identified two circumstances in which substantive relief may be appropriate: *(a)* where the end result is 'a foregone conclusion'; and *(b)* where the reviewed decision-maker 'has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again'. To these two circumstances can be added a third and fourth: *(c)* where further delay would unjustifiably prejudice the subject of the decision;[2] and *(d)* where a court is as qualified as the administrator to make the decision.[3]

Two points should be made in relation to this list of circumstances. First, they are only considerations to be taken into account (along with all other relevant considerations) in assessing whether substantive relief should be granted. Simply because one or more of *(a)* to *(d)* arises does not mean that substantive relief will automatically be granted.[4] The courts have, for example, emphasised that simply because the court may be as well placed as the administrator to make the decision, does not mean that the court *should* take the decision.[5] Second, whatever other circumstances may exist, a court should not grant substantive relief unless it has

[1] 1969 (2) SA 72 (T) at 76.

[2] *Ruyobeza & Another v Minister of Home Affairs & Others* 2003 (5) SA 51, 65 (C); *Reynolds Brothers Limited v Chairman, Local Road Transportation Board, Johannesburg & Another* 1985 (2) SA 790, 805 (A).

[3] See Hoexter *Administrative Law* (supra) at 490–492. For a comprehensive list of the considerations that may play a role in determining whether exceptional circumstances arise, see De Ville *Judicial Review* (supra) 336–337. In *Silverstar* (supra) the SCA took the dramatic step, following a successful review, of awarding a casino licence to the applicant. The SCA's decision was based on the apparent inevitability of the award of the licence to the applicant if the matter had been remitted (paras 38–39), the delay had 'reached substantial proportions' (para 40) and the well-founded belief of the applicant that the administrative decision-maker (the Gauteng Gambling Board) had 'lost its objectivity' (ibid). The Court adopted this approach despite acknowledging that the Board held manifest advantages over a court as a decision-maker on this issue (para 38).

[4] The one possible exception is *(a)*. If a court can say with absolute certainty that a particular decision is a 'foregone conclusion', there would seem to be no difficulty with granting the substantive remedy.

[5] *University of the Western Cape & Others v Member of the Executive Committee for Health and Social Services & Others* 1998 (3) SA 124 (C) at 131; *Commissioner, Competition Commission v General Council of the Bar of South Africa & Others* 2002 (6) SA 606 (SCA) ('*Commissioner, Competition Commission v GCB*'); and Baxter *Administrative Law* (supra) at 684.

adequate information, and the requisite institutional competence, to make the substantive decision. The need for adequate information is reflected in the recent decision in *Intertrade Two (Pty) Limited v MEC for Roads and Public Works, Eastern Cape, & Another*.[1] In *Intertrade*, the High Court refused to order that two tenders be awarded to the applicant, despite the fact that the tender process was 'shot through with irregularities',[2] that there had been numerous delays in the tendering process, that the applicant was the only tenderer in respect of the two tenders and that the tenders related to the vital function of maintaining hospital equipment. As Plasket J explained:

> The availability of proper and adequate information and the institutional competence of the Court to take the decision for the administrative decision-maker are necessary prerequisites that must be present, apart from 'exceptional circumstances', before a court can legitimately assume an administrative decision-making function. This, it seems to me, is a minimum requirement of rational decision-making, a fundamental requirement of the rule of law.[3]

In addition to factors *(a)* to *(d)* above — and the significant considerations of institutional competence and the separation of powers — fairness also plays an important role in considering whether or not to grant a substantive remedy.[4] As Hefer JA stated in *Commissioner, Competition Commission v GCB*, 'considerations of fairness may in a given case require the court to make the decision itself provided it is able to do so'.[5]

63.10 THE SUBSTANTIVE PROTECTION OF LEGITIMATE EXPECTATIONS[6]

An issue that has attracted a great deal of academic debate and judicial attention in recent years is the extent to which substantive legitimate expectations enjoy substantive protection.[7] As discussed above in the context of procedural fairness,

[1] 2007 (6) SA 442 (CkHC)('*Intertrade*').

[2] Ibid at para 36.

[3] Ibid at para 43.

[4] Hoexter *Administrative Law* (supra) at 489 and 492. De Ville *Judicial Review* (supra) at 337 describes fairness to all concerned as the 'primary consideration' in assessing substantive relief. De Ville quotes Holmes AJA in *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) 349: 'although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides'. See also *Commissioner, Competition Commission v GCB* (supra) at para 14.

[5] *Commissioner, Competition Commission v GCB* (supra) at para 15.

[6] Although the substantive protection of legitimate expectations is often included in discussions of procedural fairness, it is not in fact an issue of procedural fairness. While the concept of legitimate expectations owes its origin to the application of the right to a hearing, the substantive protection of these expectations falls more appropriately under the headings of legality, reasonableness and administrative remedies. It is for this reason that this complex issue is briefly discussed under this separate heading.

[7] The recent literature on substantive protection of legitimate expectations is voluminous. See, eg, J Campbell 'Legitimate Expectations: The Potential and Limits of Substantive Protection in South Africa' (2003) 120 *SALJ* 292 ('The Potential and Limits of Substantive Protection'); J Campbell 'Legitimate Expectations: Developments at Home and Abroad' (2004) 121 *SALJ* 328; G Quinot 'The developing doctrine of substantive legitimate expectations in South Africa administrative law' (2004) 12 *SAPL* 543; C Forsyth 'The provenance and protection of legitimate expectations' 1988 *Cambridge LJ* 238; C Forsyth

the founding basis of a legitimate expectation can either be procedural (where an affected person has a reasonable expectation of a hearing prior to a decision being taken) or substantive (where one has a reasonable expectation of a benefit or favourable decision).[1] Whichever form the legitimate expectation takes, the traditional approach is that it only entitles one to procedural protection. In other words, a legitimate expectation entitles one to a hearing prior to a decision which might frustrate that expectation.

In recent years, courts in various jurisdictions have gone further and in a few cases have provided *substantive* protection to substantive legitimate expectations. In other words, courts have protected the substance of the expectation. The effect of this so-called doctrine of substantive legitimate expectations is, by way of example, that where an administrator has promised a particular benefit (such as the grant of a permit or the application of a particular policy), the administrator must comply with that promise (i.e. the permit must be granted or the policy must be applied).

In recent years the doctrine of substantive legitimate expectations has been increasingly considered and to some extent accepted in the United Kingdom and in other, though not all, commonwealth countries.[2] The doctrine has been specifically rejected in Australia.[3] Even where accepted, however, courts and academics have not agreed on the manner in which these expectations are to be protected.[4] One recent judicial authority on substantive legitimate expectations in the UK is the decision of the Court of Appeal in *R (Abdi and Nadarajah) v Secretary of State for the Home Department*.[5] In *R (Abdi and Nadarajah) v Secretary of State for the Home Department*, Laws J held, *obiter*, that a public authority may only

'*Wednesbury* Protection of Substantive Legitimate Expectations' (1997) *Public Law* 375; P Craig 'Legitimate expectations: a conceptual analysis' 1992 *LQR* 79; Hoexter *Administrative Law* (supra) at 382–392; and De Ville *Judicial Review* (supra) at 123–135.

[1] See § 63.5*(d)*(ii) supra.

[2] See Campbell 'The Potential and Limits of Substantive Protection' (supra) at 292 and Quinot (supra) at 556–563 (See cases cited). The one court of final appeal that has accepted the notion is in Hong Kong: *Ng Sui Tung v Director of Immigration* [2002] 1 HKLRD 561.

[3] *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* [2003] HCA 6, (2003) 214 CLR 1; 195 ALR 502.

[4] For useful discussions of the different approaches, see Campbell 'The Potential and Limits of Substantive Protection' (supra) and Quinot (supra) at 556–63. One approach (promoted by Professor Craig) adopted in the UK is to protect substantive legitimate expectations directly through balancing the person's interest in the expectation against the public or state interest in frustrating the expectation. This approach has been applied in different ways. See *R v Ministry of Agriculture, Fisheries and Food; ex parte Hamble (Offshore) Fisheries Limited* [1995] 2 All ER 714 (QB); *R v North and East Devon Health Authority, ex parte Coughlan (Secretary of State for Health intervening)* [2000] 3 All ER 850 (CA)). The second approach in the UK is to protect legitimate expectations where a frustration of the expectation would fall short of the standard of *Wednesbury* unreasonableness. See, eg, *R v Secretary of State for Transport, Ex Parte Richmond-upon-Thames London* [1994] 1 WLR 74.

[5] [2005] EWCA Civ 1363.

frustrate a legitimate expectation where it is proportionate to do so, taking into account the competing interests in the matter. He emphasised that holding a public authority to its promises or past practices accords with the principle of good administration.[1] According to the court, the substantive protection of legitimate should only be denied:

> in circumstances where to do so is the public body's duty, or is otherwise … a proportionate response … having regard to the legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.[2]

The doctrine of substantive legitimate expectations has, to date, had a mixed reception in South African courts. While substantive protection has been granted in some cases,[3] the doctrine has been rejected in a more recent decision of the High Court.[4] Although the issue has been raised in our highest courts on a number of occasions and has again recently been argued in the Constitutional Court,[5] both that Constitutional Court and the Supreme Court of Appeal have left open the question as to whether substantive protection may be granted in respect of legitimate expectations.[6]

The reticence to embrace this controversial doctrine arises from what is often seen as a tension at the heart of the substantive protection of legitimate expectations. On the one hand, a failure to fulfill a legitimate expectation is seen as unfair (in the general sense) and as undermining certainty and confidence in the administration.[7] On the other hand, the traditional objections to the substantive protection of substantive legitimate expectations are that to do so: *(a)* involves courts descending into the merits of administrative decision-making and thus undermines the separation of powers between the executive and judiciary; *(b)* results in the fettering of administrative decision-making, by holding administrators to their undertakings and current practices or policies; *(c)* undermines the rule of law, by enabling administrative decision-makers to exceed their powers (ie it creates

[1] *R (Abdi and Nadarajah) v Secretary of State for the Home Department* (supra) at para 68.

[2] Ibid.

[3] See Campbell 'The Potential and Limits of Substantive Protection' (supra) at 314–315 (Points to the decisions in *Traub v Administrator, Transvaal* 1989 (2) SA 397 (T) and *Minister of Local Government & Land Tenure v Inkosinathi Property Developers (Pty) Ltd* 1992 (2) SA 234 (TkA) as examples of the substantive protection of legitimate expectations.)

[4] See *Durban Add-Ventures v Premier Kwazulu-Natal (No 2)* 2001 (1) SA 389 (N).

[5] See *Various Occupants v Thubelisha Homes and Others* CCT22/08.

[6] See *Premier, Mpumalanga* (supra) at para 36; *Bel Porto* (supra) at para 96; *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) at para 27; and *Szymanski* (supra) at para 15. The question was also left open by the High Court in *Putco Ltd v The Minster of Transport for the Republic of South Africa* 2003 JDR 0408 (W), referred to in Quinot (supra) at 549–550. But see *Bel Porto* (supra) at para 212–213 (Madala J)(Appears to accept that substantive protection of legitimate expectations is possible.)

[7] See Hoexter *Administrative Law* (supra) at 382.

the risk of an administrator, in effect, arrogating to herself a power she does not have, through a promise or other form of conduct); and *(d)* it discourages changes to administrative decision-making and policy-making, thus undermining the ease with which the administration responds to evolving public interests.[1]

Although it is possible that the direct application of the doctrine of substantive legitimate expectations will find acceptance in our law,[2] we agree with John Campbell that substantive protection should be granted in appropriate cases using the established grounds of review under PAJA. The effect of s 3 of PAJA is that a person whose legitimate expectations are materially and adversely affected by administrative action must be given an opportunity to make representations on the proposed action. As Campbell points out, it would follow from this proposition that the person's expectation (and the past practice, promise or other facts underlying it) would be a relevant consideration in coming to the administrative decision.[3] A failure by the administrator to give due regard to the expectation would thus be reviewable on the ground of a failure to consider a relevant consideration.[4] In addition, and perhaps most significantly, the legitimate expectation would place a thumb on the scales in considering whether the administrative action is reasonable. If the action is unreasonable, then it would fall foul of s 6(2)*(h)* of PAJA.[5] The effect is that a substantive legitimate expectation cannot be denied where it would be unreasonable to do so. This approach allows the court to take into account all relevant circumstances, including, on the one hand, the impact of a negative decision on the holder of the legitimate expectation and, on the other, the public interest that is served by frustrating that expectation (including the interest in ensuring that public administration is not unduly hampered and that changes in policy can be effected in the public interest). The question is thus: 'could the reasonable administrator have made the decision even though it adversely affected X's legitimate expectation of a substantive benefit?'[6]

[1] See, generally, Pretorius 'Ten years after Traub' (supra) at 531; Hoexter *Administrative Law* (supra) at 382; De Ville *Judicial Review* (supra) at 123–124; Campbell 'The Potential and Limits of Substantive Protection' (supra) at 294–295.

[2] A court could, eg, hold that administrative action may only adversely affect a substantive legitimate expectation where it is proportionate or there is a pressing public interest. On the latter, see *Bel Porto* (supra) at para 213 (Madala J). If accepted, this test could possibly be accommodated under the ground of review in s 6(2)*(i)* of PAJA ('The action is otherwise unconstitutional or unlawful'). See Hoexter *Administrative Law* (supra) at 391.

[3] 'Legitimate expectations are, quintessentially, relevant factors for consideration in [the decision-making] process and can never be ignored. There is no escape from this requirement' (Campbell 'The Potential and Limits of Substantive Protection' (supra) at 311).

[4] Section 6(2)*(e)*(iii) of PAJA.

[5] If the administrative action is irrational, it would also contravene s 6(2)*(f)*(ii) of PAJA.

[6] A consideration of legitimate expectations would seem to fall within the broad notion of reasonableness review contemplated in *Bato Star*. O'Regan J noted that the factors to be taken into account in assessing the reasonableness of administrative action include 'the range of factors relevant to the decision, . . . the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected'. *Bato Star* (supra) at para 45. See § 63.6 supra.

This leaves the issue of remedy. Again, the remedial approach inherent within the substantive protection of substantive legitimate expectations can be accommodated within our existing administrative law. Where the expectation is that a current state of affairs will continue (eg an old age home will not be closed or subsidies will continue to be paid), a court upholding that expectation can simply interdict the administrator from changing the status quo. Where, on the other hand, the expectation is that a new benefit will be granted (eg, the issuing of a permit), a court could, in exceptional circumstances, grant a substantive remedy under PAJA (eg, to compel the issuing of a permit).[1]

If the substantive protection of legitimate expectations is construed in the manner we have just suggested, then the main concerns relating to this protection (set out above) are considerably reduced (or removed). Part of this doctrinal security flows from the constitutional context of South African administrative law: it requires that everyone is entitled to lawful and reasonable administrative action. First, substantive protection would take place through the established grounds of review under PAJA, including a failure to have regard to relevant considerations and unreasonableness. Although the latter, to some extent, involves an assessment of the merits of administrative action, the assessment is confined to whether or not the action is reasonable. In this way, respect for the separation of powers is maintained.[2] Second, substantive protection does not mean that an administrator cannot deviate from his or her undertakings or existing policies. It only means that he or she cannot do so unless it is reasonable having regard to all the circumstances, including the impact of frustrating the expectation. We note in this regard that in treating the legitimate expectation as a factor in assessing the reasonableness of the decision, and not as a trump, the distinction between rights and legitimate expectations is maintained.[3] A person's legitimate expectation is protected not because he or she has an entitlement to it, but because the administrative decision-making is 'disciplined by the ordinary rules of administrative law'.[4] Third, as Hoexter points out, substantive protection advances the principles of good administration, and therefore the values of the Final Constitution, through promoting accountability, responsiveness, candour and transparency in public administration.[5]

[1] Section 8(1)*(c)*(ii)(aa) of PAJA. As to the circumstances in which substitution may be appropriate in this context, see Campbell 'The Potential and Limits of Substantive Protection' (supra) at 314. See also § 63.9 supra.

[2] See § 63.6 supra. Even if our courts were to apply the substantive legitimate expectation doctrine directly, it is unlikely to involve scrutiny of the merits to a greater degree than reasonableness review already contemplates. See De Ville (supra) at 124.

[3] See Campbell 'The Potential and Limits of Substantive Protection' (supra) at 294–6 and 316.

[4] Ibid at 311.

[5] See Hoexter *Administrative Law* (supra) at 391. See also FC s 195 (Principles of public administration). See, generally, A Bodasing 'Public Administration' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 23A.

We thus support the protection of substantive legitimate expectations, in appropriate cases, to the extent that this relatively new doctrine can be accommodated within the application of the normal rules of administrative law. The bottom line for us is that these expectations cannot be overridden where it is unreasonable to do so and where it is appropriate to grant substantive relief.

64 Slavery, Servitude and Forced Labour

Stuart Woolman and Michael Bishop

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64.1 INTRODUCTION

> No one may be subjected to slavery, servitude or forced labour.[1]

> The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only [by] positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory.[2]

> The truth of the independent consciousness is accordingly the servile consciousness of the bondsman. This, it is true, appears at first outside of itself and not as the truth of self-consciousness. But just as lordship showed that its essential nature is the reverse of what it wants to be, so too servitude in its consummation will really turn into the opposite of what it immediately is; as consciousness forced back into itself; it will withdraw into itself and be transformed into a truly independent consciousness.[3]

Traditional forms of slavery and the positive law that condoned such practices have been almost completely abolished.[4] But given the estimated 200 million people in the world subject to coeval forms of bondage, Hegel's attribution of subjecthood to the slave may seem self indulgent, Lord Mansfield's indictment of the institution quaint.[5] The international trafficking of people for prostitution, prison labour, the sale of women for marriage, and the exploitation of domestic

[1] Section 13 of the Constitution of the Republic of South Africa Act 108 of 1996 ('FC' or 'Final Constitution').

[2] *Sommersett v Steward* 99 Eng Rep 499, 510 (KB 1772)(Mansfeld CJ)

[3] GWF Hegel *The Phenomenology of Spirit* (1807, trans AV Miller, 1977) 117. Hegel was certainly correct to attribute to the slave a 'truly independent consciousness'. The cost of consciousness earned through such labour can be quite high. As Hegel notes, 'if a man is a slave, his own will is responsible'. See GWF Hegel *Philosophy of Right* (1821) § 57A, 239. Some might demur from a cosmology in which a slave is understood to participate in her enslavement by choosing to submit rather than risk death by resisting. However, as we shall see, deciding when an individual is to be held culpable for her condition is not an academic enquiry.

[4] Despite having committed themselves through municipal law and international convention to the elimination of chattel slavery, Sudan and Mauritania represent two of the most notorious examples of regimes knowingly complicit in the perpetuation of the slave trade. Sudan — up to and through the genocide in Dafur — has been repeatedly remonstrated by UN officials and human rights NGOs for aiding and abetting slavery on a massive scale. See M Kaye *Forced Labour in the 21st Century* (2002) 3–4 ('In 1999, the United Nations Special Rapporteur on Human Rights in Sudan reported that militias, sometimes with the support of forces directly under the control of the Sudanese authorities, systematically raid villages, torch houses, steal cattle, kill men and capture women and children as war booty. These women and children, whether captured in the course of the civil war or as a result of longer term conflict between communities, are often taken to the North where they are forced to work either for their captors or sold on to other people. Many of the people enslaved in this way have been subjected to physical or sexual abuse . . . In June 2000, the ILO's Committee on the Application of Standards . . . expressed deep concern at continuing reports of abductions and slavery.') See also *Report of the Working Group on Contemporary Forms of Slavery* (1996) United Nations ESCOR [48th Session] paras 96–100; *Preliminary Observations of the Committee on the Rights of the Child* (1996) Committee on the Rights of the Child [3rd Session] at para 12. As of 1997, Mauritania was home to 90 000 descendants of slaves. These persons worked without compensation and were not free to marry or to educate their children without the consent of their owners. See E Burkett 'God Created Me To Be A Slave' *The New York Times* (12 October 1997) 56; 'Mauritania Country Report on Human Rights Practices for 2002' *United States Department of State Country Reports on Human Rights* (2003).

[5] Y Rassam 'Contemporary Forms of Slavery and the Evolution of Slavery and the Slave Trade under International Customary Law' (1999) 39 *Virginia J of IL* 303, 305 (Rassam compares the estimated 20 million slaves bartered in the Atlantic slave trade over 350 years with estimates of numbers currently in bondage.)

workers, agricultural workers and children are deeply entrenched, if not ineradicable, features of the South African landscape.

Domestic case law has yet to meaningfully engage these contemporary forms of bondage. However, a spate of recent legislation, the ratification of international instruments and a burgeoning body of foreign case law provide the requisite scaffolding for an emergent constitutional doctrine. This chapter marries this nascent jurisprudence on slavery, servitude and forced labour to recent fieldwork by government departments, academics and CBOs in an attempt to distinguish those economic, social and legal relationships that warrant constitutional censure from those pernicious practices that must be engaged in some other way.

64.2 Doctrinal Dilemmas

The Constitutional Court's corpus of dignity, equality, socio-economic rights, freedom and security of the person and customary law jurisprudence, as well as the foreign and international learning on slavery, servitude and forced labour, provide our exploration of FC s 13 with a substantial amount of traction. The absence of case law that engages FC s 13 directly means that much of our analysis remains speculative.

While the three conditions proscribed by the FC s 13 possess distinct content, the three terms do not lend themselves to the articulation of bright line rules. Each of these three terms can, with enough creativity, be used to challenge many a practice that might fit more comfortably within the ambit of one of the other terms. The concatenation — and the inevitable elision — of these three appellations has its uses. Read together 'slavery, servitude and forced labour' mark an entire spectrum of constitutionally suspect legal, social and economic practices: from those that rob human beings entirely of their physical autonomy to those that conspire to deny human flourishing through more subtle forms of exploitation. This last point suggests that the presence of a clear textual proscription of slavery means that one can, via the proscriptions on servitude and forced labour, attend in a somewhat more nuanced manner to coercive relationships that impair individual dignity even as they offer the illusion of autonomy.

The social practices most apt to satisfy the requisite desiderata for slavery, servitude and forced labour are those in which the state can remedy a problem by 'simply' ensuring that an individual's autonomy is not so readily violated. We are all justifiably naïve enough to believe that the state can eliminate sexual slavery by arresting the traffickers, end the servitude of women by withdrawing state sanction for *lobola*, and abolish forced labour by denying wardens the power to use work as a tool of prison discipline. But the trajectory of this injunction to free ourselves from the most pernicious forms of physical coercion leads, almost ineluctably, to a desire to rid our society of those practices that constrain us socially, psychologically, economically and emotionally. In short, our understanding of FC s 13 reflects the evolution of our polity from a night watchman state committed to ensuring *freedom from* undue interference with an individual's autonomy to a social welfare state that provides individuals with the material conditions of *freedom to* govern themselves and to shape meaningfully their lives.

This evolution of the right's extension creates a number of difficulties.

As we move away from degradation to optimalization, from brute force to more subtle forms of coercion, many state policies meant to further the common good attract constitutional scrutiny. Community service programmes often employ coercive practices that 'force' individuals to work for the common good. The state's emphasis on improving the material conditions of its citizens through such forced labour clashes with quite fundamental concerns about the extent to which the state can use individuals as mere means to further its ends. A right concerned, at bottom, with eliminating physical coercion and rather adamantine structures of domination may yet endorse remedies that rely upon intentional state-sponsored physical coercion. That the very same right can be both the disease and the cure demonstrates the extent to which our understanding of slavery, servitude and forced labour is bound up with contested notions of the common good.[1]

The synonymity and the alterity of the terms slavery, servitude and forced labour generates significant tension in attempts to expand the extension of the

[1] Seemingly abstract inquiries as to how much we owe our fellow citizens have a direct bearing on very concrete legal findings with respect to slavery, servitude and forced labour. In the course of her now classic article, 'A Defence of Abortion', JJ Thomson asks us to imagine a world-renowned, but diabetic, violinist who requires the use of your kidneys — as a synechdoche for dialysis — in order to stay alive and to keep filling the world with her beautiful music. (1971) 1 *Philosophy & Public Affairs* 47. JJ Thomson claims, and I think that most of us would agree, that 'having a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another's body — even if one needs it for life itself.' Ibid at 56. You would be well within your rights to deny her such access. Few people believe human solidarity entitles others — especially strangers — to make this type of demand on our person. Most readers would consider such a coercive relationship to be exactly the kind of state of affairs that FC s 13 forbids. The point of this intuition pump, however, is not to force the reader to reflect upon 'easy' and 'obvious' cases of slavery, servitude and forced labour. Thomson's violinist-kidney-as-dialysis thought experiment is designed to force her readers to reconsider the relationship between a women and the foetus she carries. The thought experiment possesses the obvious virtue of eliminating arguments about whether or when a foetus counts as a person. The only question that remains is whether the foetus can demand, at any moment prior to viability, that the woman continue to carry her to term. A reader who agrees that the violinist has no right to demand use of the reader's kidneys in manner that radically curtails her physical autonomy is now asked to distinguish — if she can — ostensibly similar demands made on her behalf of a foetus with respect to the woman carrying it.

Clever as this institution pump may be, it begs as many important questions as it answers. Sure, criminal sanctions that force a woman to bring a foetus to term does look a lot like 'forced labour'. See § 64.3*(c)* infra. See also A Koppelman 'Forced Labour: A Thirteenth Amendment Defense of Abortion' (1990) 84 *Northwestern University Law Review* 480 (Argues that State cannot carry burden of justification for infringement of the right to be free of involuntary servitude because the State cannot prove that a foetus possesses the requisite indicia for personhood that would at least serve as the initial foundation for any justificatory exercise.) But what the violinist/ foetus analogy forces us to ask — and cannot answer — is exactly how much we owe to fellow members of our community? Progressive taxation schemes, social welfare programmes and other forms of both public and private insurance mediate the restribution of wealth in a manner that avoids charges of forced labour that direct redistribution would inevitably elicit (Few complain about taxes being used to build toilets; many would complain if they had to dig a pit latrine). With respect to many forms of redistribution — compulsory prison labour, community service requirements *qua* qualifications for entry into a profession and military conscription — there can be no masking of the coercion required to effect the desired end. To what extent are these programmes the moral and the constitutional equivalent of the provision of a kidney for the violinist and a womb for the foetus? See § 64.5*(f)*, *(g)* and *(h)* infra.

three discrete prohibitions beyond their easily cognisable core. Contemporary forms of 'slavery' that do not entirely offend our ethical sensibilities may not seem substantially different from the most pernicious forms of modern 'servitude'. A rather odious form of 'forced labour' may seem experientially equivalent to rather temperate manifestations of 'servitude'. So while we might prefer to plot along a single continuum all of FC s 13's suspect practices, the open texture of these three terms, and our inclination to prescribe the most obviously offensive practices captured by each of the three prohibitions, seems to militate against the creation of any such metric. We may find that FC s 13 produces the somewhat uncomfortable result of proscribing the lesser of two evils.

The economic exigencies of South African life place other kinds of limits on constitutional construction. All South African lawyers know that the language of the Final Constitution only requires that the state undertake reasonable steps to realize progressively various socio-economic rights.[1] Although the language of FC s 13 suggests that similar internal limitations ought not to read into FC s 13, we could still employ *Grootboom*–like criteria to determine under FC s 36 whether, say, the state had crafted a comprehensive programme to redress the problem of farm worker servitude. The real problem is this: structural employment is so high and so resistant to neo-liberal macro-economic policy interventions that only the most extravagant government programme may be able to manumit farm workers.[2] If this is so — and we do not wish to be misunderstood as maintaining such at this juncture — then it might well constrain our assessment as to whether or not the state has discharged its duty to eliminate all constitutionally suspect forms of slavery, servitude or forced labour. Put somewhat differently, the kinds of social conditions in an advanced western democracy that might lead us to declare unequivocally that a violation of FC s 13 has occurred might not warrant a similar assessment here: not because we are disinclined to view the conditions as morally deficient or constitutionally suspect, but because we lack currently the capacity to alter them.[3]

This last observation — with which some may well differ — is underwritten by a certain modesty that experience imposes upon constitutional lawyers. Much as we might like the courts to be engines of social change in the sevice of ends we believe noble and true, they lack the requisite authority to be bring about — on their own — radical transformation. Courts are good at the resolution of discrete disputes and putting parties on notice that they have not discharged their duties. What we try to

[1] See, eg, S Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33; D Brand 'Food' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005)

[2] See § 64.6*(c)* infra, for an analysis of the conditions of farm workers in terms of FC s 13's prohibition of servitude.

[3] The ethically ambiguous condition of the slave identified by Hegel and Weber is also a central feature of South African liberation discourse. See M Weber 'Politics as Vocation' in HH Gerth & C Wright Mills (eds) *Essays in Sociology* (1988) 77, 120 ('[A]n ethic of responsibility, . . . [requires] one to give an account of the foreseeable results of one's action.') Consider Nelson Mandela's justification for the armed struggle: 'Without violence there would be no way open to the African people to succeed in their struggle against the principle of white supremacy. All lawful modes of expressing opposition to this principle had been closed by legislation, and we were placed in a position in which we had either to accept a permanent state of inferiority, or to defy the Government' — 'I am Prepared to Die' Statement from the Dock at the

suggest in the following account is that many individuals — from prostitutes to prisoners, domestic workers to farm labourers, comfort women to conscriptees — toil in conditions of slavery, servitude and forced labour. Appropriately crafted FC s 13 challenges could put the government on notice that it needs to create comprehensive and coordinated programmes designed to restore the dignity of these individuals.

64.3 Drafting History

Despite the long history of legally-sanctioned physical, social and economic coercion in South Africa, the drafters of the Interim Constitution did not see fit to include a prohibition on slavery. Section 12 of the Interim Constitution read: 'No person may be subject to servitude or forced labour.'[1]

Advocates of a broader prohibition were fortunate to come away with the language of IC s 12.[2] The African National Congress ('ANC') initially proposed placing the above guarantee under the right to dignity.[3] The ANC's preferred rendering would have also carved out a number of express exceptions to 'forced labour'.[4] After much deliberation at the Multi-Party Negotiating Forum, both proposals were dropped.

During the drafting of the Final Constitution, several different formulations of the right were considered by the Constitutional Assembly.[5] The Technical Committee with responsibility for this right eventually decided to add slavery to the list of prohibited activities. That decision was ratified by the Constitutional Assembly.

64.4 Definitions

This section addresses the extension of each of the three terms found in FC

Opening of the Defence Case in the Rivonia Treason Trial, Pretoria Supreme Court (20 April 1964). Mandela's statement ratifies an ethic in which all persons are held accountable and sounds a cautionary note with regard to those who would make the state alone culpable for conditions of slavery, servitude and forced labour. Mandela understands that to do so robs entirely the individual — whether subordinated or subordinating — of the agency upon which any meaningful notion of citizenship is predicated. This account of agency is, it must be said, political, not metaphysical. See S Woolman & L Yu 'The Selfless Constitution: Flourishing & Experimentation as the Foundations of the South African State' (2006) 21 *SA Public Law*.

[1] Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution').

[2] Only on the most aridly textual reading would IC s 12's formulation have not prohibited slavery.

[3] See *A Bill of Rights for a Democratic South Africa: Working Draft for Consultation* (1991) 7 *SAJHR* 110. The Draft Bill was prepared by the Constitutional Committee set up by the ANC's National Executive Committee.

[4] The enumerated activities were: work carried out during a prison sentence; military or national service by a conscientious objector; services required in an emergency; and work required as part of normal civil obligations. This formulation of the exceptions to forced labour mirrors those exceptions found in many international human rights instruments. See § 64.4*(c)* infra.

[5] Submissions to the Constitutional Assembly by political parties, CBOs and other interested parties are housed at www.law.wits.ac.za.

s 13: 'slavery', 'servitude' or 'forced labour'.[1] Each subsection concludes with a working definition that delineates the ambit of the particular prohibition.

(a) Slavery

Article 1(1) of the Slavery Convention of 1926 reads:

> Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.[2]

This gloss on 'slavery' means that a slave need not be subject to forced labour, or indeed, required to do any labour at all. The definition treats the bundle of entitlements that make up slave ownership much as we would treat any of the

[1] However much the concepts of slavery, servitude and forced labour overlap and therefore over-determine the proscription of various practices, the distinction between the terms retains its relevance in times of national emergency. FC s 37(5), States of Emergency, reads in relevant part: 'No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise '*(c)* any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table'. In terms of the table, the rights to be free from slavery and servitude remain non-derogable. Legislation passed in terms of FC s 37 may allow for some forms of forced labour.

Slavery and servitude may, on occasion be non-derogable. But are they non-amendable? The Constitutional Court has intimated that some provisions could be so fundamental, so 'basic' to the Final Constitution, that they may not be removed by constitutional amendment. See *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 204 ('[T]here are certain features of the constitutional order so fundamental that even if parliament followed the necessary amendment procedures, it could not change them'); *Premier of Kwa-Zulu Natal & Others v President of the Republic of South Africa* 1996 (1) SA 769 (CC), 1995 (12) BCLR 1361 (CC) at para 64 ('[A] purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and re-organizing the fundamental premises of the Constitution might not qualify as an 'amendment' at all'); *United Democratic Movement v President of the Republic of South Africa* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) at para 17 (Basic structure argument foregrounded, but not dispositive.) The 'basic structure argument' poses at least three related formal problems for constitutional analysis: (1) the identification of those first 'principles' deemed so basic to our constitutional democracy that they cannot be altered, but not so basic as to have been declared immutable at the time the Final Constitution was drafted; (2) the presence of rules that can be amended by normal constitutional procedures but which are deemed so inextricably linked to the basic structure of constitutional democracy that they are, simultaneously, immune from amendment; and (3) the legitimacy of a judicial decision in which a court charged with securing compliance with the basic law refuses to enforce a textual provision of the basic law because a deeper non-textual source of basic law precludes it from doing so. For more on the extent to which a commitment to constitutional supremacy inevitably involves a justification for the basic law that goes beyond the text of the basic law, see F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11. For the technical differences between, and the numerical requirements for, the amendment processes established by FC ss 74(1) and 74(2), see S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 17. See also Z Motola & C Ramaphosa *Constitutional Law: Analysis and Cases* (2002) 96 (Despite the obvious difficulties with the basic structure argument, the authors suggest that if some version of the argument were accepted, then the prohibition of slavery and servitude would be one of the provisions of the Final Constitution immune to amendment.)

[2] Slavery Convention (1926) 60 LNTS 253 (Ratified by South Africa on 18 June 1927).

entitlements of normal property ownership. Neither normal property ownership property nor slave ownership requires that the owner's entitlements be exercised.[1]

The standard notion of property rights as a bundle of discrete entitlements only does so much work with regard to this definition of slavery. The Convention's take on slavery does not contemplate disaggregating the bundle of entitlements in the self into 'slave-entitlements' and 'non-slave entitlements'.[2] It prohibits the ownership of *any* entitlement in another.[3] Moreover, the Convention's definition embraces those instances where the state of slavery is entered into voluntarily.[4]

The virtue of the Convention's definition is that it does not reduce slavery to 'a relatively limited and technical notion' dependent upon the 'destruction of the juridical personality.'[5] Too many contemporary forms of slavery would elude such a narrow construction.[6]

[1] J Asher 'How the United States is Violating International Agreements to Combat Slavery' (1994) 4 *Emory International LR* 215, 238-9 ('If the convention was aimed solely at pure slavery, the word 'any' would not have been included since chattel slavery was ownership of humans, pure and simple. The use of the word 'any' is a significant departure from chattel slavery. The word suggests that a person can be held in servitude or slavery so long as the 'employer' engages in any of the typical behaviours common to owners. Such behaviour could be as simple as keeping a person in place against his or her will.')

[2] Slave ownership *qua* property ownership entails the control of *any* aspect of a person's right to dispose of herself as she chooses — not just control over movement and commercial usage. C Argibay 'Sexual Slavery and the Comfort Women of World War II' (2003) 21 *Berkeley J of IL* 375, 375 ('Slavery is often equated with forced labor or deprivation of liberty; however, sexual autonomy is a power attaching to the right of ownership of a person, and controlling another person's sexuality is, therefore, a form of slavery.') See *Prosecutor v Kunarac* Application Nos IT-96-23-T and IT-96-23/1-T (Appeals Chamber ICTY, 12 June 2002), available at http://0-www.un.org.innopac.up.ac.za/icty/kunarac/appeal/judgement/kun-aj020612e.pdf (accessed on 15 January 2005)(Appeals Chamber of the ICTY considers 'control of sexuality' as a factor to be considered when determining whether the crime of enslavement was committed. The other factors listed are control of movement, control of physical environment, psychological control, measures to prevent escape, force or threat of force, duration assertion of exclusivity, cruel treatment and forced labour.) See also P Bridgewater 'Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurispudence' (2001) 7 *Washington and Lee Race and Ethnic Ancestry Journal* 11 (The use of people for reproduction constitutes 'involuntary servitude' under US Constitution, 13th Amendment.)

[3] Asher (supra) at 239.

[4] See Argibay (supra) at 379-80:

> Slavery is the antithesis of freedom. As a basic principle of the rule of law, freedom cannot be relinquished. It is not an exercise of paternalism to say that no one can consent to enslavement; it is fundamental to the nature of freedom itself. Freedom and equality under international law are based on a concept of the human being as free and able to fulfil his or her capabilities. Freedom requires protection of individual autonomy, respect for every person's potential and development, and the presence of enabling economic social and cultural conditions. Consent, to be valid, must be based on knowledge and sustained by reason and the ability to make free and informed choices. Consent is not valid when it is not knowingly and freely given; when there is deceptive or distorted information, or no information at all; when there is coercion, violence, or the threat thereof; when the victim is subject to inhumane and debilitating conditions, kept isolated from social support or denied the means of survival and without access to means of communication, assistance, or redress; or when there is exploitation of the victim's vulnerability. Consent is not free when the victim fears retaliation in the form of physical or mental abuse.

See also Rassam (supra) at 334, fn 141.

[5] M Bossuit *Guide to the 'Travaux Preparatoires' of the International Covenant on Civil and Political Rights* (1987) 167 as cited in Asher (supra) at 246.

[6] MC Bassiouni 'Enslavement as an International Crime' (1991) 23 *New York University Journal of Law and Politics* 445. Too narrow a definition of slavery also increases the pressure to broaden the meaning of 'servitude'. Bossuit (supra) at 167 ('[S]ervitude [is] a more general idea covering all possible forms of man's domination of man.') The danger with such a failsafe approach to slavery and servitude is that it

The difficulty with the Convention's definition is that it has the potential to draw too many complex relationships — from the workplace to the homestead to the bed — into its orbit. We should be able to say with confidence that control over another person's reproductive capacity or sexual activity reflects an abuse of a normal 'power of ownership', but that such incidental infringements of autonomy as 'curfew' for a teenager are not captured by our definition of slavery.

When then is the exercise of 'entitlements of ownership' of one person by another sufficient to trigger the protection afforded by FC s 13? Justice O' Regan's oft quoted dictum in *Dawood* provides a useful departure point:

> Human . . . dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman and degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected. In many cases however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.[1]

One would like to be able to say that entitlements that would infringe the dignity of those over whom they are exercised (control of reproductive capacity) amount to slavery and those that do not infringe a person's dignity (curfew) do not amount to slavery. Unfortunately, the use of dignity as the linchpin for slavery analysis is not an entirely straightforward matter. The *Dawood* dictum intimates that it is the infringement of FC s 13 (slavery) that establishes an infringement of FC s 10 (dignity) — and not the other way around. This relationship reflects the first rule of South African dignity jurisprudence. Where a court can identify the infringement of a more specific right, FC s 10 will not add to the enquiry.[2]

However, the *Dawood* Court's characterization of dignity as a residual right that 'may' give expression to international human rights norms belies the heavy lifting that it actually does. In *Ferreira*, Justice Ackermann wrote:

> Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential. Each human being is

seems to diminish the suffering associated with those kinds of bondage classified as servitude rather than those identified with the more invidious term slavery. While this definitional exercise may appear rather academic, its consequences are not. The eradication of contemporary forms of slavery is contingent on the priorities of law enforcement officials. Rassam (supra) at 349 (Arguing for a more inclusive definition that would enable historically disadvantaged groups to challenge oppressive social and economic practices under both domestic and international customary law.) Law enforcement officials tend to devote more time to crime that captures the imagination of politicians and the electorate.

[1] *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) ('*Dawood*') at para 35.

[2] Ibid.

> uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.[1]

Dignity is meant to secure the space for self-actualisation.[2] (Self-actualisation describes a political and not a metaphysical state.) Dignity as the condition for self-actualisation can inform our understanding of slavery in number of ways.[3] Dignity *qua* slavery underwrites the proscription of those practices where the exercise of 'entitlements of ownership' in one person by another 'impair substantially' the ability of a person to develop optimally her unique talents.[4] The exercise of entitlements of ownership in the context of a curfew for persons below the

[1] *Ferreira v Levin* 1996 (1) SA 984, 1013-1014 (CC), 1996 (4) BCLR 1 (CC)('*Ferreira*') at para 49.

[2] The majority in *Ferreira* rejected Justice Ackermann's view that IC s 11(1) and FC s 12(1) contain a residual freedom right. Ibid at paras 170–185. The current Constitutional Court has, however, accepted Justice Ackermann's notion that dignity is meant to secure the space for self-actualisation. It is important to note that self-actualisation is not, on this account, realized through political participation, but rather through a commitment to negative liberty. *Ferreira*'s dignity as freedom is developed in a long line of cases. See, eg, *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41 ('[D]ignity is at the heart of *individual* rights in a *free* and democratic society'); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at paras 28–30 (Court, finding the common law criminalization of sodomy a violation of the right to dignity, wrote: '[I]t is clear that the constitutional protection of dignity requires us to acknowledge the value and the worth of all individuals as members of society.' The language echoes Justice Ackermann's emphasis in *Ferreira* on the inextricable link between dignity and the need for individual freedom from state intervention. Individual freedom — negative liberty — thus becomes the foundation for dignity. Dignity, in turn, becomes the basis for equality.)

[3] The link between dignity and slavery is buttressed by the drafting history of the Final Constitution. See § 64.3 supra.

[4] While this distinction between curfews and concubines is fairly stark, it does not tell us when the exercise of entitlements of ownership in one person by another actually amounts to slavery. Again, the method of analysis that informs the construction of the constitutional norm of dignity can assist us in discriminating between conditions of slavery and non-slavery. Dignity, unlike equality, does not much depend on our ability to identify invidious differentiation between classes of persons. Dignity rests instead on the recognition of a core set of entitlements that are the necessary, if not sufficient, conditions for self-actualisation. For the most part, current South African dignity jurisprudence does not specify those *positive* goods that a person requires for self-actualisation. See *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)(Court finds violation of FC s 26 and grounds the entitlement to adequate housing in the right to dignity. But while Court describes the entitlements secured through socio-economic rights as essential components of a just political order because they are necessary for self-actualisation, it is loath to tell the government exactly how it should go about making provision of those goods.) Our extant dignity jurisprudence identifies an ever-expanding list of practices that prevent self-actualisation. The Constitutional Court has begun the compilation of this list by identifying those practices that are 'universally' accepted as ethically repugnant. Quite often the universe of these repugnant practices in international human rights documents consists of the aspirational, rather than actual. However, once the Constitutional Court imports a discrete international human rights norm into our municipal law, the stage is then set for the expansion of the list of repugnant practices. The Constitutional Court augments this list of internationally designated

age of majority would not impair significantly the development of unique talents. The exercise of entitlements of ownership in the context of sexual trafficking and exploitation would.

Our dignity jurisprudence does more than merely proscribe the constitutionally repugnant practice. It also seeks to purge our legal system of all those rules of law that give aid and comfort to the repugnant practice. In *Dawood*, the Constitutional Court noted that it was not simply laws that prevented persons from entering into a married relationship that constituted an impairment of individual dignity. The *Dawood* Court concluded that 'any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right.'[1] Given that the immigration laws under scrutiny in *Dawood* made it effectively impossible for the couples in question to cohabit, and that cohabitation forms a central part of a married relationship, immigration laws that significantly impaired the capacity of permanent residents to live with their spouses in South Africa were understood to constitute an unjustifiable limitation of the right to dignity.[2]

Assume that sexual trafficking was deemed to be a violation of the prohibition against slavery.[3] As we show below, where immigration legislation has the consequence of forcing sexual trafficking victims to choose between bondage and deportation, then the provision at issue may violate the prohibition against slavery.[4] To make the prohibition against slavery meaningful under these conditions

repugnant — and now constitutionally infirm — practices by identifying analogous practices. So, for example, in *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* the Constitutional Court held that statutory provisions that did not accord same-sex partners the same set of entitlements to permanent residence violate the right to dignity. 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC). In *Satchwell v President of the Republic of South Africa & Another*, the Constitutional Court found that statutory provisions withholding spousal survivor benefits to the survivors of same-sex relationships were analogous to statutory provisions that did not accord same-sex partners the same set of entitlements to permanent residence. 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC). As a result, the refusal to grant spousal survival benefits to the survivors of same-sex relationships constitutes a violation of the right to dignity.

[1] *Dawood* (supra) at paras 35–7.

[2] Ibid.

[3] Human trafficking, forced prostitution, debt bondage, forced labour and exploitation of domestic workers are 'obvious candidates for inclusion in the term "modern forms of slavery".' Rassam (supra) at 320. Rassam offers two criteria, consistent with our own, when attempting to determine whether a practice qualifies as a modern form of slavery: (1) extreme direct physical or psychological coercion that gives an individual or the state control over every aspect of another person's life; and (2) the presence of state complicity in the practice or a failure to adequately enforce domestic laws prohibiting the practice. Ibid.

[4] See Bassiouni (supra) at 458–459. As Bassiouni observes, slavery-like practices operating under colour of law are relatively commonplace:

> Traffic in children for adoption, a lucrative operation which has grown significantly over the years, has resulted in a large number of children from Asia and Latin America being brought into North America and Western Europe. The lack of legislation and/or legal controls in the countries of origin or the possibility of evading the law in the destination countries has allowed these practices to continue under some color of law. . . . Technically, the child in this case is not a slave, but since the child has no physical control over his person and, in terms of legal capacity, no control over his treatment, for all intents and purposes such activity is slave-like. The primary reason for these still prevalent manifestations of slavery and related practices is that the basic legal element in international

requires that a person prosecuted under immigration laws, after having escaped a slave-like state, possess a reasonably robust form of legal protection.[1]

Definition of Slavery

1. Slavery is the exercise by one person of any or all of another person's rights of ownership in her self. This definition does not contemplate disaggregating the bundle of entitlements in the self into the ownership of slave-entitlements and the ownership of non-slave entitlements. It prohibits the ownership of any entitlement in another.
2. Application of the term 'slavery' should be limited to those practices in which the exercise of entitlements of ownership of one person by another 'impair substantially' the ability of that original owner to pursue the development of 'her unique talents'.
3. A slave need not be subject to forced labour, or indeed, any labour at all to secure the protection of this prohibition.
4. A person may not consent, contra of or enter voluntarily a relationship of slavery. A person who so contracts or consents remains a slave for the purpose of FC s 13.
5. The prohibition of slavery proscribes those rules of law that directly and indirectly support the practice of slavery.

(b) Servitude

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery ('Supplementary Convention') provides a useful departure point for defining servitude.[2] Article 1 identifies the following prohibited practices as servitude (whether or not they are similarly captured in the Slavery Convention):

instruments on slavery is the total physical control by one person over another. Whenever the control is less than total, such as when it is partial and limited in time, it is removed from the system of protections developed by these international instruments.

See Bassiouni (supra) at 458–459.

[1] See § 64.6*(a)* infra (Analysis of the extent to which our immigration laws offend FC s 13.) See also S Drew 'Human Trafficking: A Modern Form of Slavery' (2002) 4 *European Human Rights LR* 481, 490 ('Organisations frequently state that an approach to human trafficking must be seen as human rights based. What this means in practice is that action against human trafficking must involve not only affirmation and enforcement of its illegality through the criminal law — which law acts to protect the interests of society — but positive protection of the rights of the adults and children who are trafficked. In adopting such a human rights based approach, any strategy to deal with human trafficking must involve legalisation in a number of senses. First, a degree of legalisation of the entry of unskilled labour is required since it is impossible to ignore that there is an association between restricting legal immigration and the recent growth in trafficking.')

[2] Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956) 226 UNTS 3 (Not yet ratified by South Africa)('Supplementary Convention'). Although South Africa has not ratified this convention, it still reflects the international community's understanding of the concept of servitude and thereby informs our process of constitutional interpretation. See FC ss 232 and 233. See also J De Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (4th Edition, 2001) 265.

(a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined[1];

(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person;

(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.[2]

How does servitude differ from slavery? On our account, slavery consists in the exercise of the entitlements of ownership in a person (the slave) by another (the slave-master) and operates through the overt exercise of force or coercion. Servitude is dominion underwritten by 'law, custom or agreement'.[3] But neither law, nor custom or nor agreement ought to be construed to mean consent by the bondsman to her abject conditions. Consider the caste conditions of an 'untouchable' in India. Members of higher castes do not exercise rights of ownership. The untouchable appears to work 'voluntarily' for all those above her. However, she is not free to change her status as an untouchable because of the nature of the caste system. In sum, servitude is about status.[4]

In *Coetzee v Government of the Republic of South Africa,* the Constitutional Court held that a provision of the Magistrates Court Act[5] that permitted incarceration

[1] Debt bondage or bonded labour occurs when persons work in conditions of servitude to pay off a debt. That debt is often incurred by another. Worse still, the debt is rarely paid off because of high interest rates charged by the 'lender/owner'. Debt bondage often looks like slavery not only because the debt becomes permanent but because the debt is often passed down to the next generation.

[2] See also Supplementary Convention, Article 7*(b)*: 'A person of servile status [is] a person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention.'

[3] See *W, X, Y & Z v The United Kingdom* (1968) 11 *Yearbook of the European Convention on Human Rights* 562 (European Commission on Human Rights held that the inability of a minor to leave voluntary military service did not amount to servitude. The Commission did not, however, offer a definition of 'servitude'.)

[4] Ibid (Applicant argued that because servitude deals with the status of a person, objective characteristics such as gender, race and age are relevant to servitude analysis in ways that might not be not relevant when a court must engage in forced labour analysis.)

[5] Act 32 of 1944.

without trial of a civil debtor constituted an unjustifiable infringement of the right to freedom and security of the person.[1] Had the *Coetzee* Court not had IC s 11(1) upon which to rely, it could have characterized these civil imprisonment provisions as a species of servitude. The debtor was obliged to stay in prison because of his status — his inability to pay off a debt. The debtor's condition was not one in which the incidents of ownership were exercised by another. Moreover, his failure to remain solvent led to a further reduction in status: imprisonment. The *Coetzee* Court did away with these civil imprisonment provisions largely because incarceration for 'status' — and not crime — is out of step with contemporary mores.[2]

[1] 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC)('*Coetzee*'). IC s 11(1) read, in relevant part, as follows: '[E]very person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.'

[2] Ibid at paras 66–67. Sachs J wrote:

> The essence of civil imprisonment, even in its milder forms, has always been that the debtor pays with his or her body. The Afrikaans word gyselaar (hostage) comes from the contract recognised in Roman-Dutch law in terms of which a freeman pledged his person as suretyship for performance. . . . The broad question before us would be whether, in the open and democratic society contemplated by the Constitution, it could ever be appropriate to use imprisonment as a means of ensuring that creditors got paid in full, bearing in mind that the amount to be collected would often fall below the costs of collection, not to speak of the costs to the taxpayer of keeping the debtor in prison. It is evident from the statistical data presented to us that committal to prison is in reality mainly for relatively small amounts and largely for debt in respect of goods purchased, services rendered and money borrowed . . . The persons most vulnerable to committal orders would be precisely those who were unemployed, and thus could not be subject to emoluments orders, and those who did not have any property which could be attached. To penalise the workless and the poor so as to frighten those a little better-off would be exactly the kind of instrumentalising of human beings which the concept of fundamental rights was designed to rebut.

The line taken by the *Coetzee* Court is consistent with our view that since apartheid was consciously designed to result in both public and private forms of servitude, FC s 13 must, consequently, have as its target the elimination of all public and private manifestations of servitude.

The history of the Thirteenth Amendment of the US Constitution supports such a construction of FC s 13. The 13th Amendment was originally construed, though not necessarily intended, to apply only to state action. See *The Slaughter-House Cases* (1873) 83 US 36 (Limited 13th Amendment to prohibition of the institution of African slavery); *The Civil Rights Cases* (1883) 109 US 3, 24 (Court rejects proposition that social or private discrimination was an incident of slavery captured by the 13th Amendment.) According to most American legal historians, however, the drafters of the 13th Amendment understood that free blacks lived under conditions virtually identical to that of slaves. The Amendment was viewed by its proponents as a Declaration of Independence for former slaves — a constitutional guarantee that the emancipation brought about by the Civil War would ensure that all men are not only created equal, but would be treated as such. See J tenBroek 'Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and the Key to the Fourteenth Amendment' (1951) 39 *Cal L Rev* 171, 179–180; D Colbert 'Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges' (1990) 76 *Cornell L Rev* 1, 33-34. Ultimately the US Supreme Court did extend the reach of the 13th Amendment to some forms of private conduct. See *Bailey v Alabama* (1911) 219 US 243 (State may not enforce laws that directly or indirectly result in compulsory service; whether a debt is voluntary or involuntary does not effect determination of whether servitude exists); *US v Reynolds* (1914) 235 US 133 (Statute assessed fines for criminal convictions which could be paid by a 3rd party and that convict was obliged to work for the surety for period determined by that court. US Supreme Court found that the constant threat of arrest and imprisonment for failure to pay timeously the 3rd party debt, turned the obligation to work into compulsory or forced labour designed to satisfy a debt, and thus a violation of the prohibition against servitude.)

Not all courts construe 'servitude' in a manner that engages the social status of a person.[1] In *US v Kozminski*, the US Supreme Court held that the Thirteenth Amendment prohibited only 'involuntary servitude enforced by the use or threatened use of physical or legal coercion.'[2] Such a cramped definition fails to capture the myriad ways in which social conventions radically constrain individual autonomy.[3] Prohibitions against servitude exist in order to disrupt social arrangements that perpetuate domination without overt resort to legal sanction or physical punishment. Contrary to the holding in *Kozminski*, the Final Constitution's prohibition against servitude is meant to roll back the quiet occupation of the body.

Definitions of Servitude

1. Broad definition: Servitude is about caste or status. Persons in conditions of servitude occupy a social station that does not allow them to alter the conditions of their existence. Persons in positions of servitude appear to work voluntarily for those above them. Servitude often appears voluntary because this form of dominion of man over man is underwritten by tradition, custom or agreement and not by a particular legal relationship of control of one person over another. Such tradition, custom or agreement refers to social understandings and not necessarily, to any consent by the bondsman to her abject conditions.
2. Narrow definition: Debt bondage occurs whenever a person is compelled to work in order to pay off a debt. However, the concept of involuntary servitude may embrace services rendered for reasons other than indebtedness.

[1] Early on, the United States Supreme Court found the extension of the term 'involuntary servitude' to be broader than that of slavery. See *The Slaughter-House Cases* (supra) at 69 ('[T]he word servitude is of larger meaning than slavery.') In *Plessy v Ferguson*, the Court wrote that involuntary servitude encompasses 'the control of the labour and the services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services.' (1896) 163 US 537, 542.

[2] (1988) 487 US 931. See CM Page '*United States v Kozminski*: Involuntary Servitude — A Standard At Last' (1989) 20 *U of Toledo LR* 1023; Asher (supra) at 252 (Criticizes *Kozminski* definition for falling short of international standards for servitude and argues for a more expansive definition). See also R Goluboff 'The 13th Amendment and the Lost Origins of Civil Rights' (2001) 50 *Duke LJ* 1609 (General analysis of 13th Amendment jurisprudence.)

[3] The US Supreme Court originally held that involuntary servitude (or 'peonage') existed only when the worker was forced to work in order to discharge a debt. See, eg, *Clyatt v United States* (1905) 197 US 207, 215 ('[T]he basic fact of [peonage] is indebtedness. . . . The essence of [peonage] is compulsory service in payment of a debt.') This narrow construction of servitude is consistent with the foundational nature of 'freedom of contract' in the US Supreme Court's jurisprudence at the turn of the 20th Century. See *Lochner v New York* (1905) 198 US 45. Peons, those labouring under conditions of involuntary servitude, could not contract to alienate freely their labour and enjoyed the protection of the 13th Amendment and the Peonage Act. The definition of 'involuntary servitude' expanded gradually to include services rendered for reasons apart from indebtedness.

(c) Forced Labour

Article 2(1) of the Forced Labour Convention of the International Labour Organization ('ILO') defines forced labour as follows:

> [A]ll work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.[1]

FC s 13 prohibits expressly only forced labour. The loose denotation of this term — married to the equally loose constructions of slavery and servitude — might suggest that the extension of forced labour in FC s 13 embraces all forms of non-voluntary labour. That would constitute far too generous a reading. Not all non-voluntary labour is forced labour.

One form of non-voluntary labour that should not be considered forced labour is that which flows from a back-to-work order in the context of an industrial action. In *Botswana Railways' Organization v Setsogo*, the Botswana High Court held that although s 6(2) of the Botswana Constitution prohibits forced labour, s 6(3)*(a)* of the Botswana Constitution states that 'forced labour' does not include labour required in consequence of an order of court. As a result, a back-to-work order by a court during an industrial action does not constitute forced labour.[2] The rationale for the holding is as follows. The court is not compelling a party to work. No one has to obey the court order. The court is simply requiring the employer-employee relationship to continue as usual while the negotiations between the parties continue. Should an employee not wish to follow the court's back-to-work order, her behaviour is governed by the normal rules of employment. Should her absence be grounds for dismissal, any consequent termination cannot be attributed to the allegedly coercive background conditions of the court's order.[3]

The centripetal forces at work in *Setsogo* narrow our construction of 'forced labour'. But as several foreign courts have noted, centrifugal forces generate a broader construction.[4] The European Court of Human Rights ('ECHR Court')

[1] Convention Concerning Forced or Compulsory Labour (1932) ILO No 29, 39 UNTS 55 (Ratified by South Africa on 5 March 1997).

[2] (1995) BLR 758, 764.

[3] See, eg, *South African Municipal Workers Union v Jada and Others* 2003 (6) SA 294, 305 (W)(A general right to strike does not insulate parties participating in an unauthorized industrial action from the normal ramifications of a refusal to report. Failure to comply with the terms of the Labour Relations Act puts employees in legitimate danger of termination. The offer by the town council to arbitrate — provided the plaintiffs returned to work — and the plaintiffs' rejection of that offer was the ultimate cause for their dismissal.) For a more general discussion of the interaction between constitutional labour rights and the effects of a back-to-work order, see C Cooper 'Labour' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, August 2005) Chapter 53.

[4] In terms of s 48 of the Basic Conditions of Employment Act, forced labour is a criminal offence punishable by a fine and up to three years imprisonment. Act 75 of 1997 (Section 48 read with Section 93). Neither slavery nor servitude is subject to a similar statutory proscription. To the extent that a practice engages a labour relationship — and not a relationship of status — the term 'forced labour' in the Basic Conditions of Employment Act ought to capture incidents of slavery and servitude. The need to broaden the use of the term 'forced labour' in the Basic Conditions of Employment Act to cover incidents of slavery and servitude serves as a reminder that the terms slavery, servitude and forced labour mark a range of exploitative practices and that within this range of repugnant practices, the three terms can often be used interchangeably.

distinguishes forced labour from compulsory labout. That, distinction, however, is a function of the express language of the European Convention itself.[1] For the purposes of FC s 13 analysis, the ECHR's take on compulsory labour informs — or fleshes out — our understanding of forced labour. In *Van der Mussele v Belgium*, the ECHR Court depicts forced labour as a condition that 'brings to mind the idea of physical or mental constraint.'[2] It characterizes compulsory labour as work done 'against the will of the person' and 'under the menace of any penalty.'[3] Labour — forced or compulsory — is not limited to physical or manual labour. Moreover, forced labour and compulsory labour can be compensated or uncompensated. The mere fact of compensation does not affect the attribution of 'force' or 'compulsion'.[4] Furthermore, work entered into voluntarily but which a person is compelled to continue may amount to forced labour. After establishing these various parameters, the *Van der Mussele* Court concluded that legislation requiring aspirant attorneys to accept a certain number of pro bono clients as a conditon for entry into the legal profession did not constitute unjustifiable forms of forced labour and compulsory labour.[5]

In *W, X, Y & Z v The United Kingdom*, the European Commission on Human Rights ('ECHR Commission') became a forum for debate about the degree of degradation associated with slavery, servitude and forced labour. The applicants contended that 'it is wrong to conclude that [either] slavery or servitude constitute a more oppressive condition' than forced.[6] While slavery and servitude are 'condition[s] different conceptually from forced labour, the applicants averred, they 'may or may not be more oppressive.'[7] The ECHR Commission accepted the applicants' argument that it is the lived experience of slavery or forced labour that determines how oppressive the condition is and not its classification. The ECHR

[1] Article 4.

[2] (1984) 6 EHRR 163, 183.

[3] Ibid. The European Commission on Human Rights and the European court on Human Rights have a fairly well-developed forced labour jurisprudence. See, eg, *X v Federal Republic of Germany* (1978) 17 *Yearbook of the European Conventionon Human Rights* 148 (Pro bono services required of lawyer); *Gussenbauer v Austria* (1975) 15 *Yearbook of the European Convention on Human Rights* 448 (Pro bono services required of lawyer); *Van Droogenbroeck v Belgium* (1892) 4 EHRR 443 (Prison labour); *W, X, Y & Z v The United Kingdom* (supra) (Inability of minors to leave voluntary military service); *Grandruth v Federal Republic of Germany* (1967) 10 *Yearbook of the European Convention on Human Rights* 626 (Refusal of Jehovah to witness to perform community service); *Iversen v Norway* (1963) 6 *European Yearbook of the European Convention of Human Rights* 327 (Dentist sent to remote part of country to practice.) See also R Gordon, T Ward & T Eicke *The Strasabourg case law: Leading Cases from the European Human Rights Reports* (2001) 197–207 and A Naidu 'The Right to be Free from Slavery, Servitude and Forced Labour' (1987) 20 *CILSA*108, 111–3.

[4] *Van der Mussele* (supra) at 173, 177.

[5] For a more detailed discussion of *Van der Mussele* in the context of community service reqirements for entry into a profession, see § 64.5*(g)* infra.

[6] *W, X, Y & Z* (supra) at para 9.

[7] Ibid.

Commission also agreed with the applicants' assertion that military service could amount to forced labour.[1]

Similarly, the Indian Supreme Court has noted that forced labour is often a function of other social conditions just as apt to exhaust individual identity as slavery and servitude. In *People's Union for Democratic Rights & Others v Union of India & Others*, the Indian Supreme Court, in concluding that any work done for less than the minimum wage amounts to forced labour, wrote:

> [I]t may be physical force which compels a person to provide labour or service to another or it may even be compulsion arising from hunger or poverty, want and destitution. Any factor which deprives a person of a choice of alternatives and compels him to adopt a particular course may properly be regarded as 'force' and if labour or service is compelled as a result of such 'force' it would be 'forced labour'.[2]

The virtue of such a broad definition of forced labour under FC s 13 would be that it would enable South African courts to engage effectively such problems as trafficking, child labour, farm labour and domestic labour. The danger is that such a definition of forced labour casts too wide a net and captures labour relations that we would not, as yet, wish to view as constitutionally infirm.

For us the critical heuristic distinction is that limited options and demeaning work alone are necessary, but not sufficient, conditions, for a constitutional finding of forced labour. Forced labour only occurs where the employer uses the existence of limited options and demeaning work to abuse her employees. Objective manifestations of such abuse include sub-minimum wage remuneration and horrific working conditions. So even though a person may enter 'voluntarily' into demeaning work, she may still have her dignity impaired by *(a)* the demeaning nature of the work and *(b)* her inability to insist on better conditions or better pay. Conversely, a person forced physically or forced by menace of penalty to do 'good' work on behalf of the commonweal has her dignity impaired when she loses complete control over her labour. The presence of either set of conditions will support a finding of forced labour.

[1] *W, X, Y & Z* (supra) at 596 ('[A]lthough [servitude and forced labour] must in fact often overlap, they cannot be treated as equivalent.') For all the conceptual overlap of the three terms, the Final Constitution does appear to take slavery and servitude somewhat more seriously than forced labour. See § 64.3 supra (Discussion of non-derogation.) FC s 37 permits forced labour in states of emergency. Slavery and servitude are non-derogable.

[2] [1983] 1 SCR 456, 491 (Workers were paid substantially below minimum wage for their work and were obliged to accept employment). See also *Van der Mussele* (supra) at 174-5 (ECHR Court found that a person who voluntarily took up a profession could still claim that community service performed in order to secure admittance to the profession constitutes forced labour.)

Definition of forced labour:
1. Forced labour is all work or service: *(a)* exacted from any person under the menace of any penalty or by dint of physical force and *(b)* for which the said person has not offered himself voluntarily.
2. Forced labour is not limited to physical or manual labour.
3. Forced labour can be compensated or uncompensated.
4. Work entered into voluntarily, but which a person is forced to continue, may amount to forced labour.
5. Forced labour denotes those labour practices where an employer is able to exploit an employee's radically constrained options in order to induce her to work for pay and in circumstances that fall far below acceptable labour standards. Such unacceptable standards may mean sub-minimum wage pay, or horrific working conditions, or both.
6. FC s 13 contains no internal modifiers with respect to forced labour. All exceptions to the definition of forced labour must be justified. Some generally accepted exceptions include: *(a)* normal civic obligations; *(c)* military service; *(d)* national service by a conscientious objector; *(e)* community service required in an emergency.

64.4 International Law Obligations

(a) Customary international law

The prohibition of slavery is an obligation *erga omnes* under international customary law.[1] It may have even acquired the status of *jus cogens*[2], As Rassam writes:

> [E]very state has illegalized institutionalized slavery and the slave trade and no state dares assert that it does not have an international legal obligation to outlaw slavery and the slave trade.[3]

Slavery, as an international crime, attaches individual criminal liability to private persons irrespective of state involvement or the location of the crime. It also creates the basis for universal jurisdiction.[4] The reach of the enabling legislation for the International Court of Justice[5] and the International Criminal

[1] See *Case Concerning the Barcelona Traction Light and Power Company (Belgium v Spain)* (1970) *ICJ Reports* 3.
[2] See J Dugard *International Law: A South African Perspective* (2nd Edition, 2000) 40.
[3] Rassam (supra) at 311.
[4] Bassiouni (supra) at 454.
[5] See Statute of the International Court of Justic, Article 36 (2)*(a)-(c)*(Gives the court the power to decide disputes concerning 'the interpretation of a treaty', 'any question of international law' and 'the existence of any fact, which if established, would constitute a breach of an international obligation.')

Court,[1] when read together with FC ss 231 and 232, place South Africa's obligation to enforce FC s 13's prohibition of slavery beyond doubt.[2]

(b) General conventions

The Slavery Convention imposes on South Africa as a state party the positive obligation to 'bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.'[3]

South Africa recently ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ('Palermo Protocol').[4] The Palermo Protocol requires all state parties to criminalize trafficking in persons.[5] The Protocol's broad definition of trafficking[6] and the removal of consent of the victim as a bar to prosecution[7] ought to augment our existing taxonomy of slavery, servitude and forced labour.

The International Labour Organization ('ILO') Forced Labour Convention obliges all state parties to abolish forced labour[8] and to criminalize and to prosecute any occurrences of it.[9] The ILO Abolition of Forced Labour Convention requires

[1] Rome Statute of the International Criminal Court, Article 7(1)*(c)*, UN Doc. A/CONF.183/9, 2187 UNTS 90 (Ratified by South Africa on 27 November 2000).

[2] FC s 231(4) reads, in relevant part: 'Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.' FC s 232 reads, in relevant part: 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.' For more on the role of international law under the Final Constitution, see K Hopkins & H Strydom 'International Law and Agreements' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 30.

[3] Slavery Convention (1926) 60 LNTS 253, Article 2 (Ratified by South Africa on 18 June 1927).

[4] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (2000) UN Doc. A/55/383 (Ratified by South Africa on 20 February 2004).

[5] Article 5(1). Article 5(2) further requires the criminalization of *(a)* attempted trafficking, *(b)* acting as an accomplice to trafficking, and *(c)* organizing or directing trafficking. The South African Law Commission's recent report on trafficking anticipates legislative enactment of the Protocol in domestic law within the next few years. South African Law Commission Report *Trafficking in Persons* (2004) Issue Paper 25, Project 131.

[6] Article 3*(a)* reads as follows: 'For the purposes of this Protocol: *(a)* 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation. Exploitation shall include at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery or the removal of organs.' See § 64.6*(a)* infra for a detailed discussion of sexual slavery and human trafficking.

[7] Article 3*(b)* reads as follows: 'The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph *(a)* of this article shall be irrelevant where any of the means set forth in subparagraph *(a)* have been used.'

[8] Convention Concerning Forced or Compulsory Labour (1932) ILO No 29, 39 UNTS 55, arts 10, 18 (Ratified by South Africa on 5 March 1997).

[9] Ibid at arts 1, 4, 5, 10, 18 and 25.

states to 'suppress and not to make use of any form of forced or compulsory labour.'[1] Prohibitions on forced labour with respect to children can be found in the Convention on the Rights of the Child[2] and the ILO Convention on the Worst Forms of Child Labour.[3]

(c) Human rights instruments

Most international human rights instruments prohibit both slavery and servitude. The Universal Declaration of Human Rights prohibits slavery[4] and protects everybody's right to 'free choice of employment'.[5] The African Charter on Human and Peoples' Rights prohibits slavery and the slave trade.[6] The International Covenant on Civil and Political Rights[7], the European Convention for the Protection of Human Rights and Fundamental Freedoms[8] and the Inter-

[1] (1959) ILO No 105, 320 UNTS 291, Article 1 (Ratified by South Africa on 5 March 1997).

[2] (1989) UN Doc A/44/49 (Ratified by South Africa on 16 June 1995). Article 32 requires states to 'recognize the right of the child to be protected from economic exploitation and from performing work that is likely to be hazardous.'

[3] Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) ILO No 182, 38 ILM 1207 (Ratified by South Africa on 19 November 2000). Article 1 states: 'Each member which ratifies this Convention shall take *immediate* and effective measures to secure the prohibition and *elimination* of the worst forms of child labour as a matter of urgency.' (Our emphasis.)

[4] Article 4.

[5] Article 23.

[6] Article 5. The African Commission on Human and Peoples Rights has heard only one such complaint. See *SOS Esclaves v Mauritania* 198/97 (1997)(Complaint was found to be inadmissible.) The Commission then considered the state of slavery in Mauritania in its Tenth Annual Activity Report. It found that contrary to the contentions of the NGO representing the SOS slaves that there remained only vestiges of slavery and that the government was complying with its obligations to abolish all forms of slavery. 'Tenth Activity Report of the African Commission' in R Murray & M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (2001) 546-50. That account appears inconsistent with other cotemporaneous accounts of slavery in Mauritania. See § 64.1 supra.

[7] Article 8 reads, in relevant part, as follows:

No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. 2. No one shall be held in servitude. 3. *(a)* No one shall be required to perform forced or compulsory labour; *(b)* Paragraph 3 *(a)* shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court; *(c)* For the purpose of this paragraph the term 'forced or compulsory labour' shall not include: (i) Any work or service, not referred to in subparagraph *(b)*, normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors; (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community; (iv) Any work or service which forms part of normal civil obligations.

[8] Article 4 reads as follows:

(1) No one shall be held in slavery or servitude. (2) No one shall be required to perform forced or compulsory labour. (3) For the purposes of this article the term 'forced or compulsory labour' shall not include: *(a)* any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this convention or during conditional release from such detention; *(b)* any service of a military character or, in the case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; *(c)* any service exacted in case of an emergency or amity threatening the life or well-being of the community; *(d)* any work or service that forms part of normal civic obligations.'

American Convention on Human Rights[1] all contain similar provisions that prohibit slavery and servitude *tout court* and most instances of forced labour. The prohibition on forced labour is generally subject to the following exceptions: *(a)* work done during lawful detention; *(b)* military service; *(c)* service in case of emergency or calamity; and *(d)* normal civic obligations.[2]

64.6 Slavery, Servitude and Forced Labour in Context

(a) Sexual slavery and human trafficking

At least 800 000 to 900 000 people are trafficked annually around the globe.[3] Human trafficking stands third on international organized crime's year-end earnings list — after drugs and armaments — at $7 billion.[4]

While hard data on the actual scale of human trafficking for the purposes of

[1] Article 6 reads as follows:

(1) No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women. (2) No one shall be required to perform forced or compulsory labour. This provision shall not be interpreted to meant that in those countries in which the penalty established for certain crime is deprivation of liberty or forced labour, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labour shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner. (3) For the purposes of this article, the following do not constitute force or compulsory labour: *(a)* work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority. Such work or service shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company or juridicial person; *(b)* military service and, in countries in which conscientious objectors are recognised, national service that the law may provide for in lieu of military service; *(c)* service extracted in time of danger or calamity that threatens the existence or well-being of the community; or *(d)*work or service that forms part of normal civic obligations.

See *IACHR Report on the Situation of Human Rights in Panama* (1978)(The Inter-American Commission on Human Rights reviews allegations of unfair prison labour.) See also S Davidson 'The Civil and Political Rights Protected in the Inter-American Human Rights System' in DJ Harris & S Livingstone (eds) *The Inter-American System of Human Rights* (1998) 231-2.

[2] The Constitutional Assembly, in line with these international instruments, considered including these four exceptions. It eventually rejected them in favour of a crisp construction of FC s 13. Although the grounds for not incorporating these internal qualifiers is unclear, this silence should not be read to mean that the Final Constitution regards any of these 'unlisted' practices either as a *prima facie* abrogation of or a permissible limitation of FC s 13. The drafters' decision to leave FC s 13 open-ended permits the courts to respond to ever-evolving understandings of slavery, servitude and forced labour and the novel exigencies that might demand the relaxation of the section's prohibitions. See § 64.3 supra.

[3] US Department of State 'Trafficking in Persons Report: Trafficking Victims Protection Act of 2000' (2003) 7.

[4] J M Maciej, M Pieczkowski & B van Vuuren-Smyth 'Seduction, Sale and Slavery: Trafficking in Women and Children for Sexual Exploitation in Southern Africa' International Organization for Migration, Regional Office for Southern Africa (3rd Edition, 2003) 16 ('IOM *Trafficking Report*') quoting FT Miko 'Trafficking in Women and Children: The US and International Response' *Congressional Research Service Report 98-649 C* (2000), available at www.iom.org.za/Reports/TraffickingReport3rdEd.pdf, (accessed on 25 December 2004).

sexual exploitation in South Africa remains limited,[1] recent reports from the International Organization for Migration ('IOM') and South African Law Commission ('SALC')[2] provide a fairly comprehensive, if grim, picture of South African-based trafficking activities. The IOM and the SALC both note that while South Africa serves as both source and transit hub for sexual trafficking activities, it functions primarily as a final market for tens of thousands of women and children.[3] Terms such as 'source', 'transit hub', 'market' and 'organized crime' mask the brutality of an 'industry' whose one and only good is rape. Moreover, the use of such terms as 'prostitution' shifts responsibility for the repeated rape

[1] South African Police Service Child Protection Unit statistics suggest that some twenty-eight thousand children are trafficked for the purposes of commercial sexual exploitation in South Africa's cities. However, even the SAPS acknowledges the inevitability of underreporting in this setting. See K Fitzgibbon 'Modern Day Slavery: The Scope of Trafficking in Africa' (2003) 12(1) *African Security Review* 81, 83.

[2] South African Law Commission Report *Trafficking in Persons* (2004) Issue Paper 25, Project 131 ('SALC *Trafficking Paper*').

[3] Ibid at 11. Most women and children sold into sexual slavery in South Africa are refugees from around the continent. The remainder of South African sex slaves are sourced primarily from Lesotho, Mozambique, Malawi, Thailand, China; and Eastern Europe. The methods of conniving and coercion employed to 'recruit' women and children to South Africa are as varied as their source. Some are enticed by promises of better jobs or marriage. Others are abducted. But perhaps the most distressing fact of all is that most are sold down the river by members of their family. M Songololo *The Trafficking of Children for Sexual Exploitation* (2000) 11; IOM *Trafficking Report* (supra) at 16, 65.

Refugees from other African countries already in South Africa often arrange for close female relatives to join them. Once these women receive asylum-seeker status, their male relatives force them into prostitution. The victims are generally unable to speak the language, do not know the lay of the land and face unsympathetic, if not exploitative, immigration officials. Even when women are able to overcome these impediments, an extensive criminal network often tracks down and recaptures them. The fortunate few able to access the law are then placed in the unenviable position of choosing between deportation to an inhospitable home or remaining 'enslaved' but 'with' their family. Ibid at 20-34. The Lesotho-South Africa slave trade takes the following form. Boys and girls as young as 13 are abducted, or lured, from the streets of Maseru or other border towns. They are taken to private homes in nearby Free State towns where they are repeatedly raped for extended periods. These children are often returned to Lesotho or simply abandoned. The IOM report contends that the brazen nature of this practice reflects high degrees of police and immigration official complicity. Ibid at 34-47. Approximately 1000 Mozambiquan girls and women are trafficked annually in South Africa. Ibid at 63. Some young girls are actively recruited with promises of a lucrative job in a big South African city. Others are picked up at taxi ranks while searching for a lift. After crossing the border illegally, most are subjected to an 'initiation' — rape — at transit houses near the border. The girls are then sold as 'wives' to men on the mines in the West Rand for R650 — see § 64.6*(b)*(ii) infra — or to South African brothels for R1000. Ibid at 47-64. The trafficking of girls and women from Malawi is underwritten by a custom called *kuhaha*. Ibid at 65. This set of coercive sexual initiation practices — intended to drive young women into early marriage — make young Malawi women particularly vulnerable to South African truckers and Malawian businesswomen who promise them jobs and marriage in South Africa. Most are raped en route. They are then sold to a brothel or retained as personal sex-slaves and rented out to friends. Ibid at 64-7, 85-93. Almost 1000 Thai women and girls are tricked each year into coming to South Africa with promises of high-wage restaurant work. Upon arrival, these women are auctioned off at restaurants for R15 000 to R25 000, have their passports confiscated, kept in closely guarded private homes in Johannesburg and are then forced into sex work to repay their 'debt'. Ibid at 93-108. Chinese Triads bring young women into South Africa to work in exclusive and well-known Chinese clubs. Most of these victims are relatively well-educated and have been convinced that a legitimate market exists for their skills. As with most cases of such bondage, 'debts' of R75 000 make discharge almost impossible. Ibid at 108-123.

of women and children from the criminals engaged in this 'trade' to the women and children themselves.[1] Such legal obfuscation of what would — in times of war — be described as crimes against humanity conceals the high degree of state complicity that makes this most ancient and yet coetaneous form of chattel slavery possible. So while the disturbing prevalence of human trafficking in Southern Africa is variously attributed to extreme poverty, unemployment, war, lack of food[2] and traditional practices that commodify women and make their sale acceptable,[3] such 'causes' are really no more than enabling conditions. They only make trafficking easier. The demand for sex-workers, the existence of organized criminal syndicates and the failure of legal imagination and political will drive the South African market.[4]

S v Jordan & Others evinces just such a failure of legal imagination.[5] In *Jordan*, the Constitutional Court rejected equality, dignity, privacy and freedom of profession challenges to provisions of the Sexual Offences Act that criminalize prostitution.[6] The majority reasoned as follows:

> If the public sees the recipient of reward as being 'more to blame' than the 'client', and a conviction carries a greater stigma on the 'prostitute' for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attaches to them, not by virtue of their gender, but by virtue of the conduct they engage in. That stigma attaches to female and male prostitutes alike. I am not persuaded by the argument that gender discrimination exists simply because there are more female prostitutes than male prostitutes just as I would not be persuaded if the same argument were to be advanced by males accused of certain crimes, the great majority of which are committed by men.[7]

The majority's very strong commitment to a form of metaphysical autonomy that makes all individuals morally and legally culpable for those actions that issue ineluctably from their circumstances fails dramatically the victims of sexual trafficking. Sexual trafficking is about the sale and exploitation of women and female children — of people who have little chance, and no choice, in life's wheel of fortune. *Jordan* has nothing to say about state complicity in a legal regime that condones institutionalised rape. Perhaps this characterization of *Jordan*'s weltanschauung seems unfair. We think the majority judgment speaks for itself:

[1] See C Argibay 'Sexual Slavery and the Comfort Women of World War II' (2003) 21 *Berkeley J of IL* 375, 386-7 ('[T]he terms 'prostitute' and 'prostitution' reflect profoundly discriminatory attitudes toward women, the situation of [victims of trafficking] is more accurately termed "sexual slavery" rather than "forced prostitution". "Forced prostitution" reflects the male view; "sexual slavery" reflects the victim's view.')

[2] IOM *Trafficking Report* (supra) at 15-21.

[3] SALC *Trafficking Paper* (supra) at 27-28.

[4] See B Balos 'The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation' (2004) 27 *Harvard Women's LJ* 137. Balos argues that customers buy victims of trafficking mainly as an exercise in power that invariably results in the objectification of the woman involved. Article 9(5) of the Palermo Protocol requires state parties to 'adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.' Although such measures can be legislated, whether they can be effectively implemented is unclear.

[5] 2002 (6) SA 642 (CC), 1997 (6) BCLR 759 (CC)('*Jordan*').

[6] Sexual Offences Act 23 of 1957, s 20(1)(aA).

[7] *Jordan* (supra) at paras 16-17.

> It was accepted that they have a choice but it was contended that the choice is limited or 'constrained'. Once it is accepted that [the criminalization of prostitution] is gender-neutral and that by engaging in commercial sex work prostitutes *knowingly* attract the stigma associated with prostitution, it can hardly be contended that female prostitutes are discriminated against.[1]

The minority, although sympathetic, offers more of the same:

> Their status as social outcasts cannot be blamed on the law or society entirely. By engaging in commercial sex work, prostitutes *knowingly* accept the risk of lowering their standing in the eyes of the community. In using their bodies as commodities in the marketplace, they undermine their status and become vulnerable.[2]

The *Jordan* majority and minority's approach may hold in the context of some 'voluntary' forms of prostitution. It cannot be applied, without real violence being done to the word 'voluntary', to victims of trafficking and sexual slavery.[3]

The language of many international instruments also obscures the two-fold nature of this crime. Article 3*(a)* of the Palermo Protocol states that trafficking is proscribed when it occurs for one of the following purposes: 'exploitation of

[1] See *Jordan* (supra) at para 16 (emphasis added)(How and why knowing that stigma attaches to a practice or an event — that takes place under conditions of duress and compulsion — creates culpability remains unclear.)

[2] Ibid at para 66 (Sachs and O'Regan JJ)(emphasis added). As one of the authors has written elsewhere, all of us gainfully employed, constitutional court judges included, commodify our bodies in exchange for remuneration. S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) § 44.3*(c)*(ix).

[3] A recent judgment hints at a way out of the Constitutional Court's autonomy bind. See *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC). In *Khosa*, the Constitutional Court found unconstitutional, as a violation of both FC s 9 and FC s 27 (1), the exclusion of permanent residents from the classes of person entitled to a variety of social security grants: old age, disability, veterans, child-support and foster care. Mokgoro J writes:

> The exclusion of permanent residents in need of social-security programmes forces them into relationships of dependency upon families, friends and the community in which they live, none of whom may have agreed to sponsor the immigration of such persons to South Africa. . . . Apart from the undue burden that this places on those who take on this responsibility, it is likely to have a serious impact on the dignity of the permanent residents concerned who are cast in the role of supplicants.

Ibid at 76. Mokgoro J could well have added that permanent residents are, as supplicants, not merely dependent on family members, but quite literally at their mercy. Sex slaves — prostitutes — would consider themselves fortunate to be supplicants. They are not just excluded from the protection of the law. Many prostitutes, as we noted above, do not speak the language, do not know the lay of the land, do not have the resources to engage corrupt immigration officials or to escape criminal syndicates. Many are enslaved by their own family. The point is not that sex slaves are excluded from some particular benefit to which another class of persons is entitled. *Khosa* stands for the broader proposition that FC s 7(2) places the state under an obligation to protect and to fulfil the rights of all persons in South Africa. As the *Khosa* Court rightly recognizes, legal regimes that offer incentives to become members of the political community but that punish persons who cannot act on such incentives — by withholding benefits or through incarceration — are perverse. These disincentives deny the affected person exactly that which the state is obliged to provide. The *Khosa* Court indicates that where all meaningful choice is extinguished, the state bears a much greater burden with respect to the entitlements of the persons within its midst. For children, the aged and the disabled, the inability to work underwrites their claim for state support. The current inability of sex slaves to liberate themselves requires the creation of a comprehensive and coordinated state programme designed to realize their emancipation.

the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.'[1] No South African jurist ought to lose sight of the fact that trafficking in persons or their parts is, in itself, a violation of FC s 13.[2] That this sale of human flesh is married to a state-enabled,[3] and thus acceptable, form of rape,[4] simply makes it the most abhorrent form of contemporary slavery.[5]

The IOM and the SALC reports suggest that the conditions of sale of women and children for sexual exploitation in South Africa easily satisfy the criteria for trafficking set out in the Palermo Protocol.[6] However, the Protocol's pre-

[1] See SALC *Trafficking Paper* (supra) at 18-21 (Identifies adoption, forced marriage and domestic work as practices that could qualify as exploitation.)

[2] See F Gold 'Redefining the Slave Trade: The Current Trends in the International Trafficking of Women' (2003) 11 *University of Miami International and Comparative LR* 99, 100 (Gold explains the conditions that reinforce this practice in terms of the objectification of the victim: '[The victims] know their own purchase price, and understand that the purchaser demands strict obedience, and will ensure such behaviour through coercive tactics. The height of objectification is illustrated by the women's belief that it is the employer's ultimate right to resell the women at the employer's discretion.')

[3] State complicity may take the form of a failure to adequately enforce domestic laws prohibiting the practice. See Rassam (supra) at 320.

[4] See Argibay (supra) at 375. See § 64.4*(a)* supra (Definition of slavery).

[5] While the nature and the extent of suffering in the sex trade itself may vary, sexual trafficking must be understood in terms of both slavery and rape. No meaningful volition exists. The absence of volition in the context of sex is rape. See NK Katyal 'Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution' (1993) 103 *Yale LJ* 791, 826 ('If forced prostitutes today are not slaves, then neither was half of the Southern black population in 1850.') See also Gold (supra) at 101('[E]ven the term voluntary is contentious because most women who engage in prostitution do so as a result of their own particular financial and societal situations. They may voluntarily choose to engage in prostitution, but external factors leave prostitutes no other option. Furthermore, once they have 'chosen' a life of prostitution, they may fear the threat of violence if they attempt to change their lifestyle.')

[6] Article 3 of the Palermo Protocol defines trafficking as follows:

(a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph *(a)* of this article shall be irrelevant where any of the means set forth in subparagraph *(a)* have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph *(a)* of this article;

(d) 'Child' shall mean any person under eighteen years of age.

Under the Protocol, the prosecution must establish the presence of 3 elements in order prove a person is a trafficker. First, the trafficker must perform one of the listed actions: namely 'recruitment, transportation, transfer, harbouring or receipt of persons.' These activities embrace all of the component parts of a trafficking operation — save for the client. However, in order to realize fully the right to be free from slavery, a client who knowingly solicits the services of a trafficked and sexually exploited person must be brought to book. Legislation must engage both the demand and the supply. Second, the trafficker must use threat of force, coercion, abduction, fraud, deception, abuse of power or the vulnerability of another person in order to achieve her ends. The *Travaux Preparatoires* states that 'abuse of

occupation with the elimination of trans-national organized crime limits its efficacy as a both a model for and a tool in efforts to eradicate sexual slavery.[1]

FC s 13 can play a dual role in combating human trafficking. Firstly, it can be read to require that the state produce a comprehensive plan to eradicate, to prevent and to punish trafficking.[2] Secondly, it can be read to require that the state 'protect and assist the victims of . . . trafficking, with full respect for their human rights.'[3] Such protection demands: *(a)* adequate physical security;[4] *(b)* the

power' refers 'to any situation in which the person involved had no real and acceptable alternative but to submit to the abuse involved.' See *Travaux Preparatoires* (Interpretative Notes) for the Negotiation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, UN Doc A/55/383/Add.1 at para 63. Almost all victims of trafficking — once ensconsed at their ultimate destination — find that they have no means of communicating, no money, no friends, no travel documents, no access to the law. Moreover, the fear of physical punishment and further sexual abuse often creates insuperable barriers to flight. Third, the trafficking must have been undertaken for the purpose of exploitation. Exploitation includes such practices as exploitation of another for the purposes of making money from the sale of another's sexual capacity. This definition of exploitation seems sufficiently elastic to cover such practices as pornography and forced marriages.

[1] For example, the Protocol only applies to trafficking over borders (article 4) by a group of at least 3 people (article 2*(a)*). As Anti-Slavery International observes, these provisions may be necessary to combat international crime, but are irrelevant to a victim who has been trafficked by a single person or within national borders. D Weissbrodt & Anti-Slavery International 'Abolishing Slavery and its Contemporary Forms' for the Office of the United Nations High Commissioner for Human Rights HR/PUB/02/4 (2002) 21. As the IOM and SALC reports note, the proportion of trafficking that occurs within South Africa — especially within existing refugee communities — constitutes a substantial percentage of the total. The efficacy of the Protocol is further undermined by making the articles that deal directly with victims purely discretionary.

[2] Such a programme has several essential features. One facet is detailed legislation criminalizing trafficking in persons. IOM *Trafficking Report* (supra) at 133. In theory, traffickers can be prosecuted for kidnapping, abduction and rape under the common law and various statutes. Statutory offences include violations of the Sexual Offences Act 23 of 1957, the Immigration Act 13 of 2002 and the Basic Conditions of Employment Act 75 of 1997. But they cannot be punished for the act of trafficking itself. SALC *Trafficking Paper* (supra) at 54. The proposed legislation should draw on the Palermo Protocol. Indeed, the Children's Bill incorporates the definition of trafficking in the Palermo Protocol and gives the Protocol the force of law. However, a more nuanced piece of legislation aimed specifically at traffickers is required in order to take account of practices unique to the South African sex slave trade and the capacity of existing law enforcement structures. A second aspect is the creation of a national task force on trafficking in persons. See IOM *Trafficking Report* (supra) at 134. Such a task force has already been established in Gauteng. SALC *Trafficking Paper* (supra) at 45. A third component is educating communities on the dangers of trafficking. Ibid at 39.

[3] Article 2*(b)* of the Palermo Protocol. Attention to the human rights of victims can also aid in minimising the problem. See J Fitzpatrick 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking' (2003) 24 *Michigan J of IL* 1143, 1165 ('Only whenstates commit themselves to tackle human rights violations across the entire spectrum of the traffic, will we begin to see a diminution in this serious human rights violation.')

[4] The nature of this care can be found in article 6(3) of the Palermo Protocol. Article 6(3) requires state parties to 'consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of: *(a)* Appropriate housing; *(b)* Counseling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; *(c)* Medical, psychological and material assistance; and *(d)* Employment, educational and training opportunities.' The Law Commission recommends that the services offered to victims of trafficking should include at least 'health care services, shelter, counseling, education and vocational training.' SALC

opportunity for victims to seek reparations from their traffickers;[1] and *(c)* sufficient safeguards in our immigration laws to enable victims to seek asylum.[2] The present legal regime fails to provide such protection[3] and may even exacerbate

Trafficking Paper (supra) at 35. See also Gold (supra) at 132 ('Overall, victims need to feel empowered after a situation in which control was stripped from them. The ability to file private civil actions, obtain proper medical attention, and receive proper repatriation will slowly allow a victim to regain power in her own life.')

[1] The current legal regime governing the victims of trafficking neither affords victims an opportunity to press criminal charges nor allows victims to institute a claim for compensation. SAHRC *Lindela: at the Crossroads for Detention and Repatriation* (2000) 68 ('SAHRC Lindela Report')(The Human Rights Commission's investigation into the conditions at the Lindela detention centre found that people awaiting deportation there have no opportunity to press civil or criminal charges) The SALC has suggested that in terms of s 300 of the Criminal Procedure Act 51 of 1977 and s 30 of the Organized Crime Act 121 of 1998, a person is found guilty of a crime related to trafficking could have his assets sold to compensate the victim. SALC *Trafficking Paper* (supra) at 62. However, even the Law Commission recognizes the current inadequacies in these provisions: (1) trafficking is not a crime; (2) they only cover patrimonial loss, not pain and suffering; (3) any patrimonial loss is likely to be lost earnings from prostitution — and a court is unlikely compensate the victim for illegal earnings.

[2] The Constitutional Court and the Supreme Court of Appeal have handed down a number of judgments recently on the level of constitutional solicitude afforded undocumented persons in the face of singularly inhospitable immigration laws. The Supreme Court of Appeal, in *Minister of Home Affairs v Watchenuka*, found unconstitutional regulations issued by the Minister and rules emanating from the Standing Committee for Refugee Affairs that visited blanket prohibitions with respect to employment and study on asylum seekers. 2004 (4) SA 326 (SCA), 2004 (2) BCLR 120 (SCA)('*Watchenuka*'). The *Watchenuka* Court held that such prohibitions constituted a violation of the right to dignity because the state refused to offer support to asylum seekers and left persons exercising their right to apply for asylum no alternative but to turn to crime, begging or foraging. The Court also held that such prohibitions constituted a violation of the right to education because children lawfully in the country to seek asylum may not be deprived of such resources at critical period of their development. The *Watchenuka* Court recognizes that a right to asylum only becomes meaningful if immigration laws actually permit a person to seek asylum. In *Lawyers for Human Rights & Another v Minister of Home Affairs & Another*, the Constitutional Court construed several provisions of the Immigration Act in a manner that expands the level of due process to which undocumented persons on board ships are entitled. 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC)('*Lawyers for Human Rights*'). The *Lawyers for Human Right* Court described the basis for this expansion as follows:

> [We are] concerned with a delicate issue that has implications for the circumstances in and the extent to which we restrict the liberty of human beings who may be said to be illegal foreigners. The determination of this question could adversely affect not only the freedom of the people concerned but also their dignity as human beings. The very fabric of our society and the values embodied in our Constitution could be demeaned if the freedom and dignity of illegal foreigners are violated in the process of preserving our national integrity.

Ibid at para 20. Read together, the decisions support the dual proposition that our immigration laws must be construed in a manner that permits the actual, and not merely theoretical, exercise of every person's fundamental rights and that our immigration laws cannot be used to exact non-judicial penalties in order to further domestic policies aimed at blunting the influx of illegal immigrants.

[3] The Immigration Act states that all illegal foreigners shall be deported. Act 13 of 2002, s 32(2). Immigration officers are also entitled to arrest an illegal foreigner and cause her to be deported, without a warrant. Section 34(1), reads, in relevant part, as follows: 'Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General.' An 'illegal foreigner' is defined in s 1 as 'a foreigner who is in the Republic in contravention of this Act' The Act criminalizes employing and aiding 'illegal foreigners' save for the provision of 'necessary humanitarian aid.' The Act ostensibly makes provision for suspected

the dangers to which trafficking victims are exposed.[1] An immigration regime that sanctions automatic deportation places victims in an untenable position: remain a sex slave or face deportation without compensation or protection.[2]

(b) Marriage and servitude

(i) *Lobola*

Lobolo, or bride-wealth, is an amount paid by the husband or his family to the family of the woman in return for the reproductive capacity of the woman.[3] The Recognition of Customary Marriages Act, which regulates customary marriages in South Africa, does not require *lobolo* to be paid for a customary marriage to be valid.[4] It does, however, demand that 'the marriage be negotiated and entered into or celebrated in accordance with customary law.'[5] *Lobola* therefore remains an

illegal foreigners to be fairly treated once arrested. Immigation Act, s 34(1)*(a)-(e)*. However, neither the conditions of detention centres such as Lindela nor the legal process to which they are generally subject meet internationally accepted standards. SAHRC *Lindela Report* (supra) at 20-25. Because most detainees are not addressed in a language they can understand, they have little prospect of making use of the limited due process rights to which they are entitled let alone the benefits of substantive law that might accrue to them. See also SAHRC 'Report into the Arrest and Detention of Suspected Undocumented Migrants' (1999); SALC *Trafficking Paper* (supra) at 35 (Notes that 85% of victims spoke Portuguese, Swahili, French, an East Asian or Eastern European language. Few could converse in an official South African language.) Almost all are returned to their country of origin where they are once again vulnerable to being trafficked.

[1] Traffickers often use the opportunities afforded by South Africa's asylum regime to coerce their own family members into becoming sex workers. IOM *Trafficking Report* (supra) at 28.

[2] See § 64.4*(a)* supra. Creating a legal regime to protect and to compensate the victims of trafficking poses significant challenges. The state cannot be expected to investigate and to prosecute every plausible claim of sexual slavery. SALC *Trafficking Paper* (supra) at 50. The American 'T Visa' system offers one possible solution. See Victims of Trafficking and Violence Protection Act of 2000. For a detailed analysis of the T Visa, see T Hartsough 'Asylum for Trafficked Women: Escape Strategies Beyond the T Visa' (2002) 13 *Hasting's Women's LJ* 77. The T Visa is a category of visa created specifically for victims of trafficking. If these victims are deemed to be persons of 'good moral character' after 3 years, they may even be given permanent residence. The T Visa is a promising concept. However, one of the requirements for T Visa is that the victim must comply with any reasonable request for assistance in the prosecution of the traffickers. This requirement conflates the state's obligation to the victim and its obligation to eradicate trafficking. The fear associated with such confrontations, and trauma visited upon a person repeatedly subject to rape at the hand of the person being charged, diminishes the attractiveness of the T Visa programme. See 'Informal Note by the UN High Commissioner for Human Rights' UN Doc A/Ac.254/16 (1999) 5 ('[I]t is important in this context to note that victim protection must be considered separately to witness protection, as not all victims of trafficking will be selected to act as witnesses in criminal proceedings.')

[3] RM Jansen & AJ Ellis 'The South African Common Law and *Lobolo* — Another Perspective' (1999) 24(2) *J for Juridical Science* 41, 42.

[4] Recognition of Customary Marriages Act 120 of 1998 ('Customary Marriages Act').

[5] Section 3(1)*(b)*. But see Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 8*(d)*('Any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men' may amount to unfair discrimination.)

essential condition for a valid marriage if the customary law of the parties so compels.[1]

Does the practice of *lobola* infringe a woman's right to be free from slavery, servitude and forced labour?[2] International law censures practices similar to *lobola*. The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery identifies as servitude '[any] institution or practice whereby [a] woman, *without the right to refuse*, is promised or given in marriage on payment of consideration in money or in kind to her parents.'[3] If we accept the force of the Supplementary Convention's definition, then when a bride has been denied the right to refuse to enter a union and *lobolo* has been paid, a *prima facie* violation of FC s 13's prohibition against servitude is established.

The Customary Marriages Act requires both parties' consent for a customary marriage to be valid.[4] The Act thereby avoids the most obvious basis for a FC s 13 challenge. But the requirement of consent and a right of refusal alone should be insufficient to enable the Act and the practise of *lobola* to escape contestation. First, despite the 'paper law' requiring consent, one must ascertain whether the 'living law' ensures something more than mere acquiescence. Where the consent of a woman is not properly obtained, the paying of *lobolo* must be deemed a 'practice similar to slavery' that impairs FC s 13.[5] Second, in circumstances under which a woman is unable to exercise meaningful choice — where she

[1] See *Mabena v Letsoalo* 1998 (2) SA 1068, 1073 (T)('[C]ustomary marriage comprises two distinct legal actions: there is on the one hand the marriage itself. On the other hand there is the *lobolo* agreement with the handing over of the bride.') See also JG Horn & AM Janse van Rensburg 'Non-Recognition?: Lobolo as a Requirement for a Valid Customary Marriage' (2002) 27(2) *J for Juridical Science* 170, 176; JG Horn & AM Janse van Rensburg 'Practical Implications of the Recognition of Customary Marriages' (2002) 27(1) *J for Juridical Science* 54, 59; IP Mathuifi & JC Bekker 'The Recognition of the Customary Marriages Act of 1998 and Its Impact on Family Law in South Africa' (2002) 35 *CILSA* 182, 187. Customary law normally requires only agreement on the amount of *lobolo*, and not actual payment, in order for the marriage to be declared valid.

[2] Our courts have not, as yet, been asked to consider the constitutionality of *lobola*. They have pronounced on the constitutionality of a number of other customary law doctrines. See, eg, *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('*Bhe*')(Succession based upon male primogeniture held by Constitutional Court to be unconstitutional); *Mhlekwa v Head of the Western Tembuland Regional Authority & Another* 2001 (1) SA 574 (Tk)(Power of Regional Authority Court to apply customary law did not justify limitations of the right to a fair trial and the right to equality. Selective process of applying legislation, and thus customary law, found to be unconstitutional); *Mabuza v Mbatha* 2003 (4) SA 218 (C), 2003 (7) BCLR 743 (C) ('*Mabuza*')(Development of customary law in light of the Constitution's commitment to an open and democratic society based upon equality, dignity and freedom means that siSwati custom of *ukumekeza* (the formal integration of bride into bridegroom's family) can be waived by both parties to marriage and cannot be used to coerce bride.) Cf Jansen & Ellis (supra) at 46 (Authors ask whether *lobola* 'strengthens the authoritative position of husbands, and [reinforces] the subordination of women.' They conclude that s 6 of the Customary Marriages Act diminishes any deleterious consequences of *lobola* by ensuring that husband and wife in customary marriages have equal status.)

[3] Article 1*(c)*(i)(Emphasis added).

[4] Section 3(1)*(b)*.

[5] See C Rautenbach 'Some Comments on the Status of Customary Law in Relation to the Bill of Rights' (2003) 14 *Stell LR* 107 (General discussion on how the Bill of Rights applies to customary law and the difference between the 'paper law' and the 'living law'.)

cannot vote with her feet — more than consent is required. The court must interrogate the contractual environment to determine whether the woman has been coerced into matrimony.

Even with these two provisos, it seems fair to ask whether *lobola* survives FC s 13 — or FC s 9 or FC s 10 — analysis. *Lobola* perpetuates the systemic disadvantage to which black South African women have been historically subject and impairs the dignity of the complainant. Ought it to matter that a woman in a traditional community may not experience the exchange of her body for *lobolo* as an impairment of her dignity? One way to engage the problem of false consciousness is to begin by drawing the line at physical coercion.[1] The South African Law Reform Commission notes that:

> Bride-wealth may have a more concrete effect on individual rights and freedoms by binding women to unwanted marriages. If a wife seeks a divorce, her family is usually obliged to return bride-wealth, and, rather than do so, they may force her to put up with an unhappy relationship.[2]

The Law Commission refuses to draw the logical conclusion: namely, that the exchange of bride-wealth constitutes debt bondage that creates conditions of servitude from which women struggle to escape. Instead it observes that:

> [U]ndue pressure cannot be remedied by legislation. Women have the freedom to end their marriages when they wish, and the law cannot control all economic and social circumstances that might compel or persuade them to remain married.[3]

But it simply does not follow that because the law cannot eliminate subtle forms of coercion, it must endorse institutions that create conditions of servitude. That *lobola* may continue even when a constitutional or statutory provision is understood to prohibit the practice hardly constitutes an argument in favour of it. The Law Commission itself describes a contemporary system of *lobola* in which *(a)* bridewealth represents 'consideration for a wife's reproductive potential' and 'compensates the wife's family for the loss of a daughter'; *(b)* transfers no longer serve as assurance for the long-term familial security of the wife and her family, but may be used to fund the unrelated needs of family members, such as the purchase of furniture; and *(c)* requests for a divorce may trigger a demand for repayment of bride-wealth. Some women may feel that a good price for their body enhances their dignity. The fact remains that the practice functions as a real

[1] S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44. See also M Matsuda 'Pragmatism Modified and the False Consciousness Problem' (1990) 63 *S Cal L Rev* 1763, 1765 (Matsuda notes that structures of subordination both inhibit the very recognition of domination and blunt its expression once that recognition occurs.)

[2] South African Law Commission, Project 90, *The Harmonisation of the Common Law and the Indigenous Law, Discussion Paper 74, Customary Marriages* (August 1997)('SALC *Report on Customary Marriage I*') at para 4.3.3.5

[3] Ibid.

constraint on the ability of women to negotiate their own terms of entry and to engineer their own departure.

Despite the obvious physical, legal and economic encumbrances imposed upon women for whom *lobolo* is paid, the Law Commission asserts that since 'it would be impossible to demonstrate that payment of bride-wealth was the condition precedent to the unfavourable treatment of wives,' *lobola* neither directly nor indirectly discriminates against women in terms of FC s 9. 'After all', the Commission reasons, 'men have to pay, not women.'

Will the courts accept such tortured logic with respect to FC ss 9, 10 and 13 challenges to *lobola*? Several recent decisions give us reason to believe that an appropriately chosen attack might result in its removal as a rule of customary law. In *Bhe v Magistrate, Khayelitsha & Others*, the Constitutional Court found that the customary law rule of male primogeniture — and several statutory provisions that reinforced the rule — unfairly discriminated against the deceased's wife and her two children because the rule and the other impugned provisions prevented the children from inheriting the deceased's estate.[1] The *Bhe* Court's disabling strategy with respect to this rule of customary rule is instructive.

The *Bhe* Court begins with the following bromide. While customary law provides a comprehensive vision of the good life for many South African communities, the new-found constitutional respect for traditional practices does not immunize them from constitutional review.[2] The *Bhe* Court locates any ongoing justification of customary law in the provisions of the Final Constitution. The *Bhe* Court then goes on to characterize the customary law of succession in terms that validate its spirit without necessitating that the Court be beholden to its letter. The customary law of succession is, according to the Court, a set of rules

> designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community . . . . The heir did not merely succeed to the assets of the deceased; succession was not primarily concerned with the distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit. Property was collectively

[1] *Bhe v Magistrate, Khayelitsha & others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('*Bhe*').

[2] Ibid at paras 42–46. ('At the level of constitutional validity, the question in this case is not whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are consistent with the Constitution. This status of customary law has been acknowledged and endorsed by this Court.') See also *Alexkor Ltd & Another v Richtersveld Community & Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) ('*Richtersveld*') at para 51 ('While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution'); *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 44; *Mabuza v Mbatha* 2003 (4) SA 218 (C), 2003 (7) BCLR 743 (C) at para 32 ('[These rules] provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as *ubuntu*. These valuable aspects of customary law more than justify its protection by the Constitution. It bears repeating, however, that as with all law, the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights.')

> owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. He inherited the property of the deceased only in the sense that he assumed control and administration of the property subject to his rights and obligations as head of the family unit. The rules of the customary law of succession were consequently mainly concerned with succession to the position and status of the deceased family head rather than the distribution of his personal assets.[1]

By recasting the justification for customary rules of succession in terms of family and community stability, rather than patriarchy and property, the *Bhe* Court softens its critique of this traditional way of life. It then notes that the conditions of family and community which gave rise to the challenged rules no longer obtain. The *Bhe* Court writes:

> Modern urban communities and families are structured and organised differently and no longer purely along traditional lines. The customary law rules of succession . . . determine succession to the deceased's estate without the accompanying social implications which they traditionally had. Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family which would include the spouse of the deceased as well as other dependants and descendants. He often simply acquires the estate without assuming, or even being in a position to assume, any of the deceased's responsibilities. In the changed circumstances, therefore, the succession of the heir to the assets of the deceased does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family and dependants of the deceased.[2]

Customary law has not, the *Bhe* Court ruefully observes, evolved to meet the changing needs of the community. It fails African widows because '*(a)* . . . social conditions frequently do not make living with the heir a realistic or even a tolerable proposition; *(b)* . . . the African woman does not have a right of ownership; and *(c)* the prerequisite of a good working relationship with the heir for the effectiveness of the widow's right to maintenance', as a general matter, no longer exists.[3] Again the Court takes care to note that the fault for this arrested development lies outside traditional communities. Ruptures within traditional ways of life — caused by apartheid, the hegemony of western culture and capitalism — have prevented the law's evolution.[4] This aside actually sets the stage for delivery of the *Bhe* Court's coup de grace: that 'the official rules of customary law of succession are no longer universally observed.'[5] The trend within traditional communities is toward new norms that 'sustain the surviving family unit' without re-inscribing male primogeniture.

[1] *Bhe* (supra) at para 75.
[2] Ibid at para 80.
[3] See South African Law Reform Commission *The Harmonisation of the Common Law and the Indigenous Law: Succession in Customary La*w Issue Paper 12, Project 90 (April 1998) 6-9. See also TW Bennett *Human Rights and African Customary Law under the South African Constitution* (1997) 126-7.
[4] See, eg, *Richtersveld Community and Others v Alexkor Ltd & Another* 2003 (6) SA 104 (SCA) at paras 85–105.
[5] *Bhe* (supra) at para 84.

By having shown that the spirit of succession lies in its commitment to family cohesion, that the traditional family no longer coheres as it once did, and that the 'distorted' rules of customary law, as frozen in time by apartheid-era statute and case law, that 'emphasise . . . patriarchal features and minimise . . . communitarian ones,' the *Bhe* Court closes the gap between constitutional imperative and customary obligation.[1] Had customary law been permitted to develop in an 'active and dynamic manner,' it would have already reflected the *Bhe* Court's conclusion that 'the exclusion of women from inheritance on the grounds of gender is a clear violation of . . . [FC s] 9(3).'[2] Had customary law not been fossilised, traditional communities would have noted how male primogeniture entrenched 'past patterns of disadvantage among a vulnerable group' and endorsed the *Bhe* Court's reworking of customary understandings of the competence 'to own and administer property' in a manner that vindicates a woman's right to dignity under FC s 10.[3]

Judge Hlophe employs a similar disabling strategy in *Mabuza v Mbatha*.[4] He recognizes the supremacy of the Final Constitution at the same time as he asserts the protean features of customary law that enable it to conform, as necessary, to the dictates of the Bill of Rights. His nuanced assessment of the role of *ukumekeza* reconfigures siSwati marriage conventions in a manner that *(a)* refuses to allow *ukumekeza* to be used by the groom's family as a means of control over the bride and *(b)* consciously places the husband and wife on an equal footing with respect to subsequent determinations of whether a valid marriage under siSwati customary law has taken place.

Constitutional challenges to *lobola* should be able to exploit the schema developed in *Bhe* and *Mabuza*. Those familiar with and committed to customary law acknowledge that: *(a)* the conditions under which *lobola* served to unite families and create security for women and their children no longer obtain; *(b)* cash lobolo transactions, which result in the purchase of such transient goods as home furnishings, can hardly be said to benefit the clan or the community; and *(c)* the present practice of *lobola* serves the pecuniary interests of a few men. By showing that the spirit of *lobola* lies in its commitment to family cohesion and that the 'distorted' rules of customary marriage emphasise male domination at the expense of communitarian concerns, a party challenging the centrality of *lobola* in customary marriages can close the gap between constitutional imperative and customary obligation. Following *Bhe*, a court can feel confident that in so far as *lobolo* remains an obstacle either to an exchange of vows or to the disengagement from a failed relationship, the practice constitutes a violation of a woman's rights to equality and dignity. More importantly for our immediate purposes, *Bhe* supports the proposition that neither the living customary law nor the Final Constitution can be squared with an institution that ultimately reduces to the purchase of a women's reproductive capacity or to compensation for the loss of female labour

[1] *Bhe* (supra) at para 89.
[2] Ibid at para 83.
[3] Ibid at para 84.
[4] *Mabuza* (supra) at paras 9–32.

in the father's household. Following *Mabuza*, a court can ameliorate the burden of *lobola* by making its legal status as a marker of marriage contingent upon evidence of genuine mutual consent. The requirement of genuine mutual consent introduced by *Mabuza* means that *lobolo* can be waived as a condition for recognition of marriage.[1] The *Mabuza* Court makes clear that traditional institutions such as *lobola* can only survive as legally binding rites of marriage when shorn of all those asymmetries that reduce women to chattel.[2]

(ii) *Religious marriages*

Our analysis of religious marital rites largely tracks the analysis of *lobola* above. Any religious rite that constrains radically the ability of a person to disengage from a failed relationship constitutes a violation of that person's rights to equality, to dignity and to be free from conditions of servitude. Such institutions should

[1] The decisions in both *Bhe* and *Mabuza* courts manifest the related virtues of reliance on objective characterizations of the subordinate position of women in traditional communities and avoidance of thorny issues of false consciousness. As one of the authors has written in this work's chapter on Freedom of Association:

> It seems trite, but still worth noting, that when faced with physical coercion, the rights of women to freedom and security of the person, to freedom from servitude, to equality and to dignity all trump any and all benefits that might accrue from sustaining traditional ways of life that re-inscribe such abuse. Female genital mutilation and forced labour are obvious candidates for the trash-heap of history. But polygamy and lobola? It is easy — and in most cases quite right — to identify such practices with the continued subordination of women. . . . The more difficult question is whether such practices can be reconfigured so as to sustain legitimately both intimate familial associations and cultural practices. . . . With adults, one difficulty is the paternalistic presumption that government can substitute its judgment of what is best for that of its citizenry. Inquiries into non-physical coercion of children and adults are united by considerations of exit. One must take great care, however, when we interfere in associational life that we are not too quick to allow attributions of 'false consciousness' to masquerade as concerns about the inability of children or adults to vote with their feet.

S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) §§ 44.3*(c)*(ii) and 44.2*(d)*. Caution with respect to such attributions does not mean abdication. Where reliable qualitative and statistical analysis can show that *lobolo*-like exchange correlates closely with lower levels of education, higher incidents of domestic violence, lower wages, higher rates of morbidity and lower levels of life expectancy for women in such relationships than in those without, then the grounds for caution may be overcome.

[2] Even the South African Law Reform Commission recognizes the possibility that 'payment or non-payment of bridewealth' can be removed as a matter of legal consequence when assessing the validity of marriage, the spouses' marital obligations or the custodial rights to children. The Law Reform Commission observes that in customary law, payment of bridewealth is often deferred and the status of a marriage is seldom placed in doubt through failure to pay timeously. SALC *Report on Customary Marriage I* (supra) at para 4.3.1. It further observes after promulgation of the General Law Fourth Amendment Act husbands lost the traditional marital power they exercised over their wives. Act 132 of 1993, s 29.

only survive as traditions shorn of all asymmetrical legal consequences.[1] The actual analysis of religious rites of marriage, and the extent to which they are entitled to judicial solicitude, is covered at length elsewhere in this work.[2]

(iii) *Mine wives*

A recent report by the International Migration Organization identifies the sale of illegal immigrants as wives to workers on mines in the East Rand as an especially vital market for human trafficking in South Africa.[3] This selling of wives possesses none of the communitarian virtues associated with such traditional practices as *lobola*. The wife is chattel property — a slave pure and simple.[4]

[1] The facts and the holding of *Republic v Kadhi, Kisumu Ex Parte Nasreen* provide a useful departure point for analysis of religious rites of marriage. [1973] EALR 153 (High Court of Kenya). The High Court of Kenya was asked to enforce a Kadhi order that held that Islamic law required the return of a wife to her husband. The High Court rejected the request on the grounds that the 'Kadhi order would . . . subject the [wife] to the effective dominion of the plaintiff to an extent constituting "servitude" . . . and in a manner inconsistent with the intendment of s 73(1) of the [Kenyan] Constitution.' Ibid at 161. While South African courts must treat non-Christian religious rites with a relatively high degree of solicitude, a South African court would, we think, be obliged to reach an identical conclusion under the Final Constitution. Compare *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) and *Ryland v Erdos* 1997 (2) SA 690 (C), 1997 (1) BCLR 77 (C)(Holding that Muslim religious rites of marriage are not presumptively *contra bonos mores*) with *Ismail v Ismail* 1983 (1) SA 1006 (A)(Holding that Muslim religious rites of marriage are *contra bonos mores*). The Final Constitution reflects the Lockean discomfort with using the profane power of the state to alter what others believe to be the contours of sacred space by subjecting its protection of customary law to FC s 31(2)'s proviso that a rule of customary law inconsistent with a provision of the Bill of Rights is *prima facie* unconstitutional, but not forcing a rule of religious law protected by FC s 15 to operate under any such disability. See also *Taylor v Kurstag* [2004] 4 All SA 317 (W)(Court upheld the right of the Beth Din to issue a Cherem — an excommunication edict — against a member of the Jewish community who had violated the terms of the Beth Din's child maintenance order, but refused to enforce the maintenance order itself.)

[2] P Farlam 'Religion' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 41.

[3] J Martens, M Pieczkowski & B van Vuuren-Smith 'Seduction, Sale and Slavery: Trafficking of Women and Children for Sexual Exploitation in Southern Africa' International Organization for Migration, Regional Office for Southern Africa (3rd Edition, 2003) 127-8 available at www.iom.org.za/Reports/TraffickingReport3rdEd.pdf, (accessed on 25 December 2004). The IOM paints the following dispassionate, but still harrowing, account of the provenance and the fate of mine wives on the West Rand:

> [The] victims come from rural and urban backgrounds, from Maputo and Nampula provinces. . . Victims are recruited by Mozambican women, working in partnership with Mozambican and South African men responsible for transportation of victims and exploitation. . . . Upon arrival in Johannesburg, victims who were expecting restaurant jobs are taken to transit houses in Soweto and Lenasia before being sold. Sex worker victims are sold to brothels in Johannesburg central business district (CBD) for ZAR 1000. Victims who were promised restaurant jobs are sold on private order, or sold as 'wives' to mine-workers on the West Rand for ZAR 850. IOM estimates that at least 1000 Mozambican victims are recruited, transported, and exploited in this way every year, earning traffickers approximately ZAR 1 million annually.

[4] See § 64.6*(a)* supra (Analysis of sex slaves and human trafficking.)

The subsequent inability of the 'wife' to alter her status amounts to servitude.[1] Bondage or deportation is Hobson's choice.

In addition, mine wives generally perform both basic domestic labour and much more strenuous non-remunerative work under highly coercive conditions. The wife's powerlessness to contest these conditions and to secure compensation brings this work within the definition of forced labour.[2]

(c) Farm labour

According to s 1 of the Basic Conditions of Employment Act ('BCEA'), a farm worker is:

> An employee who is employed mainly or in connection with farming activities, and includes an employee who wholly or mainly performs domestic work in a home on a farm.[3]

The BCEA provides for a sectoral determination that deals comprehensively with the specific working conditions of farm labourers: Sectoral Determination 8.[4] Sectoral Determination 8 rehearses the constitutional prohibition against forced labour[5] and then adds the following language: '[n]o person may for their own benefit or for the benefit of someone else cause, demand or impose forced labour.'[6] Read together the BCEA and Sectoral Determination 8 provide a comprehensive scheme for farm worker protection.[7] Any farm labour performed at standards significantly below those laid down by the sectoral determination will constitute forced labour.[8]

Forced labour may be the most obvious problem in farm labour. However, the history of farm work in South Africa is a history of servitude. Farm labourers still

[1] See § 64.4*(b)* supra, for a definition and a discussion of servitude.

[2] See § 64.4*(c)* supra, for a definition and a discussion of forced labour.

[3] Act 75 of 1997. Sectoral Determination 8: Farm Worker Sector, South Africa GN R1499, Government Gazette 24114 (2 December 2002) ('Sectoral Determination 8') states: 'Without limiting its meaning, 'farming activities' includes primary and secondary agriculture, mixed farming, horticulture, aqua farming and the farming of animal products or field crops excluding the Forestry Sector.'

[4] Sectoral Determination 8. The determination was enacted in terms of the Basic Conditions of Employment Act, s 51. Section 51 allows for the regulation of a specific field of labour. The sectoral determination contains detailed provisions on minimum wages, manner of payment, leave and overtime work.

[5] Sectoral Determination 8, s 25(4).

[6] Sectoral Determination 8, s 25(5). It accords child farm workers a substantially higher degree of solicitude. See Sectoral Determination 8: s 25(1) (no child under 15 or still at school may be employed); s 25(2) (no child may do work that is inappropriate or possibly detrimental); 25(3) (employer must retain records of child's employment); s 25(7)*(a)* (no work for children between 18h00 and 6h00); s 25(7)*(b)* (no child may work more than 35 hours a week); and s 25(7)*(c)* (no child may work with agro-chemicals). It contains terms that criminalize forced labour. Sectoral Determination 8 s 25(6).

[7] See South African Human Rights Commission *Inquiry into Human Rights in Farming Communities* (2003) ('*SAHRC Farming Inquiry*') 25-6 (The most common areas of non-compliance with the BCEA are: non-adherence to working hours; overtime (54% of labourers continue work after the day officially ends without compensation); work on Sundays and public holidays; annual leave (92% of male farm workers do not receive any paid annual leave); and maternity benefit provisions.)

[8] See § 64.4*(c)* supra.

often live their entire lives on a farm. The *de jure* feudal order of farm work under apartheid has given way to *de facto* serfdom. Even without pass laws, today's farm workers have few options to go elsewhere and do other:

> Farm workers usually live in houses that do not belong to them. A central component of the arrangements on farms is that many workers not only work on the farms but also live there, with housing being either a form of payment in kind, or part of the terms of their contract. Thus, for many farm workers, the loss of their job means the loss of their house. The farmer is able to exercise control over the farm workers' daily bread, as well as over the roof over their heads. This increases farm workers' dependence on the farmer, and contributes significantly to the imbalance of power.[1]

The vast majority of farm workers in South Africa are unable to change their status[2] and thus rather easily satisfy the Supplementary Convention's definition of a serf:

> A tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status.[3]

[1] A Isaacs 'Trapped Farm Labour: Obstacles to Rights and Freedom' (2003) *Development Update* 27, 36. The *SAHRC Farming Inquiry* identifies both the threat and the prevalence of evictions of farm workers as one of the primary problems in the sector. As a result, farm workers worry far less than they ought about changing their status, and far more than they should about maintaining what little security they enjoy on the farms. *SAHRC Farming Inquiry* (supra) at 9.

[2] In March 2004, Statistics South Africa estimated that there were 930 000 people employed in commercial agriculture. Statistics South Africa *Labour Force Survey* (2004), available at www.statssa.gov.za. Approximately 914 473 farm workers live with their families on farms. M Wegerif 'Creating Long-Term Security of Tenure for Farm Dwellers' paper Department of Land Affairs' National Land Tenure Conference (Durban 2001) 3. The five to six dependents of each worker have led researchers to conclude that approximately six million people live on farms. See K McKay, 'Farm Workers in the Karoo: Isolation=Exploitation' (23 April 2003)(manuscript on file with authors)('Farm workers earn the equivalent of $100 Canadian per month and support an average of five dependants on that amount . . . Statistics South Africa predicts that the number of dependants will rise due to . . . HIV/AIDS. . . . [F]arm . . . employees are the most destitute and least educated group in South Africa. . . . According to Statistics South Africa, people employed in agriculture are worse off than those in every other major sector of the economy. For black and coloured workers on farms, wages are low, housing is poor, access to education difficult or non-existent, and health indicators are bad.') Although figures vary widely, the SAHRC has estimated that there are around 250 000 labour tenants in South Africa. *SAHRC Farming Inquiry* (supra) at 13. A labour tenant is defined in s 1 of the Land Reform (Labour Tenants) Act as a person who resides on a farm with a right to sharecropping and provides labour in return and whose parents resided on the farm under a similar agreement. Act 3 of 1996. This definition fits precisely that of a serf. The *SAHRC Farming Inquiry* concludes that: 'Farming communities are characterised by skewed power dynamics between farm dwellers and farm owners.' *SAHRC Farming Inquiry* (supra) at 170. The report further asserts that: 'The power of farm owners extends to ownership of land, employment and access to economic and social needs. Farm dwellers are dependent on employers for employment and tenure security, and in some cases, their basic economic and social rights. This pervades all aspects of life resulting in gross power imbalances between parties.' Ibid at 172. See also Isaacs (supra) at 51 (Argues that while government has made an effort to deal with '[t]rapped farm labour . . . legislative changes . . . have not substantially altered conditions on the ground.')

[3] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956) 226 UNTS 3 Article 1 (Not yet ratified by South Africa).

A prohibition on servitude makes complete sense only against a background in which people are generally free to move and to alienate their labour. But what might it mean under conditions in which alternative employment and housing is scarce, education and skill levels are low, *and* farms fail to meet statutory standards? Who would bear the burden of vindicating the rights of those millions living in servitude? Everyone. The servitude of most farm workers can no longer be viewed solely through the prism of employer-employee relations. Take the synoptic view and it becomes clear that the problem of farm workers in South Africa is a problem of caste.

Recasting the problem of farm workers in terms of caste makes it slightly less amenable to resolution in the adversarial setting of a court. To remedy this problem of caste one must engage *all* of the social conditions that reinforce such depridations.[1] It requires a concerted effort to not only enforce basic employment conditions but also to invest in education, to redistribute land and to create jobs. Described thus, this violation of FC s 13's prohibition of servitude turns as much on the state's failiure to provide access to adequate housing, health care, food, education, legal representation and social security, as it does on any given farmer's refusal to abide by the BCEA.[2] Described thus, it is the state — in concert with private parties — that must develop a comprehensive programme designed to realize progressively the manumission of South Africa's farm workers.[3]

[1] Many farmers do not compensate their employees at the rates required nor do they create the work environment contemplated by the BCEA, Sectoral Determination 8 or other applicable legislation. See *SAHRC Farming Inquiry* (supra) at iv–vi ('[D]espite constitutional provisions and the promulgation of legislation such as ESTA and LTA to protect those whose tenure on land is legally insecure, there is a clear lack of support for the legislation . . . and widespread lack of compliance.')

[2] *SAHRC Farming Inquiry* (supra) at 7–56. The *SAHRC Farming Inquiry* details the Government's comprehensive failure to alter the current social, economic and legal status of farm labourers. It notes that workers lack: *(a)* legal representation when rights are violated; *(b)* effective child labour structures to eradicate abuses; *(c)* meaningful protection from violence perpetrated by owners and other members of the community; and *(d)* access to service delivery from the State and a basic understanding of their entitlements. The *SAHRC Farming Inquiry* decries the State's abdication of responsibility for service delivery to farm workers and their families. Few housing units have been built in farming communities because both the Department of Land Affairs and the Department of Housing have each decided that the other department must provide housing for farm workers. The Department of Health has not yet devised a comprehensive programme to enable farming communities to secure adequate health-care. The Primary School Nutrition Programme operates nowhere near optimal levels. The Department of Home Affairs bears some responsibility for the inability of farm dwellers to secure social security grants — many farm dwellers do not possess the requisite ID documents and have no idea how to procure them.

[3] Scott's neologism 'diagonality' speaks to circumstances in which both the state and private actors are responsible for creating unconstitutional conditions. In such circumstances, the Bill of Rights will require analysis and may require remedies that address the respective duties imposed upon both state and private actors. See C Scott 'Social Rights: Towards a Principled Pragmatic Judicial Role' (1999) 1 (4) *ESR Rev* 4, 6 ('There is an important category of cases in which the most effective process would require a joinder of private and state parties in order to facilitate a legal analysis of how to allocate constitutional obligations as between private entities and the State . . . This conceptualisation has considerable potential for promoting a more holistic analysis of human rights violations that are located within a field of overlapping state and non-state power structures.')

This burden is not insuperable. In *Grootboom*, the Constitutional Court set out the criteria by which it would assess whether the state had discharged its duty to develop a comprehensive programme designed to realize progressively a right.[1] In sum, a state programme to eliminate servitude (1) must ensure that 'the appropriate financial and human resources are available'; (2) 'must be capable of facilitating the realisation of the right'; (3) must be reasonable 'both in their conception and their implementation'; (4) must attend to 'crises'; (5) must not exclude 'a significant segment' of the effected population; and (6) must 'respond to the urgent needs of those in desperate situations.'[2] A state programme that meets these criteria would constitute the remedy appropriate for a violation of FC s 13's prohibition against servitude.[3]

The *Grootboom* criteria provide a useful rubric for appraising the reasonableness of the government's efforts to amediorate conditions of servitude. However, our use of these socio-economic rights criteria is not meant to suggest that only the state can violate FC s 13. They simply draw our attention to the multi-dimensional nature of the problem of farm worker servitude. Where individual instances of servitude are a consequence of the relationship between private

[1] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)('*Grootboom*').

[2] Ibid at paras 39–46, 52, 53, 63–69, 74 83. For a similar analysis in terms of the state's obligations vis-à-vis the right to food, see D Brand 'Food' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 56C.

[3] But what if conditions are such that even a properly conceived and fully executed state programme failed to enable farm labourers to move off the land into employment? This question has more than rhetorical force. Given the high levels of structural unemployment in our economy, it is certainly plausible that well-serviced farm workers and their families might still lack new and meaningful work opportunities. See M Legum 'Livelihoods, Not Employment' (2003) 3 (22) *South African New Economics* 1 ('First, unemployment is world-wide; and new jobs everywhere, including the US, are casualised, low-paid, low-skilled and often temporary. Second, … with few exceptions, skills are not the problem. More education and more skills means more skilled and educated unemployed people.') See also M Legum 'Does this Explain Rejection of the BIG?' (2003) 3 (23) *South African New Economics* 1 (Gap between jobs and job-seekers is growing.) We would argue that under such conditions the state would have discharged its duty. For although the farm workers and their families would still 'belong' to the land, the actual improvement in the quality of life would have elevated their status well above that of a serf. The state's first obligation is the dignity of its citizens. A comprehensive programme that addresses the education, health care, physical security and land tenure needs of farm workers would give them that dignity.

That freedom through work cannot be the threshold test for a programme designed to eradicate servitude does not mean that the state ought not to devise public works programmes where possible. See I Friedman 'Basic Income and/or Public Works?' (2003) 3 (24) *South African New Economics* 1 (Arguing that 'fears that the wages for public works programmes would undermine the struggle for a living wage are unfounded' and that 'public works wages . . . set at the minimum wage . . . establish these as *de facto* rather than theoretical levels.') It only means that neither the availability of private employment nor the creation of EPWP jobs ought to be the measure of success for a state programme designed to eradicate farm worker servitude.

parties, the private party responsible for creating the conditions of servitude is the party that must bear the burden of setting things right.[1]

(d) Domestic workers

The condition of the roughly one million domestic workers in South Africa bears more than a passing resemblance to that of farm workers.[2] Although the state has made significant efforts to turn this historically inhospitable informal sector of the economy into a substantially more formal and equitable sector, domestic workers are often only notionally 'free' to alter their conditions of employment.[3]

Other jurisdictions have analysed the hostile working environment of domestic servants in terms of slavery and servitude. In *United States v Ingalls*, a US federal district court extended the accepted definitions of slavery and servitude beyond the specific form of ante-bellum slavery towards which the 13th Amendment had been directed.[4] The *Ingalls* court wrote:

> There is an abundance of evidence which establishes that the defendant Elizabeth Cocker kept one Dora L Jones, a Negro woman, in her household as a servant during a period in excess of twenty-five years. . . . that . . . said servant was required to . . . perform practically all of the household labour . . . was forbidden to leave the household except for the commission of errands and performed drudgery of the most menial . . . type without compensation. There is evidence that the food furnished to her by the defendant was of a substantially lower quality than that common to servants generally . . . [that] she was denied the right to have friends and was required to send away relative[s] who called upon her.[5]

Combined with threats of imprisonment and institutionalisation, this hostile work environment created conditions that led Ms Jones to believe that she was not free to leave. The *Ingalls* court likewise concluded that Ms Jones was wholly subject to the will of the defendant, had no freedom of action and lived in a state of enforced compulsory service. As Goluboff notes, the case signals a shift in the

[1] Our use of socio-economic rights' justification criteria is not meant to suggest that an internal limitation ought to be read into FC s 13. The general limitation clause remains the appropriate vehicle for justification of any rule of law that impairs the right. But see *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)(Majority and minority use rationality and reasonableness tests, respectively, to determine whether or not the government had discharged its obligations under FC s 19.)

[2] See Statistics South Africa *Labour Force Survey* (2004), available at www.statssa.gov.za. Approximately 1 013 000 women work as housekeepers, cooks and nannies. Ibid at v. About 218 000 men work as gardeners and security guards. Ibid at 31. Most of these workers are of African and Coloured descent. Ibid at vi. Domestic workers represent roughly 9% of all formal and informal employment in South Africa. However, they reflect 18.6% of female employment and only 0.6% of male employment. Ibid at v.

[3] Under the Basic Conditions Act, s 1, a domestic worker is 'an employee who performs domestic work in the home of his or her employer and includes — *(a)* a gardener; *(b)* a person employed by a household as driver of a motor vehicle; and *(c)* a person who takes care of children, the aged, the sick, the frail or the disabled.'

[4] 73 F Supp 76, 77–79 (SD Cal 1947).

[5] Ibid at 78.

doctrine of servitude from one anchored in clear manifestations of physical constraint and indebtedness to one focused on the actual lived experience of workers.[1] It also signalled a shift in the role of government — from that 'of policing contracts to one of ensuring labourers their freedom.'[2]

Many domestic workers in South Africa find themselves in an *Ingalls*-like environment. Their hostile work environment coupled with an absence of alternative employment, limited education and low skills conspire to keep a large number of women in conditions of servitude.

What then should we make of recent econometric research which suggests that the situation of domestic workers may not be as dire as that of farm workers? The government has attempted to improve the labour conditions for domestic workers through BCEA, Sectoral Determination 7.[3] This sectoral determination contains detailed provisions on minimum wages,[4] working hours,[5] leave,[6] and termination of employment.[7] The determination also includes a prohibition on child labour and forced labour.[8] Hertz contends that these regulations benefit many domestic workers and, thankfully, do them very little harm.[9] Wages for domestic work have gone up faster than the CPI and faster than wages in demographically comparable occupational sectors.[10] The regulations, Hertz suggests,

[1] R Goluboff 'The Thirteenth Amendment and the Lost Origins of Civil Rights' (2001) 50 *Duke Law Journal* 1609.

[2] Ibid at 1667–1668.

[3] Government Notice R1068 Government Gazette 23732 (15 August 2002).

[4] Part B. In November of 2002, a schedule of minimum wages, including time-and-a-half provisions for overtime work, went into effect. As Hertz observes 'The minima were set *above* the median hourly wages that prevailed at the time, making this a significant intervention in the domestic worker labour market.' T Hertz 'Have Minimum Wages Benefited South Africa's Domestic Service Workers?' *African Development and Poverty Reduction Forum* Paper 4 (13 October 2004).

[5] Sectoral Determination 7, Part D.

[6] Sectoral Determination 7, Part E.

[7] Sectoral Determination 7, Part G.

[8] Section 23.

[9] Hertz (supra) at 1–22. Hertz traces the effects of multiple changes in the legal regime that governs domestic workers. He notes that:

> [I]n September of 2002 South Africa's . . . domestic workers were granted formal labor market protection, including the right to a written contract with their employers, the right to paid leave, to severance pay, and to notice prior to dismissal. Employers were . . . required to register their domestic workers with the Unemployment Insurance Fund (UIF) and to withhold UIF contributions from their paychecks. In November of 2002, a schedule of minimum wages, including time-and-a-half provisions for overtime work, went into effect. The minima were set *above* the median hourly wages that prevailed at the time, making this a significant intervention in the domestic worker labour market.

Ibid at 2.

[10] Ibid at 1 ('The regulations do appear to have raised wages: Average nominal hourly wages for domestic workers in September of 2003 were 23% higher than they had been in September 2002, while for demographically similar workers in other occupations the nominal wage increase was less than 5%. Econometric evidence supports the conclusion that the wage increases were caused by the regulations, since the largest increases are seen in places where the greatest number of workers were initially below the minimum wage.')

have had a palpable effect on non-wage labour conditions as well. Hertz writes that:

> The proportion of domestics who report having a written contract with their employer rose from 7% in February of 2002 to 25% in September of 2003; and the number who report UIF deductions rose from 3% to 25%.[1]

Even proponents of these minimum standards feared that these laws might have the unintended consequence of driving down both employment figures and real wages for domestic workers. Two years of statistics allay these concerns. While hours of work among domestic workers employed 'fell by about 4%', this change was largely consistent with hours worked in other occupations. Moreover, while domestic worker employment levels also fell by 3%, Hertz concluded that that the decrease was not 'causally connected to the wage changes,' and that the decrease was in line with 'the rate of decline of the employment-to-population ratio for demographically similar workers in other occupations.'[2]

As Hertz concedes, such news is not really all that cheery. Only 25% of workers have a written contract and have UIF deducted. Only 22% receive paid leave. Just over 10% have a pension. Less than 2% have any health insurance. In light of such substantial non-compliance with the statutory and the regulatory framework governing domestic employees, Hertz tells us that we ought to be pleased that conditions for domestic workers are not worse and that the law has not made them so.

Given Hertz's analysis, the crisp question is whether the presence of this regulatory framework is sufficient to discharge the state's obligations under FC s 13. As Brand notes in his analysis of the government's efforts to fulfil its duties under FC s 27, the government must do more than simply craft a reasonable response to a constitutionally suspect set of practices. It must execute effectively its policies.[3] FC s 13 along with the Basic Conditions Act and Sectoral Determination 7 offer some consolation to those individual workers, who, with access to representation, can liberate themselves from their immediate conditions of confinement. But neither FC 13 nor BCEA Sectoral Determination 7 protect the vast majority of domestic workers who lack both access to counsel and meaningful employment alternatives. To discharge its duty to promote and to fulfil the rights of domestic workers, the state must develop a more comprehensive and coordinated programme to realize progressively the manumission of South Africa's domestic workers.[4]

[1] Hertz (supra) at 2.

[2] Ibid at 6–9.

[3] See D Brand 'Food' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) § 56.3.

[4] The elasticity of the term 'servitude' tempts us to extend the reach of FC s 13 to hostile work environments in which the woman harassed has no choice but to accept sexual harassment as a deleterious condition of employment. See J Conn 'Sexual Harassment: A Thirteenth Amendment Response' (1995) 28 *Columbia J Law & Social Problems* 519, 548–556 (Conn argues that the 13th Amendment not only 'freed female slaves,' but also 'forbade the sexual exploitation that accompanied slavery.') See also J McConnell 'Beyond Metaphor: Battered Women, Involuntary Servitude and the

(e) Child labour

According to the law, child labour ought not to exist in South Africa. The Child Care Act, s 52A(1), prohibits any employment of a child under 15 without a special exemption from the Minister.[1] This prohibition is repeated in BCEA, s 43.[2] The soon to be enacted Children's Bill characterises child labour as a form of abuse and exploitation.[3] Section 28(1) of the Final Constitution reads, in relevant part, that '[e]very child has the right *(e)* to be protected from exploitative labour practices; *(f)* not to be required or permitted to perform work or provide services that — (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.'[4] South Africa is also a signatory to a number of international instruments that tightly regulate child labour.[5]

Despite such comprehensive regulation, more than one out of every three

Thirteenth Amendment' (1992) 4 *Yale J Law & Feminism* 207. (Given that Courts have found that 13th Amendment prohibits any practice characteristic of chattel slavery, and sexual exploitation was a characteristic of chattel slavery, severe forms of sexual exploitation are the kinds of practice that the 13th Amendment was designed to eliminate.) One common objection to expanding the ambit of the 13th Amendment to capture sexual harassment is that servitude cannot take place in the context of a voluntary labour environment. A second objection is that the attempt to squeeze sexual harassment into this particular legal category hampers the development of more nuanced understandings of this offence and actually raises the threshold for demonstrating that sexual harassment has occurred.

[1] Act 74 of 1983.

[2] Act 75 of 1997.

[3] Bill 70 of 2003, s 1(1).

[4] For a detailed discussion of FC s 28, see A Friedman & A Pantazis 'Children's Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 47. BCEA, s 43 rehearses the prohibitions of FC s 28(1)*(f)*.

[5] See Convention on the Rights of the Child; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999)('Worst Forms of Child Labour Convention'). The Worst Forms of Child Labour Convention, Article 3, defines the worst forms of child labour as *(a)* all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; *(b)* the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; *(c)* the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; *(d)* work which . . . is likely to harm the health, safety or morals of children.' For the obligations imposed by these conventions on state parties, see § 64.4*(b)* supra. See also Convention Concerning Minimum Age For Admission to Employment ILO No 138 (Ratified by South Africa on 30 March 2000)('Minimum Age Convention'). Minimum Age Convention, Article 1, obliges South Africa to 'undertake to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.' The number of international instruments regulating child labour is partially explained by the fact that of the 250 million children who work, 60 million children work in 'especially horrific circumstances'. See UNICEF 'Beyond Child Labour: Affirming Rights' (2001), available at www.unicef.org, (accessed on 14 May 2004).

children work.[1] Poverty and adult unemployment are the primary drivers of illegal child labour.[2] Most adults who worked as children do not possess a proper education and cannot command a living wage. Ultimately, they come to rely upon their children to supplement family income. A large pool of child labourers forced by parents to work on the cheap creates incentives for employers in labour intensive industries to hire children.[3]

The social and economic conditions that reinforce this vicious cycle 'require interventions above and beyond [legal prohibitions] directed to the employment context.'[4] Sufficient welfare entitlements would be a start. However, the government currently fails to provide 'social security . . . for children older than six years.'[5] Because the current under-inclusive and under-financed child support entitlements programme supports children financially only until they are six years old but prohibits them from working until they are 15, many children above the age of six are therefore obliged to work illegally and under conditions tantamount to forced labour. Only a more inclusive benefits scheme will diminish the susceptibility of child labourers to exploitation.[6]

[1] South African Law Commission *Review of the Child Care Act* Discussion Paper 103 (2001)('SALC *Review of the Child Care Act*') 592 citing Network Against Child Labour and the Child Labour Intersectoral Group 'Child Labour in South Africa' (March 2001). This statistic is somewhat inflated. The definition of 'child labour' used was 'at least three hours per week per child being spent in economic activities, at least seven hours per week in domestic chores, or at least five hours per week in school labour (i.e. cleaning or improvement of school premises).' However, the study found that '551 000 children spent at least 8 hours per week in economic activities. For 95 000 of them, 36 or more hours were spent in such work. For 23 000, time at work exceeded 50 hours per week.' The effect of such work — however limited — ought not to be discounted. It impairs learning. The main sectors for child labour are prostitution — see § 64.6*(a)* supra — commercial agriculture — see § 64.6*(c)* supra — domestic service — see § 64.6*(d)* supra — street trading, the taxi industry and brickyards. See SALC *Review of the Child Care Act* (supra) at 592. Finally, the Law Commission found that the law does little to control this problem: '[B]oth section 52A of the Child Care Act and section 43 of the BCEA are ignored on a wide scale.' SALC *Review of the Child Care Act* (supra) at 602.

[2] See J Loffell 'Child Labour: Economic Exploitation as a Form of Child Abuse' (1993) 43 *Critical Health* 38. See also SALC *Review of the Child Care Act* (supra) at 591 ('[I]mproving schooling for the poor is often identified as the single most effective way to prevent children from entering abusive forms of work.')

[3] See NGO Group for the CRC Sub-Group on Child Labour 'The Impact of Discrimination on Working Children and on the Phenomenon of Child Labour' (June 2002) 1.

[4] SALC *Review of the Child Care Act* (supra) at 594.

[5] Ibid at 606. However, according to an announcement by the Department of the Treasury in March 2005, the government will immediately extend benefits to children up to 13 years of age. The Department of Social Development states that the current scheme will be extended, by the end of 2006, to children up to 14 years of age. See Department of Social Development 'Child Grants 2004' (2004), available at www.socdev.gov.za, (accessed on 15 December 2004).

[6] There are two general approaches to the eradication of child labour. The abolitionist school asserts the need for a complete ban of child labour. See SALC *Review of the Child Care Act* (supra) at 593. See A Bequele 'The Effective Elimination of Child Labour: Challenges and Opportunities' Conference Paper, ISPCAN Congress (Durban 2000) as cited in SALC *Review of Child Care Act* (supra) at 593 (Argues that some nations advocate a total ban because they are interested in protecting local jobs and markets from the effects of cheap, child-produced goods.) The regulation school recognizes that poverty necessitates child labour and that only a well-conceived regulatory framework can minimise its negative impact. The regulation school advocates flexible school hours to allow children to work and to study, children's trade unions, skills training, and programmes to promote awareness of poverty eradication programmes. SALC *Review of the Child Care Act* (supra) at 594-5.

As our previous analysis suggests, child labour violates FC s 13 in two distinct ways.[1]

Child labour may amount to forced labour.[2] While a fairly well-developed regulatory framework for child labour places obvious limits on the need for constitutional challenges under the Bill of Rights,[3] an FC s 13 challenge can meaningfully supplement existing statutory remedies. First, enforcement efforts by state officials are plagued by 'gaps or excessive complexity in legislation, inadequate penalties, ignorance of the law and of the hazards of child labour, and problems related to inspectorates as causative factors.'[4] The institutions charged with oversight of child labour laws — the inspectorates — 'tend to have capacity problems; they may lack legal access to sites of child labour; or they may be affected by low motivation, poor pay and/or corruption.'[5] Second, the statutory framework is not as comprehensive as it ought to be. No protection is afforded children who complain to the authorities.[6] No plans exist to prevent children from returning to an exploitative labour environment after they have been removed from it.[7] An FC s 13 forced labour challenge ought to put the state

[1] Some commentators argue that certain forms of child labour are so abusive as to be tantamount to slavery. See A Amar & D Widawsky 'Child Abuse as Slavery: A Thirteenth Amendment Response to *Deshaney*' (1992) 105 *Harvard LR* 1359. Child labour is, quite often, a form of child abuse. See Children's Bill, s 1 (Defines 'abuse' as including 'committing an exploitative labour practice in relation to a child.') See also A Bequele 'The Effective Elimination of Child Labour: Challenges and Opportunities' Paper Presented at ISPCAN Congress, Durban (2000)(Suggests that child labour is the most prevalent form of child abuse.) Fieldwork in South Africa, and experiences around the continent, support affording parents of families in difficult straits the freedom to arrange for their children to engage in light work. Moreover, Amar and Widawsky's 13th Amendment slavery argument appears to be motivated primarily by the absence of an express constitutional prohibition on forced labour. Slavery arguments ought to be reserved for those transactions in which the child is transformed into a piece of property to be exploited for the benefit of third parties and is forced into employment that extinguishes most, if not all indicia of individual autonomy. See § 64.4*(a)* supra.

[2] See § 64.4*(c)* supra. Recall that the term 'forced labour' captures work by dint of physical force or menace of penalty. But it also denotes those labour practices where an employer is able to exploit an employee's radically constrained options in order to induce her to work for pay and in circumstances that fall far below acceptable labour standards. The labour standards found in the manifold statutory prohibitions on child labour provide a useful departure point for FC s 13 analysis.

[3] It is trite law to assert that where sufficient statutory or common law remedies exist to address pressing social problems, courts should not resort to the creation of novel constitutional doctrines to effect the same ends. See *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (2) SACR 277 (CC), 1995 (7) BCLR 793 (CC) at para 59 ('[W]here it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.') See also *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC), 1995 (10) BCLR 1424 (CC) at para 8; I Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 138. But see SALC *Review of Child Care Act* (supra) at 608 ('A disadvantage of this approach is that the enforcement of labour regulations does not *ipso facto* involve action to address the social context of the child in illegal employment and his or her family. Neither does it offer any remedies for the situation of such a child once the employer has been dealt with and the illegal practice ended.')

[4] SALC *Review of the Child Care Act* (supra) at 604.

[5] Ibid.

[6] Ibid at 604-5.

[7] Ibid at 608 ('Neither does [regulating child labour under labour law] offer any remedies for the situation of such a child once the employer has been dealt with and the illegal practice ended.')

on notice that its failure to enforce existing law and to develop policy initiatives to deal with the extant law's inadequacies have risen to the level of a constitutional offence.[1]

Child labour can also be viewed as a form of servitude.[2] The Supplementary Convention extends 'servitude' to:

> Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.[3]

The current entitlements regime for children conspires with conditions of poverty and poor law enforcement to create a hostile and a coercive work environment from which poor children cannot extricate themselves. The virtue of identifying child labour as a form of servitude is that it holds both private parties and state actors responsible for the perpetuation of exploitative child labour practices.[4]

(f) Prison labour

Compulsory prison labour raises two issues for the purposes of FC s 13 analysis. Is forced labour a necessary consequence of incarceration? Is there any rehabilitative benefit to forced prison labour?

De Jonge has argued that prison labour should not be compulsory.[5] Despite the now 'conventional wisdom' on the subject,[6] he claims that:

[1] See *Grootboom* (supra) at 42 (State obliged not simply to devise a comprehensive plan but to execute it); *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) at paras 14 — 16 (While not the function of courts to criticize construction of social policy by state, the courts are obliged to create adequate remedies where the state 'impede[s] the rightful claims of its citizens.') See also SALC *Review of the Child Care Act* (supra) at 608 (Noting that the existing set of remedies for exploitative child labour practices constitute too blunt a cudgel, and that a far more polycentric approach to the social, economic and legal conditions that fuel child labour practices is required.)

[2] See § 64.4*(b)* supra.

[3] Article 1*(d)*.

[4] The Child Labour Action Program ('CLAP') illustrates the kind of comprehensive and co-ordinated plan required to eliminate child labour as a form of servitude. See Department of Labour, South African Child Labour Action Programme (6 May 1998). CLAP demands broad public and private participation: it creates distinct roles for government departments, NGO's, trade unions and employer organizations. SALC *Review of the Child Care Act* (supra) at 602. The Department of Labour, the Department of Education and the Department of Welfare must collectively devise a plan that enhances existing employment law, education policy, access to adequate social security, programmes to alleviate child poverty, and social mobilisation. CLAP is meant to address the very conditions that give rise to and perpetuate exploitative child practices.

Ghana has implemented such a programme. Children's Act of 1998. The carefully calibrated provisions of the Act distinguish appropriate work for children in both formal and informal economies from inappropriate work, and establish minimum age requirements for light work (13), normal work (15), and hazardous work (18). Ibid at ss 89–91. These age limits take seriously the need for some children to engage in the small amount of work required to ensure the survival of the household. Indeed, South Africa's own Children's Bill, s 16, recognises that: **'**Every child has responsibilities appropriate to the child's age and ability towards his or her family, community and the state.'

[5] G De Jonge 'Still 'Slaves of the State': Prison Labour and International Law' in D van Zyl Smit & F Dünkel (eds) *Prison Labour: Salvation or Slavery* (1999) 329.

[6] Ibid at 329.

> A prison sentence means no more and no less than a deprivation of liberty . . . [I]t does not implicitly licence prison administrations to rob the prisoner of his only remaining asset: the value of his labour.[1]

De Jonge's position derives some support from recent case law. Prisoners retain all rights not necessarily removed by incarceration.[2] At a minimum, they possess a *prima facie* right not to be subject to forced labour. Section 36 of the new Correctional Services Act ('CSA') reads:

> With due regard to the fact that the deprivation of liberty serves the purpose of punishment, the implementation of a sentence of imprisonment has the objective of enabling the sentenced prisoner to lead a socially responsible and crime-free life in the future. [3]

The CSA does not characterize labour as a punishment. The above language from the CSA suggests that labour serves the purposes of incarceration only when it advances rehabilitative ends. In addition, while the correctional services regime in South Africa currently requires all sentenced prisoners to perform labour,[4] the CSA places significant restrictions on the exercise of this power by prison administrators. Sick prisoners may not be forced to work.[5] More importantly for our purposes, prisoners may 'never be instructed or compelled to work as a form of punishment or disciplinary measure.'[6]

The general prohibition on the use of labour as punishment is undercut by CSA s 16. CSA s 16 holds that it is a disciplinary infringement if a prisoner 'fails or refuses to perform *any labour* or other duty imposed or authorised by this Act.'[7] So although labour itself may not be meted out as punishment, a prisoner may be punished for refusing to do it.[8] By ensuring that prison labour takes place 'under the menace of . . . penalty,' CSA s 16 turns prison labour into a species of forced labour.[9]

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[1] De Jonge (supra) at 330.

[2] *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A); *August & Another v Electoral Commission & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 18 ('It is a well established principle of our common law, predating the era of constitutionalism, that prisoners are entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they have been placed.' Courts hold that prisoners retain the right to register to vote and the right to exercise franchise); *Minister of Home Affairs v Nicro & Others* 2004 (5) BCLR 445 (CC)(Court held that prisoners could not, without compelling justification, be divested of their constitutional rights, generally, and their right to vote, in particular); *Thukwane v Minister of Correctional Services & Others* 2003 (1) SA 51 (T)(Prisoners retain their right to education, although this right is limited by their circumstances.) See also D van Zyl Smit 'Sentencing and Punishment' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 49.

[3] Act 111 of 1998 ('CSA').

[4] CSA ss 37 and 40(1). CSA s 40(1) reads, in relevant part: 'Sufficient work must as far as is practicable be provided to keep prisoners active for a normal working day and *a prisoner may be compelled to do such work*.' (Our emphasis). This section recently replaced similar provisions in the Correctional Services Act 8 of 1959, s 77.

[5] CSA s 37(1)*(b)*.

[6] CSA s 40(5).

[7] CSA s 23(1)*(d)*(Our emphasis.)

[8] Penalties range from a reprimand (CSA ss 24(3)*(a)* and 24(5)*(a)*) to a restriction of amenities of up to 42 days (CSA ss 24(3)*(c)*) and 24(5)*(c)*) to 30 days solitary confinement (CSA s 24(5)*(d)*).

[9] *Van der Mussele v Belgium* (1984) 6 EHRR 163, 173.

[1] See ICCPR, Article 8(3)*(c)*(i); ECHR, Article 4(3)*(a)*; American Convention on Human Rights

Assume, for the sake of argument, that CSA s 16 was repealed. Would the CSA's compulsory prison labour provisions still infringe FC s 13? Most international human rights instruments that prohibit forced labour make an exception for labour imposed on people detained by an order of court.[1] FC s 13 makes no such exception.[2]

Assume that opponents of prison labour succeed in establishing that the impugned provisions of the CSA constitute a *prima facie* infringement of FC s 13. Can the impugned provisions be justified by reference to FC s 36? While this is not the space for a detailed analysis of the CSA, we can offer a number of general observations.

Advocates of prison labour generally proffer five justifications for prison labour: (1) rehabilitation; (2) restitution; (3) prison order; (4) prison costs; and (5) the mental and physical well-being of the incarcerated population. Of these, the discipline and the skills needed to survive in the post-prison work-place are said to constitute the strongest justification for compulsory prison labour.[3] In South Africa, this justification has little purchase. For although all prisoners

Article, 6(3)*(a)* and the ILO Forced Labour Convention, Article 2(1)*(c)*. See, in particular, *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443 (Belgian prisoner contended that the prison labour system of Belgium violated the Article 4 of the European Convention. The applicant would only be eligible for parole after saving 12 000 Belgian Francs through his prison work. The court dismissed the claim based upon the exception for prison labour found in Article 4(3)*(a)*.)

[2] See D van Zyl Smit & F Dunkel 'Conclusion: Prison Labour Salvation or Slavery' in D van Zyl Smit & F Dunkel (supra) at 337 ('[T]he principle that sentenced prisoners have a formal duty to work is so well established in South Africa that this particular provision of the Constitution is likely to be regarded as subject to an implicit limitation.') But see Van Zyl Smit 'Sentencing' (supra) at 35 (Contends that a challenge to prison labour based on FC s 13 might succeed. The existence of different ends for incarceration — retributive and rehabilitative — and the purpose of different kinds of labour — kitchen work as necessity, rock quarry as punitive — suggests that not every kind of prison labour constitutes a *prima facie* infringement of FC s 13. Even if a particular form of prison labour is found to fall within the ambit of forced labour, the state may have an opportunity to justify its work programme under FC s 36.) See, generally, S Woolman & H Botha 'Limitation' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 34

[3] See K Hafner & E Zurcher *Schweizerische Gefängiskunde* (1925) 160-1, as quoted and translated in A Baechtold 'Switzerland' in Van Zyl Smit & Dunkel (supra) at 260:

> Prison labour is no longer a punishment, even if individual prisoners might take it to be practically the same thing. Work and movement are the bases of physical and psychological vitality. Work helps to make discipline more pleasant, promote a sense of security, and improve a prisoner's chances of coping after their release. Its highest goal, however, is to contribute to the improvement of the prisoners; to convey the conviction that it is only hard work which both provides the individual with a basis for personal satisfaction and a livelihood-in other words, his happiness- as well as providing the foundation for the well-being of the nation.

Baechtold himself offers an opposing view of the Swiss commitment to state enforcement of this strict work ethic in prison. He writes:

> [I]ncreasingly, the duty to work as part of a prison sentence is a contradiction in the wider world of work. The ordinary worker, as a result of not only economic but also structurally related unemployment, sees a job as a rare advantage, while the convicted prisoner receives work from the state. This conflicts with the widely accepted criminological viewpoint that the environment inside the prison should reflect the environment outside the prison as much as possible.

Ibid at 265-6.

may be required to work, few are given the opportunity to do so.[1] This absence of work and skills development opportunities in prison may be one of the reasons for the high rate of recidivism in South Africa.[2]

This gulf between ideal and reality with respect to prison job training opportunities raises a related limitations question. Can the state justify a compulsory prison labour programme when only 8.8% of prisoners are offered any kind of employment?[3] The answer should be a qualified yes. Assuming that the state is able to demonstrate a correlation between prison labour and rehabilitation, and assuming that the state is able to show that prison labour is not used as a penalty over and above sentencing, the mere fact that only some prisoners are required to work is not, alone, sufficient to undermine the justification for the state's prison labour initiatives.

(g) Community service and public works

'Normal civic obligations' are generally excluded from most international documents prohibiting forced labour.[4] Despite this exception, the ECHR Court and the ECHR Commission have heard several challenges to compulsory community service programmes. While all of these challenges have failed, the cases have refined our understanding of forced labour in the context of compulsory community service.

In *Van der Mussele v Belgium,* a pupil *avocat* challenged legislation that obliged him to represent a certain number of clients without payment or compensation for expenses. The *Van der Mussele* Court first asked whether the labour was performed under the menace of any penalty and whether it was involuntary.[5] It found that refusal of admittance to a profession amounted to 'any penalty' and

[1] See South African Human Rights Commission *Report of the National Prisons Project* (1997) ('SAHRC *Report on Prisons*'). As of 31 December 1997, for 100 975 sentenced (able to work) prisoners, only 8 895 (8.8% of sentenced and able to work prisoners) work opportunities per day were offered. Only 1 270 prisoners (1.25%) were involved in vocational training. Only 7 108 prisoners (7.03%) received career-directed skills training. See also Department of Correctional Services 'Statistics' *Annual Report on Prisons* (1997). Although these statistics are dated, no current exists to suggest any significant improvement.

[2] *SAHRC Report on Prisons* (supra) at 25 ('The acquisition of adequate skills very often is the key to successful rehabilitation. The problem of recidivism in the SA prison system is exacerbated by the reality that our prisons have simply been unable to prepare prisoners meaningfully for release or to cope in the outside world. The available statistics show a negligible proportion of the prison population as beneficiaries of training.') Many more South African prisoners complain of idleness and lack of work opportunities than of forced labour. Ibid at 24.

[3] Ibid at 9–23.

[4] See ICCPR, Article 8(3)*(c)*(iv); European Convention of Human Rights, Article 4(3)*(d)*, American Convention of Human Rights, Article 6(3)*(d)* and the ILO Forced Labour Convention, Article 2(1)*(b)*.

[5] *Van der Mussele v Belgium* (supra) at 173-4. The ECHR Commission had adopted a somewhat different approach to the case. It held that for labour to qualify as forced labour, it must be performed: *(a)* against the will of the person; and *(b)* must be 'unjust', 'oppressive' or constitute an 'unavoidable hardship'. The ECHR Commission followed this approach in *X v Federal Republic of Germany* (1978) 17 *Yearbook of the European Convention on Humann Rights* 118; *Gussenbauer v Austria* (1975) 15 *Yearbook of the European Convention on Human Rights* 148; and *Iversen v Norway* (1963) 6 *Yearbook of the European Convention on Human Rights* 327.

that the choice of profession did not amount to consent to perform community service. The *Van der Mussele* Court then asked whether the burden imposed by the labour was 'so excessive or disproportionate to the advantages attached to the future exercise of that profession that the service could not be treated as having been voluntarily accepted beforehand.'[1] The *Van der Mussele* Court held that the burden of the labour did not outweigh the benefit of entry into the profession. The community service was, therefore, not forced labour.[2]

Van der Mussele offers a useful model for analyzing community service in terms of forced labour under FC s 13. The first step of a court's enquiry should be to determine whether the community service was involuntary and performed under the menace of any penalty. If so, then the court ought to view the community service programme as a *prima facie* infringement of FC s 13.[3] Assuming that the community service programme has been effected in terms of a law of general application, the court may then weigh the societal benefits of community service against the burdens imposed upon the person forced to engage in a particular kind of labour.

Community service as a pre-condition for plying a trade is not an abstract issue in South Africa. Community service is required for aspiring doctors[4] and pharmacists.[5] Lawyers may soon be added to the list.[6]

Community services programmes can occur in contexts other than entry qualifications for professions. Community service programmes often feature as part of secondary school education and may even constitute a condition for graduation. These programmes are justified on the grounds that they promote awareness and acceptance of the responsibilities of citizenship.[7]

Objections to such community service programmes as educational tools take two forms. First, these programmes and classes are said to violate the freedom of expression by forcing students to endorse a particular understanding of citizenship. Second, any component of community service programmes that requires students to work for the benefit of others — or the commonwealth — constitutes servitude or forced labour.

[1] *Van der Mussele v Belgium* (supra) at 175. Requiring a person to do work completely unrelated to his profession (such as requiring a medical student to work on a building site) could constitute a 'disproportionate use' of services.

[2] The ECHR Court did not consider whether, under ECHR, Article 4(3)*(d)*, the community service at issue fell within 'normal civic obligations' exception. It left open the question as to whether labour required only of a specific class of people is still saved by this exception. Ibid at 178.

[3] See § 64.4*(c)* supra.

[4] Health Professions Act 56 of 1974, s 24A.

[5] Pharmacy Act 53 of 1974, s 14A.

[6] Legal Practitioner's Bill [B-00] 2000, s 13*(b)*(i).

[7] One reason a community service programme as part of a civics curriculum is to be preferred to classroom instruction alone is that most studies confirm the commonplace pedagogical verity that learning is most effective where a student is called upon to perform a concrete task. See M Csikszentmihali & I Csikszentmihali (eds) *Optimal Experience: Psychological Studies of Flow in Consciousness* (1990). Community service is, in this regard, much like laboratory training in one of the natural sciences. Indeed, studies demonstrate that the most effective learning takes place when the community service is followed by a period of disciplined reflection — in class — on the experience. D Rutter & G Newman 'The Potential of Community Service to Enhance Civic Responsibility' (1989) 53 *Social Education* 371.

A civics programme certainly reflects a particular conception — however thin — of what citizenship requires. Whether participation in the programme constitutes expressive conduct that is transformed into coerced expression by graduation requirements is another question. Our inclination is to view the students' participation in such classes as a symbolic act designed to convey a message to the rest of the community.[1] That such coerced expression constitutes a *prima facie* violation of FC s 16 does not mean it cannot be justified under FC s 36.

Duties of citizenship constitute notable exceptions to the prohibition against servitude and forced labour. Courts in other jurisdictions regard the duties of citizenship, however burdensome, as inescapable conditions for political liberty.[2] Should community service programmes that constitute part of a civics curriculum be regarded as inescapable conditions for an open and democratic society committed to human dignity, equality and freedom? The United States Supreme Court has suggested as much. In *Bethel School District No. 403 v Fraser*, the US Supreme Court wrote:

> The role and the purpose of the . . . public school system were well described by two historians, who stated: 'Public education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness, and as indispensable to the practice of self-government in the community and the nation.' . . . The process of educating our youth for citizenship in public schools is not confined to books, the curriculum and the civics classes; schools must teach by example the shared values of a civilized social order.[3]

Community service programmes are an effective method — and perhaps the most narrowly tailored means — of teaching students the requirements of citizenship.

The role of community service programmes in secondary school civics classes suggests how the state might justify community service programme requirements for professionals. First, as the Final Constitution makes clear in FC 3(2), all citizens are 'equally subject to the duties and responsibilities of citizenship.' Community service programmes articulate those responsibilities. Second, those

[1] See *Spence v Washington* (1974) 418 US 405, 410-411(Whether conduct possesses sufficient communicative elements so as to attract constitutional protection is contingent upon '[a]n intent to convey a particular message' and whether 'the likelihood was great that the message would be understood by those who viewed it.') See also *Texas v Johnson* (1989) 491 US 397, 404. For more on expressive conduct and freedom of expression, see Dario Milo & A Stein 'Expression' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 42.

[2] See *Butler v Perry* (1916) 240 US 328, 333 (Upholding compulsory military service and requirements that able-bodied men build public roads. Such burdens are not without limit. Supreme Court granted the state a citizenship exception only for those public activities without which liberty itself could not be secured.)

[3] (1986) 478 US 675, 681, 683.

persons who benefit from the education they receive from the state ought to appreciate that they incur an obligation to the state and their fellow citizens.[1]

Unlike community service requirements for professional qualifications — where the professional retains a high degree of autonomy — state public works programmes that require that welfare grant recipients actually work for their grants come dangerously close to satisfying the conditions for both servitude and forced labour. 'Workfare', writes Bailey, like peonage or debt bondage, 'exacts mandatory labour as satisfaction for a debt, and imposes legal sanctions for non-performance.'[2] In this relationship, the state replaces the 'employer' as the holder of the debt and the debt to be repaid by the workfare recipient is the welfare grant. To put it slightly differently, when a person receives a welfare grant through a mandatory workfare program, the grant is transformed into a debt, and the debt can only be discharged by the recipient if she engages in the work which the programme compels her to undertake. Workfare creates conditions of involuntary servitude because the only choice the recipient has is to work or to starve.

The status of such public works programmes is a live issue in South Africa. In April 2004, the South African Government launched its Expanded Public Works Programme ('EPWP').[3] The rationale for such work is simple. The DPW notes that as of September 2003:

> 4.6 million people were unemployed in terms of the strict definition and 8.3 million in terms of the broad definition ... The unemployment rate has been growing by 1% to 2% per annum, reaching 30.7% by September 2002. To reach government's target of halving unemployment by 2014 (i.e. reducing the unemployment rate from 30% to 15%),

[1] Given that public service, in one form or another, is an essential condition for the maintenance of a truly democratic republic, the state can make a compelling argument that the doctors, lawyers and pharmacists it trains must not only learn what citizenship demands but reflect that learning in the practice of their profession. One rejoinder might be that students who wish to become doctors, lawyers and pharmacists are being singled out from amongst the larger student body. The appropriate riposte is that no student is obliged to become a doctor, lawyer or pharmacist nor is the state precluded from attaching similar conditions for qualification in other professions. The state must take care, however, that an unintended consequence of its actions is not a significant diminution in either the quantity or the quality of professionals made available to the public — especially in those areas that are in greatest need. Such an outcome could not be justified given that these programmes are designed to increase the quantity and the quality of professionals available to serve those in the greatest need.

[2] C Bailey 'Workfare and Involuntary Servitude: What You Wanted to Know But Were Afraid to Ask' (1995) 15 *Boston College Third World LJ* 285, 316.

[3] See Department of Labour, Ministerial Determination: Special Public Works Programmes, Basic Conditions of Employment Act, 1997, Government Gazette No 23045 (25 January 2002). Under the auspices of the Department of Public Works ('DPW'), the Department of Labour ('DOL'), Department of Social Development ('DSD'), Department of Environmental Affairs and Tourism ('DEAT'), Department of Trade and Industry ('DTI'), Department of Public Enterprises ('DPE') and South African Local Government Association ('SALGA'), the EPWP created almost 38 000 work opportunities during the first quarter of the financial year 2004/05. See Department of Public Works 'Expanded Public Works Programme' (2004) available at www.epwp.gov.za, (accessed on 19 December 2004).

546,000 new jobs would have to be created each year — 276,000 more than has hitherto been the case.[1]

Unlike workfare programmes in the United States, the EPWP is not meant to supplant other forms of government assistance. Nor are persons who might qualify for EPWP work threatened with the termination of existing benefits should they refuse to make themselves available for work. The EPWP provides a mechanism for income transfer to poor households and for skills development for the heretofore unemployed. The conditions under which a workfare programme might create conditions of servitude do not obtain in South Africa under the EPWP.

(h) Conscription

Conscription in South Africa was abolished in 1993 by the Defence Second Amendment Act.[2] However, various constitutional provisions — eg, FC s 37 — anticipate future exigencies that might require re-enactment of a draft.

Most international and regional human rights treaties exclude expressly conscription from the ambit of their forced labour provisions.[3] FC s 13 does not. As with prison labour and community service, this structured silence should not be read as acquiescence. A criminal sanction attached to a failure to heed a call up would qualify conscription as labour performed under the menace of penalty and satisfy the test for forced labour.[4]

[1] See Department of Public Works 'Expanded Public Works Programme' (2004) available at www.epwp.gov.za, (accessed on 19 December 2004). Most of the unemployed — some 59% — have never worked at all. Amongst youth — defined as persons age 16 to 34 — 70% report never having worked. Such high levels of unemployment married to grinding poverty make the EPWP a necessary addition to the government's armoury of poverty alleviation programmes.

[2] Act 134 of 1993. See *End Conscription Campaign v Minister of Defence* 1992 (1) SA 589 (T)(Court hears challenge to whites-only conscription. The applicant argued that the Population Registration Act Repeal Act 115 of 1991, which removed the definition of 'white person' in s 1 of the Population Registration Act 30 of 1950, necessarily implied the repeal of whites-only military service under Defence Act 44 of 1957, s 2(1). The court rejected this argument. It held that that: *(a)* a repeal statute did not repeal provisions of the repealed statute incorporated in another statute; and *(b)* if the legislature had intended to abolish conscription, it would have done so explicitly.) For a general account of the campaign to abolish conscription, see J Sarkin 'Conscription' (1993) 4 *SAHR Yearbook* 37; R Louw 'Conscription' (1994) 5 *SAHR Yearbook* 33.

[3] See § 64.5*(c)* supra. Under international law, states retain the power to conscript. E Marcus 'Conscientious Objection as an Emerging Human Right' (1998) 38 *Virginia Journal of International Law* 507, 510; M Mthombeni 'Forced Recruitment, A Violation of Human Rights?' (1991-2) 17 *SA Yearbook of International Law* 12, 14. This power is considered necessary in order to preserve the territory and the political sovereignty of the state. See Mthombeni (supra) at 17 (States retain the right to self-defence in terms of UN Charter, s 2(4). Does a rebel force have a right to conscript in order to overthrow the government? Despite the absence of an expression provision in the Charter, Mthombeni argues that a democratic opposition force representing the people derives a right to conscript from the right to self-determination.) This general power is subject to two provisos. Children under fifteen may not be conscripted. See Article 3*(c)* of the Second Protocol to the Geneva Convention. In South Africa, the Basic Conditions of Employment Act prohibits any employment of children under 15. Recruitment into the armed forces may not be arbitrary or discriminatory. See, eg, Universal Declaration of Human Rights (1948); International Covenant on Civil and Political Rights (1967).

[4] See §64.4*(c)* supra (Definition of forced labour.)

When asked to assess the state's justification for its conscription regime, the courts will pay particular attention to the length and the conditions of the military service. In *W, X, Y & Z v United Kingdom*, the ECHR Commission went so far as to recognize the possibility that significant restrictions on the inability to leave voluntary military service could amount, not simply to forced labour, but to servitude.[1]

Let us assume that, as a general matter, the state's regime of conscription is not so oppressive as to constitute a violation of the right to be free from forced labour. Can a conscientious objector still rely on FC s 13 and its prohibition of forced labour? Under international law, the right to be free from forced labour excludes conscription 'and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors.'[2] So even if a conscientious objector could make the case that FC s 13 prohibited the forced labour that conscription entails — which is by no means clear — he or she would be hard pressed to rebuff the state's entreaties to spend a comparable period of time working for the betterment of the commonwealth.[3]

[1] See *W, X, Y & Z v The United Kingdom* (1968) 11 *Yearbook of the European Convention on Human Rights* 562.

[2] ICCPR Article 8(3)*(c)*(ii).

[3] Conscientious objectors are likely to find greater succour in FC s 15 — freedom of religion, belief and opinion. See Marcus (supra) at 514. FC 15 reads: 'Everyone has the right to freedom of conscience, religion, thought, belief and opinion.' See, generally, P Farlam 'Religion, Belief and Opinion' in M Chaskalson , J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein & S Woolman (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 41. The strength of the FC s 15 claim is contingent upon the basis for the objection. Courts are often predisposed to vindicate claims grounded in accepted religious practice and less inclined towards the protection of identical claims shorn of their religious moorings. As Farlam correctly observes, however, the text of FC s 15 provides cover for both religious and non-religious practices. It privileges neither one nor the other. See Farlam (supra) at 41-13 — 41-15. See also *Prince v President Cape Law Society* 2002 (2) SA 794 (CC), 2002 (1) SACR 425 (CC), 2002 (3) BCLR 231 (CC); *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051) (CC); *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC).

The right to conscientious objection can also be derived from the rights to life, to association, and to expression. Marcus (supra) at 518 — 524. While this freedom was, at international law, initially construed to exclude conscientious objection, the UN Human Rights Committee notes that although '[t]he Covenant does not explicitly refer to a right to conscientious objection, . . . the Committee believes that such a right can be derived from Article 18.' UN Human Rights Committee, ICCPR, General Comment 22, U.N. Doc. HRI/GEN/1/Rev.3 (1997) 11. Conscientious objection is still not recognised under the ECHR. But see D Decker & L Fresia 'The Status of Conscientious Objection Under Article 4 of the European Convention on Human Rights' (2001) 33 *NYU J of Int'l Law and Politics* 379, 414-6 (Describing moves towards recognition.) For the early position of the UN Human Rights Committee refuses to ground conscientious objection in Article 18, see *LTK v Finland* Communication No 185 (1984)(Failure to recognize right to conscientious objection not a violation of freedom of religion, belief and opinion); *Aapo Järvinen v Finland* Communication No 295 (1988)(Longer civil service than military service not a violation of right to freedom from forced labour or right not to be discriminated against). The European Commission on Human Rights trod a similar path in *Grandrath v Federal Republic of Germany* (1967) 10 *Yearbook of the European Convention on Human Rights* 626 (Jehovah's Witness leader not exempted from alternative civilian service); *X v Austria* Application number 5591/72 (1973)(Roman Catholic required to perform military service). These ECHR Commission's decisions rely on the wording of Articles 8(3)*(c)*(ii) and 4(3)*(b)*, respectively, to find that conscientious objection falls outside the scope of the right to freedom of religion, belief and opinion. For an excellent summary of the Committee's and Commission's case law on conscription, see M Major 'Conscientious Objection to Military Service: The European Commission on Human Rights and the Human Rights Committee' (2001) 32 *California Western International LJ* 1. See also H Gilbert 'The Slow Development of the Right to Conscientious Objection to Military Service Under the European Convention on Human Rights' (2001) 5 *European Human Rights LR* 554.

65 Official Languages and Language Rights

Iain Currie

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Languages

6. (1) The official languages of the Republic are Sepedi, Sesotho, Setswana siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

(2) Recognising the historically diminshed use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.

(3) *(a)* The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the poulation as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages;

(b) Municipalities must take into account the language usage and preferences of their residents.

(4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.

(5) A Pan South African Language Board established by national legislation must

(a) promote, and create conditions for, the development and use of
  (i) all official languages;
  (ii) the Khoi, Nama and San languages; and
  (iii) sign language; and

(b) promote and ensure respect for
  (i) all official languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portugese, Tamil, Telugu, and Urdu; and
  (ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.[1]

65.1 Historical Context of the Official Language Provisions

Constitutional protection of language rights in South Africa can be traced back to the National Convention of 1909. Representatives of the former Transvaal and Free State Republics, fearing continued discrimination against Dutch speakers by a government under British supervision and dominated by English speakers, insisted on provisions in the Union Constitution that guaranteed the equality of the Dutch language.[2] Both English and Dutch were recognized as official languages of the Union: speakers possessed the same rights and privileges; public documents were printed in both languages. More importantly, the entrenchment of these provisions meant that any legislation that might affect or alter the equal

[1] Constitution of the Republic of South Africa, 1996 ('FC' or 'Final Constitution').

[2] Despite the provisions of the Treaty of Vereeniging (1902) permitting the teaching of Dutch in schools in the former Transvaal and Free State colonies, an official policy of Anglicisation saw Dutch treated merely as a medium for teaching English between 1902 and 1910. See David Brown 'Language and Social History in South Africa' in Robert K Herbert (ed) *Language and Society in Africa: The Theory and Practice of Sociolinguistics* (1992) 71, 74. Some of the history behind the recognition of Dutch as an official language is recounted in *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*. 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC) at para 46 (Sachs J).

status of the two languages required special procedures and majorities.[1] The 1961 and 1983 Constitutions preserved this protection.[2]

The constitutional protection of language rights was accompanied by discrimination against speakers of non-official languages. African languages were undervalued and neglected. While mother-tongue education in primary school served the apartheid aim of promoting ethnic identity, proficiency in the official languages became a principal determinant of subsequent progress in secondary and tertiary education and of access to employment.[3] Official bilingualism in a multilingual country came to symbolise white political domination.[4] During apartheid, Afrikaans, imposed on an unwilling population of learners as a language of instruction, was, in turn, vilified as the 'language of the oppressor'.[5]

The language provisions of the Interim Constitution were a bold attempt to end the linguistic discrimination practiced by the apartheid state.[6] Three fundamental rights vouchsafed linguistic freedom and equality. IC s 8(2) prohibited unfair discrimination on the grounds of language. IC s 31 guaranteed a right to use a language of choice. IC s 32*(b)* contained a right to education in

[1] Section 137 of the South Africa Act (1909). See HR Hahlo & Ellison Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 125. See also *Harris v Minister of the Interior* 1952 (2) SA 428 (A)(Legislation passed by ordinary procedures removing entrenched rights declared invalid); *Swart NO & Nicol NO v De Kock & Garner* 1951 (1) SA 589, 601–602 (A)(The constitutional entrenchment of the equality of the official languages entitles an individual to call on the courts to resist any legislative or executive action offending against the entrenchment.)

[2] Afrikaans was included in the definition of Dutch by the Official Languages of the Union Act. Act 8 of 1925. Section 119 of the Republic of South Africa Constitution Act defined Afrikaans as including Dutch. Act 32 of 1961. Section 99(2) of the Republic of South Africa Constitution Act required special procedures and majorities for legislation infringing the equal status of English and Afrikaans. Act 110 of 1983. No mention was made of Dutch. Commentators have suggested that Dutch remained an official language of South Africa, since the special procedures first detailed in the South Africa Act were not followed to demote it. See Julien Hofman 'Official Languages for a New South Africa: Article 5 of the ANC's Bill of Rights' (1991) 3 *Stellenbosch LR* 328. This mild controversy over the status of Dutch was resolved by the passage of the Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution'). The exclusion of Dutch from the list of official languages was validated by the use of the procedures required by s 99(2) of the 1983 Constitution to enact the Interim Constitution.

[3] See Brown (supra) at 86 (The emphasis on vernacular instruction 'led to an enforced trilingualism in African education, with equal time being given to the official languages regardless of region'. This was 'an unusually onerous prescription, even in harsh colonial contexts'.) See also Neville Alexander *Language Policy and National Unity in South Africa/Azania* (1989) 38–9 ('Black students, generally, were placed at a disadvantage educationally because they came from economically and culturally deprived family and community backgrounds and because the imperialist and racist language policies followed by the NP government placed one more hurdle in their collective path.')

[4] The 1991 census figures show 21 sizeable home languages in South Africa. Fourteen of these languages are spoken as a home language by groups of more than 100 000 people. See South African Institute of Race Relations *Race Relations Survey 1993/94* (1994) 86–7.

[5] Robert K Herbert 'Language in a Divided Society' in Herbert (supra) at 1, 8. See also Alexander (supra) at 39.

[6] IC s 3 read:

(1) Afrikaans, English, isiNdebele, Sesotho sa Leboa, Sesotho, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa and isiZulu shall be the official South African languages at national level, and conditions shall be created for their development and for the promotion of their equal use and enjoyment.

(2) Rights relating to language and the status of languages existing at the commencement of this Constitution shall not be diminished, and provision shall be made by an Act of Parliament for rights relating to language and the status of languages existing only at regional level, to be extended nationally in accordance with the principles set out in subsection (9).

a language of choice where reasonably practicable. In addition, eleven of the principal languages spoken in South Africa were granted the status of official languages. The users of these eleven languages possessed additional rights and the state incurred a duty to promote their development, equal use and enjoyment.

Constitutional Principle CP XI shaped the language rights and the official language provisions of the Final Constitution: 'The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.' As a result of CP XI, the Final Constitution prohibits both public and private discrimination on the basis of language (FC ss 9(3) and (4)), accords an individual right to use a language of choice (FC s 30), protects the rights of linguistic minorities (FC s 31) and ensures that all learners have a right to receive, where reasonably practicable, an education in the official language of their

(3) Wherever practicable, a person shall have the right to use and to be addressed in his or her dealings with any public administration at the national level of government in any official South African language of his or her choice.

(4) Regional differentiation in relation to language policy and practice shall be permissible.

(5) A provincial legislature may, by a resolution adopted by a majority of at least two- thirds of all its members, declare any language referred to in subsection (1) to be an official language for the whole or any part of the province and for any or all powers and functions within the competence of that legislature, save that neither the rights relating to language nor the status of an official language as existing in any area or in relation to any function at the time of the commencement of this Constitution, shall be diminished.

(6) Wherever practicable, a person shall have the right to use and to be addressed in his or her dealings with any public administration at the provincial level of government in any one of the official languages of his or her choice as contemplated in subsection (5).

(7) A member of Parliament may address Parliament in the official South African language of his or her choice.

(8) Parliament and any provincial legislature may, subject to this section, make provision by legislation for the use of official languages for the purposes of the functioning of government, taking into account questions of usage, practicality and expense.

(9) Legislation, as well as official policy and practice, in relation to the use of languages at any level of government shall be subject to and based on the provisions of this section and the following principles:

(a) The creation of conditions for the development and for the promotion of the equal use and enjoyment of all official South African languages;

(b) the extension of those rights relating to language and the status of languages which at the commencement of this Constitution are restricted to certain regions;

(c) the prevention of the use of any language for the purposes of exploitation, domination or division;

(d) the promotion of multilingualism and the provision of translation facilities;

(e) the fostering of respect for languages spoken in the Republic other than the official languages, and the encouragement of their use in appropriate circumstances; and

(f) the non-diminution of rights relating to language and the status of languages existing at the commencement of this Constitution.

(10) *(a)* Provision shall be made by an Act of Parliament for the establishment by the Senate of an independent Pan South African Language Board to promote respect for the principles referred to in subsection (9) and to further the development of the official South African languages.

(b) The Pan South African Language Board shall be consulted, and be given the opportunity to make recommendations, in relation to any proposed legislation contemplated in this section.

(c) The Pan South African Language Board shall be responsible for promoting respect for and the development of German, Greek, Gujerati, Hindi, Portuguese, Tamil, Telegu, Urdu and other languages used by communities in South Africa, as well as Arabic, Hebrew and Sanskrit and other languages used for religious purposes.

choice (FC s 29).[1] FC s 6 identifies eleven official languages and makes provision for legislative and administrative measures to regulate their use.

65.2 The Official Languages

(a) The eleven languages

FC s 6(1) names eleven languages as 'the official languages of the Republic'. The languages are: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. There is one change to the Interim Constitution's list. Sesotho sa Leboa (sometimes called Northern Sotho) is now described by its more correct name: Sepedi.

Though the list aims to be as inclusive as possible, during the first certification hearings the Constitutional Court heard argument that some of the Indian languages spoken in South Africa deserved official status.[2] The Court rejected this argument on the grounds that the object of CP XI was to provide protection for the diversity of languages, not the official recognition of any particular language. Decisions about the actual content of South Africa's official language policy fell entirely within the purview of the Constitutional Assembly. The protection of non-official languages, and thus diversity in its fullness, was accommodated by the specific measures provided for in FC ss 6(2) to (5).[3] These measures include the requirement that the Pan South African Language Board 'promote and ensure respect for' the principal Indian languages spoken in South Africa.[4]

(b) The meaning of 'official language'

The right of an individual to 'speak the language of his or her choice' (FC s 30) and the rights of linguistic communities to use their language (FC s 31) protect individual use of a language (any language — official or not) in private communication and in public fora such as the media, schools, public meetings and organisations.[5] By

[1] Language rights are engaged in a number of other chapters in this text. See Cathi Albertyn & Beth Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constituional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 35; Iain Currie 'Community Rights: Language, Culture and Religion' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constituional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 58; Stuart Woolman & Michael Bishop 'Education' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constituional Law of South Africa* (2nd Edition, OS, August 2006) Chapter 57; Stuart Woolman & Julie Soweto-Aullo 'Commission for the Promotion and the Protection of the Rights of Religious, Linguistic and Cultural Communities in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constituional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24F.

[2] These Indian languages include Urdu, Tamil and Hindi. Some 900 000 people are speakers of Indian languages in South Africa. Raymond G Gordon (ed) *Ethnologue: Languages of the World* (15th Edition 2005), available at http://www.ethnologue.com (accessed on 15 September 2005). By comparison, Tshivenda, an official language, has about 1 million speakers. See Statistics South Africa *Census in Brief* (2001).

[3] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 210.

[4] FC s 6(5)*(b)*(i).

[5] See Iain Currie 'Community Rights: Language, Culture and Religion' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constituional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 58.

contrast, the term 'official language' is usually understood to mean a 'language used in the business of government — legislative, executive and judicial'.[1] Such a gloss appears to have been placed on the phrase by South African courts prior to the new dispensation.[2]

No immediate or practical consequences follow from the mere declaration of a language as an official language.[3] Legal content is given to official language policy through regulation of the following forms of state action:[4]

1. the use of a language in a court of law;
2. the use of a language when communicating with government (filling in forms, dealing with officials and the like);
3. the use of a language in public notices (such as street signs, public information and the like);
4. the use of a language in government reports, documents, hearings, transcripts and other official publications intended for public distribution;
5. the use of a language in legislation, and in the proceedings and records of the legislature.[5]

65.3 Relationship Between the Official Languages

(a) Equitable treatment and parity of esteem

The 1909 Constitution and its successors demanded that the two official languages 'be treated on a footing of equality', and declared that they were to 'possess and enjoy equal freedom, rights and privileges'. The courts interpreted these two requirements to mean that official use of one language would be as effective as the use of the other. It did not mean that official action (other than that specifically regulated by the 1909 Constitution: ie, Parliamentary legislation,

[1] UNESCO *The Use of Vernacular Languages in Education* (1953) 46. But see Francesco Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (1991) 75.

[2] See *Swart NO & Nicol NO v De Kock & Garner* 1951 (1) SA 589, 600 (A)(1909 Constitution conveys an instruction to all three branches of government to treat both languages equally); *Madikizela v State President, Republic of Transkei* 1986 (2) SA 180, 185H-J (Tk)(Any of the three official languages of Transkei may be used 'for official purposes'.)

[3] See *Société des Acadiens du Nouveau-Brunswick v Association of Parents for Fairness in Education* (1986) 27 DLR (4th) 406 (SC)(Canadian Supreme Court holds that constitutional recognition of official languages does not in itself guarantee a right to any type of service in either official language.) But see Fernand de Varennes *Language, Minorities and Human Rights* (1996) 174 (Argues that an official language declaration does at least 'signal that the use of such language in a state is provided by law; however the exact scope of a right to use an official language can always be subjected to various limitations and considerations'.)

[4] According to the Québec Superior Court, the declaration of French as the official language of Québec 'has little concrete meaning'. To give substance to the declaration, 'laws must be enacted which attach specific legal effects to the . . . proclamation . . . recognizing the use of the language, or allowing for the legal effects of its use in a variety of areas.' *Bureau Métropolitain des Ecoles Protestantes de Montréal v Ministre de l'Education du Québec* [1976] 1 CS 430, 452 (as translated in Gilbert A Beaudoin & Edward Ratushny *The Canadian Charter of Rights and Freedoms* (2nd Edition, 1989) 661.)

[5] See Manfred W Wenner 'The Politics of Equality Among European Linguistic Minorities' in Richard P Claude (ed) *Comparative Human Rights* (1976) 184, 193.

proceedings and records and central government publications) had to take place in both languages to be effective.[1]

By contrast, the Interim Constitution did not require all eleven official languages to be treated equally. The opening statement of IC s 3(1) identifying the official languages at national level was declaratory. The balance of the section identified the consequences of this declaration: the state was required to create conditions for the development of the languages, and for 'the promotion of their equal use and enjoyment'. Rather than create an immediate obligation to treat all official languages equally, equality of the official languages became an aspiration. IC s 3(9) confirmed this interpretation: it enjoined the state to create the necessary 'conditions for the development and for the promotion of the equal use and enjoyment of all official South African languages.'[2]

The Final Constitution similarly avoids any language that might give rise to a claim that the official languages must be treated equally. Moreover, it does not even repeat the Interim Constitution's promise of prospective equality. Instead FC s 6(4) simply requires that 'all official languages must enjoy parity of esteem, and must be treated equitably'. 'Equitable' treatment is clearly not the same as 'equal' treatment. Equitable treatment is treatment that is just and fair in the circumstances. Those circumstances include a history of official denigration and neglect of indigenous languages. Equity may therefore require that the languages that FC s 6(2) terms 'historically diminished' in use and status receive particular attention from and support from the state. It might mean that historically undiminished languages (ie, English and Afrikaans) are treated with relative inattention.

In any event, there is no hard and fast requirement that the national or provincial governments use more than two of the official languages 'for the purposes of government'. The national government may decide that only its communications in two of the official languages have legal validity, while those in any other language do not. Such legislation must reflect a good faith assessment that usage, practicality, expense and the other factors mentioned in FC s 6(3)*(a)* require such a measure.

As for 'parity of esteem', this awkward phrase probably has little legal significance. 'Parity' is possible only where there is a legal prescription that the official languages are treated equally and that they all have the same rights and status. But as we have seen, the Final Constitution does not insist on actual substantive equality. Instead, some languages may, for reasons of expense and practicality, end up enjoying greater rights and status than others. What then is the purpose of requiring the eleven languages to be treated with 'parity of esteem'? In a multilingual state, an official language policy can have the practical aim of designating a single language in which the business of government will be conducted. This has

[1] See *Ex parte Suid Afrikaanse Nasionale Trust en Assuransie Maatschappij Bpk* 1918 CPD 207, 209 (De Villiers AJ)('When the Act of Union provides that the two languages shall have equal rights and privileges, it means that these two modes of expressing thoughts may be used equally; a person may use the one or the other.') See also *R v Schaper* 1945 AD 716 (Promulgation of a by-law in English only would not offend against the equality requirement.)

[2] IC s 3(9)*(a)*.

been the approachof a number of post-colonial African states that have given official status solely to the former colonial language.[1] On the other hand, an official language policy may have political and cultural objectives, rather than practical aims. Like the 1909 Union Constitution, the adoption of eleven official languages in the Final Constitution blunts the force of criticism that one language, rather than another, has become the language of government. At the same time, according a language official status encourages its speakers to participate in political life and to press for the use of their language, where practicable, in the business of government. It enriches the cultural wealth of the nation through the invigoration of languages heretofore ignored. In short, while parity of esteem does not ensure the equal treatment of all eleven official languages, it does oblige the state to take all eleven languages seriously.

(b) Non-diminishment of existing status and rights

The official language policy of the Interim Constitution increased the number of official languages and the rights relating to those languages. At the same time, it sought to preserve the existing rights and status of the pre-1994 official languages: English and Afrikaans. To that end, the Interim Constitution contained a provision stipulating that 'the rights relating to language and the status of languages as they existed at the time of the commencement of this Constitution shall not be diminished.'[2] Similar provisions relating to the non-diminishment of the existing status and rights of languages were contained in IC s 3(5)(non-diminishment at regional level) and IC s 3(9)*(f)*(the use of languages at any level of government).

What was the practical effect of the non-diminishment provisions at national level? Parliament could not amend the Interim Constitution to remove English or Afrikaans from the list of official languages. To do so would have diminished the pre-constitutional status of those languages. Parliamentary bills and legislation, the record of proceedings of Parliament, and government notices of general public interest and importance had to continue to be published in English and Afrikaans. Section 89(2) of the 1983 Constitution had required that 'all . . . laws . . . issued by the government of the Republic' be in both official languages. This meant that delegated legislation issued by the post-1994 national administration had to be published in English and Afrikaans in order to comply with the non-diminishment requirements.

Additional rights relating to the 1983 Constitution's provisions regarding official languages were grounded in statute. IC s 232(1)*(d)* provided that:

> [u]nless it is inconsistent with the context or clearly inappropriate, a reference in a law [in force] . . . to an official language or to both official languages, shall be construed, with due regard to section 3, as a reference to any of the official South African languages under this Constitution.

The effect of the section, read with IC s 3(2), was that where legislation in force granted rights to English and Afrikaans, it could be read to grant the other

[1] See, eg, Article 3(1) of the Namibian Constitution and Article 5 of the Constitution of Mozambique, respectively, designating English and Portuguese as the official languages in those countries.

[2] IC s 3(2).

nine official languages the same rights, but could not be read to withdraw rights from English and Afrikaans and grant those rights to any other language.[1]

At provincial level, the non-diminishment provisions had the potential to require the executive authorities of the new provinces to issue delegated legislation and public notices in English and Afrikaans. Where the new provinces contained the re-incorporated TBVC states, the rights and status of the former official languages of these territories could not be diminished by re-incorporation into a unitary South Africa. Instead those languages retained whatever rights and status they once enjoyed, but now only at a 'regional level'. This probably meant that in those 'regions' or parts of a province formerly occupied by self-governing territories or by one of the TBVC states, the provincial government could not demote a former official language, or remove any rights that a language enjoyed in that region.

IC s 3 and the non-diminution requirements, though binding on Parliament during the operation of the Interim Constitution, were not binding on the Constitutional Assembly. The Constitutional Assembly could have, consistent with Constitutional Principle XI, substantially revised the state's official language policies in the Final Constitution. In the end, however, the most substantial change was the dropping of the non-diminution requirement. During the certification hearings, the Constitutional Court heard argument that the status of Afrikaans had been 'diluted' in the Final Constitution. The argument was rejected. According to the Constitutional Court, no Constitutional Principle required that Afrikaans be given a special status in the Final Constitution. The Court also observed that the Final Constitution

> does not reduce the status of Afrikaans relative to the [Interim Constitution]. Afrikaans is accorded official status in terms of s 6(1). Affording other languages the same status does not diminish that of Afrikaans.[2]

The absence of a non-diminution requirement does, however, mean a loss of the constitutional rights enjoyed by these two languages since 1910. FC s 6(3)*(a)* provides that 'national government and provincial governments may use any particular official languages for the purposes of government.' The languages chosen need not include English and Afrikaans. This makes it constitutionally (if not practically or politically) possible for the business of national and provincial government to be transacted in languages other than English or Afrikaans for the first time since Union.

[1] IC s 232(1)*(d)*'s mention of 'an official language or . . . *both* official languages' appeared to exclude legislation of the former TBVC and self-governing territories that granted rights to official languages other than or in addition to the two official languages of the 1983 Constitution. (My emphasis).

[2] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 212; *Ex parte Gauteng Provincial Legislature re: In Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC) at para 74 (Discussion of non-dimunition).

65.4 Use of Official Languages for the Functioning of Government

(a) The National Language Policy Framework

The National Language Policy Framework, government's policy on the achievement of the goals of the Final Constitution's official language provisions, was adopted by the cabinet in 2002.[1] The policy is the result of a lengthy drafting process conducted by the Language Plan Task Group ('LANGTAG') established by the national Department of Arts and Culture in 1995.[2] The aims of the policy are to promote the equitable use of the official languages at all levels of government; to facilitate equitable access to government services, knowledge and information; to ensure redress for the previously marginalised official indigenous languages; to initiate and to sustain a vibrant discourse on multilingualism with all language communities; to encourage the learning of indigenous languages in order to promote national unity, as well as linguistic and cultural diversity; and to promote good language management for efficient public service administration.[3]

As part of the implementation of the policy, a draft South African Languages Bill has been prepared by the Department.[4] In the description of the current law on the use of the official languages that follows, reference will be made to the reforms proposed by the Framework and the draft Bill.

(b) National and provincial government

(i) *The 'purposes of government'*

The South Africa Act and its successors required that records, journals and proceedings of Parliament were kept in both the official languages. All bills, laws and notices of general public importance or interest issued by the government were required to be in both official languages. Provinces were obliged to legislate and to conduct administration in English and in Afrikaans. Section 90 of the 1983 Constitution required that all 'records, journals and proceedings of a provincial council shall be kept in both official languages.' The same requirements applied to all 'draft ordinances, ordinances and notices of public importance or interest issued by a provincial administration.'

The Final Constitution contains no similar set of obligations. Instead, FC s 6(3)*(a)* is permissive:

> The national government and provincial governments may use any particular official languages for the purposes of government taking into account usage, practicality, expense,

[1] National Language Policy Framework (2002), available at http://www.info.gov.za/gazette/otherdocs/2002/langpolicy.pdf (accessed on 15 September 2005)('National Framework').

[2] See 'Towards a National Language Plan for South Africa: Final Report of the Language Plan Task Group (8 August 1996)('LANGTAG Final Report'), available at http://www.dac.gov.za/reports/langtag_report/langtag_report.htm (accessed on 15 September 2005). For a useful review of the Report, see LT du Plessis & JL Pretorius 'The Structure of the Official Language Clause. A Framework for its Implementation' (2000) 15 *SA Public Law* 504.

[3] LANGTAG Final Report (supra) at para 2.1.

[4] The South African Languages Bill (24 April 2003), available at http://www.dac.gov.za/legislation_policies/bills/sa_language_bill.doc (accessed on 15 September 2005).

regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned.

However, both national and provincial government must use at least two of the official languages 'for the purposes of government'. Both the national and provincial governments are obliged by FC s 6(4) to regulate and to monitor their use of the official languages by means of legislative and other measures.

The phrase 'purposes of government' encompasses the various activities of government. The effect of language on two such activities — legislation and administration — warrants closer inspection.

(ii) *Legislation*

Legislation creates rights and duties throughout the jurisdiction of the legislature, and ought to be intelligible to the people to whom it applies.[1] Legislation at national level should, in principle, be published in all of the principal languages of the state. Similarly, legislation at provincial level should be published in the principal languages spoken in the province.[2]

Similar obligations apply to the languages employed during the legislative process. Parliamentary debate should take place in all the principal languages of the state. Members of a provincial legislature should be able to use the languages of the province in their deliberations.[3] Failure to observe this principle will leave speakers of unaccommodated languages feeling that they are not represented in the legislative process. Members of Parliament will face the burdensome obstacle of communicating in languages that are not their mother tongue. This may make them less effective debaters, or may inhibit them from entering Parliament in the first place. IC s 3(7) provided an unqualified right to members of Parliament to address Parliament in the official South African language of their choice.[4] There is no corresponding right in the Final Constitution. This means that the languages

[1] Julien Hofman 'Official Languages for a New South Africa: Article 5 of the ANC's Bill of Rights' (1991) 3 *Stellenbosch LR* 328, 333.

[2] See Universal Declaration of Linguistic Rights (10th draft, International PEN Committee for Translation and Linguistic Rights and Centre Internacional Escarré per les Minories Etniques i les Nacions, Barcelona 1995), available at http://www.linguistic-declaration.org (accessed on 15 September 2005)('Universal Declaration of Linguistic Rights'). Article 19 of the draft declaration proposes that:

1. All language communities have the right for laws and other legal provisions which concern them to be published in a language specific to the territory.
2. Public authorities who have more than one territorially historic language within their jurisdiction must publish all laws and other legal provisions of a general nature in each of these languages, whether or not their speakers understand other languages.

[3] According to Article 20 of the Universal Declaration of Linguistic Rights:

1. Representative assemblies must have as their official language*(s)* the language*(s)* historically spoken in the territory they represent.
2. Supraterritorial representative assemblies, which cover a larger territory with more than one territorially historic language, must have all such languages as official languages.

[4] See Gilbert A Beaudoin & Edward Ratushny *The Canadian Charter of Rights and Freedoms* (2nd Edition, 1989) 678 (Discussion of provisions of the Canadian Charter of Rights and Freedoms and the Constitution Act 1867 that are, or were, comparable to IC s 3(7)). In practice, Parliamentary proceedings were simultaneously translated, but only into English and Afrikaans. *Debates of the National Assembly* (31 August 1994) 2197.

legislation used for and by legislators is, in terms of FC ss 6(3) and (4), left largely to the discretion of the legislature.

Recognising these principles, the National Language Policy Framework proposes the use of all the official languages in 'all legislative activities' as a matter of right, though in provincial legislatures the incidence of use of the languages in the region can be taken into account.[1] The phrase 'all legislative activities' clearly encompasses both the publication of legislation and the conduct of legislative proceedings.

The South Africa Act and its successors required the two official languages to be placed on an equal footing. For this reason both English and Afrikaans were considered to be the languages of enactment of legislation. This meant that either version of a statute was as authentic as the other and that the meaning of the statute was to be found by consulting the two versions and reconciling the contents of both.[2] Only in the event of an irreconcilable interpretative conflict between the two versions would the signed version of the legislation be treated as authoritative.[3]

As we have already seen, there is no longer a constitutional requirement that the official languages be treated equally. This makes it difficult to decide which version of an Act is to be considered authoritative in the event of an interpretative conflict. The task of consulting and reconciling as many as eleven versions of a statute would be overwhelming, if not impossible. FC s 82 may provide a solution to this problem. It reads: 'the signed copy of an Act of Parliament is conclusive evidence of the provisions of that Act.'[4] The section ought to be read to mean that where multiple versions of an Act exist, the signed copy should be taken to be authoritative for purposes of interpretation. A similar provision existed in the Interim Constitution, and FC s 82 should, for purposes of convenience, be treated as its successor.[5]

[1] National Framework (supra) at para 2.4.4. Some provinces have already legislated in this regard. See, eg, Northern Province Language Act 7 of 2000 (Provincial official languages are Sepedi, Afrikaans, English, Tshivenda, Xitsonga and Isindebele; any official language can be used in legislative proceedings and legislation must be published in two languages); The Constitution of the Western Cape, 1997, s 5 (Designates Afrikaans, English and isiXhosa as official languages for the province.) The Western Cape Provincial Languages Act provides for the use of these languages by the legislature and requires all legislation to be published (but not necessarily simultaneously) in Afrikaans, English and isiXhosa. Act 13 of 1998.

[2] *New Union Goldfields v CIR* 1950 (3) SA 392, 405–406 (A). See Hofman (supra) at 335; George Devenish 'Statutory Bilingualism as an Aid to Construction in South Africa' (1990) 107 *SALJ* 441, 442–446.

[3] Section 35 of the Constitution of the Republic of South Africa Act 110 of 1983. The practice was for the State President to sign an Act in one language and the following Act in the other language. This practice was continued for a time after 1994. More recently, the practice is to sign Acts in English only.

[4] There is a similar provision for provincial legislation: FC s 124.

[5] IC s 65 required Acts of Parliament to be enrolled of record at the Appellate Division 'in such official South African languages as may be required in terms of section 3'. In the event of multiple versions being enrolled, IC s 65(2) provided that in cases of conflict between versions, the version signed by the President would prevail.

(iii) *Administration*

In contrast to legislation, the activities of the administration affect limited sections of the population, and do so at different times. This allows greater flexibility in the formulation of a language policy appropriate to a particular region, a section of the population or an administrative function.[1] The government should, in principle, be able to respond to communications from the public in the principal languages of a region and be able to offer public services in those languages.[2]

Some guidance on the content of the government's obligations to provide multilingual administrative services was provided by the Interim Constitution. IC s 3(3) read: 'Wherever practicable, a person shall have the right to use and to be addressed in his or her dealings with any public administration at the national level of government in any official South African language of his or her choice.' IC s 3(6) contained a similar right to communicate with a provincial administration in the official languages declared for the province.[3] The section imposed a duty on government institutions to implement measures enabling them to communicate in all official languages. Such measures would obviously entail employment of officials conversant with the official languages and the provision of translation services. The aim of the measures should have been to provide service of equal quality to the public in any of the official languages. However, given the qualification that the right was available only 'where practicable' and that equality between the official languages was a matter of aspiration rather than obligation, the government was in effect required only to attempt to provide the best possible services in all official languages.

FC s 6 does not repeat the prescriptions of IC s 3(3). The language in which administrative services are provided is instead left as a matter for regulation by

[1] A similar distinction is made between the official languages of the European Union for purposes of legislation and administration. There are 21 'official languages and the working languages' of the institutions of the Union. Regulations and documents of general application must be in all official languages. Documents sent directly by a member state or a citizen of the Union to the Union's institutions may be in any of the official languages. The reply must be in the language in which the communication was sent. Documents sent by an institution or official of the Union to a citizen of a member state must be in the language of the state or the language of the citizen. Failure by an institution to communicate or to transmit a document in the proper official language selected in terms of these rules constitutes an irregularity capable of affecting the validity of that document. See *Chemiefarma v Commission* [1970] ECR 661, 686–7.

[2] Fernand de Varennes *Language, Minorities and Human Rights* (1996) 176. De Varennes notes that failure by the government to communicate in the language of its citizens might have discriminatory effects:

> In addition to the fewer opportunities for employment in the state bureaucracy, non-native speakers with a lower proficiency in the official or majority language as compared to native speakers may experience disadvantages in the area of public services such as delays in obtaining appointments and interviews with bilingual public servants, the cost of paying another person to act as an interpreter during interviews and to assist with the completion of forms and consequent delays, the inability or varying level of difficulty to communicate information in order to be eligible for public benefits, decisions or privileges involving public authorities, the unintentional communication of incorrect information by untrained family members and friends acting as interpreters, the inability to accurately communicate medical information to public health authorities and employees, additional costs such as family members' travel expenses and absences from work in order to interpret.

[3] The ambit of the right was dependent on the declaration of official languages by the province. However, there was no constitutional obligation on a province to declare official languages.

legislation and policy. The National Language Policy Framework requires that official correspondence must be in the official language of the recipient's choice. Oral communication must take place in the preferred official language of the target audience.[1] Government documents must be in all eleven languages when 'the effective and stable operation of government at any level requires comprehensive communication of information', or in all of the official languages of a province. In cases where it is not necessary to make documents available in all eleven languages, they should be published in six languages.[2] The policy also requires each government structure to agree to use one or more working languages and languages of record for the purposes of intra- and inter-departmental communication.[3] The draft National Languages Bill proposes legislation to enforce these requirements.

(iv) *The margin of appreciation*

Whatever the government's obligations in principle, in practice its official language policy may be qualified by a number of considerations: 'usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population'. The first of these — 'usage' — presumably refers to the objective demographic incidence of use of a language in a particular region. The incidence of use of the eleven official languages is not uniform throughout South Africa.[4] In some regions there may be too few speakers of a particular language to justify measures protecting and encouraging the use of that language.[5] This fact would clearly justify the use by a provincial government of only the principal languages used in that province for purposes of legislation and administration.[6] It would also justify the national government's formulation of a policy in which only the principal languages of a region were employed for the provision of administrative services in that region.

The other limiting considerations — 'practicality, expense, regional circumstances and the balance of the needs and preferences of the population' — confer

[1] National Framework (supra) at para 2.4.6.2.

[2] The six must embrace one of the four Nguni languages, one of the three Sotho languages, Tshivenda, Xitsonga, English and Afrikaans. The Nguni and Sotho languages are to be used in rotation. Ibid at para 2.4.6.5.

[3] Ibid at 2.4.6.1.

[4] See, generally, E Grobler, KP Prinsloo & IJ Van der Merwe (eds) *Language Atlas of South Africa: Language and Literacy Patterns* (1990).

[5] Cf Committee of Ministers of the Council of Europe *European Charter for Regional or Minority Languages* (Adopted 1992)(Reprinted in Hurst Hannum (ed) *Documents on Autonomy and Minority Rights* (1993) 86.) The Charter requires States to implement measures protecting and encouraging the use of regional and minority languages in 'the geographical area in which the said language is the mode of expression of a number of people justifying the adoption of the various protective and promotional measures provided for in this convention.' Article 1*(b)*.

[6] This has been the approach of those provinces that have developed official language policies. The Constitution of the Western Cape, 1997 s 5 (Designates Afrikaans, English and isiXhosa as official languages for the province). The ill-fated Constitution of KwaZulu-Natal designated Zulu, English and Afrikaans as official languages. See *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: in re Certification of the KwaZulu-Natal Constitution* 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC)(Denying certification, but not on grounds of official language.)

a considerable margin of appreciation on the government. While 'regional circumstances' sounds like it covers the same ground as 'usage', it presumably must mean something different. The term may refer to conditions in a region which impact on administration and which influence the provision of services in multiple languages. For example, the absence of translation facilities in a particularly undeveloped region might qualify as a 'regional circumstance' justifying a restriction on the provision of multilingual services. As for 'practicality' and 'expense', these considerations recognise that, however noble the intentions behind the Final Constitution's recognition of eleven official languages, the constraints inhibiting the translation of intention into practice are considerable. It will all too often be practically and financially impossible to provide every type of government service in each of the official languages.

(c) Local government

When passing measures or taking action in relation to the languages employed by local government, municipalities 'must take into account the language usage and preferences of their residents'.[1] There are two significant differences between the constitutional language requirements for national and provincial governments and the constitutional language requirements for municipalities. First, there is no requirement that a municipality use at least two official languages. Second, rather than the long list of factors qualifying the obligation to provide multilingual services, municipalities are given a great deal less discretion: they may consider only usage and the preferences of their residents.

We have seen that 'usage' refers to objective demographic factors. International practice suggests that a 'sliding scale' is the most appropriate measure for determining the reasonableness of an official language policy for local or regional government. The greater the concentration of speakers of a language in a particular municipal area, the greater the obligation to provide municipal services in that language. Where there are fewer speakers of a language in the area, the municipality might be justified in providing fewer of its services in that language or even none at all.[2]

'Preference' refers to the fact that, in a multilingual state, individuals may be happy to communicate in languages other than their mother tongue. Where a municipality argues that its failure to provide services in a particular language is in accordance with the preferences of its residents, it must be able to demonstrate some evidence of these preferences.

65.5 Corrective Measures in Relation to Indigenous Languages

Notwithstanding the wide margin of appreciation conferred on the state in

[1] The Interim Constitution's official language provisions (IC s 3) bound only the national and provincial levels of government. See *Louw v Transitional Local Council of Greater Germiston* 1997 (8) BCLR 1062 (W)(No obstacle in Interim Constitution to a decision of council that English only be used in all official communications and proceedings.)

[2] See de Varennes (supra) at 177–8.

implementing its official language policy, FC s 6(2) requires the state to promote the use of indigenous languages: 'Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.' The corrective measures required by the subsection may obviously include, but are not confined to, the use of languages by government. Expense and practicality aside, the government should, in the elaboration of its official language policy, actively promote use of the 'historically diminished' languages in legislation and administration.[1]

Is Afrikaans an 'indigenous language of our people'? Afrikaans is a creole language, a variant of the Dutch of the 17th century colonists, with some lexical and syntactic borrowings from Malay, Bantu languages, Khoisan languages, Portuguese, and other European languages.[2] While its origins might qualify it for the label 'indigenous', it is unlikely that Afrikaans qualifies for the corrective measures required by FC s 6(2). The language was the beneficiary of decades of active promotion by the National Party government and can hardly be considered 'historically diminished' in use and status.

65.6 Use of an Official Language in Judicial Proceedings

The 1909 official language provisions and their successors did not require use of the official languages by the judiciary. Nevertheless, a practice developed that judicial proceedings could be conducted in either official language. Provision was also made for interpretation of criminal proceedings at state expense to accused persons who could speak neither official language.[3] In civil proceedings, neither the parties nor the witnesses possessed a right to the interpretation of evidence at state expense: though a court was required to call for interpretation where necessary.[4] The language of record of the courts was English or Afrikaans, and any part of criminal or civil proceedings not in these languages would be

[1] Besides official language measures, positive measures to promote indigenous languages would include the provision of education at all levels in a language, subsidising the production of dictionaries, textbooks and literature in that language and requiring the use of the language by the public broadcasting media.

[2] Raymond G Gordon (ed) *Ethnologue: Languages of the World* (15th Edition 2005), available at http://www.ethnologue.com (accessed on 15 September 2005).

[3] Section 6 of the Magistrates Court Act codified the rule of practice followed in the Supreme Court. Act 32 of 1944. Subsection 1 provided: 'Either of the official languages may be used at any stage of the proceedings in any court and the evidence shall be recorded in the language so used'. Subsection 2 provided for interpretation of evidence to an accused person who is not sufficiently conversant in the language in which that evidence is given. If, in the opinion, of a judicial officer an accused was not sufficiently conversant with the language being used in criminal proceedings, that judicial officer had a duty to provide for interpretation into a language the accused could understand.

[4] Rule 61 of the Uniform Rules of Court requires interpretation where evidence is given in a language with which the court or a party is not sufficiently conversant. Where the services of an interpreter are employed in any proceedings, the costs (if any) of interpretation are, unless the court otherwise orders, costs in the cause. Where the interpretation of evidence given in one of the official languages of the Republic is required by a party, such costs are at that party's expense. Section 5(2) of the Small Claims Courts Act is more generous. Act 61 of 1981. If evidence is given in a language with which one of the parties is not sufficiently conversant, an interpreter may be called by the court to interpret that evidence into a language with which that party appears to be sufficiently conversant, irrespective of whether the language in which the evidence is given is one of the official languages.

conducted through an interpreter and translated into and recorded in either English or Afrikaans.[1]

The Final Constitution contains measures aimed at allowing any person, whether a speaker of one of the official languages or not, to understand the criminal proceedings in which he or she participates. In criminal matters, FC s 35(3)*(k)* provides that, as part of the fundamental right to a fair trial, an accused person has the right 'to be tried in a language which the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language.'[2] According to FC s 35(4), detained, arrested and accused persons have the right to be given information about the reasons for their detention, their right to remain silent and their right to legal representation in a language that they understand.

There are no similar provisions in respect of civil matters.[3] Arguably, the right to have civil proceedings conducted in a language of choice forms part of the right to have disputes decided 'in a fair public hearing before a court.'[4] Court proceedings can hardly be considered fair if they are not intelligible to the parties.

It is, however, not clear whether the cost of provision of interpretation services should be borne by the state or by the litigant who requires those services. FC s 35(3)*(k)* is phrased as a fundamental right of an accused to the interpretation of judicial proceedings, and should be interpreted as placing a duty on the state to

[1] This practice continues even in the case of proceedings where all participants are conversant with an official language other than English or Afrikaans. See *S v Matomela* 1998 (3) BCLR 339 (Ck)(Nothing in the Final Constitution prevents the use of any official language for the purpose of conducting court proceedings where all participants are conversant with the language. However conduct of court proceedings in languages other than English or Afrikaans will entail inconvenience, delay and the additional expense of translation of the record in the event of a review or appeal.) See also *S v Damoyi* 2004 (2) SA 564 (C)(Conducting of court proceedings in Xhosa out of necessity when no interpreters were available and when all participants were Xhosa-speaking not a reviewable defect in the proceedings.) For criticism of these decisions on the grounds that they fail to live up to the Final Constitution's goals of multilingualism, see John Hlophe 'Official Languages and the Courts' (2000) 117 *SALJ* 690. For arguments that a single language of record (English) should not be adopted, see JJ Malan 'Die gebruik van Afrikaans vir die Notulering van Hofverrigtenge Gemeet aan Demokatiese Standaarde' (2003) 28 *J for Juridical Science* 36 (Removal of Afrikaans as a language of record would be contrary to official language provisions and, moreover, inefficient); *S v Pienaar* 2000 (2) SACR 143 (NC). But see *Damoyi* (supra) at para 18 (English ought to be treated as the language of record).

[2] The subsection does not confer a right to be tried in a language of choice but merely a language that the accused understands. See *Mthethwa v De Bruin NO* 1998 (3) BCLR (N). See, further, PJ Schwikkard 'Arrested, Detained and Accused Persons' in I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 737, 787; Frank Snyckers & Jolandi Le Roux 'Criminal Procedure: Arrested, Detained and Accused Persons' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 51.

[3] The Final Constitution contains no provision equivalent to IC s 107(1). IC s 107(1) read: '[a] party to litigation, an accused person and a witness may, during the proceedings of a court, use the South African language of his or her choice, and may require such proceedings of a court in which he or she is involved to be interpreted in a language understood by him or her.'

[4] FC s 34. See Iain Currie 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 60.

provide interpretation.[1] Such a duty was assumed by the state prior to the Interim Constitution in terms of the common law right to a fair trial, and it seems unlikely that the Bill of Rights would seek to alter this position.[2]

As for the provision of interpretation in the case of civil litigants and witnesses, the previous practice was for the parties to civil litigation to bear the cost of interpretation for any language other than English or Afrikaans. This practice is likely to continue, though certainly the state should attempt to provide court services in all official languages. As with criminal proceedings, a witness or civil litigant wishing to address a court in any of the official languages should be able to do so, and a court not sufficiently conversant with that language should be required to have such evidence interpreted at state expense.

65.7 Pan South African Language Board

IC s 3(10) required the Senate to establish an independent Pan South African Language Board ('PANSALB'). PANSALB was designed to 'promote respect for … and to further the development of the official languages.' The Interim Constitution further required that PANSALB be consulted and given the opportunity to make recommendations in relation to any proposed legislation relating to the official languages.[3]

PANSALB currently consists of no fewer than 11 and no more than 15 members — appointed by the Minister of Arts and Culture after consultation with the Parliamentary Portfolio Committee on Arts and Culture — who are experts in the fields of language planning, translation, interpreting, lexicography, language teaching, literacy, language legislation and language matters. Under the Final Constitution, PANSALB is, in addition, charged with promoting respect for and the development of a list of languages 'used by communities in South Africa' that have not been designated as official languages,[4] as well as 'Arabic, Hebrew and Sanskrit and other languages used for religious purposes'.

[1] Such an interpretation accords with international practice. See Bruno de Witte 'Linguistic Equality: A Study in Comparative Constitutional Law' (1985) 3 *Revista de Llengua i Dret* 43, 105:

> Practically all countries provide for the assistance of an interpreter to the persons who do not have a sufficient knowledge of the language used by the [criminal] court; such aid is usually provided without cost for the accused … this guarantee is only indirectly linked to the general principle of equality and more closely to the more specific constitutional principles of 'fair trial, 'equality of arms', or, in the United States, 'due process'.

[2] The right of an accused to provision of interpretation at state expense was essential for a fair trial, and could not be lawfully waived by the accused. See *Mackessack v Assistant Magistrate, Empangeni* 1963 (1) SA 892 (N); *Geidel v Bosman NO* 1963 (4) SA 253 (T); *Ohanessian v Koen* 1964 (1) SA 663 (T). FC s 39(3) reads, in relevant part: 'The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

[3] Pan South African Language Board Act 59 of 1995.

[4] These languages are German, Greek, Gujerati, Hindi, Portuguese, Tamil, Telegu and Urdu. See FC s 6 and IC s 3.

Item 20 of Schedule 6 provides that the Pan South African Language Board created under the Interim Constitution continues to function under the Final Constitution. FC s 6(5) amplifies PANSALB's obligations and requires that PANSALB promotes the official languages, as well as Khoi, Nama, San, and sign language.

66 Freedom of Movement and Residence

Jonathan Klaaren

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Freedom of movement and residence

21. (1) Everyone has the right to freedom of movement.

(2) Everyone has the right to leave the Republic.

(3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.

(4) Every citizen has the right to a passport.[1]

66.1 INTRODUCTION

(a) Application and Scope of FC s 21

The application and the scope of FC s 21 are two significant issues analytically prior to the determination of the extent of the protection of the right. The content and the interpretation of the right to freedom of movement and residence are intricably linked to general issues of application and more specific questions about citizenship.[2]

(i) *Beneficiaries of the Right*[3]

Textually, FC s 21's protection is given in some cases to 'everyone' and in other cases only to 'every citizen'. FC ss 21(1) and (2) are granted to 'everyone'. FC ss 21(3) and (4) are granted to 'citizens'. This distinction between citizens and non-citizens serves only to restrict the protection of the rights to enter the Republic, to remain in the Republic, and to reside anywhere in the Republic. On a straightforward textual interpretation, it is only the criterion of citizenship and not those of territoriality, nationality, or legality that determine FC s 21's application. Nonetheless, because these three latter criteria often drive the meaning of citizenship, they warrant further discussion.

As noted below, 'everyone' as used in FC s 21(1) and (2) means *everyone* and will apply to non-citizens. By contrast, the application of FC s 21 (3) and (4) is limited to South African citizens.

Where do juristic persons fit within this scheme? That juristic persons are able to possess the attributes of territoriality, nationality, and legality suggests that they ought to be able to secure some of the benefits of FC s 21.

That said, a distinction ought to be drawn between the first two sub-clauses of FC s 21 and the last two. The first two, certainly insofar as they comprise the freedom of locomotion, are presumably restricted to natural persons.

[1] Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)('Final Constitution' or 'FC').

[2] While the application of other clauses in the Bill of Rights is limited to citizens, the limited coverage of the last two sub-clauses in FC s 21 flows from a very specific intervention by the Constitutional Assembly. For a discussion of this intervention, see Jonathan Klaaren 'Contested Citizenship' in Penelope Andrews & Stephen Ellmann *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 304, 308-9.

[3] For a general discussion of the different classes of beneficiaries of the substantive provisions of the Bill of Rights, see Stu Woolman 'Application' in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 31.3.

With respect to dual nationals, such persons, whether juristic or natural, should likewise be able to benefit from their South African nationality. Indeed, at international law, a person may have more than one nationality. South Africa's domestic legislation is relatively tolerant of dual nationality and clearly envisages persons with a nationality in addition to their South African nationality.

(ii) *The Criterion of Territoriality*

Territoriality is intimately bound up with the right to freedom of movement within the Republic. The Constitutional Court has, over several cases, articulated a relatively restrictive, though somewhat incoherent, territory-based approach to the application of the Bill of Rights.[1]

In *Lawyers for Human Rights v Minister of Home Affairs*, the Minister of Home Affairs argued for the non-application of the Bill of Rights to foreign nationals on the borders and without formal entry.[2] The Court rejected this contention and applied the constitutional rights to persons at South Africa's borders. *Lawyers for Human Rights* thus granted protection of the right of freedom and security of the person and the right of arrested, detained and accused persons to foreign nationals not yet formally granted permission to enter the country. However, the Court charted a relatively cautious course with respect to the application of the Bill of Rights in similar situations:

> It is neither necessary nor desirable to answer the general question as to whether the people to whom s 34 of the [Immigration] Act applies are beneficiaries of all the rights in the Constitution. It is apparent from this judgment that the rights contained in s 12 and s 35(2) of the Constitution are implicated. The only relevant question in this case therefore is whether these rights are applicable to foreign nationals who are physically in our country but who have not been granted permission to enter and have therefore not entered the country formally. These rights are integral to the values of human dignity, equality and freedom that are fundamental to our constitutional order. The denial of these rights to human beings who are physically inside the country at sea- or airports merely because they have not entered South Africa formally would constitute a negation of the values underlying our Constitution. It could hardly be suggested that persons who are being unlawfully detained on a ship in South African waters cannot turn to South African courts for

[1] For a slightly different interpretation of the Court's position on extraterritoriality, see Woolman 'Application' (supra) at § 31.6.

[2] *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC)('*Lawyers for Human Rights*').

protection, or that a person who commits murder on board a ship in South African waters is not liable to prosecution in a South African court.[1]

Once it is accepted that persons *within* our territorial boundaries are entitled to constitutional protection, there is no reason why 'everyone' in FC s 12(2) and FC s 35(2) should not be given its ordinary meaning. When the Final Constitution intends to confine rights to citizens it says so.

Lawyers for Human Rights turns on a reading of the Bill of Rights that limits its protection to persons *within* the territorial boundaries of the Republic. Indeed, the *Lawyers for Human Rights* Court did not clearly rule out the use of the criterion of South African nationality in considering the application of other rights. Of even greater concern, the Court may also be understood to be leaving open the door to the 'entry doctrine'. That doctrine treats persons without regularised migration status within the country as if they remained outside its territory. Following *Lawyers from Human Rights*, when read with both *Mohamed* and *Kaunda*, the Court's position can be articulated as follows: A substantive provision of the Bill of Rights will be strongly presumed to operate within the territory of the Republic; however, the extra-territorial application of a substantive provision of the Bill of Rights will have to be demonstrated clearly.

What bearing does this position have on the content of FC s 21? It would seem that FC s 21 (1) and FC s 21(2) apply to all persons within the territory. FC s 21 would also seem to possess at least some extra-territorial dimensions. For instance, the protection afforded to every citizen of a right to a passport must have some application to the activity of South African embassies or consulates. Furthermore, the protection afforded to enter and to leave the country would not be meaningful without at least some extra-territorial protection. Still, as *Lawyers for Human Rights* suggests, the extra-territorial application of FC s 21 is not to be presumed, and is likely to be limited to its specific purposes. Finally, FC s 21 (3) and FC s 21(4) would appear to possess little by way of extra-territorial application.

(iii) *The Criterion of South African Nationality*

The term 'everyone' in FC s 21 (1) and FC s (2) should be interpreted as affording coverage to all natural persons, whether or not they hold South African nationality.[2] Constitutional Court authority and the text of FC s 21 (3) and FC s (4) support this proposition.[3]

This state of play was not always so clear. The application of various substantive provisions of the Bill of Rights to the Aliens Control Act was hotly contested

[1] *Lawyers for Human Rights* (supra) at paras 26-27. The Court further noted: 'It is not necessary in this case to answer the question whether people who seek to enter South Africa by road at border posts are entitled to the rights under our Constitution if they are not allowed to enter the country.' Ibid at para 27.

[2] See Woolman 'Application' (supra) at § 31.3.

[3] The drafting history also supports this conclusion.

in the lower courts under the Interim Constitution.[1] Despite the trend of court decisions against its position, the Minister and the Department of Home Affairs continued to insist that persons without South African nationality could not benefit from the Bill of Rights.[2]

As I have already noted, the Constitutional Court lent some succor to this position in *Lawyers for Human Rights* by refusing to state, categorically, that all persons would enjoy all provisions of the Bill of Rights.[3] The *Lawyers for Human Rights* Court was careful to leave open the question of whether the rights of freedom and security of the person and the rights of arrested, detained, and accused persons applied to persons arriving by road at the borders of the Republic.

However, in *Khosa*, the Court stated emphatically that the criterion of South African nationality would not be applied in determining the application of the Bill of Rights within the territory of the Republic. Writing for the majority, Mokgoro J contrasted the right to social security granted to 'everyone' in FC s 27 with the right of access to land in FC s 25(5) granted to 'citizens'. Mokgoro J confirmed that 'everyone' would be given its ordinary meaning and would apply to non-citizens — and in particular permanent residents — claiming the benefits of access to social security.[4]

(iv) *The Criterion of Legality*

Intertwined in the debate over the application of the Bill of Rights (and perhaps especially so in the policy areas of movement and residence) is the question of legality.[5] While lower courts have not always been explicit on this point, whether a

[1] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC'). See Jonathan Klaaren 'So Far Not So Good: An Analysis of Immigration Decisions Under the Interim Constitution' (1996) 12 *SAJHR* 605; Anton Katz 'Immigration and the Court: From *Xu* to *Ruyobeza*' in Max du Plessis & Steve Pete (eds) *Constitutional Democracy in South Africa: 1991-2004* (2004). Our constitutional doctrine has thus departed from pre-Bill of Rights cases. See *Cabinet for the Territory of South West Africa v Chikane & Another* 1989 (1) SA 349 (A)(Fundamental rights are often restricted to nationals of states with charters of human rights; restrictions on aliens' rights to enter and to move could not contravene the rights to equality or due process); *Lewis v Minister of Internal Affairs & Another* 1991 (3) SA 628 (B)(Since it was never the intention of the legislature in promulgating the Bophuthatswana Bill of Rights to allow individual rights to prevail over the interests of the state or public safety, an alien may not contest a Minister's decision on the grounds that he was denied a hearing, reasons for his deportation, or treated unequally.)

[2] For more on the relationship between nationality and children, see Adrian Friedman & Angelo Pantazis 'Children's Rights' in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 54.

[3] This case-by-case approach may have been a result of the unusual procedural circumstances of the case. The case which required, effectively, abstract review of parts of the Immigration Act.

[4] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) at paras 46-47.

[5] For the constitutional doctrine of legality, as opposed to the meaning of the term under immigration legislation, see Frank Michelman 'The Rule of Law, Legality, and the Supremacy of the Constitution' in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11. Indeed, the constitutional doctrine of 'legality' suggests that the immigration doctrines of 'legality' may well be unconstitutional.

person is 'legal' or 'illegal' has often counted heavily in the determination of fundamental rights protection. This is true both at the level of doctrine, and perhaps more significantly, at how the law is applied on the streets.

What the criterion of 'legality' entails in these debates over application is usually understood as a regularized status in terms of migration legislation. Before 2002, the applicable legislation was the Aliens Control Act. As of 2002 the Aliens Control Act was supplanted by the Immigration Act.[1]

In present day South Africa, migration status is, however, more a matter of bureaucratic practice than it is of judicial interpretation. Furthermore, more than ten years after the coming into effect of South Africa's constitutional framework, migration status still bears the readily apparent effects of apartheid. The Aliens Control Act afforded state bureaucrats under apartheid the discretion to determine rights of movement and residence. Despite the replacement of the Aliens Control Act by the Immigration Act in 2002, the bureaucracy has remained wedded to the discriminatory ways of the Aliens Control Act. As we shall see, however, the doctrine of constitutional supremacy may warrant a finding that the immigration legality doctrine offends any number of substantive provisions of the Bill of Rights.

According to the drafting history of FC s 21, the issue of immigration legality was specifically touched upon by the Constitutional Assembly. The Panel of Constitutional Experts addressed the issue of immigration legality and argued that migration status was appropriate for limitations enquiry and not for rights protection or application concerns.[2] After consideration of this opinion, the final text adopted by the Assembly granted the right of residence only to citizens. Thus, the Assembly used the criterion of South African nationality and not that of legality in delineating the scope of application of FC s 21. This drafting history strongly suggests that FC s 21 — where it applies to everyone — applies to all persons present in the territory of the Republic regardless of the criterion of legality. In addition, the drafting history supports the contention that persons challenging their citizenship status or the right to a passport can rely upon FC s 21.

(b) The Content of FC s 21

(i) *Purpose of the Right to Freedom of Movement and Residence*

Any constitutional interpretation of the right to freedom of movement and residence must acknowledge the apartheid history of restrictions on those rights.[3] Pass laws were a defining feature of apartheid. They were among the earliest and

[1] Act 13 of 2002.

[2] Jonathan Klaaren 'Contested Citizenship' in Penelope Andrews and Steven Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 304, 308-9.

[3] John Dugard *Human Rights and the South African Legal Order* (1978) 137-141 (Discusses the power to restrict movement in terms of the Riotous Assemblies Act, the Internal Security Act, and the Bantu Administration Act.)

one of the most hated of apartheid restrictions on the rights of black South Africans. A common phrase of the anti-apartheid struggle was that black persons had no place to rest.[1]

This deep national concern with rights of movement and residence — along with their inclusion in international instruments[2] — resulted in FC s 21. The prominence of rights — and the denial of rights — to movement and residence in South Africa resonates profoundly with contemporary concerns about migration and national policy towards foreign nationals (non-South African nationals)[3] and ought to inform our interpretation of FC s 21. The courts have already demonstrated that they are alive to the purpose of FC s 21 and are committed to not permitting history to repeat itself.[4]

A historical inquiry would also show how the freedom of movement relates to the freedom of residence. Because of an overriding concern with granting rights to 'illegals', South Africa's Final Constitution does separate the two rights. This bifurcation of the rights suggests that the state possesses greater latitude with respect to the right to residence than with respect to the right to movement.

A further purpose of the right is the promotion of liberty. Where foreign constitutional courts recognize an implicit right to freedom of movement, it is often grounded in an express right to personal liberty.[5]

Where the freedom of movement has been expressly enumerated in constitutional texts, it has often been linked to the right of economic activity. This relationship suggests a final purpose of the right: the construction of a Republic as a free trading area. The drafters of the Final Constitution did not expressly follow this trend.[6] However, while the core of the right of freedom of movement may be

[1] Christina Murray & Catherine O'Regan *No Place to Rest: Forced Removals and the Law in South Africa* (1990).

[2] Beyond its specifically South African roots, the right of the freedom of movement has a venerable international pedigree. Indeed, the right to freedom of movement is contained explicitly in many of the international human rights instruments. See, eg, art 13 of the Universal Declaration of Human Rights, art 12 of the International Covenant on Civil and Political Rights, and art 12 of the African Charter on Human and Peoples' Rights.

[3] The Constitutional Court prefers the term 'foreign national' over that of 'alien'. See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) n 11.

[4] *Victoria & Alfred Waterfront (Pty) Ltd & Another v Police Commissioner of the Western Cape & Others* 2004 (4) SA 444 (C), [2004] 1 All SA 579, 584 (C)('*Victoria' & Alfred Waterfront*')('I may add that in the light of the unfortunate recent history of this country where millions of people were denied access to towns, cities and other public places, the practice of excluding people from parts of a city, albeit for limited periods, may appear repugnant and not pass constitutional muster.')

[5] Indian case law suggests that the right may be interpreted in this fashion. See Penuell Maduna 'Movement and Residence' in Halton Cheadle, Dennis Davis, and Nicholas Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 321 citing Paul Sieghart *The International Law of Human Rights* (1983). The right of freedom of movement has also been used in the construction and interpretation of other rights. See *The Attorney-General v Dow* 1994 (6) BCLR 1 (Botswana Court uses freedom of movement to flesh out understanding of geneder equality).

[6] Lourens du Plessis & Jacque de Ville 'Personal Rights: Life, Freedom and Security of the Person, Privacy and Freedom of Movement' in David Van Wyk, John Dugard, Bertus de Villiers, and Dennis Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 212, 254-263 (Notice that the Kempton Park negotiators opted for 'the German rather than the Canadian approach.').

located in the right of individual locomotion,[1] the right of freedom of movement inevitably establishes the territory of the Republic as one where free movement, and thus free economic activity and trade, may occur.[2]

(ii) *Everyone has the right to freedom of movement*

The pass laws of apartheid offer perhaps the most obvious and egregious example of a violation of the right to freedom of movement. The use of border posts to regulate inter-provincial travel within South Africa would, likewise, be deemed constitutionally infirm under our basic law.

The content of the right of freedom of movement in post-apartheid South Africa clearly extends beyond preventing the reintroduction of pass law legislation.[3] Random checks of identity documents would likely not pass constitutional muster.[4] Indeed, the right may now be deemed to operate not only between the state and its citizens, but in the 'so-called' private domain.[5]

For example, in *Victoria & Alfred Waterfront (Pty) Ltd & Another v Police Commissioner of the Western Cape* the High Court was obliged to assess the relative value of the applicants' property rights — including an obvious right to protect their custom and business interests — and the respondents' right to freedom of movement — where they engaged in the practice of begging — at a popular Cape

[1] It is sometimes suggested that the freedom of movement right also includes a right to be free from surveillance. See Maduna (supra) at 321—322 (Citing *Kharak Singh v State of Uttar Pradesh* [1964] 1 SCR 332 (Subha Rao J for the minority).) The placing of a person under surveillance may constitute a restriction with a lower degree of control than a detention that would trigger the right of freedom and security. Nevertheless, surveillance constitutes a degree of control of personal liberty that ought to attract the attention of our courts. However, it would seem that the right to privacy and the right of access to information would be better suited to provide a location for defending the individual or a juristic person against unjustifiable surveillance. See David McQuoid-Mason 'Privacy' in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 38; & Jonathan Klaaren & Glen Penfold 'Access to Information' in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2002) Chapter 62.

[2] For related views on the relationship between conflicts of law and free economic activity, see Victoria Bronstein 'Conflicts' in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 16.

[3] *Victoria & Alfred Waterfront* (supra) at 585 ('With regard to freedom of movement (section 21 of the Bill of Rights) Mr de Waal submitted that the core of the right is to prevent the reintroduction of the pass laws which prevented people from moving freely from one place to another during the apartheid era. It may be that the effect of the section is to prohibit such legislation. However, the section is not limited to those circumstances. It is broadly stated. There is no reason to limit it so as to bring it in line with the common law; rather, the converse applies.')

[4] See *Elliot v Commissioner of Police, Zimbabwe* 1998 (1) SA 21 (ZS).

[5] *Victoria & Alfred Waterfront* (supra) at 585 ('The right to exclude is further limited by the fact that exclusions will be a limitation of the constitutional right of freedom of movement of the second and third respondents.') See also *South African National Defence Union v Minister of Defence & Others* 2003 (3) SA 239, 255 (T), 2003 (9) BCLR 1054 (T)('*SANDU*')(Discusses the right of free movement.) But see *SANDU & Another v Minister of Defence & Others; In re* ***SANDU v Minister of Defence & Others*** 2004 (4) SA 10 (T), [2003] 3 All SA 436 (T)(Criticizes the Constitutional Court's earlier judgment in *SANDU* in this regard.)

Town mall.[1] The decision turned in part on the character of this mall. The Court wrote:

> The Waterfront is somewhat different from other shopping malls and appears to be private property of a particular kind. It is 123 hectares in extent and consists of a vast array of shops, restaurants, offices and places of public entertainment. It also includes public roads, hotels and access to the sea. People wishing to visit Robben Island are obliged to board the boat or ferry transferring them to the island at the Waterfront. Moreover, a post office and a police charge office are located on the property. It has the distinctive character of private property to which members of the public have routine access and which the public are invited to visit whether or not they intend to conduct any business on the property. It is for all practical purposes a suburb of Cape Town.[2]

It may make some difference where in the territory of the Republic the restrictions on movement are levied. For instance, the police and the military may legitimately exercise greater powers of search and seizure within a certain proximity of the nation's borders. Likewise, reasonable restrictions on movement after natural disasters or in the immediate environs of a police investigation are likely to be found justifiable.

An infringement of the freedom of movement is conceptually distinct from an infringement of the right of freedom and security of the person.[3] One way to state the distinction between these two rights is that a restriction of the freedom of movement is a restriction that does not amount to a detention. It may be a condition on access or egress. A restriction on movement would embrace a mandatory exclusion from a certain area (such as exclusion from a military base), rather than a mandatory inclusion (detention). As a general rule, a restriction on the freedom of movement does not entail the same degree of control as does a detention.

The general right to freedom of movement may apply to the right to international travel. Such a right would, in part, be contingent upon the Court's recognition of FC s 21's extraterritorial application. However, one can imagine a FC s 21 challenge where an international speaker is refused a visa to South Africa or persons within the country are denied the ability to travel to hear a speaker on a controversial topic.

The right of freedom of movement may also be influential in respect of decisions regarding deportation. For instance, the right of freedom of movement was employed in a pre-Immigration Act matter declaring invalid the deportation from

[1] For a general discussion of rights of assembly and movement in quasi-public spaces such as shopping malls, see Stu Woolman 'Freedom of Assembly' in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 43.

[2] *Victoria & Alfred Waterfront* (supra) at 582. Cf *Landvreugd v Netherlands* 36 EHRR 56 (A 14-day banning of beggars from an area of Amsterdam was upheld.)

[3] For a detailed analysis of the right to freedom and security of the person, see Michael Bishop & Stu Woolman 'Freedom & Security of the Person' in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 40.

South Africa of a foreign national married to a South African citizen.[1] Section 34 of the Immigration Act now regulates the deportation and detention of 'illegal foreigners' and, at least in respect of deportation, must comply with the right of freedom of movement and residence.

The right of freedom of movement in FC s 21(1) likely protects the rights of lawful resident foreign nationals in a similar manner to FC s 21(3). In short, lawful resident foreign nationals should possess the same rights to enter, remain in and to reside anywhere in the Republic.[2] That said, it may be easier for the government to justify regulation of, for instance, the right to enter the Republic with respect to foreign nationals than with respect to citizens.

Residency requirements may impact upon the freedom of movement as well as upon the freedom of residence. Disproportionate requirements of residency may interfere with the freedom of movement. For instance, if the hospitals of Gauteng were to limit the availability of their services to residents of Gauteng, this limitation might require justification in terms of FC s 36.[3]

(iii) *Everyone has the right to leave the Republic.*

The laws of apartheid-era South Africa regulated the right of persons to leave the Republic.[4] Currently, most Southern African countries have only procedural requirements for departure from their territory. However, some countries substantively regulate the right of persons to leave their territory.[5]

Procedural regulations regarding departure would clearly fall within the ambit of FC s 21(2). They would, however, in most cases be deemed constitutional.[6] Such procedural regulations are usually not intrusive and certainly yields benefits of information to the state in its efforts to promote development and, at least in the case of its nationals, to protect their rights beyond the borders of the territory.

[1] *Patel &Another v Minister of Home Affairs & Another* [2000] 4 All SA 256 (D).

[2] In this respect, the thrust of the interpretation offered by a former Minister of Home Affairs, Penuell Maduna, is instructive:

> Though the words used in section 21(3) of the Constitution are clear, it is unimaginable that the intention of the makers of our Constitution (all of whom were inspired by the noble ideal of democracy founded on basic core values encapsulated in the Constitution) was consciously to take away the rights of foreigners lawfully abiding with the national territory of our country. In terms of section 6(2) of the Canadian Charter of Rights and Freedoms, these rights are enjoyed by all persons lawfully within any democratic country. It is, thus, safer to assume that a foreigner lawfully within the Republic has a right to enter, reside and remain in any province, city, town or community with generally the same mobility rights as a South African citizen.

Penuell Maduna 'Movement & Residence' Halton Cheadle, Dennis Davis & Nicholas Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 299.

[3] In this respect, it is probably worth noting that the constitutional position of the provinces is derivative of the national territory rather than the reverse. In this respect, the South African position on residency would presumably be even stronger than the protection afforded by the US Constitution.

[4] John Dugard *Human Rights and the South African Legal Order* (1978) 141-143.

[5] For instance, the African Emigration and Immigrant Workers Act 1 of 1954 (Malawi) apparently remains in effect.

[6] Section 9 of the Immigration Act 13 of 2002 regulates the departure of persons from the territory requiring a passport, that such departure be done at a port of entry, that the departure is recorded by an immigration officer, and that such departing person may be examined by an immigration officer.

For example, in the current global market for services and skilled professionals, medical professionals trained in South Africa will want to exercise the right to leave the Republic to work in other countries.

FC s 21(2) differs from the rights contained in FC s 21(3) most obviously (apart from its content) by its extension to 'everyone' as opposed to every 'citizen'. As noted above, FC s 21(2) is most likely applicable only to natural persons.

(iv) *Every citizen has the right to enter the Republic*[1]

The procedures that the state uses to verify claims of entrance based on citizenship at the border would be implicated by this right.[2] One substantive obligation imposed by the right is that a state must accept a citizen deported to it.

(v) *Every citizen has the right to remain in the Republic*

Most of the litigation regarding the right to remain in the Republic is concerned with the legislative provisions allowing for extradition.[3] Comparative constitutional case law suggests that extradition laws do not violate the right of freedom of movement.[4] Despite the wording of FC s 21(3), the current policy of the Republic is that the citizenship of the person to be extradited is not relevant. The Constitutional Court has found no reason to query this policy determination.[5] Nonetheless, in the view of the *Geuking* Court, FC s 21(3) could well be relevant to 'the exercise of the discretion conferred on the Minister by the Act.'[6] To be safe, the Minister ought to at the least consider the citizenship of the person in the exercise of the Extradition Act's provisions regarding orders or refusals of surrender to a foreign state.

The language of FC s 21(3) suggests that certain forms of punishment are no longer permissible. For example, FC s 21(3) should bar the state from exiling a citizen.[7]

[1] One relevant international instrument is the International Covenant on Civil and Political Rights. Article 12(4) provides: 'No one shall be arbitrarily deprived of the right to enter his own country.'

[2] Section 9 of the Immigration Act 13 of 2002 regulates admission requiring a passport, that such admission be done at a port of entry, that the entry is recorded by an immigration officer, and that such entering person may be examined by an immigration officer.

[3] Extradition Act 67 of 1962. Other constitutional challenges to extradition proceedings have implicated other provisions of the Final Constitution. See *Harksen v President of the Republic of South Africa* 2000 (2) SA 825 (CC), 2000 (4) BCLR 578 (CC)(FC s 231); *Director of Public Prosecutions: Cape of Good Hope v Robinson* 2005 (2) BCLR 103 (CC), 2005 (2) BCLR 103 (CC)(FC s 39(2)).

[4] *Re Federal Republic of Germany and Ruaca* (1983) 145 DLR (3d) 638.

[5] *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC), 2004 (9) BCLR 895 (CC)('*Geuking*') at para 28 ('The President is therefore entitled to adopt a policy that it is in the interests of the Republic to consent to a request for extradition proceedings against a person, regardless of his or her citizenship.')

[6] Ibid.

[7] Although it did not explicitly use the right to movement and residence, *Mohamed v President of the Republic of South Africa* concerned the conditions of leaving the Republic where the person in question has been detained by the state. 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC) The *Mohamed* Court interpreted the right to life and the right to be free from cruel and unusual punishment to require assurances from a *receiving* state that a death penalty would not be used upon a person being *removed* from South Africa.

(vi) *Every citizen has the right to reside anywhere in the Republic*

Residence means an acknowledged or a sanctioned place of residence. It does not refer to the substantive aspects of residence. The right to shelter is catered for by FC s 26, the right to adequate housing.

It has been argued that the term 'anywhere in the Republic' restricts the powers of the provincial legislatures to prevent persons from other provinces from taking up residency.[1] For example, any provincial law or policy requiring occupancy in a province for more than a year before providing particular medical benefits or even treatment would be constitutionally suspect.[2] FC s 21(3) may well protect a person's right to determine where they receive their post.

That the benefits of FC s 21(3) extend only to citizens has certain repercussions for non-citizens. Any challenge to a residency requirement by a non-citizen (for instance asylum seekers) would need to proceed in terms of FC s 21(1).

(vii) *Every citizen has the right to a passport*

Since the issues that this subsection raises are closely connected with the status, rights, and duties of citizenship, this aspect of the right to freedom of movement and residence is discussed, along with such closely related provisions as FC s 3 and FC s 20, in the chapter on citizenship.[3]

(c) Policy issues relevant to the Right to Freedom of Movement and Residence

The courts have deployed the right of freedom of movement and residence in a number of decisions where the right itself was not actually at issue. In criminal law, the right has been used as a partial justification for the length of a sentence.[4] In matrimonial property law, the right has been cited as part of the justification for a spoliation order to return marital property taken from a residence.[5] In prisons law, the right was considered 'widely' relevant in a decision denying internet access for study purposes.[6] In some evictions cases before the Land Claims Court, the right has been said to be of little or no avail.[7] In respect of civil procedure, the right was invoked in support of an order requiring release of

[1] Maduna (supra) at 315.

[2] Ibid at 320.

[3] See Jonathan Klaaren 'Citizenship' in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, April 2007) Chapter 67 (Discusses the provisions of the South African Citizenship Act 88 of 1995 and the South African Passports and Travel Documents Act 4 of 1994).

[4] *Mfingwa & Others v S* [2001] JOL 8933 (Tk)(Two year sentence for kidnapping of a woman and a child and forcible ejection from their homestead.)

[5] *Mans v Mans (born Maddock)* [1999] 3 All SA 506 (C).

[6] *Thukwane v Minister of Correctional Services & Others* [2005] JOL 13467 (T).

[7] *Portion 608 New Belgium CC v Monyiki & Another* [2003] JOL 10995 (LCC)(Little avail); *Swanevelder & another v Mpedi & others* [2002] JOL 9913 (LCC)(No avail).

the passport and the travel documents of a person arrested in terms of an arrest *tamquam suspectus de fuga*.[1]

The Constitutional Court has considered two challenges based on the right of freedom of movement and residence to certain aspects of a health care providers licensing scheme. In *Affordable Medicines Trust & Others v Minister of Health of RSA & Another*, the licensing scheme at issue linked the license to dispense medicines to a particular premises.[2] The Constitutional Court dismissed the freedom of movement and residence challenge in the following terms:

> The applicants contended that the requirement to apply for a new licence whenever a medical practitioner is moving to new premises interferes with the freedom of movement. I think that it can be accepted that the right to practise a profession includes the right to decide where one will practise one's profession. This being a right relating to the practice of a profession, it is subject to regulation under section 22. The requirement of a licence does not take away the right to choose where to practise medicine. But what it does is merely to require that if the practice is to involve compounding and dispensing of medicines, this should be done from premises in respect of which a licence to dispense medicines has been issued. This does not infringe the right to freedom of movement as contemplated in section 21 of the Constitution. There is nothing in the regulations to suggest that medical practitioners will be prevented from practising their profession from wherever they choose.[3]

The *Affordable Medicines Trust* Court thus preferred to view the matter in terms of the right to practice a profession rather than the right of freedom of movement and residence.[4] Similarly, in *Coetzee v Comitis*, a challenge to restraint of trade, worded at times in the language of the freedom of movement, was ultimately decided by the Cape High Court in terms of the right to practice one's profession.[5]

(d) The relationship of freedom of movement and residence to other constitutional rights

(i) *Dignity*

In *Dawood v Minister of Home Affairs*, the right to dignity was understood to encompass a right of spouses to live together.[6] An immigration regulation requirement that an application for permanent residence had to be made from outside the country would have forced spouses to choose between leaving South Africa or separating from one another. The Court held such a choice to be a

[1] *Alliance Corporation Ltd v Blogg: In re Alliance Corporation Ltd v Blogg & Others* [1999] 3 All SA 262 (W)(Detention of person's travel documents and limitation on freedom of movement not justified once conditions for an internationally enforceable judgment have been satisfied.)

[2] 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC)('*Affordable Medicines Trust*').

[3] Ibid at paras 102-103.

[4] Ibid at para 134 (Related challenge to a regulation on the basis of the right of freedom of movement and residence was also dismissed.)

[5] *Coetzee v Comitis & Others* 2001 (1) SA 1254 (C), 2001 (4) BCLR 323 (C), [2001] 1 All SA 538 (C)(Declared invalid a restraint of trade clause that limited a football player's movement from one club to another.)

[6] 2000 (1) SA 936 (CC), 2000 (8) BCLR 837 (CC). See also *Booysen v Minister of Home Affairs* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC)(Extended *Dawood* to further classes of migration regulation.)

violation of the right to intimate association protected by FC s 10.[1] In *Minister of Home Affairs v Watchenuka*,[2] the Supreme Court of Appeal used the right to dignity to strike down an official policy barring 'asylum seekers — people who claim to be taking refuge in this country from persecution or conflict elsewhere — from being employed and from studying while they are waiting to be recognised as refugees.'[3]

(ii) *Equality*

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, gay and lesbian persons challenged an immigration regulation that did not extend the same benefits to same-sex life partners as it did to opposite-sex life partners.[4] The Constitutional Court ultimately ordered that permanent residence permits be made available to persons in same-sex life partnerships.

In *Khosa v Minister of Social Development*, the Constitutional Court struck down a legislative scheme that limited the right to social benefits to South African nationals.[5] The Court held that permanent residents — in this case former refugees from Mozambique — were entitled to equal treatment and equal access to social assistance.

However, refugees and foreign nationals are not always accorded equal treatment under our basic law. In *Union of Refugee Women*, a majority of the Constitutional Court found that a bar on refugees being employed as security service providers did not violate the refugees' right to equality.[6]

[1] The South African approach differs from the Zimbabwean approach to this issue. See *Rattigan & Others v Chief Immigration Officer & Others* 1994 (2) ZLR 54 (S); *Salem v Chief Immigration Officer & Another* 1994 (2) ZLR 287 (S); and *Kohlhaas v Chief Immigration Officer & Another* 1997 (2) ZLR 441 (S).

[2] 2004 (4) SA 326 (SCA), 2004 (2) BCLR 120 (SCA).

[3] Ibid at para 1.

[4] 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC)(The right of freedom of movement had been argued as an alternative basis for the ruling in the lower court.) See also *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 1999 (3) SA 173 (C), 1999 (3) BCLR 280 (C), [1999] 1 All SA 643 (C).

[5] *Khosa & Others v Minister of Social Development & Others; Mahlaule & Another v Min of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC).

[6] *Union of Refugee Women & Others v The Director: The Private Security Industry Regulatory Authority & Others* CCT 39/06 (as yet unreported decision of 12 December 2006).

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26.6*(c)*(iii), 32.3*(a)*, 32.3*(c)*, 35.1*(d)*(ii), 35.4*(a)*, 35.4*(d)*(iii), 48.4, 50.3*(b)*(i)*(z)*, 50.3*(b)*(ii)*(bb)(y)*, 56B.3*(b)*(i), 63.1, 63.6*(a)*, 63.6*(b)*, 63.6*(d)*

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Democratic Alliance Western Cape v Western Cape Minister of Local Government and Another [2006] 1 All SA 384 (C) 23A.3

Democratic Party and Others v Brakpan Transitional Local Council and Others 1999 (4) SA 339 (W), (1999) (6) BCLR 657 (W) ..... 10.3*(d)*(ii)
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Department of Land Affairs and Others v Goedgelegen Tropical Fruit (Pty) Ltd 2007 (6) SA 199 (CC), 2007 (10) BCLR 1027 (CC) ..... 4.3*(d)*(iii)
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Deutschmann NO and Others v Commissioner for the South African Revenue Service; Shelton v Commissioner for the South African Revenue Service 2000 (2) SA 106 (E) ..... 34.7*(a)*
De Waal v Ziervogel 1938 AD 112 ..... 38.2*(c)*(i)
De Wit v May (unreported Land Claims Court No LCC 45R / 03, 12 June 2003) ..... 48.7*(b)*(iv)
Dews and Another v Simon's Town Municipality 1991 (4) SA 479 (C) ..... 50.4*(h)*(ii)*(ff)*
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Die Minister van Justisie, Ex Parte, In re S v Van Wyk 1967 (1) SA 488 (A) ..... 39.5*(a)*
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Die Spoorbond and Another v South African Railways; Van Heerden and Others v South African Railways 1946 AD 999 ..... 42.9*(a)*
Dikoko v Mokhatla 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC), [2006] ZACC 10 ..... 3.2, 3.6, 4.3*(d)*(iv), 4.3*(g)*(ii), 4.3*(h)*(i)*(aa)*, 4.3*(h)*(ii)*(aa)*, 4.3*(h)*(ii)*(dd)*, 9.2*(d)*(i)*(aa)*, 9.5*(a)*(ii)*(cc)*, 9.5*(a)*(iii), 17.7*(c)*, 22.2*(c)*(ii), 42.5, 42.9*(a)*, 42.10
Diko v Nobonogoza 2006 (3) SA 126 (C) ..... 22.2*(b)*(iii)

Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Department van Handel en Nywerheid 1992 (4) SA 1 (A) ..... 63.3*(b)*, 63.3*(a)*(iv)
Dilworth v Reichard [2002] 4 All SA 677 (W), 2003 (4) BCLR 388 (W) ..... 40.7*(a)*(i)
Director, Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others 1999 (2) SA 709 (SCA), 1999 (8) BCLR 845 (SCA) ..... 50.3*(b)*(i)*(cc)*, 50.3*(b)*(i)*(dd)(x)*(2), 50.3*(b)*(i)*(dd)(y)*, 50.3*(b)*(ii)*(bb)*, 50.3*(b)*(ii)*(bb)(y)*, 50.4*(c)*, 63.3*(c)*
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Director of Public Prosecutions, KZN v Regional Magistrate, Durban and Another 2001 (2) SACR 463 (N) ..... 51.5*(f)*
Director of Public Prosecutions, Natal v Magidela 2000 (1) SACR 458 (SCA), [2000] 2 All SA 337 (A) ..... 52.4*(b)*(ii)
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Director of Public Prosecutions, Transvaal v Viljoen 2005 (1) SACR 505 (SCA), [2005] 2 All SA 355 (SCA) ..... 52.4*(b)*(ii), 52.10*(e)*
Director of Public Prosecutions (Western Cape) v Midi Television (Pty) Ltd t/a e-TV 2006 (1) SACR 574 (C), [2006] 2 All SA 286 (C) ..... 42.9*(c)*
Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting 1996 (3) SA 800 (T), [1996] 2 All SA 83 (T) ..... 12.3*(d)*(iii), 31.4*(f)*(i), 31.4*(f)*(ii), 62.6, 62.7, 63.3*(b)*
Dispersion Technology (SA) (Pty) Ltd t/a Pelp Healthcare v State Tender Board and Another [2007] ZAGPHC 175 ..... 9.5*(a)*(i)
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Dlomo v Dlomo 4 NAC 181 (1922) ..... 26.6*(d)*(i)
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Dodd v Multilateral Motor Vehicle Accidents Fund 1997 (2) SA 763 (A) ... 32.3*(a)*

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Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v King NO and Others 2000 (4) SA 973 (C) ... 24A.4*(b)*(ii), 42.9*(c)*, 62.2*(a)*

Drumearn (Pty) Ltd v Wagner and Others 2002 (6) SA 500 (LCC) ... 48.7*(b)*(iv)

Du Bois v Stompdrift-Kamanassie Besproeiingsraad 2002 (5) SA 186 (C).. 25.8, 63.5*(e)*

Dudley v City of Cape Town and Another 2005 (5) SA 429 (CC), (2004) 25 ILJ 991 (CC), 2004 (8) BCLR 805 (CC) ... 5.3*(e)*(i), 5.3*(e)*(ii)

Dulabh and Another v Department of Land Affairs 1997 (4) SA 1108 (LCC), [1997] 3 All SA 635 (LCC) ... 32.3*(a)*, 32.4*(a)*, 48.8*(c)*(ii)

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Du Plessis v Road Accident Fund 2004 (1) SA 359 (SCA), 2003 (11) BCLR 1220 (SCA) ... 31.2*(d)*(vi), 31.4*(d)*(i),

31.4*(e)*(iii), 31.4*(e)*(iv), 32.5*(b)*, 35.5*(g)*(v), 36.4*(a)*

Du Plooy v Minister of Correctional Services and Others [2004] 3 All SA 613 (T) ..... 32.3*(c)*

Du Preez and Another v Truth and Reconciliation Commission 1997 (3) SA 204 (A), 1997 (4) BCLR 531 (A) ..... 63.3*(b)*, 63.5*(e)*

Du Preez v Attorney-General of the Eastern Cape 1997 (2) SACR 375 (E), 1997 (3) BCLR 329 (E) ..... 51.2, 51.5*(f)*

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Durban City Council v Association of Building Societies 1942 AD 27 ..... 9.5*(b)*(ii)

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Du Toit en Andere v Direkteur van Openbare Vervolging, Transvaal: In re S v Du Toit en Andere 2004 (2) SACR 584 (T) ..... 51.5*(c)*

Du Toit v Kruger (1905) 22 SC 234 ..... 30.2*(a)*

Du Toit v Minister of Transport 2003 (1) SA 586 (C) ..... 31.4*(e)*(vi), 46.2*(a)*, 46.3*(a)*, 46.8*(b)*(i)

Du Toit v Minister of Transport 2006 (1) SA 297 (CC), 2005 (11) BCLR 1053 (CC) ..... 4.2*(b)*, 4.3*(g)*(ii), 4.4, 9.2*(e)*(i), 18.2*(b)*, 32.5*(b)*, 34.7*(a)*

Du Toit v Minister of Welfare and Population Development 2003 (2) SA 198 (CC) ..... 44.3*(c)*(ii)

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EN and Others v Government of RSA and Others 2007 (1) BCLR 84 (D) ..... 9.6*(c)*(ii)*(bb)*, 50.4*(h)*(ii)*(bb)(ẓ)*, 57.2*(a)*(i)*(bb)(y)*

Eagles Landing Body Corporate v Molewa NO and Others 2003 (1) SA 412 (T) ..... 50.3*(b)*(i)*(bb)(y)*, 50.3*(b)*(i)*(ee)(ẓ)*, 50.4*(h)*(ii)*(bb)*

Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another 2005 (3) SA 156 (C) .. 50.3*((b)*(i)*(ẓ)*, 50.3*(b)*(ii)*(bb)(y)*, 50.4*(h)*(ii)*(aa)*, 63.5*(e)*

Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd 2001 (4) SA 142 (SCA) ..... 25.5*(d)*, 25.9*(b)*

Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd 2001 (4) SA 661 (W) ..... 23A.4, 31.4*(e)*(ii), 31.4*(e)*(iv), 63.3*(c)*

East Rand Gold and Uranium Co Ltd v NUM (1989) 10 ILJ 683 (LAC) .... 53.2*(b)*

Eastwood v Shepstone 1902 TS 294 ..... 4.3*(d)*(i)*(aa)*

East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council and Others 1998 (2) SA 61 (CC), 1998 (1) BCLR 1 (CC) ..... 3.3*(d)*, 9.2*(c)*(iii)*(ff)*, 12.3*(d)*(ii)*(cc)*, 31.3*(d)*, 35.3*(a)*(ii)

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Eke v Sugden 2001 (2) SA 216 (E)..... 59.4*(a)*(iv)
Elliot v Commissioner of Police and Another 1997 (2) SACR 315 (ZS), 1998 (1) SA 21 (ZS)..... 51.2, 66.1*(b)*(ii)
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Ellis v Viljoen 2001 (4) SA 795 (C), 2001 (5) BCLR 487 (C)..... 33.11*(c)*, 56C.3*(b)*(ii)
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Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa and Others 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC), [1999] ZACC 13..... 4.3*(b)*(i), 6.2*(a)*, 9.4*(e)*(i)*(bb)*, 10.3*(b)*, 10.3*(d)*(i), 2.3*(b)*(iii), 12.3(c(ii), 12.3*(d)*(ii)*(cc)*, 12.3*(d)*(iii), 14.3*(b)*(ii), 14.3*(c)*(i), 14.3*(c)*(ii), 17.5, 17.5*(g)*, 17.5*(e)*(i), 17.7*(b)*(i), 18.2*(b)*, 19.3*(a)*(i), 19.4*(b)*, 22.2*(a)*, 22.2*(a)*(iii), 22.2*(c)*(iii), 22.2*(b)*(i), 22.2*(c)*(i), 22.3*(b)*(iv), 29.6, 32.3*(b)*, 32.4*(a)*, 32.4*(c)*, 32.5*(c)*

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Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) ..... 2.5*(a)*, 2.5*(b)*, 22.1*(c)*, 22.2*(a)*(ii), 22.2*(a)*(iii), 22.2*(c)*(i), 22.3*(b)*(i), 22.6*(d)*, 32.1*(c)*, 32.2*(a)*,

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Ex Parte Gauteng Provincial Legislature. In re: Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC) ..... 32.4*(c)*, 32.5*(c)*

Ex Parte Minister of Safety and Security and Others: In re S v Walters and Another 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) ..... 9.2*(b)*(ii)*(bb)*, 9.2*(b)*(iii), 9.2*(c)*(iii)*(aa)*, 9.2*(e)*(iv)*(bb)*, 9.2*(f)*(ii), 9.4*(e)*(i)*(bb)*, 9.4*(e)*(ii)*(aa)*, 9.4*(e)*(ii)*(bb)*, 14.5*(d)*(ii)*(cc)*, 23B.3*(c)*(i), 32.2*(b)*, 32.5*(b)*

Ex Parte: Minister of Social Development and Others 2006 (4) SA 309 (CC), 2006 (5) BCLR 604 (CC), [2006] ZACC 3 ..... 4.3*(h)*(ii)*(aa)*, 9.2*(c)*(iii)*(aa)*,

9.4*(e)*, 9.4*(e)*(i)*(aa)*, 9.4*(e)*(i)*(bb)*, 9.4*(e)*(i)*(ee)*, 56D.3*(f)*(i)

Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal 1996, 1996 (11) BCLR 1419 (CC), 1996 (4) SA 1098 (CC) ..... 32.5*(c)*

Ex Parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995 1996 (3) SA 289 (CC) ..... 14.1, 14.3*(a)*

Ex Parte the President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC) ..... 4.3*(b)*(ii)*(aa)*, 4.3*(b)*(ii)*(bb)*, 14.3*(a)*, 14.3*(c)*(i)*(cc)*, 17.3*(f)*(i), 17.6*(b)*(i) & (ii), 18.2*(b)*, 32.4*(a)*, 32.5*(b)*, 32.5*(c)*

Ex Parte the President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) 1.3, 2.1

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Federal Mogul Aftermarket Southern Africa (Pty) Limited v Competition Commission & Another 2005 (6) BCLR 613 (CAC) ..... 3.3*(a)*

Fedics Group (Pty) Ltd and Another v Matus and Another 1998 (2) SA 617 (C), 1997 (9) BCLR 1199 (C) ..... 38.3*(a)*(ii), 38.3*(a)*(iii), 38.3*(b)*(iv), 52.10*(f)*

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1998 (2) SA 1115 (SCA), 1998 (6) BCLR 671 (SCA) ..... 4.3*(d)*(ii), 11.3*(b)*, 31.8*(b)*, 7.2*(b)*

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC), [1999] ZACC 21 ..... 1.3, 2.1, 3.3*(d)*, 4.3*(a)*(i), 4.3*(b)*(i), 4.3*(d)*(ii), 6.2*(a)*, 10.5*(a)*, 11.1*(b)*, 11.1*(c)*, 11.2*(b)*, 11.2*(b)*(i), 11.2*(b)*(ii), 11.2*(b)*(iii), 11.3*(b)*, 11.3*(c)*, 11.3*(c)*(ii), 11.3*(c)*(iii), 11.4,

12.3*(c)*(ii), 12.3*(d)*(i)*(bb)*, 14.3*(a)*, 14.3*(b)*(i), 17.5*(f)*, 18.2*(b)*, 22.1*(a)*, 22.1*(c)*, 22.2*(c)*(iv), 22.1*(f)*, 22.5*(c)*, 22.5*(e)*, 22.6*(a)*–*(b)*, 22.6*(e)*, 23B.6*(b)*(iii), 24A.4*(a)*(iii), 25.9*(b)*, 26.6*(c)*(iii), 27.2*(d)*, 27.4*(a)*, 27.6*(b)*, 27.6*(c)*, 31.1*(c)*, 31 Appendix (4)*(c)*, 31.2*(a)*(ii), 31.4*(a)*(v), 31.4*(b)*(iv), 31.4*(e)*(iv), 31.8*(b)*, 32.3*(c)*, 32.4*(c)*, 32.5*(c)*, 40.1*(b)*(i), 46.5*(c)*, 56B.4*(g)*, 63.1, 63.3*(a)*, 63.3*(b)*, 63.3*(c)*, 63.4

Fedsure Life Assurance Ltd v Wolfaardt 2002 (1) SA 49 SCA ..... 9.2*(a)*, 9.7, 14.5*(d)*(ii)*(aa)*

Feedmill Developments (Pty) Ltd and Another v Attorney-General, KwaZulu-Natal 1998 (9) BCLR 1072 (N) ..... 51.5*(f)*

Fei Lui and Others v Commanding Officer, Kempton Park and Others 1999 (3) SA 996 (W) ..... 32.3*(a)*

Feni v Head of the Western Tembuland Regional Authority and Another 2001 (1) SA 574 (Tk) ..... 34.7*(c)*(ii)

Ferreira v Levin NO 1996 (2) SA 621 (CC), 1996 (4) BCLR 441 (CC) ..... 6.2*(a)*, 6.2*(b)*(i)

Ferreira v Levin NO and Others 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) ..... 3.1, 3.7*(a)*

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) ..... 3.4*(a)*, 5.3*(a)*(i), 6.2*(a)*, 6.2*(b)*(i), 7.1, 7.2*(c)*, 7.2*(c)*(i), 7.2*(c)*(iii), 7.2*(c)*(iv), 7.3*(c)*(i), 8.1*(b)*, 9.4*(c)*, 9.4*(d)*(ii), 9.4*(e)*(ii)*(aa)*, 10.3*(c)*, 12.3*(d)*(i)*(aa)*, 12.3*(d)*(ii)*(aa)*, 12.3*(d)*(ii)*(bb)*, 31.2*(d)*(v), 31.4*(a)*(v), 32.3*(a)*, 32.3*(b)*, 32.3*(c)*, 32.4*(c)*, 32.5*(c)*, 34.1*(b)*, 34.3*(b)*, 34.5*(b)*(ii), 34.6, 34.7*(c)*(ii), 34.8*(c)*(ii), 36.2*(c)*, 36.3*(c)*, 36.5*(a)*(ii), 37.5, 38.5*(b)*, 40.1*(b)*(i), 42.5, 43.3*(a)*, 44.3*(a)*(i), 45.2*(f)*, 45.5*(b)*, 49.2*(c)*(i), 51.1*(a)*(ii), 51.1*(a)*(iv), 51.1*(b)*(ii), 51.1*(b)*(iv), 51.2, 51.3*(e)*, 51.4*(b)*(i), 51.4*(b)*(iii), 51.5*(b)*, 51.5(I), 52.2*(b)*, 52.8, 52.11, 54.3, 63.8, 64.4*(a)*

Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain 2001 (2) SA 853 (SE), 1997 (10) BCLR 1443 (SE) ..... 31, 34.7*(a)*, 34.7*(c)*(i), 36.4*(f)*, 54.4, Appendix (1)

Fihla v Pest Control Tvl Pty (Ltd) (1984) 5 ILJ 165 (IC) ..... 53.2*(b)*

Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another 1993 (2) SA 451 (A) ..... 4.3*(d)*(i)*(aa)*, 38.2*(a)*(i), 38.2*(a)*(iii), 38.2*(c)*(i), 38.3*(a)*(i), 38.4, 38.2*(b)*(ii), 42,2, 42.9*(b)*
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First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and Others: Sheard v Land and Agricultural Bank of South Africa and Another 2000 (3) SA 626 (CC), 2000 (8) BCLR 876 (CC) ..... 9.4*(d)*(i), 9.4*(e)*(i)*(bb)*, 12.3*(d)*(ii)*(cc)*, 34.8*(c)*(i), 59.4*(a)*(i)
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Fose v Minister of Safety and Security 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC), [1997] ZACC 6 ..... 5.3*(a)*(ii), 9.2*(b)*(i), 9.2*(b)*(ii)*(aa)*, 9.2*(c)*(i)*(bb)*, 9.2*(c)*(i)*(dd)*, 9.2*(c)*(iv), 9.2*(d)*(i)*(aa)*, 9.2*(e)*(i), 9.2*(e)*(iii)*(bb)*, 9.2*(e)*(iv)*(aa)*, 9.2*(e)*(iv)*(cc)*, 9.2*(e)*(iv)*(dd)*, 9.2*(f)*(i), 9.3, 9.4*(c)*, 9.5*(a)*, 9.5*(a)*(ii), 9.5*(a)*(ii)*(bb)*, 9.5*(c)*(iii), 12.3*(d)*(ii)*(cc)*, 24C.3*(c)*(ii), 31 Appendix(3)*(b)*, 31 Appendix(4)*(b)*, 31.4*(c)*(ii), 32.4*(c)*, 32.5*(c)*, 33.12, 38.2, 38.2*(b)*(I), 38.3*(b)*(i), 40.6*(a)*, 42.9*(a)*, 50.4*(h)*(ii)*(gg)*, 57.2*(a)*(i)*(bb)(y)*, 59.4*(b)*(i), 59.4*(d)*
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Fourways Mall (Pty) Ltd v South African Commercial Catering 1999 (3) SA 752 (W) ..... 43.1, 43.3*(a)*(i)

Fraser v ABSA Bank Limited 2007 (3) SA 484 (CC), 2007 BCLR 219 (CC) ..... 4.2*(b)*, 4.3*(a)*, 4.3*(a)*(ii) 4.3*(d)*(i)*(bb)*, 4.3*(g)*(ii), 4.3*(h)*(i)*(aa)*

Fraser v Children's Court, Pretoria North, and Others 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC) ..... 3.7*(b)*(ii), 9.2*(b)*(ii)*(bb)*, 9.2*(b)*(iii), 9.2*(e)*(iv)*(aa)*, 9.4*(d)*(i), 9.4*(d)*(ii), 9.4*(e)*(i)*(bb)*, 9.4*(e)*(i)*(cc)*, 9.4*(e)*(ii)*(bb)*, 12.3*(d)*(ii)*(cc)*, 13.5*(a)*, 31.3*(c)*, 32.3*(c)*, 32.4*(c)*, 36.4*(b)*, 44.3*(c)*(ii), 47.3*(a)*, 35.5*(g)*(ii), 35.5*(g)*(iii), 35.5*(g)*(viii)

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Galago Publishers (Pty) Ltd Erasmus 1989 (1) SA 276 (A) ..... 42.7*(c)*

Gamevest (Pty) Limited v Regional Land Claims Commissioner, Northern Province and Mpumalanga, and Others 2003 (1) SA 373 (SCA) ..... 63.3*(a)*

Garces v Fouche and Others 1998 (9) BCLR 1098 (Nm) ..... 51.4*(c)*, 51.4*(d)*

Garden Cities Incorporated Association Not for Gain v Northpine Islamic Society 1999 (2) SA 268 (C) ..... 31.7*(a)*, 41.3*(b)*, 41.4*(d)*

Gardener v Whitaker 1995 (2) SA 672 (E), 1994 (5) BCLR 19 (E) ..... 32.3*(b)*, 34.6, 38.2, 38.2*(a)*(i), 38.2*(c)*(i), 38.5*(b)*, 42.5*(a)*, 42.5*(c)*, 42.9*(a)*

Gardener v Whitaker 1996 (4) SA 337 (CC), 1996 (6) BCLR 775 (CC)..... 11.2*(a)*, 31.8*(a)*
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Geuking v President of the RSA 2002 (1) SA 204 (C), 2001 (11) BCLR 1208 (C)..... 60.6
Geyser and Another v Msunduzi Municipality and Others 2003 (5) SA 18 (N), 2003 (3) BCLR 235 (N)..... 22.4*(e)*(v), 46.1, 46.3*(b)*, 46.4, 46.5*(b)*
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Giddey NO v JC Barnard and Partners 2007 (5) SA 525 (CC), 2007 (2) BCLR 125 (CC)..... 3.1, 4.3*(d)*(iv), 9.4*(b)*(i), 59.4*(a)*(iv), 59.4*(a)*(viii)
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Glenister v Speaker of the National Assembly & Others [2009] ZAWCHC 1 ..... 23B.6*(b)*(iii)

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11.3*(c)*(iii), 12.3*(d)*(ii)*(bb)*, 14.3*(a)*, 14.3*(b)*(i), 16.4*(b)*(ii), 17.5*(b)*, 19.3*(c)*, 22.4*(b)*, 22.4*(c)*, 24C.3*(c)*(ii), 24C.3*(d)*(ii), 30.3, 31.2*(d)*(ii), 32.3*(b)*, 32.3*(c)*, 32.4*(c)*, 32.5*(c)*, 33.1, 33.10*(a)*, 33.10*(b)*, 33.11*(a)*, 33.11*(b)*, 33.11*(c)*, 33.12, 33.13, 33.2*(c)*(ii), 33.3, 33.4*(a)*, 33.4*(b)*, 33.4*(c)*, 33.5*(a)*, 33.5*(b)*, 33.5*(c)*, 33.5*(d)*, 33.5*(e)*(i), 33.5*(e)*(ii), 33.5*(e)*(iii), 33.5*(e)*(iv), 33.5*(f)*(ii), 33.5*(f)*(iii), 33.5*(f)*(iv), 33.5*(g)*, 33.5*(g)*(i), 33.5*(g)*(ii), 33.5*(h)*, 33.6, 33.7, 33.9, 34.1*(b)*, 34.5*(a)*, 34.5*(b)*(ii), 34.6, 34.8*(e)*(ii), 35.1*(b)*, 35.1*(d)*(i), 35.4*(f)*, 36.2*(e)*, 36.4(i), 44.3*(c)*(ii), 47.3*(b)*, 47.4*(a)*, 47.4*(b)*, 47.4*(c)*, 47.4*(e)*, 48.1, 48.3, 48.4, 48.6*(a)*, 48.6*(c)*, 50.3*(b)*(i)*(ee)(w)*, 55.1, 55.3*(a)*, 55.3*(b)*, 55.3*(c)*, 55.4*(a)*, 55.4*(b)*(i), 55.4*(b)*(ii), 55.4*(b)*(iii), 55.4*(b)*(iv), 55.4*(b)*(v), 55.5*(a)*, 55.5*(b)*, 55.*(d)*, 56A.2*(a)*, 56A.2*(b)*(v), 56A.2*(b)*(vi), 56A.2*(b)*(vii), 56A.2*(c)*, 56A.3*(f)*, 56A.4*(d)*, 56B.1, 56B.3*(a)*, 56B.3*(b)*(i), 56B.3*(b)*(v), 56B.4*(b)*, 56B.4*(c)*(ii), 56B.4*(g)*, 56C.3*(a)*, 56C.3*(b)*(ii), 56C.3*(b)*(iii), 56D.1, 56D.3*(b)–(d)*, 56D.5*(b)*, 56D.6, 56D.6*(b)*, 64.4*(a)*, 57.2*(a)*(i)*(bb)(y)*, 59.2*(c)*, 64.4*(c)*, 64.4*(e)*

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Khumalo NO v Minister of Land Affairs and Another 2005 (2) SA 618 (LCC) ..... 48.8*(c)*(iii)

Khumalo v Potgieter [2000] 2 B All SA 456 (LCC) ..... 46.8*(b)*(i)

Kidson v SA Associated Newspapers Ltd 1957 (3) SA 461 (W) ..... 38.2*(a)*(ii), 38.2*(a)*(iii), 38.2*(b)*(i), 38.2*(c)*(i), 38.2*(c)*(ii)

Kilian v Gauteng Provincial Legislature 1999 (2) BCLR 225 (T) ..... 19.1*(d)*(ii)

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King and Others v Attorneys Fidelity Fund Board of Control and Another 2006 (1) SA 474 (SCA), 2006 (4) BCLR 442 (SCA) ..... 4.3*(b)*(v), 10.3*(d)*, 10.3*(d)*(ii), 32.3*(c)*, 32.5*(b)*

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Masetlha v President of the Republic of South Africa and Another 2008 (1) SA 566 (CC), 2008 (1) BCLR 1 (CC), [2007] ZACC 20 ..... 4.3*(d)*(ii), 9.2*(c)*(iii)*(aa)*, 18.2*(c)*(i), 18.3*(a)*, 23B.5*(b)*(iv), 42.9*(c)*, 63.2*(b)*, 63.3*(a)*, 63.3*(b)*, 63.3*(c)*, 63.5*(b)*, 63.5*(c)*
Masetlha v The President of the Republic of South Africa and Another [2006] ZAGPHC 107 ..... 23B.5*(b)*(iv)
Mashavha v The President of the Republic of South Africa and Others 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC), [2004] ZACC 6 ..... 9.4, 9.4*(e)*, 9.4*(e)*(i)*(ee)*, 16.4*(a)*(i), 16.4*(a)*(iii), 16.4*(b)*(ii), 19.3*(a)*(ii), 23A.8, 32.1*(c)*, 56C.3*(b)*(i), 56D.3*(e)*, 56D.3*(f)*(i), 56D.5
Masiya v Director of Public Prosecutions, Pretoria and Others (Centre for Applied Legal Studies and Another as Amici Curiae) 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 ..... 4.3, 9.2*(b)*(ii)*(bb)*, 9.2*(c)*(iii)*(aa)*, 9.2*(c)*(iii)*(bb)*, 9.2*(e)*(iv)*(aa)*, 9.4*(b)*(i), 9.4*(d)*(iii), 9.4*(e)*(i)*(bb)*, 9.4*(e)*(ii)*(aa)*, 9.4*(e)*(ii)*(bb)*, 32.1*(c)*, 32.3*(c)*, 32.4*(c)*, 32.5*(b)*, 35.5*(g)*(ii), 47.5
Masuku and Another v State President and Others 1994 (4) SA 374 (T) ..... 7.4*(b)*
Matatiele Municipality and Others v President of the Republic of South Africa and Others (No 1) 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC), [2006] ZACC 2 ..... 3.7*(a)*, 4.3*(a)*(ii), 4.3*(b)*(i), 4.3*(b)*(iv), 10.3*(b)*, 10.3*(d)*, 10.3*(d)*(iii), 10.5*(c)*, 12.3*(b)*(iii), 14.3*(b)*(ii), 14.5*(d)*(i), 17.3*(a)*, 17.5*(g)*, 22.2*(a)*, 42.10
Matatiele Municipality and Others v The President of the Republic of South Africa and Others (No 2) 2007(6) SA 477 (CC), 2007 (1) BCLR 47 (CC) ..... 2.1, 4.3*(b)*(iv), 5.2, 9.2*(c)*(iii)*(aa)*, 9.2*(c)*(i)*(dd)*, 9.4*(e)*, 9.4*(e)*(i)*(bb)*, 9.4*(e)*(i)*(cc)*, 12.3*(d)*(ii)*(aa)*, 12.3*(d)*(ii)*(cc)*, 17.5*(g)*, 17.6*(a)*(i), 17.6*(a)*(ii)*(bb)*, 17.6*(a)*(ii)*(cc)*(2), 17.6*(a)*(iii), 22.1*(e)*, 22.7*(d)*, 23C.2, 32.3*(c)*, 32.4*(c)*, 32.5*(c)*, 34.9, 42.5*(b)*, 45.1, 45.5*(b)*, 45.6, 45.7, 63.5*(b)*

Mateis v Plaaslike Munisipaliteit Ngwathe and Andere 2003 (4) SA 361 (SCA) ..... 22.5*(b)*
Mathebe v Regering van die RSA en Andere 1988 (3) SA 667 (A) 26.2
Mathee en 'n Ander v Lerm 1980 (3) SA 742 (C) ..... 50.4*(a)*
Mathew Shunmugam and Others v Newcastle Local Munipality and Others [2007] ZAKZHC 1 (4 December 2007) ..... 22.2*(b)*(iii)
Mathews v Young 1922 AD 492 ..... 38.2*(b)*(i)
Mathiba v Du Toit 1926 TPD 126 ..... 26.2
Mathibe v Tsoke 1925 AD 105 ..... 26.6*(c)*(iii)
Matinkinca v Council of State, Ciskei 1994 (4) SA 472 (Ck), 1994 (1) BCLR 17 (Ck) ..... 34.1*(b)*
Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Another 1994 (3) SA 899 (E), 1994 (3) BCLR 80 (E) ..... 7.2*(c)*(iii), 32.1*(b)*, 32.3*(b)*, 51.3*(g)*
Matlou v Makhubedu 1978 (1) SA 946 (A) ..... 23B.3*(c)*(i)
Matukane and Others v Laerskool Potgietersrus 1996 (3) SA 223 (T), [1996] 1 All SA 468 (T) ..... 35.5*(g)*(viii), 36.4*(d)*(ii), 44.3*(c)*(iii), 57.2*(a)*(i)*(bb)(x)*, 57.2*(a)*(ii)*(aa)(y)*(bbb)*(xx)*, 57.3*(c)*(vi), 58.7*(b)*
Mayfair South Townships v Jhina 1980 (1) SA 869 (T) ..... 32.5*(c)*
May v Udwin 1981 (1) SA 1 (A) ..... 38.2*(c)*(i), 59.4*(b)*(iii)
May v Union Government 1954 (3) SA 120 (N) ..... 38.3*(a)*(iv)
Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC), [2009] ZACC 28 ..... 50.3*(b)*(ii)*(aa)(y)*, 56B.1, 56B.3*(a)*, 56B.3*(b)*(i), 56B.3*(b)*(ii), 56B.3*(b)*(iii), 56B.3*(b)*(iv), 56B.4*(c)*(i), 56B.4*(c)*(ii), 56B.4*(g)*, 56B.5*(b)*, 56D.3*(d)*, 56D.3*(f)*(i), 56D.6*(b)*
Mazibuko and Others v The City of Johannesburg and Others [2008] 4 All SA 471, [2008] ZAGPHC 128 (30 April 2008) ..... 22.4*(b)*, 56D.3*(b)*(iii)*(aa)*
Mbambo v Minister of Defence 2005 (2) SA 226 (T) ..... 51.1*(b)*(iii)
Mbanga v MEC for Welfare, Eastern Cape and Another 2002 (1) SA 359 (SE) ..... 38.3*(b)*(v), 56D.3*(f)*(ii)
Mbatha v Vleissentraal Co-operative Ltd (1985) 6 ILJ 333 (IC) ..... 53.2*(b)*
Mbebe and Others v Chairman, White Commission and Others 2000 (7) BCLR 754 (Tk) ..... 59.4*(c)*(v)
Mbelu and Others v MEC for Health and Welfare Eastern Cape and Others 1997 (2) SA 823 (Tk) 53.6
Mbuli v Mehlomakulu 1961 NAC 68 ..... 59.2*(a)*
McBride v The Citizen 1978 (Pty) Ltd (unreported WLD Case No 03/15780, 6 February 2008) ..... 42.9*(a)*
McCall v McCall 1994 (3) SA 201 (C) ..... 47.8*(b)*
McCarthy and Others v Constantia Property Owners' Association and Others 1999 (4) SA 847 (C) ..... 7.2*(c)*
McCarthy v Additional Magistrate, Johannesburg 2000 (2) SACR 542 (SCA) ..... 51.5*(f)*
McDonald and Others v Minister of Minerals and Energy and Others 2007 (5) SA 642 (C) ..... 18.2*(b)*
McDonald's Corp v Joburgers Drive-Inn Restaurant (Pty) Ltd; McDonald's Corp v Dax Prop CC; McDonald's Corp v Joburgers Drive-Inn Restaurant (Pty) Ltd & Dax Prop CC 1997 (1) SA 1 (A) ..... 52.6*(a)*(i)

McIntyre and Others v Pietersen NO and Another 1998 (1) BCLR 18 (T) ..... 51.1*(b)*(iii)
McKay v Editor City Press and Another [2002] 1 All SA 538 (SE) ..... 42.9*(a)*
McKenzie NO and Another v Lukas and Others (unreported, LCC Case No 11R/04, 22 April 2004) ..... 48.7*(b)*(iv)
Mc Nally v M&G Media Limited and Others 1997 (4) SA 267 (W), 1997 (6) BCLR 818 (W) ..... 42.9*(a)*
Media 24 Ltd and Another v Grobler 2005 (6) SA 328 (SCA) ..... 40.5*(b)*(ii), 40.8*(b)*
Member of the Executive Committee for Development Planning and Local Government, Gauteng v Democratic Party 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC) ..... 5.3*(e)*, 5.3*(e)*(i), 5.3*(e)*(ii), 10.5*(c)*, 18.2*(b)*, 19.6, 31.4*(a)*(v), 32.3*(a)*, 32.4*(a)*, 34.1*(b)*, 34.6
Member of the Executive Council for Local Government, Mpumalanga v Independent Municipal and Allied Trade Unions and Others 2002 (1) SA 76 (SCA) ..... 14.3*(a)*, 14.3*(b)*(i), 14.3*(c)*(ii)
Mendes and Another v Kitching NO and Another 1996 (1) SA 259 (E), 1995 (2) SACR 634 (E) ..... 51.4*(b)*(ii), 52.10*(d)*
Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others 2008 (5) SA 171 (CC), 2008 (10) BCLR 969 (CC), [2008] ZACC 10 ..... 17.2*(b)*(ii), 17.3*(a)*, 17.5*(g)*, 17.6*(a)*(ii)*(cc)(c)*, 17.6*(a)*(iii), 17.7*(b)*(i)4., 17.8*(b)*, 22.7*(d)*, 23C.2, 32.3*(b)*, 42.5*(b)*
Mercer and Another, Ex parte: 2003 (1) SA 203 (CC) ..... 50.3*(b)*(i), 50.3*(b)*(ii)*(aa)(u)*
Metal and Allied Workers Union v State President 1986 (4) SA 358 (N) ..... 17.3*(f)*
Metcash Trading Ltd v Commissioner for the SA Revenue Service and Another 2000 (2) SA 232 (W), 2000 (3) BCLR 318 (W) ..... 59.4*(a)*(i)
Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC) ..... 4.3*(d)*(ii), 4.3*(g)*(ii), 12.3*(d)*(iv), 31.2*(d)*(vi), 31.4*(b)*(iii), 31.4*(e)*(iv), 34.8*(c)*(ii), 34.8*(c)*(iii), 59.2*(b)*, 59.4*(a)*(i), 59.4*(c)*
Metlika Trading v South African Revenue Service 2005 (3) SA 1 (SCA) ..... 31.6*(a)*, 31.6*(b)*
Metro Projects CC and Another v Klerksdorp Local Municipality and Others, 2004 (1) SA 16 (SCA) ..... 25.2*(c)*(i), 25.3*(b)*, 25.8, 25.9*(b)*
Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA) 63.10
Mfingwa and Others v S (unreported Transkei High Court Case No A 58 / 2001, 10 August 2001) ..... 66.1*(c)*
Mfolo and Others v Minister of Education, Bophuthatswana 1992 (3) SA 181 (B), 1994 (1) BCLR 136 (B) 37.4
Mgcina v Regional Magistrate, Lenasia, and Another 1997 (2) SACR 711 (W) ..... 51.3*(f)*, 51.5*(h)*, 52.4*(c)*(i)
Mgijima v Eastern Cape Appropriate Technology Unit 2000 (2) SA 291 (TkH) ..... 9.7, 31.4*(f)*
Mhlekwa v Head of the Western Tembuland Regional Authority; Feni v Head of the Western Tembuland Regional Authority and Another 2001 (1) SA 574 (Tk), 2000 (2) SACR 596 (Tk), 2000 (9) BCLR 979 (Tk) ..... 26.6*(c)*(i), 26.7, 34.7*(c)*(ii), 51.1*(a)*(iv),

	64.4*(b)*(i), 51.5*(e)*(i), 52.4*(c)*(i), 58.5*(a)*, 60.4
Mhlongo v Bailey and Another 1958 (1) SA 370 (W)	38.2*(a)*(ii), 38.2*(a)*(iii), 38.2*(b)*(i)
Micro Finance Regulatory Council v AAA Investments (Pty) Limited and Another 2006 (1) SA 27 (SCA)	17.5*(e)*(iii), 63.3*(b)*
Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape) 2007 (5) SA 540 (SCA)	42.4, 42.7*(a)*, 42.7*(d)*, 42.9*(a)*, 42.9*(c)*, 42.9*(g)*, 42.9*(h)*
Midi Television (Pty) Ltd t/a e-TV v Downer (D&CLD Case No 15927/04, 12 October 2004)	42.9*(c)*
Milani and Another v South African Medical and Dental Council and Another 1990 (1) SA 899 (T)	7.2*(b)*
Mineworkers Investment Co (Pty) Ltd v Modibane 2002 (6) SA 512 (W)	38.2*(b)*(iii), 38.3*(b)*(v), 42.9*(a)*, 43.2*(b)*(ii)
Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland) 2005 (2) SA 110 (SCA), [2005] 1 All SA 559 (SCA)	26.6*(a)*
Minister of Correctional Services and Others v Kwakwa and Another 2002 (4) SA 455 (SCA), 2002 (1) SACR 705 (SCA), [2002] 3 All SA 242 (A)	36.4*(c)*(iii), 49.3*(a)*, 49.3*(b)*(i), 51.3*(c)*
Minister of Correctional Services v Ngubo 2000 (2) SA 668 (N)	43.3*(a)*(iv)
Minister of Defence and Others v Dunn 2007 (6) SA 52 (SCA)	63.3*(c)*
Minister of Defence and Others v South African National Defence Union; Minister of Defence and Others v South African National Defence Union and Another 2007 (1) SA 422 (SCA)	23B.3*(d)*, 23B.4*(d)*
Minister of Defence, Namibia v Mwandinghi 1992 (2) SA 355 (NmS)	32.1*(b)*
Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others 2002 (1) SA 1 (CC), 2002 (11) BCLR 1137 (CC)	5.3*(a)*(ii), 23B.4*(c)*, 32.5*(c)*
Minister of Education and Another v Syfrets Trust Ltd NO and Another 2006 (4) SA 205 (C), 2006 (10) BCLR 1214 (C)	35.5*(g)*(viii), 35.6
Minister of Education v Harris 2001 (4) SA 1297 (CC), 2001 (11) BCLR 1157 (CC)	31.3*(c)*, 32.5*(b)*, 57.2*(a)*(ii)*(aa)(y)*(bbb)*(xx)*, 57.4*(b)*
Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another 2006 (1) SA 1 (SCA), 2005 (10) BCLR 973 (SCA)	35.5*(g)*(viii), 57.3*(c)*(vi), 58.1*(c)*, 58.4*(a)*(i), 58.4*(a)*(vii), 58.7*(b)*
Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd 2005 (6) SA 182 (SCA)	18.2*(b)*
Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA)	63.7*(d)*
Minister of Environmental Affairs and Tourism v George [2006] SCA 57 (RSA)	35.8
Minister of Finance and Another v Van Heerden 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC)	32.4*(c)*, 34.7*(a)*, 35.1*(a)*, 35.1*(d)*(ii), 35.1*(d)*(iii), 35.2, 35.4*(a)*, 35.4*(b)*, 35.4*(c)*, 35.4*(c)*(i), 35.4*(c)*(ii), 35.4*(c)*(iii), 35.4*(d)*,

35.4*(d)*(i), 35.4*(d)*(ii), 35.4*(d)*(iii), 35.4*(e)*, 35.4*(f)*, 35.5*(h)*, 35.5*(h)*(ii), 36.4*(a)*, 51.1*(b)*(iv), 57.2*(b)*(ii)*(bb)*, 58.7*(b)*

Minister of Finance and Others v Gore NO 2007 (1) SA 111 (SCA)..... 9.5*(a)*(i)

Minister of Finance v Van Heerden and Another (unreported, CPD Case No 7067/01, 12 June 2003)..... 35.4*(c)*

Minister of Forestry v Quathambla (Pty) Ltd 1973 (3) SA 69 (A)..... 40.5*(b)*(ii)

Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae) 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 (CC) ..... 3.3*(c)*, 4.3*(d)*(iv), 6.2*(b)*(ii), 6.2*(h)*, 17.5*(e)*(i), (iii) & (iv), 18.2*(b)*, 23A.1, 27.4*(b)*, 32.3*(c)*, 32.4*(a)*, 32.4*(c)*, 32.5*(b)*, 48.4, 56A.3*(b)*, 56A.4*(e)*, 63.1, 63.2*(a)*, 63.3*(a)*, 63.3*(c)*, 63.5*(c)*, 63.5*(e)*, 63.6*(b)*

Minister of Health and Others v Treatment Action Campaign and Others (No 1) 2002 (5) SA 703 (CC) ..... 5.3*(e)*(i), 5.3*(e)*(v)

Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC), [2002] ZACC 15 ..... 4.2*(a)*, 4.3*(c)*(ii), 4.3*(h)*(ii)*(bb)*, 9.2*(c)*(iii)*(bb)*, 9.2*(c)*(iii)*(ee)*, 9.2*(d)*(i)*(aa)*, 9.2*(e)*(iv)*(cc)*, 9.5*(c)*(i), 9.6*(a)*, 9.6*(c)*(ii), 10.4*(c)*, 12.3*(d)*(ii)*(aa)*, 12.3*(d)*(ii)*(bb)*, 14.1, 16.1*(b)*, 22.4*(b)*, 30.3, 31.4*(b)*(v), 32.3*(b)*, 33.1, 33.11*(b)*, 33.12, 33.3, 33.4*(a)*, 33.4*(b)*, 33.5*(b)*, 33.5*(e)*(ii), 33.5*(e)*(iii), 33.5*(e)*(iv), 33.5*(f)*(iii), 33.5*(f)*(iv), 33.5*(g)*(i), 33.5*(h)*, 33.7, 34.6, 36.4(i), 39.8, 40.1*(b)*(i), 45.5*(a)*, 47.4*(b)*, 47.4*(c)*, 48.3, 48.6*(a)*, 50.3*(b)*(i)*(ee)*(x), 55.3*(b)*, 56A.2*(a)*, 56A.2*(b)*(v), 56A.2*(b)*(vii), 56A.2*(c)*, 56A.3*(a)*, 56A.3*(d)*, , 56B.3*(b)*(i), 56B.3*(b)*(iii)*(bb)*, 56B.4*(g)*, 56C.3*(a)*, 56C.3*(b)*(iii), 56D.3*(d)*, 56D.6, 56D.6*(b)*, 57.2*(a)*(i)*(bb)*(y)

Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another 1996 (3) SA 155 (N) ..... 7.2*(c)*(iii), 31.3, 50.3*(b)*(i)*(bb)*(x)(1),

50.3*(b)*(i)*(ee)(y)*(8), 50.4*(h)*(ii)*(bb)(x)*

Minister of Home Affairs and Another v American Ninja IV Partnership and Another 1993 (1) SA 257 (A) ..... 18.3*(f)*(i)

Minister of Home Affairs v Eisenberg and Associates: In re Eisenberg and Associates v Minister of Home Affairs and Others 2003 (5) SA 281 (CC), 2003 (8) BCLR 838 (CC) ..... 6.2*(a)*, 31.4*(a)*(v), 34.6, 63.3*(b)*, 63.3*(c)*

Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) ..... 2.1, 3.7*(b)*(ii), 4.3*(h)*(ii)*(bb)*, 5.3*(a)*(ii), 5.3*(d)*, 9.2*(b)*(ii)*(bb)*, 9.2*(c)*(iii)*(bb)*, 9.2*(c)*(iii)*(dd)*, 9.2*(d)*(ii), 9.2*(e)*(i), 9.2*(e)*(iii)*(bb)*, 9.2*(e)*(iv)*(bb)*, 9.2*(e)*(iv)*(cc)*, 9.4*(b)*(ii), 9.4*(c)*, 9.4*(d)*(iii), 9.4*(e)*, 9.4*(e)*(i)*(bb)*, 9.4*(e)*(i)*(cc)*, 10.2*(c)*, 12.3*(d)*(ii)*(aa)*, 12.3*(d)*(ii)*(cc)*, 32.3*(c)*, 34.8*(c)*(i), 34.8*(d)*(i), 34.8*(e)*(ii), 35.1*(d)*(i), 35.5*(g)*(iii), 35.5*(g)*(v) 35.5*(g)*(viii), 35.5*(h)*(i), 36.2*(d)*, 36.4*(a)*, 36.4*(b)*, 36.4*(d)*(i), 36.5*(a)*(i), 42.5*(d)*, 57.3*(b)*, 57.3*(c)*(vi), 57.4*(c)*(ii)*(cc)*, 57.5, 58.1*(a)*, 58.1*(c)*, 58.4*(a)*(i), 58.4*(a)*(iii), 58.4*(a)*(v), 58.4*(a)*(vii), 58.7*(a)*

Minister of Home Affairs v Liebenberg 2002 (1) SA 33 (CC), 2001 (11) BCLR 1168 (CC) ..... 4.3*(c)*(i), 5.3*(c)*, 18.3*(c)*

Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC), [2004] ZACC 10 ..... 1.3, 3.3*(b)*, 9.2*(e)*(i), 9.2*(e)*(iv)*(aa)*, 9.4*(d)*(i), 9.5*(a)*(i), 9.6*(c)*(ii)*(bb)*, 10.3*(c)*, 10.4*(a)*, 10.5*(a)*, 10.5*(c)*, 11.1*(c)*, 11.4, 12.3*(d)*(ii)*(bb)*, 13.4, 13.6, 17.5*(b)*, 23A.4, 23B.6*(b)*(iii), 29.2*(b)*, 31 Appendix (3)*(a)*, 31.1*(b)*, 31.4*(e)*(iii), 34.8*(c)*(i), 35.1*(a)*, 36.2*(d)*, 36.3*(d)*, 45.4, 45.5*(b)*, 45.10*(b)*(iii), 52.11, 59.4*(a)*(iv), 64.6*(f)*

Minister of Home Affairs v Watchenuka 2004 (4) SA 326 (SCA), 2004 (2) BCLR 120 (SCA) ..... 31.3*(a)*(i), 57.2*(a)*(ii)*(aa)(y)*(bbb)*(xx)*, 57.2*(b)*(ii)*(bb)*, 60.3, 64.6*(a)*, 66.1*(d)*(i)

Minister of Justice, Ex parte: In re Pillay 1945 AD 653 ..... 52.6*(d)*

Minister of Justice, Ex parte: In re R v Matemba 1941 AD 75	52.4*(c)*(ii)
Minister of Justice, Transkei v Gemi 1994 (3) SA 28 (TkA)	63.5*(d)*
Minister of Justice v Hofmeyr 1993 (3) SA 131 (A)	38.2*(a)*(ii), 38.2*(a)*(iii), 38.3*(a)*(iv), 49.3*(a)*, 64.6*(f)*
Minister of Justice v Language (unreported, DCLD Case No 14181/2005, 20 March 2006)	35.8
Minister of Justice v Ntuli 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC)	3.7*(b)*(ii), 6.2*(f)*, 9.4*(e)*(i)*(bb)*, 9.4*(e)*(i)*(ee)*, 24.3*(c)*(ii), 32.4*(c)*
Minister of Land Affairs v Slamdien 1999 (4) BCLR 413 (LCC)	32.3*(b)*, 32.4*(a)*, 48.8*(c)*(ii), 48.8*(c)*(iii)
Minister of Law and Order, KwaNdebele, and Others v Mathebe and Another 1990 (1) SA 114 (A)	51.2, 51.3*(c)*
Minister of Law and Order v Hurley 1986 (3) SA 568 (A)	38.3*(a)*(iv), 59.2*(a)*
Minister of Law and Order v Kader 1991 (1) SA 41 (A)	51.3*(b)*
Minister of Law and Order v Parker 1989 (2) SA 633 (A)	51.3*(b)*
Minister of Local Government and Land Tenure and Another v Sizwe Development and Others: In re Sizwe Development v Flagstaff Municipality 1991 (1) SA 677 (Tk)	24B.
Minister of Local Government and Land Tenure v Inkosinathi Property Developers (Pty) Ltd 1992 (2) SA 234 (TkA)	63.10
Minister of Native Affairs and Another v Buthelezi 1961 (1) SA 766 (D)	26.6*(a)*
Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening) 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC), [2001] ZACC 19	4.3*(a)*(i), 4.3*(d)*(ii), 5.3*(a)*(i), 5.3*(e)*(ii), 8.1*(c)*, 11.2*(b)*(ii), 11.3*(c)*(ii), 11.3*(c)*(iii), 23B.5*(b)*(iv), 25.8, 31.2*(d)*(ii), 32.3*(b)*, 33.6, 40.1*(b)*(i), 50.3*(b)*(i)*(dd)*(x)(2), 50.3*(b)*(ii)*(aa)*(x), 55.4*(b)*(i), 56B.4*(c)*(ii), 56C.3*(b)*(ii), 62.1, 63.1, 63.3*(c)*, 63.5*(c)*, 63.5*(d)*, 63.5*(e)*
Minister of Safety and Security v F [2011] ZASCA 3	23B.3*(c)*(iii)*(bb)*
Minister of Safety and Security and Another v Gaqa 2002 (1) SACR 654 (C)	23B.3*(c)*(ii),40.10*(a)*, 51.4*(b)*(iii), 51.5*(j)*(iii), 52.4*(c)*(ii)
Minister of Safety and Security and Another v Hamilton 2004 (2) SA 216 (SCA)	9.5*(a)*(i), 23B.3*(c)*(iii)*(bb)*, 40.5*(b)*(i)
Minister of Safety and Security v Venter [2011] ZASCA 42	23B.3*(e)*(ii)
Minister of Safety and Security and Another v Xaba 2003 (2) SA 703 (D), 2004 (1) SACR 149 (D)	23B.3*(c)*(ii), 34.7*(c)*(i), 40.5*(c)*, 40.10*(a)*, 51.4*(b)*(iii), 52.4*(c)*(ii)
Minister of Safety and Security and Others, Ex Parte: In re S v Walters and Another 2002 (4) SA 613 (CC), 2002 (2) SACR 105 (CC), 2002 (7) BCLR 663 (CC), [2002] ZACC 6	3.7*(b)*(ii), 9.2*(e)*(iv)*(cc)*, 23B.3*(c)*(i), 10.3*(c)*, 11.2*(a)*, 17.3*(e)*, 23B.3*(c)*(i), 31.1*(c)*, 31.4*(a)*(v), 31.4*(e)*(x),

34.8*(c)*(i), 34.8*(c)*(iii), 36.4*(c)*(iii), 39.5*(a)*, 40.5*(c)*, 43.2*(b)*(ii), 51.1*(b)*(iv), 51.2

Minister of Safety and Security v Carmichele 2004 (3) SA 305 (SCA), 2004 (2) BCLR 133 (SCA) ..... 9.5*(a)*(i), 36.4*(c)*(i), 39.6, 40.5

Minister of Safety and Security v Hamilton 2001 (3) SA 50 (SCA) ..... 3.3*(a)*, 3.5*(b)*

Minister of Safety and Security v Luiters 2006 (4) SA 160 (SCA) ..... 9.5*(a)*(i), 23B.3*(c)*(iii)

Minister of Safety and Security v Luiters 2007 (2) SA 106 (CC), 2007 (3) BCLR 287 (CC) ..... 4.2*(b)*, 4.3*(d)*(i)*(aa)*, 4.3*(g)*(i), 4.3*(g)*(ii), 4.3*(h)*(ii)*(cc)*, 9.5*(a)*(i), 23B.3*(c)*(iii), 32.5*(b)*

Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA), [2002] 3 All SA 741 (SCA) ..... 4.3*(d)*(i)*(aa)*, 13.3, 13.5*(a)*, 23B.3*(c)*(iii)*(bb)*, 32.5*(b)*, 36.4*(c)*(i), 39.6, 40.5*(b)*(i), 42.5*(b)*

Minister of Safety and Security v Van Duivenboden 2003 (1) SA 389 (SCA) ..... 9.5*(a)*(i)

Minister of Safety and Security v Van Niekerk 2007 (10) BCLR 1102 (CC) ..... 4.3*(g)*(i), 4.3*(h)*(i)*(aa)*

Minister of Social Development and Others, Ex Parte 2006 (4) SA 309 (CC), 2006 (5) BCLR 604 (CC), [2006] ZACC 3 ..... 3.7*(b)*(ii), 16.4*(b)*(ii), 56D.3*(f)*(i)

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Minister of Welfare and Population Development v Fitzpatrick and Others 2000 (3) SA 422 (CC), 2000 (3) BCLR 713 (CC) ..... 9.4*(e)*(i)*(bb)*, 34.6, 36.4*(b)*, 44.3*(c)*(ii), 47.10*(a)*, 47.10*(b)*

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Mitchell and Another v Hodes and Others NNO 2003 (3) SA 176 (C), 2003 (1) SACR 524 (C) ..... 51.4*(b)*(iii), 52.2*(b)*

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Mittalsteel South Africa Ltd v Hlatshwayo 2007 (1) SA 66 (SCA) ..... 63.3*(b)*

Mkangeli and Others v Joubert and Others 2001 (2) SA 1191 (CC), 2001 (4) BCLR 316 (CC) ..... 5.3*(e)*(ii), 34.7*(c)*(ii), 48.3, 48.7*(b)*(iv), 48.7*(c)*

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Mketsu and Others v African National Congress and Others 2003 (2) SA 1 (SCA), 2002 (4) All SA 205 (SCA) 29.1, 29.8
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President of the Republic of Bophuthatswana and Another v Milsell Chrome Mines (Pty) Ltd and Others 1995 (3) BCLR 354 (B) ..... 28.2*(a)*(ii)

President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) ..... 4.3*(d)*(ii), 9.2*(c)*(iii)*(bb)*, 11.1*(b)*, 11.2*(b)*(i), 11.3*(c)*(ii), 11.4, 13.6, 12.3*(b)*(i), 12.3*(d)*(ii)*(bb)*, 17.6*(d)*, 18.2, 18.2*(b)*, 18.2*(d)* 24F.4*(a)*, 26.1, 31 Appendix(4)*(c)*, 32.3*(c)*, 32.4*(c)*, 33.5*(e)*(iii), 34.5*(b)*(ii), 34.7*(a)*, 34.7*(c)*(ii), 34.8*(e)*(ii), 35.1*(b)*, 35.1*(d)*(i), 35.2, 35.5*(b)*, 35.5*(f)*, 35.5*(g)*(ii), 35.5*(h)*, 35.5*(h)*(i), 35.5*(h)*(ii), 35.5*(h)*(iii), 35.5(i), 36.2*(b)*, 36.2*(c)*, 36.3*(c)*, 36.4*(a)*, 36.4*(f)*, 36.5*(a)*(ii), 37.4, 44.2*(b)*, 44.3*(a)*(i), 49.3*(b)*(ii), 51.1*(b)*(iv), 56A.5*(a)*, , 56B.4*(g)*, 58.1, 63.3*(b)*, 63.3*(a)*(iv), 64.4*(a)*

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President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd 2004 (6) SA 40 (SCA), 2004 (8) BCLR 821 SCA ..... 9.2*(d)*(i)*(aa)*, 9.2*(e)*(iv)*(bb)*, 9.2*(e)*(iv)*(cc)*, 9.6*(c)*(ii)*(aa)*

President of the Republic of South Africa & Others v Quagliani 2009 (4) BCLR 345 (CC), [2009] ZACC 1 ..... 17.2*(b)*(ii)

President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (2) SA 14 (CC), 1999 (2) BCLR 175 (CC) (SARFU I) ..... 4.2*(b)*, 4.3*(b)*, 4.3*(b)*(v), 5.3*(c)*, 17.5*(f)*, 59.4*(b)*(iii)

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President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC), [1999] ZACC 11 (SARFU III) ..... 3.3*(d)*, 4.3*(b)*, 4.3*(d)*(ii), 6.2*(h)*, 6.2*(k)*, 11.3*(c)*(ii), 12.3*(b)*(ii), 18.2, 18.2*(b)*,

18.2*(d)*, 18.2*(f)*, 18.3*(d)*(i), 18.3*(j)*, 23B.5*(b)*(iv), 24A.4*(a)*(iii), 24B.1, 24C.4*(d)*, 26.6*(d)*, 26.6*(d)*(iii), 31.4*(b)*(v), 63.10, 63.3*(a)*(iv), 63.5*(a)*, 63.5*(b)*(i), 63.6*(a)*, 11.4, 23A.1, 23A.3, 23A.4, 23B.5*(b)*(iv), 31.4*(b)*(v), 63.2*(b)*, 63.3*(a)*, 63.3*(b)*, 63.5*(d)*

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President of the Republic of South Africa, Ex Parte: In re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC), [1999] ZACC 15 ..... 3.3*(d)*, 14.3*(a)*, 14.3*(c)*(i), 15.1, 15.2*(b)*, 15.3*(a)*, 15.3*(a)*(ii), 15.3*(a)*(iv), 15.3*(b)*, 15.3*(c)*(i), 15.3*(c)*(vi), 17.3*(f)*(i), 17.6*(b)*(i), (ii) & (iii), 19.3*(a)*(i), 19.3*(c)*, 21.2*(a)*

President of the Republic of South Africa v Eisenberg and Associates (Minister of Home Affairs Intervening) 2005 (1) SA 247 (C) ..... 18.3*(d)*(ii)

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Prinsloo v Development Bank of Southern Africa Pension Fund and Another [1999] 12 BPLR 439 (PFA) 24A.6
Prinsloo v Nasionale Vervolgingsgesag En Andere 2011 (2) SA 214 (GNP) ..... 23B.3*(c)*(iii)*(cc)*
Prinsloo v Newman 1975 (1) SA 481 (A) ..... 38.3*(a)*(iv)
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35.3*(e)*(i), 35.5*(b)*, 35.5*(g)*(viii), 36.2*(c)*, 36.3*(c)*, 36.4*(a)*, 36.4*(f)*, 37.4, 40.3*(c)*(i), 44.3*(a)*(i), 52.2*(b)*, 52.4*(a)*(ii), 56B.4*(g)*, 56D.5*(c)*(ii), 63.2*(b)*, 64.4*(a)*

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R v Daniels 1938 TPD 312 ..... 38.2*(a)*(iii)

R v Duetsimi 1950 (3) SA 674 (A) ..... 52.4*(c)*(ii)

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R v Holliday 1927 CPD 395 ..... 38.2*(a)*(iii)

R v Ismail 1952 (1) SA 204 (A) ..... 52.4*(b)*(ii)

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S v A Juvenile 1990 (4) SA 151 (ZS) ..... 49.2*(d)*, 49.2*(d)*(ii)
S v Ambros 2005 (2) SACR 211 (C) ..... 52.4*(c)*(i)
S v Angula and Others; S v Lucas 1997 (9) BCLR 1314 (Nm) ..... 51.5*(c)*
S v B 1980 (2) SA 946 (A) 52.9
S v B 2006 (1) SACR 311 (SCA), [2005] 2 All SA 1 (SCA) ..... 47.7*(a)*
S v Baloyi (Minister of Justice and Another Intervening) 2000 (2) SA 425 (CC), 2000 (1) SACR 81 (CC), 2000 (1) BCLR 86 (CC) ..... 17.5*(b)*, 24D.5*(e)*, 32.3*(b)*, 32.4*(c)*, 32.5*(c)*, 35.5*(g)*(ii), 36.4*(c)*(i), 37.5, 40.5*(b)*(i),

	51.1*(a)*(iv), 51.5(i), 52.4*(a)*(ii), 52.9
S v Basson 2005 (1) SA 171 (CC), 2004 (6), BCLR 620 (CC), 2004 (1) SACR 285 (CC)	4.3*(d)*(i)*(bb)*, 4.3*(d)*(iii), 4.3*(d)*(iv), 4.3*(e)*, 4.3*(g)*(ii), 5.3*(e)*, 5.3*(e)*(iv), 51.1*(b)*(iii), 51.5*(n)*(i)
S v Basson 2007 (3) SA 582 (CC), 2007 (1) SACR 566 (CC), 2005 (12) BCLR 1192 (CC)	4.3*(h)*(i)*(aa)*, 4.4, 52.10*(b)*, 59.4*(b)*(iii)
S v Bequinot 1997 (2) SA 887 (CC), 1996 (12) BCLR 1588 (CC)	7.3*(c)*(iii), 32.5*(b)*
S v Bhengu 1995 (3) BCLR 394 (D)	51.5*(e)*(i), 51.5*(o)*
S v Bhoolia 1970 (4) SA 692 (A)	26.2
S v Bhulwana; S v Gwadiso 1996 (1) SA 388 (CC), 1995 (2) SACR 748 (CC), 1995 (12) BCLR 1579 (CC)	3.7*(b)*(ii), 9.2*(b)*(ii)*(bb)*, 9.2*(d)*(i)*(aa)*, 9.2*(e)*(iv)*(aa)*, 9.2*(e)*(iv)*(cc)*, 9.4*(b)*(i), 9.4*(b)*(ii), 9.4*(e)*(i)*(bb)*, 9.4*(e)*(ii)*(aa)*, 9.4*(e)*(ii)*(bb)*, 9.4*(e)*(ii)*(cc)*, 12.3*(d)*(ii)*(cc)*, 31.4*(e)*(vi), 32.5*(b)*, 34.2*(c)*, 34.8*(b)*, 34.8*(c)*(ii), 34.8*(c)*(iii), 42.4, 49.2*(c)*(i), 51.5(i), 52.4*(a)*(ii), 52.4*(a)*(iii)
S v Bierman 2002 (5) SA 243 (CC), 2002 (10) BCLR 1078 (CC)	4.2*(b)*, 4.3*(d)*(i)*(aa)*, 4.3*(d)*(iii), 31.4*(e)*(ii), 31.4*(e)*(iv), 32.5*(b)*
S v Binta 1993 (2) SACR 553 (C)	52.4*(c)*(ii)
S v Blaauw 2001 (2) SACR 255 (C), [2001] 3 All SA 588 (C)	49.2*(c)*(i)
S v Boesak 2001 (1) SA 912 (CC), 2001 (1) SACR 1 (CC), 2001 (1) BCLR 36 (CC)	4.2*(b)*, 4.3*(a)*, 4.3*(a)*(ii), 4.3*(d)*(i)*(aa)*, 4.3*(g)*(i), 4.3*(h)*(i)*(aa)*, 4.3*(h)*(ii)*(cc)*, 5.3*(e)*, 5.3*(e)*(i), 9.5*(a)*(iii), 11.2*(a)*, 11.2*(b)*(i), 31.4*(b)*(iii), 31.4*(e)*(ii), 31.4*(e)*(x), 40.3*(c)*(ii), 52.4*(a)*(ii), 52.4*(b)*(ii), 52.5, 53.1*(a)*(ii)
S v Boshoff and others 1981 (1) SA 393 (T)	38.2*(a)*(iii)
S v Botha en Andere (2) 1995 (2) SACR 605 (W)	51.5(i), 51.5*(f)*(ii)
S v Botha en Andere 1994 (4) SA 799 (W), 1994 (3) BCLR 93 (W)	51.5*(c)*
S v Bresler and Another 2002 (4) SA 524 (T)	42.9*(c)*
S v Brown en 'n Ander 1996 (2) SACR 49 (NC), 1996 (11) BCLR 1480 (NC)	51.1*(b)*(iii), 51.3*(f)*, 51.5*(f)*(ii), 52.4*(b)*(ii)
S v Budlender and Another 1973 (1) SA 264 (C)	2.2(i)(iii), 43.2*(a)*
S v Bull and Another; S v Chavulla and Others 2002 (1) SA 535 (SCA), 2001 (2) SACR 681 (SCA), 2002 (6) BCLR 551 (SCA)	31.4*(e)*(vi), 40.7*(c)*(i), 49.2*(c)*(ii), 49.2*(d)*(iv)
S v C 1998 (2) SACR 721 (C)	51.4*(d)*
S v Campbell 1991 (1) SACR 435 (Nm)	52.4*(b)*(iii)
S v Chabalala 2002 (1) SACR 5 (T)	51.1*(b)*(iii)
S v Chabedi 2004 (1) SACR 477 (W)	51.1*(b)*(iii)
S v Chapman 1997 (3) SA 341 (SCA), 1997 (2) SACR 3 (SCA)	36.4*(c)*(i), 36.4*(c)*(iii)

S v Charles 2002 (2) SACR 492 (E) ..... 52.4*(c)*(i)
S v Chauke and Another 1998 (1) SACR 354 (V) ..... 51.5*(c)*, 51.5*(l)*
S v Chavulla 1999 (1) SACR 39 (C) ..... 51.5*(b)*
S v Chikunga and Another 1997 (2) SACR 470 (Nms), 1997 (9) BCLR 1321 (NmS) ..... 51.5*(c)*
S v Cloete and Another 1999 (2) SACR 137 (C) ..... 51.5*(j)*(ii)
S v Coetzee and Others 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC) ... 9.4*(e)*(ii)*(aa)*, 37.5, 40.1*(b)*(i), 40.3*(c)*(ii), 51.1*(a)*(iii), 51.5(i), 52.4*(a)*(ii), 52.4*(a)*(iii)
S v Collett 1990 (1) SACR 465 (A) ..... 49.2*(c)*(iii)
S v Collier 1995 (2) SACR 648 (C), 1995 (8) BCLR 975 (C) ..... 51.5*(e)*(i), 51.5*(l)*
S v Conifer (Pty) Ltd 1974 (1) SA 651 (A) ..... 32.3*(a)*
S v Cooper and Others 1976 (2) SA 875 (T) ..... 51.5*(c)*
S v Cornelissen; Cornelissen v Zeelie NO 1994 (2) SACR 41 (W) ..... 42.7*(d)*, 52.9
S v Damons and Others 1997 (2) SACR 218 (W) ..... 51.5*(j)*(ii)
S v Damoyi 2004 (2) SA 564 (C) ..... 13.7*(b)*, 65.6
S v Dangatye 1994 (2) SACR 1 (A) ..... 51.5*(g)*
S v Danster; S v Nqido 2002 (4) SA 749 (C) ..... 51.5*(o)*
S v De Bellocq 1975 (3) SA 538 (T) 39.4
S v De Kock 1997 (2) SACR 171 (T) ..... 40.7*(c)*(i), 49.2*(d)*(iv)
S v De Villiers 1999 (1) SACR 297 (O) ..... 52.7*(c)*
S v De Vries 1989 (1) SA 228 (A) ..... 51.5*(j)*(ii)
S v Dlamini 1973 (1) SA 144 (A) ..... 52.2*(b)*
S v Dlamini; S v Dladla; S v Joubert; S v Schietekat 1999 (4) SA 623 (CC), 1999 (2) SACR 51 (CC), 1999 (7) BCLR 771 (CC) ..... 4.3*(d)*(iv), 7.3*(c)*(iii), 7.4*(c)*, 17.5*(d)*, 31.2*(d)*(v), 32.3*(a)*, 32.4*(a)*, 32.5*(c)*, 34.6, 34.8*(c)*(i), 34.8*(c)*(iii), 40.4*(b)*, 51.1*(b)*(iv), 51.3*(f)*, 51.4*(d)*, 51.5*(c)*, 51.5(i), 52.2*(b)*, 52.4*(a)*(i), 52.5
S v Dodo 2001 (1) SACR 301 (E) ..... 51.5*(e)*(i), 51.5*(k)*, 52.6*(a)*(i)
S v Dodo 2001 (3) SA 382 (CC), 2001 (1) SACR 594 (CC), 2001 (5) BCLR 423 (CC) ..... 12.2*(b)*, 12.3*(b)*, 12.3*(c)*(i), 12.3*(d)*(i)*(bb)*, 17.5*(d)*, 31 Appendix(4)*(c)*, 32.4*(c)*, 34.2*(c)*, 36.4*(c)*(iii), 40.7, 40.7*(a)*(ii), 40.7*(c)*(ii), 47.7*(a)*, 49.2*(c)*, 49.2*(c)*(i), 51.5*(e)*(i)
S v Domingo 2005 (1) SACR 193 (C) ..... 52.6*(a)*(ii)
S v Dougherty 2003 (2) SACR 36 (W) ..... 39.5*(a)*
S v Dube 2000 (2) SA 583 (N), 2000 (1) SACR 53 (N), 2000 (6) BCLR 685 (N) ..... 36.2*(e)*, 36.4*(c)*(iii), 36.4*(e)*, 38.3*(a)*(iii), 38.3*(c)*, 51.1*(b)*(ii), 51.1*(b)*(iii), 52.10*(a)*, 52.10*(d)*
S v Du Plessis 1981 (3) SA 382 (A) ..... 32.5*(c)*
S v Du Preez 1975 (4) SA 606 (C) ..... 47.5*(a)*
S v Du Toit and Others 2005 (2) SACR 411 (T) ..... 52.4*(c)*(i)
S v Du Toit en Andere 2005 (1) SACR 47 (T) ..... 52.6*(d)*
S v Dyani 2004 (2) SACR 365 (E) ..... 52.4*(c)*(i), 52.6*(b)*
S v Dzukuda and Others; S Tshilo 2000 (4) SA 1078 (CC), 2000 (2) SACR 443 (CC), 2000 (11) BCLR 1252 (CC) ..... 9.2*(a)*, 14.5*(d)*(ii)*(aa)*, 32.4*(c)*, 49.2, 51.5*(b)*,

	51.5*(f)*, 52.2*(a)*, 52.4*(a)*(ii), 52.10*(b)*
S v Ebrahim 1991 (2) SA 553 (A)	31.6*(a)*
S v Erasmus 1973 (4) SA 481 (T)	47.5*(c)*
S v F 1999 (1) SACR 571 (C)	51.5*(k)*, 52.6*(a)*(ii)
S v Fani and Others 1994 (3) SA 619 (E), 1994 (1) BCLR 43 (E)	51.5*(c)*
S v Fazzie and Others 1964 (4) SA 673 (A)	17.5*(c)*, 32.5*(c)*
S v Ffrench-Beytagh (1) 1971 (4) SA 333 (T)	32.5*(c)*
S v Gabriel 1971 (1) SA 646 (RA)	51.5*(n)*(iii)
S v Gasa 1998 (1) SACR 446 (D)	52.4*(c)*(i)
S v Gasa and Others 1998 (1) SACR 446 (D)	51.3*(f)*
S v Geiges [2007] ZAGPHC 46	42.9*(c)*
S v Geiges and Others (M&G Media Ltd and Others Intervening) 2007 (2) SACR 507 (T)	42.9*(g)*
S v Geldenhuys 2009 (1) SACR 1 (SCA)	47.5*(d)*
S v Gentle 2005 (1) SACR 420 (SCA)	52.7*(a)*(i), 52.7*(c)*
S v Gibson 1974 (4) SA 478 (A)	49.2*(c)*(i)
S v Gordon 1962 (4) SA 727 (N)	39.4
S v Gouwe 1995 (8) BCLR 968 (B)	51.5*(h)*
S v Gumede and Others 1998 (5) BCLR 530 (D)	32.1*(b)*, 32.4*(c)*, 38.3*(a)*(i), 51.3*(f)*, 52.4*(c)*(i)
S v Gwala 1989 (4) SA 937 (N)	52.6*(b)*
S v H 1995 (1) SA 120 (C)	36.4*(b)*, 44.3*(c)*(ii)
S v Halgryn 2002 (2) SACR 211 (SCA)	52.4*(c)*(i)
S v Hammer and Others 1994 (2) SACR 496 (C)	38.2*(a)*(iii), 52.10*(a)*
S v H and Another 1978 (4) SA 385 (E)	47.7*(a)*
S v Harber and Another 1988 (3) SA 396 (A)	42.4, 42.9*(c)*
S v Hartmann 1975 (3) SA 532 (C)	39.4
S v Hartmann and Another 1984 (1) SA 305 (ZS)	42.9*(c)*
S v Hassen and Another 1997 (2) SA 253 (T), 1997 (3) BCLR 377 (T)	51.1*(b)*(iii), 51.5*(b)*, 52.10*(d)*
S v Hayes 1998 (1) SACR 625 (O)	52.10*(d)*
S v Hena 2006 (2) SACR 33 (SE)	52.4*(b)*(ii), 52.10*(a)*, 52.10*(b)*, 52.10*(e)*
S v Henckert 1981 (3) SA 445 (A)	32.5*(c)*
S v Hlalikaya and Others 1997 (1) SACR 613 (SE)	51.2, 51.3*(f)*, 51.4*(b)*(iii), 51.5*(f)*(ii), 52.4*(c)*(ii)
S v Hlongwa 1979 (4) SA 112 (D)	51.4*(d)*
S v Hlongwa 2002 (2) SACR 37 (T)	52.4*(b)*(ii)
S v Hoosen 1999 (9) BCLR 987 (N)	51.5(i)
S v Huma and Another 1996 (1) SA 232 (W), 1995 (2) SACR 411 (W)	36.4*(e)*, 38.3*(a)*(ii), 40.3*(b)*, 40.7*(a)*(i), 40.10*(a)*, 51.1*(a)*(ii), 51.1*(b)*(iii), 51.4*(b)*(Iii), 52.4*(c)*(ii)
S v I and Another 1976 (1) SA 781 (RA)	38.2*(a)*(iii), 38.2*(c)*(i)
S v Ismail 2006 (1) SACR 593 (C)	52.6
S v J 1998 (2) SA 984 (SCA), 1998 (1) SACR 470 (SCA), 1998 (4) BCLR 424 (SCA)	51.5.*(i)*
S v Jaars; S v Williams; S v Jantjies 2002 (1) SACR 546 (C)	51.5*(o)*
S v Jackson 1998 (1) SACR 470	32.5*(b)*, 52.7*(a)*(i)
S v Jafta; S Ndondo; S v Mcontana 2004 (2) SACR 103 (E)	51.5*(o)*
S v Jaipal 2005 (4) SA 581 (CC), 2005 (5) BCLR 423 (CC), 2005 (1) SACR 215 (CC)	51.5*(b)*, 52.2*(a)*, 63.5*(g)*
S v Jama and Another 1998 (4) BCLR 485 (N)	51.5*(i)*
S v James 1994 (3) SA 881 (E), 1994 (1) BCLR 57 (E)	51.5*(c)*
S v J and Others 2000 (2) SACR 310 (C)	47.7*(a)*

S v Jansen 1975 (1) SA 425 (A) ..... 47.7*(a)*
S v January; Prokureur-Generaal, Natal v Khumalo 1994 (2) SACR 801 (A) ..... 52.4*(c)*(ii)
S v Jeniker (2) 1993 (2) SACR 464 (C) ..... 52.6*(b)*
S v Johardien 1990 (1) SA 1026 (C) ..... 41.1*(a)*, 41.6
S v John 2003 (2) SACR 499 (C) ..... 51.1*(b)*(iii)
S v Jonathan en Andere 1987 (1) SA 633 (A) ..... 51.4*(b)*(ii)
S v Joors 2004 (1) SACR 494 (C), [2003] 4 All SA 628 (C) ..... 51.1*(b)*(iii), 51.5*(b)*
S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC), 2002 (2) SACR 499 (CC), 2002 (11) BCLR 1117 (CC) ..... 3.7*(b)*(i), 9.4*(e)*(i)*(bb)*, 13.3, 17.5*(b)*, 24C.3*(c)*(ii), 24D.4, 24F.4*(e)*(i), 31.4*(e)*(viii), 34.8*(c)*(i), 35.1*(d)*(i), 35.2, 35.3*(a)*(i), 35.5*(b)*, 35.5*(c)*, 35.5*(g)*, 35.5*(g)*(ii), 35.5*(h)*, 35.5*(j)*, 36.2*(d)*, 36.3*(c)*, 36.4*(b)*, 36.4*(f)*, 36.4*(g)*, 38.3*(a)*(i), 38.5*(a)*, 40.3*(c)*(ii), 40.10*(b)*, 44.1*(b)*(i), 44.2*(d)*, 44.3*(c)*(ii), 44.3*(c)*(x), 58.1*(a)*, 64.6*(a)*
S v Julies 1996 (4) SA 313 (CC), 1996 (7) BCLR 899 (CC), 1996 (2) SACR 108 (CC) ..... 3.7*(b)*(ii), 9.4*(e)*(ii)*(bb)*
S v Kampher 1997 (4) SA 460 (C), 1997 (9) BCLR 1283 (C) ..... 36.4*(b)*, 44.3*(c)*(ii)
S v Kandovasu 1998 (9) BCLR 1148 (NmS) ..... 51.5*(c)*
S v Kanyile 1988 (3) SA 795 (N) ..... 51.5*(g)*
S v Katamba 2000 (1) SACR 162 (NmS) 52.8
S v Katoo 2005 (1) SACR 522 (SCA) ..... 52.7*(b)*, 52.7*(d)*
S v Kellerman 1996 (1) SACR 89 (T) ..... 51.5*(e)*(i)
S v Kester 1996 (1) SACR 461 (B) ..... 51.1*(b)*(iii), 51.5*(b)*, 51.5*(c)*
S v Kgafela 2003 (5) SA 339 (SCA) ..... 31.4*(e)*(x)
S v Kgampe and Others 1998 (2) SACR 617 (W) ..... 51.5*(n)*(ii), 51.5*(o)*
S v Khan 1997 (2) SACR 611 (SCA) ..... 51.3*(f)*, 51.4*(b)*(ii), 51.5*(b)*, 51.5*(j)*(ii)
S v Khanyapa 1979 (1) SA 824 (A) ..... 32.5*(c)*
S v Khanyile 1988 (3) SA 795 (N) ..... 51.5*(h)*, 52.4*(c)*(i)
S v Khomunala and Another 1998 (1) SACR 362 (V) ..... 51.5*(j)*(ii)
S v Khoza en Andere 1994 (2) SACR 611 (W) ..... 51.5*(c)*
S v Khulu 1975 (2) SA 518 (N) ..... 49.2*(c)*(iii)
S v Khumalo 2006 (1) SACR 447 (N) ..... 52.2*(a)*
S v Khumbisa and Others 1984 (2) SA 670 (N) ..... 49.2*(c)*(i)
S v Kidson 1999 (1) SACR 338 (W) ..... 38.3*(a)*(iii), 52.10*(a)*, 52.10*(e)*
S v Kika 1998 (2) SACR 428 (W) ..... 47.3*(b)*
S v Kok 2005 (2) SACR 240 (NC) ..... 52.4*(c)*(i), 52.6*(a)*
S v Kumalo and Others 1965 (4) SA 565 (N) ..... 49.2*(d)*(ii)
S v Kwalase 2000 (2) SACR 135 (C), [2001] 3 All SA 588 (C) ..... 47.7*(a)*, 49.2*(c)*(i)
S v Langa 1996 (2) SACR 153 (N) ..... 51.5*(g)*
S v Langa and Others 1998 (1) SACR 21 (T) ..... 51.1*(a)*(iv), 51.2, 51.4*(b)*(ii), 52.2*(b)*
S v Lavhengwa 1996 (2) SACR 453 (W) ..... 35.3*(c)*, 35.3*(d)*, 51.1*(a)*(iii), 51.1*(b)*(iii), 51.1*(b)*(iv), 51.4*(b)*(ii), 51.5*(c)*, 51.5*(d)*, 51.5*(e)*(i),

51.5*(h)*, 51.5*(j)*(ii), 52.4*(b)*(ii)
S v Lawrence; S v Negal; S v Solberg 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) ..... 3.3*(d)*, 8.3*(g)*, 32.3*(a)*, 32.4*(c)*, 34.8*(c)*(ii), 35.5*(g)*(viii), 41.1*(a)*, 41.1*(b)*, 41.1*(c)*(iii), 41.2*(b)*(ii), 41.2*(b)*(iv), 41.2*(c)*, 41.2*(d)*, 41.2*(e)*, 41.4*(a)*, 41.5, 44.3*(c)*(iv), 46.5*(b)*, 52.8, 54.1, 54.5, 58.4*(a)*(v), 58.6, 64.6*(h)*
S v Legoa 2003 (1) SACR 13 (SCA) ..... 49.2, 51.1*(b)*(iii)
S v Legote 2001 (2) SACR 179 (SCA) ..... 52.4*(b)*(iii)
S v Lehnberg 1975 (4) SA 553 (A) ..... 47.7*(a)*
S v Leholoane 2001 (2) SACR 297 (T) ..... 49.3*(b)*(ii)
S v Lekhetho 2002 (2) SACR 13 (O) ..... 52.4*(c)*(i)
S v Letaoana 1997 (11) BCLR 1581 (W) ..... 51.1*(b)*(iii), 51.4*(d)*
S v Letsin 1963 (1) SA 60 (O) ..... 51.1*(a)*(ii)
S v Letsoko 1964 (4) SA 768 (A) ..... 52.4*(b)*(ii)
S v Likuwa 1999 (2) SACR 44 (Nm), 1999 (5) BCLR 599 (Nm) ..... 49.2*(c)*(i)
S v Lombard en 'n Ander 1994 (3) SA 776 (T), 1994 (3) BCLR 126 (T) ..... 51.5*(g)*
S v Looij 1975 (4) SA SA 703 ..... 32.3*(a)*, 32.5*(c)*
S v Lottering 1999 (12) BCLR 1478 (N) ..... 52.4*(c)*(i), 52.10*(a)*, 52.10*(b)*, 52.10*(c)*
S v Lubaxa 2001 (4) SA 1251 (SCA), 2001 (2) SACR 703 (SCA) ..... 40.3*(c)*(ii), 51.5*(j)*(ii), 52.4*(b)*(iii)
S v Lubisi: In Re S v Lubisi and Others 2004 (3) SA 520 (T), 2003 (9) BCLR 1041 (T) ..... 31.4*(b)*(iii), 31.4*(e)*(iii), 31.4*(e)*(iv), 51.1*(b)*(iii)
S v Lukhandile 1999 (1) SACR 568 (C) ..... 51.5*(o)*
S v Lungile and Another 1999 (2) SACR 597 (SCA) ..... 51.5*(k)*
S v Lusu 2005 (2) SACR 538 (E) ..... 52.4*(c)*(i)
S v Lwane 1966 (2) SA 433 (A) ..... 52.2*(b)*
S v M 1999 (1) SACR 664 (C) ..... 51.5*(j)*(ii), 51.5*(k)*, 52.7*(b)*
S v M 2000 (1) SACR 484 (W) ..... 51.5*(i)*
S v M 2002 (2) SACR 411 (SCA) ..... 52.7*(d)*, 52.10*(a)*, 52.10*(b)*
S v M 2003 (1) SA 341 (SCA) ..... 51.1*(b)*(ii), 51.1*(b)*(iii), 51.5*(b)*
S v M [2004] 2 All SA 74 (D) ..... 51.5*(g)*
S v M 2004 (3) SA 680 (O) ..... 31.4*(e)*(viii), 40.10*(b)*
S v M 2006 (1) SACR 135 (SCA) ..... 47.5*(d)*, 52.7*(a)*(i)
S v M and Another 2005 (1) SACR 481 (E) ..... 47.7*(a)*
S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC), 2007 (2) SACR 539 (CC), 2007 (12) BCLR 1312 (CC) 47.1
S v Maake 2001 (2) SACR 288 (W) ..... 52.10*(e)*
S v Mabaso and Another 1990 (3) SA 185 (A) ..... 51.5*(g)*, 51.5*(j)*(ii)
S v Machasa 1991 (2) SACR 308 (A) ..... 47.7*(a)*
S v Madiba 1998 (1) BCLR 38 (D) ..... 38.3*(a)*(i), 51.1*(b)*(ii), 52.10*(a)*, 52.10*(b)*, 52.10*(c)*
S v Maduna en 'n Andere 1997 (1) SACR 646 (T) ..... 51.1*(b)*(ii), 51.1*(b)*(iii), 51.5*(g)*
S v Mafu 1978 (1) SA 454 (C) ..... 51.5*(l)*
S v Maghuwazuma 1997 (2) SACR 675 (C) ..... 51.5*(e)*(i)
S v Mahlangu 2000 (1) SACR 565 (W) ..... 51.1*(a)*(iv), 51.2, 52.2*(b)*, 52.9

S v Mahomotsa 2002 (2) SACR 435 (SCA), [2002] 3 All SA 534 (SCA) ..... 49.2*(c)*(i)
S v Majavu 1994 (4) SA 268 (Ck), 1994 (2) SACR 265 (Ck), 1994 (2) BCLR 56 (Ck) ..... 34.2*(c)*, 51.5*(b)*, 51.5*(c)*
S v Makiti [1997] 1 All SA 291 (B) 52.5
S v Makoena 2005 (1) SACR 594 (T) ..... 52.4*(c)*(i)
S v Makofane 1998 (1) SACR 603 (T) ..... 51.1*(b)*(ii), 52.4*(b)*(iii)
S v Makofane 1998 (1) SACR 603 (T) ..... 51.5(i), 51.5*(j)*(ii)
S v Makwanyane and Another 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC) ..... 1.3, 2.2*(a)*, 4.2*(a)*, 3.3*(c)*, 3.7*(a)*, 3.7*(b)*(i), 8.1*(b)*, 8.1*(c)*, 9.2*(b)*(iv), 9.2*(c)*(iv), 9.4*(c)*, 9.5*(c)*(iii), 9.6*(c)*(iii),10.3*(c)*, 11.3*(c)*(i), 12.3*(d)*(ii)*(bb)*, 13.2*(a)*, 23A.4, 24E.3*(b)*, 30.3, 30.4*(a)*, 31.2*(d)*(v), 31.7*(a)*, 32.2*(a)*, 32.3*(a)*, 32.3*(b)*, 32.3*(c)*, 32.4*(c)*, 32.5*(c)*, 33.3*(c)*, 33.9, 34.1*(a)*, 34.1*(b)*, 34.2*(c)*, 34.3*(b)*, 34.6, 34.7*(a)*, 34.7*(c)*(ii), 34.8*(b)*, 34.8*(c)*(i), 34.8*(e)*(ii), 36.1*(b)*, 36.2*(e)*, 36.4*(c)*(iii), 37.2, 37.4, 37.8, 38.3*(a)*(i), 38.5*(b)*, 39.2, 39.5*(a)*, 39.7, 39.8, 40.3*(d)*, 40.5*(c)*, 40.6*(a)*, 40.6*(b)*, 40.7, 40.7*(a)*(ii), 42.4, 43.3*(a)*, 47.7*(a)*, 48.4, 49.1, 49.2*(b)*, 49.2*(c)*, 49.2*(c)*(ii), 49.2*(d)*, 49.2*(d)*(i), 49.2*(d)*(iv), 49.3*(a)*, 50.3*(c)*(ii), 51.1*(b)*(iv), 51.4*(d)*, 52.8, 52.11, 59.2*(c)*, 53.6, 55.2*(b)*
S v Malatji and Another 1998 (2) SACR 622 (W) ..... 51.5*(b)*, 51.5*(o)*, 52.6*(a)*
S v Malefo en Andere 1998 (1) SACR 127 (W), 1998 (2) BCLR 187 (W) .... 51.1*(b)*(iii), 51.3*(f)*, 52.4*(c)*(i)
S v Malgas 2001 (2) SA 1222 (SCA), 2001 (1) SACR 469 (SCA) ..... 12.3*(d)*(i)*(bb)*, 31.4*(e)*(x), 49.2*(c)*(i)
S v Mamabolo (E TV and Others Intervening) 2001 (3) SA 409 (CC), 2001 (1) SACR 686 (CC), 2001 (5) BCLR 449 (CC) ..... 10.3*(a)*, 10.4, 10.4*(a)*, 12.3*(d)*(ii)*(aa)*, 13.6, 31.2*(d)*(v), 31.4*(b)*(iii), 32.3*(b)*, 32.4*(c)*, 32.5*(c)*, 34.1*(a)*, 34.1*(b)*, 34.7*(a)*, 34.8*(c)*(ii), 34.8*(c)*(iii), 36.4*(h)*, 36.4*(h)*(iii), 36.5*(a)*(ii), 42.4, 42.5*(a)*, 42.7*(a)*, 42.9*(c)*, 42.9*(g)*, 43.1, 43.2*(b)*(ii), 51.1*(a)*(iii), 51.1*(b)*(iii), 51.1*(b)*(iv), 51.5*(e)*(i), 52.4*(a)*(ii)
S v Manale 2000 (2) SACR 666 (NC) ..... 51.5*(g)*, 52.4*(c)*(i)

S v Manamela and Another (DG of Justice Intervening) 2000 (3) SA 1 (CC), 2000 (1) SACR 414 (CC), 2000 (5) BCLR 491 (CC) ..... 7.4*(c)*, 9.2*(c)*(iii)*(aa)*, 9.4*(d)*(iii), 10.3*(c)*, 17.5*(b)*, 34.1*(a)*, 34.2*(c)*, 34.8*(b)*, 34.8*(c)*(ii), 34.8*(c)*(iii), 42.9*(g)*, 51.1*(b)*(iv), 51.5(i), 51.5*(j)*(ii), 52.4*(a)*(i), 52.4*(b)*(i), 52.11
S v Manguanyana 1996 (2) SACR 283 (E) ..... 51.5*(g)*, 52.4*(c)*(i)
S v Manqaba 2005 (2) SACR 489 (W) ..... 52.6*(a)*, 52.6*(a)*(ii)
S v Mansoor 2002 (1) SACR 629 (W) ..... 52.10*(a)*
S v Manuel 1997 (11) BCLR 1597 (C) ..... 51.5*(b)*
S v Manuel 2001 (4) SA 1351 (W) ..... 52.4*(c)*(i)
S v Manyonyo 1996 (11) BCLR 1463 (E) ..... 51.1*(a)*(ii), 51.5*(f)*, 51.5(i)
S v Maphumulo and Another 1996 (2) SACR 84 (N), 1996 (2) BCLR 167 (N) ..... 51.3*(f)*, 52.4*(c)*(ii)
S v Maputle and Another 2003 (2) SACR 15 (SCA) ..... 51.5*(b)*, 52.10*(e)*
S v Maredi 2000 (1) SACR 611 (T) ..... 51.5*(f)*
S v Maritz 1974 (1) SA 266 (NC) ..... 51.4*(b)*(ii)
S v Mark 2001 (1) SACR 572 (C) ..... 52.10*(a)*, 52.10*(c)*
S v Marwane 1982 (3) SA 717 (A) ..... 32.1*(a)*, 32.1*(b)*
S v Marx and Another 1996 (2) SACR 140 (W) ..... 51.3*(f)*, 52.4*(c)*(i)
S v Maseko 1982 (1) SA 99 (A) ..... 49.2*(c)*(iii)
S v Maseko 1996 (2) SACR 91 (W), 1996 (9) BCLR 1137 (W) ..... 51.1*(b)*(iii), 51.5*(j)*(ii)
S v Masina 1990 (4) SA 709 ..... 32.3*(a)*
S v Masiya (unreported, SHG Case No 94/04, 11 July 2005) (unreported, SHG case no 94/04, 11 July 2005) ..... 3.7*(b)*(ii)
S v Mataboge and Others 1991 (1) SACR 539 (B) ..... 51.4*(d)*
S v Mathebula 1997 (1) SACR 10 (W), 1997 (1) BCLR 123 (W) ..... 34.7*(c)*(i), 34.7*(c)*(ii), 51.1*(a)*(ii), 51.1*(b)*(ii), 51.1*(b)*(iv), 51.3*(f)*, 51.4*(b)*(iii), 51.5(i), 51.5*(j)*(ii), 52.2*(b)*, 52.4*(b)*(iii), 52.4*(c)*(i)
S v Mathole 2002 (2) SACR 484 (T) ..... 52.4*(c)*(i)
S v Matladi 2002 (2) SACR 447 (T) ..... 52.4*(c)*(i), 52.6
S v Matlawe 1989 (2) SA 883 (BG) ..... 51.4*(a)*
S v Matoma 1981 (3) SA 838 (A) ..... 49.2*(c)*(iii)
S v Matomela 1998 (3) BCLR 339 (Ck), [1998] 2 All SA 1 (Ck) ..... 13.7*(b)*, 51.5*(l)*, 65.6
S v Mavuso 1987 (3) SA 499 (A) ..... 51.5*(n)*(iii)
S v May 2005 (2) SACR 331 (SCA) ..... 52.4*(c)*(i)
S v Mayekiso 1996 (2) SACR 298 (C) ..... 52.10*(a)*, 52.10*(e)*
S v Mazingane 2002 (6) BCLR 634 (W) ..... 51.5*(b)*
S v Mbaba 2002 (1) SACR 43 (E) ..... 51.1*(a)*(iii)
S v Mbambo 1999 (2) SACR 421 (W) ..... 51.3*(f)*, 51.5*(g)*, 52.4*(c)*(i)
S v Mbatha; S v Prinsloo 1996 (2) SA 464 (CC), 1996 (1) SACR 371, 1996 (3) BCLR 293 (CC) ..... 3.7*(b)*(ii), 5.3*(d)*, 9.4*(e)*(i)*(bb)*, 9.4*(e)*(ii)*(bb)*, 9.4*(e)*(ii)*(cc)*, 10.3*(c)*, 34.1*(a)*, 34.8*(c)*(i), 34.8*(c)*(iv), 51.4*(a)*, 51.5(i), 52.4*(a)*(iii)
S v Mbeje 1996 (2) SACR 252 (N) ..... 51.5*(b)*, 51.5*(k)*
S v Mbele and Another 1996 (1) SACR 212 (W) ..... 51.4*(d)*
S v Mbolombo 1995 (5) BCLR 614 (C) ..... 51.4*(b)*(iii), 51.5(i), 51.5*(j)*(ii)
S v Mcasa 2005 (1) SACR 388 (SCA) ..... 52.4*(b)*(i)

S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC), 2007 (2) SACR 539, 2007 (12) BCLR 1312 (CC) ..... 47.1, 47.3*(b)*, 47.4*(a)*, 47.10*(c)*
S v McIntyre en Andere 1997 (2) SACR 333 (T) ..... 51.5*(n)*(iii)
S v McKenna 1998 (1) SACR 106 (C) ..... 51.3*(f)*, 51.5*(b)*, 51.5*(g)*, 51.5*(h)*, 51.5*(k)*, 52.4*(b)*(iii)
S v Mdau 1991 (1) SA 169 (A) ..... 49.2*(d)*(iv)
S v Meaker 1998 (2) SACR 73 (W), 1998 (8) BCLR 1038 (W) ..... 31.8*(b)*, 51.1*(a)*(iii), 51.1*(b)*(iv), 51.4*(a)*
S v Meer en 'n Ander 1981 (4) SA 604 (A) ..... 2.2(i)(iii), 43.2*(a)*
S v Mehlape en Andere 1993 (2) SACR 180 (T) ..... 49.2*(d)*(iv)
S v Melani 1996 (1) SACR 335 (E) ..... 52.4*(c)*(i), 52.10*(a)*
S v Melani and Others 1995 (4) SA 412 (E), 1995 (2) SACR 141 (E), 1996 (2) BCLR 174 (E) ..... 51.1*(a)*(iv), 51.2, 51.3*(f)*, 51.4*(b)*(iii), 51.5*(b)*, 51.5*(b)*, 51.5*(h)*, 52.10*(a)*
S v Mello and Another 1998 (3) SA 712 (CC), 1998 (7) BCLR 908 (CC) ..... 3.7*(b)*(ii), 9.4*(e)*(ii)*(bb)*, 34.8*(c)*(i), 52.4*(a)*(iii)
S v Mfazwe and Others (Unreported Cape Provincial Division Case No 07/06, 28 June 2007) ..... 47.7*(a)*
S v Mfene 1998 (9) BCLR 1157 (N) ..... 51.3*(f)*, 52.4*(c)*(i)
S v Mgcina 2007 (1) SACR 82 (T) ..... 52.10*(g)*
S v Mhlakaza and Others 1996 (2) SACR 187 (C), 1996 (6) BCLR 814 (C). 32.1*(c)*, 51.1*(b)*(ii), 51.3*(f)*, 51.5*(b)*, 51.5*(j)*(ii), 52.4*(c)*(ii), 52.10*(e)*
S v Mhlungu and Others 1995 (3) SA 867 (CC), 1995 (2) SACR 277 (CC), 1995 (7) BCLR 793 (CC) ..... 3.4*(g)*, 4.3*(c)*(i), 4.3*(h)*(ii)*(bb)*, 7.3*(c)*(iii), 9.2*(f)*(ii), 9.4*(e)*(ii)*(bb)*, 9.4*(e)*(ii)*(cc)*, 10.3*(a)*, 19.6, 31 Appendix(2), 32.3*(a)*, 32.3*(b)*, 32.4*(a)*, 32.4*(c)*, 32.5*(b)*, 32.5*(c)*, 34.1*(c)*, 34.8*(e)*(i), 51.3*(f)*, 57.3*(c)*(vi), 57.4*(c)*(ii)*(aa)*, 59.3*(a)*(i), 64.6*(e)*
S v Mkhize 1999 (2) SACR 632 (W) ..... 52.10*(b)*, 52.10*(c)*
S v Mofokeng 2004 (1) SACR 349 (W) ..... 51.5*(h)*, 52.4*(c)*(i)
S v Mogotsi and Another 1982 (1) SA 190 (B) ..... 51.4*(b)*(ii)
S v Mohlobane 1969 (1) SA 561 (A) ..... 47.7*(a)*
S v Moilwa 1997 (1) SACR 188 (NC) ..... 51.1*(b)*(iii), 51.5*(b)*, 51.5*(h)*, 51.5*(k)*
S v Mokoena and Others 2006 (1) SACR 29 (W) ..... 52.4*(b)*(ii)
S v Mokoena en Ander 1998 (2) SACR 642 (W) ..... 51.3*(f)*, 51.4*(b)*(ii), 51.4*(b)*(iii), 52.4*(c)*(ii)
Sv Mokoena; S v Phaswane [2008] ZAGPHC 148 ..... 9.6*(c)*(ii)*(bb)*
S v Molenbeek en Andere 1997 (12) BCLR 1779 (O) ..... 51.5*(g)*
S v Monyane and Others 2001 (1) SACR 115 (T) ..... 51.1*(b)*(iii), 51.2, 51.3*(a)*, 51.3*(f)*, 51.4*(b)*(iii), 52.4*(c)*(i), 52.4*(c)*(ii)
S v Moos 1998 (1) SACR 372 (C) ..... 51.5*(h)*, 52.4*(c)*(i)
S v Mosoetsa 2005 (1) SACR 304 (T) ..... 51.5*(k)*
S v Mosoinyane 1998 (1) SACR 583 (T) ..... 51.5*(e)*(i)
S v Mothopeng 1978 (4) SA 874 (T) ..... 59.4*(b)*(v)

S v Motloutsi 1996 (1) SA 584 (C), 1996 (1) SACR 78 (C), 1996 (2) (7) BCLR 220 (C)	38.3*(a)*(ii), 52.10*(a)*, 52.10*(b)*
S v Motsasi 1998 (2) SACR 35 (W)	51.3*(f)*, 51.5*(f)*
S v Motshari 2001 (1) SACR 550 (NC), 2001 (2) All SA 207 (NC)	32.3*(a)*
S v Motsoetsoana 1986 (3) SA 350 (N)	49.2*(d)*(ii)
S v Mpetha (2) 1983 (1) SA 576 (C)	52.2*(b)*
S v Mphala 1998 (1) SACR 388 (W), 1998 (4) BCLR 494 (W)	51.3*(f)*, 52.10*(b)*, 52.10*(c)*
S v Mphala 1998 (1) SACR 654 (W)	52.4*(c)*(ii)
S v Mpofana 1998 (1) SACR 40 (Tk)	51.3*(d)*, 51.3*(e)*, 51.3*(g)*
S v Mseleku 2006 (2) SACR 574 (D)	52.4*(b)*(ii)
S v Msenti 1998 (1) SACR 401 (W), 1998 (3) BCLR 343 (W)	51.5*(e)*(i), 51.5*(o)*
S v Mshumpa 2008 (1) SACR 126 (E)	47.11*(a)*
S v Msithing 2006 (1) SACR 266 (N)	52.2*(a)*
S v Mthethwa 2004 (1) SACR 449 (E)	51.1*(a)*(iv), 52.2*(b)*, 52.10*(a)*
S v Mthetwa 1972 (3) SA 766 (A)	52.4*(b)*(ii)
S v Mtyuda 1995 (5) BCLR 646 (E)	51.5*(b)*
S v Muchindu 1995 (2) SA 36 (W)	30.1*(b)*(i)
S v Mukwevho; S v Ramukhuba 1983 (3) SA 498 (V)	26.6*(d)*(iii)
S v Muller 2005 (2) SACR 451 (C)	52.2*(a)*, 52.6
S v Mumbe 1997 (1) SA 854 (W)	50.4*(c)*
S v Mungoni 1997 (2) SACR 366 (V), 1997 (8) BCLR 1083 (V)	51.5*(b)*, 52.6*(b)*
S v Munn 1973 (3) SA 734 (NC)	52.7*(b)*
S v Mvelasi 2005 (2) SACR 266 (O)	52.2*(a)*
S v N 1998 (1) BCLR 97 (Tk)	51.5*(b)*, 51.5*(d)*
S v N 2008 (2) SACR 135 (SCA)	47.7*(a)*
S v Naidoo 1998 (1) SACR 479 (N), 1998 (1) BCLR 46 (D)	31.8*(b)*, 38.3*(a)*(i), 38.3*(a)*(iii), 38.3*(b)*(iii), 38.3*(b)*(iv), 51.1*(b)*(ii), 51.1*(b)*(iv), 52.10*(b)*, 52.10*(c)*, 52.10*(g)*
S v N and Another 2005 (1) SACR 201 (CkH)	47.7*(a)*
S v Naude 2005 (2) SACR 218 (W)	52.5, 52.7*(b)*, 52.7*(c)*
S v Ncube; S v Tshuma; S v Ndhlovu 1988 (2) SA 702 (ZS)	40.7*(a)*(i), 40.7*(a)*(ii), 49.2*(d)*, 49.2*(d)*(ii)
S v Ndaba and others 1987 (1) SA 237 (T)	49.2*(d)*(ii)
S v Ndala 1996 (2) SACR 218 (C)	51.5*(l)*
S v Ndhlovu 1997 (12) BCLR 1785 (N)	52.2*(b)*
S v Ndhlovu and Others 2001 (1) SACR 85 (W)	51.4*(b)*(ii)
S v Ndhlovu and Others 2002 (6) SA 305 (SCA), 2002 (2) SACR 325 (SCA)	13.3, 51.1*(b)*(iii), 52.6*(a)*(i)
S v Ndlangamandla 1999 (1) SACR 391 (W)	51.5*(j)*(ii)
S v Ndlovu 1997 (12) BCLR 1785 (N)	51.4*(b)*(i)
S v Ndlovu 2001 (1) SACR 85 (W)	51.5*(k)*
S v Ndlovu 2001 (1) SACR 204 (W)	52.4*(c)*(i)
S v Ndlovu 2003 (1) SACR 331 (SCA)	49.2
S v Ndlovu; S v Sibisi 2005 (2) SACR 645 (W)	52.4*(c)*(i)
S v Ndou 2006 (2) SACR 497 (T)	52.6*(a)*
S v Ndou and Others 1971 (1) SA 668 (A)	51.5*(n)*(i), 51.5*(n)*(iii)
S v Nduku 2000 (2) SACR 382 (TkHC)	52.4*(a)*(iii)
S v Nehemia Tjijo (unreported Namibia High Court, 4 September 1991)	49.2*(d)*(iv)
S v Nel 1987 (4) SA 276 (O)	32.3*(a)*
S v Nel 1987 (4) SA 950 (W)	49.2*(c)*(i)
S v Ngcobo 1998 (10) BCLR 1248 (N)	51.3*(f)*, 52.4*(c)*(i), 52.10*(b)*, 52.10*(c)*, 52.10*(e)*

S v Ngcobo 1999 (3) BCLR 298 (N) ..... 51.5*(e)*(i)
S v Ngubane 1995 (1) BCLR 121 (T) ..... 51.5*(k)*
S v Ngwani 1990 (1) SACR 449 (N) ..... 52.6*(a)*(i)
S v Ngwenya and Others 1998 (2) SACR 503 (W), 1999 (3) BCLR 308 (W) ..... 51.2, 51.3*(f)*, 51.4*(b)*(ii), 51.4*(b)*(iii), 52.2*(b)*, 52.4*(c)*(ii)
S v Nichas and Another 1977 (1) SA 257 (C) ..... 51.4*(d)*
S v Niemand 2002 (1) SA 21 (CC), 2001 (2) SACR 654 (CC), 2001 (11) BCCR 1181 (CC) ..... 9.4*(d)*(ii), 9.4*(d)*(iii), 9.4*(e)*(ii)*(bb)*, 34.6, 40.7, 40.7*(c)*(i), 49.2*(c)*(ii)
S v Njikaza 2002 (2) SACR 481 (C) ..... 52.4*(c)*(i)
S v Nkabinde 1998 (8) BCLR 996 (N) ..... 38.3*(a)*(iii), 51.5*(d)*, 51.5*(e)*(i), 51.5*(j)*(ii)
S v Nkondo 2000 (1) SACR 358 (W) ..... 52.4*(c)*(i)
S v Nkosi 2002 (1) SA 494 (W), 2002 (1) SACR 135 (W), [2002] 4 All SA 745 (W) ..... 47.7*(a)*, 49.2*(c)*(i)
S v Nkosi and Another 2003 (1) SACR 91 (SCA) ..... 40.7*(c)*(i), 49.2*(d)*(iii), 49.2*(d)*(iv)
S v Nkosi en 'n Andere 1984 (3) SA 345 (A) ..... 51.5*(j)*(ii)
S v Nkosiyana and Another 1966 (4) SA 655 (A) ..... 42.8*(b)*
S v Nocuse and Others 1995 (3) SA 240 (Tk) ..... 34.7*(a)*
S v Nombewu 1996 (2) SACR 396 (E), 1996 (12) BCLR 1635 (E) ..... 51.1*(b)*(ii), 51.1*(b)*(iii), 51.3*(f)*, 51.4*(b)*(i), 51.5*(b)*, 52.4*(c)*(i), 52.10*(g)*
S v Nortjé 1997 (1) SA 90 (C) ..... 51.1*(b)*(ii), 51.5*(b)*
S v Ntsele 1997 (2) SACR 740 (CC), 1997 (11) BCLR 1543 (CC) ..... 3.7*(b)*(ii), 9.2*(b)*(ii)*(bb)*, 9.2*(d)*(i)*(aa)*, 9.4*(e)*(ii)*(aa)*, 9.4*(e)*(ii)*(bb)*, 34.8*(c)*(i), 52.4*(a)*(iii)
S v Ntshwence 2004 (1) SACR 506 (Tk), [2004] 1 All SA 328 (Tk) ..... 51.1*(a)*(iii), 51.5*(e)*(i)
S v Ntuli 1993 (2) SACR 599 (W) ..... 52.10*(e)*
S v Ntuli 1996 (1) SA 1207 (CC), 1996 (1) SACR 94 (CC), 1996 (1) BCLR 141 (CC) ..... 3.7*(b)*(ii), 9.2*(c)*(iii)*(aa)*, 9.2*(e)*(iv)*(cc)*, 9.4*(e)*(i)*(bb)*, 12.3*(d)*(ii)*(cc)*, 35.3, 35.3*(c)*, 35.3*(d)* 35.3*(e)*(i), 51.1*(b)*(iii), 51.5*(b)*, 51.5*(o)*, 52.2*(a)*, 52.8
S v Ntuli 2003 (4) SA 258 (W), 2003 (1) SACR 613 (W) ..... 51.5*(h)*, 52.4*(c)*(i)
S v Ntzweli 2001 (2) SACR 361 (C) ..... 52.10*(e)*
S v Nzima 2001 (2) SACR 345 (C) ..... 52.4*(c)*(i)
S v Odugo 2001 (1) SACR 560 (W) ..... 52.10*(d)*
S v Oosthuizen 1991 (2) SACR 298 (A) ..... 49.2*(d)*(iv)
S v Orrie 2004 (1) SACR 162 (C) ..... 51.4*(b)*(iii), 52.4*(c)*(ii)
S v Orrie 2005 (1) SACR 63 (C) ..... 51.1*(a)*(iv), 51.5*(h)*, 52.2*(b)*, 52.4*(c)*(i), 52.4*(c)*(ii)
S v P 1985 (4) SA 105 (N) ..... 49.2*(c)*(iv)
S v Pennington and Another 1997 (4) SA 1076 (CC), 1999 (2) SACR 329 (CC), 1997 (10) BCLR 1413 (CC) ..... 4.2*(b)*, 11.2*(a)*, 19.6, 31.4*(e)*(ii), 31.4*(e)*(iv), 31.8*(a)*, 31.8*(b)*, 36.4*(c)*(iii), 51.1*(a)*(v), 51.5*(f)*, 51.5*(o)*, 59.3*(a)*(iii)
S v Penrose 1966 (1) SA 5 (N) ..... 30.2*(a)*

S v Petane 1988 (3) SA 51 (C) ..... 30.1*(a)*
S v Petersen en 'n Ander 2001 (1) SACR 16 (SCA) ..... 47.7*(a)*
S v Petrus and Another [1985] LRC (Const) 699 (Botswana CA) ..... 40.7*(c)*(i), 49.2*(d)*(ii)
S v Phallo and Others 1998 (3) BCLR 352 (B) ..... 51.1*(a)*(iii), 51.4*(a)*, 51.4*(b)*(i), 51.5*(e)*(i)
S v Philemon 1997 (2) SACR 651 (W) ..... 51.5*(b)*, 51.5*(g)*
S v Pienaar 2000 (2) SACR 143 (NC), 2000 (7) BCLR 800 (NC) ..... 13.7*(b)*, 65.6, 51.5*(b)*, 51.5*(l)*
S v Pillay 2004 (2) SACR 419 (SCA) ..... 52.10*(b)*, 52.10*(c)*, 52.10*(d)*
S v Pitso 2002 (2) SACR 586 (C) ..... 52.4*(c)*(i)
S v Pogrund 1961 (3) SA 868 (T) ..... 42.7*(d)*, 52.9
S v Potgieter 1994 (1) SACR 61 (A) ..... 49.2*(c)*(iii)
S v Quandu en Andere 1989 (1) SA 517 (A) 47.7
S v R 1993 (1) SA 476 (A), 1993 (1) SACR 209 (A) ..... 49.2*(a)*(i)
S v R 2000 (1) SACR 33 (W) ..... 38.3*(a)*(i), 52.10*(b)*
S v Radebe 1968 (4) SA 410 (A) ..... 52.4*(c)*(ii)
S v Radebe 1988 (1) SA 772 (A) ..... 32.3*(a)*
S v Radebe, S v Mbonani 1988 (1) SA 191 (T) ..... 52.4*(c)*(i)
S v Ralukukwe 2006 (2) SACR 394 (SCA) ..... 52.4*(c)*(ii), 52.6*(a)*(i)
S v Ramadzanga 1988 (2) SA 816 (V) ..... 47.7*(a)*
S v Ramavhale 1996 (1) SACR 639 (A) ..... 51.5*(b)*, 51.5*(j)*(ii), 51.5*(k)*, 52.6*(a)*(i)
S v Ramuongiwa 1997 (2) BCLR 268 (V) ..... 51.1*(a)*(ii), 51.5*(b)*, 51.5*(h)*
S v Reay 1987 (1) SA 873 (A) ..... 49.2*(c)*(iii)
S v Reeding 2005 (2) SACR 631 (C) ..... 52.10*(d)*
S v Rens 1996 (1) SA 1218 (CC), 1996 (1) SACR 105 (CC), 1996 (2) BCLR 155 (CC) ..... 32.3*(a)*, 35.3*(c)*, 35.3*(e)*(i), 51.5*(b)*, 51.5*(e)*(i), 51.5*(o)*, 59.3*(a)*(iv), 59.4*(a)*(v)
S v Roberts 1999 (4) SA 915 (SCA) ..... 63.5*(g)*
S v Rudman and Another 1992 (1) SA 343 (A) ..... 51.5*(b)*
S v Rudman and Another; S v Mthwana 1992 (1) SA 343 (A), 1992 (1) SACR 70 100 ..... 52.2*(a)*, 52.4*(c)*(i)
S v S 1999 (1) SACR 608 (W) ..... 51.5*(o)*
S v S 2001 (1) SACR 79 (W) ..... 47.7*(a)*
S v S 2001 (2) SACR 321 (T) ..... 47.7*(a)*
S v Schietekat 1999 (2) BCLR 240 (C) ..... 51.4*(d)*
S v Scholtz 1996 (2) SACR 40 (NC), 1996 (11) BCLR 1504 (NC) ..... 51.1*(b)*(iii), 51.5*(j)*(ii), 52.4*(b)*(ii)
S v Scholtz 1997 (1) BCLR 103 (NmS) ..... 51.5*(c)*

S v Sebejan 1997 (1) SACR 626, 1997 (8) BCLR 1086 (W)	51.1*(b)*(iv), 51.4*(b)*(ii), 52.2*(b)*
S v Sefadi 1995 (1) SA 433 (D), 1994 (2) SACR 667 (D)	51.5*(c)*
S v Sejaphale 2000 (1) SACR 603 (T)	51.5*(j)*(ii)
S v Sekete 1980 (1) SA 171 (N)	59.4*(b)*(v)
S v Sekoboane 1997 (2) SACR 32 (T)	49.2*(a)*(i)
S v Seseane 2000 (2) SACR 225 (O)	51.4*(b)*(ii), 52.10*(b)*
S v Shaba en 'n Ander 1998 (1) SACR 16 (T), 1998 (2) BCLR 220 (T)	51.1*(b)*(ii), 51.3*(f)*, 52.4*(c)*(i)
S v Shackell 2001 (4) SA 1 (SCA)	63.5*(g)*
S v Shaik [2005] 3 All SA 211 (C)	42.9*(c)*
S v Shaik 2007 (1) SA 240 (SCA)	42.9*(c)*
S v Shaik and Others 2008 (2) SA 208 (CC), 2007 (12) BCLR 1360 (CC)	4.3*(d)*(i)*(bb)*, 4.3*(d)*(iii), 9.2*(d)*(i)*(aa)*, 9.8, 42.9*(c)*
S v Sheehama 1991 (2) SA 860 (A)	52.4*(c)*(ii)
S v Shiburi 2004 (2) SACR 314 (W)	51.5*(b)*, 52.4*(c)*(i), 52.5
S v Shikunga 1997 (2) SACR 470 (NmS), 1997 (9) BCLR 1321 (NmS)	51.5*(b)*
S v Shinga 2007 (2) SACR 28 (CC), 2007 (5) BCLR 474 (CC)	9.2*(d)*(i)*(aa)*, 9.4*(e)*(i)*(bb)*, 9.4*(e)*(i)*(dd)*, 9.4*(e)*(ii)*(bb)*, 23B.5(3)*(c)*(ii)*(bb)*
S v Shongwe 2003 (5) SA 276 (CC), 2003 (2) SACR 103 (CC), 2003 (8) BCLR 858 (CC)	5.3*(d)*
S v Shongwe en Andere 1998 (2) SACR 321 (T), 1998 (9) BCLR 1170 (T)	51.1*(b)*(ii), 51.2, 51.3*(f)*, 52.4*(c)*(i)
S v Shuping 1983 (2) SA 119 (B)	52.4*(b)*(iii)
S v Sidziya and Others 1995 (12) BCLR 1626 (Tk)	51.5*(j)*(ii)
S v Sikhipha 2006 (2) SACR 439 (SCA)	52.4*(c)*(i)
S v Silvale 1999 (2) SACR 102 (SCA)	49.2*(d)*(iv)
S v Simanaga 1998 (1) SACR 351 (Ck)	51.5*(b)*, 51.5*(g)*, 51.5*(h)*
S v Simxadi 1997 (1) SACR 169 (C)	51.5*(b)*, 52.6*(b)*
S v Singo 2002 (4) SA 858 (CC), 2002 (2) SACR 160 (CC), 2002 (8) BCLR 793 (CC)	34.8*(c)*(ii), 51.1*(a)*(iii), 51.1*(b)*(iii), 51.5*(d)*, 51.5(i), 52.4*(a)*(i), 52.4*(a)*(ii), 52.6*(a)*(i)
S v Sishi [2000] 2 All SA 56 (N)	52.6*(b)*
S v Sithebe 1992 (1) SACR 347 (A)	51.5*(j)*(ii)
S v Sithole 2005 (2) SACR 504 (SCA)	52.4*(b)*(ii)
S v Siwela 1981 (2) SA 56 (T)	51.5*(l)*
S v Siyotula 2003 (1) SACR 154	51.5*(l)*
S v Smile and Another 1998 (1) SACR 688 (SCA), 1998 (5) BCLR 519 (SCA)	51.5*(b)*
S v Smith 1996 (1) SACR 250 (E)	49.2*(d)*(iv)
S v Smith and Another 1994 (3) SA 887 (SE), 1994 (1) BCLR 63 (SE)	51.5*(c)*
S v Smorenburg 1992 (2) SACR 389 (C)	39.4
S v Snyman 1968 (2) SA 582 (A)	52.4*(b)*(ii)
S v Sobandla 1992 (2) SACR 613 (A)	49.2*(c)*(iii)
S v Soci 1998 (2) SACR 275 (E), 1998 (3) BCLR 376 (E)	51.3*(a)*, 51.3*(f)*, 51.5*(h)*, 52.4*(c)*(i), 52.10*(a)*, 52.10*(b)*, 52.10*(c)*, 52.10*(g)*
S v Solo 1995 (5) BCLR 587 (E)	51.5*(g)*
S v Solomons 2004 (1) SACR 137 (C)	51.1*(a)*(iii), 51.5*(e)*(i), 51.5*(h)*, 52.4*(b)*(iii), 52.4*(c)*(i)
S v Sonday and Another 1995 (1) SA 497 (C), 1994 (2) SACR 810 (C), 1994 (4) BCLR 138 (C)	51.1*(b)*(iv), 51.5*(e)*(i)

S v Spies 2000 (1) SACR 312 (SCA)	52.10*(d)*
S v Staggie 2003 (1) SACR 232 (C)	52.6*(a)*(ii)
S v Stefaans 1999 (1) SACR 182 (C)	51.5*(g)*, 51.5*(k)*
S v Steyn 2001 (1) SA 1146 (CC), 2001 (1) SACR 25 (CC), 2001 (1) BCLR 52 (CC)	9.2*(c)*(iii)*(aa)*, 9.4*(e)*(i)*(bb)*, 34.1*(c)*, 34.6, 34.8*(c)*(i), 51.1*(b)*(ii), 51.5*(o)*
S v Stowitzki 1995 (2) SA 525 (NmHC)	52.6*(b)*
S v Strauss 1995 (5) BCLR 623 (O)	51.5*(b)*, 51.5(i)
S v Tcoeib 1993 (1) SACR 274 (Nm)	40.7*(c)*(i), 49.2*(d)*, 49.2*(d)*(iv), 49.3*(b)*(ii), 51.1*(b)*(iii)
S v Tcoeib 1996 (1) SACR 390 (NmS)	39.5*(b)*
S v Thamaha 1979 (3) SA 487 (O)	51.4*(a)*
S v Thapedi 2002 (1) SACR 598 (T)	52.4*(c)*(ii)
S v Thebus and Another 2003 (6) SA 505 (CC), 2003 (2) SACR 319 (CC), 2003 (10) BCLR 1100 (CC)	1.3, 4.3*(b)*(ii), 13.3, 31 Appendix (1), 31 Appendix (3)*(a)*, 31.1*(c)*, 31.4*(a)*(v), 31.4*(b)*(iii), 31.4*(c)*(ii), 31.4*(d)*(i), 31.4*(e)*(ii), 31.4*(e)*(iii), 31.4*(e)*(viii), 34.7*(a)*, 36.4*(c)*(iii), 40.2*(a)*, 51.1*(a)*(iii), 51.1*(b)*(i), 51.1*(b)*(ii), 51.1*(b)*(iii), 51.1*(b)*(iv), 51.2, 51.4*(b)*(ii), 51.5(i), 52.4*(b)*(i), 52.4*(b)*(ii)
S v Thobaglale and Others 1998 (1) SACR 703 (W)	51.5*(o)*
S v Thomas 2001 (2) SACR 608 (W)	52.4*(c)*(i)
S v Thusi 2002 (12) BCLR 1274 (N)	52.4*(c)*(i)
S v Thusi and Others 2000 (4) BCLR 433 (N)	51.5*(j)*(ii)
S v Toms; S v Bruce 1990 (2) SA 802 (A)	32.3*(a)*, 49.2*(c)*(i)
S v Tsanshana 1996 (2) SACR 157 (E)	49.2*(a)*(i)
S v Tshabalala 1998 (2) SACR 259 (C)	51.4*(d)*
S v Tshabalala 1999 (1) SACR 163 (T)	51.5*(c)*
S v Tshidiso 2002 (1) SACR 207 (W)	52.4*(c)*(i)
S v Tsotetsi and Others (1) 2003 (2) SACR 623 (W)	51.5*(g)*, 51.5*(b)*, 52.10*(c)*
S v Tsotetsi and Others (2) 2003 (2) SACR 638 (W)	52.4*(b)*(iii)
S v Tsotetsi and Others (3) 2003 (2) SACR 648 (W)	52.10*(c)*, 52.10*(e)*
S v Tuhadeleni and Others 1969 (1) SA 153 (A)	30.1*(b)*(i)
S v Turrell and Others 1973 (1) SA 248 (C)	43.1, 43.2*(a)*
S v Tusani 2002 (2) SACR 468 (TD)	52.4*(b)*(iii)
S v Twala (South African Human Rights Commission Intervening) 2000 (1) SA 879 (CC), 1999 (2) SACR 622 (CC), 2000 (1) BCLR 106 (CC)	24C.3*(c)*(ii), 32.3*(b)*, 51.1*(b)*(iii)
S v Tyebela 1989 (2) SA 22 (A)	52.6*(a)*
S v Vakalisa 1990 (2) SACR 88 (Tk)	49.2*(d)*(ii)
S v Van den Berg 1996 (1) SACR 19 (Nm), 1995 (4) BCLR 479 (Nm)	51.5*(e)*(i), 51.5*(n)*(iii)
S v Van der Merwe 1998 (1) SACR 194 (O), 1997 (10) BCLR 1470 (O)	51.1*(a)*(iv), 51.3*(f)*, 51.4*(b)*(ii), 52.2*(b)*
S v Van der Ross 2002 (2) SACR 362 (C)	51.5(i), 52.7*(a)*(i), 52.7*(b)*, 52.7*(c)*
S v Van der Sandt 1997 (2) SACR 116 (W)	51.5*(k)*, 52.6*(a)*(i)
S v van Heerden en Ander Sake 2002 (1) SACR 409 (T)	52.4*(c)*(i)

S v Van Niekerk 1972 (3) SA 711 (A) ..... 42.4, 42.9*(c)*
S v Van Rooyen and Others 2001 (2) SACR 376 (T), 2001 (4) SA 396 (T) .. 51.5*(e)*(i)
S v Van Rooyen and Others 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) ..... 2.6*(b)*, 17.5*(d)*, 17.5*(e)*(i)
S v Vermaas 1996 (1) SACR 528 (T) ..... 51.4*(d)*
S v Vermaas; S v Du Plessis 1995 (3) SA 292 (CC), 1995 SACR 125 (CC), 1995 (7) BCLR 851 (CC) ..... 51.1*(b)*(ii), 51.3*(f)*, 51.5*(g)*, 51.5*(g)*, 51.5*(h)*, 52.4*(c)*(i)
S v Vilakazi en 'n Ander 1996 (1) SACR 425 (T) ..... 51.1*(a)*(ii), 51.4*(b)*(iii), 52.10*(e)*
S v Viljoen 2003 (4) BCLR 450 (T) ..... 52.4*(c)*(i)
S v Visser 2001 (1) SACR 401 (C) ..... 52.4*(c)*(i)
S v Vries 1996 (2) SACR 638 (Nm), 1996 (12) BCLR 1666 (Nm) ..... 49.2*(c)*(i)
S v Vumase 2000 (2) SACR 579 (W) ..... 51.3*(f)*
S v W 1993 (2) SACR 74 (A) ..... 49.2*(d)*(iv)
S v Walters and Another 2001 (2) SACR 471 (Tk), 2001 (10) BCLR 1088 (Tk) ..... 23B.3*(c)*(i)*(aa)*, 34.8*(c)*(iii)
S v Western Areas Ltd and Others 2005 (5) SA 214 (SCA), 2005 (1) SACR 441 (SCA) ..... 3.3*(a)*, 3.5*(b)*
S v Williams and Five Similar Cases 1994 (4) SA 126 (C) ..... 49.2*(d)*
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S v Woods 1978 (1) SA 713 (A) ..... 42.7*(d)*
S v Xaba 1997 (1) SACR 194 (W) ..... 51.5*(b)*, 51.5*(c)*
S v Younas 1996 (2) SACR 272 (C) ..... 51.5*(b)*, 51.5*(k)*, 52.6*(b)*
S v Z and 23 similar cases 2004 (4) BCLR 410 (E) ..... 9.6*(c)*, 9.6*(c)*(ii)*(bb)*, 47.7*(a)*
S v Z en vier ander sake 1999 (1) SACR 427 (E) ..... 47.7*(a)*
S v Zimmerie 1989 (3) SA 484 (C) ..... 52.4*(b)*(iii), 52.6*(a)*(i)
S v Zingilo 1995 (9) BCLR 1186 (O) ..... 51.5*(b)*, 51.5*(k)*
S v Zondo 1999 (1) SACR 54 (N), 1999 (3) BCLR 316 (N) ..... 51.1*(a)*(iii)
S v Zuba [2004] ZAECHC 3 ..... 9.6*(c)*(ii)*(bb)*
S v Zuma 2006 (2) SACR 191 (W), 2006 (7) BCLR 790 (W) ..... 52.4*(b)*(iii), 52.7*(a)*(i), 52.7*(b)*, 52.7*(d)*
S v Zuma and Others 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC) ..... 3.3*(c)*, 4.3*(c)*(ii), 5.3*(d)*, 9.4*(e)*(ii)*(bb)*, 9.4*(e)*(ii)*(cc)*, 10.3*(c)*, 11.3*(c)*(iii), 12.3*(d)*(ii)*(bb)*, 31.2*(d)*(v), 31.4*(d)*(ii), 31.8*(a)*, 32.1*(b)*, 32.3*(a)*, 32.3*(b)*, 32.3*(c)*, 32.5*(c)*, 33.9, 34.1*(b)*, 34.2*(c)*, 34.8*(d)*, 43.3*(a)*, 51.1*(a)*(ii), 51.1*(b)*(i), 51.1*(b)*(ii), 51.1*(b)*(iii), 51.4*(a)*, 51.4*(b)*(iii), 51.5*(b)*, 51.5(i), 51.5*(j)*(i), 52.2*(a)*, 52.4*(a)*(ii), 52.4*(a)*(iii), 52.4*(b)*(iii), 52.10*(b)*,

52.10*(g)*, 53.6, 59.3*(a)*(i), 59.4*(b)*(i)
S v Zwayi 1997 (2) SACR 772 (Ck), 1998 (2) BCLR 242 (Ck), [1998] 1 All SA 569 (Ck) ... 38.2*(a)*(iii), 51.3*(f)*, 52.4*(b)*(ii), 52.4*(c)*(ii)
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SACCAWU v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (8) BCLR 886 (CC) ... 32.3*(a)*
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Santos Prof Football Club v Igesund 2002 (5) SA 697 (C) ..... 36.4*(f)*
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Sonderup v Tondelli and Another. 2001 (1) SA 1171 (CC), 2001 (2) BCLR 152 (CC) ..... 34.7*(a)*, 37.5, 47.10*(b)*, 47.10*(c)*

Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC), 1997 ZACC 17 ..... 4.2*(a)*, 9.2*(c)*(iii)*(bb)*, 10.3*(a)*, 10.4*(c)*, 12.3*(d)*(ii)*(bb)*, 13.2*(a)*, 32.3*(b)*, 32.4*(c)*, 33.3, 33.4*(a)*, 33.4*(b)*, 33.4*(d)*,

33.5*(c)*, 33.5*(f)*(i), 33.5*(f)*(ii), 33.5*(f)*(iv), 33.5*(h)*, 33.9, 34.5*(b)*(ii), 36.4(i), 39.8, 50.3*(b)*(i)*(ee)(x)*, 55.3*(b)*, 55.3*(c)*, 56A.2*(a)*, 56A.2*(b)*(v), 56A.2*(b)*(vi), 56A.2*(b)*(vii), 56A.2*(e)*(i), 56A.2*(e)*(ii), 56A.3*(a)*, 56A.3*(d)*, 56A.4*(c)*(i), 56A.4*(f)*(i), 56A.4*(f)*(ii), 56A.5*(a)*, 56B.3*(a)*, 56B.4*(e)*, 56B.4*(g)*, 56C.3*(a)*, 56D.1, 57.2*(a)*(i)*(bb)(y)*

South African Associated Newspapers Ltd and Another v Estate Pelser 1975 (4) SA 797 (A) ..... 42.9*(a)*

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South African Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd 2007 (2) SA 461 (C) ..... 63.3*(c)*

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South African Liquor Traders Association and Others v Chairperson, Gauteng Liquor Board and Others 2009 (1) SA 565 (CC), 2006 (8) BCLR 901 (CC), [2006] ZACC 7 ..... 3.7*(a)*, 6.2(i), 9.4*(d)*(i), 9.4*(d)*(iii), 9.4*(e)*(i)*(cc)*, 12.3*(d)*(ii)*(cc)*, 17.5*(f)*(ii)
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South African Veterinary Council and Another v Syzmanski 2003 (4) SA 42 (SCA), 2003 (4) BCLR 378 (SCA) ..... 63.5*(d)*
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Speaker of the KwaZulu-Natal Provincial Legislature, Ex Parte: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995 1996 (4) SA 653 (CC), 1996 (7) BCLR 903 (CC) ..... 4.3*(b)*(ii)*(aa)*, 6.2*(g)*, 15.3*(a)*, 15.3*(a)*(iii), 16.3*(b)*, 17.6*(b)*(i), 26.5*(c)*, 38.3*(a)*(ii)
Speaker of the National Assembly, Ex Parte: In re Dispute Concerning The Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995 1996 (3) SA 289 (CC); 1996 (4) BCLR 518 (CC), [1996] ZACC 3 ..... 4.3*(b)*(ii)*(aa)*, 14.1, 14.3*(a)*, 15.1, 15.3*(c)*(iii), 16.3*(a)*, 17.3*(f)*(ii), 17.5*(e)*(ii), 19.3*(a)*(ii), 19.4*(a)*, 20.2*(a)*, 20.3*(b)*, 21.2*(a)*, 21.4*(a)*, 21.5, 38.3*(b)*(v), 45.10*(a)*(iii)
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Speaker of the Western Cape Provincial Legislature, Ex Parte: In re Certification of the Amended Text of the Constitution of the Western Cape 1997 1998 (1) SA 655 (CC), 1997 (12) BCLR 1653 (CC) ..... 4.3*(a)*(ii), 4.3*(b)*(vi), 19.3*(b)*, 21.4*(b)*, 29.3*(b)*
Speaker of the Western Cape Provincial Legislature, Ex Parte: In re Certification of the Constitution of the Western Cape, 1997 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC) ..... 4.3*(a)*(ii), 10.3*(b)*, 19.1*(a)*, 19.3*(b)*, 20.2*(a)*, 20.3*(b)*, 21.2*(a)*, 21.2*(b)*, 21.2*(c)*, 21.4*(b)*, 29.3*(b)*, 41.1*(c)*(i), 45.10*(a)*(iii)
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